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Marching (Senate Style) Towards Majority Rule

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Abstract: The United States Senate is marching, Senate style, toward majority rule. Chamber rules have long required super, rather than simple, majorities to end debate on major and minor matters alike. But occasionally over its history – and several times over the past decade – the Senate has pared back procedural protections afforded to senators, making it easier for cohesive majorities to secure their policy goals. Both parties have pursued such changes – sometimes imposed by simple majority, other times by a bipartisan coalition. Why has the pace of change accelerated, and with what consequences for the Senate? In this article, I connect rising partisanship and electoral competition to the weakening of partisan commitments to Senate supermajority rule. No one can predict with any certainty whether the Senate will yet abolish the so-called "legislative filibuster." But pressures continue to mount towards that end.

Keywords: Senate, nuclear option, filibuster, reform, Congress, majority rule

The United States Senate is marching, Senate style, toward majority rule. The chamber's lax limits on debate have long required super, rather than simple, majorities to get much done. But over the past decade, the Senate has several times curtailed senators' procedural rights. Such changes typically pare back procedural protections afforded to Senate minorities, in theory enhancing the ability of cohesive majorities to secure their policy goals. Both Democratic and Republican parties have pursued such changes – sometimes imposed by simple majority, other times by a bipartisan coalition. Why has the pace of change accelerated, and with what consequences for future reform? In this article, I connect increasing partisanship and electoral competition to the weakening of partisan commitments to the Senate's tradition of extended debate. Whether or when the Senate would actually abolish its legislative filibuster is of course unknown. But pressures continue to mount towards that end.

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1 The New Partisan Era

Shifting political, economic and social forces over the past half-century have remade American politics. Core political trends – ideological sorting of the parties, rising partisan behavior, and increased electoral competition nationally – are of course well known, and scholars have amply documented their contours, causes, and consequences.[1] Perhaps the most iconic (for political scientists) depiction of this transformation appears in Figure 1. Using roll-call based NOMINATE scores, the graph shows the increasing "distance" between the two political parties in both chambers in recent decades (McCarty, Poole, and Rosenthal 2016).

Students of Congress offer varying interpretations of the rise in polarized legislative parties. Many suggest that these vote-based measures capture lawmakers' ideological positions. In this vein, increased polarization reflects decades-long ideological sorting: Conservatives have increasingly identified as Republicans and liberals have moved into the Democratic party. As a result, the parties in both chambers of Congress have polarized in recent decades, leaving few lawmakers in the political

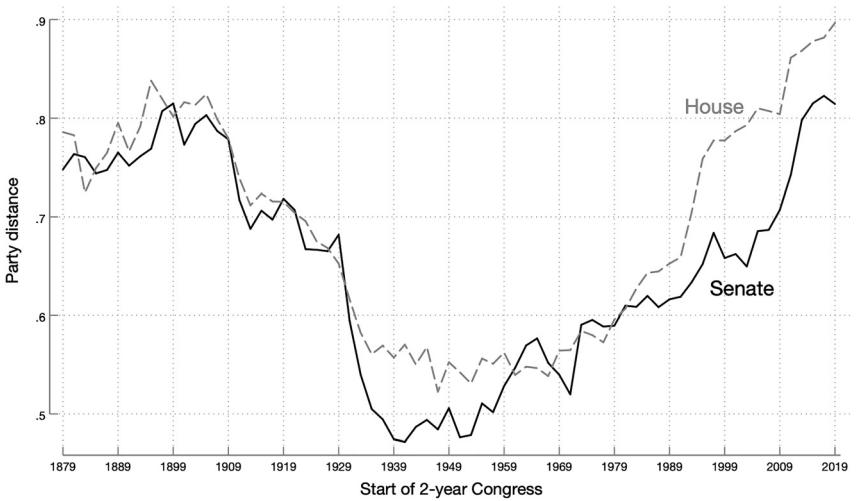

Figure 1: Rise in partisan polarization in Congress (1879–2020). Data available at http://www.voteview.com/.

1 For example, McCarty, Poole, and Rosenthal (2016) address rising ideological polarization, Lee (2009) investigates increased partisan team play, and Gilmour (1995) and Lee (2016) explore strategic disagreement that can arise when competitive parties anticipate changes in party control of Congress. I set aside in this essay the broad array of economic and social forces that also encourage polarization – including the infrastructure of the media, activities of donors, and other organized interests outside the Congress.

center. What's more, partisan sorting of lawmakers into ideological camps in Congress (and to varying degrees, state legislators) means fewer centrist candidates come election time, forcing voters to choose between two off-center candidates (Fiorina 2006) and further fueling polarization. Notably, both chambers have polarized along party lines in recent decades. As detected by NOMINATE scores, however, the Senate initially lagged behind the House, where polarization jumped sharply in the mid-1990s upon the election of Speaker Newt Gingrich's GOP-led House majority.

The rise in polarization, however, captures more than just differences in the ideological positions of the two parties' lawmakers. Partisans polarize even on issues devoid of ideological content (Lee 2009). Partisans take opposite stands in Congress on issues that do not engage classic "ideological" questions that capture lawmakers' differences over the appropriate role of government in resolving major problems. Instead, competitive team-play often encourages partisans to take opposite positions: Your team is for it, so my team is against it. As Jacobson (2021) has documented, partisanship in recent decades has become a remarkably pervasive cue at both the mass and elite levels. In this light, rising polarization captures increased partisanship regardless of the underlying policy convictions that lawmakers (or their constituents) might hold or develop. The two forces likely also reinforce each other. When polarization is more pervasive, the parties are less cooperative and the pursuit of party advantage more frequently shapes congressional leaders' strategies (Smith 2021a).

Forces encouraging more loyal partisan behavior in Congress have developed in tandem with more electorally competitive parties nationally since the mid-1980s. Frequent changes in party control of the House and Senate – as well as presidential elections won by the narrowest of margins in swing states – demonstrate a more dynamic party system in which neither party can count on maintaining control of either branch of government for long. Unified party control has rarely lasted very long in American politics (Binder 2005), and it has been particularly short-lived in recent decades – lasting just two years starting in 1993, 2009, 2017, and (at this writing) probably 2021. Compare such fleeting party control to the decades of uninterrupted House and Senate Democratic majorities starting in the 1950s and lasting until 1980 (Senate) and 1994 (House). Frequent change in party control encourages each party to "strategically disagree" with the other party – a strategy that often makes it harder for the governing majority party to succeed legislatively (Gilmour 1995). Viewed in this light, the rise in partisan polarization reflects the increased salience of partisan cues in shaping both lawmakers' votes and leaders' strategies: Treat votes as opportunities to send partisan messages with an eye to upcoming elections – rather than as pathways to making a bipartisan deal. To be sure, not every vote on every issue becomes fodder for partisan messaging wars in Congress. But the steep rise in polarization measures

suggests that such tactics have become a core strategy of leaders in the contemporary Congress.

No matter how we interpret polarization data, the trends can obscure significant policy differences within each party. Such internal party cleavages have been on display in recent years – often in a dramatic fashion on each party's top priorities. In an era of intensely partisan politics, leaders prefer not to air their party's dirty laundry. But on particularly salient issues atop their party's agenda, that can be hard to do. For example, Republican disagreements over whether and how to repeal and replace the Affordable Care Act tanked their party's top priority upon winning control of Congress and the White House in 2017. On the other side of the aisle, Democrats divided in 2021 between progressive and moderate flanks over the size and scope of a measure to advance President Biden's "Build Back Better" initiative, a top Biden priority to strengthen the social safety net and limit climate change. Internal party conflicts likely pale in comparison to disagreements – ideologically based or not – between the two political parties. Still, these intra-party cleavages are essential to keep in sight as we turn our focus to parliamentary developments in the contemporary Senate.

2 How Partisanship has Changed the Senate

Such electoral shifts outside Congress have been consequential for both chambers of Congress, but especially for the Senate in recent decades. Ideological sorting of political elite and rising partisan behavior in and outside of Congress – reinforced by partisan media, donors, and organized interests off Capitol Hill – have put tremendous pressure on inherited ways of doing business in the Senate. In the past two decades in particular, lawmakers have centralized more power in the hands of Senate party leaders, participation on the Senate floor is increasingly negotiated and curtailed, and pressure continues to grow on majority parties to short cut rules and practices as minority obstruction has constrained the legislative ambitions of majority parties. To understand how the evolution of American parties have helped to transform the Senate, I start with a very brief glimpse of Senate workways before the rise in partisanship that started in the 1980s and then turn to the contemporary Senate.

2.1 From Communitarianism to Individualism

Writing in the late 1980s, political scientist Richard F. Fenno, Jr. offered a succinct but illuminating view of how the Senate had evolved over past decades. When Fenno

(1989) penned his observations in 1989, he observed a Senate well along in its transition from a "communitarian" past (in the 1950s and 1960s) to an "individualist" present (in the 1980s). The communitarian Senate focused inwardly, dominated by southern Democratic conservative committee chairs and undergirded by forbearance. A norm of forbearance meant that senators rarely fully exploited their formal parliamentary advantages; doing so would risk disrupting the informal practices and behavioral expectations that shaped the midcentury Senate (e.g. Matthews 1973). Senators reserved the filibuster, for example, for only those times in which senators wanted to signal that "the most intensely held interests were at stake" – typically filibusters by southern conservatives seeking to block the advance of civil rights measures (Fenno 1989, 316).

The individualistic Senate that emerged by the late 1980s was noticeably "less self-contained and more outward-looking than the communitarian one" (Fenno 1989, 317). As early as the 1970s, an emerging liberal Democratic majority inside the Senate and a combustible political environment outside combined to remake the Senate's internal distribution of power and its procedural character. As senators became champions for groups and causes outside the institution, internal influence spread far more broadly across the chamber (Sinclair 1989). What's more, the focus of legislating moved to the Senate floor (Smith 1989), undermining conservative committee chairs and weakening committee influence on party agendas.

That was the context in which Fenno (1989) observed the Senate's 1980s debates about whether and how television coverage might be introduced into the chamber. Senators were divided over whether to turn on the cameras. Some, like Democratic minority leader Robert Byrd of West Virginia, viewed the question as an opportunity to convince senators to tighten the rules of debate as part of televising the Senate. As Fenno (1989, 345) remarked about the television debate,

> It was a long, hard, thoughtful, and informative debate, conducted according to the 'special traditions' of a 'great deliberative body.' An intense minority was allowed every opportunity to make its case, and the eventual decision was a highly consensual one.

Even in the late 1980s senators with an active floor life, senators managed their way through an institutional disagreement to reach a final vote. In fact, the vote on final passage drew the support of some senators who had found themselves on the losing end of key votes along the way to a final compromise. As Fenno observed about the debates and votes, it seemed that vestiges of the communitarian Senate still lived – despite the Senate's increasingly outward facing posture and receptivity to social, economic, and political currents buffeting the Senate.

2.2 A Distinctly Partisan Senate

Viewed from today's vantage point, the individualism phase of the postwar Senate did not last long. As early as the 1990s, we see movement towards a more partisan and centralized Senate – a development still ongoing in today's Senate. To be sure, individualism has not disappeared from the Senate. Rules and practices – including lax limits on debate, no germaneness requirement for most floor amendments, and senators' ability to pursue issues outside of their committee domains – bolster individual senators' capacity to shape the Senate agenda and legislative outcomes. But the contemporary Senate still looks markedly different in a number of related ways.

First, party leaders have become far more central to the negotiation of legislative deals – often without direct involvement of relevant committee chairs. The rise in sheer partisanship generates demand within each party for leaders to coordinate party strategies – coordination that increasingly involves centralizing power within the hands of party leaders. Granted, party leaders still need to build chamber majorities – and in the Senate, typically bipartisan supermajorities. But these negotiations are more often in the hands of party (rather than committee) leaders, at least on the most salient issues. And even when committee leaders generate and negotiate legislative agreements – such as reform of secondary education laws in 2015 or adoption of a landmark land conservation bill in 2020, party leaders are typically integrally involved in negotiations over how a bill will be considered by the Senate.

Second, the rise in partisanship has also shaped the strategies of minority party leaders (Smith 2021b). The same forces that encourage majority party leaders to more tightly manage party strategy also embolden minority party leaders to coordinate obstruction that often derails the majority's plans. Smith (2014) calls this the "obstruct and restrict" syndrome. Increased party-line obstruction in the Senate provokes new majority party efforts to tighten the reins in a more centralized Senate, which encourages the minority to find new ways of blocking the majority. When in the majority, both parties have tried to tighten the thumbscrews: For example, increasingly since the 1990s, majority party leaders have "filled the tree" to limit opportunities for any senator to offer amendments and sought unanimous consent agreements with the minority party that exclude amendments deemed particularly noxious to majority party senators.

Patterns in the Senate's use of a procedure known as "cloture" over recent decades illuminate these changes in leaders' strategies and senators' behavior. The Senate's Rule 22 (the cloture rule) since 1975 has required sixty votes to cut off

debate on legislative measures and motions.[2] Figure 2 shows a marked rise in leaders' reliance on cloture as a mechanism for cutting off debate and bringing the Senate to a vote. Note that from Fenno's (1989) vantage point, Senate leaders were relying on cloture to manage the floor roughly 25 times a year, or twice a month. In recent Congresses, Senate leaders turn to cloture on average about 150 times a year, or three times a week. In the earlier period, leaders typically moved measures and nominations to the floor by asking for unanimous consent (which allowed just a single senator to object and derail the move). In other words, leaders filed fewer cloture motions because they weren't needed to advance their agendas. In the contemporary Senate, leaders rely instead on cloture because they often encounter minority party objections when they seek consent. True, minority party leaders often counter that majorities are too quick to file for cloture instead of waiting to secure agreement. But majority party leader and staff rarely see the dynamic that way.

Figure 2 combines cloture motions filed on both legislative motions and nominations. In fact, a good portion of the recent rapid increase in reliance on cloture stems from minority parties' aggressive obstruction of nominations when

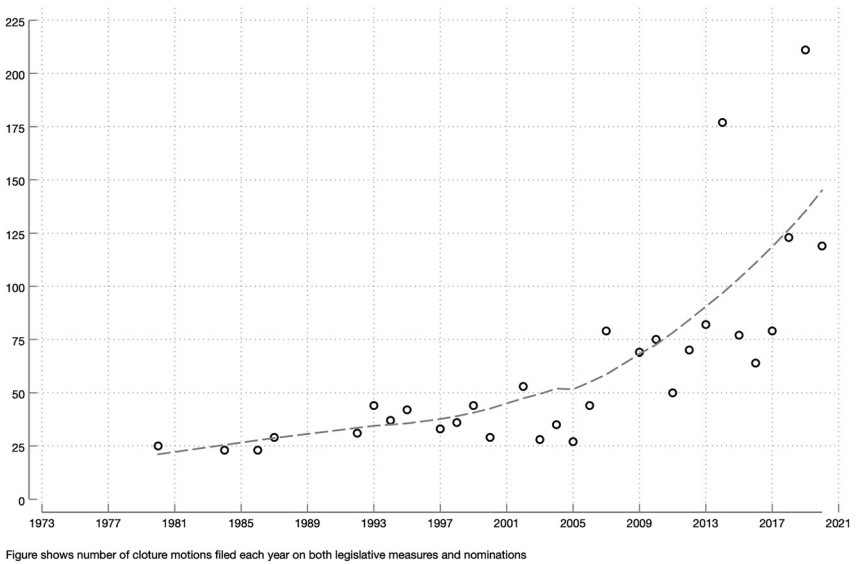

Figure 2: Number of Senate cloture motions filed each year (1973–2020). Data available at https://www.senate.gov/legislative/cloture/clotureCounts.htm.

2 As discussed below, only a simple majority has been required to invoke cloture on executive and judicial nominations since 2013 and on Supreme Court nominations since 2017. Motions related to changes in Senate rules require a two-thirds vote to end debate.

the president's party controls the Senate. As explored below, blanket GOP votes against cloture on President Obama's executive and judicial nominations led former Democratic Senate leader Harry Reid (D-N.V.) to convince Democrats to ban most nomination filibusters in 2013. That move undermined Republicans' success in blocking nominations even as they continued to derail many Democratic legislative initiatives; Democrats returned the favor in 2017 when Republicans regained control of the White House and Congress. We can see these trends in Figure 3, which shows separate lines for how often majorities successfully invoke cloture on legislative measures or nominations. Majorities succeed more often in ending debate on nominations since the 1970s, especially of course after Democrats banned nomination filibusters in 2013. In contrast, over the past two decades the Senate has invoked cloture on legislative matters roughly half the time. That certainly reflects the prevalence of partisan team play that today leads minority party senators to band together to block majority priorities. Of course, it could also reflect majority party leaders' willingness to pursue cloture on measures they know Republicans will block – such as voting rights reform in 2021 – thus exploiting cloture to enable the majority party to blame Republicans for Senate inaction.

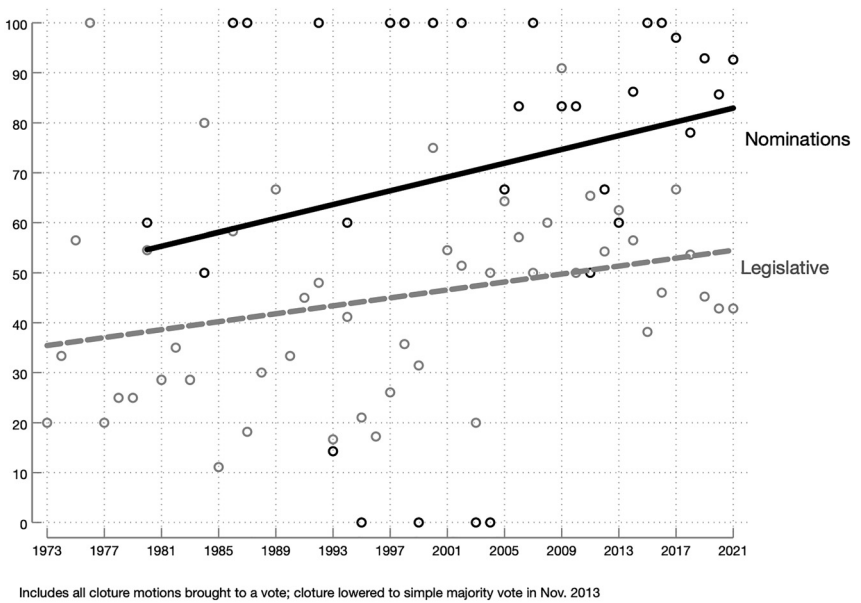

Figure 3: Percentage of cloture motions invoked (1973–October 2021). Data available at https://www.senate.gov/legislative/cloture/clotureCounts.htm.

All told, these recent developments in the Senate – leader-dominated negotiations, more aggressive party management of the chamber floor, and the difficulties of securing cloture – produce a Senate that barely reflects the chamber Fenno observed in 1989. Whether driven by ideological differences between the parties or sheer partisan and electoral incentives to differentiate the parties from each other, these changes have transformed the Senate. Today, there are fewer opportunities for rank and file senators from either the majority or minority party to participate on the Senate floor. Senators expect instead that their party leaders will aggressively seek to manage the Senate – negotiating compromises, structuring floor votes to advance the electoral interests of their party and individual members of the majority party. Often times that means forcing cloture votes that are sure to fail; other times, precluding amendments from minority party senators if majority party senators fear electoral retribution for casting particularly controversial votes. True, the Senate does still successfully legislate on big bipartisan measures that advance both parties' electoral interests, such as the five mammoth measures enacted by a divided Congress and President Trump in 2020 that provided landmark, emergency pandemic relief. Even so, party leaders ultimately nailed down those agreements, and gave rank and file lawmakers few opportunities to offer floor amendments that could unwind centrally negotiated deals.

3 The Senate's Nuclear Parliamentary Arms Race

Intense partisan team play in the Senate often puts legislative deals out of reach. Granted, not every bargaining failure stems from the parties unable to negotiate bipartisan deals. Sometimes, disagreements within the majority can undermine pursuit of its agenda (for example, when Republican defections undermined GOP efforts to repeal the Affordable Care Act or Democratic resistance derailed an increase in the minimum wage in 2021). Regardless of the reason for legislative failure, political pressures outside the chamber from party activists, donors, and sometimes the president (amplified by the media) push majority party leaders to devise new institutional solutions to resolve recurring deadlocks.

Today's efforts to revamp Senate rules come on the heels of more than a century of efforts to enhance the procedural rights of majorities in a chamber whose rules often advantage organized minorities as small as a single senator (Binder and Smith 1997). Over the past decade, Senate majorities have repeatedly considered new institutional solutions to advance the priorities of the majority party over the objections of dissenting senators. These institutional solutions fall into three categories. First, majorities sometimes lean harder on existing rules, stretching them to advance the party's agenda. The most salient of these rules arise from the Congressional

Budget Act, which protects several budget related measures from a filibuster if they meet a set of stringent budget rules such as the Byrd Rule. In recent years, both parties have stretched budget rules to better fit their ambitious policy proposals, for instance writing "shell" budgets with the express purpose of generating a filibuster-proof "reconciliation" bill and jamming reconciliation bills with Republican-sought tax cuts or Democratic-favored spending on new social programs.

Second, majority parties deploy what Senate scholars call "reform by ruling" (Koger 2010, Wawro and Schickler 2006) or "going nuclear": reinterpreting floor precedents by majority vote to (most often) limit the rights of the minority. As I explore below, these efforts to revamp Rule 22 have succeeded most often in the realm of the Senate's practice of advice and consent. Third, ambitious majorities also target informal practices that constrain the ambitions of cohesive majorities. For example, Republicans in 2017 abandoned one version of the "blue slip" practice that encourages deference to the views of senators about whether to advance nominations for vacant Courts of Appeals judgeships in their home states. More recently, activists have called on majority party senators to reject the advice of the Senate parliamentarian, the chamber's neutral arbiter whose guidance can disadvantage the majority party. Each of these avenues of reform can be consequential for the Senate, but here I focus exclusively on the Senate's tangles with the nuclear option over the past decade.

3.1 Resilience of Senate Rules

Before examining recent reform moments, a quick parliamentary tour of Senate procedural change is in order.[3] Students of Congress and political institutions more broadly typically consider institutions more or less binding constraints on the players who operate within them. Indeed, spatial models of politics typically consider institutions to be exogenous: fixed elements of the legislative game that shape players' strategies. But congressional rules (formal or otherwise) are better considered to be endogenous: Lawmakers choose them. And if lawmakers can choose rules of the game, in theory they can also revamp or revoke them. Rules in other words might not be as "fixed" as theory often treats them.

That doesn't mean that it's easy to change institutional rules. As Riker (1980, 445) observed decades ago, "If institutions do generate an outcome in which everyone loses, it is reasonable to expect some new and less distasteful institutions…*although it may take generations to alter them* [emphasis added]." The stickiness of rules led Riker to note (1980, 445) "that we can get a lot of mileage out

3 This section draws heavily from Binder (2018).

of relatively stable institutions"—even if rules are technically endogenous. Most importantly, Cox (2000) argues that we can infer from the often high cost of changing rules that institutions matter: They allocate procedural rights that help to determine policy and political winners and losers and to sometimes keep rival rules off the table.

One challenge in studying Senate institutions is that they can take different forms – including formal (standing) rules of the chamber, binding chamber "precedents," informal committee practices, and provisions of federal laws, such as the Congressional Budget Act, that detail congressional procedures. In the House, changes to the standing rules require a majority vote of the chamber. And although changes to the Senate's standing rules also require a majority vote, Senate rules set a higher threshold (two-thirds of senators present and voting) for cutting off debate on any motion or measure to change the rules. In contrast, simple majorities in both the House and Senate can set new precedents (essentially, new interpretations of how the chamber's formal rules apply in different parliamentary situations). And no formal action is required to reset informal practices or norms—such as the degree of deference noted above in the blue slip tradition.

The authority to set new precedents or break old norms empowers lawmakers to alter the rules of the game without formally changing them. The nuclear option is the prime example. As I explore below, Senate Democrats in 2013 went "nuclear," banning filibusters of all judicial and executive branch nominees, save for the Supreme Court. The text of Rule 22 requires a three-fifths majority (or sixty senators) to cut off debate on debatable measures and motions, including nominations. And the rule stipulates a two-thirds vote to limit debate on motions to make formal changes to the Senate's standing rules (including changes to Rule 22).

By simple majority, however, Democrats in 2013 went nuclear: They overturned the presiding officer's ruling that it takes sixty votes to cut off debate on nominations. By overruling the chair, Democrats set a new precedent that a simple majority suffices to cut off debate on most nominations. Literally, Democrats reinterpreted "three-fifths" to mean "simple majority" when applied to nominations – even though senators did not adopt a motion to change the text of Rule 22 to conform with the new precedent.[4] That is why the Senate minority leader charged that Democrats had "broken the rules to change the rules" (Maier 2013).

Shepsle (2017) calls the Senate's recent nuclear moves "rule breaking" transgressions. As a technical matter, Senate majorities hold the power to interpret how a chamber rule should be applied in a particular parliamentary circumstance

4 This was not the first time a majority "went nuclear." Wawro and Schickler 2006 and Koger 2010 both explore the broader phenomenon of "reform by ruling" over the course of Senate history.

(Dauster 2016, 651).[5] By doing so, majorities set new binding precedents for the future—unless and until a subsequent majority votes to alter the precedent. That power itself is enshrined in the Senate's precedents. As Riddick and Frumin (1992, 987) note in their compilation of Senate precedents:

> Any ruling by the Chair not appealed or which is sustained by vote of the Senate, or any verdict by the Senate on a point of order, becomes a precedent of the Senate *which the Senate follows just as it would its rules*, unless and until the Senate in its wisdom should reverse or modify that decision [emphasis added].

In other words, there is no technical prohibition stopping the Senate from evading or bending formal rules in this way. Senate rules and practices have no means of "protecting" themselves from senators seeking to change or reinterpret them. Still, there is a difference between what senators *can* do and what is considered "in order" in the Senate. Setting new precedents that contradict formal chamber rules are hardly "in order" in the Senate—meaning that they contravene established Senate practices. Like Shepsle (2017), we might well call such behavior "rule breaking" although rule bending is perhaps a less pejorative way to describe the outcome of reinterpreting rules in a manner at odds with the formal language of the chamber's standing rules.

The concurrent increase in partisanship, ideological differences, electoral competition, and short-lived party control generate tremendous weight on Senate rules and workways that often curtail the ability of cohesive majorities to secure their policy aims. In light of these mounting pressures, the technical capacity of majorities to reinterpret old rules open an attractive window for majority parties seeking institutional change absent minority party support. Indeed, over the past decade both Senate parties have gone nuclear in ways that strengthen the power of a cohesive majority to work its will on Senate business. And as I argue below, each time a majority detonates a nuclear weapon, it becomes politically easier for the other party to launch their own nuke once they regain power – adding a nuclear twist to the Senate's parliamentary arms race.

3.2 Nuking Rule 22 (2011)

The first of the four nuclear moves reviewed here was not nearly as explosive as the three that followed. Some Senate observers at the time (myself included) wondered

5 Such votes are technically taken in response to a ruling of the presiding officer. If a senator appeals the ruling of the chair, the question before the Senate becomes whether or not to uphold the ruling of the chair. For constitutional-related questions, the presiding officer typically doesn't rule, but instead turns over the question to the Senate to decide.

whether we should even count the events of October 6, 2011, as a nuclear move. But in their basic parliamentary outline, Democrats' steps that night bear a strong resemblance to more recent nuclear moves. In short, a Senate majority voted to overturn a ruling of the chair, thereby creating a new precedent at odds with the text of the cloture rule.[6]

Rule 22 precludes senators from offering non-germane floor amendments after the Senate invokes cloture on a bill, unless the Senate unanimously agrees to allow unrelated amendments. While considering a Chinese currency manipulation bill (on which a bipartisan majority had voted to invoke cloture), Minority leader Mitch McConnell (R-Ky.) and Majority leader Harry Reid (D-Nev.) worked to negotiate an agreement to allow Republicans to offer seven non-germane amendments during the period of post-cloture debate. Disagreement over which amendments would be allowed stalled movement on the bill. Instead, Reid offered a motion to suspend the rules, and then immediately raised a point of order against his own motion on the grounds that the motion to suspend in this context was dilatory. Guided by the parliamentarian, the presiding officer ruled that the motion was not dilatory in this context and thus Reid's motion could be made. Reid then detonated a small nuclear device: He appealed the ruling of the chair, and Reid mustered all Democrats save one to vote to overturn the chair's ruling.

By doing so, the Senate set a new precedent that reinterpreted Rule 22: A motion to suspend the rules to offer a non-germane amendment made after invoking cloture would now be considered dilatory. From the minority's perspective, it was a pure power grab by the majority party to avoid having to face controversial votes. The majority leader had already blocked Republican amendments earlier in the process. And then while the parties were still negotiating over which amendments could be offered post-cloture, Democrats' nuclear move shut down the final avenue for securing votes on non-germane amendments.

McConnell reacted this way.

> I would say to my friend the majority leader—and this is nothing personal about him; I like him, and we deal with each other every day—we are fundamentally turning the Senate into the House….This is a free-wheeling body, and everybody is better off when we operate that way. Everybody is, whether you are in the majority or the minority, because today's minority may be tomorrow's majority, and the country is better off to have at least one place where there is extended debate and where you have to reach a supermajority to do things.[7]

McConnell appealed on the floor to the interests of both the chamber ("…it would be a lot better for the Senate") and its members ("…today's minority may be

6 This section draws heavily from Binder (2011).

7 *Congressional Record*, S6317, October 6, 2011.

tomorrow's majority"). Moreover, McConnell reaffirmed the *de facto* sixty-vote requirement to get anything done: "When the Senate gets tired of the process," McConnell put it squarely, "sixty people shut it down, and you move to conclusion."[8]

For the Democratic majority, sixty votes meant stalemate. Listen to how Reid defended his earlier move to block all amendments: "Why did I do that? I have found over the last Congress and nine months that when I try to have an open amendment process, it is a road to nowhere."[9] Of course, both majority and minority party senators lost their right to amend bills with Reid's moves. But majority party senators often accept such legislative tactics devised by their party leaders to advance their party's agenda. Nor was Reid shy about blaming McConnell: Republicans were holding the Senate hostage to its partisan ambitions. The outcome? Debate ended that night with Reid raising the prospects of a bipartisan caucus to "let a little air out of the tires." No such meeting took place.

3.3 Nuking Rule 22 (2013)

Democrats went nuclear with greater force two years later, banning filibusters of executive and judicial nominees, save for the Supreme Court. The Democrats' move came in the aftermath of more than a decade of partisan fireworks over the other party's nominees for the federal courts. With federal courts nearly balanced between Democratic and Republican presidential appointees early in the Bush administration, Democrats in 2003 began to scrutinize judicial nominees and achieved remarkable unity in blocking nominees deemed particularly egregious. No wonder Republicans responded in kind in 2005, threatening recalcitrant Democrats with the nuclear option. But Republicans backed down when a bipartisan "Gang of 14" emerged to defuse tensions, and both sides promised to reserve the filibuster for only the most extraordinary circumstances.

Ten years later, Democrats went nuclear in late November 2013. Repeated GOP filibusters of executive branch nominees a few months earlier had been resolved with bipartisan détente. All but two senators sequestered themselves in the old Senate chamber to air grievances. And Senators John McCain (R-Ariz.) and Charles Schumer (D-NY) negotiated what would turn out to be a temporary truce. Republicans ended their filibusters of several long-stalled Obama labor, consumer and environmental nominees, and Democrats backed away from cracking down on filibusters. The agreement left the Senate's cloture rule unchanged – allowing

8 *Congressional Record*, S6318, October 6, 2011.

9 *Congressional Record*, S6316, October 6, 2011.

Republicans to filibuster in the future—and Democrats refused to take the nuclear option to ban filibusters off the table. As Republican Senator Lindsey Graham of South Carolina admitted to reporters, senators were filibustering some nominees because Republicans opposed the law that created their position. "That's not a reason to deny someone their appointment. We were wrong" (Weisman and Steinhauer 2013).

Four months later, the truce went up in flames. The immediate spark were GOP filibusters against three Obama nominees to the D.C. Court of Appeals. Some Republicans opposed the nominees on ideological grounds; others sought to block Obama from shifting the court to the left with the new appointees. More broadly, the battle reflected years of partisan frustrations: Democrats added up the litany of GOP efforts to block Obama's agenda and his picks for prime appointments and collectively lit the fire. After repeated, failed cloture votes and warnings from Majority Leader Reid that he had the votes to ban filibusters of executive and judicial nominees (save for the Supreme Court), Reid and 51 Democratic colleagues detonated their nuclear device. The chair ruled that Rule 22 required sixty votes to end debate on nominations; Democrats by majority vote reversed the chair's ruling on appeal to set a new precedent that a simple majority was sufficient to close debate.

Republicans had promised to "blow up every bridge in sight" in response, but their response was less drastic than anticipated. The chair of the Senate Judiciary Committee, Patrick Leahy (D-Vt) defused some of the angst by keeping the blue slip practice, allowing GOP senators to continue to block nominees to their home states. Nor did Republicans appreciably ramp up obstruction of other Senate business unrelated to nominees. As Democrats suggested at the time, Republicans were already filibustering at the max, suggesting that there was little else worth the cost of blocking. Such GOP obstruction was of course what helped to propel Democrats to go nuclear in the first place.

Notably, Republicans did not reverse the precedent when they regained control of the Senate the next year. First, they disagreed about whether or not to lift the threshold back to sixty. Second, with Democrat Obama in the White House, Republicans no longer needed the filibuster to defeat his nominees: They just refused to consider them (most famously ignoring Obama's Supreme Court nominee, Merrick Garland, in 2016 to keep the seat vacant for the next president to fill). Third, senators from both parties quickly adapted to the new parliamentary regime. Sen. Richard Shelby (R-Ala.) suggested that Republicans had little choice: "It's hard to put the toothpaste back in the tube" (as quoted in Binder 2014). Or as Senator Roy Blunt (R-Mo.) put it, "I think it's well within the traditions of the Senate for a majority to decide nominations and a supermajority to decide legislation" (Raju 2014). Within a year, Republicans had rationalized, internalized, and institutionalized a

ban on nomination filibusters as Senate "tradition." Even the most hallowed Senate traditions can be unmasked as the by-product of hard-fought politics.

3.4 Nuking Rule 22 (2017)

Early in the first year of President Donald Trump's term, Senate Republicans in April 2017 closed the loophole left by Democrats, reinterpreting Rule 22 to allow a simple majority to end debate on Supreme Court nominations. Republicans united in favor of confirming conservative judge Neil Gorsuch to the Supreme Court (filling the seat to which Obama had nominated Judge Garland). But the GOP lacked the necessary sixty votes to kill an anticipated Democratic filibuster. When Majority leader McConnell led Republicans through the nuclear steps to allow a simple majority to cut off debate on Supreme Court nominees (following the parliamentary path Democrats followed in 2013), Republicans voted in lock step.

Republicans charged that Democrats' opposition to Gorsuch reflected their long-standing war against GOP judicial appointments, regardless of the qualification of the nominee. Going nuclear to ban Supreme Court nomination filibusters, McConnell argued, was simply the next necessary step for reigning in partisan excess by Senate Democrats.

> This is the latest escalation in the left's never-ending judicial war, the most audacious yet… And it cannot and it will not stand. There cannot be two sets of standards: one for the nominees of the Democratic president and another for the nominees of Republican presidents (Flegenheimer 2017).

Or as GOP Senator Tom Cotton of Arkansas weighed inOr as GOP Senator Tom Cotton of Arkansas weighed in,

> Put simply, the Democrats broke one of the Senate's oldest customs in 2003 so that they could filibuster Republican judges, and they subsequently filibustered more judges than did the Republicans. So it should come as no surprise that the Democrats took an even more radical step in 2013 when they used the so-called nuclear option to eliminate the filibuster for executive branch, trial court, and appellate court nominations.[10]

Republicans' basically argued that Democrats made them do it, given their past treatment of GOP nominees. Democrats charged in return that GOP behavior was worse, having blocked Judge Garland's nomination. More broadly, Senator Jeff Merkley charged that Republicans were the ones exhibiting truly partisan behavior:

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10 *Congressional Record*, S2203, April 4, 2017.

> In a very *de facto* matter, the nuclear option went off the day the majority leader came to the floor and said that we are going to conduct ourselves in a totally different way than the Senate's ever conducted itself. Unlike every other time in U.S. history, when there was a vacancy during election year and the Senate acted, we are not going to act. We are going to essentially engage in stonewalling the President's nominee—no hearing, no discussion. That was a nuclear option.

Democrats had set the pace by nuking all the other nominations. That left them without higher institutional ground to stand on, and made it easy for Republicans to blame Democrats for nuking first.

Not surprisingly, a bipartisan effort to defuse the partisan stalemate over Gorsuch folded quickly. Although she joined her GOP colleagues to ban the filibuster, the impasse provoked Senator Susan Collins (R-Me.) to bemoan the breakdown in Senate trust: "It's hard to know whether the polarization in the Senate reflects the country or whether the polarization and divisiveness in the Senate affects the country…Well, it clearly affects the country. But which causes the other is at times hard to discern" (Flegenheimer 2017). Rising partisan pressures – whatever their source – generate too much pressure for parties to withstand, leading successive majorities to take further steps towards majority rule.

3.5 Nuking Rule 22 (2019)

Republicans deployed two small nuclear devices in April 2019, with all but two Senate Republicans (Susan Collins of Maine and Mike Lee of Utah) voting against 46 Democrats to go nuclear. The target of both nukes was the portion of Rule 22 that allows for "post-cloture" debate after the Senate invokes cloture. The rule allows up to 30 hours of "post-cloture" debate. By going nuclear, Republicans set a new chamber precedent that limited time allowed for post-cloture debate: Two-hours for most executive branch nominees (save Cabinet officials and other high profile appointments) and for all nominations to federal trial courts.

Once again, Majority leader McConnell blamed Democrats, arguing that they had exploited hours of post-cloture debate even when they supported confirmation. Judging from Senate voting records, McConnell's charge fell a bit wide of the mark (Binder 2019). Half the time in the previous Congress, post-cloture debate for judicial nominees took up less than 22 hours. And for nearly every nominee, the two party leaders negotiated the timing of the confirmation vote. In fact, leaders typically negotiated such agreements to accommodate senators' schedules, putting off confirmation votes sometimes days after 30 hours had elapsed. In other words, Democrats (like Republicans before them) weren't actually exploiting

post-cloture debate to delay confirmation votes. When it takes a long time to get to a confirmation vote, it's usually because both parties want it that way.

Remarkably, there was no filibuster underway on either of the two nominations that McConnell used to put the nuclear option into place.[11] Nor did senators seem to miss the 30 hours for either of the nominees. As the assistant majority leader, Roy Blunt (R-Missouri) put it: "I guarantee that there will not be 2 hours of debate about this nominee. There may not be 2 minutes of debate about this nominee if we see what we have seen happened in the last 2 years."[12] Or as McConnell told his colleagues,

> There is nothing radical about this. He is acting like it is a sad day for the Senate. If you want to pick a sad day for the Senate, go back to 2003 when we started filibustering the Executive Calendar. He started it. That was a sad day. This is a glad day. We are trying to end the dysfunction on the Executive Calendar.[13]

Democrats charged that Republicans couldn't have it both ways. At the same time that Republicans blamed Democrats for delays in confirming Trump nominees, McConnell would often take credit for how many Trump nominees had been confirmed to the federal bench. In Schumer's words:

> At a time when Leader McConnell brags about confirming more judges than anyone has done in a very long time, he feels the need to invoke the terribly destructive and disproportionate procedure of the nuclear option in order to fast-track even more of President Trump's ultraconservative nominees to the Federal bench.[14]

In a decidedly partisan era, complicated by slim majorities, inherited rules can only bend so far to accommodate ambitious majorities before majorities coalesce to break them.

4 Why so Many Nukes?

Why has the Senate repeatedly gone nuclear over the past decade and succeeded? My sense is that the probability of a simple majority Senate debate limit has increased. It is impossible to know of course whether or when the Senate would actually detonate a nuclear device to eliminate what we now call the "legislative filibuster," or whether a majority might use the nuclear option to "carve out" an

11 The nominees were Roy Kalman Altman (slated for a judgeship on the Southern District of Florida) and Jeffrey Kessler (nominated to be an assistant secretary of Commerce).

12 *Congressional Record*, S2220, April 3, 2019.

13 *Congressional Record*, S2219, April 3, 2019.

14 *Congressional Record*, S2216, April 3, 2019.

exception to the filibuster for a particular issue. But recent episodes collectively suggest that the political costs of going nuclear to lower the cloture threshold to a simple majority vote have declined significantly. And that makes additional steps towards majority cloture far more likely today than in the Senate past. I reach that conclusion from a brief survey of the partisan, electoral and institutional forces weighing on senators, party leaders, and the Senate today.

First, there's no doubt that the several recent nuclear moves reflect ambitious, frustrated majority parties operating in a heavily partisan arena – bearing internal and external partisan pressures to advance the party agenda. Notably, except for the 2011 event, senators aimed the other three nukes at the confirmation process. That is one area of each party's agenda on which Senate majority parties almost always march in lock step: confirming their own party's nominees to the executive branch and the federal bench while often opposing the other's. True, neither party has yet asmassed a simple majority for going nuclear to carve out an exception for the filibuster or to abolish legislative filibusters altogether. As Senator Joe Manchin (D-W.V.), the most prominent Democratic opponent of the nuclear option, argued in 2022, "Any time there's a carve-out, you eat the whole turkey" (Kim 2022). Senator Manchin's opposition to carve outs makes plain the path dependent nature of using the nuclear option: Each time you detonate a nuke, it becomes politically less costly to do it again. Don't think you'll just be nibbling the turkey, Manchin argues. Once you start, there'll be nothing left for the guests.

Second, the drive for majority cloture stems from more than just rising partisan expectations. One striking element of the Democrats' 2013 nuclear move was the failure of any Senate gang to emerge to stop it, as had a gang in 2005 during an earlier nuclear huddle. The 2005 gang comprised primarily ideological centrists, such Joe Lieberman (I-Conn.) and Susan Collins (R-Me.) But there was also an array of senators who fit Fenno's (1989) mode of institutionalists: A species of senators who find the Senate's lax limits on debate advantageous regardless of whether they hail from the majority or minority party. Regardless of whether ideological or institutional forces more often generate viable Senate gangs, such pivotal, bipartisan confabs seem rarer today.

Third, each time a Senate majority has gone nuclear in recent years, the minority party has not exacted as much payback as expected. Both parties believe that the other party has already become grossly obstructive. In an increasingly partisan Senate, majorities thus appear to wager that their gains from enhancing majority rights outstrip the potential costs imposed by the minority in response. In short, it becomes less costly over time for each party to bend the rules again. As Senator Richard Blumenthal (D-Conn.) put it in 2019 after Republicans used the nuclear option to curtail post-cloture debate, "The 'nuclear option' used to be nuclear. No longer" (as quoted in Everett 2019). Successful nuclear moves suggest

a path dependent cast to contemporary Senate parliamentary dynamics. Although unexpected by most Senate observers at the time, Reid's 2013 nuclear move seems to have depressed the institutional costs of going nuclear: Senators have now adjusted their expectations to anticipate future use of the nuclear option. Ultimately, partisans' acceptance of—if not demand for—the nuclear option is tough to separate from the declining institutional costs of doing so.

5 March toward Majority Rule?

The Senate is evolving along a path toward majority rule, with the Senate only rarely reversing course to restore procedural rights to the minority. In addition to the nuclear moves and norm breaking explored above, Congress has periodically placed filibuster limitations into statutes, such as the War Powers Resolution, the National Emergencies Act, the Congressional Review Act, and so on (Reynolds 2017). Viewed in this broader light, the recent nuclear moves suggest that a cohesive, ambitious Senate majority party could one day be tempted to finish the march toward majority cloture by nuking the legislative filibuster altogether.

Several factors weigh against senators eliminating the legislative filibuster so soon. All senators – regardless of party status – derive institutional power from the Senate's lax rules of amendment and debate. Even a majority party senator can take a measure hostage by threatening a filibuster (that is, refusing to consent to the measure's consideration) and release their prey only if leaders offer something valuable to the senator in exchange. What's more, keeping the legislative filibuster can ironically serve the majority party's interests. When the majority cannot resolve their own policy disagreements, it can be more politically palatable to deflect blame onto the other party for filibustering the measure. Obstruction also protects a party's president from having to veto popular bills he might oppose. And of course, majority party senators do at times consider their future parliamentary needs as the minority party, surely giving some majority party senators second thoughts about banning the filibuster altogether. Regardless of whether individual or party interests are at stake, supermajority rules can redound to the benefit of both.

Still, the Senate keeps progressing towards majority cloture along a nuclear path. Indeed these successive nuclear moves themselves seem to polarize the Senate further by amplifying inter-party cleavages inside and outside the chamber. As Senator Blumenthal (D-Conn.) observed recently, "At the end of the day, these changes deepen the divisions and the slope continues to ending the filibuster." And after the last nuclear move, another Democratic senator sounded downright resigned to it. "We're going to be the House of Representatives by the time my term is done. And that will be McConnell's legacy," observed Senator Chris Murphy

(D-Conn.) after he was re-elected to another six-year term. As Murphy continued: "We're headed to a majoritarian institution. And maybe we're better off. Maybe we'd be able to have actual debates and real amendments. The House has more debate than we do." Senators have not mapped out a path to majority cloture, but the route seems clearer than ever.

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