Legislatures as Hostages of Obstructionism: Political Constitutionalism and the Due Process of Lawmaking

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The normative accounts of political constitutionalism maintain that legislatures are to be preferred to courts for the enforcement of the Constitution and claim that disagreement is at the core of democratic decision-making. Although disagreement in legislatures is vital for the fulfillment of their representative function, if such disagreement is able to turn itself into unconstrained obstructionism as a routine practice, then parliamentary institutions may become hostages of their own internal opposition. Indeed, the deadlock created by parliamentary obstructionism affects the decision-making capacity of legislatures vis-à-vis the other branches of government. By relying on a comparative analysis, the article highlights the downside effect of obstructionism on the constitutional role and legitimation of legislatures. It also makes a case for a careful limitation of this practice by protecting the "due process" of lawmaking through a strict enforcement of constitutional provisions and standing orders by legislatures or, should they fail, and as an extrema ratio, by courts.

Les comptes rendus normatifs du constitutionnalisme politique soutiennent que les législatures doivent être préférées aux tribunaux pour la mise en application de la Constitution et prétendent que le désaccord est au cœur du processus décisionnel démocratique. Bien que le désaccord dans les législatures soit essentiel pour la réalisation de leur fonction représentative, si le désaccord arrive à se transformer en obstructionnisme sans contraintes dans la pratique courante, alors les institutions parlementaires pourraient devenir otages de leur propre opposition interne. En effet, l'impasse créée par l'obstructionnisme parlementaire influe sur la capacité décisionnelle des législatures par rapport aux autres branches du gouvernement. L'auteure de l'article s'appuie sur une analyse comparative afin de souligner les effets désavantageux de l'obstructionnisme sur le rôle constitutionnel et la légitimation des législatures. Elle établit aussi le bien-fondé d'une restriction prudente de cette pratique en protégeant la « due process » du processus législatif grâce à une mise en application stricte des dispositions constitutionelles et règlements des assemblées parlementaires par les législatures ou, dans le cas où elles n'y parviennent pas, et en tant qu'extrema ratio, par les cours.

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Introduction

One of the main tenets of normative theories of political constitutionalism is that the enforcement of a Constitution should not be viewed solely, or even primarily, as the task of the judiciary.[1] Rather, such enforcement is more legitimate when understood as the result of political decision-making, whereby the deliberative process reconciles disagreements through political debate.[2] Insofar as they follow from the participation of a wide range of political actors, many of them minorities, disagreements are not only inherent to any democratic legal system but also desirable.[3] Conflicts and disagreements are at the core of politics and they stand as a necessary precondition for the legitimation of lawmaking.[4]

Although disagreement in legislatures is vital for the fulfillment of their representative function, if such disagreement is able to turn itself into unconstrained obstructionism as a routine practice to pursue unconstitutional ends, then parliamentary institutions may become the victims of their own internal opposition. The deadlock created by parliamentary obstructionism affects the decision-making capacity of legislatures vis-à-vis other branches of government. The use of obstructionist techniques, like filibustering, without effective limitations, derogates from majority rule. These derogations are usually tolerated in the name of minority protection and the constitutional autonomy legislatures enjoy to set and apply their own internal rules.

Of course, distinctions should be made depending on the specific features of a political system, in particular based on the structure of the government

1 As outlined by Marco Goldoni & Christopher McCorkindale, "A Note From the Editors: The State of the Political Constitution" (2013) 14:12 German LJ, there are three waves of political constitutionalism: the first, 'functional political constitutionalism', dates back to authors like John Griffith, who considers the Constitution to be used to realize political objectives and enhance the role of conflicts in democratic decision-making. The second wave — the one with which this article engages as the relevant authors focus particularly on legislatures — is marked by a normative turn, which emphasizes the virtue of parliamentary politics and lawmaking and is endorsed by scholars like Jeremy Waldron, Richard Bellamy and Adam Tomkins. Finally, the third wave, which is more attentive to the reflexive dimension of the constitutional theory and investigates its underpinnings, pools together authors like Martin Loughlin, Grégoire Webber, and Graham Gee.

2 For example, John AG Griffith, "The Political Constitution" (1979) 42:1 Modern L Rev 1, where he emphasizes the idea of an instrumental or utilitarian use of the Constitution in relation to political objectives.

3 *Ibid* at 20.

4 See Jeremy Waldron, *Law and Disagreement* (Oxford: Oxford University Press, 1999) at 232ff, who describes participation as "the right of rights." On the same normative appraisal regarding political participation for the purpose of enforcing a Constitution, see also Adam Tomkins, *Our Republican Constitution* (Oxford: Hart Publishing, 2005) and Richard Bellamy, *Political Constitutionalism. A Republican Defence of the Constitutionality of Democracy* (Cambridge: Cambridge University Press, 2007).

and the dynamics of political parties and parliamentary groups.[5] For instance, in parliamentary systems like Canada's, where the executive branch is able to dominate parliamentary action through the support of a cohesive parliamentary majority in the House of Commons,[6] tolerating a degree of obstructionism by political minorities can be perceived as a legitimate exercise of the 'right of resistance'[7] by those minorities. By the same token, during periods of unified government in the US, the use of procedural devices by the minority party to counter an otherwise unlimited "tyranny" of the majority is vital for the appropriate functioning of checks and balances. However, the abuse of obstructive techniques in the case of divided, minority or coalition governments can become dangerous for a legislature because such abuse impairs its ability to fulfill its representative functions in lawmaking and holding the executive accountable, and might lead to political paralysis. By allowing the exploitation of veto or delay powers by either chamber, bicameralism can also become an instrument of obstruction in a legislature in which the two chambers enjoy the same or equivalent decision-making powers.

Relying on a comparative analysis, this article highlights the downside effects of obstructionism on legislatures and makes a case for a careful limitation of this political and institutional practice for the sake of protecting the constitutional role assigned to legislatures in relation to executives. It highlights that mechanisms to ensure democratic dissent can easily slide into unconstrained obstructionism, causing the powers of a legislature in the constitutional system to be severely impaired.

This article mainly focuses on the legislatures in France, Italy, and the US. The case selection is explained by the different forms of government and legislative systems of those countries, according to Hirschl's theory of the "most different case logic."[8] The aim of the article is to show that obstructive tactics pose a serious challenge to the authority of legislatures, regardless of whether the form of government is presidential (the US), semi-presidential (France), or parliamentary (Italy), and despite a variety of institutional and political features

5 As has been significantly pointed out by Daryl J Levinson & Richard H Pildes, "Separation of Parties, Not Powers" (2006) 119:8 Harv L Rev2311 the 'separation of parties' within a legislature can be much more important than the structural separation of powers when it comes to the functioning of the form of government.

6 See Craig Forcese and Aaron Freeman, *The Laws of Government: The Legal Foundation of Canadian Democracy* (Toronto: Irwin Law, 2005) at 310ff.

7 John Locke, "Two Treatises of Government" in Paul E Sigmund, ed, *The Selected Political Writings of John Locke,* (New York: WW Norton and Co, 2005).

8 See Ran Hirschl, "The Question of Case Selection in Comparative Constitutional Law" (2006) 53:1 Am J Comp L 125.

that favor or counter obstructionism. It argues that a stricter enforcement of constitutional rules and standing orders by Speakers in legislatures paralyzed by obstructionism is desirable. When these rules and orders are not sufficient, judicial intervention may be required. Although it poses the risk of undermining parliamentary autonomy and privileges, the involvement of courts to limit obstructionism is appropriate provided that courts comply with these standards: i) they exercise self-restraint and "passive virtues";[9] and ii) they consider constitutional adjudication in this field instrumental in the guaranteeing of procedural preconditions for democratic decision-making, including by majorities, rather than being solely devoted to the protection of minority rights.[10]

The article is set out as follows. First, it looks at the constitutional role of legislatures and the application of majority rule and minority rights in this context. Here, the article focuses on the conditions under which obstructionism can impair the ability of a legislature to fulfill its constitutional tasks. Second, the article examines concrete examples of obstructive tactics that delay legislative debate indefinitely or work to overturn the results of parliamentary debate. Third, the paper discusses the main assumptions of political constitutionalism in those accounts that argue in favor of the strengthening of the role of legislatures in constitutional democracies, and asks whether this theory effectively takes into account the problems that loose anti-obstructionist rules or their non-enforcement may create for the authority of legislatures. Fourth, it highlights the importance of a legislature effectively applying constitutional rules in countering obstructionism and the role courts can play under specific conditions. Finally, based on the comparative analysis, conclusions are drawn on the enforcement of the rules governing legislatures and on how to protect the "due process" of lawmaking, i.e., the legal requirements for parliamentary procedures that fulfill the constitutional functions of a legislature, including the balance between majority decisions and minority rights.[11]

The constitutional role of legislatures: majority rule and minority rights

Legislatures are not just arenas for public debate. Indeed, they are first and foremost constitutional bodies entitled to legislate and, hence, to decide by

9 Alexander M Bickel, *The Least Dangerous Branch. The Supreme Court at the Bar of Politics*, 2nd ed (New Heaven: Yale University Press, 1986) at 111-199.

10 John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard: Harvard University Press, 1980) at 73-104.

11 On the notion of due process of lawmaking, see extensively, Hans A Linde, "Due Process of Lawmaking" (1976) 55:2 Neb L Rev 197 at 240-242.

majority rule on public policies, hopefully in agreement with the executive. In other words, besides providing a forum for the exchange of views, the representative function is performed by legislatures in passing laws, approving budgets, and scrutinizing and sometimes sanctioning the executive. Legislatures cannot relinquish their decision-making role and postpone the approval of the measures needed indefinitely without violating the Constitution. To this end they must be organized in such a way as to ensure that laws are approved in due time to address the political, social, and economic concerns that have prompted their adoption. However, as democratic representative institutions, legislatures must operate on the basis of rules (rooted either in the Constitution or in the legislature's own standing orders) that enable minority groups or parties to be involved in the debate and, on some occasions, to prevent the adoption of decisions.[12]

In this regard, a distinction has to be drawn between debates and decision-making within a deliberative process in legislatures. Decisions on legislative bills or motions are normally majority decisions. The use of a higher *quorum* for adopting a decision, inclusive of minorities, should be exceptional, as with the power of minorities to obstruct decisions otherwise supported by a majority. The reason for exceptions of this kind is the need to build more robust and legitimate outputs that enjoy the widest possible consensus. Without clear limits, obstructionism can become a major concern for the legitimacy of legislatures if it makes them unable to decide and thus to satisfy the demands of representation coming from the majority of the people.

The claims of minorities can be endorsed in a legislative decision by means other than participation in a quorum. Minority groups can make their voices heard in debates that precede a final vote. Their claims can be put forward in different forms, such as: putting questions to the government, as in France, where the standing orders of the National Assembly reserve time on the agenda to questions from minority groups;[13] setting up committees of inquiry, as in Germany, where the Basic Law acknowledges the right of one quarter of the *Bundestag*'s MPs to establish such a committee;[14]or, making a larger share of time available for minority groups than majority groups to debate governmental bills, as in Italy.[15] Such mechanisms give minorities their rightful role to

12 Here the words "minority groups" and "parties" or "minorities" are used instead of "opposition" because in many countries there is not official recognition of the role of the Opposition as the main political formation after the one in government.

13 Art 48.8, Standing orders of the French National Assembly.

14 *Germany: Basic Law for the Federal Republic of Germany,*23 May 1949, art. 44.1.

15 Art 24.7 Standing orders of the Italian Chamber of Deputies.

engage in debates and influence the final result of deliberations, through the quality of the arguments advanced, legislative tactics, and inter-party negotiations. Giving minorities the power to prevent the adoption of decisions by the legislature may well produce "boomerang effects" on the institution.

Obstructionist strategies are frequently deployed by strategically manipulating the rules governing democratic legislatures. Such obstructionism often takes place in compliance with the standing orders, or the plausible interpretation thereof, but in a way that blocks the ordinary functioning of the legislature in question.

Among the factors that can turn obstructionism into a threat to the constitutional role legislatures are called to play are the presence, in particular in parliamentary systems, of coalition governments, based on a fragmented and loose alliance of parties. Small parties within the coalition can find it easier to have an influence on policy-making, and obtain visibility, by threatening to delay parliamentary debates or by introducing a large number of amendments. Likewise, minority governments can become subject to the blackmail of the parties in parliament that usually offer external support to government policies, even though not voting in favor of the government in office.

Bicameralism can also be used with a view to obstructing the work of a legislature. Bicameral systems in which both chambers enjoy the same decision making powers — in Italy, for instance — and where they show different political majorities, as in France at present, or in times of divided governments, can lead to a situation in which one chamber regularly obstructs the work of the other.[16]

Obstructionism is more problematic now for democratic legislatures than it was several decades ago. What has changed is that, under the pressure of globalization and processes of regional integration, external time constraints — in addition to those already imposed by the executive — often shape the agendas of legislatures. The inability of a legislature to make prompt decisions, given international and European obligations, can thus result in taking *de facto* lawmaking powers away from legislatures. A paradox emerges where minority groups and parties that often complain about the increasingly limited role left to legislatures in policy-making are precisely the very ones that act to maintain or even worsen this situation through obstructionism.

16 See, for instance, George Tsebelis, *Veto Players: How Political Institutions Work* (Princeton: Princeton University Press, 2002) at 136-160.

The level of media coverage of legislatures has also substantially increased in recent decades, with the effect that minorities are led to use obstructionism as a strategic tool to garner attention for their opposition positions. This link between the use of obstructive techniques within legislatures and the need for visibility in the media can become significant, especially in countries where there are no other constitutional devices, such as an Ombudsman or the referral by parliamentary minorities of a constitutional question (*saisine parlementaire*) to a Constitutional Court,[17] available to minorities to influence decision-making.

Obstructive techniques in three democracies: The US, Italy, and France

Unconstrained debate

Perhaps the most renowned example of obstructionism in legislatures is that of filibustering in the US Senate, the chamber in which states are represented on an equal footing, with two Senators per state regardless of the size and the population (Article 1, section 2 of the Constitution). In the Senate, the standing orders (Rule XXII) allow a debate to be closed only with a super-majority of three-fifths (60) of the Senators. The text of the Constitution neither endorses nor forbids the practice of unconstrained debates.[18]

While the House of Representatives has gradually changed this rule on cloture so as to weaken its implications for the House's activities,[19] the Senate has not done so, despite the fact that Senators have criticized its enforcement since the very first years of the Senate because of the paralysis it can prompt. This is largely because the filibuster represents an extraordinarily powerful tool in the hands of individual Senators in political bargaining.[20] Moreover, filibustering is tied to and to some extent justified by the nature of this Chamber as the link

17 *Saisine parlementaire* for example, exists in France, Germany, Poland, and Spain.

18 See Barbara Sinclair, "The '60-Vote Senate:' Strategies, Process, and Outcomes" in Bruce I Oppenheimer, ed, *US Senate Exceptionalism* (Columbus, OH: The Ohio State University Press, 2002) 260.

19 The House of Representatives post-2000 is traditionally seen as a chamber dominated by the majority party, through the Rules Committee and the manipulative interpretation of standing orders to the detriment of the minority: see Thomas E. Mann & Norman J Ornstein, *The Broken Branch: How Congress Is Failing America And How To Get It Back On Track* (Oxford: Oxford University Press, 2006) at 7-15.

20 See William McKay & Charles W Johnson, *Parliament and Congress: Representation and Scrutiny in the Twenty-First Century* (Oxford: Oxford University Press, 2010) 439; Sarah A Binder & Steven S Smith, *Politics or Principle? Filibustering in the United States Senate* (Washington DC: Brookings Institution, 1997) 4.

between Federation and states whereby the extension of the debate until the super-majority is reached is a form of protection of the states' interests.

From 1789 to 1917 debates in the Senate could be closed only by the unanimous consent of the Senators. Interestingly, in 1917 the choice to move away from the unanimity rule was taken upon request by President Woodrow Wilson. Because of the unanimity rule, a bill supported by the President to equip US merchant ships against attacks by German submarines during WWI could not be put to a vote (the United States entered the war five weeks after the change of the rule on filibustering). The threshold was lowered to three-fifths in 1975. According to Sarah A. Binder, the original sin was not in the rule allowing for filibustering in itself, but in the Senate's mistake in 1949 of abolishing the motion for a previous question that could be tabled by any Senator and which is still in force in the House of Representatives. If approved by simple majority, the motion for a previous question allows the House to immediately conclude debate and to vote. Without such a motion, the Senate lost the main device to counter obstructionism.[21]

All attempts to challenge the constitutionality of the Senate's filibustering rule have failed, both on the grounds of lack of standing and the prospective violation of the Chamber's autonomy to determine the rules of its own proceedings under Article I of the Constitution. The most recent case, *Common Cause v Biden*, originated from a federal lawsuit filed by the group Common Cause, several congressmen, and the potential beneficiaries of proposed legislation that could not be brought to a vote. The plaintiffs argued that filibustering is an unsustainable alteration of the ordinary majority rule, which should be presumed to apply in Congress unless otherwise provided for by the Constitution. The Supreme Court nevertheless denied *certiorari* on 3 November 2014.[22] Given the lack of judicial protection against filibustering,[23] the only tool to defeat it is a change of the precedents or the rules of the Senate. This change requires agreement of the minority, taking into account that the debate on amendments of the Senate's standing orders can be put to a cloture only by a two-thirds majority (a higher quorum than the usual three-fifths rule).

21 In the 1950s, Senator Strom Thurmond was able to filibuster the approval of the *Civil Rights Act 1957* by speaking undisturbed for 24 hours and 18 minutes, the longest filibuster in the Senate's history.

22 See US Supreme Court, *Common Cause v Biden* (3 November 2014), US14-253 (denying petition for certiorari).

23 This can also be linked to the debate over the ability of Congress to interpret the Constitution, and whether Congress needs an external authority imposing the correct constitutional interpretation from above. See Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton: Princeton University Press, 2000) at 6ff.

In a similar way as the problems with the US Senate, obstructionism in Italy has also directed its attack against changes to the chambers' standing orders on the ending of debates. The combined effects of the lack of rules to constrain debates together with the flow of amendments tabled, in particular by the small Italian Radical Party, led to a deadlock in the Chamber of Deputies in 1981. The reform of the standing orders of the Chamber was then made possible only by a creative interpretation of the rules regarding the amendment of the standing orders themselves by the Speaker, Nilde Iotti. MPs now cannot present their own amendments, but just "principles and criteria" to be transformed into specific amendments by the Committee on rules, should they be approved by the Floor.[24]

At the beginning of the 1990s, a new device against obstructionism in parliamentary debates was introduced — the allotment of precise quotas of time (*contingentamento dei tempi*) for parliamentary procedures. Until this change the government and the parliamentary groups supporting it had not really been able to implement their agenda. Any attempt to plan parliamentary activities was thwarted by oratorical marathons on the part of minority groups that significantly delayed the approval of bills. Since 1990, each bill has been assigned a finite amount of time available for the whole parliamentary activity, and this quota is then split between the government, the rapporteurs, and the different political groups, based on their size.

In the Chamber of Deputies, the rules on the allocation of time have remained controversial, and as a result, have been relaxed in terms of their anti-obstructive effects. While these rules are applied to the general debate, this is not always the case for the examination of and voting on articles and amendments, and the final vote.[25] Most important, by way of a precedent set by the Speaker in 1990, the pre-defined allocation of time is not enforceable to "decree-laws," which account for a significant part of the statutes finally enacted.[26]

24 Once this precedent was settled by the Speaker, another condition that allowed obstructionism to survive, the general application of secret votes on the final approval of bills, was eventually removed in 1988.

25 See Luigi Gianniti & Nicola Lupo, *Corso di diritto parlamentare*, 2nd ed (Bologna: Il Mulino, 2013) 178.

26 This temporary derogation has now become permanent to some extent — although it is not codified — as this apparently illogical exclusion has been confirmed by the Speakers so far in order to avoid a further increase in the adoption of decree-laws: a targeted objective that has not yet been achieved.

Unconstrained amending powers

Rules on amendments in the US Congress differ substantially between the House of Representatives and the Senate. In the House, which is dominated by the majority party, amendments to a bill must be strictly linked to the subject of the article to which they refer (*germaneness*) and there is a tight control on their admissibility by both the Speaker and committee chairmen.[27] By contrast, in the Senate, not only are there no limits to the number of amendments that can be tabled or to the length of the oral explanation by the presenters — filibustering on amendments is also applied in Senate committees — there are no constraints on the subject of amendments either.[28] The absence of limits also poses a problem of compliance with Article I, section 7 of the US Constitution, which states that money bills must originate in the House of Representatives. Through unrestricted amendments, the Senate can usurp this role.

Some limits on amendments have been introduced. Robert Byrd, a long-serving Senate Majority leader for the Democratic Party, succeeded in changing Senate precedents with the support of a simple majority in order to counter legislative gridlock. For example, as the Presiding Officer of the Senate he set a new precedent that allowed the Presiding Officer to rule dilatory amendments out of order. In 2013 a temporary change of the Senate's standing orders eliminated the right of the minority party to filibuster a bill provided that each party has had the opportunity to present at least two amendments to the bill.[29]

In the Italian Parliament, standing orders and institutional practice of both chambers fix precise time limits and relevancy limits to the bill under scrutiny, depending on the nature of bill. Despite these limits, the number of amendments tabled by individual MPs and committees can be huge. The high number of amendments — often in the thousands — paired with the lack of fast-track procedures, make any kind of review on the admissibility of amendments by the Speaker a weak instrument to ensure that legislative procedure is carried out in due time.

27 See Congressional Research Service, *The Amending Process in the House of Representatives*, by Christopher M Davis (Washington, DC: CRS Report for Congress, 2015) at 6ff.

28 In contrast, many states' Constitutions fix the 'single subject rule,' a requirement to confine all acts of a state legislature to a single subject. The violation of such requirement has led some state courts to invalidate legislation (and constitutional amendments). See Millard H Ruud, "No Law Shall Embrace More Than One Subject" (1958) 42 Minn L Rev 389 at 395; Martha J Dragich, "State Constitutional Restrictions on Legislative Procedure: Rethinking the Analysis of Original Purpose, Single Subject, and Clear Title Challenges" (2001) 38 Harv J on Legis 103 at 165-166.

29 See Congressional Research Service, *Changes to Senate Procedures in the 113th Congress Affecting the Operation of Cloture (S.Res. 15 and S.Res. 16)*, by Elizabeth Rybicki (Washington, DC: CRS Report for Congress, 2013).

The case of decree-laws enacted by the government and to be converted into statutes within 60 days is different. A strict scrutiny of the admissibility of amendments to these acts is ensured and a fast-track procedure is followed. The Italian Senate's standing orders allow the use of the *guillotine* (*ghigliottina*) on amendments for decree-laws. If, after 30 days from the start of the examination of the decree-law, the Senate has not completed the conversion of the decree into a statute, the Speaker can put the decree to a final vote that precludes unexamined and undebated amendments. While this preferential treatment of decree-laws has led the executive to use this technique widely, as if it were the "ordinary" procedure for legislation, it has not solved the problem of the enormous number of amendments. To the contrary, with the predominance of decree-laws, MPs find it particularly important to use amendments as tools to show the electorate their engagement with parliamentary activities, even if they are eventually precluded by the *guillotine*.

What must be done with the massive flow of amendments? Since the 1990s the practice has become the approval of a maxi-amendment composed of one article and thousands of sections on which the executive asks for a confidence vote to take control of amendments. A maxi-amendment of one article bypasses the ordinary legislative procedure as well as the legislative process regarding decree-laws.[30] Although doubts have been raised about their compliance with the Constitution, the Speakers of the two Chambers have never declared maxi-amendments inadmissible. The advantage of a maxi-amendment for the executive is that it gives the government the opportunity to table an amendment that entirely replaces the content of the bill, inserting new provisions but also saving most of the amendments tabled by MPs (who then find a further incentive to table a huge number of amendments).[31] The chamber votes on the bill as if it were one single item and not article by article, unlike what Article 72 of the Italian Constitution prescribes. The confidence vote puts a "take it or leave it" alternative before the chamber. If the chamber rejects the bill (necessarily as a whole), then it forces the government to resign, and it also becomes likely — although not compulsory — that parliament is dissolved and new elections are called.

30 See Elena Griglio, "I maxi-emendamenti del governo in parlamento" (2005) 4 Quaderni costituzionali 807.

31 See governmental bill on the reform of the education system (A.S. 1934) — now Law no 107/2015 — that attracted more than 2400 amendments in the Senate on its first reading. The committee rapporteur proposed a maxi-amendment, inclusive of amendments presented by individual MPs, also from minority groups, that was finally approved on 25 June 2015 with the usual combination with a confidence vote asked by the executive to secure the approval by the majority.

The development of this practice, which is also influenced by the instability of parliamentary majorities and coalition governments in Italy, has not been countered either by a strict scrutiny on the admissibility of amendments by the Speakers or by constitutional case law.[32]

By contrast, the Speakers of the French Parliament and the *Conseil constitutionnel* ensure tighter enforcement of standing orders on the requirements for and the admissibility of amendments. An amendment in the French Parliament must be accompanied by a brief explanation, an impact regulatory analysis, and be related only to a single article (Articles 98 and 98-1 RAN; Article 48 RS). The latter provision prevents maxi-amendments. Additional articles whose content is irrelevant to the subject of the bill are also inadmissible (the so-called *cavaliers legislatifs*).

The case law of the *Conseil constitutionnel* has been largely favorable to the extension of the amendment rights of MPs as corollary of the right to initiate bills. However, from 1986 to 2001, in order to counter obstructionism during the three governments of "cohabitation,"[33] the *Conseil constitutionnel* adopted a restrictive interpretation of the right of amendment based on the doctrine of the "*limites inhérentes*": the admissibility of an amendment depends on its relevance to the subject of the bill and its significance in terms of impact on the text. The judicial construction aimed to prohibit the practice of tabling and approving amendments which reproduced the content of other normative measures, above all executive ordinances.[34] However this strict scrutiny and the doctrine of the inherent limits were abandoned in 2001.[35]

Although the requirements posed by the Constitution, the standing orders for tabling amendments, and the case law of the *Conseil constitutionnel* all discourage MPs from tabling thousands of amendments, their number remains considerable. The executive can use a variety of instruments to prevent obstructionism through amendments. The government may request a "*vote bloqué*" in the legislative process at the National Assembly or the Senate, consisting of a single vote on a bill. This is effective in containing the number of amendments since it makes it possible to skip voting on amendments and articles. The

32 See Giovanni Piccirilli, *L'emendamento nel processo di decisione parlamentare* (Padova: Cedam, 2008).

33 The three cohabitations took place in the following periods: 1986-1988, 1993-1995, 1997-2002.

34 See Cons const, 23 January 1987, *Loi portant diverses mesures d'ordre social,* (1987) Rec 13, 86-225 DC, on the so-called "Séguin amendment."

35 See Cons const, 19 June 2001, *Loi organique relative au statut des magistrats et au Conseil supérieur de la magistrature,* (2001) Rec 63, 2001-445 DC.

only amendments implicitly approved are those presented or accepted by the Executive.

The French "nuclear option" against amendments, however, is a combination of a confidence vote with the "*vote bloqué*": a sort of "*super-vote bloqué*" (Article 49, paragraph 3 of the Constitution). Once the Prime Minister declares that he wants to engage the confidence relationship with the National Assembly on the approval of a certain bill, the bill is considered automatically approved unless, within the subsequent twenty-four hours, one or more resolutions of no-confidence are tabled (subscribed to by at least one tenth of the deputies) and approved. The bill is "approved" as modified by the amendments proposed or accepted by the Executive. The constitutional reform of July 2008 has moderated the power of the Government to use this procedure by providing that it can only be used on finance bills and social security financing bills, and only once in a session on Private Members' bills. The use of this procedure is rare although it was recently applied twice by Prime Minister Manuel Valls to pass the much controversial labour reform on 10 May and 6 July 2016.[36] It has never led to the approval of a resolution of no confidence.[37]

Assumption by the Executive of Legislatures' Powers

If activities of legislatures are blocked or significantly delayed by obstructionism, what can and often does happen is that the actual power to decide is transferred from legislative assemblies to the executive. This is a trend seen in many countries and implies a significant limitation of legislatures' authority in lawmaking and oversight powers.

An example of the first kind has occurred in France with the use (and abuse) of executive ordinances (*ordonnances*) to shorten the length of the ordinary legislative procedure. The executive may adopt an ordinance, in order to implement its political programme, on matters reserved by Article 34 of the French Constitution, and by fixing a time limit in the enabling act, previously approved by the Parliament (Article 38 of the Constitution). Afterwards, the content of the ordinance has to be confirmed by a statute. In the absence of

36 *See Projet de loi relatif au travail, à la modernisation du dialogue social et à la sécurisation des parcours professionnels*, XIVe Législature, last modified on 15 July 2016: <https://www.legifrance.gouv.fr/affichLoiPreparation.do?idDocument=JORFDOLE000032291025&type=general&typeLoi=proj&legislature=14>.

37 Another interesting and recent example of the use of the "*super-vote bloqué*" to let the government pass a fundamental bill for the implementation of its political programme against more than 3000 amendments tabled is provided by the approval of the so-called "Macron Law", now *Loi n° 2015-990 pour la croissance, l'activité et l'égalité des chances économiques*, JO, 7 August 2015, 13537.

the adoption of this statute, the ordinance lapses and its content can be modified only by a subsequent statute. Therefore, the executive makes every possible effort to ensure fast confirmation by parliamentary statute. The mixed nature, both parliamentary and governmental, of the procedure for adopting these executive acts has caused an improper use of this measure. Until recently, both the authorization and the ratification of ordinances derived from an amendment to the text of a bill having a completely different content. In order to prevent the misuse of the *ordonnances*, a constitutional reform in 2008 amended Article 38 of the Constitution to permit ratification of the ordinances only by explicit statutory terms.[38]

In Italy, symmetric bicameralism and the lack of shortened or accelerated parliamentary procedures for the approval of statutes have led to an abuse of the tool of decree-laws, almost always combined in recent parliamentary practice with maxi-amendments and confidence votes. In the 1990s, the Italian Constitutional Court declared the practice of the executive of tabling decree-laws a second time before Parliament just a few days before their validity expired to be unconstitutional (so-called reiteration of decree-laws).[39] Since 2007 the Constitutional Court has started to review the existence of "a case of extraordinary necessity and urgency" that Article 77 of the Constitution imposes on the adoption of a decree-law, and on this basis has occasionally struck down statutes converting decree-laws.[40] In 2012, the Court found the evident lack of internal consistency and homogeneity of an omnibus decree-law converted into a statute by Parliament to be unconstitutional. Although the Court did not enter into the details of parliamentary procedures — such as the adoption of maxi-amendments — something it has so far excluded from its jurisdiction, it nevertheless introduced clear limits on the amendability of decree-laws and the practice followed by the executive with the agreement of the governing bodies of the parliament.[41]

Constitutional case law has thus partly compensated for the failure of Speakers to prevent the occurrence of this troublesome situation, despite their

38 Jean-Pierre Camby and Pierre Servent, *Le travail parlementaire sous la cinquième république*, 5th ed (Paris: Montchrestien, 2011) at 92-100.

39 Judgment 360/1996, Corte Costituzionale della Repubblica Italiana, Rome, 17 October 1996, Gazzetta Ufficiale, 44 (Italy).

40 Judgment 171/2007, Corte Costituzionale della Repubblica Italiana, Rome, 30 May 2007, Gazzetta Ufficiale, 21 (Italy). Judgment 128/2008, Corte Costituzionale della Repubblica Italiana, Rome, 5 July 2008, Gazzetta Ufficiale, 20 (Italy).

41 Judgment 22/2012, Corte Costituzionale della Repubblica Italiana, Rome, 22 February 2012, Gazzetta Ufficiale, 8 (Italy). Judgment 32/2014, Corte Costituzionale della Repubblica Italiana, Rome, 22 February 2014, Gazzetta Ufficiale 11 (Italy).

having the legal tools in the Constitution and in standing orders to protect parliamentary powers. For example, Article 72 of the Italian Constitution is incompatible with the practice of maxi-amendments in that it imposes the approval of a law article by article, which becomes impossible when a single article composed of thousands of sections is voted to replace the content of the whole bill. Nevertheless, Speakers have not enforced this provision.

The weak enforcement of the standing orders and constitutional provisions by Speakers, as if they were mere political guidelines, has favored an abusive stretching of parliamentary procedures, which is also the inheritance of decades of obstructionism by some minority groups. The executive has put parliamentary procedures under stress because it has not been allowed to govern and implement its political programme through legislation.[42]

In the US the abuse of obstructionist tactics has had the consequence of limiting the exercise of veto powers by the Senate, especially regarding the ratification of international treaties and, to a lesser extent, presidential appointments. Accordingly, the authority of the President and the executive have been expanded in these fields.

Indeed, when it comes to international treaties, the Senate must decide by a super majority of two-thirds (Article II, section 2 of the Constitution).[43] A series of circumstances, however, has contributed to bypassing the advice and consent of the Senate. A practice begun in WWI has almost become the rule: the greater part of international agreements signed by the US have taken the form of executive agreements under national law, which do not require the procedure under Article II of the Constitution to be followed.[44] The main instrument used by the Senate to influence the executive on international agreements yet to be negotiated are "reservations," whereby in a resolution the Senate fixes the conditions that must be fulfilled by the prospective treaty in order to be

42 This is why, for instance, the government "invented" the new (unconstitutional) tool of the reiteration of decree-laws to compel the parliament to consider those decrees. See Andrea Manzella, *Il parlamento*, 3rd ed (Bologna: Il Mulino, 2003).

43 See Lori Fisler Damrosch, "The Role of the United States Senate Concerning 'Self-Executing' and 'Non-Self-Executing' Treaties" in Stefan A Riesenfeld & Frederick M Abbott, eds, *Parliamentary Participation in the Making and Operation of Treaties: A Comparative Study* (Dordrecht: Martinus Nijhoff, 1994) 205-223 and Adrian Vermeule, "Absolute Majority Rules" (2007) 37:4 Brit J of Political Science 655.

44 See McKay & Johnson, *supra* note 20 at 67-68. On some issues, like commercial policy, the President has an obligation by law — under the *Trade Act of 1974,* 19 USC 12 (1975) — to agree with the Congress on the position to be taken towards a treaty under negotiation. See the recent case of the Trade Promotion Authority bill and the filibustering in the Senate against its approval.

concluded as an executive agreement, and thus waive the power to authorize the ratification by super majority.[45]

A similar attempt of the executive to withdraw powers from the Senate can be detected in the field of presidential appointments. The advice and consent of the Senate is required for ambassadors, members of the cabinet and Justices of the US Supreme Court, as well as "all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law (Article II, section 2)." Additional constraints have been added by the US Supreme Court in a series of cases.[46] For example, the advice and consent of the Senate must be applied to the appointment of any public official at the federal level who enjoys a significant authority under federal law, and Congress cannot delegate the veto power to an officer of the Senate or to both chambers.

While the advice and consent procedure on presidential appointments requires only a majority vote, unconstrained filibustering effectively means that a three-fifths vote is needed for cloture before the Senate votes on the appointee. The abuse of filibustering and the delay or refusal to make decisions on confirmation on the part of the Senate have been severely criticized by scholars, especially with respect to vacancies on the federal courts. A serious discussion on how to limit filibustering of appointments was launched by the Senate itself in 2010.[47]

The most serious delay with the Senate procedure occurred during the first term of the Obama presidency (2009-2013). Given the gridlock in this period, Congress itself constrained the advice and consent power of the Senate. The *Presidential Appointment Efficiency and Streamlining Act of 2011*, which entered

45 The debate on these procedures and the attempt of the President to bypass the Congress have recently resurfaced concerning the Iranian Nuclear Arms Deal, against the strong opposition of Republicans that dominates both chambers of the current 114th US Congress. See Jay Solomon, "Obama Legacy on Nuclear Arms Under Threat", *The Wall Street Journal* (14 June 2015).

46 See, for instance, US Supreme Court, *Buckley v Valeo*, 424 US 1 (1976).

47 See Sarah A Binder & Forrest Maltzman, *Advice and Dissent: The Struggle to Shape the Federal Judiciary* (Washington D.C.: Brookings Institution Press, 2009) at 79ff. and Bruce Ackerman, *The decline and fall of the American Republic* (Harvard: Harvard University Press, 2010) at 141ff. In 2010 the Senate organised a series of hearings of experts on congressional procedures on how to reform the rule on filibustering: see US Senate, Committee on Rules and Administration, *Hearings on Examining the Filibuster*; 111th Congress, 2nd session, 22 April-29 September 2010 (Washington D.C., U.S. Government Printing Office), at 17ff.

into force on 9 October 2012, removed 163 offices from the approval of the Senate.[48]

A second step taken in November 2013, while 59 executive branch nominees and 17 judicial nominees were awaiting confirmation, was the use of the "nuclear option"[49] and the change of Senate precedents — not the standing orders — on presidential appointments by majority vote. The Senate rules on filibustering in the legislative process had been changed a few months beforehand. By slight majority (52-48), Democratic Senators succeeded in forbidding the use of the filibuster on all executive branch and judicial nominees other than to the Supreme Court.[50]

The limits of political constitutionalism and the procedural justification of judicial review: the ambiguous nature of the legislatures' rules

The threat that obstructionism may represent for legislatures poses a paradox for normative accounts of political constitutionalism. Such accounts contend that because of competitive elections and democratic decision-making, legislatures are to be preferred to courts for enforcing the rule of law and rights protection.[51] In according this central role to legislatures, political constitutionalism fails to consider that, under certain conditions, parliaments might be blocked in the exercise of their functions by the use of obstructive powers by minorities, making them unable to enforce the Constitution.

48 See Maeve P Carey, *Presidential Appointments, the Senate's Confirmation Process, and Changes Made in the 112th Congress* (Washington D.C.: Congressional Research Service, 2012) at 9ff.

49 This denomination was first used in 2005 when, facing a deadlock in the advice and consent procedure on presidential appointments, a group of Republican senators put forward the idea of having the President of the Senate, Dick Cheney at that time, rule from the chair that filibustering on judicial appointees was unconstitutional in that it prevented the President of the United States from naming judges with the simple majority of the Senate, with which the consent was deemed to be formed (rather than the three-fifths rule provided by the Senate's standing orders). The "nuclear option" was, however, only threatened but not used on that occasion.

50 All Republican senators and three democrats opposed the use of the "nuclear option." As for recent controversy on President Obama's proposal to appoint Merrick Garland as the new Associate Justice of the Supreme Court and the Senate's refusal to consider such appointment, see, provocatively, Gregory L Diskant, "Obama Can Appoint Merrick Garland to the Supreme Court if the Senate does Nothing", *Washington Post*, 8 April 2016

51 See, for example, Richard Bellamy, "The Political Form of the Constitution: the Separation of Powers, Rights and Representative Democracy" (1996) 44 Political Studies 436, Jeremy Waldron, "The Core of The Case Against Judicial Review" (2005) 115 Yale LJ1346 and, recently, Cormac Mac Amhlaigh, "Putting Political Constitutionalism in its Place" (2016) 14:1 Intl J Constitutional L 175.

For some theorists of political constitutionalism,[52] the superior authority of legislatures has its roots in their accountability to voters and in the enhancement of public debate through the confrontation between opposed factions. Legislatures are viewed as ensuring that those positions are ultimately reconciled through transparency and the involvement of the highest number of individuals. By contrast, in a court "the counter-majoritarian bias promotes privileged against unprivileged minorities, while its legalism and focus on individual cases distort public debate."[53] Normative theories of political constitutionalism also argue that the enforcement of the majority rule and the promotion of a public debate in democratic processes should be guaranteed by means of electoral reforms and strengthened parliamentary processes, in particular for the benefit of minorities, and not by rules entrenched in rigid Constitutions and enforced by judicial review.

However, what if obstructive tactics promoted by minorities prevent legislatures from fulfilling their functions and majorities from enacting their programs? Codified constitutional rules, enforced by an independent arbiter like a court, may be needed to ensure the regular functioning of a democratic system. Nevertheless, there are also historical and legal reasons, beyond the arguments put forward by political constitutionalists, that support a cautious approach by courts when the adjudication of parliamentary procedures is at stake. Indeed, the protection of parliamentary autonomy is a landmark principle in constitutional law which can be traced back to the English Bill of Rights 1689, which states that "the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament." Along these lines Rudolf von Gneist in Germany and Albert Dicey in the United Kingdom elaborated on the doctrine of the *interna corporis acta* and the notion of parliamentary sovereignty, respectively.[54] Both theories assume that the acts and the conduct adopted in parliament are immune from judicial challenge and review. Although the value and implementation of those theories have been softened in practice by developments in constitutional law, they still serve to protect legislatures from the interference of other institu-

52 In particular the normative accounts of political constitutionalism: see Marco Goldoni & Christopher McCorkindale, "Why we (still) Need a Revolution" (2013) 14:2 German LJ 2197.

53 See Bellamy, *supra* note 4. On the influence of privileged groups on the case law of courts, see Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard: Harvard University Press, 2007).

54 See Rudolf von Gneist, "Soll der Richter auch über die Frage zu befinden haben, ob ein Gesetz verfassungsmäßig zu Stande gekommen?", *Gutachtenfür den vierten Deutschen Juristentag* (Berlin: Springer, 1863) at 5-6 and Albert V Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan & co, Ltd, 1885).

tions so as to preserve separation of powers and democratic decision-making through parliamentary autonomy provided that such autonomy does not affect the functioning of a Constitution itself, like obstructionism may do.

A role for constitutional rules and courts

In ordinary political life the adoption of precise anti-obstructive rules in a legislature's standing orders is sufficient, provided that they are consistently enforced by its governing bodies, *in primis* the Speaker. However, what frequently happens is that, although equipped with anti-obstructive provisions, the standing orders are degraded to nothing more than political rules, subject to whatever derogation political parties and groups find convenient for their strategic purposes at a given moment. These derogations are often seconded by Speakers. In contrast, it is argued here that the rules governing the functioning of democratic legislatures should be understood as legal and binding, to be applied as long as they contribute to the fulfillment of the constitutional role held by a legislature. If obsolete and dysfunctional, they must be updated and amended without resorting to "creative" interpretations by Speakers. A formal amendment of a legislature's standing orders ensures legal certainty, transparency, and predictability of the procedures. To this end having a minimum set of rules on legislative process entrenched in the Constitution can provide an important benchmark for the development and evolution of standing orders.[55] In other words, the problem of systematic obstructionism has to be countered, first of all, by designing procedural rules in legislatures in a way that restricts the margins in which obstructionist tactics are established and tolerated. These rules must be strictly enforced by Speakers and other governing bodies of a legislature.

Nevertheless, as political parties and groups often find avenues to exploit rules to their own advantage without paying attention to the long-term institutional effects, courts should be allowed to intervene to redress unsustainable obstructive practice in legislatures as a last resort. This should be the case even where practice is formally in compliance with the standing orders, but nevertheless violates principles entrenched in the Constitution concerning the attribution of powers to the different branches of government.

55 This is the case of the standing orders of the French Parliament after the constitutional reform of 2008 that have been constantly updated as to enhance the decision-making capacity of both chambers. See French Sénat, *Résolution réformant les méthodes de travail du Sénat dans le respect du pluralisme, du droit d'amendement et de la spécificité sénatoriale, pour un Sénat plus présent, plus moderne et plus efficace*, by Gérard Larcher, Report No 100 (31 May 2015).

Although the author agrees with political constitutionalists that it is problematic for courts to command legislatures, as this encroaches upon the principle of the separation of powers and parliamentary privilege, as a last resort they should be able to adjudicate whether legislatures are violating constitutional provisions and procedures or, by omission, failing to fulfill their constitutional function. For example, if due to obstructionism, a Parliament systematically relinquishes the appointment of constitutional or supreme court judges or the adoption of the budget while an obligation exists under the Constitution — as was the case in the deadlock over the approval of the US federal budget and the subsequent government shutdown[56] — this may mean that the legislature is unable to fulfill the representative and democratic function for which it is established.

Nevertheless, courts should only have a say in how parliamentary procedures are carried out in the case of systematic infringements of the Constitution. Otherwise, giving courts the last word on the application of the "due process of lawmaking" might have remarkable downside effects on the autonomy of legislatures and the judicialisation of their procedures.[57] Hence, "Courts that insist on 'due process of lawmaking' must do so in ways that respect the underlying realities of each nation's constitutional structure" — and particularly parliamentary prerogatives — "and acknowledge the limited competence of the judiciary."[58] Some conditions can be offered under which judicial review on parliamentary procedures is legitimately fulfilled:

i) Whenever possible, courts follow self-restraint by putting forward an interpretation in conformity with the Constitution[59] or as to allow a weak form of judicial review;[60] and

ii) Judicial review is intended as an instrument to preserve the fundamental conditions for the deployment according to the Constitution of the legislative process, seen as the basic democratic procedure from which

56 See Pete V Domenici e Alice M Rivlin, "Congressional Budget Process is Broken, Drastic Makeover Needed" (27 July 2015), *Opinions* (blog), online:<http://www.brookings.edu/research/opinions/2015/07/27-congressional-budget-overhaul-rivlin-domenici>.

57 Susan R Ackerman, Stefanie Egidy & James Fowkes, *Due Process of Lawmaking: The United States, South Africa, Germany, and the European Union* (Cambridge: Cambridge University Press, 2015) at 3.

58 *Ibid.*

59 See Bickel, *supra* note 9.

60 See Marc Tushnet, "Alternative Forms of Judicial Review" (2003) 101:8 Mich L Rev 2781, at 2785 and Stephen Gardbaum, "The Case for the New Commonwealth Model of Constitutionalism" (2013) 14 German LJ 2229.

> all the others stem, and where not only minorities are to be protected but also the right of the majority to decide has to be respected.[61]

The first condition would include courts, when declaring a parliamentary statute unconstitutional, postponing the effect of their judgment, as well as issuing a warning to parliament concerning a future lack of compliance with the Constitution. Self-restraint also requires that courts only become involved by means of individual direct complaints or of referrals by the Head of State, the Speaker, or the Ombudsman targeted to detect a violation of constitutional provisions dealing with parliamentary procedures, not on their own motion. The second condition largely calls on John Hart Ely's theory of procedural judicial review, whereby courts would eschew their own policy preferences in favour of protecting the fundamental principles of the legislative process entrenched in the Constitution, including majority rule where appropriate. In many countries, these conditions are already observed. In Italy, the Constitutional Court can only be called upon with great difficulty to decide issues dealing with legislatures' internal procedures, as this encroaches upon parliamentary sovereignty (*autodichia*).[62] In Spain, where in principle courts can make decisions on those cases, they often refrain from doing so by means of the interpretation in conformity with the Constitution.[63] Also in the case of France's *Conseil constitutionnel*, a hybrid between a judicial and a political body with the direct power to intervene even while the legislative process is taking place, constitutional judgments dealing with parliamentary procedures usually uphold the validity of the parliamentary outcome.[64]

Conclusion

Are legislatures better suited than courts to protect the value of constitutional democracies, as the normative accounts of political constitutionalism contend? This article argues that such a conclusion should be checked against the actual ability of legislatures to preserve their representative and decision-making functions under constitutional law, and in particular focuses on the downside effects of obstructionism. The failure of legislatures to address the challenge of

61 John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard: Harvard University Press, 1980) at 73ff.

62 See Judgment 154/1985, Corte Costituzionale della Repubblica Italiana, Rome, 06 May 1985, Gazzetta Ufficiale, 0 (Italy), and, for a gradual overcoming of *autodichia*, Judgment 120/2014, Corte Costituzionale della Repubblica Italiana, Rome, 05 May 2014, Gazzetta Ufficiale 21 (Italy).

63 See José M Morales Arroyo, *El conflict parlamentario ante el Tribunal Constitucional* (Madrid: Centro de Estudios Políticos y Constitucionales, 2008) at 109ff.

64 See the section above on unconstrained amending powers.

obstructionism properly, even when anti-obstructive rules are formally provided by standing orders, leads to questioning whether legislatures enjoy a superior authority in protecting democratic principles and procedures. If in legislatures the majority rule is systematically relinquished in favor of super-majorities or veto powers of minorities, then decision-making powers may well come to be exercised by other, more effective, institutions.

The way to cope with the challenge of obstructionism is neither leaving the task of finding solutions on a case by case basis to politics and political agreements, nor entitling courts to review legislatures' procedures on a first instance basis. Indeed, many courts refrain from deciding this kind of controversy.

What is needed instead is the adoption of a basic set of written constitutional norms defining the general framework for carrying out procedures in a legislature and designing the functions it has to perform. These norms form the starting point for the development of legislatures' standing orders that, while giving the opportunity to any political force to express its view in the debate, at the same time allows the majority to pass the measures needed to address problems of the polity.

Once these anti-obstructive rules are established in a legislature's standing orders, then they must be applied consistently as legally binding provisions. This implies that the "due process of lawmaking" in legislatures, in particular with respect to obstructionism, should be established first within legislatures and based on the observance of constitutional rules and standing orders.[65] Only as a last resort, in the event of a persistent or recurrent deadlock in the legislature that patently violates constitutional rules and cannot be overcome otherwise, should courts be allowed to intervene. Indeed, as claimed by John Hart Ely, judicial review can here be justified on procedural grounds. Beyond the substantive protection of the right of political minorities to be involved in parliamentary debates, the resorting to judicial review in *extrema ratio* can help to ensure respect for the successful completion of decision-making in a legislature.

65 With this regard the decision of the Speaker of the Italian Senate on 29 September 2015, based on Arts. 8, 55, and 97 of the standing orders, to consider as not duly received — and hence excluded for the debate and voting — the seventy-two million amendments (!) tabled on the Floor of the Senate on the Constitutional Reform Bill (A.S. 1429-B), unless they had not been already received by the Committee on Constitutional Affairs, seems to go in the right direction. The Constitutional Reform Bill, indeed, has been examined by the Senate in the third reading, after two previous approvals, by the Senate and the Chamber of Deputies, respectively. See Nicola Lupo, "Il Presidente del Senato e la riforma costituzionale: gli effetti della mancata revisione del diritto parlamentare", online: (2015) 18 *Federalismi.it* <http://www.federalismi.it/nv14/editoriale.cfm?eid=379>.