

THE HEALING CONSTITUTION: UPDATING THE FRAMERS’ DESIGN FOR A HYPERPOLARIZED SOCIETY

*By: Stephen M. Maurer**

I. INTRODUCTION

“I . . . recognized that I’m going to get nothing done—nothing—unless [my Democratic opponents] . . . work with me and can work collaboratively.”

– Mitt Romney¹

To American ears, statements that legislation requires “reaching across the aisle” sound self-evident. How else could one reach a majority? Conversely, the idea that democratic politics can sometimes coerce² minorities and even the majority barely occurs to us. Yet, the history of European mass democracy is filled with coercive politics, including the Continent’s greatest catastrophes.³ One can of course take the American exceptionalist view that, in Sinclair Lewis’s sardonic phrase, *It Can’t Happen Here*.⁴ Still, it makes sense to worry. This paper takes the possibility seriously, arguing that theories of coercive

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¹ Tony Leys, *Leadership Profile: Mitt Romney Made Effort to Reach Across Aisle*, DES MOINES REG. (Dec. 30, 2011, 12:06 AM), <http://caucuses.desmoinesregister.com/2011/12/30/romney-made-effort-to-reach-across-aisle/> [https://perma.cc/KYU2-HKZS].

² The term “coercion” requires comment. Of course, all bargaining is coercive in the sense that both sides can and do threaten to walk away. In what follows, we exclude transactions where legislation is expected to benefit everyone and negotiation is limited to dividing the surplus. This includes both compromises where legislation is modified to reallocate rewards, and so-called “logrolling” transactions in which members trade “yes” votes to pass a package that benefits everyone on net. Instead, we focus on the special case where parties threaten to inflict *more* injury than simply blocking new legislation itself. Government-wide shutdowns, which indiscriminately interrupt previously agreed spending, are the archetype of such tactics.

³ Readers can find detailed case studies of representative European politics from the late nineteenth to mid-twentieth centuries at the Appendix.

⁴ See generally SINCLAIR LEWIS, *IT CAN’T HAPPEN HERE* (1935).

politics are a natural extension of the Framers' arguments to hyperpolarized societies. It also argues that well-designed institutions should minimize what the Supreme Court has called "... [the] large measure of 'unfairness' in any winner-take-all system,"⁵ especially when majority rule creates deeply held grievances in large swathes of the population. It then deploys these ideas to ask when the transition to coercive politics should be expected, whether it might sometimes be desirable, and how institutions can be reformed to better manage conflicts and promote an early return to the cooperative politics that most Americans say they want.

We proceed as follows. Section II argues that the behaviors that typify American politics, like many complex social systems, can change profoundly when key social variables (here, polarization) cross some critical threshold. It then presents a simple typology for cataloging the various possible types of polarization. Section III analyzes the simplest such regime and reviews the Framers' fear that the politics of compromise could tip into a pathological "tyranny of the majority." Section IV argues that the Framers' design actually fell into a second regime that targeted historically- and biologically- defined minorities. The next three sections describe a third type of polarization in which centrists find themselves sandwiched between warring extremists. Section V sets the stage by reviewing how Case 3 polarization led to the disastrous politics of late nineteenth- and early twentieth-century Europe. Section VI briefly reviews evidence for Case 3 opinion patterns in the contemporary United States. Finally, Section VII analyzes how Case 3 politics are likely to play out in American circumstances. Sections VIII and IX extend the model to include rule of law. Section X asks what reform can do to better manage coercive politics and facilitate a quick return to centrist politics when polarization subsides. Section XI presents a brief conclusion.

II. VISUALIZING POLARIZATION

"Pre-eminent . . . was the fact, difficult to grasp for one accustomed to political life in English-speaking nations, that the political opposition . . . was not a 'loyal' opposition . . . Rather, their aim was to take over the Republic and totally change its form."

— Richard Watt, *Dare Call it Treason* (1969)⁶

Legal analysis typically asks whether a particular set of rules, for example the U.S. Constitution, encourages desired behaviors, like consensus politics, and deters destructive ones, like tyranny. However, this only says that pathologies are *possible*. What we really want to know is whether they are *likely*. Sorting this out starts by identifying the relevant social variable(s). This paper adopts the common diagnosis that America's recent political crises stem from polarization.⁷ One benefit of this approach is that it dovetails with the Framers'

⁵ *Rucho v. Common Cause*, 139 S. Ct. 2484, 2500 (2019).

⁶ RICHARD M. WATT, *DARE CALL IT TREASON* 8 (1969) (describing French national politics from Dreyfus to the First World War).

⁷ See Yoni Appelbaum, *How America Ends*, ATLANTIC, Dec. 2019, at 1, 3, for a recent example.

own arguments, making it easier to identify natural extensions of the Constitution they wrote.

This Section begins the task by cataloguing the various polarization patterns our society might reasonably expect to encounter.⁸ One complication is that the term “polarization” is often used to denote both disagreement *and* intensity simultaneously. Our scheme addresses these separately.

A. *Visualizing Opinion*

Our goal is to explore how different polarization patterns affect politics. Fig. 1 starts the inquiry by summarizing the various ways that opinion can be distributed across voters. Here, the horizontal axis lists possible policy choices according to some ordered parameter, for example the rates that rich taxpayers could be asked to pay.⁹ The vertical axis then indicates how many citizens prefer each choice.¹⁰

Readers will note that Fig. 1 ignores intensity, i.e. the fact that some citizens have more passionately held opinions than others. This is a convenient way to analyze the Framers’ “one man, one vote” (“OMOV”) system in which each citizen’s preferences carry equal weight.¹¹ At the same time, we know that intensity plays a central role in politics and that any analysis that ignores this fact is necessarily incomplete. We supply this gap in the next section.

⁸ Like the Framers, we will say little about how polarization originates in the broader society. See CHARLES A. MURRAY, *COMING APART: THE STATE OF WHITE AMERICA, 1960-2010* (2012), for a provocative exploration of these issues. Alternatively, it might be reasonable to argue that no ideology can become mainstream unless it is supported by at least one dedicated media outlet. If so, the exceptional unity of American views from 1920 to the late 1960s mostly reflects the physics of broadcasting, where limited bandwidth shoehorned public discourse into just three networks. American politics was considerably more fractious in the nineteenth century when technology encouraged dozens of competing newspapers. Today’s 500-channel cable outlets have recapitulated this situation with a vengeance.

⁹ Many issues (e.g., abortion) present discrete rather than continuous choices. This would require us to redraw Fig. 1 as a bar graph. The technicality does not affect our arguments so long as the choices can be rank-ordered by severity.

¹⁰ Some readers will note that the vertical axis actually denotes what mathematicians call a “number density.” The distinction does not matter for what follows.

¹¹ We should note that OMOV is not identical to majority vote; more complex rules are also possible, notably including “Condorcet” systems in which voters are asked to rank-order their preferences in order to overcome well-known ambiguities in what constitutes the most popular choice. See, e.g., John O. McGinnis & Michael Rappaport, *The Condorcet Case for Supermajority Rules*, 16 SUP. CT. ECON. REV. 67, 67–71 (2008). We ignore these in what follows. The reason is that rank-ordering says nothing about the intensity of voters’ political passions. For example, Voter A might feel more strongly about every possible choice than Voter B. This would be completely invisible from rank-ordered ballots.

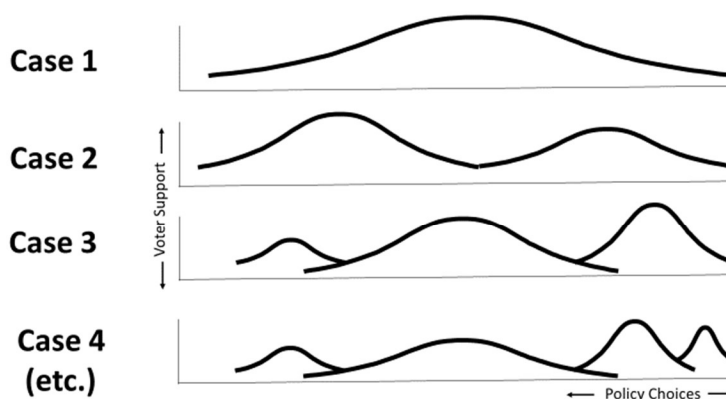


Fig. 1: Visualizing Polarization

In the meantime, we note that, like all social science models, Fig. 1 contains significant simplifications. Most obviously, it plots polarization as if only one issue existed. In principle, we could add more axes to show that voters can agree on some issues while disputing others. Historically, our simplification has worked remarkably well because of class divisions that convinced voters that income inequality both dwarfed and determined all other issues. Recent opinion polls show that voter responses continue to be highly correlated across issues.¹²

Finally, there is no *a priori* reason why our typology could not extend to Case 4 conflicts featuring more than two extremist groups. These, however, have been historically negligible.¹³ For Americans, the limitation is enforced by the two-party system, which biases politics toward Case 1 and 2 standoffs.

B. Visualizing Intensity

We have already said that OMOV ignores intensity. But intellectual history is filled with cases where partial theories could only be fully understood after expanding the analysis to include missing variables. This includes how the recognition of so-called “imaginary” numbers in mathematics explained the previously mysterious behavior of the “reals,”¹⁴ or how the discovery of invisible ultraviolet radiation in physics explained how certain flowers can shine

¹² See *infra* Section VII. This social fact is reinforced by modern political parties, which constantly hector their constituents to support each other’s priorities.

¹³ One of the most important twentieth-century examples of Case 4 politics involved the three-way struggle between monarchist, fascist, and communist parties in the early Weimar Republic. See *infra* text accompanying notes 211–17. The transitional nature of this example, in which the monarchist parties quickly became irrelevant, hints that Case 4 politics could be significantly unstable. This would be natural given the existence of substantial scale economies in organizing major political parties and/or network effects in voters’ decision to embrace a particular ideology.

¹⁴ ROGER PENROSE, *THE ROAD TO REALITY: A COMPLETE GUIDE TO THE LAWS OF THE UNIVERSE* 81–83 (2004).

so brightly on cloudy days.¹⁵ We argue below that the familiar politics of filibusters and government shutdowns is similarly incomplete without some theory of intensity.

We should, of course, be cautious. Like ultraviolet light, political intensity is fiendishly hard to measure. Worse, we know that politicians cannot be trusted to report their outrage honestly and, indeed, have every reason to exaggerate.¹⁶ At the same time, this should not deter us from asking whether intensity is a legitimate democratic criterion, how an ideal democracy would be designed if intensity were easily measured, or how existing institutions can better approximate this ideal. The task is formidable. At the most conceptual level, theorists have long debated how, and even if, intensity can be compared across humans.¹⁷ The best answer is that political systems cannot ignore the issue and that even partial solutions are worth implementing if they improve on intensity-blind OMOV rules.

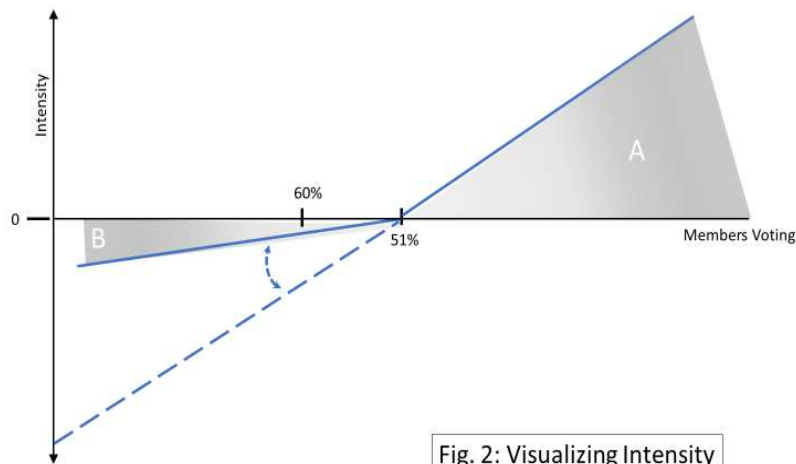


Fig. 2: Visualizing Intensity

A Baseline Model. Prudent in our ignorance, we adopt the simplest possible

¹⁵ Austa Somvichian-Clausen, *Pictures Capture the Invisible Glow of Flowers*, NAT'L GEOGRAPHIC (Feb. 23, 2018), <https://www.nationalgeographic.com/photography/proof/2018/february/glowing-flowers-ultraviolet-light/> [https://perma.cc/DF2Q-8SZ2].

¹⁶ The situation is further complicated by the notion that people who are passionate about a subject must know more—a fallacy particularly prevalent among fanatics. THE FEDERALIST NO. 1 (Alexander Hamilton) (cautioning against this fallacy: “we, upon many occasions, see wise and good men on the wrong as well as the right side of questions of the first magnitude to society. This circumstance, if duly attended to, would furnish a lesson of moderation to those who are ever so much persuaded of their being in the right in any controversy”).

¹⁷ Readers interested in the argument over interpersonal utility comparisons will find a concise survey of the literature in Christian List, *Social Choice Theory*, STAN. ENCYCLOPEDIA PHIL. (Dec. 18, 2013), <https://plato.stanford.edu/entries/social-choice/#MeaIntComWel> [https://perma.cc/NE Y2-MPYE].

model of intensity. Fig. 2 shows passion changing linearly from strong “Nay” votes on the left to comparably intense “Aye” votes on the right, with milder “swing” votes near the center. Our assumption that passion is greatest at the extremes is justified by history: Europe’s left/right divisions have deep roots in Western culture and are unlikely to go away.¹⁸

That said, we should not let Fig. 2 seduce us; however clear the intensity plot looks on the page, it is mostly invisible in life. Following the economics literature, we ignore what politicians *say* about their passion as “cheap talk” that reveals little of their true feelings.¹⁹ Instead, we focus on those instances where “actions speak louder than words,” i.e. when politicians must choose between holding and abandoning their positions in the face of some sanction. For the U.S. Congress, we will argue that the most informative decisions almost always measure the passion of swing voters near the center of Fig. 2. However, we should remember that extra-legal actions like political protests can supply information about more extreme views and that real-world politicians may sometimes use this data to infer intensity across voters.²⁰

We could, of course, postulate more complex curves than our simple linear figure.²¹ If we do not, it is because we know very little about what such refinements would look like. In the meantime, our straight line is already more reasonable than OMOV’s hidden assumption that intensity can be safely ignored because it is philosophically distasteful, empirically negligible, and/or roughly equal across voters.

Finally, our linear model is convenient. First, it permits a simple extension of the Framers’ OMOV rule. Since the horizontal axes in Figs. 1 and 2 are identical, multiplying our opinion and intensity plots point-by-point produces a weighted vote.²² Second, Fig. 2 provides a simple geometric intuition for when our intensity-weighted scheme’s outcomes agree with OMOV, i.e. that the area of Triangle A should be at least as large as Triangle B.²³ Crucially, this depends

¹⁸ For Case 3, we can also argue that the existence of deep valleys in Fig. 1 implies that the available compromises are incoherent or otherwise disfavored. For example, politicians in the abortion debate have tried hard to invent compromises based on viability outside the womb, how long the woman has carried the fetus, or whether she was raped. None are tenable for voters who hold more basic convictions that abortion should respect either “A Woman’s Right to Choose” or conversely “The Fetus’s Right to Life.”

¹⁹ See generally Joseph Farrell & Matthew Rabin, *Cheap Talk*, J. ECON. PERSP., Summer 1996, at 103, 117 (presenting economic analysis of how rational actors discount unsupported assurances).

²⁰ Extremist citizens often organize protests for and against proposed policies. The fact that these are costly in time and money—and sometimes lead to incarceration—evidences great sincerity. According to our linear model, a politician who saw protests on one side but not the other would be justified in assuming a similar imbalance across less vocal parts of the electorate.

²¹ These would appear as error terms to our linear estimate.

²² As before, our linear intensities model excludes more complex systems—for example, schemes that exaggerate or else cap weighting for very high intensities—as beyond current knowledge. Linear schemes might also be justified, for example, by the need to keep pathologically emotive “utility monsters” from outvoting everyone else. See generally JASON KUZNICKI, *ATTACK OF THE UTILITY MONSTERS: THE NEW THREATS TO FREE SPEECH* (2009), <https://www.cato.org/sites/cato.org/files/pubs/pdf/pa652.pdf> [<https://perma.cc/V72S-GGSV>] (referencing Robert Nozick).

²³ The argument also requires that Fig. 1 be symmetric around the swing vote.

on whether the pivot point, or “knee,” where the two triangles meet bends up or down. If up, OMOV and our intensity-weighted vote will always agree. We argue below that rules like filibusters and shutdowns are best understood as attempts to address cases where the knee bends downward instead.

C. Transitions

We have argued that polarization can exist in different states. But then consistency requires us to consider that society can transition back and forth between states and that this can radically change the country’s politics. This forces us to ask just when our Case 2 distribution crosses over into a qualitatively different Case 3. For reasons that appear below, we argue that the answer is surprisingly well-defined, with a critical threshold just below the point where the total vote for extremist parties exceeds fifty-one percent of the electorate.

This approach differs fundamentally from many political science and legal scholars whose arguments depend on modest extrapolations from history.²⁴ While these clearly have their place, we know from complex physical and social systems that such inferences can be dangerous. In this sense, Americans are like the physicist who has spent his life studying water between 35°F and 60°F. No matter how confident he might feel, we know that his predictions will fail badly at 32°F (melting) and 212°F (boiling). This article explores the argument that American politics can similarly suffer qualitative “meltdowns” as polarization enters new regions.

This is not to say that transitions, let alone history, is circular. When Case 1 consensus politics does return, our Case 1 beliefs could be entirely different than they were before.²⁵ Indeed, every fanatic dreams of founding the next centrist majority. In what follows, we deliberately study opinion without regard to substantive content, let alone the merits of rival proposals.

III. CASE 1: TYRANNY OF THE MAJORITY

“‘[T]here are 47 percent who are with him, who are dependent upon government . . . And they will vote for this president no matter what. . . . [M]y job is not to worry about those people. I’ll never convince them they should take personal responsibility and care for their lives.’”

— Mitt Romney²⁶

Today’s politicians look back on twentieth-century-style “bipartisanship”

²⁴ See generally PHILIP E. TETLOCK, *EXPERT POLITICAL JUDGMENT: HOW GOOD IS IT? HOW CAN WE KNOW?* (2005), for a comprehensive analysis of political predictions.

²⁵ For example, the dominant ideologies that emerged from the English, French, and Russian revolutions commanded only miniscule support at the outset. See generally CRANE BRINTON, *ANATOMY OF REVOLUTION* (rev. & expanded ed. 1965).

²⁶ Lucy Madison, *Fact-checking Romney’s “47 Percent” Comment*, CBS NEWS (Sept. 25, 2012, 10:57 AM), <https://www.cbsnews.com/news/fact-checking-romneys-47-percent-comment/> [<https://perma.cc/QK62-49PK>].

and “reaching across the aisle” with undisguised nostalgia.²⁷ But society changes, and so do the rules of the game. For the past decade or so, politicians have increasingly replaced compromises based on mutual benefit with deliberate gridlock, e.g. by blockading the president’s efforts to confirm Cabinet members²⁸ or forcing government shutdowns.²⁹ Significantly, the resulting pain burdens both sides indiscriminately.³⁰ If politicians nevertheless pursue these strategies, it must be because they think that their opponents are less passionate and will surrender first.

This Section reviews the Framers’ arguments for how cooperative politics was supposed to work, along with their overriding fear—amply justified by Greek and Roman history—that America could fall into a “tyranny of the majority” where half the citizenry oppressed the other half. This sets the stage for problems that the Framers either ignored or failed to anticipate. These include the special vulnerability of minority groups (Section IV) and three-way confrontations in which centrists fight two sets of extremists simultaneously (Sections V and VII).

A. *The Bipartisan Baseline*

We begin with the simplest type of polarization sketched in Fig. 1, i.e. a single-peaked “Case 1” bell curve. While the Framers probably imagined Congress as a simple image of the broader society,³¹ the rise of political parties

²⁷ See Andrew O’Reilly, *Michelle Obama Rebukes Holder, Clinton over Calls for Political Warfare*, FOX NEWS (Oct. 11, 2018), <https://www.foxnews.com/politics/michelle-obama-rebukes-holder-clinton-over-calls-for-political-warfare> [https://perma.cc/42YT-CWHC] (quoting U.S. Sen. Heidi Heitkamp: “I mean, I can’t imagine how you get anything done if you don’t bring civility back into politics, and that goes for both sides”); Doug Shoen, *Hillary and Holder Hurting Democrats with Their Amazing and Disgusting Comments*, FOX NEWS (Oct. 14, 2018), <https://www.foxnews.com/opinion/doug-schoen-hillary-and-holder-hurting-democrats-with-their-amazing-and-disgusting-comments> [https://perma.cc/MYY9-DPHV] (“The only way the Democrats can regain the majority in either or both houses of Congress is by being civil.”).

²⁸ John Kruzel, *Why Trump Appointments Have Lagged Behind Other Presidents*, POLITIFACT (Mar. 16, 2018), <https://www.politifact.com/truth-o-meter/statements/2018/mar/16/donald-trump/why-trump-appointments-have-lagged-behind-other-pr/> [https://perma.cc/T4EN-ZBED] (documenting the role of Democrat obstruction among various factors that have delayed Trump Administration confirmations).

²⁹ See, e.g., Gretchen Frazee & Lisa Desjardins, *How the Government Shutdown Compared to Every Other since 1976*, PBS (Dec. 26, 2018, 4:42 PM), <https://www.pbs.org/newshour/politics/every-government-shutdown-from-1976-to-now> [https://perma.cc/PL66-BEW7].

³⁰ This is not for want of trying. President Trump argued that shutting down the federal government would hurt Democrat voters more than Republicans. Felicia Sonmez & Christopher Ingraham, *Trump Claims Most Suffering Under Shutdown Are Democrats*, MERCURY NEWS (Dec. 28, 2018, 10:45 AM), <https://www.mercurynews.com/2018/12/27/trump-claims-most-suffering-under-shutdown-are-democrats/> [https://perma.cc/TFY4-QVE9].

³¹ The Framers probably imagined elections as a free-for-all with a crowded field of candidates. Given the difficulty of making a rational choice in such circumstances, voters would have ended up choosing winners almost at random. The resulting Congress would then have replicated the community in miniature. See, e.g., Letter from John Adams to John Penn (Mar. 27, 1776) (on file with the U.S. National Archives and Records Administration), <https://founders.archives.gov/>

running on agreed platforms fundamentally changed this.³² As Professor Downs has shown, the logic of party competition reliably imposes certain characteristics onto politics. The most important of these include:

Two Party System. Rational voters are reluctant to support parties that have no chance of winning. In America's first-past-the-post voting system, this usually dooms third parties to irrelevancy³³ so that public debate is reduced to two competing platforms.³⁴ This is very different from the situation in Europe, where proportional representation preserves ideological diversity by assuring small parties seats in Parliament.³⁵

Convergent Politics. Downs showed that politicians in a Case 1 two-party system always maximize votes by designing platforms to please the median voter.³⁶ This forces a strong convergence across party platforms that facilitates bipartisanship.³⁷

documents/Adams/06-04-02-0026-0003 [https://perma.cc/7LNZ-DJ4L] ("The Representative Assembly[] should be an exact Portrait, in Miniature, of the People at large.").

³² Scholars argue that the American system of two parties running on national platforms was not fully implemented before the 1840s. See, e.g., Martin H. Quitt, *Congressional (Partisan) Constitutionalism: The Apportionment Act Debates of 1842 and 1844*, 28 J. EARLY REPUBLIC 629, 651 (2008) ("In 1842[,] House Whigs . . . reduce[d] the size of their chamber for the first time. The lack of an uproar in the country [showed] . . . popular understanding of the new reality: The parties, not individuals, counted in Congress[.]").

³³ The election of 1860, which led to Lincoln's presidency and the American Civil War, underscores that transient exceptions can occur and present real danger.

³⁴ This is not necessarily a bad thing since all collective action must eventually reduce diverging viewpoints to a single plan. The only question is whether to effect this reduction early or late. Given that it is better to make decisions on full information, one might worry about discarding minority viewpoints too soon. However, transaction cost arguments suggest that trying to process too much information can lead to gridlock. The correct balance is, in general, ambiguous.

³⁵ Mary A. Inman, *C.P.R. (Change Through Proportional Representation): Resuscitating a Federal Electoral System*, 141 U. PA. L. REV. 1991, 1991–92 n.4 (1993) (showing that most non-U.S. democracies have adopted variants of proportional representation).

³⁶ ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 117–18 (1957). Downs's work was closely modeled on Hotelling's earlier analysis of inter-brand competition in economics. See generally Harold Hotelling, *Stability in Competition*, 39 ECON. J. 41 (1929). Downs expressly noted that the "stable politics" of a two-party system depended on what we have called "Case 1" assumptions, arguing that broader disagreements within the electorate would lead to multiparty systems. DOWNS, *supra*, at 121–22. See David Ronayne, *Extreme Idealism and Equilibrium in the Hotelling-Downs Model of Political Competition*, 176 PUB. CHOICE 389 (2018), for a useful review of recent literature exploring Downsian models with more than two parties. Professor Ronayne goes on to explore a model in which extremist-idealist candidates run even though they have no rational hope of winning. *Id.* at 390–91. This article differs from the earlier literature by arguing that extremist candidates can indeed win—but only by blocking centrist policy options so that voters' choices are limited to extreme outcomes that they would normally reject. *Id.* at 401. The Hotelling-Downs-Ronayne formalism ignores the possibility of coercive politics entirely, with the single exception that voters can punish insufficiently militant parties by refusing to vote. See, e.g., DOWNS, *supra*, at 260–76.

³⁷ Cf. *Davis v. Bandemer*, 478 U.S. 109, 144–45 (1986) (O'Connor, J., concurring) ("There can be little doubt that the emergence of a strong and stable two-party system in this country has contributed enormously to sound and effective government. . . . Nor do I believe that the proportional representation . . . is consistent with our history, our traditions, or our political institutions.").

Close Elections. The same imperative that drives convergent platforms guarantees that Case 1 races will often be tight.³⁸ In the real world where voters have limited information, the winner will normally be decided by small accidents and misunderstandings.

Downs's work assumed pure platform competition. However, American voters also care about candidates' individual trustworthiness and personalities.³⁹ If party discipline were perfect, every congressional bill would pass by the same margin. This is plainly false: party discipline is significantly incomplete, presumably because members like it that way.

Misjudging Intensity. We now ask how OMOV and intensity-weighted systems compare. Looking back to Fig. 2, imagine a typically Downsian result in which fifty-one percent of the legislature votes for a particular statute. If the losers feel less intensely than the winners, both systems will produce the same result provided that the area occupied by Triangle B is less than or equal to that occupied by Triangle A. When this happens, the legislation makes society happier on net even when some individuals dissent.

The trouble comes when a comparatively apathetic majority outvotes a bitterly resentful minority. Now Triangle B is larger than Triangle A, so that OMOV legislation makes the country unhappier on net. This is clearly problematic. At a practical level, it seems obvious that there is a limit to how many such laws the country can enact and still remain stable.⁴⁰ There is also the ethical issue that most people pay attention to their friends' feelings in everyday interactions. It seems strange that a just society would not honor some similar instinct in politics.

³⁸ DOWNS, *supra* note 36, at 117 (stating that dynamics drive both parties to converge "until practically all voters are indifferent between them"); Tyler Cowen, *Why Politics is Stuck in the Middle*, N.Y. TIMES (Feb. 6, 2010), <https://www.nytimes.com/2010/02/07/business/economy/07view.html> [<https://perma.cc/EN3N-W4Q8>]. The prediction is nicely illustrated by the exquisite closeness of many American races including, notoriously, George W. Bush's 537 vote margin over Al Gore in 2000. Ron Elving, *The Florida Recount of 2000: A Nightmare That Goes on Haunting*, NPR (Nov. 12, 2018, 5:00 AM), <https://www.npr.org/2018/11/12/666812854/the-florida-recount-of-2000-a-nightmare-that-goes-on-haunting> [<https://perma.cc/UVW4-WKBS>].

³⁹ See John Gramlich, *Partisans Agree Political Leaders Should be Honest and Ethical, Disagree Whether Trump Fits the Bill*, PEW RES. CTR. (Jan. 30, 2019), <https://www.pewresearch.org/fact-tank/2019/01/30/partisans-agree-political-leaders-should-be-honest-and-ethical-disagree-whether-trump-fits-the-bill/> [<https://perma.cc/PH4V-MU8L>]; Kevin D. Williamson, *We Need to Talk about Joe Biden*, NAT'L REV. (Sept. 1, 2019, 6:30 AM), <https://www.nationalreview.com/2019/09/joe-biden-unfit-for-presidency/> [<https://perma.cc/FZW4-EH26>], for recent examples of character issues in American politics.

⁴⁰ This is the kernel of truth in the instinct that large legislative initiatives, like Medicare (1961) and the Voting Rights Act of 1964, were stronger for being "bipartisan." *Medicare Signed into Law*, U.S. SENATE, https://www.senate.gov/artandhistory/history/minute/Medicare_Signed_Into_Law.htm [<https://perma.cc/E58B-43QE>]; *The Senate Passes the Voting Rights Act*, U.S. SENATE, https://www.senate.gov/artandhistory/history/minute/Senate_Passes_Voting_Rights_Act.htm [<https://perma.cc/AX73-L5YH>]. By comparison, the Affordable Care Act, which finally passed by a procedural maneuver along party lines, has created seemingly endless bitterness. See *Affordable Care Act (ACA) & Health Care and Education Reconciliation Act of 2010 (HCERA)*, U. MINN. L. SCH., <https://libguides.law.umn.edu/c.php?g=125769&p=906254> [<https://perma.cc/P58R-LHML>].

B. Tyranny of the Majority

The Framers knew that Case 1 democracies could easily slide into tyrannies where a razor thin majority exploits the minority.⁴¹ Indeed, Greek and Roman history is filled with examples.⁴² The reason is that OMOV's intensity-blind voting enables a kind of arbitrage by which tyrants buy votes cheaply from a nearly-indifferent majority, and then use them to outvote a passionate minority.

In practice, the Framers hoped that rational men could be trusted to side against tyranny regardless of their immediate interests.⁴³ After all, today's winners know that they could just as easily be targets tomorrow.⁴⁴ This however meant that they had to trust the losers to show similar forbearance when the situation was reversed.⁴⁵ Economists have formalized this logic by analyzing "trust games" where players trade favors that are neither simultaneous nor enforceable by contract.⁴⁶ According to the so-called "Folk Theorem," such systems are indeed stable so long as the exchanges are expected to continue indefinitely.⁴⁷ That said, there is also instability: as soon as one player violates

⁴¹ THE FEDERALIST NO. 51 (James Madison). THE FEDERALIST NO. 10 (James Madison) ("If a faction consists of less than a majority, relief is supplied by the republican principle[.]"). *Id.* (illustrating that this leaves protecting against a majority as ". . . the great object to which our inquiries are directed").

⁴² The most influential examples concern Athens in the fifth and sixth centuries B.C. Here, a society divided between violently hostile aristocrat, merchant, sailor, and small farming classes oscillated between rules-based democracy and tyrannies in which one group seized power to pursue its interests. *See generally* CARLOS GOMEZ, THE ENCYCLOPEDIA OF ANCIENT GREECE (2019) (describing Athenian history, including the rise of Peisistratus, Hippias, Hipparchus, Alcibiades, and other tyrants).

⁴³ *Davis v. Bandemer*, 478 U.S. 109, 152 (1986) (O'Connor, J., concurring) (noting that the plurality's review of political questions is based on the assumption ". . . that elected candidates will not ignore the interests of voters for the losing candidate, and . . . that 'the power to influence the political process is not limited to winning elections'").

⁴⁴ THE FEDERALIST NO. 51 (James Madison) ("[E]ven the stronger individuals are prompted, by the uncertainty of their condition, to submit to a government which may protect the weak as well as themselves; so, in the former state, will the more powerful factions or parties be [gradually] induced, by a like motive, to wish for a government which will protect all parties, the weaker as well as the more powerful."). *See also* THE FEDERALIST NO. 62 (James Madison) ("It will be of little avail to the people, that the laws are made by men of their own choice, if the laws . . . undergo such incessant changes that no man, who knows what the law is to-day, can guess what it will be tomorrow."). *Id.* (stating that, without stability, "no great improvement or laudable enterprise can go forward which requires the auspices of a steady stream of national policy").

⁴⁵ A narrower variant of the argument depends on social mobility: the member who finds himself in the middle tax bracket today could still vote against taxing the upper bracket because he hopes to join them.

⁴⁶ *See* STEPHEN M. MAURER, SELF-GOVERNANCE IN SCIENCE: COMMUNITY-BASED STRATEGIES FOR MANAGING DANGEROUS KNOWLEDGE 127–28 (2017), for a short overview of trust and reputation games.

⁴⁷ *See, e.g.,* STEVEN TADELIS, GAME THEORY: AN INTRODUCTION 190–96 (2013), <https://procspero.keybase.pub/%5BMath%5D%20Probability%20and%20Statistics/Game%20Theory%20-%20An%20Introduction.pdf> [<https://perma.cc/Y6QG-Z826>]. The Folk Theorem owes its ironic name to the fact that the scholars who discovered it never published and so remain anonymous. *Game Theory III: Folk Theorem*, POLICONOMICS, <https://policonomics.com/lp-game-theory3-folk-theorem/> [<https://perma.cc/HPL7-43PZ>].

the dominant principle, every other player immediately revises his trust estimate downward. This can lead to still more violations and a downward spiral.⁴⁸

C. Remedies

The Framers hoped that democracy was inherently stable, i.e. that enlightened self-interest would prevent tyranny. Apart from the presidential veto, however, they placed few procedural checks on Congress's ability to pass abusive legislation. This gap was partially filled by the U.S. Senate, which spent most of the next two centuries experimenting with a variety of rules and institutional safeguards.⁴⁹

Supermajorities. Observers often cite supermajorities as an obstacle to majority tyranny.⁵⁰ If the goal is to prevent armed insurrection, a numerical criterion is probably sufficient to keep the number of dissenters manageable. The surprise is that supermajorities can also encode fairness, or at least limit outrage. To see how they do this, return to Fig. 2. We have said that Triangle B is sure to be larger than A when the knee is flat or points downward. Adding a supermajority changes this by moving the deciding "swing" vote to the left, for example to the point marked "sixty-one percent." This ensures that A's area will exceed B's for all but the sharpest "knees."

The problem with this fix is that the supermajority in any particular case will always be too small or too large. When it is too small, OMOV generates net negative intensity just like before. When it is too large, it empowers what the Framers called a "pertinacious minority" to force its views on the majority.⁵¹ The political system would be much more efficient if it could find a way to turn the supermajority "off" and "on" depending on intensity. The filibuster goes some distance to doing this.

Filibusters. The dominant method for accommodating intensity from the mid-nineteenth to early twenty-first century was the Senate's "filibuster" rule. It provided that a fixed number of senators—most recently forty—could halt all

⁴⁸ See, e.g., TADELIS, *supra* note 47, at 198.

⁴⁹ The question remains why this role lodged itself in the Senate. The most likely answer is that the President, being a single human being, often sided with the majority. Conversely the House, being elected most often, was the most democratic body. This made it a hotbed for fevers that the Framers sought to guard against.

⁵⁰ For a typical instance, see *Supermajority Vote Requirements*, NAT'L CONF. ST. LEGISLATURES, <https://www.ncsl.org/research/elections-and-campaigns/supermajority-vote-requirements.aspx> [https://perma.cc/FKV4-V8GT] ("Supermajorities are intended to prevent a 'tyranny of the majority.'").

⁵¹ THE FEDERALIST NO. 22 (Alexander Hamilton) ("[T]here is commonly a necessity for action. The public business must, in some way or other, go forward. If a pertinacious minority can control the opinion of a majority, respecting the best mode of conducting it, the majority, in order that something may be done, must conform to the views of the minority; and thus the sense of the smaller number will overrule that of the greater, and give a tone to the National proceedings."). On the face of things, one might expect this "minority tyranny" to happen just as often as the majority kind, in which case the benefits and costs would exactly cancel. If we do not believe this, it must be because the gains from expropriating minorities make "majority tyranny" more profitable so that it happens more often.

new legislation unless and until the majority stopped trying to pass a particular bill.⁵² Given that every senator needs to pass legislation to win re-election, the filibuster inflicted pain more or less equally. But as the pain dragged on, those who cared least—moderates near the deciding swing vote—were increasingly tempted to defect to whichever side seemed closest to winning. At the same time, congressmen on the steeper side of the knee felt more strongly by definition, and thus were less likely to defect. If the “Ayes” prove themselves able to outwait the “Nays,” we can reasonably infer that Fig. 2’s “knee” points upward. This system features various strengths and weaknesses:

Measurement. The contest takes place in the interval between majority (fifty-one percent) and supermajority (say, sixty-one percent) rule and ends when defectors drive the vote total outside this range. This process implicitly probes the feelings of perhaps ten potential defectors, which seems a respectable sample. At the same time, the procedure is significantly imperfect since sampling near the knee can be imprecise⁵³ and defections are subject to gamesmanship.⁵⁴

Cost. Defectors represent, more or less by definition, the Senate’s least passionate members. This minimizes the amount of pain that must be inflicted to obtain a signal and is, to that extent, economical. We also expect the contest to end as soon as one side or the other decides that it is going to lose.⁵⁵ If this happens quickly enough, most of the pain can be avoided. Indeed, many filibusters will never be launched at all.

Scope. The filibuster ignored minorities with fewer than forty members. This can be rationalized by assuming that very few knees are sharp enough to reverse the OMOV result when Triangle B is radically foreshortened. The more careful answer is that increasing the required supermajority would simultaneously improve the estimate and incur more pain. Very large

⁵² S. Res. 285, 113th Cong. Rule XXII.2 (2013).

⁵³ We have already said that our deliberately simple model assumes that individual senators’ opinions (a) are evenly distributed across the available policy options (Fig. 1), and (b) the intensity of their views increases with distance from centrist political views (Fig. 2). This makes it reasonable to worry that substantial departures from these assumptions could mislead supermajority rules into overestimating total intensity for one side or the other. The good news is that empirical studies have shown that individual senators’ voting records are indeed uniformly distributed in the way Fig. 1 suggests. See, e.g., PETER C. HANSON, RESTORING REGULAR ORDER IN CONGRESSIONAL APPROPRIATIONS 1 (2015), <https://www.brookings.edu/research/restoring-regular-order-in-congressional-appropriations/> [<https://perma.cc/VR8S-TH68>]. The fact that the Senate’s swing voters are overwhelmingly moderates similarly confirms that Fig. 2’s assumptions are reasonable. See, e.g., Matthew Yglesias, *Swing Voters are Extremely Real*, VOX (July 23, 2018, 9:30 AM), <https://www.vox.com/2018/7/23/17575768/swing-voters-exist> [<https://perma.cc/V5NA-4YVL>].

⁵⁴ Defections can take place in both directions. However, early defections also change members’ estimates of who will win. This means that a burst of defections on one side may stampede other members into believing that they are on the losing side so that they too defect. The resulting cascade may sometimes let the weaker side win.

⁵⁵ The most famous American example is President Nixon’s decision to leave office after three Republican Senators convinced him that he could not muster enough votes to defeat impeachment. See Leonard Garment, SPARTACUS EDUC., <https://spartacus-educational.com/JFKgarment.htm> [<https://perma.cc/L39J-VGJG>].

supermajorities would then create the opposite error by making measurement dependent on the most extreme, if not the craziest of the Senate's 100 members.

One would like to do better, i.e. perform the same measurement with less pain. Here, it is worth noting that filibusters inflict *both* political *and* personal pain, with the latter including everything from the inconvenience of giving marathon speeches⁵⁶ to fatal heart attacks.⁵⁷ This gives politicians the chance to trade high principle against personal comfort. However shabby that might seem, substituting personal suffering for national gridlock offers vast cost-saving to society.⁵⁸

Vetoes. The Constitution gives the President the power to veto congressional legislation subject to a two-thirds override.⁵⁹ This is oddly symmetric to the filibuster since it allows the president to turn the supermajority off and on at will. There is also the deeper similarity that invoking the veto causes the president pain since the balked majority is more likely to vote against him at the next election.⁶⁰ The obvious downside of vetoes is that they are only exercised when the president is in the minority. Still, it seems better to have a safeguard that works in some cases than none at all.

D. Endogeneity

The most striking feature of all these institutions is that—excepting the veto—Congress *chose* to adopt them *after* the Constitution existed. This implies that legislators wanted and kept them in their own self-interest.⁶¹ To understand

⁵⁶ Jimmy Stewart most famously dramatized giving this type of speech. MR. SMITH GOES TO WASHINGTON (Columbia Pictures 1939). U.S. Sen. Ted Cruz notoriously read bedtime stories as part of his twenty-one-hour speech during the 2013 shutdown. Meagan Fitzpatrick, *Why Ted Cruz Read Green Eggs and Ham in the U.S. Senate*, CBC NEWS (Sept. 25, 2013, 8:33 AM), <https://www.cbc.ca/news/world/why-ted-cruz-read-green-eggs-and-ham-in-the-u-s-senate-1.1867499> [<https://perma.cc/HZN3-ABMC>].

⁵⁷ David R. Mayhew, *Supermajority Rule in the U.S. Senate*, 36 PS: POL. SCI. & POL. 31, 33 (2003) (describing U.S. Sen. Majority Leader Joseph Robinson's death in 1937).

⁵⁸ The number of Congressmen who retire when they realize that their party is about to lose its majority shows that personal power and fringe benefits matter deeply to politicians. Deirdre Shesgreen, *House Republicans are Retiring in Drove. What's Pushing Them Out?*, USA TODAY (Jan. 31, 2018, 6:00 PM), <https://www.usatoday.com/story/news/politics/2018/01/31/house-republicans-retiring-drove-amid-gridlock-gloomy-election-forecast-and-scandal/1084809001/> [<https://perma.cc/RHC6-UZD8>] (highlighting members who retire rather than face the prospect of losing majority and/or chairmanships).

⁵⁹ U.S. CONST. art. I, § 7, cl. 2.

⁶⁰ One might have thought that the Twenty-second Amendment's two-term limit would make lame duck presidents immune to sanctions. Party discipline seems to have suppressed this effect. *But see Pardon Probe: Marc Rich*, PBS NEWS HOUR (Feb. 8, 2001, 12:00 AM), <https://www.pbs.org/news/hour/show/pardon-probe-marc-rich> [<https://perma.cc/2WGX-4Z98>]. The discipline is backed by strong rewards since well-behaved former Presidents can expect to exert influence and receive benefits—ranging from reputation to cash speaker fees—long after leaving the White House. Michael Kruse, *On Talk Circuit, George W. Bush Makes Millions but Few Waves*, POLITICO (June 7, 2015, 5:02 PM), <https://www.politico.com/story/2015/06/on-talk-circuit-george-bush-makes-millions-but-few-waves-118697> [<https://perma.cc/N8HV-MUZX>].

⁶¹ Standard accounts usually stress that the filibuster emerged inadvertently from seemingly

their reasoning, consider the filibuster. On the one hand, frustrated members of the majority could see that abolishing the tactic would immediately win today's argument. But they also knew that this would leave them defenseless if some new majority targeted their own interests tomorrow. On the usual insurance logic, this made it wiser to pay a "premium" (here, lost Senate business) against possibly bigger losses later. At the same time, letting individual senators filibuster would invite the crankiest members to bring constant challenges. Adding a two-thirds supermajority to end filibusters kept these costs manageable.⁶²

E. Normative Implications

Finally, we would like some sense of how much unhappiness tyranny of the majority actually generates. We start by noting that the Senate's supermajority lets the majority oppress up to forty percent of the population. If this power is used to expropriate the minority, each dollar transferred will then increase society's resentment on net,⁶³ with intensity increasing in the amount transferred. Presumably, a profit-maximizing tyrant would continue to expropriate until the oppressed's anger threatens physical security.⁶⁴ This implies very large losses.

Worse, expropriation does not exhaust the possibilities. More recent tyrannies have also tried to restructure society along millenarian lines. The minority was then saddled with the implied risk premium for these experiments. This figure was very large in the twentieth century, when Nazi and Communist

mundane rule changes. *Filibuster and Cloture*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/briefing/Filibuster_Clature.htm [<https://perma.cc/VX3M-HWGA>]. But there is no real question that a majority of senators could have repealed the filibuster had they wanted to. Anglo-Saxon legislatures regularly use doubtful rules interpretations—and even “majority coups”—to get rid of filibusters. See Tonja Jacobi & Jeff VanDam, *The Filibuster and Reconciliation: The Future of Majoritarian Lawmaking in the U.S. Senate*, 47 U.C.D. L. REV. 261, 278–79 (2013). The question then becomes why they kept it. One possibility involves the American South, where there was probably a sense both before and after the Civil War that interfering with race relations was physically dangerous. However, this cannot be a complete answer given that the Senate still observes supermajorities today.

⁶² The Senate practice of “blue slips,” which gives members a courtesy veto over judicial appointments in their home states, is the exception that proves our rule. Carl Tobias, *Senate Blue Slips and Senate Regular Order*, YALE L. & POL’Y REV. (Nov. 20, 2018, 7:30 PM), https://ylpr.yale.edu/inter_alia/senate-blue-slips-and-senate-regular-order [<https://perma.cc/JV6T-MJV2>]. Even more than the filibuster, this insurance is tightly bound by the fact that only two members can exercise the right for any single nominee. See *id.*

⁶³ Because marginal utility declines with income, expropriation from one group to a second, equally wealthy group causes more resentment in the losers than happiness for the winners. The effect is further aggravated when a part of the proceeds is diverted to the tyrant and his cronies. By the same token, expropriation could actually *improve* net happiness in the common twenty-first-century case where transfers are meant to narrow the gap between rich and poor.

⁶⁴ The security constraint is most obvious in the ancient Athenian practice of “ostracism,” in which a majority vote could banish (“ostracize”) minority politicians for up to ten years. GOMEZ, *supra* note 42, at 165–66.

experiments proved, if anything, even more destructive than expropriation.⁶⁵

IV. CASE 2: NIEMÖLLER SLICING

“First, they came for the Communists and I did not speak out because I was not a Communist. Then they came for the Socialists and I did not speak out because I was not a Socialist. Then they came for the trade unionists and I did not speak out because I was not a trade unionist. Then they came for the Jews and I did not speak out because I was not a Jew. Then they came for me and there was no one left to speak out for me.”

– Martin Niemöller (1892–1984)⁶⁶

The Framers understood that legislators have solidly material incentives to oppose tyrannical majorities. But they said very little about how badly their logic erodes when the tyranny targets minorities.⁶⁷ As our Niemöller epigram implies, real tyrants prefer to slice opponents into bite-sized groups. The silver lining is that members of the majority usually demand clear assurances that the slicing will stop before they, too, are victimized. The resulting insistence on bright line categories normally limits feasible targets to an historical or biologically defined “other.” In this sense, the most striking implication of Niemöller’s rhetoric—that successive slices will continue to add up until *most* voters are oppressed—would require an astonishingly fractured society. Indeed, the statement was probably wrong even in Weimar, where the combined Communist/Social Democratic Party/Jewish vote never totaled much more than one-third of the electorate.⁶⁸

America’s most serious Case 2 failure was Congress’s refusal to intervene in the South’s Jim Crow policies before the 1960s.⁶⁹ That said, it would be natural for modern identity politics’ obsession with biologically-defined others⁷⁰ to revive the tactic. There is more than a hint of this in Senate Democrats’ recent

⁶⁵ The risk is admittedly reduced for Case 1, where a majority of the population prefers moderate policies and is less likely to tolerate radical redistribution even where they stand to benefit.

⁶⁶ Martin Niemöller, *First They Came*, HOLOCAUST MEMORIAL DAY TR., <https://www.hmd.org.uk/resource/first-they-came-by-pastor-martin-niemoller/> [<https://perma.cc/9SKZ-LDMS>].

⁶⁷ This is surprising since the Framers would have recalled divide-and-conquer religious persecution from Britain’s Glorious Revolution (1688–1689). *See, e.g.*, BRINTON, *supra* note 25, at 202.

⁶⁸ The high watermark for the combined Communist (KPD)/Socialist vote (SPD) was 37.3 percent of the electorate. *See, e.g.*, DEUTSCHER BUNDESTAG, ELECTIONS IN THE WEIMAR REPUBLIC (2006), https://www.bundestag.de/resource/blob/189774/7c6dd629f4aff7bf4f962a45c110b5f/elections_weimar_republic-data.pdf [<https://perma.cc/3W8N-9YXN>]. Weimar’s Jews represented just one percent of the electorate. *See, e.g.*, Erin Blakemore, *After WWI, Hundreds of Politicians Were Murdered in Germany*, HISTORY (Oct. 26, 2018), <https://www.history.com/news/political-assassinations-germany-weimar-republic> [<https://perma.cc/G3Q3-SCHA>].

⁶⁹ Mayhew, *supra* note 57, at 34 (“Anti-civil rights southerners representing their region’s dominant white caste cared a lot; pro-civil rights northerners representing few blacks and largely indifferent whites cared little . . . southerners could have gotten themselves into political trouble back home by *not* filibustering against civil rights bills.”).

⁷⁰ *See, e.g.*, Cressida Hayes, *Identity Politics*, STAN. ENCYCLOPEDIA PHIL. (Mar. 23, 2016), <https://plato.stanford.edu/entries/identity-politics/> [<https://perma.cc/C7JQ-7BED>].

attempt to challenge a judicial nominee who belonged to a mainstream Catholic service organization.⁷¹

A. *Traditional Fixes*

Formally, Niemöller slicing should be viable against any group that includes less than one-third of the population.⁷² But in that case, the oppressed groups are also too small to invoke supermajority or filibuster protections.⁷³ Despite this, the American system includes important protections against slicing. The reason is that political parties let minority groups trade support for each others' causes. Given that non-white minorities now account for forty percent of the U.S. population,⁷⁴ this is more than enough to prevent Niemöller slicing—but only if the groups pool their votes in a single party. This suggests that the fundamental asymmetry between “diversity” on the Democrat and Republican sides is endogenous.⁷⁵ At the same time, groups must constantly reassure each other that the pact still holds. This may account for Democrats' visible sensitivity to anyone who questions identity politics.

Additional Constitutional Protections. The States further reinforced these basic protections when they ratified the Bill of Rights two years after the Constitution itself.⁷⁶ This made slicing by religion and political speech markedly

⁷¹ As the *Wall Street Journal* complained, “[n]o longer is it necessary to . . . demonstrate he’d use personal views to override the law. Today it is enough to label a nominee’s religion or associations ‘extreme’ and use that to try to banish him from public life.” The Editorial Board, *Kamala Harris’s Dark Knights*, WALL ST. J. (Jan. 2, 2019, 6:57 PM), <https://www.wsj.com/articles/kamala-harris-dark-knights-11546473440> [https://perma.cc/MXC2-SD2V] (describing U.S. Sen. Kamala Harris’s challenge to federal district court nominee Brian Buescher for belonging to Knights of Columbus); see also Eugene F. Rivers III, *Another Religious Test in the Senate*, WALL ST. J. (Jan. 3, 2019, 6:52 PM), <https://www.wsj.com/articles/another-religious-test-in-the-senate-11546559559> [https://perma.cc/VV5B-7TY8] (“We non-Catholics must also stand up, if not for courage then for survival.”).

⁷² To see why, imagine counterfactually that America had three major political parties. Then both of the two largest parties can earn more votes by oppressing the target group than the remaining party can gain by protecting it. Given America’s first-past-the-post voting, we expect the smallest party to disappear, leaving the targeted group voiceless.

⁷³ This did not, of course, stop Southern senators from filibustering Northern legislation that threatened segregation. Mayhew, *supra* note 57, at 34.

⁷⁴ See *QuickFacts*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045219> [https://perma.cc/5VUJ-H9DB].

⁷⁵ Barton Swaim, *‘How America’s Political Parties Change (and How They Don’t)’ Review: Prognosticators, Take it Easy*, WALL ST. J. (Nov. 8, 2019, 5:35 PM), <https://www.wsj.com/articles/how-americas-political-parties-change-and-how-they-dont-review-prognosticators-take-it-easy-11573252536> [https://perma.cc/JD6J-VM9L] (“The Democratic Party . . . ‘has always been a collection of out-groups, of demographic groups that have not been regarded by themselves or others as typically American’: Southern segregationists, Irish immigrants, racial minorities, union leaders and so on, depending on the era. These out-groups amount to a popular majority, but they don’t easily hang together.”).

⁷⁶ The Framers originally argued that a “Bill of Rights” was inconsistent with limited government because it protected rights that were otherwise outside the new government’s purview. See, e.g., THE FEDERALIST No. 84 (Alexander Hamilton).

harder. Similar protections⁷⁷ have since been extended to race,⁷⁸ sexual preference,⁷⁹ and out-of-wedlock births.⁸⁰ The key in each case was authorizing courts to step in when majorities target personal characteristics that cannot easily be changed. Finally, many revolutions have proceeded by expelling legislators.⁸¹ The Constitution discourages this by limiting Congress's power to expel members to a two-thirds vote.⁸² In practice, the provision is seldom used, with most cases predicated on treason, notably including secession before the Civil War. The rest have hinged on well-defined criminal offenses, like election fraud and corruption.⁸³ This narrowness confirms our argument that members need a bright line (here, criminal culpability) to embrace Niemöller methods.

B. Normative Implications

The question remains whether Case 2 pathologies are more or less destructive than Case 1 tyrannies. Here, the silver lining is that Niemöller slicing is limited to groups that comprise less than one-third of the electorate. Even when the system fails, therefore, the number of victims will normally be smaller than "tyranny of the majority" outcomes where the number of victims can reach forty-nine percent. At the same time, Niemöller minorities are likely to be victimized more strongly. The reason is that they are too small to mount a physical revolt against injustice. This suggests that there is no fundamental limit to how much suffering the majority can inflict on them. Expropriation is also likely to bite more deeply: given that marginal utility is inversely related to income, we expect forced wealth transfers to generate more net unhappiness where the victim group is small and the beneficiaries are numerous.

⁷⁷ See U.S. CONST. amend. XIV, § 1 ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

⁷⁸ *E.g.*, *Shelley v. Kraemer*, 334 U.S. 1 (1948) (using the Fourteenth Amendment to extend equal protection to African Americans against unlawful state action).

⁷⁹ *E.g.*, *Romer v. Evans*, 517 U.S. 620 (1996) (using the Fourteenth Amendment to extend equal protection to homosexuals against unlawful state action).

⁸⁰ *E.g.*, *Levy v. Louisiana*, 391 U.S. 68 (1968) (using the Fourteenth Amendment to extend equal protection to out-of-wedlock children against unlawful state action).

⁸¹ See BRINTON, *supra* note 25, at 176–81, for the classic account.

⁸² U.S. CONST. art. I, § 5, cl. 2.

⁸³ Five U.S. House members have been expelled: three for backing secession and two for receiving bribes. *List of Individuals Expelled, Censured, or Reprimanded in the U.S. House of Representatives*, HIST., ART & ARCHIVES, <https://history.house.gov/Institution/Discipline/Expulsion-on-Censure-Reprimand/#expel> [<https://perma.cc/X46M-6T5Y>]. Two more U.S. House members resigned under threat of expulsion, both for corruption. *Id.*; *Discipline & Punishment*, HIST., ART & ARCHIVES, <https://history.house.gov/Institution/Origins-Development/Discipline/> [<https://perma.cc/2H6F-FXD7>]. Fifteen U.S. Senators have been expelled—all but one for backing secession. *United States Senate Expulsion Cases*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/expulsion_cases/intro.htm [<https://perma.cc/W9D8-4NR4>]. Five more resigned under threat of expulsion. *Id.*

V. CASE 3: WEIMAR'S SHADOW

"Things fall apart; the centre cannot hold . . ."
 – William Butler Yeats, *The Second Coming* (1919)⁸⁴

We have already said that Case 1 opinion distributions force even extremist politicians to woo median voters. Furthermore, this was *also* true of our "tyranny of the majority" and Case 2 "Niemöller" pathologies, the only real difference being that demagogues offer no positive agenda apart from encouraging the center to exploit minorities. But America's current political crises do not resemble these models. Instead, the main examples of dysfunction—most notably immigration, healthcare, and abortion reform—have followed a very different model in which a centrist plurality tries to assemble a majority by wooing left- or right-wing extremists. These have almost always failed, usually because extremists on one or both sides refused to make meaningful compromises.⁸⁵

It is hard to imagine a dynamic more foreign to the logic of Case 1 and Case 2 politics. There is nevertheless a close analog. Readers of a certain age will remember when almost every aberration in American politics was met with gloomy comparisons to Germany's Weimar Republic. But as our Yeats epigram implies, Weimar was just one of many instances where the great European democracies were assailed by the left and right simultaneously.⁸⁶ This Section

⁸⁴ William Butler Yeats, *The Second Coming*, in THE COLLECTED POEMS OF W.B. YEATS 187, 187 (Richard J. Finneran ed., Scribner Paperback Poetry 2d rev. ed. 1996).

⁸⁵ For an analysis of healthcare, see Paul Starr, *What Happened to Health Care Reform?*, AM. PROSPECT (Nov. 19, 2001), <https://prospect.org/article/what-happened-health-care-reform> [<https://perma.cc/2S62-9MY2>]; Robert Pear, *13 Men, and No Women, are Writing New G.O.P. Health Bill in Senate*, N.Y. TIMES (May 8, 2017), <https://www.nytimes.com/2017/05/08/us/politics/women-health-care-senate.html> [<https://perma.cc/VU98-8XQ3>]; Marcy Kreiter, *Is Health Care Reform Dead? Effort to Bring Ultra-Right on Board Could Alienate Centrists*, INT'L BUS. TIMES (Apr. 4, 2017, 7:00 PM), <https://www.ibtimes.com/health-care-reform-dead-effort-bring-ultra-right-board-could-alienate-centrists-2520751> [<https://perma.cc/UW4N-L4LZ>]; Amy Goldstein, *How the Demise of Her Health-Care Plan Led to the Politician Clinton is Today*, WASH. POST (Aug. 25, 2016), https://www.washingtonpost.com/politics/after-health-care-missteps-a-chastened-hillary-clinton-emerged/2016/08/25/2d200cb4-64b4-11e6-be4e23fc4d4d12b4_story.html?utm_term=.ecd9806cacf [<https://perma.cc/CLL6-2FYP>]. For an analysis on immigration, see The Editorial Board, *Pelosi's Dreamer Pawns*, WALL ST. J. (Jan. 21, 2019, 3:42 PM), <https://www.wsj.com/articles/pelosis-dreamer-pawns-11548103367> [<https://perma.cc/AU4T-AZKX>] (explaining that polarization on immigration has led to "two decades of legislative frustration"); Tim Kane, *Trump Base Wants Immigration Compromise*, WALL ST. J. (Feb. 27, 2019, 7:09 PM), <https://www.wsj.com/articles/trump-base-wants-immigration-compromise-11551312588> [<https://perma.cc/UW3N-NFCY>] (presenting poll data showing that Democrats and Republicans would agree to a compromise immigration bill, if Speaker Pelosi allowed a vote); William A. Galston, *Biden Exits Abortion's Wide Middle Lane*, WALL ST. J. (June 11, 2019, 7:05 PM), <https://www.wsj.com/articles/biden-exits-abortions-wide-middle-lane-11560294354> [<https://perma.cc/43LJ-7AM3>] (reviewing survey evidence that major party orthodoxies ignore the "nuanced center on this long-contested issue . . .").

⁸⁶ Yeats, *supra* note 84, at 187 ("Mere anarchy is loosed upon the world;/ The blood-dimmed tide is loosed, and everywhere/ The ceremony of innocence is drowned;/ The best lack all conviction, while the worst/ Are full of passionate intensity/. . . And what rough beast, its hour come round at last,/ Slouches towards Bethlehem to be born?").

looks at European history to extract the logic of Case 3 politics in its purest and most classical form. This sets the stage for an empirical profile of Case 3 opinion in the contemporary United States (Section VI) and an extended analysis of how we expect Case 3 politics to present themselves in American conditions (Section VII).

A. *The Weimar Template*

Granted that history never repeats itself exactly, Europe's troubles in the nineteenth and early twentieth centuries show an astonishing sameness. This basic template included three stages. While we focus on Weimar in what follows, most of the Continent's democracies repeatedly passed through similar crises between the Dreyfus Affair (1894) and the start of World War II.⁸⁷

Origins. Weimar's crises began with polarization on Case 3's familiar three-humped pattern, with left- and right-wing extremists promising to overthrow the status quo.⁸⁸ As to intensity, Communists and Nazis both genuinely believed that no other agenda could save society.⁸⁹ This ensured that members greatly preferred their own agendas to cooperation with the center,⁹⁰ a view that was further bolstered by overheated rhetoric that collaboration with "social fascist" centrist governments was immoral.⁹¹

Crisis. So long as Weimar's center held an absolute majority, they could debate and pass legislation as if the extremists did not exist. Formally, this condition was satisfied until the Republic's final year.⁹² After that, however,

⁸⁷ See *infra* text accompanying notes 201–10.

⁸⁸ See *infra* text accompanying notes 211–17.

⁸⁹ The attitude is an extreme version of the standard Downsian assumption that extremist voters may abstain from voting entirely rather than support candidates they consider to be insufficiently militant. See DOWNS, *supra* note 36, at 117. See FREEK VAN GILS ET AL., BIG DATA AND DEMOCRACY (2019), <https://www.slideshare.net/FSRCommunicationsand/big-data-and-democracy-freek-van-gils-wieland-muller-and-jens-prufer> [<https://perma.cc/FVL7-6PHH>], for a recent paper exploring the idea.

⁹⁰ Western historians often argue that the German Communist party's rejectionist politics reinforced the Nazis' attacks on democracy. James J. Ward, "Smash the Fascists...": German Communist Efforts to Counter the Nazis, 1930–31, 14 CENT. EUR. HIST. 30, 39 (1981) (explaining that cooperation was often deliberate, as when some local Communists "invaded Nazi meetings . . . to urge collaboration in strikes, protest demonstrations, and defiance of republican authorities"). Communist leaders similarly took solace in ideological predictions that a Nazi dictatorship would only be a "short-lived prelude to proletarian revolution" and ". . . accelerat[e] the clarification of class fronts and the pace of revolutionary politics in Germany." *Id.* at 32, 57–58; see also ALEXANDRA RICHIE, FAUST'S METROPOLIS 386 (1998) ("[Nazi leader Josef] Goebbels saw that the Communists and Nazis shared anti-democratic and anti-republican aims, and when making his early speeches he would even insist on being called 'Comrade Dr. Goebbels.' He realized that the Communists were his main rivals in the working-class areas but his overriding aim was not to destroy the [German Communist Party], but to topple the republic.").

⁹¹ Michael Brie, *Is Socialist Politics Possible from a Position in Government?*, ROSA LUXEMBURG STIFTUNG BRUSSELS OFF. (May 3, 2010), <https://www.rosalux.eu/en/article/262.is-socialist-politics-possible-from-a-position-in-government.html> [<https://perma.cc/8XXJ-7DST>].

⁹² The combined Communist/Nazi tickets polled 51.9 percent in the July 1932 election and 50.0 percent in November 1932. DEUTSCHER BUNDESTAG, *supra* note 68. In practice, however, the

everything changed with politics becoming a three-way standoff in which each side made demands that the other two refused.⁹³

This gridlock was nevertheless rational for extremists; given that they held just twenty-five percent of the vote,⁹⁴ their only hope of winning a majority was to persuade voters that centrist alternatives were off the table. At that point, rational voters would have to choose between the two extremist parties. Historians often say that German voters were “radicalized.”⁹⁵ This is true in the narrow sense that the extremists steadily drained votes from the center parties. What is less clear is how many voters resigned themselves to voting for the least-bad alternative.⁹⁶ The necessity for making *some* choice was, of course, greatly accelerated by the Depression.⁹⁷

Significantly, this strategy depended on extremists’ intensity or, more precisely, their determination to blockade and outlast the center. Equation 1 summarizes how a typical Nazi or Communist would have weighed his options. If he wanted to, he could immediately defect to the centrists and pass reform legislation with probability 1. But we have already said that he considered his own agenda far more valuable. This made it rational to continue the blockade so long as his side had even a modest chance of success.⁹⁸ Collecting these observations, we conclude that the blockade would continue so long as the following conditions were met:

$$\text{Eq. 1: Prob (Winning) x Value (Winning) > Value (Centrist Agenda)} \\ > \text{Prob (Losing) x Value (Losing)}$$

The net result was that one of the two extremist parties would eventually inherit enough centrist votes to win—even though only about one-fourth of the population actually wanted this outcome.

End Game. Equation 1 nevertheless contained a silver lining: the extremists’ joint blockade was unstable. As soon as the Communists saw that the Nazis were about to win, their best choice should have been to block them by joining the center. The tragedy of Weimar was that this conversion came too late. For Communist leaders, joining the center meant renouncing a lifetime’s faith that history was on their side. Rank-and-file constituents, on the other hand,

center was confused and divided, so that control probably lapsed a year or so sooner. The reason, as Williamson emphasizes, is that centrist members typically lack the time and energy to determine their own best interests, especially when other parties try to confuse or mislead them. *See generally* OLIVER E. WILLIAMSON, *MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS* (1975).

⁹³ *See infra* text accompanying notes 206–11.

⁹⁴ DEUTSCHER BUNDESTAG, *supra* note 68.

⁹⁵ *See infra* text accompanying notes 211–17.

⁹⁶ RICHIE, *supra* note 90, at 401 (quoting campaign speech by leading Nazi Josef Goebbels: “things cannot go on as they are . . . We have the choice: from here on into Bolshevik anarchy or from here on into National Socialist order and discipline”).

⁹⁷ *See infra* text accompanying notes 211–17.

⁹⁸ Formally, his “expected value” from winning should exceed both the expected value from defecting to the center and the expected value that the other side’s extremists will prevail.

had internalized this propaganda and lacked the kind of insider knowledge needed to understand just how desperate the political situation had become. This led many to abandon their leaders as opportunists.⁹⁹ While the French and Spanish Left were more agile in forming so-called “Popular Front” governments, they too had trouble cooperating with centrists once in power.¹⁰⁰ This left the new governments shaky and vulnerable.¹⁰¹

B. *American Analog*

American politics have seldom been polarized in this classically European way, if only because enthusiasm for left-right divisions was largely confined to immigrants. Despite this, there is an obvious parallel. Professor Ayers has shown that political debate immediately before the Civil War displayed a distinctly Case 3 pattern, with beleaguered centrists sandwiched between abolitionists on one side and secessionists on the other.¹⁰² The American endgame was also similar, with both sides stumbling into war hoping that the other would blink.¹⁰³

C. *Normative Implications*

By far the most jarring feature of Case 3 politics is that one-fourth of the population ends up dictating its agenda to everyone else. To estimate how much net unhappiness this produces, note that the winners’ joy is almost exactly canceled by unhappy extremists on the other side. The Center’s disappointment then decides net (negative) utility for the entire society.¹⁰⁴

The size of this suffering depends on the winners’ agenda. In the twentieth-

⁹⁹ Western enthusiasm for local Communist Parties never recovered from news that Stalin had signed a non-aggression treaty with Hitler. PIERS BRENDON, *THE DARK VALLEY: A PANORAMA OF THE 1930S* 684 (2000) (“[T]he Nazi-Soviet Pact . . . struck at the root of the Communist faith, exposing its moral hollowness to all but the most blinkered devotees.”); *see also* Ward, *supra* note 90, at 59, 61 (explaining that the Communist party’s decision to support Nazi calls for new elections in Prussia alienated turnout in working class districts and invited both passive and active opposition within the party itself); Ward, *supra* note 90, at 59, 61 (stating that local party groups proposed the “heresy” of forming alliances with the Center against the Nazis); *cf.* WATT, *supra* note 6, at 8 (stating that nineteenth-century French voters were “unalterably opposed to compromise”).

¹⁰⁰ BRENDON, *supra* note 99, at 338 (“The common programme amounted to little more than opposition to fascism. . .”).

¹⁰¹ Spain’s Popular Front government was overthrown by a right-wing coup. *See infra* text accompanying notes 226–30. The French experiment was more successful, keeping right wing parties out of power down to the Nazi invasion in 1940. *See infra* text accompanying notes 206–10.

¹⁰² EDWARD L. AYERS, *IN THE PRESENCE OF MINE ENEMIES: THE CIVIL WAR IN THE HEART OF AMERICA, 1859-1864* 65–67, 103 (2004) (describing centrists’ inability to find a party that would represent them).

¹⁰³ *Id.* at 69, 90 (explaining that the North and South dismissed each other’s threats as bluffs). *Id.* at 104 (recounting the argument that Southern firmness against Northern demands would render secession “improbable”). *Id.* at 114 (recounting Republican arguments that they had broken the South’s will, revealing secession “for the sham it was”).

¹⁰⁴ As previously noted, the losses are amplified for Case 3 opinion distributions where, by definition, we expect extremists to make choices that are very distant from centrist opinion. *See supra* Section II.B.

century, Case 3 dictatorships typically embraced maximalist demands for *both* large-scale expropriation *and* millenarian transformations of society. These losses were at least as large as any Greek or Roman tyranny.¹⁰⁵

Finally, a full accounting should also consider the high transaction cost of a politics where extremists deliberately blockade reforms that could save the existing system. The hope, of course, is that the suffering will be cut short when one side or the other realizes its weakness and capitulates. But in fact, the examples in our Appendix suggest that the struggle will most likely persist for decades. Meanwhile, game-of-chicken strategies on both sides invite failures so big that disaster may become unavoidable no matter who wins. This could be the biggest reason why Yeats lived to see his prophecy come true.

VI. WHAT WORLD DO WE LIVE IN?

“The degree of polarization that currently exists in Washington is such where I think it’s fair to say if I presented a cure for cancer, getting legislation passed to move forward would be a nail-biter.”

– Barack Obama¹⁰⁶

So far, we have treated Case 3 pathologies as theoretical and historical. However, we should also worry about coercive politics in our own time. Anecdotaly, the signs are everywhere: recurring government shutdowns, Congress deadlocked for decades over healthcare and immigration,¹⁰⁷ sanctuary cities that defy federal law enforcement, continuous challenges to the legitimacy of the last four presidencies;¹⁰⁸ and, most recently, a smug “Resistance” defined by obstruction.¹⁰⁹ This Section asks how closely public opinion resembles our Case 3 paradigm.

¹⁰⁵ See, e.g., *Research Starters: Worldwide Deaths in World War II*, NAT’L WWII MUSEUM, <https://www.nationalww2museum.org/students-teachers/student-resources/research-starters/research-starters-worldwide-deaths-world-war> [https://perma.cc/G495-Z33K].

¹⁰⁶ See David Ignatius, *Obama’s Cry of Despair on the Iran Deal*, WASH. POST (Aug. 6, 2015), https://www.washingtonpost.com/opinions/obamas-cry-of-despair-on-the-iran-deal/2015/08/06/e1bcf326-3c5b-11e5-8e98-115a3cf7d7ae_story.html [https://perma.cc/P389-2G85].

¹⁰⁷ See *supra* note 84 and accompanying text.

¹⁰⁸ Andrés Martínez, *Americans Have Seen the Last Four Presidents as Illegitimate: Here’s Why*, WASH. POST (Jan. 20, 2017, 5:00 AM), https://www.washingtonpost.com/posteverything/wp/2017/01/20/americans-have-seen-the-last-four-presidents-as-illegitimate-hereswhy/?utm_term=.441a9607a1f5 [https://perma.cc/CS3N-V32Y].

¹⁰⁹ Fred Barnes, *The Man Democrats Loath More Than Trump*, WALL ST. J. (Sept. 20, 2019, 5:24 PM), <https://www.wsj.com/articles/the-man-democrats-loathe-more-than-trump-11569014685> [https://perma.cc/AU6V-CG78] (describing criticism of U.S. Sen. Majority Leader Mitch McConnell’s refusal to schedule votes on bills passed by the House); *but see* Julie Grace Brufke, *Pelosi Blasts McConnell for Not Taking Up House Bills*, HILL (Apr. 26, 2019, 1:15 PM), <https://thehill.com/homenews/house/440844-pelosi-blasts-mcconnell-for-not-taking-up-house-bills> [https://perma.cc/8EEA-WDBU] (recounting U.S. Sen. Majority Leader Mitch McConnell’s mirror-image complaint that Speaker Pelosi has used control of the House to block “bipartisan” bills that the Senate could agree to).

A. *Conflicting Opinion*

We have assumed that polarization is exogenous, i.e. mostly originates outside politics in the broader society. A recent survey by the *Hidden Tribes Project* confirms the truth of this statement. It polled 8,000 Americans on their attitudes toward immigration, sexual harassment, white privilege, Islamophobia, and other hot button issues.¹¹⁰ It then used factor analysis¹¹¹ to divide them into groups or “tribes” according to their overall world view. Three of these—“Progressive Activists” on the left (eight percent) and “Traditional Conservatives” (nineteen percent) and “Devoted Conservatives” (six percent) on the right—hold extreme views and resist compromise.¹¹² However, this leaves fully two-thirds (sixty-seven percent) of the population squarely centrist.¹¹³ That sounds a good deal better than Weimar until you realize that the figure includes a “Politically Disengaged” population (twenty-six percent) who seldom vote.¹¹⁴ Subtracting them from the electorate leaves centrists with just fifty-five percent of active voters, a distribution comparable to Weimar in pattern though not intensity.

The *Hidden Tribes* data immediately explains American partisanship. According to a recent Pew Foundation survey, the median Republican is now more conservative than ninety-four percent of Democrats, compared with seventy percent twenty years ago.¹¹⁵ And the median Democrat is more liberal than ninety-two percent of Republicans, up from sixty-four percent.¹¹⁶ Meanwhile, the center has gotten smaller: thirty-nine percent of Americans currently take a roughly equal number of liberal and conservative positions, down from forty-nine percent in surveys conducted in 1994 and 2004.¹¹⁷

¹¹⁰ STEPHEN HAWKINS ET AL., *HIDDEN TRIBES: A STUDY OF AMERICA’S POLARIZED LANDSCAPE* 8, 21 (2018).

¹¹¹ Factor analysis is a statistical tool used to decompose an essentially unpredictable (large variance) sample into several highly predictable (low variance) subgroups. *Factor Analysis*, IBM KNOWLEDGE CTR., https://www.ibm.com/support/knowledgecenter/en/SSLVMB_25.0.0/statistics_mainhelp_ddita/spss/base/idh_fact.html [<https://perma.cc/RL6Y-ABKV>].

¹¹² HAWKINS ET AL., *supra* note 110, at 12; accord Zach Goldberg, *America’s White Saviors*, TABLET (June 5, 2019, 9:30 PM), <https://www.tabletmag.com/jewish-news-and-politics/284875/americas-white-saviors> [<https://perma.cc/82S3-BJEJ>].

¹¹³ HAWKINS ET AL., *supra* note 110, at 6 (dividing the sixty-seven percent by: Traditional Liberals (eleven percent), Passive (fifteen percent), Politically Disengaged (twenty-six percent), and Moderates (fifteen percent)); see also MICHAEL DIMOCK ET AL., *POLITICAL POLARIZATION IN THE AMERICAN PUBLIC* 7 (2014), <https://www.people-press.org/2014/06/12/political-polarization-in-the-american-public/> [<https://perma.cc/DDU5-VB3H>] (explaining that “the overall share of Americans who express consistently conservative or consistently liberal opinions has doubled over the past two decades from 10% to 21%”).

¹¹⁴ HAWKINS ET AL., *supra* note 110, at 6.

¹¹⁵ Jocelyn Kiley, *In Polarized Era, Fewer Americans Hold a Mix of Conservative and Liberal Views*, PEW RES. CTR. (Oct. 23, 2017), <https://www.pewresearch.org/fact-tank/2017/10/23/in-polarized-era-fewer-americans-hold-a-mix-of-conservative-and-liberal-views/> [<https://perma.cc/FWG6-LPHB>].

¹¹⁶ *Id.*

¹¹⁷ DIMOCK ET AL., *supra* note 113.

B. Intensity

The harder question is intensity. We have already said that the *Hidden Tribes Project* found that extremists resist compromise. A recent Pew Foundation survey takes this further by reporting that seventy percent of politically active Democrats and sixty-two percent of politically active Republicans are “afraid” of the other party.¹¹⁸ Granted that self-reported intensity is not reliable, other, less direct lines of questioning are consistent. Here, the best test case is almost certainly impeachment. Much has been made of polls showing that forty-one percent of voters wanted to impeach President Trump long before the House debated the issue or even discovered the grounds it eventually chose to rely on.¹¹⁹ The surprise is that the numbers were not much better for Presidents Obama (thirty-three percent), Bush (thirty percent), or Clinton (twenty-nine percent).¹²⁰ Worse, it seems safe to assume that respondents who wanted to remove Bush/Trump had almost no overlap with those preferred to see Clinton/Obama go.¹²¹ *This implies that fully sixty percent of today’s electorate would be happy to overrule election results when their side loses.* This confirms the existence of widespread intensity even if America’s political passions are still mild compared to the ones that fueled Weimar’s street fights.¹²²

¹¹⁸ CARROLL DOHERTY ET AL., PARTISANSHIP AND POLITICAL ANIMOSITY IN 2016 1 (2016), <http://www.people-press.org/2016/06/22/partisanship-and-political-animosity-in-2016/> [<https://perma.cc/SU9L-2Q2M>].

¹¹⁹ *NBC News Exit Poll: Majority of Voters Don’t Think Trump Should Be Impeached*, NBC NEWS (Nov. 6, 2018, 9:34 PM), <https://www.nbcnews.com/card/nbc-news-exit-poll-majority-voters-don-t-think-trump-n933011> [<https://perma.cc/Z3KK-Q6HH>]; *see also Support for Impeachment at Record High*, PUB. POL’Y POLLING (Oct. 31, 2017), <https://www.publicpolicypolling.com/polls/support-impeachment-record-high/> [<https://perma.cc/6J2C-CJLU>] (stating that forty-nine percent of voters support impeachment); John Bowden, *Poll: Majority Don’t Want Dems to Impeach Trump if They Retake House*, HILL (Jan. 10, 2018, 2:45 PM), <https://thehill.com/blogs/blog-briefing-room/news/368351-poll-majority-doesnt-want-dems-to-impeach-trump-if-they-retake> [<https://perma.cc/4M3N-25KF>] (stating that forty-five percent of voters support impeachment); Carrie Dann, *Just 36% of Americans Indicate They Would Vote for Trump in 2020*, NBC NEWS (Dec. 20, 2017, 3:52 AM), https://www.nbcnews.com/politics/first-read/poll-just-36-americans-indicate-they-would-vote-trump-2020-n831266?cid=sm_npd_nn_tw_ma [<https://perma.cc/7ER5-NGBT>] (“The new survey finds that 41 percent of Americans want Congress to hold impeachment hearings to remove Trump from office, including 70 percent of Democrats, 40 percent of independents and seven percent of Republicans.”).

¹²⁰ Jonathan Topaz, *Poll: One-Third Say Impeach Obama*, POLITICO (July 25, 2014, 7:09 AM), <https://www.politico.com/story/2014/07/poll-impeach-obama-support-33-percent-109369> [<https://perma.cc/FQ84-ARG5>].

¹²¹ *See also Support for Impeachment*, *supra* note 119 (stating that forty-nine percent of voters support impeachment); Bowden, *supra* note 119 (stating that forty-five support impeachment); Dann, *supra* note 119 (reporting that “41 percent of Americans want Congress to hold impeachment hearings to remove Trump from office, including 70 percent of Democrats, 40 percent of independents and 7 percent of Republicans”); Topaz, *supra* note 120 (stating that “[f]ifty-seven percent of Republicans say they support impeaching Obama, compared with just 35 percent of independent voters and 13 percent of Democrats”).

¹²² We ignore “Black Block” and “Antifa” rioters as negligible on the scale of Thirties-era political violence.

C. Self-Awareness

The question remains how fully politicians and sophisticated voters have internalized the logic of coercive politics. This matters because the persistence of old bipartisan habits might be expected to slow the emergence of coercive strategies appropriate to Case 3.¹²³ The bad news, therefore, is how many politicians,¹²⁴ journalists,¹²⁵ and ordinary citizens¹²⁶ now openly understand and embrace coercive politics. Given that so many people say such things out loud, it seems obvious that many more are thinking them in private—or soon will.

VII. CASE 3: AMERICAN VERSION

It is only natural to ask what our analysis implies for contemporary American politics. Plainly, the United States is not Weimar. Most obviously, its Constitution is different, and its enmities are less pronounced. What does our Case 3 logic predict?

¹²³ In fact, recent data indicate that individual senators' commitment to bipartisanship remains surprisingly strong. Jay Branegan & Jamie Spitz, *Senate Bipartisanship Way Up, Democrats Down*, LUGAR CTR. (Apr. 26, 2018), <http://www.thelugarcenter.org/blog-senate-bipartisanship-gop-way-up-democrats-down> [https://perma.cc/QPM6-RKHX].

¹²⁴ Tyler O'Neil, *Lindsey Graham to Democrats: 'Boy, You All Want Power. God, I Hope You Never Get It'*, PJ MEDIA (Sept. 27, 2018), <https://pjmedia.com/video/lindsey-graham-goes-off-this-is-not-a-job-interview-this-is-hell/> [https://perma.cc/K5W9-76HF] (quoting U.S. Sen. Lindsey Graham: "[w]hat you want to do is destroy this guy's life, hold this seat open, and hope you win in 2020"); The Editorial Board, *A Way Out of the Shutdown*, WALL ST. J. (Jan. 2, 2019, 6:18 PM), <https://www.wsj.com/articles/a-way-out-of-the-shutdown-11546298309> [https://perma.cc/36WE-927J] (stating that "[s]ome Republicans, mainly in the House Freedom Caucus, think Mr. Trump can win an extended game of chicken with Democrats"); see also Katie Reilly, *Read Hillary Clinton's 'Basket of Deplorables' Remarks About Donald Trump Supporters*, TIME (Sept. 10, 2016, 12:27 PM), <https://time.com/4486502/hillary-clinton-basket-of-deplorables-transcript/> [https://perma.cc/YX77-UHMA].

¹²⁵ Daniel Henninger, *What is Elizabeth Warren?*, WALL ST. J. (Oct. 17, 2018, 6:47 PM), <https://www.wsj.com/articles/what-is-elizabeth-warren-1539816439> [https://perma.cc/YHH6-MZ XU] (stating that "[t]his looks like the future of American politics: Play to a base jacked up by social media, hold it with scheduled feedings of red meat and simply force the rest of the bewildered electorate to sort it out and choose between two poles"); Michael Goodwin, *Hillary's Calling for a 'Civil' War – Where's the Outrage?*, FOX NEWS (Oct. 10, 2018), <https://www.foxnews.com/opinion/michael-goodwin-hillarys-calling-for-a-civil-war-wheres-the-outrage> [https://perma.cc/K6EV-3UYK] (stating "[s]till, there is danger when two sides both think they can outlast the other"); Ted Rall, *Progressives Who Prefer Trump to Biden*, WALL ST. J. (June 5, 2019, 6:33 PM), <https://www.wsj.com/articles/progressives-who-prefer-trump-to-biden-11559687632> [https://perma.cc/CBC4-SV6L] ("[M]any Progressives would rather see a second Trump term than a President Biden, who would govern through Clintonian triangulation . . . Winning the next election isn't necessarily more important than the long-term objective of winning over the Democratic Party. Progressives' broader aim is moving the 50 yard-line of American politics to the left.").

¹²⁶ Goodwin, *supra* note 125 (describing interactions with readers: "[r]esponding to my concern that America might be sleepwalking into a second civil war, a number of readers agreed. Some said they welcomed it. Curt Doolittle wrote this: 'We aren't sleepwalking into it, we know exactly what we're doing and why. The hard right and hard left are planning on it, ready for it, and looking for an opportunity'").

A. *Extremism in Two-Party Systems*

At first blush, Case 3 pathologies seem impossible in the United States. Historians have long blamed Weimar's collapse on proportional voting rules that gave small extremist parties seats in the Reichstag.¹²⁷ By comparison, America's first-past-the-post voting ensures that two—and only two—major parties can exercise power in Congress.¹²⁸ But in that case we also expect centrists to control the biggest party for as long as they hold a plurality. That leaves room for just one extremist party at a time.

Despite this, the argument has a loophole. Because American centrists are half Republican and half Democrat, the centrist/extremist struggle *within* each party remains a tossup.¹²⁹ This turns American politics into a child's game of musical chairs: no matter how much Right, Left, and Center maneuver, only two can reach Congress in significant numbers. This sets up two possible outcomes:

Centrists Triumphant. First, suppose that centrists control at least one party. Given that roughly half the electorate prefers centrists,¹³⁰ a moderate party will enjoy a nearly insurmountable advantage. But in that case, the extremist party must also move to the center to remain competitive. This scenario seems to have played out several times in American history.¹³¹

Extremism Triumphant. The case is different where extremists simultaneously take over both parties, so that voters have no centrist choice at all. This is the Weimar blockade in American circumstances.¹³² The rise of

¹²⁷ See, e.g., *The Weimar Republic*, WIENER HOLOCAUST LIBR., <https://www.theholocaustexplained.org/the-nazi-rise-to-power/the-weimar-republic/political-instability/> [<https://perma.cc/H4K4-U7DU>].

¹²⁸ See, e.g., William H. Riker, *The Two-Party System and Duverger's Law: An Essay on the History of Political Science*, 76 AM. POL. SCI. REV. 753 (1982).

¹²⁹ See William A. Galston, *Polarized America Still Has a Big Middle*, WALL ST. J. (Dec. 3, 2019, 6:53 PM), <https://www.wsj.com/articles/polarized-america-still-has-a-big-middle-11575417229> [<https://perma.cc/QG3K-7NEA>].

¹³⁰ See, e.g., Allisia Finlay, *A Big Night for Democrats But Not Progressives*, WALL ST. J. (Nov. 8, 2018, 7:13 PM), <https://www.wsj.com/articles/both-parties-winand-lose-1541636254> [<https://perma.cc/H49E-ZXGT>] (reporting Progressive candidates fared worse than centrist Democrats: “[i]n places where progressive candidates won they tacked to the center”); Karl Rove, *Both Parties Win—and Lose*, WALL ST. J. (Nov. 7, 2018, 7:17 PM), <https://www.wsj.com/articles/both-parties-winand-lose-1541636254> [<https://perma.cc/H3M7-V3WG>] (“For Democrats, left-wing policy nostrums not only cost them winnable races but also hardened feelings among middle-class voters that today’s Democratic Party . . . isn’t for them.”).

¹³¹ James McPherson, *Notable & Quotable*, WALL ST. J. (Jan. 28, 2019, 4:23 PM), <https://www.wsj.com/articles/notable-quotable-political-division-in-perspective-11548624184> [<https://perma.cc/R74H-7WZS>] (arguing that the United States was markedly more divided in 1890s and 1930s than it is today). The 1890s split was driven by Populism and labor violence and persuaded Democrats to nominate William Jennings Bryant three times, inadvertently leading to twenty years of Republican dominance. Franklin Roosevelt (FDR) is a more ambiguous figure, having pioneered many of the Big Government institutions that still dominate America. *Id.* However, McPherson emphasizes that FDR took power at a time when people were seriously talking about embracing fascist or communist models from Europe. *Id.* By that standard, at least, Roosevelt was a resolute centrist. *Id.*

¹³² The dynamic has also been an important theme in the current 2020 race. Daniel Henninger,

extremists in both parties makes this a reasonable description of recent U.S. politics.¹³³

The existence of not one but two possible Case 3 dynamics, only one of which is pathological, is significant. In our European example, it hardly mattered whether there were more extremists on one side than the other. But even under Case 3 circumstances, American extremism is only stable when it controls both parties.¹³⁴ This is hard to maintain if we assume (following Weimar experience) that the two extremist parties will never poll much more than fifty percent between them. More precisely, our “Extremism Triumphant” outcome will only be stable so long as left and right divide the extremist vote almost exactly down the middle.¹³⁵ At the same time, we know that the Weimar right did better in some elections and the left in others. The bottom line is that coercive politics is possible in America but also more fragile.

World War Trump, WALL ST. J. (Oct. 9, 2019, 6:53 PM), <https://www.wsj.com/articles/world-war-trump-11570661608> [<https://perma.cc/D7CP-L4TV>] (“You may not like me . . . but you’re going to have to vote for me to save your 401(k) . . . It’s me or the deep blue sea . . . [Meanwhile the Democratic Party’s] plan is to make the country’s political life so intolerable that the American people simply run up the white flag on the Trump presidency . . . They’re targeting a less committed 10% to 15% in the expectation these voters will decide that making accommodations between policy and personality has become impossible and that four more years of this would be too much to endure, even accepting 401(k) losses as the price of deliverance.”).

¹³³ This is evidenced, *inter alia*, in the increasingly common (and plausible) complaint that both parties have become captured dominated by their respective extremists. See, e.g., Carl P. Leubsdorf, *The Squad is President Trump’s Dream Opponent*, LACROSSE TRIB. (July 25, 2019), https://lacrosetribune.com/opinion/columnists/carl-p-leubsdorf-the-squad-is-president-trump-s-dream/article_223e86c3-574a-5f56-9ae8-3155aa07f2ed.html [<https://perma.cc/C6PM-V5LZ>] (“Republicans have the Tea Party on their right; Democrats have the Squad on their left.”).

¹³⁴ This explains the widespread observation that extremist groups that claim to be enemies nevertheless need each other to survive. See Stephen H. Miller, *The Symbiotic Relationship Between the Alt-Right and PC Left*, IGF CULTURE WATCH (Jan. 5, 2017), <https://igfculturewatch.com/2017/01/05/kirchick-symbiotic-relationship-alt-right-pc-left/> [<https://perma.cc/59RN-XZN8>].

¹³⁵ Our argument assumes that control within parties is settled by something like majority rule. This is only an approximation. Post-Watergate reforms designed to replace smoke-filled rooms with primaries have put a premium on turnout. This usually favors extremists, although the ability of party insiders to beat back challenges to Hilary Clinton’s nomination in 2016 hint that the effect is limited. The Editors of Encyclopaedia Britannica, *Primary Election*, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/topic/primary-election> [<https://perma.cc/8CBY-T4NJ>]. Control is even more fraught in Congress. This is because parties have their own collective action problem: just like the broader society, extremists can sometimes coerce results that would never command a majority. Probably the best example is the House Freedom Caucus, a group of Republican extremists who routinely threatened to vote against the GOP party unless colleagues tacked to the right. See, e.g., Drew DeSilver, *What is the House Freedom Caucus, and Who’s in It?*, PEW RES. CTR. (Oct. 20, 2015), <http://www.pewresearch.org/fact-tank/2015/10/20/house-freedom-caucus-what-is-it-and-whos-in-it/> [<https://perma.cc/6CAE-HJGR>]. The tactic was especially costly since it meant that the Caucus had to occasionally kill legislation to stay credible. See Samuel Chamberlain, *House Democrats Postpone Budget Measure Vote Amid Progressive Resistance*, FOX NEWS (Apr. 9, 2019), <https://www.foxnews.com/politics/house-democrats-postpone-budget-measure-vote-amid-progressive-resistance> [<https://perma.cc/ATB6-NRWP>], for Progressives’ recent attempts to imitate Freedom Caucus tactics.

B. *Intensity*

We have seen that America's differences of opinion are nearly as broad as Weimar's. But where Weimar extremists saw a fight to the death, American passions are far more limited. First, U.S. extremists offer nothing like Europe's millenarian urge to rework society. Instead, Conservatives look to restore a past that existed in living memory, while Progressives mostly demand measures that already exist in other countries. Second, European extremists believed that history was on their side. By comparison, the nightmare of American extremists is that the country could remain centrist forever. Finally, American extremists claim no deep ethical objections against working with centrists, although right-wing slurs that politicians are Republicans in Name Only ("RINOs") come close.

Despite these differences, the logic of blockade is similar. The only difference, compared to Eq. 1, is that party discipline means that unhappy legislators have no "Centrist Agenda" to defect to. This simplifies the conditions needed for extremists to continue the blockade:

$$\text{Eq. 2: Prob (Winning) x Value (Winning) > Prob (Losing) x Value (Losing)}$$

For extremists, the left-hand terms are lower in the American case while the right-hand terms are higher. This narrows the inequality so that defections may become more attractive than the political pain of continued gridlock. Centrists, on the other hand, are forced to choose between extremists in their own party and extremists across the aisle. So long as they see a reasonable chance of their own side winning, they are likely to go on waiting.

C. *End Game*

Even more than its European analog, the American endgame is unstable. This makes it easy to see how the pain of a government shutdown, say, could persuade centrists to defy party discipline. These initial defections would then lead to further cascades or else frighten extremists on both sides into a negotiated settlement. While this will inevitably be called "bipartisanship," the result will usually be more accurately described as an armed truce between wars.

The Road Back. Despite this, the long-term diagnosis is hopeful. We have argued that blockades can only persist so long as extremists control both parties. This implies three roads back:

Debate. A McGovern- or Goldwater-style election debacle could disable extremists' control over one party, at which point the other party would itself have to move to the center or face a similar debacle four years later. This dynamic is only slightly damped by presidential politics, which periodically

locks parties into running unpopular incumbents for a second term, thereby making it safe for the other party to put forward its own marginal candidates.¹³⁶

Realignment. Politicians could break the blockade by founding a new centrist party. This is not nearly as improbable as it might sound: political scientists conventionally count four so-called “party realignments” in U.S. history.¹³⁷ Since the last realignment dates from the 1960s,¹³⁸ the United States might seem to be due.

Victory. Extremists on one side or the other could outlast their opponents. The winning side would then have to retain power long enough not just to pass legislation but also for voters to get used to it so that the revolution became permanent.

D. *Are Traditional Fixes Still Viable?*

Case 3 coercive politics is fundamentally different from Case 1 and 2 models. This section asks whether familiar rules and institutions could fail, or even be harmful, in this new environment.

Supermajorities. We have argued that supermajorities are an essential element for managing Case 1 intensity. But Case 3 supermajorities let extremists blockade the center sooner with just forty percent of the vote. This is probably unavoidable in any system that lets passionate minorities block legislation.

Shutdowns. Senate leaders began bundling appropriations into “omnibus packages” in the early 2000s, hoping that dissidents would think twice before challenging so-called “must-pass” legislation.¹³⁹ Their reasoning seems to have been that there would be (a) less time for amendment, and (b) an unprecedented escalation of political pain if government operations were interrupted. The surprise, of course, was that Ted Cruz (2013),¹⁴⁰ Chuck Schumer (2018), and Donald Trump (2018) cheerfully accepted the challenge by shuttering large parts of the federal government.¹⁴¹

¹³⁶ The dynamic is particularly evident in the current cycle. Once Republicans locked themselves into an historically unpopular incumbent in 2020, Progressives felt emboldened to nominate their own true believer in hopes of winning a razor-close “mandate” in 2020. See Mara Liasson, *What the 2020 Election Is All About*, NPR (Feb. 2, 2020, 5:00 AM), <https://www.npr.org/2020/02/02/801946521/what-the-2020-election-is-all-about> [<https://perma.cc/B77F-5LE4>]. At least in principle, a Progressive victory might then embolden post-Trump Republicans to nominate their own extremist candidate in 2024.

¹³⁷ Stephen Ansolabehere & James M. Jr. Snyder, *Reapportionment and Party Realignment in the American States*, 153 U. PA. L. REV. 433, 438 (2004).

¹³⁸ See *id.* at 439.

¹³⁹ HANSON, *supra* note 53, at 1 (“Leaders count on end-of-session pressures and the fear of a government shutdown to allow adoption of the package with minimal debate.”).

¹⁴⁰ David A. Fahrenthold & Katie Zezima, *For Ted Cruz, The 2013 Shutdown Was a Defining Moment*, WASH. POST (Feb. 16, 2016), https://www.washingtonpost.com/politics/how-cruzs-plan-to-defund-obamacare-failed--and-what-it-achieved/2016/02/16/4e2ce116-c6cb-11e5-8965-0607e0e265ce_story.html?utm_term=.19286f6a8bd6 [<https://perma.cc/VD36-77P2>].

¹⁴¹ An early example led by Newt Gingrich (1995) unusually originated in the House. Don Gonyea, *The Longest Government Shutdown in History, No Longer — How 1995 Changed Everything*, NPR

The forty-plus Senators who agreed to support these campaigns were presumably moved by three distinct motives:

Positive Legislation. Unlike filibusters, shutdowns let extremists extract new legislation that could not otherwise command an OMOV majority. The idea that a minority might sometimes prevail in this way is, of course, entirely consistent with our arguments for intensity-weighted voting. Nevertheless, the rhetoric of OMOV commands such widespread respect that letting a passionate minority “outvote” the majority is bound to be controversial. The best response is that Trump’s “deplorables” *do* feel strongly. Giving them an occasional win defuses the otherwise dangerous perception that elites do not care about their concerns.¹⁴²

Correlated Opposition. Using omnibus legislation to suppress filibusters assumes a traditional politics where senators only feel strongly about one or two issues. However, contemporary public opinion has become highly correlated, and increased party discipline amplifies this. This explains, among other things, how minor expenditures like a \$5 billion border wall can shake the political system.

Traditional Filibuster Strategies. Filibusters were far less painful before the era of shutdowns. All the same, senators who feel very strongly about particular bills might not be deterred. Meanwhile, the pressure of shutdowns also increases leadership incentives to drop controversial legislation.

For now, shutdowns have acquired a bad name. However, the condemnation only makes sense if we worry that shutdowns are “losing” legislation that “should have” passed under OMOV. If intensity also matters, the better question is whether we can screen out divisive bills more cheaply. The answer is far from obvious: given how much is decided, shutdowns might well be cheaper than filibusters on a *per issue* basis. This is particularly true since victory could establish one side’s dominance for one or two election cycles, in which case most shutdowns will never happen at all.

That said, we still want shutdowns to be efficient, i.e. to inflict as little pain as possible before settling the issues at hand. Since pain accumulates over time, this means that the escalation should start at a level high enough to attract swing voters’ attention and then quickly ramp up until defections end the struggle. The fact that past shutdowns have (so far) ended quickly suggests that these conditions are at least roughly satisfied. This is roughly what might be expected given each side’s incentive to pick sanctions that will make the opposition—but not its own followers—defect.¹⁴³ The fact that the recent Trump shutdown

(Jan. 12, 2019, 12:00 AM), <https://www.npr.org/2019/01/12/683304824/the-longest-government-shutdown-in-history-no-longer-how-1995-changed-everything> [<https://perma.cc/9S54-NPVU>].

¹⁴² See generally TUCKER CARLSON, SHIP OF FOOLS (2018) (providing an eloquent, extended, and overtly partisan framing of the accusation).

¹⁴³ See Andrew Restuccia et al., *Both Parties Aim to Woo Defectors as Shutdown Drags On*, POLITICO (Jan. 14, 2019, 10:10 AM), <https://www.politico.com/story/2019/01/14/trump-on-declaring-national-emergency-im-not-looking-to-do-that-1098886> [<https://perma.cc/FGX9-8T62>], for a detailed account of the struggle for defectors in the recent Trump Shutdown.

affected less than one-fourth of the Federal budget¹⁴⁴ confirms that pain levels are precisely targeted.

*Veto*s. We have argued that vetoes improve Case 1 politics by triggering supermajorities that measure intensity. The situation for Case 3 is more complicated. Centrist presidents can use vetoes to backstop centrist legislators who might otherwise give in to coercion. But an extremist president could equally use vetoes to continue a coercive shutdown until Congress mustered a two-thirds vote to override him. It is hard to see how any compromise can address both these possibilities. The better answer could be to leave the veto in place and trust impeachment to stop extremist presidents who use vetoes to blockade centrist legislation until their demands are met.¹⁴⁵

E. Normative Implications

We have argued that the disutility that Case 3 inflicts on the electorate is roughly identical to the centrists' displeasure. Here, the good news is that U.S. extremists are markedly less millenarian or expropriationist than their European forbears.¹⁴⁶ This sets a rough floor under the center's misery, limiting the harm that Case 3 politics inflict in American circumstances.

VIII. THE TIME DIMENSION (A): JITTER

"Society is indeed a contract. . . . It is a partnership . . . not only between those who are living, but between those who are living, those who are dead, and those who are to be born."

– Edmund Burke, *Reflections on the Revolution in France* (1790)¹⁴⁷

So far, we have emphasized the logic of getting legislation approved. But in fact, our lives are mostly governed by laws that already exist. In keeping with Burke's epigram, these often express the will of Congresses elected decades or centuries ago. Given the press of new business, the idea that the current Congress is aware of, much less approves of, these laws is generally quite notional.

A. Jitter

OMOV implies that even tiny vote margins can set policy. But in that case, minor fluctuations in public opinion can also reverse it. Fortunately, even a bad statute can ameliorate problems enough for Congress to avoid revisiting the

¹⁴⁴ Damien Paletta, *By Pursuing Shutdown, Trump Revealed How Much America Depends on Government*, WASH. POST (Jan. 26, 2019, 6:00 AM), https://www.washingtonpost.com/business/2019/01/26/by-pursuing-shutdown-trump-revealed-how-much-america-depends-government/?utm_term=.17901856b5c1 [<https://perma.cc/6D5U-RXB7>].

¹⁴⁵ One practical difficulty is that it would be very hard to make root-and-branch obstructionism an impeachable "high crime" without simultaneously outlawing the kinds of routine horse-trading that Case 1 politics depends on. If we believe that Case 3 politics is transient and unstable, it might be better not to try.

¹⁴⁶ At least for now. As Brinton emphasized, revolutions often develop extreme positions that hardly anyone embraced at the outset. BRINTON, *supra* note 25, at 179–211.

¹⁴⁷ EDMUND BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* 119–20 (1790).

subject.

The problem comes when the losing side feels so intensely that it tries to reverse the statute the next time it gains power. This jitter is costly. First, policy may not be pursued long enough to see if it works. Second, repeal-and-replace initiatives reduce Congress's capacity to address new issues. Finally, constantly changing laws deter private investment.¹⁴⁸ At the same time, some jitter is essential. If the barriers to change are too high, citizens will rightly complain that the system is undemocratic.¹⁴⁹

B. *Healing Jitter*

We have argued that OMOV legislation is acceptable when the losers' intensity is less than the winners'. But this is only true for isolated votes. Over time, a healthy political system should *also* ensure that the winners and losers trade places often enough that small grievances do not accumulate into large ones. The good news, following Professor Downs, is that a Case 1 party system does this automatically.¹⁵⁰ We can also imagine something similar happening in Case 3, when frustrated centrists alternate their support between opposing extremists to approximate something like a middle course.

The question is whether we can design rules and institutions to further moderate the swings. Here the ideal, in the words of one observer, would be to design institutions that stop ". . . both parties . . . from governing as if they represent a permanent majority, and instead to limit the power of their offices to what they would be comfortable with their opponents possessing."¹⁵¹

C. *Traditional Fixes*

The simplest and most basic limit on jitter is congressional procedure. So long as individual members make up their own minds, they must be free to inform and be informed by others. But the rules that guarantee this automatically limit how fast legislation can be reversed.

Supermajorities. The prototype supermajority is found in the Constitution.

¹⁴⁸ THE FEDERALIST NO. 62 (Alexander Hamilton or James Madison) (arguing that "no great improvement or laudable enterprise can go forward" without stable laws).

¹⁴⁹ THE FEDERALIST NO. 43 (James Madison) (stating that the Amendment process must "[guard] equally against that extreme facility, which would render the Constitution too mutable; and that extreme difficulty, which might perpetuate its discovered faults"). Over-rigid barriers to change were one of the main reasons that Frenchmen supported Napoleon's overthrow of the Directorate in 1799. ANDREW ROBERTS, NAPOLEON: A LIFE 312 (2014) ("After a decade of Revolution, many Frenchmen were desperate for leadership and recognized that the parliamentary process inhibited that, as did a constitution that was next to impossible to amend. They were thus willing to see representative government temporarily suspended in order for Napoleon and his co-conspirators to cut the Gordian knot.").

¹⁵⁰ The fact that both parties strive to please the median voter immediately implies that most votes will be close, except by accident. *See supra* text accompanying note 37.

¹⁵¹ Bobby Jindal, *This Political Fight Will Go Many More Rounds*, WALL ST. J. (Aug. 2, 2018, 6:46 PM), <https://www.wsj.com/articles/this-political-fight-will-go-many-more-rounds-1533163590> [https://perma.cc/YC52-AV3V].

It provides that amendments require a two-thirds vote in both houses of Congress followed by three-fourths of the States.¹⁵² Like all supermajorities, these repeated votes guard against transient extremist majorities passing amendments. The two-thirds requirement also forces proponents to show such overwhelming political strength that the losers may be too overawed to seek a rematch.

The more general principle is that supermajorities should be high enough to avoid knife-edged votes that invite reversal at the next election, but low enough so that defective laws can be fixed. Unfortunately, there is no reason why these goals should be simultaneously possible. In 2010, the Senate's sixty percent threshold almost stopped an historically large Democrat-majority from passing the Affordable Care Act. Yet, the same supermajority *failed* to deter angry Republicans from spending most of the following decade pursuing "repeal-and-replace."¹⁵³ This hints that the current sixty vote figure is, at best, a kind of least-bad compromise.

Sunset Provisions. The earliest sunset provision is the Constitution's prohibition on funding the U.S. Army for more than two years at a time.¹⁵⁴ Ironically, forcing frequent debates probably worked to the fledgling Army's advantage, with successive Congresses repeatedly expanding the organization as militias proved inadequate.¹⁵⁵ This suggests that sunset clauses are useful for statutes that are simultaneously important, controversial, and address poorly-understood or evolving problems. Sunset provisions also guarantee that Congress will revisit legislation by some date certain. This suppresses jitter by making an earlier vote less urgent.

Separation of Powers. We have argued that the Framers imagined Congress as a snapshot of the electorate. But in that case, requiring the House, Senate, and President to agree to legislation implies that three different electorates would have consented. This means that winning one or even two aberrant elections cannot change American policy.¹⁵⁶ This is the literal implementation of Burke's dictum that the past ought to be represented alongside the present. The surprise

¹⁵² U.S. CONST. art. V.

¹⁵³ See *Budget Reconciliation*, HERITAGE FOUND., <https://www.heritage.org/political-process/heritage-explains/budget-reconciliation> [<https://perma.cc/4RTF-LGJL>], for a brief history of the various maneuvers.

¹⁵⁴ U.S. CONST. art. I, § 8, cl. 12. The idea of sunset laws was already practiced in ancient Athens, where the lawgiver Solon enacted his reforms for 100 years on the theory that they would become familiar and accepted after ten. 1 PLUTARCH, PLUTARCH LIVES 161–62 (Bernadotte Perrin trans., Harvard Univ. Press 1914) (100 AD). James Madison was similarly aware of the possibility, remarking during the Constitutional Convention that "[a]s to the difficulty of repeals, it was probable that, in doubtful cases, the policy would soon take place of limiting the duration of laws as to require renewal instead of repeal." I.N.S. v. Chadha, 462 U.S. 919, 954 n.18 (1983).

¹⁵⁵ The American Army had just 718 members in 1789. U.S. DEP'T OF DEFENSE, SELECTED MANPOWER STATISTICS: FISCAL YEAR 1997 46 (1997), https://www.alternatewars.com/BBOW/Stats/DOD_SelectedStats_FY97.pdf [<https://perma.cc/57Y3-A9G2>].

¹⁵⁶ We tend to forget that statistical fluctuations can produce spurious "mandates" even when the electorate is neutral. Suppose, for example, that each of the country's 435 House races was so evenly balanced that its outcome was equivalent to a simple coin toss. According to the Binomial Theorem, we expect one party or the other to win by twenty or more seats 3.4 percent of the time. Smaller margins would be even more frequent.

in our “information age” is that the public’s fevers often linger beyond one or two election cycles. Short of keeping representatives in office for much longer terms—a wildly antidemocratic result—it is hard to see how the Framers’ vision can be rescued.

Impeachment. For the executive, jitter means insulating the president from shifts in public opinion long enough to show that the platform he was elected on can work. This means, among other things, preventing a simple majority in Congress from removing him the first time his party loses an election. The Framers’ solution is part procedural (two-thirds supermajority in the Senate) and part law-and-fact inquiry (“High crimes”). The first component ensures that electors would have to swing the Senate’s partisan balance by roughly sixteen percent to remove a president whose party originally commanded a majority.¹⁵⁷ This seems comfortably larger than the swings associated with modern repudiations of unpopular incumbents like Carter (9.7 percent) and George H.W. Bush (5.56 percent).¹⁵⁸ The second component then reinforces this protection by requiring senators to find some predicate wrongdoing beyond simple unpopularity.

IX. THE TIME DIMENSION (B): RULE OF LAW

“You belong to a party, my friend. That is to say, you have to applaud or vilify though it goes against the grain. The party insists on it.”

– Paul Valéry (1871–1945)¹⁵⁹

Most collective action requires concerted activity over a period of years. This is only possible when (i) written legislation has an objectively determinate meaning, and (ii) judges and bureaucrats regularly enforce that meaning over their own personal policy preferences.¹⁶⁰ These conditions are typically, if somewhat vaguely referred to as “rule of law.”

The proposition that law has a discernible meaning is routinely challenged by legal realist and post-modernist scholars who claim that judges can always find verbal formulae to rule for either side in any dispute. But as I have argued elsewhere, the statement that judges *can* find for either side is different from saying that they *will*. For this reason, “rule of law” need only be true in the probabilistic sense that we expect most lawyers to decide legal questions the

¹⁵⁷ Our argument assumes that the winning presidential margin is a reasonable predictor for partisan control of the Senate.

¹⁵⁸ See Oishimaya Sen Nag, *Largest Landslide Victories in US Presidential Election History*, WORLD ATLAS (Apr. 25, 2017), <https://www.worldatlas.com/articles/largest-landslide-victories-in-us-presidential-election-history.html> [<https://perma.cc/97DS-CJ8A>].

¹⁵⁹ 14 PAUL VALÉRY, COLLECTED WORKS OF PAUL VALÉRY 71 (Stuart Gilbert trans., Princeton Univ. Press 1970).

¹⁶⁰ The Framers stressed that their scheme required a judiciary that had “. . . neither FORCE nor WILL, but merely judgment.” THE FEDERALIST NO. 78 (Alexander Hamilton). This self-abnegation would prevent them from substituting “. . . their pleasure to that of the legislative body.” *Id.*

same way.¹⁶¹

The second condition is that judges and officials actually follow the law. The large economics literature on trust games explains how this is possible.¹⁶² For our purposes, it is enough to say that officials who see colleagues honor the law are more likely to reciprocate. At the same time, the readiness to obey is always limited. We should therefore expect each increase in polarization to create still more angry extremists willing to ignore rule of law. This, in turn, destabilizes reciprocity, inviting a downward spiral.¹⁶³ Weakening rule of law also reduces centrists' confidence that laws, once passed, will be implemented as intended. Centrist legislators may then decide that it is better to pass no laws at all than to give extremist bureaucrats even more excuses to write their own rules. The resulting paralysis accelerates the slide to Case 3 politics.

A. *A Decaying Standard*

Lawyers are trained to recognize and resist departures from the rule of law. Indeed, much of first year law school is dedicated to suppressing students' urge to cherry pick facts and law to reach congenial outcomes.¹⁶⁴ But most Americans have never been to law school and many of those who have seem to have forgotten what they learned. Turn on CNN or Fox and one can infallibly predict how Republican and Democratic pundits will "spin" each new event to fit their needs.

None of this is new: indeed, it was already obvious in the Dreyfus Affair (1894).¹⁶⁵ For Americans, the dynamic's modern incarnation is more usefully dated to the Clinton/Lewinsky scandal (1998).¹⁶⁶ Since then, it has become

¹⁶¹ Stephen M. Maurer, *Beauty is Truth and Truth Beauty: How Intuitive Insights Shape Legal Reasoning and the Rule of Law*, 42 SEATTLE U. L. REV. 129, 154–60 (2018). There is good evidence that this convergence is rooted not just in education and socialization but also neurologically. *Id.*

¹⁶² See LUIS M.B. CABRAL, *THE ECONOMICS OF TRUST AND REPUTATION: A PRIMER* (2005), for a comprehensive and technically rigorous introduction.

¹⁶³ Maurer, *supra* note 161, at 155 (presenting a simple trust model of judicial behavior).

¹⁶⁴ One might argue that litigators cherry-pick arguments and facts constantly. This is true but irrelevant. Rather, the job of the advocate is to select the *best* argument from the subset that reach a certain result. This is simply a truncated form of the reasoning taught in first year law classes. Effective advocacy also requires an honest acknowledgment of not only the weaknesses but also the strengths of opposing arguments.

¹⁶⁵ Those holding anti-Dreyfus views were generally conservative, while pro-Dreyfusards were typically leftist or anticlerical. *See, e.g.,* WATT, *supra* note 6, at 22. Defenders of the Army and Church denounced Dreyfus even when they knew him to be innocent. *Id.* at 23. *See generally* DAVID GREENBERG, *REPUBLIC OF SPIN: AN INSIDE HISTORY OF THE AMERICAN PRESIDENCY* (2016) (detailing "spin" from the Theodore Roosevelt to Barack Obama), for the roots of American "spin."

¹⁶⁶ Martha MacCallum, 'She Denied It to Bill's Victims': Juanita Broaddrick Blasts Hillary Calling for 'Due Process' on Kavanaugh Accuser, FOX NEWS (Sept. 19, 2018, 8:33 PM), <http://insider.foxnews.com/2018/09/19/juanita-broaddrick-responds-hillary-clinton-brett-kavanaugh-due-process> [<https://perma.cc/S75D-T3S2>] (quoting U.S. Sen. Ted Stevens: "'I don't care if you prove he raped a woman and then stood up and shot her dead—you are not going to get sixty-seven votes [to remove Clinton from office]'").

steadily more insistent, culminating (for now) in Justice Kavanaugh's confirmation (2018)¹⁶⁷ and the Trump impeachment hearings.¹⁶⁸ As U.S. Sen. Ben Sasse puts it, "we're headed toward a place where hefty majorities of both sides of the electorate are going to regularly embrace unsupported and blatantly false assertions."¹⁶⁹

B. Rule of Law: Congress

Congress must follow the Constitution. At least theoretically, this means that members have the same obligation to observe rule of law as everyone else. The question then becomes whether inquiries that depend on complex judgments add something to mechanical supermajority rules.¹⁷⁰ This section argues that

¹⁶⁷ Seventy-four percent of Republicans believed Judge Kavanaugh, seventy-three percent of Democrats believed his accuser, and independents were evenly divided. Bryan Dean Wright, *Dems to Pay in November for Overplaying Kavanaugh Hand*, FOX NEWS (Oct. 1, 2018), <https://www.foxnews.com/opinion/dems-to-pay-in-november-for-overplaying-kavanaugh-hand> [https://perma.cc/84PR-AE92]. Greg Re, *Antonin Scalia 'Wouldn't Be Terribly Surprised' by 'Mad Libs Protesting' on Kavanaugh*, FOX NEWS (Sept. 30, 2018), <https://www.foxnews.com/politics/antonin-scalia-wouldnt-be-terribly-surprised-by-mad-libs-protesting-on-kavanaugh-son-s> [https://perma.cc/SHF6-FUTT] ("[P]rotesters . . . showed up at the Supreme Court on the night of Kavanaugh's nomination . . . with protest signs that allowed them to write in the nominee's name on the fly."). *Id.* (stating that one Women's March statement began "[i]n response to Donald Trump's nomination of XX to the Supreme Court" before arguing that Kavanaugh's nomination was "a death sentence for thousands of women in the United States"). O'Neil, *supra* note 124 (quoting U.S. Sen. Lindsey Graham: "Senator Schumer said, 23 minutes after [the] nomination, 'I'll oppose Judge Kavanaugh's nomination with everything I have. . . .'").

¹⁶⁸ See, e.g., Andrew O'Hehir, *Trump Impeachment Isn't About Democrats vs. Republicans – It's About Whether Our Democratic Institutions Have Any Mojo Left*, RAW STORY (Oct. 7, 2019), <http://www.rawstory.com/2019/10/trump-impeachment-isnt-about-democrats-vs-republicans-its-about-whether-our-democratic-institutions-have-any-mojo-left/> [https://perma.cc/AUG5-JLM3] (arguing that impeachment debate is really "about competing groups who don't even perceive the same reality").

¹⁶⁹ Andrew O'Reilly, *Trump Critic Sen. Sasse Says He's Considering Leaving Republican Party, Calls WH a 'Reality Show'*, FOX NEWS (Sept. 9, 2018), <https://www.foxnews.com/politics/trump-critic-sen-sasse-says-hes-considering-leaving-republican-party-calls-wh-a-reality-show> [https://perma.cc/6A79-JS2Z]; see also Howard Kurtz, *Rush to Judgment: Pols, Pundits Picking Sides on Kavanaugh Accusation*, FOX NEWS (Sept. 19, 2018), <https://www.foxnews.com/politics/rush-to-judgment-pols-pundits-picking-sides-on-kavanaugh-accusation> [https://perma.cc/YP4M-XZV5] ("One of the depressing aspects of the cultural debate sparked by the accusation against Brett Kavanaugh is that so many politicians, pundits and ordinary people have already made up their minds based on very limited information. . . . Democratic pols and liberal commentators, who would love to keep Kavanaugh off the high court, are quickly out of the gate saying they believe Ford . . . Republican pols and conservative commentators, who would love to see the judge elevated, are backing him and doubting Ford . . . Most would immediately switch sides if a Democrat was facing such accusations."); Lindsey Graham, *Allegations Against Kavanaugh are Collapsing*, FOX NEWS (Sept. 25, 2018), <http://video.foxnews.com/v/5839537740001/?#sp=show-clips> [https://perma.cc/56E6-TVJY] ("This is about outcome politics. Whatever it takes to stop Trump we'll do. Whatever we have to say about Kavanaugh to stop him we'll say.").

¹⁷⁰ The fundamental distinction between legal judgments and objective rules is that the former cannot be fully articulable or, more precisely, cannot be reduced to explicit algorithms that a machine could implement. See generally DANIEL KAHNEMAN, *THINKING FAST AND SLOW* (2011), for a comprehensive account of these distinct forms of human reasoning.

invoking legal judgments makes American institutions more resistant to Case 3 politics.

Impeachment. Impeachment provides an after-the-fact inquiry when a president, appointed official, or judge disregards the law. For Case 1, we have argued that rule of law helps block impeachment for unpopularity alone. The surprise is that rule of law continues to suppress partisanship well into Case 3. To see this, consider a benchmark example where the Senate's Extremist/Center/Extremist vote divides twenty-five/fifty/twenty-five. We have already said that we expect those who feel strongest to violate rule of law first. But if only extremists defect, the most they can muster is fifty votes—not nearly enough to remove a centrist president. On the other hand, an extremist president will automatically start with twenty-five percent support from his partisan allies. This leaves her needing eight centrist votes to survive. Assuming that centrists honor rule of law, this is satisfyingly close to the principle that it is better to let ten guilty men go free than to punish a single innocent.¹⁷¹ Knowing this arithmetic, an extremist president who wants to accomplish as much of her agenda as possible will paradoxically moderate her excesses to stay in power.

This simple model is, of course, only a snapshot. As rule of law declines, centrists will also become more partisan, especially if there is some chance of replacing an extremist president with their own candidate. Instead of an eight-member panel of honest senators, there will only be four or none at all. Even this, however, has the virtue of graceful failure. Better that rule of law fades gradually than collapse at once.

Advice and Consent. The Constitution requires the Senate to advise and consent when filling any one of approximately 1200 executive branch offices of the U.S.¹⁷² Senate rules currently provide that this should be done by majority vote, although sixty percent was required in the past.¹⁷³

The phrase “advice and consent” evidently means something less than the power to “co-nominate” candidates. The usual gloss is that members should approve candidates so long as they are “mainstream” and can be trusted to apply the law honestly. This inquiry is formally objective and non-partisan.¹⁷⁴ But since legislators also have honest differences of opinion, we cannot be sure in any specific case whether a senator has voted in bad faith. Despite this ambiguity, Democrats routinely approved Republican nominees and *vice versa*

¹⁷¹ *Blackstone's Ratio*, WIKIPEDIA, https://en.wikipedia.org/wiki/Blackstone%27s_ratio#cite_note-1 [<https://perma.cc/N3LL-7XA3>].

¹⁷² MAEVE P. CAREY, CONG. RESEARCH SERV., R41872, PRESIDENTIAL APPOINTMENTS, THE SENATE'S CONFIRMATION PROCESS, AND CHANGES MADE IN THE 112TH CONGRESS 2 (2012).

¹⁷³ *Id.* at 5.

¹⁷⁴ The Framers sometimes argued that rule of law would provide an effective lever over legislators. THE FEDERALIST NO. 66 (Alexander Hamilton) (“ . . . [T]here might be no positive ground of opposition.”). At other times, they seemed more skeptical, arguing instead that even senators would approve nominees since the president might retaliate by nominating a candidate they liked even less. *Id.*

for most of our history.¹⁷⁵

That, however, was in a Case 1 world where both sides wanted agreed policies to be implemented. Part of the problem today is that Supreme Court justices have embroiled themselves in hot button social issues,¹⁷⁶ radically increasing the incentives for extremists to abandon rule of law. Neither candidate in the Clinton-Trump debates even pretended that they would nominate justices without regard to ideology.¹⁷⁷ This, however, still does not explain the vast majority of fights where the nominee will never face a single hot button issue. Here, the obvious Case 3 interpretation is that extremists are using Advice and Consent to blockade the executive. Moreover, the evidence of Trump Administration cabinet confirmations suggests that all members in both parties are indeed significantly partisan.¹⁷⁸ That said, the fact that some Democrats oppose nominations much more often than others is consistent with the notion that deference norms continue to influence centrists.¹⁷⁹

X. REFORMS

Americans have spent too long pining for a lost age of bipartisanship. It is better to admit that politics have entered a new and coercive phase and ask what we can do about it. Parts A and B suggest reforms for Congress and the Executive. Part C asks what reform can do to destabilize the coercive equilibrium Americans find themselves trapped in.

A. *Managing Congress*

We have argued that political passions are easily counterfeited and that this makes coercive methods by far the most reliable measure of intensity. Rather than trying to abolish supermajorities and shutdowns, reform should aim to make

¹⁷⁵ Kevin Uhrmacher & Kevin Schaul, *Three Months In and Trump's Cabinet Already Has More 'No' Votes than Any Other*, WASH. POST (Apr. 27, 2017), <https://www.washingtonpost.com/graphics/politics/confirmation-no-votes/> [<https://perma.cc/7YB3-XKA5>] (“Opposing senators were mostly deferential to the president’s picks until about four decades ago, and more voted ‘no’ on President Obama’s picks than those of any previous president. Trump’s nominees broke that record. . . .”).

¹⁷⁶ See, e.g., CLARKE D. FORSYTH, *ABUSE OF DISCRETION: THE INSIDE STORY OF ROE V. WADE* (2013), for a detailed account of the Supreme Court’s most spectacular decision to intervene.

¹⁷⁷ Michael Bobelian, *In Debate, Clinton and Trump Feud Over Supreme Court, Continuing a Campaign Battle Ignited by Nixon in '68*, FORBES (Oct. 20, 2016), <https://www.forbes.com/sites/michaelbobelian/2016/10/20/clinton-trump-feud-over-supreme-court-fueling-a-campaign-battle-ignited-by-nixon-in-68/#1112e6e51e01> [<https://perma.cc/AW8A-LHXG>].

¹⁷⁸ Partisanship is most visible in party votes. *Every* Democrat voted “no” more often than *any* Republican. Put differently, the *average* Democrat voted “no” fifty-seven percent of the time compared to just one percent for Republicans. Wilson Andrews, *How Each Senator Voted on Trump's Cabinet and Administration Nominees*, N.Y. TIMES (May 11, 2017), <https://www.nytimes.com/interactive/2017/01/31/us/politics/trump-cabinet-confirmation-votes.html> [<https://perma.cc/A2JR-8MT2>].

¹⁷⁹ However, the top half (seventy percent nays) was much more negative than the bottom half (forty-four percent nays). Not surprisingly, partisanship was most pronounced for declared presidential candidates (eighty-six percent nays), each of whom voted “no” more often than every other Democrat apart from Massachusetts Senator Ed Markey. *Id.*

them more efficient.

The “Nuclear Option.” President Trump has called for a so-called “nuclear option” to end the Senate’s sixty-vote supermajority—though so far with little or no support in the Senate.¹⁸⁰ Nevertheless, it is easy to see how frustration with “gridlock”—and the power of OMOV rhetoric—could change minds. This makes it prudent to ask how the blow can be softened if the Senate is eventually persuaded.

We have argued that the Framers’ scheme of overlapping tenures was too short to implement the Burkean safeguard that new legislation should be acceptable to politicians elected by not just one but several successive electorates. Fortunately, sunset clauses can fill this gap. If the Senate does end the supermajority, it should carve out an exception so that sixty votes are still required for *permanent* legislation. Bills that passed by narrower margins would then terminate automatically after some reasonable time, e.g. ten years. This would give even mediocre legislation time to build a constituency. If it does, reauthorization will be more or less automatic, and could even yield the sixty votes needed to prevent further sunseting. If it does not, the legislation probably has enough faults that Congress should fix it.

Domesticating Shutdowns. If the supermajority does survive, the Senate could decide to target shutdowns instead. Here, the usual proposal is to extend existing budget appropriations indefinitely until the shutdown ends.¹⁸¹ The trouble, once again, is that the Senate would lose its main vehicle for measuring intensity.

But in that case, we should worry that the reform would be weaponized. So long as they command forty percent of Congress, either party could continue to block change long after it was voted out of power. Even more basically, no budget is sensible for all time. This suggests that old budgets would eventually become intolerable. A scheme that trades the short, sharp pain of a shutdown for prolonged misery seems misguided.

The better question, then, is less whether shutdowns should be abolished than how to make them more cost-effective. Here, policymakers should consider three sets of reforms:

Transparency. We have argued that coercive politics measure intensity. But extremist tacticians will almost always try to hide this information behind secrecy and bluff. Policy should counteract this by forcing transparency, most obviously through daily roll call votes that make defections immediately public.

¹⁸⁰ Marivic Cabural Summers, *Republican Senators Reject Trump’s Proposal to Use “Nuclear Option” on Border Wall Funding*, USA HERALD (Dec. 21, 2018), <https://usaherald.com/republican-senators-reject-trump-nuclear-option/> [<https://perma.cc/C7FW-XS3K>].

¹⁸¹ See Bill Cassidy, *Let Congress Debate Spending Again*, WALL ST. J. (Dec. 26, 2019, 5:47 PM), <https://www.wsj.com/articles/let-congress-debate-spending-again-11577400430> [<https://perma.cc/RHZ5-P8DK>]; Avery Anapol, *Senate Dem Introduces ‘Stop Stupidity’ Act to End Government Shutdowns*, HILL (Jan. 22, 2019, 3:25 PM), <https://thehill.com/homenews/senate/426459-senate-dem-introduces-stop-stupidity-act-to-end-government-shutdowns> [<https://perma.cc/MH2A-WMCB>].

Sanctions. We have argued that substituting personal for public pain offers large savings. This principle can be further reinforced by suspending members' salary,¹⁸² pension contributions, medical benefits,¹⁸³ and non-essential travel¹⁸⁴ until the shutdown ends.

Safety Valves. We have argued that Senators support shutdowns (a) to pass legislation that cannot otherwise command an OMOV majority, (b) because issues have become so correlated that blocking omnibus bills is now worth the political pain, and (c) to target individual legislation that was previously the subject of filibusters. This suggests that peeling off type "c" members can sometimes disable otherwise feasible shutdowns. One way to do this would be to institute a rule that lets forty Senators demand a separate supermajority vote on any omnibus component they oppose. If this stopped just one shutdown, the reform would pay for itself. More importantly, our Case 3 politics will end one day. Restoring less destructive options will make consensus politics more efficient when it returns.

B. Managing the Executive

We have argued that Senate supermajorities make it easier for extremists to block new policies. But the executive and judiciary are supposed to implement policies that Congress has already settled. The good news in this context is that supermajorities can sometimes resist blockades instead of facilitating them.

Advice and Consent. We have argued that Advice and Consent is at least partly a legal standard. But if so, the usual jury logic suggests that the president's choice of nominee should only be overruled when some supermajority finds special circumstances for doing so. Following our earlier analysis of a twenty-five/fifty/twenty-five Congress, nominees should win approval unless a sixty percent supermajority finds reason to reject them. This would necessarily include enough centrists to implement a rough approximation of Blackstone's Rule.

*Autopilot Legislation.*¹⁸⁵ The 2019 Trump shutdown brought new attention to whether presidents should be allowed to re-direct previously-authorized spending under the National Emergencies Act.¹⁸⁶ Following our Burkean logic, the statute is best seen as a "living will" that lets the president step in when

¹⁸² Ron Johnson, *Close the Book on Shutdowns*, WALL ST. J. (Sept. 22, 2019, 4:34 PM), <https://www.wsj.com/articles/close-the-book-on-shutdowns-11569184460> [<https://perma.cc/7Q5R-VVM3>].

¹⁸³ More draconian measures would increase the pressure still further by fining members or extending sanctions to include their staff.

¹⁸⁴ Tom Fitton, *'Air Pelosi'—What You Don't Know About the Lucrative Travel Our Leaders Enjoy on Your Dime*, FOX NEWS (Jan. 24, 2019), <https://www.foxnews.com/opinion/tom-fitton-air-pelosi-what-you-dont-know-about-the-lucrative-travel-our-leaders-enjoy-on-your-dime> [<https://perma.cc/MJ4M-RRQD>].

¹⁸⁵ William A. Galston, *A Bipartisan Shutdown Solution*, WALL ST. J. (Jan. 23, 2019, 6:52 PM), <https://www.wsj.com/articles/a-bipartisan-shutdown-solution-11548201127> [<https://perma.cc/JC W3-LZ3K>] (describing a 1981 proposal for an "automatic continuing resolution" that would extend funding indefinitely when Congress finds itself deadlocked).

¹⁸⁶ National Emergencies Act, 50 U.S.C.A. §§ 1601–1651 (West 1976).

Congress deadlocks. But in that case the power should end as soon as a new Congress musters a majority—including (for now) sixty votes in the Senate—to rescind its authorization. Instead, the statute lets the president exercise his veto so that rescission can sometimes require a two-thirds override.¹⁸⁷ Here, the supermajority serves no obvious purpose beyond helping a Case 3 extremist president blockade a centrist Congress.

C. *Returning to Consensus Politics*

We have argued that Case 3 coercive politics are unstable. Reform can increase this by loosening the grip of party discipline on centrists, increasing the number of centrists elected to Congress, and re-stabilizing rule of law norms.

Parties. We have argued that parties greatly improved Case 1 and Case 2 politics but also make it easier for extremists to mount Case 3 blockades. This means that we should “dial down” party discipline when coercive politics dominates. Instead, recent history has seen party discipline reach unprecedented levels.¹⁸⁸

The most straightforward way to dilute discipline might be to introduce “free” or “conscience” votes on the pattern of Commonwealth countries.¹⁸⁹ Indeed, this is more or less what President Trump and Speaker Pelosi did when they deputized a group of congressional moderates—themselves among the most likely defectors—to negotiate terms for ending the shutdown.¹⁹⁰ But conscience votes only let centrists cross the aisle when leaders let them. The “Problem Solvers Caucus” aims to empower bipartisanship further through rule changes that let centrists force floor votes on compromise legislation.¹⁹¹ This

¹⁸⁷ 50 U.S.C.A. § 1622(a) (West 1976) (requiring that joint congressional termination resolutions be “enacted into law”). Doctrinally, the veto requirement follows from the proposition that a statute can only be repealed or amended by another statute, which includes the possibility of a presidential veto. Cf. *I.N.S. v. Chadha*, 462 U.S. 919, 954 (1983) (holding one-house veto unconstitutional on the ground that congressional action to change duties of executive branch officials is a necessarily a “legislative act” subject to “. . . the procedures set out in Art. I”).

¹⁸⁸ Galston, *A Bipartisan Shutdown Solution*, *supra* note 185 (“Party discipline in the House has reached quasi-parliamentary levels that British Prime Minister Theresa May must envy.”). The weakness of modern members is mysterious. One possibility is that party support is more valuable than it used to be, perhaps because nationwide donors give leaders more money to distribute.

¹⁸⁹ See LUCIE LECOMTE, PARTY DISCIPLINE AND FREE VOTES 3 (2018), <https://bdp.parl.ca/staticfiles/PublicWebsite/Home/ResearchPublications/InBriefs/PDF/2018-26-e.pdf> [<https://perma.cc/5J86-PD5A>]. We could, of course, worry that party leaders might continue dictating votes in secret. That said, even an insincere permission would go a long way toward immunizing members from retaliation. For example, it would be hard to criticize members for taking stands that the left deemed “racist” or the right dubbed “Republican in Name Only,” if party leaders had already said that a conscience vote was appropriate.

¹⁹⁰ In the words of U.S. Sen. John Thune, “[i]f you allow the regular order to work we can get some things done around here.” Michael C. Bender, *How the Border Wall, Trump's Signature Campaign Promise, Turned into a National Emergency*, WALL ST. J. (Feb. 15, 2019, 3:34 PM), <https://www.wsj.com/articles/trump-promised-to-build-that-wall-then-ran-out-of-time-and-options-11550262854> [<https://perma.cc/RC7X-Y6VP>].

¹⁹¹ PROBLEM SOLVERS CAUCUS, *Break the Gridlock: A Package of Reforms to Make the House Work Again for the American People* 1–3 (2018), https://gottheimer.house.gov/uploadedfiles/break_the_gridlock_packet.pdf [<https://perma.cc/DJP9-K9RJ>].

seems sensible,¹⁹² but runs into the usual political obstacle that the current rules almost certainly exist because members want them—probably because the dominant faction in each party knows that discipline will enhance its own power still further. From this perspective, the Problem Solvers are unlikely to succeed unless public pressure joins them in demanding changes that Congress would never pass on its own.

Mandatory Voting. We have already noted that the *Hidden Tribes Project* survey found that America is comfortably short of Case 3 polarization—but only if non-voters are included in the mix.¹⁹³ It follows that the quickest way to restore a Case 1 Congress is to increase across-the-board voter turnout.¹⁹⁴ Of course, the respite will only be temporary if polarization continues to increase. But even a temporary return to Case 1 would be welcome, if it provides breathing space to absorb recent OMOV legislation and enact process reforms to better manage intensity.¹⁹⁵

The simplest and most obvious intervention is to make voting mandatory. The idea is not new. Australia has fined non-voters for nearly a century¹⁹⁶ during which time turnout has never fallen below ninety percent¹⁹⁷—fifty percent above U.S. rates. Academics argue that the provision has suppressed fiery “appeals to the base” aimed at mobilizing extremists.¹⁹⁸ This is exactly what one would expect if Australia was operating in a Case 1 regime.

Rule of Law. We have said that rule of law is reciprocal, so that defection by any one official makes other defections more likely. The silver lining is that this dynamic should also work in reverse, with stronger enforcement producing more compliance leading to greater rule of law and still more compliance.

To see how this might work, assume that the average bureaucrat balances

¹⁹² The downside is that letting centrists force floor votes would make each party’s national platform less credible. This is concerning since we have argued that platform competition improves Case 1 democracy. That said, American democracy has always given congressmen substantial leeway. A minor increase in independence seems an acceptable trade if it makes Case 3 blockades markedly less stable.

¹⁹³ The disproportionate number of centrist non-voters requires explanation. At least two mechanisms seem to be in play. First, we have argued that pain selects for passion, which in practice means extremism. This turns out to be true even when the sanction is limited to the time and effort required to vote by mail. Second, both parties have become increasingly reliant on sophisticated “get out the vote” campaigns. These are preferentially targeted on known or suspected partisans, avoiding centrists who might just as easily vote for the opposition.

¹⁹⁴ This is, of course, fundamentally different from the “ground game” strategies in which election campaigns try to “get out the vote” by selectively mobilizing known or suspected supporters.

¹⁹⁵ The measure would be especially straightforward in an age when voting is tied to driver’s licenses and other government databases.

¹⁹⁶ Tacey Rychter, *How Compulsory Voting Works: Australians Explain*, N.Y. TIMES (Nov. 5, 2018), <https://www.nytimes.com/2018/10/22/world/australia/compulsory-voting.html> [<https://perma.cc/X2MJ-UV54>]. Australia’s mandatory voting law has been on the books since 1924. *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ We might, of course, worry that mandatory voting would force ignorant voters to the polls. But researchers have repeatedly found that non-voters look like everyone else. RAYMOND E. WOLFINGER & STEVEN J. ROSENSTONE, WHO VOTES? 109 (1980) (stating that non-voters are “virtually a carbon copy” of the electorate).

the expected pain of punishment against the personal pleasure of meddling in public policy. Eq. 3 summarizes and expands this logic:

$$\text{Eq. 3: } [\text{Prob. that Bureaucrat Will Be Punished if Found Lawless}] \times [\text{Prob. Act is Found to Be Lawlessness}] \times [\text{Sanction}] < [\text{Bureaucrat's Private Benefit from Meddling in Public Policy}]$$

To analyze this problem, assume (as seems reasonable) that the right-hand side is constant while the first term on the left-hand side is decided by prosecutors and the third term is set by Congress. This means that our bureaucrat can only influence the middle variable, which he does by deciding when and how to behave lawlessly. But in that case, we expect him to follow rule of law more closely when enforcement increases. Of course, this strategy cannot go so far that it punishes bureaucrats for making good faith mistakes. This implies that prosecutors should only act in cases that follow something like Blackstone's rule that nine out of ten lawyers would see a violation. Even so, recent evidence suggests substantial room for improvement.¹⁹⁹

XI. CONCLUSION

We are still very much the Framers' children. But the Constitution does little to manage intensity, and this failing has become dangerously destructive in our hyperpolarized society. Politicians who pile up resentment with each OMOV win are making the problem worse. The country needs breathing space to digest and, very possibly, to modify their handiwork.

The question is how. Politicians who make speeches calling for the old cooperative ways to return are practicing wish fulfillment. Better to recognize that coercive politics pays (for now) and ask how reforms can slow the rate at which new enmities pile up. Rather than ban shutdowns outright, we should reform them to manage anger at less cost. Beyond that we have argued that coercive politics is fundamentally unstable. This implies that modest changes to party discipline, mandatory voting, and rule of law incentives will accelerate the country's return to a politics of compromise.

One hallmark of a sustainable politics is that it avoids and absorbs resentments faster than it generates them. Three decades ago, Bill Clinton was reelected president on a "triangulation" strategy that concentrated on placating

¹⁹⁹ On recent evidence, plainly illegal acts like leaking government documents do not seem to be enforced at all. Byron Tau & Aruna Viswanatha, *Justice Department Watchdog Probes Comey Memos Over Classified Information*, WALL ST. J. (Apr. 20, 2018, 7:19 PM), <https://www.wsj.com/articles/justice-department-watchdog-probes-comey-memos-over-classified-information-1524243505> [<https://perma.cc/3BU3-7RFH>]; DEP'T OF JUSTICE, A REVIEW OF VARIOUS ACTIONS BY THE FEDERAL BUREAU OF INVESTIGATION AND DEPARTMENT OF JUSTICE IN ADVANCE OF THE 2016 ELECTION (2018) (reflecting "the volume of communications that [Department of Justice] identified between FBI employees and media representatives in April/May and October 2016" in Attachments G and H).

enemies at least as much as pleasing supporters.²⁰⁰ Successful reforms should similarly reward today's congressmen for writing laws that minimize anger, especially from citizens who will never vote for them.

²⁰⁰ Ronald Brownstein, *Will Trump Triangulate?*, ATLANTIC (Apr. 6, 2017), <https://www.theatlantic.com/politics/archive/2017/04/will-trump-triangulate/521973/> [<https://perma.cc/DY8V-WNKB>].

APPENDIX

Extremist Politics: Six Examples

Country	Description
France 1898–1914	Monarchist and Socialist extremists openly opposed all French governments after the collapse of the Second Empire in 1870. ²⁰¹ Thereafter, centrist governments could only survive by making concessions to the left or right that prevented them from making strong programs of their own. ²⁰² Over time, the French Left slowly gained ground by abandoning support for violent revolution and picked up votes from the center following various government scandals. ²⁰³ The turning point came with the so-called Dreyfus Affair, when monarchist French Army officers framed a Jewish colleague for treason. ²⁰⁴ The scandal persuaded the Socialists to form mass parties that worked with centrists to keep right wing nationalists from power. ²⁰⁵
France 1936–1938	Communists militantly opposed cooperation with the country's many small centrist and socialist parties. ²⁰⁶ However, they reversed course when riots nearly led to a right wing coup in 1934. ²⁰⁷ They then joined centrists in a "Popular Front" government. ²⁰⁸ Despite deep substantive disagreements, the Front persisted to 1938. ²⁰⁹ This made it instrumental in excluding rightists from power until Nazi Germany occupied the country in World War II. ²¹⁰

²⁰¹ See, e.g., WATT, *supra* note 6, at 2–19 (detailing French rejectionist politics in the Third Republic); LESLIE DERFLER, THE DREYFUS AFFAIR 7 (2002) ("During its seventy-year life, [the Third Republic] endured repeated attacks from monarchists and Bonapartists on its right and from revolutionary Socialists and then Communists on its left.").

²⁰² WATT, *supra* note 6, at 8.

²⁰³ *Id.* at 17–18.

²⁰⁴ Jean-Baptiste Tai-Sheng Jacquet, *The Significance of the Dreyfus Affairs on Politics in France from 1894 to 1906*, E-INT'L REL. STUDENTS (June 6, 2012), <https://www.e-ir.info/2012/06/06/the-significance-of-the-dreyfus-affairs-on-politics-in-france-from-1894-to-1906/> [<https://perma.cc/LK M5-STA8>]; DERFLER, *supra* note 201, at 29.

²⁰⁵ See Tai-Sheng Jacquet, *supra* note 204.

²⁰⁶ BRENDON, *supra* note 99, at 333.

²⁰⁷ See *id.* at 172–73.

²⁰⁸ See generally *id.* at 344.

²⁰⁹ Dan La Botz, *The Popular Front, A Social and Political Tragedy: The Case of France*, 13 NEW POL. 91, 91–92, 101 (2011).

²¹⁰ *Id.* at 102.

Germany 1929–1933	Germany established its first democratic government (the “Weimar Republic”) following the First World War. ²¹¹ Extremist monarchist, Communist, and (after 1923) Nazi parties openly sought to replace the government throughout its existence. ²¹² The extremist parties focused on weakening the center by preaching violence, promoting civil disorder and economic disruption, ²¹³ and using their parliamentary representation less for legislation than obstruction and propaganda. ²¹⁴ Despite this, centrists were able to govern throughout the 1920s. ²¹⁵ The system was finally destabilized by the Great Depression, which drove impoverished voters to the Communists and, especially, Nazis at the expense of the center parties. ²¹⁶ Hitler became chancellor in 1933. ²¹⁷
Italy 1898–1914	Socialists and conservative Catholic parties boycotted centrist governments, which nevertheless passed legislation to appease both sides. ²¹⁸ Centrists also received the “tacit support of moderate Socialist deputies and union leaders,” who abandoned efforts to overthrow the government. ²¹⁹ However, Socialist voters continued to hold revolutionary views that prevented their representatives from joining centrist governments. ²²⁰ On the right, the Vatican similarly barred believers from participating in or even voting for the Italian Government until 1905, when a partial exception was made to prevent the election of “subversive” candidates. ²²¹ The ban was not finally lifted until 1919. ²²²

²¹¹ The Editors of Encyclopaedia Britannica, *Weimar Republic*, ENCYCLOPAEDIA BRITANNICA (Feb. 28, 2020), <https://www.britannica.com/place/Weimar-Republic> [<https://perma.cc/X5R4-692U>].

²¹² HANS MOMMSEN, *THE RISE AND FALL OF WEIMAR DEMOCRACY* 355 (1996) (stating that Hitler invariably refused to cooperate with existing political parties . . . “so that he could present himself as an uncompromising adversary of the existing political system”); Ward, *supra* note 90, at 32 (stating that Communists were pledged to overthrowing the republic and establishing a soviet dictatorship).

²¹³ Ward, *supra* note 90, at 30.

²¹⁴ *See id.* at 32–33.

²¹⁵ *See id.* at 32.

²¹⁶ *See id.* at 34, 38.

²¹⁷ *See generally* La Botz, *supra* note 209, at 96.

²¹⁸ *The Giolitti Era, 1900–14*, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/place/Italy/The-Giolitti-era-1900-14> [<https://perma.cc/3TM9-XSSV>].

²¹⁹ *See id.*

²²⁰ *See id.*

²²¹ The Editors of Encyclopaedia Britannica, *Non Expedit*, ENCYCLOPAEDIA BRITANNICA, <https://www.britannica.com/topic/non-expedit> [<https://perma.cc/BAJ8-YXXZ>].

²²² *Id.*

Italy 1920–1922	Communist and Fascist parties both demanded an end to the centrist government. ²²³ However, Fascist thugs quickly suppressed the Left through extralegal raids and murders. ²²⁴ The existing government then yielded power following a Fascist “March on Rome.” ²²⁵
Spain 1936–1937	Politics was badly fragmented among nationalists, conservatives, clericals, traditionalists, centrists, liberal democrats, separatists, radicals, left republicans, socialists, and syndicalist parties. All were intransigent and some openly sought to overthrow the State. ²²⁶ A Communist-backed left-wing rising was quickly quashed in 1934. ²²⁷ However, a right wing regional uprising persuaded the Communists to join a Popular Front with centrists that gained power in 1936. ²²⁸ Despite this, deep policy disagreements prevented the Front from governing effectively. ²²⁹ This led to an attempted coup followed by the Spanish Civil War. ²³⁰

²²³ BRENDON, *supra* note 99, at 26 (stating that by 1922 Mussolini was declaring that “either the Government of the country must be given peaceably to the Fascisti or we will take it by force”).

²²⁴ *Id.* at 26.

²²⁵ Blaine Taylor, *Benito Mussolini & The Fascist March on Rome*, WARFARE HIST. NETWORK (Dec. 2009), <https://warfarehistorynetwork.com/2018/02/01/benito-mussolini-the-fascist-march-on-rome/> [<https://perma.cc/P4CS-MF2G>] (last updated Feb. 1, 2017).

²²⁶ BRENDON, *supra* note 99, at 351, 365.

²²⁷ *Id.* at 368.

²²⁸ John Simkin, *The Popular Front*, SPARTACUS EDUC. (Sept. 1997), <https://spartacus-educational.com/SPpopular.htm> [<https://perma.cc/C4JS-QFHY>] (last updated Jan. 2020).

²²⁹ *See generally id.*

²³⁰ *See id.*; BRENDON, *supra* note 99, at 372.