

Democracy by Deterrence: Strategic Self-Entrenchment in U.S. Elections

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Abstract

If politicians and their political parties generally want to stay in power, why would they ever forgo using anti-democratic tactics to win elections? We analyze a game-theoretic model to explain democracy by deterrence, which specifies how fear of retaliation by the opposition party can check the incumbent party, as well as describes the conditions for deterrence to break down. In our dynamic model, party leaders can strategically tilt electoral rules to their advantage. Asymmetric legal opportunities emergent in the constitutional order that enable a party to legally target certain groups of voters, combined with high partisan sorting, activate a party's incentives for self-entrenchment. This mechanism does not require that politicians have short time horizons, nor that parties differ in anti-democratic sentiments. We apply this framework to illuminate the dynamics of gerrymandering and voter suppression, two key areas of contemporary American electoral politics that threaten fundamental democratic principles.

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1 INTRODUCTION

Self-enforcing democracy requires not only that losers accept unfavorable electoral results, but also that winners refrain from using their office to alter rules and norms to stay in power. Recent research on democratic erosion seeks to understand how the guardrails against self-entrenchment by incumbents can crumble (Bermeo, 2016; Ginsburg and Huq, 2018; Levitsky and Ziblatt, 2018; Waldner and Lust, 2018; Przeworski, 2019). We draw on theories of deterrence (more commonly studied international relations) to provide a new perspective on strategic incentives for party self-entrenchment. This logic helps to understand the dynamics of democratic contraction, particularly with respect to electoral politics in the contemporary United States.

The United States is one of the oldest and most robust constitutional democracies in the world. However, throughout its history, the major parties have routinely used nominally legal tactics to either disenfranchise or discount the votes of the opposing party's supporters. In the antebellum era, Democrats and Whigs alike stripped voting rights from free Black men (while expanding the white male franchise; Bateman 2018) and routinely engineered highly malapportioned districts that favored rural areas (Engstrom, 2013). After Reconstruction, Southern Democrats introduced laws such as poll taxes and literacy tests throughout the South to disenfranchise African Americans and poor whites (Mickey, 2015). More recently, Republican officials have increasingly challenged democratic principles of equal representation and equal access to voting, for example, by seeking to narrow or distort the electorate through extreme gerrymandering and suppressing voting access.

Although the prevalence of legal, but anti-democratic, tactics to boost a party's electoral fortunes is a well-known empirical fact, the strategic underpinnings remain surprisingly underdeveloped. Recent formal theoretic and empirical research advances our understanding of democratic backsliding in the context of a leader interacting with citizens, and explains that opportunistic politicians can get away with subverting democracy if sufficiently polarized citizens are willing to forgive or ignore authoritarian actions (Nalepa, Vanberg and Chiopris, 2018; Buisseret and Van Weelden, 2020;

Luo and Przeworski, 2019; Graham and Svobik, 2020; Grillo and Prato, 2020). However, scholars have paid little attention to understanding why competing parties in an established democracy might fail to check an opportunistic rival. Applying James Madison’s famous phrase “ambition must be made to counteract ambition” (Federalist #51) about branches of government to parties, we might expect that transgressions by an incumbent party to tilt the playing field would either be matched by the opposition party in the future, or be deterred altogether by the threat of future punishment. Why, then, in a competitive party system, might an incumbent party instead rationally anticipate success at grabbing undemocratic advantages for itself? And why would the opposition party fail to check these transgressions?

We supply a novel answer that explains the importance of deterrence threats for upholding democratic principles and norms. In our game-theoretic model, party leaders interact over an infinite horizon and, any time they are in power, make decisions about seizing constitutionally permissible opportunities for self-entrenchment. Choosing to exploit legal opportunities bolsters the incumbent party’s probability of winning the next election, but also triggers retaliation by the opposing party, who will then seek self-entrenchment whenever they are in power and engage in obstruction whenever out of power.¹ Our model centers on three key factors that underpin democracy by deterrence: legal scope, asymmetric opportunities, and sorting of distinct voting blocs (e.g., urban, minorities) into parties. Taken together, our analysis of how these three factors interact to affect parties’ strategic choices about upholding or distorting the rules of the democratic game offers a new and parsimonious account of the dynamics underlying important maladies in contemporary electoral politics in the United States.

First, the degree of *legal scope* for tilting the electoral playing field matters. At one extreme, if

¹Our model has complete and perfect information. We depart from existing formal theories that feature repeated elections with history-dependent punishments (Alesina 1988; De Figueiredo 2002; Fox 2006; see also Gibilisco et al. 2015) because, in our model, parties’ strategic actions endogenously affect the probability of winning future elections.

constitutional leeway is minimal, then incumbents will eschew self-entrenchment regardless of their opponents' capacity to retaliate. At the other extreme, if legal scope is unlimited, then one player can essentially end the game by deviating. In the United States, opportunities for self-entrenchment lie in between these two extremes. There are well-established norms of adhering to judicial interpretations of a written constitution. Consequently, refusing to hold scheduled elections or banning opposition parties is nearly inconceivable. Yet despite certain hard legal bounds in the U.S. Constitution, there is still considerable legal scope to tilt the electoral playing field.² Unlike most developed democracies, there is no national elections commission, and state politicians have considerable latitude to determine who can vote and to draw boundaries for congressional districts. But this is only one of three conditions. Under what circumstances will politicians exploit scope in a constitution to undermine free and fair electoral competition?

The second condition is *asymmetric* legal opportunities. If the legal bounds create equal leeway for politicians in each party to suppress the other parties' voters, then deterrence can sustain democratic norms because each side fears punishment by the other. Under such symmetric legal opportunities, for example, Republicans should forgo using anti-democratic tactics to avoid a tit-for-tat spiral with Democrats in which Republicans disenfranchise some Democratic-leaning groups, Democrats respond by disenfranchising some Republican-leaning groups, and so on. Yet, sometimes even seemingly party-neutral legal bounds can nevertheless create asymmetric opportunities to tilt the rules. In our main empirical examples from contemporary U.S. politics, contemporary Republican politicians have considerable scope to exploit gaps in the legal rules to suppress Democratic voters, but Democrats have minimal leeway to respond in kind. Hence, democracy by deterrence breaks down. But what creates stark asymmetries between the two parties?

The final condition in the theory is sorting of distinct voting blocs into parties, or *partisan sorting*. We assume that parties can legally target only certain attributes of each citizen. For example, under

²This approach is consistent with the broader recognition about how elites can subvert democracy without ever clearly stepping outside the bounds of constitutional law.

contemporary interpretations of the U.S. Constitution, party leaders can gerrymander districts to underweight the importance of *urban* voters as a bloc. But they cannot write a law that explicitly targets individuals based on their *partisan* affiliation. Likewise, politicians can limit voting rights for *ex-felons*, but not directly for *African Americans*. However, whenever individual characteristics that are legally permissible to target correlate highly with partisan identification—i.e., high partisan sorting—then one party can gain a sizable advantage by tilting the rules through legal means. Conversely, if parties were not heavily sorted along a dimension that could be legally exploited (e.g., if urban and rural voters distributed their votes evenly between the two parties), then deterrence upholds democratic norms precisely because using legally permissible anti-democratic tactics would not convey large electoral advantages for either party. Thus, asymmetric opportunities for party leaders to discount votes arise only if voters are sorted in a way that makes one party’s supporters more vulnerable than the other’s.

After developing the logic formally, we then apply the model to explain contemporary challenges to democratic norms in the United States. Our primary examples are two areas with asymmetric legal advantages for Republicans, gerrymandering and voter suppression. We explain how the legal bounds interact with partisan sorting to create these advantages, and provide evidence of strategic actions by both parties. Our framework is consistent with, for example, Rodden’s (2019) account of how partisan sorting affects gerrymandering. However, our model offers a unified strategic framework for analyzing important empirical phenomena that are usually studied separately by scholars of American politics. In Appendix B, we provide examples of other ranges of the parameter space: asymmetries that favor Democrats (state expansion), symmetric deterrence breakdown (expansion of presidential power), and symmetric deterrence (conceding electoral defeat).

Our proposed deterrence mechanism contrasts in several important ways from existing accounts of democratic erosion. We shift the focus from citizens’ failures to protect democracy (Nalepa, Vanberg and Chiopris, 2018; Buisseret and Van Weelden, 2020; Luo and Przeworski, 2019; Graham and Svobik, 2020; Grillo and Prato, 2020) to the strategies of inter-party elites. We also show

that ideological polarization, a key component of the aforementioned articles, is not a necessary condition for democratic backsliding. There is no ideology parameter in our model, and therefore we implicitly hold fixed voters' ideal points and the extent of ideological polarization. Instead, our mechanism highlights the importance of (a) varied legal opportunities to disenfranchise different blocs of voters and (b) extreme sorting of such blocs into parties. By creating asymmetries between the two parties, deterrence against transgressing democratic norms breaks down. We thus build on the well-established fact in the Americanist literature that urban and minority voters each vote overwhelmingly for the Democratic party, without wading into debates about whether ideological polarization among the masses per se has increased in recent decades (see McCarty 2019).

For the same reason, our account does not require that parties differ in their inherent commitments to democratic norms. In the context of contemporary American politics, therefore, we need not assume that Republican politicians are more extreme ideologically or less committed to democratic principles than their Democratic Party counterparts (Fishkin and Pozen, 2018; Lieberman et al., 2019; Pierson and Schickler, 2020). Instead, anti-democratic tactics can emerge endogenously for either party by self-interested politicians who simultaneously adhere to and exploit the limits imposed by the constitution. Nor is the willingness to erode democracy necessarily driven by short-term concerns about self-preservation amid unfavorable future demographic trends, as Levitsky and Ziblatt (2018) posit for the Republican Party. Political leaders who defect from the democratic rules of the game need not be driven by short time horizons, as in the repeated prisoner's dilemma game. Asymmetric legal bounds are sufficient for democratic backsliding—even if both parties are perfectly patient.

Relative to the Americanist literature, our focus on institutional change departs from standard pivotal politics models in which institutional rules are exogenously determined. Instead, our account more closely relates to research on the evolution of Senate rules (Shepsle, 2017), the historical emergence of legislative elections and constitutional review in the United States (Gailmard, 2017, 2019), expansion of presidential power (Howell, Shepsle and Wolton, 2019), and incentives to

subvert the majority party (Lee, 2016). Finally, by highlighting the importance of constitutional scope and asymmetry, we also provide new scrutiny of the U.S. Constitution (e.g., Dahl, 2003) and of democratic constitutions more broadly (Albertus and Menaldo, 2018).

2 MODEL SETUP

We formally analyze a strategic interaction between long-lived representative agents of two political parties, R and D . The labels correspond with Republican and Democrat, although the ideological positions of the real-world parties plays no role in the model. The two parties interact in an infinite time horizon with time denoted by $t \in \mathbb{Z}_+$, and they discount future periods by a common factor $\delta \in (0, 1)$. In each period t , Nature chooses one of the two parties as the winner of an election. Then, the out-party decides whether to obstruct, which determines the benefit that the in-party gains in that period from governing. Finally, the in-party chooses the electoral weight of each voting bloc (subject to exogenously fixed constitutional bounds), which affects election outcomes in period $t + 1$.

2.1 KEY CONCEPTS: SCOPE, ASYMMETRY, AND SORTING

We embed our three key concepts (legal scope, asymmetry, partisan sorting) into a function that determines which party wins the election in each period. Society contains two groups of non-strategic voters. For concreteness, we refer to these groups as rural and urban, although the following logic is not confined to geographically differentiated groups only. The consequential assumption is that the identity cleavage between the two groups is a dimension on which it is legally permissible for parties to down-weight votes. By contrast, it would not work to assume that the *defining* difference between the groups is their race or support for Democrats/Republicans, since parties (at least in the United States) cannot *directly* target voters on those dimensions. However, legally permissible characteristics may correlate highly with illegal partisan or racial characteristics, which relates to the partisan sorting parameter in the model (introduced below).

Each member of both groups participates in the election in every period and is assumed to vote sincerely for their most-preferred party, R or D . We implicitly assume that each voting group is equal-sized and that, in a fair election, support for the two parties is split 50-50. This avoids unnecessary parameters about *overall* partisan support. Instead, the key parameters correspond with our three conditions. In each period t , R wins with probability:

$$p(b_t) = \frac{(1 + b_t) \cdot \overbrace{s}^{\% \text{ ruralites who vote } R} + (1 - b_t) \cdot \overbrace{(1 - s)}^{\% \text{ urbanites who vote } R}}{2} \quad (1)$$

The parameter $s \in (0.5, 1]$ denotes the degree of *partisan sorting*. We assume s percent of rural voters and $1 - s$ percent of urban voters each prefer R . The complementary set of voters prefer D . Therefore, R has a comparative advantage among rural voters, and the magnitude of this comparative advantage—i.e., the extent of partisan sorting—increases in s . At $s = 1$, every rural voter goes Republican and every urban voter goes Democrat. By contrast, at $s = 0.5$, the two voting blocs each evenly distribute their support between Republican and Democrat.

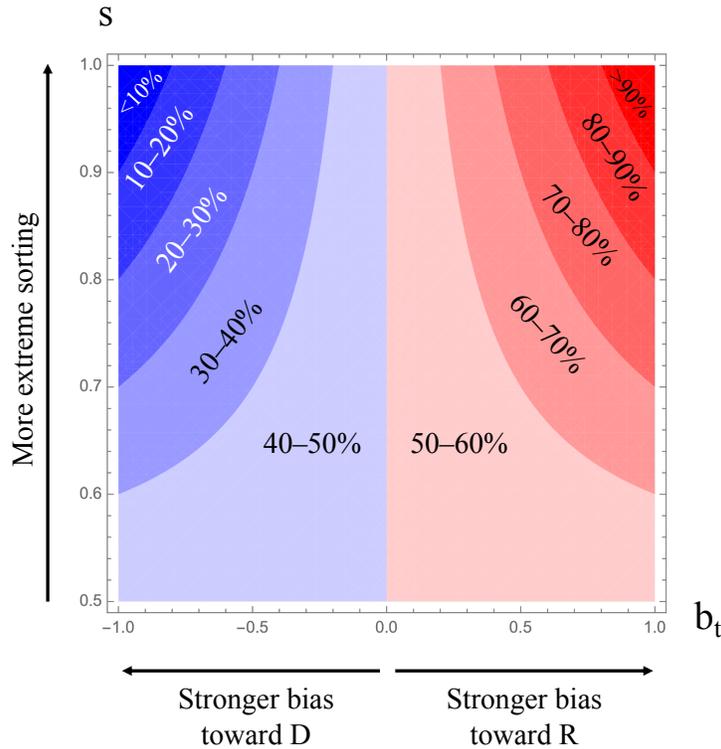
The variable b_t denotes the bias for translating votes into R 's probability of winning, and in principle can range between -1 and 1 . Any $b_t > 0$ biases against urban voters—and therefore against D —and any $b_t < 0$ biases against rural voters, and hence against R . At the extremes, with $b_t = 1$, urban voters are disenfranchised and $p(1) = s$; and with $b_t = -1$, rural voters are disenfranchised and $p(-1) = 1 - s$. Finally, at $b_t = 0$, there is no bias. Given the 50-50 underlying support for each party, $p(0) = 0.5$. To focus attention solely on the bias induced by non-equal voting weights, the mapping from R 's weighted voting share to its probability of winning an election is perfectly proportional.

In reality, not all values of b_t are legally permissible, which relates to our concept of *legal scope* for tilting the electoral playing field. We assume $b_t \in [b_D, b_R]$, for $-1 < b_D < 0 < b_R < 1$. Thus, larger absolute values of either b_D or b_R denote greater scope. If $b_R = -b_D$, then the bounds are symmetric. By contrast, $b_R > -b_D$ implies that the legal bounds are *asymmetric* and favor R , and

$b_R < -b_D$ implies an *asymmetry* that favors D .

Figure 1 plots R 's probability of winning in period t as a function of b_t and s . Whichever party the bias favors gains from more intense sorting. Higher bias means their supporters are over-weighted, and higher sorting creates a stronger comparative advantage among their preferred voter group.

Figure 1: Probability of Winning for R



Notes: Figure 1 is a contour plot of Equation 1 with R 's probability of winning disaggregated into colored deciles.

2.2 SEQUENCE OF MOVES AND CONSUMPTION

In every period t , the following events occur. First, Nature chooses the winner of the election from a Bernoulli distribution such that R wins with probability $p(b_t)$, defined in Equation 1.

Second, the losing party decides whether to obstruct. If they do not, then the winning party consumes 1 and the losing party consumes 0. If they obstruct, then the winning party consumes $1 - \phi$, for $\phi \in (0, 1)$, and the losing party consumes ϵ , for infinitesimal $\epsilon > 0$. The core idea behind

assuming that joint consumption is lower with obstruction, i.e., $\phi > 0$, is that obstruction reduces policy effectiveness and engenders general distrust of government (Lee, 2016; Levitsky and Ziblatt, 2018).

Third, the winning party chooses $b_{t+1} \in [b_D, b_R]$. The game begins without bias, $b_0 = 0$, which implies that the status quo is more democratic than any possible alternative. In the conclusion, we briefly discuss how changing the electoral rules can promote rather than undermine democracy.

2.3 DISCUSSION OF LEGAL BOUNDS

We highlight four important assumptions about the legal bounds. First, the parties are circumscribed to choose policies that lie within legal limits, as opposed to taking actions such as coups that blatantly violate the constitution. Although these types of outside options are relevant in some substantive contexts, they are not viable in the contemporary United States, nor do they help to illuminate democratic backsliding by legal means.

Second, the legal bounds are common knowledge. Although, in reality, the limits of the law are imprecisely known, as long as actors have accurate assessments of the expected legal bounds, the strategic logic would not change. If we introduced incomplete information about the bounds, it would be possible for a party to pass a law that subsequently gets struck down. Then, we would simply assume that parties adhere to the courts' decisions.

Third, we interpret b_R and b_D mainly in legal terms. However, in reality, the normative commitments of members of each party (both officials and voters) can also shape the policies that their party is willing to enact, which affects these bounds.

Fourth, the legal bounds are fixed across the infinite horizon. We offer three defenses for this assumption. (a) The main upshot is analytical tractability, as it simplifies the construction of each party's incentive-compatibility constraint. We could instead complicate the model by assuming either that the legal bounds follow a specified stochastic process across time, or that the bounds

evolve according to strategic decisions. In either case, actors would evaluate their expectations over future legal bounds, and therefore b_R and b_D would simply represent averages over future time periods rather than fixed quantities. (b) Despite its simplicity, our way of modeling legal bounds allows flexible interpretation of legal bounds in the real world. One reason R might be able to move b_t toward b_R (or, equivalently, for D to move b_t toward b_D) is that, when in power, they can influence either the composition or the strategic rulings of the Supreme Court, and these unmodeled actions affect the range of legally possible b_t choices.³ (c) Over medium-term horizons, it is difficult to dramatically alter legal bounds. In his survey of U.S. legal history, Ackerman (1991) argues that only during three time periods have actors fundamentally transformed U.S. constitutional law: the 1787 federal convention, Reconstruction, and the New Deal. Below, we also discuss watershed events in the 1960s that shaped voting rights and districting practices.⁴ Thus, our model provides a tractable framework for understanding the strategic incentives that party leaders—constrained by legal limits—face to tilting the electoral playing field.

3 MODEL ANALYSIS

The following provides visual intuition for the main results, and Appendix A presents every formal statement and proof.

3.1 INCENTIVE COMPATIBILITY CONSTRAINTS

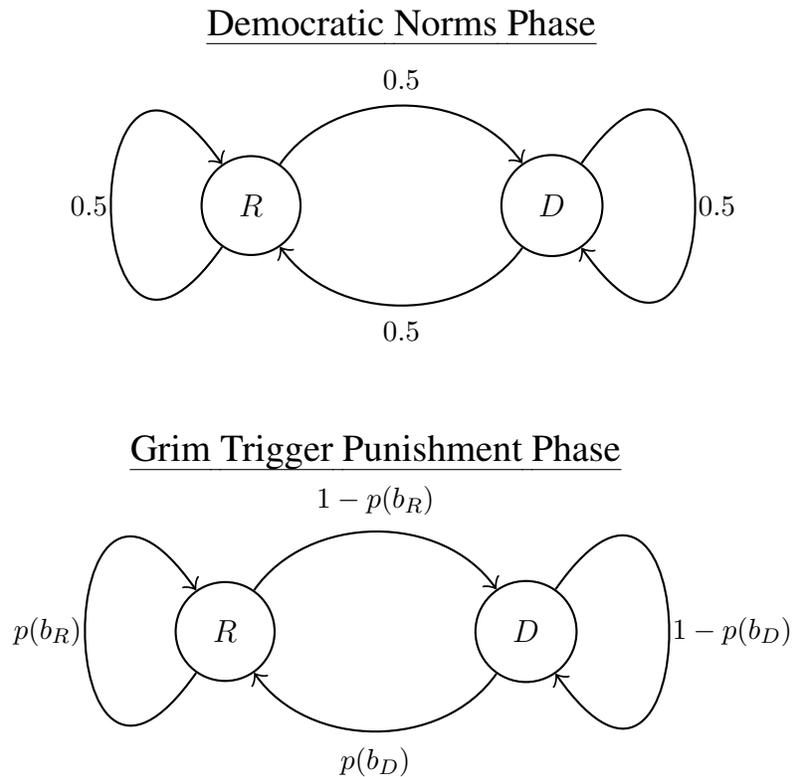
Appendix A presents the incentive-compatibility constraints for either party to uphold democratic norms—that is, retain the original status quo of no bias—in a subgame perfect Nash Equilibrium.

³Clark (2010) discusses how the threat of court-curbing by the elected branches affects Supreme Court decisions.

⁴As a standard refrain for dynamic games, the “infinite” part of our infinite horizon setup should not be taken literally. It simply makes it tractable to analyze how future punishments can constrain choices in any particular period of the game.

Punishments are grim trigger: in any period following a deviation from $b_t = 0$, the out-party obstructs and the in-party tilts maximally for the next election, i.e., R chooses $b_{t+1} = b_R$ and D chooses $b_{t+1} = b_D$. Therefore, by deviating, the in-party gains an immediate electoral advantage by raising their probability of winning the next election, but then each side punishes the other in all subsequent periods.⁵ Neither party can profitably deviate from their assigned action in the punishment phase: the opposition party, when in power, always plays their most extreme strategy; and the out-party always obstructs, hence reducing the in-party's payoff to $1 - \phi$. Figure 2 summarizes the probabilities of either party winning in each period.

Figure 2: Transitions in Which Party Controls the Government

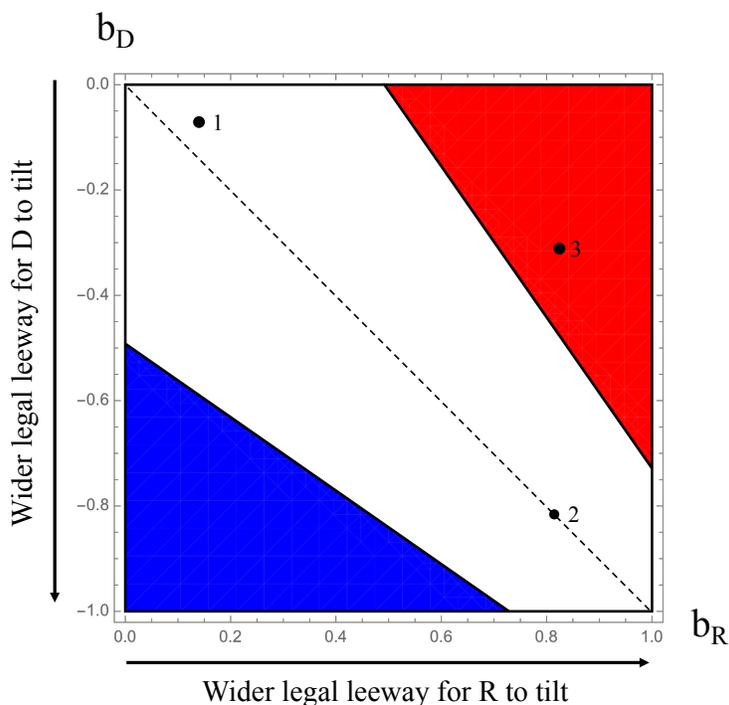


⁵We constructed the out-party's payoff to obstructing, infinitesimal $\epsilon > 0$, such that it is never optimal to obstruct prior to a deviation by the in-party. This simplifies the set of incentive compatibility conditions to check without qualitatively changing the equilibrium structure.

3.2 WIDE AND ASYMMETRIC BOUNDS

Given these incentive compatibility constraints, we characterize, in terms of the legal bounds b_R and b_D , the conditions in which a democratic equilibrium exists. Our main result shows why asymmetric legal bounds cause one party to take anti-democratic actions in equilibrium. Figure 3 provides visual intuition by presenting a region plot with b_D on the vertical axis and b_R on the horizontal axis. These legal bounds on actions are identical what each in-power party will choose in every period in the punishment phase. The dashed 45-degree line $b_R = -b_D$ expresses parameter values at which each party's legal leeway to tilt institutions in their favor is symmetric. Left of this line, D enjoys greater legal leeway than R to shift institutions in its favor, whereas the opposite is true to the right. The white region indicates values of b_R and b_D for which both parties uphold democratic norms. In the red region, R will deviate to anti-democratic tactics after it wins an election, and the blue region represents the same for D .

Figure 3: Wide/Asymmetric Legal Bounds and Deterrence Failure



Notes: Figure 3 sets $\delta = 0.9$, $\phi = 0.08$, and $s = 0.6$. The axes on each figure are the legal bounds for each party. These are equivalent to the strategies that, following a deviation, each will choose in every period they are in power.

The interaction of wide and asymmetric legal bounds causes deterrence failure. To highlight why wide scope is necessary for anti-democratic deviation, consider R 's incentives to deviate at point 1. Although R enjoys greater legal opportunities to overweight rural voters than does D to overweight urban voters, deviating yields only a small advantage for R because b_R is so small. Thus, despite D 's minimal ability to retaliate, R is unwilling to incur the permanent cost of obstruction, ϕ , that the in-party incurs in the punishment phase. In this case, minimal legal scope for tilting undermines R 's incentives to pursue any electoral tilting, and D 's calculus is identical.

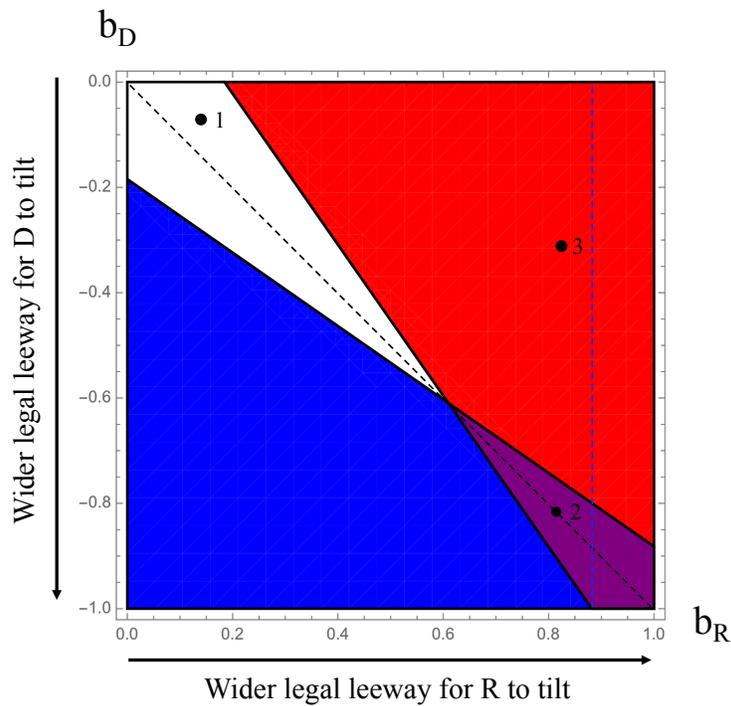
To highlight how asymmetries contribute to deterrence failure, we can compare equilibrium actions at points 2 and 3. At both values, the value of b_R is higher than in point 1, indicating greater legal opportunities for R to tilt elections in its favor. However, whether R deviates depends on D 's ability to retaliate. Point 2 lies on the line of symmetry. R can tilt elections fairly substantially in its favor by overweighting rural voters. However, D enjoys the same scope of legal opportunities when in power. Thus, when out of power, the electoral disadvantage for R is equally large, which deters deviation. By comparison, at point 3, b_R is the same value as for point 2, but b_D is smaller in magnitude. This undermines D 's ability to punish R , which causes deterrence breakdown. Although deviating triggers a spiral of anti-democratic actions by both sides, R will fare well when both parties go back-and-forth tilting the electoral playing field because the asymmetric punishment opportunities favor R 's electoral fortunes.

3.3 PARTISAN SORTING

High partisan sorting exacerbates prospects for upholding democracy by deterrence. To show this visually, Figure 4 uses the same parameter values as in Figure 3 except the value of s is higher. Each player will deviate under a wider range of parameter values than with lower sorting. Thus, the same point 2 at which R did not deviate in Figure 3 falls in the deviation range in Figure 4. The logic, previewed by Figure 1, is straightforward. Higher s enhances the benefit that R derives from overweighting rural supporters, and vice versa for D with urban supporters, since each comparative advantage is stronger. Thus, increases in s imply that wider legal bounds translate into a more

pronounced anti-democratic advantage whenever a party tilts in their favor.⁶ By contrast, as s shrinks to 0.5 (not depicted), either party gains only a small advantage from deviating even if the legal bounds considerably favor its voting bloc, since these voters only slightly prefer that party. Overall, in terms of incentives to deviate, increasing the extent of partisan sorting has the same effect as making the legal bounds less restrictive, and high-enough partisan sorting is a necessary condition for deviation.

Figure 4: High Partisan Sorting



Notes: This is identical to Figure 3 except $s = 0.9$.

The purple region shows that asymmetry is not necessary for breakdown—in this region of very high scope, *both* parties prefer deviation over the status quo. Additionally, all points to the right of the dashed blue line highlight a distinct path to anti-democratic actions, although these parameter values are less substantively relevant because they in effect correspond to an authoritarian regime.

⁶Sorting also creates an indirect effect that mitigates incentives to deviate, by enhancing the ability of the other party to retaliate when they are in power. However, the direct effect dominates, and higher s implies that at least one party faces stronger incentives to tilt.

Here, R will deviate regardless of b_D . The legal bounds are so wide that R effectively ends the game by maximally tilting elections in favor of rural voters. Even if D has considerable legal leeway to overweight urban voters, the low probability with which D will regain power makes this threat less costly to R .

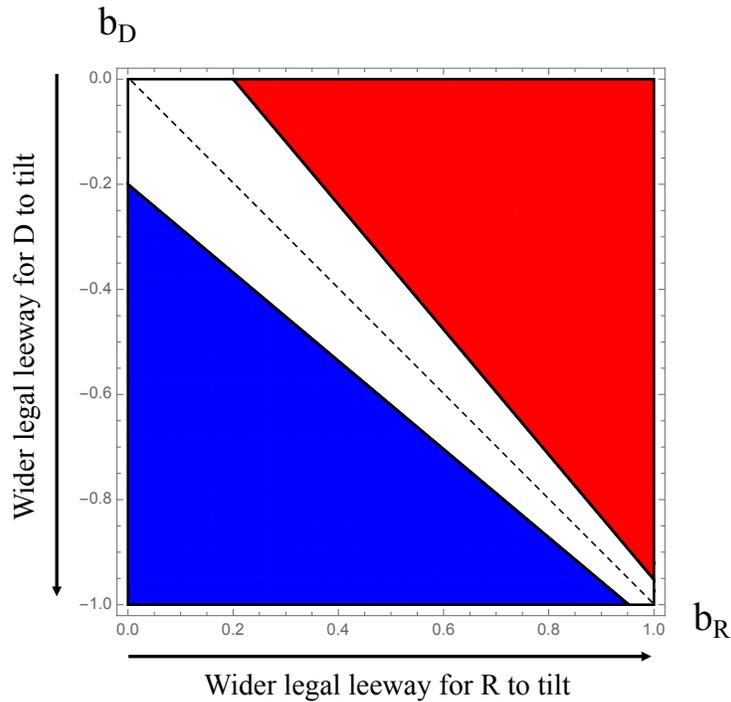
3.4 DETERRENCE FAILURE DESPITE LONG TIME HORIZONS

The analysis also delivers an important implication about the time horizon of the two parties, that is, the discount factor δ . Many influential ideas about sustaining cooperation are premised on the logic of a repeated prisoner’s dilemma with a grim trigger punishment strategy. In that model, when considering whether to cooperate or transgress, players trade off between the short-term gains and long-term costs of transgressing. The benefit to a player from defecting is that it can leave the other player with the “sucker’s payoff” by taking an individually beneficial action that yields a short-term gain for itself while leaving its opponent out to dry. However, starting in the next period, the “sucker” responds by punishing the transgressor in every future period, causing the transgressor to consume less in every future period compared to the counterfactual scenario in which it had not transgressed. Highly patient players never deviate because they dread the long-term costs of defecting more than they enjoy the short-term gains.

However, in our game, even perfectly patient parties may deviate because a party may achieve higher payoffs during the punishment phase than under democratic cooperation. Figure 5 uses the same parameter values as in Figure 4 but sets $\delta \rightarrow 1$. Raising the discount factor indeed narrows the range of parameter values in which deviation occurs, but a deviation region exists⁷ for all δ because asymmetric legal bounds create asymmetric ability for the parties to punish each other. Consequently, a party achieves *higher* payoffs in the long run from initiating an anti-democratic spiral if it enjoys wide scope to tilt institutions in its favor but the other party does not, despite assuming that the punishment phase undermines policy effectiveness ($\phi > 0$). This contrasts with arguments such as those by Levitsky and Ziblatt (2018) that unfavorable future demographic

⁷That is, given the previous discussion, assuming s is high enough.

Figure 5: Perfectly Patient Parties



Notes: This is identical to Figure 4 except $\delta \rightarrow 1$.

trends for Republican constituents have caused their party leaders to act undemocratically. Instead, long-lived parties that highly value the future may still act undemocratically.⁸

3.5 EXTENSION WITH FEDERALISM

The model highlights the key intuitions about legal scope, asymmetries, and partisan sorting in a simple setting with a unitary government. However, as we discuss in our application to U.S. institutions, there is an important distinction between whether a law can be passed at the state level (e.g., drawing House districts, determining voter eligibility) or only at the federal level (e.g., adding a new state). The bicameral Congress and separate presidential elections create the possibility of divided government at the federal level, and thousands of additional elections occur at the state and lower levels. To more closely connect the application to the model, it is straightforward to relax the assumption that one party “wins” an election in each period. Suppose that following an electoral

⁸See our additional discussion about δ before the statement of Appendix Lemma A.1.

victory, each party will only probabilistically have an opportunity to tilt the playing field in their favor. Denote these probabilities as $\kappa_R \in (0, 1)$ for R and $\kappa_D \in (0, 1)$ for D . Now, even if the legal bounds are symmetric ($b_R = -b_D$), one party enjoys an advantage over the other if $\kappa_R \neq \kappa_D$. Thus, our core insights about asymmetry and legal deterrence are qualitatively identical even if the government is not unitary.

Differential κ 's could arise because partisan supporters are distributed geographically in ways that favor a particular party under the “fixed” institutional provisions (i.e., those that are not subject to strategic tilting in our model). For example, the U.S. Constitution is unambiguous that each state gets the same number of U.S. Senators. As discussed below, Republican supporters are disproportionately concentrated in states with smaller populations, which means that Democrats face greater difficulties to simultaneously win control of all federal institutions than Republicans even if voter support is split 50-50; which in turn affects their ability to change electoral rules.

4 APPLICATION TO CONTEMPORARY AMERICAN POLITICS

Contemporary U.S. politics is characterized by high polarization (McCarty, 2019), intense obstruction (Lee, 2016), and a general erosion in norms of forbearance (Levitsky and Ziblatt, 2018). Our theoretical framework suggests that there is a common strategic logic driving disparate areas of electoral competition. Our primary examples are two areas with asymmetric legal advantages for contemporary Republicans, gerrymandering and voter suppression. We explain how the legal bounds interact with partisan sorting to create these advantages, and provide evidence of strategic actions by both parties. Appendix B provides additional references and discusses other aspects of American politics (state expansion, presidential power, conceding electoral loss).

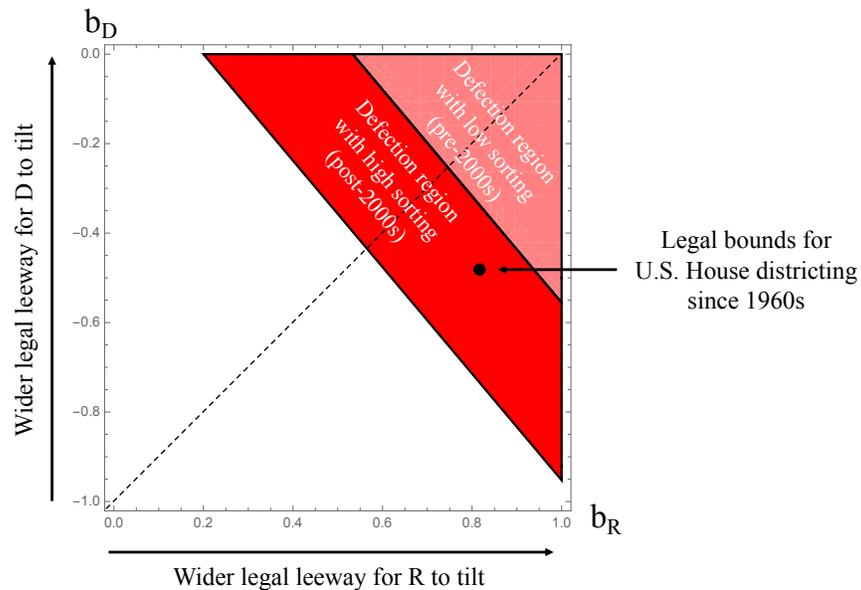
4.1 ASYMMETRIC OPPORTUNITIES FOR GERRYMANDERING THE U.S. HOUSE

State legislatures in the United States enjoy considerable legal leeway to draw partisan-skewed districts. Although this legal leeway does not create *inherent* bias toward one party, it will ad-

vantage any party with supporters that are geographically dispersed “efficiently” both within and across states. Whereas neither party enjoyed a considerable advantage on these dimensions prior to the 2000s, both currently favor Republicans. Contemporary trends in partisan sorting have made urban and minority areas overwhelmingly Democratic, which has created considerable opportunities for Republicans to gain electoral advantages through partisan gerrymandering while limiting Democrats’ ability to retaliate. Under these conditions, we expect the deterrence mechanism to fail. We document that actions by both sides are consistent with a “punishment phase” during roughly the past two decades. Appendix B.1 provides supporting information.

Figure 6 summarizes our argument in terms of model parameters. Although the legal bounds have remained largely fixed since the “reapportionment revolution” of the 1960s and have consistently favored Republicans at least somewhat because of their comparative advantage in rural voters (see the dot), recent and stark increases in geographical and racial sorting have magnified this comparative advantage, illustrated by the widening defection region from the pink area only (pre-2000s) to additionally encompassing the red region (post-2000s).

Figure 6: Applying the Model to Contemporary Gerrymandering



Notes: Pink region has same parameter values as in Figure 3, and the red region in Figure 4.

Why asymmetries favor Republicans. An important trends in American politics, which has re-

ceived considerable scholarly attention, is the extreme geographical partisan sorting that has emerged in recent decades.⁹ We argue that this pattern interacts with relatively wide legal bounds for districting to create asymmetries that favors contemporary Republicans in gerrymandering. Within states, Republicans can usually draw highly favorable maps if they control districting, whereas Democratic map-drawers face greater constraints. Across states, Republican voters are distributed more efficiently, which creates a comparative advantage in controlling statehouses.

Despite numerous legal restrictions on drawing U.S. House districts, parties can exploit wide legal leeway to bias the districting process in their favor. The Constitution mandates elections for each House seat every two years and that, each decade, Congress determines the total number of seats per state based on the most recent census. Additional contemporary constraints are that districts are single-member and contiguous (originally, an 1842 federal statute), equal-sized (reapportionment revolution of the 1960s), and do not artificially crack areas with a majority population of minority groups (amendments to Voting Rights Act of 1965). However, the federal Constitution does not prohibit state legislatures from drawing districts. For post-2010 redistricting, the state legislature played a role in drawing the borders in 37 of the 43 states with more than one House representative (McGann et al., 2016, 153). Consequently, in most states, a party with united control over a state government can strategically exploit leeway in the legal bounds. Additionally, not only does the federal Constitution provide no guidance on within-state districts, over the past few decades, the U.S. Supreme Court has consistently ruled that partisan gerrymandering claims are beyond its jurisdiction (McGann et al., 2016, ch. 2).¹⁰

⁹Scholars debate the distinction between mass polarization and mass partisan sorting (McCarty, 2019), but it is uncontroversial that urban and/or minority voters reliably vote Democratic. Although these patterns originated during the New Deal, urban concentration of Democrats has accelerated in recent decades.

¹⁰It is reasonable to interpret rulings such as *Vieth v. Jubelirer* (2004) as widening the legal bounds somewhat, i.e., moving the dot in Figure 6 to the right and perhaps upwards as well. Such decisions signal that the Court, under its current ideological composition, requires a higher

Why does this matter? *Within a particular state*, Republicans can usually draw highly favorable maps if they control districting, whereas Democratic map-drawers face greater constraints. Although the precise reasons why are an ongoing area of research, the prevailing explanation is that if partisans are tightly concentrated in geographically circumscribed areas—which means that all live in highly co-partisan neighborhoods—then it is relatively straightforward to either pack lots of co-partisans into the same district (if the size of the district is smaller than the city) or to crack the city to prevent its residents from electing any preferred representative, if the size of the district is larger than the city (Rodden, 2019; Eubank and Rodden, 2019). One, although not the only, reason for the geographic clustering of Democrats is that African American and Hispanic populations often live in concentrated regions, and vote overwhelmingly Democratic (i.e., high partisan sorting). In fact, the “packing” of such populations into single districts is mandated by the Voting Rights Act, which compels politicians to create districts with a majority of minority groups wherever possible. This is a paradoxical consequence of a provision intended to boost minority representation in Congress.¹¹

By contrast, Democrats that control districting lack the ability to create similarly inefficiently packed Republican districts because their support is more geographically diffuse. A particularly important legal constraint is contiguous districts. Otherwise, Democratic map-drawers could easily draw multiple non-contiguous districts in which densely Democratic city blocks would overwhelm Republican strongholds in rural areas that they merged into the same district. Statistical evidence threshold to intervene in states’ districting choices than in the 1960s. However, this does not mitigate the importance of geographical sorting for considerably widening the defection region, discussed next.

¹¹However, as Rodden (2019, 174-5) discusses, geographic concentration yields a benefit to Democrats in states that are overwhelmingly Republican. In Utah, Republican map-drawers must concede at least one Democratic House district because it cannot effectively crack Democratic voters in Salt Lake City. The same is true in Alabama because Birmingham is a majority-minority area. See also Shotts (2001).

shows that partisan attempts at gerrymandering indeed tend to reduce the number of Democratic seats in the U.S. House beyond what their natural geographic disadvantages dictate. Eubank and Rodden (2019) simulate drawing partisan-neutral House districts to create a counterfactual. They show that after accounting for geographic disadvantages of Democrats, Republicans won approximately 6% more seats in states where they drew the maps. Appendix B.1 summarizes an exercise we conducted by showing that, across all states, the “best” Republican gerrymander is considerably better for Republicans than is the “best” Democratic gerrymander for Democrats. Importantly, this exercise holds fixed which party draws the lines.

Democratic voters are also distributed inefficiently *across states*, which creates an advantage for Republicans to have the opportunity to draw districts. This contributed to Republicans’ disproportionate control over districting following the 2010 census. In the 2010 elections, Republicans achieved a trifecta in government for multi-district states that totaled 193 seats, compared to only 44 for Democrats (the remaining states had independent commissions or divided government; Daley 2017, xx-xxi). This partly reflected a natural regression for the governing party, the Democrats, in midterm elections. However, figures presented in Appendix B suggest a deeper story than simple mean reversion, as Republican control of state legislatures and trifectas in fact accelerated *after* 2010. Geographical concentration of Democrats in urban areas works to their disadvantage for controlling statehouses. Among states, the percentage of urban residents positively correlates with total state population, which makes the median voter in the median state more conservative than the national median voter. Even in swing states, state legislative elections are considerably biased toward Republicans (i.e., at 50% of the popular vote, Republicans expect to win more than 50% of the seats). The same geographic and racial factors that naturally pack Democratic voters into U.S. House districts also create disadvantages in state houses and senates (Rodden, 2019).

Collectively, these factors mean that if each side punishes the other by implementing extreme gerrymanders whenever they control the districting process, Republicans have a clear upper hand. This asymmetry provides an incentive to deviate from democratic norms, even if it unleashes a

spiral of punishments.

Evidence of contemporary punishment phase. A strong pro-Republican bias in U.S. House election has emerged and accelerated since the turn of the century, following several decades since the 1960s with small bias (Stephanopoulos and McGhee, 2015). Although “natural geographic” gerrymandering undoubtedly accounts for part of this trend, strategic actions by both parties are consistent with a punishment phase over roughly the past two decades. The still-prevailing norm is for state legislatures to redraw districts only once per decade, after the census, except when a court mandates new borders. However, this norm was weakened in the mid-2000s when Republicans flipped control of the legislature in several states to enact mid-decade redistricting plans. Later, Republicans accentuated their natural geographic advantages by strategically targeting state elections in 2010 in a concerted effort to control redistricting for 2012–2020. Conservative activists and donors combined with the Republican State Leadership Committee (RSLC), a Super PAC that invented the Redistricting Majority Project (REDMAP). This project explicitly aimed to spend heavily in swing districts in states for which majority control was in reach before the 2010 elections. Republicans immediately capitalized on the *Citizens United* ruling earlier in 2010 to spend considerably more than was typical in midterm election years (Daley, 2017).¹²

Many recent Republican-drawn maps have faced court challenges. Democrats successfully overturned some maps on the grounds of unconstitutional racial gerrymanders. In fact, when North Carolina Republicans defended their districting scheme in court, they explicitly touted its intentional partisan effects while (unsuccessfully) arguing that it was not racially motivated. Representative David Lewis stated that North Carolina Republicans held a 10-3 advantage in the U.S.

¹²Projects such as REDMAP highlight the relevance of considering a strategic interaction between national political parties, despite the fact that politicians in individual states control districting. Although it is unrealistic to assume that politicians in one state would attempt to punish deviant actions by politicians in another state, it is realistic to assume that actors can coordinate strategies within the national party, especially given the broader nationalization of U.S. politics.

House—despite rough partisan balance in statewide vote share—“because I do not believe it’s possible to draw a map with 11 Republicans and two Democrats.” This statement, particularly explicit about partisan intent but not unique, clearly indicates a willingness to exploit the legal bounds for maximum partisan advantage.¹³ In states like North Carolina and Virginia, Republicans have also taken advantage of the Voting Rights Act to draw districts with far larger African American populations than legally required, hence “wasting” votes in a district guaranteed to choose a Democratic representative (Rodden, 2019, 173).

Democrats’ behavior is also consistent with attempting to press the limits amid the contemporary punishment phase, but they have faced fewer legally viable opportunities. Several examples suggest that Democrats have little ability to draw districts that considerably bias in favor of their supporters—instead, they often face impediments to even getting the map back to neutral.¹⁴ There is considerable evidence that Illinois Democrats during post-2010 redistricting engaged in a “great deal of cartographical creativity” amid a “deliberate [search] to maximize partisan advantage” (McGann et al., 2016, 105). However, the efficiency gap for districts in Illinois slightly favors *Republicans*, given the inability to spread out Democratic support from the heavily Democratic city of Chicago in the northeast corner of the state. In 2018, New Jersey Democrats briefly floated a districting plan decried by the Left as a “diabolical gerrymandering scheme,” although some argue that the plan would not in fact have locked in a Democratic majority. Instead, it would have made the relationship between statewide votes and seats more proportional—leaving Democrats vulnerable to Republican-wave elections. Massachusetts is also an informative case. As of 2019, Democrats held all nine U.S. House seats. However, this is a rare case in which Democratic supporters are diffuse throughout the state (Rodden, 2019), and the expected partisan makeup of

¹³Lewis reaffirmed in 2019 that drawing the maps to maximize partisan advantage was “the point.” See also ongoing legal contentions involving evidence from the private files of the recently deceased Thomas Hofeller, a prominent Republican strategist that greatly influenced North Carolina’s post-2010 maps.

¹⁴However, this is not true in all states, as Altman and McDonald (2015) show for Florida.

districts would be similar if legislators drew districts to maximize compactness.¹⁵

4.2 ASYMMETRIC OPPORTUNITIES FOR VOTER SUPPRESSION

Although scholars typically study voting rights separately from gerrymandering, here we argue that they follow a common strategic logic in the contemporary period. Despite important civil rights reforms in the 1960s, considerable leeway to suppress the vote remains, in particular because states control elections. Once again, this legal leeway does not create *inherent* bias toward one party, but it will disadvantage a party that receives support from societal groups for whom it is easier to erect hurdles to voting; and Black voters are disproportionately susceptible to provisions such as voter ID laws, purges from voting rolls, and ex-felon disenfranchisement. Once again, wide legal bounds combined with extreme partisan sorting have created stark asymmetries that favor Republicans, causing the deterrence mechanism to fail (thus, Figure 6 is relevant here as well). Appendix B.2 provides additional references.

Why asymmetries favor Republicans. The Republican Party currently enjoys favorable legal asymmetries for similar reasons as with gerrymandering: permissive legal bounds and extreme partisan sorting by race. Key legal constraints for voting rights are that states cannot deny the right to vote based on race (Fifteenth Amendment in 1870, Twenty-fourth amendment in 1964, Voting Rights Act of 1965 and subsequent renewals and amendments), gender (Nineteenth Amendment in 1920), or age above 18 (Twenty-sixth Amendment in 1971). Despite these crucial advancements, state officials continue to enjoy leeway to suppress voting rights. States have considerable discretion over issues such as requirements for casting a vote (including possession of identification), ex-felon voting rights, the time periods that can elapse before non-voters can be removed from the voting rolls, the number of early voting days, and eligibility for casting an absentee ballot. States' leeway has in fact increased within the past decade, as the Supreme Court's decision in

¹⁵In Appendix B.1, we additionally discuss possible “anti-hardball” strategies—that is, passing laws that *reduce* the scope of either party to punish the other with unfavorable districts—that Democrats could play, while also emphasizing the difficulties of these alternatives.

Shelby County v. Holder (2013) eliminated preclearance protections from Section 5 of the Voting Rights Act. This decision provided more leeway for officials in states with a history of voter discrimination over implementing new voter suppression measures.

Regarding sorting, African Americans have identified with and voted at consistently high levels for the Democratic party since the late 1960s. This provides a key background condition for pro-Republican asymmetries, although cannot by itself explain why concrete evidence of a punishment phase failed to emerge until the 2000s. Perhaps the most important change over time has been increasing Republican control of state legislatures, especially since 2010, which we discussed above as one consequence of increased geographic sorting. This has provided the *opportunity* to pass laws that disproportionately target Democratic voters. Racial sorting has also contributed to this pattern. Although Black sorting into the Democratic party was largely complete by the 1970s, southern realignment toward Republicans lagged by decades. The South became strongly pro-Republican in presidential voting starting with Nixon, but not at the state level until more recently (Bullock III et al., 2019). Thus, not only do Republicans have a general comparative advantage for controlling statehouses, they now also have unified control of the government in most of the states that have historically suppressed Black voting rights most aggressively.

Permissive legal bounds and racial sorting have generated asymmetries that favor Republicans because the known legal loopholes to suppressing the vote are disproportionately effective against racial minorities, in particular African Americans. Consider (1) felon disenfranchisement, (2) voter-roll purges, and (3) voter ID laws, for which we provide further evidence in the appendix. First, in 2016, approximately 6.1 million people nationwide were disenfranchised because of felony convictions, which equals 2.5% of the country's voting-age population. This percentage is considerably larger among African Americans, 7.4%, and exceeds 20% in four states. Second, between 2016 and 2018, at least 17 million voters were purged from their states' voting rolls. Available evidence suggests that recent voter purges have disproportionately targeted African Americans. Third, many studies show that African Americans, Hispanics, and Native Americans

are less likely to possess the types of identification cards that typical voter ID laws require.

Evidence of contemporary punishment phase. Although Democrats (except most Southern Democrats) led the push for the Voting Rights Act of 1965, its renewal and amendments in 1970, 1975, and 1982 were all signed by Republican presidents with broad Republican support in Congress.¹⁶ Widespread Republican support for provisions that raise hurdles for voting, particularly those that disproportionately impact minorities, began later. Whereas the Motor Voter bill of 1995 signified the last important event in a period since the 1960s of “breaking barriers” (Keyssar, 2000, 311-5), since the 2000s, the Republican party has consistently upheld old and erected new hurdles to voting. We characterize this as the contemporary punishment phase.

Partisan evidence of intent is clear-cut for voter ID laws. In 2000, fourteen states requested some identification from voters, and by 2016 this had more than doubled to thirty-two states. And whereas all earlier laws requested but did not require an ID or photo ID to vote, between 2006 and 2015, fifteen states—all Republican-controlled—passed laws that *required* a photo ID in order for one’s vote to count, although court challenges prevented some of these provisions from becoming law (Highton, 2017, 153). Statistical analyses of correlates of adopting voter ID and related voter restrictions consistently find evidence of a positive, statistically significant, and substantively large estimated effect of Republican state control; and this effect is larger in states with more African Americans or that exhibit higher partisan contestation (Bentele and O’Brien, 2013).¹⁷

¹⁶Rigueur (2016) discusses Gerald Ford’s pronounced outreach to Black voters. However, there were also early cross-currents, exemplified by statements by Kevin Phillips (the main publicist of Richard Nixon’s “Southern Strategy”) about how Republicans should support the Voting Rights Act and encourage Black voting only to enflame southern white sentiment against Democrats.

¹⁷Numerous additional authors cited in Highton (2017) provide similar results. There is ongoing debate in the literature about the *effectiveness* of these provisions, but party elites seem to believe that they provide an advantage. Additionally, Highton (2017, 163) notes that, at the time that the initial studies on the vote-suppressing consequences of voter ID laws were conducted, most states lacked stringent voter ID laws. Thus, more convincing empirical tests of the impact of these

The trend is similar for voter roll purges. In 2017 and 2018, the purge rate was considerably higher in counties previously covered by the preclearance provision of the Voting Rights Act. All nine states for which the entire state used to require preclearance had a Republican-controlled legislature in 2018.

Regarding felon disenfranchisement, restrictive actions occurred in more immediate proximity to the Voting Rights Act, and revived statutes originally imposed during Reconstruction. For decades, restrictive policies enjoyed broad bipartisan support, and the federal “three strikes law” that resulted in massive increases in incarceration (which disproportionately affected minorities) was signed by a Democratic president in 1994. However, more recently, Democratic-controlled states have significantly lowered the voting hurdles for ex-felons. We calculated that 79% of states with a Republican-majority legislature in 2018 required ex-felons to pay various legal financial obligations before regaining voting rights, compared to 36% among other states.¹⁸ In a recent case, Republican officials in Florida attempted to impose a de facto poll tax to thwart a state constitutional amendment (passed via a voter initiative in 2018) intended to enfranchise ex-felons.

By contrast, Democrats enjoy limited legal opportunities to play tit-for-tat by restricting reliable Republican-leaning groups from voting, and there is minimal evidence of Democrats attempting to suppress Republican voters. One possible constituency they could target are the elderly, which tend to vote Republican. There are scattered examples of Democratic resistance to measures that might disproportionately lower burdens for older voters, such as in 1995 when the Democratic governor of Oregon vetoed a bill for universal mail-in voting passed by a Republican-controlled legislature. Oregon’s secretary of state in the 1990s “recalled conversations with Democratic politicians who worried, ‘It’ll help rural white voters, and it won’t help our base, and it’s a bad idea.’”¹⁹ However, strict voter ID laws also pose disproportionate barriers for older voters, and as noted, these recent measures are exclusive to Republican-controlled states. Given their comparative disadvantage in provisions await future data.

¹⁸This difference is statistically significant at 1%. Data discussed in Appendix B.2.

¹⁹See WIRED citation in appendix.

suppressing Republican voters, Democrats have recently gone in the opposite direction and seek to use “anti-hardball” tactics to expand voting rights (see Appendix B.2).

The Oregon example is also somewhat of an outlier regarding Democrats opposing vote-by-mail. Until the Covid-19 crisis in 2020, there was considerable bipartisan support for vote-by-mail. Since then, Democrats have become vocal advocates, in contrast to opposition by many prominent Republicans. President Trump has repeatedly made unfounded claims that expanding voting by mail would unleash massive voter fraud, and Republican legislators in Wisconsin and Texas have triggered high-profile lawsuits in their attempts to restrict mail-in voting. In Appendix B.2, we provide statistical evidence that as of May 2020, on average, Republican-controlled states impose greater restrictions on mail-in voting.²⁰

5 DISCUSSION

Why do political parties sometimes uphold democratic norms and other times pursue legal opportunities for self-entrenchment? We developed a formal model rooted in the logic of deterrence. Specifically, we analyzed how the interaction of three basic scope conditions—wide legal bounds, asymmetric opportunities between the two parties to tilt the playing field toward their supporters, and high partisan sorting—leads party elites to seek to distort democracy in their favor. Applying our theoretical framework to contemporary American electoral politics, we then offered a unified and novel account of both the current Republican party’s disproportionate reliance on gerrymandering and voter suppression to stay in power, as well as the relatively muted response by Democratic politicians to such tactics. The key component of our framework is asymmetric legal opportunities, rather than differential commitments to democracy.

Our logic of inter-party deterrence, however, is not limited to explaining these two types of elec-

²⁰Of course, Republicans have not acted monolithically. For example, in Utah, all voters are mailed a ballot, and in 2020, many Republican governments have moved their primary elections and otherwise acted to expand access to voting by mail in response to Covid.

toral tactics, nor to accounting for asymmetries that necessarily advantage contemporary Republicans. Rather, the flexibility of our framework can potentially help to illuminate institutional opportunities skewed in favor of the Left, as well as arenas where the collapse of deterrence has been largely symmetric, or cooperation has been maintained.

For instance, on-going debates over statehood for Washington D.C. and Puerto Rico offer a clear example of how the prospect of unified Democratic control of the federal government post-2020 might enable the Left to legally tilt the institutional playing field in their favor. Meanwhile, there are no realistic parallel prospects to add conservative-leaning states, such as splitting Texas into multiple states. This helps to account for why statehood has largely been an issue pushed by the Democrats. In contrast, both parties have faced powerful incentives because of closely contested elections, and opportunities stemming from the vagueness and breadth of Article II, to push the legal limits of their power with respect to the U.S. presidency. Cast in terms of our model, presidential power since the New Deal is thus best captured by the purple region in Figure 4 in which deterrence failures have become largely mutual; presidents from both parties have sought to seize unilateral power when in office, and to denounce it when not. Finally, the long-standing democratic norm of electoral concession within the United States fits roughly with 1) the importance of narrow legal bounds for sustaining cooperation, which apply in instances where the winner is clear-cut, and 2) the importance of symmetric legal opportunities for sustaining cooperation where the winner is in doubt.²¹ Nevertheless, patterns since 2000 have increasingly cast doubt on whether even this most fundamental norm of democracy can be sustained. In Appendix B, we provide additional details on how statehood expansion, presidential power, and norms of electoral concessions fit within our framework.

In addition to further exploring the empirical reach of our deterrence framework, our theoretical approach can be expanded in at least two directions. First, in the current setup, we account for

²¹For an alternative account of incentives for conceding electoral loss, see Little, Tucker and LaGatta (2015).

how asymmetric legal bounds trigger the *onset* of anti-democratic punishments, but future work could extend our framework to address how these phases either escalate or end. Second, in the real world, actors may respond to transgressions in one arena by seeking change in another. For example, some Democrats have proposed adding justices to the Supreme Court not only to make up for the seat they allege Republicans “stole” in 2016, but also to begin to redress many of the legal asymmetries that favor Republican voters, as described above. From our perspective, this sort of response raises an interesting theoretical issue, as well: how to capture the choice to alter legal bounds, rather than simply model the choice to punish opponents within fixed legal bounds.

Endogenizing bounds, in turn, raises additional questions about why parties might either take actions to *accentuate* an unfair advantage, or instead choose “anti-hardball” tactics that generate a more even playing field. Indeed, institutional change is often pro-democratic, exemplified by the much larger franchise in the contemporary United States than in 1787—although, as the post-Reconstruction period indicates, democratic expansion can itself trigger punishment phases. Extending the model in these directions promises additional insight into the conditions under which institutional change enhances or diminishes democracy.

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Online Appendix for
“Democracy by Deterrence:
Strategic Self-Entrenchment in U.S. Elections”

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A PROOFS FOR FORMAL MODEL

We first need to derive the incentive compatibility constraints for each party. In the democratic phase, choosing $b_t = 0$ is incentive compatible for R if and only if:

$$\underbrace{1 + \frac{\delta}{1-\delta} \cdot \frac{1}{2}}_{\text{Democratic}} \geq \underbrace{1 + \delta \cdot [p(b_R) \cdot V_R^R + [1 - p(b_R)] \cdot V_D^R]}_{\text{Deviation}}, \quad (\text{A.1})$$

for:

$$V_R^R = 1 - \phi + \delta \cdot [p(b_R) \cdot V_R^R + [1 - p(b_R)] \cdot V_D^R] \quad (\text{A.2})$$

$$V_D^R = \delta \cdot [p(b_D) \cdot V_R^R + [1 - p(b_D)] \cdot V_D^R] \quad (\text{A.3})$$

The expected consumption term for the democratic phase arises because R wins half the time, consumes 1 in every period it wins, and 0 in every period it loses. Because this occurs over an infinite time horizon, the entire future consumption stream is multiplied by $\frac{\delta}{1-\delta}$.

There are two continuation values for R in the deviation phase, written as recursive equations. For Equation A.2, if R is in power at time t , we write the continuation value as V_R^R . R consumes $1 - \phi$ in period t . With probability $p(b_R)$, it retains power in period $t + 1$, in which case we start over again with V_R^R , discounted by a period. With complementary probability, R loses power and its continuation value is V_D^R , defined in Equation A.3. In any period that R is out of power, it consumes ϵ , although we take the limit to 0. With probability $1 - p(b_D)$, D retains power and R 's continuation value remains V_D^R , discounted by a period. With complementary probability, R regains power and the continuation value moves to V_R^R . The winning probabilities are a function of b_R in periods R holds power and of b_D in periods D holds power because, in the punishment phase, the party in power always chooses maximum bias.

Solving Equations A.2 and A.3, substituting into Equation A.1, and simplifying yields the following incentive-compatibility constraint:

$$\frac{1}{2} > \frac{(1 - \phi) \cdot [(1 - \delta) \cdot p(b_R) + \delta \cdot p(b_D)]}{1 - \delta \cdot [p(b_R) - p(b_D)]} \quad (\text{A.4})$$

The intuition for D 's incentive-compatibility constraint is identical:

$$\underbrace{1 + \frac{\delta}{1-\delta} \cdot \frac{1}{2}}_{\text{Democratic}} \geq \underbrace{1 + \delta \cdot [[1 - p(b_D)] \cdot V_D^D + p(b_D) \cdot V_R^D]}_{\text{Deviation}}, \quad (\text{A.5})$$

for:

$$V_D^D = 1 - \phi + \delta \cdot [[1 - p(b_D)] \cdot V_D^D + p(b_D) \cdot V_R^D] \quad (\text{A.6})$$

$$V_R^D = \delta \cdot [[1 - p(b_R)] \cdot V_D^D + p(b_R) \cdot V_R^D] \quad (\text{A.7})$$

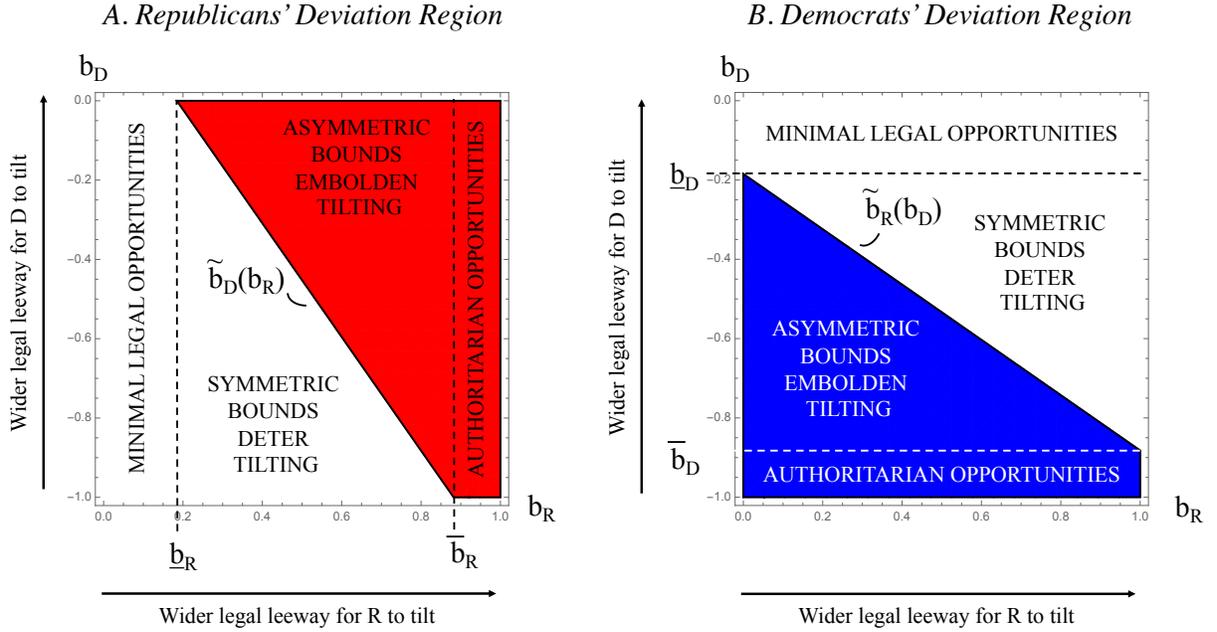
Solving Equations A.6 and A.7, substituting into Equation A.5, and simplifying yields the following incentive-compatibility constraint:

$$\frac{1}{2} > \frac{(1 - \phi) \cdot [1 - (1 - \delta) \cdot p(b_D) - \delta \cdot p(b_R)]}{1 - \delta \cdot [p(b_R) - p(b_D)]} \quad (\text{A.8})$$

Note that setting $\epsilon \rightarrow 0$ ensures that neither party will unilaterally obstruct if there have not been any prior deviations. The gain for the losing party in period t would be infinitesimal, and they would win the election in period $t + 1$ with discretely lower probability because their obstruction will induce the other party to tilt maximally. However, $\epsilon > 0$ is sufficient to ensure that the losing party will obstruct in any period for which the history features a deviation, since they achieve a small gain without affect the winning party's behavior—they will tilt maximally regardless.

The following figure reproduces the deviation region for R in Figure 4, but is marked with the various labels introduced in Proposition A.1. The intuition for D 's thresholds is identical.

Figure A.1: Deviation Regions from Figure 4 with Marked Labels



Notes: These are the same components of the deviation regions as in Figure 4.

Proposition A.1 (Equilibrium). *The following actions constitute an equilibrium strategy profile. The proof formally defines every (unique) threshold. If $b_j = 0$ for all periods $j < t$ and neither player has obstructed in any period $j \leq t$, then the losing party does not obstruct. Each player takes the following actions in any period t they win an election:*

Case 1. Restricted legal opportunities

- If $b_R < \underline{b}_R$, then R sets $b_t = 0$. See point 1 in Figure 3.
- If $|b_D| < |\underline{b}_D|$, then D sets $b_t = 0$.

Case 2a. Intermediate legal opportunities with symmetric legal bounds

- If $b_R \in (\underline{b}_R, \bar{b}_R)$ and $|b_D| > \tilde{b}_D(b_R)$, then R sets $b_t = 0$. See point 2 in Figure 3.
- If $b_D \in (\underline{b}_D, \bar{b}_D)$ and $b_R > \tilde{b}_R(b_D)$, then D sets $b_t = 0$.

Case 2b. Intermediate legal opportunities with asymmetric legal bounds

- If $b_R \in (\underline{b}_R, \bar{b}_R)$ and $|b_D| < \tilde{b}_D(b_R)$, then R sets $b_t = b_R$. See point 3 in Figure 3.
- If $b_D \in (\underline{b}_D, \bar{b}_D)$ and $b_R < \tilde{b}_R(b_D)$, then D sets $b_t = b_D$.

Case 3. “Authoritarian” legal opportunities

- If $b_R > \bar{b}_R$, then R sets $b_t = b_R$. See point 2 in Figure 4.
- If $|b_D| > \bar{b}_D$, then D sets $b_t = b_D$.

If $b_j \neq 0$ for any period $j < t$ or a player has obstructed in some period $j \leq t$, then: the losing party obstructs, R chooses $b_t = b_R$ in any period they win the election, and D chooses $b_t = b_D$ in any period they win the election.

Proof. The first step for deriving the thresholds stated in the proposition to show:

$$\frac{\partial p(b_t)}{\partial b_t} = s - \frac{1}{2} > 0 \quad (\text{A.9})$$

Next, show that the right-hand side of Equation A.4 strictly increases in each of b_R and b_D , and the right-hand side of Equation A.8 strictly decreases in each of b_R and b_D .

$$\begin{aligned} \frac{\partial}{\partial b_R} \left[\frac{(1-\phi) \cdot [p(b_R) - \delta \cdot [p(b_R) - p(b_D)]]}{1 - \delta \cdot [p(b_R) - p(b_D)]} \right] &= \frac{(1-\phi) \cdot [1 - \delta \cdot [1 - p(b_D)]]}{[1 - \delta \cdot [p(b_R) - p(b_D)]]^2} \cdot \frac{\partial p(b_R)}{\partial b_R} > 0 \\ \frac{\partial}{\partial b_D} \left[\frac{(1-\phi) \cdot [p(b_R) - \delta \cdot [p(b_R) - p(b_D)]]}{1 - \delta \cdot [p(b_R) - p(b_D)]} \right] &= \frac{(1-\phi) \cdot \delta \cdot [1 - p(b_R)]}{[1 - \delta \cdot [p(b_R) - p(b_D)]]^2} \cdot \frac{\partial p(b_D)}{\partial b_D} > 0 \\ \frac{\partial}{\partial b_R} \left[\frac{(1-\phi) \cdot [1 - p(b_D) - \delta \cdot [p(b_R) - p(b_D)]]}{1 - \delta \cdot [p(b_R) - p(b_D)]} \right] &= -\frac{(1-\phi) \cdot \delta \cdot p(b_D)}{[1 - \delta \cdot [p(b_R) - p(b_D)]]^2} \cdot \frac{\partial p(b_R)}{\partial b_R} < 0 \\ \frac{\partial}{\partial b_D} \left[\frac{(1-\phi) \cdot [1 - p(b_D) - \delta \cdot [p(b_R) - p(b_D)]]}{1 - \delta \cdot [p(b_R) - p(b_D)]} \right] &= -\frac{(1-\phi) \cdot [1 - \delta \cdot p(b_R)]}{[1 - \delta \cdot [p(b_R) - p(b_D)]]^2} \cdot \frac{\partial p(b_D)}{\partial b_D} < 0 \end{aligned} \quad (\text{A.10})$$

Now we derive the thresholds stated in the proposition (showing that each player chooses the specified actions for each set of parameter values and information set is straightforward). Given the strict monotonicity results just proven, the upper bound for R 's payoff occurs when $b_D = 0$, in which case $p(b_D) = \frac{1}{2}$. Therefore, if R does not deviate at $b_D = 0$, then they will not deviate for any b_D . This enables us to implicitly characterize:

$$\frac{1}{2} = \frac{(1-\phi) \cdot [p(\underline{b}_R) - \delta \cdot [p(\underline{b}_R) - \frac{1}{2}]]}{1 - \delta \cdot [p(\underline{b}_R) - \frac{1}{2}]}$$

The lower bound for R 's payoff occurs when $b_D = -1$, in which case $p(b_D) = 1 - s$. Therefore, if R

deviates at $b_D = -1$, then they will deviate for all b_D . This enables us to implicitly characterize:

$$\frac{1}{2} = \frac{(1 - \phi) \cdot (1 - \delta) \cdot p(\bar{b}_R)}{1 - \delta \cdot p(\bar{b}_R)} \quad (\text{A.11})$$

These boundaries, along with the monotonicity results, also allow us to characterize the threshold for the unique $\tilde{b}_D \in [-1, 0]$ that, for any $b_R \in [\underline{b}_R, \bar{b}_R]$, satisfies:

$$\frac{1}{2} = \frac{(1 - \phi) \cdot [p(b_R) - \delta \cdot [p(b_R) - p(\tilde{b}_D)]]}{1 - \delta \cdot [p(b_R) - p(\tilde{b}_D)]}$$

The three thresholds for D can be characterized analogously. The upper bound for D 's payoff occurs when $b_R = 0$, in which case $p(b_R) = \frac{1}{2}$. Therefore, if D does not deviate at $b_R = 0$, then it will not deviate for any b_R . This enables us to implicitly characterize:

$$\frac{1}{2} = \frac{(1 - \phi) \cdot [1 - p(\underline{b}_D) - \delta \cdot [\frac{1}{2} - p(\underline{b}_D)]]}{1 - \delta \cdot [1 - p(\underline{b}_D)]}$$

The lower bound for D 's payoff occurs when $b_R = 1$, in which case $p(b_R) = s$. Therefore, if D deviates at $b_R = 1$, then they will deviate for all b_R . This enables us to implicitly characterize:

$$\frac{1}{2} = \frac{(1 - \phi) \cdot (1 - \delta) \cdot [1 - p(\bar{b}_D)]}{1 - \delta \cdot [1 - p(\bar{b}_D)]} \quad (\text{A.12})$$

These boundaries, along with the monotonicity results, also allow us to characterize the threshold for the unique $\tilde{b}_R \in [0, 1]$ that, for any $b_D \in [\bar{b}_D, \underline{b}_D]$, satisfies:

$$\frac{1}{2} = \frac{(1 - \phi) \cdot [1 - p(b_D) - \delta \cdot [p(\tilde{b}_R) - p(b_D)]]}{1 - \delta \cdot [p(\tilde{b}_R) - p(b_D)]} \quad (\text{A.13})$$

■

The following corollary confirms an additional intuition from Figure A.1 about the slope of the threshold values $\tilde{b}_D(b_R)$ and $\tilde{b}_R(b_D)$. In words, the larger is b_R , the wider is the range of b_D values for which R will deviate, meaning \tilde{b}_D is lower (i.e., larger in magnitude on the negative b_D scale). Additionally, the larger is b_D (i.e., lower-magnitude values on the negative b_D scale), the narrower is the range of b_R values for which D will deviate, meaning \tilde{b}_R is lower.

Corollary A.1 (Extent of asymmetry).

$$\frac{d\tilde{b}_D}{db_R} < 0 \quad \text{and} \quad \frac{d\tilde{b}_R}{db_D} < 0$$

Proof. By the implicit function theorem, we have:

$$\frac{d\tilde{b}_D}{db_R} = -\frac{1 - \delta \cdot [1 - p(\tilde{b}_D)]}{\delta \cdot [1 - p(b_R)]} \cdot \frac{\partial p}{\partial b_R} < 0$$

$$\frac{d\tilde{b}_R}{db_D} = -\frac{1 - \delta \cdot p(b_R)}{\delta \cdot p(b_D)} \cdot \frac{\frac{\partial p}{\partial b_D}}{\frac{\partial p}{\partial b_R}} < 0$$

Proposition A.2 (Partisan sorting).

Part a. Higher partisan sorting increases the range of parameter values in which at least one party will deviate.

Part b. As $s \rightarrow 0.5$, neither party will deviate.

Proof of part a. It suffices to show that an increase in s strictly increases the sum of the terms on the right-hand sides of Equations A.4 and A.8:

$$\frac{d}{ds} \left[\frac{(1 - \phi) \cdot [1 + (1 - 2\delta) \cdot [p(b_R) - p(b_D)]]}{1 - \delta \cdot [p(b_R) - p(b_D)]} \right] = \frac{1 - \delta}{[1 - \delta \cdot [p(b_R) - p(b_D)]]^2} \cdot \left[\frac{\partial p(b_R)}{\partial s} - \frac{\partial p(b_D)}{\partial s} \right]$$

Because $b_R > b_D$, it thus suffices to show that $\frac{\partial^2 p(b_t)}{\partial b_t \partial s} = 1 > 0$.

Part b. It is easy to demonstrate that the right-hand side of Equation A.4 and of Equation A.8 converges to $0.5 \cdot (1 - \phi)$ for $s \rightarrow 0.5$, which is strictly less than the left-hand side of each inequality.

Proposition A.3 (Long-term incentives for anti-democratic tilting). For $\phi \rightarrow 0$, a democratic equilibrium does not exist for any $\delta \in (0, 1)$.

Proof. Suppose not. Then Equations A.4 and A.8 each hold at $\phi \rightarrow 0$. Adding these two inequalities and solving yields $\delta > 1$, a contradiction. ■

As Figure 5 highlights visually, $\delta \rightarrow 1$ is not sufficient to uphold democratic norms. However, $\delta \rightarrow 1$ eliminates the purple region in Figure 4 in which both parties will deviate. This region arises because for any $\delta < 1$, players put more weight on the immediate gains that they receive from tilting. By contrast, over the long term, these advantages wash out because the long-term transition probabilities in a Markov chain are independent of the initial state (see Lemma A.1), and perfectly patient players care only about the long term. The proof for Proposition A.1 can be used to show that if players are perfectly patient, then there is no “authoritarian opportunities” range (simply substitute $\delta \rightarrow 1$ into Equations A.11 and A.12).

Lemma A.1 (Long-term probabilities of winning in punishment phase). If either party deviates, then the percentage of periods over the infinite horizon in which R will hold power equals $\frac{p(b_D)}{1 + p(b_D) - p(b_R)}$. This probability does not depend on which party deviates.

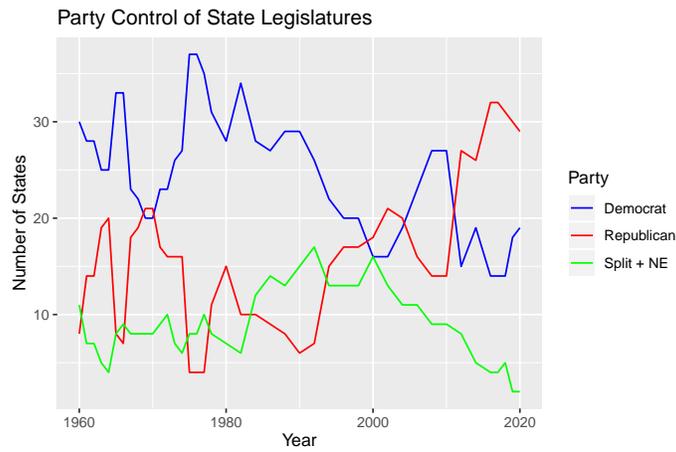
Proof. If we set $\phi = 0$ and $\delta = 0$, on the right-hand side of Equation A.4, then this expression calculates the percentage of periods in which R holds power with each period weighted equally. Algebraic simplification yields the term stated in the lemma. Performing the same steps on Equation A.8 yields an identical term. ■

B SUPPLEMENTARY INFORMATION FOR EMPIRICAL CASES

In this appendix, Sections B.1 and B.2 provide supplemental information on the empirical cases about gerrymandering and voting rights in the main text. Sections B.3, B.4, and B.5 provide additional applications of the model to statehood expansion, unilateral presidential power, and electoral concessions.

B.1 GERRYMANDERING

Figure B.1: Party control of state legislatures over time



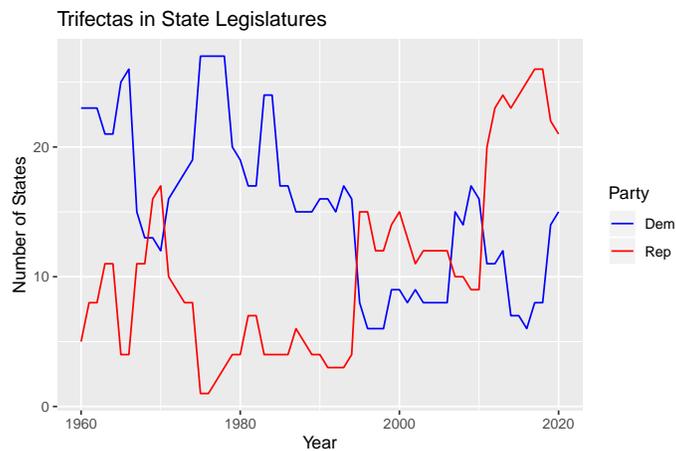
Data sources:

1960-1977: Klarner (2013)

1977-2016: <https://web.education.wisc.edu/nwhillman/index.php/2017/02/01/party-control-in-congress-and-state-legislatures/>

2016-2020: <https://www.ncsl.org/research/about-state-legislatures/partisan-composition.aspx>

Figure B.2: Trifectas in state government over time



Data from 1960-2011 come from Klarner (2013), and from Ballotpedia (2020) for 2012-2020.

B.1.1 Estimating Legal Bounds by State

In the text, we mentioned that, across all states, the “best” Republican gerrymander is considerably better for Republicans than is the “best” Democratic gerrymander for Democrats. We establish this by analyzing data from FiveThirtyEight’s (2018) gerrymandering project. Using online tools, FiveThirtyEight computes the efficiency gap (a commonly-used measure of the extent of biased districting, which higher values indicating greater bias) under alternative districting schemes for each state. Importantly, the FiveThirtyEight map-drawers follow relevant legal bounds such as contiguity and preserving majority-minority districts. The two alternative districting schemes that are relevant for us, since they correspond with our concepts of legal bounds, are the “best” districting schemes for either Republicans or Democrats. We computed the difference in efficiency gap for each. For example, in North Carolina, the bounds range from a 24% efficiency gap in favor of Republicans to a 16% gap in favor of Democrats, yielding a net 8% advantage for Republicans. This figure is close to the sample average. Among the 38 states that have three or more congressional districts, the average difference in efficiency gap favors Republicans by 9% (median is 10%).

B.1.2 Democratic Anti-Hardball?

Given Democrats’ difficulties at playing tit-for-tat on gerrymandering, an alternative possibility would be to play “anti-hardball” strategies by passing laws that *reduce* the scope of either party to punish the other with unfavorable districts (Pozen, 2018). We do not explicitly consider this possibility in the model, as it would involve endogenously decreasing the width of the legal bounds, but the empirical difficulty of executing such strategies also provides credence for our simplifying assumption of fixed legal bounds. Speculating about these possibilities is useful for highlighting that Democrats in fact face tight legal constraints, as opposed to a problem of limited legal creativity. Given the 5-4 splits in recent relevant Court rulings, if the Supreme Court attained a majority of Democratic-appointed justices, it would likely narrow considerably the legal bounds for gerrymandering. However, this would require controlling both the presidency and the Senate, likely for several electoral cycles. Beyond changing the composition of the Court, Democrats could change the electoral rules with unified control of the federal government—winning the presidency, commanding a majority in the House, and either winning 60 Senate seats or gaining a simple majority in the Senate and eliminating the filibuster. However, commonly discussed proposals such as mandating independent districting commissions for each state would not solve Democrats’ underlying geography problem (Rodden, 2019, 264-8). Alternatively, they could attempt to enlarge the size of the House, introduce multi-member districts, or move to proportional representation elections, but these moves would carry costs for Democratic incumbents (e.g., completely redrawn districts, emergence of new parties). Finally, Democrats *could* eliminate the requirement that districts are contiguous, but the absurdity and unpalatable political nature of such a scheme highlights the general difficulties that Democrats would face even if they controlled the federal government.

B.1.3 Additional Sources Consulted

- The following sources provide different pieces of evidence that Democratic voters are inefficiently geographically concentrated for the purposes of districting: Chen and Rodden (2013) use automated districting simulations, Sussell (2013) and Martin and Webster (2018) use voter registration files to show the concentration of neighborhoods by party, and Rodden (2019) demonstrates a strong correlation between population density and Democratic vote share.
- There is considerable evidence that U.S. House districts have become more biased against Democrats in recent decades. Stephanopoulos and McGhee (2015) document this pattern by plotting the “efficiency gap” between 1972 and 2012. Incorporating more recent data, FiveThirtyEight (2018) estimates that under the districting plans in place as of 2018, Republicans will win thirty-four more seats than Democrats (in an average election based on historical voting patterns since 2006). By contrast, this advantage would drop to seven seats if districts were instead drawn to make seat share as proportional to vote share as possible.
- Tarr and Benenson (2012, 331) discuss mid-decade redistricting by Republicans in Colorado, Georgia, and Texas in the mid-2000s.
- Hertel-Fernandez (2019) provides more information about the actions by REDMAP to win battleground states for Republicans in the 2010 elections.
- Hopkins (2018) discusses the nationalization of U.S. politics.
- FiveThirtyEight (2018) provides the efficiency gap estimate for Illinois, and shows that the partisan composition of U.S. House districts in Massachusetts would be similar if drawn to maximize compactness.
- “How the Voting Rights Act Hurts Democrats and Minorities.” <https://www.theatlantic.com/politics/archive/2013/06/how-the-voting-rights-act-hurts-democrats-276893/>
- “The Congressional Map Has A Record-Setting Bias Against Democrats—And it’s not just 2018.” <https://fivethirtyeight.com/features/the-congressional-map-is-hist>
- David Lewis’s discussion of partisan gerrymandering in North Carolina: “We Drew Congressional Maps for Partisan Advantage. That Was the Point.” <https://www.theatlantic.com/ideas/archive/2019/03/ralph-hise-and-david-lewis-nc-gerrymandering/585619>
- “New Jersey Democrats’ Diabolical Gerrymandering Scheme Is an Affront to Democracy.” <https://slate.com/news-and-politics/2018/12/new-jersey-gerrymandering-p.html>.
- “How a lazy media narrative has missed the boat on the NJ redistricting story.” <http://election.princeton.edu/2018/12/15/nj-redistricting-amendment-mistakes-i>

B.2 VOTING RIGHTS

B.2.1 Partisan Differences in Voting-by-Mail Laws

In the text, we mentioned that as of May 2020, on average, Republican-controlled states imposed greater restrictions on mail-in voting. We used the following data to reach this conclusion. In May 2020, the National Vote at Home Institute compiled an analysis of state-by-state vote-at-home provisions, available at <https://www.voteathome.org/wp-content/uploads/2020/05/NVAHI-50-State-Policy-Analysis.pdf>. They evaluate states on a 1-5 scale, with 1 corresponding with “states that still require an excuse for a voter to obtain an absentee/mail ballot for the 2020 general election” and 5 corresponding with “states that already have Vote at Home systems,” i.e., all voters are automatically mailed a ballot. We combined their data with data on state control of legislatures, described above. The bivariate correlation between a state’s voting-at-home score and Republican control of the state government in 2018 is -1.01, that is, an entire point on the five-point scale, with a p-value of 0.005.

B.2.2 Democratic Anti-Hardball?

Rather than attempt to disenfranchise Republican supporters, the most realistic possibilities for Democrats to neutralize their disadvantages are to pass new voting right laws at the federal level, which—like attempts to minimize legal leeway to gerrymander—fall into the category of anti-hardball. In 2019, the Democratic-controlled House passed HR1, “For the People Act of 2019.” Its voting rights provisions include introducing a national voter-registration program, making Election Day a federal holiday, requiring non-partisan commissions to draw electoral districts, and limiting efforts to purge voting rolls. However, given Republican opposition, it seems unlikely that this bill will become law unless Democrats gain unified control of the federal government. And even then, the law would garner court challenges for overstepping the power of the federal government to regulate states’ electoral procedures.

B.2.3 Additional Sources Consulted

- White and Laird (2020, 66-9) present statistical evidence regarding African American voting for the Democratic party.
- Various pieces of evidence suggest that black voters are disproportionately affected by purges of voter rolls. The Brennan Center (see reference below) provides relevant data. Although they cannot assess how many voters were improperly purged, as opposed to correctly removed from the rolls because they died or moved, they do show that the purge rate in counties previously covered by the preclearance provisions in Section 5 of the Voting Rights Act was 40% higher than in other counties. The federal government originally targeted these counties for preclearance because, historically, officials had systematically excluded large Black populations from voting. In the run-up to Georgia’s 2018 gubernatorial election, for example, Georgia officials were more than five times more likely remove Blacks than other voters from the voter roll for failing a stringent exact-match signature test.

- Studies showing that various minority groups are less likely to possess the types of identification cards that typical voter ID laws require include Barreto, Nuno and Sanchez (2009), Pastor et al. (2010), Stewart III (2013), Barreto et al. (2019), and Barreto et al. (2019).
- Weaver (2007) discusses felon disenfranchisement laws passed starting in the 1960s.
- In the text, we calculated that 79% of states with a Republican-majority legislature in 2018 required ex-felons to pay various legal financial obligations before regaining voting rights, compared to 36% among other states. These data are from Georgetown Law (2019).
- The Sentencing Project. 2016. “6 Million Lost Voters: State-Level Estimates of Felony Disenfranchisement, 2016.” <https://www.sentencingproject.org/publications/6-million-lost-voters-state-level-estimates-felony-disenfranchisement-2>
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- A recent working paper studies the effects of voting-by-mail by comparing county-by-county roll-outs in California, Utah, and Washington, showing no statistically discernible boost for either party. Thompson, Daniel M., Jennifer Wu, Jesse Yoder, and Andrew B. Hall. 2020. “Universal Vote-by-Mail Has No Impact on Partisan Turnout or Vote Share. Available at http://www.andrewbenjaminhall.com/Thompson_et_al_VBM.pdf.

B.3 ASYMMETRIC OPPORTUNITIES FOR STATE EXPANSION

Another important component of contemporary debates over voting rights and representation is the prospect of statehood for Washington, D.C. and Puerto Rico. This discussion is somewhat more speculative because it concerns only actions that actors have *not* yet taken, but it is informative because it offers a clear example of how Democrats could potentially bias institutions in their favor, given the expectation that both states would tend to elect Democrats. That said, unlike the gerrymandering and voter suppression examples, adding D.C. and Puerto Rico as states would expand, rather than contract, democracy.

Why asymmetries favor Democrats. The most concrete legal bound on adding states comes from Article IV, Section 3 of the federal constitution: “New States may be admitted by the Congress into this Union; but no new States shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.” Another possible legal bound arises from the minimum size of territories for statehood, as set in the Northwest Ordinance of 1787. However, state-size guidelines were routinely violated in the nineteenth century (Stewart and Weingast, 1992), and lack legal standing.

An additional specific stipulation applies to Washington, D.C. Article I, Section 8, of the federal Constitution states that Congress will exercise exclusive jurisdiction of a federal “District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States.” Some argue that this poses an inconsequential restriction. That is, D.C. can be added as a state by the standard process, as opposed to only by constitutional amendment. The new state of D.C. would simply exclude the White House, Congress, and National Mall, which would remain as the federal district (American Civil Liberties Union, 2019). However, others challenge this legal position by arguing that either (a) this is an unconstitutional work-around of the “enclave clause” or (b) a vote from Maryland’s state legislature would also be needed because Maryland originally ceded the land for the contemporary federal district (Heritage Foundation, 1993).

Unlike the legal bounds for gerrymandering and voting rights, controlling individual statehouses is not sufficient to induce substantial institutional change on this dimension. Instead, politicians can add a state only by passing a bill at the federal level, in conjunction with political actors in a territory targeted as a state and in states whose territory would be affected. Thus, although the *number* of restrictions on adding states is relatively small, the requirement that changes are made at the federal level (in addition to the specific legal difficulties to adding D.C. as a state) implies that the legal bounds are narrower for this issue than for gerrymandering or voting rights.

Following the Civil War, Republicans’ temporary domination of Congress enabled them to add new Republican-leaning territories as states while denying entry for Democratic-leaning territories, a tactic that enabled them to control the Senate for most of the rest of the nineteenth century (Stewart and Weingast, 1992).

Currently, the constitutional process for adding states favors Democrats because the two most viable territories to add as states support Democrats. Residents of D.C. have participated in presidential elections since 1964, and the Democratic candidate has received at least 75% of the vote in

every presidential election, and at least 90% since 2008. African Americans are the plurality group in D.C. and, historically, have been a majority. The partisan loyalties of Spanish-speaking Puerto Rico are less clear-cut because their territorial legislators are divided by their stance on statehood rather than between Democrats and Republicans. A Washington Post survey after Hurricane Maria finds that more than twice as many Puerto Ricans identify as Democrats versus Republicans, although a high percentage of respondents answer “Other/none” and “Don’t know/Refused” (Washington Post, 2018). Among Puerto Ricans that live on the mainland, 56% identify as Democrats, 28% as Independents, and 16% as Republicans (Ansolabehere and Schaffner, 2017).

There are other possible rearrangements of states, such as Texas or California either dissolving into multiple states or seceding, or disaffected parts of certain states switching to a neighboring state (e.g., Izaguirre and Suderman, 2020), but these are considerably more far-fetched. Furthermore, any initiative involving multiple states entails the additional hurdle of gaining approval from all the affected state legislatures.

Why no action by Democrats? Despite a latent advantage on this facet of the Constitution, Democrats have added neither D.C. nor Puerto Rico as a state. Democrats would need unified control the federal government (and would probably also need to eliminate the Senate filibuster) to add either. The legal bounds prevent Democratic-controlled state legislatures from directing this process, and there is intense Republican opposition to statehood for either D.C. or Puerto Rico. In 2019, Republican Senate majority leader Mitch McConnell decried Democrats’ “plan to make the District of Columbia a state—that’d give them two new Democratic senators—Puerto Rico a state, that would give them two more new Democratic senators . . . this is a full bore socialism on the march in the House” (Stieb, 2019).

Indirect effects related in part to geographical sorting exacerbate this challenge. The malapportioned U.S. Senate requires Democrats to win in some red states to gain a majority because the median state is more conservative than the median national voter. The same racial composition of D.C. and Puerto Rico that generates support for Democrats also creates political impediments for Democratic senators in red states. Historically, states that were not overwhelmingly white and English-speaking have faced considerable delays to gaining statehood (Arizona, New Mexico, Oklahoma, Alaska, Hawaii; and, for similar discriminatory reasons, Mormons in Utah), and gained admission only after the white/English-speaking population increased (Frymer, 2017). A statehood push for D.C. would “risk antagonizing white swing-state voters who may be less sympathetic to the plight of a city whose two major constituencies are African Americans and white liberal elites. Picking up two reliably blue Senate seats might not matter if the Claire McCaskills or Joe Manchin of the Senate lose theirs in the process” (Paviour, 2018), although at the time we submitted this manuscript for review, only Manchin is still in the Senate. Puerto Rico’s admission as a state would likely animate fears of white decline, which many scholars argue is an important source of Republican voter support (Mutz, 2018). These reasons contributed to why Democrats did not make it a legislative priority to add these states in 2009 when they controlled the presidency, the House, and (briefly) a filibuster-proof majority in the Senate; they instead used their floor time to debate and pass the Affordable Care Act (Faris, 2018, 54).

B.4 WIDE BUT SYMMETRIC BOUNDS: PRESIDENTIAL POWER

One area with wide but symmetric bounds is presidential power. Under these parameter values, we expect both parties to want to defect from democratic norms. Each party anticipates costs over the longer term from an overly powerful executive whenever the other party gains power. However, the short-term gains from defection are large because the governing party enjoys immediate and large partisan gains to flexing presidential power. Strictly speaking, this lies beyond our focus on electoral manipulation. Yet one important use of executive orders and actions is to improve the incumbent party's chances of winning the next presidential election. This is also a useful example because, consistent with theoretical expectations, there is no clear difference between recent Democratic and Republican presidents in their willingness to push the legal limits of their power, although these presidents have differed in *which types* of legal bounds they have pushed. This supports our overarching premise that the legal opportunities that each party faces in different institutional areas helps to explain outcomes, as opposed to appealing to other fundamental differences between the two parties that might affect their preferences to change the democratic rules.

Symmetric legal bounds. Article II of the Constitution, which delineates the mode of selection and the scope of presidential power, is famously vague and enables wide legal bounds for unilateral presidential actions. The first sentence of Article II is: “The executive Power shall be vested in a President of the United States of America.” Some scholars, justices, and politicians interpret presidential powers mainly with regard to the powers specifically delineated in Article II, in deference to the broader system of separation of powers laid out in the Constitution. Yet even among the written powers of the president, there is still ambiguity, for example: “Which positions require Senate confirmation” (Rudalevige, 2008). By contrast, others subscribe to the theory of the “unitary executive” that views presidential power as essentially unbounded. Many scholars discuss the ambiguity of Article II. Moe and Howell (1999) argue that the unilateral powers of the president “derives its strength and resilience from the ambiguity of the formal structure,” and Huq and Ginsburg (2018) note that the “secular and fairly continuous increase in executive power over the last several decades” is due to vague congressional delegations of power and emergencies that make it easier for the executive branch to act.

These constitutional ambiguities do not clearly favor one party over the other. Since the 1990s, most presidential races have been very closely contested, with even relatively large victories (e.g., President Obama in 2008) being highly uncertain *ex ante*. Thus, both parties are roughly equal in their opportunities to seize executive power. It would perhaps seem that Democratic presidents could benefit more from unilateral executive action given their greater general desire to expand the role of government. However, Republican presidents can also derive considerable advantages from bypassing Congress, as we highlight below.

Evidence of contemporary punishment phase. At least since the New Deal, there is clear evidence of every president pushing unilateral executive action to enact their policy agenda (Chiou and Rothenberg, 2017). Unsurprisingly, politicians and supporters of the out-of-power party routinely denounce unilateral actions taken by the incumbent. On the campaign trail in 2008, Barack Obama asserted that the “biggest problems that we’re facing right now have to do with George Bush trying to bring more and more power into the executive branch and not go through Congress at all” (Chiou

and Rothenberg, 2017). In turn, candidate Donald Trump offered a qualitatively similar critique of President Obama’s use of executive orders: “Obama, because he couldn’t get anybody to agree with him, he starts signing them like they’re butter” (<https://www.washingtonpost.com/news/monkey-cage/wp/2017/10/17/candidate-trump-attacked-obamas-executive-or>). Many conservative scholars and pundits levied similar critiques of Obama, in particular denouncing the legality of his decision to bypass Congress to sign a nuclear treaty with Iran (<https://columbialawreview.org/content/constitutional-hardball-yes-asymmetric-not-so>). Yet as president, Trump is on track to pass Obama on the number of Executive Orders issued (<https://apnews.com/25ca8d3b39024f9e828df7eb718274>). Correspondingly, critiques by liberals of Trump’s presidency often focus on specific unilateral executive action such as denying immigration visas for people from select Muslim countries, diverting Congressional funds to add fencing along the southern border, and governmental oversight and liability of social media companies. Consistent with the notion of pushing legal bounds, it has also become routine since the Bill Clinton presidency for opposition leaders and commentators to allege that the president has committed impeachable acts amid the pursuit of expanded power (Tribe and Matz, 2017), and in 2020 the House of Representatives impeached Trump on the charge of “abuse of power.”

Several additional considerations accentuate incentives to accumulate presidential power that are not present in our other examples. The president is the sole nationally elected official, which exacerbates the inherent ambiguity in Article II. Presidents often claim to have a mandate from “the people” to enact their agenda, in contrast to congresspeople that are locally elected (Howell and Moe, 2016). Presidents take actions to minimize the “presidential expectations gap,” which arises because candidates make broad promises about legislation that are infeasible to implement within the separation-of-powers system (Waterman et al., 2014). Short-term defections to accumulate presidential power also give rise to “a persistent accumulation of executive authority” whereby future confirmations of authority rest on what was previously an aggregation in power (Howell, Shepsle and Wolton, 2019; Bradley and Morrison, 2012). Understanding the most permissive conditions for presidents to accumulate power lies outside the scope of our paper, but scholars have discussed the importance of which party controls Congress, divided government, the composition of the Supreme Court, the president’s popularity, and the specific action taken (e.g., Krause and Cohen, 1997; Deering and Maltzman, 1999; Howell, 2003; Bolton and Thrower, 2016; Chiou and Rothenberg, 2017; Barber, Bolton and Thrower, 2019; Christenson and Kriner, 2020).

B.5 SYMMETRIC DETERRENCE: CONCEDED ELECTORAL DEFEAT

The norm of electoral concession and the peaceful transition of power is essential to democratic regimes. Although the United States has faced periodic stress tests surrounding the validity of presidential elections, ultimately, losing candidates have always willingly (and often graciously) conceded. Our theoretical framework helps to account for the relative robustness of the peaceful alternation of presidents in the United States by situating it as a case of symmetric deterrence. The model also helps to understand important contemporary concerns about whether this norm will continue to hold across U.S. elections.

Symmetric legal bounds. Some aspects of the U.S. electoral college-based procedure for selecting a president are clearly articulated and create narrow legal scope for contesting a defeat. Specifi-

cally, election results that yield a clear electoral college winner provide little scope for contestation according to the U.S. Constitution and statutory law. Article II of the Constitution, the 12th Amendment, and the Electoral Count Act of 1887 articulate the guidelines by which electors vote by ballot for president and vice president. Each state's electoral votes are opened and counted in alphabetical order beginning at 1 PM on January 6 by the president of the Senate in the presence of both the Senate and House of Representatives. The rules also state that the person having the greatest number of votes will be the president, and that if no candidate has a majority of votes, then the House of Representative shall choose the president. In a hypothetical scenario where an incumbent tries to cling to power, the path for removal is clear: the 20th Amendment explicitly states that "the terms of the President and Vice President shall end at noon on the 20th day of January."

However, there are at least three areas of ambiguity that can arise in close elections, which widen the legal bounds. The first affects all elections in the United States, not just presidential elections. There are any number of legal loopholes that enable election-related lawsuits, and the relevant laws vary by state. One example of this issue arising for a presidential election was in Florida in 2000. Thus, in cases where the electoral vote is close, lawsuits over outcomes in individual states can shape the winner of the presidential election, therefore creating non-trivial legal bounds for manipulation.

A second area of ambiguity in presidential elections arises if (a) the electoral votes submitted by a state are in dispute, perhaps because the legislature in one state certifies a different set of results than that state's governor, and (b) the House and the Senate cannot agree on which result to accept. In that case, neither the Constitution nor the Electoral Count Act of 1887 clearly states how to settle the dispute (Foley, 2019). Indeed, both constitutional and historical precedent support multiple interpretations of the procedures for resolution. Nor can the judiciary necessarily be counted on to play a decisive role. Even assuming a politically neutral court, the justices retain full discretionary power to avoid deciding electoral controversies, and thus may well decline to weigh in at all.

Third, there is a rarely invoked element of the electoral college procedure that creates additional problems. As stated above, if no candidate receives a majority of the electoral votes, then the House of Representatives chooses the president with one vote per state delegation. This could occur either because two candidates tie 269-269 in the electorate votes, or if a third-party candidate wins enough electoral votes to deny any candidate from gaining a majority of electoral votes. In addition to important concerns about the democratic legitimacy of this run-off election procedure, there are considerable ambiguities about the voting rules and how to break ties. These caused problems in 1800 and 1824, the only presidential elections decided by the House.

Throughout most of U.S. history, these legal ambiguities do not appear to have systematically favored one party over the other, and thus the legal bounds have largely been symmetric. However, at present, there may be a slight bias toward Republicans, as we discuss below.

Evidence of deterrence. In most elections, presidential races have produced clear electoral college winners, hence eliminating legal scope for contesting defeat. Other elections have exposed crucial ambiguities in the laws for choosing a president (1800, 1824, 1876, 1960, 2000), but in each case one side eventually conceded defeat without resorting to extra-legal means. Perhaps the biggest disasters occurred in 1800 and 1876, and each was followed by an important reform: the 12th

amendment and Electoral Count Act of 1887, respectively. (Although the U.S. Civil War broke out after Abraham Lincoln's victory in the election of 1860, legal ambiguities about his electoral college victory did not play a role.) Given the centrality in a democratic regime of conceding electoral defeat, a likely contributor to upholding this norm is that the costs of continuing to contest the election after one side had a better legal argument for claiming victory have been perceived as extremely high. For example, in 1800, Federalists in the U.S. House could have plausibly held on longer to prevent either Thomas Jefferson or Aaron Burr (both Democratic-Republicans) from gaining a majority of votes in their run-off election, hence allowing a Federalist to occupy the presidency. However, they eventually backed down and allowed Jefferson to gain a majority of votes. We can situate this in the model in terms of a high value of the parameter ϕ that, in equilibrium, the winning party pays in each period of the punishment phase (because the losing party always obstructs).

Drawing examples from modern elections, in 1960, Richard Nixon could have challenged John F. Kennedy's electoral college victory by casting doubt on the fairness of the election in both Texas and Illinois. Although Nixon explained his decision as a kind of public-spirited self-sacrifice to preserve the positive image of American democracy in midst of Cold War (Nixon, 2013), historians interpret Nixon's concession mostly as a pragmatic choice. Given that he likely would not have been able to produce a favorable count in either state, he would have ultimately ended up looking like a sore loser (Foley, 2016, 217–28).

Also consistent with our model, the incentive to concede may be bolstered by the losing candidate's desire to run again, and to avoid a kind of tit-for-tat spiral that we associate with the punishment phase of our game. For example, eight years after Nixon lost to Kennedy, he ran again and won the presidency by an extraordinarily close margin. Tellingly, he acknowledged Hubert Humphrey's concession to him by saying, "I know exactly how he felt. I know how it feels to lose close one" (United Press International, 1968). Likewise, assuming Al Gore considered running again, he may not have wanted to trigger any future retaliation were he to find himself be in a position similar to George W. Bush's in 2000.

Growing concerns about norms breaking down. In the new millennium, the norm of electoral concession is becoming increasingly vulnerable. Many pundits have raised concerns about the 2020 presidential election, reinforced by troubling trends in recent elections for other offices. From Donald Trump's notorious statements during the 2016 campaign that he would only view the election as legitimate if he won, to Stacey Abrams' highly publicized claims that the outcome of the Georgian election for governor in 2018 was illegitimate, political rhetoric on both Left and Right about stolen elections is on the rise. Meanwhile, litigation surrounding elections has sharply increased, rising from fewer than 100 cases per year prior to 2000 to an average of 270 annual cases afterwards, and nearly 400 cases following the 2018 midterm elections (Hasen, 2020, 56). Not surprisingly, Americans' confidence in the fairness of the electoral system is also suffering. According to a recent poll from the PEW research center, less than half of Democrats are confident in the fairness and accuracy of the upcoming 2020 presidential election, versus 75% of Republicans surveyed. Compare this to 2004, where less than a quarter of Democrats viewed as elections as unfair compared to roughly 3% of Republicans (Hasen, 2005, 943). According to Hasen (2020), four sets of factors—voter suppression, pockets of incompetence, dirty tricks, and incendiary rhetoric—are combining to undermine voter trust in the legitimacy of American elections.

Thus far, the norm of concession has still managed to hold. In the 2018 elections, Republicans conceded a tight race in Arizona, and the Democrats likewise in both Georgia and Florida. In terms of our model, however, the United States may increasingly be moving toward the range of parameters in which *both sides* face high incentives to tilt, despite symmetric legal opportunities (see the purple region in Figure 4). The core features of our model help to account for these proximate sources of election meltdown identified by Hasen (2020) and others. Ambiguities in the legal bounds, coupled with extreme partisan sorting, have created coherent narratives for each side to contest election outcomes. For example, as we documented earlier, it is increasingly clear that Democratic voters are hurt by efforts at voter suppression. This creates asymmetric incentives for the Right to exploit gaps within the existing legal structure that make it more difficult for citizens to vote. In turn, this fuels rhetoric on Left that the playing field is not only tilted against them, but that elections are being stolen outright. Thus, losing Democratic candidates can continue to contest after election day without being perceived by their base as sore losers.

Meanwhile, election law experts have documented a growing pattern in the post-2000 era whereby elections that go into overtime (i.e., elections that are not resolved once every precinct has reported on election night) are increasingly breaking toward Democrats. Referred to as the “big blue shift,” Republicans see their margins from election night steadily erode as provisional and absentee ballots are counted (Foley, 2012). Although the causal mechanisms underlying the shift have not been fully identified, the incentives for both parties to refuse to concede are clear. On the Left, the growing margin of litigation incentivizes Democrats to refuse to concede on election night. And on the Right, Republicans often allege that any overtime vote counting—particularly when it ends up diminishing or reversing the lead of the Republican candidate—is inherently suspicious.

There are also concerns specifically about the electoral college in 2020. At present, the ambiguities in the relevant law appear to be biased toward Republicans. One possible source of bias arises from the fact that most legislatures in swing states are majority Republican. This raises the possibility, in the case of a disputed statewide popular vote, that Republican legislators could be in a position to send in electoral votes to Congress that support the Republican candidate even if the popular mandate from their state suggests the votes should go to the Democratic candidate. Foley (2019) details how this scenario could play out in practice. Furthermore, since the onset of the Covid-19 crisis, many pundits have raised similar concerns. Many prominent Republicans have alleged that increased mail-in voting will create large amounts of fraud, hence creating a narrative to contest popular votes. Republicans are also favored in the case of a House contingent election (which occurs if no presidential candidate receives a majority of electoral votes). Their popularity in smaller, rural states means in general that they are more likely to have a majority in terms of (a) the number of states in which a majority of representatives are Republicans, rather than (b) the full U.S. House. Indeed, for the Congress of 2019–20, a majority of representatives in the U.S. House are Democrats, but 26 of the 49 states without split delegations have a majority of Republican representatives. Pro-Republican bias in the House contingent election could create an additional incentive for Republican state legislators to contest their state’s popular vote.

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