Legislative Obstructionism

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Abstract

We review debates concerning the evolution and impact of parliamentary obstruction in the U.S. Senate, focusing on path dependency versus remote majoritarian perspectives. We consider the viability of circumventing supermajority requirements for rules changes by using rulings from the chair to establish precedents. Because the viability of this approach depends, at least in part, on the anticipated reaction of the public, we conduct a preliminary analysis of public opinion data from the 1940s through the 1960s and from the showdown over the obstruction of judicial nominees in 2005. We contend that the balance of the evidence favors the position that senators have generally supported the maintenance of the filibuster and have been able to make procedural adjustments when obstruction threatened a committed majority's top priorities, although we offer some important refinements required in comparing the historical operation of obstruction to its impact in today's Senate.

INTRODUCTION

The filibuster in the U.S. Senate remains a central feature of the institution and one that renders it unique among legislative bodies. Indeed, the filibuster—and the supermajoritarian character it induces in the Senate—has become increasingly "institutionalized," as senators resort to it more often and adapt their behavioral patterns and procedural practices to respond to the expansion in its use. Media discussion of the need to reach 60 votes to end filibusters and move the Senate's business forward is ubiquitous. Even though obstructionist senators no longer take and hold the floor in the traditional way (i.e., by using extended speeches and countless dilatory motions), the filibuster continues to play a profound role in the most important political debates and decisions of the day, from economic stimulus legislation to judicial nominations to health care reform.

After much neglect, political scientists have recently turned their attention to the topic of the filibuster, significantly enhancing our understanding of its evolution and impact. Binder & Smith's (1997) comprehensive analysis of the filibuster's historical development and its consequences for contemporary policy making showed the way for political scientists to theorize and conduct quantitative analysis to address several misunderstandings that constituted the conventional wisdom on the topic. Krehbiel's (1998) *Pivotal Politics*, one of the most widely cited works in American politics of the past decade, derived a simple yet powerful model of the separation-of-powers system that has at its core the assumption that policy cannot be altered unless 60 votes can be found in the Senate to stop a filibuster. Krehbiel contended that the pivotal player in determining policy outcomes was not the median voter in the Senate but instead was the "filibuster pivot"—the senator whose vote was needed to meet the supermajority threshold established in the chamber's cloture rule.

These works have helped to initiate a new wave of research on legislative obstruction (see also Binder 1997 and Dion 1997). Scholars have sought to explain when and why filibustering occurs, why it has increased in the contemporary Senate, and how this has affected the Senate's operation as a legislative body (Binder et al. 2002, Sinclair 2002, Overby & Bell 2004). Theorizing about filibusters has become more sophisticated through formalization (Alter & McGranahan 2000, Bawn & Koger 2003, Dion et al. 2008). Robust debates have developed over (*a*) whether the filibuster has locked the Senate into rules that render it a supermajoritarian institution against the will of a majority of senators (Koger 2002, Gold & Gupta 2004, Wawro & Schickler 2006, Binder et al. 2007); (*b*) whether the cloture rule adopted in 1917, which required two thirds present and voting to end a filibuster, had any real impact on the ability of the Senate to legislate effectively (Koger 2007, Wawro & Schickler 2007); and (*c*) how the filibuster affects judicial appointments and the ideological makeup of the Supreme Court and lower courts in the federal judiciary (Johnson & Roberts 2005, Krehbiel 2007, Rohde & Shepsle 2007, Primo et al. 2008). The energy and effort that scholars are putting into studying the dynamics of the filibuster make this one of the most vibrant and interesting areas of research in legislative studies.

In this review, we focus on the debates concerning Senate rules changes regarding the filibuster. The key dimension of these debates concerns whether the Senate, when it deleted its provision for the previous question in 1806, essentially handcuffed itself into supermajority rule even though a majority of senators from time to time have wanted to change the rules to prevent minority obstruction. The logic here is that the procedures that permit minority obstruction of legislation also permit minority obstruction of any attempt to change these procedures. Thus, even if a majority prefers simple majority to supermajority rule, the minority can prevent them from achieving it by successfully filibustering the proposed rules change.

We entered into this debate as part of our attempt to determine the location of the filibuster pivot prior to the adoption of the Senate's cloture rule (Rule 22) in 1917. The rule

as initially adopted established the filibuster pivot as the senator located at the 67th percentile of the ideological distribution of senators present and voting.[1]

But prior to 1917, it was possible—and assumed by many—that since Senate rules permitted a single senator to talk to death a piece of legislation, the Senate required unanimity to pass legislation, effectively making the 100th-percentile senator the filibuster pivot. Sensational filibusters by solitary senators supported this view of the Senate as a universalistic legislature (Burdette 1940).

We developed a theory, drawing on and refining the pivotal-politics model, that predicted the opposite (Wawro & Schickler 2004). The theory argued that norms against the use of obstruction in the early Senate, backed by threats that an intense majority would change the rules to crack down on obstruction, produced an institutional equilibrium where the median voter was generally pivotal. The institutional environment of the Senate—stemming from its constitutional origins—permitted a kind of "relational legislating" that operated more through shared understandings about constraints on behavior than it did through explicit, written directives (see Dixit 2004 on relational contracting in economics). Indeed, the threat of moving to more rules-based legislating, and the costs that this entails, helped to support relational legislating.

A limiting condition to this theory concerned obstruction close to the end of a Congress, when time constraints empowered (and emboldened) small minorities to an extent that they could kill legislation favored by majorities. Even under those circumstances, though, there are many cases where narrow majorities were successful in passing legislation in the face of obstructive minorities.

Systematic analysis of coalition size before and after 1917 indicated that our median-plus-veto-pivot model outperformed competing alternatives. Unanimity was not generally required to pass legislation addressing the most important issues of the day, and in fact, coalition sizes on significant legislation were generally *smaller* prior to 1917. We discovered numerous cases where highly contentious legislation passed with the narrowest of majorities, indicating that the impact of filibusters and unlimited debate was very different in the nineteenth century from what it is today.

The ability of the majority to change the rules regarding extended debate plays a central role in the development of our theoretical perspective. We contend that rules changes were much easier to implement in the nineteenth century, either by passing resolutions through normal legislative procedures or by relying on rulings from the chair to establish binding precedents. "Reform-by-ruling" is particularly attractive because when the Senate decides on such rulings, there are severe restrictions on the right to debate, thereby undercutting the effectiveness of filibustering against rules changes. Such rulings can and have served to impose stricter limits on the use of obstructive tactics. The ultimate use of this kind of maneuver, known in the contemporary Senate as the "nuclear option" (and less pejoratively as the "constitutional option"), involves attempting to establish cloture by a simple majority. Although the Senate has never resorted to this most extreme option, the history of the Senate is marked by instances where rulings from the chair imposed significant constraints on obstructionist behavior, stopping short of the imposition of majority cloture but nevertheless cowing an obstinate minority.

Adjudicating among these competing understandings of the Senate filibuster raises difficult theoretical and empirical issues. In particular, teasing out the role of norms and threats presents obvious challenges, given the potential influence of anticipated reactions. Our argument about the effectiveness of rulings from the chair is essentially one of subgame perfection.

[1]The definition of the filibuster pivot is a bit more nuanced than this, since it needs to take into consideration the ideological location of the president. Technically, the filibuster pivot is the 66th percentile (or the 60th percentile post 1975) senator on the opposite side of the median in the Senate from the president.

If the extreme maneuver of using rulings from the chair to impose majority cloture is a credible threat, then we should never see it used successfully, since the minority will seek compromise with the majority before they lose the wellspring of their power in the institution. In practice, each side is uncertain about how committed the other side is and how far they can and will go. The majority sends a strong signal of commitment when it embarks on rules change and seeks rulings from the chair, which often—but not always—has led the minority to relent.

Assessing this and competing interpretations requires close examination of cases in which rules changes were threatened. Following Binder et al., we focus on the famous 1890–1891 filibuster of the federal elections bill as a key test case. We then consider the potential for imposing majority rule in the contemporary Senate; the key obstacle is not that inherited rules make it impossible but rather that senators appear to value the personal power benefits that they derive from the prerogative of unlimited debate. We highlight the Byrd Rule, which senators adopted in 1985 in a deliberate attempt to block efforts to capitalize on the budget process to evade the requirement for 60 votes to make major policy changes. We then consider the 2005 battle over judicial nominations, in which Republicans threatened to force majority rule in confirmation battles. Binder et al. treat this case as further evidence that minority obstruction cannot effectively be overcome with threats of rules changes. We instead argue that the case ended in at least partial triumph for the Republicans: Pivotal Democrats allowed several of the GOP's controversial judicial nominees to be confirmed, and refused to back a filibuster of Supreme Court nominee Samuel Alito. The 2005 battle hinged in large part on expectations of the public's reaction to implementation of the nuclear option. This motivates us to conclude with a preliminary analysis of what we see as a crucial remaining unanswered question about the Senate filibuster: How does the mass public think about the Senate filibuster, and how would the electorate respond to a showdown in which a Senate majority sought to impose majority rule on a recalcitrant minority? We expect such showdowns to loom more prominently as sharpened party polarization has made it more likely that an intense majority will find itself thwarted by an equally committed minority.

THE CREDIBILITY OF THREATS TO CHANGE THE RULES

Binder et al. (2007) take issue with our argument that filibusters in the nineteenth century were constrained, in part, by the threat that the majority could change the rules to limit obstruction. Binder et al. instead argue that the evidence on the whole suggests that the majority in the Senate is generally stuck with a set of rules empowering minorities, and cannot, as either a practical or a political matter, change the rules over the objections of the minority. They point out that, notwithstanding the occasional threats of party leaders to "go nuclear," the Senate has never actually implemented majority rule, even in the face of successful filibusters.

Binder et al. also challenge the notion that norms of restraint, combined with the threat of a crackdown on a refractory minority, limited obstruction in the nineteenth century. They rightly note that it is difficult to determine when norms are responsible for members backing down from obstruction, as opposed to alternative explanations such as concern that the filibuster will undermine the chances for other legislation important to those members. Similarly, demonstrating that threats of a crackdown restrained obstruction is challenging, given that such threats often operate through anticipated reactions.

However, these concerns beg the larger question: Why were narrow majorities routinely successful in passing major legislation in the nineteenth and early twentieth centuries? Why were coalition sizes generally smaller in the nineteenth century than after the adoption of a cloture rule in 1917? For example, Wawro & Schickler (2006) show that 48% of landmark bills enacted in 1881–1917 were supported by less than two thirds of the senators voting. A

full 20% of the landmark enactments were supported by less than three fifths of the voting senators. Why did the senators opposed to these bills not push their prerogatives to the limit and block their enactment, if the lack of a provision for the previous question had so empowered minorities?

Arguably the most prominent policy area in the nineteenth century was the tariff, and major tariff bills were often passed with nearly half of the Senate in opposition. The 1875 tariff bill was approved 30–29 with just days left in the session. The conference report on the 1883 tariff act was also passed by a single vote as time nearly ran out on the 47th Congress. The highly controversial McKinley Tariff of 1890—which raised rates dramatically—was approved by a 33–27 margin. Four years later, Democrats succeeded in cutting the tariff on a 39–34 vote. Similar patterns characterize other major policy domains in the nineteenth century.

It is difficult to imagine so many major legislative changes passing in today's Senate absent supermajority support or protection from obstruction through budget reconciliation rules. Yet prior to 1917, there was no cloture rule for cutting off a filibuster. This strikes us as the central puzzle concerning the development of obstruction in the Senate. There evidently were numerous major bills that a minority could have blocked under the rules of the precloture Senate—and that the minority fiercely opposed—yet these bills became law.

A few important filibusters did succeed, but these appear to have occurred in situations where the minority was far more intense in its preferences than the majority (see, e.g., the 1890–1891 filibuster of the federal elections bill discussed below). We argue that an intense majority could generally expect to wait out an obstructive minority in the nineteenth century. Norms of restraint acted at least in part as a deterrent to a minority facing (*a*) a majority that demonstrated commitment to legislation and (*b*) the threat of new rules or rulings from the chair, which were available as a last resort. In that context, filibusters could operate as information-revelation devices in the sense of game-theoretic models of wars of attrition (cf. Fudenberg & Tirole 1991, Tirole 1988), since only an intense minority would incur the costs of obstruction, whereas an intense majority could demonstrate its commitment by holding extended sessions and threatening rules changes.

It is thus essential not to view nineteenth-century obstruction through the prism of the modern, "60-vote" Senate. In today's Senate, obstruction is accepted as a routine part of everyday business. In the nineteenth century, the filibuster was not viewed as an entirely legitimate device either by senators or by the public. As a result, senators engaged in obstruction often denied that they were filibustering at all (as opposed to the contemporary era, when senators proudly advertise their filibustering activities). In that context, norms of restraint and threats of a crackdown would likely have resonated to a greater extent than is the case today. Along these lines, it is also worth noting that although the 1917 rule made two-thirds support a sufficient condition for Senate passage, it did not dictate that minorities would always attempt to obstruct legislation that fell short of two-thirds support. For several decades after adoption of the cloture rule, filibustering still required senators to hold the floor, and thus was more demanding in terms of physical exertion and opportunity costs. As a result, factors central to our argument, such as the preference intensity of both the majority and the minority, continued to be important after the cloture rule's adoption. Thus, some major bills passed with fewer than two thirds of the Senate in support after 1917 (Mayhew 2003; Wawro & Schickler 2006, ch. 4).

REFORM-BY-RULING IN HISTORICAL PERSPECTIVE

An important implication of our argument is that obstruction persisted in the nineteenth and early twentieth centuries because most senators were, on the whole, satisfied with the set of rules, procedures, and norms that characterized the chamber. In a chamber with fewer than

80 members up through 1888, it was possible to handle the Senate's legislative workload without resorting to the tight procedural constraints adopted in the House (see Taylor 2006). By affording senators greater leeway to obstruct, the Senate made it possible for members to reveal how much they cared about an issue in a credible manner, since both obstruction and sitting out a filibuster had more direct and tangible costs in this period. At the same time, we argue that obstruction would not, as a general matter, succeed when faced with an intense majority. This system of relational legislating began to fray in the late nineteenth century as the Senate's membership increased and the agenda became more crowded. The cloture rule adopted in 1917 provided a mechanism to reduce the uncertainty posed by end-of-session filibusters, while still leaving senators with considerable freedom of action on the floor. By contrast, Binder et al. (2007) suggest that a majority of senators may well have preferred, at times, to adopt majority rule, but they lacked a practical way to achieve this preference given that rules changes could be obstructed.

A key question is whether a crackdown on obstruction was a politically feasible threat in either the nineteenth century or today's Senate. Recent debates over the nuclear option tend to couch this question in an all-or-nothing form: either the Senate implements majority rule or obstructionists triumph. But in the nineteenth century, when obstruction required individual senators to hold the floor for an extended period of time, it was possible to use incremental reforms to make life more difficult for would-be obstructionists. Rulings from the chair were used repeatedly to do just that (see the examples cited in Wawro & Schickler 2006, p. 70). For example, the Senate in 1859 established the precedent that it is not in order to discuss the merits of a bill on a motion to postpone. In 1872, the presiding officer ruled that a motion to recess is not debatable. The Senate also established important precedents allowing a quorum to be counted, and in 1897, the presiding officer ruled that when a roll call has revealed the presence of a quorum, a further quorum call cannot be made until business has intervened. An indication that these rulings were effective is that senators largely abandoned using dilatory motions (i.e., motions to table legislative items, to postpone, to recess, and to adjourn) as part of their filibustering strategies by the beginning of the twentieth century, instead relying more heavily on extended speeches.

Binder et al. (2007) suggest that rulings from the chair were vulnerable to obstruction. They note that prior to 1868, the Senate rules did not specify that a motion to table an appeal of a chair's ruling could not be debated; as a result, even if the presiding officer made a ruling against obstruction, the potential existed for the minority to appeal the ruling and then to delay indefinitely a resolution of the appeal. However, even prior to 1868, there were several cases in which a chair made a controversial ruling that was then appealed and sustained by a majority vote without a filibuster. There also were cases in which the chair referred a point of order to the floor for a decision and the chamber voted on the matter without any evident obstruction, thereby establishing a precedent. In the nineteenth-century Senate, it simply was not expected that any effort to change the rules or precedents governing obstruction would necessarily confront a filibuster. Indeed, our extensive search of the record identified no examples of appeals of rulings by a chair being successfully filibustered in the nineteenth century. We also found no cases in which the minority blocked a vote on deciding a point of order when the presiding officer referred the issue to the chamber as a whole. Just as bare majorities were generally sufficient to enact controversial legislation at the time, it appears that majorities were able to enact new precedents that either increased or decreased the costs of obstruction, depending on the majority's preferences regarding the balance between majority rule and minority rights. It is true, as Binder et al. (2007, p. 735) point out, that the various parliamentary components that constitute the contemporary nuclear option developed gradually and were not well established at all points of Senate history, but it is incorrect

to conclude that a majority had to follow exactly the same strategy that senators in the modern Senate have pursued for cracking down on minorities. If anything, majorities had more discretion over how they could deal with obstructive minorities because Senate rules and precedents protecting rights to obstruct had not yet fully congealed.

THE FEDERAL ELECTIONS BILL FILIBUSTER AND MAJORITY RULE

One might counter these examples by arguing that even if a determined majority could scale back the tactics available to obstructionists, the majority could not, as a practical matter, adopt broader reforms. From that standpoint, the 1890–1891 battle over the federal elections bill to safeguard African Americans' voting rights is crucial. Binder et al. (2007, p. 734) highlight this case, asserting that "several basic facts" about it are "readily established." The bill was "initially favored by a majority, then filibustered by southerners for two months, and eventually set aside in favor of another bill." As they note, Republican leader Nelson Aldrich (R–RI) threatened to end the filibuster through reform-by-ruling and other actions to create a cloture rule, but party leaders instead withdrew the bill after pro-silver western Republicans, "who initially favored the elections bill, eventually concluded the filibuster was preventing action on currency legislation of vital interest to their region." Binder et al. conclude that although reform-by-ruling was threatened, "little fear of it was expressed in debate or shown in the action of the minority" (p. 734). The battle ended on January 26, when Democrats were joined by six Republicans in narrowly sidetracking the cloture resolution by a 35–34 vote.

Binder et al. are right that there initially was a majority in favor of the elections bill, but their narrative leaves out crucial aspects of the case.[2] Most important, there is good reason to believe that by the time the key showdown occurred in January 1891, a majority of the full Senate did not support the elections bill on the merits. Instead of an obstructive minority defeating a determined majority, this was a case in which the majority lost support amid signs that the electorate at large did not back its cause.

It is crucial to note that the 1890 midterm elections intervened in between the initial consideration of the bill (at which point there appears to have been majority support) and the January 1891 effort to pass a rules change curtailing obstruction and to enact the legislation itself. The 1890 election witnessed mammoth Republican losses—the GOP lost 93 House seats and four Senate seats. Newspaper accounts at the time attributed the losses, in part, to the elections bill's unpopularity with voters and its purported connection to other examples of alleged Republican "centralization," such as the tariff, Reed Rules, and record spending levels (see, e.g., *New York Times* 1890, Schickler 2001).

In addition to the huge electoral setback, Republicans confronted mounting evidence that the elections bill—labeled the "Force Bill" by its opponents—was unpopular and hurting their party's image. In his history of Republican efforts to pass civil rights legislation in the nineteenth century, DeSantis (1969, p. 210) argues that "during the summer and fall of 1890, public opinion in the country turned heavily against the Force Bill." DeSantis emphasizes the outpouring of anti–elections bill petitions sent to Congress and the Farmers' Alliance Convention's condemnation of the bill as critical signs of this public shift. Republican state parties in Wisconsin, Minnesota, Nebraska, and Michigan each declined to endorse the bill, even as they took a stand on the other leading national issues, and Tennessee Republicans'

[2] Binder et al. (2007) take issue with the interpretation of a handful of cases discussed by Wawro & Schickler (2006). A point-by-point rebuttal is not the best use of this space; we simply point out that the book marshals many more cases and reports quantitative analysis in a multi-pronged approach to support our arguments about the historical development and impact of the filibuster.

platform explicitly condemned the measure (p. 210). Several Republican newspapers also concluded that enacting the bill would hurt the GOP's image and thus it should be allowed to die (see *Congressional Record*, Jan. 21, 1891, pp. 1698–99; DeSantis 1969, p. 211). For example, the moderate Republican *St. Louis Globe–Democrat*, citing the widespread popular dissatisfaction with the bill in the south and west, concluded that the GOP should drop the measure (DeSantis 1969, p. 211).

In the aftermath of the devastating midterm defeat and rising public tide against the bill, key Republican swing voters in the Senate evidently moved away from their earlier support of the elections bill. With a relatively slim Senate majority in the 51st Congress (1889–1891), Republicans could afford few defections before losing majority support for the bill. Press reports from early January 1891 revealed that several Republicans were hostile to the bill and that a handful of others were leaning against it. It was the defection of these individuals that doomed Aldrich's majority cloture resolution.

Binder et al. imply that these members favored the underlying bill but were willing to cave in to the filibuster lest it threaten enactment of free silver legislation. But the individual pro-silver Republicans made plain that they opposed the elections bill itself. For example, Edward Wolcott (R–CO) declared that the bill interfered with state control of elections and would spark civil strife in the south. Wolcott highlighted the threat of the Chinese gaining electoral clout in the west, noting that "the white vote" should always govern there (*Washington Post* 1890b). Similarly, John Jones (R–NV) told the *New York Tribune* (1891a) that the Fifteenth Amendment had given African Americans the vote too soon and echoed Wolcott's fears about Chinese suffrage in the west. A third defector, William Washburn of Minnesota, had expressed doubts about the elections bill as early as August 1890, declaring that he had "talked with people at St. Paul, Minn., Chicago, and other points, and he [said] that he can find no general demand for passage of the Force bill" (*Washington Post* 1890a). Washburn sided with Aldrich and the Republicans on some of the procedural skirmishes over the cloture proposal in January 1891, but decided at the last moment to vote to sidetrack the proposed rule because doing so "was the most effective means of disposing of the Force bill" (*New York Herald* 1891c). Other Republican defectors on the cloture proposal—such as James Cameron of Pennsylvania and Leland Stanford of California—made it clear that they opposed the elections bill itself. For example, Cameron declared in December 1890 that he would "vote against the election bill whatever form it may assume" because of his concerns that it would disrupt trade with the south (DeSantis 1969, p. 213).

Indeed, a final striking feature of the debate over the Aldrich proposal is that in mid-January 1891, several major Republican and Democratic newspapers evidently believed that cloture reform had a better chance of passage than did the elections bill. For example, the *New York Herald* (1891a), which opposed both the cloture rule and the elections bill, noted that "the Democrats in the Senate are making the fight of their lives for justice and the freedom of debate. They are liable to get neither." The *Herald* claimed that "there is not a shadow of doubt" that the rule change would pass (see also *Washington Post* 1891b, *New York Tribune* 1891b). This stands in contrast to Binder et al.'s (2007, p. 734) contention that the reform was not viewed as a credible threat. The *Herald* added, however, that several of the Republicans who so far had stuck with Aldrich on the rules change were hostile to the elections bill itself (*New York Herald* 1891a). Elaborating on this the following day, the *Herald* claimed that "there is no certainty, even though the cloture be adopted, that the Force bill will pass . . . The Democrats already have assurances that six Republicans, e.g.,—Teller, Wolcott, Stewart, Jones, Ingalls, and Washburn will act with them, and it is believed that Stanford, Cameron, Plumb and Paddock will also vote in

the negative if their aid shall be needed" (*New York Herald* 1891b; see also *Washington Post* 1891a).

By the time the cloture rule was considered in January 1891, it had become evident that there was not a clear majority on the Senate floor in favor of the elections bill. It is thus no surprise that Aldrich was unable to generate a majority in favor of cloture reform; one of the key preconditions for such a move would be an intense majority that was thwarted by obstruction. In this case, Aldrich may well have lost a direct up-or-down vote on the obstructed bill itself. A January 1891 private letter from leading Republican John Spooner (R–WI) aptly summarized the situation: "enough abandon us on the election bill . . . to constitute, with the Democrats, a majority of the Senate" (quoted in DeSantis 1969, p. 213). A close examination of the elections bill case thus suggests that the potential for a rules change was real, but it required committed majority support for the underlying legislation, which simply did not exist after the negative public reaction and midterm setback of fall 1890.

Although case studies are clearly subject to competing interpretations, we believe that they can be quite useful in assessing the possibility for cloture reform. However, in doing so, a key question to focus on is whether a committed majority supported the underlying legislation that was at stake when the decision was made concerning whether to adopt majority cloture. In addition, it is important to view the case studies in the context of other indicators of how the precloture Senate operated, such as the prevalence of slim majorities in passing major legislation in the nineteenth century and the ultimate passage of many obstructed measures (see chapters 4 and 6 of Wawro & Schickler 2006). Together, the case studies of obstruction and analysis of coalition sizes indicate that the precloture-era Senate generally allowed determined majorities to work their will; obstruction permitted an intense minority to demonstrate its opposition, but not, in general, to triumph over an equally determined majority.

GOING NUCLEAR IN THE POST–CLOTURE RULE SENATE

Minority obstruction has become a much more formidable problem for majorities in the twentieth century. Several scholars have highlighted how obstruction itself has become virtually costless, as the minority no longer has to hold the floor for an extended period in order to block action (Sinclair 2002). This raises the question of whether a determined majority could still change the rules in today's Senate. We believe that the balance of the evidence suggests that a determined floor majority could still move the Senate toward majority rule, but the political obstacles to such a move are more substantial now than in the nineteenth century. The filibuster appears to be viewed as a far more legitimate tactic in contemporary politics, and thus there may be considerable political costs for a crackdown that did not exist in the nineteenth century (we take up the latter issue when we discuss public opinion below). In addition, individual senators garner considerable individual power and publicity from the potential to obstruct, and thus have shown considerable reluctance to give up their prerogatives.

The issue of tightening the cloture rule came up repeatedly in the 1940s–1960s, with the filibuster's connection to civil rights often dominating the proceedings. Liberal Democrats, working with a handful of Republican allies, repeatedly called for majority cloture, and in doing so, threatened to draw on rulings from the chair as a key part of their strategy. The solid opposition of southern Democrats, combined with many moderate and conservative Republicans' resistance to reform, meant that these proposals were generally unable to muster even majority support. However, there was sufficient support for more modest measures, so that reform advocates did reach compromises with opponents that at times made cloture a more feasible option.

A key initial juncture occurred on March 17, 1949, when the Senate passed a compromise proposal for cloture reform that closed a loophole in the rule by allowing cloture to be applied

to motions and other pending matters (excepting motions to take up a rules change), while raising the cloture threshold to two thirds of the chamber from two thirds present and voting. Prior to the reform, senators could filibuster the motion to proceed to consider legislation rather than the actual bills, leaving proponents little recourse to move the legislation forward. A ruling from the chair played a role in the reform effort, but in this case the ruling favorable to the reformers did not have the support of a majority (CQ Almanac 1949). Although at the time some thought that exempting motions to proceed to rules changes would prevent the Senate from ever adopting a stricter cloture rule (Binder 1997, p. 193), the Senate did so in 1959 and again in 1975. In 1959, in the face of a threat to force reform by a ruling from the chair, senators agreed to a compromise worked out by Majority Leader Lyndon Johnson that permitted cloture to apply to rules changes and lowered the threshold to two thirds present and voting, while explicitly affirming in the rules that the Senate was a continuing body (see CQ Almanac 1959). The 1975 reform, which reduced the cloture threshold to three fifths of the chamber, also involved an attempt to use a ruling from the chair that led to a compromise solution (see Wawro & Schickler 2006, pp. 266–68; Koger & Noel 2009; Gilmour 1995).

Indeed, the major reforms to the cloture rule that were adopted in the post–World War II era all followed a similar pattern: Proponents of reform seek rulings from the chair to circumvent supermajority requirements, the minority signals its intensity on the issue by a prolonged filibuster but eventually relents when a compromise is reached that tightens the cloture rule but falls short of majority cloture. Although proponents of reform never secured majority cloture, they did manage to make significant changes that tightened the cloture rule. If minorities did not fear a more harsh reform, why did they bother to compromise at all? If reform-by-ruling was so useless, why did proponents of reform continually incorporate it into their strategies?

The striking feature of Senate decision making about obstruction in recent decades has been a simultaneous willingness to carve out certain exceptions that allow crucial budget legislation to pass with majority support, combined with opposition to allowing these exceptions to become a wedge enabling the Senate to operate routinely as a majority-rule institution. The Budget Act of 1974, by setting firm time limits on budget resolutions and reconciliation bills, set the stage for a series of decisions in which senators had the opportunity to move dramatically away from the 60-vote model and yet chose not to do so. Instead, they have reinforced their commitment to supermajority policy making through the adoption and refinement of the Byrd Rule concerning reconciliation bills. The Byrd Rule, which the Senate has institutionalized as part of the budget process, limits the kind of provisions that can be included in a reconciliation bill and thereby afforded protection from filibusters. Although the Byrd Rule is highly technical, it essentially provides the opportunity to raise a point of order against any provision that is not directly connected to levels of outlays or revenues or that increases the deficit during a fiscal year after the period covered by the reconciliation bill. Such a point of order—if upheld by the presiding officer, acting on the advice of the parliamentarian—puts the Senate back into supermajority mode, since a vote of three fifths is required to maintain the challenged provision. The Senate originally adopted the Byrd Rule in October 1985 on a 96–0 vote, suggesting widespread support for the principle that the budget process should not become a vehicle to eviscerate the 60-vote threshold as the normal mode for enacting policy changes.

Indeed, the ensuing debates over the application of the Byrd Rule during the past 25 years have demonstrated both the ability of a committed majority to bend the rule's meaning to allow high-priority measures to pass and a refusal to break with the rule entirely. Many provisions have fallen in the face of Byrd Rule challenges, even as the majority has at times adopted precedents that

arguably go against the original meaning of the rule.

For example, in 1996, then-Minority Leader Tom Daschle raised a point of order challenging an attempt by the Republican majority to pass a trio of reconciliation bills, one of which would have cut taxes but would not have contributed to deficit reduction. Democrats were concerned that this was an attempt to use reconciliation to pass legislation that normally would require 60 votes, and that it would establish a precedent that would open the floodgates for the majority to circumvent filibusters on a vast array of legislation. Daschle's point of order sought to prevent the move by arguing that the bill containing the tax cuts did not constitute a proper budget resolution and therefore did not deserve filibuster protection. Following the advice of parliamentarian Robert Dove, the presiding officer, James Inhofe (R–OK), rejected the point of order, ruling that the resolution was appropriate for consideration under reconciliation procedures. Daschle appealed the ruling and after extended debate, the chair's ruling was upheld on a strict party-line vote, 53–47 (see *Congressional Record*, May 21, 1996, pp. 5415–23, 5430; May 23, 1996, p. 5516).

Even though Democrats' fear that reconciliation protection would soon be extended to a wide variety of bills did not come to pass, the way that this precedent was established has given minorities pause when they confront attempts by majorities to circumvent supermajority requirements. In 2001, Democrats did not challenge the use of reconciliation to pass the first round of President Bush's tax cuts with less than 60 votes, even though parliamentarian Dove had since disavowed his 1996 decision. Democrats believed that Republicans, given their intensity concerning the tax cuts, would again use a ruling from the chair to establish another precedent that would further limit minority rights (Taylor 2001). A similar scenario played out in 2003 for the second round of tax cuts, which were enacted using reconciliation and passed with the narrowest of majorities, 51–50 (Vice President Dick Cheney cast the tie-breaking vote).

Therefore, although there does seem to exist broad commitment to maintaining the supermajoritarian nature of the Senate with regard to reconciliation, the majority has on occasion flexed its parliamentary muscles in ways that the minority has not challenged, despite the apparent existence of enough votes (i.e., more than 40) to stymie the majority under normal circumstances. The narrow votes on the 1996 ruling and the Bush tax cuts support the view that a kind of remote majoritarianism (cf. Krehbiel 1991), however, undergirds the maintenance of the Byrd Rule. In these cases where the majority has signaled intensity and a willingness to use rulings from the chair to enact key policy initiatives, the minority has largely acquiesced and has not attempted to shut down the Senate.

JUDICIAL CONFIRMATIONS AND THE NUCLEAR OPTION

The most famous case in which the two parties came close to putting to the test whether the majority can use reform-by-ruling to eradicate obstruction came in 2005. Republicans threatened to exercise the nuclear option to force a final vote on judicial nominations. Binder et al. (2007) argue that Republicans ultimately failed to achieve their goal of reining in obstruction, instead settling for a weak compromise necessitated by the political infeasibility of reform. However, an equally compelling argument is that the "compromise" on the nuclear option demonstrated that the GOP threat had paid concrete dividends. The Democrats who signed onto the deal agreed to allow five of the seven pending controversial appeals court nominations to move forward. More important, the Democratic signatories agreed not to attempt a filibuster of a Supreme Court nominee unless there were "extraordinary circumstances." When President Bush proceeded to nominate arch-conservative Samuel Alito to replace the moderate justice Sandra Day O'Connor—a switch that threatened to undermine key precedents, such as *Roe v. Wade*—the Democratic signatories all stuck with the deal and voted for cloture. The key counterfactual to consider is

whether moderate Democrats would have been more willing to go all out in filibustering Alito if not for the earlier threat that Republicans would use the nuclear option. It is certainly the case that Democrats faced considerable pressure from allied interest groups to support a filibuster. The fact that 15 Democrats voted for cloture even as they voted against approving the nomination suggests that the threat of going nuclear had some impact.

It is also worth asking why the seven Republicans signed onto the Gang of 14 deal. The Binder et al. (2007) interpretation suggests that these Republicans would have preferred a majoritarian Senate but believed that it was too costly to get there through the nuclear option given the entrenchment of obstruction in the existing set of rules. But several of the Gang of 14 were themselves moderate Republicans who were often empowered by the cloture rule. These are the same individuals who reasonably can expect to be the pivotal voters under a Democratic majority seeking 60 votes for policy change (see Koger 2008, p. 172). These same moderate Republicans are also the least likely to be enthusiastic about the conservative policies that probably would have been produced by a majoritarian Republican Senate led by Bill Frist (R–TN), in cooperation with a GOP House and President.

For the nuclear option to be implemented, our analysis suggests that it would be necessary for a unified majority to see one—or several—of its top-priority measures obstructed by an equally determined minority. It is also essential that the minority not back down when faced with the threat of reform-by-ruling. In the judicial nominations case, pivotal Democrats chose not to support a filibuster of Alito, obviating the need for majority Republicans to implement the nuclear option. In addition, the Democrats gave in on most of the contested appeals court nominees covered by the agreement, greatly reducing Republicans' incentive to attempt reform-by-ruling. Binder et al. (2007, p. 737) assert that "in the views of most observers, including the majority and minority leaders, the minority came out better than the majority" in the compromise. However, the citations they provide do not explicitly say this, nor do we see how it is possible to determine the views of "most observers" without a systematic survey (see Conda 2006 for an argument that the compromise was a victory for the GOP).

A final important observation about the judicial nominations fight is that it was not simply played out within the Senate chamber. It was also a battle over public perceptions. Republican leaders sought to persuade voters that the Democrats were behaving irresponsibly by obstructing final votes on President Bush's nominations. Democrats, by contrast, accused Republicans of an extremist power grab. A key question confronting both sides was how the public would respond if Republicans sought to implement the nuclear option. Democrats threatened that they would retaliate by shutting down the Senate. Republicans would have presumably responded to this by attempting to pin blame on the Democrats for blocking urgently needed legislation. Neither side could have been certain how the public would have responded to these theatrics. Indeed, for all of the recent studies of the Senate filibuster, we still lack a solid basis for making inferences about how the public thinks about Senate obstruction generally. We turn to this important frontier for research in the next section.

PUBLIC OPINION AND THE FILIBUSTER

To our knowledge, no systematic research has been conducted to gauge voters' understanding and views of obstruction in the Senate, despite the existence of several public opinion polls that ask questions on the filibuster and cloture reform.[3] One of the first was conducted by the Gallup Organization in 1937 and asked whether respondents favored or opposed a filibuster aimed at defeating a compromise

[3]To determine the existence of polls on the filibuster and supermajority procedures, we conducted extensive searches employing relevant search terms on iPOLL, *National Journal's* Hotline, pollster.com, and Gallup (1999).

proposal for enlarging the Supreme Court (see Caldeira 1987 on public opinion toward court-packing more generally). When the data are weighted to partially address problems with sampling in the early polls, 27% favored the filibuster, 31% opposed it, and 32% did not understand the issue (see Berinsky 2006 and Berinsky & Schickler 2006 on the weights; the unweighted results are substantively similar but suggest only 25% did not understand the issue).

Uncertainty and lack of knowledge has long characterized public opinion about filibusters. Gallup asked individuals if they knew what the term filibuster meant in 1947, January and March of 1949, 1950, 1963, and 1964. The percentages of respondents who gave correct answers were, respectively, 48, 54, 62, 54, 53, and 54.[4] Though far from encouraging, these numbers are comparable to levels of knowledge with respect to basic features of the political system. Surveys that asked respondents if they knew how many senators represented each state found that 55% (1945), 60% (1951), 49% (1954), and 52% (1978) knew the correct answer (Delli Carpini & Keeter 1996). Of the 54% who correctly defined "filibuster" in the January 1949 survey, a follow-up question revealed that 65% had an unfavorable opinion of the tactic and only 19% had a favorable opinion. In March of 1949, 56% expressed unfavorable opinions and 28% expressed either approval or qualified approval. These results suggest that, as of the 1940s–1950s, those who knew about filibusters generally frowned on the tactic, but the public as a whole was largely uninformed about this feature of the Senate rules.

Polls indicate that although the degree of popular support for supermajority procedures in the Senate has varied considerably over time, it generally seems to have increased since the 1940s–1950s. Several surveys in the late 1940s sought to assess opinions on the filibuster and, in particular, support for cloture reform. These early surveys took place in a context in which filibusters were credited with defeating fair-employment-practices legislation and (on four separate occasions) anti-poll-tax legislation, and, as discussed above, numerous attempts were made to reform the cloture rule (U.S. Congress. Senate. Committee on Rules & Administration 1985).

In a survey conducted May 1–14, 1946, the Roper Organization posed the following question to respondents:

> Some people say that a filibuster is part of the right of freedom of speech, and should not be stopped. Others say that it interferes with Congress' business of making laws, and should be stopped. With which group do you agree?

Forty-seven percent surveyed thought the filibuster "should be stopped," 26% thought it "should not be stopped," and the remaining respondents were categorized as "don't know." Breaking down opinions by region reveals that 57% of southerners with an opinion favored "stopping the filibuster" while 43% did not. This contrasts with 67% of nonsoutherners saying the filibuster should be stopped and 33% saying it should not. Although these differences are statistically significant, indicating that southerners are less likely than northerners to oppose the filibuster, it is somewhat surprising that a solid majority of southerners with an opinion appeared to view the filibuster unfavorably, given the significance of the filibuster historically and during this period in particular in hampering the passage of civil rights legislation. This result appears to be related somewhat to political knowledge. A logistic regression where opinion about the filibuster is the dependent variable reveals that southerners who have better than a high school education are about 17 percentage points less likely to say that the filibuster should be stopped. Owing to space constraints, we do not report detailed results of the multivariate analysis

[4]Surveys by Gallup Organization, February 14–19, 1947; January 23–28, 1949; March 6–11, 1949; March 6–11, 1950; December 14–19, 1956; June 21–26, 1963; February 28–March 5, 1964. Retrieved September 20, 2009 from the iPOLL Databank, The Roper Center for Public Opinion Research, University of Connecticut (**http://www.ropercenter.uconn.edu/ipoll.html**).

of these early polls, although the full results are available upon request from the authors.

In the aforementioned 1947 Gallup survey, those respondents who correctly defined the term filibuster were asked whether they approved of the suggestion that "the Senate change its rules so that a simple majority can call for an end to discussion instead of a two-thirds majority as is now the case." Fifty-six percent approved and 31% disapproved of majority cloture, with the rest having no opinion. The approval/disapproval percentages were approximately the same for Republicans and Democrats. Interestingly, southerners did not voice opinions that were different from nonsoutherners. Approximately 56% favored reducing the cloture threshold and 31% disapproved, compared with 54% and 31%, respectively, for nonsoutherners. Consistent with the results from the 1946 Roper survey, a multivariate regression analysis where approval of majority cloture is the dependent variable suggests that the similarity between northern and southern opinion is partly due to southerners' weaker understanding of the filibuster: Southerners who did not graduate from high school were 10 percentage points more likely than high school graduates in the south to favor cloture reform. Both Republican and Democratic identifiers are less likely to support reduction of cloture than are Independents, and there is no distinction in support between southern and nonsouthern Democrats.

When Gallup asked this question again in January and March of 1949, the results revealed that opinion in the south was no longer conditioned on education and that mass opinion generally was headed in the direction of the sectional divide that characterized elite positions in the Senate. In the March survey, which was in the field during a filibuster led by southerners against cloture reform, 54% of respondents who could define the term filibuster approved of majority cloture, while 35% disapproved and 11% had no opinion. A majority of southerners who had an opinion on the issue disapproved of changing the cloture rule, 58% to 42%. Nonsoutherners favored the change by 57% to 43%. This pattern held up in the survey taken in December 1956, where 46% in the south opposed cloture reform and 40% approved. Outside of the south, a solid majority favored reducing the cloture threshold (Gallup 1972a, p. 1463). Opinion on the filibuster still had not taken on a partisan character, however, as approximately the same proportion (i.e., half) of Republicans, Democrats, and Independents approved of majority cloture.

Early in 1963, the Senate was again consumed by an attempt to change the cloture rule in what had become a biennial ritual. The effort had largely been thwarted by February, although a feeble attempt to resurrect the proposal to reduce the cloture threshold to three fifths was made in September (CQ Almanac 1963). As pressure was mounting for action on civil rights in the summer of 1963—culminating in the March on Washington—Gallup again attempted to gauge opinion regarding support for a simple majority cloture rule. The results were largely the same as those found with the March 1949 and 1956 surveys, although nonsoutherners' support for the change had dropped by about five percentage points.

After the Civil Rights Act of 1964 had passed the House and was placed on the Senate calendar at the end of February, Gallup (1972b, pp. 1870–71) asked this question again and found that 40% overall approved of moving to majority cloture, 38% disapproved, and 22% had no opinion. Gallup reported marginals by region, and only in the south did more respondents oppose than favor a cloture rule change. However, in the midwest and west, respondents were essentially evenly split in terms of approval/disapproval at this critical moment in the civil rights movement.

Overall, the available data from the 1940s–1960s indicate that opinion concerning the filibuster and cloture reform was essentially nonpartisan and became gradually structured by section, but even then the south/nonsouth split was not as stark as conventional wisdom might lead us to believe. Polls suggest that—to the extent that the public was familiar with

the filibuster—more people viewed it unfavorably than favorably. Given the widespread lack of information about the filibuster, however, it would be wrong to characterize this as evidence that a majority of the public actively demanded cloture reform. But pluralities, and at times majorities, of those who could define a filibuster evidently favored majority cloture.

This contrasts with mass opinion today, which is structured more by party affiliation while on the whole appearing to be firmly in favor of maintaining filibusters and against majority cloture. The development of this shift, however, is difficult to study systematically because from 1964 until 2005 there appears to have been no nonpartisan public opinion polling on the topic of filibusters, and only a handful of isolated partisan polls. This is somewhat surprising given the explosion in the use of filibusters that began in the 1970s.

Beginning in 2005, several surveys asked filibuster-related questions during the fight over President Bush's judicial nominees. Although these surveys generally found that overwhelming majorities were either not following the debate at all or not paying much attention to it, the public tended to be opposed to eliminating filibusters and in favor of maintaining supermajority requirements. An NBC News/*Wall Street Journal* survey conducted in the spring found that 50% of respondents thought the Senate should maintain the opportunity to filibuster and 40% thought it should not. A CNN/*USA Today* poll at about the same time found that 52% favored the general use of the filibuster while 40% were opposed. The same question wording appeared in a November 2009 CNN survey—but now with Republicans obstructing a Democratic president's agenda. Despite the change in political context, the survey revealed that 56% favored the use of the filibuster, 39% opposed it, and only 5% reported having no opinion.

A CBS News survey in May 2005 directly asked respondents' opinions about supermajority requirements for confirmation of judges and justices in the context of the fight over Bush's nominations. The question read:

> As you may know, there are 100 Senators. How many Senators' votes should it take to move ahead to confirm a Federal judicial nominee/Supreme Court nominee? Should a majority of 51 votes be required, or is this something that should require a larger majority of 60 votes?

The results were similar for both kinds of nominees. Sixty-three percent thought that a "larger majority of 60" should be required to move ahead to confirm federal judicial nominees, while 64% thought this should be the case for Supreme Court nominees. A *Time* survey, also conducted in May, asked directly whether Republicans should be allowed to eliminate filibusters of judicial nominees and found that 59% felt they should not.

The long time gap between the 1940s–1960s survey items and the more recent questions—along with changes in question wording—require considerable caution in making inferences about longitudinal changes. However, it is striking that there now seems to be greater popular support for the "right" to filibuster than in the past. The available poll evidence suggests that in the 1940s–1960s, most Americans—even many southerners—viewed the filibuster as suspect and were predisposed to favor majoritarian alternatives. By contrast, when the choice is posed between majority rule and the 60-vote requirement in the Senate today, a majority of Americans now seem to prefer supermajoritarian rules. It is plausible that as the filibuster has become a routine part of the legislative process, it has gained greater legitimacy in citizens' minds.

Still, given the lack of information on the part of many citizens—and the close linkage between debates about the cloture rule and short-term political fights (e.g., over Republican judicial nominees in 2005–2006 or health care in 2009)—a closer look at how such opinions were formed is essential to advance our understanding of public opinion toward lowering the cloture threshold in the contemporary Senate. To suggest how this might be done, we conducted a preliminary analysis

of a recent survey in an attempt to uncover systematic relationships between opinions about judicial filibusters and factors that conventional wisdom suggests might be important in opinion formation. We do not attempt here to develop a theory of opinion formation relevant for filibusters; we merely endeavor to demonstrate how we could begin to get at causal relationships. The analysis consisted of a pair of logit models where the dependent variable equaled one if the respondent thought that only a simple majority should be necessary to move ahead to confirm a Supreme Court/lower court nominee, and equaled zero otherwise.

Several plausibly relevant explanatory variables can be constructed on the basis of information available from the Gallup survey. It is difficult to separate opinions about the filibuster from the business it is used to obstruct, and it could be that the support for supermajority provisions in the 2005 polls merely reflected respondents' ideological stances with respect to the judicial nominees and President Bush. We included in our model dummy variables measuring whether the respondent self-identified as a Republican or a Democrat, leaving Independent as the reference category. Because ideological stances may be more nuanced than what is captured by party labels, we also included dummy variables indicating whether the respondent described her political philosophy as "liberal" or "conservative," with "moderate" as the reference category.

Certain demographic characteristics might also be related to opinions. It is possible that respondents are confusing the procedural requirements for the confirmation of judges with supermajority requirements for the approval of treaties by the Senate—after all, treaty and confirmation powers of the Senate are both discussed in Article II, Section 2 of the Constitution. One way to assess this possibility is to include a measure of education in the model; we opted for a dummy variable indicating whether or not the respondent completed high school. Given the historical identification of filibusters with civil rights legislation, it is plausible that nonwhites might have more negative views about supermajority requirements and would prefer to see them eliminated. To assess this relationship, we included a dummy indicating whether or not the respondent self-identified as white. Age of the respondent may also play a role, since younger respondents have formed beliefs about politics in a context where it has become standard to legislate via supermajorities. We include the self-reported age of the respondent to gauge this potential effect.

We also included some contextual variables to assess whether opinions are related to how constituents might be adversely affected by a change in Senate procedures. Because supermajority requirements have been cast as a protection for smaller states, it makes sense to include the natural log of the population of the respondent's state. In the language of the pivotal-politics model, reducing the cloture threshold in the manner suggested by the questions means moving the filibuster pivot to the location of the median voter in the chamber. Nominations that could have been derailed by a coalition of 41 senators could now be brought to a final vote. The filibuster pivot under the three-fifths cloture rule would be made worse off by simple majority cloture, since she would no longer be decisive. But senators more extreme than the filibuster pivot would also be made worse off, as would some senators in between the filibuster pivot and the median. The pivotal-politics model suggests that the cutpoint dividing senators who would oppose the reform from those who would favor it is the midpoint between the senator located at the 60th percentile of the ideological distribution and the median. Senators who are on the opposite side of this cutpoint from the median voter would be opposed to reducing the cloture threshold, and it is plausible that the constituents of these senators would be opposed as well. To assess this prediction, our model includes dummies that equal one if at least one of the senators from the respondent's state is located ideologically—as measured by first- and second-dimension DW-NOMINATE scores (Poole & Rosenthal 1997)—externally to the cutpoint.

Owing to space constraints, we only discuss the results for the equation pertaining to reducing the cloture threshold for federal judges, since the results for the question pertaining to Supreme Court nominees did not differ substantially. As the estimates contained in **Table 1** indicate, Republican respondents are more likely to support reducing the cloture threshold than are Independents, whereas Democrats are no more likely to support the reform than are Independents. For the variables with statistically significant coefficients, we computed marginal effects in the form of simulated probabilities and 95% confidence intervals around those probabilities. The variables were set to their median values and then manipulated using *Clarify* (King et al. 2000). At median values, an individual has a 0.32 probability of supporting reduction of the cloture threshold, with 95% confidence bounds at [0.19, 0.48]. This probability increases to 0.69 [0.53, 0.82] if the individual identifies as a Republican—a substantively significant change from the median value of being an Independent. Individuals who identified themselves as liberals are less likely than moderates to support the reform, and there appears to be no difference in support between conservatives and moderates. Liberals have only a 0.16 probability (with confidence bounds [0.07, 0.29]) of supporting the suggested reform. Respondents who did not graduate from high school are much less likely to support reform than are those with higher levels of educational attainment. They have only a 0.07 probability [0.01, 0.19] of being in favor of majority cloture. The older a respondent is, the more likely she is to support the reform (this coefficient is barely statistically significant at the 0.1 level). If the respondent's age increases to the 75th percentile in the sample (66 years old) from the median value (52), the probability of supporting the reform increases slightly to 0.35 [0.21, 0.51]. Race does not appear to be related to opinions, as the coefficient on our white/nonwhite dummy is not bounded away from zero. None of the contextual variables have statistically significant coefficients, indicating that size of state and ideological location of senators are not related to support for reform.[5] We also estimated models that included various interaction terms (e.g., interacting the education dummy with the other variables), but we did not find that these terms either significantly improved the fit of the model or substantially altered the results reported here.

Table 1 Logit results for lower cloture threshold on federal judges

Variable	Coefficient (standard errors in parentheses)
Constant	−2.493 (2.825)
Republican	1.602 (0.338)
Democrat	0.052 (0.337)
Liberal	−0.948 (0.377)
Conservative	0.062 (0.318)
Not a high school graduate	−2.076 (0.660)
White	0.012 (0.439)
Age	0.013 (0.008)
Ln state population	0.069 (0.169)
Hurt by reform, first dimension	−0.016 (0.292)
Hurt by reform, second dimension	−0.058 (0.298)
Observations	311
Pseudo R^2	0.173
χ^2	71.45

Preliminary analysis of the Gallup data reveals some systematic variation in opinion formation. Still, this analysis is merely a first cut, and we are limited by the items that are available in the Gallup survey. We suspect that Democrats and liberals would be more favorable toward cloture reform in the context of the 111th Congress (and Republicans and conservatives less favorable), with a Democratic Congress and White House. Yet it is striking that as of 2005, respondents near the median (moderates, Independents) were not supportive of majority rule. The November 2009 CNN survey noted above suggests that most Americans continue to support

[5] An alternative specification included a simple measure of extremity of senators in the form of a squared deviation from the median variable, but it also did not appear to be related to opinions.

supermajority rule, even in the very different context of Democratic unified party government. It is thus evident that bids for majority cloture may not find a particularly receptive public, which suggests a potential political advantage for the minority were the majority to go nuclear. However, these questions tell us little about how the public would respond should the minority attempt to shut the Senate down in retaliation for the majority employing the nuclear option. It is plausible that even if the public was skeptical of the imposition of majority rule, voters would be even more hostile to a minority that retaliated by blocking all legislative action. Indeed, Democratic leaders voiced precisely this concern as they plotted strategy in response to GOP threats of imposing majority rule on judicial nominations (Crowley 2005). Designing surveys to probe such hypotheticals, though obviously difficult, is essential to resolving the debate on the viability of going nuclear. If we are to understand the extent to which the public comprehends obstruction in the Senate and how voters might react to a nuclear shutdown, we need to design questions and collect data on other variables that are directly relevant to the issue. Supermajority requirements and filibusters are complicated issues, and great care must be taken to formulate questions that will adequately tap into individuals' potentially limited knowledge of them.

Nevertheless, a few tentative conclusions emerge from this initial examination of public opinion toward the filibuster. First, the public as a whole has consistently paid relatively little attention to the filibuster, and thus there is a lack of information and crystallized attitudes in this area. Second, despite this lack of attention, there is a noticeable overall shift in the tenor of public opinion on the subject: Whereas those informed about the filibuster had been largely negative toward the right to obstruct in the 1940s–1960s, citizens today lean more toward viewing the filibuster as a legitimate part of the legislative process. This parallels the routinization of minority obstruction in the Senate. Third, opinion toward the filibuster is more structured by short-term partisan calculations today than in the 1940s–1960s, when region generally trumped party. However, it is noteworthy that moderates and Independents seem to favor maintaining the right to unlimited debate. These attitudes likely would factor into both sides' calculations regarding the politics of the nuclear option, but considerably more research into the dynamics of public opinion is required to put such calculations on a firmer empirical footing.

CONCLUSION: POLARIZATION AND THE FUTURE OF THE FILIBUSTER

Even casual observation of policy making in the United States reveals a profound role for the filibuster, which has essentially rendered the Senate a supermajority institution. A complete understanding of how the policy-making process works demands an understanding of how the Senate developed to this point and how the current institutional equilibrium is maintained. Given the central place that the filibuster currently occupies in the architecture of American government, it is not surprising that a robust debate has emerged concerning this aspect of Senate development.

A key question in this literature is whether senators are essentially trapped by inherited institutions into accepting supermajority rule or, instead, senators have generally supported the maintenance of the filibuster and have been able to make procedural adjustments when obstruction threatened a committed majority's top priorities. We believe that the balance of the evidence favors the latter position, though some important refinements are required in comparing the historical operation of obstruction to its impact today.

In the nineteenth and early twentieth centuries, the threat posed by minority obstruction in the Senate was far more limited than in today's Senate. An intense minority could use obstruction—often through the use of dilatory motions—to test the resolve of the majority. But with a less crowded agenda, the majority could confront this obstruction by keeping the

Senate in session and forcing the minority into a war of attrition. Senators evidently shared a widespread understanding that it was not legitimate for the minority to block action by a determined majority. These informal norms were buttressed by occasional threats by the majority to rein in obstruction. Although the majority never was forced to abolish obstruction entirely, there were several episodes in which rulings from the chair were used to take away tools that had been used by obstructionist senators. The net result of all of this was that obstructionists rarely succeeded in killing legislation in the nineteenth century. Furthermore, narrow majorities were generally sufficient to pass even the most controversial legislation. Filibusters could succeed only when the majority proved tepid in its support for legislation—as in the case of the federal elections bill of 1890–1891—or, increasingly toward the end of the nineteenth century and in the early twentieth century, as the Senate grew in size and norms of restraint faded, when time was running out at the very end of a session.

Minority obstruction is clearly a much more potent weapon today. It is commonplace for the majority to make important concessions in search of the 60 votes needed for cloture. The physical and opportunity costs of filibustering are minimal, since doing so no longer requires senators to hold the floor. Obstruction is now thus a routine and accepted part of the policy-making process. Unlike in the nineteenth-century Senate, even a committed majority can lose out on a favored policy owing to the filibuster.

As party polarization has increased dramatically over the past three decades, filibuster battles have also come to have much clearer partisan stakes and potentially can have more substantial policy stakes. With party lines now corresponding to policy preferences (and ideological groupings) more tightly than in much of American history, the filibuster has become more clearly identified as a key tool of the minority *party* rather than as a tool used by various types of minorities. It is expected that the minority party will attempt to defeat large portions of the majority party's agenda through obstruction. Party polarization also may increase the policy consequences of the filibuster because it tends to increase the distance between the floor median (and majority-party median) and the filibuster pivot. With almost no overlap between the parties, the filibuster pivot will generally be a minority party member who is relatively far from the floor median and especially distant from the majority party median.

These developments raise the question of whether the majority party could end the filibuster today. Binder et al. (2007) emphasize that adopting majority cloture has not been "politically feasible," which suggests the power of inherited institutions to shape outcomes and the inability of a Senate majority to work its will. We believe that a better way to think about the problem is to ask whether a majority of the Senate actively prefers majority rule to the current set of rules and procedures. In the precloture Senate, the floor majority could generally expect to win on policy; senators in the majority had little incentive to favor majority rule over procedures that gave individual senators leeway to obstruct, and thus to credibly reveal information about the intensity of their position. In today's Senate, members on the majority side do pay a bigger policy price for allowing obstruction. Nonetheless, it is not at all self-evident that a majority of the Senate would choose to end minority obstruction given a direct up-or-down vote.

One reason for reluctance to do away with obstruction is that senators themselves are able to use the right to filibuster to gain individual publicity and prominence in the political system. A second reason is that majority-party members may anticipate being in the minority in the not-so-distant future, and thus do not want to lose their prerogatives.

A third motivation for retaining the filibuster may be especially important for moderates in today's sharply polarized Senate. Consider the case of the Democrats in the 111th Congress (2009–2010). In a majority-rule Senate, Democrats would presumably have been able to enact a substantially more liberal

policy agenda than resulted from the need to win over more conservative party members, such as Ben Nelson (D–NE) and Blanche Lincoln (D–AR), or moderate Republicans, such as Olympia Snowe (R–ME). Clearly, the Nelsons, Lincolns, and Snowes of the Senate prefer a set of rules that forces their views to be taken into account. But even slightly more liberal Democrats—those close to the floor median—may prefer a policy agenda that is constrained by the need to win over the more conservative Democrats and moderate Republicans at the filibuster pivot. It is worth keeping in mind that these Democrats near the floor median are typically from relatively conservative states but face liberal primary electorates; as a result, they would be cross-pressured if faced with a passage vote on major liberal legislation, such as health care reform with a strong public option (see Kelly & Van Houweling 2009). Given sharp party polarization and aggressive efforts by the party base to enforce loyalty, it may help these cross-pressured Democrats to have their liberal brethren reined in by the filibuster pivot.

In any case, when faced with the opportunity to eviscerate the right to obstruct, senators have chosen to protect the concept of the 60-vote Senate. The adoption of the Byrd Rule in 1985 was particularly noteworthy, as senators explicitly chose to forgo the opportunity to turn the reconciliation process into a wide-open instrument for avoiding the need for 60 votes to pass major policy changes. Thus, although cloture reform is feasible in the sense that a floor majority could eliminate supermajority requirements if it were determined to do so, it is not necessarily desirable from the standpoint of a floor majority.

Still, as battles over minority obstruction have become increasingly partisan in today's highly polarized Senate, the possibility for an all-out confrontation over minority rights becomes more likely. The key question is what would happen if a determined minority sought to block the majority on a series of high-profile proposals that the majority cares about deeply. For example, what if Democrats had not backed down and instead voted as a bloc against cloture on the Alito nomination? In the 2005–2006 case, enough Democrats backed down and agreed to confirm nominations they clearly had the votes to kill—and then voted for cloture on the most salient nominations, those for the Supreme Court. But it is conceivable that there will be an issue on which neither side is willing to back down, particularly given increasing pressure from party activists to stand firm. Should that happen, a central concern is how the public would react: Would voters view the imposition of majority rule as illegitimate? Would they punish the minority if it retaliated by attempting to shut the Senate down? Uncertainty about the public reaction makes the nuclear option a risky prospect for both sides, potentially creating the political space for a compromise that can win over pivotal moderates in both parties. Whether this will continue to hold should polarization continue to increase is more difficult to forecast.

The study of the development of the filibuster suggests a nuanced role for inherited institutions in shaping politics. The "stickiness" of rules in a legislative body such as the Senate does not come primarily from their power as constraints on what a majority can do. The Senate is not totally locked into its rules regarding filibusters, since a determined majority of the Senate could change the rules of the game. Indeed, the Senate has established qualified majority cloture through fast-track and reconciliation procedures, with a very narrow majority expanding the use of the latter through a ruling from the chair in the 1996 Daschle case that did not prompt the minority to shut down the institution.

Nevertheless, decades of experience with minority obstruction have helped shape senators' own beliefs, expectations, and preferences with respect to the filibuster. Most senators evidently believe that they benefit, on the whole, from a system that empowers individual senators to obstruct business. There are short-term policy costs for majority senators from this system, and the majority has developed mechanisms to evade minority obstruction for

certain high-priority items. However, the senators have generally chosen to tailor these alternative mechanisms as narrowly as possible, rather than eviscerate a system that makes each individual senator a more prominent political player. Absent this long experience with the filibuster, it is not at all evident that a group of 100 legislators meeting to form rules would opt to institutionalize the filibuster. But that does not mean that given a direct vote, today's senators would choose majority rule over the 60-vote Senate.

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LITERATURE CITED

Alter AB, McGranahan LM. 2000. Reexamining the filibuster and proposal powers in the Senate. *Legis. Stud. Q.* 25(2):259–84

Bawn K, Koger G. 2003. Effort, intensity and position taking: reconsidering obstruction in the pre-cloture Senate. *J. Theor. Polit.* 20(1):67–92

Berinsky AJ. 2006. American public opinion in the 1930s and 1940s: the analysis of quota-controlled sample survey data. *Public Opin. Q.* 70(4):499–529

Berinsky AJ, Schickler E. 2006. *The American mass public in the 1930s and 1940s*. Natl. Sci. Found. Collab. Res. Grant. **http://web.mit.edu/berinsky/www/nsf.pdf**

Binder SA. 1997. *Minority Rights, Majority Rule*. New York: Cambridge Univ. Press

Binder SA, Lawrence ED, Smith SS. 2002. Tracking the filibuster, 1917 to 1996. *Am. Polit. Res.* 30(4):406–22

Binder SA, Madonna AJ, Smith SS. 2007. Going nuclear, Senate style. *Perspect. Polit.* 5(4):729–40

Binder SA, Smith SS. 1997. *Politics or Principle? Filibustering in the United States Senate*. Washington, DC: Brookings Inst.

Burdette FL. 1940. *Filibustering in the Senate*. Princeton, NJ: Princeton Univ. Press

Caldeira GA. 1987. Public opinion and the U.S. Supreme Court: FDR's court-packing plan. *Am. Polit. Sci. Rev.* 81(4):1139–53

Conda C. 2006. The "Gang of 14" compromise was a victory for the GOP. *Roll Call* May 2, p. 8

CQ Almanac. 1949. Limitation of debate. *CQ Almanac*, pp. 583–87. Washington, DC: Congr. Q.

CQ Almanac. 1959. Senate rules change. *CQ Almanac*, pp. 212–14. Washington, DC: Congr. Q.

CQ Almanac. 1963. Criticism of Congress provokes few changes. *CQ Almanac*, pp. 373–76. Washington, DC: Congr. Q.

Crowley M. 2005. The day after. *New Republic* Apr. 18, p. 10

Delli Carpini MX, Keeter S. 1996. *What Americans Know About Politics and Why It Matters*. New Haven, CT: Yale Univ. Press

DeSantis V. 1969. *Republicans Face the Southern Question*. New York: Greenwood

Dion D. 1997. *Turning the Legislative Thumbscrew*. Ann Arbor: Univ. Mich. Press

Dion D, Boehmke FJ, MacMillan W, Shipan CR. 2008. *Are filibusters informative?* Work. pap., Univ. Mich.

Dixit AK. 2004. *Lawlessness and Economics: Alternative Modes of Governance*. Princeton, NJ: Princeton Univ. Press

Fudenberg D, Tirole J. 1991. *Game Theory*. Cambridge, MA: MIT Press
Gallup AM. 1999. *The Gallup Poll Cumulative Index: Public Opinion, 1935–1997*. Wilmington, DE: Scholarly Resour.
Gallup GH. 1972a. *The Gallup Poll: Public Opinion 1935–1971. Vol. II, 1949–1958*. New York: Random House
Gallup GH. 1972b. *The Gallup Poll: Public Opinion 1959–1971. Vol. III, 1959–1971*. New York: Random House
Gilmour JB. 1995. *The contest for Senate cloture reform, 1949–1975*. Presented at Annu. Meet. Am. Polit. Sci. Assoc., Chicago
Gold MB, Gupta D. 2004. The constitutional option to change Senate rules and procedures: a majoritarian means to overcome the filibuster. *Harvard J. Law Public Policy* 28(1):206–72
Johnson TR, Roberts JM. 2005. Pivotal politics, presidential capital, and Supreme Court nominations. *Congress Presidency* 32(1):31–48
Kelly A, Van Houweling R. 2009. *Roll calls, constituents, and representation: results from a survey experiment*. Presented at Annu. Meet. Am. Polit. Sci. Assoc., Toronto
King G, Tomz M, Wittenberg J. 2000. Making the most of statistical analyses: improving interpretation and presentation. *Am. J. Polit. Sci.* 44(2):347–61
Koger G. 2002. *Obstruction in the House and Senate*. PhD thesis, Univ. Calif. Los Angeles
Koger G. 2007. Filibuster reform in the Senate, 1913–17. In *Process, Party and Policy Making: Further New Perspectives on the History of Congress*, ed. DW Brady, MD McCubbins, 2:205–25. Palo Alto, CA: Stanford Univ. Press
Koger G. 2008. Filibustering and majority rule in the Senate: the contest over judicial nomination, 2003–2005. In *Why Not Parties?*, ed. NW Monroe, JM Roberts, DW Rohde, pp. 159–81. Chicago: Univ. Chicago Press
Koger G, Noel H. 2009. *The contest for majority cloture in the Senate, 1949–1975: an analysis of senators' preferences*. Presented at Annu. Meet. Southern Polit. Sci. Assoc., New Orleans, Louisiana
Krehbiel K. 1991. *Information and Legislative Organization*. Ann Arbor: Univ. Mich. Press
Krehbiel K. 1998. *Pivotal Politics*. Chicago: Univ. Chicago Press
Krehbiel K. 2007. Supreme Court appointments as a move-the-median game. *Am. J. Polit. Sci.* 51(2):231–40
Mayhew DR. 2003. Supermajority rule in the U.S. Senate. *PS: Polit. Sci. Polit.* 36(1):31–36
New York Herald. 1891a. Debate the closure in the Senate. Jan. 23, p. 4
New York Herald. 1891b. A vice president useful in certain emergencies. Jan. 24, p. 1
New York Herald. 1891c. Goodby, closure, goodby, Force Bill. Jan. 27, p. 3
New York Times. 1890. Comfort for Harrison. Nov. 6, p. 1
New York Tribune. 1891a. Washington gossip: Senator Jones on the election bill. Jan. 19, p. 7
New York Tribune. 1891b. Republicans in control. Jan. 23, p. 1
Overby LM, Bell LC. 2004. Rational behavior or the norm of cooperation? Filibustering among retiring senators. *J. Polit.* 66(3):906–24
Poole KT, Rosenthal HL. 1997. *Congress: A Political-Economic History of Roll Call Voting*. New York: Oxford Univ. Press
Primo DM, Binder SA, Maltzman F. 2008. Who consents? Competing pivots in federal judicial selection. *Am. J. Polit. Sci.* 52(3):471–89
Rohde DW, Shepsle KA. 2007. Advising and consenting in the 60-vote Senate: strategic appointments to the Supreme Court. *J. Polit.* 69:664–77
Schickler E. 2001. *Disjointed Pluralism: Institutional Innovation and the Development of the U.S. Congress*. Princeton, NJ: Princeton Univ. Press
Sinclair B. 2002. The "60-vote Senate." In *U.S. Senate Exceptionalism*, ed. BI Oppenheimer, pp. 241–61. Columbus: Ohio State Univ. Press
Taylor A. 2001. Law designed for curbing deficits becomes GOP tool for cutting taxes. *Congr. Q. Wkly. Rep.*, Apr. 7, p. 770
Taylor AJ. 2006. Size, power, and electoral systems: exogenous determinants of legislative procedural choice. *Legis. Stud. Q.* 31(3):323–45
Tirole J. 1988. *The Theory of Industrial Organization*. Cambridge, MA: MIT Press
U.S. Congress. Senate. Committee on Rules and Administration. 1985. Senate Cloture Rule. Committee Print, no. 99–95, 99th Cong., 1st sess.

Washington Post. 1890a. No gag for the Senate. Aug. 11, p. 1
Washington Post. 1890b. Mr. Wolcott's speech. Dec. 31, p. 7
Washington Post. 1891a. By aid of the chair. Jan. 23, p. 2
Washington Post. 1891b. To close the debate. Jan. 26, p. 1
Wawro G, Schickler E. 2004. Where's the pivot? Obstruction and lawmaking in the pre-cloture Senate. *Am. J. Polit. Sci.* 48(4):758–74
Wawro G, Schickler E. 2006. *Filibuster: Obstruction and Lawmaking in the United States Senate*. Princeton, NJ: Princeton Univ. Press
Wawro GJ, Schickler E. 2007. Cloture reform reconsidered. In *Process, Party and Policy Making: Further New Perspectives on the History of Congress*, 2:226–48. Palo Alto, CA: Stanford Univ. Press

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