

THE FORGOTTEN SAFEGUARD: CONGRESS'S PROCEDURAL RULES AS “CHECKS AND BALANCES” IN AMERICAN POLITICS

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ABSTRACT

The Framers designed the Constitution with a total of eight checks and balances, each of which pits two government institutions against each other. But the American government has evolved since then in ways no one could foresee. Probably the largest and most consequential change is the “two-party system.” As Anthony Downs and Richard Hofstadter pointed out more than half a century ago, the rise of mass parties almost certainly saved James Madison’s design from extinction. Yet it also brought new problems, most notably by encouraging both parties to advocate policy experiments that are well to the left (or right) of what centrist voters want. The challenge for the Constitution is to preserve democracy by limiting how fast these excursions depart from mainstream opinion. This Article argues that Congress’s procedural rules have evolved to fill this gap. In the process, they also help to correct several electoral distortions, notably including gerrymanders. The Article concludes by proposing reforms that could improve the system still further.

I. INTRODUCTION

Americans are justly proud of their Constitution. Yet their democratic institutions are also a moving target, having evolved continuously over the centuries. Here, the first and most consequential change was the two-party system. Indeed, the Democrat and Republican parties probably play larger roles in deciding the country’s major policies than the Congress or the President do. More than that, the two-party system also rewrote the country’s political dynamics. The Framers’ generation imagined a simple system where Americans debated the correct policies and then elected leaders to take them there. But as Professor Downs stressed in his landmark study,¹ the two-party system is much less direct than that. The reason, he argued, is that it rewards politicians for amplifying the country’s differences, an effect that grows larger when society is polarized to begin with. The result is that both parties routinely propose platforms that are well to the right (or left) of what

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¹ ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (1957).

the median voter wants.² This leads to a crabwise trajectory in which successive administrations shift policy first one way and then the other.

The question is whether a system that routinely ignores the median voter can nevertheless be considered democratic. The answer is yes, but under two conditions. First, the system's swings from one administration to the next must approximately cancel on average. This should happen automatically as voters tire of each administration's persistent drift to the right or left. The second condition is harder. Democracy also requires that the swing in any single administration must never be "too fast." This requirement was easily met in the 1950s, when voter polarization was so low that two-party competition had little to amplify. That, of course, is no longer true. The result is that politicians are now much more likely to be rewarded for adopting extreme platforms and, if elected, trying to enact them.

We know how Madison would have approached these difficulties. His essays in *The Federalist* nearly always invoke "checks and balances" in which rival institutions try to limit each other's power. This makes it natural to ask whether we can similarly limit party extremism by adding a ninth mechanism to the eight "checks and balances" identified by the Framers. One might argue that it is dangerous to invent new safeguards from scratch. But this misunderstands Madison's work. Rather than design from a blank sheet of paper, Madison actually identified and refined structures that had evolved to perform similar functions in the past.³

This Article argues that Congress's internal procedural rules have similarly evolved to resist policies that disproportionately burden the minority. This makes them a natural vehicle to slow policy swings that only a handful of voters support. More generally, the same dynamic also protects minorities that become vulnerable through gerrymanders and other distortions. The Article then turns to a detailed history of House and Senate procedures to construct an explicit theory of how their rules have operated and evolved over time. Finally, the Article uses this theory to ask how well existing rules keep the American system approximately democratic and suggest reforms that could improve the current system's performance still further.

We proceed as follows: the first part of this Article reviews what we should expect from "checks and balances" generally, and whether congressional rules provide a suitable candidate. Part I describes the political philosophy that Madison was trying to implement, while Part II inventories the various political pathologies that Madison's system must cope with. These include majority tyranny, gerrymandering, and the deliberate distortions that the Framers built into the Senate and the Electoral College. Part III asks how Madison's system was designed to reduce the anger that results from these distortions and takes a first look at how congressional procedures could ideally support this framework. The second part of the Article addresses Congress's actual rules. Here, Parts IV and V set the stage by describing the history of House and Senate rules down to the present. Part VI then constructs an explicit theory of how Congress sets rules for itself.

² *Id.* at 117–20. For a recent precis of these arguments, see, e.g., STEPHEN M. MAURER, WE HOLD THESE TRUTHS: UPDATING THE FRAMERS' VISION OF AMERICAN DEMOCRACY 136–57 (2023).

³ MAURER, *supra* note 2, at 7.

The final part of this Article uses the theory to evaluate whether Congress's rules really do provide appropriate checks and balances. Part VII begins by comparing our theory's predictions against the needs previously described in Part III. Part VIII discusses reforms that could improve the system still further. The Article ends with a brief conclusion addressing the wider implications of using checks and balances within Madison's system.

II. THE DREAM OF CHECKS AND BALANCES

Madison's Constitution emerged from a centuries-old search for "checks and balances" that would automatically stop democracies from sliding into tyranny. This marked a sharp departure from older Greek and Roman traditions that depended on fragile human virtues to stop tyrants.⁴ In the end, Madison's design included eight separate checks and balances,⁵ each of which pitted two of the system's principal institutions against one another, leaving voters to decide which would prevail. The Framers often describe these mechanisms as if they were designed from a blank sheet of paper. This is convenient for exposition but also misleading. Instead, each of Madison's checks and balances were carefully modeled on familiar institutional arrangements that had emerged spontaneously within England's unwritten constitution.

But politics in the Anglo-American world did not stop evolving when America declared independence. To the contrary: by the 1830s, mass political parties were every bit as central to deciding the basic direction of national policy as Congress or the President.⁶ But in that case, might the country need still more checks and balances? And if it did, could it find them in other mechanisms that had sprung up unnoticed, or at least unmentioned, by the Framers? This Article argues that the peculiar dynamics of two-party competition does indeed require a ninth check-and-balance beyond the canonical eight and that evolution has given Congress's rules precisely those features that a rational designer would choose for the task.

A. THE DREAM OF CHECKS AND BALANCES

The Federalist was destined to become the Constitution's great companion document and explainer. But as David Wootton emphasizes in his masterful survey, it also marked the culmination of a centuries-old effort "to clarify and formulate [a] new understanding of politics . . . and draw from it a new design for the machinery of politics."⁷ This intellectual agenda,

⁴ DAVID WOOTTON, *Liberty, Metaphor, and Mechanism: "Checks and Balances" and the Origins of Modern Constitutionalism*, in *LIBERTY AND AMERICAN EXPERIENCE IN THE EIGHTEENTH CENTURY* 209, 218 (David Womersley ed. 2006).

⁵ John Adams identified a total of eight balances in the Constitution, each of which paired two institutions against each other: the states and the federal government; the House of Representatives and the Senate; the executive and the legislature; the judiciary and the rest of government; the Senate and the president in appointments and treaties; the people and their representatives; state legislatures and the U.S. senators they selected; and the people and the Electoral College. *Id.* at 246.

⁶ *Id.* at 141–42.

⁷ WOOTTON, *supra* note 4, at 258. Noah Webster seemed to have been the first to use the phrase "checks and balances," though *The Federalist* came close with "balances and checks." *THE FEDERALIST* No. 9, at 43 (Alexander Hamilton) (Ian Shapiro ed., 2009).

inspired by Isaac Newton's clockwork universe,⁸ had grand ambitions. Once set in motion, its advocates argued that a system of checks and balances would be self-correcting and could go on forever.

The Constitution's success shows that the political philosophers were onto something. All the same, the idea of checks and balances is elusive. Part of the difficulty is that it nearly always explains itself metaphorically and never more so than in Newton's towering rhetoric of clockwork universe.⁹ That image was particularly persuasive in the last years of the 18th Century, when inventors were just starting to show that machines could correct their own errors.¹⁰ Yet the metaphor obscures as much as it enlightens, a fact that becomes obvious as soon as we try to extract specific design principles for government. What does it mean, for example, to say that the House and Senate must "balance" or keep each other "in check?" Here, it helps to imagine concrete examples that are *both* physical *and* social systems at once. Consider, then, the familiar image of a backyard tug-of-war. Superficially, the forces might seem to balance. Look closer, though, and you will notice that real tugs-of-war do not balance at all. Instead, random advances and missteps on each side cause the system to slowly wander away from its starting point.¹¹ At best, then, all the pushing and pulling only manages to slow instabilities the way friction would. While this idea is plainly better than nothing, it falls well short of the usual checks and balances rhetoric. After all, friction does not prevent collapse but only delays it. Genuine balance, whether physical or social, needs something more. Here, a moment's thought identifies the missing ingredients. First, there must be what physicists call a "restoring force" to drag the system back to its starting point. And second, there must be some way to "recognize" that location so that the system can stop when it returns there.¹²

The first requirement is straightforward. In physical systems, the restoring force is typically provided by gravity or a steel spring. For Madison, the corresponding social force was "[t]he People." As Wootton points out, this meant that the People have to be at least approximately "undifferentiated" or monolithic—right or wrong, their judgment must never be ambivalent.¹³ Only then could they use their "overwhelming

⁸ The idea that Nature could be understood in terms of purely deterministic and predictable laws was a central tenet of the Enlightenment. This led to the guiding image of a mechanical or "clockwork" universe. See, e.g., *Clockwork Universe*, WIKIPEDIA, https://en.wikipedia.org/wiki/Clockwork_universe [https://perma.cc/WUV7-MQQ3].

⁹ WOOTTON, *supra* note 4, at 254.

¹⁰ Contemporary examples included thermostats, ball valves, and sensors that automatically kept windmills pointed in the right direction. Probably the most spectacular example was due to James Watt, who invented a mechanical "governor" to regulate the speed of his new steam engines in the same year that *The Federalist* was written. *Id.* at 254–55.

¹¹ See generally *Random Walk*, WIKIPEDIA, https://en.wikipedia.org/wiki/Random_walk [https://perma.cc/LAT4-RWNF].

¹² The requirement is sufficiently subtle that even famous scientists have occasionally stumbled. In the 1940s, physicist George Gamow argued that the idea that rockets could be guided by gyroscopes within a sealed container was obvious nonsense because they would then have no external reference points. The error lay in ignoring the fact that even sealed containers are subject to gravity, which allows the gyroscopes' accelerations to be compared against predictions lodged in the missile's computer. DONALD MACKENZIE, *INVENTING ACCURACY* 68 (1993).

¹³ Looking back, one might well question Madison's assumption. *The Federalist* was, after all, written before the French Revolution, whose left-wing and right-wing ideological choices still divide our politics. That said, it is reasonable to think that many issues really do satisfy Madison's assumption. This is especially true since many voters are conformists less interested in reaching the right policy answers

preponderance of power” to force the different branches of government back into alignment.¹⁴

That, however, still leaves the second requirement: somehow, the system must recognize its starting point when it returns. Here, Wootton argues that the Framers went beyond earlier thinkers who had imagined Newton’s clockwork endlessly returning to its original state. Madison’s innovation, he writes, was to see that social systems could be trusted to adapt and change indefinitely far from their starting points. In Wootton’s words, “Madison was . . . proposing to let the system run, on the presumption that as long as . . . there were adequate barriers to a monopoly of power, the system could be allowed to evolve over time.” The Constitution would then be “self-stabilizing but never repeat[] itself,” making it both “adaptable” and “resilient.”¹⁵ This was elegant stuff indeed.

B. MADISON’S SYSTEM

So far, we have treated “checks and balances” as a theory—and so they were when *The Federalist* first appeared in 1787–1788 as a combined apologia and owner’s manual for the yet-to-be-approved Constitution. Today, however, that same Constitution has evolved as the result of dozens of explicit amendments and a whole forest of quiet understandings. This Article argues that Congress’s procedural rules play a crucial role in the Constitution that we actually live under today.

We begin with an explicit description of how Madison thought his system would work. The Framers’ main purpose was less to design a democracy—that had been done many times—than to construct one stable enough to last beyond a generation or two. That meant, above all, minimizing the kind of public anger that had sparked the American Revolution. But where a more casual observer might have blamed the catastrophe on Britain’s bad judgment, Madison saw a more general problem. Democracies, he insisted, were inherently vulnerable to “tyrannies of the majority.”

Madison’s rhetoric may sound quaint to modern readers who rarely if ever use the word “tyranny.” Here again, it helps to be concrete. Suppose that fifty-one percent of voters dislike and seek to oppress everyone else. No matter how free and fair the election is, the remaining forty-nine percent will have no say in what happens next in a majority-takes-all system. This is an obvious formula for civil war. Then too, Madison’s central diagnosis of the problem sounds astonishingly prescient. Indeed, the idea that half the country might want to impose laws that the other half despises sounds very like our own era’s politics of razor-close elections and angry resentments.

All the same, the two-party system adds some important wrinkles. Where Madison saw majority tyranny as an episodic catastrophe, the two-party system makes the problem endemic. The reason, as Downs explained in his landmark *Economic Theory of Democracy*, is that rational parties

than just getting along with each another. This hints that public debates may often “tip” to a few, and sometimes just one consensus opinion. For a survey of the political sociology literature, see MAURER, *supra* note 2, at 40–44.

¹⁴ WOOTTON, *supra* note 4, at 252–53 (“The new theory . . . assumed that an overwhelming preponderance of power lay with a relatively undifferentiated ‘people’”).

¹⁵ *Id.* at 273–74.

almost always make promises that are significantly to the left (or right) of what the median voter prefers.¹⁶ This means that the only way for voters to get the policies they want is to regularly force the incumbents and challengers to switch places. That, however, can only happen once the incumbent has introduced big enough policy experiments for voters to notice and reach some judgment about whether to reverse them. The observation immediately tells us how an ideal check-and-balance should regulate new experiments. On the one hand, placing excessive limits on new policies “wastes” elections by denying voters the information they need to reach meaningful judgments. This suggests that new administrations should always receive “enough rope to hang themselves.” At the same time, very large policy excursions are also wasteful. Once voters have seen enough to make up their minds, further developments in the same direction will only make them angry to no purpose. Then too, excessive swings make the overall system less democratic by pushing policy at any given instant even further to the left (or right) of what the median voter wants. This makes it natural to ask whether some form of check-and-balance exists to perform the Goldilocks function of making sure that policy swings are neither too bland nor too violent.

C. DESIGN PRINCIPLES

Considered as institutions, the Republican and Democratic Parties are roughly as durable—and just as central to deciding the country’s broad policy directions—as Congress or the president. This makes it natural to think that the Framers would have tried to balance the parties in the same way that, for example, they expected the Senate to balance the House. Of course, one might object that elections already balance the parties. That observation, however, mostly applies over the long term and does little to limit the possibility of large policy swings between elections.¹⁷ This Article will argue that Congress’s internal procedural rules have evolved to fill this gap. For now, though, just stating the hypothesis tells us important facts about how such a mechanism might work and what it could look like.

A Proxy. “Tyranny” cannot be measured directly. The usual definition that it is “cruel,” “unreasonable,” or “arbitrary”¹⁸ is simply too subjective. There is, however, a reliably useful proxy: under almost any definition, tyranny produces outsized anger in the oppressed.¹⁹ A well-designed system should therefore erect special

¹⁶ Downs was building on earlier work by economist Harold Hotelling showing that competitors in a two-party system would target the median voter. Harold Hotelling, *Stability in Competition*, 39 *ECON. J.* 41 (1929). Downs, however, added a crucial refinement: since parties only cared about *actual* voters, they needed their most excitable members to turn out. On the usual assumption that extremists are more passionate than centrists, this includes writing party platforms that feature a generous helping of “red meat” promises. DOWNS, *supra* note 1, at 117–22.

¹⁷ It is true that pragmatic politicians can voluntarily limit their policy initiatives, judging that more extreme programs will lead to disaster at the next election. That said, there are strong theory reasons to believe that not all politicians are pragmatists, and that those who are must still offer enough dramatic change to keep their extremist supporters motivated. *See infra* note 49.

¹⁸ *See, e.g., Tyranny*, OED.COM, https://www.oed.com/dictionary/tyranny_n?tab=meaning_and_use#17322114 [https://perma.cc/3UG4-Q2A4].

¹⁹ Indeed, a practical politician might well argue that a tyranny without anger is not worth worrying about.

obstacles to legislation that enrages the losing side more than it pleases the winners.

An Internal Mechanism. Madison's checks and balances imagine the People umpiring disputes between different branches of government.²⁰ By comparison, the House or Senate's rules are entirely internal to those bodies, with members standing in for their constituents. That distinction would not have seemed important to the Framers, who usually imagine Congress as a replica of the larger society in which members vote exactly the way their constituents would. At the same time, the two-party system often departs from this ideal. This Article returns to this problem in Part VII.

One Fix, Many Distortions. Judges and legal scholars typically find and fix problems one at a time. The novelty of checks and balances is that they correct instabilities *without caring where or how they originate*.²¹ In Wootton's phrase, Madison thought his Constitution would endure "not because it would never go wrong, but because it would have the capacity to right itself when it did go wrong."²² This approach works particularly well for the two-party system, where the possible sources of error are numerous and sometimes obscure.

Evolution. Madison imagined his checks and balances changing over time.²³ It follows that it is not enough for Congress's rules to operate correctly in today's circumstances; rational politicians must also change them in constructive ways when society itself evolves. This places a heavy burden on the Constitution to establish incentives not only for the current environment but also for every possible future one.

So far these are only generalities. To be more specific, we must take the extra step of choosing some definite theory to work with. Since our topic is checks and balances, this can hardly avoid being Madisonian. We will therefore adopt *The Federalist* in what follows. However, this still leaves the difficulty that the Framers neither predicted nor analyzed anything remotely resembling the two-party system of today. Here, the most natural choice is to extend the Madisonian analysis using the framework that Downs's *Economic Theory of Democracy* established more than sixty years ago. On the one hand, the book's longevity has made it an inescapable marker of mainstream thought. On the other, its relentlessly economic approach fits neatly with Madison's penchant for constructing arguments from what social scientists now call "rational man" assumptions. The rest of this Article asks what this Madison-Downs analysis can teach us about the role Congress's procedural rules play in regulating America's political system.

²⁰ Hamilton came closest to the idea that Congress's rules provide a useful check-and-balance when he insisted that most new laws do more harm than good, so that losing legislation to procedural hurdles like the presidential veto is no great loss. *THE FEDERALIST* NO. 73, at 372 (Alexander Hamilton) (Ian Shapiro ed. 2009). Madison, who routinely argued that the People need time to overcome their bad instincts, would presumably have said the same thing about delay. But if delay is beneficial, it follows that the congressional rules that generate it must also qualify as a check-and-balance.

²¹ Such ideas spread rapidly in the mid-twentieth century when talk of "holistic," "cybernetic," or "closed loop" systems became commonplace.

²² WOOTTON, *supra* note 4, at 274.

²³ *Id.*

III. OUR IMPERFECT POLITICS: DISTORTION AND CHANGE

We have said that Madison saw the pathologies inherent in a democratic election where fifty-one percent of the population dictates what happens for everyone else. But in fact, *every* successful political initiative starts by assembling a majority from coalitions whose member groups are rewarded in rough proportion to their numbers in Congress.²⁴ This makes it practically certain that overcounted groups will get more than their share and that these excesses will add up across the coalition. In the usual zero-sum game, the resulting burdens—Madison would have said “oppression”—cannot help being passed along to the losing side. Moreover, this problem becomes much worse when our imperfect electoral system gives some groups fewer seats than their numbers would warrant, while others are overcounted. This section presents a short survey of the various ways this can happen.

A. SIDE-EFFECTS OF A TWO-PARTY SYSTEM

The Framers nearly always disparaged political parties as “factions” and did what they could to discourage them. Despite this, by the 1830s it was abundantly clear that America’s political system robustly supported two—and only two—major parties at a time. Moreover, Americans were starting to see that this was a good thing. Instead of fracturing the country, the two-party system more often drove politicians to bracket the median voter, thereby avoiding the extremist politics that would plague Europe in the coming century.²⁵ As Hofstadter observed more than half a century ago, “without the two-party system, it was dubious that [Madison’s] constitutional system for all its ingenuity could have been made operative.”²⁶

For a long time, just how the two-party system achieved this moderation remained obscure.²⁷ Indeed, a definitive theory had to wait for Downs’s landmark work in the 1950s. And when the theory did arrive, Downs added several caveats. The most important of these is polarization. Before Downs’s work, economists had predicted that both parties would pander to the median voter, resulting in two nearly indistinguishable platforms.²⁸ While this might have been dismissed as pardonable exaggeration in the 1950s, it was unrealistic even then. Downs removed the embarrassment by pointing out that party strategists do not target the median potential voter, instead targeting only those citizens who can actually be persuaded to vote. Since these people are more likely to be extremists,²⁹ rational political platforms

²⁴ MAURER, *supra* note 2, at 221–28.

²⁵ RICHARD HOFSTADTER, *THE IDEA OF A PARTY SYSTEM* 251–68 (1969) [hereinafter HOFSTADTER, *THE IDEA OF A PARTY SYSTEM*].

²⁶ Richard Hofstadter, *The Political Philosophy of the Framers of the Constitution*, in *ANTI-INTELLECTUALISM IN AMERICAN LIFE* 800, 812 (Sean Wilentz ed. 2020) [hereinafter Hofstadter, *The Political Philosophy of the Framers*].

²⁷ For the definitive intellectual history, see generally HOFSTADTER, *THE IDEA OF A PARTY SYSTEM*, *supra* note 25.

²⁸ The term “median voter” conventionally refers to “[t]he voter (or pair of voters) in the exact middle of a ranking of voters along some issue dimension, e.g. from the most left-wing to the most right-wing.” *Median Voter*, OXFORD REFERENCE, <https://www.oxfordreference.com/display/10.1093/oi/authority.20110803100146688> [https://perma.cc/62TE-RXBX].

²⁹ Political economists typically assume that voters’ passion increases linearly with the distance between their preferred policies and current ones. SCOTT GEHLBACH, *FORMAL MODELS OF DOMESTIC POLITICS* 2–3 (2d ed. 2021).

usually advocate for more “red meat” policies than the median voter prefers. This results in more extreme policies, along with rhetoric that polarizes the country even further. The silver lining in the bipartisan 1950s was that public polarization was so modest that there was comparatively little to amplify. Today, however, Downs’s mechanism helps explain why politicians in Congress are far more polarized than the voters who elect them.

But Downs also had a blind spot. He imagined the two-party system unraveling according to Madison’s prescription of a “majority tyranny” in which a fifty-one percent majority oppressed everyone else. This must have seemed reassuring since that level of polarization had never been seen in any developed country, not even the Weimar Republic.³⁰ The problem as I have argued elsewhere is that the two-party system can become unstable at much lower levels of polarization.³¹ To see how this take-it-or-leave-it politics works, suppose that the number of left-wing and right-wing extremists reaches 20-25% apiece while the remaining 50% plurality is centrist. At this point, we expect Downsian strategies that bracket the median voter to split the centrist vote down the middle. That, however, leaves extremists a near-majority in both parties. To the extent they succeed in taking control, we expect each party to adopt platforms that outrage three-fourths of the population.³²

Finally, Madison could not foresee just how profoundly two-party competition would short-circuit his checks and balances. Madison wanted the Senate to act as a check on the House and wanted Congress to balance the president. But that could only happen if legislators owed their principal loyalty to Congress. In reality, the two-party system creates a second and generally stronger set of loyalties. The result is that Madison’s safeguards tend to disappear the moment one party captures multiple institutions. Then too, the two-party system has also transformed Congress itself. Instead of each representative voting their conscience, we now have majority and minority “teams,” with the majority dictating the agenda. So long as party discipline holds, what the minority thinks no longer matters. This puts bipartisan deals almost permanently out of reach. Even more pathologically, party discipline can break down if polarization becomes so strong that the majority party’s extremists start to see their moderate colleagues as indistinguishable from “the other side.” When that happens, groups like the GOP “Freedom Caucus” and the Democrat “Squad” may threaten to withhold support from their own party unless and until it embraces their policies. The result, at least in theory, is that the House can end up passing statutes that only a tiny fraction of one party supports.

³⁰ The high watermark came in the June 1932 election, where the Nazis and Communists accounted for 51.6% of all votes cast. *Total Number of Votes Received by Each Major Party in Federal Elections Held in Germany Between May 1924 and March 1933*, STATISTA, <https://www.statista.com/statistics/1340968/germany-federal-election-total-vote-results-weimar> [https://perma.cc/9AWE-HGBD].

³¹ MAURER, *supra* note 2, 157–64.

³² Further details can be found in *id.* at 157–70.

B. GERRYMANDERS

Modern democracies invariably organize themselves geographically. This, however, requires boundary lines that divide some groups more than others. That arbitrarily makes some constituencies stronger and others weaker. Such distortions are bad enough when they are innocent and unavoidable. But maliciously partisan line-drawing sounds like a formula for tyranny.

Fortunately, the damage is not as bad as it seems. To see why, consider a hypothetical state with five congressional seats and an equal number of Republican and Democrat voters. An ideal Republican gerrymander would create one district populated entirely by Democrats so that Republicans could enjoy a sixty-to-forty ratio advantage everywhere else. The usual result would then be a four-to-one seat advantage in Congress. No reasonable person would argue that this outcome is fair. Even so, sixty-forty majorities can still be overturned by “landslide” elections.³³ More immediately, laws that require “compact” and “contiguous” districts place further—though somewhat vague—limits on what partisans can get away with when redrawing district lines. Finally, the fact that both parties engage in gerrymandering means that gains in one district are often cancelled by equal and opposite cheating elsewhere. The net result, as Edward R. Tufte showed more than fifty years ago, is that real gerrymanders typically deliver benefits of just a few percentage points.³⁴

The deeper problem is that gerrymanders amplify extremism. The reason is that skewing districts to particular parties moves the average opinion within each district away from the statewide figure. This encourages politicians to take positions further to the right (or left) than they otherwise would. The result is plainly visible in the data: while gerrymandering has risen steadily since the 1960s,³⁵ the average polarization across voters during that time has barely changed.³⁶ Meanwhile, average polarization across *congressmen* increased 35%.³⁷

Other Distortions. Like most competitions, it is natural to think that Downsian election races will often be close.³⁸ This, however, implies that victory will often depend on small random disturbances like a candidate’s gaffe or bad weather suppressing turnout on Election Day. This will not, of course, stop the winners from claiming “mandates.” But to put things in perspective, recall that the Republicans claimed a nine-seat majority in the

³³ See, e.g., *Landslide Victory*, WIKIPEDIA, https://en.wikipedia.org/wiki/Landslide_victory [<https://perma.cc/U98B-Z86E>].

³⁴ At the national level, Democrats needed to persuade forty-eight percent of the electorate to control the House in an average year between 1900 and 1970. Edward R. Tufte, *The Relationship Between Seats and Votes in Two-Party Systems*, 67 *Am. Pol. Sci. Rev.*, 540, 543 (1973). The most efficient gerrymander in Tufte’s sample turns out to be New Jersey (1926–1947), where Republicans needed just thirty-nine percent of the vote to carry the statehouse. More recent data shows distortions in congressional elections slowly rising from 1.25 in 2002 to 2.34 in 2010 with no obvious trend since then. See Jeffrey Shen, *Exploring the Seats-Votes Curve: A Historical Primer on Congressional Seat-Votes Curves and Partisan Bias, Symmetry, and Responsiveness*, from 2000 – 2016, Jeffrey Shen, <https://jeffreysen19.github.io/Seats-Votes-Curves> [<https://perma.cc/Q3A3-FWLA>].

³⁵ Seth J. Hill & Chris Tausanovitch, *A Disconnect in Representation? Comparison of Trends in Congressional and Public Polarization*, 77 *J. POL.* 1058, 1068 (2015).

³⁶ *Id.*

³⁷ *Id.* Things are presumably worse now: Hill & Tausanovitch’s data ends in 2010.

³⁸ See, e.g., MAURER, *supra* note 2, at 156–57.

2022 midterms. This, however, was no better than what the GOP could have expected roughly one-third (35%) of the time if each seat had been decided by a random coin toss.³⁹ Then too, the Framers introduced some distortions deliberately. These notably include giving outsized representation in Senate and Electoral College to states with smaller populations. Some of the reasons for this were pragmatic, reflecting the fact that low population states might never have joined the Union knowing that they would be perpetually outvoted.⁴⁰ But it also helped avoid a majority tyranny in which urban states ignored rural ones to pass whatever laws they liked.

Finally, distortions are a moving target. We argued that many distortions stem from polarization—but this has varied widely over time. Polarization was high throughout the eighteenth and nineteenth centuries, with no obvious trends except for brief peaks during the Alien and Sedition Laws of the 1790s and the approach to Civil War in the 1850s.⁴¹ The surprise, as Jon Grinspan has documented, was a decline in partisanship and polarization that started abruptly with what contemporaries called “a great quieting” around 1900.⁴² This period was followed by steadily increasing bipartisanship down to the 1960s. Yet the change was not permanent and today we can see that the reverse trend has lasted nearly as long. This makes it reasonable to assume that today’s levels of polarization and anger could be equally transient, with the public mood oscillating on scales of a human lifetime. If so, checks and balances that work well in one era are sure to need revision as time goes by.

IV. WHAT SHOULD WE WISH FOR?

We are used to thinking of the Constitution as a master blueprint, so it comes as something of a surprise that it says nothing about the most important issue of all: how seat counts in Congress should translate into new policy experiments. As the Supreme Court’s *Rucho* decision demonstrates, lawyers and judges have devoted fifty years of intense effort to developing a “fairness” principle to bridge this gap.⁴³ Their failure to produce an acceptable answer in all that time shows that the problem is difficult and perhaps even insoluble.⁴⁴

Here, we take a different tack. The whole point of checks and balances in Madison’s system is that what institutions do is meaningless unless and

³⁹ Readers can confirm the result by consulting Maciej Kowalski, *Coin Flip Probability Calculator*, OMNI CALCULATOR, <https://www.omnicalculator.com/statistics/coin-flip-probability> [https://perma.cc/AS35-9R2T].

⁴⁰ Both Missouri and Texas threatened to go their own ways in the early nineteenth century. The issue was slavery. H.W. BRANDS, *HEIRS OF THE FOUNDERS: THE EPIC RIVALRY OF HENRY CLAY, JOHN CALHOUN AND DANIEL WEBSTER, THE SECOND GENERATION OF AMERICAN GIANTS* 298–99 (2018).

⁴¹ See generally, JOHN GRINSPAN, *THE VIRGIN VOTE: HOW YOUNG AMERICANS MADE DEMOCRACY SOCIAL, POLITICS PERSONAL, AND VOTING POPULAR IN THE NINETEENTH CENTURY* (2016).

⁴² JON GRINSPAN, *THE AGE OF ACRIMONY: HOW AMERICANS FOUGHT TO FIX THEIR DEMOCRACY, 1865-1915* at 238 (2021).

⁴³ See *infra* Section VIII.D.

⁴⁴ The basic difficulty lies in the American system’s historic commitment to “winner-take-all elections,” which takes the most obvious “fairness” definition—proportional representation—off the table. Alexander Karapetyan & Stephen M. Maurer, *Picking Up the Pieces: Options for Federal Anti-Gerrymandering Law After Rucho*, 11 WAKE FOREST J. L. & POL’Y 238, 250 (2021). For a short history of federal courts’ failed quest to invent a coherent gerrymander doctrine, see generally *id.* at 250–54.

until it finally leads to government action. From this standpoint, we can see that the Court's focus on "fairness" was misplaced. "Seats in Congress," after all, mostly matter to a few hundred career politicians and their staffs. The only thing the rest of us care about is whether and to what extent party platforms become law.

Just saying this is clarifying: unlike the "fairness" in seat allocations, "fairness" in launching new policy experiments has a clear Madisonian meaning: checks and balances are good if (and only if) they produce government outcomes that approximate the "will of the people." In practice, this almost always comes down to doing what the median voter wants.⁴⁵

How Much Obstruction Should We Want? Madison imagined the American public repeatedly lurching into error before settling on the correct policy a year or two later.⁴⁶ In this world, only one party could be right, and it was the voters' job to find out which. Once they did, the favored party would then hold power perpetually. Of course, things did not turn out that way. Instead, the triumph of the Jefferson-Democrats after the War of 1812—ironically termed the "Era of Good Feelings"—produced only chaos followed by spontaneous fission into two new parties.⁴⁷ By the mid-nineteenth century, Americans began to see that the Constitution naturally defaulted to a two-party system where incumbents and challengers routinely swapped places. Moreover, they also saw that this was a good thing, encouraging politicians to take the more moderate stance that most voters preferred.⁴⁸ This somewhat groping realization received its most rigorous form in the mid-twentieth century work of Hotelling and Downs. However, Downs's definitive theory came with the significant caveat that both parties often took "red meat" positions to mobilize their respective "base" voters. This meant that the eventual winners were almost certain to set policies appreciably to the right and left of what the median voter wanted. Because of this, the correct democratic outcome could only emerge on average, as voters replaced incumbents in an endless series of course corrections.

It is useful to ask how an ideal check-and-balance would manage this process. In the bipartisan case where both parties agree, we would want politicians to implement unlimited change. But where the parties differ, the same rule should permit changes that are just barely large enough to provide a clear choice at the next election. Whether the majority will actually use this freedom is less certain. In principle, at least, the incumbent could deliberately refrain from policies likely to anger the opposing side's voters.⁴⁹ Still, from a Madisonian perspective this is just a detail. The important point in both

⁴⁵ Democracy's deeper goal would presumably be to minimize total dissatisfaction with government across all voters. The median voter shorthand does this for most realistic scenarios. See MAURER, *supra* note 2, at 15–16.

⁴⁶ MAURER, *supra* note 2, at 8.

⁴⁷ HOFSTADTER, THE IDEA OF A PARTY SYSTEM, *supra* note 25, 183–88.

⁴⁸ *Id.* at 212–71.

⁴⁹ This was the gist of Bill Clinton's famous "triangulation" strategy for winning elections. Whether real politicians actually show such restraint is debatable, although the fact that presidents are reliably less adventurous in their second terms provides some evidence for the argument. On the one hand, politicians need extreme issues to keep their partisans and donors motivated. On the other, Downs argued that incumbents cannot help alienating more and more "single-issue voters" as time goes by. This implies that even the most moderate leaders will eventually be replaced. See DOWNS, *supra* note 1, at 55–60.

scenarios is that policy departures should stay reasonably close to what the median voter wants.

Now, consider what a badly designed check-and-balance would look like. On the one hand, an excessively weak rule lets the majority pass much bigger policy experiments than the median voter needs to make their decision. This is wasteful as larger swings will cause more anger than the system requires to change course. Conversely, excessively tight limits on new legislation could make change so gradual that voters only discover their outrage after several elections. This is also wasteful because course corrections will occur less often than they ought to.⁵⁰

Thus far, this Article has discussed how fast policy should evolve. But in discussing congressional rules it is often more intuitive to think in terms of resistance. Here an ideal check-and-balance would ensure that new legislation faces minimal resistance when both parties agree,⁵¹ and maximal resistance where they disagree. Resistance should also become steeper the further proposed policies depart from bipartisanship. Finally, the concept of resistance applies not just where opponents stop legislation but also where they only delay it. The reason is that majorities are hardly ever able to pass their entire agendas in a single term. Even if the delayed legislation passes, other agenda items will almost always be sacrificed.

Finally, our analysis of checks and balances implicitly depends on how much time politicians need to show that their policies actually work. The Federalist usually identifies this term with the House's two-year election cycle or, occasionally, the president's four-year term.⁵² This has sometimes been stretched to eight years to encompass two presidential terms, based on George Washington's decision not to seek a third term, later codified as the Twenty-Second Amendment. Suffice to say, our arguments are sufficiently general to apply regardless of what choice is taken.

V. PRACTICAL POLITICS: THE HOUSE

As previously mentioned, Congress cannot avoid hierarchy if members hope to accomplish anything. The constraint has been especially tight in the House, which grew from a manageable sixty-three members in 1787 to 435

⁵⁰ We can make the criterion more precise. We have said that politicians often try to exercise restraint. It follows that an ideal check-and-balance should let "true believers" go far enough that voters can clearly distinguish them from pragmatists exercising restraint. Assuming that true believers and pragmatists are equally common, an ideal rule would give the majority enough policy leeway for voters to correctly identify true believers two-thirds of the time. It is worth pointing out that "true believers" are not necessarily irrational if the median voter's policy preferences—and therefore the intensity of their opposition—softens over time. This might happen because "iron triangle" effects in government tend to create their own constituencies. Then too, voters may change their minds once they see the new policies in practice. This seems reasonable if only because very few policies work either as well or as badly as politicians on both sides like to pretend.

⁵¹ One might ask whether the permissible rate of change should be restricted even for bipartisan policies. Hamilton, who believed that legislatures pass more bad laws than good, would almost certainly have answered yes. THE FEDERALIST NO. 73, at 372 (Alexander Hamilton) (Ian Shapiro ed. 2009). At the same time, the existence of a two-party duopoly makes delay redundant. If the parties manage to agree on some measure today, it is very unlikely that they or anyone else will be able to raise the issue at the next election.

⁵² MAURER, *supra* note 2, at 20.

members in 1913 and has remained there ever since.⁵³ Given its awkward size, the House's rules have nearly always concentrated authority in Speakers, committee chairs and party leaders. The main differences in any given Congress involve how power is shared out across these groups.

A. THE EARLY REPUBLIC

Congress originally imagined that its committees would serve as impartial boards.⁵⁴ Since 1790, however, the Speaker's greatest power has usually been the right to appoint members and chairs.⁵⁵ This was almost immediately used to pack committees with members who agreed with the Speaker's positions, to favor particular interests, to reward friends and punish enemies, and to trade appointments for votes on specific issues.⁵⁶ The rise of mass political parties predictably accelerated these practices by making committees actively partisan.⁵⁷ By the 1840s, Speakers refused to recognize some members' right to speak entirely for both private and political reasons. This predictably evoked "bitter resentment."⁵⁸

But if Speakers and committee chairs held such power, how could ordinary members protect themselves? As early as 1794, the House allowed motions to suspend the rules, including the Speaker's powers, on one day's notice.⁵⁹ However this became much more difficult after 1822, when the provision was amended to require a two-thirds majority.⁶⁰ This left obstruction and delay as the only practical options. At first these tactics usually invoked each congressman's right to unlimited speech. However this quickly became controversial. In 1807, House Speaker Joseph Bradley Varnum introduced a "previous question" motion to cut off debate but was outvoted by a lopsided 103 to 14.⁶¹ By 1810–1811, the result was that

⁵³ In the very next apportionment in 1790, membership jumped to 105, a figure not too different from today's Senate. Thereafter, it drifted steadily higher until it reached 240 members in 1830. The surprise came ten years later, when members voted to *reduce* their number by 17 seats. That, however, collided with voters' desire for small districts where representatives knew them and could focus on their needs. Thereafter, House membership resumed its upward march, finally reaching 357 members in 1890. This ushered in a second period of hesitation, with reformers arguing that a smaller House would dilute the power of committees. The result was a standoff: since 1913 the total has, with very minor exceptions, held constant at 435 members. DE ALVA STANWOOD ALEXANDER, HISTORY AND PROCEDURE OF THE HOUSE OF REPRESENTATIVES 8 (1916).

⁵⁴ *Id.* at 66.

⁵⁵ *Id.* Members reserved the right to reverse choices they disapproved of. *Id.*

⁵⁶ *Id.* at 67. Speakers also punished enemies by exiling them to committees where there was nothing to do, although member expectations that the Speaker would act as an impartial moderator sometimes operated as an "unwritten law" that appointments would reflect seniority, ability, "party standing, and a fair division among States and important groups." *Id.* at 67–68. Professor Freeman adds that the Speaker was further constrained by the need to persuade voters that the House was a source of "credible debate and compromise." JOANNE B. FREEMAN, THE FIELD OF BLOOD: VIOLENCE IN CONGRESS AND THE ROAD TO CIVIL WAR 129 (2018).

⁵⁷ ALEXANDER, *supra* note 53, at 66–70.

⁵⁸ *Id.* at 58.

⁵⁹ Damon Chappie, *House Caught in a State of Suspension*, ROLL CALL (Jan. 23, 2003), <https://rollcall.com/2003/01/23/house-caught-in-a-state-of-suspension> [<https://perma.cc/DM64-R6XV>]. In modern times, the minority party possesses a similar right known as a "Motion to Recommit with Instructions." The number of allowable instructions is broad and sometimes wins enough votes across the aisle to pass. MATTHEW N. GREEN, UNDERDOG POLITICS: THE MINORITY PARTY IN THE U.S. HOUSE OF REPRESENTATIVES 171–74.

⁶⁰ Chappie, *supra* note 59.

⁶¹ GREGORY J. WAWRO & ERIC SHICKLER, FILIBUSTER: OBSTRUCTION AND LAWMAKING IN THE U.S. SENATE 62 (2006). *See also* CHARLES W. JOHNSON, JOHN V. SULLIVAN, THOMAS J. WICKHAM, JR., HOUSE PRACTICE: A GUIDE TO THE RULES, PRECEDENTS AND PROCEDURES OF THE HOUSE 654 (2017).

Federalist Representative Barent Gardenier used his “remarkable capacity to talk indefinitely” to block resolutions urging war with England.⁶² This time when Speaker Varnum moved to cut off debate, the majority backed him.⁶³ And yet, even then, not much seems to have changed. Over the next twenty years the House voted to cut off members’ speech on just four occasions.⁶⁴

The “Partisan Era” Begins.⁶⁵ The Framers imagined that every congressman would advocate for his own individual views. The rise of mass political parties changed that. Individual obstruction had been bad enough. But once politics became a team sport, interminable speechifying could easily block statutes that the majority wanted. By the 1840s, the majority party routinely tyrannized the minority, while the latter retaliated by using its members’ procedural rights to disrupt business.⁶⁶ This led the House to finally elevate the Gardenier precedent to a formal rule.⁶⁷ This technically outlawed filibusters, although members sometimes voted to overrule Speakers trying to cut off speech as late as 1845.⁶⁸

Meanwhile, the majority was developing new weapons against the minority. For the first fifty years of its existence, the House had simply readopted its existing rules at the start of each session so that the Rules Committee often had little to do.⁶⁹ Then, in 1841, the majority voted to let the Committee report continuously throughout the session. From that point on, the Committee used its power to repeatedly suspend the rules—something that had previously required a two-thirds vote. In the words of one commentator, this finally made the majority party “master of the House.”⁷⁰ All the same, the minority party continued to obstruct. The result was a “constant warfare” in which the majority would no sooner shut off one tactic than the minority would find another.⁷¹ By mid-century, the most important of these stratagems was the “disappearing quorum” in which members would refuse to vote or else leave the floor when the Speaker tried to confirm the constitutional requirement that one-fifth of the House was present and able to vote.⁷² Other tactics similarly invoked rules for calling the House to order, calling for the previous question, moving to adjourn, or harassing opponents with constant interruptions.⁷³

⁶² ALEXANDER, *supra* note 53, at 185 (quoting John C. Calhoun). It did not help that Gardenier was so stubborn that he continued to cause obstructions even after another member challenged him to a duel and shot him. *Id.* at 185–86.

⁶³ Scott Bomboy, *The Classic Age of the Filibuster*, NAT’L CONST. CTR.: CONST. DAILY BLOG (Dec. 8, 2022), <https://constitutioncenter.org/blog/the-classic-age-of-the-filibuster> [https://perma.cc/3CJL-PN2C].

⁶⁴ ALEXANDER, *supra* note 53, at 189.

⁶⁵ *History of the United States Congress*, WIKIPEDIA, https://en.wikipedia.org/wiki/History_of_the_United_States_Congress [https://perma.cc/7AFX-6LHG].

⁶⁶ RANDALL B. RIPLEY, *PARTY LEADERS IN THE HOUSE OF REPRESENTATIVES* 50 (1967).

⁶⁷ ALEXANDER, *supra* note 53, at 187–89.

⁶⁸ *Id.* at 190.

⁶⁹ *Id.* at 182.

⁷⁰ *Id.* at 191.

⁷¹ *Id.* at 184.

⁷² Bomboy, *supra* note 63.

⁷³ FREEMAN, *supra* note 56, at 126–28.

B. TRANSITION TO VIOLENCE

The House's tyranny depended on members' willingness to follow rules set by the majority. But there was no assurance that individuals or even parties would respect majority rule, and when they did not, it was a short step to violence. From the 1820s onward, bullying became a semiformal "system" in its own right.⁷⁴ Not surprisingly for that era, the resulting conflicts almost always pitted the North against the South. From there, further escalations were obvious. In the words of one North Carolina member, Southerners would use the rules to bring government to a dead stop, followed by violence and the collapse of Congress if Northerners tried to expel the troublemakers.⁷⁵ Perversely, voters on both sides of the Mason-Dixon line rewarded politicians for such tactics, perhaps because fighting seemed to show sincerity. This predictably led both sides to practice even more violence.⁷⁶

Thereafter, both gridlock and the number of congressional fistfights surged exponentially. In the end, the violence in Congress became an example for the wider society. We usually imagine congressmen taking their cues from what voters want. But Southern voters knew hardly anything about Northerners and *vice versa*. Therefore, it was only natural that voters would start to take cues from Congress. Seeing their representatives threaten and assault each other, voters began to think about secession and armed conflict in their own lives.⁷⁷ The final unraveling came when the Southern delegation left the Capitol following Lincoln's election. One senator stayed behind to make trouble but was promptly expelled.⁷⁸

C. THE SPEAKERS TAKE CHARGE (1865-1911)

The Speaker made himself chairman of the Rules Committee in 1857.⁷⁹ This dual position—coupled with fierce post-Civil War partisanship and a flood of new and inexperienced congressmen⁸⁰—produced the most powerful Speakers in history.⁸¹ This could not help feeding resentments, especially after Speakers started refusing members' requests to speak in order to kill bills for their districts.⁸² Matters finally came to a head in 1881,

⁷⁴ *Id.* at 130.

⁷⁵ *Id.* at 157 (quoting North Carolina Congressman Thomas Clingman). Some Southerners vowed that "if the South was treated unfairly, they would keep the House disordered forever." *Id.* at 145. Probably the most ballyhooed pronouncements came from Representative Henry Foote (a Democrat from Mississippi), who claimed that a pack of armed Southerners had agreed to stop the House from admitting California into the Union. After that, he added, open warfare would break out in the House before spreading across the country. While most newspapers were skeptical, people streamed into Washington hoping to see the fight on the appointed day. Nothing happened. *Id.* at 158–159. Threats of violence by Northern antislavery advocates were more effective, forcing Congress to adjourn before it could pass the Kansas-Nebraska Act in 1854. *Id.* at 193–94, 200.

⁷⁶ *Id.* at 73, 198.

⁷⁷ *Id.* at 261.

⁷⁸ *Id.* at 269; Louis Wigfall, WIKIPEDIA, https://en.wikipedia.org/wiki/Louis_Wigfall [<https://perma.cc/QC3Q-E7LX>].

⁷⁹ ALEXANDER, *supra* note 53, at 41.

⁸⁰ Samuel Kernell, *Toward Understanding 19th Century Congressional Careers: Ambition, Competition, and Rotation*, 21 AM. J. POL. SCI. 669, 674 (1977).

⁸¹ From 1870 to 1895, policy was decided by five Speakers, alone or with the president, while just one Speaker operated collectively with senior committee chairmen. RIPLEY, *supra* note 66, at 14–18.

⁸² ALEXANDER, *supra* note 53, at 59. This did not affect bills that members could raise through privileged motions or on fixed days of the week. *Id.* at 61.

when the majority backed the Speaker's decision to overrule earlier precedents that let the full House second-guess his rulings on when members could speak.⁸³ At this point, the aggrieved congressmen retaliated by bringing dilatory motions. By decade's end, there were so many disgruntled members that the majority was able to pass just one contested measure in the entire Fiftieth Congress.⁸⁴

Republican Speaker Thomas Reed counterattacked in 1890 by banning the disappearing quorum. Instead, he told the House clerk to count all members present, even when they refused to vote. His party then backed the ruling despite decades of precedent to the contrary.⁸⁵ Contemporaries aptly called this cynical maneuver a "revolution."⁸⁶

The immediate result was a near-riot in which angry members rushed the aisles, approached the Speaker's rostrum, and loudly denounced Reed as a "tyrant" and "czar."⁸⁷ The minority then settled down to what modern politicians call a "nuclear" response. The Constitution gives one-fifth of the members the right to call for a vote. The minority invoked this right to keep the House in perpetual roll calls so that leadership accomplished the equivalent of just two days' work over the following month.⁸⁸ Seeing that business had become impossible, the majority finally agreed to address members' objection that the new rule would let Speakers claim fictitious quorums where none existed. Henceforth "tellers" from each party would confirm the count.⁸⁹ Tellingly, both sides felt injured by the standoff. Having fought bitterly for weeks, they suddenly cooperated to rush through as much legislation as they could.⁹⁰

Yet even in the hour of Speaker Reed's triumph, the pendulum had started to swing back. When Democrats took power in 1891, they replaced his rule with one authorizing the Rules Committee to meet at any time and report without notice. While this still solved the problem of disappearing quorums, it also shifted the Speaker's newfound power back to the Rules Committee.⁹¹ By the early 1900s the Speaker's authority was visibly decaying.⁹²

D. A SECOND "REVOLUTION"

The twentieth century vastly increased the number of incumbents.⁹³ The responsible factors included the "realigning" election of 1896—which

⁸³ *Id.* at 60.

⁸⁴ *Id.* at 62.

⁸⁵ Quorum, Wikipedia, <https://en.wikipedia.org/wiki/Quorum> [<https://perma.cc/96N4-TBGW>]; Bomboy, *supra* note 63. Reed had hesitated for fear that his own party—which held only a slim majority—might not support this violation of precedent. Alexander, *supra* note 53, at 165. The U.S. Supreme Court affirmed Reed's ruling two years later in *United States v. Ballin*, 144 U.S. 1 (1892).

⁸⁶ WAWRO & SCHICKLER, *supra* note 61, at 63.

⁸⁷ ALEXANDER, *supra* note 53, at 167.

⁸⁸ *Id.* at 173.

⁸⁹ "For the first time in the history of the House," one member said, "a minority, acting as a unit, had stopped all legislation of whatever kind and nature" and compelled the majority to agree to its demands. *Id.* at 177.

⁹⁰ *Id.* at 178.

⁹¹ *Id.* at 206–07.

⁹² Speaker Cannon usually operated collectively, while Henderson acted mostly as a figurehead. RIPLEY, *supra* note 66, at 16.

⁹³ Kernell, *supra* note 80, at 672

increased the number of safe seats on both sides—and a still unexplained reduction in partisanship after 1900 that made name recognition more important compared to party endorsements.⁹⁴ By 1901, for the first time in U.S. history, the average member had served at least three terms.⁹⁵ And having more experience, they also wanted more power. This was especially true since large, progressive contingents in both parties were demanding deep policy changes. The result was a series of bipartisan challenges that took on both party leaderships at once.

Speakers had long relied on the small, unelected Rules Committee to enforce their will.⁹⁶ In 1908, John Sharp Williams, a Democratic senator from Mississippi, used his constitutional privilege to demand ten or twelve roll call votes each day. This deadlocked the House for the entire summer in a series of physically exhausting sessions. But when the Rules Committee passed special rules to stop Williams, many members resented the intervention.⁹⁷ The following year, Congress's standing committees started to meet whether or not the Speaker convened them. Then, in 1911, President Theodore Roosevelt helped his progressive allies form a bipartisan coalition to depose Speaker Joseph Gurney Cannon.⁹⁸ As in the 1890 rebellion, the rebels happily ignored earlier precedents. In theory, all rule changes had to go through the Rules Committee. Now, they simply defenestrated the Committee by adopting rules that required its members to be elected by the full House.⁹⁹ The dishonesty was so open that some of the protagonists later admitted that the vote had been “revolutionary.” Even more tellingly, members reinstated the old procedure as soon as their reforms were implemented.¹⁰⁰

But by that time, the system had been changed forever. Apart from the Rules Committee, the insurgents' biggest achievement was to create a new procedure called the “discharge petition.” Now, one-third of all members could send bills to a floor vote even if the Speaker and committee chairs opposed them.¹⁰¹ But here, the House establishment fought back. An early 1910 version of the procedure drew so many filings—some deliberately created to drown out genuine petitions—that the House could not address them all. This was followed by a revised version the following year which, in the words of one commentator, did “no serious harm, if little good.”¹⁰² The rule's modern form dates from 1931, but it was tightened four years later by

⁹⁴ *Id.*; Jon Grinspan, *The Forgotten Precedent for Our 'Unprecedented' Political Insanity*, POLITICO (Apr. 24, 2024), <https://www.politico.com/news/magazine/2021/04/24/forgotten-precedent-unprecedented-politics-age-of-acrimony-484072> [<https://perma.cc/8SBY-8SXD>].

⁹⁵ RIPLEY, *supra* note 66, at 51.

⁹⁶ ALEXANDER, *supra* note 53, at xii–xiii. Reed argued that letting caucuses select committees would require too much logrolling “to secure a board that will favor various measures” and that an enlarged and elected Rules Committee would represent:

[S]everal and sometimes conflicting legislative interests, it is as likely to be divisive as advisory. Nor is it longer an emergency committee, but a full-fledged, independent entity, with a room and a clerk, and engaged in matters of its own, which are entirely divorced from questions pertaining to the leadership of the House.

Id.

⁹⁷ *Id.* at 208–10.

⁹⁸ RIPLEY, *supra* note 66, at 19–20.

⁹⁹ *Id.*

¹⁰⁰ WAWRO & SHICKLER, *supra* note 61, at 64.

¹⁰¹ RIPLEY, *supra* note 66, at 19; *Discharge Petition*, WIKIPEDIA, https://en.wikipedia.org/wiki/Discharge_petition [<https://perma.cc/GBD3-G267>].

¹⁰² ALEXANDER, *supra* note 53, at 64–65, 83.

Democratic leaders who increased the threshold of required signatures from one-third to one-half.¹⁰³ This transparent power grab would never have been possible had it not been for the once-in-a-lifetime combination of an astonishingly popular president, an outsized majority in Congress, and public impatience with anyone trying to obstruct action in the depths of the Depression.¹⁰⁴

Since then, the tool has been reliably ineffective.¹⁰⁵ Of the 563 discharge petitions filed between 1931 and 2003, just 5% managed to force a vote and only 3% passed the House. In the end, just 0.4% became law. Moreover, the successes became rarer still from the 1980s onward,¹⁰⁶ a trend further accelerated by a 1993 rule change that made signers' names immediately public. This made it vastly easier for outside groups to intimidate members.¹⁰⁷ Since then, petitions have been almost entirely limited to symbolic protests by the minority party: where sixty percent of petitions were introduced by members of the majority in 1971, that number dropped to zero by the early 2000s.¹⁰⁸

E. THE COMMITTEE ERA (1911–1971)

After 1911, seniority became the unwritten rule for chairmanships, with occasional exceptions for members who defied party discipline.¹⁰⁹ Despite this, the majority's ability to dictate policy remained strong. Starting in 1913, the majority Democrats began each session by debating legislation among themselves and then pledging to reject any and all Republican input as "settled by the caucus."¹¹⁰ By the 1920s, however, seniority routinely overshadowed party as well. The result was a host of powerful chairs that Speakers could only partly control.¹¹¹ This was natural in an age where voters cared less and less about party labels. Then too, even young members could support a system that promised steady promotions and eventual power. Best of all, voters quickly realized that reelecting their current congressman would give their district more seniority, and hence more federal dollars, than any challenger could promise. In effect, seniority had become an incumbents' conspiracy against challengers.

This advantage became even more important in the 1930s when government spending drastically expanded the possibilities for pork barrel politics. This, however, only made the question of how members should

¹⁰³ *Discharge Petition*, *supra* note 101.

¹⁰⁴ RIPLEY, *supra* note 66, at 19.

¹⁰⁵ *Discharge Petition*, *supra* note 101. Fear of the rule may sometimes have persuaded leadership to issue preemptive concessions to stop pending petitions from passing. *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ GREEN, *supra* note 59, at 165, 171 ("only in recent years have petitions regularly failed to garner close to 218 signatures—a sign . . . that crossing party lines on petitions has become taboo for the majority").

¹⁰⁸ *Id.* at 165.

¹⁰⁹ Down to the early 1970s, just three members were reduced in rank. Each had committed the cardinal sin of endorsing the other party's presidential candidate. RIPLEY, *supra* note 66, at 52–53.

¹¹⁰ Charles O. Jones, *The Minority Party and Policy-Making in the House of Representatives*, 62 AM. POL. SCI. REV. 481, 485 (1968). The exceptions came on those occasions when President Wilson sought Republican votes to overrule his own House leaders. *Id.* at 483.

¹¹¹ RIPLEY, *supra* note 66, at 81; *History of the United States Congress*, *supra* note 65. During the Committee era, three of ten Speakers would work alone or with the president to set policy. RIPLEY, *supra* note 66, at 14–17.

divide the spoils more urgent. As David R. Mayhew's classic analysis of Congress argued in the early 1970s, there were just two possibilities. In the first, transient majorities could use their power to deprive the minority of pork, committee influence, and the ability to advertise their agendas.¹¹² But that was mostly theoretical and, as Mayhew wrote, "obviously" untrue.¹¹³ This left a second "universalist" regime in which "every member, regardless of party or seniority" could expect enough benefits to assure a comfortable victory margin in the next election.¹¹⁴ But in that case, why pay attention to parties at all? By the 1960s, party leaders found themselves demoted, in Mayhew's phrase, from "program salesmen or vote mobilizers" to "brokers and favor-doers."¹¹⁵ Party-line votes reached record lows,¹¹⁶ with some committees boasting that party affiliation made "no difference" in members' right to participate.¹¹⁷

The surprise, looking back, was that partisanship was about to make a comeback. Yet even at the time, Mayhew saw that pork barrel politics were vulnerable to "ideological voters who can be mobilized by extreme, red meat positions."¹¹⁸ The difference today is that such people are no longer unusual. While political scientists still rely on Mayhew's theoretical framework, they immediately add, "[c]learly something has changed."¹¹⁹

F. MODERNITY

Most House members are relatively anonymous. This makes them dependent on party labels, a phenomenon that became more pronounced as polarization increased from the late 1960s onward. This produced a fierce loyalty that led many members to help party leaders ram through platforms that their own constituents opposed.¹²⁰

As in the nineteenth century, the result was an endless cycle in which the majority would periodically tighten House rules to overcome obstruction, only to see the minority mobilize some new tactic to fight back.¹²¹ By 1975, partisanship was running so high that the Democratic caucus had resumed the Wilson-era practice of telling its committee chairmen how to vote and punishing those who refused.¹²² The following year, they took matters even further by writing House rules with no Republican input at all¹²³—a practice

¹¹² DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 87 (1974) (describing work by public choice economists Buchanan and Tulloch).

¹¹³ *Id.* at 97–98. Mayhew was incredulous, adding that he doubted whether "many assemblies anywhere engage in it" and asking whether it might even be a "recipe for civil war."

¹¹⁴ *Id.* at 88.

¹¹⁵ *Id.* at 100.

¹¹⁶ *Id.* at 103. Despite the overall trend, partisanship often fluctuated on shorter timescales. In the early 1930s, the Hoover debacle saw Republicans outnumbered by an astonishing 244 seats. Democrats used this power to ride roughshod over debate, sometimes passing major legislation in days. Jones, *supra* note 110, at 486–87. But that was aberrational. By the 1950s, the Democrats' majority had shrunk to fifty-three percent so that Speaker Sam Rayburn was afraid to assert party discipline. He focused instead on trying to keep his members happy as individuals. *Id.* at 488–89.

¹¹⁷ GREEN, *supra* note 59, at 142.

¹¹⁸ MAYHEW, *supra* note 112.

¹¹⁹ SETH E. MASKET, NO MIDDLE GROUND: HOW INFORMAL PARTY ORGANIZATIONS CONTROL NOMINATIONS AND POLARIZE LEGISLATURES 6 (2009).

¹²⁰ BARBARA SINCLAIR, PARTY WARS: POLARIZATION AND THE POLITICS OF NATIONAL POLICY MAKING 191 (2006); GREEN, *supra* note 59, at 122.

¹²¹ GREEN, *supra* note 59, at 121.

¹²² *Id.* at 149–50. The majority removed three chairmen for disobedience in 1975. *Id.* at 149.

¹²³ *Id.* at 121.

that has continued ever since.¹²⁴ After that, a series of high-profile disputes led to further declines in cooperation.¹²⁵ By 2024, the House stopped using “open rules” that allowed any member to offer amendments: instead, the Speaker used the Rules Committee to issue “boutique rules” for each individual bill.¹²⁶ These routinely favored the majority by limiting or forbidding amendments,¹²⁷ creating rigorous timelines for debate and voting,¹²⁸ and even rewriting bills and deeming them “passed” so long as the majority approved the Committee’s rule change.¹²⁹ The upshot was that the majority now paid little attention to the minority,¹³⁰ whose bills seldom reached the floor.¹³¹

Inevitably, the tightening noose sparked resistance. Back in the 1970s, Republicans had relied on individual volunteers to push back against majority abuses, but a single member could do little to delay proceedings under House rules and made an easy target for retaliation.¹³² By the 1980s, this persuaded Newt Gingrich and a younger generation of activists that it was better to coordinate their tactics.¹³³ This proved far more successful, especially when party leaders endorsed their actions.¹³⁴ Successful obstruction, in turn, encouraged members to attempt it more often.¹³⁵ By the late 1990s, roughly a third of the protests managed to extract concessions from the majority.¹³⁶ More importantly, each was a test of strength designed to show which party could outlast the other.¹³⁷ Both sides would then retreat into an uneasy peace until the next flare-up.¹³⁸

By the early 2010s, increasing polarization was also creating more confrontational politics within the parties themselves. The fights would begin when the conservative “Freedom Caucus” or Progressive “Squad” threatened to withhold support from their party unless it embraced their

¹²⁴ *Id.* at 121, 123.

¹²⁵ Leading examples included Democrats’ decision to seat one of their own after a contested election in Indiana (1985), the Senate’s rejection of Robert Bork’s Supreme Court nomination (1987), House Speaker Jim Wright’s forced resignation (1989), and the 1995–1996 federal budget shutdown. MASKET, *supra* note 119, at 4. By the mid-1990s, partisan feeling was so high that Speaker Nancy Pelosi could require her caucus to vote against all major Republican bills on principle. GREEN, *supra* note 59, at 153. This was soon matched by the GOP’s ‘Hastert Rule’ that barred Speakers from bringing bills to the floor unless a majority of their caucus supported them. *Id.*

¹²⁶ In modern times, the Speaker selects nine members subject to the approval of his caucus while the minority party chooses the remaining four members. RICHARD A. ARENBERG & ROBERT B. DOVE, *DEFENDING THE FILIBUSTER* 53 (2012).

¹²⁷ See KEVIN F. MCCUMBER, *RULES OF THE HOUSE OF REPRESENTATIVES: ONE HUNDRED EIGHTEENTH CONGRESS*, (2023), <https://rules.house.gov/sites/evo-subsites/republicans-rules.house.gov/files/documents/118/Additional%20Items/118-House-Rules-Clerk-v2.pdf> [<https://perma.cc/F7M6-EMCS>].

¹²⁸ ARENBERG & DOVE, *supra* note 126.

¹²⁹ See MCCUMBER, *supra* note 127. In 2011, the Republican majority even gave House Budget Committee Chairman Paul Ryan the power to establish spending ceilings—potentially including deep spending cuts—without a vote by his committee or the full House. ARENBERG & DOVE, *supra* note 126, at 54.

¹³⁰ ARENBERG & DOVE, *supra* note 126, at 41.

¹³¹ GREEN, *supra* note 59, at 143.

¹³² *Id.* at 118–19.

¹³³ *Id.* at 122.

¹³⁴ *Id.* at 114.

¹³⁵ *Id.*

¹³⁶ *Id.* at 139–40. Of fifty-two procedural protests identified by Green between 1993 and 2012, fifteen produced at least some results for the minority. *Id.*

¹³⁷ *Id.* at 120.

¹³⁸ Protests typically broke out two to three times per year. *Id.* at 153.

policies. Given the tiny size of these groups, one might have thought that other, more moderate caucuses would counter with their own threats.¹³⁹ But extremists were far more willing to withhold their votes, whether from conviction or because their constituents expected them to. The trouble came when moderate Republicans rejected the resulting bill. In the end, Speakers Kevin McCarthy and James Michael Johnson both had to rely on Democrats to suspend the calendar so that more centrist bills could reach the floor.¹⁴⁰

VI. PRACTICAL POLITICS: THE SENATE

Party has almost always been less important in the Senate compared to the House. On the one hand, the smaller and more intimate Senate encourages more direct loyalty across individuals. This effect is even stronger because overlapping six-year terms encourage members to build relationships across long series of deals.¹⁴¹ On the other hand, senators' higher visibility also makes party endorsements less necessary. The resulting individualism is famously visible in the Senate's "right of recognition," which provides that a member who holds the floor can keep the chamber from voting so long as they are physically able to stand and speak,¹⁴² even when their only goal is obstruction.¹⁴³

A. THE NINETEENTH CENTURY

Despite occasional efforts to impose order, the Senate remained "essentially a free-for-all" down to the early twentieth century. As now, this included unlimited debate and numerous opportunities to amend. The surprise is that even relatively narrow majorities regularly overcame these obstacles.¹⁴⁴ The reason was that the majority's willingness to "tolerate[]" delay was limited by an understanding that "priority bills favored by a clear majority" would eventually be allowed to pass.¹⁴⁵ For closer disputes, the

¹³⁹ The principal groups on the Republican side include the bipartisan Problem Solvers Caucus (29 Members), whose members disproportionately include swing districts; the Republican Governance Group (42 Members) and Main Street Caucus (67 Members), which tend to be pragmatic; and the House Freedom Caucus (33 Members), which is the Republican Party's smallest and most ideologically conservative group. The largest group, the Republican Study Committee (173 Members), is built around the GOP's most widely shared principles. Adrian Blanco, Marianna Sotomayor & Hannah Dormido, *Meet 'The Five Families' That Wield Power in McCarthy's House Majority*, WASH. POST (Apr. 17, 2023), <https://www.washingtonpost.com/politics/interactive/2023/house-republican-five-families> [https://perma.cc/ND9Y-DDUU].

¹⁴⁰ Theodor Meyer, Leigh Ann Caldwell, Marianna Sotomayor & Tobi Raji, *How Congress Averted a Government Shutdown — For Now*, WASH. POST (Oct. 1, 2023), <https://www.washingtonpost.com/politics/2023/10/01/how-congress-averted-government-shutdown-now> [https://perma.cc/Z2E7-3FT7].

¹⁴¹ WAWRO & SCHICKLER, *supra* note 61, at 38–39 (Long-term relationships "can be self-enforcing for reasons familiar from the theory of repeated games: the immediate benefit of acting opportunistically can be offset by future losses, because the opportunism leads to a collapse of the relationship and therefore to lower future payoffs").

¹⁴² *Id.* at 14. Senate Rule XIX states that "[w]hen a Senator desires to speak, he shall rise and address the Presiding Officer, and shall not proceed until recognized, and the Presiding Officer shall recognize the Senator who shall first address him. No Senator shall interrupt another Senator in debate without his consent." This rule combined with the absence of a conventional parliamentary rule authorizing "previous question motions" to end debate and force votes means that senators can block action for so long as they are physically able to speak. ARENBERG & DOVE, *supra* note 126, at 4–5.

¹⁴³ WAWRO & SCHICKLER, *supra* note 61, at 13–14, 13 n.21. Senator Ted Cruz famously taunted colleagues by reading from the classic children's story *Green Eggs and Ham* in 2012.

¹⁴⁴ *Id.* at 93.

¹⁴⁵ ARENBERG & DOVE, *supra* note 126, at 22.

success of any single filibuster came down to which side had “the greater resolve.”¹⁴⁶

For the first fifty years of Congress, there is little evidence that filibusters even existed.¹⁴⁷ So long as the Senate was small, it was enough for members to retaliate when colleagues exceeded the bounds of custom. Instead, the first true filibuster occurred at the dawn of the mass party era, when the Democrats, having just lost the 1840 election, launched a coordinated effort to protect their supporters’ existing patronage contracts. The effort failed.¹⁴⁸ Then, a few months later, South Carolina Senator John C. Calhoun revived the tactic to block legislation authorizing a national bank.¹⁴⁹ At this point, Henry Clay threatened to change the rules so that a simple majority could control Senate business.¹⁵⁰ Seeing that Clay’s threat was loudly supported by the majority, Calhoun negotiated a compromise.¹⁵¹ But the example had been set and thereafter members remained free to obstruct subject only to their “sense of decorum.”¹⁵²

By the 1880s, filibusters had become more common and successful. This was especially true when dissenters joined forces across party lines, most notably when Free-Silver Republicans joined Farmer Democrats in an unsuccessful forty-six day effort to block the Cleveland administration’s repeal of mandatory silver purchases in 1893.¹⁵³

Like all obstructions, the filibuster invited pushback. Formally, the debate was constitutional. One might have thought that the Senate, like the House, would adopt its rules by majority vote at the start of each session.¹⁵⁴ However, senators have argued since at least 1891 that members’ overlapping terms make the Senate “a continuing body” whose rules persist from session to session.¹⁵⁵ That said, the argument has often been challenged. The most dramatic example came in 1917, when Democratic Senator Thomas Walsh of Massachusetts denied that the Senate’s rules were continuing and called for a committee that would write new rules to cut off debate.¹⁵⁶ In the event, his threat was enough to force a compromise and was later abandoned.¹⁵⁷ The argument then lay fallow until Senate liberals revived it to challenge Southern segregationists in 1953¹⁵⁸ and Vice President Walter Mondale discussed using it in the 1970s.¹⁵⁹ If the filibuster is ever abolished, the winners will almost certainly follow this path.¹⁶⁰

¹⁴⁶ WAWRO & SCHICKLER, *supra* note 61, at 18.

¹⁴⁷ ARENBERG & DOVE, *supra* note 126, at 19; Bomboy, *supra* note 63.

¹⁴⁸ ARENBERG & DOVE, *supra* note 126, at 20.

¹⁴⁹ *Id.* at 21.

¹⁵⁰ *Id.* at 21.

¹⁵¹ *Id.*

¹⁵² *Id.*; WAWRO & SCHICKLER, *supra* note 61, at 14.

¹⁵³ *Silver Republican Party*, WIKIPEDIA, https://en.wikipedia.org/wiki/Silver_Republican_Party [https://perma.cc/BAU2-E3YC].

¹⁵⁴ U.S. CONST. art. I, § 5.

¹⁵⁵ ARENBERG & DOVE, *supra* note 126, at 117–18, 122.

¹⁵⁶ *Id.* at 123. Walsh further argued that the committee’s work would have to be debated under “general parliamentary law,” including a “previous question” provision that made filibusters impossible. *Id.*

¹⁵⁷ *Id.* at 123–24 (quoting Martin Gold and Dimple Gupta).

¹⁵⁸ *Id.* at 119.

¹⁵⁹ *Id.* at 126.

¹⁶⁰ The reason is that the Senate’s current rules preserve the classical two-thirds majority for rule changes. *Id.* at 125.

B. REFORM

And if the filibuster could not be abolished, perhaps it could be rewritten. Republicans began pressing for rules establishing time limits (“cloture”) as early as 1903.¹⁶¹ Meanwhile, filibusters themselves proliferated.¹⁶² This led to rough justice in 1908, when progressive Republican Senator Robert La Follette led a filibuster against his own party.¹⁶³ Eighteen hours into the session, having already used two quorum calls to rest, La Follette asked for a third. Party leader Nelson W. Aldrich objected, whereupon the Senate voted thirty-five to eight that senators could make just two quorum calls before surrendering the floor.¹⁶⁴ La Follette is said to have “writhed in the humiliation,” while angry senators nearly came to blows.¹⁶⁵

Things got even worse when Democrats regained control of the Senate in 1913. Republicans now mounted an unheard of seven filibusters in the Sixty-Third Congress.¹⁶⁶ The most bitter ones involved how America should respond to the World War raging in Europe at the time. The climax came in 1917 when LaFollette and ten other senators successfully filibustered a bill to arm American vessels.¹⁶⁷ Once again, senators cooperated to keep him off the floor.¹⁶⁸ President Wilson then called the Senate back into session while stirring public outrage against the dissenters.¹⁶⁹ This forced a compromise which limited but retained the filibuster. Under the new rule, a two-thirds majority could end debate after which each member would be permitted to speak for one more hour.¹⁷⁰

C. THE CLASSIC FILIBUSTER

At the time, many observers predicted that the Senate would soon change its rules to allow cloture by a simple majority.¹⁷¹ Instead, the compromise lasted for sixty years.¹⁷² Superficially, the rule change seemed anticlimactic, with senators bringing just sixteen cloture motions from 1917 to 1964.¹⁷³ On closer examination, though, the rule transformed what had previously been an amorphous estimate of when the majority might lose patience, into a straightforward vote-counting exercise.¹⁷⁴ Meanwhile, the threat of filibusters encouraged senators to do more business informally through so-called “unanimous consent agreements.”¹⁷⁵ These included everything from

¹⁶¹ Bomboy, *supra* note 63; WAWRO & SCHICKLER, *supra* note 61, at 187.

¹⁶² WAWRO & SCHICKLER, *supra* note 61, at 183.

¹⁶³ The position of majority leader did not exist at the time. Nevertheless, Aldrich was widely recognized as one of the “Big Four” Republicans who controlled the Senate. *Nelson W. Aldrich*, WIKIPEDIA, https://en.wikipedia.org/wiki/Nelson_W._Aldrich [https://perma.cc/3GEA-5ANB].

¹⁶⁴ Bomboy, *supra* note 63.

¹⁶⁵ WAWRO & SCHICKLER, *supra* note 61, at 52.

¹⁶⁶ *Id.* at 183.

¹⁶⁷ Bomboy, *supra* note 63.

¹⁶⁸ WAWRO & SCHICKLER, *supra* note 61, at 51.

¹⁶⁹ *Id.* at 124, 212.

¹⁷⁰ ARENBERG & DOVE, *supra* note 126, at 24.

¹⁷¹ WAWRO & SCHICKLER, *supra* note 61, at 213.

¹⁷² Bomboy, *supra* note 63.

¹⁷³ *Id.*

¹⁷⁴ WAWRO & SCHICKLER, *supra* note 61, at 28–29.

¹⁷⁵ *Id.* at 16; ARENBERG & DOVE, *supra* note 126, at 86.

simple requests to be heard, to setting time limits for debate, and specifying the amendments that each side would offer.¹⁷⁶

The irony of course was that the majority could have revoked the filibuster rule any time they wanted to. That, however, would have forced members to ignore precedent and damage their reputation for honesty—a crucial asset in making deals. Conversely, defying precedent—particularly if it involved overruling the Senate parliamentarian—could potentially alienate voters at the next election. These factors were particularly salient in 1947–1948, when Ohio Senator Arthur Vandenberg refused to overrule a Southern filibuster on the ground that doing so would change “the rules, hereafter, [to] mean whatever the Presiding Officer of the Senate, plus a simple majority of senators voting at the time, want the rules to mean.”¹⁷⁷ Yet even here, senators split the difference—affirming Vandenberg’s ruling but then diluting the rule a week later.¹⁷⁸

The filibuster’s finest hour was the 1964 Civil Rights Act. As usual, the procedure punished both sides. Thus, the Kennedy Administration worried that a long fight would derail its agenda,¹⁷⁹ while filibustering Southerners knew that each day’s deadlock would deprive their districts of still more federal dollars. But while these concerns were familiar, the conflict’s intensity was unprecedented. The result was a seventy-five day filibuster, the longest in the Senate’s history.¹⁸⁰ Even so, the political payoff was worth it. The Supreme Court’s *Brown v. Board* decision had been dictated to the South. But the Civil Rights Act was different because Southern senators had fought and then abandoned a *political* process. This showed voters that their leaders, despite their loud rhetoric, thought segregation was less valuable than a return to business as usual.¹⁸¹ In some ways, the admission may have meant more than the statute itself. After nearly a century of Jim Crow laws, Black people “were amazed to find how easy it fell apart.”¹⁸²

D. THE FILIBUSTER REBORN

The wave of liberal Northern politicians, who began entering the Senate in the 1950s, reached critical mass in the late 1960s.¹⁸³ Their Legislative Reorganization Act of 1970 finally broke senior southerners’ grip over the chamber. The reforms included letting a majority of committee members call meetings without the chair’s approval, limiting the number of committees that senators could sit on, and making more seats available to junior members.¹⁸⁴ At the same time, they also encouraged vastly more

¹⁷⁶ ARENBERG & DOVE, *supra* note 126 at 86; *see also* WAWRO & SCHICKLER, *supra* note 61, at 16. Once agreed upon, an instance of unanimous consent can only be changed by a second instance of unanimous consent. *Id.*

¹⁷⁷ ARENBERG & DOVE, *supra* note 126, at 26.

¹⁷⁸ *Id.*

¹⁷⁹ CLAY RISEN, *THE BILL OF THE CENTURY: THE EPIC BATTLE FOR THE CIVIL RIGHTS ACT* 8 (2014).

¹⁸⁰ *Id.* at 229.

¹⁸¹ *Id.* at 248.

¹⁸² *Id.* at 5.

¹⁸³ SINCLAIR, *supra* note 120, at 186.

¹⁸⁴ *About the Committee System: Historical Overview*, U.S. SENATE, <https://www.senate.gov/about/origins-foundations/committee-system/overview.htm> [https://perma.cc/6YJS-ZZ53].

amendments—and policymaking—on the floor. This made the Senate more inclusive but also less predictable.¹⁸⁵

The public mood after Watergate accelerated reform. The result was the 1974 Congressional Budget and Impoundment Control Act which revised how Congress approved spending. Crucially, its “expedited procedures” limited Senate debate—including filibusters—to just fifty hours.¹⁸⁶ This was a tempting vehicle for partisans trying to pass sweeping legislation.¹⁸⁷ It also placed a heavy load on the Senate’s parliamentarian, who now had to decide which amendments did and did not qualify.¹⁸⁸

Finally, in 1975, the Senate liberals’ decades-long campaign culminated a new filibuster reform that reduced cloture from two-thirds of senators voting to three-fifths of all senators “duly elected and sworn.”¹⁸⁹ Shortly after, post-cloture debate was further capped at thirty hours.¹⁹⁰ Together, the changes established a de facto sixty-vote supermajority.¹⁹¹ The rub was that senators could now block legislation without feeling much pain themselves. Where filibusters had averaged less than 1 per year in the late 1950s, they reached 11.4 per year in the 1970s.¹⁹² By the 1980s, roughly half of all major legislation was encountering filibuster-related obstruction.¹⁹³

Meanwhile, senators continued to toy with more limited changes. This notably included Majority Leader Bill Frist, a Republican from Tennessee, threatening to end the filibuster for judicial nominees. Procedurally, the maneuver would have started with a senator objecting that it was unconstitutional to filibuster presidential nominees; Vice President Cheney would then have affirmed the point of order despite the Senate’s existing precedents and, almost certainly, the parliamentarian’s objections. Had he done so, however, the Democrats vowed to use all available procedural tools to bring the Senate to a standstill in what *The Washington Post* christened as “the nuclear option.”¹⁹⁴ As in the past, none of these threats and counterthreats were ever carried out. Instead, seven centrist Republicans stopped supporting Frist in exchange for seven centrist Democrats promising to abandon their party’s current campaign to filibuster nominees. This

¹⁸⁵ Frances E. Lee, *Two-Party Competition and Senate Politics: The Permanent Campaign on the Floor of the U.S. Senate* 3, available at <https://www.vanderbilt.edu/csdi/events/Lee.pdf> [<https://perma.cc/K77H-HC7B>] (mimeo.).

¹⁸⁶ ARENBERG & DOVE, *supra* note 126, at 110. The related Byrd Rule (1985) adds the further requirement that amendments may not change spending levels or revenues. SINCLAIR, *supra* note 120, at 223–24.

¹⁸⁷ ARENBERG & DOVE, *supra* note 126, at 114–15. In 2008, for example, the Senate voted a record forty-four times in a single day. *Id.* at 115.

¹⁸⁸ *Id.* at 114.

¹⁸⁹ *Id.* at 6, 27. As part of the compromise, however, the classical two-thirds threshold for ending debate was retained for Senate rule changes.

¹⁹⁰ *Id.* at 27.

¹⁹¹ Here, the conventional explanation for the change is that the Senate’s agenda had become too crowded to wait out obstructionists. WAWRO & SCHICKLER, *supra* note 61, at 28–29. This cannot be the whole story since increased business should have affected both the majority and dissenters equally, producing shorter struggles but otherwise leaving the filibuster unchanged. A closer examination would probably show that the costs of standoffs had increased while the filibuster’s chief “benefit” to southern members—preserving segregation—no longer existed after the 1964 Civil Rights Act.

¹⁹² SINCLAIR, *supra* note 120, at 190.

¹⁹³ *Id.* at 213–14.

¹⁹⁴ WAWRO & SCHICKLER, *supra* note 61, at 5. The name seems to have been invented by *Washington Post* reporter Charles Babington. ARENBERG & DOVE, *supra* note 126, at 136–37.

stopped the nuclear option in its tracks, though leaving open the possibility of either party filibustering nominees in the future.¹⁹⁵

E. MODERNITY

We have already said that the Senate requires fewer rules than the much larger House. This explains why, apart from the filibuster, the body remained relatively informal throughout the nineteenth century. That slowly began to change after the Senate created the post of majority leader in 1913.¹⁹⁶ However, it took another twenty-four years for the office to gain its most important power.¹⁹⁷ This “right of first recognition” lets the majority leader speak before other senators.¹⁹⁸ If he chooses, this can include making as many amendments as the Senate rules allow, “filling the amendment tree” so that no other changes can be debated. At this point the minority’s only remaining recourse is to mount a filibuster. While the resulting standoff can sometimes force negotiations, it also breeds stalemate.¹⁹⁹

Despite this, an individual senator’s power to obstruct continues to make senate leaders far more dependent on consent than any House Speaker. Since the 1950s, most business in the Senate has proceeded through Unanimous Consent Agreements. Unanimity, in turn, is negotiated through an elaborate “hold” process which starts with members notifying their leaders that they object to a proposed piece of legislation and explaining how they plan to obstruct it.²⁰⁰ Though there is no formal requirement, the “unspoken rule” is that the leadership will keep holds anonymous.²⁰¹ Assuming that the objections are eventually resolved, the majority leader then takes the floor and asks for consent.²⁰² The number of holds exploded in the early 2000s,²⁰³ shadowing the rise in filibusters.²⁰⁴ In practice, there are two kinds of holds. Public holds are intended to force negotiations in the usual logrolling way.²⁰⁵ Here, secrecy lets senators explore compromise without being publicly accused of weakness. At the same time, everyone knows that leaders almost always drop contentious bills in order to pass easy ones.²⁰⁶ This encourages so-called secret holds, in which the objecting senators have no interest in logrolling. This allows senators to kill bills without investing the time, effort, or reputational damage of an open filibuster.²⁰⁷

Meanwhile, senators’ incentives to cooperate have declined. Post-World War II senators were relatively obscure and mostly traded favors with each

¹⁹⁵ ARENBERG & DOVE, *supra* note 126, at 138.

¹⁹⁶ Democrats elected their first majority leader in the 1893–1895 Congress but did not hold power again until 1913. *Complete List of Majority and Minority Leaders*, U.S. SENATE, <https://www.senate.gov/senators/majority-minority-leaders.htm> [<https://perma.cc/35UH-E4LC>].

¹⁹⁷ ARENBERG & DOVE, *supra* note 126, at 97.

¹⁹⁸ *Id.* at 96–97; SINCLAIR, *supra* note 120, at 204.

¹⁹⁹ ARENBERG & DOVE, *supra* note 126, at 97–98.

²⁰⁰ SINCLAIR, *supra* note 120, at 206–07.

²⁰¹ ARENBERG & DOVE, *supra* note 126, at 88.

²⁰² SINCLAIR, *supra* note 120, at 205–06.

²⁰³ ARENBERG & DOVE, *supra* note 126, at 29 (the number of legislative measures affected by holds and filibuster threats rose from eight percent in the 1960s to seventy percent in 2007.).

²⁰⁴ *Id.* at 90.

²⁰⁵ SINCLAIR, *supra* note 120, at 207–09.

²⁰⁶ *Id.* at 186.

²⁰⁷ *Id.* at 208.

other; this helped bind them together.²⁰⁸ Starting in the 1960s and 1970s, on the other hand, senators have increasingly found outside allies in the national media and special interest groups. This allowed divisions to widen when members became more partisan and polarized in the 1980s.²⁰⁹ Whereas senators previously tried to save each other from politically embarrassing votes, the minority party now routinely proposes amendments to force the majority onto the record²¹⁰ or “slow-roll” its agenda.²¹¹ Sometimes, they even propose “poison pill” amendments that members are afraid to vote against openly but will later force them to abandon the bill.²¹²

As in the House, such tactics have touched off the usual cycle of oppression, resistance, and still more oppression. Traditionally, Speakers hardly ever used their power to “fill the amendment tree.” However, in the mid-1980s, they started invoking it three to six times per session. Speaker Harry Reid then ratcheted up the tactic by using it an average of twenty-three times per year from 2007 to 2010.²¹³ Even so, the Senate remained noticeably less disciplined than the House. Not only did the minority party receive its full share of powerful committee seats, but the Unanimous Consent system also encouraged sponsors to put together broad coalitions that reached deep into the other party’s ideological spectrum.²¹⁴

VII. TOWARD A THEORY OF RULES AND RULEMAKING

The last two sections have summarized more than two centuries of rules and rule changes. Despite this, there is a certain sameness to the stories.²¹⁵ We now explore the logic that unites and explains this resemblance.

A. FUNDAMENTALS

We start with a puzzle. We have seen that Congress can change its rules by majority vote whenever it wants to. So why don’t members also change the rules whenever they find it convenient? For the two most basic rules, the answer is public opinion. The first rule is the principle of deciding by majority vote. This commands more agreement than any other proposition in American political life. Then too, counting heads is so obvious that violations would be hard to disguise. In practice, legislators’ fidelity to the rule is so strong that partisan minorities accept it even when it condemns them to one-party rule. The second, only slightly less fundamental, rule

²⁰⁸ *Id.* at 190.

²⁰⁹ *Id.* at 190–91.

²¹⁰ ARENBERG & DOVE, *supra* note 126, at 97. Majority Leader Bob Dole (a Republican from Kansas) filled the tree five times in the 99th Congress from 1985–1986. *Id.* at 102.

²¹¹ *Id.* at 16.

²¹² *Id.* at 15.

²¹³ *Id.* at 102–03.

²¹⁴ SINCLAIR, *supra* note 120, at 199.

²¹⁵ Prominent recurring themes include (a) an apparently endless cycle of obstruction, rule changes, and further obstruction; (b) the ability to change any rule by majority vote; (c) the steady codification of initially chaotic procedures, like the filibuster, within highly formalized rules; (d) the durability of even hotly-contested rules over generational times scales; (e) recurring minority threats to escalate normal proceedings into hyper-vigorous, “nuclear option” obstruction; (f) periodic contests in which the majority and minority try to outlast each other; (g) party tyranny in the House compared to a consistently more liberal Senate; (h) periodic attempts by rank-and-file members to overrule their leaderships; (i) a persistent weakness for rules that favor incumbents over challengers; and (j) the outsized leverage of extremist groups within both parties in hyper-polarized eras.

comes from the Constitution, which provides that one-fifth of all members must be present in the chamber to pass laws.²¹⁶ This forces the House to convene as a single body (the “Committee of the Whole”) to reach decisions. More importantly for present purposes, it also places strong limits on how much so-called “privileged motions”—which include quorum votes—can be restricted. Though sometimes trimmed,²¹⁷ these rights are almost certain to endure in one way or another. And so long as they do, each congressman has a baseline power to obstruct.

But those rules are special cases. Less fundamental rules depend for their durability on a kind of bootstrap. On the one hand, members know that any rule that can be casually changed is worthless. On the other, the average member cares relatively little about most issues. This means that most members usually prefer to swallow bad outcomes than pursue rule changes.²¹⁸

Finally, the average member cares a great deal about rules that establish their rights in Congress. As previously stated, practically all members are loyal to larger partisan and ideological “teams.” However, they also want benefits for themselves and their constituents, and these ambitions never disappear in even the most partisan eras.²¹⁹ But in that case, each congressman must find some way to assert himself against other members, including the leadership. This implies three requisites. Here, the most basic is simply the right to exist, i.e. to be seated and to vote. The best measure of members’ sensitivity on this point is that no Congress has ever abridged these rights apart from clear cases of criminality, treason, and, very occasionally, contested elections. Presumably, these situations are so unambiguous that members can vote for expulsion without feeling threatened themselves.²²⁰ A second, broader category of rules protects members by making sure that votes happen and are meaningful. These are necessary because the leadership’s power to schedule votes—though unavoidable—can easily be abused by, for example, keeping Congress in perpetual session and calling snap votes whenever the Speaker’s allies momentarily outnumber everyone else. This leads to a maze of rules involving quorums, adjournment, and reconvening. But the fact that these motions are “privileged”—i.e. that the minority can assert them at any time—also makes them useful for obstruction. Finally, politicians must be able to show voters that they have

²¹⁶ U.S. CONST. art. I, § 5, cl. 3.

²¹⁷ Probably the most extreme example was Speaker Reed’s claim that he could establish a quorum simply by stating that the required number of members was present. In principle, at least, this would have allowed him to claim quorums where none existed. He eventually relented. ALEXANDER, *supra* note 53, at 166.

²¹⁸ The observation necessarily implies that members want “to get things done”—i.e., that they consider themselves better off within the Union than outside it. This is not a hard limit since small numbers of obstructors can always be ejected. The Tennessee legislature’s decision to expel three lawmakers who practiced civil disobedience by ignoring procedural rules provides one recent example. 2023 *Tennessee House of Representatives Expulsions*, WIKIPEDIA, https://en.wikipedia.org/wiki/2023_Tennessee_House_of_Representatives_expulsions [https://perma.cc/W32E-8P6C].

²¹⁹ Advocating for constituents is more or less inevitable in any system where members’ districts are at least somewhat diverse. After that, one representative’s attempt to gain “pork” for his region automatically forces his colleagues to make similar demands in self-defense. In practice, even Soviet legislators made a point of defending their constituents. David Dresher, *Legislative Representation in the USSR*, 12 J. POL. SCI. 64, 64 (1985).

²²⁰ That said, the experience of both the British “Long Parliament” and the French Revolution show that angry legislators can sometimes breach the barrier, though usually to their sorrow.

accomplished something. For this reason, members can never entirely surrender their right to introduce and advocate for bills. In the modern House, the privilege has been trimmed to just five minutes.²²¹ But with 435 members, that already gives large minorities the power to stop proceedings for up to eighteen hours.

The dilemma in all of these cases is that the same rules that protect members' rights can also be used for delay. The circle could be squared if leaders could be trusted to overrule members who invoked the rules with bad intent. But since leaders have their own individual interests, that is impossible. This places strong limits on efforts to limit obstruction.

B. WHAT MEMBERS WANT

So far, this Article has discussed members' power to obstruct. But the more important question is how they use it. In eras when party and institutional structures are weak, the power to obstruct is mostly used to threaten other members. From there, it might seem a short step to retaliation, escalation, and a war of all against all. The surprise is how seldom this happens. As Mayhew argued fifty years ago, the reason is diminishing returns: so long as members receive enough benefits to have "reasonable" prospects for reelection, any attempt to seize more than one's share is likely to spark conflicts that leave all sides worse off than if they had cooperated.²²² According to the usual deterrence logic, we therefore expect broadly similar legislative achievements across congressmen, with members from the most competitive districts demanding and receiving a bit more. The same reasoning similarly explains why senators seldom press their rights to the limit, even modifying bills to please colleagues whose votes are not technically necessary.²²³

The difference in more partisan eras is that obstruction can also become collective. Here, the good news—with some important exceptions²²⁴—is that delay tends to punish both sides. This implies that victory will usually go to whichever side can stand the pain the longest, i.e. whichever side feels more strongly.²²⁵ Yet this presents a puzzle: why doesn't the less-passionate side

²²¹ *XII. Amendments under the Five-Minute Rule*, CONG. INST., <https://www.congressionalinstitute.org/112th-congress-house-floor-procedures-manual/xii-amendments-under-the-five-minute-rule> [<https://perma.cc/NQ55-TBX7>].

²²² Mayhew further argued that credit-taking encouraged each congressman to find a different niche specialty. This minimized overlap and, implicitly, the conflicts and negotiation.

²²³ SINCLAIR, *supra* note 120, at 231–33.

²²⁴ The physical discomforts associated with the classical filibuster fell mostly on the majority, which had to maintain a quorum near the floor at all times. This meant sleeping on cots while obstructionists only needed to visit the floor every few days to make speeches. A historian noted that that "[t]he all-night filibuster wore down the majority much faster than it did the minority," and Senator William Proxmire (a Democrat from Wisconsin) recalled that it was "an absolutely exhausting experience." ARENBERG & DOVE, *supra* note 126, at 147. Additionally, the question of who bears the political fallout can be unpredictable, particularly since voters seldom know enough to assign blame. *Id.* at 24. This does *not* apply to government shutdowns, which, by definition, threaten previously agreed—and therefore presumptively centrist and legitimate—programs. In this case, politicians supporting the shutdown are far more likely to be blamed. Meyer et al., *supra* note 140 (reporting that both sides are afraid to vote against centrist compromises).

²²⁵ This is nicely illustrated by nineteenth-century battles over the tariff. Despite the fact that both sides supported their positions passionately, most fights ended in the Northern majority's favor. The situation was very different in the first half of the twentieth century, when Southern senators cared much more about civil rights—albeit for reprehensible reasons—than Northerners did. WAWRO & SCHICKLER, *supra* note 61, at 12.

just see that it will lose and cut its losses? The answer, almost certainly, is limited information. Politics, after all, is rife with posturing and dissimulation. It is only once the filibuster starts—and frantic politicking begins—that each side can begin to learn about other’s true appetite for punishment.²²⁶ Then too, the process of bluff and counterbluff is chaotic, with one or two premature defectors setting off further cascades.²²⁷ This makes filibusters a high-risk test of strength for both sides.

C. INSTITUTIONAL AND TWO-PARTY EFFECTS

So far, this Article has focused on members’ individual goals. But what becomes law also depends on institutional arrangements. Here, it is useful to start with the baseline case of a non-hierarchical, non-partisan legislature where members have unlimited time to talk with each other. In this very simple “Madisonian” Congress, we would expect each member to negotiate with every other member until fifty-one percent of the body agrees on laws they prefer to every other option. This is less oppressive than it sounds: since members can trade votes on the issues they feel most keenly, the new laws will reflect a “Pareto optimum” in which no congressman can be made better off without making another one worse off.

Of course, this Madisonian ideal is unattainable, most obviously because the required one-on-one negotiations would take many human lifetimes. Instead, all real legislatures find themselves delegating power to institutional leaders whose work must receive substantial deference if it is not to be wasted. But since these leaders have their own constituencies and allies, we also expect them to divert at least some of this power to their own ends. Even so, these effects seem to have been modest in early Congresses, when Speakers often tried to present themselves as impartial moderators.²²⁸ This ended with the rise of mass parties in the 1830s. To be sure, even partisan Speakers were theoretically answerable to their own caucus. The difficulty, in practice, was that no caucus could possibly specify how the Speaker should handle every contingency in advance.²²⁹ This meant that the Speaker

²²⁶ Indeed, some members may not know their minds at the outset and only decide later.

²²⁷ For a day-by-day account of how Republicans and Democrats competed to woo defectors in President Trump’s 2019 government shutdown, see generally Andrew Restuccia, Rachael Bade, John Bresnahan & Burgess Everett, *Both Parties Aim to Woo Defectors as Shutdown Drags On*, POLITICO (Jan. 14, 2019, 10:10 AM), <https://www.politico.com/story/2019/01/14/trump-on-declaring-national-emergency-im-not-looking-to-do-that-1098886> [<https://perma.cc/S2AJ-D4CV>].

²²⁸ Roger H. Davidson & Susan Webb Hammond, *Rediscovering the “Masters of the House,”* in *MASTERS OF THE HOUSE: CONGRESSIONAL LEADERSHIP OVER TWO CENTURIES* 1, 4 (Roger H. Davidson et. al eds., 1998). Speakers continued to feel a much diminished obligation to act impartially even after the rise of parties. ALEXANDER, *supra* note 53, at 44 (despite his status as a party leader, “it has always been held that a Speaker while presiding is in nowise emancipated from the obligation to act impartially, and fairness at such times has largely determined his character as an official worthy of the great trust imposed on him”). This presumably reflected the fact that members’ individual consciences never entirely disappear in even the most partisan eras. Speaker Reed’s reluctance to mount a “revolution” by ignoring precedent in 1880 reflected a very real concern that his own caucus might not back his dishonesty. *Id.* at 165.

²²⁹ On the one hand, the public’s mood changes constantly, opening new political opportunities and closing off others. On the other hand, many legislators may have no opinion at all when the caucus votes or might change their mind when they see bills that they supported reduced to writing. Congressional politics are reportedly so fluid that even an hour’s delay can sometimes buy enough time to build a winning coalition. GREEN, *supra* note 59 at, 117. There is also the further problem that intra-party horse trading sometimes includes agreements *not* to pursue legislation that most caucus members want. But in

needed broad discretion to change and reprioritize bills—but this same discretion also gave him the power to elevate his own policies.

Finally, majority party dictatorship presumes sufficient discipline to carry out whatever agenda the caucus decides. The trouble in highly polarized eras is that the range of views within each party is enormous. This can manifest itself in at least two ways. In the nineteenth century, and again in the early twentieth century, moderates broke party discipline to seek allies across the aisle. This had the salutary effect of empowering a majority of House members to reject policies that their leaderships had tried to impose. In the twenty-first century, on the other hand, the conflict has more often involved extremists threatening to stop supporting the majority party's hold on power. The result was an intra-party game of chicken in which moderate members usually gave way to more passionate extremists. This let small minorities extract concessions that most House members opposed.

D. TRANSMUTED RULES

We have argued that the power to obstruct is so intimately tied up with members' rights that no reform can ever abolish it. But if resistance is always possible, why create new protest procedures—like the filibuster—when anyone who loses the fight can simply revert to the old tactics? The best answer probably is that losing a filibuster provides information. This will often convince dissenters that continuing the struggle would only lead to a second defeat. In the meantime, the new rule reduces uncertainty on both sides by replacing messy judgments of how much obstruction the majority is prepared to tolerate with a straightforward vote-count.

E. A STICK-SLIP DYNAMIC

We have seen that nearly all of Congress's rules can be changed by pairing majority vote with pretended legality.²³⁰ One might have guessed that such a system was unstable. Despite this, most procedural rules last for decades, while “revolutions” are measured in weeks.

This very unusual dynamic suggests a useful analogy to earthquakes, in which the combination of steadily accumulating strains and large frictions similarly generates long-lived quiescence punctuated by short, sharp upheavals. Here, the analog to physical “force” comes from the mismatch between the rules as originally written and what members would choose today. This, in turn, is driven by members' changing risk and benefit judgments, which themselves reflect voters' constantly evolving polarization, partisanship, and ideological beliefs. The analog to friction, on the other hand, includes the fact that any attempt to change the rules will be costly in time and effort, might fail entirely, and could inadvertently lead to outcomes that members like even less than the current rules. Then too, it risks unpredictable escalations that could slow legislation to a crawl, invite

that case, what is to keep the caucus majority from reneging once its own priorities become law? Rules like the filibuster fill this gap by giving dissenters a formal veto against being double-crossed.

²³⁰ ARENBERG & DOVE, *supra* note 126, at 128. *Id.* at 131 (“in reality, the vice president or presiding officer can do whatever a majority will permit as long as he or she and the Senate's majority are willing to ignore the Senate rules”); *see also* GREEN, *supra* note 59.

voter backlash, and damage trust with other legislators. Small wonder, then, that rules appear stable for decades and even generations at a time.

The earthquake analogy also suggests that the final rupture will often be triggered by comparatively small events that are only recognizable afterward.²³¹ Historically, we have seen that rule changes are most likely when the last election heavily favored the majority, is backed by a popular president, and the dissent's cause is unpopular with voters.²³² While an unprincipled "revolution" could easily invite public anger, an otherwise popular majority may feel it can afford this. Rule changes are also more likely in polarized eras, when members are more willing to overlook principle to defeat an opposition they have already demonized.

F. ESCALATION

So far, this Article has described a system that alternates between customary deference to rules and unprincipled "revolutions." But the experience of pre-Civil War Congresses shows that fights can also escalate beyond this. This Article closes by sketching how the normal cycles of obstruction and retaliation can spin out of control.

Conventional Obstruction. In the ordinary case, the majority drafts legislation that stops short of making the minority angry enough to cause excessive delays or threaten passage. But since no estimate is exact, the majority sometimes finds more opposition than it bargained for. At this point, it may decide that it cannot win and abandon the fight.

Rewriting the Rules. If the majority persists, the minority must decide how much delay it can inflict before the majority changes the rules. At this point, it may also abandon the fight. That said, the 1964 Civil Rights Act provides spectacular evidence that rules can remain stable up to very high levels of conflict.

Nuclear Option. Even if the majority rewrites the rules, the minority can continue resisting by "going nuclear" as the House did in 1880, and the Senate threatened to do in 2004. Based on the 1880 example, the nuclear option would not shut down legislation entirely, although it would certainly come close.

Majority Voting is Replaced by Violence. So far, we have imagined both sides following procedure backed by majority vote. What might be termed the "thermonuclear" option occurs when members supplement or replace voting with physical violence. The nineteenth century Congress crossed this threshold with the Kansas-Nebraska Act when beatings and the risk of death coexisted alongside normal voting. This led naturally to a politics based on telling voters that the

²³¹ The foreshocks and tremblors often include the majority's decision to start preparing for a rules fight. This is often enough to convince dissenters that the majority feels intensely enough to change the existing rule even if it means foregoing rights it might want in the future. WAWRO & SCHICKLER, *supra* note 61, at 37.

²³² ARENBERG & DOVE, *supra* note 126, at 159. This was true even in the climactic fight over the Civil Rights Act, when grassroots activists used church and labor union endorsements to pressure otherwise popular segregationist senators into relenting. *Id.*

“other side” was abusing them, that they would be better off outside the Union, and that if they did fight, their enemies would quickly surrender. From there, it was only a short step to violence, secession, and open warfare.

VIII. A SELF-REGULATING MACHINE?

The Framers could have written Congress’s rules directly into the Constitution. Instead, they let representatives adopt whatever rules seemed best in a changing world. Whether they were right to do this depends on whether we can trust self-interested legislators to write rules that address three closely related policy problems. First, as argued in Part II, they need to write rules that limit the rate at which new policy experiments depart from what the median voter prefers. Second, they need to write rules that mitigate majority tyranny and the various related distortions described in Part I. And finally, they need to adjust their existing rules to slow policy experiments, especially in eras when anger and polarization run hot. We now consider these challenges in turn.

Limiting Swings Between Elections. The two-party system is most democratic when Congress’s rules restrict policy swings to levels that are just barely sufficient to catch voters’ attention and, if necessary, persuade them to eject the incumbents. The question is how closely legislators’ incentives approximate this goal. This requires members to balance the rules they would wish for as members of the majority against what they would want if they found themselves in the minority.²³³

Suppose first that senators imagine themselves in the majority. From a party politics perspective, this would seem to favor rules that let them do as much as possible. This is correct for true believers who place ideological loyalty above their own political interests. Pragmatists, on the other hand, understand that pursuing their party’s ideological agenda too hard could reduce their chances of reelection.²³⁴ This is not to say that majority members would refuse more power if it were offered, since it is always better to have the option, even if they never use it. Even so, they have no reason to push for it. Meanwhile, legislators who imagine themselves in the minority will see majority overreach as their best chance to regain power.²³⁵ But this mostly applies to policy experiments that are just barely large enough for voters to notice and judge; after that, the possibility of still bigger swings is much less valuable. Then, whether pragmatist politicians imagine themselves in power or not, we expect them to vote for rules that limit the majority to fairly

²³³ Cf. WAWRO & SCHICKLER, *supra* note 61, at 91 (senators often say that they favor weak cloture rules because of “uncertainty” about whether they could find themselves in the minority tomorrow).

²³⁴ Even pragmatist politicians may not be able to avoid the trap if party extremists increase their demands from one election to the next. This necessarily forces incumbents to back bigger and bigger policy swings that alienate centrists and increase the other party’s turnout. This practically guarantees that incumbents will sooner or later lose their majority.

²³⁵ We should point out that voters also punish “do-nothing Congress[es].” This cornerstone of Truman’s famous 1948 presidential victory has been widely revived in the current era of deadlocked politics. Taegan Goddard, *Do-Nothing Congress*, POL. DICTIONARY, <https://politicaldictionary.com/words/do-nothing-congress> [<https://perma.cc/HQX2-Q49L>]. That said, politicians who use the argument must first persuade voters that their opponents are at fault. This typically means explaining the complicated back-and-forth of congressional negotiations. In practice, it is often simpler to attack policies that the public already dislikes.

moderate policy experiments. This is, of course, is precisely what the two-party system needs. That said, we expect true believers to seize as much power as they can. This suggests a dangerous instability in eras when extremists take control of the majority party.

So much for partisans. But politicians who vote for their constituents' interests face a different calculation. This involves balancing the probable benefits of future legislation by either party against the losses their constituents might suffer. Here, the fact that most people are risk-averse²³⁶ implies that they will normally worry about possible downsides more than upsides. This may sometimes lead members to favor rules that limit policy swings more than their national party would prefer. The calculation does, however, bring congressmen closer to what their constituents want.²³⁷

So far, this Article has argued that members who balance possible future benefits against risks will choose rules that limit policy swings to levels that voters would prefer to see on Election Day. This, however, depends on the usual "Veil of Ignorance" assumption that legislators have no idea whether they will be part of the majority when the rules are applied.²³⁸ In fact, members know a great deal, and this is especially true in the House where new rules are written after each election. That makes the Senate, with its continuing rules, the main bulwark against excessive policy swings. Here, the good news is that our Veil of Ignorance assumptions appear to be robust. On the one hand, partisan control of the Senate has changed hands on average every 4.75 years since the 1980s.²³⁹ On the other, this period is noticeably shorter than the lifespan of most rules or most senators' expected tenure in office. This encourages us to think that the Senate does indeed provide a strong check-and-balance on swings.²⁴⁰

A. CORRECTING DISTORTIONS

Part II identified a great many pathologies that can leave groups with less political power than their absolute numbers suggest. This, in turn, makes them vulnerable to oppression. To see how congressional rules help to mitigate this danger, consider first the simple case where the minority's seat count decreases for some random reason, like bad weather on Election Day. We have already said that Congress's rules let angry minorities outlast a less-passionate majority. This lets us construct a simple model:

²³⁶ This is most obviously true for transfer payments on the assumption that each marginal dollar of income has less utility than the one that preceded it. The idea is similarly inherent in the politics of some majority tyranny strategies, most obviously where politicians form a majority by making small payments to largely indifferent voters so that they can impose burdensome extractions from the outvoted minority and pocket the difference.

²³⁷ This can be quite ugly, as Southern enthusiasm for nineteenth-century slavery and twentieth-century Jim Crow laws shows. The only possible answer is that it is nearly impossible for a democracy to be more ethical than its citizens.

²³⁸ See generally *Original Position*, WIKIPEDIA, https://en.wikipedia.org/wiki/Original_position [<https://perma.cc/6G63-3Y5C>].

²³⁹ See Charles Apple, *In Control*, SPOKESMAN-REV., <https://www.spokesman.com/stories/2020/jun/25/control-house-and-senate-1900> [<https://perma.cc/QR46-ZU2P>].

²⁴⁰ Simple models suggest that House bargainers will often push senators to abandon their first-best preferences, though never so far as to pass changes that can be blocked by a Senate filibuster. GEHLBACH, *supra* note 29, at 79–89 (modelling legislatures that include "veto players").

- (a) Suppose a distortion gives the minority fewer seats in Congress. Seeing this, the majority decides to seek more ambitious legislation.
- (b) The new legislative agenda makes the minority angrier. This encourages them to invest more time and energy in obstructing it.
- (c) By comparison, the majority is no angrier than it was before. As a result, the “intensity gap” between the minority and the majority grows.
- (d) The new equilibrium features larger policy experiments and more minority anger than before. However, increased resistance also ensures that the policy changes are more modest than they otherwise would be.²⁴¹

This is, of course, exactly how we expect checks and balances to behave. Indeed, our scenario follows the same logic as Wootton’s gorgeously spare description of how mechanical feedbacks work—“a feedback loop enables the machine to regulate itself. What is involved here is not a static but a dynamic equilibrium: first the balance tips slightly one way, then the other, but each time it is brought back towards the horizontal.” Absent this check-and-balance, the system would have “see-sawed wildly.” Instead, “it oscillates gently, always close to the horizontal.”²⁴²

The point in both cases is that the check or balance never returns to its original state. It does, however, push back hard enough so that the initial disturbance is partially corrected. This will always be helpful and sometimes sufficient.

The remaining cases described in Part II are more complicated because they change *both* intensity *and* seat counts. For example, we explained how both gerrymanders and “red meat” partisan politics increase politicians’ willingness to take extreme positions. While we still expect Congress’s rules to act as a check-and-balance, the fact that we also expect extremist members to be more intense is bound to make the pushback less effective compared to our baseline example. Conversely, the Framers’ deliberate amplification of small state influence through the Senate and Electoral College leads to the opposite logic: because additional seats make the minority *more* able to resist the majority, we expect them to feel *less* anger than they would otherwise.²⁴³

Finally, our argument includes two caveats. First, it depends on intensity. Where voters ignore or are indifferent to their oppression, our check-and-balance fails entirely. This is hardly surprising, since no democracy can be wiser than its citizens. A second, deeper objection is that our check-and-

²⁴¹ As with all simple models, it is easy to imagine complications that would change our results. That said, Occam’s Razor tells us that we should take the simplest possibilities seriously unless and until such complications are shown to exist.

²⁴² WOOTTON, *supra* note 4, at 250. For a classic exposition of the underlying physics, see RICHARD P. FEYNMAN, THE FEYNMAN LECTURES OF PHYSICS VOL. 1 (1963) at 20–3, https://www.feynmanlectures.caltech.edu/I_20.html#Ch20-S3 [https://perma.cc/98NG-VMCG] (describing physics of tops and gyroscopes).

²⁴³ One might well ask why these particular minorities should receive more protection against majority tyranny than anyone else. That said, Madison’s answer is clear enough: in a system organized by geography, struggles between representatives are likely to implicate issues tied to regions. The example of the Civil War—and even the modern enmity between “The Coasts” and “Flyover Country”—shows that his judgment had some significant basis in fact.

balance fades as the number of minority seats approaches zero. This makes it a poor safeguard against truly comprehensive abuses like disenfranchising an entire race or applying poll taxes that systematically suppress turnout.²⁴⁴

IX. REFORMING THE SYSTEM

So far, this Article has discussed rule changes as if members' self-interest decides everything. But the public's intermittent attention to and, in some quarters, outrage at the filibuster show that outside pressures can also influence Congress's ground rules.²⁴⁵ This suggests that reform is both possible and worth discussing.

A. CONTINUING RULES

The most fundamental difference between the House and Senate is the latter's use of semi-permanent, "continuing" rules. Requiring the Senate to similarly rewrite its rules every two years would immediately reduce "gridlock." That said, the reform would be counterproductive if its main effect was to let extremists in the Senate ram through bills written by their ideological allies in the House—a result that would almost certainly increase the country's policy swings and the anger they generate. If anything, reform should aim to give minorities more protection, not less.

The better question, then, is to ask whether the House would be better off adopting its own version of the Senate's continuing rules. It is important to note that this convergence need not be all-or-nothing and could be incremental. For example, we can imagine Congress passing a law that delays rule changes so that they only take effect one or two Congresses hence. This would create a useful ambiguity by reminding both sides that they could find themselves in the minority when the new rules finally take hold. The result would then be a weaker majority and—since party leaders would have fewer benefits to dole out—less rank-and-file discipline. That, in turn, would remove the main source of leverage that currently gives such outsized power to groups like the "Squad" and the "Freedom Caucus." A leavening of minority views would also simplify reconciliation by bringing House bills closer to the more centrist Senate.

B. FILIBUSTERS, SHUTDOWNS AND HOLDS

Current obstruction disproportionately relies on filibusters, together with the holds and government shutdowns they make possible.²⁴⁶ Here, the main

²⁴⁴ Similarly, a system based on geographically-defined election districts cannot help slighting groups which, though nationally important, nowhere constitute a local majority. Such groups can, however, still exert influence intermittently when the major parties find themselves so evenly matched that even small groups can swing elections. Recent observers have frequently criticized the Freedom Caucus's outsized power and that of Progressives on the left. However, this is the same mechanism that let Black America use its swing state numbers to push John F. Kennedy toward civil rights in the early 1960s. RISEN, *supra* note 179, at 3.

²⁴⁵ Anthony Salvanto, Jennifer De Pinto & Fred Backus, *CBS News poll analysis: Who wants to end or keep the filibuster?*, CBS NEWS (January 19, 2022, 12:00 PM), <https://www.cbsnews.com/news/filibuster-opinion-poll-january-2022> [https://perma.cc/BF8T-UH7D].

²⁴⁶ Shutdowns can also be launched independently of the filibuster. The House majority deployed the tactic in 1995–1996 to pressure then-President Bill Clinton.

issue is how many votes should be needed to end a filibuster. In principle, this number could be set to any value between fifty-one and seventy-five percent.²⁴⁷ In practice, there appears to be no obvious benchmark for saying just which value best serves the median voter's interests. Intuitively, we might think that the filibuster threshold should force the majority to write bills that the other party's centrists can vote for. The embarrassment today is that this group is so depopulated in both parties that the implied filibuster threshold practically disappears.²⁴⁸ This seems like a bad investment if we expect centrist senators to make a comeback at some point in the future. At the same time, setting a higher threshold would reinforce the power of small minorities to insist on take-it-or-leave-it bills. Given these competing arguments, it is probably better to address the Senate's polarization some other way.²⁴⁹

In the meantime, some smaller reforms make sense. First, senators could end the painless filibuster introduced in the 1970s. We have argued that dissenters should be willing to pay something for blocking the majority. While today's cost is probably not zero—if nothing else, obstruction compromises the trust that dissenters need to get their own legislation passed—the price of gridlock is currently quite low. The prospect of modest pain would also remind the majority not to ignore the minority's concerns from simple laziness.²⁵⁰

Second, we have argued that the filibuster should ideally be designed to prove that the minority is more passionate than the majority. But the classical rule, despite its virtues, never did this. Instead, it forced the majority to sleep on cots near the Senate floor, testing its determination far more than the minority's.²⁵¹ Specifying that senators need only be available for roll call votes on ninety minutes notice would fix the flaw by allowing the majority to retreat to hotel rooms in the Washington, D.C. area. More ambitious changes could put still more pressure on the minority by, for example, halting paychecks for members and their staff until the filibuster ends.

Finally, senators should ban secret holds. This is admittedly context dependent. Holds can and presumably do prevent red meat politicians from denouncing any centrist willing to discuss compromise. But this argument only works so long as politicians pursue logrolling. The problem today is

²⁴⁷ A fifty percent threshold would merge with ordinary majority voting. Conversely, a seventy percent threshold would let majority members who lost caucus votes appeal to the full Senate. Party leaders would surely oppose this change, although on the simplest theory centrist members might prefer it.

²⁴⁸ See *117th Congress: 2021–2023*, GOVTRACK, <https://www.govtrack.us/congress/bills/browse?congress=117>.

²⁴⁹ Just what those alternatives might be is unclear. Hortatory calls for “bipartisanship” and “civility” seem plainly ineffectual, while *Rucho* suggests that principled gerrymander reform is unlikely. One faintly desperate measure would be to disable the two-party system's “red meat” turnout strategies by making voting mandatory. Anecdotally, at least, the experiment seems to have made Australian politics more centrist. See MAURER, *supra* note 2, at 325–26.

²⁵⁰ ARENBERG & DOVE, *supra* note 126, at 159 (quoting former Congressman Bill Frenzel, “[the filibuster] gives a minority the opportunity to negotiate what it believes is an intolerable proposal into one it can live with”).

²⁵¹ The comment is limited to the physical burdens of filibustering and could in principle be swamped by, for example, the enmity that filibustering earns from senate colleagues or an impatient public. That said, these latter costs are uncertain, variable, and tend to fall on the majority as well. Because physical costs are specific to filibustering, they are almost certainly the only practical way to confirm that the minority really does feel more intensely than the majority.

that many politicians prefer to block legislation entirely. In such cases, secrecy only makes obstruction worse. The best solution is probably to find a compromise rule that works in both cases. One possibility would be to provide a fixed period for negotiations and make all holds public after that.

Meanwhile, it makes sense to ask what might replace the filibuster if critics abolish it. At the very least, reformers should be able to explain why ending the filibuster would not push the Senate into a House-style partisan dictatorship. One possible replacement would be to specify that any legislation that passes by less than the current sixty votes would automatically “sunset” in ten years. If voters came to accept the legislation by then, well and good.²⁵² If not, politicians favoring the law would have to defend its reauthorization on the campaign trail.

C. EMPOWERING THE MAJORITY

Discharge petitions and motions to suspend the calendar return the House to the structureless and non-partisan state that Madison hoped for. That, however, is a good thing when leaders block laws that command a bipartisan majority. It follows that when members manage to agree despite their leaders, they should be able to vote.

The discharge petition, which deliberately bypasses the Speaker’s agenda, is often seen as an assault on his authority.²⁵³ For this reason, it has nearly always been sabotaged. Indeed, the one exception—a brief loosening of requirements in 1931—was followed four years later by a draconian fifty percent threshold that prevented members from forcing a vote without simultaneously proving that the contested bill would pass.²⁵⁴ This made it easy for leaders to derail petitions using party discipline and threats of retaliation. But in that case, reversing the 1935 “reform” is mostly a matter of rolling back the threshold to some lower figure. Just what that number should be is not particularly clear. Among other things, it changes constantly as party discipline fluctuates. The only firm constraint is that it cannot be so low that small minorities can demand meaningless votes to obstruct proceedings.²⁵⁵ Probably the safest answer is to say that the old one-third threshold worked fine.

The House’s other safety valve, suspending the calendar, can only be invoked by the Speaker and, even then, requires a two-thirds vote to become operative. This potentially lets the Speaker overrule a majority within his own caucus. Partisans often object that this gives the other party a “win” by advancing its platform. But that is a matter for the Speaker to decide, and if the caucus disagrees, it can always remove him. The better question is whether the two-thirds threshold should be reduced to one-half or eliminated

²⁵² The limited available evidence suggests that most time-limited statutes are reauthorized with little controversy.

²⁵³ Majority members usually consider signing discharge petitions “virtually unthinkable” as “a direct assault on their own speaker’s authority.” Marc A. Thiessen, *Here’s a Deal That Could Get Aid to Ukraine*, WASH. POST (Feb. 14, 2024, 5:06 PM), <https://www.washingtonpost.com/opinions/2024/02/14/moderate-republicans-aid-ukraine-border> [https://perma.cc/EP7T-ES8D].

²⁵⁴ *Discharge Petition*, WIKIPEDIA, https://en.wikipedia.org/wiki/Discharge_petition [https://perma.cc/UTC8-S3ZC].

²⁵⁵ The fact that early discharge motions were often filed maliciously suggests this danger is real.

entirely. No doubt the Speaker would then invoke the procedure more often. But if he is willing to temporarily let members make their own decisions, it is hard to see why the rest of us should object.

D. REVISITING GERRYMANDER LAW

Recognizing a ninth check-and-balance also solves a puzzle that has plagued constitutional law for more than half a century. The Supreme Court's *Gaffney v. Cummings* (1973) decision called on federal judges to develop a constitutional standard for gerrymandering cases even though none existed at the time.²⁵⁶ The trouble set in almost immediately when Justice White noted in *Davis v. Bandemer* that boundary lines could be drawn *either* to define "safe" seats that insulated legislators from voters *or* "competitive" seats that caused wild policy swings back and forth. Here, originalism was no help at all: indeed, the Framers never even raised the issue. Worse, the only obvious standard—awarding seats in rough proportion to statewide returns—was inconsistent with the country's historic reliance on "winner-take-all, district-based elections."²⁵⁷ As Justice O'Connor warned, retroactively outlawing the practice would destabilize the two-party system, which had "contributed enormously to sound and effective government."²⁵⁸

Despite this dead end, White was understandably reluctant to call off the search and pressed ahead, a position that Justice Kennedy would later renew in 2007.²⁵⁹ It would take another decade for *Rucho* to finally end the hunt by declaring that existing "fairness" standard proposals were all unsatisfactory and that federal courts should give up the chase unless and until some suitable candidate emerged.

Rucho has been widely criticized. All the same, no one has ever given a satisfactory answer to Justice White's objection that there is no principled way to decide how much power elections should confer on the winners. But in that case, checks and balances are the only alternative. If nothing else, it is time that courts moved beyond the hopeless muddle of defining "fairness." The great advantage of checks and balances, after all, is that they are neither fair nor unfair but only instrumental. If they bring Madison's system closer to the median voter, they are normatively good—and if not, they are bad. That, at least, is a potentially intelligible standard.

In the meantime, a checks and balances perspective encourages us to see *Rucho* as more than an abdication to corrupt state legislatures. After all, state legislatures have procedural rules too. Potentially, at least, this may provide some limited safeguard against abuses. More importantly, it gives courts something to watch over and improve. For example, this Article has argued that the identification between voters and representatives breaks down when incumbents entrench themselves at the expense of challengers. This is a

²⁵⁶ This adventurous position may have seemed more plausible in the wake of *Baker v. Carr*, 369 U.S. 186 (1962), where the Court's call for lawyers to develop a new standard had quickly been answered. *Davis v. Bandemer*, 478 U.S. 109, 123 (1986) ("[t]he one person, one vote principle had not yet been developed when *Baker* was decided").

²⁵⁷ *Id.* One assumes that it would have included some narrow band in which variations from proportionality were presumptively acceptable, just as it had already done for one-man, one-vote.

²⁵⁸ *Id.* at 144–45.

²⁵⁹ *Vieth v. Jubelirer*, 541 U.S. 267, 312 (2004) (Kennedy, J., concurring).

broad hint that state laws that try to protect existing districts in the name of protecting incumbents deserve more scrutiny.²⁶⁰

E. STANDING

Finally, we have argued that Congress's internal procedures serve a vital role in insulating U.S. government policy against the party system's recurring oscillations. That said, checks and balances presuppose the courts' willingness to step in if and when the president ignores Congress's words. In practice, this judicial intervention is less predictable than it ought to be. The reason, for the past three decades, has been the Supreme Court's insistence that judicial standing should be reserved for minorities who have suffered some special injury not generally shared by the public. In this view, judges have no business enforcing the majority's "public interest in government observance of the Constitution and laws," which can safely be left to politics.²⁶¹ Indeed, even presidents who ignore the law are assumed to carry out the majority's will.²⁶²

This reasoning is, of course, flawlessly Madisonian. The trouble, as we have emphasized, is that it ignores the practical politics of America's two-party system. As Downs explained over sixty years ago, pursuing policies that the majority dislikes can and often does make excellent political sense. Here, the good news is that just stating the problem points to a remedy. We have argued that the two-party system does indeed implement the will of the majority—but only when both parties compete. The cure, then, is to make sure that this same competition spills over into the court system. This can most easily be done by giving state attorneys general automatic standing to

²⁶⁰ According to one survey, seven states allow districting to protect incumbents and five ban it. ROYCE CROCKER, CONG. RSCH. SERV., R42831, CONGRESSIONAL REDISTRICTING: AN OVERVIEW 3 (2012).

²⁶¹ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992). Professor Heather Elliott's able paraphrase of the prevailing syllogism is particularly noteworthy:

(1) [M]ajorities do not need the courts, because they can engage the engines of democracy; courts exist to protect minorities from the oppression of the majority; (2) therefore, if the political branches ignore a problem, it is because the majority wants them to ignore it; and (3) therefore laws that go unenforced are unenforced because they are no longer desired by the majority.

Heather Elliott, *The Functions of Standing*, 61 STAN. L. REV. 459, 489 (2008).

²⁶² In the words of then-D.C. Circuit Judge Antonin Scalia:

The ability to lose or misdirect laws can be said to be one of the prime engines of social change, and the prohibition against such carelessness is (believe it or not) profoundly conservative. Sunday blue laws, for example, were widely unenforced long before they were widely repealed—and had the first not been possible the second might never have occurred.

Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881, 897 (1983).

challenge any federal policy that affects their citizens.²⁶³ This modest change would greatly clarify standing.²⁶⁴

X. CONCLUSION

This Article has argued that Congress's procedural rules provide a ninth check-and-balance beyond those listed in *The Federalist*. More than that, they regulate a two-party system that did not even exist in Madison's time. This sounds very similar to Wootton's claim that Madison expected his checks and balances to grow and evolve.

There is of course no magic in this. The Framers liked to imagine themselves as architects of a system that had "no model on the face of the globe."²⁶⁵ But it takes nothing from their achievement to say that they built their Constitution from components that had already been refined by centuries of trial and error. Rather, Madison's contributions were to notice that some feature, say bicameral legislatures, routinely produced stability and explain how a similar check-and-balance would strengthen the Constitution. But, of course, the American system has many more borrowings than the eight specific checks and balances that Madison focused on. This makes it nearly inevitable that other evolved features could prove useful. This Article has argued that legislative rules provide a ninth safeguard. But there is no reason why the list should stop there.

In the meanwhile, the idea that checks and balances exist beyond Madison's list should comfort us. Indeed, the *Rucho* case reminds us that judge-made standards are not always possible and, even if they are, may force unacceptable changes onto our understanding of the Constitution. The good news is that there will often be checks and balances to take up the slack. The task for us is to recognize and improve them still further.

²⁶³ One might consider adding U.S. senators and representatives to the list, on the ground that they have a very Madisonian interest in seeing that Congress's words are respected. That, however, would add little to empowering state attorneys general, who possess far more institutional resources to bring suit. One possible exception involves cases where Congress speaks to federal policies (e.g. foreign relations) that do not affect the states. Congress could presumably fill this gap by authorizing some or all of its members to bring suit on these topics. A second exception has to do with federal elections: it seems absurd that standing requirements can block any and all challenges to assertedly defective elections. See, e.g., *US Supreme Court Rejects Trump-Backed Bid to Overturn Election*, BRITISH BROADCASTING CORP. (Dec. 11, 2020), <https://www.bbc.com/news/world-us-canada-55283024> [<https://perma.cc/8Q6E-XUMG>] (discussing Supreme Court's standing-based rejection of Texas's challenges to 2020 presidential election).

²⁶⁴ State attorneys general routinely bring suits already. For a partial list, see *Multistate Lawsuits Against the Federal Government During the Biden Administration*, BALLOTPEdia, https://ballotpedia.org/Multistate_lawsuits_against_the_federal_government_during_the_Biden_administration [<https://perma.cc/4BP3-VP8K>]. For this reason, changing current standing law is unlikely to increase the number of challenges filed. It would, however, help mitigate the arbitrariness of the current rule, in which states' ability to advocate their policy interests turns on tangential facts that have little or no bearing on their reasons for bringing suit in the first place.

²⁶⁵ THE FEDERALIST NO. 14, at 71 (James Madison) (Ian Shapiro ed. 2009).