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Party Advantage  
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PART I

COSTLY CONSIDERATION

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[More information](#)

## I

### Costly Consideration and the Majority's Advantage

During 1997 and 1998, the United States Congress wrestled with H.R. 2646, the Education Savings Act for Public and Private Schools, a bill that proposed the creation of tax-free education savings accounts. Most Republicans favored the bill, while most Democrats opposed it (Hosansky 1997; Kirchhoff 1998). Republicans held 52 percent of the House seats (227 of 434 seats at the time the bill passed) and 55 of the 100 Senate seats.

The bill passed through the House quickly. It was introduced on October 9, 1997, reported from the Ways and Means Committee on October 21, and brought up, debated, and passed (without any amendments having been offered) on October 23. On the final passage vote, Republicans voted 215–8 in favor; Democrats voted 190–15 against.

In the Senate, however, the fight over the bill was much different. The chamber took up the bill on the floor by unanimous consent on October 29; but on October 31 and November 4, the Senate voted against invoking cloture, each time with 56 votes for cloture and a nearly perfect partisan split.

The bill was then set aside until the following March, when majority leader Trent Lott made a motion to bring the bill up on the floor. Republican Senate Finance Committee chair William Roth proposed an amendment – a bundle of changes designed to lure Democratic votes (Kirchhoff 1998) – and on March 17 the Senate voted 74–24 to invoke cloture on the motion to proceed, with all 55 Republicans and 19 of 43 Democrats voting in favor. The Senate then considered the bill and adopted Roth's amendment by voice vote on March 18, but it quickly became apparent that Democrats would continue to obstruct the bill unless

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Excerpt

[More information](#)

they got additional concessions. On March 19 and again on March 26, the Senate refused to invoke cloture (with 54 and 58 votes in favor, respectively). On March 27, Lott and Democratic leader Tom Daschle agreed on a unanimous consent agreement in which Republicans conceded to Democrats the right to offer several amendments on the floor.

Up to this point, the story of H.R. 2646 illustrates many widely accepted claims about the role of parties in Congress. Congressional scholars frequently characterize the House as a chamber in which the majority tends to steamroll the minority party, and characterize the Senate as a chamber in which the minority has broad powers to thwart the efforts of the majority. Conventional wisdom holds that the Senate's extensive reliance on unanimous consent agreements for conducting its business, as well as the need for 60 votes to overcome the threat of a filibuster, presents daunting obstacles that the majority struggles to overcome.

Senate scholars also argue that the Senate's amendment process, which places few restrictions on senators' ability to offer amendments on the floor, creates significant problems for the majority. The process gives minority senators a way to present amendments that they hope will divide the majority party and prevent majority leaders from pushing through their legislative agenda. As we see in the case of H.R. 2646, the minority party has substantial tools for protecting its ability to offer amendments.

The Senate took up H.R. 2646, under the terms of the unanimous consent agreement, on April 20. Over the next few days, the chamber considered and disposed of various Democratic and Republican amendments. But there is a curious pattern to the disposition of these amendments: the chamber tabled, ruled out of order, or voted down almost all the Democrats' amendments, adopting only a few Democratic amendments that had the support of a majority of Republicans. On the other hand, the Senate adopted several Republican-sponsored amendments, some of which had Democratic support but some of which faced strong Democratic opposition. Once it finished with amendments, the chamber passed the bill as amended on a 56–43 vote; Republicans voted 51–3 in favor, and Democrats voted 40–5 against.

The perceived role of the majority party from the conventional viewpoint is somewhat ambiguous. Some authors seem to assert that the Senate's procedures keep the majority party from having any more influence over legislative decisions than do individual senators, or groups of senators other than the majority party; others appear to be more agnostic about the role of the majority party, seemingly open to the

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Excerpt

[More information](#)*Costly Consideration and the Majority's Advantage*

5

possibility that the majority party has some advantages. But claims that the majority plays a predominant role and has significant advantages elicit widespread skepticism.

However, this traditional thinking sits uncomfortably alongside some of the particulars of the H.R. 2646 example – especially once the bill reached the floor. For instance, why did no controversial Democratic amendments succeed, while controversial Republican amendments did? Since minority party members offered several amendments, how did they end up with a bill they overwhelmingly opposed? Also, given that more than 40 senators voted against the bill on final passage, as well as on several early cloture motions, how did it ultimately overcome the filibuster and pass? For that matter, even some of the pre-floor facts of the case raise questions. Why did a number of senators who strongly opposed the bill allow it to be scheduled more than once by unanimous consent? And why was it the committee chair and the majority leader who got to make the first proposals, against which subsequent bargaining occurred, regarding amendments and unanimous consent terms? Why did the minority leader not follow a similar strategy, offering a proposal and then making incremental concessions and side-payments until the minority could pass a bill that was more to its liking? Conventional wisdom offers few answers to such questions. Our take is that the conventional view captures much of what is important about Senate behavior but also misses some crucial elements.

The Senate literature, which is largely atheoretical, tells us that we should not expect to see the majority party systematically passing the legislation it wants. But the literature offers little else in the way of generalizations about which actors, if any, systematically succeed in passing the policies they favor.<sup>1</sup> It tells us that the Senate is complicated and sometimes seems to imply that it is *too* complicated for general theorizing.

Numerous recent empirical studies, however, conclude that the majority party influences Senate decisions (Bargen 2003; Campbell, Cox, and

<sup>1</sup> Krehbiel's (1998) pivotal politics model is, in a sense, an exception. It is a formal theory that is quite specific about which actors in the Senate affect policy and how they affect it. But we view it as separate from what we characterize as the Senate literature. The pivot model is a more general theory, aimed at explaining which proposals become laws rather than explaining the related, but different question about the Senate's internal workings that we address. It includes the House and the president as prominently as the Senate, and incorporates legislative procedures only in broad strokes, meaning it says little about the details of Senate procedure.

As we point out in Chapter 3, our model makes some predictions similar to those of the pivot model but makes other predictions at odds with the model. In Chapter 10 we test predictions from both models.

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[More information](#)

McCubbins 2002; Crespin and Finocchiaro 2008; Den Hartog and Monroe 2008a; Gailmard and Jenkins 2007; Koger 2003; Koger and Fowler 2006; Lee 2009). But such studies frequently elicit skepticism, and not only from the conventional point of view – even many scholars who believe that parties matter, or at least suspect that they do, ask the great unanswered question regarding Senate parties: *how* can the majority influence the agenda, given the way the Senate goes about its business?

Of course, congressional literature prominently features theories of legislative decision making that emphasize parties' influence over legislation. But like the conventional wisdom, these partisan theories have trouble explaining the case of H.R. 2646. They emphasize majority party influence through agenda setting rather than through party discipline on substantive votes (Aldrich and Rohde 2000; Campbell, Cox, and McCubbins 2002; Cox and McCubbins 1993, 2005), but they offer limited explanations for why the majority would be stymied initially, then have to offer concessions to the minority party to push the agenda they wanted.<sup>2</sup> This lack of explanatory power largely reflects the historical focus of the congressional organization literature – including partisan theories – on the House of Representatives. It arises from an approach that takes little account of the Senate's different organizational environment.

The focus on the House has contributed to the widespread conceptualization of agenda setting as a gatekeeping, veto-based process. This thinking fits neatly with the House legislative process, in which the Rules Committee serves as an effective instrument for controlling the floor; but the Senate has no equivalent control mechanism. Such veto-based models seem less applicable to the upper chamber, where the majority party scraps, battles, and bargains its way to final passage. The example of H.R. 2646 illustrates why House-based partisan theories do not transfer comfortably to the Senate – they do not explain how a Senate majority manipulates the agenda.

### The Costly-Consideration Theory

We offer a theory of legislative decision making that bridges the gap between these two schools and helps us better understand the Senate. In spirit, our take is similar to that of Rawls (2009), who characterizes the

<sup>2</sup> The House literature does, however, provide insights into how procedural majorities might allow the majority party in the Senate to influence the agenda (Rohde 1991; Van Houweling 2003). For an explicit treatment of the Senate, see Rohde (1992).

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Excerpt

[More information](#)*Costly Consideration and the Majority's Advantage*

7

majority caucus as the team that plays offense and the minority caucus as the team that plays defense. Extending Rawls's analogy slightly, imagine a football game in which one team always plays offense: the majority is in a much better position than the minority to score; this does not mean that the majority scores on every drive or that the minority never scores off a turnover, but overall we expect the majority to score decidedly more often than the minority.

An aspect of agenda setting prominently highlighted in recent years is the distinction between "positive agenda control," the power to ensure a final vote on a proposal, and "negative agenda control," the power to prevent a final vote on a proposal (Cox and McCubbins 2005). Most Senate literature focuses on negative agenda power, whereas, in a sense, ours is a theory of positive agenda power; that is, we are most interested not in who can block bills, but rather in who can pass them.

However, we diverge from previous treatments of agenda setting in three important respects. First, we emphasize that agenda setting in the Senate requires getting a proposal to a final passage vote – which we refer to as *final consideration*, or just *consideration*<sup>3</sup> – as opposed to merely offering a proposal on the floor. In many legislatures, offering a proposal and final consideration are tantamount, and this distinction is not necessarily useful. In the Senate, however, the difference between offering a proposal on the floor and having the chamber vote on that proposal can be enormous.

Second, we conceptualize agenda setting as a costly process. For a bill's proponents, navigating the various procedural minefields that can kill a bill on the floor sometimes requires great effort and substantial resources. Such resources are scarce.

Third, we treat influence over the agenda as continuous rather than dichotomous. Existing literature conceptualizes negative and positive agenda influence largely as a matter of absolute agenda power; that is, an actor has either complete negative agenda control or zero negative agenda control, and has either complete positive agenda control or zero positive agenda control. In our theory, though, both the majority and its opponents hold partial agenda influence. One way of characterizing our thinking is that partial negative agenda influence is distributed widely

<sup>3</sup> This usage of the word *consideration* is at odds with the usual usage, which refers to any type of floor activity on a bill. We use various other terms, such as *offering* or *proposal of amendments*, *floor time*, *floor action*, or *floor activity*, to refer to forms of consideration other than final consideration.

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Excerpt

[More information](#)

in the Senate, and positive agenda influence is a matter of being able to overcome opponents' negative agenda influence – and the majority is in a better position than its opponents to do this, giving it an agenda-setting advantage.<sup>4</sup>

Our theory's logic is similar to the logic of bargaining games (Rubinstein 1982), in which actors make proposals about how to divide a fixed benefit, and the actor who makes the first proposal is able to claim a bigger share of that benefit by making a strategic proposal that the other actor will accept because a counteroffer would be too costly to be worthwhile. In our model, the majority party's first-proposal power combines with costs the minority must bear to make counterproposals to give it a similar advantage. It uses this advantage to claim a bigger share of the benefit (which in our model is the policy space).<sup>5</sup>

One of the strengths of our theory is that it incorporates assumptions that are central to the conventional wisdom, such as the possibility of filibusters and the broad right of senators to propose policies via amendments. But because we include additional assumptions that we believe are quite plausible in light of Senate practice, the theory leads to the *unconventional* conclusion that the majority party can often manipulate Senate decisions in its favor. The three main additional assumptions that underpin our theory are, first, that agenda setting is costly; second, that it is less costly for the majority party than for others; and, third, that the majority party has a first-proposal advantage.

We formalize our theory in a game-theoretic model that is similar in nature to many previous legislative agenda-setting models. The model provides a link between formal spatial models – a staple of congressional theory – and the heavily empirical Senate literature that often portrays Senate agenda setting as a matter of bargaining between the majority and the minority but rarely offers specific theories about the structure or consequences of this bargaining.

We anticipate that some readers will be skeptical about our spatial modeling approach. One likely critique is that our assumptions oversimplify

<sup>4</sup> In this regard, we have misgivings about applying the distinction between positive and negative agenda power to our theory. Whereas the distinction frames negative and positive powers as discrete (i.e., it is possible to have one without having the other), they are flip sides of the same coin from our point of view. The size of the costs that a proposal's supporters must bear to get it to a final passage vote is a function of others' negative agenda influence.

<sup>5</sup> A difference between our model and bargaining games is that, in our model, the chamber's final decision about what division of the benefit to accept is made by the floor median rather than by agreement between the two parties.

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Excerpt

[More information](#)*Costly Consideration and the Majority's Advantage*

9

the Senate's complex procedures; another is that a one-dimensional model is too crude to capture the rich context of Senate politics. We agree that we dramatically simplify an institution that is extraordinarily complex, with the upshot that our model neither captures every interesting aspect of Senate decision making nor explains every legislative battle in the Senate. Moreover, we do not claim that our model is the "correct" way to think about the Senate (from our point of view, there is no such thing). But our goal is not to explain everything or to present an unassailable model. Rather, it is to advance understanding of Senate policy making by providing a better theory than exists at present; to us, this means a theory that explains behavior not explained by other theories and that does so in a relatively parsimonious way. Simplification comes with the territory. We agree that the Senate's complexity is fascinating, and as readers will see, our theory is thoroughly grounded in Senate procedures.

The contribution of our costly-consideration theory is evident in the case of H.R. 2646. The majority party ultimately succeeded in advancing the bill to final consideration against strong minority opposition, but doing so was difficult and costly. The majority *proposed* the bill on the floor without much difficulty. But to move the bill from initial proposal to final passage, it paid significant costs to overcome filibusters, used its first-mover bargaining advantage to schedule minority amendments in return for getting final consideration of the bill, and employed a variety of procedural tools to keep its initial proposal more or less intact. As we see it, the story of H.R. 2646 is a highlight reel of consideration costs and majority party procedural advantage.

**Consideration Costs, Parties, and Legislative Process**

Throughout the book we use a few concepts that are central to our thinking but that can easily be understood to mean a variety of things. In this section we therefore clarify what we mean when we use the terms *consideration costs*, *majority party*, and *minority party*.

***Consideration Costs***

We assume that legislators are rational utility maximizers. But when we refer to costs, we especially want to avoid giving the impression that we believe there is some point in the legislative process that is analogous to a market exchange in which there is a buyer and a seller who first agree to a mutually acceptable selling price, then explicitly trade payment for a good. Rather, as in basic economics, we mean opportunity costs – that



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Excerpt

[More information](#)

is, the utility that would follow from the next-best use of whatever scarce resources one sacrifices by taking a particular course of action.<sup>6</sup>

Given the intended audience for this book, a perhaps useful illustration is the sort of costs entailed in obtaining a graduate degree. During grad school, one pays opportunity costs by sacrificing time, energy, potential earnings, and other things that could be put to good alternative uses, in the hope of obtaining a better outcome down the road than would occur if one did not go to grad school. Similarly, in the Senate, policies' proponents must sacrifice things they value in order to push their proposals through the chamber's complex legislative process to a final vote, but nonetheless often do so in the hope of passing legislation that they value. Such sacrifices are what we mean when we use the term *consideration costs*.

The universe of costly sacrifices that senators make to gain consideration of proposals presumably comprises a virtually unlimited number of resources, including things as obscure as five minutes not spent on a photo-op with constituents or not enjoying dinner with one's family because of stress induced by legislative bargaining. We make no attempt at a definitive accounting of all consideration costs, but there are some that we see as most significant:

- Legislators' time, attention, and energy
- Staffers' time, attention, and energy
- Side-payments used to build a winning coalition<sup>7</sup>
- Legislators' votes
- Political chips or favors that a legislator can call in from, or offer to, another legislator
- Campaign resources

Until this point, we have discussed legislators' goals only as a matter of utility calculations that follow from policy outcomes and the sacrifices made to shape policy outcomes. But, of course, *any* outcome that increases a legislator's utility is a potential goal of that legislator. Moreover, the Congress literature emphasizes goals other than policy outcomes, especially electoral goals. Clearly, electoral outcomes not only are a major source of utility, but are affected by policy-making decisions. Hence, a

<sup>6</sup> Note that our notion of costly action has roots in transaction cost economics literature (Alchian and Demsetz 1972; Coase 1937; Demsetz 1968; North 1981; Williamson 1985). For other recent work explicitly considering the implications of legislative transaction costs in the Senate, see Koger (2004) and Wawro and Schickler (2004, 2006).

<sup>7</sup> By *side-payments*, we mean concessions on unrelated policy dimensions, often in the form of support for pet programs or district projects.

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Chris Den Hartog and Nathan W. Monroe

Excerpt

[More information](#)*Costly Consideration and the Majority's Advantage*

11

theory of policy making such as ours should incorporate the effects of electoral goals (Smith 2007).

Obviously, legislators value some of the items on our list because they sometimes translate into electoral benefits. In this respect, our discussion already includes electoral considerations. But two other factors that can fundamentally affect a legislator's chances of winning reelection are the reputations, or brand names, of the legislator's party and of the other party. We expand our discussion of consideration costs to include such effects later in this section. Partly in order to lay the foundation for that discussion, however, we turn first to our conception of parties.

*The Majority and Minority Parties*

Scholars use the word *party* in different ways, referring to such diverse entities as voters registered to a given party, national or state party organizations, or co-partisans holding government offices. Occasionally, this gives rise to arguments that stem more from definitional differences than from substantive disagreement. In the congressional policy-making literature there is less disagreement about terminology; the term is commonly understood to refer to a party caucus in a particular legislative chamber and that caucus's efforts to act collectively.

However, even among Congress scholars there is no consensus about exactly what *collective efforts* means. There is broad agreement that parties create institutional structures to try to achieve goals that they pursue, but disagreement about what counts as part of these institutional structures. For example, though party leaders are clearly part of this structure, committee chairs are sometimes treated as part of the organization and sometimes not. Similarly, there is broad agreement that it entails attempts to overcome collective action problems in pursuit of shared goals, such as managing the party's brand name, passing policies desired by most caucus members, holding a majority of the chamber's seats, and claiming a disproportionate piece of the distributional pie. But there is disagreement about which of these goals matters, how much each matters, and how they interact. Finally, there is disagreement about what tools parties use to solve collective action problems and how successful these tools are.

Such differences, though often subtle, can have significant consequences for our understanding. Consider the hypothetical example of a Democratic committee chair using the chair's power to push through an alternative-energy bill loaded with pork. If the chair is seen as an agent of the majority party, the bill could be interpreted as evidence that the chair worked to foster the Democrat's reputation; or it could be interpreted as