In Defense of Filibustering

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Abstract: The Senate filibuster is among the most criticized political institutions in the United States. This paper examines the ethics of filibustering. The way filibustering currently proceeds in the Senate, I argue, is morally indefensible. Yet, there is a way filibustering *could* proceed that is both defensible and desirable from a normative perspective. This is because filibustering—if it is properly institutionalized—allows minority parties in the legislature to protect and advance their interests in a manner that avoids shortcomings faced by other institutions proposed to accomplish these goals, such as supermajority rule and judicial review.

Keywords: filibuster; obstruction; tyranny of the majority; persistent minority; minority rights; supermajority.

1. Introduction

The Senate filibuster is among the oldest and most criticized political institutions in the United States of America. The filibuster, as it currently operates, imposes a *de facto* supermajority (three-fifths) requirement to pass legislation. The predictable result is gridlock and frustration. Consequently, we are inundated on an almost weekly basis with cries to abolish the filibuster.

There is no philosophical work that reflects on filibustering from a normative perspective, although there is some work analyzing other parliamentary tactics such as logrolling through an ethical lens (Thrasher 2016). I hope to change that with this paper. I am not going to

defend filibustering as it currently proceeds in the Senate. The way filibustering currently works is indefensible. Yet, there is a way filibustering *could* proceed that is both defensible and desirable from a normative perspective. This is because filibustering—if it is properly institutionalized—is the best available option for protecting and advancing minority interests. Far from being just a peculiar institution of the U.S. Senate, filibustering—again, if it is properly institutionalized—should be permitted in legislatures around the world.

Here is a summary of the argument. The next section offers a brief overview of filibustering (§2). After this, I turn my attention to the status of minorities in a regime of majority rule (§3). There are several compelling reasons to insist on majority rule as the preferred method for making collective decisions, yet this voting rule often treats minorities in a regrettable manner, in that they are sometimes threatened by the majority and rarely afforded the opportunity to advance their interests. Several institutions—such as supermajority rule and judicial review—have been proposed to remedy these problems, but they face significant shortcomings. Might filibustering fare better?

I think so. To show this, I walk through a simple model of filibustering under a restricted set of assumptions (§4). When these assumptions hold, filibustering protects and advances minority interests in a manner that avoids shortcomings faced by other institutions such as supermajority rule and judicial review (§5). This is the core argument for why filibustering should be embraced as a parliamentary tactic. Unfortunately, when these restricted assumptions are relaxed filibustering loses some of its desirable properties (§6). Filibustering can be reformed, however, to ensure it always operates in the desired manner (§7). This is why I said above that I will not defend filibustering as it currently works in the Senate, but will defend a reformed version of it. To end, I consider objections (§8).

One clarifying point before I begin. We often associate filibustering with the U.S. Senate, but I want to consider it more abstractly, detached from this specific institution. There are a few reasons why. First, filibustering can happen in any legislature so long as parliamentary procedure is structured a certain way (more on this in the next section).[1] Most legislatures structure their procedure in a manner that prevents filibustering, but this can easily be changed, typically with a simple majority vote. My argument is meant to be a general defense of filibustering as a parliamentary tactic. If it succeeds, filibustering should be embraced in legislatures around the world, not just the U.S. Senate.

Second, the U.S. Senate has unusual features that may make filibustering more or less attractive. Here I refer to its disproportionate system of representation: two Senators per state, regardless of population size. This feature may play a role in determining whether filibustering is all-things-considered a good idea for the Senate. But because the Senate's disproportionate scheme of representation is unique, any argument that accounts for this distinctive feature will not be general. In my view, it's worth articulating general arguments for and against filibustering. The conclusions of these arguments might be overturned once specific features of institutions (such as the Senate's disproportionate representation) are brought back into the analysis. Still, it is worth examining the normative status of filibustering generally, which requires we abstract from parochial features of legislatures like the U.S. Senate.

[1] The United Kingdom's House of Commons once allowed filibustering by virtue of its poverty of formal rules governing parliamentary debate (debate was governed mainly by informal "gentlemanly" norms). This dearth of formal rules was taken advantage of by Charles Stewart Parnell of the Irish nationalist Home Rule party in the 1870's. The majority in the House of Commons responded by introducing new rules limiting Parnell's obstructionist efforts. These rules remain in place, so filibustering is no longer possible in the UK's lower house. For a brief history, see Chafetz (2011: 1017–1022).

2. Overview of Filibustering

Filibustering is "legislative behavior (or threat of such behavior) intended to delay a collective decision for strategic gain" (Koger 2010: 16). This legislative behavior can take many forms, such as dilatory motions and broken quorums (Koger 2010: 17–19). However, the most famous form of filibustering—and what I shall focus on in this paper—is prolonged speeches. Strom Thurmond set the record for the longest Congressional filibuster by talking for over twenty-four hours straight in a failed attempt to stop passage of the Civil Rights Act of 1957 (Koger 2010: 17).

Three ingredients make filibustering possible (Wawro and Schickler 2006: 13; Reynolds 2017: 11). The first is the right of recognition, which means that "the presiding officer must recognize any senator who wishes to speak" (Reynolds 2017: 11). Second is the absence of any kind of germaneness requirement concerning the content of a legislator's speech. More specifically, "once recognized to speak, a senator may do so on any kind of subject whatsoever" (Reynolds 2017: 11). Third is the absence of any kind of formal debate-ending simple majority cloture rule (Koger 2010: 60). Debate continues so long as a legislator seeks recognition and holds the floor.

When these three features are present (as they are in the U.S. Senate) filibustering will occur. As political scientists Gregory J. Wawro and Eric Schickler describe it:

> By precedent, the presiding officer cannot refuse to recognize a senator who seeks the floor … Once a senator has obtained the floor, she cannot be interrupted by another senator without her consent, and can hold the floor for as long as she is physically capable of doing so, since the rules require the senator to stand and address the chair ... As long as she obeys the Senate's rules regarding decorum (e.g., does not impugn the

> character of another senator or a state of the Union) she continues to hold the floor until she sits down. A debatable question can be moved only when no senator seeks recognition to debate it (Wawro and Schickler 2006: 13–14).

So, the Senate's basic rules are set up to allow filibustering. In the old days, filibusters were wars of attrition between the minority and the majority (Wawro and Schickler 2006: 34; Koger 2010: 22). Who could last the longest? The minority, filibustering on the Senate floor, or the majority, who had to maintain a quorum? If the majority quit first, then the bill was dead. If the minority quit first, then the majority could pass the bill. As political scientist Gregory Koger describes it: "Classic filibusters were contests of endurance, not votes. They were dramatic and unscripted marathons. *And they were exceedingly rare*" (Koger 2010: 4). Not only were they rare, but they were also not overly obstructive of the majority's agenda. Looking at all filibusters in the U.S. House of Representatives and Senate from 1789 to 1901, filibustered bills failed only 27 percent of the time in the House, and they failed only 21 percent of the time in the Senate (Koger 2010: 59).[2]

At the beginning of the twentieth century something changed, and filibusters became more and more common and were increasingly disruptive of the majority's agenda. Why this happened will be discussed in §6 below. In response, the Senate introduced a *cloture rule*, or a rule to shut off debate (officially, Senate Rule 22). Passed in 1917, the original cloture rule required two-thirds of the Senate to agree to stop debate; this bar would later be lowered to three-fifths in 1975 where it currently stands today (Wawro and Schickler 2006: 89).

[2] The House of Representatives allowed filibustering from its inception until reforms were passed in the 1890's (Koger 2010: 53–56).

Note that the cloture rule does not prevent filibusters from proceeding as wars of attrition as they did in the past. Since the reforms, the majority is still at liberty to outwait the minority to pass their preferred legislation. This, however, almost never happens anymore. Instead, when a single Senator declares her intent to filibuster, cloture is viewed as the only viable path forward. If the majority cannot achieve cloture, they give up, so the minority never (or rarely) must continuously occupy the floor. Instead of wars of attrition, nowadays "a typical 'filibuster' occurs when a senator refuses to agree to a time to hold a vote on a measure and, implicitly, threatens to drag out the debate indefinitely" (Koger 2010: 4). Why the majority insists on pursuing cloture and refuses to force the minority to continuously hold the Senate floor is something I discuss in §6 below.

For now, the only important thing to note is that filibustering is a parliamentary tactic that involves continuous occupation of the floor of the legislature to obstruct the majority. How should we think about this tactic from the moral point of view? Before answering this question, we need to take a brief detour and examine a key issue in democratic theory: the status of minorities in a regime of majority rule.

3. Minorities and Majority Rule

When collective decisions must be made, it is common to hold that the majority should prevail. Though there are many reasons to insist on majority rule as the preferred method for making collective choices, there is a deep concern that it sometimes treats minority groups in a regrettable manner.

There are two worries in particular. First is the *tyranny of the majority* (Nyirkos 2018). The tyranny of the majority occurs when the majority passes policies that violate the rights or seriously undermine the well-being of minorities. As Thomas Christiano phrases it, "the case of majority tyranny involves a disregard for the rights of the minority or even an explicit attempt to dispossess the minority of those rights" (Christiano 1994: 174). Even if majorities don't undermine the rights and well-being of minorities, there is still the concern that minorities have no chance to advance their interests in a regime of majority rule. As Christiano articulates this concern, the worry is that "the minority rarely gets its way on any of the collective properties it prefers" (Christiano 1994: 175). In contrast to the tyranny of the majority, call this problem the *impotence of the minority*.

This paper assumes the tyranny of the majority and the impotence of the minority are valid concerns that should be addressed. What to do? Some democratic theorists respond: just wait. Due to structural features of democratic politics (such as Arrow's impossibility theorem), majority and minority coalitions cycle over time, so that those who are now in the minority will be in the majority soon enough (Miller 1983; McGann 2006). These structural features "ensure that there are no permanent losers" (McGann 2006: 109). Because minorities will soon be majorities, they will have a chance to advance their interests, solving the impotence of the minority. The tyranny of the majority is solved because "it is not in the interest of members of the winning coalition to try to drive the losers to the wall" (McGann 2006: 109). It is not in their interest to do this because they will soon be in the minority, and don't want that kind of treatment reciprocated when they are in the disfavored position.

The "just wait" approach is unsatisfying, for it completely ignores *persistent minorities*, or those who rarely or perhaps even never find themselves in a position to exercise political

power. There are many examples of persistent minorities around the globe. In the United Kingdom's House of Commons, the Scottish National Party has never been in a majority governing coalition, nor has the Bloc Québécois in Canada's House of Commons. There are currently no persistent minority parties in the U.S. House and Senate; control of the federal legislature has of late been incredibly competitive, with power changing hands frequently (Lee 2016). This was not always true. From 1933 to 1981, the Democrats controlled both houses of Congress, except for four years (1947–1949 and 1953–1955). And at the level of state legislatures, one finds numerous examples of persistent minorities. For instance, the Democrats have controlled both houses of the legislatures of California, Massachusetts, and Maryland (among others) for at least the past twenty years. Republicans have controlled both houses of the legislatures of South Carolina, Utah, and Florida (among others) for at least the past twenty years.

Many democratic theorists are deeply concerned about persistent minorities, both for reasons stemming from the tyranny of the majority and the impotence of the minority (Jones 1983; Christiano 1994; Lee 2001a; 2001b; Christiano 2008: 288–299; Saunders 2010; Abizadeh 2021). Given the failures of the just wait approach, what institutions best protect minorities and help advance their interests? There are a few proposals on the table; I shall focus on what I regard as the most popular two.

An obvious option is to adopt some kind of supermajority decision rule (e.g., Calhoun 1992; Guinier 1994: 16–17; Buchanan and Tullock 2004: ch. 7). Suppose a legislature consists of a majority party holding 60 percent of all seats and a minority party holding 40 percent of all seats. The majority wishes to pass policies that undermine the rights and well-being of the minority. If the legislature passes policies by simple majority rule, then these policies will pass.

Yet, if the legislature adopts a two-thirds voting rule, then the majority will be unable to pass their pernicious policies. To reach the two-thirds threshold, the majority will need some agreement from the minority, and the minority will not agree to policies that undermine their rights and well-being. This solves the tyranny of the majority. The impotence of the minority is solved because anytime the majority wants to pass a policy, they must get at least some minority members to join them. This forces the majority to make concessions to the minority.

The problem with supermajority voting rules is that they favor some choice options over others; in the technical language of social choice theory, they violate *neutrality* (Rae 1975; McGann 2006: 89; Schwartzberg 2014: 121). Here is an illustration. Suppose a legislature consisting of 100 members adopts a voting rule that says 60 votes are needed to pass a policy. Suppose policy *p* goes up for a vote. For *p* to pass, it needs 60 votes. For the status quo to remain in place, it only needs 41 votes. Thus, the status quo is privileged in this supermajoritarian system. Insofar as persons (such as conservatives) consistently favor the status quo, their interests are favored by the collective choice rule. This seems unfair.

Another option is judicial review. Judicial review is often upheld as a bulwark against the tyranny of the majority (e.g., Ely 1980; Cross 2000; Fallon 2008; Kyritsis 2017), although it is less clear the extent to which it can solve the impotence of the minority. The idea is simple. If there are certain rights enshrined in a constitution, and if the majority passes policies that deprive the minority of these rights, then the judiciary will strike down these laws as invalid, thus protecting minority interests.

Many have raised objections to judicial review, and I cannot cover them all (e.g., Tushnet 1999; Bellamy 2007). The most compelling objection, in my view, comes from Jeremy Waldron (2006). Waldron is concerned about the *fairness* of judicial review as a procedure for settling

disputes about rights. In a system without judicial review, disagreements about rights are settled by the legislature, elected by the people. With judicial review, disagreements about rights are settled by judges who are typically appointed by the legislative or executive branches (or some combination). If a decision is made that a citizen disagrees with in either system, why should she regard the decision as legitimate?

According to Waldron, in a system of legislative supremacy, disagreements about rights are resolved fairly, for the procedure used to resolve these disagreements affords everyone an equal opportunity to influence the resolution of the disagreement. Each citizen gets one equally weighted vote when selecting representatives,[3] and representatives in the legislature each get one equally weighted vote when it comes to passing legislation. The system thus treats everyone fairly, in that "we give each person the greatest possible say compatible with an equal say for each of the others" (Waldron 2006: 1388–1389). This is why someone who disagrees with the decision should regard the outcome as legitimate: her opportunity to influence the outcome was equal to everyone else's.

By contrast, settling disputes via judicial review is unfair, for not everyone is afforded equal opportunity to influence the outcome. Most citizens' opportunity to influence the outcome is non-existent. Only those who sit on the bench have an opportunity to influence the outcome. There is thus an inherent unfairness in judicial review, for some (i.e., judges) have a greater opportunity to influence the outcome than others. As Waldron puts it, "institutions giving final authority on these matters to judges fail to offer any sort of adequate response to the fairness-complaint of the ordinary citizen based on the principle—not just the value—of political

[3] This is the case in an *ideal* electoral system, but some electoral systems are not ideal. For instance, because the U.S. Constitution affords each state two Senators regardless of population size, many have argued the Senate violates the principle of one person, one equally weighted vote (e.g., Dahl 2003: 46–54)

equality" (Waldron 2006: 1393). This is why someone who disagrees with the decision is less likely to regard the outcome as legitimate: her opportunity to influence the outcome was not equal to everyone else's.

4. A Simple Model of Filibustering

We should be concerned about the tyranny of the majority and impotence of the minority. Solutions have been proposed to address these concerns, but they face shortcomings. How does filibustering compare to these other proposals? After all, many who embrace filibustering claim it protects and advances minority interests (Arenberg and Dove 2015). Before we compare filibustering to other proposals, we need to better understand how it works in practice. To this end, the current section walks through a simple model of filibustering under a restricted set of assumptions.

Let's suppose that in the legislature there is a majority group and a minority group. At issue is policy *p*, that is preferred by the majority, but dis-preferred by the minority. Now consider the following two possible worlds:[4]

(W1) The majority prefers *p* more intensely than the minority dis-prefers it.

(W2) The majority prefers *p* less intensely than the minority dis-prefers it.

Preference intensity refers to the amount of satisfaction derived when the relevant state of the world obtains. Preference intensity thus assumes cardinality of preferences. So, in world (W1), the majority derives more satisfaction from *p* passing than the minority derives from its defeat. In

[4] I don't consider the case where the majority prefers and the minority dis-prefers *p* with equal intensity, because the model then becomes indeterminate. I also think such cases are extraordinarily unlikely.

world (W2), the minority derives more satisfaction from obstructing *p* than the majority derives from its passage.

Filibustering is costly for both the majority and the minority (Wawro and Schickler 2006: 30–31; Koger 2010: 22). The costs imposed on the minority are clear: they must continually occupy the floor, which is exhausting. There is also the opportunity cost: every hour spent on the floor is an hour not spent doing something else. Depending on the attitudes and desires of the electorate, filibustering may also result in a negative reputation for the minority, as they are blamed for legislative gridlock. I shall denote the costs faced by the minority during a filibuster c_{minority}.

The majority also faces costs if the minority decides to filibuster. They must be present in the chamber to not break quorum, which is exhausting. If they break quorum, then the minority gets a rest. They also face the opportunity cost of sitting in the chamber, though their opportunity costs differ from the minority's. They, like the minority, are deprived of engaging in other activities. However, the majority is also deprived the ability to introduce and consider further legislation they wish to pass. Every hour spent debating policy *p* is an hour not spent considering their next most favored policy. I shall denote the costs faced by the minority during a filibuster c_{majority}.

Assume, for the time being, that the costs associated with filibustering are equal for both the majority and minority. That is, assume $c_{\text{majority}} = c_{\text{minority}}$. This assumption does not always hold, and what happens when the assumption is relaxed is examined in §6. Under the assumption that the costs associated with filibustering are equal for the majority and the minority, in what worlds will the minority prevail over the majority?

Consider first world (W1). In this world, the majority prefers *p* more intensely than the minority dis-prefers it. Here, the majority will outwait the minority's filibuster. This is because the majority and the minority face equal costs of filibustering, but the majority derives more welfare from the policy's passage than the minority derives from its defeat. So, it is rational for the majority to wait longer than the minority, as they will be willing to pay a higher cost to implement the policy than the minority will be willing to pay to block it. After the majority has outwaited the minority, they can pass *p*.

Let us now turn to world (W2). In this world, the majority prefers *p* less intensely than the minority dis-prefers it. In this case, the majority will not outwait the minority. This is because the majority and the minority face equal costs of filibustering, but the minority derives more welfare from the policy's defeat than the majority derives from its passage. So, they will be willing to pay a higher cost to defeat the policy than the majority will be willing to pay to implement it. The majority will eventually give up.[5]

In essence, filibustering is a bargain between the majority and minority.[6] What is interesting, though, is that it is a bargain that allows the minority to prevail (when the costs of filibustering are equal) *only when* their intensity against *p* is greater than the majority's intensity for *p*. If the majority prefers *p* more intensely than the minority dis-prefers it, then the majority will prevail. But if the minority dis-prefers *p* more intensely than the majority prefers it, then the minority will be the last one standing, and will defeat the bill. As Wawro and Schickler describe it:

[5] A criticism of this simple model is that I only consider the majority's desire to pass *p* and the minority's desire to defeat *p*. However, there may be other motives relevant to filibustering that should be considered: the desire to express contempt for one's political opponents, the desire to embarrass the opposition, and so on. I discuss these complicating motives in §8.2 below.
[6] For formal models of this bargain, see Bawn and Kroger (2008); Dion et al. (2016).

> Rather than creating a de facto supermajority or unanimity requirement, obstruction primarily allowed an intense minority to block action or force concessions from a less intense majority. Thus, the pre-cloture Senate accommodated preference intensity through the device of unlimited debate, while still allowing the majority, as a general matter, to rule (Wawro and Schickler 2006: 28).

And as Koger describes it:

> Under the right conditions, however, filibustering can accommodate differences in preference intensity by enabling a political minority to credibly signal its intensity. If the costs of waiting out a filibuster are comparable to the costs of filibustering, an indifferent majority will be likely to defer to an intense minority rather than force the issue to a vote (Koger 2010: 191).

Importantly, if the minority believes that the majority prefers *p* more intensely than they do, the minority will not even attempt a filibuster, as they believe the majority will outwait them. It is only when the minority has good reason to think that they dis-prefer *p* more intensely than the majority prefers it that a filibuster will be attempted. If they are right, they will prevail; if they are wrong, the majority will outwait them.

5. In Praise of the Simple Model

The last section presented a simple model of filibustering under the assumption that $c_{\text{majority}} = c_{\text{minority}}$. This section argues that, *so long as this assumption holds*, filibustering is an attractive solution to the tyranny of the majority and the impotence of the minority. First, I argue that filibustering resolves the tyranny of the majority and the impotence of the minority. Then, I

argue that filibustering avoids the concerns raised against other institutions proposed to resolve these problems (such as supermajority rule and judicial review).

Start first with the tyranny of the majority, which worries about majorities violating the rights and seriously undermining the well-being of minorities. Filibustering resolves this problem so long as minorities care more about their rights being violated than majorities care about violating rights. Intuitively it seems like this will be true in most cases. This does not mean that majorities won't care very deeply about passing policies that cause serious harm to others—in some cases, they will. Rather, the claim is that those seriously harmed by such policies will care *even more* than the majority does, if only slightly. So long as this is true, minority filibusters will successfully block policies that violate their rights and seriously undermine their well-being.

For filibustering to resolve the impotence of the minority, it must go beyond allowing the minority to *block* policies that undermine their rights and well-being, but also *pass* policies that advance their interests. Can filibustering do this? It can. As Koger notes, "filibusters had a variety of effects: killing bills, forcing amendments, gaining floor time and opportunities to amend proposals on the floor, forcing consideration of new agenda items, and attracting public attention for the obstructionist(s)" (Koger 2010: 99). When the minority filibusters a bill to advance a different, nongermane policy or amendment it is called *hostage taking* (Koger 2010: 112). The minority engages in a hostage-taking filibuster when they block the majority's preferred policy p_1 until the majority agrees to pass the minority's preferred p_2. This allows minorities to advance their interests, resolving the impotence of the minority.

For example, in 1934 Huey Long filibustered all legislation until the Senate passed the Federal Farm Bankruptcy Act, which sheltered farmers from bankruptcy during the Great Depression (Koger 2010: 113). As another example, in 1996 the Democratic minority held

hostage several Republican bills until they agreed to raise the minimum wage (Koger 2010: 113). Though killing a bill was the most common motive for filibustering between 1901–2004, the second most common motive was to amend bills, and the third most common was to support a different, nongermane bill (Koger 2010: 112).

Filibustering thus solves the tyranny of the majority and the impotence of the minority. But there are other institutions that can also solve these problems, such as supermajority rule and judicial review. Why prefer filibustering to these other options? I shall now argue that filibustering avoids the problems these other options face.

The problem with supermajority rule is that it favors some choice options over others. More votes are needed to overturn the status quo than are needed to maintain it. This gives those who prefer the status quo (i.e., conservatives) unfair advantage. Filibustering does not have this problem, because it is perfectly compatible with simple majority rule (or any voting rule, for that matter). We can have a legislature of 100 that both allows filibustering and requires 51 votes in favor of p to pass it, and 51 votes against p to maintain the status quo.[7] In terms of voting specifically, filibustering itself cannot be biased toward the status quo, because it has nothing to do with voting.

Votes, however, are not the only thing that matters when it comes to passing policies. When filibustering is allowed, implementing a policy does not only require 51 votes, it also requires (in some cases) outwaiting a minority filibuster. These costs must be accounted for when determining the ease of passing p. While this is true, it is important to remember that filibustering is not free for the minority. Whenever the majority must sit through a filibuster to

[7] Assume 50–50 ties are resolved via coin flip.

pass *p* (which adds to the difficulty of passing *p*) the minority must sustain a filibuster to reject *p* (which adds to the difficulty of maintaining the status quo). Both activities make it harder to pass policies and maintain the status quo respectively.

Because this section analyzes filibustering under the assumption that $c_{\text{majority}} = c_{\text{minority}}$, it follows that filibustering cannot make it more difficult for the majority to pass *p* than it is for the minority to maintain the status quo. Whatever additional costs the majority must pay to get their way beyond 51 votes, the minority (by assumption) must pay these exact same costs. Under the assumption of equal costs, filibustering does not favor the status quo, making it superior to supermajority rule.

Moving on, the problem with judicial review is that it affords unequal opportunities to influence outcomes. It violates political equality. Does filibustering give everyone an equal opportunity to influence whether or not *p* passes? Suppose we have a legislature that allows filibustering; suppose all citizens have an equally weighted vote when selecting representatives to the legislature. All representatives in the legislature also have an equally weighted vote; decisions in the legislature are made by simple majority. So far, everyone seems to have an equal opportunity to determine whether *p* passes.

Legislators who disagree with the majority's proposed policy *p* have the opportunity to thwart the majority by filibustering. While this might seem to afford the minority an opportunity to exert influence that the majority lacks, the majority has the opportunity to outwait the minority's filibuster to thwart the minority. So, filibustering affords the minority a way to thwart the majority, but it also affords the majority a way to thwart the minority. When $c_{\text{majority}} = c_{\text{minority}}$, these opportunities are equally accessible to both parties. It is just as easy for the majority to thwart the minority as it is for the minority to thwart the majority. Under the assumption of equal

costs, filibustering gives everyone an equal opportunity to influence outcomes, making it superior to judicial review.

6. The Fragility of the Simple Model

In the last section I argued that filibustering is an attractive solution to the tyranny of the majority and impotence of the minority when $c_{\text{majority}} = c_{\text{minority}}$. Yet, the costs of filibustering will not always be equal for the majority and the minority. And when they are not, filibustering loses some of its attractive properties.

This, in fact, is descriptive of what is currently happening in the U.S. Senate. As I noted in §2 above, at the beginning of the twentieth century, filibusters became more and more common, and were increasingly disruptive. In response, the Senate introduced a *cloture rule*, or a rule to shut off debate. Since the reforms, the majority is still at liberty to outwait the minority to pass their preferred legislation. However, this almost never happens anymore. When a single Senator declares her intent to filibuster, cloture is viewed as the only viable path forward. Why did filibustering become more common and disruptive, and why does the majority now refuse to outwait filibusters as they did in the past? The answer is that filibustering is now far more costly for the majority than it is for the minority. In other words, $c_{\text{majority}} > c_{\text{minority}}$. There are a few reasons why this happened.

One reason filibustering became asymmetrically costly is that the Senate is expected to conduct more business today than it was expected to conduct in the past (Binder and Smith 1997: 13–15; Wawro and Schickler 2006: 57; Koger 2010: 133–134; Reynolds 2017: 12). This imperative to conduct more business falls on the shoulders of the majority. Every minute spent

outwaiting a filibuster over a controversial bill is a minute spent not working on more mundane but nonetheless important matters. The minority doesn't have this problem—they're not expected to govern. So, filling out a quorum hurts the majority more than continuously occupying the floor hurts the minority, because the majority's opportunity costs are now higher than the minority's.

Another factor is the growth of the Senate (Wawro and Schickler 2006: 55–56, 182–193; Koger 2010: 80). Initially, there were 13 states, meaning the Senate consisted of 26 members. Suppose the minority has 10 members in it. It is difficult for ten members to continuously rotate occupying the floor to maintain a filibuster. Now there are 50 states and 100 Senators. Suppose the minority has 40 members in it. It is not that difficult for 40 people to continuously rotate occupying the floor to continue a filibuster. While the growth of the Senate makes filibustering easier for the minority, it has no such effect for the majority. This is because the quorum for the Senate is set by the Constitution (Article 1, Section 5) at a bare majority, meaning it continuously rises as the chamber expands. Initially, a quorum of 14 was needed when there were 26 members; now 51 are needed with 100 members. No matter how big the Senate is, the filibustering party needs only one member present to continue obstruction; the greater your numbers, the easier it is to fulfill this requirement. But as the Senate grows so does the number of majority members needed to maintain a quorum; greater numbers does not make this easier. For this reason too, filibustering now hurts the majority far more than it hurts the minority.

When it is far cheaper for the minority to sustain a filibuster than it is for the majority to maintain a quorum, the minority will abuse filibustering. They know the majority won't outwait them (because it is too costly), so they will filibuster any time they dis-prefer a policy, not only when they intensely dis-prefer it. As Wawro and Schickler describe the dynamics: "the great

irony appears to be that filibusters have become costless for the minority because the costs to the majority of engaging in wars of attrition have become prohibitively high" (Wawro and Schickler 2006: 263). This does not mean that filibustering no longer resolves the tyranny of the majority and the impotence of the minority. In fact, when $c_{\text{majority}} > c_{\text{minority}}$ it is *easier* for the minority to protect their rights and well-being and to advance their interests. However, when the costs of filibustering are asymmetric, filibustering no longer avoids the shortcomings of supermajority rule and judicial review.

Supermajority rule, recall, does not treat choice options equally in that it favors the status quo. When $c_{\text{majority}} > c_{\text{minority}}$, filibustering also favors the status quo. It is still the case that filibustering is consistent with a voting rule that says a policy *p*, in a legislature of 100, requires 51 votes to pass and 51 votes to maintain the status quo. The majority needs more than 51 votes to pass a policy, however. In some cases, they must outwait a filibuster. The minority still needs to sustain a filibuster to maintain the status quo, yet doing so is now easier for them than it is for the majority to outwait a filibuster. Because the majority must pay more to outwait a filibuster than the minority must pay to sustain it, it follows that implementing policy *p* is more difficult than maintaining the status quo. When $c_{\text{majority}} > c_{\text{minority}}$, filibustering favors the status quo, making it no better than supermajority rule.

Judicial review, recall, violates political equality because it does not afford everyone an equal opportunity to influence political outcomes. When $c_{\text{majority}} > c_{\text{minority}}$, filibustering also violates political equality. Legislators still have the same number of equally weighted votes. The minority still has a tactic to thwart the majority and the majority still has a tactic to thwart the minority. The problem, however, is that these opportunities are no longer equally accessible to both parties. When $c_{\text{majority}} > c_{\text{minority}}$, it is far easier for the minority to effectively use their tactic

than it is for the majority to use their tactic. Though formally there is still an equal opportunity to influence outcomes, informally there is not.

An example will help illustrate this point. Suppose there is an electoral district where every adult citizen has an equally weighted vote. Formally, everyone has an equal opportunity to influence the outcome. Yet suppose that some citizens—call them the Unluckies—must clear several hurdles that make it more difficult to vote than other citizens—call them the Luckies. The Unluckies must show three forms of identification to vote, while the Luckies don't have to show any. The Unluckies can only vote on one specific date, while the Luckies are given several dates to vote at their convenience. The Unluckies must vote in person and face long lines; the Luckies are allowed to vote from home. Intuitively, the Unluckies and Luckies do not have an equal opportunity to influence the outcome of the election. Though formal opportunities are equal, informal opportunities are not.

The same applies to filibustering when $c_{\text{majority}} > c_{\text{minority}}$. Though the majority and minority are still both afforded tactics to thwart the opposing group, it is far easier for the minority to wield their tactic than it is for the majority to wield theirs. The end result is unequal opportunity for influence. To put it another way, when costs are asymmetric, filibustering for the minority is like voting from home and not having to show identification and having several different days from which to choose to vote. Outwaiting a filibuster for the majority is like having to vote in person, on one specific day, while showing three forms of identification. For this reason, when $c_{\text{majority}} > c_{\text{minority}}$ filibustering runs into the same problem judicial review does: it affords unequal opportunity to influence outcomes.

7. A Reformed Model of Filibustering

Let me summarize where we are at. When $c_{\text{majority}} = c_{\text{minority}}$, filibustering resolves the tyranny of the majority and the impotence of the minority in a manner that avoids the problems other proposals face. However, when $c_{\text{majority}} > c_{\text{minority}}$ (which is currently the case in the U.S. Senate), filibustering still resolves the tyranny of the majority and the impotence of the minority, but no longer avoids the shortcomings of other proposals. Should we conclude that filibustering is no better than other institutions proposed to protect and advance minority interests?

Not yet. If we can ensure that $c_{\text{majority}} = c_{\text{minority}}$ (or close to it) then filibustering is our best option for addressing the tyranny of the majority and the impotence of the minority. I now propose a reformed model of filibustering that, I believe, roughly equalizes the cost of filibustering for both parties. I do not want to place too much emphasis on my proposal, however. It is limited in that it assumes a two-party political system that is only present in some countries. The proposal should be interpreted as a starting point for further discussion. My broader point is that we should not give up on filibustering all together. There are several proposals (other than the one I am about to offer) for reforming, rather than eliminating, the U.S. Senate filibuster (e.g., Harkin 2011; Hamm 2012; Shaheen 2013; Barnes et al. 2021). There are also possible proposals that have not yet been considered. Given how attractive filibustering is when $c_{\text{majority}} = c_{\text{minority}}$, we should evaluate existing and think of new proposals in terms of how well they equalize the costs of filibustering. In what follows I briefly sketch one such attempt.

Assume we have a legislature consisting of 100 members, and that bills are passed by simple majority rule. A majority (51 legislators) must be present for a quorum. Every bill requires a mandatory amount of debate time; this can be set at five hours, ten hours, thirty hours, etc. After this mandatory debate time has passed, and before the bill goes up for a final vote, a motion is held on whether the bill should be debated even further. For debate to continue, at least

one-third (i.e., 33) of all legislators must be in favor of further debate. Call the legislators who vote for further debate *dissenters*. Debate will continue indefinitely so long as two conditions hold: (C1) a legislator (whether a dissenter or not) holds the floor and talks, and (C2) at least 25 dissenters are present in the chamber. As soon as (C1) or (C2) is violated, cloture is invoked, and a vote must be held.

Condition (C1) is present in normal filibusters, but (C2) is a novel addition. Essentially, (C2) makes filibustering more costly for the minority, as more of them must continuously occupy the chamber for a filibuster to continue. This is currently not the case. With the current system, a filibuster can proceed with only one pro-filibuster legislator in the chamber, who occupies the floor and talks. Every other member present in the chamber may be a majority member. What condition (C2) does is force those in favor of a particular filibuster to fill out roughly half the required quorum. This is costly.

Condition (C2) not only makes filibusters more costly for the minority, but it also lowers the costs for the majority. In traditional filibusters, one cost the majority faces is the requirement that they have enough people in the chamber to maintain a quorum. If they break the quorum then the minority gets a rest, so it is imperative they always keep at least 50 persons in the chamber (a quorum in our hypothetical legislature is 51, so, in the limiting case, 50 majority members and one minority who holds the floor). This is quite costly. By requiring there always be at least 25 dissenters in the chamber, condition (C2) lowers the number of majority members that must be present to maintain a quorum, thereby lowering their costs of sitting through a filibuster.

To sum up, the proposal is that a significant number of pro-filibuster minorities must occupy the chamber for a filibuster to continue. This makes filibustering more costly for the

minority and less costly for the majority. If this proposal roughly equalizes the costs of filibustering, then filibustering resolves the tyranny of the majority and impotence of the minority in a manner that avoids problems other proposed institutions face.

Again, I do not want to place too much emphasis on my specific proposal. The more general point is that filibustering should be reformed to ensure roughly equal costs between a filibustering minority and a majority who must maintain a quorum. My proposal may not work in legislatures that commonly see more than two parties, for some minority parties (such as Sinn Fèin or Plaid Cymru in the United Kingdom's House of Commons) may be so small that they are unable to rally enough dissenters to vote for more debate and continuously occupy the chamber. In this case, other mechanisms must be proposed to make filibustering just as costly for these very small minorities as it is for the majority.

8. Common Objections to Filibustering

Filibustering is an attractive solution to the tyranny of the majority and impotence of the minority when $c_{\text{majority}} = c_{\text{minority}}$. Rather than embrace supermajority rule and judicial review, we should embrace filibustering and try to ensure the costs of filibustering are roughly equal for the majority and minority. The reader might not be fully convinced by my argument, as there are objections to filibustering that I have not yet considered. I address what I think are the two most common objections in this final section.

8.1 *Filibustering and Civil Rights*.

An important concern with my argument is that I have ignored the impact of filibustering on civil rights. Though I have argued that (under certain conditions) it is an attractive tool to protect and advance minority interests, filibustering played a role in delaying attempts to codify and protect the rights of Black Americans in the twentieth century, one of the most vulnerable minority groups in the United States. Koger finds that there were 31 active filibusters involving civil rights from 1901 to 2004 (Koger 2010: 117). Not all these filibusters were initiated to defeat or delay the expansion of civil rights—some were launched by proponents of *expanding* civil rights as instances of hostage-taking filibusters—though most were. These filibusters succeeded about half the time. Notably, the major civil rights acts passed in 1957, 1960, 1964, and 1965 were all filibustered, but the obstructionist efforts failed.[8] Nonetheless, it is true that filibustering blocked civil rights reform in many cases. What does this mean for my argument? There are several issues to untangle here.

First, one might ask: if filibustering was used to delay civil rights reform, doesn't this give us sufficient reason to reject it? I don't think so. Many institutions were used in the past to advance morally objectionable ends. And yet, we do not typically think this gives us sufficient reason to abandon them. Simple majority rule as a decision procedure has been used to pass morally horrific policies, such as the Fugitive Slave Act. Judicial review has been used to render appalling verdicts, such as *Dred Scott v. Sandford* and *Plessy v. Ferguson*. The separation of powers allowed President Andrew Johnson to veto the Civil Rights Act of 1866 (though Congress would overcome the veto by supermajority, ultimately resulting in the act's passage). Even the secret ballot has a sordid history, in that it was supported by many during Reconstruction to disenfranchise Black voters, as it acted as an implicit literacy test (Crowley

[8] For in-depth analysis of the filibustering that surrounded the 1960 Civil Rights Act, see Koger (2012).

2006: §4). Though there may be good reasons to reject these institutions, few argue that we should reject them because they were used for morally objectionable ends in the past. Why should filibustering be different?

The above discussion highlights something important: any institution can produce appalling results if enough of those who interact with the institution lack a sense of justice. Perhaps some institutions are more robust than others when it comes to weathering the influence of the wicked, however. This leads to a second question worth considering: is there reason to think filibustering is especially prone to capture by the wicked, resulting in unjust policy?

Here is an argument answering this question affirmatively. Filibustering, the argument goes, is more likely to result in morally objectionable policy because a filibuster can be sustained by a small group of persons. Thus, filibustering allows a small group of persons with objectionable views to exert influence on the legislative process. By contrast, implementing immoral policies with simple majority rule (and no filibuster) requires comparatively more persons with objectionable views, which is harder to achieve. In a legislature of 100, it takes 51 legislators with objectionable views to implement immoral policies if there is no filibuster. If my specific filibuster proposal is adopted, then it takes only 33 persons with objectionable views to launch a filibuster and thereby influence policy.

The above argument fails because it does not account for the inverse case. Just as a small number of people with objectionable views can filibuster to advance their interests, a small number of people with laudable policy aspirations can filibuster to advance their interests. In a legislature of 100, it takes 51 legislators to implement a just policy if there is no filibuster. On my proposal, it takes only 33 who care about justice to exert influence on the legislative process.

Because cases like this cancel out the kinds of cases considered in the paragraph above, I see no reason to believe filibustering is especially prone to result in morally objectionable policy.

This raises a final question worth considering: if filibustering can protect and advance minority interests, why didn't it do more to protect and advance the interests of Black Americans during the struggle for civil rights? The main issue was that Blacks were not sufficiently represented in the Senate. In terms of direct representation, Hiram Revels and Blanche K. Bruce—the first two Black Americans to serve in the Senate—were elected and served during the Reconstruction era; after Reconstruction efforts collapsed, the next Black person to serve in the Senate was Edward Brooke in 1967, nearly 100 years later (U.S. Senate, n.d.). In terms of indirect representation, Koger (2010: 108) notes that many white Senators who nominally backed civil rights were actually quite tepid in their support, making them unlikely to engage in a war of attrition on behalf of Black Americans.

The filibuster is a tool that allows minority groups *in the legislature* to protect and advance their interests. But if a minority group is not represented in the legislature, then there is nothing the filibuster can do to help them. Clearly, Black Americans were (and still are) underrepresented in the Senate. Even when there are no explicit denials of suffrage (as was the case during the Jim Crow era), different voting systems can do better or worse jobs at representing minorities (Lijphart 2012: ch. 8). The filibuster, on its own, can do nothing to help a minority if they do not achieve sufficient representation in the first place. How minority groups can achieve sufficient representation is an incredibly important question. My paper, however, is about how minorities—once represented in the legislature—can protect and advance their interests.

8.2 *Filibustering and Polarization*.

Another objection to my argument is that I have ignored our highly polarized political environment. Given how polarized we currently are, filibustering is likely to be abused. Many will find this line of criticism compelling, but it is vague. It is not hard to find pronouncements in popular media claiming that our politics are deeply polarized, but what exactly does this mean? In fact, it means many things, and it is worth exploring different definitions of polarization and what these different definitions mean for filibustering.

On the most common understanding, polarization means that ideological orientations are becoming more extreme (McCarty 2019: 10). In an unpolarized environment, there are some ultra-conservative Republicans and ultra-liberal Democrats, but there are also many moderates. In a polarized environment, more Republicans are characterized as ultra-conservative and more Democrats as ultra-liberal; there are fewer moderates. This kind of polarization can describe political elites as well as ordinary voters. The research suggests that political elites are more polarized, but whether ordinary voters are is unclear (McCarty 2019: ch. 3–4).

This kind of polarization is a big problem when $c_{\text{majority}} > c_{\text{minority}}$ and the only viable option to pass policy is invoking supermajority cloture (as is currently the case in the U.S. Senate). When there are few moderates willing to compromise, and when the majority party rarely holds 60 seats, a three-fifths cloture threshold becomes insurmountable (McCarty 2019: 138–140). That said, it is hard to see how ideological polarization affects a reformed model of filibustering that roughly guarantees $c_{\text{majority}} = c_{\text{minority}}$. For polarization to result in an abuse of filibustering in this case, it must make filibustering cheaper for the minority than it is for the majority. Thus, polarization must either reduce the costs of filibustering for the minority without *also* reducing costs for the majority, or it must raise the costs of filibustering for the majority

without *also* raising costs for the minority. It is hard to see, though, how having fewer moderates will affect the costs of filibustering at all.

Another understanding of polarization is less concerned with where persons fall on the ideological spectrum and instead focuses on affective attitudes. Lilliana Mason calls this *social polarization*, which is defined by "prejudice, anger, and activism on behalf of that prejudice and anger" (Mason 2018: 4). When we are socially polarized, we see "each other only as two teams fighting for a trophy" (Mason 2018: 4). Social polarization may accompany ideological polarization, but it need not; in fact, social polarization can happen in its absence. When this happens "we act like we disagree more than we really do" (Mason 2018: 4).

One might think that social polarization can lead to an abuse of filibustering, because it offsets some of the minority's costs. Typically, the minority's payoff from filibustering is determined by the benefit of possibly killing the bill minus the cost of maintaining a filibuster. But if the minority holds great animosity toward the majority, then the payoff is determined by the benefit of possibly killing the bill *plus the benefit of hurting the majority*[9] minus the cost of maintaining a filibuster. The worry is that, if there is social polarization, then the minority will derive benefit from filibustering simply because it causes pain for the majority. In effect, this reduces the price of filibustering for the minority, potentially leading to asymmetric costs.

Social polarization may offset some of the minority's filibustering costs, but it will also do so for the majority so long as social polarization is symmetrical. Typically, the majority's payoff for withstanding a filibuster is determined by the benefit of possibly passing the bill minus the cost of maintaining a quorum. But if the majority holds great animosity toward the

[9] "Hurting" can mean many things: making one's opponent physically uncomfortable by forcing them to maintain a quorum (or, in the opposite case, forcing them to continuously hold the floor), frustrating their legislative ambitions, embarrassing them in the eyes of the electorate, expressing disrespect and contempt for them, and so on.

minority, then the payoff is determined by the benefit of possibly passing the bill *plus the benefit of hurting the minority* minus the cost of maintaining a quorum. If social polarization is happening on both sides, then if the costs of filibustering are equal before social polarization, they should be equal after as well. However, if social polarization is not happening on both sides, then it could result in asymmetric costs to filibustering, which is problematic.

Finally, polarization can refer to partisan messaging. Partisan messaging occurs when a political party tries to make an electoral case for itself by magnifying the differences between themselves and the opposition. Most often, a political party will do this by trying to "make its opposition appear weak and incompetent, as well as ideologically extreme and out of touch with mainstream public opinion" (Lee 2016: 2). The fruits of this behavior are "a more confrontational style of partisanship in Congress" (Lee 2016: 2). Increasingly competitive elections, according to Frances Lee, explains rises in partisan messaging. When there is a legitimate chance to control the House and Senate after the next election then there is an incentive to do everything you can to differentiate yourself. If you have little hope of gaining power, then the incentive is diminished.

I do not think partisan messaging causes significant problems for a reformed version of filibustering where $c_{\text{majority}} = c_{\text{minority}}$. When there is an incentive to engage in partisan messaging, the payoff from filibustering for the minority is determined by the benefit of possibly killing the bill *plus the benefit of partisan messaging* minus the cost of maintaining a filibuster. By continuously talking on the floor, the minority gets free advertising, which effectively reduces their costs.

But recall, legislators from both parties are allowed to occupy the floor and talk during a filibuster. Just because a filibuster is launched by the minority does not mean only they can

speak; any legislator can occupy the floor if she chooses. As such, when there is an incentive to engage in partisan messaging, the payoff for the majority is determined by the benefit of possibly passing the bill *plus the benefit of partisan messaging* minus the cost of maintaining a quorum. Because majority members can also get free advertising by continuously talking on the floor, it effectively reduces their costs as well. Since partisan messaging is incentivized whenever elections are highly competitive, it follows that whenever the minority has incentive to partisan message the majority will as well—by definition, an election cannot be competitive for only one party. So, if the minority gets a benefit from partisan messaging during a filibuster, the majority will as well.

9. Conclusion

The filibuster is among the U.S.'s most criticized political institutions. I have tried to rehabilitate filibustering's reputation. When certain conditions hold—when it is just as difficult to maintain a filibuster as it is to maintain a quorum—filibustering is an attractive solution to the tyranny of the majority and the impotence of the minority. It is an attractive solution because it avoids problems other institutions proposed to remedy these issues face, such as supermajority rule and judicial review. That said, filibustering as it currently works in the U.S. Senate is not defensible, because the costs of filibustering are asymmetric. Efforts should be made to think of how we can reform filibustering, to ensure the costs associated with filibustering are roughly equal for majority and minority.

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