Legislative Obstruction

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Filibustering: A Political History of Obstruction in the House and Senate. By Gregory Koger. Chicago: University of Chicago Press, 2010. 272p. $72.00 cloth, $24.00 paper.

The Democrats dodged a bullet on health care in the spring of 2010, but the Senate filibuster is still with us. The 60-vote pivot, the cloture strategies, Senator Scott Brown (R-MA), the member "holds," and the rest are as basic as anything these days to U.S. national policymaking.

Until recently, almost no one studied the filibuster in a systematic way.[1] That may be surprising, but the subject is daunting. Theoretical puzzles and data difficulties abound. Threats of obstruction, which are not easily trackable, can be as important as actual obstruction. Preference intensity is a hard nut to crack. Senate practices are drenched in path dependence, yet changes in those practices are incessant and always possible. Inference backwards in history is perilous. Senate enactments may require 60 votes today, but did they require a two-thirds vote between 1917 and 1975 when that fraction was the cloture mark? How about before 1917 when no cloture process existed at all? In fact, majority rule has been common in Senate history on showdown issues. Some instances:

- In 1841, Henry Clay won his national bank bill by 26–23.[2]
- In 1845, annexation of Texas cleared the Senate by 27–25 six days before the closing deadline of a lame-duck Congress.
- Major tariff bills cleared the Senate by 26–21 in 1828, 24–23 in 1842, 28–27 in 1846, 30–29 in 1875, 32–31 in 1883, 33–27 in 1890, 44–42 in 1930.[3]
- In 1938, Franklin D. Roosevelt's executive reorganization bill, which stirred something like a Tea Party protest among sectors of the public, cleared the Senate by 49–42 before foundering in a tense 196–204 loss in the House.[4]
- From 1950 through 1970, many hard-fought White House initiatives cleared the Senate short of two-thirds approval in roll calls: tidelands oil in 1953, the Saint Lawrence Seaway in 1954, federal aid to education in 1961, the Housing Act of 1961, creation of the Department of Housing and Urban Development in 1965, the Housing Act of 1965, and crime control in the District of Columbia in 1970.[5]

The new fixed-in-cement quality of today's 60-vote pivot is one of the filibuster's many complexities.[6] Fortunately, the subject of legislative obstruction, which covers the Senate filibuster but not just that, has drawn major talent during the last decade and a half. In 1997, Sarah A. Binder and Steven S. Smith canvassed Senate history and contributed new data sets in their *Politics or Principle?* In 1998, Keith Krehbiel gave compelling theoretical life to the 60-vote pivot in his more comprehensive work on lawmaking, *Pivotal Politics*. Influenced, like others, by Krehbiel's work, Gregory J. Wawro and Eric Schickler took a new look at winning and losing coalitions in the nineteenth- and early-twentieth-century Senate in their 2006 work, *Filibuster*. Gregory Koger's new book adds fresh illumination.

As its subtitle suggests, Koger's work is tilted toward history. His opening paragraphs give the flavor (p. 3): "Over the last fifty years, there has been a quiet revolution in American politics. A major hurdle has been added to the legislative process . . . It just happened, and it happened so quietly we barely noticed." We need "to trace the history of filibustering in Congress: the present is confusing because we do not really understand the past."

History, yes, but this book is a multiple-methods work firmly centered in political science. Koger's strategy of multipleness works very well. It fits the subject. In the first part of this essay, I dwell on method because I believe there is some point in highlighting the variety of intellectual moves that can be made in analyzing a subject like this. Then I will go on to discuss certain of Koger's theoretical and empirical contributions. On the methods side, I see six distinct kinds of Koger presentation:

Mapping. It helps to know a subject before trying to explain it. What happened when? Koger, with an eye for tactical moves, applications of time and energy, and political and

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policy importance, is very good at ferreting out, weighing, and discussing the congressional events since 1789 that a student of obstruction might heed. Both the Senate and the House (obstruction has occurred there, too) are covered. This is done with economy and authority. There are sketches and lists. There are "obstruction scores" for bills. The book, notably Chapters 4, 6, and 8, can be read for its mapping alone.[7] We are informed, for example (p. 67), that the effort by House northerners to block the Kansas-Nebraska Act in 1854 (they failed) was the leading congressional obstruction event of the pre–Civil War era. Among Senate filibusters, a top-10 list for the twentieth century scores the Civil Rights Act of 1964 in first place (pp. 108–109). Campaign finance reform, admission of states, organizing the chamber, and other topics of partisan or electoral advantage have brought perennial heat and obstruction to the Senate (pp. 72–73, 109, 124–127).

Classification. Analysis often begins with taxonomy. This requires making judgments about the correct, or at least the useful, joints to cut at. Koger is a resolute taxonomist and he does well at it. His classifications underpin his analysis. As a practical matter, congressional obstructionists have had a palette of three options from which to choose: prolonged speaking, dilatory motions, and disappearing quorums (that is, do not show up, thus preventing any legislative business) (pp. 16–19). In turn, congressional majorities trying to suppress obstruction have had three options from which to choose: formal rules (that is, calling the previous question, suspending the rules, voting cloture, arranging unanimous consent agreements, or ruling members out of order), attrition (that is, wearing the obstructionists down), and parliamentary innovation (that is, changing a chamber's rules or precedents) (pp. 19–24). Why would legislators try to obstruct at all? Well, more than one answer emerges. They might wish to block a bill—the obvious aim—but otherwise they might wish to gain license for amendments, force action on an unrelated issue, take a stand, delay action on a second bill, or ensure prolonged discussion (p. 103).[8] All these aims have historical grounding. Koger goes on in this classifying vein. Labels make an appearance. New to me were "clusterbusters" (pp. 104, 148–149), "buffer bills" (p. 114), and "hostage-taking filibusters" (pp. 112–113, 132).

Historical explanation. By this I mean the kind of narrative spiced with genetic or probabilistic explanation that historians ordinarily use to trace causation.[9] Congressional obstruction cries out for both a social scientist's touch and a historian's touch. In this regard, Koger turns out to be a first-rate historian. His judgments are interesting, well-grounded, well-argued, and credible even when they are contestable and sometimes speculative. As a result, his "mapping" chapters can also be read as good history. Here are some tastes of his presentation:

- "Another nine filibusters [in the 1850s] were directly related to the emergence of the Republican Party and the dissolution of the union" (p. 68).
- "To the extent that the Compromise of 1877 shifted Reconstruction policy, this change is the result of a filibuster in the U.S. House" (p. 71).
- "The implication of these patterns is that Senate decisionmaking changed significantly during the middle decades of the twentieth century . . . An increased capacity for senators to filibuster is probably a contributing factor" (p. 130).
- "While historical evidence on the emergence of these norms [that is, the mid-twentieth-century Senate norms documented by Donald Matthews in 1960] is scanty, they might be considered a repudiation of Huey Long, who began grandstanding as soon as he arrived [in the 1930s], rejected committed work, filibustered on various issues, insulted his colleagues, and used the Senate floor as his personal stage" (p. 160).[10]
- "This single vote [on a communications satellite bill in 1962] transformed cloture politics in the Senate" (p. 169).
- "Instead of reducing obstruction, these reforms [of the 1970s] institutionalized the notion that filibustering was an ordinary element of Senate decisionmaking" (p. 178).

Prominent in accounts like these is human agency. Certain congressional obstructionists have tested the limits—for example, Senators Robert La Follette (p. 4),[11] Matthew Quay,[12] "Pitchfork" Ben Tillman (p. 148), Huey Long (pp. 158–160), Strom Thurmond (p. 121), and James B. Allen (pp. 176–177).[13] Certain leaders have clamped down or tried to do so—House Speaker Thomas Reed famously in 1890 (pp. 53–55).[14] Senate instances include Nelson Aldrich (pp. 4, 74), Robert Taft (pp. 163–164), Mike Mansfield (pp. 167–172), Robert Byrd (pp. 177–183), and Bill Frist (pp. 183–185).[15] Vice presidents have often weighed in as majoritarian advocates in their role as Senate presiding officers.[16] To a degree, the history of the relevant processes is a sequence of what these various figures did. It could have evolved otherwise had they done otherwise.

Data sets. My dissertation advisor V. O. Key, Jr., once said that it is easier to lie without numbers than with them. Hence, the high value of data sets. Data gathering can be especially tricky in areas where behavior has a strategic substratum. Congressional obstruction is an obvious instance. But good measurement has been done. Richard S. Beth compiled a list of Senate filibusters that is well regarded.[17] Binder and Smith have contributed data sets on major Senate rules changes and procedural rulings, numbers of Senate filibusters per Congress, and measures

blocked and enactments shaped by Senate filibusters or the threat of them.[18] Wawro and Schickler have provided, among other things, data sets on Senate dilatory motions and on the sizes of Senate winning coalitions on major legislation.[19]

Koger adds to this stock of calibration. For reasons of data availability as well as congressional practice, he handles the nineteenth century one way, the twentieth century another. For the nineteenth century, he tracks instances of dilatory motions and, separately, of disappearing quorums as indexed by trademark motions in the House and, separately, the Senate (pp. 43–49). In turn, these results feed into a data set of bills that encountered a threshold of obstruction whether or not they passed (those outcomes are documented, too) (pp. 57–66). For the twentieth century, he resorts to the *New York Times* and other media sources for references to House or Senate filibuster activity or the threat or anticipation of it, yielding 6,055 articles in the *Times* alone (pp. 99–111).[20] For the Senate, these media references sort into 879 distinct filibusters (or looming ones) during the twentieth century, with a trend line zooming up starting in the 1970s (pp. 106–108). Anyone, not just its compiler, can use a data set, and I would expect considerable use of these Koger compilations. So far as I can tell, they are well put together.

Analysis of variance. Having assembled his data sets, Koger deploys them (Chapters 5, 7). The workhorse logic of the social sciences makes an appearance in variables and regressions. Obstruction per Congress performs as a dependent variable for the nineteenth century, number of Senate filibusters per Congress for the twentieth century. Independent variables are carefully crafted. Perhaps the chief message from the Koger equations is that, over time during either century, obstruction varies with chamber workload. A tighter time schedule tempts members to put sticks in the spokes. This ratifies a judgment arrived at by other analysts.[21] Generally speaking, I found Koger's equation work well worth attending to, yet somewhat ornate and indirect.[22] Independent variables that slope monotonically or nearly so over a long stretch of time, such as member attendance or chamber size in the nineteenth century or the rise of the Tuesday-Thursday Club in the twentieth, can pose interpretive problems. I am not sure that membership stability indexes the strength of norms (p. 140). I did not know what to make of a borrowed variable counting number of presidential requests that soars to then-historic heights under President Chester Arthur.[23] But these are matters of judgment. In the assembling of these equations there is a wealth of interesting information. You can see the moves and appraise them, and everything is clearly presented.

Theory. Krehbiel set a new standard for theorizing about the filibuster in his *Pivotal Politics*.[24] His formulation is sleek and elegant, and it fits well with the experience of the last quarter century or so in which the Senate's 60-vote cloture pivot has approached the sureness of the Constitution's two-thirds presidential veto pivot as a marker of enactment possibility. A "gridlock interval," now a well-known term, sandwiches between those pivots. Technically, if members and policies are arrayed along a unidimensional policy space, no status quo policy located anywhere between these pivots can be changed, even if a legislative majority exists that favors change. In a familiar scenario, the presidential veto can block proposals for change from one side, the Senate filibuster from the other.[25] Among Krehbiel's simplifying assumptions are that filibustering is costless, members care only about policy (not, for example, about playing to the constituency galleries), members count equally (intensity differences are irrelevant), each legislative enterprise is in principle isolated from all others, and the Senate's rules are exogenous (that is, certain and fixed, not changeable).[26] Seemingly implicit also is the idea that voters, insofar as they enter the picture at all, care about policy but not process. These are stern constraints,[27] but, again, the theory works well for recent times. For one thing, little is more striking these days than the near costlessness of Senate obstruction. A threat, or even an intimation of a threat, can bring things to a halt.

That is these days. Koger, and also Wawro and Schickler, dwell on the past. How could it be that obstruction often occurred and sometimes prevailed back then, yet majority rule also routinely occurred? How can we illuminate what was happening on the obstruction front during the first two centuries of congressional history? To accommodate the earlier experience theoretically, Koger, and Wawro and Schickler, proceed by relaxing a number of Krehbiel's assumptions. For discussion purposes I will blend together certain relaxation moves made in these two post-Krehbiel works, since their authors' arguments are similar (though not identical). Also, I will attach the arguments specifically to the past although they are not entirely irrelevant to the present, as will be seen. The overall theorizing seems apt in both works given the loosened constraints. Following are certain of those relaxations. I aim for shades of emphasis, even if that might mean violating standards of duplication or crispness.

- *Convenience*. Obstruction back then, as well as efforts to contain it, could entail physical, comfort, or other convenience costs. It was no fun to sleep on cots in sweltering quarters or risk heart attacks. Time at home, at outside pleasures, or with constituents could be lost opportunities.[28]
- *Public opinion*. Obstruction, as well as efforts to contain it, could incur costs or benefits in the realm of public opinion. Position taking might earn points with the public, but ugly spectacles could lose points, and majority strategists had to consider whether crackdowns would play well.[29]

- *Agenda space*. This is basic. Obstructionists, as well as majorities that would contain them, had to consider whether their actions might gain or sacrifice opportunities to address other legislative issues. Calculations of how to proceed could vary with the heaviness of chamber workload, the tightness of time, and, specifically, the proximity to an adjournment.[30] As a theoretical matter, relaxed here, for one thing, is the idea that issues are in principle isolable from each other in process terms as Congress takes them up.
- *Intensity*. Members could differ in intensity on or across issues and act accordingly.[31] As with certain tariff bills of the nineteenth century, high intensity on both sides might bring dramatic, drawn-out contests before an engaged, polarized public.[32] "Asymmetrical intensity" might array stubborn minorities against tepid majorities—a chronic, and chronically consequential, pattern on Civil Rights during the many decades in which the Senate's white southerners outcared, outmaneuvered, and outlasted northerners.[33] Emphatic violations of the isolability assumption often occurred in this issue area as impatient northerners threw in the towel on Civil Rights so as to pursue other legislative causes.[34]
- *Changeable rules*. Congressional rules were not rigidly fixed. Then as now, in the Senate as well as the House, a whiff of endogeneity inhered in the realm of congressional rules. In the Senate, antiobstruction reforms could come about through formal rules changes, as in 1917, 1959, 1975, 1979, and 1986, or else through on-the-spot "creative reinterpretation" of Senate precedents, as in 1872, 1897, 1908, 1935, 1937, and 1976.[35] Just as important, the *threat* of clampdown changes in the Senate's rules or precedents could hang in the air and enter the strategic calculations of all sides—as in, for example, 1841, 1858, 1873, 1893, 1903, 1947, 1957, 1960, 1975, and recently in 2005 when Majority Leader Bill Frist flirted with the "nuclear option" to carry his party's judicial nominations.[36]

Brandishing these relaxations, Koger offers what he calls a "general theory of obstruction" (Chapters 1, 2). In this model, filibustering is "a strategic game between teams of legislators in which legislators receive both policy and position-taking payoffs, incur penalties for wasting time, and pay special costs for active filibustering" (p. 10). In the classical Senate, to put it in a nutshell, minorities could aim to win legislative victories by exacting the various kinds of costs discussed here. Majorities, weighing various possible costs, benefits, and options, could respond by cracking down, notably through "wars of attrition." Out could come the cots. Critical was "the patience of the majority compared to the resolve of the obstructionists" (p. 13). All this seems sound. Koger, aside from his reflections about monitoring by the public, is a bit short on what might have kept this classical system in place. On this question, Wawro and Schickler step up with the idea that, in general, the Senate has tilted toward norms rather than formal rules—including any strict majority rule—as a mode of operating. Mutual adjustment emanating in norms has served the members' individual and collective interests. The senators have not wanted or needed strict majority rule. In the classical Senate, for one thing, obstruction as a means of signaling intensity served an agreeable purpose.[37]

So what happened in the 1970s and 1980s? How did the cloture pivot get stiffened? This change was gradual and at least for that reason hard to get a handle on. Yet analysts agree that soaring time constraints were a central ingredient.[38] Rising demands of workload, campaigning, fund-raising, and travel back home put an end to wars of attrition: "The sixty-vote Senate is the product of impatience" (p. 5). More specifically, "the unwillingness of majorities of fewer than sixty senators to engage in wars of attrition and incur the attendant costs is essentially what has made filibustering costless for minorities."[39] Now, the minorities could just beef and block. The history could have run otherwise. The senators of the 1970s, vexed by their newly clogged context, could have reached for strict majority rule as did the House in 1890. But they did not do that. Instead, they sidled into routinizing today's 60-vote pivot: "The main narrative is that votes [60 of them] replaced intensity as the critical commodity of Senate lawmaking" (p. 147).

Those are the bones of the Koger structure, along with certain borrowings from others. I see the following as special lessons and questions raised by Koger's analysis.

First, it is well to realize with Koger that the Senate has not stood alone as a legislative body prone to obstruction. Once, before the Reed reforms of 1890, there was the U.S. House (pp. 42–53): "By almost any method of measurement that we choose, there was more filibustering [during the century before the 1890s] in the House than in the Senate" (p. 51). There does not seem to be any doubt about it. Koger also came across references to obstruction in 20 state legislatures, 19 foreign legislative bodies, and the United Nations (p. 5). The tips, narratives, and analytic equipment brought to bear by all the authors surveyed here might interest a wider audience.

Second, race, sectional politics, and Civil Rights keep lurching to the foreground in an account of congressional obstruction. This is even truer than we might have thought. Until the 1960s, slavery and then the southern caste system were contested questions in U.S. history, and congressional obstruction kept erupting as an emanation of that contesting. There are several memorable nodes. In the House, the conflict over receiving antislavery petitions in 1840 hinged on filibustering (p. 67). It is *not* true that congressional obstruction in the pre–Civil War era issued

in any special degree from senators (as opposed to House members) or from the pro-slavery side; any such image seems to be a false elision backwards from twentieth-century experience. But it is true that both northerners and southerners, pursuing their opposing causes, lofted congressional obstruction to new heights in the 1850s, late 1860s, and 1870s (pp. 69–72).[40] As noted, a House filibuster in 1877 backgrounded the key sectional compromise of that year (pp. 70–71).[41] The defeat of the Force Bill in 1891, which aimed to guarantee African American suffrage in the South, was not only a major policy event but also, in confrontation terms, "an important chapter in the history of Senate lawmaking and obstruction."[42] Following World War I, another tense showdown came in the successful Senate filibuster of the Dyer antilynching bill in 1922. New to me was Koger's idea that the southerners' alarm over the Dyer bill spurred them into nourishing, as a pan-Senate logroll, the reluctance to vote cloture on anything at all (the two-thirds cloture rule had been adopted in 1917) that stamped the chamber for decades afterwards (pp. 118–119, 123, 154–157). Finally came the familiar generation-long run-up across filibuster hurdles to the historic Civil Rights enactments of 1964 and 1965 (pp. 169–171).[43] That brought the end of a story. The Senate's filibuster explosion of the last 40 years has followed on the country's extrication in the 1960s from a particularly faceted, century-long association between obstruction and race.

Third, one common suspicion is that the rise in Senate filibustering during recent times has had something to do with growing polarization—in particular, polarization between the two parties.[44] The topic is mind-clouding. In principle, "polarization" seems to connote an increasing distance between two sides on some issue or ideological scale. But it also seems to connote an accentuation of opposing intensities located in two sides (or, perhaps, just the existence of high-gauge opposing intensities), which is not the same thing. Also, of course, intensities can be asymmetrical. Because imbalance is a property of asymmetrical intensity, we might not call that latter state "polarization."

Let me preface the rest of this discussion by bringing up some history. In 1850, Congress debated the historic Compromise of that year monitored by a convention in Nashville at which representatives of one region threatened secession if they lost.[45] In 1856, when Preston Brooks caned and nearly killed Charles Sumner on the Senate floor in a confrontation over slavery, the New Englanders back home raged but the white deep-southerners back home cheered.[46] In the late 1850s, certain members packed pistols on the House floor.[47] In 1877, as Koger reports the deal settling the contested Hayes-Tilden election, "Obstruction may have literally been a proxy for violent conflict . . . The ability of House Democrats [notably southerners] to credibly threaten a descent into chaos empowered them to extort an apparent shift in federal policy toward the South" (p. 71). In all of these cases we see sky-high intensity. In all of them we see polarization, although the intensities had grown somewhat imbalanced by 1877.

Now for the point. It is a real headache to measure either intensity or polarization. True, polarization can be dented into by analyzing summary congressional roll-call data. It is of relevance to ask whether the members line up coherently into opposing sides, as does Koger (pp. 138–139, 143–145).[48] But going beyond such denting runs into trouble. Missing is a calibration of oomph inhering in the two sides, especially if that oomph is societally induced. For this purpose, I do not see a way to manipulate roll-call data that distinguishes clearly between the congressional conflict of the Civil War and Reconstruction era and, say, heated partisan disputes today about how high to raise the minimum wage. I cannot imagine any array of roll-call data that would convince me that polarization and intensity were *not* sky-high from the 1850s through the 1870s.

For the most part, it is probably best to look beyond roll calls for sure guidance on intensity or polarization. That might mean using not easily scalable historical evidence. Certain data sets can be suggestive. For the nineteenth century, Wawro and Schickler present a time-series plot of Senate obstruction events that neatly zooms to peaks in the 1850s and the Reconstruction era—there is an understandable sag during the intervening Civil War when the southerners were absent.[49] This plot has surface validity. As for polarization between the parties, an interesting clue is Jeffery Jenkins's plot of contested House elections from 1789 to the present. These are cases where an apparently losing candidate in a district challenged the outcome officially. Busy data appear from the 1860s into the 1890s.[50] During these years, the stakes of House party control were uncommonly high as the Civil War was fought, its memories were kept, and its results remained contested; edgy use of election returns was widespread. These Wawro/Schickler and Jenkins data sets are suggestive backhand routes to polarization. Summary roll-call data can help, too. But I do not see a convincing overall forehand route.

There is an implication for recent times. To figure out whether rising polarization—especially if it is societally anchored—has been spurring increasing congressional obstruction during these times, we should not rely exclusively on summary roll-call data sets—even if they happen to march appropriately—to study or index polarization.[51] As in earlier U.S. history, context should be consulted. A promising argument exists. It is that ideological activist groups and campaign funding networks have nested within each of the two parties in an unparalleled way recently, infusing special oomph and loyalty into the cores of each of the congressional parties.[52] Now, a minority-party senator may face trouble back home by *not* joining a party

filibuster on a divisive issue. A primary challenger might appear; funding might disappear; bloggers or talk-show hosts might rant; the American Civil Liberties Union or the Club for Growth might rise up. Whatever else, given today's recruitment routines, the senator might have an origin and an identity in such purism. This scenario is aided by a variety of evidence, notably survey data, indicating that polarization has creepingly invested American politics at least in the key elite sector during recent times.[53] All of this is a commonsense interpretation of recent trends that seems quite plausible. On balance, polarization may compete with time tightness as a source of today's Senate obstruction.

Fourth, it is important to realize that the U.S. public is not entirely indifferent to the processes of Congress. Koger is adept on this question. Voters can care about process as well as policy. Public opinion can constrain both obstructors and the curbers of obstruction. At a level of specific issues, the public, or at least nontrivial sectors of it, may have views not only about whether a bill should pass but also about whether it is in order to obstruct it or to crack down on obstruction of it. This can be important. Koger writes, for example, that Senate opponents of the Lend-Lease Act and of relaxing the Neutrality Act in 1941 gave up on obstruction once they concluded that that course was a loser with the public (p. 162).[54] In 2005, the flare-up over using the "nuclear option" to clinch George W. Bush's judicial nominations was shot through with calculations by both parties' leaders about whether a majoritarian crackdown, or on the Democratic side an all-out response to it, would play well with the public (pp. 183–186).[55]

The argument goes deeper. Electorates can have consequential views about legislative processes in general. Legislatures are creations, after all. The United States is not California, where voter initiatives targeting the behavior of that state's legislature (either by specifying its processes directly or specifying the means for selecting its members) have been a running story—supermajority rules for budgets in 1933 and for tax hikes in 1978,[56] the abandonment of "cross filing" in primaries in 1952, imposition of term limits in 1990, the jungle primary in 2010.[57] Voter initiatives are not on the table nationally. Yet twice, constitutional amendments have reached into congressional processes. The Seventeenth Amendment in 1913 brought direct election of senators, and the Twentieth Amendment in 1933 targeted Senate obstruction (I was surprised at Koger's convincing account of how big a role this concern played in the anti-lame-duck drive) by scrubbing the old congressional sessions with their sure deadlines (pp. 41–42, 111, 157–158). Also at the national level, pressure campaigns can mimic California's initiative drives. Koger clocks a "reform threat," for example, in a surge of newspaper articles dwelling on Senate cloture reform during the late 1940s through the early 1960s as the Civil Rights cause heated up (p. 141). Filibustering soared then as a public issue. In hindsight, it seems a good bet that this reform drive would have culminated in an antifilibuster rules change if the Civil Rights bills of 1964 and 1965 had been blocked.[58]

Yet this anti-obstruction story has a tail on it. As a general proposition, shades of California's budget constraints, it is not clear that the American public favors strict majority rule in Congress. In one survey probe in 2005, as the "nuclear threat" played out, most respondents in a Gallup poll opposed efforts to eliminate the Senate filibuster.[59] Perhaps this is the normal public pulse. For one thing, for those who think about it, performance assessments of the Senate as opposed to the majoritarian House of Representatives might not work in the House's favor.[60]

Fifth, the question of congressional obstruction will not sit still. Amid the long history of moves and countermoves by the obstructors and their would-be quellers, one pattern is of gradual buildups of great exasperation on the majority side—we are not going to take it anymore. In the House, the Reed rules of 1890 had such antecedence: "After a decade of increasing obstruction in the House, the Fiftieth Congress (1887–89) was especially dysfunctional" (p. 53). Senate cloture reform in 1917, whatever its immediate trigger, grew from a worsening "general political and institutional environment of the early-20th century."[61] As for the Twentieth Amendment, the "rash of short session filibusters during the 1920s fed the movement for reform" (p. 157).[62] The reform drive of the postwar Civil Rights era, although it did not spur actual rules changes, belongs on this list. We may be seeing another exasperation buildup right now. Obstruction and the reaction to it have been tying the Senate in novel knots during the last decade.[63]

Finally, the Senate filibuster is one tough bird. It is challenged, and it changes, but many factors keep it alive. Koger concludes: "Filibustering remains the defining institution of the Senate because generations of legislators have resisted the occasional effort to impose majority cloture on their chamber" (p. 199). Not least, the members value their individual prerogatives.[64] If I were a power-happy senator, I would love the "holds" system (pp. 173–176). Possibly underweighed in public discourse is the role of carve-outs in keeping the obstruction system in place (pp. 161, 178–179).[65] Carve-outs began in the Executive Reorganization Act of 1939. Under this act, presidents could offer plans to reorganize the executive branch, but Congress could block such plans, and strict majority rule would obtain in either chamber in considering any blocking motion.[66] Here was a specified formal immunity to obstruction by a Senate minority. Fast-track trade agreements have been another area of formal carve-out; presidents have enjoyed sure unobstructable Senate votes. An application of the "nuclear option" in 2005 to just judicial nominations, not legislative measures, would have been

another carve-out. The crowning carve-out is the "reconciliation" process of the Budget and Impoundment Act of 1974.[67] Budgets cannot be filibustered. Also, surprisingly, from 1981 through 2010 the reconciliation process has come to accommodate huge spending cuts, tax cuts, and entitlements expansion assisted, to boot, by inventive arithmetic. As a dent into Senate obstruction, exemptions insertable into reconciliation are a trend to keep watching. These are large holes in the supermajority dike. There is an irony. The Senate filibuster stays alive and well and it touches a great deal, but one thing probably keeping it from being scrapped is an evolving limitation of its scope. If the parties cannot achieve aims like Ronald Reagan's government shrinkage, George W. Bush's tax cuts, or Barack Obama's health-care reform, they might get the rules changed.

In the end, Koger does not come down as an abolitionist on the question of the filibuster. There are pluses and minuses. "The contemporary Senate," he writes with apparent approval, "still embodies the notion that every legislator should have influence, that minorities should be heard, and that there are bounds to the bonds of party" (p. 200). In normative terms, the leading frame for evaluating the Senate filibuster is no doubt that of majority rule versus its lack (pp. 189–194). Yet this frame has its ambiguities. A majority of what? Of a congressional chamber, or of the American public? Often, these standards are not identical. The parties, victors in elections for whatever reasons, come storming into power bent on pleasing their off-center bases. "Party government" can amount to a kind of ideological rent seeking in which the median voter pays the rent. In this circumstance, it is no surprise that American voters tend to tire of either party's policy performance rather quickly, switch to the other party, then get tired there too, then switch back, and so on. Policy overshooting is the norm. Homeostatic gyration between left and right is the general picture.[68] Accordingly, one view of Senate supermajoritarianism might be: Anything that dampens this gyration is a service to democracy. Yet a countering argument is that the American governmental system tilts toward stasis in a great many ways. Elite-led policy innovation aided by slim unobstructed party majorities, regardless of what the median voter might think, is needed to make anything happen at all. From the standpoint of democracy, however, this latter argument has a compensating downside: The country can get stuck with off-center policies—or off-center federal judges—for a long time.

There is an additional evaluative frame, perhaps the most important one. The United States has a presidential system. The White House is the country's main center of power, energy, initiative, and public attention. It is also the chief potential threat to the balance of the system, given among other things the president's commander-in-chief authority. On Congress' side, nothing is more important than that institution's role of *opposition* to the presidency.[69] Discussions of congressional processes need to bear that role in mind. Regarding the Senate filibuster, that consideration seems to cut two ways. On the one hand, presidents have an institutional temptation to cry crisis and ram their remedies quickly through both houses of Congress in a haze of go-ahead majorities. Often, the tires of those proposals need to be kicked. Throughout U.S. history, the members of the Senate have done a lot of the kicking. Often, that chamber's slow-down processes have invited an evolving public opinion into the decision making. On the other hand, Frances E. Lee has pressed an interesting argument recently.[70] The particular clog-up of Senate processes in recent times may be inducing a functional drift of decision power to the White House and the executive agencies. This would be an ominous development.

Notes

1 A pioneer was Franklin L. Burdette (1965).
2 Wawro and Schickler 2006, 72–76.
3 Ibid., Chap. 6.
4 Mayhew 2003, 33.
5 Mayhew n.d., Chap. 4.
6 Scholars of constitutional law as well as political scientists have noted the procedural hardening. Fisk and Chemerinsky commented in 1997 (p. 184): "The contemporary filibuster is an entirely different—and generally more powerful—weapon than the filibuster of the past."
7 As can Wawro and Schickler 2006, Chaps. 3, 5–7.
8 Before the adoption of the Twentieth Amendment in 1933, another occasional aim, as a lame-duck session ended, was to force the president to call a new Congress into session by blocking legislative action at the close of the old one.
9 See Nagel 1961, 564–575.
10 In a sketch at pp. 158–160, Koger provides a sense of how badly Huey Long traumatized the Senate and how his colleagues reacted in alarm.
11 See also Wawro and Schickler 2006, 51–52, 71–72, 205–206.
12 Ibid., p. 52.
13 On Allen, see also ibid., pp. 267–68.
14 See also ibid., p. 63.
15 See also ibid., pp. 3–4, 77–86, 205 on Aldrich; 267–268 on Mansfield; 268–269 on Byrd; 264–265, 269–271 on Frist.
16 Instances include Charles Dawes, Richard Nixon, Hubert Humphrey, Nelson Rockefeller, and Walter Mondale. See Koger, 154–155; Wawro and Schickler 2006, 33–34, 266–269; Binder and Smith 1997, 175–182.
17 Beth 1994.
18 Binder and Smith 1997, 6–13, 129–136, 144–146.
19 Wawro and Schickler 2006, 96–108, 111–118.

20 Koger is careful to note that the *Times* might pay special attention to New York affairs. In 1986 and 1992, Senator Al D'Amato of that state "waged solitary filibusters on behalf of his constituents that coincided with his reelection campaigns." At least in 1992, only the *Times* seems to have taken note (pp. 100, 116).
21 See Binder and Smith 1997, 63–66; Fisk and Chemerinsky 1997, 186; Oppenheimer 1985; Wawro and Schicker 2006, 193.
22 Certain equations in Wawro and Schickler 2006 seem to work a bit better; see pp. 118–125, 182–195.
23 The time series in Figure 5.4 at p. 83 seems to say that. For the entire nineteenth century, the decade of the 1880s is a clear winner in this measure that is given the label "external policy demand" (p. 82). For this reading, there is more surface plausibility in the cases of the Grover Cleveland and Benjamin Harrison administrations of that decade. Yet no bump at all appears for the 1860s, which enjoyed considerable external policy demand, if not necessarily from the White House.
24 Krehbiel 1998, Chap. 2.
25 Ibid., pp. 34–39.
26 The Constitution is in the background. Koger (pp. 40–42) makes the interesting point that the U.S. Constitution in some ways *invites* obstruction against congressional majorities even if it does not authorize it (except explicitly in the cases of treaties, etc.). The quorum requirement invites minorities to disappear. The requirement of roll calls invites minorities to keep asking for them. Before the adoption of the Twentieth Amendment in 1933, the certain deadline hanging over lame-duck sessions invited last-minute footdragging.
27 I hope I have them correct.
28 These ideas appear in Koger, pp. 16, 17, 22–23, 26, 31, and 78–80. See also Wawro and Schickler 2006, 26–28, 30–31.
29 See Koger, pp. 10, 16, 23, 24, 29, 116, 184 (a recent instance); Wawro and Schickler 2006, 5, 31, 142, 181–83, 271–73 (the same recent instance).
30 See Koger, pp. 22, 24, 28, 78–90, 112–114, 133–136, 148–149; Wawro and Schickler 2006, 30–31, 54, 56–57, 76–86.
31 See Koger, pp. 68, 70–71, 74, 116; Wawro and Schickler 2006, 28, 35–36, 42, 55, 76–77, 82–83, 86–87.
32 The tariff measures of that time could be "in general highly salient to both supporters and opponents." "It became quite typical for the consideration of each bill to drag on for anywhere from one to six months in the Senate." One reason for this drag was minority obstruction. See Wawro and Schickler 2006, Chap. 6 ("Obstruction and the Tariff"), quotations at pp. 127, 147. The authors view a "highly intense minority" as "one that both opposes the substance of the legislation and believes that its constituents will reward it for pushing that opposition to the limit, even at the cost of other legislative priorities" (p. 129). Some, though not all, oppositions in the tariff realm met these criteria. Tariff advocates were intense also.
33 See Koger, pp. 74 (site of the term), 116–124; Wawro and Schickler 2006, 86–87.
34 See Mayhew 2003, 32–34; Wawro and Schickler 2006, 76–77, 82–83.
35 See Koger, pp. 10–11, 23–24, 152, 176–178; see also Binder and Smith 1997, 7, 175–176, 181–182; Riddick 1974, 436–438; Wawro and Schickler 2006, 26–29 (quotation at p. 27), 32–34, 58, 65–72, 211–214.
36 See Koger, pp. 74, 121–122, 140–141, 148–151, 163–164, 177, 183–186; see also Binder and Smith 1997, 176, 181; Wawro and Schickler 2006, 3, 5, 37, 49, 58, 61–62, 72, 76–87, 264–276.
37 See Wawro and Schickler 2006, 11, 28–29, 38–42, 58–59. "We argue that a small collective choice body does not necessarily need extensive, explicit procedural infrastructure in order to meet the demands it confronts. A set of shared, stable procedural expectations can evolve and be sustained over the long term that can serve the collective interests of the body as well as the individual interests of its members" (p. 11). As for the Senate before 1917, "When an issue was salient to both the majority and minority, the pre-cloture Senate was essentially majoritarian, with the sole caveat being that filibusters in the final days of a congress posed a genuine threat to legislation . . . The pre-cloture Senate accommodated preference intensity through the device of unlimited debate, while still allowing the majority, as a general matter, to rule" (p. 28).
38 See Koger, Chap. 7; see also Binder and Smith 1997, 13–19; Oppenheimer 1985; Wawro and Schickler 2006, 259–264.
39 Wawro and Schickler 2006, 262.
40 See also ibid., p. 120.
41 See also Holt 2008, 234–243.
42 Wawro and Schickler 2006, 76–87, quotation at p. 76. See also Koger, p. 74.
43 See also Binder and Smith 1997, 136–141.
44 See Koger, pp. 8, 138–39; see also Binder and Smith 1997, 15–18.
45 See Remini 2010, 56–58, 89, 131–132, 135, 151–152, 157. The southerners at Nashville "waited to see if the politicians in Washington could work out a compromise that would allow them to remain in the Union" (p. 157).
46 Freehling 2007, 81–84.

47 Ibid., pp. 247, 257.
48 And as do Binder and Smith 1997, 15–18.
49 Wawro and Schickler 2006, Figure 5.2 at p. 120. This is a plot of dilatory motions. The authors are careful to point out that the dataset sags in utility around 1900 when the senators were shifting from dilatory motions to long speeches as obstruction techniques.
50 Jenkins 2004, Figure 1 at p. 116.
51 Koger takes up the causal relation between polarization and obstruction in a multivariate analysis covering 1901–2004, using standard manipulations of roll-call data to index polarization, and comes up dry. See pp. 143–145. There is no *general* fit. It is an embarrassment, for one thing, that roll-call polarization was generally high in the early twentieth century, for whatever reasons, yet the incidence of filibustering was low at that time (pp. 107, 139, 143). Possibly the data could be maneuvered to yield a positive answer in a multivariate analysis covering, say, just the last 40 years. There is no doubt that roll-call polarization, at least by one of Koger's measures, and in common consensus, has been rising during this recent time span at the same time that Senate obstruction has been rising. But questions would be left hanging. What was really going on?
52 See Binder and Smith 1997, 17; Koger, p. 184; Layman et al. 2010.
53 See Fiorina 2005; Nivola and Brady 2006. There is dissensus about the degree of polarization in the general public, but not about its prominence in the elite sector.
54 Specifically in the latter case: "Public opinion thus acted as an effective constraint on obstruction" (p. 162).
55 See also Wawro and Schickler 2006, 272–273.
56 O'Leary 2009.
57 On cross-filing and term limits, Masket 2009, 50, 72–74. Cross-filing had allowed any candidate to enter the primaries of both parties without any designation of party affiliation on the primary ballot. The process was a deposit of the Progressive era. It brought a context in which the parties were weak, interest groups were powerful, and legislative incumbents tended to be sure bets for reelection through winning nomination in both parties. Democrats backed by labor unions took the lead in dismantling the cross-filing system in 1952. (Actually, it was not fully repealed until 1959). Standard U.S. election processes ensued. The Democrats' aim, which was pretty much achieved, was to allow a clearer presentation of the party's candidates and programs before the public, thus affecting the content of campaigns and in turn the behavior of officeholders. A half-century later, California's recent switch to an all-candidate "jungle primary" has been a move in the opposite direction. Its apparent aim is to weaken the parties or at least to diminish their well-honed ideological purism, notably in the state legislature.
58 See, for example, Gilmour 1995; Gold and Gupta 2004, 230–249; R. Mann 2007, 35–36, 68–69, 137–138.
59 Wawro and Schickler 2006, 273. This is an elusive subject. Views on the issue at hand in 2005 (the judicial nominations) might have swayed answers. A long time series of views on the filibuster would be helpful. Yet Wawro and Schickler comment with care on the 2005 Gallup report: "While the complexities of the issue and the obscurity of the Senate's internal workings require caution in interpreting responses to queries about support for the filibuster, the report indicated that the results were consistent across a broad range of question formats and wordings."
60 It is possible that the public reacted adversely to the Reed revolution bringing majority rule to the House in early 1890. Koger writes: "During the 1890 elections, the Democrats criticized the House Republicans' drastic rulemaking and their subsequent legislative activism. They scored a dramatic electoral victory, increasing their share of House seats from 47.3 to 69.4 percent" (p. 55). Other things were going on in 1890, but perhaps this interpretation has some merit.
61 Wawro and Schickler 2006, 181–92, quotation at 181. See also Koger, p. 111: "Note too that the number of filibuster mentions [in the press] increases significantly during the eight years preceding the adoption of the Senate's first cloture rule in 1917, from 27 to 153."
62 More generally, see Koger, pp. 99, 109–111, 157–158.
63 See Smith 2010.
64 See Wawro and Schickler 2006, 273–274.
65 See also Binder and Smith 1997, 185–194.
66 This executive reorganization measure of 1939 was much more protective of congressional authority than had been the White House's plan blocked by Congress in 1938.
67 On the generous use of reconciliation over the years, see T. Mann et al., "Reconciling With the Past," *New York Times,* 7 March 2010.
68 This pattern is astutely depicted in Erikson, MacKuen, and Stimson 2002, Chap. 9.
69 See the discussion in Mayhew 2000, 106–122, 219–224.
70 Lee 2010.

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