Supermajority Rule in the U.S. Senate

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For this occasion, I decided to tackle a topic of, I hope, some historical and theoretical interest, of current policy importance and one that might have interested James Madison.[1] That topic is supermajority rule in the U.S. Senate—that is, the need to win more than a simple majority of senators to pass laws. Great checker and balancer though Madison was, *this* feature of American institutional life would probably have surprised him and might have distressed him.

But we certainly have it today—filibusters, threatened filibusters, and the three-fifths cloture requirement that, except on budgeting and a few other matters, dog the legislative process. The 60-votes barrier has become hard contextual fact for the press, as in *Washington Post* coverage of recent efforts to repeal the inheritance tax and enact anti-cloning legislation: "The vote on the president's proposal was 54 to 44, six short of the 60 required for passage" (Dewar and Eilperin 2002); "Neither side appeared to have the 60 Senate votes needed to prevail" (Dewar 2002). Any observer of recent Congresses can recite instances of cloture-rule casualties—for example, during the Democratic Congress of 1993–94 under Clinton, measures in the areas of campaign finance reform, lobbying reform, product liability, striker replacement, and stimulating the economy (Binder and Smith 1997, 135; Fisk and Chemerinsky 1997, 182; Mayhew 1998, 274).[2] In political science, Keith Krebiel (1998) has addressed the current 60-votes Senate regime elegantly and convincingly in terms of a "filibuster pivot."

Automatic failure for bills not reaching the 60 mark. That is the current Senate practice, and in my view it has aroused surprisingly little interest or concern among the public or even in political science.[3] It is treated as matter-of-fact. One might ask: What ever happened to the value of majority rule? This is a complicated question, but I would guess that one reason for the lack of interest or concern is an impression of the past. If majority rule is in principle the preferred standard, conditions may be bad in the Senate today but weren't they even worse in the past? After all, the cloture rule called for an even higher two-thirds vote between 1917 and 1975 (that would mean 67 senators today, not 60). Some political scientists are hypothesizing the existence of a decisive two-thirds "filibuster pivot" during that long middle half of the 20th century (Young and Heitshusen 2002; Sala 2002). Back before 1917, when there was no cloture rule at all, how did the Senate manage to enact any legislation at all? In the face of this stylized history, the current judgment probably is: If Senate floor majorities have it rough today, they used to have it, if anything, rougher. Why worry?

But was the past really like that? I for one doubt it. This is a general impression. Across a wide range of issues, I doubt that the Senate of past generations had any anti-majoritarian barrier as concrete, as decisive, or as consequential as today's rule of 60. If anything, floor majorities seem to have had it easier. Consider off the top, for example, the big tariff bills that often fired party passions and dominated congressional politics from the 1820s through the 1930s. Often, those bills cleared the Senate by sliver-small majorities, and there does not seem to be much sign that policy minorities enjoyed muscular options on them in the Senate that they lacked in the House (Schickler and Wawro 2002, 18–34).

This is an extremely difficult subject on both logic and evidence grounds. It raises considerations of anticipated reactions, threatened as well as staged filibusters, modification as well as blocking of bills, not to mention two centuries of congressional history. There are various ways of attacking it. (For some, see Schickler and Wawro 2002). But it is at least an empirical subject. Reading the rules of the Senate to deduce what happened in the past is not enough. My course here is to probe into the Senate record of *one* particular past Congress with an eye for the strategies and actions of floor majorities and floor minorities. If rules are significant, they should leave traces in evidence about strategies.

The 75th Congress of 1937–38 is my choice for examination. This is



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for three reasons. First, the majority party's legislative aspirations during that Congress were unusually high. Possibly no party's have ever been higher. Franklin Roosevelt had won a landslide reelection, the New Dealers entertained a commensurate agenda, and the Republican congressional minority had been reduced to 16 senators and 89 House members—lows for a major party during the 20th century. In all of American history, this may have been the left's main chance for a policy breakthrough. Second, it was widely believed, as the Congress began, that if any of the elective institutions was to block the New Dealers' initiatives during 1937–38, it had to be the Senate. The House Democratic party entirely elected on a ticket with FDR in 1936 was thought to be in his pocket. (As it happened, this proved not to be true.) Third, notwithstanding its immense Democratic majorities, the 75th Congress earned a place in history for blocking bills. Concerted opposition in that Congress is not a null topic (Mayhew 2000, 110–13, 219–22).

Here, I will examine three lengthy, controversial, and well-publicized legislative drives of that Congress—all of which failed. They are FDR's proposal to pack the Supreme Court, FDR's proposal to reorganize the executive branch, and a major anti-lynching measure. The first two of these initiatives were top White House priorities in early 1937. Structural reform of the courts and agencies had to come first, the White House view was, if New Deal ambitions in various policy areas were to succeed. The anti-lynching measure was *not* a White House or Democratic party priority, although it was advanced by congressional liberals. Obviously, the civil rights area is an exception to any general speculation that Senate floor majorities may have had it easy in earlier times (Wolfinger 1971). Accordingly, the inclusion of the anti-lynching drive here, merited in any case on grounds of its historical importance, will afford some useful empirical and theoretical contrast.

I will present sketches of the three legislative drives, and then go on to offer three theoretical arguments regarding the strategies pursued by the relevant political actors in these various drives and the contexts in which they were pursued.

Anti-Lynching

This sketch can be very brief, since it bears out everybody's image of civil rights legislating during earlier times. There are no surprises. Aided by some gruesome southern lynchings, a nationwide campaign to enact an anti-lynching bill gained strength in the 1930s peaking in 1937–38 (Sitkoff 1978, ch. 11). The House passed a bill in 1937, FDR said he would sign it, and it reached the Senate in January 1938 with some 70 senators said to favor it (*Time*, Jan. 24, 1938, 10). But the southern Democratic senators, spotting a threat to their region's system of white supremacy, expressed "determination to prevent the bill ever reaching a vote." Many lengthy speeches ensued, as in the report: "[Allen] Ellender [D-LA] Speaks 4 Days and Goes On." Leadership efforts to break the filibuster were lax: "Such rules as might be inconvenient for filibusters were not enforced; all-night or even long-continued sessions were not employed" (Burdette 1965, 198–99). After two weeks, some 20 northern Democrats nominally favoring the bill signaled that it was time to move on as there was "little likelihood of breaking the filibuster." In late January and mid-February, successive cloture motions failed. The southerners continued to obstruct. After seven weeks, the Senate voted 58-22 to lay the measure aside. That concluded the anti-lynching drive of 1937–38.[4]

Court-Packing

In early 1937, President Roosevelt, exasperated by Supreme Court strikedowns of several key New Deal enactments during 1935–36 and worried about more such strikedowns, proposed a bill to authorize the appointment of one additional Justice for any current Justice over the age of 70. As of 1937, this would have expanded the Court to 15 members by adding six FDR nominees. One of the major controversies of American political history ensued (Alsop and Catledge 1938; Baker 1967).

Congressional handling of the Court-packing proposal was lengthy and complicated. There were three phases. In February and March, the bill was taken up in the Senate[5] where a vehement cross-party opposition led by the veteran Progressive Burton K. Wheeler (D-MT) devised a steering committee and a whipping system and joined an anti-FDR media campaign (Alsop and Catledge 1938, 80–105; Patterson 1967, ch. 3). Soon, radio listeners across the country could tune in to hear such senators as Wheeler, Josiah Bailey (D-NC), Carter Glass (D-VA), Henry Cabot Lodge (R-MA), and Arthur Vandenberg (R-MI) inveigh against the president's plan (Baker 1967, ch. 6; Moore 1968, ch. 8; Wheeler 1962, ch. 15). In the Senate, individual senators took to announcing their positions one by one. The press offered horserace coverage centering on which side could reach a Senate majority—that is, 49 votes. The bet was on FDR—the president would probably get his Court-packing plan if he really wanted it—but the Senate statistics languished along at roughly one-third yes, one-third no, and one-third undecided.[6]

During April and May (phase two), the Supreme Court, evidently reacting to its threatening political environment, handed down landmark decisions approving the Wagner Act of 1935, the Social Security Act of 1935, and other previous liberal or New Deal enactments. "Who needs a Court-packing plan anymore?" came to be asked on Capitol Hill. Considerable steam went out of the White House legislative drive, which fell below the likely majority mark in the Senate (Alsop and Catledge 1938, 135–216).[7]

But then in June and July (phase three), Roosevelt stubbornly insisted on a Court-expansion measure anyway, this time settling for one incremental Justice per year (rather than six all at once). On this revised measure the New Deal forces, led by Majority Leader Joseph Robinson (D-AR), seemed to have a slim Senate majority. That was the informed reading (Alsop and Catledge 1938, 217–43; Baker 1967, 231–34). It was showdown time. For the still adamant Senate opposition, any tampering at all with the size of the Supreme Court was poison. A vigorous filibuster loomed (Alsop and Catledge 1938, 248–50). Available for participation, according to Senator Wheeler, were 43 senators "ready to fight to the end—in seven speaking teams of five each and with eight senators in reserve" (*New York Herald Tribune*, July 3, 1937, 1). The ringleaders of this coalition, according to one account, "constituted themselves a sort of battalion of death" (Alsop and Catledge 1938, 248). That gives a sense of the opposition's determination.[8]

Given the two-thirds cloture rule, shouldn't that have been the end of it? In fact, it wasn't. Majority Leader Robinson moved to crack down on obstructive activity, and the Senate's presiding officer, Key Pittman (D-NV), contributed some procedural rulings favorable to the White House cause.[9] It was not clear what the outcome would be. "The President told me he thought there were enough votes to put the Court program across," Interior Secretary Harold Ickes entered in his diary" (1954, 166). Senator Wheeler met with

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FDR but no compromise emerged: "Roosevelt believed his men had the Senate votes to pass the Court bill. Wheeler believed he had the strength, by means of a filibuster, to prevent a vote from being taken" (Baker 1967, 239). Many prognostications ignored or downplayed the cloture rule. In the *New York Herald Tribune* (July 6, 1937, 9): "Veterans are inclined to agree that no filibuster really succeeds except at the end of a session." In another newspaper: "General opinion is the substitute will pass, and sooner than expected, since votes enough to pass it seem apparent, and the opposition cannot filibuster forever" (Leuchtenburg 1995, 149). In the *New York Times* (July 2, 1937, 5): "As time marches on and they [the obstructing senators] see their local bills dying of attrition, it is confidently expected by administration chiefs that they will have a change of heart and let the compromise come to a vote." As of early July, according to Alsop and Catledge (1938, 244), "The two sides were so evenly matched and placed that none could tell how the fight would end."

In the end, fate intruded. Senator Robinson, the respected and, by some, beloved Democratic leader died of a heart attack in mid-July as a likely result of overexertion in the Court-packing cause, and that was that. Because of, or at least concurrent with, Robinson's death any Senate floor majority for the substitute measure disappeared and the bill was sent back to committee for burial (Alsop and Catledge 1938, 266–94). Interestingly, the House may have also lost its floor majority for the proposal at roughly this time, although no vote was taken (Baker 1967, 243; *New York Times*, July 14, 1937, 1).

Executive Reorganization

In many ways, the controversy over executive reorganization during the 75th Congress was a replay of the Court-packing struggle. It reached decision time a year later. In the reorganization case also, the president requested in early 1937, by way of a legislative proposal, vastly more leeway vis-à-vis another branch of government. In this case that leeway involved, among other things, authority to reorganize according to presidential taste any element of the executive branch though *without* the legislative veto power over specific plans that Congress did successfully insist on in the well-known reorganization bill enacted later in 1939 (Polenberg 1966, chs. 1, 2). Not surprisingly, many came to see the reorganization plan as a dangerous White House power grab. The House acted first and favorably. But as the plan reached the Senate floor in March 1938, an opposition coalition of some 40 senators coalesced under the leadership of, again, Senator Wheeler (*New York Times*, March 9, 1938, 4). The stakes were thought to be high. Under the headline "Wheeler Warns Senate Against Dictatorship," one report told of "heated interchanges which were reminiscent of the days when Senator Wheeler led the coalition fight on the President's court plan" (*New York Herald Tribune*, March 9, 1938, 1, 10). Senator David I. Walsh (D-MA) saw in the reorganization plan a "plunging of a dagger into the very heart of democracy" (Davis 1993, 213). The Senate debated for several weeks amid well-publicized maneuvering by both sides (Polenberg 1966, ch. 6).

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But the opposition's strategy was thoroughly majoritarian. It was to offer several appealing uppercut amendments in the hope that one or more would attract a floor majority. Success nearly came with a "Wheeler Amendment" that lost in a tense 43 to 39 showdown. As for obstruction, or rather its lack, the opposition twice signed on to unanimous consent agreements that guaranteed a final up-or-down Senate decision (Altman 1938, 1111–12), which came in a favorable vote of 49 to 42 in late March.[10] Yet a surprise was in store. Tens of thousands of anti-reorganization protest telegrams, inspired by the Gannett newspaper chain and its spinoff National Committee to Uphold Constitutional Government, flooded into the Capitol in late March and early April. The public seemed to be alarmed. That helped along a dramatic result in the House, where the reorganization plan, back for a second round of decision, was voted down by 204 to 196 on April 8 in an astounding defeat for the Roosevelt presidency (Polenberg 1966, ch. 8). Executive reorganization was finally killed in 1938, but a publicity campaign and the House did it, not the Senate. So much for the Senate as the blocking institution of last resort.

Explaining the Patterns

Those are the three sketches. All three bills ran up against sizable committed minorities. All three bills failed on Capitol Hill, somehow. But what we do *not* see is anything like an automatic application of the two-thirds pivot logic in the Senate. Indeed, the one measure that certifiably did fall to a filibuster, the anti-lynching bill, drew an opposition on the merits, so far as one can tell, of *fewer* than the 33 senators (that is, one-third plus one of the membership) required to work the pivot. The Court-packing and reorganization bills drew spirited minority oppositions of considerably *more* than 33 senators, but obstructive filibustering might or might not have worked in the former case—no one will ever know for sure—and was not tried in the latter.

What can be said that might illuminate these various results and the strategies that underpinned them? To me, a good deal of mystery remains, but I came away from the records with three general idea or conjectures that might help. Each of them involves relaxing an assumption often made in studying congressional behavior.

1) The Senate, with Its Rules that Allow Slowdowns, is Unusually Good at Accommodating Differences in Intensity

The Senate is probably better in this regard than the formally majoritarian U.S. House, although as Buchanan and Tullock pointed out years ago (1962), legislatures in general are pretty good at accommodating differences in intensity. That is one reason for having legislatures. For purposes here, the assumption that needs relaxing is one that is surprisingly commonly embedded, without thinking about it very much, in legislative research—that members have equal intensities on any issue and across all issues. They do not, and the fact that they do not helps to promote continual vote-trading among members and across issues in the form of explicit or implicit logrolling (Stearns 1994, 1277–80). In the particular case of the U.S. Senate,

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the rules of that body that allow slowdowns give, in effect, extra stacks of trading chips to intense minorities that face not-so-intense majorities.

Perhaps this argument about the Senate is obvious, but the disparate outcomes I have pointed to during the 75th Congress place it in relief. For an intensity differential on Capitol Hill, at least in the realm of reasonably broad issues, possibly nothing in American history has matched civil rights from the 1890s through the 1950s.[11] That helps account for the Senate's distinctive zero-outcome record on civil rights during that time. Anti-civil rights southerners representing their region's dominant white caste cared a lot; pro-civil rights northerners representing few blacks and largely indifferent whites cared little. As a plausible indicator of intensity—which is always difficult to measure—the southern senators were willing to talk forever and stay up all night. This commitment seems to be have been electorally induced, in the sense that the southerners could have gotten themselves into political trouble back home by *not* filibustering against civil rights bills.[12] The effect was a kind of electorally-induced weighted voting.[13]

Northern senators, on the other hand, tended to eye the opportunity costs of trying to match the southerners' commitment of time and energy and say no. Other agenda items beckoned. One way to size up intensity in the Senate is to watch the circumstances in which members will favor folding one legislative drive so as to move to another. In the civil rights area, in the face of southern obstruction, such procedural switching was once a signature move for many northerners. In 1890–91, the Federal Elections Bill gave way to pressing tariff and silver issues (Welch 1965). The anti-lynching cause had to give way to "the New Deal's 1935 program" or, for Senator George Norris (Ind-NE), "important economic legislation," in 1935 (Sitkoff 1978, 288; Greenbaum 1967, 83); to "many other important measures" including a $250 million relief bill in 1938 (*New York Times*, January 25, 1938, 6; Sitkoff 1978, 294); to defense and foreign policy considerations in 1940 (Sitkoff 1978, 295).[14] As a practical matter, costs beyond foregone agenda items could arise for northern senators choosing to combat these southern talkathons. Those might include lost family time, impaired health, and even, as Senator Robinson found in the sweltering non-air-conditioned Senate of the summer of 1937, their lives.

For the analysis here, the main point is a contrast. The Court-packing and executive reorganization drives of 1937–38, unlike the anti-lynching drive, did *not* feature an intensity differential between the two sides. Yes, this claim needs defense: Questions of evidence arise, distributions of views as well as coalition medians need to be considered, and, on the Court-packing matter, an intensity gap had indeed quite possibly opened up by mid-July of 1937. But the claim will probably stand. That raises the general question: Given a condition of approximately equal intensities, was it possible for Senate minorities to block Senate majorities back then? That is possibly the $64,000 question. Let me restate it more particularly and pose it as a historical question covering in principle the entire century and a half of American experience before World War II. Given a condition of roughly equal intensities on measures pressed as high priorities by presidents or congressional majority parties, given probably also the background environment of a non-lameduck Congress (in the old lameduck Congresses, obstruction was easier because of the March 3 closing deadlines),[15] was it possible for Senate minorities to block the legislative drives of Senate majorities back then? In fact, there seems to be precious little evidence that it was—either before or after the 1917 cloture reform (see Schickler and Wawro 2002; Burdette 1965; Binder and Smith 1997, 135). What are the instances?[16] If this conjecture about the history is, for whatever reasons, correct, that should reduce our surprise that the leaders of the Court-packing drive thought they could just bull their bill through in 1937 or that the opponents of executive reorganization did not even try to obstruct in 1938. There was solid warrant for both strategies.

2) The Rules Environment in the Senate can be Unclear

A two-thirds rule is a two-thirds rule, is it not? Not so fast! Words on paper are one thing, but the hard-headed expectations of politicians about how the Senate will actually operate are another. In fact, in the case of the Court-packing bill of 1937, it was not clear to the politicians or the Washington press corps what would happen if one-third plus one of the senators tried to block it. This was at least because no one could be certain what a determined floor majority, in league with a friendly Senate presiding officer, would do in a pinch.

For analytic purposes, the assumption that needs relaxing here is that of fixed rules. One theme in contemporary political science is that legislative rules can be *manipulated* (Riker 1986). But legislative rules can also be *changed*, which seems to be a distinctly different matter.[17] As of the 1930s, the history of Anglo-American legislatures had been, among other things, a record of majoritarian coups. Minorities enjoyed procedural prerogatives yesterday that they suddenly lost today. Shut down on the spot in such fashion had been Federalists in the U.S. House in 1811 (Adams 1986, 244–46), Irish Nationalists in the British House of Commons in 1881 (Jennings 1969, 127–30), Democratic victims of the "Reed Rules" in the U.S. House in 1890 (Schickler 2001, 32–43), and Progressive obstructors of a currency bill in the U.S. Senate in 1908 (Burdette 1965, 83–91). Although perhaps short of the coup category, common-law-type rulings from the chair, of which the Senate had seen many, could in effect change the rules and hobble or inconvenience obstructive minorities. That had happened as recently as 1935 (Burdette 1965, 185), and indeed it happened during the Court-packing debate itself in July 1937 as Senator Pittman, acting in complicity with Majority Leader Robinson, handed down restrictive rulings that won standing as Senate precedents—one involving the meaning of "legislative day" (*New York Times*, July 9, 1937, 1, 5; Riddick 1974, 436–38). According to a contemporary political scientist's account: "A plethora of points of order and parliamentary inquiries, though time-consuming, failed to upset the chair's constrictive rulings. . . . For several days the deadlocked sides jockeyed for position, not only in the Senate but before the bar of public opinion. Senator Robinson's death, however, suddenly destroyed his majority and ended the drama. In the failure to complete this experiment in defeating a filibuster by a novel interpretation of the regular Senate rules, it is possible that a valuable precedent for the future was lost" (Altman 1937, 1079).

One way to put it is that the Senate's two-thirds cloture rule back then seemed to lack the sureness of that body's other familiar two-thirds hurdles involving veto overrides and treaty ratifications. It was less sure at least because it was less exogenous. In this circumstance, it was risky for a determined opposition to place anything like all its eggs in the cloture-rule basket—perhaps especially on an issue so explosive as Court-packing. An alternative course of action was more prudent, as see below.

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3) Often, on a Highly Prominent Issue, the Best Blocking Strategy for a Sizable Senate Minority is to Try to Shape Public Opinion

To say this is to relax an assumption that the public, or politicians responsive to it, possess fixed views on public issues. Very often they do not. Rarely is any congressional proposal an exact duplicate of a previous one. Some proposals, such as Court-packing and executive reorganization in 1937–38, are brand-new. Even where legislative proposals come to map onto the country's dominant ideological dimension, as many, perhaps most, do, members of Congress and others routinely move to shape public and elite opinion so as to affect the correlation of any such mapping and its cutpoint. There is a good case for endogenizing such shaping activity into analysis of congressional context and strategy (see Jacobs and Shapiro 2000; Mayhew 2000).

All this was obvious to the Wheeler-led opponents of Court-packing in 1937. They did not say: "We have the requisite 33 nay votes [which in fact they very quickly did have] so don't try to roll over us." Rather, they headed for the radio and the local speech circuit around the country to make their case. This strategy, aided to be sure by anti-FDR opinion leaders outside the Senate and by the Supreme Court's own retreat from its previous rulings, was evidently a brilliant success. "Rather than being the ally of the Court bill's successful passage, time was the enemy. Time permitted the opponents to gain strength, extend their propaganda, augment their forces" (Baker 1967, 152). Over the months, public support for the president's plan tailed off (Caldeira 1987, 1147). It is a good bet that declining public support came to influence the positions of many senators on the Court-packing plan, as well as their intensities. By July 1937, the legislative drive seemed to be sliding into an adverse intensities gap where the chances of successful minority obstruction seem to maximize, but we will never know if it had slid far enough.[18]

In the argument here, the importance of strategies aimed at shaping opinion is as follows. To the extent that such strategies are employed, the cloture rule and other congressional procedures can recede into a faint role or no role at all. Something else taking place in the realm of strategy can be important, even determinative. Moreover, as a comparative matter, similar exercises of opinion leadership undertaken in different eras can make legislative drives of those eras look surprisingly similar. In this regard, I recommend back-to-back reading of Alsop and Catledge (1938) on the Court-packing saga of 1937 and Johnson and Broder (1996) on Clinton's health-care reform drive in 1993–94. There is considerable commonality in opinion dynamics, and one does not come away with a judgment that the Senate cloture rule played much of a role in either outcome.[19]

* * *

In sum, to try to get a handle on Senate supermajority politics of earlier times—specifically here, the Congress of 1937–38—it may make sense to consider three theoretical moves.[20] First, look to intensity differences. That is, relax the assumption of equal member intensities. Second, look to the potential on-the-spot creation of new rules. That is, relax the assumption of fixed rules. Third, look to the shaping of public opinion. That is, relax the assumption of fixed public (and induced fixed member) views. An implication of the analysis is that Senate floor majorities, the classic and major exception of civil rights issues aside, may not have had it worse back then. If anything, given the evident hardness of today's sixty-vote rule, they may even have had it easier.

Notes

1. I would like to thank Alan Gerber and Eric Schickler for their help on this work. A useful clarifying point came from Morris Fiorina. Matthew Glassman helped with the references.

2. Although evidently not Clinton's health-care reform measure, which never commanded 218 votes in the House. See Johnson and Broder 1996, 509.

3. Although see Gilmour 1994.

4. Most of this chronology is from the *New York Times* of 1938: January 9, p. 1 (first quotation); January 19, p. 4 (second quotation); January 22, p. 5 (the northern Democrats); January 23, p. 5; January 27, p. 6; February 17, p. 12; February 22, p. 1.

5. White House strategists bypassed the House at this stage because of the stern upfront opposition of Hatton Sumners (D-TX), chairman of the Judiciary Committee. Still, it was assumed that the House would swing into line eventually. See Alsop and Catledge 1938, 51; *New York Times*, February 8, 1937, 6.

6. Most of this chronology is from the *New York Times* of 1937. The initial situation: February 7, p. 1; 8, p. 1. The horserace coverage: February 10, p. 1; 14, p. 28; 15, p. 1; 17, p. 2; 22, p. 1; 24, p. 1; 25, p. 1. The opposition: February 10, pp. 1, 15; 12, p. 1; 19, p. 1; 23, p. 4. For horserace coverage see also *Time*, February 22, 1937, 11–13; March 1, 1937, 10–13.

7. There was an interesting sideline wrinkle in June. The Senate Judiciary Committee voted by 10 to 8 to disapprove the Court-packing measure but sent it to the floor anyway. So much for committees as automatic blockers of measures they do not like. The verdict of the committee majority was not wishy-washy: "It is a measure which should be so emphatically rejected that its parallel will never again be presented to the free representatives of the free people of America." Alsop and Catledge 1938, 233.

8. For the looming filibuster, see also *New York Times*, 1938: June 6, p. 37; June 16, p. 16; June 27, p. 1; June 28, p. 4; July 2, pp. 1, 5; July 3, p. 1; July 6, pp. 1, 20; July 14, p. 1.

9. *New York Times*, 1938: July 6, pp. 1, 20; 7, p. 1; 9, pp. 1, 5; 11, p. 1; 13, pp. 1, 8; 14, p. 1.

10. For these events, see *New York Times*, 1938: March 10, p. 1 (majoritarian strategy); March 19, p. 1 (Wheeler Amendment); March 28, p. 1 (unanimous consent); March 29, p. 1 (final passage).

11. During the last half century, the best candidate for an intensity differential may be labor-management relations, on which congressional Democrats often seem to have shallow commitments to unions and Republican deep commitments to business. Striker replacement legislation easily lost out to Senate obstruction in 1993–94, and overhaul of the Taft-Hartley Act suffered that fate in 1965–66.

12. Such back-home trouble in primaries or general elections might serve as an indirect evidential guide to member intensity.

13. A similar effect of something like societally, if not exactly electorally, induced weighted voting appears in Hall's (1996) study of interest group influence in congressional committees.

14. A generation later, a similar logic involving intensities and trading obtained in the drive to pass the Civil Rights Act of 1957. The times had changed, and the southern senators could not completely block this bill, but they could take steps to modify it. Famously, they made a deal with relatively indifferent westerners—support for the Hells Canyon Dam in exchange for dilution of the civil rights measure. See Caro 2002, ch. 38. By the time of the civil rights enactments of 1964 and 1965, the southern versus northern intensities had probably more or less equalized.

15. There were two other reasons why obstruction might have been more successfully prosecuted during lameduck Congresses. The Congresses still considering laws had hemorrhaged legitimacy because new elections had chosen their successors, and congressional minority parties, not trusting presidents to run the country by themselves from March through November, occasionally tried to block legislation before March 4 so as to force the calling of special congressional sessions.

16. To be sure, presidents or parties may sometimes refrain from proposing measures that they see will be blocked. But we shouldn't become immobilized by this consideration. Political actors may advance proposals anyway if they see them to be necessary, right, popular

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generally, popular with key minorities, or possibly merchandisable.

17. Riker takes up Speaker Reed's rules changes of 1890 in his work on "heresthetics" (1986), but this incident fits oddly into a book that is otherwise largely about manipulation of existent rules.

18. At the cusp of successful obstruction, a complicating factor can be that some senators may choose to diversity their position-taking portfolios. That is, a senator can at once oppose a measure and oppose obstruction against it. Senator Gordon Smith (R-OR) did that at a critical moment on the McCain-Feingold campaign-finance reform bill in early 2002.

19. In a Gallup poll in April 1994, "by a two-to-one margin [respondents] thought quality of care would decline and they would be worse off" if the Clinton plan became law (Johnson and Broder 1996, 371). With numbers like these, not much room remains for a procedurally obstructive opposition.

20. It should go without saying that this is not an exhaustive list of possibly useful moves. I have not taken up Oppenheimer's (1985) case that ample Senate debate time owing to much slimmer issue agendas made effective obstruction a chancier proposition in earlier times.

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