Modeling Majoritarian Congressional Rule Changes in a Polarized Environment

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Legislative rules can have a profound impact on the legislative process. However, amid record levels of congressional polarization, little work has been done to project polarization's impact on congressional development through rule changes. This study theorizes that, in a polarized environment, Congress will act in accordance with a proposed Partisan Distributive Game, in which increased minority obstruction is met with majoritarian rule changes. This theory is applied to three case studies: the removal of the filibuster for Federal Judicial appointments, the enactment of Reed's rules in the late 19th Century, and the passage of the 1946 Legislative Reorganization Act. The study analysis of all three cases affirms the conclusion that congressional polarization is tied to majoritarian rule changes.

Introduction

Legislative rule making can have a profound effect on how the US Congress operates. Throughout American history, periods of legislative rule changes drastically altered the balance of power among parties, committees, and positions of leadership. These rules are often challenged by periods of high partisanship. The contemporary growing polarization of Congress has significant potential to impact its operations.[1] Proposals to end the Senate filibuster are gaining support. Bipartisan voting has continued to decrease. Cloture has been invoked at a rate that would have been almost unimaginable thirty years ago. Partisan contention has clearly made passing legislation much more difficult across both chambers, so it is fair to ask if more innovative rule changes may be enacted to prevent increasingly high levels of gridlock.

Examining the historical progression of American legislative rules offers clues on how high levels of partisan polarization could drive institutional change in the House and Senate. This paper examines the literature on congressional decision-making, polarization, and congressional development to theorize how high periods of polarization may affect congressional rules and norms. It then ties this theory to a case study of recent changes in Senate behavior around Federal Judiciary appointments by Keith Whittington. It also evaluates how polarization shaped the immense rule changes carried out by Speaker Thomas Reed in the late 19th century House of Representatives. As a contrast, the paper assesses changes evolved in the absence of polarization via the 1946 Legislative Reorganization Act. Each case study reinforces the same process-based theory. The study finds that high periods of congressional party polarization drive minority parties to break norms of behavior, weaponize congressional rules to obstruct voting, and act to deny the majority's agenda. In retaliation, the majority eventually removes these obstructive abilities, resulting in a majoritarian set of institutional rules. This behavior is not followed in a period of low party polarization, leading to the conclusion that these changes are specific to polarized conditions.

[1] Jeff Lewis, "Polarization in Congress," *VoteView*, June 4, 2020, https://www.voteview.com/articles/party_polarization.

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Establishing Predicted Behavior

Disjointed pluralism is a useful lens to predict how polarization might alter the development of congressional rules and norms. This lens suggests motivations of Congressmembers in a polarized environment and forecasts congressional behavior during periods of high partisan conflict and ideological separation. Eric Schickler introduces disjointed pluralism as a model of competing interests that Congressmembers abide by when making legislative decisions. Specifically, he provides five factors that drive congressional decision-making: re-election interests, the interests' congressional capacity and power, interests in institutional power bases, party-based interests, and policy-based interests.[2] The orientation of these interests are responsible for both policy and procedural changes in Congress. Schickler claims that these interests collectively shape most changes in congressional institutions and that large changes cause reactionary counter-changes led by the disadvantaged interests.[3] Schickler's model suggests which interests might be most important under high levels of partisan polarization to determine how they might shape congressional behavior and legislative development.

Cynthia Farina presents one potential explanation of member priorities under polarization. She examines the literature on the causes of legislative polarization, finding evidence for three broad factors that have been linked to increased polarization.[4] None of the factors are shown to be the main cause of legislative polarization, but all three play a role and each connects to one of Schickler's congressional interests. Increasing polarization in the electorate ties closely to congressmembers' re-election interests, as a polarized electorate permits and rewards congressmembers for voting on party lines. An increase in partisan group strategy implies a strong partisan-based interest to vote down the party line. Finally, an increased salience of polarizing issues due to demographic changes results in congressmembers making polarizing votes to advance their policy interests. Overall, in periods of high polarization, acting in a partisan matter benefits a member's electoral odds, party, and preferred policies.

Hahrie Han and David Brady come to a similar conclusion when examining polarization from a historical development standpoint. They look at the relatively de-polarized environment in the 1950s and 60s to examine changes in levels of polarization. They find that polarization increases as members in competitive or opposing-party districts become less common, determining that legislative polarization increases when a congressmember's partisan and electoral interests align.[5] Like Farina, they assess that in a polarized environment, members are able to act in the interest of both their electoral and partisan needs. Reaffirming the issue-based element of polarization, Matthew Levandusky ties polarization to partisan issue-alignment. He argues that, in a polarized environment, more and more issues become separated along partisan lines. Voters and members take cues from parties that stake out opposing claims along almost every issue.[6] This analysis reaffirms the conclusion that periods of high polarization can

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[2] Eric Schickler, "Disjointed Pluralism and Institutional Change," *Disjointed Pluralism* (Princeton, NJ: Princeton University Press, 2001), 5.

[3] Schickler, "Disjointed Pluralism", 12-18.

[4] Cynthia Farina, "Congressional Polarization: Terminal Constitutional Dysfunction?," *Columbia Law Review* 115 (2015): 1690–1738.

[5] Hahrie Han and David Brady, "A Delayed Return to Historical Norms: Congressional Party Polarization after the Second World War," *British Journal of Political Science* 37, no. 3 (2007): 505–31.

[6] Mathew Levendusky, *The Partisan Sort: How Liberals Became Democrats and Conservatives Became Republicans* (Chicago, IL: University of Chicago Press, 2009).

tie together congressional interests along the electoral, partisan, and ideological dimensions.

How polarization affects congressional rules and norms naturally follows identifying the interests that congressmembers prioritize in periods of high polarization. Barry Weingast breaks down congressional development into a rational choice model consisting of two opposing "games."[7] The Distributive Legislative Game posits a congressional strategy of achieving their preferred policy by forming the smallest winning coalition of fellow members who are adjacent in policy preferences.[8] In opposition is the Universalism Legislative Game, where members form unanimous coalitions because of the greater ease and electoral rewards of group policymaking.[9] Under periods of high polarization, members will best represent their ideological and electoral interests when following their party. Thus, the electoral reward that Weingast attributes to group policymaking is minimal in a polarized environment, while the policy-interest cost of compromising with the opposed party is much larger. This means that members will be less eager to play the Universalism Legislative Game in periods of high polarization. They will instead show a preference for playing the Distributive Legislative Game and forming the smallest winning coalition. Because ideological interests are typically aligned with partisan ones in a polarized environment, the game transforms into one where the majority party will attempt to pass legislation without support from the ideologically distant minority party members. Under such a game, it is likely that the minority (without any ability to advance legislation itself) will be relegated to doing whatever it can to oppose the interests of the majority. The majority, in turn, will focus on increasing its ability to legislate without support from the other party. Because this is a party-centric interpretation of Weingast's Distributive Legislative Game, it can be called the Partisan Distributive Game.

This game largely results in continued majoritarian rule changes in legislative institutions. But, like the periodization approach taken by Stephen Skowronek to evaluate the Presidency, it seems likely that political conditions shape whether majoritarian rule changes are made rather than thinking of a continuous change over secular time.[10] According to the game, it is the presence of high polarization and the interest alignment it causes that drives majoritarian institution changes. Therefore, institutions should become more or less majoritarian as polarization increases and decreases.

Application 1: Whittington's Analysis of Federal Judicial Appointments

The Partisan Distributive Game plays out in the evolution of Senate rules around Judicial appointments. Keith Whittington outlines how, while "nominations to seats on the lower federal courts were once routinely confirmed with little controversy," lower court nominations have become "hotly contested" since the Clinton administration.[11] In the Clinton administration, parties showed increasing interest in advancing ideological agendas through the courts. Due to diverging perspectives between the parties on what makes a candidate

[7] Barry Weingast, "A Rational Choice Perspective on Congressional Norms," *American Journal of Political Science* 23, no. 2 (1979): 245–62, https://doi.org/10.2307/2111001.

[8] Weingast, "A Rational Choice Perspective", 3.

[9] Weingast, "A Rational Choice Perspective", 8.

[10] Stephen Skowronek, *Presidential Leadership in Political Time: Reprise and Reappraisal*, 3rd ed., rev.expanded (Lawrence, KS: University Press of Kansas, 2020).

[11] Keith Whittington, "Partisanship, Norms, and Federal Judicial Appointments," *Georgetown Journal of Law & Public Policy* 16, no. 2 (2018): 521.

ideologically acceptable, the Senate began to "[obstruct] circuit-court nominations at a historically unprecedented rate."[12] The opposition party in the Senate found that, because of stark partisan and ideological separation from the President, it preferred to wait to confirm justices until they had the power to make the choice rather than compromise with the President. Although this contestation broke norms of expected behavior, it was permissible by current legislative rules. Whittington argues that, because of the modern ideological separation in the polarized Senate, presidents were no longer able to find "compromise candidates" that could gain sufficient votes from the opposite party to invoke cloture and be nominated.[13] Because of this increasing resistance to a formerly uncontested set of votes, the Democratic Senate majority during the Obama administration responded by taking the so-called nuclear option. This rule change removed the filibuster for judicial nominees and allowed the Senate to confirm as many nominees as possible when the Senate and the presidency were controlled by the same party.[14] Whittington adds that this was only possible because Senators believed they were not electorally damaged by the obstruction of nominees and may have even benefited from it.

Whittington's example shows how high levels of polarization led both sides to play the Partisan Distributive Game. The opposition party did not have enough ideological overlap with the President's party to find candidates that were acceptable to both sides, or even to get to 60 votes when the President's party held the Senate majority. There was also no electoral incentive for opposition Senators to vote for the president's nominees. Instead, the opposition party did what was in their best interest: breaking norms by voting down nominations when they had the majority and obstructing nominations through the filibuster when they were in the minority. As predicted by our Partisan Distributive Game, the president's party eventually adjusted the Senate rules to allowing confirmation of justices with just majority party support.

Application 2: The Gilded Age and Reed's Rules

As a highly polarized period with massive shifts in congressional rules, the late 19th century House of Representatives is another opportunity to assess the Partisan Distributive Game. DW-NOMINATE spatial analysis places the 1880s and 90s among the most polarized periods since the Civil War and analysis of voting constituencies shows both parties having clearly polarized voting bases.[15] Then-Speaker of the House Thomas Reed implemented a set of rules that drastically changed the operation of Congress by reducing the obstructive ability of the minority party and increasing the strength of the Speaker. These changes resulted in a much more majoritarian system. Since this period had both a highly polarized environment and majoritarian rule change, it should follow the rules of the Partisan Distributive Game. A deeper qualitative assessment of the congressional procedures at the time and why the change took place can reveal whether this was the case.

The conditions which spurred Reed to propose such bold institutional change are important to understand. After Reconstruction, the minority party increasingly exploited rulebook

[12] Whittington, "Partisanship", 525.

[13] Whittington, "Partisanship", 531.

[14] Whittington, "Partisanship", 532.

[15] Lewis, "Polarization in Congress"; Richard G. Forgette, "Reed's Rules and the Partisan Theory of Legislative Organization," *Polity* 29, no. 3 (1997): 375–96, https://doi.org/10.2307/3235312.

opportunities to obstruct House order. They turned to the frequent use of dilatory tactics and motions such as the disappearing quorum, in which members of the minority would call for a vote to verify the presence of a quorum and not answer when their names were called. This meant that a quorum could not be established and votes to pass legislation could not be held unless the entire majority party was present.[16] As a result, the majority party was "at a local nadir of relative agenda power" and the House "found it exceedingly difficult, if not impossible, to act when a determined minority opposed action."[17] Reed himself recognized this growing obstruction, speaking against it several times even while in the minority. Writing during his time as Speaker, he noted "for the last dozen years there has been a steady determination on the part of powerful men to reduce the business of [the House] to a minimum."[18]

The Partisan Distributive Game expects obstruction to stem from the minority party's greater partisan motivations and decreased incentives to compromise with the majority. Congressional speeches made in favor of the obstruction-enabling rules certainly indicate that this was the case. In 1880, speaking against an amendment that would prohibit the 'revolutionary' disappearing quorum, Representative McLane, a member of the Republican minority, spoke that he would rather "resort to a revolutionary proceeding than submit to the arbitrary and tyrannical conduct of a majority."[19] This statement was met with cheers from the Republican side of the chamber, indicating that the debate over these rules was related to party conflict. McLane and his Republican peers believed that continued obstruction was in their best interest as a party, leading to the strong approval for continuing the procedural status quo.

In 1890, when Democrats were in the minority and Reed had begun implementing his new set of majoritarian rules, Representative Homan also spoke in favor of obstruction, calling the proposed changes partisan and unconstitutional while praising past examples of members spearheading efforts to deny legislation. Upon close examination, we can see that Homan's appeal was also laced with his own partisan interests. In defense of minority obstruction, he lamented rising spending and lawmaking and objected to potential increases in both under Reed's majoritarian rule, saying that "many very sensible men believe that the curse of our age is too much legislation, not too little."[20] With this argument, Homan reveals the partisan motivation behind his support for continued obstruction. The Democratic party at the time broadly supported decreased federal involvement, and Homan believed continued obstruction would help maintain this goal.[21]

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[16] Gary Cox and Mathew McCubbins, "Chapter 4: The Primacy of Reed's Rules in House Organization," in *Legislative Leviathan Revisited*, n.d., 14, https:/law.yale.edu/sites/default/files/documents/pdf/mccubbins.pdf.

[17] Cox and McCubbins, "Primacy of Reed's Rules" 14; Joseph Cooper and Cheryl D. Young, "Bill Introduction in the Nineteenth Century: A Study of Institutional Change", *Legislative Studies Quarterly* 14, no. 1 (1989): 95, https://doi.org/10.2307/440092.

[18] Thomas Reed, "Rules of the House of Representatives", *Teaching American History* (blog), March 31, 1889, https://teachingamericanhistory.org/document/rules-of-the-house-of-representatives/; *Congressional Record*, vol. 15 (Washington, DC: Library of Congress, 1884), 868; *Congressional Record*, vol. 10 (Washington, DC: Library of Congress, 1880), 578-579.

[19] *Congressional Record*, 1880, 579.

[20] *Congressional Record*, vol. 21 (Washington, DC: Library of Congress, 1890).

[21] "Joan Waugh's Gilded Age Homepage", accessed April 11, 2022, http://www.sscnet.ucla.edu/history/waughj/classes/gildedage/private/gilded_age_politics/history/political_culture.html.

However, despite Homan's assertions that the House was doing "too much legislating," the increasing rate of both obstruction and bill introduction meant that the House was able to take on just a small amount of the bills it had to consider. Reed certainly agreed with this claim, saying in 1889 that "the House does but eight percent of its business."[22] The inefficiencies were also recognized a decade earlier in 1880 when the House made a comprehensive change to the rules of bill introduction and consideration. These changes were "not radical" and focused on increasing efficiency and organization.[23] However, these changes proved to be rather ineffective, failing to "establish an order of business that was both efficient and fair."[24] This environment of high obstruction and business completion set the stage for Reed to implement new majoritarian rules as the Speaker.

Taking power in 1889, Reed was determined to purge means of obstruction from the House rules. His primary motivation appears to have been non-partisan, as he viewed his proposed rules as a "consistent system, founded on common sense, and sanctioned by the experience of mankind." As mentioned, he spoke against obstruction even while in the minority.[25] However, his fellow party members did not hold such definite beliefs against obstruction. While in the minority for eight years during the 1880s, most of the Republican party took part in legislative obstruction and opposed efforts to change the House rules.[26] Yet, once in the majority in 1889 and 1890, they threw their support behind the Speaker's overhaul of the rules. Therefore, the Republican majority followed the Partisan Distribution Game by reforming rules to create a more majoritarian system when it served their partisan, ideological, and electoral interests. How the changes served their partisan interests was clear: removing obstruction allowed for the Republicans to seize more procedural control over the House as the majority.

Their ideological interest was also best served by overhauling the House rules. Not only did the Republicans have the House majority, but they held united government across the House, Senate, and Presidency for the first time in 14 years.[27] This rare window increased the urgency to pass policies that the members of the party ideologically agreed with. The most notable of these policy proposals was the McKinley tariff. Tariffs were perhaps the most polarizing issue of the period: efforts to reform the tariff system failed in the previous two congresses and tariffs became the leading issue in the 1888 congressional campaign.[28] Not only that, but tariffs had been the chief campaign promise of their party's new President, Benjamin Harrison.[29] Rule changes were the only way to get around Democratic obstruction and capitalize on this rare opportunity to pass legislation that was very important ideologically to their party.

Finally, House Republicans' electoral interests were also best served by removing obstruction. The 1888 election further divided Republican and Democratic electoral bases along an agricultural versus industrial split. Passing legislation like the tariff was the best way for

[22] Forgette, "Reed's Rules", 386.

[23] Cooper and Young, "Bill Introduction in the Nineteenth Century", 22-24.

[24] Cooper and Young, "Bill Introduction in the Nineteenth Century", 91.

[25] Thomas Reed, "Rules of the House of Representatives."

[26] Forgette, "Reed's Rules", 384.

[27] Forgette, "Reed's Rules", 386.

[28] Forgette, "Reed's Rules", 385.

[29] Forgette, "Reed's Rules", 386.

House Republicans to maintain support for the base that had just voted them into the majority. The convergence of these three interests aligns with the game's theoretical predictions. Following the partisan distributive game, House Republicans served their three converging interests by supporting Speaker Reed in passing a set of rules that drastically increased the majority party's hold on House procedures.

Application 3: The 1946 Legislative Reorganization Act

In contrast to the previous two applications, the 1940s were a period of comparatively low polarization. Within both the House and Senate, parties demonstrated the lowest median ideological gap recorded by DW-NOMINATE.[30] This period also saw the highest overlap between Democratic and Republican members, marked by "low levels of internal [party] cohesion and high levels of intra-party overlap."[31] This lessened partisan behavior was in part due to the unique congressional voting bases in the period, which featured a high amount of cross-pressured legislators (e.g., a Republican elected by a liberal-leaning district.)[32] In this period, neither members' ideological nor electoral interests are strongly aligned with their partisan interests, so it does not fit the conditions of the Partisan Distributive Game. Rather than minority obstruction followed by majoritarian rule changes, Congress at this time conducted bipartisan rule reform meant to increase overall institutional strength by passing the 1946 Legislative Reorganization Act (LRA).

From its onset, the development of the LRA strayed from the partisan focus that both the filibuster repeal and the enaction of Reed's rules were tied to. After a committee of political scientists urged Congress to modernize to better manage the rapidly growing federal bureaucracy, the Joint Committee on the Organization of Congress[33] delivered a unanimous report of suggested changes.[34] The report's suggestions, including streamlining the committee system, increasing staff resources and expertise, and increasing committee supervision of the executive branch, formed the basis of the successfully passed LRA.[35]

Additionally, while the Joint Committee's report recommended centralized party policy committees, the House removed this provision, instead leaving more power distributed amongst the committee chairs.[36] In fact, this decision was made precisely because members lacked the strong party ties of a polarized Congress. Speaker of the House Sam Rayburn led the effort against the party policy committees due to the belief that his thinly held together party coalition was threatened by imposing a centralized policy agenda.[37]

The lack of congressmember interest convergence and associated low polarization of the 1940s resulted in a pivot away from the Partisan Distributive Game, exactly as predicted. The rule

[30] Han and Brady, "A Delayed Return to Historical Norms", 509.

[31] Han and Brady, "A Delayed Return to Historical Norms", 509.

[32] Han and Brady, "A Delayed Return to Historical Norms", 517-521.

[33] The Committee was formed with six Democrats, five Republicans, and one Independent.

[34] Joseph Postell, "The Decision of 1946: The Legislative Reorganization Act and the Administrative Procedure Act Symposium", *George Mason Law Review* 28, no. 2 (2021): 619-22.

[35] Postell, "The Decision of 1946", 622-632.

[36] Postell, "The Decision of 1946", 630-32.

[37] Postell, "The Decision of 1946", 630-632.

changes adopted in the LRA focused on increased institutional strength rather than party or policy interests. The rejection of party policy committees demonstrated a rejection of centralized majority power.

Key Findings And Significance

Overall, the historical case studies in this paper affirm the proposed model. Increased polarization generally leads to an alignment of three congressional interests: the success of their party, ideological preferences, and reelection campaigns. Following these interests, the minority party is often led to leverage any powers they might have to restrict the majority's ability to pass legislation. In response, the majority will increase its ability to handle legislative tasks without bending to the minority's interests, generally by enacting rule changes that restrict minority rights and increase majoritarian power.

The effects of the Partisan Distributive Game might not be beneficial from a congressional effectiveness standpoint. Although majoritarian changes might make individual legislative institutions more effective at passing legislation, individual chambers of the legislature are unable to enact legislation alone. As exhibited in the case of both the removal of the filibuster for Judicial nominees and the enaction of Reed's rules, these changes can only effectively contribute to lawmaking when a party holds united government.

In contrast, the analysis of the 1946 Legislative Reduction Act affirms the flip side of the model. In a period of low polarization, Congress pivoted away from majoritarian rule changes and enacted bipartisan reform focused on increasing institutional strength.

In current times, with no indication of polarization slowing down, Congress will continue to follow the Partisan Distributive Game. Continued or increased use of minority obstruction in the House and Senate will likely be met by more majoritarian rule changes, likely including at some point the complete removal of the filibuster in the Senate. But these rules will not be beneficial for enacting new laws in times of divided government, which is the predominant governing environment.

Conclusion

This paper combined literature on Congressional decision-making, polarized environments, and legislative rule changes to develop a theory of how periods of high polarization affect Congressional procedure. Based on the aligned interests that occur during periods of partisan polarization, the theory projects that high polarization will result in the minority being increasingly obstructive. The majority reacts to this obstruction by making Congressional rules increasingly majoritarian. Both recent and historical examples support this Partisan Distributive Game as a valid explanation for congressional rule changes in a polarized environment. However, a more thorough examination of historical evidence is necessary to confirm the model's accuracy. The era of America's founding could be particularly interesting to explore, as it contained varying levels of party conflict while setting many of the congressional rules and norms that remain today. Additionally, further research should explore how Congressional rule changes might differ under different forms of polarization, such as the geographical polarization that spanned parties in the pre-Civil War Era.