

Opinion

The Senate Filibuster: For and Against

McConnell's Rewriting of History

To make his case for the filibuster, he has essentially rewritten the history of the Senate.

Jamelle Bouie, *The New York Times* National Edition, January 30, 2021, A22.



Credit...Erin Schaff/The New York Times

On Tuesday, Mitch McConnell, now the Senate minority leader, [spoke](#) in defense of the legislative filibuster.

“When it comes to lawmaking, the framers’ vision and our history are clear. The Senate exists to require deliberation and cooperation,” McConnell declared. “James Madison said the Senate’s job was to provide a ‘complicated check’ against ‘improper acts of legislation.’ We ensure that laws earn enough buy-in to receive the lasting consent of the governed. We stop bad ideas, improve good ideas and keep laws from swinging wildly with every election.”

He went on: “More than any other feature, it is the Senate’s 60-vote threshold to end debate on legislation that achieves this.”

It’s hard to take any of this seriously. None of McConnell’s stated concern for the “lasting consent of the governed” was on display when Senate Republicans, under his leadership, [tried to repeal](#) the Affordable Care Act by majority vote. Nor was there any

interest in “deliberation and cooperation” when Republicans wanted [a new round](#) of corporate and upper-income tax cuts.

If anything, the filibuster stymies that deliberation and cooperation by destroying the will to legislate at all. It makes bipartisanship less likely by erasing any incentive to build novel coalitions for particular issues. If, under the filibuster, there’s no difference between 51 votes for immigration reform and 56 votes (or even 59), then what’s the point of even trying? Why reach out to the other side if there’s almost no way you’ll reach the threshold to take action? And on the other side, why tinker with legislation if you know it’s not going to pass? When there’s no reason to do otherwise, why not act as a rigid, unyielding partisan?

It’s obvious that McConnell’s commitment to the filibuster is instrumental. The filibuster on executive branch nominations of appointees and federal judges was sacred — he [condemned](#) the Democrats’ use of the “nuclear option” to get rid of it in 2013 — until President Trump needed Neil Gorsuch on the Supreme Court and then it was bye-bye to the filibuster for Supreme Court nominees that McConnell’s predecessor as Senate majority leader, Harry Reid, had left intact. If the reconciliation process didn’t exist, and Republicans needed 60 votes for upper-income tax cuts, there’s almost no doubt McConnell would have killed the legislative filibuster in 2017, for the sake of his party’s signature priority.

I’m not actually that interested in McConnell’s hypocrisy. I’m interested in his history. To make his case for the indispensable importance of the legislative filibuster, McConnell has essentially rewritten the history of the Senate. He has to create a new narrative to serve his current interests.

The truth is that the filibuster was an accident; an extra-constitutional innovation that lay dormant for a generation after its unintentional creation during the Jefferson administration. For most of the Senate’s history after the Civil War, filibusters were rare, deployed as the Southern weapon of choice against civil rights legislation, and an occasional tool of partisan obstruction.

Far from necessary, the filibuster is extraneous. Everything it is said to encourage — debate, deliberation, consensus building — is already accomplished by the structure of the chamber itself, insofar as it happens at all.

In the form it takes today, the filibuster doesn’t make the Senate work the way the framers intended. Instead, it makes the Senate a nearly insurmountable obstacle to most legislative business. And that, in turn, has made Congress inert and dysfunctional to the point of disrupting the constitutional balance of power. Legislation that deserves a debate never reaches the floor; coalitions that could form never get off the ground.

In quoting Madison, McConnell frames the filibuster as part of our constitutional inheritance. It is not. The filibuster isn’t in the Constitution. The Senate, like the House of Representatives, was meant to run on majority rule.

Remember, the framers had direct experience with supermajority government. Under the Articles of Confederation, each state had equal representation and it took a two-thirds vote of the states for Congress to exercise its enumerated powers. Without the consent of nine states (out of 13), Congress could not enter treaties, appropriate funds or

borrow money. And the bar to amendment, unanimity, was even higher. The articles were such a disaster that, rather than try to amend them, a group of influential elites decided to scrap them altogether.

For a taste of this frustration, read Alexander Hamilton [in Federalist no. 22](#), which contains a fierce condemnation of supermajority rule as it was under the articles:

The necessity of unanimity in public bodies, or of something approaching toward it, has been founded upon a supposition that it would contribute to security. But its real operation is to embarrass the administration, to destroy the energy of the government, and to substitute the pleasure, caprice, or artifices of an insignificant, turbulent, or corrupt junto, to the regular deliberations and decisions of a respectable majority.

Hamilton is especially angry with the effect of the supermajority requirement on governance.

In those emergencies of a nation, in which the goodness or badness, the weakness or strength of its government, is of the greatest importance, there is commonly a necessity for action. The public business must, in some way or other, go forward. If a pertinacious minority can control the opinion of a majority, respecting the best mode of conducting it, the majority, in order that something may be done, must conform to the views of the minority; and thus the sense of the smaller number will overrule that of the greater, and give a tone to the national proceedings. Hence, tedious delays; continual negotiation and intrigue; contemptible compromises of the public good.

Delegates to the constitutional convention considered and rejected supermajority requirements for navigation acts (concerning ships and shipping), regulation of interstate commerce and the raising of armies. Majorities would have the final say everywhere except for treaties, amendments and conviction in an impeachment trial.

To make the Senate slow-moving and deliberative, the framers would not raise barriers to action so much as they would insulate the body from short-term democratic accountability. That meant indirect election by state legislatures, staggered terms of six years and a small membership of two senators per state. And at ratification, that is where the Senate stood: a self-consciously aristocratic body meant to check the House of Representatives and oversee the executive branch, confirming its appointments and ratifying its foreign agreements.

The filibuster doesn't enter the picture until years later, as an accident of parliamentary bookkeeping. In 1806, on the advice of Vice President Aaron Burr (who thought it redundant), the Senate [dropped](#) the "previous question" — a motion to end debate and bring an item up for immediate vote — from its rules. Without a motion to call the previous question, however, an individual senator could, in theory, hold the floor indefinitely.

It took 31 years for someone to actually do it. The first known filibuster took place in 1837, when several Whig senators tried unsuccessfully to block a Democratic bill to [reverse](#) an 1834 censure of President Andrew Jackson and expunge it from the congressional record. Even then, the filibuster was not widely used until the second half of the 19th century, as the parties, and thus the Senate, grew more polarized along party lines.

The filibuster as we understand it developed in the 20th century. [In 1917](#), President Woodrow Wilson called on Senate Democrats to reform the filibuster as a war measure after Republicans successfully filibustered a bill to arm merchant ships. Democrats obliged and created a “cloture” rule to end debate with a two-thirds vote of the chamber. [In 1975](#), the Senate reduced that threshold from two-thirds to three-fifths, or 60 votes in a 100-member body.

Throughout this time, filibusters were uncommon. It was perfectly possible for the Senate to debate, deliberate and come to consensus without the supermajority requirement McConnell and the Republican caucus have imposed on virtually all legislation since 2009.

The point of comparison for the Senate as McConnell has shaped it is the middle of the 20th century, when a conservative coalition of Republicans and Dixiecrats made the chamber a graveyard of liberal legislation and social reform. Consensus didn’t matter. Power did. And it wasn’t until liberals [wrested power](#) from this coalition — in the House as well as the Senate — that they could take the initiative and begin work on an otherwise popular agenda.

There is no question the Senate is supposed to be slow, even sluggish. But it’s not supposed to be an endless bottleneck. The framers wanted stability in government, not stagnation. What we have now, with the filibuster intact, is a Senate that can barely move.

This isn’t just a problem for President Biden and the Democratic Party; it’s a problem for the entire constitutional order. Our system is built around Congress; Congress makes laws, Congress holds the purse strings, Congress hands out mandates, Congress checks the president and makes sure the judiciary stays in its lane.

When Congress doesn’t act, other actors take up the slack. The story of our democracy these last 10 years is, in part, the story of how a listless, sclerotic Senate broke Congress and pushed the other branches to govern in its stead, with the president and the courts making as much policy as they can without congressional input, with all the capriciousness, whiplash and uncertainty that can come from that.

If you don’t like presidents governing through executive order, then you should want an active, energetic Congress that embraces its constitutional mandate to rule over the whole country and direct its government. If you want that, you should oppose the filibuster.

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Opinion

Mitch McConnell: The Filibuster Plays a Crucial Role in Our Constitutional Order

Democrats who want to change Senate rules for temporary political gain will rue the day, as they have before.

Mitch McConnell, *The New York Times* Online Edition, August 22, 2019.



"America needs the Senate to be the Senate," Senator Mitch McConnell, shown here in his office on Capitol Hill, writes. Credit...Damon Winter/The New York Times

"You'll regret this, and you may regret this a lot sooner than you think."

That was my warning to Senate Democrats in November 2013. Their leader, Harry Reid, had just persuaded them to trample longstanding Senate rules and precedents. Now that some Democrats [are proposing](#) further radical changes to the Senate's functioning, it is instructive to recall what happened next.

To confirm more of President Barack Obama's controversial nominees, Democrats took two radical steps. First, since the nominees had proved unable to earn the 60 votes necessary to overcome a filibuster, Democrats sought to change Senate rules so that ending debate on most nominations would require only a simple majority. Second, lacking the two-thirds supermajority needed to change the rules normally, Democrats

decided to short-circuit standard procedure and muscle through the new rule with a simple majority as well — the first use of the infamous “nuclear option.”

Republicans opposed both moves on principle. Strong minority rights have always been the Senate’s distinguishing feature. But when appeals to principle fell on deaf ears, I tried a practical argument. The political winds shift often, I reminded my Democratic friends. I doubted they’d like their new rules when the shoe was on the other foot.

Unfortunately, Senate Democrats bought what Senator Reid was selling — but buyer’s remorse arrived with lightning speed. Just one year later, Republicans retook the majority. Two years after that, Americans elected President Trump. In 2017, we took the Reid precedent to its logical conclusion, covering all nominations up to and including the Supreme Court.

So this is the legacy of the procedural avalanche Democrats set off: Justice Neil Gorsuch, Justice Brett Kavanaugh and [43 new lifetime circuit judges](#) — the most ever at this point in a presidency. The consequences of taking Senator Reid’s advice will haunt liberals for decades.

A number of Democrats publicly regret their 2013 vote. One [calls it](#) “probably the biggest mistake I ever made.” Nevertheless, the far left now wants Democrats to touch the hot stove yet again. This time, they want to erase the Senate’s 60-vote threshold

A Democratic assault on the legislative filibuster would make the nomination fights look like child’s play. That’s because systematically filibustering nominees was not an old tradition but a modern phenomenon, pioneered in 2003 by Democrats who [opposed](#) President George W. Bush. When Republicans followed suit and held up a handful of Obama nominees the same way, Democrats could not stomach their own medicine and began a “nuclear” exchange that Republicans had to end.

The back-and-forth was regrettable, but the silver lining is that the failed experiment Democrats started in 2003 is now over. The Senate has taken a step back toward its centuries-old norms on nominations: limited debate and a simple majority threshold.

On legislation, however, the Senate’s treasured tradition is not efficiency but deliberation. One of the body’s central purposes is making new laws earn broader support than what is required for a bare majority in the House. The legislative filibuster does not appear in the Constitution’s text, but it is central to the order the Constitution sets forth. It echoes James Madison’s [explanation](#) in Federalist 62 that the Senate is designed not to rubber-stamp House bills but to act as an “additional impediment” and “complicated check” on “improper acts of legislation.” It embodies Thomas Jefferson’s principle that “great innovations should not be forced on slender majorities.”

The legislative filibuster is directly downstream from our founding tradition. If that tradition frustrates the whims of those on the far left, it is their half-baked proposals and not the centuries-old wisdom that need retooling.

Yes, the Senate’s design makes it difficult for one party to enact sweeping legislation on its own. Yes, the filibuster makes policy less likely to seesaw wildly with every election. These are features, not bugs. Our country doesn’t need a second House of

Representatives with fewer members and longer terms. America needs the Senate to be the Senate.

I recognize it may seem odd that a Senate majority leader opposes a proposal to increase his own power. Certainly it is curious that liberals are choosing this moment, when Americans have elected Republican majorities three consecutive times and counting, to attack the minority's powers.

But my Republican colleagues and I have not and will not vandalize this core tradition for short-term gain. We recognize what everyone should recognize — there are no permanent victories in politics. No Republican has any trouble imagining the laundry list of socialist policies that 51 Senate Democrats would happily inflict on Middle America in a filibuster-free Senate.

In this country, radical changes face a high bar by design. It is telling that today's left-wing activists would rather lower that bar than produce ideas that can meet it.

I am known for appreciating an old Kentucky saying: "There's no education in the second kick of a mule." Some Senate Democrats seem to agree. Thirteen of their ranking members on Senate committees have publicly stated that they oppose tampering with the legislative filibuster.

But the Democratic Party is racing leftward, with presidential debates that make the 2008 exchanges between Barack Obama, Hillary Clinton and John Edwards look downright conservative by comparison. The party is rallying around the very kinds of radical schemes that the Constitution intentionally frustrates. And rather than moderate or engage in persuasion, many on the left seem more tempted to rewrite the rules once again.

A majority of the Democratic presidential candidates are flirting with ending the legislative filibuster. Even more irresponsibly, Chuck Schumer and Dick Durbin, the top two Senate Democrats, have signaled openness as well. On this subject, like so many others, what was recently fringe nonsense seems to be rapidly becoming mainstream Democratic dogma.

I hope the saner voices among Democrats can help their compatriots see reason. Unless and until that happens, Americans must never let this radical movement gain enough power to vandalize the Senate.

If future Democrats shortsightedly decide to reduce the Senate to majority rule, we'll have lost a key safeguard of American government.

And — stop me if you've heard this one — they'd regret it a lot sooner than they think.

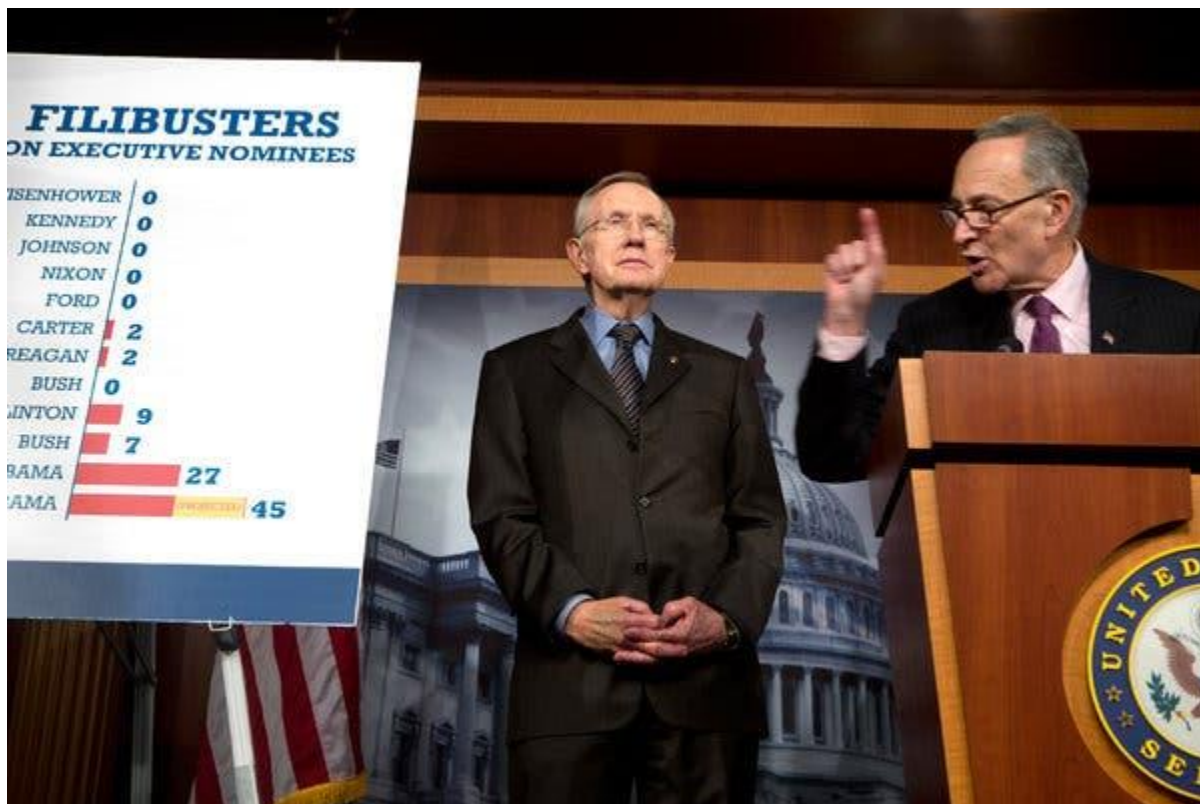
Mitch McConnell ([@senatemajldr](https://twitter.com/senatemajldr)), a Republican from Kentucky, is the Senate Majority Leader.

Opinion

Harry Reid: The Filibuster Is Suffocating the Will of the American People

To save our country's future, Democrats must abolish this arcane Senate rule.

Harry Reid, *The New York Times* Online Edition, August 12, 2019.



Senators Harry Reid, left, and Charles Schumer in 2013 supporting the abolishment of the filibuster for most presidential appointees. Credit... Stephen Crowley/The New York Times

I am not an expert on all of government, but I do know something about the United States Senate. As the former majority leader, I know how tough it is to get anything through the chamber, which was designed to serve as the slower, more deliberative body of the United States Congress.

But what is happening today is a far cry from what the framers intended. They created the Senate as a majority-rule body, where both sides could have their say at length — but at the end of the day, bills would pass or fail on a simple majority vote. In their vision, debate was supposed to inform and enrich the process, not be exploited as a mechanism to grind it to a halt.

The Senate today, after years of abusing an arcane procedural rule known as the filibuster, has become an unworkable legislative [graveyard](#). Not part of the framers' original vision, the modern filibuster was [created](#) in 1917. The recent use of the filibuster — an attempt by a minority of lawmakers to delay or block a vote on a bill or confirmation — has exploited this rule, forcing virtually all Senate business to require 60 of the 100 senators' votes to proceed. This means a simple majority is not enough to advance even the most bipartisan legislation.

Republicans over the past decade — [knowing](#) their policies are unpopular and that obstruction benefits them politically — perfected and [increased](#) the gratuitous use of the filibuster. Even routine Senate business is now subject to the filibuster and Republicans' seeming obsession with [gridlock](#) and obstruction.

The Senate is now a place where the most pressing issues facing our country are disregarded, along with the will of the American people overwhelmingly calling for action. The future of our country is sacrificed at the altar of the filibuster.

Something must change. That is why I am now calling on the Senate to abolish the filibuster in all its forms. And I am calling on candidates seeking the Democratic nomination for president to do the same.

If a Democratic president wants to tackle the most important issues facing our country, then he or she must have the ability to do so — and that means curtailing Republicans' ability to stifle the will of the American people. It's time to allow a simple majority vote instead of the 60-vote threshold now required for legislation. When the American people demand change and elect a new Senate, a new majority leader must be able to respond to that call and pass legislation.

The list of issues stalled by the Senate filibuster is enormous — and still growing.

People ask how it is possible that America is [failing](#) to lead on climate change, even as we rapidly [approach](#) a catastrophic transformation of our planet that will wreak irreversible havoc on millions of Americans. The answer: the filibuster.

People ask how America — a country that used to set the example for the world on human rights — could [tear families apart at the border](#) and put children in cells so [overcrowded](#) they cannot lie down. They ask how our country can allow those children to be lost in a labyrinthine system, possibly [never reunited](#) with family again. The answer remains the same: the filibuster.

People ask why the federal government hasn't lifted a finger to stop the growing epidemic of gun violence, despite Americans' demands for action and overwhelming [support](#) for common-sense reforms like universal background checks and bans on high-capacity magazines. They ask how we can stand by as the country suffers tragedy after tragedy and [averages](#) more than one mass shooting every single day. The answer once again: the filibuster.

If not for abuse of the filibuster, we would have [passed](#) major legislation addressing some of our country's most pressing issues under President Obama: Millions of undocumented immigrants brought to this country as children would have a pathway to

citizenship through the Dream Act; millions of Americans would have a government-run public option as part of health care reform; and the American Jobs Act and the “Buffet Rule” requiring the wealthy pay their fair share of taxes would be law, further strengthening the economy and helping to address the issue of income inequality.

If the Senate cannot address the most important issues of our time, then it is time for the chamber itself to change, as it has done in the past.

I didn’t come to this decision lightly. In bygone eras, the filibuster was a symbol of the Senate’s famed role as the cooling saucer for legislation and ideas from the more hot-tempered House of Representatives. The Senate was known as “the world’s greatest deliberative body,” a place where collegiality and compromise held sway and issues could be discussed rationally and agreements could be reached. The 60-vote threshold reflected those sentiments.

Sadly, we are not living in the same legislative world anymore.

As majority leader of the Senate, facing the strenuous obstruction of President Obama’s nominees by Republicans hoping to cripple his administration, I decided in 2013 to [abolish](#) the filibuster for most presidential appointees. Because of this change, we were able to [confirm](#) more of President Obama’s judicial nominees than we would have been able to otherwise, leaving President Trump fewer vacancies to fill.

I kept the filibuster in place for Supreme Court nominees and legislation, believing the filibuster was necessary for other Senate business because of the chamber’s deliberative nature. Republicans, after loudly [denouncing](#) the 2013 change, went a step further in 2017 and [abolished](#) the filibuster for Supreme Court nominees as well.

I previously assumed, perhaps wrongly, that the fever would eventually break — that Republicans would be forced by the American people to put their country above their party. I assumed the calls for action on critical issues would be heard — that collegiality in the Senate would prevail.

That never happened. If anything, the Senate is more [gridlocked](#) and polarized than ever.

As I said in 2013, the Senate is a living thing, and to survive, it must change — just as it has throughout the history of our country. The American people elect leaders to address the issues facing our country, not to cower behind arcane parliamentary procedure.

This era of obstruction and inaction must come to an end, and I urge our nation’s leaders to join me in calling for the abolition of the filibuster. It’s time for the Senate to start working again.

Harry Reid is a former United States Senator from Nevada, serving from 1987 to 2017. He led the Senate’s Democratic Conference from 2005 to 2017 and was the Senate Majority Leader from 2007 to 2015.