



Volume 48, Number 2

Summer 2011

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ARTICLE

THE SENATE FILIBUSTER: THE POLITICS OF OBSTRUCTION

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The notion that the Framers of the Constitution intended to allow a minority in the U.S. Senate to exercise veto power over legislation and presidential appointments is not only profoundly undemocratic, it is also a myth. The overwhelming trend in the literature on this topic has been to assume that because the Constitution grants to each house the power to make its own rules, the Senate filibuster rule is immune from constitutional scrutiny. This Article takes an opposing position, based upon the often overlooked history of the filibuster, the text of the Constitution, and relevant court precedents, which demonstrate that the constitutionality of the Senate filibuster rule is not, as many have assumed, a political question that is beyond the jurisdiction of the federal courts. This Article argues that the filibuster is unconstitutional, that the arguments to the contrary are weak, and that the courts have both the power and duty to strike down Senate rules, like the filibuster rule, that conflict with the Constitution.

I. INTRODUCTION

The democratic principle of majority rule does not apply in the United States Senate. Majority rule has been replaced by rule by the minority. Rule XXII of the Standing Rules of the U.S. Senate currently gives a minority of forty-one senators, who may be elected from states that contain as little as eleven percent of the nation's population,¹ the power to prevent the Senate from debating or voting on bills, resolutions, or presidential appointments by filibustering or acquiescing in a filibuster. It also magnifies the ability of an individual senator to obstruct the business of the Senate and, therefore, of Congress—an ability he or she would not have if the Senate operated under a strict version of the principle of majority rule.

A filibuster is an intentional abuse of the privilege of unlimited debate. It is not used to inform or persuade, but rather to obstruct the proceedings of the Senate by preventing the majority from taking action opposed by a mi-

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¹ See *Apportionment Data*, U.S. CENSUS 2010, <http://2010.census.gov/2010census/data/apportionment-data.php> (last visited Mar. 6, 2011) (displaying population data by state). Based on the 2010 census, the twenty-one least populous states (represented by a total of forty-two senators) account for 34,922,038, or 11.3%, of the total United States population of 308,745,538. *Id.*

nority of senators. Filibusters in the Senate are a profoundly undemocratic result of a mistake made in 1806 when the Senate accepted the advice of Aaron Burr and eliminated the “previous question” motion from its rules.²

Before that change, the previous question motion had been a “non-debatable motion that, if favored by the majority, close[d] debate and force[d] an immediate vote on a matter.”³ As such, filibusters as a parliamentary tactic were unknown at the time the Constitution was adopted, and the members of the English Parliament had no right to obstruct the proceedings by engaging in unlimited debate over the objections of the majority.⁴ The rules of the Second Continental Congress, and rules adopted by the first Senate in April 1789, immediately after the Constitution was ratified, allowed for a motion for the previous question as a procedural method of empowering the majority to end debate.⁵

By contrast, the current rules of the Senate do not permit debate on a bill to even *begin* without a unanimous consent agreement or the adoption of a motion to proceed.⁶ Under Rule VIII, a motion to proceed is a debatable motion and can therefore be filibustered.⁷ A filibuster of a motion to proceed can only be defeated by the adoption of a motion for cloture under Rule XXII, which requires the support of three-fifths of the Senate (currently sixty senators), rather than a vote of a simple majority (currently fifty-one senators).⁸ Once a motion to proceed has been adopted, allowing substantive debate on a matter to begin, the debate cannot be brought to an end over the objections of even a single senator without the adoption of another cloture

² See *infra* note 31.

³ Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 188 (1997); see also HENRY M. ROBERT, ROBERT'S RULES OF ORDER § 16, at 190–91 (Sarah C. Robert ed., 10th ed. 2000).

⁴ See *infra* note 21 and accompanying text.

⁵ See *infra* notes 22–24 and accompanying text. The first rules adopted in 1789 by the House of Representatives also allowed the majority to end debate by voting for the previous question. “The House of Representatives has always had the previous question motion. From 1789 to 1880, it was in the same form as that provided by the early rules of the Senate, namely: ‘Shall the main question now be put?’” 103 CONG. REC. 6677 (1957) (statement of Sen. Paul Douglas (D-Ill.)); see also CLERK OF THE HOUSE OF REP., 112TH CONG., RULES OF THE HOUSE OF REPRESENTATIVES R. XIX (2011) (describing history of the previous question motion), available at <http://clerk.house.gov/legislative/house-rules.pdf>.

⁶ S. COMM. ON RULES AND ADMIN., 111TH CONG., STANDING RULES OF THE SENATE RS. VIII, XXII (2009) [hereinafter SENATE RULES].

⁷ See *id.*, R. VIII.

⁸ *Id.* R. XXII. Rule XXII provides:

22.2 [a]t any time a motion signed by sixteen Senators, to bring to a close the debate upon any measure . . . is presented to the Senate, the Presiding Officer, or clerk at the direction of the Presiding Officer, shall at once state the motion to the Senate, . . . “Is it the sense of the Senate that the debate shall be brought to a close?” And if that question shall be decided in the affirmative by three-fifths of the Senators duly chosen and sworn – except on a measure or motion to amend the Senate rules, in which case the necessary affirmative vote shall be two-thirds of the Senators present and voting – then said measure . . . shall be the unfinished business to the exclusion of all other business until disposed of.

Id.

motion under Rule XXII, which requires an additional supermajority vote of at least sixty senators.⁹ Even after a cloture motion has been adopted, thirty more hours of debate are allowed before the calling of the vote.¹⁰ Thus, the effect of the Senate filibuster rule is to give a minority of forty-one senators an absolute veto power over the business of the Senate—and therefore of Congress and the entire legislative process.

This Article proceeds in four parts. Part II traces the history of the filibuster, documents the recent surge in filibusters, and explains why the rules of the Senate, including the filibuster rule, cannot be amended by a simple majority vote (unlike the rules of the House of Representatives). The Senate filibuster rule is responsible for much of the partisan gridlock in Congress, and has replaced majority rule with a tyranny of the minority.¹¹ The Senate is incapable of reforming this rule for largely the same reason that state legislatures and Congress refused to reform the apportionment of state legislative and congressional districts: self-interest of individual senators in preserving their leverage to obstruct the legislative process,¹² leverage that they would not have in a Senate governed by the principle of majority rule. If reform is to come, it is unlikely to come from within the Senate, and thus must come from the courts, as in the cases of apportionment of congressional and state legislative districts, the one-house veto, and the line-item veto.¹³

Part III examines the historical evidence, which reveals that there was no “right” to unlimited debate at the time the Constitution was adopted, and that the filibuster is nothing more than an unintended consequence of a decision by the Senate to delete the previous question motion from its rules in 1806. That decision was based on the naïve assumption that the rule was unnecessary because senators were gentlemen who would never obstruct the business of the Senate by abusing the privilege of debate.¹⁴ This Part examines the filibuster in light of the debates at the Constitutional Convention, the Federalist Papers, and the express language of Article I of the Constitution, all of which were premised on the democratic principle of majority rule. When the Framers of the Constitution intended to condition action on a vote of more than a simple majority of the House or Senate, they did so expressly, in six carefully defined exceptions. Significantly, the Framers rejected the proposals at the Federal Convention that would have prohibited a

⁹ *Id.*

¹⁰ *Id.*

¹¹ See *infra* Part II.C; see, e.g., Robert Goodman & Jimmy Soni, *How the Filibuster Wrecked the Roman Senate and Could Wreck Ours*, THE ATLANTIC, Mar. 24, 2011, <http://www.theatlantic.com/politics/archive/2011/03/how-the-filibuster-wrecked-the-roman-senate-and-could-wreck-ours/72776>.

¹² Cf. John O. McGinnis & Michael Rappaport, *The Judicial Filibuster, The Median Senator, and the Countermajoritarian Difficulty*, 2005 SUP. CT. REV. 257, 282 (2005) (explaining that Senators will preserve the filibuster for self-interested reasons, in the context of judicial nominations).

¹³ See *infra* notes 246–257.

¹⁴ See *infra* notes 31–35 and accompanying text.

simple majority from passing legislation prior to its presentation to the President.¹⁵ Although defenders of the filibuster argue that the Constitution gives each house the power to make its own rules, this power is not absolute. The Supreme Court ruled over a century ago that this rulemaking power does not include the power to adopt rules that violate other provisions of the Constitution, which the filibuster rule does.¹⁶ Finally, this Part also argues that Senate Rule V, which provides that the rules of the Senate continue from one Senate to the next and prohibits the Senate from amending its own rules without a two-thirds vote,¹⁷ is also unconstitutional.¹⁸

In Part IV, this Article responds to those who contend that the federal courts are barred by jurisdictional obstacles from ruling on the merits of the constitutionality of Senate rules. The Supreme Court ruled in 1892 that the question of whether a House rule violated other provisions of the Constitution was a justiciable matter for the federal courts.¹⁹ Part IV also addresses the issue of standing, on which previous challenges to the Senate filibuster rule have foundered. This Part demonstrates that there are many potential plaintiffs who are directly injured by the filibuster and thus have standing to challenge its constitutionality in federal court.

Finally, Part V responds to potential defenses of the filibuster, including the inaccurate contentions that a filibuster has always existed and that it is merely a rule of procedure.

II. THE HISTORY OF FILIBUSTERS

*The Senate . . . is the only legislative body in the world which cannot act when its majority is ready for action. A little group of willful men, representing no opinion but their own, have rendered the great government of the United States helpless and contemptible.*²⁰

*President Woodrow Wilson,
March 1917*

A. From the “Previous Question Motion” to the Filibuster

Obstructing the legislative process by extended debate—i.e., by “filibustering”—was unknown as a parliamentary tactic at the time of the adoption of the Constitution. Filibusters were prohibited in the English Parliament after 1604 as a result of the adoption of the “previous question

¹⁵ See *infra* notes 155–169 and accompanying text.

¹⁶ *United States v. Ballin*, 144 U.S. 1, 5 (1892).

¹⁷ See SENATE RULES, *supra* note 6, R. V.

¹⁸ See *infra* Part III.G.

¹⁹ See *Ballin*, 144 U.S. at 1.

²⁰ 65 CONG. REC. 20 (1917) (statement of Pres. Woodrow Wilson).

motion” as a rule of parliamentary procedure.²¹ The Second Continental Congress, modeling its rules on English parliamentary practice, adopted the previous question motion into its rules in May 1778 (well before the Constitutional Convention of 1787).²² This rule allowed the majority to end or postpone debate by majority vote.²³

Immediately after the Constitution was ratified, “the Rules Committee of the First Senate took specific steps to regulate debate.”²⁴ The first rules adopted by the Senate “provided for the accepted parliamentary practice of ‘moving for the previous question,’ which, if passed by a simple majority, would bring the main issues to a vote without further debate.”²⁵

Thomas Jefferson presided over the Senate during his four years as John Adams’s Vice President. Jefferson compiled what became known as *Jefferson’s Manual*, a manual of parliamentary procedure following the rules of the Senate.²⁶ In his *Manual*, Jefferson described the operation of a previous question motion under Rule IX as follows:

²¹ JOHN V. SULLIVAN, H.R. DOC. NO. 108-241, CONSTITUTION, JEFFERSON’S MANUAL, AND RULES OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES, ONE HUNDRED NINTH CONGRESS, at 240–42 (2005); accord Martin B. Gold & Dimple Gupta, *The Constitutional Option to Change Senate Rules and Procedures: A Majoritarian Means to Over Come the Filibuster*, 28 HARV. J.L. & PUB. POL’Y 205, 214 (2004); see also 151 CONG. REC. S5484 (daily ed. May 19, 2005) (statement of Sen. Robert Byrd (D-W. Va.)) (describing the history of the previous question as a rule of parliamentary procedure).

²² 11 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 534–35 (1908); see also 103 CONG. REC. 6677 (1957) (statement of Sen. Paul Douglas). The relevant rules were:

Rule 10. While a question is before the House, no motion shall be received, unless for an amendment for the previous question, to postpone the consideration of the main question, or to commit it. . . .

Rule 13. The previous question (that is, that the main question be not put) being moved, the question from the chair shall be, that those who are for the previous question say ay, and those against it, no; and if there be a majority of ayes, then the question shall not be put, but otherwise it shall.

JOURNALS OF THE CONTINENTAL CONGRESS, *supra*.

²³ JOSEPH COOPER, THE PREVIOUS QUESTION: ITS STANDING AS A PRECEDENT FOR CLOSURE IN THE UNITED STATES SENATE, S. DOC. NO. 87-104, at 4, 8–9, 9 n.31 (1962). “In the Continental Congress, where the previous question rule was put in negative form, a victory by the nays rather than the yeas constituted an affirmative determination of the previous question Before 1780 a victory for the negative seems always to have resulted in an immediate vote on the main question.” *Id.* at 9 n.31.

²⁴ Richard R. Beeman, *Unlimited Debate in the Senate: The First Phase*, 88 POL. SCI. Q. 419, 420 (1968).

²⁵ *Id.* Rules VIII and IX provided:

VIII. While a question is before the Senate, no motion shall be received unless for an amendment, for the previous question, or for postponing the main question, or to commit it, or to adjourn.

IX. The previous question being moved and seconded, the question from the chair shall be: “Shall the main question now be put?” And if the nays prevail, the main question shall not then be put.

1 ANNALS OF CONG. 20–21 (1789) (Joseph Gales ed., 1834).

²⁶ See SULLIVAN, *supra* note 21, at 123–330 (2005). “The Manual is regarded by English parliamentarians as the best statement of what the law of Parliament was at the time Jefferson wrote it.” *Id.* at 125 n.1.

When any question is before the House, any Member may move a previous question, "Whether that question (called the main question) shall now be put?" If it pass in the affirmative, then the main question is to be put immediately, and no man may speak anything further to it, either to add or alter. *Memor. in Hakew., 28; 4 Grey, 27.*

The previous question being moved and seconded, the question from the Chair shall be, "Shall the main question now be put?" and if the nays prevail, the main question shall not then be put.²⁷

In other words, if the Senate voted in favor of invoking the "previous question"—i.e., the substantive question then being debated—that issue would be put to an immediate vote, which could not be postponed or committed for further debate.

The actions of the First Congress are strong evidence of the intent of the Framers and understanding as to how the Constitution should be applied because, among other reasons, twenty of its members had been delegates to the Constitutional Convention.²⁸ Noted historian Irving Brant has emphasized that "[f]rom 1789 to 1806, debate on a bill could be ended instantly by a majority of senators present through the adoption of an undebatable motion calling for the previous question."²⁹ The Senate's previous question rule was invoked ten times during the seventeen-year period in which the rule remained in effect.³⁰ Although infrequently used, the rule did succeed in curtailing obstruction by unending debate.

The Senate's previous question rule was eliminated in 1806 at the suggestion of Aaron Burr.³¹ Vice President Burr observed in his farewell address to the Senate that its rules were excessively lengthy and complex and needed simplification.³² He thought that the previous question motion, in particular, was unnecessary and could be eliminated because it had been invoked only once during his four-year term as Jefferson's Vice President from 1801 to

²⁷ *Id.* at 240–41.

²⁸ *Bowsher v. Synar*, 478 U.S. 714, 723–24 (1986); *Marsh v. Chambers*, 463 U.S. 783, 790 (1983) (quoting *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888)) ("Acts 'passed by the first Congress assembled under the Constitution, many of whose members had taken part in framing that instrument . . . is contemporaneous and weighty evidence of its true meaning."); cf. *Cook v. Gralike*, 531 U.S. 510, 521 (2001) (giving weight to "the fact that the First Congress rejected a proposal to insert a right of the people to 'instruct their representatives' into what would become the First Amendment").

²⁹ Irving Brant, *Absurdities and Conflicts in Senate Rules are Outlined*, WASH. POST, Jan. 2, 1957, reprinted in 103 CONG. REC. 17 (1957).

³⁰ See 151 CONG. REC. S5485 (daily ed. May 19, 2005) (statement of Sen. Robert Byrd). But see 107 CONG. REC. 242–56 (1961) (statement of Sen. Paul Douglas) (reporting, based on Irving Brant's research, that the previous question motion had been invoked only four times between 1789 and 1806); 103 CONG. REC. 6669–88 (1957) (statement of Sen. Paul Douglas) (same).

³¹ 1 MEMOIRS OF JOHN QUINCY ADAMS 365 (Charles F. Adams ed., 1874).

³² *Id.*

1805.³³ When the rules of the Senate were revised in 1806, Rules VIII and IX of the 1789 Senate Rules were eliminated and replaced by a new rule that omitted any reference to the previous question motion.³⁴

The elimination of the previous question motion was “not motivated by a desire to remove obstacles to free debate, but rather by the belief that the rule’s infrequent use made it unnecessary.”³⁵ The Senate did not foresee that it might need the previous question motion to prevent a minority from abusing the privilege of debate and obstructing the business of the Senate altogether.

Far from being a matter of high principle, the filibuster appears to be nothing more than an unforeseen and unintended consequence of the elimination of the previous question motion from the rules of the Senate. More than thirty years elapsed before a member of the Senate took advantage of the absence of the previous question motion to launch the first filibuster, in either 1837 or 1841, at least fifty years after the adoption of the Constitution.³⁶ As political scientist Norman Ornstein of the American Enterprise Institute recently testified at a hearing before the Senate Rules Committee, “unlimited debate in the Senate was . . . a historical accident, not an objective of the Framers.”³⁷

Filibusters were relatively rare during the nineteenth and early twentieth centuries. There were a total of only sixteen filibusters in the sixty years between 1840 and 1900—an average of one every four years—and an additional seventeen filibusters between 1900 and 1917, when the predecessor of the current Senate cloture rule, used to end a filibuster, was adopted.³⁸

The cloture rule was adopted in 1917, after the Senate successfully filibustered the Wilson administration’s bill to arm American merchant ships

³³ See *id.*; accord Gold & Gupta, *supra* note 21, at 215.

³⁴ Gold & Gupta, *supra* note 21, at 215–16, 216 n.34. For the text of the current rule, see SENATE RULES, *supra* note 6, R. XXII.

³⁵ Beeman, *supra* note 24, at 421; accord SARAH A. BINDER & STEPHEN S. SMITH, POLITICS OR PRINCIPLE? FILIBUSTERING IN THE UNITED STATES SENATE 33–34 (1997) (“In making the rule change in 1806 that made possible the filibuster . . . members of the original Senate expressed no commitment to a right of extended debate.”); see also 151 CONG. REC. S5485 (daily ed. May 19, 2005) (statement of Sen. Robert Byrd); Gold & Gupta, *supra* note 21, at 215–16.

³⁶ DEMOCRATIC STUDY GRP., DSG SPECIAL REPORT NO. 103-28, A LOOK AT THE SENATE FILIBUSTER 5 (1994) (“[T]he first time . . . an attempt was made to block a bill in the Senate through the use of unlimited debate (*i.e.*, a filibuster) did not occur for another 35 years, until 1841.”). Gold & Gupta, *supra* note 21, at 216, suggest that the first filibuster may have occurred as early as 1837.

³⁷ *Examining the Filibuster: The Filibuster Today and Its Consequences: Hearing Before the S. Rules Comm.*, 111th Cong. 168–74 (2010) [hereinafter *2010 Filibuster Hearings*] (statement of Norman J. Ornstein, American Enterprise Institute), available at <http://www.aei.org/docLib/20100519-Ornstein-Testimony.pdf>.

³⁸ DEMOCRATIC STUDY GRP., *supra* note 36, app. B; see also CONG. RESEARCH SERV., S. PR. 99-95, LIMITATION ON DEBATE IN THE CONGRESS OF THE UNITED STATES AND LEGISLATIVE HISTORY OF PARAGRAPH 2 OF RULE XXII OF THE STANDING RULES OF THE UNITED STATES SENATE (CLOTURE RULE) 37 (1985) (listing “Outstanding Senate Filibusters From 1841 to 1984”).

following the sinking of the ocean liner *RMS Lusitania* by a German U-boat.³⁹ President Woodrow Wilson refused to call “a special session of Congress to deal with the war emergency” until the rules of the Senate were amended to provide a method for ending filibusters.⁴⁰ Public pressure forced the Senate to capitulate and adopt the predecessor of the current cloture rule in March 1917,⁴¹ a month before the United States declared war against Germany.

The purpose of the 1917 cloture rule was not to codify a minority right to obstruct the business of the Senate, but rather to fill the gap in the Senate rules by giving the Senate, for the first time since 1806, a method of limiting debate.⁴² Instead of reinstating the previous question motion, the Senate adopted Rule XXII, which allowed two-thirds of the senators present and voting—which at the time could have been as few as thirty-three senators⁴³—to end debate on a measure through a motion for cloture.⁴⁴ Rule XXII’s effect on ending filibusters was “more symbolic than real,” and in practice did very little. From 1917 to 1927, “cloture was voted on only ten times and it was adopted only four times.”⁴⁵ Similarly, from 1931 to 1964, “cloture was seldom sought and only twice obtained.”⁴⁶

The Senate filibuster rule has since been amended only when its continued existence has been threatened.⁴⁷ In 1949, liberals in the Senate attempted to amend the filibuster rule in order to prevent Southern senators from filibustering President Truman’s civil rights bill.⁴⁸ After the civil rights bill failed, Senator Richard Russell pushed through an amendment that expanded the cloture rule to include motions and other matters pending before the

³⁹ DEMOCRATIC STUDY GRP., *supra* note 36, at 6; Gold & Gupta, *supra* note 21, at 217–19.

⁴⁰ 151 CONG. REC. S5485 (daily ed. May 19, 2005) (statement of Sen. Robert Byrd); *see also* 2 ROBERT C. BYRD, *THE SENATE 1789–1989: ADDRESSES ON THE HISTORY OF THE UNITED STATES SENATE* 122–23 (Wendy Wolf ed., 1991); Joyce Appleby, *The Founders Cared About the Majority Principle*, HISTORY NEWS NETWORK (Jan. 17, 2011), <http://hnn.us/articles/135436.html>.

⁴¹ BYRD, *supra* note 40, at 122.

⁴² Brant, *supra* note 29, at 17 (“In 1917, to check filibusters, a ‘cloture’ rule was adopted.”); *see also* 3 ROBERT A. CARO, *THE YEARS OF LYNDON JOHNSON: MASTER OF THE SENATE* 93 (2002) (“The rule was drafted by a bipartisan committee ‘whose stated purpose was to terminate filibustering . . . but the Committee made a mistake . . . leaving a loophole.’”); *id.* at 216–17 (citing a ruling rendered by Arthur Vandenberg as president pro tempore of the Senate in 1948 that the “loop holes in Rule 22” meant “that while cloture could be applied to debate on a bill that was already on the floor, it could not be applied to debate on a motion to bring a bill to the floor (a ruling which . . . made the threat of cloture almost totally ineffective)”).

⁴³ I.e., two-thirds of a quorum, which could be as few as forty-nine out of a total of ninety-six senators.

⁴⁴ CONG. RESEARCH SERV., *supra* note 38, at 105–12; *see* 151 CONG. REC. S5485 (daily ed. May 19, 2005) (statement of Sen. Robert Byrd).

⁴⁵ Fisk & Chemerinsky, *supra* note 3, at 198.

⁴⁶ *Id.* at 198–99.

⁴⁷ CONG. RESEARCH SERV., *supra* note 38, at 104 (Legislative History of Paragraph 2 of Rule XXII); *see* 151 CONG. REC. S5485 (daily ed. May 19, 2005) (statement of Sen. Robert Byrd); Fisk & Chemerinsky, *supra* note 3, at 209–10.

⁴⁸ Fisk & Chemerinsky, *supra* note 3, at 210.

Senate, but made it even harder to invoke cloture by requiring the vote of two-thirds of the entire Senate (not just those present) to end a filibuster.⁴⁹ Importantly, under the amendment, cloture could not be invoked to end debate on a motion to amend the Senate rules.⁵⁰

The rules of the Senate, as amended in 1949, were silent on the question of whether they continued from one Congress to the next or expired at the end of each Congress, as was—and still is—the case for the rules of the House.⁵¹ The mechanism for altering Senate rules, including the filibuster rule, also remained unclear. In 1957, Vice President Nixon rendered an advisory opinion determining that the Senate filibuster rule could be amended by a majority vote.⁵² He said that:

[W]hile the rules of the Senate have been continued from one Congress to another, the right of a current majority of the Senate at the beginning of a new Congress to adopt it [sic] own rules, stemming as it does from the Constitution itself, cannot be restricted or limited by rules adopted by a majority of the Senate in a previous Congress.

Any provision of Senate rules adopted in a previous Congress which has the expressed or practical effect of denying Congress the right to adopt the rules under which it desires to proceed is, in the opinion of the Chair, unconstitutional. . . . [R]ule 22 in practice has such an effect.⁵³

Vice President Hubert Humphrey issued a similar ruling in 1969, but his ruling was overturned by the Senate on a point of order.⁵⁴

In 1957, Lyndon B. Johnson, then-Senate majority leader, preempted an attempt led by Senator Clinton Anderson (D-N.M.) to amend the rules of the Senate by a simple majority vote.⁵⁵ In 1959, Senator Johnson negotiated a compromise: the Senate amended Rule XXII to reduce the number of votes required for cloture from two-thirds of the Senate to two-thirds of a quorum and expanded the rule to allow cloture for motions to amend the rules of the Senate. In return, the amendment declared—for the first time—that the rules of the Senate were “continuing” and could be amended only as provided in the rules themselves.⁵⁶ These amendments made the rules of the Senate expressly binding on future Congresses. Further, the amendment, by requiring

⁴⁹ CARO, *supra* note 42, at 217–18.

⁵⁰ CONG. RESEARCH SERV., *supra* note 38, at 111.

⁵¹ U.S. CONST. art. I, § 5, cl. 2; SULLIVAN, *supra* note 21, at 25 (2007) (noting that the House is not bound by rules of a previous House of Representatives, though it may incorporate prior House rules by reference when adopting rules for each session).

⁵² 103 CONG. REC. 178 (1957).

⁵³ *Id.*; see also CARO, *supra* note 42, at 854–58.

⁵⁴ Fisk & Chemerinsky, *supra* note 3, at 212.

⁵⁵ CARO, *supra* note 42, at 854–58.

⁵⁶ Gold & Gupta, *supra* note 21, at 231. For the rule in its current form, see SENATE RULES, *supra* note 6, R. V.

two-thirds of a quorum to vote to end any filibuster (i.e., to obtain cloture) of a motion to amend the Senate rules, effectively prevented future rules amendments from being passed by a simple majority.⁵⁷

In 1975, an attempt by Senator Walter Mondale (D-Minn.) to amend the rules by majority vote rather than a two-thirds vote triggered another compromise.⁵⁸ This time, the Senate amended Rule XXII to fix the minimum number of votes required to adopt a motion for cloture at three-fifths of the Senate rather than two-thirds of a quorum.⁵⁹ As a *quid pro quo*, the Senate voted to reverse the tabling of a point of order that would have established as a “precedent” that the rules could be amended by a vote of a simple majority.⁶⁰ However, motions to amend the rules of the Senate were also excluded from the sixty-vote rule and continue to require a two-thirds vote of senators present and voting,⁶¹ making it virtually impossible to amend Senate rules by majority vote.

B. *Filibustering Proposed Amendments to the Filibuster*

It is impossible, as a practical matter, for a simple majority in the Senate to amend Rule XXII because of the “triple whammy” created by the combination of (1) Rule V, which declares the rules of the Senate to be continuing and amendable only “as provided in these rules” (meaning that cloture of a motion to amend the rules requires a two-thirds vote per Rule XXII); (2) Rule VIII, which provides that debate on a motion to amend the rules cannot *begin* without the unanimous consent or adoption of a motion to proceed, which is subject to being filibustered and cannot be ended without a two-thirds vote on a motion for cloture; and (3) Rule XXII, which requires that substantive debate on a motion to amend the rules cannot be ended without another two-thirds cloture vote.⁶²

There have been many attempts to reform the rules of the Senate to allow a majority to end filibusters. The first was made by Henry Clay in 1841, when he proposed that the previous question rule be restored.⁶³ Clay’s motion was defeated by the threat of a filibuster.⁶⁴ Dozens of subsequent attempts over the next 170 years have been equally unsuccessful.⁶⁵

⁵⁷ SENATE RULES, *supra* note 6, R. V.

⁵⁸ Fisk & Chemerinsky, *supra* note 3, at 212–13.

⁵⁹ *Id.* at 213.

⁶⁰ *See id.*

⁶¹ CONG. RESEARCH SERV., *supra* note 38, at 119–21; 2010 *Filibuster Hearings*, *supra* note 37 (statement of Walter F. Mondale, Dorsey & Whitney LLP).

⁶² U.S. CONST. art. V.

⁶³ Fisk & Chemerinsky, *supra* note 3, at 191.

⁶⁴ *Id.*; *see also* CONG. RESEARCH SERV., *supra* note 38, at 12.

⁶⁵ *See* CONG. RESEARCH SERV., *supra* note 38, at 11–35; FLOYD M. RIDDICK, SENATE PARLIAMENTARIAN ORAL HISTORY INTERVIEWS 122–220 (1978), available at http://www.senate.gov/artandhistory/history/resources/pdf/Riddick_interview_4.pdf; *see also* John Cornyn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, 27 HARV. J.L.

In 1995, Senator Tom Harkin (D-Iowa) proposed an amendment to Rule XXII that would have allowed fifty-one senators to invoke cloture after earlier cloture motions had failed. The motion was tabled,⁶⁶ but Senator Harkin introduced a similar proposal in February of 2010.⁶⁷ Even though Democrats were then in the majority, Senator Harkin's second attempt to amend Rule XXII was dismissed out of hand on the following day by Democratic Majority Leader Harry Reid (D-Nev.), who said: "I'm totally familiar with his [Senator Harkin's] idea . . . It takes 67 votes, and that kind of answers the question."⁶⁸

A determined effort to amend the rules of the Senate by Senator Harkin, Senator Tom Udall (D-N.M.), and Senator Jeffrey Merkley (D-Or.) was defeated when Senator Lamar Alexander (R-Tenn.) objected to requests for unanimous consent to allow the Senate to consider their motions; they were unable to obtain the necessary two-thirds vote required for cloture of motions to proceed with that debate.⁶⁹ As a practical matter, the Senate rules have effectively entrenched the filibuster.

C. *The Flood in the Number of Filibusters*

What began in 1837 as a trickle of filibusters has now become a flood that has engulfed the Senate, and made it impossible for the Senate to pass any bill or resolution or to confirm any presidential appointee over the objections of even a single senator, absent the sixty votes necessary to invoke cloture.

There were only sixty filibusters (an average of 2 per year) in the first thirty years after the adoption of the cloture rule in 1917, and a total of only twenty filibusters (an average of 1.4 per year) during the next twenty years from 1950 to 1969.⁷⁰ In the last twenty years, however, the filibuster has become the weapon of choice for the minority party in the Senate. Both Democrats and Republicans have used filibusters, and the threat of filibusters to prevent the majority party from passing legislation or confirming presidential nominees.

The number of cloture votes in the Senate has doubled in the last decade, and has risen to triple the number of cloture votes called for twenty

& PUB. POL'Y 181, 212 (2003) ("The Senate has previously considered at least thirty proposals to eliminate filibusters altogether.").

⁶⁶ 141 CONG. REC. 430 (1995).

⁶⁷ S. RES. 416, 111th Cong. (2011).

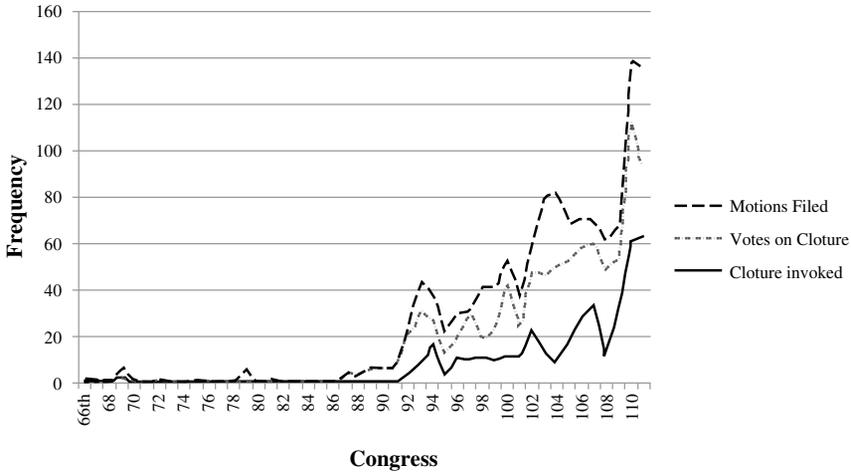
⁶⁸ Paul Kane, *Reid Nixes Filibuster Reform Effort*, WASH. POST (Feb. 12, 2010), <http://voices.washingtonpost.com/44/2010/02/reid-nixes-filibuster-reform-e.html>.

⁶⁹ See 157 CONG. REC. S19-67 (daily ed. Jan. 5, 2011); 157 CONG. REC. S85-99, S244-46 (daily ed. Jan. 25, 2011); 157 CONG. REC. S265 (daily ed. Jan. 26, 2011); 157 CONG. REC. S296-329 (daily ed. Jan. 27, 2011).

⁷⁰ *Senate Action on Cloture Motions*, U.S. SENATE, http://www.senate.gov/pagelayout/reference/cloture_motions/clotureCounts.htm (last visited Mar. 13, 2011).

years ago.⁷¹ Even more recently, the number of formal cloture motions has doubled since 2006.⁷² In 2009, the first half of the 111th Congress, there were a record sixty-seven filibusters—double the number that occurred in the entire twenty-year period between 1950 and 1969. The 111th Congress also eclipsed the 139 motions filed in the 110th Congress.⁷³

The drastic increase in the number of cloture motions is illustrated by the following chart:

CHART 1⁷⁴

Even the threat of a filibuster “is enough to keep a bill off the floor,” leading to the so-called “stealth filibuster.”⁷⁵ Fisk and Chemerinsky found that by 1997, “the stealth filibuster’s impact on the legislative process [had become] enormous [F]ilibustering has in effect created a

⁷¹ Faiz Shakir et al., *Democracy Subverted—The Progress Report*, THE CENTER FOR AM. PROGRESS (Jan. 25, 2010), <http://pr.thinkprogress.org/2010/01/pr20100125>.

⁷² The number of cloture motions drastically understates the actual impact of Rule XXII on the legislative process, due to the “stealth filibuster.” For further discussion, see *infra* notes 75–77.

⁷³ See *2010 Filibuster Hearings*, *supra* note 35 (statement of Sen. Charles E. Schumer, Chairman, S. Rules Comm.).

⁷⁴ Data are from *Senate Action on Cloture Motions*, U.S. SENATE, http://www.senate.gov/pagelayout/reference/cloture_motions/clotureCounts.htm (last visited Mar. 13, 2011).

⁷⁵ Fisk & Chemerinsky, *supra* note 3, at 203.

A credible threat that forty-one senators will refuse to vote for cloture . . . is enough to keep a bill off the floor. The Senate leadership simply delays consideration of a bill until it has the sixty votes necessary for cloture [T]he stealth filibuster eliminates the distinction between a filibuster and a threat to filibuster; any credible threat to filibuster is a filibuster . . . and is largely silent [and] invisible.

Id.

supermajority requirement for the enactment of most legislation.”⁷⁶ They concluded that “[t]he widespread use of filibusters or threats of filibusters has effectively increased the number of votes it takes to enact legislation from fifty-one (or fifty plus the Vice President’s vote) to sixty.”⁷⁷ This is even truer today, as the number of filibusters has skyrocketed⁷⁸ and the Senate has become more partisan and polarized.⁷⁹

The filibuster also contributes to the widespread public anger at the gridlock in Congress and the belief among the general public that the government no longer works for average Americans.⁸⁰ This loss of public confidence in government—and particularly in Congress—has sharpened the need for federal courts to examine the constitutionality of the supermajority requirement in Rule XXII.

III. THE UNCONSTITUTIONALITY OF THE FILIBUSTER

The principle of majority rule was both an essential feature of a republican form of government and a settled norm of parliamentary practice at the time of the Constitution’s adoption. This foundational principle is reflected in many of the document’s provisions. For example, the Quorum Clause in the Constitution requires only the presence of a simple majority of senators before the Senate can “do Business.”⁸¹ Under the Presentment Clauses, only a majority of a quorum of the House or Senate is required to “pass” a bill⁸² or resolution⁸³ prior to its presentment to the President.

Exceptions to the general principle of majority rule are expressly stated in the text of the Constitution. The exceptions were designed to address a limited number of unusual situations deemed by the Framers to be of such gravity and importance that they should not be left to the vote of a simple majority, such as impeachment of a President, or expulsion of a member of Congress.⁸⁴

The Framers had also experienced firsthand the paralysis that resulted from the supermajority voting provisions of the Articles of Confederation, which made it impossible for Congress to act without the votes of nine of the thirteen states.⁸⁵ The Framers deliberately rejected supermajority voting re-

⁷⁶ *Id.* at 213.

⁷⁷ *Id.* at 215.

⁷⁸ See *2010 Filibuster Hearings*, *supra* note 37 (“The sharp increase in cloture motions reflects the routinized use of the filibuster . . . as a weapon to delay and obstruct in nearly all matters . . . as the minority has moved to erect a filibuster bar.”).

⁷⁹ See Goodman & Soni, *supra* note 11.

⁸⁰ See David Frum, *Blame Yesterday’s Reforms for Today’s Gridlocked Congress*, CNN.COM, Mar. 1, 2010, http://articles.cnn.com/2010-03-01/opinion/frum.smoke.filled.congress_1_filibustering-congress-welfare-reform?_s=PM:OPINION.

⁸¹ U.S. CONST. art. I, § 5.

⁸² U.S. CONST. art. I, § 7, cl. 2.

⁸³ U.S. CONST. art. I, § 7, cl. 3.

⁸⁴ See U.S. CONST. art. I, § 3, cl. 6 (impeachment).

⁸⁵ See ARTICLES OF CONFEDERATION of 1781, art. IX, cl. 6.

quirements in the new Constitution because such an arrangement would transfer power to the minority, and thus “the fundamental principle of free government would be reversed.”⁸⁶ A supermajority voting requirement in the new Constitution would have meant, as Alexander Hamilton explained in Federalist Number 22, that “the majority, in order that something may be done, must conform to the views of the minority; and thus . . . the smaller number will overrule that of the greater.”⁸⁷ As Hamilton correctly predicted, “[in] its real operation,” a supermajority requirement would be used by the minority to “embarrass the administration, . . . destroy the energy of government,” and subject the decisions of the majority in Congress to “the . . . caprice or artifices of an insignificant, turbulent, or corrupt junta.”⁸⁸

As this Part will discuss in further detail, the sixty-vote supermajority requirement in Senate Rule XXII is unconstitutional because it conflicts with the Constitution in seven ways.

First, Rule XXII’s supermajority vote requirement exceeds the authority granted by the Constitution to “Each House [to] . . . Determine the Rules of its Proceedings.”⁸⁹ The purpose of that provision was to authorize each house to adopt procedural rules by majority vote,⁹⁰ not to adopt rules that prohibit a *future* majority of the Senate from amending its own rules without a two-thirds vote; allow the minority in the Senate to dictate the ultimate outcome of bills, resolutions, and presidential appointments that they oppose;⁹¹ or conflict with other provisions of the Constitution.⁹²

Second, Rule XXII’s supermajority voting requirement fundamentally alters the “finely wrought” balance between the interests of the majority of citizens in the more populous states and the minority living in the less populous states—a balance that was “exhaustively considered” by the Framers

⁸⁶ THE FEDERALIST NO. 58, at 397 (James Madison) (Jacob E. Cooke ed., 1961); *see also* THE FEDERALIST NO. 22, at 140–41 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); THE FEDERALIST NO. 75, at 507–08 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

⁸⁷ THE FEDERALIST NO. 22, at 141 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

⁸⁸ *Id.* at 140.

⁸⁹ U.S. CONST. art. I, § 5, cl. 2.

⁹⁰ *See* John C. Roberts, *Majority Voting in Congress: Further Notes on the Constitutionality of the Senate Cloture Rule*, 20 J.L. & POL. 505, 533, 535–37 (2004) (explaining why the Rulemaking Clause gives both houses continuous rulemaking power, and does not authorize the binding of future houses through a rule that requires a supermajority vote for any change in the rules); *see also* Cornyn, *supra* note 65, at 204.

Just as one Congress cannot enact a law that a subsequent Congress could not amend by majority vote, the Senate cannot enact a rule that a subsequent Senate could not amend by majority vote . . . Such power would arguably offend the U.S. Constitution because it would be tantamount to amending the Constitution by a majority vote of [one house of] Congress.

Cornyn, *supra* note 65, at 204.

⁹¹ *Cf.* U.S. Term Limits v. Thornton, 514 U.S. 779, 833–34 (1995); Cook v. Gralike, 531 U.S. 510, 523 (2001) (holding that the power delegated to states by Article I, Section 4, Clause 1 to prescribe the manner of elections of members of Congress was limited to the establishment of procedural regulations and not to dictating the outcomes of elections).

⁹² United States v. Ballin, 144 U.S. 1, 5 (1892).

and which resulted in the Great Compromise.⁹³ The rule also violates the provisions in Article I and Article V that guarantee each state equal representation in the Senate⁹⁴ by preventing a majority of states from passing bills or resolutions or approving presidential nominations. Instead of allowing a simple majority of fifty-one senators representing a majority of states to pass a bill, the rule effectively requires at least sixty votes of senators from a minimum of thirty states to pass a bill or approve a presidential nomination.

Third, the practical impact of the rule conflicts with the Quorum Clause⁹⁵ by preventing the Senate from “do[ing] Business” without the presence of at least sixty senators to vote in favor of motions for cloture.

Fourth, the rule conflicts with the Presentment Clause in Article I, Section 7 by effectively requiring a minimum of sixty affirmative votes in the Senate—rather than a simple majority of a quorum—to “pass” a bill⁹⁶ or resolution⁹⁷ prior to its presentment to the President.

Fifth, the rule seeks to add to the list of six exceptions to the general principle of majority rule in the original Constitution, and the two exceptions that have been added by amendment. But, the exceptions in the Constitution are exclusive and specify the only circumstances under which the vote of a simple majority is not sufficient.⁹⁸

Sixth, the rule conflicts with the basic assumption reflected in Clause 4 of Article I, Section 3, that decisions in the Senate would be made by majority rule. The Framers assumed that tie votes would be inevitable in a Senate composed of an even number of senators. The Framers could have done nothing—which would have meant that a bill that failed to receive a majority vote because of a tie would simply die. Instead, the Framers gave the Vice President the ability to create a majority in favor of a bill by voting to break a tie, an exception to the general rule prohibiting the Vice President from voting in the Senate.⁹⁹ Thus, Rule XXII is inconsistent with the Framers’ assumption that issues in the Senate would be decided by majority vote,

⁹³ Cf. *INS v. Chadha*, 462 U.S. 919, 951 (1983) (striking down as unconstitutional a one-house legislative veto, partially on the grounds that it was inconsistent with the Constitution’s “finely wrought” and “exhaustively considered” legislative process).

⁹⁴ U.S. CONST. art. I, § 3, cl. 1 (providing for two Senators from each state); U.S. CONST. art. V (providing that “no State, without its Consent, shall be deprived of its equal Suffrage in the Senate”).

⁹⁵ U.S. CONST. art. I, § 5.

⁹⁶ U.S. CONST. art. I, § 7, cl. 2.

⁹⁷ U.S. CONST. art. I, § 7, cl. 3.

⁹⁸ The common law rule of construction, *expressio unius est exclusio alterius*, was discussed by John Dickinson of Delaware during the Federal Convention, 2 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 123 (Max Farrand rev. ed., 1937), and was quoted in *Powell v. McCormack*, 395 U.S. 486, 532–33 (1969). See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803); see also U.S. CONST. amend. IX (“The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”).

⁹⁹ U.S. CONST. art. II, § 1.

and deprives the Vice President of one of only two powers assigned to that office by the Constitution.¹⁰⁰

Seventh, the provisions of Senate Rule V declaring that the rules of the Senate do not expire at the end of each Congress, but continue from one Congress to the next and can be amended only as provided in the rules, are also unconstitutional. When combined with the provision in Rule XXII requiring a two-thirds vote to amend the rules of the Senate, Rule V deprives the majority of the current Senate of the power granted to each house by Article I, Section 5 to make its own rules by majority vote. The deprivation of this authority violates the fundamental constitutional principle that one Congress cannot bind its successors and make it impossible for them to amend or repeal statutes and rules by majority vote.

A. *Rule XXII Exceeds the Rulemaking Authority of the Senate*

Although each chamber of Congress has constitutional authority to “determine the Rules of its Proceedings,”¹⁰¹ this rulemaking authority is not unlimited and cannot be used to violate other provisions of the Constitution.¹⁰²

No one would argue, for example, that a majority of senators could adopt a rule stating that no treaty could be ratified without a three-fourths vote of the Senate, instead of the two-thirds vote specified in the Constitution.¹⁰³ Similarly, no one would argue that Congress could adopt a rule reducing the number of votes in the Senate required for an impeachment conviction from the two-thirds vote specified in the Constitution¹⁰⁴ to a vote of a simple majority. And if the Senate cannot by rule directly repeal or supersede the majority vote provision in Article I, Section 7, surely the Senate cannot adopt a rule that has the same practical effect of requiring sixty votes to debate or pass a bill or to confirm a presidential nominee.

If the rules of the Senate were totally immune from judicial review, the amendment procedures in the Constitution would become a dead letter. The notion that rules of Congress are immune from judicial review was rejected over one hundred years ago by the Supreme Court when it held in *United States v. Ballin* that although “[t]he Constitution empowers each house to determine its rules of proceedings . . . [,] [i]t may not by its rules ignore constitutional restraints or violate fundamental rights.”¹⁰⁵ The D.C. Circuit

¹⁰⁰ See U.S. CONST. art. I, § 3, cl. 4 (“The Vice President of the United States shall be President of the Senate, but shall have no vote, unless they be equally divided.”)

¹⁰¹ U.S. CONST. art. I, § 5, cl. 2.

¹⁰² *United States v. Ballin*, 144 U.S. 1, 5 (1892) (“The Constitution empowers each house to determine its rules of proceedings . . . [but i]t may not by its rules ignore constitutional restraints . . .”).

¹⁰³ U.S. CONST. art. II, § 2, cl. 2.

¹⁰⁴ U.S. CONST. art. I, § 3, cl. 5.

¹⁰⁵ *Id.* at 5. The Court has repeatedly applied this principle to invalidate a wide range of legislative actions that were based on other provisions of the Constitution that are at least as

has also said “that if Congress should adopt internal procedures which ‘ignore constitutional restraints or violate fundamental rights,’ it is clear we must provide remedial action.”¹⁰⁶

Moreover, there is no reason to believe that the power delegated to each house by Article I, Section 5 to make the “rules of its proceedings” is any broader than the power delegated to the states in the preceding section of the Constitution to prescribe “the times, places and manner of holding elections”¹⁰⁷ of members of Congress. This latter power has been held to be only “a grant of authority to issue *procedural regulations*, and not as a source of power to dictate electoral outcomes.”¹⁰⁸

Rule XXII is far more than a procedural regulation. It vests in a minority of senators the power to dictate the outcomes in the Senate by preventing a simple majority from debating or voting on legislation or presidential nominees. Rule XXII, therefore, exceeds the rulemaking authority granted to the Senate in Article I, Section 5, for the same reasons that the state statute in *U.S. Term Limits* and the state constitutional provision in *Cook* were held invalid.

B. Rule XXII Upsets the Balance of the Great Compromise

The supermajority vote requirement fundamentally alters the “finely wrought”¹⁰⁹ procedure that was the outcome of the Great Compromise. To reconcile the differences between the interests of large states that contained a majority of the population and smaller states that contained a minority, the Framers were forced to compromise on the democratic principle of majority rule. They gave all states, regardless of size, equal representation in the Senate in the form of two senators chosen by their respective state legislatures.¹¹⁰ Emblematic of the effect of equal representation in the Senate divorced from population, a majority of the first Senate was elected by the

broad as the delegation of rulemaking power in Article I, Section 5. See *Clinton v. City of New York*, 524 U.S. 417 (1998) (holding that Congress could not use its legislative power to delegate a line-item veto power to the President); *INS v. Chadha*, 462 U.S. 919 (1983) (holding that Congress could not use its power in Article I, Section 8, Clause 4 to establish uniform laws of naturalization to justify a one-house veto over an INS decision because doing so violated the Presentment Clause in Article I, Section 7); *Powell v. McCormack*, 395 U.S. 486 (1969) (holding that the House could not use the power granted by Article I, Section 5, Clause 1 to judge the qualifications of its members to add an additional qualification to the exclusive list of qualifications in Article I, Section 2, Clause 2); see also *Cook v. Gralike*, 531 U.S. 510 (2001); *U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995).

¹⁰⁶ *Vander Jagt v. O’Neill*, 699 F.2d 1166, 1170 (D.C. Cir. 1983) (quoting *Ballin*, 144 U.S. at 6); see also *Michel v. Anderson*, 14 F.3d 623, 627 (D.C. Cir. 1994) (“There are limitations to the House’s rulemaking power, and Art. I, § 2 is such a limit.”).

¹⁰⁷ U.S. CONST. art. I, § 4.

¹⁰⁸ *U.S. Term Limits*, 514 U.S. at 833–34 (emphasis added); *Cook*, 531 U.S. at 523.

¹⁰⁹ *INS v. Chadha*, 462 U.S. 919, 951 (1983).

¹¹⁰ U.S. CONST. art. I, § 3, cl. 1; see also JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION ch. IV (1996).

legislatures of seven states that contained only twenty-seven percent of the population, based on the first census taken in 1790.¹¹¹

The supermajority vote requirement in Rule XXII upsets the Great Compromise's carefully crafted balance between the large states and the small states in two ways:

First, the rule violates the equal distribution of political power in the Senate among the states in Article I, Section 3. Through the Great Compromise, the Framers intended to vest Senate decisionmaking power in a majority of states, whose legislatures elected a majority of senators. Article V guaranteed that no state could be deprived of equal representation in the Senate without its consent, even by an amendment to the Constitution.¹¹² Taken together, these provisions intended to give a majority of states the power to pass bills or resolutions or approve presidential nominees by a majority vote of their collective senators. Rule XXII is inconsistent with the constitutional scheme because it increases from twenty-six to at least thirty the number of states whose senators must vote to pass bills or resolutions or approve presidential appointments. Conversely, Rule XXII shifts political power in the Senate in favor of a minority of states by reducing from twenty-five to twenty-one the number of states whose senators can block a bill, resolution or presidential appointment.

Second, the rule exacerbates even further the inequalities of representation in the Senate between people living in large and small states. At the time of the Great Compromise, the legislatures of seven states containing 27% of the population elected 54% of the seats in the first Senate (fourteen of the twenty-six seats). By 2000, 18% of the U.S. population living in twenty-six states elected 52% of the Senate.¹¹³ Rule XXII exacerbates unequal representation in the Senate by giving 11% of the population—living in just twenty-one states—the power to elect forty-two senators with the power to veto all measures and presidential appointments.

C. Rule XXII Conflicts with the Quorum Clause

Article I, Section 5 of the Constitution specifies that “a Majority of each [house] shall constitute a Quorum to do Business; but a smaller Num-

¹¹¹ New Hampshire, Rhode Island, Connecticut, New Jersey, Delaware, South Carolina, and Georgia were the seven least populous states and contained a total population of 1,023,510. See *1790 Census of Population and Housing*, U.S. CENSUS BUREAU, <http://www.census.gov/prod/www/abs/decennial/1790.html> (last visited Mar. 28, 2011). Although listed separately in the 1790 census, *id.*, Maine and Kentucky were part of Massachusetts and Virginia, respectively, in 1790, and Vermont was not yet a state. Not counting Vermont's population, then, the total population of the thirteen states was 3,808,096 in 1790. *Id.* Thus, the seven least populous states represented only 27% of the population. *Id.*

¹¹² See U.S. CONST. art. V.

¹¹³ See *Ranking Tables for States: 1990 and 2000*, U.S. CENSUS BUREAU, <http://www.census.gov/population/www/cen2000/briefs/phc-t2/tables/tab01.pdf> (last visited Mar. 20, 2011).

ber may adjourn . . . and may be authorized to compel the Attendance of absent Members.”¹¹⁴

The government created by the Articles of Confederation was not a union of states, but was, as the name implies, a confederacy of thirteen sovereign states.¹¹⁵ Each state had one vote in Congress,¹¹⁶ which was hamstrung and could take no action without the approval of at least nine states.¹¹⁷ Congress could not (1) engage in war; (2) enter into treaties; (3) coin money; (4) ascertain the sums of money necessary for defense; (5) issue bills; (6) borrow money; (7) appropriate money; (8) establish the number of naval vessels; (9) determine the size of land and sea forces; or (10) appoint a commander-in-chief of the army or navy, “unless nine states assent[ed] to the same.”¹¹⁸

Widespread dissatisfaction with the Articles of Confederation led to the Constitutional Convention in Philadelphia in 1787. When the new Constitution was drafted, unlike the Articles of Confederation, it was founded on the fundamental democratic principle of majority rule. The Framers deliberately rejected the supermajority requirements in the Articles of Confederation both for purposes of establishing the number of members constituting a quorum in the House and Senate¹¹⁹ and for passage of bills and resolutions¹²⁰ precisely because a supermajority requirement would have been inconsistent with this democratic principle.¹²¹

The first draft of the new Constitution proposed by the Committee of Detail provided that only a simple “majority shall be a quorum for business” for both the House of Delegates, as it was then called,¹²² and the Senate.¹²³ On August 10, 1789, Nathaniel Gorham of Massachusetts argued that a majority was too high, and that less than a majority of each house should be made a quorum.¹²⁴ After debate, a motion to reduce a quorum from a simple majority to “not less than 33 in the H. of Reps., nor less than 14 in the Senate . . . which may be increased by a law” was defeated by a vote of nine states to two.¹²⁵ On August 16, Daniel Carroll of Maryland argued that a quorum should in fact consist of more than a simple majority. He “reminded the Convention of the great difference of interests among the States, and

¹¹⁴ U.S. CONST. art V, § 1.

¹¹⁵ ARTICLES OF CONFEDERATION of 1781, art. I.

¹¹⁶ ARTICLES OF CONFEDERATION of 1781, art. V.

¹¹⁷ ARTICLES OF CONFEDERATION of 1781, art. IX, cl. 6.

¹¹⁸ *Id.*

¹¹⁹ U.S. CONST. art. I, § 5.

¹²⁰ U.S. CONST. art. I, § 7, cl. 2, 3.

¹²¹ See THE FEDERALIST NOS. 22, 75 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); THE FEDERALIST NO. 58 (James Madison) (Jacob E. Cooke ed., 1961).

¹²² 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 140–41 (Max Farrand rev. ed., 1937) [hereinafter 2 RECORDS].

¹²³ *Id.* at 141, 155, 165 (July 24–26, 1787); *id.* at 180 (Aug. 6).

¹²⁴ *Id.* at 251.

¹²⁵ *Id.* at 244, 253.

doubt[ed] the propriety . . . of letting a majority be a quorum.”¹²⁶ But Carroll did not move to amend the draft, nor did anyone at the Convention respond to Carroll’s statement.¹²⁷

On September 8, 1789, James Madison again raised the question of a quorum during debate on whether the President’s treaty-making power should be conditioned on a two-thirds vote of the Senate. “Madison movd. [sic] that a Quorum of the Senate consist of 2/3 of all the members.”¹²⁸ Madison’s motion was defeated.¹²⁹ The final wording of the Quorum Clause, requiring only a simple majority vote, was drafted by the Committee on Style and approved by the Convention on September 17, 1789.¹³⁰

In Federalist Number 58, Madison responded to complaints that the new Constitution should have required the presence of “more than a majority . . . for a quorum.”¹³¹ Madison said:

It has been said that more than a majority ought to have been required for a quorum, and in particular cases, if not in all, more than a majority of a quorum for a decision. That some advantages might have resulted from such a precaution, cannot be denied. It might have been an additional shield to some particular interests, and another obstacle generally to hasty and partial measures. But these considerations are outweighed by the inconveniences in the opposite scale. In all cases where justice or the general good might require new laws to be passed, or active measures to be pursued, the fundamental principle of free government would be reversed. *It would be no longer the majority that would rule; the power would be transferred to the minority.* Were the defensive privilege limited to particular cases, an interested minority might take advantage of it to screen themselves from equitable sacrifices to the general weal, or in particular emergencies to extort unreasonable indulgences.¹³²

¹²⁶ *Id.* at 305.

¹²⁷ *Id.*

¹²⁸ *Id.* at 549.

¹²⁹ *Id.*

¹³⁰ *Id.* at 592, 648. Chief Judge Harry Edwards summarized much of this history from the Federal Convention in his dissenting opinion in *Skaggs v. Carle*, 110 F.3d 831, 841–42 (D.C. Cir. 1997) (Edwards, C.J., dissenting).

¹³¹ THE FEDERALIST No. 58, at 396 (James Madison) (Jacob E. Cooke ed., 1961).

¹³² *Id.* at 396–97 (emphasis added). The notorious “Cornhusker Kickback” and “Louisiana Purchase” concessions are but two recent examples of “unreasonable indulgences” extorted by Senators Ben Nelson of Nebraska and Mary Landrieu of Louisiana as the price of their votes for cloture on the health care debate. See Dana Milbank, *On Health-Care Bill, Democratic Senators are in States of Denial*, WASH. POST, Dec. 22, 2009, at A2. The “hold” placed by Senator Richard Shelby on “at least 70” presidential nominees to secure a defense contract for a company in Alabama is yet another recent example of the use of Rule XXII by a member of the Senate to “extort unreasonable indulgences.” Scott Wilson & Shailagh Murray, *Sen. Richard Shelby of Alabama Holding Up Obama Nominees for Home-State Pork*, WASH. POST, Feb. 6, 2010, at A3.

Long before the present controversy over the filibuster, the Supreme Court held that the language in Article I, Section 5 specifying that “a majority of each [house] shall constitute a quorum to do business” means that when a quorum is present, the capacity of the majority to transact business is established and does not depend on “the disposition or assent” of a minority.¹³³ This interpretation reinforces the understanding that Rule XXII conflicts with the Quorum Clause. Both Madison and the Supreme Court saw the Quorum Clause as instantiating majority rule. To be sure, a contrary rule would present tremendous difficulties, as Madison clearly foresaw in a rejoinder that can apply with equal force to modern proponents of the filibuster.

By providing that each house has the power “to do Business” whenever a simple majority of its members is present, the Quorum Clause reflects the prevailing rule of all parliamentary bodies at the time the Constitution was adopted.¹³⁴ It is unlikely that the Framers intended to delegate to either house the power to reverse “the fundamental principle of free government”¹³⁵ by adopting an internal procedural rule that would allow a minority of senators to prevent bills or presidential nominees from being brought to the floor of the Senate for debate or a final vote.

D. Rule XXII Conflicts With the Presentment Clauses

Article I, Section 7 of the Constitution sets forth in detail the steps through which a bill, referenced in Clause 2, or a resolution, referenced in Clause 3, must pass before becoming a law:

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall . . . proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. . . . Every Order, Resolution or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President . . . , and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the

¹³³ *United States v. Ballin*, 144 U.S. 1, 5–6 (1892).

¹³⁴ See *infra* Part III.D.1.

¹³⁵ THE FEDERALIST NO. 58, at 397 (James Madison) (Jacob E. Cooke ed., 1961).

Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.¹³⁶

The Supreme Court has said that “[t]he prescription for legislative action in [Article I, Section 7] represents the Framers’ decision that the legislative power of the Federal Government be exercised in accord with a single, finely wrought and exhaustively considered, procedure.”¹³⁷ This balance is upset if a minority in the Senate can veto legislation passed by the House and any presidential nomination.

Professor Rubinfeld has argued persuasively that:

[T]he proper interpretation of Article I, Section 7, is that “passed by the House” means passed by majority vote of the House.

Section 7 contains the Constitution’s Lawmaking Clauses. It is therefore one of the most central provisions—maybe the central provision—of the entire Constitution as originally written [T]he Lawmaking Clauses in fact embody ‘a single, finely wrought and exhaustively considered, procedure’ for lawmaking in which the great structural questions facing those who made our Constitution were resolved.

Section 7 strikes a balance between large and small states, between state and federal government, between House and Senate, between Congress and President. This balance of powers would be entirely undone if it were true that each legislative chamber could define what it means for that chamber to “pass” a bill.¹³⁸

Nevertheless, some defenders of the filibuster have argued that because the word “passed” is not explicitly defined in the Presentment Clauses, “the Constitution permits each house to decide how many members are necessary to pass a bill.”¹³⁹

There are several responses to this argument. First, it ignores the ruling in *United States v. Ballin*, in which the Supreme Court held that Article I, Section 7 of the Constitution is to be interpreted to mean that “the act of a majority of the quorum is the act of the body.”¹⁴⁰ Additionally, the argument is inconsistent with the Framers’ understanding of the word “pass” in Article I, Section 7 as being synonymous with majority vote, a conclusion that is supported by: (1) the plain meaning and the ordinary understanding of the

¹³⁶ U.S. CONST. art. I, § 7.

¹³⁷ *INS v. Chadha*, 462 U.S. 919, 951 (1983).

¹³⁸ Jed Rubinfeld, *Rights of Passage: Majority Rule in Congress*, 46 DUKE L.J. 73, 78–79 (1996) (quoting *Chadha*, 462 U.S. at 951).

¹³⁹ See Michael J. Gerhardt, *The Constitutionality of the Filibuster*, 21 CONST. COMMENT. 445, 457 (2004) (“No language within the Constitution expressly mandates majority rule in the Senate.”); John O. McGinnis & Michael Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483, 486 (1995).

¹⁴⁰ *Ballin*, 144 U.S. at 6.

term “pass” as reflected by dictionaries of the time;¹⁴¹ (2) the debates at the Constitutional Convention, particularly those surrounding the rejection of proposals to prohibit Congress from passing navigation acts without a two-thirds vote of both houses;¹⁴² and (3) Hamilton’s and Madison’s defense of the majority vote requirements in Federalist Numbers 22, 58, and 75.¹⁴³

1. *The General Rule of All Parliamentary Bodies*

The Supreme Court held in *Ballin* that the lawmaking provisions in Article I, Section 7 must be interpreted in light of “the general rule of all parliamentary bodies” that prevailed at the time of the adoption of the Constitution, namely that “the act of a majority of the quorum is the act of the body.”¹⁴⁴ The question in *Ballin* was whether the word “pass” in Article I, Section 7 means that a vote of a majority of a quorum or a majority of the full House is required to pass a bill. The Court held that a simple majority of a quorum was all that was required:

[T]he general rule of all parliamentary bodies is that, when a quorum is present, the act of a majority of the quorum is the act of the body. This has been the rule for all time, except so far as in any given case the terms of the organic act under which the body is assembled have prescribed specific limitations No such limitation is found in the Federal Constitution, and therefore the general law of such bodies obtains.¹⁴⁵

¹⁴¹ See *infra* Part III.D.2.

¹⁴² See *infra* Part III.D.3.

¹⁴³ See *infra* Part III.D.4.

¹⁴⁴ *Ballin*, 144 U.S. at 6; see also Rubinfeld, *supra* note 138, at 77 (citing Thomas Jefferson, *Notes on the State of Virginia*, in 2 THE WRITINGS OF THOMAS JEFFERSON 1, 172 (1905); Thomas Jefferson, *A Manual of Parliamentary Practice*, in 2 THE WRITINGS OF THOMAS JEFFERSON 335, § XLI at 420–21 (1905)) (“Majority rule was, moreover, the established practice of the British Parliament and was regarded as the ‘natural’ rule for all assemblies. Thus, at least where no contrary rule was specified, those who ratified the Constitution would certainly have understood ‘passed’ to mean ‘passed by majority vote.’”); *Skaggs v. Carle*, 110 F.3d 831, 841 (D.C. Cir. 1997) (Edwards, C.J., dissenting) (“The general rule governing parliamentary procedure at the time of the constitutional convention, which still holds true today, was that the act of a majority of a quorum is the act of the body. The presumption of parliamentary procedure therefore was a presumption of majority rule.”).

¹⁴⁵ *Ballin*, 144 U.S. at 6. The Court’s view of “the general rule of all parliamentary bodies,” dating to before the adoption of the Constitution, was correct. See, e.g., WILLIAM HAKEWILL, *MODUS TENENDI PARLIAMENTUM* [THE OLD MANNER OF HOLDING PARLIAMENTS IN ENGLAND] 93 (Abel Roper ed., 1671).

In the Parliament, if the greater part of the knights of the Shire do assent to the making of an Act of Parliament, and the lesser part will not agree to it, yet this is a good Act or Statute to last in perpetuum: and that the Law of majoris parties is so in all Counsels, Elections & C. Both by the rules of the Common law and the Civil.”

Id.; see also GEORGE PETYT, *LEX PARLIAMENTARIA* [A TREATISE OF THE LAW AND CUSTOM OF THE PARLIAMENTS OF ENGLAND] 165 (1689).

The “organic act under which [Congress] is assembled” is, of course, the Constitution. And because the Constitution prescribed no other rule for counting votes for and against the final passage of bills, the Court said “the general law of [parliamentary] bodies obtains,” and “the act of a majority of the quorum is the act of the body.”¹⁴⁶ Thus, Article I, Section 7 established majority rule as the method for passing bills and resolutions.

2. Plain Meaning and Context

It is clear from the text of the Constitution that when the Framers stated in Article I, Section 7 that a bill must “have passed the House of Representatives and the Senate” before being presented to the President,¹⁴⁷ they meant that the bill must have been approved (“passed”) by a simple majority vote of a quorum in each house. This conclusion is supported by the fact that when the Framers used the word “passed” a second time in Article I, Section 7 to describe the procedure for overriding a presidential veto, they added modifying language requiring that a vetoed bill “pass” the second time by a two-thirds vote before becoming law.¹⁴⁸

In addition, under established rules of construction, words in the Constitution are presumed to have been used according to their ordinary meanings, unless the context indicates that a different meaning was intended by the Framers.¹⁴⁹ In the context of legislation, the common meaning of the word “passed,” as defined in dictionaries at the time of the Federal Convention, was that the legislation had been approved by a vote of a *simple majority* of the legislative body:

When someone wants to know the outcome of a majority vote in a legislative body, ordinary English usage asks whether the measure “passed.” Dictionaries of older American and English legal usage define “pass” in just such terms: “When a legislative bill is finally assented to by a majority vote . . . , it is said to be ‘passed’ by such body”¹⁵⁰

¹⁴⁶ *Ballin*, 144 U.S. at 6. *Ballin* remains good law. In 1967, the Supreme Court squarely relied on *Ballin* in determining that a simple majority of a quorum of the Federal Trade Commission could exercise the Commission’s power based on “the almost universally accepted common-law rule . . . that . . . in the absence of a contrary statutory provision, a majority of a quorum . . . is empowered to act for the body.” *FTC v. Flotill Prods., Inc.*, 389 U.S. 179, 183–84 (1967) (internal citations omitted).

¹⁴⁷ U.S. CONST. art. I, § 7, cl. 2 (emphasis added).

¹⁴⁸ *Id.*

¹⁴⁹ See, e.g., *United States v. Sprague*, 282 U.S. 716, 731 (1931) (“The Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning . . .”).

¹⁵⁰ Rubinfeld, *supra* note 138, at 77.

When the Framers intended to require more than a vote of a simple majority to “pass” or “repass” a bill or resolution to override a presidential veto, they added specific language requiring a two-thirds vote.¹⁵¹

3. *The Debates of the Federal Convention*

That the Framers used the word “pass” to mean approval by a majority vote is reflected by the daily *Journal of the Federal Convention*. The rules of the Federal Convention specified that “all questions shall be decided by the greater number” of states.¹⁵² The Framers would certainly have understood the word “passed” to be associated with the idea of approval by a simple majority, at least in the absence of specific rule to the contrary.¹⁵³

The debates at the Federal Convention also indicate that the Framers specifically understood the word “pass” in Article I, Section 7 to mean that a simple majority of each house could enact bills or resolutions without the consent of the minority. One of the most hotly contested issues at the Federal Convention was the question of whether a simple majority of Congress should have the power to pass laws regulating navigation under its general law-making powers in Article I, Section 7. Other than the decision to require a two-thirds vote of both houses to override a presidential veto, this was the only time the Framers debated whether the passage of legislation should be conditioned on a supermajority vote.¹⁵⁴

The Southern states feared that senators and representatives from New England and the Middle Atlantic states would try to force the South to ship goods on Northern ships by imposing protective tariffs on foreign ships, thereby making the Southern states’ freight rates non-competitive with those of Northern ship owners.¹⁵⁵ The ensuing debate reflects a common understanding on the part of the delegates that in the absence of an express provision specifying that no navigation act could be adopted without a two-thirds vote of both houses, Article I, Section 7 would allow a simple majority to pass navigation acts just as in the case of any other bill or resolution.

Charles Pinckney of South Carolina and George Mason of Virginia, among others, urged the Convention to adopt an exception to Article I, Sec-

¹⁵¹ See U.S. CONST. art. I, § 7, cl. 2 (requiring a two-thirds vote to override a presidential veto).

¹⁵² 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 8 (Max Farrand ed., 1911) [hereinafter 1 RECORDS].

¹⁵³ Rubinfeld, *supra* note 138, at 74.

¹⁵⁴ As explained in Part III.E, *infra*, except for the power of Congress in Article I, Section 7 to override a presidential veto of legislation by a two-thirds vote, none of the other instances in which the Constitution prohibited one or both houses of Congress from acting without a two-thirds vote involved legislation. They instead involved other actions of an unusual nature and such special importance that the Framers felt they should not be decided by a simple majority vote—e.g., the expulsion of a member of Congress, ratification of a treaty, the conviction of a president or other officers after an impeachment by the House, or proposals to amend the Constitution.

¹⁵⁵ 2 RECORDS, *supra* note 122, at 449–50 (Madison, August 29, 1787).

tion 7 that would prohibit Congress from passing navigation acts without a two-thirds vote.¹⁵⁶ To satisfy these concerns, the Committee of Detail included in its draft of the Constitution a provision that would have excepted navigation acts from the majority vote provisions of Article I, Section 7 by expressly prohibiting the passage of navigation acts without a two-thirds vote of both houses.¹⁵⁷

On August 22, 1787, the Convention voted to commit this section of the report of the Committee of Detail to an eleven-man committee composed of one delegate from each state.¹⁵⁸ On August 29, the Committee of Eleven recommended that the navigation acts voting provision proposed by the Committee of Detail be struck out.¹⁵⁹ Pinckney immediately moved that this portion of the committee's report be postponed and that the Convention adopt, in its stead, a prohibition against the passage of navigation acts without a two-thirds vote of both houses.¹⁶⁰

Pinckney opened the debate by arguing that the New England and Middle Atlantic states had different economic interests from those of the Southern states and that these interests "would be a source of oppressive regulations if no check to a bare majority should be provided."¹⁶¹ George Mason joined Pinckney in urging the Convention to require a two-thirds vote instead of a majority for passage of navigation acts. Mason argued that "[t]he Majority will be governed by their interests," and the Southern states could not be expected to "deliver themselves bound hand and foot to the Eastern states," which would be the result because "[t]he Southern states are in the minority in both Houses."¹⁶²

Responding to Mason, James Wilson of Pennsylvania "remarked that if every peculiar interest was to be secured, *unanimity* ought to be required. The majority he said would no more be governed by [self] interests than the minority—it was surely better to let the [minority] be bound hand and foot than the former."¹⁶³ Wilson also reminded the Convention of the "great inconveniences . . . experienced in Congress from the Articles of Confederation requiring nine votes in certain cases."¹⁶⁴ Roger Sherman of Connecticut agreed that the supermajority requirement under the Articles of Confederation had been an "embarrassing" stricture.¹⁶⁵

¹⁵⁶ *Id.* at 449–51.

¹⁵⁷ *Id.* at 143 (Report of Committee of Detail IV); *id.* at 169 (Report of Committee of Detail IX); *id.* at 183 (Madison, August 6, 1787).

¹⁵⁸ *Id.* at 366 (Madison). The Committee had only eleven members because Rhode Island did not participate in the convention and New Hampshire's delegates had not yet arrived. *See id.*

¹⁵⁹ *Id.* at 449 (Madison).

¹⁶⁰ *Id.* at 449 (Madison, August 29, 1787).

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 450.

The Convention defeated Pinckney's motion by a vote of seven to four, and "the *Report of the Committee* for striking out sect. 6 requiring two-thirds of each House to pass a navigation act was then agreed to."¹⁶⁶

Finally, on September 15, 1789, Mason—who later opposed ratification of the Constitution—made a last-ditch attempt at a compromise: he proposed that a two-thirds vote of each house be required to pass navigation acts for the next twenty years, until 1808.¹⁶⁷ In arguing for a supermajority requirement, Mason

express[ed] his discontent at the power given to Congress by a bare majority to pass navigation acts Whereas requiring two-thirds of the members present in both Houses would have produced mutual moderation . . . and removed an insuperable objection to the adoption of this government.¹⁶⁸

The Convention, however, defeated Mason's proposed compromise by a vote of seven states to three.¹⁶⁹

The Convention's specific debate over the proposal to except navigation acts from the provisions of Article I, Section 7 by conditioning the passage of such acts on a two-thirds vote of both houses, and the Convention's forceful rejection of that proposal, provide strong evidence of the Framers' commitment to the principle of majority rule for the passage of all acts by Congress absent an express exception in the Constitution.

4. *The Federalist*

When the Constitution was submitted to the states for ratification, opponents argued that it should be rejected because it allowed Congress to pass laws that would bind the entire country by a vote of a bare majority of a quorum of the House and Senate.¹⁷⁰ Alexander Hamilton and James Madison responded to these objections in *Federalist* Numbers 22 (Hamilton), 58 (Madison), and 75 (Hamilton). Hamilton and Madison were amazingly farsighted in describing the harm that would flow from a rule that conditioned the passage of legislation on a supermajority vote. Their views would still have contemporary relevance if published verbatim today in *The New York Times* to describe the effects of the filibuster rule on the operations of the Senate.

Hamilton wrote in *Federalist* Number 22:

¹⁶⁶ *Id.* at 453; see IRVING BRANT, JAMES MADISON, FATHER OF THE CONSTITUTION 1787–1800, at 122–25 (1950).

¹⁶⁷ 2 RECORDS, *supra* note 122, at 631.

¹⁶⁸ *Id.* at 631, 640 (emphasis added).

¹⁶⁹ *Id.* at 631.

¹⁷⁰ John Bryan Williams, *How to Survive a Terrorist Attack: The Constitution's Majority Quorum Requirement and the Continuity of Congress*, 48 WM. & MARY L. REV. 1025, 1041–42 (2006).

To give a minority a negative upon the majority (which is always the case where more than a majority is requisite to a decision) is in its tendency to subject the sense of the greater number to that of the lesser number The necessity of unanimity in public bodies, or of something approaching towards it, has been founded upon a supposition that it would contribute to security. But its real operation is to embarrass the administration, to destroy the energy of government, and to substitute the pleasure, caprice or artifices of an insignificant, turbulent or corrupt junta, to the regular deliberations and decisions of a respectable majority If a pertinacious minority can control the opinion of a majority respecting the best mode of conducting it; . . . the sense of the smaller number will over-rule that of the greater When the concurrence of a large number is required . . . , we are apt to rest satisfied that all is safe, because nothing improper will be likely to be done; but we forget how much good may be prevented, and how much ill may be produced, by the power of hindering the doings what may be necessary, and of keeping affairs in the same unfavorable posture in which they may happen to stand at particular periods.¹⁷¹

Hamilton again defended the Framers' decision to reject a requirement conditioning the passage of legislation on the vote of a supermajority in Federalist Number 75:

[A]ll provisions which require more than the majority of any body to its resolutions, have a direct tendency to embarrass the operations of the government and an indirect one to subject the sense of the majority to that of the minority If two thirds of the whole number of members had been required, it would . . . amount in practice to a necessity of unanimity. And the history of every political establishment in which this principle has prevailed, is a history of impotence, perplexity, and disorder.¹⁷²

Hamilton and Madison's words continue to ring true today.

E. The Constitution's Exclusive List of Exceptions to the Principle of Majority Rule

Although James Madison was committed to the fundamental democratic principle of majority rule, he also believed that there were some actions that were "too important to be exercised by a bare majority of a quorum."¹⁷³ It is significant that none of the exceptions to the principle of majority rule in the Constitution relate to the confirmation of presidential

¹⁷¹ THE FEDERALIST NO. 22, at 140–41 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

¹⁷² THE FEDERALIST NO. 75, at 507–08 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

¹⁷³ 2 RECORDS, *supra* note 122, at 254.

nominees or the passage of legislation—except an override of a presidential veto.¹⁷⁴ All the exceptions address the exercise of unusual powers by one or both houses of Congress, outside the normal legislative process prescribed in Article I, Section 7. Each of the six exceptions was individually debated, and include such important issues as the removal of the President or other officers by the Senate after impeachment by the House¹⁷⁵ or expulsions of members of Congress:¹⁷⁶

1. Art. 1, § 3, cl. 6—Impeachments:

“And no Person shall be convicted without the Concurrence of two thirds of the Members present.”

2. Art. 1, § 5, cl. 2—Expelling Members:

“Each House may . . . punish its Members for disorderly Behaviour, and, with the concurrence of two thirds, expel a Member.”

3. Art. 1, § 7, cl. 2—Overriding a presidential veto of a bill:

“If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law.”

4. Art. 1, § 7, cl. 3—Overriding a presidential veto of an “Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary:”

“. . . or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.”

5. Art. 2, § 2, cl. 2—Ratification of treaties by the Senate:

“He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur;”

6. Art. V—Amendments to the Constitution:

“The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution.”¹⁷⁷

The debates on these exceptions, like the debate on the navigation acts, reflect an understanding on the part of the Framers that all decisions in Congress would, as a general matter, be made by majority rule, unless a supermajority vote was required by the Constitution. On the matter of expulsions, for example, Madison argued that “the right of expulsion . . . was too

¹⁷⁴ U.S. CONST. art. I, § 7, cls. 2–3.

¹⁷⁵ U.S. CONST. art. I, § 3, cl. 6.

¹⁷⁶ U.S. CONST. art. I, § 5, cl. 2.

¹⁷⁷ In addition to these six exceptions to the principle of majority rule in the original Constitution, there are two other specific exceptions in which a two-thirds vote, and not a majority vote, is required by amendment. U.S. CONST. amend. XIV, § 3 (two-thirds vote of each house to remove the ban against former Confederate soldiers from running for federal office); U.S. CONST. amend. XXV, § 4 (two-thirds vote of each house required to determine that the president is physically or mentally incapable of discharging the duties of office).

important to be exercised by a bare majority of a quorum: and in emergencies of faction might be dangerously abused.”¹⁷⁸ On the question of amendments to the Constitution, Elbridge Gerry argued that a simple majority should not be able to “bind the Union to innovations that may subvert the State-Constitutions altogether.”¹⁷⁹ The Convention agreed and provided in Article I that amendments be ratified by three-fourths of the states.¹⁸⁰ On impeachments, the Convention rejected John Dickinson’s proposal that “the Executive be made removable by . . . a majority of the Legislatures of individual States.”¹⁸¹ The Convention later decided that a President could not be removed from office without a two-thirds vote of the Senate.¹⁸² There was also extensive debate about the two-thirds vote for Senate ratification of treaties.¹⁸³ Thus, when the Framers intended to condition the action of one house on the vote of more than a simple majority, they did so expressly.

The Framers were aware of the established rule of construction, *expressio unius est exclusio alteris*, and that by adopting these six exceptions to the principle of majority rule, they were excluding other exceptions. John Dickinson of Delaware cited this rule of construction during the debate on the question of whether the Constitution should include a specific list of qualifications for election to the House or Senate¹⁸⁴—the very issue later litigated in *Powell v. McCormack*¹⁸⁵ and *U.S. Term Limits v. Thornton*.¹⁸⁶ Dickinson opposed the inclusion of a list of qualifications in the Constitution because it would be “impossible to make a complete one, and a partial one would by implication tie up the hands of the Legislature from supplying the omissions.”¹⁸⁷ The Convention, however, did just the opposite. The Framers were aware that by listing the qualifications of members of Congress in Sections 2 and 3 of Article I, they were excluding either house of Congress¹⁸⁸ or the states¹⁸⁹ from imposing additional qualifications. Thus, it can similarly be assumed that the Framers were aware that when they adopted six exceptions to the principle of majority rule in the Constitution, they were excluding other exceptions. In fact, the Framers spoke clearly when they intended the *expressio unius* canon to be inapplicable. In adopting the Bill of Rights for ratification by the states, the first Congress was careful to expressly negate the application of the *expressio unius* rule of construction by providing in

¹⁷⁸ 2 RECORDS, *supra* note 122, at 254 (footnote omitted) (Madison, August 10, 1787).

¹⁷⁹ *Id.* at 557–58.

¹⁸⁰ *Id.* at 559.

¹⁸¹ 1 RECORDS, *supra* note 152, at 85.

¹⁸² 2 RECORDS, *supra* note 122, at 497, 547.

¹⁸³ *Id.* at 540, 548.

¹⁸⁴ 2 RECORDS, *supra* note 122, at 123.

¹⁸⁵ 395 U.S. 486 (1969).

¹⁸⁶ 514 U.S. 779 (1995).

¹⁸⁷ 2 RECORDS, *supra* note 122, at 123.

¹⁸⁸ See *Powell*, 395 U.S. at 532–47 (1969) (discussing the Framers’ intent regarding the ability of either house to add to the listed qualifications).

¹⁸⁹ See *U.S. Term Limits*, 514 U.S. at 783–93 (1995) (discussing the Framers’ intent regarding the ability of the states to add to the listed qualifications).

Amendment IX that “the enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”¹⁹⁰

The Supreme Court has repeatedly applied the *expressio unius* principle in interpreting the Constitution.¹⁹¹ For example, in *Marbury v. Madison*, the Court considered whether the provisions in Article III, Section 2, Clause 2, which stated that the Supreme Court “shall have original jurisdiction” in all cases “affecting Ambassadors, other public Ministers and Consuls and those in which a state shall be a party,” was exclusive and prohibited Congress from giving the Court original jurisdiction over other cases.¹⁹² The Court held that the list was exclusive, and that an act of Congress that attempted to expand this list by giving the court original jurisdiction over a mandamus action against Jefferson’s Secretary of State, James Madison, was unconstitutional.¹⁹³ Chief Justice Marshall expressly rejected the argument that because Article III, Section 2, Clause 2 “contains no negative words” prohibiting Congress from adding to the Court’s original jurisdiction, the Court should uphold the expansion of its jurisdiction. Marshall said:

If it had been intended to leave it in the discretion of the legislature . . . it would certainly have been useless to have proceeded further than to have defined the judicial power The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction.¹⁹⁴

In *Powell v. McCormack*, the Supreme Court relied on Dickinson’s argument at the Federal Convention in holding, just as Dickinson had predicted, that the list of qualifications for election to the House in Article I, Section 2, Clause 2 was exclusive, and prohibited the House from adding substantive requirements to this list under the guise of judging the qualifications of its members.¹⁹⁵ The Court held that even though Article I, Section 5 granted to “Each House” the power to “be the Judge of the . . . Qualifications of its own Members,” the House could not use this power to refuse to seat Representative Adam Clayton Powell because of his misconduct while in office, which was not one of the three specified qualifications.¹⁹⁶ To do so, the Court held, would violate the Qualifications Clause in Article I, Section 2.¹⁹⁷

¹⁹⁰ U.S. CONST. amend. IX.

¹⁹¹ See, e.g., *Clinton v. City of New York*, 524 U.S. 417, 439–40 (1998); *U.S. Term Limits*, 514 U.S. at 792–93; *INS v. Chadha*, 462 U.S. 919, 956 n.21 (1983); *Powell*, 395 U.S. at 550; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803).

¹⁹² 5 U.S. (1 Cranch) at 174.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Powell*, 395 U.S. at 532–33, 550.

¹⁹⁶ *Id.* at 550.

¹⁹⁷ *Id.* at 536, 550. The Court later reaffirmed this holding in *U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995).

The Supreme Court similarly relied upon *expressio unius* in the constitutional context in *Clinton v. City of New York*,¹⁹⁸ holding that the limited grant of power to the President under the Presentment Clause¹⁹⁹ to veto bills passed by Congress precludes the inference that the President has implicit powers to veto line-items within a bill:

[The Constitution] is silent on the subject of unilateral presidential action that either repeals or amends part of duly enacted statutes. . . . There are powerful reasons for construing constitutional silence on this profoundly important issue as equivalent to an express prohibition²⁰⁰

Thus, the Court struck down the Act as a violation of the bicameralism and presentment process, described in detail in Article I, Section 7.²⁰¹

F. *The Vice President's Tie-breaking Power*

The Constitution provides: "The Vice President . . . shall be President of the Senate, but shall have no Vote, unless they be equally divided."²⁰² This provision reflects an assumption by the Framers that the Senate would be governed by the principle of majority rule, and that tie votes were likely in a Senate composed of an even number of members. The Framers could have chosen to allow bills that resulted in a tie vote to be defeated, as occurs with bills in the House.²⁰³ Instead, the Framers decided to give the Vice President the power to vote and break a tie.

This provision provides additional support for the argument that the Framers believed that no more than a bare majority was required for the approval of legislation in the Senate, as well as in the House. There would be no need for the Framers to have made an exception to the rule that the Vice President cannot vote in the Senate if the Framers had intended to give the Senate the authority to adopt an internal supermajority vote rule that would eliminate the significance of ties. Thus, Rule XXII's sixty-vote requirement is inconsistent with the assumption of majority rule on which Clause 4 of Article I, Section 3, was based.²⁰⁴

¹⁹⁸ 524 U.S. 417, 439–40 (1998).

¹⁹⁹ U.S. CONST. art. I, § 7, cls. 2–3.

²⁰⁰ *Clinton v. City of New York*, 524 U.S. 417, 439 (1998).

²⁰¹ *Id.* at 448–49.

²⁰² U.S. CONST. art. I, § 3, cl. 4.

²⁰³ *CAFTA Voting Irregularities*, DEMOCRACY NOW!, http://www.democracynow.org/2005/7/29/cafta_voting_irregularities (last visited Mar. 13, 2011).

²⁰⁴ It also effectively deprives the Vice President of one of only two powers granted to the office by the Constitution.

G. *The Unconstitutional Combination of Rules V, VIII, and XXII*

Unlike the Rules of the House of Representatives, which expire at the end of each term of Congress, Senate Rule V declares: “The rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules.”²⁰⁵

Debate on any matter in the Senate, including a proposed amendment to Rule XXII, cannot begin over the objection of a single senator without the adoption of a motion to proceed under Rule VIII, which is a “debatable motion” and can be blocked by a filibuster.²⁰⁶ Moreover, Rule XXII provides that a vote on a motion for cloture of debate on a proposal to amend the Senate rules only succeeds if “two-thirds of the Senate present and voting” support cloture, rather than the three-fifths of the total body normally required for other cloture motions.²⁰⁷ The combination of these three rules means that debate on a motion to amend the Senate filibuster rule cannot *begin* without a motion to proceed under Rule VIII, which, if objected to, is a debatable motion which can be filibustered.

Whether the Senate is a “continuing body,” as implied by Rule V, has been long disputed, and is certainly open to question.²⁰⁸ However, this issue is a red herring in the debate over the filibuster’s constitutionality. The continuation of the Senate rules from one session to the next (as provided for by Rule V) would be inconsequential but for the provisions in Rule XXII prohibiting cloture on proposed amendments to the Senate rules without a two-thirds vote. There would be no constitutional problem with Rule V if a majority of senators had the power to amend the rules without being filibustered. Rule V would then be nothing more than a default provision—a convenient way of making it unnecessary for the Senate to adopt a new set of rules when it first convenes in January every other year, but without preventing a majority in the Senate from amending the rules when the occasion required.

The principle has long been recognized that a legislative body cannot bind its successors by statute.²⁰⁹ The only way one Congress can bind successive Congresses is by amending the Constitution through the Article V process, which requires the concurrence of state legislatures or state conven-

²⁰⁵ SENATE RULES, *supra* note 6, R. V.

²⁰⁶ *Id.* Rs. VIII, XXII.

²⁰⁷ *Id.* R. XXII, at 16.

²⁰⁸ See generally Roberts, *supra* note 90. While addressing this topic is not necessary to find that the filibuster is unconstitutional, the fact that pending legislation in the Senate dies at the end of each term suggests that the Senate is not a continuing body. See FLOYD RIDDICK, THE UNITED STATES CONGRESS: ORGANIZATION AND PROCEDURE 56 (1949) (stating that proposed but unenacted legislation dies “when a Congress adjourns its last session”).

²⁰⁹ See, e.g., 1 WILLIAM BLACKSTONE, COMMENTARIES *90 (“Acts of parliament derogatory from the power of subsequent parliaments bind not. . . . Because the [subsequent] legislature being in truth the sovereign power, is always equal [to its predecessors].”). Note that the filibuster rule binds future Congresses not even by a statute subject to bicameralism and presentment, but by rules promulgated by only one of the two houses.

tions.²¹⁰ The Supreme Court has repeatedly affirmed this principle, holding that “no one legislature can . . . disarm their successors of any of the powers or rights of sovereignty confided by the people to the legislative body.”²¹¹ As Fisk and Chemerinsky explain, Rules V and XXII conflict with this principle:

The conjunction of Rules V and XXII does exactly what . . . the Constitution forbids: it allows one session of the Senate to bind later sessions to its procedure for approving legislation. Rule XXII effectively extends a supermajority requirement to the passage of any measure before it, including proposed rule changes. Rule V preserves all Senate rules from one session to the next. The Senate thus . . . deprives “succeeding legislature[s] . . . [of] the same jurisdiction and power . . . as its predecessors.”²¹²

Thus, because they “entrench” the filibuster, such that it cannot be eliminated by a simple majority vote, the Senate rules are unconstitutional.²¹³

IV. JURISDICTIONAL OBSTACLES

It has been widely assumed that the validity of a Senate rule cannot be challenged in federal court. Objections to such a challenge fall under many labels, with Article III standing requirements and the political question doctrine providing the most legitimate concerns. Ultimately, all such objections are without merit; the federal courts can—and should—strike down the filibuster rule as unconstitutional.

²¹⁰ See U.S. CONST. art. V.

²¹¹ *Ohio Life Ins. & Trust Co. v. Debolt*, 57 U.S. (16 How.) 416, 431 (1853); see also *Conn. Mut. Life Ins. Co. v. Spratley*, 172 U.S. 602, 621 (1899) (“[E]ach subsequent legislature has equal power to legislate upon the same subject. The legislature has power at any time to repeal or modify [an] act.”); *Newton v. Comm’rs*, 100 U.S. 548, 559 (1880) (“Every succeeding legislature possesses the same jurisdiction and power . . . as its predecessors. The latter have the same power of repeal and modification which the former had of enactment, neither more nor less.”).

²¹² Fisk & Chemerinsky, *supra* note 3, at 248–50; see also John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 CALIF. L. REV. 1773 (2003); Roberts, *supra* note 90, at 507 (“[I]f the Cloture Rule were binding in some legal sense on a simple majority of senators, it would be unconstitutional . . . [based] on the Constitution’s inherent majority voting rule for enactment purposes, on the Rule Making Clause in Article I, Section 5, and on the anti-entrenchment principle.”).

²¹³ See Roberts, *supra* note 90, at 540–47.

A. Standing

There are many potential plaintiffs who are directly injured by the filibuster rule and have standing to challenge its constitutionality in federal court. This Section will discuss some, although not all, of them.²¹⁴

1. Individual Members of the U.S. Senate

Any sitting senator who can show that he or she has been denied the opportunity to vote on a bill, resolution, or presidential appointment because a filibuster under Rule XXII prevented a final vote, or who can show that his or her vote has been nullified as a result of the rule, is directly injured by Rule XXII and has standing to challenge the constitutionality of the rule. While no senator has ever tested this precise proposition in court, analogous cases provide helpful authority.²¹⁵

In *Coleman v. Miller*,²¹⁶ the Supreme Court held that twenty senators in the Kansas legislature whose votes against a labor law were “nullified” when the lieutenant governor cast an allegedly illegal tie-breaking vote were held to have standing to challenge the lieutenant governor’s power to break ties.²¹⁷ While this case was about state senators, it has come to stand for the proposition that “nullification” of a legislator’s vote is a cognizable injury for the purposes of Article III standing, conferring standing on the legislator in question.²¹⁸

²¹⁴ Other potential plaintiffs include members of the House who voted for a bill that was filibustered in the Senate, or the Vice-President, after being deprived of his ability to cast a tie-breaking vote.

²¹⁵ See *Skaggs v. Carle*, 110 F.3d 831, 834 (D.C. Cir. 1997); *Michel v. Anderson*, 14 F.3d 623, 625 (D.C. Cir. 1994) (House members had standing to challenge dilution of their voting power); *Barnes v. Kline*, 759 F.2d 21, 25–30 (D.C. Cir. 1985), *vacated as moot*, 479 U.S. 361 (1987) (House members had standing to challenge nullification of their votes by illegal pocket veto); *Vander Jagt v. O’Neill*, 699 F.2d 1166, 1168–71 (D.C. Cir. 1983) (member of House had standing to challenge committee appointments that diluted political power); *Riegle v. Fed. Open Mkt. Comm.*, 656 F.2d 873, 877–79 (D.C. Cir. 1981) (Senator had standing to challenge the denial of his right to vote on appointment of members of the Federal Reserve Board); *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir. 1979), *vacated on other grounds*, 444 U.S. 996 (1979) (Senator had standing to challenge the nullification of a treaty by the president that was alleged to have denied senators of their right to vote); *Kennedy v. Sampson*, 511 F.2d 430, 433–36 (D.C. Cir. 1974) (Senator had standing to challenge nullification of his vote by an unauthorized pocket veto); *cf. Coleman v. Miller*, 307 U.S. 433, 438 (1939) (“We think that these [state] senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes.”).

²¹⁶ 307 U.S. 433 (1939).

²¹⁷ *Id.* at 435–36.

²¹⁸ *Coleman* stands . . . for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified.

Raines v. Byrd, 521 U.S. 811, 823 (1997).

In *Michel v. Anderson*,²¹⁹ members of the House whose votes in the Committee of the Whole were diluted by a House rule that allowed territorial delegates to cast symbolic votes were held to have standing to challenge the House rule.²²⁰ The D.C. Circuit was not troubled by the issue of “the congressmen’s standing to assert that this voting power has been diluted” and cited *Vander Jagt v. O’Neill*²²¹ as having clearly “establish[ed] that congressmen asserting such a claim have suffered an Article III injury.”²²²

In *Skaggs v. Carle*,²²³ the D.C. Circuit rejected a challenge by members of the House of Representatives to the constitutionality of a novel House rule, Rule XXI(5)(c), which required a three-fifths supermajority vote to pass bills raising federal income taxes.²²⁴ The court first rejected the argument that, in order to have standing, the House members were required to show that a bill they supported would have passed the House but for the House rule:

[W]e do not agree . . . that, in order to establish that they have been injured by the Rule, the appellant would have to show that 218 Members have voted or would vote (but for the Rule) in favor of a bill carrying an income tax increase [V]ote dilution is itself a cognizable injury regardless whether it has yet affected a legislative outcome.²²⁵

Then-Judge Ruth Bader Ginsburg, writing for the panel’s 2-1 majority, went on to say that the House members would have had standing if they had been able to show that they had been denied the right to vote on a bill to

²¹⁹ 14 F.3d 623 (D.C. Cir. 1994).

²²⁰ *Id.* at 625.

²²¹ 699 F.2d 1166, *cert. denied*, 464 U.S. 828 (1983).

²²² *Michel*, 14 F.3d at 625–26.

²²³ 110 F.3d 831 (D.C. Cir. 1997).

²²⁴ *Id.* at 833, 837.

²²⁵ *Id.* at 834. Admittedly, the continuing validity of this portion of the ruling in *Skaggs* was called into question by the Supreme Court’s decision in *Raines v. Byrd*, 521 U.S. 811 (1997). In *Raines*, the Supreme Court held that Senator Robert Byrd did not have standing to challenge the constitutionality of the Line Item Veto Act, which granted the president the power to “cause certain line items in revenue bills to be cancelled” because, among other reasons, Senator Byrd and the other plaintiff senators had “not alleged that they voted for a specific bill, that there were sufficient votes to pass the bill, and that the bill was nonetheless deemed defeated.” *Id.* at 824. But, the Court implied that if the senators had alleged that their votes in favor of a particular appropriation had been nullified by a line item veto, they would have had standing. See *Campbell v. Clinton*, 203 F.3d 19, 22 (D.C. Cir. 2000) (citing *Raines*, 521 U.S. at 824) (“[T]he Court emphasized [in *Raines*] that the Congressmen were not asserting that their votes had been completely nullified.”). The plaintiffs’ complaint in *Raines* was that the Act allowed the president to veto part of a bill rather than the whole bill as required by the Presentment Clause. See *Raines*, 521 U.S. at 816. The Court ruled that the plaintiffs could avoid their injury because, “[i]n the future, a majority of senators and congressmen can pass or reject appropriations bills; the Act has no effect on this process. In addition, a majority of senators and members of Congress can vote to repeal the Act, or to exempt a given appropriations bill [from this process].” *Id.* at 824; see also *id.* at 829 (explaining that “Members of Congress [have] . . . an adequate remedy since they may repeal the Act or exempt appropriations bills from its reach” by a simple majority vote).

raise federal taxes.²²⁶ The majority held, however, that the House members' standing in *Skaggs* was dependent on the validity of:

their assertion that Rule XXI(5)(c) in fact renders the votes of 218 Members inadequate to pass legislation carrying an income tax increase. If the votes of a simple majority are still sufficient, in practice, to pass such legislation, then Rule XXI(5)(c) has not caused the vote dilution that would establish their injury for the purpose of standing under Article III.²²⁷

The court wisely focused on the practical realities of the rule and did not dwell on formal distinctions.

The court then analyzed the House rules and found that they conflicted with the plaintiffs' claims—on which their standing depended—that they had been denied the opportunity to enact tax increases by majority vote, explaining that “[b]oth the House Rules and their role in the 104th Congress strongly suggest that Rule XXI(5)(c) does not prevent 218 Members set upon passing an income tax increase from working their legislative will.”²²⁸ The plaintiffs could still enact tax increases by majority vote because “the House Rules allow any Member to introduce a resolution to amend or to repeal Rule XXI(5)(c), and any such resolution could be adopted by the vote of a simple majority.”²²⁹ The court also pointed out that “a simple majority [could] suspend Rule XXI(5)(c) in order to allow a bill carrying a tax increase to pass by a simple majority vote.”²³⁰ The panel also found “telling . . . that on at least four occasions during the 104th Congress, the House had voted to waive the requirement of Rule XXI(5)(c) in order to allow a simple majority to enact legislation that increased income tax rates.”²³¹ Thus, the court ultimately concluded that plaintiffs failed to allege more than a “conjectural or hypothetical injury” because the record showed that “when a simple majority wanted to vote for legislation increasing income tax rates, the House voted to waive the Rule.”²³²

Unlike the House rule at issue in *Skaggs*, Rule XXII cannot be repealed, amended, suspended, or otherwise bypassed by a simple majority vote. This difference is critical. Thus, although the court in *Skaggs v. Carle* ultimately found that the plaintiffs lacked standing, *Skaggs* provides strong authority for the standing of a sitting senator to challenge the constitutional-

²²⁶ See *Skaggs*, 110 F.3d at 834.

²²⁷ *Id.* at 834–35.

²²⁸ *Id.* at 835.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.* at 834–36; see also *Raines v. Byrd*, 521 U.S. 811, 824 (1997) (emphasis added) (explaining that members of Congress cannot “allege that the [Line Item Veto] Act will nullify their votes [on appropriations bills] in the future [because] . . . a majority of senators and congressmen can pass or reject appropriations bills . . . [and] can vote to repeal the Act, or to exempt a given appropriations bill” from the Act).

ity of the Senate filibuster rule—a rule which, importantly, cannot be eliminated by a simple majority vote and which severely dilutes the vote of an individual senator.²³³

2. *Voter or Citizen Standing*

In *Michel*,²³⁴ the D.C. Circuit held that voters had standing to challenge a House rule that allowed territorial delegates to vote as members of the Committee of the Whole because the votes of their representatives were being diluted, and therefore their individual votes were being diluted, as well.²³⁵ More relevant, as far as Rule XXII is concerned, however, is the statement by the court that “[i]t could not be argued seriously that voters would not have an injury if their congressman was not permitted to vote at all on the House [or Senate] floor.”²³⁶

This issue arose again a few years later in *Page v. Shelby*,²³⁷ when a voter challenged the constitutionality of Senate Rule XXII. The court dismissed the voter’s complaint for lack of standing because his complaint was “based solely on his speculation that, no matter which party’s senatorial candidates he voted for, senators of the other party will invoke Rule XXII to prevent the passage of unspecified legislation.”²³⁸ Because the plaintiff did not “show that he would suffer any personal harm should the hypothetical legislation not come to a vote,” the court dismissed his case for lack of standing.²³⁹

The standing problem in *Page* was that the plaintiff voter alleged only that the filibuster harmed the legislative *process*, rather than injuring him as an individual. Under well-established standing jurisprudence, this sort of generalized injury shared by the entire electorate is insufficient.²⁴⁰ But, the plaintiff would likely have had standing if he had alleged that he would have been the direct beneficiary of a specific bill that passed the House, but died in the Senate because of a filibuster. That injury would have been specific to the intended beneficiaries of the particular bill. In *Clinton v. City of New York*,²⁴¹ for example, the Supreme Court determined that the beneficiaries of appropriations that had been line item vetoed by President Clinton had

²³³ See *Skaggs*, 521 U.S. at 838–41 (Edwards, C.J., dissenting) (arguing in dissent that voters have standing to bring constitutional challenges to House rules).

²³⁴ 14 F.3d 623, 626 (D.C. Cir. 1994).

²³⁵ See *id.* (“[P]reviously they had a right to elect a representative who cast one of 435 votes, whereas now, their vote elects a representative whose vote is worth only one in 440.”). The territorial delegates represented Puerto Rico, Guam, the Virgin Islands, American Samoa, and the District of Columbia. *Id.* at 624.

²³⁶ *Id.*

²³⁷ 995 F. Supp. 23 (D.D.C. 1998), *aff’d*, 172 F.3d 920 (D.C. Cir. 1998).

²³⁸ *Id.* at 27.

²³⁹ *Id.* at 28.

²⁴⁰ See, e.g., *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 575 (1992).

²⁴¹ 524 U.S. 417 (1998).

standing to challenge the constitutionality of the Line Item Veto Act.²⁴² This type of plaintiff could easily be found to challenge the filibuster: one who would have concretely benefited from the passage of a bill, but failed to obtain those benefits, despite having the support of more than fifty, but fewer than sixty, members of the U.S. Senate.²⁴³

3. A Filibustered Presidential Nominee

A presidential nominee who was denied confirmation in the Senate as a result of a filibuster would also suffer a concrete, individualized injury as a direct result of Rule XXII's supermajority vote requirement. Thus, the nominee should have standing to challenge the validity of the filibuster rule. While such a case has never been tested in the federal courts, conceptually, it may be the simplest case for finding a plaintiff with standing.²⁴⁴

B. The Political Question Doctrine

A challenge to Rule XXII is not a political question that the Constitution has committed exclusively to another branch under the doctrine of separation of powers. The courts will dismiss a controversy as a nonjusticiable political question "where there is 'a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it'"²⁴⁵ Because the Supreme Court has not hesitated to act as a final arbiter in disputes among the political branches in cases far more "political" than would be a challenge to the filibuster rule, the political question doctrine is no obstacle to such a claim.

The Supreme Court has held in a long line of cases, beginning with *Marbury v. Madison*,²⁴⁶ that the political question doctrine does not bar the

²⁴² *Id.* at 449; *see also* *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (finding standing on similar grounds).

²⁴³ A bill that received less than fifty votes in the Senate would fail the "causation" requirement of Article III standing, because, even without the filibuster rule, it would not have passed in the Senate. *See Lujan*, 504 U.S. at 560.

²⁴⁴ In *Lujan*, the Court held that to establish Article III standing, the injury must be one that is capable of being "redressed by a favorable decision." *Lujan*, 504 U.S. at 560. The injuries described above are fully capable of being "redressed" by the entry of a declaratory judgment finding the supermajority vote requirement in Rule XXII unconstitutional. The only relief required is a declaratory judgment declaring unconstitutional those portions of Rule XXII that require (a) sixty votes to pass motions for cloture on motions, bills, and presidential nominations, and (b) a two-thirds vote in the case of amendments to Senate rules. A court could simply sever the unconstitutional portions of Rule XXII from the remainder of the rule. A court would not, as one court has suggested in dicta, be required to "rewrite the Senate rules." *Page v. Shelby*, 995 F. Supp. 23, 29 (D.D.C. 1998), *aff'd*, 172 F.3d 920 (D.C. Cir. 1998); *see, e.g., Powell v. McCormack*, 395 U.S. 486, 517–18 (1969) (suggesting that when a party only seeks a declaratory judgment, judicial relief is generally appropriate).

²⁴⁵ *Nixon v. United States*, 506 U.S. 224, 228 (1993) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

²⁴⁶ 5 U.S. (1 Cranch) 137 (1803).

federal courts from ruling in a wide variety of cases involving actions by one or both houses of Congress. These cases have included: (1) challenges to the validity of laws passed by both houses of Congress and signed by the President;²⁴⁷ (2) an arrest order issued by Congress for contempt;²⁴⁸ (3) rules adopted by one house of Congress under its rule-making power that are alleged to conflict with other sections of the Constitution;²⁴⁹ (4) Congress's refusal to exercise its power to "make or alter" the unequal apportionment of congressional districts by state legislatures;²⁵⁰ (5) the refusal by the House of Representatives to seat a member-elect;²⁵¹ (6) authorization for a one-house legislative veto;²⁵² (7) the delegation of executive branch powers to a legislative branch official;²⁵³ (8) a twenty-five dollar special assessment in criminal cases that was alleged to have violated the Origination Clause;²⁵⁴ (9) the constitutionality of the method of allocation of House seats among the states after each census;²⁵⁵ (10) the constitutionality of state-imposed term limits for members of Congress;²⁵⁶ and (11) delegation to the President of the power to veto line-items in appropriations bills.²⁵⁷ The arguments in favor of judicial deference to the political branches were at least as strong, if not stronger, in those cases than in the case of the filibuster.

In *Chadha*,²⁵⁸ for example, the Supreme Court rejected the argument that the question of the validity of the one-house legislative veto was a non-justiciable political question. The Court held:

[Even if a] controversy may . . . be termed 'political' . . . the presence of constitutional issues with significant political overtones does not automatically invoke the political question doctrine. Resolution of litigation challenging the constitutional authority of one of the three branches cannot be evaded by courts because the issues have political implications²⁵⁹

Noting that *Marbury v. Madison* "was also a 'political' case," the Court held that the federal "courts cannot reject as 'no law suit' a bona fide controversy as to whether some action denominated 'political' exceeds constitutional authority."²⁶⁰

²⁴⁷ *Id.*

²⁴⁸ *Kilbourn v. Thompson*, 103 U.S. 168 (1881).

²⁴⁹ *United States v. Ballin*, 144 U.S. 1 (1892).

²⁵⁰ *Wesberry v. Sanders*, 376 U.S. 1 (1964).

²⁵¹ *Powell v. McCormack*, 395 U.S. 486, 514–16 (1969).

²⁵² *INS v. Chadha*, 462 U.S. 919 (1983).

²⁵³ *Bowsher v. Synar*, 478 U.S. 714, 715–16 (1986).

²⁵⁴ *United States v. Munoz-Flores*, 495 U.S. 385 (1990).

²⁵⁵ *Dep't. of Commerce v. Montana*, 503 U.S. 442, 456–59 (1992).

²⁵⁶ *U.S. Term Limits v. Thornton*, 514 U.S. 779, 808 (1995).

²⁵⁷ *Clinton v. City of New York*, 524 U.S. 417 (1998).

²⁵⁸ 462 U.S. 919, 942–43 (1983).

²⁵⁹ *Id.*

²⁶⁰ *Id.* (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

Similarly, in *Powell v. McCormack*,²⁶¹ the Court rejected the argument that all “adjudicatory powers” concerning the qualifications of members of the House were committed exclusively to the House by the Qualifications Clause in Article I, Section 5.²⁶² Thus, the political question doctrine did not preclude the Court from reviewing the decision by the House to refuse to seat Representative-elect Powell.²⁶³

In *United States v. Munoz-Flores*,²⁶⁴ the Court rejected the government’s argument that the Court was precluded by the political question doctrine from ruling on a challenge under the Origination Clause to a twenty-five dollar assessment in criminal cases, which had “originated” in the Senate.²⁶⁵ The Court held that “[a]lthough the House certainly can refuse to pass a bill [that originated in the Senate] because it violates the Origination Clause, that ability does not absolve this Court of its responsibility to consider constitutional challenges to congressional enactments” or preclude judicial review under the doctrine of separation of powers.²⁶⁶ “[T]he fact that one institution of Government has mechanisms available to guard against incursions into its power by other governmental institutions does not require that the Judiciary remove itself from the controversy by labeling the issue a political question.”²⁶⁷ Thus, even in political controversies between the House and Senate, where the dispute is completely internal to the legislative branch, the Court has not hesitated to provide judicial review. Accordingly, the political question doctrine should not prevent review of the filibuster rule in the federal courts.

V. POSSIBLE COUNTERARGUMENTS IN FAVOR OF THE FILIBUSTER

A. Congress’s Rulemaking Power

Some argue that because the Senate has the power to “determine the Rules of its Proceedings,”²⁶⁸ its rules cannot be challenged in court.²⁶⁹ There are two responses to this argument. First, the grant of this rulemaking power is analogous to the delegation to the states to determine “The Times, Places and Manner of . . . Elections,”²⁷⁰ in that both grant procedural, rather than substantive, authority. The Supreme Court has explicitly declared that the Elections Clause grants to the states only the authority to adopt *procedural*

²⁶¹ 395 U.S. 486 (1969).

²⁶² *Id.* at 548–49.

²⁶³ *Id.*

²⁶⁴ 495 U.S. 385 (1990).

²⁶⁵ *Id.* at 392; *see also* U.S. CONST. art. I, § 7, cl. 1.

²⁶⁶ 495 U.S. at 392.

²⁶⁷ *Id.* at 393.

²⁶⁸ U.S. CONST. art. I, § 5, cl. 2.

²⁶⁹ *See, e.g.,* Gerhardt, *supra* note 139, at 450–51; McGinnis & Rappaport, *supra* note 139, at 485–86.

²⁷⁰ U.S. CONST. art. I, § 4, cl. 1.

regulations, and does not allow the states to dictate *substantive* electoral outcomes.²⁷¹ Importantly, Rule XXII is far more than a procedural regulation; it is a *de facto* requirement that no bill can pass through the Senate without sixty votes. It therefore exceeds the grant of authority in clause 2 of Article I, Section 5.

Second, there are constitutional limits on the rule-making power of the Senate. The Senate cannot use the constitutional grant of power to make its own rules violate other constitutional provisions. This seemingly obvious proposition was confirmed in *United States v. Ballin*,²⁷² in which the Court held that while “[t]he Constitution empowers each house to determine its rules of proceedings,” it “may not by its rules ignore constitutional restraints or violate fundamental rights”²⁷³

For example, the dispute in *INS v. Chadha*²⁷⁴ regarded the constitutionality of a statute that gave either house in Congress the power to veto decisions by the Attorney General to suspend deportation of aliens.²⁷⁵ Congress argued that it had been granted the constitutional power “to establish a uniform Rule of Naturalization,” and thus had “unreviewable authority over the regulations of aliens.”²⁷⁶ Rejecting this argument, the Court held that even though “[t]he plenary authority of Congress over aliens under Article 1, § 8, cl. 4 is not open to question, what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing that power.”²⁷⁷ The Court ruled that Congress’s authority existed only “so long as the exercise of that authority does not offend some other constitutional restriction.”²⁷⁸

The *Ballin* principle—that Congress cannot use the authority delegated in one section of the Constitution to violate other sections of the Constitution—has frequently been used to invalidate actions of Congress.²⁷⁹ The filibuster is a clear violation of this rule, and thus should also be struck down as unconstitutional.

²⁷¹ See *Cook v. Gralike*, 531 U.S. 510, 511, 523 (2005) (citing *U.S. Term Limits v. Thornton*, 514 U.S. 779, 833–34 (1995)).

²⁷² 144 U.S. at 5 (emphasis added); see also *Vander Jagt v. O’Neill*, 699 F.2d 1166, 1170 (D.C. Cir. 1983) (relying on *Ballin* and explaining that “if Congress should adopt internal procedures which ‘ignore constitutional restraints or violate fundamental rights,’ it is clear that we must provide remedial action”).

²⁷³ *Ballin*, 144 U.S. at 5.

²⁷⁴ 462 U.S. 919 (1983).

²⁷⁵ *Id.* at 940–41.

²⁷⁶ *Id.* at 940.

²⁷⁷ *Id.*

²⁷⁸ *Id.* at 941.

²⁷⁹ See, e.g., *Cook v. Gralike*, 531 U.S. 510, 522–27 (2005); *Clinton v. City of New York*, 524 U.S. 417, 448–49 (1998); *U.S. Term Limits v. Thornton*, 514 U.S. 779, 837–38 (1995); *Powell v. McCormack*, 395 U.S. 486, 550 (1969).

B. The Filibuster's Protection of the Minority from the Tyranny of the Majority

Defenders of Rule XXII further argue that the filibuster is necessary to prevent the tyranny of the majority. But the Framers debated whether the interests of the minority should be protected from the majority by requiring a supermajority both for the purposes of a quorum²⁸⁰ and for the passage of navigation acts.²⁸¹ Motions by the Southern states to except navigation acts from the principle of majority rule were repeatedly rejected.²⁸² The Convention decided instead to side with James Wilson of Pennsylvania, who said that given a choice between allowing the minority in Congress to dominate the majority, and allowing the majority to dominate the minority, “[i]t was surely better to let the [minority] be bound hand and foot.”²⁸³

Moreover, the rights of an important minority that the Framers of the Constitution were very concerned about—those living in the smaller states—were protected in other ways. The Framers protected minority interests (1) by creating a bicameral legislature composed of two houses;²⁸⁴ (2) by guaranteeing each state equal representation in the Senate, regardless of population;²⁸⁵ (3) by guaranteeing that each state would have representation in the House by at least one representative, regardless of its population;²⁸⁶ and (4) by giving the minority of the population living in the smaller states a disproportionate voice in the election of a President through the electoral college.²⁸⁷ Thus, adjusting the procedural rules of the Senate to further protect these interests would be overcompensating.

More broadly, there is no evidence that the Framers intended to allow a rule-making power to be used by either chamber to alter the carefully crafted balance reflected by the Great Compromise, to make the Senate even less representative of the national population, or to give a minority of senators a veto power over the business of the Senate, and therefore, over the entire legislative process.

C. The Historical Defense

Fisk and Chemerinsky appear to recognize the strength of the argument that the filibuster directly conflicts with the principle of majority rule in the text of the Constitution.²⁸⁸ They shy away from this claim, however, based

²⁸⁰ See *supra* notes 119–130 and accompanying text.

²⁸¹ See *supra* notes 154–169 and accompanying text.

²⁸² See *supra* notes 154–169 and accompanying text.

²⁸³ 2 RECORDS, *supra* note 122, at 451.

²⁸⁴ U.S. CONST. art. I, § 1.

²⁸⁵ U.S. CONST. art. I, § 3, cl. 1, art. V.

²⁸⁶ U.S. CONST. art. I, § 2, cl. 3.

²⁸⁷ See U.S. CONST. art. II, § 1, cls. 2–3.

²⁸⁸ See Fisk & Chemerinsky, *supra* note 3, at 240 (conceding that the “textual argument is strong”).

partly on the assertion that “the filibuster’s long history makes the textual argument highly questionable.”²⁸⁹

This historical argument is based on the assumption that senators had a right to unlimited debate at the time the Constitution was adopted, and that the majority had no power to adopt rules that interfered with this right by imposing limits on debate.²⁹⁰ This assumption is demonstrably untrue as a matter of historical fact.²⁹¹ Filibusters were not allowed in Parliament, in the Second Continental Congress, or under the first rules adopted by the Senate in 1789.²⁹² The first filibuster did not occur in the Senate until more than fifty years after the Constitution was adopted.²⁹³

More importantly, even if this premise were accurate, historical practice is not a defense to an unconstitutional act. There have been many cases in which the Supreme Court declared unconstitutional practices that had historical roots far deeper than the Senate filibuster rule. Neither state legislative districts nor U.S. congressional districts, for example, were equally apportioned based on population at the time the Constitution was adopted in 1789.²⁹⁴ For the next 170 years, state legislatures, Congress and the courts at least tolerated, if not approved, apportionments of state legislative and congressional districts that were grossly unequal in population.²⁹⁵ Beginning, however, in 1962 with *Baker v. Carr*,²⁹⁶ followed in 1963 by *Gray v. Sanders*,²⁹⁷ and culminating in 1964 with *Reynolds v. Sims*²⁹⁸ and *Wesberry v. Sanders*,²⁹⁹ the Supreme Court held that the Constitution requires that districts be reapportioned after each census (which had not occurred for decades in many states) based on the one-person-one-vote rule.³⁰⁰

The Court dismissed a similar historical argument in *INS v. Chadha*.³⁰¹ In *Chadha*, Congress defended a one-house legislative veto partially on the grounds that it had enacted many similar statutes in the past.³⁰² The Court turned this argument against Congress, saying that “[o]ur inquiry is sharpened, rather than blunted by the fact that Congressional veto provisions are appearing with increasing frequency”³⁰³

²⁸⁹ See *id.* at 242.

²⁹⁰ See *id.* at 185–188.

²⁹¹ See *supra* note 37 and accompanying text.

²⁹² See *supra* note 29 and accompanying text.

²⁹³ See *supra* note 36 and accompanying text.

²⁹⁴ See *Gray v. Sanders*, 372 U.S. 368, 382–90 (1963) (Harlan, J., dissenting).

²⁹⁵ See *id.*

²⁹⁶ 369 U.S. 186 (1962).

²⁹⁷ 372 U.S. at 368.

²⁹⁸ 377 U.S. 533 (1964).

²⁹⁹ 376 U.S. 1 (1964).

³⁰⁰ See, e.g., *Gray*, 372 U.S. at 379–81.

³⁰¹ 462 U.S. 919.

³⁰² *Id.* at 944.

³⁰³ *Id.*

In sum, as the Court said in *Powell v. McCormack*,³⁰⁴ the fact that “an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date.”³⁰⁵ For that reason, historical practice is not a defense to unconstitutional action.

D. The Procedure-based Defense

A few judges have said, in dicta, that the filibuster rule is “only” a rule of procedure and does not violate the majority vote requirement in the Constitution because the rule does not, on its face, change the number of votes ultimately required for final passage of a bill in the Senate.³⁰⁶ For instance, in *Page v. Dole*, Judge Green said that “the fatal flaw inherent in Page’s [standing] argument is that Senate Rule XXII is an internal procedural rule. To put it more baldly, Senate Rule XXII is not the same as a vote for or against legislation.”³⁰⁷ Chief Judge Edwards, dissenting in *Skaggs*, picked up on this point in attempting to distinguish the Gingrich House rule requiring a three-fifths vote to pass a tax increase—which he said was unconstitutional—from Rule XXII’s requirement of a three-fifths vote on a motion for cloture before a bill can even reach the Senate floor for a final vote. He said:

Requiring a supermajority to pass a bill into law can be distinguished from procedural rules—like the Senate cloture rule—that require a supermajority to bring an issue to a vote. Although such supermajority requirements may hinder or help a bill to become law, these procedural rules do not explicitly conflict with the presentment clause requirement that a bill that has passed be presented to the President.³⁰⁸

The statements in these cases are highly formalistic, and ignore the rule’s obvious substantive effect. The Supreme Court has long held that “constitutional rights would be of little value if they could be . . . indirectly denied The Constitution nullifies sophisticated as well as simple-minded modes of infringing constitutional protections.”³⁰⁹

It is impossible to dispute that the practical effect of Rule XXII is to give a minority of forty-one senators an absolute veto power over the business of the Senate. No bill can reach the Senate floor for debate without the adoption of cloture on a motion to proceed under Rule VIII, which, under

³⁰⁴ 395 U.S. 486 (1969).

³⁰⁵ *Id.* at 546–47.

³⁰⁶ *See, e.g., Page v. Dole*, No. 93-1546 (D.D.C. Aug. 18, 1994), *vacated as moot*, 1996 WL 310132 (D.C. Cir. 1996); *Skaggs v. Carle*, 110 F.3d 831, 847 (D.C. Cir. 1997) (Edwards, C.J., dissenting).

³⁰⁷ *Page*, No. 93-1546, slip op. at 15.

³⁰⁸ *Skaggs*, 110 F.3d at 846 (Edwards, C.J., dissenting).

³⁰⁹ *U.S. Term Limits v. Thornton*, 514 U.S. 779, 829 (1995) (internal quotation omitted); *see also Anderson v. Martin*, 375 U.S. 399, 404 (1964) (“[T]hat which cannot be done [directly] by express statutory prohibition cannot be done by indirection.”).

Rule XXII, requires sixty votes. Even if debate is allowed, the bill cannot be brought to a final vote without the adoption of a second motion for cloture, which also requires sixty votes. As Lloyd Cutler pointed out in his testimony before a Joint Committee of Congress on May 18, 1993:

If the Senate can constitutionally require a supermajority vote to cut off debate . . . , it can constitutionally require unanimous consent to cut off debate on this or any other pending matter And that would mean that any minority, down to a single Senator, could constitutionally prevent the Senate from doing business³¹⁰

By way of analogy, consider that the Supreme Court has repeatedly held in the so-called “White Primary” cases that state statutes and political party rules that prevented black voters from voting in primary elections were not immune from attack simply because those voters were allowed to vote in the general election.³¹¹ In *Terry v. Adams*,³¹² for example, the Supreme Court ruled that the exclusion of African American voters from participating in a pre-primary election held by an all-white political club in Texas was unconstitutional, even though African Americans were not prohibited from voting either in the party primary which followed or in the general election.³¹³ The Court said that the “primary has become an integral part, indeed the only effective part, of the elective process that determines who shall rule and govern in the county.”³¹⁴

Similarly, the filibuster (and the threat of one) has become an “integral part” of the legislative process in the Senate. The Supreme Court has not hesitated to declare unconstitutional statutes whose effects were far more subtle and indirect than the effects of Rule XXII.³¹⁵ When it comes to the filibuster, the Court should do the same, by considering the obvious substan-

³¹⁰ *Floor Deliberations and Scheduling: Hearing Before the Joint Comm. on the Org. of Cong.*, 103d Cong. 23 (statement of Lloyd Cutler, Counsel, President Carter).

³¹¹ See *Terry v. Adams*, 345 U.S. 461, 469–70 (1953); *Smith v. Allwright*, 321 U.S. 649, 664 (1944).

³¹² 345 U.S. at 461.

³¹³ *Id.* at 463–64, 470.

³¹⁴ *Id.* at 469; see also *Gray v. Sanders*, 372 U.S. 368, 379–81 (1963) (holding that the Georgia county “unit system” was unconstitutional, even though the system applied only to the nominating process in primary elections and not to general elections, which were decided by a majority of the popular vote).

³¹⁵ See, e.g., *Cook v. Gralike*, 531 U.S. 510, 524–26 (2001) (holding that a Missouri constitutional provision requiring that there be printed next to a candidate’s name on a ballot information about whether the candidate supported term limits for members of Congress was a transparent attempt to influence voters); *Anderson v. Celebrezze*, 460 U.S. 780, 792, 795, 806 (1983) (invalidating Ohio’s early nomination requirements for independent presidential candidates on the ground that the practical effect of the requirement was to ban independent candidates from having access to the general election ballot); *Anderson v. Martin*, 375 U.S. 399, 402–04 (1964) (striking down a Louisiana statute that required that the race of a candidate be printed next to a candidate’s name on the ballot because its practical effect was to influence voters to cast their ballots based on race).

tive impact of the rule, rather than being blinded by the formalist arguments in its favor.

VI. CONCLUSION

The filibuster is fundamentally inconsistent with the democratic process envisioned by the Framers of the Constitution. The constitutionality of the filibuster does not depend on which political party happens to be in power at the moment, nor should its validity be a partisan issue with Republicans on one side and Democrats on the other. At one time or another, people on opposite ends of the political spectrum have agreed that the filibuster is unconstitutional.³¹⁶ It is time for the Supreme Court to do the same.

³¹⁶ See Cornyn, *supra* note 65, at 191–92.

