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Gregory J. Wawro and Eric Schickler: Filibuster

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Chapter One

Introduction

In August of 1848, a bill establishing a territorial government for Oregon was considered in the U.S. Senate. The version of H.R. 201 passed by the House of Representatives included a provision—consistent with the Northwest Ordinance—that prohibited slavery in the territory. This provision touched what was arguably the deepest political fault line of the period. Southern senators, extremely wary of any attempt by the federal government to limit the institution of slavery, marshaled their forces to stop the bill with this provision from passing. They did so in part by exploiting procedural rules in the Senate that permitted parliamentary obstruction—a strategy that would come to define the institution although it was not, at least by today's standards, widely pursued at the time. The group of recalcitrant southerners intimated that dropping the offending provision would allow them to support the bill. Supporters of H.R. 201 insisted that the provision remain part of the bill, leading opponents to resort to obstruction in the hope they could prevent its passage before August 14, the date that had been established for the adjournment of the first session. The effort to kill the bill reached a fever pitch on August 12, as the cadre of southerners delivered long speeches interspersed with dilatory motions. Previous votes suggested that the Oregon Bill with the free-soil provision was supported by a fairly narrow majority. Those supporters demonstrated their commitment to waiting out the obstructionists, keeping the Senate in session into the next morning by voting against repeated motions to adjourn. The obstructionist senators finally relented at 9 a.m. on August 13, and votes were taken to recede from Senate amendments so that the bill was identical to that which had passed the House. But this did not bring the battle to a conclusion.

The Senate adjourned on the 13th without holding a final vote on passage. When senators reconvened on the 14th, proponents of the bill were confronted with a parliamentary obstacle because Rule XVII of the joint rules of Congress prohibited bills from being presented to the president on the last day of the session. In order for the bill to become law, the rules would have to be suspended, which at the time could be accomplished by a majority vote. The resolution to suspend the rules would have allowed several other bills to pass, including an army appropriations bill that several senators remarked was desperately needed. But opponents of the Oregon Bill resumed their temporizing tactics. Rather than dispense with the reading of the Senate Journal as was customary, Senator Hopkins Turney (D-TN) insisted that it be read after the morning prayer. Turney then embarked

on a speech criticizing the tactics that the majority had used to move the bill toward final passage, claiming they had violated long-standing traditions by imposing a gag on opponents and circumventing the conference committee procedure. Senator Daniel Webster (Whig-MA) raised a point of order, claiming that Turney's words were irrelevant to the subject before the Senate. Webster's move provoked the ire of Senators Henry Foote (D-MS) and John C. Calhoun (D-SC), who came to Turney's defense. After the presiding officer affirmed that Turney was in order—a clear victory for the obstructionists—the southerners began to send signals that they would let the House version pass. Despite Calhoun's assertion that “by the rules of the Senate, the bill was lost, and the majority well knew that” (p. 1084), Foote announced that he “felt authorized to declare that they [the minority] were now willing to yield and let the majority take the responsibility,” even though they previously had been fully prepared to consume the remaining time to kill the bill (p. 1085).¹ The resolution was then—rather anti-climactically—adopted without a recorded vote.

Observers of the contemporary Senate should find this case puzzling. The conventional wisdom is that at least a three-fifths majority is necessary, in practice, to pass major legislation today, because the chamber's rules specify that 60 votes are required to force a vote on proposals. Although a bare majority can pass a bill once it reaches a final vote, supermajority support is necessary to reach that stage. At the time the Oregon Bill was considered, the Senate had no rule for cutting off debate and forcing a vote on legislation. How then was a narrow majority able to pass the bill even though its supporters lacked a formal mechanism for stopping minority obstruction? Why did the opponents of the bill relent when the rules of the Senate and time constraints would have enabled them to prevent the bill from passing before the time for adjournment was reached?²

The Oregon Bill represents a case where the minority relented despite having a sizable coalition and the parliamentary deck stacked in its favor. But filibustering minorities also had important successes in the 19th century. A particularly consequential—and infamous—filibuster occurred some forty years after the Oregon Bill's passage, culminating in the defeat of the Federal Elections Bill. The bill sought to address the systematic disenfranchisement of African Americans in the South after the end of Reconstruction, by making federal circuit courts, rather than state governors and state certifying boards, the arbiter of congressional election procedures and returns. Even though the bill did not involve the use of federal troops, its opponents—mostly southerners—labeled it “the Force Bill,” and fought it vigorously in the Senate. The bill was brought to the floor on December 2, 1890, and

¹The official record of debate is the *Congressional Globe*, 30th Cong., 1st Sess., August 12, 1077–78, August 14, 1083–85. Other accounts include Beeman (1968) and Lyman (1903, 93–100).

²The bill would have been carried over to the lame duck session, which began after the fall elections. Given the volatile political conditions of the time, such a delay would have at least generated considerable uncertainty about the bill's ultimate fate.

Democratic senators began speaking at length against it.³ The bill's Republican proponents responded by committing to "sit out" the filibuster—that is, forcing extended sessions in order to exhaust the obstructionists—as well as threatening a change in the rules that would allow a majority to close debate and bring the measure to a final passage vote.

After four weeks of debate, Senator Nelson Aldrich (R-RI)—considered to be the de facto majority leader of the Senate—proposed a rules change, which would remain in effect for the remainder of the 51st Congress. The rule provided that a floor majority could end debate and force a final vote on a measure, following a "reasonable" amount of debate. Since the opponents of the Elections Bill could obstruct the proposed rules change as well, some method for closing off debate on that proposal would be required. The Senate's sparse rules regarding debate presented both an obstacle and an opportunity. The lack of a motion for the previous question meant that debate could not be easily cut off under existing practices. Yet ambiguities in the rules allowed for the establishment of new precedents that would clear the way for the Aldrich proposal to go forward. These precedents would enable the majority to crush the filibuster of the rules change, which in turn would allow the Elections Bill to pass. The key to the strategy was the cooperation of the Republican Vice President Levi Morton, who under the Constitution was the Senate's presiding officer. The Republicans hoped to use Morton's rulings on points of order to defeat the obstruction (see Crofts 1968, 329–30; "Trampling on the Rules," *New York Times*, January 23, 1891, p. 1). Democrats could have appealed Morton's rulings, and such appeals were subject to debate (and thus delay). But Republicans could then have moved to table the appeal, and a motion to table would not have been debatable. If the motion to table passed, the ruling would then have established a valid, binding precedent. Republicans used this stratagem to overcome Democrats' efforts to prevent the rules change from even reaching the floor (see Chapter 3 for details). The GOP plan was then to use the same approach to force a final vote on the Aldrich resolution, paving the way for a simple majority to pass the Elections Bill.

Newspaper coverage at the time makes clear that the key question was whether a floor majority would stick together to force a vote on the rule change.⁴ Both Democratic newspapers (which opposed the Elections Bill and cloture rule) and Republican newspapers (which favored the measures) tracked Aldrich's efforts to build a majority coalition and Democratic efforts to deprive the GOP of a floor majority. For example, the anti-Elections Bill *New York Times* gloated on January 23, 1891, that "in order to pass

³The bill was initially considered on the floor in the summer of 1890. It was postponed to the post-election lame duck session when it confronted a filibuster that threatened passage of a major tariff bill.

⁴Observers at the time noted that Republicans were emulating the basic approach of Thomas Reed (R-ME), who had used rulings from the chair to crack-down on obstruction by Democrats in the House just a year earlier (see, e.g., "Reed's Humble Followers," *New York Times*, January 29, 1891, p. 1).

the gag law or pass the Force bill there must be forty-five Republicans in the chamber and all but Mr. Allison [who was paired for the bill] must vote in the affirmative. There are not that many gag rule senators now in Washington” (“Trampling on the Rules,” p. 1) The staunchly Republican *New York Tribune* countered that the GOP would win, predicting that the GOP could rally the necessary floor majority (“Republicans in Control,” January 23, 1891, p. 1). Given his reputation as an extremely practical politician, Aldrich’s involvement was taken as a signal that the change had a genuine chance of success (see Crofts 1968, 328; “Closure Comes up To-Day,” *New York Tribune*, January 20, 1891, p. 3). But Aldrich’s efforts were hampered by a group of silver Republicans who were cool toward the Elections Bill and had earlier joined with Democrats to pass silver legislation.

In the end, the Democrats triumphed by a single vote: on January 26, the Senate narrowly approved a motion to displace the cloture rule with a proposed apportionment bill. While some have claimed this is an example where a filibuster blocked a rules change that may have had majority support (Binder and Smith 1997, 75), the record suggests that Republicans lacked a floor majority for both cloture and the Elections Bill itself (see Chapter 3). It was widely expected that Republicans could use the strategy of a ruling from the chair to force a vote on a cloture rule, so long as they had a majority of the Senate behind their effort. The proponents of the Elections Bill and cloture appeared to have been unable to muster even majority support, however (Upchurch 2004).

Although these cases occurred long ago, they are highly relevant for understanding the operation of the contemporary Senate. Obstruction remains a prominent feature of the institution, with the most recent high-profile filibusters involving a set of nominees to the federal bench. These filibusters share features of the historical filibusters just discussed, including a drawn-out war of attrition and threats to change the rules to stop the obstruction. The conflict gained national attention on November 12, 2003, when for the first time in over ten years, the Senate held an all-night session. The filibuster of the judicial nominees began in February of 2003, as debate on Miguel Estrada, the first nominee voted out of the Judiciary Committee that year, stretched for weeks. The beleaguered nomination drew a substantial amount of attention, as Republicans claimed it was the first time an appeals court nominee was blocked by filibuster. They expressed concern that it was unconstitutional and would set a dangerous precedent requiring three-fifths majorities for the confirmation of judges.⁵ Democrats argued

⁵As late as March 1, *CQ Weekly* implied the filibuster had only been “threatened” while at the same time conceding the Senate was “stuck” on the nomination (“What’s Ahead: Week of March 3,” *CQ Weekly*, March 1, 2003, p. 481). The Senate disposed of several judicial nominees during the time that Estrada was under consideration. A handful of previous cases exist where appeals court nominees appeared to have been filibustered, although they were eventually confirmed after cloture was invoked on them by wide margins (see U.S. Congress. Senate. Committee on Rules and Administration 1985, 63; Karen Foerstel, “Dozens of Clinton Nominees Win Confirmation After Lott Strikes Deal With Democrats,” *CQ Weekly*, November 13, 1999).

that Estrada's ideological bent put him out of the mainstream and that their opposition was an attempt to prevent the president from stacking the bench with conservative extremists. By the end of March, three cloture votes had been unsuccessful at ending debate over the nomination (Jennifer A. Dlouhy, "Third Vote Can't Charm Lawmakers," *CQ Weekly*, March 22, 2003, p. 697). Debate continued on Estrada, who asked the president to withdraw his name from consideration on September 4. But the controversy continued to simmer as more nominees were added to the list of those being obstructed.

In response to their inability to bring the nominations to a vote, the Republican majority decided to hold the all-night session, which lasted thirty-nine and a half hours. By publicizing the obstruction, they hoped to galvanize public opinion against the Democrats and thereby shake the nominations loose. The Democratic minority happily participated in the event, consuming half of the time allotted for debate, in an attempt to highlight what they viewed as the policy failures of Republicans during a period of unified control of the presidency and Congress. The purpose of the all-night session was not to exhaust the minority (especially considering Republicans held the floor for half of the time), but to wage a public relations campaign. While the event garnered the media attention its planners sought, it did little to mobilize public opinion behind the cause of the obstructed nominees.

Republicans responded with another tactic, one that had potentially far-reaching consequences for the conduct of business in the Senate. Similar to Aldrich's stratagem during the Elections Bill filibuster, Majority Leader Bill Frist (R-TN) pushed the option of establishing a precedent that would enable a simple majority rather than a supermajority to bring nominations to a floor vote (Helen Dewar and Mike Allen, "GOP May Target Use of Filibuster," *Washington Post*, December 13, 2004, p. A01). The so-called "nuclear option" would most likely take the form of a point of order claiming it is unconstitutional to filibuster presidential nominees, followed by a supportive ruling from the presiding officer. Democrats would appeal the ruling, but a motion to table the appeal is non-debatable and thus would require just a bare majority. The Democrats threatened to respond to such a move with every tool of parliamentary obstruction to bring the chamber to a standstill and cause severe disruption of the legislative agenda—hence the term "nuclear option."⁶ The establishment of this kind of precedent would affect only the consideration of judicial nominees and would not apply to legislative items. But it no doubt would open the door for applying this approach more generally and thus have dramatic consequences for the protection of minority interests in the Senate.

Republicans' justification for "going nuclear" is that the Senate is no longer functioning effectively. Democrats counter that they are merely ex-

⁶Our choice of terms to describe this maneuver is not intended to imply support or opposition to its use. Although Trent Lott (R-MS) is credited with coining the term "nuclear option," Republicans subsequently have favored calling it the "constitutional option" or "Byrd option"—labels they believe are more politically appealing.

exercising the long-standing right of the minority to block extreme proposals, and that eliminating the right to obstruct judicial nominees would eviscerate the Senate's quality as a deliberative assembly. A full understanding of the feasibility, desirability, and potential implications of the proposed changes requires an in-depth examination of the history of obstruction and institutional change in the Senate. For much of its existence, the Senate lacked even the most basic constraints on debate. Yet the Senate appears to have functioned well enough to be a major player in one of the most successful and prosperous democratic nations the world has known. How did the Senate conduct its business and manage to function during earlier periods of its history? Was the restraint exercised by the minority in the Oregon Bill case typical of the 19th-century Senate, and if so, why were minority rights not exploited more fully? What role did threats of rules changes, such as the Aldrich cloture resolution, have in restraining obstruction? Finally, why did the Senate eventually move, in 1917, to adopt formal rules to limit debate, and what was the impact of this reform? These are the critical questions this book seeks to answer.

1.1 THE CENTRALITY OF OBSTRUCTION TO SENATE LAW-MAKING

No activity in the United States Congress captures the attention of political practitioners, pundits, and the public like filibustering in the Senate. The issue of filibusters has tremendous power to get ink for editorial columns flowing and to rouse even the most somnolent students in lectures on Congress. Perhaps this has something to do with fundamental conflicting concerns about the principles of majority rule and minority rights. Perhaps it is simply that filibusters make good political theater, inducing nostalgia for the days when politics was more of a contact sport. Indeed, it is a supreme irony that some of the loftiest democratic ideals like freedom of speech and minority rights are protected through astonishingly ignoble and bare-knuckle behavior. Whatever the reason, the filibuster is deeply ingrained in the political culture of the United States. Case in point: the word "filibuster" appears on a recently produced list of 100 words that is intended to provide a benchmark by which high school students (and their parents) can measure their command of the English language.⁷ As Sinclair (2002) points out, if a given person knows anything about the U.S. Congress, they will most likely know that senators can filibuster. Chances are they will know little beyond that, but even well-read students of American politics typically know only the most superficial details about the filibuster and its history.

Even though the filibuster is undoubtedly the most popularly known parliamentary maneuver in the Congress, it has received scant scholarly atten-

⁷The list was compiled by the editors of the *American Heritage Dictionaries*. Other politically relevant terms on the list include "enfranchise," "impeach," "gerrymander," "oligarchy," "suffragist," and "totalitarian."

tion. The first book-length treatment of the filibuster was Burdette's classic *Filibustering in the Senate*, published in 1940. Although Burdette bemoaned the dearth of scholarly work on the filibuster at the time, his concerns did not inspire an active research agenda in political science. Since the publication of Burdette's book, Binder and Smith's important work *Politics or Principle?* published in 1997, has been the only book-length treatment of filibuster politics.⁸ Although journalistic accounts of filibusters abound, only a handful of scholarly articles on the topic were published during this sixty-year interval (see, e.g., Beeman 1968; Wolfinger 1971; and Oppenheimer 1985). While today it is difficult to find a newspaper article about lawmaking in the Senate that does not include some allusion to the filibuster, there have been few scholarly works that conduct systematic examination of filibusters using modern tools of theoretical and empirical analysis. Discussions that appear in works on Congress are typically descriptive, highlighting some of the details of the usage of the filibuster or notable historical instances of obstruction. The filibuster has simply not been given an amount of rigorous, scholarly attention that matches its place in the popular conscience.

Yet this lack of attention does not appear to be due to the belief that the filibuster is unimportant or irrelevant to understanding lawmaking. As Oleszek (2001, 228) has put it, "The filibuster permeates virtually all senatorial decision making." The principle of unlimited debate and the obstruction that it allows has been a defining feature of the Senate throughout most of its history.⁹ Senator Robert Byrd (1988, Vol. II, 162–163) is worth quoting at length on this point:

We must not forget that the right of extended, even unlimited, debate is the main cornerstone of the Senate's uniqueness. It is also a primary reason that the United States Senate is the most powerful upper chamber in the world today. . . . Without the right of unlimited debate, of course, there would be no filibusters, but there would also be no Senate, as we know it. . . . Filibusters are a necessary evil, which must be tolerated lest the Senate lose its special strength and become a mere appendage of the House of Representatives. If this should happen, which God avert, the American Senate would cease to be "that remarkable body" about which William Ewart Gladstone spoke—"the most remarkable of all the inventions of modern politics."¹⁰

⁸Binder (1997) and Dion (1997) are recent books that address the issue of obstruction. However, since their focus is mostly on the House of Representatives, and in particular on the question of explaining why Congress expands or contracts the parliamentary rights of minorities, they do not address the questions we seek to answer.

⁹It should be emphasized that the term "unlimited debate" means not only the lack of constraints on floor speech, but also a lack of constraints on motions and amendments that can be made on the floor. Debate in the Senate has never been completely without limits. For example, the Senate's rules have always included a provision limiting senators to speaking twice on the same subject in a legislative day without leave of the Senate. See Section 1.2.

¹⁰See also Rogers (1926, 5–8).

The rules of the Senate have been viewed as important not only because of their effect on the internal dynamics of the institution, but also because of their larger ramifications for the operation of the separation of powers system. Rogers (1926, 256), in arguing that the Senate does “its most notable work” as “a critic of the executive,” claimed that “complete freedom of debate and the absence of closure except as a real emergency” are “indispensable” to the Senate’s role as a counterpoise to the president. Indeed, in a public relations campaign against senatorial obstruction, Vice President Charles Dawes compared the filibuster with the president’s main weapon in inter-branch bargaining, averring that the filibuster “places in the hands of one or of a minority of Senators a greater power than the veto power exercised under the Constitution by the President of the United States, which is limited in its effectiveness by the necessity of an affirmative two-thirds votes” (*Congressional Record*, March 4, 1925, p. 3). Krehbiel’s (1998) more recent investigation of lawmaking in the United States demonstrates theoretically and empirically that one cannot hope to understand fully how legislation is passed without taking into consideration the pivotal role that is bestowed on particular senators by their chamber’s rules regarding debate.

Unlimited debate in the Senate has often been portrayed as a *sine qua non* of democratic freedoms. In his maiden speech in the Senate, Lyndon Johnson argued that the rules permitting filibusters were a progenitor of freedom. In the midst of the Cold War, when fears of totalitarianism and threats to democratic forms of government were particularly tangible, Johnson stated that if he “should have the opportunity to send into the countries behind the iron curtain one freedom and only one,” he would send “the right of unlimited debate in their legislative chambers,” because though “it would go as merely a seed . . . the harvest would be bountiful; for by planting in their system this bit of freedom we would see all freedoms grow, as they have never grown before on the soils of Eastern Europe.” To Johnson, unlimited debate was “fundamental and indispensable,” standing “as the fountainhead of all of our freedoms” (*Congressional Record*, March 9, 1948, pp. 2048–49).¹¹

Although unlimited debate in the Senate has been roundly praised as an essential component of American democracy, usually by those who have benefited from it the most, the filibuster has also been blamed by many for stalling essential legislation and violating the basic democratic value of majority rule. While in one person’s view the filibuster is a protection against

¹¹A more recent statement about the value of unlimited debate to the promotion of freedom in countries lacking democratic traditions was made in regard to Iraq by Senator Johnny Isakson (R-GA). Isakson recounted a conversation with a Kurdish leader regarding concerns about the Shiite majority dominating the Kurdish minority. The leader claimed that the Kurds had a “secret weapon” to prevent this from happening in the form of the filibuster. Isakson claimed that his optimism about the prospects for democracy in Iraq had been bolstered by the Kurdish leader’s reliance upon “one of the pillars and principles of our government as the way [the Kurds] would ensure that the majority never overran the minority” (Al Kamen, “Kurds Invoke Senate Rule,” *Washington Post*, February 16, 2005, p. A17).

majority tyranny, others view it as a device of tyrannical minorities.¹² White (1968, 228) claims that the filibuster and the Senate's investigative process are the two activities that have most often brought the Senate into disrepute. McCall (1911, 197–98) views unlimited debate as “a vital defect” in the Senate's procedure that did “violence” to “the foundation principle of our government” and rendered the Senate “scarcely as representative an institution as the British House of Lords.” Von Holst (1893, 264) argued that the Senate “outrageously tramples under foot the underlying principle of the whole Constitution, if it perverts the right given by Article I, Section 5, Clause 2, to each House of Congress to ‘determine the rules of its proceedings,’ into a privilege enabling every one of its members to prevent for an indefinite time its acting.” While noting that “the total absence of all rules in anyway of limiting discussion” was “the principal characteristic . . . of the procedure of the Senate,” Reinsch (1907, 113) emphasized it was “a negative one.” More substantively, southern Democrats made extensive use of the filibuster as part of their strategy for blocking civil rights legislation in the 1940s through the early 1960s. This led civil rights groups to make reforming the filibuster a top priority (see Zelizer 2004). Still, those observers who have an unfavorable view of unlimited debate clearly agree with its proponents that its exploitation has enormous consequences for the process of lawmaking in the United States.

If anything, the lack of limits on debate has become more relevant to the uniqueness of the Senate today than it was in the early years of the institution. The Senate, as designed by the Framers, was *sui generis* among legislative bodies in many ways. Equal representation of the states in the Senate as opposed to proportional representation was viewed at the time as an integral part of the innovative federal system the Framers created, enabling smaller, less populous states to maintain their integrity as sovereign units (Lowi, Ginsberg, and Shepsle 2002, Ch. 3; Riker 1964). Indirect election of senators by state legislatures was viewed as a check on the potential excesses of popular democracy. Both of these features were essential to the Framers' intention to insulate the Senate from the influence of passionate and capricious majorities. However, both of these features are much less important for understanding how the Senate works today. The 17th Amendment removed the insulation provided by indirect elections.¹³ The tremendous expansion of the federal government in size and scope has radically altered the Framers' original federal design. Senators themselves have been active participants in using the commerce clause of the Constitution to extend the

¹²Indeed, constancy within individuals concerning their views about the normative character of the filibuster is not always forthcoming. As Ornstein (2003) points out “No issue has had more hypocrisy attached to it in Congress than the filibuster. Go back through the decades and read Democrats and Republicans, liberals and conservatives blithely reverse positions as they move from majority to minority or vice versa, or from holding the White House to not” (see also Binder and Smith 1997).

¹³Some have argued that state-level electoral reforms had undercut indirect election long before the passage of the constitutional amendment, however (Haynes 1938, Merriam and Overacker 1928, Riker 1955). We investigate this claim as it relates to obstruction in Chapter 8.

power of the federal government into policy realms that were once the exclusive domain of state governments, dramatically diluting their sovereignty. Although equal representation still influences Senate outcomes, it does so in ways that are much different from those anticipated by the Framers (Lee and Oppenheimer 1999).

The Senate's rules that protect unlimited debate and effectively require supermajorities for the passage of legislation were not part of the Framers' blueprint for the Senate. Nevertheless, these rules are consistent, at least in principle, with their conception of the Senate as a bulwark protecting minorities and as a brake on precipitate action.¹⁴ Perhaps ironically, the rules remain as protections while other institutional safeguards the Framers put into place have become enervated or have disappeared with the passage of time. If anything, Senate rules and practices concerning unlimited debate have become *more* important as the Senate has evolved.

Our study explores the dynamics of Senate obstruction during earlier historical eras in order to cast light on the modern Senate and on legislative politics more generally. The literature on the U.S. Congress has been dominated in the past three decades by research focusing on how institutions guide behavior and how specific institutional structures are chosen to produce particular outcomes.¹⁵ If congressional scholars share any common belief, that belief would be that institutions *matter*. But rare is the congressional study where institutions actually *vary*. It is difficult to determine to what degree institutions matter if we have no variation in their features. Historical examination creates opportunities for capitalizing on institutional variance to advance our understanding of how structure, rules, and procedures affect outcomes. It offers practical insight for constitutional architects in fledgling democracies. Advocates of institutional reform can learn valuable lessons from history, not only in terms of what the actual impact of their proposals will be, but also in terms of what it takes to bring about the changes they seek. In this regard, the neglect of the subject of obstruction by researchers has left huge gaps in our understanding of the Senate, which is surprising given the centrality of the filibuster to the operation of the institution. This is especially important due to the recent talk of eliminating or significantly curtailing supermajoritarian features of the contemporary Senate through the establishment of new precedents. Our investigation explores the viability of this tactic throughout the Senate's history and how it profoundly affected lawmaking in the body despite the general lack of formal constraints on debate. Our argument on this point marks a major departure from previous work on obstruction, which claims that path dependence rendered Senate rules immune from fundamental changes since inherited rules

¹⁴This is not to say that the Framers intended for a minority to be empowered to block legislation in the Senate. To the contrary, there is good reason to believe that the Framers anticipated the Senate, like the House, would operate under majority rule (Binder and Smith 1997).

¹⁵For an excellent review of this "neo-institutional" work see, Shepsle and Weingast (1994).

enabled minorities to obstruct attempts to change the rules (Binder 1997; Binder and Smith 1997). We argue that the mutability of the Senate's rules was an important constraint on obstructive behavior in the 19th century. Our historical investigation then provides important insight on the question of what impact this approach to changing the rules will have on the contemporary Senate.

Our study is of relevance for students of legislatures generally and for students of political development in the United States and abroad. Every legislature must decide how it will structure its internal workings, and in particular how to balance the need for action with the need for deliberation and debate—no mean feat given the multitude of interests legislatures are called upon to represent. This balance is typically struck with explicit rules that put limits on how long legislators can speak and on what topics. But striking this balance is an evolutionary process, with legislators adjusting procedures as it becomes clear what works and what does not. Legislatures will evolve in different directions depending on their members' needs and exogenous demands. While a good deal of work has focused on the developmental process in terms of how legislators adopt complex formal institutional structures, much less effort has been devoted to understanding how legislatures might function in the absence of such structure.

We argue that a small collective choice body does not necessarily need extensive, explicit procedural infrastructure in order to meet the demands it confronts. A set of shared, stable procedural expectations can evolve and be sustained over the long term that can serve the collective interests of the body as well as the individual interests of its members, just as well as or perhaps even better than explicit infrastructure. Legislatures that lack extensive formal procedural constraints should not be considered as underdeveloped or immature. They can operate effectively—or at least be effective to the extent required by their members' electoral and policy goals. As the size of the legislature grows and as it experiences (more or less) exogenous policy shocks—possibly severe enough to induce crises—it may become necessary to specify and formalize procedural constraints. But this kind of “institutionalization” may just involve the codification of what had worked well informally.¹⁶ Indeed, our argument focuses on how the threat of codification can help keep the informal system working effectively.

We focus on the Senate in the 19th and early-20th centuries, a period that is important along several dimensions. First, throughout most of this period, the Senate managed to operate—although at times with great difficulty—without even the simplest of provisions like the previous question, which allows a majority to force an immediate vote on a bill or resolution. Explaining how the Senate did so greatly enhances our understanding of how rules, procedure, and informal expectations shape legislative behavior.

¹⁶See Polsby (1968) on the institutionalization of the House and Swift (1996) on the institutionalization of the early Senate.

Second, it was during this period that senators developed a repertoire of obstructive tactics that worked within the Senate's unique institutional context. The first responses to constrain the usage of these tactics were also conceived and deployed. Examining the evolving strategies of senators who support and oppose obstruction informs what we know about how senators pursue their goals, how preferences get converted into policy, and ultimately how representative institutions function, especially in terms of fundamental trade-offs between deliberation and action.

Third, it was during this period that the House of Representatives all but eliminated parliamentary tools that minorities in that chamber used to obstruct. The Senate also adopted a few limits on debate that affected minority rights during this period, some of which were broadly similar to the restrictions adopted in the House. Our analysis illuminates the degree to which the Senate has served as an obstacle to legislation favored by the more explicitly majoritarian House, which in turn tells us about the power of legislative minorities in the American political system.¹⁷ We provide new insight into the the Senate's role as an institutional safeguard in the separation of powers system for securing minority interests, since it is minorities who exploit the Senate's rules regarding debate to obstruct legislation in their attempts to prevent majorities from working their will.

Fourth, we leverage our focus on obstruction to gain additional perspective on two of the central policy battles in American political history: the antebellum struggle over slavery and the recurrent disputes over the use of tariffs to promote American industry. We argue that the threat of minority obstruction often played a significant role when the Senate considered slavery-related legislation, as southerners in particular proved willing at times to push their prerogatives to great extremes in order to prevent changes in the status quo. By contrast, minority obstruction played a much more limited role in tariff politics, which with few exceptions proved majoritarian. We argue that major tariff bills were generally equally salient to both their supporters and opponents, thus making it less likely that a minority could succeed in blocking action. By contrast, southern senators repeatedly have shown a greater commitment on civil rights related issues than non-southerners, a critical advantage in filibuster battles.

Finally, the Senate experienced two of its most fundamental institutional changes in its history during this period: the move to direct election and the adoption of cloture reform. These changes had potential ramifications for obstruction and lawmaking in the Senate, but they are poorly understood on their own and as they relate to each other. Indeed, the basic rules that make obstruction possible and effective as a legislative strategy are not widely appreciated. The next section outlines the institutional context of the Senate to clarify how and why the filibuster came to be so closely associated with the chamber.

¹⁷The Senate's equal representation of states means that legislative minorities cannot necessarily be equated with popular majorities. Such an equation is more plausible in the House, though significant inequities in district size persisted until the early 1960s.

1.2 OBSTRUCTION FUNDAMENTALS

Obstruction is neither unique nor original to the Senate. Parliamentary obstruction is as old as legislative assemblies themselves, with some notable instances of delay occurring as far back as the Roman republic.¹⁸ However, among modern legislatures, the Senate remains one of the last bastions of obstructionists, where parliamentary delay continues to be a part of the institution's quotidian routine.

The uniqueness of the Senate stems from its rules of operation—or lack thereof. The rules that were adopted in 1789 consisted of only twenty-nine items and consumed only one page of the *Senate Journal* (April 16, 1789, p. 13). In 1806, when the Senate dropped the provision for the previous question from its standing rules, they had expanded to forty provisions, but still consumed less than four columns of space in the *Annals of Congress* (see March 26, 1806, pp. 201–4). The rules have granted substantial parliamentary rights to individuals and have placed few restrictions on the exercise of those rights. This was especially the case in the first century of the Senate's existence, and the Senate's standing rules have changed little with respect to the basic rights of senators to engage in debate.

There are essentially three unique features of the rules that form the basis of the institution's tradition of obstruction: the right of recognition, the absence of a previous question rule, and the lack of a germaneness rule.¹⁹ The right of recognition is arguably the most important. Each senator has the right to be recognized by the presiding officer when she seeks the floor. Although several senators can seek recognition at the same time and the chair has some discretion in deciding who sought it first, every senator who seeks to speak must at some point be recognized.²⁰ By precedent, the presiding officer cannot refuse to recognize a senator who seeks the floor. Thus, “the Senate cannot vote on whatever debatable question is pending so long as any senator wants to be recognized to debate it” (Bach 2001, 2). It is important to point out that these provisions are not explicitly stated in the standing rules of the Senate, and therefore are subject to interpretation and modification through the establishment of new precedents.²¹

¹⁸See Byrd (1988), Dion (1997), and Luce (1922) for histories of the use of obstruction.

¹⁹The next several paragraphs draw from Bach (2001).

²⁰The right of recognition is subject to a “two-speech” limit, discussed below.

²¹The rule from which the right of recognition stems is paragraph 1(a) of Rule XIX, which reads: “When a Senator desires to speak, he shall rise and address the Presiding Officer, and shall not proceed until he is recognized, and the Presiding Officer shall recognize the Senator who shall first address him. No Senator shall interrupt another Senator in debate without his consent, and to obtain such consent he shall first address the Presiding Officer, and no Senator shall speak more than twice upon any one question in debate on the same legislative day without leave of the Senate, which shall be determined without debate.” Although this is a broad grant of power to individual members, it leaves open the question of whether a senator seeking to speak solely for dilatory purposes must be recognized. Subsequent precedents—rather than specific, written rules—have allowed senators to speak on whatever topic they choose and have provided that senators are not to be called to order for dilatory speech.

Once a senator has obtained the floor, she cannot be interrupted by another senator without her consent, and can hold the floor for as long as she is physically capable of doing so, since the rules require the senator to stand and address the chair. She can yield for questions without losing the floor, but cannot yield the floor to another senator. As long as she obeys the Senate's rules regarding decorum (e.g., does not impugn the character of another senator or a state of the Union) she continues to hold the floor until she sits down. A debatable question can be moved only when no senator seeks recognition to debate it.²²

Other legislative bodies typically allow a question to be moved by a majority vote, regardless of whether one or more of its members wishes to continue debate. The Senate deleted the provision for the previous question from its rules in 1806. The provision that was originally adopted in 1789 stated that,

The previous question being moved and seconded, the question from the chair shall be: "Shall the main question be now put?" And if the nays prevail, the main question shall not then be put. (*Senate Journal*, April 16, 1789, p. 13)

Although the previous question eventually came to be viewed as a means for cutting off debate so that a vote might be taken, this was not the case in the early Senate.²³ Instead, the rule was seen as a tool to delay or kill legislation (Binder 1997; Cooper 1962). If a vote on the previous question was determined in the negative, this typically meant that consideration of the legislation would be postponed until the next day and perhaps indefinitely. The rule provided majorities with a means to remove from consideration items that they did not want to address, rather than a means to force action on items they desired.

Its infrequent use in the Senate, along with the availability of other motions that could accomplish the same ends (e.g., a motion to postpone consideration), led to the deletion of the previous question from the Senate rules. The Senate deemed it viable to rely on the informal constraints of "dignity and courtesy" to prevent its members from abusing the absence of limits on debate and amendments (Luce 1922, 289). As we show in subsequent chapters, however, these informal constraints frayed by the late-19th century, leading to concerted efforts to substitute formal rules, which culminated with the cloture rule of 1917.

One potentially important restriction on debate that has existed from the very first incarnation of the Senate's rules is that a senator is prevented from speaking more than twice on any single question on the same legislative day without leave from the Senate. Regardless of the topic or the length of the speech, it still counts against the quota of speeches on the pending

²²Some motions, such as a motion to adjourn and a motion to table, are not debatable. As we discuss below in more detail, non-debatable motions play a central role in attempts to curtail obstruction by establishing new precedents.

²³See Luce (1922, 270–73) for the development and changing interpretations of previous question rules.

question.²⁴ While this rule is typically applied loosely, it can be enforced more strictly when multiple speeches are used for dilatory purposes. It can be especially restrictive when the Senate maintains the same legislative day over several calendar days by recessing rather than adjourning (Bach 2001, 3).

The lack of a germaneness rule in the Senate means that once a senator is recognized, she can speak on any topic of her choosing, although it still counts against her speech allotment on the pending question. The right of recognition and the lack of constraints on topics that senators may address provide in tandem the basis for the tactics most commonly associated with Senate obstruction. Under standard floor procedure, a senator cannot be denied recognition, nor can she be denied from speaking in a desultory way or discussing a topic entirely distinct from the question at hand. Thus, when Huey Long gave his recipe for “potlikker” during his famous 1935 filibuster of a proposed extension of the National Industrial Recovery Act, he was drawing upon a long-standing Senate tradition.

Although obstruction in the modern Senate is equated with extended speeches, this is not the only method senators have employed to hinder majorities. The right of recognition also applies to senators who seek to make motions on the floor. These include motions regarding amendments as well as various procedural motions, such as motions to adjourn, to recess, to postpone, or to table legislative items. Senators can also suggest the absence of a quorum, forcing a call of the roll. These motions do not count against the two-speech limit, although at times certain limits have been placed on their usage. Throughout much of the 19th century, dilatory motions were the primary tactic used by Senate obstructionists. However, by the turn of the century, obstructionists began to use these kinds of motions less and less, relying instead on temporizing speeches. The move away from dilatory motions appears to have begun in response to a series of precedents established in the second half of the century that made it easier to count quorums, along with a 1908 ruling making it harder to use consecutive dilatory motions.²⁵

We use the terms “filibuster” and “obstruction” interchangeably in this book to connote the full range of tactics used by opponents to stall legislation. This comports with the traditional understanding that long speeches are but one of a family of tactics used by obstructionists. It is only in the contemporary period that filibusters came to be equated with long speeches, and this shift was largely due to the restrictions on dilatory motions adopted in the late-19th and early-20th centuries.

The basic ground rules that enable obstruction are altered by unanimous consent agreements (UCAs) and, after 1917, when cloture has been invoked.

²⁴Bach (2001, 3) points out that “senators often can circumvent the two-speech rule by making a motion or offering an amendment that constitutes a new and different debatable question.”

²⁵See Chapters 2 and 3 for details regarding the establishment of these precedents. Dilatory motions did not disappear completely with these precedents, even though they receded in prominence. Indeed, the cloture rule adopted in 1917 took specific aim at these kinds of motions, providing that “no dilatory motion shall be in order” once cloture has been invoked (*Congressional Record*, March 8, 1917, p. 40).

UCAs work similarly to special rules in the House, placing limits on debate and amendments. The big difference, of course, is that they require unanimity to be put into effect, while only a majority is required to approve a special rule in the House. Although achieving this degree of consensus might seem impossible, the acceptance of UCAs has become the norm for floor procedure in the modern Senate.²⁶ However, because of the compromises that are necessary to obtain unanimity, Smith (1989, 119) argues that UCAs place “very little genuine restraint on amending activity and debate.” Although UCAs were available to senators during the period we investigate, they were not used very often and did not play as prominent a role as they do in the contemporary Senate.²⁷

The cloture rule adopted in 1917, which allowed for a two-thirds majority to end debate, also imposed limits on the nature and amount of debate that could take place after cloture is invoked. The original cloture rule allotted one hour of debate to each senator and prevented the offering of amendments that had not been proposed prior to the invocation of cloture. Stricter germaneness rules apply, and the presiding officer is empowered to rule motions and amendments out of order if he deems them dilatory. While questions have been raised about the effectiveness of the cloture rule, which we will address in Chapter 9, its adoption in 1917 provided structure to floor procedure that had been alien to the Senate.

Prior to the regularization of UCAs and the adoption of cloture, the Senate floor was essentially a free-for-all, standing in sharp contrast to the House, which by the end of the 19th century had a highly structured floor procedure with agenda control centralized in the Speaker.²⁸ Although steering committees and party leaders would emerge and attempt to impose some order on the floor agenda in the upper chamber, they would never achieve the kind of institutional authority that leaders in the House possessed.²⁹ The formal position of the Senate majority leader was not established until the early-20th century, and even then the position was not endowed with the right of first recognition—arguably the most important power the majority leader possesses—until 1937.³⁰

²⁶See Krehbiel (1986) for a model of how acceptance of a UCA is consistent with individual expected utility maximization. The intuition is that a senator is better off by going along with a UCA that leads to a passage of a bill she does not favor if it allows consideration and passage of a bill she favors by a substantial amount.

²⁷The first unanimous consent agreement was used in 1846 during debate over the Oregon territory, although the agreement “was not terribly well-enforced” (Binder and Smith 1997, 76). Furthermore, presiding officers were not obligated to enforce UCAs until a rule change in 1914 (Gamm and Smith 2000). We conduct a systematic investigation of the impact of UCAs in Chapter 9.

²⁸Some contend the Senate floor remains something of a free-for-all (Smith 1989).

²⁹The development of partisan institutions in the 19th and early-20th centuries is another topic that has been vastly understudied, although recent work has greatly increased our knowledge of this subject (Gamm and Smith 2001b, 2002a,b, 2003).

³⁰The right of first recognition means that the presiding officer recognizes the majority leader before anyone else (Smith 1995, 152). This precedent enables the majority leader to structure the agenda before any other senator can offer motions or amendments. While

The congressional literature leaves us with a poor understanding of how the Senate managed to function with so little institutional structure and such extensive individual prerogatives. This book will explore both how individual senators responded to their sparse institutional environment, and how this individual behavior translated into macro outcomes in terms of legislative performance and lawmaking generally. Recent work in economics, anthropology, and sociology has considered how societies function in the absence of a government capable of enforcing clear rules of the game (for a review, see Dixit 2004). Our analysis of Senate politics in the 19th and early-20th centuries contributes to this new literature by exploring how the absence of clear rules limiting debate affected legislative decision-making.

1.3 LAYOUT OF THE BOOK

In the next chapter, we develop our theoretical framework. Much of the prior work on filibusters lacks explicit theoretical development, and the relevant theories that have been developed are largely partisan based (Binder 1997; Dion 1997; Koger 2002). Yet there are several reasons to believe that a party-centered approach will result in an incomplete picture of obstruction and lawmaking given the lack of formal partisan leadership positions and institutions throughout most of the period under examination. Party caucuses and steering committees did not become active until the late-19th century (Gamm and Smith 2001b, 2003), and even then it is open to question how much influence they had over the policy-making process in the Senate. Institutionalized leadership positions have been a focus of partisan-oriented studies of Congress, but these works have dealt almost exclusively with the House (Rohde 1991; Aldrich 1995; Cox and McCubbins 1993). Thus, we seek an alternative to partisan-based theories for answering the questions that we pose.

Although we are sensitive to the potential impact of partisan forces, we begin with a simple focus on the policy and electoral goals of individual senators. We assume that senators are rational, goal-oriented actors who make decisions regarding obstruction that are shaped by institutional context. Extant work on the filibuster has failed to grapple with the simple questions of why senators choose to obstruct rather than simply vote “no” on legislation they oppose or, alternatively, why they would choose not to obstruct legislation that they vote against. Yet the answer to this question has implications for issues that are fundamental to legislative politics, particularly how those

this grants the majority leader an important power, it pales in comparison with the formal agenda setting powers of House leaders. See U.S. Congress. Senate (1992, 1093–94, 1098) for details on this precedent. It is worth noting that the precedent establishing the majority leader’s right of recognition is in tension with the rule providing that the presiding officer “shall” recognize the first senator who stands and asks to speak. This underscores the extent to which the Senate has used the establishment of precedents to change the actual rules of the game in important ways.

ected to representative institutions use their range of powers and resources to translate constituent preferences into policy outcomes. We address this theoretical point by considering the costs that obstruction entails. These costs involve the physical effort associated with actually holding the floor for an extended period of time, as well as the opportunity costs that result from reduced time to pursue other legislation or to cultivate constituents at home. A similar cost calculus also applies to bill supporters. The key question in pre-cloture filibuster battles was which side had the greater resolve to bear such costs in order to secure its favored outcome. We argue that this institutional context fostered confrontations that were akin to game-theoretic models of “wars of attrition” and that electorally relevant information conveyed through filibuster battles helps to explain why a legislature would choose to allow minorities to obstruct business in the first place. We develop a theory that generates predictions about the conditions under which obstruction will succeed. We argue that even narrow majorities should generally be successful in these wars of attrition, in part due to the implicit threat that the majority will, if necessary, change the rules by resolution or by “revolution” (i.e., by establishing precedents) in ways that eviscerate minority rights. The main exceptions to this generalization occur when the minority has a greater stake in the issue than the majority, and thus has a greater resolve to bear the costs of obstruction. In addition, when final adjournment loomed, the deadline gave an advantage to the minority seeking to run out the clock.

We emphasize that this system involving obstruction was sustainable so long as the Senate was characterized by a set of norms that coordinated expectations about the role of obstruction. Drawing on the literature on “lawlessness and economics,” we develop the theory and analyze the dynamics of “relation-based legislating” in Senate deliberations, and we discuss why senators found it more attractive to rely on informal conventions instead of formal rules for a substantial part of their chamber’s history. In particular, this system provided a mechanism for senators to credibly convey their preference intensity and for the Senate as a whole to take some rough account of differential intensity. We also assess the conditions that led to institutional change in reaction to the breakdown of relational legislating. This chapter makes clear how a legislature can function even when the actual threshold for passage of legislation is unclear because there is no rule providing for the application of the *de jure* threshold of majority rule.

Our theoretical approach relies in part on the credibility of threats to establish new rules and precedents restricting obstruction. As noted above, this contrasts with the idea that inherited institutions empowered minorities to ward off changes in the rules of the game (see Binder and Smith 1997). We thus turn in Chapter 3 to an investigation of efforts to change Senate rules and precedents in order to lay a firm foundation for the remaining components of our analysis. We argue that threats to enact precedents restricting obstruction were credible for much of Senate history and, as a result, were a significant restraint on obstruction. We consider two high-

profile cases in which a floor majority allegedly was thwarted in its effort to change the rules, and we show that the key problem instead was the absence of a majority in support of the underlying legislation at stake in the fight. We also document several instances in which a majority on the floor enacted precedents that helped defeat particular filibusters and that limited the range of tactics available to obstructionists.

Having established the theoretical foundation for examining obstruction, Chapters 4 through 6 provide a macro analysis of lawmaking in the Senate both before and after cloture reform. These chapters constitute a three-pronged analytical approach to testing predictions from alternative theories, which is motivated in part by the need to consider possible selection problems that plague the analysis of filibusters. A lack of past systematic empirical work has given rise to conflicting sets of assumptions concerning how the Senate operated during earlier periods of its history. Our analysis helps to resolve these conflicts. With some qualifications, our theoretical development leads us to expect that lawmaking in the pre-cloture Senate was generally majoritarian when it came to significant legislation, following a “median-plus-veto-pivot” model.³¹ This stands in contrast with claims that the lack of a cloture rule induced universal coalitions, because a single senator could credibly threaten to obstruct and kill legislation (Burdette 1940; Heitshusen and Young 2001; McCall 1911; Reinsch 1907; Von Holst 1893). We connect these claims to the theory of universalism—one of the most prominent theories in the congressional literature regarding coalition sizes (Weingast 1979; Collie 1988), discussing how this theory relates to obstruction in the Senate. These chapters report empirical work that tests our theoretical claims against the claims of the theory of universalism.

Chapter 4 undertakes an examination of coalition sizes on significant legislation during the pre- and post-cloture periods to assess which theory more accurately explains historical patterns. This analysis extends recent work on the production of significant legislation to a period not yet examined (Mayhew 1991; Krehbiel 1998; Cameron 2000; Binder 2003). In addition to presenting a range of statistics regarding coalition sizes, we also examine variation in coalition sizes, taking into account other pivotal players in the separation of powers system. We do this by replicating Krehbiel’s (1998, 82–90) analysis of the impact of “presidential regime switches,” making adjustments for the institutional context of the pre–World War II era. The analysis in this chapter indicates that although many major bills enjoyed supermajority support in 1881–1917, coalitions were typically smaller than in 1917–1946 (and smaller than in the contemporary Senate), with a much larger proportion of bills passing with only a slim majority in favor. In terms of coalition sizes on significant legislation, the median-plus-veto-pivot model does a better job of explaining lawmaking in the pre-cloture Senate than do the approaches that predict universalism. We also find evidence that

³¹We argue that significant legislation is likely to be salient to both supporters and opponents due its landmark character.

coalition sizes tended to be larger in the final weeks at the end of the lame duck sessions, which is consistent with the “filibusters as wars of attrition” approach developed in Chapter 2.

Chapter 5 continues this line of inquiry by examining the use of obstruction directly. We assess how the size of coalitions opposing obstruction affects whether or not dilatory efforts are successful, incorporating arguments regarding time constraints into the analysis. Specifically, we examine roll call votes on dilatory motions—a central feature of pre-cloture obstructive efforts—to determine how the size of coalitions supporting these motions predicts the failure of the targeted legislation. For example, if unanimity or near unanimity was required to pass legislation, then we should observe that obstruction generally succeeds even when large majorities of senators oppose the dilatory motions directed at a given bill. The results from this analysis are consistent with the results on significant legislation, indicating that unanimity or near unanimity was not necessary to overcome obstruction prior to 1917. Fairly narrow majorities were remarkably successful in passing legislation despite obstruction. While their success rate decreased when the obstruction occurred late in a congress, universal coalitions were still not necessary even during the last few days before the March 4 adjournment deadline. However, as adjournment drew near, there was increasing uncertainty about how large a coalition had to be in order to overcome obstruction. We return to the issue of uncertainty and how it relates to cloture reform in Chapter 9.

Chapter 6 pursues these issues from a different tack, undertaking a case study analysis of obstruction and tariff politics. In addition to being one of the most important policy areas during the period we cover, the tariff is particularly well suited for evaluating our competing hypotheses. Competing conventional wisdoms about the nature of the tariff—as a broadly inclusive distributive policy versus a highly partisan issue area provoking sectional conflict—map tightly onto the models of lawmaking that we consider. Drawing from a wide range of primary and secondary sources, we not only help to settle competing claims about the operation of the Senate, but also divergent views about the politics of one of the dominant policy issues in the history of the United States. The general conclusion that we draw from these different analyses is that despite institutional structures that granted extensive latitude to minorities to prevent the passage of legislation through obstruction, the Senate functioned largely as a majoritarian body, except when end-of-congress time constraints allowed the minority to run out the clock before legislative work was completed. But even then, there was a surprising amount of restraint in the use of obstruction.

Following our three-pronged test of competing theories of lawmaking in the pre-cloture Senate, we turn in Chapter 7 to an individual-level analysis of decisions to engage in obstruction. We take advantage of the unique political context and strategies of obstruction employed during the antebellum period to answer the simple yet crucial question of what drives individuals to move beyond simply voting against legislation and engage in obstruction.

The focus here is on slavery-related legislation, and how southerners' concerns about having minority status drove them to obstruct. We posit that the overwhelming salience of the slavery issue to southern members would make them more likely to obstruct as they became more of a minority in the chamber. While it may seem obvious that southerners would obstruct items related to slavery, our prediction is more nuanced: we predict variation in their use of obstruction in connection with the threat presented by their minority status. We find that both sectional and partisan factors explain antebellum obstruction, with the former being especially relevant for understanding obstruction aimed at legislation related to slavery. This reemphasizes the importance of considering how different policy areas can define minorities in ways that do not always fall neatly along partisan lines. While sectional factors are widely accepted as playing an important role in filibusters of the 20th century, this analysis demonstrates that the sectional divide has been a persistent source of obstructive behavior, dating back to early in the Republic.

While our analysis of coalition sizes in the pre- and post-cloture periods and of antebellum obstruction provide important answers to questions about lawmaking in the Senate, the results also raise several puzzles, especially about the motivation for and impact of cloture reform. Given the success that slim majorities had in passing legislation prior to 1917, why did senators bother to adopt a cloture rule that could be invoked only by a coalition *larger* than had generally been necessary at the time to pass legislation? The congressional literature does not provide a clear assessment of the practical importance of this landmark reform, again producing several competing conventional wisdoms regarding the adoption of cloture.

We approach the critical questions regarding cloture reform from two angles. The first is an attempt to explain why cloture reform happened when it did. Chapter 8 examines changes in the broader political and institutional environment around the turn of the century that undermined the legislative ordering that had existed previously, prompting a move from the reliance on informal conventions to the adoption of more formal rules concerning debate. We investigate how the contextual changes adversely affected the ability of the Senate to operate on the basis of relational legislating as it had during the 19th century. Attention is focused on the development of direct election of senators, which might have affected both the incentives senators had to obey norms against exploiting individual prerogatives as well as the responsiveness of senators to demands for institutional reform. We consider the relationship between incidents of obstruction, turnover, stability, workload, and chamber size, weighing how these different factors might promote or hinder relational legislating. We argue that achieving the cooperative outcome characterized by restraint in the use of obstruction became more difficult due to changes in institutional context.

While several factors may have contributed to the breakdown of informal conventions, our analysis reveals that the increasing size of the Senate and increasing workload were the primary factors. A marked increase in the membership of the Senate due to the addition of new states crippled

the effectiveness of relation-based legislating. Other changes in the institutional, political, and economic context intensified the effect of the Senate's expansion, attenuated interpersonal networks, and impaired communication among senators. The systematic evidence that we present exonerates direct election—a prime suspect among the causes of institutional change within the Senate. That reform did not increase turnover or alter individual senators' voting behavior in a manner consistent with the hypothesis that popular control mechanisms motivated senators to adopt more formal rules concerning debate. While direct election may have led the Senate to become more like the House descriptively in terms of members' backgrounds, reforms that reduced and eventually eliminated the role that state legislatures played in selecting senators did not have discernible behavioral consequences for obstruction.

Chapter 9 investigates the impact of cloture reform itself, assessing the degree to which the rule affected lawmaking in the Senate. At the time of its adoption in 1917, the new cloture rule was viewed as a powerful remedy for the ills inflicted on the chamber by its lack of rules regarding debate. However, the prevailing conventional wisdom in the congressional literature is that the cloture reform of 1917 was merely symbolic and had almost no influence on lawmaking in subsequent decades, in part because the cloture procedure was used so infrequently. We develop a simple model that elucidates the benefits of supermajority procedures for shutting off debate, which legislators can realize without actually resorting to these procedures. The model demonstrates how senators can reduce uncertainty associated with passing legislation by enlarging the supporting coalition. The cloture rule offered legislative entrepreneurs a reduction in the uncertainty of passage when they assembled coalitions including two-thirds of the membership. This incentive shift leads one to expect an increase in average coalition sizes and a reduction in their variance after 1917. We adjudicate among the different perspectives on cloture reform, extending our analysis of coalition sizes. Consistent with the predictions of the model, we find a reduction in the variance of coalition sizes on significant legislation, indicating that the adoption of the cloture rule had a substantive impact on the operation of the Senate, contrary to what the conventional wisdom would have us believe. In addition, we evaluate competing hypotheses regarding changes in coalition sizes during this period. Empirical evidence does not support arguments regarding the effects of parties, changes in preference distributions in Congress, the advent of enforcement of UCAs, or changes in the legislative agenda.

Chapter 10 pursues the impact of cloture by examining the effects of cloture on the appropriations process in the Senate. Obstruction was a major source of vexation for senators when it came to exercising their power over the purse strings of the federal government because it often inhibited them from passing spending measures before the fiscal year expired, which threatened severe disruption in government operations. Our analysis considers whether the cloture rule's designation of a sufficient condition for ending debate promoted efficiency in the appropriations process. We argue that

cloture worked in tandem with a set of reforms enacted during this period—including the Budget and Accounting Act of 1921 and the recentralization of appropriations jurisdiction in the Appropriations Committee—as the Senate confronted the problems that obstruction posed for enacting fiscal policy. Our quantitative analysis illuminates the impact of these reforms on the ability of the Senate to process appropriations bills by relevant deadlines—namely, the start of the fiscal year—and leads to the conclusion that cloture operated in conjunction with the other institutional changes to improve the Senate’s punctuality in passing spending measures. The appropriations analysis thus reinforces the argument that the cloture rule counteracted the uncertainty fostered by minority obstruction.

Chapter 11 concludes with a discussion of legislative behavior, institutional choice, and political outcomes. We discuss the differences between the pre-cloture Senate and the contemporary Senate, and what our historical analysis tells us about the institution and lawmaking today. The costs that undergirded filibusters as wars of attrition are no longer applicable; tight scheduling constraints have led the costs facing obstructionists to become negligible. Yet the right of unlimited debate—though qualified by the cloture rule—persists, even as the informational value of obstruction has faded. We explore the implications of “costless” filibusters for lawmaking in the contemporary Senate. In particular, we focus on the recent debate over the Democratic filibuster of President George W. Bush’s nominees to the federal bench. As noted above, the Republican leadership has threatened to execute a “rules revolution” through new precedents, which, if successful, could eviscerate the institution’s supermajority requirements and eradicate long-standing protections for minorities. We discuss what our historical perspective reveals about the feasibility and wisdom of the proposed changes, as well as the future of supermajority requirements and limits on debate in the Senate.