



Filibuster Reform is Coming— Here's How

Seven Ideas for Change

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Introduction

In the America of 2021, a seemingly unstoppable force has met an apparently immovable object. Across the nation, state officials are acting with brazen impunity in curtailing voting rights. At best nakedly partisan, and at worst openly racist, legislators are proposing and passing, and some governors are signing, statutes that will strip the ballot from millions, seize the power to overturn election outcomes those partisans don't like, and potentially tilt the political playing field for decades to come.¹ No wonder President Biden has declared it the “most significant test of our democracy since the Civil War.”²

Federal legislation could prevent this by establishing reasonable best practices for voter registration and early voting, and by barring the worst of the provisions.³ But that is where the immovable object comes in. Despite majorities in both houses of Congress that have expressed support for voting rights legislation, the Senate filibuster stands in the way.⁴ Overcoming a filibuster requires “cloture,” or a supermajority of 60 votes to proceed to debate and vote on a bill in the Senate.⁵ A preliminary test vote on a motion to proceed to one bill that would help address the voter suppression wave, S. 1, failed 50-50 on party lines.⁶ Vice President Harris was available to cast the decisive 51st vote on the bill—but because of the filibuster, the cloture threshold fell 10 votes short, and the Senate could not proceed to vote on or even debate the bill itself.⁷ Senate Majority Leader Chuck Schumer brought up S. 1 again on August 11, together with two pieces of companion legislation that focused on redistricting and campaign finance. All three bills were filibustered by the minority.

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We do not believe that the unstoppable forces of voter suppression and election subversion are, alas, going anywhere. We only expect those forces to intensify. In their face, doing nothing is not viable. Or as Senator Joe Manchin (D-W.Va.) has said, “inaction is not an option.”⁸ Senator Manchin has also been among those defending the filibuster as a vehicle for compromise.⁹ He has insisted that he will not eliminate it, but he has mused publicly and privately about how it might be modified.¹⁰

In this paper we assess a range of possible filibuster modifications. We believe the Senate will also consider these options as the pressure to do something to meet the crisis ratchets up. The history of the filibuster is the history of such changes, and so we begin with a survey of that history in Part I. In Part II, we catalog today's principal proposals for modification, enumerating their pros and cons. We include remedies such as reducing the number of senators needed to open debate in the face of a filibuster; obligating the objectors to be present with one of their number speaking at all times during a filibuster; and shifting the burden to them to muster the requisite number of votes required to maintain the filibuster whenever challenged, instead of requiring the 60 who wish to proceed to so vote.

In Part III, we advocate for one additional option that the authors have previously written about, and that has been getting some significant proponents of late. We term that approach "democracy reconciliation."¹¹ It is based upon the existing practice of budget reconciliation, which allows certain fiscal measures to have an up-or-down simple majority vote.¹² As we explain, we would craft a similar

exception for voting measures, allowing them a similar opportunity to be voted upon by a majority. Reconciliation operates on a key principle known as the Byrd Rule, named after the late West Virginia Senator Robert Byrd.¹³ Because the current fate of the filibuster swirls around his successor, Senator Manchin, one may refer to this hoped-for new compromise of democracy reconciliation as "the Byrd-Manchin" Rule.

Because the filibuster is a perpetual obstacle to reform, and because even if modified it is unlikely to be eliminated, we articulate the full range of reform options.

We assess that the pressure to effectuate one or more of these filibuster reform proposals is building. As we explain below, influential figures inside and outside of Congress have renewed calls for a solution.¹⁴ It is hard to understand how the Senate will stand by and do nothing while our democracy is dismantled (and many senators' jobs threatened). Still, it remains to be seen whether any of the fixes we discuss will be undertaken. Because the filibuster is a perpetual obstacle to reform, and because even if modified it is unlikely to be eliminated, we articulate the full range of reform options. But first, we begin with the history of this controversial procedure.

I. History of the Evolving Filibuster

Amidst talk about the Senate's illustrious tradition of "unlimited debate," the filibuster can seem to embody a time-honored pillar of American democracy, enshrined in the Constitution and necessary to the structural soundness of our government. The truth is that the filibuster as practiced today would be unrecognizable to the Framers of the Constitution, who considered and specifically rejected the idea of requiring more than a simple majority to advance legislation in Congress.¹⁵

James Madison, Alexander Hamilton, and their fellow Framers, who had experienced the challenges imposed by supermajority requirements under the Articles of Confederation, were eager to correct that mistake in constructing the Constitution. Frustration with the impasse a supermajority threshold too often created under the previous system led the Framers to reserve a requirement that more than a simple majority agree to only the weightiest decisions.¹⁶ Those include overriding a presidential veto, impeaching an officer, ratifying a treaty, and amending the Constitution itself.¹⁷

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This is not to say that the Framers were dismissive of arguments that had not yet attracted majority support. To the contrary, the rights of those in dissent were considered at length. The Senate rules were shaped to ensure that such voices were not only heard but also given sufficient opportunity to persuade colleagues—or, failing that, the voters themselves.¹⁸ Allowing a minority faction to exercise a veto over the wisdom of the majority, however, was considered antithetical to the core principles of the Constitution's design. As Alexander Hamilton wrote in *Federalist No. 22*, "to give a minority a negative upon the majority (which is always the case where more than a majority is requisite to a decision), is, in its tendency, to subject the sense of the greater number to that of the lesser."¹⁹ James Madison expanded upon the danger of giving the minority faction outsized power: "In all cases where justice or the general good might require new laws to be passed, or active measures to be pursued, the fundamental principle of free government would be reversed. It would be no longer the majority that would rule: the power would be transferred to the minority."²⁰

The idea that the Senate was designed to be a “cooling saucer” for legislation passed in haste out of the House of Representatives has a kernel of truth, but it has been distorted across time.²¹ The Framers chose other means to accomplish cooling legislative passions. Indeed, the very existence of a second chamber was a compromise accepted to prevent legislation from proceeding too quickly.²² Beyond that, the Senate was structured to be slower to respond to political winds than the House by requiring both an older membership (at least 30 years old as opposed to 25), and responsibility to a broader constituency (the full state legislature, and later, an entire state, not just a local district).^{23 24} Staggered six-year terms also insulated senators from political winds, so that the passions of any given moment would settle before the body’s membership could be meaningfully altered.²⁵

Equal representation in the Senate of every state was critiqued at the time as unduly favoring minority interests (even then, population differences across states were significant enough to concern the Framers, just as they continue to trouble modern observers).²⁶ But the understanding was that Senate representatives of half the states, if not half the American people, would be able to advance legislation, after thorough debate, on a simple majority vote. The prospect that a minority faction could indefinitely, even perpetually, block legislation supported by a majority would not only have been foreign to the Framers, but in direct opposition to their design.²⁷

How then, did the supermajority requirement come to be? The filibuster as we know it today is the result of decades of evolution—and at times devolution—of Senate procedure.

The story began with a suggestion by Aaron Burr. Attempting to tidy up the Senate rules in 1805, Burr suggested removing several unused procedural tools, including the motion for calling “the previous question.”²⁸ At the time, the adoption of Burr’s suggestion was unremarkable, as other tools existed to express that debate had passed the point of usefulness. Those tools, however, slowly fell by the wayside.²⁹

Decades after Burr brought about removal of the “previous question” rule, the consequences of his action were first felt. A number of eminent authorities point to 1837 as at least the first “incipient filibuster,” waged in connection with the battle over expunging the controversial Senate censure of then-President Andrew Jackson.³⁰ Another early milestone came in 1841. Recognizing that his Senate colleagues had no formal mechanism for ending floor debate, South Carolina Democrat John C. Calhoun engaged in what might be called a proto-filibuster. Previewing a consistent theme underlying the filibuster’s evolution, two main forces brought this procedural issue to the fore: an individual senator’s desire for personal power combined with an effort to bolster white supremacy.³¹

Calhoun opposed the establishment of a national bank, which he saw as a threat to the economic power of the South and slavery.³² He convinced a band of Southern senators to take to the floor in succession for days, offering amendment after amendment to the bank bill.³³ Calhoun hoped to run out the clock to the Senate’s summer recess, preventing the bill’s passage until the following session.³⁴ Senators were outraged by this unprecedented obstruction, and in the end, the bill passed only slightly later

than expected, before the summer adjournment.³⁵ Calhoun would continue to employ this tactic in the following sessions, invoking the language of “minority rights” while advocating for Southern secession and opposing recognition of an antislavery territorial government in Oregon.³⁶ Other Southern senators joined him, anxious to wield power disproportionate to their faction’s numbers.³⁷

Over the following years, senators attempted to end this obstructionist tactic through multiple reform proposals, but filibusters (or threats of filibusters) made procedural change difficult.³⁸ Efforts to reform the tools of delay were themselves filibustered. Finally, in 1917, the filibuster fever broke. Wisconsin Progressive Bob La Follette and his allies opposed U.S. intervention in World War I. La Follette coordinated a filibuster that blocked a vote on arming merchant ships.³⁹ In response, President Woodrow Wilson publicly demanded a procedure to force a Senate vote. A compromise was reached: Congress agreed to adopt Rule XXII, known as “cloture,” but with a steep supermajority threshold then set at two-thirds of senators present and voting.⁴⁰

Wilson’s drive to (somewhat) limit obstruction was finally successful because it was tied to a must-pass policy: protecting national security on the brink of war. Procedure and policy have always been intertwined in the case of the filibuster. That is also revealed by reversals in the positions of leaders in both the Democratic and Republican caucuses in the Senate over the past decade as they switched from majority to minority status and back again.⁴¹

But Wilson had not killed the filibuster so much as forced its reinvention. Resistance to Civil Rights Era legislation would breathe new life into the filibuster. Extended speechmaking became a vital tool for obstructing the expansion of civil rights protections, delaying federal bans on poll taxes and lynching long past the time when they had the support of a majority of the public, even in the South.⁴² Georgia Democrat Richard Russell picked up where Calhoun left off, creatively coordinating Senate delay and consolidating his own power in the process. Unable to completely block reforms, Russell and his Senate supporters delayed popular civil rights legislation for years with filibusters and threats to filibuster.⁴³ Strom Thurmond, perhaps the Senate’s most famous segregationist, still holds the record for the longest filibuster in the institution’s history: speaking against the Civil Rights Act of 1957 for 24 hours and 18 minutes. The bill passed less than two hours after he finished.⁴⁴

The distortion of the filibuster into a tool that could truly *prevent* passage of legislation, not simply delay it, occurred more recently, in the 1970s. Two key changes in Senate procedure brought this about, both of which were initially considered progressive reforms aimed at reducing gridlock.

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First, in 1975, Senate Rule XXII was amended to lower the vote threshold needed for cloture in most instances⁴⁵ from two-thirds of senators present and voting to three-fifths of the full Senate. This lowered the necessary supermajority from as many as 67 senators to only 60. But it also freed obstruction-minded senators from having to come to the Senate floor to vote against cloture—by simply staying home, they could deny a cloture motion one of the 60 votes it needed to pass. The burden shifted from the minority to the majority.⁴⁶

Second, also in the 1970s, the Senate adopted a “two-track” process for scheduling business on the floor. While allowing the chamber to get more done, this new approach also ended the “talking filibuster” of the likes employed by Strom Thurmond. No longer did blocking a vote require a senator to hold the floor and speak continuously. Instead, any senator could merely indicate an intention to filibuster, and the Senate would proceed with other business while the clock ticked down to the cloture vote. Filibustering senators no longer need to engage in “debate”—some have even stooped to the level of reading from a phone book—to advance their aim of delaying Senate action.⁴⁷

These changes in the 1970s inverted the burden of the filibuster: Ever since Calhoun’s innovation, the filibuster had always required active, even extraordinary, performance by the senator seeking delay; but now the objecting senator did not need to hold the floor, or even speak aloud, but merely signal their intention to obstruct. The result is that a majority in the Senate is no longer sufficient; legislation often cannot move forward in the Senate until a *supermajority* of 60 senators votes for cloture.⁴⁸ A minority that opposes a bill need generally not even vote against the bill. That minority can block a vote on the legislation from occurring by triggering a procedural maneuver with minimal effort.⁴⁹ The result is diametrically opposed to the principled debate the framers sought to guarantee for minority factions.

Once the filibuster evolved to this level of obstruction, passing even the most essential legislation became difficult. Without a supermajority willing to reform or abolish the filibuster, exceptions to its reach became necessary. The Senate has created such exceptions through legislation, like the budget reconciliation process created in the 1970s and refined in the 80s and 90s.⁵⁰ It has created other exceptions via reinterpretations of the cloture rule: setting new precedents that exempted first executive and certain judicial nominations, and then were expanded to include nominations to the U.S. Supreme Court.⁵¹ “Fast-track” procedures enacted through legislation, like budget reconciliation and the Congressional Review Act (CRA), were passed to set limits on debate for certain types of future legislation.⁵² Supermajority support was, in effect, required to pass the bills that originally established these fast-track pathways (they could have been filibustered although they were not). In contrast, the changes that lowered the threshold to approve executive nominations in 2013 and 2017 were accomplished with a simple majority vote in the Senate.⁵³ These moves did not pass a new law or amend a formal Senate rule: Instead, they overruled precedent—previous interpretations of a Senate rule—to the same effect. Although overruling precedent in this manner has been referred to as “going nuclear,” the long history of senators developing and altering the filibuster suggests that this description is overly dramatic.⁵⁴ The filibuster’s history has been one of periodic evolution.

What is a shocking departure is the level of obstruction the modern Senate has achieved. Even after the end of the talking filibuster and the introduction of the two-track process made delay easier, the usage of the filibuster did not skyrocket until our current era of hyperpartisan polarization.⁵⁵ The Senate has too often stopped functioning as a great deliberative body—or functioning at all. From January 2001 to the end of 2006, a Democratic minority in the Senate used 201 filibusters to block bills with majority support. In a comparable six-year period, from January 2009 to the end of 2014, Republicans were in the minority, and used the filibuster 504 times—more than twice as often.⁵⁶

For the half-century between the advent of the cloture rule on the eve of World War I and the two-track reform in 1970, the Senate averaged fewer than 3 filibusters per two-year Congress (measured by cloture motions filed, the best analogue publicly tracked by the Senate). By the George W. Bush Administration, that average was up to 85 per Congress.⁵⁷ Everything changed when the filibuster gained its most recent and innovative champion: Senator Mitch McConnell. McConnell served as the minority leader for most of the Obama Administration, and vowed early, clearly, and publicly that his number one goal was ensuring Obama had only one term as president.⁵⁸ McConnell would fail by that measure but succeed tremendously in delaying and blocking popular legislation supported by Obama, the majority of the Senate, and majorities of the American public. During Obama's presidency, the average number of filibusters (cloture motions filed) per Congress shot up to 158—nearly double the previously unheard-of record during the term of his immediate predecessor.⁵⁹ Correspondingly, fewer bills on average were passed as filibuster numbers increased: From 1950–1990, over 1,000 bills were passed by the Senate each Congress; between 2009 and 2018, that average was less than 450.⁶⁰ The modern drop in Senate productivity is even more dramatic when examining how many bills passed excluding those passed via voice votes (generally indicative of a noncontroversial bill with broad support, such as a bill to rename a post office). Roll call votes accounted for only 52 pieces of legislation passed in the 2017–2018 Senate.⁶¹

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McConnell's use of cloture and other procedural rules to stall any business in the Senate from his perch atop the minority did not engender an age of great debate. It did not incentivize negotiation among senators with different views. It merely prevented everything from civil rights advances to the most basic and necessary business of government from moving forward—all in silence and nearly invisible to most voters. Those who say the filibuster promotes legislative compromise are ignoring history. But to the extent that was ever true, it describes a bygone era that has nothing in common with our present politics and the modern Senate.

II. Proposals for Modern Filibuster Reform

Neither the filibuster itself nor the extreme abuse of its current iteration is a new problem. The current iteration of the filibuster has been obstructing routine governance and a properly functioning Senate for a generation now. Numerous proposals have been developed to mitigate the filibuster’s abuse without abandoning the concept entirely. This section recaps six of the leading contenders, before we discuss our preferred seventh approach in Section III.

Talk, talk, talk

Perhaps the most common—and most intuitive—reform proposal is to restore the filibuster to its popular understanding: A senator holding the floor and speaking at length to show his or her passionate objection to the policy under consideration. This is the “Mr. Smith Goes to Washington” version of the filibuster,⁶² most notably practiced by Senator Thurmond in a futile effort to delay the Civil Rights Act

of 1957⁶³—and more recently at the state legislative level by Texas State Senator Wendy Davis in a successful effort to forestall adoption of restrictions on abortion clinics in that jurisdiction.⁶⁴ The basic idea is to restore a talking filibuster so that a senator who wants to slow the progress of Senate business has to do something—and something difficult—to pursue that goal.⁶⁵

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Senators Elizabeth Warren and Jeff Merkley have long championed this reform.⁶⁶ And Senator Joe Manchin recently signaled that he, too, would be

open to making the filibuster “a little more painful” to use by requiring a filibustering senator to “stand there and talk.”⁶⁷ The underlying theory is that if, as filibuster proponents often proclaim, the purpose of the filibuster is to promote debate, then use it actually to debate, not to passively delay legislation in the background while the Senate proceeds with floor business on a separate track.⁶⁸

Proponents of the talking filibuster point to two significant benefits.⁶⁹ First, by making it harder for a senator to filibuster, this approach would likely decrease the filibuster's use. It would substantially realign the costs and benefits of any individual senator's decision to filibuster, thereby (at least in theory) deterring those filibusters that are frivolous and leading to a chamber in which senators filibuster only in those instances where they feel the issue is of significant importance.⁷⁰ Second, a talking filibuster would increase transparency, attaching the name, face, and speech of a filibustering senator to the delay imposed by their filibuster. This would (again, at least in theory) require filibustering senators to articulate clearly their reasons for filibustering a particular proposal, generating public attention—and scrutiny—to their position. Even if they are unable to persuade their colleagues, they may persuade—or at least inform—their voters. An additional point about this approach has received somewhat less attention: It would return the filibuster to a tool of temporary delay rather than one that functions as an effective veto. Recall that, until the combination of the cloture rule and the multitrack Senate floor schedule, a filibuster could forestall legislative progress for only the time that a senator or group of senators could hold the floor; once they yielded, the Senate could—and often did—proceed to adopt the bill under consideration. For example, Senator Thurmond held up the Civil Rights Act of 1957 for more than 24 hours (even though the bill had already been weakened to overcome filibuster threats). The bill passed less than two hours after his filibuster ended.⁷¹

But there are downsides to this proposal. First, the reality is that this reform might not quite be painful enough to truly weaken the filibuster as we know it: Senators coordinating a tag-team effort would be required to undertake some logistics, but not necessarily hold the floor for even an hour before yielding to the next team member to take up the tactic. On many bills this inconvenience may be enough, but it is unlikely to offer sufficient deterrence or obstacle when it comes to major policy priorities like democ-

racy reform. But more consequentially, by restoring the Senate to a one-track schedule—a necessity if a filibuster would last only as long as its sponsor(s) could hold the floor—the talking filibuster would allow the Senate's minority faction to delay not only a particular proposal that one or more of its senators was willing to filibuster, but all other Senate business as well.⁷² A filibuster of a major bill, for example, might draw attention to and delay an infrastructure package, but every hour of filibuster would also prevent other essential Senate tasks—whether judicial nominations, treaty ratifications, budget resolutions, or other legislative proposals—from reaching the floor. A talking filibuster therefore moves from a tool to block one legislative proposal to one that delays all legislative business entirely. That is why one commentator has noted that “[t]he basic reason we don't have talking filibusters is to protect the majority party, not the minority party.”⁷³

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Your move, minority

An alternative would keep the filibuster in place and allow the Senate to continue with a multitrack floor schedule, while shifting the onus in any cloture vote to the minority faction. Instead of requiring 60 votes to end a filibuster, this approach, proposed by Norman Ornstein and Al Franken, would require 41 votes to keep the filibuster going.⁷⁴ Even though the filibuster itself would continue to be a theoretical exercise rather than a performative one on the Senate floor, a vote called by Senate majority to end the filibuster would succeed unless there were 41 votes to sustain the filibuster. And, since the minority faction would merely be voting to sustain the filibuster, the majority could call that vote repeatedly, across time. In any instance where the minority faction did not have at least 41 votes to keep the filibuster going, the cloture vote would succeed, and the Senate could proceed to a vote on the merits of the bill.

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Like the talking filibuster, this approach would “require a huge, sustained commitment” by those seeking to use the filibuster, rather than “the minor gesture” that is now sufficient to trigger a filibuster.⁷⁵ Moreover, it would not keep the Senate from proceeding with other business during a filibuster. Some critics complain that “the legislative filibuster would no longer be able to prevent the passage of a

bill; it could only slow it down, because octogenarian senators aren't capable of staying on the Senate floor round the clock for years on end, no matter the righteousness of the cause.”⁷⁶ This is an odd criticism, given that for most of American history the filibuster, which itself was never an intentional feature of the Senate, could, at most, delay Senate passage of legislation. It is only recent changes that have turned the filibuster into “the easily deployed blockade it is today.”⁷⁷ Others complain that this approach, even as part of a larger package of reform, amounts to nothing more than a tepid half-measure, ill-suited to “solve the problem of polarized parties, separation of powers, and lack of accountability.”⁷⁸ The reality is that no feasible change in the broader filibuster rule—that is, no change that can likely command 50 votes now—will entirely “solve the problem.” But changes like this can remove the use of the filibuster as a casual weapon of mass obstruction, one that is used on minor and major measures alike. This reform would sharply increase the burden on the minority, while shedding much more public light on the use of the filibuster as a weapon of routine legislative obstruction.

Ratcheting down

Another oft-discussed reform option is creating a diminishing threshold for cloture, so that each successive vote on an individual piece of legislation ratchets down the number of senators from whom consent is needed to move on to a final merits vote. This has the benefit of allowing for debate—or even

a silent signaling of opposition—that presents a real and tangible hurdle, but not the brick wall of current practice.⁷⁹ Establishing a window of debate required by each unsuccessful cloture vote, before another could be called, would slow down the process.⁸⁰ It would allow senators in the minority to indicate their strong opposition to legislation. It would require multiple votes before a bill could move forward, with as much attendant public scrutiny as the minority could muster. But it would also create a path forward. By setting the threshold for cloture at 60 senators on a first pass at ending debate, then 57 after a few more days of discussion, then 54, down to a simple 51-vote majority would return the filibuster to the delay tactic (even one painful to the majority) that it was for most of the Senate's history.⁸¹ It would ensure the majority is truly committed to passing legislation, without maintaining the absolute veto power the minority now wields.⁸²

Senator Tom Harkin introduced a version of this reform repeatedly, but it never gained sufficient support in the Senate.⁸³ To Harkin's credit, he advanced this sliding-scale approach when he sat in both the minority and the majority, from the 1990s into the Obama administration.⁸⁴ Even two decades before peak gridlock, Harkin was articulating how drastic the filibuster's evolution had been, and how at odds with the tool's purported purpose its modern iteration had become. "The filibusters aren't just against passage, they're also against process."⁸⁵ It was 2009 when Harkin said, "we've entered a new era here of outright stoppage at all costs," and even opponents of his reform proposal can't seriously argue the Senate's functionality has improved in the years since.⁸⁶

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Full-majority press

If the sliding scale or ratcheting down approach sounds too complex or burdensome, here's a simpler idea: Set the threshold for cloture to match the number of senators in the majority in any given Congress.⁸⁷ It attaches the filibuster to a sliding scale, but a different, more consistent version. In a Senate with even the slightest one-party majority, cloture would require the full number of votes needed to actually pass a bill. For example, if the majority party held 53 seats, then, in order to invoke cloture, 53 votes would be needed. As recent intraparty Democratic wrangling over S.1 and infrastructure legislation have shown, unanimity is no simple matter. That point is also shown by the late Senator John McCain's now famous 2017 Senate vote that doomed Republican legislation attempting "skinny repeal" of the Affordable Care Act.

On this model, for every senator the majority party could not convince to toe the line, one vote from the minority would be needed. This would allow the majority to control the agenda and move legislation, but it would theoretically promote negotiation and compromise by requiring unanimity among the majority party (or a minority-party replacement for each holdout) to invoke cloture.⁸⁸ This is *de facto* how budget reconciliation works in the evenly divided Senate we see today. This reform has the benefit (perhaps undesirable to those of us outside the Senate) of preserving or even enhancing the leverage that any single senator can exercise—similar to the current and historical filibuster.

A one-two punch

A perhaps more obvious and simple approach than “ratcheting down” or a majority-party-numbered threshold is lowering the number of votes needed for cloture. Reduce, for example, the 60 votes currently required for cloture to 55. The result is still a supermajority requirement (55 percent of the Senate’s membership), but one that further limits opportunities for minority rule (by requiring a larger minority for obstruction). In the current Senate, this may have little practical effect; in the long term it puts more negotiated compromises within reach.⁸⁹

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Alternatively, the current 60-vote threshold could be reconceptualized, not in terms of a strict number of votes, but as a percentage of those senators present and voting. Recall that until 1975, this was how the cloture threshold worked (though two-thirds, instead of three-fifths of the votes were needed at that time).⁹⁰ A return to a present-and-voting standard can hardly be critiqued as a dramatic reform when it was in place for most of the filibuster’s

history. Moreover, the essential fairness of this reform is hard to deny: If the minority wants to block cloture, they at least need to make sure their members show up. The current filibuster rules allow senators to simply avoid votes that they might not wish to defend on the campaign trail or in the press; they can advance obstruction simply by absenting themselves, whereas members of the majority must be present to advance legislation over a threatened filibuster. A return to present-and-voting would force senators to put their position on record.⁹¹

Both of these paths have been advanced by Norman Ornstein as options that reform the filibuster while retaining the facets its proponents, Senator Manchin included, value.⁹² They retain minority input, as well as the minority’s ability to slow down legislation and extend debate in the congressional “cooling saucer.”

These two paths also lend themselves nicely to being implemented in combination: 55 percent of senators present and voting could be the new standard for closing debate. As a pair, this one-two punch of changes offers a requirement of commitment to a particular filibuster—not holding the floor in a Mr. Smith-style speech perhaps, but not going home to a comfortable bed either. At the same time, they mitigate, without ending, the minority's ability to exert control over the majority. A Senate with a thus-reformed filibuster (55 percent of those present-and-voting required for cloture) could, with time, look a lot more like the idealized body of great debate seen in movies or in politicians' memories.

Debate freely

One of the most troubling aspects of the filibuster's current iteration is its consistent use to foreclose not only substantive policy votes, but also procedural votes.⁹³ A more minor reform could restrict the filibuster to votes on substantive policy: That is, senatorial decisions on the merits of proposed legislation. This would eliminate the filibuster on motions to proceed,⁹⁴ which may currently be used to prevent even bringing a piece of legislation to the floor for debate. Under this reform, a simple majority could control the agenda enough to open substantive debate on a bill,⁹⁵ even if it could not ever force a vote (60 votes would still be needed to invoke cloture and start the 30-hour countdown to an end of debate and a vote on the bill).

While this reform would cut the opportunities to filibuster a given bill in half, the failure of the majority to get 60 votes could still prevent a final vote on any piece of legislation. But proponents point out that, at least in theory, senators will find it more difficult to obstruct a vote on a bill after substantive debate and news coverage of that debate. A more informed public might assign some level of shame and accountability to obstructionism they see as tied to a specific policy. Then again, senators should ask themselves how likely that sounds in our current partisan world, and if it is even worth bringing a reform this minor (and inconsequential) to a vote. At any rate, broader reform of the filibuster can easily include the removal of a higher threshold on the motion to proceed, taking away the “two bites of the apple” delay.

Broader reform of the filibuster can easily include the removal of a higher threshold on the motion to proceed, taking away the “two bites of the apple” delay.

III. Democracy Reconciliation

Another solution, that two authors of this paper have advocated elsewhere,⁹⁶ may be termed “democracy reconciliation”—the Senate creating an exception allowing for a majority vote to accomplish voting reforms, akin to the exception the Senate already allows for legislation known as budget reconciliation. This could be done through passing a statute allowing the exception, as was the case with the creation of reconciliation.⁹⁷ The problem of course is that the effort to pass such a statute in the Senate could itself be filibustered. Accordingly, a democracy exception would likely need to be accomplished through the “nuclear option,” with a simple majority voting as a parliamentary matter to create such an exception, as we explain more fully below. The nuclear option to create a voting rights exception could be undertaken within and as part of a larger budget reconciliation process, or entirely independent of budget reconciliation, as we also explain.

Because the fast-track procedures of budget reconciliation as an exception to the filibuster were shaped by legendary West Virginia Senator Robert Byrd, its application is now limited by the “Byrd Rule.” The Byrd Rule governs which provisions are subject to a 50-vote threshold and which are subject to a 60-vote threshold.⁹⁸ Our “democracy reconciliation” approach is in part inspired by the Byrd Rule, although as

we explain below, it could be accomplished without legislation and by a simple majority vote of 51 senators. Because it responds to concerns raised by current West Virginia Senator Joe Manchin, it could fairly be termed the Byrd-Manchin Rule if implemented. Under this approach, voting-related measures would also be handled separately from the current cloture hurdles.

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This approach has gained renewed attention of late. Congressman James Clyburn, a close White House ally, has advanced “the idea of creating a carveout to the legislative filibuster in the Senate for legislation that applies to the Constitution.”^{99 100} Clyburn stated that Biden could “pick up the phone and tell [Sen.] Joe Manchin, ‘Hey, we should do a carve out’...I don’t care whether he does it in a microphone or on the telephone—just do it.” Indeed, remarks by Senator Manchin himself have opened the door to this possibility. He has suggested in an interview that a reconciliation approach might be utilized if all efforts at bipartisanship fail with respect to S.1:

CHUCK TODD:

Well that sounds like, if the Republicans—then what you're saying is if Republicans continue to be unified in opposition and don't have an open mind, then you may change your mind?

SEN. JOE MANCHIN:

Well, I'm not going to change my mind on the filibuster. I'll change my mind if we need to go to a—to a reconciliation—

CHUCK TODD:

Gotcha.

SEN. JOE MANCHIN:

—to where we have to get something done. Once I know they have process into it. But I'm not going to go there until my Republican friends have the ability to have their say, also. And I'm hoping they'll get involved to the point to where we have 10 of them that will work with 50 of us, or 15 of them that will work with 45 of us. However, you know, we, I just—whatever it takes the majority—and it takes 60 when we are moving it through normal process—I'm for that. You said something about the founding fathers. Why did, why did Washington have bicameral? Why'd he want two bodies? One was supposed to be the cooling saucer, as you will. It takes deliberation, it takes listening to the minority, to make sure that the majority is getting it right.¹⁰¹

The senator has since suggested an openness to many of the other reforms discussed in this report.¹⁰² President Biden has also signaled openness to reforming the filibuster (though less than some) but has also stated that it is a matter for the Senate to decide.¹⁰³

Democracy reconciliation would remove the current supermajority requirement for those legislative proposals addressing election issues fundamental to the structure of American democracy, including voting rights, election procedures, and redistricting.¹⁰⁴ They are *the* core concerns of American democracy. Even more than our nation's annual budget, they are essential if America is to continue having a functional, legitimate, accepted government. Without democracy—the consent of the governed—the entire concept of government of the people, by the people, for the people falls to pieces.¹⁰⁵ These democracy issues, distinct from substantial debates on proper policy responses to a plethora of other pressing problems, are at the root of everything we do as a nation, and certainly everything that the Congress considers. If the framework underlying our self-governance cannot be maintained, even as it openly falls into disrepair and demands Congress's attention, then America itself becomes unstable.¹⁰⁶ It risks endangering our national experiment, the key role democracy plays worldwide, and the notion that democratic government is up to the challenges presented—here and abroad—by a new generation of would-be autocrats.¹⁰⁷

To meet the challenge and avoid catastrophic decline, the Senate must be able to address these narrow election-related issues of democracy on a majority basis. This approach acknowledges the existence of a constituency that accepts, or even strongly favors, the idea that a minority of senators, who can in theory represent less than 12 percent of the American people, can block any Senate action.¹⁰⁸ But democracy reconciliation also recognizes that the idea is incompatible with our core democratic values. Even the filibuster's fiercest supporters have to acknowledge the irony of allowing a minority faction to block proposals advanced to ensure the viability of majority rule within the constraints of the Constitution.

Democracy reconciliation can be achieved in two ways, neither of which would require changing statutory language or the text of Senate rules. The first would be to use the nuclear option if a minority in the Senate were filibustering election-related legislation. In that case, the majority leader would raise a point of order that cloture on election-related legislation be decided by a simple majority vote, which would be denied by the presiding officer (acting on advice of the parliamentarian). The leader would then appeal the ruling to the Senate, the vote on which, if done in reconsideration of a failed

cloture vote, is not subject to debate. The Senate would then vote on the appeal. If the appeal were successful by simple majority, the new precedent of requiring only a simple majority vote for cloture would prevent the filibuster of voting legislation, such as S. 1.¹⁰⁹ A majority vote deeming the filibuster inapplicable to S. 1 would create the mechanism of democracy reconciliation and would establish it as a narrow exception, not a wholesale change, to the filibuster.¹¹⁰

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Alternatively, this could be accomplished within reconciliation itself. Election-related provisions could be offered as part of a budget reconciliation bill, and if challenged under the Byrd Rule, the presiding officer would rule the provisions are allowable, disregarding the advice of the parliamentarian. That ruling would presumably be appealed by the minority, but the appeal could be tabled by a simple majority vote, thus setting a new precedent—that election-related legislation can be advanced using the fast-track procedures afforded to budget bills. This has the advantage of not changing precedent on the filibuster, so that Senator Manchin and his allies would keep their word on not blowing up an institution they find valuable.^{111, 112}

The Senate has already acknowledged that core democracy issues are unlike any others that come before the Senate by excepting legislation addressing voting and elections from the “unfunded mandate rule.”¹¹³ That rule prohibits federal legislation from imposing financial burdens on state and local governments without also providing aid to pay for the burdens Congress is creating. This is, generally speaking, a sound practice. But when Congress adopts new laws for elections, states and localities must comply, even when they bear the burden of finding the money to do so. This follows from the

Senate's sensible recognition that elections are simply too important to be held hostage to disputes ancillary to the merits of the democracy reforms at issue. Voting rights laws protect the most core constitutional rights, and therefore states should and must prioritize implementation. By the same rationale, the practice of democracy should also be exempt from any use of the filibuster.

Democracy reconciliation is not without hypothetical risks. Once democracy reconciliation opens the door to majority rule of election-related issues, a future Congress with a narrow majority and a very different policy orientation may walk through that door. While this Congress will use democracy reconciliation to expand voting rights, a future Congress could instead rely on it as a tool to restrict voting rights. To give a couple of hypothetical examples, a stringent federal voter ID requirement or a nationwide prohibition on voting by mail would both fall within the ambit of democracy reconciliation and could pass the Senate on a majority vote. These risks should not be ignored, but neither should they be overstated.

A simple truth is relevant here: Americans are proud of our democracy. Free and fair elections are enduringly popular with the electorate. As our nation has expanded the franchise and access to the ballot over the decades, there has not been a successful effort at the congressional level to roll them back significantly. Congress has never reversed that trend. Elected officials are more comfortable blocking proposed policies than reversing such policies once enacted. Take the Civil Rights Act of 1964 and the Voting Rights Act of 1965 as examples: Notwithstanding the extensive efforts to frustrate and delay those bills through the filibuster and other tactics, opponents never repealed either piece of landmark legislation, even as the composition of the Senate changed across time. To the contrary, Congress repeatedly extended and expanded those landmark laws, with the only significant rollbacks resulting from misguided judicial decisions.¹¹⁴ This concern that democracy reconciliation could be used against voting rights may be more theoretical than practical. Even if it is not, that possibility must be weighed against the profound danger of taking no action in this moment.

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Implementing democracy reconciliation alone would, of course, be vastly preferable to doing nothing, especially because it would make it possible to take action to counter the existential threat that now exists to the fundamentals of our democracy. But it must be accompanied by a broader change in the filibuster rule. There are other important priorities that should not continue to be subject to a 60-vote hurdle that puts no burden or accountability whatsoever on the minority. Doing both together—a carve-out for democracy issues and one or more of the changes we have enumerated to Rule XXII—is the best route to take.

Conclusion

Democracy reconciliation and the other proposals we discuss for modifying—but not eliminating—the filibuster would preserve the fundamental principles of American democracy without upending wholesale either the Senate’s rules or its traditions. And adopting one or more of them would be only the next step in the filibuster’s more-than-two-century journey. The filibuster has always been a tool. It evolved from one characterized by epic floor speeches and endurance contests to the present iteration that has imposed regular shutdowns of Congressional business, with precious little fanfare.¹¹⁵ One benefit the contemporary filibuster confers upon its patrons is that it exacts no cost; not only does invoking cloture require no effort or action, but the fact that such invocations have become part and parcel of everyday Senate procedure means that there is no public attention to, and no opprobrium resulting from, any individual senator’s decision to block legislation.

Reform would help move the filibuster back towards being a tool in a functioning deliberative body. It would end the antidemocratic blockade that has bottled up necessary reforms to our voting laws, our elections, and our democracy. By doing so, it would allow our laws to catch up to the political tactics, the social media environment, the court decisions, and the practical realities that have altered the practice of American democracy—many without any congressional response for far too long, if ever. Realigning our laws with current political practices will restore health to our democratic processes and promote public confidence in both our elections themselves and the ability of our federal government to respond to changing circumstances. Better, fairer elections may also yield different results, ensuring that our representative government more accurately represents the will of the people. That is an invaluable end in itself; it may also yield a Senate in which the filibuster would be a less effective tool to evade debate on the topics to which it would still apply.

The worst-case scenario is not a hypothetical future abuse of democracy reconciliation but a failure to act now. American democracy is at a point of inflection.

The worst-case scenario is not a hypothetical future abuse of democracy reconciliation but a failure to act now. American democracy is at a point of inflection. Absent federal legislation,¹¹⁶ some states and municipalities will further restrict the rights and opportunities for voters to participate in American democracy. This is not alarmist rhetoric: We have seen these restrictions metastasize since the Supreme Court struck down large portions of the Voting Rights Act in *Shelby County v. Holder*, 570 U.S. 529

(2013),¹¹⁷ and now it has further curtailed surviving provisions of that law in *Brnovich v. Democratic National Committee*, 594 U. S. ____ (2021).¹¹⁸ We have seen over the past year a sustained, consistent, baseless attack on the integrity of our elections, leading to an unprecedented armed attempt to seize the U.S. Capitol and disrupt the peaceful transfer of presidential power. And in the months since that insurrection, we have seen literally hundreds of proposals introduced in state legislatures around the country to make it harder for eligible voters to cast their ballots and have their voices heard.¹¹⁹

Worse yet, this is a redistricting year. In the absence of a federal legislative solution, gerrymandered state legislatures across the country will likely take all possible steps to perpetuate their own power.¹²⁰ These steps include last-gasp passage of unprecedented restrictions of voting rights, as well as a no-holds-barred effort, in state legislatures and courtrooms alike, to enact new, extreme gerrymanders that ensure that those wielding power do not meaningfully reflect the will of the voters.

These present efforts are antithetical to American democracy. Neither any individual politician nor any political party should be able to cling to power without winning the contest of ideas and building an electoral coalition that attracts majority support. But there is a clear trend nationally to invert this most basic understanding of democracy; to change the ground rules of our electoral system to obviate any need to build winning coalitions; to exclude voters, limit voting opportunities, and enhance opportunities for partisan and racial gerrymanders; and otherwise to reject the fundamental premises of American democracy.

The last four years are instructive on how much our institutions—no matter how enduring they may seem—can be tested, and eroded, in a short period of time. Filibuster reform may not be the ultimate solution to some of the challenges facing the Senate, but it is a necessary step; without it, further debate over the alternatives may be meaningless. The filibuster cannot be more sacred or important than our government itself. Whether through some combination of the reforms described here or otherwise, reforming the filibuster is not an act of escalation. To the contrary, without reform, the Senate will, by choosing inaction, endanger American democracy. An overly broad application of the filibuster, a tool adapted to support the Jim Crow era and weaponized to distort the Senate's function, cannot be the reason that we risk more seriously than we have since the Civil War, the prospect that American democracy shall perish from the Earth.

The last four years are instructive on how much our institutions—no matter how enduring they may seem—can be tested, and eroded, in a short period of time. Filibuster reform may not be the ultimate solution to some of the challenges facing the Senate, but it is a necessary step. The filibuster cannot be more sacred or important than our government itself.

As we read the mounting political pressure created by antidemocracy overreach around the country, some change is very likely coming to the filibuster. Institutionalists should pick their path now, before it is too late.

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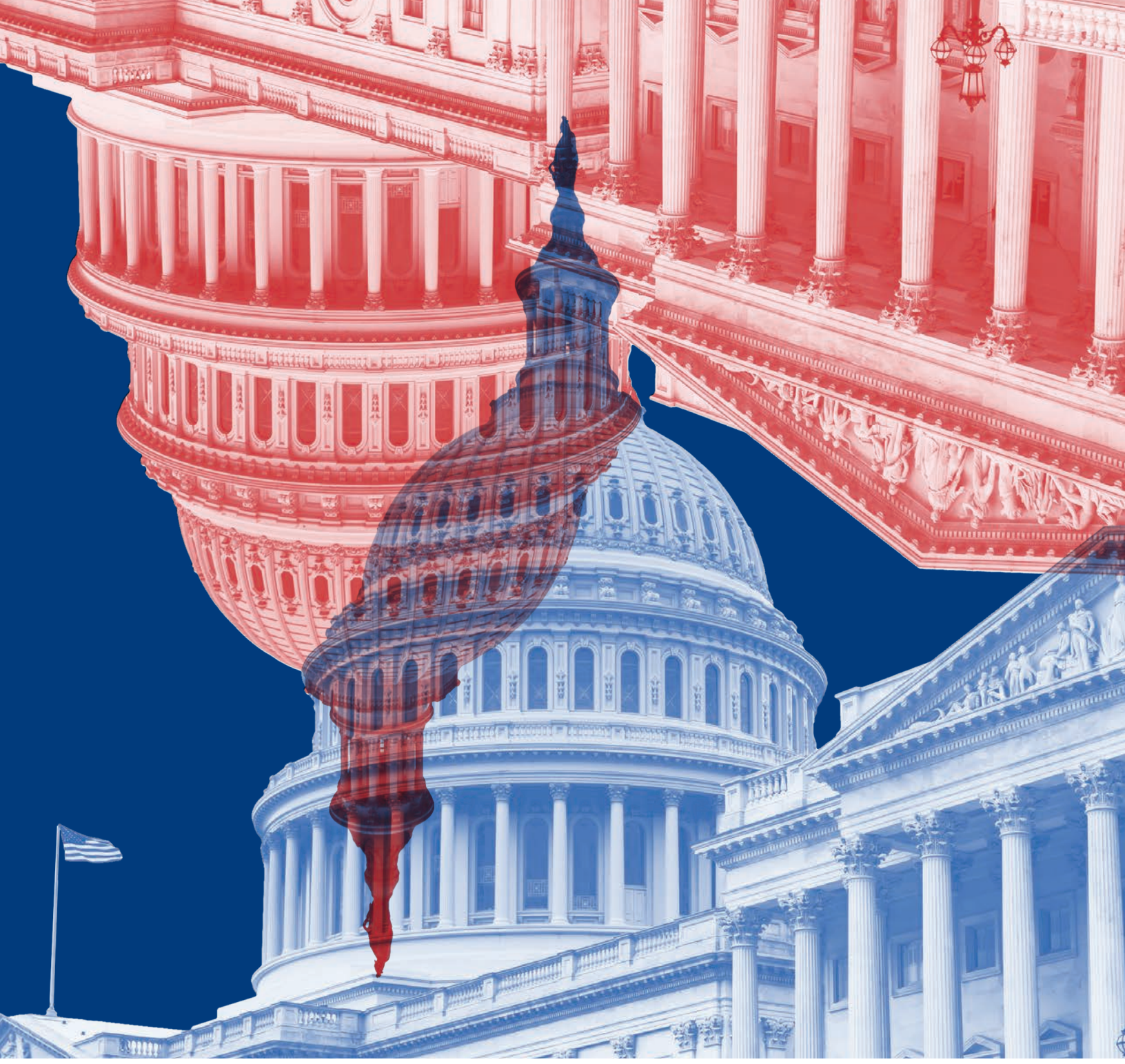
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