Part I
Patterns and Dynamics of Congressional Change

1. The New World of U.S. Senators

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The U.S. Senate has the most permissive rules of any legislature in the world, but the extent to which senators make full use of their prerogatives under the rules has varied over time. In the clubby, inward-looking Senate of the 1950s, senators were highly constrained in the use of their prerogatives. By the 1970s, as the Senate became more outward looking, individuals and small groups of senators routinely employed extended debate and the amending process for their own individual purposes. In the contemporary Senate, increasingly cohesive party contingents aggressively exploit Senate rules to pursue partisan advantage. The majority party leadership has responded to the minority's aggressive use of Senate prerogatives with hardball procedural ploys, and a procedural arms race has ensued. Intense partisan polarization, when combined with nonmajoritarian rules, greatly alters how the Senate functions and leaves the chamber in continual danger of policy gridlock.

- A courtly older gentleman—probably a conservative Southern Democrat, perhaps even white haired and clad in a white linen suit—working in committee behind closed doors
- A policy entrepreneur—Democrat or Republican, liberal or conservative—pursuing his cause singly or with a few allies on the Senate floor, aggressively using nongermane amendments and extended debate as his weapons
- A partisan warrior, acting as a member of a party team, dueling with his opposing-party counterparts in the public arena and on the floor, using all of the procedural and PR tools available

These three images capture the differences among the Senates of the 1950s, the 1970s, and the 1990s and beyond. To be sure, they are simplifications, and some elements of the 1950s Senate and many of the 1970s Senate persist. Yet the Senate of the early twenty-first century is very different from the 1950s Senate, which fictional and some journalistic accounts still often depict as current, and it is appreciably different from the 1970s Senate.

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The U.S. Senate has the most permissive rules of any legislature in the world.[1] Extended debate allows senators to hold the floor as long as they wish, unless cloture is invoked, and that requires a supermajority of sixty votes. The Senate's amending rules enable senators to offer any—and as many—amendments as they please to almost any bill, and those amendments need not even be germane. The extent to which senators make full use of their prerogatives under the rules has varied over time. The Senate of the early twenty-first century is characterized by increasingly cohesive party contingents that aggressively exploit Senate rules to pursue partisan advantage but also by the persistence of the Senate individualism that developed in the 1960s and 1970s.

In this chapter, I briefly examine how and why the Senate changed from the 1950s to the present. I then analyze the impacts of intensified partisanship and of continuing individualism on how the contemporary Senate functions and on legislative outcomes.

Development of the Individualist, Partisan Senate

The Senate of the 1950s was a clubby, inward-looking body governed by con-straining norms; influence was relatively unequally distributed and centered in strong committees and their senior leaders, who were most often conservatives, frequently Southern Democrats.[2] The typical senator of the 1950s was a specialist who concentrated on the issues that came before his committees. His legislative activities were largely confined to the committee room; he was seldom active on the Senate floor, was highly restrained in his exercise of the prerogatives the Senate rules gave him, and made little use of the national media.

The Senate's institutional structure and the political environment rewarded such behavior.[3] The lack of staff made it hard for new senators to participate intel-ligently right away, so serving an apprenticeship helped prevent a new member from making a fool of himself early in his career. Meager staff resources also made specialization the only really feasible course for attaining influence. Restraint in exploiting extended debate was encouraged by the absence of the time pressure that would later make extended debate such a formidable weapon; when floor time is plentiful, the leverage senators derive from extended debate is much less.[4] Furthermore, the dominant Southern Democrats had a strong constituency-based interest in restricting and thus protecting the filibuster for their one big issue: opposition to civil rights.

The majority of senators, especially the Southern Democrats, faced no imminent reelection peril so long as they were free to reflect their constituents' views in their votes and capable of providing the projects their constituents desired. The system of reciprocity, which dictated that senators do constituency-related favors for one another whenever possible, served them well. The seniority system, bolstered by norms of apprenticeship, specialization, and intercommittee reciprocity, assured members of considerable independent influence in their area of jurisdiction if they stayed in the Senate long enough, and it did not make that

influence dependent on their voting behavior. For the moderate-to-conservative Senate membership, the parochial and limited legislation that such a system produced was quite satisfactory. The Senate of the 1950s was an institution well designed for its generally conservative and electorally secure members to further their goals.

Membership turnover and a transformation of the political environment altered the costs and benefits of such behavior and induced members to change the institution; over time, norms, practices, and rules were altered.[5] The 1958 elections brought into the Senate a big class of new senators with different policy goals and reelection needs. Mostly northern Democrats, they were activist liberals, and most had been elected in highly competitive contests, in many cases defeating incumbents. Both their policy goals and their reelection needs dictated a more activist style; these senators simply could not afford to wait to make their mark. Subsequent elections brought in more and more such members.

In the 1960s, the political environment began a transformation. A host of new issues rose to prominence—first, civil rights, then, environmental issues and consumer rights; the war in Vietnam and the questions about American foreign and defense policy that it raised; women's rights and women's liberation; the rights of other ethnic groups, especially Latinos and Native Americans; the rights of the poor and disabled; and, by the early 1970s, gay rights. These were issues that engaged, often intensely, many ordinary citizens, and politics became more highly charged. The interest group community exploded in size and became more diverse; many of the social movements of the 1960s spawned or already had interest groups. A hoard of environmental groups, consumer groups, women's groups, and other liberal social welfare and civil rights groups joined the Washington political community and made it more diverse. Then, in response to some of these groups' policy successes—for example, on environmental legislation—the business community mobilized. In the 1970s, many more businesses established a permanent presence in Washington, and specialized trade associations proliferated. The media, especially television, became a much bigger player in politics.

This new environment offered tempting new opportunities to senators.[6] The myriad interest groups needed champions and spokesmen, and the media needed credible sources to represent issue positions and provide commentary. Because of the prestige and small size of the Senate, senators fit the bill. The opportunity for senators to become significant players on a broader stage, with possible policy, power, reelection, or higher-office payoffs, was there, but to take advantage of the opportunity, senators needed to change their behavior and their institution.

From the mid-1960s through the mid-1970s, senators did just that. They increased the number of positions on good committees and the number of subcommittee leadership positions and distributed them much more broadly. Staff was greatly expanded and made available to junior, as well as senior, senators. Senators were consequently able to involve themselves in a much broader range of issues, and they did so. Senators also became much more active on the Senate floor, offering more amendments to a wider range of bills. Senators exploited

extended debate to a much greater extent, and the frequency of filibusters shot up.[7] The media became an increasingly important arena for participation and a significant resource for senators in the pursuit of their policy, power, and reelection goals.

By the mid-1970s, the individualist Senate had emerged. The Senate had become a body in which every member, regardless of seniority, considered himself entitled to participate on any issue that interested him for either constituency or policy reasons. Senators took for granted that they—and their colleagues—would regularly exploit the powers that the Senate rules gave them. Senators became more outwardly directed, focusing on their links with interest groups, policy communities, and the media more than on their ties to one another.

The 1980 elections made Ronald Reagan president and, to almost everyone's surprise, brought a Republican majority to the Senate. As president, Reagan was more conservative and confrontational than his Republican predecessors of the post–World War II era, and his election signaled an intensification of ideological conflict that increasingly fell along partisan lines.

Realignment in the South, the Proposition 13 tax-cutting fever, the rise of the Christian right, and the increasing prominence of supply-side economics were changing the political parties. In 1961, not a single senator from the eleven states of the old Confederacy was a Republican; by 1973, seven were, and by 1980, the number had risen to ten. In 2015, the number stood at nineteen, or 86 percent of the senators from the once solidly Democratic old South. As conservative Southern Democrats were replaced by even more conservative Southern Republicans, the congressional Democratic Party became more homogeneously liberal and the Republican Party more conservative. Outside the South as well, Republican candidates and activists were becoming more ideologically conservative.

Voting on the Senate floor became increasingly partisan. In the late 1960s and early 1970s, a majority of Democrats opposed a majority of Republicans on only about a third of Senate roll call votes. By the 1990s, between half and two-thirds of roll calls were such party votes, and that has continued; the average over the Congresses from 2003 through 2014 is 63 percent. The frequency with which senators voted with their partisan colleagues on party votes increased significantly as well. By the 1990s, a typical party vote saw well over 80 percent of Democrats voting together on one side and well over 80 percent of Republicans on the other. In the 113th Congress (2013–2014), majorities of Democrats and Republicans opposed each other on 68 percent of the Senate's recorded votes, and 97 percent of Democrats opposed 89 percent of Republicans on a typical party vote.[8]

Partisan polarization has made participation through their party more attractive to senators than it was when the parties were more heterogeneous and the ideological distance between them less. Recent Senate party leaders have sought to provide more channels for members to participate in and through the party.[9] Increasingly, senators of the same party are acting as a party team and are exploiting Senate prerogatives to gain partisan advantage.

Over this same period, the Senate membership has become more diverse. Although most senators are still white men, the 113th Congress included twenty women—an all-time high—two African Americans, three Latinos (all Cuban Americans), and one Asian American. By contrast, in the Eighty-fifth Congress (1957–1958), every senator was white, and only one was female. The greater diversity influences how the Senate operates, but its impact is much less than those of individualism and intense partisanship.

The Legislative Process in the Contemporary Senate

What effect has the combination of individualism and partisanship had on the legislative process in the Senate? Individualism changed the way Senate committees work and altered even more floor-related legislative routines, complicating the Senate majority leader's job of floor scheduling and coordination. Intensified partisanship exacerbated the problems the majority leader faces in keeping the Senate functioning as a legislative body.

Senate Committees and the Prefloor Process

Senators hold multiple committee assignments and usually lead at least one subcommittee, often more. In the 112th Congress, senators averaged 4 committee assignments and 8.4 subcommittee assignments each; members of the majority party averaged 1.7 chairmanships.[10] Thus, senators are stretched very thin; they treat their committees not as work groups in which to participate regularly but as arenas in which they pick and choose whether to participate depending upon their interest in the subject being considered. Senators rely heavily on staff for committee work. Committee decisions on many issues are made by the "interesteds," who make up considerably less than the full committee membership.[11] A major tax bill will elicit active participation from all the members of the relevant committee; a rewrite of copyright law, important but narrower and more technical legislation, may be left to a handful of senators.

Because of senators' workloads and the large number of subcommittees, subcommittees are usually "starring" vehicles for their chairs. The chairs can use their subcommittees to publicize problems and policy solutions, to cater to allied interest groups, to promote themselves, or to do all three. Under most circumstances, other senators, even the chair of the full committee, are too busy to interfere.

The marking up of bills most frequently takes place in full committee.[12] Senators on the subcommittee do not have time to go through two markups, and they know that any interested committee member not on the subcommittee would insist on having a say at the full committee level.

Even in this period of heightened partisanship, Senate committees not infrequently work in a bipartisan fashion. Bill sponsors know that their legislation's chances of surviving the Senate floor are much better if it has broad support. Committee chairs usually try to negotiate the *chairman's mark*, the legislative language

from which the committee will work, with their minority party counterpart and other interested committee members. In 2011, for example, Tom Harkin, chair of the Committee on Health, Education, Labor and Pensions (HELP), and Mike Enzi, the committee's ranking member, worked together to draft a bill reauthorizing the No Child Left Behind Education Act that garnered bipartisan support in the committee. Similarly, in 2015, Lamar Alexander, R-Tenn., HELP committee chair, and Patty Murray, D-Wash., ranking minority member, negotiated a compromise reform of the program that passed the committee unanimously. Conflict within committees is also sometimes dampened down by senators' tendency to postpone contentious issues until floor debate. When negotiating and marking up the bill reauthorizing farm programs in 2007, the Agriculture Committee agreed to put off amendments for stricter crop payment limits; highly controversial, that issue would be fought out on the floor again in any case. To report legislation in a timely manner and to maintain its bipartisan style of internal decision making, the Appropriations Committee regularly agreed to withhold divisive, policy-related amendments until the floor.

Committee decision making must be sensitive to the policy preferences of interested senators who are not members of the committee. Because any senator can cause problems for legislation on the floor and may, in fact, be able to block it from getting to the floor, committee proponents of particular legislation have considerable incentive to try to anticipate other senators' views and bargain with those with intense preferences before the committee reports the bill. Senate committees are perforce highly permeable.

Senate committee decision making is, nevertheless, more likely to be partisan than it used to be. In the Congresses of the 1960s and 1970s, the Senate committee process was partisan on less than one in ten major measures; that increased to about one in seven in the 1980s.[13] In the Congresses of the 1990s and 2000s (103rd–110th), the Senate committee process was partisan on about a quarter of the major measures considered, and the figure rose to almost 40 percent in the 111th Congress, but it declined in the two subsequent Congresses to an average of 15 percent.[14]

Still, Senate committee decision making has been considerably more partisan since the mid-1990s than it was before. The figures for partisanship in committee decision making are not higher, in part, because frequently now, committees are bypassed on the most partisan issues (as discussed later). Despite incentives in Senate procedures to avoid narrow supportive majorities, partisan polarization has made finding compromises acceptable to both political parties much more difficult. With the intensification of partisanship, majority party committee contingents have also become increasingly responsive to their party leader and their party colleagues. Majority leaders now often involve themselves in the substance of legislation in committee, as well as after a bill has been reported. The then majority leader Bill Frist, R-Tenn., was a major participant in negotiating the substance of the bill adding a prescription drug benefit to Medicare in 2003. The lobbying and ethics reform bill that the Senate debated

in early 2007 was the result of negotiations between majority leader Harry Reid, D-Nev., and minority leader Mitch McConnell, R-Ky.; it never went through committee. And after the HELP and Finance Committees reported very different health care reform bills in the summer and fall of 2009, Reid played a central role in putting together the bill that went to the floor and was passed by the chamber right before Christmas, on December 24, 2009. The 2015 budget deal—to relax for two years the draconian spending cuts dictated by the 2011 deal and to suspend the debt ceiling until after the 2016 elections—was crafted by the top-four party leaders and the White House.

Majority Leadership and the Senate Floor

In the contemporary Senate, floor scheduling is, of necessity, an exercise in broad and, in the end, bipartisan accommodation.[15] Although he is not the Senate's presiding officer and lacks many of the powers the House Speaker commands, the Senate majority leader is as close to a central leader as the chamber has, and he is charged with scheduling legislation for floor consideration. To bring legislation to the floor, the majority leader uses his right of first recognition, a prerogative the leader has had under Senate precedent since the 1930s. The majority leader can move that a bill be taken off of the calendar and considered, but the motion to proceed is a debatable motion—and thus subject to filibuster. Or he can ask for unanimous consent that the bill be taken off of the calendar and considered, a request that can be blocked by any senator's objection. Clearly, any senator can cause problems for the majority leader.

How Senators Cause Trouble: The Strategic Use of Senate Rules

Understanding the problems of legislative scheduling in the Senate and the routines that have developed requires a look at the strategic use of Senate rules by the individualistic and now also highly partisan Senate membership.

The filibuster—the use of extended debate to prevent a vote on a motion or measure unless a supermajority (now usually sixty) can be mustered—is certainly the best-known strategic use of Senate rules. With the development of the individualist Senate, the use of extended debate—and of cloture to try to cut it off—increased enormously (see Table 1-1). To be sure, the data must be regarded with some caution.[16] Exactly when lengthy debate becomes a filibuster is, in part, a matter of judgment. Furthermore, as I discuss later, filibusters have changed their form, and threats to filibuster have become much more frequent than actual talkathons. As a consequence, cloture is sometimes sought before a filibuster manifests itself on the floor. Nevertheless, experts and participants agree that the frequency of obstructionism has increased. In the 1950s, filibusters were rare; they increased during the 1960s and again during the 1970s. By the late 1980s and the 1990s, they had become routine. Cloture votes have increased in tandem, and more than one cloture vote per issue is now the norm.

Table 1-1   Increase in Filibusters and Cloture Votes, 1951–2014

Years	Congress	Filibusters per Congress	Cloture votes per Congress	Successful cloture votes per Congress
1951–1960	82nd–86th	1.0	0.4	0.0
1961–1970	87th–91st	4.6	5.2	0.8
1971–1980	92nd–96th	11.0	22.0	9.0
1981–1986	97th–99th	17.0	23.0	10.0
1987–1992	100th–102nd	27.0	39.0	15.0
1993–2006	103rd–109th	30.0	53.0	21.0
2007–2014*	110th–113th	55.0	91.0	55.0

*Filibusters and cloture votes on nominations after the rules change on November 21, 2013, reducing number required for cloture to a simple majority are not counted.

Sources: Data for 82nd–102nd Congresses: Congressional Research Service, comp., "A Look at the Senate Filibuster," in Democratic Studies Group Special Report, June 13, 1994, Appendix B; Norman Ornstein, Thomas Mann, and Michael Malbin, *Vital Statistics on Congress 1993–1994* (Washington, DC: CQ Press, 1994), 162. Data for 103rd Congress: Richard S. Beth, "Cloture in the Senate, 103d Congress," memorandum, Congressional Research Service, June 23, 1995. Data for 104th–108th Congresses: *CQ Almanac* for the years 1995–2007 (Washington, DC: CQ Press); 108th–114th Congresses, CQ online, library.cqpress.com/cqweekly.

As filibusters became more frequent, the character of the filibusterers and of the targeted legislation broadened. By the 1970s, liberals and conservatives frequently used this weapon, and senators used it on all sorts of legislation, parochial as well as momentous. For example, as Congress was rushing to adjourn in October 1992, Sen. Alfonse D'Amato, R-N.Y., held the floor for fifteen hours and fifteen minutes to protest the removal of a provision that he said could have restored jobs at a New York typewriter plant from an urban-aid tax bill.[17]

Senators use actual or threatened filibusters for a variety of purposes. Their aim may be to kill legislation, but it may also be to extract substantive concessions on a bill. Sometimes, senators' use of extended debate is a form of position taking; senators may know that they cannot kill or weaken the legislation but may want to make a strong statement about their position and the intensity of their feelings about it. Targeting one measure to extract concessions on another, sometimes known as "hostage taking," has become an increasingly frequent use of extended debate.

Nominations, as well as legislation, can be filibustered. In the late 1990s, Republicans killed a number of President Bill Clinton's judicial nominations by refusing to report them from committee. Democrats, lacking a Senate majority during most of the early 2000s and thus unable to prevent nominees they considered too extreme from being reported out, blocked a number of President

George W. Bush's judicial nominations on the floor. Republicans failed to get the requisite sixty votes to cut off debate and bring to a vote the nomination of Miguel Estrada to the Court of Appeals for the District of Columbia; after the seventh unsuccessful cloture vote, Estrada withdrew. President Barack Obama's judicial and many of his executive-branch nominees have routinely faced extended-debate-related problems.

Senators now often block nominees they do not oppose to gain a bargaining chip for use with the administration. In February 2010, Richard Shelby, R-Ala., placed a hold on more than seventy Obama nominees; Shelby demanded funding for the KC-135 Air Force tanker fleet, a project that could generate thousands of jobs in Alabama, and the restoration of a funding cut from the budget for the FBI's Terrorist Explosive Device Analytical Center, also located in Alabama. After intense media attention and widespread criticism, Shelby lifted his holds on most of the nominees, claiming he had accomplished his purpose: "to get the White House's attention."[18] Frustrated by the Federal Emergency Management Agency's treatment of a couple who were his constituents, Sen. Mark Pryor, D-Ark., in October 2011, placed holds on all Treasury Department nominees. Only after FEMA had reached an agreement with the couple over mistakenly awarded disaster relief funds did Pryor release his hold. Note that in this case, it was a member of the president's party who held up the nominations. "Hostage taking," as a strategy, is not limited to the president's opponents.

The offering of many, not necessarily germane, amendments on the floor is a signature characteristic of the individualist Senate. When major bills are considered, dozens of amendments are routinely offered. Budget resolutions frequently see more than forty amendments offered and pushed to a recorded vote; on the FY2010 budget resolution, there were thirty-eight roll call votes on amendments. The 2009 economic stimulus bill and the 2010 financial services reform bill (Dodd-Frank) were also subject to amending marathons, with twenty-six amendment-related roll calls on the former, twenty-eight on the latter, and many more amendments disposed of without roll calls. During floor consideration of the Department of Defense authorization bill in late 2011, 104 amendments were pending simultaneously; that is, they had been offered and had to be disposed of before the bill could come to a passage vote.[19]

Most amendments are germane, and the sponsor's aim is to influence the substance of the bill. But individual senators do use nongermane amendments to pursue their personal agendas and to bring to the floor issues that the leadership might like to avoid. Among the amendments offered to a 2007 bill on student loans were ones repealing the alternative minimum tax, barring the Federal Communications Commission from reinstating the Fairness Doctrine, requiring voters in federal elections to present photo identification, and expressing the sense of the Senate that detainees at Guantanamo Bay, including senior members of al Qaeda, should not be transferred to the United States.[20]

With the growth of partisan polarization, the minorities making use of Senate prerogatives are more often organized, partisan ones. The ideological polarization that coincides with the partisan polarization means that Democrats and Republicans have very different and often conflicting notions of what constitutes good public policy. Consequently, the minority party in the Senate has strong incentives to use its prerogatives to stymie the majority, and the minority's efforts to do so have only intensified in recent congresses (as discussed later).

In the 1990s, exploiting Senate prerogatives to attempt to seize control of the agenda from the majority party became a key minority party strategy. The lack of a germaneness requirement for amendments to most bills severely weakens the majority party's ability to control the floor agenda. If the majority leader refuses to bring a bill to the floor, its supporters can offer it as an amendment to most legislation that the leader does bring to the floor. The majority leader can make a motion to table the amendment, which is nondebatable. That does, however, require his members to vote on the issue, albeit in a procedural guise, and the leader may want to avoid that. Furthermore, even after the minority's amendment has been tabled, the minority can continue to offer other amendments, including even individual parts of the original amendment, and can block a vote on the underlying bill that the majority party wants to pass. The leader can, of course, file a cloture petition and try to shut off debate, but he needs sixty votes to do so.

The minority party can use this strategy to bring its agenda to the floor, and if the strategy is accompanied by a sophisticated public relations campaign (which the Senate parties are increasingly capable of orchestrating), it can draw favorable publicity and sometimes pressure enough majority party members into supporting the bill to pass it. In 1996, Senate Democrats used this strategy to enact a minimum wage increase. In 2001, campaign finance legislation passed the Senate before the Democrats took control of the chamber. John McCain, R-Ariz., and the Democrats had threatened to use the add-it-as-an-amendment-to-everything strategy, which would have wreaked havoc with the consideration of President Bush's program. Furthermore, Republicans knew that the cost of trying to stop campaign finance from being considered would be terrible publicity, so the Senate Republican leadership capitulated and agreed to bring it to the floor.

The majority's limited agenda control can also create problems for legislation the majority wants and has the votes to pass. The minority can sometimes come up with "killer" amendments that result in the defeat of a bill that otherwise would command a majority. In the 111th Congress, conservative Republicans offered an amendment to the District of Columbia Voting Rights Act that would have repealed the District's strict gun control provisions; although the amendment's passage did not prevent the bill, which Republicans strongly opposed, from passing the Senate, it killed the bill in the House.

Getting Legislation to the Senate Floor

    Given the extent to which senators, as individuals and as party teams, now exploit their prerogatives, how does the Senate manage to legislate at all? As shown in Table 1-2, major legislation is now very frequently subject to some sort of extended-debate–related problem, discernible from the public record.[21] Since the early 1990s, about half of the major legislation that was vulnerable to a filibuster actually encountered some sort of filibuster-related problem, and in the period 2007 to 2014, that rose to about 70 percent. If measures protected by rules from filibusters (budget resolution and reconciliation bills) are included, the proportion decreases only marginally.

    The Senate has long done most of its work through unanimous consent agreements (UCAs). By unanimous consent, senators agree to bring a bill to the floor, perhaps to place some limits on the amendments that may be offered or on the length of debate on specific amendments and then maybe to set a time for the final vote.[22] Some UCAs are highly elaborate and govern the entire floor consideration of a bill, but a series of partial agreements is more frequent than a single comprehensive one. As a highly knowledgeable participant explained, "Usually you have a UCA only to bring something to the floor, and then maybe you have another one that will deal with a couple of important amendments, and then perhaps a little later, one that will start limiting amendments to some extent, and then perhaps one that specifies when a vote will take place. So it's done through a series of steps, each of which sort of leaves less and less leeway."

    Ordinarily, Senate floor consideration of legislation begins with the majority leader asking and receiving unanimous consent to take a bill off the calendar

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Table 1-2   Increasing Frequency of Extended-Debate–Related Problems on Major Measures

Years*	Measures Affected (in percentages)[a]
1960s	8
1970s–1980s	27
1990s–mid-2000s	51
2007–2008	70
2009–2010	72
2011–2012	59
2013–2014	68

*Congresses included: 1960s: 87, 89, 91; 1970s–1980s: 94, 95, 97, 100, 101; 1990s–mid-2000s: 103, 104, 105, 107, 108, 109

[a] Figures represent percentage of "filibusterable" major measures that were subject to extended-debate–related problems.

Source: Author's calculations.

and proceed to consider it. This seemingly simple and easy process for getting legislation to the floor has been preceded by an elaborate consultation process to ensure that unanimous consent is forthcoming. The party leaders oversee the negotiation of unanimous consent agreements. The majority and minority party secretaries of the Senate now are the most important staffers involved; they serve as clearinghouses and points of continuous contact between the parties and often do much of the negotiating.

When the majority leader, after consultation with the relevant committee chair, decides that he wants to schedule a bill, the process begins. To ensure that there will be no objections to the consent request on the floor, it must be cleared with the minority leader, committee leaders, other senators who have expressed an interest in the bill, and, in effect, every senator on both sides of the aisle. The party secretaries keep the list of those senators who have requested that they be consulted before the bill is scheduled. If a fellow party member has expressed opposition to the bill being brought to the floor, negotiations may be necessary to take care of his or her concerns. When the leaders reach a tentative agreement, both parties put out a recorded message on their telephone hotline and also send an e-mail to all Senate offices. The message lays out the terms of the agreement and asks senators who have objections to call their leader within a specified period of time. If there are objections, they have to be taken care of. When every senator is prepared to assent to the unanimous consent agreement, the majority leader takes it to the floor and makes the request.

When a senator informs his leader, directly or through the party secretary, that he wishes to be consulted before a measure is scheduled, the senator may only want to be sure that he or she is not otherwise committed, is prepared for floor debate, or is ready to offer an amendment. Often, however, such a notification is a *hold*. "A hold," as a knowledgeable participant explained, "is a letter to your leader telling him which of the many powers that you have as a senator you intend to use on a given issue." Most holds, then, are threats to object to a unanimous consent agreement, and in a body that conducts most of its business through UCAs, that is, in effect, as a leadership staffer said, "a threat to filibuster."

The party secretaries confer every morning and tell each other what new holds there are on legislation or nominations. They do not reveal the names of the members who have placed the holds, so holds can be secret. The Senate has made a number of attempts to mandate disclosure, but none have been particularly effective. Of course, holds are often invitations to negotiate, and those, of necessity, have to be made public. "There's no point in taking a hostage, if you're not going to write a ransom note," a knowledgeable participant explained.

Visible filibusters, then, are just the tip of the iceberg. The Senate's permissive rules have much more effect on the legislative process through filibuster threats than through actual filibusters (see Table 1-2; remember that holds and filibuster threats, as well as actual filibusters, are reflected in the figures). "Classic" filibusters, with the Senate in session all night, senators sleeping on cots off

the Senate floor, and filibusterers making interminable speeches, no longer occur. Occasionally, the majority leader will force senators opposing a matter to take to the floor. The judicial nomination of Miguel Estrada was debated for almost one hundred hours over the course of a month before the majority leader filed a cloture petition, and during that period, the Senate did little else.[23] However, once the first cloture vote failed, Majority Leader Frist went on to other business (though there were more cloture votes). Most of the time, the majority leader does not force such a prolonged showdown.

Since holds are nowhere mentioned in the Senate rules, why do Senate leaders condone and, in fact, maintain the hold system? "It's to the majority leader's advantage to have holds because it gives him information," a knowledgeable observer explained. "He's always trying to negotiate unanimous consent agreements, and he needs to know if there are pockets of problems, and holds do that." An expert concluded succinctly, "The only way you could get rid of holds would be to change the rules of the Senate drastically."

Critics often argue that leaders should be tougher and call members' bluffs more often. The threat to filibuster supposedly inherent in holds would, in many cases, prove to be empty rhetoric if put to the test, such critics claim. In fact, holds are not automatic vetoes. A hold cannot kill must-pass legislation, such as appropriations bills. A hold "doesn't mean the legislation won't come to the floor," a former majority leader explained. "Leaders are always bringing up legislation that has a hold on it; they do it all the time. But you know what you're getting into, that somebody is likely to obstruct, that you're going to have to jump through a lot of procedural hoops." Although holds are certainly not absolute, the time pressure under which the Senate operates gives them considerable power. Frist could let the Estrada nomination dominate floor business in February 2003 because it was early in the first year of a Congress, and not much legislation was ready for floor consideration. By March, that situation had changed. If Republicans had forced Democrats to continue, it would have been at the expense of President Bush's initiatives. As a staffer explained, "Holds are effective because the majority leader has a finite amount of time. If there are going to be cloture votes and the like, it can take days to ram something through this place. You can't do it on every bill. You can only do it on a selected few bills." Senators, most of whom have legislation they want considered on the floor, as well as many other demands on their time, want floor time used productively, and the majority leader needs to use the time efficiently if he is to pass as much of the party agenda as possible. In making a choice of which bills to bring to the floor, the majority leader must consider how much time a bill will take, as well as the likelihood of successful passage.

As a result, senators who want their bills to receive floor consideration are under tremendous pressure to negotiate with those who have holds on them. "Things that aren't a top priority for the majority leader, he wants you to work it out," a senior staffer explained. "If you go to him and say you want something brought to the floor, he'll say, 'You work it out. You find out who has holds on

it. You work out whatever problems they have, and I'll schedule it when you've worked it out.'" In fall 2007, Sen. Tom Coburn, R-Okla., placed a hold on a bill providing suicide prevention services to veterans because he opposed a section instructing the Veterans Affairs Department to track the veterans helped; Coburn claimed that that might prevent those veterans from being able to buy handguns.[24] Although no one else opposed the bill, the sponsors were forced to remove the provision in order to move the bill. In the 109th Congress, Frist never scheduled a major telecommunications bill because there was a Democratic hold on it, and the committee chair was unable to assure Frist that he had sixty votes. Thus, a measure often must command a substantial majority simply to get to the floor. When time is especially tight—before a recess and at the end of a session—a single objection can kill legislation. In the lame-duck (postelection) session of the 113th Congress, a bill extending a number of broadly supported tax breaks died; an unnamed Republican senator had put a hold on the bill, and although that was not the only problem, it contributed to the bill's demise. Sen. Coburn, a prolific employer of holds, stopped another broadly supported bill, the Terrorism Risk Insurance Act (TRIA), in the same lame-duck session. Although the bill had passed both houses, and a compromise between the chambers had been worked out, Majority Leader Reid did not bring the bill to the floor; time was simply too limited so long as there were objections. "Coburn's holding everything up," said Senator Chuck Schumer, D-N.Y., who had brokered the deal with Financial Services chairman Jeb Hensarling, R-Tex. "He won't let us do anything. Coburn is holding it all up."

Majority and Minority Cooperation and Conflict

Keeping the Senate functioning as a legislature requires broad accommodation; it dictates satisfying every senator to some extent. A reasonably cohesive majority party can run the House of Representatives without consulting the minority. The Senate only runs smoothly when the majority leader and the minority leader cooperate—and not always then. The party leaders or their top aides consult on a daily basis. "The two leaders talk extensively to each other during the day," a knowledgeable participant explained. "You see it during votes. We'll have two or three votes a day at least, usually, and that's one of the times when they confer. But they have to talk to each other; if they don't, that's when things break down." A telephone hotline connects the leaders' offices directly to facilitate quick communication.[25] The leaders often work together to get unanimous consent agreements and to get essential legislative business done.

Yet the Senate leaders are party leaders, elected by their party members in the chamber, and those members expect them to pursue partisan advantage. With the increase in partisan polarization, the often narrow margins, and the shifts in partisan control of the chamber, senators' expectations that their leader promote their collective partisan interests have intensified. With the changes in the character of politics and the role of the media in political life, those expectations

have also changed in form. Over the second half of the twentieth century, the role of the media in American politics increased enormously. National politics has come to be played out on the public stage much more than formerly, often with audience reactions determining who wins and who loses. In the 1990s, policy battles increasingly came to be fought out in public through public relations, or PR, wars.[26] Whether in the majority or in the minority, senators now expect their party leader to promote their collective partisan interests through message strategies directed at the public, as well as by internal procedural and legislative strategies.

These expectations create a dilemma for the leaders, especially for the majority leader. Majority party senators expect their leader to promote the party agenda by passing legislation and publicizing party positions and successes. They also expect him to keep off the floor the other party's agenda, which often consists of issues on which the minority party and a significant segment of the public agree, thus putting some members of the majority party in a tough position. And all senators expect their leaders to keep the Senate functioning. Yet in the Senate, unlike the House, a majority is not sufficient to act. To keep the Senate functioning requires supermajorities, and that almost always requires the majority leader to accommodate the minority to some extent.

The Sixty-Vote Senate and the Procedural Arms Race

The conundrum of leading a nonmajoritarian chamber in a partisan age has only become knottier in recent years. The minority party increasingly perceives obstructionism as its best strategy for furthering its policy and political objectives. Given the ideological divide between the parties, a bill that both consider better than the status quo of no new legislation often does not exist, especially on the most salient issues of the day. And even on nonideological issues, the minority may benefit from making the majority look incapable of governing.[27] Majority leaders have responded to minority obstructionism with hardball procedural ploys, and a procedural arms race has ensued.[28] As Chuck Schumer, third ranking in the Democratic leadership, summed up the situation in 2011,

> You are frustrated because you feel the tree is filled all the time and you cannot make amendments. But we are frustrated because the 60-vote rule—which has always been used here—is now used routinely, which never has been done before. . . . [D]istrict court judges . . . Routine appointees—assistant secretaries of this, deputy secretaries of that—60 votes. . . .
>
> In the past, the motion to proceed was not routinely blocked. And almost every single bill . . . on minor bills—we had a filibuster on technical corrections to the Transportation bill, where 287 was written down by mistake instead of 387. It was filibustered—60 votes. So our defense is to fill the tree.[29]

On major legislation, majority leaders now are central to the policy process.[30] Not infrequently, they bypass committee and bring legislation directly to the floor. In the Congresses of the 1960s through the 1980s for which data are available, the committee was bypassed in the Senate on 7 percent of major measures; for the 103rd through 110th Congresses, the average increased to 26 percent; in the period 2009 through 2014, it was 52 percent. Usually, though not always, committee leaders are involved in the process and have, in fact, drafted the bill. But the majority leader's strategy dictates going directly to the floor rather than allowing the committee to mark up and report the bill. Thus, in 2013, the Federal Aviation Administration (FAA) began furloughing air traffic controllers to meet the spending cuts required by legislation Congress had passed earlier. Fearing an outcry from passengers, who, after all, are constituents, members quickly passed a bill allowing the FAA to transfer money to prevent the furloughs. To do so quickly, committees were bypassed in both chambers. Later the same year, Majority Leader Harry Reid, D-Nev., brought to the floor a bill establishing a uniform national system for collecting sales taxes on online purchases. He bypassed the Finance Committee because its chair, Max Baucus of Montana, opposed the bill. Montana does not have a sales tax, and he feared the bill would hurt his state's businesses.

The minority's strategy in recent years entails filibustering, not just the bill but the motion to proceed to consider the bill. If successful, this prevents the bill from ever being formally considered on the floor, and even if not, it eats up time. By the 112th Congress (2011–2012), votes on motions to proceed had become commonplace. In that Congress, there were forty-two roll calls on thirty-four different measures—on motions to proceed or, more frequently, on imposing cloture on the motion to proceed offered by the majority leadership, eight of which failed. In 2013–2014, there were thirty-six such roll calls on twenty-nine different measures; eleven failed.

Increasingly, then, all Senate decisions require sixty votes. When in the minority, Republican leader Mitch McConnell argued that this is a long-established Senate tradition. In fact, that is not the case, but a cohesive minority of more than forty senators can force the majority to get sixty votes to act.

Starting in the early 1990s—when Minority Leader Bob Dole used the filibuster against President Bill Clinton's agenda, blocking some items and forcing substantive concessions on others—and ratcheting up ever since, minorities have forced majorities to get supermajorities to act. Democrats frequently used extended debate to obstruct when they were in the minority during the George W. Bush administration, and minority Republicans ratcheted up the employment of obstructionist strategies still more after they lost their majority in the 2006 elections, as Table 1-2 shows. By refusing to agree to bring up by unanimous consent and then voting against cloture on the motion to proceed, minority Democrats in the 109th Congress (2005–2006) blocked several Republican attempts to repeal the estate tax and refused Republicans an up-or-down vote on a constitutional amendment banning gay marriage. They killed legislation on abortion notification by refusing to allow the bill to go to conference and killed drilling in the

Arctic National Wildlife Refuge (ANWR) by blocking a vote on the conference report that contained the provision. Some legislation on the Republican Party agenda did pass: a bill on class action lawsuits and one overhauling bankruptcy laws. Democrats had blocked both in the previous Congress, and Republicans had been forced to make substantial compromises to get the sixty votes necessary for passage. On legislation altering offshore drilling policy, House Republicans were forced to swallow a weak Senate bill to get any legislation at all. Minority Democrats also used the Senate's permissive amending rules to force votes on issues, such as the minimum wage, that they wanted to highlight.

In the 110th Congress, Republicans, newly but barely in the minority, made even greater use of obstructionist strategies. The number of filibusters, defined as matters on which cloture was attempted, jumped to fifty-four in the 110th and the number of cloture votes to 112, an all-time record. Bills allowing the government to negotiate drug prices with pharmaceutical companies for Medicare patients, making union organizing easier, and giving the District of Columbia a vote in the House of Representatives—all Democratic Party priorities—were blocked from floor consideration when Republicans refused to allow votes on the motions to proceed. Resolutions expressing opposition to the "surge" in Iraq were also blocked from an up-or-down vote, as were various other anti-Iraq provisions. The price of an up-or-down vote on a bill raising the minimum wage was the attachment to it of large tax breaks for small business. Republicans allowed legislation implementing the 9/11 Commission's recommendations to go to conference only after Democrats agreed to a UCA guaranteeing that the provision allowing collective bargaining for Transportation Security Agency screeners would be dropped.

Political circumstances—a new president who had run on an ambitious agenda and a Congress in which the same party had big majorities in both chambers—were much more conducive to major legislative accomplishments in 2009 to 2010. And in fact, the 111th Congress was extraordinarily productive, perhaps the most productive Congress since the Great Society Congresses of the mid-1960s. A massive stimulus bill, health care reform that went a long way toward providing universal coverage, and major financial services regulation reform (Dodd-Frank) are best known, but other significant legislation enacted included the Lilly Ledbetter Fair Pay Act, a major change in the student loan program to free up more money for loans, food safety and child nutrition bills, a credit card regulation bill, legislation to allow the FDA to regulate tobacco, an expansion of the hate crimes covered by federal law, and repeal of "Don't Ask, Don't Tell." The Senate also ratified the New Strategic Arms Reduction Treaty (START).

Yet despite the favorable conditions, passing this legislation was often extraordinarily difficult, and the problem was most often the Senate. Over the course of the Congress, Senate Democrats numbered between fifty-eight and sixty, a huge majority by recent standards. But Republicans decided even before the Congress began that their best strategy was all-out opposition. Most Republicans sincerely opposed the Democratic agenda on policy grounds, and they were confident that Republican activists would reward them for refusing to compromise.

They believed that, in any case, if Obama's policies appeared to work, Obama and the Democrats would get the credit, even if the Republicans had participated in passing it. The Republican strategy meant that Senate Democrats would have to amass sixty votes for essentially everything except measures, primarily budget resolutions and reconciliation bills, protected from filibusters by Senate rules.

Getting to sixty was often difficult and required painful concessions; furthermore, even when sixty votes were in hand, the process could be excruciatingly slow. To pass the stimulus bill early in 2009, Majority Leader Harry Reid needed the votes of at least two Republicans. The price for the three votes he got was a significant cut in the size of the stimulus, with considerable aid to the states being deleted. (One of the Republicans, Arlen Specter, quickly discovered that his vote for the stimulus had so enraged the Republican base in his home state of Pennsylvania that he would lose in the 2010 primary. He switched to the Democratic Party and, with the seating of Al Franken once the Minnesota recount was decided, gave the Democrats a Senate majority of sixty.)

The cloture process is time consuming and cumbersome. Any senator may circulate a cloture petition. When the senator has gathered sixteen signatures, the petition is filed; after a one-day layover, the Senate votes. Even after a successful cloture vote, debate does not necessarily end immediately. Senate Rule 22, the cloture rule, places a cap of thirty hours on consideration after the cloture vote, and opponents can insist on the time. The thirty hours does include time spent on quorum calls and voting, as well as on debate. The rule also requires that amendments considered after cloture must be germane.

If opponents are determined, supporters may need to impose cloture at more than one stage in a bill's progress through the chamber. Thus, extended debate can occur on the motion to proceed to consider the measure, on specific amendments, on the measure itself, on the motion related to going to conference, and on the conference report. No single measure has ever been subject to filibusters at all of these stages, but it is not uncommon for cloture to be sought at several stages. To pass the tobacco regulation bill in 2009, supporters had to win cloture votes on the motion to proceed; on the Dodd amendment in the nature of a substitute, which was the committee bill; and on passage. The process took two weeks of Senate floor time.

Because filibuster threats, in their various forms, have become so routine, sixty-vote requirements for passage of legislation are now sometimes written into unanimous consent agreements. The majority agrees because it saves time; the minority may extract substantive concessions or, for a variety of possible reasons, may not want to go through the time-consuming cloture process either. And if cloture is invoked, the minority may not insist on using the thirty hours. Yet a minority intent on making its opposition dramatically evident, perhaps to convince its activist base it fought to the bitter end, can stretch the process out for days.

The health care reform bill's passage in the Senate in 2009 illustrated how excruciatingly difficult the process can be when the minority insists on using all

of its prerogatives.[31] At 7 a.m. on Christmas Eve morning, the bill passed the Senate on a straight party-line vote of 60–39. The Senate had debated the bill for twenty-five days, without breaks for weekends, since early December; not only did Democrats have to win five cloture votes, Republicans forced thirty hours of debate after each, only relenting on the last so that senators could beat a major snowstorm out of Washington on Christmas Eve. Provisions that a large majority of the Democratic membership strongly supported had to be dropped to get the requisite sixty votes. This case vividly illustrates why the "make them filibuster" strategy cannot be routinely employed.

The majority party and its agent, the majority leader, are not without weapons to combat obstructionist strategies. The majority leader's right of first recognition allows him to use a tactic called *filling the amendment tree*—that is, offering amendments in all of the parliamentarily permissible slots, thus preventing other senators from offering their amendments, and then usually filing for cloture. Although no complete list of all of the instances when majority leaders have used this parliamentary tactic is available (identifying them is not easy), experts agree that the practice has increased in recent years.[32] Majority Leader Frist appears to have done so on initial consideration of legislation six times in 2005–2006; Reid did it nine times in 2007–2008 and even more frequently in 2009–2010. Minority Leader McConnell has claimed that Reid filled the tree forty-three times in the 2007–2010 period.[33]

Reid's big majority in the 111th Congress made filling the amendment tree an often successful tactic. For example, Reid used it in December 2009 on the health care bill; after the bill had been on the floor for a number of days, and he had cobbled together a compromise that all sixty Democratic senators could support, Reid offered that compromise as a manager's amendment, filled the amendment tree, and then immediately filed for cloture. These moves meant that no further amendments would be in order until Reid's were disposed of, and if cloture were invoked, he could run out the clock—that is, prevent his amendments from coming to a vote until the postcloture time had expired so no other amendments could be offered. The majority leader can sometimes use the explicit or implicit threat to fill the tree as a bargaining tool to get the minority to agree to unanimous consent agreements, placing some limits on the amendment process. In fact, UCAs specifying that certain amendments require sixty votes to pass have become relatively common in recent years. In the 109th Congress, six amendments were subject to a sixty-vote requirement in UCAs; this shot up to thirty-three in the 110th Congress. Minority party members agree to such UCAs because the UCA gives them an up-or-down vote on their amendment, and in most cases, they know their amendment would, in any case, fail to get a simple majority. The sponsors' primary motive may well be to publicize their own proposals or to force their opponents to cast a difficult-to-explain vote.

Threatening to fill the amendment tree may induce the minority to bargain; actually doing so may block amendments altogether. But its limitation as a strategy, in either case, is that unless the majority leader can muster sixty votes

(or at least persuade the minority he can do so), he cannot bring the bill at issue to a passage vote. In the late 1990s, Majority Leader Trent Lott used the tactic a number of times, but because Democrats maintained high cohesion on cloture votes, it usually just led to gridlock. In eight of the fifteen times it was employed by Frist and Reid in the 109th and 110th Congresses, the majority leader either had to pull the bill off the floor or withdraw his amendments so as to allow other senators to offer theirs. The minority party complains bitterly when the tactic is used. However, when the majority party is required to get a supermajority to pass almost everything, then, once the sixty votes are in hand, the majority leader has every incentive to fill the tree and cut off amendments.

In the 112th and 113th Congresses, with the Democratic majority severely reduced, the dilemmas inherent in leading a nonmajoritarian chamber in a hyperpartisan environment became even more marked. Reid could use strategies like filling the tree to protect his members from having to take politically perilous votes. He could actually pass legislation only with minority party acquiescence, which was often not forthcoming. With the House controlled by Republicans, Reid knew that major Democratic Party agenda items had little chance of becoming law. Thus, he had little incentive to allow Republicans to offer nongermane amendments, which were often aimed at embarrassing Democrats and furthering the Republican agenda. Over the course of his eight years as majority leader, Reid filled the tree ninety-five times, according to the Congressional Research Service.[34] In 2014, he allowed votes on only fifteen amendments.

Even bills with bipartisan support were often caught in the procedural morass. In the spring and summer of 2011, the Senate spent many days considering a small-business research bill and an Economic Development Administration reauthorization, both noncontroversial bills, but was never able to get to a passage vote on either. Numerous amendments were debated, but reaching a UCA to end debate proved to be impossible, and cloture votes failed.

The Republican minority complained bitterly about Reid's aggressive filling of the tree to prevent GOP amendments. If the electorate gave them a Senate majority in the 2014 elections, he would eschew the tactic, Republican leader Mitch McConnell promised, and return to an open amendment process. Republicans did, in fact, win a majority in 2014, and Mitch McConnell became majority leader. In his first year as majority leader, McConnell did allow more votes on amendments; there were 145 amendment votes during the first seven months of 2015.[35] (Obviously, this is a much greater number than the fifteen Reid allowed in 2014, when he had largely given up on passing legislation. It is a less stark contrast with the ninety-nine such votes Reid allowed in the first seven months of 2013.)

McConnell found, however, that he too sometimes had to fill the amendment tree if he wished to bring legislation to a passage vote. He did so twelve times in his first eleven months as leader, including on the Keystone XL Pipeline bill, on a highway bill, and on trade legislation.

Democrats did not obstruct legislation across the board, as Republicans had; with a fellow partisan in the White House, both policy and political motives

dictated some cooperation. Furthermore, some of the legislation McConnell sought to pass in the early months of his tenure were bills that Democrats had unsuccessfully tried to pass in the previous Congress, such as an antiterrorism insurance bill. When, however, McConnell tried to pass legislation Democrats opposed, they made full use of their Senate prerogatives to block action. Thus, early in 2015, the House sent the Senate an appropriations bill funding the Department of Homeland Security (DHS) with a provision defunding the Obama administration's immigration plan. Democrats filibustered the motion to proceed and, despite six cloture votes intended to embarrass them, refused to give in. To avoid leaving the DHS without funds, McConnell was forced to pass a clean bill—that is, one without the immigration provision. Democrats blocked an up-or-down vote on the Iran Nuclear Agreement Disapproval Resolution, thus killing it. They refused to allow the Senate to consider appropriations bills until a bipartisan agreement was reached on spending increases for domestic discretionary programs. Through October 22, 2015, the Senate voted on cloture fifty-six times; on twenty-six of these votes, cloture was invoked, often after multiple unsuccessful cloture votes and most often after Democrats gained concessions. In sum, the Senate continues to frequently suffer from gridlock. Reconciliation bills—ones making changes in law in accordance with instructions in the budget resolution—are not subject to filibuster. Consequently, the temptation for the majority party to accomplish its policy goals through the budget process is strong. The big tax cuts that President Bush requested in 2001 and 2003 were enacted through reconciliation bills whose passage only required a simple majority. In 2010, after the Senate Democrats lost their sixty-vote majority, they knew they would not be able to pass a health care reform bill making the necessary compromises with the House version through the normal process. The House agreed to pass the Senate bill, and the "fixes" to Senate version on which the House insisted were included in a reconciliation bill. Democrats were also able to include a major revision of the student loan program in the reconciliation bill. Senate rules—most importantly, the Byrd rule barring extraneous matters in reconciliation bills—restrict the use of this strategy. (The student loan provisions met the Byrd rule test because they saved money.) The Byrd rule can only be waived by a three-fifths supermajority. In 2015, Republicans hoped to repeal "Obamacare" through the reconciliation process, but the Byrd rule proved to be a major impediment.

With limited exceptions, as long as the minority can command forty-one votes, it can prevent the majority from acting. Only damage to the minority party's reputation or to the reelection chances of its members acts as a constraint.

Nominations have been a particular source of conflict in recent years. Both parties have used the filibuster to deny confirmation to nominees of presidents of the other party. In 2005, after Democrats had blocked a number of Bush judicial nominees, Majority Leader Frist threatened to change the rules for presidential nominations through a highly controversial procedure that required only a simple majority. This "nuclear option" would have entailed the Senate's presiding officer ruling—against established Senate precedents—that cutting off debate on

nominations only requires a simple majority. Democrats would, of course, have appealed the ruling, but only a simple majority is required to uphold a ruling of the chair. A deal put together by seven Democrats and seven Republicans averted the move.[36] In the 111th Congress, the first of the Obama presidency, the Democrats' majority was wide enough that Majority Leader Reid could usually impose cloture if he was willing to take the time to do so, but because of time constraints, the backlog of unconfirmed nominees reached unprecedented levels. With the size of their majority reduced after the 2010 elections, Senate Democrats had even more difficulty confirming nominations, and junior members began to press their leaders to institute filibuster reform.

Under a threat from Democrats of "going nuclear," Republicans agreed to reduce the amount of debate time allowed after cloture on many nominees. The standing order, a Senate rules change valid for only the current Congress, was reached in 2013, at the beginning of the 113th Congress. The rules change did not, however, reduce the votes needed to invoke cloture, and Republicans, with forty-five members, often refused Democrats an up-or-down vote on President Obama's nominees. Frustrated by the minority's blocking of nominees for secretary of labor, head of the Consumer Finance Protection Bureau (CFPB), administrator of the Environmental Protection Agency, and twelve other executive-branch nominees who, Majority Leader Harry Reid claimed, had been waiting about 260 days for confirmation votes, Reid threatened the nuclear option again; McConnell had not lived up to his promise to limit delays, Reid argued. Again, a deal was reached for an up-or-down vote on seven of the nominees.

In fall 2013, Republicans blocked votes on three nominees to the U.S. Court of Appeals for the D.C. Circuit. Although it is considered the second-most-important federal court after the Supreme Court because of the significance of the cases it hears, Republicans argued it did not need a full complement of judges. Democrats responded that Republicans were just trying to maintain a Republican majority on the court. On November 21, 2013, after Republicans had, on October 31, again prevented cloture on one of the nominees, Reid pulled the trigger on the nuclear option. He moved to reconsider one of the nominations and then raised a point of order that, for non–Supreme Court nominations, only a simple majority was required to invoke cloture. In conformity with then current precedent, the presiding officer ruled that sixty votes were required. Reid appealed the ruling of the chair to the entire Senate, which voted by a simple majority in Reid's favor. Thus, until it is changed again, which could be done in the same way, invoking cloture on all nominees, except Supreme Court Justices, requires a simple majority. The rules change allowed Democrats to confirm many more nominees than previously. From the date of the rules change through the end of the 113th Congress, just a little over a year, the Senate confirmed ninety-six judges and about three hundred executive-branch nominees.

Despite their outrage at the use of the nuclear option, Republicans did not change the rule when they won control of the Senate. They did, however,

drastically slow down the confirmation of Obama nominees. As Senate majority leader, Mitch McConnell has honored the holds of fellow Republicans. He has also refused to bring most judicial nominations to the floor for a vote.[37] Thus, the battle over the confirmation of presidential nominees continues.

Individualism, Partisanship, and Legislative Outcomes

How does the combination of individualism and intense partisanship that characterizes the contemporary Senate affect legislative outcomes? As shown in Table 1-3, the likelihood of a major measure becoming law is less in recent Congresses than in earlier ones. In the Congresses since the early 1990s, during which half or more of the major legislation was subject to some sort of filibuster problem, 43 percent of the major measures failed enactment. By contrast, in the earlier Congresses, characterized by less filibuster activity, 28 percent of the major measures failed. Of course, there are many steps in the legislative process, and these figures, by themselves, do not prove that the Senate is responsible for the increase in legislative failures. However, as also shown in Table 1-3, in the more recent Congresses, legislation was much more likely to pass the House but fail in the Senate than the reverse; in the earlier Congresses, the difference was not very great.

Does the increasing frequency with which measures encounter extended-debate–related problems in the Senate explain this pattern? Filibuster problems do, in fact, depress a measure's chances of surviving the legislative process. In Congresses between the 1960s and 2010, 28 percent of major measures that did not encounter such a problem, either because senators chose not to use their prerogatives or because the measure enjoyed statutory protection, failed to be enacted; 42 percent of those that did experience a filibuster problem failed to become law.[38]

Table 1-3   Where Major Measures Failed

What Happened?	Failed Measures	
	87th–101st Congresses	103rd–113th Congresses
Passed by neither House nor Senate	40%	26%
Passed by House but not by Senate	19%	49%
Passed by Senate but not by House	13%	6%
Passed by House and Senate	28%	19%
Total number of failed measures	112 (of 405 measures)	233 (of 537 measures)
Percentage of total measures that failed	27.7	43.4

Source: Author's calculations.

Inasmuch as filibusters and filibuster threats are by no means always intended to kill legislation, these figures suggest a considerable effect.

Thus, the combination of individualism and intense partisanship that characterizes the contemporary Senate does depress the likelihood of bills successfully surviving the legislative process. Yet given the Senate rules and the ways that senators currently exploit them, it is perhaps more surprising that the Senate manages to legislate at all. The Senate does pass legislation, both must-pass measures, such as appropriations legislation, and other major bills. To be sure, some measures—budget resolutions and reconciliation bills, most importantly—are protected from filibusters and nongermane amendments by law; that has been vital to the passage of some of the most important legislation of the last decade.[39] But considerable legislation without such protection gets through the Senate as well.

Dodging Legislative Breakdown?

Clearly, the Senate could not function if senators maximally exploited their prerogatives—if, for example, every senator objected to every unanimous consent agreement on any matter that he or she did not completely support. What, then, has kept senators, as individuals and as party teams, from pushing their prerogatives over the limit and miring the Senate in total gridlock? And is true legislative breakdown now an imminent danger?

Asked that question, senators, staff members, and informed observers uniformly respond that almost all senators want to "get something done" and are aware that many senators exploiting their prerogatives to the limit would make that impossible. As one knowledgeable insider phrased it, "I like to think of the Senate as a bunch of armed nuclear nations. Each senator knows he can blow the place up. But most of them came here to do something, and if he does blow things up, if he does use his powers that way, then he won't be able to do anything." Using one's prerogatives aggressively entails concrete short-run costs, most also argued. "If you do object [to a unanimous consent request], it's going to hurt someone and maybe more than one person," a senior staffer explained. "So the next time you want something, it may very well happen to you."

Similar considerations have tended to restrain senators as party teams and have especially restrained their leaders. The leaders are very much aware that as much as senators want to gain partisan advantage on the big issues, they also want, for both reelection and policy reasons, to pass bills. As the earlier discussion of the interactions between the party leaders indicated, the leaders are instrumental in maintaining the cooperation necessary to keep the Senate functioning. They do so by working together closely, by adeptly employing both procedural and peer pressure to encourage the recalcitrant to deal, and by accommodating, to some extent, all senators with problems.[40] Although the procedural resources and the favors the leaders command are fairly meager, they do have one persuasive argument for inducing cooperation. As a knowledgeable insider put it, senators "can use the powers they have to create chaos and confusion on the floor, in which case

senators don't have a life, where the floor debate goes on to all hours without any knowledge of when anything will happen, or they can defer to their leaders to create a structure with some predictability, and then they do have a life. And that's the bargain they have made." Leaders are not shy about using senators' desire for predictability and time off to pressure them. As a Capitol Hill reporter stated, "Vows to cancel a recess, hold a session late into the night or meet through the weekend have in recent years become standard parts of a Senate Majority Leader's repertoire."[41]

Leaders also need to concern themselves with guarding the party's reputation within the chamber and with the public. The minority party's influence within the chamber depends on its being able to block cloture when a party effort is made to do so, and that has tended to require using obstructionism selectively. The minority has to avoid being perceived as obstructionist on legislation popular with the public.

In its everyday functioning, the contemporary Senate exhibits a peculiar combination of conflict and cooperation, of aggressive exploitation of rules and accommodation. The hottest partisan legislative battles are studded with unanimous consent agreements. Thus, the Senate will agree by unanimous consent on a time to begin consideration of a motion to proceed that everyone knows the minority will block. And the more intense the partisan fight, the more frequently the majority and minority leaders confer. On bills not at the center of partisan conflict, senators routinely cooperate across the partisan divide. As a senior aide expressed the consensus, "If you really want to move stuff, if it's not a big partisan matter, a big ideological issue, and you really want to move it, then you really have to be bipartisan. You've got to work out the difficulties, and you've got to work across the aisle." Bipartisanship is especially important on legislation of secondary importance because the majority leader requires that the problems be resolved before he attempts to bring those bills to the floor. Senators, as individuals, do put holds on one another's bills, but they also often attempt to accommodate one another on an individual basis in ways that extend far beyond what occurs in the House. A staffer explained such responsiveness not by norms of civility and reciprocity but by the facts of life in the contemporary Senate. It is "because they need to accommodate you to move something," the aide continued. "They want to get something done. They want to get legislation, and to do that, you have to take care of people's problems."

Thus, senators' acute awareness of the weapons all senators command can work to produce cooperation and some restraint. Yet in an era of intensified partisanship, combined with the continuing individualism that has characterized the Senate since the 1970s, the Senate legislative process is fragile. Senate party leaders are under considerable pressure from their members to pursue partisan advantage aggressively, and partisan battles aimed at electoral gain are zero sum. Most of the time, the Senate has managed to maintain the minimum restraint and cooperation necessary to avoid total gridlock, yet the chamber regularly seems to teeter on the precipice of legislative breakdown.

In the last few years, Senate functioning has become increasingly problematic. The minority party seems to perceive less danger to its reputation in almost constant obstructionism, perhaps because attentive citizens are themselves so split along coinciding ideological and partisan lines. The majority has become increasingly frustrated and has sometimes acted in ways that have exacerbated partisan rancor. Whether this Senate can continue to dodge legislative breakdown is an open question.

Notes

The definitive work on the Senate in the 1950s is Donald Matthews's *U.S. Senators and Their World* (New York: Vintage Books, 1960). The title of this chapter is intended as a tribute to Don and his classic. All unattributed quotations in the main text of the chapter are from interviews conducted by the author.

1. Barbara Sinclair, *Unorthodox Lawmaking* (Washington, DC: CQ Press, 1997; 2nd ed., 2000; 3rd ed., 2007; 4th ed., 2011); Sarah Binder and Steven S. Smith, *Politics or Principle? Filibustering in the United States Senate* (Washington, DC: Brookings Institution Press, 1997).

2. Donald R. Matthews, *U.S. Senators and Their World* (Chapel Hill: University of North Carolina Press, 1960).

3. Barbara Sinclair, *The Transformation of the U.S. Senate* (Baltimore: Johns Hopkins University Press, 1989); Ralph Huitt, "The Internal Distribution of Influence: The Senate," in *The Congress and America's Future,* ed. David Truman (New York: Prentice Hall, 1965).

4. Bruce Oppenheimer, "Changing Time Constraints on Congress: Historical Perspectives on the Use of Cloture," in *Congress Reconsidered*, 3rd ed., ed. Lawrence C. Dodd and Bruce I. Oppenheimer (Washington, DC: CQ Press, 1985); Gregory Koger, *Filibustering: A Political History of Obstruction in the House and Senate* (Chicago: University of Chicago Press, 2010).

5. Sinclair, *Transformation;* Michael Foley, *The New Senate* (New Haven: Yale University Press, 1980); David Rohde, Norman Ornstein, and Robert Peabody, "Political Change and Legislative Norms in the U.S. Senate, 1957–1974," in *Studies of Congress*, ed. Glenn Parker (Washington, DC: CQ Press, 1985).

6. See also Burdett Loomis, *The New American Politician* (New York: Basic Books, 1988).

7. Binder and Smith, *Politics or Principle?*

8. *CQ Weekly*, January 16, 2012, 117. Party support score figures are adjusted for absences.

9. Patrick J. Sellers, "Winning Media Coverage in the U.S. Congress," in *U.S. Senate Exceptionalism*, ed. Bruce Oppenheimer (Columbus: The Ohio State University Press, 2002); Donald Baumer, "Senate Democratic Leadership in the 100th Congress," in *The Atomistic Congress*, ed. Ronald Peters and Allen Herzke (Armonk, NY: M. E. Sharpe, 1992); Steven S. Smith, "Forces of Change in Senate Party Leadership and Organization," in *Congress Reconsidered*, 5th ed., ed. Lawrence C. Dodd and Bruce I. Oppenheimer (Washington, DC: CQ Press, 1993); Mary Jacoby, "Waiting in Wings, a Kinder, Gentler Lott?" *Roll Call,* March 9, 1995, 22.

10. Computed from committee and subcommittee lists on Senate committee Web sites, accessed through www.senate.gov.

11. Richard Hall, *Participation in Congress* (New Haven: Yale University Press, 1996).

12. Christopher J. Deering and Steven S. Smith, *Committees in Congress* (Washington, DC: CQ Press, 1997).

13. Major measures are defined as those measures in lists of major legislation published in *CQ Almanacs* and the *CQ Weekly*, plus those measures on which key votes occurred, again according to *Congressional Quarterly*.

14. Sinclair, *Unorthodox Lawmaking*, 4th ed., 8–9, 43–44.

15. Roger H. Davidson, "Senate Leaders: Janitors for an Untidy Chamber?" in *Congress Reconsidered*, 3rd ed., ed. Lawrence C. Dodd and Bruce I. Oppenheimer (Washington, DC: CQ Press, 1985); Sinclair, *Transformation*; Smith, "Forces of Change."

16. See Richard Beth, "What We Don't Know about Filibusters," paper presented at the annual meeting of the Western Political Science Association, Portland, OR, March 15–18, 1995; also Sinclair, *Unorthodox Lawmaking*, 1st ed., 47–49; Koger, *Filibustering*. Sources for the data are given in the note to Table 1-1. The House Democratic Study Group publication relies on data supplied by Congressional Research Service experts; these experts' judgments about what constitutes a filibuster are not limited to instances in which cloture was sought. For the 103rd through the 110th Congresses, instances in which cloture was sought are used as the basis of the filibuster estimate. One can argue that this overestimates because in some cases, cloture was sought for reasons other than a fear of extended debate (for example, as a test vote or to impose germaneness). However, one can also argue that it underestimates because those cases in which cloture was not sought—perhaps because it was known to be out of reach—are not counted. For an estimate based on a different methodology, see Table 1-2.

17. Phil Kuntz, "Drawn-Out Denouement Mirrors Character of 102nd Congress," *CQ Weekly Report*, October 10, 1992, 3128.

18. *Washington Post*, February 8, 2010.

19. *Congressional Record*, December 1, 2011, S8114–37.

20. *CQ Weekly*, July 23, 2007, 2208–11.

21. Holds and threats to filibuster, as well as actual extended-debate-related delay on the floor, were coded as filibuster problems (see below). The definition of major legislation used here—those measures in lists of major legislation published in *CQ Almanacs* and the *CQ Weekly*, plus those measures on which key votes occurred, again according to *Congressional Quarterly*—yields forty to sixty measures per Congress. Thus, although truly minor legislation is excluded, the listing is not restricted to only the most contentious and highly salient issues.

22. C. Lawrence Evans and Walter Oleszek, "The Procedural Context of Senate Deliberation," in *Esteemed Colleagues: Civility and Deliberation in the U.S. Senate*, ed. Burdett Loomis (Washington, DC: Brookings Institution Press, 2000).

23. *Congressional Record*, March 6, 2003, S3216.

24. *CQ Weekly,* October 29, 2007, 3179.

25. Tom Daschle, *Like No Other Time* (New York: Crown, 2003), 208.

26. See Sellers, "Winning Media Coverage"; Barbara Sinclair, "The Plot Thickens: Congress and the President," in *Great Theatre: The American Congress in Action*, ed. Herbert Weisberg and Samuel Patterson (Cambridge, UK: Cambridge University Press, 1998); C. Lawrence Evans and Walter Oleszek, "Message Politics and Agenda Control in the U.S. Senate," in *The Contentious Senate*, ed. Colton C. Campbell and Nicol C. Rae (Lanham, MD: Rowman and Littlefield, 2001).

27. Francis Lee, *Beyond Ideology: Politics, Principles and Partisanship in the U.S. Senate* (Chicago: University of Chicago Press, 2009).

28. Steven Smith, *The Senate Syndrome* (Norman: University of Oklahoma Press, 2014).

29. *Congressional Record*, October 6, 2011, S6319.

30. Smith, *Senate Syndrome*.

31. Sinclair, *Unorthodox Lawmaking*, 4th ed., Chapter 8.

32. Richard Beth, Valerie Heitshusen, Bill Heniff, and Elizabeth Rybicki, "Leadership Tools for Managing the U.S. Senate," paper presented at the annual meeting of the American Political Science Association, Toronto, Canada, September 1–4, 2009.

33. *Congressional Record*, December 18, 2010, S10664.

34. Manu Raju, "McConnell Employs Reid's Hardball Tactic," *Politico*, July 30, 2015, http://www.politico.com/story/2015/07/mitch-mcconnell-harry-reid-hardball-tactic-120801.

35. *CQ Weekly*, July 27, 2015, 7.

36. Sarah A. Binder, Anthony Madonna, and Steven S. Smith, "Going Nuclear, Senate Style," *Perspectives on Politics* 5 (2007): 729–40.

37. Seung Min Kim and Burgess Everett, "Angry GOP Senate Freezes Out Obama Nominees," Politico, October 14, 2015, http://www.politico.com/story/2015/10/gop-senate-barack-obama-cotton-214700.

38. Based on selected Congresses, 87th–111th. Measures that did not get far enough to encounter the prospect of a filibuster problem are coded as missing data on the filibuster variable.

39. See the case studies of the 1993, 1995, and 1997 reconciliation (that is, budget) bills in Sinclair, *Unorthodox Lawmaking*, 2nd ed.

40. Barbara Sinclair, "The Senate Leadership Dilemma: Passing Bills and Pursuing Partisan Advantage in a Non-Majoritarian Chamber," in *The Contentious Senate*, ed. Colton C. Campbell and Nicol C. Rae (Lanham, MD: Rowman and Littlefield, 2001).

41. *Roll Call*, July 25, 2007.