EXCEPTIONS* TO THE RULE

MOLLY E. REYNOLDS

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THE POLITICS OF FILIBUSTER LIMITATIONS IN THE U.S. SENATE

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One

INTRODUCTION

But every schoolboy in the United States knows that [the Senate] is practically the only parliamentary body in the world where the majority cannot transact the public business, and where the minority instead of the majority transacts the business of the country.

SENATOR WILLIAM E. MASON (R-ILL.),
APRIL 21, 1897

The Senate is not a majoritarian body.

SENATOR CHUCK SCHUMER (D-N.Y.), MAY 10, 2005

In many other ways—including the issues on its agenda and the demographic composition of its membership—the U.S. Senate at the beginning of the twenty-first century would be unrecognizable to a member of the body at the end of the nineteenth. The notion that simple majorities do not rule, however, is a rare point of consensus across both time and party. Our understanding of the Senate as a slower-moving, more deliberate body than the House of Representatives dates to the Constitutional Convention, where James Madison characterized the chamber as proceeding with "more coolness . . . [and] more system."[1] The chamber lost its ability to end debate with simple majority vote in 1806, and it took nearly a century of increasing obstruction before the cloture rule provided a supermajority solution, in 1917.[2] Over the course of the twentieth century, the filibuster became a routine procedural tool that is often blamed for the gridlock and dysfunction that characterizes our contemporary political system.

This ability of a minority to obstruct legislative progress in the Senate permeates the understanding of deliberation and activity in Congress for academics, journalists, and ordinary citizens alike. From a scholarly perspective, the filibuster sits at the center of Krehbiel's well-known account of lawmaking in the separation-of-powers system.[3] Work on gridlock and legislative productivity[4] and executive nominations[5] has similarly embraced the notion that the filibuster dictates what the Senate, and by extension, the House and the president, can achieve.

Coverage of the Senate in the popular press now also takes for granted the notion that virtually all legislative action requires the support of three-fifths of the Senate. Discussions of specific bills are often framed as needing sixty votes for passage; in reference to the 2008 auto bailout, for example, the *New York Times*'s David Herszenhorn wrote that "passing any legislation to aid the auto companies would *require* 60 votes in the Senate."[6] So ingrained is the effect of the filibuster rule that journalists regularly describe measures that obtain more than fifty but fewer than sixty votes as failing, without additional discussion of why and how something that has majority support does not pass the chamber.[7]

There exists, however, a set of procedures in the Senate that complicates this account, which is so prevalent among Congress watchers of all stripes. Over the past nearly fifty years, Congress has repeatedly included in statutory law provisions that I call "majoritarian exceptions."[8] By reallocating power within the chamber in three different ways, these special procedures empower simple majorities and make operations of the Senate more majoritarian. Some prior work on these procedures explores them only in the context of broader arguments and not as an independent object of interest.[9] In other instances, the procedures are explored in depth but only as specific, substantive case studies[10] or as a way of explaining a particular set of legislative outcomes.[11] In this book, I unify the narrow and the broad by analyzing systematically the creation, use, and policy consequences of these special procedures in the Senate.

In chapter 2, I explore at some length what constitutes a majoritarian exception, that is, a provision included in statutory law that prevents some future piece of legislation from being filibustered on the floor of the Senate. A careful review of the historical record has identified 161 such provisions adopted between the 91st and 113th Congresses (1969–2014). They cover a wide range of policy areas, including trade (such as the multiple provisions providing the

president with fast-track trade authority); foreign policy (including rules for the imposition or waiver of international sanctions); defense matters (such as procedures for closing military bases); the federal budget (including the process for developing and passing the congressional budget resolution); and health care (such as the provisions governing the adoption of proposed cuts in Medicare spending).

The logic as to why majoritarian exceptions matter is simple: by eliminating the possibility of a filibuster, they ease the process of building a coalition in favor of a particular piece of legislation. Because majoritarian exceptions apply only in specific circumstances, however, even close observers of Congress tend to think of each set of procedures in isolation, frequently describing even the best known examples, such as budget reconciliation, as "arcane."[12] By providing a systematic look at the exceptions together, as a single class of procedures, however, I am able to demonstrate how majoritarian exceptions represent an important procedural dynamic in the Senate in their own right.

Indeed, one need only look at both the 2016 election campaign and its immediate aftermath to see the central role that majoritarian exceptions can play in public policymaking in the United States. While the presidential race was notoriously light on policy issues, one area on which then candidate Donald Trump focused heavily was trade; debates over whether to ratify the Trans-Pacific Partnership also featured prominently in the Democratic primary between Hillary Clinton and Bernie Sanders. As shown in chapter 3, majoritarian exceptions under which trade deals come to the floor of the Senate protected from amendment and a filibuster have been central to the conduct of trade policy in the United States since the early 1970s. Chapters 4 and 5 explore a particular majoritarian exception, known as budget reconciliation, that appeared in the headlines beginning the day after the election as a possible mechanism for accomplishing some of the new unified Republican Congress's biggest legislative goals, including repeal of the Affordable Care Act and tax reform.[13] Those procedures, which protect certain budgetary legislation from a filibuster and some amendments in the Senate, have been used to accomplish a range of significant policy changes since the 1980s. As demonstrated throughout the book, these kinds of high-profile examples of the role of majoritarian exceptions are joined by many less noticeable, but still consequential, instances of policymaking that involve decisions to institute simple majority thresholds for particular legislation.

THE ARGUMENT AND ITS BUILDING BLOCKS

Throughout this book, I document one way in which simple majorities can be influential in Senate policymaking; to borrow a phrase from Krehbiel, I argue that the Senate is sometimes actively, rather than remotely, majoritarian.[14] In particular, the chapters to follow unite the theory and data with two principal arguments about the ends produced by this particular form of majority rule. First, majoritarian exceptions ease the passage of the bills to which they apply. There are three potential components of a majoritarian exception—protection from a filibuster on the floor, a prohibition on amendments, and a preclusion of committee obstruction—and each reduces the hurdles that the measure must clear on its way to passage.

The committee-related provisions, for example, reduce the chance that a simple majority of a committee can prevent a measure from coming to the floor. When, thanks to a majoritarian exception, a bill is automatically reported out of a committee, it is impossible for the legislation to get stuck at that stage of the process; the same is true when the special procedures send a measure directly to the floor.[15] Decisions about when exceptions should be created and used, then, should be shaped by the fact that they will make it more difficult to engage in future obstruction on the legislation to be considered under the special procedures.

The second goal of majoritarian exceptions is to help the Senate's majority party maintain its control of the chamber. As a result, the procedures will be both created and used when doing so helps the majority party remain as such. In making this argument, I join a growing chorus of scholars who view the Senate as the home of influential parties rather than an individualistic body. Conceptually, much of this literature portrays the chamber as the home of two competing partisan teams that work together to achieve shared goals at the expense of their partisan opponents.[16] The majority team attempts to pass legislation it favors, while the minority team works to obstruct those initiatives. The majority party has a wide range of tools, both formal[17] and informal,[18] at its disposal as it attempts to enact its preferred policy agenda and maintain its majority status.

In the context of majority maintenance, there are three basic ingredients for a successful defense of its status by the Senate majority party. First, majority party members must collaborate to change policies in ways preferred by constituents and generate a record of legislative accomplishment.[19] Second, they

must generate opportunities for individual members to produce accomplishments for which they can claim credit.[20] Third, they must avoid blame for negative events.[21] Expedited procedures can serve as a valuable tool as the majority party works to put each of these elements together into a winning formula.

To build this argument, I rely on several familiar assumptions. First, the individual members who constitute the majority caucus desire to be reelected.[22] Second, rank-and-file members of the majority party delegate some of their power to the leaders of their party, who, in turn, assume responsibility for acting in the party's interest—that is, the party acts as procedural cartel.[23] In this context, leaders must satisfy this obligation both when new procedures are created and when they are used. Finally, the proximate shared goal of individual majority party senators is to enable their party to maintain its majority status;[24] the benefits to a party's members of having their party hold majority status are well documented empirically.[25]

As I make these arguments, I answer important substantive questions about how the Senate operates. Much recent work on the consequences of procedural reform in the Senate has leveraged the 2013 decision to make nominations to the executive branch and courts below the Supreme Court subject to simply majority cloture.[26] In the first year after the change to the procedures, judicial nominees were confirmed more frequently and more quickly but were not significantly more liberal.[27] Meanwhile, for other, nonjudicial appointments, confirmation rates increased in the first year, but nominations took longer to receive attention.[28] There is little systematic knowledge, however, about the creation and use of expedited procedures for other legislation, and documenting these patterns is particularly important, given their extensive policy implications. Chapter 5 explores at length how the use of one particular exception—the budget reconciliation process—has had wide-ranging consequences for mandatory spending programs such as Medicare, Medicaid, food stamps, and farm price supports. The examples discussed in chapters 3, 4, and 6 also include proposed and enacted exceptions involving the conduct of the war in Iraq, the sale of weapons to other countries, the negotiation of international trade agreements, the closing of military bases, and the review by Congress of regulations promulgated by executive branch agencies. The wide reach of this final exception alone suggests the breadth of the procedures' potential policy consequences.

In addition to addressing this substantive gap, this account also contributes to our understanding of from where institutions come. On one hand, a

number of important accounts of Senate policymaking assume that institutions such as the filibuster are exogenous and immutable;[29] both my theoretical and empirical investigations here demonstrate the limitations of that assumption. Instead, I join others who have illustrated how new procedures are created to achieve proximate political goals; indeed, notable works on the evolution of the filibuster have argued that Senate rules are changed in response to short-term political forces rather than to principled commitment to supermajoritarianism. One prominent account of the creation of the cloture rule (Rule 22) in 1917, for example, examines the political circumstances surrounding the measure, whose passage was facilitated by the existence of new procedures for ending debate. Senate (majority) Democrats and President Wilson framed that bill, which permitted the arming of merchant ships during World War I, as a national security measure, portraying the procedural question as a matter of policy. The new rules, they argued, were needed if the Senate was going to enact a popular and salient policy change.[30] A similar dynamic holds for majoritarian exceptions.

Finally, by marshaling data on a range of examples in numerous policy areas, the account of procedural change presented here provides useful context for arguments about whether, and under what circumstances, we should expect broader filibuster reform in the U.S. Senate. Exceptions to the filibuster rule, according to the evidence presented here, reflect the electoral priorities of the Senate's majority party, even when adopting them requires the support of some minority party members. This explanation, when combined with the existing political science literature, suggests that future changes to the rules are likely to be produced by political realities and not by senators' principled positions on the role of unlimited debate in the chamber.

PLAN OF THE BOOK

The discussion above provides some context for our exploration of majoritarian exceptions. But a more thorough explanation of how these procedures fit in the broader landscape of unlimited debate in the Senate, how exactly they limit debate, and how I identify them in the historical record provides useful groundwork on which to build.

In general, majoritarian exceptions can be divided into two general categories, largely based on the content of the underlying legislative proposal that they shepherd to and through floor consideration, as described in chapter 2.

One category involves efforts by the Senate to delegate some of its power to one or more actors, either within or outside the chamber. The actor or actors to whom this power is delegated are tasked with drafting a new policy, after which the proposal is sent to the floor of the Senate under expedited legislative procedures. The process for closing military bases is a well-known case of this kind of exception. An independent Base Realignment and Closure Commission (BRAC) is authorized by Congress to select bases for closure, and the legislation approving those selections cannot be filibustered or amended. These delegation procedures are explored in chapter 3, which shows how they can benefit the majority party by helping it solve internal collective action problems.

Chapters 4 and 5 focus on one particular majoritarian exception: the budget reconciliation procedure. Created in 1974, the reconciliation process allows for changes to mandatory federal programs and revenue-raising instruments to be made through a filibuster-proof process that also restricts amendments. The history and development of the procedures are described in chapter 4, followed by a theoretical account that highlights how these particular features of the procedures can be leveraged to produce policy outcomes that reflect the majority's preferences, making the caucus appear competent and enhancing its reputation in the eyes of voters. An empirical test and series of brief case studies illustrate how these dynamics have played out over the past thirty years.

Chapter 5 explores whether the reconciliation procedures are actually used in a way that is likely to help the majority party achieve its goal of maintaining control of the chamber. I argue that the reconciliation process generates opportunities for majority party members to claim credit and avoid blame. Because the majority party's ability to maintain its status involves defending different sets of seats in different electoral cycles, we should expect the programmatic changes made through the process to reflect these varying strategic concerns. I test this hypothesis using new data on programmatic reforms made using the procedures.

Chapter 6 takes up the second category of exceptions, which seek to limit the president's power to take unilateral actions in the face of a range of disincentives to do so. Depending on the degree to which Congress and the president prefer the same policy outcomes, the legislative branch may disapprove of a unilateral action taken by the president, either through an executive order, signing statement, or other method. By creating an executive branch oversight

exception, Congress can make a specifically delineated unilateral action by the president subject to legislative approval. Because the measure acceding to the president's action is privileged for consideration and cannot be filibustered, Congress is guaranteeing, through a legislative check, that it has increased input in a particular policy area. Take, for example, the provision of the International Security Assistance and Arms Export Control Act of 1976, which allows Congress to disapprove of presidentially proposed sales of major defense equipment. The resolution rejecting such a deal can be compelled out of committee by a highly privileged resolution after ten days and is limited to ten hours of debate on the floor of the Senate.

Before these provisions were enacted, arms sales could be handled entirely within the executive branch, provided the president certified that the sale would "strengthen the security of the United States and promote world peace"—a determination that was made for all proposed transactions by both Presidents Lyndon Johnson and Richard Nixon.[31] Congress certainly had the power to respond to this presidential act through its regular legislative procedures before creation of the procedural exception. By changing its internal procedures for this particular policy choice, however, Congress made it easier for itself to exert power in the policy area by creating opportunities for majority rule.

Finally, chapter 7 summarizes my findings and offers several implications of this work for the prospects of further procedural change in Congress. In particular, I discuss how existing exceptions have been used in the contemporary Congress by senators to send messages to important constituencies outside the chamber and describe several dynamics that have been at play in the successful creation of new majoritarian exceptions in recent years.

In the policymaking world, where the upper chamber is so often understood to be the sixty-vote Senate, majoritarian exceptions are just that—exceptions to the overall, prevailing dynamic that shapes coalition building in the chamber. Certainly, in most cases, the presence of Rule 22 can shape deliberation. Indeed, in the contemporary era, in many instances, it does influence what the Senate, and by extension the House and the president, can accomplish. But as the pages to come show, as with so many things in the Senate, the story is not that simple. Let us begin.

Two

LIMITING THE UNLIMITED
DEBATE IN THE U.S. SENATE

As the United States began to recover from the Great Recession in late 2009, President Obama and congressional Democrats began to call attention to the large budget deficit, produced in part by the fiscal stimulus enacted in 2009 to prop up the then faltering economy.[1] Obama even went as far as to call for a three-year freeze on discretionary, non-national-security federal spending in his 2010 State of the Union address.[2] Taking up the president's charge, Senators Conrad (D-N.D.) and Gregg (R-N.H.) introduced an amendment to a resolution raising the federal debt limit that would create a Bipartisan Commission for Responsible Fiscal Action. This panel would be made up of two executive branch appointees (the secretary of the treasury and a second person selected by the president) and sixteen members of Congress, with the Senate majority leader, Senate minority leader, Speaker of the House, and House minority leader each selecting four members.

The task force would be responsible for developing recommendations that "will significantly improve the long-term fiscal imbalance of the Federal Government."[3] While the amendment did not specify how this goal would be achieved, much of the floor debate on the matter focused on the possibility of cuts to Social Security and Medicare and of increases in taxes.[4] The commission, then, would have the potential to make major changes to several of the most important ways that individual voters interact with the federal government. Once

submitted to Congress the proposal would be considered under expedited procedures in the Senate, including a protection from amendments.

Although it was favored by the president, whose party held sixty seats in the chamber at the time of the vote, the Conrad-Gregg amendment failed after only fifty-three senators supported cloture.[5] Among the twenty-three Democrats who opposed the measure was Senator Baucus (D-Mont.), who claimed that creating the commission would limit the fundamental tasks of senators: "Two things most define a Senator. Senators can amend legislation, even with different subjects. And Senators can debate legislation, sometimes at length. The Conrad-Gregg proposal curtails both of those defining powers. The Conrad-Gregg proposal completely eliminates the ability to amend. And the Conrad-Gregg proposal sharply limits the ability to debate."[6]

As is demonstrated over the course of this book, proposals like the Conrad-Gregg amendment are a common feature of the contemporary Senate. Like this 2010 proposal, they are often unsuccessful, but when Congress does choose to adopt them, they can have significant consequences for the policymaking process. Given Baucus's characterization of unlimited amendment and debate as behaviors that "most define a senator," it is useful to consider how majoritarian exceptions fit into the broader context of the Senate's procedural environment. To do so, I begin by exploring why limitations on debate are an exception to the chamber's normal operating procedures. From there, we examine the earliest examples of restrictions on how long a measure could be debated before laying out, in detail, the definition of a majoritarian exception. Next, to provide readers—especially those from outside political science—with context for the contribution of this account, I discuss how majoritarian exceptions differ from other congressional procedures.

Finally, to lay the groundwork for the chapters to come, I take up three important data-related questions. First, how do we identify majoritarian exceptions in the historical record? Second, is there reason to believe that they are actually relevant soon after they are created (an assumption necessary for our argument about adoption meeting proximate political needs)? Third, given that these limitations on debate apply in specific issue areas, how do we measure their policy content?

THE ORIGINS OF UNLIMITED DEBATE IN THE SENATE

To understand why limitations on debate in the Senate matter, it is important to understand why debate in the chamber is generally unlimited. Operation-

ally, the possibility of unlimited debate in the Senate is built on three pillars.[7] The first of these is the right of recognition. The presiding officer must recognize any senator who wishes to speak; Senate Rule 19, which governs floor debate, does not permit the presiding officer to simply decline to recognize a senator. If multiple senators request time to speak on a debatable question (such as a motion or bill), all must be recognized to speak before the chamber can vote on it. In general, senators are acknowledged to speak in the order they sought recognition, with the important exception that the leaders of the majority and minority parties enjoy preference in recognition, getting to jump the line to maintain orderly operations on the floor. Rule 19 does not place any limits on how long a senator may speak once recognized.[8]

The second pillar of unlimited debate is the absence of a germaneness requirement for debate. With the exception of the first three hours of consideration of legislative business on each calendar day (when debate must be related to the underlying question), once recognized to speak, a senator may do so on any subject whatsoever. It is this lack of germaneness that helped produce the kind of filibuster famous in the popular mind, such as when Senator D'Amato (R-N.Y.) sang and read the same newspaper article repeatedly during a fifteen-hour floor speech in 1992.[9] Certainly, senators engaging in extended debate often do use their floor time to speak on the subject at hand, but the absence of a requirement to do so helps ease the task of doing so.

The third and final pillar of unlimited debate is the absence of a previous question motion in the Senate. Many other legislative bodies—including the House of Representatives—allow for such a motion, which lets a simple majority force a vote on whatever underlying question is currently being debated. In the Senate, however, no such motion exists—though it has not always been absent from the chamber's rules. Indeed, the Senate's original rules, adopted in 1789, allowed for such a motion. It was used infrequently during the Senate's early years, however. The historical record suggests that when it was deployed, it was used to postpone consideration of a measure rather than to force an end to debate and proceed to a final vote.[10] Seeing the motion as duplicative of the motion to postpone (which persists to this day as part of Rule 22) and acting at the suggestion of recently indicted Vice President Burr, the Senate removed the motion from its rules in 1806.[11]

How unlimited debate shaped the chamber between 1806 and the adoption of Rule 22 (allowing two-thirds of the Senate present and voting to invoke cloture and end debate) has been explored in depth elsewhere.[12] But a brief review of the period provides useful context for this exploration of when

the Senate chooses to limit debate (and otherwise make deliberation more majoritarian) for specific measures.

Obstruction, and effort to change the rules to contain it, was certainly present at times in the Senate in the earlier part of the nineteenth century. In one particularly prominent example from 1841, Henry Clay, Whig senator from Kentucky, frustrated by Senate Democrats' derailing of the majority Whigs' legislative agenda, proposed both a one-hour individual debate limit and a resurrection of the previous question motion. Clay was unsuccessful in adopting his favored rules changes,[13] but while the Democrats delayed action on his legislation program, much of it (with the notable exception of a bill resurrecting a national bank) was eventually enacted.[14] Obstruction was also present in debates over slavery and its proxy cousin, territorial expansion; between 1845 and 1861 there were five separate filibusters related to new territories.[15]

In the post–Civil War period, however, the incidence of obstruction increased significantly. Scholars generally agree that the changing nature of the chamber's workload was largely responsible for this escalation, but they posit different mechanisms for why new responsibilities led senators to engage in more extended debate. Binder and Smith argue that the Senate's agenda expanded in the postwar period and that more issues requiring attention meant more opportunities to obstruct.[16] Broader responsibilities also raised the chamber's profile, which, coupled with a closer alignment of partisanship and preferences, created electoral pressures on members to exploit their procedural rights in pursuit of legislative victories. Koger describes how a larger agenda can increase the value of floor time: when there are more issues to which the Senate must attend, the opportunity cost of spending time on any one matter also grows.[17] Under this logic, when floor time is scarce, a bill's proponents are less willing to let it languish for an extended period, since there are other important issues with which the chamber could be dealing. Knowing this, opposition legislators will engage in more obstruction, with the expectation that they will be more successful. Finally, Wawro and Schickler emphasize a particular cause of the Senate's expanded agenda—the entry of new states into the union—and argue that as the chamber's membership increased, it became more difficult to sustain a set of norms under which senators refrained from fully exploiting their available opportunities to obstruct legislation.[18]

Nineteenth-century Senate obstruction, both pre– and post–Civil War, relied heavily not only on extended speech-making but also on dilatory motions. Various motions can be considered dilatory, or "[intended only] to consume