

## PREVENTING GOVERNMENT SHUTDOWNS: DESIGNING DEFAULT RULES FOR BUDGETS

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*In nearly every area of law and governance, default policies exist when lawmakers cannot pass new legislation—typically the status quo simply remains in effect. To its detriment, United States budget making at both the state and federal levels lacks effective defaults. If a new budget isn't passed by year end, there is no budget, and the government shuts down. The lack of defaults, coupled with a dysfunctional era of budgetary politics, has led to a number of recent high-profile and costly government shutdowns at the state and federal levels.*

*To date, legal scholarship has failed to address both the causes and costs of government shutdowns and near shutdowns, as well as possible solutions to prevent them. This Article takes up this cause, exploring the history and sources of recent government shutdowns. Government shutdowns are the result of a perfect storm of contemporary*

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Many thanks to Anne Alstott, Michelle Wilde Anderson, Ilan Benshalom, Eric Biber, Jennifer Bird-Pollan, Josh Blank, Andrew Bradt, Robert Cooter, William N. Eskridge, Jr., Lilian Faulhaber, Dan Feder, Brian Galle, Bruce Gibrey, Jacob Goldin, Jacob Hacker, Daniel Hemel, Nicole Huberfeld, Alex Jacobs, Rebecca Kysar, Sarah Lawsky, Zachary Liscow, Stephanie McMahon, Susan Morse, Leigh Osofsky, Shruti Rana, Darien Shanske, Karen Tani, David Wildasin, and the other participants at the University of Kentucky Law School Faculty Workshop, the Berkeley Junior Scholars Working Ideas Group, the Sixth Annual Junior Tax Scholars Conference, the Yale University Institution for Social and Policy Studies Policy Fellows Forum, the Yale Law School Tax Policy Workshop, the Law and Society Annual Conference, and the UC Hastings Constitutional Law Quarterly Symposium. Thanks also to Shanna Lehrman and Jon Ma for research assistance, and extra special thanks to Ian Washburn for his extensive work assisting with an earlier draft of this project. Finally, thanks to our editors at the Colorado Law Review for their invaluable editorial work.

*politics: acrimonious budget making characterized by partisan brinkmanship, game-of-chicken-style negotiation strategies, and strong anti-tax sentiment among many conservative legislators. Drawing on political science research on legislative negotiation theory, this Article explains how what we call the “new fiscal politics” results in regular budget negotiation failures, greatly increasing the risk of costly government shutdowns or near shutdowns.*

*From this diagnosis of budgetary dysfunction, this Article advocates for the adoption of default budget policies to maintain government operations in the event that legislators fail to pass a timely budget. This Article explains how default budget policies might be implemented to avert shutdowns and to stabilize the budget-making process. Drawing on the experiences of several states with automatic continuing appropriations provisions and the federal experience with sequestration, we explore how default budget policies might work in practice. Properly enacted, default budget policies have the potential to mitigate the harmful consequences of budget negotiation failures and to restore sanity to this era of new fiscal politics.*

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## INTRODUCTION

Students of negotiation theory quickly learn the importance of understanding what happens if negotiations fail, because the consequences of negotiation failure affect preferences and strategy in the negotiations themselves.<sup>1</sup> With legislative negotiations, just as with private contract negotiations, it is thus crucial to understand the default policy outcomes that occur in the absence of a legislative agreement. For most legislative negotiations, failure to reach an agreement results in the prior law remaining in effect.<sup>2</sup> In contrast, at the United States federal level and in most states, the failure to regularly pass a new budget agreement results in a government shutdown.<sup>3</sup>

In essence, then, no meaningful default outcome exists under the current budgeting rules. In recent years, as party polarization and partisan fiscal politics have made it ever more difficult to reach agreement, government shutdowns have been occurring at both the federal<sup>4</sup> and state<sup>5</sup> levels with increasing frequency. But few Americans consider government shutdowns

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1. Thus, a central concept of negotiation theory is the so-called “BATNA”: Best Alternative To a Negotiated Agreement. Russel Korobkin, *A Positive Theory of Legal Negotiation*, 88 GEO. L.J. 1789, 1795 (2000).

2. See *infra* Part I.C.

3. This is because the Antideficiency Act prohibits executive branch agents from authorizing expenditures or obligations in excess of the amount appropriated by Congress. 31 U.S.C. § 1341 (2012); see also SARAH A. BINDER & FRANCES E. LEE, *NEGOTIATING AGREEMENT IN POLITICS* 65 (Jane Mansbridge, Cathie Jo Martin eds., 2013), available at <http://www.apsanet.org/Files/Task%20Force%20Reports/Chapter3Mansbridge.pdf>, archived at <http://perma.cc/H8QQ-GXUL> (“Failure to enact annual spending bills to fund the government’s discretionary programs forces a government shutdown.”).

4. See *infra* Part III.A.

5. *Id.*

to be a functional default option when negotiations fail.<sup>6</sup> Instead, government shutdowns create short-term crises that last until politicians inevitably achieve successful budget agreements. Yet these shutdowns leave long-term consequences in their wake.<sup>7</sup>

The past decade has seen a steady rise in the number of government shutdowns. From brief shutdowns in New Jersey in 2006,<sup>8</sup> in Pennsylvania in 2007,<sup>9</sup> and in Minnesota in 2011,<sup>10</sup> to narrowly avoided government shutdowns in Virginia and in other states,<sup>11</sup> government shutdowns have become increasingly common. Memorably, California's failure to pass a budget in 2009 led the state to issue 'I.O.U.s' in lieu of payments to state workers and contractors, drawing comparisons to "failed states" like Greece.<sup>12</sup> Meanwhile, the

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6. See, e.g., Allison Kopicki, *Poll Shows Disapproval of Threat of Government Shutdown*, N.Y. TIMES (Sept. 25, 2013), <http://www.nytimes.com/2013/09/26/us/politics/poll-shows-disapproval-of-threat-of-government-shutdown.html>, archived at <http://perma.cc/T5TF-SDRQ> ("Republicans, Democrats, independents and Tea Party supporters alike object to the threat of a shutdown, the poll says."); Lori Montgomery, Paul Kane & Rosalind S. Helderman, *House GOP Pushes U.S. to the Edge of a Shutdown*, WASH. POST (Sept. 28, 2013), [http://www.washingtonpost.com/politics/house-republicans-to-propose-one-year-delay-in-obamacare/2013/09/28/1e884de6-2859-11e3-9256-41f018d21b49\\_story.html](http://www.washingtonpost.com/politics/house-republicans-to-propose-one-year-delay-in-obamacare/2013/09/28/1e884de6-2859-11e3-9256-41f018d21b49_story.html), archived at <http://perma.cc/TD4K-NHHM> ("Leaders of both parties agree that a government shutdown would be bad for the economy and that a default would be potentially catastrophic.").

7. See *infra* Part III.B.

8. A disagreement between Governor Jon Corzine and the state legislature regarding how to close the state's budget deficit led to a six-day government shutdown in July 2006. The shutdown led to the idling of 1,000,000 casino and state agency workers and cost the state at least \$3.3 million per day in lost gambling and lottery revenue. See Richard G. Jones, *Deal on Sales Tax Ends Shutdown in New Jersey*, N.Y. TIMES (July 6, 2006), <http://www.nytimes.com/2006/07/07/nyregion/07budget.html>, archived at <http://perma.cc/39BH-4LYF>.

9. A standoff between Pennsylvania Governor Edward Rendell and the Republican-controlled state senate over electricity surcharges led to a one-day government shutdown in July 2007. See Ian Urbina, *Government Shutdown in Pennsylvania*, N.Y. TIMES (July 9, 2007), <http://www.nytimes.com/2007/07/09/us/09cnd-penn.html?pagewanted=print>, archived at <http://perma.cc/P7KC-AJ37>.

10. See *infra* Part III.A.

11. See Katelyn Polantz, *McDonnell: Virginia Budget Standoff Imperils State Services*, PBS NEWSHOUR (Apr. 18, 2012, 11:41 AM), <http://www.pbs.org/news/hour/rundown/mcdonnell-says-virginia-budget-standoff-imperils-state-services/>, archived at <http://perma.cc/M7PZ-PHZQ>.

12. See, e.g., Jerry Adler, *Debate: California Is a Failed State*, NEWSWEEK (Mar. 13, 2010, 6:50 PM), <http://www.newsweek.com/debate-california-failed-state-71157>, archived at <http://perma.cc/M5VS-YUSM>; Paul Harris, *Will California Become America's First Failed State?*, GUARDIAN (Oct. 3, 2009), <http://www.guardian.co.uk/world/2009/oct/04/california-failing-state-debt>, archived at <http://perma.cc/>

federal government has teetered on the brink of shutdown during most of the major budget negotiations in recent years, and in October of 2013, the federal government shut down for the second time in as many decades.<sup>13</sup>

In this Article, we apply political science models of legislative negotiation theory to recent developments in United States fiscal politics and show why budget negotiation failures are becoming an increasingly serious problem. We explain how the combination of rising conservative anti-tax sentiment and increased partisan polarization has affected budget negotiations through a combination of trends that we call the “new fiscal politics.” We argue that this environment of new fiscal politics induces dysfunctional game-of-chicken budget politics that make negotiation failure far more likely.

Under current budgeting rules, the consequences of these negotiation failures are costly government shutdowns and near shutdowns. Government shutdowns waste public resources, shortchange public-sector employees and government contractors, and close public services that taxpayers rely on. Beyond these direct harms, even the credible threat of an impending government shutdown creates uncertainty and distrust. As we explain, this uncertainty about the future of federal and state fiscal policy can harm economic growth, sap investor confidence in federal debt and state and municipal bonds, and further undermine the public’s faith in government.

Despite the significance of government shutdowns to fiscal policymaking, legal scholarship has not seriously considered the causes and costs of government shutdowns or possible preventive measures. While legal scholars have written extensively on federal and state budget rules and procedures, the existing literature provides only fleeting analysis of the effects of government shutdowns—or near shutdowns—on budget making.<sup>14</sup>

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EE2A-QZZ9; James Quinn, *California is a Greater Risk Than Greece, Warns JP Morgan Chief*, TELEGRAPH (Feb. 26, 2010, 8:20 PM), <http://www.telegraph.co.uk/finance/financialcrisis/7326772/California-is-a-greater-risk-than-Greece-warns-JP-Morgan-chief.html>, archived at <http://perma.cc/R7DL-HB2V>.

13. See *infra* Part III.A.

14. See, e.g., Josh Chafetz, *The Phenomenology of Gridlock*, 88 NOTRE DAME L. REV. 2065, 2079 (2013) (arguing that gridlock is unlikely to lead to a government shutdown in instances where both parties fear the consequences of being seen as holding up progress); Josh Chafetz, *Congress’s Constitution*, 160 U. PA. L. REV. 715, 725–35 (2012) (analyzing how effecting government shutdowns may be a source of legislative power for Congress vis-à-vis the President);

To address the growing problems of government shutdowns and near shutdowns, we propose the adoption of default budget policies. Such default policies would prevent government shutdowns when budget negotiations end in failure by providing a functional temporary appropriations procedure until legislators reach a new budget agreement. We discuss options for how default budget policies might be implemented and address concerns related to the implementation of these policies. Unless and until default budget policies are adopted, we predict that budget negotiation failures resulting in government shutdowns and near shutdowns will remain a recurring problem at both the United States federal and state levels for the foreseeable future.

This Article proceeds in four parts. In Part I, we identify the key features unique to budget making, drawing from the political science literature on “vetogates”—individual or collective actors whose agreement is required to change the status quo—and on theoretical models of legislative negotiations. We argue that the threat of government shutdowns is far more severe when budget negotiations follow a game-of-chicken model and when no meaningful default

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Kenneth W. Dam, *The American Fiscal Constitution*, 44 U. CHI. L. REV. 271 (1977) (arguing that, although the United States Constitution provides relatively few provisions concerning the government’s taxing and spending powers, an elaborate structure of rules, framework legislation, and Supreme Court decisions have constructed America’s “Fiscal Constitution”); Elizabeth Garrett, *Rethinking the Structures of Decisionmaking in the Federal Budget Process*, 35 HARV. J. ON LEGIS. 387 (1998) (advocating, among other things, for reform of the budget-making process around major functional categories rather than between mandatory and discretionary spending in order to enhance transparency of budgeting decisions); Anita S. Krishnakumar, *Reconciliation and the Fiscal Constitution: The Anatomy of the 1995–96 Budget Train Wreck*, 35 HARV. J. ON LEGIS. 589 (1998) (arguing that the congressional reconciliation process undermines the entire budget process); Peter M. Shane, *When Inter-Branch Norms Break Down: Of Arms-for-Hostages, Orderly Shutdowns, Presidential Impeachments, and Judicial Coups*, 12 CORNELL J. L. & PUB. POL’Y 503, 516–521 (2002) (arguing that the 1995–96 Republican-forced government shutdowns were a breakdown of inter-branch norms and the Constitutional imperative for Congress not to use its appropriations power to shut down a coordinate branch of government); Kate Stith, *Congress’ Power of the Purse*, 97 YALE L.J. 1343 (1988) (arguing that the Constitution imposes on Congress an obligation to limit the amount and duration of each grant of spending authority and a limitation on the executive branch not to raise or spend funds not appropriated by explicit legislative action); Kate Stith, *Rewriting the Fiscal Constitution: The Case of Gramm-Rudman-Hollings*, 76 CALIF. L. REV. 593 (1988) (exploring how the Gramm-Rudman-Hollings Act and sequestration altered the federal budget process’s “fiscal constitution”).

option exists in the event of a negotiation failure.

Unfortunately, as we discuss in Part II, the conditions that we call the new fiscal politics make it far more likely that budget negotiations will follow the game-of-chicken model. The rise of a strident conservative anti-tax ideology, increasing political party polarization, the decline of competitive congressional districts, and the limited disciplining power of voters at the polls combine to create a perfect storm for budget-making dysfunction—resulting in a series of government shutdowns and near shutdowns.

Further, as we discuss in Part III, even when voters are demonstrably unhappy with politicians' failures to reach budget agreements, the conditions of the new fiscal politics limit the effectiveness of voter discipline of elected representatives. To illustrate the harms that result from government shutdowns and near shutdowns, we briefly survey the 1995–1996 and 2013 federal government shutdowns, California's budget crises between 2008 and 2012, and the 2011 Minnesota state government shutdown. We also evaluate the likelihood of future state and federal budget standoffs. We conclude that, without the adoption of some form of default budget policies, government shutdowns are likely to remain a recurring problem even when voters strongly disapprove of them.

Finally, in Part IV, we make the case for the adoption of default budget policies. We evaluate the partial default budget policies currently in effect for state governments in Wisconsin and Rhode Island. We further discuss the lessons that can be learned from the federal experience with sequestration, which we argue operates similarly to a partial default budget policy. We then analyze options for how a default budget policy might be implemented. In doing so, we address the possible counterargument that the threat of government shutdowns is necessary in order to induce compromise among legislators. We conclude that such a compromise-forcing device is probably unnecessary, and that, in any case, better options exist to induce legislative compromise than the costly threat of government shutdowns.

## I. DEFAULT RULES AND THE NEGOTIATION THEORY OF BUDGET MAKING

In a variety of contexts, legal scholarship has generated powerful insights by analyzing default rules. From contracts to property, many areas of law have default provisions that fill gaps in incomplete agreements,<sup>15</sup> or that serve as baseline outcomes that parties may negotiate to alter.<sup>16</sup> Budget making stands as one of the few areas of law that lacks defaults;<sup>17</sup> when the present law expires at every year's end, there is no default fallback.<sup>18</sup> Lawmakers must engage in repeated negotiations and agreements to produce a new budget.<sup>19</sup> Because no meaningful defaults exist for budgeting,<sup>20</sup> government shutdowns will occur whenever no new budget is passed in time to replace the expiring law.<sup>21</sup> Drawing on theoretical modeling of legislative games, and aided by an understanding of default rules, this Part explains why modern-day budget negotiations are more prone to fail, and why the lack of budget defaults both increases the likelihood of failure and exacerbates the consequences of such failures—resulting in government shutdowns and near shutdowns.

We draw on two helpful models of legislative budgeting from political science—the logrolling model and the game-of-

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15. For a general discussion of default rules in contract negotiations, see Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989).

16. For a discussion of the benefits of default rules in property law, see, for example, Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000).

17. An important exception to this is so-called “sunset” legislation. Congress has only occasionally implemented such provisions in non-budgetary legislation, which alter defaults over time by purposefully creating a termination date on legislation absent subsequent renewal. This legislative form is more frequently used by states. See Dan R. Price, *Sunset Legislation in the United States*, 30 BAYLOR L. REV. 401 (1978). More recently, Rebecca Kysar has argued forcefully in favor of a presumption against legislation enacted with sunset provisions given the previously understated costs and overrated benefits of such temporary enactments. See Rebecca M. Kysar, *Lasting Legislation*, 159 U. PA. L. REV. 1007 (2011).

18. See *infra* Part I.C.

19. Elizabeth Garrett & Adrian Vermeule, *Institutional Design of a Thayerian Congress*, 50 DUKE L.J. 1277, 1327 (2001).

20. Congress passes budgets for the fiscal year commencing the subsequent October 1 and ending the following September 30. See 31 U.S.C. § 1102 (2012).

21. One could argue that the government shutting down is the default, and in a sense that is correct. But we think it is more intuitive to conceive of government shutdowns as a result of the absence of a meaningful default for budgeting.

chicken model. The logrolling model depicts a system of majority rule voting in which a coalition assembles its majority by making concessions to prospective coalition members.<sup>22</sup> In contrast, the game-of-chicken model depicts negotiation among rigid coalitions that issue take-it-or-leave-it threats to one another to gain concessions.<sup>23</sup> As we will explain, in this era of new fiscal politics, legislative deal making around budgets less frequently resembles the logrolling model and increasingly resembles the game-of-chicken model.

#### A. Modeling Legislative Budget Negotiations

As any civics textbook teaches, the American system of government is characterized by numerous Madisonian “checks and balances”<sup>24</sup> at both the federal and state levels, which—among other things—reduce the ease with which lawmakers can change the status quo. These checks and balances serve to slow the enactment of new legislation,<sup>25</sup> and are often regarded as desirable,<sup>26</sup> as slowing legislative change may create more policy stability over time by mitigating the effects of short-term variations in public opinion and voting behavior.<sup>27</sup> Yet the presence of numerous checks and balances also creates

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22. For an overview of the logrolling model in game theory, see JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 151–53 (2004); *see also* Gordon Tullock, *Problems of Majority Voting*, 67 *J. POL. ECON.* 571 (1959) (describing the dynamics of logrolling in majority voting systems).

23. For general discussion of the game-of-chicken model, see WARD FARNSWORTH, *THE LEGAL ANALYST: A TOOLKIT FOR THINKING ABOUT THE LAW* 126–35 (2007); Anatol Rapoport & Albert M. Chammah, *The Game of Chicken*, 10 *AM. BEHAV. SCIENTIST* 10 (1966).

24. The concept of checks and balances in American politics largely owes its origins to Madison’s writings in *The Federalist*, *THE FEDERALIST NO. 51* (James Madison) (Clinton Rossiter ed., 1961), although other early modern political philosophers such as John Locke and Charles Louis de Secondat, Baron de Montesquieu, had also previously advocated for the advantages of a separation of powers. *See* JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* (C.B. Macpherson ed., Hackett 1980); CHARLES DE MONTESQUIEU, *MONTESQUIEU: THE SPIRIT OF THE LAWS* (Cohler, Miller, & Stone eds., Cambridge University Press 1989).

25. *See* Bruce Ackerman, *The New Separation of Powers*, 113 *HARV. L. REV.* 633, 643–45 (2000).

26. *See, e.g.*, Torsten Persson et al., *Separation of Powers and Political Accountability*, 112 *Q.J. ECON.* 1163 (1997) (arguing that, properly calibrated, separation of powers disciplines opposing public officials to the benefit of voters, producing greater accountability, eliciting information for voters, and preventing abuses of powers).

27. *Id.*

vetogates that shape the nature of the legislative budgeting game. The political science literature on institutional decision-making generally uses the terms “veto points,” “veto players,” and “vetogates” interchangeably—all three terms describe a person or institutional body that must consent in order for legislation to be passed.<sup>28</sup>

Drawing on legislative negotiation theory and thinking of budgeting as a legislative game allows us to focus on how the players’ incentives interact with the procedural rules—and the lack of default rules.<sup>29</sup> The simplest model approaches budget making as a majority-rule game, where a majority coalition needs only the votes of 50 percent plus one of all legislators in order to pass a budget. Of course, in practice, budget making is complicated by the presence of multiple vetogates, which can obstruct the will of a simple majority.<sup>30</sup>

Among the most important vetogates at the federal level are those established in the so-called Presentment Clause of Article I, Section 7 of the Constitution, which requires legislation to be passed by majorities in both the House and the Senate and then signed by the President, or else passed by a two-thirds majority in both chambers to overcome the President’s veto.<sup>31</sup> Thus, a simple majority in the House or Senate—as well as the President—can block new legislation. Moreover, the increasingly frequent use of Senate filibusters has led to the routine need for cloture votes to overcome the

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28. The term veto players has been in common parlance since its use in George Tsebelis, *Decision Making in Political Systems: Veto Players in Presidentialism, Parliamentarism, Multicameralism and Multipartyism*, 25 BRIT. J. POL. SCI. 289 (1995), and has been elaborated in GEORGE TSEBELIS, *VETO PLAYERS: HOW POLITICAL INSTITUTIONS WORK* (2002). The term vetogates is also frequently used. See, e.g., William N. Eskridge Jr., *Vetogates, Chevron, Preemption*, 83 NOTRE DAME L. REV. 1441 (2007); Matthew McCubbins et al., *Positive Canons: The Role of Legislative Bargains in Statutory Interpretation*, 80 GEO. L.J. 705 (1992). This Article uses these terms interchangeably throughout.

29. For a general discussion of the modeling of legislative games, see BUCHANAN & TULLOCK, *supra* note 22, especially chapters 10–12 and 15–16, and ROBERT D. COOTER, *THE STRATEGIC CONSTITUTION* (2000), especially chapters 2–3.

30. In contrast, under parliamentary systems of government, the need to regularly pass budgets is rarely a problem, as there are few impediments to the majority coalition enacting its preferred policies. See COOTER, *supra* note 29, at 215; William N. Eskridge Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523 (1991).

31. Other veto players are important too, especially appropriations subcommittees and the reconciliation process. See Krishnakumar, *supra* note 14.

filibuster and to pass legislation.<sup>32</sup> Since a three-fifths supermajority is required to invoke cloture, this supermajority requirement<sup>33</sup> can function as its own separate vetogate that enables the minority party or minority coalition to stall or block legislation.<sup>34</sup> This can also confer additional leverage for those who strategically hold out for additional concessions before agreeing to join the majority coalition.<sup>35</sup> As a result of these vetogates, during times of divided government no political party will usually be able to pass a budget on its own.<sup>36</sup>

Similar vetogates operate at the state level,<sup>37</sup> with some variation amongst the states.<sup>38</sup> Moreover, many states have

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32. See Mark Tushnet, *Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 52–53 (1999) (finding that the filibuster and other supermajority requirements play an increasingly large role in structuring legislation); Ben Frumin & Jason Reif, *The Rise Of Cloture: How GOP Filibuster Threats Have Changed The Senate*, TALKING POINTS MEMO (Jan. 27, 2010, 4:51 PM), <http://tpmdc.talkingpointsmemo.com/2010/01/the-rise-of-cloture-how-gop-filibuster-threats-have-changed-the-senate.php>, archived at <http://perma.cc/HK6X-2SET> (same). But see Benjamin Eidelson, *The Majoritarian Filibuster*, 122 YALE L.J. 980 (2013) (observing that since Senate composition is not based on an equal distribution of population across the states, over the past two decades, a majority of successful filibustering coalitions have actually represented more United States citizens than the majority coalitions they stymied).

33. See, e.g., John O. McGinnis & Michael B. Rappaport, *Majority and Supermajority Rules: Three Views of the Capitol*, 85 TEX. L. REV. 1115, 1125–26 (2006) (comparing the effects of majority and supermajority requirements for the passage of legislation).

34. However, note that current federal legislative rules often allow the majority party to bypass the filibuster for budget legislation that qualifies under the reconciliation process. We thus discuss the filibuster in the main text due to its salience as an example, not because it is necessarily of particular importance to budgeting. Other federal veto points that may be relevant include the more limited powers of congressional committees to prevent new legislation from coming to a floor vote, and the agenda-setting powers of the majority party leadership in each chamber, among others.

35. See John O. McGinnis & Michael B. Rappaport, *Supermajority Rules as a Constitutional Solution*, 40 WM. & MARY L. REV. 365, 421 (1998).

36. Except when one party controls both chambers of Congress and the presidency (or, at the state level, both the governorship and the state legislature), it will not always be clear which party should be considered the majority political party. Nevertheless, we use the term majority political party to loosely refer to whichever party controls more of the levers of government.

37. See, e.g., Gerald Benjamin, *Reform in New York: The Budget, The Legislature, and the Governance Process*, 67 ALB. L. REV. 1021, 1028 (2004) (“It is commonplace that the constitutional design of the New York political system, like that of the nation and all but one of the states, creates a three-way relationship for peak political decision making among the executive and each house of a bicameral legislature.”).

38. Nebraska, for instance, has a unicameral state legislature. *Id.* at 1028

supermajority rules for passing budgets or for raising taxes, which can create further vetogates through which minority coalitions can block policy changes supported by the majority.<sup>39</sup> For instance, until very recently, California had a supermajority requirement to pass the state budget, creating a minority-party vetogate whereby the minority party legislators could block any budget.<sup>40</sup> Because this requirement remains for tax increases,<sup>41</sup> as long as the minority party maintains a united front and controls at least one-third of the votes in at least one of the chambers of the state legislature, the minority party can continue to function as a vetogate with respect to any budget proposals that include tax increases.<sup>42</sup>

Default rules also alter incentives and behavior. In most ordinary legislative settings, legislators bargain to alter already-existing laws. For example, when leaders in Congress negotiated to pass the Patient Protection and Affordable Care Act (often known as the “ACA” or, more colloquially, as “Obamacare”) in late 2009 and early 2010, they negotiated against the background of current health care laws and policies.<sup>43</sup> Had Congress failed to pass the ACA, the status quo

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n.29.

39. See *Supermajority Vote Requirements to Pass the Budget*, NAT'L CONF. STATE LEG., <http://www.ncsl.org/research/fiscal-policy/supermajority-vote-requirements-to-pass-the-budget.aspx> (last updated Oct. 2008), *archived at* <http://perma.cc/H2FC-5JNG>.

40. The Riley-Stewart Amendment, approved by state voters in 1933, required a two-thirds majority vote for the California State Legislature to pass a budget. Riley-Stewart initially limited the two-thirds requirement to budgets exceeding 105 percent of the previous year's spending, but 1962's Proposition 16 extended this limitation to nearly all legislative appropriations, including the budget, and thus until 2010 the passage of any budget required a two-thirds majority. See Seanna M. Sheffrin, *Tax Reform Commissions in the Sweep of California's Fiscal History*, 37 HASTINGS CONST. L.Q. 661, 673 (2010). This was overturned by Proposition 25, the On Time Budget Act of 2010, which exempted appropriations in the budget bill or other bills providing appropriations related to the budget bill from being subject to the two-thirds requirement. See Proposition 25, CALIFORNIA STATEWIDE GENERAL ELECTION, <http://voterguide.sos.ca.gov/past/2010/general/propositions/25/> (last visited Sept. 24, 2014), *archived at* <http://perma.cc/V6WZ-F9VL>; CAL. SECRETARY OF ST., VOTES FOR AND AGAINST NOVEMBER 2, 2010, STATEWIDE BALLOT MEASURES (2011), *available at* <http://www.sos.ca.gov/elections/sov/2010-general/complete-sov.pdf>, *archived at* <http://perma.cc/UHS5-RNVC>.

41. See CAL. CONST. art. IV, § 12(d).

42. For the past several decades, Republicans have been the minority party in California, yet they have usually controlled enough seats to exercise veto points due to the supermajority rules.

43. For discussion of the ACA, see David Gamage, *Perverse Incentives Arising*

would have remained unchanged. In contrast, when legislators fail to pass an annual budget on time, most appropriations must halt entirely and the government shuts down.<sup>44</sup>

### B. Logrolling and Game-of-Chicken Negotiations

Of the two major political-science models of legislative negotiations, the logrolling<sup>45</sup> model probably best describes the majority of legislative negotiations over the course of United States history.<sup>46</sup> In particular, the logrolling model tends to describe legislative negotiations more accurately when minority party discipline is weak and when a majority party coalition is relatively easy to assemble.<sup>47</sup> In order to pass a budget under the logrolling model, the majority coalition offers enticements to swing members of the majority party as well as moderate members of the minority party in order to induce them to support the majority coalition's budget.<sup>48</sup> Since individual legislators represent their geographic regions and not just their parties, the majority coalition can induce compromise by offering "pork" for legislators' home districts.<sup>49</sup> The resulting budget will thus usually be a compromise

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*from the Tax Provisions of Healthcare Reform: Why Further Reforms Are Needed to Prevent Avoidable Costs to Low- and Moderate-Income Workers*, 65 TAX L. REV. 669, 669–70 (2012).

44. For a discussion on why appropriations come to a halt, see *supra* note 3; see also McGinnis & Rappaport, *supra* note 33, at 1120 ("[T]he status quo—the failure to pass a budget—results in zero spending . . .").

45. For a basic overview of logrolling, see *supra* note 22.

46. Note that this section assumes a highly constrained institutional environment in which the majority party controls the agenda-setting process and domain space for alternatives is limited. See Kenneth A. Shepsle & Barry R. Weingast, *Structure-Induced Equilibrium and Legislative Choice*, 37 PUB. CHOICE 503, 508 (1981). However, this assumption largely represents the budget-making process given that one party will always be in the majority for the purposes of setting the agenda.

47. See *supra* note 22, and accompanying text.

48. This can usually be accomplished because the costs to the coalition of providing concessions to a swing vote or holdout are smaller than the benefits of their joining the coalition, and vice versa. See, e.g., Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 800, n.171 (1983).

49. Note that we do not necessarily believe logrolling budget making produces normatively better budget outcomes. As this observation indicates, logrolling often produces significant misallocations of funding through pork barrel politicking to trade votes. See, e.g., Diana Evans, *Policy and Pork: The Use of Pork Barrel Projects to Build Policy Coalitions in the House of Representatives*, 38 AM. J. POL. SCI. 894 (1994).

between the preferences of the majority party leadership and the preferences of the most centrist members of both the majority and minority parties.

Under this model, the majority party leadership's influence often depends on how easily it can assemble a coalition amongst party members. It also depends on how cohesive the interests of the minority party members are, and whether the intensity of preference among them is weak enough that the majority can offer sufficient concessions to obtain agreement.<sup>50</sup> If the majority party leadership has multiple prospective coalition partners among the centrist members of the majority and minority parties, then the majority party leadership may pass a budget closer to its true preference.<sup>51</sup> Conversely, if the majority party leadership must secure the votes of nearly every potential swing vote, then it may be forced to agree to many of these legislators' demands.<sup>52</sup>

In times of divided government, the key to successful logrolling will typically be the moderate members of the minority party; these legislators might be enticed to vote with the majority party coalition in order to get a modified version of the majority's budget through the chamber controlled by the minority party. For instance, the contrasts between the repeal of the "Don't Ask, Don't Tell" policy and the passage of the ACA are instructive recent examples of the differences between logrolling when there are many moderate minority party members to choose from, and logrolling when the majority coalition has almost no options from which to pick. Ahead of the repeal of Don't Ask, Don't Tell in the fall of 2010, Senate Democrats needed to win over only a handful of moderate Republicans amongst a number of possible choices to achieve a cloture-proof 60-member supermajority coalition.<sup>53</sup> Once a filibuster-proof coalition had been assembled, several additional moderate Republicans ultimately joined the vote anyway, likely so they could be part of a seemingly inevitable winning coalition.<sup>54</sup> In contrast, uniform Republican opposition

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50. See, e.g., Thomas Stratmann, *Logrolling*, in PERSPECTIVES ON PUBLIC CHOICE 322 (Dennis C. Mueller ed., 1997).

51. See *id.*

52. See *id.*

53. For a description of this effort, see Steve Kornacki, "Don't Ask, Don't Tell": 1993-2010, SALON (Dec. 18, 2010, 2:05 PM), [http://www.salon.com/2010/12/18/dont\\_ask\\_dont\\_tell\\_repealed/](http://www.salon.com/2010/12/18/dont_ask_dont_tell_repealed/), archived at <http://perma.cc/67QX-5AVM>.

54. Eight Republicans ultimately joined Democrats in passing the repeal, a

to the ACA forced Democrats to pass the bill without a single Republican vote in the Senate.<sup>55</sup> Democrats had to achieve unanimous support among their caucus of 60 to overcome cloture, requiring significant concessions to the most centrist members of their own party to form the coalition; no moderate Republicans availed themselves of the winning coalition.<sup>56</sup>

The repeal of Don't Ask, Don't Tell teaches that when minority party discipline is weak and individual members of the minority party vote based on their own preferences, the majority party can usually entice some members of the minority to form a coalition without significant concessions.<sup>57</sup> This can be especially true of budget making, since the process consists of numerous smaller policy choices and amounts among many different programs. Individual politicians will have far stronger preferences about some fiscal policy choices than others, so when minority party discipline is weak, the majority party can usually form a coalition to pass a budget.<sup>58</sup>

In contrast to the logrolling model, the game-of-chicken model tends to describe negotiations when minority party discipline is strong, and vetogates necessitate at least some

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65-member majority that surpassed the necessary 60 votes Democrats had initially struggled to assemble. *Senate Vote 281 - Repeals 'Don't Ask, Don't Tell'*, N.Y. TIMES (Dec. 18, 2010), <http://politics.nytimes.com/congress/votes/111/senate/2/281>, archived at <http://perma.cc/Z8HU-KUQE>.

55. The Act ultimately passed the Senate with exactly 60 votes. *See Senate Vote 396 - Passes Health Care Bill*, N.Y. TIMES (Dec. 24, 2009), <http://politics.nytimes.com/congress/votes/111/senate/1/396>, archived at <http://perma.cc/PEB4-G4AZ>.

56. For example, even though Senate Democrats had a majority in the Senate, in order to secure Senator Nelson's crucial 60th vote to end cloture on the ACA, Senate Democrats conceded to both so-called pork barrel spending to Nelson's home state of Nebraska, as well as to additional limitations on the availability of abortions in insurance sold in state exchanges. *See Huma Khan, President Obama Hails Senate Health Care Bill as Ben Nelson Jumps on Board*, ABC NEWS (Dec. 19, 2009), <http://abcnews.go.com/Politics/HealthCare/senator-ben-nelson-approves-health-care-bill-obama/story?id=9381054>, archived at <http://perma.cc/888T-8XNG>.

57. The concessions offered to minority party legislators need not be pork barrel spending such as in the examples above. The concessions might alternatively be made with respect to non-pork barrel policies for which specific individual members of the minority party have relatively strong preferences. *See Stratmann, supra* note 50, at 325 ("Members sell their votes for issues they do not feel intensely about and secure votes on public goods issues that are intensely favored by them. Expected utility is maximized when costs of selling another vote equal benefits from obtaining another vote. At this point, an equilibrium is reached that maximizes a social welfare function.")

58. *See, e.g., McGinnis & Rappaport, supra* note 33, at 1141.

minority party support. If the majority party cannot entice a sufficient number of centrist members of the minority parties to break ranks, then the majority party may need to negotiate with the leadership of the minority party itself in the hope of forging a bipartisan compromise budget. Party-line voting can thus turn budget negotiations into a partisan game of chicken where neither party can peel away enough members of the opposition in order to form a coalition capable of passing a budget without the cooperation of the other party's leadership.<sup>59</sup>

Budget negotiations that follow the game-of-chicken model are far more likely to result in negotiation failure because compromise outcomes are more difficult to achieve.<sup>60</sup> Even if every player would prefer a compromise to the default outcome, they may still fail to reach a compromise, triggering the default in spite of their preferences.<sup>61</sup> In considering why game-of-chicken models are far likelier to result in negotiation failure, it is useful to imagine the classic adolescent-dare version of the game of chicken. In this game, two teenagers drive cars directly at one another, with the loser being the teenager who swerves first so as to avoid collision. In such an instance, both teenagers strongly prefer to avoid collision. Nevertheless, because neither teenager wants to swerve first (and to thereby lose the game and be called a chicken), there is a risk that both teenagers miscalculate and think that the other teenager will swerve first. Thus, the game can result in the analogue to negotiation failure—a deadly collision. As Ward Farnsworth notes, people are “killed every year playing the automotive version of chicken.”<sup>62</sup> Part III of this Article, describing recent government shutdowns, provides several clear examples of game-of-chicken negotiations that resulted in failure.

Two major differences between the game-of-chicken model

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59. Of course, unlike a classic game of chicken, there are a continuous rather than discrete number of options for the two parties to choose between. We do not claim in this section that budget negotiations in a partisan party-line environment are precisely like the game of chicken, but rather that the intuitions provided by the game shed light on the dynamics we describe.

60. See, e.g., Brendan Greeley, *The Debt Ceiling Deal: The Case for Caving*, BLOOMBERG BUSINESSWEEK (Aug. 3, 2011), <http://www.businessweek.com/magazine/the-debt-ceiling-deal-the-case-for-caving-08032011.html>, archived at <http://perma.cc/4E35-V6BZ>.

61. Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PENN. L. REV. 991, 1024 (2008).

62. FARNSWORTH, *supra* note 23, at 216.

and the logrolling model concern (a) whose preferences dictate the likely outcomes, and (b) the manner in which default outcomes alter bargaining positions. First, in logrolling models, the preferences that matter most are those of the majority party's leadership and of the moderate members of both parties. The preferences of the orthodox members of the minority party are unlikely to influence the outcome.<sup>63</sup> In contrast, because each political party's leadership controls a vetogate in game-of-chicken models, the majority leadership's preferences are no likelier to dictate the outcome than are the minority leadership's preferences. Additionally, the more moderate members of the minority party—including, in some cases, the party's leadership—may not have any more influence than the more orthodox members, depending on which members control the relevant vetogates.<sup>64</sup>

Moreover, game-of-chicken negotiations stand in contrast to logrolling negotiations, where the outcome will generally be a compromise between the majority party and the members of the minority party enticed to vote with the majority. Outcomes in game-of-chicken negotiations may depend more on the parties' negotiating tactics and on their relative aversion to negotiation failure. As a result, as in any negotiation between bilateral monopolies, the outcome will depend on the relative

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63. During negotiations over the repeal of Don't Ask, Don't Tell, for example, headline supporters of the policy such as Senator John McCain argued stridently that the policy should not be changed while troops were deployed in active combat zones. See David M. Herszenhorn, *McCain on 'Don't Ask, Don't Tell': Don't Rush*, N.Y. TIMES CAUCUS BLOG (Dec. 2, 2010, 10:15 AM), <http://thecaucus.blogs.nytimes.com/2010/12/02/mccain-on-dont-ask-dont-tell-dont-rush/>, archived at <http://perma.cc/97M5-4GUP>. He was nonetheless overruled and the repeal went into effect with the armed forces still deployed in active combat zones. See *Senate Vote 281 - Repeals 'Don't Ask, Don't Tell'*, *supra* note 54.

64. Several of the recent budget negotiations have reflected this phenomenon, including instances in which the leadership of the party is outvoted by its caucus. For example, in recent years Speaker of the House John Boehner has repeatedly been forced to pull bills he has brought for a vote in the face of substantial opposition from his own party, imperiling a bill's passage and undermining his leadership of the party. See Naftali Bendavid & Carol E. Lee, *House Postpones Vote on Boehner Debt Plan*, WALL ST. J. (July 29, 2011), <http://online.wsj.com/news/articles/SB10001424053111904800304576474072808358338>, archived at <http://perma.cc/M9Z4-SAL3> (noting Boehner's failed attempt to corral support to raise the federal debt ceiling and subsequent postponement of a full vote, "a rejection [of which] could undermine his speakership"); Janet Hook et al., *Boehner's Budget "Plan B" Collapses*, WALL ST. J. (Dec. 21, 2012), <http://online.wsj.com/news/articles/SB10001424127887324461604578191453200498818>, archived at <http://perma.cc/R5E3-2PL2> (describing Boehner's failure to get caucus support for a 2012 compromise budget bill that included some tax increases).

bargaining power of the leadership of the majority and minority parties.<sup>65</sup> In the budget-making process, this bargaining power significantly depends on the degree to which the parties fear the consequences of failure, as we discuss below in Part I.C. In the context of budget negotiations, whichever party's leadership is less concerned about the threat of a government shutdown will often have more bargaining power in bilateral budget negotiations. This is critical to the dynamics of budgeting because unlike other areas of lawmaking, the status quo will not remain in the event of negotiation failure.

### C. Vetogates and Default Rules

The outcome of any legislative negotiation game depends on the default outcome—what happens if legislation is not passed. Often, the default outcome is simply the status quo, in that failure to pass new legislation means that the previously existing laws remain in effect unaltered. However, in the absence of continuing appropriations, failure to pass a budget means that no appropriations are made and government operations gradually grind to a halt. Rational choice theory suggests that default outcomes can alter the negotiation position of parties.<sup>66</sup>

The literature on contracts law has long observed that altering default rules can alter the bargaining positions and the strategic behavior of parties.<sup>67</sup> What's different about budget making is that it is a contract between (political) parties that *must* take place. Whereas default rules in contract law are typically referenced with regard to filling gaps in incomplete agreements, in the budget process default rules are most relevant in determining what happens if no agreement is reached whatsoever.

In ordinary appropriations settings, the absence of a default rule for budgets usually functions as a strong form of

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65. See, e.g., John Charles Bradbury & W. Mark Crain, *Legislative Organization and Government Spending: Cross-Country Evidence*, 82 J. PUB. ECON. 309, 313 (2001).

66. See McGinnis & Rappaport, *supra* note 33, at 1146 (“Legislators’ preference for legislation can be profoundly affected by what the status quo is in the absence of the legislation.”).

67. See, e.g., Jason Scott Johnston, *Strategic Bargaining and the Economic Theory of Contract Default Rules*, 100 YALE L.J. 615, 615–18 (1990).

penalty-default rule.<sup>68</sup> A simple example illustrates this phenomenon: consider a hypothetical city council renewing funding for firefighters' salaries with a default outcome that zero firefighters will be employed. Even if council members widely disagree on the ideal number of firefighters, they will be highly motivated to assemble *some* form of majority coalition to fund a non-zero number of firefighters. However, if the default outcome is the previous year's funding level, then council members may be far more comfortable insisting on their preferences even to the point of negotiation failure, knowing full well that the status quo will remain in the event of disagreement.

However, the absence of a default budget can function as a *distorted* penalty-default rule when only one party is highly averse to negotiation failure, because the default outcome penalizes only that party. The threat of government shutdowns gives significant leverage to holdouts.<sup>69</sup> To see why, consider a hypothetical in which Party B wants to avoid a government shutdown at all costs, while Party A may prefer to avoid a shutdown but isn't strongly averse to one and is highly motivated to extract significant concessions from Party B. If Party A can make Party B think that Party B's *only* option for avoiding a government shutdown is to agree to Party A's demands, and if Party B will do almost anything to avoid a shutdown, then Party A will be able to pass the budget Party A desires because the costs of negotiation failure are much greater for Party B. Thus, armed with the threat of a government shutdown, Party A can extract a more favorable budget deal than it could were there no threat of a shutdown. This dynamic alters and arguably distorts the negotiation process.

Thus, in two-player negotiations, when one coalition or political party is significantly more averse to the default outcome, that party or coalition is, *ceteris paribus*, at a structural disadvantage in negotiations as compared to the less

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68. For an explanation of penalty default rules, see Ian Ayres, *Ya-Huh: There Are and Should Be Penalty Defaults*, 33 FLA. ST. U. L. REV. 589 (2005); Eric Maskin, *On the Rationale for Penalty Default Rules*, 33 FLA. ST. U. L. REV. 557 (2006).

69. McGinnis & Rappaport, *supra* note 35, at 421 ("The threat of a government shutdown gives significant leverage to holdouts."). Holdouts occur whenever legislators who may otherwise support a bill refuse to do so in order to extract other benefits in addition. *See id.* at 404.

averse party. Likewise, the party that is more comfortable with the default outcome can have a structural advantage because at any time that party may more credibly threaten to walk away from the negotiations, and they may use this threat as leverage in negotiations.<sup>70</sup>

Even more troubling is that even when *both* parties strongly prefer to pass a compromise budget over a government shutdown, negotiation failure may still occur because both parties face strong incentives to *appear* unwilling to compromise. This is especially so when party polarization is high and legislators face internal pressure from party ideologues, as we describe below in Part II.<sup>71</sup> Thus, if Party B bluffs to Party A that it will not accede to Party A's demands, then Party A must determine whether it believes Party B is being honest; if it doesn't, it may press forward assuming Party B will fold. And if Party B assumes Party A will fold, and neither blinks, the government will shut down.

Thus, in divided government settings, the extent to which the outcomes of a game-of-chicken model are likely to follow the majority party's preferences or the minority party's preferences—or neither—depends largely on: (a) how comparatively averse each party is to the default outcome; (b) the negotiation tactics employed by each party; and (c) how well each party can predict whether the other will blink.<sup>72</sup> If one party is significantly less averse to a government shutdown than is the other party, the less averse party may be capable of making an offer in the bargain set closest to their most preferred outcome, knowing that the more averse party cannot

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70. This is akin to other rational choice theory predictions in negotiations between two parties where one party has far more fixed preferences or a greater strength of commitment than does the other, or is willing to make a take-it-or-leave-it offer, or both; rational choice analysis suggests the former will be at an advantage in negotiations with the latter. See COOTER, *supra* note 29, at 220 (“In general, the actor in a bargaining situation who succeeds in making a credible commitment gains an advantage by losing the power to compromise.”).

71. See Rapoport & Chammah, *supra* note 23, at 10 (“The usual argument for brinkmanship is that if one can *convince* the other player that one is unalterably *committed* to [not compromising], for example, by letting him know that one has deliberately destroyed one's own freedom of choice (burned one's bridges), then one can safely [pursue his first choice] (against a rational opponent).”).

72. Of course, some negotiators are simply better at bluffing and at employing other negotiation tactics. If the leadership of the party that is more averse to a government shutdown is more skilled at negotiation tactics, that party may be able to achieve most of its goals despite the structural disadvantage that results from the party being more averse to negotiation failure.

afford negotiation failure (leading to government shutdown). This is true regardless of whether the less averse party is the majority party or the minority party.

We have just captured the budget-making dynamic where no default budget rules exist and game-of-chicken-style negotiations are rampant. While legislative gridlock has long been lamented, it can be particularly problematic for fiscal policy: budgets *must* be passed. But, in times of divided government, the majority party will usually be unable to pass a budget without the support of at least some members of the minority party.<sup>73</sup> Outside of budgetary policy, the American system of checks and balances serves to slow the enactment of new legislation. This is arguably desirable in order to prevent rushed legislation pushed through Congress by an unstable and temporary governing majority. But when it comes to passing budgets, the vetogates created by the American system of checks and balances produce the threat of government shutdowns.<sup>74</sup> And in the highly partisan climate of the new fiscal politics—which we discuss in Part II—budget negotiations are much more likely to resemble a game of chicken, with an increased risk of down-to-the-wire bargaining and negotiation failure. This contest gives a potential structural advantage for the party least fearful of such failure and concomitant risk of a government shutdown.

## II. THE NEW FISCAL POLITICS AND GAME-OF-CHICKEN-STYLE BUDGET NEGOTIATIONS

Having outlined the unique characteristics of budgeting—wherein game-of-chicken-style budget negotiations threaten government shutdowns and impair effective budget making—we next argue that the collective trends we call the “new fiscal politics” contribute to precisely such dysfunctional game-of-

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73. Some have argued that gridlock can actually be a form of policy stability, and some empirical work has shown that divided government itself has far less of an effect on gridlock than the preferences of veto players. See Manabu Saeki, *Gridlock in the Government of the United States: Influence of Divided Government and Veto Players*, 39 BRIT. J. POL. SCI. 587 (2009). Nevertheless, since budgets expire at year's end leading to government shutdowns, gridlock in the budget-making process leads to anything but stability. For a general discussion of gridlock and divided government, see DAVID R. MAYHEW, *DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946–2002* (2005).

74. See *supra* note 28 and accompanying text.

chicken-style budget negotiations. Today's political climate features substantial ideological opposition to nearly all forms of taxation. This is largely, although not exclusively, due to an increasingly powerful and fiscally conservative segment of voters generally aligned with the Republican Party.<sup>75</sup> Accompanying the rise of a rigid anti-tax ideology is the trend toward heightened party polarization among both the Democratic and Republican parties over the last several decades. Fewer moderate members of Congress exist to function as swing legislators, able to induce compromise between the parties by straddling ideological positions.<sup>76</sup> In addition, internally incoherent fiscal policy preferences among voters generally means that voters are unlikely to punish legislators who fail to compromise, even when voters strongly disapprove of their unwillingness to come to agreement.<sup>77</sup> As a result, few structural incentives remain for politicians to seek compromise, and those politicians who do are often punished for it in party primaries. The combination of voters' conflicting and asymmetric fiscal policy preferences and a declining number of competitive House districts<sup>78</sup> incentivizes legislators to indulge their bases instead of forging compromise.

We argue that in this environment of new fiscal politics, legislative budget negotiations increasingly resemble game-of-chicken negotiations rather than logrolling negotiations. Legislator preferences are fixed, few moderate members of the minority coalition can be brought into the majority coalition through logrolling, and both parties have an incentive to

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75. See *infra* Part II.A.

76. See *infra* Part II.B.

77. See *infra* Part II.C.

78. See Thomas E. Mann, *Polarizing the House of Representatives: How Much Does Gerrymandering Matter?*, in 1 RED AND BLUE NATION?: CHARACTERISTICS AND CAUSES OF AMERICA'S POLARIZED POLITICS 269 (Pietro S. Nivola & David W. Brady eds., 2006) (discussing the decline in the number of marginal house seats (those decided within the range of 55 to 45 percent of the two-party district vote)). However, it is arguable that gerrymandering itself has little to do with the decrease in competitive House seats. See Alan I. Abramowitz, Brad Alexander & Matthew Gunning, *Incumbency, Redistricting, and the Decline of Competition in U.S. House Elections*, 68 J. POL. 75 (2006) (finding that demographic change and ideological realignment within the electorate, not gerrymandering, is the cause for the substantial increase in the number of safe House districts since the 1970s); Nolan McCarty, Keith T. Poole & Howard Rosenthal, *Does Gerrymandering Cause Polarization?*, 53 AM. J. POL. SCI. 666 (2009) (finding that gerrymandering generally does not cause polarization, but has resulted in an increase in the Republican seat share in the House).

appear unwilling to compromise (to achieve their preferred bargaining outcome) and little incentive to appear conciliatory (since they rarely face direct consequences for refusal to cooperate, and sometimes face direct consequences for being seen as turncoats). Additionally, as we have discussed above, in the absence of budget defaults, partisan game-of-chicken budget negotiations are far more likely to result in government shutdowns or near shutdowns. This Part identifies these elements of the new fiscal politics and explains why they contribute to such shutdowns and near shutdowns.

### A. *The Rise of Conservative Anti-Tax Ideology*

The contemporary anti-tax, anti-government Tea Party movement is only the most recent manifestation of a decades-long “tax revolt” that has developed in American politics. In recent decades, categorical opposition to taxation has increased dramatically among citizens and politicians.<sup>79</sup> Though far from the first tax revolt in United States history, the passage of California’s Proposition 13 in 1978 was a watershed moment for contemporary opposition to taxation.<sup>80</sup> Proposition 13, which dramatically capped residential property tax increases by restricting increases in assessment values to at most 2 percent per year, also imposed a supermajority requirement for tax increases passed by the California state legislature.<sup>81</sup> Many

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79. See, e.g., Fred Block, *Read Their Lips: Taxation and the Right-Wing Agenda*, in *THE NEW FISCAL SOCIOLOGY: TAXATION IN COMPARATIVE AND HISTORICAL PERSPECTIVE*, 68–85 (Isaac William Martin et al., eds., 2009) (describing the rise of the anti-tax conservative movement in American politics over the last thirty years).

80. See, e.g., Marjorie E. Kornhauser, *Legitimacy and the Right of Revolution: The Role of Tax Protests and Anti-Tax Rhetoric in America*, 50 *BUFF. L. REV.* 819, 909 (2002). Contrary to common perception, however, Kornhauser argues that Proposition 13 sprung not from a bottom-up popular rebellion but a well-organized campaign of zealous anti-tax advocates. A similar argument is made by Daniel Smith, who argues that “Proposition 13 ushered in [the] era of *faux* populist moments.” DANIEL A. SMITH, *TAX CRUSADERS AND THE POLITICS OF DIRECT DEMOCRACY* 49 (1998).

81. *The Original Proposition 13*, HOWARD JARVIS TAXPAYERS ASS’N (May 6, 2006), <http://www.hjta.org/propositions/proposition-13/original-proposition-13>, archived at <http://perma.cc/T74C-FYZA>. More recently, California voters cemented their desire to make any form of tax hike difficult to pass. Proposition 26, passed in November of 2010, altered California’s constitution by explicitly requiring that not only taxes, but also increases in state or local fees, be passed by a two-thirds majority in the legislature. CAL CONST. art. XIII A, § 3; CAL CONST. art. XIIC, § 1.

scholars have observed the ways in which Proposition 13 and the political mobilization behind it have shifted the narrative surrounding expectations of government and the willingness of citizens to fund government services.<sup>82</sup>

A similar phenomenon occurred nationwide: throughout the 1970s, a number of states passed similar initiatives, and by 1980, thirty-eight states had reduced or stabilized their tax bases through laws similar to Proposition 13.<sup>83</sup> In the same year, Ronald Reagan won the presidency on a campaign heavily reliant on anti-tax rhetoric.<sup>84</sup> The tide against taxation extended into the 1990s, informing President Bill Clinton's 1996 announcement that "the era of big government is over";<sup>85</sup> the subsequent Clinton-Republican Congressional agreement to reform welfare in 1996; and the so-called "Bush tax cuts" to federal income and estate taxes in 2001.<sup>86</sup> Over the course of this revolt, anti-tax sentiment has increased dramatically while the level of taxation has become a much more salient political issue among both voters and politicians.<sup>87</sup>

Although politicians from both parties have become increasingly opposed to tax increases, the Republican Party has become ardently anti-tax in its rhetoric and policies over the last several decades, having "decided to make a war on taxes the center of their political agenda continuously from the late

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82. See, e.g., Jack Citrin, *Introduction: The Legacy of Proposition 13*, in CALIFORNIA AND THE AMERICAN TAX REVOLT: PROPOSITION 13 FIVE YEARS LATER 1, 20 (Terry Schwadron & Paul Richter eds., 1984) ("Proposition 13 ushered in an era of tax relief during which many states legislated reductions and others eschewed the increase that would have been required for government to continue to expand."); Jack Citrin & Frank Levy, *From 13 to 4 and Beyond: The Political Meaning of the Ongoing Tax Revolt, in California*, in THE PROPERTY TAX REVOLT: THE CASE OF PROPOSITION 13, at 18 (George G. Kaufman & Kenneth T. Rosen eds., 1981) ("An immediate consequence of Proposition 13's overwhelming victory was to elevate tax and spending limitation to a status previously accorded such symbols of virtue as motherhood and the flag."); ISAAC WILLIAM MARTIN, THE PERMANENT TAX REVOLT: HOW THE PROPERTY TAX TRANSFORMED AMERICAN POLITICS 112 (2008) (arguing that Proposition 13 "altered the balance of power" by empowering conservative interest groups that had previously sat out tax protests "to see that it was possible to limit taxation—if they were willing to focus on the property tax").

83. David Lowery & Lee Sigelman, *Understanding the Tax Revolt: Eight Explanations*, 75 AM. POL. SCI. REV. 963, 963 (1981).

84. Kornhauser, *supra* note 80, at 913.

85. *CNN Transcript of President Clinton's Radio Address*, CNN (Jan. 27, 1996, 11:00 PM), [http://www.cnn.com/US/9601/budget/01-27/clinton\\_radio/](http://www.cnn.com/US/9601/budget/01-27/clinton_radio/), archived at <http://perma.cc/ZG3N-YJAW>.

86. Kornhauser, *supra* note 80, at 913.

87. *Id.* at 913, 923.

1970s down to the 2008 election when John McCain promised to make George W. Bush's tax cuts permanent."<sup>88</sup> The Republican Party Platform has long supported fiscal conservatism, but in recent election years, the party's platform has devoted increasing attention to warnings about the dangers of taxation and the necessity of reducing taxes while increasingly characterizing taxation in a wholly negative light.<sup>89</sup> This is epitomized by the widespread willingness over the past several decades of Republicans to agree to the Grover-Norquist-led Americans for Tax Reform's Taxpayer Protection Pledge that opposes all tax increases.<sup>90</sup> Since the Pledge was created in 1986, it has been signed by over 1,100 state officeholders as well as 219 representatives and 39 senators of the 113th Congress.<sup>91</sup> As Americans for Tax Reform proudly explains, "the pledge has become *de rigueur* for Republicans seeking office, and is a necessity for Democrats running in Republican districts."<sup>92</sup> In recent years, conservative members of Congress have even gone so far as to advocate repeal of the Sixteenth Amendment to the Constitution,<sup>93</sup> which ushered in the federal income tax.<sup>94</sup>

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88. Block, *supra* note 79, at 72.

89. Compare Archive of Political Party Platforms, *Republican Party Platform of 1972*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/index.php?pid=25842> (last visited Aug. 8, 2014), *archived at* <http://perma.cc/T2CR-896Z> (using language such as "[t]axes and government spending are inseparable. . . . Only if the taxpayers' money is prudently managed can taxes be kept at reasonable levels" and 57 uses of the word tax and its compounds), with Archive of Political Party Platforms, *Republican Party Platform of 2008*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsb.edu/ws/index.php?pid=78545> (last visited Aug. 8, 2014), *archived at* <http://perma.cc/6U3P-64JD> (100 uses of the word "tax" and its compounds), and REPUBLICAN PLATFORM OF 2012, *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=101961> (last visited Sept. 1, 2014), *archived at* <http://perma.cc/4357-KNN6> (using language such as "[t]axes, by their very nature, reduce a citizen's freedom" and 97 total references to the word "tax" and its compounds).

90. AMS. FOR TAX REFORM, FEDERAL TAXPAYER PROTECTION PLEDGE, 113TH CONGRESSIONAL LIST, *available at* <http://s3.amazonaws.com/atrfiles/files/files/121012-113thCongress.pdf>, *archived at* <http://perma.cc/P2MW-LRH9>.

91. *Id.*

92. *About the Taxpayer Protection Pledge*, AMS. FOR TAX REFORM, <http://www.atr.org/federal-taxpayer-protection-questions-answers-a6204> (last visited Aug. 22, 2014), *archived at* <http://perma.cc/3PGL-9A93>.

93. See, e.g., Fair Tax Act of 2011, H.R. 25, 112th Cong. (2011).

94. Prior to the ratification of the Sixteenth Amendment, the Supreme Court had famously ruled that any national tax administered by the federal government and assessed in a manner not directly proportionate to a state's population was unconstitutional. *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895).

The emergence of a broad anti-tax sentiment among conservatives, as we discuss below, shifts the structural incentives for the Republican Party in negotiations of budget making. Coupled with the political polarization we describe in the next section, this anti-tax sentiment encourages fiscally conservative Republicans to participate in game-of-chicken-style negotiations, since they have reduced incentives to make fiscal compromises, and it enhances the benefits to many elected representatives of appearing to steadfastly oppose anything other than broad-based tax cuts.<sup>95</sup>

### *B. Increased Partisan Polarization*

In addition to the rise of conservative anti-tax sentiment, recent years have witnessed a dramatic rise in partisan polarization, which has also contributed to the new fiscal politics we identify. Rational choice analysis has long predicted that in winner-take-all elections, candidates will tend to sort themselves into two parties. This has been the case for most of the history of the United States.<sup>96</sup> Yet party cohesion has grown much stronger over the past several decades,<sup>97</sup> becoming especially heightened with respect to fiscal issues. In just one recent example, in April of 2011 the House voted almost entirely along party lines to cut federal spending by \$5.8 trillion over the proceeding decade and substantially alter the structure of the federal Medicare program.<sup>98</sup> Not a single

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95. See, e.g., Jennifer Steinhauer, *Debt Bill Is Signed, Ending a Fractious Battle*, N.Y. TIMES (Aug. 2, 2011), [http://www.nytimes.com/2011/08/03/us/politics/03fiscal.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/08/03/us/politics/03fiscal.html?pagewanted=all&_r=0), archived at <http://perma.cc/DWU9-RPRA> (“‘The difference is the intensity here,’ said David R. Mayhew, a political science professor at Yale. ‘The Republicans have the Tea Party, and the Democrats don’t have anything of comparable animation on their side.’ Democrats, hamstrung in part by Congressional procedures and hewing to more traditional methods of compromise and negotiation, allowed Republicans to pull the center of debate much closer to their priorities.”).

96. This is known as Duverger’s Law. See William H. Riker, *The Two-Party System and Duverger’s Law: An Essay on the History of Political Science*, 76 AM. POL. SCI. REV. 753 (1982) (summarizing political science research showing Duverger’s Law—that a plurality rule for selecting the winner of elections favors a two-party system—is generally true, as rational choice theory would predict).

97. THOMAS E. MANN & NORMAL J. ORNSTEIN, IT’S EVEN WORSE THAN IT LOOKS 44–51 (2012); Jacob S. Hacker, *Yes We Can? The New Push for American Health Security*, 37 POL. SOC’Y 3, 24–25 (2009).

98. Carl Hulse, *House Approves Republican Budget Plan to Cut Trillions*, N.Y. TIMES (Apr. 15, 2011), <http://www.nytimes.com/2011/04/16/us/politics/16congress.html>, archived at <http://perma.cc/RAS8-3SSB>.

Democrat voted for the proposal while only four House Republicans opposed it.<sup>99</sup> According to the *National Jurist*, at that point the 111th Congress of 2009–2010 was the most polarized in history.<sup>100</sup> Just five House Republicans in 2010 generated vote ratings more liberal than the most conservative House Democrat, and just four Democrats produced ratings more conservative than the most liberal Republican.<sup>101</sup>

At both the national and the state levels, this rising polarization has been accompanied by the growing power of political parties. During the middle decades of the 20th century, party cohesion was at historically low levels.<sup>102</sup> Beginning with the presidency of Jimmy Carter and continuing through the 1980s, however, party unity increased as the incumbency advantage receded and the national political climate increasingly affected local races.<sup>103</sup> The 1994 Congressional elections heralded the start of a new era of party-centric politics; local votes depended more on national-partisan identification, such that “personal opposition to gun control or various other liberal policies no longer sufficed to save Democrats in conservative districts.”<sup>104</sup> As a result of these new voting patterns, legislators’ electoral fates have become profoundly linked to their party’s popularity; distinguishing oneself from one’s party has become less valuable for a legislator while supporting party leadership has become more valuable.<sup>105</sup> At the same time, increasingly gerrymandered districts have reduced the number of truly competitive congressional seats in the House—from 152 in the 1970s to 101 today—resulting in fewer moderate representatives and a more polarized House membership.<sup>106</sup>

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99. *Id.*

100. Ronald Brownstein, *Pulling Apart*, NAT’L J. (Feb. 24, 2011), <http://www.nationaljournal.com/magazine/congress-hits-new-peak-in-polarization-20110224>, archived at <http://perma.cc/LSR9-2V5X>.

101. *Id.*

102. See Patricia A. Hurley & Rick K. Wilson, *Partisan Voting Patterns in the U.S. Senate, 1877–1986*, 14 LEG. STUD. Q. 225, 229–30 (1989).

103. Morris P. Fiorina, *Parties as Problem Solvers*, in PROMOTING THE GENERAL WELFARE: NEW PERSPECTIVES ON GOVERNMENT PERFORMANCE 242 (Alan S. Gerber & Eric M. Patashnik, eds. 2007).

104. *Id.*

105. See, e.g., FRANCES E. LEE, BEYOND IDEOLOGY: POLITICS, PRINCIPLES, AND PARTISANSHIP IN THE U. S. SENATE 188 (2009).

106. See BIPARTISAN POL’Y CTR., 2012 REDISTRICTING: WILL THE HOUSE BE MORE POLARIZED THAN EVER? (2012), available at [http://bipartisanpolicy.org/sites/default/files/Redistricting\\_Report\\_format\\_11-2.pdf](http://bipartisanpolicy.org/sites/default/files/Redistricting_Report_format_11-2.pdf), archived at <http://perma>

Indeed, the 112th Congress has since surpassed the 111th Congress as one of the most polarized in modern history.<sup>107</sup>

It is perhaps worth noting that party polarization contributing to government shutdowns is generally only a problem in the United States,<sup>108</sup> because in parliamentary democracies, negotiation failures rarely result in government shutdowns.<sup>109</sup> Typically, the majority coalition either has enough control to pass a budget or else a new election is called; polarization rarely leads to complete inaction.<sup>110</sup> Thus, the differences between the United States political system and those of other democracies limit what we can learn from foreign experiences.<sup>111</sup>

In the United States, political polarization makes party-line votes more likely because it eliminates overlap in the political orientations of even relatively moderate members of the Democratic and Republican parties.<sup>112</sup> Increases in party polarization have led to a reduced number of moderate lawmakers who might facilitate compromise between the parties.<sup>113</sup> Partisan power makes party-line votes more likely,

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.cc/9VC2-KRZB. In particular, gerrymandering by state legislatures in 2010 provided Republicans with significant advantages in carrying proportionally more House seats in the 2012 election than would have been the case if seats had been apportioned according to statewide votes for House candidates. Adam Serwer et al., *Now That's What I Call Gerrymandering!*, MOTHER JONES (Nov. 14, 2012), <http://www.motherjones.com/politics/2012/11/republicans-gerrymandering-house-representatives-election-chart>, archived at <http://perma.cc/5E3F-7R7V>.

107. Dylan Matthews, *It's Official: The 112th Congress Was the Most Polarized Ever*, WASH. POST (Jan. 17, 2013, 11:07 AM), <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/01/17/its-official-the-112th-congress-was-the-most-polarized-ever/>, archived at <http://perma.cc/4DYR-KK23>.

108. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-AMFD-86-16, APPROPRIATIONS: CONTINUING RESOLUTIONS AND AN ASSESSMENT OF AUTOMATIC FUNDING APPROACHES 27 (1986), available at <http://www.gao.gov/products/AFMD-86-16>, archived at <http://perma.cc/H8ZK-RDY7>.

109. See Katharine G. Young, *Shutdown Exceptionalism: A Comparative Constitutional Reflection on the 2013 Lapse in Appropriations* (Nov. 16, 2013) (unpublished manuscript) (on file with authors).

110. See *id.* ("One possible explanation for the lack of experience could be that many of these countries' governments are organized under the parliamentary system.").

111. *Id.* at 26. Young has argued that structural aspects of the American system—the legislative branch's dual responsibility to pass laws but also to check and sometimes impede the executive branch, coupled with the absence of a fiscal impasse resolution rule—leads to political dysfunction unique to the United States.

112. See James M. Snyder & Tim Groseclose, *Estimating Party Influence in Congressional Roll-Call Voting*, 44 AM. J. POL. SCI. 193 (2000).

113. Political polarization need not express itself in terms of a

because such a climate decreases any benefits of breaking from the party line; the benefit of logrolling for district advantage will be outweighed by the challenge a legislator may face at the next primary election for appearing too willing to compromise.<sup>114</sup> Indeed, partisan polarization is reflected in an increasing percentage of representatives voting with their party at the federal level; the percentage of representatives voting with their party has increased over the last twenty years.<sup>115</sup> As breaks within the party over individual votes become rarer, such breaks become more notable and the political downsides to legislators increase, leading ultimately to increased polarization in roll call votes.<sup>116</sup> Empirical research suggests that party influence is most demonstrable in budget resolutions and tax policy matters.<sup>117</sup>

Such party uniformity has come at the expense of moderate incumbents who might wish to eschew party-line politics.<sup>118</sup> A number of recent incumbent Republicans have lost their campaigns for reelection not in the general election

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Democrat/Republican split. However, as discussed below, over the past thirty-five years polarization has increasingly been equated to interparty conflict. See NOLAN M. MCCARTY ET AL., *POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES* 3 (2008).

114. See Aaron Blake, *The GOP's Biggest Sin: 'Unwilling to Compromise'*, WASH. POST (Apr. 1, 2013), <http://www.washingtonpost.com/blogs/post-politics/wp/2013/04/01/the-gops-biggest-sin-unwilling-to-compromise/>, archived at <http://perma.cc/JYJ9-EJAJ> (“[I]ndividual Republican members of Congress continue to have plenty of incentive to hold firm and resist compromise. A recent Pew Research Center survey found that Republican voters preferred principled stands to compromise by a margin of 55 percent to 36 percent. And the vast majority of Republican members have more to fear in their primaries than they do in the general election.”).

115. See Brett Gall, *Politics by the Numbers: Proving the Partisan Divide*, CTR. FOR STUDY PRESIDENCY & CONGRESS (July 2, 2010), <http://thecenterforthestudyofthepresidencyandcongress.wordpress.com/2010/07/02/politics-by-the-numbers-proving-the-partisan-divide/>, archived at <http://perma.cc/F6TE-LRXH>.

116. See, e.g., MCCARTY ET AL., *supra* note 113.

117. See Snyder & Groseclose, *supra* note 112, at 202–03 (“Evidence of [party] influence appears most frequently and steadily on large issues that have clearly distinguished the parties . . . such as budget resolutions that set overall spending priorities, tax policy, social security, social welfare policy, and the national debt limit.”).

118. For a general discussion of the demise of Republican moderates, see Jonathan Chait, *How the GOP Destroyed its Moderates*, NEW REPUBLIC (Oct. 5, 2012), <http://www.newrepublic.com/article/books-and-arts/magazine/108150/the-revolution-eats-its-own#>, archived at <http://perma.cc/TW46-XCBP>, as well as the book it reviews, GEOFFREY KABASERVICE, *RULE AND RUIN: THE DOWNFALL OF MODERATION AND THE DESTRUCTION OF THE REPUBLICAN PARTY, FROM EISENHOWER TO THE TEA PARTY* (2012).

but by losing their party primary to a far more right-wing candidate. These upsets provide high-profile lessons in the dangers of appearing too willing to compromise.<sup>119</sup> Recent Senate incumbents who have lost their seats in a party primary include Senator Richard G. Lugar of Indiana,<sup>120</sup> one of the longest-serving Republican senators at the time of his loss;<sup>121</sup> Senator Robert F. Bennett of Utah;<sup>122</sup> Senator Arlen Specter, forced to switch parties to avoid a widely-predicted Republican primary loss;<sup>123</sup> and Senator Lisa Murkowski of Alaska.<sup>124</sup> Only Murkowski would go on to retain her seat, running as the first write-in candidate to win election to the United States Senate since Senator Strom Thurmond in 1954.<sup>125</sup> And in many places, especially the Deep South, most Republican candidates who appear even occasionally to buck the conservative line are put through purity test challenges in

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119. See, e.g., Charlie Cook, *The GOP's Primal Fear of Primaries*, NAT'L J. (Feb. 10, 2014), <http://www.nationaljournal.com/off-to-the-races/the-gop-s-primal-fear-of-primaries-20140210>, archived at <http://perma.cc/T8JJ-ZQ9A> ("Although a certain amount of paranoia is natural for any elected official, it is particularly prevalent now among Republicans, who are enmeshed in a civil war between the Republican Party establishment and the GOP's tea-party/most conservative elements."); Stephen Stromberg, *Eric Cantor's Defeat Hurts the Country*, WASH. POST (June 11, 2014), <http://www.washingtonpost.com/blogs/post-partisan/wp/2014/06/11/eric-cantors-defeat-is-no-victory-for-democrats/>, archived at <http://perma.cc/H8BK-S3MS> (Noting that even before House Majority Leader Eric Cantor's shocking primary defeat in 2014, "Republicans already feared drawing primary challenges for failing to be adequately doctrinaire, which explains a lot of the dysfunction in Washington. For Republicans, the cautious move has been to refuse compromise with Democrats.").

120. Monica Davey, *Lugar Loses Primary Challenge in Indiana*, N.Y. TIMES (May 8, 2012), <http://www.nytimes.com/2012/05/09/us/politics/lugar-loses-primary-challenge-in-indiana.html>, archived at <http://perma.cc/ESE3-LLNP>.

121. *Id.*

122. Amy Gardner, *Tea Party Wins Victory in Utah as Incumbent GOP Senator Loses Bid for Nomination*, WASH. POST (May 9, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/08/AR2010050803430.html>, archived at <http://perma.cc/6B5K-GN7M>.

123. Stephanie Condon, *Arlen Specter Loses Pennsylvania Democratic Senate Primary to Joe Sestak*, CBS NEWS (May 19, 2010, 4:52 PM), <http://www.cbsnews.com/news/arlen-specter-loses-pennsylvania-democratic-senate-primary-to-joe-sestak/>, archived at <http://perma.cc/6WDP-KSW2>.

124. Linda Feldmann, *Lisa Murkowski of Alaska Bows Out, Is Seventh Losing Incumbent*, CHRISTIAN SCI. MONITOR (Sept. 1, 2010), <http://www.csmonitor.com/USA/Elections/Senate/2010/0901/Lisa-Murkowski-of-Alaska-bows-out-is-seventh-losing-incumbent>, archived at <http://perma.cc/MKV-7R8U>.

125. Vauhini Vara, *Murkowski Is Winner of Alaska Senate Race*, WALL ST. J. (Nov. 18, 2010), <http://online.wsj.com/article/SB10001424052748704648604575620843677187322.html>, archived at <http://perma.cc/TE2E-R9RR>.

the primaries,<sup>126</sup> including, most recently, Senator Thad Cochran of Mississippi, who narrowly won a run-off primary contest.<sup>127</sup> Even the Party leadership is not immune: one recent high-profile casualty was Representative Eric Cantor of Virginia, the sitting house majority leader, who lost his 2014 Republican primary election to a near-totally unknown Tea Party-backed challenger.<sup>128</sup>

Contemporary anti-tax sentiment among conservatives coupled with the internal party pressure placed on moderates to toe the party line at all costs decreases the likelihood of a logrolling model of legislative negotiations.<sup>129</sup> In the neutral environment, a legislator might be willing to trade her support for something of interest to her. In the tax revolt environment, her support will come at a much higher cost, if it comes at all. The combination of the recent anti-tax movement among conservative politicians and increased partisanship has thus had three broad effects, which we identify as the new fiscal politics: (i) bills involving any form of tax increases are, overall, far less likely to pass, and where logrolling is still possible, it will be more difficult and will require larger concessions; (ii) budget negotiations are more likely to follow the game-of-chicken model, such that default outcomes will more frequently occur due to the higher costs associated with negotiated compromise; and (iii) because of (i) and (ii), since fiscal policy often lacks default outcomes, the threat of government shutdowns is real, and their occurrence not improbable. Sure enough, this is precisely what we have seen in a number of

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126. Jonathan Martin, *One Party, Two Factions: South's Republicans Look a Lot Like Its 1970s Democrats*, N.Y. TIMES (June 2, 2014), <http://www.nytimes.com/2014/06/03/us/politics/one-party-two-factions-souths-republicans-look-a-lot-like-its-1970s-democrats.html>, archived at <http://perma.cc/E6NZ-9BA5>.

127. Donna Cassata & Emily Wagster Pettus, *GOP Sen. Thad Cochran Narrowly Defeats Tea Party Opponent*, SALON (June 24, 2014, 9:30 PM), [http://www.salon.com/2014/06/25/gop\\_sen\\_thad\\_cochran\\_narrowly\\_defeats\\_tea\\_party\\_opponent/](http://www.salon.com/2014/06/25/gop_sen_thad_cochran_narrowly_defeats_tea_party_opponent/), archived at <http://perma.cc/5C89-5F6Y>.

128. Jonathan Martin, *Eric Cantor Defeated by David Brat, Tea Party Challenger, in G.O.P. Primary Upset*, N.Y. TIMES (June 10, 2014), <http://www.nytimes.com/2014/06/11/us/politics/eric-cantor-loses-gop-primary.html>, archived at <http://perma.cc/3BLM-L7DJ>.

129. As a recent example, longtime moderate Republican Senator Olympia Snowe of Maine declined to run for reelection in 2012, citing the increasingly partisan environment. See Dana Bash & Paul Steinhauser, *Citing Partisanship, Maine's Snowe Says She'll Leave the Senate*, CNN (Feb. 28, 2012, 8:36 PM), <http://www.cnn.com/2012/02/28/politics/senate-snowe-retiring/index.html>, archived at <http://perma.cc/3WHF-84QZ>.

recent and well-documented fiscal crises that have resulted from the breakdown of negotiations over budget making.<sup>130</sup>

### C. *The Limited Power of Voter Discipline*

Exacerbating these components of the new fiscal politics is the limited role that public opinion has played in altering legislative behavior. This is due in part to several psychological phenomena that influence perception and decision making, including the isolation effect,<sup>131</sup> the priming effect,<sup>132</sup> and the “identified victim effect.”<sup>133</sup> Neuroscience and behavioral economics research has shown that voters communicate inconsistent and asymmetric preferences with respect to fiscal policy. For example, when polled, voters often express incoherent preferences, strongly supporting calls by politicians to cut taxes even when the voters are equally opposed to service cuts.<sup>134</sup>

Because voters both generally express support for cutting spending to balance the federal budget and oppose tax hikes,<sup>135</sup> politicians may be tempted to make cuts to particular programs in order to accomplish this. Yet when individual programs are identified for cutting, the same voters often express strong

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130. See *infra* Part III.B.

131. See, e.g., Edward J. McCaffery & Jonathan Baron, *Isolation Effects and the Neglect of Indirect Effects of Fiscal Policies*, 19 J. BEHAV. DEC. MAKING 289, 290 (2006) (“People know about indirect effects but do not consider them, or do not consider them enough, when evaluating the attraction of the tax or other payment mechanism . . . [W]e follow others in calling this an isolation effect.”).

132. See, e.g., Dennis Chong, Jack Citrin & Patricia Conley, *When Self-Interest Matters*, 22 POL. PSYCHOL. 541, 544 (2001) (“[P]eople are more likely to recognize their own self-interest and to act upon it when . . . they have been primed to think about the personal costs and benefits of the policy.”).

133. The identifiable victim effect is the psychological phenomenon whereby people are more willing to expend resources to save an identifiable victim than an equal number of unidentifiable victims. See, e.g., Karen E. Jenni & George Loewenstein, *Explaining the Identifiable Victim Effect*, 14 J. RISK & UNCERTAINTY 235 (1997); Deborah A. Small & George Loewenstein, *Helping a Victim or Helping the Victim: Altruism and Identifiability*, 26 J. RISK & UNCERTAINTY 5 (2003).

134. See Edward J. McCaffery & Jonathan Baron, *Thinking About Tax*, 12 PSYCHOL. PUB. POL’Y & L. 106, 118 (2006); see also Block, *supra* note 79, at 68 (“The [public’s] ambivalence [about tax cuts] exists because people want both the services that government provides and low personal tax burdens.”).

135. See, e.g., Susan Welch, *The “More for Less” Paradox: Public Attitudes on Taxing and Spending*, 49 PUB. OPINION Q. 310, 310 (1985) (describing widespread research indicating that voters want both tax reductions and increased levels of government services).

disapproval of these cuts.<sup>136</sup> This “isolation effect” frequently leads voters to support the abstract notion of budget cuts, but then to oppose actual budget cuts once identifiable programs are placed on the chopping block.<sup>137</sup> Thus, no politician or party has a strong incentive to take the lead on making painful cuts in services or on raising taxes, because any politicians who take such initiative are likely to be looked upon unfavorably by voters.

Likewise, although voters may be displeased with dysfunctional budget negotiations and the threat or actuality of a government shutdown,<sup>138</sup> this is just one of many issues that voters face at the ballot box. While Congress as an institution has seen historically low approval ratings,<sup>139</sup> voters continue to approve of the work done by their individual representatives at much higher rates.<sup>140</sup> Even when most representatives have negative approval ratings, the combination of gerrymandered districts and the advantages of incumbency lead to far fewer incumbents losing than voter approval ratings would predict.<sup>141</sup>

Further reducing the disciplining power of voters is the asymmetric nature of their responses. While a majority of voters prefer compromise to negotiation failure, a sufficient number of conservative anti-tax voters instead appear to

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136. See DAVID O. SEARS & JACK CITRIN, *TAX REVOLT: SOMETHING FOR NOTHING IN CALIFORNIA* 60–72 (1982) (showing through original research that even voters who strongly support tax cuts also often oppose concomitant cuts in services which those tax cuts would necessitate).

137. See *supra* note 134 and accompanying text.

138. See *infra* Part III.A.

139. For example, during the debt ceiling negotiations in July of 2011, Congress reached a then-record low 18 percent approval rating. Frank Newport, *Congress' Approval Entrenched at 18% as Debt Talks Continue*, GALLUP POLITICS (July 11, 2011), <http://www.gallup.com/poll/148439/Congress-Approval-Entrenched-Debt-Talks-Continue.aspx>, archived at <http://perma.cc/T82Q-ZUM9>.

140. For example, a CBS News/New York Times Poll taken shortly after the fiscal cliff negotiations in 2011 found that while only 6 percent of voters thought most members of Congress deserved reelection, 33 percent felt their own representative should be reelected. *Low Marks for Congress*, CBS NEWS (Sept. 16, 2011, 7:00 AM), [http://www.cbsnews.com/htdocs/pdf/CBSNYTPoll\\_Congress\\_091611.pdf](http://www.cbsnews.com/htdocs/pdf/CBSNYTPoll_Congress_091611.pdf), archived at <http://perma.cc/E5VM-S6DY>.

141. Despite terribly low approval ratings for both Congress as a whole and voters' own representatives, the 2012 general election saw only one incumbent Senator and roughly two dozen incumbent Representatives defeated. Aaron Blake, *Congressional Incumbents Have a Very Good Day*, WASH. POST (Nov. 7, 2012), <http://www.washingtonpost.com/blogs/the-fix/wp/2012/11/07/congressional-incumbents-have-a-very-good-day/>, archived at <http://perma.cc/62ZX-BF94>.

*punish* lawmakers who pursue a strategy of conciliation. As discussed *supra* in Part II.B, a number of Republican lawmakers perceived as too moderate have recently been voted out in primaries or declined to seek reelection when faced with a bitter primary fight.<sup>142</sup> This has only become more prominent with the rise of the Tea Party's ardent anti-tax, budget-deficit reduction platform. This, coupled with growing demand for tighter party unity,<sup>143</sup> has put individual Republican representatives under increasing pressure to oppose any tax hike in any context.<sup>144</sup> And because party primaries are often decided by ideologically extreme portions of the electorate,<sup>145</sup> many lawmakers have strong incentives to stand firm on principle and avoid compromising rather than conciliate and be perceived as a RINO (Republican in name only).<sup>146</sup> Thus, while moderate and swing voters appear to disapprove of legislators who fail to reach a compromise solution or who stake out extreme positions,<sup>147</sup> because an increasing number of legislators are in relatively safe districts,<sup>148</sup> they may have more to gain by sticking to their party's position than seeking compromise. Consequently, as we demonstrate further through examples in the next Part, even when government shutdowns are highly unpopular with the majority of voters, politicians still have structural incentives to flirt with negotiation failure

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142. See *supra* notes 120–125 and accompanying text.

143. See *supra* note 92 and accompanying text.

144. See, e.g., Alex Newman, *Tea Party Activists Target GOP House Leaders*, NEW AM. (Mar. 30, 2011), <http://www.thenewamerican.com/usnews/politics/item/5696-tea-party-activists-target-gop-house-leaders>, archived at <http://perma.cc/83AR-AJDA>.

145. See David W. Brady, Hahrie Han & Jeremy C. Pope, *Primary Elections and Candidate Ideology: Out of Step with the Primary Electorate?*, 32 LEGIS. STUD. Q. 79 (2007) (finding that primary voters favor more ideologically extreme candidates and that congressional candidates respond by positioning themselves closer to the primary electorate than the general electorate).

146. See, e.g., DAVID MARANISS & MICHAEL WEISSKOPF, TELL NEWT TO SHUT UP! 167–68 (1996). Maraniss and Weisskopf describe how, during the 1995–1996 government shutdowns, Speaker of the House Newt Gingrich and Majority Leader Tom DeLay felt they could not appear to compromise once the government shutdown had begun. *Id.* The authors note that in response to a proposal to pass a continuing resolution to reopen the government and restart negotiations, DeLay was quoted as saying, “Our members will kill us!” *Id.*

147. See *infra* Part III.A.

148. See, e.g., Alan I. Abramowitz et al., *Incumbency, Redistricting, and the Decline of Competition in U.S. House Elections*, 68 J. POL. 75 (2006). This, of course, does not account for the United States Senate, elections to which remain bound to historical state boundaries.

anyway.

### III. RECENT GAME-OF-CHICKEN BUDGET FAILURES

As several recent case studies below demonstrate, the rising anti-tax sentiment among conservatives and the structural consequences of increasing partisanship and polarization have led to a number of game-of-chicken-style negotiations over state and federal budgets in which neither party blinked. Polling suggests that moderate, independent, and swing voters dislike government shutdowns or even the threat of government shutdowns, and may want to punish the party viewed as taking too hard a line and being unwilling to compromise to prevent a shutdown.<sup>149</sup> In theory, then, despite conditions which make game-of-chicken politics—and therefore government shutdowns—more likely, we might think that voters should be able to discipline lawmakers through the democratic process by making their displeasure with these outcomes known at the ballot box.

Yet as the following case studies make clear (and bolstering the theoretical discussion in the previous Part) the threat of popular disapproval has often been insufficient to overcome the admixture of partisanship, anti-tax sentiment, and structural incentives to engage in game-of-chicken-style politics. Thus, absent concerted voter disciplining of legislators and the executive, lawmakers today are frequently tempted to walk right to the edge of a shutdown in order to extract concessions knowing that even if neither party blinks, they are unlikely to face serious personal consequences.

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149. For example, an April 2011 NBC News/Wall Street Journal Survey found that a large majority of Independents wanted party leaders in the House and Senate to make compromises to gain consensus on the ongoing 2011 budget debate; 76 percent wanted such compromise from the Democratic leadership and 66 percent from the Republican leaders. Mark Murray, *Poll: Democrats Want Compromise, Republicans Prefer Resolve*, NBC NEWS (Apr. 6, 2011, 6:28 PM), [http://www.nbcnews.com/id/42460168/ns/politics-white\\_house/t/poll-democrats-want-compromise-republicans-prefer-resolve/#.U8HNeEJdVo8](http://www.nbcnews.com/id/42460168/ns/politics-white_house/t/poll-democrats-want-compromise-republicans-prefer-resolve/#.U8HNeEJdVo8), archived at <http://perma.cc/82E-PTVP>. Likewise, a Gallup poll taken during the 2011 debt ceiling negotiation indicated that 72 percent of Independents, as compared to 57 percent of Republicans and 69 percent of Democrats, thought that lawmakers should agree to a compromise, even if it was a plan which they disagreed with. Frank Newport, *Americans, Including Republicans, Want Debt Compromise*, GALLUP POLITICS (July 18, 2011), <http://www.gallup.com/poll/148562/Americans-Including-Republicans-Debt-Compromise.aspx>, archived at <http://perma.cc/T4K6-QEU2>.

To explore the role of public opinion in these game-of-chicken negotiations, we briefly survey several of the most prominent government shutdowns in recent years: the 1995–1996 and 2013 federal government shutdowns, the 2008–2012 California budget crises, and the summer 2011 Minnesota state government shutdown. Although we caution against extrapolating too broadly from these case studies, in all but the California examples, voters expressed more disapproval of the Republican legislature than the Democratic executive (President Clinton in 1995–1996, President Obama in 2013, and Governor Mark Dayton in 2011).<sup>150</sup>

These case studies are thus largely consistent with a story in which Republican legislators are often tempted to take an increasingly hard line in budget negotiations. The most ideologically conservative Republicans increasingly seem to be less concerned about the consequences of government shutdowns than are most Democrats and more moderate Republicans.<sup>151</sup> As game-of-chicken models predict, when one coalition knows that the other coalition is more averse to the consequences of negotiation failure, the less-averse coalition has incentives aggressively to press their position in negotiations.<sup>152</sup> It should thus come as no surprise that voters have blamed Republicans more than Democrats for many of the recent government shutdowns, perceiving Republican legislators as less willing to compromise.<sup>153</sup>

All of the recent government shutdowns resulted in job approval declining for the leadership of both parties. Nevertheless, game-of-chicken-style budget negotiations continue because, despite the unpopularity of government shutdowns, partisan polarization makes compromise more difficult, and neither party is willing to give in to all—or even most—of the other party's demands.

These shutdowns are illustrative of the effects of the new fiscal politics we have described above: although in every shutdown all parties lose voter approval as a result of failing to pass a budget, the short-term game-of-chicken incentives to

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150. See *infra* Part III.A (providing case studies of each shutdown).

151. See *infra* notes 182–185 and accompanying text.

152. See *supra* notes 69–70 and accompanying text.

153. See Lydia Saad, *Americans' Top Critique of GOP: 'Unwilling to Compromise'*, GALLUP POLITICS (Apr. 1, 2013), <http://www.gallup.com/poll/161573/americans-top-critique-gop-unwilling-compromise.aspx>, archived at <http://perma.cc/MD74-A4JP>.

refuse compromise and the absence of longer-term consequences for negotiation failure have led to repeated shutdowns. This is a problem, considering that government shutdowns are costly, and even near shutdowns can have negative effects due to the uncertainty they create.<sup>154</sup> Below, we thus briefly discuss some of the consequences that have stemmed from recent government shutdowns to demonstrate why the threat of government shutdowns should be curtailed. In addition, we explain why we believe the absence of default budgets, coupled with the new fiscal politics, will likely lead to future shutdowns.

### A. Case Studies of Government Shutdowns

#### 1. 1995–1996 Federal Government Shutdowns

The first modern major federal government shutdown took place during the fall of 1995 and early winter of 1996.<sup>155</sup> Given the record Republican gains in the 1994 midterms led by newly-elected Speaker of the House Newt Gingrich and his “Contract with America,” many speculated that congressional Republicans would enjoy popular support should a budget dispute with President Clinton emerge.<sup>156</sup> Indeed, in the months leading up to the fall 1995 government shutdown, many expected a major game-of-chicken confrontation between Gingrich and the Republican House leadership and President Clinton over deficit reduction in the 1996 federal budget.<sup>157</sup> Ahead of the confrontation, both parties were confident that voters would blame the other party’s leadership for a possible government shutdown.<sup>158</sup>

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154. See *infra* Part III.B.

155. See, e.g., ELIZABETH DREW, SHOWDOWN: THE STRUGGLE BETWEEN THE GINGRICH CONGRESS AND THE CLINTON WHITE HOUSE 96–109 (1997) (describing the sense of momentum among Congressional Republicans after the 1994 midterm elections and their push to implement their “Contract for America”).

156. *Id.*

157. See MARANISS & WEISSKOPF, *supra* note 146, at 149.

158. David Maraniss and Michael Weisskopf capture this dynamic in retelling an encounter between then-House Majority Whip Tom Delay and Vice President Al Gore in the lead-up to the 1995 government shutdown. See *id.* at 146. In response to Delay’s threat to shut down the government, Gore responded, “Our polls show you guys lose if the government shuts down.” *Id.* In contrast, Republicans expected that their approach would “pay political dividends” by “demonstrat[ing] their dedication to cutting the cost and size of the Federal

Pressing their perceived advantage, congressional Republicans sought to reduce dramatically the size of the federal government over the course of 1995, seeking to cut projected federal spending by \$894 billion over seven years, including billions in cuts to Medicare, Medicaid, entitlement programs, and the earned income tax credit.<sup>159</sup> President Clinton, refusing to pass a budget that would have gutted many Democratically-backed social welfare programs, haggled over differences with Republicans into the fall while the government operated after October 1—the start of the new fiscal year<sup>160</sup>—on a series of continuing resolutions set to expire on November 13.<sup>161</sup> When both President Clinton and Congressional Republicans stood firm on their demands at the expiration of the continuing resolutions, all but essential government services shut down between November 13 and 19, resulting in the furlough of an estimated 800,000 federal workers.<sup>162</sup> The parties reached a compromise on a temporary spending bill on November 20, reopening the government until December 15, but after President Clinton vetoed the budget-reconciliation bill on December 6 and the parties could not reach an agreement, the government shut down again on December 15, this time idling over 260,000 workers.<sup>163</sup> This shutdown, which lasted for 21 days between December 15, 1995 and January 6, 1996, was the longest shutdown in the federal government's history and resulted in the furlough of roughly 284,000 federal employees and the nonpayment of an additional 475,000 excepted federal employees who continued to work throughout the shutdown.<sup>164</sup> The shutdown finally ended when Clinton committed to balancing the federal budget within seven years in exchange for a budget containing billions

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Government.” Adam Clymer, *Big Risk for G.O.P.*, N.Y. TIMES (Nov. 11, 1995), <http://www.nytimes.com/1995/11/11/us/big-risk-for-gop.html>, archived at <http://perma.cc/TTC7-ZDH8>. Republicans anticipated the public would blame President Clinton for vetoing their budgets without making a plausible case for how he would balance the budget. *Id.*

159. *GOP Throws Down Budget Gauntlet*, 51 CONG. Q. ALMANAC 2-30, 2-31 (1995).

160. According to the Congressional Budget Process, the federal government's fiscal year begins on October 1 of the prior calendar year. 2 U.S.C. § 631 (2012).

161. See CLINTON T. BRASS, CONG. RESEARCH SERV., RL34680, SHUTDOWN OF THE FEDERAL GOVERNMENT: CAUSES, PROCESSES, AND EFFECTS 9 (2013).

162. *Id.*

163. See *GOP Throws Down Budget Gauntlet*, *supra* note 159, at 2-59, 2-62.

164. BRASS, *supra* note 161, at 9-10.

less in cuts to Medicare and Medicaid than sought by Republicans.<sup>165</sup> Despite the costly and embarrassing shutdown, Clinton and Congressional Republicans “never closed the gap on core policy questions, such as how far to go in overhauling expensive health and welfare entitlements”<sup>166</sup>—evidence of the needless consequences associated with shutdowns that are highly unlikely to bring about significant fiscal policy changes worth their costs.

Both sides sought to frame the shutdowns as the product of the other side’s unreasonable behavior.<sup>167</sup> These moves were accompanied by highly political rhetoric: in his message accompanying the veto, Clinton labeled the Republican proposal as one that was “extreme,” and would “raise taxes on millions of working men and women and their families” while “provid[ing] a huge tax cut . . . [for] those who are already the most well-off.”<sup>168</sup> Vice President Al Gore accused Republicans of having “not done their job” and trying “to make an end run around the Constitution, around the normal procedures.”<sup>169</sup> Gingrich blamed Clinton for a potential shutdown,<sup>170</sup> reasoning that Clinton was responsible since he held the final veto power, while the Republican Committee released an advertisement claiming, “[T]he President spent \$607 million and closed the Washington Monument. It would have been cheaper to balance the budget.”<sup>171</sup>

Contrary to both parties’ expectations, voters viewed *all* parties involved in negotiations more negatively as a result of the shutdown. Clinton’s approval rating for his handling of the

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165. Jerry Gray, *A Chilly G.O.P. Response to Clinton’s Budget Plan*, N.Y. TIMES (Jan. 8, 1996), <http://www.nytimes.com/1996/01/08/us/battle-over-budget-overview-chilly-gop-response-clinton-s-budget-plan.html>, archived at <http://perma.cc/M8LJ-C2Z2>.

166. *Budget Talks Limp Into 1996, Then Collapse*, 52 CONG. Q. ALMANAC 2–5 (1996).

167. Compare MARANISS & WEISSKOPF, *supra* note 146, at 147 (“Gingrich . . . complained that the White House was making movement toward compromise more difficult by labeling him and his troops ‘extremists.’”), with *id.* at 166 (“Clinton placed the blame for the breakdown on the Republicans and said they would be held responsible for shutting down the government again.”).

168. WILLIAM J. CLINTON, VETO OF H.R. 2491, H.R. DOC. NO. 104–141, at 1.

169. *Nightline: Government Shutdown Battle* (ABC television broadcast Nov. 13, 1995) (transcript available at <http://www.pbs.org/wgbh/pages/frontline/shows/clinton/etc/11131995.html>, archived at <http://perma.cc/UN8H-XSXB>).

170. DREW, *supra* note 155, at 311.

171. *Nightline: Government Shutdown Battle*, *supra* note 169.

shutdown was a mere 48 percent,<sup>172</sup> Gingrich's an even more meager 22 percent.<sup>173</sup> While 49 percent blamed Republicans in Congress for the government shutdown, 26 percent also blamed President Clinton, and 19 percent blamed both parties for the shutdown.<sup>174</sup> Gingrich was especially pilloried: he reached a record 65 percent disapproval rating during his budget battle with President Clinton;<sup>175</sup> 64 percent of Americans opposed his reelection to the speakership the following term;<sup>176</sup> and 70 percent approved of his decision to step down as Speaker after the November 1998 election.<sup>177</sup> Thus, while the public placed the majority of the blame for the budget crisis and subsequent shutdown on Gingrich and congressional Republicans, all parties were viewed far less favorably. Voters felt that both sides were trying to gain political advantage from the crisis, with 36 percent accusing Clinton and 52 percent accusing Republicans of doing so.<sup>178</sup>

Despite widespread disapproval from the American public, a costly and damaging government shutdown, and little to show for delaying a budget agreement that was largely the same as that proposed prior to the shutdown, political leaders faced insufficient costs to avoid the shutdown and the temptation of trying to extract concessions from the other party by threatening—and enacting—such a shutdown.

## 2. 2013 Federal Government Shutdown

Like the 1995–1996 federal government shutdown, the recent 2013 federal government shutdown stemmed from brinksmanship and a negotiation stalemate between a Democratic President and a Republican-led House of

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172. *Americans Blame GOP for Budget Mess*, CNN (Nov. 15, 1995, 11:10 AM), [http://www.cnn.com/US/9511/debt\\_limit/11-15/poll/poll\\_txt.html](http://www.cnn.com/US/9511/debt_limit/11-15/poll/poll_txt.html), archived at <http://perma.cc/L7PB-W7NR>.

173. *Id.*

174. *Id.*

175. Gary Langer, *Gingrich as Speaker: Remembering When*, ABC NEWS (Sept. 28, 2007, 10:02 AM), <http://abcnews.go.com/blogs/politics/2007/09/gingrich-as-spe/>, archived at <http://perma.cc/L7PB-W7NR>.

176. *Id.*

177. *Id.*

178. Alec Tyson, *The Last Government Shutdown and Now: A Different Environment*, PEW RES. CTR. (Sept. 13, 2013), <http://www.pewresearch.org/fact-tank/2013/09/30/the-last-government-shutdown-and-now-a-different-environment/>, archived at <http://perma.cc/B6E3-6KBD>.

Representatives. Much like the 1995–1996 shutdown, the public reaction viewed all parties in a more negative light, but the Republicans more so. Much of the lead-up to the shutdown over the summer of 2013 centered on the Affordable Care Act, with many congressional Republicans seeking to undermine implementation of healthcare reform through strategic defunding during budget negotiations. Just as we have described above, many Republicans hoped to play a game of chicken with the federal budget, “hop[ing] that the prospect of a government shutdown would pressure Senate Democrats to make even a symbolic concession to their demand for changes in the Affordable Care Act, perhaps by agreeing to the repeal of the medical-device tax intended to help fund the law.”<sup>179</sup> Furthermore, many conservatives in the House also opposed the necessary increase in the federal debt ceiling, which Speaker of the House John Boehner had hoped to tie to delays in the implementation of the ACA.<sup>180</sup> After the Democratic-led Senate rejected a final budget proposal by House Republicans that would have delayed the implementation of the ACA’s “individual mandate,” and with the federal government lacking appropriations into the new fiscal year, all non-essential federal government employees and offices shut down on October 1st, the first federal government shutdown in seventeen years.<sup>181</sup>

Ahead of the shutdown, some members of the Republican Party were already gloating about it. Minnesota Representative Michele Bachmann said she was “very excited” about getting “exactly what we wanted,” while Texas Representative John Abney Culberson said, “It’s wonderful . . . [w]e’re 100 percent united!”<sup>182</sup> Many others expressed similar

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179. Janet Hook & Kristina Peterson, *Government Heads Toward Shutdown*, WALL ST. J. (Sept. 30, 2013, 5:16 AM), <http://online.wsj.com/news/articles/SB10001424052702304373104579105483307740074>, archived at <http://perma.cc/6ATJ-R2HP>.

180. See Janet Hook & Kristina Peterson, *No Clear Path to Avoid Shutdown as House GOP Stands Firm*, WALL ST. J. (Sept. 26, 2013, 7:36 PM), <http://online.wsj.com/news/articles/SB10001424052702303342104579099151237112452>, archived at <http://perma.cc/42QV-QH8V>.

181. Lori Montgomery & Paul Kane, *Senate Rejects House Amendments to Spending Bill as Shutdown Looms*, WASH. POST (Oct. 1, 2013), [http://www.washingtonpost.com/politics/washington-braces-for-the-first-shutdown-of-the-national-government-in-17-years/2013/09/30/977ebca2-29bd-11e3-97a3-ff2758228523\\_story.html](http://www.washingtonpost.com/politics/washington-braces-for-the-first-shutdown-of-the-national-government-in-17-years/2013/09/30/977ebca2-29bd-11e3-97a3-ff2758228523_story.html), archived at <http://perma.cc/72C2-JYJE>.

182. Ed O’Keefe & Rosalind S. Helderman, *On Cusp of Shutdown, House*

sentiments about the desirability of the shutdown.<sup>183</sup> Nevertheless, others, such as California Representative Devin Nunes, warned that Democrats would likely benefit from a shutdown that would hurt the Republican Party,<sup>184</sup> arguing that it was “moronic” to shut down the government over a dispute regarding the ACA.<sup>185</sup> New York Representative Peter T. King concluded that House Republicans were locked in “the dead end that Ted Cruz created.”<sup>186</sup> Democrats largely sought to cast the looming shutdown as resulting from the Republicans’ inappropriate overreaching: Senate Majority Leader Harry Reid flatly stated that “[w]e are not going to be bullied,” and President Obama argued that “[y]ou don’t get to extract a ransom for doing your job.”<sup>187</sup>

Once again, the shutdown negatively affected voters’ views of *all* government leadership.<sup>188</sup> According to a Gallup poll taken during the shutdown, Americans had a record-low satisfaction with the way the nation was being governed, with only 18 percent of respondents satisfied and 81 percent dissatisfied, the worst assessment in the over-forty-year history of the Gallup poll.<sup>189</sup> In addition, the favorability ratings of both President Obama and Speaker of the House John Boehner declined dramatically during the shutdown: President Obama’s net favorability rating dropped from +10 to 0,<sup>190</sup> and Boehner’s

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*Conservatives Excited, Say They Are Doing the Right Thing*, WASH. POST (Sept. 28, 2013), [http://www.washingtonpost.com/politics/on-cusp-of-shutdown-house-conservatives-excited-say-they-are-doing-the-right-thing/2013/09/28/2a5ab618-285e-11e3-97e6-2e07cad1b77e\\_story.html](http://www.washingtonpost.com/politics/on-cusp-of-shutdown-house-conservatives-excited-say-they-are-doing-the-right-thing/2013/09/28/2a5ab618-285e-11e3-97e6-2e07cad1b77e_story.html), archived at <http://perma.cc/69K5-27BG>.

183. See Svati Kirsten Narula, Ryan Jacobs & Judith Ohikuare, *32 Republicans Who Caused the Government Shutdown: Meet the House Conservative Hardliners*, ATLANTIC (Oct. 4, 2013, 4:46 PM), <http://www.theatlantic.com/politics/archive/2013/10/32-republicans-who-caused-the-government-shutdown/280236/>, archived at <http://perma.cc/32EZ-4YKN>.

184. See Hook & Peterson, *supra* note 179.

185. Jonathan Weisman & Jeremy W. Peters, *Government Shuts Down in Budget Impasse*, N.Y. TIMES (Sept. 30, 2013), <http://www.nytimes.com/2013/10/01/us/politics/congress-shutdown-debate.html>, archived at <http://perma.cc/98SL-LGDM>.

186. *Id.*

187. *Id.*

188. See Joy Wilke, *Americans’ Satisfaction With U.S. Gov’t Drops to New Low*, GALLUP POLITICS (Oct. 10, 2013), <http://www.gallup.com/poll/165371/americans-satisfaction-gov-drops-new-low.aspx>, archived at <http://perma.cc/N7A4-ULUR>.

189. *Id.*

190. Jeffrey M. Jones, *Americans Down on D.C. Leaders Since Shutdown Began*, GALLUP POLITICS (Oct. 10, 2013), <http://www.gallup.com/poll/165362/americans-down-leaders-shutdown-began.aspx>, archived at <http://perma.cc/7M37->

from -10 to -24.<sup>191</sup> Boehner's net favorability rating hit a new low during the shutdown.<sup>192</sup> Further, the Republican Party's favorability dropped 10 percentage points in the month leading up to the shutdown, to a record-low 28 percent favorability in the twenty-year history of the poll.<sup>193</sup> An NBC News/Wall Street Journal poll found that while 31 percent of those polled blamed President Obama for the shutdown, 53 percent blamed Republicans in Congress. Seventy percent said Republicans were putting politics ahead of what was best for the country, while 51 percent said the same about President Obama.<sup>194</sup>

In total, the shutdown lasted sixteen days until the Treasury warned that it was less than a day away from defaulting on its obligations.<sup>195</sup> With the danger of a government default looming, enough moderate Republicans in the House and Senate voted to end the shutdown and fund the government into early 2014, averting a default on the national debt.<sup>196</sup> Unfortunately, as we described in Part II, above, even widespread dissatisfaction with government shutdowns does not necessarily translate into effective voter disciplining of politicians, because both parties—and especially the Republican Party—are increasingly driven by the more partisan segments of their membership. Indeed, three months after the 2013 shutdown, a Washington Post/ABC News poll showed that Republican voters supported the Tea Party at the same rate after the shutdown as before it, signaling that even as a majority of Americans disapproved of the Republican tactics that led to the shutdown, the core GOP constituency continued to show largely unwavering support for the party's

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191. *Id.*

192. *Id.*

193. Andrew Dugan, *Republican Party Favorability Sinks to Record Low*, GALLUP POLITICS (Oct. 9, 2013), <http://www.gallup.com/poll/165317/republican-party-favorability-sinks-record-low.aspx>, archived at <http://perma.cc/99JH-KHY3>.

194. Cathleen Decker, *NBC News/Wall Street Journal Poll Adds to Republican Shutdown Woes*, L.A. TIMES (Oct. 11, 2013), <http://articles.latimes.com/2013/oct/11/news/la-pn-nbc-wsj-poll-republican-shutdown-20131011>, archived at <http://perma.cc/6PXH-M7EA>.

195. Jonathan Weisman, *Senators Restart Talks as Default Looms*, N.Y. TIMES (Oct. 15, 2013), <http://www.nytimes.com/2013/10/16/us/politics/congress-budget-debate.html>, archived at <http://perma.cc/3MR4-JNLT>.

196. Jonathan Weisman & Ashley Parker, *Republicans Back Down, Ending Crisis Over Shutdown and Debt Limit*, N.Y. TIMES (Oct. 16, 2013), <http://www.nytimes.com/2013/10/17/us/congress-budget-debate.html>, archived at <http://perma.cc/HD3H-Y2GN>.

most anti-tax politicians.<sup>197</sup>

### 3. 2008–2010 California Shutdowns

California's budget crises are particularly exemplary of the new fiscal politics, given the prolonged length of California's crises, the highly partisan climate in which budget negotiations took place, and the repeated failure to pass a budget on time. California's dysfunctions, like those of the federal government, have resulted from the highly polarized nature of the state legislature. Although Democrats have generally held majorities in both the California Senate and State Assembly,<sup>198</sup> Democratic legislators regularly struggled during this period to achieve the two-thirds supermajority necessary to increase taxes and pass a budget, and thus the support of at least some Republicans was crucial to California's fiscal policy.<sup>199</sup> Much

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197. See Jaime Fuller, *What Shutdown? New Poll Shows Tea Party Support Remains Steady*, WASH. POST (Jan. 28, 2013), <http://www.washingtonpost.com/blogs/the-fix/wp/2014/01/28/what-shutdown-new-poll-shows-tea-party-support-remains-steady/>, archived at <http://perma.cc/KW57-FMVY>.

198. See Adam Nagourney, *With a Supermajority, California Democrats Begin to Make Plans*, N.Y. TIMES (Dec. 16, 2012), <http://www.nytimes.com/2012/12/17/us/politics/for-california-democrats-supermajority-is-a-new-challenge.html>, archived at <http://perma.cc/EFX6-N4S6> (noting that while the Democratic Party has controlled the California Legislature in a nearly unbroken stretch over the past 40 or so years, it only recently achieved a supermajority).

199. Until 2011, California's Constitution required a supermajority of two-thirds of lawmakers in both houses to pass a budget, and while the Democrats held large majorities in both houses, they could not surpass this supermajority without Republican support. Assembly and Senate Republicans regularly vowed to vote against any budget that included tax increases, and instead proposed a bill that would implement an automatic state spending cap based on population growth and inflation rates. Matthew Yi, *Latest Gambit in State Budget Impasse*, S.F. CHRON., Aug. 15, 2008, at B1, available at <http://www.sfgate.com/bayarea/article/Latest-gambit-in-state-budget-impasse-3273148.php>, archived at <http://perma.cc/5U9N-AVA7>.

In November 2010, voters approved Proposition 25, which reduced the requirements to pass the budget to a simple majority and permanently docked legislators' pay for each day the budget was late. Wyatt Buchanan & Justin Berton, *Prop. 25, Which Eases Budget Process, Passes*, S.F. CHRON. (Nov. 3, 2010), <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2010/11/02/MNGN1G2HVF.DTL>, archived at <http://perma.cc/ZDX9-XLW2>. However, voters also passed Proposition 26, which requires two-thirds approval for many fees that previously required a majority vote. *Id.* As a result, any time the state legislature seeks to increase taxes or fees, it must achieve the same supermajority to do so. This effectively means that in periods of budget deficits—which are all too common in recent years—any attempt to balance the budget through more than just budget cuts will require the same supermajority as before.

like the national Republican Party, California Republicans have manifested increasingly unified opposition to any form of tax increases.<sup>200</sup> Individual Republicans who join Democrats to vote for tax increases often become subject to intense conservative backlash. For example, when six Republicans known as the Sacramento Six voted with Democrats on a budgetary bill in February 2009, three faced organized recall efforts, and the state Republican Party froze campaign support to all six.<sup>201</sup> Whatever incentives these legislators might have had to compromise in the face of voter disapproval, they faced stronger threats of party and primary discipline to discourage compromising.

In 2008, the California Legislature and Governor Arnold Schwarzenegger took a then-record eighty-five days beyond the annual June 15 deadline to sign the next year's budget,<sup>202</sup> in what political scientist Larry Gerston called "by far the worst" budget impasse in thirty years.<sup>203</sup> As a cash-savings measure while California went without a working budget, Governor Schwarzenegger ordered pay cuts for thousands of state workers to the federal minimum wage of \$6.55 and layoffs of more than 10,000 employees.<sup>204</sup> After state Controller John Chiang refused the Governor's order, Schwarzenegger sued Chiang, ordering him to slash their pay.<sup>205</sup> The Governor also delayed payments to nursing homes, community colleges, and state vendors, among others.<sup>206</sup>

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200. See CAL. REPUBLICAN PARTY, CALIFORNIA REPUBLICAN PARTY PLATFORM 2012–2016, at 9 (2012), available at <http://www.cagop.org/wp-content/uploads/2014/05/2012-2016-Platform.pdf>, archived at <http://perma.cc/BG7P-3B2H> ("We call upon our government officials to join a pledge to stand together against any new taxes.").

201. Martin A. Sullivan, *California's Epic Budget Struggle*, TAX NOTES, July 29, 2009, at 212.

202. Kevin Yamamura, *Schwarzenegger Signs Record-Late State Budget*, SACRAMENTO BEE (Sept. 23, 2008, 10:23 AM), [http://www.ezpolicyblog.com/file/080923\\_SacBee\\_103bil.pdf](http://www.ezpolicyblog.com/file/080923_SacBee_103bil.pdf), archived at <http://perma.cc/8T3E-UFR7>.

203. Matthew Yi, *State Budget Impasse Looks Poised to Worsen*, S.F. CHRON., Aug. 11, 2008, at B1, available at <http://www.sfgate.com/bayarea/article/State-budget-impasse-looks-poised-to-worsen-3200151.php>, archived at <http://perma.cc/WH2R-96ZL>.

204. Matthew Yi, *Governor Sues Controller to Force Pay Cuts*, S.F. CHRON., Aug. 12, 2008, at B1, available at <http://www.sfgate.com/bayarea/article/Governor-sues-controller-to-force-pay-cuts-3199879.php>, archived at <http://perma.cc/4ZZT-Y3DZ>.

205. *Id.*

206. Arnold Schwarzenegger, Cal. Governor, Press Conference Vowing to Veto State Budget (Sept. 16, 2008) (transcript available at <http://www.latimes.com/>

Legislators finally agreed on a budget seventy-eight days after the July 1 start of the fiscal year.<sup>207</sup> Additional revenue was gained primarily by increasing individual withholdings during the first half of the next calendar year and frontloading quarterly tax payments by individuals and businesses,<sup>208</sup> as well as by making reductions in deductions for corporate taxpayers.<sup>209</sup> These temporary solutions mostly consisted of accounting gimmicks to borrow time, rather than genuine efforts to raise long-term revenues, as Democratic lawmakers were constrained from raising revenues by Republicans opposed to any form of tax increases.<sup>210</sup> Indeed, Governor Schwarzenegger threatened to veto this budget proposal, calling it “a fake budget reform.”<sup>211</sup> Then, faced with the prospect that the legislature could override his veto, Schwarzenegger also threatened to veto any future bill that would require generating additional revenue.<sup>212</sup>

Negotiations over the 2010–2011 budget were also stalled down to the wire, and by July, Governor Schwarzenegger once again sought to reduce state workers’ salaries to the minimum wage, this time rebuffed by a state judge.<sup>213</sup> Schwarzenegger was again blocked by the courts when he sought to furlough state workers.<sup>214</sup> Lawmakers and the Governor finally reached an agreement in early October—one hundred days after the deadline—that included \$3.5 billion in cuts to public education and public employee pensions. It also employed yet more

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news/local/la-me-budget17-2008sep17-transcript,0,5758192.story, *archived at* <http://perma.cc/QUD7-8KEU>.

207. Matthew Yi, *Budget Approved Despite Governor’s Threatened Veto*, S.F. CHRON. (Sept. 16, 2008, 4:00 AM), <http://www.sfgate.com/politics/article/Budget-approved-despite-governor-s-threatened-veto-3194573.php>, *archived at* <http://perma.cc/7REL-5ZAX>.

208. *Id.*

209. Matthew Yi, *Legislature Approves Record-late Budget*, S.F. CHRON., Sept. 20, 2008, at A1, *available at* <http://www.sfgate.com/news/article/Legislature-approves-record-late-budget-3194254.php>, *archived at* <http://perma.cc/HYZ3-YG6E>.

210. *Id.*

211. Schwarzenegger, *supra* note 206.

212. *Id.*

213. Jennifer Steinhauer, *On State Pay Cuts, Judge Rebuffs California Governor*, N.Y. TIMES (July 16, 2010), <http://www.nytimes.com/2010/07/17/us/politics/17minimum.html#>, *archived at* <http://perma.cc/H345-T8BL>.

214. Marisa Lagos, *Governor Appeals Judge’s Furlough Ruling*, S.F. CHRON., Aug. 11, 2010, at C4, *available at* <http://www.sfgate.com/bayarea/article/Governor-appeals-judge-s-furlough-ruling-3178946.php>, *archived at* <http://perma.cc/L2UZ-VGSL>.

accounting gimmicks, such as deferrals on payments and optimistic but unrealistic revenue projections.<sup>215</sup> Just days before the governor and legislature agreed to a budget, a public opinion poll found that a record-low 10 percent of registered voters approved of the job the legislature was doing, with 80 percent disapproving.<sup>216</sup> Likewise, Governor Schwarzenegger, just months from leaving office, also hit an all-time-low 23 percent approval rating.<sup>217</sup>

Empirical research on California's political process supports our proposition that many of the structural features of the new fiscal politics are responsible for budget delays and negotiation breakdowns. A recent study found that divided government and party polarization appear to be the main political-environment variables that drive gridlock.<sup>218</sup>

#### 4. 2011 Minnesota Shutdown

Another recent state-government shutdown occurred during the summer of 2011 in the state of Minnesota.<sup>219</sup> While Democratic Governor Mark Dayton narrowly won election on a platform of preserving state services by increasing taxes on the richest 2 percent of Minnesotans, Republicans recaptured the legislature for the first time in thirty-eight years on a pledge of no new taxes.<sup>220</sup> Such seemingly contradictory election results

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215. Adam Nagourney, *California Lawmakers Pass Overdue Budget*, N.Y. TIMES (Oct. 7, 2010), <http://www.nytimes.com/2010/10/08/us/08california.html>, archived at <http://perma.cc/Y9RJ-XSAA>.

216. Wyatt Buchanan, *Field Poll: Legislature Sinks to All-Time Low*, S.F. CHRON., Sept. 28, 2010, at C3, available at <http://www.sfgate.com/bayarea/article/Field-Poll-Legislature-sinks-to-all-time-low-3173029.php>, archived at <http://perma.cc/W7NL-VNNX>.

217. *Id.*

218. Jeff Cummins, *An Empirical Analysis of California Budget Gridlock*, 12 ST. POL. & POL'Y Q. 23 (2012). Cummins notes that another source of gridlock is the inherent instability of relying primarily on a state income tax to raise revenue, since (not infrequent) economic downturns and booms lead to sudden and unpredictable fluctuations in state revenue. For additional discussion of the role of California's tax mix, see David Gamage, *Coping Through California's Budget Crises in Light of Proposition 13 and California's Fiscal Constitution*, in PROPOSITION 13 AT 30, at 51 (Jack Citrin & Isaac Martin eds., 2009).

219. See Rachel Weiner, *Minnesota Government Shuts Down*, WASH. POST (July 1, 2011, 9:34 AM), [http://www.washingtonpost.com/blogs/the-fix/post/minnesota-government-shuts-down/2011/07/01/AGvBVTtH\\_blog.html](http://www.washingtonpost.com/blogs/the-fix/post/minnesota-government-shuts-down/2011/07/01/AGvBVTtH_blog.html), archived at <http://perma.cc/KR6X-V4LM>.

220. See Baird Helgeson et al., *Broken Deals, Bitter Words and a State Shuts Down*, STAR TRIB. (July 1, 2011, 1:52 PM), <http://www.startribune.com/politics/>

are all too possible with highly gerrymandered districts, asymmetric voter preferences, and a high degree of partisan polarization. As a result, the Governor and state legislature faced a stalemate over how to address the state's \$5 billion budget deficit in light of decreasing state revenue. Republicans proposed state spending cuts, layoffs for some state workers and teachers, the delay of \$700 million in payments to public schools (which were already owed roughly \$1 billion by the state), and borrowing ahead of tobacco settlement payments to the state.<sup>221</sup>

In an exemplary display of game-of-chicken politics, state Republicans also sought to include anti-abortion and voter ID measures in the appropriations bill—measures they had been unable to pass as separate bills—hoping Dayton would feel forced to pass their version of the bill rather than risk a shutdown.<sup>222</sup> Dayton countered by proposing a tax increase on the wealthiest 2 percent of Minnesota taxpayers.<sup>223</sup> As game-of-chicken modeling would predict, neither party appeared willing to compromise. When the parties could not come to an agreement by June 30, all non-emergency services of the state government of Minnesota officially shut down.<sup>224</sup> Twenty-three thousand of roughly 36,000 state employees were furloughed,<sup>225</sup> and only critical functions and constitutionally-mandated programs were permitted to continue operation, as determined by Ramsey County District Court Judge Kathleen R. Gearin.<sup>226</sup> In total, the shutdown lasted twenty days from July 1 to July 20.<sup>227</sup> The shutdown ended when Governor

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statelocal/124824189.html, archived at <http://perma.cc/HV7S-YJ2N>; Martiga Lohn & Amy Forliti, *Minnesota Government Shutdown 2011: Budget Deal Unreached*, HUFFINGTON POST (July 1, 2011, 10:26 PM), [http://www.huffingtonpost.com/2011/07/01/minnesota-government-shutdown-2011\\_n\\_888418.html](http://www.huffingtonpost.com/2011/07/01/minnesota-government-shutdown-2011_n_888418.html), archived at <http://perma.cc/KXR5-N83T>.

221. See Helgeson et al., *supra* note 220.

222. David Bailey, *Minnesota Government Shutdown Begins After Talks Fail*, REUTERS (July 1, 2011, 7:56 PM), <http://www.reuters.com/article/2011/07/01/us-minnesota-budget-idUSTRE7600MG20110701>, archived at <http://perma.cc/QBV2-WVUN>.

223. *Id.*

224. *Id.*

225. *Id.*

226. Order Granting Motion for Temporary Funding at 7, In Re Temporary Funding of Core Functions of the Executive Branch of the State of Minnesota, No. 62-CV-11-5203 (2d Dist. Ct. Minn. June 29, 2011).

227. Monica Davey, *Minnesota Governor Signs Budget, Ending Shutdown*, N.Y. TIMES, July 20, 2011, at A13, available at <http://www.nytimes.com/>

Dayton and the Republican legislature agreed to the deferred payments to public schools and borrowing ahead of tobacco-company payments in exchange for no tax increase and the removal of anti-abortion and voter ID measures.<sup>228</sup>

Once again, the prospect of strong voter disapproval was insufficient incentive for either party to give in and avoid a shutdown. In the aftermath of the shutdown, voters appeared to blame the Republican legislature more than Governor Dayton, but the approval ratings of both fell.<sup>229</sup> According to a MinnPost poll, 42 percent of respondents blamed the Republicans in the legislature, 21 percent blamed Governor Dayton, and 22 percent blamed both equally.<sup>230</sup> Likewise, a St. Cloud University survey found that 57 percent of respondents blamed Republicans for the shutdown, 19 percent blamed Governor Dayton, and 18 percent blamed both.<sup>231</sup>

### *B. The Harms of Shutdowns (and Near Shutdowns)*

Each of these negotiation failures, in the absence of default budgets, has led to government shutdowns. These are costly to public sector employees, government contractors, and the public at large. Even very short government shutdowns can have significant consequences and diminish the quality of public functions and services. Moreover, even when government shutdowns are averted at the last minute, the uncertainty surrounding unstable budget negotiations itself creates harmful consequences. Uncertainty about the future of the federal and state budgets and the stability of government taxing and spending can harm economic growth, investor

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2011/07/21/us/21minnesota.html, archived at <http://perma.cc/58T2-YZNE>.

228. See Michael A. Fletcher & Rachel Weiner, *Minnesota Governor, GOP Lawmakers Agree to End Shutdown*, WASH. POST (July 14, 2011), [http://www.washingtonpost.com/business/economy/governor-gop-lawmakers-agree-to-end-shutdown/2011/07/14/gIQAP1brEI\\_story.html](http://www.washingtonpost.com/business/economy/governor-gop-lawmakers-agree-to-end-shutdown/2011/07/14/gIQAP1brEI_story.html), archived at <http://perma.cc/5EQ-UFDV>.

229. Eric Black, *MinnPost Poll: Minnesotans Blame GOP for Shutdown*, MINNPOST (July 28, 2011), <http://www.minnpost.com/politics-policy/2011/07/minnpost-poll-minnesotans-blame-gop-shutdown>, archived at <http://perma.cc/6BBS-LVAZ>.

230. *Id.*

231. SAINT CLOUD ST. UNIV. SURVEY, ANNUAL MINNESOTA STATEWIDE SURVEY FALL 2011, FINDINGS REPORT, available at <http://www.scribd.com/doc/72353118/Fall-Findings-Sfrank-Version-11-10>, archived at <http://perma.cc/3RX7-52P6>.

confidence in federal debt and state and municipal bonds, and the public's faith in government more generally.

Both of the recent federal government shutdowns are paradigmatic of the direct costs of shutdowns. The 1995–1996 shutdowns were estimated to cost \$1.4 billion in direct revenue losses.<sup>232</sup> In the wake of the 2013 federal government shutdown, the Office of Management and Budget reported that the federal government shutdown would lower fourth quarter GDP growth by between 0.2 and 0.6 percentage points, or between \$2 and \$6 billion in lost output,<sup>233</sup> with private analysts estimating over \$3 billion in lost output.<sup>234</sup>

Shutdowns are also expensive because either government employees go without a salary for the period of the shutdown, or their retroactive pay once government restarts effectively forces the government to pay for employees who were unable to do any work. The 2013 federal government shutdown, for example, cost the government approximately \$2.5 billion in total compensation for furloughed employees who did not work during the shutdown, an estimated loss of over 6.6 million days of work.<sup>235</sup> Shutdowns are also costly for employees: the 1995–1996 government shutdowns cost nearly \$1.1 billion in wages to furloughed workers,<sup>236</sup> and the 2011 Minnesota government shutdown cost Minnesota state employees \$65 million in lost income because the agreement between Governor Dayton and the legislature did not include a back-pay provision.<sup>237</sup>

The budget crises in California were also indicative of another consequence of budget negotiation failure in the absence of defaults: reputation loss. In response to the state controller's issuance of I.O.U.s—or warrants—in lieu of payments (a gimmick that the National Conference of State

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232. Richard A. Gephardt, *The Congressional Budget Impasse*, 16 ST. LOUIS U. PUB. L. REV. 5, 11 (1996).

233. OFFICE OF MGMT. & BUDGET, IMPACTS AND COSTS OF THE OCTOBER 2013 FEDERAL GOVERNMENT SHUTDOWN 2 (2013).

234. Annie Lowrey & Michael D. Shear, *Shutdown to Cost U.S. Billions, Analysts Say, While Eroding Confidence*, N.Y. TIMES, Oct. 18, 2013, at A12, available at [http://www.nytimes.com/2013/10/19/us/shutdown-to-cost-us-billions-analysts-say-while-eroding-confidence.html?\\_r=0](http://www.nytimes.com/2013/10/19/us/shutdown-to-cost-us-billions-analysts-say-while-eroding-confidence.html?_r=0), archived at <http://perma.cc/RW9R-T54V>.

235. OFFICE OF MGMT. & BUDGET, *supra* note 233, at 4.

236. *Id.* at 13.

237. MINN. MGMT. & BUDGET, STATE GOVERNMENT SHUTDOWN EXECUTIVE SUMMARY 4 (2011), available at <http://www.mn.gov/mmb/images/2011-shutdown-report%2520October%25202011.pdf>, archived at <http://perma.cc/DZ77-YHQG>.

Legislatures reported was unprecedented by any American state government),<sup>238</sup> Fitch Ratings cut its rating of California's general obligation debt from A+ to BBB, two notches above junk status.<sup>239</sup>

Shutdowns also affect the provision of state and federal services to the public. In general, each shutdown will uniquely curtail government functions depending on administrative and judicial findings regarding essential services coupled with any court orders to maintain particular operations. However, shutdowns have typically affected public health; law enforcement and public safety; the operation of state and national parks, monuments, and museums; licensing and registration functions; and (at the federal level) visa and passport provisions, veterans' affairs, and American Indian tribes.<sup>240</sup> The 2013 federal government shutdown led to a \$4 billion backlog in IRS tax refunds.<sup>241</sup> The backlogs created can affect service provision for years. CBS News reported that as of October 2012—well over a year after the Minnesota shutdown—driver's license applicants in Minnesota needed to show up by 4 a.m. to wait in line for a driver's test or else face scheduling delays of up to two months, delays attributed to the government shutdown that occurred over a year prior.<sup>242</sup>

Shutdowns also delay work with government contractors on infrastructure and building projects. These delays can drive up costs or lead to a quagmire of lost-work claims filed by contractors, and they hurt small and medium-sized businesses that may rely on government contracts for a substantial portion of their business.<sup>243</sup> When shutdowns loom, these

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238. Jennifer Steinhauer, *Coffers Empty, California Pays With I.O.U.'s*, N.Y. TIMES, July 3, 2009, at A1, available at <http://www.nytimes.com/2009/07/03/us/03calif.html>, archived at <http://perma.cc/WL69-XXGT>.

239. *Closer to Junk: Fitch Cuts California Debt Rating*, DEALBOOK (July 7, 2009, 7:06 AM), <http://dealbook.nytimes.com/2009/07/07/just-above-junk-fitch-cuts-california-debt-rating/>, archived at <http://perma.cc/A86P-JM29>.

240. For a list of services furloughed during the 1995–1996 federal government shutdown, see KEVIN R. KOSAR, CONG. RESEARCH SERV., 98-844, SHUTDOWN OF THE FEDERAL GOVERNMENT: CAUSES, EFFECTS, AND PROCESS 4–5 (2004).

241. OFFICE OF MGMT. & BUDGET, *supra* note 233, at 21.

242. *Arrive At 4 A.M. Or Wait 2 Months For Driver's License Test*, CBS MINN. (Oct. 17, 2012), <http://minnesota.cbslocal.com/2012/10/17/arrive-at-4-a-m-or-wait-2-months-for-drivers-license-test/>, archived at <http://perma.cc/YT9A-GAED>.

243. Elizabeth Williamson, *Government Contractors Brace for Shutdown*, WALL ST. J. (Apr. 4, 2011, 12:01 AM), <http://online.wsj.com/article/SB10001424052748704587004576241033511757282.html>, archived at <http://perma.cc/7QA5-CX8K>.

contractors and their employees must speculate whether they will be furloughed or allowed to continue; this alone is costly.<sup>244</sup> If they are furloughed, they must go without pay and must litigate if they wish to seek back pay.<sup>245</sup> Sometimes, particularly with weather-sensitive highway projects, these projects are then delayed into the following season, assuming the appropriation will roll over into the following year. One such “interruption of work was so severe that it threaten[ed] the survival” of local contracting businesses in Minnesota.<sup>246</sup>

More often than not, negotiation failures are temporary and political leaders reach last-minute agreements to prevent actual government shutdowns. Yet the uncertainty surrounding last-minute budget deals and the risk of government shutdowns is arguably more harmful than the actual shutdowns themselves. Even when shutdowns are averted, budget negotiations under the game-of-chicken model still tend to delay the forging of budget compromises, and often result in temporary policy extensions and midnight agreements sometimes literally minutes before the deadline. The resulting uncertainty over the contents of the final budget—and whether there will even be one—frequently diminishes the effectiveness of public functions even in the absence of an actual shutdown. This is because fiscal policymaking necessarily requires some degree of certainty about the future.<sup>247</sup> Without knowing how funds will be appropriated, public sector managers face difficulties in planning for contingencies, as do government

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244. Stacy Cowley, *Government Shutdown Threat Paralyzes Contractors*, CNN MONEY (Apr. 7, 2007, 2:02 PM), [http://money.cnn.com/2011/04/07/technology/government\\_contractors\\_shutdown/index.htm](http://money.cnn.com/2011/04/07/technology/government_contractors_shutdown/index.htm), archived at <http://perma.cc/622J-CHV2>.

245. Pat Doyle, *Cost of Minnesota Government Shutdown Still Climbing*, STAR TRIB. (Jan. 26, 2012, 7:49 PM), <http://www.startribune.com/politics/statelocal/138169549.html>, archived at <http://perma.cc/7TQN-UTV2> (describing “the escalating cost of claims by highway contractors for lost work”).

246. *Id.* (noting the “magnifying effect” the shutdown had on the progress of large public works projects).

247. For a general discussion of the harms of budget uncertainty, see PHILIP G. JOYCE, MARYLAND SCH. OF PUB. POL’Y, *THE COSTS OF BUDGET UNCERTAINTY: ANALYZING THE IMPACT OF LATE APPROPRIATIONS* (2012), available at [http://faculty.publicpolicy.umd.edu/sites/default/files/joyce/files/the\\_costs\\_of\\_budget\\_uncertainty.pdf](http://faculty.publicpolicy.umd.edu/sites/default/files/joyce/files/the_costs_of_budget_uncertainty.pdf), archived at <http://perma.cc/G2G2-58TB>. For a general discussion of the effects of instability and volatility in fiscal policy, see David Gamage, *Preventing State Budget Crises: Managing the Fiscal Volatility Problem*, 98 CALIF. L. REV. 749 (2010) [hereinafter Gamage, *Preventing State Budget Crises*], especially Part II.

contractors and private sector actors who rely on public functions.<sup>248</sup> Uncertainty also harms government contractors and the private sector at large,<sup>249</sup> since it is difficult to plan into the future when tax and budgetary decisions remain up in the air. In addition, tax policy uncertainty also affects taxpayers, who may be unsure year to year whether certain deductions, credits, or rates will remain the same.

The harm created by budgetary uncertainty is exacerbated in the public sector due to the incentives facing agencies in the budgeting game.<sup>250</sup> Because the budgets for public-sector programs are set through the political process, public-sector managers have incentives to demonstrate the need for as much funding as possible in order to protect their budgets from cuts to save programs elsewhere. Consequently, in response to real or threatened funding cuts, public-sector managers may act so as to make the impact of funding cuts as salient (and painful) as possible for voters.<sup>251</sup>

In addition to the direct harms of government shutdowns and the harms that result from uncertainty, the conditions of the new fiscal politics lead to the possibility that budgetary outcomes may not always reflect preferences closest to the median voter. This is because these conditions distort the parties' relative bargaining power.<sup>252</sup> As discussed previously, bargaining power under the game-of-chicken model partially depends on the extent to which each party fears the consequences of failure to reach an agreement.<sup>253</sup> When one party believes more in the value of government programs and is more concerned about the welfare of government employees and program beneficiaries, that party will tend to have more cause to fear the consequences of a government shutdown. In

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248. *Late State Budgets*, NAT'L CONF. ST. LEG. (Aug. 27, 2010), <http://www.ncsl.org/issues-research/budget/late-state-budgets.aspx>, archived at <http://perma.cc/ZU89-VKUS> [hereinafter NCSL Late State Budgets] ("Without appropriation bill details, state agencies and local governments, including school districts, are unable to budget, plan or deal effectively with their contractual obligations leading to secondary and tertiary costs to overall government operations.").

249. See, e.g., Geoff Colvin, *Business's Real Problem: Uncertainty, Uncertainty, Uncertainty*, FORTUNE (Aug. 8, 2012, 9:00 AM), <http://management.fortune.cnn.com/2012/08/08/business-economic-uncertainty/>, archived at <http://perma.cc/Z8HQ-VCJH>.

250. See Gamage, *Preventing State Budget Crises*, *supra* note 247, at 789.

251. *Id.*

252. See *supra* note 70 and accompanying text.

253. See *supra* notes 69–70 and accompanying text.

American fiscal politics, this has generally been the Democratic Party, and as a result, the Republican Party enjoys a structural advantage when budget negotiations resemble the game-of-chicken model, as government shutdowns are more harmful to Democratic Party priorities than to Republican Party priorities.<sup>254</sup>

Finally, the uncertainty created by game-of-chicken negotiations, coupled with the occasions on which governments actually shut down, tends to erode long-term public trust in government. As noted previously, public approval declines not just for all parties in the wake of a shutdown or near shutdown, but also for the institutions of government themselves.<sup>255</sup> Coinciding with the rise of the new fiscal politics, long-term trust in America's basic political institutions has in recent years hovered near record lows.<sup>256</sup>

### C. *The Likelihood of Future Government Shutdowns*

Although most states had recovered from their post-financial crisis nadirs by early 2014, many still face significant long-term fiscal shortfalls: according to the Center on Budget Policy and Priorities, state governments faced \$55 billion in budget shortfalls for the fiscal year 2013, an average of 9.5 percent of the states' entire fiscal-year budgets, and this after four consecutive years of over \$100 billion in total budget shortfalls annually.<sup>257</sup> Further, the cyclical nature of state

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254. Thus, as we suggested in Part I.C *supra*, the recent government shutdowns are generally consistent with a story in which Republicans are tempted to take very aggressive positions due to the Democrats' greater aversion to government shutdowns. The limitation to this tendency is that the voting public then observes the Republicans taking a hard line and tends to blame Republicans more for government shutdowns. *But see* Jonathan Chait, *Must Democrats Act Like Such Wimps? Actually, Yes.*, NEW REPUBLIC (Apr. 4, 2011), <http://www.newrepublic.com/blog/jonathan-chait/86237/must-democrats-act-such-wimps-actually-yes>, archived at <http://perma.cc/R7EB-JT4Z> (arguing that Democrats must compromise not because their voting coalition comprises public sector employees, but because it comprises more moderates who "want their leaders to compromise and act pragmatically").

255. *See supra* notes 188–94 and accompanying text.

256. *Public Trust in Government: 1958–2013*, PEW RESEARCH CTR. (Oct. 18, 2013), <http://www.people-press.org/2013/10/18/trust-in-government-interactive/>, archived at <http://perma.cc/987B-99RS> (finding that public trust in the government, already quite low, fell even lower in a survey conducted during the October 2013 government shutdown).

257. PHIL OLIFF ET AL., CTR. ON BUDGET & POL'Y PRIORITIES, STATES CONTINUE TO FEEL RECESSION'S IMPACT (July 27, 2012), available at <http://www>.

financing is such that future budget shortfalls are almost certain,<sup>258</sup> especially with over a trillion dollars outstanding in unsustainable and underfunded pension, health, and other obligations to state employees.<sup>259</sup> Indeed, some state and local governments continue to borrow against future tax revenues to fund present-day expenses.<sup>260</sup> Meanwhile, at the federal level, the prospect of another shutdown is not insignificant, insofar as the conservative anti-tax movement continues to maintain its grip over the Republican Party, while the trend toward increased polarization continues.<sup>261</sup>

In short, we expect that negotiation failures leading to state government shutdowns will resume with the next economic downturn. At the federal level, there is no end in sight to the continually resurging budget fights that threaten government shutdowns or other dire budgetary consequences desired by neither political party.

Despite the nearly universal decline in popular approval for legislative and executive leaders in the wake of shutdowns or near shutdowns, the nature of the new fiscal politics—increased party polarization, strong ideological opposition to tax increases, voter aversion to hard fiscal policy choices, and

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[cbpp.org/cms/index.cfm?fa=view&id=711](http://cbpp.org/cms/index.cfm?fa=view&id=711), archived at <http://perma.cc/94SE-E7W3>.

258. For a discussion of the cyclical nature of state budget financing, see Gamage, *Preventing State Budget Crises*, *supra* note 247.

259. The State Budget Crisis Task Force estimates that nationwide, state and local government pensions are underfunded by at least \$1 trillion and by as much as \$3 trillion depending on estimates. STATE BUDGET CRISIS TASK FORCE, REPORT OF THE STATE BUDGET CRISIS TASK FORCE 35 (July 17, 2012), <http://www.statebudgetcrisis.org/wp-content/images/Report-of-the-State-Budget-Crisis-Task-Force-Full.pdf>, archived at <http://perma.cc/USX6-DSSQ>. In California, observers speculate that the state's California Public Employees Retirement System has an unfunded liability of nearly \$300 billion in addition to another \$100 billion in unfunded retiree health care obligations. Dan Walters, *California Pension Funds Still Face Huge Liabilities*, SACRAMENTO BEE (Jan. 28, 2013), <http://www.sacbee.com/2013/01/28/5144933/dan-walters-california-pension.html>, archived at <http://perma.cc/manage/created-links/volume-86-issue-1/gamage>; see also Steven Malanga, *The Pension Fund That Ate California*, 23 CITY J. 1 (2013).

260. Ian Lovett, *California Schools Finance Upgrades by Making the Next Generation Pay*, N.Y. TIMES, Feb. 9, 2013, at A25, available at <http://www.nytimes.com/2013/02/10/us/10schools.html>, archived at <http://perma.cc/635C-94FF>.

261. Thomas E. Mann, *Admit It, Political Scientists: Politics Really Is More Broken Than Ever*, ATLANTIC (May 26, 2014, 8:00 AM), <http://www.theatlantic.com/politics/archive/2014/05/dysfunction/371544/>, archived at <http://perma.cc/UG67-3U8V> (“[T]he parties in Congress are as polarized—internally unified and distinctive from one another—as any time in history. And the 2012 electorate was the most polarized ever.”).

the absence of default budgets—nonetheless encourages game-of-chicken-style politics that risk such negotiation failures. Accordingly, to alleviate the harms caused by budget negotiation failures and end the risk of costly government shutdowns, Part IV calls for the adoption of default budget policies.

#### IV. THE CASE FOR DEFAULT BUDGETS

Having described what we call the new fiscal politics and the harms that result from the new fiscal politics,<sup>262</sup> we now discuss how default budget policies could alleviate many of these harms. Many have called for reduced partisanship in Washington and in state capitals: some hope that proposals such as non-partisan redistricting or non-party primaries might succeed in reducing partisanship and thereby alleviate the risk of negotiation failures resulting in government shutdowns.<sup>263</sup> For the purposes of this discussion, we take no position on the desirability or merits of these broader proposals to alter the composition of Congress or the electoral process.<sup>264</sup>

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262. It is worth noting here that we are not arguing that *successful* budget negotiations under the game-of-chicken model necessarily produce worse outcomes than do budget negotiations under the logrolling model. For instance, a plausible argument can be made that budgets negotiations under the logrolling model are likely to produce more wasteful pork-barrel spending and special-interest tax provisions, since individual legislators will more easily secure their preferred outcomes at the expense of the larger electorates' preferences. We argue only that budget negotiations under the game-of-chicken model are far more likely to result in negotiation failures, thus increasing the risk of government shutdowns. Even if the harms that result from the logrolling model are worse than the negotiation-failure-related harms that result from the game-of-chicken model, we should still strive to address the harmful consequences of negotiation failures and to mitigate those harms to the extent possible. *See supra* Part I.B.

263. *See, e.g.*, Phil Keisling, *To Reduce Partisanship, Get Rid of Partisans*, N.Y. TIMES (Mar. 22, 2010), <http://www.nytimes.com/2010/03/22/opinion/22keisling.html>, *archived at* <http://perma.cc/W38E-W9Y5> (arguing for the abolition of party primaries to reduce partisanship). California voters recently passed a ballot initiative to move to non-partisan primaries in state elections in part in the hope that it might lead to the election of more moderate candidates. Jennifer Medina, *Nonpartisan Primaries Face Test in California As Way to End Gridlock*, N.Y. TIMES (June 3, 2012), <http://www.nytimes.com/2012/06/04/us/politics/california-tests-nonpartisan-primaries.html>, *archived at* <http://perma.cc/ZN8G-8E7W>. Indeed, empirical research suggests non-partisan primaries will produce candidates closer to the median voter. *See* Elisabeth R. Gerber & Rebecca B. Morton, *Primary Election Systems and Representation*, 14 J.L. ECON. & ORG. 304 (1998).

264. One of the authors has previously discussed some of the limitations on

We think it unlikely that any of these proposals alone will prove to be a panacea, and we thus expect the trend of heightened partisanship to remain part of the United States political landscape for the foreseeable future. Consequently, we expect that the threat of budget negotiation failures is here to stay.

Rather than attempting the Sisyphean task of exhorting Democrats and Republicans to work together on bipartisan budget compromises, we instead advocate for implementation of default budget policies that would automatically trigger when negotiation failure occurs. If we are correct in predicting that the risk of negotiation failure is here to stay, then reforms should aim at reducing the harmful consequences of such failure. That negotiation failure can result in government shutdowns at the United States federal and state levels is a consequence of existing budgeting rules. Instead of leading to government shutdowns, however, budgeting rules could be reformed so that negotiation failure would instead result in the automatic, though temporary, implementation of some form of default budget policy.

Several forms of partial default budget policies already exist, and these are instructive for understanding how our proposal for a full default budget policy might be implemented. This Part discusses two of these forms: the automatic continuing appropriations provisions in place in two states—Rhode Island and Wisconsin—and the United States federal sequestration policy that has been enacted on and off since 1985. While the former are straightforward examples of partial default budget policies (with these two states thus serving as classic “laboratories” of state-level experimentation),<sup>265</sup> the latter may at first glance appear to have little in common with default budget policies. However, as we show, sequestration functions as a classic default rule: it alters the status quo environment in the event of negotiation failure, thus forcing

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campaign finance reform and how campaign finance reform should be restructured in light of those limitations, but this discussion does not directly relate to the problem of government shutdowns. See David S. Gamage, *Taxing Political Donations: The Case for Corrective Taxes in Campaign Finance*, 113 YALE L.J. 1283 (2004).

265. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

legislators to draft in the shadow of the pre-specified default outcomes. The federal experience with sequestration provides several important lessons about how default rules can positively alter budget negotiations. This Part also explores how default budget policies might be implemented. Finally, we discuss one set of alternatives to budget default policies—compromise-forcing devices—that could also prevent government shutdowns by punishing legislators for negotiation failure. We explain why we believe these compromise devices are, and have been, an ineffective second-best solution to preventing shutdowns and near shutdowns altogether via default budget policies.

#### A. *The Policies Adopted in Wisconsin and Rhode Island*

Although default budget policies have been proposed at the federal level on at least several occasions,<sup>266</sup> the most extensive of the existing default budget policies employed are at the state level—in Wisconsin and Rhode Island. In Wisconsin, if the

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266. From the late 1980s until at least 1996, Republican Representative George Gekas of Pennsylvania introduced, every legislative term, a bill which would have provided for the adoption of a federal-level automatic continuing appropriation provision in the event that no budget was enacted by September 30th. *See, e.g.*, 142 CONG. REC. 18,896–97 (1996) (statement of Rep. Gekas).

Looking beyond proposals, Congress has at least twice given serious consideration to the implementation of automatic continuing resolution provisions. In 1999, the 106th Congress, during the legislative drafting process for H.R. 853, The Comprehensive Budget Process Reform Act, considered both a two-year budget cycle and an automatic continuing resolution that, like the automatic continuing appropriations in Wisconsin and Rhode Island, would have continued funding of government services in the event that legislators were unable to reach a compromise. Subtitle D of the Act would have amended Title 31 of the United States Code to establish the automatic continuation of discretionary funding for all federal programs in the event that legislators failed to enact any of the regular appropriations acts on time. *To Consider Budget Process Reform, Joint Hearing Before the S. Comm. on the Budget & the S. Comm. on Gov't Affairs*, 106th Cong. 15 (1999) (statement of Sen. McCain).

During a hearing before the Committee on the Budget in the House of Representatives, Representative Jim Nussle of Iowa stated that the purpose behind the automatic continuing resolution was to “prevent future government shutdowns” and to “take away from both the President and Congress the incentive to refuse to negotiate in good faith on appropriation bills on the assumption that one side or the other will bear the wrath of the public for shutting down the Federal Government.” *Id.* at 30 (statement of Rep. Nussle). Likewise, Representative Benjamin J. Cardin of Maryland also advocated for the automatic continuing resolution, arguing it would “guard against the uncertainty and instability of future government shutdowns.” *Id.* at 20 (statement of Sen. Cardin).

state legislature “does not amend or eliminate any existing appropriations on or before the beginning of a new biennium, all existing appropriations are in effect in the new fiscal year and all subsequent fiscal years until amended or eliminated.”<sup>267</sup> In other words, if the Wisconsin state legislature fails to pass a new budget or other appropriation bills, the previously existing budget goes into effect until the state legislature finalizes a new one. Similarly, in Rhode Island, in “an emergency caused by a failure of the general assembly to pass the annual appropriations bill, the same amounts appropriated in the previous fiscal years are available to each department and division.”<sup>268</sup> Again, if negotiation failures result in the state legislature not passing a budget, the previously existing budget goes into effect, thereby averting a government shutdown.

These partial default budget policies are often called “automatic continuing appropriations provisions”<sup>269</sup> or “automatic funding approaches,”<sup>270</sup> among other terms. What distinguishes these provisions from full default budget policies is that no method is specified for how to proceed if collected tax revenues are insufficient to fund the automatic continuing appropriations.<sup>271</sup> At the state level, where balanced budget provisions limit the states’ abilities to deficit spend, it may not be possible to simply maintain the prior year’s authorization levels, at least during periods of economic downturn in which revenues are declining.<sup>272</sup> A full default budget policy thus must specify how spending levels or tax rates would be adjusted in the event of a revenue shortfall.

Nevertheless, Wisconsin and Rhode Island have come close to implementing full default budget policies, and the experience of these two states is illustrative. Perhaps knowing they can fall back on a default budget policy, Wisconsin lawmakers have often failed to pass a budget by the state’s June 30th

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267. WIS. STAT. § 20.002(1)(b)(2) (2014).

268. R.I. GEN. LAWS § 35-3-19 (2013).

269. COLBEY SULLIVAN, MINN. HOUSE OF REPRESENTATIVES, POLICY BRIEF: AUTOMATIC CONTINUING APPROPRIATIONS AND GOVERNMENT SHUTDOWNS (Dec. 2011), available at <http://www.house.leg.state.mn.us/hrd/pubs/contappr.pdf>.

270. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 108.

271. In contrast, for example, sequestration legislation typically includes some prescription for how automatic budget cuts will be implemented to ensure a budget running a deficit is balanced. For a further discussion of the role of sequestration as a form of partial budget default policy, see *infra* Part IV.B.

272. Gamage, *Preventing State Budget Crises*, *supra* note 247, at 754–65.

deadline.<sup>273</sup> Sometimes negotiation failures and political impasse have prevented the state legislature from passing a budget on time; in other instances, the governor has simply been able to take a few extra weeks to review the budget before signing it.<sup>274</sup> Regardless, Wisconsin lawmakers have always eventually come together to pass a new budget.<sup>275</sup> The longest Wisconsin has delayed before passing a new budget was until November 4th (in 1971).<sup>276</sup> In more recent years, the longest delay was until October 27th (in 2007).<sup>277</sup> According to Bob Lang, the Director of the Wisconsin Legislative Fiscal Bureau in 2011, Wisconsin's default budget provision has been effective in preventing government shutdowns: far from leaving Wisconsin running on autopilot, the legislature has always passed a budget because of pressure from local governments and from the general public.<sup>278</sup>

Similarly, although Rhode Island's partial default budget provision has been in place since 1935, Rhode Island has only twice failed to adopt an on-time budget, in 1992 and in 1993.<sup>279</sup> In both of those instances, a new budget was adopted within roughly two weeks of the missed deadline.<sup>280</sup> According to Sharon Reynolds Ferland, Rhode Island's House Fiscal Advisor in 2011, Rhode Island's default budget provision "does not appear to decrease lawmakers' incentive to enact a new budget."<sup>281</sup>

Wisconsin and Rhode Island's approaches—having the previous year's budget authorizations remain in effect until new budget authorizations are passed—suffice to prevent government shutdowns during periods of economic growth when tax revenues are flat or increasing, since blunt maintenance of the status quo won't incur deficit spending. Yet this approach falls short of offering a full default budget policy. During economic downturns, maintaining the previous years' budget authorizations may offer only a temporary solution, as

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273. SULLIVAN, *supra* note 269, at 7.

274. *Id.*

275. *Id.* at 8.

276. *Id.*

277. *Id.*

278. *Id.* (reporting a phone conversation with Bob Lang, Director of the Wisconsin Legislative Fiscal Bureau).

279. *Id.*

280. *Id.*

281. *Id.* (reporting an email response from Sharon Reynolds Ferland, Rhode Island House Fiscal Advisor).

the reduced tax revenues that typically result from economic downturns will eventually cause the state to run out of money. Were Wisconsin or Rhode Island to fail to pass new budget authorizations for a sufficiently long period during which tax revenues were falling, the eventual result would be a government shutdown.<sup>282</sup> That this has never happened in either state suggests that the threat of a government shutdown is not needed to induce legislators to compromise and pass a budget—a theme we will discuss further below.

Beyond Wisconsin and Rhode Island, eleven states have provisions whereby the state legislature can choose to pass temporary appropriations if a full budget is not passed by the deadline, and twelve states have provisions whereby some payments automatically continue in the absence of the state passing a new full or partial budget.<sup>283</sup> Only twenty-two states have rules that result in a full government shutdown if a new budget is not passed on time.<sup>284</sup> In the majority of states, then, if state lawmakers fail to authorize either new permanent or temporary appropriations the result is a partial government shutdown. In these states, failure to pass a budget by the deadline can result in a partial government shutdown even when the state has sufficient tax revenues to fund the entirety of the previous year's expenditures.

### *B. Sequestration as a Partial Default Budget Policy*

Beyond the states, the federal experience implementing various forms of automatic budget restrictions, commonly known as budget sequestration, can also serve as a helpful lesson in thinking about the various ways in which a default budget policy might be implemented. Sequestration suggests that automatic continuing appropriations are unlikely to become permanent as legislators decline to take action and allow the government to run on autopilot.

Sequestration was first implemented as part of the

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282. *Id.* at 12 (“The de facto enactment of an unbalanced budget could mean that, in the absence of a new budget, the state would run out of money at some point toward the end of the biennium, leading to a shutdown.”).

283. See NCSL Late State Budgets, *supra* note 248.

284. *Id.* In eleven states, government officials apparently do not know what procedures would be required if a budget is late because state law does not directly address the issue and because the states' budgets have always been passed on time.

Balanced Budget and Emergency Deficit Control Act of 1985 (often known as the Gramm-Rudman-Hollings Act for the bill's principal sponsors).<sup>285</sup> The Gramm-Rudman-Hollings Act was enacted in order to effect the gradual reduction of annual federal budget deficits by requiring adherence to strict deficit targets, with the long-term goal to eliminate the federal budget deficit altogether.<sup>286</sup> This aim was accomplished through sequestration. In order to keep the annual budget within mandated deficit reduction parameters, automatic spending cuts would be implemented across all discretionary spending areas at the beginning of the fiscal year if necessary.<sup>287</sup> Since this was "perceived to be drastic action, many regarded it as providing a strong incentive for Congress and the President to reach agreement on established budgetary goals through the regular legislative process."<sup>288</sup> Thus in implementing sequestration, Congress tied its hands in the future to ensure that even if Congress failed to meet its previously stated deficit reduction targets in annual budget negotiations, the reduction targets would be effectuated nevertheless.

This process originally involved the adjustment of the budget by the Comptroller General, an executive officer impeachable by Congress, after Congress had passed the budget and the President had signed it.<sup>289</sup> Famously, the Supreme Court found the Comptroller General to be an agent of Congress and held that Congress could not usurp from the executive branch the execution of its laws, concluding that the sequestration procedure under the Gramm-Rudman-Hollings Act was unconstitutional.<sup>290</sup> Importantly, this suggests that were a default budget policy to be implemented at the federal level, its execution must be delegated to the executive branch. Nevertheless, this constitutional requirement is easily met: Congress went on to amend the sequestration process in 1987, assigning the task of sequestration to the Director of the Office of Management and Budget, an agent indisputably and solely

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285. Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037 (codified as amended at 2 U.S.C. §§ 901 *et seq.* (2012)).

286. ROBERT KEITH, CONG. RESEARCH SERV., RL31137, SEQUESTRATION PROCEDURES UNDER THE 1985 BALANCED BUDGET ACT 2 (2001) [hereinafter KEITH, SEQUESTRATION PROCEDURES].

287. *Id.*

288. *Id.*

289. *Id.*

290. *See* *Bowsher v. Synar*, 478 U.S. 714 (1986).

of the executive branch.<sup>291</sup>

Although the procedures for sequestration have changed over the years, sequestration became newsworthy again in 2011 when Democrats agreed to sequestration in exchange for an increase in the federal debt ceiling. As part of the Budget Control Act of 2011,<sup>292</sup> Congress mandated \$1.2 trillion in multi-year budget cuts across many areas of federal spending, to be specified by a specially established Joint Select Committee on Deficit Reduction.<sup>293</sup> Importantly, however, the law mandated that if the Committee were unable to agree on how to reduce \$1.2 trillion from the budget, automatic sequestration and across-the-board cuts to both defense and non-defense discretionary spending would take place.<sup>294</sup> Quite predictably in the era of new fiscal politics, the Committee failed,<sup>295</sup> and sequestration went into effect in early 2013 with blunt, broad-based cuts designed to reach the \$1.2 trillion target in spending reductions over the next eight years.<sup>296</sup> Sequestration automatically took effect when Congress did not act to pass a new budget agreement. In this sense, sequestration is a form of default budget policy. By establishing a default, Congress could negotiate from a new baseline knowing with more certainty what negotiation failure would bring.

Congress's experience with sequestration in the 1980s suggests that setting future defaults can help reduce year-to-year uncertainty and produce budget compromises. For the fiscal years 1986, 1988, and 1990, Congress initially set federal discretionary appropriations at levels that would exceed deficit reductions targets required by the Gramm-Rudman-Hollings

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291. See Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987, Pub. L. No. 100-119, 101 Stat. 754 (1987).

292. Budget Control Act of 2011, Pub. L. No. 112-25, 125 Stat. 240 (2011) [hereinafter Budget Control Act].

293. Ford Fessenden et al., *The Plans for Reducing the Deficit*, N.Y. TIMES (Nov. 21, 2011), <http://www.nytimes.com/interactive/2011/07/22/us/politics/20110722-comparing-deficit-reduction-plans.html>, archived at <http://perma.cc/MDZ4-9JBT>.

294. Budget Control Act, *supra* note 292.

295. See Janet Hook & Naftali Bendavid, *Deficit Panel Folds Its Tent*, WALL ST. J. (Nov. 22, 2011), <http://online.wsj.com/news/articles/SB10001424052970204443404577052311834234128>, archived at <http://perma.cc/P55Q-FSX2>.

296. Michael D. Shear, *Across-the-Board Cuts Take Effect, But Their Impact Is Not Immediately Felt*, N.Y. TIMES (Mar. 2, 2013), <http://www.nytimes.com/2013/03/03/us/politics/Spending-Cuts-Imposed-US-Starts-to-Trim-Its-Budget.html>, archived at <http://perma.cc/X7DV-FXTH>.

Act.<sup>297</sup> In the first fiscal year, 1986, automatic sequestration reduced appropriations by \$11.7 billion in automatic across-the-board cuts.<sup>298</sup> Perhaps learning from this, when Congress was projected to surpass its deficit reduction target by \$20 billion for the 1988 fiscal year budget, it reached a budget summit agreement to avoid sequestration.<sup>299</sup> Likewise, during the 1990 fiscal year, an initial estimated sequestration of \$16.1 billion was reduced to \$4.55 billion by a subsequent omnibus budget reconciliation act.<sup>300</sup> In both years, Congress's prior commitment to automatic deficit reduction eliminated uncertainty about the ultimate outcome of Congressional budget making: it was certain that these reductions in appropriations would take place, regardless of whether they happened automatically or by subsequent and deliberate Congressional action.<sup>301</sup> Sequestration during these years appears to have twice brought congressional leaders together to compromise and make cuts in a deliberate and thoughtful fashion.<sup>302</sup>

In a similar manner, Congress implemented sequestration in 2011 to achieve long-term deficit reduction goals.<sup>303</sup> Even the bipartisan budget agreement passed at the end of 2013, which sought to "eas[e] across-the-board spending cuts," still used sequestration as the baseline from which to alter appropriations targets. While the ultimate agreement permitted increased spending of \$62 billion over two years, it was offset by \$85 billion in cuts to be made over ten years.<sup>304</sup> Sequestration has thus repeatedly functioned as a form of default akin to a form of default budget policy: it establishes automatic baselines and reduces the leverage parties have to threaten to walk away from negotiations. Inaction will no

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297. KEITH, SEQUESTRATION PROCEDURES, *supra* note 286, at 10–11.

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.*

303. *See* Budget Control Act, *supra* note 292, § 251A (“Unless a joint committee bill achieving an amount greater than \$1,200,000,000,000 in deficit reduction . . . is enacted by January 15, 2012, the discretionary spending limits listed in section 251(c) shall be revised, and discretionary appropriations and direct spending shall be reduced . . .”).

304. Colleen McCain Nelson, *Obama Signs Budget Agreement*, WALL ST. J. (Dec. 26, 2013), <http://online.wsj.com/news/articles/SB10001424052702304753504579282873251626400>, archived at <http://perma.cc/65JB-A5LQ>.

longer lead to catastrophe, but instead automatic default policies.<sup>305</sup>

Some might suggest that sequestration shows that default policies may be less temporary than we anticipate, given the dysfunctional nature of today's Congress. As contemporary sequestration has shown, even a default budget highly undesirable to both parties was not a sufficient stick to motivate Congress to reach an agreement over a new budget before sequestration took effect.<sup>306</sup> One might be concerned, then, that a default budget policy would lead to a federal fiscal policy on autopilot, unresponsive to the country's immediate policy and spending needs.<sup>307</sup>

Yet we think this is not the lesson of sequestration. Even in this era of new fiscal politics, members of Congress want—and need—to take credit for action. Congressional Republicans fulfilled their pledge to their more conservative constituents to enact significant budget cuts,<sup>308</sup> while Congressional Democrats pleased liberals by warding off deep cuts to social welfare programs and including defense spending among the targets of sequestration.<sup>309</sup> Despite sequestration's

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305. See, e.g., Fred Barnes, *The Upside of the GOP Shutdown Defeat*, WALL ST. J. (Oct. 21, 2013), <http://online.wsj.com/news/articles/SB10001424052702303448104579149741045522708>, archived at <http://perma.cc/M3QR-K88E>

306. See Hook & Bendavid, *supra* note 295 (describing how the sequestration cuts target programs dear to both Democrats and Republicans); Carl Hulse & Helene Cooper, *Obama and Leaders Reach Debt Deal*, N.Y. TIMES (July 31, 2011), <http://www.nytimes.com/2011/08/01/us/politics/01FISCAL.html>, archived at <http://perma.cc/6HBX-5UYP> (“The rationale for picking favored programs like the Pentagon for Republicans and Medicare for Democrats was to provide a strong incentive for the new committee to avoid a deadlock and deliver a deficit reduction plan that could clear Congress.”).

307. See, e.g., SULLIVAN, *supra* note 269, at 10 (“[S]ome may argue that [automatic continuing appropriations] would reduce the incentive for the legislature and governor to agree upon a new budget in a timely manner. Currently, the threat or existence of a shutdown may add a sense of urgency to the budget debate and could hasten the inevitable resolution of differences.”).

308. See Sarah Wheaton, *Boehner's Debt Ceiling Agreement Presentation*, N.Y. TIMES (July 31, 2011), [http://www.nytimes.com/interactive/2011/08/01/us/politics/20110801\\_BOEHNER\\_DEBT\\_FRAMEWORK.html](http://www.nytimes.com/interactive/2011/08/01/us/politics/20110801_BOEHNER_DEBT_FRAMEWORK.html), archived at <http://perma.cc/82MZ-T3ZM>. Speaker John Boehner emphasized how the agreement achieved Republican objectives to “cut government spending more than it increases the debt limit [and] implements spending caps to reduce future spending . . . without tax hikes, which would destroy jobs, while preventing a job-killing national default.” *Id.* at 1.

309. See Jonathan Weisman, *Parties Focus on the Positive as Budget Cuts Draw Near*, N.Y. TIMES (Feb. 27, 2013), <http://www.nytimes.com/2013/02/28/us/politics/parties-focus-on-the-positive-as-budget-cuts-near.html>, archived at

implementation, legislators remained able to negotiate around it in ways that were satisfactory to both Democrats and Republicans.<sup>310</sup> Adopting a full default budget policy would deny all lawmakers the ability to claim any measure of victory if Congress failed to pass a budget and a default policy went into effect. Lawmakers would likely receive criticism from the press, hear from dissatisfied citizens and donors, and eventually face primary threats from challengers lambasting a do nothing Congress. Indeed, the desire of both parties to claim credit-taking action led Congress to alter the sequestration defaults in a rare moment of bipartisan budget agreement at the end of 2013.<sup>311</sup>

For these reasons, we think sequestration serves as an example of a partial default budget policy that ensures implementation of previously determined outcomes even in the face of partisan budget negotiation failure. Sequestration can thus be thought of as a form of a partial default budget policy that is intended to be temporary but that can function semi-permanently if Congress fails to negotiate an alternative.

### C. *Implementing Default Budgets*

Should Congress or state legislatures choose to implement a full default budget policy, they might proceed in a number of ways. This section explores some of these possibilities and the considerations that they entail.

First, and most obviously, the actual budget from the prior year could automatically be re-authorized as the new default budget, in a fashion similar to proposals for automatic continuing appropriations provisions.<sup>312</sup> The prior year's discretionary appropriations would simply continue as before, maintaining the status quo spending levels until a new budget

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<http://perma.cc/9FFR-A2H6> ("Some of the most liberal members of Congress see the cuts as a rare opportunity to whittle down Pentagon spending. The poor are already shielded from the worst of the cuts, and the process could take pressure off the Democratic Party, at least in the short run, to tamper with Social Security and Medicare.").

310. See Jonathan Weisman, *Capitol Leaders Agree to a Deal on the Budget*, N.Y. TIMES (Dec. 10, 2013), <http://www.nytimes.com/2013/12/11/us/politics/party-leaders-indicate-deal-is-reached-on-budget.html>, archived at <http://perma.cc/X99J-XVML> (discussing how the revised budget reduced both defense cuts and also domestic programs).

311. Nelson, *supra* note 304.

312. See discussion *supra* Part IV.A.

could be passed. As discussed previously, this approach would not represent a full default budget policy at the state level, due to the states' balanced budget requirements limiting their ability to incur deficits during economic downturns. However, at the federal level, where deficit spending is less restricted, this approach could potentially function as a full default budget policy (at least in the absence of an active sequestration policy).<sup>313</sup> Moreover, this approach would in some ways be the simplest, as federal agencies would not need to make temporary and sudden adjustments to outlays. However, because federal revenues are in constant flux, in down economic years this could lead to unexpected deficits if such a default budget policy were in operation for a significant portion of the following fiscal year. This could then lead to problems if a given Congress had also committed to a sequestration policy.

Another default budget option could be implementing a modified version of the prior year's budget, made to reflect changes in population and economic climate. These modifications could be made to spending, to revenue generation, or to both. One possible approach for default budgets would thus be for an administrative agency to adjust taxes and spending—following predetermined formulas—so that the default budget would remain balanced (or imbalanced at previously specified levels) in light of economic changes.<sup>314</sup> This would mirror the role of the Director of the OMB in automatically implementing sequestration in years in which Congress's legislative actions led to year-end deficits.<sup>315</sup> Further, although such actions might arguably be more insulated from voter accountability, public choice scholars suggest this may still be more desirable to voters than elected—but more inept—politicians.<sup>316</sup>

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313. Conceivably, at the federal level, all spending could be managed under the default budget in the same fashion as Social Security is currently managed. Spending could then continue to be authorized at the same levels as in the prior year (or perhaps with adjustments made for inflation or economic growth), with any gap between spending and taxes met by deficit borrowing. However, if the disconnect between taxes and spending became too severe, Congress would eventually need to take action (as has been done for Social Security).

314. For a discussion of how this might work in Minnesota, see SULLIVAN, *supra* note 269, at 12–13.

315. See *supra* notes 290–292 and accompanying text.

316. See David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 110 (2000) (arguing that if the agency's values are no more dissimilar to the median voter's values than are the median

A default budget policy could also be negotiated as part of the regular annual budget-making process. For example, the legislature could assign itself the task of regularly producing both a new budget for year T and a default budget for year T+1. If negotiations failed for year T+1, the last agreed-upon default budget would go into effect instead. That budget could then be based on the legislature's desires for future years, or could be designed to function as a penalty default in a manner similar to sequestration. Painful across-the-board cuts or tax hikes could encourage future legislators to agree to a new budget and curtail the automatic (but miserly) continuing appropriations. Of course, this approach risks the penalty default budget going into effect in the event of negotiation failure, but this would almost certainly be preferable to the government shutting down—the result of negotiation failure under current budget rules. As Congress's recent experience with sequestration has shown, sequestration is tolerable, if undesirable, and can also spur bipartisan budget agreements in a political climate in which they are otherwise exceedingly rare.

An even more ambitious default budget policy would be one that empowers a panel of citizens to produce a default budget that would then become law if the legislature did not pass a new budget by a specified date. Or, as a variation on this approach, an administrative agency or some elected official could be charged with producing the default budget.<sup>317</sup> Almost certainly, this could only be implemented at the state level, given federal constitutional limitations.

We are largely ambivalent as to how specifically a default budget policy should be enacted.<sup>318</sup> Any default budget policy that maintains government functions by specifying what actions should be taken if new budget authorizations are not passed (and addresses the possibility of declining tax revenues) would be suitable. Any of the approaches for implementing a

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elected politician's values, then the median voter prefers that the agency make the policy choice, since the agency has access to the largest amount of accurate information).

317. These more ambitious possibilities are more realistic at the state level, and particularly in California where the Constitution can be amended through a simple majority vote of the electorate. Reforms that would require a constitutional amendment are, needless to say, much less plausible at the federal level.

318. For a more elaborate discussion of options for implementing a federal-level default budget policy, see U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 108, at 32–43.

default budget policy that we discuss above would end the threat of costly government shutdowns and near shutdowns, a vast improvement from the current dysfunctional budget-making system.

Importantly, the composition of the default budget will likely affect the bargaining power of the two parties in their negotiations to pass a regular budget. Some forms of default budget policies might result in one party having a structural advantage in budgeting negotiations, just as we argue that at present the Republican Party enjoys a structural advantage from their comparative lack of concern about the policy-outcome consequences of government shutdowns.<sup>319</sup> It may ultimately prove impossible to design a default budget so that neither party has any structural advantage whatsoever.<sup>320</sup> Nevertheless, we argue that the existence of any such advantage should be brought into the open through discussions of the composition of the default budget.

Under any default budget policy, if the minority party prefers the default budget to the budget proposals of the majority party, the minority party can block the passage of a regular budget so that the default budget goes into effect. We do not view this outcome as necessarily problematic. Again, a default budget policy makes budgeting more like other areas of domestic policy or entitlement spending, where the minority party can block new legislation or reforms if it prefers the status quo to the majority party's proposals. This outcome is a natural result of a system of governance with many vetogates that permit the minority party to stop or slow the majority party's policies from being implemented. We do not view this outcome as being any less democratic or improper for budgeting than in any other area of legislation.<sup>321</sup> Nevertheless, it is worth evaluating further the role that the threat of government shutdowns might play as a compromise-forcing device; we analyze this question in the following section.

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319. See *supra* notes 69–70, 95 and 253 and accompanying text.

320. A default budget could, for example, both raise taxes (which would be unpopular with conservatives) and cut social spending (likely unpopular with liberals).

321. The problem of government shutdowns could alternatively be addressed by removing some of the veto points that currently obstruct the adoption of budgets—for instance, the power to pass a budget could be placed solely in one legislative chamber or the executive could be prevented from vetoing budgets.

*D. Compromise-Forcing Devices*

One argument against default budget proposals is that the threat of a government shutdown is necessary to force legislators to compromise and pass a new budget.<sup>322</sup> In this sense, the threat of a government shutdown functions as a compromise-forcing mechanism. Some might argue that with automatic budgets to fall back on, legislators will neither govern nor be accountable to voters. Without the threat of government shutdowns, veto players might find it too easy to block a new budget from being passed. Even worse, this argument goes, compromise might become *harder* to achieve, since each veto player could afford to dig in their heels. As policy needs naturally evolve over time, the failure to pass new budgets could also lead to misallocation and waste, insofar as the default budgets might not optimally reallocate resources to account for changing circumstances.<sup>323</sup> In this section, we explain why we think the threat of a government shutdown is an ineffective compromise-forcing device that insufficiently punishes legislators for failing to come to an agreement while simultaneously punishing voters instead.

Although Wisconsin and Rhode Island provide only two data points on the efficacy of a default budget policy, these states' experiences suggest that concerns over the need for compromise-forcing devices may be overblown: in both states, legislators have always passed new budgets no later than early into the next fiscal year.<sup>324</sup> The partial default budget policies of both states have simply averted government shutdowns during the periods in which state legislators and governors

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322. See *supra* note 307; see also Richard Kogan, *Proposal for Automatic Continuing Resolutions Would Likely Make it Harder to Pass Regular Appropriations Bills*, CTR. ON BUDGET & POL'Y PRIORITIES (June 24, 2004), <http://www.cbpp.org/cms/index.cfm?fa=view&id=1984>, archived at <http://perma.cc/Z7TA-PJ25> ("The proposals [sic] main purpose is to avoid government shutdowns. But its principal effect would likely be to disrupt the appropriations process and make appropriations bills harder to pass."); ROBERT KEITH, CONG. RESEARCH SERV., RL30339, PREVENTING FEDERAL GOVERNMENT SHUTDOWNS: PROPOSALS FOR AN AUTOMATIC CONTINUING RESOLUTION 7 (2000) ("The major concern of opponents of ACR proposals is that they could serve as a disincentive to enact the regular appropriations bills in a timely manner, or even at all.").

323. See SULLIVAN, *supra* note 269, at 10 (discussing the risk of a possible "mismatch between base funding and current public sentiment").

324. *Id.* Indeed, in Rhode Island the legislature has only twice failed to pass a budget on time.

have negotiated the terms of the next year's budget. We thus see no convincing reason to think that a default budget policy, if implemented broadly, would lead to chronic, long-term, and detrimental reliance on default budgets.

As we discussed above, politicians win reelection by delivering for their constituents and the interest groups on whose support they rely. We expect that veto players' desires to shape policy by enacting new budgets should suffice as a compromise-forcing mechanism in most circumstances. To the extent that default budgets do go into effect during periods of negotiation failure, and to the extent that these default budgets misallocate resources due to changing circumstances, the voters and interest groups adversely affected by these resource misallocations would likely pressure veto players to compromise on a new budget. Ultimately, any harms resulting from allowing a default budget to remain in effect would at worst mirror the harms from sequestration, and would likely induce compromise in a similar fashion. Furthermore, having a default budget policy in place might actually make lawmakers *more* accountable to their constituents. At present, game-of-chicken negotiations frequently lead to last-minute, behind-closed-doors budget agreements in which it is often unclear how certain provisions originated, making it difficult for voters to allocate blame (or credit) to individual lawmakers.<sup>325</sup>

For these reasons, we doubt the need for a compromise-forcing device beyond the general incentives for political actors to pass new budgets in order to provide for their constituents and interest groups. Were default budget policies to be widely implemented, we would not be surprised if default budgets were sometimes allowed to go into effect for short time periods, as has often been the case in Wisconsin. Yet we expect that in all but the most extraordinary of circumstances new budgets would be passed well before the default budget would pose serious resource misallocation or governing accountability

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325. See, e.g., Natasha Lennard, *How the Monsanto Protection Act Snuck Into Law*, SALON (Mar. 27, 2013, 4:44 PM), [http://www.salon.com/2013/03/27/how\\_the\\_monsanto\\_protection\\_act\\_snuck\\_into\\_law/](http://www.salon.com/2013/03/27/how_the_monsanto_protection_act_snuck_into_law/), archived at <http://perma.cc/Y6YQ-XH3Z>. Lennard describes the last-minute introduction of the so-called Monsanto Protection Act, which was slipped anonymously into an Agriculture Appropriations Bill and which would protect genetically modified seeds from litigation: "[M]any members of Congress were apparently unaware that the 'Monsanto Protection Act' even existed within the spending bill, HR 933; they voted in order to avert a government shutdown." *Id.*

concerns.

We might be mistaken in these predictions. If so, we view the harms resulting from the threat of government shutdowns as more concerning than any harms that might result from the implementation of a default budget policy. Moreover, if a compromise-forcing device is needed, then maintaining the threat of government shutdowns strikes us as a poor candidate. The adoption of a default budget policy could be combined with the creation of new, better-designed, compromise-forcing mechanisms.

The threat of government shutdowns as a compromise-forcing device is inapt because it primarily impacts the public at large rather than the political actors responsible for passing a budget. In contrast, better-designed, compromise-forcing mechanisms should target politicians and especially veto players—those responsible for passing the budget. Those hardest hit during government shutdowns are often constituents who rely on government services and state workers who will be furloughed for the duration of the shutdown. In contrast, legislators often face no direct consequences whatsoever.<sup>326</sup> A properly designed compromise-forcing mechanism would allocate more of the costs of negotiation failure to the politicians responsible for negotiating budgets, rather than to citizens.

Most straightforwardly, the failure to pass a budget on time could trigger either the docking of legislators' salaries or the delay of salary payments until a new budget is passed and implemented, a so-called "no budget, no pay" policy.<sup>327</sup> When combined with the implementation of a default budget policy, this approach would allocate the costs of negotiation failure more on legislators and less on the public. Of course, the effectiveness of this strategy depends in part on the degree to

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326. Arguably, legislators may suffer long-term effects to their approval ratings and chances for reelection, but these do not seem to be substantial enough to ward off complicity in negotiation failures and subsequent shutdowns.

327. California's Constitution contains such a provision, prohibiting all salary and travel and expense reimbursement for members of the Legislature if a budget has not passed the Legislature by the June 15 deadline. *See* CAL. CONST. art. IV, § 12(h). This has also been implemented by the state of New York and withstood constitutional scrutiny. L. Anthony Sutin, *Check, Please: Constitutional Dimensions of Halting the Pay of Public Officials*, 26 J. LEGIS. 221, 246–47 (2000). "No budget, no pay" bills have also been introduced in Congress, and have even been passed by the Senate, but have languished in conference and never been implemented as law. *Id.* at 248.

which legislators rely on their salaries: eighteen states have part-time legislators who make an average of \$15,984 per year, while an additional twenty-three states with full-time legislators provide an average salary of \$35,326. This suggests that most legislators likely generate significant income from other sources.<sup>328</sup> Even in the full-time United States Congress, most legislators have significant wealth outside their salary as an elected representative.<sup>329</sup> To the extent that most draw the majority of their income from other sources, docking legislative pay may not be sufficiently punitive to alter negotiating positions. We might also worry that docking legislators' pay would disproportionately impact less wealthy legislators. Nevertheless, although we would probably not recommend the approach of docking legislators' pay as a result of these concerns, this approach is suggestive of the general strategy that we recommend.<sup>330</sup> At least one Senator is on record as believing that the number of days Congress could tolerate shutting down the government under such a policy "would approach zero."<sup>331</sup>

As another example, since 1959, Washington State law requires that legislators be charged with a misdemeanor if they fail to pass a budget at least thirty days before the new biennium.<sup>332</sup> However, this penalty has never been enforced, even on the three occasions the Washington legislature was late to pass a budget since the provision's enactment.<sup>333</sup> Consequently, whereas docking legislative pay is probably not

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328. *Full- and Part-Time Legislatures*, NAT'L CONF. ST. LEG. (June 1, 2014), <http://www.ncsl.org/legislatures-elections/legislatures/full-and-part-time-legislatures.aspx>, archived at <http://perma.cc/SU2H-NW7T>.

329. See Tami Luhby, *The One Percenters in Congress*, CNN MONEY (May 8, 2012), <http://money.cnn.com/2012/05/08/news/economy/congress-net-worth/index.htm>, archived at <http://perma.cc/AAF2-BF2E> (noting that the median net worth in 2010 for federal Democratic lawmakers was \$878,500 and for federal Republican lawmakers was \$957,500).

330. Another related approach could be to treat legislators' pay in the same manner as state workers whose pay is adversely affected during a shutdown, suspending payment during the crisis, and retroactively paying legislators only if state workers are also paid. See Jonathan D. McPike, *Merit Pay and Pain: Linking Congressional Pay to Performance*, 86 IND. L.J. 335, 355 (2011).

331. 141 CONG. REC. 37,539 (1995) (statement of Sen. Harkin) (quoted in Sutin, *supra* note 327, at 248).

332. Todd Haggerty, *Shutdown Showdowns*, NAT'L CONF. ST. LEG. (Dec. 1, 2013), <http://www.ncsl.org/research/fiscal-policy/shutdown-showdowns.aspx>, archived at <http://perma.cc/GP5Y-NPJJ>.

333. *Id.*

sufficiently punitive to be an effective compromise-forcing device, charging legislators with misdemeanors is probably too draconian to be realistic. An effective compromise-forcing device should thus probably fall somewhere between these extremes.

One policy that may be desirable has already been implemented in West Virginia. Its law dictates when the state budget has not been passed by day 57 of the 60-day annual legislative session, the session is automatically extended; during this extension, only the budget can be considered.<sup>334</sup> To the extent that the state's governing politicians care about passing any measures other than the budget, this approach pushes them to pass a compromise budget. Combined with a default budget policy, this approach would have the potential to induce compromise while avoiding the threat of costly government shutdowns and near shutdowns.

Another potential and somewhat counterintuitive strategy is to *increase* the consensus-threshold for agreement if a budget is not passed on time. In Illinois, while a majority vote is required to pass the budget until June 1, after that date the required passage margin increases to a three-fifths majority.<sup>335</sup> In theory, this rule encourages lawmakers to seek consensus knowing that agreement will be harder to achieve later.<sup>336</sup>

More aggressive strategies along these lines might include establishing a rule that forces turnover in party or committee leadership if a budget is not passed on time, or even tying the imposition of term limits to the failure to pass a budget on time. The rules could also curtail various perks of legislators and the President or Governor during the period in which a new budget has not been passed.

To reiterate, we do not believe that any additional compromise-forcing device is necessary beyond the general incentives politicians face to pass new budgets. Further, we are ambivalent about whether coordinating the implementation of a default budget policy with the adoption of additional compromise-forcing devices would be desirable. We are ultimately not convinced that there is anything harmful about a legislature allowing a default budget to come into effect. But if a compromise-forcing device is thought to be necessary, much

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334. W. VA. CONST. art. VI, § 51(8).

335. See Haggerty *supra* note 332.

336. *Id.*

better alternatives exist than having budget negotiation failures trigger government shutdowns. Instead, we would call for compromise-forcing devices designed to impose the negative consequences of bargaining failure on the policymakers responsible for passing a budget instead of on the broader public. This would also assuage those who agree that the risk of government shutdowns is harmful, but who worry that adopting a default budget policy would reduce incentives to compromise. Coupling a default budget policy with better-designed, compromise-forcing mechanisms would allow us to have our cake and eat it too. The concern that we retain a compromise-forcing device need not stand in the way of the adoption of default budget policies.

#### CONCLUSION

Without reform, we predict that government shutdowns and near shutdowns will remain a recurring problem at both the United States federal and state levels. We thus propose the adoption of default budget policies in order to prevent the harms that are otherwise likely to arise from the political and fiscal climate we call the new fiscal politics. Implementing default budget policies would prevent government shutdowns and would reduce the costly uncertainty that results from repeated and protracted last-minute budget negotiations.

To conclude, it is worth briefly pondering the political plausibility of default budget policies being enacted. Arguably, the same dynamics that foster dysfunctional budget making might lead veto players to obstruct the adoption of a default budget policy. Yet we are cautiously optimistic. At a minimum, in comparing possible reforms, implementing a default budget policy should require less dramatic changes than solving the problems of gerrymandered legislative districts or the prevalence of vetogates in the United States system of governance. Moreover, in some states, a default budget policy might be enacted through the initiative or referendum process, thereby bypassing the vetogates that thwart the ordinary budget making process. Considering the substantial success that tax reform advocates have had in passing ballot initiatives—the passage of Proposition 13 in California in 1978 is often considered the foundational voter rebellion against

creeping tax burdens<sup>337</sup>—it is not implausible to think that voters could also rally around the prevention of costly and embarrassing government shutdowns.

More generally, both political parties could potentially benefit from the adoption of a default budget policy. Democrats would obviously benefit to the extent that government shutdowns disproportionately harm Democratic priorities and interest groups. Yet Republicans might also benefit. Republican Party leaders regularly face the dilemma that appeasing the Party's base requires holding firm and resisting compromise. Yet when this refusal to compromise leads to a government shutdown, the Republican Party risks disproportionately losing the support of moderate swing voters and being blamed for the shutdown.<sup>338</sup> Republicans might thus be amenable to the adoption of a default budget policy so that in future budget negotiations, Republican legislators could follow the wishes of the Party's base with less risk of alienating moderate swing voters. Republican legislators might also find that a default budget policy could provide a backstop against incremental increases in government spending, since they could tie new spending in the next budget more closely to that of the default budget, or else refuse to sign on.

Even under a default budget regime, the minority political party will likely still wield considerable leverage. The majority party will generally want to pass a new budget so as to enact its governing priorities and appeal to its constituents. If the minority party controls a vetogate, compromise will still be necessary, even more so if the enactment of the default budget policy is combined with the adoption of further compromise-forcing devices.

In any case, it is difficult to predict the future of politics at either the federal or state levels. Any number of possible, but as of now unforeseen, developments could cause Congress or a state legislature to reform its budgeting institutions at some future date. If so, we hope that this Article will draw attention to default budget policies as a candidate for inclusion in future budget reform proposals.

Not so long ago, it was considered almost unthinkable that political leaders might allow budget negotiation failures to

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337. See *supra* notes 80–86 and accompanying text.

338. See *supra* note 149 and accompanying text.

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regularly threaten government shutdowns and related harms.<sup>339</sup> Yet in the environment of the new fiscal politics, the once unthinkable has become all too commonplace. To restore sanity to our budgetary processes, we thus call for the adoption of default budget policies. We hope such reforms will protect future eras from the harms of the dysfunctional budget politics we have seen in recent decades.

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339. Robert Jenkins, *Think the Unthinkable on U.S. Debt*, FIN. TIMES (Nov. 14, 2012), <http://www.ft.com/intl/cms/s/0/63ffec6e-2a6a-11e2-a137-00144feabdc0.html>, archived at <http://perma.cc/U2T6-A5R7>.