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By

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# The Death of Deliberation: Political Parties, Procedure, and Policy in the United States Senate

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A common observation of the Senate today is that it is paralyzed by excessive levels of legislative gridlock. The Senate is currently composed of more ideologically polarized members, and party leaders exercise more influence in the decision-making process by virtue of leading more cohesive political parties. However, the argument that the Senate and, by extension, the Congress are being undermined by rampant obstruction overlooks the fact that the contemporary Senate is still capable of overcoming the differences among its members on measures of significant import without descending into an endless debate characterized by ideological partisanship and irreconcilable gridlock. So while scholarly accounts of congressional decision-making all too often seek to explain why gridlock happens, the more important question, and the one that forms the basis of this dissertation, is why gridlock does not happen. Specifically, I argue that the Senate has developed several patterns of decision-making throughout its history in an effort to maintain its legislative productivity in the presence of procedurally-empowered senators. My primary thesis is that the Senate has developed a new pattern of decision-making called *structured consent* in order to limit conflict and pass legislation in a polarized environment. According to my theory of structured consent, both the majority and minority party leaders exercise significant influence over the decision-making

process by virtue of their leadership positions, which they routinely choose to utilize in order to moderate, rather than exacerbate, the procedural choices of their partisan colleagues. I conclude with the observation that the Senate's ability to produce important legislation in the current environment may undermine the institution's deliberative function. This suggests that while the contemporary Senate may indeed be "broken," it may not be the result of the conditions typically acknowledged in the literature. Put simply, deliberation has succumbed to the Senate's bipartisan determination to avoid gridlock and pass important legislation.

This dissertation by James Ian Wallner fulfills the dissertation requirement for the doctoral degree in Political Science approved by John Kenneth White, Ph.D., as Director, and by Matthew N. Green, Ph.D., and Phillip Henderson, Ph.D., as Readers.

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## Chapter 1: Introduction

*“The Senate is a chemical place. Something happens when Senators are all in the room, debating an issue, especially when everyone understands that we are going to stay in and not adjourn until we get things done.”*

-Senator Edward M. Kennedy<sup>1</sup>

Few have been able to sum up the fundamental nature of the Senate as well as the late Senator Edward M. Kennedy, who recognized the inherent flexibility of the legislative process in the institution a result of his nearly five decades of service in the nation’s upper chamber. Kennedy’s comment does a particularly good job in drawing our focus to the seemingly flexible and spontaneous nature of the legislative process in the Senate. Yet most scholarly treatments of the Senate have fallen short in that they claim that the legislative process in the institution is more rigid and inflexible. This is not to suggest that the literature claims that the Senate’s decision-making process has not changed over time. Rather, the weakness of the conventional wisdom lies in the fact that it typically acknowledges only one form of decision-making in the Senate at a particular period in time. The two most popular portrayals presented by such treatments can be illustrated in the juxtaposition of the Senate’s orderly consideration of the Clean Air Amendments Act (Public Law 101-549) in 1990 with the legislative battle over the Climate Security Act (S. 3036) in 2008.

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<sup>1</sup> Edward M. Kennedy, *True Compass: A Memoir* (New York: Hachette Book Group, 2009), 458.

The Senate's consideration of the Clean Air Amendments Act occurred over a period of several weeks in the winter of 1990, during which time the Democrats controlled both houses of Congress and President George H. W. Bush occupied the White House. During the bill's consideration, 180 amendments were filed. 138 (77%) of these were actually offered to the legislation on the floor. 20 (14%) of the amendments offered to the bill received an up-or-down recorded vote. 110 (61%) of the amendments offered to the bill received a voice vote. The majority-party Democrats sponsored 63 (71%) of the amendments offered. The minority-party Republicans sponsored 78 (84%) of the amendments offered. 124 of the 138 amendments offered (69%) to the legislation passed the Senate. The Clean Air Amendments Act ultimately passed 89 to 11 and was signed into law by former President Bush.

The Senate considered a similar piece of legislation concerning the emissions of harmful pollutants into the atmosphere, the Lieberman-Warner Climate Security Act (S. 3036), in the summer of 2008. Echoing the concerns of millions of Americans, Senate Majority Leader Harry Reid (D-Nevada) asserted on the Senate floor that "global warming is easily the gravest long-term challenge that our country faces and the world faces. It is the most critical issue of our time."<sup>2</sup> Indeed, all Democrats and even some Republicans demanded action to address the issue.<sup>3</sup> The Majority Leader recognized this,

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<sup>2</sup> Majority Leader Harry Reid, "Comments on the Senate Floor," ed. United States Senate (Congressional Record, 2008), S5015.

<sup>3</sup> For example, nine Republican senators cosponsored comprehensive climate change legislation during the 110<sup>th</sup> Congress. Republican senators Norm Coleman (MN), Susan Collins (ME), Elizabeth Dole (NC), and John Warner (VA) were original cosponsors of the Lieberman-Warner Climate Security Act of 2007 (S. 2191), to which S. 3036 was nearly identical. Republican senators John McCain (AZ) and



arguing that “the American people have a right to expect their legislature, their Congress to address this issue.”<sup>4</sup>

However, the Senate’s consideration of this legislation differed significantly from its successful work on the Clean Air Amendments Act eighteen years earlier. Because of what Reid believed to be the gravity of the situation and a popular demand for action, Senator Reid used his prerogative as Majority Leader to prevent his colleagues from offering amendments to the Climate Security Act and moved to end debate on the measure less than five minutes after bringing the bill to the Senate floor for consideration. In explaining his motives for taking such action, Senator Reid argued that the Republicans were only interested in making political points and would do everything they could to defeat the legislation.

Anybody watching this debate will know the Republicans have fully executed this strategy. What did they do today to execute in making political points? That is some political point. It is routine here to not read the amendments, but they said “we object.” So we proceeded to have the amendment read. They executed this strategy and they have done it well, and they tried to make political points. I have no reason to doubt that they are prepared to go the final mile to stretch out the final consideration of this bill before finally killing it.<sup>5</sup>

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Olympia Snowe (ME) joined Coleman and Collins to cosponsor the Climate Stewardship and Innovation Act of 2007 (S. 280). Republican senators Lisa Murkowski (AK), Arlen Specter (PA), and Ted Stevens (AK) cosponsored the Low Carbon Economy Act of 2007 (S. 1766). In addition, former Republican Speaker of the House Newt Gingrich (GA) and Minnesota Governor Tim Pawlenty both supported efforts to combat climate change in 2007-2008.

<sup>4</sup> Reid, “Comments on the Senate Floor,” S5015.

<sup>5</sup> Ibid.

In order to stymie Republican efforts to “kill” the legislation, Reid utilized a parliamentary procedure known as “filling the amendment tree” to block other senators from offering their own amendments to the measure, and he filed cloture on the legislation to bring debate to a close. Reid’s stated goal in making such a move was to end consideration of an issue that the Majority Leader, his party, and many Americans considered “the most critical issue” of the time.<sup>6</sup>

While the Majority Leader blocked amendments to S. 3036, the Minority Leader utilized the procedural tools at his disposal to slow down consideration of the legislation. In response to an unrelated matter concerning the confirmation of district and appellate court judges, Minority Leader Mitch McConnell (R-Kentucky) objected to the routine waiving of the requirement that legislation be read aloud into the Congressional Record by the Senate’s clerks prior to its consideration. As a result, work on the Climate Security Act stalled as the clerks spent an entire calendar day reading the measure.<sup>7</sup> The outcome of this legislation was also much different than the final disposition of the Clean Air Amendments Act. The bill was ultimately pulled from the floor after it became clear that it lacked the requisite votes for passage.

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<sup>6</sup> The Senate’s precedents give the Senate Majority Leader the right of first recognition. This allows the leader to “fill the amendment tree,” or offer the maximum allowable number of amendments to legislation, and file cloture on a bill before other senators have a chance to debate the measure and offer amendments. Christopher M. Davis, *Filling the Amendment Tree in the Senate* (Washington, D.C.: Congressional Research Service, 2011), Reid, “Comments on the Senate Floor,” S5015.

<sup>7</sup> Minority Leader Mitch McConnell, “Comments on the Senate Floor,” ed. United States Senate (Congressional Record, 2008), S5014.

The juxtaposition of the Senate's work on the Clean Air Amendments Act in 1990 with its consideration of the Climate Security Act in 2008 underscores a narrative popular in the academic literature on Congress. According to this narrative, over the past three decades the Senate has gradually evolved from a close-knit, collegial, and deliberative institution governed by tradition and mutual respect to a majoritarian-like institution in which excessive partisanship and ideological polarization have led to perpetual gridlock. As a consequence, a common observation of the Senate today is that it is paralyzed by excessive levels of legislative gridlock, with the institution unable to pass legislation as a result of minority party obstruction.<sup>8</sup>

This gridlock has an impact on the reputation of Congress. Public perceptions of the institution echo the popular academic critique that Congress is beset by gridlock and thus dysfunctional. According to a November 2011 ABC News/Washington Post poll,

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<sup>8</sup> For example, see: Norman Ornstein, "Our Broken Senate," *The American*, March/April 2008; Thomas E. Mann and Norman J. Ornstein, *The Broken Branch: How Congress Is Failing America and How to Get It Back on Track* (New York: Oxford University Press, 2006); Thomas E. Mann and Norman J. Ornstein, *It's Even Worse Than It Looks: How The American Constitutional System Collided With The New Politics Of Extremism* (New York: Basic Books, 2012); Sarah A. Binder, *Stalemate: Causes and Consequences of Legislative Gridlock* (Washington, D.C.: Brookings Institution Press, 2003); Sarah A. Binder, "Through the Looking Glass, Darkly: What Has Become of the Senate?" *The Forum*: Vol. 9: Iss. 4, Article 2 (2011); Sean A. Theriault, *Party Polarization in Congress* (New York: Cambridge University Press, 2008); Frances E. Lee, *Beyond Ideology: Politics, Principles, and Partisanship in the U.S. Senate* (Chicago: University of Chicago Press, 2009); Barry C. Burden, "Polarization, Obstruction, and Governing in the Senate," *The Forum*: Vol. 9: Iss. 4, Article 4 (2011); Gregory Koger, "The Past and Future of the Supermajority Senate," *The Forum*: Vol. 9: Iss. 4, Article 10 (2011); Gregory Koger, "Filibustering and Partisanship in the Modern Senate," in *Party and Procedure in the United States Congress*, Jacob R. Straus, ed. (New York: Rowman & Littlefield Publishers, Inc., 2012); Steven S. Smith, "The Senate Syndrome," in *The U.S. Senate: From Deliberation to Dysfunction*, Burdett A. Loomis, ed. (Washington, D.C.: CQ Press, 2012).

69% of Americans had an unfavorable impression of the House and Senate.<sup>9</sup> A Fox News poll during the same period found that 80% disapproved of Congress' job performance.<sup>10</sup> This dissatisfaction was directed almost equally to both sides of the partisan divide, with both Democrats and Republicans receiving commensurate blame. 65% of Americans disapproved of the job Democrats in Congress were doing and 70% disapproved of Republicans in Congress according to a November 2011 McClatchy/Marist Poll.<sup>11</sup> Most stunningly, Congress' approval rating reached a new low of 9% after the Joint Select Committee on Deficit Reduction (the so-called "super committee") failed to reach bipartisan agreement on a deficit reduction package before a November 26, 2011 deadline.<sup>12</sup> To quote one senator in the aftermath of the failure of the super committee, "more people support the United States becoming communist... at 11 percent, than approve of the job that we're doing."<sup>13</sup> A congressman reflecting on the failure of his colleagues in Congress and on the super committee to address the budget deficit and persistent unemployment observed that "if the entire institution can't act and can't move

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<sup>9</sup> ABC News/Washington Post Poll, Nov, 2011. Retrieved Dec-1-2011 from the iPOLL Databank, The Roper Center for Public Opinion Research, University of Connecticut.  
[http://www.ropcenter.uconn.edu.proxycu.wrlc.org/data\\_access/ipoll/ipoll.html](http://www.ropcenter.uconn.edu.proxycu.wrlc.org/data_access/ipoll/ipoll.html).

<sup>10</sup> Fox News Poll, Nov, 2011. Retrieved Dec-1-2011 from the iPOLL Databank, The Roper Center for Public Opinion Research, University of Connecticut.  
[http://www.ropcenter.uconn.edu.proxycu.wrlc.org/data\\_access/ipoll/ipoll.html](http://www.ropcenter.uconn.edu.proxycu.wrlc.org/data_access/ipoll/ipoll.html).

<sup>11</sup> McCaltchy/Marist Poll, Nov, 2011. Retrieved Dec-1-2011 from the iPOLL Databank, The Roper Center for Public Opinion Research, University of Connecticut.  
[http://www.ropcenter.uconn.edu.proxycu.wrlc.org/data\\_access/ipoll/ipoll.html](http://www.ropcenter.uconn.edu.proxycu.wrlc.org/data_access/ipoll/ipoll.html).

<sup>12</sup> Bernd Debusmann, "U.S. Congress, Communists and God," in *Reuters* (November 29, 2011).

<sup>13</sup> David Welna, "Even Lawmakers Ask: Does Anyone Like Congress?" in *NPR News: All Things Considered* (November 25, 2011).

forward and can't find a way to work with the president in such tough economic times, we deserve the blame heaped on us.”<sup>14</sup>

However, the argument that the Senate and, by extension, the Congress, is being undermined by rampant obstruction overlooks the fact that the contemporary Senate is still capable of overcoming the differences among its members on measures of significant import without descending into an endless debate characterized by ideological partisanship and irreconcilable gridlock. So while scholarly accounts of congressional decision-making all too often seek to explain why gridlock happens, the more important question, and the one that forms the basis of this dissertation, is why gridlock does *not* happen.<sup>15</sup> This is a particularly interesting and important question because it speaks directly to the Senate's continued relevance in our political system.

### **“A Broken Senate?”**

Why do so many congressional scholars get the Senate wrong? In part, it may be because many of them are accustomed to the formal, centralized, and predictably majoritarian House of Representatives, a chamber which differs in many ways from the more informal, decentralized, and less-predictable Senate. The Senate's small membership and the absence of predictable and readily observable and formal parliamentary procedures also complicate scholarly efforts to form generalized models

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<sup>14</sup> Welna, “Even Lawmakers Ask: Does Anyone Like Congress?”

<sup>15</sup> Such an approach broadens our perspective of Senate decision-making by focusing on the minority party leadership in addition to the majority party leadership.

with which to measure statistically significant behavior. Some studies also predate important developments in the Senate's formal and informal institutional features that affect decision-making in the chamber. In addition, the most recent scholarship that seeks to explain the impact of partisanship and ideological polarization on Senate decision-making either overstates the problem or misinterprets its consequences because of a narrow focus on easily observable behavior like cloture votes. Such approaches fail to account for why obstructionism is not as persistent a feature of the decision-making process as one would expect given the ease with which any individual member can effectively halt the Senate's activity. Doing so requires a more nuanced examination of the Senate's decision-making process, one that recognizes this individual restraint and captures the myriad sources of influence on member behavior.

One recent study that represents the various ways in which the current literature perceives the Senate is Thomas E. Mann and Norman J. Ornstein's *The Broken Branch: How Congress is Failing America and How to Get It Back on Track* and their follow-up, *It's Even Worse Than It Looks: How The American Constitutional System Collided With The New Politics of Extremism*. In these works, the authors argue that the Senate has experienced a period of institutional decline over the last three decades as a result of the increasingly polarized political environment in which it exists. Such polarization has occurred largely along partisan and ideological lines and is manifested inside the Senate in the form of increased *conflict* between its members. Conflict refers here to significant disagreement between members over both public policies and parliamentary procedures.

This conflict has led to gridlock because individual members are unable to overcome their differences in a manner that allows them to compromise. This results from the fact that members have incentives to exploit their considerable parliamentary prerogatives in order to achieve their goals.

Mann and Ornstein observe that such behavior has increased considerably over the past several years. For example, they argue that one of the most significant developments of the 110<sup>th</sup> Congress “was the expanded use of delaying tactics- holds, filibuster threats, and filibusters on issues ranging from divisive national ones to many with broad bipartisan support, sometimes driven by individual senators and sometimes manipulated in a concerted strategy by Republican leaders.”<sup>16</sup> The 110<sup>th</sup> Congress owed its uniqueness to the latter far more than the former. While there were certainly more individual members who were likely to perform the time-honored role of “skunk at the Senate garden party,” an honor previously bestowed only on a few members such as senators James Allen (D-AL), Jesse Helms (R-NC), and Howard Metzenbaum (D-OH), the dramatic increase in obstruction was due primarily to the “increased use of such tactics by the minority to delay and block action by the majority.”<sup>17</sup> Indeed, Mann and Ornstein attribute this shift to a decision by the Republican Leader Mitch McConnell to “employ threats of filibuster on a wide range of issues contentious and otherwise, big and

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<sup>16</sup> Thomas E. Mann and Norman J. Ornstein, “Is Congress Still the Broken Branch?” in *Congress Reconsidered*, 8<sup>th</sup> ed. Lawrence C. Dodd and Bruce I. Oppenheimer, eds. (Washington, D.C., CQ Press, 2009), 62.

<sup>17</sup> Mann & Ornstein, “Is Congress Still the Broken Branch?” 63.

small...in part to throw roadblocks in the way of the majority's ability to get anything done or done on time.”<sup>18</sup>

This “pervasive obstructionism,” to borrow a phrase from Mann and Ornstein, creates delay because invoking cloture is a cumbersome process that requires a three-fifths vote of sixty senators to end debate and that can consume up to four days of scarce floor time.<sup>19</sup> These higher hurdles for legislative success have had the effect of slowing floor business and constraining both the number and the nature of bills that can ultimately pass the Senate. This development has led Mann and Ornstein to claim that cloture's sixty-vote requirement has become a “stranglehold on the Senate.”<sup>20</sup>

According to Mann and Ornstein, this period of institutional decline began in the 1980s and intensified during the 1990s when Republicans regained majority control of the House and Senate for the first time in four decades. More importantly, they argue that this transformation has had several important implications for the decision-making process in the Senate. First, the growing prevalence of gridlock has led Senate leaders to avail themselves of procedural tools like budget reconciliation and other forms of “unorthodox lawmaking” in order to limit the ability of some members to obstruct the legislative process. Second, the increased use of these unorthodox procedures has precipitated the demise of what they term “regular order” in the Senate. Taken together,

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<sup>18</sup> Mann & Ornstein, “Is Congress Still the Broken Branch?” 63.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.



these developments have eroded the deliberative nature of the decision-making process, thereby diminishing the likelihood of bipartisan cooperation on important legislation, and thus perpetuating “patterns of dysfunctional behavior in Congress.”<sup>21</sup>

A recent example of the broken branch in action, according to the proponents of this view, is provided by the consideration of legislation to increase the statutory debt ceiling during the summer of 2011. The ensuing debate between Democrats and Republicans in both the House and Senate led, in part, to Ornstein dubbing the 112<sup>th</sup> Congress the “Worst. Congress. Ever” and to Mann and Ornstein titling their newest book, *It’s Even Worse Than It Looks*.<sup>22</sup> Sarah Binder echoes his accusation, writing that “yes, it’s really that bad.”<sup>23</sup> She argues that “Ornstein nails the country’s current predicament as succinctly as anyone in or outside Washington can.”<sup>24</sup> According to such a view, the hyper-partisanship surrounding the question of whether or not to increase the debt ceiling threatened to precipitate “financial Armageddon.”<sup>25</sup> Again, Binder concurs, writing that “Ornstein has fingered publicly the most important culprit driving today’s

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<sup>21</sup> Man & Ornstein, “Is Congress Still the Broken Branch?” 54.

<sup>22</sup> Norman J. Ornstein, “Worst. Congress. Ever.” in *Foreign Policy*, (July 19, 2011).

<sup>23</sup> Sarah A. Binder, “Is This Really the Worst Congress Ever?” in *Brookings Institution Opinions* (July 27, 2011).

<sup>24</sup> Ibid.

<sup>25</sup> Norman J. Ornstein, “Troubled by Debt Limit Despite Reassurances,” in *Roll Call* (June 29, 2011).

dysfunction: the steadily growing polarization of the two legislative parties in Washington.”<sup>26</sup>

Yet for scholars like Binder and Ornstein, such polarization among the rank-and-file is not the sole culprit. The negotiating posture of the Republican leadership in the House and Senate is equally to blame. Mann and Ornstein write that in the debt limit debate “Republican party leaders cynically decided to hold hostage America’s full faith and credit in a reckless game of chicken with the president” and that their behavior “moved the dysfunction gauge sharply into the danger zone.”<sup>27</sup> Moreover, Republican Party leadership behavior may have actually exacerbated the views of many in their respective conferences who believed that “breaching the debt limit is no big deal.”<sup>28</sup> For Ornstein, such “my way or the highway” posturing reflected Republican behavior throughout the first session of the 112<sup>th</sup> Congress.<sup>29</sup> Binder laments that such polarized parties and party leadership undermined Congress’s “lawmaking capacity.”<sup>30</sup>

For many, the partisan impasse over the debt ceiling reflects a more fundamental shift in relations between the majority and minority parties towards a more zero-sum struggle for political and policy supremacy in the Senate. For Ornstein, “the Senate has

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<sup>26</sup> Binder, “Is This Really the Worst Congress Ever?”

<sup>27</sup> Mann and Ornstein, *It’s Even Worse Than It Looks*, 3.

<sup>28</sup> Ornstein, “Troubled by Debt Limit Despite Reassurances.”

<sup>29</sup> Norman J. Ornstein, “Contentious Style Will Continue in Congress,” in *Roll Call* (August 3, 2011).

<sup>30</sup> Binder, “Is This Really the Worst Congress Ever?”

taken the term ‘deliberative’ to a new level, slowing not just contentious legislation but also bills that have overwhelming support.”<sup>31</sup> This results from the fact that “everybody is an obstructionist in today’s Senate.”<sup>32</sup> Members now routinely resort to informal practices like the hold and formal rules such as their ability to filibuster to obstruct legislation. This shift in behavior, according to Ornstein, stems from a deliberate change in strategy by the Republican leadership. “Republican Senate leader Mitch McConnell has threatened to filibuster on a wide range of issues, in part to force Majority Leader Harry Reid to negotiate with his party and in part just to gum up the works.”<sup>33</sup> The result is a Senate that no longer works. Again, according to Mann and Ornstein, Democrats and Republicans “have become as vehemently adversarial as parliamentary parties” but our political system, “unlike a parliamentary democracy, makes it extremely difficult for majorities to act.” Put simply, “parliamentary style parties in a separation-of-powers government are a formula for willful obstruction.”<sup>34</sup>

This sentiment extends beyond academia as reflected in an August 2010 article in *The New Yorker* in which the author, George Packer, describes a Senate beset by obstruction and an institution in which nothing gets done.<sup>35</sup> Senator Carl Levin is quoted

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<sup>31</sup> Norman J. Ornstein, “Our Broken Senate,” in *The American* (March/April 2008).

<sup>32</sup> Ibid.

<sup>33</sup> Ibid.

<sup>34</sup> Mann and Ornstein, *It’s Even Worse Than It Looks*, xiii.

<sup>35</sup> George Packer, “The Empty Chamber: Just how broken is the Senate?” in *The New Yorker* (August 9 2010).

by Packer observing that “the obstructionism has become mindless.”<sup>36</sup> During consideration of the health care reconciliation bill during the spring of 2010, Packer attributes blatantly obstructionist motivations to Senate Republicans, claiming that Republican-sponsored amendments were designed to either make the Democrats look hypocritical by opposing policies they ostensibly support, or were “more nakedly partisan, and outlandish.”<sup>37</sup> Senator Jeff Merkley remarks that he winces every time he hears the Senate described as “the world’s greatest deliberative body” because “the amount of real deliberation, in terms of exchange of ideas, is so limited.”<sup>38</sup>

For Packer, “the Senate’s modern decline began in 1978, with the election of a new wave of anti-government conservatives, and accelerated as Republicans became the majority in 1981.” The Senate’s unique institutional culture has since been fundamentally altered as its “rules and precedents have been warped beyond recognition by the modern pressures of partisanship.”<sup>39</sup> To be sure, both parties share responsibility for the increase in obstruction observed by Packer. However, he writes that filibusters became “everyday events” only after Democrats reclaimed the majority in 2006 and Republicans once again found themselves in the minority. Packer asserts that “under McConnell, Republicans have consistently consumed as much of the Senate’s calendar as possible with legislative

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<sup>36</sup> Quoted in Packer, “The Empty Chamber.” Ibid.

<sup>37</sup> Packer, “The Empty Chamber.”

<sup>38</sup> Quoted in Packer, “The Empty Chamber.” Ibid.

<sup>39</sup> Ibid.

maneuvering. The strategy is not to extend deliberation of the Senate's agenda but to prevent it."<sup>40</sup>

While scholars such as Mann and Ornstein, and journalists such as Packer, correctly point out that the decision-making process in the Senate has changed considerably over the last 30 years, their emphasis on cooperation and conflict as mutually exclusive patterns of parliamentary behavior obscures current procedural practice in the institution and fails to account for the Senate's legislative productivity despite the conflict inherent in the increasingly partisan and ideologically polarized environment in which it exists. Moreover, their concept of "regular order" is based on an idealized perception of decision-making that closely corresponds to the legislative process exemplified in the mid-twentieth century. According to this perspective, a bill becomes a law only after its committee of jurisdiction conducts hearings on the issue and reports legislation addressing the problems raised in such hearings. Afterwards, the legislation is further reviewed and debated on the Senate floor by members from both political parties for a reasonable period of time, but that is not so long as to actually "delay" or "obstruct" the legislation. Finally, a joint House-Senate conference committee is convened to resolve any differences between the two chambers on a bipartisan and bicameral basis.<sup>41</sup> By adopting this period as a point of reference, they are defining deliberation narrowly as a bipartisan and cooperative process, the goal of which is to pass

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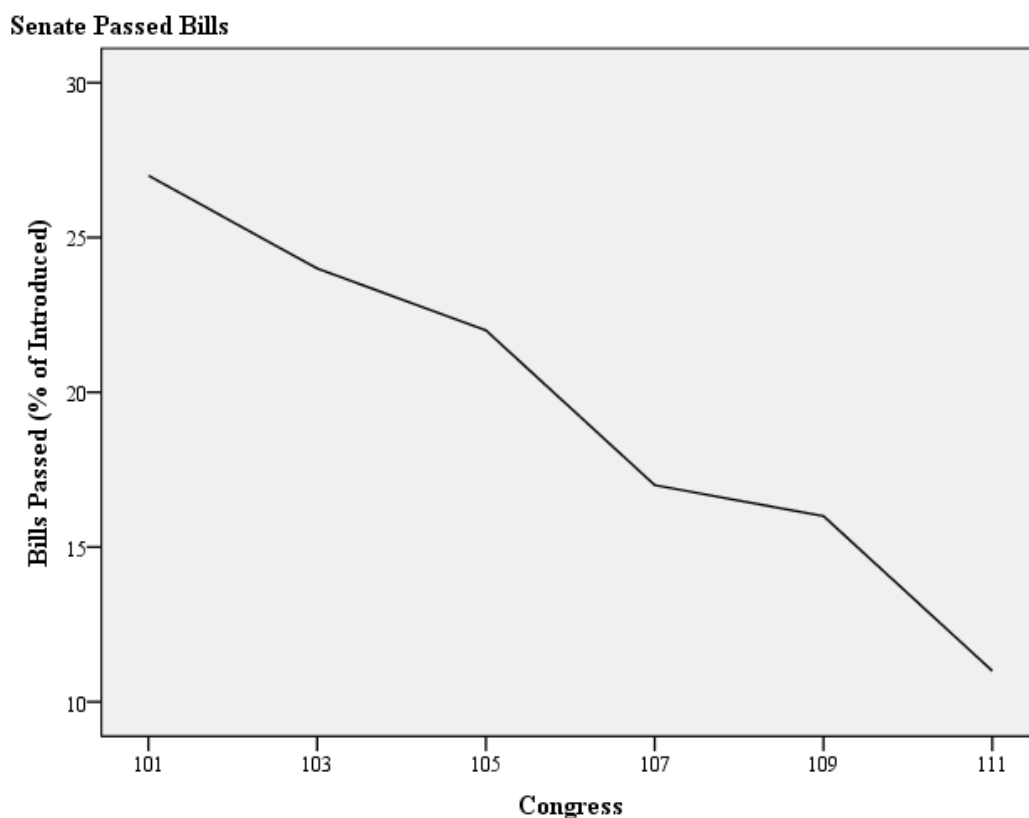
<sup>40</sup> Quoted in Packer, "The Empty Chamber."

<sup>41</sup> Mann & Ornstein, "Is Congress Still the Broken Branch?"

legislation. However, such a definition invariably impacts our perception of Senate decision-making more broadly.

### **A Different Interpretation of Gridlock**

There is something to be said for viewing decision-making in the contemporary Senate as characterized by excessive levels of legislative gridlock. To be sure, the Senate today is composed of more ideologically extreme members than in the past. Furthermore, statistical data would suggest that the Senate has become more inefficient, presumably the result of polarization and gridlock in the chamber. For example, the overall number of public laws passed by Congress over the past twenty-five years has declined. And the percentage of all bills introduced that are passed by the Senate has declined over the period beginning with the 97<sup>th</sup> Congress in 1981-1982, when Republicans regained control of the Senate for the first time in over twenty years, and ending with the 110<sup>th</sup> Congress in 2007-2008 (see Figure 1.1 below).

Figure 1.1<sup>42</sup>

Yet this is not sufficient to indict the institution for being “broken” or paralyzed by gridlock. Partisan competition in the Senate has, in fact, been surprisingly constrained despite the growing number of ideologically-polarized Senators, and the legislative process has not been characterized by irreconcilable gridlock. Claims that the Senate is paralyzed by gridlock have difficulty explaining why the minority party does not obstruct all legislation with which it disagrees. Indeed, the Senate continues to formulate policy and pass legislation on controversial and uncontroversial issues alike, despite significant levels of minority opposition. For example, 786 bills passed the Senate during the 97<sup>th</sup>

<sup>42</sup> The data is listed for odd numbered Congresses only in order to simplify the figures.

Congress. In the 110<sup>th</sup> Congress, 556 bills passed the Senate. In the 111<sup>th</sup> Congress, 454 bills passed the Senate. While the overall number of bills passed by the Senate observed above has admittedly declined, the Senate successfully passed legislation of considerable controversy during this period, including health care reform and financial regulatory reform in the 111<sup>th</sup> Congress. Moreover, the number of measures passed by the Senate in the 104<sup>th</sup>, 105<sup>th</sup>, and the 108<sup>th</sup> Congresses indicate that the institution can be productive despite the increasing partisanship and polarization that has often been described by Senate observers during these years. These congresses also signify that such productivity can occur in periods of divided government (104<sup>th</sup> and 105<sup>th</sup> Congresses) and in periods of unified government (108<sup>th</sup> Congress).

Furthermore, the decline in the percentage of bills passed by the Senate closely tracks the number of bills actually considered on the Senate floor. In other words, the Senate passes fewer bills because it is considering fewer of them on the floor. While this may suggest that the majority is bringing fewer bills to the floor in anticipation of the minority's opposition, it does not itself represent evidence that the Senate has difficulty passing legislation because of minority obstruction and gridlock. Interestingly, the percent of bills brought to the Senate floor that pass the chamber has actually *increased* over the last two decades (see Figure 1.2 below).



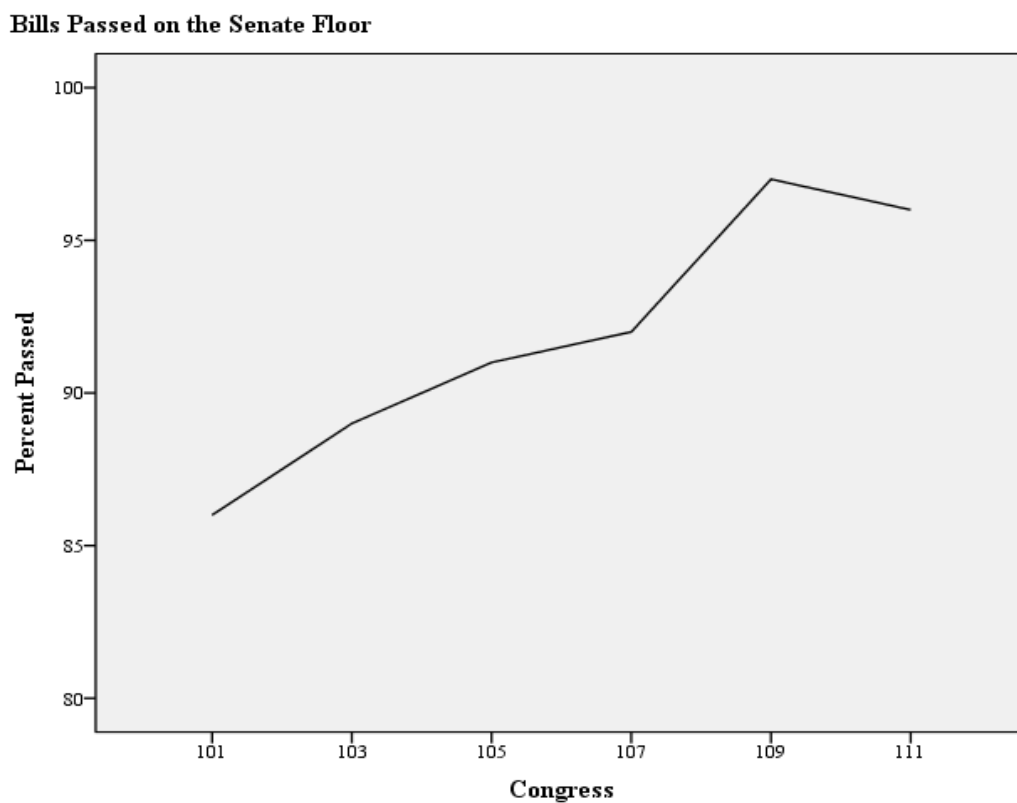
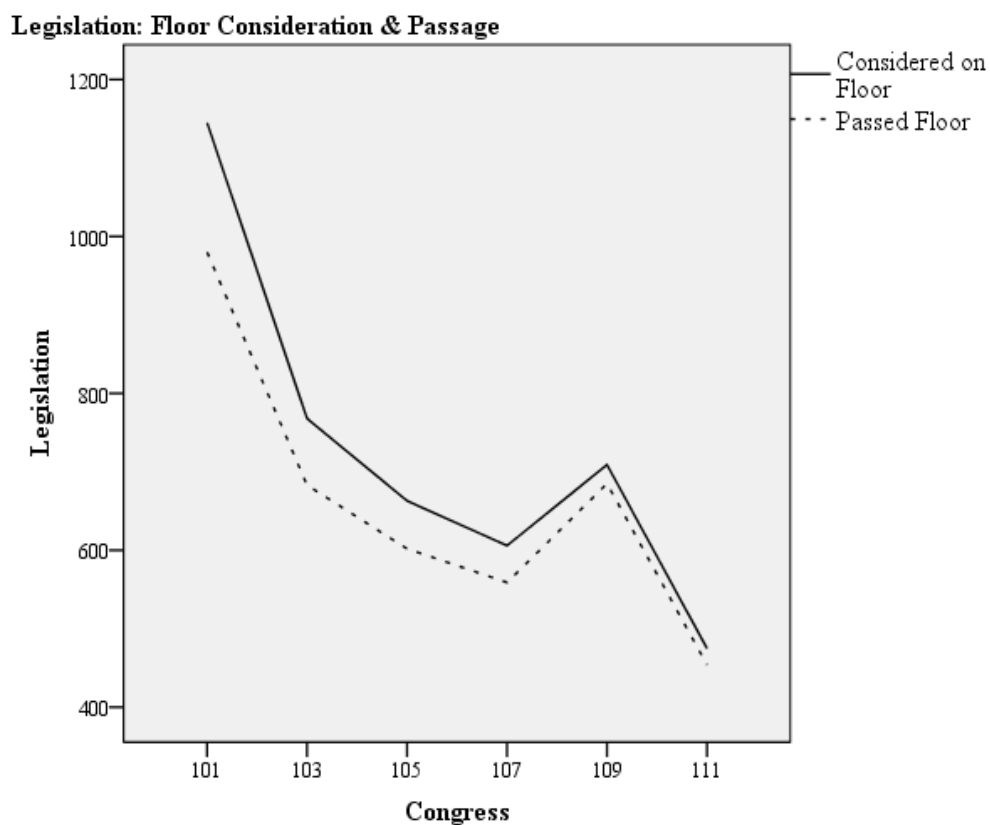
**Figure 1.2**

Figure 1.3 below indicates that a bill is more likely to pass if it receives consideration on the Senate floor than it was two decades ago. It also demonstrates that an overwhelming percentage of bills considered on the Senate floor pass when compared to the number of those that are defeated.

Figure 1.3<sup>43</sup>

The difference in the number of bills considered on the floor and the number of bills that the Senate passes actually *narrows* over the course of the period observed.

Comparing the total number of public laws passed by Congress with the number of bills passed by the Senate demonstrates that the Senate's productivity does closely follow overall congressional productivity. However, the relatively consistent productivity of the Senate as a percentage of the legislation considered each Congress, despite a

<sup>43</sup> The data presented in Figure 3 represents the total number of bills considered on the Senate floor and the total number of bills that pass the Senate.

generally rising workload, suggests that the Senate is not the sole source of gridlock in the political system.

**Figure 1.4**

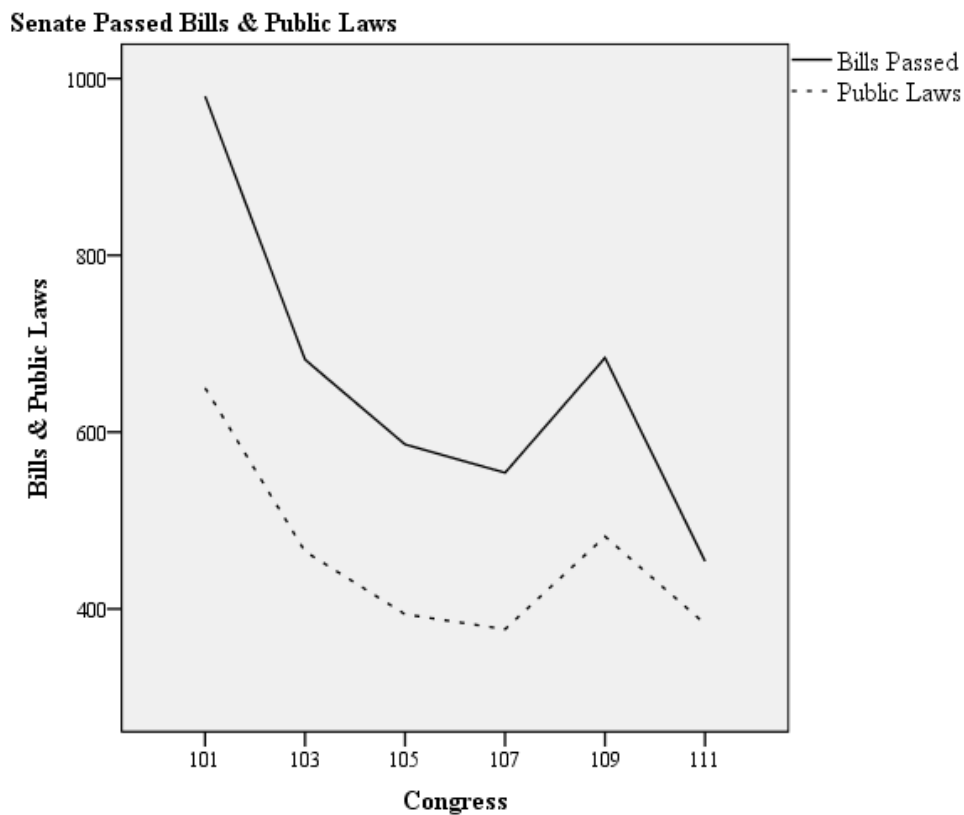
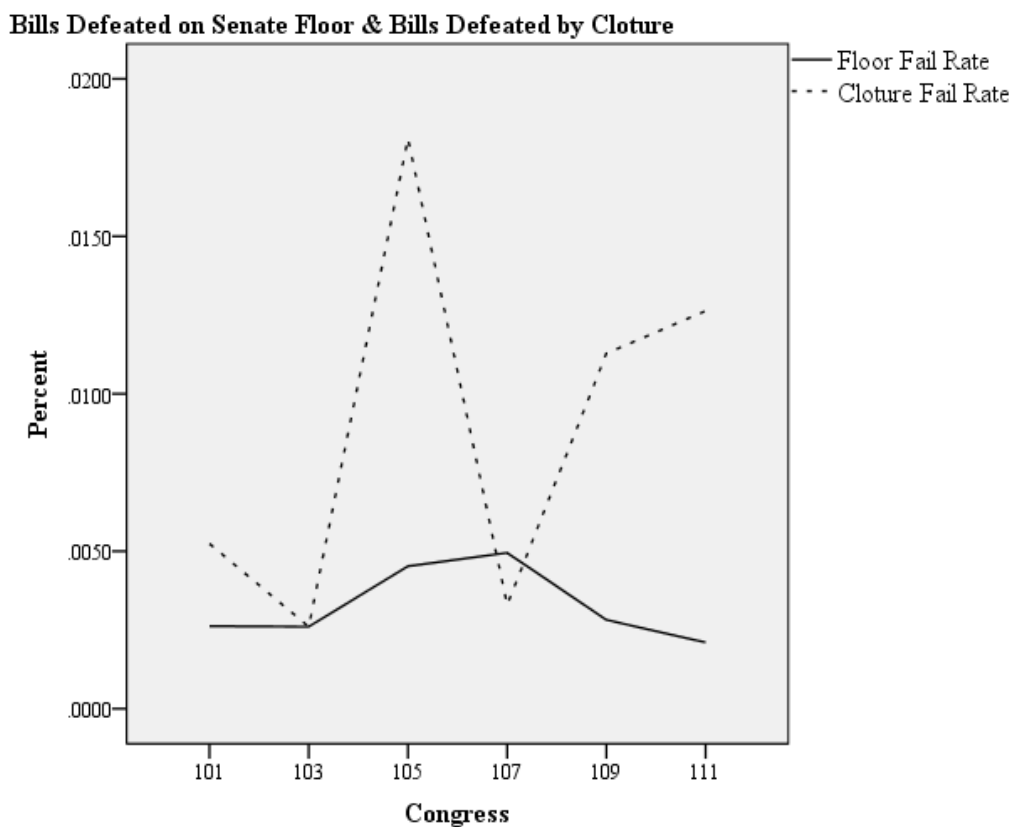


Figure 1.4 above compares the number of bills passed by the Senate in a given Congress (solid line) with the number of public laws enacted in that Congress (dotted line). This figure strongly suggests that the Senate has no problem passing legislation. It can thus be reasonably inferred that in some cases legislation doesn't become law due to opposition elsewhere in the federal government and not as a result of gridlock in the Senate.

The Senate’s supermajoritarian requirement to end debate – three-fifths of the Senate (reduced from two-thirds in 1975) to invoke what is known as “cloture” – is typically cited as the reason the institution is gridlocked. Some data would seem to support this claim. For example, a higher percentage of legislation is defeated by a failed cloture vote than a failed final passage vote (see Figure 1.5 below).

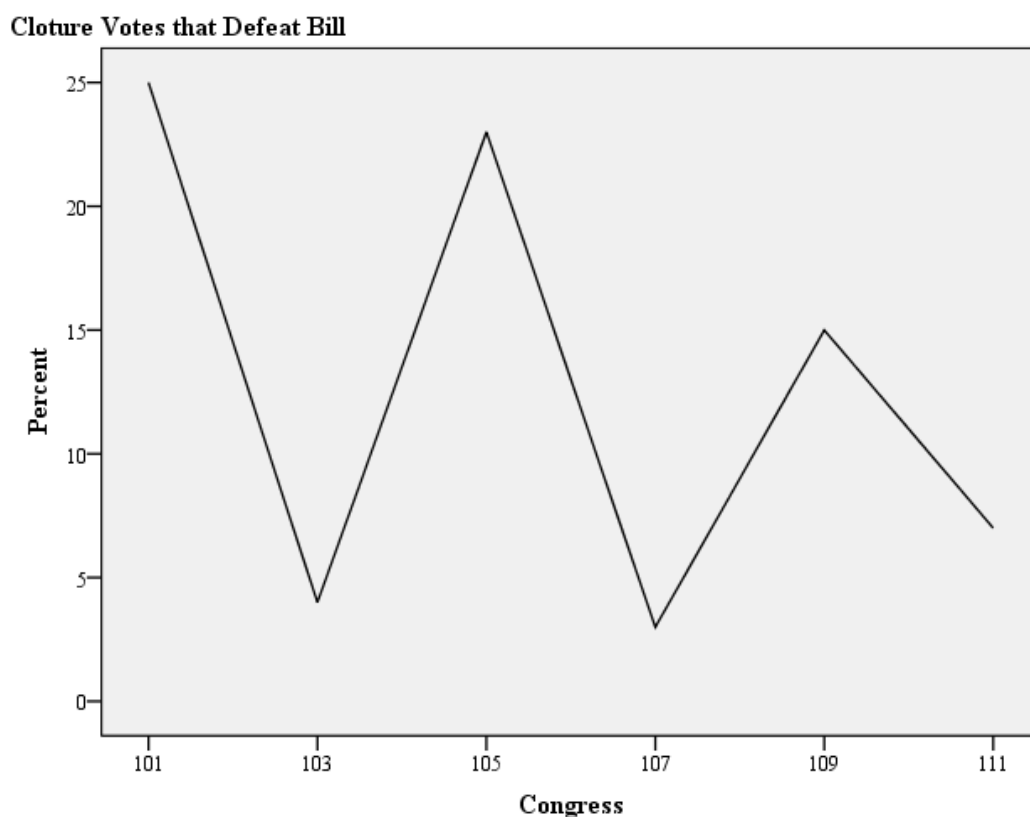
**Figure 1.5<sup>44</sup>**



<sup>44</sup> In Figure 4, “Cloture Fail Rate” refers to the percent of bills on which cloture is not successfully invoked and are thus defeated. “Floor Fail Rate” refers to the percent of bills that are defeated on an up-or-down final passage vote.

Yet the percentage of cloture votes that actually defeat legislation exhibits an uneven pattern over the same period (see Figure 1.6 below).

**Figure 1.6**



Such an observation raises several important questions. Why is gridlock not a persistent feature of Senate decision-making? What explains the Senate's ability to pass legislation despite the opposition of procedurally empowered and ideologically polarized partisan minorities? Why do individual senators and the minority party leadership consistently refrain from utilizing all of the tools available to them under Senate rules to

obstruct the agenda of the majority party? My purpose in this dissertation is to answer these questions, and more generally, account for the Senate's ability to maintain its legislative productivity in a polarized environment without being stymied by persistent obstruction or having to change its rules to overcome minority obstruction.

### **The Structured Consent Thesis**

The Senate has developed several patterns of decision-making throughout its history in an effort to maintain its legislative productivity in the presence of procedurally-empowered senators. My primary thesis in this dissertation is that the Senate has developed a new pattern of decision-making called *structured consent* in order to limit conflict and pass legislation in a polarized environment. According to the theory of structured consent, both the majority and minority party leaders exercise significant influence over the decision-making process by virtue of their leadership positions, which they routinely choose to utilize in order to *moderate*, rather than exacerbate, the procedural choices of their partisan colleagues.

A pattern of decision-making can be identified to the extent that it represents a collection of procedural innovations that enable the Senate to successfully limit conflict between its members and pass legislation. Patterns implicitly recognized in the political science literature up to this point can be categorized as the following: *normative*; *collegial*; and *majoritarian*. These patterns of decision-making evolved over the second half of the twentieth century and the collegial and majoritarian patterns are exhibited on

the Senate floor under varying circumstances today. (The normative pattern is no longer followed in the contemporary Senate.) It is important to note that each pattern represents a collection of general procedural activities only and not concrete activities whose features are rigidly defined. Nevertheless, these patterns are useful in that they help us make sense of the myriad forces that structure Senate decision-making at any given point in time.

The theory of structured consent differs from these existing approaches in three important ways. First, it accounts for the contemporary Senate's continued productivity when considering highly controversial legislation. Put simply, the normative, collegial, and majoritarian patterns cannot explain the Senate's ability to overcome conflict between its members on controversial legislation in a polarized environment. Supporting this claim is the fact that the consideration of highly controversial legislation on the Senate floor increasingly fails to exhibit the procedural features of these patterns.

Second, structured consent suggests that existing arguments that conflict in the contemporary Senate is a zero-sum struggle between polarized political parties are incorrect. This results from the fact that current literature focuses primarily on the majority party in explaining Senate decision-making.<sup>45</sup> To the extent that the literature acknowledges that the minority party matters, it argues that the minority has a negative

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<sup>45</sup> David W. Rohde, *Parties and Leaders in the Postreform House* (Chicago: University of Chicago Press, 1992); Barbara Sinclair, *Legislators, Leaders, and Lawmaking: The U.S. House of Representatives in the Postreform Era* (Baltimore: Johns Hopkins University Press, 1995); Gary W. Cox and Mathew D. McCubbins, *Legislative Leviathan: Party Government in the House* (New York: Cambridge University Press, 1993); Gary W. Cox and Mathew D. McCubbins, *Setting the Agenda: Responsible Party Government in the U.S. House of Representatives* (New York: Cambridge University Press, 2005).

influence on the decision-making process (i.e., it obstructs the legislative agenda of the majority).<sup>46</sup> In contrast, the structured consent theory of Senate decision-making suggests that the minority party not only matters but that it can exert a positive influence on the legislative process. Thus, the underlying premise of the theory is that the majority *and* minority party leaders routinely serve a moderating function in the Senate by acting within certain bounds to ameliorate the conflict and instability inherent in the institution and its broader environment. As a result, structured consent points to a more accurate understanding of the role played by parties in Senate decision-making.

Finally, structured consent's emphasis on cooperation between the majority and minority leaders draws attention to a more accurate understanding of the consequences of polarization for Senate decision-making today. Specifically, it suggests that the forces motivating leadership behavior vis-à-vis their partisan colleagues are much more nuanced and give rise to different outcomes than previously suspected. These leaders are able to convince, or compel, their memberships to support the decisions they make even though such decisions may periodically conflict with a member's own parochial goals. To be sure, such a perspective has been applied to the *Majority* Leader in the past. For example, Lyndon Johnson effectively convinced, and compelled, his Democratic colleagues to support numerous policies with which they disagreed during his tenure as Senate

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<sup>46</sup> Sarah A. Binder, *Minority Rights, Majority Rule: Partisanship and the Development of Congress* (New York: Cambridge University Press, 1997).



Majority Leader.<sup>47</sup> However, what makes structured consent unique is that it ascribes similar behavior, and influence, to the Senate *Minority* Leader. Furthermore, the theory claims that the two party leaders cooperate at times in order to avoid what they each view as excessive obstruction that could grind the Senate to a halt. While other treatments of obstruction in Senate decision-making suggest that minority parties periodically acquiesce to the majority in order to avoid a draconian crack-down, structured consent suggests that minority leaders are motivated to willingly cooperate by the reputational costs posed for both parties by excessive obstruction.<sup>48</sup>

### **Organization of the Study**

I pursue two primary lines of inquiry here in order to support my theory of structured consent. First, I examine normative, collegial, majoritarian, and structured consent decision-making in order to better understand how conflict is limited in each pattern. Since these patterns developed more or less chronologically, my examination is necessarily historical in nature. However, it is important to note that my primary purpose here is to explain decision-making in the contemporary Senate rather than its institutional development over time. Nevertheless, a historical examination is helpful because it

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<sup>47</sup> For example, see: Rowland Evans & Robert Novak, *Lyndon B. Johnson: The Exercise of Power* (New York: The New American Library, Inc., 1966); Howard E. Shuman, "Lyndon B. Johnson: The Senate's Powerful Persuader," in *First Among Equals: Outstanding Senate Leaders of the Twentieth Century*, Richard A. Baker & Roger H. Davidson, eds. (Washington, D.C.: Congressional Quarterly Inc., 1991): 199-235.

<sup>48</sup> For example, see: Gregory J. Wawro and Eric Schickler, *Filibuster: Obstruction and Lawmaking in the U.S. Senate* (Princeton: Princeton University Press, 2006); Daniel DiSalvo, "Legislative Coalitions, Polarization, and the U.S. Senate," *The Forum*: Vol. 9: Iss. 4, Article 5 (2011).

demonstrates how new patterns of decision-making allow the Senate maintain its legislative productivity.

My second line of inquiry examines major legislation, as defined by Congressional Quarterly, considered in the 102<sup>nd</sup>, 108<sup>th</sup>, 110<sup>th</sup>, and 111<sup>th</sup> Congresses in order to determine whether it meets the criteria for collegial, majoritarian, or structured consent decision-making.<sup>49</sup> I chose these particular Congresses because they include several different scenarios for partisan control of Congress and the presidency. Both the 102<sup>nd</sup> and the 110<sup>th</sup> Congresses experienced unified Democratic control of the House and Senate and Republican control of the White House. The 108<sup>th</sup> and 111<sup>th</sup> Congresses witnessed unified Republican and Democratic control of government respectively. In addition, the distance between the 102<sup>nd</sup> and 111<sup>th</sup> Congresses allows for one to observe just how dramatically decision-making has changed in the Senate over the last two decades. Specifically, this period was marked by the emergence of a powerful, centralized party leadership in Congress.

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<sup>49</sup> CQ selects key votes for the Senate on major issues considered in each Congress according to the following criteria: "a matter of major controversy; a matter of presidential or political power; a matter of potentially great impact on the nation and lives of Americans." "How CQ Picks Key Votes," *Congressional Quarterly Weekly*, December 15 2008. For a list of key votes in the 102<sup>nd</sup> Congress see: "Senate Key Votes," *Congressional Quarterly Weekly*, December 28 1991. "Key Senate Votes," *Congressional Quarterly Weekly*, December 19 1992. For a list of key votes in the 108<sup>th</sup> Congress see: "Key Senate Votes," *Congressional Quarterly Weekly*, January 3 2004. "Key Votes 2004: Senate," *Congressional Quarterly Weekly*, December 11 2004. For a list of key votes in the 110<sup>th</sup> Congress see: "Key Senate Votes," *Congressional Quarterly Weekly*, January 7 2008. "2008 Key Votes: Senate," *Congressional Quarterly Weekly*, December 15 2008. For a list of key votes in the 111<sup>th</sup> Congress see: Kent Allen, "Majority Sweats the Big Stuff," *Congressional Quarterly Weekly*, January 4 2010. "Senate Key Votes," *Congressional Quarterly Weekly*, January 3 2011. For the purposes of this dissertation, any measure receiving a key vote is analyzed. Measures with more than one key vote are counted only once. Nominations are excluded. In addition, legislation is only analyzed at the stage of initial consideration in the Senate.

This dissertation proceeds as follows. In chapter two I explore the relevant literature on congressional decision-making with a particular focus on how Congress uses parliamentary procedures to limit conflict. I review the relevant literature in the context of the three identifiable patterns of decision-making that have been utilized to limit conflict within Congress in the past: normative; collegial; and majoritarian. While there is admittedly some overlap, the literature, at least implicitly, distinguishes between these patterns by the identity and number of actors that participate in the legislative process and the location in which major decisions are made.

I present the structured consent theory of Senate decision-making in chapter three. I first generate empirically-defined patterns of decision-making for the collegial and majoritarian forms identified in chapter two. These patterns stipulate the predominant procedural characteristics of each form of decision-making. (An empirically-defined pattern is not generated for normative decision-making because it is no longer observed in the Senate.) I then generate an empirically-defined pattern for structured consent decision-making.

Due to the importance of party leaders in structured consent decision-making, I examine the gradual transfer of power from the Senate's standing committees to the leadership of the two political parties in chapter four. Today, party leaders influence decision-making by utilizing a variety of formal and informal tools at their disposal. The application of these tools, as well as the resulting influence gained by Senate leaders, varies within and across parties and over time. The relative power of both Democratic

and Republican leaders over the Senate decision-making process also evolved gradually. No two party leaders exercise power in precisely the same manner. Rather, each sought to adopt their own leadership style in response to the unique legislative environment they confronted. Nevertheless, broad patterns can be discerned in their seemingly disparate leadership styles. These broad patterns conform to the procedural patterns of Senate decision-making identified in chapter three.

In an effort to better understand the prevalence of the collegial, majoritarian, and structured consent patterns of decision-making defined and documented in chapters three and four, I examine the decision-making process for major legislation considered in the 102<sup>nd</sup>, 108<sup>th</sup>, 110<sup>th</sup>, and 111<sup>th</sup> Congresses in chapter five. This chapter demonstrates that the structured consent pattern of decision-making increasingly characterizes the legislative process in the contemporary Senate precisely because it allows the institution to overcome the instability inherent in its design and pass controversial legislation despite the partisanship and ideological conflict characteristic of the current environment.

I analyze the debt ceiling debate in more detail in chapter six in order to determine the ways in which structured consent's ability to overcome polarized conflict affirms the central claims of this dissertation. Such an examination supports my theory that structured consent represents a pattern of parliamentary procedures that is ideally suited to limiting conflict in a polarized Senate.

I conclude with an analysis of the consequences of current patterns of decision-making for the Senate's larger role in the legislative process at the beginning of the

twenty-first century. I present here the argument that the Senate's ability to produce important legislation in the current environment may undermine the institution's deliberative function. Such an observation suggests that while the contemporary Senate may indeed be "broken," it may not be the result of the conditions typically acknowledged in the literature.

## **Chapter 2: Conflict & Congressional Decision-Making**

Theories of congressional organization can be divided into three general approaches: distributive (Mayhew 1974); informational (Krehbiel 1992); and partisan (Rohde 1991, Cox & McCubbins 1993 and 2005, Sinclair 1995). These theoretical approaches have advanced our understanding of the relationship between congressional procedure and decision-making as well as the implications of this relationship for member participation in the legislative process. Yet the question remains, how is conflict limited in the Senate? In an effort to illustrate how existing scholarship answers this question, this chapter will review the relevant literature on Congress.

The vast majority of scholarship on this subject has neglected the Senate. As a result, I review House-focused approaches in addition to those focused on the Senate in this chapter. Such a review is important because it provides us with a broader understanding of congressional decision-making in general.

According to such reasoning, including House-focused theories in a review of the relevant literature on Senate decision-making provides valuable insights into the legislative process that are less readily observed in the Senate. Indeed, approaches focused on the House are helpful to the extent that they offer examples of sophisticated theories for how congressional organization influences the decision-making in Congress. Furthermore, an awareness of House-focused approaches will help delineate between the decision-making processes in the two chambers.

The theories of congressional organization described above can also be further categorized according to the primary method by which conflict is limited within Congress. These methods are distinguished by the identity and number of actors that participate in the legislative process and the location in which major decisions are made. The first method, though largely outdated, reflects a cultural approach and suggests that various norms serve to limit conflict in the Senate within a decentralized process in which a small number of members freely participate in the decision-making process primarily in the institution's standing committees. A second method also assumes that the Senate is a relatively decentralized institution but reflects a distributive approach. This method suggests that individual members freely participate in the decision-making process on the Senate floor and within the committee system. While member behavior continues to reflect various norms, the primary method by which conflict is limited is the open and deliberative process which facilitates the participation of interested senators in the legislative process. Finally, the third method reflects the partisan approach and observes that the Senate has become a more centralized institution in recent years. According to this method, political parties seek to limit member participation in the decision-making process in an effort to limit conflict.

An analysis of these methods of limiting conflict also illustrates several ways in which the complex relationship between party leaders and individual members can be understood. Such an examination is important because party leaders play an important

role in facilitating the decision-making process in Congress through the successful limitation of conflict. According to Sinclair (1998), scholarly interest in party leaders “stems primarily from the potentially critical role the leadership may play in enabling the Congress to perform its core function of lawmaking.”<sup>1</sup> Put simply, party leaders help to limit conflict in the House and Senate, thereby enabling these institutions to maintain their legislative productivity. Party leaders thus directly affect “the ability of Congress to carry out its functions successfully.”<sup>2</sup>

### **Normative Method of Limiting Conflict**

The strictly normative method of conflict limitation is no longer observed in the more recent literature on congressional decision-making. According to this method, the Senate’s unique institutional culture contained conflict in the decision-making process during the immediate post-World War II period.<sup>3</sup> Normative decision-making derives its name from that which enabled the Senate to overcome conflict during this period: informal rules, or norms. According to Donald R. Matthews, “these rules are *normative*, that is, they define how a senator ought to behave.”<sup>4</sup> In a 1959 article in the *American*

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<sup>1</sup> Barbara Sinclair, *Legislators, Leaders, and Lawmaking: The U.S. House of Representatives in the Postreform Era* (Baltimore: Johns Hopkins University Press, 1995), 7.

<sup>2</sup> Sinclair, “Congressional Leadership,” 97.

<sup>3</sup> Ripley dates the period of what is here termed normative decision-making as occurring between 1937 and 1961, during which time a decentralized distribution of power was in effect. Ripley, *Power in the Senate*, 15.

<sup>4</sup> Donald R. Matthews, “The Folkways of the United States Senate: Conformity to Group Norms and Legislative Effectiveness,” *American Political Science Review* 53, no. 4 (1959), 1086.



*Political Science Review* entitled “The Folkways of the United States Senate: Conformity to Group Norms and Legislative Effectiveness,” Matthews presents one of the first scholarly treatments of the role played by informal norms in Senate decision-making by employing a new, sociological, approach to understanding the Senate. He concludes that “normative expectations widely shared among senators” exerted a significant influence on member behavior.<sup>5</sup> Specifically, these folkways were defined as “unwritten but generally accepted and informally enforced norms of conduct in the chamber.”<sup>6</sup>

Matthews expanded on the several “folkways,” or norms, that he identified in his 1959 *APSR* article in his book, *U.S. Senators and Their World*. According to Matthews, Senate norms helped to structure the institution’s decision-making process by performing several important functions. First, they motivated members to undertake undesirable legislative work. Second, they encouraged members not to avail themselves of the considerable procedural prerogatives they enjoyed at the time, such as the right to engage in virtually unlimited debate. They also encouraged senators to develop substantive expertise and provided a corresponding division of labor that structured the institution’s legislative work. Finally, they promoted civility and cooperation between members.<sup>7</sup> In the absence of restrictive Senate procedures, norms served to constrain the behavior of individual members. According to Matthews, the institution’s norms “encouraged

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<sup>5</sup> Donald R. Matthews, “Communications: Can the ‘Outsider’s Role Be Legitimate?,” *American Political Science Review* 55, no. 4 (1961), 882.

<sup>6</sup> Matthews, “The Folkways of the United States Senate,” 1064.

<sup>7</sup> *Ibid.*, 1074.

Senators to become ‘compromisers’ and ‘bargainers’ and to use their substantial powers with caution and restraint.”<sup>8</sup> Without such norms to contain conflict, the Senate could not operate according to this pattern of decision-making.

The limited conflict between members that materialized during this period was overcome by a decentralized process in which a small number of members freely participated in deliberations that occurred primarily in the standing committees. Ripley (1969) observed that this had the effect of making committee chairmen and ranking minority members the most powerful members in the Senate.<sup>9</sup> In such an environment, “the individual senator tends to be committee-centered. If he wants to have legislative impact, the key supporters he needs are committee chairmen or ranking minority members.”<sup>10</sup>

Though no longer observed in the current literature, an examination of the normative method of conflict limitation is important because it draws attention to the ways in which institutional cultures influence the behavior of their members by outlining and reinforcing behavioral norms. According to Matthews (1960), the unique institutional culture of the Senate provides “motivation for the performance of vital duties and essential modes of behavior which, otherwise, would go unrewarded.”<sup>11</sup> Without such an institutional culture, “the Senate could hardly operate with its present

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<sup>8</sup> Matthews, “The Folkways of the United States Senate,” 1074.

<sup>9</sup> Ripley, *Power in the Senate*. 10.

<sup>10</sup> *Ibid.*, 11.

<sup>11</sup> Donald R. Matthews, *U.S. Senators & Their World* (New York: Vintage Books, 1960), 116.

organization and rules.”<sup>12</sup> Members that adhered to the behavior prescribed by Senate norms were rewarded with legislative success and internal advancement. Those that ignored their prescriptions found the attainment of such desirable outcomes elusive. As a consequence, the Senate’s norms produced a certain type of Senator.

In *Citadel: The Story of the U.S. Senate*, William S. White describes the prototypical “Senate-type” of the period in the context of conformity to the particular institutional culture.<sup>13</sup> This culture was largely defined by a smaller “Inner Club” of members who were particularly influential and set the tone of the Senate’s decision-making process. Specifically, White argues that the “Senate-type” was characterized by “tolerance towards his fellows, intolerance toward any who would in any real way change the Senate, its customs or its way of life.”<sup>14</sup> Similarly, Ripley observes that the institutional culture underpinning the decision-making process was “perpetuated in part by the continuing emergence of ‘Senate men’ who possess certain personal traits acceptable to the ruling oligarchs.”<sup>15</sup> Members that did not conform to these standards were prohibited from wielding significant influence in the Senate.

During this period, the legislative work of the Senate occurred almost exclusively in its various standing committees. A familiar refrain in the Senate at the time was that

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<sup>12</sup> Matthews, *U.S. Senators & Their World*, 116.

<sup>13</sup> William S. White, *Citadel: The Story of the U.S. Senate* (New York: Harper & Brothers Publishing, 1957).

<sup>14</sup> *Ibid.*, 92.

<sup>15</sup> Ripley, *Power in the Senate*, 54.

“the committees are [*sic*] where the *real* work of the Senate is done.”<sup>16</sup> While the Senate floor remained available as an arena in which members could exploit opportunities to advance their legislative proposals, few, if any, floor amendments were ever offered. The consideration of issues not previously reviewed by a Senate panel was discouraged and decisions made in committee were typically ratified on the Senate floor.

The committees themselves were dominated by their chairmen and broad participation in their deliberations was limited. The chairmen were not only powerful; they were also autonomous and exercised their influence largely independent of their political party. This institutional arrangement was mutually reinforcing. Senators from one-party states were more likely to be electorally secure and thus more likely to amass the seniority necessary to become a chairman. Once in place, chairmen often did not require assistance from their political party to remain in office. As a result, chairmen and, by extension, their committees were more likely to pursue their policy goals irrespective of those of their political party. They typically acted to protect and extend their own power at the expense of their party.<sup>17</sup>

Reflecting this institutional arrangement, the literature at the time largely eschewed an in-depth examination of the role played by political parties in the Senate. Indeed, it became common-place for scholars to argue that party was irrelevant in understanding the Senate. Despite the emergence of formal party leadership a few

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<sup>16</sup> Matthews, *U.S. Senators & Their World*, 147. Italics in the original.

<sup>17</sup> *Ibid.*, 164.

decades earlier, the structural balance of power was tilted decisively in favor of the various standing committees and their powerful chairmen.

The cumulative effect of this institutional arrangement was to reward senators who acted like a “work horse” and not like a “show horse.”<sup>18</sup> The extent that senators were work horses resulted from an in-depth focus on a particular set of issues. By focusing on the issues that came before a committee on which he served, a senator could become a legislative specialist.<sup>19</sup> In addition to dedicating oneself to the development of legislative expertise in a particular issue area, freshmen members were expected to serve an apprenticeship once they arrived in the Senate. During this period, it was expected that these members would maintain a low profile and passively observe the inner workings of the institution.<sup>20</sup>

The Senate during this period was also characterized by a high degree of courtesy and reciprocity. Senators were careful to exercise deference in their dealings with one another. This reciprocity was indicative of the fact that the Senate was a collective institution, and that a senator could not achieve his legislative goals without the cooperation of his colleagues. As such, senators usually refrained from fully utilizing the procedural tools at their disposal on all but the most controversial measures. The environment created by these norms led members to have a high degree of institutional

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<sup>18</sup> Matthews, *U.S. Senators & Their World*, 94-95.

<sup>19</sup> Ibid.

<sup>20</sup> Snapping at a freshman senator who seemingly ignored this norm at his own peril, the then-dean of the Senate, Walter George (D-Georgia) remarked: “freshmen didn’t use [*sic*] to talk so much.” Ibid., 94.

patriotism. It was not uncommon to hear refrains on the floor from members of both parties that the Senate was the greatest legislative body in the world.<sup>21</sup>

Robert G. Lehnert affirms the organizational structure provided by the Senate's norms in a 1967 article in the *Midwest Journal of Political Science*.<sup>22</sup> Lehnert concludes that the institution's norms structured its pattern of decision-making in his analysis of member behavior on the Senate floor. Specifically, the typology Lehnert employs to classify different senators rests on the assumption, albeit implicitly, that there exists a certain standard of behavior in the Senate. Lehnert categorized senators according to the following: High Deviants; Low Deviants; Non-Deviants; and Non-Talkers. Presumably, such a classification scheme is dependent on a standard from which non-conformers can deviate. Indeed, without such a standard, Lehnert's typology would have little analytical coherence.

Lehnert also documents evidence of a departure from a normative decision-making process in his examination of the 1<sup>st</sup> session of the 87<sup>th</sup> Congress in 1961.<sup>23</sup> He argues that during this session it seems "plausible to expect that a single standard of behavior does not prevail among the Senate, or if it does, many senators find reasons for

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<sup>21</sup> Matthews, *U.S. Senators & Their World*, 97-101.

<sup>22</sup> Robert G. Lehnert, "Behavior on the Senate Floor: An Analysis of Debate in the U.S. Senate," *Midwest Journal of Political Science* 11, no. 4 (1967).

<sup>23</sup> Interestingly, 1961 is also the year in which Ripley (1969) observes a shift in the internal distribution of power in the Senate from a decentralized structure to a more individualized structure. Ripley, *Power in the Senate*, 15.

deviating from that standard.”<sup>24</sup> However, it is important to note that Lehnén is describing member behavior on the Senate floor during *debate* only. It would still take time for norms inhibiting a broader activism with amendments and extended debate to disappear.

Ralph K. Huitt provides an important qualification to Matthew’s thesis in his 1961 *American Political Science Review* article, “The Outsider in the Senate: An Alternative Role,” that in many ways confirms the pervasiveness of norms in Senate decision-making during this period.<sup>25</sup> While an analysis of the question of whether or not the concept of a legitimate “outsider” in the Senate is compatible with Matthew’s thesis is beyond the scope of this chapter, it is important to note that Huitt’s broader argument, like Lehnén’s, rests on the assumption that some form of Senate norms exist against which the “outsider” can be defined. In a response to Huitt’s 1961 article, Matthews argues that “the existence of systematic deviations from these norms by a few senators is consistent with a widespread recognition of them.”<sup>26</sup> Indeed, the toleration of such outsiders provides compelling evidence that the majority of the Senate’s membership at the time was conforming to many of its own norms, such as tolerance towards one’s colleagues and respect for the principle of seniority. The internal organization of the

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<sup>24</sup> Lehnén, “Behavior on the Senate Floor,” 520.

<sup>25</sup> Ralph K. Huitt, “The Outsider in the Senate: An Alternative Role,” *American Political Science Review* 55, no. 3 (1961).

<sup>26</sup> Matthews, “Communications,” 882.

Senate was deemed too important to the orderly functioning of the institution by most members to undermine it on account of just a few bad apples.<sup>27</sup>

Huitt's critique of Matthews also inadvertently points to a broader understanding of the dynamics of change in Senate decision-making. Perhaps there is no better indication of the emergence of a new pattern of decision-making than when the "outsider" becomes the "insider." A new pattern of decision-making is needed to maintain the Senate's legislative productivity when the old pattern is incapable of successfully limiting new forms of conflict.

Matthews acknowledges the possibility of such a transition by arguing that a decision-making process relying on norms to limit conflict invariably contains within it a built in bias towards the very developments that would eventually undermine it. Senate norms, according to Matthews (1959), "buttress the *status quo* in the chamber. And the distribution of power within the chamber results in generally conservative policies."<sup>28</sup> As a result, the increasingly liberal bloc of new members elected to the Senate beginning in 1958 would profoundly affect the decision-making process in the institution. Matthews (1960) correctly identified several factors that would weaken and ultimately erode the Senate's ability to overcome conflict by using the normative pattern of decision-making:

The trend in American politics seems to be toward more competitive two-party politics; a greater political role for the mass media of communications and those skilled in their political use; larger, more urban constituencies. All

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<sup>27</sup> Matthews, "Communications," 882.

<sup>28</sup> Matthews, "The Folkways of the United States Senate," 1083. Italics in the original.



these are factors which presently encourage departure from the norms of Senate behavior. In all likelihood, therefore, nonconformity will increase in the future if the folkways remain as they are today.<sup>29</sup>

Put simply, the rise of competitive party politics, the revolution in communications and transportation technology, and the development of more diverse constituencies confronted the Senate with a form of conflict that could no longer be successfully limited by the normative pattern of decision-making alone. Because this pattern relied primarily upon specific norms to limit conflict within the institution, efforts to change the way in which the Senate did business inevitably involved challenging these norms.

Successful contests between new members and the Senate establishment eventually led to broader participation in the decision-making process in the standing committees *and* on the Senate floor. Ripley (1969) observed this transition in Senate decision-making in the 1960s. He writes that “between 1945 and 1968 the Senate has transformed itself from a body in which principal legislative power resided in the chairmen and, to a lesser extent, the ranking minority members of the full standing committees into a body in which significant legislative power is spread among virtually all senators of both parties.”<sup>30</sup> As new members were elected and the policy environment began to change, a new institutional culture gradually emerged in the Senate. In response to these changes in the Senate’s external and internal environments, individual members

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<sup>29</sup> Matthews, *U.S. Senators & Their World*, 117.

<sup>30</sup> Ripley, *Power in the Senate*, 53.

changed their behavior and, by extension, altered the decision-making process in the institution.<sup>31</sup>

The literature that specifically focused on leaders in the House and Senate during this period espoused a middleman theory of party leadership. This theory was first articulated by David B. Truman in *The Congressional Party: A Case Study*. Specifically, Truman observed that party leaders are typically ideological and structural moderates who occupy a position located in the middle of their party conference memberships.<sup>32</sup> Such moderation is necessitated by the unique responsibilities of the job:

Given the depth and persistence of the cleavages in both parties... one would expect that a Leader who accepted any degree of responsibility for the substantive actions of the party would almost certainly be a middleman, not only in the sense of a negotiator but also in a literal structural sense. One would not expect that he could attract the support necessary for election unless his voting record placed him somewhere near the center in an evenly divided party, and one would not expect him to be effective in his role unless he continued to avoid identification with one of the extreme groups within his nominal following.<sup>33</sup>

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<sup>31</sup> Barbara Sinclair, *The Transformation of the U.S. Senate* (Baltimore: Johns Hopkins University Press, 1989), 72.

<sup>32</sup> David B. Truman, *The Congressional Party: A Case Study* (New York: John Wiley & Sons, Inc., 1959). For a more recent examination of the “leader as middleman” theory, see: Stephen Jessee and Neil Malhotra, “Are Congressional Leaders Middlepersons or Extremists? Yes.,” *Legislative Studies Quarterly* 35, no. 3 (2010). Jessee and Malhotra reject arguments that congressional party leaders are selected from the extremes in both parties. While party leaders are generally to the left of the median position in the Democratic Party and to the right of the median position in the Republican Party, their findings suggest that “leaders also tend to be selected from closer to their party’s median than would likely occur by chance.” Malhotra, “Are Congressional Leaders Middlepersons or Extremists?” 386.

<sup>33</sup> Truman, *The Congressional Party*, 106.

Such leaders are forced to pursue a strategy of bargaining to placate the separate factions within their parties.<sup>34</sup> According to Truman, a successful party leader must “be a middleman in the sense of a broker. To operate this way, however, he must in turn be a middleman in the structural sense, if only because of the difficult communication problems with which he is faced.”<sup>35</sup> The heterogeneity characteristic of both political parties in the 1950s required that at least one member be in a position to communicate with their various factions if the party was to be effective at all. According to Patterson (1963), the ideological position of party leaders is determined, in part, by the level of partisanship in Congress.<sup>36</sup> For Truman, “a stable and functioning leadership is inevitably engaged in repeated, even continuous, efforts at restructuring, reconstituting the group.”<sup>37</sup> Such efforts are needed if the party is ever to reach agreement on policy and a legislative strategy to successfully pass it in the Senate. The leadership’s ideological and structural location in the middle of the party thus assists them in facilitating such agreement.<sup>38</sup>

More recently, Lee (2009) expands on Truman’s thesis of congressional leadership by arguing that party leaders do not necessarily always adopt a bargaining strategy simply to reach agreement between the party’s factions on policy and legislative

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<sup>34</sup> Andrea C. Hatcher, "A Man for All Seasons: Partisan Constraints on U.S. Senate Majority Leaders," *Party Politics* 16, no. 3 (2010), 341. See also: Andrea C. Hatcher, *Majority Leadership in the U.S. Senate* (New York: Cambria Press, 2010).

<sup>35</sup> Truman, *The Congressional Party*, 115.

<sup>36</sup> Samuel C. Patterson, "Legislative Leadership and Political Ideology," *Public Opinion Quarterly* 27, no. 3 (1963), 409.

<sup>37</sup> Ibid.

<sup>38</sup> Truman, *The Congressional Party*, 116.

strategy. Rather, Lee argues that party leaders constantly work to reconfigure the policy and strategic views of the various factions within the party:

The leader's lack of exclusive affiliation with any particular faction within the party enables her to remain "above the fray" and to maintain open lines of communication with the entire party membership. This position allows the leader to build common ground where it does not initially exist- literally "restructuring" and "reconstituting" the party itself- and adjust the bundle of commitments that characterize the party at any given time.<sup>39</sup>

According to Lee's interpretation of Truman's "leader as middleman" theory, party leaders are, at least in some respects, independent actors whose behavior serves to influence the balance-of-power within congressional parties and thus shape the decision-making process in important ways. However, it is important to note that according to this theory, party leaders do not have independent power. Rather, their influence in the legislative process is derived from the party's distinct factions, or blocs, and their ability to get these partisan blocs to agree on policy and legislative strategy. Moreover, this theory reveals nothing about leadership influence when parties are more cohesive and not divided between contending factions. In this respect, the "leader as middleman" theory is very much a product of the middle of the twentieth century (Lee's recent expansion notwithstanding) when the Democratic Party was divided between conservative and liberal wings and the Republicans were similarly split between moderates and conservatives.

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<sup>39</sup> Frances E. Lee, *Beyond Ideology: Politics, Principles, and Partisanship in the U.S. Senate* (Chicago: University of Chicago Press, 2009), 45.

### Collegial Method of Limiting Conflict

The second method of conflict limitation that has been observed generally in the literature up to this point is characterized by a deliberative and collegial legislative process. This results from the participation of a large number of members in the decision-making process in the standing committees and on the Senate floor. Members are not discouraged from offering amendments to committee-reported legislation out of deference to the committee of jurisdiction or other Senate norms. In addition, no one actor exercises control over the decision-making process on the Senate floor.

The development of a more collegial decision-making process was reflected in the literature by a transition away from a focus on norms.<sup>40</sup> This new approach emphasized the behavior of individual members and the strategic calculations they make to achieve their goals in Congress. Richard Fenno first set the research agenda for this new approach in 1973 in *Congressmen in Committees*.<sup>41</sup> Specifically, Fenno identifies three goals that drive member behavior: securing reelection; acquiring power in Congress; and passing good public policy.<sup>42</sup> While Fenno is principally concerned with the House in this work,

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<sup>40</sup> For a norms based explanation of this change, see: See also: David W. Rohde, Norman J. Ornstein, and Robert L. Peabody, "Political Change and Legislative Norms in the U.S. Senate, 1957-1974," in *Studies of Congress*, Glenn R. Parker ed. (Washington, D.C.: Congressional Quarterly Inc., 1985): 147-188.

<sup>41</sup> Richard Fenno, *Congressmen in Committees* (Berkeley: University of California Institute of Governmental Studies, 1995).

<sup>42</sup> Fenno actually identifies five member goals: reelection; good public policy; influence within Congress; career beyond Congress; and private gain. The fourth goal was not addressed by Fenno in any

his explanation for how these goals structure decision-making yields important insights into how the purposive behavior of individual members shapes the organization of Congress more generally. Fenno observes that the committee system in the House was organized to facilitate member efforts to achieve these three goals. Service on what Fenno terms a “Constituency Committee” assisted members in securing reelection. Similarly, membership on a “Prestige Committee” enhanced one’s influence within Congress and a seat on a “Policy Committee” helped to pass good public policy.<sup>43</sup> According to Fenno, the decision-making process in each committee is structured by the goals of its members, the constraints posed by its environment, and the rules each panel adopted for making substantive decisions.

In *Congress: The Electoral Connection*, Mayhew incorporates Fenno’s individualistic approach into a broader theoretical explanation of decision-making in Congress.<sup>44</sup> While Mayhew is also primarily focused on the House, his work further advances an understanding of the relationship between congressional organization and decision-making, as well as the implications of this relationship for member participation in the legislative process. Where Fenno identifies three goals, however, Mayhew argues

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significant depth; the last goal identified by Fenno was not discussed at all. Fenno, *Congressmen in Committees*, 1.

<sup>43</sup> Constituency Committees identified by Fenno included the House Interior and Post Office committees. Prestige Committees included the House Appropriations and Ways and Means committees. Policy Committees included the House Education and Labor Committee and the Foreign Affairs Committee.

<sup>44</sup> David R. Mayhew, *Congress: The Electoral Connection*, 2nd ed. (New Haven: Yale University Press, 2004).

that the quest for reelection is the primary goal driving member behavior. According to Mayhew, the fact that congressmen are “single-minded seekers of reelection” implies that they will engage in certain activities within Congress.<sup>45</sup>

Such goal-driven behavior facilitates a decision-making process that minimizes conflict between individual members in the House and Senate. According to Mayhew, individual members are concerned solely with satisfying their constituents in order to win reelection and perpetuate their careers in office. Such behavior does not automatically generate conflict between members because each member represents a distinct and separate constituency which includes a unique mixture of interests. As a result, members and their constituencies are likely to be concerned with different issues at any given point in time, the satisfaction of which will not necessarily likely to generate significant conflict in Congress.<sup>46</sup>

Such an observation does not depend on acknowledging the primacy of the electoral quest in motivating member behavior. It is not a given that other motivations such as the desire to acquire power in Congress or pass good public policy will invariably bring members in to conflict with one another. In such an environment, members will pursue their goals through a strategy of bargaining, or by pursuing “gains from trade.” Put simply, members help their colleagues get what they want so that their colleagues

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<sup>45</sup> Mayhew, *Congress*, 5. The three activities identified by Mayhew are advertising, credit claiming, and position-taking. Ibid., 49-73.

<sup>46</sup> Note: this does not imply that there are no issues over which significant conflict occurs, or that representatives and senators are not concerned with national interests.

will help them get what they want in return. In Mayhew's own words: "the organization of Congress meets remarkably well the electoral needs of its members" and "the satisfaction of electoral needs requires remarkably little zero-sum conflict among members."<sup>47</sup>

Yet it is important to note that Mayhew does not argue that there is literally no conflict in Congress. Indeed, Mayhew suggests that a legislature populated solely by members concerned with their own reelection will inevitably be confronted with problems of institutional maintenance.<sup>48</sup> If members fail to maintain the institutional prestige of Congress, its eventual decline will ultimately undermine their reelection prospects. "Select incentives" are thus needed to entice members to engage in the thankless task of maintaining the institutional prestige of Congress. In other words, "leadership positions are created to give certain members incentives to carry out necessary tasks that otherwise might not be performed."<sup>49</sup>

According to Mayhew, party leaders "are vitally important as institutional protectors."<sup>50</sup> The members who occupy these positions are paid in internal currency in exchange for engaging in activities that maintain the good standing of Congress in the public's eyes, even if such activities sometimes conflict with their own efforts to secure

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<sup>47</sup> Mayhew, *Congress*, 81-82.

<sup>48</sup> *Ibid.*, 141.

<sup>49</sup> Sinclair, *Legislators, Leaders, and Lawmaking*, 9.

<sup>50</sup> Mayhew, *Congress*, 147.



reelection.<sup>51</sup> An important method by which party leaders maintain the institutional prestige of Congress is by coordinating the efforts of their colleagues in the decision-making process. Party leaders do this primarily by forming and maintaining majority coalitions in order to pass legislation.<sup>52</sup>

In addition to their departure from a norms based approach, Fenno and Mayhew continued the broader shift in the literature away from studying political parties. Unlike the immediate postwar era during which political scientists increasingly assumed that parties served to contain conflict and help facilitate effective decision-making in Congress, the literature during this period does not view political parties as analytical units that can be used to help make sense of, and lend order to, the political process by containing conflict.<sup>53</sup> Indeed, the individualistic focus of these approaches leaves little room for political parties. Mayhew goes so far as to claim that “no theoretical treatment of the United States Congress that posits parties as analytic units will go very far.”<sup>54</sup>

Such a behavioral approach privileges the means of congressional decision-making over the ends to which it is employed. Questions of principle are subsumed by concerns about the distributive nature of policies and whether or not their passage will help a member secure reelection or achieve another goal. A collegial decision-making

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<sup>51</sup> Mayhew, *Congress*, 146. In addition to party leaders, Mayhew identifies “control committees” in the House like Rules, Appropriations, and Ways and Means that also work to maintain the institutional prestige of Congress. Mayhew, *Congress*, 149.

<sup>52</sup> Sinclair, *Legislators, Leaders, and Lawmaking*, 9.

<sup>53</sup> For example, see: David S. Broder, *The Party's Over* (New York: Harper & Row, 1971).

<sup>54</sup> Mayhew, *Congress*, 27.

process is ideally suited for limiting conflict in such an environment because it represents a decentralized process in which individual members largely pursue their own parochial goals irrespective of party or larger issues of principle. Thus, an intricate system of Senate norms is no longer needed to contain conflict precisely because there is little conflict that cannot be resolved through bargaining. The principal method of limiting conflict in such a decision-making process is voting and Senate procedures observed in distributive approaches are very egalitarian.

While Fenno and Mayhew are primarily concerned with the House, the literature explicitly addressing the Senate during this period also focuses on the behavior of individual senators and the strategic calculations they make to achieve their goals. In *Call to Order: Floor Politics in the House and Senate*, Steven S. Smith defines collegial decision-making as the active participation of individual members in the legislative process on the Senate floor.<sup>55</sup> According to Smith, members are “driven to the floor” by shifting “internal incentives and resources and external pressures.”<sup>56</sup> Put simply, the combination of an expanded issue agenda with the increased resources necessary to actively participate in the legislative process leads members to become more active in the Senate’s deliberations, regardless of their seniority or committee assignments. As a result, the privileged institutional position of committees characteristic of normative decision-making is *supplemented* with the active participation of individual members on the

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<sup>55</sup> Steven S. Smith, *Call to Order: Floor Politics in the House and Senate* (Washington, D.C.: Brookings Institution Press, 1989), 3, 11.

<sup>56</sup> *Ibid.*, 11.

Senate floor. According to Ripley (1969), the individual-focused nature of collegial decision-making “results in a segmented legislative process in which there is no consistently dependable central element that can guarantee a steady flow of outcomes or determine the nature of those outcomes.”<sup>57</sup>

It is important to note that committees continue to influence the legislative process in the collegial pattern of decision-making. According to Smith, committees help to “structure opportunities, responsibilities, and resources in ways that shape members’ roles on the floor.”<sup>58</sup> A more accurate description of the constraints faced by committees in collegial decision-making is that their decisions are no longer automatically ratified without change on the Senate floor. Indeed, this point better distinguishes between the normative and collegial patterns. In normative decision-making, committees exercise positive and negative agenda control. As such, chairmen can block the consideration of measures with which they disagree. In contrast, the agenda control of chairmen is largely positive in collegial decision-making. That is, chairmen are viewed as knowledgeable of the issues under their jurisdiction, and are given deference in advancing those issues on the floor. However, such deference exists only to the extent that other members support them and agree with the policies they advance. As a result, chairmen cannot single-

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<sup>57</sup> Ripley, *Power in the Senate*, 60.

<sup>58</sup> Smith, *Call to Order*, 167.

handedly block the consideration of measures with which they disagree in collegial decision-making.<sup>59</sup>

The old “folkways” underpinning normative decision-making were gradually replaced by new forms of behavior that reflected this new, more participatory, pattern. The changing environment in which the Senate existed, both externally and internally, created incentives for members to be involved in a broader array of issues. Moreover, the development of new procedural mechanisms, such as the hold process which allows senators to delay bills and nominations, enhanced the ability of individual members to be more active in the legislative process, regardless of their seniority or committee assignments. Furthermore, the increasingly crowded issue agenda and the corresponding number of interest groups seeking representation in the legislative process created more informal leadership positions for individual members. This had the effect of encouraging legislative activity. Yet such activity did not immediately increase conflict to levels not easily managed by the collegial pattern of decision-making.<sup>60</sup>

Like Fenno and Mayhew, scholarly accounts focused on the Senate increasingly eschewed a focus on the institution itself and instead concentrated on the goal-driven behavior of its individual membership. These works sought to explain how member behavior influenced various aspects of Senate decision-making, such as bill sponsorship, policy development, or amendment activity and voting patterns on the floor. From such a

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<sup>59</sup> Smith, *Call to Order*, 171.

<sup>60</sup> Ibid., 70.

focus on the Senate's constituent parts and parliamentary procedures, these new approaches led to a broader understanding of the institution. For example, Sinclair (1989) identifies a new version of White's (1956) "proto-typical senator" that arises from the Senate's new institutional culture as well as the pressures and opportunities presented by the collegial pattern of decision-making.<sup>61</sup>

According to Sinclair, members in the new Senate were not legislative specialists confining their activities to the committee rooms. The new policy environment made the costs of conforming to the specialist norm too high for members. The legislative work norm also weakened as senators had less time to focus on a smaller number of issues in greater detail. Furthermore, the new environment undermined the courtesy characteristic of interactions between senators in the chamber during the first half of the twentieth century. As more controversial issues were considered on the Senate floor, the institution predictably became more confrontational. Moreover, members had less time to spend with one another as the demands on their time increased both inside and outside of the chamber.<sup>62</sup>

In collegial decision-making, the typical senator became a legislative generalist and a legislative activist both in committee and on the floor. In addition, freshmen senators no longer observed the apprenticeship norm. Individual members increasingly offered floor amendments to legislation that was not reviewed by a committee on which

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<sup>61</sup> Sinclair, *The Transformation of the U.S. Senate*.

<sup>62</sup> Ibid., 89, 100.

they sat. Floor amendments offered by non-committee members increased significantly during the 1950-1970 period. This became common practice in the 1980s and 1990s. The institutional patriotism norm was ultimately weakened by these developments.<sup>63</sup>

Overcoming conflict on the Senate floor can be difficult. According to Sinclair, the open environment of the floor leads senators to more fully exploit their procedural rights in an effort to achieve their goals. A collegial legislative process is thus maintained as long as member goals are not mutually exclusive and they can be pursued via a bargaining strategy. However, the collegial pattern of decision-making can easily give rise to member behavior that ultimately undermines its effectiveness in processing legislation. Such a scenario leads to greater conflict as members utilize their procedural rights to obstruct legislation with which they disagree and to advance proposals that they support. In addition to the traditional use of procedures like the filibuster to block measures they oppose, members may also use procedures like the threat of protracted debate to positively affect the content of legislation, as well as to force action on unrelated matters. As a result, filibusters may increase in both scope and frequency in collegial decision-making as member goals periodically become mutually exclusive.<sup>64</sup>

Of course, the emergence of the floor as an acceptable location for decision-making does not mean that decisions made there are inevitably contentious. Smith (1989)

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<sup>63</sup> Sinclair, *The Transformation of the U.S. Senate*, 80-82, 85.

<sup>64</sup> Smith, *Politics or Principle*, 103. The rise of individualism in the Senate prompted increasingly novel uses of traditional obstructionism in the Senate. Barbara Sinclair, "The '60-Vote Senate': Strategies, Process, and Outcomes," in *U.S. Senate Exceptionalism*, ed. Bruce I. Oppenheimer (Columbus: The Ohio State University Press, 2002), 246-247.

argues that the Senate continues to rely on supermajorities and unanimous consent requests to pass legislation in collegial decision-making.<sup>65</sup> Despite the relatively few constraints placed on member participation in the collegial pattern, conflict is not endemic and legislation continues to pass the Senate. Yet notwithstanding the underlying consensus characteristic of this pattern, events in the 1960s and 1970s combined with increasing budget constraints in the 1980s and the eruption of the culture wars in the 1990s to undermine the notion that conflict could be easily limited by members pursuing their own parochial goals in an institution structured according to distributive principles. Ripley (1969) presciently predicted the external pressures that would come to characterize this period. He writes that “the Senate is likely to change again; but it is unlikely that the motive force for major change will come from within.”<sup>66</sup>

Confirming Ripley’s predictions, important changes in the electorate impacted Senate decision-making internally as the Democratic Party became more liberal and the Republican Party became more conservative. The increasingly cohesive party blocs took a greater role in structuring Senate decision-making in an effort to limit new forms and heightened levels of conflict that resulted from ideological and partisan polarization in the electorate and in the institution. New procedures were needed to preserve the legislative productivity of the Senate on the most controversial issues due to the

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<sup>65</sup> Smith, *Call to Order*, 13.

<sup>66</sup> Ripley, *Power in the Senate*, 27.

increasing conflict between members' goals in the institution during the last two decades of the twentieth century.

### **Partisan Method of Conflict Limitation**

In the partisan method of conflict limitation, the majority party explicitly attempts to limit conflict and overcome minority obstruction in a manner that advantages its members by restricting the procedural options of the minority. The majority's behavior can be interpreted as a response to the increased likelihood that the minority party will seek to obstruct, or block, the majority from passing its agenda, thereby advantaging its members. Steven S. Smith has dubbed this phenomenon the "obstruct-and-restrict syndrome."<sup>67</sup> Specifically, Smith (2010) argues that "each party's leaders, guided by a consensus view among their fellow partisans, pursue strategies that perpetuate the obstruct-and-restrict syndrome of the modern Senate."<sup>68</sup>

The partisan method relies on a different form of internal organization and set of parliamentary procedures to limit conflict within the Senate. At the center of this process stands the political party; specifically the majority party. In the post-war era, political scientists increasingly assumed political parties could serve to contain conflict and help facilitate effective decision-making in Congress, even in a highly polarized environment. This general approach was reflected in the Report of the American Political Science

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<sup>67</sup> Steven S. Smith, *The Senate Syndrome* (Washington, D.C.: The Brookings Institution, 2010), 2.

<sup>68</sup> *Ibid.*, 21.



Association's Committee on Political Parties entitled "Toward a More Responsible Two-Party System," which highlighted the need for stronger parties as a solution to many of the problems plaguing the government.<sup>69</sup> According to a Responsible Party Government approach, parties formulate clear policy platforms, make commitments to the electorate based on those platforms, and seek to implement those policies once in control of Congress. The minority party would, in turn, seek to provide clear alternative policy positions. In the process the electorate would be presented with a clear choice as well as the means to hold their elected officials accountable. Thus, the committee's report implicitly assumed that the majority and minority parties in Congress would oppose one another and that such opposition would be based on the line of cleavage present in American politics at a particular time.<sup>70</sup> According to this approach, parties help make sense of, and lend order to, the political process by containing conflict.

Yet as previously stated the emergence of first the normative and then the collegial method of limiting conflict led the literature to focus on the decline of partisanship in Congress and emphasize instead the role of norms (normative) or the parochial goals of individual members (collegial) in the decision-making process. The

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<sup>69</sup> The Committee on Political Parties identified the lack of accountability in government as a major problem. It also called for more effective policy development and implementation in government and better integration among the governments many disparate activities. Committee on Political Parties, "Toward a More Responsible Two-Party System," *American Political Science Review* 44, no. 3, Part 2 (1950).

<sup>70</sup> For example, see: E. E. Schattschneider, *The Semisovereign People: A Realist's View of Democracy in Government* (New York: Holt, Rinehart and Winston, 1975). Schattschneider argues that axial principles divide society along shifting "lines of cleavage" and that the political parties organize themselves along this line in opposition to one another.

decentralization of congressional decision-making underscored the decline in political parties in American politics more broadly during this period. However, there was a resurgence of interest in using parties to explain congressional decision-making during the last two decades of the twentieth century. As a result, the recent literature acknowledges that parties do matter in Congress and several studies have shifted the focus from the efforts of individual members to achieve their goals in the institution to the Democratic and Republican parties in the House and Senate.<sup>71</sup> These works share the common assumption that political parties structure the decision-making process in Congress and influence the behavior of their members. Smith (2007) provides an in-depth analysis of this literature in which he observes that “congressional parties affect policy choices by influencing the behavior of legislators.”<sup>72</sup>

Theories of congressional parties typically view the Democratic and Republican parties as “teams” or “cartels.”<sup>73</sup> These partisan teams “pursue certain objectives or goals held in common by their members.”<sup>74</sup> In *Parties and Leaders in the Postreform House*,

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<sup>71</sup> Notable exceptions are: Krehbiel, *Information and Legislative Organization* and Keith Krehbiel, *Pivotal Politics: A Theory of U.S. Lawmaking* (Chicago: University of Chicago Press, 1998).

<sup>72</sup> Smith, *Party Influence in Congress*, 2.

<sup>73</sup> David W. Rohde, *Parties and Leaders in the Postreform House* (Chicago: University of Chicago Press, 1992); Gary W. Cox and Mathew D. McCubbins, *Legislative Leviathan: Party Government in the House* (New York: Cambridge University Press, 1993); Gary W. Cox and Mathew D. McCubbins, *Setting the Agenda: Responsible Party Government in the U.S. House of Representatives* (New York: Cambridge University Press, 2005); Sarah A. Binder, *Minority Rights, Majority Rule: Partisanship and the Development of Congress* (New York: Cambridge University Press, 1997); Sarah A. Binder, *Stalemate: Causes and Consequences of Legislative Gridlock* (Washington, D.C.: Brookings Institution Press, 2003); Sean A. Theriault, *Party Polarization in Congress* (New York: Cambridge University Press, 2008); Lee, *Beyond Ideology*.

<sup>74</sup> Smith, *Party Influence in Congress*, 3.

David W. Rohde argues that the previous scholarship on Congress could not account for the increase in partisanship in the House and Senate beginning in the 1980s.<sup>75</sup> In contrast to an approach focused on individual members of Congress and the decentralized decision-making environment in which they pursued their goals, Rohde presents a theory of Conditional Party Government (CPG) and argues that members of the majority party work collectively to pass their agenda. Such collective action is made possible by broad agreement on a party program, which itself depends on the ideological cohesiveness of the two political parties. As such, the development of partisan decision-making was made possible only by significant shifts in the electorate during the second half of the twentieth century that led the Democratic Party to become more liberal and the Republican Party to become more conservative.<sup>76</sup> According to Rohde's analysis, the decision-making process will become more partisan as cohesive majority parties seek to exert control over the legislative process in an effort to enact their agenda over the objections of the minority party.

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<sup>75</sup> Rohde, *Parties and Leaders in the Postreform House*.

<sup>76</sup> For a different perspective, see: Morris P. Fiorina, *Culture War? The Myth of a Polarized America*, 3rd ed. (London: Longman, 2010). Fiorina argues that a "silent majority," to borrow a term from the Nixon era, is in agreement on most of the issues that dominate American politics today. Yet this majority is presented with increasingly polarized choices as the political class polarizes. As such, American politics has the appearance of being bitterly divided between two polarized segments of the electorate. Yet Fiorina's argument ultimately breaks down when confronted with its own logic. If the political class is increasingly imposing its polarized view of culture on American politics and governmental decision-making, at some point the process will become self-fulfilling. Fiorina certainly does not deny the impact of such a process on the tenor of American politics currently. It is likely that at some point the electorate will begin to serve as an echo chamber that simply internalizes and reflects the choices with which they are presented.

The changing institutional context in which parties operate has important implications for the nature of party leadership in Congress. For example, Rohde (1991) draws a direct connection between the level of internal cohesion of a party and what kind of leader its members select to represent them in the decision-making process.<sup>77</sup> According to this approach, ideologically homogeneous parties will select strong leaders and grant them significant powers in order to maintain intraparty cooperation and enact a partisan agenda. In contrast, members of ideologically heterogeneous parties will choose relatively weak leaders and will retain any powers that could be used by such leaders to advance an agenda with which they disagree. Under such circumstances, party leaders are forced to pursue a bargaining strategy to maintain intraparty cooperation and enact those items on which the party can reach an agreement. Rohde argues that individual members retain considerable freedom to pursue their own particular goals in a decentralized environment. However, such autonomy is restricted by the party leadership during the consideration of those issues on which a large number of the party's members agree. Party leaders exercise the most influence on party defining issues. Put simply, leaders derive their influence from their efforts to achieve collective party goals. In this scenario, partisanship will increase as the parties become more ideologically homogenous and, as a result, confer greater power to their party leadership to pursue a common agenda.<sup>78</sup>

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<sup>77</sup> See also: Joseph Cooper and David W. Brady, "Institutional Context and Leadership Style: The House from Cannon to Rayburn," in *The American Political Science Review*, vol. 75, no. 2 (Jun., 1981): 411-425.

<sup>78</sup> Rohde, *Parties and Leaders in the Postreform House*, 1-16.

Similarly, Gary W. Cox and Mathew D. McCubbins present a theory of “legislative cartels” to account for the behavior of majority parties in Congress.<sup>79</sup> According to their approach, majority parties seek to structure the decision-making process in a way that advantages policy outcomes favored by their members. Three aspects of legislative cartel theory draw particular attention to certain characteristics of majoritarian decision-making as understood in this dissertation. First, the decision-making process is structured to favor the majority party. Legislation with which the party disagrees faces considerable barriers to enactment and is typically blocked from floor consideration. Second, the most influential members in the decision-making process belong to the majority party. Finally, the legislative process itself is facilitated and its rules of procedure are enforced by the majority. As a result, the majority party exercises near-exclusive control over the agenda and policies with which it disagrees are often blocked from consideration.

Yet it is important to note that CPG and cartel theory are primarily applied to decision-making in the House. Indeed, the literature on congressional parties has largely neglected the Senate and focused instead on developments in the House. According to Smith (2007), “no persuasive treatment of the Senate exists in this recent literature.”<sup>80</sup> Several differences between the two institutions serve to complicate the applicability of House-based theories to Senate decision-making. Specifically, the majority party’s

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<sup>79</sup> McCubbins, *Legislative Leviathan*; McCubbins, *Setting the Agenda*.

<sup>80</sup> Smith, *Party Influence in Congress*, 214.

inability to easily alter formal procedures in its favor, the diverse nature of constituencies that encompass entire states, and the considerable power of individual members to participate in the legislative process each serve to dilute the level of partisanship in the Senate vis-à-vis the House. As a result, the majority party in the Senate does not exert the same control over the legislative process as its counterpart in the House.

Nevertheless, it would be a mistake to then infer that majority parties are weak or powerless in the Senate. As in the House, partisanship, as well as the ideological cohesiveness of the two parties, has increased in the Senate over the last two decades. Nathan W. Monroe, Jason M. Roberts, and David W. Rohde cite the “naked-eye partisanship of the contemporary Senate” as one of several reasons to study party effects in the institution.<sup>81</sup> Kathryn Pearson demonstrates that “party loyalty in policy voting has increased in both chambers.”<sup>82</sup> Thus, it is helpful to consider changes in Senate decision-making in the context of broader changes in congressional decision-making more generally. Viewed in this context, House-based theories of congressional parties are helpful in illustrating the ways in which parties and their leaders seek to structure the decision-making process to their advantage.

According to this perspective, leaders act as agents of their partisan colleagues. In *Legislators, Leaders, and Lawmaking: The U.S. House of Representatives in the*

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<sup>81</sup> Jason M. Roberts Nathan W. Monroe, and David W. Rohde, "Introduction: Assessing the Impact of Parties in the U.S. Senate," in *Why Not Parties? Party Effects in the United States Senate*, ed. and David W. Rohde Jason M. Roberts Nathan W. Monroe (Chicago: The University of Chicago Press, 2008), 1.

<sup>82</sup> Kathryn Pearson, "Party Loyalty and Discipline in the Individualistic Senate," in *Why Not Parties? Party Effects in the United States Senate*, ed. Jason M. Roberts Nathan W. Monroe, and David W. Rohde (Chicago: The University of Chicago Press, 2008), 104.

*Postreform Era*, Barbara Sinclair argues that principal agent theory represents the conceptual framework best able to account for the complex relationship between party leaders and individual members.<sup>83</sup> According to Sinclair:

Congressional party leaders can best be understood as agents of the membership that chooses them and, therefore, that changes in leadership functioning are best explained as a response to the expectations of members as those expectations are shaped and altered by the institutional and political environment.<sup>84</sup>

Party leaders (or agents) are held accountable by their partisan colleagues (or principals) through the process by which they are selected.<sup>85</sup> As a result, party leaders have an incentive to meet the expectations of their party's membership if they want to remain in their jobs.<sup>86</sup>

According to principal-agent theory, party leaders are charged by their members with facilitating the "passage of legislation that fosters the members' policy, reelection, and power goals."<sup>87</sup> This can be accomplished in a variety of ways, including: determining the agenda; influencing the substance of legislation; scheduling legislation for floor consideration; forming majorities to pass legislation; enhancing the party image; serving as a public spokesperson with the media; and individually helping members

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<sup>83</sup> McCubbins, *Setting the Agenda*.

<sup>84</sup> Sinclair, *Legislators, Leaders, and Lawmaking*, 6.

<sup>85</sup> In the Senate, Democratic and Republican party leaders are elected in bi-annual leadership elections at the beginning of each Congress.

<sup>86</sup> Sinclair, *Legislators, Leaders, and Lawmaking*, 18.

<sup>87</sup> *Ibid.*, 12.

pursue their own unique goals in the legislature. Leaders must be given informal and formal powers with which to carry out these duties on behalf of their party. They must be allowed to make important decisions regarding the legislative process and they must be given sufficient resources that can be used to influence the behavior of other members in order to induce them to go along with the decisions they make. Yet delegating power to party leaders is not without risks for individual senators. Such power could be used against members in the future to impede their ability to achieve their own goals. This raises the important question of why individual members would surrender considerable discretion to their party leaders.<sup>88</sup>

Like Rohde (1991), Sinclair argues that delegating power to party leaders becomes less risky for individual members as their preferences become more similar and the party becomes more homogenous.<sup>89</sup> Yet increasing ideological homogeneity alone fails to fully explain the increased power of party leaders. Sinclair notes that weak parties-in-the-electorate during the 1980s should have given individual members incentives to maintain their own autonomy inside Congress despite the overall increasing homogeneity of parties-in-government. Yet members chose to cede greater power to their leadership despite the weakness of partisan attachments in their constituencies during this period.<sup>90</sup> Sinclair argues that:

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<sup>88</sup> Sinclair, *Legislators, Leaders, and Lawmaking*, 12-13.

<sup>89</sup> *Ibid.*, 15.

<sup>90</sup> *Ibid.*, 6.



changes within the institution or in the political environment that alter the difficulty of enacting the legislation members need to advance their goals may thereby also alter the perceived costs and benefits to members of an assertive or restrained leadership, and thus may lead members to expand or diminish the powers and resources they delegate to their party leaders.<sup>91</sup>

In other words, strong party leadership is made necessary internally by increased conflict precipitated externally. Members are thus motivated by “perceived costs and benefits” and structure their institution accordingly.

The literature assumes that like “teams” or “cartels,” the majority and minority parties in Congress are in conflict with each other, and that such conflict structures the decision-making process in the House and Senate. For example, Sarah A. Binder argues in *Minority Rights, Majority Rule: Partisanship and the Development of Congress* that partisan competition is the driving force structuring the legislative process.<sup>92</sup> Specifically, Binder argues that patterns of decision-making are dependent on the shape of partisan forces within Congress at a particular time. As such, the decision-making process will exhibit a more partisan, or majoritarian, pattern when members of the majority party believe that rules changes to limit minority rights are necessary to achieve their legislative objectives. Minority party members regain parliamentary rights when

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<sup>91</sup> Sinclair, *Legislators, Leaders, and Lawmaking*, 16.

<sup>92</sup> Binder, *Minority Rights, Majority Rule*, 2, 11, 68, 167-168. Specifically, Binder argues that minority rights in the Senate are conditional on the capacity and need of the majority party. Yet it must be noted that Binder also argues that inherited rules make it more difficult for the majority to restrict minority rights in the Senate. Partisan competition may be a determinant of procedural choice. However, decision-making in the contemporary Senate is not characterized by a zero-sum struggle between the majority and minority parties over parliamentary rights, regardless of whether or not inherited rules serve to protect the rights of the minority party.

bipartisan coalitions form to demand new rights from a weakened majority. In addition, Binder argues that the Senate's inherited rules interact with competition between the majority and minority parties to structure the decision-making process in the institution. Put simply, decision-making is dependent on both the partisan need and capacity for change and past procedural decisions that serve to constrain individual member behavior in the Senate. According to Binder, this creates a "cyclical nature to changes in minority rights" that characterizes Senate decision-making as conflict between the two parties encourages the minority to exploit its procedural prerogatives to thwart the legislative ambitions of the majority and the majority seeks to limit the rights of the minority in order to pass its agenda over their objections.<sup>93</sup>

Similarly, C. Lawrence Evans and Walter J. Oleszek argue that procedural disagreements are zero-sum games in the Senate. Specifically, they argue in "The Procedural Context of Senate Deliberation" that "when issues touch on the message agenda of one or both parties, it becomes extremely difficult to devise an acceptable procedure for floor action, with gridlock a likely result."<sup>94</sup> According to this argument, the Senate will invariably experience gridlock as the national issue agenda becomes more contentious and the parties increasingly polarize between conservative and liberal poles.

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<sup>93</sup> Binder, *Minority Rights, Majority Rule*, 16.

<sup>94</sup> C. Lawrence Evans and Walter J. Oleszek, "The Procedural Context of Senate Deliberation," in *Esteemed Colleagues: Civility and Deliberation in the U.S. Senate*, ed. Burdett A. Loomis (Washington, D.C.: The Brookings Institution, 2000), 100.

Sean A. Theriault departs slightly from this emphasis on internal partisan competition as the principal source of conflict in the Senate in *Party Polarization in Congress*.<sup>95</sup> Specifically, Theriault argues that ideological polarization *externally* in the electorate leads the two parties to oppose each other *internally* in Congress. While an examination of the specific causes of polarization is beyond the scope of this dissertation, it is important to note that increasingly cohesive parties led to increased conflict between Democrats and Republicans in the Senate. Specifically, Theriault argues that the balkanization, or “geographic sorting,” of voters in the electorate has led to more polarized constituencies. These constituencies typically send more polarized senators to Congress who, in turn, chose more polarized party leaders. These party leaders subsequently pursue a more polarized legislative agenda by exploiting Senate procedures for their own partisan gain. The practical effect of this ideological polarization, according to Theriault, has been that the Senate’s decision-making process has become more partisan and confrontational.<sup>96</sup> Binder (2003) supports Theriault’s thesis in *Stalemate: Causes and Consequences of Legislative Gridlock*.<sup>97</sup> She argues that polarization increases partisanship and gridlock:

The number of moderate legislators is important because it likely affects the ease of crafting and finalizing policy

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<sup>95</sup> Theriault, *Party Polarization in Congress*.

<sup>96</sup> Ibid., 3; Sinclair, “The “60-Vote Senate,”” 246. Sinclair argues that roll call voting in the Senate became increasingly partisan in the late 1980s and 1990s as a result of realignment. As the Democratic Party became more liberal in the north and the Republican Party became more conservative in the south, the two political parties became more cohesive and ideologically homogenous in the Senate.

<sup>97</sup> Binder, *Stalemate*.

compromises...legislators often prefer disagreement to compromise, especially if electoral incentives encourage the two parties to differentiate themselves. Such incentives are more likely to be present as each party's core electoral and activist constituencies become more dissimilar and homogenous. When constituencies polarize, the two parties have an increased incentive to distinguish their records and positions and a lower incentive to bargain and compromise.<sup>98</sup>

In *Beyond Ideology: Politics, Principles, and Partisanship in the U.S. Senate*, Frances E. Lee expands on this approach by differentiating between the more familiar ideological sources of conflict and partisan conflict.<sup>99</sup> Lee agrees with the previous literature that argues that ideology serves as a major source of conflict in Congress. Yet she also argues that ideology cannot explain all of the conflict in the institution. Instead, Lee makes a persuasive argument that “congressional parties hold together and battle with one another because of powerful competing *political interests*, not just because of members’ *ideals* or ideological preferences.”<sup>100</sup> Such “reflexive partisanship” has important implications for Senate decision-making because it serves to broaden the ideological conflict characteristic of the current environment to incorporate new areas as a result of efforts by the two political parties to gain or maintain power.<sup>101</sup> Thus, Lee argues that Senate decision-making is characterized by “inherent zero-sum conflict”

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<sup>98</sup> Binder, *Stalemate*, 24-25.

<sup>99</sup> Lee, *Beyond Ideology*.

<sup>100</sup> Ibid., 3. Italics in the original.

<sup>101</sup> Ibid., 4.

between the two parties.<sup>102</sup> According to Lee, “the majority party attempts to monopolize the agenda for its message, while the minority party contests the majority’s control and tries to change the subject to its advantage.”<sup>103</sup> More importantly, “minority party members continually try to force the majority to take positions on difficult or controversial issues.”<sup>104</sup> According to Sinclair (2008), “the obvious strategy for a new minority is to attempt to block action by the new majority and so make it look unresponsive and incompetent.”<sup>105</sup> The parliamentary jockeying on the part of the two parties reflects the fact that their fundamental interests are in conflict.

The characteristics of collegial decision-making, such as its decentralized pattern of deliberation and method for limiting conflict, are poorly suited for overcoming conflict in a highly partisan environment. As a result, influence has been gradually centralized under the auspices of the majority party in response to new demands placed on the Senate by increasingly interested and polarized constituents and the increasing cohesiveness of the parties themselves. As a consequence, the standing committees and individual members participating on the Senate floor gradually ceded influence over the decision-making process to the majority party leadership.<sup>106</sup>

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<sup>102</sup> Lee, *Beyond Ideology*, 18.

<sup>103</sup> Ibid., 11.

<sup>104</sup> Ibid.

<sup>105</sup> Barbara Sinclair, "Leading the New Majorities," *PS: Political Science & Politics* 41, no. 1 (2008), 92.

<sup>106</sup> Binder argues that much of the gridlock experienced in Congress over the last half century is a result of internal institutional structures interacting with the changing external environment. Binder,

Yet despite its analytical utility, a significant limitation of the current literature on congressional parties and partisan decision-making is that it largely focuses only on the majority party in explaining the legislative process in the Senate.<sup>107</sup> To the extent that the literature acknowledges that the minority party matters, it argues that minority parties have a negative influence on the decision-making process (i.e., they obstruct the legislative agenda of the majority).<sup>108</sup> Indeed, the literature has largely been silent on the positive influence of the minority party in the decision-making process.

However, the minority party does matter. Despite the emergence of the majoritarian pattern of decision-making at the end of the twentieth century, individual senators, and the minority party collectively, continue to possess considerable procedural rights with which to obstruct the majority party as it seeks to pass its agenda. Indeed, this simple fact largely informs conventional wisdom, journalistic reports, and most of the current scholarship on the Senate. Such observations typically hold that a more ideologically polarized electorate produces a more partisan and ideologically polarized Senate membership. As a result, senators are more likely to utilize their procedural rights to pursue more partisan and ideologically polarized goals. The majority party avails itself of all of its procedural tools to enact a more partisan agenda. In response, the minority

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*Stalemate*, 58, 60. In contrast, this dissertation will argue that the development of internal institutional structures helps to ensure that the changing external environment does not precipitate persistent gridlock in the Senate. Smith, *Call to Order*, 6-8, 11, 97; Sinclair, *The Transformation of the U.S. Senate*, 114-115.

<sup>107</sup> Rohde, *Parties and Leaders in the Postreform House*; Sinclair, *Legislators, Leaders, and Lawmaking*; McCubbins, *Legislative Leviathan*; McCubbins, *Setting the Agenda*.

<sup>108</sup> Binder, *Minority Rights, Majority Rule*.

party seeks to obstruct the majority for perceived policy and electoral gain. This obstructionism, so the argument goes, leads to gridlock precisely because the Senate is unable to overcome the instability inherent in its institutional structure and pass legislation in such a polarized environment.

### **Chapter 3: A Theoretical Foundation for Senate Decision-Making**

In the previous chapter, I reviewed the relevant literature on congressional decision-making and presented the argument that the Senate gradually developed several patterns of decision-making during the second half of the twentieth century in order to maintain its legislative productivity in the context of increasing partisan conflict between its members. Within this context, the development of new patterns of decision-making reflects the innovative utilization of existing Senate procedures in order to adapt to changes in the political environment. These innovations, however, do not necessarily preclude the utilization of past tools and strategies. For example, the development of the majoritarian pattern allowed the Senate to maintain its productivity when legislation that divided members along partisan lines was under consideration. Yet the collegial pattern of decision-making was not altogether abandoned. Indeed, both the collegial and majoritarian patterns continue to be utilized in the contemporary Senate. The normative pattern, however, is no longer observed in the contemporary Senate.

Additionally, the Senate's permissive procedural environment, which first gave rise to collegial decision-making, persists today despite the emergence of more cohesive parties and the corresponding increase in conflict precipitated by partisan polarization. Specifically, individual members retain considerable procedural autonomy to freely pursue their own goals in the institution and the Senate floor remains the primary arena in which controversial legislation is considered. Yet the very definition of majoritarian



decision-making entails a method of limiting conflict that advantages policy outcomes favored by the majority party while disadvantaging outcomes favored only by the minority party. Viewed from this perspective, the majoritarian pattern of decision-making represents the final pattern identified by the literature for limiting conflict in the Senate.

In the absence of a new pattern of decision-making, the restrictive nature of the majoritarian pattern must be reconciled with the Senate's permissive rules. Any departure from the majoritarian pattern requires significant changes in Senate rules in order to overcome the minority's ability to obstruct the majority. Put simply, majoritarian decision-making does not provide sufficient opportunity for individual members, largely from the minority party, to participate in the legislative process. At some point a transition back to collegial decision-making would be observed, or a total breakdown in the Senate's productivity would occur in the form of an increase in gridlock. Otherwise, why would individual senators, or even a collection of like-minded senators, consistently refrain from utilizing procedural prerogatives, such as the right to participate in extended debate and the ability to freely offer germane and non-germane amendments on the Senate floor, if doing so helps them achieve their goals of securing reelection, passing good public policy, or acquiring power in the Senate? Given these considerations, the most astonishing observation is not that controversial legislation is periodically blocked by minority obstruction in the Senate. Rather, it is that anything manages to pass at all. The only way to consistently maintain productivity under conditions of majoritarian decision-making would be to reform Senate rules to reduce the procedural prerogatives

granted to individual members, especially in the minority, thereby making the institution even more like the House.

But such a transformation has not been observed in the Senate in recent years. Nevertheless, the institution's decision-making process increasingly exhibits neither collegial nor majoritarian features when controversial legislation is considered. In the absence of reforms to the Senate's rules, it cannot be assumed that the minority simply acquiesces to the exclusive control of the majority, particularly in light of the significant policy disagreements between the two parties. It is simply unrealistic to expect polarized members to voluntarily refrain from using the procedural tools at their disposal to block measures with which they disagree. Moreover, it is not uncommon for members to grant unanimous consent to proceed with the consideration of controversial bills and amendments that they oppose. As a result, something must be at work to limit conflict in the contemporary Senate. New parliamentary procedures must support a new method of limiting conflict.

### **Theoretical Assumptions**

In order to fully understand decision-making in the contemporary Senate, a theoretical framework is needed in which we can place and make sense of the empirical data. Specifically, the structured consent approach offers a new theory of decision-making that explains politics and lawmaking in the contemporary Senate better than existing models. While my theory is more complex than existing models, it trades

parsimony for accuracy. As a result, it helps us understand how a polarized Senate can coexist with a productive Senate in the current political environment.

The predictions of the structured consent approach are based on several assumptions about the Senate that are informed by previous research, observable legislative behavior, and logic. First, all legislatures, including the Senate, are characterized by two fundamental features. They are collective institutions comprised of members who represent separate and distinct constituencies. They are also egalitarian institutions in that their members are inherently equal and possess the same authority over their vote; no member's vote counts more than another.<sup>1</sup> Yet despite these fundamental features, legislative institutions in general, and the Senate in particular, are governed by a mixture of formal rules and informal norms and precedents. These rules necessarily restrict the authority of individual members.

Second, members cede power to enforce these rules to others in order to ensure that Congress performs its primary function of lawmaking.<sup>2</sup> Doing so allows members of both political parties to maintain the Senate's legislative productivity. This is important because an unproductive Senate makes it more difficult, if not outright impossible, for members to achieve their goals in the institution. In the extreme, the failure to maintain the Senate's legislative productivity could result in an erosion of its institutional reputation, impacting all of its members equally.

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<sup>1</sup> This does not exclude chamber-imposed hierarchies. See: Gerhard Loewenberg, "the Role of Parliaments in Modern Political Systems," in *British & French Parliaments in Comparative Perspective*, Gerhard Loewenberg, ed. (New Brunswick, New Jersey: Transaction Publishers, 1971): 1-20.

<sup>2</sup> Cox & McCubbins, *Legislative Leviathan*; Cox & McCubbins, *Setting the Agenda*.

Third, party leaders limit conflict in the Senate by enforcing the institution's rules and norms. They do this by exercising power to influence their colleagues, thereby affecting legislative outcomes. Members give leaders power to enforce the Senate's rules because they are the institutional actors best situated to ensure that the Senate maintains its legislative productivity.

Fourth, a focus solely on formal rules limits our understanding of Senate decision-making. Specifically, Senate rules are derived from the following four formal and informal sources: the Constitution; the Standing Rules of the Senate; statutory rules passed by Congress; and informal precedents. The Constitution, Standing Rules of the Senate, and any statutory rules passed by Congress represent formal rules. Precedents form informal rules. It is the combination of each of these sources that forms the procedural framework within which the decision-making process unfolds in the Senate.<sup>3</sup>

The Senate has established formal rules pursuant to Article 1, Section 5. There are currently 44 standing rules that cover everything from non-controversial issues like the oath of office (Rule III) and the committee referral process (Rule XVII) to controversial issues such as the process to end debate (Rule XXII).<sup>4</sup> These rules remain in effect from

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<sup>3</sup> Long-standing traditions of the Senate, such as the preferential treatment given to the Majority Leader to make motions, as well as party conference rules can also impact Senate decision-making.

<sup>4</sup> Technically, the Standing Rules of the Senate can be amended with 51 votes, or a simple majority of the institution. However, Rule XXII of the Senate's Standing Rules creates a higher threshold for ending debate on measures to amend the institution's rules. Specifically, debate can only be ended "by three-fifths of the senators duly chosen and sworn – except on a measure or motion to amend the Senate rules, in which case the necessary affirmative vote shall be two-thirds of the senators present and voting." in the *Senate Manual: Containing the Standing Rules, Orders, Laws, and Resolutions Affecting the Business of the United States Senate*. (110<sup>th</sup> Congress, 2<sup>nd</sup> Session) Senate Document 110-1, 21.

one Congress to the next according to the concept that the Senate is a continuing body.<sup>5</sup>

For the most part, the Senate's standing rules are very general and do not address circumstances that may arise in specific parliamentary situations.

The Senate operates on a daily basis largely according to rules established pursuant to a collection of informal precedents. According to the late Senator Robert C. Byrd (D-West Virginia), “precedents reflect the application of the Constitution, statutes, the Senate rules, and common sense reasoning to specific past parliamentary situations.”<sup>6</sup> Former Senate Parliamentarian Floyd M. Riddick offered the following clarification of the relationship between the Senate's precedents and its standing rules:

The precedents of the Senate are just as significant as the Rules of the Senate. The rules are very vague in some regards, and the practices of the Senate pursuant to those rules are developed and established, and as they are established, they become the rules of the Senate until the Senate should reverse this procedure.<sup>7</sup>

Put simply, precedents reflect the practices of the Senate pursuant to the Constitution, its standing rules, and any relevant rule-making statutes. These practices serve to “fill in the

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<sup>5</sup> The Constitution divided the Senate's membership into three classes with staggered tenures. Such a system ensured that a majority of the Senate would not stand for election at any one time, thus ensuring that the institution would “continue” from one Congress to the next. This reasoning is reflected in Rule V of the Standing Rules of the Senate. Specifically, the rule states that “the rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules.” *Senate Manual*, 5.

<sup>6</sup> Senator Robert C. Byrd, *The Senate, 1789-1989: Addresses on the History of the United States Senate* (Washington: U.S. Government Printing Office, 1991), 52.

<sup>7</sup> Floyd M. Riddick, “Oral History Project,” interview by Donald A. Ritchie, (November 21, 1978), *United States Senate Historical Office*, interview no. 9, 426.

gaps” contained in these procedural authorities when they fail to address specific parliamentary situations.

Precedents can be created by one of three methods in the Senate. First, they can be established pursuant to rulings of the Senate’s Presiding Officer, or “Chair,” on points of order against violations of the Senate’s rules. These rules are not self-enforcing and violations that do not elicit points of order do not necessarily create new precedents. One of the most consequential developments in the evolution of Senate decision-making resulted from the creation of a new precedent by this method.

In 1937, the Senate Majority Leader was granted priority of recognition as a result of a ruling made by Vice President Jack Garner while presiding over the Senate. As a result, the Senate’s precedents now state:

The Presiding Officer is required to recognize the senator who in his discretion first sought recognition. However, in the event that several senators seek recognition simultaneously, priority of recognition shall be accorded the Majority Leader and Minority Leader, the majority manager and the minority manager, in that order.<sup>8</sup>

This precedent serves as the foundation on which centralized party leadership is based in the contemporary Senate. Since any member can technically make a motion to consider legislation under the Senate’s rules, being the first to do so enables the Majority Leader to set the schedule and control the agenda to a limited degree. According to Smith (2007), the establishment of a precedent giving the Majority Leader priority of

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<sup>8</sup> Floyd M. Riddick and Alan S. Frumin, *Riddick’s Senate Procedure* ed. Alan S. Frumin (Washington, D.C.: U.S. Government Printing Office, 1992), 1098.

recognition “initiated the modern regime [*in Senate party leadership*] in which the Majority Leader assumed responsibility for the Senate’s agenda.”<sup>9</sup> Thus, fully understanding Senate decision-making is thus dependent on appreciating the complex interplay between formal *and* informal rules.

### **Four Claims**

Four claims about Senate decision-making can be inferred from these basic tenets. The theoretical argument that the Senate is not gridlocked and that party leaders regularly act to make the institution work is best examined within the context of these four claims. It is the interplay between these claims that enable the Senate to utilize the structured consent pattern of decision-making to pass controversial legislation in a polarized political environment without permanently changing its permissive rules of procedure.

#### **Claim #1: The Senate follows several patterns of decision-making to limit conflict and pass legislation on a routine basis.**

This claim rests on the simple premise that the parliamentary procedures utilized to limit conflict on a routine basis reveal important aspects of the decision-making process in the Senate. In an effort to make sense of the procedural behavior that characterizes Senate decision-making from time to time, I adopt a classification scheme similar to that identified by Ripley (1969) in order to identify patterns of Senate decision-

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<sup>9</sup> Smith, *Party Influence in Congress*, 68.

making.<sup>10</sup> Yet where Ripley focuses on power in the Senate, my focus here is on the various procedures utilized to overcome conflict in the institution. Nevertheless, both approaches do share certain similarities. Power is inherent in limiting conflict. Its use is necessary to successfully manage antagonistic interests in an egalitarian institution like the Senate. The specific goals of members are not necessarily important. The simple assumption that they have goals, that these goals will come into conflict with each other, and that members will act within their power overcome conflict in a way that advantages their goals, is alone sufficient.

Two general patterns of Senate decision-making can be derived from the theories currently advanced in the literature (see Table 3.1 below).

**Table 3.1**

<i><b>Pattern</b></i>	<b>Collegial</b>	<b>Majoritarian</b>
<i>Nature of Decision-Making</i>	Deliberative & Bipartisan	Partisan
<i>Location of Decision-Making</i>	Committee & Floor	Majority Party Conference
<i>Primary Actor(s) Involved</i>	Individual Members	Majority Party Leadership
<i>Process for Reaching Decisions</i>	Decentralized	Centralized

A particular pattern of decision-making persists in the Senate to the extent that it enables the institution to overcome conflict on a routine basis. When a pattern is no longer able to overcome conflict over an issue, it is set aside for a new pattern that allows

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<sup>10</sup> Ripley identifies three similar distributions of power in Senate decision-making: centralization; decentralization; and individualism. The internal distribution of power in the Senate is determined by the location in which power is centered. In the first distribution, power is centralized in the party leadership. In the second distribution, power is dispersed among several standing committees and their chairmen. Finally, power is shared widely by all members in the last distribution. Ripley, *Power in the Senate*, 6-13.



the Senate to maintain its productivity. Thus, each pattern is specifically equipped to deal with a certain type and level of legislative conflict. For example, the development of the collegial and majoritarian patterns of decision-making occurred in response to the emergence of new forms of conflict. It is precisely in reaction to these new forms, particularly the inability of existing processes to deal with them, that the collegial and majoritarian patterns were developed. Correctly identifying the decision-making pattern exhibited at a particular time thus reveals important information about the nature of conflict in the Senate, how the institution is structured internally, and how such structures serve to limit this conflict.

With this in mind, two empirically defined patterns of decision-making can be generated that correspond to the collegial and majoritarian methods of limiting conflict currently observed in the literature based on the unique procedural features they exhibit (see Table 3.2 below).

Table 3.2

**Patterns of Senate Decision-Making: Collegial & Majoritarian Characteristics**

<i>Characteristics</i>	<i>Collegial</i>	<i>Majoritarian</i>
<b>Overall</b>	Open	Closed
<b>Member Participation</b>	No Significant Barriers	Significant Barriers
<b>Primary Participants</b>	Interested Members (any number)	Majority Party Leadership
<b>Decision-Making Process</b>	Decentralized	Centralized
<b>Constraints on Debate &amp; Amendments</b>	Limited	Significant
<b>Place of Primary Action</b>	Senate Floor	Off the Senate Floor, in Majority Party Conference
<b>Amendments Allowed</b>	Large Number from Both Parties	None/Only from Majority Party
<b>Cloture Motions</b>	None	Used to Speed Consideration of Obstructed Measures
<b>Vote Outcomes</b>	Bipartisan	Partisan
<b>Resolving House-Senate Differences</b>	Conference Committee	Amendment Exchange

*Collegial Decision-Making*

The collegial pattern of decision-making arose out of the reforms of the 1970s. Specifically, a large number of members took part in the legislative process on the Senate floor.<sup>11</sup> The important aspect of collegial decision-making is that it is an inclusive process in which there are few constraints on member participation and the level of partisan conflict is relatively minor. It is a committee-based process in which legislation is placed on the Senate calendar only after it has been considered by the relevant committee of jurisdiction. Efforts to move to legislation by the Majority Leader are usually uncontroversial and measures are often laid before the Senate by unanimous consent. In some cases, cloture on the motion to proceed is filed. However, vote outcomes on these motions are usually bipartisan, if not unanimous.

The collegial pattern is largely characterized by an open decision-making process on the Senate floor once legislation is made pending. There are no significant barriers to the participation of interested members other than their own time and resources. The total number of members directly involved in the process is a function of the salience of the issue under consideration. An issue with high salience will lead to a greater amount of member involvement; an issue with low salience will lead to a smaller amount of member involvement. The decision-making process itself is relatively decentralized and there are few constraints on interested members when participating in the debate and amendment process. As a result, action occurs predominantly on the Senate floor as legislation is openly debated and amended. Majority and minority amendments are allowed and cloture

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<sup>11</sup> Smith, *Call to Order*, 3, 11.

is rarely used to limit debate. A large percentage of the amendments filed are offered and most of those are disposed of by voice vote or unanimous consent. Recorded votes on amendments are rare, but exhibit largely bipartisan patterns when they occur. While a majority of one party may vote against a majority of the other party on some amendments, the overall number of such instances is relatively low. Majority and minority party success rates on amendments offered are also high. Vote outcomes on the final passage of legislation are bipartisan. Finally, conference committees are typically used to resolve differences between the House and Senate in collegial decision-making.

As a result of its relatively open and deliberative process, the collegial pattern of decision-making is incapable of overcoming significant conflict between members while simultaneously maintaining its legislative productivity. This is due to the fact that its procedural features cannot efficiently accommodate proposals that significantly divide the Senate membership. It is not difficult to imagine a highly contentious measure dragging on for months as members freely engage in procedural combat under the collegial pattern of decision-making.

### *Majoritarian Decision-Making*

At the other end of the continuum is majoritarian decision-making. In contrast to collegial, the majoritarian pattern of decision-making is an exclusive process in which there are significant constraints on member participation and the level of partisan conflict is significant. Majoritarian decision-making typically circumvents the committee process

and legislation developed within the majority party under the direction of the party leadership is placed directly on the Senate calendar.<sup>12</sup> As a result, subsequent efforts to move to the legislation by the Majority Leader are highly controversial. Cloture on the motion to proceed to such legislation is very common and vote outcomes on such motions are highly partisan.

Majoritarian decision-making is characterized by a closed process on the Senate floor. There are significant barriers to participation, even for interested members willing to expend the necessary time and resources to be involved. As its name implies, majoritarian decision-making is a partisan process in which the minority party is essentially blocked from any meaningful participation in decision-making. The majority party leadership is the only meaningful participant and it exercises centralized, partisan, control over the debate and amendment process. As a result, action occurs predominantly off the Senate floor within the majority party. Decisions made there are merely ratified on the Senate floor. At that stage, the Majority Leader usually seeks to control the number and nature of the amendments offered by threatening to fill the amendment tree and file cloture. If any amendments are allowed, they are typically majority party amendments. A low percentage of amendments filed are offered and recorded votes, typically motions to table, are usually necessary to dispose of minority amendments. Vote outcomes on

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<sup>12</sup> In its literal sense, majoritarian decision-making could apply to any organized majority in the Senate, including geographical and ideological. However, in this paper, “majoritarian” decision-making will refer to partisan majorities. For a theoretical perspective that relies on nonpartisan majorities, see: Keith Krehbiel, *Pivotal Politics: A Theory of U.S. Lawmaking* (Chicago: University of Chicago Press, 1998).

amendments are largely partisan in nature and the success rate of majority amendments is high compared to a low success rate for minority amendments.

Cloture is periodically used preemptively by the Majority Leader to speed consideration of legislation throughout the process regardless of the time spent on the floor. Vote outcomes on the final passage of legislation are highly partisan. Finally, differences between the House and Senate are typically resolved by a process of amendment exchange between the two chambers.

The majoritarian pattern of decision-making is dependent on a cohesive party conference large enough to repeatedly produce the procedural supermajorities necessary to pass legislation in the Senate over the objections of the minority party. In this process, the majority party obstructs the minority's ability to freely debate measures and offer amendments pursuant to the Senate rules. Such majoritarian obstructionism may simply result from the anticipation of expected obstruction by the minority party. It could also represent a genuine effort to push the majority's agenda through the Senate unchanged in a timely manner. The restrictive process could also be utilized to defend carefully negotiated legislation from killer amendments or to protect majority party members from having to take tough votes. Regardless of the motivations, majoritarian decision-making is unlikely to be successfully sustained for a significant period of time. This is due to the fact that its procedural features cannot accommodate the inevitable demands of individual members from both parties to debate and amend legislation on the Senate floor.

**Claim #2: The Senate developed a new pattern of decision-making in response to partisan polarization in order to limit conflict and pass legislation.**

As discussed, conventional wisdom and current scholarship suggest that the Senate functions largely according to either the collegial or majoritarian patterns of decision-making.<sup>13</sup> Yet an examination of the Senate in recent years demonstrates that the institution increasingly functions according to the structured consent pattern of decision-making (see Table 3.3 below).

**Table 3.3**

<i><b>Pattern</b></i>	<b>Structured Consent</b>
<i>Nature of Decision-Making</i>	Bipartisan
<i>Location of Decision-Making</i>	Informal Negotiations
<i>Primary Actor(s) Involved</i>	Majority & Minority Party Leaders
<i>Process for Reaching Decisions</i>	Centralized

Structured consent enables the Senate to pass controversial legislation in a polarized environment without changing its rules. As a result, it has been followed more than majoritarian decision-making in recent years. This finding contradicts arguments that conflict in the contemporary Senate is a zero-sum struggle between polarized political parties and that the Senate is becoming more like the House. It also points to a more accurate understanding of the role played by parties in Senate decision-making. As

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<sup>13</sup> Smith, *Call to Order*, 3-5. Smith identifies three patterns of decision-making in the Senate: decentralized; centralized; and collegial. Specifically, Smith defines collegial decision-making as "...broad participation within one or few organizational units." Ibid., 4.

with the collegial and majoritarian patterns, structured consent decision-making can be identified by its own unique procedural characteristics (see Table 3.4 below).

**Table 3.4**

**Patterns of Senate Decision-Making: Structured Consent Characteristics**

<i>Characteristics</i>	<i>Structured Consent</i>
<b>Overall</b>	Structured (either open or closed)
<b>Member Participation</b>	Moderate Barriers
<b>Primary Participants</b>	Majority and Minority Party Leadership
<b>Decision-Making Process</b>	Centralized
<b>Constraints on Debate &amp; Amendments</b>	Moderate
<b>Place of Primary Action</b>	Off the Senate Floor, in Majority & Minority Party Conferences and Negotiations between Majority & Minority Leaders
<b>Amendments Allowed</b>	Limited Number from both Parties; Preselected & Identified in Unanimous Consent Agreements
<b>Cloture Motions</b>	Requirements Set by Unanimous Consent/Necessary in Some Cases
<b>Vote Outcomes</b>	Partisan for Amendments & Bipartisan for Final Passage
<b>Resolving House-Senate Differences</b>	Conference Committee or Amendment Exchange



*Structured Consent Decision-Making*

Structured consent is a semi-exclusive process in which there are moderate constraints on member participation. It resembles the majoritarian pattern in that conflict between the majority and minority parties is significant. However, the majority party does not overcome this conflict by obstructing the ability of the minority to participate in the legislative process. Rather, the Majority Leader works with the Minority Leader to jointly limit the conflict between their members in an effort to maintain the Senate's legislative productivity.

Structured consent usually circumvents the committee process and legislation developed within the majority party under the direction of the party leadership is placed directly on the Senate calendar. However, the Majority Leader will often work with the Minority Leader to schedule legislation for floor consideration. Subsequent efforts to move to legislation by the Majority Leader may not be controversial. Cloture on the motion to proceed to such legislation remains common as some minority party members may refuse to grant unanimous consent to make the legislation pending in protest of the closed process in which it was originally developed. As a result, vote outcomes on cloture on the motion to proceed may be either partisan or bipartisan.

In contrast to both the collegial and majoritarian patterns, the structured consent pattern of decision-making is characterized by a prearranged process (either open or closed) on the Senate floor. There are moderate barriers to the participation of highly interested members who are willing to devote the time and resources necessary to be

involved. Decision-making in conditions of structured consent takes the form of a centralized bipartisan process in which the majority *and* minority party leadership serve as the only meaningful participants on a consistent basis and across all issues. While a small number of highly interested members may participate at times, the majority and minority party leaders largely determine the nature of floor consideration by negotiating comprehensive unanimous consent agreements to structure debate and amendment activity. As a result, action occurs predominantly off the Senate floor in negotiations between the two leaders and within each party under the direction of its leadership.

Relatively few amendments are allowed to be offered to legislation under conditions of structured consent. The majority and minority leaders negotiate to determine the amendments that will be allowed on each side, and once a list is agreed upon each leader works to get the consent of their rank and file members. Because the Majority Leader is unlikely to approve minority amendments that could potentially be successful but are opposed by a significant number of his party, such amendments offered typically fail while any majority amendments usually succeed. The Majority Leader has more leverage to enforce such an agreement in negotiations with the Minority Leader, as constant obstruction by the minority could lead the Majority Leader to threaten to adopt a majoritarian pattern of decision-making and shut out the minority from the decision-making process entirely. Recorded votes are used to dispose of amendments and pre-arranged 60-vote thresholds are common when disposing of controversial issues.

Cloture is not always necessary to end debate in structured consent as the majority and minority leaders usually agree to set its requirements by unanimous consent, thus avoiding lengthy procedural delays. However, a structured consent pattern of decision-making can also be followed in tandem with the cloture process. Vote outcomes on amendments are largely partisan in nature. Vote outcomes on the final passage of legislation are largely bipartisan. Finally, conference committees and amendment exchanges can be used to resolve differences between the House and Senate.

The structured consent pattern of decision-making is dependent on relatively cohesive parties, as well as majority and minority leaders that are capable of mollifying the demands of their most ideological members without upsetting their negotiations. Moreover, majority and minority party goals must not be mutually exclusive. For example, a Minority Leader concerned with messaging and improving his party's position in the next election may not be concerned with whether or not its amendments are successful. In turn, a Majority Leader primarily concerned with translating his party's agenda into law may not be as concerned with the minority's messaging amendments so long as they do not jeopardize that agenda by passing. When these conditions are not present, or when the majority party is more united than the minority party, structured consent can easily turn in to a majoritarian process.

**Claim #3: Party leaders exercise significant influence over the decision-making process by virtue of their leadership positions.**

Current approaches to understanding congressional party leadership serve to broaden our understanding of the complex relationship between individual senators and party leaders in the contemporary Senate. Yet in many important ways they fail to provide a complete theoretical account of this relationship and its impact on the institution's decision-making process. For example, party leaders may possess significant influence in the Senate at critical periods in history independent of distinct party factions and the goals of their partisan colleagues.<sup>14</sup>

To understand this counter-intuitive claim, it is important to recognize that party leaders have flexibility in fulfilling their responsibilities.<sup>15</sup> In addition, members of Congress have conflicting and weak preferences as well as incomplete information about what their leaders do. Furthermore, obstruction can negatively impact members of both the majority and minority parties in Congress. The threshold for obstruction is low because of the Senate's permissive rules. As a result of the combination of these considerations, party leaders possess the ability as well as the incentive to pursue the structured consent pattern of decision-making.

Party leaders have the freedom to follow structured consent because individual members are motivated by multiple and conflicting electoral, policy, and power goals. When the goals of a party's membership conflict with one another, it is typically the

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<sup>14</sup> For example, see: Randall Strahan, "Leadership and Institutional Change in the Nineteenth-Century House," in *Party, Process, and Political Change in Congress: New Perspectives on the History of Congress*, David W. Brady and Mathew D. McCubbins, eds. (Stanford: Stanford University Press, 2002): 237-269; Randall Strahan, *Leading Representatives: The Agency of Leaders in the Politics of the U.S. House* (Baltimore: The Johns Hopkins University Press, 2007).

<sup>15</sup> Sinclair, *Legislators, Leaders, and Lawmaking*; Smith, *Party Influence in Congress*, 40-41.

responsibility of the party leadership to choose between the competing goals and fashion a unified party position on a particular course of action.<sup>16</sup> The ability to choose between the competing courses of action represents the foundation the party leaders' power in the contemporary Senate. Powerful party leaders are able to convince or compel their partisan colleagues to support the decisions they make even though they may periodically conflict with a member's own parochial goals. It is important to note that an individual senator need not actively support a course of action in order to "go along" with it. As previously stated, each individual member possesses the ability to act autonomously to achieve their goals. However, senators can be said to acquiesce to a course of action that contradicts their goals by choosing not to utilize the procedural prerogatives at his disposal.

**Claim #4: In structured consent decision-making, party leaders may choose to utilize their influence to *moderate*, rather than exacerbate, the procedural choices of their partisan colleagues.**

In contrast to the predictions of existing theories of congressional party leadership, party leaders use their power in structured consent decision-making to encourage their members not to obstruct the decision-making process, even if they are leading more cohesive and ideologically polarized parties. In this sense, leaders utilize their power in an attempt to "restructure" and "reconstitute" their party's position on policy and legislative strategies. However, such action by party leaders today differs from

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<sup>16</sup> Smith, *Party Influence in Congress*, 4, 12.

that predicted by Truman (1959) in that Senate parties are more cohesive ideologically today than they were in the 1950s.

Smith (2007) acknowledges that recent works on party effects have failed to fully grasp this complex relationship.<sup>17</sup> As a result, previous efforts have failed to identify structured consent decision-making in the contemporary Senate. This failure stems from the inability of “existing studies of party effects... to capture the quite varied forms of party influence that are frequently observed.”<sup>18</sup> It also results from a misunderstanding regarding the ends to which partisan efforts are directed.

Individual members possess significant power with which to affect Senate business simply by obstructing it. This power is compounded many times over when utilized collectively. While there are many different types of minorities in the Senate, a focus on partisan minorities is most appropriate because political parties have become increasingly salient in the political system. In addition, conflict in the contemporary Senate is highly partisan in nature. As minority parties have grown more cohesive ideologically, their ability to impact the Senate agenda has also increased. However, the existing literature largely studies only the majority party leadership when seeking to explain positive party effects in the Senate. Yet a focus on Senate minorities is also needed in order to fully understand the decision-making process in the institution. Indeed, the role of political parties and their impact on decision-making can only be fully

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<sup>17</sup> Smith, *Party Influence in Congress*, 6-7, 11.

<sup>18</sup> Ibid., 5.

explained in the context of the relationship between the majority *and* the minority parties. Sean Gailmard and Jeffrey A. Jenkins acknowledge as much when they write that “focusing on the minority party can help achieve the broader goal of understanding the institutional foundations of party power in Congress.”<sup>19</sup>

To the extent that the literature has attempted such an examination, its conclusions have been mostly negative in nature- that the minority obstructs the majority for partisan gain. According to this analysis, the minority’s ability to obstruct is directly proportional to the Senate’s permissive procedural environment. According to Gailmard and Jenkins, “a coalition of any size has an easier time ‘gumming up the works’ in the Senate than in the House; this translates into greater minority blocking power in the Senate than in the House.”<sup>20</sup> Similarly, Kathryn Pearson writes that “Senators – typically those in the minority party – have increasingly employed filibusters, holds, and other individualistic Senate prerogatives for partisan gain.”<sup>21</sup> Gregory Koger makes a more explicit connection between minority parties as a collective entity and obstruction in the Senate. Specifically, he defines it as “legislative behavior (or a threat of such behavior)

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<sup>19</sup> Sean Gailmard and Jeffrey A. Jenkins, "Minority-Party Power in the Senate and House of Representatives," in *Why Not Parties? Party Effects in the United States Senate*, ed. and David W. Rohde Jason M. Roberts Nathan W. Monroe (Chicago: The University of Chicago Press, 2008), 195.

<sup>20</sup> Ibid., 196.

<sup>21</sup> Kathryn Pearson, "Party Loyalty and Discipline in the Individualistic Senate," in *Why Not Parties? Party Effects in the United States Senate*, ed. Jason M. Roberts Nathan W. Monroe, and David W. Rohde (Chicago: The University of Chicago Press, 2008), 102.

intended to delay a collective decision for strategic gain.”<sup>22</sup> Thus, the legislative process is characterized as a contest between two teams which represent a majority and minority of the Senate. According to this construct, obstruction results from a “united minority party blocking majority party proposals for some sort of political gain as well as policy payoff.”<sup>23</sup>

Yet despite their accuracy in certain circumstances, such conclusions conceal the nuanced role played by minority parties in the contemporary Senate. Notwithstanding the analytical limitations of existing measures of minority obstruction, the fact remains that the minority does not always obstruct the majority. As a result, assuming that the minority differs politically and ideologically from the majority, efforts to fully understand how the Senate makes decisions must consider why the minority party chooses not to obstruct to the fullest extent of its procedural power.<sup>24</sup>

Thus, the minority party does matter, and it can exert a *positive* influence on the decision-making process in the Senate. Specifically, where most of the literature sees *partisan disagreement* or *partisan competition* as the defining characteristic of the Senate today, *partisan agreement* or *partisan cooperation* at the leadership level is the most

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<sup>22</sup> Gregory Koger, *Filibustering: A Political History of Obstruction in the House and Senate* (Chicago: The University of Chicago Press, 2010), 16.

<sup>23</sup> Ibid., 7. Italics in the original.

<sup>24</sup> For a similar perspective on why Senate minorities choose not to obstruct a majority, see: Gregory J. Wawro and Eric Schickler, *Filibuster: Obstruction and Lawmaking in the U.S. Senate* (Princeton: Princeton University Press, 2006), 34-42. Specifically, the authors argue that in the pre-cloture Senate, majority and minority coalitions engaged in game-theoretic “wars of attrition” and that obstruction served an important information revelation mechanism.



significant characteristic of the contemporary Senate, and one that serves to explain how the institution is able to process legislation dealing with controversial issues in such a permissive procedural environment despite the presence of ideologically cohesive and polarized political parties.

Put simply, the majority *and* minority party leaders generally serve a moderating function in structured consent decision-making by acting within certain bounds to ameliorate the conflict and instability inherent in the institution and its broader environment. Such an argument is not entirely new. However, previous iterations began from the premise that Senate rules force the Majority Leader to cooperate with the minority party in order to pass legislation. According to Samuel C. Patterson, “there is a kind of symbiotic relationship between Senate majority and minority leaders. The capacity of the Senate to operate as a legislative body indeed depends on the ability of the two leaders to cooperate.”<sup>25</sup> Similarly, Green (2010) observes:

When bipartisan leadership is committed by the Majority Leader, it seems to be due primarily to the nature of the Senate itself: unless his party controls a supermajority of seats, the leader must contend with the considerable power of the minority to hinder or obstruct legislation, encouraging consensual leadership to ensure legislative success.<sup>26</sup>

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<sup>25</sup> Samuel C. Patterson, "Party Leadership in the U.S. Senate," *Legislative Studies Quarterly* 14, no. 3 (1989), 409.

<sup>26</sup> Matthew N. Green, *The Speaker of the House: A Study of Leadership* (New Haven: Yale University Press, 2010), 219.

Smith (2010) argues that “The need to create some kind of a schedule forces the Majority Leader to check with the Minority Leader on a regular basis.”<sup>27</sup> This perspective suggests that only the majority has an incentive to cooperate and that it is forced to cooperate at that.

### **Measuring Decision-Making: A Note on Procedure**

As a result of its small size and the importance of inherited rules, the Senate has proven less amenable than the House to more conventional approaches that are predominantly quantitative or abstract in nature. Moreover, limiting an examination of the Senate to a single quantifiable aspect of decision-making, such as voting, member preferences, or political parties invariably fails to grasp the complexity of the legislative process in the institution. Conclusions reached by such approaches can distort, albeit unintentionally, our understanding of the contemporary Senate by privileging one aspect of its decision-making over another. In contrast, analyzing decision-making in the Senate from a procedural perspective incorporates these aspects and yields important insights about the complex and multifaceted nature of the legislative process at the beginning of the twenty first century.

C. Lawrence Evans and Walter J. Oleszek argue that “because procedure shapes policy, the nature of Congress as a representative body can be understood by looking at

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<sup>27</sup> Steven S. Smith, *The Senate Syndrome* (Washington, D.C.: The Brookings Institution, 2010), 11.

the direction in which its procedures have evolved.”<sup>28</sup> Indeed, while the precise motivations for individual member activity cannot be known with a great degree of certainty, several assumptions about Senate decision-making can be made by consulting the procedural record. Such consultation may even be necessary in order to fully understand the substantive issues in question. Referencing the procedural nature of unanimous consent agreements, Scott Ainsworth and Marcus Flathman argue that “policy debates and policy outputs cannot be understood without first understanding how the agreement attached to the legislation was constructed.”<sup>29</sup> To this end, various procedural activities commonly observed in the collegial, majoritarian, and structured consent patterns of decision-making can be measured by examining the manner in which legislation is considered. Smith (2010) has correctly observed that Senate procedures resemble a “geologic record.”<sup>30</sup> He argues that “they are the formal record of more complicated interaction between the majority and minority parties, much of which does not get recorded.”<sup>31</sup> As such, the path a measure takes to the Senate floor, the nature of amendment activity and debate limitations once on the floor, as well as the partisan

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<sup>28</sup> C. Lawrence Evans and Walter J. Oleszek, "The Procedural Context of Senate Deliberation," in *Esteemed Colleagues: Civility and Deliberation in the U.S. Senate*, ed. Burdett A. Loomis (Washington, D.C.: The Brookings Institution, 2000), 85-86.

<sup>29</sup> Scott Ainsworth and Marcus Flathman, "Unanimous Consent Agreements as Leadership Tools," *Legislative Studies Quarterly* 20, no. 2 (1995), 179.

<sup>30</sup> Smith (2010), "The Senate Syndrome," 10.

<sup>31</sup> Smith (2010), "The Senate Syndrome," 11.

nature of roll call voting can be used to measure the presence of each pattern of decision-making.

### *Path to Floor*

All legislation introduced in the Senate is referred to specific committees according to defined areas of jurisdiction. However, Senate Rule XIV provides individual members with the ability to place measures directly on the Senate calendar without first receiving committee consideration. Yet Rule XIV simply allows measures to be placed on the calendar for *potential* consideration. According to Senate norms and traditions, scheduling measures for *actual* consideration is the prerogative of the Majority Leader. As such, a measure will remain on the calendar if the Majority Leader refuses to schedule it for floor consideration, even if it was placed there by the Rule XIV procedure. Rule XIV thus represents a powerful tool with which the Majority Leader can bypass committee consideration and advance his party's agenda.<sup>32</sup>

### *Amendment Activity & Debate Limitations*

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<sup>32</sup> Michael L. Koempel, *Senate Rule XIV Procedures for Placing Measures Directly on the Senate Calendar* (Washington, D.C.: Congressional Research Service, 2011). The majority leader was granted priority of recognition in 1936 in a ruling made by Vice President Jack Garner while he was presiding over the Senate. In 1949, the majority leader became the only Senator who made regular motions to make a measure on the Senate Calendar pending before the Senate. These two developments allowed the majority leader to set the schedule and determine the order of business in the Senate. Frumin, *Riddick's Senate Procedure*, 1098.

According to Senate rules, there are very few limits to the total number of amendments members are allowed to file when considering legislation on the floor.<sup>33</sup> The ability to offer amendments on the floor is particularly useful for senators in the minority party, especially if the majority-controlled committees resist reporting minority-sponsored measures. As a result, minority party senators have a potentially powerful way to achieve their individual policy and political goals by virtue of their ability to offer amendments.<sup>34</sup>

While there is no general restriction in the rules on an individual member's ability to offer amendments on the Senate floor, structured consent is marked by an informally structured decision-making process that seeks to limit a member's procedural prerogatives. Yet such structure can only be imposed by individual self-restraint through unanimous consent agreements. Today, party leaders increasingly utilize unanimous consent agreements as "structured consent" agreements. Far from merely setting dates for a future vote and scheduling speeches, these new consent agreements are much more comprehensive. They typically stipulate how much time can be used to debate a bill and divide this time between the majority and the minority parties. They also serve to limit what amendments will be allowed and state when they can be offered. These structured

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<sup>33</sup> With the exception of first and second degree filing deadlines stipulated in Rule XXII.

<sup>34</sup> Judy Schneider, *Minority Rights and Senate Procedure* (Washington, D.C.: Congressional Research Service, 2005); Martin B. Gold, *Senate Procedure and Practice* (New York: Rowman & Littlefield Publishers, Inc., 2004), 105-106. Non-germane amendments are limited by Senate rules and statute. Specifically, they are not in order when cloture has been invoked. In addition, they are not in order on general appropriations bills and budget measures. The full Senate may also place limitations on both germane and non-germane amendments by unanimous consent.

requests may also limit other prerogatives of individual members. As a result of their utility, comprehensive unanimous consent agreements are now used to manage the decision-making process on the Senate floor to an unprecedented degree. What had been a very permissive procedural environment has gradually become more restrictive, and at no other time in its history has the outcome of the Senate's work been less in doubt.

It is important not to overstate the power of unanimous consent agreements. Such agreements still require the consent of every single member. Yet the two party leaders' centralized position allows them to more easily secure the needed support because they usually know what members need in return for their "consent." It is also common for party leaders to secure favors that can be called in at any time in order to ensure that they receive the necessary consent from reluctant members.

Finally, three-fifths of the senators duly chosen and sworn are required to end debate on a measure over the objection of individual members and proceed to a vote in relation to it under Rule XXII. As a result, any member can force the Majority Leader to file cloture on a bill. Such an objection increasingly takes the form of a senatorial "hold," and poses relatively few costs on the member raising the objection.<sup>35</sup>

As a result of these rules and practices, individual senators have considerable power with which to affect the legislative process. As such, constraints on member

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<sup>35</sup> Walter J. Oleszek, *"Holds" in the Senate* (Washington, D.C.: Congressional Research Service, 2008); Schickler, *Filibuster*, 263. Wawro and Schickler describe the rise of relatively costless obstructionism in the decades after the adoption of the cloture rule as a "great irony" in Senate history. The hold process was modified slightly on January 27, 2011. The Senate passed a resolution (S. Res. 28) that ended "secret holds" by a vote of 92 to 4. Specifically, the resolution established a standing order of the Senate requiring that a senator publicly disclose a notice of intent to object to any measure or matter.

interest and participation associated with each pattern of decision-making can be identified by measuring the number of amendments filed, the percentage of amendments filed that are offered to legislation, the nature of unanimous consent agreements, and the number of cloture motions filed on a bill. While such an approach is admittedly limited, it still does not seem very probable that ideologically polarized members will simply refuse to consistently participate in the decision-making process in a highly partisan Senate in the absence of some constraint or influence on their behavior. If the number of amendments filed and the percentage of those offered are low in the current environment, for example, then it is a safe assumption that something caused such behavior other than waning member interest. Furthermore, the use of highly detailed unanimous consent agreements to manage decision-making on the Senate floor depends upon some level of coordination. Such coordination can be exerted by exogenous or endogenous institutions. Given that outside groups and the erosion of Senate norms have helped make the contemporary Senate a more confrontational institution, it is safe to assume that endogenous institutions like unanimous consent agreements and Senate norms of behavior serve to facilitate decision-making.

According to Keith Krehbiel, “in the absence of binding agreements, endogenous institutions may be the next best thing when, as UCAs, they permit leaders to construct situations in which the socially desired behavior is rational by individual cost-benefit standards.”<sup>36</sup> With this observation, Krehbiel implicitly acknowledges the central tenet of

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<sup>36</sup> Keith Krehbiel, "Unanimous Consent Agreements: Going Along in the Senate," *The Journal of Politics* 48, no. 3 (1986), 22.

this dissertation: that the majority and minority party leaders utilize procedures to structure the decision-making process in a way that facilitates the legislative productivity of the Senate. Krehbiel argues that the particular procedural characteristics of Senate decision-making serve to create “opportunities, indeed invitations, for leaders to construct situations in which potential defectors’ extreme temptations to object are tempered by the prospect of severe costs.”<sup>37</sup> Adopting a similar argument, Ainsworth and Flathman argue that “convincing members to restrict their own freedoms is a fundamental element of leadership in the U.S. Senate.”<sup>38</sup> According to this analysis, party leaders will attempt to “counter senators’ increasing individualism with strategic ploys of their own.”<sup>39</sup> Exacerbating these tendencies is the inescapable fact that only the leadership of the two political parties occupies the centralized institutional position necessary to *repeatedly* influence member behavior and induce senatorial constraint throughout each party and across all issue areas.

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<sup>37</sup> Krehbiel, “Unanimous Consent Agreements,” 22.

<sup>38</sup> Flathman, “Unanimous Consent Agreements,” 177.

<sup>39</sup> *Ibid.*, 188.



## **Chapter 4: Senate Decision-Making in Practice**

The transfer of power from the Senate's standing committees to the leadership of the two political parties during the second half of the twentieth century reflects my claim that the institution follows several patterns of decision-making to limit conflict and pass legislation on a routine basis. Each pattern is specifically equipped to deal with a certain type and level of legislative conflict. As a result, the legislative process exhibits procedural characteristics that are consistent with the pattern that is most useful in limiting a particular form of conflict over a given issue at a specific time. When a pattern is no longer able to limit this conflict, it is set aside for a new pattern that allows the Senate to maintain its productivity.

In this chapter, I examine the ways in which the collegial, majoritarian, and structured consent patterns of decision-making enable the Senate to maintain its legislative productivity. Doing so helps us understand how the Senate is structured internally and how such structures serve to facilitate decision-making. It also presents a more accurate portrayal of the role played by party leaders in the legislative process. This is important because leaders exercise significant influence over the decision-making process by virtue of their leadership positions. While no two party leaders exercise power in the same manner, broad patterns can be discerned in their disparate leadership styles that conform to the three patterns of decision-making. This suggests that a focus solely on the ideological position of party leaders vis-à-vis their colleagues, while important, may

overlook some of the ways in which the particular nature of conflict in the Senate's environment may influence leadership behavior. For example, party leaders utilize their influence regularly to moderate the procedural choices of their partisan colleagues in the contemporary Senate. In this respect, correctly identifying the influence of party leaders depends on recognizing the constraints imposed on them by the predominant pattern of decision-making in the Senate in a given period.

### **A Decentralized Pattern of Decision-Making**

Senate decision-making was characterized by a decentralized process throughout much of the twentieth century. Order was maintained by various norms and conflict was overcome in a deliberative fashion. The issue agenda was not particularly polarized and political parties were not cohesive ideological organizations. These characteristics were reflected in the legislative process. During this period, the floor consideration of bills was not initially characterized by the participation of a large number of members and party leaders played a secondary role in facilitating decision-making.

Yet the Senate's decision-making process changed as its external environment gradually grew more contentious. Party leaders began to play a larger role in the decision-making process in an effort to manage the participation of a large number of members on the Senate floor, which itself was precipitated by the changing external issue environment (Sinclair 1989). However, the party leaders did not yet supplant individual members and the committee chairmen/ranking members in the legislative process.

Nevertheless, Senate decision-making would gradually become characterized by a collegial pattern in the middle part of the twentieth century. During this period, there were no significant barriers to the participation of interested members and the total number of members involved in the decision-making process was usually quite large. As such, decision-making was relatively decentralized and there were few constraints on members in the debate and amendment process. Moreover, action occurred predominately on the Senate floor. Both majority and minority members participated in the process and a high percentage of amendments filed by members of both parties were ultimately offered to the legislation under consideration. Furthermore, the percentage of amendments offered and ultimately agreed to were high for members of both parties. As a result, the success rates for majority and minority amendments were relatively even and most of the amendments offered were disposed of by voice vote. Finally, cloture was not needed to end debate on most of the measures examined. In the rare circumstance that the cloture process was utilized on the motion to proceed to legislation, a majority of both parties typically supported the efforts to end debate. A majority of both parties also supported final passage most of the time. Conference committees were commonly used to negotiate differences between the House and Senate.

The collegial pattern of decision-making would characterize the legislative process in the Senate well into the last two decades of the twentieth century. This persistence can be attributed to the lingering effects of several Senate norms that once commonly served to create an institutional culture that restrained individual members

from regularly exploiting their procedural rights in an effort to achieve their goals. Specifically, the Senate was characterized by a high degree of courtesy, reciprocity, and institutional patriotism during the first half of the twentieth century. In such a permissive procedural environment, these norms alone were largely responsible for ensuring that the Senate remained a functional yet deliberative body.

However, these norms were increasingly being eroded by the changing nature of the Senate's external environment and the subsequent response of its members internally. The new environment created incentives for senators to be involved in a broader array of issues. New procedural mechanisms like the hold process gave individual members the ability to be more active in the Senate's deliberations, regardless of their seniority or committee assignments. Furthermore, the increasingly crowded Senate agenda and the corresponding growth of interest groups seeking representation in the policy process created more opportunities for members to become legislatively active.

### **The Deliberative Nature of Collegial Decision-Making**

The development of the collegial pattern of decision-making was precipitated by the combination of an increasingly liberal Democratic conference in the Senate in the late 1950s and early 1960s, the emergence of new and more controversial issues such as civil rights, and a corresponding increase in the number of interest groups seeking representation on Capitol Hill. Despite the temporary respite provided by Lyndon Johnson's (D-TX) tenure as Majority Leader, the confluence of these developments

overwhelmed the ability of the Senate to limit conflict among its members following the normative pattern of decision-making. A new pattern was needed to accommodate increased member demands to participate in the legislative process and articulate issues. The innovations implemented by Johnson in the 1950s allowed Senate party leadership to facilitate the transition to collegial decision-making while ensuring that the institution maintained its legislative productivity.<sup>1</sup> As a consequence, the internal characteristics of the Senate were considerably altered. The privileged institutional position of the standing committees' characteristic of the Senate in the 1950s initially gave way to the more active participation of individual members on the Senate floor in the 1960s and 1970s.<sup>2</sup>

As Sinclair (1989) has observed, a new wave of politicians, particularly from the North, entered the Senate beginning with the class of 1958. These new members capitalized on a changing electorate and the emergence of a new issue agenda to win office. In the 1958 midterm elections, the Democrats picked up twelve seats. These freshmen were decidedly more liberal than their more senior colleagues from the South. In addition, they represented largely competitive two-party states in the North. As a result, they were less willing to defer to seniority and wait their turn to advance legislative proposals. The new ideological composition of the Democratic Party in the Senate and the unwillingness of its more liberal members to wait their turn presented new challenges for a weak party leadership apparatus. Yet such difficulties also presented

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<sup>1</sup> Loomis, "Everett McKinley Dirksen," 239.

<sup>2</sup> Smith, *Call to Order*, 3, 11.

unique opportunities for party leaders to increase their influence vis-à-vis the committees and exercise more influence over the Senate's deliberations.<sup>3</sup>

The committees certainly continued to serve as centers of influence in the Senate, and they were still highly autonomous. However, a subtle shift in the relationship between committee chairmen and the party leadership can be observed during this period as a consequence of the shift in decision-making from the committees to the Senate floor. As a result of the conservative dominance of the committees, the newly elected liberal members looked to the Senate floor, with its permissive procedural rules, as an attractive alternative forum in which to articulate their interests and pursue their legislative goals. Reinforcing this trend was the fact that the new issues were unlikely to be favorably received by the conservative dominated committees. The Senate floor presented a much more attractive alternative since the membership of the chamber as a whole was decidedly more liberal than the chairmen who dominated the committees. Personal staffs also increased during the period, allowing senators to be involved in more issues. Moreover, they were no longer beholden to chairmen-controlled committee staff for information. As such, they could more credibly mount more threatening challenges to legislation on the Senate floor.<sup>4</sup>

Changes in the Senate's internal environment during this period reinforced the shift in the structural balance of power from committees to party leadership. The

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<sup>3</sup> Sinclair, *The Transformation of the U.S. Senate*, 30-31.

<sup>4</sup> Ibid., 42-43.

Legislative Reorganization Act of 1970 placed some important constraints on committee chairmen. This legislation allowed a majority of committee members to call a hearing over the objections of the chairman. It also required committees to publish rules governing their procedures and operations. Minority members were guaranteed witnesses at hearings and were allowed to file minority views as an addendum to the committee report that often accompanied legislation cleared by a committee. Furthermore, a committee report was now required to be available at least three days before legislation reported by the panel was eligible to be considered on the Senate floor.<sup>5</sup>

Another rules change in 1975 opened all Senate committees to the public. This move provided interest groups and the news media more information with which to influence and report on the chamber's deliberations. This significantly altered the decision-making environment and made reaching compromise much more difficult. These "sunshine reforms" made the committees much more open and more democratic. In such an environment, the committees could no longer expect to have their decisions simply ratified without question on the Senate floor. Reforms passed in 1977 further empowered junior members and made the legislative process more fragmented. In 1986, the Senate took another step in this process by agreeing to allow its proceedings to be

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<sup>5</sup> Sinclair, *The Transformation of the U.S. Senate*, 47.

broadcast on national television. Now Americans could follow the Senate's deliberations from the comfort of their own homes.<sup>6</sup>

These developments had the cumulative effect of increasing the amount of information available to rank-and-file members. More information increased the ability of these senators to mount credible and serious challenges to committee-reported legislation once it reached the floor. These developments reinforced the shift from a committee-centered body to a more participatory body. A more participatory body strengthened party leadership because it alone was in a position to negotiate with all of the interested members on issues that transcended the jurisdictional boundaries of committees.

The influence of the party leaders also increased during this period as a result of various rules changes. The Senate's standing rules were changed to prohibit committees from meeting after a certain time while the Senate was in session.<sup>7</sup> This prohibition could be waived by the joint consent of the majority and minority Leaders. The requirement that committee reports be available to members for at least three days could also be waived by the joint consent of the two leaders.<sup>8</sup> While admittedly minor, these two changes reflected an important shift in the Senate. Increasingly, individual members

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<sup>6</sup> Eric Schickler, *Disjointed Pluralism: Institutional Innovation and the Development of Congress* (Princeton: Princeton University Press, 2001), 208; Sinclair, *The Transformation of the U.S. Senate*, 105-111.

<sup>7</sup> The Appropriations and Budget committees are exempted from this prohibition.

<sup>8</sup> Floyd M. Riddick, *Majority and Minority Leaders of the Senate: History and Development of the Offices of the Floor Leaders* (Washington, D.C.: U.S. Government Printing Office, 1981), 13.



would defer to the party leadership to make decisions that concerned not just a particular committee or a specific issue area, but that impacted the entire institution.

The increase in floor activity over the course of the 1960s and 1970s was the result of several factors that combined to reduce the costs of participation and filibustering for individual senators. Changes in workload, partisanship levels, and the broader electoral and political environment combined to precipitate a significant transformation in the internal functioning of the Senate. The new open and more confrontational environment led minority party senators, as well as majority party members that were out of step with their caucus, to more fully exploit their procedural rights on the floor. In addition to the traditional uses of obstructionism, members began to aggressively attempt to positively affect the outcome of legislation. As a result, the number of floor amendments increased between 1960s and 1970s.<sup>9</sup>

As amendments increased, committee control over the agenda was further eroded. Members began to use the amendment process to circumvent committees that were opposed to their points of view. In the past, committees could control the agenda by keeping items under their jurisdiction with which they disagreed off of the Senate floor, negatively affecting the agenda. However, they no longer possessed this ability to the degree they once did because of the increased use of the Rule XIV process and the ability to offer amendments under Senate rules.

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<sup>9</sup> Sarah A. Binder and Steven E. Smith, *Politics or Principle? Filibustering in the United States Senate* (Washington, D.C.: Brookings Institution Press, 1997), 13; Sinclair, *The Transformation of the U.S. Senate*.

According to Senate rules, there are very few limits to the total number of amendments members are allowed to file when considering legislation on the floor.<sup>10</sup> The ability to offer amendments on the floor is particularly useful for senators in the minority party, especially if the majority-controlled committees resist reporting minority-sponsored measures. As a result, minority party senators have a potentially powerful way to achieve their individual policy and political goals by virtue of their ability to offer amendments. According to Smith (1989), individual senators can readily offer and obtain votes on amendments in collegial decision-making. Coercive rules and procedures do not stop them.<sup>11</sup>

As the number of amendments gradually began to overwhelm the permissive procedural characteristics of collegial decision-making, the majority party changed the manner in which it dealt with them. In the 1950s and early 1960s, the few amendments offered on the floor typically received an up or down vote. Beginning in the 1970s however, motions to table amendments were offered much more frequently. Majority Leader Byrd increasingly utilized these motions to dispose of unwanted amendments on the Senate floor in collegial decision-making. In the 84<sup>th</sup> Congress (1955-56), three Motions to Table were used. This amount increased to 272 in the 99<sup>th</sup> Congress (1985-

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<sup>10</sup> With the exception of first and second degree filing deadlines stipulated in Rule XXII.

<sup>11</sup> Judy Schneider, *Minority Rights and Senate Procedure* (Washington, D.C.: Congressional Research Service, 2005); Martin B. Gold, *Senate Procedure and Practice* (New York: Rowman & Littlefield Publishers, Inc., 2004), 105-106. Non-germane amendments are limited by Senate rules and statute. Specifically, they are not in order when cloture has been invoked. In addition, they are not in order on general appropriations bills and budget measures. The full Senate may also place limitations on both germane and non-germane amendments by unanimous consent; Smith, *Call to Order*, 86.

86).<sup>12</sup> These motions are not debatable and only require a simple majority to pass. As such, motions to table provide Senate majorities with an attractive procedural tool with which to avoid taking tough votes on the actual substance of the amendments. Indeed, the majority party often utilizes such motions to successfully defeat minority party amendments. Members of the majority typically view such votes as procedural in nature and thus vote on a party-line basis, regardless of the underlying issue at stake.<sup>13</sup>

A crowded agenda meant that efforts to drag out debate via filibusters would be more effective. With a crowded schedule, the Senate could no longer afford to spend months debating a single piece of legislation. While the Rule XXII process now applied to both motions to consider legislation as well as the actual legislation, the reality was still unacceptable to a succession of Majority Leaders who were primarily interested in advancing their party's agenda through the legislative process. Furthermore, two-thirds of the entire Senate voting in the affirmative was very difficult to achieve, thereby making the cloture rule an unrealistic means of limiting debate in all but the best of circumstances.

Opponents of various legislative proposals recognized this. As such, filibusters increased in both scope and frequency during this period as individual senators reacted to a larger array of issues. Filibusters represent an important procedural tool to protect the

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<sup>12</sup> Smith, *Call to Order*, 106-107.

<sup>13</sup> Sinclair, *The Transformation of the U.S. Senate*, 85, 115; Smith, *Politics or Principle*, 15; Chris Den Hartog and Nathan W. Monroe, "Agenda Influence and Tabling Motions in the U.S. Senate," in *Why Not Parties? Party Effects in the United States Senate*, ed. Jason M. Roberts Nathan W. Monroe, and David W. Rohde (Chicago: The University of Chicago Press, 2008), 154-155.

status quo. As such, they were seldom used during the immediate postwar period on issues other than civil rights legislation when a conservative-controlled Senate acted to protect the status quo as a whole. However, as the Senate's ideological center of gravity shifted to the left, it became a more activist institution and the rate of filibusters increased in response. Liberals favored invoking cloture during this period more than conservatives. Liberals also largely supported a lower threshold for invoking cloture, as their agenda was consistently falling victim to conservative filibusters.<sup>14</sup>

In an effort to overcome conservative filibusters, liberals and the majority party leadership sought to limit debate by reducing the threshold required to invoke cloture. In 1975, the cloture rule was changed to reduce the necessary threshold from two-thirds to three-fifths of the entire Senate. However, James Allen (D-Alabama) found a way around this liberalization with the post-cloture filibuster by which a final vote on legislation was delayed through the use of repeated motions during post-cloture time. In response, Rule XXII was changed yet again in 1979 to require a final vote to take place no later than 100 hours after cloture was invoked. Any procedural motions counted against the time limit. Yet 100 hours of post-cloture time still proved unworkable in light of the crowded Senate

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<sup>14</sup> Sinclair, *The Transformation of the U.S. Senate*, 127; Congressional Research Service, "Senate Procedural Tools to Block the Minority: Cloture Motions Since 1919." Data also available from the United States Senate Library: <http://www.congress.gov/xtags/senlib/cloture/clotureCounts.jsp>; Smith, *Call to Order*, 103. Conservatives would tend to support cloture when Republicans were in charge and oppose cloture when Democrats were in control. But the overall trend remains: conservatives generally seek to block new policy proposals and support procedures that enable them to do so. Even instances of Republican control of the Senate can be understood in this light. For example, after Republicans regained the majority in the Senate after the 1994-midterm elections, conservatives sought to proactively roll back liberal policies. Now the cloture rule inhibited this option, and was viewed as an obstacle to enacting their agenda, which was largely negative in nature.

agenda, so the Senate again modified Rule XXII in 1986 to reduce post-cloture time to 30 hours.<sup>15</sup>

A more liberal cloture rule was not the only procedural development during this period. Individual senators also began to use the *threat* of a filibuster to influence the chamber's actions. These "holds" arose out of the necessity to reach unanimous consent on measures. Holds are simply requests by a senator to their party leader to delay action on a measure. The party leader maintained a list of what holds members had on what legislation at any given moment. In collegial decision-making, individual senators like procedures such as holds and filibusters because "they enhance the importance of the senator in the larger polity."<sup>16</sup> These procedures allow members to better secure their policy preferences, political calculations, and electoral goals in a decentralized decision-making environment.

### *Collegial Method of Limiting Conflict*

Despite the many innovations in party leadership pioneered by Lyndon Johnson, he did not completely alter the structural balance of power between committees and the party leadership. Committees and committee chairmen remained highly autonomous and powerful actors that provided substantive policy leadership in the Senate. Indeed, the centralized position of party leadership pursued by Johnson precluded a sustained effort

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<sup>15</sup> Sinclair, *The Transformation of the U.S. Senate*, 128-129.

<sup>16</sup> Smith, *Call to Order*, 207.

to directly and proactively shape policy because the Majority Leader's primary task at this time was to broker compromise among highly fractious partisan blocs and facilitate the consideration of legislation in the Senate. Yet even in collegial decision-making, party leaders play an important role in resolving conflict. While not yet resembling the dominant actors they would become in the majoritarian pattern, party leaders were the sole actors capable of providing organization and structure to the Senate's deliberations in the new environment. Without such structure, the collegial pattern would be unable to order the many divergent efforts of the Senate's membership and successfully limit conflict in the institution. As such, party leadership in the mid-twentieth century was more concerned with the procedural aspects of the legislative process and not as focused on substantive decision-making.<sup>17</sup>

According to Smith (1989), Majority Leader "Byrd sought to further reduce the inefficiency and unpredictability of floor proceedings" in the 1970s as more and more members took to the Senate floor:<sup>18</sup>

With Byrd directing traffic on the floor, senators were more likely to find their floor activity restricted if they had not made their concerns explicit. This is not to say that Byrd trampled on his colleagues' floor privileges, for he generally was very responsive to requests for protective provisions and in the end could go only as far as unanimous consent would allow. But he was less willing to leave matters to chance.<sup>19</sup>

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<sup>17</sup> Steven S. Smith, "Forces of Change in Senate Party Leadership and Organization," in *Congress Reconsidered*, ed. Lawrence C. Dodd and Bruce I. Oppenheimer (Washington, D.C.: CQ Press, 1993), 259.

<sup>18</sup> Smith, *Call to Order*, 105.

<sup>19</sup> Ibid.

In collegial decision-making, party leaders will seek to be more inclusive of individual members and try to accommodate their concerns while facilitating their participation in the decision-making process. For example, Majority Leader Mike Mansfield (D-Montana) expanded the Policy Committee to include more junior members and democratized its activities.<sup>20</sup> In addition, Mansfield did not try to dominate the Democratic Steering Committee in order to determine committee assignments for the conference:

Despite his central position as Majority Leader, accompanied by an almost inevitable control over scheduling and the flow of legislation on the floor, Mansfield goes out of his way to promote a climate in which every Senator is perceived and treated as equal to every other Senator.”<sup>21</sup>

Indeed, Mansfield’s leadership style was more “laissez-faire” and accommodating as compared to that of Johnson, who exercised leadership in a more domineering way. Peabody (1976) attributes such differences to the size of their respective majorities in the Senate. Mansfield was forced to adopt a more “permissive” leadership style as a result of the “larger, more unwieldy majorities” over which he presided.<sup>22</sup> In contrast, Johnson’s leadership style was indicative of the smaller Democratic majorities of the 1950s in

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<sup>20</sup> Robert L. Peabody, *Leadership in Congress: Stability, Succession, and Change* (Boston: Little Brown and Company, 1976), 341.

<sup>21</sup> *Ibid.*, 342.

<sup>22</sup> *Ibid.*, 345.

which “every vote counted.”<sup>23</sup> While majority size presumably played a role in dictating the leadership styles of these two Majority Leaders, the unique institutional structure, procedures, and culture characteristic of the Senate in the 1950s and 1960s had more of an impact in determining their approach to leadership. For example, Johnson was able to exercise stronger leadership precisely because his influence depended on a foundation of strong power (i.e. committee chairmen, seniority, and the Senate’s culture). It was from this foundation that Johnson’s power flowed. In contrast, Mansfield served as Majority Leader during a period in which collegial decision-making characterized the Senate’s deliberations. In an environment in which individual members increasingly exercised their procedural prerogatives on the Senate floor to advance their goals, Mansfield had to be more accommodating of their demands. His power rested on a foundation that was much more diffuse than Johnson’s. His influence depended on the support of his members more broadly, and not on the institutional culture of the Senate and its corresponding set of norms to restrain member behavior. According to Sinclair, “Mansfield’s style seems to have been suited to these new member expectations. Certainly his style maximized individual senators’ leeway to participate in the legislative process and to pursue their own policy preferences.”<sup>24</sup> As such, the overarching goal of

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<sup>23</sup> Peabody, *Leadership in Congress*, 345.

<sup>24</sup> Barbara Sinclair, "Congressional Leadership: A Review Essay and a Research Agenda," in *Leading Congress: New Styles, New Strategies*, ed. John J. Kornacki (Washington, D.C.: Congressional Quarterly, Inc., 1990), 142.



Mansfield's leadership was to strengthen the Senate as "an assembly of equals."<sup>25</sup>

According to Senator Edmund S. Muskie (D-Maine), Mansfield "felt that the way to make the Senate effective was simply to let it work its will."<sup>26</sup>

Similarly, Minority Leader Dirksen sought to facilitate the participation of Republican members in the legislative process. Dirksen sought to effectively communicate the concerns of his colleagues to one another and he did not view opposing the majority as the minority's sole responsibility.<sup>27</sup> Yet rather than representing a bygone era of principled bipartisanship when statesmen populated the Senate, such a nonbelligerent attitude in the party leadership simply underscored the lack of significant conflict between political parties in the Senate. Moreover, the Democratic and Republican parties were highly fractured during this period and often failed to reach agreement on controversial issues among themselves, much less with the other party. Dirksen did not view it as the responsibility of the minority to reflexively oppose the majority precisely because the two parties were not necessarily always in conflict. It was highly unlikely that the majority party could reach consensus within its own ranks sufficient to formulate and advance a partisan agenda irrespective of the opposition of the

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<sup>25</sup> Ross K. Baker, "Mike Mansfield and the Birth of the Modern Senate," in *First among Equals: Outstanding Senate Leaders of the Twentieth Century*, ed. Richard A. Baker & Roger H. Davidson (Washington, D.C.: Congressional Quarterly, Inc., 1991), 277. See also: Francis R. Valeo, *Mike Mansfield, Majority Leader: A Different Kind of Senate, 1961-1976* (Armonk, New York: M. E. Sharpe, 1999); Don Oberdorfer, *Senator Mansfield: The Extraordinary Life of a Great American Statesman and Diplomat* (Washington, D.C.: Smithsonian Books, 2003).

<sup>26</sup> Quoted in Baker, "Mike Mansfield and the Birth of the Modern Senate," 276.

<sup>27</sup> Loomis, "Everett McKinley Dirksen," 248-251, 254-255.

minority in the Senate. In such an environment, party leaders could focus on facilitating member participation in the legislative process and maintaining a cordial relationship with the opposition party. Indeed, such responsibilities were necessary to keep the Senate legislatively productive, not because the parties were in persistent conflict with one another, but because they were not. In the absence of party leaders, the many disparate, but not necessarily antithetical, goals of individual members would inevitably overwhelm the ability of the collegial pattern to efficiently process them in the Senate decision-making process.

Majority Leaders during this period sought to take advantage of the structural shift in decision-making to the floor and assist in resolving the increased conflict between the time demands of individual members that was generated there. In addition to the changes they attempted to make to the cloture rule, leaders adjusted tactically to specific instances of obstruction by threatening to hold around-the-clock sessions to wait out obstructionists and waiting until the last days of a session of a congressional session to force an issue on the floor.<sup>28</sup> In addition, Majority Leader Mansfield and Majority Whip Byrd devised a “tracking system” whereby the Senate would set aside measures that were being filibustered and would consider other legislation. This procedure requires unanimous consent, so it is not always available for use. However, it helps to minimize scheduling difficulties. Yet it is important to note that the tracking system only works if the majority is willing to give up on measures that are being obstructed, either

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<sup>28</sup> Smith, *Call to Order*, 95-96.

temporarily or permanently. It also only works if the legislation to which the Majority Leader would like to proceed is supported by all members, including the objecting senators.<sup>29</sup>

Despite the “increasing institutionalization” of Senate party leadership, its role in the institution remained very similar in collegial decision-making to that observed in normative decision-making (Peabody 1976). While a party leader now had more staff, public stature and a greater role in managing the floor as an active decision-making arena, his primary responsibility and function remained efforts to “program and expedite the flow of his party’s legislation.”<sup>30</sup> Party leaders were not responsible for developing that legislation. Instead, committees maintained “unlimited control over legislation until it is reported out for floor consideration.”<sup>31</sup>

The individualistic Senate characteristic of collegial decision-making is particularly suited for agenda setting and publicizing issues. It is not ideally suited for decision-making. This weakness was eventually exacerbated by increasing partisan conflict in the 1980s and 1990s. Senators increasingly exploit their procedural prerogatives on the floor in response to political interests, more controversial issues, greater constituent pressure, and more interest group pressure. This leads to more

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<sup>29</sup> Smith, *Call to Order*, 96.

<sup>30</sup> Peabody, *Leadership in Congress*, 336.

<sup>31</sup> *Ibid.*, 337.

amendments, debate, and obstruction. New procedures would be needed to maintain decision-making and the institution's productivity.<sup>32</sup>

As this examination has demonstrated, party leaders have limited control over the Senate floor in collegial decision-making. According to one observer of the institution during this period, "the Senate has not yet found a general strategy for limiting amendments and reducing the dangers of floor decision-making for committees and party leaders."<sup>33</sup> Yet the changing political environment forced the Senate to develop methods by which the "dangers of floor decision-making" could be reduced and its productivity could be maintained.

### **Centralized Patterns of Decision-Making**

The Senate developed a more centralized decision-making process in the 1980s and 1990s in order to maintain its legislative productivity within a political environment dominated by a polarized issue agenda and characterized by increasingly cohesive political parties.<sup>34</sup> A decentralized process such as collegial decision-making was unable to regularly limit conflict in such an environment in an efficient and timely manner. The Senate simply consumed too much time deliberating issues in the collegial pattern by accommodating the demands of individual members. Referring to the decision-making

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<sup>32</sup> Barbara Sinclair, *Unorthodox Lawmaking: New Legislative Processes in the U.S. Congress*, 3rd ed. (Washington, D.C.: Congressional Quarterly Press, 2007), 113-114; Smith, *Call to Order*, 95.

<sup>33</sup> Smith, *Call to Order*, 128.

<sup>34</sup> Sinclair, *Unorthodox Lawmaking*.

process during Mansfield's tenure as Majority Leader, Senator Howard Cannon (D-Nevada) remarked that "it sure took a hell of a lot longer to get things out of Congress."<sup>35</sup> Put simply, the development of a polarized issue agenda and cohesive parties exacerbated the permissive procedural environment characteristic of collegial decision-making, thereby undermining its ability to maintain the Senate's legislative productivity.

Centralized patterns of decision-making first emerged as a viable alternative to the decentralization of the normative and collegial patterns beginning in the early 1980s. Significantly, the 1980 election heralded a change in the relationship between individual senators' electoral fortunes and the popularity of their national party. During this election, Ronald Reagan campaigned aggressively for Republican candidates who increasingly articulated common themes in their campaigns. Individual Democratic senators also discovered that the popularity of their national party impacted their electoral fortunes when several seemingly popular incumbents lost reelection and the Democratic Party lost majority-control of the Senate. Popular incumbents like Birch E. Bayh II (D-Indiana), Frank Church (D-Idaho), John Culver (D-Iowa), George McGovern (D-South Dakota), and Herman Talmadge (D-Georgia) were defeated by Republican candidates considered long shots at best.

The development of increasingly cohesive political parties resulted from significant shifts in the electorate throughout the twentieth century and, as a consequence, led the Democratic Caucus in the Senate to become more liberal and the Senate

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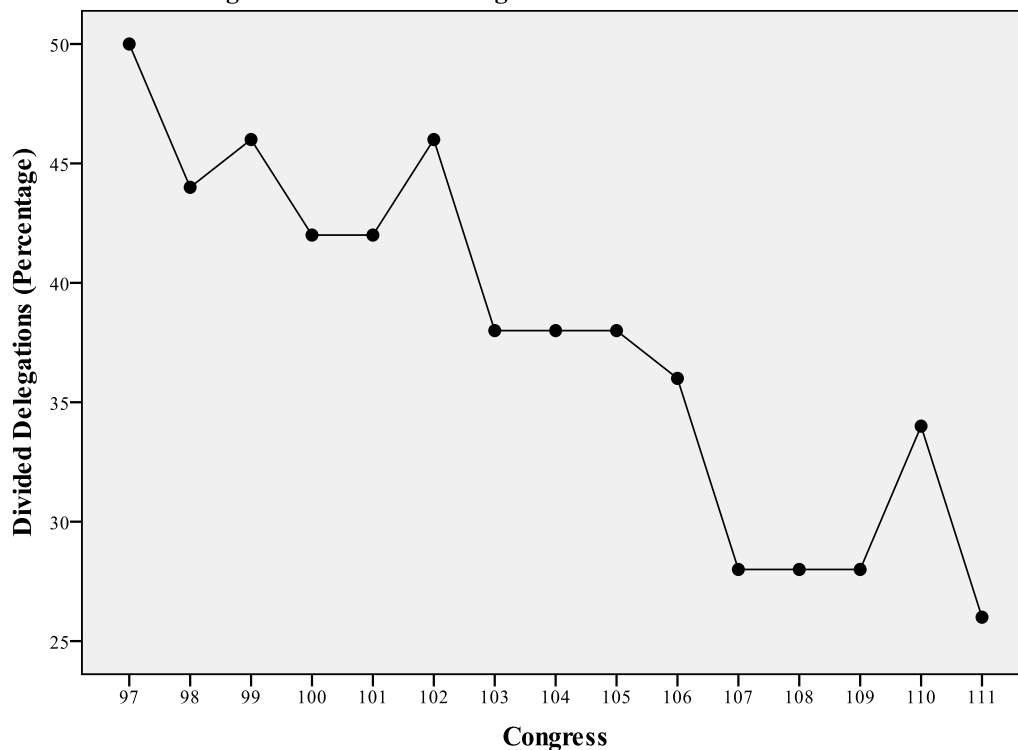
<sup>35</sup> Quoted in Baker, "Mike Mansfield and the Birth of the Modern Senate," 277.

Republican Conference to become more conservative.<sup>36</sup> While an examination of the specific causes of polarization is beyond the scope of this chapter, it is important to note that the impact on the Senate internally of the solidification of the electorate into blue and red camps and the emergence of two political parties dominated by their liberal and conservative wings can be observed in the overall decline in the number of divided Senate delegations (see Figure 4.1 below).<sup>37</sup>

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<sup>36</sup> See: Shankar Vedantam, "My Team Vs. Your Team: The Political Arena Lives up to Its Name," *Washington Post*, September 29 2008, A6. For a different perspective, see: Morris P. Fiorina, *Culture War? The Myth of a Polarized America*, 3rd ed. (London: Longman, 2010). Fiorina argues that a "silent majority," to borrow a term from the Nixon era, is in agreement on most of the issues that dominate American politics today. Yet this majority is presented with increasingly polarized choices as the political class polarizes. As such, American politics has the appearance of being bitterly divided between two polarized segments of the electorate. Yet Fiorina's argument ultimately breaks down when confronted with its own logic. If the political class is increasingly imposing its polarized view of culture on American politics and governmental decision-making, at some point the process will become self-fulfilling. Fiorina certainly does not deny the impact of such a process on the tenor of American politics currently. It is likely that at some point the electorate will begin to serve as an echo chamber that simply internalizes and reflects the choices with which they are presented.

<sup>37</sup> Theriault, *Party Polarization in Congress*, 99-100.

**Figure 4.1****Divided Senate Delegations: 97th-111th Congress**

Data Compiled by Author

The development of cohesive political parties externally was also mirrored internally by changes in the Senate's decision-making process. Power inside the institution gradually shifted from committee leaders and individual members to the leadership of the two political parties. This subtle shift in power to the party leadership has, in some respects, reduced the autonomy of individual members that has long characterized the Senate. For example, both parties required their full conference membership to ratify committee selections for their chairmen and ranking minority members as recently as the 1970s, and these decisions were made strictly on the basis of

seniority. Yet while seniority still continues to informally govern the committee selection process today, the Republican Party's conference rules specifically state that the decision need not be made on the basis on seniority and that committee members may select someone who is not the longest serving member on the panel. Under the rules of the Senate Republican Conference, "the Republican members of each standing committee at the beginning of each Congress shall select from their number a chairman or ranking minority member, *who need not be the member with the longest consecutive service on such committee*, subject to confirmation by the Conference."<sup>38</sup>

The Democratic Party does not publish its conference rules. However, it also does not strictly follow seniority as the sole criteria in the committee selection process. For example, Senator Blanche Lincoln (D-AR) was allowed to assume the chairmanship of the Agriculture Committee after then-chairman Tom Harkin (D-IA) gave up the position to assume the chair of the Senate Health, Education, Labor, and Pensions Committee which had been left empty with the death of Senator Edward M. Kennedy (D-MA). Lincoln was a relatively junior member on the panel. However, party leaders viewed the committee chairmanship as an opportunity to bolster Lincoln's reelection chances in heavily rural Arkansas.<sup>39</sup>

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<sup>38</sup> Chairman and Senator John Barrasso Senator Lamar Alexander, Vice Chairman, *History, Rules, & Precedents of the Senate Republican Conference* (Washington, D.C.: United States Senate, 2010). Italics added for emphasis.

<sup>39</sup> Bart Jansen, "Harkin, Lincoln to Claim New Senate Committee Gavels," *CQ Today*, September 9 2009.



While the principle of seniority does not explicitly govern selection of chairmen/ranking members in the Senate, it is important to note that seniority remains an informal criterion that has been historically followed. One notable example is the dispute between Senator Jesse Helms (R-North Carolina) and Senator Richard Lugar (R-Indiana) over the ranking member position on the Foreign Relations Committee. After losing control of the Senate in the 1986 midterm elections, Helms decided to relinquish the top Republican spot on the Agriculture Committee, which he previously chaired in order to claim the ranking member position on the Foreign Relations Committee, as he was the most senior Republican on the panel. However, Lugar also asserted a claim to the top position by virtue of the fact that he had chaired the committee in the previous Congress. Pursuant to conference rules, the Republican members of the committee, with the exception of Helms, voted to allow Lugar to retain his position as ranking member on the panel. Helms subsequently challenged this decision in the full conference and staked his claim exclusively on seniority. Specifically, Helms argued that failure to allow him to claim the ranking member position would effectively end seniority as the guiding principle in the committee assignment process. This argument was received favorably, even among liberal Republicans who were not predisposed to support Helms and viewed his ideological views and obstructionist tactics with suspicion. On January 20, 1987, the Republican Conference voted 24-17 in favor of Helms. The conference also passed a resolution stating that the decision to allow Helms to claim the ranking member position

on the Foreign Relations Committee was necessary “in order to preserve the vital principles of party unity and seniority.”<sup>40</sup>

Despite the precedent sets in the Helms-Lugar dispute, the use of seniority as the sole governing criteria in the committee selection process has weakened in recent years. For example, after the 2004 elections Senate Republicans on the Judiciary Committee considered denying Arlen Specter (R-PA) the chairmanship of that panel because of their concerns over his ideological views on social issues and how these views would impact President George Bush’s Supreme Court nominees during the next Congress. Specter was eventually allowed to claim the gavel, but only after assuring his fellow committee members that he would support the president’s judicial nominees.<sup>41</sup> As a result, ideology was now taken into consideration along with seniority in determining the top positions on committees.

While Specter’s experience assuming the Judiciary Committee Chairmanship reaffirmed the use seniority by the Republican Conference, albeit on a weakened basis, Senator John Warner’s (R-VA) attempt to claim the ranking member position on the Environment and Public Works Committee (EPW) after the 2006 elections demonstrates that seniority may not always be followed in the Senate. In this example, Senator Warner asserted a claim to the top Republican spot on EPW due to his seniority on the panel.

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<sup>40</sup> William A. Link, *Righteous Warrior: Jesse Helms and the Rise of Modern Conservatism* (New York: St. Martin’s Press, 2008), 338-340.

<sup>41</sup> Keith Perine, "Specter Fights for Judiciary Chairmanship as Calls Continue," *CQ Today*, November 8 2004; Keith Perine, "Specter to Plead His Case to Fellow Judiciary Members," *CQ Today*, November 11 2004.

Senator James Inhofe (R-OK) also asserted a claim to the position based on the fact that he served as the top Republican on the panel in the previous Congress. However, unlike the Helms-Lugar situation in the 1980s, Inhofe was allowed to retain the position in the new Congress.<sup>42</sup>

In response to the informal power of seniority, the Republican Conference adopted a list of reforms in the mid-1990s proposed by conservative members unhappy with Senator Mark Hatfield's (R-Oregon) defection on a vote to pass a balanced budget constitutional amendment (the amendment subsequently lost by one vote). The adopted reforms included: a secret ballot vote for committee chairs/ranking members both in committee and in the full conference; adoption of a Republican Conference agenda by a three-quarters vote of the full Conference; six year term limits for committee chairs/ranking members and party leaders (notably this last rule specifically excluded the Republican Leader from term limits).<sup>43</sup> The goal of these reforms was to restrict the individual autonomy of more moderate Republicans and extend the control of the conservative wing of the party over its membership in positions of power.

This shift occurred in the context of an increasingly crowded and polarized issue agenda. Time spent in session is increasingly consumed with legislative and representative activities. Members are often forced to balance both constituent meetings

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<sup>42</sup> Daphne Retter, "Musical Chairs Will Leave One Senior Republican without Top Committee Slot," *CQ Today*, December 7 2006.

<sup>43</sup> Barbara Sinclair, *Party Wars: Polarization and the Politics of National Policy Making* (Norman: University of Oklahoma Press, 2006), 194-195.

and multiple committee hearings with floor deliberation on a daily basis. As the agenda has become more crowded and each individual member's workload has increased, senators have sought to bring a semblance of regularity and predictability to the legislative process. This has necessitated the development of new decision-making processes that better limits conflict between cohesive partisan teams.<sup>44</sup> These new patterns of decision-making have led the Senate to "become *more* formal and impersonal, *more* tightly organized, through its 'reformed' committee system, and has developed *more* rigid floor rules and procedures."<sup>45</sup>

Cohesive parties form the foundation upon which the new centralized patterns of decision-making are based.<sup>46</sup> Rather than simply precipitating obstruction, political parties help make the Senate work. In the absence of any credible alternative, the parties have emerged as the only institutional actors that can successfully manage the floor, negotiate agreements between interested members, and ensure that the Senate completes its business, thereby maintaining its legislative productivity in the face of increasing conflict characteristic of its external and internal environment.<sup>47</sup>

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<sup>44</sup> Norman J. Ornstein, "The House and the Senate in a New Congress," in *The New Congress*, ed. Thomas E. Mann and Norman J. Ornstein (Washington, D.C.: American Enterprise Institute Press, 1981), 367.

<sup>45</sup> Ibid.

<sup>46</sup> Note: because the majoritarian and structured consent patterns of decision-making are both centralized processes, they are distinguished primarily by the relationship between the two parties.

<sup>47</sup> Smith, *Call to Order*, 3, 95; Sinclair, *The Transformation of the U.S. Senate*, 5, 71-72, 85. Ensuring that the Senate completed its business helped maintain the reputation of the Senate. According to this view, party leaders serve as institutional protectors. In this sense, Congress' institutional prestige is ensured because the party leaders are able to maintain a basic level of legislative productivity. See: Mayhew, *Congress*, 147-149; Gamm and Smith build upon Mayhew's approach by arguing that party

The centralized patterns of decision-making currently observed in the Senate are majoritarian and structured consent. Both rely on a particular internal organization and set of procedures to limit conflict within the Senate. The most important feature of these patterns is the political party, specifically the majority party (majoritarian) or the majority and minority parties (structured consent).<sup>48</sup> As a result, parties help make sense of, and lend order to, the political process by resolving conflict within Congress. While party conflict certainly continues to characterize the Senate's deliberations, it is managed in either a partisan (majoritarian) or bipartisan (structured consent) manner and its existence does not threaten the legislative productivity of the Senate.

In some instances, conflict along party lines may actually serve to unite party members behind centralized procedures in an effort to allow the Senate to work. Individual members defer to their political party precisely because they agree with it on most issues. The prominence of parties also implies that they have more to offer their members to help them achieve their goals in Congress such as the desire to win reelection. Parties also help members achieve their power goals in the Senate because power often depends on majority party status, which is bestowed collectively on all members of the party. Finally, members increasingly support the parties to which they

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leaders help solve the collective action problems faced by individual senators. Gerald Gamm and Steven S. Smith, "Emergence of Senate Party Leadership," in *U.S. Senate Exceptionalism*, ed. Bruce I. Oppenheimer (Columbus: Ohio State University Press, 2002), 213.

<sup>48</sup> In its literal sense, majoritarian decision-making could apply to any organized majority in the Senate, including geographical and ideological. However, in this dissertation, "majoritarian" decision-making will refer to partisan majorities. For a theoretical perspective that relies on nonpartisan majorities, see: Keith Krehbiel, *Pivotal Politics: A Theory of U.S. Lawmaking* (Chicago: University of Chicago Press, 1998).

belong because their policy positions more closely align with those of their partisan colleagues.<sup>49</sup> In such a context, the majority party attempts to formulate clear policy platforms, make commitments to the electorate based on these platforms, and seeks to implement these policies on behalf of the electorate once in office. In contrast, the minority party seeks to develop clear alternative policy positions. The electorate is thus presented with a choice as well as the means to hold their elected officials accountable. Both the majoritarian and structured consent patterns of decision-making are dependent on strong party leaders to make the Senate work.

*“Responsible” Party Leadership*

I have taken the position in this dissertation that a Senate-focused approach is required to fully understand the role played by party leaders in the decision-making process in the institution. Such an approach is needed, in part, because Senate party leaders operate in a unique institutional context.<sup>50</sup> However, a common mistake made by congressional scholars is to approach the Senate from the perspective of what is currently known about the House. Such a perspective suggests that party leaders in the Senate are weak institutional actors because they lack the power to command their colleagues and

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<sup>49</sup> Lee, *Beyond Ideology*; Binder, *Minority Rights, Majority Rule*, 10.

<sup>50</sup> C. Lawrence Evans and Walter J. Oleszek, "The Strategic Context of Congressional Party Leadership," *Congress & the Presidency* 26, no. 1 (1999), 2.

are thus forced to pursue a bargaining strategy in order to accomplish their goals.<sup>51</sup> While party leaders certainly lack the formal and centralized power wielded by their counterparts in the House, such a comparison inevitably overlooks the nuanced ways in which leaders influence the decision-making process in the Senate. Far from illustrating their institutional weakness, facilitating intraparty communication and policy consensus serves as a source of power for Senate party leaders. Party leaders use their power to facilitate a centralized decision-making process in the current Senate.

Despite the many important contributions made by Johnson, Mansfield, and Byrd to the development of party leadership in the Senate, the centralized role of party leaders in the legislative process would not emerge as a persistent feature until the 1980s and 1990s during the tenures of George Mitchell (D-Maine), Tom Daschle (D-South Dakota), and Harry Reid (D-Nevada) in the Democratic Party and Howard Baker (R-Tennessee), Bob Dole (R-Kansas), Trent Lott (R-Mississippi), and Bill Frist (R-Tennessee) in the Republican Party. During this period, the majority party leadership became increasingly involved in substantive decision-making.<sup>52</sup> In addition to facilitating procedural decision-making, the leaders now played a more central role in developing and managing their

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<sup>51</sup> Steven S. Smith and Gerald Gamm, "The Dynamics of Party Government in Congress," in *Congress Reconsidered*, ed. Lawrence C. Dodd and Bruce I. Oppenheimer (Washington, D.C.: CQ Press, 2005), 199.

<sup>52</sup> Smith, *The Senate Syndrome*, 5.

party's agenda inside the Senate. They also assumed a larger role in the development and implementation of each party's communications strategy outside the Senate.<sup>53</sup>

The changed nature of the issue agenda and legislation considered in the Senate brings the two party leaders into the process and gives them a substantive role to play in formulating legislation. New issues frequently overlap with the jurisdictions of several committees and the leaders are often able to assist these multiple committees in reaching an agreement on final legislation. Such a role inevitably involves the party leadership in the substantive side of Senate decision-making because it helps to negotiate the final legislative language before a bill reaches the Senate floor. For example, climate change legislation considered in the 110<sup>th</sup> Congress involved the Energy and Natural Resources Committee and the Energy and Public Works Committee. Health care reform in the 111<sup>th</sup> Congress involved the Senate Committee on Health, Education, Labor, and Pensions and the Finance Committee.<sup>54</sup>

In addition to a new issue agenda that often transcends the jurisdictional boundaries of the Senate's committee system; the panels themselves are increasingly partisan. According to Sinclair (2007), committees were partisan in the consideration of

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<sup>53</sup> Smith, "Forces of Change in Senate Party Leadership and Organization," 259, 262, 268-276, 280-286; Gerald Gamm and Steven S. Smith, "Policy Leadership in the Development of the Modern Senate," in *Party, Process, and Political Change in Congress: New Perspectives on the History of Congress*, ed. David W. Brady and Mathew D. McCubbins (Stanford: Stanford University Press, 2002), 287-289; Mike Mansfield (D-MT), William Knowland (R-CA), and Hugh Scott (R-PA) did not attempt to replicate the leadership style or success of Johnson. See: Riddick, *Majority and Minority Leaders of the Senate*; The leadership of both political parties formed new communications operations within the leadership structure during the first decade of the Twenty-First Century in an effort to respond rapidly to claims made by the other party and to facilitate the development of a unified party message. Matt Latimer, *Speechless: Tales of a White House Survivor* (New York: Crown Publishers, 2009), 147.

<sup>54</sup> Sinclair, *Unorthodox Lawmaking*, 50.



10% of the major legislation in the 1960s and 1970s, 14% in the 1980s, and 25% of legislation in the 1990s and the early 2000s.<sup>55</sup> Party leaders increasingly seek to facilitate committee decision-making and will often seek to keep members who are out of the mainstream of the party ideologically off of major panels that cover issues on which they disagree. To this end, the Republican Conference changed its rules governing committee assignments in the 1990s in order to give the Republican Leader the ability to appoint members of their choosing to 50% of all vacancies on “A” committees. Such a move arose out of a concern that more liberal members would continue to be disproportionately represented on certain important committees like Finance.<sup>56</sup> Party leaders also work to build support for party positions in committees, which makes it easier to keep their party unified on the Senate floor after committee consideration has been completed. This is exacerbated by the narrow party control of the 1990s, which translated into narrow committee ratios, thus further strengthening the hand of the party leadership.<sup>57</sup>

As a result of these changes in committee decision-making, more controversial issues are often “punted” at the committee level and postponed until the floor stage. Committee members typically do not want to have a fight twice, or to unnecessarily

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<sup>55</sup> Sinclair, *Unorthodox Lawmaking*, 45.

<sup>56</sup> Senate Rule XXV governs committees. “A” Committees include: Agriculture, Nutrition, and Forestry; Appropriations; Armed Services; Banking, Housing, and Urban Affairs; Commerce, Science, and Transportation; Energy and Natural Resources; Environment and Public Works; Finance; Foreign Relations; Health, Education, Labor, and Pensions; Homeland Security and Government Affairs; Judiciary; and Select Committee on Intelligence. Judy Schneider, *Committee Assignment Process in the U.S. Senate: Democratic and Republican Party Procedures* (Washington, D.C.: Congressional Research Service, 2006).

<sup>57</sup> Sinclair, *Unorthodox Lawmaking*, 46.

imperil their legislation on the floor.<sup>58</sup> This further strengthens Majority Leaders because they are typically the most active members on the floor and occupy a centralized position in the decision-making process there.<sup>59</sup> The fact that legislation has become harder to pass on the floor also makes the party leaders more influential on average. Committees rely on the party leadership to help pass or block legislation and amendments on the floor.<sup>60</sup> They are involved in the legislative process at an earlier stage, and stay involved throughout in order to ensure the legislation can pass on the Senate floor.<sup>61</sup>

The party leaders also often convene meetings to discuss particularly controversial issues prior to committee consideration and continue their involvement throughout the committee and floor consideration stage. They are the only members intimately and centrally involved at all stages of the legislative process.<sup>62</sup>

Beyond serving as a source of information, party leaders seek to influence the voting behavior of their partisan colleagues. Specifically, party leaders attempt to build majorities for their preferred position on the Senate floor. They structure choices by setting the agenda and they manipulate the process in order to secure support from their partisan colleagues. In addition to structuring the agenda, party leaders also influence the decisions of their colleagues with a combination of rewards and punishments. They can

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<sup>58</sup> Sinclair, *Party Wars*, 199.

<sup>59</sup> Sinclair, *Unorthodox Lawmaking*, 46.

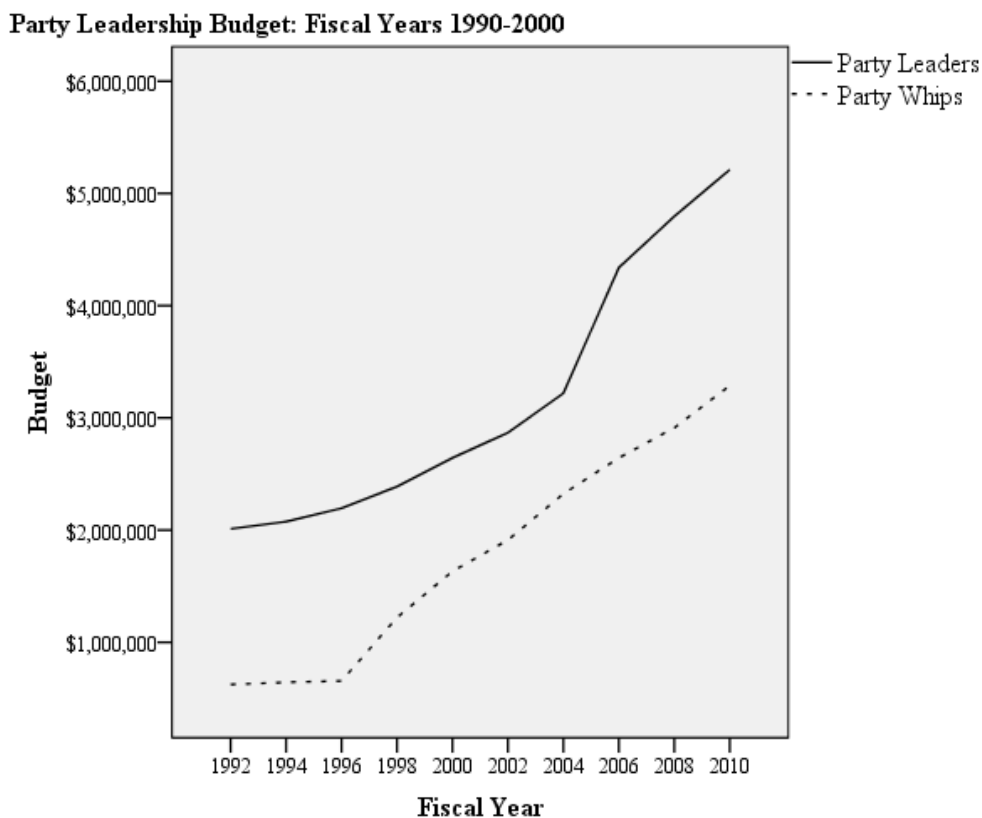
<sup>60</sup> Sinclair, *Party Wars*, 203.

<sup>61</sup> *Ibid.*, 208.

<sup>62</sup> Sinclair, *Unorthodox Lawmaking*, 50.

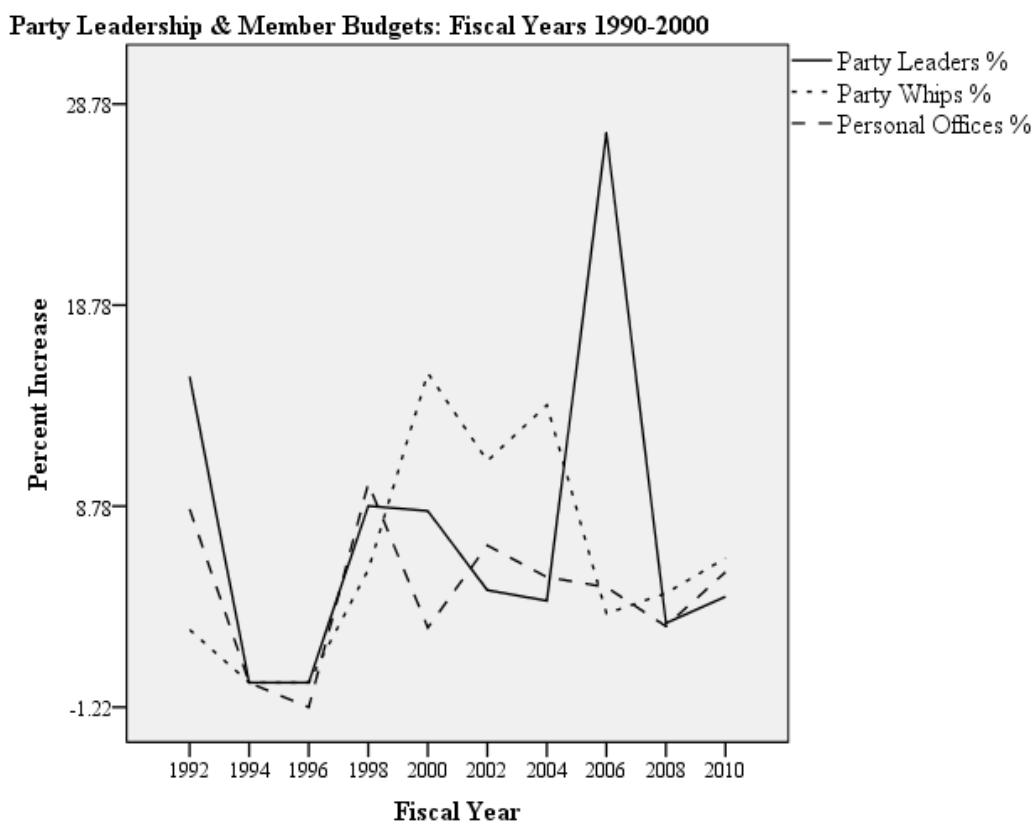
do this by providing services such as expert staffing or by supplying pertinent information regarding the legislative process. They can intervene in the committee assignment process, raise money for candidates, and shape the party's communications strategy as one of its most visible members.

Reflecting the increased role of party leaders in Senate decision-making is the increase over the last two decades in the resources allocated to these positions via their annual office budgets. Funding for the offices of majority and minority leader are allocated to one account in the annual legislative branch appropriations bill. This amount is divided evenly according to Senate tradition, regardless of the number of members each party has. The budgets for the party whips are handled in the same manner (see Figure 4.2 below).

**Figure 4.2**

The amount allocated to the offices of the majority and minority leaders increased from \$1.4 million in 1990 to \$5.2 million in 2010. This represents an increase of approximately 350% in 20 years, or an average annual rate of growth of 6.52%.

Similarly, the amount allocated to the whips increased from \$458,000 in 1990 to \$3.3 million in 2010. This represents an increase of over 700% in the same period, or an average annual rate of growth of 10.36%. In contrast, the office budgets of individual senators increased by only 262% over the same period; an average annual rate of growth of just 4.93%.

**Figure 4.3**

As demonstrated in Figure 4.3 above, the rate of growth in the office budgets of the party leaders and whips exceeded that observed for individual senators in all but six fiscal years during this period. Interestingly, the rate of growth for individual senators exceeded that for both the party leaders and whips in only one year. It is also important to note that the party leaders receive individual office budgets as well, and that these resources can be used to supplement their leadership accounts if necessary.

Committee assignments and campaign contributions can also be utilized by party leaders to demonstrate support for particular members. Committee assignments for both parties are made by a Committee on Committees. The Majority Leader and the Minority Leader both play an influential role in this process. As already noted, the Republican Conference adopted rules to go in to effect in the 109th Congress that would allow the Republican Leader to fill half of the vacancies of “A” committees at the beginning of a Congress. The only limitation was that every member was guaranteed to receive two “A” committees. This gave the Republican Leader considerable leverage over new and continuing members.<sup>63</sup> The Democratic Leader also has significant influence over committee assignments. Committee vacancies are filled by the Democratic Steering and Outreach Committee, of which the Democratic Leader is one member. However, the Democratic Leader appoints its chairman and members. The Democratic Conference perfunctorily ratifies its decisions.

Party leaders have become increasingly involved in their colleagues’ campaigns for office. They often attend fundraisers on their behalf, thereby helping to raise more money. Party leaders also maintain large political action committees (PACs) and typically give generously to their colleagues. On occasion, leaders may even intervene in primary elections to influence the race directly. For example, Senator McConnell intervened in Senator Jim Bunning’s (R-KY) reelection campaign making it more difficult for the latter to raise money in Kentucky. When Bunning withdrew from the race

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<sup>63</sup> Alan K. Ota, "Senate GOP Gives Its Leader a Powerful New Tool," *CQ Weekly*, November 20 2004.

and announced his retirement, McConnell quickly lent his support to candidate Trey Grayson (R-KY) in the race against the eventual victor, Rand Paul (R-KY).

Yet notwithstanding the common attributes shared by the leaders in both parties vis-à-vis their colleagues, important differences remain in their ability to impact the decision-making process based on whether that party is in the majority or minority. As one would expect, the Majority Leader's ability to influence the decision-making process differs considerably from the Minority Leader's. Yet the specific nature and interaction of their respective powers serve to make the majoritarian and structured consent patterns of decision-making work.

One of the primary ways in which the Majority Leader manages the decision-making process is represented by what Sinclair (2007) terms "post-committee adjustments."<sup>64</sup> In his capacity as a facilitator of compromise between multiple committees, the Majority Leader assumes a direct role in crafting legislation that can pass on the Senate floor. The need for post-committee adjustments also increases as more controversial issues that precipitate obstructionist tactics by the minority party are considered. Thus, the Majority Leader influence increases when controversial issues are considered. As the only member of the Senate with a truly global view of the hurdles to passing legislation, the Majority Leader is uniquely suited to craft compromises on committee products that can surmount any hurdles raised by obstructionists. As filibusters increase and the number of legislation that needs 60 votes for passage

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<sup>64</sup> Sinclair, *Unorthodox Lawmaking*, 51.

increases, the likelihood that post-committee adjustments to facilitate agreement will also increase. As post-committee adjustments increase, the role of the Majority Leader as the facilitator of compromise at the post-committee stage also increases, and thus the influence of the Majority Leader increases. As such, the super-majoritarian aspects of the Senate indirectly, and counter-intuitively, increase the influence of the Majority Leader.<sup>65</sup>

In addition, members are more likely to defer to their party leaders on controversial legislation precisely because they are chosen by the full conference, and not by some abstract principle. As such, the Majority Leader may feel more responsibility to negotiate an agreement with which the party agrees and reflects their concerns. Moreover, the conference may feel more comfortable with having someone they picked represent them on major issues. Committee leaders are not necessarily out of their party's mainstream like the chairmen in the 1940s and 1950s, but while they are technically responsible to their conference, the power of seniority leads many to conclude that all but the most serious infractions of committee leaders will go unpunished by the conference. For example, Senator Robert "Bob" C. Smith (R-New Hampshire) was allowed to claim the chairmanship of the Environment and Public Works Committee after the death of its chairman despite having previously left the Republican Party simply on the condition that he rejoin the party. A similar situation occurred with Senator Joe Lieberman (I-Connecticut) and the Homeland Security and Government Affairs Committee after Lieberman left the Democratic Party and successfully ran for reelection as an

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<sup>65</sup> Sinclair, *Unorthodox Lawmaking*, 21.



independent. More recently, Senator Murkowski was allowed to retain her ranking member position on the Energy and Natural Resources Committee after being stripped of her party leadership position for running as an independent write-in candidate for the Senate seat in Alaska against a Republican endorsed by the state and national parties.

The development of the Majority Leader as the principal arbiter of influence in the contemporary Senate strengthens the position of the Minority Leader relative to his own party. Minority party members will be better able to respond to the centralization of influence under the Majority Leader if they designate one member with whom the Majority Leader can negotiate directly to structure the legislative process.

The centralization of the decision-making process under the Majority Leader and the emergence of the Minority Leader as an effective counter-part to the Majority Leader allows the Minority Leader to serve as an important source of information for his party members. This role is underscored by the increasingly crowded Senate agenda and workload. In such an environment, individual members become more reliant on their party leaders for important information. Through weekly policy lunches, both party leaders have an opportunity to influence their members in a larger group. While agreement is not a given, being the first to present an opinion helps to frame the debate and dictate its general parameters.

### **The Partisan Nature of Majoritarian Decision-Making**

The majoritarian pattern of decision-making represents an explicit attempt by the majority party to limit conflict in a manner that advantages its members. As a consequence, the detailed legislative work of the Senate on controversial issues occurs primarily in negotiations within the majority party itself. Committee consideration of such issues is perfunctory at best and bypassed altogether at worst, and legislation developed within the majority party conference is placed directly on the Senate floor for consideration. Floor participation is constrained and the minority party is essentially blocked from any meaningful participation in the legislative process. Yet the super-majoritarian requirements of Senate rules usually force the Majority Leader to add a limited number of members of the minority party to his governing coalition in order to reach the 60 votes necessary to end debate and proceed to a final vote on a proposal.<sup>66</sup>

The drive to achieve collective party goals motivated Majority Leaders to seek to use the full extent of their influence to structure Senate decision-making. According to Sinclair (2006):

By controlling the agenda, leaders can reduce the frequency with which they and their colleagues must choose between a preferred policy position and the position dictated by electoral concerns. They might be able to ensure that the opposition cannot offer an amendment that would split the party and create a public relations problem for the leadership.<sup>67</sup>

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<sup>66</sup> Andrea C. Hatcher, "A Man for All Seasons: Partisan Constraints on U.S. Senate Majority Leaders," *Party Politics* 16, no. 3 (2010), 90-91. Also see: Barbara Sinclair, "The Senate Leadership Dilemma: Passing Bills and Pursuing Partisan Advantage in a Nonmajoritarian Chamber," in *The Contentious Senate: Partisanship, Ideology, and the Myth of Cool Judgment*, ed. Colton C. Campbell and Nicol C. Rae (New York: Rowman & Littlefield Publishers, Inc., 2001).

<sup>67</sup> Sinclair, *Party Wars*, 41.

Baker and Dole were the first Majority Leaders to operate in a majoritarian manner. During his tenure as Majority Leader, Dole “was far more willing to bring a measure to the floor, challenge his colleagues to object to proposed amendments, and, at least implicitly, threaten retaliation.”<sup>68</sup> Dole was also “generally unsympathetic to colleagues seeking to reserve opportunities to offer unspecified amendments and often pressured party colleagues into concurring with unanimous consent requests that did not fully accommodate their interests.”<sup>69</sup> Majority Leader Dole was able to do this by threatening 24-hour sessions and weekend sessions. He would also often threaten to cancel upcoming recesses so that the Senate could finish its work. Dole also increasingly used smaller and less comprehensive unanimous consent requests that would not cover an entire bill. He would also force a senator to object to these requests and actually filibuster a bill.<sup>70</sup>

Leaders Baker and Dole sought to diminish individual member autonomy in other ways as well. For example, both sought to change the way the practice of “holds” worked in the Senate. In 1982, Majority Leader Baker announced that he would no longer automatically treat member holds as binding. Dole announced in 1986 that holds would

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<sup>68</sup> Smith, *Call to Order*, 109.

<sup>69</sup> Ibid.

<sup>70</sup> Ibid., 109-111.

no longer be kept in confidence. In the future, concerned members could learn the identity of those members placing holds on legislation.<sup>71</sup>

These developments ultimately reinforced and accelerated the shift in the structural balance of power from the committees to the party leadership. As a result, the positions of influence in the Senate changed. The decentralized institutional position of chairmen that previously characterized the Senate gave way to active participation and the emergence of the Majority Leader as *the* arbiter of influence within the Senate.

### *Majoritarian Method of Limiting Conflict*

An important aspect of majoritarian decision-making is that it reflects the use of Senate rules by the majority party to limit the participation of the minority in the legislative process. Because majoritarian decision-making reflects procedures designed to explicitly block the minority from participating in the legislative process, its use can be interpreted as obstruction by a Senate majority. Put simply, the majority obstructs, or blocks, the minority from participating in the debate and amendment process on the Senate floor. Such majoritarian obstructionism is often mistakenly identified as minority obstruction because members of the minority party often resort to procedural maneuvers to protest the majority's use of this pattern of decision-making.

Viewed in this context, the increasingly centralized position of political parties in Senate decision-making has had a significant impact on the institution's procedures and

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<sup>71</sup> Smith, *Call to Order*, 112.

the manner in which they are used. As described above, the majority party, acting through the Majority Leader, often resorts to procedures in order to limit conflict that results from the combination of the Senate's permissive procedural atmosphere and the polarized political environment in which it deliberates. Procedures are the principal means by which unified and ideologically cohesive majority parties seek to maintain the Senate's productivity while also passing their policy agenda. This inevitably entails reducing opportunities for the minority party to participate in the decision-making process. In majoritarian decision-making, minority party members are limited in the amendments they can offer and are often forced to resort to obstructionist procedures in order to make substantive policy arguments. Sinclair (2006) acknowledges this, arguing that "procedural votes may be substantive votes in hiding."<sup>72</sup> As a result, senators are more likely to utilize their procedural rights to pursue more partisan and ideologically polarized goals. The majority party is likely to avail itself of all of its procedural tools to enact a more partisan and ideologically polarized agenda. In response, the minority party will likely seek to obstruct the majority for perceived policy and electoral gain. This obstructionism, so the argument goes, leads to gridlock precisely because the Senate is unable to overcome the instability inherent in its institutional structure and pass legislation in such a polarized environment. The dramatic increase in the number of cloture motions filed and invoked over the last twenty-five years and the rapid rise in the

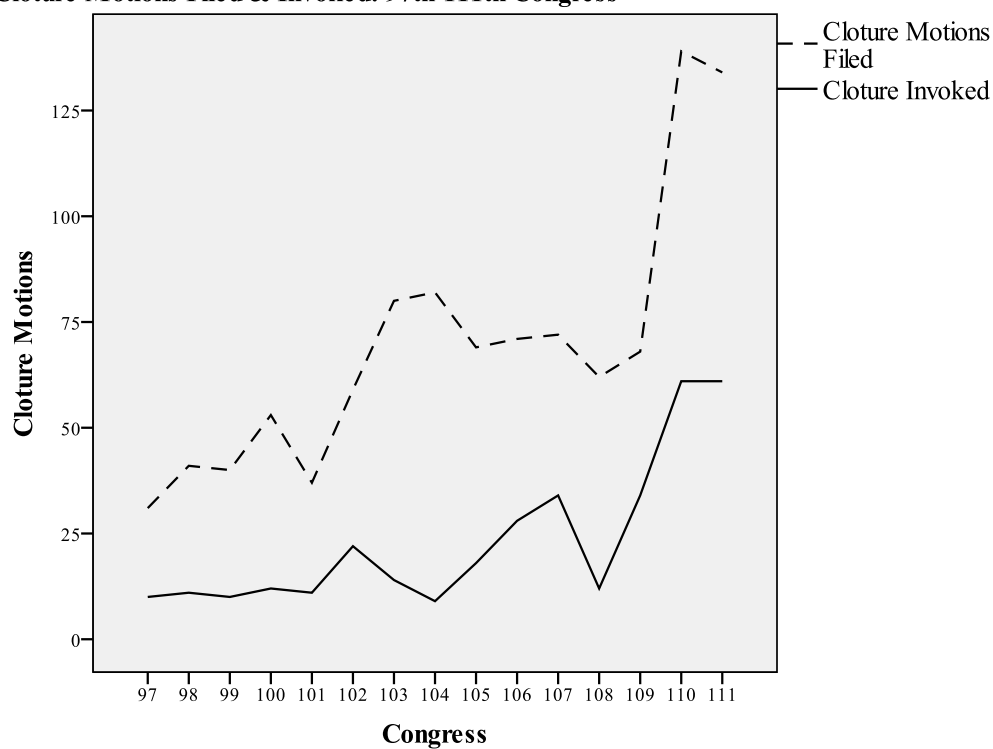
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<sup>72</sup> Sinclair, *Party Wars*, 150, 164.

practice of “filling the amendment tree” to block the consideration of unwanted amendments seemingly supports this argument (see Figures 4.4 and 4.5 below).

**Figure 4.4**<sup>73</sup>

**Cloture Motions Filed & Invoked: 97th-111th Congress**

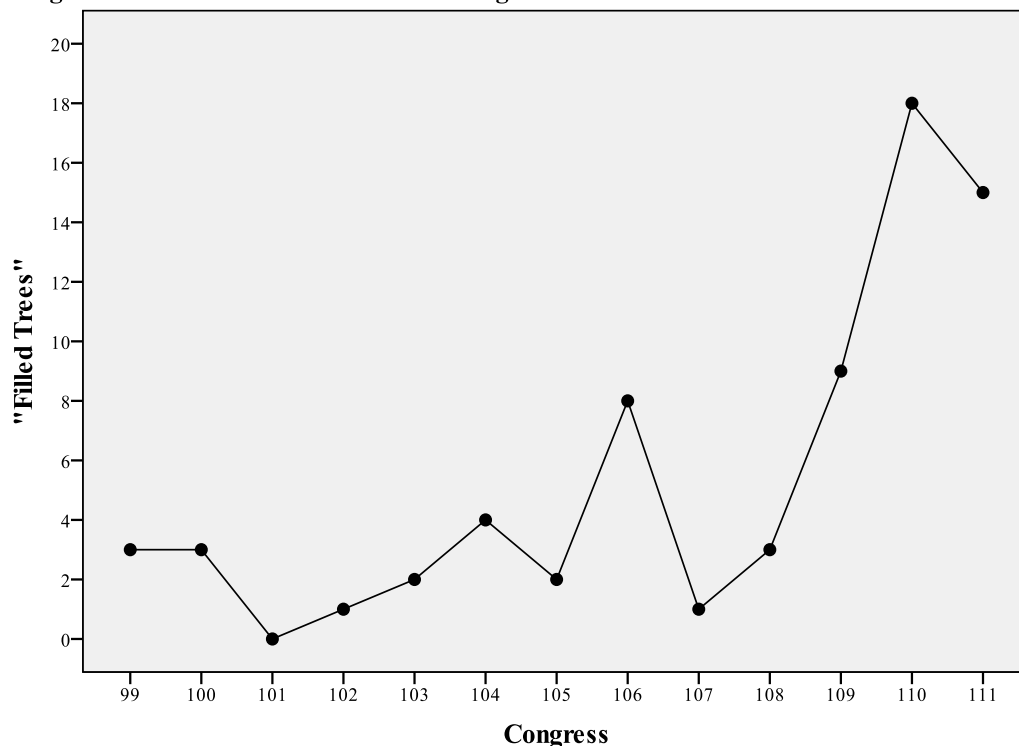


Data Compiled by the Congressional Research Service & Author

<sup>73</sup> *Congressional Research Service*, “Senate Procedural Tools to Block the Minority: Cloture Motions Since 1919.” Data also available from the United States Senate Library: <http://www.congress.gov/xtags/senlib/cloture/clotureCounts.jsp>.

Figure 4.5<sup>74</sup>

## Filling the Amendment Tree: 99th-111th Congress



Data Compiled by the Congressional Research Service & Author

According to this analysis, minority party members obstruct the majority by abusing the Senate's right to unlimited debate and the ability to freely offer germane and non-germane amendments on the Senate floor. As a result, the Majority Leader is often forced to fill the amendment tree and file cloture on legislation in an effort to overcome obstruction. Yet for many scholars and journalists, the evidence for minority obstructionism is based simply on the total number of cloture motions filed. Put simply, majoritarian obstructionism is not widely acknowledged in the literature. According to

<sup>74</sup> *Congressional Research Service*, Report prepared as of October, 2010. Information updated through the end of the 111<sup>th</sup> Congress by author.

Binder, “it is very hard for political scientists to take those numbers and disentangle the two alternatives.”<sup>75</sup> Binder cites two explanations for the dramatic increase in cloture motions filed over the past two decades:

One is the possibility that there is actually obstruction so the Majority Leader feels he needs to file cloture or the fact that the Majority Leader wants to have some certainty and so he files cloture to lend some certainty to what’s coming.<sup>76</sup>

However, a third explanation for the dramatic increase in cloture motions is possible. Indeed, a closer examination of the procedural record indicates that there are other explanations for the dramatic increase in cloture motions than either minority obstruction or the desire for “certainty” in the legislative process. Such explanations underscore the rationale behind the majoritarian pattern of decision-making and illustrate its particular utility to the majority party. In addition, they specifically illustrate how the majoritarian pattern can be utilized to successfully limit conflict in the Senate while maintaining the institution’s legislative productivity. They also reveal significant limitations inherent in such a pattern.

For many students of the Senate, cloture motions and filibusters are synonymous.<sup>77</sup> According to this popular interpretation, the permissive procedural

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<sup>75</sup> Sara A. Binder, “The Past, Present, and Future of the Filibuster,” in *AEI Politics Watch, Session III* (Washington, D.C.: 2010).

<sup>76</sup> Ibid.

<sup>77</sup> For example, see: Norman Ornstein, “Our Broken Senate,” *The American*, March/April 2008. Ornstein attributes the dramatic increase in cloture motions during the 110<sup>th</sup> Congress to increased minority obstruction.



environment of the Senate floor led minority party senators, and majority party members who were out of step with their colleagues on various issues, to more fully exploit their procedural rights in an effort to achieve their goals. Senators quickly recognized the increased importance of the floor as an arena for decision-making and increasingly utilized the filibuster to obstruct legislation with which they disagreed. In addition to the traditional use of the filibuster to block measures they opposed, members also began to aggressively use the threat of protracted debate to affect the content and outcome of legislation, as well as to force action on unrelated matters.<sup>78</sup> With this rapid increase in both the scope and frequency of filibusters during the second half of the twentieth century came an increase in the number of cloture motions.<sup>79</sup>

It is certainly not incorrect to view cloture motions and filibusters as related. However, such a narrow focus overlooks the many advantages that the cloture rule gives the Majority Leader. The evolution in the use of cloture during the second half of the twentieth century for purposes other than to simply combat minority obstruction and proceed to a final vote on legislation favored by a supermajority of the Senate increased the influence of the Majority Leader. Specifically, cloture was increasingly utilized preemptively to speed consideration of legislation regardless of time spent on the floor. In this process, the majority party obstructs the minority's ability to freely debate measures

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<sup>78</sup> Walter J. Oleszek, *"Holds" in the Senate* (Washington, D.C.: Congressional Research Service, 2008), 1. Smith, *Politics or Principle*, 151.

<sup>79</sup> Smith, *Politics or Principle*, 103; The rise of individualism in the Senate prompted increasingly novel uses of traditional obstructionism in the Senate. Barbara Sinclair, "The '60-Vote Senate': Strategies, Process, and Outcomes," in *U.S. Senate Exceptionalism*, ed. Bruce I. Oppenheimer (Columbus: The Ohio State University Press, 2002), 246-247.

and offer amendments pursuant to the Senate rules. Such majoritarian obstructionism may simply result from the anticipation of expected obstruction by the minority party. It could also represent a genuine effort to push the majority's agenda through the Senate unchanged in a timely manner. The restrictive process could also be utilized to defend carefully negotiated legislation from killer amendments or to protect majority party members from having to take tough votes.<sup>80</sup>

According to House-focused theories of congressional parties, the majority party, acting through its leadership, seeks to structure the legislative process to its advantage. Viewed in this context, the evolution of the cloture rule can be interpreted as increasing the influence of the Majority Leader and, by extension, the majority party in Senate decision-making. Specifically, the Majority Leader uses cloture as a scheduling tool in the contemporary Senate. While filing cloture is a time-intensive process, it does provide the only clearly established procedure and timeline for the resolution of debatable questions in the Senate. Thus, the cloture rule provides a small degree of certainty in an otherwise uncertain environment. The Majority Leader can use such certainty to his advantage by scheduling votes at the end of the week and immediately prior to a long recess in an effort to force an issue. Obstructing senators are less likely to risk the ire of their colleagues by forcing a rare weekend session.

The cloture rule also gives the Majority Leader the ability to impose a germaneness requirement on amendments to legislation post-cloture. Such a requirement

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<sup>80</sup> Sinclair, *The Transformation of the U.S. Senate*, 129.

may spare majority party members from having to take tough votes on non-germane amendments. It also protects carefully crafted legislation from poison-pill amendments unrelated to the underlying issue. However, recent procedural innovations may undermine cloture's ability to impose a germaneness requirement in this manner. In the 111<sup>th</sup> Congress, the Senate Parliamentarian ruled that motions to suspend the rules in order to offer an amendment post-cloture regardless of whether or not it is germane are allowed under the Senate's precedents.<sup>81</sup> This ruling effectively neutralized the restrictions on amendments triggered by successfully invoking cloture. When combined with the guarantee of ten minutes of debate time for any member post-cloture, senators can utilize motions to suspend the rules to force a vote on any issue despite the opposition of the majority. However, it is important to note that such votes are procedural in nature (i.e. to suspend the rules) and thus do not directly involve the underlying question (i.e. the amendment offered). Only after the rules have been successfully suspended can the underlying question receive an up or down vote.

Nevertheless, the early evidence suggests that such motions paradoxically strengthen the position of the majority. The Senate's consideration of the Food Safety Bill (S. 510) at the end of the 111<sup>th</sup> Congress illustrates one way that the Majority Leader can use motions to suspend the rules to his advantage. Such motions require 67 votes for

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<sup>81</sup> Prior to this innovation, motions to suspend the rule were used "primarily to make it in order to offer amendments, legislative in nature, to appropriation bills, which otherwise under Rule XVI would be out of order." According to Rule V of the Senate's standing rules: "Any rule of the Senate may be suspended at any time after a day's notice in writing by a two-thirds vote." Frumin, *Riddick's Senate Procedure*, 1266.

passage, as opposed to the 60 votes required to invoke cloture and the 51 votes to pass a measure on an up or down vote. As such, the Majority Leader has a vested interest in blocking measures from receiving votes during regular order. Members blocked from offering their amendments on S. 510 resorted to filing motions to suspend the rules after cloture was invoked. Once filed, Majority Leader Reid negotiated a unanimous consent agreement that set up stacked votes on the motions and final passage. However, unlike recent unanimous consent agreement that typically set 60-vote thresholds for controversial issues, this unanimous consent agreement established a 67-vote threshold for passage pursuant to the threshold required to suspend the Senate's rules. As a result, the legislation negotiated by the majority was better protected from a limited number of minority amendments and ultimately passed.<sup>82</sup>

Finally, cloture is often utilized by the Majority Leader for symbolic purposes. By triggering an up or down vote on legislation, cloture usually establishes a clearly defined line of demarcation between the majority and minority parties on controversial issues. Such votes can be presented as "take-it-or-leave-it" propositions and those voting against them for procedural reasons (i.e. blocked from offering amendments) are often portrayed as not supporting the underlying legislation by the measure's proponents.

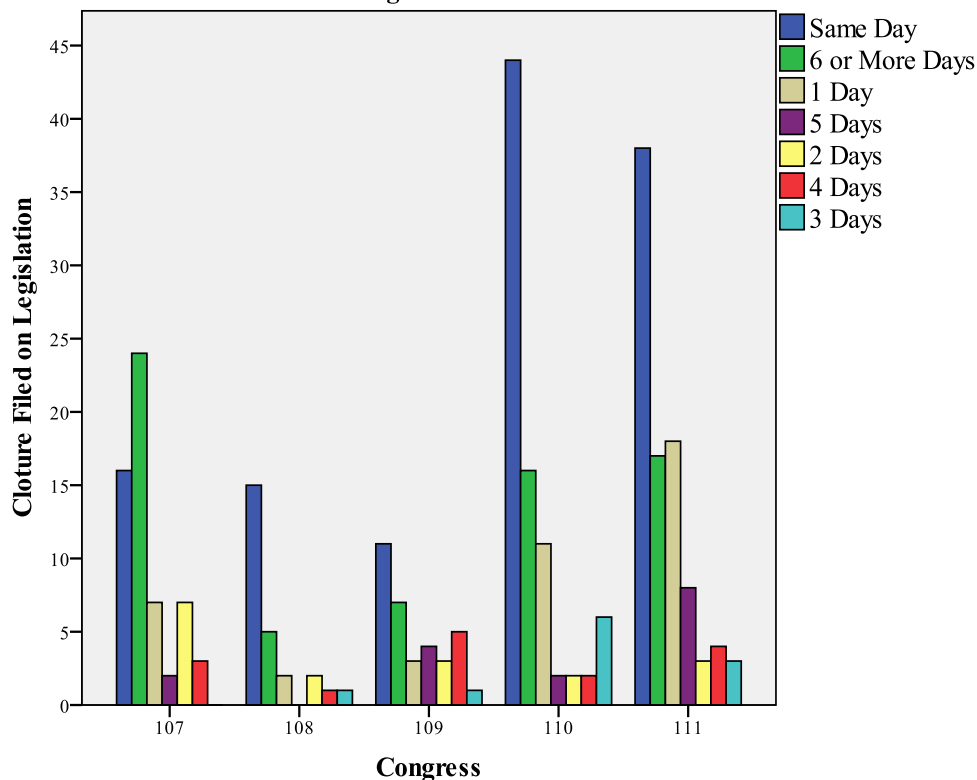
Without the cloture process, the Majority Leader would not have these admittedly limited tools at his disposal and would thus be unable to structure the legislative process in the majority's advantage. When combined with the practice of filling the amendment

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<sup>82</sup> Niels Lesniewski, "Senate Passes Food Safety Bill after Rejecting Earmark Ban," *CQ Today*, November 30 2010.

tree, the cloture process further allows the Majority Leader to effectively obstruct the ability of individual senators to participate in the legislative process pursuant to Senate rules.

Filling the amendment tree and filing cloture all block some sort of amendments and thus give the Majority Leader more control over the agenda. As such, as instances of filling the amendment tree and motions to invoke cloture increase, the Majority Leader's control over the agenda increases as well. Such control is particularly evident when cloture is filed early in the process before any obstruction can be said to have occurred. Indeed, the Majority Leader has increasingly circumvented the regular legislative process in the Senate by filling the amendment tree and filing cloture on measures *before* a filibuster could be said to have actually occurred (see Figure 4.6 below.)

**Figure 4.6****Cloture Schedule: 107th-111th Congress**

Data Compiled by the Congressional Research Service & Author

The presence of majoritarian obstructionism in the Senate is further supported when the cloture and filling the amendment tree procedures are utilized *in tandem* by the Majority Leader to restrict the minority's ability to freely debate and amend measures on the Senate floor. The amendment tree was filled during the consideration of three measures during the 108<sup>th</sup> Congress and cloture was filed on the same day the legislation was brought to the floor on one of these measures (33%). However, this number increases considerably in the next three congresses. In the 109<sup>th</sup> Congress, the Majority Leader utilized the "same-day cloture" procedure during the consideration of seven out of the

nine measures on which he filled the amendment tree (78%). In the 110<sup>th</sup> Congress, this number rose to ten of eighteen (56%). Finally, the Majority Leader utilized the “same-day cloture” procedure during the consideration of fourteen out of the fifteen measures on which he filled the amendment tree (93%) in the 111<sup>th</sup> Congress. These numbers support the argument that the Senate Majority Leader increasingly utilizes procedures to control the agenda and pass policies the majority party supports over the objections of the minority and in contradiction of long-standing traditions and rules in the institution (majoritarian obstructionism).

The cloture rule no longer simply represents a procedural tool to bring debate to a close on a particular measure, thereby overcoming minority filibusters. Sinclair (2007) acknowledges this evolving use of the cloture rule:

Because filibuster threats are frequent and may also be nebulous, a bill’s supporters may file for cloture before opponents have clearly indicated they intend to engage in extended debate, and undoubtedly sometimes when opponents actually had no such intention. The requirement that all amendments must be germane after cloture is invoked sometimes encourages supporters to try for cloture. Finally, when senators spend a long time debating and amending a measure, they may simply be performing their deliberative function rather than trying to kill the measure. Many filibusters have as their purpose forcing a compromise on the legislation rather than killing it outright. Therefore, distinguishing between deliberating and filibustering becomes even harder.<sup>83</sup>

As the majority party sought to expand its control over Senate decision-making by structuring the legislative process to its advantage, the minority party increasingly

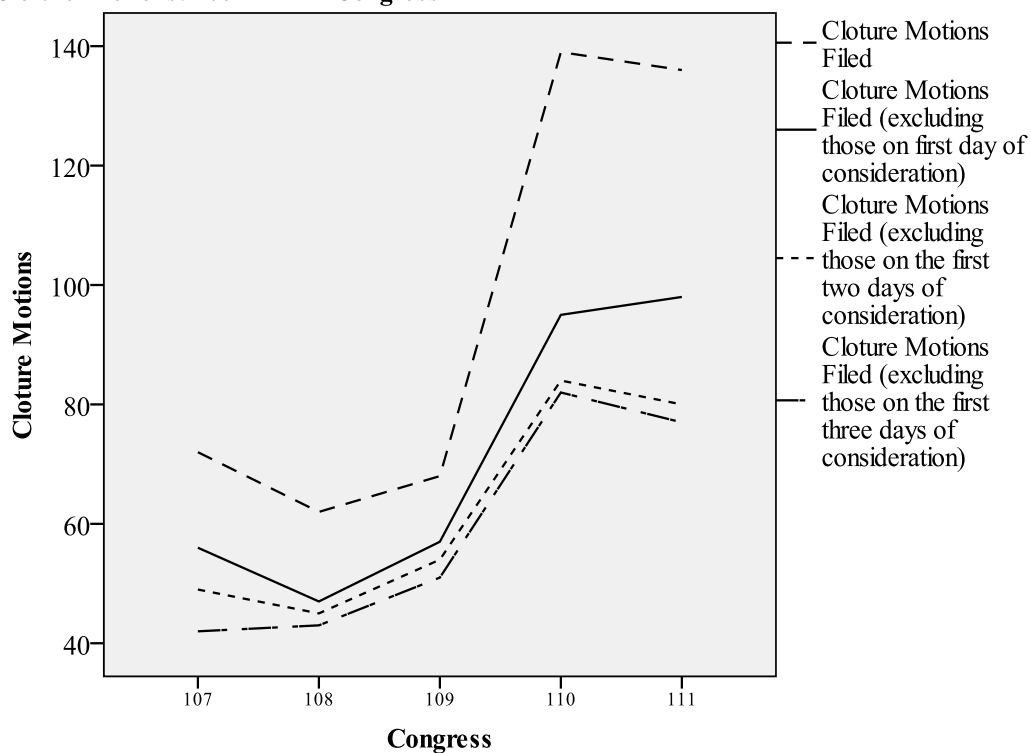
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<sup>83</sup> Sinclair, *Unorthodox Lawmaking*, 68-69.

resorted to procedures such as the right to extended debate and the ability to freely offer amendments to legislation in an effort to protest the new-found limitations on their participation in the consideration of legislation on the Senate floor.<sup>84</sup> This dynamic can be easily illustrated by comparing the total number of cloture motions filed in a particular Congress with the number filed when omitting those motions filed on the first day of legislation's consideration or very early in the decision-making process (see Figure 4.7 below).

**Figure 4.7**

**Cloture Motions: 107th-111th Congress**



Data Compiled by the Congressional Research Service & Author

<sup>84</sup> Sinclair, *Unorthodox Lawmaking*, 63-64; Sinclair, *Party Wars*, 150.



Majoritarian decision-making is unlikely to be successfully sustained for a significant period of time. This is due to the fact that its procedural features cannot accommodate the inevitable demands of individual members from both parties to debate and amend legislation on the Senate floor. While a polarized issue agenda and highly cohesive parties continue to characterize the environment in which the Senate exists, changes in the institution's formal rules and procedures designed to limit minority rights have not yet occurred.<sup>85</sup> While there has been a decline in the percentage of bills and joint resolutions passed by the Senate since the 97<sup>th</sup> Congress, the decrease does not indicate persistent gridlock. What explains such consistent levels of legislative productivity despite the opposition of procedurally empowered and ideologically polarized partisan minorities? Why do individual senators and the minority party leadership consistently refrain from using Senate rules to obstruct the agenda of the majority party if doing so is perceived to bring them policy and electoral gain?

### **The Bipartisan Nature of Structured Consent Decision-Making**

The structured consent pattern of decision-making is characterized by a prearranged process on the Senate floor. There are moderate barriers to the participation of highly interested members who are willing to devote the time and resources necessary to be involved and the majority and minority leaders serve as the only meaningful

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<sup>85</sup> The reduction of the threshold necessary to invoke cloture from two-thirds to three-fifths of the Senate in 1975 and the reduction of post-cloture time to 100 hours in 1979 and a further reduction to 30 hours in 1986 are the only significant changes in the Senate's *formal* rules during this period that significantly limited minority rights. Sinclair, *The Transformation of the U.S. Senate*, 128-129.

participants on a consistent basis and across all issues. While a small number of highly interested senators may participate at times, it is the two party leaders who largely determine the decision-making process by negotiating unanimous consent agreements (UCAs) to structure debate and amendment activity. As a result, action occurs predominantly off the Senate floor in negotiations between the two leaders and within each party conference under the direction of its leadership.

While there will certainly be variations depending on the partisan balance of power in Congress and the White House, as well as the nature of the legislative agenda and media coverage of the Senate, structured consent is the primary pattern of decision-making in the contemporary Senate precisely because it allows the institution to overcome the instability inherent in its design and pass legislation despite the partisanship and ideological conflict characteristic of the current political environment.

While the conflict characteristic of the Senate's environment requires a centralized decision-making process in order to make the institution work, the majoritarian pattern of decision-making is difficult to successfully sustain for a significant period of time because its procedural features cannot accommodate the demands of individual members of both political parties to participate in the legislative process. In this respect, the individualism inherent in the Senate's super-majoritarian nature will lead the majority party to pursue structured consent decision-making as the next best method of limiting conflict. In addition, the procedural features of majoritarian decision-making, such as its restrictions on amendments, will lead the minority party to

pursue structured consent decision-making as a means of guaranteeing its participation, albeit on a limited basis, in the legislative process. Structured consent decision-making can thus be interpreted as resulting from the combination of the individualism, polarization, and overall improved team play characteristic of the Senate's current environment. These features create incentives for the party leaders to cooperate to advance the legislative process. In this respect, increasingly polarized parties paradoxically create the conditions necessary for bipartisan cooperation at the leadership level.

Resembling the majoritarian pattern, structured consent is dependent on cohesive parties to provide centralized structures within which the decision-making process occurs. However, decision-making in conditions of structured consent takes the form of a centralized bipartisan process in which the majority and minority party leaders cooperate within certain bounds to limit conflict.<sup>86</sup> Such cooperation is possible because the goals of the two parties are not necessarily always mutually exclusive. For example, the minority party may be concerned with winning a majority in the next election and will thus focus its efforts primarily on messaging outside the Senate in order to achieve that goal. As a result, minority party members may not be overly concerned with legislative success inside the Senate. Securing votes on amendments that are ultimately defeated may even enhance the party's messaging efforts. In turn, the majority party may be primarily focused on enacting its legislative agenda before the next election and will thus

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<sup>86</sup> In contrast to the approach taken in this dissertation, Lee argues in *Beyond Ideology* that political parties in the Senate consistently oppose one another on either ideological or partisan grounds. Lee, *Beyond Ideology*, 3.

be less concerned with the messaging efforts of the minority party so long as they do not unduly delay or jeopardize that agenda. Structured consent decision-making can easily transition into a majoritarian process, however, if the goals of the majority and minority parties are mutually exclusive or if the majority is more cohesive than the minority. Such scenarios would preclude the cooperation characteristic of structured consent and allow the majority the opportunity to entice like-minded minority party members to support its legislative proposals.

Structured consent is dependent on powerful majority *and* minority party leaders more than any other institutional actors to limit conflict. Indeed, it is principally the increased role of the Minority Leader in the legislative process that distinguishes structured consent from majoritarian decision-making. Cooperation between the two party leaders is induced by the combination of the conflict characteristic of the Senate's current external environment with the institution's permissive procedural rules internally. As such, the majority and minority leaders must find ways to mollify the demands of their most ideological and combative members while negotiating with each other in order to advance the decision-making process. Their efforts thus represent a delicate balancing act. On one hand, party leaders must be seen as advancing the goals of their partisan colleagues to the disadvantage of the opposition party. On the other hand, excessive intransigence by party leaders on behalf of their memberships would lead to an increase

in obstruction and the resulting gridlock. Sinclair (2001) has labeled this phenomenon the dilemma of Senate party leadership.<sup>87</sup>

The centralized location of the majority and minority leaders allows them to shape the preferences of their partisan colleagues on both policy and parliamentary strategy.<sup>88</sup> For example, leaders will often attempt to leverage their centralized location in their conference in an effort to fashion a consensus within their party because unanimity increases their leverage in negotiations with each other. The Minority Leader's ability to extract a commitment from the Majority Leader to allow votes on minority amendments will increase if he can successfully block cloture. While doing so does not typically require the Minority Leader to maintain the support of everyone in his party, a united minority reduces the likelihood that the Majority Leader will be able to secure the 60 votes needed to invoke cloture by negotiating with a small number of minority party members.

Procedurally empowered and polarized senators generally defer to their party leadership because they want to get something accomplished themselves by virtue of the legislative process. Individual members thus balance the short-term benefits of obstruction with its long-term costs. Members negatively affected by obstruction are likely to retaliate in kind in the future. In addition, reputational concerns at both the

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<sup>87</sup> Sinclair, "The Senate Leadership Dilemma," 65.

<sup>88</sup> Oleszek, "The Strategic Context of Congressional Party Leadership," 2.

individual and party level may also induce restraint and elite cooperation.<sup>89</sup> As a result, while senators in both parties guard their individual autonomy and generally oppose permanent changes in the Senate's rules that would weaken or reduce this autonomy for the sake of efficiency, regularity, and a streamlined decision-making process, they will often create ad hoc, largely informal structures in which party leaders are given great leeway to negotiate compromises with each other in order to limit conflict in the decision-making process.

### *Structured Consent Method of Limiting Conflict*

As I have argued, structured consent decision-making is made necessary by the increase in obstruction that resulted from the erosion of norms that previously restrained member behavior in the Senate. The typical senator today is more likely to avail himself of extending debate and other procedural tools to protect his interests. This transformation created significant problems for the institution and led to the creation of the "60-Vote Senate."<sup>90</sup> According to the conventional wisdom, the growth of obstructionism has left a partisan and confrontational environment in its wake. This results from broader member participation and is exacerbated by narrower partisan majorities and a crowded agenda as well as the willingness of individual senators to

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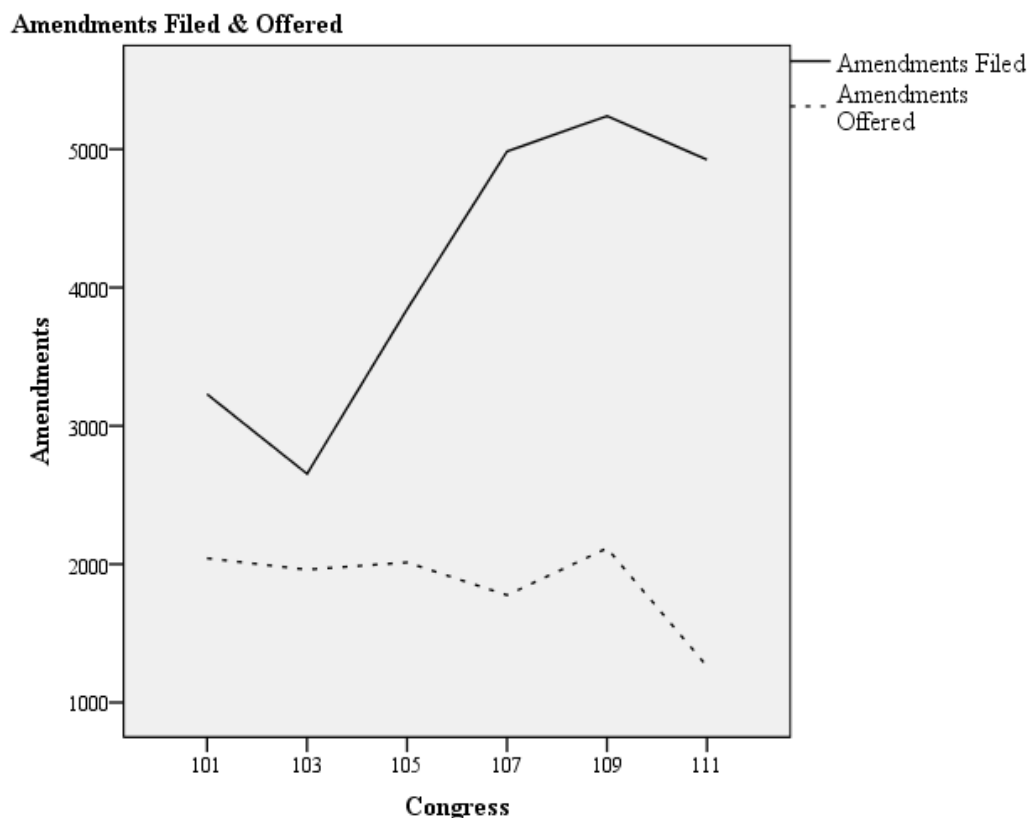
<sup>89</sup> Barbara Sinclair, "The New World of U.S. Senators," in *Congress Reconsidered*, ed. Lawrence C. Dodd and Bruce I. Oppenheimer (Washington, D.C.: CQ Press, 2005), 17-18; Valerie Heitshusen Richard S. Beth, Bill Heniff Jr., and Elizabeth Rybicki, "Leadership Tools for Managing the U.S. Senate," in *Annual Meeting of the American Political Science Association* (Toronto, Canada: 2009), 20.

<sup>90</sup> Sinclair, *The Transformation of the U.S. Senate*; Sinclair, "The "60-Vote Senate"."

pursue their own agenda at the expense of the institution's collective interests. Yet the Senate continues to function despite these difficulties.

In an effort to compensate for the erosion of Senate norms, increasingly influential majority and minority leaders gradually began to work together to ensure that the Senate continued to pass legislation dealing with controversial and uncontroversial issues alike. Over the course of the 1990s and the first decade of the twenty-first century, the party leaders would eventually supplant the old norms and customs of the Senate as the predominant force making the institution work. The procedural patterns of Senate decision-making changed considerably as a result.

The Senate limits conflict in structured consent decision-making by erecting moderate barriers to the participation of interested members. This creates a semi-exclusive debate and amendment process on the Senate floor. While most members continue to participate in the amendment process, a much lower percentage of the amendments filed are actually offered (see Figure 4.8 below). Furthermore, the percentage of amendments offered and ultimately agreed to is low for most measures.

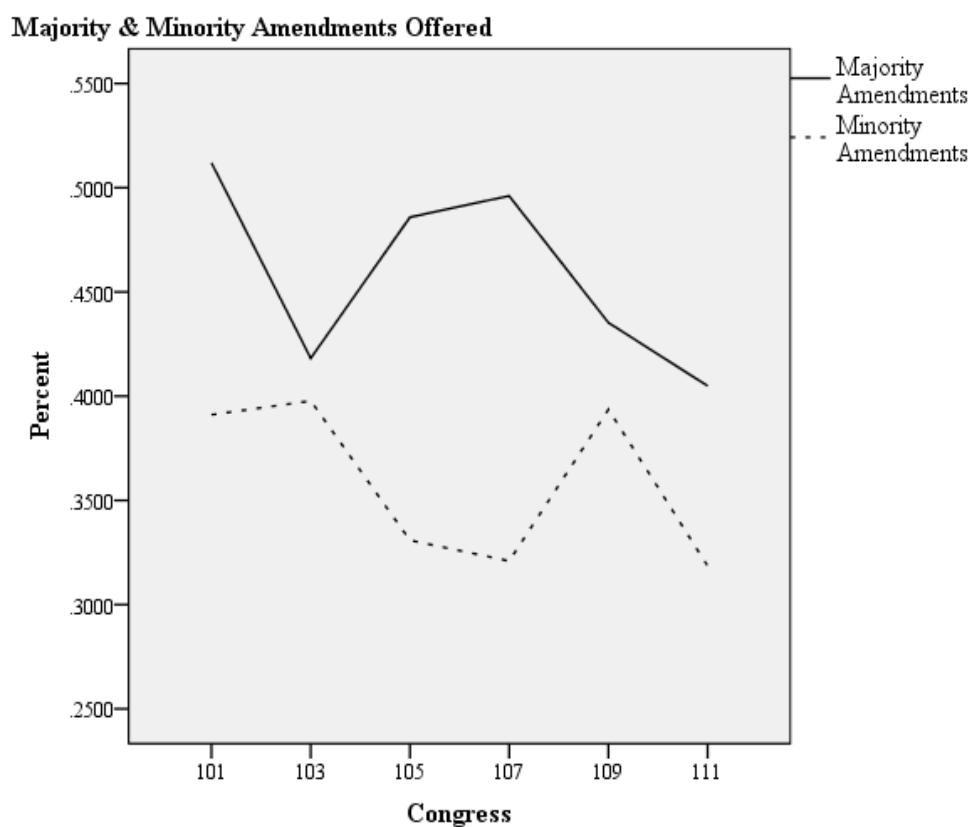
**Figure 4.8**

As illustrated in Figure 4.8 above, the difference between the number of amendments filed and those actually offered to legislation increases as the level of conflict increases within the Senate for the simple reason that members seeking to take a position on a contentious issue are likely to file an amendment dealing with that issue. However, both the majoritarian and structured consent patterns of decision-making contain this conflict in part by limiting the number of amendments actually offered to legislation and thus considered on the Senate floor. As a result, the gap between amendments filed and offered widens over the course of the period observed.



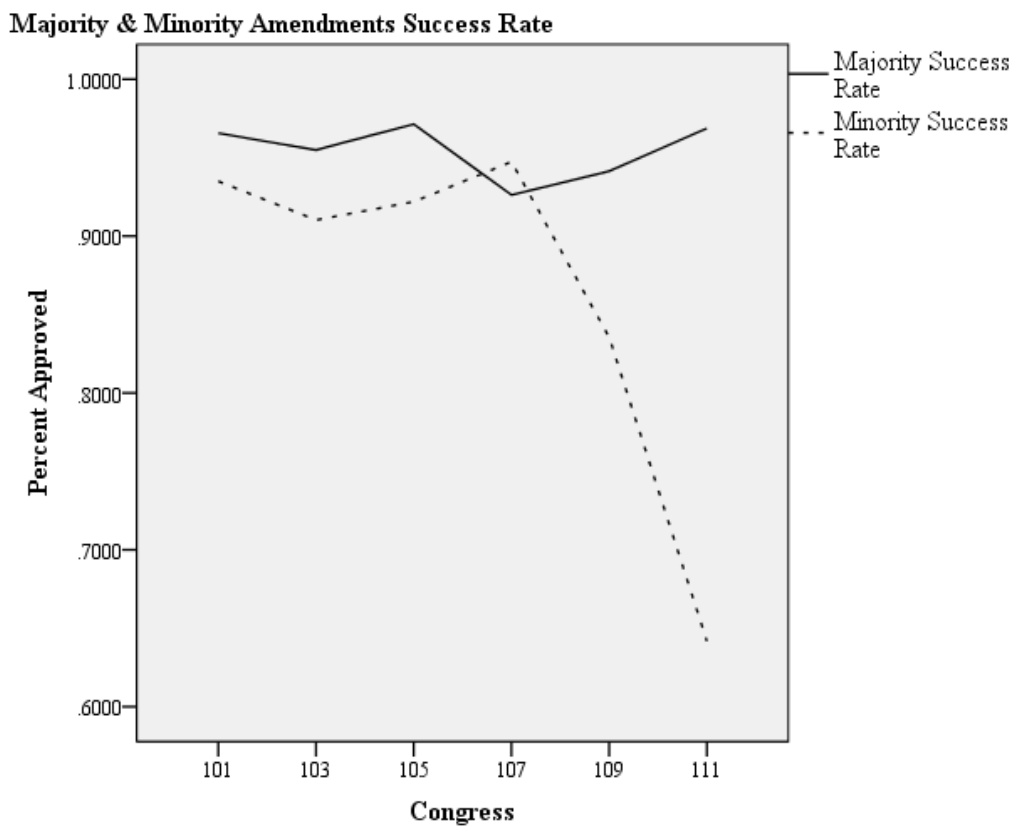
However, unlike in the majoritarian pattern, majority and minority party amending activity is relatively uneven in structured consent decision-making. Figure 4.9 illustrates the percent of majority and minority amendments offered to legislation on the Senate floor. This demonstrates an inverse relationship between the two parties in terms of amending activity. Put simply, when the majority party successfully offers a higher percentage of the amendments on the floor, the minority party is likely to offer a lower percentage.

**Figure 4.9**



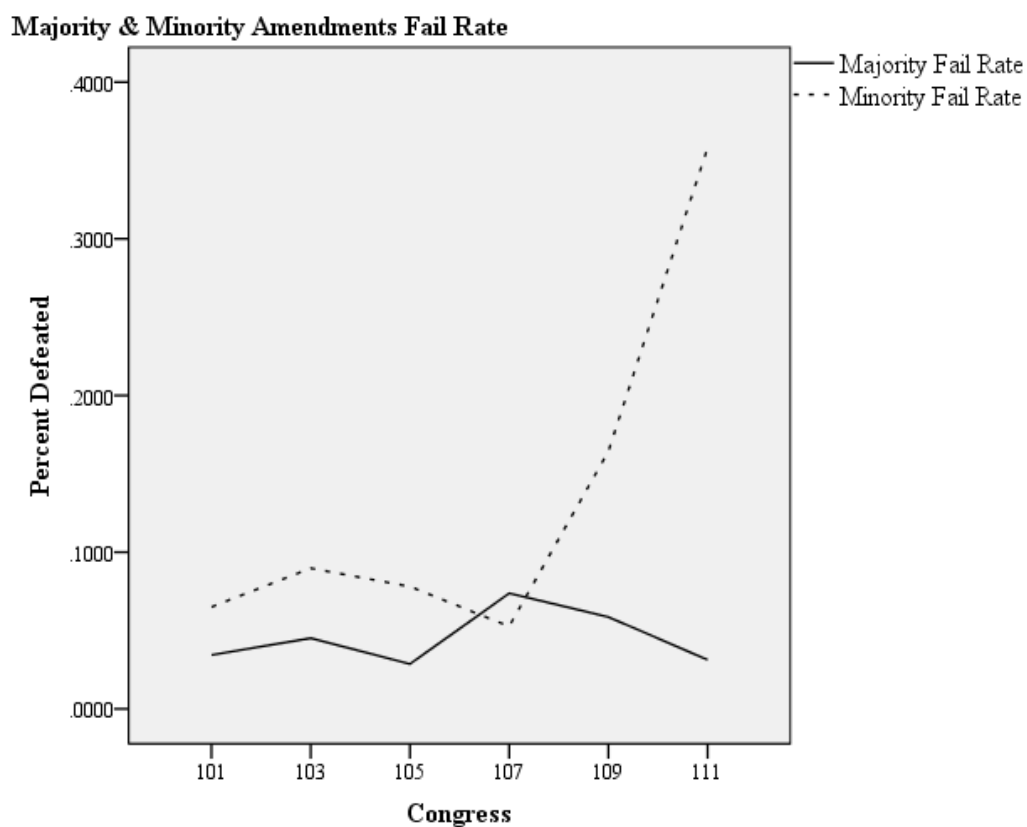
However, an examination of the success and fail rates for majority and minority amendments does not reveal the same inverse relationship. The likelihood that majority party amendments will pass on the Senate floor remains fairly consistent over time, while the likelihood that minority party amendments will pass declines significantly. Figure 4.10 below illustrates this disproportionate relationship between majority and minority success rates.

**Figure 4.10**



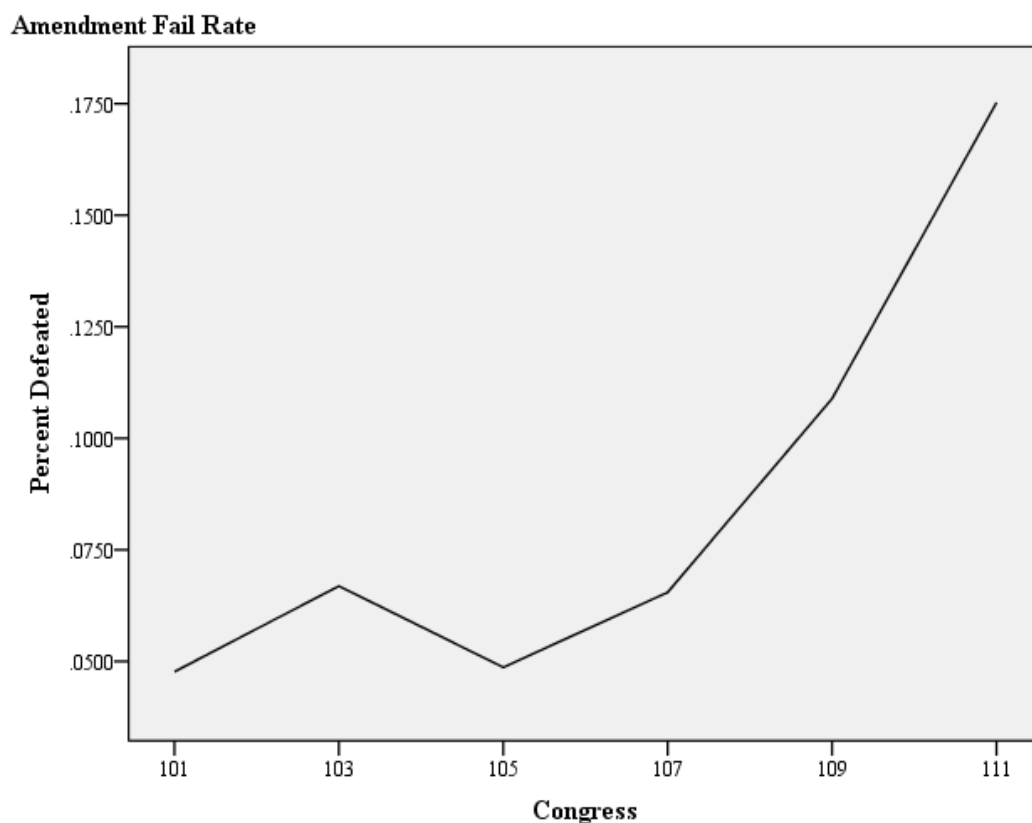
While the percent of majority amendments approved remains relatively even during this period, the percentage of minority amendments approved declines significantly beginning around the 106<sup>th</sup> and 107<sup>th</sup> Congresses. Similarly, Figure 4.11 below illustrates the percent of majority and minority amendments defeated on the Senate floor.

**Figure 4.11**



This significant disparity between fail rates for majority and minority amendments is reflected in an increase in the overall fail rate for amendments considered on the Senate floor, regardless of party sponsor (see Figure 4.12 below).

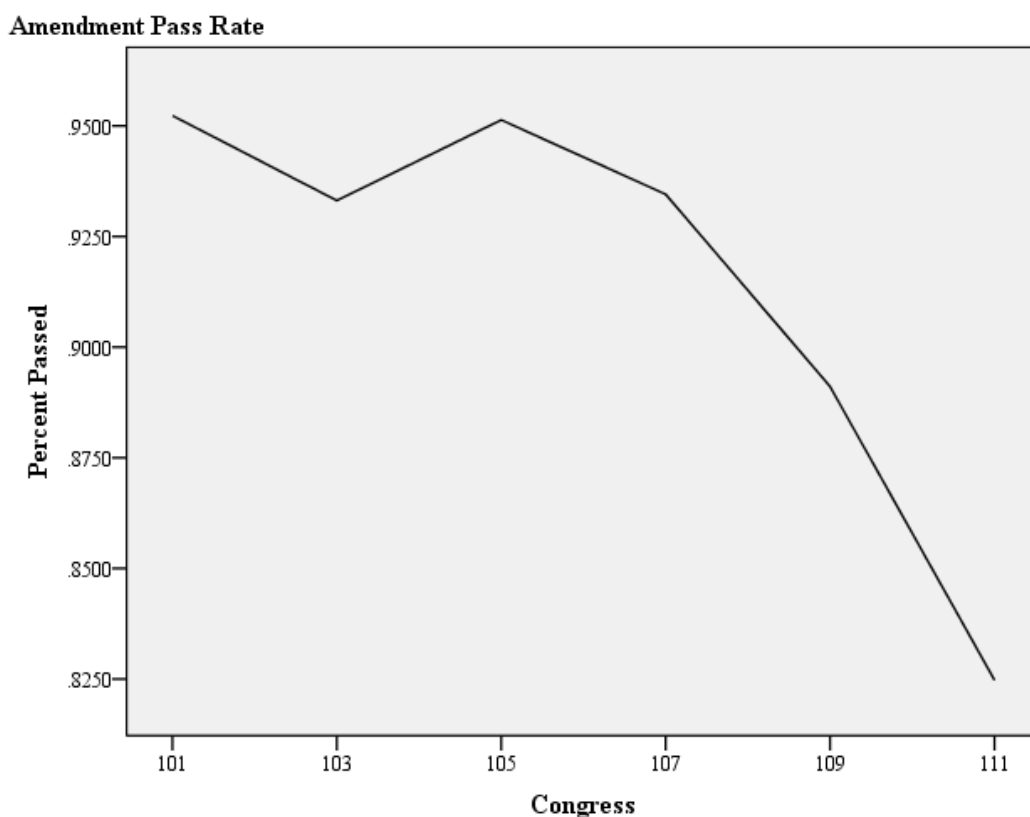
**Figure 4.12**



As illustrated above, the percent of amendments that were defeated increased dramatically from approximately 5% in the 101<sup>st</sup> Congress to approximately 17% in the 111<sup>th</sup> Congress. Similarly, the percent of amendments that passed when considered on the

Senate floor decreased significantly over the same period, falling from approximately 95% in the 101<sup>st</sup> Congress to 82% in the 111<sup>th</sup> Congress (see Figure 4.13 below).

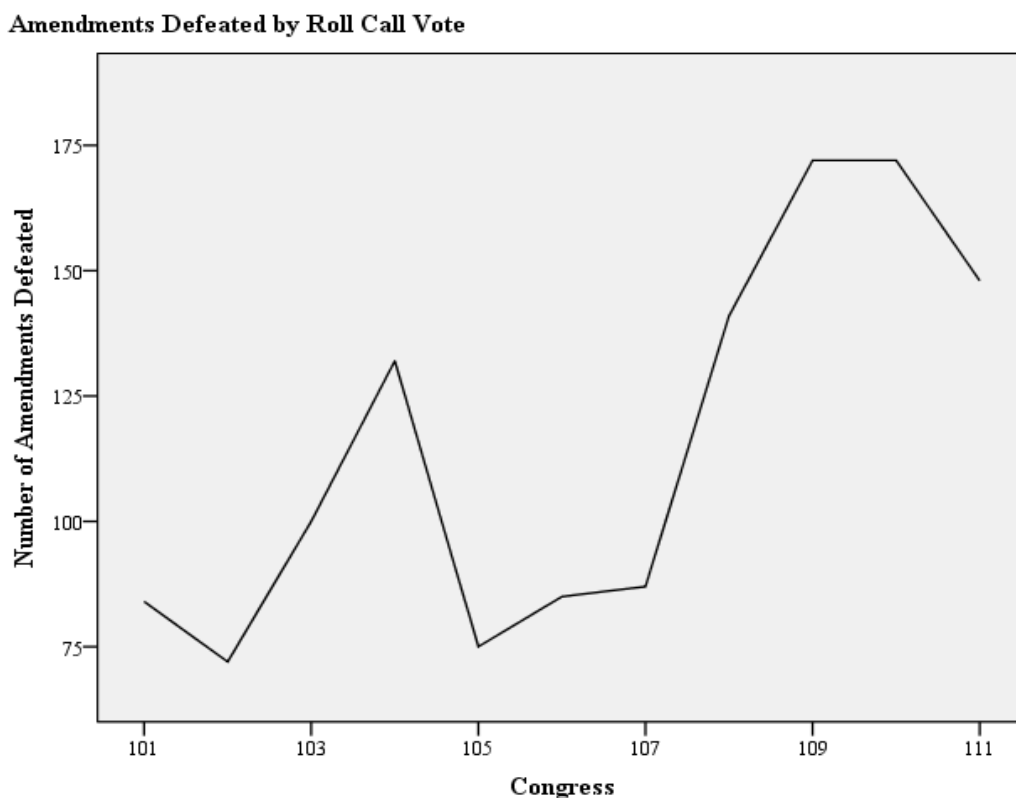
**Figure 4.13**



The rising number of amendments defeated on the Senate floor should reflect an increase in roll call votes given that any senator may request such a vote as long as it is seconded by one-fifth of the senators present and that members are unlikely to acquiesce in the defeat of their amendments on a regular basis without a roll call vote. As a result,

the number of amendments defeated by a roll call vote reveals a similar trend over the same period (see Figure 4.14 below).

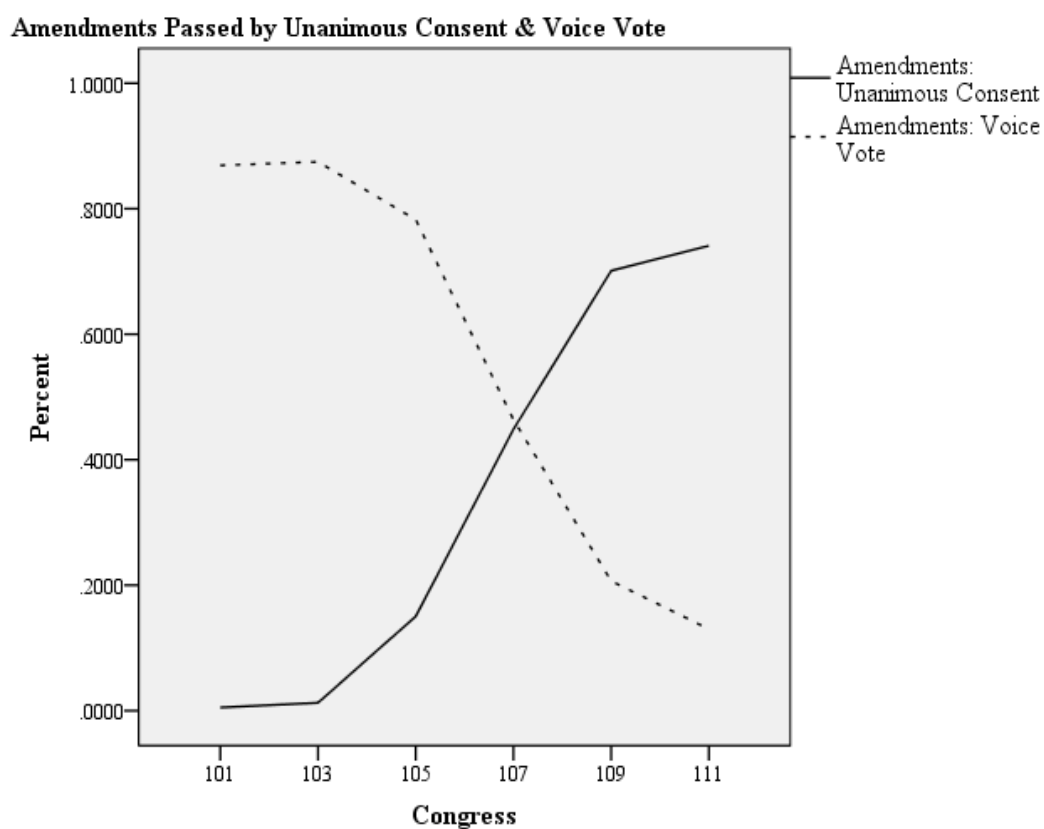
**Figure 4.14**



Yet despite the significant disparity in success rates for majority and minority amendments and the increase in amendments defeated by a roll call vote, amending activity during this period was not predominantly characterized by an overly contentious process. It is important to note that in the 111<sup>th</sup> Congress, approximately 82.4% of the amendments offered to legislation on the Senate floor passed. Only 17.5% were defeated.

The share of amendments passed on the floor significantly exceeds those that fail in every Congress examined. The manner in which amendments are passed on the Senate floor supports the argument that the decision-making process is not as contentious as it would appear by examining majority and minority amending activity alone. While the number of amendments approved by voice vote declined over the period, amendments approved by unanimous consent increased dramatically. Indeed, approximately 75% of all amendments are passed by unanimous consent today (see Figure 4.15 below).

**Figure 4.15**



The overall increase in the share of amendments passed by unanimous consent is particularly interesting given the disproportionate role played by the party leadership in crafting unanimous consent agreements (UCAs). Party leaders increasingly utilize UCAs as “structured consent” agreements. Far from merely setting dates for a future vote and scheduling speeches, these new consent agreements are much more comprehensive. They typically stipulate how much time can be used to debate a bill and divide this time between the majority and the minority parties. They also serve to limit what amendments will be allowed and state when they can be offered. These structured requests may also limit other prerogatives of individual members. While they can be negotiated at any point in the decision-making process, the likelihood that UCAs will be utilized in structured consent increases as the legislative process proceeds on a bill. In addition, they are likely used to wrap up consideration of a bill. As a result of their utility, comprehensive UCAs are now used to manage the decision-making process on the Senate floor to an unprecedented degree. What had been a very permissive procedural environment has gradually become more restrictive, and at no other time in its history has the outcome of the Senate’s decision-making process on the floor been less in doubt.

UCAs represent the chief means by which negotiated agreements between the majority and minority leaders can be “locked in.” In this respect, the use of UCAs in structured consent differs in subtle, yet important ways from that observed in other patterns. Specifically, UCAs serve as a tool with which party leaders encourage their colleagues to support the negotiated compromise. UCAs cannot be used in this manner



effectively by rank-and-file members. As a result, they represent valuable leadership tools in structured consent decision-making.

Structured consent decision-making is also evident in the use of UCAs to set 60-vote thresholds for amendments. The earliest documented use of a UCA to establish a higher vote threshold was in the 102<sup>nd</sup> Congress. However, this was a relatively rare procedural tool until the 109<sup>th</sup> and 110<sup>th</sup> Congresses, when Majority Leader Bill Frist and Harry Reid, respectfully, utilized them on an increasing scale. In the 109<sup>th</sup> Congress, UCAs were used in this manner in nine instances. However, in the 110<sup>th</sup> Congress, their use increased significantly, totaling 51 instances. Pursuant to such agreements, the amendment is withdrawn if it does not get the requisite number of votes. The practice allows an amendment's supporters to demonstrate support for cloture without going through the time-consuming process of invoking it. However, they are seldom successful. In the 109<sup>th</sup> and 110<sup>th</sup> Congresses, amendments considered in this manner failed 82% of the time.<sup>91</sup> As a result, their use can be interpreted as allowing the Majority Leader to facilitate the passage of legislation without having to block minority amendments. This process does not present a problem for majority party members because they oppose the amendment in question, and a 60-vote threshold means that it is unlikely to pass. Minority party members support this process because it provides an opportunity to offer the amendment in question and get a vote on it, all without having to expend the

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<sup>91</sup> Richard S. Beth, "Leadership Tools for Managing the U.S. Senate," 23.

necessary resources to actually filibuster the underlying legislation. In addition, they are not as concerned with defeat as they are likely more focused on messaging.<sup>92</sup>

Yet it is important not to overstate the power of UCAs like those stipulating 60-vote thresholds to pass amendments. Such agreements still require the consent of every single member. However, the two party leaders' centralized position allows them to more easily secure the needed support because they usually know what members need in return for their "consent." It is also common for party leaders to secure favors that can be called in at any time in order to ensure that they receive the necessary consent from reluctant members. Members agree to UCAs for several reasons. The most straightforward reason is that they may support the underlying legislation, and UCAs simply facilitates its passage. They may also support UCAs for scheduling reasons. Such agreements provide much needed certainty for members with very crowded schedules and for whom time is increasingly scarce. Members may also agree to give their consent to an agreement reached in negotiations between the majority and minority leaders in exchange for side payments, or their support on other items in the future. Finally, members may agree to UCAs as a result of pressure from colleagues, constituents, the president, or interest groups.

In a hypothetical example, the Majority Leader informs the Minority Leader of his intent to schedule a bill for floor consideration and asks for a list of amendments that minority members would like to offer. The Minority Leader has likely been in contact

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<sup>92</sup> Smith, *The Senate Syndrome*, 15; Richard S. Beth, "Leadership Tools for Managing the U.S. Senate," 21-23.

with his membership and has already attempted to encourage members to offer amendments that he believes will unify the conference or that provide valuable messaging opportunities for the party. The Minority Leader combines these amendments with those on which highly interested members insist and provides the list to the Majority Leader. The Majority Leader objects to any minority amendments that may pass, thereby undermining the underlying legislation he helped craft, or that are opposed by highly interested majority party members. The Majority Leader may also provide his counterpart with a list of amendments which majority members want to offer, though this list will likely be much shorter than the minority's as the majority party's concerns should have been incorporated into the underlying legislation by this point.

The Minority Leader discusses this new list of amendments with his conference and urges members not to insist on those amendments objected to by the majority. Doing so would jeopardize opportunities for roll call votes on the minority amendments with which the majority had no objection. The Majority Leader then leverages the support of the minority party in discussions with his own party conference in order to secure its support for allowing votes on the remaining minority amendments and to not insist on any additional amendments on their side that may cause the minority not to support the agreement.

Once the support of both the minority and majority conferences is secured, a UCA can be finalized that locks in the amendments allowed to be offered and the terms of the debate. Once on the legislation, lots of amendments are filed. However, only those

stipulated in the agreement receive action. Thus, the number of amendments offered will be low compared to those filed. Moreover, the minority amendments offered are likely to be defeated and the majority amendments offered are likely to pass.

This process facilitates what would most certainly be a more contentious debate if agreement could not be reached within the party conferences prior to floor consideration. In addition, it serves the interests of both party leaders in that the Majority Leader can effectively pick the minority amendments that will be offered, thereby protecting the underlying legislation and ensuring that his members do not have to cast tough votes that could be used against them in the next election cycle. In turn, the Minority Leader can secure votes on amendments that do not divide his membership and that represent messaging opportunities that the minority party would otherwise not have. The Majority Leader can abandon structured consent for a majoritarian pattern in the event that the Minority Leader is no longer interested in cooperating, or if he is unable to deliver the support of his conference for the agreement in question.

## Chapter 5: Legislative Productivity in the Contemporary Senate

*“Do people like legislation? They may not. And do some people wish that we could have... had a health care bill that had the public option in it? Absolutely. But you can’t say it’s dysfunctional or gridlock when you passed such an incredible amount of legislation.”*

-Former Senator Ted Kaufman (D-DE)<sup>1</sup>

The central claim of the proceeding analysis has been that current scholarship has failed to fully appreciate the nature of the relationship between the two political parties in Senate decision-making. Contemporary accounts of the Senate often characterize the decision-making process as “broken” because it is mired in partisan acrimony and gridlock. According to critics in academia and the media, such maladies prevent the Senate from performing its central function of lawmaking. “Congress Returns to Gridlock” proclaimed the front page of the Capitol Hill newspaper Roll Call in September 2010, shortly after the Senate returned from its annual August recess.<sup>2</sup> Excessive partisanship in the Senate was identified by the article’s authors as the culprit preventing Congress from passing several pieces of significant legislation during the remaining months of the 111<sup>th</sup> Congress. Similarly, reports of the Senate’s consideration of health care reform legislation in the fall of 2009 cast the debate as a monumental

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<sup>1</sup> Robert Siegel, "An Exit Interview with Delaware Sen. Ted Kaufman," *National Public Radio*, November 9 2010.

<sup>2</sup> Emily Pierce and Steven T. Dennis, "Congress Returns to Gridlock: Partisanship Will Keep Members from Accomplishing Much in September," *Roll Call*, September 13 2010.

struggle between Democrats and Republicans in which the latter utilized every tool at their disposal in order to obstruct the legislation.<sup>1</sup>

However, I have argued that such characterizations of Senate decision-making are not wholly accurate, and that they may even serve to distort our understanding of the legislative process in the institution. In reality, Senate decision-making is not typically characterized by such zero-sum conflict. Admittedly, nothing of consequence would pass if this were the case given the Senate's permissive rules of procedure and the power to affect the legislative process bestowed by such rules on individual members, particularly in the minority party. Rather, a certain degree of cooperation between the two political parties characterizes the legislative process. Such bipartisan collaboration can be brought into focus by viewing Senate decision-making as a multidimensional process in which majority and minority party leaders interact with a perpetually changing cast of rank-and-file members in both parties in an effort to simultaneously achieve disparate, though not always antithetical, goals.

Former Senator Ted Kaufman illustrated this disconnect between conventional wisdom and the actual nature of decision-making in the contemporary Senate while reflecting on a decades long career in the institution. In an interview with National Public Radio in the closing days of the 111<sup>th</sup> Congress, Kaufman observed that the Senate was not less civil than it was in the 1970s when he first began his career on Capitol Hill.

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<sup>1</sup> John Stanton and Emily Pierce, "Coburn Launches Procedural Move to Slow Health Care Debate," *Roll Call*, December 16 2009; Emily Pierce, "Senate Races the Clock: Reid Still Eyes Next Week for Health Debate," *Roll Call*, November 10 2009.

According to Kaufman, “in the Senate, the civility is excellent... you can watch it on C-SPAN. Members aren’t down on the floor yelling at each other.”<sup>2</sup> Kaufman’s interview also draws our attention to the problems associated with viewing decision-making in the Senate as characterized by excessive levels of gridlock. Again, to quote Kaufman:

And the other thing that you hear from people is the Senate is dysfunctional or gridlocked, but we passed more legislation in this Congress. I’ve been around – 40 years I’ve been around and talking to some of the experts around town who follow this, more legislation since FDR. So it’s not like we have gridlock now.<sup>3</sup>

Kaufman’s description of Senate decision-making implicitly supports my central argument that partisan competition has been relatively restrained in recent years given the polarizing environment in which the Senate exists, and that the legislative process has not been characterized by irreconcilable gridlock as a result. Indeed, the Senate continues to formulate policy and pass legislation on controversial and uncontroversial issues alike.

I have argued that party leaders are the only actors that are consistently involved in the decision-making process across the range of issues considered in the contemporary Senate. The collaboration bred by such extensive involvement between the majority and minority leaders facilitates Senate decision-making by serving as the mechanism by which the disparate goals of their partisan colleagues can be aligned in such a way that does not jeopardize the legislative productivity of the institution.

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<sup>2</sup> Siegel, "An Exit Interview with Delaware Sen. Ted Kaufman."

<sup>3</sup> Ibid.

The Senate debate over health care reform legislation comes into sharper focus when viewed from this perspective. While Republicans obstructed the motion to proceed to the legislation and ultimately forced the Majority Leader to file cloture to end debate and proceed to a final vote on the measure, the bill's actual consideration on the Senate floor was not characterized by excessive minority-party obstruction and gridlock. Senate Republicans approached the debate from the perspective of the upcoming 2010 midterm elections. Recognizing that they could not block the measure, they sought to use it as an opportunity to clarify the distinction between the two parties on health care. Yet Senate Republicans needed to balance this goal with the need to demonstrate to the Republican base that they were fighting the legislation as hard as they could. In contrast, the overriding goal for Senate Democrats was to pass health care reform. Given these considerations, it is not surprising that the majority and minority leaders negotiated UCAs to structure the decision-making process on a daily basis. These agreements set up side-by-side votes on majority- and minority-sponsored amendments and required that they get 60 votes in order to pass. Importantly, either leader could veto their colleague's choice of amendment simply by withholding their consent. Similarly, any individual Democrat or Republican senator could object to these agreements. However, such obstruction did not occur and the decision-making process unfolded in the manner described above until Majority Leader Reid finally secured the 60-votes necessary to end debate and proceed to a final vote on the legislation. At that point, Senate Republicans pivoted back to obstructing the legislation as they forced the Democrats to clear all of the



procedural hurdles they could possibly erect prior to an actual vote on final passage occurred. However, it is important to note that such obstruction did not occur until the bill's passage was clearly inevitable, at which point such obstruction could be interpreted as pointless as it could not succeed in blocking final passage of the legislation.

If party leaders are indeed cooperating in this manner to structure Senate decision-making on a regular basis, one test would be whether or not the Senate can continue to pass legislation in a polarized environment, and whether or not it does so in ways that differ fundamentally from the procedural features exhibited in majoritarian decision-making. Indeed, one can observe fewer amendments being offered to legislation and less time spent debating measures in the absence of procedural features characteristic of the majoritarian pattern over the last two decades as well. However, partisan voting patterns on procedural votes have increased. Given this evidence, something must be at work to limit conflict between polarized senators in the absence of the majoritarian obstructionism characteristic of majoritarian decision-making.

In this chapter, I argue that an examination of the procedural record over the past two decades demonstrates that structured consent has gradually supplanted collegial decision-making as the dominant pattern in the contemporary Senate, and that its procedural features largely account for the continued legislative productivity of the Senate during the consideration of controversial legislation.

While the precise motivations for individual member activity cannot be known with a great degree of certainty, several assumptions about Senate decision-making can

be made by consulting the procedural record. To this end, various procedural activities commonly observed in collegial, majoritarian, and structured consent patterns of decision-making can be measured by examining the manner in which legislation is considered in the Senate. As such, the path a measure takes to the Senate floor, the nature of debate limitations and amendment activity once on the floor, as well as the partisan nature of roll call voting can be used to measure the presence of each pattern of decision-making. However, it is important to note that these patterns of decision-making represent mere approximations of the legislative process in practice. Nevertheless, the decision-making process in the Senate does exhibit such patterned behavior and the consideration of legislation on the Senate floor can be distinguished by the metrics listed above.

### **Methodology**

Evidence shows that major legislation is considered under conditions of structured consent in the contemporary Senate. In testing this hypothesis, this dissertation examines major legislation, as defined by Congressional Quarterly, considered in the 102<sup>nd</sup>, 108<sup>th</sup>, 110<sup>th</sup>, and 111<sup>th</sup> Congresses in order to determine whether it meets the criteria for collegial, majoritarian, or structured consent decision-making.<sup>4</sup> These particular

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<sup>4</sup> CQ selects key votes for the Senate on major issues considered in each Congress according to the following criteria: "a matter of major controversy; a matter of presidential or political power; a matter of potentially great impact on the nation and lives of Americans." "How CQ Picks Key Votes," *Congressional Quarterly Weekly*, December 15 2008. For a list of key votes in the 102<sup>nd</sup> Congress see: "Senate Key Votes," *Congressional Quarterly Weekly*, December 28 1991. "Key Senate Votes," *Congressional Quarterly Weekly*, December 19 1992. For a list of key votes in the 108<sup>th</sup> Congress see: "Key Senate Votes," *Congressional Quarterly Weekly*, January 3 2004. "Key Votes 2004: Senate," *Congressional Quarterly Weekly*, December 11 2004. For a list of key votes in the 110<sup>th</sup> Congress see: "Key Senate Votes," *Congressional Quarterly Weekly*, January 7 2008. "2008 Key Votes: Senate," *Congressional*

Congresses were chosen because they include several different scenarios for partisan control of Congress and the presidency. Both the 102<sup>nd</sup> and the 110<sup>th</sup> Congresses experienced unified Democratic control of the House and Senate and Republican control of the White House. The 108<sup>th</sup> and 111<sup>th</sup> Congress witnessed unified Republican and Democratic control of government respectively. In addition, the distance between the 102<sup>nd</sup> and 111<sup>th</sup> Congress will allow for one to observe just how dramatically decision-making has changed in the Senate over the last two decades. Specifically, this period was marked by the emergence of a powerful, centralized, party leadership in Congress. This dissertation concludes with a comparison of the predominant pattern of decision-making in each Congress in an effort to better distinguish between the three patterns and articulate the conditions under which structured consent operates.

Methodological approaches similar to the one adopted here have been utilized in the literature to illustrate broader trends in Senate decision-making. For example, France E. Lee and Bruce I. Oppenheimer utilize a similar approach in *Sizing Up the Senate: The Unequal Consequences of Equal Representation*.<sup>5</sup> Lee and Oppenheimer use Congressional Quarterly's Key Vote database in the Senate to compile a list of important

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*Quarterly Weekly*, December 15 2008. For a list of key votes in the 111<sup>th</sup> Congress see: Kent Allen, "Majority Sweats the Big Stuff," *Congressional Quarterly Weekly*, January 4 2010. "Senate Key Votes," *Congressional Quarterly Weekly*, January 3 2011. For the purposes of this dissertation, any measure receiving a key vote is analyzed. Measures with more than one key vote are counted only once. Nominations are excluded. In addition, legislation is only analyzed at the stage of initial consideration in the Senate.

<sup>5</sup> Frances E. Lee and Bruce I. Oppenheimer, *Sizing up the Senate: The Unequal Consequences of Equal Representation* (Chicago: The University of Chicago Press, 1999).

votes and then examine them to evaluate whether or not small state senators are more likely to adopt particular legislative strategies to achieve their goals.<sup>6</sup>

Examinations of individual senators' voting records are used extensively in the literature on congressional parties and decision-making.<sup>7</sup> In addition to the roll call voting record, this chapter will examine other procedural activities that take place on the Senate floor. This chapter proceeds on the assumption that if roll call votes can accurately demonstrate member behavior and provide evidence of member goals, so too can other activities of individual members such as amendment activity and the path a measure takes to the floor. A similar methodological approach is employed by both Sinclair (1989) and Smith (1989) to document the transformation in Senate decision-making from what this dissertation terms normative decision-making to collegial decision-making.

### **Decision-Making in the 102<sup>nd</sup> Congress**

Based on the categories in Tables 3.2 and 3.4, the collegial pattern of decision-making was, at least for key votes, by far the most prevalent in the 102<sup>nd</sup> Congress. CQ rated actions on 26 different bills as key votes in 1991 and 1992. Of these bills, 81% were

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<sup>6</sup> Lee and Oppenheimer, *Sizing up the Senate*, 142.

<sup>7</sup> John W. Kingdon adopts such an approach in *Congressmen's Voting Decisions*. Kingdon writes that "social scientists have traditionally studied legislative voting by analyzing roll call data." Specifically, he utilizes voting data to illustrate how particular constituencies, congressional colleagues and staff, committees, party leadership, and the executive branch influence the behavior of members of Congress. John W. Kingdon, *Congressmen's Voting Decisions*, 3rd ed. (Ann Arbor: The University of Michigan Press, 2007), 6-8, 10; According to Smith (2007), "political scientists have been drawn most frequently to the roll call voting record of Congress for evidence of party influence. Smith, *Party Influence in Congress*, 4.

considered under procedural conditions of collegial decision-making. Only 8% could be identified as majoritarian and 11% as structured consent.

### *Collegial Decision-Making*

Out of the 21 measures considered under conditions of collegial decision-making, 17 were placed on the Senate calendar only after receiving committee consideration. Two of the four measures placed directly on the calendar without having gone through the committee process had companion measures that had previously been considered by the relevant committee of jurisdiction in the Senate. The Civil Rights Act of 1991 (S. 1745) was placed on the calendar after the Labor and Human Resources Committee reported a companion measure (S. 611) by unanimous consent. The Senate placed the House-passed Soviet Nuclear Threat Reduction Act of 1991 (HR 3807) on the calendar and proceeded to its consideration by unanimous consent out of procedural convenience even though the Foreign Relations Committee reported a companion measure (S. 1987) almost a week earlier.

Pursuant to the characteristics of collegial decision-making, 17 measures were laid before the Senate by unanimous consent. In addition, objections to proceeding to the remaining four measures were minor and cloture on the motion to proceed to each passed 93-4, 93-0, 95-0, and 98-2. In each instance, an overwhelming majority supported ending debate and proceeding to the measure for consideration.

As a result of the broad consensus to move to these 21 measures, there were few constraints on the debate and amendment process during their consideration. In all but one case, over 75% of the amendments filed were offered to the legislation. More importantly, over 75% of the amendments offered were agreed to in all but six cases. The percentage of amendments offered that were agreed to in five of these six cases were 70%, 67%, 67%, 57%, and 54%. In 20 out of 21 cases of collegial decision-making, more than 50% of the amendments offered were agreed to. The percentage of amendments offered and agreed to dropped below 50% on only one measure. Only 33% of the amendments offered during the consideration of the Family and Medical Leave Act of 1991 (S. 5) were agreed to. However, this low rate should not be interpreted as evidence of significant disagreement between members as only three amendments were filed to S. 5 and 100% of these were offered.

Illustrating the inclusive nature of the collegial pattern of decision-making, the number of majority and minority amendments offered to each measure was relatively even. In nine cases minority party members offered more amendments than their colleagues in the majority party. Success rates for majority and minority amendments were also consistently even, falling between 67% and 100% in 18 cases. During the consideration of S. 5, only one minority amendment was agreed to. However, all three minority amendments filed were offered and the majority party did not offer any amendments. During consideration of the Neighborhood Schools Improvement Act (S. 2), 43% of the minority party amendments offered were agreed to compared to a rate of

67% for the majority. Finally, 50% of the minority amendments offered to the Unemployment Compensation Amendments of 1992 (HR 5260) were agreed to.

Amendments to the measures considered under conditions of collegial decision-making were mostly disposed of by voice vote. While there were recorded votes on some amendments to these bills, these votes represent a small portion of the total amendments considered. Furthermore, a majority of one party voted against a majority of the other party less than 50% of the time on seven of the 20 bills receiving recorded votes. Only on five measures did a majority of each party vote against each other more than 75% of the time.

Unanimous consent agreements were utilized on all but three of the measures considered under conditions of collegial decision-making. These consent agreements were largely used to make the debate and amendment process more manageable for the individual members that wanted to participate. For example, they typically set vote and speech times. The following consent agreement from the Freedom for Russia and Emerging Eurasian Democracies and Open Markets Support Act (S. 2532) illustrates this scheduling function:

Mr. FORD. Mr. President, I ask unanimous consent that when the Senate completes its business today, it stand in recess until 8:30 a.m., Thursday, July 2; that following the prayer, the Journal of proceedings be deemed approved to date, and the time for the two leaders be reserved for their use later in the day; that there then be a period for morning business, not to extend beyond 10:30 a.m., with Senators permitted to speak therein for up to 5 minutes each; that immediately after the Chair's announcement, Senator NUNN be recognized to speak for up to 30 minutes; that

Senators MCCAIN, GORTON, and PRYOR be recognized for up to 10 minutes each; with Senator SIMPSON, or his designee, recognized for up to 10 minutes; with the time from 9:30 a.m. to 10 a.m., under the control of the Majority Leader or his designee, Senator LIEBERMAN; that Senator GRASSLEY be recognized for up to 20 minutes; that at 10:30 a.m., the Senate resume consideration of S. 2532, the Freedom Support Act; that once the bill is resumed, Senator LIEBERMAN be recognized to offer an amendment relating to business centers; that upon disposition of the first Lieberman amendment, Senator LIEBERMAN be recognized again to offer an amendment relating to science foundation; that no second degree amendments be in order to either of the Lieberman amendments; and that upon disposition of the second Lieberman amendment, Senator BRADLEY be recognized to offer an amendment relating to educational exchanges.<sup>8</sup>

Unanimous consent agreements were also utilized to limit the number of amendments that could be offered to the legislation under consideration. However, these instances were relatively rare in the 102<sup>nd</sup> Congress. The restrictive consent agreements that were used typically included all of the amendments members wanted to offer. Such agreements were utilized during the consideration of the Foreign Operations, Export Financing, and Related Programs Appropriations Act (HR 5368) and the Cancer Registries Amendment Act (HR 2507). In both cases, the number of amendments allowed to be offered (42 for HR 5368 and 12 for HR 2507) exceeded the number of amendments ultimately offered to each measure (28 for HR 5368 and 7 for HR 2507).

The cloture process was used to end debate on only one out of the 21 bills considered under collegial decision-making. Yet a majority of both parties voted to end

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<sup>8</sup> Senator Wendell H. Ford, "Comments on the Senate Floor," ed. United States Senate (Congressional Record, 1992): S9472.



debate and invoke cloture on the Biden-Thurmond Violent Crime Control Act of 1991 (S. 1241) only after ten days of floor consideration during which 101 amendments were considered and 92 were agreed to. 56 of the amendments were offered by the minority party and 46 were offered by the majority party. 57 members participated in the amendment process and the success rate for majority and minority amendments was 93% and 86%, respectively.

On final passage, eight out of the 21 measures passed by voice vote. Of the 13 remaining bills that passed by recorded vote, a majority of both parties supported passage on 12. Only on the United States-China Act of 1991 (HR 2212) did a majority of one party vote against a majority of the other party on final passage. Yet it is important to note that the minority party was not blocked from participating in floor consideration of HR 2212. A companion measure (S. 1367) was previously laid before the Senate by unanimous consent after being reported by the Finance Committee. During consideration of S. 1367, 86% of the amendments filed were offered and 100% of these were agreed to. Cloture was not needed to end debate either on the motion to proceed or the bill itself.

Finally, a conference committee was used to resolve differences between the House and Senate versions in 19 out of the 21 cases of collegial decision-making. Only S. 1745 and HR 3807 failed to go to conference. However, the House simply passed the Senate bill in both cases.

### *Majoritarian Decision-Making*

In contrast to the prevalence of collegial decision-making, only 8% of the measures identified by CQ were considered under a majoritarian pattern of decision-making. In all of these cases, the legislation failed to receive substantive floor consideration during the 102<sup>nd</sup> Congress. A majority of one party voted against a majority of the other party on cloture on the motion to proceed to the consideration of both the National Energy Security Act of 1991 (S. 1220) and the Appropriations Category Reform Act of 1992 (S. 2399). As a result, it is unclear whether or not the pattern would have held if the Senate chose to move to their consideration instead.

#### *Structured Consent Decision-Making*

Finally, 11% of the bills identified by CQ as receiving a key vote during the 102<sup>nd</sup> Congress were considered under conditions of structured consent. During the consideration of these three measures, a large minority opposed a large majority yet opportunities to debate and amend each bill were not fully utilized. Despite this opposition and lack of member participation, cloture on either the motion to proceed or the underlying measure itself was not necessary to make the legislation pending or to end debate. Consideration of the Authorization for Use of Military Force Against Iraq Resolution (S. J. Res. 2) only took one day on the Senate floor and no amendments were filed or offered. This lack of debate and amendment activity cannot be interpreted as evidence of widespread support for the resolution in the Senate. Only 18% of Democrats supported the resolution compared to 95% of Republicans. A majority of one party also

voted against a majority of the other party during consideration of the Unemployment Insurance Reform Act of 1991 (S. 1722). Yet despite the partisan nature of the opposition, S. 1722 passed after only two days of floor consideration. Finally, a majority of Democrats opposed a majority of Republicans during consideration of the Congressional Campaign Spending Limit and Election Reform Act of 1991 (S. 3). S. 3 was on the Senate floor for seven days and 100% of the 32 amendments filed were offered to the legislation. While only 44% of these were agreed to, 21 of the amendments offered were minority party amendments. The success rate for minority party amendments was 19% compared to 91% for the majority and a majority of both parties opposed each other on 95% of the recorded votes on the amendments considered. Yet despite this procedural combat, S. 3 passed 56-42, just 4 votes shy of the 60 needed to invoke cloture and shut off debate in the face of a filibuster.

A House-Senate conference committee was used to resolve the differences between the two versions in two cases. S. J. Res. 2 was incorporated into H.J. Res 77, which the Senate then passed and sent to the president to be signed into law.

### **Decision-Making in the 108<sup>th</sup> Congress**

Resembling the 102<sup>nd</sup> Congress, the collegial pattern of decision-making was, at least for the measures examined, the most prevalent pattern in the 108<sup>th</sup> Congress. CQ rated actions on 22 different bills as key votes in 2003 and 2004. However, only a plurality (41%) of these were considered under procedural conditions characteristic of

collegial decision-making. This is noticeably different from the 102<sup>nd</sup> Congress, during which an overwhelming majority of the bills examined were considered pursuant to the collegial pattern. The decline in the prevalence of collegial decision-making is reflected in the increase in the utilization of the structured consent and majoritarian patterns. 36% of the bills examined in the 108<sup>th</sup> Congress were considered under conditions of structured consent. 23% were considered pursuant to the majoritarian pattern.

### *Collegial Decision-Making*

Out of the nine measures considered under conditions of collegial decision-making, five were placed on the Senate calendar only after receiving prior committee consideration. One of the four measures placed directly on the calendar without having gone through the committee process had a companion measure that was previously considered by the relevant committee of jurisdiction.

The Rule XIV process was utilized to place three of the four measures directly on the calendar for procedural convenience, thus bypassing committee review. The Intelligence Reform and Terrorism Prevention Act of 2004 (S. 2845) was placed on the calendar via the Rule XIV process only after the Senate Committee on Governmental Affairs approved a related measure, the National Intelligence Reform Act of 2004 (S. 2840). The Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act of 2004 (HR 2660) and the Transportation, Treasury, and Independent Agencies Appropriations Act of 2004 (HR 2989) were placed

directly on the calendar immediately after they were received from the House. Once these measures were pending on the Senate floor, the bill managers offered amendments incorporating the work of the Senate Appropriations Committee into the House-passed versions. These “substitute amendments” were then treated as the underlying language for purposes of amendment. Only the Consolidated Appropriations Resolution of 2003 (H. J. Res. 2) was placed directly on the calendar without having received prior committee consideration. However, this measure is unique in that it was considered during the first week of the first session of the 108<sup>th</sup> Congress and represented the unfinished appropriations work of the 107<sup>th</sup> Congress.

Reflecting the relatively insignificant level of conflict in collegial decision-making, there were no objections to proceeding to all nine of the measures examined. Accordingly, each bill was laid before the Senate by unanimous consent. As a result of this broad consensus to move to these measures, there were few constraints on the amendment process on the Senate floor. A large number of amendments were filed and offered to each of these measures. More than 60% of the amendments filed were offered to the legislation under consideration in all but three cases. Yet these cases hardly represent a dramatic departure from the inclusive nature of collegial decision-making. 50%, 52%, and 56% of the amendments filed to each bill were offered in each case. The percentage of amendments offered on the Senate floor did not fall below 50% in any of the measures considered pursuant to the collegial pattern.

In addition, the percentage of amendments offered that eventually passed exceeded 60% in all but one case. In two of the three cases in which less than 60% of the amendments filed were offered, 83% and 92% of these amendments offered passed. The percentage of amendments that were ultimately successful dropped below 60% on only one measure. Only 47% of the amendments offered during the consideration of the Prescription Drug and Medicare Improvement Act of 2003 (S. 1) eventually passed. However, this low rate of success does not constitute evidence of significant constraints on amendment activity. Rather, the fact that so many amendments were offered and defeated affirms the presence of an open amendment process on the Senate floor. 63% of the 203 amendments filed during the consideration of S. 1 were offered to the legislation on the floor. Out of the 127 amendments that were offered, 60 ultimately passed.

The number of majority and minority members that offered amendments to the nine bills examined was relatively even. Indeed, the number of minority members actively participating in the legislative process *exceeded* the number of majority members during the consideration of each measure. Reflecting these participation trends, the number of minority-sponsored amendments offered exceeded the number of majority-sponsored amendments in seven of the nine cases. In the two cases in which majority party members offered more amendments than their colleagues in the minority, minority-sponsored amendments accounted for 48% and 39% of the total amendments offered.

Success rates for majority- and minority-sponsored amendments were also relatively even. Amendments offered by members in both parties were successful more

than 50% of the time in all but one case. Only 30% of the amendments offered by the minority party were successful during the consideration of S. 1. However, over 63% of the amendments offered to the legislation on the Senate floor were sponsored by members of the minority party. As such, this low rate of success should not be interpreted as a significant constraint on amendment activity during the measure's consideration.

The amendments offered during the consideration of these nine measures were mostly disposed of by voice vote or unanimous consent. Over 80% of the pending amendments were disposed of by voice vote during the consideration of HR 2989 and the Aviation Investment and Revitalization Vision Act (S. 824). 73% of the amendments offered during the consideration of the Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005 (S. 2400) were disposed of by voice vote or unanimous consent. In contrast, the number of pending amendments disposed of by a motion to table or an up-or-down recorded vote was below 15% for all but three measures. During the consideration of H. J. Res. 2, S. 1, and the Emergency Supplemental Appropriations for Iraq and Afghanistan Security and Reconstruction Act of 2004 (S. 1689), 17%, 26%, and 32%, respectively, of the pending amendments were disposed of by a motion to table or an up-or-down recorded vote. Yet the percentage of amendments disposed of by voice vote or unanimous consent for these measures still surpassed those disposed of by motion to table or up-or-down recorded vote (79%, 41%, and 55%, respectively). Thus, it can be concluded that the decision-making process for each measure was not dominated by significant conflict. Had such conflict been present

on a consistent basis, members would have been more likely to utilize their procedural prerogatives to articulate their preferences in a more overt manner.

In a noticeable departure from the general characteristics of the collegial pattern as observed in the 102<sup>nd</sup> Congress, a majority of one party voted against a majority of the other party on more than 50% of the recorded amendment votes during the consideration of all but one of the nine bills examined. During the consideration of seven measures, a majority of each party opposed one another on over 75% of the recorded amendment votes. The percentage of such amendment votes dropped below 50% only during the consideration of S. 2845. However, the number of amendments disposed of by voice vote and unanimous consent continued to exceed those disposed of by recorded vote, partisan or otherwise.

The cloture process was utilized to end debate on only two of the nine bills considered under conditions of collegial decision-making. Even in the two cases in which cloture was utilized to end debate, its use is not indicative of substantial conflict over the provisions of the underlying measures. During the consideration of S. 2845, 88% of the majority party and 91% of the minority party voted to end debate (cloture was invoked by an 85 to 10 vote). Furthermore, the motion to invoke cloture was filed only after the measure received five days of consideration on the Senate floor during which time 135 amendments were offered. 62% of the amendments offered were sponsored by majority party members and 66% were sponsored by members of the minority party. Similarly,



two cloture motions were filed during the consideration of S. 2400 after eight and 12 days of floor consideration. However, both motions were withdrawn by unanimous consent.

On final passage, four of the nine bills passed by a unanimous recorded vote. Seven of the measures received 87 votes or more. S. 1 passed by a vote of 76 to 21 with a majority of both parties supporting the measure. H. J. Res. 2 was the only bill considered under procedural conditions of collegial decision-making that did not receive the support of a majority of both parties on final passage. The legislation passed on a 69 to 29 vote with 98% of the majority voting for final passage and 60% of the minority opposing final passage. Yet it is important to note that the minority party was not blocked from participating in the floor consideration of H. J. Res. 2. 59% of the amendments offered to the legislation were sponsored by minority party members. Moreover, 77% of these minority-sponsored amendments were ultimately successful.

Finally, a joint House-Senate conference committee was utilized to resolve any difference between the House-passed and Senate-passed versions in each of the nine cases. Such predominance of the conference method of resolving differences is in keeping with the collegial pattern of decision-making.

### *Structured Consent Decision-Making*

In contrast to the small number of measures considered pursuant to structured consent decision-making in the 102<sup>nd</sup> Congress, the pattern was utilized more often in the 108<sup>th</sup> Congress, characterizing the legislative process during the consideration of eight

(36%) of the measures examined. While these represented some of the most controversial measures considered during the 108<sup>th</sup> Congress, opportunities to debate and amend the bills on the Senate floor were not fully utilized by individual members.

Despite the controversy associated with these measures, cloture on the motion to invoke cloture on the motion to proceed and/or the underlying measure itself was not necessary to end debate during the consideration of all but two of these bills. In the two exceptions, a bipartisan coalition of 75 members voted to invoke cloture on the motion to proceed to the Safe, Accountable, Flexible, and Efficient Transportation Equity Act of 2004 (S. 1072) and the Protection of Lawful Commerce in Arms Act (S. 1805). During the consideration of S. 1072, only 7% of the 353 amendments filed were actually offered. 44% of the 25 amendment offered to this legislation ultimately passed. In contrast, 90% of the amendment filed to S. 1805 were offered during the legislation's consideration on the Senate floor. Yet this is not indicative of a more collegial process, as only 21 amendments were filed to the legislation in the first place. Moreover, only 47% of the amendments offered were eventually successful.

This pattern of amending activity was also exhibited on the other six measures during the consideration of which a structured consent pattern of decision-making was present. In addition to S. 1805, the percentage of amendments offered exceeded 50% for four other measures. 100% of the amendments filed were offered during consideration of the Partial-Birth Abortion Ban Act of 2003 (S. 3), Laci and Conner's Law (HR 1997), and the Working Families Tax Relief Act of 2004 (HR 1308). Yet the total number of

amendments filed was very small in each instance. Four amendments were filed during the consideration of S. 3, and two amendments were filed during the consideration of HR 1997 and HR 1308. Moreover, only one of the four amendments offered to S. 3 ultimately passed and neither of the two amendments offered to HR 1997 were successful. 62% of the amendments filed to the Healthy Forests Restoration Act of 2003 (HR 1904) were offered; only 46% of these ultimately passed.

The number of members who offered amendments on the Senate floor was also much lower for these measures as compared to the bills considered under conditions of collegial decision-making in the 108<sup>th</sup> Congress. In contrast to the wide participation characteristic of the collegial pattern, the total number of members participating in the amendment process never exceeded 25 for the measures examined. During the consideration of six of the eight measures, less than 20 members offered amendments. This number dropped below ten for four of these measures.

A majority of each party opposed one another on recorded amendment votes, despite the fact that opportunities to offer amendments were not fully utilized. In five instances, a majority of each party opposed one another on 100%, 100%, 85%, 70%, and 67% of the recorded amendment votes. Of the remaining three bills, no minority amendments were offered to HR 1308. Only 43% of the minority amendments offered to the Jumpstart Our Business Strength (JOBS) Act (S. 1637) were successful. While 50% of the minority-sponsored amendments were ultimately successful during the

consideration of S. 1072, only 32% of the amendments actually offered were sponsored by members of the minority party.

Yet despite the controversial nature of these bills, the low levels of participation, and uneven success rates for majority- and minority-sponsored amendments, cloture was only utilized to end debate on S. 1637. In addition, almost every measure received bipartisan support on final passage. Only S. 3 and HR 1997 failed to receive the support of a majority of both parties. Yet cloture was not needed to end debate on either measure. Moreover, S. 3 was only considered on the Senate floor for four days. HR 1997 received only one day of floor consideration.

Finally, a House-Senate conference committee was used to resolve the differences between the two versions for six out of the eight measures examined. S. 1805 failed on an 8 to 90 vote. The Senate passed the House version of HR 1997.

### *Majoritarian Decision-Making*

23% of the measures identified by CQ were considered pursuant to a majoritarian pattern of decision-making in the 108<sup>th</sup> Congress. The legislation failed to receive substantive floor consideration in five cases. Cloture on the motion to proceed was not invoked during the consideration of the Class Action Fairness Act of 2003 (S. 1751), the Healthy Mothers and Healthy Babies Access to Care Act of 2003 (HR 2061), and the Federal Marriage Amendment to the Constitution (S. J. Res. 40). In each of these cases, a majority of each party voted against one another to end debate on the motion to proceed.

As a result, it is unclear whether or not the majoritarian pattern would have continued to characterize the decision-making process on these measures.

The remaining two bills considered pursuant to majoritarian decision-making did receive substantive consideration on the Senate floor at the post-motion to proceed stage. As such, they provide examples of how the majoritarian pattern of decision-making was utilized to resolve conflict in the 108<sup>th</sup> Congress. The Personal Responsibility and Individual Development for Everyone Act (HR 4) was placed on the calendar after being reported by the Finance Committee. In contrast, the Class Action Fairness Act of 2004 (S. 2062) was placed on the calendar by the Rule XIV process. Both measures were made pending on the Senate floor by unanimous consent. Yet once on the floor, the Majority Leader filled the amendment tree in order to block the consideration of unwanted amendments during the consideration of S. 2062. As a result, majority and minority members were unable to participate in the amendment process on the Senate floor.

In each case, cloture was filed on the underlying measure on its second day of consideration on the Senate floor. This is notable in that cloture was filed before an actual filibuster could be said to have occurred. However, cloture was not invoked in either circumstance and the measures failed to pass the Senate as a result.

### **Decision-Making in the 110<sup>th</sup> Congress**

In contrast to the 102<sup>nd</sup> Congress, the structured consent pattern of decision-making was the most prevalent in the 110<sup>th</sup> Congress based on the categories in Tables

3.2 and 3.4. CQ rated actions on 20 different bills as key votes in 2007 and 2008. Of these bills, 60% can be identified as being considered under procedural conditions of structured consent. Only 20% each could be identified as collegial or majoritarian.

### *Structured Consent Decision-Making*

Out of the 12 measures considered under conditions of structured consent, 11 were placed on the Senate calendar by the Rule XIV process, thus bypassing review by the relevant committee of jurisdiction. Only three of these measures received committee consideration prior to being placed directly on the calendar. The Water Resources Development Act (HR 1495) had a companion measure (S. 1248) that was reported by the Environment and Public Works Committee. A companion measure (S. 2302) to the Food, Conservation, and Energy Act (HR 2419) was reported by the Agriculture, Nutrition, and Forestry Committee. Finally, the Energy and Natural Resources Committee reported a companion measure (S. 1321) that ultimately became the Energy Independence and Security Act (HR 6) as passed by the Senate. In each of these three cases, the Rule XIV process was utilized to make the legislative process more efficient by proceeding directly to the House-passed measure and amending it with the legislation reported by the relevant Senate committee of jurisdiction.

Seven of the 12 measures considered under conditions of structured consent were laid before the Senate only after cloture on the motion to proceed was successfully invoked. In four of these cases, at least 80 members voted for cloture. During

consideration of the Medicare Improvements for Patients and Providers Act (HR 6331) and the Comprehensive Immigration Reform Act (S. 1348), 69 members voted to invoke cloture. Cloture on the motion to proceed to another comprehensive immigration bill, S. 1639, was the only measure on which less than two-thirds of the Senate (67) did not vote to invoke cloture. However, in this instance, 64 members voted to end debate and proceed to the measure's consideration, four more than the three-fifths (60) required under Senate rules.

As illustrated by these numbers, a broad consensus existed to move to each measure either by unanimous consent or by invoking cloture on the motion to proceed. Yet despite this consensus, there were constraints on the debate and amendment process during floor consideration. While these constraints are subtle, they can be illustrated by examining the amendment data for the 11 measures considered under conditions of structured consent on which amendments were filed.

More than 50% of the amendments filed were allowed to be offered to the legislation on only four of these 11 bills. During consideration of the Preserving United States Attorney Independence Act (S. 214) and the Protect America Act (S. 1927), 100% of the amendments filed were offered. However, less than three amendments were filed on each of these measures. During the consideration of the FISA Amendments Act (HR 6304) and the Emergency Economic Stabilization Act (HR 1424), 60% and 75% of the amendments filed were offered. However, in each case, only a small number of amendments were originally filed. In the remaining seven cases, less than 50% of the

amendments filed were eventually offered to each bill. In six cases, less than 25% of the amendments filed were offered, and more than 30 amendments were filed on five of these measures.

As with the number of amendments filed that were eventually offered, the number of amendments ultimately agreed to was disproportionate to those offered. More than 50% of the amendments offered were agreed to in five cases. Yet out of these five cases more than 50% of the amendments filed were actually offered only during the consideration of two measures: S. 1927 and HR 1424. In the remaining three cases, less than 25% of the amendments filed were offered. This suggests that despite the relatively high rates of amendment success on these measures, the decision-making process was far from inclusive due to the low rates of filed amendments actually being offered to the legislation under consideration.

This semi-exclusive process can be further illustrated by examining the six remaining measures to which amendments were offered. During consideration of S. 214, S. 1639, and HR 6304, none of the amendments offered were agreed to. Less than 30% of the amendments offered were agreed to during the consideration of the Fair Minimum Wage Act (HR 2), HR 1495, and HR 2419.

In contrast to the collegial pattern of decision-making, a relatively uneven number of majority and minority members offered amendments to the 11 measures considered under conditions of structured consent. Members from one party were responsible for at least 60% of the amendments to measures that had more than four amendments filed. For



those measures on which a significant number of amendments were filed, both parties were relatively even on only two: S. 1348 and HR 2419. In both cases, a bipartisan coalition supported the legislation under consideration. Minority amendments outnumbered majority amendments on only three measures.

Success rates for majority and minority amendments were also relatively uneven. In only three cases did the majority and minority success rates each exceed 50%. In the cases which both majority and minority amendments were offered, the majority success rate was higher than the minority's on five measures. The minority success rate exceeded the majority's only on the Housing and Economic Recovery Act (HR 3221). Neither majority nor minority amendments were successful during the consideration of two measures.

Amendments to the measures considered under conditions of structured consent were mostly disposed of by recorded vote. Those disposed of by voice vote or unanimous consent exceeded those disposed of by recorded vote on only HR 6 and HR 3221. On HR 2 and HR 2419, more than 20 amendments were withdrawn. However, in each case, cloture was invoked and non-germane amendments currently pending were subsequently and automatically withdrawn.

A majority of one party opposed a majority of the other party on more than 50% of the recorded votes in seven cases. During the consideration of S. 214 and HR 6304, a majority voted against a majority on 100% of the recorded amendment votes. During consideration of S. 1348, S. 1639, and HR 6, a majority voted against a majority on more

than 80% of the recorded amendment votes. During the consideration of HR 2419, a majority of each party opposed each other on 75% of the recorded amendment votes. Finally, a majority of each party voted against each other less than 50% of the time in only three cases. During the consideration of HR 1495 and HR 3221, a majority of each party voted against each other on 43% and 38% of the recorded amendment votes, respectively. During the consideration of HR 1424, a majority never voted against a majority.

Comprehensive unanimous consent agreements were used to manage the decision-making process for the 12 measures considered under conditions of structured consent. These agreements were used to structure debate and set vote times for amendments and final passage in all but one case. More importantly, unanimous consent agreements were utilized to limit amendment activity in ten cases. Unanimous consent agreements were not used to limit amendment activity during the consideration of HR 6331 because no amendments were offered to the legislation. Three amendments were offered to S. 1639, but the process governing decision-making in this instance was procedurally unique and consent was not needed to manage amendment activity during its consideration.<sup>9</sup> The following example illustrates how comprehensive unanimous

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<sup>9</sup> Prior to the consideration of S. 1639, members from both parties that supported the bill negotiated a single amendment containing the text of 13 Democratic and 13 Republican amendments and one managers' amendment. Parliamentary procedures were utilized to block other amendments from being offered. This comprehensive amendment was subsequently divided into three separate parts which would be considered separately. These three divisions were subsequently voted on and serve as the three amendments to S. 1639.

consent agreements were utilized to structure the entire decision-making process on the Senate floor during the 110<sup>th</sup> Congress:

Mr. REID. Mr. President, I ask unanimous consent that on Wednesday, October 1, following the debate with respect to H.R. 7081, the Senate proceed to the consideration of Calendar No. 610, H.R. 1424; that once the bill is reported, the Dodd, et al., amendment, which is at the desk, be considered; except that this agreement is only valid if both leaders are in concurrence with the provisions of the Dodd, et al., amendment and have so notified the Chair, and that there be general debate on the amendment for 90 minutes, with the time equally divided and controlled between the leaders or their designees; that upon the use or yielding back of this time, the amendment be set aside, and the Senate then consider the only other amendment in order to the bill, a Sanders amendment re: tax on high-income individuals; that there be 60 minutes of debate with respect to that amendment, with the time equally divided and controlled in the usual form; that upon the use or yielding back of all time with respect to the bill and amendments, the measure be set aside to recur upon disposition of H.R. 7081; that with respect to the disposition of the amendments to H.R. 1424, the first vote occur with respect to the Sanders amendment; that upon disposition of that amendment, the Senate would then consider the Dodd, et al., amendment, that upon disposition of that amendment, the bill, as amended, if amended, be read a third time and the Senate proceed to vote on passage of the bill; that upon passage, with the above occurring without further intervening action or debate, the Dodd, et al., amendment and the bill be subject to a 60-vote threshold.<sup>10</sup>

Floor consideration of HR 6304 illustrates how comprehensive unanimous consent agreements were utilized to structure debate and limit amendment activity even in a

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<sup>10</sup> Majority Leader Harry Reid, "Comments on the Senate Floor," ed. United States Senate (Congressional Record, 2008): S10187-S10188.

highly partisan environment. In this case, a majority of each party opposed one another on every amendment vote and final passage. Yet despite this partisan conflict, a unanimous consent agreement was used to structure the decision-making process:

Mr. REID. Mr. President, I ask unanimous consent that on Tuesday, July 8, at a time to be determined by the Majority Leader, following consultation with Senator *McConnell*, all post cloture time be yielded back and the motion to proceed to Calendar No. 827, H.R. 6304, be agreed to, the motion to reconsider be laid upon the table, and the Senate then proceed to the consideration of the bill; that once the bill is reported, the only amendments in order be the following: Dodd-Feingold-Leahy amendment to strike immunity; a Specter amendment which is relevant; a Bingaman amendment re: staying court cases against telecom companies; that no other amendments be in order; that debate time on the Bingaman amendment be limited to 60 minutes, equally divided and controlled in the usual form, and 2 hours each with respect to the Dodd and Specter amendments, equally divided and controlled, with 10 minutes of the Dodd time under the control of Senator *Leahy*; that upon the use or yielding back of all time, the Senate proceed to vote on the pending amendments; there be 2 minutes of debate equally divided and controlled in the usual form prior to each vote; that after the first vote in the sequence, succeeding votes be limited to 10 minutes each; that upon the disposition of all amendments, the bill, as amended, if amended, be read a third time and the Senate then proceed to vote on a motion to invoke cloture on the bill, with the mandatory quorum waived; that prior to the cloture vote, there be 60 minutes plus the time specified below for debate time, equally divided and controlled between the two leaders or their designees, with 10 minutes under the control of Senator *Leahy*, with an additional 30 minutes under the control of Senator *Feingold*, with an additional 15 minutes under the control of Senator *Dodd*; further, that if cloture is invoked on H.R. 6304, then all post cloture time be yielded back, and without further intervening action or debate, the Senate proceed to vote on passage of the bill, as amended, if amended; further, that it

be in order to file the cloture motion on the bill at any time prior to the cloture vote, with the mandatory quorum waived, notwithstanding rule XXII, if applicable, and that if applicable, post cloture time be charged during this agreement.<sup>11</sup>

The cloture process was utilized to end debate on six of the 12 measures considered under conditions of the structured consent. Cloture was successfully invoked in four cases. Cloture was not successfully invoked during the consideration of S. 1348 and S. 1639. In the remaining six cases, cloture was not needed to end debate and proceed to a vote on final passage.

Nine out of the ten measures that reached final passage received a recorded vote; HR 6331 passed by unanimous consent. Of these nine measures, a majority of each party voted in support of the legislation in six cases. A majority of one party opposed a majority of the other party on final passage of S. 1927, HR 6304, and HR 6.

Finally, a conference committee was used to resolve differences between the House and Senate versions of legislation that passed under conditions of structured consent in only two cases. A process of amendment exchange between the two chambers was utilized in three cases. The House simply passed the Senate bill or the Senate passed the House bill in the five remaining cases.

### *Majoritarian & Collegial Decision-Making*

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<sup>11</sup> Majority Leader Harry Reid, "Comments on the Senate Floor," ed. United States Senate (Congressional Record, 2008): S6224

In contrast to the prevalence of structured consent, only 20% of the measures identified by CQ in the 110<sup>th</sup> Congress were considered under either a majoritarian or collegial pattern of decision-making. The procedural characteristics of these patterns are consistent with those in the 102<sup>nd</sup> Congress. However, what is striking is that the majoritarian pattern of decision-making was successfully followed beyond the motion to invoke cloture on the motion to proceed in two cases. The Economic Stimulus Act (HR 5140) eventually passed the Senate despite the Majority Leader filling the tree and using cloture to end debate. The Senate proceeded to the consideration of the Lieberman-Warner Climate Security Act (S. 3036) and processed amendments to it. However, cloture could not be invoked on the bill itself and it thus failed to receive a final vote. The increased success of the majoritarian pattern of decision-making would seem to suggest that either the majority party was more cohesive in the 110<sup>th</sup> Congress, and thus better able to sustain such a restrictive decision-making process internally, or that the minority party was more fractured, and thus less able to uniformly oppose majoritarian obstructionism.

### **Decision-Making in the 111<sup>th</sup> Congress**

Resembling the 110<sup>th</sup> Congress, the structured consent pattern of decision-making was, at least for the measures examined, the most prevalent pattern in the 111<sup>th</sup> Congress. CQ rated actions on 18 different bills as key votes in 2009 and 2010. Of these, 50% were considered pursuant to the structured consent pattern of decision-making. 33% were

considered pursuant to majoritarian decision-making, and only 17% were considered pursuant to the collegial pattern of decision-making. These findings support the argument of this dissertation that the dominant pattern of decision-making has shifted in the Senate over the last two decades, and that while the collegial, majoritarian, and structured consent patterns continue to be utilized in the contemporary Senate, structured consent has replaced collegial decision-making as the most prevalent pattern precisely because its procedural features are able to limit the conflict characteristic of the institution's current environment. This shift represents a reversal in the prevalence of patterns observed in the 102<sup>nd</sup> Congress.

#### *Structured Consent Decision-Making*

Out of the nine measures considered under conditions of structured consent, seven were placed on the Senate calendar by the Rule XIV process, thus bypassing review by the relevant committee of jurisdiction. Only three measures received committee consideration prior to being placed directly on the calendar. The Credit Card Accountability Responsibility and Disclosure Act of 2009 (HR 627) had a companion measure (S. 414) in the Senate that was reported by the Banking, Housing, and Urban Affairs Committee. A Senate companion measure (S. 892) to the Family Smoking Prevention and Tobacco Control Act (HR 1256) was reported by the Health, Education, Labor and Pensions (HELP) Committee. Finally, the Patient Protection and Affordable Care Act (HR 3590) was placed directly on the calendar only after the Senate Finance

and HELP committees reported their own versions of health care reform legislation dealing with the health-related programs under their respective jurisdictions. These two versions of health care reform were combined into one bill by Majority Leader Reid prior to the measure's consideration on the Senate floor. Nevertheless, the Rule XIV process was utilized by the Majority Leader in each of these cases to make the legislative process more efficient by proceeding directly to the House-passed measure and amending it with the legislation reported by the relevant committee of jurisdiction in the Senate.

Three of the nine measures considered under conditions of structured consent were laid before the Senate only after cloture on the motion to proceed was successfully invoked. In two of these cases, a bipartisan supermajority voted to invoke cloture. During the consideration of the Lilly Ledbetter Fair Pay Act of 2009 (S. 181), 72 members voted to end debate on the motion to proceed. This represented 100% of the majority party and 43% of the minority party. During the consideration of HR 1256, 84 members voted in support of cloture, including 98% of the majority party and 74% of the minority party. Cloture on the motion to proceed to HR 3590 was the only measure considered under conditions of structured consent in the 111<sup>th</sup> Congress in which less than two-thirds of the Senate (67 members) did not vote to invoke cloture.

A broad consensus existed to move to each of these measures (with the exception of HR 3590), either by unanimous consent, or by invoking cloture on the motion to proceed. Yet despite this consensus, there were constraints on the amendment process



during floor consideration. While these constraints are subtle, they can be illustrated by examining the amendment data for these nine measures.

More than 50% of the amendments filed were allowed to be offered to the legislation on only three of these bills. During the consideration of S. 181, 62% of the amendments filed were offered. However, only 13 amendments were filed in the first place which meant that only eight amendments were actually offered. 90% of the amendments filed were offered during the consideration of legislation to increase the statutory limit on the public debt (H. J. Res. 45). However, only nine amendments were offered and all of these were stipulated in the UCA that established the parameters of floor consideration for the legislation and the amendments that could be offered. A larger number of amendments (29) were filed during the consideration of the Helping Families Save Their Homes Act of 2009 (S. 896), 66% of which were actually offered to the legislation on the Senate floor.

Less than 50% of the amendments filed were ultimately offered during the consideration of the six remaining measures considered pursuant to structured consent. In all but two of these cases, the total number of amendments filed was also small. 223 and 516 amendments were filed during the consideration of the Unemployment Compensation Extension Act of 2010 (HR 4213) and HR 3590, respectively. However, in each of these instances, only 29% and 5%, respectively, of the amendments filed were ultimately offered.

As with the number of amendments filed that were ultimately offered, the number of amendments that eventually passed was also small. Of the three measures in which more than 50% of the amendments filed were offered, in only one instance was the percentage of successful amendments greater than 50%. During the consideration of S. 896, 58% of the amendments offered passed. Instead, most of the amendments offered on the Senate floor during the consideration of these measures were unsuccessful.

Majority-sponsored amendments were more likely to succeed than minority-sponsored amendments. The success rate for majority amendments was greater than 50% in all but one case. Conversely, the rate of success for minority amendments was less than 50% for all but one measure. During the consideration of S. 181, none of the amendments offered ultimately passed.

Amendments to the measures considered under conditions of structured consent were mostly disposed of by recorded vote. Those disposed of by voice vote or unanimous consent exceeded those disposed of by a recorded vote on a motion to table or an up-or-down vote only during the consideration of HR 627 and HR 4213. The number of amendments disposed of by voice vote or unanimous consent equaled those disposed of by recorded vote during the consideration of S. 896 and HR 1256. In the remaining cases, motions to table and up-or-down recorded votes were overwhelmingly utilized to dispose of the amendments offered. For those amendments disposed of by an up-or-down recorded vote, 60-vote thresholds were established for amendments during floor action on four of the measures considered under structured consent.

A majority of one party opposed a majority of the other party on more than 75% of all of the recorded amendment votes during the consideration of each of the nine measures examined. The percent of recorded votes exceeded 80% in six cases. During the consideration of S. 181 and HR 1256, a majority of each party voted against each other 100% of the time. During the consideration of HR 4213, the Children's Health Insurance Program Reauthorization Act of 2009 (HR 2), HR 4853, and H. J. Res. 45, a majority of each party opposed each other on 97%, 93%, 83%, and 82% of the recorded votes, respectively.

Like the 110<sup>th</sup> Congress, comprehensive UCAs were used to manage the decision-making process for the measures considered under conditions of structured consent in the 111<sup>th</sup> Congress. These agreements were utilized to structure debate and set vote times for amendments and final passage. More importantly, UCAS were utilized to limit amendment activity in several cases and to establish higher vote-thresholds for more controversial amendments. During the consideration of S. 896, a UCA set a higher vote threshold for a controversial amendment offered by Senator Richard Durbin (D-IL).

Mr. REID. Mr. President, I ask unanimous consent that on Thursday, April 30, following a period of morning business, the Senate proceed to the consideration of Calendar No. 52, S. 896, Helping Families Saves Their Homes; that immediately after the bill is reported, Senator *Durbin* be recognized to offer an amendment relating to ``cram-down"--that is, bankruptcy; that there be 4 hours for debate with respect to the amendment and the time be equally divided and controlled between the leaders or their designees; that upon the use or yielding back of time, the Senate proceed to vote in relation to that amendment; that

adoption of the amendment will require an affirmative 60-vote threshold; that if the threshold is achieved, the amendment be agreed to and the motion to reconsider be laid upon the table; that if the amendment does not achieve that threshold, that it will be withdrawn; provided further that no amendment be in order to the amendment and that no further amendments on the subject of ``cram-down" be in order during the pendency of S. 896; further, that upon disposition of the Durbin amendment, Senator *Dodd* be recognized to offer a Dodd-Shelby substitute amendment.<sup>12</sup>

In this example, the time-consuming aspects of Rule XXII were avoided without sacrificing the higher vote threshold associated with invoking cloture.

The following example from the consideration of H. J. Res. 45 provides an ideal illustration of how UCAs were utilized in the structured consent pattern to manage the decision-making process in the 111<sup>th</sup> Congress:

Mr. REID. Mr. President, I ask unanimous consent that....on Wednesday, January 20, 2010, at a time to be determined by the Majority Leader, following consultation with the Republican leader, the Finance Committee be discharged of H.J. Res. 45, increasing the statutory limit on the public debt and the Senate then proceed to the measure; that immediately after the joint resolution is reported, the Majority Leader or his designee be recognized to offer a substitute amendment and that the following be the only first-degree amendments in order to the joint resolution: Thune, TARP; Murkowski, endangerment EPA regs; Coburn, rescissions package; Sessions, spending caps; McConnell, relevant to any on the list; Reid, one relevant to any on the list; Reid, pay-go; Baucus, three relevant to any on the list; Conrad-Gregg, fiscal task force; that each of the listed amendments be subject to an affirmative 60-vote threshold and that if any achieve that threshold, then they

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<sup>12</sup> Majority Leader Harry Reid, "Comments on the Senate Floor," ed. United States Senate (Congressional Record, 2009): S4902

be agreed to and the motion to reconsider be laid upon the table; that if they do not achieve the 60-vote threshold, then they be withdrawn; that upon disposition of all amendments, the substitute amendment, as amended, if amended, be agreed to, the joint resolution, as amended, be read a third time and the Senate then proceed to vote on passage; further, that passage also be subject to an affirmative 60-vote threshold.<sup>13</sup>

In this example, H. J. Res. 45 was made pending on the Senate floor by unanimous consent. The same UCA listed the amendments allowed to be offered and prohibited any member from offering an amendment that was not on the list. However under the agreement, Majority Leader Reid and Minority Leader McConnell were each allowed to offer an amendment “relevant to any of the list.” This represents a significant grant of discretion given that the other amendments were listed both by sponsor name and subject matter. The UCA set 60-vote thresholds for each of the amendments considered and established a hurdle of 60 votes for final passage of the legislation. Separate cloture motions would have been required for each amendment and final passage if consent could not be reached to establish this higher threshold. While the 60-vote requirement makes it more difficult to pass an amendment, the members listed in the agreement were willing to see their amendments defeated as long as they were allowed to offer them in the first place. An objection to this UCA could have potentially pushed the Majority Leader to utilize the majoritarian pattern of decision-making to pass H. J. Res. 45. Under such a scenario, it is unlikely that minority amendments of any merit would be allowed to be offered. Given the significance of this measure for the economy, it is also likely that

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<sup>13</sup> Majority Leader Harry Reid, "Comments on the Senate Floor," ed. United States Senate (Congressional Record, 2009): S13747-S13748.

the Majority Leader could have secured the support of a sufficient number of outliers in the minority party in order to assemble the 60-votes necessary to pass the legislation. Given these considerations, it is clear that structured consent allowed the Majority and Minority Leaders to get some of what they wanted out of the decision-making process for this measure. The Majority Leader was able to secure a process that would guarantee passage of the must-pass legislation in the least amount of time necessary. The Minority Leader was able to secure votes on politically difficult amendments sponsored by his partisan colleagues.

The use of UCAs during the consideration of HR 3590 illustrates how the two party leaders utilize such agreements to limit conflict in the decision-making process. While Majority Leader Reid possessed the votes necessary to end debate on the motion to proceed to the controversial legislation, he did not yet command the requisite 60-votes to end debate on the underlying measure and proceed to final passage (itself only a 51-vote threshold). Several members of the majority party needed the political cover offered by proposing amendments to the legislation, even if they were ultimately unsuccessful. In turn, Minority Leader McConnell recognized that he was unlikely to be able to muster everyone in his conference to vote against ending debate on the legislation for a prolonged period of time.<sup>14</sup> In addition, Senate Democrats were unlikely to allow minority-sponsored amendments to be offered to HR 3590 if Republicans refused to cooperate on structured the decision-making process. Finally, the Minority Leader

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<sup>14</sup> For example, Senator Olympia Snowe (R-ME) voted in support of the health care reform proposal when it was reported by the Senate Finance Committee.

believed that a prolonged filibuster of health care reform legislation could negatively impact the party's image in the 2010 midterm elections.

Given these considerations, Majority Leader Reid and Minority Leader McConnell negotiated several UCAs to structure floor consideration of HR 3590 on a near-daily basis. These agreements set up votes on side-by-side amendments; one would be offered by a Democrat and one would be offered by a Republican. Votes would occur on these two amendments at the end of each day. 60-votes would be required for final passage. Through this process, Majority Leader Reid was able to provide his more vulnerable members political cover by giving them an opportunity to offer amendments to the legislation. In turn, Minority Leader McConnell was able to secure opportunities to offer political messaging amendments that could be utilized to clarify the Republican message on health care reform heading in to a midterm election.

This collaborative process broke down during the consideration of a drug re-importation amendment offered by Senator Byron Dorgan (D-ND). Under Senate rules, a measure is "stuck" on the Senate floor if 51 votes to table the proposal or 60 votes to invoke cloture on it cannot be secured. In this case, more than 51 members supported the Dorgan amendment. In addition, the majority feared that erstwhile Republican opponents of drug re-importation would strategically change their position on the issue in order to pass the Dorgan amendment, the addition of which could jeopardize the final passage of HR 3590. As a result, the process described above now jeopardized the orderly consideration of HR 3590 because the Dorgan amendment blocked the consideration of

other proposals until it was disposed of in one way or another. Supporters of the amendment were unlikely to agree to a UCA that allowed for the continued consideration of the legislation without first dealing with Dorgan's proposal. Eventually, Majority Leader Reid and Minority Leader McConnell successfully negotiated a procedural path forward that resolved the contentious issue and ensured that the consideration of HR 3590 could continue as before. Their negotiations are reflected in the UCA below:

Mr. REID. Mr. President, I ask unanimous consent that immediately after the opening of the Senate tomorrow, Tuesday, December 15, and following the leader time, the Senate resume consideration of H.R. 3590, and there then be a period of 5 hours of debate, with the time divided as follows: 2 hours equally divided between Senators BAUCUS and CRAPO or their designees and 2 hours equally divided between Senators DORGAN and LAUTENBERG or their designees, and 1 hour under the control of the Republican leader or his designee or designees; that during this debate time, it be in order for Senator *Baucus* to offer a side-by-side amendment to the Crapo motion to commit; and Senator *Lautenberg* be recognized to offer amendment No. 3156 as a side-by-side to the Dorgan-McCain amendment No. 2793, as modified; that no further amendments or motions be in order during the pendency of this agreement, except as noted in this agreement; that upon the use or yielding back of all time, the Senate then proceed to vote in relation to the aforementioned amendments and motion in this order: Baucus, Crapo, Lautenberg, and Dorgan, with each subject to an affirmative 60-vote threshold, and that if they achieve that threshold, then they be agreed to and the motion to reconsider be laid upon the table; that if they do not achieve that threshold, they be withdrawn; further, that the cloture motion with respect to the Crapo motion be withdrawn; provided further that upon disposition of the above-referenced amendments and motion, the next two Senators to be recognized to offer a motion and amendment be Senator *Hutchison* to offer a motion to commit regarding



taxes and implementation and Senator *Sanders* to offer amendment No. 2837; that no amendments be in order to the Hutchison motion or the Sanders amendment; that upon their disposition, the Majority Leader be recognized.

The PRESIDING OFFICER. Is there objection?

Mr. *McConnell*. Mr. President, reserving the right to object, and I am not going to object, I would just want to confirm with the Majority Leader our understanding that even though it is not locked in in this consent agreement, we anticipate voting on both the Hutchison amendment and the Sanders amendment.

Mr. REID. Yes. And I say to my friend, either vote on them or have some kind of procedural motion.

Mr. *McConnell*. Yes.

Mr. REID. Which I have no idea what it would be at this stage. But the answer is yes. I would also say, I have spoken to the Senator's floor staff, and, as I indicated to the Republican leader, we have to be at the White House for a while tomorrow afternoon--we will give the Republican leader that time--for which we will probably have to be in recess because the whole caucus is called to go down there. But it is my desire to make sure we finish this tomorrow. I think that is to everyone's interest. That is what we are doing here, with 5 hours.<sup>15</sup>

The problem was resolved by propounding another UCA that set up a side-by-side to the Dorgan drug re-importation amendment (i.e. the Lautenberg amendment mentioned above) that would be sufficient to deny the Dorgan amendment the 60-votes necessary to pass.

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<sup>15</sup> Majority Leader Harry Reid, "Comments on the Senate Floor," ed. United States Senate (Congressional Record, 2009): S13177.

The cloture process was utilized to end debate on five of the nine measures considered pursuant to structured consent. Cloture was successfully invoked in four cases. While cloture was not filed, and therefore not invoked, during the consideration of H. J. Res. 45, the higher threshold of 60-votes associated with cloture was required for final passage of the legislation pursuant to a UCA.

Eight of the nine measures that reached the stage of final passage received a recorded vote. HR 4853 passed by unanimous consent. Of these eight measures, a majority of each party voted in support of the legislation on three occasions. A majority of each party voted against one another in the remaining five instances.

Finally, a process of amendment exchange was utilized to resolve the differences between the House and Senate versions of the legislation that passed under conditions of structured consent in four cases. Reflecting the institutional dynamics inherent in the bicameral structure of Congress and the different rules of procedure in the House and Senate, the House passed the Senate version of legislation in the remaining five instances.

### *Majoritarian Decision-Making*

Despite the unified Democratic control of government and the filibuster-proof majority enjoyed by Senate Democrats for much of the 111<sup>th</sup> Congress, only 33% of the measures identified by CQ were considered under conditions of majoritarian decision-making. Resembling the use of majoritarian decision-making in the 110<sup>th</sup> Congress, the pattern was successfully utilized beyond the motion to proceed during the consideration

of several bills. This pattern was used throughout floor consideration and through final passage in four of the six measures examined: the American Recovery and Reinvestment Act of 2009 (HR 1); the District of Columbia House Voting Rights Act of 2009 (S. 160); the Health Care and Education Reconciliation Act of 2010 (HR 4872); and the Don't Ask, Don't Tell Repeal Act of 2010 (HR 2965). Only one of the six measures examined failed to receive some consideration on the Senate floor. Efforts to invoke cloture on the Democracy is Strengthened by Casting Light on Spending in Elections Act (S. 3628) were unsuccessful on two separate occasions. The motion to proceed to the other bill that did not pass, the Removal Clarification Act of 2010 (HR 5281), was non-debatable because the legislation was privileged. However, the majority party failed to invoke cloture on the underlying legislation (the vote was 55 to 41) and the bill thus failed to pass the Senate.

The continued trend in the successful application of the majoritarian pattern in Senate decision-making conforms to the conventional wisdom that the majority party was more cohesive in the 111<sup>th</sup> Congress. Such cohesion on the part of the majority allowed it to better sustain such a restrictive decision-making process internally while maximizing pressure on ideological outliers in the minority party. Such minority party support was necessary to secure the supermajority coalition required to pass legislation in the Senate. However, the increased levels of cohesion in the minority party dictated the utilization of the structured consent pattern of decision-making on some of the most controversial

measures. Given this increased cohesion, it would be difficult to secure the support of the ideological outliers necessary to pass legislation in majoritarian decision-making.

### *Collegial Decision-Making*

Only 17% of the measures identified by CQ in the 111<sup>th</sup> Congress were considered under conditions of collegial decision-making. This reflects the general decline in the prevalence of the pattern in Senate decision-making over the last two decades. In each case, majority and minority party members participated in the amendment process and their amendments were mostly successful. Two of the measures examined, the National Defense Authorization Act for Fiscal Year 2010 (S. 1390) and the FAA Air Transportation Modernization and Safety Improvement Act (HR 1586), passed with considerable bipartisan support. A majority of each party opposed one another on final passage only on the Dodd-Frank Wall Street Reform and Consumer Protection Act (HR 4173). However, this measure passed only after 17 days of floor consideration during which time 41 members participated in the amendment process. 56 amendments were offered and 32 ultimately passed. Majority and minority success rates were also even during the consideration of HR 4173.

## **Chapter 6: The Debt Ceiling Debate in the 112<sup>th</sup> Congress**

The federal budget, deficits, and the debt they accumulated over time dominated the legislative agenda of the first session of the 112<sup>th</sup> Congress. Indeed, the Senate had difficulty processing any legislation that did not address this issue in some way.<sup>1</sup> Of the legislation considered on the Senate floor during the first half of 2011, the debate over the federal debt ceiling was by far the most polarizing and contentious. Yet the Senate eventually managed to pass legislation addressing this issue. As such, an examination of the debt ceiling debate provides a greater understanding of how the Senate successfully limits conflict and passes legislation despite the polarizing conflict characteristic of its current environment.

Such an examination demonstrates that the structured consent pattern of decision-making represents a pattern of parliamentary procedure that is ideally suited to resolving conflict in a polarized Senate. In this chapter I examine the debt limit debate in the 112<sup>th</sup> Congress in order to demonstrate why the structured consent pattern of decision-making has seen increased use in the Senate over the last two decades and how precisely it allows the institution to overcome the instability inherent in the Senate's design and pass legislation.

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<sup>1</sup> Only 123 recorded votes had been cast on the Senate floor by the beginning of the August recess. Of the 16 bills and joint resolutions that received an up-or-down vote or were considered on the Senate floor, eight dealt specifically with federal spending and debt. Four more were focused on the economy and job creation. In contrast, three of the four measures that failed to receive floor consideration past the motion-to-proceed stage were unrelated to the federal budget and the economy.

### **The Political Environment**

Budgetary issues are inherently political issues. Budgets, deficits, and their accumulated debt represent the priorities and governing agenda of the majority party in Congress. If proposed, a minority party's alternative represents its critique of the policies advocated by the majority. Given the controversy surrounding budgetary politics in the 112<sup>th</sup> Congress, it is difficult to imagine a policy area that generated a comparable degree of conflict between the two political parties. However, raising the debt ceiling, never an easy task for the majority party, promised to be particularly difficult given the Senate's external and internal environments. Predictably, divided control of Congress between a Republican-controlled House and a Democratic Senate made reaching an agreement particularly challenging. A large ideological distance existed between the majority parties in each chamber which made it difficult to identify the middle ground on this issue.

More importantly for my purposes here, various factors specific to the Senate in the 112<sup>th</sup> Congress created obstacles to passing legislation to increase the debt ceiling. First, Republican gains in the 2010 midterm elections reduced the Democrat's majority to 53 members. As a result, securing the 60 votes necessary to end debate on controversial legislation became more difficult for the majority party. Second, these gains significantly changed the internal dynamic of the Republican Conference in the Senate. For example, several members elected in 2010 were more hawkish on federal spending and wanted to be more aggressive in tackling the federal debt. These freshmen viewed the debate over

increasing the debt ceiling as an opportunity to secure significant cuts in federal spending as well as reforms to the congressional budget process.

The results of the 2010 elections also altered the perspective of several veteran members of the Republican Party who would be on the ballot themselves in 2012. Members like Orrin Hatch (R-UT), Olympia Snowe (R-ME), and Richard Lugar (R-IN) could normally be relied upon to vote in favor of increasing the debt ceiling in this situation. However, concerns over the likelihood of conservative primary challengers induced in these members a reluctance to support increasing the debt ceiling. The fate of former colleagues like Bob Bennett (R-UT), who lost to a conservative primary opponent in 2010, led many members to worry that the same fate would befall them if they voted to increase the debt ceiling. As a result of these concerns, the Senate Republican Conference exhibited a greater-than-normal degree of cohesion during the debt debate. Such unanimity made it more difficult to secure the seven Republican votes needed to end debate on legislation to increase the debt ceiling.

Finally, both conservative and liberal outside groups were organized and ready to participate in the debt ceiling debate in the spring and summer of 2011. Many conservatives felt empowered after taking back control of the House and coming within striking distance of taking back the Senate in the 2010 midterm elections. Moreover, the particular nature of Republican victories in the midterms that year, during which several conservative candidates prevailed over “establishment” challengers, led these groups to eschew compromise tactics and push for sweeping policy victories instead. In contrast,

liberal groups had recently found an issue on which to put the Republicans on the defensive for the first time since losing the House. The Medicare reform proposals included in the House Republican's Fiscal Year 2012 budget resolution offered congressional Democrats an attractive issue on which to campaign in 2012. Yet Democrats were concerned that conservative Republicans would take the debt ceiling hostage in order to leverage the Medicare cuts contained in their budget resolution. As such, Democrats were reluctant to concede changes to the entitlement program in exchange for Republican support to increase the debt ceiling.<sup>1</sup>

### **Three Patterns of Decision-Making**

Both Democratic and Republican Party leaders believed that the debt ceiling ultimately needed to be increased in order to avoid damaging the economy. Disagreements between the two sides simply concerned the details of a deficit reduction package that would be included in legislation to increase the debt ceiling. The majority and minority leaders were also concerned about the impact of the debt ceiling debate on their respective party's electoral fortunes in the 2012 elections.

While the collegial, majoritarian, and structured consent patterns of decision-making each theoretically offered party leaders a procedural roadmap with which to pass a debt ceiling increase, only structured consent allowed leaders to actually pass such legislation in the context of the Senate's contentious environment. Moreover, structured

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<sup>1</sup> Steven T. Dennis, "Democrats Thread the Needle on Medicare: Senate Leaders Want to Seem Mindful of Deficit," *Roll Call*, June 7 2011; Glenn Thrush and Jake Sherman, "Republicans Ignored Warnings on Paul Ryan Plan," *Politico*, May 23 2011.



consent allowed the Majority and Minority Leaders to balance their policy and electoral goals in a way that ensured that each party would largely achieve its desired ends. Nevertheless, it is helpful to first consider the limitations of the collegial and majoritarian patterns of decision-making in the context of this debate before turning to an examination of the specific ways in which structured consent governed the consideration of debt ceiling legislation.

In light of the level and nature of conflict surrounding the debt ceiling debate during the spring and summer of 2011 and the unique internal dynamics of the Senate at the time, the collegial and majoritarian patterns did not provide party leaders with a particularly useful decision-making process with which to successfully pass legislation. Specifically, procedural features unique to each pattern presented leaders with several difficulties. First, the most salient features of collegial decision-making are its reliance on an open debate and amendment process and its extensive floor consideration in order to limit conflict and pass legislation. Yet party leaders were unwilling to utilize the collegial pattern of decision-making despite the fact that they had ample time during which to consider the legislation on the Senate floor during the first session of the 112<sup>th</sup> Congress. In addition, it could be argued that an open debate and amendment process was necessary to pass legislation because it lacked the 60-votes necessary to end debate on an expected “filibuster” for the first seven months of the year. However, party leaders were concerned that their members would be forced to take politically damaging votes on numerous

amendments in such an open process. As a result, the collegial pattern represented more of a liability in this case than a benefit.

Second, the most salient feature of the majoritarian pattern is its reliance on a closed process to contain conflict and pass legislation. However, the pattern's almost exclusive reliance on the majority party to block the participation of the minority in the debate and amendment process on the Senate floor caused it to be insufficient for passing legislation in this environment. Specifically, the increased cohesion on the debt ceiling exhibited by Senate Republicans made it less likely that Majority Leader Reid could secure the necessary support of the seven Republicans needed to pass legislation. Even in the event that legislation to increase the debt ceiling could be passed in the Democratic Senate with a simple majority, it was extremely unlikely that it could also pass the Republican-controlled House in that form. As such, it was unlikely that legislation produced by the majoritarian pattern could ever be signed into law by the president.

Some level of cooperation between the majority and minority leaders was thus needed in this environment in order to increase the debt ceiling without an open decision-making process. The structured consent pattern offered the two leaders a decision-making process in which they could negotiate an agreement off the Senate floor while building support for the proposal within their respective conferences. Structured consent also offered a decision-making process in which amendments could be limited and floor consideration could be structured in a way that made legislative success much more likely. As a result of this decision-making process, Senate Democrats could achieve their

primary goal of increasing the debt ceiling while protecting the spending programs most important to their constituencies. Simultaneously, Republicans could accomplish their twin goals of not being blamed for failure to increase the debt ceiling while gaining an issue on which to campaign in the 2012 presidential and congressional elections.

### **The Debt Ceiling Debate**

Negotiations over the debt ceiling began in earnest following passage of the fiscal year 2011 omnibus appropriations bill in March. Specifically, Democrats were primarily concerned that any increase in the debt ceiling not be accompanied by deep cuts in spending and that the size of an increase be sufficient to cover at least \$2.4 trillion in new borrowing authority. Democrats argued that such an increase would provide much needed certainty to the markets in the current economic climate. Republicans countered that the size of the increase was simply dictated by politics, and that it would allow Democrats to avoid raising the debt ceiling again until after the 2012 elections. Nevertheless, congressional Republicans were also not anxious to vote on multiple debt ceiling increases prior to the 2012 elections. In contrast, they argued that any increase in the debt ceiling should be accompanied by legislation to reduce the budget deficit. In addition to favoring deficit reduction in general, Senate Republicans were eager to cut Medicare spending in the aftermath of the public uproar over the House budget resolution. Republicans believed that such cuts in spending were needed in order to prolong the life of the program. They were also hopeful that including Medicare cuts as part of a broader

deficit reduction package would inoculate their candidates against Democratic attacks in 2012.<sup>2</sup>

Initial negotiations occurred in a bipartisan working group led by Vice President Joe Biden and composed of congressional leaders from the House and Senate. The goal of the group, which was announced by President Obama on April 13, was to provide a forum in which an agreement on a deficit reduction package could be reached. Party leaders participating in the talks would be tasked with persuading their respective conferences to support the proposal if an agreement could be reached.<sup>3</sup> As expected, bipartisan agreement on a deficit reduction package proved elusive. Chief among the disputes was whether or not new “revenue” should be included as part of the package. Specifically, Senate Democrats were supportive of including new revenue in the package while Republicans were opposed.<sup>4</sup>

On Monday, May 16, the Treasury Department announced the beginning of a “debt issuance suspension period” which allowed the Secretary of the Treasury to take a series of emergency actions in order to avoid reaching the debt ceiling. According to the Treasury, such steps would allow the government to continue funding all of its obligations while remaining below the debt ceiling until August 2. Treasury Secretary

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<sup>2</sup> Paul M. Krawzak and Brian Friel, “McConnell Wants Spending Cuts, Entitlement Limits for Debt Limit Increase,” *CQ Today*, May 12 2011; Manu Raju, “Harry Reid: Deal Must Have Revenues,” *Politico*, July 21 2011.

<sup>3</sup> Sam Goldfarb and Brian Friel, “Obama’s Call for Deficit Panel Catches Leaders Off Guard,” *CQ Today*, April 14 2011.

<sup>4</sup> Carol E. Lee and Naftali Bendavid, “Gridlock for Debt Talks,” *The Wall Street Journal*, July 25 2011.

Timothy Geithner stated that the government would be unable to continue paying all of its obligations if the debt ceiling was not raised by that date.<sup>5</sup>

Both Majority Leader Reid and Minority Leader McConnell were concerned about the consequences of not raising the debt ceiling and did not see an alternative to passing legislation by August 2 notwithstanding the specific provisions of the deficit reduction package. While this aligned Reid with the views of his conference, such a willingness to increase the debt ceiling without simultaneously enacting substantial deficit reduction put McConnell at odds with the large portion of his conference which believed that failure to change the nation's current fiscal path represented a greater threat to the economy than the August 2 deadline announced by Geithner. These members wanted to condition their support for increasing the debt ceiling on securing significant spending cuts and process reforms that would change the government's fiscal trajectory. As such, McConnell's efforts to pass legislation provide a particularly instructive example of the ways in which Minority Leaders attempt to shape the views of their partisan colleagues in structured consent decision-making in order to generate support for agreements they negotiate with the Majority Leader.

In an effort to promote an orderly discussion of the debt ceiling and the various ways in which it could be raised, McConnell re-instituted weekly members meetings to discuss the issue. Similar meetings were utilized during the debate over health care reform in 2009 and provide a useful forum in which leaders may receive valuable

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<sup>5</sup> Brian Friel, "Geithner Starts Anti-Default Measures, but Congress Quiet on Debt for Now," *CQ Today*, May 16 2011.

information on the position of their rank-and-file membership. The meetings also allow skillful leaders to frame the discussions in such a way that the positions they support appear to have more support within the conference. This allows party leaders to utilize group dynamics to secure their desired policy or procedural outcomes. For example, McConnell invited a former Bush Administration Treasury official to brief members on the negative consequences that would likely result if the debt ceiling was not raised in a timely manner. One of the goals of this discussion was to encourage senators to view the debt debate from the leader's perspective; to focus on the consequence of not raising the debt ceiling instead of the policy opportunities presented by the debate.

It is important to note that these weekly meetings were held in addition to the weekly Policy Lunch (Tuesdays) and Steering Lunch (Wednesdays). Members also discussed legislative and parliamentary strategy and tactics during these meetings and party leaders receive time during each lunch's program to present their position to their colleagues. All of these meetings are "members only." However, leadership staff and staff from the relevant committees of jurisdiction (pending the issue under consideration) are allowed to attend. Significantly, rank-and-file members' personal staff are prohibited from attending the meetings. This places personal office staff at a distinct information disadvantage vis-à-vis leadership staff. It also provides party leaders with an opportunity with which to attempt to persuade members to support their position in the absence of their staff

On Sunday, June 19, Minority Leader McConnell announced on the CBS program *Face the Nation* that he would support a short-term debt ceiling increase in the event that an agreement on a deficit reduction package could not be reached with Senate Democrats. In the weekly Republican staff meeting the following Monday, leadership staff indicated that the Minority Leader would be recommending that all Republican senators support a short-term increase if no agreement on a long term deal could be reached by the August 2 deadline. Significantly, this placed McConnell *publicly* at odds with a large segment of the Republican Conference for the first time since the debt ceiling debate began. In contrast, several conservative Republicans publicly announced their opposition to legislation increasing the debt limit if it was not accompanied by a “cut, cap, and balance” approach to deficit reduction that included significant cuts in federal spending for fiscal year 2012, long-term statutory spending caps, and passage of a balanced budget amendment to the Constitution (BBA). The “cut” and “cap” aspects of this approach were already under discussion in the Biden group negotiations. However, the BBA was opposed vehemently by Senate Democrats and was thus viewed with tepid enthusiasm by Republican leaders due to its unlikely prospects of passing the Senate.

Conservative demands for a cut, cap, and balance approach led Republican leaders to announce that they would force a vote on a BBA on the Senate floor in July. While a BBA had little chance of passing, such a move offered Republican leaders two distinct advantages. First, it would demonstrate unity within the Republican Conference at a time when members were in open disagreement over how to deal with the debt

ceiling.<sup>6</sup> Party leaders believed that such unity increased their leverage in negotiations with Senate Democrats by making it more difficult for Majority Leader Reid to peel away the seven Republican senators he would need to secure the 60 votes necessary to pass any debt limit increase.<sup>7</sup>

Second, an unsuccessful vote on the BBA could be used as leverage to convince conservatives to drop their demands for a constitutional amendment in exchange for supporting an increase in the debt ceiling. Such demands made it more difficult to secure conference agreement on a less ambitious deficit reduction package. Supporting this conclusion was the fact that the BBA was the only measure party leaders proposed to receive an up-or-down vote on the Senate floor separate from debt ceiling legislation. Notably, it was never suggested that other proposals such as entitlement and tax reform receive an up-or-down vote. Rather, party leaders argued that it was the very need to increase the debt ceiling that gave Republicans leverage to pass these proposals in the first place, and that they should only be proposed in the context of legislation increasing the debt ceiling. In contrast, Republican leaders argued that an up-or-down vote on a BBA would provide a good messaging opportunity for the Republican Party.

Efforts by Republican leaders to force a vote on the BBA were eventually postponed as momentum shifted to legislation embodying “cut, cap, balance” after it passed the House. Yet Senate Democrats were implacably opposed to such an approach

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<sup>6</sup> All 47 Senate Republicans supported a balanced budget constitutional amendment (S. J. Res. 10) introduced by senators Mike Lee (R-UT) and Orrin Hatch (R-UT) at the beginning of the 112<sup>th</sup> Congress.

<sup>7</sup> Kate Ackley, "McConnell Looks to Wrap up Budget Talks, Plans Balanced Budget Vote," *Roll Call*, June 26 2011.



and successfully defeated it as soon as it reached the Senate floor. In the absence of a viable path forward, negotiations continued to find a compromise.

After negotiations between congressional leaders and Vice President Biden reached an impasse and two rounds of talks between House leaders and the President failed to produce an agreement, Minority Leader McConnell proposed a plan on July 12 that he argued would place full responsibility for increasing the federal debt on the Democrats while allowing Senate Republicans to avoid blame. Specifically, the McConnell plan would cede authority to the President to raise the debt ceiling unilaterally. According to the plan's provisions, the president would be required to submit to Congress notification of his intent to increase the debt ceiling. Upon the receipt of such notification, Congress would be allowed to pass a resolution of disapproval if it wanted to block the increase. If Congress chose to do nothing instead, or if either the House or Senate failed to pass the disapproval resolution, the debt ceiling would be increased pursuant to the president's notification.<sup>8</sup>

McConnell briefed Republican members on his plan at a members meeting called specifically for this purpose on July 12. While the plan essentially represented a clean debt ceiling increase which Republicans had opposed from the beginning, McConnell argued that few other options remained. According to his reasoning, the current impasse had two possible outcomes, both of which were undesirable from the Republicans' perspective. First, the debt ceiling would not be raised. Under such a scenario, the economy would slide back into a recession and the Republicans would be blamed

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<sup>8</sup> David Rogers, "Debt Talks Blow Up," *Politico*, July 13 2011.

because of their opposition to increasing the debt ceiling. McConnell argued that this would translate into Democratic victories in the 2012 elections, including a potential second term for President Obama. While not yet representing a majority of the Republican Conference, a growing number of rank-and-file senators held a similar perspective.<sup>9</sup>

Second, the debt ceiling would be increased, but that it would be accompanied by a broader deficit reduction package negotiated by Democratic and Republican Party leaders. McConnell argued that Democrats would not support such an agreement if it did not include new revenue in addition to the spending cuts demanded by Republicans. However, almost all members were concerned that the spending cuts in such an agreement would be postponed for several years, and perhaps not occur at all, while the tax increases would take effect immediately.<sup>10</sup>

McConnell argued that given these two undesirable scenarios, Republicans were left with little choice but to support his plan. While imperfect, McConnell argued that such an approach allowed Republicans to avoid blame for the sluggish economy and the imposition of new taxes. Such reasoning was based upon the belief that Republicans were likely to take control of the Senate in the 2012 elections and that they had an outside chance of winning the presidency. In light of these possibilities, party leaders were determined to avoid taking any steps that could jeopardize their chances for securing

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<sup>9</sup> Minority Leader Mitch McConnell, "Comments on the Senate Floor," ed. United States Senate (Congressional Record, 2011): S4538.

<sup>10</sup> Ibid.

unified Republican control of the government for the first time since the 109<sup>th</sup> Congress.<sup>11</sup>

However, a cross-section of the Republican Conference opposed the McConnell plan. Conservative senators Jim DeMint (R-SC) and Mike Lee (R-UT) pledged to filibuster the plan if it was considered on the Senate floor. DeMint stated that “Republicans were elected last November to get control of spending, borrowing, and debt...” and that “...the last thing we should do is make it easier to spend and borrow money.”<sup>12</sup> These concerns were not limited to the conservative wing of the Republican Conference. Senator Bob Corker (R-TN) criticized the decision-making process utilized to develop the proposal in a speech on the Senate floor.

I realize a scheme has been concocted on the debt ceiling that allows Democrats to go into this next election continuing to ensure that spending to many of their constituents is at levels that please them; therefore, allowing them to run successfully in 2012, and that scheme also allows Republicans to run in 2012 with spending being the issue. I think we all understand that, look, the debt ceiling is going to be increased, and it is going to be increased in such a way that both sides of the aisle have the ability to campaign against the other respective to their bases. But the fact is, our great Nation is in decline because of the elected leaders in Washington. Our great Nation is in decline because of this body and the way it is acting...I think this body was created to be “the greatest deliberative body in the country.” Yet we do not do that. We do not act that way. We do not debate tough issues. We hide--all of

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<sup>11</sup> Minority Leader Mitch McConnell, “Comments on the Senate Floor,” ed. United States Senate (Congressional Record, 2011).

<sup>12</sup> Steven T. Dennis, “McConnell Taking Fire from Right Wing,” *Roll Call*, July 13 2011.

us--we hide and we let our leadership concoct ways to keep us from doing the tough things we need to do.<sup>13</sup>

Yet the prevalence of concerns such as these among the rank-and-file members in the Republican Conference did not stop McConnell from pushing forward with his plan.<sup>14</sup>

In addition, the Minority Leader did not encourage members to propose changes to his plan despite these concerns. Changes were not solicited from concerned senators when they were briefed on the plan, and the proposal was not debated in depth by Republican senators before it was publicly announced at a press conference later that afternoon. Moreover, the Wall Street Journal published an editorial in support of the McConnell plan the same day.<sup>15</sup> Similarly, McConnell touted the support of prominent conservative activists and media personalities as he attempted to persuade senators to support his plan that afternoon and evening.<sup>16</sup> Such efforts suggest a level of advanced cooperation with the Minority Leader's office in order to coordinate the plan's roll out in this manner on such short notice. In light of this cooperative effort, it is not surprising that changes to the plan were not considered by party leaders despite the lukewarm reception it received from individual senators.

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<sup>13</sup> Senator Bob Corker, "Comments on the Senate Floor," ed. United States Senate (Congressional Record, 2011): S4569-S4570.

<sup>14</sup> Manu Raju, "Mitch McConnell Does Damage Control on Debt Ceiling Plan," *Politico*, July 13 2011.

<sup>15</sup> Wall Street Journal Editorial Page, "Debt Limit Harakiri," *The Wall Street Journal*, July 13 2011. The editorial appeared in the July 13 print edition. However, it was available on-line on July 12.

<sup>16</sup> Grover Norquist, Hugh Hewitt, and Fred Barnes were among the early supporters of the McConnell plan.

In a sign of the cooperation between the majority and minority leaders to develop the debt ceiling legislation that would eventually pass, it was evident by the end of the week that Reid and McConnell had begun negotiations on an agreement based on the McConnell plan. Early details of the bipartisan Reid-McConnell approach that emerged from these negotiations confirmed that it was based on McConnell's original plan. However, it would include a commission that would be charged with identifying spending cuts. The commission would be required to release its findings by the end of the year. Legislation embodying the commission's recommendations would receive fast-track consideration on the Senate floor and amendments would be prohibited. Details on the manner in which Senate leaders hoped to resolve their differences on the legislation with the House also emerged. It was reported that the Senate would first pass the Reid-McConnell plan and send it to the House, where a package of spending cuts valued at approximately \$1.5 trillion would be added in order to secure the 218 votes necessary to pass. The modified measure would then be sent back to the Senate where it would be passed without amendment and sent to the President in order to be signed into law.<sup>17</sup>

However, several exogenous and endogenous factors combined to slow momentum on the Reid-McConnell plan shortly after it was released. Externally, the rating agencies Moody's and S&P released reports detailing what a deficit reduction package would need to include in order to avoid a downgrade of the U.S. government's credit rating; the Reid-McConnell plan failed to meet any of these criteria. In addition,

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<sup>17</sup> Scott Wong, "Harry Reid Commends Mitch McConnell's Debt Plan," *Politico*, July 13 2011.

nearly 100 Republicans in the House sent a letter to Speaker Boehner requesting that the McConnell plan not be scheduled for a vote on the House floor. The mechanism in which the debt ceiling would be raised in the Reid-McConnell plan was reported to be identical to McConnell's original plan.<sup>18</sup>

In the Senate, a bipartisan group of senators dubbed the "Gang of Six" released a framework for a more comprehensive deficit reduction package on which they had been working. The release of their plan surprised many in Washington and undermined the support that had been growing for the Reid-McConnell plan. Senate Democrats also faced problems of their own as frustrations boiled over in a closed-door meeting on July 21 with the Director of the Office of Management and Budget, Jacob Lew. Rank-and-file members were growing increasingly frustrated with the decision-making process and the lack of consultation with them by their leadership. Many senators felt that they were conceding too much in negotiations with the Republicans and wanted their leaders to assume a harder line in future talks.<sup>19</sup>

McConnell reached out to Reid and Vice President Biden after a last minute effort by the House was rejected by Senate Democrats. Details of this latest deal emerged the night of July 30. The debt ceiling would be increased by \$2.4 trillion in two steps. This increase would be "offset" by spending cuts, the first \$1 trillion of which would take

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<sup>18</sup> Jonathan Allen and Jake Sherman, "GOP Threatens to Bolt on McConnell's Plan," *Politico*, July 15 2011.

<sup>19</sup> Steven T. Dennis, "'Gang of Six' May Be Too Late," *Roll Call*, July 20 2011. Manu Raju, "Debt Talks Have Senators Angry About Being Left Out," *Politico*, July 21 2011.

effect immediately. A joint committee composed of congressmen and senators appointed by the party leadership in each chamber would be charged with identifying the remaining \$1.5 trillion in deficit reduction. It would be required to report its recommendations by November 23. These recommendations would receive expedited consideration on the floor of both the House and Senate and would be protected from amendments. If Congress failed to pass the committee's recommendations or if the committee itself failed to report legislation, across-the-board spending cuts would automatically occur. The President endorsed the plan in a nationally-televised speech on July 31. More importantly for its chances of actually passing the Senate, both Majority Leader Reid and Minority Leader McConnell supported the plan and were urging their colleagues to do the same.<sup>20</sup> Senate Republicans had a members-only meeting the following day to review the details of the plan and to register any concerns. However, with party leaders and the President supporting it, there was virtually no chance that its provisions would be changed in order to mollify any concerned members. Instead, this support was leveraged by each party's leadership to secure the support of their respective conferences.

The House passed the Budget Control Act of 2011 (Public Law 112-25) on the night of August 1. The final vote was 269 to 161; only 66 Republicans voted against it. Interestingly, a sizeable number of minority-party Democrats also voted in support of the proposal in the House. This is significant, because the measure would have failed if every

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<sup>20</sup> David Rogers, "Debt Ceiling Talks between Joe Biden, Mitch McConnell," *Politico*, July 27 2011.

Democrat voted against it. The Senate passed the measure the next day by a vote of 74 to 26, pursuant to the comprehensive UCA listed below.

Mr. REID. I ask unanimous consent that when the Chair lays before the body the House message to accompany S. 365, I be recognized to move to concur in the House amendments; that the time until noon, Tuesday, August 2, be for debate on the motion to concur, equally divided between the two leaders or their designees; that at noon, the Senate proceed to vote on the Reid motion to concur; that the motion to concur be subject to a 60-vote threshold; that no amendments, points of order, or other motions be in order to the message prior to the vote.<sup>21</sup>

This agreement is consistent with the structured consent pattern in that it made the Budget Control Act the pending business on the Senate floor, limited the amount of time it would be debated, and prohibited all amendments. It also set a 60-vote threshold for final passage.

While nearly half of the Republican Conference ended up opposing the Budget Control Act, the fact that they did not also object to the UCA structuring its floor consideration and paving the way for its final passage can be interpreted as evidence that McConnell's efforts to persuade his colleagues to support his position were partly successful.<sup>22</sup> The President signed the bill into law on August 3. The entire process took only three days.

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<sup>21</sup> Majority Leader Harry Reid, "Comments on the Senate Floor," ed. United States Senate (Congressional Record, 2011): S5183.

<sup>22</sup> 19 Republican senators, or 40% of the Senate Republican Conference, opposed the Budget Control Act on final passage.



### **Findings**

Several aspects of the debate over increasing the federal debt ceiling conform to the structured consent pattern of decision-making. For one, the vast majority of the substantive deliberation on the issue occurred off the Senate floor out of public view. The primary actors involved throughout the process were the Majority and Minority Leaders. Rank-and-file members in both parties remained largely on the sidelines as the decision-making process unfolded.

In an example of the cooperative process between the two leaders, the Minority Leader worked diligently to persuade his colleagues to support the agreement reached with the Majority Leader. Significantly, this placed the Minority Leader on a different side of the issue than a sizeable portion of his conference. Nevertheless, the Minority Leader utilized the influence bestowed by his centralized position in the conference to convince his colleagues not to oppose the agreement procedurally.

Floor consideration of the Budget Control Act was marked by significant barriers to the participation of interested members. A comprehensive UCA was utilized to govern the measure's consideration from introduction through final passage. It limited debate time and prohibited amendments to the legislation. Significantly, the UCA also set a 60-vote threshold for final passage. In this way, the UCA mimicked the requirements of the cloture rule while avoiding its longer time requirements. The Budget Control Act received only one day of floor consideration in the Senate, despite the level of conflict over the issue and the time it took to reach an agreement.

Finally, a majority of both the Democratic and Republican parties voted for final passage. Yet the large number of minority party senators that ultimately opposed the agreement negotiated by their party leaders points to several limitations of the structured consent pattern of decision-making that may impede its ability to limit conflict in the future. First, conflict in the debt debate was exacerbated by the disjointed nature of the decision-making process as it lurched from one development to the next. To a certain extent, the legislative process serves as an information revelation mechanism.<sup>23</sup> Members are able to ascertain the varying levels of resolve for each of their colleagues and modify their behavior accordingly. In this example, as in structured consent more generally, the legislative process does not serve to fulfill this informative role particularly well. Rather, important information typically remains unclear until an agreement is reached between the two party leaders. As a result, the decision-making process prior to the announcement of a deal is often characterized by a certain degree of incoherence as members repeatedly overreact to developments without the information necessary to fully assess the situation. As a result, such reactions themselves serve to precipitate ever increasing conflict as one overreaction begets a subsequent reaction. Within the context of this escalating process, it becomes increasingly difficult for party leaders, particularly minority party leaders, to

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<sup>23</sup> Gregory J. Wawro and Eric Schickler, *Filibuster: Obstruction and Lawmaking in the U.S. Senate* (Princeton: Princeton University Press, 2006), 34-42.

persuade their colleagues to support negotiated agreements designed to facilitate the legislative process.<sup>24</sup>

Finally, the opposition of nearly half of the Republican Conference on final passage of the Budget Control Act suggests that structured consent may breakdown in the absence of cohesive parties. While the 2010 elections elicited greater-than-normal support on the part of moderate senators for the party position on fiscal issues, some of the freshmen members who won in 2010 dramatically changed the internal dynamics of the conference. In recent years, Senate Republicans have been relatively unified, with only a handful of moderate members deviating from the party line on most issues. Such a dynamic has led Republican leaders to adopt a strategy of pursuing the “lowest common denominator” in developing legislative and parliamentary strategy. Specifically, Minority Leader McConnell typically seeks to develop a consensus position (i.e. the lowest common denominator) that is supported by all Republicans. In the past, conservative senators were willing to support such an approach in light of the concern that moderate members would join with Democrats and pass legislation that was even further from the party’s ideal preference point if they were unwilling to be cooperative. However, the newly minted freshmen senators interacted with some of the more senior conservatives to change the dynamic within the Republican Conference. Specifically, their opposition to a strategy of pursuing the “lowest common denominator” led other members to join them. As the distance between moderates and conservatives widens, structured consent will be

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<sup>24</sup> Steven T. Dennis and Meredith Shiner, "Senators Reluctantly Back Debt Deal," *Roll Call*, August 1 2011; Jake Sherman, Jonathan Allen, and Manu Raju, "Democrats and Senate Republicans Still Grumbling," *Politico*, July 31 2011.

less and less able to successfully limit the conflict inherent in the Senate's current environment.

## **Chapter 7: The Death of Deliberation?**

The preceding analysis supports my claim that the Senate developed different patterns of decision-making in an effort to maintain its legislative productivity in the presence of procedurally-empowered senators. Such patterns of decision-making are identifiable because each is marked by a collection of procedural innovations that enable the Senate to successfully limit conflict between its members and pass legislation. Viewed from this perspective, three patterns of decision-making were identified that have been implicitly recognized in the political science literature up to this point. They are normative, collegial, and majoritarian decision-making. Empirical definitions for the collegial and majoritarian patterns were given particularly attention in the preceding analysis due to the fact that they are still observed in the Senate today. A more thorough analysis of the normative pattern beyond its identification was forgone because it is no longer observed in the contemporary Senate.

Building upon this finding, I argued that the Senate recently developed a new pattern of decision-making called structured consent. This new pattern enables the institution to limit conflict and pass legislation in its current polarized environment, despite the procedural autonomy of its members. According to my theory, both the majority and minority party leaders exercise significant influence over the legislative process by virtue of their leadership positions. These leaders routinely choose to utilize

this influence in order to moderate, rather than exacerbate, the procedural choices of their partisan colleagues.

The collegial, majoritarian, and structured consent patterns of decision-making can each be observed in the Senate today. They represent the repertoire of parliamentary procedures exhibited during the consideration of important legislation on the Senate floor. As a result, these patterns help us make sense of the seemingly flexible and spontaneous nature of the legislative process in the institution.

### **A New Theoretical Foundation**

The data presented in this dissertation supports my theoretical arguments underpinning structured consent, namely that the Senate is not gridlocked, at least in the way we typically think of gridlock, because party leaders regularly act to make the institution work. According to the theoretical foundations of structured consent, the Senate is governed by a mixture of formal rules and informal norms and precedents. These rules necessarily restrict the autonomy of individual members. However, members cede power to enforce these rules to others in order to ensure that Congress performs its primary function of lawmaking. Doing so allows the Senate to maintain its legislative productivity. An unproductive Senate makes it more difficult for members to achieve their goals and may result in an erosion of its institutional reputation, which impacts members in both parties negatively. Finally, members cede power to enforce Senate rules

to their party leaders in an effort to limit conflict because they are the institutional actors best situated to maintain productivity in the legislative process.

Specifically, party leaders have flexibility in fulfilling their responsibilities. This flexibility results from the fact that individual senators have conflicting and weak preferences as well as incomplete information about what their leaders do. Party leaders have the freedom to follow structured consent decision-making because individual members are motivated by multiple and conflicting electoral, policy, and power goals. When the goals of a party's membership conflict with one another, it is typically the responsibility of the party leadership to choose between the competing goals and fashion a unified party position on a particular course of action. The ability to choose between these competing courses of action represents the foundation of power for party leaders. Thus, powerful leaders are able to convince or compel their partisan colleagues to support the decisions they make even though they may periodically conflict with a member's own parochial goals.

The power of individual members to affect Senate business simply by obstructing it is compounded many times over when utilized collectively. Thus, the ability of minority parties to impact the Senate agenda has increased as they have grown more cohesive ideologically. Yet this nevertheless conceals the nuanced role played by minority parties in the legislative process today. Put simply, the minority does not always obstruct the majority.

Such a conclusion points to the fact that the minority party does matter, and it can exert a *positive* influence on the decision-making process in the Senate. Thus, rather than seeing *partisan disagreement* or *partisan competition* as the defining characteristic of the Senate today, structured consent suggests that *partisan agreement* or *partisan cooperation* at the leadership level is the most significant characteristic of the contemporary Senate, and one that serves to explain how the institution is able to process legislation dealing with controversial issues in such a permissive procedural environment despite the presence of ideologically cohesive and polarized political parties. The majority *and* minority party leaders generally serve a moderating function in structured consent decision-making by acting within certain bounds to ameliorate the conflict and instability inherent in the institution and its broader environment. Structured consent thus offers a better explanation of politics and lawmaking in the contemporary Senate than existing models.

### **Findings**

In this dissertation I pursued two primary lines of inquiry in order to support my theory of structured consent. First, I explored how conflict is limited in each of the patterns of decision-making identified. Since these patterns developed more or less chronologically, my examination was necessarily historical in nature. Such an approach was helpful because it drew our focus to the ways in which new patterns of decision-making allow the Senate to maintain its legislative productivity.



In my second line of inquiry, I examined major legislation, as defined by Congressional Quarterly, considered in the 102<sup>nd</sup>, 108<sup>th</sup>, 110<sup>th</sup>, and 111<sup>th</sup> Congresses in order to determine whether it met the criteria for collegial, majoritarian, or structured consent decision-making. These particular Congresses were chosen because they include several different scenarios for partisan control of Congress and the presidency. In addition, this period was marked by the emergence of a powerful, centralized party leadership in Congress.

Both of these lines of inquiry strongly suggest that the Senate increasingly functions according to the structured consent pattern of decision-making, and that it has been followed more than majoritarian decision-making in recent years. My findings contradict arguments that conflict in the contemporary Senate is a zero-sum struggle between polarized political parties and that the Senate is becoming more like the House as a result. They also point to a more accurate understanding of the role played by parties in Senate decision-making.

In the 102<sup>nd</sup> Congress, Senate decision-making was overwhelmingly characterized by a collegial pattern of decision-making. There were no significant barriers to the participation of interested members and the total number of members involved in the decision-making process was usually quite large. As such, decision-making was relatively decentralized and there were few constraints on members in the debate and amendment process. Moreover, action occurred predominately on the Senate floor. Both majority and minority members participated in the process and a high percentage of

amendments filed by members of both parties were ultimately offered to the legislation under consideration. Furthermore, the percentage of amendments offered that ultimately passed was high for all measures. As a result, the success rates for majority- and minority-sponsored amendments were relatively even and most of the amendments offered were disposed of by voice vote. In those cases in which a recorded vote was necessary, a majority of one party voted against a majority of the other party most of the time. However, these votes represented only a small fraction of the total amendments disposed of during the 102<sup>nd</sup> Congress. Finally, cloture was not needed to end debate on most of the measures examined. In the few instances in which the cloture process was utilized on the motion to proceed to legislation, a majority of both parties supported the efforts to end debate. A majority of both parties also supported final passage most of the time. Conference committees were used to negotiate differences between the House and Senate in all but two cases. In each of these cases, the House simply passed the Senate-passed legislation.

The dominance of the collegial pattern of decision-making in the 102<sup>nd</sup> Congress can be attributed to the lingering effects of several Senate norms that once commonly served to create an institutional culture that restrained individual members from regularly exploiting their procedural rights in an effort to achieve their goals. Specifically, the Senate was characterized by a high degree of courtesy, reciprocity, and institutional patriotism during the first half of the twentieth century. In such a permissive procedural environment, these norms alone were largely responsible for ensuring that the Senate

remained a functional yet deliberative body. The absence of significant polarization between the two parties in Congress and in the electorate also served to facilitate collegial decision-making.

However, Senate norms and the collegial relationship between the two parties were increasingly being eroded by the changing nature of the Senate's external environment and the subsequent response of its members internally. The new environment created incentives for senators to be involved in a broader array of issues. New procedural mechanisms like the hold process gave individual members the ability to be more active in the Senate's deliberations, regardless of their seniority or committee assignments. Furthermore, the increasingly crowded Senate agenda and the corresponding growth of interest groups seeking representation in the policy process created more opportunities for members to become legislatively active.

As the norms that previously restrained member behavior eroded, obstructionism increased. The typical senator was increasingly more likely to avail himself of extending debate and other procedural tools to protect his interests. This transformation created significant problems for the institution and led to the creation of the "60-Vote Senate." The growth of obstructionism has left a partisan and confrontational environment in its wake. It is now more difficult for the Senate to complete work on the legislation it must pass each year. This results from broader member participation and is exacerbated by narrower partisan majorities and a crowded agenda as well as the willingness of

individual senators to pursue their own agenda at the expense of the institution's collective interests. Yet, the Senate continues to function despite these difficulties.

In an effort to compensate for the erosion of Senate norms, increasingly influential majority and minority party leaders gradually began to work together to ensure that the Senate continued to pass legislation dealing with controversial and uncontroversial issues alike. Over the course of the 1990s and the first decade of the twenty-first century, the two party leaders would eventually supplant the old norms and customs of the Senate as the predominant force making the institution work. As a result, Senate decision-making changed dramatically by the 111<sup>th</sup> Congress.

In contrast to the 102<sup>nd</sup> Congress, Senate decision-making in the 111<sup>th</sup> was largely characterized by conditions of structured consent. There were moderate barriers to the participation of interested members and the debate and amendment process was semi-exclusive. While both majority and minority members continued to participate in the amendment process, a much lower percentage of the amendments filed were eventually offered to legislation on the Senate floor. Furthermore, the percentage of amendments offered that were ultimately agreed to was also low for most measures. The rates of success for majority- and minority-sponsored amendments were relatively uneven and most amendments were disposed of by recorded vote. On these votes, a majority of each party voted against one another most of the time. Finally, cloture was necessary to end debate on most measures. Curiously, a majority of both parties supported final passage in all but a few cases. A process of amendment exchange between the House and Senate

was increasingly utilized to resolve differences between the two chambers. However, conference committees and House passage of Senate-passed legislation were also common.

### **Implications**

The structured consent theory of Senate decision-making has several important implications for the continued study of the institution. First, it provides a more nuanced explanation for how the contemporary Senate is able to maintain its productivity and pass controversial legislation in a highly polarized environment. Second, the concept of general patterns of decision-making changing in response to conflict underscores the need for a more comprehensive definition of obstruction. Finally, structured consent builds upon this more comprehensive definition of obstruction to draw our attention to a more accurate understanding of polarization and its consequences for the legislative process today. Such an understanding suggests that while the Senate may indeed be broken, such dysfunction is due to reasons other than those acknowledged in the literature up to this point (i.e. rampant minority party obstruction).

#### *A Nuanced Approach Is Needed*

Two primary theoretical approaches have advanced our understanding of the relationship between parliamentary procedures and the Senate's ability (or lack thereof) to pass controversial legislation, as well as the impact of this relationship on member

participation in the legislation process. While these approaches have informed scholarship on the Senate in numerous important ways, they have also limited our understanding of the institution and how it makes important decisions. Put simply, the predictions of each approach do not alone explain the contemporary Senate's ability to overcome conflict between its members and pass legislation in a polarized environment.

One of the theoretical approaches posits that institutional rules are path dependent.<sup>1</sup> Put simply, the Senate's inherited rules of procedure affect the legislative process by constraining the majority party in the pursuit of its goals and enhancing the ability of the minority party to obstruct the majority. According to Binder (1997), "earlier procedural decisions are inherited by subsequent majorities – and act as constraints when those majorities try to choose their own set of rules."<sup>2</sup> In this way, procedural rules are "sticky."<sup>3</sup> Binder argues that the Senate's inherited rules interact with competition between the majority and minority parties to structure the legislative process in the institution. Senate decision-making is thus dependent on both the partisan need and capacity for change *and* past procedural decisions that serve to constrain individual member behavior.

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<sup>1</sup> For example, see: John Aldrich, "Rational Choice Theory and the Study of American Politics," in the *Dynamics of American Politics: Approaches and Interpretations*, Lawrence C. Dodd and Calvin Jilson, eds. (Boulder, Co.: Westview Press, 1994): 208-233.

<sup>2</sup> Binder, *Minority Rights, Majority Rule*, 3.

<sup>3</sup> Kenneth A. Shepsle, "Institutional Equilibrium and Equilibrium Institutions," in *Political Science: the Science of Politics*, Herbert Weisberg ed. (New York: Agathon Press, 1986): 51-81.

The principal manner in which rules restrain Senate majorities from one Congress to the next is that they require a supermajority vote to be changed.<sup>4</sup> As a result of these costs, Senate rules have remained relatively stable over time, especially when compared to those in the House. Procedural innovations are typically incorporated into the existing rules instead of replacing them entirely. As such, the development of Senate rules reflects a “path-dependent layering process.”<sup>5</sup>

Viewed from this perspective, the institution’s rules are “historical composites” that continue to impact the legislative process in unintended ways long after they are created.<sup>6</sup> According to Binder and Smith (1997), “the character of the Senate today represents the sum choices senators have made about institutional arrangements since the very first Senate met in 1789.”<sup>7</sup> The power individual members derive from the path dependent nature of the Senate’s rules allows the minority party to obstruct the majority to a significant degree. The logical result during periods of significant partisan polarization is an increase in gridlock.

An alternative theoretical approach asserts that Senate rules reflect majoritarian decisions. Krehbiel (1992) raises the consideration that “objects of legislative choice in

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<sup>4</sup> Binder, *Majority Rights, Minority Rule*, 167, 203.

<sup>5</sup> Eric Schickler, *Disjointed Pluralism: Institutional Innovation and the Development of Congress* (Princeton: Princeton University Press, 2001), 16.

<sup>6</sup> *Ibid.*, 267.

<sup>7</sup> Binder and Smith, *Politics or Principle?* 23.

both procedural and policy domains must be chosen by a majority of the legislature.”<sup>8</sup> As a result, “majoritarianism” remotely determines procedural rules. Wawro and Schickler (2006) apply Krehbiel’s concept of “remote majoritarianism” to the pre-cloture Senate. Specifically, they argue that the “mutability” of Senate rules enables a committed majority to curtail minority rights in response to excessive obstruction. Put simply, the provisions of Senate rules, such as the super-majoritarian requirement to change them, are ultimately majoritarian in nature.<sup>9</sup> Senate majorities may overcome the super-majoritarian barriers erected by the institution’s inherited rules simply by establishing a new precedent by a simple-majority vote.<sup>10</sup> It should be noted, however, that this approach does not entirely dismiss the relevance of the Senate’s inherited rules. Rather, Wawro and Schickler argue that the “stickiness” of these rules do not prevent, in and of themselves, a committed majority from exerting more control over the legislative process.<sup>11</sup>

However, a narrow focus on Senate procedure, whether path dependent or majoritarian in nature, is by itself insufficient to account for how the legislative process works in the Senate. Instead, a more nuanced approach is needed. While conceding that the procedures governing Senate decision-making reflect remote majoritarian choices on a fundamental level, such a theoretical approach tells us remarkably little about the

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<sup>8</sup> Krehbiel, *Information and Legislative Organization*, 16.

<sup>9</sup> Wawro & Schickler, *Filibuster*, 33.

<sup>10</sup> *Ibid.*, 263.

<sup>11</sup> *Ibid.*



impact they have on the legislative process in practice. Similarly, acknowledging that the minority party collectively chooses not to obstruct the majority during the consideration of controversial legislation on the Senate floor on a routine basis suggests that the power individual members derive from the path dependent nature of Senate rules is also not a particularly good predictor of member behavior on a daily basis.

In contrast, the majoritarian and structured consent patterns of decision-making offer two alternative ways in which the Senate can overcome the differing theoretical obstacles to decision-making offered by the remote majoritarian and path dependent approaches described above. First, the majoritarian pattern demonstrates that Senate majority parties have the means, albeit of admittedly limited nature, to structure the legislative process in a way that disadvantages the minority party. This necessarily reduces the minority's procedural ability to obstruct the majority. As a result, the majority party does not need to resort to changing the Senate's rules in order to overcome obstruction and pass legislation.

Second, structured consent decision-making illustrates the ways in which Senate minority parties can influence policy outcomes without resorting to overt obstruction, which itself may disadvantage the minority by harming its reputation. The bipartisan cooperation characteristic of the structured consent pattern suggests that conflict in the Senate is not zero-sum in nature. By extension, structured consent supports the contention that the majority party is not simply the victim of a committed minority exploiting inherited and outdated rules of procedure to obstruct its agenda.

*A Comprehensive Definition of Obstruction Is Needed*

According to conventional wisdom, decision-making in the contemporary Senate has become more partisan and confrontational. This conflict is due, in part, to increasingly polarized constituencies outside the Senate and, in part, to competing political and ideological interests inside the Senate.<sup>12</sup> The result is zero-sum conflict between the two parties, precipitated principally by minority party obstruction.

The majority party explicitly attempts to limit conflict and overcome such minority obstruction in a manner that advantages its members by restricting the procedural options of the minority. The majority's behavior is interpreted as a response to the increased likelihood that the minority party will seek to obstruct, or block, the majority from passing its agenda, thereby advantaging its members. Steven S. Smith has dubbed this phenomenon the "obstruct-and-restrict syndrome."<sup>13</sup> Specifically, Smith (2010) argues that "each party's leaders, guided by a consensus view among their fellow partisans, pursue strategies that perpetuate the obstruct-and-restrict syndrome of the modern Senate."<sup>14</sup> Reflecting this trend, majority leaders began to more aggressively utilize their procedural prerogatives to limit debate and control amending activity on the

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<sup>12</sup> Theriault, *Party Polarization in Congress*, 3; Lee, *Beyond Ideology*, 3.

<sup>13</sup> Smith, *The Senate Syndrome*, 2.

<sup>14</sup> *Ibid.*, 21.

Senate floor. Yet such a perspective suggests a causal, unidirectional, connection between minority obstruction and majority restriction in that obstruction begets restriction.

Wawro and Schickler (2006) adopt a similar approach with their argument that “legislative obstruction is a tool of minorities.”<sup>15</sup> By a “minority,” the authors mean any coalition of legislators that “opposes passage of a bill, resolution, or amendment, but would be defeated if that measure were subject to an up-or-down vote.”<sup>16</sup> Wawro and Schickler argue that the Senate’s permissive procedural environment that enables minority obstruction in the first place is itself a remote majoritarian choice.<sup>17</sup> They contend that excessive minority obstruction will cause the majority to change the rules of the legislative game by establishing new precedents through rulings of the Senate’s presiding officer.<sup>18</sup>

Koger (2010) adopts a similar view of obstruction. Specifically, he defines it as “legislative behavior (or a threat of such behavior) intended to delay a collective decision for strategic gain.”<sup>19</sup> Thus, the legislative process is characterized as a contest between two teams which represent a majority and minority of the Senate. According to this construct, obstruction results from a “united minority party blocking majority party

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<sup>15</sup> Wawro & Schickler, *Filibuster*, 25.

<sup>16</sup> *Ibid.*, 25.

<sup>17</sup> *Ibid.*, 33.

<sup>18</sup> *Ibid.*, 32.

<sup>19</sup> Koger, *Filibustering*, 16.

proposals for some sort of political gain as well as policy payoff.”<sup>20</sup> Koger argues that Senate majority parties are not powerless in the face of minority obstruction. They may avail themselves of several procedural strategies, including: unanimous consent agreements; cloture; attrition; and parliamentary innovations through the creation of new precedents.

Notwithstanding these similarities, Koger (2010) inadvertently draws our focus to the ways in which majority parties may obstruct minority parties in the Senate. For example, Koger defines the means of obstruction as “the unusual use of ordinary privileges.” It is important to note that he is referring to common maneuvers utilized by minority parties to obstruct legislation in the Senate such as “prolonged speaking,” or filibustering.<sup>21</sup> Nevertheless, Koger correctly points out that the “tactics legislators use to *respond* to obstruction has a tremendous impact on whether opponents of a proposal attempt a filibuster.”<sup>22</sup>

The majoritarian pattern of decision-making builds upon Koger’s implicit acknowledgement that such tactics by the majority party may *precede* obstructive behavior on the part of Senate minorities. In the majoritarian pattern, the majority party does not simply restrict the procedural options of the minority in response to such obstruction. Rather, the majority uses its “ordinary privileges” to proactively block the

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<sup>20</sup> Koger, *Filibustering*, 7.

<sup>21</sup> *Ibid.*, 17.

<sup>22</sup> Italics in the original. *Ibid.*, 33.

minority from participating in the legislative process pursuant to the Senate's rules.

Indeed, such obstruction exhibited by the majority party can be observed before a minority filibuster can be said to have occurred. It is precisely this action that often leads the minority party to vote against cloture, thereby engaging in "obstruction" as conventionally understood.

Efforts to limit conflict via majoritarian decision-making have led to an increase in majoritarian obstruction. In such a scenario, excessive conflict is limited by the majority party blocking the minority's ability to debate legislation and offer amendments on the Senate floor pursuant to the institution's rules. Some of the recent literature has acknowledged the increased prominence of Senate parties and their role in managing or creating conflict in the institution. Yet the literature does not offer a comprehensive understanding of the nature of obstruction in the contemporary Senate that necessarily follows from the identification of the majoritarian pattern. Indeed, the literature assumes, either explicitly or implicitly, that obstruction results from the efforts of members in the minority party to manipulate the Senate's procedures for political gain. Indeed, very little attention has been given to the manner in which these procedures actually strengthen, rather than weaken, the majority party by allowing it to effectively block minority party members from participating in the legislative process.

As a result, I have sought to make the case that majoritarian obstruction does occur in the contemporary Senate. I have not claimed that all controversial legislation is considered pursuant to the majoritarian pattern. Nor have I claimed that conflict over

legislation is only limited through the use of majoritarian decision-making. For example, structured consent decision-making is also routinely utilized in the Senate today during the consideration of controversial legislation. Rather, I have simply suggested that there are clear instances in which Senate majorities seek to obstruct the minority for partisan or policy gain. Such an acknowledgement leads to the inevitable conclusion that the dramatic increase in obstruction in the contemporary Senate cannot be solely attributed to minority efforts alone. A more comprehensive definition of obstruction is thus needed in order to foster a better understanding of Senate decision-making.

More importantly, an incomplete understanding of the nature of obstruction in the contemporary Senate limits the ability of political scientists to correctly diagnose the problems confronting the institution and inform the debate over reforming the institution's rules. Scholars that adopt such an approach risk becoming part of the political debate instead of objective analysts interpreting the data in an impartial manner. Proposed reforms to reduce the ability of the minority party to "obstruct" legislation may simply address the symptoms rather than the underlying problem. In contrast, a more comprehensive definition of obstruction allows scholars to form a better understanding of the ways in which the contemporary Senate may be "broken."

### *"A Broken Senate" Revisited*

The Senate's increased reliance on the majoritarian and structured consent patterns of decision-making suggests that deliberation and the open decision-making

process on which it depends are no longer characteristic of the legislative process when major legislation is considered on the Senate floor. Instead of deliberation, scripted speeches and prearranged colloquies fill floor time while the party leadership works out the legislative details and resolves any controversies off the floor and out of public view. However, developments external to the Senate would quickly lead to gridlock if not counterbalanced by these internal changes. Such changes have admittedly made the Senate, its committees, and the floor operate faster and more efficiently, given the level of conflict between the two parties and their ideological cohesion, than at any time in the past despite the partisanship and ideological polarization characteristic of its environment. Put simply, deliberation has succumbed to the Senate's bipartisan determination to avoid gridlock and pass important legislation.

This gives rise to an important question that speaks directly to the Senate's continued relevance in our political system: Is the transformation of the Senate into a more centralized, restrictive, and partisan institution a negative development if such a change is needed to maintain its legislative productivity? Like all democratic institutions, the Senate certainly needs to adapt to changing circumstances and new electoral environments in order to maintain its legitimacy and relevance within the political system. In light of the significant fluctuations in Senate decision-making described in this dissertation, can the contemporary Senate then be embraced as an example of how Congress can adapt to a changing environment in order to maintain its legitimacy and relevance without undertaking major internal reform of its formal rules?

Some would likely argue that Senate decision-making remains inefficient despite these changes and that it is still unable to pass legislation to address society's most pressing problems. However, was such an activist institution what the framers of the Constitution envisioned when creating the Senate? While a single theoretical view of the Senate was lacking at the Constitutional Convention, the framers did broadly share in the belief that they were creating a deliberative institution designed to bring a different perspective to Congress, thereby serving as an internal check on the House of Representatives. From this stand point, it becomes clear that the framers charged the Senate with two fundamental, yet contradictory goals: passing legislation along with the House and simultaneously checking the House by promoting deliberation in the legislative process. Questions of bicameralism and the overall size of the Senate were resolved within this context.

The framers and original leaders of the Senate conceived of deliberation as a means to educate senators and the public on the great choices before the institution. While passing legislation was certainly important, it was not the *only* important function of the Senate. Indeed, the framers gave as much consideration to the necessity of deliberating on intemperate measures as to the need of quickly passing legislation. They believed that such an institutional structure represented the best method to preserve individual liberty by checking popular opinion without undermining the republican principles on which the Constitution rested.



It is in this sense that the contemporary Senate may be viewed as broken. While the Senate continues to produce important legislation at relatively consistent rates despite a rapidly changing environment and increasing workload, it has done so largely at the expense of the institution's deliberative function. Reasoned deliberation has nearly disappeared in the contemporary Senate as decision-making has gradually migrated from committee hearings and the Senate floor to informal and ad hoc meetings of interested members typically held under the auspices of the party leadership and out of public view. This death of public deliberation may ultimately undermine our representative democracy. Despite the fact that more groups are participating in the federal policy process than ever before, they are expressing their viewpoints within an echo chamber absent thoughtful deliberation. As a result, the American people are increasingly disillusioned with the Congress and cynical about its accomplishments (or perceived lack thereof).

Contrary to conventional wisdom, an increasingly partisan and ideologically polarized Senate in which deliberation takes place in public may not have an inherently negative influence on American politics in the twenty-first century. Politics organized around two opposing sets of principles is not a bad thing in and of itself. Indeed, the current state of politics in the United States and public disapproval with the political process in general seemingly calls for an ideologically driven yet deliberative Senate. However, such a Senate may not be possible in the current environment. The contemporary Senate is increasingly accountable to the American people to a degree not

envisioned by the framers of the Constitution. A Senate directly accountable to popular opinion may not be able to quickly and efficiently translate such deeply and closely divided opinion into legislation without sacrificing its deliberative nature. As a consequence, we may be forced to choose between an efficient Senate and the death of deliberation.

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