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## The Senate Filibuster: The Politics of Destruction

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# THE SENATE FILIBUSTER: THE POLITICS OF DESTRUCTION

Emmet J. Bondurant\*

## ABSTRACT

*The notion that the Framers of the Constitution intended to allow a minority in the U.S. Senate to exercise a veto power over legislation and presidential appointments is not only profoundly undemocratic, it is also a myth. The overwhelming trend of law review articles have assumed that because the Constitution grants to each house the power to make its own rules, the Senate filibuster rule is immune from constitutional attack. This Article takes an opposite position based on the often overlooked history of the filibuster, the text of the Constitution and the 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 proceeds in four parts. Part I 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 as can 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. The Senate is incapable of reforming its rules for the same reasons that state legislatures and Congress refused to reform of the apportionment of state legislative and congressional districts. If reform is to come, it will not come from within the Senate, and can only come from the courts as occurred in the case of congressional and state legislative districts, the one-house veto, and the line-item veto cases.*

*Part II examines the historical evidence that reveals that there was no “right” of 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 attempt to obstruct the business of the Senate by abusing the privilege of debate. This Part examines the filibuster in the light of the debates at the Federal Convention, the Federalists Papers and the express language of Article I 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 or more than a simple majority of the House or Senate, they did so expressly in six carefully defined exceptions—and significantly rejected the only proposals at the Federal Convention that would have prohibited a simple majority from passing legislation prior to its presentation to the President. 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 rule-making power does not include the power to adopt rules that violate other provisions of the Constitution. Finally, this Part also argues that Senate Rule V, which provides that the rules of the Senate to continue from one Senate to the next and prohibits the Senate from amending its own rules without a two-thirds vote, is also unconstitutional.*

*In Part III, I confront the skeptics who contend that the federal courts are barred by the separation of powers and the political question doctrines from ruling on the merits of the constitutionality of the rules of the Senate. The Supreme Court ruled in 1892, however, that the question of whether a House rule violated other provisions of the Constitution was a matter for the federal courts. Part III also addresses the issue of standing on which previous challenges to the Senate filibuster rule have foundered. This Part demonstrates that there are a number of potential plaintiffs with standing, including the Vice President, sitting members of the Senate and the House, individuals who would have been direct beneficiaries of measures that passed the House but died in the Senate, presidential appointees whose*

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*nominations were denied a confirmation vote as a result of actual or threatened filibusters, and organizations such as Common Cause. These individuals and entities have all been directly injured and would have standing to challenge the Senate filibuster rule. Part III also explains that the courts are fully capable of granting complete relief without “rewriting” the rules of the Senate, simply by the entry of a declaratory judgment declaring the supermajority vote portions of Rule XXII unconstitutional.*

*Part IV address the common arguments espoused in favor of the filibuster, such as the contention that it prevents the passage of hastily adopted legislation, promotes compromise, and prevents the “tyranny of the majority.” I also address the unfounded contentions that “we have always had a filibuster” and “it’s only a rule of procedure.” Lastly, I answer the argument that the “remedial discretion” doctrine, a doctrine unique to the U.S. Court of Appeals for the D.C. Circuit, would doom any legal challenge to the filibuster.*

*The filibuster is unconstitutional. The arguments to the contrary are weak. And the courts have both the power and duty to strike down the Senate Rules that conflict with the Constitution.*

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*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 [and women], representing no opinion but their own, have rendered the great government of the United States helpless and contemptible.*<sup>1</sup>

*President Woodrow Wilson, March, 1917*

## 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 Senate gives a minority of 41 senators who may be elected from states that contain as little as 11% of the Nation's population, the power to prevent the Senate from *debating* or *voting* on bills, resolutions, or presidential appointments by filibustering.

A "filibuster" is an abuse of the privilege of unlimited debate, not to inform or persuade, but to *obstruct* the proceedings of the Senate by preventing the majority from taking action opposed by a minority of senators. Filibusters in the U.S. Senate are a profoundly undemocratic result of a mistake that was made in 1806 when the Senate accepted the advice of Aaron Burr and eliminated the previous question motion from its rules.

Filibusters as a parliamentary tactic were unknown at the time the Constitution was adopted. The members of the English Parliament had no "right" to obstruct the proceedings by engaging in unlimited debate over the objections of the majority. The rules of the Second Continental Congress that preceded the adoption of the Constitution and the first rules adopted by the Senate in April of 1789 immediately after the Constitution was ratified,<sup>2</sup> also gave the majority the power to end debate and bring a measure to a final vote at any time by the adoption of a motion for the previous question.<sup>3</sup>

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<sup>1</sup> Martin B. Gold & Dimple Gupta, *The Constitutional Option to Change Senate Rules and Procedures*, 28 Harv. J.L. & Pub. Pol'y 205, 219 (2004) (hereinafter, "Gold & Gupta").

<sup>2</sup> The first rules adopted in 1789 by the House of Representatives of which James Madison was a member, 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?'..." Remarks of Senator Paul Douglas, 103 Cong. Rec. S6677 (daily ed. May 9, 1957); see House Rule XIX.

<sup>3</sup> The motion for the previous question was "the earliest cloture device [and] ... was employed by the Continental Congress and the English Parliament.... The previous question is a non-debatable motion that, if favored by the majority, closes debate and forces an immediate vote on a matter." Catherine Fisk and Erwin Chemerinsky, *The Filibuster*, 49 Stan. L. Rev. 181, 188 (1997); see also Henry M. Robert III, *Robert's Rules of Order Newly Revised*, pp. 190-91 (10<sup>th</sup> ed. 2000) (The motion for the previous question is "a non-debatable motion" under the rules of parliamentary procedure that "[t]akes precedence over all debatable and amendable motions," which, when approved by the vote of a simple majority, ends debate and brings a measure to the floor for a final up-or-down vote).

In contrast, the current rules of the Senate do not permit debate on a bill to *begin* without unanimous consent or the adoption of a motion to proceed. Under Rule VIII, a motion to proceed is a debatable motion and can, therefore, be filibustered. An actual or threatened filibuster of a motion to proceed cannot be brought to an end without the adoption of a motion for cloture under Rule XXII, which requires 60 votes, rather than a vote of a simple majority of 51 senators. Once a motion to proceed has been adopted allowing substantive debate to begin on a bill, resolution, or presidential nomination, the debate cannot be brought to an end over the objections of even a single senator without the adoption of another cloture motion under Rule XXII, which requires another supermajority vote of at least 60 senators. Even after a cloture motion has been adopted, thirty more hours of debate are allowed before the calling of the vote.<sup>4</sup> Thus, the effect of the Senate filibuster rule is to give a minority of 41 senators an absolute veto power over the business of the Senate and, therefore, of the Congress.

Senate Rule XXII provides:

22.2 Notwithstanding the provisions of rule II or rule IV or any other rule of the Senate, at 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, ... he shall lay the motion before the Senate and direct that the clerk call the roll, and upon the ascertainment that a quorum is present, the Presiding Officer shall, without debate, submit to the Senate by a yea-and-nay vote the question:

“Is it the sense of the Senate that the debate shall be brought to a close?”  
***And if that question 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.<sup>5</sup>

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<sup>4</sup> Rule XXII.

<sup>5</sup> Senate Manual, pp. 20-21 (2008 ed.) (emphasis added).

## PART I: THE HISTORY OF FILIBUSTERS

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

Obstruction of 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 motion” as a rule of parliamentary procedure.<sup>6</sup>

The Second Continental Congress adopted the previous question motion from English parliamentary practice as a part of its rules in May, 1778, well before the Constitutional Convention of 1787.

“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.”<sup>7</sup>

Immediately after the Constitution was ratified, “the Rules Committee of the First Senate took specific steps to regulate debate.” Richard R. Beeman, *Unlimited Debate in the Senate: The First Phase*, 88 Pol. Sci. Q. 419, 420 (1968). 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.” *Id.* Rules VIII and IX provided:

VIII. When 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.

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<sup>6</sup> *Jefferson’s Manual*, Sec. XXXIV (reprinted in H. Doc. 108-241, pp. 240-42 (108<sup>th</sup> Cong. 2<sup>nd</sup> Sess. 2005); see Gold & Gupta, *supra*, at 214 (“This motion [for the previous question] was a well-entrenched tradition among legislatures of the time: It had been recognized by the British Parliament since 1604, by the Continental Congress, and by the House of Representatives, which still observes it to this day.”); see also, Remarks of Senator Robert M. Byrd in 151 Cong. Rec. S5484 (daily ed. May 19, 2005) (describing the history of the previous question as a rule of parliamentary procedure).

<sup>7</sup> *XI Journals of Continental Congress, 1774-1789*, 533 at 534-35 (1908) (emphasis added); see Remarks of Senator Paul Douglas, 103 Cong. Rec. S6677 (daily ed. May 9, 1957); see Joseph Cooper, *The Previous Question: Its Standing as a Precedent for Cloture in the United States Senate*, S. Doc. No. 104, 87<sup>th</sup> Cong., 2<sup>nd</sup> Sess., pp. 4, 9, n.3i (1962) (“In the Continental Congress where the previous question rule was put in negative form, a victory for 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.”).

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.<sup>8</sup>

Thomas Jefferson presided over the Senate during his four years as John Adams’ Vice President. Jefferson compiled what became known as *Jefferson’s Manual* of parliamentary procedure under the rules of the Senate.<sup>9</sup> “The *Manual* is regarded by English parliamentarians as the best statement of what the law of Parliament was at the time Jefferson wrote it.”<sup>10</sup> In his *Manual*, Jefferson described the operation of a previous question motion under Rule IX, as follows: Sec. XXXIV – THE PREVIOUS QUESTION

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.<sup>11</sup>

As Jefferson explained, “if the previous question be decided affirmatively, to wit, that the main question *now* be put, it would ... be against the decision to postpone or commit.”<sup>12</sup>

The actions of the First Congress are strong evidence of the Framers’ intent and understanding as to how the Constitution should be applied because twenty of its members had been delegates to the Constitutional Convention.<sup>13</sup> “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.’”<sup>14</sup> Noted historian and Madison’s biographer, 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

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<sup>8</sup> Annals of Congress, First Congress, First Session (April 16, 1789) (emphasis added).

<sup>9</sup> *Jefferson’s Manual*, Reprinted in H. Doc. 108-241 (108<sup>th</sup> Cong. 2<sup>nd</sup> Sess., pp. 123-330) (2005).

<sup>10</sup> *Id.* at 125 (footnote 1).

<sup>11</sup> H. Doc. 108-241 at p. 240-41.

<sup>12</sup> *Jefferson’s Manual*, Sec. XXXIII – Privileged Questions (emphasis in original), H. Doc. 108-241 at p. 227; see also p. 233.

<sup>13</sup> *Clemons v. United States Dep’t. of Commerce*, --- F. Supp. 2d ---, 2010 WL 2732610 (N.D. Miss. 2010) (three judge district court); *Bowsher v. Synar*, 478 U.S. 714, 723-24 (1986).

<sup>14</sup> *Marsh v. Chambers*, 463 U.S. 783, 790 (1983) (quoting *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 297 (1888)); see also *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.”).

question.”<sup>15</sup> The Senate’s previous question rule was invoked ten times during that seventeen-year period in which the rule remained in effect, from 1789 until 1806.<sup>16</sup>

The Senate’s previous question rule was, however, eliminated in 1806, apparently at the suggestion of Aaron Burr. Burr observed in his farewell address as Vice President to the Senate that the Senate rules were excessively lengthy and complex and needed simplification. He thought that the previous question motion was unnecessary and might be eliminated, because it had been invoked only once during his four-year term as Jefferson’s Vice President (1801-1805).<sup>17</sup> 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:

8. While a question is before the Senate, no motion shall be received unless for an amendment, for postponing the question, or to commit it or to adjourn.<sup>18</sup>

The elimination of the previous question motion from the rules of the Senate 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.”<sup>19</sup> “In making the rule change in 1806 that made possible the filibuster – by eliminating the Senate’s previous question rule ... members of the original Senate expressed no commitment to a right of extended debate.” Binder & Smith, *supra* at 33-34 (citing the Journal of the Senate, p. 231 (1806)).

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<sup>15</sup> Irving Brant, *Absurdities and Conflicts in Senate Rules are Outlined*, Wash. Post, Jan. 2, 1957 (reprinted in 103 Cong. Rec. 17 (1957)).

<sup>16</sup> See Remarks of Senator Robert M. Byrd, 151 Cong. Rec. S5485 (daily ed. May 19, 2005); *but see* Remarks of Senator Paul Douglas, *The Previous Question in the Senate*, 103 Cong. Rec. S6669-88 (daily ed. May 9, 1957) (reporting based on Irving Brant’s research, that the previous question motion had been invoked four times between 1789 and 1806); Remarks of Senator Paul Douglas, 107 Cong. Rec. S242-56 (daily ed. Jan. 5, 1961) (same).

Scholars have debated whether the previous question motion was “designed as a cloture mechanism,” or as a method of “avoiding undesired discussion and/or decisions.” See Joseph Cooper, *The Previous Question: Its Standing as a Precedent for Cloture in the Senate of the United States*, S. Doc. No. 104 (87<sup>th</sup> Cong., 2<sup>nd</sup> Sess.) (1962). The distinction is only of academic interest because it is undisputed that if the previous question motion was adopted by a majority vote, the effect was to end debate and bring the main question to an immediate up-or-down vote. *Id.* As Dr. Cooper (a political science professor at Harvard and a proponent of the view that the previous question motion was designed as a method of avoiding a decision on the main question, rather than as a procedure for ending debate and bringing the main question to an immediate vote) has acknowledged in the 1789-1806 time period, “the Senate appears to have accepted the view that the proper result on an affirmative decision was an end to debate and an immediate vote on the main question. This is what seems to have occurred in the three instances in which the previous question was determined affirmatively in the Senate.” *Id.* at 9; *see also* footnote 31 at page 9 (“In the Continental Congress where the previous question by 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.”).

<sup>17</sup> *I Memoirs of John Quincy Adams*, p. 365 (Phil. 1874) quoted in Joseph Cooper, *The Previous Question*, S. Doc. No. 104 at 4, and in Sarah A. Binder & Stephen S. Smith, *Politics or Principle? Filibustering in the United States Senate*, 33-34 (1997) (citing the Journal of the Senate, p. 231 (1806)); Gold & Gupta, *supra* at 215.

<sup>18</sup> Gold & Gupta, *supra*, at 216 n.34.

<sup>19</sup> Beeman, *supra* at 412; *see also*, Remarks of Senator Byrd, *supra* at S5485; Gold & Gupta, *supra*, at 215-16.

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. At least thirty-five years were to elapse before a member of the Senate took advantage of the absence of the previous question motion to prevent a vote in the Senate by a filibuster. The first filibuster did not take place until 1837 or 1841, 50 years after the Constitution was adopted.<sup>20</sup> As Norman J. Ornstein recently testified at a hearing of the Senate Rules Committee, “unlimited debate in the Senate was ... a historical accident, not an objective of the Framers.”<sup>21</sup>

Filibusters were relatively rare during the 19<sup>th</sup> and the first part of the 20<sup>th</sup> Century. There were a total of only 16 filibusters in the sixty years between 1840 and 1900 (an average of one every four years), and an additional 17 filibusters between 1900 and 1917, when the predecessor of the current Senate filibuster rule was adopted.<sup>22</sup>

“[I]n the second decade of the 20<sup>th</sup> century, two key filibusters – one in 1915 and one in 1917 – led to the adoption of the ‘cloture rule.’ In 1915, there was a successful filibuster lasting 33 days of the Wilson Administration’s Ship Purchase Act, under which German ships in American ports would have been purchased. More significantly, in 1917, there was a successful filibuster, lasting 23 days, of the Wilson Administration’s bill to arm American Merchant Ships” despite the sinking of the Lusitania by a German U-boat in 1916, followed by the disclosure in 1917 of the Zimmerman Telegram to the Mexican government.<sup>23</sup>

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.<sup>24</sup> Public pressure forced the Senate to adopt the predecessor of the current cloture rule in March, 1917, a month before war was declared on Germany in April of 1917.

The purpose of the 1917 cloture rule was not to *guarantee* a minority in the Senate a right to obstruct the business of the Senate by engaging in unlimited debate, but to fill the gap in the Senate rules by giving the Senate, for the first time since 1806, a method of limiting debate.<sup>25</sup>

Instead of reinstating the previous question motion, the Senate adopted a rule that allowed two-thirds of the senators present and voting (which at the time could have been as few as 33 senators – *i.e.*, two-thirds of a quorum of 49 of 96 senators) to end debate on “a measure” by voting for a motion for cloture.<sup>26</sup>

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<sup>20</sup> According to the Congressional Research Service, “the 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.” Democratic Study Group, *A Look at the Senate Filibuster*, DSG Special Report No. 103-28, at p. 5 (June 13, 1994) (hereinafter cited as DSG, *A Look at the Senate Filibuster*). Gold & Gupta, *supra* at 216, suggest that the first filibuster may have occurred as early as 1837.

<sup>21</sup>

<sup>22</sup> See Democratic Study Group, *A Look at the Senate Filibuster*, DSG Special Report No. 103-28, at p. 5 (June 13, 1994) (hereinafter cited as DSG, *A Look at the Senate Filibuster*), Appendix B; see also S. Print 99-95, *Senate Cloture Rule*, pp. 37, *et seq.* (listing “Outstanding Senate Filibusters From 1841 to 1984”) (1985).

<sup>23</sup> DSG, *A Look at the Senate Filibuster*, *supra* at 6; Gold & Gupta, *supra*, at 217-19.

<sup>24</sup> Remarks of Senator Robert M. Byrd, 151 Cong. Rec. S5485 (daily ed. May 19, 2005).

<sup>25</sup> See Irving Brant, *Absurdities and Conflicts in Senate Rules*, *supra* (“In 1917 to check filibusters, a ‘cloture’ rule was adopted.”).

<sup>26</sup> S. Print 99-95, *Senate Cloture Rule*, pp. 105-112 (1985); Byrd, *supra*, at S5485.

The rule was drafted by a bipartisan committee ‘whose stated purpose was to terminate successful filibustering’ ... but the committee made a mistake, one omission, leaving a loophole ... While Rule 22 made cloture possible on any pending measure – any bill that had been brought to the floor to be dealt with next – other Senate rules [*i.e.*, Rule VIII] required a motion and a vote to *make* a measure pending and the 1917 rule neglected to monitor such a vote.

A senator ... could therefore begin talking as soon as a motion was made to bring to the floor a bill they didn’t like – and there was no procedure to impose ‘cloture’ and stop them from talking, and therefore a vote on that motion [to proceed] could never be taken, and the bill would never get to the floor, thus never reach the stage at which cloture could be applied.<sup>27</sup>

The adoption of Rule XXII was “more symbolic than real,” and in practice had only very limited effect in ending filibusters. “Between 1917 and 1927, cloture was voted on only ten times and it was adopted only four times. Between 1931 and the enactment of the Civil Rights Act of 1964, cloture was seldom sought and only twice obtained.”<sup>28</sup>

The Senate filibuster rule has been amended only when its continued existence has been threatened.<sup>29</sup> 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. After the civil rights bill failed, “Richard Russell was in a position to exact vengeance on those who had dared to try liberalizing the cloture rule. Suggesting ‘to his co-horts that the opposition needed to be taught a lesson’ ... [Russell] pushed through a ‘compromise’ on cloture .... Under Russell’s ‘compromise’ cloture would now require, no matter how many senators were present, the votes of two-thirds of the entire Senate – sixty-four votes ... [making] its walls actually higher than before.”<sup>30</sup> As a *quid pro quo* for raising the bar, Rule XXII was expanded to allow cloture on any subject that required a vote of the Senate.

The rules of the Senate, as amended in 1949, were silent when it came to the question of whether the rules of the Senate continued from one Congress to the next or expired at the end of each Congress as did the rules of the House. In 1957, Vice President Nixon rendered an advisory opinion that raised the specter that the Senate filibuster rule might be amended by a majority vote. Vice President Nixon said that:

It is the opinion of the Chair that while 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

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<sup>27</sup> Robert A. Caro, *The Years of Lyndon Johnson (Vol. 3) Master of the Senate*, p. 93 (2002), *see also* pp. 216-17 (citing a ruling by Arthur Vandenberg as president pro tem 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)”).

<sup>28</sup> Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 *Stan. L. Rev.* 181, 198-99 (1997).

<sup>29</sup> S. Print 99-95, *Senate Cloture Rule – Part 2*, p. 104 (Legislative History of Paragraph 2 of Rule XXII) (1985); Byrd, *supra* at S5485; Fisk & Chemerinsky, *supra*, at 209-10.

<sup>30</sup> Caro, *supra* at 217-18.

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. It is also the opinion of the Chair that section 3 of rule 22 in practice has such an effect.*<sup>31</sup>

Vice President Hubert Humphrey issued a similar ruling in 1969, but his ruling was overturned by the Senate on a point of order.<sup>32</sup>

Faced with the threat that the Senate filibuster rule might be overturned by a majority vote, Lyndon Johnson, who was the Senate majority leader, derailed a resolution by Senator Clinton Anderson to amend the rules of the Senate by a simple majority vote. Senator Johnson negotiated a compromise and Rule XXII was amended to reduce the number of votes required for cloture from 2/3rds of the Senate to two-thirds of a quorum, and to extend the cloture rule to include motions to amend the rules of the Senate. In return, Rule V was amended to declare – for the first time – that the rules of the Senate were “continuing” and could be amended only as provided in Rule XXII. The effect of these amendments was to make the rules of the Senate expressly binding on future generations of senators and to prevent the rules from being amended by majority vote.<sup>33</sup>

In 1975, the tabling by the Senate of a point of order by Senator Mansfield objecting to a motion by Senator Mondale to amend the rules by majority vote again raised the specter that the filibuster rule might be amended by a majority vote rather than a 2/3rds vote, and triggered another compromise. Rule XXII was amended to fix the *minimum* number of votes required to adopt a motion for cloture at three-fifths of the Senate (*i.e.*, 60), instead of two-thirds of a quorum (which could require as many as 67 or as few as 34 votes). But the *quid pro quo* was the reversal by a vote of the Senate of the “precedent” that had been set when the Senate voted to table Senator Mansfield’s point of order based on Rule V. Motions to amend the rules of the Senate were also excluded from the 60 vote rule and continue to require a 2/3rds vote of senators present and voting.<sup>34</sup>

## **B. The Majority Cannot Amend Rule XXII.**

It is impossible as a practical matter for a 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 can be amended only “as provided in these rules,” which means by a 2/3rds vote under Rule XXII), (2) Rule VIII (which provides that debate on a bill or resolution cannot *begin* without the unanimous consent

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<sup>31</sup> 103 Cong. Rec. 178 (Jan. 4, 1957) (quoted in S. Prt. 99-95, *Senate Cloture Rule* at p. 114 (99<sup>th</sup> Cong. 1<sup>st</sup> Sess. 1985) (emphasis added); see Caro, *supra* at 854-58.

<sup>32</sup> Fisk & Chemerinsky, 49 Stan. at 212 (“[I]n 1969, Vice President Hubert Humphrey ... rul[ed] ... that a majority of the Senate had a right to cut off debate and proceed on changing the rules; however, the Senate voted to overturn his ruling.”).

<sup>33</sup>

<sup>34</sup> S. Print 99-95, at pp. 119-21; Testimony of Walter F. Mondale, Senate Rules Committee Hearing on *Examining the Filibuster: The Filibuster Today and its Consequences* (May 19, 2010).

or adoption of a motion to proceed, which is subject to being filibustered), and (3) the requirement in Rule XXII that debate cannot be ended on a proposal to amend the rules of the Senate without a two-thirds vote of senators present and voting – *the same number of votes in the Senate that would be required to amend the Constitution*.<sup>35</sup>

There have been many attempts to reform the rules of the Senate to allow a majority to end filibusters. All of these attempts have been unsuccessful. The first attempt was made by Henry Clay in 1841, who proposed that the previous question rule be restored. Clay’s motion was defeated by the threat of a filibuster.<sup>36</sup> All subsequent attempts have also failed.<sup>37</sup>

In 1995, Senator Tom Harkin (D. Iowa) proposed an amendment to Rule XXII, even though Democrats were then in the minority. His amendment would have allowed 51 senators to invoke cloture after earlier cloture motions had failed. Senator Harkin’s motion was tabled.<sup>38</sup> Senator Harkin introduced a similar proposal to amend Rule XXII in February of 2010. S. Res. 416, 156 Cong. Rec. S571-74 (daily ed. Feb. 11, 2010). 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 the Democratic Majority Leader Harry Reid, who said: “I’m totally familiar with his [Senator Harkin’s] idea.... It takes 67 votes, and that kind of answers the question.”<sup>39</sup>

### 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 as a practical matter for the Senate to pass any bill, resolution or presidential appointment over the objections of a single senator without 60 votes.

There were only 60 filibusters (an average 2 per year) in the first 30 years after the adoption of the cloture rule in 1917 (1918-1949), and a total of only 27 filibusters (an average of 1.4 per year) during the next 20 years (from 1950-1969).

In the last 20 years, however, the filibuster has become the primary weapon of choice of the minority party in the Senate. Both Democrats and Republicans have used the threat of a filibuster to prevent the majority party from passing legislation or confirming presidential nominees to the federal courts and other offices requiring Senate confirmation.

The number of cloture votes in the Senate has *doubled* in the last decade and is triple the number of cloture votes 20 years ago.<sup>40</sup> The number of formal cloture *motions*<sup>41</sup> has increased by 100% since 2006. In the first half of the 111<sup>th</sup> Congress

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<sup>35</sup> U.S. Const. Art. V.

<sup>36</sup> Fisk & Chemerinsky, *supra* at 191.

<sup>37</sup> See Senator John Cornyn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, 27 Harv. J.L. & Pub. Pol’y 181, 212 (2003) (“The Senate has previously considered at least thirty proposals to eliminate filibusters altogether.”).

<sup>38</sup> 141 Cong. Rec. S430 (daily ed. Jan. 5, 1995).

<sup>39</sup>

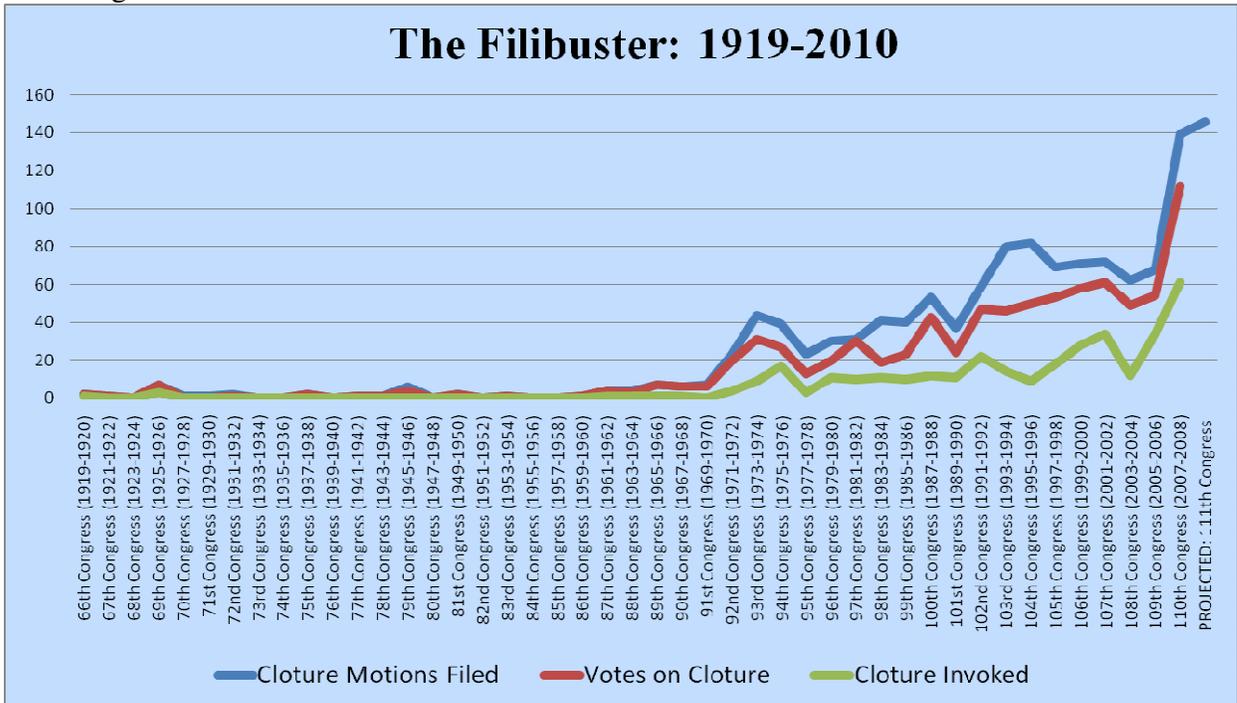
<sup>40</sup> Faiz Shakir, *et al.*, *Democracy Subverted – The Progress Report*, The Center for American Progress, January 25, 2010 (available at <http://pr.thinkprogress.org/2010/01/pr20100125>).

<sup>41</sup> The number of cloture *motions* drastically understates the actual impact of Rule XXII on the legislative process. “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

(2009), there were a record 67 filibusters – *double the number of filibusters that occurred in the entire 20-year period between 1950 and 1969*. The 111<sup>th</sup> Congress is well on its way to match or eclipse the 139 motions filed in the 110<sup>th</sup> Congress (2007-2008), and has already surpassed the entire number of cloture motions filed in the 109<sup>th</sup> Congress (2005-2006).

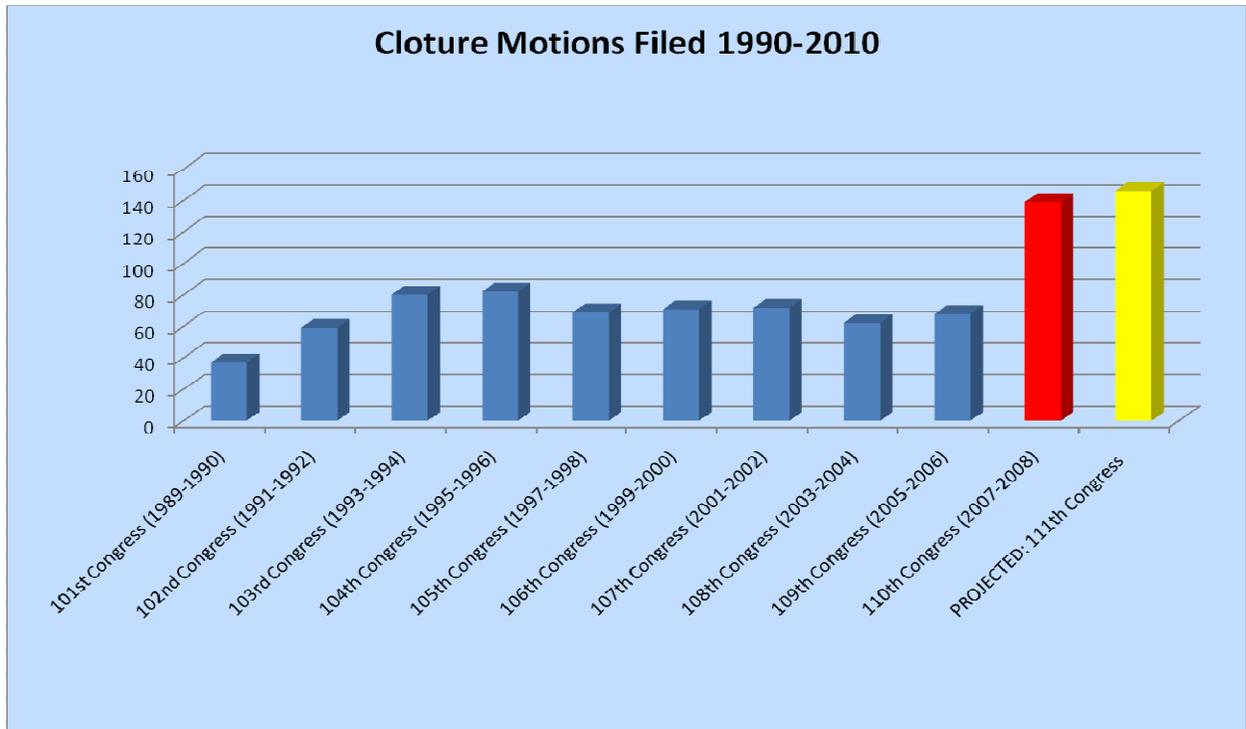
“According to statistics maintained by the Senate Library [as of May, 2010] ... 400 bills [that] passed the House in this [111<sup>th</sup>] Congress ... have not been considered by the Senate. Of these, 184 had [been] passed [in the House by a voice vote] and another 149 passed with a majority of House Republicans voting yes....”<sup>42</sup>

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



threat to filibuster; any credible threat to filibuster is a filibuster ... and is largely silent [and] invisible.” Fisk & Chemerinsky, *supra*, at 203.

<sup>42</sup> Statement of Chairman Charles E. Schumer, Senate Rules Committee Hearing on *Examining the Filibuster: The Filibuster Today and its Consequences* (May 19, 2010).



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 supermajority requirement for the enactment of most legislation.”<sup>43</sup> They also concluded that “The 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.”<sup>44</sup> What was true in the 1997 is even more true today as the number of filibusters has skyrocketed and the Senate has become even more partisan and polarized.<sup>45</sup>

The filibuster is also responsible for much of the widespread public anger at the gridlock in Congress and the belief among much of the general public that the “government no longer works” for average Americans. This loss of confidence in government and particularly in Congress on the part of a majority of Americans, has “sharpened rather than blunted” the need for federal courts to examine the constitutionality of the supermajority requirement in Rule XXII.<sup>46</sup>

<sup>43</sup> Fisk & Chemerinsky, *supra* at 213.

<sup>44</sup> *Id.* at 215.

<sup>45</sup> See Testimony of Norman J. Ornstein, Senate Rules Committee Hearing, *Examining the Filibuster: The Filibuster Today and its Consequences* (May 19, 2010) (“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.”).

<sup>46</sup> *INS v. Chadha* 462 U.S. 919, 944 (1983).

## PART II: SUMMARY OF CONSTITUTIONAL ARGUMENTS

The principle of majority rule was both an essential feature of a republican form of government and a settled norm of parliamentary behavior at the time of the adoption of the Constitution and is reflected in many of its 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.”<sup>47</sup> Under the Presentment Clauses, only a majority of a quorum of the House or Senate is required to “pass” a bill<sup>48</sup> or resolution<sup>49</sup> prior to its presentment to the President. When the Framers of the Constitution intended that there be exceptions to the general principle of majority rule, those exceptions were expressly stated in the text of the Constitution. These exceptions were intended to address a limited number of unusual issues that were deemed by the Framers to be of such gravity and importance (such as impeachment of a president or expulsion of a member of Congress) that they should not be left to the vote of a simple majority.

The Framers of the Constitution had also experienced first hand the paralysis that had resulted from the supermajority voting provisions of the Articles of Confederation that had made it impossible for Congress to act without the votes of nine of thirteen states. They deliberately rejected supermajority voting requirements in the new Constitution both because they had been proven to be unworkable and because they would have amounted to a “reversal” of “the fundamental principle of free government” of majority rule.<sup>50</sup> A supermajority voting requirement in the new Constitution would have meant, as Alexander Hamilton explained in *The Federalist No. 22*,<sup>51</sup> that “the majority, in order that something may be done, must conform to the views of the minority; and thus . . . the smaller numbers will overrule the greater.” As Hamilton correctly predicted, “[i]n 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.”<sup>52</sup>

The Supreme Court ruled over a century ago that while the Constitution gives each house of Congress the power to “Determine the Rules of its proceedings,”<sup>53</sup> neither house “can by its rules ignore constitutional restraints.”<sup>54</sup>

The 60-vote supermajority requirement in Rule XXII is unconstitutional because it conflicts with the Constitution in seven ways.

*First*, Rule XXII’s supermajority vote requirement both exceeds the authority granted by Article I, Section 5, clause 2 to “Each House [to] . . . Determine the Rules of its Proceedings” and also conflicts with that provision. The purpose of that provision was

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<sup>47</sup> Art. I, § 5.

<sup>48</sup> Art. I, § 7, cl. 2.

<sup>49</sup> Art. I, § 7, cl. 3.

<sup>50</sup> See *The Federalist Nos. 22, 58 and 75*.

<sup>51</sup> *The Federalist No. 22*, at 140-41 (Cooke ed. 1961).

<sup>52</sup> *Id.* (quoted in full at pp. 33 below).

<sup>53</sup> Art. I, sec. 5, clause 2.

<sup>54</sup> *United States v. Ballin*, 144 U.S. 1, 5 (1892); *Vander Jagt v. O’Neill*, 699 F.2d 1166, 1170 (D.C. Cir. 1983) (“[I]f Congress should adopt internal procedures which ‘ignore constitutional restraints’ . . . it is clear we must provide remedial action.”).

to authorize each house to adopt *procedural* rules by *majority* vote,<sup>55</sup> not to adopt rules that prohibit a *future* majority of the Senate from amending its own rules without a two-thirds vote, or to adopt a rule that allows the minority in the Senate to dictate the ultimate outcome of bills, resolutions and presidential appointments which they oppose<sup>56</sup> – or a rule that conflicts with *other* provisions of the Constitution.<sup>57</sup>

*Second*, the Supreme Court has recognized that “any departure from strict majority rule gives disproportionate power to the minority.”<sup>58</sup> By giving disproportionate power to the minority in the Senate, 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 those of the minority living in the less populous states that was “exhaustively considered” by the Framers and resulted in the Great Compromise.<sup>59</sup> The rule also violates the provisions in Article I and Article V that guarantee each state equal representation in the Senate. The rule prevents a majority of states from passing bills, resolutions or approving presidential nominations. Instead of allowing a simple majority of 51 senators representing a majority of states (26) to pass a bill, the rule requires at least 60 votes of senators from at least 30 states to pass a bill or approve a presidential nomination. Conversely, the rule increases the power of a minority of states by reducing the number of votes required to block a bill, resolution or presidential appointment in the Senate, from 50 (representing at least 25 states) to 41 (from 21 states that may contain as little as 11% of the population of the Country).

*Third*, the rule conflicts with the Quorum Clause (Art. I, § 5) by preventing the Senate from “do[ing] Business without the *presence* of at least 60 senators to vote in favor of motions for cloture without which the Senate can neither *begin* debate nor can it *end* debate and bring a bill or appointment to a final vote over the objections of a single senator.

*Fourth*, the rule conflicts with the Presentment Clauses in Article I, § 7 by effectively requiring a minimum of 60 affirmative votes in the Senate – rather than a simple majority<sup>60</sup> of a quorum<sup>61</sup> – to “pass” a bill<sup>62</sup> or resolution<sup>63</sup> over the objections of a single senator 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 two exceptions that have been added by

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<sup>55</sup> John C. Roberts, *Majority Voting in Congress: Further Notes on the Constitutionality of the Senate Cloture Rule*, 20 J.L. & Pol. 505 (2004). John Cornyn, *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, *supra*, 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 ... [s]uch 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.”).

<sup>56</sup> See *U.S. Term Limits v. Thornton*, 514 U.S. 779, 833-34 (1995); *Cook*, 531 U.S. at 523 (holding that the power delegated to states by Art. I, sec. 4, cl. 1 to prescribe the manner of elections of members of Congress was limited to the establishment of procedural regulations and not to dictate outcomes).

<sup>57</sup> *United States v. Ballin*, *supra*.

<sup>58</sup> *Gordon v. Lance*, 403 U.S. 1, 6 (1971).

<sup>59</sup> *Chadha*, 462 U.S. at 951.

<sup>60</sup> 26 of 51 senators.

<sup>61</sup> 51 of 100 senators.

<sup>62</sup> Art. I, § 7, cl. 2.

<sup>63</sup> Art. I, § 7, cl. 3.

amendment. The exceptions in the Constitution are *exclusive* and specify the only circumstances under which the vote of a simple majority is *not* sufficient, and a two-thirds vote is required.

*Sixth*, the rule conflicts with the Advice and Consent Clause in Article II, Section 2, clause 2 by allowing a minority of 41 senators to deprive the majority of senators of their rights to vote to consent to the appointment of presidential nominees.

*Seventh*, the rule conflicts with the basic assumption reflected by Article I, Section 3, clause 4 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 vote would simply die. Although the Vice President is not a member of the Senate, the Framers chose instead to make an exception to the rule that prohibited the Vice President from voting in the Senate by allowing the Vice President to create a majority in favor of a bill by voting to break a tie. Rule XXII is inconsistent with the Framers’ assumption that issues in the Senate would be decided by majority vote, and deprives the Vice President of one of only two powers assigned to that office by the Constitution.<sup>64</sup>

In addition, the provision of Senate Rule V that declares that the rules of the Senate do not expire at the end of each Congress, but continue from one Congress to the next, and are, therefore, binding on successive generations of senators, is also unconstitutional *when combined with* the provision in Rule XXII requiring a two-thirds vote to amend the rules of the Senate. The combination of the two rules violates the fundamental constitutional principle that one Congress cannot, without amending the Constitution in the manner prescribed as provided in Article V, bind successive generations of senators by making it impossible for them to amend or abolish the rules of the Senate by majority vote.

#### A. **Rule XXII exceeds the rule-making authority of the Senate.**

Although Art. I, § 5, cl. 2 of the Constitution grants each house the authority to “Determine the Rules of its Proceedings,” this rule-making authority is not absolute or unlimited, and cannot be used to violate other provisions of the Constitution.<sup>65</sup>

No one would argue, for example, that a majority of senators could adopt a rule that stated that no treaty could be ratified without a 3/4ths vote of the Senate instead of the 2/3rds vote specified in Art. II, § 2, cl. 2, or to adopt a rule prior to the impeachment trials of Andrew Johnson or Bill Clinton that reduced the number of votes in the Senate required for a conviction from the 2/3rds specified in Article I, § 3, cl. 5, to a vote of simple majority, or to adopt a rule that stated expressly that no bill could be sent to the House or presented to the President without 60 votes instead of a vote of the simple majority. And if the Senate cannot adopt a rule that repeals or supersedes the majority vote provision in Art. I, § 7 directly, surely the Senate cannot accomplish the same result indirectly by adopting a cloture rule that has the same practical effect.

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<sup>64</sup> Art. I, § 3, cl. 4.

<sup>65</sup> *United States v. Ballin*, 144 U.S. 1, 5 (1892) (“The Constitution empowers each house to determine its rules of proceedings [but] it may not by its rules ignore constitutional restraints.”).

The rules of the Senate cannot be totally immune from judicial review; otherwise 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 100 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.”<sup>66</sup> The D.C. Circuit 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.”<sup>67</sup>

Moreover, there is no reason to believe that the power delegated to each house by Article I, § 5 to make its own “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” 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.”<sup>68</sup> In *Thornton*, the Court held invalid attempts by Arkansas to directly influence the election of senators and representatives by making their prior service in Congress a disqualification for reelection. In *Cook*, the Court struck down a Missouri constitutional provision that attempted to influence the election of members of Congress indirectly by stating on the ballot whether the candidate had pledged to support term limits.<sup>69</sup> The Court held that both attempts fell “outside the grant of authority” to the states in Section 4 of Article I to “prescribe the times, places and manner of elections of members of Congress.” In *Cook*, the Court emphasized that it had already “made [it] clear in *U.S. Term Limits*, [that] ‘the Framers understood the Elections Clause as a grant of authority to issue *procedural regulations*, and not as a source of power to dictate electoral outcomes ....’”<sup>70</sup>

Rule XXII is far more than a mere “procedural regulation.” It vests in a minority of senators the power to dictate the outcome of legislation in the Senate by preventing the

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<sup>66</sup> *Ballin*, 144 U.S. at 5 (emphasis added). This principle has been repeatedly applied by the Court to invalidate a wide range of legislative actions that were based on other provisions of the Constitution that are at least as broad as the delegation of rule-making power in Art. I, § 5. See *Powell v. McCormack*, 395 U.S. 486 (1969) (holding that the House could not use the power granted by Art. I, § 5, cl. 1 to judge the qualifications of its members to add an additional qualification to the exclusive list of qualifications in Art. I, § 2, cl. 2); *Chadha*, 462 U.S. at 919 (holding that Congress could not use its power in Art. I, § 8, cl. 4 to establish uniform laws of naturalization to justify a one-house veto over an INS decision in violation of the Presentment Clause in Art. I, § 7); *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); see also *U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995) (holding that a state cannot use its power under Art. I, § 4, cl. 1 to “prescribe the times, places and manner of elections” of members of Congress to add term limits in violation of the exclusive lists of qualifications stated in Art. I, §§ 2 & 3); *Cook*, 531 U.S. at 510 (holding that a state could not use its power under Art. I, § 4, cl. 1 to prescribe “the times, places and manner of holding elections” of members of Congress to “instruct” its members of Congress to support a constitutional amendment imposing term limits).

<sup>67</sup> *Vander Jagt v. O’Neill*, 699 F.2d 1166, 1170 (D.C. Cir. 1983) (quoting *Ballin*, 144 U.S. at 6); *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.”).

<sup>68</sup> *U.S. Term Limits v. Thornton*, 514 U.S. 779, 833-34 (1995) (emphasis added); *Cook v. Gralike*, 531 U.S. 510, 523 (2001).

<sup>69</sup> *Cook*, 531 U.S. 510.

<sup>70</sup> *Id.* at 523 (emphasis added).

majority from debating or voting on legislation or presidential nominees. Rule XXII, therefore, exceeds the rule-making authority granted to the Senate in Article I, § 5 for the same reasons that the state statute in *Thornton* 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” procedure that resulted in the Great Compromise.<sup>71</sup> To reconcile the differences between the interests of large states which contained a majority of the population, and those of the minority in the smaller states, the Framers were forced to compromise the democratic principle of majority rule. They gave the small states, regardless of size, equal representation in the Senate by two senators chosen by their respective state legislatures. A majority of the first Senate was elected by the legislatures of seven states that contained only 28% of the population, based on the first Census taken in 1790. Senators from these seven small states could out-vote senators from the six largest states that contained 72% of the population.

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 among the states in the Senate in Article I, Sec. 3. The Great Compromise vested decision-making power in the Senate 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. Taken together, these provisions gave a majority of states the power to pass bills, resolutions or approve presidential nominees by a majority vote of their respective senators. Rule XXII is inconsistent with the constitutional scheme because it increases from 26 to at least 30 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 25 to 21 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 different states. At the time of the Great Compromise, the legislatures of seven states that contained 28% of the population elected 54% (14) of the 26 seats in the first Senate. By 2000, 18% of the U.S. population living in 26 states elected 52% of the Senate. Rule XXII exacerbates the unequal representation in the Senate even further by giving 11% of the population living in just 21 states the power to elect 42 senators with the power to veto all bills, resolutions and presidential appointments.

**C. Rule XXII also conflicts with the Quorum Clause.**

Article 1, § 5 of the Constitution specifies that:

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<sup>71</sup> *Chadha*, 462 U.S. at 951.

**[A] Majority** of each [house] shall constitute a Quorum *to do Business*; but a smaller Number may adjourn ... and may be authorized to compel the Attendance of absent Members.... (emphasis added).

Under the Articles of Confederation, the “United States *in Congress*” was not a union of states, but was, as the name implies, a “confederacy” of thirteen sovereign states.<sup>72</sup> “Each state retain[ed] its sovereignty, freedom, and independence, and every power and jurisdiction, and right ... not by this confederation expressly delegated to the United States in Congress assembled.”<sup>73</sup> Each state had one vote (Art. V) in the “United States *in Congress*.”<sup>74</sup> That Congress was hamstrung and could take no action without the approval of at least nine states.<sup>75</sup> Congress could not (1) engage in war, (2) enter into treaties, (3) coin money, (4) ascertain the sums necessary for defense, (5) issue bills, (6) borrow money, (7) appropriate money, (8) agree on the number of naval vessels or (9) of the size of land and sea forces, or (10) appoint a commander-in-chief of the army or navy “unless nine states assent to the same.”<sup>76</sup>

This widespread dissatisfaction with the Articles of Confederation led to the convening of the Constitutional Convention in Philadelphia in 1787. Unlike the Articles of Confederation, the new Constitution 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 a quorum of the House and Senate<sup>77</sup> and for passage of bills and resolutions<sup>78</sup> precisely because a supermajority requirement would have been inconsistent with this democratic principle.<sup>79</sup>

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,<sup>80</sup> and the Senate.<sup>81</sup> On August 10, 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. *Id.* at 251. 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 law” was defeated (“passed in the negative”) by a vote of 9 to 2.<sup>82</sup> On August 16, 1789, Daniel Carroll of Maryland made the opposite argument that a quorum should consist of more than a simple majority. He “reminded the Convention of the great difference of interests among the States, and doubts the propriety ... of letting a majority be a quorum.”<sup>83</sup> But Mr. Carroll did not move to amend the draft, nor did anyone at the Convention respond to Mr. Carroll’s statement.

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<sup>72</sup> Art. I.

<sup>73</sup> Art. II.

<sup>74</sup> Art. V.

<sup>75</sup> Art. IX, ¶ 6.

<sup>76</sup> Art. IX, ¶ 6.

<sup>77</sup> Art. I, § 5.

<sup>78</sup> Art. I, § 7, cl. 2 and cl. 3.

<sup>79</sup> See The Federalist Nos. 22, 58, 75.

<sup>80</sup> 2 Max Farrand, *The Records of the Federal Convention of 1787*, at 140-41 (¶ 12) (1937 rev. ed.).

<sup>81</sup> *Id.* at 141, 155, 165 (July 24-July 26, 1787); *Id.* at 180 (Aug. 6).

<sup>82</sup> *Id.* at 244, 253.

<sup>83</sup> *Id.* at 305 (*Madison’s Journal*).

On September 8, 1789, the question of a quorum was again raised by James Madison during the debate on the question of whether the President's treaty-making power should be conditioned on a two-thirds vote of the Senate. "Madison moved that the Quorum of the Senate consist of 2/3 of all the members."<sup>84</sup> Madison's motion was defeated ("passed in the negative") by 5 ayes and 6 nays.<sup>85</sup>

The final wording of the Quorum Clause, was drafted by the Committee on Style and approved by the Convention on September 17, 1789.<sup>86</sup>

In *The Federalist No. 58*, James Madison responded to objections that the new Constitution should have required the presence of "more than a majority ... for a quorum," 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 inconveniencies 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.***<sup>87</sup>

Long before the present controversy, the Supreme Court held that the language in Article I, § 5 which specifies 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:*

The Constitution provides that a 'majority of each [house] shall constitute a quorum to do business.' ... [W]hen a majority are present, the house is in a position to do business. Its capacity to transact business is then established, created by the mere presence of a majority, ***and does not***

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<sup>84</sup> *Id.* at 549.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 614. 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).

<sup>87</sup> *Federalist No. 58*, at 396-97 (emphasis added). The notorious "Cornhusker Kickback" and the "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 of the health care debate. 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 a third 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 Ala. "Holding Up Obama Nominees for Home-State Pork," *Wash. Post*, Feb. 6, 2010.

*depend upon the disposition or assent or action of any single number or fraction of the majority present.*<sup>88</sup>

By providing that each house would have the power “to do Business” whenever a simple majority of its members is present, the Quorum Clause merely reflected the prevailing rule of all parliamentary bodies at the time the Constitution was adopted. It is very unlikely that the Framers intended to delegate to either house the power to reverse “the fundamental principle of free government” 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. The supermajority requirement in Rule XXII conflicts with the presentment clauses in Article I, § 7, cl. 2 and cl. 3.**

Article I, § 7 of the Constitution sets forth in detail the steps through which a bill (cl. 2) or a resolution (cl. 3) must go “before it becomes 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 approves, 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 vote of that House it shall become Law*. (Emphasis added).

Every Order, Resolution or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except as 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 Senate and House of Representatives*, according to the Rules and Limitations prescribed in the Case of a Bill. (Emphasis added).

The Supreme Court has said that “[t]he prescription for legislative action in Art. I, §§ 1, 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.”<sup>89</sup>

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

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<sup>88</sup> *Ballin*, 144 U.S. at 5-6 (emphasis added).

<sup>89</sup> *Chadha*, 462 U.S. at 951 (emphasis added).

entire Constitution as originally written.... Nearly nothing was more important to them, for example, than the question of how much influence the various states would have in the passage of law, or what role the President would play in legislating. These and other equally crucial questions were decided by: 1) the “great compromise” that determined the different compositions of the House and Senate; and 2) the Lawmaking Clauses of Article I, Section 7. Deceptively simple on their surface, the 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.<sup>90</sup>*

Some defenders of the filibuster have argued, nevertheless, that because the word “passed” is not explicitly defined in the Presentment Clauses, “the Constitution’s failure to specify a proportion necessary to pass a bill, combined with the delegation of authority of each house [to make rules], suggests that the Constitution permits each house to decide how many members are necessary to pass a bill.”<sup>91</sup>

The Supreme Court has held that Article I, § 7 of the Constitution is to be interpreted in the light of “the general rule of all parliamentary bodies” that prevailed at the time of the adoption of the Constitution “that the act of a majority of a quorum is the act of the body.” *United States v. Ballin*, 144 U.S. at 6. The Framers understood the word “pass” in Article I, § 7 to be synonymous with majority vote. This conclusion is supported by (1) the text of Article I, § 7, (2) the common ordinary meaning of the term “pass” as reflected by dictionaries of the time, (3) the Framers’ usage of the word “pass” in the minutes of the Federal Convention and in Madison’s *Journal*, (4) the rejection by the Federal Convention of proposals to prohibit Congress from passing navigation acts without a 2/3rds vote of both houses; (5) Hamilton’s defense of the majority vote requirements in *The Federalist* Nos. 22, 58, and 75; and (6) over 225 years of unbroken interpretation since the adoption of the Constitution of the word “passed” in Art. I, § 7 by both the Senate and the House.

1. *The General Rule of All Parliamentary Bodies* – The Supreme Court has held that the law-making provisions in Article I, § 7 must be interpreted in the light of

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<sup>90</sup> Jed Rubenfeld, *Rights of Passage: Majority Rule in Congress*, 46 Duke L.J. 73, 78-79 (1996) (emphasis added).

<sup>91</sup> John O. McGinnis and Michael Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 Yale L.J. 483, 486 (1995); Michael J. Gerhardt, *The Constitutionality of the Filibuster*, 21 Const. Comm. 445, 457 (2004) (“No language within the Constitution expressly mandates majority rule in the Senate.”).

“the general rule of all parliamentary bodies” which prevailed at the time of the adoption of the Constitution that “the act of a majority of the quorum is the act of the body.”<sup>92</sup>

The question in *Ballin* was whether a majority of a quorum or a majority of the full House was required to pass a bill. The Court held that a 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.*<sup>93</sup>

The “organic act under which [Congress] is assembled” is, of course, the Constitution. And, since 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.”<sup>94</sup>

The ruling in *Ballin* has never been questioned and remains good law. In 1967, the Supreme Court squarely relied on *Ballin* in determining that a simple majority of the Federal Trade Commission’s quorum could exercise the Commission’s power:

The almost universally accepted common-law rule is ... that ... in the absence of a contrary statutory provision, a majority of a quorum constituted of a simple majority of a collective body is empowered to act for the body. Where the enabling statute is silent on the question, the body is justified in adhering to that common-law rule.<sup>95</sup>

The D.C. Circuit has also followed *Ballin* in a variety of circumstances,<sup>96</sup> as have other courts.<sup>97</sup> For example, in *Vander Jagt v. O’Neill*, 699 F.2d 1166, 1170 (D.C. Cir. 1983),

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<sup>92</sup> *United States v. Ballin*, 144 U.S. 1, 6 (1892); see also Rubenfeld, *Rights of Passage: Majority Rule in Congress*, 46 Duke L.J. at 77 (“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’” (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*, § XLI, in 2 *The Writings of Thomas Jefferson*, *supra*, at 335, 420-21)); *Skaggs*, 110 F.3d at 841 (“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”) (dissenting opinion).

<sup>93</sup> *Id.* (emphasis added). The Court’s view of “the general rule of all parliamentary bodies,” dating to before the adoption of the U.S. Constitution, was correct. See, e.g., William Hakewill, *Modus tenendi Parliamentum, or The Old Manner of Holding Parliaments in England* 93 (London, 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.”); George Petyt, *Lex Parliamentaria, or, A Treatise of the Law and Custom of the Parliaments of England* 165 (1689).

<sup>94</sup> *Id.*

<sup>95</sup> *FTC v. Flotill Prods., Inc.*, 389 U.S. 179, 183-84 (1967) (footnote omitted).

<sup>96</sup> See, e.g., *Au Yi Lau v. INS*, 555 F.2d 1036, 1041 (D.C. Cir. 1977) (majority of quorum of Board of Immigration Appeals may act for the Board); *Public Serv. Comm’n v. Federal Power Comm’n*, 543 F.2d

the D.C. Circuit cited *Ballin* as support for the proposition “that if Congress should adopt internal procedures which ‘ignore constitutional restraints . . .,’ it is clear that we must provide remedial action.”

2. *Plain Meaning from the Text* – It is clear from the text of Article I, § 7 that when the Framers said in Article I, § 7 that a bill must “have passed the House of Representatives and the Senate” before being presented to the President (Art. I, § 7, cl. 2), they meant that the bill must have been approved (*i.e.*, “passed”) by a simple majority vote of a quorum in each house. When the Framers used the word “passed” a second time in § 7 of Article I in describing the procedure for overriding a presidential veto, the Framers added the modifying language requiring that a vetoed bill “pass” the second time by a two-thirds vote before it becomes law.

3. *Contemporary Dictionary Definitions* – Under established rules of construction, words in the Constitution are presumed to have been used according to their common ordinary meanings unless the context indicates that a different meaning was intended by the Framers. In the context of legislation, the common ordinary 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. As Professor Rubinfeld has observed:

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 of the body . . ., it is said to be ‘passed’ by such body....”<sup>98</sup>

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 language requiring a two-thirds vote.

4. *The Minutes of the Federal Convention* – That the Framers used the word “pass” as being synonymous with majority vote is reflected by the *Journal of the Federal Convention*. The rules of the Federal Convention specified that “all questions shall be

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757, 776-77 (D.C. Cir. 1974) (same with respect to FPC), *cert. denied*, 424 U.S. 910 (1976); *WIBC, Inc. v. FCC*, 259 F.2d 941, 943 (D.C. Cir. 1958) (FCC may act on vote of majority of quorum, and this practice is “in accord with the authorities concerning the action of Congress as well as administrative agencies”), *cert. denied*, 358 U.S. 920 (1958).

<sup>97</sup> See, e.g., *Morris v. Commodity Futures Trading Comm’n*, 980 F.2d 1289, 1293-94 (9<sup>th</sup> Cir. 1992) (regarding CFTC); *Tagatz v. Marquette Univ.*, 861 F.2d 1040, 1042 n.\* (7<sup>th</sup> Cir. 1988); *Voss Int’l Corp. v. United States*, 628 F.2d 1328, 1332 (C.C.P.A. 1980) (U.S. Tariff Commission). State courts have applied the same principle of majority rule in interpreting state constitutions. See, e.g., *In re Opinion of the Justices*, 98 A.2d 635, 636 (N.H. 1953) (majority of quorum of State Council responsible for approving gubernatorial appointments sufficient to act for whole); *State ex rel. Garland v. Guillory*, 166 So. 94, 102 (La. 1935) (two-thirds of quorum of each house of state legislature sufficient to amend state constitution and quoting Cooley’s *Constitutional Limitations* for proposition that “[a] simple majority of a quorum is sufficient, unless the Constitution establishes some other rule”).

<sup>98</sup> Rubinfeld, *supra* at 77.

decided by the greater number” of states – *i.e.*, passed by majority vote.<sup>99</sup> The *Journal of the Federal Convention* reflects the term “passed” was used consistently by the Framers to describe the outcome of a vote by a simple majority of the Convention. According to the *Journal*, a motion was either “passed in the affirmative” – which meant that the motion was approved by a majority vote – or “passed in the negative” – which meant that a majority had voted to defeat the motion.<sup>100</sup>

5. *The Debates at the Federal Convention* – The debates at the Federal Convention also reflect that the Framers understood the word “pass” in Article I, § 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 debated 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, § 7. Other than the decision to require a 2/3rds 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.<sup>101</sup>

The Southern states feared that senators and representatives from the New England and Middle Atlantic states would try to force the South to ship goods on Northern ships by imposing protective tariffs on foreign ships, thereby making their freight rates non-competitive with those of Northern ship owners. Charles Pinckney from South Carolina and George Mason from Virginia, among others, urged the Convention to adopt an exception to Article I, § 7 that would prohibit Congress from passing navigation acts without a 2/3rds vote. To satisfy these concerns, the Committee of Detail included in its draft of the Constitution a provision (Art. VII, § 6) that would have excepted navigation acts from the majority vote provisions of Article I, § 7 by expressly prohibiting the passage of navigation acts without a 2/3rds vote of both houses.<sup>102</sup>

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.<sup>103</sup> On August 29, 1787, the Committee of Eleven recommended that “Article VII, Sec. 6 ... be struck out.”<sup>104</sup> Charles Pinckney of South Carolina 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 2/3rds vote of both houses.<sup>105</sup>

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<sup>99</sup> 1 Farrand, *supra*, at 8.

<sup>100</sup> *See, e.g.*, 1 Farrand, *supra*, at 94.

<sup>101</sup> As explained in Section II-E (pp. 57-66), except for the power of Congress in Article I, § 7 to override a presidential veto by a 2/3rds vote, all other instances in which the Constitution prohibited one or both houses of Congress from acting without a 2/3rds vote, did not involve legislation, but other unusual actions of such special importance that the Framers felt should not be decided by a simple majority vote – *e.g.*, the expulsion of a member, ratification of a treaty, the conviction of a president or other officers after an impeachment by the House, or proposals to amend the Constitution.

<sup>102</sup> 2 Farrand, p. 143 (*Report of Committee of Detail IV*); p. 169 (*Report of Committee of Detail IX*); p. 183 (*Madison’s Journal*).

<sup>103</sup> 2 Farrand, p. 366 (*Madison*).

<sup>104</sup> 2 Farrand, p. 449 (*Madison*, August 29, 1787).

<sup>105</sup> *Id.*

*The debate on Pinckney's motion reflects a clear understanding on the part of the Framers on both sides of this controversy that no more than the vote of a bare majority would be required under Article I, § 7 to pass laws, including navigation acts, in the absence of an express provision in the constitution requiring a greater vote.*

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.*”<sup>106</sup>

Roger Sherman of Connecticut responded “*that to require more than a majority to decide a questions was always embarrassing* as had been experienced [under the Articles of Confederation] in cases requiring the votes of nine states in Congress.”<sup>107</sup>

“Mr. Williamson [of North Carolina] was in favor of making *two thirds instead of a majority* [although] ... he acknowledged that he did not think that the motion requiring 2/3 necessary in itself, because if a *majority* of the Northern states should push their regulations too far, the Southern states would build ships for themselves; but he knew the Southern people were apprehensive ... and would be pleased with the precaution.”<sup>108</sup>

Pierce Butler spoke in opposition to Pinckney's motion even though he too was from South Carolina. Butler said he would “vote against requiring 2/3 *instead of a majority*” because he thought that there was little chance that the Eastern states would gang up against the South because their interests were “as different as the interests of Russia and Turkey.”<sup>109</sup>

George Mason joined Pinckney in urging the Convention to require a 2/3rds vote instead of a majority vote for passage of navigation acts. Mason argued that “[t]he *Majority* (emphasis in original) will be governed by their interests” and that 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* (emphasis in original) in both Houses.”<sup>110</sup>

Responding to Mason, James Wilson of Pennsylvania “remarked that if every peculiar interest was to be secured, *unanimity* (italics in original) 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.*” (Emphasis added). Wilson also reminded the Convention of the “great inconveniences ... experienced in Congress from the Articles of Confederation requiring nine votes in certain cases.”<sup>111</sup>

The Convention defeated Pinckney's motion by a 7 to 4 vote, 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.”<sup>112</sup>

Finally, on September 15, 1789, George Mason of Virginia (who later opposed ratification of the Constitution) made a last-ditch attempt at a compromise that would

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<sup>106</sup> 2 Farrand at 449 (emphasis added).

<sup>107</sup> 2 Farrand at 450 (emphasis added).

<sup>108</sup> 2 Farrand at 450-51 (emphasis added).

<sup>109</sup> 2 Farrand at 451 (emphasis added).

<sup>110</sup> 2 Farrand at 451.

<sup>111</sup> 2 Farrand at 451.

<sup>112</sup> 2 Farrand at 453 (Madison's *Journal*, August 29, 1787); see Irving Brant, *James Madison, Father of the Constitution 1787-1800*, 122-125 (1950).

have required a 2/3rds vote of each house instead of a bare majority to pass navigation acts for the next 20 years, until 1808. Mason “express[ed] his discontent at the power given to Congress *by a bare majority* to pass navigation acts....” Mason proposed that “no law in the nature of a navigation act [could] be passed before the year 1808 without the consent of 2/3 of each branch of the Legislature.”<sup>113</sup> Mason also circulated a long list of “Objections to this Constitution of Government” – in which he argued that navigation laws should be excepted from the principle of majority rule in Article I, § 7. “By requiring only a *majority* to make all commercial and navigation laws, the five southern states, whose product and circumstances are totally different from the eight northern and eastern states may (will) be ruined.... 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.”<sup>114</sup>

Col: Mason *expressing his discontent at the power given to Congress by a bare majority to pass navigation acts*, which he said would not only enhance the freight, a consequence he did not so much regard – but would enable a few rich merchants in Philada N. York & Boston, to monopolize the Staples of the Southern States & reduce their value perhaps 50 Per Ct – moved a further proviso “that no law in nature of a navigation act be passed before the year 1808, without the consent of 2/3 of each branch of the Legislature.”<sup>115</sup>

The Convention, however, defeated Mason’s proposed compromise by a vote of seven states to three<sup>116</sup> and, thereby, reaffirmed its understanding that a simple majority of a quorum of each house would have the power to pass bills or resolutions prior to their presentment to the President, including bills regulating or taxing navigation.

6. *The Federalist* – When the Constitution was submitted to the states for ratification, opponents argued that the new Constitution should be rejected because it allowed laws that would bind the entire country to be passed by a bare majority of a quorum of the House and Senate. Both Alexander Hamilton and James Madison responded to these objections in *The Federalist Nos. 22* (Hamilton), 58 (Madison) and 75 (Hamilton). Hamilton and Madison were amazingly far sighted 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 they were published verbatim today in *The New York Times* to describe the effects of Rule XXII.

Hamilton said in *The Federalist No. 22*:

***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***

<sup>113</sup> *Id.* at 631 (Sept. 15, 1789).

<sup>114</sup> *Id.* at 637, 639 (emphasis added).

<sup>115</sup> 2 Farrand at 631 (Madison’s Notes, Sept. 15) (emphasis added).

<sup>116</sup> 2 Farrand at 631.

*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 *majority in order that something may be done, must conform to the views of the minority; and thus the sense of the smaller number will over-rule that of the greater*, and give a tone to the national proceedings. *Hence tedious delays – continual negotiation and intrigue – contemptible compromises of the public good.... For upon some occasions, things will not admit of accommodation; and then the measures of government must be injuriously suspended or fatally defeated. It is often, by the impracticability of obtaining the concurrence of the necessary number of votes, kept in a state of inaction.* Its situation must always savour of weakness – sometimes order upon anarchy.

When the concurrence of a large number is required by the constitution to the doing of any national act, 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.<sup>117</sup>

Hamilton defended the decision of the Framers of the Constitution to reject a requirement that conditioned the passage of legislation on the vote of a supermajority again in *The Federalist No. 75*.

It has been shown under the second head of our inquiries, that *all 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.* Proofs of this position might be adduced from the examples of the Roman Tribuneship, the Polish Diet and the States-General of the Netherlands; did not an example at home render foreign precedents unnecessary.<sup>118</sup>

<sup>117</sup> Cooke ed., *supra*, at 140-41 (emphasis added); see also *INS v. Chadha*, 462 U.S. at 948 (The word “passed” when first used in Article I, § 7 means “that no law could take effect without the concurrence of the prescribed majority of the Members of both Houses.”) (emphasis added); *Skaggs v. Carle*, 110 F.3d 831, 841 (D.C. Cir. 1997) (dissenting opinion) (emphasis added) (“Although the word ‘passed’ is not defined explicitly, an analysis of the Framers’ intent and Supreme Court precedent demonstrate that it means *passed by a majority* ... [and] is an unalterable constitutional demand.”) (emphasis added).

<sup>118</sup> *Id.* at 507-08 (emphasis added).

7. *Unbroken Practice* – Finally, the courts should give weight to the interpretation of Article I, § 7 by the Senate and the House. For more than 225 years, both the Senate and the House have interpreted the word “pass” in Article I, § 7 to mean that no more than the vote of a bare majority was required before a bill and resolution could be sent to the other house or to the President.<sup>119</sup>

Rule XXII upsets “the single, finely wrought and exhaustively considered procedure” for passage of a bill in Article I, § 7<sup>120</sup> by imposing a *de facto* requirement that bills be approved by a vote of at least 60 senators before being debated on the floor of the Senate or submitted to a final vote.

**E. Rule XXII conflicts with the exclusive list of exceptions to the principle of majority rule in the Constitution.**

Although James Madison was committed to the fundamental democratic principle of majority rule, Madison also believed that there were some actions that were “too important to be exercised by a bare majority of a quorum.”<sup>121</sup> It is significant that none of the exceptions to the principle of majority rule in the Constitution applied to the passage of legislation other than to override a presidential veto or to the confirmation of presidential nominees. All of the exceptions addressed the exercise of unusual power by one or both houses of Congress outside of the normal legislative process prescribed in Article I, § 7. Each exception was individually debated and included such important issues as the removal of the President or other officers by the Senate after impeachment by the House,<sup>122</sup> expulsions of Members of Congress,<sup>123</sup> overriding a presidential veto of a bill or resolution,<sup>124</sup> ratification of treaties,<sup>125</sup> and proposals by Congress to amend the Constitution.<sup>126</sup>

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 greater vote was required by the Constitution.

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<sup>119</sup> See *Skaggs v. Carle*, 110 F.3d 831 (D.C. Cir. 1997). The only exception to this unbroken interpretation and practice was in the 104<sup>th</sup> Congress (1995-1996), when, at Newt Gingrich’s urging, the House adopted a rule prohibiting tax increases without a 3/5ths vote in the House. In his dissenting opinion in *Skaggs v. Carle*, 110 F.3d at 837-38, Judge Harry Edwards “look[ed] to the intent of the Framers of the Constitution as well as Supreme Court precedent construing the [Presentment] Clause” and concluded “[t]his evidence – along with long-standing traditions underlying our constitutional democracy – makes it clear that ‘passed’ means ‘passed by a majority, except in those few instances where the Constitution explicitly states otherwise.’ *The rule-making clause ... surely is not an explicit exception to the presentment clause. Thus, in using the rule-making clause to redefine what it means for a bill to be passed, Rule XXI(5)(c) rewrites the imperative of the presentment clause and, therefore, must be struck down.*” (emphasis added).

<sup>120</sup> *INS v. Chadha*, 462 U.S. at 951.

<sup>121</sup> *Powell v. McCormack*, 395 U.S. 486, 536 (1969) (quoting James Madison; 2 Farrand, *supra*, at 254).

<sup>122</sup> Art. I, § 3, cl. 6.

<sup>123</sup> Art. I, § 5, cl. 2.

<sup>124</sup> Art. I, § 7, cl. 2 and cl. 3.

<sup>125</sup> Art. I, § 2, cl. 2.

<sup>126</sup> Art. V.

On expulsions, for example, Madison argued that “the right of expulsion ... was too important to be exercised by a bare majority of a quorum: and in emergencies of faction might be dangerously abused.”<sup>127</sup> 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.”<sup>128</sup> In response, James Wilson proposed that three-fourths of the states’ proposed amendments be ratified by a requirement that appears in the Constitution.<sup>129</sup> On impeachments, the Convention rejected John Dickinson’s proposal that “the Executive be made removable by a ... majority of the Legislatures of individual states.”<sup>130</sup> The Convention later decided that a President could not be removed from office without a two-thirds vote of the Senate.<sup>131</sup> There was also extensive debate about the two-thirds vote for Senate ratification of treaties.<sup>132</sup>

When the Framers of the Constitution intended to condition the action of one house or the other on the vote of more than a simple majority, they did so expressly in six discrete provisions, all of which were addressed to unusual, as opposed to routine actions:

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 behavior, 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*, 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 ... 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:

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<sup>127</sup> 2 Farrand, *supra*, at 254 (Madison’s Notes, Aug. 10, 1787) (footnote omitted).

<sup>128</sup> *Id.* at 557-58.

<sup>129</sup> *Id.* at 559.

<sup>130</sup> 1 Farrand, *supra*, at 85.

<sup>131</sup> 2 Farrand, *supra*, at 497, 547.

<sup>132</sup> *See id.* at 540, 548.

“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.”<sup>133</sup>

The Framers were also 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 well-known 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 Senate – the very issue later litigated in *Powell v. McCormack*, 395 U.S. 486 (1969) and in *U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995). 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 tie up the hands of the Legislature from supplying the omissions.”<sup>134</sup> The Convention, however, did the opposite. Just as 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,<sup>135</sup> or the states<sup>136</sup> from imposing additional qualifications, the Framers were also aware that when they adopted six exceptions to the principle of majority rule in the Constitution, they were excluding other exceptions.

The Supreme Court has repeatedly applied the *expressio unius* principle in interpreting the Constitution.<sup>137</sup>

The issue in *Marbury* was whether the provisions in Article III, § 2, cl. 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 of other cases. The Court held that the list was exclusive, and that an act of Congress that attempted to expand this exclusive list by giving the court original jurisdiction of a mandamus action against Jefferson’s Secretary of State, James Madison, was unconstitutional.<sup>138</sup> Chief Justice Marshall expressly rejected the argument that because Article III, § 2, cl. 2 “contains no negative words” that prohibited Congress from adding to the Court’s original jurisdiction, the Court should uphold the expansion of its jurisdiction. Marshall said:

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<sup>133</sup> In addition to six exceptions to the principle of majority rule in the original Constitution, there are two other specific exceptions in which a 2/3rds vote and not a majority vote is required. Amendment XIV, § 3 (2/3rds vote of each house to remove the disability from running for federal office of soldiers who fought on the side of the Confederacy); Amendment XXV, § 4 (2/3rds vote of both houses required to determine that the President is physically or mentally incapable of discharging the duties of office).

<sup>134</sup> 2 Farrand, *supra*, at 123 (quoted in *Powell*, 395 U.S. at 532-33).

<sup>135</sup> *Powell v. McCormack*, 395 U.S. 486.

<sup>136</sup> *U.S. Term Limits v. Thornton*, 514 U.S. 779.

<sup>137</sup> See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *Powell*, 395 U.S. at 486; *Thornton*, 514 U.S. 779; *Chadha*, 462 U.S. 919; and *Clinton*, 524 U.S. at 439.

<sup>138</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) at 174.

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 point of the section is mere surplusage, is entirely without meaning, if such is to be the construction....

*Affirmative words are often, in their operation, negative of other objects than those affirmed, and in this case, a negative or exclusive sense must be given [to the words in Article 3 defining the original jurisdiction of the Supreme Court] or they have no operation at all.*

It cannot be presumed that any clause in the Constitution is intended to be without effect; and, therefore, such construction is inadmissible, unless the words require it.<sup>139</sup>

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 three qualifications for election to the House in Art. I, § 2, cl. 2 (25 years of age, a citizen for seven years, and an inhabitant of the state) was *exclusive*, and prohibited the House from adding to this list under the guise of judging the qualifications of its members. The Court held that even though Art. I, § 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 Rep. Adam Clayton Powell because his misconduct while in office that was not one of the three qualifications specified in Art. I, § 2, cl. 2 of the Constitution. To do so, the Court held would violate the Qualifications Clause in § 2 of Article I.<sup>140</sup>

The House defended its refusal to seat Representative Powell based on the fact that the House had refused to seat other congressmen on several previous occasions for reasons not specified in the list of qualifications enumerated in the Constitution. The Court dismissed this argument out of hand, holding that the fact that "an unconstitutional action has been taken before surely does not render that same action any less unconstitutional at a later date."<sup>141</sup> The Court had previously dismissed similar arguments in both the state legislative reapportionment cases<sup>142</sup> and the congressional reapportionment case.<sup>143</sup> The Court held that while it was true that state legislative districts and congressional districts had never been equally apportioned, either at the time the Constitution was adopted or at any time in the ensuing 175 years, these "precedents" were not enough to prevent the Court from declaring malapportioned districts unconstitutional, and requiring that the state legislatures and congressional districts be reapportioned on a one-person-one-vote basis.

The Court dismissed the same historical argument in *INS v. Chadha*. Congress defended the one-house veto based on the fact that it had enacted a large number of similar statutes that had reserved to one house of Congress the power to veto

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<sup>139</sup> 5 U.S. (1 Cranch) at 174 (emphasis added).

<sup>140</sup> *Powell*, 395 U.S. at 536.

<sup>141</sup> 395 U.S. at 546-47.

<sup>142</sup> *Baker v. Carr*, 369 U.S. 186 (1962), *Reynolds v. Sims*, 377 U.S. 533 (1964).

<sup>143</sup> *Wesberry v. Sanders*, 376 U.S. 1 (1964).

administrative regulations and decisions.<sup>144</sup> The Court turned the 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 in statutes that delegate authority to the executive and independent agencies.”

The issue in *INS v. Chadha* was the constitutionality of a statute that gave either house in Congress the power to veto administrative regulations or orders of the Immigration and Naturalization Service.<sup>145</sup> The House used the one-house veto to overturn a deportation ruling of the INS. Congress defended the one-house veto on the ground that it had been granted by the Constitution the power “to establish a uniform Rule of Naturalization,” and had “unreviewable authority over the regulations of aliens.”<sup>146</sup> Rejecting this argument, the Court held that even though “The plenary authority of Congress over aliens under Article I, § 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.*”<sup>147</sup> Echoing its earlier ruling in *United States v. Ballin*, the Court ruled that Congress’ authority over aliens existed only “*so long as the exercise of that authority does not offend some other constitutional restriction.*”<sup>148</sup>

In *Thornton*, 514 U.S. 779, the Supreme Court reaffirmed the ruling in *Powell v. McCormack* that the enumeration in the Constitution of the qualifications for election to the House or Senate is exclusive and precludes not only Congress, but the states, from adding additional qualifications or impediments to the election of senators or representatives. The State of Arkansas argued that the state had the power to enact term limits for senators and representatives under the power delegated to state legislatures by Section 4 of Article I to prescribe the “Times, Places and Manner of holding Elections for Senators and Representatives.” The Court held, however, that the qualifications for election to the House and Senate in the Constitution were exclusive, and that the Arkansas legislature could not use the power in Art. I, § 4 to prescribe the “[m]anner of holding elections for Senators and Representatives” to add term limits to the list of qualifications for election to the Senate or the House of Representatives stated in the Constitution.

In the Line Item Veto Case,<sup>149</sup> the Supreme Court held that the powers of the President under the Presentment Clause<sup>150</sup> to sign or veto bills and resolutions passed by Congress, were also exclusive and rendered unconstitutional the grant of additional powers to the President to veto line items in appropriation bills after they had become law. The Court held that:

There are important differences between the President’s “return” of a bill pursuant to Article I, § 7, and the exercise of the president’s cancellation authority pursuant to the Line Item Veto Act. The constitutional return takes place *before* the bill becomes law; the statutory cancellation occurs *after* the bill become law. The constitutional return is of the entire bill; the

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<sup>144</sup> 462 U.S. at 944.

<sup>145</sup> 462 U.S. at 940-41.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Chadha*, 462 U.S. at 941-42 (emphasis added). See *Ballin*, 144 U.S. at 5 (while “the Constitution empowers each house to determine its rules [i]t may not by its rules ignore constitutional restraints....”).

<sup>149</sup> *Clinton v. City of New York*, 524 U.S. 417, 438-39 (1998).

<sup>150</sup> Art. I, § 7, cl. 2 and cl. 3.

statutory cancellation is of only a part. Although the Constitution expressly authorizes the President to play a role in the process of enacting statutes, it is silent on the subject of unilateral presidential action that either repeals or amends part of duly enacted statutes. (Emphasis in original).

*There are powerful reasons for construing constitutional silence on this profoundly important issue as equivalent to an express prohibition....*

What has emerged in these cases from the president's exercise of his statutory cancellation powers, however, are truncated versions of two bills that passed both Houses of Congress. They are not the product of the "finely wrought" procedure that the Framers designed.<sup>151</sup>

**F. Rule XXII's 60-vote requirement is inconsistent with Article I, § 3, cl. 4 which gives the Vice President the power to vote in the Senate in case of a tie.**

Article I, § 3, cl. 4 provides: "The Vice President ... shall be President of the Senate, but shall have no vote, unless they be equally divided." This provision reflects an assumption on the part of the Framers that the Senate would be governed by the principle of majority rule which meant that tie votes were a virtual certainty in a Senate composed of an even number of members.

The Framers could have chosen to allow that bills that failed to receive a majority vote as a result of a tie vote to be defeated and die in the Senate. The Framers decided instead to give the Vice President, as President of the Senate, the option of voting in the Senate to break a tie even though the Vice President is not a member of the Senate and cannot otherwise vote on matters before the Senate. The existence of this provision provides additional support for the textual argument that the Framers understood the word "pass" in the Presentment Clause to mean no more than that the vote of a bare majority is required for the approval of legislation in the Senate, as well as 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 tie votes in the Senate.

Rule XXII's 60-vote requirement is not only inconsistent with the assumption of majority rule on which Article I, § 3, cl. 4 was based, it also effectively deprives the Vice President of one of *only two* powers granted to the Vice President by the Constitution – the power to cast a vote in the Senate in case of a tie.

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<sup>151</sup> 524 U.S. at 439 (emphasis added). A number of states attempted to "instruct" members of Congress to support a constitutional amendment imposing term limits by printing next to the names on ballots whether they had "DISREGARDED VOTERS' INSTRUCTIONS ON TERM LIMITS." The Eighth Circuit held in *Gralike v. Cook*, 191 F.3d 911 (8<sup>th</sup> Cir. 1999) and in *Miller v. Moore*, 169 F.3d 1119 (8<sup>th</sup> Cir. 1999), that the two methods for amending the Constitution in Article V were exclusive, and that such statutes were an unconstitutional attempt to create a third method of amending the Constitution (by instructing members of Congress to vote for a term-limits amendment). See *Cook v. Gralike*, 531 U.S. 510, 518, n.10 (2001). In *Cook v. Gralike*, the Supreme Court cited these decisions in footnote 10 of its opinion, but chose to affirm the ruling of the Eighth Circuit on other grounds.

**G. The combination of Rule V, which declares the rules of the Senate to be continuing and Rule XXII's prohibition against amendment to Senate rules without a two-thirds vote, is unconstitutional.**

Unlike the Rules of the House of Representatives that expire at the end of each term of Congress and must be readopted by the House when each new Congress convenes, Senate Rule V declares that: “The rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules.”

Debate on a matter in the Senate, including a proposed amendment to Rule XXII, cannot begin over the objections 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. Moreover, Rule XXII provides that a vote on a motion for cloture of debate on a “motion to amend the Senate rules” is not “three-fifths of the senators chosen and sworn,” as is the case with other cloture motions, but requires an “affirmative vote ... [of] two-thirds of the Senate present and voting.” 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, requires 60 votes, and a motion for cloture of the substantive debate on a motion to amend the rules of the Senate cannot be brought to an *end* without 67 affirmative votes (assuming all 100 members of the Senate are present) – *the same number of votes in the Senate that would be required to approve an amendment to the Constitution.*

Whether the Senate is “a continuing body” as stated in Rule V has been disputed within the Senate for at least 50 years, and is seriously open to question. If the Senate were really a continuing body, (1) legislation that passed by the house and pending in the Senate would not die at the end of each term of Congress; (2) nor would the Senate hold a new election of majority and minority leaders at the commencement of each new Congress. The old leadership would hold over and continue just as the rules are claimed to do. Moreover, as a matter of practice, the majority leader of the Senate asks the Senate at the beginning of each new Congress to adopt the existing Senate rules by unanimous consent. These three facts are incompatible with the notion that the Senate is a continuing body, notwithstanding the fact that a third of its members must stand for election every two years.<sup>152</sup>

The issue of whether the Senate is a “continuing body” is, however, beside the point. Rule V would be inconsequential *but for the provisions in Rule XXII prohibiting cloture on proposed amendments to the Senate rules without a 2/3rds vote.* There would be no constitutional objection to 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 whole new set of rules when it first convenes in January of every odd numbered year, but without preventing a majority in the Senate from amending the rules when the occasion required.<sup>153</sup>

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<sup>152</sup> See Aaron-Andrew P. Bruhl, *Burying the “Continuing Body Theory” of the Senate*, 95 Iowa L. Rev. 1401 (2010).

<sup>153</sup> Even if the rules of the Senate could be amended by a majority vote, it does not follow that the Rule XXII 60 vote requirement to close debate on bills, resolutions or presidential appointments would be constitutional. While a majority of senators may be willing to give up *their individual* rights to debate or

It is the *combination* of Rule V, Rule VIII and Rule XXII that renders Rule V unconstitutional. Rule V prohibits the Senate from amending its rules *except in the manner prescribed in Rule XXII*, which means that debate on a proposed amendment to any of the rules of the Senate can neither begin<sup>154</sup> without 60 votes, nor be brought to an end<sup>155</sup> without a 2/3rds vote. If the supermajority vote requirements in Rules VIII and XXII were declared unconstitutional and no longer existed, it would be irrelevant whether the Senate is a “continuing body” that continues from one Congress to the next, or becomes a “new” Senate after each biennial election when one-third of its members are elected. No changes in Rule V or Rule VIII would be necessary.

The principle has long been recognized that a legislative body cannot bind its successors by statute, much less by a rule adopted only by one house.<sup>156</sup> The only way one Congress can bind successive Congresses is by amending the Constitution in the manner prescribed in Article V.

The Supreme Court has applied this principle as a rule of federal constitutional law in a series of cases. The Court has repeatedly held that “no one legislature can, by its own act, disarm their successors of any of the powers or rights of sovereignty confided by the people to the legislative body.”<sup>157</sup>

As Fisk & Chemerinsky have pointed out,

The conjunction of Rules V and XXII does exactly what all of these cases say that 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 violates the Court’s declaration in *Newton* by depriving “succeeding legislature[s] ... [of] the same jurisdiction and power ... as its predecessors.” Rules V and XXII unconstitutionally limit the power of those sessions which came after their enactment.

[T]he reason ... Rule XXII is unconstitutional is that it frustrates the will of future majorities and violates the democratic principles of representation and accountability.<sup>158</sup>

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vote on bills, resolutions or presidential appointments that are opposed by 41 senators, they should not be able to deprive *other senators of their* rights to debate and vote on bills, resolutions or presidential appointment simply because they may be opposed by 41 senators.

<sup>154</sup> Rule VIII.

<sup>155</sup> Rule XXII.

<sup>156</sup> See, e.g., 1 William Blackstone, *Commentaries on the Common Law*, p. 90 (St. George Tucker ed. 1803) (“Acts of parliament derogatory from the power of subsequent parliaments bind not.... Because the [subsequent] legislature being a truth the sovereign power, is always equal [to its predecessors].”).

<sup>157</sup> *Ohio Life Ins. & Trust Co. v. Debolt*, 57 U.S. (16 How.) 416, 431 (1853); *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.”); *Connecticut 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.”).

<sup>158</sup> Fisk & Chemerinsky, *supra*, at 248-49, 250; John C. Roberts and Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 Cal. L. Rev. 1773

### PART III: JURISDICTION, STANDING, SEPARATION OF POWERS, JUSTICIABILITY AND RELATED ISSUES

#### A. The federal courts have subject matter jurisdiction under 28 U.S.C. § 1331.

The federal district courts have subject matter jurisdiction over all civil actions that “aris[e] under the Constitution, laws or treaties of the United States.”<sup>159</sup> The Supreme Court upheld the subject matter jurisdiction of federal courts to determine whether the House of Representatives had exceeded its authority granted to “Each House” by Art. I, § 5, cl. 1 to “be the Judge of the ... Qualifications of its own Members,” when it refused to seat Adam Clayton Powell for a reason other than one of the three qualifications for election to the House enumerated in Article I, § 2, cl. 2 of the Constitution.<sup>160</sup>

#### B. The sitting members of the Senate, the House of Representatives, voters, and organizations such as Common Cause have standing.

##### 1. *The Vice President.*

A sitting Vice President should be in the best position to bring a declaratory judgment action seeking a *judicial* determination of the constitutionality of Rules V and XXII. One of his duties is to preside over the Senate to rule on points of order, including those that turn on the validity of Rule V or Rule XXII under the Constitution. As the Supreme Court held in *Marbury v. Madison*, however, the constitutionality of an act of Congress, much less a rule adopted by only one house of Congress, is a legal question that can only be decided authoritatively by the courts, not by Congress. Even if the Vice President were to undertake to decide a constitutional question on a point of order, the “precedent” is not *legally* binding and can be disregarded whenever a majority of the Senate chooses. Moreover, any senator who is injured by a parliamentary “ruling” of the Vice President or the full Senate on a point of order, would have standing<sup>161</sup> to challenge the ruling in the federal courts. Thus, it would make perfect sense for the Vice President to bring a declaratory judgment action seeking a ruling of the federal courts on a point of order challenging the constitutionality of Rule V or Rule XXII, rather than issuing an advisory opinion that would neither bind, nor satisfy, anyone.

Moreover, a sitting Vice President may be the only party with standing to challenge the Senate filibuster rule on the ground that it deprives the office of Vice

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(2003); John C. Roberts, *Majority Voting in Congress: Further Notes on the Constitutionality of the Senate Cloture Rule*, 20 J.L. & Pol., 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 [*i.e.*, the Presentment Clause] on the Rule Making Clause in Article I, Section 5, and on the anti-entrenchment principle.”).

<sup>159</sup> 28 U.S.C. § 1331.

<sup>160</sup> *Powell v. McCormack*, 395 U.S. at 512-16 (“§ 2 [of Article III] mandates that the ‘judicial power shall extend to all cases ... aris[ing] under this Constitution....’ It has long been held that a suit ‘arises under’ the Constitution if petitioner’s claim ‘will be sustained if the Constitution is given one construction and will be defeated if [it is] given another.’”); *id.* at 514.

<sup>161</sup> *Coleman v. Miller*, 307 U.S. 433 (1939) (discussed below).

President of the right to vote<sup>162</sup> in case of a tie because only the incumbent Vice President is directly injured by the denial of his right to cast a vote to break a tie. The absence of the Vice President as a plaintiff would not, however, prevent a senator or representative from relying on Article I, § 3, cl. 5 as evidence of the Framers' intent – that is, they gave the Vice President the option of voting in the Senate when there is a tie – because they understood that issues in the Senate would be decided by a majority vote – except in those instances in which a 2/3rds vote is expressly required by the Constitution.

## 2. *Sitting Members of the Senate.*

Any sitting member of the Senate who can show that he or she has been *denied* the opportunity to vote on a bill, resolution or presidential appointment because they were prevented by a filibuster under Rule XXII for debate on a final vote getting to the floor of the Senate, or who can show that his or her vote has been *nullified* or *diluted* as a result of the rule, is directly injured by Rule XXII and has standing to challenge the constitutionality of the rule.<sup>163</sup>

In *Coleman*,<sup>164</sup> twenty senators in the Kansas legislature whose votes against ratification of the Child Labor Amendment were nullified when the Lt. Governor cast an allegedly illegal tie-breaking vote, were held to have standing to challenge the Lt. Governor's power to break ties.<sup>165</sup>

In *Anderson*, Republican 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 as members of the Committee of the Whole were held to have standing to challenge the House rule.<sup>166</sup> The D.C. Circuit said that “Amici [had] not question[ed] the congressmen's standing to assert that this voting power has been diluted” and cited *Vander Jagt v. O'Neill*, 699 F.2d 1166 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 828

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<sup>162</sup> Article I, § 3, cl. 4.

<sup>163</sup> *Coleman*, 307 U.S. at 438 (“We think that these [state] senators have a plain, direct and adequate interest in maintaining the effectiveness of their votes.”); *Kennedy v. Sampson*, 511 F.2d 430, 433-36 (D.C. Cir. 1974) (Senator had standing to challenge nullification of his vote on an unauthorized pocket veto); *Goldwater v. Carter*, 617 F.2d 697 (D.C. Cir.), *vacated on other grounds*, 444 U.S. 996 (1979) (Senator had standing to challenge the nullification of a treaty by the President which was alleged to have denied them of their right to vote on nullification, as well as on ratification of a treaty); *Riegle v. Federal Open Market Committee*, 656 F.2d 873, 877-79 (D.C. Cir. 1981) (Senator had standing to challenge the denial of his right to vote on an appointment of members of the Federal Reserve Board); *Vander Jagt*, 699 F.2d at 1168-71 (Republican member of House had standing to challenge committee appointments that diluted political 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); *Michel v. Anderson*, 14 F.3d 623, 625 (D.C. Cir. 1994) (House members had standing to challenge dilution of their voting power as members of the Committee of the Whole); *Skaggs v. Carle*, 110 F.3d 831, 834 (D.C. Cir. 1997); *compare McClure v. Carter*, 513 F. Supp. 265, 270 (D. Idaho 1981) (distinguishing *Kennedy v. Sampson*), *aff'd* 454 U.S. 1025 (1981); Fisk & Chemerinsky, *The Filibuster*, 49 Stan. at 234, 235-37.

<sup>164</sup> *Coleman v. Miller*, 307 U.S. 433, 438 (1939).

<sup>165</sup> *See Raines v. Byrd*, 521 U.S. 811, 823 (1997) (“*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.”). *Skaggs*, 110 F.3d at 834 (“The lesson of *Michel v. Anderson*, 14 F.3d 623 (D.C. Cir. 1994) is that vote dilution is itself a cognizable injury regardless whether has yet affected a legislative outcome”).

<sup>166</sup> *Michel v. Anderson*, 14 F.3d 623, 625 (D.C. Cir. 1994).

(1983) as having “establish[ed] that congressmen asserting such a claim have suffered an Article III injury.”<sup>167</sup>

In *Skaggs*,<sup>168</sup> the D.C. Circuit, by a 2-1 vote, rejected a challenge by 27 members of the House of Representatives to the constitutionality of a novel House Rule XXI(5)(c) that was adopted in 1995 as a part of Newt Gingrich’s “Contract with America.” The rule required a three-fifths (60%) supermajority vote to pass bills raising Federal income taxes.<sup>169</sup>

The D.C. Circuit first rejected the argument that in order to have standing, the House Members were required to show that a bill which they supported would have passed the House but for the House rule.

As an initial matter, we do not agree with the Clerk 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. *The lesson of Michel is that vote dilution is itself a cognizable injury regardless whether it has yet affected a legislative outcome.*<sup>170</sup>

Judge Ruth Bader Ginsberg, writing for the majority, also said that House Members would have had standing *if they had in fact been able to show that they had been denied the right to vote on a bill to raise federal taxes, or their votes had been nullified or diluted as a result of the three-fifths rule.* The majority held, however, that the plaintiff House Members’ standing in *Skaggs* was dependent on the *merits* 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 218 Members 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.”<sup>171</sup>

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<sup>167</sup> See 699 F.2d at 1168-71 (holding that congressmen have standing to challenge method by which House committee seats are allocated).” *Id.* at 625-26.

<sup>168</sup> *Skaggs*, 110 F.3d 831.

<sup>169</sup> This was the federal counterpart to California Proposition 13 that prohibits the California legislature from raising taxes without a two-thirds vote, and has brought California to the edge of bankruptcy.

<sup>170</sup> 110 F.3d at 834 (emphasis added). The continuing validity of this portion of the ruling in *Skaggs* is put in doubt by the later decision of the Supreme Court in *Raines v. Byrd*, 521 U.S. 811 (1997). In *Raines*, the Supreme Court held that Senator Robert C. Byrd and three other senators did not have standing to challenge the constitutionality of the Line Item Veto Act that granted the President the power to “cause certain line items in revenue bills within 5 days of them becoming law,” because, among other reasons, the 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. This objection to the senator’s standing makes no sense. The plaintiffs were not complaining that the Line Item Veto Act prevented the Senate from passing future legislation by majority vote. Their complaint was that the Act allowed the President to veto part of a bill rather than the whole bill as required by the Presentment Clause. The Court’s standing ruling can be sustained on other grounds because, as the Court noted, “In 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 congressmen can vote to repeal the Act, or to exempt a given appropriation’s bill [from this process].” *Id.* at 824. And see p. 829 (“Members of Congress [have] ... an adequate remedy since they may repeal the Act or except appropriations bills from its reach” by a simple majority vote).

<sup>171</sup> *Id.* at 834-35.

The majority then rejected on the merits plaintiffs’ claims that they had been denied the opportunity to enact tax increases by majority vote. “Both the House Rules and their role in the 104<sup>th</sup> 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.”<sup>172</sup> According to the majority, 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.*”<sup>173</sup> The majority also pointed out that if the House Rules Committee tried to “slow or block ... consideration [of a resolution to amend or repeal the supermajority rule for tax increases, a simple majority of], 218 Members of the House could, by petition, cause a resolution to be discharged from that Committee and put to a vote on the floor of the House.... Similarly, if the Rules Committee determines that the vote for a bill should be governed by a special rule, *a simple majority* [of the House] may amend that rule.... For that matter, *a simple majority* may suspend Rule XXI(5)(c) in order to allow a bill carrying a tax increase to pass by *a simple majority vote.*”<sup>174</sup>

The majority also found “telling” in *Skaggs* “The Clerk’s ... response ... that on at least four occasions during the 104<sup>th</sup> 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.”<sup>175</sup>

The majority ruled “*we are therefore forced to the conclusion that the plaintiffs have alleged only a conjectural or hypothetical injury*”<sup>176</sup> 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; indeed, the appellants point to no instance in which a Member (presumably one who wanted to vote for legislation increasing income tax rates) proposed to waive the Rule, but the House voted against waiving the Rule.”<sup>177</sup>

Unlike the rules of the House at issue in *Skaggs*, Rule XXII cannot be repealed, amended, suspended or otherwise bypassed by a simple majority vote.<sup>178</sup> *Skaggs v. Carle* is not only distinguishable, *Skaggs* actually supports rather than defeats the standing of a sitting senator to challenge the constitutionality of the Senate filibuster rule.

### 3. *Sitting Members of the House.*

It is likely that the D.C. Circuit would also hold that sitting members of the House of Representatives are directly injured by and would, therefore, have standing to challenge the constitutionality of the Senate filibuster rule because their votes in favor of

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<sup>172</sup> *Id.* at 835.

<sup>173</sup> *Id.* (emphasis added).

<sup>174</sup> *Id.* (emphasis added).

<sup>175</sup> *Id.* at 835.

<sup>176</sup> *See also Raines*, 521 U.S. at 824 (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); *see also*, p. 829 (“Members of Congress [have] ... an adequate remedy ... since they may repeal the Act or exempt appropriations bills from its reach.” *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

<sup>177</sup> *Id.* at 835-36.

<sup>178</sup> Judge Harry Edwards’ lengthy and thorough dissenting opinion on the merits in *Skaggs* fully supports the proposition that Rule XXII is unconstitutional.

a piece of legislation that passed the House have been *nullified* when the legislation subsequently died in the Senate because of the filibuster rule.<sup>179</sup>

#### 4. *Voter/Taxpayer Standing.*

The D.C. Circuit cases are split as to whether a voter who is represented by a senator or representative whose right to vote for final passage of a bill was denied by the Senate filibuster rule or whose vote in favor of a bill in the House was nullified, has standing to challenge the constitutionality of the filibuster rule. In *Michel*,<sup>180</sup> the D.C. Circuit held that voters were injured by and had standing to challenge a House rule that allowed territorial delegates to vote on Members of the Committee of the Whole because the votes of their representatives were being *diluted*, and, therefore, their individual votes. “[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” in the Committee of the Whole. More to the point as far as Rule XXII is concerned, however, is the statement by the D.C. Circuit in *Michel* that:

It could not be argued seriously that voters would not have an injury if their congressman were not permitted to vote at all on the House [or Senate] floor.<sup>181</sup>

In two later cases brought by a *pro se* voter challenging the constitutionality of Senate Rule XXII, however, the D.C. Circuit held that the voter lacked standing.<sup>182</sup> In the first case, *Page v. Dole*, the D.C. Circuit *vacated* the district court’s order on the ground that the plaintiff’s “complaint was framed in terms of a dilution, of the Democratic majority’s vote by the Republican minority’s use of Senate Rule XXII [because] the Senate no longer has a Democratic majority ... and appellant as its supporter [is] not now allegedly being injured by the rule.”<sup>183</sup> In the second case, *Page v. Shelby*,<sup>184</sup> the district court again dismissed Mr. Page’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 ... he cannot show that he would suffer any *personal* harm should the hypothetical legislation not come to a vote ... his complaint contains [only] unspecified allegations regarding ‘legislation he desires.’”

#### 5. *Beneficiaries of Filibustered Bills*

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<sup>179</sup> *Skaggs*, 110 F.3d 831, *Michel*, 14 F.3d 623; *Vander Jagt*, 699 F.2d at 1168 (citing *Riegle v. Federal Open Market Committee*, 656 F.2d 873 (D.C. Cir. 1981) as having discarded the distinction in earlier D.C. Circuit cases between allegations that a legislator’s vote has been “nullified” and allegations that a legislator’s influence has merely been diminished or diluted); Fisk & Chemerinsky, *supra* at 237 (“If the bill [that passed the House] was stifled by a filibuster ... a House member who voted for the bill could plausibly claim that the filibuster effectively nullified his vote.”).

<sup>180</sup> 14 F.3d at 626.

<sup>181</sup> *Id.* at 626.

<sup>182</sup> See *Page v. Shelby*, 995 F. Supp. 23 (D.D.C. 1998), *aff’d without opinion*, 172 F.3d 920 (D.C. Cir. 1998); *Page v. Dole*, Case No. 93-1546 (unreported, D.C.C. Aug. 18, 1994), vacated as moot by the D.C. Cir., 1996 WL 310132 (D.C. Cir. 1996) (an unreported district court opinion that dismissed a claim by a voter for want of standing without citing *Michel*, 14 F.3d at 623).

<sup>183</sup> *Page v. Dole*, No. 94-5291, 1996 WL 310132, at \*1 (D.C. Cir. May 13, 1996).

<sup>184</sup> 995 F. Supp. at 27-28.

The standing problem in both cases was that *Page* (the voter plaintiff) alleged only that the Senate filibuster rule injured the *legislative process*, rather than injuring himself as an individual. This kind of generalized injury that is shared by the entire electorate is not sufficient to confer standing under *Massachusetts v. Mellon*.<sup>185</sup> *Page* might 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 not be shared by the electorate in general, but would have been specific to *Page* and other beneficiaries of that particular bill. In *Clinton*,<sup>186</sup> for example, the Supreme Court held that the City of New York and other beneficiaries of appropriations that had been line-item vetoed by President Clinton, had standing to challenge the constitutionality of the Line-Item Veto Act, and held the act unconstitutional under Article I, Sec. 7.<sup>187</sup>

6. *A Filibustered Presidential Nominee.*

A presidential nominee who was denied a confirmation vote in the Senate as a result of an actual or threatened filibuster (Miguel Estrada or Dawn Johnsen for example) has suffered the requisite concrete injury as a direct result of Rule XXII's supermajority vote requirement and should have standing under *Lujan* to challenge the validity of the filibuster rule.

7. *Common Cause.*

The Supreme Court held in *Hunt v. Washington State Apple Advertising Comm'n*,<sup>188</sup> that an organization has standing to sue if (1) any of its members would have standing to sue on their own; (2) the interests it seeks to protect are germane to its purpose; and (3) its claim and requested relief do not require participation of its members.<sup>189</sup> As long as Common Cause has members who would have standing to sue on their own right (*e.g.*, sitting members of the Senate or House of Representatives, filibustered presidential nominees, or beneficiaries of bill that died as a result of filibusters), Common Cause would also have standing to sue.

**C. The Vice President, the Clerk, Parliamentarian, and Sergeant at Arms of the Senate are all proper defendants.**

In *Powell v. McCormack*, the Supreme Court held that the Speech and Debate Clause in Art. I, § 6 conferred absolute immunity from suit on John McCormack, the Speaker of the House, and members of the House who voted not to seat Representative

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<sup>185</sup> 262 U.S. 447, 448-49 (1923).

<sup>186</sup> *Clinton v. City of New York*, 524 U.S. 417 (1998).

<sup>187</sup> See also *Bowsher v. Synar*, 478 U.S. 714, 721 (1986) (“It is clear that members of the Union, one of whom is an appellee ... will sustain injury by not receiving a scheduled increase in benefits” that had been sequestered).

<sup>188</sup> 432 U.S. 333 (1977).

<sup>189</sup> *Bowsher*, 478 U.S. at 721; *Common Cause v. Billups*, 554 F.3d 1340 (11<sup>th</sup> Cir. 2009) (reversing the district court insofar as it held that the NAACP did not have standing to challenge the Georgia Voter ID Act on behalf of its members); *Fla. State Conf. of the NAACP v. Browning*, 522 F.3d 1153 (11<sup>th</sup> Cir. 2008) (holding that the NAACP had standing to sue on behalf of its members to challenge a Florida voting statute without having to identify or name individual members injured by the statute).

Adam Clayton Powell.<sup>190</sup> Although the Court held that John McCormack and other members of the House were immune from suit, the Court held that Powell was nevertheless “entitled to maintain [his] action against House employees [the Clerk and the Sergeant at Arms] and to judicial review of the propriety of the decision to exclude petitioner Powell.”<sup>191</sup> The Court said that, “Legislative immunity does not ... bar all judicial review of legislative acts. That issue was settled by implication as early as 1803 [in] *Marbury v. Madison* ... and expressly in *Kilbourn v. Thompson* [103 U.S. 168 (1881)]....”<sup>192</sup> The Court also held in *Powell* that the fact that “House employees [were] acting pursuant to express orders of the House does not bar judicial review of the constitutionality of the underlying legislative decision.”<sup>193</sup>

The Speech and Debate Clause does not, however, apply to the Vice President or to employees of the Senate. Although the Vice President is President of the Senate and presides over the Senate, he is not a member of the Senate and cannot debate or vote as a member of the Senate,<sup>194</sup> except in the case of a tie. Employees of the Senate, such as the Parliamentarian, the Clerk and the Sergeant at Arms, are not members of the Senate and are not immune from suit under the Speech and Debate Clause.<sup>195</sup>

**D. A suit challenging Rule XXII is “justiciable” because (1) the claims are of the type that admit judicial resolution, (2) are capable of judicial redress, and (3) are not “political questions” barred by the doctrine of separation of powers.**

In *Powell v. McCormack*, the Supreme Court held that only “[t]wo determinations must be made” to determine whether a plaintiff’s claim is “justiciable” by the federal courts.

First, we must decide whether the *claim presented* and the *relief sought* are of the type which *admit of judicial resolution*. Second, we must determine *whether the structure of the Federal Government renders the issue presented a “political question”* – that is, a question which is *not*

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<sup>190</sup> 395 U.S. at 501-06.

<sup>191</sup> *Id.* at 506.

<sup>192</sup> *Id.* at 503.

<sup>193</sup> *Id.* at 504-05.

<sup>194</sup> Art. I, § 3, ¶ 4.

<sup>195</sup> *Powell v. McCormack*, 395 U.S. 486; *Kilbourn v. Thompson*, 103 U.S. 168 (1881); *see also Michel*, 14 F.3d at 623 (in which the challenge to the House rule allowing territorial delegates to vote as Members of the Committee of the Whole was brought against the Clerk of the House); *Skaggs*, 110 F.3d at 831 (the challenge to the House 2/3 vote rule was brought against the Clerk of the House); *Judicial Watch, Inc. v. United States Senate*, 432 F.3d 359 (D.C. Cir. 2005) (in which the plaintiff named the United States Senate, the Secretary of the United States Senate, and the Sergeant at Arms of the Senate as defendants in a challenge to the Senate filibuster rule as applied only to President Bush’s judicial nominations). The *Judicial Watch* case was also dismissed by the D.C. Circuit on standing grounds because *Judicial Watch* had not shown that it was injured by the Democrats’ threats to filibuster the nominations of Miguel Estrada and other conservative judges because *Judicial Watch* failed to show that the filibusters had any discernable effect in the speed with which its cases (or any actions) were tried or disposed of in the federal courts.

*justiciable* in the federal court *because of the separation of powers* provided by the Constitution.<sup>196</sup>

A challenge to the Senate filibuster rule is justiciable under this standard.

1. *The claims admit of judicial resolution.*

The Supreme Court has long held that the Constitution provides judicially manageable standards that are well within the competence of the federal courts and enable the courts to determine whether a statute, rule or procedure adopted by one or both houses of Congress is constitutional. In *Marbury v. Madison*, the Supreme Court held that “[i]t is emphatically the province and duty of the judicial department to say what the law is” by interpreting the Constitution and that “a legislative act contrary to the Constitution is not law.”<sup>197</sup>

The Court in *Powell* quoted its 1881 decision in *Kilbourn v. Thompson*, 103 U.S. at 199, as having held “in language which has not dimmed with time” that:

***Epecially is it competent and proper for this court to consider whether its [the legislature’s] proceedings are in conformity with the Constitution and laws***, because, living under a written constitution, no branch or department of the government is supreme; and it is the province and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of the government, and even those of the legislature in the enactment of laws, have been exercised in conformity to the Constitution; and if they have not, to treat their acts as null and void.<sup>198</sup>

In *United States v. Ballin* in 1892, the Court held that while it was not for the courts to decide whether a particular rule of the House of Representatives has “advantages or disadvantages” or represents “wisdom or fallacy,” the courts do have jurisdiction to decide whether the House had the power to adopt the particular rule – *i.e.*, whether that rule violated provisions of the Constitution. The Court went on to hold that although “[t]he Constitution empowers each house to determine its rules of proceedings, [the House] *may not by its rules ignore constitutional restraints.*”<sup>199</sup>

And in *INS v. Chadha*, the Supreme Court again held that “Article I provides the judicially discoverable and manageable standards ... for resolving the question of conflict” between the Presentment Clause and the acts of Congress reserving to each

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<sup>196</sup> 395 U.S. at 516-17 (emphasis added). “A review of the cases indicates that a constitutional challenge to the filibuster should not be declared a nonjusticiable political question.... The decisions indicate that the Court will decide constitutional objections to congressional procedures where there is reason to believe that internal congressional mechanisms are inadequate to deal with the problem.” Fisk & Chemerinsky, *supra* at 226-27.

<sup>197</sup> 5 U.S. (1 Cranch) at 177 (1803).

<sup>198</sup> 395 U.S. at 506 (emphasis added).

<sup>199</sup> 144 U.S. at 5 (emphasis added); *see also Michel*, 14 F.3d at 627 (“There are limitations to the House’s rule-making power, and Article I, § 2 is such a limit.”); *Vander Jagt v. O’Neill*, 699 F.2d at 1170 (“[I]f Congress should adopt internal procedures which ignore constitutional restraints ... ‘it is clear that we must provide remedial action.’” (quoting *United States v. Ballin*, 144 U.S. at 5)).

house the power to veto administrative regulations.<sup>200</sup> In the light of the ruling in *Chadha*, there can be no doubt that Article I also provides equally discoverable and judicially manageable standards for deciding whether the supermajority vote requirement in Rule XXII conflicts with the provisions of Article I.

2. *The relief sought “admit[s] of judicial resolution.”*

In *Powell*, the Supreme Court said that to be “justiciable,” the *relief* sought must also be of a type “which admits of judicial resolution.” This requirement was repeated in *Lujan v. Defenders of Wildlife*,<sup>201</sup> in which the Court held that to establish Article III standing, the injury of which plaintiff complains must be one that is capable of being “redressed by a favorable decision.” Whether viewed as a test of justiciability or as a rule of standing, there can be no doubt that the injuries to the rights of sitting members of the Senate or the House (among others) to vote resulting from the inability of the senate to pass legislation without the 60 votes required to overcome a filibuster is fully capable of being “redressed” by the entry of a judgment under 28 U.S.C. § 2201 declaring the supermajority vote requirement in Rule XXII unconstitutional.

In *Powell*, the Court rejected the argument that the House’s refusal to seat Adam Clayton Powell was “not justiciable because ... it is impossible for a federal court to ‘mold effective relief’ ... [since] the federal courts cannot issue mandamus or injunctions compelling officers or employees of the House” to seat Mr. Powell.<sup>202</sup> The Supreme Court held that it did not have to decide whether Powell’s claims for coercive relief (*i.e.*, mandamus and injunctive relief) were justiciable because Powell also “sought a declaratory judgment, a form of relief the District Court could have issued (citing the Declaratory Judgment Act, 28 U.S.C. § 2201) ... [w]e thus conclude that ... this case is justiciable.”<sup>203</sup>

In the Nixon Tapes case,<sup>204</sup> the Supreme Court upheld an order enforcing a subpoena served on President Nixon by the Watergate special prosecutor. The Court rejected President Nixon’s arguments that the matter was both nonjusticiable and was also barred by the doctrine of separation of powers. Specifically, the President argued that it was (1) merely an “intra-branch dispute” within the Executive Branch between the President and the Watergate Special Prosecutor, as one of his subordinates; (2) that the Executive Branch had exclusive, absolute, and unreviewable discretion under the Constitution to decide whether to prosecute a criminal case and what evidence to subpoena or to present; and (3) that the federal courts were barred by the doctrine of separation of powers from reviewing a President’s claim of executive privilege. Reaffirming its rulings *Powell v. McCormack* and *Baker v. Carr*, the Court said that  
Our system ... requires that federal courts on occasion interpret the Constitution in a manner that is at variance with the construction given ... by another branch [quoting *Powell*]. Deciding whether a matter has ... been committed by the Constitution to another branch of government, or whether the action of that branch [has] exceed[ed] [its] authority is ... [a]n

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<sup>200</sup> *INS v. Chadha*, 462 U.S. at 942.

<sup>201</sup> 504 U.S. 555, 561 (1992).

<sup>202</sup> 395 U.S. at 517.

<sup>203</sup> *Id.* at 518.

<sup>204</sup> *United States v. Nixon*, 418 U.S. 683 (1974).

exercise in constitutional interpretation, and is a responsibility of this Court as the ultimate interpreter of the Constitution.<sup>205</sup>

As in *Powell v. McCormack*, the only relief required to fully redress the injury to a senator's right to vote is the entry of a declaratory judgment that declares unconstitutional those portions of Rule XXII (a) which require 60 votes to pass motions for cloture, and (b) which prohibit the Senate from amending its rules without a two-thirds vote. Once the unconstitutional portions of Rule XXII have been declared invalid, the remainder of Rule XXII would then read as follows:

Senate Rule XXII provides:

22.2 Notwithstanding the provisions of rule II or rule IV or any other rule of the Senate, at 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, ... he shall lay the motion before the Senate and direct that the clerk call the roll, and upon the ascertainment that a quorum is present, the Presiding Officer shall, without debate, submit to the Senate by a ye-a-and-nay vote the question:

“Is it the sense of the Senate that the debate shall be brought to a close?”  
... then said measure ... shall be the unfinished business to the exclusion of all other business until disposed of.<sup>206</sup>

Once the offending provisions of Rule XXII have been declared invalid, no further action on the part of the court or of the Senate is required. “The general rule of all parliamentary bodies” recognized by the Supreme Court in *Ballin* will then apply, and “the act of a majority of the quorum [will be] the act of the body.”<sup>207</sup>

3. *The validity of Rule XXII is not a political question.*

A challenge to Rule XXII is not a political question committed exclusively to another branch by the doctrine of separation of powers. The Supreme Court has held in a long line of cases beginning with *Marbury v. Madison* in 1803, that the doctrine of separation of powers does not bar the federal courts from ruling on the constitutionality of a wide variety of actions on the part of one or both Houses of Congress. These cases include challenges to the validity of (1) laws passed by both Houses of Congress and

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<sup>205</sup> 418 U.S. at 704 (quoting *Powell v. McCormack* and *Baker v. Carr*).

<sup>206</sup> Senate Manual, pp. 20-21 (2008 ed.) (emphasis added).

<sup>207</sup> *Ballin*, 144 U.S. at 6; *Skaggs*, 110 F.3d at 845 (“The Court in *Ballin* makes it clear that where the Constitution is silent on voting requirements, the general law of parliamentary bodies applies.”) (dissenting opinion); *INS v. Chadha* 462 U.S. at 956, n.21 (“Art. II, § 2 requires that two-thirds of the senators present concur [to approve a treaty] rather than the simple majority required for passage of legislation.”). A court would not, as some courts have suggested in dicta, be required to “rewrite the Senate rules.” *Page v. Shelby*, 995 F. Supp. 23, 29 (D.D.C.), *aff’d*, 172 F.3d 920 (D.C. Cir. 1998) (dismissing a voter’s generalized attack of the Senate filibuster rule for want of standing under *Lujan*); *see also, Judicial Watch*, 432 F.3d at 365-66.

signed by the President,<sup>208</sup> (2) the one-house veto passed by Congress and signed by the President that expressly reserved to each house the power to veto agency regulations,<sup>209</sup> (3) the line-item veto act passed by Congress that delegated to the President the power to veto a portion of an appropriations bill passed by Congress,<sup>210</sup> (4) rules adopted by one house of Congress under the rule-making power in Art. I, § 5 that are alleged to conflict with other sections of the Constitution,<sup>211</sup> (5) the refusal by the House of Representatives to seat Adam Clayton Powell,<sup>212</sup> (6) the refusal of Congress to exercise the power granted by Art. I, § 4 to “make or alter” term limits adopted by a state legislature,<sup>213</sup> (7) the refusal of Congress to exercise its power under Art. I, § 4 to “make or alter” the unequal apportionment of congressional districts by state legislatures,<sup>214</sup> (8) an arrest order issued by Congress for contempt,<sup>215</sup> (9) a \$25 special assessment in criminal cases that was alleged to have violated the Origination Clause because it originated in the Senate,<sup>216</sup> (10) the constitutionality of the method of allocation of House seats among the states after each decennial census,<sup>217</sup> and (11) the delegation of executive branch powers to the Comptroller General, a legislative branch official.<sup>218</sup>

In *INS v. Chadha*,<sup>219</sup> the Supreme Court rejected the argument that the question of the validity of the one-house veto was a political dispute between the Congress and the President and that the doctrine of separation of powers precluded the Court from intruding on that dispute. The Court held that 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 implications ....” Noting that *Marbury v. Madison*... “was also a ‘political case...,’” the Court held that the federal “courts cannot reject as ‘no lawsuit’ a bona fide controversy as to whether some action denominated ‘political’ exceeds constitutional authority.” (citing *Baker v. Carr*).<sup>220</sup>

In *Powell v. McCormack*, the Court also rejected the argument that all “adjudicatory powers” concerning the qualifications of members to the House were committed exclusively to the House by the Qualifications Clause in Art. I, § 5, cl. 1 and that the federal court was precluded by the doctrine of separation of powers from intruding on the decision of the House to refuse to seat Rep. Powell.

<sup>208</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

<sup>209</sup> *INS v. Chadha*, 462 U.S. 919 (1983).

<sup>210</sup> *Clinton v. City of New York*, 524 U.S. 417 (1998).

<sup>211</sup> *United States v. Ballin*, 144 U.S. 1 (1892).

<sup>212</sup> *Powell v. McCormack*, 395 U.S. 486, 514-16 (1969).

<sup>213</sup> *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 808 (1995).

<sup>214</sup> *Wesberry v. Sanders*, 376 U.S. 1 (1964).

<sup>215</sup> *Kilbourn v. Thompson*, 103 U.S. 168 (1881).

<sup>216</sup> *United States v. Munoz-Flores*, 495 U.S. 385 (1990).

<sup>217</sup> *Dep’t. of Commerce v. Montana*, 503 U.S. 442, 456-59 (1992); see also *Clemons v. United States Dep’t. of Commerce*, \_\_\_ F. Supp. 2d \_\_\_, 2010 WL 2732610 (N.D. Miss. 2010) (three judge district court).

<sup>218</sup> *Bowsher v. Synar*, 478 U.S. 714 (1986).

<sup>219</sup> 462 U.S. at 942-43.

<sup>220</sup> 462 U.S. at 942-43.

In *United States v. Munoz-Flores*,<sup>221</sup> the Court rejected the government’s argument that the Court was precluded by the doctrine of separation of powers from ruling on a challenge under the Origination Clause to a \$25 assessment in criminal cases that originated in the Senate. 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.<sup>222</sup> “[T]he fact that one institution of Government has mechanisms available to guard against invasions into its power by other governmental institutions does not require that the Judiciary remove itself from the controversy by labeling the issue as a political question.”<sup>223</sup>

In *Wesberry v. Sanders*,<sup>224</sup> the Court overruled *Colegrove v. Green*,<sup>225</sup> which had held that the question of whether congressional districts should be equally apportioned was a political question that was exclusively committed by Article I, § 4 to the state legislatures in the first instance, and to Congress, to whom the Constitution had reserved the power to “at any time by law make or alter [state election] Regulations, except as to the Places of choosing senators.”<sup>226</sup> The Court in *Wesberry* held that “nothing in the language of that article gives support to a construction that would immunize state congressional apportionment laws which debase a citizen’s right to vote from the power of courts to protect the constitutional rights of individuals from legislative destruction.”<sup>227</sup>

#### PART IV: ANALYSIS OF POSSIBLE DEFENSES

##### A. The power of the Senate to makes its own rules.

Defenders of Rule XXII contend that the Senate has the power under Article I, § 5, cl. 2 to “determine the Rules of its proceedings,” and that its rules cannot be challenged in court. There are two answers to this argument. *First*, the grant in Art. I, § 5, cl. 2 to each house of the power to “determine the rules of its proceedings” is analogous to the delegation to the states in Article I, § 4, cl. 1 to determine “The Times, Places and Manner . . . of Elections” of senators and representatives which has been held by the Supreme Court to grant to the states only the authority to adopt *procedural regulations*, and does not allow the states to *dictate electoral outcomes*.<sup>228</sup> Rule XXII is more than a “procedural regulation;” it is a substantive rule that dictates outcomes of legislation in the Senate, and therefore exceeds the grant of authority in Art. I, § 5, cl. 2.

*Second*, there are constitutional limits on the rule-making power of the Senate. The Senate cannot use the power to make its own rules granted in one section of the Constitution to violate *other* sections of the Constitution. This proposition was

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<sup>221</sup> 495 U.S. 385, 392 (1990).

<sup>222</sup> 95 U.S. at 392.

<sup>223</sup> *Id.* at 393.

<sup>224</sup> 376 U.S. 1, 6 (1964).

<sup>225</sup> 328 U.S. 549 (1946).

<sup>226</sup> *Id.* at 7 n. 7.

<sup>227</sup> *Id.* at 6; *see also U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995).

<sup>228</sup> *See Cook*, 531 U.S. at 523; *Thornton*, 514 U.S. at 833-34.

established in *Ballin*,<sup>229</sup> in which the Court held that while “[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...” The Senate could not, for example, adopt a rule that said that ratification of a treaty would require a 3/4ths vote instead of a 2/3rds vote prescribed in Article II, § 3, cl. 5 or to raise or lower the number of votes required to convict for impeachment from the 2/3rds specified in Art. I, Sec. 3, Cl. 5, or to adopt a rule prohibiting the passage of navigation acts or acts raising federal taxes without a 2/3rds vote.

This *Ballin* principle – that Congress cannot use the authority delegated in one section of the Constitution to violate other sections of the Constitution – has subsequently been applied in many cases to invalidate actions of Congress that conflicted with other provisions of the Constitution.<sup>230</sup>

#### **B. Filibusters prevent hasty adoption of legislation.**

Defenders of Rule XXII argue that the filibuster is necessary to ensure that bills will not be adopted hastily without being fully debated. They ignore the distinction between a rule that protects the right of a senator to engage in a full and fair debate for a legitimate purpose of informing and persuading fellow senators to vote in a particular way, and the abuse of the privilege of debate to obstruct the business of the Senate and prevent other senators from exercising their constitutional rights to vote on bills or resolutions, to confirm treaties or presidential nominees. The fact that the filibuster is used to *prevent* debate in the Senate makes hollow the defenders’ claim that the purpose of the filibuster is to guarantee senators a reasonable opportunity to engage in a full and free debate.

#### **C. Filibusters promote compromise.**

Defenders also argue that the filibuster is necessary to promote compromise. In a democracy, senators are expected to compromise to *build* a majority. But once the support of a majority of senators has been secured, the principle of majority rule should then apply. The majority should not be required to appease the minority and give in to

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<sup>229</sup> 144 U.S. at 5 (emphasis added); *see also Vander Jagt v. O’Neill, supra* in which the D.C. Circuit relied on *Ballin* in holding that “if Congress should adopt internal procedures which ‘ignore constitutional restraints’ ..., it is clear that we must provide remedial action.” 699 F.2d at 1170.

<sup>230</sup> *See, e.g., Powell v. McCormack*, 395 U.S. 486 (1969) (holding that the House could not use the power granted by Art. I, § 5, cl. 1 to judge the qualifications of its members to violate the Constitution by adding an additional qualification to the exclusive list of qualifications in Art. I, § 2, cl. 2); *INS v. Chadha*, 462 U.S. 919 (1983) (holding that Congress could not use its power in Art. I, § 8, cl. 4 to establish uniform laws of naturalization to violate the Presentment Clause in Art. I, § 7 by enacting a one-house veto over an administrative regulation); *Clinton v. City of New York*, 524 U.S. 417 (1998) (holding that Congress could not use its legislative power to violate the Presentment Clause by delegating to the President a line item veto); *see also Thornton*, 514 U.S. 779 (holding that a state cannot use its power under Art. I, § 4, cl. 1 to prescribe the times, places and manner of elections of members of Congress to impose term limits in violation of the exclusive lists of qualifications stated in Art. I, §§ 2 & 3); *Cook*, 531 U.S. at 510 (holding that a state could not use its power under Art. I, § 4, cl. 1 to prescribe the times, places and manner of elections of members of Congress to violate the Constitution by “instructing” its members of Congress to support a constitutional amendment imposing term limits).

their demands as a condition of being allowed to bring a bill to the floor for debate or to vote for final passage. That is not how a democracy is supposed to work.

**D. Filibusters protect the minority from the tyranny of the majority.**

Defenders of Rule XXII argue that the filibuster is necessary to protect the minority from “the tyranny of the majority.” The Framers debated whether the interests of the minority should be protected from the majority by requiring a super majority vote both for the purposes of a quorum and for the passage of navigation acts. Motions by the southern states to except navigation acts from the principle of majority rule in Article I, § 7 by prohibiting Congress from passing navigation acts without a 2/3rds vote of both houses were rejected. The Convention decided instead to side with James Wilson of Pennsylvania who said that protection of every minority interest would require unanimity, and that given a choice between allowing the minority in Congress to bind the majority hand and foot, and allowing the minority in Congress to bind the majority “hand and foot ... it was surely better to let the [minority] be bound hand and foot” than the majority.<sup>231</sup>

Moreover, the rights of the minority living in the small states were protected by the Framers of the Constitution in other ways. The Framers protected minority interests (1) by creating a bi-cameral legislature composed of two houses, (2) by guaranteeing each state equal representation in the Senate regardless of population, (3) by guaranteeing that each state would have representation in the House by at least one representative regardless of its population, 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.

The minority of the population living in the small states are represented in the Senate far out of proportion to their numbers as a result of the Great Compromise. A majority of the Senate is now elected by only 18% of the U.S. population. The seven least populous states (Alaska, Delaware, Montana, North Dakota, South Dakota, Vermont and Wyoming) with a collective population of just over 4.8 million and are represented in the Senate by 14 senators, while California, which has a population of 33.8 million, has only two Senators. Voters in Wyoming, which has a population of less than 500,000, are represented by two Senators, and have 67.6 times the representation in the Senate as voters in California.

Finally, there is no evidence the Framers intended to grant the Senate the power to use its rule-making power to alter the carefully crafted balance of power reflected by the Great Compromise or to make the Senate even less representative by giving a minority of Senators a veto power over the business of the Senate, and therefore of Congress.

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<sup>231</sup> 2 Farrand at page 451.

## **E. The “We Have Always Done It” defense.**

Fisk and Chemerinsky recognize the strength of the argument that the filibuster conflicts directly with the principle of majority rule in the text of the Constitution. They say, however, that “the filibuster’s long history makes the textual argument highly questionable.”<sup>232</sup>

Fisk and Chemerinsky’s concerns seem to be based on the assumption that senators had a constitutional “right” of 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. This assumption is demonstrably untrue as a matter of historical fact. And, even if the first Senate had not adopted the previous question motion as a part of its rules, the fact that the Senate has a long history of filibusters does not make the supermajority vote requirement in Rule XXII constitutional. As the Supreme Court held in *Powell*, the fact “[t]hat an unconstitutional action has been taken before, surely does not render that same action any less unconstitutional at a later date.”<sup>233</sup>

Filibusters were not allowed in Parliament in the Second Continental Congress – or under the first rules adopted by the Senate in 1789. The first filibuster did not occur in the Senate until more than 50 years after the Constitution was adopted.

Moreover, there have been many cases in which the Supreme Court declared unconstitutional practices that had historical roots that were 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. For the next 170 years of our history, 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. Beginning, however, in 1962 with *Baker v. Carr*,<sup>234</sup> followed in 1963 by *Gray v. Sanders*,<sup>235</sup> and culminating in 1964 with *Reynolds v. Sims*,<sup>236</sup> and *Wesberry v. Sanders*,<sup>237</sup> 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. *Brown v. Board of Educ.*<sup>238</sup> is another example of a case in which the Supreme Court declared unconstitutional a historical practice of racial discrimination that not only existed at the time of the adoption of the Constitution, it was deliberately not addressed by the Framers at the Constitutional Convention,<sup>239</sup> and continued long after the adoption of the Fourteenth Amendment. In two more recent cases, the Supreme Court declared unconstitutional gun control laws<sup>240</sup> and campaign finance laws that prohibited corporations from using corporate funds to advocate the election or defeat of candidates<sup>241</sup> that had existed at least as long as the Senate filibuster rule has existed.

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<sup>232</sup> Fisk & Chemerinsky, *supra*, at 242.

<sup>233</sup> 395 U.S. at 546-47.

<sup>234</sup> 369 U.S. 186 (1962).

<sup>235</sup> 372 U.S. 368 (1963).

<sup>236</sup> 377 U.S. 533 (1964).

<sup>237</sup> 376 U.S. 1 (1964).

<sup>238</sup> 347 U.S. 483 (1954).

<sup>239</sup> Art. I, § 9, cl. 1.

<sup>240</sup> *District of Columbia v. Heller*, 554 U.S. \_\_\_, 128 S. Ct. 2783 (2008).

<sup>241</sup> *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

## F. The “It’s Only a Rule of Procedure” defense.

Several judges have said in *dicta* that the 60 supermajority vote requirement in Rule XXII 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.<sup>242</sup>

In *Page v. Dole*, Judge Green said that “the fatal flaw in Page’s second [standing] argument is that Senate Rule XXII is an internal procedural rule. To put it more boldly, Senate Rule XXII is not the same as a vote for or against legislation.”<sup>243</sup>

Judge Edwards in his dissent in *Skaggs* picked up on the point in attempting to distinguish the Gingrich House rule requiring a three-fifths vote to pass a tax increase in the House – which he said was unconstitutional – from Rule XXII, which requires a three-fifths vote of 60 senators on a motion for cloture to end debate and 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.

The presentment clause, by virtue of the Framers’ adoption of the general rule of parliamentary procedure, merely defines the number of votes necessary to enact a bill into law. It does not speak to these other procedural matters.<sup>244</sup>

The short answer is that the statements in all three cases are *dicta* and are based on the form of the rule, while ignoring its substance. The Supreme Court has long held that “constitutional rights would be of little value if they could be ... indirectly denied ... [and that] the Constitution nullifies sophisticated as well as simple-minded modes of infringing constitutional protections.”<sup>245</sup>

In the case of Rule XXII, form and substance are the same. The practical effect of Rule XXII is to give a minority of 41 senators an absolute veto power over the business of the Senate. No bill can even reach the Senate floor for a *debate* over the objections of a single senator without the adoption of cloture on a motion to proceed under Rule VIII, which, under Rule XXII, requires 60 votes. Even if debate is allowed, debate cannot be

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<sup>242</sup> *Page v. Dole*, Case No. 93-1546 (unreported, D.C. Cir. Aug. 18, 1994), *vacated as moot by the D.C. Cir.*, 1996 WL 310132 (D.C. Cir. 1996); *Skaggs v. Carle*, 110 F.3d at 846 (dissenting opinion).

<sup>243</sup> Opinion, p. 15.

<sup>244</sup> *Skaggs*, 110 F.3d at 846; *see also Page v. Shelby*, in which the district court cited the language from Judge Edwards’ dissent in *Skaggs* in *dictum*, as an additional ground supporting its ruling that Page did not have standing to challenge the Senate filibuster rule. 995 F. Supp. 23, 28 (D.D.C. 1998), *aff’d without opinion*, 172 F.3d 920 (D.C. Cir. 1998).

<sup>245</sup> *U.S. Term Limits v. Thornton*, 514 U.S. at 829 (internal quotations omitted); *Anderson v. Martin*, 375 U.S. 399, 404 (1964) (“that which cannot be done [directly] by express statutory prohibition cannot be done by indirection.”).

terminated and the bill brought to a final vote over the objection of a single senator without the adoption of a second motion for cloture which also requires 60 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 matter, as it actually did from 1806 until 1917. And that would mean that any minority, down to a single senator, could constitutionally prevent the Senate from doing business, and it would make a mockery out of the express constitutional provision that a simple majority is sufficient for a quorum and the implied provision ... that a mere majority is constitutionally sufficient to pass any measure, including an amendment of the rules.<sup>246</sup>

Moreover, the Supreme Court has repeatedly held in the *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.<sup>247</sup>

In *Terry v. Adams*, 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 Jaybird political club in Texas was unconstitutional even though African-Americans were not prohibited from voting either in the Democratic Party Primary which followed, or in the general election in Texas. The Court said that “The Jaybird 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.”<sup>248</sup> In *Gray v. Sanders*,<sup>249</sup> the Court declared the Georgia county unit system unconstitutional under the one-person-one vote rule even though it applied only to primary elections and did not apply to general elections.

Rule XXII has been an “integral part” of the legislative process in the Senate for more than ninety years and has had at least as much effect on the legislative process in the Senate as did the Jaybird Club’s all-white primary on the Georgia county unit system in the outcome of general elections in Texas and Georgia.

The Supreme Court has not hesitated to declare unconstitutional state statutes whose effects on electoral outcomes were far more subtle and indirect than Rule XXII. In *Anderson v. Martin*,<sup>250</sup> for example, the Supreme Court struck down a Texas statute that required that the race of a candidate be printed next to a candidate’s name on the ballot. Although the information was truthful, the Court held the statute to be discriminatory because its practical effect was to influence voters to cast their ballots was based on the race of the candidate, rather than candidates’ qualifications. In *Cook v. Gralike*,<sup>251</sup> the Court again looked at the substance in holding that a Missouri

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<sup>246</sup> S. Hrg. 103-119; Hearing before the Joint Committee on the Organization of Congress, p. 23 (May 18, 20, and 25, 1993).

<sup>247</sup> *Terry v. Adams*, 345 U.S. 461 (1953) (the Texas Jaybird Primary case); *Smith v. Allwright*, 321 U.S. 649 (1944) (the Democratic White Primary case) (and cases cited).

<sup>248</sup> 345 U.S. at 469.

<sup>249</sup> 372 U.S. 368 (1963).

<sup>250</sup> 375 U.S. 399 (1964).

<sup>251</sup> 531 U.S. 510 (2001).

constitutional provision requiring that there be printed next to a candidate's name on a ballot whether the candidate had pledged to support a constitutional amendment imposing term limits on members of Congress was a transparent attempt to influence voters to vote for or against a candidate based on this single issue.<sup>252</sup>

**G. Gordon v. Lance, 403 U.S. 1 (1971) does not support the filibuster rule.**

Supporters of the filibuster rule may attempt to justify the filibuster rule based on loose language in *Gordon v. Lance*,<sup>253</sup> in which the Supreme Court said that although: “any departure from strict majority rule gives disproportionate power to the minority ... *there is nothing in the language of the Constitution, our history or our cases that requires that the majority prevail on every issue.*”<sup>254</sup>

The language in *Gordon* cannot be read out of the context of that case – a challenge under the *equal protection clause* of the Fourteenth Amendment to a provision in the West Virginia Constitution that prohibited localities from incurring bonded indebtednesses or raising property taxes without the approval of 60% of the voters. The Court simply held that “so long as such provisions do not *discriminate* against or authorize discrimination against any identifiable class they do not violate the Equal Protection Clause.”<sup>255</sup>

The equal protection analysis in *Gordon* does not apply to a challenge to the Senate filibuster rule based on Article I of the Constitution. Article I defines and limits only the powers of Congress, not of state legislatures. Article I does not apply to the states, which are free to structure their legislatures and adopt law-making procedure in ways that Congress cannot under Article I. For example, the Constitution requires a bicameral Congress composed of a House of Representatives and a Senate. By contrast, states are free to have a unicameral legislature, as Nebraska has done. Article I, § 7 requires that all federal laws must originate in and be approved by Congress. States are not prohibited by Article I from adopting initiative and referendum measures that allow the people of the state to bypass their state legislatures and adopt statutes or amend their state constitutions directly. Voters in California, for example, have amended their state constitution by adopting Proposition 8 (prohibiting gay marriage) and Proposition 13 (prohibiting tax increases without a 2/3rds vote of the legislature). Thus, *Gordon* is

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<sup>252</sup> See also *Anderson v. Celebrezze*, 460 U.S. 780 (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); *Harman v. Forssenius*, 380 U.S. 528 (1965) (holding invalid under the Fourteenth Amendment Virginia's nominal \$1.50 poll tax).

<sup>253</sup> 403 U.S. 1, 6 (1971).

<sup>254</sup> *Gordon*, 403 U.S. at 6 (emphasis added). The statement in *Gordon* that “there is nothing in the ... Constitution ... that requires the majority prevail on every issue” is literally true even as applied to Congress. See Part II E (pp. 57-66) above listing the six exceptions in the original Constitution to the principle of majority rule and the two additional exceptions that have been added by Amendments 14 (§ 3) and 25 (§ 4).

<sup>255</sup> *Id.* at 7 (emphasis added).

distinguishable and provides no support for the constitutionality of the Senate filibuster rule.

#### **H. The D.C. Circuit should not deny relief under its unique “remedial discretion” doctrine.**

The “remedial discretion” doctrine is unique to the D.C. Circuit. It is not jurisdictional, nor is it an absolute bar to suits by members of Congress. It is, at most, “a prudential, self-imposed limitation on [the court’s] discretion [that] is premised on a congressman’s ability to take care of his own interests by persuading his colleagues.”<sup>256</sup>

The remedial discretion doctrine appears to be analogous to the doctrine of exhaustion of administrative remedies. As the D.C. Circuit explained its remedial discretion doctrine in *Michel*: “[U]nder the doctrine ... *the availability of an internally available remedy to Members of Congress* means that it would be an abuse of discretion for the judiciary to entertain the action.”<sup>257</sup> Accordingly, “[w]here a congressional plaintiff could obtain substantial relief from his fellow legislators through the enactment, repeal, or amendment of a statute, this court should exercise its equitable discretion to dismiss the legislator’s action.”<sup>258</sup>

On the other hand, the D.C. Circuit has also held that “We do not exercise our discretion to dismiss a case ... when a congressman suffers an effective nullification of his vote, or if his influence is substantially diminished.” *Boehner*, 30 F.3d at 160 (citations omitted). And in *Vander Jagt*,<sup>259</sup> the D.C. Circuit said that “if Congress should adopt internal procedures which ‘ignore constitutional restraints’ ... it is clear we must provide remedial action” (citing *United States v. Ballin*).<sup>260</sup>

Several panels in the D.C. Circuit have questioned the legitimacy of “this circuit’s recently minted doctrine of equitable discretion [that] has not even been addressed, much less endorsed, by the Supreme Court. Moreover, several members of this court have previously expressed concern over whether equitable discretion represents ‘a viable doctrine upon which to determine the fate of constitutional litigation.’”<sup>261</sup>

The D.C. Circuit’s remedial discretion doctrine appears to be inconsistent with the ruling of the Supreme Court in *United States v. Munoz-Flores*.<sup>262</sup> The issue in that case was whether the statute imposing a \$25/per count special assessment in all federal criminal cases violated the Origination Clause because it originated in the Senate, rather

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<sup>256</sup> *Michel*, 14 F.3d at 628.

<sup>257</sup> *Michel*, 14 F.3d at 627 (quoting *Humphrey v. Baker*, 848 F.2d 211, 214 (D.C. Cir.), *cert. denied*, 488 U.S. 966 (1988)).

<sup>258</sup> *Boehner v. Anderson*, 30 F.3d 156, 160 (D.C. Cir. 1994) (quoting *Riegle v. Federal Open Mkt. Comm’n.*, 656 F.2d at 881); *see also Michel*, 14 F.3d at 627.

<sup>259</sup> 699 F.2d at 1171.

<sup>260</sup> Whatever the validity of the remedial discretion doctrine, it does not apply to a case brought by a private citizen (assuming that a private citizen would otherwise have standing) because “the doctrine ... however construed ... has no applicability to private voters.” *Michel*, 14 F.3d at 628 (citing *Gregg v. Barrett*, 771 F.2d 539, 546 (D.C. Cir. 1985)). It would also not apply to a suit by a member of the House challenging the Senate filibuster rule, or a failed presidential nomination because neither has the power to introduce an amendment to an internal rule of the Senate.

<sup>261</sup> *Humphrey v. Baker*, 848 F.2d 211, 214 (D.C. Cir.), *cert. denied*, 488 U.S. 966 (1988) (quoting *Melcher v. Federal Open Mkt. Committee*, 836 F.2d 561, 565 (D.C. Cir. 1987) (Edwards, J., concurring)).

<sup>262</sup> 495 U.S. 385, 392 (1990).

than the House. The Court rejected an argument by the Government that looks a lot like the D.C. Circuit’s remedial discretion doctrine. The Government argued that the case should be dismissed because “the House has the power to protect its institutional interests by refusing to pass a bill if it believes the Origination Clause has been violated.” The Court dismissed the Government’s argument stating “[a]lthough the House certainly can refuse to pass a bill because it violates the Origination Clause, that ability does not absolve this Court of its responsibility to consider constitutional challenges to congressional enactments.... Nor do the House’s incentives to safeguard its origination prerogative obviate the need for judicial review.”<sup>263</sup>

Assuming the continued existence of the D.C. Circuit’s remedial discretion rule, it should not apply to a challenge to the Senate filibuster rule. Senator Harkin’s unsuccessful efforts to amend Rule XXII have shown that there is no “internally available remedy” in the Senate whereby a majority of senators can repeal, suspend or amend the Senate filibuster rule. Moreover, the remedial discretion doctrine does not apply to and will not be a bar to a suit by a member of the House, an organization such as Common Cause, or a private person who has been directly injured as a result of a filibuster of a bill that would have benefited the organization or the individual because none of these plaintiffs have a legislative remedy under the rules of the Senate.<sup>264</sup> This factor alone is sufficient to distinguish this case from *Skaggs v. Carle*<sup>265</sup> and *Raines v. Byrd*.<sup>266</sup>

## CONCLUSION

The filibuster is fundamentally inconsistent with the democratic process envisioned by the Framers of the Constitution and is unconstitutional as a matter of principle. 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. People on opposite ends of the political spectrum – such as Democratic Senators Senator Paul Douglas and Clinton Anderson in the 1950’s and Tom Harkin, Dick Durbin and Joseph Lieberman in the 1990’s and Tom Harkin and Tom Udall in 2010, and Republicans such as Richard Nixon and Senator John Cornyn of Texas all have agreed at one time or another that the filibuster is unconstitutional. For example, as recently as six years ago, Senator Cornyn wrote in *Our Broken Judicial Confirmation Process and the Need for Filibuster Reform*, *supra* that:

The current filibuster of judicial nominations ... [is] offensive to our nation’s constitutional design ...

*The essence of our democratic system of government is simple: Majorities must be permitted to govern.. And the constitutional case against*

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<sup>263</sup> *Id.* at 392.

<sup>264</sup> *Michel*, 14 F.3d at 628 (“[T]he doctrine ... has no applicability to private voters.”); *Skaggs*, 110 F.3d at 840 (dissenting opinion); Fisk & Chemerinsky, *supra* at 226 (“It is precisely the inability of members of Congress to protect their own interests that distinguishes [the filibuster] .... A majority of the Senate cannot adopt additional legislation to remedy the filibuster’s harm because of the sixty votes needed for cloture and the two-thirds margin required to challenge the Senate’s rules.”).

<sup>265</sup> 110 F.3d 831.

<sup>266</sup> 521 U.S. at 824, 829.

*filibusters of judicial nominations is rather straightforward* as a result. The text of Article II states that “[t]he President ... shall nominate, and by and with the Advice and Consent of the Senate, shall appoint ... Judges.” It has long been understood that, as a matter of general parliamentary law, the constitution should be construed to provide for simple majority rule except where it expressly states otherwise.... (citing *United States v. Ballin*, 144 U.S. 1 (1892)).

The *Ballin* approach to textual silence is reinforced by Thomas Jefferson’s *Manual of Parliamentary Procedure* – which still governs the House of Representatives to this day, and which Jefferson used to govern the Senate when he was Vice President. Section 41 of the *Manual* states that “[t]he voice of the majority decides. For the *lex majoris partis* is the law of all councils, elections, &c. where not otherwise expressly provided.”

By contrast, the Constitution expressly establishes supermajority voting requirements in a variety of contexts:... (listing the seven provisions in the Constitution that require 2/3rds votes).

In addition, Article 9, Section 6 of the Articles of Confederation contains an express supermajority requirement for appointing commanders in chief – stating that “[t]he United States in Congress assembled shall never ... appoint a commander-in-chief of the army or navy, unless nine states assent to the same” – and expressly provides for supermajority voting rules in a variety of other contexts as well. *In light of these express supermajority voting requirements, it seems clear that the Founders did not intend to impose a supermajority voting rule for the confirmation of judges.*

*This canon of interpretation – that majorities rule unless otherwise stated explicitly in constitutional text – is also reinforced by the shared beliefs of our Founding Fathers.* As Alexander Hamilton explained in Federalist No. 22, “the fundamental maxim of republican government ... requires that the sense of the majority should prevail.” Similarly, James Madison stated in Federalist No. 58 that “the fundamental principle of free government would be reversed” if supermajority voting requirements were the norm. “It would be no longer the majority that would rule: the power would be transferred to the minority.”

*After all, no Senate rule can trump the Constitution.* As the Supreme Court unanimously noted in *Ballin*, although “[t]he Constitution empowers each house to determine its rules of proceedings,” neither House of Congress may “by its rules ignore constitutional restraints....”<sup>267</sup>

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<sup>267</sup> Cornyn, *Id.* at 194-97. Although the focus of Senator Cornyn’s article was on filibusters of judicial nominations, there is no principled basis on which his constitutional arguments can be limited to filibusters of judicial nominations. If anything, a stronger case can be made for requiring a supermajority

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vote to approve judicial nominations which are life-time appointments and cannot be removed by the President or undone by a simple majority vote, than for ordinary legislation, or other appointees who serve at the pleasure of the President.