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New Directions in Veto Bargaining: Message Legislation, Virtue Signaling, and Electoral Accountability

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INTRODUCTION

In the years since the creation of separation-of-powers (SOP) models – aimed first at courts,[1] then at Congress,[2] and finally at presidents[3] – much has changed though much remains the same. Needless to say, the constitutionally mandated architecture of the American government hasn't changed at all. This architecture separates the three branches and forces them to interact through a structured bargaining process of proposals and vetoes. On the other hand, the coalition structure of the political parties, the participants in politician selection and the media environment have all changed, arguably dramatically.[4] The causal linkages remain disputed but the net effects are striking and manifest to all: elite partisan polarization, political rancor, congressional stasis, aggressive presidential unilateralism, and puissant courts.[5] In the new American politics, policy outcomes are generally quite understandable using the classic SOP models, or so we assert. But much of the action, the sound and fury of daily politics, is quite mysterious and clearly beyond the ambit of those simple frameworks. Examples include repeated fruitless attempts to pass doomed bills, hopeless vetoes, futile filibusters, lopsided cloture votes, obviously doomed attempts at bicameral legislating, hostage-taking via government shut-downs, manifestly impossible impeachment attempts, ostentatiously illegal executive orders and more.

In this chapter we focus on the mysterious, and we offer some suggestions on how to make the murky more transparent.

We begin with a brief review of the classic separation-of-powers (SOP) models, focusing on the veto bargaining version but noting easy extensions to the filibuster. We emphasize the use of incomplete information models to study not just outcomes but process. We are terse because handy and more elaborate reviews are available elsewhere.[6] Then, we note the rise of several puzzling empirical phenomena. These include bizarre

vote margins on vetoed bills and during over-ride attempts; similarly weird vote margins for filibustered bills and during cloture votes; and the useless re-passage, many times, of virtually the same doomed legislation. (If space allowed, we would add more from the laundry list above.) We trace much of these phenomena to a single cause: *the desire of political agents to send credible signals to political principals about their dedication and ideological fealty, using the policymaking procedures of the SOP system.* In other words, they are variants on or consequences of what congressional scholar Frances Lee, in a seminal contribution, called 'message legislation' in the lawmaking context.[7] We dub this phenomenon 'virtue signaling'. Virtue signaling is closely related to, complementary of, but distinct from, blame game politics.

With one exception – Groseclose and McCarty's prescient explication of 'blame game vetoes' – the first-generation SOP models did not accommodate, and say nothing about, message-oriented manipulation of the SOP system's policymaking procedures.[8] Instead, they assume serious policy-minded actors who pursue genuine policy goals by bargaining with one other in a straightforward and serious way. Even the blame game veto model, which takes a big step away from this paradigm, does not fully capture the new direction in American legislative politics. We assert, however, that if the SOP models are suitably modified, then new veto bargaining, pivotal politics and related models *can* make sense of the novel phenomena while retaining their broad accuracy about policy outcomes.

The trick (in our view) is to move beyond the first-generation framework by embedding the SOP games within what is now called an 'accountability' model of elections.[9] In other words: situate the SOP game in a larger model that features retrospective voting or similar action by political principals. The principals we have in mind are the high-information 'base' or 'selectorate', that is, the individuals who are critical in candidate recruitment, fund-raising, participation in primaries, campaigning and turnout.[10] Without the enthusiastic support of these individuals, a member of Congress or president is in serious electoral peril. Furthermore, the selectorate will be enthusiastic only about politicians who, if circumstances permit, are willing to work hard to enact the base's policy agenda. That programmatic agenda is, in contrast to the typically muddled and inchoate desires of less engaged citizens, usually quite definite in some particulars. Politicians' seemingly bizarre SOP manipulations, such as fruitlessly repealing portions of the Affordable Care Act dozens of times in a legislatively hopeless configuration, can be seen as rational efforts to prove to their skeptical 'boss' that they are indeed the type who will bring home the policy bacon should circumstances permit in the future. And demanding such signaling is actually rational for a boss who is doubtful whether the agent possesses 'true grit'.

To illustrate these points, we sketch a simple model that embeds a stripped-down veto bargaining game within a simple accountability model (we do not undertake a genuine formal analysis here; our discussion is merely illustrative). We hope these notes-to-a-theory suggest the potential for a new direction for separation-of-powers models.

We conclude with some observations about whether the sound and fury of phony legislating actually makes a substantive difference or is just meaningless political theater. Our simple new-style SOP model suggests it does make a difference.

CLASSICAL VETO BARGAINING GAMES

The classical models feature bilateral bargaining between a policy proposer, Congress, or C, and a policy receiver, the President, P. Also making an appearance is the veto over-ride player, O. This player is defined as the legislator closest to the president for whom exactly

one third of the legislature has ideal points either lower or higher than the over-ride player's, depending on whether the president's ideal point p (defined momentarily) lies in the left or right portion of the policy space, respectively. In some versions another player, the filibuster pivot, appears as well. The filibuster pivot is defined similarly but only for the Senate and using 40 members (the threshold for cloture since 1975), most relevantly on the opposite side of the median from the President. The policy space is typically assumed to be one dimensional. So it is a policy evaluation space similar to the oft-used NOMINATE space in empirical studies of roll-call voting.[11] A critical point in the policy space is the current policy, the status quo, denoted q.

Each actor has a policy utility function defined over the policy space, with a well-identified most preferred policy, the ideal point. Call these ideal policies c and p, for Congress and President respectively, and that of the veto override player o. Policies increasing far from the ideal point have declining value. An example of such a utility function is the 'tent' utility function:

$$u(x, xi) \; = \; - \mid x - xi \mid$$

where x_i is player i's most-preferred policy (e.g., c, p, and o) and x is any policy in the policy space.

This simple apparatus was first developed to study elections and voting.[12] The SOP policy-making models take the apparatus in a somewhat different direction, however.

The Engine: the One-shot Take-it-or-Leave-it (TILI) Bargaining Game

The engine that makes the SOP models run is the celebrated one-shot take-it-or-leave-it (TILI) bargaining game first analyzed by Romer and Rosenthal (1978). Most of the SOP models, including veto bargaining, just make changes to this model, for example, by adding more moves, additional institutional actors and incomplete information. In its simplest form, the sequence of play in TILI bargaining is:

1 C makes a proposal b (a 'bill') to change the status quo or reversion policy q.
2 P accepts or vetoes the offer. If P accepts the offer, the final policy outcome x is the bill b, and the game ends.
3 If P vetoes the offer, a vote on a motion to over-ride occurs. If O supports the motion, the bill is successful and again x = b is the new policy. If O does not support the motion, the bill fails and x = q, so the status quo remains the policy in effect.

Because the game features complete and perfect information, it is easily solved using backward induction, thereby incorporating the idea of forward-thinking strategically minded actors. The resulting subgame perfect equilibrium is unique, depending only on the configuration of ideal points and the location of the status quo. We will not go into any of the details since very clear expositions are readily available. However, several points are worth noting. The first three are substantive; the last two are theoretical.

First, the basic model reveals a *prominent advantage for Congress relative to the President*. The presidential veto acts as a check on congressional power, but Congress's ability to force an unamendable offer on a president who can only say 'yes' or 'no' (and who might not be able to make 'no' stick) gives a huge, constitutionally entrenched power advantage to Congress.

Second, given much policy disagreement between the legislature and the executive or across the parties, *moving the status quo usually requires supermajorities* in the legislature. Given the Constitution's veto override provisions and the Senate's privileging of the filibuster, this should hardly be a surprise. But it is a point of major historical importance – almost every piece of important legislation in the post-World War II era was enacted through supermajorities.[13] It also implies that the American rules of the policymaking game force narrow coalitions

of extremists to compromise if they are to accomplish anything legislatively. Moderates will see this as highly desirable normatively; passionate extremists will see it as a bug, not a feature, of American government.

Third, (and related to the second point), *often no policy movement is possible*: the status quo lies in the so-called gridlock region. In fact, the model and its variants supply the causal mechanisms behind the *status quo bias* so characteristic of American politics. We all know that status quo bias exists because there are so many choke points in the policy process. The models go beyond this cliché to show exactly how the choke points work to create policy gridlock.

Fourth, because the core model is so simple and easy to analyze, *the analysis is very extendable*. This is a lovely feature for the theoretically inclined. For example, one can add congressional committees with gate-keeping power;[14] filibusters and cloture votes;[15] a powerful Speaker of the House with gate-keeping power;[16] agencies that begin the game by setting a policy via regulation, so the model becomes a model of the administrative state in action;[17] presidents who move first via an executive order, so the model illustrates presidential unilateral action;[18] and more. With very simple tools requiring minimal mathematical ability, one can easily see how a great deal of national policymaking works.

The fifth point is subtle and deep and not easy to grasp on first acquaintance. In complete information models of the kind we have been discussing, policy typically moves quickly to its final resting place. There are no vetoes, over-rides, filibusters or cloture votes along the path of play; policy just adjusts. If no movement is possible, nothing happens at all. In this sense, the modern analysis of vetoes and filibusters is similar to modern analyses of wars, litigation and strikes. Complete information models of those phenomena predict changes in territorial boundaries, cross-litigant payments and wages. But they also predict no wars, no trials, no strikes. The reason is that the participants understand perfectly what ultimate adjustments will happen and therefore reach agreements that obviate uselessly destructive conflict. In order to get actual vetoes, filibusters, wars, trials, strikes, and so on, a model *requires a degree of incomplete information*. In other words, some actor must lack knowledge about an important variable, and this ignorance or uncertainty leads to 'mistakes' (more accurately, the rational calculations of the actors lead one or both to insist on obdurate actions that would not occur if everyone knew everything).

This fundamental point about human interactions is often met with skepticism: do you mean to say the horrific slaughter in the trenches of World War I (for instance) was caused by a lack of information, not nationalism, militarism, military technology, age-old hatreds, and so on and so on? Not exactly: nationalism and so on may have been *necessary* for the conflict, in the same way that policy disagreement is necessary for a veto. But nationalism was not *sufficient*. It took nationalism *plus* incomplete information to produce the tragic slaughter. Similarly, in SOP models, it takes policy disagreement plus incomplete information to produce a veto, a filibuster, an over-ride attempt, a cloture vote, a judicial strike-down of an executive order, a congressional reversal of a judicial policy, and so on.

There is a logical corollary: analysts who want to study not just policy outcomes but phenomena such as vetoes, filibusters, cloture votes and over-ride attempts need to use models that incorporate incomplete information.

Bilateral Bargaining Under Incomplete Information

Early analysts of separation-of-powers politics moved to do just that. McCarty (1997), for example, studied how a president can use vetoes to build a reputation across different

policy arenas over time. This model affords one explanation for the well-known honeymoon effect in presidential–congressional relations (Congress, knowing the freshman president is hungry to build a reputation for toughness, is extremely accommodating – at first).

Cameron (2000) explored a model of sequential veto bargaining. Here, Congress and President go through multiple rounds of passing and vetoing the same bill, with Congress making concessions each time in an effort to produce an offer the President will accept, and the President vetoing and re-vetoing in a gamble that Congress will return with a better offer before bargaining breaks down. Perhaps somewhat surprisingly, some of the most consequential legislation of the 20th century emerged from this sequential bargaining process (e.g., welfare reform under Clinton).

Cameron (2000) also offered a very simple model of over-ride attempts. Here, in the face of uncertainty about who the critical veto over-ride player will be at the actual moment of the attempt, over-rides can occur, both successful and unsuccessful. Essentially the same model could be used to study filibusters and cloture voting.

In a particularly clever model, Matthews (1989) studied veto threats. Here, a veto threat is a little like a bid in a poker game: the president opens with a 'bid' (a veto threat), Congress may or may not adjust its next 'bid' (a bill) and then the President 'calls' or 'folds' by vetoing or accepting.[19] Cameron et al. (2000) take this model to data, which generally display the predicted empirical patterns.

All of these models feature bilateral bargaining between the President and Congress with uncertainty about one of the player's preferences. In most cases, the uncertainty involves the president's preferences, although in the simple veto over-ride model the uncertainty is about the preferences of the over-ride player. Models in which the unknown-preference President moves before

a move or counter-move by Congress are signaling games.[20] These games feature strategic reputation-building and require more sophisticated modes of analysis than the simple complete information models (one must model player beliefs simultaneously with player strategies, and the two must reinforce one another).

Many of the incomplete information bilateral bargaining models make rather precise empirical predictions about vetoes, overrides and so on. Data from the mid-20th century (or earlier) through to the 1980s or so strongly display the predicted patterns. As a result, this analytical endeavor has often been seen as a success for the empirical implications of theoretical models (EITM) movement in political science. Critically, however, some of the key predictions of the incomplete information bilateral bargaining models show signs of breaking down – a point we return to below.

Bargaining before an Audience: Message Votes

One of the early incomplete information models stands out from the others, because it is not a bilateral bargaining game. We refer to Groseclose and McCarty's blame game veto model (2001). This model involves three intrinsically important players. Specifically, Congress and the President play a legislative game before an audience, a Voter. The President and Congress understand each other's preferences perfectly, so there is no incomplete information at that point. But the Voter is somewhat uncertain about the President's preferences; therein lies the critical incomplete information. The Voter's uncertainty creates the opportunity for Congress to set up a policymaking sequence which, if observed by the Voter, will lead her to draw a relatively unfavorable inference about the President's preferences (even knowing that Congress would like this to happen). And that is the whole point – not truly

legislating, but play-acting legislating in order to cast blame on the other side. Indeed, the veto-bait bill may fail miserably in enactment but still succeed as symbolic action.

The ideas in the Groseclose–McCarty model should resonate with contemporary scholars, for blame-game vetoes are closely related to what Frances Lee has called 'message votes'. According to Lee (2016: 143–4), message votes occur when

> A party brings to the floor an attractive-sounding idea with the following characteristics: (1) its members support it; (2) the other party opposes it; and (3) it is not expected to become law. Former Senator Olympia Snowe offers a more detailed explanation: 'much of what occurs in Congress today is what is often called "political messaging". Rather than putting forward a plausible, realistic solution to a problem, members on both sides offer legislation that is designed to make the opposing side look bad on an issue and it is not intended to ever actually pass.'

The Groseclose–McCarty model works out the logic of 'make the opposing side look bad' in the specific context of the presidential veto.[21]

An obvious question is, how frequently have blame game vetoes occurred? We take a look at some relevant data below. But Cameron (2000a) addressed this question over the 20th century, using an admittedly stringent set of criteria: the veto needed to be prominent, occur in the run-up to a presidential election, and led to a hopeless over-ride attempt (so the enactors should have known that serious legislating was off the table). The historical data on vetoes during the 20th century uncovers relatively few blame game vetoes, according to these criteria (see ibid, Table 5.1). Most vetoes did not look like this. To the extent that this is a fair test, the blame game model does not look like a general model of vetoes, at least over much of the 20th century. However, the data reveal that *some vetoes were clearly blame game vetoes.* An example was the Family and Medical Leave Act of 1991, passed by a Democratic Congress and presented to Republican President George H. W. Bush immediately before the 1992 presidential election. Bush had publicly opposed the bill and his veto was entirely predictable. Given the vote margins, a successful over-ride was clearly doomed. So from a serious legislating perspective, the bill was futile. The Democrats nonetheless pressed ahead, and then used the failed bill as a signature electoral issue. Upon re-gaining the presidency, they quickly enacted family leave in 1993 and touted it as a flagship legislative accomplishment. Quintessential blame game politics!

The general phenomenon of blame game politics, presciently explored by Groseclose and McCarty in the specific context of veto bargaining, has now become routine, at least in the opinion of astute observers such as Lee and candid participants such as Snowe. In fact, a series of empirical anomalies in separation-of-power politics suggest the need for some fresh thinking.

EMPIRICAL ANOMALIES

Recent years have seen congressional legislative behavior that is extremely difficult to reconcile with the classical SOP models. Let's look at some of the empirical anomalies.

What to Look for: Vote Margins at the Pivots and Policy Concessions

The first question, though, is this: where should we look for legislative anomalies? The incomplete information bilateral bargaining models assume a degree of uncertainty about the preferences of a key player, but not a huge amount of incomplete information. This has important implications for vote margins at the pivots and for policy concessions in re-passed bills.

First, *vote margins at the critical pivots should be close*. To see the logic, suppose, for example, a bill is geared to beat a likely

presidential veto with the veto over-ride player as the critical pivot. Then the roll call margin on passage in both chambers should be about two-thirds. If it is much higher, the proposers have not been tough enough; they have conceded too much. If it is far shy of two-thirds then the bill is a sitting duck, doomed from day one, and the proposers are wasting their time. The margin for the over-ride attempt should also be about two-thirds. Now, suppose the president himself is the critical pivot (that is, the veto override player is more extreme than the president). Then the passage margin may be lower than two-thirds but if the president does veto the bill, no over-ride attempt should follow, as the over-ride is hopeless. If an over-ride attempt did occur (anomalously), the vote margin would be well short of two-thirds. In short, unless the president is moderate relative to the over-ride pivot, passage margins for vetoed bills should be about two-third yeas and one-third nays, over-ride attempts should not occur for vetoed bills with narrow passage margins and actual over-ride margins should be about two-thirds yeas and one-third nays.

Similar ideas apply to filibusters. Suppose a bill is geared to beat a filibuster in the Senate. Then a bill that is likely to provoke a filibuster should pass the Senate with about 60 votes. If it passed with many more votes, the filibuster is pointless since cloture will be easy, hence no filibuster should occur (and the bill's proponents conceded too much to the opposition). If initially passed with a narrow majority, then cloture seems likely to fail and the bill should not have been passed in the first place – its authors should have conceded more, or just abandoned the effort. Similarly, actual cloture votes should show about 60 votes in favor of cloture. Lop-sided successful cloture votes should not occur because the filibusterers should have known they would fail; lop-sided failed cloture votes should not occur because the bill authors should have known the bill was a sitting duck and either conceded more or given up the cloture attempt.

A second anomaly can occur with re-passed, previously failed legislation: *no concessions*. (That is, for re-passage under the same configuration of players.) Under the sequential veto bargaining model, re-passage of vetoed bills can occur, but the re-passed bill should contain a compromise in the direction of the president, so either he will sign it or the veto over-ride player will support the bill. As a result, the cutting line between the yeas and nays in NOMINATE space should shift toward the president, and the aye margin should increase.[22] Similar logic applies to bills that die from a filibuster in the Senate: if re-passed, they should contain a compromise to the filibusterers so that either they will accept it or cloture will succeed. The same logic also applies to bills that are enacted by one chamber during split-chamber divided government, but then die in the other chamber (perhaps they are never taken up). If the first chamber re-passes the bill, it should contain concessions to the recalcitrant chamber. Cutting lines for the roll call vote in the enacting chamber should shift in the direction of the recalcitrant chamber and vote margins should increase.

In sum, the place to look for legislative anomalies are: 1) lop-sided supermajorities or, conversely, very narrow enactment votes for vetoed bills upon initial passage; 2) veto over-ride margins far from two-thirds in one or both chambers; 3) enactment votes for filibustered bills far from 60–40 in the Senate; 4) cloture vote margins far from 60–40; and 5) re-passed previously failed bills in the same legislative configuration that do not contain concessions from bill to bill.

So, how many legislative anomalies have occurred in recent decades? Has the rate of anomalies increased? Unfortunately, a comprehensive empirical analysis lies outside our writ here. However, we can present some simple data and mini-case studies that suggest anomalies now abound and have distinctive features.

Veto Anomalies

Table 13.1 presents some simple summary statistics on vetoes from 1975 to 2018. There were 167 vetoes in that period, with about half escaping an over-ride attempt. Of those that were challenged (90), about 69% were sustained (the over-ride attempt failed) while 31% succeeded. Under traditional veto bargaining models, we would expect that if a veto is challenged it should either succeed or fail by a narrow margin. Otherwise, either the president should not have vetoed it or Congress should not have challenged it. Hence, a 70% failure rate for over-ride attempts may raise an eyebrow; one might expect something closer to 50–50. In fact, Cameron (2000) reports a success rate of 45%, using earlier data (p. 56). Still, one needs to look more closely at actual vote margins to identify anomalies.

Table 13.2 takes a closer look at sustained vetoes, that is, failed over-ride attempts. It focuses on hopeless over-ride attempts. In the House, over half of the time that an over-ride attempt failed, it failed by at least 10% of the required votes (29 votes). In the Senate, some 10 of the 22 failed over-ride attempts failed by the comparable 10% margin (6 votes). Hence, the "hopeless over-ride" rate among the failures was 60% in the House and 45% in the Senate. Theory would predict something close to zero. It should also be noted that, of the 34 hopeless over-ride failures, six of these over-ride attempts failed in the Senate after success in the House (so the House success was immaterial), while the other four hopeless over-ride failures in the Senate occurred for vetoes where the House did not even attempt an over-ride (so they were truly hopeless failures). In sum, the number of hopeless over-ride attempts was not large but this phenomenon has become a notable feature of veto politics.

What type of bills did Congress typically try so hopelessly to over-ride? At least in recent cases, the bills were highly visible, highly contentious vehicles for partisan position-taking. They are similar to the bills involved in the frenetic, frenzied re-passage episodes discussed momentarily; in fact, some of them are the same bills. So, for example, bills repealing parts of Obamacare and the Dodd–Frank financial legislation both generated vetoes and hopeless over-ride failures in the Republican Congresses facing President Obama. Hopeless over-ride failures during the Bush administration were generated by vetoed bills banning waterboarding and establishing a timeline for withdrawing troops from Iraq.

Some of the hopeless over-rides seem to follow the script of Groseclose and McCarty's

Table 13.1   Summary statistics on vetoes: 1975–2018

Sustained[1]	62	37.1%
Overridden	28	16.8%
Unchallenged	77	46.1%
Total vetoes	167	100%

[1]This counts two vetoes that were overridden in one chamber but unchallenged in the other, technically leading to an outcome where the veto was challenged but not overridden. Accordingly, we classified these as sustained but exclude them from the following analysis of sustained votes.

Table 13.2   Hopeless over-ride attempts, 1975–2018

Sustained in House	40	Sustained in Senate	22
Failed by more than 10%	24	Failed by more than 10%	10
Percent not close	60%	Percent not close	45%

blame game vetoes. For instance, the waterboarding episode can be seen as an attempt by the Democrats to demonstrate to the public the inhumanity of the president and his administration. However, in some cases there are hints of another dynamic. Thus, reporting in *The Hill* noted: 'Republicans say they are playing the long game with the [ACA] repeal vote, hoping it will give voters a glimpse of how they would govern if they win back the White House in November.'[23] We will return to this point below.

We have looked at hopeless over-ride attempts; what about hopeless vetoes? How frequently does the president get massively rolled after vetoing a bill? Given the hopeless quality of the veto, why did he veto it in the first place?

In the time period we study, the president occasionally vetoed a bill with massive support, so that an over-ride was virtually certain. Of the 28 over-ridden vetoes during this time period, Congress overrode nine of them by at least 10% in each chamber. Six of these massive rolls came during the first 12 years of the data (during the Ford and Reagan Administrations). Since then,

massive rolls of vetoes have occurred only about once per decade. Table 13.3 provides a brief overview of these vetoes.

At the time of writing, the most recent massive roll of a presidential veto involved President Obama's veto of the Justice Against Sponsors of Terrorism Act (JASTA). This bill would have allowed private individuals to pursue legal action against foreign companies in US courts, primarily in response to the victims of the 9/11 terrorist attack. President Obama veto message cited foreign policy concerns.[24] President Bush's lone massive roll came from his veto of the Water Resources Development Act of 2007. Bush claimed the bill was too pork-ridden to serve the nation's interests.[25] Finally, a bill canceling Clinton's line-item veto of military construction projects was also overridden by large margins.[26] As with Bush's veto, the concerns behind the veto seem primarily centered on pork.[27]

In each of these examples, the president had genuine policy concerns, but the veto – a hopeless endeavor from the get-go – seems to have been undertaken partly or primarily for position-taking. Perhaps the president wanted

Table 13.3   Massive rolls of presidential vetoes, 1975–2018

Bill Number	Bill Name	Date of Veto	House Vote	Senate Vote	Reason for Veto
S.2040	Justice Against Sponsors of Terrorism Act	9/23/16	348–77	97–1	International concerns
H.R.1495	Water Resources Development Act of 2007	11/2/07	361–54	79–14	Too much pork
H.R.2631	Line Item Veto Cancellation	11/13/97	347–69	78–20	Too much pork
H.R.1	Water Quality Act	1/30/87	401–26	86–14	Too much spending and federal oversight
H.R.2409	Health Research Extension Act	11/8/85	380–32	89–7	Too much red tape and bureaucracy
H.R.6198	To amend the manufacturing clause of the Copyright Law	7/8/82	324–86	84–9	Free trade concerns
H.R.7102	Veterans' Administration Health-Care Amendments	8/22/80	401–5	85–0	Spent money on VA physician bonuses instead of helping veterans
H.R.5901	Education Division and Related Agencies Appropriation Act	7/25/75	379–41	88–12	Fiscal irresponsibility
H.R.4222	National School Lunch and Child Nutrition Act	10/3/75	397–18	79–13	Fiscal irresponsibility/personal responsibility

to signal his frugality and good stewardship to a national audience (or, in Obama's case, an international one). Or, the president may have wanted to highlight Congress's fiscal imprudence, a sort of *reverse* blame-game veto. In all three of these examples, both chambers of Congress were controlled by the other party.

Filibuster Anomalies

Discussion of the filibuster may seem somewhat odd in an essay on veto bargaining, but we argue that the anomalies are similar in both cases and likely to have a common origin. Therefore, let us quickly examine 'strange' patterns in filibusters, focusing on cloture vote margins.

Figure 13.1 displays vote margins in all cloture votes in the 111th to 115th Congresses (2009–18). Recall that the required quota for success was 60 votes in this period; in the figure, a margin of 0 corresponds to 60 votes for cloture. The thin vertical line shows the average margin in these Congresses: about 7.3 votes (in the 94th through 98th Congresses, the average margin was almost exactly 0). Two features stand out in the figure.

First, and most noticeable, is the very long and rather flat right-hand tail, that is, successful cloture votes. As shown, some cloture votes succeeded with absolutely spectacular margins, suggesting that the filibuster in question was a hopeless endeavor. Unfortunately, this inference is clouded by the changing vagaries of senatorial procedure. As explained by CRS experts: 'In recent times … Senate leadership has increasingly made use of cloture as a normal tool for managing the flow of business on the floor, even when no evident filibuster has yet occurred.'[28] Thus, cloture is now used pre-emptively and as a device to restrict non-germane amendments. This change in procedure probably accounts for some of the huge positive margins in cloture voting. Some

filibusters may have been fruitless efforts leading to a crushing cloture vote, but one cannot easily detect such filibusters using positive cloture margins alone.

Therefore, let us turn our focus to the left-hand tail: failed cloture motions. In the face of incomplete information about the filibuster pivot, one would expect some cloture motions to fail, but generally with margins close to zero. Yet one sees some eye-popping negative margins, some by 20 votes or more. Thus, some invincible filibusters provoked completely hopeless cloture attempts. Votes like this are hard to reconcile with classical SOP style models.

Have futile cloture efforts increased over time? Figure 13.2 address this question by examining the number of hopelessly failed cloture votes, votes failing by a 10% margin or more (that is, six votes or more). The time period is longer, from the 94th Congress to the 115th, in order to provide more of a historic contrast (the critical cloture margin was 60 votes over the entire period). As shown in the figure, there appears to be a jump in the number of big failures starting at the 104th Congress (1995–6). Using the benchmark of a 10% short-fall in votes, the average number of futile cloture votes was 10.1 in the 94th to 103rd Congresses; it was 23.5 in the 104th to 115th Congresses. Thus, the number of futile cloture votes doubled beginning with the 'Gingrich Revolution' Congress after the 1994 mid-term election. We note that the percentage of futile cloture votes (relative to all cloture votes) did not change much over this time period, though the number of such votes seemed to increase.

What were some examples of recent hopeless cloture votes? In the most recent period, many deal with border security, sanctuary cities, DACA and abortion – all highly visible and highly partisan issues.

We have just scratched the surface of this material but clearly some filibuster and cloture attempts look quite strange from a bilateral bargaining perspective.
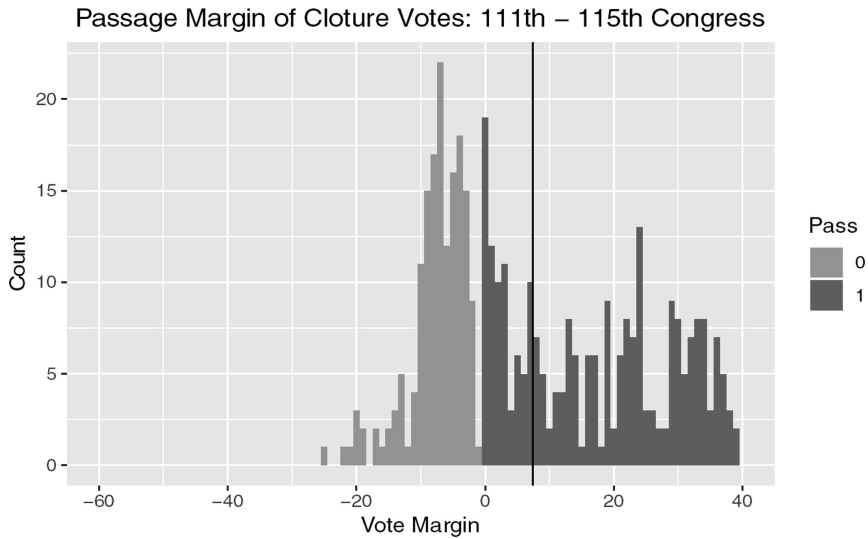
Figure 13.1   Passage margin of cloture votes, 2009–2018

Note: A vote margin of 0 corresponds to 60 votes for cloture. The right-hand tail of the figure captures successful cloture votes; the left-hand tail unsuccessful ones. Not every cloture motion resulted in a vote. The data exclude nominees considered under a pure majority confirmation rule.
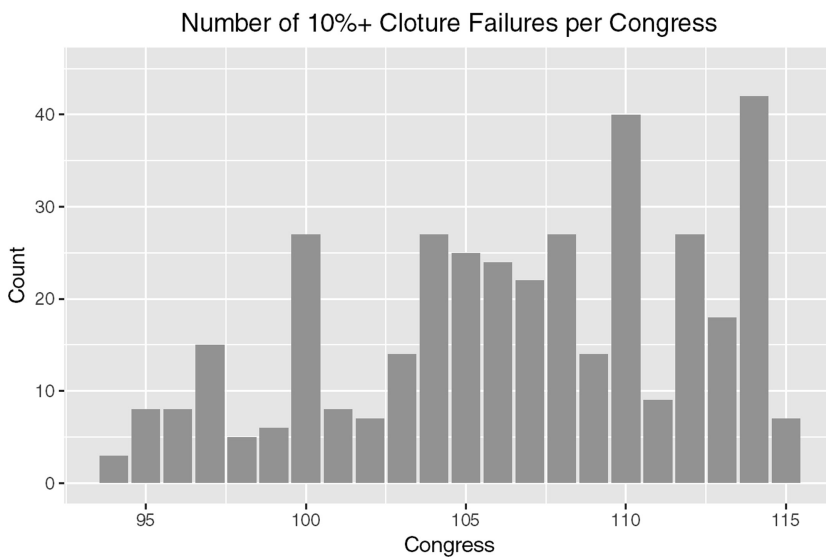
Figure 13.2   Futile cloture votes, 1975–2018

Note: Shown are counts of dramatically failed cloture votes by Congress, using the benchmark of a 10% short-fall in votes.

Frenetic Failed Legislation

One of the strangest recent phenomena in the new legislative politics is what can be called *frenetic failed legislation*. With frenetic failed legislation, one or both chambers of Congress repeatedly enact almost identical bills that all participants understand have no realistic chance of becoming law. And they do not, until the legislative configuration changes. In the traditional SOP frameworks, this spastic re-passage of doomed legislation makes about as much sense as repeatedly slamming oneself in the face with a baseball bat: it is a sign of madness. Yet, Congress has spent significant time and resources on such bills in recent Congresses. In fact, it has become a signature activity of contemporary legislative politics.

To be clear, frenetic failed legislation typically occurs under divided government, where one chamber (typically the House) passes and re-passes a bill (sometimes with minor variations) favored by the majority party in that chamber but opposed by the other chamber and/or the president. The status quo clearly falls within the gridlock interval. That is, the bill lacks the votes to overcome a filibuster or veto or both. In contrast to the sequential veto bargaining model, which envisions repeated passage of a succession of modified bills in a serious effort at policymaking, there is no effort at compromise. Instead, these repeated efforts are characterized by their intransigent and clearly infeasible nature. Let us look at a few examples from recent periods of divided government to illustrate.

The most famous example of frenetic failed legislation is of course the Republican efforts to 'repeal and replace' the Affordable Care Act. Recall that this landmark legislation was enacted by the 111th Congress after a historic donnybrook and signed into law by President Barack Obama in March 2010. The mid-term elections that November then saw the electorate administer a brutal drubbing to the Democrats, racking up some of the largest losses since the Great Depression – a

'shellacking', in President Obama's memorable phrase. Critically, the Republican gained control of the House of Representatives, while the Democrats retained the Senate until the 2014 election, when the Republicans established a narrow majority. The Democrats held onto the presidency until the 2016 election.

The classic SOP models clearly indicate that the Republicans had no realistic prospect of repealing the ACA in the 112th, 113th and 114th Congresses. In the first two Congresses, the Democratic-controlled Senate would simply ignore House legislation. In the third Congress, Democratic filibusters or presidential vetoes would surely kill Republican bills. These were the transparently obvious outcomes predicted by the models, and that is what transpired.

Accordingly, using the SOP models, one might expect Republican legislators to focus on other legislation that might actually have a chance of enactment. Or, they might concentrate their efforts on congressional oversight, constituency service, fund-raising and just plain electioneering. Nonetheless, the *Washington Post* documented a total of 54 total or partial repeals of the ACA in the first four years of Republican control.[29] While these bills were far from identical, attacking the existing law from a plethora of angles, they all had the exact same chance of becoming law: zero.

The ACA wasn't the only Obama-era statute that Republicans repeatedly attempted to repeal during this period. They also made several efforts to undo the Dodd–Frank regulations on the financial industry. For example, in 2013 alone, House Republicans passed HR 1256, HR 992, HR 2374 and HR 1105, all of which were intended to repeal aspects of Dodd–Frank.[30] None of these bills were considered by the Democratic Senate.

It should be noted that Republicans held no monopoly on frenetic failed legislation. Democrats found themselves in a similar political configuration during the 109th Congress, when they had a House majority during the waning years of the Bush

administration. And they engaged in similar legislative behavior. In particular, House Democrats repeatedly attempted to restrict activities in the Iraq war, such as through requiring troop withdrawals. As noted in *CQ Weekly*: 'In July, for example, the House passed a bill (HR 2956) sponsored by Armed Services Chairman Ike Skelton, D-Mo., that would have required troop withdrawals. But like about a half dozen other measures, it went no further.'[31] Furthermore, the accounts make clear that House Democrats were fully aware of the futility of their efforts:

> After Republicans blocked an effort last week to require a withdrawal of U.S. troops from Iraq, Senate Democrats put the issue aside and are not expected to return to it until after the August recess. House Democrats, however, plan to do their part to keep the subject alive this week, with war-related votes possible during committee consideration of the fiscal 2008 Defense spending bill and on the floor.[32]

If the multitudinous ACA repeals are a sign of legislative madness, the malady, unlike much in Washington today, is refreshingly bipartisan.

But perhaps there is a method in the madness, a method outside the ambit of the classical SOP models.

What is Going on? Blame Game Versus Virtue Signaling

Our admittedly cursory review of recent empirical evidence suggests that much legislating continues to follow the script of the classical, incomplete information bilateral bargaining models. For example, in Figure 13.1 most cloture votes do fall near the 60-vote benchmark. As the same time, there appears to be a serious under-current of something else going on. What is it?

An obvious candidate is blame game politics. As suggested by Senator Snowe's comment, a phenomenon like forcing a futile cloture vote in the face of an invincible filibuster may be an attempt by the chamber's

majority to highlight the perfidy of the opposition: 'Look, everyone! We would have this wonderful legislation but for the intransigence of these terrible people!' So: throw the bums out!

At the same time, much of the weirdness seems somewhat distinct from pure blame game politics. For example, it may make sense to try and fail to pass a symbolically resonant bill once, in order to demonstrate that the fault for failure lies with the opposition. But why pass the same bill 60 times? How much more education in the vileness of the opposition does the public need, once the opposition is revealed to be bad via the first failure? If, as Senate Majority Leader Mitch McConnell liked to suggest, 'There's no education in the second kick of a mule',[33] how much is there in the 40th, 50th or 60th? Similarly, even in clear blame game politics such as the veto of the Family and Medical Leave Act, part of the signaling was not just that President Bush was blocking family leave. The message was also, 'we Democrats are really in favor of this idea and can be trusted to deliver if handed the keys to the kingdom'. In other words, the message sent to the audience is not just 'the other side is horrible, so kick them out' but also 'our side is wonderful, so support us'. Virtue signaling seems as much at play as blame game.

Consequently, let's briefly explore the politics of virtue signaling.

TOWARD A MODEL OF MESSAGE LEGISLATION: VIRTUE SIGNALING AND ACCOUNTABILITY

Let's consider a model of message legislation, legislation not intended for enactment but instead constructed *solely to send a message to outside observers*. Many obvious questions arise: who are the senders? Who are the receivers? What is the message? What gives the message meaning? What gives it credibility? Why is strategic information

transmission of this form advantageous to the parties? Many answers to these questions are possible and lead to different models. But let's sketch one set of answers, if only to suggest how to embed veto bargaining-style models of SOP policymaking within an accountability model of the electorate. We'll focus on the dramatic, frenetic failed legislation of the 'repeal and replace' variety.

First, let's assume the senders are members of a party that controls one chamber of Congress but does not control all the major veto points in the legislative process. So, the president may belong to the opposite party. Or, the other chamber may be controlled by the other party. Or, 'our' chamber may be the House while the other party controls the very constraining filibuster pivot in the Senate. Let's assume the status quo lies firmly in the gridlock region, so no enactment improving matters from the sender's policy perspective is actually possible.

Let's assume the receiver of the message is the sender's selectorate – the high-information, highly engaged portion of the party whose money, time and enthusiasm is vital for re-election. With the support of these hyper-engaged kingmakers, re-election is almost assured (the district is a safe one). But without it, the sender may well be 'primaried' and out of office. This approach is particularly compatible with the UCLA approach to parties, where parties are formed out of a coalition of policy-motivated groups which 'insist on the nomination of candidates with a demonstrated commitment to its program',[34] but can also fit with others in which the political marketplace is less than perfect.

Two broad classes of messages are possible. The first (as discussed above) is the *blame-game message*: I will show you that the other side is terrible [so you should support me]. The second is the *virtue-signaling message*: I will show you that I am trustworthy, your faithful agent, one of you [so you should support me]. Let's consider the second class of models, since Groseclose and

McCarty already constructed an example of the former.

Virtue signaling requires the receiver (the selectorate) to have incomplete information *about the sender*, the incumbent legislator. This is in contrast to the blame-game approach, where the incomplete information must be about the opposition (e.g., the opposition president or party). So, here, the selectorate is somewhat uncertain about the virtue of the incumbent representative. To make matters concrete, suppose there are two types of representatives: slackers (low virtue) and zealots (high virtue).[35] Slackers have no policy convictions but just value holding office. Zealots also value office but in addition they value policy, and value it similarly to the selectorate. From the viewpoint of the policy-minded selectorate, it doesn't make much difference which type holds office when policy is gridlocked. After all, no change is possible. But if policymaking becomes possible and is costly of time and effort, then it may make a great deal of difference who holds office. For on that happy day, the slacker won't do much work, but the zealot will toil like a Trojan in order to achieve the policy goal. Clearly, from the viewpoint of the policy-oriented selectorate, it will be much better to be represented by a zealot rather than a slacker on that future day.

How then can an incumbent zealot prove he is a zealot and worthy of re-election? A non-starter is, issue a raft of campaign promises. Any promise a zealot could make, a slacker could make as well. So, our model will not feature Downsian-style prospective campaign promises. Rather, it will incorporate V.O. Key-style retrospective voting. The selectorate will act in light of what has gone before, eliminating incumbents likely to be slackers and retaining those likely to be zealots. The point is to increase the chances of having a zealot incumbent when policy windows open in the future.[36]

Let's focus on one type of action the incumbent can undertake: frenetic failed legislation. So, pass, re-pass and continue

re-passing virtually the same bill in the face of an unbeatable veto, an invincible filibuster or just plain disregard from the opposite chamber. The resulting sequence of play is:

1. Nature selects the incumbent legislator's type (slacker or zealot), which is private information for the incumbent.
2. The incumbent engages in a futile legislative interaction with, say, the President, fruitlessly passing and re-passing the same bill with multiple vetoes and re-vetoes. Enactments are costly of time and effort that could profitably be spent elsewhere.
3. When either the president accepts a bill or the incumbent desists with fruitless legislating, players receive period 1 payoffs.
4. The voter then retains or fires the incumbent. If the voter fires the incumbent, nature selects the type of the new representative. Nature also selects a new president so that policy windows open.
5. The representative (either new or retained) engages in a legislative interaction with the new President.
6. Based on the outcome of the legislative interaction, players receive second period pay-offs.

Comparison of this sequence with that of the simple TILI game indicates a much more complex game. It features two periods, not one; incomplete information (held by the voter about the incumbent's preferences), not complete information; voter beliefs about the incumbent's preferences; costly signaling by the incumbent in period 1; retrospective voting by the voter; and, finally, serious policymaking in the second period. Still, as a costly signaling game, it is not hard to analyze using modern techniques.

We assert without proof that the virtue signaling game has two generic equilibria. In the first, a pooling equilibrium, both a slacker legislator and a zealot legislator behave the same way in period 1: they do nothing. And, in this 'incumbency advantage' equilibrium, the voter re-elects the incumbent despite the dearth of effort. Then, in the second period, a zealot legislator engages in fruitful legislating while a slacker does nothing. This equilibrium is quite attractive for the incumbent politician regardless of type; after all, he doesn't have to do much policy work in period 1 and yet gets re-elected. But it is not so good for the voter, because when the policy window opens in the second period he may find himself saddled with a slacker as representative, resulting in a missed legislative opportunity.

The second, and more interesting, equilibrium is a separating equilibrium.[37] Here, in period 1 incumbent slackers and zealots behave in very different ways. The zealot engages in frantic frenetic failed legislating, fruitlessly passing and re-passing the same bill over and over and over. The slacker does nothing because imitating the furious action of the zealot would be too costly of effort. The zealot's policy-mindedness creates a wedge between him and the slacker that allows this separation to occur – but only at high levels of effort, hence the need to do a lot of futile policymaking. The voter then fires a revealed slacker and retains a revealed zealot. In the second period, when policy windows open, a zealot works hard to legislate and a slacker doesn't. This equilibrium is much worse for the legislator: a period 1 slacker gets fired, and a period 1 zealot must slave away at phony legislating in order to retain his job. But this equilibrium is much better for the voter because it boosts the chance of having a valuable zealot in place when policy windows open.

We have only sketched an analysis of message legislation and virtue signaling. But we hope we have at least suggested that the idea is worth pursuing, and that the politics of virtue signaling is distinct from but complementary to the politics of the blame game. Carefully elaborating the theory of virtue signaling may enable some parsing of the difference between the two and lead empirical work in new directions, for example the effect of message votes on fund raising, primary challenges and citizen voting – all new directions for SOP-style models. In addition, further theoretical development might well

tackle the question: why the rise in message legislation? The new media environment, partisan polarization of elites, the rise of groups such as the Tea Party on the right and "the opposition" on the left, partisan sorting geographically and across the parties, and the increase in competition to control the government are probably all implicated. But how exactly? In a related way, in the context of the virtue signaling model one might ask, across different issues, when should we expect the pooling equilibrium to prevail, and when the separating equilibrium (the difficult question of equilibrium selection)?

DOES BARGAINING BEFORE AN AUDIENCE MAKE A DIFFERENCE?

We have suggested ways to modify classical SOP models, such as the veto bargaining models, in order to better capture the new American legislative politics. The new politics on which we have focused results from blame game politics but also (we suggest) from politicians' virtue signaling to an attentive audience of ideological extremists. But is modifying the classical models to incorporate message legislation really worth the effort? After all, the classic SOP models more or less get it right with respect to policy outcomes: when they say policy windows are shut, relatively little is enacted. When they identity the key veto players, they are generally correct. And when they suggest the political evaluation needed for enactment – that is, the spatial position of viable legislation in something like NOMINATE space – usually they are close to the mark. So, one may well ask, does all the noisy action attendant on message legislation actually make a substantive difference? Or does the sound and fury signify nothing?

Our sketch model of message legislation and virtue signal suggests that the politics of bargaining before an audience does make a difference for outcomes, though a

fairly subtle one. The separating equilibrium in our proto-model involves considerable information transmission between the sending congressperson and the constituent. The constituent learns something about the congressperson and – critically – then uses the information in choosing either to support or oppose the incumbent. The result is an ideological filter applied to incumbents, resulting over time in greater retention of representatives who are zealous in pursuit of the selectorate's ideological goals. The result is not quite the same thing as ideological polarization per se. But because the key constituents who follow and respond to the political theater tend to be high-information ideologically consistent extremists, the net effect is to build a more extreme legislature over time. In essence, there is an enhanced feedback loop between incumbent position taking and constituent response, leading to a legislature responsive to relatively extreme blocks within the electorate. Or so the model suggests. An obvious question is: is this actually happening?

There is another element, outside our sketch model, but of potential importance and concern. In the pooling equilibrium, zealous incumbents who face gridlock don't undertake any policymaking effort since it won't accomplish anything substantively and they will get re-elected anyway. But in fact, case studies show zealous policy-minded congressmen doing a lot of policy work during down periods. In particular, congressional policy entrepreneurs hone their legislative proposals and lay the foundation for future legislative coalitions. For instance, Senator Bill Bradley spent years working on tax reform before policy windows opened creating the opportunity for a big policy innovation.[38] Similarly, famed policy entrepreneur Representative Henry Waxman labored long and hard, often for years, to build carefully crafted bills well aimed at specific health policy problems.[39] The result was (arguably) high quality bills ready to go, when the gridlock region narrowed and legislative opportunity presented itself.

In contrast, in the separating equilibrium, zealous legislators work extremely hard during the gridlock period, acting out a laborious pantomime of legislating – 'repeal and replace', for instance. All that effort devoted to phony legislating must come from somewhere. One obvious candidate is real legislating of the Bradley–Waxman variety: low-profile, under-the-radar preliminary work without which high quality enactments are impossible, or at least far less likely.[40] From this perspective, one consequence of the era of message legislation may be a reduction in the quality of actual enactments. In addition, the dearth of high-quality ready-to-go bills may suppress legislative productivity when policy windows open, again as suggested by the failure of the ACA repeal. Obviously, this possibility is speculative. But is it true? Is the quality of enactments down, is there a dearth of high-quality draft bills, and does legislation fail despite open windows because no one did the preliminary work of crafting a high-quality bill? These are troubling but compelling questions.

Changes in American politics create opportunities and challenges for empiricists and theorists both: for the first, to document what has happened, for the latter to explain it. Then, there is a challenge at the interface of theory and data: does the new theory really afford an understanding of the new patterns? Or has it missed the mark? In this chapter, we have reviewed some of the big changes in American legislative politics and offered a proposal on how to craft new theory for the new politics. Whether that new theory will be forthcoming, and whether it will prove successful in explaining the new politics, remains to be seen.

Notes

1   Ferejohn and Shipan, 1990; Gely and Spiller, 1990.
2   Krehbiel, 1998; Brady and Volden, 1998; Wawro and Schickler, 2013.
3   Cameron, 2000; Groseclose and McCarty, 2001; Howell, 2003.
4   On the parties, see Bawn et al., 2012; Heany et al., 2012; Levendusky, 2009. For an interesting elaboration and partial demurral, see McCarty and Schickler, 2018. On new media and the new media environment, see Farrell, 2012 and Prior, 2013.
5   McCarty, forthcoming.
6   One of the authors is somewhat partial to Cameron and McCarty, 2004 and Cameron, 2009.
7   Lee, 2016.
8   We would be remiss not to note Gilmour, 1995, an analysis that in retrospect appears extremely perceptive.
9   Ashworth, 2012 is a succinct recent overview. Besley, 2006 is often seen as a touchstone, while Fearon, 1999 remains useful.
10 We borrow the concept of the selectorate from Bueno de Mesquita et al., 2005; see also Bawn et al., 2012.
11 In simple models, though, the space could be multi-dimensional so long as the players are assumed to be unitary actors.
12 For interested readers, a good introduction to the spatial theory of voting remains Enelow and Hinich, 1984; Duggan, 2005 provides a comprehensive recent survey.
13 Mayhew, 1991.
14 Krehbiel, 1998.
15 Ibid., but see Wawro and Schickler, 2013 for a war-of-attrition approach to the filibuster.
16 Cox and McCubbins, 2007.
17 Ferejohn and Shipan, 1990.
18 Moe and Howell, 1999.
19 There are other ways to study veto threats that deserve attention: see Hassell and Kernell, 2016.
20 Banks, 1991.
21 Again, a forward-thinking precursor was Gilmour, 1995.
22 The cutting line between yeas and nays in the policy space occurs midway between the bill and the status quo. If the status quo remains the same and the bill is re-passed with a concession, the new cutting line should shift in the direction of the concession. The logic is explained in more detail in Cameron, 2000, which takes the test to actual data. Over most of the 20th century, one sees this pattern during sequential veto bargaining.
23 Weaver, 2016.
24 Obama, 2016.
25 Bush, 2007.
26 The Line Item Veto Act of 1996 conferred a line item veto on the president. The Supreme Court quickly struck down the legislation as unconstitutional, but in its brief life it allowed President Clinton to line-item veto portions of some bills.

27 Clinton, 1997.
28 Heitshusen and Beth, 2017: 1.
29 O'Keefe, 2014.
30 Weyl, 2014.
31 Donnelly, 2008: 41.
32 Donnelly and Graham-Silverman, 2007: 2186.
33 Bolton, 2013.
34 Bawn et al., 2012: 571.
35 This follows the nomenclature of Gailmard and Patty, 2007.
36 Ashworth, 2012 makes the interesting observation that rational retrospective voting is inherently prospective in intent, a point that is not completely transparent in early discussions like that of Key, 1966 or Fiorina, 1981. The logic is similar to punishing a child for bad behavior: the point is not to slake the parent's thirst for revenge, but to improve the child's conduct in the future.
37 The separating equilibrium requires technical conditions typical of costly signaling games (see Banks, 1991). Critically, the marginal cost of repeated failures must be smaller for zealots than for slackers.
38 Birnbaum and Murray, 1988.
39 Waxman, 2009.
40 The diversion of effort from low-profile bill crafting to high-profile messaging is an example of the perverse incentives often seen in multi-task principal–agent games: see Holmstrom and Milgrom, 1991.

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