

# THE HEALING CONSTITUTION: UPDATING THE FRAMERS' DESIGN FOR A HYPERPOLARIZED SOCIETY

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**Abstract.** The genius of the Framers lay in identifying and systematically planning for the known pathologies of democratic government. That said, most of their evidence was limited to Greek and Roman history. This gave little warning of the disastrous polarization that would destabilize European mass democracies over the next two centuries. This paper asks how the Framers might have extended their design had they understood these dangers.

We start by noting that the well-known “median voter theorem,” which holds that successful American political parties must position themselves near the center, depends on very special assumptions about how public opinion is actually distributed. This implies that American politics can and probably will behave very differently as polarization increases. This paper presents a typology of possible polarizations, and argues from both theory and history that each is associated with its own unique political style. Significantly, only some of these styles favor consensus politics. Others are confrontational, with extremists deliberately sabotaging government to coerce opponents. Recent government shutdowns are an extreme expression of these tactics.

One peculiarity of coercive politics is that it depends at least as much on political passion (“intensity”) as raw vote totals. Asking whether such politics are democratically legitimate necessarily forces us beyond the familiar language of one-man-one-vote (“OMOV”) theories that count all votes equally. This philosophical question also has a practical side. After all, no real government can go on passing laws that increase public anger forever. The paper develops a simple baseline model of intensity-weighted voting and asks how familiar American rules like supermajorities, presidential vetoes, and filibusters have modified OMOV to avoid oppressive outcomes in the past. In doing so, we rely heavily on European historical precedents and ask how these might change in American circumstances.

We argue that coercive politics, while sometimes pathological, is an essential tool for measuring and accommodating voter intensity. It follows that reform should aim less to suppress coercive methods than to make them less costly. We argue that suitably reformed versions of government shutdowns, supermajorities, sunset legislation, regular order, and stiffened rule of law incentives offer the fastest path to restoring cooperative politics.

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## 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 Romney<sup>2</sup>

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 coerce<sup>3</sup> minorities and sometimes 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. One can of course take the American exceptionalist view that, in Sinclair Lewis’s sardonic phrase, *It Can’t Happen Here*.<sup>4</sup> Still, it makes sense to worry. This paper takes the possibility seriously, arguing that theories of coercive politics are a natural extension of the Framers’ arguments to hyperpolarized societies. 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 conflict and promote an early return to the cooperative politics that 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 analyses the simplest such regime, and reviews the Framers’ fear that compromise politics could tip into a pathological “tyranny of the majority.” Section IV argues that the Framers’ design actually fell into a different pattern 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 19<sup>th</sup> and early 20<sup>th</sup> Century Europe. Section VI briefly reviews evidence for Case 3

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<sup>2</sup> Tony Leys, “Leadership Profile: Mitt Romney Made Effort to Reach Across Aisle” (Dec. 30, 2011) *Des Moines Register* <http://caucuses.desmoinesregister.com/2011/12/30/romney-made-effort-to-reach-across-aisle/>

<sup>3</sup> 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 “arm-twisting” scenarios where one side threatens to make everyone, including its own supporters, worse off by blocking legislation. Government-wide shutdowns, which have the effect of taking every federal program hostage simultaneously, are the culmination of such tactics.

<sup>4</sup> Sinclair Lewis, *It Can’t Happen Here* (Signet: 2014 [1935]).

opinion patterns in the contemporary US. Finally, Section VII analyzes how Case 3 politics are likely to play out in American circumstances. Section VIII concludes the article by asking what reform can do to better manage coercive politics and facilitate a return to centrist politics when polarization subsides.

## II. Visualizing Polarization

“Preeminent 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)<sup>5</sup>

Legal analysis typically asks whether a particular set of rules, for example the US 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. One benefit of this approach is that it dovetails with the Framers’ 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.<sup>6</sup> One complication is that the term “polarization” is often used to denote divergence *and* intensity simultaneously. Our scheme addresses these separately.

### A. Visualizing Opinion

Our goal is to explore how different polarization patterns affect politics. Figure 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

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<sup>5</sup> Richard M. Watt, *Dare Call It Treason*, p. 8 (Dorset: 2001 [1969]).

<sup>6</sup> Like the Framers, we will say little about how polarization originates in the broader society. For a provocative exploration of these issues, see Charles Murray, *Coming Apart: The State of White America, 1960-2010* (Crown Forum: 2012). Another possible conjecture is that no ideology can become mainstream unless it is supported by at least one dedicated media outlet. From this standpoint, the exceptional unity of American views from 1920 to the late Sixties mostly reflects the physics of broadcasting, where limited bandwidth shoehorned public discourse into just three networks. American politics were considerably more fractious when technology expressed itself through dozens of competing newspapers in the 19<sup>th</sup> Century or today’s 500-channel cable outlets.

example the rates that rich taxpayers could be asked to pay.<sup>7</sup> The vertical axis then indicates how many citizens prefer each choice.<sup>8</sup>

Readers will note that Figure 1 ignores intensity, *i.e.* the fact that some citizens have more passionate 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.<sup>9</sup> 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.

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 usually been enforced by 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.<sup>10</sup>

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.

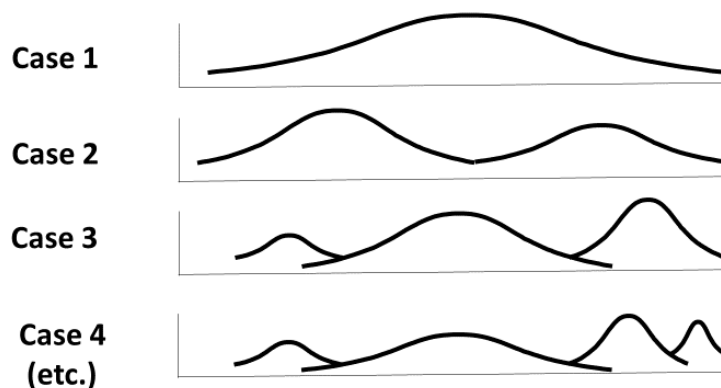


Fig. 1: Visualizing Polarization

<sup>7</sup> Many issues (*e.g.* abortion) present discrete rather than continuous choices. This would require us to redraw Fig. 1 as a bar graph. This technicality does not affect our arguments so long as the choices can be rank-ordered by severity.

<sup>8</sup> Some readers will note that vertical axis actually denotes what mathematicians call a "number density." The distinction does not matter for what follows.

<sup>9</sup> 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 and Michael Rappaport, "The Condorcet Case for Supermajority Rules," 16 *Sup. Ct. Econ. Rev.* 67 (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.

<sup>10</sup> Section VII, *infra*. This social fact is reinforced by modern political parties, which constantly hector their constituents to support each others' priorities.

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”<sup>11</sup>, or how the discovery of invisible ultraviolet radiation in physics explained how certain flowers can shine so brilliantly on cloudy days.<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup> 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.

*A Baseline Model.* Prudent in our ignorance, we adopt the simplest possible model of intensity. Figure 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

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<sup>11</sup> Roger Penrose, *The Road to Reality* (Vintage: 2004) at pp. 81-83.

<sup>12</sup> Austa Somvichian-Clausen, “Pictures Capture the Invisible Glow of Flowers,” *National Geographic* (Feb. 23, 2018) <https://www.nationalgeographic.com/photography/proof/2018/february/glowing-flowers-ultraviolet-light/>.

<sup>13</sup> 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. As the Framers cautioned, “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 thoroughly persuaded of their being in the right in any controversy.” [Hamilton: Federalist No. 1]

<sup>14</sup> Readers interested in the argument over interpersonal utility comparisons will find a concise survey of the literature at Wikipedia, “Social Choice Theory,” [https://en.wikipedia.org/wiki/Social\\_choice\\_theory](https://en.wikipedia.org/wiki/Social_choice_theory).

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.<sup>15</sup>

That said, we should

not let Figure 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. 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 US 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.<sup>16</sup>

We could, of course, postulate more complex curves than our simple linear figure.<sup>17</sup> 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.

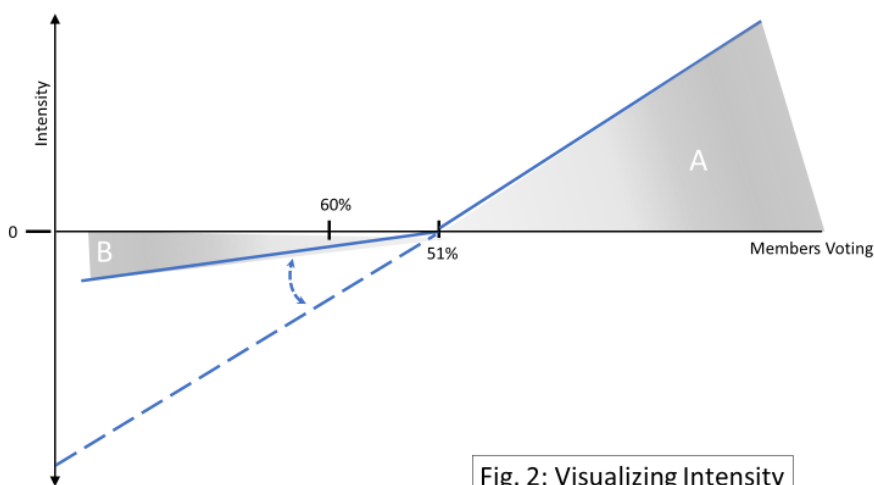


Fig. 2: Visualizing Intensity

<sup>15</sup> 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 hold more basic convictions that abortion should respect either "A Woman's Right to Choose" or conversely "The Fetus's Right to Life."

<sup>16</sup> 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.

<sup>17</sup> These would appear as error terms to our linear estimate.

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.<sup>18</sup> Second, Figure 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.<sup>19</sup> Crucially, this depends 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. 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. 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.

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<sup>18</sup> 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. These might be justified, for example, by the need to keep pathologically emotive "utility monsters" from outvoting everyone else. Wikipedia, "Utility Monster," [https://en.wikipedia.org/wiki/Utility\\_monster](https://en.wikipedia.org/wiki/Utility_monster).

<sup>19</sup> The argument also requires that Fig. 1 be symmetric around the swing vote.

### 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."<sup>20</sup>

- Mitt Romney

Today's politicians look back on 20<sup>th</sup> Century-style "bipartisanship" and "reaching across the aisle" with undisguised nostalgia.<sup>21</sup> 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, for example by blockading the president's efforts to confirm Cabinet members or forcing government shutdowns. Significantly, the resulting pain burdens both sides indiscriminately.<sup>22</sup> 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).

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<sup>20</sup> Lucy Madison, "Fact-Checking Romney's '47 Percent' Comment," *CBS News* (Sept. 25, 2012) <https://www.cbsnews.com/news/fact-checking-romneys-47-percent-comment/>.

<sup>21</sup> 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> (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> ("The only way the Democrats can regain the majority in either or both houses of Congress is by being civil.")

<sup>22</sup> 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 and Christopher Ingram, "Trump Claims Shutdown Will Hurt Democrats More Than Republicans," *San Jose Mercury News* (Dec. 28, 2018), <https://www.mercurynews.com/2018/12/27/trump-claims-most-suffering-under-shutdown-are-democrats/>.

## 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<sup>23</sup>, the rise of political parties running on agreed platforms fundamentally changed this. As Prof. 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 irrelevancy<sup>24</sup> so that public debate is reduced to two competing platforms.<sup>25</sup> This is very different from the situation in Europe, where proportional representation preserves ideological diversity by assuring small parties seats in Parliament.

*Convergent Politics.* Downs showed that politicians in a Case 1 two-party system always maximize votes by designing platforms to please the median voter.<sup>26</sup> This forces a strong convergence across party platforms that facilitates bipartisanship. The dynamic does *not* hold for Case 2 and 3 systems<sup>27</sup>, leaving more room for extremism.

*Close Elections.* The same imperative that drives convergent platforms guarantees that Case 1 races will often be tight.<sup>28</sup> In the real world where voters have limited information the winner will normally be decided by small accidents and misunderstandings.

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<sup>23</sup> 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.

<sup>24</sup> 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.

<sup>25</sup> 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, transactions cost arguments suggest that trying to process too much information can lead to gridlock. The correct balance is, in general, ambiguous.

<sup>26</sup> Anthony Downs, *An Economic Theory of Democracy* at pp. 117-18. Downs’ work was closely modeled on Hotelling’s earlier analysis of inter-brand competition in economics. H. Hotelling, “Stability in Competition,” *Economic Journal* 39 (153): 41-57 (1929)

<sup>27</sup> Wikipedia, “Median Voter Theorem,” *supra*, at [https://en.wikipedia.org/wiki/Median\\_voter\\_theorem](https://en.wikipedia.org/wiki/Median_voter_theorem).

<sup>28</sup> Downs, *supra* n. 26 at p. 117 (dynamics drive both parties to converge “until practically all voters are indifferent between them”); see *also* Wikipedia, “Median Voter Theorem,” *supra* at n. 27. 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.

Downs' work assumed pure platform competition. However, American voters also care about candidates' trustworthiness and personalities. If party discipline were perfect, every congressional bill would pass by the same margin. This is plainly false: Party discipline is significantly imperfect, 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.<sup>29</sup> 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.

## **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.<sup>30</sup> Indeed, Greek and Roman history is filled with examples. 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. After all, today's winners know that they could just as easily be targets tomorrow.<sup>31</sup> This however meant that they had to trust the losers to show

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<sup>29</sup> 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." By comparison, the Affordable Care Act, which finally passed by a procedural maneuver along party lines, has created seemingly endless bitterness.

<sup>30</sup> [https://en.wikipedia.org/wiki/Tyranny\\_of\\_the\\_majority](https://en.wikipedia.org/wiki/Tyranny_of_the_majority). Madison: Federalist No. 10 ("If faction consists of less than a majority, relief is supplied by the republican principle" This leaves protecting against a majority as "... the great object to which our inquiries are directed.")

<sup>31</sup> Madison: Federalist No. 51 ("[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 that will protect all parties, the weaker as well as the more powerful."); see also Madison, Federalist No. 62 ("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 many, who knows what the law is today, can guess what it will be tomorrow."); *Id.* (Without stability, "no great

similar forbearance when the situation was reversed.<sup>32</sup> Economists have formalized this logic by analyzing “trust games” where players trade favors that are neither simultaneous nor enforceable by contract. According to the so-called “Folk Theorem,” such systems are indeed stable so long as the exchanges are expected to continue indefinitely. That said, there is also instability: As soon as one player violates the dominant principle, every other player immediately revises his trust estimate downward. This can lead to still more violations and a downward spiral.<sup>33</sup>

### 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 US Senate, which spent most of the next two centuries experimenting with a variety of rules and institutional safeguards<sup>34</sup>

*Supermajorities.* Observers often cite supermajorities as an obstacle to majority tyranny. If the goal is to prevent armed insurrection, a numerical criterion is probably sufficient to keep the number of dissenters manageable. The case becomes harder if supermajorities are meant to encode fairness, or at least limit outrage. To see how supermajorities do this, return to Figure 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 “61%.” 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.<sup>35</sup> The political system would be much more efficient if it could find a way

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improvement or laudable enterprise can go forward which requires the auspices of a steady stream of national policy.”)

<sup>32</sup> 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.

<sup>33</sup> See, *e.g.*, Wikipedia, “Folk Theorem (Game Theory),” [https://en.wikipedia.org/wiki/Folk\\_theorem\\_%28game\\_theory%29](https://en.wikipedia.org/wiki/Folk_theorem_%28game_theory%29). The Folk Theorem owes its ironic name to the fact that the scholars who discovered it never published, and so remain anonymous.

<sup>34</sup> 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 the fevers the Framers wanted to guard against.

<sup>35</sup> Federalist No. 22 (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

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-19<sup>th</sup> to early 21<sup>st</sup> Century was the Senate’s “filibuster” rule. It provided that a fixed number of senators – most recently forty – could halt all new legislation unless and until the majority stopped trying to pass a particular bill. Given that every senator needs to pass legislation to win reelection, 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 outwait the Nays, we can reasonably infer that Figure 2’s “knee” points upward.

This system features various strengths and weaknesses:

*Measurement.* The contest takes place in interval between majority (51%) and supermajority (say, 61%) 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 imprecise<sup>36</sup> and defections are subject to gamesmanship.<sup>37</sup>

*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

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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.

<sup>36</sup> We know that individual senators’ opinions and intensities are bound to vary somewhat from Figs. 1 and 2’s straight line estimates. We expect this scatter (technically: “variance”) to introduce errors in estimating the weighted vote, and these will normally be larger for data taken near the “knee.” The good news, empirically, is that distributions across the knee are known to be fairly uniform. See, e.g. Peter Hanson, “Restoring Regular Order in Congressional Appropriations,” *Economic Studies at Brookings* (Nov. 2015) at Fig. 2.

<sup>37</sup> 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 sometimes 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.

or the other decides that it is going to lose.<sup>38</sup> 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 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 speeches<sup>39</sup> to fatal heart attacks.<sup>40</sup> 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.<sup>41</sup>

*Veto.* The Constitution gives the President the power to veto congressional legislation subject to a two-thirds override.<sup>42</sup> This is oddly symmetric to the filibuster, since it allows the president 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

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<sup>38</sup> 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. "Leonard Garment," *Spartacus Educational*, <https://spartacus-educational.com/JFKgarment.htm>.

<sup>39</sup> Most famously dramatized by Jimmy Stewart in *Mr. Smith Goes to Washington* (Columbia Pictures: 1939). Sen. Ted Cruz notoriously read bedtime stories as part of his 21-hour speech during the 2013 shutdown. Meagan Fitzpatrick, "Why Ted Cruz Read Green Eggs and Ham in the US Senate," *CBC News* (Sept. 25 2013) <https://www.cbc.ca/news/world/why-ted-cruz-read-green-eggs-and-ham-in-the-u-s-senate-1.1867499>.

<sup>40</sup> David R. Mayhew. *PS: Political Science and Politics* 35(1): pp. 31-36 (Jan. 2003) "Supermajority Rule in the U.S. Senate," at p. 33 (describing Senate Majority Leader Joseph Robinson's death in 1937). <https://www.cambridge.org/core/journals/ps-political-science-and-politics/article/supermajority-rule-in-the-us-senate/10A07BCC31339821DF1DA930AB224C5B>.

<sup>41</sup> 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?" (prospect of losing majority and/or chairmanships) *USA Today* (Jan. 31, 2018), <https://www.usatoday.com/story/news/politics/2018/01/31/house-republicans-retiring-drove-amid-gridlock-gloomy-election-forecast-and-scandal/1084809001/>.

<sup>42</sup> Art. I.7.2

the next election.<sup>43</sup> 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.<sup>44</sup> To understand 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.<sup>45</sup>

#### D. Normative Implications

Finally, we would like to develop some intuition for 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

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<sup>43</sup> One might have thought that the 22d Amendment’s two-term limit would have made lame duck presidents immune to sanctions. Party discipline seems to have suppressed this effect. *But see*, Wikipedia, “Bill Clinton’s Pardon Controversy” (“While most presidents grant pardons throughout their terms, Clinton chose to make nearly a third of them on January 20, 2001, his last day in office.”) [https://en.wikipedia.org/wiki/Bill\\_Clinton\\_pardon\\_controversy](https://en.wikipedia.org/wiki/Bill_Clinton_pardon_controversy). 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.

<sup>44</sup> Standard accounts usually stress that the filibuster emerged inadvertently from seemingly mundane rule changes. Wikipedia, “Filibuster in the United States Senate,” [https://en.wikipedia.org/wiki/Filibuster\\_in\\_the\\_United\\_States\\_Senate#Accidental\\_creation\\_and\\_early\\_use\\_of\\_the\\_filibuster](https://en.wikipedia.org/wiki/Filibuster_in_the_United_States_Senate#Accidental_creation_and_early_use_of_the_filibuster). But there is no real question that a majority of senators could have repealed the filibuster had they wanted to. *Id.* (Anglo-Saxon legislatures regularly use doubtful rules interpretations, and even “majority coups” to get rid of filibusters.) 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.

<sup>45</sup> 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. Even more than the filibuster, this insurance is tightly bounded by the fact that only two members can exercise the right for any single nominee.

minority, each dollar transferred will then increase society's resentment on net,<sup>46</sup> with intensity increasing in the amount transferred. Presumably, a profit maximizing tyrant would continue to expropriate until the oppressed's anger threatens physical security. 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 20<sup>th</sup> Century, when Nazi and Communist experiments proved, if anything, even more destructive than expropriation.

#### IV. Case 2: Niemöller Slicing

"First 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 for me."

- Martin Niemöller (1892–1984).<sup>47</sup>

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.<sup>48</sup> 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 add up until *most* voters are oppressed – would require an astonishingly fractured society.

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<sup>46</sup> 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 part of the proceeds are diverted to the tyrant and his cronies. By the same token, expropriation could actually *improve* net happiness in the common 21<sup>st</sup> Century case where transfers are meant to narrow the gap between rich and poor.

<sup>47</sup> [https://en.wikipedia.org/wiki/First\\_they\\_came...](https://en.wikipedia.org/wiki/First_they_came...)

<sup>48</sup> This is surprising given since the Framers would have recalled divide-and-conquer religious persecution from Britain's Glorious Revolution (1688-89). See, e.g., Crane Brinton, *Anatomy of Revolution* (W.W. Norton 1938) at p. 202.

Indeed, the statement was probably wrong even in Weimar, where the combined Communist/SPD/Jewish vote never totaled much more than one-third of the electorate.<sup>49</sup>

America's most serious Case 2 failure was Congress's refusal to intervene in the South's Jim Crow policies before the 1960s.<sup>50</sup> That said, it would be natural for modern identity politics' obsession with biologically-defined others to revive the tactic. There is more than a hint of this in Senate Democrats' recent attempt to challenge a judicial nominee who belonged to a mainstream Catholic service organization.<sup>51</sup>

### A. Traditional Fixes.

Formally, Niemöller slicing should be viable against any group that includes less than one-third of the population.<sup>52</sup> But in that case the oppressed groups are also too small to invoke supermajority or filibuster protections.<sup>53</sup> Despite this, the American system includes important protections against slicing.

*Parties.* We have already said that the emergence of Case 2's two-humped opinion distribution frees parties from having to design platforms to woo the median voter.<sup>54</sup> This presents a large opening for extremists. That said, the existence of parties still improves Case 2 political outcomes by letting groups trade support for each others' causes. Given that non-white

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<sup>49</sup> The high watermark for the combined Communist (KPD)/Socialist vote (SPD) was 37.3% of the electorate. See, e.g. William L. Patch, "The Polarization of the Electorate in The Weimar Republic," [http://home.wlu.edu/~patchw/His\\_214/handouts/weimar\\_elections.htm](http://home.wlu.edu/~patchw/His_214/handouts/weimar_elections.htm); Weimar's Jews represented just one percent of the electorate. See, e.g., Geni.Com, "German Jewry in the Weimar Republic (1918- 1933)," <https://www.geni.com/projects/German-Jewry-in-the-Weimar-Republic-1918-1933/17042>.

<sup>50</sup> David Mayhew, "The Filibuster in the US Senate," *supra* n. 41 at p. 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.")

<sup>51</sup> As the *Wall Street Journal* complained, "No 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." Editorial: "Kamala Harris's Dark Knights," *Wall Street Journal* (Jan. 3 2019) (challenging federal district court nominee Carl Buescher for belonging to Knights of Columbus); see also, Eugene F. Rivers III, "Another Religious Test in the Senate," *Wall Street Journal* (Jan. 4 2019) ("We non-Catholics must also stand up, if not for courage then for survival").

<sup>52</sup> 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.

<sup>53</sup> This did not, of course, stop Southern senators from filibustering Northern legislation that threatened segregation. Mayhew, *supra* at n. 40 and p. 34.

<sup>54</sup> See Wikipedia, "Median Voter Theorem," *supra* at n. 27.

minorities now account for forty percent of the US population, 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. 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.

*Bill of Rights.* The States ratified the Bill of Rights two years after the Constitution itself.<sup>55</sup> This made slicing by religion and political speech markedly harder. Similar protections have since been extended to race<sup>56</sup>, sexual preference<sup>57</sup>, and out-of-wedlock births<sup>58</sup>. The key in each case was authorizing courts to step in when majorities target personal characteristics that cannot easily be changed.

*Expulsion.* The Constitution also discourages slicing by limiting Congress’s power to expel members to a two-thirds vote.<sup>59</sup> However 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.<sup>60</sup> This narrowness confirms our argument that members need a bright line (here, criminal culpability) to embrace Niemöller methods. Given how many revolutions have proceeded by expelling legislators,<sup>61</sup> that reluctance seems healthy.

## **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

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<sup>55</sup> 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., *Federalist* No. 84

<sup>56</sup> US Constitution at Art. XIV. (“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.”)

<sup>57</sup> *Romer v. Evans*, 517 U.S. 620 (1996)

<sup>58</sup> *Levy vs. Louisiana*, 391 US 68 (1968).

<sup>59</sup> US Constitution Art. I.5.2.

<sup>60</sup> Six House members were expelled for backing secession, one for conspiring with England, and two for receiving bribes. Two more House members resigned under threat of expulsion, both for corruption. Fifteen Senators were expelled, all for backing secession. Four more resigned under threat of expulsion. Wikipedia, “Expulsion from the United States Congress,” [https://en.wikipedia.org/wiki/Expulsion\\_from\\_the\\_United\\_States\\_Congress](https://en.wikipedia.org/wiki/Expulsion_from_the_United_States_Congress).

<sup>61</sup> For the classic account, see Crane Brinton, *Anatomy of Revolution* (W.W. Norton: 1938) at pp. 176-181.

will normally be small compared to “tyranny of the majority” outcomes. At the same time, the minority is almost always too small to threaten security. This removes the main limit on how much *per capita* suffering the majority can inflict on them through expropriation and social engineering.

## V. Case 3: Weimar’s Shadow

“Things fall apart; the centre cannot hold”

- William Butler Yeats,  
“The Second Coming” (1919)<sup>62</sup>

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 centrists now hope to profit by voting to oppress others. But America’s current political crises do not look resemble these models. Instead, the main examples of dysfunction – most notably immigration and healthcare 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.<sup>63</sup>

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 instance among many where the great European democracies were simultaneously assailed from both the left and the right.<sup>64</sup> This Section looks at European history to extract the logic of Case 3 politics in its purest

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<sup>62</sup> Richard J. Finneran (ed.), *The Collected Poems of W.B. Yeats* (Macmillan: 1983) at p. 187.

<sup>63</sup> For an analysis of healthcare, see Paul Starr, “What Happened to Health Care Reform?” *American Prospect* (Winter 1995), <https://prospect.org/article/what-happened-health-care-reform>; Robert Pear, “13 Men and No Women are Writing New GOP Health Bill in Senate,” *New York Times* (May 8, 2017), <https://www.nytimes.com/2017/05/08/us/politics/women-health-care-senate.html>; Marcy Kreiter, “Is Health Care Reform Dead? Effort To Bring Ultra-Right On Board Could Alienate Centrists,” *International Business Times* (April 4 2017), <https://www.ibtimes.com/health-care-reform-dead-effort-bring-ultra-right-board-could-alienate-centrists-2520751>; Amy Goldstein, “How The Demise of Her Health-Care Plan Led to the Politician Clinton is Today,” *Washington Post* (Aug. 25 2018)(describing political failures of the early 1990s), [https://www.washingtonpost.com/politics/after-health-care-missteps-a-chastened-hillary-clinton-emerged/2016/08/25/2d200cb4-64b4-11e6-be4e-23fc4d4d12b4\\_story.html?utm\\_term=.ecdb9806cacf](https://www.washingtonpost.com/politics/after-health-care-missteps-a-chastened-hillary-clinton-emerged/2016/08/25/2d200cb4-64b4-11e6-be4e-23fc4d4d12b4_story.html?utm_term=.ecdb9806cacf). For immigration see, e.g. Anon., “Pelosi’s Dreamer Pawns,” *Wall Street Journal* (Jan. 22 2019) (polarization on immigration has led to “two decades of legislative frustration”); Tim Kane, “Trump Base Wants Immigration Compromise,” *Wall Street Journal* (Jan.28 2018)(presenting poll data showing that Democrats and Republicans agree to compromise immigration bill if Speaker Pelosi allowed a vote).

<sup>64</sup> The poet was also right – though hardly alone – in predicting that Europe’s political hatreds would boil over into apocalyptic violence. The quoted lines continue: “Mere anarchy is loosed upon the world/The blood-dimmed tide

and most classical form. This sets the stage for an empirical profile of Case 3 opinion in the contemporary US (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 19th and early 20<sup>th</sup> Centuries show an astonishing sameness. This basic template included three stages. While we focus on Weimar in what follows, readers can confirm from Appendix 1 that most of the Continent's democracies repeatedly passed through similar crises between the Dreyfus Affair (1894) and the start of World War II.

*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*. As to intensity, Communists and Nazis both genuinely believed that no other agenda could save society. This ensured that members greatly preferred their own agendas to cooperation with the center,<sup>65</sup> a view that was further bolstered by overheated rhetoric that collaboration with "social fascist" centrist governments was immoral.<sup>66</sup>

*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.<sup>67</sup> After that, however everything changed with politics becoming a three-way standoff in which each side made demands that the other two refused.

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is loosed, and everywhere/The ceremony of innocence is drowned; The best lack all conviction, while the worst are full of passionate intensity." And again, "[W]hat rough beast, its hour come round at last/Slouches towards Bethlehem to be born?" *Id.*

<sup>65</sup> 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," *Central European History* 14(1): 30-62 (1981) at 30. This cooperation was often deliberate, as when some local Communists "...invaded Nazi meetings to urge collaboration in strikes, protests, and defiance of republican authorities." *Id.* at 99. 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 57-58.

<sup>66</sup> Rosa Luxemburg, "Is Socialist Politics Possible from a Position in Government?" *Rosa Luxemburg Stiftung (Brussels)*, <https://www.rosalux.eu/topics/crises-and-left-solutions/is-socialist-politics-possible-from-a-position-in-government/>.

<sup>67</sup> The combined Communist/Nazi tickets polled 51.9% in the July election and 50.0% in November. Patch, "The Polarization of the Electorate in The Weimar Republic," *supra* at n. 49. In practice, however, the 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 Williamson, *Markets and Hierarchies: Analysis and Antitrust Implications: A Study in the Economics of Internal Organization* (Free Press: 1975).

This gridlock was nevertheless rational for extremists: Given that they held just 25% of the vote, 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.” 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. The necessity for making *some* choice was, of course, greatly accelerated by the Depression.

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.<sup>68</sup> Collecting these observations, we conclude that the blockade would continue so long as the following conditions were met:

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

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 was 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, had heard the propaganda all their lives 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.<sup>69</sup> While the French and Spanish Left were more agile in forming so-called

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<sup>68</sup> 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.

<sup>69</sup> 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* (Knopf: 2000) at p. 684 (The Hitler-Stalin Act “...struck at the root of the Communist faith, exposing its moral hollowness to all but the most blinkered devotees.”). See also, James J. Ward “Smash the Fascists...” n. 66, *supra* at p. 59 (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.) and p. 61 (Local party groups proposed the “heresy” of forming alliances with the Center against the Nazis); cf., Richard M. Watt, *Dare Call It Treason*, p. 8 (Dorset: 2001 [1969]) (19<sup>th</sup> Century French voters were “unalterably opposed to compromise”).

“Popular Front” governments, they too had trouble cooperating with centrists once in power.<sup>70</sup> This left the new governments shaky and vulnerable.<sup>71</sup>

## B. American Analog

American politics were seldom 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. Prof. 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. The American end-game was also similar, with both sides stumbling into war hoping that the other would blink.<sup>72</sup>

## 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 is produced, 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.<sup>73</sup>

The size of this suffering depends on the winners’ agenda. In the 20<sup>th</sup> 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.<sup>74</sup>

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

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<sup>70</sup> *Dark Valley* at p. 338 (“The common program amounted to little more than opposition to fascism.”)

<sup>71</sup> Spain’s Popular Front government was overthrown by a right-wing coup. The French experiment was more successful, keeping right wing parties out of power down to the Nazi invasion in 1940.

<sup>72</sup> Edward L. Ayers, *In the Presence of Mine Enemies: the Civil War in the Heart of America, 1859-1864* (Norton: 2004) at pp. 65-67 and 103 (describing centrists’ inability to find a party that would represent them); 69, 90 (North and South dismissed each others’ threats as bluffs); 104 (recounting argument that Southern firmness against Northern demands would render secession “improbable”); and 114 (recounting Republican arguments that they had broken the South’s will, revealing secession “for the sham it was.”).

<sup>73</sup> Our analysis focuses on winners and losers the day after the election. This makes sense from a democratic theory standpoint which ignores the possibility that some policies are better than others and could therefore gain converts over time. See Section VIII.C, *infra*. That said, the Twentieth Century pattern – for example following Bolshevism in Russia and Fascism in Europe – was generally the opposite, with things turning out worse than foreseen.

<sup>74</sup> Today’s democratic theorists still shudder at the collapse of Germany’s Weimar democracy, the coming of Hitler, and the seventy million who died as a result. See, e.g., Wikipedia, “World War II Casualties,” at [https://en.wikipedia.org/wiki/World\\_War\\_II\\_casualties](https://en.wikipedia.org/wiki/World_War_II_casualties).

course, is that the suffering will be cut short when one side or the other realizes its weakness and capitulates. But in fact, Appendix 1 suggests that the struggle typically continues for decades. Meanwhile, game-of-chicken strategies on both sides invite failures so big that disaster is unavoidable whoever wins. This could be the biggest reason why Yeats lived to see his prophecy come true.

## VII. 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 Obama

So far we have treated Case 3 pathologies as theoretical and historical. However, we should also worry about coercive politics in our own time. Anecdotally, the signs are everywhere: Recurring government shutdowns; Congress deadlocked for decades over healthcare and immigration<sup>75</sup>; sanctuary cities that defy federal law enforcement; continuous challenges to the legitimacy of the last four presidencies<sup>76</sup>; and, most recently, a smug “Resistance” defined by obstruction. This Section asks how closely public opinion resembles our Case 3 paradigm.

### 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.<sup>77</sup> It then used factor analysis<sup>78</sup> to divide them into groups or “tribes” according to their overall world view. Three of these – “Progressive Activists” on the left (8%) and Traditional Conservatives (19%) and Devoted

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<sup>75</sup> See note 63, *supra*.

<sup>76</sup> Andres Martinez, “Americans Have Seen the Last Four President’s as Illegitimate: Here’s Why,” *Washington Post* (Jan. 20 2017) [https://www.washingtonpost.com/posteverything/wp/2017/01/20/americans-have-seen-the-last-four-presidents-as-illegitimate-heres-why/?utm\\_term=.441a9607a1f5](https://www.washingtonpost.com/posteverything/wp/2017/01/20/americans-have-seen-the-last-four-presidents-as-illegitimate-heres-why/?utm_term=.441a9607a1f5).

<sup>77</sup> Stephen Hawkins, Daniel Yudkin, Miriam Juan-Torres, and Tim Dixon, *Hidden Tribes* (More in Common: 2018) p. 8.

<sup>78</sup> Factor analysis is a statistical tool used to decompose an essentially unpredictable (large variance) sample into several highly predictable (low variance) subgroups. IBM, “Factor Analysis,” [https://www.ibm.com/support/knowledgecenter/en/SSLVMB\\_25.0.0/statistics\\_mainhelp\\_ddita/spss/base/idh\\_fa.html](https://www.ibm.com/support/knowledgecenter/en/SSLVMB_25.0.0/statistics_mainhelp_ddita/spss/base/idh_fa.html).

Conservatives (6%) on the right – hold extreme views and resist compromise.<sup>79</sup> However, this leaves fully two-thirds (67%) of the population squarely centrist.<sup>80</sup> That sounds a good deal better than Weimar until you realize that the figure includes a “Politically Disengaged” population (26%) who seldom vote. 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 *Tribes* data immediately explains American partisanship. According to a recent Pew Foundation survey, the median Republican is now more conservative than 94% of Democrats, compared with 70% twenty years ago. And the median Democrat is more liberal than 92% of Republicans, up from 64%. Meanwhile the center has gotten smaller: Thirty-nine percent of Americans currently take a roughly equal number of liberal and conservative positions, down from 49% in surveys conducted in 1994 and 2004.<sup>81</sup>

## **B. Intensity.**

The harder question is intensity. We have already said that *Hidden Tribes* found that extremists resist compromise. A recent Pew Foundation survey takes this further by reporting that 70% of politically active Democrats and 62% of Republicans are “afraid” of the other party.<sup>82</sup> However we have already said that self-reported intensity is not reliable. While the problem is inherent in all surveys, we can at least check whether other, less direct lines of questioning are consistent. Here the best test case is almost certainly impeachment. Much has been made of

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<sup>79</sup> Hawkins *et al.*, *Hidden Tribes supra* at n. 77 and p. 12.

<sup>80</sup> Specifically, Traditional Liberals (11%), Passive (15%), Politically Disengaged (26%), and Moderates (15%). *Id.* at p. 6. *See also*, Pew Survey (2014) The share of Americans who express consistently conservative or consistently liberal opinions has doubled over the past two decades from 10% to 21%.

<sup>81</sup> Michael Dimock, Carroll Doherty, Jocelyn Kiley, and Russ Oates, *Political Polarization in the American Public: How Increasing Ideological Uniformity and Partisan Antipathy Affect Politics, Compromise and Everyday Life* (Pew Research Center: 2014).

<sup>82</sup> Pew Research Center, “Partisanship and Political Animosity in 2016,” <http://www.people-press.org/2016/06/22/partisanship-and-political-animosity-in-2016/>.

polls showing that forty-one percent of voters want to impeach President Trump.<sup>83</sup> The surprise is that the numbers were not much better for Presidents Obama (33%), Bush (30%) or Clinton (29%).<sup>84</sup> 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.<sup>85</sup> *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.<sup>86</sup>

### 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. The bad news,

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<sup>83</sup> NBC News, "NBC News Exit Poll: Majority of Voters Don't Think Trump Should Be Impeached" (Nov. 6 2018). <https://www.nbcnews.com/card/nbc-news-exit-poll-majority-voters-don-t-think-trump-n933011>. See also Public Policy Polling, "Support for Impeachment at Record High," (Oct. 31 2017)(49% of voters support impeachment); John Bowden, *The Hill* "Poll: Majority Don't Want Dems to Impeach Trump if They Retake House," (January 10 2018) (45% support impeachment); Carrie Dann, NBC News, "Just 36% of Americans Say They Would Vote for Trump in 2020," (Dec. 20 2017) [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://www.nbcnews.com/politics/first-read/poll-just-36-americans-indicate-they-would-vote-trump-2020-n831266?cid=sm_npd_nn_tw_ma) ("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.")

<sup>84</sup> Jonathan Topaz, "Poll: One-Third Say Impeach Obama," (July 25, 2014) <https://www.politico.com/story/2014/07/poll-impeach-obama-support-33-percent-109369>. A near-simultaneous Fox Poll found that 36% favored impeachment. *Id.*

<sup>85</sup> For example, 78% of Democrats want President Trump impeached but just 5% of Republicans. NBC News, "NBC News Exit Poll: Majority of Voters Don't Think Trump Should Be Impeached" (Nov. 6 2018). <https://www.nbcnews.com/card/nbc-news-exit-poll-majority-voters-don-t-think-trump-n933011>. See also Public Policy Polling, "Support for Impeachment at Record High," (Oct. 31 2017)(49% of voters support impeachment); John Bowden, *The Hill* "Poll: Majority Don't Want Dems to Impeach Trump if They Retake House," (January 10 2018) (45% support impeachment); Carrie Dann, NBC News, "Just 36% of Americans Say They Would Vote for Trump in 2020," (Dec. 20 2017) [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://www.nbcnews.com/politics/first-read/poll-just-36-americans-indicate-they-would-vote-trump-2020-n831266?cid=sm_npd_nn_tw_ma); Jonathan Topaz, "Poll: One-Third Say Impeach Obama," (July 25, 2014) (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 seven percent of Republicans), <https://www.politico.com/story/2014/07/poll-impeach-obama-support-33-percent-109369>. (Fifty-seven percent of Republicans say they support impeaching Obama, compared with just 35 percent of independent voters and 13 percent of Democrats.)

<sup>86</sup> We ignore "Black Block" and "Antifa" violence as negligible on the scale of Thirties-era rioters.

therefore, is how many politicians<sup>87</sup>, journalists,<sup>88</sup> and ordinary citizens<sup>89</sup> 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 Case 3 model 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?

### A. Extremism In Two-Party Systems

At first blush, Case 3 pathologies seem impossible in the US. Historians have long blamed Weimar's collapse on proportional voting rules that gave small extremist parties seats in the Reichstag. By comparison, America's first-past-the-post voting ensures that two – and only two – major parties can exercise power in Congress. 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. 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:

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<sup>87</sup> Tyler O'Neil, "Lindsey Graham to Democrats: 'Boy, You All Want Power. God, I Hope You Never Get It'" *PJ Media* (quoting Sen. Lindsay Graham: "What you want to do is destroy this guy's life, hold this seat open, and hope you win in 2020.") (Sept. 27 2018), <https://pjmedia.com/video/lindsey-graham-goes-off-this-is-not-a-job-interview-this-is-hell/>; Editorial: "A Way Out of the Shutdown," *Wall Street Journal* (Jan. 2, 2019). "Some Republicans, mainly in the House Freedom Caucus, think Mr. Trump can win an extended game of chicken with Democrats..."

<sup>88</sup> Daniel Heninger, "What is Elizabeth Warren?" *Wall Street Journal* (Oct. 18 2018) ("This 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) ("Still, there is danger when two sides both think they can outlast the other.") <http://2020accessonline.com/newsyoumaybeabletouse/2018/10/10/michael-goodwin-hillarys-calling-for-a-civil-war-wheres-the-outrage/>.

<sup>89</sup> Michael Goodwin, "Hillary's Calling for a 'Civil' War – Where's the Outrage?" *supra* n. 89 (describing interactions with readers: "Responding 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.")

*Centrists Triumphant.* First, suppose that centrists control at least one party. Given that roughly half the electorate prefers centrists,<sup>90</sup> 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.<sup>91</sup>

*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. The rise of extremists in both parties makes this a reasonable description of recent US politics.

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.<sup>92</sup> This is hard to maintain if we assume (following Weimar experience) that the two extremist parties 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.<sup>93</sup> At the same time, we

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<sup>90</sup> Despite widespread dissatisfaction with President Trump, Progressive candidates fared much worse than centrist Democrats in the 2018 midterms. See e.g., Allysia Finlay, “A Big Night for Democrats But Not Progressives,” WSJ (Nov. 8 2018) (“In places where progressive candidates won they tacked to the center”); Karl Rove, “Both Parties Win – and Lose,” *Wall Street Journal* (Nov. 8 2018) (“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.”).

<sup>91</sup> Civil War historian James McPherson argues that the US was markedly more divided in 1890s and 1930s than it is today. “Notable & Quotable,” *Wall Street Journal* (Jan. 28 2019). 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 is a more ambiguous figure, having pioneered many of the Big Government institutions that still dominate America. As McPherson emphasizes, however, he took power at a time when people were seriously talking about embracing fascist or communist models from Europe. By that standard, at least, FDR was a resolute centrist.

<sup>92</sup> This explains the widespread observation that extremist groups that claim to be enemies nevertheless need each other to survive. Stephen H. Miller, “The Symbiotic Relationship Between the Alt-Right and PC Left” (Jan. 5, 2017), *IGF Culture Watch*, <https://igfculturewatch.com/2017/01/05/kirchick-symbiotic-relationship-alt-right-pc-left/>.

<sup>93</sup> 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. Wikipedia, “Primary Election,” [https://en.wikipedia.org/wiki/Primary\\_election](https://en.wikipedia.org/wiki/Primary_election). 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

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.

## **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, US 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 "RINOs" ("Republican in Name Only") 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:

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

The bottom line is that centrists 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 will prefer to go on waiting. That said, 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.

## **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 nothing more than a breathing space 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.

*Debacle.* 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

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right. <http://www.pewresearch.org/fact-tank/2015/10/20/house-freedom-caucus-what-is-it-and-whos-in-it/>. The tactic was especially costly since it meant that the Caucus had to occasionally kill legislation to stay credible.

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.<sup>94</sup>

*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 US history.<sup>95</sup> Since the last realignment dates from the 1960s, the US 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 a very large drawback, but 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.<sup>96</sup> 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)<sup>97</sup>, Chuck Schumer (2018), and Donald Trump (2018) cheerfully accepted the challenge by shuttering large parts of the

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<sup>94</sup> The dynamic is particularly evident in the current cycle. Given that Republicans have locked themselves into an historically unpopular incumbent in 2020, Progressives will argue that it is better to nominate a true-believer in hopes of winning a razor-close “mandate” in 2020. That, in turn, would embolden post-Trump Republicans to nominate their own extremist candidate in 2024.

<sup>95</sup> Wikipedia, “Party Realignment in the United States,” [https://simple.wikipedia.org/wiki/Party\\_realignment\\_in\\_the\\_United\\_States](https://simple.wikipedia.org/wiki/Party_realignment_in_the_United_States).

<sup>96</sup> Peter Hanson, “Restoring Regular Order” *supra* n. 37 and p. 1 (“Leaders count on end-of-session pressures and the fear of a government shutdown to allow adoption of the package with minimal debate.”)

<sup>97</sup> [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://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).

federal government hostage.<sup>98</sup> The forty-plus Senators who agreed to support these campaigns were presumably moved by three distinct motives:

*Positive Legislation.* Unlike filibusters, shutdowns let extremists enact legislation that does not command a freestanding 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 Trump’s “deplorables” *do* feel strongly and the fact that they mostly lose OMOV contests is neither here nor there. Giving them an occasional win could defuse the perception that elites consider them as rounding errors in nation’s well-being.<sup>99</sup>

*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. Additionally, Congress has more extremists it used to. This means that the average member feels more strongly and is more willing to accept the pain of a shutdown.

*Traditional Filibuster Strategies.* Filibusters were far less painful before shutdown era. 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 would still want shutdowns to be efficient, *i.e.* to inflict as little pains 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

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<sup>98</sup> An early example led by Newt Gingrich (1995) unusually originated in the House.

<sup>99</sup> For an eloquent, extended, and overtly partisan framing of the accusation, see Tucker Carlson, *Ship of Fools* (2018).

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.<sup>100</sup> The fact that the recent Trump shutdown affected less than one-fourth of the Federal budget<sup>101</sup> confirms that pain levels are precisely targeted.

*Veto*s. We have argued that vetoes improve Case 1 politics by triggering supermajorities where the OMOV result ignores 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 is probably 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.

#### **D. 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 US extremists are markedly less millenarian or expropriationist than their European forbears.<sup>102</sup> This sets a rough floor under the center's misery, limiting the harm that Case 3 politics inflict in American circumstances.

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<sup>100</sup> For a detailed account of the struggle for defectors in the recent Trump Shutdown, see, Andrew Restuccia, Rachel Bade, John Bresnahan and Burgess Everett, "Both Parties Aim to Woo Defectors as Shutdown Drags On," *Politico* (Jan. 14, 2019) <https://www.politico.com/story/2019/01/14/trump-on-declaring-national-emergency-im-not-looking-to-do-that-1098886>.

<sup>101</sup> Damien Paletta, "By Pursuing Shutdown, Trump Revealed How Much America Depends on Government," *Washington Post* (Jan. 26, 2019), [https://www.washingtonpost.com/business/2019/01/26/by-pursuing-shutdown-trump-revealed-how-much-america-depends-government/?utm\\_term=.17901856b5c1](https://www.washingtonpost.com/business/2019/01/26/by-pursuing-shutdown-trump-revealed-how-much-america-depends-government/?utm_term=.17901856b5c1).

<sup>102</sup> At least for now. As Brinton emphasized, revolutions often develop extreme positions that hardly anyone embraced at the outset.

## VI. 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)<sup>103</sup>

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 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.<sup>104</sup> 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.<sup>105</sup>

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<sup>103</sup> Edmund Burke, *Reflections on the Revolution in France* (Methuen: 1905 [1790]) p. 84.

<sup>104</sup> Madison: Federalist No. 62 (Arguing that "no great improvement or laudable enterprise can go forward ..." without stable laws).

<sup>105</sup> Madison: Federalist No. 43 (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* (Penguin: 2014) p. 312 ("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.").

## 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 Prof. Downs, is that a Case 1 party system does this automatically. 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."<sup>106</sup>

## 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. It provides that amendments require a two-thirds vote in both houses of Congress followed by three-fourths of the States. 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." 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 US Army for more than two years at a time.<sup>107</sup> Ironically, forcing frequent debates probably

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<sup>106</sup> Bobby Jindal, "This Political Fight Will Go Many More Rounds," *Wall Street Journal* (Aug. 2, 2018).

<sup>107</sup> Art. I.8.12. The Framers were plainly aware that sunset provisions were possible. Indeed, Madison remarked in the course of the Constitutional Convention that "[a]s to the difficulty of repeals, it was probable that, in doubtful

worked to the fledgling Army's advantage, with successive Congresses repeatedly expanding the organization as militias proved inadequate.<sup>108</sup> 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. This is the literal implementation of Burke's dictum that the past ought to be represented alongside the present. The surprise 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.<sup>109</sup> This seems comfortably larger than the swings associated with modern repudiations of unpopular incumbents like Carter (9.7%) and George H.W. Bush (5.56%).<sup>110</sup> The second component then reinforces this protection by requiring senators to find some predicate wrongdoing beyond simple unpopularity.

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cases, the policy would soon take place of limiting the duration of laws as to require renewal instead of repeal." Quoted in *Chadha, supra*, 462 US 954 and n. 18.

<sup>108</sup> The American Army had just 718 members in 1789. US Dept. of Defense/Directorate for Information Operations and Reports, *Selected Manpower Statistics* (1997) at p. 46, Table 2-11. Available at [https://www.alternatewars.com/BBOW/Stats/DOD\\_SelectedStats\\_FY97.pdf](https://www.alternatewars.com/BBOW/Stats/DOD_SelectedStats_FY97.pdf).

<sup>109</sup> Our argument assumes that the winning presidential margin is a reasonable predictor for partisan control of the Senate.

<sup>110</sup> Wordatlas.com, "Largest Landslide Victories In US Presidential Election History," <https://www.worldatlas.com/articles/largest-landslide-victories-in-us-presidential-election-history.html>.

## VII. 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)<sup>111</sup>

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.<sup>112</sup> 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 same way.<sup>113</sup>

The second condition is that judges and officials actually follow the law. The large economics literature on trust games explains how this is possible. 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 more angry extremists who ignore rule of law. This, in turn, destabilizes reciprocity, inviting a downward spiral.<sup>114</sup> 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 an excuse to write their own rules. The resulting paralysis accelerates the slide to Case 3 politics.

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<sup>111</sup> Paul Valéry, *Collected Works of Paul Valéry* Vol. 14 (Tr. Stuart Gilbert) (Princeton Univ. Press: 1970) at p. 71.

<sup>112</sup> The Framers stressed that their scheme required a judiciary that had “...neither FORCE nor WILL but merely JUDGMENT.” This self-abnegation would prevent them from substituting “...their pleasure to that of the legislative body.” [Federalist No. 78]

<sup>113</sup> Stephen M. Maurer, “Beauty is Truth and Truth Beauty: How Intuitive Insights Shape Legal Reasoning and the Rule of Law,” *Seattle Law Review* 42(1): 129-160 (2018). There is good evidence that this convergence is rooted not merely in education and socialization, but also at a neurological level. *Id.*

<sup>114</sup> Cabral, Luis MB, “The Economics of Trust and Reputation: A Primer (2005 Draft - Preliminary). [http://pages.stern.nyu.edu/~lcabral/reputation/Reputation\\_June05.pdf](http://pages.stern.nyu.edu/~lcabral/reputation/Reputation_June05.pdf).

## 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.<sup>115</sup> But most Americans have never been to law school or else if they have no longer remember the lesson. Turn on CNN or Fox and you 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).<sup>116</sup> For Americans, the dynamic's modern incarnation is more usefully dated to the Clinton/Lewinski scandal (1998).<sup>117</sup> Since then, it has become steadily more insistent culminating (for now) in Justice Kavanaugh's confirmation hearing (2018).<sup>118</sup> As 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."<sup>119</sup>

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<sup>115</sup> 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.

<sup>116</sup> Those holding anti-Dreyfus views were generally conservative, while pro-Dreyfusards were typically leftist or anticlerical. See, e.g. Richard M. Watt, *Dare Call It Treason*, pp. 22 (Dorset: 2001 [1969]). Defenders of the Army and Church denounced Dreyfus even when they knew him to be innocent. *Id.* at 23. For the roots of American "spin," see generally David Greenberg, *Republic of Spin: An Inside History of the American Presidency* (2016) (detailing "spin" from the Theodore Roosevelt to Barack Obama).

<sup>117</sup> Martha MacCallum, "Transcript," *The Story With Martha MacCallum* (Sept. 19 2018) (quoting 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].") <http://insider.foxnews.com/2018/09/19/juanita-broadrick-responds-hillary-clinton-brett-kavanaugh-due-process>.

<sup>118</sup> Seventy-four percent of Republicans believed Judge Kavanaugh, 73 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>; Greg Re, "Antonin Scalia 'Wouldn't Be Terribly Surprised' by 'Mad Libs Protesting' on Kavanaugh," (Sept. 30 2018) *Fox News* <https://www.foxnews.com/politics/antonin-scalia-wouldnt-be-terribly-surprised-by-mad-libs-protesting-on-kavanaugh-son-says>. ("[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.* (Womens March statement began "In 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."); Tyler O'Neil, "Lindsey Graham to Democrats: 'Boy, You All Want Power. God, I Hope You Never Get It'" *PJ Media* (Sept. 27, 2018) (Quoting Republican Sen. Lindsay Graham: "Senator Schumer said, 23 minutes after [the] nomination, 'I'll oppose Judge Kavanaugh's nomination with everything I have...'"), <https://pjmedia.com/video/lindsey-graham-goes-off-this-is-not-a-job-interview-this-is-hell/>.

<sup>119</sup> 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>; see also, Howard Kurtz, "Rush to Judgment: Pols, Pundits Picking

## 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.<sup>120</sup> This section argues that 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 25/50/25. 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.<sup>121</sup> 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

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Sides on Kavanaugh Accusation," *Fox News* (Sept. 19, 2018), <https://www.foxnews.com/politics/rush-to-judgment-pols-pundits-picking-sides-on-kavanaugh-accusation>. ("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."); Sen. Lindsay Graham, "Allegations Against Kavanaugh are Collapsing" *Hannity* (Fox News: Sept. 24 2018) ("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.") <http://video.foxnews.com/v/5839537740001/?#sp=show-clips>

<sup>120</sup> 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. For a comprehensive account of these distinct forms of human reasoning, see Daniel Kahneman, *Thinking Fast and Slow* (Farrar, Staus & Giroux: 2011).

<sup>121</sup> Wikipedia, "Blackstone's Ratio" Commentaries on the Laws of England, Book IV, Chapter 27 (1760). at pp. 358-9 [https://en.wikipedia.org/wiki/Blackstone%27s\\_ratio#cite\\_note-1](https://en.wikipedia.org/wiki/Blackstone%27s_ratio#cite_note-1).

be four or none at all. Even this, however, has the virtue of graceful failure. Better that rule of law fade gradually than collapse at once.

*Advice and Consent.* The Constitution requires the Senate to advise and consent when filling any one of approximately 1200 “offices of the United States.”<sup>122</sup> Senate rules currently provide that this should be done by majority vote, although sixty percent was required in the past.<sup>123</sup>

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 law honestly. This inquiry is formally objective and non-partisan.<sup>124</sup> 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* for most of our history.

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, 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.<sup>125</sup> 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. That said, the evidence of Trump Administration cabinet confirmations suggests that all members in both parties are now significantly partisan.<sup>126</sup> That said, fact that some

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<sup>122</sup> Wikipedia, “List of Positions Filled by Presidential Appointment With Senate Confirmation,” [https://en.m.wikipedia.org/wiki/List\\_of\\_positions\\_filled\\_by\\_presidential\\_appointment\\_with\\_Senate\\_confirmation](https://en.m.wikipedia.org/wiki/List_of_positions_filled_by_presidential_appointment_with_Senate_confirmation)

<sup>123</sup> Wikipedia, “Advice and Consent,” at [https://en.wikipedia.org/wiki/Advice\\_and\\_consent](https://en.wikipedia.org/wiki/Advice_and_consent).

<sup>124</sup> The Framers sometimes argued that rule of law would provide an effective lever over legislators (“...there 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. [Federalist No. 66]

<sup>125</sup> 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>.

<sup>126</sup> Partisanship is most visible in party votes: *Every* Democrat voted “no” more often than *any* Republican. Put differently, the *average* Democrat voted “no” 57% of the time compared to just 1% for Republicans. Wilson Andrews, “How Each Senator Voted on Trump’s Cabinet and Administration Nominees, *New York Times* (May 11 2017), <https://www.nytimes.com/interactive/2017/01/31/us/politics/trump-cabinet-confirmation-votes.html>.

Democrats oppose nominations much more often than others is at least consistent with notion that traditional deference norms remain influential among centrists.<sup>127</sup>

## VIII. Reforms

Americans have spent too long pining for a lost age of bipartisanship. 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 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.<sup>128</sup> 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. That said, sunset clauses can do the same thing. 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, for example ten years. This would give even mediocre legislation time to build a constituency. If it did, reauthorization will be more or less automatic, and could even yield the sixty votes needed to prevent further sunseting. If it did 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

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<sup>127</sup> However, the top half (70%) was sixty percent more negative than the bottom half (44%). Not surprisingly, partisanship was most pronounced for declared presidential candidates (86%), each of whom voted “no” more often than every other Democrat apart from Massachusetts Senator Ed Markey. *Id.*

<sup>128</sup> Marivic Cabural Summers, “Republican Senators Reject Trump’s Proposal to Use “Nuclear Option” on Border Wall Funding,” *USA Herald* (December 21, 2018), <https://usaherald.com/republican-senators-reject-trump-nuclear-option/>.

indefinitely until the shutdown ends.<sup>129</sup> 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 budget 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.

*Sanctions.* We have argued that substituting personal for public pain offers large savings. This principle can be further reinforced by suspending members' salary, pension contributions, medical benefits,<sup>130</sup> and non-essential travel<sup>131</sup> 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.

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<sup>129</sup> Avery Anapol, "Senate Dem Introduces 'Stop Stupidity' Act to End Government Shutdowns," (Jan. 22, 2019) *The Hill*, <https://thehill.com/homenews/senate/426459-senate-dem-introduces-stop-stupidity-act-to-end-government-shutdowns>.

<sup>130</sup> More draconian measures would increase the pressure still further by fining members or extending sanctions to include their staff.

<sup>131</sup> 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>

## 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 25-50-25 Congress, a sixty percent supermajority would include enough centrists to approximate Blackstone's Rule.

*Autopilot Legislation.*<sup>132</sup> The 2019 Trump shutdown brought new attention to whether presidents should be allowed to re-direct previously-authorized spending under the National Emergency Act.<sup>133</sup> Following our Burkean logic, the statute is best seen as a "living will" that lets the president to step in when 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.<sup>134</sup> 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"

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<sup>132</sup> William A. Galston, "A Bipartisan Shutdown Solution," *Wall Street Journal* (Jan. 23, 2019) (describing 1981 proposal for an "automatic continuing resolution" that would extend funding indefinitely when Congress finds itself deadlocked.).

<sup>133</sup> 50 U.S.C. §§1601–1651.

<sup>134</sup> 50 U.S.C. §1622(a) (termination requires that joint congressional resolution 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. INS v. Chadha*, 462 U.S. 919 (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.")

party discipline when coercive politics dominates. Instead, recent history has seen party discipline reach unprecedented levels.<sup>135</sup>

The most straightforward to dilute discipline is to authorize “free” or “conscience” votes on the pattern of Commonwealth countries.<sup>136</sup> 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.<sup>137</sup> 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.<sup>138</sup> This seems sensible,<sup>139</sup> but runs into the usual political obstacle that the current rules almost certainly exist because members want them. 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* survey found that America is comfortably short of Case 3 polarization – but only if non-voters are included in the mix.<sup>140</sup> It follows that the quickest way to restore a Case 1 Congress is to increase across-the-board voter

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<sup>135</sup> William A. Galston, “A Bipartisan Shutdown Solution,” *Wall Street Journal* (Jan. 23, 2019) (“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.

<sup>136</sup> [https://en.wikipedia.org/wiki/Conscience\\_vote](https://en.wikipedia.org/wiki/Conscience_vote). We might, 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 legislative stands that were “racist” on the left, or “big government” on the right, if the party’s leaders had already said that a conscience vote was appropriate.

<sup>137</sup> In the words of Sen. John Thune, “If you allow the regular order to work we can get some things done around here.” Quoted in Michael C. Bender, “Neglect, Then Renewed Wall Push,” *Wall Street Journal* (Feb. 16, 2019).

<sup>138</sup> Problem Solvers Caucus, Working Draft: *Break the Gridlock: A Package of Reforms to Make the House Work Again for the American People* (2018) [https://gottheimer.house.gov/uploadedfiles/break\\_the\\_gridlock\\_packet.pdf](https://gottheimer.house.gov/uploadedfiles/break_the_gridlock_packet.pdf).

<sup>139</sup> 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. This seems an acceptable trade for destabilizing extremist outcomes in Case 3.

<sup>140</sup> The disproportionate number of centrist non-voters requires explanation. At least three 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.

turnout.<sup>141</sup> 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.<sup>142</sup>

The simplest and most obvious intervention is to make voting mandatory. The idea is not new. Australia has fined non-voters for nearly a century<sup>143</sup> during which time turnout has never fallen below 92% – fifty percent above US rates. Academics argue that the provision has suppressed fiery “appeals to the base” aimed at mobilizing extremists.<sup>144</sup> 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 the expected pain of punishment against the personal pleasure of meddling in public policy. Equation 3 summarizes and expands this logic:

**Eq. 3:** [Prob. That Bureaucrat Will be Punished if Found Lawless]

$$x [\text{Prob. Act is Found to be Lawlessness}] \times [\text{Sanction}] \\ < [\text{Bureaucrat's Private Benefit from Meddling in Public Policy}].$$

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

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<sup>141</sup> This is, of course, different from the “ground game” strategies in which election campaigns selectively try to “get out the vote” by targeting known or suspected supporters.

<sup>142</sup> The measure would be especially straightforward in an age when voting is tied to drivers licenses other government databases.

<sup>143</sup> [https://www.aec.gov.au/FAQs/Voting\\_Australia.htm](https://www.aec.gov.au/FAQs/Voting_Australia.htm). Australia’s mandatory voting law has been on the books since 1924. *Id.*

<sup>144</sup> 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. S.E. Wolfinger and R.J. Rosenstone, *Who Votes?* (Yale: 1980) at p. 109 (non-voters are “virtually a carbon copy” of the electorate).

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<sup>145</sup>

## IX. 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 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 enemies at least as much as pleasing supporters.<sup>146</sup> Successful reforms should similarly reward today's congressmen for writing laws that minimize anger, especially from citizens who would never, ever vote for them.

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<sup>145</sup> On recent evidence, plainly illegal acts like leaking government documents do not seem to be enforced at all. Byron Tau and Aruna Viswanatha, "Justice Department Watchdog Probes Comey Memos Over Classified Information" *Wall Street Journal* (April 20 2018); Department of Justice/Office of Inspector General, "A Review of Various Actions by the Federal Bureau of Investigation and Department of Justice in Advance of the 2016 Election," (2018) at Attachments G and H.

<sup>146</sup> Wikipedia, "Triangulation," [https://en.wikipedia.org/wiki/Triangulation\\_\(politics\)](https://en.wikipedia.org/wiki/Triangulation_(politics)).

## Appendix 1

### Extremist Politics: Six Examples

Country	Description
France 1898 – 1914	Monarchist and Socialist extremists openly oppose French governments after the collapse of the Second Empire in 1870. <sup>147</sup> Thereafter, centrist governments could only survive by making concessions to the left or right, which prevented them from making strong programs of their own. <sup>148</sup> The 19 <sup>th</sup> Century French Left slowly gains ground by abandoning support for violent revolution and picking up votes from the centrists following various government scandals. <sup>149</sup> The turning point comes with the so-called Dreyfus Affair, when monarchist French Army officers frame a Jewish colleague for treason. The scandal persuades Socialists to form mass parties over the next decade that work with centrists to keep right wing nationalists from power. <sup>150</sup>
France 1936 – 1938	Communists militantly oppose cooperation with fragmented centrist and socialist parties. However, they reverse course when riots nearly lead to a right wing coup in February 1936. <sup>151</sup> They then join the centrists in a “Popular Front” government. <sup>152</sup> Despite deep substantive disagreements, the Front persists to 1938. This makes it instrumental in excluding rightists from power until Nazi Germany occupies the country in World War II. <sup>153</sup>
Germany 1929 – 1933	Germany establishes its first democratic government (the “Weimar Republic”) following the First World War. Extremist monarchist, Communist, and (after 1923) Nazi parties openly seek to replace the government throughout its existence. <sup>154</sup> The communists

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<sup>147</sup> See, e.g. Richard M. Watt, *Dare Call It Treason*, pp. 2-19 (Dorset: 2001 [1969])(detailing French rejectionist politics in the Third Republic); Leslie Derfler, *The Dreyfus Affair* (Greenwood: 2002) at p. 7. (“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.”)

<sup>148</sup> Watt, *Dare Call It Treason* at p. 8.

<sup>149</sup> Watt, *Dare Call It Treason* at p. 17-18.

<sup>150</sup> [https://en.m.wikipedia.org/wiki/Dreyfus\\_affair#cite\\_note-259](https://en.m.wikipedia.org/wiki/Dreyfus_affair#cite_note-259) (describing origins of French Section of Worker’s International); Leslie Derfler, *The Dreyfus Affair* (Greenwood: 2002) at p. 29.

<sup>151</sup> Brendon, *Dark Valley* at pp. 172-73

<sup>152</sup> Brendon, *Dark Valley* at p. 344.

<sup>153</sup> [https://en.m.wikipedia.org/wiki/Popular\\_Front\\_\(France\)](https://en.m.wikipedia.org/wiki/Popular_Front_(France))

<sup>154</sup> Hans Mommsen, *The Rise and Fall of Weimar Democracy* (UNC Press: Chapel Hill and London 1996) at p. 355 (“Hitler invariably refused to cooperate with existing political parties “... so that he could present himself as an

	focus on weakening the center by preaching violence, promoting civil disorder and economic disruption, <sup>155</sup> and using its parliamentary representation less for legislation than obstruction and propaganda. <sup>156</sup> Despite this, centrists are able to pass legislation needed to govern throughout the Twenties. The system is destabilized by the Great Depression, which drives impoverished voters to the Communist and, especially, Nazis at the expense center parties. <sup>157</sup> Hitler becomes chancellor in 1933.
Italy 1898 – 1914	Socialists and conservative Catholic parties boycott centrist governments, which nevertheless pass legislation to appease both sides. Centrists also receive tacit support from moderate Socialist deputies and union leaders who abandon effort to overthrow the government. However, Socialist voters continue to hold revolutionary views that prevent their representatives from joining centrist governments. <sup>158</sup> On the right, the Vatican similarly bars believers from participating in or even voting for the Italian Government until 1905, when a partial exception was made when voting was necessary to prevent the election of “subversive” candidates. The ban is not finally lifted in 1918. <sup>159</sup>
Italy 1920 – 1922	Communist and Fascist parties founded after World War I both demand an end to the existing centrist government. <sup>160</sup> By 1921 Fascist thugs had suppressed the left through extralegal raids and murders. <sup>161</sup> Two years later the existing government yielded power to Fascists following a revolutionary “March on Rome.” <sup>162</sup>
Spain	Politics is badly fragmented among nationalists, conservatives, clericals, traditionalists, centrists, liberal democrats, separatists, radicals, left republicans, socialists, and

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uncompromising adversary of the existing political system.”). James J. Ward “‘Smash the Fascists...’, note 66, *supra* at 32. (Communists were pledged to overthrowing the republic and establishing a soviet dictatorship.)

<sup>155</sup> James J. Ward “‘Smash the Fascists...’”, *supra* n. 66 at p. 30.

<sup>156</sup> *Id.* at p. 33.

<sup>157</sup> *Id.* at pp. 34, 38.

<sup>158</sup> Italy: The Giolitti era, 1900–14, *Britannica* <https://www.britannica.com/place/Italy/The-Giolitti-era-1900-14>

<sup>159</sup> Wikipedia, “Non Expedit,” [https://en.wikipedia.org/wiki/Non\\_Expedit](https://en.wikipedia.org/wiki/Non_Expedit).

<sup>160</sup> Piers Brendon, *The Dark Valley: A Panorama of the 1930s* (Knopf: 2000) at p. 25.

<sup>160</sup> 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.”

<sup>161</sup> Piers Brendon, *The Dark Valley* at p. 26.

<sup>162</sup> Wikipedia, “Communist Party of Italy” at [https://en.m.wikipedia.org/wiki/Communist\\_Party\\_of\\_Italy](https://en.m.wikipedia.org/wiki/Communist_Party_of_Italy).  
Wikipedia, “[https://en.m.wikipedia.org/wiki/Italian\\_Communist\\_Party](https://en.m.wikipedia.org/wiki/Italian_Communist_Party)

1936 - 1937	syndicalist parties. All are intransigent and some openly seek to overthrow the Spanish state. <sup>163</sup> A Communist-backed left-wing rising is quickly quashed in 1934. <sup>164</sup> However a right wing regional uprising persuades the Communists to join a Popular Front with centrists that gains power in 1936. <sup>165</sup> Despite this, deep policy disagreements prevent the Front from governing effectively leading to an attempted coup and the start of the Spanish Civil War. <sup>166</sup>
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<sup>163</sup> Brendon, *Dark Valley* at pp. 351, 365.

<sup>164</sup> Brendon, *Dark Valley* at p. 368.

<sup>165</sup> Wikipedia, "Popular Front (Spain)" at [https://en.wikipedia.org/wiki/Popular\\_Front\\_\(Spain\)](https://en.wikipedia.org/wiki/Popular_Front_(Spain)).

<sup>166</sup> Brendon, *Dark Valley* at p. 372. Wikipedia, "Popular Front (Spain)" [https://en.wikipedia.org/wiki/Popular\\_Front\\_\(Spain\)](https://en.wikipedia.org/wiki/Popular_Front_(Spain)) ("The government did not stay in power long mainly because of the conflict of ideological views by many of the parties. The only factor working for the government was the unity for the conquest of fascism.")