

**Senate Rules and Procedure:
Revisiting the Bank Bill of 1841 and the Development of Senate Obstruction**

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The United States Senate is a legislative body that features a wide assortment of unique procedures. In recent years, political scientists have taken a detailed look at many of these. For example, scholars have examined the majority party's usage of the motion to table (Den Hartog and Monroe 2008), the blocking of judicial nominations via the "blue-slip" procedure (Binder 2007; Binder and Maltzman 2004) and the formation of unanimous consent agreements (Ainsworth and Flathman 1995; Smith and Flathman 1989). While the effects these procedures have on policy outcomes differ, the development of each of them stems from the Senate's most distinguishing feature: *the right of a minority to obstruct or filibuster chamber business*. Despite the seemingly prominent role the filibuster plays in the United States Senate, political scientists have been unable to come to a consensus over why the institution persists.

The literature on this issue is largely divided into two camps. Some scholars stress the constraining influence inherited chamber rules have on procedural choice (Binder 1997; Binder and Smith 1997; Binder, Madonna and Smith 2007; Lynch and Madonna 2010). They argue that there have been times when Senate majorities have been blocked from altering the chamber's debate rules by minorities. An alternative account suggests that the Senate's rules reflect the preferences of majorities (Gold and Gupta 2005; Koger 2010; Wawro and Schickler 2004; 2006; 2010). These theories largely emphasize the importance of reciprocity norms, as well as the applicability of nuclear option-type procedures.¹

¹ The term "nuclear option" stemmed from a 2003 episode in which majority party Republicans sought to employ an unorthodox procedural mechanism in order to overcome Democratic obstruction of several of President George W. Bush's judicial nominees. The proposed procedure was to operate accordingly: A senator favoring the confirmation of the judicial nominee would raise a point of order that the Senate must reach a vote on nominations in order to execute its constitutional "advise and consent" power. The chair would then sustain the point of order, thus establishing a new precedent for limiting consideration of those matters. An opponent of the ruling could appeal the chair's decision and the appeal would be subject to a filibuster. However, supporters would be able to offer a motion to lay the appeals on the table. The motion to table is not debatable, requires only simple majority approval, and if accepted would uphold the chair's ruling and force all senators to cast up or down votes on the nominations.

The issue of why Senate obstruction persists is important because it bears directly on the broader, normative issue of whether the chambers rules are harmful to policy output. Those articulating the view that rules adopted by previous Senates – as well as the United States Constitution -- have left the filibuster largely immune to chamber majorities argue further that this has had a substantial limiting effect on the lawmaking process (Binder and Smith 1997). These scholars stress the need for procedural reform. Scholars arguing that the modern Senate reflects the will of chamber majorities suggest that the filibuster fosters compromise and that, “this need to compromise may, in practice, enhance the extent to which Senate outcomes reflect the public's views” (Wawro and Schickler 2006, 280). Accordingly, these scholars suggest that procedural reforms may be unnecessary.

The evidence presented by both theoretical perspectives has relied primarily on individual case studies of historical episodes of obstruction. Many of the same cases are cited by both theories, and often, the amount of detail given is brief and restricted only to the Senate. In this essay, I provide a detailed discussion of the literature on the filibuster. I then reevaluate one of the most prominently cited case studies in the debate over the filibuster -- that of the passage of the Bank Bill of 1841. A more detailed account of the Bank Bill's consideration yields three primary conclusions. First, by employing a strictly unicameral case study, scholars are unable to offer a complete assessment of senators' decision-making. Second, both camps' accounts of the episode were biased by the omission of key issues. Finally, when these issues and the broader, separation of powers context is considered, I believe the inherited rules theory offers a more satisfying explanation for how obstruction affected the bill's consideration. I conclude by offering suggestions for future examinations of Senate procedure.

Inherited Rules and Procedural Choice

In their 1997 book, Sarah Binder and Steven S. Smith put forth the claim that the rules of the modern Senate have been preserved in spite of occasional opposition from chamber majorities. They argue that minorities have taken advantage of inherited chamber rules to thwart potential reforms supported by simple majorities. In later work, they re-specified this theory, arguing that these inherited chamber rules systematically altered the cost-benefit analysis of members in a way that inoculated the chamber from reform (Binder et al. 2007).

There are three primary inherited institutions that have served to constrain member decision-making. The first of these stemmed from an 1806 decision to eliminate the previous question motion from the Senate's standing rules (Binder 1997; Binder and Smith 1997). This rule previously allowed a simple majority of senators to bring debate to an end. The decision to drop the rule was not made in a conscious effort to promote unlimited debate. At the time, the rule had seen limited usage and its removal amounted to little more than parliamentary house-keeping (Binder 1997). Since that decision was made, no formal method of ending debate by a simple majority has existed in the body and any attempt to institute one has been subject to obstruction.

Second, the Constitution specifies staggered terms for senators. This provision was included to provide stability within the chamber during periods of electoral turnover (Story 1833). The clause also created a system where older senators would be able to mentor incoming members (Amar 1988). Accordingly, the Senate never officially ends; rather it operates as a “continuing body.” One consequence of this decision is that -- unlike the House -- the chamber does not adopt new rules at the start of each Congress (Binder 1997). Instead, the new Senate

must operate under the rules of its predecessor. Thus, once the only formal method for ending debate by a simple majority was dropped, it could not apply in any future Senates.

Finally, the constitutional designation of the Vice President as the president of the Senate has further served to constrain majorities from ending the filibuster (Gamm and Smith 2002; Lynch and Madonna 2010). Debate records from the Constitutional Convention indicate this provision was granted to the Vice President for two reasons. First, without the power to serve in this capacity, the officer would essentially have nothing to do. Second, supporters of the provision argued that it would constitute the fairest way to break a tie vote in the Senate (Hatfield 1997). This decision means that the Senate is presided over by a member not elected by that body. As such, Senate majorities have been hesitant to centralize chamber power. This contrasts sharply with the House of Representatives, where members had far less trouble delegating power to the Speaker – a member proscribed by the Constitution to be directly elected by that body.

Thus, inherited rules served to insulate the filibuster from reform by altering each member's cost-benefit calculus. The remaining factors that influence this calculus can be classified into two groups: environmental and political. In order to prevent a final vote, senators must be prepared to hold the floor for hours on end by speaking. Because of this, environmental factors have historically played a major role in limiting the success of obstruction. These include the number of other senators that will support a filibuster on the floor, the quality of the air conditions within the chamber, and total time spent in Washington. When environmental factors are considerable, there should be less obstruction.

Additionally, members must also consider the underlying political context. The most primal of these variables is the member's attitude with respect to the underlying legislation.

However, electoral factors are also important, as is the potential impact obstruction may have on the future legislative agenda.² As the legislative agenda is typically set by the majority party, minority party obstructionists typically (but not always) have less to sacrifice by a manifest filibuster.³ Thus, scholars in the inherited rules camp argue that “the threat of minority retaliation is sufficient to derail majority efforts to significantly curtail the filibuster” (Binder et al. 2007).

Figure 7.1 outlines how inherited rules impact procedural choice. Environmental and political factors combine to influence the decision to obstruct. When these variables suppress obstruction, reform efforts are unlikely to be entertained because of the perceived lack of necessity. When they facilitate more filibusters, reform should be more desirable. However, in order to alter inherited chamber rules, members must either fight lengthy battles on the chamber floor or be prepared to centralize power under a Vice President that is not chosen by the party. This forces senators seeking political reform to sacrifice their short-term legislative goals for an increase in long-term chamber efficiency. As each individual member makes this decision independently, creating and maintaining a coalition in favor of amending the rules becomes extremely difficult. Thus, while changes in environmental factors may facilitate more obstruction, increasing the desire for procedural change, this effect is mitigated by the depressing influence inherited institutions have on the political benefits for reformers. According to scholars in the inherited rules camp, this has essentially insulated the Senate's debate rules from any meaningful alterations.

² Since being subjected to direct elections by the Seventeenth Amendment, research has demonstrated that senators have become more responsive to their constituents (Crook and Hibbing 1997).

³ Bills cannot be considered in the Senate without majority approval. Generally this is done by unanimous consent. But if consent is not given, a motion to proceed to consideration is in order and subject to simple majority approval. See Den Hartog and Monroe (2010) and Gailmard and Jenkins (2007) for a more detailed discussion of majority party control in the Senate.

[INSERT FIGURE 7.1 ABOUT HERE]

Remote Majoritarianism in the Senate

Recent theoretical work has argued that inherited institutions have not left the chamber's rules immune to reform efforts. Instead, the Senate's procedures have always been subjected to majority approval due to the presence of unorthodox rules changes -- like that of the “nuclear option.” While Senate observers had long acknowledged the technical feasibility of unorthodox rules changes, Gregory Wawro and Eric Schickler (2006) were the first to claim that the procedure has had a substantial effect on chamber development.⁴ The authors argue that majorities have not been thwarted from changing chamber rules by threats of minority obstruction. Rather, majority threats of “going nuclear” -- as well as norms of restraint -- have reigned in the minority's usage of obstruction. They suggest that because majorities could always change the rules, the Senate has operated under a form of “remote majoritarianism” (Wawro and Schickler 2006).

Like the inherited institutions theory presented in Figure 7.1, Wawro and Schickler's thesis emphasizes a strong connection between procedural choice and a cost-benefit analysis. The factors that go into an individual's cost-benefit calculus under the remote majoritarianism theory are fairly similar to those discussed by scholars in the inherited institutions camp. Again, these factors can be best thought of as being either political or environmental. The authors discuss many of the same concepts, such as time spent away from families, the physical costs obstructionist senators need to pay by speaking at length on the Senate floor, electoral concerns, and the sacrifice of future legislative goals.

⁴ See also Burdette (1940), Binder (1997) and Tiefer (1989) on this point.

However, Wawro and Schickler's cost-benefit analysis does depart in two notable ways from the process detailed by Binder and Smith. First, they emphasize the connection between procedural choice and levels of resolve. Once the other environmental and political factors are controlled for, the success of obstruction is determined by the amount of resolve the minority has relative to the majority. The authors analogize this concept to a “war of attrition.” The second point of departure is closely related. The remote majoritarianism theory predicts that manifest filibusters should only occur if there is incomplete information about the cost-benefit calculi. Otherwise, one side would recognize the futility of acting on their procedural preferences and abandon their position. Doing so would save them from having to bear the physical and political costs associated with holding the floor during a filibuster, or forcing the other side to actually hold the floor during a filibuster.

Wawro and Schickler (2006) argue that this informational component is beneficial to the chamber for two reasons. First, it increases Senate effectiveness by blocking “inefficient policies” – or policies favored by a less intense majority over a more intense minority. Second, when a member observes an opponent displaying a high level of resolve, it serves as a cue to the attitudes of their home state constituencies. The authors conclude by warning that this informational component is only useful if environmental factors force obstructionists to bear high physical costs. If not, the filibuster is costless for the minority and the majority gains nothing while being forced to pay higher political costs by sacrificing items from their future legislative agenda. This can lead to an increased desire for reform.

Under this theory, the informational benefits for the majority are dependent on obstructionists bearing high physical costs. However, those physical costs are negatively related to the time left before the mandatory adjournment date. Without another credible constraint

upon the minority's procedural choice, end-of-the-session filibusters would be innumerable. The existence of Senate norms against obstruction serves as that additional theoretical constraint. The evolution and maintenance of these norms was closely tied to the size of the chamber. In the early era, the small size of the Senate allowed senators to develop close relationships with colleagues. The concern over maintaining these good relationships operated as a major constraint on obstruction, thus decreasing the overall political benefit majorities would have received by enacting reforms.

When the Senate's membership expanded in the late 19th century, the relationships weakened and the norms broke down. This was evident with the defeat of several significant pieces of legislation considered close to the mandatory adjournment deadline. Ultimately, it was this breakdown of chamber norms that led the Senate to formally codify a method for ending debate. Adopted in 1917, cloture (or Rule 22) allowed a supermajority (two-thirds) to set a date for a final passage vote. This meant that large majorities could cut down on uncertainty late in a congressional session. However, the adoption of the rule signaled to minorities that obstruction was acceptable. This ultimately served to “institutionalize” the filibuster.

Threats of unorthodox rules changes supplement relations-based norms and also served to constrain minority obstruction. This procedure necessitates a favorable ruling from the chamber's presiding officer upon a question of order. Once the ruling is made, it sets a precedent that binds future rulings. Moreover, the minority learns that the majority has a particularly high level of resolve on this issue. Accordingly, under the war of attrition framework, they should drop the obstruction.

Figure 7.2 outlines how procedural choice is made under the theory of remote majoritarianism. Like the inherited institutions theory, environmental and political factors are

weighed in a cost-benefit analysis. However, in that account, existing chamber rules force majorities into lengthy floor battles. This results in substantial legislative costs for the majority. Under remote majoritarianism, unorthodox rules changes free potential reformers from having to engage in that long floor battle, and thus, they no longer have to sacrifice their future agenda. Additionally, even when environmental factors facilitate obstruction, senators are still conditioned by relations-based norms. This results in few instances of manifest obstruction.

[INSERT FIGURE 7.2 ABOUT HERE]

Testing Theories of Procedural Choice

While these two camps specify largely distinct accounts of procedural choice in the United States Senate, testing these theories has proven difficult for several reasons. First, both theories yield similar predictions for the usage of obstruction in the early Senate. Environmental factors featured high physical costs for senators looking to hold the Senate floor while political factors like chamber workload and electoral incentives were fairly low. Because of this, Binder and Smith (1997) predict limited success for obstructionists in the nineteenth century Senate. Similarly, Wawro and Schickler (2006) argue that norms against obstruction were robust and the threats of unorthodox rules changes were consistently high during this era. Thus, they also predict limited success for obstructionists in the era.

In the modern Senate, the theories should yield differing predictions. Binder and Smith (1997) argue that changes in environmental and political conditions have resulted in more incidents of obstruction. This has resulted in many bills and nominations being killed by minorities. The remote majoritarianism thesis suggests that this should only be true for issues where the majority has less resolve than the minority. This makes any evidence regarding the number of manifest filibusters difficult to interpret.

Such data would be problematic to interpret for several reasons. First, determining whether or not a filibuster has taken place is almost entirely arbitrary. While some scholars define a filibuster as an outright attempt to kill a bill, others will count attempts to delay the vote or extract concessions as filibustering. Both perspectives require some subjective judgment about what constitutes legitimate debate. Second, accurate accounts are far easier to come by in the most modern Congresses, when sources like *Congressional Quarterly* give detailed summaries of legislation. For the nineteenth and much of the twentieth century's, scholars like Burdette (1940) had to rely on less reliable sources. Third, the threat of obstruction often keeps legislation off the floor, and there is no way to accurately account for this phenomenon. Finally, when a successful manifest filibuster occurs, it often kills not only the underlying bill, but also other pieces of legislation that would have been considered later in the session.

Since empirical evidence is particularly challenging to acquire and evaluate in this debate, scholars have focused on interpreting historical incidents involving obstruction. Unfortunately, these case studies are rarely presented with enough detail to adequately separate the effect of inherited rules, relations-based norms, and threats of unorthodox rules changes from other political and environmental factors that make up a senators' cost-benefit analysis. The remainder of this essay demonstrates this by providing an expanded account of one key episode of obstruction -- the Bank Bill of 1841.

The Bank Bill of 1841

The case of the Bank Bill of 1841 represents the first occasion where chamber obstruction prompted an attempted change in Senate rules. A brief outlining of the facts is as follows: The Bank Bill debate occurred during the 27th Senate, the first controlled by the Whig party. On June 21, 1841, Whig leader Henry Clay reported the Bank Bill out of committee and

on to the Senate floor. Three weeks later, with the debate continuing, Clay proposed a rules change to “give to the majority the control of the business of the United States Senate” (*Congressional Globe*, 27 Cong. 1, July 12, 1841, 184). Minority Democrats expressed outrage at the Clay proposal, prompting Senator William Rufus King (D-AL) to reply, “I will tell the Senator [Clay], then that he may make his arrangements at his boarding house for the winter” (*Congressional Globe*, 27 Cong. 1, July 12, 1841, 203). The inference from King's statement, as well as from the comments of other prominent Democrats, is that they intended to prevent a vote on the Clay resolution by obstruction. Clay eventually retreated from his rules change proposal. Then, on July 28th, the Bank Bill passed the Senate on a largely party-line vote.

To bolster their theoretical claims, both the inherited institutions and remote majoritarianism camps draw competing inferences from this episode. Binder and Smith (1997, 75) conclude that “a majority in favor of [Clay's] reform was apparently forced to retreat in face of a determined filibustering minority.” This, they imply, is due primarily to the constraining influence of inherited institutions. Wawro and Schickler (2006) disagree, arguing that Clay's rules change proposal actually facilitated the passage of the Bank Bill. Moreover, they argue that rather than kill the Whig agenda, the minority party allowed it to pass in its entirety.

To arbitrate between these two competing interpretations, I take a more comprehensive look at the consideration of the Bank Bill. While it is doubtful that the minority was intent on killing the Bank Bill via filibuster, the evidence suggests that obstruction played an important role in the failure of the bill, and the Whig agenda more broadly. Obstructive Democrats strung out the session and exploited every opportunity to exacerbate internal tension within the Whig Party. My evaluation of the Bank Bill starts with a consideration of the election of 1840 and the cohesiveness of the Whig coalition.

The Election of 1840

The election of 1840 produced a resounding victory for the Whig Party. Their candidate for President, William Henry Harrison trounced incumbent Democratic President Martin Van Buren in the Electoral College. Both Houses of Congress moved into Whig control as well, with the party holding a seven seat majority in the Senate. Historians have argued that this contest was one of the first in American history that pitted two political parties with clear, contrasting viewpoints regarding the proper role of government in shaping public policy (Holt 1992). This is evidenced by the sharp increase in partisan voting during this era (Binder 1997; Poole and Rosenthal 1997; Silbey 1985).

The Whigs ran on a platform that called for an increase in government intervention. This included seeking an upward revision of the tariff, distribution of land revenues to the states, federal and state financed internal improvements, and an increased federal role in banking and currency. The Democrats, following the positions taken during the Jackson presidency, rejected an active role for the government (Holt 1992). Harrison's election represented an opportunity for the Whig Party to strengthen its ideological association with the voters. Clay and other Whig legislators felt the party needed to act quickly to capitalize on their momentum. Moreover, Treasury Secretary Thomas Ewing reported that the government needed to raise revenue quickly to cover an exorbitant national debt. In response, Harrison summoned the emergency session on March 17, 1841. Eighteen days later, he died of pneumonia, elevating the relatively unknown Vice President John Tyler to the presidency.

The Whig Congressional Agenda

On May 31, 1841, the emergency session of the 27th Congress convened. After quickly electing John White (W-KY)--a Clay ally--Speaker of the House, sectional cracks in the Whig

Party began to emerge. Henry A. Wise (W-VA) moved that the party adopt the previous rules of the House, which included a previous question motion for ending debate. John Quincy Adams then offered an amendment rescinding the rule prohibiting the reception of abolition petitions. This sparked a prolonged debate in the chamber, which Democrats happily sought to enable.⁵ Adding to this was President Tyler's continued association with a group of states' rights Virginians. Clay was acutely aware of this, writing in mid-June that there was a concern that Tyler would fall in with this crowd, and that it would jeopardize the Whig agenda (Coleman 1871, 157).

This appears to have reinforced Clay's belief that the Whig agenda must be passed quickly. On June 7th, the Kentucky senator outlined the goals of the session. The Whigs sought a repeal of the sub-treasury system, the distribution of land revenues to the states, a new loan to pay for governmental business until revenues were increased, an upward revision of the tariff, a national bankruptcy law to relieve debtors, and the incorporation of a new national bank (Holt 1999, 129). Further, they hoped to complete all this within the emergency session. The consensus of modern historians and contemporary legislators was that the incorporation of a new national bank was the centerpiece of this agenda. Senator John C. Calhoun argued that defeating the bank would “defeat all the other measures and terminate the session” (Jameson 1900, 481). Holt (1999, 129) put it bluntly, “on that rock (the Bank Bill) the Whig program would flounder and the Whig party splinter.”

Further evidence of internal problems with the Whig Party was given by President Tyler's statement to Congress. Tyler indicated support for the repeal of the sub-treasury system. However, his support for distribution and the loan were conditional on the upward revision of the

⁵ See Cutler (1979) and Shanks (1953) on this point.

tariff being less than twenty percent. This was not likely to be feasible. Furthermore, he indicated his opposition to the incorporation of a new national bank he deemed to be unconstitutional. In summary, as the emergency session began, the Whigs were set to implement an ambitious agenda with internal sectional tension and a president that shared their party name, but expressed—at best—tepid support for their legislative goals.

Unlimited Debate in the Senate

Clay believed the key to success was to act quickly. On April 30, 1841, he wrote Treasury Secretary Ewing and asked him to prepare a copy of an administration-approved Bank Bill before the opening of Congress (Seager 1988, 524). He reiterated this request in writing on June 2nd and then on the floor of the Senate on June 7th. However, sometime during this period Ewing had taken ill and was unable to accomplish this in a timely fashion.⁶ This would ultimately prove to be fortuitous for the Democrats. The administration-backed bill was reported to the Senate on June 12, 1841, nearly a month and a half after Clay first requested it.

The Ewing Bill infuriated Clay supporters. Primarily, this was because it allowed the states to tax the bank. Although it also allowed the national bank to establish banks in the states, it made this contingent on the approval of state legislators. The view of many Whigs on this were adequately summarized in a letter by New York Whig Mordecai Noah to Senator Willie Mangum (W-NC), “I believe when I say that of the Whig party in this city, that not one in a hundred approve of Mr. Ewing’s plan I am short of the truth” (Shanks 1953, 167). Over the next five days, the Whig caucus convened to design a substitute.

Democrats sought to seize on the apparent unrest within the Whig Party. In mid-June, Silas Wright (D-NY) gave a three hour speech against the Bank Bill, which was not under

⁶ See Senator Willie Mangum’s (W-NC) letter to Duncan Cameron, dated June 26, 1841 (Shanks 1953, 182).

consideration. This led to Clay's taking up his first rules change resolution.⁷ It provided that the chamber, after any adjournment of the Senate during consideration of a given subject, resume consideration of that subject during the next meeting of the Senate. Presumably, this would facilitate quicker passage for the caucus bill, which had not yet been reported. The Democrats strongly objected to Clay's resolution. Thomas Hart Benton declared "it showed a determination to dictate to the Senate its order of business and the duration of the session" (*Congressional Globe*, 27 Cong. 1, June 12, 1841, 45). Calhoun declared that this "attempt thus to cut off debate was a thing unprecedented in the Senate" (*Congressional Globe*, 27 Cong. 1, June 12, 1841, 46).

In spite of the Democrats objections, a united Whig Party then rejected a Calhoun proposal to table the resolution 27 to 19. During the debate, Clay chided the minority by asking, "Did the gentlemen really imagine, that because as a minority they possessed certain rights, they had the right of controlling the business of Congress?" (*Congressional Globe*, 27 Cong. 1, June 12, 1841, 47). However, the tabling motion could not end debate, forcing Clay to placate the minority by offering a modification to the rule, allowing for one hour of discussion of other subjects. The rule then passed by a voice vote. Notably, this rule was not a mere compromise for the minority, but a complete capitulation by Clay. Senator Ambrose Sevier (D-AR) asked Clay, "is this resolution not nearly word for word with the long standing rules of the Senate?" (*Congressional Globe*, 27 Cong. 1, June 12, 1841, 48). To his credit, Clay acknowledged that it was.

⁷ In addition to Wright's speech, Clay also dealt with significant obstruction during a special session of Congress in early March that was to be confined to executive business. The outgoing Democratic majority decided to continue the Senate's association with Congressional Globe printers Francis Preston Blair and John Cook Rives. This angered the Whigs, who believed the printers distorted the debates. In the special session, the Whigs went ahead with a resolution removing them. This was met with fierce Democratic resistance, whom did not back down for six days (Burdette 1940).

Unable to secure a favorable rules change, Clay and the Whig leadership went ahead with the caucus-backed Bank Bill. They kept the pressure on the Democrats by keeping the chamber in session eight hours a day, six days a week. Calhoun described the harshness of the situation: “our sittings are exceedingly laborious, averaging about six hours in the day and thirty six in the week. This, at this warm season, combined with a heavy correspondence, reading of documents and preparation for discussion is heavy and exhausting work” (Jameson 1900, 481). Moreover, the Whigs united behind the caucus bill and agreed to vote down all Democratic amendments during the caucus (Shanks 1953, 182).

On June 21, 1841, Clay reported the Bank Bill out of committee. The chamber then commenced debate on a bill appropriating 25,000 dollars for the relief of President Harrison's widow. Consideration of this bill consumed a full two legislative days, largely attributed to lengthy speeches offered by Senate Democrats. The relief bill passed near the end of the day on June 25th, 28 to 16, with all Whigs and two Democrats voting in support. The Bank Bill was then taken up, and Whig amendments were considered.

Throughout this period, cracks in the Whig coalition began to worsen. Secretary of State Daniel Webster began lobbying Senate Whigs to oppose Clay's caucus bill and support the Ewing Bill. His reasons for doing so were three-fold. First, he believed it would provoke an executive veto, resulting in the dissolution of the cabinet and eventual expulsion of Tyler from the party. Second, Webster believed that a Bank Bill was better than no bill at all. On the same lines, he argued that the provisions of the Ewing Bill were strong enough and that the omission of the branching power is not a “surrender of a great principle” (Wiltse 1982, 135). Third, there was clearly an electoral benefit for Webster to be seen as the power broker between Tyler and Congressional Whigs. His lobbying, combined with Democratic obstruction, facilitated the

defection of at least four Southern swing votes: William C. Rives (W-VA), William S. Archer (W-VA), William C. Preston (W-SC) and John Henderson (W-MS). Later, the administration would allocate favorable patronage appointments to garner the support of William Merrick (D-MD) and Alexander Barrow (D-LA) (Holt 1999, 132; Shanks 1953, 182).

By late June it was clear that Clay's caucus bill was in trouble. Calhoun, expressing confidence, noted that “we have, I think, gained on them since the beginning of the [s]ession. They are now dispirited and distracted” (Jameson 1900, 479). The minority continued to operate under a strategy of obstructing consideration of the caucus bill, while seeming supportive of Tyler's objectives. On this point, a Benton biographer notes that the Democratic objective was, “delay and an appeal to public opinion through the [Globe] and other Democratic organs” (Chambers 1956, 252). Holt (1999, 132) argues that “...minority Democrats played a brilliant hand, offering little opposition to those measures Tyler agreed with but strenuously objecting to the measures that offended the president's constitutional sensibilities.”

Appearing amiable to Tyler did not, however, dwarf the minority's larger strategy of driving a wedge in the majority party. When Rives (W-VA) offered a compromise amendment on July 1, 1841, restoring the Ewing Bill, the Democrats joined with Clay's supporters to overwhelmingly defeat it. The minority, wrote Poage (1936, 57) was “delighted at the quandary of the Whigs, and, as was manifestly their policy, resolved to vote en masse against the Rives Amendment in order to increase the confusion of the Whigs.” Further, the nature of the debate between Clay and the Whigs backing the Ewing Bill indicated to Senate Democrats that Tyler intended to veto the caucus bill. Democrats were eager to see this happen.

After defeating the Rives amendment, Clay himself began expressing doubts about his ability to pass the caucus bill. Adams chronicled in his journal dated July 7th, that Clay “thinks the passage of the Bank bill in the Senate doubtful” (Adams 1876, 498). However, on July 12th and 13th, the Whig leadership again held a caucus to work out a compromise to ensure the passage of the caucus bill (Remini 1991, 589). On those days, they voted down five straight Democratic amendments on party-line votes. It also was during this time of renewed Whig unity that Clay's second rules change threat was made. The proposal came at the heels of a Calhoun speech that lambasted Clay for accusing the minority of offering amendments and speeches for no other purpose than to “...embarrass the majority by frivolous and vexatious delay” (*Congressional Globe*, 27 Cong. 1, July 12, 1841, 184).

Calhoun asserted that Clay's proposal called for the Senate to “adopt the same means which had proved so beneficial in the House” (*Congressional Globe*, 27 Cong. 1, July 12, 1841, 203). After a series of long, aggressive speeches by King (D-AL), Calhoun (D-SC), Linn (D-MO) and Benton (D-MO), the proposal was dropped and the chamber went into executive session. On July 23, 1841, after again consulting with the Whig caucus, Clay offered a compromise amendment. The amendment allowed states to accept or reject bank branches. However, Congress could then override the states' decisions. The compromise amendment passed 25 to 24 after Preston (W-SC) voted in support and Henderson (W-MS) abstained. A motion by Thomas Hart Benton (D-MO) to postpone the bill indefinitely was then beaten back 28-21 on a party line vote. The compromised caucus bill passed the chamber 26-23 with nearly all Whigs voting in favor. The passage of the caucus bill had been in doubt at times, but it was not a mortal blow for Senate Democrats. Indeed, from their unified rejection of the Rives amendment, it was apparent the party preferred to pursue a strategy that would lead to a Tyler

veto. Calhoun discussed this in a letter to Thomas Clemson: “I should much rather Clay's bill should pass and be vetoed (than Ewing's bill pass and be signed by the President)” (Jameson 1900, 480).

The Previous Question Motion in the House

Early in the emergency session, House Whigs appeared to be more divided than their Senate counterparts. On June 7, 1841, the House adopted a set of rules that included both the previous question motion, and Adams' amendment barring the ‘gag rule’ against abolitionist petitions. This was reversed nearly a week later. The new rule deferred consideration of the gag rule one full year. Binder (1997, 102) argues that this compromise was a partisan one, with Southern Whigs largely joining Northerners in support of the measure.

It is within this parliamentary environment that the chamber received the Senate Bank Bill. The presence of the previous question motion virtually ensured quick passage of the bill. Representative Cave Johnson (D-TN), writing to Polk, noted that: “It will pass the House, probably during the ensuing week. With their amended rules, they have the previous question...[and] use it upon all occasions” (Cutler 1979, 710). On August 3rd, the House voted on the first amendment to the Bank Bill, rejecting a minority proposal to liberalize the chamber's rules with regard to the bill by a vote of 107 to 84. The next day, the chamber passed a resolution setting a date to end debate on the Bank Bill. On August 6, 1841, the House passed the Bank Bill by a vote of 128 to 98. However, and as the Democrats anticipated, the bill was vetoed by President Tyler on August 16th.

Revisiting the Evidence

The history of the Bank Bill of 1841 demonstrates that there were many important factors that led to the bill's failure, not the least of which was the attitude of the executive branch. Also important was the timing of the bill's consideration, as well as how Clay and the other Whig leaders in the Senate managed the entire chamber agenda, electoral considerations, the composition of the bill itself, and minority obstruction. So how does one interpret the role unlimited debate played in the consideration of the Bank Bill of 1841? To answer this, I reconsider the claims made by both the inherited institutions and remote majoritarianism camps.

Wawro and Schickler (2006, 74-75) argue that “obstruction might have delayed progress, but in the face of a determined majority willing to threaten changes in the rules, the minority relented.” To support this claim, they argue that when he proposed the rules change, Clay actually lacked a majority for the Bank Bill. The evidence suggests that this is likely the case. However, the evidence also is clear that Clay had a majority *in favor* of the Bank Bill at several different points during in the session. In his letter to Cameron describing the Whig caucus, Mangum makes it clear that a majority supported the caucus bill. This is consistent with Binder's (1997) observation of near-perfect party unity on procedural votes.

Further, Wawro and Schickler claim the Whig majority was only secured after Clay's compromise amendment was adopted. However, that amendment sacrificed virtually nothing of the substance of the caucus bill. Remini (1991, 589) dismisses it as a “wretched compromise,” that “hardly deserved the name.” The rule, if passed, would have allowed Clay and the Whig leadership to call for a caucus, line up support, and then minimize the possibility of defections by cutting off debate and limiting the amount of time the opposition could influence moderate Whigs. It also would have allowed for earlier passage of the bill, which may have led to Tyler's support. Many congressional Whigs believed that Tyler's support waned over the course of the

session. Just as the long debate afforded the minority time to pressure moderate Whig senators, it also allowed them to influence Tyler. Like Wawro and Schickler, scholars in the inherited institutions camp also fail to adequately account for the effect the delay had on President Tyler.

Wawro and Schickler also argue that there was a precedent established earlier in the session where Clay passed a rules change resolution over the minority. The evidence suggests that just the opposite occurred. Clay's rules change resolution was met with determined Democratic resistance. Rather than face a prolonged battle over it, the Kentuckian proposed a face-saving compromise. The compromise resolution was allowed to pass as a voice vote - not because the minority feared the majority - but because it was a "word for word" reiteration of the Senate's current standing rules.

Finally, the remote majoritarianism account posits that "one difficulty with [the inherited institutions] interpretation of the Whigs' troubles in 1841 is that Clay actually succeeded in passing his substantive agenda through the Senate" (Wawro and Schickler 2006, 75). The authors cite the eventual passage of the Bank Bill, the repeal of the sub-treasury plan, the Loan Bill, an enacted tariff and the Land Distribution Bill as evidence. This argument is – at best – overly simplistic. Holt (1999, 123) argues that "almost every one of their [The Whigs] bright expectations went aglimmering." Colton (1904, 375) argues that nearly all the Whig's great measures, "were defeated by the political defection and faithless conduct of the acting chief magistrate." This was certainly not a favorable outcome. The Loan Bill passed in mid-June and was a moderate victory for the Whigs. The Land Distribution Bill also passed -- but in a

compromised form that rendered it impotent even before the end of the Congress.⁸ Of the five planks in their agenda for the 27th Congress, only the Tariff and Loan Bills could be considered successes, and of those two, only the former had any lasting impact. Their legislative failures led to the Whigs losing roughly half of their seats in the House of Representatives during the 1842 election (Holt 1999).

The inherited institutions account argues that “a majority in favor of [Clay’s] reform was apparently forced to retreat in face of a determined filibustering minority (Binder and Smith 1997, 75).” The evidence for this contention is suggestive, but ultimately inconclusive. It is true that the Whigs rejected a proposal to table the rules’ change on a united vote. Further, Benton’s discussion indicates that at one point the Whigs likely held a majority in support of the rules change. How long this majority existed, however, is unclear. Once the debate dragged on, Clay and the Whigs essentially backed off the proposal.

Ultimately, it is true that the minority relented and let the majority vote on final passage. However, three factors likely influenced this decision. First, as both camps recognized, the physical costs of delay were taking their toll. This is evident in Calhoun’s letter to Thomas Clemson, wherein he complained about the length of the days spent in chamber and the heavy correspondence. Additionally, consistent with a costs-benefits framework, there would likely be some sort of electoral retribution for a manifest Democratic filibuster. The party suffered staggering defeats the previous year, largely due to inaction in the wake of the depression. By failing to allow a vote on the centerpiece of the Whig agenda, Clay and his supporters would have been able to reiterate this accusation. Perhaps most importantly, though, by this point the

⁸ This was due to a provision that land sales would cease if tariff rates were over twenty percent. Consequently, when the Whigs finally passed a tariff in 1842 – after being thwarted twice – the party was forced to sacrifice distribution.

damage had largely been done. There was an open fissure between Clay's supporters and the Whigs supporting President Tyler. This culminated in an admission by one of the Tyler Whigs that the president planned on vetoing the Clay bill. Contrary to Wawro and Schickler's argument, by the time the bill passed, the veto was fairly evident. Calhoun had predicted it in several letters, and the Democrats went so far as to reject the more preferable administration bill so as to encourage the Tyler veto.

Two important conclusions can be reached from the Bank Bill episode. Again, unlimited debate does not need to be exploited in a way that prevents a vote on a bill to be effective. The episode demonstrates that majorities are rarely stable and fixed. Had the Bank Bill been considered under the rules of the modern House, there is little doubt the majority would have been able to pass it -- and pass it quickly. This would have minimized the strain placed upon the fragile Whig coalition and possibly preserved it throughout the session. It is possible that this may have led to vastly different policy outcomes. In this respect, while unlimited debate did not play the role of the murder weapon in the earlier analogy, it did serve as the dark alley that concealed the crime. Second, while the dispersed physical costs in the House better facilitated obstruction compared to the Senate, this episode reinforces the observation that when House majorities were forced to deal with dissident minorities, they could turn to the inherited previous question motion.

Discussion

Conducting empirical tests for theories of filibustering in the Senate is difficult due to both the availability of reliable data and the relative observational equivalency of the two leading theories. As such, drawing implications from key historical case studies is a necessary tactic for

scholars seeking to bolster their theoretical accounts. Both the inherited institutions and remote majoritarian camps glossed over critical details in their consideration of the Bank Bill of 1841. When those details are included, I believe that -- on balance -- the inherited institutions account offers a more satisfying explanation for how obstruction affected the bill's consideration.

The broader point, however, concerns how scholars of legislative obstruction utilize historical case studies. The preceding discussion demonstrates that they need to be discussed in greater detail to properly evaluate all possible explanations. Further, by restricting case studies to only the Senate, scholars are unable to capture the full cost-benefit calculation made by members. However, the Bank Bill of 1841 is just one of several cases cited by these two scholarly camps. As such, future work is needed to clarify the role of obstruction other in cases. See, for instance, the Oregon Territory Bill of 1848, the Federal Elections Bill of 1890-1891, the Armed Ship Filibuster of 1917, anti-lynching bills in 1922, 1935 and 1938, Rule 22 reform proposals in 1967 and 1969 and the 2003 battle over the Nuclear Option,

In conjunction with case studies like this, empirical research linking these incidents of obstruction with the success of the majority party's agenda could prove valuable. Specifically, the claim that obstruction forces the majority to sacrifice some of its agenda could be examined in a more rigorous manner. Looking at issues reported by newspapers or stressed in party platforms should serve as a sufficient, exogenous proxy for a party agenda. Then evaluating the success rate on those issues and linking it to the case studies discussed could provide additional evidence for or against the leading theories of procedural choice in the Senate.

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Figure 7.1: Inherited Institutions and Procedural Reform

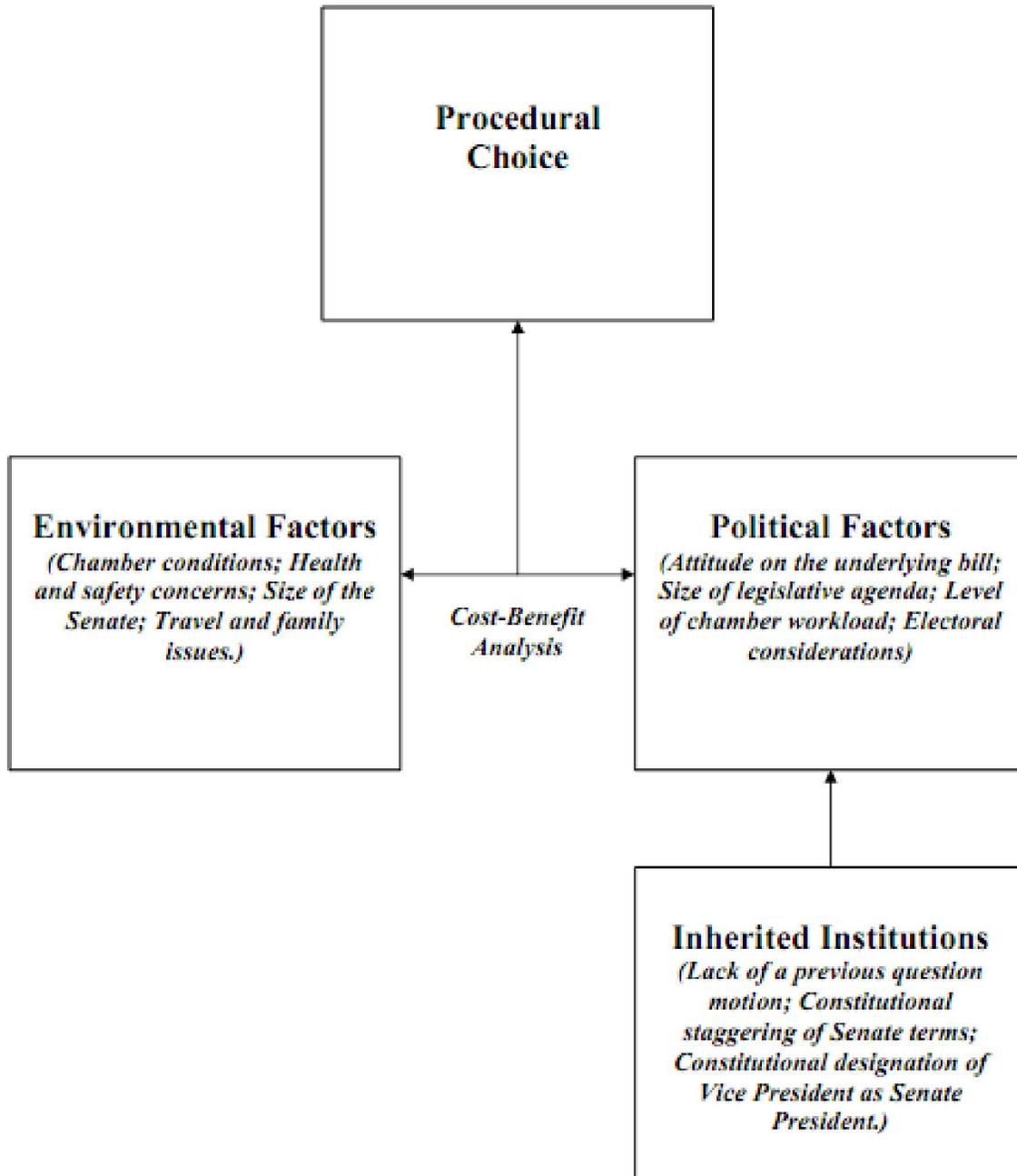


Figure 7.2: Remote Majoritarianism and Procedural Reform

