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The Majoritarian Filibuster

ABSTRACT. The debate over the Senate filibuster revolves around its apparent conflict with the principle of majority rule. Because narrow Senate majorities often represent only a minority of Americans, however, many filibusters are not at odds with majority rule at all. By paying attention to such “majoritarian filibusters,” this Note aims to disrupt the terms of the traditional debate and open up a new space for potential compromise. This Note reports the first empirical study of the majoritarian or countermajoritarian character of recent filibusters. These data reveal that, in half of the Congresses over the past two decades, successful filibustering minorities usually represented more people than the majorities they defeated. The choice whether to preserve the filibuster therefore cannot be reduced to a simple choice between majority rule and minority rights. After exploring the distribution of majoritarian and countermajoritarian filibusters along other dimensions of interest, this Note proposes that the majority-rule principle might be better served by simply reducing the sixty-vote cloture threshold—thereby shifting the balance toward majoritarian as opposed to countermajoritarian filibusters—than by abolishing the filibuster altogether.

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INTRODUCTION

The basic contours of the debate over the Senate filibuster are settled and familiar. Critics argue that the filibuster undermines democratic values by allowing a minority to veto legislation or nominees favored by the majority.¹ As one academic critic recently put it, the filibuster poses the “most troubling counter-majoritarian difficulty in modern constitutional law.”² Moreover, according to its detractors, the filibuster is particularly indefensible because it compounds the malapportionment that is hardwired into the Senate’s design. “[I]t is now possible,” we are told, “for the senators representing . . . a little more than 11 percent of the nation’s population . . . to nullify the wishes of the representatives of the remaining 88 percent of Americans.”³

1. For recent criticism to this effect from within the legal academy, see Emmet J. Bondurant, *The Senate Filibuster: The Politics of Obstruction*, 48 HARV. J. ON LEGIS. 467, 467-69 (2011); Aaron-Andrew P. Bruhl, *The Senate: Out of Order?*, 43 CONN. L. REV. 1041, 1053 (2011); Josh Chafetz, *The Unconstitutionality of the Filibuster*, 43 CONN. L. REV. 1003, 1006 (2011); and Gerard N. Magliocca, *Reforming the Filibuster*, 105 NW. U. L. REV. 303, 303-04 (2011). For arguments to this effect in the broader popular debate, see Harold Meyerson, Op-Ed., *Can Boxer and Feinstein Be Filibuster Busters?*, L.A. TIMES, Jan. 14, 2010, <http://articles.latimes.com/2010/jan/14/opinion/la-oe-meyerson14-2010jan14>; Matt Miller, Op-Ed., *It’s the Filibuster, Stupid*, WASH. POST, Sept. 27, 2012, http://www.washingtonpost.com/opinions/matt-miller-its-the-filibuster-stupid/2012/09/27/53a5f9ba-082f-11e2-a10c-fa5a255a9258_story.html; Editorial, *Time To Retire the Filibuster*, N.Y. TIMES, Jan. 1, 1995, <http://www.nytimes.com/1995/01/01/opinion/time-to-retire-the-filibuster.html>; Matthew Yglesias, *Failure Buster*, AM. PROSPECT, Apr. 12, 2005, <http://www.prospect.org/article/failure-buster>; Timothy Noah, *Abolish the Filibuster!*, SLATE (Feb. 1, 2001, 5:33 PM), <http://www.slate.com/id/1006999>; Alex Seitz-Wald, *5 Reasons To Kill the Filibuster*, SALON (Nov. 28, 2012, 5:35 PM), http://www.salon.com/2012/11/28/five_reasons_to_kill_the_filibuster.
2. Magliocca, *supra* note 1, at 303.
3. Jean Edward Smith, *Filibusters: The Senate’s Self-Inflicted Wound*, N.Y. TIMES: 100 DAYS (Mar. 1, 2009, 10:00 PM), <http://100days.blogs.nytimes.com/2009/03/01/filibusters-the-senates-self-inflicted-wound>; see also Bondurant, *supra* note 1, at 467 (observing that the filibuster “gives a minority of forty-one senators, who may be elected from states that contain as little as eleven percent of the nation’s population, the power to prevent the Senate from” taking action (footnote omitted)); Magliocca, *supra* note 1, at 303-04 (“Forty-one senators, who could represent less than forty-one percent of the population due to the malapportionment of the Senate, can veto most legislation and presidential nominations by refusing to invoke ‘cloture.’” (footnote omitted)); Miller, *supra* note 1 (“How many schoolchildren are taught that a rule of the Senate lets 41 senators representing as little as 11 percent of the population stop anything from happening?”); Noah, *supra* note 1 (arguing that “the filibuster . . . exaggerates the Senate’s tendency to give legislators representing a small number of people disproportionate power”).

The standard reply, of course, is that a measure of countermajoritarianism isn't such a bad thing. The filibuster prevents a narrow Senate majority from enacting an ideological agenda out of proportion to its electoral mandate.⁴ It forces the majority to compromise with the minority, and thereby "keeps whimsical, immature, and ultimately unpopular bills out of the statute books."⁵ Indeed, as we are also often told, the whole design of our constitutional system—including of the Senate itself—evinces a distrust of simple majorities.⁶

This familiar debate has grown increasingly stale. There is another response to the filibuster critics, however, that has received far less attention. In 1918, confronted with a measure that would curtail filibusters in the name of "the rule of the majority," Senator Lawrence Sherman responded:

I am moved to inquire a majority of what? If it promotes the rule of a majority of States, the Senator from Oklahoma is correct. If it promotes the rule of a majority of the people of the United States, he is inaccurate, because the latter is far from being the truth.⁷

Taking the successful filibuster of the 1915 Ship Purchase Bill as an example, Senator Sherman proceeded to enumerate "with mathematical accuracy" the

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4. See, e.g., Howard H. Baker, Jr., Op-Ed., *Rule XXII: Don't Kill It!*, WASH. POST, Apr. 27, 1993, at A17; Editorial, *Walking in the Opposition's Shoes*, N.Y. TIMES, Mar. 29, 2005, <http://www.nytimes.com/2005/03/29/opinion/29tue1.html>; see also Catherine Fisk & Erwin Chemerinsky, *In Defense of Filibustering Judicial Nominations*, 26 CARDOZO L. REV. 331, 343 (2005) (arguing that the filibuster forces presidents to nominate more moderate judges).
 5. Bill Frenzel, *Defending the Dinosaur: The Case for Not Fixing the Filibuster*, BROOKINGS REV., Summer 1995, at 47, 49; see also RICHARD A. ARENBERG & ROBERT B. DOVE, *DEFENDING THE FILIBUSTER: THE SOUL OF THE SENATE* 162 (2012) ("It is, simply put, the possibility of filibusters that drives senators to reach for consensus."); Gary Becker, *The Filibuster and Supermajorities*, BECKER-POSNER BLOG (Mar. 7, 2010, 4:29 PM), <http://www.becker-posner-blog.com/2010/03/the-filibuster-and-supermajorities-becker.html> ("[T]he supermajority requirement of invoking cloture to cut off Senate debate is useful protection not only to minorities, but also to overly hasty passage of controversial legislation.").
 6. See Fisk & Chemerinsky, *supra* note 4, at 336 ("The reality is that the American constitutional system values and institutionalizes checks on majoritarian preferences."); see also Baker, *supra* note 4 (arguing that abolishing the filibuster "would topple one of the pillars of American[] democracy: the protection of minority rights from majority rule"); George F. Will, *The Framers' Intent*, WASH. POST, Apr. 25, 1993, at C7 (arguing that the filibuster debate is about "two different stances toward government," one of which calls for "implement[ing] the majority's will quickly," the other of which "respects the right of an intense minority to put sand in the gears of government").
 7. 56 CONG. REC. 7538 (1918). For a summary of the 1918 proposal, see SARAH A. BINDER & STEVEN S. SMITH, *POLITICS OR PRINCIPLE?: FILIBUSTERING IN THE UNITED STATES SENATE* 171-73 (1997).

populations represented by the bill's supporters and opponents.⁸ This evidence, he said, demonstrated "the paradox" that the filibuster "is an ally of the majority of the people of the United States."⁹ As he explained:

The 36 Democratic Senators in the first group of States voting for the shipping bill represented a population of 37,000,000, and the 30 Republican Senators and 1 Progressive Senator in the second group voting against the bill represented a population of 41,000,000

Can it be said that it is promoting the rule of the majority to . . . promote the rule of 37,000,000 people over 40,000,000? That is not the way majorities rule in democracies.¹⁰

Nearly eighty years later, the *New York Times* defended filibusters against President George W. Bush's judicial nominees on precisely the same ground: the filibusters had "allow[ed] a minority that actually represents more American people to veto lifetime appointments of judges who are far outside the mainstream of American thinking."¹¹

Although this majoritarian defense of the filibuster has surfaced occasionally—and usually opportunistically—it has received no systematic investigation.¹² It is potentially a very powerful argument, however, since it

8. 56 CONG. REC. 7537 (1918).

9. *Id.*

10. *Id.* at 7539.

11. Editorial, *Disarmament in the Senate*, N.Y. TIMES, May 25, 2005, <http://www.nytimes.com/2005/05/25/opinion/25wed1.html>; see also Hendrik Hertzberg, *Nuke 'Em*, NEW YORKER, Mar. 14, 2005, http://www.newyorker.com/archive/2005/03/14/050314ta_talk_hertzberg ("The forty-four-person Senate Democratic minority, therefore, represents a two-million-plus popular majority. . . . So Democrats, as democrats, need not feel too terribly guilty about engaging in a spot of filibustering from time to time.").

12. The possibility that a filibustering minority may represent a majority of the country has sometimes been acknowledged in passing. See LINDSAY ROGERS, *THE AMERICAN SENATE* 163-64 (1926) ("Incidentally . . . [the] minority may nearly or even actually represent a majority of the population of the country"); Bruhl, *supra* note 1, at 1050 n.42; Edward N. Kearny & Robert A. Heineman, *The Senate Filibuster: A Constitutional Critique*, 26 PERSP. ON POL. SCI. 5, 8 n.11 (1997) ("Although such instances are probably rare, it is conceivable that a filibuster could represent a majority of the population if the particular configuration of senators engaging in a filibuster came from states with a majority of the population"); Magliocca, *supra* note 1, at 304 n.2; see also BINDER & SMITH, *supra* note 7, at 153-54 (noting the argument "that the filibuster occasionally prevents a Senate majority from passing legislation that is opposed by a majority of Americans" and observing that it is "not backed by systematic analysis"). In defending Democratic filibusters of President George W. Bush's judicial nominees, Catherine Fisk and Erwin Chemerinsky also drew the broader inference that the filibuster can "play[] an important *majoritarian* check in the context of the

appeals to the critics' own commitment to the principle of majority rule. The basic logic of the argument is simple: although the filibuster is a countermajoritarian prerogative *within* the Senate, it can sometimes be invoked to counteract the structural countermajoritarianism *of* the Senate. In this way the filibuster can function as a democratic backstop, obstructing narrow Senate majorities that represent only a minority of Americans. What's more, because of the constitutionally limited role of the House of Representatives, a Senate filibuster of this kind offers the only veto point at which the elected representatives of a majority of Americans can deny life tenure to a presidential nominee for the federal bench.

As the momentum toward reforming or abolishing the filibuster builds,¹³ this majoritarian side of the institution warrants closer study. To that end, this Note follows Senator Sherman's example and presents the first empirical evidence measuring the majoritarian or countermajoritarian character of actual Senate filibusters in recent years.¹⁴ The data show that many recent filibusters have served to obstruct unrepresentative Senate majorities—effectively furthering, rather than thwarting, majority rule at the national level—and that these cases are clustered in ways that bear on the merits of different proposals for reform.

Part I offers some background on the filibuster and the ongoing debate over its legitimacy. Part II describes a simple research method for quantifying the countermajoritarianism of recent filibusters: calculating the populations represented by the supporters and opponents of cloture. These new data, drawn from the period from 1991 to 2010, allow us to ask natural but neglected questions. How rare is it for a filibustering minority to represent more people than the majority it defeats? How severely countermajoritarian have filibusters tended to be—on average, at their best, and at their worst? What were the most

inherently anti-majoritarian United States Senate.” Fisk & Chemerinsky, *supra* note 4, at 336.

13. See, e.g., Jillian Rayfield, *Harry Reid: Senate Will Pursue Filibuster Reform*, SALON (Nov. 9, 2012, 4:44 PM), http://www.salon.com/2012/11/09/harry_reid_senate_will_pursue_filibuster_reform (quoting Senate Majority Leader Harry Reid as saying “the rules have been abused, and we are going to work to change them”); Elizabeth Warren, *The First Week in January*, HUFFINGTON POST (Nov. 15, 2012, 9:44 AM), http://www.huffingtonpost.com/elizabeth-warren/filibuster-reform_b_2136800.html (calling for filibuster reform in the 113th Congress); see also Jeffrey Toobin, *Can the Senate Be Saved?*, NEW YORKER: DAILY COMMENT (Nov. 20, 2012), <http://www.newyorker.com/online/blogs/comment/2012/11/can-the-senate-be-saved.html> (describing the prospects for reform).
14. I previewed a portion of this data in a short op-ed in 2010. Ben Eidelson, *Let the Majority Rule*, SLATE (Feb. 8, 2010, 4:31 PM), http://www.slate.com/articles/news_and_politics/politics/2010/02/let_the_majority_rule.html.

and least undemocratic filibusters in recent history? How does the majoritarianism of filibusters vary across legislative and political contexts?

Part III offers answers to these questions. As it turns out, in half of the Congresses over the past two decades, most successful filibustering minorities represented more Americans than the majorities they obstructed. Such cases, which I call *majoritarian filibusters*, are thus strikingly common—particularly for a phenomenon previously deemed “conceivable” but “probably rare.”¹⁵ Overall, roughly one-third of all successful filibusters from 1991 to 2010 were majoritarian in character. More than half of the failed attempts by a Senate majority to invoke cloture on presidential nominees during this period have reflected majoritarian filibusters as well. And, interestingly, few if any filibusters in this period were as severely countermajoritarian as the theoretical scenarios deployed by the institution’s critics would suggest.

Finally, the data also reveal a significant partisan asymmetry that has not previously been quantified. Because of the distribution of party support across large and small states in recent years, filibusters undertaken by Republicans have typically been much more strongly countermajoritarian than those undertaken by Democrats. This pattern may offer a broader lesson: whenever one of the major parties holds a consistent advantage in low-population states, the filibuster serves as an underappreciated check on that party’s power to enact its agenda and confirm nominees without the acquiescence of most Americans.

Part IV begins to explore how a greater awareness of majoritarian filibusters should bear on our views of certain pending reform proposals, offering two particular suggestions. First, simply lowering the cloture threshold, rather than abolishing the filibuster altogether, would likely shift the balance significantly towards majoritarian filibusters. Such a compromise reform is therefore much more favorable, from the perspective of those committed to majority rule, than it may appear on the surface. Second, even if reformers aim to curtail or abolish the filibuster for legislation, they should strongly consider preserving it for presidential nominees because of the unique role majoritarian filibusters play in this context. In sum, this Note aims to furnish the information necessary for a more nuanced understanding of the tradeoffs among competing democratic values that are posed by the ongoing filibuster debate.

15. Kearny & Heineman, *supra* note 12, at 9 n.11.

I. THE FILIBUSTER AND THE FILIBUSTER DEBATE

Because a measure must win sixty votes to overcome a Senate filibuster, proposed legislation and nominees are routinely held to a supermajority standard in one house of Congress.¹⁶ This is a remarkable feature of contemporary American government, and several detailed histories of its emergence have been written.¹⁷ Without rehearsing the whole story, this Part aims to offer some general background on the advent of the modern filibuster and the recent evolution in its institutional character. It then turns to the debate *about* the filibuster, which provides necessary context for the data that follow. In short, as the filibuster has evolved from a tool of delay into an effective minority veto, the debate over its legitimacy has shifted in character as well—focusing less on the necessity of expeditious action, and more on the institution’s perceived countermajoritarian aspect. If the problem with the filibuster is that it undermines the democratic value of majority rule, however, that problem cannot be understood, much less measured, without taking account of the interaction between the filibuster’s supermajority requirement and the structural disproportionality of the Senate itself.

A. *The Filibuster and the Cloture Rule*

The Constitution empowers “[e]ach House” of Congress to “determine the Rules of its Proceedings.”¹⁸ The “filibuster” as such makes no appearance in the rules adopted by the Senate, however.¹⁹ Rather, “possibilities for filibustering exist because Senate Rules deliberately *lack* provisions that would place specific limits on Senators’ rights and opportunities in the legislative process.”²⁰

16. See Barbara Sinclair, *The “60-Vote Senate”: Strategies, Process, and Outcomes*, in U.S. SENATE EXCEPTIONALISM 241, 256 (Bruce I. Oppenheimer ed., 2002) (observing that “anything contentious must command sixty votes in order to pass”).

17. See LAUREN C. BELL, *FILIBUSTERING IN THE U.S. SENATE* (2011); GREGORY KOGER, *FILIBUSTERING: A POLITICAL HISTORY OF OBSTRUCTION IN THE HOUSE AND SENATE* (2010); GREGORY J. WAWRO & ERIC SCHICKLER, *FILIBUSTER: OBSTRUCTION AND LAWMAKING IN THE U.S. SENATE* (2006); Sarah A. Binder, Eric D. Lawrence & Steven S. Smith, *Tracking the Filibuster, 1917 to 1996*, 30 AM. POL. RES. 406 (2002); Catherine Fisk & Erwin Chemerinsky, *The Filibuster*, 49 STAN. L. REV. 181 (1997); Sinclair, *supra* note 16.

18. U.S. CONST. art. I, § 5, cl. 2.

19. See *STANDING RULES OF THE SENATE*, S. DOC. NO. 110-9 (2007).

20. RICHARD S. BETH & VALERIE HEITSHUSEN, CONG. RESEARCH SERV., RL30360, *FILIBUSTERS AND CLOTURE IN THE SENATE 1* (2011).

For much of the Senate's history, those rights and opportunities were subject to even fewer formal constraints than they are today. In 1917, for example, the Senate failed to pass legislation to arm merchant ships against German attacks because of intransigence by a group of only eleven or twelve senators.²¹ President Wilson excoriated the body for "render[ing] the great Government of the United States helpless and contemptible" in the face of world events, heaping particular scorn on the "little group of willful men, representing no opinion but their own," who had obstructed action until Congress adjourned.²² The incident prompted the Senate to adopt a "cloture rule" in special session only days later.²³

In its current form, Rule XXII of the Senate's Standing Rules provides that by a three-fifths majority vote of its membership, the Senate can invoke cloture on a motion.²⁴ Cloture strictly curtails debate by prohibiting new or nongermane amendments and forcing a vote on the underlying measure after at most thirty hours of further consideration.²⁵ In its original form, the cloture rule could be invoked with the support of two-thirds of the senators present and voting.²⁶ In 1975, however, the threshold for invoking cloture was changed to three-fifths of the full Senate—in effect, sixty votes.²⁷

The most important development since that time has been the rise of what Catherine Fisk and Erwin Chemerinsky call the "stealth filibuster."²⁸ Traditionally, filibustering meant holding the floor indefinitely and thereby obstructing a bill—as well as all other Senate business—until its supporters either relented or, after 1917, managed to invoke cloture. Since the early 1970s, however, a new system for managing the floor, known as "tracking," has

21. See Fisk & Chemerinsky, *supra* note 17, at 196–97 (citing THOMAS W. RYLEY, *A LITTLE GROUP OF WILLFUL MEN* (1975)).

22. 41 THE PAPERS OF WOODROW WILSON 320 (Arthur S. Link ed., 1983).

23. See 55 CONG. REC. 45 (1917); see also Fisk & Chemerinsky, *supra* note 17, at 197–98 (recounting these events).

24. See STANDING RULES OF THE SENATE, *supra* note 19, R. XXII. The three-fifths-of-membership standard has the effect of requiring sixty votes, assuming the Senate has its full complement of one hundred members at the time, even if not all senators vote on the motion.

25. BETH & HEITSHUSEN, *supra* note 20, at 12–15.

26. See BINDER & SMITH, *supra* note 7, at 8. This threshold was raised to two-thirds of the full Senate in 1949 but reverted back again in 1959. *Id.*

27. *Id.*

28. Fisk & Chemerinsky, *supra* note 17, at 203; see also Karl E. Meyer, Editorial Notebook, *New Age Filibusters*, N.Y. TIMES, June 6, 1993, <http://www.nytimes.com/1993/06/06/opinion/editorial-notebook-new-age-filibusters.html> (narrating this development).

helped to transform the role of the filibuster in Senate procedure.²⁹ In essence, tracking allows the Senate to consider one measure while another is also held pending. As a result, when a senator or group of senators signals an intention to filibuster a measure, the majority leader typically does not bring the measure up for live debate at all, instead filing a cloture motion and endeavoring to assemble the sixty votes necessary to win the cloture vote.³⁰ In the interim, the Senate proceeds to other business on a second track, unhindered by the dilatory debate that the cloture motion nominally exists to curtail.

This approach prevents a filibuster on one measure from derailing the rest of the majority's agenda.³¹ But, from the minority's point of view, it also reduces the cost of filibustering, since the opponents of a measure no longer need to hold the floor for hours on end or conspicuously identify themselves as obstructionists. As Josh Chafetz explains, "With such reduced costs, there was no longer any reason to treat the filibuster as an extraordinary measure, used in cases in which the minority had very intense preferences."³²

This shift in incentives is reflected in the explosion of cloture votes since the 1970s.³³ In the five decades from 1921 to 1970, a total of 47 cloture votes were held—less than one per year.³⁴ By contrast, 112 cloture votes were held in the subsequent decade alone.³⁵ This trend has only accelerated in recent years: more than 300 cloture votes were held between 2001 and 2010.³⁶

As the filibuster has become routine, its meaning has evolved as well. For much of its history, the filibuster was understood as a corollary of a senator's prerogative to debate.³⁷ The debate may sometimes have been purely dilatory and, to that extent, insincere, but it nonetheless involved ongoing action by one coalition that stood in the way of action by the majority. That understanding of the filibuster has eroded along with its procedural foundations. Increasingly, the filibuster has come to be understood as a simple

29. See Chafetz, *supra* note 1, at 1010; Fisk & Chemerinsky, *supra* note 17, at 201.

30. Fisk & Chemerinsky, *supra* note 17, at 205.

31. *Id.* at 203.

32. Chafetz, *supra* note 1, at 1010.

33. See *Senate Action on Cloture Motions*, U.S. SENATE, http://www.senate.gov/pagelayout/reference/cloture_motions/clotureCounts.htm (last visited Dec. 5, 2012).

34. *Id.*

35. *Id.*

36. *Id.*

37. See Magliocca, *supra* note 1, at 308 (arguing that "until the 1970s, unlimited debate was mainly a procedural device that protected free speech, improved the quality of deliberation, and revealed the intensity of preferences in the Senate").

supermajority rule for passing legislation or confirming nominees. As Fisk and Chemerinsky conclude, “The modern filibuster . . . has little to do with deliberation and even less to do with debate. The modern filibuster is simply a minority veto, and a powerful one at that.”³⁸ The idea that it is *curtailing debate* that takes sixty votes—and not the ultimate passage of anything—has thus been reduced to a legal fiction.

This shift in both the practice and the meaning of the filibuster reorients the debate over its legitimacy. As I describe below, the modern debate is framed in terms of a basic choice between majority and supermajority rule. If the filibuster debate is not really about the Senate’s internal rules for governing its deliberative processes, however, but rather, as this new framing suggests, about the question whose preferences will ultimately prevail, it is a mistake to focus only on the filibuster’s effect on majority rule *within* the Senate. Insofar as the legitimacy or illegitimacy of the filibuster turns on the democratic principle of majority rule, that is, we ought to be interested in majority rule not only among senators, but also among citizens. The new information I offer in Part III aims to facilitate such an expanded conversation.

B. Internal and External Majoritarianism

The popular and academic debate over the Senate filibuster in recent years has focused overwhelmingly on its perceived conflict with the principle of majority rule.³⁹ Bruce Ackerman voices a widespread sentiment when he argues that “filibustering legislation is downright undemocratic” because it “allow[s] a Senate minority to veto a bill that has majority support in both houses of Congress.”⁴⁰ Gerard Magliocca likewise suggests that “the presumption that a supermajority is required for most Senate action . . . casts a shadow over democratic self-government.”⁴¹ Indeed, some have gone so far as to argue that

38. Fisk & Chemerinsky, *supra* note 17, at 184; see also Richard Posner, *Should the Senate Abolish the Filibuster?*, BECKER-POSNER BLOG (Mar. 7, 2010, 5:49 PM), <http://www.becker-posner-blog.com/2010/03/should-the-senate-abolish-the-filibuster-posner.html> (“The filibuster, especially in its present streamlined form, creates a supermajority requirement to enact federal legislation.”).

39. Compare, e.g., Smith, *supra* note 3 (“The routine use of the filibuster as a matter of everyday politics has transformed the Senate’s legislative process from majority rule into minority tyranny.”), with ARENBERG & DOVE, *supra* note 5, at 8 (defending “the filibuster as a protection of minority rights and a force for consensus building”).

40. Bruce Ackerman, Op-Ed., *Filibuster Reform Both Parties Can Agree on*, WALL ST. J., Jan. 4, 2011, <http://online.wsj.com/article/SB10001424052970203731004576045660871279874.html>.

41. Magliocca, *supra* note 1, at 304. To offer one other example, Emmet Bondurant similarly bemoans the fact that “[t]he democratic principle of majority rule does not apply in the

the filibuster's infringement on the principle of majority rule is unconstitutional, because "the Constitution cannot countenance permanent minority obstruction in a house of Congress."⁴² A lawsuit advancing this theory, brought by several members of the House and affected individuals, is pending in federal court.⁴³

These arguments revolve around the filibuster's relationship to what I will call the *internal* majoritarianism of the Senate's decisionmaking—the degree to which the majority-rule principle prevails among senators. But, as a matter of political morality, it is hard to see why that should be our predominant, much less exclusive, concern. Majority rule is not a freestanding value but a decision procedure. Its appeal rests on its connection, in a given context, to more basic normative commitments.⁴⁴ One such commitment is the "conception of political equality" that demands that the votes of individual citizens be accorded equal weight as one another.⁴⁵ The majority should carry the day in an ordinary legislative election, for instance, because that is simply what happens when the preferences of each voter are counted equally and summed together.

The apportionment of the Senate plainly breaks with this conception of political equality, however, in affording equal say to half a million Wyomingites and thirty-eight million Californians.⁴⁶ In other words, the central connection between majoritarian practices and their ordinary motivating value—equal say for all qualified citizens—has already been severed in the very composition of the body. To the extent that we are concerned about

United States Senate," because "[m]ajority rule has been replaced by rule by the minority." Bondurant, *supra* note 1, at 467.

42. Chafetz, *supra* note 1, at 1015; *see also* Bondurant, *supra* note 1, at 479-82 (arguing that the modern filibuster is unconstitutional).

43. *Common Cause v. Biden*, No. 12-5412 (D.C. Cir. filed Dec. 28, 2012).

44. *See* RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 17 (1996) (arguing that democracy "requires . . . majoritarian procedures out of a concern for the equal status of citizens, . . . not out of any commitment to the goals of majority rule" as ends in themselves); *see also* Amy Gutmann, *Democracy*, in 2 *A COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY* 521, 523 (Robert E. Goodin et al. eds., 2007) (suggesting that "the view that there is something especially valuable about democratic procedures" is rooted in "the idea of the people ruling themselves as free and equal beings").

45. *Reynolds v. Sims*, 377 U.S. 533, 558 (1964) ("The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote." (quoting *Gray v. Sanders*, 372 U.S. 368, 381 (1963))).

46. These are 2011 population estimates from the U.S. Census Bureau. *See State & County QuickFacts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/index.html> (last visited Oct. 29, 2012).

the core democratic values that undergird majority rule, then, we should be at least as interested in the filibuster's bearing on the *external* majoritarianism of the Senate's decisionmaking—that is, on the extent to which the representatives of a majority or a minority of citizens are empowered to rule—as on its consequences for the Senate's internal majoritarianism.

Nonetheless, it may strike some as obtuse to assess the Senate's decisionmaking in terms of its external majoritarianism at all. After all, doesn't this argument miss the point of the Senate? According to the traditional view, "[t]he Senate, though the Senate of the United States, is in fact the Senate of the States."⁴⁷ Perhaps, then, the majoritarian significance of the filibuster is as obvious as it is usually assumed to be: by requiring sixty votes rather than a bare majority, the filibuster allows a minority of states to obstruct the will of a majority of states.⁴⁸

Matters are not so simple, however, for two reasons. First, this state-centric view imputes too much theoretical coherence to what was in fact an expedient political compromise, fraught with normative doubts from the start. As James Madison explained in *Federalist No. 62*, the equality of states in the composition of the Senate was "the result of compromise between the opposite pretensions of the large and the small States," and hence "the lesser evil" of the available options.⁴⁹ "[I]t is superfluous to try by the standards of theory, a part of the constitution which is allowed on all hands to be the result not of theory, but of . . . that mutual deference and concession which the peculiarity of our political situation rendered indispensable."⁵⁰ Those who would say that considering the external majoritarianism of the Senate's decisionmaking misses the theoretical point of the Senate may err, then, in supposing that its design *had* a theoretical point, rather than a simple instrumental objective of securing the agreement of the smaller states, however unreasonable their conditions.⁵¹

Second, even if the Senate as originally designed did reflect a genuine embrace of a state-centric theory of representation, the reality is that many rightly regard such a theory as deeply problematic today. With the direct election of senators, for example, Americans moved distinctly away from the

47. WILLIAM S. WHITE, *CITADEL: THE STORY OF THE U.S. SENATE* 18 (1956).

48. Even if we accepted this framing, we might wonder how many representatives of states the filibuster typically allows to be thwarted by how many other representatives of states, and this is among the data I report below. See *infra* Section III.A.

49. THE FEDERALIST NO. 62 (James Madison).

50. *Id.* (internal quotation marks omitted).

51. See SANFORD LEVINSON, *FRAMED: AMERICA'S FIFTY-ONE CONSTITUTIONS AND THE CRISIS OF GOVERNANCE* 35-36, 47-48 (2012) (detailing the threats and compromises that gave rise to the equal-voting rule).

idea that the Senate's legitimacy rests on its representing states qua states, rather than as collections of citizens.⁵² More generally, as Akhil Amar puts it: "Over the centuries, We the People of the 'United States' have placed increased emphasis on the word 'United' and have correspondingly diminished the status of 'States.'"⁵³

It is therefore unsurprising that the Senate's unequal allotment of power to voters from different states is among the most criticized aspects of the Constitution today.⁵⁴ Sanford Levinson, for example, argues that the Senate's apportionment "makes an absolute shambles of the idea that in the United States the majority of the people rule."⁵⁵ Robert Dahl, a leading democratic theorist, claims that "the degree of unequal representation in the U.S. Senate is by far the most extreme" among the world's federal systems, and describes this as a "profound violation of the democratic idea of political equality among all citizens."⁵⁶ A substantial literature in political science has documented the systematic redistributive effects of the Senate's disproportional design, and the sizable advantages that small-state voters enjoy as a result.⁵⁷

Seen in this light, the Senate's state-based structure is hardly a touchstone of legitimacy that leaves only questions about internal majoritarianism worth

52. See U.S. CONST. amend. XVII (providing for direct election of senators); see also AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 412-13 (2005) (discussing the shift in the conception of the Senate that precipitated and followed the Seventeenth Amendment); LEVINSON, *supra* note 51, at 150 (arguing that whereas once "one could make a reasonable argument that senators were . . . the representatives of state governments rather than the people of the given states," the Seventeenth Amendment vitiated this argument by "sever[ing] the connection between senators and state officialdom").

53. AMAR, *supra* note 52, at 413.

54. See, e.g., ROBERT A. DAHL, *HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION?* 49 (2002); SANFORD LEVINSON, *OUR UNDEMOCRATIC CONSTITUTION: WHERE THE CONSTITUTION GOES WRONG (AND HOW WE THE PEOPLE CAN CORRECT IT)* 49-62 (2006); Bruhl, *supra* note 1, at 1046-47 (describing "the Senate's malapportionment with regard to population" as "both highly consequential and quite hard to justify today"); William N. Eskridge, Jr., *The One Senator, One Vote Clauses*, in *CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES* 35, 35 (William N. Eskridge, Jr. & Sanford Levinson eds., 1998) ("In my opinion, the One Senator, One Vote Clauses are the most problematic ones remaining in the Constitution."); Suzanna Sherry, *Our Unconstitutional Senate*, in *CONSTITUTIONAL STUPIDITIES, CONSTITUTIONAL TRAGEDIES*, *supra*, at 95, 95-97; see also Thomas J. Main, *The Constitution and Its Critics*, *POL'Y REV.*, June-July 2011, at 3, 5 (observing that "[e]qual representation of all states in the Senate seems to most trouble the critics of the Constitution").

55. LEVINSON, *supra* note 54, at 58.

56. DAHL, *supra* note 54, at 49.

57. See, e.g., FRANCES E. LEE & BRUCE I. OPPENHEIMER, *SIZING UP THE SENATE: THE UNEQUAL CONSEQUENCES OF EQUAL REPRESENTATION* (1999).

asking. Rather, because the democratic legitimacy of the Senate itself depends in part on how badly it violates the principle of “one person, one vote,”⁵⁸ the question whether the filibuster is a desirable feature of the Senate cannot be resolved without considering the filibuster’s own effect on the principle of majority rule at the national level. This recognition is not at odds with the concession that the Senate deviates from proportionality by design. Rather, to the extent that many find large deviations from national majority rule troubling—or at the very least noteworthy—it matters how much the filibuster serves to amplify the Senate’s countermajoritarian aspect, or whether it might sometimes serve to dampen it.

A final indication that the legitimacy of the filibuster turns in part on its consequences for the external majoritarianism of the Senate is that this seems to have been taken for granted, often implicitly, by many participants in the modern filibuster debate. The dominant argument against the filibuster remains that it permits a minority of senators to thwart the majority.⁵⁹ But it is also common for critics to state the case against the institution precisely in terms of how many Americans it allows to obstruct the will of how many others. Emmet Bondurant, for example, opens his case against the filibuster by observing that it “gives a minority of forty-one senators, who may be elected from states that contain as little as eleven percent of the nation’s population, the power to prevent the Senate from” taking action.⁶⁰ As we will see below, there is no evidence that theoretical scenarios like this one have ever come to pass, at least not in recent history. But the fact that critics regularly invoke them suggests that, in indicting the undemocratic character of the filibuster, they are really making claims about its bearing on *external* majoritarianism as much as anything else.⁶¹ The debate is thus ripe for the introduction of

58. *Reynolds v. Sims*, 377 U.S. 533, 558 (1964) (quoting *Gray v. Sanders*, 372 U.S. 368, 381 (1963)); see also Eskridge, *supra* note 54, at 35 (“The One Senator, One Vote Clauses flout the constitutional principle of ‘one person, one vote.’”).

59. See *supra* notes 39-43 and accompanying text.

60. Bondurant, *supra* note 1, at 467 (footnote omitted); see also sources cited *supra* note 3 (making the same point).

61. Defenders of the filibuster sometimes make arguments that are best understood as claims about the Senate’s external majoritarianism as well. Editorializing against Republican efforts to curtail the filibuster in 2004, for example, *New York Times* defended the institution as “the main means by which the 48 percent of Americans who voted for John Kerry can influence federal policy.” Editorial, *Mr. Smith Goes Under the Gavel*, N.Y. TIMES, Nov. 28, 2004, <http://www.nytimes.com/2004/11/28/opinion/28sun1.html>. Jacob Weisberg similarly argued that the filibuster should be preserved because, “[f]or a democratic system to function fairly and effectively, 51 percent of a population, or of a legislative body, cannot simply impose its will on the other 49 percent.” Jacob Weisberg, *Frist’s Folly*, SLATE (Apr. 20,

empirical evidence gauging the filibuster's actual relationship to majority rule at the national level.

II. QUANTIFYING THE FILIBUSTER'S EFFECT ON MAJORITY RULE

In this Part, I describe a straightforward research method for investigating the connection between the Senate filibuster and majority rule at the national level. I first explain why I chose to pose the research question as I did, and then consider in more depth the reasonableness of employing failed cloture votes as a proxy for filibusters.

A. Conceptual Overview

In light of the emphasis on the democratic value of majority rule in public and scholarly debates over the filibuster, it is a striking omission that we have not amassed statistical information regarding how countermajoritarian the modern filibuster actually is in practice. To begin to fill in this gap, I constructed a new data set that allows us to examine the fraction of the national population represented by the supporters and opponents of recent filibusters.

I began with data describing all the roll-call votes in the Senate from the 102nd Congress to the 111th Congress—thus covering the period from 1991 to 2010—as well as Census estimates of state-by-state population figures for each year in this range.⁶² I filtered out all of the votes except those on cloture motions, and cross-referenced the Census estimates with the roll-call data to calculate the total populations represented by the senators voting for and

2005, 3:13 PM), http://www.slate.com/articles/news_and_politics/the_big_idea/2005/04/frists_folly.html.

62. The roll-call data are drawn from a collection compiled by Keith Poole, Jeff Lewis, and Nolan McCarty. See *Data Download*, VOTEVIEW.COM, <http://www.voteview.com/downloads.asp> (last visited Dec. 8, 2012). The population data are drawn from the U.S. Census Bureau's annual estimates of state population. See *Population Estimates*, U.S. CENSUS BUREAU, <http://www.census.gov/popest/data/historical/index.html> (last visited Oct. 29, 2012). Specifically, the population data for 2001 to 2007 are from table NST-EST2007-01, the data for 2008 are from NST-EST2008-01, the data for 2009 are from NST-EST2009-01, and the data for 2010 are from NST-EST2011-01. I chose to study the most recent two decades for convenience and feasibility, as well as to ensure that the data capture the filibuster in close to its present form. Extending the data set further back would be a fruitful historical exercise, however, and the relative balance of majoritarian and countermajoritarian filibusters has no doubt varied over time.

against each motion.⁶³ Because each state has two senators, I treated each senator as representing one-half of the state's population. Thus if both senators from a state voted the same way on a motion, that side was credited with the support of the full population of the state, but if the senators split, each side was credited with support equal to one-half of the state's population.⁶⁴

Before turning to what these data reveal, several threshold issues require discussion. First, why look to the population represented by a senator, rather than the number of people who actually voted for that senator? Simply because a person's senators are her representatives in the Senate whether she voted for them or not. Put another way, when a person's preferred candidate for Senate loses an election (or even chooses not to run), there is a sense in which her *views* may not be represented in the Senate. But *she* is not unrepresented in the way that she would be if one of her state's Senate seats lay vacant.

Alternatively, why not assess the filibuster's connection to majority rule by looking to survey data measuring public support for the various specific measures that have been obstructed?⁶⁵ For one thing, such data are simply unavailable, except perhaps with respect to a handful of high-salience cases.⁶⁶ More fundamentally, however, there is value in considering the Senate on its own terms as an institution of representative, rather than direct, democracy.

It is worth pausing over this point. The choice between representative and direct institutions concerns the way in which a person has her political say—in particular, whether it is delegated to an intermediary or not. By contrast, the choice between majoritarian and nonmajoritarian rules concerns how her say is

63. Specifically, my procedure retains only votes where the words “cloture” or “close further debate” are mentioned in the “question” or “description” fields of the input data set described *supra* note 62. (To accommodate typographical errors and minor inconsistencies in the original data set, I included references to some other variants as well, such as “close furhter [sic] debate” and “close debate on.”) The outputs of this process were checked against the Senate historian's record of cloture votes in each Congress, and minor corrections were made on this basis. For example, my procedure originally treated a vote in the 104th Congress on revising the cloture rule as if it were itself a cloture vote, since “cloture” was mentioned.

64. Of course, there is no need to suppose that in some sense one senator represents one half of the population, while the other represents the other half. The rule can equally be understood as crediting both coalitions with one-half of each person's representation in the Senate, rather than with the full representation of half of the people.

65. See Ramesh Ponnuru, *Democratic Hackery at Slate*, NAT'L REV. ONLINE (Feb. 9, 2010, 3:51 PM), <http://www.nationalreview.com/corner/194611/democratic-hackery-slate/ramesh-ponnuru> (“[W]hy not look at the polls on the actual bills being filibustered?”).

66. See BINDER & SMITH, *supra* note 7, at 154 (arguing that “marshaling evidence about majority opinion in the general public and the Senate” to consider the filibuster's bearing on public preferences “is not feasible”).

weighed against that of others. Public preferences on legislation or nominees may diverge from the Senate's decisionmaking for reasons grounded in either of these dimensions – that is, either because the representatives of the national majority do not prevail, or simply because the Senate is a representative body rather than a mechanism of direct democracy. Even if we could procure public-opinion data systematically for the hundreds of measures that have been filibustered in the Senate, then, we could not use it to isolate and evaluate the institution's standing by the lights of the majority-rule principle.

Finally, we should recognize that senators' votes for and against cloture cannot always be interpreted as reflecting their positions on the underlying measure. A senator who favors a bill but whose party opposes it might vote against cloture out of party loyalty, for instance.⁶⁷ Of course, a senator who favors a bill but whose party opposes it might vote against the bill itself out of party loyalty as well, though perhaps greater latitude is afforded at this juncture. In any case, these observations do not undermine the approach I've described. Even when senators act strategically – and perhaps they always do – they retain their status as the elected representatives of their constituents, and we are therefore right to ask just how many people they represent. In other words, it is true that we are measuring the majoritarian or countermajoritarian character of the decision to thwart a final vote on some underlying measure – and that this might vary in some cases from the degree of support for or opposition to the measure itself – but it is perfectly appropriate to ask whether those making this decision act in the name of a majority or a minority of Americans.

B. Operationalizing the Filibuster

The most important step in constructing the data set is arriving at a functional characterization of the filibuster itself. As noted above, I employed defeated cloture votes for this purpose. In particular, I restricted the data set to votes on cloture where the motion received more than fifty but fewer than sixty votes. These are the relevant cases because in each of them a majority of the Senate was obstructed from voting on a measure by a minority.⁶⁸ As I argued

67. See Fisk & Chemerinsky, *supra* note 17, at 205 n.131 (“[M]any senators who might support a bill or passage will vote with their obstructionist colleagues against cloture simply as a matter of party loyalty.”).

68. What about cases in which a cloture motion received less than fifty votes, but a majority of the senators voting supported it? Such cases should be excluded because it would not be safe to infer that a majority of the Senate favored bringing the underlying measure to a vote. Since failing to vote at all on a cloture motion has the same effect as voting against it, the

in Part I, this feature marks the core of the modern debate over the democratic legitimacy of the filibuster. By contrast, the significance of successful cloture motions is less clear. They may represent defeated filibusters, but they may also represent moves to end debate that were not seriously contested, including nonconfrontational measures to structure the Senate calendar.⁶⁹

My use of defeated cloture motions as a proxy for successful filibusters requires some defense, however. In particular, although both scholarly and media reports widely conflate cloture votes with filibusters,⁷⁰ Richard S. Beth of the Congressional Research Service has noted that “[i]t would be incorrect to assume that situations in which cloture is sought correspond completely with those in which filibusters occur.”⁷¹ Beth points to two specific categories of divergence between cloture motions and filibusters.

First, “[e]ven if opponents attempt to block a nomination through delaying tactics, supporters may decide not to move for cloture.”⁷² Such cases are indeed excluded from my data set.⁷³ The magnitude of this loss can be roughly estimated by comparing my record of cloture votes with the most comprehensive manual list of filibusters to date, published in 2011 by Lauren Cohen Bell.⁷⁴ Because Bell identified filibusters by reference to contemporaneous newspaper accounts, her data include cases that did not result in cloture votes as well as those that did. Eighty percent of the filibusters

nonvoting senators may well have preferred for cloture not to be invoked, but recognized that it was unnecessary for them to vote this preference.

69. See Sarah A. Binder et al., *Mending the Broken Branch: Assessing the 110th Congress, Anticipating the 111th*, BROOKINGS INSTITUTION 11 (Jan. 2009), http://www.brookings.edu/~media/research/files/papers/2009/1/08-broken-branch-binder-mann/0108_broken_branch_binder_mann.pdf.
70. See, e.g., Bondurant, *supra* note 1, at 477 & n.70 (reporting on the number of “filibusters” and citing data on the number of cloture motions); Tom Udall, *The Constitutional Option: Reforming the Rules of the Senate To Restore Accountability and Reduce Gridlock*, 5 HARV. L. & POL’Y REV. 115, 121 (2011) (same); Editorial, *Not Too Late To Curb the Filibuster*, N.Y. TIMES, May 14, 2012, <http://www.nytimes.com/2012/05/15/opinion/not-too-late-to-curb-the-filibuster.html> (same).
71. RICHARD S. BETH, CONG. RESEARCH SERV., RS20801, CLOTURE ATTEMPTS ON NOMINATIONS 2 (2002), <http://www.senate.gov/reference/resources/pdf/RS20801.pdf>.
72. *Id.*; see also Lauren Cohen Bell & L. Marvin Overby, *Extended Debate over Time: Patterns and Trends in the History of Filibusters in the U.S. Senate 6* (Apr. 2, 2007) (unpublished manuscript), http://citation.allacademic.com/meta/p_mla_apa_research_citation/1/9/6/7/6/pages196768/p196768-1.php (“[S]ome measures under filibuster might never be subject to a cloture vote.”).
73. Somewhat encouragingly, Beth also suggests that such a failure to file for cloture in the face of a filibuster is “perhaps uncommon today.” BETH, *supra* note 71, at 2.
74. See BELL, *supra* note 17, app. at 169-77.

she identified in the relevant period do appear to correspond to cloture votes, however.⁷⁵

Beth's second concern is about cases where "supporters of a nomination may move for cloture, in order to speed action, even when opponents may not consider themselves to be conducting a filibuster against it, or when they may have only threatened, but not actually conducted, a filibuster."⁷⁶ The force of this concern is blunted somewhat by our restriction of the data set to failed cloture motions, since moves to invoke cloture that are not opposed—and, indeed, opposed successfully—will not be counted as filibusters.

Nonetheless, there may also be cases where the minority thwarts a cloture motion not in order to conduct or perpetuate a filibuster per se, but simply in order to secure a reasonable opportunity to be heard. In principle, then, the only distinction between sincerely demanding further debate and filibustering may consist in the intentions of the opponents of cloture.⁷⁷ Such a difference in intentions could not be used to operationalize the filibuster for the purposes of a systematic investigation, however. As Franklin Burdette explained in his 1940 treatise, "With motives hidden in the give and take of parliamentary battle, who can say whether a prolonged speech is a concealed design for obstruction or a sincere effort to impart information, whether garrulousness is more cunning than it seems?"⁷⁸

75. Some of these overlapping cases were excluded from the analyses I report here by the rule that we are considering only failed cloture motions receiving more than fifty votes. My data set also includes several cases that Bell's does not. Specifically, of the portion of my data that overlaps chronologically with Bell's, forty-five percent of the cases in which cloture motions received more than fifty but fewer than sixty votes do not correspond to any filibuster that I could identify in Bell's list. There is a strong argument for including these failed cloture votes in our analysis, however, since each involves a Senate minority defeating the majority's effort to hold a vote. Examples include the DREAM Act, S. 2205, 110th Cong. (2007), which would have adjusted the legal status of certain undocumented immigrants who entered the country as children; President George W. Bush's nomination of Carolyn Kuhl to the Ninth Circuit (2003); and the Truth in Employment Act, S. 1981, 105th Cong. (1998), which would have limited "salting" by union organizers. Each of these measures failed when cloture was not invoked despite majority support, but none is counted as a filibuster in Bell's analysis. Compare 153 CONG. REC. 28,101 (2007) (cloture vote on DREAM Act), 149 CONG. REC. 28,864 (2003) (cloture vote on Carolyn Kuhl), and 144 CONG. REC. 20,147 (1998) (cloture vote on Truth in Employment Act), with BELL, *supra* note 17, app. at 169-77.

76. BETH, *supra* note 71, at 2.

77. Cf. BELL, *supra* note 17, at 11 (defining a filibuster as an effort to "intentionally delay or prevent any measure, nomination, or procedural activity from taking place" (emphasis omitted)); Bondurant, *supra* note 1, at 467 ("A filibuster is an intentional abuse of the privilege of unlimited debate.").

78. FRANKLIN L. BURDETTE, *FILIBUSTERING IN THE SENATE* at vii (1940).

Faced with these difficulties, and because there is no formal definition of a filibuster in the Senate Rules, we should focus on the concept's functional significance. For our purposes, this is the power it gives a Senate minority to thwart a vote that the majority seeks to hold. As I have suggested, this central feature is in evidence whenever a cloture motion supported by a majority of the Senate is defeated, whether the opponents of cloture consider themselves to be conducting a filibuster or not. In this sense, if a minority does not understand itself to be filibustering, a cloture motion is filed, and the minority then defeats the cloture motion, it is fair to say that they conducted a filibuster—even if they were induced to do so by what they regarded as a premature effort to cut off debate.

Others have also adopted cloture motions or cloture votes as workable, if imperfect, proxies for filibusters. Indeed, in one study of the statistical predictors of filibustering over the course of the twentieth century, the authors obtained “essentially the same” results whether identifying filibusters by cloture motions or by scrutinizing other historical records.⁷⁹ Steven S. Smith likewise concludes that “[t]he frequency of filibusters can be gauged at least crudely by the number of issues for which cloture motions are made.”⁸⁰ And Beth too acknowledges that, “[s]ince filibusters may be conducted through a variety of tactics, . . . the presence of cloture attempts may at least be a readily available means for attempting to identify some cases in which filibusters may have occurred.”⁸¹ As described above, I hope to further mitigate some of the imprecisions of this approach by considering only cloture votes in which a majority is defeated by a minority, and by trading on the modern functional understanding of the filibuster as a supermajority requirement.

Before turning to the data, let me briefly note two other issues. First, a single filibuster can often result in more than one cloture vote being held. In order to ensure that such successive cloture votes are not counted as separate, additional filibusters, I identified cloture votes on a common measure wherever possible and excluded from the data set all but one vote from each group.⁸² If

79. Binder et al., *supra* note 17, at 416.

80. STEVEN S. SMITH, *CALL TO ORDER: FLOOR POLITICS IN THE HOUSE AND SENATE* 94 (1989).

81. BETH, *supra* note 71, at 2.

82. See Richard S. Beth, *What We Don't Know About Filibusters* 5 (Mar. 1995) (unpublished manuscript) (on file with author) (“It is little consistent with any accepted concept of the filibuster to say that these eight cloture votes [on a single measure] indicated the occurrence of eight filibusters. For any plausible purposes it is more appropriate to view them as eight attempts to overcome one filibuster.”). I did not treat cloture votes dealing with the same underlying bill at different procedural stages as duplicates, however, in part because the substance of the measure may have changed. For example, I counted separately the July 10,

only one of the duplicate cloture votes received more than fifty but fewer than sixty yeas, I retained that one. If more than one met this criterion, I retained the earliest one.

Second, the functional definition of a filibuster I have described here necessarily excludes cases where a minority delays a vote by filibustering or threatening to filibuster, prompting a cloture motion to be filed, and then proceeds to lose the cloture vote to the majority. Where we might have been inclined to say that the minority successfully filibustered for a time but was eventually defeated, my taxonomy commits us to saying that the minority attempted to filibuster the measure but ultimately failed to do so. I suspect that ordinary usage reflects allegiances to both of these ways of thinking, again suggesting that the filibuster is a concept whose meaning is not rigidly fixed. The advantage of my approach is that it focuses us on the essence of the filibuster as a prerogative allowing a minority to prevent a majority from holding a vote, while facilitating quantitative analysis of the filibuster in terms of failed cloture votes. Nonetheless, there is an important limitation to my approach that arises here as well: filibusters or threats of a filibuster can sometimes force changes in bills even if cloture is successfully invoked—perhaps because cloture only could have been invoked with the change—and this part of the filibuster’s influence will not be reflected in my data unless there is a defeated cloture motion in the record.⁸³

As this discussion suggests, identifying filibusters systematically is a vexing problem, and my use of defeated cloture motions as a proxy is hardly a perfect solution. So long as we bear its imprecisions in mind, however, they seem a fair price to pay for the analytic leverage this method allows through quantitative analysis. Some tradeoff of this kind is necessary, since the facts we are trying to ascertain—facts that I have argued should significantly enhance the filibuster debate—require both recorded votes and a computational approach. Still, my

1991, cloture vote on the Biden-Thurmond Violent Crime Control Act and the March 19, 1992, cloture vote on the Conference Report on the Act. In addition, I never counted cloture votes falling in different Congresses as duplicates. Thus, for example, I counted separately the July 18, 1991, cloture vote on the National Voter Registration Act of 1992 and the March 5, 1993, cloture vote on the National Voter Registration Act of 1993.

83. See Fisk & Chemerinsky, *supra* note 17, at 195 n.73 (“Filibusters often force significant changes in bills.”); see also SMITH, *supra* note 80, at 97 (“Unfortunately, there is no practical way to assess systematically the policy concessions made to senators threatening to filibuster.”). However, if an initial cloture motion supported by a majority of senators fails, but a subsequent cloture motion succeeds—perhaps because substantive changes to the underlying measure have broadened its appeal—then my procedure will count the original vote as a successful filibuster in its own right. For an example of this dynamic, see *infra* notes 89-91 and accompanying text.

evidence about the filibuster should hardly be seen as definitive. One of its most important limitations, in my view, is that it offers no vantage point on the long shadow cast by the filibuster—that is, on the many initiatives that are (or would be) supported by a majority of senators, but which are never the subject of a cloture motion at all, precisely because the infeasibility of securing sixty votes is understood in advance. Unfortunately, this difficulty is endemic to studies that take actual rather than hypothetical filibusters as their subject.

III. RESULTS

A. Overview of the Data

There were 173 cases in which a cloture motion supported by more than fifty senators was defeated between the beginning of the 102nd Congress in 1991 and the end of the 111th Congress in 2010, excluding successive cloture votes on the same underlying measure. (In what follows, I will refer to these 173 cases simply as “filibusters.”) The counts for each Congress are shown in Table 1, alongside the majority party in the Senate at the time, the average numbers of votes for and against cloture, and the average share of the national population represented by the supporters and opponents of cloture.

Because a three-fifths majority of the Senate is required to invoke cloture no matter how many senators vote, failing to vote on a cloture motion has the same effect as voting against it. For this reason, I report the share of the total national population that is represented by the supporters of cloture, and count the rest of the national population as opposing it.⁸⁴ Counting only the population represented by voting senators would misleadingly portray nonvoting senators as irrelevant or neutral with respect to whether cloture is invoked.⁸⁵

84. I used the sum of the populations of all fifty states in the year of each vote to determine the “national population.” Thus my figures exclude the District of Columbia (as they should for these purposes, since it is not represented in the Senate).

85. Of course, many failures to vote on a cloture motion may reflect unrelated absences. The point is simply that failing to vote has the same *effect* as voting against the motion—a fact of which senators are no doubt aware when they decide whether to be present for the vote.

THE MAJORITARIAN FILIBUSTER

Table 1.

DATA ON FILIBUSTERS IN EACH CONGRESS FROM 102ND TO 111TH

CONGRESS	MAJORITY PARTY	SUCCESSFUL FILIBUSTERS	MEAN VOTE ON CLOTURE (YEA / NAY)	MEAN POPULATION REPRESENTED (SUPPORTERS OF CLOTURE / OPPONENTS OF CLOTURE)	MEAN SHARE OF POPULATION REPRESENTED (SUPPORTERS OF CLOTURE / OPPONENTS OF CLOTURE)
102d (1991-1992)	Democratic	15	55.9 / 40.3	152M / 102M	59.9% / 40.1%
103d (1993-1994)	Democratic	17	55.6 / 42.1	160M / 100M	61.5% / 38.5%
104th (1995-1996)	Republican	21	54.2 / 44.0	137M / 131M	51.2% / 48.8%
105th (1997-1998)	Republican	17	53.8 / 44.1	137M / 137M	50.2% / 49.8%
106th (1999-2000)	Republican	17	53.6 / 43.9	140M / 139M	50.1% / 49.9%
107th (2001-2002)	Mixed	9	54.4 / 41.4	175M / 111M	61.1% / 38.9%
108th (2003-2004)	Republican	17	54.1 / 43.1	137M / 154M	47.2% / 52.8%
109th (2005-2006)	Republican	11	54.6 / 43.2	148M / 149M	49.9% / 50.1%
110th (2007-2008)	Democratic	28	53.9 / 41.6	173M / 128M	57.5% / 42.5%
111th (2009-2010)	Democratic	21	55.6 / 40.2	187M / 122M	60.5% / 39.5%
Total	4 Democratic 5 Republican 1 Mixed	173	54.5 / 42.4	156M / 128M	54.9% / 45.1%

These data confirm that the connection between the filibuster and majority rule is far more complicated than the standard debate would suggest. Several features of the data are particularly noteworthy. First, the average situation in which a filibuster succeeds is quite unlike the limiting case that attracts the

most discussion, where fifty-nine senators are thwarted by forty-one.⁸⁶ Rather, the majority that is prevented from holding a vote has been made up of only 54.5 senators on average. These defeated supporters of cloture represented 55% of the country on average, whereas those not voting to invoke cloture represented 45%.

For 45% of the nation to obstruct the will of the other 55% is a significant but hardly stunning affront to the principle of majority rule. It is particularly modest relative to the nightmare scenarios sometimes deployed by opponents of the filibuster.⁸⁷ As the critics often observe, if forty-one senators from the twenty-one least-populous states banded together, they could maintain a filibuster while representing a mere 11% of the national population.⁸⁸ It is significant, then, that such hypothetical alignments do not come close to representing the reality of the filibuster's typical use, at least in modern practice. In fact, the average number of votes for cloture in a successful filibuster, 54.5, is very nearly proportionate to the 54.9% share of the population these senators represent.

B. The Countermajoritarian Filibuster

Although the filibuster does not appear to be as strongly countermajoritarian as some have imagined, it is undeniable that it very often enables minorities to thwart the will of sizable majorities, and this familiar fact is reflected (and now quantified) in the data as well. Indeed, in fifty-five cases (32% of the total) a filibuster thwarted the representatives of 60% or more of the national population. The ten most egregiously countermajoritarian filibusters are detailed in Table 2 below (in descending order of egregiousness).

86. See sources cited *supra* note 3.

87. See, e.g., Magliocca, *supra* note 1; Miller, *supra* note 1; Smith, *supra* note 3.

88. This figure is based on Census population estimates for 2011. See *State & County QuickFacts*, *supra* note 46. The twenty-one least populous states are, in ascending order of population: Wyoming, Vermont, North Dakota, Alaska, South Dakota, Delaware, Montana, Rhode Island, New Hampshire, Maine, Hawaii, Idaho, Nebraska, West Virginia, New Mexico, Nevada, Utah, Kansas, Arkansas, Mississippi, and Iowa.

THE MAJORITARIAN FILIBUSTER

Table 2.

THE TEN MOST COUNTERMAJORITARIAN FILIBUSTERS FROM THE 102ND CONGRESS TO THE 111TH

DATE OF CLOTURE VOTE	ROLL CALL NO.	SUBJECT MATTER	VOTE (YEA / NAY)	SHARE OF POPULATION REPRESENTED (SUPPORTERS OF CLOTURE / OPPONENTS OF CLOTURE)
Aug. 2, 1991	102d Cong., 1st Sess., Roll Call No. 177	Wirth Amendment (S. Amend. 1038 to S. 1507) 137 CONG. REC. 22,081-82 (1991)	58 / 40	68% / 32%
		Overturing ban on abortions at overseas military medical facilities		
Mar. 16, 1993	103d Cong., 1st Sess., Roll Call No. 33	National Voter Registration Act (S. 460)	59 / 41	67% / 33%
		Voter registration reforms ("Motor Voter")		
May 21, 2002	107th Cong., 2d Sess., Roll Call No. 117	Rockefeller Amendment (S. Amend. 3433 to H.R. 3009) 148 CONG. REC. 8093-94 (2002)	56 / 40	66% / 34%
		Health insurance trade adjustment assistance for retired steelworkers		
Apr. 21, 1993	103d Cong., 1st Sess., Roll Call No. 105	Emergency Supplemental Appropriations Act (H.R. 1335)	56 / 43	65% / 35%
		Economic stimulus		
Nov. 6, 2001	107th Cong., 1st Sess., Roll Call No. 323	Daschle Amendment (S. Amend. 2044 to H.R. 3061) 147 CONG. REC. 21,213-15 (2001)	56 / 44	65% / 35%
		Collective bargaining rights for state public safety officers		
Feb. 6, 2002	107th Cong., 2d Sess., Roll Call No. 13	Daschle Amendment (S. Amend. 2698 to H.R. 622) 148 CONG. REC. 73-76 (2002)	56 / 39	65% / 35%
		Economic stimulus		

Table 2 continued.

DATE OF CLOTURE VOTE	ROLL CALL NO.	SUBJECT MATTER	VOTE (YEA / NAY)	SHARE OF POPULATION REPRESENTED (SUPPORTERS OF CLOTURE / OPPONENTS OF CLOTURE)
Oct. 2, 1992	102d Cong., 2d Sess., Roll Call No. 261	Neighborhood Schools Improvement Act (S.2)	59 / 40	65% / 35%
		Education-reform grants		
Aug. 4, 1999	106th Cong., 1st Sess., Roll Call No. 252	Lott Motion To Recommit (S. 1233)	53 / 47	64% / 36%
		Barring reform of federal milk marketing orders		
Oct. 7, 1993	103d Cong., 1st Sess., Roll Call No. 307	Nomination of Walter Dellinger as Assistant Attorney General	59 / 39	64% / 36%
Mar. 24, 1994	103d Cong., 2d Sess., Roll Call No. 75	Federal Workforce Restructuring Act (H.R. 3345)	58 / 41	64% / 36%
		Cash buyouts for federal workers		

This list renders more concrete the many hypothetical suggestions that the filibuster could empower senators representing a small minority of Americans to thwart legislation that has wide support. Many of these filibusters also tell interesting stories in their own right. The National Voter Registration Act of 1993, widely known as the “Motor Voter” bill, provides an instructive example. The bill, which integrated opportunities for voter registration into the process of obtaining or renewing a driver’s license, was successfully filibustered on March 16, 1993. Cloture was then invoked the next day – but only after the bill was amended to make the provision mandating that states also offer voter registration at public assistance agencies entirely optional.⁸⁹ As Senator Paul Wellstone noted at the time of the change, this was a significant concession:

89. Compare National Voter Registration Act of 1993, H.R. 2, 103d Cong. § 7(a)(2) (1993) (as received in Senate) (“Each State shall designate as voter registration agencies . . . all offices in the State that provide public assistance, unemployment compensation, or related services”), with 139 CONG. REC. 5302 (1993) (S. Amend. 176 to S. 460; Ford Amendment) (“In section 7(a)(2), strike the word ‘shall’ and insert the word ‘may.’”). For another account, see

[A]bove and beyond motor-voter are citizens in our country who do not have enough money to own an automobile, who would not be able to be registered that way. The agency-based registration was an attempt to reach out to try and register low-income people, as well. It was the right thing to do, for anyone who wants to expand democracy. It dealt with an economic bias. We should have done it.⁹⁰

The filibustering minority that extracted this concession represented only one-third of the American people, making their obstruction one of the most countermajoritarian legislative acts in recent history. More broadly, the vignette demonstrates the power that a filibustering minority, here representing a small minority of the country, can exert even on the contents of legislation that does ultimately pass. Had the senators representing one-third of the country not been able to thwart those representing the other two-thirds, the law would have been materially different.⁹¹

Because much of the recent debate over the filibuster has focused on its use to block consideration of presidential nominees, I provide data on the twenty-one instances in which a Senate majority failed to invoke cloture on a nomination in the Appendix. I return to the significance of these cases in discussing normative implications of the data in Part IV.

C. *The Majoritarian Filibuster*

The aggregate figures above help to put a scale on the stakes in the debate over the democratic legitimacy of the filibuster. Table 2 also demonstrates just how countermajoritarian the filibuster, when superimposed on the Senate's own disproportional structure, can be. The most striking feature of the data, however, is the incidence of *majoritarian* filibusters—cases in which the obstructionist minority represented more people than the majority that failed to invoke cloture.

Overall, in 34% of the filibusters between 1991 and 2010, the supporters of cloture, despite numbering more than fifty senators, represented less than half

Editorial, *A Useless Filibuster*, N.Y. TIMES, May 11, 1993, <http://www.nytimes.com/1993/05/11/opinion/a-useless-filibuster.html>.

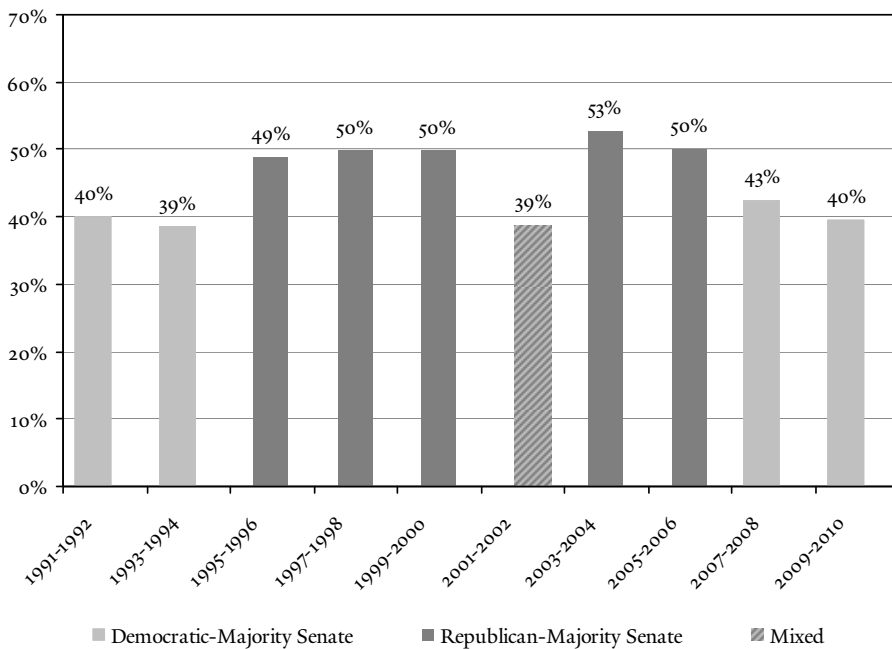
90. 139 CONG. REC. 5223 (1993) (paragraph break omitted).

91. In a final compromise with the House, the enacted bill covered welfare agencies, but not unemployment offices. *See id.* at 9501 (statement of Sen. Wendell Ford) (“The agreement reinstates the mandatory agency-based registration portion of the bill to include all public assistance offices, and all offices in the State that provide State-funded programs primarily engaged in providing services to persons with disabilities. Unemployment offices may be designated, but they are not mandated.”).

of the national population. Unsurprisingly, both majoritarian and countermajoritarian filibusters tend to be clustered in particular Congresses, since the majority party in the Senate either did or did not represent a collection of states comprising a majority of the national population. Thus, in five of the ten Congresses under consideration, most of the filibusters were majoritarian.⁹² Figure 1 depicts the average share of the population represented by filibustering minorities across Congresses, and Figure 2 depicts the number and relative share of filibusters that were majoritarian across Congresses.

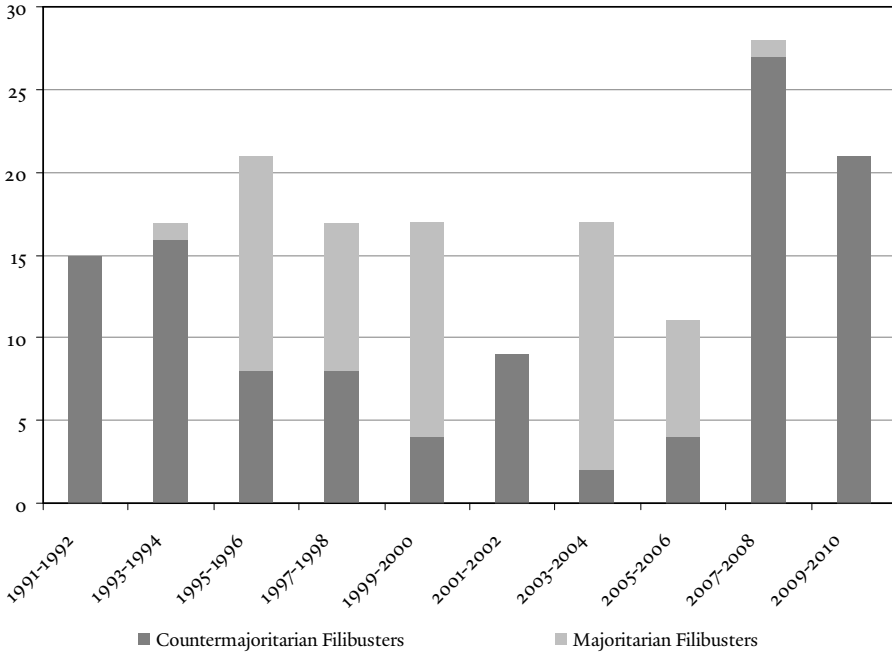
Figure 1.

THE AVERAGE SHARE OF THE NATIONAL POPULATION REPRESENTED BY THE OPPONENTS OF CLOTURE IN SUCCESSFUL FILIBUSTERS



⁹² These are the 104th, 105th, 106th, 108th, and 109th Congresses.

Figure 2.
THE INCIDENCE OF COUNTERMAJORITARIAN AND MAJORITARIAN FILIBUSTERS



As Figure 1 and Figure 2 illustrate, the differences across Congresses appear to reflect changes in party control of the Senate. Compare, for example, the 110th Congress (2007-2008) to the 104th (1995-1996). In the 110th, which began after Democrats won control of the Senate in 2006, the senators attempting but failing to defeat a filibuster represented roughly 57% of the national population on average. Their opponents—counting senators who did not vote—represented 43%. By contrast, in the 104th Congress, which began after Republicans retook control of the Senate in 1994, the defeated supporters of cloture represented only 51% of the country on average, while the filibustering minority represented fully 49%. Figure 1 shows that this partisan asymmetry is reflected in every Congress from the 102nd to the 111th (setting aside the 107th, in which party control shifted back and forth). Overall, two majoritarian filibusters took place under Democratic majorities, and fifty-seven occurred under Republican majorities.⁹³

93. In both of the majoritarian filibusters that occurred while Democrats held the majority in the Senate, the majority of Democratic senators were in the filibustering minority. In each

Over the past twenty years, then, the majoritarian import of the filibuster has varied dramatically with the party in power. When Democrats have been in the majority, the average shares of the national population represented by the supporters and opponents of ending a filibuster have been 60% and 40%, respectively. When Republicans have been in power, these averages round to 50% each.⁹⁴

Of course, this pattern is not difficult to explain. As is well known, Republicans have been more likely than Democrats to represent states with smaller populations in recent decades. At the outset of the 112th Congress in 2011, for example, a Republican senator represented 5.8 million people on average, whereas a Democratic senator represented 6.7 million.⁹⁵ The significance of this disparity for the debate over the democratic legitimacy of the filibuster has largely gone overlooked, however.⁹⁶ In short, often the filibuster has not been a countermajoritarian institution, but rather a way to force the majority party in the Senate to win the support of the representatives of a genuine popular majority before enacting legislation or confirming nominees.

It is an interesting question whether this partisan asymmetry reflects a contingent feature of the electoral map of the 1990s and 2000s or a cleavage more deeply rooted in the American political experience and the structure of our institutions. Even if it were the former, it would be important to understand the way that the Senate and its filibuster rule interact with the politics of our moment in determining how closely our institutions hew to the majority-rule principle. There is also reason to suspect that the majoritarian filibuster's disproportionate role in obstructing the will of one party has deeper and more enduring foundations, however.

case, the supporters of cloture numbered more than fifty because a minority of Democrats joined with a majority of Republicans in voting for cloture. One vote was on the Product Liability Fairness Act, S. 687, 103d Cong. (1994), and the other was on the Warner Amendment establishing benchmarks for progress in Iraq, 153 CONG. REC. 12,564-65 (2007) (S. Amend. 1134 to H.R. 1495), which some Democrats criticized as toothless, *see* 153 CONG. REC. 12,588 (2007) (statement of Sen. Harry Reid) ("If you look in the dictionary under 'weak,' the Warner amendment would be listed right under it.").

94. These figures are not listed in Table 1. They are simply the values that would appear in the final column if all of the cloture votes under Democratic and Republican majorities were pooled together.
95. *See Senators of the 112th Congress*, U.S. SENATE, http://www.senate.gov/general/contact_information/senators_cfm.cfm (last visited Oct. 29, 2012); *State & County QuickFacts*, *supra* note 46.
96. It was noted by some in the midst of the debate over Democratic filibusters of President George W. Bush's judicial nominees. *See* Fisk & Chemerinsky, *supra* note 4, at 336; Editorial, *supra* note 11; Hertzberg, *supra* note 11.

In particular, as Mark Graber explains, “political movements that flourish in large states have different characteristics than political movements that flourish in smaller states.”⁹⁷ William Eskridge has thus identified an enduring bloc of “sagebrush states” whose senators are most advantaged by the Senate’s structural solicitude for small states.⁹⁸ These senators “have been a distinctive voting bloc throughout the post-New Deal era,” characterized by both common material interests and a common political culture.⁹⁹

So long as these political and cultural alignments remain, we can expect to confront a political landscape in which one party tends to fare relatively better in larger states, and the other in smaller ones. And so long as that is true, we can also expect an ongoing pattern in which one party more often holds the majority in the Senate without representing a majority of Americans. Democrats and Republicans have not always occupied the same roles in this arrangement, and they may not in the future.¹⁰⁰ The partisan asymmetry reflected in the data is noteworthy, then, not only as a vantage point on contemporary politics, but also as a mark of the majoritarian filibuster’s underappreciated role as a democratic check on certain countermajoritarian tendencies of our constitutional and political condition.

To render this discussion of the majoritarian filibuster more concrete, and to identify interesting cases for further investigation, Table 3 lists the ten most strongly majoritarian filibusters between 1991 and 2010. These filibusters obstructed a wide variety of measures, including a broad energy bill favored by the Republican majority in 2004, repeated efforts to curtail product liability tort claims, bankruptcy reform legislation, and a proposal to set benchmarks for ending the war in Iraq. Several illustrative examples of majoritarian filibusters are also included in the Appendix, which lists all of the cases in which a Senate majority tried but failed to invoke cloture on a nomination. Majoritarian filibusters were conducted against many of President George W.

97. Mark A. Graber, *The Countermajoritarian Difficulty: From Courts to Congress to Constitutional Order*, 4 ANN. REV. L. & SOC. SCI. 361, 378 (2008); see also *id.* at 377 (“Even if political coalitions based in more populous states are neither consistently liberal nor consistently conservative, a fair possibility exists that the politics of these jurisdictions have some common features.”).

98. Eskridge, *supra* note 54, at 36.

99. *Id.* at 39 n.6. Akhil Amar suggests that when the Constitution was framed, by contrast, “the Senate’s overrepresentations and underrepresentations tended to cancel out, randomly cutting across America’s main geographic and ideological fault lines.” AMAR, *supra* note 52, at 86.

100. Cf. ROGERS, *supra* note 12, at 99–100 (observing in 1926 that “[i]t may, of course, be shown that Senate majorities represent population minorities, but it would be strange indeed if this were not the case, particularly when the Senate is controlled by Democrats who are elected by the smaller states” (footnote omitted)).

Bush's nominees, including William Myers, Priscilla Owen, Henry Saad, Carolyn Kuhl, Janice Rogers Brown, William Pryor, and John Bolton.¹⁰¹

Table 3.

THE TEN MOST MAJORITARIAN FILIBUSTERS FROM THE 102ND CONGRESS TO THE 111TH

DATE OF CLOTURE VOTE	ROLL CALL NO.	SUBJECT MATTER	VOTE (YEA / NAY)	SHARE OF POPULATION REPRESENTED (SUPPORTERS OF CLOTURE / OPPONENTS OF CLOTURE)
Apr. 29, 2004	108th Cong., 2d Sess., Roll Call No. 74	Domenici Amendment (S. Amend. 3051 to S. 150) 150 CONG. REC. 7769-7872 (2004)	55 / 43	43% / 57%
		Energy policy		
Sept. 14, 1998	105th Cong., 2d Sess., Roll Call No. 266	Truth in Employment Act (S. 1981)	52 / 42	44% / 56%
		Limits on union "salting"		
June 28, 1994	103d Cong., 2d Sess., Roll Call No. 169	Product Liability Fairness Act (S. 687)	54 / 44	44% / 56%
		Limits on product liability lawsuits		
May 15, 1997	105th Cong., 1st Sess., Roll Call No. 68	Family Friendly Workplace Act (S. 4)	53 / 47	45% / 55%
		Overtime and compensatory time reform		
July 9, 1998	105th Cong., 2d Sess., Roll Call No. 188	Product Liability Reform Act Lott Amendment (S. Amend. 3064 to S. 648) 144 CONG. REC. 14,665-72 (1998)	51 / 47	45% / 55%
		Limits on product liability lawsuits		

¹⁰¹. See *infra* Appendix Table 4.

THE MAJORITARIAN FILIBUSTER

May 16, 2007	110th Cong., 1st Sess., Roll Call No. 168	Warner Amendment (S. Amend. 1134 to H.R. 1495) 153 CONG. REC. 12,564-65 (2007)	52 / 44	45% / 55%
		Benchmarks for Iraq War		
July 20, 2004	108th Cong., 2d Sess., Roll Call No. 158	Nomination of William G. Myers to be U.S. Circuit Judge	53 / 44	45% / 55%
Mar. 24, 2004	108th Cong., 2d Sess., Roll Call No. 60	JOBS Act (S. 1637)	51 / 47	45% / 55%
		Corporate tax reforms		
Nov. 1, 2000	106th Cong., 2d Sess., Roll Call No. 294	Bankruptcy Reform Act (H.R. 2415)	53 / 30	45% / 55%
		Bankruptcy law reform		
Sept. 28, 1998	105th Cong., 2d Sess., Roll Call No. 289	Federal Vacancies Reform Act (S. 2176)	53 / 38	46% / 54%
		"Acting" appointments to vacant offices		

D. Rethinking the Filibuster Debate

Together, these facts call into question assumptions that have structured much of the modern filibuster debate. As I have noted throughout, the filibuster is widely assumed to be a countermajoritarian institution. This assumption is trivially true at the level of internal majoritarianism, or the rules for the Senate's own decisionmaking. But it is usually taken to follow naturally that the assumption will also hold at the level of external majoritarianism – that giving a veto to a minority of Senators will give a veto to the representatives of a minority of the country.

In reality, the filibuster is often countermajoritarian, but it is hardly always so. In half of the Congresses over the past two decades, its use has conformed to the principle of majority rule at the national level more often than not. Moreover, an important worry about the filibuster has been that, because some states enjoy power in the Senate disproportionate to their populations, the filibuster rule is even more countermajoritarian than it appears – effectively requiring *more* than

60% national support to enact legislation. This concern, it turns out, is very rarely borne out. The average Senate majority defeated by a filibuster has represented only 55% of the country, and in only 2% of successful filibusters have the supporters of cloture represented 65% of the country or more.

Of course, the fact that the filibuster sometimes empowers the representatives of a popular majority does not mean that it tends toward majoritarianism overall. On the contrary, we have seen that it has usually been used to thwart coalitions representing the national majority. But the point stands that what infringes the majority-rule principle may not be the filibuster as such, but a subset of filibusters that have a certain character. If the proportion of such filibusters could be reduced, relative to the share of majoritarian ones, we might have good reason to support the institution overall—even from a majoritarian point of view. I consider that possibility below.

IV. IMPLICATIONS FOR REFORM

How do these findings bear on the various proposals to reform the Senate Rules governing the filibuster? In this final Part, I will focus on two proposed reforms that have received substantial attention in recent years: abolishing the filibuster outright, and adopting a sliding-scale threshold for cloture.¹⁰² I suggest that in light of the data presented above, many advocates of these proposals should consider pursuing two possible compromises with the status quo instead: retaining the filibuster as a genuine supermajority requirement, but only for confirming nominees; and significantly lowering the threshold for invoking cloture.

At the outset, however, one other possible reform should be mentioned. In principle, we might like to preserve the possibility of majoritarian filibusters while doing away with all the others. The most direct way of doing this would

102. A third proposal that has also been the subject of much recent discussion would insist on “talking” filibusters, rather than the modern “stealth” filibusters described *supra* Section I.A. See, e.g., S. Res. 10, 112th Cong. § 4 (2011). It is not clear how much of a difference this proposal would make in practice. It aims to raise the costs of filibustering for the minority, but in general “[a] tag-team of minority senators can keep the debate going with little effort.” Steven S. Smith, Comments on the Harkin-Klobuchar-Merkley-Udall Filibuster Reform Proposal 4 (2011) (unpublished manuscript), http://wc.wustl.edu/files/wc/Comments_on_the_Draft_Filibuster_Reform_Proposal.pdf. The proposal would also empower the minority to derail the majority’s agenda—precisely what the tracking system emerged to avoid. See Magliocca, *supra* note 1, at 316. The majority could counteract this effect by withdrawing the matter from consideration as pending business, but that would relieve the minority of the obligation to continue debate, defeating the point of the plan. See Smith, *supra*, at 4-5.

be to simply allow all and only Senate majorities that represent a majority of the country to invoke cloture.¹⁰³ We can dismiss such a reform, however, because it would be a nonstarter in the Senate. It too openly defies the internal logic of the institution. Assessing the Senate's decisionmaking by reference to external majoritarianism is one thing, but injecting such considerations into its formal legislative process is another. Such a maneuver would also be at least arguably unconstitutional. Article I guarantees "each Senator . . . one Vote,"¹⁰⁴ and Article V promises "that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."¹⁰⁵ On its face, a voting rule that conditions a senator's formal power over a legislative outcome on the size of her state would deny the smaller states "equal Suffrage" in the body.

A. *Abolishing the Filibuster*

As we have seen, many who argue for eliminating the filibuster defend this position by appealing to the principle of majority rule.¹⁰⁶ In essence, they believe it is simply undemocratic for a minority to be able to obstruct the will of a sizable majority of the Senate or the country—and they naturally believe that this is what the filibuster permits. Inasmuch as they are committed to majority rule, however, the surprising incidence of majoritarian filibusters should perhaps lead these people to reconsider their views.

In other words, proponents of majority rule should be concerned not only with *allowing* majorities to enact their agendas over the objections of minorities, but also with *disallowing* minorities from enacting their agendas over the objections of majorities. We often take the latter constraint for granted, but this may be a mistake. If the filibuster were abolished—effectively allowing a bare majority of senators to invoke cloture—majoritarian filibusters would be discarded along with all of the others.

Of course, any bill would still have to receive majority support in the House of Representatives in order to become a law. But bills without sound democratic pedigrees do sometimes pass in the House, for reasons ranging from legislative logrolling, to gerrymandering, to low public salience. If the

103. Some have reacted to the evidence of majoritarian filibusters by proposing a scheme like this. See, e.g., Scott Winship, *A Proposed Compromise on the Filibuster*, PROGRESSIVE POL'Y INST.: PROGRESSIVE FIX (Feb. 12, 2010), <http://www.progressivepolicy.org/2010/02/a-proposed-compromise-on-the-filibuster>.

104. U.S. CONST. art. I, § 3.

105. U.S. CONST. art. V.

106. See, e.g., Bondurant, *supra* note 1; Meyerson, *supra* note 1; Noah, *supra* note 1; Seitz-Wald, *supra* note 1.

filibuster were eliminated, they could then reach the President's desk without the support of senators representing a majority of the American people. That the House promises no majoritarian guarantee is vividly demonstrated by the 2012 election, in which Democratic candidates received roughly a million more votes than Republicans, but won roughly thirty fewer seats.¹⁰⁷ Moreover, the veto exercised by the House offers no reassurance at all in the context of confirmation proceedings, which are the sole province of the Senate.¹⁰⁸ As the cloture votes on nominations detailed in the Appendix demonstrate, filibusters have prevented senators representing only a minority of Americans from confirming many judicial nominees and affording them life tenure on the bench.

To be sure, it is impossible to know just how past confrontations would have played out if the filibuster had not existed. Senators are strategic actors, and they no doubt take account of the decision rules within the body in deciding how to vote. But it is safe to say that the fifty-nine majoritarian filibusters over the past twenty years could not have occurred if a majority of the Senate could have invoked cloture at will. A defender of majority rule should regard this as a significant concern, particularly in the context of confirmation proceedings.

B. Reducing the Cloture Threshold

These majoritarian grounds for ambivalence about eliminating the filibuster point toward an alternative that may be more promising. Instead of permitting a bare majority to invoke cloture, reformers could propose to simply reduce the sixty-vote threshold. The logic of this proposal rests on the simple fact that majoritarian filibusters usually obstruct relatively narrow Senate majorities. After all, the larger the Senate majority, the more likely it is to represent a majority of Americans as well, rendering the filibuster countermajoritarian. By taking note of this pattern, reformers might be able to

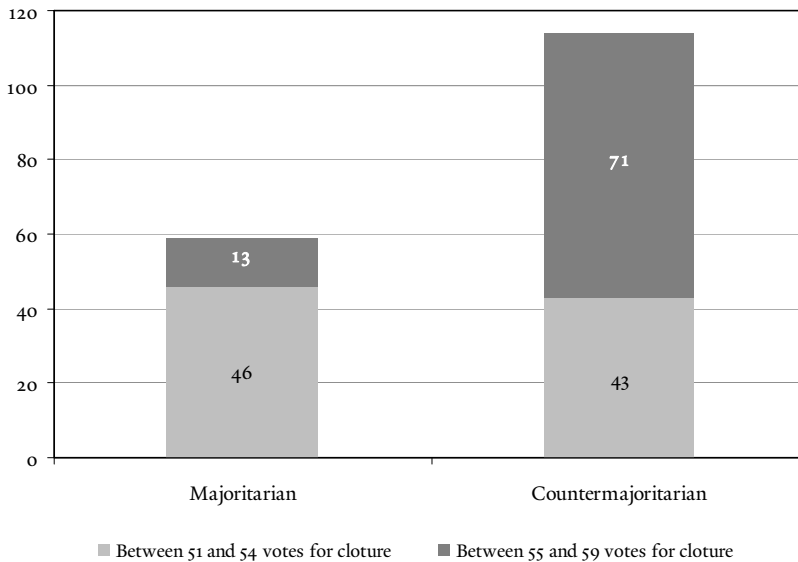
¹⁰⁷. See Greg Giroux, *Republicans Can't Claim Mandate as Democrats Top House Vote*, BLOOMBERG BUSINESSWEEK, Nov. 16, 2012, <http://www.businessweek.com/news/2012-11-15/republicans-can-t-declare-mandate-with-more-democrat-house-votes>. This outcome is rare but not unprecedented. See Richard Winger, *Only Four U.S. House Elections in the Last Hundred Years Gave One Party a House Majority, Even Though the Other Major Party Polled More Votes for U.S. House*, BALLOT ACCESS NEWS, Nov. 12, 2012, <http://www.ballot-access.org/2012/11/12/only-four-u-s-house-elections-in-the-last-hundred-years-gave-one-party-a-house-majority-even-though-the-other-major-party-polled-more-votes-for-u-s-house>.

¹⁰⁸. See U.S. CONST. art. II, § 2.

preclude many of the most countermajoritarian filibusters while retaining most of the majoritarian ones.

This intuition is borne out by the data, as illustrated by Figure 3 below. More than three-quarters (78%) of the majoritarian filibusters in the data set were cases in which the Senate majority seeking cloture was made up of fifty-four Senators or fewer. Had the threshold for invoking cloture been fifty-five votes rather than sixty, then, the vast majority of majoritarian filibusters might have been preserved. At the same time, in only 38% of countermajoritarian filibusters did the majority seeking cloture garner fewer than fifty-five votes. With a fifty-five-vote threshold for cloture, then, the number of countermajoritarian filibusters might have been reduced by more than half, from 114 to 43. In other words, the hypothetical effect of reducing the cloture threshold would be to remove the dark gray regions of Figure 3 – cases in which a filibuster succeeded despite fifty-five or more votes for cloture – from the graph.

Figure 3.
THE INCIDENCE OF COUNTERMAJORITARIAN AND MAJORITARIAN FILIBUSTERS, 1991-2010, SEPARATED BY NUMBER OF VOTES FOR CLOTURE



Under these counterfactual projections, the number of majoritarian filibusters (46) would have slightly exceeded the number of countermajoritarian filibusters (43) over the past two decades. Moreover, the

residual countermajoritarian filibusters would necessarily have been the relatively less troublesome ones, since the national majorities thwarted in these cases—those where the senators supporting cloture numbered fifty-four or fewer—were naturally smaller than in others.

Again, the point of this thought experiment is not to make particular judgments about a counterfactual past—judgments that would be both unreliable and uninformative. Nor is there anything especially significant about these particular numbers. The exercise is merely meant to illustrate a more general suggestion. Specifically, an advocate of majority rule should regard lowering the threshold for cloture not simply as a compromise relative to the principled goal of abolishing the filibuster, but as a compelling alternative in its own right. Because majoritarian filibusters will naturally tend to be ones in which relatively slight Senate majorities favor cloture, most of these filibusters could be retained even if the cloture threshold were lowered significantly. Meanwhile, since countermajoritarian filibusters are not concentrated in this way, many more of them would be eliminated as the cloture threshold was reduced from the current sixty votes. Finally, because the most starkly countermajoritarian filibusters will tend to be those where the largest Senate majorities favor cloture, these will be the first eliminated as the threshold is lowered.

Suppose that an abolitionist would nonetheless prefer to forfeit majoritarian filibusters for the sake of eliminating countermajoritarian filibusters. Such a person should at least recognize that merely reducing the cloture threshold, rather than abolishing the filibuster, is not nearly as large a compromise as she might have thought. A very substantial share of the filibusters that would still be allowed under the compromise would be majoritarian ones, and, from a majoritarian perspective, these are neutral events at worst.

C. The Sliding-Scale Proposals

1. The Harkin-Lieberman Proposal

In 1995, Senators Tom Harkin and Joe Lieberman introduced a proposal to reform the cloture rule by ratcheting down the number of votes required to invoke cloture, beginning from the original sixty, with each subsequent cloture vote on a measure.¹⁰⁹ Under this plan, the threshold would decrease by three

¹⁰⁹ 141 CONG. REC. 434 (1995) (S. Amend. 1 to S. Res. 14; Harkin Amendment).

with each vote, until it reached a simple majority of the Senate.¹¹⁰ Senator Harkin described the objective of the proposal as “a process whereby the minority can slow things down, debate them, but not kill things outright.”¹¹¹ He reintroduced the proposal in 2010.¹¹²

As Senator Harkin’s comments suggest, the main appeal of the sliding-scale proposal is that it would preserve the deliberative virtue of giving a hearing to minority concerns, without surrendering the principle of majority rule at the end of the process. As such, the sliding-scale model might appeal to the same kind of majoritarian who would be drawn to abolishing the filibuster outright. Unsurprisingly, then, the sliding-scale proposal is open to the same counterargument as abolition is.

Like the abolition proposal, the sliding-scale proposal would forfeit the majoritarian filibusters along with the countermajoritarian ones. But if the goal is to ensure majority rule, then permitting a bare majority of senators to invoke cloture may not be the best way to accomplish that objective—whether the threshold is lowered to a simple majority gradually, per the sliding-scale proposal, or not. Just as the majoritarian ambition of abolition might be better served by simply lowering the threshold for cloture, then, the goals of the sliding-scale proposal might be better served by incrementally decreasing the threshold for cloture, but not to the point of a bare majority.

2. *The Frist Proposal*

Senator Bill Frist introduced another version of the sliding-scale model in 2003.¹¹³ His proposal resembled the Harkin-Lieberman plan, with the important difference that the reform would be limited specifically to confirmation proceedings for presidential nominees.¹¹⁴ Senator Frist and his

110. See *id.* (“[T]he affirmative vote required to bring to a close debate upon that measure . . . shall be reduced by three votes on the second such motion, and by three additional votes on each succeeding motion, until the affirmative vote is reduced to a number equal to or less than an affirmative vote of a majority of the Senators duly chosen and sworn.”).

111. 141 CONG. REC. 36 (1995).

112. See S. Res. 416, 111th Cong. (2010); see also Tom Harkin, *Fixing the Filibuster: Restoring Real Democracy in the Senate*, 95 IOWA L. REV. BULL. 67, 76-78 (2010), http://www.uiowa.edu/~ilr/bulletin/ILRB_95_Harkin.pdf.

113. See S. Res. 138, 108th Cong. (2003).

114. See *id.*; see also 149 CONG. REC. 10,985-86 (2003) (statement of Sen. Frist).

supporters touted this restriction as an important virtue of the plan.¹¹⁵ Senator Jon Kyl, for example, responded to criticism of the proposed change by emphasizing that “the legislative filibuster . . . [is] not going to go away. Senators want their right to filibuster. And they’ll have it.”¹¹⁶ On the other hand, critics of the proposal insisted that “there’s no principled, or even plausible, distinction here.”¹¹⁷

In fact, the evidence I have presented suggests that there is indeed a plausible and principled distinction between filibustering legislation and filibustering nominees, but it cuts in the opposite direction of the Frist proposal. Because the Senate has the exclusive power to consent to presidential nominations,¹¹⁸ the case for preserving the opportunity for majoritarian filibusters is *strongest* in this area. Without them, there would often be no step in the confirmation process at which the elected representatives of a majority of the American people could veto a nomination. This suggests that even advocates for majority rule who are intent on eliminating the legislative filibuster should strongly consider retaining the filibuster for judicial nominations (perhaps with a reduced cloture threshold).¹¹⁹ That possibility should appeal particularly to “conservative” majoritarians: those who place a greater premium on ensuring that any nominee opposed by senators representing a majority of the country is rejected than on ensuring that any nominee supported by senators representing a majority of the country is confirmed.

One way or another, reformers must grapple with the complexities of the relationship between the modern filibuster and the principle of majority rule. As I have suggested, one promising compromise reform would be simply to lower the cloture threshold. Alternatively, a hybrid model would abolish the

115. See 149 CONG. REC. 10,985 (2003) (statement of Sen. Frist) (“My resolution . . . is more narrowly tailored, tailored to respond to the problem at hand. My resolution applies only to nominations. . . . It addresses the very specific defect that needs repair.”).

116. *Majority Leader Bill Frist Threatens To Change Senate Filibuster Rules*, PBS NEWSHOUR (Apr. 25, 2005), http://www.pbs.org/newshour/bb/congress/jan-june05/judges_4-25.html.

117. Weisberg, *supra* note 61.

118. U.S. CONST. art. II, § 2, cl. 2.

119. Aaron-Andrew Bruhl briefly considers the possibility of a majoritarian filibuster, but concludes that “we do not need the filibuster to prevent minority rule by an unrepresentative Senate majority” because “a party that is strong enough to hold the presidency, the majority in the House, and the majority in the Senate has sufficiently proven its democratic pedigree that it should be permitted to govern.” Bruhl, *supra* note 1, at 1050 n.42. Whatever one makes of this argument generally, see *supra* note 107 and accompanying text, it is much weaker when the House is not involved.

legislative filibuster but reduce the cloture threshold for presidential nominees. Both of these possibilities warrant serious consideration.

CONCLUSION

I have argued that the traditional debate over the democratic legitimacy of the filibuster is premised on an assumption that is mistaken: that the filibuster is strictly a countermajoritarian institution. In fact, an accurate discussion of the democratic significance of the filibuster is only possible if we recognize its recurring role in enhancing, as well as undermining, the power of senators representing most Americans. Similarly, inasmuch as reform efforts are motivated by the principle of majority rule, they must take account of the filibuster's complex implications for the abilities of both minorities *and* majorities to achieve their goals within our constitutional system. The new data and analysis offered here hardly resolve the debate over the merits of the Senate filibuster, but I hope they may therefore help to enrich it.

APPENDIX: FILIBUSTERS OF PRESIDENTIAL NOMINATIONS

The table below lists defeated cloture votes on presidential nominees in which more than fifty senators supported invoking cloture, noting the shares of the national population represented by the supporters and opponents of cloture, respectively.

Table 4.**FILIBUSTERS OF PRESIDENTIAL NOMINEES FROM THE 102ND CONGRESS TO THE 111TH**

DATE OF CLOTURE VOTE	ROLL CALL NO.	NOMINATION	VOTE (YEA / NAY)	SHARE OF POPULATION REPRESENTED (SUPPORTERS OF CLOTURE / OPPONENTS OF CLOTURE)
Feb. 9, 2010	111th Cong., 2d Sess., Roll Call No. 22	Craig Becker to the National Labor Relations Board	52 / 33	60% / 40%
May 13, 2009	111th Cong., 1st Sess., Roll Call No. 189	David J. Hayes to be Deputy Secretary of the Interior	57 / 39	61% / 39%
Apr. 7, 2006	109th Cong., 2d Sess., Roll Call No. 92	Peter Flory to be Assistant Secretary of Defense	52 / 41	49% / 51%
May 26, 2005	109th Cong., 1st Sess., Roll Call No. 129	John R. Bolton to be U.S. Permanent Representative to the United Nations	56 / 42	48% / 52%
July 22, 2004	108th Cong., 2d Sess., Roll Call No. 161	Richard A. Griffin to be U.S. Circuit Judge	54 / 44	47% / 53%
July 22, 2004	108th Cong., 2d Sess., Roll Call No. 162	David W. McKeague to be U.S. Circuit Judge	53 / 44	47% / 53%
July 22, 2004	108th Cong., 2d Sess., Roll Call No. 160	Henry W. Saad to be U.S. Circuit Judge	52 / 46	46% / 54%
July 20, 2004	108th Cong., 2d Sess., Roll Call No. 158	William G. Myers III to be U.S. Circuit Judge	53 / 44	45% / 55%
Nov. 18, 2003	108th Cong., 1st Sess., Roll Call No. 455	Thomas C. Dorr to the Board of Directors of the Commodity Credit Corporation	57 / 39	48% / 52%

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Nov. 18, 2003	108th Cong., 1st Sess., Roll Call No. 454	Thomas C. Dorr to be Under Secretary of Agriculture	57 / 39	48% / 52%
Nov. 12, 2003	108th Cong., 1st Sess., Roll Call No. 452	Janice R. Brown to be U.S. Circuit Judge	53 / 43	47% / 53%
Nov. 12, 2003	108th Cong., 1st Sess., Roll Call No. 451	Carolyn B. Kuhl to be U.S. Circuit Judge	53 / 43	47% / 53%
Oct. 30, 2003	108th Cong., 1st Sess., Roll Call No. 419	Charles W. Pickering to be U.S. Circuit Judge	54 / 43	47% / 53%
July 31, 2003	108th Cong., 1st Sess., Roll Call No. 316	William H. Pryor, Jr., to be U.S. Circuit Judge	53 / 44	47% / 53%
May 1, 2003	108th Cong., 1st Sess., Roll Call No. 137	Priscilla R. Owen to be U.S. Circuit Judge	52 / 44	46% / 54%
Mar. 6, 2003	108th Cong., 1st Sess., Roll Call No. 40	Miguel A. Estrada to be U.S. Circuit Judge	55 / 44	50% / 50%
Sept. 21, 1999	106th Cong., 1st Sess., Roll Call No. 281	Brian T. Stewart to be U.S. District Judge	55 / 44	52% / 48%
June 21, 1995	104th Cong., 1st Sess., Roll Call No. 273	Henry W. Foster, Jr., to be Surgeon General	57 / 43	58% / 42%
May 24, 1994	103d Cong., 2d Sess., Roll Call No. 131	Sam W. Brown, Jr., to hold the rank of Ambassador as Permanent Representative to the Conference on Security and Cooperation in Europe	54 / 44	60% / 40%
Nov. 3, 1993	103d Cong., 1st Sess., Roll Call No. 349	Alan J. Blinken to be Ambassador to Belgium; Tobi T. Gati to be Assistant Secretary of State; Swanee G. Hunt to be Ambassador to Austria; Thomas A. Loftus to be Ambassador to Norway; Daniel L. Spiegel to be Representative to the European Office of the U.N.	58 / 42	63% / 37%
Oct. 7, 1993	103d Cong., 1st Sess., Roll Call No. 307	Walter Dellinger to be Assistant Attorney General	59 / 39	64% / 36%