



THE UNIVERSITY OF CHICAGO

**CENTER FOR EFFECTIVE
GOVERNMENT**

Harris School of Public Policy

DEMOCRACY REFORM PRIMER SERIES

Filibuster Reform

A Practical Research Guide

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2024 Edition

About the Democracy Reform Primer Series

Narrowing the gap between research and public dialogue, the University of Chicago Center for Effective Government's Democracy Reform Primers responsibly advance conversations and strategy about proposed changes to our political institutions. Each Primer focuses on a particular reform, clarifies its intended purposes, and critically evaluates what the best available research has to say about it. The Primers do not serve as a platform for either authors or the Center to advance their own independent views about the reform; to the contrary, they serve as an objective and authoritative guide about what we actually know—and what we still don't know—about the likely effects of adopting prominent reforms to our political institutions. In some instances, the available evidence may clearly support the claims of a reform's advocates. In other instances, it may cut against them. And in still others, the scholarly literature may be mixed, indeterminate, or altogether silent. Without partisan judgment or ideological pretense, and grounded in objective scholarship, these Primers set the record straight by clarifying what can be said about democracy reforms with confidence and what requires further study. This series is produced with support from Democracy Fund and the Democracy Innovation Fund.

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The University of Chicago Center for Effective Government was founded in 2019 at the University of Chicago's Harris School of Public Policy to help solve the problems of government ineffectiveness with a multi-faceted theory of action. The Center organizes its work and activities around three key areas—ideas, education, and engagement—and builds bridges across differences between scholars, students, practitioners, leaders, journalists, and advocates. Through robust, innovative programming, the Center works to strengthen institutions of democracy and improve government's capacity to solve public problems.

About The Author



Ruth Bloch Rubin is an assistant professor in the Department of Political Science. Her research explores how intraparty divisions drive patterns of lawmaking, institutional development, and party leadership in Congress. She is the author of *Building the Bloc: Intraparty Organization in the U.S. Congress* (Cambridge University Press), which explains the logic and development of organized intraparty factions in the first branch. *Building the Bloc* was awarded the Alan Rosenthal Prize by APSA's Legislative Studies Section for the best article or book by a junior scholar and the D.B. Hardeman Prize by the Lyndon Baines Johnson Foundation for the best book on Congress by a biographer, historian, journalist, or political scientist.

A second book, *Divided Parties: Strong Leaders* (under contract, University of Chicago Press), explores intraparty politics from a different vantage, offering a new way to think about how factions shape the power of congressional party leaders. Her research has also been published in *Studies in American Political Development*, *Law & Social Inquiry*, and *Congress & Presidency*. She received her Ph.D. from the University of California, Berkeley, and was a Robert Wood Johnson Scholar in Health Policy Research at Harvard University. Her research has been supported by the National Science Foundation, Social Science Research Council, Dirksen Congressional Center, and the University of Chicago's Neubauer Collegium for Culture and Society.

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Summary

Promise of the Reform

Many important and popular pieces of legislation that have majority support are not enacted because their sponsors lack the votes to override a potential Senate filibuster. By changing how the filibuster is practiced, or eliminating it altogether, the Senate would no longer be hostage to relentless obstruction and would instead be more productive and responsive to the will of the people.



Key Takeaways from The Research

- Filibustering has become more common in recent decades.
- The filibuster is often characterized as anti-majoritarian, but Senate majorities have the power to change the practice and have mostly opted not to.
- The filibuster is not the only or most important source of legislative gridlock. The most common reason Senate majorities fail to enact their agendas is internal disagreement.
- Issue-specific carveouts, including special rules and a majoritarian budget process, make it possible for a motivated majority to legislate in the absence of a supermajority.
- Without the filibuster, power would likely become more centralized in majority and minority party leadership.

Important Questions that the Research Does Not Answer

- Who benefits most from the filibuster: members of the minority party or majority party members closest to the floor median?
- Would the Senate really be more responsive or productive if the filibuster were eliminated (or its use sharply curtailed)?
- How would inter-cameral and inter-branch politics change if the filibuster were curbed?

Introduction

“Obstructionism in the modern Senate is ‘woven into the fabric of things’.”

It’s easy to understand why many people want to reform the Senate filibuster.

While the era of the talking filibuster—the lengthy speeches intended to delay a floor vote—has long since passed, today, simply the threat of obstruction (a “silent” filibuster or “hold” on a nomination) is sufficient to compel Senate leaders to move on to new business.¹ As a result, the incidence of filibustering (both real and threatened) has increased significantly,² leading some observers to suggest that obstructionism in the modern Senate “is woven into the fabric of things.”³

Proponents of reform, often progressives, point out that Senate Rule XXII, which requires a 60-vote supermajority to close debate, is incompatible with the principle of majority rule. How can it be right, reform proponents argue, that 40 senators representing states with dwindling populations can use procedural means to frustrate the will of the majority of Americans? These concerns aren’t simply hypothetical. In practice, the filibuster has been employed to support repugnant positions. It was used in the nineteenth century to protest federal oversight of elections in the former Confederacy and again in the mid-twentieth century to prevent passage of anti-lynching, anti-poll tax, and civil rights bills.⁴

Finally, the filibuster is thought to disproportionately benefit Republicans, who have a narrow legislative agenda and possess a range of other legislative tools to defeat policy interventions they oppose.

In contrast, friends of the filibuster argue that it provides political minorities a voice in an otherwise ruthlessly majoritarian legislative process. Or they contend that, by slowing the pace of lawmaking, Senators are incentivized to deliberate and find consensus.⁵

Broadly speaking, filibuster reform efforts have centered on four proposals:

- Getting rid of the filibuster altogether, as was done with the House filibuster in the 1880s.
- Returning to the “talking” filibuster or reducing the number of senators needed to secure cloture to end debate.
- Further narrowing what can be subject to a filibuster, adding new carveouts to the current menu of judicial nominations and budget bills.
- Reimagining *who* gets to filibuster, such that, perhaps only senators representing states that in combination constitute a majority of the population ought to have the privilege.⁶

This Primer has two aims. First, to understand the particular appeal of filibuster reform today, and, second, to assess whether making it more difficult to engage in strategic delay would render the Senate more productive and responsive to public opinion.

Theoretical Research on the Filibuster

To understand why a behavior that frustrates so many has lasted so long, it is helpful to ask: what purpose does the filibuster serve?

“For those who oppose the filibuster, sensitivity to minority interests is a problem.”

The filibuster protects minority rights. If a minority of senators prefer the status quo to a proposed change, they can use the filibuster to forestall action and potentially preserve their favored equilibrium.⁷ For the filibuster’s defenders, this is a good thing. The bills that pass the Senate via regular procedure will have the backing of a legislative supermajority and, at least in theory, the support of most Americans.

For those who oppose the filibuster, sensitivity to minority interests is a problem. Majorities are elected with a mandate to govern and the minority party shouldn’t get to make that task more difficult. The Senate filibuster is an unnecessary obstacle to enacting policies that are popular with voters and central to the majority party’s agenda.

The Senate filibuster is unusual among allegedly anti-majoritarian legislative procedures for its durability (consider that the House filibuster was phased out in the late nineteenth century). This has led some to suggest that the filibuster is not anti-majoritarian at all, but actually reflects the preferences of successive Senate majorities. In recent decades, for instance, both Democratic and Republican majorities have created filibuster carveouts to advance judicial nominees.⁸

The filibuster provides information. Uncertainty is endemic to the legislative process. Not only must a legislator ascertain who supports (or opposes) a bill she wishes to pass, and who is likely to vote for it (or against it), she must also gauge how intensely those preferences are held. The more intense the opposition, the harder the sponsor will have to work to get her bill enacted.⁹ (A related claim for which there is little evidence, but much insistence, is that filibustering prolongs substantive debate over a policy’s particulars, thus improving information about the policy itself.)

Filibustering conveys credible information to the Senate about how determined a senator is to maintain the status quo and/or the relative reward she derives from fighting.¹⁰ After all, senators have lots of things to do other than filibuster, and so their choice to filibuster suggests they really care about the issue. But the less costly it is for any senator (or group of senators) to filibuster, the noisier the signal about the intensity of their opposition. If filibustering is cheap and easy, there is little to stop lawmakers from filibustering on issues they care only weakly about.

Theoretical Research on the Filibuster

The filibuster helps leaders agenda-set efficiently.

Given that time is scarce, and policy-making hard, the Senate cannot legislate on everything. At the same time, because filibustering requires an outlay of time and/or political capital, senators will be selective in what they choose to obstruct, presumably opposing only those bills they dislike the most. Senate leaders can use the presence (or absence) of a filibuster to distinguish between those bills that are likely to have strong, bipartisan support and those that are likely to generate meaningful opposition.¹¹ By putting those bills that lack a filibuster threat on the agenda, the Senate can prioritize mutually agreeable policy interventions and legislate more efficiency. But, here too, the filibuster promotes efficiency only if filibustering is somewhat costly and Senate leaders are otherwise unable to identify bills with cross-party appeal. To the extent we believe leaders are good at their jobs, the filibuster may not add much to their toolkit.

The filibuster serves senators' reelection goals.

Legislating is a collective enterprise, but lawmakers are elected on their own auspices. This means that legislators will always be on the hunt for ways to distinguish themselves or score points with their constituents.¹² This dynamic has led some to theorize that filibustering, independent of its outcome, carries political rewards. Even quixotic efforts to obstruct the legislative process provide opportunities for a senator to credibly signal to donors or constituents her position on (or commitment to) an issue.¹³ Consider, for example, that both Texas' Ted Cruz and Kentucky's Rand Paul increased their public profiles through regular (if ultimately fruitless) obstruction.

“To the extent we believe leaders are good at their jobs, the filibuster may not add much to their toolkit.”

Empirical Research on the Filibuster

What, if any, evidence do we have that the filibuster is about more than minoritarian obstruction?

“Throughout the Senate’s history, threatened rules changes restrained minority obstruction.”

The procedures filibustering senators draw on are not necessarily minoritarian. As only fifty-one senators are needed to change the chamber rules that make filibustering possible, filibusterers operate with the tacit consent of the Senate majority. Notably, majority-party senators near the floor median have consistently defended dilatory procedures, suggesting that a legislative majority (if not the majority party) backs the practice.

Accordingly, if the filibuster were routinely serving the interests of only a minority of the Senate, a sufficiently motivated majority could alter their use.¹⁴ Indeed, throughout the Senate’s history, threatened rules changes restrained minority obstruction. In this sense, the filibuster reflects “remote majoritarianism.”¹⁵

The majority party has circumvented the filibuster when it has wanted to. Reforms to the congressional budget process and a host of associated special rules (also known as “majoritarian exceptions”) aid Senate majorities in exploiting issue-specific carveouts for the filibuster.

Thanks to exceptions like the “Byrd rule,” senators can use the budget process to pass any legislative package that has a substantial budgetary component by a simple majority. So, too, the Senate has adopted rules changes that insulate judicial nominees from the filibuster.

In theory, these issue-specific carveouts make it possible for Senate majorities to work around the filibuster should they wish to.¹⁶ In practice, however, the use of majoritarian exceptions has declined, while the number of threatened filibusters has only grown.

One way to interpret these trends is to say that, given the costs of using special rules to bypass a filibuster, majorities will do so only when members are sufficiently motivated to change the status quo. Put differently, filibusters tend to be threatened over bills that majorities are lukewarm about or where they cannot reach consensus.

“The use of majoritarian exceptions has declined, while the number of threatened filibusters has only grown.”

Conclusion

The filibuster surely makes it harder for the Senate to legislate, but it seems that the extent to which the practice contributes to gridlock or yields anti-majoritarian outcomes has been exaggerated. The real obstacle to legislating in the Senate appears, in fact, to be senators themselves.

There is little evidence that filibuster reform would significantly improve the Senate's productivity and responsiveness to public opinion.¹⁷ Political scientists have instead found that the most common reason majority parties fail to enact their agendas is internal disagreement.¹⁸

Notwithstanding the possibility that polarization has encouraged Senate minorities to engage in obstruction, threats to filibuster do not account for a greater share of majority-party agenda failures in recent legislative sessions.¹⁹ The upshot is that reformers interested in increasing the Senate's productivity might be better served finding other targets.

If the productivity argument fails, what about the role of the filibuster in determining the Senate's overall responsiveness? Were the filibuster to be removed, would the upper chamber better reflect majoritarian interests? By definition, if the Senate were to operate by majoritarian rules, its legislative output would reflect the preferences of a chamber majority. However, majority rule in Congress has generally redounded to the benefit of the majority *party* as a whole, rather than to its individual members.

Within legislative parties, authority tends to be distributed hierarchically, and rank-and-file members possess substantially less power than their leadership.

This is thought to benefit the party collectively, as it can coordinate more efficiently and thereby create a public reputation for effectiveness.²⁰ For that reason, majoritarian reforms, including the elimination of the lower-chamber's filibuster, are often accompanied by procedural changes that centralize power in party leadership and disempower rank-and-file members.²¹ Were the filibuster weakened or eliminated, it would likely continue to trend towards centralizing power in the majority party and its leadership.²²

In summary, it maybe that, despite the principled objections to the filibuster and despite its inglorious historical use, its abolition wouldn't necessarily deliver the benefits that reformers desire.

“There is little evidence that any of the proposed filibuster reforms would significantly improve the Senate’s productivity and responsiveness to public opinion.”

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