OUR CONSTITUTIONAL DEMOCRACY AND THE MINORITY VETO: A CASE AGAINST THE FILIBUSTER

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I. INTRODUCTION

On November 3, 2021, Senate Republicans successfully blocked action on the John Lewis Voting Rights Advancement Act, a bill aimed at restoring and strengthening the Voting Rights Act of 1965.[1] Despite support from fifty-one senators to open debate, the bill was derailed by a GOP-led filibuster.[2] Days earlier, the Freedom to Vote Act, a carefully crafted compromise package, was similarly blocked for the third time in 2021.[3] Notably, neither of these blockades was accompanied by the valor many Americans associate with the Senate filibuster, immortalized in Jimmy Stewart's twenty-four-hour filibuster against corruption in *Mr. Smith Goes to Washington*.[4] Quite the opposite, both of these bills were stalled by "silent filibusters," which require only forty-one senators to merely threaten a filibuster.[5] Over time, the Senate filibuster has transformed from a laborious tool used to encourage the majority to compromise, to its modern form, in which it is used to torpedo social reform and essentially grant two-fifths of senators a minority veto.

The filibuster is a term used to describe an attempt to delay a vote on legislation.[6] Today, the Senate cloture rule requires sixty senators to overcome a filibuster and bring a bill to a vote.[7] Given the current political landscape and pattern of filibuster use, it is now commonly understood that legislation in the Senate requires sixty votes to pass.[8] In the last few decades, the filibuster has gridlocked Congress and doomed popular reform on hot-button issues ranging from gun control to climate change and campaign

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[1] Carl Hulse, *Republicans Block a Second Voting Rights Bill in the Senate*, N.Y. TIMES (Nov. 4, 2021), https://www.nytimes.com/2021/11/03/us/politics/senate-republicans-voting-rights-act.html [https://perma.cc/7SLX-5KEU].

[2] *Id.*

[3] Carl Hulse, *Senate Republicans Block Voting Rights Bill, Leaving Its Fate in Doubt,* N.Y. TIMES (Oct. 22, 2021), https://www.nytimes.com/2021/10/20/us/politics/senate-voting-rights-filibuster.html [https://perma.cc/2U5M-SW64].

[4] Alissa Wilkinson, *Mr. Smith Goes to Washington Has Become Synonymous With the Filibuster—For Good Reason,* VOX (Apr. 8, 2017, 10:30 AM), https://www.vox.com/culture/2017/4/8/15168072/mr-smith-goes-to-washington-filibuster [https://perma.cc/553L-FQBG]; *see also* MR. SMITH GOES TO WASHINGTON (Columbia Pictures 1939).

[5] Molly E. Reynolds, *What Is the Senate Filibuster, and What Would it Take to Eliminate It?*, BROOKINGS (Sept. 9, 2020), https://www.brookings.edu/policy2020/votervital/what-is-the-senate-filibuster-and-what-would-it-take-to-eliminate-it/ [https://perma.cc/J479-78CT].

[6] *About Filibusters and Cloture,* U.S. SENATE, https://www.senate.gov/about/powers-procedures/filibusters-cloture/overview.htm [https://perma.cc/V7EM-SHR9].

[7] Reynolds, *supra* note 5.

[8] Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181, 182 (1997).

finance.[9] With this frustrating lack of action continuing into the nation's 117th session of Congress, we must consider when the American public first became hostage to a minority of Senators.[10] As this Note will discuss, the meteoric rise in deployment of the filibuster has roots in Southern resistance to civil rights legislation in the nineteenth and twentieth centuries.[11] Since then, use of the filibuster has grown, with more cloture motions having been filed in the last twenty years than in the eighty years before.[12]

Clearly something has broken down in the legislative process. With prominent politicians from both political parties calling for reform of the filibuster, we must address their chief concern: the filibuster undermines majority rule.[13] If the filibuster undermines majority rule and, in turn, undermines democracy, can the filibuster be constitutional? After decades of stalemate, it is past time to seriously consider the filibuster's compatibility with our constitutional democracy. This Note will (1) examine the history of the Senate cloture rule, with an eye to how the tool has been exploited to block civil rights legislation, (2) investigate the filibuster's contribution to unproductive lawmaking in Congress today, (3) explore counterarguments to filibuster reform and the political process of reform, (4) argue that the filibuster is unconstitutional, and (5) assess how the filibuster could be challenged in court.

II. THE HISTORY OF THE FILIBUSTER

A. EARLY HISTORY

The Senate, ironically hailed as "the world's 'greatest deliberative body,' " has long been championed as the slow-moving house of Congress, featuring unlimited debate and flowery statesmanship.[14] Through this lens, the filibuster might appear to be a cornerstone of deliberation and safeguard against the tyranny of the majority. However, although the idea of the Senate as a "saucer" to cool the "hot tea" sent by the House of Representatives dates back to the Constitutional Convention, the modern cloture rule was not included in the founders' vision of the Senate.[15] On the contrary, the founders frequently warned against providing factions with the power to obstruct

[9] Alex Tausanovitch & Sam Berger, *The Impact of the Filibuster on Federal Policymaking*, AM. PROGRESS (Dec. 5, 2019), https://www.americanprogress.org/article/impact-filibuster-federal-policymaking/ [https://perma.cc/9YHL-LL7P].

[10] *Dates of Sessions of the Congress,* U.S. SENATE, https://www.senate.gov/legislative/DatesofSessionsofCongress.htm [https://perma.cc/59NT-U7QE].

[11] Zack Beauchamp, *The Filibuster's Racist History, Explained*, VOX (Mar. 25, 2021, 11:20 AM), https://www.vox.com/policy-and-politics/2021/3/25/22348308/filibuster -racism-jim-crow-mitch-mcconnell [https://perma.cc/M5LH-KWUU].

[12] Reynolds, *supra* note 5.

[13] JM Rieger, *39 Senators Who Now Support Changing or Eliminating the Filibuster Previously Opposed Doing So,* WASH. POST (June 18, 2021, 2:09 PM), https://www.washingtonpost.com/politics/2021/06/18/39-senators-who-now-support-changing-or-eliminating-filibuster-previously-opposed-doing-so/ [https://perma.cc/CV59-WXNC].

[14] Kathy Kiely, *Five Myths About the U.S. Senate,* WASH. POST (Jan. 31, 2020), https://www.washingtonpost.com/outlook/five-myths/five-myths-about-the-us-senate/2020/01/31/e36ddbe8-4374-11ea-aa6a-083d01b3ed18_story.html [https://perma.cc/XW5P-CG6N].

[15] Julia Jacobs, Sarah Mervosh & Matt Stevens, *When the House and the Senate Are Controlled by Different Parties, Who Wins?*, N.Y. TIMES (Nov. 7, 2018), https://www.nytimes.com/2018/11/07/us/politics/house-senate-difference-control.html [https://perma.cc/GZ5A-6XFR]; Reynolds, *supra* note 5.

majority will and constructed our democratic system accordingly. As James Madison wrote in *Federalist 10*, "If a faction consists of less than a majority, relief is supplied by the republican principle, which enables the majority to defeat its sinister views by regular vote."[16]

The long history of the filibuster is an unintended consequence of an early housekeeping measure. Vice President Aaron Burr argued that the Senate should remove a rule that allowed a simple majority to end debate and force a vote because it was redundant and rarely used.[17] Even after the Senate removed this rule in 1806, it took more than thirty years before a Senator would first think to exploit this rule and deliver a filibuster.[18] Early Congressional history suggests a disapproval of protracted speeches unrelated to the issue of debate.[19] In fact, the Senate had informally adopted Thomas Jefferson's *Manual of Parliamentary Procedure,* which declared that "no one is to speak impertinently or beside the question, superfluously or tediously."[20]

Despite the early theoretical resistance to the filibuster, the tool became quite commonplace in the Senate before the Civil War. John C. Calhoun, a prominent pro-slavery Senator from the South, famously deployed the filibuster to protect Southern interests and, in turn, promote the views of the slaveholding South.[21] Some experts, such as Adam Jentleson, former aide to Senator Harry Reid, argue that the filibuster's rise can be directly attributed to Senator Calhoun and pro-slavery interests.[22]

This is perhaps reflected in the origin of the term "filibuster." The obstruction of legislation through unlimited debate was first given a name during the sectional disputes between the North and South in the 1850s.[23] "Filibuster" is derived from a Dutch word meaning "free booter," which passed into a Spanish word, "filibustero," commonly referring to West Indian pirates. In the United States, the term referred to private militias that invaded nations in Latin America, often to annex new slave territories.[24] Filibusterers, as defined in its pre-legislative usage, were spurred by pro-slavery

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[16] THE FEDERALIST NO. 10, at 83–89 (James Madison) (Jacob E. Cooke ed., 1961).

[17] Reynolds, *supra* note 5.

[18] Andrew Glass, *Senate Conducts First Filibuster March 5, 1841*, POLITICO (Mar. 5, 2008, 6:02 AM), https://www.politico.com/story/2008/03/senate-conducts-first-filibuster-march-5-1841-008822 [https://perma.cc/XD4R-5SJS]; Scott Bomboy, *Is Aaron Burr Really the Father of the Filibuster?*, CONST. CTR. (Apr. 5, 2021), https://constitutioncenter.org/blog/is-aaron-burr-really-the-father-of-the-filibuster [https://perma.cc/7BPR-LTL6].

[19] Akhil Reed Amar & Gary Hart, *How To End the Filibuster Forever,* SLATE (Jan. 6, 2011), https://slate.com/news-and-politics/2011/01/how-to-end-the-filibuster.html [https://perma.cc/8TUU-GB5G]; Fisk & Chemerinsky, *supra* note 8, at 189.

[20] Fisk & Chemerinsky, *supra* note 8, at 188–89 (citing Thomas Jefferson, A Manual of Parliamentary Practice 40 (New York, Clark & Maynard 1874)). It is hard to argue that Ted Cruz's reading of Dr. Seuss's "Green Eggs and Ham" during his attempted filibuster of a bill to defund the Affordable Care Act in 2013 passed this test. *See* Meagan Fitzpatrick, *Why Ted Cruz read Green Eggs and Ham in the U.S. Senate,* CBC (SEPT. 25, 2013, 5:33 AM), https://www.cbc.ca/news/world/why-ted-cruz-read-green-eggs-and-ham-in-the-u-s-senate-1.1867499 [https://perma.cc/6JET-JHN9].

[21] Fisk & Chemerinsky*, supra* note 8, at 189.

[22] Beauchamp, *supra* note 11.

[23] Fisk & Chemerinsky, *supra* note 8, at 192.

[24] John Patrick Leary, *The Manifest Destiny Marauders Who Gave the "Filibuster" Its Name*, THE NEW REPUBLIC (Mar. 5, 2021), https://newrepublic.com/article/161562/filibuster-origin-history-manifest-destiny-marauders [https://perma.cc/F8B5-385Y]; Fisk & Chemerinsky, *supra* note 8, at 192.

Southerners who wanted to add new slave states to the Union.[25] While much of the early history of filibuster usage is hotly contested by historians, the fact that the legislative tool was named after pro-slavery expeditions sheds light on the strong link between the obstructionist tool and the pro-slavery sentiments of those who popularized it.

B. INCEPTION OF THE CLOTURE RULE AND OBSTRUCTION IN THE CIVIL RIGHTS ERA

Despite growing usage in the middle of the nineteenth century, filibusters did not become successful in blocking legislation until the 1880s.[26] In the late nineteenth century, debate was marked by lengthy filibusters from both conservatives and progressives.[27] Unlimited debate became so problematic that Senators often tried to ban the filibuster, ultimately being thwarted by opponents' filibusters of motions to end the filibuster.[28] However, this changed in 1917 after a group of eleven progressive Senators blocked President Woodrow Wilson's proposal to arm American merchant ships during World War I.[29] After the stunning defeat of this war-time bill, President Wilson implored the Senate to change the rules, issuing a statement attacking the Senate as "the only legislative body in the world which cannot act when its majority is ready for action."[30] In response to enormous nationwide pressure, the Senate adopted the first version of current Rule XXII, which required the vote of a two-thirds quorum of the Senate to end debate.[31]

However, despite the adoption of this new cloture rule, the filibuster's reign continued. From 1917 to 1927, cloture was adopted only four times.[32] Further, between 1931 and the passage of the Civil Rights Act of 1964, cloture was adopted only twice.[33] From the 1930s to the 1970s, the filibuster was overwhelmingly used in the fight over civil rights.[34] According to a study conducted by Sarah Binder and Steven Smith, nearly half of Senate bills between 1917 and 1994 that failed solely because of the filibuster were civil rights bills.[35] Of the most notorious anti-civil-rights filibusters was the seventy-four-day filibuster against the Civil Rights Act of 1964.[36] Credited as the longest filibuster, it also stirred up a great deal of national outrage against Southern opposition to civil rights. Even so, filibusters continued to

[25] *Filibustering*, BRITANNICA, https://www.britannica.com/topic/filibustering [https://perma.cc/398D-YJKC].
[26] Fisk & Chemerinsky, *supra* note 8, at 195.
[27] *Id.* at 196. Notable filibusters included Southern Democrats blocking a bill to provide federal supervision of Southern congressional elections and Progressive resistance to a currency bill benefiting the rich. *Id.*
[28] Reynolds, *supra* note 5.
[29] *Id.*
[30] *On This Day, Wilson's Own Rule Helps Defeat the Versailles Treaty*, CONST. CTR. (Nov. 15, 2017), https://constitutioncenter.org/blog/on-this-day-wilsons-own-rule-defeats-the-versailles-treaty [https://perma.cc/VHE6-B8H2].
[31] Fisk & Chemerinsky, *supra* note 8, at 198.
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] Beauchamp, *supra* note 11.
[36] Fisk & Chemerinsky, *supra* note 8, at 199.

delay landmark legislation, such as the Fair Housing Act of 1968 and the Voting Rights Act in 1970.[37]

Indeed, proponents of the filibuster are correct in that the filibuster protects minority senators, but do these senators represent "unpopular minority groups that require protection from oppression?"[38] As we will further discuss in this Note, acknowledging the racist history of the filibuster helps in evaluating such normative arguments about the filibuster's role in protecting minority rights.

C. TRANSFORMATION OF THE FILIBUSTER

In the 1970s, the filibuster changed dramatically. Up until that point, senators were required to hold the floor and speak to delay a vote. However, in 1972, the Senate adopted the "two-track system" for handling debate.[39] The two-track system essentially allows the Senate to spend half of the day on filibustered legislation and the other half on other business.[40] Although originally designed to facilitate the majority in passing legislation, it has led to the advent of the silent filibuster. Now, senators no longer have to hold the floor for hours of debate. Rather, senators can trigger a filibuster by signaling an intent to filibuster, whether publicly or privately in a conversation with the Majority Leader.[41] Alternatively, senators can place a bill "on hold," which effectively communicates to the Majority Leader that a senator wishes to delay a vote on the bill.[42] Under this method, the identity of the filibustering senator is confidential.[43] Regardless of the procedural method, the silent filibuster "eliminates the distinction between a filibuster and a threat to filibuster."[44]

The effects of the silent filibuster were instantaneous. Before 1970, cloture attempts never exceeded seven per congressional session.[45] In 1972, the amount of cloture attempts rose to twenty-four.[46] The abolishment of the speaking requirement, coupled with a 1975 change in the requisite vote for cloture to three-fifths of present senators, led to the modern form of the Senate cloture rule.[47] Since then, the filibuster has continued to grow in use. Between 1970 and 2000, there were, on average, seventeen cloture votes a year.[48] Given the anonymity of threatened filibusters, this number does not even account for any legislation that was blocked from ever reaching the floor. The silent filibuster has ultimately reduced, if not eliminated, public accountability for filibustering senators and has led to an explosion in the use of strategic filibusters. Without having to commit valuable hours towards

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[37] *Id.* at 200.
[38] Beauchamp, *supra* note 11.
[39] Fisk & Chemerinsky, *supra* note 8, at 201.
[40] *Id.*
[41] *Id.* at 203.
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] Jacob Miller, *The Silent Filibuster Paradox: Searching for Solutions to the Senate Standstill*, HARV. POL. REV. (Aug. 26, 2021), https://harvardpolitics.com/silent-filibuster-paradox/ [https://perma.cc/R6HE-MRL2].
[46] *Id.*
[47] Reynolds, *supra* note 5.
[48] Tausanovitch & Berger, *supra* note 9.

holding the floor during debate, hours that could be spent fundraising for reelection, senators now face a very low cost in filibustering.[49]

III. CURRENT GRIDLOCK AND THE NEED FOR CHANGE

A. MCCONNELLISM AND GRIDLOCK IN THE TWENTY-FIRST CENTURY

Use of the filibuster grew exponentially in the 2000s, in large part due to the leadership of Senator Mitch McConnell. Senator McConnell, a Republican Senator from Kentucky, first served in Senate leadership as majority whip in 2003.[50] He became minority leader in 2007, majority leader in 2015, and minority leader again in 2021.[51] With his rise within the GOP came a stunning rise in the use of the filibuster. From 2000 to 2018, an average of fifty-three clotures votes were held a year.[52] Particular spikes were recorded in the 113th Congress (2013-14) with 218 cloture votes, and in the 115th Congress (2017-18) with 168 cloture votes.[53] In a time of growing partisanship, the McConnell-led GOP vowed to obstruct President Obama's agenda, frequently turning to the filibuster to stall any legislation proposed by Democrats.[54]

1. Relationship Between Filibuster Use and Declining Productivity

Assessing the full breadth of the filibuster's consequences is difficult. Two helpful measures can help us build a causal relationship between use of the filibuster and the Senate's declining productivity: (1) the number of cloture motions filed and (2) the number of bills passed.[55] First, 44.5% of all cloture motions ever filed were filed between 1917 and 2006;[56] 55% of all cloture motions were filed just in the fourteen-year period between 2006 and 2020.[57] Of course, this staggering rise in use of the filibuster can be attributed to a rise in partisanship and obstructionism from minority parties. But this metric is important in indicating how often the filibuster is exploited to *effectuate* such hyper-partisanship.

Second, productivity in Congress has long been on the decline, with the 116th Congress (2019-20) being declared the "least productive since at least

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[49] Fisk & Chemerinsky, *supra* note 8, at 206.

[50] *Mitch McConnell*, BRITANNICA, https://www.britannica.com/biography/Mitch-McConnell [https://perma.cc/9BP7-XS3R].

[51] *Id.*

[52] Tausanovitch & Berger, *supra* note 9.

[53] *Id.*

[54] Michael Grunwald, *The Victory of "No"*, POLITICO (Dec. 4, 2016), https://www.politico.com/magazine/story/2016/12/republican-party-obstructionism-victory-trump-214498/ [https://perma.cc/GP7M-4TBQ]. Top Republicans infamously met on President Obama's inauguration day in 2009 to plan their strategy of obstruction, in an attempt to block his reelection. Ewen MacAskill, *Democrats Condemn GOP's Plot to Obstruct Obama as 'Appalling and Sad'*, GUARDIAN (Apr. 26, 2012, 4:21 PM), https://www.theguardian.com/world/2012/apr/26/democrats-gop-plot-obstruct-obama [https://perma.cc/GQC6-BVNQ].

[55] Caroline Fredrickson, *The Case Against the Filibuster*, BRENNAN CTR. (Oct. 30, 2020), https://www.brennancenter.org/our-work/research-reports/case-against-filibuster [https://perma.cc/2PHQ-4FYN].

[56] *Id.*

[57] *Id.*

the 1970s."[58] About 2,000 bills were passed each year in the 1950s.[59] By the 1970s, the amount of bills passed declined to about 700 bills a year.[60] In the 116th Congress, only 353 bills were passed.[61] This number cannot be attributed to a low number of bills being introduced. In 2020, 5,117 bills were introduced in either chamber of Congress.[62] This leaves the passage rate of bills at under 10% in 2020, whereas in 1947, the passage rate was about 52%.[63] The large disparity in amount of bills introduced versus passed indicates massive obstruction.

2. Legislation Impacted by the Filibuster

This dramatic rise in cloture motions and staggering decline in productivity exemplifies that the "stealth filibuster's impact on the legislative process is enormous."[64] The filibuster stalls almost all legislation but is most often used to target controversial legislation. Popular issues on both sides of the aisle have been obstructed by the Senate filibuster. For example, despite Republican control of the House of Representatives, Senate, and White House, the following prominent Republican-led bills were blocked by a Democrat minority: a 2003 bill to make it harder to bring successful class-action lawsuits, with support from fifty-nine senators; a 2005 bill to fund drilling in the Artic National Wildlife Refuge, with support from fifty-six senators; and a 2005 bill to repeal the estate tax, with support from fifty-seven senators.[65] Similarly, the following Democrat-led bills were blocked despite Democratic control of the House, Senate, and White House: a 1994 campaign spending limit reform act, with support from fifty-seven senators; a 2010 bill making it easier for women to raise wage discrimination claims, with support from fifty-eight senators; and a 2010 bill allowing public safety officers to right to collectively bargain, with support from fifty-five senators.[66] The forementioned bills would likely have passed both chambers of Congress and been signed by the President, if not for the filibuster.

Beyond legislation obstructed by the filibuster after being introduced for debate on the floor, the filibuster has also had a significant impact on the very bills being introduced. Given the *de facto* supermajority voting requirement, senators often assume legislation will never make it off the Senate floor and therefore do not broach certain issues. During the Obama administration, the House passed the American Clean Energy and Security Act, which would have set new standards for renewable fuel and implement a cap-and-trade system for reducing greenhouse-gas emissions. This bill was

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[58] Drew Desilver, *Congress Ends Least-Productive Year in Recent History*, PEW RSCH. CTR. (Dec. 23, 2013), https://www.pewresearch.org/fact-tank/2013/12/23/congress-ends-least-productive-year-in-recent-history/ [https://perma.cc/DU87-8EX3]; Neal Rothschild, *Productivity in Congress Tanked in 2020*, AXIOS (Dec. 14, 2020), https://www.axios.com/congress-legislation-covid-19-2020-28a81b79-8cfc-4fc6-8fa6-e1758dd5f81f.html [https://perma.cc/4URL-QV9M].

[59] Fredrickson, *supra* note 55.

[60] *Id.*

[61] *Id.*

[62] Rothschild, *supra* note 58.

[63] Fredrickson, *supra* note 55.

[64] Fisk & Chemerinsky, *supra* note 8, at 213.

[65] Tausanovitch & Berger, *supra* note 9.

[66] *Id.*

never brought to a vote in the Senate, with Majority Leader Harry Reid explaining, "It's easy to count to [sixty]. . . . We know where we are. We know we don't have the votes."[67] Further, despite a simple majority in favor of a "public option" for healthcare, the public option was never introduced because of a lack of supermajority support.[68] There are likely countless other examples of legislation that has failed to make its way to the Senate floor because of the threat of the filibuster.

3. Fast Track Processes

Over time, the Senate has amended the cloture rule to allow for a few filibuster-proof measures. Most notably, budget bills are filibuster-proof under a process known as budget reconciliation.[69] Senators can use this fast-track process to bring legislation related to spending or revenue to a simple majority vote for passage.[70] Being one of the only fast-track processes available to senators, the budget reconciliation process skews legislation towards financial reforms and financial avenues for reform.[71] Without supermajority-supported broad-based social reforms, senators are often left to turn to the budget reconciliation process to pass legislation. This leaves out popular social reforms that are difficult to link to spending or revenue. For example, the Senate could tackle climate change by passing a carbon tax through budget reconciliation, but they would not be able to implement a new renewable energy standard through a filibuster-proof process because such a standard is not related to spending.

Another filibuster-proof process was created by the 1996 Congressional Review Act, which allows Congress to overturn "recently promulgated regulations."[72] This procedure has only been used seventeen times, sixteen of which were during the Trump administration to overturn Obama-era regulations.[73] This process leads to a lack of substantive lawmaking and instead simply encourages reversing a previous administration's work in the pursuit of "change." The last notable filibuster loophole we will mention here is the fast-track process for nominating federal judges, including Supreme Court justices. After Republican obstruction of President Obama's nominees, Majority Leader Reid led the brigade against the supermajority requirement in cases of federal judicial confirmations.[74] Majority Leader McConnell followed his precedent during the Trump administration to expand the filibuster-proof process to Supreme Court confirmations.[75] Except for these

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[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] Dylan Scott, *9 Questions About Budget Reconciliation You Were Too Afraid to Ask*, VOX (Jan. 25, 2021, 8:00 AM), https://www.vox.com/22242476/senate-filibuster-budget-reconciliation-process/ [https://perma.cc/2UMY-YWH8]. The budget reconciliation process has been critical to the passage of the 2017 Tax Cuts and Jobs Act and the Affordable Care Act. *Id.*
[71] *See id.*
[72] Tausanovitch & Berger, *supra* note 9.
[73] *Id.*
[74] Jane C. Timm, *McConnell Went 'Nuclear' to Confirm Gorsuch. But Democrats Changed Senate Filibuster Rules First.*, NBC NEWS (June 28, 2018, 3:15 PM), https://www.nbcnews.com/politics/donald-trump/mcconnell-went-nuclear-confirm-gorsuch-democrats-changed-senate-filibuster-rules-n887271 [https://perma.cc/WHX3-J6JC].
[75] *Id.*

few exceptions, Senate action subject to debate must be able to garner supermajority support.

B. STRUCTURAL BIASES

The cloture rule has transformed Senate lawmaking into a supermajoritarian practice. Beyond the negative effect on the productivity of Congress, the filibuster also contributes greatly to compounding structural biases that exist between American political parties. "Democrats face an extraordinary number of veto points . . . more than exist in any other industrialized democracy." In particular, there is a massive imbalance in representation in the Senate. Equal voting power for each state in the Senate gives disproportionate power to citizens from small states. In the 116th Congress, Democrats and Independents controlled forty-seven seats, representing 168 million Americans, while Republicans controlled fifty-three seats, representing just 153 million Americans.[76] These larger states often represent more racially diverse voters, further building upon the structural bias of the Senate.[77]

While it is not clear that this bias will continue to negatively affect Democrats, as opposed to Republicans, it is clear that the filibuster compounds the biases of these constitutional structures. Today, the twenty-one least populous U.S. states, each of which are represented by only two Republican senators, comprise less than twenty-five percent of the U.S. population.[78] That same percentage of the population could successfully filibuster an entire agenda through its forty-one representatives in the Senate.[79] Acknowledging "structural bias can lead partisans to identify and invest in structural constitutional reforms that are normatively desirable on principled grounds, independent of which party would benefit for the foreseeable future."[80] The filibuster empowers a very small segment of America. While this may benefit Republicans today, it may not benefit them a few decades from now.

IV. COUNTERARGUMENTS AND THE POLITICAL PATH TO REFORM

A. RESPONSE TO ARGUMENTS AGAINST REFORMING THE FILIBUSTER

1. "The Filibuster Promotes Debate and Compromise on Legislation!"

Proponents of the cloture rule have long argued that the filibuster facilitates compromise in the Senate by extending debate and requiring Senators to reach across the aisle to pass legislation. While in theory this

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[76] Fredrickson, *supra* note 55.

[77] *See* David Leonhardt, *The Senate: Affirmative Action for White People,* N.Y. TIMES (Oct. 14, 2018), https://www.nytimes.com/2018/10/14/opinion/dc-puerto-rico-statehood-senate.html [https://perma.cc/VQM6-F675] ("The Senate gives the average black American only 75 percent as much representation as the average White American.").

[78] Tausanovitch & Berger, *supra* note 9.

[79] *Id.*

[80] Jonathan S. Gould & David E. Pozen, *Structural Biases in Structural Constitutional Law*, 97 N.Y.U. L. REV. 128–29 (2022).

sounds nice, in practice the filibuster does little to encourage compromise or debate. To start, the filibuster is often used to block motions to begin debate on a bill.[81] This blockage reveals a general disinterest in debate and deliberation.

Further, the filibuster does not effectively promote compromise. Many political commentators often mistakenly focus on the majority party when criticizing for a lack of compromise in Washington. But the key players to pay attention to are actually within the minority party.[82] With growing polarization, minority parties have become more willing to participate in obstructionist politicking because there is little incentive for the minority to compromise with the majority. For example, if a Republican president campaigns on the promise of bipartisan cooperation, compromise from the Democrats would hand the President legislative wins that could lead to his or her reelection. With obstruction being the most electorally rational strategy, the minority party will naturally exploit the very legislative tool meant to protect the "vulnerable" minority. Under current cloture rules, the dream of compromise would require nine senators to flip across party lines. This not only *sounds* unlikely, but it also *is* unlikely. Ultimately, as Jonathan Chait has posited, "The simplest rebuttal to [the claim that the filibuster engenders compromise] is *look around you*. Do you see a lot of legislative compromise?"[83]

2. "The Filibuster Provides a Constraint on Majority Power and Protects Minority Interests!"

One of the most common arguments in favor of the filibuster is that it protects minority interests by shielding against the tyranny of the majority. The irony of this argument is that the filibuster has historically been used to preserve the tyranny of the majority at the expense of racial minorities. Throughout the twentieth century, the filibuster was largely associated with attempts to preserve the status quo of racial segregation and discrimination. Although hailed as a bulwark against the majority, the filibuster is actually a "weapon wielded by the racial majority against racial minorities, cloaked in the rhetoric of protecting minority rights."[84]

Understanding the filibuster as a "Jim Crow relic" helps us to evaluate the argument that the filibuster protects minority rights.[85] We must consider the following questions: Which minority rights are we interested in protecting and which minority rights does the filibuster protect? Is the filibuster protecting minority groups with limited access to political participation? Or minority groups that have suffered a history of

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[81] Ezra Klein, *The Definitive Case for Ending the Filibuster*, VOX (Oct. 1, 2020, 7:30 AM), https://www.vox.com/21424582/filibuster-joe-biden-2020-senate-democrats-abolish-trump [https://perma.cc/Z73C-A3NF].

[82] *Id.*

[83] Jonathan Chait, *The Senate Is America's Most Structurally Racist Institution*, N.Y. MAG. (Aug. 10, 2020), https://nymag.com/intelligencer/2020/08/senate-washington-dc-puerto-rico-statehood-filibuster-obama-biden-racist.html [https://perma.cc/CP24-EFXH].

[84] Klein, *supra* note 81.

[85] Clare Foran and Ted Barrett, *Obama Calls Filibuster 'Jim Crow Relic' That Should Be Eliminated if Necessary to Enact Voting Rights Legislation*, CNN (July 30, 2020, 9:03 PM), https://www.cnn.com/2020/07/30/politics/obama-filibuster-jim-crow-voting-rights/index.html [https://perma.cc/2QQJ-M23G].

discrimination? At what point does our concern for potential tyranny of the majority contradict the essence of our democratic principles? The racial history of the filibuster shows that "this defense relies on a philosophically impoverished notion of what 'minority rights' means. It misunderstands what kinds of minorities need protecting in a democracy, and from whom."[86]

3. "The Next Majority Will Pass Legislation I Do Not Like!"

Perhaps the most compelling, and fear-inducing, political argument rests on the idea that although eliminating the filibuster would ensure that a majority one likes would not be beholden to a minority, this also means that a majority one does not like would be free to legislate as it pleases with no restrictions. The idea of the opposition being able to pass legislation without having to collect votes from the other side of the aisle probably sends a shiver down the spine of every partisan in the nation. However, this means that proponents of the filibuster "prefer the problems of paralysis to those of governance . . . given the choice between keeping the promises they made to the American people and sabotaging their opponents' ability to keep their promises, they choose the latter."[87]

This reaches into a fundamental question about how we want to govern and be governed. Should a majority of the public that vote for representatives who share their vision be silenced by those who "know better?" We owe voting citizens the right to see the policies they support be debated, refined, and passed as law. If we disagree with the policy, democracy tells us to convince the majority to see our side and vote those legislators out of office. And so the cycle repeats.[88] Indeed, removing the filibuster would allow the opposition to pass legislation some people may not agree with. But it would also allow for democracy to flourish and for both sides to pass meaningful legislation. With the silent filibuster, it is difficult for voters to understand which politicians are obstructing the policies the voters support and, in turn, it is difficult to assess which politicians should not be reelected. Eliminating, or reforming, the filibuster would increase accountability and ultimately improve the democratic process.

B. POTENTIAL ALTERNATIVES TO THE CURRENT FORM OF THE FILIBUSTER

Politicians and political commentators often propose different solutions to the problem of the filibuster. We will not discuss each proposal here, but will instead limit our discussion to a few options that would be constitutional under the framework discussed in Part IV of this Note. First, the Senate could reduce the cloture-vote requirement from sixty to fifty-one. This would effectively gut the filibuster and ensure that a majority of the Senate could reach a vote if so desired. Another option would be to return to "speaking filibusters." This would modify the two-track system to require filibustering senators to hold the floor while filibustering. Although this would not completely solve the issue, it would make sustaining a filibuster much more difficult and costly.

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[86] Beauchamp, *supra* note 11.
[87] Klein, *supra* note 81.
[88] *Id.*

The final option we will discuss is creating a diminishing threshold for cloture.[89] Under this regime, each successive vote on a bill would decrease the vote requirement for cloture. This means the first cloture requirement would be sixty votes, but after a few more days of debate, the cloture threshold would reduce by a few votes, and so on until the cloture-vote requirement reached a fifty-one majority. The goal of this system is to facilitate debate but ultimately allow legislation supported by a bare majority to reach a vote.

Ultimately, this is a political decision for the Senate to make. We next turn to how the Senate could modify Rule XXII to adopt a potential alternative system.

C. CAN THE SENATE REFORM THE FILIBUSTER?

1. Amending the Rules

The most straightforward approach to reforming the filibuster would be to amend Senate Rule XXII, the cloture rule. Three Senate rules are critical here in understanding the procedural requirements of amending this rule. First, Senate Rule VIII provides that debate on a motion to amend the rules requires unanimous consent or adoption of a motion to amend the rules.[90] Adopting a motion to amend the rules is subject to debate and, thus, subject to being filibustered by two-fifths of senators.[91] Second, Senate Rule XXII itself stipulates that debate on a motion to amend the rules can be ended only with a cloture vote of *two-thirds*.[92] This means that to change the cloture rules, the Senate must obtain support from a supermajority greater than the supermajority required to end normal debate. Finally, Senate Rule V declares that rules of the Senate "shall continue from one Congress to the next Congress unless they are changed as provided in these rules."[93] This is different than in the House of Representatives where each session adopts new rules by majority vote.[94] The continuation of the Senate's rules means that all future Congresses are bound by Rule XXII. Given the difficulty in amending the Senate rules, reforming cloture seems practically impossible. This trio of rules presents a catch-22: the amendment to cloture a majority may seek would be subject to the very process that the majority seeks to amend.

2. The "Nuclear Option"

An alternate approach to reforming the filibuster is available through the "nuclear option." The nuclear option does not involve changing the rules per se, but rather it creates a new precedent for future bodies to rely upon.[95]

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[89] Mel Barnes, Norman Eisen, Jeff Mandell & Norman Ornstein, *Filibuster Reform Is Coming—Here's How*, BROOKINGS, https://www.brookings.edu/wp-content/uploads/2021/09/Filibuster-Reform-is-Coming_Heres-How_Sept2021.pdf [https://perma.cc/9Q6B-8VQ6].

[90] *Rules of the Senate*, U.S. SENATE [hereinafter *Senate Rules*], https://www.rules.senate.gov/rules-of-the-senate [https://perma.cc/W9QG-EP2Y].

[91] Emmet J. Bondurant, *The Senate Filibuster: The Politics of Obstruction*, 48 HARV. J. ON LEGIS. 467, 476 (2011).

[92] *Senate Rules*, *supra* note 90, R. XXII.

[93] *Senate Rules*, *supra* note 90, R. V.

[94] Fisk & Chemerinsky, *supra* note 8, at 245.

[95] Reynolds, *supra* note 5.

Through this process, a senator can raise a point of order proposing that cloture can be achieved with a simple majority vote. Then, the presiding officer can either agree or disagree. Either decision could be subject to appeal, but a majority of the Senate can vote to affirm or reverse the decision of the presiding officer. If the presiding officer agrees and the decision is affirmed after an appeal, or the presiding officer disagrees but is overruled after an appeal, a new precedent is established. This is precisely how the Senate ended the supermajority-cloture requirement for federal judicial nominations in 2013[96] and Supreme Court nominations in 2017.[97]

The nuclear option is highly controversial and wildly unpopular. Essentially, a simple majority are able to discard Senate rules by encouraging the presiding officer to reinterpret rules, ignoring decades of precedents. Many presiding officers do not allow politics to skew their interpretation of Senate rules and established precedents. Similarly, many senators are uncomfortable throwing away Senate rules without proper process. Additionally, there is nothing to stop the next Congress from simply adopting the supermajority-cloture rule once again. Ultimately, even if the Senate deploys the nuclear option, Rule XXII would remain on the books and would be subject to revitalization at any point. The practical impossibility of amending the Senate cloture rule and ineffectiveness of the nuclear option renders the filibuster a seemingly permanent feature of the Senate.

A discussion of how the filibuster conflicts with our notions of democracy points to one ultimate issue: Is the filibuster even constitutional? Given the practical impossibility in effectively eliminating the legislative filibuster, the judiciary is best equipped to answer this constitutional question and cure a fundamental flaw in our democratic process.

V. THE FILIBUSTER IS UNCONSTITUTIONAL

Article I of the Constitution grants Congress legislative power and stipulates certain guiding procedures. Proponents of the filibuster argue that cloture is constitutional because Article I, Section V declares that "each House may determine the rules of its proceedings."[98] Since the Constitution does not expressly prohibit the filibuster, supporters argue that the Senate is free to impose a supermajority cloture rule. While the Constitution does not mention the possibility of a filibuster, it does contemplate the principle of majority rule and lays out specific exceptions for supermajority-vote requirements. Not only was the filibuster absent from the early history of our Union, but the very foundation of our constitutional democracy rests on the fear of granting disproportionate power to factions.

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[96] Paul Kane, *Reid, Democrats Trigger 'Nuclear' Option; Eliminate Most Filibusters on Nominees*, WASH. POST (Nov. 21, 2013), https://www.washingtonpost.com/politics/senate-poised-to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c_story.html [https://perma.cc/T7F5-YWWC].

[97] Seung Min Kim, Burgess Everett & Elana Schor, *Senate GOP Goes 'Nuclear' on Supreme Court Filibuster*, POLITICO (Apr. 6, 2017, 3:01 PM), https://www.politico.com/story/2017/04/senate-neil-gorsuch-nuclear-option-236937 [https://perma.cc/EK4G-CK7S].

[98] U.S. CONST. art. I, § 5.

United States v. Ballin reaffirms that "[t]he Constitution empowers each house to determine its rules of proceedings."[99] But the Court warned that Congress "may not by its rules ignore constitutional restraints or violate fundamental rights."[100] Given that Senate rules cannot violate constitutional limits, we will explore both explicit and implicit constitutional restraints on Rule XXII. This Part will argue that the filibuster is unconstitutional by addressing (1) several textual arguments against the constitutionality of the filibuster, and (2) how the principle of majority rule restrains the Senate's Article I rulemaking power.

A. EXPLICIT RESTRAINTS AND TEXTUAL TENSION

We begin by identifying explicit constitutional restraints on imposing a supermajority cloture rule. Given that it is practically impossible to reach a simple majority vote in the Senate without sixty votes to end debate, we can properly understand Rule XXII as modifying the voting requirement to pass legislation in the Senate. "The Constitution is concerned, not with form, but with substance."[101] This means that the Court assesses the practical consequences of laws and rules when considering whether the Constitution has been violated.[102] Under this substance-over-form principle, the Rule XXII *de facto* sixty-vote requirement must be treated as just that: a supermajority vote requirement.[103] With that in mind, we consider how a blanket supermajority voting requirement contradicts several textual provisions and, in turn, how Rule XXII violates the Constitution.

1. Majoritarianism Can Be Properly Read into the Presentment Clause

Article I, Section VII of the Constitution details how a bill 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."[104] How a bill "passes" in a chamber of Congress was not expressly defined in Article I. However, we can conclude that this refers to passage by a simple majority by looking at the plain language, precedent, and history.

To start, the plain meaning of "pass" points to the determination that the Framers intended Article I, Section VII to require a simple majority vote when approving bills. Unless a special meaning is provided, we generally assume that words in the Constitution were used in accordance with their ordinary meaning.[105] The ordinary meaning of "passed" at the time of the

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[99] United States v. Ballin, 144 U.S. 1, 5 (1892).

[100] *Id.*

[101] Gasoline Prods. Co. v. Champlin Ref. Co., 283 U.S. 494, 498 (1931).

[102] *See, e.g.,* Brown v. Maryland, 25 U.S. 419, 444 (1827) (upholding a constitutional challenge to the structure of a state tax with the same effect as an impermissible law because "[i]t is impossible to conceal from ourselves, that this is varying the form, without varying the substance"); United States v. DiFrancesco, 449 U.S. 117, 142 (1980) ("[I]t is the substance of the action that is controlling, and not the label given that action."); W. Union Tel. Co. v. Kansas *ex rel.* Coleman, 216 U.S. 1, 27 (1910) ("This court has repeatedly adjudged that in all such matters the judiciary will not regard mere forms, but will look through forms to the substance of things. Such is an established rule of constitutional construction, as the adjudged cases abundantly show.").

[103] Dan T. Coenen, *The Filibuster and the Framing: Why the Cloture Rule Is Unconstitutional and What to Do About It*, 55 B.C. L. REV. 39, 70–73 (2014).

[104] U.S. CONST. art. I, § 7.

[105] Bondurant, *supra* note 91, at 490.

Constitutional Convention was that legislation had been approved by a simple majority: "Dictionaries of older American and English legal usage define 'pass' [as] '[w]hen a legislative bill is finally assented to by a majority vote.' "[106] Further, the only other time the word "pass" is used in Article I, Section VII is to describe the process of overriding a presidential veto. There, the Framers specifically stipulate that to override a veto, "two thirds of that House shall agree to pass the bill."[107] By refining "pass" with a two-thirds-vote requirement, the Framers made it clear that "pass" does not ordinarily require a supermajority.

Additionally, debate at the Constitutional Convention reveals that the Framers understood the word "pass" to mean a simple majority could enact bills. For example, state delegates debated whether a simple majority of Congress should have the power to regulate navigation.[108] While arguing against ratification of the current form of Article I, Section VII and in favor of a supermajority requirement, Virginia delegate George Mason[109] "express[ed] his discontent at the power given to Congress by a bare majority to pass navigation acts." This disagreement over adding a supermajority exception to Article I's simple majority vote threshold for legislation proves that the Framers understood, and intended, Article I to contain a simple-majority vote requirement.

Finally, the Supreme Court has weighed in on this very issue. In *Ballin*, the Court addressed the question discussed here: Does the term "pass" in Article I imply a simple-majority threshold? The Court held that Article I, Section VII must be interpreted in line with the "general rule of all parliamentary bodies . . . that, when a quorum is present, the act of a majority of the quorum is the act of the body."[110] Thus, *Ballin* clearly interprets the Constitution as granting a simple majority of the Senate the power to legislate, subject to specific exceptions expressly outlined. Moreover, *INS v. Chadha* affirms the same principle.[111] *Chadha* clarified Article I, Section VII further, stating that Congress must take "action in conformity with the express procedures of the Constitution's prescription for legislative action: passage by a majority of both Houses and presentment to the President."[112] *Ballin* and *Chadha* both stand for the principle of majoritarianism in our constitutional democracy.

2. The Narrower Constitutional Exceptions to the Principle of Majority Rule Are Exclusive

In further support of the unconstitutionality of a blanket supermajority voting requirement in the Senate, we can conclude that the list of situations in which supermajoritarian process is expressly permitted by the Constitution is exhaustive and exclusive. Notably, each of the following five exceptions are either unrelated to the legislating function of Congress or

[106] Jed Rubenfeld, *Rights of Passage: Majority Rule in Congress*, 46 DUKE L.J. 73, 77 (1996).
[107] U.S. CONST. art. I, § 7.
[108] Bondurant, *supra* note 91, at 491.
[109] *George Mason, the Man*, GEO. MASON UNIV., https://www.law.gmu.edu/about/mason_man [https://perma.cc/42Q3-8GTP].
[110] United States v. Ballin, 144 U.S. 1, 6 (1892).
[111] *See* INS v. Chadha, 462 U.S. 919, 958 (1983).
[112] *Id.* at 958.

govern the relationship between the legislature and another branch of the federal government.[113] On the contrary, in the case of the filibuster, the supermajority requirement is an internal procedure directly related to lawmaking.

First, Article I, Section III requires a vote of two-thirds of the Senate to remove an officer after impeachment by the House of Representatives.[114] Second, Article I, Section V permits two-thirds of the House or Senate to expel one of its members.[115] Interestingly, during the Constitutional Convention, Delegate James Madison proposed that expulsion of a member be carried out only with the concurrence of two-thirds of the chamber. Madison warned that "the right of expulsion . . . was too important to be exercised by a bare majority of a quorum."[116] Again, this presupposes that the standard voting requirement is that of a simple majority. Third, Article I, Section VII requires a vote of two-thirds of both houses to successfully override a presidential veto.[117] This provision intentionally heightens the voting requirement when challenging a co-equal branch of government. If the ordinary lawmaking process also included a supermajoritarian requirement, what would be the purpose of this heightened requirement? If only a supermajority could present a bill to the President for signature, requiring a supermajority to then override a veto seems redundant. Fourth, Article II, Section II requires two-thirds of the Senate to ratify a treaty proposed by the President.[118] Fifth, Article V allows two-thirds of Congress to propose a constitutional amendment.[119]

Proponents of the filibuster reject this argument by responding that the Constitution does not indicate that these are the *only* situations in which a supermajority vote can be required. However, the more likely interpretation of these exceptions can be reached through the well-accepted statutory construction principle, *expressio unius exclusion alterius.*[120] The Supreme Court has frequently turned to this construction principle for guidance in interpreting the text of the Constitution. For example, in *Marbury v. Madison* the Court considered whether a lack of "negative words" in Article III, Section II barred Congress from adding to the Court's original jurisdiction.[121] Chief Justice Marshall, finding that Congress could not expand the jurisdiction of the Court, declared:

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[113] Of the five exceptions I will discuss, four of them are wholly unrelated to the legislating function of Congress. However, Congress's ability to pass a law by overriding a Presidential veto *does* relate to the legislating function of Congress, but it involves the relationship between two co-equal branches of federal government and is thus not similarly situated to the establishment of a supermajority voting requirement in the independent, legislative process. Additionally, I will not be discussing the supermajority requirements present in the 14th and 25th Amendments because they are not relevant in determining the meaning of the original text.

[114] U.S. CONST. art. I, § 3.

[115] U.S. CONST. art. I, § 5.

[116] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 140–41 (Max Farrand rev. ed., 1937); Bondurant, *supra* note 91, at 491–93.

[117] U.S. CONST. art. I, § 7.

[118] U.S. CONST. art. II, § 5.

[119] U.S. CONST. art. V.

[120] *Expressio Unius Eset Exclusio Alterius*, MERRIAM-WEBSTER, https://www.merriam-webster.com/legal/expressio%20unius%20est%20exclusio%20alterius [https://perma.cc/HWU8-68WN] ("[A] principle in statutory construction: when one or more things of a class are expressly mentioned others of the same class are excluded.").

[121] Marbury v. Madison, 5 U.S. 137, 174 (1803).

> If it had been intended to leave it in the discretion of the legislature . . . it would certainly have been useless to have proceeded further than to have defined the judicial power . . . . The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction.[122]

Similarly, here, it would have been useless for the Framers to enumerate instances in which supermajoritarian voting is appropriate if establishing voting requirements fell within the discretion of Congress. It is more logical to conclude that the list of situations in which a supermajoritarian process is permitted is exhaustive. Any supermajoritarian voting requirement beyond these exceptions must fail.

3. The Vice-President's Role as a Tiebreaker Presupposes Majority Rule

Article I, Section III grants the Vice President a vote in the case of a tie in the Senate. The very notion of a tie in the Senate assumes a bare-majority vote. Why would the Framers stipulate this special power for the Vice President if the Senate were able to adopt a supermajority rule that would render this provision pointless? Yet again, this clause supports the conclusion that the Constitution requires Article I lawmaking to comply with simple-majority rule, which Rule XXII unconstitutionally rejects.

4. Supermajority Cloture Prevents a Majority of the Senate from Conducting Business

The forementioned textual arguments rest on the idea that the cloture rule essentially heightens the voting threshold. Although it would be ingenuine to argue that the cloture rule does not effectively modify the voting requirement in the Senate, the Quorum Clause invalidates Rule XXII even without this added inference. Article I, Section V stipulates that "a Majority of each [House] shall constitute a quorum to do Business."[123] Without even reaching the issue of how many votes are required for legislation to be approved, the Quorum Clause lays out that participation of only a majority of the Senate is required to conduct business. Rule XXII stands in direct contradiction of this clause. By adopting an internal rule that allows a minority of senators to block bills from a final vote, or even be presented for debate, the Senate has impermissibly raised the quorum requirements for conducting business.

B. IMPLICIT RESTRAINTS: THE CONSTITUTIONAL PRINCIPLE OF MAJORITARIANISM LIMITS CONGRESSIONAL RULEMAKING AUTHORITY

We next consider implicit restraints on the Senate's rulemaking authority derived from our founding principles and broader constitutional norms. A successful challenge to Rule XXII would perhaps best be based on a non-originalist perspective. However, an argument based on the original meaning of the Constitution would not foreclose the unconstitutionality of the filibuster. Rather, an originalist interpretation of the Constitution would point

[122] *Id.*
[123] U.S. CONST. art. I, § 5.

towards a conflict between the intent of the Framers and current Senate practice.

1. History and Intent of the Framers Indicates a Commitment to Majority Rule

As detailed earlier, the filibuster was not used in the original sessions of Congress. In fact, the original "cloture" rule in the Senate, which took the form of a "previous question" motion, required a vote of fifty-one senators to end debate and begin a vote.[124] It was not until decades after the previous-question motion had been eliminated that filibusters came into practice. Although historians note that the filibuster has therefore been a part of our lawmaking process for two centuries, the first supermajoritarian cloture rule was not implemented until about 139 years after the ratification of the Constitution.[125] Moreover, even then, use of the filibuster was relatively scarce until the creation of the modern, silent filibuster in the 1970s. A discussion of the history of the filibuster is important in establishing that supermajority cloture is not so deeply entrenched in our republican democracy.

Outside of the history of the filibuster, we can also turn to the history of the Constitution's development to further narrow the Framers' original intent. The ratification of the Constitution came on the heels of the failure of the Articles of Confederation. One of the greatest flaws of the Articles was that it restricted Congress's ability to govern effectively. The Articles mandated a two-thirds majority to carry out the following functions: "[D]eclaring war, entering treaties, coining money, or spending or borrowing funds."[126] This supermajority requirement resulted in the paralysis of Congress and led the Framers to reject such requirements in the new Constitution, except in enumerated cases carefully considered by the Framers.[127]

The Framers wrote at length on the subject of majoritarianism and the threat of potential tyranny of the majority. After the failure of the Articles, one of the most contentious issues at the time of ratification was whether a bare majority of Congress should be able to pass laws rather than a supermajority.[128] Alexander Hamilton responded to these concerns in *Federalist Number 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 . . . substitute the pleasure, caprice or artifices of an insignificant,

[124] Amy McKeever, *The Origins of the Filibuster—and How It Came to Exasperate the U.S. Senate*, NAT'L. GEOGRAPHIC (Feb. 2, 2021), https://www.nationalgeographic.com/history/article/origins-of-filibuster-united-states-senate [https://perma.cc/7DKK-NJSY].

[125] Fredrickson, *supra* note 55.

[126] William Blake, *The Filibuster, the Constitution and the Founding Fathers*, 44 (2) PARLIAMENTARY J. 43, 47 (2003).

[127] Bondurant, *supra* note 91, at 479.

[128] *Id.* at 493.

> turbulent or corrupt junta, to the regular deliberations and decisions of a respectable majority . . . . If a pertinacious minority can control the opinion of a majority respecting the best mode of conducting it; . . . the sense of the smaller number will over-rule that of the greater . . . . When the concurrence of a large number is required . . . , we are apt to rest satisfied that all is safe, because nothing improper will be likely to be done; but we forget how much good may be prevented, and how much ill may be produced, by the power of hindering the doings what may be necessary, and of keeping affairs in the same unfavorable posture in which they may happen to stand at particular periods.[129]

Further, in *Federalist Number 10*, James Madison contemplated the role of factions in a republican democracy. Madison noted, "If a faction consists of less than a majority, relief is supported by the republican principle, which enables a majority to defeat its sinister views by regular vote."[130] Time and time again, the Framers revealed their understanding of the legislative process to feature passage of legislation by a simple majority. In *Federalist Number 58*, Madison directly addresses the calls for a supermajority voting requirement in Congress:

> 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 . . . . But these considerations are outweighed by the inconveniences in the opposite scale. In all cases where justice or the general good might require new laws to be passed, or active measures to be pursued, the fundamental principle of government would be reversed. It would be no longer the majority that would rule: the power would be transferred to the minority.[131]

Hamilton and Madison's writings in *The Federalist Papers* prove that the Framers carefully considered a supermajority voting requirement in the Senate, but ultimately decided against it and cemented a principle of majority rule. Surely, supermajority cloture effectively contradicts the intent of the Framers.

Thus, after considering whether the Constitution permits supermajoritarian voting requirements in Congress, an originalist analysis tells us quite definitively that it does not. The Framers clearly envisioned a legislative branch that reflected the views of the majority, unencumbered by obstruction from the minority. As such, the filibuster is inconsistent with the intent of the Framers.

2. How the Filibuster Interacts with Our Modern Constitutional Norms

Although only a hyper-formalist analysis of Rule XXII could argue that supermajority cloture is significantly distinct from a supermajority voting requirement, it is true that there is little evidence that the Framers considered the specific process of ending debate on the floor. Given this potential gap in

[129] THE FEDERALIST NO. 22, at 140–41 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).
[130] THE FEDERALIST NO. 10, at 83–89 (James Madison) (Jacob E. Cooke ed., 1961).
[131] THE FEDERALIST NO. 58, at 397 (James Madison) (Jacob E. Cooke ed., 1961).

an originalist analysis, we must evaluate Rule XXII in light of its effect on constitutional norms. Here, we turn to a non-originalist perspective to evaluate such norms in light of what the Constitution stands for today.

Two constitutional norms are most applicable to this discussion: (1) the principle of majoritarianism, and (2) accountability of elected officials. First, we have already pointed to text and history of the Constitution that conveys a commitment to majority rule. However, in stressing the urgency of remedying this fundamental flaw in our lawmaking procedure, John Hart Ely's *Democracy and Distrust* provides guidance.[132] Ely's theory of constitutional interpretation, "representation reinforcement," views the Constitution as the careful crafting of a structure designed to protect and encourage representative democracy. Ely argues that judges should defer to the legislative process, except in cases in which the evidence suggests that the political process is malfunctioning.[133] In such cases, "it is an appropriate function of the Court to keep the machinery of democratic government running as it should."[134]

Here, it is clear that there is something wrong with our democratic machinery; it only takes a brief review of the filibuster's effect on the Senate's productivity over the last one hundred years to determine that the political process is malfunctioning. Representation-reinforcement theory asks us to apply a functional analysis of the Senate cloture rule in light of its context in our political reality. Given this nation's history of hyper-polarization, the growing closeness in party control, malapportionment of the Senate, and immense difficulty in achieving a sixty-vote supermajority, the filibuster has rendered Congress ineffectual. As Ely argues, the Constitution's emphasis on procedural safeguards for our constitutional democracy has entrenched the principle of majority rule. Rule XXII obstructs a majority of the Senate from conducting business its constituents elected it to do. This obstruction disrupts the core of our democratic machinery and, therefore, Rule XXII violates our constitutional norm of majoritarianism.

Second, and perhaps implicit in the idea of majority rule, is the constitutional norm of accountability of elected officials. The very premise of a republican democracy rests on the assumption that voters will be represented through congressional delegates, those delegates will vote according to the interests of their constituents, and, if they fail to do so, the voters will vote those delegates out of office. Essential to this process is the ability of voters to reasonably assess whether their representatives are accurately representing their views. The media's role in our democracy,[135] our commitment to free access to public records, and high value on education for the purposes of forming an informed electorate all reinforce the idea that we have accepted accountability of public officials as a constitutional norm. A Senate majority will attempt to carry out the policies supported by its constituents, but by continuously failing to bypass a minority's obstruction,

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[132] JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 87 (1980).
[133] *Id.* at 102–03.
[134] *Id.* at 76.
[135] Often referred to as the Fourth Estate and expressly protected by the First Amendment. *Fourth Estate*, DICTIONARY.COM, http://www.dictionary.com/browse/fourth-estate [https://perma.cc/RV5E-YARA].

the majority would be subject to frustrated voters who believe their representatives are ignoring their desires. Further, the silent filibuster has allowed senators to obstruct lawmaking without any accountability. Given the identity of senators who threaten to filibuster can be held anonymous, the voters are deprived of valuable information and the filibustering senators escape accountability. This is not to suggest that voters should be entitled to unrestricted access to their senators. But given the enormity of the filibuster problem, voters should not be left in the dark about which representatives are bringing Washington to a halt. Without such vital information, our democratic system cannot function properly.

The very bedrock of our constitutional democracy rests upon the principle of majority rule. Rule XXII renders this principle void; a group of forty-one senators can hold the entire federal government hostage. Under a representation-reinforcing theory of judicial review, this is the paradigm case of a malfunction in the democratic process that needs to be rectified by the courts.

VI. CHALLENGE THE CLOTURE RULE IN COURT

Rule XXII expressly disallows amendments to cloture without support from two-thirds of the Senate. The only other option for reforming the filibuster available to the Senate is through the nuclear option. However, as we have previously discussed, this measure is controversial, unpopular, and would not preclude the possibility of another Senate majority reinstating the filibuster in the next congressional session. Given the overwhelming consequences of the legislative filibuster and the practical impossibility of amending Rule XXII, our democracy demands judicial intervention. Any challenge to the filibuster would likely be subject to standing and justiciability concerns. However, with the right case, these arguments should fail and Rule XXII would be struck down as unconstitutional.

A. THE RIGHT PLAINTIFF COULD HAVE STANDING TO CHALLENGE A SENATE RULE

The Supreme Court has limited its jurisdiction to cases in which a plaintiff can establish standing through three elements:

> First, the plaintiff must have suffered and injury in fact —an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) "actual or imminent, not 'conjectural' or 'hypothetical,' " . . . Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."[136]

[136] Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) (citations omitted).

Each of the elements would be challenged by the government in a suit seeking review of Rule XXII.[137] In proving a causal connection, an ideal plaintiff would be able to point to an injury caused by the defeat of a bill, rather than the independent action of a third party. For the issue of redressability, "it is inherently speculative whether declaring the filibuster unconstitutional would remedy the harm."[138] Here, the best challenge to the filibuster would be based on a bill passed by the House, publicly supported by a majority of senators, voted on in the Senate with a simple majority but just shy of the supermajority requirement to bypass cloture, and supported by the President. With the right case, a plaintiff could satisfy these requirements. The more difficult question would be that of injury.

The Court has held that "generalized grievances" do not satisfy the injury requirement of standing because "the impact . . . is plainly undifferentiated and 'common to all members of the public.' "[139] We can address the issue of injury using two groups of potential plaintiffs: public citizens and U.S. Senators.[140]

1. Citizen Standing

The Court has made clear that citizens can show standing if they are able to prove that they are part of a group of intended beneficiaries of a bill. In *Clinton v. City of New York,* the Court held that the beneficiaries of funds that had been line-item vetoed by President Clinton had shown a sufficient injury for standing.[141] Similarly, under a challenge to the filibuster, the right plaintiff could show that he or she would have benefited from the passage of a bill that would have passed but for the filibuster. Moreover, in *Michel v. Anderson*, the D.C. Circuit accepted the standing of plaintiffs who argued that their representatives' votes were being diluted and, therefore, their individual votes were being diluted as well.[142] The court suggested that "[i]t could not be argued seriously that voters would not have an injury if their congressman was not permitted to vote at all on the House floor."[143] Ultimately, standing must be evaluated on a case-by-case basis for citizens

[137] In fact, each of the few cases challenging Rule XXII were dismissed on justiciability or lack of jurisdiction grounds. *See* Page v. Dole, 1996 WL 310132 (D.C. Cir. 1996) (dismissed for mootness because the Democrats had since lost the majority); Page v. Shelby, 995 F. Supp. 23 (D.D.C. 1998) (dismissed for lack of standing because the plaintiff could not point to specific bills that were filibustered and ultimately caused him harm); Patterson v. U.S. Senate, No. 13-2311, 2014 U.S. Dist. LEXIS 47175 (N.D. Cal. Mar. 31, 2014) (dismissed for lack of standing because the plaintiff did not point to specific bills that failed to pass because of cloture); Jud. Watch, Inc. v. U.S. Senate, 432 F.3d 359, 369 (D.C. Cir. 2005) (dismissed for lack of standing in challenging the effect of the filibuster on judicial nominations); Common Cause v. Biden, 748 F.3d 1280 (D.C. Cir. 2014) (dismissed for lack of standing because plaintiffs erred in choosing defendants - the injury in question was not caused by any of the named defendants, but rather the Senate or senators themselves). Notably, in *Common Cause v. Biden*, the lower court dismissed the case on standing and political question grounds, but the Circuit Court did not comment on whether the political question determination was correct. *Id.* Rather, the Circuit Court confined its discussion to that on standing. *Id.*

[138] Fisk & Chemerinsky, *supra* note 8, at 232.

[139] *Defs. of Wildlife*, 504 U.S. at 575 (quoting United States v. Richardson, 418 U.S. 166, 171, 176–77 (1974).

[140] This is not an exhaustive list of plaintiffs that could potentially achieve standing. For example, perhaps the Vice President could file suit for a deprivation of his or her tiebreaking power.

[141] Clinton v. City of New York, 524 U.S. 417 (1998); Bondurant, *supra* note 91, at 504.

[142] Michel v. Anderson, 14 F.3d 623 (D.C. Cir. 1994); Bondurant, *supra* note 90, at 504.

[143] *Michel*, 14 F.3d at 626.

that sue, but there is nothing inherent in this issue that would preclude a suit brought by an affected citizen.[144]

2. Senator Standing

Successful senator-plaintiffs would have to rest their constitutional challenge upon the nullification or dilution of their vote. *Coleman v. Miller* upheld the standing of a group of state senators whose votes were "nullified" after a lieutenant governor cast an allegedly impermissible tie-breaking vote.[145] This holding stands for the proposition that "legislators whose votes would have been sufficient to [enact] a specific legislative act have standing to sue if that legislative action [does not go into effect], on the ground that their votes have been completely nullified."[146] In *Michel,* Congressional-representative-plaintiffs had sufficient standing to challenge a House rule that granted territorial delegates the right to cast symbolic votes because these symbolic votes allegedly diluted the plaintiffs' votes.[147] Additionally, in *Kennedy v. Sampson*, the D.C. Circuit recognized a sufficient injury when a senator challenged the President's use of a "pocket veto" for a bill the senator had voted for.[148] The court held that the pocket veto effectively nullified the senator's vote and such nullification was a cognizable injury for standing.

In *Skaggs v. Carle*, the D.C. Circuit held that a group of members of the House of Representatives lacked standing to challenge the constitutionality of a House rule that required a supermajority vote to approve raises in the federal income tax.[149] Despite the unfavorable outcome, the court rejected the argument that congressional plaintiffs must prove that the bill they supported would have passed but for the supermajority rule.[150] Rather, the court declared that "vote dilution is itself a cognizable injury regardless of whether it has yet affected a legislative outcome."[151] Moreover, the plaintiffs ultimately lacked standing in *Skaggs* because the House rule was amendable by a simple majority.[152] Therefore, the court believed this was not a concrete injury.[153] In the case of Senate Rule XXII, the rule is not amendable without support from two-thirds of the Senate. The nuclear option is impractical and exists outside of the accepted rulemaking procedure.[154] Thus, a challenge to Rule XXII would be distinguishable from *Skaggs*.

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[144] Fisk & Chemerinsky, *supra* note 8, at 234.
[145] Coleman v. Miller, 307 U.S. 433 (1939).
[146] Raines v. Byrd, 521 U.S. 811, 823 (1997).
[147] *Michel*, 14 F.3d at 623.
[148] Kennedy v. Sampson, 511 F.2d 430, 433 (D.C. Cir. 1974).
[149] Skaggs v. Carle, 110 F.3d 831 (D.C. Cir. 1997).
[150] *Skaggs*, 110 F.3d at 834; Bondurant, *supra* note 91, at 502.
[151] *Id.*
[152] *Id.*
[153] *Id.* at 834–36.
[154] Deploying the nuclear option requires the Senate to collectively agree to disregard years of precedent and blindly re-interpret the rules.

B. RULE XXII DOES NOT PRESENT A NON-JUSTICIABLE POLITICAL QUESTION

In addition to a motion to dismiss based on a lack of standing, the government would also likely seek to dismiss a challenge to the filibuster based on the political question doctrine. The Court has generally refrained from answering questions it believes should be left to the political branches of the government. Among the factors outlined in *Baker v. Carr* that point toward a non-justiciable political question, the most relevant here will be a "commitment of the issue to a co-ordinate political department" and "the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government."[155]

As for the argument that deciding the issue of the constitutionality of Rule XXII would implicate a lack of respect for Congress, the Court has generally been willing to review claims of impermissible congressional procedure.[156] The more threatening challenge would be one that argues that the Constitution has committed the issue of rulemaking to the Senate. However, the Court has rejected this argument on several occasions, especially where necessary to protect the democratic process. For example, in *Powell v. McCormack*, the Court reached the merits of the case despite claims that judicial review was precluded based on a non-justiciable commitment to a co-equal branch of government.[157] In *Powell*, the House of Representatives forbade Representative Adam Clayton Powell from taking his House seat based on allegations of past transgressions.[158] The government defended its activity based on Article I, Section V, which states that each house of Congress shall "be the Judge of the . . . Qualifications of its own Members."[159] However, the Court held that it had the authority to hear the merits of the case because it was essential to reviewing whether the House had overstepped its authority. Further, "the Court saw its decision as necessary to protect the integrity of the democratic process, by ensuring that people are allowed to select their legislators."[160] Similarly, here, although the government may point to Article I, Section V to argue that the Court cannot review the rulemaking authority granted to Congress, the Court will likely hold that this is not a political question because it implicates fundamental questions about our democratic process.

Further, this case would be distinguishable from *Nixon v. United States*, in which the Court held that the Senate procedure for trying impeached officers presented a non-justiciable political question.[161] The procedure in *Nixon* did not implicate any constitutional provisions other than the clause granting the Senate the "sole Power to try all Impeachments."[162] Here, a comprehensive challenge to Rule XXII could point to several provisions that are violated by cloture. Indeed, *Ballin* affirmed that Congress may not ignore

[155] Baker v. Carr, 369 U.S. 186, 217 (1962).
[156] Fisk & Chemerinsky, *supra* note 8, at 226.
[157] Powell v. McCormack, 395 U.S. 486 (1969).
[158] *Id.*
[159] *Id.* at 507; U.S. CONST. art. I, § 5.
[160] Fisk & Chemerinsky, *supra* note 8, at 227.
[161] Nixon v. United States, 506 U.S. 224 (1993).
[162] *Id.*; U.S. CONST. art. I, § 3.

constitutional restraints when establishing its rules.[163] There are a long line of additional cases the Court has resolved based on other branches of government exceeding the authority granted to them in the Constitution, especially when in direct contradiction with other parts of the Constitution.[164] The Court's precedent strongly suggests that a challenge to Rule XXII would not be considered a non-justiciable political question.

Finally, there is a strong argument to be made that these are the very cases the Court is compelled to review. Ely's representation-reinforcing theory suggests that the power of judicial review draws from a need to protect democratic processes.[165] The famous footnote four of *United States v. Carolene Products Co.* suggests the application of a "more exacting judicial scrutiny" when evaluating legislation that "restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation."[166] Although this may apply more to an analysis of the merits of this case, it also indicates that reviewing the supermajority vote requirement in congressional lawmaking is exactly the kind of function the Court was designed to conduct. The issues at stake in a challenge of Rule XXII must be addressed in order to protect the integrity of the democratic process. The question of whether implementing a supermajority voting requirement in the Senate exceeds the rulemaking authority granted in Article I, Section V is a paradigm example of the kind of question we expect our courts to resolve.

VII. CONCLUSION

The filibuster has tremendously dire consequences for our democracy. From its inception as a tool to preserve white supremacy, the filibuster has served to empower a minority of leaders who are frustrated with their lack of power and eager to obstruct the will of the people. By gifting a minority of forty-one senators a legislative veto, the federal government has failed in its promise to faithfully represent the American people. Rule XXII prevents both political parties from passing the meaningful legislation their constituents elected them to champion. Without a practical, political path to ending the reign of the filibuster, the courts must intervene to declare the filibuster unconstitutional. Upon a reaffirmation of the principle of majority rule from the courts, the Senate should adopt a diminishing threshold for cloture and reinstall the speaking requirement. Under this system, the Senate would be able to achieve what is most desirable about the filibuster: encouraging debate, deliberation, and compromise—but not at the expense of our commitment to democracy. Senate Rule XXII presents issues that threaten the very foundation of any constitutional democracy. It is up to our

[163] United States v. Ballin, 144 U.S. 1, 5 (1892).

[164] *See* INS v. Chadha, 462 U.S. 919 (1983) (reviewing the constitutionality of a one-house legislative veto); Clinton v. City of New York, 525 U.S. 417 (1998) (reviewing the constitutionality of the line-item veto); Bowsher v. Synar, 478 U.S. 714 (1986) (reviewing the delegation of executive power to a legislative official); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (reviewing the President's authority to nationalize the steel industry).

[165] ELY, *supra* note 132, at 87.

[166] United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938). This footnote is often regarded as the "blueprint for modern judicial review." Fisk & Chemerinsky, *supra* note 8, at 248.

courts to strike down the modern filibuster and end the tyranny of obstructionist minority politics.