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INTRODUCTION

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

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

The Senate is not a majoritarian body.

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

In many other ways—including the issues on its agenda and the demographic composition of its membership—the U.S. Senate at the beginning of the twenty-first century would be unrecognizable to a member of the body at the end of the nineteenth. The notion that simple majorities do not rule, however, is a rare point of consensus across both time and party. Our understanding of the Senate as a slower-moving, more deliberate body than the House of Representatives dates to the Constitutional Convention, where James Madison characterized the chamber as proceeding with “more coolness . . . [and] more system.”¹ The chamber lost its ability to end debate with simple majority vote in 1806, and it took nearly a century of increasing obstruction before the cloture rule provided a supermajority solution, in 1917.² Over the course of the twentieth century, the filibuster became a routine procedural tool that is often blamed for the gridlock and dysfunction that characterizes our contemporary political system.

This ability of a minority to obstruct legislative progress in the Senate permeates the understanding of deliberation and activity in Congress for academics, journalists, and ordinary citizens alike. From a scholarly perspective, the filibuster sits at the center of Krehbiel's well-known account of lawmaking in the separation-of-powers system.³ Work on gridlock and legislative productivity⁴ and executive nominations⁵ has similarly embraced the notion that the filibuster dictates what the Senate, and by extension, the House and the president, can achieve.

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

There exists, however, a set of procedures in the Senate that complicates this account, which is so prevalent among Congress watchers of all stripes. Over the past nearly fifty years, Congress has repeatedly included in statutory law provisions that I call "majoritarian exceptions."⁸ By reallocating power within the chamber in three different ways, these special procedures empower simple majorities and make operations of the Senate more majoritarian. Some prior work on these procedures explores them only in the context of broader arguments and not as an independent object of interest.⁹ In other instances, the procedures are explored in depth but only as specific, substantive case studies¹⁰ or as a way of explaining a particular set of legislative outcomes.¹¹ In this book, I unify the narrow and the broad by analyzing systematically the creation, use, and policy consequences of these special procedures in the Senate.

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

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

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

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

THE ARGUMENT AND ITS BUILDING BLOCKS

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

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

The second goal of majoritarian exceptions is to help the Senate's majority party maintain its control of the chamber. As a result, the procedures will be both created and used when doing so helps the majority party remain as such. In making this argument, I join a growing chorus of scholars who view the Senate as the home of influential parties rather than an individualistic body. Conceptually, much of this literature portrays the chamber as the home of two competing partisan teams that work together to achieve shared goals at the expense of their partisan opponents.¹⁶ The majority team attempts to pass legislation it favors, while the minority team works to obstruct those initiatives. The majority party has a wide range of tools, both formal¹⁷ and informal,¹⁸ at its disposal as it attempts to enact its preferred policy agenda and maintain its majority status.

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

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

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

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

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

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

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

PLAN OF THE BOOK

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

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

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

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

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

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

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

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

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

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