

NORM-BREAKERS, RIGHTS-MAKERS: LEGISLATIVE NORMS, DEMOCRATIZATION, AND THE FIGHT FOR CIVIL RIGHTS

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Norms, the conventional wisdom goes, help to keep our democracy stable. And breaking norms, scholars believe, puts democracy at risk of backsliding. This Article challenges that consensus. The original historical evidence marshaled here shows that norm-breaking by civil rights reformers in Congress was critical to jumpstarting the democratization of the United States in the mid-twentieth century, ensuring passage of both the Civil Rights Act of 1964 and Voting Rights Act of 1965. Norm-breaking, the Article makes clear, is sometimes essential to democratic reform.

Leveraging these detailed case studies, the Article explains why. In preserving the status quo, norms protect existing power hierarchies. The values, ideas, and institutional arrangements that norms help to entrench are not there by happenstance. They reflect the will of the already powerful—those individuals and interests with sufficient pull to impose their values and preferences on others through institutional practice. When we valorize stability and prescribe norm adherence as a treatment for our democratic ills, we privilege (inadvertently or otherwise) the authority of those at the top over the fate of those at the bottom. In consequence, while norms may aid in protecting whatever level of democracy we have attained, that very quality may render them obstacles to further democratization. Indeed, the more work that norms do to preserve an imperfect status quo, the more likely it is that they will need to be broken to reach a new and better equilibrium. The politics of preserving democracy for some, the Article argues, are quite different from the politics of expanding democracy to others.

For these reasons, reformers today who seek to renew our democracy for a new generation cannot afford to accept the conventional wisdom that flouting norms is bad. They must instead embrace the reality that, as rights-makers, they will need to be norm-breakers. Accordingly, the Article concludes by identifying several specific legislative norms that stand in the way of expanding suffrage—chief among them the “nontalking filibuster” in the Senate and the longstanding tradition of deference to legislative parliamentarians. These practices must be changed if we are to continue to make good on our nation’s foundational democratic commitments.

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“Get in good trouble, necessary trouble, and redeem the soul of America.”

– Rep. John Lewis (D-GA)¹

INTRODUCTION

Nearly seventy years after the Montgomery bus boycott launched a nationwide civil rights movement, America’s democratic revolution has stalled. Across the country, voting rights restrictions have proliferated, while efforts to expand suffrage—particularly for voters of color—continue to face significant legislative and judicial hurdles.² The most recent casualty: a comprehensive voting rights bill that cleared the House of Representatives but failed to win a filibuster-proof Senate supermajority. Admonishing his colleagues for their failure to secure “the most fundamental wellspring of this democracy,” Senate Majority Leader Chuck Schumer cut to the chase.³ “Isn’t protecting voting rights,” he asked, “more important than a rule in this chamber?”⁴

1. As quoted in Associated Press, *From Rep. John Lewis, Quotes in a Long Life of Activism*, WASH. POST (July 17, 2020), https://www.washingtonpost.com/national/from-rep-john-lewis-quotes-in-a-long-life-of-activism/2020/07/18/7ee684d8-c8b0-11ea-a825-8722004e4150_story.html [<https://perma.cc/8P46-PAUC>].

2. See, e.g., *Voting Laws Roundup: June 2023*, BRENNAN CTR. FOR JUST. (June 14, 2023), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-june-2023> [<https://perma.cc/NNU5-RCA8>].

3. 168 CONG. REC. S346 (daily ed. Jan. 19, 2022) (statement of Sen. Chuck Schumer).

4. *Id.*

Despite some concerning evidence that our system of government is under threat—experiencing what scholars term “democratic erosion”⁵—advocates for voting rights reform have generally refused to depart from the conventions of ordinary politics.⁶ While those who seek to rescind or curtail voting rights deploy “hardball” tactics to get their way, democracy’s defenders insist on playing by the rules.⁷ Perhaps this should not surprise us. The prevailing view is that democratization and norm-observance go hand in hand.⁸

This Article seeks to unsettle that consensus. As it argues, efforts to expand suffrage (and extend related civil rights) have historically required breaks with legislative norms and an accompanying disdain for politics as usual. And it is precisely because reformers have been unwilling to spurn standard legislative practice and the norms that undergird it—perhaps most important, those that insulate the Senate filibuster—that new voting rights bills have failed to become law.

My aim, in short, is to advance a “positive vision” of norm-breaking, harnessed to the task of propelling the ongoing process of democratization in the United States.⁹ Rather than simply catalog with ever more precision what is lost when norms are bent or flouted, this Article considers the other side of the ledger. How are efforts to *expand* democracy,

5. TOM GINSBURG & AZIZ Z. HUQ, HOW TO SAVE A CONSTITUTIONAL DEMOCRACY 39 (2018) (defining democratic erosion as the “risk of slow, but ultimately substantial unraveling along the margins of rule-of-law, democratic, and liberal rights” and distinguishing it from “authoritarian collapse”).

6. One important exception to this generalization was a 2016 sit-in organized on the House floor by civil rights icon Rep. John Lewis to protest Republican leaders’ decision not to bring gun control legislation to a vote. *See, e.g.*, Rachel Bade, Heather Caygle & Ben Wyle, *Democrats Stage Sit-in on House Floor to Force Gun Violence Vote*, POLITICO (June 22, 2016), <https://www.politico.com/story/2016/06/democrats-stage-sit-in-on-house-floor-to-force-gun-vote-224656> [<https://perma.cc/J4YU-PGTZ>].

7. Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 523 (2004); Michael J. Klarman, *The Degradation of American Democracy—and the Court*, 134 HARV. L. REV. F. 1, 46 (2019) (“Republicans have chosen to shrink the electorate and engage in other electoral machinations rather than alter their agenda to make it more popular.”).

8. *See infra*, Part I.

9. Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 350 (2019). John Hart Ely famously argued that under the Constitution the role of judges is to ensure that the democratic process does not “[m]alfunction.” JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 103 (1980). Consistent with Ely’s instinct, as Desmond King and Robert Lieberman observe, “the American regime has not always been fully democratic and . . . its democratic character has varied greatly—over time, across regions, and across groups and citizens and claimants to citizenship.” Desmond King & Robert C. Lieberman, *American Political Development as a Process of Democratization*, in *DEMOCRATIZATION IN AMERICA: A COMPARATIVE-HISTORICAL ANALYSIS* 4 (Desmond King et al. eds., 2009).

and not simply *maintain* it for some, promoted by jettisoning the unwritten rules and customs of contemporary legislative practice?¹⁰

This question is an urgent one. Over the last several decades, Republicans in Congress have betrayed a greater willingness than their Democratic opponents to undercut legislative norms and engage in constitutional hardball.¹¹ This asymmetry has prompted many, often left-sympathetic, observers to suggest that playing for keeps and deviating from ordinary legislative practice is dangerous and renewing respect for legislative norms critical.¹² But this Article contends that these “defensive” prescriptions entrench a normatively objectionable suffrage status quo—that is, they advantage those in the polity whose voting rights are already on the books and ignore the plight of those whose rights are more poorly protected.¹³ If more is to be done than simply preserve democracy for the lucky few, including passing statutes to counteract the racial and economic inequalities that impose barriers to democratic participation, reformers cannot shy away from confrontation. Like their opponents, they must break with the norms of legislative politics.

To be clear, I do not wish to dismiss out of hand the concerns of those who have warned against the perils of breaking particular norms of politics in Congress and elsewhere. For instance, attempts to deploy the prosecutorial offices of the Department of Justice to pursue the president’s enemies may indeed erode the critical democratic guarantee that only fair competition between rival political camps is permitted, a cherished value at the heart of democratic government.¹⁴ Rather, the argument I make here is that when we focus our attention on easy examples where the threat to democracy posed by a particular norm-break is clear, we understate the harder, perhaps uncomfortable, truth that abiding by other norms can be deleterious to democratization.

10. Cf. David E. Pozen, *Hardball And/As Anti-Hardball*, 21 N.Y.U. J. LEGIS. & PUB. POL’Y 949, 955 (2019) (suggesting that “some of the most morally and democratically compelling forms of anti-hardball may be unattainable without the aid of hardball”).

11. See, e.g., Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 918 (2018).

12. Cf., e.g., Robert C. Lieberman, Suzanne Mettler, Thomas B. Pepinsky, Kenneth M. Roberts & Richard Valelly, *The Trump Presidency and American Democracy: A Historical and Comparative Analysis*, 17 PERSPS. ON POL. 470, 475 (2019) (arguing that the breaking down of norms of “comity and mutual respect across party lines . . . risk[s] the possibility of legislative illegitimacy,” among other ills).

13. Bagley, *supra* note 9, at 347.

14. See, e.g., Kyle Cheney, ‘Where Are All of the Arrests?’: Trump Demands Barr Lock Up His Foes, POLITICO (Oct. 7, 2020), <https://www.politico.com/news/2020/10/07/trump-demands-barr-arrest-foes-427389> [<https://perma.cc/7UR7-CU5H>].

To make the case that deviating from legislative convention has sometimes been “good trouble,” this Article chronicles three episodes of norm-breaking in the midcentury Congress.¹⁵ Norm-breaking, it demonstrates, jumpstarted the “full” democratization of the United States, making possible the signature legislative gains of the civil rights movement.¹⁶ In so doing, it draws on thousands of pages of original archival materials. These records include the papers of the Democratic Study Group—an organization founded in the mid-1950s by congressional liberals to advance progressive priorities—as well as members’ private correspondence, oral histories, journalistic and academic accounts of the midcentury Congress, and the *Congressional Record*.¹⁷ These sources of data allow us to peel back the procedural curtain that often shields the public from learning about the real causes of legislative outcomes so that we may better appreciate why adherence to norms is likely to inhibit efforts to further expand suffrage and associated participatory rights.

As the Article details, liberal lawmakers broke a variety of legislative norms in their fight to overcome the resistance of southern conservatives who for decades had fiercely opposed all efforts to democratize the former Confederacy. Between 1960 and 1975, these advocates for voting and civil rights:

- leaked the names of signatories to a discharge petition seeking to release pending civil rights legislation from committee—thus exposing members who had failed to sign but professed support for civil rights—in violation of the norm that petition signatures be kept strictly confidential until the necessary 218 signatures (a House majority) were secured;¹⁸
- played a crucial role in expanding the House Rules Committee to ensure that this important legislative gatekeeper was controlled by a majority sympathetic to civil rights, in violation of the norm that the committee’s composition could not be augmented—or, as critics charged, “packed”—during a legislative session for the purpose of altering its ideological balance;¹⁹
- and spearheaded changes to the seniority system to undercut southern conservatives’ power by subjecting committee chair

15. *See infra*, Part II.

16. STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 144 (2018).

17. On the DSG, see RUTH BLOCH RUBIN, *BUILDING THE BLOC: INTRAPARTY ORGANIZATION IN THE U.S. CONGRESS 225–60* (2017), and JULIAN ZELIZER, *ON CAPITOL HILL: THE STRUGGLE TO REFORM CONGRESS AND ITS CONSEQUENCES, 1948–2000*, at 33–62 (2006).

18. *See infra* Part II.A.

19. *See infra* Part II.B.

appointments to a binding vote within the Democratic Party Caucus, in violation of the norm that seniority serve as the sole criterion in making committee assignments and appointing committee and subcommittee chairs.²⁰

In each episode, a long-standing legislative norm was flouted. And yet, each break with ordinary legislative politics was necessary to advance the broader cause of democracy.

This Article draws out several analytic and normative implications from its deep dive into the mid-twentieth century's battle over civil rights legislation. To begin, we will see that fights about norm-adherence often pit insurgents seeking to change the status quo to benefit some group of have-nots against more established (and often otherwise-advantaged) forces seeking to preserve the existing order.²¹ While a legislature surely needs some conventions to function, the specific practices that arise tend to benefit and entrench those holding power at any given time.²² Put differently, legislative norms do not reflect the will of a generic collective,²³ but instead the preferences of specific groups and interests that have proven capable of imposing their will on others.

Insofar as norms tend to benefit those who seek to preserve (and are advantaged by preserving) the status quo, they are "structurally biased."²⁴ Norms favor actors and interests that seek to forestall change at the expense of those who demand it. Of course, this tendency to limit change is often cast as a feature and not a bug. Norms, we are told, ensure stability and in so doing protect our democratic institutions from assault.²⁵ But as public law scholars and political scientists have thoroughly detailed, our constitutional system has a super-abundance of

20. See *infra* Part II.C.

21. Cf. Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2190 (2018) (arguing that norms "make concrete, and mediate among, competing values at the crux of American constitutional democracy"); Ashraf Ahmed, *A Theory of Constitutional Norms*, 120 MICH. L. REV. 1361, 1391 (2022) (arguing that norms "embod[y]" values).

22. On the contingency and necessity of norms, see Renan, *supra* note 21, at 2240. On norms (or "conventions") as an intermediate category between law and politics, see Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1193–94 (2013). For a discussion of how legislative procedures instantiate representational values, see Jonathan S. Gould, *The Law of Legislative Representation*, 107 U. VA. L. REV. 765, 765 (2021).

23. Ahmed, *supra* note 21, at 1391.

24. See Jonathan S. Gould & David E. Pozen, *Structural Biases in Structural Constitutional Law*, 97 N.Y.U. L. REV. 59, 59 (2022) (defining the concept of structural bias in the constitutional law context); Gregory A. Elinson & Jonathan S. Gould, *The Politics of Deference*, 75 VAND. L. REV. 475 (2022) (discussing structural bias in the context of *Chevron* deference).

25. See *infra* Part I.

veto points that make change difficult to achieve.²⁶ Because proponents of democratizing initiatives are likely to have far fewer arrows in their strategic quiver than their opponents, demanding norm-adherence will tend to mean sacrificing the possibility that our current democratic status quo can be improved.

Lest this all sound too abstract, we will see that it was southern segregationists—hardly democracy’s defenders—who insisted on abiding by the norms of ordinary politics during the heyday of the civil rights movement. Conventions like the seniority system (under which the majority-party member with the most accrued seniority on a committee automatically became its chairman) facilitated the southerners’ legislative dominance and insulated the region’s repressive racial regime from reform.²⁷ Consequently, it was liberal supporters of civil rights who found it necessary to break with past practice in their fight to help midwife a new democratic reality.

It follows from this first implication that we ought to distinguish more carefully between the work that norms do to insulate an imperfect democratic status quo from the ways that they impede efforts to improve upon that equilibrium. Democracy *protection*, this Article suggests, is fundamentally different from democracy *expansion*. In drawing this distinction, I rely on important conceptual building blocks developed by political scientists. Scholars interested in the creation and maintenance of social policy programs in the United States and elsewhere in the advanced industrial world have observed that patterns of welfare-state expansion are quite different from those of welfare-state retrenchment.²⁸ Because new welfare policies often create new institutions and constituencies—think, for instance, of the contemporary political power of retirees who receive Social Security benefits—the task of cutting established programs is fundamentally different from, and often more challenging than, the task of enacting them in the first place.²⁹ The same logic applies to norms. To the extent that norms reinforce existing power hierarchies (the less savory aspect of their stability-inducing

26. See, e.g., Gould & Pozen, *supra* note 24, at 106 (“[A] plethora of veto points in all three branches broadly favor those who would prefer to see government do less.”).

27. See *infra* notes 80–86 and accompanying text.

28. See PAUL PIERSON, *DISMANTLING THE WELFARE STATE?: REAGAN, THATCHER, AND THE POLITICS OF RETRENCHMENT* 8 (1995) (identifying retrenchment as a “distinctive process”).

29. See *id.* (arguing that, post-expansion, “[l]arge public social programs are now central features of the political landscape, and with them have come dense networks of interest groups and strong popular attachments to particular policies”); see also ANDREA LOUISE CAMPBELL, *HOW POLICIES MAKE CITIZENS: SENIOR POLITICAL ACTIVISM AND THE AMERICAN WELFARE STATE* 2 (2005) (tracing the rise of the elderly as an influential set of actors in American politics).

quality), breaking norms is often required to alter those power arrangements. Put differently, in focusing on norms' capacity to help prevent democratic backsliding, we have collectively lost sight of the generative capacity of norm-breaking. By changing the unwritten rules of the game, reformers can ensure that the fruits of American democracy are not solely enjoyed by society's established winners.

To some, this argument may seem lawless. Not so. In analogous legal contexts, lawyers and legal academics counsel against "fetishizing procedure" when the cost is substantive injustice.³⁰ Indeed, we are accustomed to tolerating—and even celebrating—breaks with the established order when the reason for the break is one we value. As Chief Justice John Roberts explains: "When considering whether to reexamine a prior erroneous holding, we must balance the importance of having constitutional questions *decided* against the importance of having them *decided right*."³¹ Legislative norms are no different. As this Article shows, it is not enough to preach fidelity to norms if we are to extend and deepen our democracy. At a time when both congressional comity and respect for legislative norms were ostensibly at their zenith,³² breaking with past practice was essential to more fully realizing America's constitutional promises.

What, then, of the possibility that the exception will swallow the rule—that the constructive possibilities afforded by norm-breaking are dwarfed by the risk that, in bending or flouting them, we will fail to keep disagreement between opposing political camps within some acceptable bounds of civility?³³ To address this understandable concern, the Article identifies and evaluates a range of possible limits that might prevent rampant and indiscriminate acts of norm-breaking. Again drawing on the history of the legislative battle for civil rights, it underscores that sustained and regularized collaboration on the part of congressional liberals was required to dislodge the norms they rightly believed

30. Bagley, *supra* note 9, at 400.

31. *Citizens United v. FEC*, 558 U.S. 310, 378 (2010) (Roberts, C.J., concurring); see also Richard M. Re, *Precedent as Permission*, 99 TEX. L. REV. 907, 940 (2021) (arguing that "if [a] precedent . . . strikes at the heart of a cherished legal value, that fact should have a powerful effect on a court's willingness to overrule").

32. See, e.g., SUZANNE METTLER & ROBERT C. LIEBERMAN, *FOUR THREATS: THE RECURRING CRISES OF AMERICAN DEMOCRACY* 217 (2020) (suggesting that legislative "norms [that] had long dictated deference to colleagues and a spirit of courtesy and bi-partisanship . . . dissipated" in the last decade of the twentieth century).

33. See, e.g., Josh Chafetz & David Pozen, *How Constitutional Norms Break Down*, 65 UCLA L. REV. 1430, 1446–47 (2018) (suggesting that whether on "Burkean" grounds of respect for tradition, or "Oakeshottian" grounds of anxiety about "epistemic hubris," there are good reasons to advance "content-independent rationales for norm stability").

stood in the way of further democratization. But collective action of this kind is famously difficult—particularly in a legislative context.³⁴ For this reason, the Article concludes, just as the limits of governing authority under our Constitution are not “determined by something outside the process of politics,”³⁵ so too, the very obstacles to collective action remain the best guarantee against the possibility that regularized norm-breaking will put our democracy at risk. To the extent that norm-breaking in Congress, like other forms of legislating, is a process that requires the cooperation of more than one legislator, we have reason to hope that barriers to collective action—which are so effective at limiting lawmakers in other contexts—may also be an adequate guard against profligate norm-breaking.

Returning to the present, the Article urges supporters of contemporary voting rights legislation, including the For the People Act,³⁶ the John R. Lewis Voting Rights Act,³⁷ and the Freedom to Vote Act,³⁸ to stop playing by the unwritten rules of the game when those rules are stacked against them. Respect for norms in the context of ordinary politics should not preclude reformers from breaking them when democratization is at stake. With this in mind, the Article identifies several legislative norms that voting rights advocates should consider targeting. First on the chopping block: the “nontalking” filibuster, under which the mere threat of a filibuster is sufficient to prompt the Senate Majority Leader to move on to other legislative business.³⁹ Reform-minded senators might also reconsider their deference to the chamber’s parliamentarian, who has foreclosed using budget reconciliation as a way to fast-track voting rights bills, even when they contain a budgetary component. Finally, those who wish to champion voting rights today might use norm-breaking as their predecessors did: strategically flouting norms that protect existing power hierarchies to bring public attention to the problem of anti-majoritarian legislative obstruction. While each of these proposed violations undoubtedly has a contemporary partisan valence, they are nevertheless grounded in “small-d democratic

34. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 11 (1965).

35. JOSH CHAFETZ, *CONGRESS’S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS* 17 (2017).

36. H.R. 1, 117th Cong. (2021) (facilitating suffrage by, among other things, requiring states to allow on-line voter registration, permit same-day voter registration, and expand the designated early voting period for federal elections).

37. H.R. 4, 117th Cong. (2021) (updating the preclearance formula struck down by the Supreme Court in *Shelby County v. Holder*, 570 U.S. 529 (2013)).

38. S. 2747, 117th Cong. (2021) (incorporating many of the provisions of the For the People Act, while providing additional protections for state election officials).

39. See *infra* Part IV.

virtues” that have an only contingent relationship with today’s partisan landscape.⁴⁰

A few final preliminaries. Because the terms used throughout this Article mean different things to different readers, some definitional work is in order. I take legislative norms to be the set of often-unwritten and unenforceable customs and practices that help to structure how Congress operates; these conventions govern and shape lawmakers’ conduct and help to constitute the “normative infrastructure” of the legislature.⁴¹ Unlike formal cameral rules, legislative norms “emerge from decentralized processes,”⁴² and reflect shared “expectations about behavior.”⁴³ Norm-breaking, then, is a narrow category of actions where members explicitly and deliberately bend, flout, or eliminate an existing, recognized legislative norm.⁴⁴

40. Jonathan S. Gould, Kenneth A. Shepsle & Matthew Stephenson, *Democratizing the Senate from Within*, 13 J. LEGAL ANALYSIS 502, 527 (2022).

41. Renan, *supra* note 21, at 2196 (defining structural norms as “the unwritten or informal rules that govern political behavior”). In this sense, there is considerable overlap between what many scholars call “constitutional” norms and what I term “congressional” norms. Of course, definitions of norms—sometimes referred to as “conventions” or “folkways”—abound. In developing the definition presented here, this Article builds on an array of recent scholarship. For important influences, see BRIAN ALEXANDER, *A SOCIAL THEORY OF CONGRESS: LEGISLATIVE NORMS IN THE TWENTY-FIRST CENTURY* 8 (2021) (defining legislative norms as “informal prescriptive rules, often unwritten or unspoken, about how lawmakers should or ought to behave in the functioning of the institution, violations of which may result in some form of reprobation or sanction”); DONALD R. MATTHEWS, *U.S. SENATORS AND THEIR WORLD* 92 (1960) (defining Senate “folkways” as its “unwritten rules of the game, its norms of behavior, its approved manner of behavior”); Ahmed, *supra* note 21, at 1365 (defining constitutional norms as “normative, contingent, and arbitrary practices that implement constitutional text and principle”); Chafetz & Pozen, *supra* note 33, at 1433–34 (defining constitutional norms as the “subset of informal norms that regulates the public behavior of actors who wield high-level governmental authority, thereby guiding and constraining how these actors exercise political discretion”) (quotation marks omitted); Jonathan S. Gould, *Codifying Constitutional Norms*, 109 GEO. L.J. 703, 711 (2021) (defining constitutional norms as “the legally unenforceable principles that govern the conduct of public officials, the structure and function of government, and the operation of campaigns and elections”); see also Julia R. Azari & Jennifer K. Smith, *Unwritten Rules: Informal Institutions in Established Democracies*, 10 PERSPS. ON POL. 37 (2012); Jon Elster, *Unwritten Constitutional Norms* (2010) (unpublished manuscript) (on file with author) [<https://perma.cc/YPN8-764G>]; David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 1, 8 (2014); Adrian Vermeule, *The Third Bound*, 164 U. PA. L. REV. 1949, 1949 (2016); Keith E. Whittington, *The Status of Unwritten Constitutional Conventions in the United States*, 2013 U. ILL. L. REV. 1847, 1869 (2013).

42. Pozen, *supra* note 41, at 29; Gould, *supra* note 41, at 712–13.

43. David W. Rohde, *Studying Congressional Norms: Concepts and Evidence*, 15 CONG. & PRESIDENCY 139, 140 (1988).

44. In this sense, I use “norm-breaking” to refer to what Josh Chafetz and David Pozen term “norm destruction.” Chafetz & Pozen, *supra* note 33, at 1435. This definition encompasses both “complete” breaks, those times when legislators break a norm

Democratization, by contrast, is deliberately broad in scope, referring to the “continuous process of reforms and modifications” that move a political system “from fewer to more degrees of free and fair contestation and participation.”⁴⁵ Democratization thus involves both procedure and substance. It includes efforts to enlarge *who* can participate in political decision-making and *how* freely they can do so—meaning “broader suffrage” and “stronger protection of voting or other rights,” as well as an accurate accounting of those entitled to participate. But it also includes efforts to dismantle the social and economic barriers that impede “higher levels of political contestation” and limit the “susceptibility of policy-making to public scrutiny and control.”⁴⁶ In the midcentury (and surely still today), these two components of democratization were inextricably linked. Those who sought to preserve Jim Crow sought to “discourage voting by blacks and poor whites through poll taxes, literacy tests, and stiff registration laws” *and* maintain an array of substantive legal arrangements: “minimal welfare laws to turn back the carpetbaggers . . . harsh antilabor [sic] statutes to cast out union organizers[,] . . . [and] miserly educational programs to ward off alien ideas.”⁴⁷

The Article proceeds in four Parts. Part I briefly surveys the existing literature on the relationship between norms and democratization. Part II develops the historical case in favor of norm-breaking. Seeking to generalize from that history, Part III then explores the implications of this history for legal scholars and would-be reformers. Part IV turns to the present, identifying several potentially fruitful avenues for norm-breaking today. A brief conclusion follows.

I.

NORMS AND DEMOCRATIZATION

Though norms have long been a subject of interest for legal scholars, it is only in recent years that they have regained pride of place

and either eliminate it or replace it with a new norm, and “one-time” breaks, those times when legislators break a norm without eliminating it.

45. Francisco E. González & Desmond King, *The State and Democratization: The United States in Comparative Perspective*, BRIT. J. POL. SCI. 193, 195 (2004); *see also* ROBERT A. DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION 2–4 (1971) (describing both “[p]ublic contestation and inclusiveness” as the essential conditions of democracy); ROBERT MICKEY, PATHS OUT OF DIXIE: THE DEMOCRATIZATION OF AUTHORITARIAN ENCLAVES IN AMERICA’S DEEP SOUTH, 1944–1972, at 7 (2015) (noting that the democratization of the South has meant that thousands of Blacks now hold elected office throughout the region, with over seventy three million “southern adults . . . participat[ing] freely in a competitive two-party system”).

46. King & Lieberman, *supra* note 9, at 9.

47. CARL ALBERT WITH DANNY GOBLE, *LITTLE GIANT: THE LIFE AND TIMES OF SPEAKER CARL ALBERT* 217 (1990).

within the field of public law (and its close cousins in political science and history).⁴⁸ By and large, scholars have sought to drive home a simple message—that norms are essential to democracy and that breaking them threatens our democratic traditions. Within constitutional law, there is a growing consensus that norms, more so than the formal rules of the game, function as critical “safeguards” against democratic erosion.⁴⁹ Indeed, norms are so central to the way our constitutional system works that their breach should be understood as a “red flag” that the basic premises undergirding judicial decision-making in the constitutional arena no longer apply.⁵⁰

Norm-breaking, on this broader account, is both a symptom and cause of democratic backsliding. “Increasing disregard of political norms and constitutional conventions by candidates and elected officials is one indication that we have lost our way, and figuring out how to encourage greater respect for them may help us find our way back.”⁵¹ Accordingly, legal scholars have argued that strengthening norms, including developing a “constitutional role morality” for elected officials, is essential to shoring up our democracy.⁵² Political scientists tend to agree. “To save our democracy,” they argue, “Americans need to restore the basic norms that once protected it” *and* “extend those norms through the whole of a diverse society.”⁵³

Of course, no scholarly consensus is without detractors. In a short piece written several years ago for the magazine *Dissent*, Jedidiah Britton-Purdy argued that the conventional wisdom has ignored the

48. Norms were central to the thinking of an earlier generation of public law scholars writing near the turn of the twentieth century—most notably, British constitutional authority A.V. Dicey, as well as influential Americans like future president Woodrow Wilson. In the contemporary American legal academy, students are most likely to encounter the subject of norms in the context of Robert Ellickson’s foundational work exploring the Coase theorem in practice. *See, e.g.*, Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623 (1986); Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. LEGAL STUD. 537 (1988).

49. GINSBURG & HUQ, *supra* note 5, at 207; Renan, *supra* note 21, at 2194 (arguing that “norms serve functions at the crux of structural constitutionalism”).

50. Renan, *supra* note 21, at 2193.

51. Neil S. Siegel, *Political Norms, Constitutional Conventions, and President Donald Trump*, 93 IND. L.J. 177, 179 (2018).

52. Neil S. Siegel, *After the Trump Era: A Constitutional Role Morality for Presidents and Members of Congress*, 107 GEO. L.J. 109, 115 (2018) (“[C]onstitutional law scholars might do for elected officials what they have long done for judges: contribute to the development of a constitutional role morality by identifying normative restraints on the discretion of politicians beyond the legal restrictions imposed by the constitution and federal law.”); *see also* Vicki C. Jackson, *Pro-Constitutional Representation: Comparing the Role Obligations of Judges and Elected Representatives in Constitutional Democracy*, 57 WM. & MARY L. REV. 1717 (2016).

53. LEVITSKY & ZIBLATT, *supra* note 16, at 231.

more complicated truth that democratic government has always “been a norm-breaking political force wherever it has been strong.”⁵⁴ Along similar lines, Corey Robin observed in *Jacobin* magazine that democracy is ultimately “a permanent project of norm erosion, forever shattering the norms of hierarchy and domination and the political forms that aid and abet them.”⁵⁵ And Josh Chafetz and David Pozen have commented that to the extent “norms have helped entrench everything from white supremacy to patriarchal gender relations to the marginalization of the poor,” there is nothing inherently desirable about their preservation.⁵⁶ Indeed, they counsel, scholars should question the “too-easy assumption that prevailing practices are desirable or that their breakdown would necessarily be regrettable.”⁵⁷

This Article builds on these insights to challenge the popular belief that breaking norms is necessarily dangerous for democracy. Extending the ideas sketched out by these authors, it departs from their collective work in three ways important ways. For one, the account offered here is explicitly—and originally—historical, the better to help identify the “specific democratic valence” of particular, identifiable norms.⁵⁸ But its reference point is not, as is often the case, the exceptional lead-up to the Civil War.⁵⁹ Most political conflicts do not have the moral or democratic stakes of that world-historic battle over whether an ostensibly democratic system of government could continue to permit the brutal subjugation and trafficking of men and women, their labor exploited and basic human rights denied. Rather, the Article’s reference point is the middle of the twentieth century. In many ways, this period is similarly unrecognizable from today’s vantage. Political parties were thought to be weak,⁶⁰ the legislature was a true boys’ club,⁶¹ and members spent less of their time raising money

54. Jedidiah Britton-Purdy, *Normcore*, DISSENT (Summer 2018), <https://www.dissentmagazine.org/article/normcore-trump-resistance-books-crisis-of-democracy> [<https://perma.cc/9AUR-BU8X>].

55. Corey Robin, *Democracy is Norm Erosion*, JACOBIN (Jan. 29, 2018), <https://www.jacobinmag.com/2018/01/democracy-trump-authoritarianism-levitsky-zillblatt-norms> [<https://perma.cc/DUP7-UQSR>].

56. Chafetz & Pozen, *supra* note 33, at 1445.

57. *Id.*

58. Robin, *supra* note 55; *see also* Ahmed, *supra* note 21, at 1401 (arguing that the study of norms “require[s] a historical lens”).

59. *See, e.g.*, Robin, *supra* note 55.

60. The passage of federal civil and voting rights legislation is generally thought to have propelled an ideologically based partisan realignment whose consequences reverberate today. *See, e.g.*, Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273 (2011).

61. *See, e.g.*, Danielle M. Thomsen, *Why So Few (Republican) Women? Explaining the Partisan Imbalance of Women in the U.S. Congress*, 40 LEGIS. STUD. Q. 295, 296

and more of it getting to know each other and the institution's rules and procedures. But we dismiss this era at our peril. Congress's towering statutory achievements stand as high-water marks in America's ongoing effort to democratize. In our own era, where previous generations' efforts to advance the cause of multiracial democracy are increasingly under threat,⁶² it is crucial to learn the lessons the mid-century Congress has to teach.⁶³

For another, the Article takes as its starting point the world of ordinary, workaday lawmaking. The choice to foreground Congress in this context is deliberate, as norms are endemic to the first branch.⁶⁴

(2015) (documenting increases in the number of female legislators from 1980 to 2012).

62. See, e.g., *Vote Suppression*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/issues/ensure-every-american-can-vote/vote-suppression> [https://perma.cc/YT42-G4WZ] (last visited Dec. 2, 2021) (“Over the last 20 years, states have put barriers in front of the ballot box—imposing strict voter ID laws, cutting voting times, restricting registration, and purging voter rolls.”).

63. Nevertheless, the links between what scholars have called the “first” Reconstruction and the civil rights period (or “second” Reconstruction) are significant. Consider the exceptional process by which the Fourteenth Amendment was ratified. In granting new protections to formerly enslaved Blacks, the Amendment sought to “consolidate democratic governance” in the former confederacy. MICKEY, *supra* note 45, at 37. But to circumvent southern white resistance, members of Congress subverted established norms of federalism, insisting that Confederate states ratify the Amendment as a condition of their reentry into the Union. See BRUCE ACKERMAN, *WE THE PEOPLE*, VOL. 2: TRANSFORMATIONS 103–04 (2000) (expressing doubt about the procedural validity of the ratification of the Thirteenth and Fourteenth Amendments). In their drive to re-found our constitutional union as a multi-racial democracy (albeit one where women remained disenfranchised), congressional Republicans would violate an array of other constitutional norms—deploying the victorious Union Army as an agent of domestic change, impeaching President Andrew Johnson for resisting their efforts, and insisting on the political equality of Black Americans as a nonnegotiable condition of the new constitutional order. See ERIC FONER, *RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION, 1863–1877*, at 267 (contending that the election of 1866 was unique in that “civil rights for blacks played a central part in a major party’s national campaign”); *id.* at 276 (describing the terms of the Reconstruction Act of 1867); *id.* at 333–36 (analyzing the politics of Johnson’s impeachment). As this Article argues, although Reconstruction represents an extraordinary moment of “constitutional creation,” BRUCE ACKERMAN, *WE THE PEOPLE*, VOL. 1: FOUNDATIONS 44 (1993), it is also part of a broader, if largely unappreciated, pattern.

64. In choosing Congress as the site of analysis, this Article capitalizes on the growing interest in legislative procedure within the legal academy. For important contributions, see CHAFETZ, *supra* note 33; Jesse M. Cross & Abbe R. Gluck, *The Congressional Bureaucracy*, 168 U. PA. L. REV. 1541 (2020); Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 STAN. L. REV. 901 (2013); Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725 (2014); Maggie Blackhawk, *Lobbying and the Petition Clause*, 68 STAN. L. REV. 1131 (2016); Gillian E. Metzger, *Taking Appropriations Seriously*, 121 COLUM. L. REV. 1075 (2021); VICTORIA F. NOURSE, *MISREADING LAW, MISREADING DEMOCRACY*

Congress “teem[s] with rules and norms, not expressly required by constitution or statute, that govern the interactions among political blocs within the institution.”⁶⁵ And given the prevalence of congressional norms and their importance, it is hardly surprising that they have proven a consistent source of legislative strife.⁶⁶ Perhaps more important, it is Congress that is empowered by the Constitution to confer new substantive rights and expand existing ones, making it a prime location to identify the structural conditions necessary for continuing democratization and to fairly evaluate the costs of norm-adherence.

Finally, the Article seeks to systematize the insights that emerge from that history, specifying not only when norm-breaking might be useful, but tempering concerns that norm-breaking might spin out of control. In so doing, it draws out the power-reinforcing character of norms. It distinguishes between norm-breaking in the service of suffrage expansion from norm-breaking in the context of democratic maintenance. And it suggests that the difficulty of acting collectively may provide a significant buffer against spiraling incivility. With these aims in mind, the next section turns to the historical evidence.

II. HISTORY

This Part recounts three episodes of norm-breaking that together made possible the passage of landmark civil rights legislation, thereby furthering the process of democratization in the United States. It begins by tracing congressional liberals’ decision to leak the names of signatories to a discharge petition to bring the bill that would become the 1960 Civil Rights Act to the House floor without a committee vote, in violation of the norm that names were to be kept confidential until a chamber majority had been reached.⁶⁷ Next, it documents the reformers’ role in altering the ideological composition of the House Rules Committee by expanding—or “packing,” as critics charged—the committee’s membership, in violation of the norm that a committee could not be enlarged during a legislative session for the explicit purpose of

(2016); Jane S. Schacter & Victoria F. Nourse, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575 (2002).

65. Fishkin & Pozen, *supra* note 11, at 920.

66. *Id.* (observing that Congress is the playing field for many “straightforward cases of hardball”); *see also* Renan, *supra* note 21, at 2281 (observing that “[n]orm erosion in Congress both reflects and contributes to partisan polarization and, in turn, exacerbates the perception, if not the reality of a ‘broken’ branch”).

67. A discharge petition is a device available in the House permitting a majority of members (218 out of 435) to release a bill out of committee and to the floor without a formal committee vote.

altering the balance of power between liberals and conservatives. Finally, it chronicles their efforts to dismantle the seniority system by revitalizing a previously moribund institution, the House Democratic Caucus, in violation of the norm that seniority was the sole criterion for elevating committee chairs.⁶⁸

The actors at the heart of this account are members of the Democratic Study Group (DSG), the congressional vanguard of democratization in the mid-twentieth century.⁶⁹ As this Part shows, its members sought to leverage their growing numerical superiority within the Democratic Party to pursue civil rights at all costs.⁷⁰ Emphasizing the importance of “party responsibility,” they urged their leaders in Congress to keep “faith” with the majority of voters (and “loyal Democratic Party workers”) who had endorsed the party’s commitment to secure civil rights for Black Americans.⁷¹ The DSG’s insistence on majority rule also meant a concomitant belief in the importance of internal majoritarianism within the party, as it would compel southern Democrats to give way to the party’s more liberal mainstream.

The changes they sought would not come easily. A myriad of “institutional norms, . . . folkways, and rituals” created a “power system” that, while “not always readily discernable,” empowered some at the expense of others.⁷² Among the most foundational of these norms were the sanctity of the congressional committee as the central locus of the legislative process, the inviolability of the seniority system as a mechanism for selecting committee chairs, and a broader sensibility that prized bipartisan collaboration and respect for the minority.⁷³ As we will see,

68. Joseph Cooper & David W. Brady, *Institutional Context and Leadership Style: The House from Cannon to Rayburn*, 75 AM. POL. SCI. REV. 411, 416–17 (1981).

69. ERIC SCHICKLER, *RACIAL REALIGNMENT: THE TRANSFORMATION OF AMERICAN LIBERALISM, 1932–1965*, at 229 (2016) (noting that “civil rights was the focal point as liberals organized in the House of Representatives to challenge the party’s more conservative leadership and move the party in a more clearly progressive direction”).

70. See, e.g., BLOCH RUBIN, *supra* note 17, at 229 (arguing that the DSG sought to “convince Democratic leaders that [the group] represented a majority opinion within the party caucus”); ZELIZER, *supra* note 17, at 36 (noting that liberals believed a “majority-based legislative system would be in their favor”).

71. Memorandum from the Office of Rep. John A. Blatnik, *The Case for House Democratic Caucus Action Against Rep. John Bell Williams and Rep. Albert W. Watson* (on file with the Library of Congress, Democratic Study Group Records, Box I:48, Folder 3) (internal quotation marks omitted); see also, e.g., Michael W. McConnell, *Moderation and Coherence in American Democracy*, 99 CALIF. L. REV. 373 (2011) (offering a contemporary defense of responsible party government).

72. CHARLES L. CLAPP, *THE CONGRESSMAN: HIS WORK AS HE SEES IT* 49 (1963).

73. See, e.g., Cooper & Brady, *supra* note 68, at 419 (describing the reemergence of committees as “feudal baronies”); *id.* at 417 (arguing that seniority during this period was “transformed” into a “sovereign principle”); *id.* at 420 (documenting the Speaker of the House’s friendly relationship with the minority party).

southern segregationists exploited each of these norms to secure and solidify their control of key committees—and with it, a stranglehold over the Democratic Party and Congress itself.

A. *Congress at Midcentury*

To provide some context, this section offers a brief overview of the “textbook” Congress, focusing specifically on the House of Representatives—the chamber at the heart of the historical narrative presented here.⁷⁴ As the moniker suggests, despite its lack of descriptive representation (including very low numbers of Black representatives and women), the legislature at midcentury is often idealized.⁷⁵ And yet, it was southern Democrats, avowed white supremacists, who ruled the House (and Senate) for much of the twentieth century. “[C]ontrolling the balance of power in nearly every congress between 1933 and 1964, . . . southern members determined the fate of both liberal and conservative initiatives.”⁷⁶ Allied with their northern and western colleagues, southerners made the New Deal possible.⁷⁷ But in concert with conservative Republicans, they stymied liberal efforts to remake the country’s racial politics, perhaps most importantly, with the passage of civil rights legislation.⁷⁸ In 1938, for example, this conservative coalition (as it came to be known) successfully beat back a liberal attempt to pass federal anti-lynching legislation; over the next decade, they blocked thirty-nine separate bills to abolish the poll tax.⁷⁹

The southerners’ first and best weapon in the fight to preserve the status quo was their dominance over the committee system, the nerve

74. See Kenneth A. Shepsle, *The Changing Textbook Congress*, in *CAN THE GOVERNMENT GOVERN?* 238–66 (John Chubb and Paul Peterson eds., 1989).

75. In this sense, the legislature reflected the broader conformism characteristic of American institutional life at the height of the Cold War. See, e.g., Aziz Rana, *Goodbye, Cold War*, *N+1* (Winter 2018), <https://nplusonemag.com/issue-30/politics/goodbye-cold-war/> [<https://perma.cc/N24R-6BHZ>] (describing an intellectual and ideological closure during the immediate postwar period).

76. BLOCH RUBIN, *supra* note 17, at 112; see also Sean Farhang & Ira Katznelson, *The Southern Imposition: Congress and Labor in the New Deal and Fair Deal*, 19 *STUD. AM. POL. DEV.* 1, 1 (2005) (arguing that “the South possessed a structural veto over all New Deal and Fair Deal legislation”).

77. IRA KATZNELSON, *FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME* 486 (2013). Indeed, as Ira Katznelson observes, “pressure by the southern rank and file in Congress made the first years of the New Deal more forceful and less circumscribed than they otherwise might have been.” *Id.* at 161.

78. As Justin Driver has argued, it is important to resist “the pervasive stereotype that reads southerners as enraged, unsophisticated bumpkins,” but instead to treat them as “calculating, self-aware and legally sophisticated” political actors. Justin Driver, *Supremacies and the Southern Manifesto*, 92 *TEX. L. REV.* 1053, 1057 (2014).

79. BLOCH RUBIN, *supra* note 17, at 134–36.

center of the mid-twentieth century House.⁸⁰ As the DSG's staff director later reflected: "[t]he House establishment was owned lock, stock, and barrel by the conservative coalition of Republicans and southern Democrats," who "virtually dominated all of the committees at the top to the extent that what came out of committee was essentially what the . . . coalition wanted."⁸¹ Often confronting minimal electoral competition, southerners were "congressional fixtures who were destined to serve over many decades."⁸² In a system that prioritized seniority above all else, including party loyalty, the result was disproportionate influence.⁸³ In 1932, southerners chaired over half of the House's forty-seven committees, including two of the most important ones: Appropriations and Ways and Means.⁸⁴ Almost a generation later, little had changed. In 1955, the committee system was still "heavily weighted with Southerners unsympathetic to the larger purposes of the Democratic party."⁸⁵

Most crucially, southerners exercised de facto control over the House Rules Committee. Although Democrats had a four-member majority on that committee, it was southern members who held the pivotal votes. If they joined with the Republican minority, they could "force measures to the floor that promoted conservative policies and that served Republicans' and southern Democrats' broader goal of undermining public support for key pillars of New Deal liberalism."⁸⁶ The

80. ZELIZER, *supra* note 17, at 34 (noting that southerners "depended on the committee process to protect their agenda"). Reflecting the importance of committees to the legislative process, Woodrow Wilson famously characterized the American system of government as "government by the chairman of the standing committees of Congress." WOODROW WILSON, *CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS* 56 (1885). In 1959, writing in the *American Historical Review*, one observer reflected that Wilson's "description [was] in a large sense still true." George B. Galloway, *Development of the Committee System in the House of Representatives*, 65 AM. HIST. REV. 17, 23 (1959).

81. Edited Version of 7/5/74 Interview with Richard Conlon, Staff Director, Democratic [sic] Study Group (on file with the Library of Congress, Democratic Study Group Records, Box II:2, Folder 12).

82. KATZNELSON, *supra* note 77, at 149.

83. DAVID W. ROHDE, *PARTIES AND LEADERS IN THE POSTREFORM HOUSE* 7 (1991) (arguing that "by the 1960s, the House was characterized by a system of committee government, dominated by a working coalition of southern Democrats and Republicans").

84. KATZNELSON, *supra* note 77, at 149. Ways and Means is the chief tax-writing committee. Together with Appropriations, it controls Congress's power of the purse.

85. RICHARD BOLLING, *POWER IN THE HOUSE: A HISTORY OF THE LEADERSHIP OF THE HOUSE OF REPRESENTATIVES* 196 (1968).

86. Eric Schickler & Kathryn Pearson, *Agenda Control, Majority Party Power, and the House Committee on Rules, 1937–52*, 34 LEGIS. STUD. Q. 455, 483 (2009).

House Rules Committee, one liberal senator charged, was “probably the only cop dedicated to snarling up traffic.”⁸⁷

By the late 1940s, civil rights proponents began to organize in opposition. Armed with a “keen awareness of the inner workings of legislative institutions, they targeted the procedural weapons of [their adversaries].”⁸⁸ Indeed, legislative procedure would become the reformers’ central focus. As congressional historian Julian Zelizer notes, “[p]rocedural issues became so important that civil rights organizations . . . placed committee and filibuster reform at the top of their political agenda.”⁸⁹ But how to confront a congressional hierarchy dominated by white supremacists and southern segregationists? For civil rights backers to pursue their democratizing agenda, they would need to neutralize the South’s control over key nodes of congressional power. To do so, however, they first had to organize themselves into a fighting force capable of matching the southerners’ discipline and parliamentary savvy.

In late 1956, a small group of House members, led by Minnesota’s John Blatnik and Eugene McCarthy, California’s Chet Holifield, Montana’s Lee Metcalf, and New Jersey’s Frank Thompson, spearheaded the task of drafting a manifesto to guide their civil rights campaign.⁹⁰ Within weeks, their statement—explicitly demanding that Congress pass civil and voting rights legislation—garnered the support of seventy-nine House Democrats, roughly a third of the Democratic Caucus.⁹¹ Over the next several years, the reformers invested further in their organization, culminating in the DSG’s founding.⁹² But coordinating their efforts to democratize would not be enough. Liberals had to pioneer a set of “guerilla” tactics they could deploy against southern committee barons.⁹³ Norm violations would prove a vital part of this new arsenal.

B. *Leaking Discharge Petition Signatures*

The bulwark of the midcentury Congress, the committee system was, at least formally, not impregnable. Under a 1931 reform to the rules of the House, any member of Congress could file a petition to discharge a bill or resolution from committee if it failed to be reported

87. William Proxmire, *Democracy is Dying in the U.S. Congress*, TRUE, THE MAN’S MAGAZINE, Feb. 1961, <https://content.wisconsinhistory.org/digital/collection/proxmire/id/4431/rec/42> [<https://perma.cc/45NW-EEMT>].

88. ZELIZER, *supra* note 17, at 33.

89. *Id.* at 44.

90. BLOCH RUBIN, *supra* note 17, at 231–32.

91. *Id.* at 232.

92. *Id.* at 240; ZELIZER, *supra* note 17, at 54.

93. ZELIZER, *supra* note 17, at 54.

out after 20 days (7 days in the Rules Committee).⁹⁴ If the petition succeeded in garnering 218 signatures—a majority of House members—a motion to discharge could then be offered on the floor.⁹⁵ Upon passage, the bill would be released from committee and voted on by the chamber body.⁹⁶

The discharge petition would prove to be a key weapon in liberals' assault on the institutional power of southern Democrats. It offered the promise of circumventing southerners' gatekeeping, enabling a floor majority in favor of the liberals' democratizing agenda to bring a civil rights bill to the floor. But making use of this procedural mechanism required assembling a workable alternative to the conservative coalition: a precarious alliance of nonsouthern Democrats and Republicans sufficiently favorable to civil rights as to break with their more conservative co-partisans.

Despite the formal availability of the discharge petition, chamber norms privileging the routine committee process discouraged its use. Emphasizing the importance of abiding by traditional legislative channels, members of the conservative coalition argued that if a majority in favor of civil rights (or any policy proposal) truly existed, it would have little need to rely on arcane procedure to make law. Majority opinion would inevitably prevail in bringing legislation to the floor. Noting that House Democrats maintained a 2-to-1 majority over Republicans, one conservative challenged proponents of civil rights to either put up a majority or shut up. "I think the American people would expect [the party] through its leadership to bring legislation of this importance before us in an orderly manner."⁹⁷ What was more, another norm ensured that on those rare occasions when a petition drive was initiated, the names of signatories were to be kept strictly confidential. Only when the 218-signature threshold had been reached were the signatories entered into the *Congressional Record* and thereby made public, making it difficult to pressure those who had not signed but nevertheless professed support for civil rights.⁹⁸

94. Kathryn Pearson & Eric Schickler, *Discharge Petitions, Agenda Control, and the Congressional Committee System, 1929–76*, 71 J. POL. 1238, 1239 (2009).

95. *Id.*; RICHARD S. BETH, CONG. RSCH. SERV., R97-552, *THE DISCHARGE RULE IN THE HOUSE: PRINCIPAL FEATURES AND USES I* (2015).

96. BETH, *supra* note 95, at 1.

97. 106 CONG. REC. 1473 (1960).

98. Pearson & Schickler, *supra* note 94, at 1238; Mark Franklin Ferber, *The Democratic Study Group: A Study of Intra-Party Organization in the House of Representatives 218 (1964)* (Ph.D. dissertation, UCLA) (ProQuest). This norm lasted until a formal change to the rules of the House in 1993 made the names of petition signatories public.

Advocates for civil rights justified their disdain for these norms by appealing to legislative majoritarianism. They knew they commanded the support of a majority of the majority party. And, given the number of Republicans who professed to be sympathetic to their cause, they also could be confident they represented a majority of the chamber—if they ever got the opportunity to show their strength on the floor. Fundamental democratic principles thus militated in favor of bypassing the southerners' control over the legislative process.

Consider the challenge facing civil rights reformers at the opening of the second session of the 86th Congress on January 7, 1960. In the previous legislative session, Judiciary Committee Chairman and civil rights advocate Emanuel Celler (D-NY) had succeeded in crafting a “modest” proposal supported by the Eisenhower administration.⁹⁹ Though less far-reaching than the legislation to come, Celler's bill was nonetheless an important milestone in the civil rights fight. Following on the heels of the Civil Rights Act of 1957—the first civil rights initiative passed by the national legislature since Reconstruction—it signaled the federal government's continued commitment to addressing pervasive racial inequality. That signal was particularly meaningful given lawmakers' failure to enact *any* civil rights bill during the previous Congress.¹⁰⁰ Among other provisions, Celler's bill required states to preserve voting records to aid federal investigations into state suffrage restrictions; criminalized interference with school desegregation orders; and extended funding for the federal Civil Rights Commission established by the 1957 Act.¹⁰¹

The draft measure was referred to the Rules Committee, chaired by a powerful southerner, Virginia's “Judge” Howard Smith. Notwithstanding its relatively limited scope, Smith refused to report a rule permitting the bill to be considered on the chamber floor, keeping the measure in committee.¹⁰² To break the legislative logjam, Celler filed a discharge petition with the tacit support of House Speaker and pride of Bonham, Texas, Sam Rayburn.¹⁰³ Rayburn's support for the petition was itself highly unusual. According to observers, “[i]t was the first time in

99. BLOCH RUBIN, *supra* note 17, at 244.

100. DANIEL M. BERMAN, *A BILL BECOMES A LAW: THE CIVIL RIGHTS ACT OF 1960*, at 2 (1962).

101. *See id.* at 19–20; Robert C. Albright, *Democrats Set Strategy on 'Rights,'* WASH. POST, Jan. 6, 1960, at A1. Civil rights proponents hoped to amend the legislation to add a provision creating federal voting registrars to help enforce the Fifteenth Amendment. *See, e.g., Rayburn Invites Action on Civil Rights*, WASH. POST, Jan. 7, 1960, at A1.

102. Ferber, *supra* note 98, at 217.

103. *Id.* at 218; *see also* Thomas W. Ottead, *Liberal Bloc is Trying to Avoid Fight with House Leadership*, ST. LOUIS DISPATCH, Jan. 17, 1960, at A3.

recent memory that any House leader had in effect given his blessing to the rarely used . . . procedure.”¹⁰⁴ But Rayburn and his leadership team had come to believe that the petition process was “the only device available to . . . get the measure to the floor.”¹⁰⁵

In the ensuing months, civil rights proponents succeeded in obtaining the signatures of 175 House members (145 Democrats and 30 Republicans), leaving them forty-three votes short of a majority.¹⁰⁶ The DSG recognized that additional pressure was necessary. The congressmen who would apply that pressure served on the group’s newly created Task Force on Civil Rights, headed by California’s James Roosevelt—eldest son of Eleanor and Franklin.¹⁰⁷ Even among congressional liberals, Roosevelt, the captain of the DSG’s “red-hot” faction, was regarded as both a firebrand and a showboat, more interested in “using the House as a forum to reach a national audience” than doing the ordinary work of legislation.¹⁰⁸

It is perhaps no surprise, then, that Roosevelt led the effort to use the pending discharge petition to “dramatize the failure of most Republicans” to do more than simply voice support for action on civil rights.¹⁰⁹ Were the names of signatories to the petition made public, in violation of the norm that they were to be kept confidential until signatories constituted a chamber majority, it would become clear that many Republicans who publicly proclaimed themselves for civil rights had not advanced the cause when given the chance.¹¹⁰ By unmasking those

104. *Rayburn Invites Action on Civil Rights*, *supra* note 101; *see also* John D. Morris, *Democrats Seek to Force Action on Civil Rights Bill*, N.Y. TIMES, Jan. 7, 1960, at 1 (describing the petition as an “extraordinary parliamentary procedure” and noting that Rayburn had never signed one).

105. Albright, *supra* note 101.

106. Ferber, *supra* note 98, at 218. According to one contemporary estimate, these figures meant that roughly eighty percent of nonsouthern Democrats had signed the petition and about twenty percent of Republicans. *See* Betty Pryor, *Rights Backers List 175 Signing Petition*, WASH. POST, Jan. 23, 1960, at A11.

107. Memorandum regarding Task Force #1—Civil Rights (1960) (on file with the Library of Congress, Democratic Study Group Records, Box I:42, Folder 5). The Task Force’s other members were: Abraham Multer (D-NY), Herbert Zelenko (D-NY), John Brademas (D-IN), Roman Pucinski (D-IL), and Joseph Karth (D-MN). *See id.*

108. Ferber, *supra* note 98, at 164, 170.

109. Memorandum from Rep. James Roosevelt to DSG Members (Jan. 26, 1960) (on file with the Library of Congress, Democratic Study Group Records, Box I:58, Folder 10); *see also* Confidential Draft Memorandum from William G. Phillips, Research Director, DSG (July 1960) (on file with Library of Congress, Democratic Study Group Records, Box I:59, Folder 11) (crediting Roosevelt with coordinating the DSG’s discharge petition effort).

110. Formally, under the Rules of the Eighty-Sixth Congress, the discharge petition was “placed in the custody of the Clerk [of the House],” whose responsibility was to “arrange some convenient place for the signatures of Members.” Rules of the House of

members, civil rights reformers could “concentrate[] their fire upon northern Republicans who . . . were looking over their shoulders at [the] Negro percentages in their home districts.”¹¹¹ The hope was that, were the bill successfully discharged, Republicans who had failed to sign the petition would be in “political trouble.”¹¹²

To obtain the list of names, the Task Force “decided on something of a ruse.”¹¹³ In early January, members met to “assign[] numbers on [the] petition to be subdivided” and thereby “reconstruct [the] list of signers.”¹¹⁴ Each member was given five numbers and told to “report back . . . the names occupying these numbers.”¹¹⁵ Members “would stroll up to the . . . [Speaker’s] desk,” where the petition was kept, “and pretend to be studying the petition,” all the while “actually checking to see whether it contained any of the names [they] had been assigned to track down.”¹¹⁶ With the list of signatories in hand, the names were then leaked to the *New York Times*.¹¹⁷ At the time, press reports acknowledged the norm violation, noting that “the petition may not be seen by anyone except a House member.”¹¹⁸ Indeed, despite the publication of the names, members refrained from further divulging the details of the petition during House debate.¹¹⁹

Liberals in Congress and their allies in the civil rights movement had been handed an “unprecedented weapon . . . [T]hey promptly put pressure on Congressmen, principally Republicans, who professed civil

Representatives, r. XXVII, cl. 4, 86th Cong. Once “a majority of the total membership of the House [had] signed the motion, it [was to] be entered on the Journal, printed with the signatures thereto in the Congressional Record, and referred to the Calendar of Motions to Discharge Committees.” *Id.*

111. Ferber, *supra* note 98, at 219 (internal quotation marks omitted).

112. Russell Baker, *Rights Deadlock Broken in House*, N.Y. TIMES, Feb. 18, 1960, at 1.

113. BERMAN, *supra* note 100, at 90.

114. Memorandum from the DSG, Chronology of Civil Rights Activity (undated) (on file with Library of Congress, Democratic Study Group Records, Box I:43, Folder 3).

115. Ferber, *supra* note 98, at 218; *see also* BERMAN, *supra* note 100, at 90.

116. BERMAN, *supra* note 100, at 90.

117. *175 In House Sign Civil Rights Plea*, N.Y. TIMES, Jan. 22, 1960, at A11; *List of 175 Supporters of Civil Rights*, N.Y. TIMES, Jan. 22, 1960, at A11. While the *Times* did not identify the leaking organization, other news accounts credited the Leadership Conference on Civil Rights, an umbrella group of approximately 50 liberal organizations, including the NAACP and the United Auto Workers. *See* Pryor, *supra* note 106.

118. Pryor, *supra* note 106; *175 In House Sign Civil Rights Plea*, *supra* note 117.

119. 106 CONG. REC. 1452 (1960) (statement of Rep. Edith Green) (“The rules prevent me from specifying the precise numbers involved, but the press has kept the American people informed of the fact that the discharge petition—the only reasonable method by which this bill can, apparently, be brought to the House floor, has thus far been signed almost exclusively by members on this side of the aisle.”).

rights attitudes but had not yet signed.”¹²⁰ Roosevelt fueled the fire with a public-relations stunt of his own. The congressman drafted a press release admonishing Republicans for their lukewarm “support [for] . . . civil rights” and daring them to sign the petition.¹²¹ Given Republicans’ public commitment to civil rights (a plank so stating was included in the party’s most recently adopted platform), Roosevelt charged, “there appears to be no logical reason for Republican members of the House to refuse.”¹²² Gifting a “complimentary ball-point pen” to every Republicans’ congressional office, Roosevelt urged his colleagues to add their names to the petition, to “permit the Civil Rights bill to be voted on in the House, [and] thus put[] into effect the civil rights ideals expressed in the Republican Party Platform.”¹²³

The DSG ratcheted up the pressure through a coordinated campaign of floor speeches designed to “embarrass Republicans into joining their fight for a civil rights bill.”¹²⁴ Days after the discharge petition leak, Roosevelt took to the floor to call House Republicans to task for failing to support “the mild proposals of the [Republican Eisenhower] Administration.”¹²⁵ For Roosevelt, the petition was a litmus test. “[T]he only test of actual support of civil rights legislation is whether or not your name is on the petition now on the Clerk’s desk.”¹²⁶ And he found the Republicans’ response wanting. Quoting from a *New York Times* editorial written in the wake of the leak, Roosevelt declared: “The Republican Party, unlike its opposition, should be free to give wholehearted support to civil rights legislation. Its failure to do so can only give credence to charges of a deal between House Republicans and southern Democrats” to suppress action on civil rights.¹²⁷

Other members of the DSG echoed Roosevelt’s themes. Celler, the petition’s sponsor, put the point bluntly: “Let [Republicans] sign the

120. Nat’l Comm. for an Effective Cong., *Democratic Study Group*, 10 CONG. REP. 1, 3 (Mar. 4, 1961) (on file with the Library of Congress, Democratic Study Group Records, Box II:1, Folder 2).

121. Press Release, DSG, (Jan. 1960) (on file with the Library of Congress, Democratic Study Group Records, Box I:43, Folder 5); Letter from James Roosevelt, Chairman, Civil Rights Task Force, DSG, to Republican Colleagues (Jan. 1960) (on file with the Library of Congress, Democratic Study Group Records, Box I:43, Folder 5).

122. Press Release, DSG, *supra* note 121.

123. Letter from James Roosevelt to Republican Colleagues, *supra* note 121.

124. Russell Baker, *Halleck’s Policy Snags Rights Bill*, N.Y. TIMES, Jan. 28, 1960, at A22.

125. 106 CONG. REC. 1424 (1960) (statement of Rep. James Roosevelt).

126. *Id.* at 1434. In the House chamber, the Clerk’s desk is located next to the Speaker’s desk.

127. *Id.*; Editorial, *A Test on Civil Rights*, N.Y. TIMES, Jan. 25, 1960, at A26 (commenting that the real “news” in the discharge petition leak was “the small number of G.O.P. signers”).

petition—either they are for civil rights legislation or against it. They cannot have it both ways.”¹²⁸ So, too, Chicago Democrat Barratt O’Hara reminded his colleagues that “practically all of the Northern Democrats [had] signed the petition,” while “[r]elatively few of the Republican Members [had] signed.”¹²⁹ “If more Republican Members from the North d[id] not sign,” he warned, “civil rights legislation is dead.”¹³⁰

Members of the conservative coalition decried the DSG’s norm break.¹³¹ Liberals, they charged, had violated the principle of regular order in the House. Given Democrats’ numerical dominance, there was no reason to “resort to such an extraordinary technique as the discharge petition.”¹³² Disputing the charge that the Rules Committee was captured by a legislative minority, the conservatives pointed to northern Republicans’ reluctance to back the measure as evidence that the proposal was flawed and that there was not yet majority support for it.

Nevertheless, the liberals’ hardball approach had its intended effect. “The country now knew that only thirty [Republicans] had signed,” a contemporary observer noted.¹³³ And “[i]t was dangerous,” particularly “in a presidential election year, to be stigmatized as the party obstructing civil rights.”¹³⁴ Within a week, thirty-six new signatures were added to the petition, leaving liberals only eight votes short of a chamber majority.¹³⁵ Bowing to what seemed like an inevitability, Rules Committee Chairman Smith relented, announcing that his committee would hold hearings “without dilly, dally, or delay.”¹³⁶ Despite his misgivings about the break with convention, Minority Leader Charles Halleck (R-IN) permitted the four Republicans on the committee to vote with its nonsouthern Democratic members to greenlight the measure.¹³⁷ And after a lengthy floor battle, the Civil Rights Act of 1960 passed the House on March 24 by a vote of 311–109.¹³⁸

The DSG’s willingness to deviate from ordinary politics and flout a legislative norm made this advance possible. In July 1960, one observer credited the group’s efforts with “blast[ing] the bill out of the

128. 106 CONG. REC. 1425 (1960) (statement of Rep. Emanuel Celler).

129. *Id.* at 1471 (statement of Rep. Barratt O’Hara).

130. *Id.*

131. Ferber, *supra* note 98, at 219.

132. Baker, *supra* note 124, at A22.

133. BERMAN, *supra* note 100, at 90.

134. *Id.*

135. BLOCH RUBIN, *supra* note 17, at 246; Ferber, *supra* note 98, at 222.

136. Robert C. Albright, *Civil Rights Advocates Score Gain*, WASH. POST, Feb. 2, 1960, at A1; *see also* BERMAN, *supra* note 100, at 91.

137. Ferber, *supra* note 98, at 222.

138. *See* BLOCH RUBIN, *supra* note 17, at 246–47 (describing the DSG’s continuing battle with southern Democrats over the content of the legislation).

reactionary House Rules Committee.”¹³⁹ It was, an editorial in the *Washington Post* put it, only the “electrified prod” of the discharge petition and the accompanying leak that moved the Rules Committee to release the civil rights bill.¹⁴⁰

C. *Packing the Rules Committee*

Norm-breaking, the liberals recognized, had been essential to achieving a tangible victory in their fight for civil rights. “[F]or the first time,” California’s Clem Miller wrote, southerners “had felt the chilling breeze of a hostile coalition, and it was not to their liking.”¹⁴¹ But many in the DSG believed the legislation did not go far enough.¹⁴² Southern Democrats’ “parliamentary virtuosity,” including the successful invocation of the House’s germaneness rules, had ensured the defeat of several amendments the DSG had hoped would strengthen the measure.¹⁴³ Liberals had also been outfoxed by a subsequent conservative maneuver whereby southern Democrats first supported a stronger bill only to vote against it after defeating alternatives that might have won the backing of moderate Republicans.¹⁴⁴

These failures were especially galling to liberals because of their disproportionate success in the 1958 midterm elections. While southern Democrats did not lose seats, northern liberals picked up dozens of formerly Republican districts.¹⁴⁵ But despite these gains, liberals found themselves no closer to securing more robust civil rights legislation.¹⁴⁶ Two years later, Democrat John F. Kennedy’s election to the White House only deepened reformers’ belief that they would need to return to norm-breaking.¹⁴⁷ Kennedy, who had “campaign[ed] on a platform

139. Willard Shelton, *It’s Your Washington* (July 2, 1960) (on file with the Library of Congress, Democratic Study Group Records, Box I:56, Folder 11).

140. “*Dilly, Dally, or Delay*,” WASH. POST, Feb. 5, 1960, at A14.

141. Clem Miller to Undisclosed Recipients (Apr. 15, 1960) (on file with the Library of Congress, Democratic Study Group Records, Box I:56, Folder 11).

142. BLOCH RUBIN, *supra* note 17, at 247.

143. BERMAN, *supra* note 100, at 106–07. Under House rules, amendments deemed not germane to a pending bill may not, as a general matter, be voted on by the floor.

144. *Id.*

145. See HELEN FULLER, *YEAR OF TRIAL: KENNEDY’S CRUCIAL DECISIONS* 81 (1962) (noting that the “prospect” of breaking the conservative coalition’s hold on the House “seemed in sight” after the “overwhelming Democratic victory in the 1958 Congressional elections”).

146. BOLLING, *supra* note 85, at 202. Observers echoed this point. See NELSON W. POLSBY, *HOW CONGRESS EVOLVES: SOCIAL BASES OF INSTITUTIONAL CHANGE* 22 (2004) (“A Congress dominated by the Democrats more fully than any Congress since 1938 has itself been dominated by a Republican President in the twilight of his official life.”).

147. ZELIZER, *supra* note 17, at 57.

of ‘action,’” promised to be an “energetic” leader—in stark contrast to Eisenhower’s more staid approach.¹⁴⁸ But with conservative Democrats and Republicans expected to command an 11-vote majority in the Eighty-Seventh Congress (1961–1963), it was hard to see how Democrats could make good on Rayburn’s promise to bring “all major items in [Kennedy’s] program . . . to the floor.” Major changes to legislative procedure were in order.¹⁴⁹

The DSG quickly trained its focus on “bust[ing]” the conservative coalition’s hold on the House Rules Committee.¹⁵⁰ Believing that the alliance of conservative Republicans and southern Democrats undermined the principle of majority-party rule in the House (insofar as liberals constituted a majority of the Democratic party), liberal reformers had long hoped to reduce the committee’s influence over the legislative process.¹⁵¹ Now, however, the belligerence of its current chairman made it their top priority. As one DSG member wrote in the spring of 1960, Smith “permits time to run on while major bills back up. With the self-assured deliberateness obtained during his years in the legislative wars, he delays, postpones and puts off—as if to tell us that Civil Rights or no, his view is going to prevail.”¹⁵²

Riding high off their daring discharge petition leak, liberals urged Rayburn to bring Smith and his conservative colleagues to heel once and for all. Initially, the Speaker rebuffed their calls, believing they did not have the votes to back up their tough talk. Missouri’s Richard Bolling, the lone liberal on the committee, remembered that Rayburn “wouldn’t move until we proved to him deliberately in 1959 and 1960 that he simply couldn’t put up with a[n obstructionist] Rules Committee.”¹⁵³ It was only after a series of embarrassing defeats, where liberals provided the votes but the Rules Committee balked, that the Speaker vowed “never [to] let the Rules Committee get away from [his] control again.”¹⁵⁴

148. Charles O. Jones, *Joseph G. Cannon and Howard W. Smith: An Essay on the Limits of Leadership in the House of Representatives*, 30 J. POL. 617, 638 (1968).

149. Nat’l Comm. for an Effective Cong., *supra* note 120, at 4.

150. BOLLING, *supra* note 85, at 207.

151. See, e.g., Arthur G. Stevens, *The Democratic Study Group and the House Democratic Party: Sixteen Years of Change* (1974) (unpublished manuscript) (on file with author) (arguing that the “ultimate goal” of the group “has been to increase the likelihood that legislation supported by a clear majority of House Democrats will receive favorable treatment at each stage of the legislative process in the House”).

152. Clem Miller to Undisclosed Recipients (Apr. 15, 1960), *supra* note 141.

153. Interview by Paige Mulhollan with Richard Bolling, Member of Congress, in Washington, D.C. (Feb. 27, 1969), in LYNDON B. JOHNSON LIBRARY ORAL HISTORIES (NAID 24617781), <https://discoverlbj.org/item/oh-bolling-19690227-1-74-179> [https://perma.cc/4CDU-2MQY].

154. Paul Duke, *Kennedy is Expected to Support Liberal Drive to Curb House Rules Committee*, WALL ST. J., Aug. 30, 1960, at 3.

The liberals' preferred plan to wrest control of the committee from the conservative coalition was to "purge" Mississippi's Bill Colmer, Smith's right-hand man, from his seat on the committee and replace him with a loyal Democrat—thereby giving liberals a narrow (7-to-5) majority.¹⁵⁵ In their eyes, Colmer was guilty of more than obstruction; he had abandoned his party's nominee for the presidency, refusing to support Kennedy because of his relatively progressive views on race.¹⁵⁶ Seizing his plum committee post seemed just punishment for this act of supreme disloyalty, "offering a beneficial spur to intra-party discipline by punishing a defector."¹⁵⁷ What was more, the purge could be effected within the Democratic Caucus itself, where committee assignments and reassignments were made, thereby eliminating the need to hold a floor vote and risk Colmer's Republican allies rallying to his defense.¹⁵⁸

But purging Colmer would be no easy task, as it would require breaking a series of interlocking norms that together governed much of legislative life.¹⁵⁹ For one, it was the longstanding practice of the House to determine the ideological balance of each standing committee through formal negotiations between the leaders of the majority and minority at the opening of every Congress.¹⁶⁰ As a general rule, the ratio of seats allocated to each party reflected the overall partisan balance of the House, but super-majorities were permitted on the highest-profile committees, including Rules, where Democrats formally outnumbered Republicans two to one.¹⁶¹ For another, House practice dictated that members possessed an effective "property right" in their committee assignments, which meant that members expected to hold their seat on a committee from one congress to the next.¹⁶² As one contemporaneous

155. NEIL MACNEIL, *FORGE OF DEMOCRACY: THE HOUSE OF REPRESENTATIVES* 416 (1963).

156. *Id.* Instead of backing Kennedy, Colmer supported "Mississippi's choice of an independent slate of Presidential electors." John D. Morris, *House Democrats Weigh Purge of Southerner from Rules Panel*, N.Y. TIMES, Nov. 13, 1960, at 1.

157. Nat'l Comm. for an Effective Cong., *supra* note 120, at 4.

158. *Id.*

159. These norms had remained largely fixed since the "Cannon Revolt" of 1910, a rebellion of Progressive Republican backbenchers against the iron-fisted rule of Speaker Joseph Cannon (R-IL). For a detailed account of the Cannon Revolt, see BLOCH RUBIN, *supra* note 17, at 29–67.

160. CLAPP, *supra* note 72, at 189; POLSBY, *supra* note 146, at 26.

161. *Id.*; Richard L. Lyons, *Rules Unit Feud Goes Underground*, WASH. POST, Jan. 5, 1961, at A4 ("Democratic and Republican leaders must agree on party ratios on those committees which change with the makeup of the House.").

162. CHRISTOPHER J. DEERING & STEVEN S. SMITH, *COMMITTEES IN CONGRESS* 27 (1997); see also Jonathan N. Katz & Brian R. Sala, *Careerism, Committee Assignments, and the Electoral Connection*, 90 AM. POL. SCI. REV. 21 (1996) (arguing that the implementation of the secret ballot—and members' concomitant interest in developing

account put it: “Once on a committee, a member can remain there as long as he wishes unless a reversal in his party’s strength in the House results in the loss of sufficient seats that, under the seniority rule, he is not entitled to one of those remaining to the party.”¹⁶³

Coupled with the norm of respecting members’ accrued seniority on their assigned committees,¹⁶⁴ it is hardly surprising that purging committee members had little precedent in either party. Only four years earlier, Rayburn had refused to remove New York’s Adam Clayton Powell, one of the few Black congressmen at the time, from his committee post, despite considerable outcry from southern Democrats when Powell backed Eisenhower’s 1956 presidential campaign on the belief that the Republican was better on civil rights than his opponent.¹⁶⁵ Two years later, Rayburn similarly rebuffed efforts to remove a Massachusetts Democrat who had been convicted for tax fraud.¹⁶⁶

Nor were the political circumstances especially propitious for change. Halleck, the Republicans’ new Minority Leader, was a committed conservative eager to use the Rules Committee to promote the interests of his party’s right wing.¹⁶⁷ To this end, one of his first acts as head of the House GOP was to fill vacancies on the committee formerly occupied by moderate Republicans with conservative firebrands.¹⁶⁸ Smith and Colmer “now had four extreme right-wing Republicans with whom they voted on nearly issue.”¹⁶⁹ With the committee deadlocked six to six, the conservative “coalition . . . had virtually complete power to say what bills the House could consider and under what terms such bills could be debated.”¹⁷⁰

a personal reputation, separate from the party’s brand—led to the establishment of this norm).

163. CLAPP, *supra* note 72, at 200.

164. See Nelson W. Polsby, Miriam Gallaher & Barry Spencer Rundquist, *The Growth of the Seniority System in the U.S. House of Representatives*, 63 AM. POL. SCI. REV. 787, 789 (1969) (noting that the “custom (not a formal rule) of seniority . . . guarantees members reappointment to committees at the opening of each new Congress, in rank order of committee service”).

165. MACNEIL, *supra* note 155, at 420.

166. *Id.*

167. Halleck “ousted” longtime Minority Leader Joseph Martin (R-MA), largely as a result of the Republicans’ “disastrous” showing in the 1958 midterm elections, in which the GOP lost forty-seven seats. ROBERT V. REMINI, *THE HOUSE: THE HISTORY OF THE HOUSE OF REPRESENTATIVES* 383 (2006). “Martin was seen by his Republican colleagues as lacking in aggressiveness and having too close a relationship with Rayburn.” *Id.*

168. D.B. HARDEMAN & DONALD C. BACON, *RAYBURN: A BIOGRAPHY* 449 (1987); John D. Morris, *Stakes High in Rules Struggle for Rayburn*, 79, and *Smith*, 77, N.Y. TIMES, Jan. 30, 1961, at 12.

169. HARDEMAN & BACON, *supra* note 168, at 449.

170. *Id.*

Rayburn proposed an alternative plan to regain control of House procedure.¹⁷¹ Rather than purge Colmer, he would seek to enlarge the Rules Committee by three (two Democrats and one Republican).¹⁷² Publicly, the Speaker suggested the expansion plan was a “way to embarrass no one unless they want to be embarrassed”; in contrast to the proposed purge of Colmer, expansion was “painless.”¹⁷³ But, like purging Colmer, expanding the committee would give civil rights backers a one-vote majority.¹⁷⁴

Rayburn’s plan, too, threatened to violate House norms. Not only did the Speaker propose to alter the ideological balance of a key committee in the middle of a legislative session, but the arrangement contravened the House’s longstanding practice of setting committee sizes at the beginning of a session, rather than midstream.¹⁷⁵ Rayburn’s staff were keenly aware that he would be breaking legislative precedent. As one staffer conceded: “Normally, you do those things right at the first of the session,” but “it was the end of January before they ever got [to changing the committee’s size and membership].”¹⁷⁶ Indeed, when the House adopted its rules from the previous session without change on January 4, 1961, observers took it as a sign that reform of the Rules Committee would be accomplished by purging Colmer, or not at all.¹⁷⁷

The stakes of “packing” the Rules Committee were apparent to all involved. As one commentator would later write, the battle was “a civil rights fight, in that any liberalizing of the legislative process would

171. As Nelson Polsby observes, “[t]his was the most moderate solution available The traditional two to one ratio of majority to minority would be maintained [and] [t]he change would be temporary, for one Congress only.” POLSBY, *supra* note 146, at 34.

172. John D. Morris, *Rayburn Abandons Purge, Seeks Bigger Rules Panel*, N.Y. TIMES, Jan. 12, 1961, at 1.

173. Richard L. Lyons, *Rayburn Announces Plan to Add 3 Members to Rules Committee*, WASH. POST, Jan. 12, 1961, at A1. According to one contemporaneous account, Rayburn believed it was “always better politics to give than to take away,” and packing the committee would do less damage to the seniority system. FULLER, *supra* note 145, at 83. Some disgruntled liberals simply felt Rayburn had gone “soft.” Ferber, *supra* note 98, at 313.

174. John D. Morris, *Rayburn Rejects All Compromises on Rules Battle*, N.Y. TIMES, Jan. 29, 1961, at 1. With two additional loyal Democrats, nonsoutherners would command an eight-to-seven majority on the committee.

175. John D. Morris, *House Democrats Seek Early Curb on Rules Group*, N.Y. TIMES, Dec. 25, 1960, at 1.

176. Interview by Michael L. Gillette with John Holton, in Washington, D.C. (June 18, 1975), in LYNDON B. JOHNSON LIBRARY ORAL HISTORIES (NAID 24617781), <https://discoverlbj.org/item/oh-holtonj-19750619-1-14-33> [<https://perma.cc/F9RY-3JCM>].

177. Richard L. Lyons, *Air of Calm in House Hides War of Nerves*, WASH. POST, Jan. 4, 1961, at A1.

make it that much easier to pass more civil rights legislation.”¹⁷⁸ So, too, the conflict reflected underlying democratic ideals, with the committee’s power to obstruct legislation frequently cast as a violation of the principle of majority rule.¹⁷⁹ Celebrated columnist Walter Lippmann declared that the conservative coalition’s hold on the Rules Committee was a “usurpation of power, depriving the majority of its right, and thwarting the will of the people.”¹⁸⁰ The result of this anti-democratic procedural feature of the House was to “block not only civil rights legislation but all manner of so-called progressive legislation.”¹⁸¹ To “recover the right to majority rule,” Lippmann urged the House to “break up” the coalition.¹⁸² For his part, Bolling later called the process of whipping votes in favor of the expansion proposal “the moral equivalent of war.”¹⁸³

Regardless of how it was to be done, liberals believed the conservative coalition’s hold on the Rules Committee could not endure. In advance of a meeting with the Speaker in late December 1960, the DSG expressed the group’s “firm conviction of the absolute necessity of corrective action” to address the committee’s obstruction.¹⁸⁴ Rayburn, in turn, told the liberals that he shared their goals, if not their proposed methods. He “promis[ed] that if the DSG did not raise an intra-party row by opposing Colmer’s reappointment to the Rules Committee, he would support an increase in the size of the Committee to reduce [conservative] coalition members to a minority.”¹⁸⁵ With liberals having succeeded in transforming “the Rules Committee fight [into] a test of the Speaker’s personal prestige,”¹⁸⁶ the Speaker met with Rules Chairman Smith, informing him of his intent to enlarge the committee by three members. The new president’s program, Rayburn told Smith, “had a right to be considered by the House.”¹⁸⁷ As the Speaker anticipated, the

178. Richard L. Lyons, *Rules Row Pits Convictions on Vital Issues*, WASH. POST, Jan. 25, 1961, at 4.

179. The day after the vote, a *Washington Post* editorial commented that the House “had voted to permit the majority to vote—which is certainly a basic principle of the democratic process.” *Rule of the Majority*, WASH. POST, Feb. 1, 1961, at A16.

180. Walter Lippmann, *Today and Tomorrow: The Rules of Majorities*, WASH. POST, Jan. 5, 1961, at A21.

181. *Id.*

182. *Id.*

183. As quoted in MACNEIL, *supra* note 155, at 438.

184. John D. Morris, *Rules-Group Curb Pressed in House*, N.Y. TIMES, Dec. 31, 1960, at 6.

185. Nat’l Comm. for an Effective Cong., *supra* note 120, at 4.

186. Ferber, *supra* note 98, at 314.

187. HARDEMAN & BACON, *supra* note 168, at 452.

chairman showed little willingness to compromise. “‘No purgin,’ he said, ‘no packin.’”¹⁸⁸

In light of Smith’s intransigence, Rayburn appeared prepared to take a harder line, telling DSG members in a subsequent meeting on January 2, 1961, that he was now willing to purge Colmer from the committee.¹⁸⁹ According to his close aides, this announcement was a deliberate trick. Rayburn’s real aim was to use the threat of a purge as “bait” to secure the backing of moderate southerners, who could be persuaded that expanding the committee rather than purging Colmer “was the lesser of two evils.”¹⁹⁰ The scheme worked. Roughly a week later, Georgia’s Carl Vinson, chairman of the Committee on Armed Services, and Pennsylvania’s Francis “Tad” Walter, chairman of the Committee on Un-American Activities, told Rayburn they could find sufficient votes among moderate southern Democrats to form a floor majority in favor of packing the committee, so long as Rayburn convinced the liberals to abandon their campaign against Colmer.¹⁹¹

With a majority of the Democratic Caucus formally backing Rayburn’s plan to expand the committee,¹⁹² Smith found himself in an unusual position: outnumbered. In an effort to win back the support of his moderate southern colleagues, he agreed to issue a rule permitting the House to vote on Rayburn’s proposal. While liberals expressed misgivings about the Speaker’s choice to pursue a risky floor vote,¹⁹³

188. As quoted in MACNEIL, *supra* note 155, at 424. Smith would later propose a compromise that Rayburn rejected, offering not to obstruct five of President-elect Kennedy’s top legislative priorities, including federal aid to schools, federal housing legislation, increases to the federal minimum wage, and changes in social security. See Richard L. Lyons, *Compromise Rejected in Rules Unit Dispute*, WASH. POST, Jan. 6, 1961, at A19.

189. REMINI, *supra* note 167, at 385.

190. HARDEMAN & BACON, *supra* note 168, at 455. At the time, observers believed that “Smith would find it less painful to enlarge the Rules Committee than to have . . . Colmer replaced.” Anthony Lewis, *Congress Heads for Showdowns on Rules Battles*, N.Y. TIMES, Jan. 9, 1961, at 1.

191. HARDEMAN & BACON, *supra* note 168, at 455.

192. Nat’l Comm. for an Effective Cong., *supra* note 120, at 4. Liberals had urged Rayburn to hold a binding caucus vote, “a rarely used [procedural] device”; had it passed, southern Democrats would have been forced to vote for the expansion proposal on the floor or to abstain. See *id.* But at the urging of Vinson and Walter, Rayburn abandoned this idea, believing he would garner more support within the caucus, and engender less opposition, by holding a nonbinding vote. See John D. Morris, *Rayburn Shifts in Rules Battle*, N.Y. TIMES, Jan. 18, 1961, at 17.

193. See Nat’l Comm. for an Effective Cong., *supra* note 120, at 5 (noting that Rayburn’s choice not to purge Colmer, which could have been done by a vote of the Democratic Caucus where the Speaker was assured of a favorable majority, meant that the “issue would remain in doubt until the final vote on the floor”); Ferber, *supra* note 98, at 312 (noting that DSG leaders were “astonished” by Rayburn’s decision not to “approach[]

they agreed to help him wage what all acknowledged would be a bruising battle. House liberals “had achieved a complete identification of the Speaker’s interest with their own cause,”¹⁹⁴ but the margin of error would be slim.

The first front in the fight was a noisy public relations campaign. Making deliberate reference to FDR’s controversial plan to violate constitutional norms by packing the Supreme Court with justices favorable to the New Deal, Smith “announced his opposition to [Rayburn’s] plan to ‘pack the Committee with leftwingers.’”¹⁹⁵ Republican leaders, too, pledged to vote against “the packing of the Rules Committee,”¹⁹⁶ claiming that Congress would “become a ‘rubber stamp’ for President Kennedy.”¹⁹⁷

Anticipating that the vote would be a tight one, Rayburn and the DSG began an extraordinary vote-swaying effort, lobbying “all the interest groups that had ever had their legislation damaged by the Rules Committee.”¹⁹⁸ Congressional lobbyists from the AFL-CIO and its member unions pledged to “use every legitimate weapon at [their] command.”¹⁹⁹ Civil rights groups and the powerful National Education Association also entered the fray,²⁰⁰ recognizing “the danger to themselves if the Rules Committee were left in the hands of the conservative coalition.”²⁰¹ And despite the new president’s pledge to let the House set

the Rules Committee problem within the confines of the Democratic caucus, where he was certain of a substantial majority”).

194. Nat’l Comm. for an Effective Cong., *supra* note 120, at 5; *see also* Lyons, *supra* note 173 (quoting DSG leader Holifield as saying that Rayburn’s plan was “the key to the success of the Democratic legislative program”).

195. Lyons, *supra* note 173.

196. Associated Press, *GOP’s Leaders Score ‘Packing’ of Rules Unit*, WASH. POST, Jan. 20, 1961, at A17.

197. As quoted in MACNEIL, *supra* note 155 at 428; *see also* Richard L. Lyons, *House GOP to Oppose Rules Plan*, WASH. POST, Jan. 24, 1961, at 1. The accusations of packing stung. In a measure of how controversial the expansion plan was, the House abruptly adjourned its January 13, 1961 session when a Republican member criticized Rayburn’s proposal as a “plan to ‘pack’ the [Rules] Committee.” Frank Eleazar, *Rules-Fight Anger Ends House’s Day*, WASH. POST, Jan. 13, 1961, at A4. After the Speaker ruled him out of order, another Republican requested an onerous quorum call “[i]n apparent retaliation.” *Id.* Rather than round up members, Majority Leader John McCormack ended the session, prompting GOP outcry that, among other things, the sudden adjournment prevented eulogies for a three-term Republican congressman and Senator-elect. *Id.*

198. Interview by Ronald J. Grele with Richard W. Bolling, Member of Congress, U.S. House of Representatives, in Washington, D.C. (Nov. 1, 1965), in JOHN F. KENNEDY LIBRARY ORAL HISTORY COLLECTION, <https://www.jfklibrary.org/asset-viewer/archives/JFKOH/Bolling%2C%20Richard%20W/JFKOH-RWB-01/JFKOH-RWB-01> [<https://perma.cc/F78V-LH8Q>].

199. Morris, *supra* note 174.

200. HARDEMAN & BACON, *supra* note 168, at 455.

201. MACNEIL, *supra* note 155, at 429.

its own course,²⁰² the Kennedy White House intervened aggressively in favor of packing the committee.²⁰³ Meanwhile, the conservative coalition called its own interest group allies—including the National Association of Manufacturers and U.S. Chamber of Commerce—to arms.²⁰⁴ Both sides understood that it would come down to a “handful of border-state Democrats, and a few Republicans from urban and industrial Congressional districts” who would determine the Rules Committee’s fate.²⁰⁵

In the debate preceding the vote, the House considered the merits and dangers of Rayburn’s plan. Those opposed made direct analogy to “the 1937 attempt of Franklin Delano Roosevelt to pack the Supreme Court,” likening the Speaker’s proposal to the former president’s overreach.²⁰⁶ For southerners (who benefited from the status quo), the dangers were even more acute. “Never before has an attempt been made to pack any House committee to control its legislative decisions,” they observed.²⁰⁷ Doing so would create a “bad precedent . . . [For] [i]f you purge this committee, you can purge any committee.”²⁰⁸ Emphasizing the need for committee autonomy and the separation of powers, they cautioned that the Rules Committee would soon be “convert[ed into] . . . a ‘rubberstamp’ committee for whatever our new President may propose and subject to the dictates of our Speaker.”²⁰⁹ In short, packing the committee was “unwise, unjustified, untimely, unnecessary and therefore unsupportable.”²¹⁰

Unsurprisingly, the Speaker and his allies emphasized the costs of continuing to abide by an antiquated norm that no longer fit the needs of the House. Where conservatives emphasized the unchanging nature of legislative practice, Rayburn and the DSG focused on shifting baselines.²¹¹ As one member noted, the chamber often altered its ways of

202. HARDEMAN & BACON, *supra* note 168, at 457 (noting that Kennedy publicly supported rules reform “as an interested” citizen, emphasizing that the “responsibility” to change House procedure “rests with members”).

203. FULLER, *supra* note 145, at 85; MACNEIL, *supra* note 155, at 437.

204. FULLER, *supra* note 145, at 85; *see also* Richard L. Lyons, *Pressure Rises as House Moves to Vote on Rules*, WASH. POST, Jan. 31, 1961, at A1.

205. MACNEIL, *supra* note 155, at 435.

206. 107 CONG. REC. 1575 (1961) (statement of Rep. Clarence J. Brown).

207. *Id.*

208. *Id.* at 1576 (statement of Rep. Howard W. Smith).

209. *Id.* at 1577 (statement of Rep. Leslie C. Arends).

210. Richard L. Lyons, *Rayburn Wins Fight on Rules By 217 to 212*, WASH. POST, Feb. 1, 1961, at A1.

211. 107 CONG. REC. 1580 (1961). Thus, the Speaker reminded his colleagues that Smith himself had been “packed” onto the committee in 1933 when the Democrats’ Committee on Committees (with Rayburn’s support) voted in favor of his nomination despite opposition from Democratic leaders. *Id.*

doing business. When “control [of the House] became too autocratic,” the institution “has taken action to remedy the situation.”²¹² Likewise, they charged that it was conservatives who had hijacked legislative power, “ignor[ing] the needs of the Nation and tak[ing] unto themselves powers never delegated to them.”²¹³ Institutional change was necessary to “convert” the Rules Committee “into an instrument of responsible party leadership.”²¹⁴

In the end, Rayburn’s expansion plan narrowly passed, 217–212, with the aid of 195 Democrats and twenty-two Republicans.²¹⁵ Liberals had played their part, “overwhelmingly support[ing] the Speaker and, through their leaders, exert[ing] pressure on him not to retreat from the fight with Smith.”²¹⁶ Days later, Rayburn (with the support of the Ways and Means Committee, responsible for Democratic committee appointments) offered the new Democratic seats on the Rules Committee to two liberals—both DSG members.²¹⁷ Packing the Committee would, they hoped, yield dramatic results. “Like the Continental Divide, which at the point of crossing may seem to be merely another hill,” one liberal newsletter opined, “the liberalization of the House Rules Committee marks a passage into a new Congressional watershed. Now the flow of legislation will follow significantly new directions.”²¹⁸

D. *Undermining the Seniority System*

But expanding the Rules Committee did not yield the immediate passage of civil rights legislation.²¹⁹ Although Smith’s hold on the committee was significantly weakened, the old southerner continued to use his considerable parliamentary savvy to delay action on key initiatives, including what would become the Civil Rights Act of 1964.²²⁰

212. *Id.* at 1581 (statement of Rep. Sidney R. Yates).

213. *Id.* at 1583 (statement of Rep. John Blatnik).

214. *Id.*

215. Lyons, *supra* note 210.

216. Stevens, *supra* note 151.

217. ZELIZER, *supra* note 17, at 60. For his part, Halleck appointed Kansas’ William Avery to the one new Republican seat on the committee.

218. Nat’l Comm. for an Effective Cong., *supra* note 120, at 1. Indeed, in short order House liberals were able to pass key aspects of Kennedy’s legislative agenda, including minimum wage increases, improvements to Social Security, and new housing legislation. See Discussion Points, Democratic Study Group (undated) (on file with the Library of Congress, Democratic Study Group Records, Box I:56, Folder 11); BOLLING, *supra* note 85, at 211; MACNEIL, *supra* note 155, at 447.

219. Ferber, *supra* note 98, at 314.

220. BLOCH RUBIN, *supra* note 17, at 176. Referring to Smith’s practice of absenting himself from Congress as a dilatory tactic, the DSG’s staff director commented “Judge Smith still could go fishing whenever he wanted.” Edited Version of 7/5/74 Interview with Richard Conlon, *supra* note 81. Liberals would further limit the committee’s

Frustrated by their inability to bring the chairman to heel, the liberals turned their guns on the practice that undergirded his continued rule: the norm of seniority. The principle of assigning chamber perquisites by a member's longevity was not inviolable in other aspects of congressional life—from the initial seating of representatives on committees to the distribution of patronage and pork. But seniority “play[ed] a role of overwhelming significance . . . in the matter of succession to the chairmanship of committees.”²²¹ Observers acknowledged that, by the end of World War II, “there exist[ed] a full-blown seniority *system*, in which seniority [was] the single, automatic criterion determining the chairmanships of all committees.”²²² It was “sanctioned neither by law nor official rule,” but was nevertheless “rigidly enforced by both houses as though . . . part of the Constitution.”²²³ As with so many other House norms, the primary beneficiaries of this system were southern members, who represented uniformly safe districts and consequently accrued disproportionate seniority.²²⁴

Acknowledging the seniority system as an ironclad norm, liberal reformers simultaneously viewed it as an unacceptable obstacle—not just to achieving their democratization objectives, but to Congress's very legitimacy. As the *Washington Post* later editorialized: “The abolition of seniority is not . . . merely a question of tossing out a few aged men no longer competent to do their job. In its broadest sense it involves the restoration of representative government.”²²⁵ To neutralize Smith and permanently curb the power of his fellow southern Democrats, the liberals sought to ensure that, when it came to making committee

power in early 1965 by spearheading the passage of the so-called twenty-one-day rule, which empowered the Speaker to bring any legislation to the floor that had languished in the Rules Committee for more than twenty-one days. *See, e.g.*, BOLLING, *supra* note 85, at 230. The twenty-one-day rule, however, only served to increase tensions between House liberals and Rayburn's successor as Speaker, John McCormack, who—though a Massachusetts Democrat—was rightly perceived as sympathetic to southern conservatives. What was more, McCormack was “widely criticized for haphazard scheduling and poor strategic planning.” ERIC SCHICKLER, *DISJOINTED PLURALISM: INSTITUTIONAL INNOVATION AND THE DEVELOPMENT OF THE U.S. CONGRESS* 189 (2001).

221. Polsby, Gallaher & Rundquist, *supra* note 164, at 789. In 1969, one study of committee chair appointments for each of the 40 Congresses from 1881 to 1963 found that that the “general trend” was “toward the increasing use of seniority as a determinant of committee chairmanships,” with nearly 100 percent of committees “on which seniority was followed in the selection of chairman” by the Eighty-First Congress (1948–1949) and continuing into the Eighty-Eighth (1963–64). *See id.* at 792–93.

222. *Id.* at 807.

223. Richard L. Lyons, *Seniority Rule Stirs Discontent in Congress*, WASH. POST, Mar. 16, 1970, at A6.

224. *Id.*

225. *Sweep Out the Seniority System*, WASH. POST, Jan. 19, 1971, at A16.

appointments, fealty to party principle would matter as much as time served.²²⁶ As the DSG's staff director recalled: "[W]hat we had to do was develop some mechanism of making the committees responsive to the majority of Democrats."²²⁷ DSG members felt the issue was of such importance that, after civil rights, "House reform [was], perhaps, the only issue on which [the group was] one-hundred percent agreed."²²⁸

But taking on the seniority system would not be easy. Many powerful players benefited from the status quo. To combat the "Dixiecrat-dominated committee fiefdoms," the liberals would need a power base of their own.²²⁹ To this end, they set about "reinvigorat[ing] the long-dormant Democratic Caucus," the formally constituted body that governed House Democrats.²³⁰ Although the Caucus had been a crucial forum for Democrats at the turn of the twentieth century—its rules even provided for the possibility that members would be bound by the organization's votes²³¹—by the mid-twentieth century it was viewed as little more than a mechanism for "pro-forma ratifying the most senior member [of each committee] as its chairman."²³² For liberals, the Caucus provided an opportunity to take advantage of their majority status within the party to "counter the dominance of conservative southern committee chairmen."²³³

The reformers began by targeting two conservative southern chairmen, attacking them for backing Republican Barry Goldwater's 1964 presidential bid in part because of his vocal opposition to federal civil

226. As early as 1960, a DSG research memorandum opined that a "member of Congress who has previously served on a committee" was not "entitled to hold his rank or even his post on that committee if he has opposed his party in the preceding national election." Research Memorandum, Democratic Study Group, Refusal of a Committee Post for Party Disloyalty (Nov. 18, 1960) (on file with the Library of Congress, Democratic Study Group Records, Box I:48, Folder 3).

227. Edited Version of 7/5/74 Interview with Richard Conlon, *supra* note 81.

228. Anne Henderson, The Democratic Study Group: An Appraisal (Apr. 15, 1970) (on file with the Library of Congress, Democratic Study Group Records, Box II:2, Folder "Academic Studies and History").

229. Activity Report, Democratic Study Group (1971) (on file with the Library of Congress, Democratic Study Group Records, Box I:56, Folder 11).

230. *Id.*

231. CLAPP, *supra* note 72, at 298.

232. Edited Version of 7/5/74 Interview with Richard Conlon, *supra* note 81; *see also* Cooper & Brady, *supra* note 68, at 416. Keeping the Caucus dormant was part of a deliberate strategy by House Democratic leaders to keep controversial civil rights legislation off the chamber agenda and preserve party harmony. SCHICKLER, *supra* note 69, at 226.

233. Norman C. Miller, *House Liberals: A Frustrated Majority*, WALL ST. J., Sept. 4, 1969, at 8.

rights legislation.²³⁴ In advance of a Caucus meeting on January 2, 1965 (at the opening of the Eighty-Ninth Congress), the DSG circulated a white paper that “set forth the basic principles motivating the [DSG] . . . to deny . . . the two Goldwater Democrats” the right to return to their committee posts.²³⁵ The crux of the liberals’ case against the southerners rested on an appeal to the principle of responsible party government. The two chairmen, they charged, were “arrogantly . . . demanding that they be given the same privileges, committee assignments, seniority, and other prerogatives reserved for *loyal* members of the Democratic Party.”²³⁶ The seniority norm, liberals argued, had to give way to higher principle. It was the “solemn duty” of the majority party in Congress to “provide the necessary legislative machinery to act upon the party program.”²³⁷ The “caucus had no alternative but to carry out the will of the majority of the American people, as expressed at the ballot box.”²³⁸ Indeed, no member “should expect to be rewarded with seniority, patronage, and other party privileges . . . when he deliberately and of his own free will chooses to work actively . . . [for] another political party.”²³⁹

Liberals’ success in persuading their colleagues to strip these members of their seniority “provided fresh evidence that the Southern conservatives’ grip on Congress [could] be loosened.”²⁴⁰ Determined to make further inroads, the reformers lobbied their colleagues to institute

234. Press Release, AFL-CIO, Indus. Union Dep’t, These Congressmen Know the Facts (undated) (on file with the Library of Congress, Democratic Study Group Records, Box I:56, Folder 11).

235. Memorandum from the Office of Rep. John A. Blatnik, *supra* note 71.

236. *Id.* (emphasis added).

237. *Id.*

238. Letter from John Blatnik, Member of Congress, to Mrs. Deming (Jan. 30, 1965) (on file with the Library of Congress, Democratic Study Group Records, Box I:48, Folder 3).

239. Letter from John Blatnik, Richard Bolling, John Brademas, Chet Holifield, James G. O’Hara, Henry S. Reuss, Frank Thompson, Jr., and Morris K. Udall, Members of Congress, to Democratic Members of Congress (Jan. 27, 1967) (on file with the Library of Congress, Democratic Study Group Records, Box I:48, Folder 3); Letter from Frank Thompson, Jr., Chairman, DSG, to DSG Members (Jan. 25, 1967) (on file with the Library of Congress, Democratic Study Group Records, Box I:48, Folder 1) (noting that the DSG’s view was that Mississippi’s John Bell Williams, one of the two Goldwater Democrats, “should remain in the same Committee ranking that he had attained at the end of the 89th Congress (No. 15 on Interstate and Foreign Commerce and No. 12 on District of Columbia”). In 1969, DSG pressure ensured that Louisiana’s John Rarick was stripped of his seniority for supporting George Wallace’s 1968 presidential campaign. See Stevens, *supra* note 151.

240. Press Release, AFL-CIO, *supra* note 234. Both men were reduced to the lowest-ranking positions on their respective committees. The move cost Williams the chairmanship of the Interstate and Foreign Commerce Committee when the chairman of that committee retired. See Michael Abram & Joseph Cooper, *The Rise of Seniority in the House of Representatives*, 1 POLITY 52, 81 (1968).

monthly Caucus meetings and to adopt new rules that would empower rank-and-file members to put issues on the party's agenda for discussion.²⁴¹ With the tacit support of now-Speaker John McCormack of Massachusetts and Majority Leader Carl Albert of Oklahoma, the DSG pushed the new procedures through at the opening of the Ninetieth Congress in January 1969, styling the reforms as an effort to "give younger members an opportunity to speak."²⁴²

Armed with these new agenda-setting powers, the DSG used the next year to advocate for the establishment of a committee to examine the pathologies of the seniority system.²⁴³ Harkening back to their attacks on the Goldwater Democrats, the DSG urged their colleagues to explore the seniority system's distorting effects. Pointing to the southerners' efforts to "kill[] or block[] civil rights, housing, education, health, welfare and other needed social legislation," the group argued that the norm "not only allow[ed] chairmen to be unresponsive to their party and the leadership," but also "permitted certain chairmen to obstruct . . . and emasculate party programs and policies with impunity."²⁴⁴

Despite their impassioned rhetoric, however, the liberals' practical objective was relatively modest. Rather than advocate *destruction* of the seniority norm, the DSG urged House Democrats to "make the seniority system responsive, to have it not be the *only* criterion upon which members got committee chairmanships."²⁴⁵ With a caucus vote scheduled, the DSG undertook a "massive effort" to rally support.²⁴⁶ Respect for the seniority norm, they reminded their colleagues, ensured

241. *Id.*; see also BURTON D. SHEPPARD, *RETHINKING CONGRESSIONAL REFORM: THE REFORM ROOTS OF THE SPECIAL INTEREST CONGRESS* 41 (1985).

242. Edited Version of 7/5/74 Interview with Richard Conlon, *supra* note 81. McCormack agreed on the condition that "the leadership would put forward the plan as its own." See SHEPPARD, *supra* note 241, at 42.

243. Richard L. Lyons, *House Liberals Plan Attack on Seniority*, WASH. POST, Feb. 10, 1970, at A1. The DSG's staff director recalled: "At the beginning of 1970, we came up with the idea of raising the issue of seniority, to create a study commission or committee of the caucus to study the seniority system, and to make recommendations back." Edited Version of 7/5/74 Interview with Richard Conlon, *supra* note 81. At the same time, liberals were pushing for "antisecrecy" reforms—in particular, providing for recorded teller votes in the House. See SCHICKLER, *supra* note 220, at 215, 237.

244. 116 CONG. REC. 41560 (1970).

245. Edited Version of 7/5/74 Interview with Richard Conlon, *supra* note 81 (emphasis added). Several options were on offer. One, backed by liberal senior statesman Bolling, sought to give the Speaker the power to nominate committee chairs at the start of every Congress, subject to a ratification vote in the Caucus. Lyons, *supra* note 223. Others sought to permit the Caucus a choice of chairman from among several of the most senior members of each standing committee or to have committee members themselves (so long as they had attained some threshold of service) select their chairman. *Id.*; *Marjorie Hunter, Liberals Win Study of House Seniority*, N.Y. TIMES, Mar. 19, 1970, at 1.

246. Edited Version of 7/5/74 Interview with Richard Conlon, *supra* note 81.

that Congress was failing to “represent the country . . . while conservative Southerners run most important committees.”²⁴⁷ As one liberal acidly observed, the House should not run on “seniority, senility, secrecy and satrapy.”²⁴⁸

After winning that first vote, the reformers encouraged the Caucus to consider another rules change: rather than appoint chairmen in private and by committee, each nominee would be subject to an automatic vote within the Caucus as a whole.²⁴⁹ By this expedient, reformers could block nominees deemed insufficiently loyal and “put on notice” those inclined to waver.²⁵⁰ Despite the DSG’s appeals, this second proposal failed. Undeterred, the reformers pressed on and, at the beginning of the Ninety-Third Congress (1973–75), secured their desired rules change. They had won the support of the party’s new Majority Leader, Massachusetts’s Tip O’Neill, who declared “committee chairmen should be elected in the most democratic way possible.”²⁵¹ Critics of the hated seniority norm rejoiced: “The seniority system as the rigid, inviolable operating framework of the House ha[d] been destroyed.”²⁵²

The effects were significant and immediately felt. In the White House, President Richard Nixon’s legislative aides cautioned that the changes “threaten[ed] to . . . institutionalize the liberals’ total control” over the chamber.²⁵³ Buoyed by dramatic electoral gains in the 1974 midterms,²⁵⁴ the “DSG went into overdrive.”²⁵⁵ Finally, “the House

247. Richard L. Lyons, *19 in House Threaten Revolt Over Seniority*, WASH. POST, Mar. 20, 1970, at A4.

248. Richard L. Lyons, *Liberals to Push Hill Reform*, WASH. POST, June 11, 1970, at F1.

249. *The Stifling Hand of Seniority*, WASH. POST, Jan. 11, 1971, at A16.

250. Letter from the DSG to Members of the Democratic Caucus (Jan. 19, 1971) (on file with the Library of Congress, Democratic Study Group Records, Box I:48, Folder 2).

251. Marjorie Hunter, *O’Neill of the House: A Majority Leader’s Perspective*, N.Y. TIMES, Jan. 20, 1973, at 21.

252. *The Democratic Caucus in Command*, WASH. POST, Jan. 20, 1975, at A18. Observers credited the DSG for spearheading the “tremendous victory.” See Richard L. Lyons, *Seniority Survives Votes in House*, WASH. POST, Jan. 24, 1973, at A4. The DSG’s chairman, California’s Phillip Burton, was happy to take responsibility, declaring that he was “wildly happy at what we’ve done.” Marjorie Hunter, *House Democrats Given Vote on Committee Heads*, N.Y. TIMES, Jan. 23, 1973, at 16. Despite the change, every committee chair ultimately appointed was the most senior Democrat on his or her committee. See Marjorie Hunter, *House Democrats Pick Chairmen*, N.Y. TIMES, Jan. 24, 1973, at 20.

253. As quoted in JOHN A. FARRELL, *TIP O’NEILL AND THE DEMOCRATIC CENTURY* 394 (2001).

254. SHEPPARD, *supra* note 241, at 193 (noting that the 94th Congress counted 291 Democrats to only 144 Republicans, with 75 new Democratic members).

255. As quoted in JOHN A. LAWRENCE, *THE CLASS OF ’74: CONGRESS AFTER WATERGATE AND THE ROOTS OF PARTISANSHIP* 96 (2018).

[was] moving with increasing speed toward management by the majority of the majority party.”²⁵⁶ Indeed, in January 1975, “in a stunning abandonment of tradition,” the DSG succeeded in deposing several conservative committee chairs.²⁵⁷ Their efforts served notice on the party’s other power brokers. It was “the explosive start of a new era in the House,” one “in which the old, stale leadership [would be] . . . supplanted by new, dynamic forces waving the banners of reform.”²⁵⁸ Seeking to deliver on long-standing promises they had never had the capacity to implement, liberals rapidly passed bills designed to address long-standing issues of material inequality, from regulating strip mining to transforming special education and reforming labor law.²⁵⁹ By breaking the seniority norm, they had succeeded in making the legislature more responsible to popular pressure, driving changes in the civil rights arena and helping to power continued democratization.

III.

IMPLICATIONS

Three times from 1960 to 1975, liberal reformers broke long-standing legislative norms to further bills they hoped would promote democracy and redress inequality. Making sense of that history, this Part explores several implications that ought to resonate in our present.

A. Norms Protect Existing Power Hierarchies

Let’s start with what norms do, and for whom. Consistent with recent scholarship, we might begin by dispensing with the fiction that legislative norms are simply coordinating conventions. True, one quality of norms that may help to explain their durability is their capacity to regularize behavior, establishing one possible (and often-provisional) equilibrium that actors can use to navigate their world with some certainty. But “for all its explanatory value, coordination does not exhaust our understanding of conventions.”²⁶⁰ Norms, Ashraf Ahmed reminds us, “concretiz[e] values,” turning “word into deed.”²⁶¹ The word may

256. *Changing the Old Guard on Capitol Hill*, WASH. POST, Dec. 16, 1974, at A22.

257. Richard L. Lyons & Mary Russell, *Democrats Oust House Chairmen Hebert, Poage*, WASH. POST, Jan. 17, 1975, at A21; SCHICKLER, *supra* note 220, at 230–31.

258. *The Democratic Caucus in Command*, *supra* note 252.

259. LAWRENCE, *supra* note 255, at 130–31, 143–46, 156–64. On the DSG’s role in spearheading the House vote to cut off funds for the Vietnam War, see History of the DSG, 1977 DSG Handbook, Folder 5, Box 18, Part 2, DSG Papers (noting that the May 10, 1973 vote to deny funds for the continued bombing of Cambodia “would not have occurred without DSG reforms”).

260. Ahmed, *supra* note 21, at 1385.

261. *Id.* at 1367.

represent an “abstract principle[] like the separation of powers, or [an] indeterminate text, such as ‘advice and consent,’” but the effect of translation is the same—by normalizing a behavior or decision process, we are choosing to make concrete via behavioral practice some collective set of ideas we believe to be important.

But in emphasizing the idea that norms convert values into practices, we risk assuming that the values that win out are those valued by all. Indeed, many who advocate greater fidelity to norms imply that those norms exist because they embed into ordinary politics the principles that are cherished by—and redound to the benefit of—everyone involved.²⁶² As Britton-Purdy trenchantly observes, “[t]he underlying assumption of those who defend norms is that, at some very deep level, Americans have always agreed on the key issues,” whether that be “liberty and equality” or some other republican principle.²⁶³ But that assumption rarely holds. As the protracted battle for civil rights made clear to liberal reformers at the time, legislative norms reflected the preferences and values of the system’s long-time winners—southern segregationists. Because they sought to impose a different set of values, reformers recognized that new norms were needed to vindicate the democratic rights of Black Americans and others left out of the political process.

To put the point in more precise terms, value-laden though they may be, we should not assume that legislative norms reflect the will of a generic, identifiable collective. There is no shared “wisdom about how . . . government *should* work.”²⁶⁴ Rather, norms embody the values or preferences of specific groups and interests that have proven capable of imposing their will on others.²⁶⁵ On this account, norms turn the values held by the powerful into practices that all participants in an institution or political system are pressured to abide by.

As reformers during the civil rights era were made painfully aware, the constellation of legislative norms that governed lawmaking in the middle of the twentieth century were created and maintained by legislators who wished to preserve a deeply undemocratic status quo. It was through “coalition control” of the Rules Committee that conservatives maintained their influence over House lawmaking.²⁶⁶ And with

262. *Id.* (“A given era’s constitutional norms reflect how people think constitutional text or principles *should* work.”).

263. Britton-Purdy, *supra* note 54.

264. Ahmed, *supra* note 21, at 1401.

265. *Cf. id.* at 1389 (suggesting that “people do not always exercise equal influence over the construction of a convention”).

266. Staff Report of William G. Phillips, DSG Staff Director, to DSG Members, The Success of the First Year (Nov. 1960) (on file with the Library of Congress, Democratic Study Group Records, Box I:56, Folder 11).

seniority serving as the sole criterion for elevation to committee chair positions, southern Democrats could guarantee continued dominance over the legislative process, even as their ranks thinned and they became a minority in the House. Because committees governed the flow of information and resources, liberal Democrats were at a substantial disadvantage even after they constituted a majority of the party.²⁶⁷ By deliberate design, one observer commented, “[t]he interaction of the seniority rule and the distinctive character of southern politics . . . placed a large number of committee and subcommittee chairmanships in the hands of conservative southern Democrats.”²⁶⁸ Maintaining that system was the South’s insurance against the rising tide of civil rights liberalism.

For these reasons, we should not confuse the “contingency” of specific norms with the underlying power hierarchies they help to preserve.²⁶⁹ Like other forms of procedural legalism, legislative norms are systematically skewed in favor of actors and interests that favor stasis and disadvantage those urging change.²⁷⁰ As Britton-Purdy observes, “norms are intrinsically conservative (in a small-c sense) because they achieve stability by maintaining unspoken habits—which institutions you defer to, which policies you do not question, and so on.”²⁷¹ Moreover, norms have some features that make them preferable to other, more formal, methods of entrenching control. For one, it is possible that implementing and maintaining legislative norms is more readily achieved than mustering the political capital to pass formal rules of procedure that lock in existing power hierarchies.²⁷² For another, a reliance on unwritten rules may help to obscure practices that redound to the benefit of existing powerbrokers but nevertheless are “unlikely to stand the test of public scrutiny.”²⁷³ Indeed, civil rights reformers had to devote considerable time and energy to demonstrating to the public why their inability to make headway was the result of legislative norms that distributed

267. Stevens, *supra* note 151.

268. *Id.*

269. Ahmed, *supra* note 21, at 1391; Renan, *supra* note 21, at 2239 (suggesting that norms are “institutionally and historically contingent”).

270. Azari & Smith, *supra* note 41, at 49 (“Unwritten rules have allowed party elites to blunt democratizing reform in presidential nominations and, in the Senate, enabled a safeguard for minority interests to metamorphose into a general supermajority requirement for legislative action.”).

271. Britton-Purdy, *supra* note 54.

272. Gretchen Helmke & Steven Levitsky, *Informal Institutions and Comparative Politics: A Research Agenda*, 2 PERSPS. ON POL. 725, 730 (2004); *see also* Gould, *supra* note 41, at 732 (suggesting that codifying norms may risk constitutional challenge).

273. Helmke & Levitsky, *supra* note 272, at 730.

power to their enemies, rather than the fault of their own deficiencies as advocates for further democratization.

Of course, this tendency to limit change is often cast as a positive. Norms, we are told, ensure stability and in so doing, protect our democratic institutions from assault. On the flipside, “norm erosion accompanie[s] political convulsion.”²⁷⁴ Yet it is precisely because of their capacity to reinforce the status quo that norms serve as an impediment to further democratization. Because our constitutional system is already “awash in veto points,” those who seek to preserve existing institutional arrangements have a multitude of tools at their disposal to block anything from happening.²⁷⁵ By contrast, those who seek to alter the status quo have far fewer tools in their strategic arsenal.²⁷⁶ As the next section argues, this means that would-be democratizers will likely need to rely on norm-breaking to achieve their ends.

Two codas are worth our attention before continuing. First, the argument here is not that the legislative norms southern Democrats defended are necessarily antithetical to democratic government because they stood in the way of civil rights bills. In fact, these very norms instantiated recognizable and normatively appealing legislative values. The confidentiality norm ensured that members could deliberate over whether to sign a discharge petition, and thus abrogate a committee’s right to oversee bills in its jurisdiction, without public pressure. The norm of preserving the Rules Committee’s ideological balance ensured that it would function as a meaningful check on majority leadership.²⁷⁷ And the norm of respecting seniority ensured the orderly and transparent transfer of power within each party, prioritizing members who had accumulated the greatest experience and expertise over those with more limited knowledge of parliamentary procedure and substantive policy. Second, the history of the battle over civil rights legislation makes clear that norm-breaking itself concretizes values. Citing their majority within the majority party, liberals argued they had a mandate—indeed, a duty “pledged to the electorate”—to use the available “legislative machinery to act upon the [majority] party program.”²⁷⁸ And it was this idea of legislative responsiveness that motivated each of the three norm-breaks chronicled in this Article.

274. Ahmed, *supra* note 21, at 1373.

275. Gould & Pozen, *supra* note 24, at 94.

276. *Cf. id.* at 62–63.

277. As one Republican argued, a “packed” committee would “bring out bills under gag rules, making it impossible for Members to propose, debate, and act on amendments,” thereby undermining any remaining “rights of the minority.” 107 CONG. REC. 1578 (1961) (statement of Rep. Walter Judd).

278. Memorandum from the Office of Rep. John A. Blatnik, *supra* note 71.

Taken together, these ideas help to underscore a central message. Evaluating norms and norm-breaks requires more than just tracing the values that particular norms (or norm-breaks) instantiate. Rather, we need to think more holistically and more structurally, taking account of the power dynamics norms help to reinforce *and* the substantive aims of those holding power.²⁷⁹ As liberal reformers recognized, it is on this score that the southerners' arguments failed, as their defense of legislative norms was ultimately about preserving Jim Crow. And it is on this same score that today we can confidently celebrate the liberals' legislative victories.

*B. Norms Abet Democracy's Protection, but Hamper
Democracy's Expansion*

If this account is correct, it suggests that norms might play a different role in the process of *expanding* democracy than in the process of *maintaining* it. That is, the more work that norms do to preserve a democratic status quo, the more likely it is that they will need to be broken if we are collectively to improve on that flawed equilibrium. Framed in these terms, norms are Janus-faced. On the one hand, their bias toward existing arrangements can be salutary. As we have seen, much of the existing literature emphasizes precisely this point—particularly in characterizing norms as necessary democratic guardrails. But this very quality can be pernicious when we seek to expand or elaborate additional democratic rights through legislative action. In this context, norms that insulate our democracy from erosion become crippling impediments. Bulwarks against backsliding are transformed into obstacles that preserve imperfect status quos, advantaging existing hierarchies at the expense of new, perhaps more equitable, power arrangements.

Though this point may, at first glance, seem radical (and perhaps even lawless), it builds intentionally on various streams of thought in both law and political science. Among scholars of social welfare policy in the United States and other advanced democracies, it has become widely accepted that the politics of establishing social welfare policies in the first instance is different from the politics of trying to roll them back—retrenchment, in the language of the literature. New programs are (to a surprising extent) self-insulating. They give rise to new constituencies that did not previously exist, helping to develop a dense ecosystem of beneficiaries and affiliated interest groups. “Public policies

279. Britton-Purdy, *supra* note 54 (“The very idea that it would be possible to analyze political developments in terms of the decline of stabilizing, trans-partisan norms rather than substantive ideology is a political position.”).

often create ‘spoils’ that provide strong motivation for beneficiaries to mobilize.”²⁸⁰ So, too, they can “create niches for political entrepreneurs” and “resources that make [interest-group] activities easier.”²⁸¹

Taken together, these dynamics help to explain why—once in place—a social program is difficult for opponents to scale back. Consider the politics of Social Security in the United States. The program created a new category of government beneficiaries—“senior citizens”—and gave them incentives to organize in defense of their benefits.²⁸² These feedback effects created a virtuous circle: the more resources that senior citizens received by virtue of old-age pensions, the more willing and capable they became of preserving and expanding their gains. Nor is Social Security exceptional in this regard. Rather, it illustrates a more general law of democratic politics that “[g]roups benefiting from positive policy feedback successfully direct their enhanced participatory capacity toward program preservation or expansion.”²⁸³ Indeed, these same processes help to explain more recent struggles to gut the Affordable Care Act, another linchpin of the social safety net. Once Americans began to receive benefits from the healthcare program, it became harder for politicians to justify rolling back the law.²⁸⁴

How do these lessons apply to the relationship between norms and democratization? As in the welfare-state context, once a given level of democratic participation is reached, norms help to shield it from erosion. That’s the point of treating norms as protective of the status quo. But to change that democratic equilibrium requires an entirely different process. To the extent that renegotiating the terms of democratic participation involves “fundamental changes in the distribution of legal rights and powers,”²⁸⁵ norms are likely to be an obstacle to reform and thus in need of breaking. As feminist pioneer and New York congresswoman Bella Abzug once observed, transforming Congress into a more representative and effective body—in other words, democratizing its membership in the service of improvements in the quality of representation—required a change in convention. A legislature “vibrant with the colorful dress and voices of several hundred young people, women, blacks, Chicanos, Puerto Ricans, Indians, veterans of the Vietnam War . . .

280. See PIERSON, *supra* note 28, at 42.

281. *Id.*

282. CAMPBELL, *supra* note 29, at 107.

283. *Id.*

284. See, e.g., Dylan Scott & Sarah Kliff, *Why Obamacare Repeal Failed*, Vox (Jul. 31, 2017), <https://www.vox.com/policy-and-politics/2017/7/31/16055960/why-obamacare-repeal-failed> [<https://perma.cc/R6K4-BGYS>].

285. Britton-Purdy, *supra* note 54.

might get disorderly at times.”²⁸⁶ Although these new members “would probably change the rules and forget about [chamber] ‘traditions,’” she concluded that “such a Congress would be far better equipped to meet the problems of our society.”²⁸⁷

On the law side, it is often—and appropriately—recognized that breaks with the existing order are necessary to better realize foundational substantive commitments. Not even those most insistent on respect for judicial precedent believe that the Supreme Court was wrong to overrule *Plessy v. Ferguson*²⁸⁸ and hold that the Constitution does not countenance de jure racial segregation.²⁸⁹ What’s more, even ostensibly merits-neutral considerations like reliance interests are sometimes appropriately subordinated to the goal of getting a substantively more just outcome. As Richard Re observes, “[s]egregationists’ reliance on *Plessy*, no matter how vast—cannot possibly ‘count’—perhaps not at all, but certainly not in a way that might override the interests of persons legally entitled to equality.”²⁹⁰ By the same token, the concept of civil disobedience is premised on the proposition that breaking the law can be a legitimate way to spur formal legal change or draw attention to a particular injustice.²⁹¹ To be sure, these doctrines have important critics, many of whom argue that ends-based exceptions of this kind risk subverting the rule of law.²⁹² Nevertheless, the key point is that, both taken

286. Bella S. Abzug, *The House of Semi-Representatives*, N.Y. TIMES, Mar. 29, 1972, at 43.

287. *Id.*

288. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

289. Cf. Jonathan F. Mitchell, *Stare Decisis and Constitutional Text*, 110 MICH. L. REV. 1, 38 (2011) (“If a textualist justice concludes that separate-but-equal violates the Fourteenth Amendment’s original meaning, he is not allowed to adhere to *Plessy* and invert Article VI’s hierarchy of laws simply by invoking the policy concerns that underlie stare decisis doctrines.”).

290. Re, *supra* note 31, at 940.

291. For one often-cited—“liberal”—definition of civil disobedience, see JOHN RAWLS, A THEORY OF JUSTICE 320 (rev. ed. 1999), defining civil disobedience as a “public, nonviolent, conscientious yet political act contrary to law *usually done with the aim of bringing about a change in the law or policies of the government*” (emphasis added). See also, e.g., David Lefkowitz, *On a Moral Right to Civil Disobedience*, 117 ETHICS 202, 204 (2007) (“Civil disobedience . . . consists in deliberate disobedience to one or more laws of a state for the purpose of advocating a change to that state’s laws or policies.”). For a more contemporary—“democratic”—account of civil disobedience, see Daniel Markovits, *Democratic Disobedience*, 114 YALE L.J. 1897, 1943–44 (2005), arguing that the goal of civil disobedience is to trigger “political reengagement” rather than legal change. See also, e.g., Robin Celikates, *Democratizing Civil Disobedience*, 42 PHIL. & SOC. CRITICISM 982, 989 (2016) (arguing that “civil disobedience can be understood as a form of democratic empowerment,” whose goal is to “initiat[e] or resum[e] political engagement”).

292. See, e.g., RANDY J. KOZEL, SETTLED VERSUS RIGHT: A THEORY OF PRECEDENT 5 (2017) (arguing that “deference to precedent” enables the Supreme Court to “bolster

together and individually, these ideas are well within the mainstream of academic and popular legal thought. Enshrining the tension between settled and right, just and unjust, legal and moral, our legal tradition consistently recognizes that otherwise iron-clad rules must make substantive allowances.

Norm-breaking in Congress is no different. As civil rights crusaders found in the mid-twentieth century, bending or flouting legislative norms was sometimes necessary to advance a democratizing agenda. As we have seen, they did not leak discharge petition signatories or weaken the seniority system on a whim; their “first priority” was securing civil rights for Black Americans.²⁹³ And it was because they came to see, rightly, that certain norms made that goal impossible that they undertook their campaign of norm-breaking, believing that “[a] majority of the Democratic party in the House ha[d] permitted its minority . . . to obstruct [and] damage” the country’s commitment to popular suffrage.²⁹⁴

For this reason, neither the norms that civil rights reformers broke, nor the act of breaking them, should be separated from the “context of exclusion” in which they originated and were ultimately overcome.²⁹⁵ This history, then, offers an antidote to the conventional view that democracy is best served by an abiding respect for norms, particularly those that govern Congress. The midcentury is often valorized as a lost Eden, a time of deep respect for legislative precedent and meaningful bipartisan collaboration.²⁹⁶ And yet, this was also a time when norm-breaking was essential to rights-making. Our collective accounting for the role that norms play in our constitutional system must grapple with the fact that norm violations, too, promote democratic government, playing as important a role as norms themselves in the process of “realizing constitutional values.”²⁹⁷

the idea that its decisions flow from enduring legal principles rather than individual proclivities”); JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON THE MORAL AUTHORITY OF LAW* 275 (2d ed. 2009) (arguing that in “liberal states,” civil disobedience is a “type of political action to which one has no right”); Lars Noah, *Civil Jury Nullification*, 86 *IOWA L. REV.* 1601, 1606 (2001) (arguing that “nullification lodges a de facto lawmaking function with an unaccountable group of laypersons and operates inconsistently for similarly-situated litigants”).

293. Press Release, Lee Metcalf, Temporary Chairman, DSG (Jan. 8, 1960) (on file with the Library of Congress, Democratic Study Group Records, Box I:56, Folder 11).

294. Richard Bolling, *The House*, *PLAYBOY*, Nov. 1969, at 119.

295. LEVITSKY & ZIBLATT, *supra* note 16, at 144.

296. *See, e.g., id.* at 146 (tracing the beginning of the decline of respect for democratic norms to the middle of the 1970s).

297. Renan, *supra* note 21, at 2240.

C. Putting the Brakes on Norm-Breaking

At this point, readers might reasonably object that even if breaking legislative norms was necessary to democratization in the midcentury, norm-breaking *today* might do more harm than good. After all, given how polarized our politics has become, it is understandable that we might seek the stabilizing force of norms in Congress and elsewhere out of concern for the “institutional integrity” of our constitutional system.²⁹⁸ At the same time, an outright ban on norm-breaking would seem misguided, as it would deprive democratic reformers of an important means of “vindicat[ing] the basic purposes of the constitutional system.”²⁹⁹ What we search for is a set of brakes officeholders (or institutions) can pump in those rare instances where the changes wrought by norm-breaking begin to pile up too quickly.

1. Substantive Brakes

How might this best be accomplished? The doctrines of *stare decisis* and civil disobedience suggest a possible substantive brake on legislative norm-breaking. Taken together, a rough “proportionality constraint” is evident, wherein breaks—whether with precedent or law—are justified only where the value furthered by the break outweighs whatever is being broken.³⁰⁰ Start with *stare decisis*. As Justice Robert Jackson wrote: “To overrule an important precedent is serious business,” requiring a judge’s “sober appraisal of the disadvantages of the innovation as well as those of the questioned case.”³⁰¹ Thus, in Justice Kavanaugh’s more recent formulation, to warrant overruling, decisions must be “not just wrong, but grievously or egregiously wrong.”³⁰² Those who practice civil disobedience, too, are not free to break the law for just any reason. Rather, for classical theorists, they must invoke “the commonly shared conception of justice that underlies the political order,”³⁰³ while, for democratic theorists, they must identify bona fide “democratic deficits,” legitimate considerations that were left out

298. *Id.* at 2201.

299. Siegel, *supra* note 51, at 190.

300. Pozen, *supra* note 41, at 65.

301. Robert H. Jackson, *Decisional Law and Stare Decisis*, 30 A.B.A. J. 334, 334 (1944).

302. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1414 (2020) (Kavanaugh, J., concurring in part); *Gamble v. United States*, 139 S. Ct. 1960, 1981 (2019) (Thomas, J., concurring) (arguing in favor of a “judicial duty” to overrule “*demonstrably* erroneous decisions—meaning decisions outside the realm of permissible interpretation”) (emphasis added).

303. RAWLS, *supra* note 292, at 321.

of the political process responsible for formulating a particular rule or policy.³⁰⁴

Applied to the norms that govern Congress, then, one might say that norm violations, should they prove necessary, ought to be done in the service of furthering only those goals that are worthy of the break, those that serve “a vital social purpose.”³⁰⁵ For example, we might well conclude that breaking the confidentiality norm against publicizing the names of discharge petition signatures was appropriate as a means of promoting racial equality, but that it would not have been had the goal simply been to embarrass another lawmaker for personal gain.

There is good reason to think that proportionality might act as a meaningful constraint on the behavior of even the most brazen actors in our political system, at least some of the time. As David Pozen has argued in the context of what he terms “constitutional” self-help that “[n]o President ever contends . . . that lawful but awful behavior by Congress liberates her to treat a duly enacted statute as void” precisely because “[t]he remedy would be seen as out of line with the critique.”³⁰⁶ Here, as elsewhere in our constitutional system, voters can sometimes prove decisive in evaluating charges that particular conduct exceeded the perceived violation. Departing the middle of the twentieth century for its last decade (if only briefly), public opinion polling and President Clinton’s landslide victory in the 1996 presidential election made clear that House Speaker Newt Gingrich had gone too far when he opted to shut down the federal government rather than compromise with the White House over federal budget policy.³⁰⁷ For the next two decades, Gingrich’s fall from grace and the perception that voters were punishing Republicans for their role in instigating the shutdown made both parties

304. Markovits, *supra* note 292, at 1921–28; see also WILL SMITH, CIVIL DISOBEDIENCE AND DELIBERATIVE DEMOCRACY 70 (2013) (describing the problem of “deliberative inertia” in response to “problems that have demonstrable and urgent import”).

305. HOWARD ZINN, DISOBEDIENCE AND DEMOCRACY: NINE FALLACIES ON LAW AND ORDER 39 (1968).

306. Pozen, *supra* note 41, at 66.

307. See CHAFETZ, *supra* note 64, at 68 (observing that “Congress was the clear institutional loser in the 1995–1996 government shutdowns”). For a useful overview of this moment in recent political history, see Don Gonyea, *The Longest Government Shutdown in History, No Longer—How 1996 Changed Everything*, NPR (Jan. 12, 2019, 12:00 AM), <https://www.npr.org/2019/01/12/683304824/the-longest-government-shutdown-in-history-no-longer-how-1995-changed-everything> [<https://perma.cc/27DB-J73H>]. As Zelizer notes, Gingrich also pushed the envelope in seeking to impeach Clinton and ultimately “paid the price” in the form of Republican losses during the 1998 midterm elections. *Id.*; see also JULIAN E. ZELIZER, BURNING DOWN THE HOUSE: NEWT GINGRICH, THE FALL OF A SPEAKER, AND THE RISE OF THE NEW REPUBLICAN PARTY 301 (2020).

cautious about shuttering the federal government to gain leverage in interbranch battles.

Nonetheless, proportionality may prove an insufficient brake in those moments where it is most needed. Even in the *stare decisis* context, where shared understandings about the importance of respect for precedent remain widespread, “it is inevitable that judges of good faith . . . will sometimes disagree about when to overrule an erroneous constitutional precedent.”³⁰⁸ As we have seen, southern Democrats never acknowledged the legitimacy of their liberal colleagues’ political goals, and thus never accepted that the liberals’ norm-breaking was at all commensurate with their aims. What’s more, disagreement about the virtues of the end to be accomplished is likely to be expressed as an argument that the associated norm-break is inappropriately tailored to its context.³⁰⁹

Perhaps, then, we should be skeptical that political adversaries—whether voters or legislators—will ever agree that an instance of norm-breaking is (or was) proportional to the supposed wrong to be remedied. And if critics are right that, today, partisan polarization has made it even more difficult for either party to believe that the other is working in good faith, one might wonder whether pumping a substantive brake would restrain norm-breakers in situations where our most deeply held political values are at stake.³¹⁰

2. *Procedural Brakes*

An alternative to the substantive brake described above is a procedural one. Perhaps, just as theorists of civil disobedience contend that lawbreaking should be a “last resort,” we might insist that would-be norm-breakers exhaust all other avenues for reform before deviating from the conventions of regular legislative order.³¹¹ But, here too, we are likely to find the proposed brake disappointing. As the lawmakers

308. *Ramos v. Louisiana*, 140 S. Ct. 1390, 1415 (Kavanaugh, J., concurring in part).

309. Critiques of congressional norm violations are, in this sense, typical of what Louis Seidman calls “substitute arguments”: “[e]veryone pretends to be making authentic arguments, while everyone accuses everyone else of using unprincipled substitutes.” Louis Michael Seidman, *Substitute Arguments in Constitutional Law*, 31 J.L. & POL. 237, 289 (2016).

310. *See, e.g.*, Klarman, *supra* note 7, at 172 (“American politics has become like a team sport, with Democrats and Republicans representing ‘us’ and ‘them,’ or vice versa.”).

311. *See, e.g.*, RAWLS, *supra* note 292, at 327; Martin Luther King, Jr., Letter from Birmingham Jail (Apr. 16, 1963), in *WHY WE CAN’T WAIT* 77 (1964) (explaining that nonviolent direct action to protest racial segregation in Birmingham, Alabama was justified because, despite the efforts of “Negro leaders . . . to negotiate with [Birmingham’s] city fathers[,] . . . the latter consistently refused to engage in good faith negotiation”).

fighting for civil rights maintained throughout their campaign, expanding American democracy was a cause too great to insist that they abide by normal procedure, especially when that procedure was stacked against them.³¹² Moreover, they argued that insisting on compliance with the established rules of the game conferred legitimacy on a system that had not earned such deference.³¹³ Finally, they warned, delay for its own sake exacted a penalty of its own, advantaging southern Democrats who wished to preserve the status quo for however long they could.

Nor does our civil rights experience suggest that those interests threatened by a norm-break would ever concede that a procedural standard—an exhaustion criterion, for instance—had been met. Recall that southern Democrats repeatedly argued that liberals were violating legislative precedent because it was expedient, not because it was necessary. The fight over the Rules Committee, they charged, erupted because liberals had not been patient enough to move their agenda through the committee system as regular order dictated. And expanding the committee was hardly a last resort, as Democratic leaders had summarily rejected reasonable compromises offered by senior southerners.

Their objections point to the challenges of developing a decision-rule to govern when we might wish to pump a procedural brake. For one, in Congress, legislation can be re-introduced in every legislative session. And it is always possible (at least theoretically) to cobble together a majority in favor of change. In this context, it is not apparent that an exhaustion criterion could ever be met, as there will always be a subsequent legislative session where reformers might be able to work their will successfully. For another, in evaluating whether a norm-break is necessary as a response to a last-resort-type situation, we are left with only more confusion. How are we to know with certainty that, say, in the case of civil rights, reformers could not have achieved their legislative goals by waiting for a new congress to be elected?³¹⁴ It is not

312. Cf. RONALD DWORKIN, A MATTER OF PRINCIPLE 114–15 (1985) (arguing that “[s]omeone who refused to aid slavecatchers or to fight a war he thinks immoral serves his purpose best when his act is covert and never discovered” rather than when he breaks the law openly, as civil disobedience theorists often suggest is required).

313. Cf. William E. Scheuerman, *Recent Theories of Civil Disobedience: An Anti-Legal Turn*, 23 J. POL. PHIL. 427, 446 (2015) (arguing that penalizing disobedients cannot be said to safeguard the rule of law when the very legitimacy of the legal system is in question—perhaps because courts are not truly independent or because proceedings are “secret, irregular, or arbitrary”).

314. Structuring plausible counterfactuals remains an enduring problem for social scientists and historians. See, e.g., Henry E. Brady, *Doing Good and Doing Better: How Far Does the Quantitative Template Get Us?*, in RETHINKING SOCIAL INQUIRY: DIVERSE TOOLS, SHARED STANDARDS 57 (Henry E. Brady & David Collier eds., 2004) (discussing the role of counterfactuals in causal inference); Giovanni Capoccia & R.

impossible that prevailing cultural and political forces would have led to sufficient turnover in Congress (or pressured enough southern Democrats) to allow civil rights and other democratizing measures to reach the floor. Without any certainty that democratizing reforms will not win out if only we wait long enough, it is difficult to evaluate the procedural propriety of any particular norm-break. To paraphrase participants in the civil rights struggle, how long is too long?

3. *Structural Brakes*

If substantive and procedural brakes are likely to be unsatisfying or difficult to implement, perhaps a more promising alternative is to insist that any deviations from ordinary politics further values that inhere in the structure of the institution whose norms are put at risk. In so doing, lawmakers could ensure that they do not irrevocably damage the institutions of government whose function in the constitutional system they seek to improve.³¹⁵ What might this look like in practice?

As a matter of constitutional principle and time-worn practice,³¹⁶ both *majoritarianism* and *deliberation* suffuse the core structures of the first branch. Majoritarianism is the legislature's primary decision-rule.³¹⁷ Under the Constitution's Presentment Clause, only a simple

Daniel Kelemen, *The Study of Critical Junctures: Theory, Narrative, and Counterfactuals in Historical Institutionalism*, 59 *WORLD POL.* 341, 356 (2011) (describing various criteria for appropriate counterfactuals in the study of historical institutionalism).

315. Cf. Andrew Sabl, *Looking Forward to Justice: Rawlsian Civil Disobedience and its Non-Rawlsian Lessons*, 9 *J. POL. PHIL.* 307, 310 (2001) (arguing that civil disobedients must not "foreclose" the possibility of future cooperation with legal authorities).

316. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 401 (1989) (observing that "traditional ways of conducting government . . . give meaning' to the Constitution") (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring)).

317. To be sure, legislative practice and academic theory each contemplate a variety of possible majoritarianisms. Increasingly (and especially in the House), much of what happens in Congress is governed by a majority of the majority party. A majority of the majority is often sufficient for various critical offices, see, e.g., Rules of the Democratic Caucus, 117th Congress (Jan. 14, 2021), <https://www.dems.gov/rules-of-the-democratic-caucus> [<https://perma.cc/4CFQ-KLD6>] (providing for the election, within the Democratic Caucus, of a Democratic Leader, Democratic Whip, and Assistant Speaker), and at least sometimes required to advance legislation, see, e.g., Sarah Binder, Commentary, *Oh 113th Congress Hastert Rule, We Hardly Knew Ye!*, *BROOKINGS* (Jan. 17, 2013), <https://www.brookings.edu/blog/up-front/2013/01/17/oh-113th-congress-hastert-rule-we-hardly-knew-ye/> [<https://perma.cc/X6MC-55HG>]. So, too, as we saw in Part I, committee majorities have more influence over the content of legislation (and the speed at which it is considered) than floor majorities. Representation comes into play as well. Putting the filibuster aside, even a simple Senate majority may not represent a majority of Americans, given that less populous states are entitled to representation equal to that of more populous states. In recognition of Senate malapportionment, scholars have recently suggested a change to the filibuster rule whereby

majority of both chambers is necessary to enact legislation.³¹⁸ So, too, under the prerogative granted to “[e]ach House [to] determine the rules of its proceedings,”³¹⁹ congressional majorities set the agenda of their respective committees (and subcommittees) and of the chamber floor.³²⁰ Indeed, even those procedural features of the Senate that are on their face nonmajoritarian—most famously (or infamously), the filibuster—ultimately rest on the consent of a majority.³²¹ As political scientists Gregory Wawro and Eric Schickler, leading experts on the practice, observe: “Senators understand that it is ultimately up to them, acting as a majority on the floor, to decide whether the filibuster continues.”³²²

Deliberation, for its part, dictates the pace of lawmaking. Under the Constitution, the legislature is established as a collective body,³²³ unlike the executive, which is distinguished by its capacity for unilateral

the votes of large-state senators would count more heavily in the vote to close debate on a particular legislative proposal. *See* Gould, Shepsle & Stephenson, *supra* note 40, at 526–27. In light of these distinctions, a more accurate way to put the point is that the principle of majority rule is constant, but the denominator—a *majority of what?*—is variable. Nuances aside, the bottom line is that formal decision-making authority in Congress is lodged in simple majorities.

318. *See* *INS v. Chadha*, 462 U.S. 919, 958 (1983) (holding that Article I, section 7 sets forth an “express procedure[] . . . for legislative action: passage by a majority of both Houses and presentment to the President”).

319. U.S. CONST., art. I, § 5, cl. 2.

320. *See* GARY W. COX & MATHEW MCCUBBINS, *SETTING THE AGENDA: RESPONSIBLE PARTY GOVERNMENT IN THE U.S. HOUSE OF REPRESENTATIVES* 26 (2005) (“[T]he majority party secures all chairs, the speakership, and a super-proportional share of seats on the Rules Committee.”); KEITH KREHBIEL, *INFORMATION AND LEGISLATIVE ORGANIZATION* 16 (1992) (arguing that enacting policy and adopting procedure requires “the consent of more than half of the legislature’s members”); VALERIE HEITSHUSEN, *CONG. RSCH. SERV.*, R42843, *INTRODUCTION TO THE LEGISLATIVE PROCESS IN THE U.S. CONGRESS* 4 (2020).

321. The modern Senate has an effective supermajority requirement because closing debate, or cloture, requires a 60-vote supermajority. GREGORY J. WAWRO & ERIC SCHICKLER, *FILIBUSTER: OBSTRUCTION AND LAWMAKING IN THE U.S. SENATE* 15–16 (2006); Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 *STAN. L. REV.* 181, 182 (1997). What’s more, in practice, the Senate is often governed by a norm of proceeding by unanimous consent. *See* WALTER OLESZEK, *CONG. RSCH. SERV.*, RL 33939, *THE RISE OF SENATE UNANIMOUS CONSENT AGREEMENTS* 1 (2008) (noting that unanimous consent agreements are “[f]undamental to the management of the contemporary Senate”). Yet legislative scholars have argued that Senate “floor majorities have derived nontrivial benefits from maintaining few limits on debate.” WAWRO & SCHICKLER, *supra*, at 28.

322. Gregory J. Wawro & Eric Schickler, *Reid’s Rules: Filibusters, the Nuclear Option, and Path Dependence in the U.S. Senate*, 43 *LEGIS. STUD. Q.* 619, 642 (2018).

323. U.S. CONST., art. I, §§ 2–3 (providing that the “House of Representatives shall be composed of members chosen every second year by the people of the several states” and that the “Senate of the United States shall be composed of two Senators from each State”).

action.³²⁴ Reflecting this structural logic, at each stage of the legislative process—from the drafting of bills, to soliciting co-sponsorships, conducting committee mark-up, engaging in floor debate, and resolving chamber differences in conference committee—lawmakers come together to discuss the costs and benefits of competing policy approaches and to persuade others of the merits of their preferred course of action.³²⁵ Even in the contemporary Congress, which is increasingly governed by centralized procedures, these key characteristics of regular order obtain at least half the time.³²⁶

Taken together, majoritarianism and deliberation offer a possible standard we might use to evaluate the relative propriety of specific norm-breaks. Take the DSG's decision to leak the names of discharge petition signatories. While that decision was made by the group's formally constituted Civil Rights Task Force, the wisdom of the maneuver was never discussed beyond the task force's half-dozen members. Nor was it subject to a broader vote, whether on the floor, within the Democratic Caucus, or among the DSG's membership. In contrast, while the liberals' drive to reform the seniority system through the Caucus was designed to circumvent a formal majority vote on the House floor, the proposed changes to Caucus rules were subject to lengthy intra-caucus deliberation and ultimately approved by a majority of Democrats. The liberals' joint campaign with Democratic leaders to pack the Rules Committee represents something of the inverse. Although a floor majority backed the expansion plan, lawmakers in both parties were barred from offering competing proposals for consideration on the floor.

From this vantage, the discharge petition leak is perhaps most concerning because it deviated from both cardinal legislative values. Adjudicating between the other two episodes is quite a bit more challenging, however, as it implicates difficult tradeoffs between them. It is perhaps true that the vote to pack the Rules Committee should give us the most comfort, as Rayburn—despite the liberals' misgivings—insisted on fighting the issue out on the floor.³²⁷ The Speaker's decision gave the

324. Terry M. Moe & William G. Howell, *The Presidential Power of Unilateral Action*, 15 J.L. ECON. & ORG. 132, 133 (1999).

325. See KEITH KREHBIEL, *INFORMATION AND LEGISLATIVE ORGANIZATION* 22 (1992) (arguing that “informational concerns—in the sense of how politicians are provided with incentives to study public problems and formulate public policy—are at the heart of legislative organization”); JAMES M. CURRY, *LEGISLATING IN THE DARK: INFORMATION AND POWER IN THE HOUSE OF REPRESENTATIVES 2* (2015) (arguing that “information . . . is a key source of power for legislative leaders”).

326. JAMES M. CURRY & FRANCES E. LEE, *THE LIMITS OF PARTY: CONGRESS AND LAWMAKING IN A POLARIZED ERA 7* (2020).

327. See Morris, *supra* note 192.

southerners a real chance to defeat the plan. And yet, while liberals admittedly stacked the deck in favor of seniority reform by forum-shopping, contemporaneous accounts suggest that the membership of the Caucus committee established to study the seniority system and propose reforms was “extraordinarily well-balanced regionally, ideologically, and in seniority.”³²⁸ This suggests a serious deliberative process that contrasts with Rayburn’s more dictatorial approach, particularly in rejecting the liberals’ preferred alternative of purging Colmer. In view of these difficulties, we might conclude that appealing to the values inherent in institutional structures offers only a marginally more implementable brake against rampant norm-breaking than the competition.

4. *Organizational Brakes*

Last but not least, we might consider the virtues of an organizational deterrent to norm-breaking. Recall that the norm violations spearheaded by civil rights reformers required members to make a durable commitment to collaborate with one another. Disrupting the status quo demanded that they work together for years, and in some cases for decades. Even a small change in the composition of one (albeit powerful) House committee took years of planning, agitating, lobbying, and persuading. That norm-breaking proved so difficult should not surprise us. As generations of social scientists have recognized, there are many organizational barriers to collective action in Congress.³²⁹ In both chambers, members represent a diverse array of geographic constituencies, are beholden to a panoply of interest groups, donors, and activists, and are often loyal to a variety of internal factions within their respective parties. To do much of anything, they must find ways to work together.³³⁰

Bending or flouting norms is no different. Endogenous to politics, the challenges of sustained collective action should make us optimistic that norm-breakers are going to have a hard time deviating from ordinary politics on a regular basis, even in the modern context.³³¹ Indeed, it was the unusual intensity of liberals’ commitment to civil rights that empowered the DSG to keep members united long enough to make

328. NORMAN J. ORNSTEIN, *CONGRESS IN CHANGE: EVOLUTION AND REFORM* 93 (1975).

329. See generally OLSON, *supra* note 34.

330. On the diversity of a legislator’s representative duties, see Gould, *supra* note 22, at 776 (arguing that “normative justifications exist for legislators to be responsive to three different types of groups: constituents, interest groups, and party leaders”).

331. See CHAFETZ, *supra* note 64, at 17 (arguing that “the authority possessed by political actors is neither static nor determined by something outside the process of politics”).

good on their democratic commitments and, in the process, reshape the midcentury Congress.³³² And without the “glue” of civil rights, liberal reformers did not remain serial norm breakers; instead, they returned to a life of ordinary politics and to defending a somewhat more perfect status quo.³³³

IV.

BACK TO THE FUTURE

Returning to the present, this Part urges those championing voting rights today to heed the wisdom of late civil rights leader and legislator, Georgia representative John Lewis. This icon of protest politics consistently advised reformers “not [to] get lost in a sea of despair” when confronted with political obstacles.³³⁴ “Never, ever be afraid,” he counseled, “to make some noise and get in good trouble.”³³⁵ For those of us dispirited by Congress’s recent failures to enact proposed democratic reforms, Lewis’s directive—against the backdrop of the history and analysis set forth to this point in the Article—suggests a path forward. Respect for norms in the context of ordinary politics ought not to preclude lawmakers from breaking them when democratization is at stake. As President Biden so passionately put it after voting rights legislation was killed in the winter of 2022 by yet another Senate filibuster: “As dangerous new . . . laws plainly designed to suppress and subvert voting rights proliferate in states across the country,” it is critical to “explore every measure and use every tool at our disposal to stand up for democracy.”³³⁶ With this in mind, what legislative norms have consistently encumbered contemporary democratizers such that they ought to be broken?

Perhaps the most obvious target for norm-breakers is the Senate filibuster. In recent years a variety of commentators have argued in favor of formal changes to the filibuster, encouraging senators to lower the threshold requirements for invoking cloture or to eliminate the rule

332. See BLOCH RUBIN, *supra* note 17, at 257.

333. By the early 1980s, the DSG had devolved into a legislative service organization that advanced few policies and instead sought to provide research services to members of the Democratic Caucus. See *id.*

334. John Lewis (@repjohnlewis), TWITTER (June 27, 2018, 11:15 AM), <https://twitter.com/repjohnlewis/status/1011991303599607808?lang=en>.

335. *Id.*

336. Press Release, White House, Statement of President Joe Biden on the Senate Vote on Voting Rights (Jan. 19, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/01/19/statement-of-president-joe-biden-on-the-senate-vote-on-voting-rights/> [<https://perma.cc/DC95-3SJG0>].

entirely (as was once done in the House).³³⁷ But formal rules changes are not the only answer. There are a variety of norms associated with the practice that could be abrogated in the service of passing voting rights legislation. Perhaps the most important of these is the problem of the “costless” or “nontalking” filibuster, wherein the mere threat of obstruction is sufficient to prompt the Senate Majority Leader to move onto other legislative business. Nothing in the Senate’s formal rules requires ceding ground to obstructionists in this way. And flouting this convention—thereby forcing senators to deliver on their promised speechifying—has the potential to make the practice more infrequent. Indeed, in previous eras where filibustering required real work from those who threatened them, the practice was less common and more stigmatizing.³³⁸

Another norm worth breaking is the Senate’s continued deference to the chamber’s parliamentarian. In the Senate, this deference norm has critical policy consequences, as it is up to the parliamentarian to decide whether particular legislative provisions, including suffrage expansion, are subject to the more forgiving simple-majority cloture rule governing the budget reconciliation process.³³⁹ The current Senate parliamentarian has foreclosed using budget reconciliation as a path to fast-track voting rights bills, even when they contain a budgetary com-

337. The literature on changing the Senate filibuster is vast. For important recent accounts advocating for eliminating the filibuster, see Klarman, *supra* note 7, at 236; Ezra Klein, *The Definitive Case for Ending the Filibuster*, VOX (Oct. 1, 2020), <https://www.vox.com/21424582/filibuster-joe-biden-2020-senate-democrats-abolish-trump> [<https://perma.cc/HQ9L-9GLW>]; Ronald Brownstein, *Abolishing the Filibuster Is Unavoidable for Democrats*, ATLANTIC (Aug. 22, 2019), <https://www.theatlantic.com/politics/archive/2019/08/democrats-filibuster-2020/596572/> [<https://perma.cc/X8NP-652S>]. For accounts advocating for changes to the formal cloture rule, see Gould, Shepsle & Stephenson, *supra* note 40, at 526–27; Jeanne Shaheen, *Gridlock Rules: Why We Need Filibuster Reform in the U.S. Senate*, 50 HARV. J. ON LEGIS. 1, 14–16 (2013) (arguing in favor of a rule that would place the burden on those seeking to continue debate to find forty-one votes in favor of doing so); Al Franken & Norman Ornstein, *Make the Filibuster Great Again*, MINNEAPOLIS STAR TRIB. (Feb. 7, 2021), <https://www.startribune.com/make-the-filibuster-great-again/600020321/> [<https://perma.cc/SW5K-HNHV>] (same); Benjamin Eidelson, Note, *The Majoritarian Filibuster*, 122 YALE L.J. 980, 1016–18 (2013) (arguing in favor of reducing the cloture vote threshold).

338. See, e.g., Jacey Fortin, *The Senate’s ‘Talking Filibuster’ Might Rise Again*, N.Y. TIMES (Mar. 19, 2021), <https://www.nytimes.com/2021/03/19/us/politics/talking-filibuster-questions-answers.html> [<https://perma.cc/GP8J-MSP6>]; Michael J. Gerhardt, *Why Gridlock Matters*, 88 NOTRE DAME L. REV. 2107, 2118–19 (2013); Walter Shapiro, *The Case for the Talking Filibuster*, NEW REPUBLIC (Apr. 13, 2021), <https://newrepublic.com/article/162023/talking-filibuster-democrats> [<https://perma.cc/H9UE-QRT5>].

339. See Jonathan S. Gould, *Law Within Congress*, 129 YALE L.J. 1946, 1971–73 (2020); Tonja Jacobi & Jeff VanDam, *The Filibuster and Reconciliation: The Future of Majoritarian Lawmaking in the U.S. Senate*, 47 U.C. DAVIS L. REV. 261, 307, 336 (2013).

ponent. That decision has weight because chamber custom dictates that advice offered by the parliamentarian is considered final. Although the parliamentarian may technically be overruled by a floor majority, norms of deference ensure that she is treated as a relatively independent, non-partisan authority on legislative procedure.³⁴⁰ Should Senate leaders choose to prioritize voting rights over an upper chamber norm, they would be free to ignore the parliamentarian's advice, thereby making voting rights reform subject to an up-or-down, majority vote. Doing so is not without precedent. At the turn of the twentieth century, the House parliamentarian had the prerogative to decide matters of procedure and did so with great frequency.³⁴¹ Ultimately, however, the House decided that parliamentary procedure ought to be the province of the Speaker as a duly elected member and leader of the chamber, not an unelected legislative appointee.

Finally, those who wish to champion voting rights today might opt, as their predecessors did, to strategically flout norms that protect existing power hierarchies in an effort to encourage greater public scrutiny of practices that abet anti-majoritarianism. As we have seen, this was the logic behind leaking the names of discharge petition signatories. Civil rights reformers used a similar tactic to publicize southern obstruction in the Rules Committee, deliberately bringing a series of popular bills before the committee that they knew southerners and their Republican allies would block. The idea was to “force a vote”³⁴² and in so doing, demonstrate the southerners' outsized power. Ultimately, it became “clearer and clearer to the public . . . that something had to be done; that this was an intolerable situation.”³⁴³ Today's reformers should continue to make that case to the public. By repeatedly introducing voting rights legislation and attempting to secure a vote with

340. See, e.g., Kristina Peterson & Andrew Duehren, *Democrats Dealt Blow on Minimum-Wage Drive for Covid-19 Bill*, WALL ST. J. (Feb. 25, 2021), <https://www.wsj.com/articles/senate-waits-for-minimum-wage-ruling-from-parliamentarian-11614266273> [<https://perma.cc/BV6Z-LQ82>] (noting that, while both President Joe Biden and Senate Majority Leader Chuck Schumer called the decision disappointing, both pledged to respect the decision); Erica Werner, *Minimum-wage Increase Imperiled in Covid Relief Bill by Senate Official's Ruling*, WASH. POST. (Feb. 25, 2021), <https://www.washingtonpost.com/us-policy/2021/02/25/minimum-wage-increase-imperiled-covid-relief-bill-by-senate-officials-ruling/> [<https://perma.cc/UD3D-8AQN>] (noting that Biden's chief of staff “publicly ruled out trying to overrule the parliamentarian”). But see Gould, *supra* note 339, at 2005–06 (describing two removals of the Senate parliamentarian); Jacobi & VanDam, *supra* note 339, at 336–38 (similar).

341. See, e.g., BLOCH RUBIN, *supra* note 17, at 30 (describing a ruling on a point of parliamentary procedure by Speaker Joseph G. Cannon).

342. Interview by Ronald J. Grele with Richard W. Bolling, *supra* note 198.

343. *Id.*

the explicit purpose of having the proposals filibustered or otherwise obstructed,³⁴⁴ it might be possible to persuade Americans that the Senate is (still) “ruled by a dwindling and over-empowered minority.”³⁴⁵

Whether or not legislative advocates for voting rights today (the vast majority of whom are members of the Democratic Party) have sufficient stomach to beat the status quo remains to be seen. “In the age of Trump, Democrats have developed a great sense of pride in their role protecting America’s frayed democratic norms.”³⁴⁶ But the history of the civil rights movement in Congress shows in no uncertain terms that lawmakers who insist on politics as usual will only get more of the same. And if today’s democratic reformers *are* serious about safeguarding Americans’ right to vote, they need to come to grips with the reality that to be rights-makers, they will need to be norm-breakers.

CONCLUSION

In Congress and elsewhere, norms are often described as fragile and in need of our protection—a different, and less hardy, species of social ordering. Particularly as our democracy seems ever more brittle and Congress increasingly dysfunctional, it is understandable why so many have sought to defend the status quo. Against this backdrop, this Article’s core contribution is to *normalize* norms. Drawing on liberal lawmakers’ midcentury struggle to enact civil rights and other democratizing legislation, it demonstrates that breaking congressional norms is sometimes necessary to perfect our constitutional union.

Norm defenses often sound in elegy. But, as this Article has sought to make clear, there is no bygone era to return to. The bottom line is this: if American democracy is truly at risk of backsliding, then no institution’s norms should be allowed to stand in the way of necessary

344. See, e.g., Carl Hulse, *Democrats, Converted to Filibuster Foes, Are Set to Force the Issue*, N.Y. TIMES (June 4, 2021), <https://www.nytimes.com/2021/06/04/us/democrats-filibuster-senate.html> [<https://perma.cc/2JUN-GDTH>]. Other potentially productive norm violations might target the remaining courtesy norms that govern the appointment and confirmation of nominees for executive and judicial offices, as well as those that govern the assignment of legislation to particular committees. On legislative courtesy norms, see, for instance, Sarah Binder & Forrest Maltzman, *The Limits of Senatorial Courtesy*, 29 LEGIS. STUD. Q. 5 (2004); Tonja Jacobi, *The Senatorial Courtesy Game*, 30 LEGIS. STUD. Q. 193 (2005). On committee jurisdictions, see DAVID C. KING, *TURF WARS: HOW CONGRESSIONAL COMMITTEES CLAIM JURISDICTION* (2008). Like those attacked by midcentury liberals, each of these norms impedes the majority party’s ability to implement its agenda.

345. Alexander Burns, *Making the Senate Work for Democrats*, N.Y. REV. OF BOOKS (Jan. 19, 2023), <https://www.nybooks.com/articles/2023/01/19/making-the-senate-work-for-democrats-arc-of-power/> [<https://perma.cc/T299-5X3A>].

346. *Id.*

democratizing reforms. The participants in the legislative struggle for civil rights and related progressive priorities believed they had no alternative to defying legislative custom, while their opponents defended existing practice with full awareness of the policy consequences of giving way. The liberals' legislative triumphs should be proof enough that the norms that have long governed our constitutional democracy ought not be treated as sacrosanct.