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ESSAY

ASYMMETRIC CONSTITUTIONAL HARDBALL

Joseph Fishkin & David E. Pozen***

Many have argued that the United States' two major political parties have experienced "asymmetric polarization" in recent decades: The Republican Party has moved significantly further to the right than the Democratic Party has moved to the left. The practice of constitutional hardball, this Essay argues, has followed a similar—and causally related—trajectory. Since at least the mid-1990s, Republican officeholders have been more likely than their Democratic counterparts to push the constitutional envelope, straining unwritten norms of governance or disrupting established constitutional understandings. Both sides have done these things. But contrary to the apparent assumption of some legal scholars, they have not done so with the same frequency or intensity.

After defining constitutional hardball and defending this descriptive claim, this Essay offers several overlapping explanations. Asymmetric constitutional hardball grows out of historically conditioned differences between the parties' electoral coalitions, mediating institutions, views of government, and views of the Constitution itself. The "restorationist" constitutional narratives and interpretive theories promoted by Republican politicians and lawyers, the Essay suggests, serve to legitimate the party's use of constitutional hardball.

Finally, and more tentatively, this Essay looks to the future. In reaction to President Trump, congressional Democrats have begun to play constitutional hardball more aggressively. Will they close the gap? Absent a fundamental political realignment, we submit that there are good structural and ideological reasons to expect the two parties to revert to the asymmetric pattern of the past twenty-five years. If this prediction is correct, it will have profound long-term implications both for

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liberal constitutional politics and for the integrity and capacity of the American constitutional system.

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INTRODUCTION

Donald Trump recently became the first President since James Garfield in 1881 to take office with a vacant Supreme Court seat to fill.[1]

1. See Barry J. McMillion, Cong. Research Serv., IN10469, Supreme Court Vacancies that Arose During One Presidency and Were Filled During a Different Presidency 1 (2016). Trump is the first President since Abraham Lincoln to take office with a Supreme Court vacancy that arose when the presidency was controlled by a different political party. Id. Not included in this accounting, because there was no actual vacancy on the Court, are the events following Chief Justice Earl Warren's announcement in June 1968 that he intended to retire upon confirmation of his successor. Outgoing President Lyndon Johnson nominated Associate Justice Abe Fortas to be the next Chief Justice. Republicans and conservative Dixiecrat Democrats successfully filibustered the nomination, defeating the key cloture vote on October 1, 1968, after which Johnson withdrew the nomination. See Attempt to Stop Fortas Debate Fails by 14-Vote Margin, CQ Almanac 1968 (1969), http://library.cqpress.com/cqalmanac/cqal68-1284316 [http://perma.cc/J4YT-KVP6].

This episode is an interesting if imperfect precursor of the phenomenon this Essay will discuss. The political factions in 1968 did not match up neatly with the parties. And

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Political struggle, as much as luck, produced this result. The vacancy arose more than eleven months prior to President Trump's inauguration. After President Obama submitted a "consensus nominee"[2] on March 16, 2016, Senate Republicans refused to give the nominee a hearing. They resolved to block anyone selected by President Obama from filling the seat. They also suggested that more was to come. As election day approached, one prominent Republican Senator "promise[d]" that his Republican colleagues would likewise "be united against any Supreme Court nominee that Hillary Clinton, if she were president, would put up."[3] The arguably unprecedented blockade of the Merrick Garland nomination[4] stands as a classic example of constitutional hardball.[5]

Fortas had minor ethics problems that became public in the months leading up to the cloture vote (his more serious ethics problems emerged later). Still, the use of a filibuster to stop a Supreme Court nomination was, at the time, unprecedented; observers speculated that the motives of the key Republican Senator leading the charge against Fortas "were, at least, mixed, and that he really intended to save the nominations for GOP Presidential candidate Richard M. Nixon, if Nixon was elected." Id. That is what happened. After Nixon was elected, he chose Warren Burger to fill the seat, and Chief Justice Warren honored his stated intention to resign.

2. Thomas Ferraro, Republican Would Back Garland for Supreme Court, Reuters (May 6, 2010), http://www.reuters.com/article/us-usa-court-hatch-idUSTRE6456QY20100506 [http://perma.cc/7YZD-BWN8] (quoting Republican Senator Orrin Hatch describing Judge Garland as "a consensus nominee" who would be confirmed with bipartisan support, "[n]o question" (internal quotation marks omitted)).

3. David A. Graham, What Happens if Republicans Refuse to Replace Justice Scalia?, Atlantic (Nov. 1, 2016), http://www.theatlantic.com/politics/archive/2016/11/whats-the-opposite-of-court-packing/506081 [http://perma.cc/GL2U-WBYV] (quoting Senator John McCain); see also id. (noting that while Senator McCain "partially walked back his comments," other Republican Senators echoed and extended them). When Trump subsequently defeated Clinton, Senate Majority Leader Mitch McConnell announced that "the American people simply will not tolerate" Democratic efforts to thwart President Trump's choice for the Court. Alexandra Jaffe, McConnell: Public "Will Not Tolerate" Dems Blocking SCOTUS Pick, NBC News (Jan. 4, 2017), http://www.nbcnews.com/politics/congress/mcconnell-public-will-not-tolerate-dems-blocking-scotus-pick-n703301 [http://perma.cc/MU6E-TWPW].

4. See, e.g., Jon Huntsman & Joseph Lieberman, Opinion, Jon Huntsman and Joseph Lieberman: The Republican SCOTUS Blockade Is 'Not Acceptable,' Time (Mar. 25, 2016), http://time.com/4271942/supreme-court-compromise (on file with the *Columbia Law Review*) ("There is no modern precedent for the blockade that Senate Republicans have put in place."). As Professors Robin Bradley Kar and Jason Mazzone have detailed, the Senate had never before "deliberately transfer[red] one President's Supreme Court appointment powers to an unknown successor" in the absence of "contemporaneous questions about the status of the nominating President as the most recently elected President." Robin Bradley Kar & Jason Mazzone, The Garland Affair: What History and the Constitution *Really* Say About President Obama's Powers to Appoint a Replacement for Justice Scalia, 91 N.Y.U. L. Rev. Online 53, 60 (2016). For a critical discussion of the choices made by Kar and Mazzone in construing the historical record, see Josh Chafetz, Unprecedented? Judicial Confirmation Battles and the Search for a Usable Past, 131 Harv. L. Rev. 96, 128–30 (2017).

5. See infra Part I (discussing definitions of constitutional hardball).

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The Democrats' response to this highly salient and consequential act of constitutional hardball was comparatively muted. President Obama did not choose to raise the stakes. He did not, for instance, threaten to install Judge Garland on the Court on a theory of implied or forfeited Senate consent, as some commentators urged as early as April 2016.[6] Nor did he give Garland a recess appointment.[7] Following President Trump's election, Senate Democrats, under heavy pressure from progressive groups,[8] engaged in a bit of constitutional hardball of their own. They used the filibuster to block President Trump's nominee, then-Judge Neil Gorsuch, for the seat Judge Garland had been denied.[9] Senate Republicans swiftly responded by exercising the "nuclear option" to change cameral rules so that a Supreme Court nominee no longer needs more than a simple majority vote.[10]

In the rush of real-time narration, as history unfolds around us, it is easy to tell a story about this episode and others before it that emphasizes tit-for-tat mutual escalation and the constitutional hardball of both sides. Such stories, we submit, neglect the elephant in the room. For a quarter of a century, Republican officials have been more willing than Democratic officials to play constitutional hardball—not only or primarily on judicial nominations but across a range of spheres. Democrats have also availed themselves of hardball throughout this period, but not with the same frequency or intensity. This partisan gap is in some ways analogous to the phenomenon of "asymmetric polarization" that social scientists have documented.[11] This Essay will suggest that the two phenomena are intertwined.

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6. See Gregory L. Diskant, Obama Can Appoint Merrick Garland to the Supreme Court if the Senate Does Nothing, Wash. Post (Apr. 8, 2016), http://wapo.st/2gNmhkM [http://perma.cc/E65J-RP6R].

7. See, e.g., David Dayen, Obama Can and Should Put Merrick Garland on the Supreme Court, New Republic (Nov. 16, 2016), http://newrepublic.com/article/138787/obama-can-put-merrick-garland-supreme-court (on file with the *Columbia Law Review*) (urging an intersession recess appointment).

8. See David Weigel, Activists Celebrate Democrats' Push to Filibuster Gorsuch, Wash. Post (Apr. 4, 2017), http://wapo.st/2o7aily?tid=ss [http://perma.cc/BF2Z-QWD6].

9. See Chafetz, supra note 4, at 108–09 (reviewing these events).

10. See id. at 109. Neither of these moves was entirely novel. Although filibusters of Supreme Court nominations have been exceedingly rare, the tactic was successfully pioneered by Senate Republicans in the Fortas affair. See supra note 1. The use of the "nuclear option" to overcome the Gorsuch filibuster has a more recent precedent in Democratic Senators' use of this method, in 2013, to remove the filibuster for non–Supreme Court nominations. See infra note 84 and accompanying text.

11. See Nolan McCarty, What We Know and Don't Know About Our Polarized Politics, Wash. Post: Monkey Cage (Jan. 8, 2014), http://wapo.st/1ifmRzK [http://perma.cc/3N3B-JKB2] ("The evidence points to a major partisan asymmetry in polarization. Despite the widespread belief that both parties have moved to the extremes, the movement of the Republican Party to the right accounts for most of the divergence between the two parties [since the 1970s]."). As we discuss below, asymmetric constitutional hardball is not simply an epiphenomenon of asymmetric polarization, although

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The small-c constitution[12] now finds itself at a crossroads. As the filibuster of Justice Gorsuch demonstrates, we are at a liminal moment in political time, in which Democratic Party leaders are showing a new appetite for playing constitutional hardball in response to President Trump. Will they close the hardball gap with their Republican counterparts in the months and years ahead? And would it be a good thing if they did?

The answer to such questions may be clouded temporarily by the political and constitutional turmoil wrought by the Trump Administration, which has put some unusual cross-pressures on congressional Republicans. We hazard no guess here about when a post-Trump political order will arrive or exactly what shape it will take. But our account of recent constitutional history leads us to offer one important prediction. Barring a fundamental realignment in the party system, we believe the now-familiar pattern of asymmetric constitutional hardball is likely to continue for the foreseeable future: While Democrats may well become more aggressive practitioners of constitutional hardball,[13] they will not keep pace with Republicans—and this partisan difference will continue to be a pivotal feature of American constitutional government.

This might seem like a reckless prediction to make at a moment when so much is in flux. But this Essay will document a number of longer-term

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the latter is almost certainly one of the former's causes. See infra notes 101–104, 177–180 and accompanying text.

12. See David A. Strauss, The Irrelevance of Constitutional Amendments, 114 Harv. L. Rev. 1457, 1459 (2001) (noting the distinction between "the small-'c' constitution—the fundamental political institutions of a society, or the constitution in practice—and the document itself"). The small-c constitution is often associated with "unwritten" norms of politics and governance. Jacob E. Gersen & Eric A. Posner, Soft Law: Lessons from Congressional Practice, 61 Stan. L. Rev. 573, 574 (2008).

13. In January 2018, Senate Democrats took the once-unthinkable (for Democrats) step of shutting down the government in a bid to prompt legislative action on the Deferred Action for Childhood Arrivals program that the Trump Administration had announced it would end. Yet to the dismay of their activist base, the Democrats "collapsed and accepted the Republican terms for reopening the government" within three days. Newt Gingrich, Opinion, Newt Gingrich: Schumer Shutdown Turns into Schumer Surrender, Fox News (Jan. 24, 2018), http://www.foxnews.com/opinion/2018/01/24/newt-gingrich-schumer-shutdown-turns-into-schumer-surrender.html (on file with the *Columbia Law Review*); see also Tim Murphy, Liberal Activists Are Furious that Democrats "Caved" on the Shutdown, Mother Jones (Jan. 22, 2018), http://www.motherjones.com/politics/2018/01/liberal-activists-are-furious-that-democrats-caved-on-the-shutdown [http://perma.cc/XTU8-PHAQ] (describing activists' criticisms of "weak-kneed" Democrats for "caving" rather than maintaining the shutdown (internal quotation marks omitted)); Nicky Woolf, The Democrats Ended the US Government Shutdown—but at What Price?, New Statesman (Jan. 23, 2018), http://www.newstatesman.com/2018/01/democrats-us-government-shutdown-republicans-state-spending-bill [http://perma.cc/4T5T-PXT2] (contrasting the January 2018 shutdown with the shutdowns forced by Republicans in 1995 and 2013 and concluding that "Democrats have demonstrated that they don't have the stomach for that kind of brinkmanship").

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dynamics that seem poised to perpetuate the divide.[14] To come to grips with the constitutional period the country has just lived through, and also with the new one it may be entering, we need to understand better both the causes and the consequences of asymmetric constitutional hardball.

I. CONSTITUTIONAL HARDBALL AND CONSTITUTIONAL CONVENTIONS

Professor Mark Tushnet has defined constitutional hardball as "political claims and practices . . . that are without much question within the bounds of existing constitutional doctrine and practice but that are nonetheless in some tension with existing *pre*-constitutional understandings."[15] Constitutional hardball tactics are viewed by the other side as provocative and unfair because they flout "the 'go without saying' assumptions that underpin working systems of constitutional government."[16] Such tactics do *not* generally flout binding legal norms. But that only heightens the sense of foul play insofar as it insulates acts of hardball from judicial review.

Although Tushnet allows for the possibility of judicial constitutional hardball,[17] his account focuses on legislative and executive actors, and the most straightforward cases of hardball often occur in legislatures. Legislative bodies teem with rules and norms, not expressly required by constitution or statute, that govern the interactions among political blocs within the institution. Tushnet's original examples of constitutional hardball include the impeachment of President Clinton, the 2002-to-2003 Democratic filibusters of judicial nominations by President Bush, and the 2003 efforts of Republican representatives in Colorado and Texas to push through mid-decade redistricting plans.[18] The recent blockade of Judge Garland fits Tushnet's model nicely, as there is a longstanding custom,

14. See infra Part III.

15. Mark Tushnet, Constitutional Hardball, 37 J. Marshall L. Rev. 523, 523 (2004) [hereinafter Tushnet, Constitutional Hardball].

16. Id. at 523 n.2; see also Mark Tushnet, 1937 Redux? Reflections on Constitutional Development and Political Structures, 14 U. Pa. J. Const. L. 1103, 1108 (2012) [hereinafter Tushnet, 1937 Redux] (describing constitutional hardball as "the development of practices that violate previously well-understood and accepted ways in which members of political parties who disagreed on matters of policy conducted their debates—and fights—over policy development").

17. Tushnet, Constitutional Hardball, supra note 15, at 537–38.

18. See id. at 524–28; cf. Lawrence Wright, America's Future Is Texas, New Yorker (July 10, 2017), http://www.newyorker.com/magazine/2017/07/10/americas-future-is-texas (on file with the *Columbia Law Review*) (stating that Texas's 2003 "redistricting process has since been replicated in statehouses around the country, creating congressional districts that are practically immune to challenge and giving Republicans an impregnable edge in Washington").

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but no clear-cut legal obligation, that the Senate provides timely advice and consent on Supreme Court nominations.[19]

In what sense are these examples of constitutional hardball, rather than simply political hardball? We believe that the use of "forceful uncompromising methods"[20] by government actors can qualify as constitutional hardball in one of two basic ways. The first involves what some call constitutional conventions.[21] Constitutional conventions are "unwritten norms of government practice" that emerge in a decentralized fashion and "are regularly followed out of a sense of obligation but are not directly enforceable in court."[22] Whatever explains their existence, constitutional conventions may foster consistency, coordination, and comity in governance by prescribing "the way in which legal powers shall be exercised" by high-level officials.[23] They fill in the gaps of adjudicated structural constitutional law.[24]

A political maneuver can amount to constitutional hardball when it *violates or strains constitutional conventions for partisan ends*.[25] In other

19. See Kar & Mazzone, supra note 4, at 58–82.

20. Hardball, Merriam-Webster, http://www.merriam-webster.com/dictionary/hardball [http://perma.cc/9DT8-HREZ] (last visited Jan. 18, 2017); see also Hardball, Oxford Dictionaries, http://en.oxforddictionaries.com/definition/hardball [http://perma.cc/3ULJ-YWPY] (last visited Feb. 15, 2017) (defining hardball as "[u]ncompromising and ruthless methods or dealings"); Hardball, Urban Dictionary, http://www.urbandictionary.com/define.php?term=hardball [http://perma.cc/R5UU-MPRF] (last visited Feb. 15, 2017) (defining hardball as "playing any kind of game, including real life, in the toughest possible way but without breaking the law").

21. This is an extension of Tushnet's account; Tushnet himself suggests this move in passing. See Tushnet, Constitutional Hardball, supra note 15, at 523 n.2.

22. David E. Pozen, Constitutional Bad Faith, 129 Harv. L. Rev. 885, 930 (2016) [hereinafter Pozen, Bad Faith]. More formally, constitutional conventions "(1) are norms of domestic governmental behavior (2) that emerge from decentralized processes, (3) are regularly followed (4) out of a sense of obligation, and (5) are not directly enforceable in court but rather (6) are enforced by political sanctions, if not also by 'the internalized sanctions of conscience.'" David E. Pozen, Self-Help and the Separation of Powers, 124 Yale L.J. 2, 29 (2014) [hereinafter Pozen, Self-Help] (quoting Adrian Vermeule, Conventions of Agency Independence, 113 Colum. L. Rev. 1163, 1182 (2013)). Less formally, they are rules of the policy game that the players themselves have developed over time, the breach of which triggers disapproval.

23. Peter W. Hogg, Constitutional Law of Canada 17 (3d ed. 1992).

24. See Pozen, Self-Help, supra note 22, at 33 ("Conventions help to organize public life in . . . the vast domain in which the [constitutional] text underdetermines outcomes. They help to shape a normative order in which representative politics is transacted." (footnote omitted)). Following a path laid by Commonwealth theorists, American scholars have increasingly begun to explore the role of constitutional conventions in our domestic system. See id. at 32–33.

25. By partisan ends, we mean the collective goals or objectives of one side in a political conflict. Often, the two sides in such conflicts will be identified with the two major political parties. But not always: A bipartisan coalition of senators, for example, could play constitutional hardball versus the President in order to advance the institutional interests of their branch or chamber.

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words, if all forms of hardball are marked by "questionable, qualm-producing means,"[26] when the means are seen as questionable and qualm-producing because they disrupt an especially respected or resilient interbranch or interparty practice, now we are talking about constitutional hardball. Uncompromising methods that do not disrupt the "machinery of government,"[27] by contrast, lack this small-c constitutional dimension. Although necessarily fuzzy at the edges, this formulation clarifies the ambiguous phrase "pre-constitutional understandings" in Tushnet's definition. This formulation also highlights something distinctively constitutional about constitutional hardball tactics: They put pressure on the "norms of good institutional citizenship" that help to structure and "sustain the constitutional system."[28]

Given that constitutional conventions are thought to serve this systemic function, acts of hardball that subvert them are experienced by officials and observers on the other side as breaches of "constitutional morality,"[29] not merely as breaches of political etiquette. When the Republican-controlled Congress shut down the executive branch in 1995 and 1996 to gain leverage over President Clinton in budget negotiations, or when Senate Democrats started holding pro forma "gavel-in, gavel-out" sessions in 2007 to block President Bush's recess appointments,

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We include practices that violate *or strain* conventions on account of the possibility that participants in these conflicts "may not view their actions as a change in existing conventions at all, but rather as the best interpretation of existing conventions with respect to a question that has never been clearly decided, or an issue that has never arisen before in precisely the same way." Jack M. Balkin, Constitutional Hardball and Constitutional Crises, 26 Quinnipiac L. Rev. 579, 585 (2008) [hereinafter Balkin, Constitutional Hardball and Constitutional Crises]. Thus, some have suggested that Senate Republicans' refusal to consider the Garland nomination was within the bounds of convention, given that (among other things) the Senate had previously stonewalled many lower court nominees and executive branch nominees. See, e.g., Michael D. Ramsey, Why the Senate Doesn't Have to Act on Merrick Garland's Nomination, Atlantic (May 15, 2016), http://www.theatlantic.com/politics/archive/2016/05/senate-obama-merrick-garland-supreme-court-nominee/482733 [http://perma.cc/GT8H-RR96]. As with all historically informed inquiries, the patterns of behavior said to give rise to conventions can be described at different levels of generality. For a detailed discussion of the malleability of claims of "unprecedentedness" in the judicial nominations context, see Chafetz, supra note 4.

26. William A. Galston, The Obligation to Play Political Hardball, Phil. & Pub. Pol'y Q., Winter 1989, at 6, 6.

27. Jon Elster, Unwritten Constitutional Norms 21 (undated) (unpublished manuscript) [http://perma.cc/YPN8-764G] ("With virtually no exception, [constitutional conventions] regulate . . . the 'machinery of government', that is, the relation between the main branches of government, their prerogatives, and the limitations on their powers.").

28. Curtis A. Bradley & Neil S. Siegel, Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers, 105 Geo. L.J. 255, 266 (2017) (discussing constitutional conventions). On account of the textual thinness and old age of the Founders' Constitution, the difficulty of formal amendment, and judicial reticence to intervene in legislative–executive disputes, it is plausible to think that conventions play an especially important role in the American constitutional system.

29. Id. (internal quotation marks omitted) (quoting A.V. Dicey, Introduction to the Study of the Law of the Constitution 346 (3d ed. 1889)).

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many believed these tactics were legally permissible yet nevertheless constitutionally worrisome in some deep sense.[30] Both tactics are fairly classed as constitutional hardball because both violated or strained constitutional conventions for partisan ends.

The second way in which a political maneuver can amount to constitutional hardball is more direct: if it is reasonably viewed by the other side as *attempting to shift settled understandings of the Constitution in an unusually aggressive or self-entrenching manner*. Put differently, constitutional hardball can involve efforts to change big-C constitutional law that are themselves seen as violations of small-c constitutional norms regarding how such changes may legitimately be made. This category, too, is necessarily fuzzy around the edges. At any given time, a variety of actors may be trying to nudge constitutional interpretations and constructions in their preferred direction through a variety of means, such as bringing strategic lawsuits or introducing legislation that tests existing legal boundaries. These are standard moves in our constitutional politics and, without more, they are not constitutional hardball.[31] But sometimes, one side tries to do something bolder: to take a substantive position that was up until that moment "off the wall"[32] and turn it into constitutional law in a more abrupt and self-serving fashion, without the extended period of public argumentation and mobilization and the incremental advances that typically enable such transformations. In such a situation, members of the other side are apt to protest that their adversaries have pressed some handy institutional advantage—such as five votes on the Supreme Court or control of the executive branch—to rewrite the constitutional rules in their favor.

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30. On the convention-straining nature of the government shutdowns, see 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, 516–21 (2003) [hereinafter Shane, Inter-Branch Norms]. On the convention-straining nature of the pro forma sessions, see Alexander M. Wolf, Note, Taking Back What's Theirs: The Recess Appointments Clause, Pro Forma Sessions, and a Political Tug-of-War, 81 Fordham L. Rev. 2055, 2067–68 (2013).

31. Tushnet suggests that political actors play constitutional hardball when they "propose legislation that pushes the envelope of existing constitutional doctrine." Tushnet, Constitutional Hardball, supra note 15, at 535. Without some element of ruthlessness or foul play, however, this suggestion threatens to divorce constitutional hardball from ordinary understandings of hardball. It also seems to be in tension with Tushnet's own definition of constitutional hardball as practices that "are without much question within the bounds of"—rather than pushing the envelope of—"existing constitutional doctrine." Id. at 523.

32. See Jack M. Balkin, From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream, Atlantic (June 4, 2012), http://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040 [http://perma.cc/T449-4S97] [hereinafter Balkin, Mandate Challenge] ("Off-the-wall arguments are those most well-trained lawyers think are clearly wrong . . . .").

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Many liberals viewed the early litigation against the Affordable Care Act (ACA) as an instance of constitutional hardball not because there was anything unusual or untoward about the formal tactic involved (filing a lawsuit), but rather because the litigation aimed to destroy the Act by creating an activity–inactivity distinction that they saw as having no basis in modern Commerce Clause doctrine.[33] The embrace of this formerly off-the-wall argument by conservative litigants and judges, from the liberals' perspective, represented an exercise of raw partisan power to change constitutional law. Many liberals saw the Supreme Court's reliance on a novel, case-specific theory of equal protection in *Bush v. Gore*[34] in similar terms.[35] For their part, many conservatives characterized various initiatives of the Obama Administration that were not clearly reviewable in court when they were undertaken—most notably, its "deferred action" programs for millions of unlawfully present immigrants—as constitutional hardball of this sort. Instead of waiting for a legislative overhaul, the Administration's programs enacted what critics argued was an unprecedented expansion of executive enforcement discretion.[36] It is this sense of a radical, and opportunistic, departure from shared

33. See, e.g., John T. Valauri, Federalism, Mandates and Individual Liberty, 43 N. Ky. L. Rev. 175, 178 (2016) ("[M]andate defenders point out that the activity/inactivity distinction is a novelty without foundation or support in constitutional text or precedent."); Balkin, Mandate Challenge, supra note 32 ("Three years ago, the idea that the Act's mandate to purchase health insurance might be unconstitutional was, in the view of most legal professionals and academics, simply crazy.").

34. 531 U.S. 98, 109 (2000) ("Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.").

35. See, e.g., Jack M. Balkin, *Bush v. Gore* and the Boundary Between Law and Politics, 110 Yale L.J. 1407, 1431 (2001) (describing as "inescapable" the suspicion that the Court's equal protection argument was "a makeweight designed primarily to stop the recounts"); cf. Michael J. Klarman, *Bush v. Gore* Through the Lens of Constitutional History, 89 Calif. L. Rev. 1721, 1730 (2001) ("The Court's equal protection rationale was so novel and far-fetched that Bush's lawyers came exceedingly close to not even bothering to raise it.").

36. See, e.g., David E. Bernstein, Lawless: The Obama Administration's Unprecedented Assault on the Constitution and the Rule of Law 141 (2015) [hereinafter Bernstein, Lawless] ("Even if one concludes that there is at least a plausible legal defense of Obama's immigration unilateralism, no president had ever used the discretion provided by immigration laws and inherent to his office simply to evade congressional opposition . . . , nor to extend de facto legal status to so many people."); Peter H. Schuck, Opinion, Why Congress Can Impeach Obama, N.Y. Times (Nov. 21, 2014), http://www.nytimes.com/2014/11/22/opinion/the-impeachment-of-obama-on-immigration-may-be-legal-but-its-wrong.html (on file with the *Columbia Law Review*) (arguing against conservative calls for impeachment over the issue, but contending that "granting legal status and work permits to millions of people most likely exceeds [the President's] discretion" and that "no one, including Congress, has legal standing to challenge his order in court"). Depending on how exactly this objection is framed, it may imply a breach of constitutional convention, an attempt to shift the substantive principles governing the constitutional order, or both.

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constitutional understandings that defines this second variant of constitutional hardball.

What connects these two forms of hardball—tactics that defy constitutional conventions and efforts to achieve especially aggressive or self-entrenching forms of constitutional change—is that they break the perceived rules of normal constitutional politics. They may reflect a sincerely held, long-term vision of a good constitutional order, as with libertarian arguments for the activity–inactivity distinction. Or they may seek a one-time victory with a powerful political effect, as with the equal protection argument in *Bush v. Gore*.[37] Either way, these maneuvers elicit in their opponents a feeling that constitutional institutions or ideas have been instrumentalized for partisan gain, that there has been a process breakdown, that they have "been had." Recognizing such behaviors as *constitutional* hardball is not to deny their fundamentally political character, but rather to illuminate the nature of the stakes and the norms involved. And recognizing such behaviors as *hardball* is not to suggest they are inherently bad. While all acts of constitutional hardball create systemic risks, as Part III will discuss,[38] specific acts may be justified for a variety of contextual normative reasons; sound political judgment might even require that certain types of hardball be played in certain situations.[39]

Many Beltway behaviors are contentious or obnoxious without being constitutional hardball. Rhetorical attacks on the other side will rarely disrupt the machinery of government or effect dramatic constitutional change.[40] So too with most policy proposals and programs. The Obama Administration's national security surveillance activities, for example, certainly became controversial, and some of them may have even been unlawful. But they did not generate charges of unfair dealing or upend the rules of the policy game.

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37. Cf. Balkin, Constitutional Hardball and Constitutional Crises, supra note 25, at 584 ("[P]olitical actors might play constitutional hardball for two reasons. First, they want to establish that the Constitution means one thing rather than another. Second, they want to stay in power and keep those who agree with them in power as long as possible.").

38. See infra notes 197–199 and accompanying text. We return to this theme in the Conclusion.

39. See Galston, supra note 26, at 6–8; cf. Thomas Nagel, Ruthlessness in Public Life, *in* Mortal Questions 75, 82 (1979) (proposing that the "moral impersonality of public action . . . warrants methods usually excluded for private individuals, and sometimes it licenses ruthlessness"). Theorizing the conditions under which constitutional hardball is justified as a matter of political or constitutional morality is an important task, but one that would require another, very different sort of paper.

40. But cf. Dylan Matthews, I Asked 8 Experts if We're in a Constitutional Crisis. Here's What They Said., Vox (Feb. 13, 2017), http://www.vox.com/policy-and-politics/2017/2/13/14541974/constitutional-crisis-experts-unanimous [http://perma.cc/6YZJ-P4EV] (quoting Tushnet as saying that "rhetoric can count as a form of constitutional hardball" when "inconsistent with settled ways of doing things" (internal quotation marks omitted)).

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Although our definition for the most part builds on and refines Tushnet's, it differs from his in that it does not limit constitutional hardball to periods of large-scale constitutional transformation.[41] While constitutional hardball may be more likely to occur "when one side sees an opportunity to shift the constitutional order," we agree with Professor Jack Balkin that the phenomenon is more general.[42] In any event, Tushnet maintains that the United States has been undergoing an "extended period of constitutional transformation" since around 1980,[43] and no one seems to deny that we have been living with substantial amounts of constitutional hardball for decades now. At this point, it is the only world our politicians know.

II. PARTISAN PATTERNS (AND PERCEPTIONS) OF CONSTITUTIONAL HARDBALL

Because acts of constitutional hardball are seen as provocative and high-stakes, they tend to invite a response. Often this response involves another act of constitutional hardball. And just as in the schoolyard, the question of who started it arises and becomes part of the dispute itself. Typically, Tushnet writes, "each side contends that the other breached the relevant implicit understandings"—or constitutional conventions—"first."[44] "The prior breach then is said to have destroyed the implicit understandings already, thereby taking the sting out of the charge that one is breaching taken-for-granted norms."[45]

In his account of this dynamic, Tushnet seems to suggest that a rough sort of symmetry, or parity, characterizes the partisan practice of constitutional hardball. Whichever side resorts to hardball, the other side will follow suit in a predictable sequence of tit-for-tat.[46] Following Tushnet, other legal scholars have suggested the same.[47] We agree that

41. See Mark Tushnet, Response, 26 Quinnipiac L. Rev. 727, 732 (2008) ("For me, constitutional hardball is—definitionally—a transitional phenomenon that occurs when one side sees an opportunity to shift the constitutional order . . . .").

42. See Balkin, Constitutional Hardball and Constitutional Crises, supra note 25, at 586–90.

43. Tushnet, Constitutional Hardball, supra note 15, at 549.

44. Tushnet, 1937 Redux, supra note 16, at 1109.

45. Id.

46. See Tushnet, Constitutional Hardball, supra note 15, at 524 n.4 ("The structure of my argument . . . strongly suggests that when one side starts to play constitutional hardball, the other side will join in."); see also Balkin, Constitutional Hardball and Constitutional Crises, supra note 25, at 581 ("As soon as one side begins to play constitutional hardball, the other usually will quickly follow with a defensive version . . . .").

47. See, e.g., Michael Greve, Our Polarized, Presidential Federalism, *in* Parchment Barriers: Political Polarization and the Limits of Constitutional Order (Zachary C. Courser et al. eds., forthcoming 2018) (manuscript at 3), http://ssrn.com/abstract=2885932 (on file with the *Columbia Law Review*) (stating that partisan polarization has generated "'constitutional hardball' on all sides" of federalism debates); Bruce G. Peabody, The Twice and Future President Revisited: Of Three-Term Presidents and Constitutional End Runs, 101

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constitutional hardball lends itself to retaliation and escalation—and that both Democratic and Republican officeholders engage in it to some substantial extent.

Yet even if constitutional hardball is by nature reciprocal, it nonetheless remains possible that one side may play hardball more frequently or intensively than the other side over a sustained period of time. This is what we submit has happened for the past quarter century or so, since roughly the Gingrich Revolution[48] of the mid-1990s.[49] Constitutional hardball remains *reciprocal but not symmetrical*. One party, the Republican Party, has become especially identified with hardball tactics during this period, with large consequences for our constitutional system.

A. *Methodological Challenges*

We acknowledge at the outset that studying this potential asymmetry poses a considerable challenge. Because of the reciprocal character of constitutional hardball and the open texture of constitutional norms, both sides will frequently have a nonfrivolous claim to be responding to a transgression or provocation by the other side. And given the partisan overlay, perceptions among Democrats that Republicans play more

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Minn. L. Rev. Headnotes 121, 154 (2016), http://www.minnesotalawreview.org/wp-content/uploads/2016/11/Peabody-2.pdf [http://perma.cc/6SHY-XZJM] (discussing "the ascension of . . . 'constitutional hardball'" and its possible use by "[f]uture partisans," without reference to party affiliation); cf. Matt Grossmann & David A. Hopkins, Ideological Republicans and Group Interest Democrats: The Asymmetry of American Party Politics, 13 Persp. on Pol. 119, 120 (2015) [hereinafter Grossmann & Hopkins, Asymmetry of American Party Politics] ("Most theories of American political parties are designed to apply equally to Democrats and Republicans without recognition of party asymmetry."). A notable exception in the legal literature is Professor David Fontana, who suggests in a recent essay that the Obama Administration's "mostly . . . cooperative" approach to judicial nominations contrasts with the "more aggressive political strategies" of prior Republican administrations, leading to "asymmetric usage of 'constitutional hardball'" in that field. David Fontana, Cooperative Judicial Nominations During the Obama Administration, 2017 Wis. L. Rev. 305, 307–08.

48. Led by Newt Gingrich, the Republican Party took back control of the House of Representatives for the first time in more than thirty years following the 1994 midterm elections. See generally Thomas E. Mann & Norman J. Ornstein, It's Even Worse than It Looks: How the American Constitutional System Collided with the New Politics of Extremism 31–43 (paperback ed. 2016) (reviewing Gingrich's confrontational tactics and their legacy). In a recent blog post that offers a relatively symmetrical account of constitutional hardball in Senate circuit court confirmations, Professor Keith Whittington nonetheless identifies an escalation in the late 1990s so significant that he divides his data into two periods, "Pre- and Post-Lewinsky." Keith E. Whittington, Partisanship, Norms and Federal Judicial Appointments, Balkinization (Nov. 29, 2017), http://balkin.blogspot.com/2017/11/partisanship-norms-and-federal-judicial.html [http://perma.cc/2ZL3-NZXM].

49. An alternative starting point for the period explored in this Essay might be the Reagan Revolution at the turn of the 1980s. See Peter M. Shane, Madison's Nightmare: How Executive Power Threatens American Democracy 119 (2009) (cataloging a long list of "right-wing norm-breaking initiatives" since 1981 and suggesting that they can be traced to Republicans' suspicion of "pre-Reagan institutional norms of governance").

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constitutional hardball, or harder hardball, are almost inevitably going to be colored by "partyism,"[50] confirmation bias, myside bias, or the like. The same goes for us. Like Tushnet, we are keenly aware that our own political location may make us "more attuned to examples of hardball practices [we] see on the right."[51]

Further complicating matters, the structure of constitutional hardball itself confounds objective measurement. By definition, constitutional hardball consists of counter-conventional behaviors and efforts at constitutional change that may take any number of forms across any number of institutional and substantive domains—and that are therefore hard to count and compare. An interpretive judgment is always required to establish that a political maneuver amounts to constitutional hardball, because one must first determine what the relevant constitutional traditions and settled understandings are, at what level of generality to assess the historical record, and whether and to what extent the maneuver deviates from them. These judgments as to what is conventional or unconventional, norm-abiding or norm-defying, are to some extent endogenous to constitutional practice. There is no Archimedean point from which we, as observers of politics, can stand outside politics and be completely confident in the accuracy of our assessments.

In light of these challenges, one might be tempted to conclude that it is simply impossible to investigate the symmetry or asymmetry of constitutional hardball in a credible or useful manner, at least beyond certain discrete patches of government activity.[52] We think this conclusion cannot be right. For one thing, it proves too much. Many different public law practices have long been inflected with partisanship. It would be perverse to exempt some or all of them from scholarly inquiry on that basis. Moreover, the phenomenon of asymmetric constitutional hardball—if it exists—would be an extremely significant feature of American constitutional politics, with potential causes and effects too important for constitutional theorists to ignore.

Given its inherently contested and shape-shifting nature, we know of no good way to reduce the overall practice of constitutional hardball to a

50. See Cass R. Sunstein, Partyism, 2015 U. Chi. Legal F. 1, 1–8 (defining partyism as hostility "to the opposing party and willing[ness] to believe that its members have a host of bad characteristics" and reviewing evidence of implicit and explicit cross-party bias).

51. Tushnet, Constitutional Hardball, supra note 15, at 524 n.4.

52. Thus, Professor Josh Chafetz suggests in a new essay on the Garland–Gorsuch imbroglio that claims that the other side has acted in an "unprecedented" manner ought to be taken with a grain of salt in the judicial nominations context, as such claims have long been a standard move in political argument. See generally Chafetz, supra note 4. The strongest version of Chafetz's thesis would hold that there is no way to say objectively, or even somewhat objectively, whether one side is playing more hardball than the other. We resist this hyper-relativist version of Chafetz's argument—as well he might, too. But we agree with Chafetz that it is important to maintain a skeptical stance toward one's own intuitive assessments of these matters, as his essay underscores.

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numerical scale, no scientific test to measure or code it.[53] And we suspect that such scales and tests, if devised, would be vulnerable to the biases and value choices of the politically aware humans who create them. In an exploratory Essay like this, we believe it is appropriate to take a more encompassing, qualitative approach. As a first cut, our basic strategy is to scour the legal, political science, and popular literatures on constitutional conflict in the political branches; to identify behaviors that plausibly satisfy the definition of constitutional hardball given in Part I; and to relate these examples to the growing bodies of research on partisan polarization, party organization, and the Constitution outside the courts. There are a number of specific domains of constitutional hardball (such as debt ceiling brinkmanship and restrictions on voting) within which the Republican–Democratic discrepancy seems plain, other domains (such as Senate obstruction of circuit court nominations) where the balance is more even. Taken together, however, the evidence suggests that constitutional hardball has been plausibly asymmetric for a quarter century. Laying out this evidence is the work of the rest of this Part.

B. *Motivating Observations*

What leads us to suspect that constitutional hardball has become asymmetric? The next section and Part III will consider numerous forms of indirect evidence. But the most immediate reason for suspecting as much is this: The recent historical record appears to contain more, and more distinctive, examples of constitutional hardball on the Republican side. Meanwhile, a *perception* of partisan asymmetry has emerged.[54] While this would be notable regardless of the reality, the perception has an empirical basis.

Our focus here is on the period from the mid-1990s through the end of the Obama Administration. Republicans and Democrats both controlled the presidency and each house of Congress for parts of this period. Partisan conflict was a near-constant, and President Trump had not yet brought his openly norm-shattering approach to the White House. There is no obvious a priori reason why one side would have become more identified with constitutional hardball than the other.

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53. This is not to say that constitutional hardball could not be measured more rigorously than we have attempted in this Essay. Systematic discourse analysis, for example, could be used to determine the partisan distribution of "hardball" allegations and hardball-equivalent allegations. Surveys and interviews might be used to gauge the views of Washington insiders. At least some familiar categories of hardball tactics, such as minoritarian blocking and delaying tactics in the Senate, may be subject to certain forms of aggregation and quantification. See, e.g., infra note 70 and accompanying text (discussing the increased use of the filibuster during the Obama presidency). If it is plausible that constitutional hardball has become asymmetric along partisan lines, then such empirical efforts may well be warranted, notwithstanding their evident limitations.

54. See infra notes 89–95 and accompanying text.

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And yet that is what happened. The literature on constitutional conflict in the political branches has identified an impressive array of examples from this period that arguably qualify as constitutional hardball on the Republican side. A partial catalog from the pre-Obama years[55] might include the government shutdowns of 1995 and 1996;[56] Newt Gingrich's efforts in that same Congress to consolidate power in the Speaker's office and "dismantle" congressional institutions with professional staff;[57] the impeachment of President Clinton in 1998;[58] the 1,052 subpoenas issued by Dan Burton, then-Chair of the House Oversight and Government Reform Committee, to the Clinton Administration and other Democratic targets from 1997 to 2002;[59] a range of techniques used in Florida to

55. This catalog is focused on the actions of federal government officials. Given that (i) the two parties have also become increasingly ideologically cohesive and polarized throughout the fifty states, see Jessica Bulman-Pozen, Partisan Federalism, 127 Harv. L. Rev. 1077, 1086–87 (2014), that (ii) state and federal politicians from the same party have increasingly collaborated around shared agendas, see id. at 1089, and that (iii) Republican state legislators on the whole have "clearly" been "polarizing faster than Democrats" over the past two decades, Boris Shor, Asymmetric Polarization in the State Legislatures? Yes and No, Measuring Am. Legislatures (July 29, 2013), http://americanlegislatures.com/2013/07/29/partisan-polarization-in-state-legislatures [http://perma.cc/4DFT-LZNX]; but cf. id. (noting "lots of differences across states"), we expect that most of our claims about asymmetric constitutional hardball are likely to hold at the subfederal level as well. A sustained analysis of state-level constitutional hardball is beyond the scope of this Essay, however. For a prominent recent example of the phenomenon, see Jedediah Purdy, North Carolina's Partisan Crisis, New Yorker (Dec. 20, 2016), http://www.newyorker.com/news/news-desk/north-carolinas-partisan-crisis [http://perma.cc/RA2T-675W] (discussing a variety of tactics used by North Carolina Republicans, including secretive legislative sessions and new limits on the governor's appointment powers, "intended to maximize partisan advantage . . . by pressing or breaking norms").

56. See supra note 30 and accompanying text.

57. Bruce Bartlett, Gingrich and the Destruction of Congressional Expertise, N.Y. Times: Economix (Nov. 29, 2011), http://economix.blogs.nytimes.com/2011/11/29/gingrich-and-the-destruction-of-congressional-expertise (on file with the *Columbia Law Review*). Gingrich's approach to the speakership was subsequently reinforced by his successors' use of the so-called Hastert Rule, the principle that Republican Speakers will only bring up a bill for a floor vote if a majority of their caucus supports it. See Holly Fechner, Managing Political Polarization in Congress: A Case Study on the Use of the Hastert Rule, 2014 Utah L. Rev. 757, 764–66.

58. See supra note 18 and accompanying text; see also Shane, Inter-Branch Norms, supra note 30, at 525 (describing the Clinton impeachment as "an inexcusable assault on inter-branch norms").

59. See Henry Waxman with Joshua Green, The Waxman Report: How Congress Really Works 148–51 (2009) (recounting this "notorious" history); Alex Slater & Calvin Harris, Darrell Issa, the Man Who Would Be Nemesis, Guardian (Nov. 30, 2010), http://www.theguardian.com/commentisfree/cifamerica/2010/nov/29/republicans-us-politics [http://perma.cc/86YK-8GFX] ("Burton issued a total of 1,052 subpoenas in his attempt to paralyse the Clinton administration . . . . Many of these investigations bordered on the farcical. Burton subpoenaed thousands of pages of documents on every conceivable issue—relevant or not.").

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restrict access to voting during the 2000 presidential election,[60] which inspired Republican regulators nationwide and opened up a new front in what some now call the "voting wars";[61] various tactical moves by the Bush side in the *Bush v. Gore* litigation and the ensuing Supreme Court decision;[62] the firing of the Senate Parliamentarian in 2001;[63] the exclusion of congressional Democrats from conference committee deliberations[64] and the turn toward "closed" rules for bills on the House floor from 2001 to 2006;[65] the mid-decade redistricting plans developed in

60. See David Schultz, Less than Fundamental: The Myth of Voter Fraud and the Coming of the Second Great Disenfranchisement, 34 Wm. Mitchell L. Rev. 483, 493 (2008) (reviewing voter suppression allegations leveled in 2000 against Katherine Harris, the Florida Secretary of State and state chair of the Bush election committee).

61. See Ari Berman, How the 2000 Election in Florida Led to a New Wave of Voter Disenfranchisement, Nation (July 28, 2015), http://www.thenation.com/article/how-the-2000-election-in-florida-led-to-a-new-wave-of-voter-disenfranchisement [http://perma.cc/YLP9-97KL]; see also Sheldon Whitehouse, Conservative Judicial Activism: The Politicization of the Supreme Court Under Chief Justice Roberts, 9 Harv. L. & Pol'y Rev. 195, 207 (2015) (criticizing "a raft of voter-identification laws, cuts to early voting, bans on same-day registration, and voter-roll purges" and arguing that "[v]oter suppression of the kind [allowed by current doctrine] works virtually exclusively in favor of Republicans"); Paul Rosenberg, Destroying Democracy Is the GOP's Goal: Obstruction, Dysfunction and the Sneaky, Decades-Long Plan to Steal Your Vote, Salon (Mar. 30, 2015), http://www.salon.com/2015/03/30/destroying_democracy_is_the_gops_goal_obstruction_dysfunction_and_the_sneaky_decades_long_plan_to_steal_your_vote [http://perma.cc/8R8V-MFP5] (stating that a "major front" of Republican "constitutional hardball in the Obama era has been the attack on voting rights centered in state legislatures"). The post-2000 wave of Republican-sponsored measures aiming to restrict voting in one way or another came as a surprise to voting rights scholars, who had generally assumed that "vote denial" controversies were a thing of the past. Cf. Daniel P. Tokaji, The New Vote Denial: Where Election Reform Meets the Voting Rights Act, 57 S.C. L. Rev. 689, 693–718 (2006) (surveying post-2000 developments and the emergence of a "new generation of vote denial claims"). For a helpful overview, see generally Richard L. Hasen, The Voting Wars: From Florida 2000 to the Next Election Meltdown (2012).

62. See supra notes 34–35 and accompanying text.

63. See Charles Tiefer, Out of Order: The Abrupt Dismissal of the Parliamentarian Threatens to Rip Apart the Fragile Fabric of Senate Procedure, Legal Times, May 14, 2001, at 62 [hereinafter Tiefer, Out of Order].

64. See Eric Schickler & Kathryn Pearson, The House Leadership in an Era of Partisan Warfare, *in* Congress Reconsidered 207, 211 (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 8th ed. 2005) ("The degree to which Republicans exclude Democrats from conference deliberations is unprecedented in the modern era . . . ."); Charles Tiefer, Congress's Transformative "Republican Revolution" in 2001–2006 and the Future of One-Party Rule, 23 J.L. & Pol. 233, 265–72 (2007) [hereinafter Tiefer, Republican Revolution] (reviewing "dramatic alterations of conference procedure" in the early 2000s); see also Hong Min Park et al., Politics over Process: Partisan Conflict and Post-Passage Processes in the U.S. Congress 70, 131 (2017) (describing a "dramatic drop in the frequency of using conference committees to resolve House-Senate differences," along with changes in the composition of these committees, that the authors attribute in substantial part to reforms "initiated by House Republicans after the 1994 elections" to advance "partisan efficiency and control").

65. See Tiefer, Republican Revolution, supra note 64, at 256–63 (reviewing the rise of closed and semi-closed rules). Closed rules deny minority-party legislators the opportunity

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Colorado, Georgia, and Texas after the 2002 elections,[66] followed by the broader and more systematic partisan redistricting initiative known as REDMAP;[67] and the "seemingly endless" ways in which the Bush Administration "pushed the legal envelope" following 9/11 in its interactions with the other branches, from increased reliance on presidential signing statements to withholding information from congressional oversight bodies to aggressive interpretations and applications of the commander-in-chief power.[68]

During the Obama Administration, Republican constitutional hardball further escalated—and, in the Senate, became programmatic. Committed self-consciously to a stance of "united and unyielding opposition,"[69] Republicans used filibusters and "holds" to block legislation and nominations on an unprecedented scale;[70] threatened repeatedly to default on

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to offer amendments to a bill. During this period, according to Juliet Eilperin, Republican House members viewed Democrats "as a bunch of sore losers who assail them on procedural grounds because they lack a compelling vision of how to rule the country," while Democrats viewed "the GOP majority as a ruthless band that will do anything to maintain its power." Juliet Eilperin, Fight Club Politics: How Partisanship Is Poisoning the U.S. House of Representatives 6 (2006).

66. See supra note 18 and accompanying text; see also Elections A to Z 331 (Dave Tarr & Bob Benenson eds., 4th ed. 2012) ("Nothing in the Constitution or federal law barred mid-decade redistricting, but an unspoken compact between the parties prevailed until the first decade of the twenty-first century, when Republicans used their control of the state legislatures in Colorado, Georgia, and Texas to enact partisan, mid-decade redistricting plans.").

67. See David Daley, Ratf**ked: The True Story Behind the Secret Plan to Steal America's Democracy, at xviii (2016) (describing REDMAP's efforts "to redraw the political map coast to coast, with the express goal of locking in Republican control of the U.S. House of Representatives and state legislative chambers for the next decade or more," as "gerrymandering's shock-and-awe campaign").

68. Jack Balkin, Constitutional Hardball in the Bush Administration, Balkinization (July 13, 2007), http://balkin.blogspot.com/2007/07/constitutional-hardball-in-bush.html [http://perma.cc/J4JU-2N68]. "These acts of constitutional hardball," according to Balkin, "were designed to transform the constitutional order to a new regime," oriented around "an expansive . . . conception of Presidential power to combat a potentially endless war on terror." Id.

69. Robert Draper, Do Not Ask What Good We Do: Inside the U.S. House of Representatives, at xix (2012) (describing "united and unyielding opposition to the president's economic policies" as one pillar of a plan devised by top congressional Republicans on the night of President Obama's inauguration); see also Michael Grunwald, The New New Deal: The Hidden Story of Change in the Obama Era 19 (2012) (quoting former Republican Senator George Voinovich as stating that "[i]f [President Obama] was for it, we had to be against it" (internal quotation marks omitted)); Michael A. Memoli, Mitch McConnell's Remarks on 2012 Draw White House Ire, L.A. Times (Oct. 27, 2010), http://articles.latimes.com/2010/oct/27/news/la-pn-obama-mcconnell-20101027 [http://perma.cc/C9QL-QQDT] (quoting Senator McConnell as stating that "the single most important thing we want to achieve is for President Obama to be a one-term president" (internal quotation marks omitted)).

70. See Pozen, Self-Help, supra note 22, at 39–40 (reviewing these developments); see also Allison Graves, Did Senate Republicans Filibuster Obama Court Nominees More than All Others Combined?, PolitiFact (Apr. 9, 2017), http://www.politifact.com/truth-o-

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the national debt;[71] "employed a battery of unorthodox procedural maneuvers," including a government shutdown, "in a campaign to defund 'Obamacare'";[72] and refused to permit any appointments to leadership posts at the Consumer Financial Protection Bureau (CFPB) or the National Labor Relations Board (NLRB).[73] Senate Republicans' stonewalling of the Garland nomination thus represented the culmination of a long line of convention-straining, yet not clearly law-violating, obstructionist maneuvers. "From its very first months," journalist Matthew Yglesias opined in 2015, "Obama's presidency has been marked by essentially nothing but constitutional hardball."[74]

To be sure, Democratic officeholders have also resorted to constitutional hardball numerous times since the mid-1990s—and many more times before then, perhaps most notably during the New Deal.[75] Hardball in the 1930s may well have had a partisan skew opposite to the one described in this Essay. More recently, the 1987 Senate campaign against Judge Robert Bork's Supreme Court nomination was an important example of constitutional hardball; many observers, especially conservatives, viewed it at the time as an unprecedented escalation of the political battles over judicial appointments.[76] A historical study with a

meter/statements/2017/apr/09/ben-cardin/did-senate-republicans-filibuster-obama-court-nomi [http://perma.cc/YUL6-T6UB] (explaining, based on Congressional Research Service data, that whereas "[l]ess than one [judicial] nominee per year was subject to a cloture filing in the 40 years before Obama took office," from 2009 to 2013 "the number of nominees subject to a cloture filing jumped to over seven per year").

71. See Neil H. Buchanan & Michael C. Dorf, Don't End or Audit the Fed: Central Bank Independence in an Age of Austerity, 102 Cornell L. Rev. 1, 3–4 (2016) (explaining that "Tea Party-affiliated congressional Republicans repeatedly threatened not to raise the debt ceiling—and thus raised the specter of a first-ever default by the government of the United States—in order to obtain deep cuts in government spending"); see also Lori Montgomery et al., Origins of the Debt Showdown, Wash. Post (Aug. 6, 2011), http://wapo.st/nLw7LO [http://perma.cc/DF6P-LRRN] (quoting then-Senate Minority Leader Mitch McConnell as saying that what Republicans "learn[ed]" from the debt ceiling showdown of 2011 "is this—it's a hostage that's worth ransoming" (internal quotation marks omitted)).

72. Pozen, Self-Help, supra note 22, at 45.

73. See John C. Roberts, The Struggle over Executive Appointments, 2014 Utah L. Rev. 725, 736 (remarking that Republicans' "blatant misuse of the constitutional advice-and-consent power . . . came to a head in 2011 when the Senate minority resolved to prevent two entities established by Congress—the CFPB and the NLRB—from carrying out their statutory responsibilities").

74. Matthew Yglesias, American Democracy Is Doomed, Vox (Oct. 8, 2015), http://www.vox.com/2015/3/2/8120063/american-democracy-doomed [http://perma.cc/RV95-88Q9].

75. See, e.g., Tushnet, Constitutional Hardball, supra note 15, at 535–36, 544–45 (analyzing the National Labor Relations Act of 1935 and President Roosevelt's Court-packing plan of 1937 as constitutional hardball).

76. Indeed, from the perspective of some Republicans, the Bork nomination's defeat remains the canonical act of modern constitutional hardball, from which many later iterations followed. See, e.g., Charles G. Geyh, Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts, 78 Ind.

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longer time horizon might reveal that asymmetric constitutional hardball has an epicyclical character in the American system, with the party that feels it was on the losing end of prior periods of hardball becoming the dominant hardball player in subsequent periods.[77]

Over the past twenty-five years, arguable examples of Democratic constitutional hardball include the Clinton Administration's increasingly controversial assertions of executive privilege from 1995 to 1999,[78] the repeated filibusters of President Bush's first-term circuit court nominations,[79] and the use of pro forma sessions to block President Bush's recess appointments in 2007 and 2008.[80] More recently, the Obama Administration and its congressional allies made a variety of moves that might be classified as constitutional hardball, from using the reconciliation process to amend the ACA without a supermajority vote,[81] to "repeatedly test[ing] the limits of executive authority in implementing the ACA,"[82] to making recess appointments to the CFPB and NLRB when

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L.J. 153, 155 (2003) ("Some trace the ignition source of the ongoing appointments conflagration to the nomination of Robert Bork to the United States Supreme Court in 1987, whose rejection at the hands of Senate Democrats politicized the judicial appointments process in unprecedented ways."); Steven G. Calabresi & Shams Hirji, Judicial Appointments After Judge Robert H. Bork, Balkinization (Nov. 27, 2017), http://balkin.blogspot.com/2017/11/judicial-appointments-after-judge.html [http://perma.cc/2WY5-EGYD] (defending a proposed judgeship bill, widely understood as a Republican court-packing plan and an extreme effort at constitutional hardball, with reference to "the unprecedented treatment given to Judge Robert H. Bork by Senate Democrats in 1987"). We see an unmistakable tit-for-tat pattern in the parties' behavior surrounding judicial nominations, going back before the mid-1990s and continuing up to the present. But we also observe, since the mid-1990s, an asymmetry emerging *within* that ongoing tit-for-tat pattern.

77. Cf. infra section III.B.2 (explaining how theories of "constitutional restorationism" have helped to motivate and justify recent Republican hardball).

78. See Mark J. Rozell, Restoring Balance to the Debate over Executive Privilege: A Response to Berger, 8 Wm. & Mary Bill Rts. J. 541, 550 (2000) (criticizing President Clinton's "extensive use of executive privilege in circumstances that do not warrant the exercise of that power").

79. See supra note 18 and accompanying text; see also Republican Nat'l Comm., 2004 Republican Party Platform 77 (2004) (calling upon "obstructionist Democrats in the Senate to abandon their unprecedented and highly irresponsible filibuster of President Bush's highly qualified judicial nominees").

80. See supra note 30 and accompanying text.

81. See Mark A. Graber, A Tale Told by a President, 28 Yale L. & Pol'y Rev. Inter Alia 13, 23 (2010), http://digitalcommons.law.umaryland.edu/fac_pubs/1149 (on file with the *Columbia Law Review*) (describing President Obama and his congressional allies as playing "far more constitutional hardball" than they had played before in their push to enact the ACA). To work around a Senate filibuster, some Democratic legislators also threatened to use the "constitutionally controversial 'deem and pass' procedure" in the House, should the need have arisen. Id.

82. Nicholas Bagley, Legal Limits and the Implementation of the Affordable Care Act, 164 U. Pa. L. Rev. 1715, 1715–16 (2016). As Professor Bagley has explained, "congressional antipathy . . . precluded looking to the legislature to iron out" difficulties that arose during the ACA's rollout. Id.

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Senate Republicans were holding pro forma sessions,[83] to eliminating the filibuster for non–Supreme Court nominees,[84] to announcing initiatives that would defer the deportation of large categories of unauthorized immigrants in the absence of legislative reform.[85] Republican office-holders clearly have no monopoly on constitutional hardball.

They appear to have a dominant market position, however. Especially within Congress, plausible examples of Democratic constitutional

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83. The NLRB appointments were invalidated by the Supreme Court in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014).

84. See Jeremy W. Peters, In Landmark Vote, Senate Limits Use of the Filibuster, N.Y. Times (Nov. 21, 2013), http://www.nytimes.com/2013/11/22/us/politics/reid-sets-in-motion-steps-to-limit-use-of-filibuster.html (on file with the *Columbia Law Review*) (describing this as "the most fundamental alteration of [Senate] rules in more than a generation" and noting that "[f]urious Republicans accused Democrats of a power grab"); see also id. ("[The 2013 filibuster reform] represented the culmination of years of frustration over what Democrats denounced as a Republican campaign to stall the machinery of Congress, stymie President Obama's agenda and block his choices for cabinet posts and federal judgeships . . . ."). Judicial appointments may well be the field with greatest overlap in Democratic and Republican hardball tactics. But cf. Fontana, supra note 47, at 306–08, 319–20, 322–26, 332–33 (detailing ways in which the Obama Administration declined to play Republican-style hardball on judicial nominations).

85. See supra note 36 and accompanying text. For an overview of these initiatives within the context of the Administration's broader immigration policy, see Adam B. Cox & Cristina M. Rodríguez, The President and Immigration Law Redux, 125 Yale L.J. 104, 135–42 (2015).

The examples listed in the main text strike us as the most significant and salient acts of constitutional hardball by the Obama Administration and its congressional supporters, assuming one does not view the Iran nuclear deal or the Paris climate agreement as such. Cf. Curtis A. Bradley & Jack L. Goldsmith, Presidential Control over International Law, 131 Harv. L. Rev. 1201, 1204 (2018) (explaining that the "Paris Agreement and the Iran deal are but two recent instances in what has been a long accretion of presidential control over international law since the constitutional Founding"). But there may be others. In the summer of 2016, for instance, after Republican leadership refused to allow gun-control measures with bipartisan support to come up for a vote, Democrats responded with a "sit-in" on the House floor. See Heather Caygle, GOP Approves New Fines for Livestreaming Protests on House Floor, Politico (Jan. 3, 2017), http://www.politico.com/story/2017/01/house-fines-livestream-protests-233145 [http://perma.cc/XYF3-S37F]. While this sit-in does seem to qualify as constitutional hardball, the immediate practical impact was minimal, and Republicans promptly responded with vigorous hardball of their own—adopting new rules that fine House members "up to $2,500 for using their phones to take pictures or shoot videos on the House floor." Id. See also, e.g., Josh Blackman, Presidential Insulation, Josh Blackman's Blog (Dec. 28, 2016), http://joshblackman.com/blog/2016/12/28/presidential-insulation [http://perma.cc/R43V-ZVTF] (cataloging actions allegedly taken by the Obama Administration in late 2016 to insulate its policies from reversal by the Trump Administration). Earlier, critics argued that certain "Dear Colleague" letters sent by the Department of Education in 2011 and 2014 "radically" departed from traditional Title IX enforcement and amounted to "a crusade against due process for students accused of sexual assault." Stuart Taylor Jr. & KC Johnson, The New Standard for Campus Sexual Assault: Guilty Until Proven Innocent, Nat'l Rev. (Dec. 30, 2015), http://www.nationalreview.com/article/428910/campus-rape-courts-why-arent-republicans-resisting [http://perma.cc/LU83-U6M7]. Depending on their framing, such arguments could be construed as alleging a form of constitutional hardball.

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hardball in recent decades are harder to find. And intriguingly, when Democrats have played hardball, they have been more diffident and apologetic about it. During the Clinton and Bush years, Balkin has argued, Democratic constitutional hardball largely arose out of, and responded to, "the Republican Party's desire to cement a lasting conservative political order."[86] President Obama's most controversial maneuvers were framed and defended as regrettable yet necessary acts of "self-help" in the face of extraordinary partisan obstruction.[87] Republican constitutional hardball, it seems, has been not only more common in practice since the mid-1990s but also more confident in justification.[88]

In line with these observations, a rough consensus has emerged among analysts of Washington politics that Republicans have a decided edge in constitutional hardball. Political scientist Jonathan Bernstein wrote in 2012, for instance, that "the party that's been [playing constitutional hardball] over the last 20 years . . . is the Republican Party."[89] "[T]he most distinctive and damaging feature of Republicans' right turn," according to Professors Jacob Hacker and Paul Pierson, "is that they have steadily ramped up the scale, intensity, and sophistication of their attacks on government and the party most closely associated with it" through constitutional hardball tactics.[90] Thomas Mann and Norman Ornstein describe the contemporary Republican Party as an "insurgent outlier in American politics" that displays "disdain for negotiation and compromise" and has embraced "cynical and destructive means to advance political ends."[91] Liberal pundits routinely echo these sentiments—remarking with envy as well as dismay that Republicans have "perfect[ed] constitutional hardball"[92] and "become past masters of the

86. Balkin, Constitutional Hardball and Constitutional Crises, supra note 25, at 588.

87. See Pozen, Self-Help, supra note 22, at 4–8, 41–47.

88. For examples of assertive Republican rhetoric concerning government shutdowns in particular, see infra notes 189–194 and accompanying text.

89. Jonathan Bernstein, Opinion, Why the Dysfunctional Republican Party Matters, Wash. Post (Apr. 30, 2012), http://www.washingtonpost.com/blogs/post-partisan/post/why-the-dysfunctional-republican-party-matters/2012/04/30/gIQAihKNsT_blog.html [http://perma.cc/8DPC-T797]; see also Jonathan Bernstein, Playing Constitutional Hardball with the Electoral College, Am. Prospect (Jan. 7, 2013), http://prospect.org/article/playing-constitutional-hardball-electoral-college [http://perma.cc/W7VW-3N32] (referring to "20 years of Republican-led Constitutional hardball").

90. Jacob Hacker & Paul Pierson, No Cost for Extremism, Am. Prospect (Apr. 20, 2015), http://prospect.org/article/no-cost-extremism [http://perma.cc/N77F-DCZV] [hereinafter Hacker & Pierson, No Cost for Extremism].

91. Mann & Ornstein, supra note 48, at 185. "Democrats are hardly blameless and have their own . . . predilection to hardball politics," Mann and Ornstein acknowledge. Id. at 186. "But . . . those tendencies have not generally veered outside the normal boundaries of robust politics." Id.

92. Scott Lemieux, The End of the Supreme Court as We Know It, New Republic (Feb. 16, 2016), http://newrepublic.com/article/129944/end-supreme-court-know [http://perma.cc/U9CD-GMK6].

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art,"[93] leaving Democrats "on the receiving end of constitutional hardball for more than two decades."[94] We do not doubt that some conservative pundits would dispute these claims. Yet whereas allegations that Republicans play more constitutional hardball have become commonplace on the left, it is hard to find any published commentary that alleges the reverse.[95]

In sum, while the academic legal literature generally continues to treat constitutional hardball as symmetric or to ignore its partisan distribution, the idea of asymmetric constitutional hardball has become increasingly familiar (if seldom analyzed in depth) outside the legal academy.[96] Hence the motivation for this Essay: to deepen these ongoing

93. Kevin Mahnken, Democrats Will Pay for Nuking the Filibuster. But They Would Have Paid, Anyway., New Republic (Nov. 22, 2013), http://newrepublic.com/article/115702/democrats-go-nuclear-senate-filibuster-gop-would-have-done-same [http://perma.cc/66FP-SZQP].

94. Republican Obstruction Is Routine, Not Revenge, First Person Pol. (Apr. 23, 2015), http://www.firstpersonpolitics.com/republican-obstruction-is-routine-not-revenge [http://perma.cc/Y9GC-7AHN]; see also Ben Fountain, Welcome to the Reign of King Trump, Guardian (Nov. 22, 2016), http://www.theguardian.com/commentisfree/2016/nov/22/king-trump-republican-party-donald-trump-presidency [http://perma.cc/ZX72-C2H4] (attributing "the constitutional hardball and scorched-earth tactics that have characterized the past quarter-century of American politics" to choices made by Republican leaders in Congress); Rosenberg, supra note 61 (observing "a profound asymmetry in how constitutional hardball has been played over the period of the past 25 years"). "The Democrats," according to former Tennessee Congressman John Tanner, "have always been . . . a little Pollyanna-ish about things and don't want to play much hardball, or whatever the hell you want to call it." Daley, supra note 67, at 109 (internal quotation marks omitted).

95. Allegations that Democrats are more treacherous, corrupt, or otherwise malevolent are part of the ordinary stuff of heated partisan commentary. And as we have suggested, plenty of Republicans argue that Democrats "started it" and should bear the blame for any given breakdown of norms, especially with regard to judicial confirmations. See, e.g., Orrin G. Hatch, Opinion, Sen. Orrin Hatch: Democrats Have Only Themselves to Blame for Rules Change, Time (Apr. 6, 2017), http://time.com/4730017/hatch-filibuster-nuclear-option [http://perma.cc/4AYF-3WNQ] ("I'm not happy Senate Republicans had to eliminate the filibuster for Supreme Court nominees . . . . But let me be clear: We are here because of what Democrats have done over the last thirty years to poison the confirmation process."). However, we have found no one seriously advancing the claim that Democratic officeholders are more likely than their Republican counterparts, on the whole, to avail themselves of constitutional hardball. Perhaps the closest claim is the charge, developed most fully by Professor David Bernstein, that the Obama Administration engaged in "rampant lawlessness." Bernstein, Lawless, supra note 36, at xxiv. Notably, such charges have tended to focus on Democratic Presidents rather than Democratic members of Congress, where we observe greater asymmetry. Moreover, their gravamen is not so much that President Obama violated constitutional conventions, or "the 'go without saying' assumptions that underpin working systems of constitutional government," Tushnet, Constitutional Hardball, supra note 15, at 523 n.2, but rather that he violated the big-C Constitution by exceeding legally binding limits on executive power—an accusation that opponents have regularly leveled at every one of the last several Presidents, Democratic and Republican.

96. The immediate reaction to the 2016 presidential vote underscored this point. "[W]e know [what] the Republicans would have done[] [i]f Mr. Trump had lost the

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conversations and to spark a new scholarly conversation about this asymmetry, its causes, and its implications for constitutional law and politics.

C. *The Plausibility of Asymmetry*

Perhaps, though, we and all of the commentators we cite are misreading the historical record. As discussed above, the hardball asymmetry thesis cannot be "proved" in any straightforward manner, given that the phenomenon itself resists numerical calculation and the proper characterization of nearly every possible example, including those listed above, is subject to debate. Nevertheless, we believe that a number of factors, taken together, strongly support our reading of the post-1994 record as containing more methodical and unabashed constitutional hardball on the right.

First, certain constitutional hardball tactics used repeatedly by contemporary Republican legislators have not migrated to the other side of the aisle, whereas the hardball tactics attributed to Democratic legislators (such as pro forma sessions in the Senate, unilateral filibuster reform, and pushing the limits of the budget reconciliation process) have been used by both sides alike. For instance, Democrats have not threatened credibly to default on the national debt.[97] They have not enacted measures likely to suppress Republican voter turnout in federal elections.[98]

Electoral College while winning the popular vote," a *New York Times* op-ed lamented last December: In contrast to "the Democrats' do-nothingness," they would have "thr[own] everything they could muster against the wall to see if it stuck." Dahlia Lithwick & David S. Cohen, Opinion, Buck Up, Democrats, and Fight like Republicans, N.Y. Times (Dec. 14, 2016), http://www.nytimes.com/2016/12/14/opinion/buck-up-democrats-and-fight-like-republicans.html (on file with the *Columbia Law Review*); see also, e.g., Michael Tomasky, Trump: The Gang, N.Y. Rev. Books (Jan. 19, 2017), http://www.nybooks.com/articles/2017/01/19/trump-the-gang (on file with the *Columbia Law Review*) (imagining similarly what Republican Party leaders would be doing "if the situation were reversed" and asserting that, among other things, they "would certainly have demanded that the members of the Electoral College reject Clinton"). The online version of this *Times* op-ed attracted 2,259 reader comments—most of them from Democrats, but a substantial fraction from self-identified independents or Trump supporters. See Lithwick & Cohen, supra. Based on our reading of all these comments, the one point on which everyone seemed to agree was the plausibility of the counterfactual premise that Republicans would have fought in ways Democrats did not, had the shoe been on the other foot. Members of both parties have been interpreting political events through the prism of hardball asymmetry.

97. There have been some recent murmurs of Democratic opposition to raising the debt ceiling, although so far they have not amounted to much; the greater threat appears to come from the House Freedom Caucus. See, e.g., James Arkin, Congress' Summer of Fiscal Woe, Real Clear Politics (July 11, 2017), http://www.realclearpolitics.com/articles/2017/07/11/congress_summer_of_fiscal_woe_134430.html [http://perma.cc/3K8E-8ZPG] ("Democrats originally took a hard line in June, saying they wouldn't back any increase without guarantees that any GOP tax reform wouldn't increase the deficit. They quickly backed away from that gambit . . . .").

98. The closest thing to a counterexample we have been able to find is the claim that, at the state and local levels, Democrats favor off-cycle or off-year election calendars—which greatly reduce turnout—more often than Republicans do. See Sarah F. Anzia,

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They have not fired their own hand-picked Senate Parliamentarian in an effort to overturn rulings that displeased them.[99] They have not appointed agency heads known to oppose the agencies they will be leading.[100] And they have not impeached a President. This tactical divide suggests that there is a qualitative, not just a quantitative, difference in how the parties have been playing constitutional hardball—which we

Timing and Turnout: How Off-Cycle Elections Favor Organized Groups 118–19 (2014) (describing what might "seem to be a baffling reversal in the major political parties' positions": "In the case of school board elections, Republicans claim to be champions of increasing voter turnout, and Democrats have become the defenders of the status quo of off-cycle election timing"); Eitan Hersh, How Democrats Suppress the Vote, FiveThirtyEight (Nov. 3, 2015), http://fivethirtyeight.com/features/how-democrats-suppress-the-vote [http://perma.cc/H73F-U4PM] (characterizing Anzia's data provocatively as showing that Democrats deliberately reduce turnout by resisting efforts to consolidate elections in November of even-numbered years). But even if this claim were true across the board, which it is not, see, e.g., Anzia, supra, at 33 (describing California Democrats' unsuccessful push to move statewide referenda to November), it would be the sort of exception that proves the rule. Whatever their drawbacks, off-cycle elections do not actually block Republicans, or anyone else, from voting. If this is as far as Democrats will go, it highlights the limits of their use of hardball in the highly contested constitutional sphere of voting.

99. Both parties, in recent times, have tended to choose a new Parliamentarian upon regaining control of the Senate. The novel form of hardball pioneered by Senate Republicans is to replace their own chosen Parliamentarian in response to a disfavored ruling. See Tonja Jacobi & Jeff VanDam, The Filibuster and Reconciliation: The Future of Majoritarian Lawmaking in the U.S. Senate, 47 U.C. Davis L. Rev. 261, 336–39 (2013) (discussing the 2001 firing of Senate Parliamentarian Robert Dove, after Dove had ruled against using budget reconciliation for tax cuts, and the threatened decline in the Parliamentarian's power); Tiefer, Out of Order, supra note 63, at 62 (same).

100. See, e.g., Gillian Metzger, The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege, 131 Harv. L. Rev. 1, 10 (2017) ("President Trump's cabinet is composed of individuals who have long opposed the agencies and programs they now lead . . . ."); cf. Donald P. Moynihan & Alasdair S. Roberts, The Triumph of Loyalty over Competence: The Bush Administration and the Exhaustion of the Politicized Presidency, 70 Pub. Admin. Rev. 572, 574 (2010) (contending that Presidents Reagan and Bush II prioritized political loyalty over competence and experience in executive branch appointments).

In terms of judicial appointments, while both parties may have chosen individuals with strongly held jurisprudential views, Democrats have not pushed through young judges to the same extent as Republicans have. Presidents Clinton and Obama, for instance, together appointed zero individuals to a circuit court who were under the age of forty at the time of nomination, whereas Presidents Reagan, Bush I, and Bush II respectively appointed eight, three, and two such individuals (in order: Kenneth Starr, J. Harvie Wilkinson III, Frank Easterbrook, Edith Jones, Alex Kozinski, Deanell Reece Tacha, James Edmondson, Douglas Ginsburg, Samuel Alito Jr., J. Michael Luttig, Timothy Lewis, Neil Gorsuch, and Kimberly Moore). See Biographical Directory of Article III Federal Judges: Export, Fed. Judicial Ctr., http://www.fjc.gov/history/judges/biographical-directory-article-iii-federal-judges-export [http://perma.cc/3N64-JNX5] (last visited July 11, 2017) (select "Database Export" to download the Excel spreadsheet containing relevant data). The average ages of circuit court and district court nominees were also lower during these Republican presidencies. See Sheldon Goldman et al., Obama's First Term Judiciary: Picking Judges in the Minefield of Obstructionism, 97 Judicature 7, 41 tbl.6, 43 tbl.8 (2013).

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contend in section III.B.1 is grounded in part in Republicans' greater willingness to incapacitate the government.

Second, our story takes place against a backdrop of asymmetric polarization: Social scientists have shown convincingly that since the 1970s, Republicans have moved further to the right than Democrats have moved to the left.[101] This is true for rank-and-file voters as well as party elites; it can be observed in public polling data as well as congressional voting patterns.[102] Moving beyond patterns of polarization, survey evidence suggests that Republican partisans are also strikingly more likely than Democratic partisans to reject consensual politics in principle. A 2010 poll, for instance, found that "a clear majority of Republicans" prefer politicians who "stand firm," whereas "a large majority of Democrats" prefer politicians who "compromise."[103] Insofar as constitutional hardball depends on political actors with strong substantive views eschewing compromise in order to advance those views, these differences in the parties' attitudes seem illuminating. They suggest an overarching reason why constitutional hardball tactics would tend to hold greater appeal and less downside for Republican officeholders.[104] Asymmetric constitutional

101. For overviews of the evidence, see Mann & Ornstein, supra note 48, at 51–58; Michael Barber & Nolan McCarty, Causes and Consequences of Polarization, *in* Am. Political Sci. Ass'n, Negotiating Agreement in Politics 19, 19–26 (Jane Mansbridge & Cathie Jo Martin eds., 2013). Professor David Schleicher usefully distinguishes (1) the increasingly uniform orientation of all political issues around a single axis of liberal–conservative disagreement from (2) the movement of Democrats and Republicans toward more extreme points along the dominant axis. David Schleicher, Things Aren't Going that Well over There Either: Party Polarization and Election Law in Comparative Perspective, 2015 U. Chi. Legal F. 433, 439–40 (2015). Political scientists have good evidence that both (1) and (2) are occurring, but it is only with respect to (2) that it is conceptually possible to observe an asymmetry. That asymmetry tends to be linked with a third variable Schleicher discusses: (3) the intensity or fundamentalism with which partisans espouse their views. Id. at 440–41. As we explain in section III.B, there is evidence of asymmetry here as well.

102. See Mann & Ornstein, supra note 48, at 56–57.

103. Michael R. Wolf et al., Incivility and Standing Firm: A Second Layer of Partisan Division, 45 PS: Pol. Sci. & Pol. 428, 430 (2012); see also Mann & Ornstein, supra note 48, at 57 (describing additional survey evidence indicating that Democratic voters value political compromise more than Republican voters do); David M. Kennedy, What Pildes Missed: The Framers, the True Impact of the Voting Rights Act, and the Far Right, 99 Calif. L. Rev. 351, 357 (2011) (suggesting that asymmetric polarization has made the Republican Party "much less inclined to compromise on value-laden social issues than the much more heterogeneous Democratic Party"); Wolf et al., supra, at 430 (describing Pew Research Center findings "that Democrats have been significantly more likely to prefer compromise than Republicans since 1987 . . . , with this gap growing over time"). In Facebook posts and press releases from 2015 and 2016, a recent study found, Republican members of Congress expressed "indignant disagreement" with the other party at roughly four times the rate that Democratic members did. Pew Research Ctr., Partisan Conflict and Congressional Outreach 18 (2017), http://assets.pewresearch.org/wp-content/uploads/sites/5/2017/02/25100146/LabsReport_FINALreport.pdf [http://perma.cc/ENN4-87UX].

104. Cf. Jacob S. Hacker & Paul Pierson, Confronting Asymmetric Polarization, *in* Solutions to Political Polarization in America 59, 66 (Nathaniel Persily ed., 2015) (con-

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hardball cannot be reduced to asymmetric polarization—the relationship between a party's ideological evolution and its approach to constitutional conflict is complex—but the existence of the latter surely makes the existence of the former more plausible.

Third, there is considerable evidence that the modern Republican Party acts more like a movement party, with clear and cohesive ideological goals, while the Democratic Party acts more like an amalgamation of interest groups. This is an oversimplified characterization of both parties, of course, but political scientists have repeatedly found a significant distinction along these lines.[105] Perhaps as a result of being more like a movement party, the current Republican Party also has fewer moderates in positions of power.[106] Insofar as constitutional hardball tactics

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tending that "[t]he most alarming feature of asymmetric polarization has been the increasing resort to forms of 'constitutional hardball'" by "the increasingly off-center and confrontational GOP").

105. See, e.g., Jo Freeman, The Political Culture of the Democratic and Republican Parties, 101 Pol. Sci. Q. 327, 329 (1986) ("Essentially, the Democratic party is pluralistic and polycentric. It has multiple power centers that compete for membership support in order to make demands on, as well as determine, the leaders."); id. ("The Republicans have a unitary party in which great deference is paid to the leadership, activists are expected to be 'good soldiers,' and competing loyalties are frowned upon."); Grossmann & Hopkins, Asymmetry of American Party Politics, supra note 47, at 120 (arguing that the "Republican Party is best viewed as the agent of an ideological movement whose members are united by a common devotion to . . . limited government," whereas "the Democratic Party is properly understood as a coalition of social groups whose interests are served by various forms of government activity"); Yphtach Lelkes & Paul M. Sniderman, The Ideological Asymmetry of the American Party System, 46 Brit. J. Pol. Sci. 825, 840 (2016) (finding that Republican Party supporters "have strikingly higher levels of ideological awareness and coherence" than do Democratic Party supporters).

Relatedly, there is intriguing evidence, which we do not have the space to explore fully here, that Republicans favor a more hierarchical form of internal party organization. See, e.g., Richard M. Skinner et al., 527 Committees and the Political Party Network, 40 Am. Pol. Res. 60, 64–65 (2012) (reviewing "numerous observational and experimental studies" finding that Republicans are "more comfortable than Democrats in leaving important party decisions up to party leaders" and that "Republican Party organizations tend to be more hierarchical than Democratic ones"). By reducing intraparty collective action problems, and by reducing the effective veto power of moderates who might oppose some tough tactics, this tendency could also facilitate constitutional hardball.

106. See James E. Campbell, Polarized: Making Sense of a Divided America 185 (2016) (noting that while "the ranks of moderate Democrats have also been depleted," moderate Republicans in Congress have faced "virtual extinction"). Prior to the Trump presidency, the fact that Republicans had fewer moderates in elected positions was easily transformed into a perception that they were more disciplined as a party. See, e.g., Jonathan Chait, Why Are Republicans More Disciplined than Democrats?, New Republic (Dec. 2, 2010), http://newrepublic.com/article/79578/why-are-republicans-more-disciplined-democrats [http://perma.cc/SKV4-6CXL]; Robert Reich, Why Republicans Are Disciplined and Democrats Aren't, Huffington Post (July 24, 2013), http://www.huffingtonpost.com/robert-reich/republican-party-discipline_b_3646393.html [http://perma.cc/3SUR-57AM] (last updated Sept. 23, 2013). The question of whether there was in fact an asymmetry in discipline is a matter of some debate. Compare Eliza Newlin Carney, Standing Together Against Any Action, CQ Wkly., Mar. 16, 2015, at 37, 38 (showing significant overlap in the

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depend on the existence or perception of an ideologically committed party with a shared vision of political change, these data points also help support the plausibility of asymmetric constitutional hardball.

Finally, differences in the constitutional philosophies of liberals and conservatives suggest different normative orientations toward constitutional hardball. We will return to this issue below.[107] Among other potentially relevant differences, stronger commitments on the Republican side to the theory of originalism and the idea of a "lost" Constitution are apt to yield considerably less deference toward the constitutional status quo and the set of unwritten norms that have evolved to facilitate moderation and cooperation in government.[108] Democrats' comparatively dynamic (or "living") understanding of the constitutional order's legitimacy and ontology, in contrast, gives them a general reason to view destabilizing constitutional hardball tactics with suspicion. They may engage in such tactics anyway, but the effort will involve greater cognitive dissonance.

These different constitutional commitments of the two parties, it bears emphasis, are contingent and bounded in political time.[109] Perhaps in some future period, it will be liberals who think and speak in terms of restoring a lost constitutional order and conservatives who are more focused on defending a body of judicial precedents that has developed case by case.[110] But over the past quarter century or so, as Part III explains, it has been conservatives who have had more to gain from dramatic departures from established constitutional understandings,

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parties' average "unity scores" on roll call votes over the past half century), with Betsy Sinclair et al., Agreement Scores, Ideal Points, and Legislative Polarization 21 (2011) (unpublished manuscript), http://mason.gmu.edu/~jvictor3/Research/Conferences/AgreementScores_.pdf [http://perma.cc/3CRU-BA5Z] (finding, based on legislator-pair "agreement scores," that congressional "Republicans tend to vote with greater internal cohesion than Democrats do"). In any event, the Trump years seem likely to scramble these calculations, increasing unity on the Democratic side and division on the Republican side, at least temporarily.

107. See infra section III.B.2.

108. The idea that liberals (Democrats) and conservatives (Republicans) have systematically different views about the Constitution is a familiar one. The idea that these groups might, as a result, have systematically different normative orientations toward constitutional conventions and toward breaches thereof is, as far as we are aware, new to the legal literature.

109. See generally Jack M. Balkin, The Last Days of Disco: Why the American Political System Is Dysfunctional, 94 B.U. L. Rev. 1159 (2014) [hereinafter Balkin, Last Days of Disco] (extending Stephen Skowronek's theory of political time to trace the rise, and perhaps now the end, of a single coherent conservative political and constitutional regime beginning in the early 1980s, which aimed in part to repudiate the prior liberal regime).

110. As we have suggested, built-in counterdynamics may tend to complicate or reverse the directionality of asymmetric constitutional hardball over long political cycles. See supra notes 75–77 and accompanying text. At least some of the factors that contribute to the present asymmetry, however, seem likely to be more enduring. See, e.g., infra section III.B.1 (describing how a political coalition's views on the value of government may affect that coalition's willingness to engage in forms of hardball that hobble the government).

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forged during the New Deal and Warren Court eras, while liberals have been pushed toward a more incrementalist and cautious constitutionalism.

The proposition that Republicans play harder hardball, in short, plausibly follows not just from the social science evidence on polarization and the structure of the parties, but also from the internal logic of each side's constitutional vision.

III. EXPLAINING ASYMMETRIC CONSTITUTIONAL HARDBALL

Having established that asymmetric constitutional hardball is at least plausible, let us now examine its potential origins and meaning a little more carefully. Why would the officeholders of different political parties be differently disposed toward playing constitutional hardball, particularly in Congress? There are two basic ways to approach this question. The first looks to the incentives and constraints facing these officials as actors embedded in a web of institutional relationships, not only with fellow legislators but also with the voters, donors, advocacy groups, media outlets, and other important players who define the political environment within which they operate.

From this angle, we can disaggregate the question into a series of smaller ones. Which of these players tend to reward or punish elected officials for playing constitutional hardball, and under what circumstances? And do these dynamics vary across the parties? We suggest in section A of this Part that while both Republicans and Democrats face political pressure to play constitutional hardball, such pressure has been considerably stronger and more systematic on the Republican side.

However, this first approach to the question may risk begging it. *Why* are various crucial players within the Republican coalition more inclined than their Democratic counterparts to reward constitutional hardball or to punish its absence? A second approach moves the analysis to the level of values and ideas. Although all political parties are ideologically diverse, substantial segments of their coalitions hold identifiable clusters of beliefs that are part of what makes the coalitions cohere. We argue in section B that differences in the party coalitions' moral, legal, and cultural beliefs further explain the asymmetry we observe.

Asymmetric constitutional hardball is not the sort of phenomenon that can be modeled in a neat, monocausal manner. As one examines the potential factors behind it, one quickly finds that many of them do not really offer alternative explanations; rather, they are interlocking elements of related causal stories. We cannot hope in an Essay like this to tease out the relative magnitude of the different causal stories, if doing so is possible at all. But we think it is useful to gather together their elements because, collectively, they can help us understand both why asymmetric constitutional hardball has become such a prominent feature of our politics, and whether it is likely to continue in the Trump era and beyond.

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A. *Asymmetric Institutions and Incentives*

In order to get into office and stay in office, elected representatives need votes. To get votes, they need to secure numerous forms of political support, including the labor of campaign workers and volunteers, the money of campaign contributors and those willing to make officially independent expenditures on a candidate's behalf, and the endorsements of activists, issue groups, public figures, and power brokers of various kinds. Successful politicians, accordingly, become embedded in a complex set of networks—local, state, and national—that generate powerful and sometimes conflicting incentives for their behavior while in government.

In recent decades, some of these networks have gained in importance while others have declined. A political scientist discussing these dynamics a generation ago likely would have emphasized the role of top party officials and, beyond them, top fundraisers and civil society leaders closely connected to those officials.[111] Without support from such "insiders," candidates' paths to victory in most electoral contexts seemed few and narrow. The influence of these insiders has been waning for some time, however, as the elections of the past decade brought into sharp relief. The center of gravity within each of the two major party coalitions has shifted considerably in the direction of so-called "outside" groups, which are not part of the formal party structure and have their own independent bases of support among donors and volunteers.[112] These outside groups include comprehensive ideological players such as FreedomWorks and Democracy Alliance; issue-specific outfits such as the Sierra Club, the National Rifle Association, and Planned Parenthood; a few unions that remain powerful locally or nationally on the Democratic side; and a large number of donor-driven groups organized under various legal categories, such as Super PACs or 501(c)(4)s.

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111. For a classic in this genre, see generally Marty Cohen et al., The Party Decides: Presidential Nominations Before and After Reform (2008), which argues that even after reforms in the 1970s aimed to promote more populist forms of democracy in presidential primary politics, party insiders reasserted control of the agenda. See also id. at 15 (theorizing parties as larger coalitions but noting that most political scientists have viewed them as "the creatures of officeholders or top party officials"). Several authors of this book have acknowledged that since its publication, a shift away from these elite networks has become more pronounced. See, e.g., Hans Noel, Why Can't the G.O.P. Stop Trump?, N.Y. Times (Mar. 1, 2016), http://www.nytimes.com/2016/03/01/opinion/campaign-stops/why-cant-the-gop-stop-trump.html (on file with the *Columbia Law Review*); Danielle Kurtzleben, Celebrities, Lies and Outsiders: How This Election Surprised One Political Scientist, NPR (June 21, 2016), http://www.npr.org/2016/06/21/482357936/celebrities-lies-and-outsiders-how-this-election-surprised-one-political-scienti (on file with the *Columbia Law Review*) (interviewing Cohen).

112. See Joseph Fishkin & Heather K. Gerken, The Party's Over: *McCutcheon*, Shadow Parties, and the Future of the Party System, 2014 Sup. Ct. Rev. 175, 176–77, 186–92 (2015) (describing these trends); see also Bulman-Pozen, supra note 55, at 1085 & n.20 (collecting sources that describe today's parties as "networks" of elected representatives, party officials, and informally affiliated individuals and organizations).

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These various "intense policy demanders"[113] may have strong views about whether elected officials should or should not engage in acts of constitutional hardball. Recall that constitutional hardball, as we have defined it, involves either breaching constitutional conventions for partisan ends or attempting to shift constitutional law in an unusually bold or self-entrenching manner—and very often it involves both. For any given elected official, the risks and rewards of playing constitutional hardball will therefore depend, first, on whether and to what extent key political constituencies and policy demanders wish to change settled understandings of the Constitution; and, second, on whether and to what extent these actors wish to see their goals pursued in a manner consistent with prevailing norms of government practice. On both of these dimensions, there is good cause to believe that the Republican coalition—including both the policy demanders and the voters[114]—generates stronger incentives than the Democratic coalition to play hardball.

1. *Safe Seats and Primary Challenges.* — One source of this imbalance is the primary system. A significant fraction of members of Congress from both parties now hold "safe seats," with little prospect of general-election defeat to a candidate from the other political party.[115] While partisan gerrymandering may have contributed to this phenomenon in the House, rising levels of geographic polarization and party loyalty in voting have extended it to the Senate as well.[116] Structurally, this means that the

113. See Cohen et al., supra note 111, at 20 (applying this label to "interest groups, ideological activists, and others" who organize political parties "to get the government policies they want").

114. We can only speculate as to this point, but to the extent that the rise of the digital age and new forms of social media and government transparency have made the typical act of constitutional hardball more widely publicized in recent years as compared to prior periods, this added publicity may tend to make the views of more members of the coalition matter.

115. See Alan I. Abramowitz, U.S. Senate Elections in a Polarized Era, *in* The U.S. Senate: From Deliberation to Dysfunction 27, 30 (Burdett A. Loomis ed., 2012) ("Fewer senators represent so-called swing states, or those states that remain competitive for both parties, while more senators represent states that are relatively safe for their own party."); Nate Silver, As Swing Districts Dwindle, Can a Divided House Stand?, N.Y. Times: FiveThirtyEight (Dec. 27, 2012), http://fivethirtyeight.blogs.nytimes.com/2012/12/27/as-swing-districts-dwindle-can-a-divided-house-stand (on file with the *Columbia Law Review*) ("*Most* members of the House now come from hyperpartisan districts where they face essentially no threat of losing their seat to the other party.").

116. See Abramowitz, supra note 115, at 30 (discussing the Senate); Richard H. Pildes, Romanticizing Democracy, Political Fragmentation, and the Decline of American Government, 124 Yale L.J. 804, 821 n.46 (2014) (discussing the empirical literature). It is possible that gerrymandering in the House has also contributed indirectly to ideological polarization in the Senate, given that so many senators are former House members who have, over the past generation, been exposed to repeated primary contests in that chamber. See Sean M. Theriault & David W. Rohde, The Gingrich Senators and Party Polarization in the U.S. Senate, 73 J. Pol. 1011, 1012 (2011) (finding that "the growing divide between the voting scores of Democrats and Republicans in the Senate can be accounted for almost entirely by the election of a particular breed of senator: Republicans

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main threat to many members' electoral survival comes from the party primary.

In theory, this threat applies equally to Democrats and Republicans. In practice, its effects have been far from equal. Very few liberal primary challengers have defeated Democratic congressional incumbents in recent years.[117] Over a dozen "Tea Party" challengers, in contrast, unseated Republican incumbents from 2010 to 2014, including House Majority Leader Eric Cantor.[118] And well before the Tea Party emerged on the scene, Republican Senators and Representatives were experiencing a greater vulnerability to primary challenges—a trend that began in 1996.[119]

Ever since the Gingrich Revolution, then, Republican members of Congress have had to worry considerably more than their Democratic counterparts about ideologically extreme rivals from their own party. Insofar as these rivals tend to favor a combative style of politics and to hold Beltway conventions in low regard, this dynamic pushes Republican officeholders in the direction of constitutional hardball. There is some intriguing anecdotal evidence from the Obama years that the most forceful demands for constitutional hardball within the House came from those representatives whose districts are overwhelmingly Republican, where these dynamics are likely the most pronounced.[120] The difficult

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who previously served in the House after 1978"). Our argument in this section does not depend on any claim that more Republicans than Democrats occupy safe seats or are the beneficiaries of partisan gerrymandering.

117. See Robert G. Boatright, Getting Primaried: The Changing Politics of Congressional Primary Challenges 2, 76–77 (2013) (describing the one successful defeat of a Democratic Representative by a challenger from the left between 2004 and 2008); id. at 133 (describing the two Democratic Senators successfully challenged between 1996 and 2010); see also Lauren Cohen Bell et al., Slingshot: The Defeat of Eric Cantor 14–16 (2016) (listing additional primary defeats of Democratic House incumbents between 2010 and 2014, most of which involved scandal rather than ideological challenge).

118. See Kiran Dhillon, Before Cantor: Seven Other Tea Party Upsets, Time (June 12, 2014), http://time.com/2864303/before-cantor-seven-other-tea-party-upsets [http://perma.cc/5K7P-HJL3]; Associated Press, A Look at the Tea Party's Primary Season Wins, Salon (Sept. 15, 2010), http://www.salon.com/2010/09/15/us_tea_party_wins [http://perma.cc/QV6K-7MKT]; see also David Wasserman, What We Can Learn from Eric Cantor's Defeat, FiveThirtyEight (June 20, 2014), http://fivethirtyeight.com/features/what-we-can-learn-from-eric-cantors-defeat [http://perma.cc/52F4-8J3U] ("Overall, 32 House incumbents have taken less than 75 percent of the vote in their primaries so far this year, up from 31 at this point in 2010 and just 12 at this point in 2006. What's more, 27 of these 32 'underperforming' incumbents have been Republicans.").

119. See Boatright, supra note 117, at 76–77 (showing that between 1996 and 2010, twenty-seven of the thirty-nine contested primaries were between Republican candidates); id. at 86 (showing that "ideology" was the most frequent reason or a common reason for primary challenges in every congressional election cycle between 1996 and 2010). In notable contrast, Democratic incumbents were more vulnerable than their Republican counterparts to primary challenges from 1970 to 1994. See id. at 76–77, 100–01.

120. See, e.g., Ryan Lizza, Where the G.O.P.'s Suicide Caucus Lives, New Yorker (Sept. 26, 2013), http://www.newyorker.com/news/daily-comment/where-the-g-o-p-s-suicide-caucus-lives [http://perma.cc/8DJ9-AFM9] (explaining that the House members who

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question remains, though, *why* primary challenges have been playing out so differently on the Republican side. The balance of this Part offers some partial explanations.

2. *Outside Funders.* — One driving force behind Republican primary challenges and constitutional hardball over the past decade or so has been the Tea Party. The Tea Party arose both as a movement of voters within the Republican coalition and as a movement of groups within the Koch brothers' network, most prominently FreedomWorks and Americans for Prosperity.[121] Like their precursors the Gingrich revolutionaries,[122] the leaders of this uprising viewed the conventional methods of political bargaining in Washington, as practiced by both parties, as a form of corruption that they sought to purge.[123] As we will discuss in section B, they also linked this ambition to a powerful vision of constitutional change, styled as constitutional restoration. In pressing its "no-compromise ideology,"[124] the movement drew organizational and financial

pushed in 2013 to use a government shutdown as leverage in their long-shot bid to force a repeal of the ACA represented such districts).

121. See Theda Skocpol & Vanessa Williamson, The Tea Party and the Remaking of Republican Conservatism 83–87 (2012). Republican supporters sometimes idealize this movement as a grassroots citizen uprising, while Democratic critics sometimes characterize it as a classic case of "astroturfing" by elite interests. Compare Ronald T. Libby, Purging the Republican Party: Tea Party Campaigns and Elections 1 (2014) (describing the Tea Party as a "populist, grassroots movement sweeping the country"), with George Monbiot, The Tea Party Movement: Deluded and Inspired by Billionaires, Guardian (Oct. 25, 2010), http://www.theguardian.com/commentisfree/cifamerica/2010/oct/25/tea-party-koch-brothers [http://perma.cc/FH9Q-99DB] (calling the Tea Party "the biggest Astroturf operation in history"). In fact, the Tea Party was both of these things at once, which is part of why it was effective. See Skocpol & Williamson, supra, at 83; Angelia R. Wilson, Tea Time? The Rise of the Tea Party, Pol. Insight, Apr. 2014, at 36, 37.

122. In 2010, FreedomWorks helped launch a "Contract from America," evoking Gingrich's 1994 Contract with America. See Teddy Davis, Tea Party Activists Craft 'Contract from America,' ABC News (Feb. 9, 2010), http://abcnews.go.com/Politics/tea-party-activists-craft-contract-america/story?id=9740705 [http://perma.cc/5LFK-A4MC].

123. This aspect of the Tea Party's approach was on prominent display in the 2011 debt ceiling confrontation. After sweeping into power in the 2010 midterms, House Republicans demanded steep spending cuts in exchange for raising the debt ceiling in August 2011, forcing the U.S. Treasury to the verge of default. See Skocpol & Williamson, supra note 121, at 180 (discussing Tea Party opposition to raising the debt ceiling, despite potential adverse consequences); Roy T. Meyers, The Implosion of the Federal Budget Process: Triggers, Commissions, Cliffs, Sequesters, Debt Ceilings, and Shutdown, Pub. Budgeting & Fin., Winter 2014, at 1, 8–9 (noting the view of Democrats that Tea Party–fueled "hardball" led to an "implosion" of the budget process). According to Jane Mayer, right-wing donors and advocacy groups such as Americans for Prosperity and the Club for Growth played a crucial role in encouraging the Republican Young Guns, led by then-House Majority Leader Eric Cantor, to push the party to the brink in this episode. See Jane Mayer, Dark Money: The Hidden History of the Billionaires Behind the Rise of the Radical Right 297 (2016) [hereinafter Mayer, Dark Money].

124. Juan Williams, Opinion, Don't Underestimate the Tea Party's Staying Power, Fox News (May 9, 2012), http://www.foxnews.com/opinion/2012/05/09/dont-underestimate-tea-party-staying-power.html (on file with the *Columbia Law Review*); see also Jared A. Goldstein, The Tea Party Movement and the Perils of Popular Originalism, 53 Ariz. L. Rev.

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support from a set of Republican-affiliated funders who have been developing, since the 1970s, an institutional infrastructure that channels monetary resources toward an agenda of deregulation, tax cuts, and generally reducing the scope of government.[125] These funders' sheer financial clout, and willingness to spend, has had a substantial long-term effect on our politics.

On the Democratic side as well, the center of political gravity has been shifting from party leaders and officials to nominally outside groups, as noted above.[126] But the Democratic network of outside groups does not similarly revolve around large, well-resourced, and broad-gauge ideological players. Instead, on the left the story remains one of coalition politics.[127] It is a story of a few remaining major unions, environmental groups like the Sierra Club, PACs like EMILY's List (which supports prochoice female candidates), trial lawyers, and so on; the list is long, and all of these groups make their demands on Democratic officeholders.[128] But no financially significant group exerts constant pressure on them to upend prevailing norms of governance. On the contrary, many of the wealthy donors and funders on whom Democrats depend tend to have a

827, 862 (2011) ("As Tea Party supporters declare, there can be no compromise or dialogue with those who would destroy America.").

125. While initially obscure, the role of the Koch brothers' network in funding and shaping the Tea Party movement has become much more well known, especially through Mayer's work. See Mayer, Dark Money, supra note 123, at 203–42; Jane Mayer, Covert Operations: The Billionaire Brothers Who Are Waging a War Against Obama, New Yorker (Aug. 30, 2010), http://www.newyorker.com/magazine/2010/08/30/covert-operations [http://perma.cc/VP6V-YJXX]; see also, e.g., Frank Rich, Opinion, The Billionaires Bankrolling the Tea Party, N.Y. Times (Aug. 28, 2010), http://www.nytimes.com/2010/08/29/opinion/29rich.html (on file with the *Columbia Law Review*). The tobacco industry also played a key role in the development of the Tea Party, building on the success of earlier "smokers' rights" groups that sought to fend off restrictions on cigarettes. See generally Amanda Fallin et al., "To Quarterback Behind the Scenes, Third-Party Efforts": The Tobacco Industry and the Tea Party, 23 Tobacco Control 322 (2014). For instance, tobacco companies funded Citizens for a Sound Economy (CSE), a predecessor to FreedomWorks and Americans for Prosperity. See id. at 326–27. In a recently published exposé, an early communications director for CSE portrays the proto–Tea Party of the 1990s as an alliance of big oil and big tobacco. See generally Jeff Nesbit, Poison Tea: How Big Oil and Big Tobacco Invented the Tea Party and Captured the GOP (2016).

126. See supra notes 111–113 and accompanying text.

127. See Matt Grossmann & David A. Hopkins, Asymmetric Politics: Ideological Republicans and Group Interest Democrats 3 (2016) ("While the Democratic Party is fundamentally a group coalition, the Republican Party can be most accurately characterized as the vehicle of an ideological movement."). "In contrast to the variety of single-issue interest groups and social movements that collectively constitute the activist population of the Democratic Party," Professors Grossmann and Hopkins show, Republican politics in recent decades has been "dominated by a broadly organized, cross-issue conservative movement . . . ." Id.

128. See id. at 100 (noting the "plethora of specialized groups that each make their own separate demands on [Democratic] candidates and elected officials").

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moderating effect on the party, rewarding candidates who cater to the professional class and stake out centrist positions.[129]

To be sure, there are some individual donors with strong ideological views who have an outsized role in contemporary Democratic politics. In the two most recent election cycles, the highest-profile example was hedge fund manager Tom Steyer. Before that, it was George Soros. The case of Steyer is instructive: While his funding may have encouraged Democrats to make addressing climate change a higher political priority, it is hard to see how any Democratic officeholder would have faced stronger incentives to play constitutional hardball, at least prior to the Trump presidency, because of support or lack of support from Steyer.[130]

In the mid-twentieth century, when unions represented a much larger proportion of American workers, one could imagine how they might have spurred Democratic politicians to play constitutional hardball, at least on issues related to workers' rights to organize and strike.[131] Their role in not only funding campaigns but also staffing them and organizing members on their behalf was for decades unparalleled.[132] Certain unions also brought a pugnacious style to Democratic politics. Yet after years of decline,[133] the labor movement was not even able to convince a sufficient

129. See, e.g., Douglas Schoen, Opinion, Why Democrats Need Wall Street, N.Y. Times (Oct. 17, 2017), http://www.nytimes.com/2017/10/17/opinion/why-democrats-need-wall-street.html (on file with the *Columbia Law Review*) (arguing that Democrats "should keep ties with Wall Street," both because it "keeps their coffers full" and because this dependence helps ensure centrist, "pro-capitalist" policies that appeal to the American electorate). If the "Wall Street" donors envisioned by this op-ed press in any general tactical or temperamental direction, it is presumably toward bipartisanship rather than toward hardball.

130. Steyer spent $74 million on the 2014 midterm elections, with $67 million going to his Super PAC NextGen Climate to support Democrats who made climate change a central issue. See Coral Davenport, Billionaire Environmentalist to Spend $25 Million to Turn Out Young Voters, N.Y. Times (Apr. 25, 2016), http://www.nytimes.com/2016/04/26/us/politics/thomas-steyer-nextgen-climate-change-voters.html (on file with the *Columbia Law Review*). He was the largest individual donor once again in the 2016 cycle, giving over $91 million to Democratic candidates and liberal outside groups. See Top Individual Contributors: All Federal Contributions, OpenSecrets.org, http://www.opensecrets.org/overview/topindivs.php [http://perma.cc/FEC8-53A4] (last visited July 11, 2017). However, Steyer specifically refused to contribute to Democratic candidates during the 2016 primaries, see Davenport, supra, suggesting his avoidance of the internecine fights through which Republican donors have pushed their representatives to the right.

131. Consider, for an executive branch example, President Kennedy's dramatic 1961 intervention in negotiations between the major steel producers and the United Steelworkers Union, forcing the steel companies to accept higher wages without raising prices. See Michael L. Wachter, Labor Unions: A Corporatist Institution in a Competitive World, 155 U. Pa. L. Rev. 581, 614–17 (2007).

132. See Daniel Schlozman, When Movements Anchor Parties: Electoral Alignments in American History 50 (2015) (explaining that starting in the late 1930s, and for the next several decades thereafter, "labor traded votes, money, and networks for policy" with Democratic officeholders).

133. See Dan Clawson & Mary Ann Clawson, What Has Happened to the US Labor Movement? Union Decline and Renewal, 25 Ann. Rev. Soc. 95, 97 (1999) (reviewing

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number of Democrats to overcome a filibuster of the Employee Free Choice Act in 2009, when Democrats controlled both houses of Congress and enjoyed a filibuster-proof majority in the Senate.[134] Moreover, it has been a long time since the labor movement seriously pressed for a wholesale change in the direction of the Democratic Party, let alone a wholesale change framed in constitutional terms. For the past half century, labor leaders have tended, instead, to make deals with incumbent players as part of Democratic coalition politics.[135]

There is, in short, no institutional equivalent on the left of the most powerful groups on the right that funded the Tea Party and its predecessors and that continue to threaten "moderate" members of Congress with primary challenges.[136] As we write these words, the Koch brothers' donor network is reportedly pressing Senate Republicans to play constitutional hardball by doing away with the "blue-slip" custom through which home-state Senators have traditionally been allowed to block

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measures of union decline, including that unions have "exercised less and less leverage within the Democratic party"); see also Mike Konczal, Opinion, Why Don't Liberals Have Their Own Tea Party?, Al Jazeera Am. (Dec. 5, 2013), http://america.aljazeera.com/opinions/2013/12/liberals-democraticteapartypolitics.html [http://perma.cc/NMJ3-AKW8] ("[W]e shouldn't discount the fact that the conservative movement has come to power during a period when the main source of liberal infrastructure, the labor movement, has fallen into disarray."). But cf. Dorian T. Warren, Labor in American Politics: Continuities, Changes, and Challenges for the Twenty-First-Century Labor Movement, 42 Polity 286, 286–87 (2010) ("The labor movement is still the most powerful core constituency of the national Democratic Party by several measures, including campaign contributions, grassroots mobilization efforts of the Party's key voters, lobbying, and setting the Party's legislative agenda.").

134. The bill, which was aggressively championed by unions, would have changed the National Labor Relations Act to allow employees to organize by collecting signature cards. The signature-card provision was removed after several moderate-to-conservative Democrats announced their opposition. See Steven Greenhouse, Democrats Drop Key Part of Bill to Assist Unions, N.Y. Times (July 16, 2009), http://www.nytimes.com/2009/07/17/business/17union.html (on file with the *Columbia Law Review*).

135. Thus, while unions over the past half century have been a source of political strength on the left, we find no evidence to suggest they have been a major source of *primary challenges from the left*. There was a time in American history when parts of the labor movement—the United Automobile Workers under Walter Reuther in the mid-twentieth century, to cite the most prominent example—played a substantial role in pulling the Democratic Party leftward on questions of tax-and-transfer policy and economic justice. See generally Kevin Boyle, The UAW and the Heyday of American Liberalism 1945–1968 (1995); Nelson Lichtenstein, The Most Dangerous Man in Detroit: Walter Reuther and the Fate of American Labor (1995). These dynamics were long gone during the period of asymmetric constitutional hardball we are considering.

136. On the efforts of such groups to threaten moderate Republicans with primary challenges, see, for example, Jonathan Easley, FreedomWorks Launches PAC Ahead of 2016, Hill (Apr. 16, 2015), http://thehill.com/blogs/ballot-box/senate-races/239082-freedomworks-launches-pac [http://perma.cc/3DXB-C25N]; Maggie Haberman, Club for Growth Targets Republicans, Politico (Feb. 27, 2013), http://www.politico.com/story/2013/02/club-for-growth-targets-republicans-088153 [http://perma.cc/VE4N-PHZN].

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certain judicial nominees.[137] But this answer to our main question, once again, may seem to raise the same question in a new form. Why are Republican donors, like Republican voters, seemingly so much less interested in rewarding bipartisanship, incumbency, and dealmaking—and so much more interested in rewarding political hardball generally and constitutional hardball specifically? We will return to this question in section B of this Part.

3. *Other Mediating Institutions.* — So far, we have focused on the parties and some of the funders and advocacy groups in their coalitions. But many of the most important mediating institutions in American politics are none of these. The most obvious institution that mediates political reality for millions of Americans is the media: mass-communication outlets and the individual hosts, commentators, and journalists they feature. Another important but less obvious set of mediating organizations and individuals are the think tanks and experts who are called on to articulate competing sides in policy debates. Together, the news industry, think tanks, and the expert voices they credential play an essential role in constructing the American public sphere. For our purposes, a particularly significant set of speakers are those credentialed to speak about the law and the Constitution. But the general run of pundits matters as well.

Both the Democratic and Republican coalitions have media outlets that tend to take their side of policy debates. And at any given time, factions within each coalition have particular speakers whose voices they seek to promote and legitimate. Is there any reason, then, to believe these institutions generate *asymmetric* incentives for the parties to engage in constitutional hardball?

There is. To see why, it helps to step back and view the development of the relevant institutions in political time.[138] In the 1970s and '80s, American conservatives emerged from the long wilderness of the post–New Deal era, eventually finding a popular president, Ronald Reagan, who brought many conservative ideas into the mainstream. That success belies significant challenges conservatives had to surmount during this period. From the perspective of those in the vanguard of an emerging

137. See Fredreka Schouten, Why the Koch Brothers Want to Kill an Obscure Senate Rule to Help Shape the Federal Courts, USA Today (July 4, 2017), http://usat.ly/2uG3VFT [http://perma.cc/FCB6-8P83]; cf. Robert Barnes & Ed O'Keefe, Senate Republicans Likely to Change Custom that Allows Democrats to Block Judicial Choices, Wash. Post (May 25, 2017), http://wapo.st/2qnTKU1 [http://perma.cc/NZG3-WURW] (observing that while adherence to the blue-slip rule "has waxed and waned, depending on the views of Senate leaders[,] . . . the rule was strictly observed during the Obama administration"). Our point here involves no claim about the merits of the blue-slip convention, but simply about a potential partisan asymmetry in the extent to which the Senate chooses to follow it.

138. Some parts of the following historical narrative may be familiar to readers. But the significance of this story for the dynamics of constitutional hardball has not, as far as we are aware, received scholarly attention.

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coalition that was considerably to the right of the prior regime, it seemed that major institutions of almost every important type were unsympathetic to their cause, from print and broadcast media outlets[139] to Washington think tanks (Brookings being the preeminent one)[140] to philanthropic foundations.[141] The policy experts considered qualified, by the standards of the time, to speak on important issues seemed centrist at best. Some were the alumni of recent, relatively liberal or heterodox political administrations; some were university professors; very few were members of the conservative movement.[142]

And so, the conservative movement began a massive institution-building effort across a number of spheres,[143] an effort whose trajectory one might usefully trace from the creation of the Heritage Foundation

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139. For a sampling of these claims from the 1970s and '80s, see Les Brown, News 'Bias' Seen Tied to Schools, N.Y. Times, Feb. 20, 1974, at 73 (describing remarks by Governor Ronald Reagan criticizing "the liberal bias he perceived in the news media," which he traced to the "ideology many [members of the media] are exposed to in classrooms"); Nixon Aide Scores TV News Practice, N.Y. Times, May 6, 1972, at 1 (reporting on White House speechwriter Patrick J. Buchanan's suggestion that "the Nixon Administration consider antitrust legislation against the three television networks" because their "liberal bias" had served to "freeze out opposing points of view and opposing information"); Sally Bedell Smith, Conservatives Seeking Stock of CBS to Alter 'Liberal Bias,' N.Y. Times (Jan. 11, 1985), http://www.nytimes.com/1985/01/11/arts/conservatives-seeking-stock-of-cbs-to-alter-liberal-bias.html (on file with the *Columbia Law Review*) (discussing an attempt led partly by Senator Jesse Helms to "buy sufficient stock in CBS to change what the North Carolina Republican sa[id] [was] the 'liberal bias' in coverage by CBS News of 'political events, personages and views'"). What matters for our purposes here is not whether these accusations of liberal bias were correct (although we do discuss that question briefly infra notes 150–156 and accompanying text), but rather the ubiquity of the accusations themselves and the way they would shape the conservative movement's institutional development.

140. See, e.g., Stephen Isaacs, Coors Beer—and Politics—Move East, Wash. Post, May 4, 1975, at A1 (noting that the founders of the Heritage Foundation hoped it would "some day be a right-wing equivalent to the Brookings Institution, which they see as left-wing"); Robert Shogan, Liberal Think-Tank Seeks Republicans, L.A. Times, Feb. 20, 1977, at B7 (describing efforts by the Brookings Institution, "which many regard as a citadel of liberal Democratic ideas," to "recruit some prominent Republican scholars").

141. See, e.g., Ghost-Written Ads, Pranks OK, Nixon Aide Says, L.A. Times, Sept. 26, 1973, at A2 (reporting that Patrick J. Buchanan recommended "measures to counter tax-exempt organizations like the Ford Foundation whose policies, he said, are 'in basic disagreement with our own political philosophy'"); Martin Morse Wooster, Conservatives Create It, and Liberals Spend It—the Dead Must Be Spinning, Wall St. J., Dec. 26, 1989, at A8 ("In nearly all foundation histories, conservatives create the endowment; liberals spend it. One wonders if the liberal program officers of the MacArthur Foundation and the Carnegie Corporation, in their ceaseless effort to expand the welfare state, have ever bothered to consider the morality of their actions.").

142. See, e.g., Shogan, supra note 140 (quoting Brookings Institution president Bruce K. MacLaury as saying that many of the Institution's senior fellows "have come out of the Kennedy-Johnson era").

143. For an early overview, see Dan Morgan, Conservatives: A Well-Financed Network, Wash. Post, Jan. 4, 1981, at A1.

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and the Cato Institute in 1973 and 1977, respectively,[144] through the 1996 launch of the Fox News Channel.[145] In the middle of this period, the Federalist Society emerged as a network of lawyers and law students that aimed to challenge the prevailing liberalism of law schools and to promote a conservative vision of American constitutionalism.[146] And of course, many existing organizations, from the Chamber of Commerce to groups on the religious right, aligned with different parts of the emerging conservative coalition and began to expand their political and legal work as well.[147]

The story of this explosion of new and newly invigorated institutions is not uniform across all these different spheres. Many of the new think tanks and foundations were the result of an infusion of capital from wealthy, mobilized advocates of deregulation.[148] The Fox News Channel, in contrast, came into being when its founders saw a business opportunity to frame cable news for a more conservative audience—an opportunity that was partly regulatory, partly technological, and partly both a

144. See About Cato, Cato Inst., http://www.cato.org/about [http://perma.cc/K7H5-XCJL] (last visited July 14, 2017); A Timeline of Heritage Successes, Heritage Found., http://www.heritage.org/article/timeline-heritage-successes [http://perma.cc/D5W4-FSWP] (last visited July 14, 2017).

145. See Paul Farhi, Murdoch Joins Crowded Cable News Field, Wash. Post, Oct. 3, 1996, at D10. We do not have the space here to explore the considerable importance of the rise of conservative talk radio, especially after the partial repeal of the "fairness doctrine" in 1987. Following its national syndication in 1988, *The Rush Limbaugh Show*'s "blend of news, entertainment, and partisan analysis became the model for legions of imitators" and was, as David Foster Wallace observed, "the first great promulgator of the Mainstream Media's Liberal Bias idea," which functioned "as a mechanism by which any criticism or refutation of conservative ideas could be dismissed." David Foster Wallace, Host: Deep into the Mercenary World of Take-No-Prisoners Political Talk Radio, Atlantic (Apr. 2005), http://www.theatlantic.com/magazine/archive/2005/04/host/303812 [http://perma.cc/5R7P-PUYT].

146. See About Us: Our Background, Federalist Soc'y, http://www.fed-soc.org/our-background [http://perma.cc/4FCJ-Q37B] (last visited July 14, 2017) ("Founded in 1982, the Federalist Society for Law and Public Policy Studies is a group of conservatives and libertarians dedicated to reforming the current legal order."); see also Steven M. Teles, The Rise of the Conservative Legal Movement: The Battle for Control of the Law 135–80 (2010) (examining the origins and development of the Federalist Society within the context of the larger conservative legal movement).

147. See, e.g., U.S. Chamber of Commerce, U.S. Chamber of Commerce: The Early Years 31, http://www.uschamber.com/sites/default/files/uscc_HistoryBook.pdf [http://perma.cc/UE4G-8Y2E] (last visited July 14, 2017) (explaining that the Chamber, "inspired" by Justice Lewis Powell's now-famous 1971 memorandum, created the National Chamber Litigation Center in 1977). For one journalist's account of the Chamber's political rise, see generally Alyssa Katz, The Influence Machine: The U.S. Chamber of Commerce and the Corporate Capture of American Life (2015).

148. See, e.g., Morgan, supra note 143 (discussing the "entrepreneurial money" behind conservative think tanks, foundations, and scholarly centers that arose in the 1970s); see also Michael J. Graetz & Ian Shapiro, Death by a Thousand Cuts: The Fight over Taxing Inherited Wealth 241–47 (2005) (collecting sources on the rise of right-leaning think tanks).

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consequence and a cause of ideological polarization.[149] Yet despite their somewhat different origin stories, there are some commonalities across these institutions, particularly in their character and self-conception as insurgent challengers to what they perceived as the dominant liberalism of the established order.

These new institutions not only often disagreed with their "mainstream" counterparts, but also often operated according to a different ethic. To see why, it helps to understand that when conservatives complained in the 1970s and '80s that the media and various centers of learning were generally "liberal," there was good data corroborating their complaints. Print and broadcast journalists,[150] college professors,[151] and scholars working in settings like the Brookings Institution[152] were indeed mostly liberal, as were the faculties and student bodies of law schools.[153] Such liberal leanings undoubtedly affected the way some of these actors thought about and addressed political issues. At the same time, however, such liberal leanings were constrained by norms of professional role morality that structured the work of these older institutions. Established foundations, for instance, "tended to disperse control among a large and diverse group of board members and staff" and "steered clear of political activism."[154] Journalists in the mid-twentieth-century American tradition

149. See generally David Folkenflik, The Birth of Fox News, Salon (Oct. 19, 2013), http://www.salon.com/2013/10/19/the_birth_of_fox_news [http://perma.cc/AJC9-3UTM]. Getting the channel off the ground required some raw political muscle. See Time Warner Cable of N.Y.C. v. City of New York, 943 F. Supp. 1357, 1403 (S.D.N.Y. 1996) (finding that the City, under Mayor Rudy Giuliani, violated the First Amendment by engaging in "a pattern of conduct with the purpose of compelling Time Warner to alter its constitutionally-protected editorial decision not to carry Fox News"), aff'd sub nom. Time Warner Cable of N.Y.C. v. Bloomberg L.P., 118 F.3d 917 (2d Cir. 1997).

150. Surveys from the period suggested that journalists on the whole leaned left, and were more likely to be Democrats than Republicans by approximately a two-to-one margin. See, e.g., Stephen Hess, The Washington Reporters 67, 87 (1981) (finding, in a 1978 survey of Washington, D.C. journalists, that forty-two percent identified as liberal, thirty-nine percent as middle-of-the-road, and nineteen percent as conservative).

151. See Neil Gross & Solon Simmons, The Social and Political Views of American College and University Professors, *in* Professors and Their Politics 19, 19–25 (Neil Gross & Solon Simmons eds., 2014) (reviewing historical research into the political views of American academics and noting that studies in the 1960s, '70s, and '80s indicated that "professors are more liberal than members of other occupational groups").

152. See Shogan, supra note 140 (quoting a senior fellow at the Brookings Institution as estimating that, in 1977, Brookings had more Democratic than Republican scholars "in the economic and foreign policy areas" and "the public policy area," though not in "government studies").

153. See, e.g., John O. McGinnis et al., The Patterns and Implications of Political Contributions by Elite Law School Faculty, 93 Geo. L.J. 1167, 1177 (2005) (finding that, among professors at twenty-one leading law schools who contributed at least $200 to a federal election campaign between 1992 and 2002, roughly eighty-one percent contributed to Democrats and fifteen percent to Republicans).

154. Martha T. McCluskey, Thinking with Wolves: Left Legal Theory After the Right's Rise, 54 Buff. L. Rev. 1191, 1217, 1219 (2007) (book review); see also id. at 1215 ("Although a number of non-conservative foundations funding intellectual work are wealthier

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viewed the "objectivity norm," and its expression in practices such as the separation of news reporting and editorializing, as central to their craft.[155] They were outraged when conservative critics accused them of shading their news coverage in ways that favored liberal policy positions.[156]

The architects of the emerging conservative movement generally viewed these sorts of depoliticizing norms as either minor or fictitious.[157] Accordingly, when they established institutions to act as counterweights, they designed them in a more partisan manner, with diminished role-morality constraints. They built grantmaking nonprofits with highly centralized governance structures and a "consciously revolutionary political mission."[158] They built a Heritage Foundation that proudly champions "conservative public policies" and makes no attempt to duplicate the Brookings Institution's aspiration (or pretense) of being non-ideological.[159] In the world of television news, where the pull of an

[than conservative foundations], 'most . . . are centrist, and their philanthropy is cautious and apolitical' . . . ." (quoting Mark Dowie, American Foundations: An Investigative History 218 (2001))).

155. See generally Michael Schudson, The Objectivity Norm in American Journalism, 2 Journalism 149 (2001). The norm against commingling of news reporting and editorializing was formalized in a prominent 1973 code of journalistic ethics. See Soc'y of Prof'l Journalists, Code of Ethics § IV.8 (1973), http://ethics.iit.edu/ecodes/node/3702 [http://perma.cc/MM2W-XC83] ("Special articles or presentations devoted to advocacy or the writer's own conclusions and interpretations should be labeled as such."); cf. S. Robert Lichter, The Media, *in* Understanding America: The Anatomy of an Exceptional Nation 181, 188–89 (Peter H. Schuck & James Q. Wilson eds., 2008) (arguing that this objectivity norm became central to the dominant media model of the latter half of the twentieth century for economic reasons yet coexisted with a modest partisan skew, whereby journalists covered politicians of all stripes negatively but in some election cycles covered Republicans even more negatively).

156. See, e.g., Steven Greenhouse, CBS Defends Independence, N.Y. Times (Apr. 18, 1985), http://www.nytimes.com/1985/04/18/business/cbs-defends-independence.html (on file with the *Columbia Law Review*) (quoting CBS Inc.'s chairman and CEO as stating that "[t]he integrity of CBS News and the independence of CBS News are inextricably linked" and that "[t]hose who seek to gain control of CBS" to end CBS News's alleged liberal bias "threaten that independence and that integrity—and this country" (internal quotation marks omitted)).

157. See, e.g., John E. Yang, Gingrich Tells Activists to Outgun "Elite Media," Wash. Post, Apr. 23, 1996, at A6 (quoting Representative Newt Gingrich as urging Republican activists to become "personal radio stations" to counteract the news media's "overwhelming" liberal bias).

158. McCluskey, supra note 154, at 1217.

159. Compare Brookings Policies on Independence and Integrity, Brookings Inst., http://www.brookings.edu/about-us/brookings-policies-on-independence-and-integrity [http://perma.cc/EVH8-RFHM] (last visited July 14, 2017) ("The Brookings Institution is a nonprofit organization devoted to independent, in-depth research that leads to pragmatic and innovative ideas on how to solve problems facing society. The integrity and objectivity of Brookings scholars and their research constitute the Institution's principal assets."), with About Heritage: Mission, Heritage Found., http://www.heritage.org/about-heritage/mission [http://perma.cc/PUA5-U53B] (last visited July 14, 2017) ("The mission of The Heritage Foundation is to formulate and promote conservative public policies

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objectivity norm remains particularly strong, Fox News famously branded itself "fair and balanced." It nonetheless conceived of and sold itself as an ideological player to a degree that was unmatched among its "mainstream media" rivals.[160]

The 2000s brought a liberal counter-reaction to these developments. New liberal think tanks and scholarly institutions such as the Center for American Progress (founded in 2003) and the American Constitution Society (founded in 2001) explicitly modeled themselves on conservative counterparts founded in the 1970s and 1980s, as they sought to challenge *those* institutions' dominance during the early twenty-first century.[161] Following the 2008 elections, MSNBC moved to market itself as a liberal cable channel in the mold of Fox News.[162] By then, liberals and conservatives were increasingly learning about constitutional developments through different outlets, which credential different experts and privilege different scholarly institutions as sources of legal and policy analysis.[163]

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based on the principles of free enterprise, limited government, individual freedom, traditional American values, and a strong national defense."). As Professor Daniel Drezner explains, Heritage led a wave of think tanks that "diverged in key ways from their predecessors": "[M]ost obvious[ly]," the new outfits "were overtly ideological in orientation"; they also "concentrated more on political advocacy" and "placed less weight on academic credentials." Daniel W. Drezner, The Ideas Industry: How Pessimists, Partisans, and Plutocrats Are Transforming the Marketplace of Ideas 133–34 (2017).

160. The claim that the mainstream media is in fact simply the liberal media is central to the channel's self-understanding and justification. See, e.g., Marshall Sella, The Red-State Network, N.Y. Times Mag. (June 24, 2001), http://www.nytimes.com/2001/06/24/magazine/the-red-state-network.html (on file with the *Columbia Law Review*) (quoting Roger Ailes, founding chairman and CEO of Fox News, as stating that "[i]f we look conservative, it's because the other guys are so far to the left").

161. See, e.g., Bob Dreyfuss, An Idea Factory for Democrats, Nation (Feb. 12, 2004), http://wwww.thenation.com/article/idea-factory-democrats [http://perma.cc/94QY-2MJX] ("In a city heavy with well-funded right-wing think tanks (Heritage Foundation, Cato Institute, American Enterprise Institute, Hudson Institute, Federalist Society), the [Center for American Progress] is designed to provide some ballast for the other side."); Crystal Nix Hines, Young Liberal Law Group Is Expanding, N.Y. Times (June 1, 2001), http://www.nytimes.com/2001/06/01/us/young-liberal-law-group-is-expanding.html (on file with the *Columbia Law Review*) (quoting the founder of the American Constitution Society as saying, "We view it as a counter to the Federalist Society").

162. See Rebecca Dana, Slyer than Fox, New Republic (Mar. 25, 2013), http://newrepublic.com/article/112733/roger-ailes-msnbc-how-phil-griffin-created-lefts-fox-news [http://perma.cc/763K-WNEM].

163. See, e.g., Vlad Niculae et al., QUOTUS: The Structure of Political Media Coverage as Revealed by Quoting Patterns, 24 Int'l World Wide Web Conf. Proc. 798, 807 (2015) (finding that "[t]here is systematic bias in the quoting patterns of different types of news sources" and that "an important dimension of [such] bias is roughly aligned with an ideology spectrum"). This phenomenon can be studied at various levels of granularity with similar results. See, e.g., Lauren Feldman et al., Climate on Cable: The Nature and Impact of Global Warming Coverage on Fox News, CNN, and MSNBC, 17 Int'l J. Press/Pol. 3, 6 (2012) (discussing prior findings that "Fox News interviewed a lower ratio of guests who

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Yet if many on both the left and the right now occupy media "bubbles" or "echo chambers," which are themselves shaped by larger networks of idea generation and dissemination, there is a significant asymmetry in the way the bubbles work. Liberals mainly continue to rely on, and to place greatest trust in, legacy media outlets such as CNN, NPR, and the *New York Times*,[164] whose institutional cultures continue to prize objectivity and to foster a relatively strong degree of respect for government and government officeholders.[165] In the world of opinion journalism, unabashedly liberal outlets abound. But their audiences have been small compared to the audience for conservative talk radio or the Fox News Channel,[166] and they themselves may be more constrained than their conservative counterparts by certain norms of professionalism.[167] Liberals do not tend to get their straight news from overtly ideological

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believed in global warming to those who doubted global warming, relative to CNN"); id. at 14–15 (replicating those findings).

164. See Pew Research Ctr., Political Polarization and Media Habits 11–16 (2014), http://www.journalism.org/files/2014/10/Political-Polarization-and-Media-Habits-FINAL-REPORT-7-27-15.pdf [http://perma.cc/UB9E-ZXP3] [hereinafter Pew Research Ctr., Political Polarization and Media Habits].

165. See, e.g., J. Benjamin Taylor, Extreme Media and American Politics: In Defense of Extremity 1 (2017) ("Viewers of broadcast network nightly news . . . generally see even-handedness and objectivity."); Stephen Ansolabehere et al., The Orientation of Newspaper Endorsements in U.S. Elections, 1940–2002, 1 Q.J. Pol. Sci. 393, 400 (2006) ("[N]ewspapers today endorse the incumbent four out of five times . . . ."); see also Liz Spayd, Seeking More Voices, Even if Some Don't Want to Hear Them, N.Y. Times (Apr. 22, 2017), http://www.nytimes.com/2017/04/22/public-editor/seeking-more-voices-even-if-some-dont-want-to-hear-them.html (on file with the *Columbia Law Review*) (describing the *New York Times*'s efforts, following President Trump's election, to "put an outstretched hand toward Red America" and feature more conservative voices).

166. See, e.g., Abram Brown, Why All the Talk-Radio Stars Are Conservative, Forbes (July 13, 2015), http://www.forbes.com/sites/abrambrown/2015/07/13/why-all-the-talk-radio-stars-are-conservative [http://perma.cc/57ZN-6Y88] ("You would've thought a single liberal [radio] personality could have emerged on a major scale. But that just hasn't happened."); Jesse Holcomb, 5 Facts About Fox News, Pew Research Ctr.: Fact Tank (Jan. 14, 2014), http://www.pewresearch.org/fact-tank/2014/01/14/five-facts-about-fox-news [http://perma.cc/F8XG-5NSV] ("[W]ith 1.7 million viewers each evening [in 2013], the [Fox News Channel] . . . drew a bigger audience than CNN, MSNBC and HLN combined.").

167. Opinion journalists and commentators do not conceive of their work in the same terms as other journalists; they do not systematically aim to separate news coverage and editorializing. Even still, prominent commentators on the left have long complained about what they sometimes call the "hack gap," or the sense that right-wing pundits operate with less regard for empiricism or with greater fealty to their political side. See, e.g., Jonathan Chait, The Hack Gap, New Republic (June 22, 2011), http://newrepublic.com/article/90492/the-hack-gap [http://perma.cc/W8F3-FJ9X]; Kevin Drum, The Hack Gap Rears Its Ugly Head Yet Again, Mother Jones (Oct. 9, 2012), http://www.motherjones.com/kevin-drum/2012/10/hack-gap-rears-its-ugly-head-yet-again [http://perma.cc/5WJY-X3XP]; Matthew Yglesias, Hack Gap, Atlantic (Aug. 14, 2007), http://www.theatlantic.com/politics/archive/2007/08/hack-gap/45795 [http://perma.cc/KD4Q-K379]. This is a difficult proposition to assess with any real objectivity. We simply note here that there is a perception on the left of a persistent and politically consequential gap.

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sources—think of *Daily Kos* or *Democracy Now!*—whose editors and producers have more leeway to feature voices arguing that the current conventions of politics or current constitutional understandings need radical revision.[168]

The conservative echo chamber of the past two decades has been less staid and more self-contained.[169] Survey data show that a large plurality of conservatives, to an extent that has no parallel on the left, orient themselves around a single news source: Fox News.[170] And as already suggested, Fox News is less beholden than its mainstream rivals to conventions of bipartisanship and nonpartisanship.[171] Fox News journalists do operate with significant role constraints[172] as compared to, say, conservative talk-radio hosts.[173] But across the core media outlets and think tanks on the conservative side, for reasons having to do with their development in political time, the authorities presented tend to be more explicitly partisan and more willing to argue that the actions or priorities

168. It is possible that the Trump era could alter these dynamics. MSNBC, in particular, has gained many more viewers recently, although it still trails Fox News. See Joe Otterson, TV Ratings: Cable News Viewership Surges in May as Fox News, CNN, MSNBC Log Double-Digit Gains, Variety (May 31, 2017), http://variety.com/2017/tv/news/cable-news-ratings-may-2017-fox-news-cnn-msnbc-1202448761 [http://perma.cc/VDM6-766N].

169. Cf. Sanford Levinson & Jack M. Balkin, Democracy and Dysfunction: An Exchange, 50 Ind. L. Rev. 281, 320 (2016) (discussing how the development of "a separate set of conservative media, think tanks, and educational institutions," combined with other factors, has "created a conservative echo chamber" and arguing that this echo chamber helps explain President Trump's political ascent).

170. See Pew Research Ctr., Political Polarization and Media Habits, supra note 164, at 4 ("[C]onservatives orient strongly around Fox News. Nearly half of consistent conservatives (47%) name it as their main source for government and political news . . . . No other sources come close. Consistent liberals, on the other hand, volunteer a wider range of main sources for political news . . . .").

171. See supra note 160 and accompanying text; see also, e.g., Project for Excellence in Journalism, The State of the News Media 164 (2005), http://assets.pewresearch.org.s3.amazonaws.com/files/journalism/State-of-the-News-Media-Report-2005-FINAL.pdf [http://perma.cc/8J49-KHJK] (finding in content analysis that "Fox was measurably more one-sided than the other networks, and Fox journalists were more opinionated on the air"). It is nearly impossible to disentangle the specific contributions of Fox News from other factors contributing to asymmetric polarization, but an intriguing recent study uses the quasi-random variable of cable news channel numbering (lower-numbered channels draw more viewers) to estimate the size of the "Fox News effect" on viewers' political preferences, and finds that this effect has increased over time and exceeds that of any other news channel. Gregory J. Martin & Ali Yurukoglu, Bias in Cable News: Persuasion and Polarization, 107 Am. Econ. Rev. 2565, 2565–68 (2017).

172. See, e.g., Sarah Ellison, "It's a Disaster. It's a Nightmare." Is a Civil War Brewing Inside Fox News?, Vanity Fair (Mar. 21, 2017), http://www.vanityfair.com/news/2017/03/inside-fox-news-after-megyn-kelly-nbc-scandal [http://perma.cc/PK5S-ZPUR] ("Despite its appearance to the outside world as a monolithic force on the right, the [Fox News] network operates internally with a distinction between its news side and its commentary side.").

173. See Pew Research Ctr., Political Polarization and Media Habits, supra note 164, at 10 ("Fox News sits to the right of the midpoint, but is not nearly as far right as several other sources, such as the radio shows of Rush Limbaugh or Glenn Beck.").

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of the other side are egregious and indefensible.[174] From Fox News suggesting in the 1990s that President Clinton be impeached[175] to Cato Institute scholars suggesting in the early 2010s that the debt ceiling is "overrated,"[176] it is plausible to infer that these institutions are more likely to explicitly or implicitly promote constitutional hardball—urging officials to upend governmental norms, just as these institutions themselves upended elite extragovernmental norms, when necessary to rescue the country or the Constitution from the damage being done by political opponents.

B. *Asymmetric Ideological Commitments*

The two coalitions that make up our major political parties once teemed with internal ideological diversity. In recent decades, however, they have become increasingly ideologically coherent and distinct.[177] The

174. Many of the right's leading mediating institutions are also more willing to challenge perceived moderates on their own side. See, e.g., Konczal, supra note 133 ("[T]he Heritage Foundation has been willing to burn relationships with [moderate] House Republicans to maintain outside pressure, something inconceivable for liberal organizations, much less centrist ones like the Brookings Institution, to do.").

175. See Jane Mayer, Roger Ailes, the Clintons, and the Scandals of the Scandalmongers, New Yorker (Aug. 24, 2016), http://www.newyorker.com/news/daily-comment/roger-ailes-the-clintons-and-the-scandals-of-the-scandalmongers [http://perma.cc/5DQY-S7X9] (discussing "Fox's breathless coverage of the Clinton-impeachment proceedings"); see also Monica Lewinsky, Opinion, Monica Lewinsky: Roger Ailes's Dream Was My Nightmare, N.Y. Times (May 22, 2017), http://www.nytimes.com/2017/05/22/opinion/monica-lewinsky-roger-ailess-dream-was-my-nightmare.html (on file with the *Columbia Law Review*) (stating that Roger Ailes, as head of Fox News, "took the story of the [Clinton–Lewinsky] affair and the trial that followed and made certain his anchors hammered it ceaselessly, 24 hours a day").

176. Michael D. Tanner, The Overrated Debt Ceiling, Cato Inst. (Jan. 15, 2013), http://www.cato.org/publications/commentary/overrated-debt-ceiling [http://perma.cc/ZPQ8-9NGE]; see also, e.g., Tad DeHaven, The Debt Ceiling Game, Cato Inst. (Feb. 22, 2011), http://www.cato.org/publications/commentary/debt-ceiling-game [http://perma.cc/8S7L-6ZG7] ("The political stakes in the latest debt ceiling game are high. The consequences of failing to use it as an opportunity to start reining in the federal government are even higher.").

177. See, e.g., Barber & McCarty, supra note 101, at 20–21 ("From the 1930s until the mid-1970s, . . . [n]ot only were [roll-call voting] differences between the typical Democratic and Republican legislators small, but there also were significant numbers of conservative Democrats and liberal Republicans."); id. at 21–22 (noting that, "[s]ince the 1970s, . . . there has been a steady and steep increase in the polarization of both the House and Senate" and that "[m]any issues that were once distinct from the party-conflict dimension have been absorbed into it"); Robert S. Erikson et al., Public Opinion in the States: A Quarter Century of Change and Stability, *in* Public Opinion in State Politics 229, 238 (Jeffrey E. Cohen ed., 2006) ("It is approaching common knowledge that the United States is becoming increasingly polarized in terms of the party-ideology connection."); Yphtach Lelkes, Mass Polarization: Manifestations and Measurements, 80 Pub. Opinion Q. 392, 395 (2016) (arguing that while evidence of some forms of polarization is more contested, evidence of increased "alignment between party identity and issue attitudes" in the mass public is unequivocal); see also Daryl J. Levinson & Richard H. Pildes, Separation of Parties, Not Powers, 119 Harv. L. Rev. 2311, 2333 & nn.80–83 (2006) (reviewing the liter-

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resulting polarization opens the door to constitutional hardball on both sides. As a general matter, if each party has many moderates in office, or if many high-profile policy issues do not break neatly along party lines, there will be many opportunities for bipartisan bargaining and compromise. Legislators who contemplated hardball tactics in the mid-twentieth century could expect to encounter opposition within their own party, making such tactics not only costlier to pursue but also less effective.[178] As we suggested at the outset and began to flesh out in preceding sections, the fact that polarization itself has been asymmetric since the 1970s—with Republicans moving further to the right than Democrats have moved to the left—is likely bound up on several levels with the rise of asymmetric constitutional hardball over the past twenty-five years.[179]

The main question we examine in this section is slightly different. So far we have talked of polarization (and its asymmetric character) largely without regard to the specific ideological commitments around which the parties have come to cohere. Does the *content* of those commitments also have implications for each side's propensity to play constitutional hardball? The answer to this question may play a significant role in determining whether use of these tactics remains asymmetric in the years ahead.

We believe that the answer is yes—that constitutional hardball cannot be well understood without taking into account the values and ideas espoused by its practitioners. The axes of disagreement between the two major party coalitions now include views about (i) government, (ii) the Constitution, and (iii) the stakes of constitutional politics, all of which bear on officeholders' assessments of the risks and rewards of engaging in certain forms of constitutional hardball. These ideological factors complement, and to some degree underpin, the institutional and electoral incentives discussed above.[180]

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ature on party polarization and ideological coherence). The increasing distinctness of the parties in terms of ideology and policy preferences does not mean that either party lacks internal disagreement. But it does mean that there is less room than before for agreement across party lines.

178. Cf. supra notes 105–106 and accompanying text (discussing the relationship between party unity and constitutional hardball).

179. See supra notes 11, 101–106 and accompanying text; supra section III.A.

180. Some political science models of legislators' behavior focus almost exclusively on their electoral incentives. See, e.g., David R. Mayhew, Congress: The Electoral Connection 13 (1974) (positing that "United States congressmen are interested in getting reelected—indeed, . . . interested in nothing else"); see also Joanna M. Shepherd, Money, Politics, and Impartial Justice, 58 Duke L.J. 623, 646 (2009) (describing Professor Mayhew's electoral-incentive assumption as "the central principle in theories about legislative politics and empirical analyses of it"). Other models assume that legislators are motivated in significant part by a desire to implement their own views. See, e.g., Edward L. Rubin, Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes, 66 N.Y.U. L. Rev. 1, 14–45 (1991) (critiquing the legislator "re-election-maximizer" model and emphasizing the role of ideological motivations). The analysis of asymmetric constitutional hardball offered in this section does not depend on which of these two models is

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1. *Views of Government and the Costs of Constitutional Hardball.* — Some of the last several decades' most forceful—and Republican-identified—forms of constitutional hardball drew their force from the way in which they threatened to disrupt the ordinary operations of government. The thousand-plus subpoenas that Representative Burton issued to the Clinton Administration consumed an enormous amount of executive branch time and energy.[181] The routinization of Senate filibusters under President Obama made it more difficult to advance legislation and nominations.[182] Government shutdowns under both Clinton and Obama forced agencies to curtail nonessential operations and services for nontrivial periods of time.[183] Lately, large blocs of Republican legislators have flirted with defaulting on the national debt, with potentially severe economic and geostrategic consequences, by failing to raise Congress's self-imposed "debt ceiling."[184] All of these tactics seek to gain political leverage through behaviors that risk hobbling the government.

Whether this seems like a worthwhile risk to take depends in part on one's views about how bad it would be to hobble the government. That question is a proxy for what one thinks about the value of the institution. Is government primarily a force for good that implements important public values, or is it primarily an impediment to individual freedom and a source of corruption and waste? There is ample reason to believe that Republicans' views on this question lubricate the path to constitutional

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more accurate, as the ideological commitments we consider are widely espoused both by politicians themselves and by many of the key players within each of the party coalitions.

181. See supra note 59 and accompanying text.

182. See supra note 70 and accompanying text; see also Josh Chafetz, Congress's Constitution, 160 U. Pa. L. Rev. 715, 762 (2012) (explaining that the filibuster, as of 2012, operated "as an absolute bar to the passage of measures that command[ed] the support of fewer than sixty Senators").

183. See supra notes 30, 56, 72 and accompanying text. This is constitutional hardball of the convention-straining kind, although after the government shutdowns of the mid-1990s, 2013, and now 2018, see supra note 13, it is becoming less certain that there is a convention against shutting down the government over policy disagreements.

184. See supra note 71 and accompanying text. The debt ceiling is a particularly interesting animal from the perspective of constitutional hardball. Imposing the statutory ceiling was not itself a form of constitutional hardball, so much as an act of symbolic politics intended to signify opposition to excessive debt. See Neil H. Buchanan & Michael C. Dorf, How to Choose the Least Unconstitutional Option: Lessons for the President (and Others) from the Debt Ceiling Standoff, 112 Colum. L. Rev. 1175, 1201 (2012). However, once the law was in place and subject to periodic votes to increase the ceiling in line with the amounts necessary to close the gap between the money Congress appropriates and the money it raises, the debt ceiling created the possibility of a particularly dangerous form of hardball: brinkmanship over default. See Jonathan Chait, The Shutdown Prophet, N.Y. Mag. (Oct. 4, 2013), http://nymag.com/news/politics/nationalinterest/government-shutdown-2013-10 [http://perma.cc/LCC4-WKSH] ("Lifting the debt ceiling, a vestigial ritual in which Congress votes to approve payment of the debts it has already incurred, is almost a symbolic event, except that not doing it would wreak unpredictable and possibly enormous worldwide economic havoc.").

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hardball.[185] The value of government—especially, but not only, the federal government—has become a point of deep division between the parties, with contemporary Republicans more likely to oppose taxes[186] and "view the [state] with suspicion even when in power," and Democrats more likely to trust public entities and experts and to believe "a strong government is necessary in order to counterbalance private economic domination."[187] If conservatives assume that they have largely lost the war to limit the size and scope of the federal government, that by itself may tend to make certain forms of government-hobbling constitutional hardball appealing, as a sort of guerrilla tactic or rearguard action.[188]

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185. As Mike Konczal observes, "liberals and those to their left look to government to provide for the common good, and therefore have an interest in showing that the government can work well." Konczal, supra note 133. For conservatives, in contrast, "sabotage of governmental processes is useful"; "when domestic government fails in the eyes of the public . . . it serves the right politically." Id.; see also Mike Lofgren, Goodbye to All That: Reflections of a GOP Operative Who Left the Cult, Truthout (Sept. 3, 2011), http://www.truth-out.org/opinion/item/3079:goodbye-to-all-that-reflections-of-a-gop-operative-who-left-the-cult [http://perma.cc/X76F-N4LX] (critiquing "the long-term Republican strategy of undermining confidence in our democratic institutions" and linking this strategy to tactics of "political terrorism"); id. ("A couple of years ago, a Republican committee staff director told me candidly (and proudly) what the method was to all this obstruction and disruption . . . . By sabotaging the reputation of an institution of government, the party that is programmatically against government would come out the relative winner."); Alec MacGillis, Opinion, Can Democrats Be as Stubborn as Mitch McConnell?, N.Y. Times (Feb. 5, 2017), http://www.nytimes.com/2017/02/03/opinion/can-the-democrats-be-as-stubborn-as-mitch-mcconnell.html (on file with the *Columbia Law Review*) (stating that Democrats "are more philosophically invested in showing that government can function" and that this makes it unclear whether they could "really bring themselves to replicate [Senator Mitch] McConnell's obstructionist methods").

186. See David Scott Louk & David Gamage, Preventing Government Shutdowns: Designing Default Rules for Budgets, 86 U. Colo. L. Rev. 181, 206 (2015) (arguing that the "emergence of a broad anti-tax sentiment among conservatives" in the 1970s, coupled with political polarization, has enhanced incentives for many Republican representatives "to participate in game-of-chicken-style [budget] negotiations").

187. Freeman, supra note 105, at 336–37; see also Russell Heimlich, Wide Gap Between Republicans, Democrats in Views of Government Effectiveness, Pew Research Ctr.: Fact Tank (June 7, 2012), http://www.pewresearch.org/fact-tank/2012/06/07/wide-gap-between-republicans-democrats-in-views-of-government-effectiveness [http://perma.cc/EZ4C-S6S3] ("About three-fourths of Republicans (77%) say that when something is run by the government it is usually inefficient and wasteful . . . . In contrast, just 41% of Democrats say the same . . . ."); Frank Newport, On Economy, Republicans Trust Business; Dems Trust Gov't, Gallup (Mar. 12, 2009), http://www.gallup.com/poll/116599/economy-republicans-trust-business-dems-trust-gov.aspx (on file with the *Columbia Law Review*) ("While 64% of Republicans say they place more trust in businesses to solve the nation's economic problems, 72% of Democrats say they trust the government more, underscoring the enormous philosophical divide in the way Republicans and Democrats view the government's role in solving the country's economic problems."). The proportion of Republicans and Democrats who report negative views of government rises when the presidency is controlled by the other political party. See Bulman-Pozen, supra note 55, at 1119–20; Heimlich, supra.

188. We thank Peter Schuck for this point.

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Republican rhetoric surrounding recent government shutdowns and threatened shutdowns vividly conveys the connection between constitutional hardball and views of government. Asked about a possible veto by President Clinton of a balanced budget bill in 1995, House Speaker Gingrich retorted, "Which of the two of us do you think worries more about the government not showing up?"[189] "We're very excited," Representative Michele Bachmann said on the eve of the 2013 shutdown over the ACA. "It's exactly what we wanted, and we got it."[190] Prominent conservative commentators amplified these sentiments. "Bring on the shutdown," wrote Tom Giovanetti, president of the libertarian Institute for Policy Innovation, in 2011. "Every day that Americans wake up and find that the coffee still brews and the water still comes out of the faucet without the assistance of the federal government, Republicans win."[191] *RedState* contributor Jeff Emanuel celebrated a shutdown that same year as a means to combat "our bloated, overfunded (with borrowed money), unsustainable government, which is badly in need of trimming and streamlining."[192] *RedState*'s then-editor-in-chief Erick Erickson tweeted in 2010: "The upside? No laws passed. No gov't spending. Can't wait for the shutdown."[193] Picking up on these attitudes toward the federal government, President Trump recently touted the idea of a shutdown, even in a period of unified Republican control of Congress, as a way to "fix [the] mess" in Washington.[194]

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189. Karen Tumulty, Getting the Edge, Time, June 5, 1995, at 22, 22. Reflecting on this episode in 2013, Gingrich enthused: "I helped close the government twice. It actually worked. Bill Clinton came in and said 'the era of big government is over' after two closures, not before." Liz Marlantes, Republicans Talk Up a 'Government Shutdown.' Do They Mean It?, Christian Sci. Monitor (Jan. 7, 2013) (internal quotation marks omitted), http://www.csmonitor.com/USA/Politics/Decoder/2013/0107/Republicans-talk-up-a-government-shutdown.-Do-they-mean-it [http://perma.cc/GZ3E-Z48T]; cf. Hacker & Pierson, No Cost for Extremism, supra note 90 (describing Gingrich's political strategy, when in the House, as "simultaneously ratcheting up dysfunction and disgust while more sharply distinguishing the GOP as the anti-government party").

190. Ed O'Keefe & Rosalind S. Helderman, On Cusp of Shutdown, House Conservatives Excited, Say They Are Doing the Right Thing, Wash. Post (Sept. 28, 2013), http://wapo.st/14Tl7r1 [http://perma.cc/C34E-FSUP].

191. David Mark, Would a Government Shutdown Be that Bad?, Politico: The Arena (Apr. 7, 2011), http://www.politico.com/arena/archive/would-a-government-shutdown-be-that-bad.html [http://perma.cc/J2FM-5ECA].

192. Id.

193. Erick Erickson (@EWErickson), Twitter (Aug. 30, 2010), http://twitter.com/EWErickson/status/22571962647 [http://perma.cc/C7F3-2FM7].

194. Donald J. Trump (@realDonaldTrump), Twitter (May 2, 2017), http://twitter.com/realDonaldTrump/status/859393829505552385 [http://perma.cc/9TYT-KJ55] ("Our country needs a good 'shutdown' in September to fix mess!"). In light of the connection between constitutional hardball and views of government, it is perhaps unsurprising that when Democrats tried to borrow this particular page from the Republican playbook and shut down the government in January 2018, they began looking for an exit strategy almost immediately—and after one weekday allowed the government to reopen without obtaining any significant concessions. See supra note 13.

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It is less clear whether this divide over the value of government affects the parties' propensity to engage in other types of constitutional hardball that do not have such obvious implications for government capacity. We might draw a distinction here between obstruction-*creating* forms of constitutional hardball and obstruction-*clearing* forms of constitutional hardball. The latter aim to minimize or circumvent barriers that have arisen—sometimes as a result of forceful uncompromising methods by the other side—to prevent legislative or administrative action. Such forms of hardball *enable* the government to get things done. President Obama's most controversial recess appointments and executive initiatives, for instance, were pitched in these terms.[195] Even if Democratic officeholders are more likely than Republicans to be constrained by a commitment to "the smooth functioning of government,"[196] as a former aide to Senator Harry Reid asserted last year, their corollary commitment to a strong government that solves economic problems[197] may have disinhibiting effects.

Overall, though, it seems safe to assume that the practice of constitutional hardball, and especially obstruction-creating hardball, tends in the aggregate to raise the transaction costs of governance. It may also lead to less durable and effective policy, insofar as it pushes those in power toward relatively precarious or piecemeal solutions that do not command broad bipartisan support and do not necessarily become legally entrenched. These policy consequences, in turn, may contribute to a decline in public trust in government as well as an exacerbation of constitutional conflict.[198] And so on multiple levels, one would expect that a party whose main commitments are framed in terms of incapacitating the government[199] would have a stronger political motivation to engage in more, and more destabilizing, forms of constitutional hardball. Conversely, one would expect that a party whose commitments are

195. See Pozen, Self-Help, supra note 22, at 4–8, 41–47.

196. Adam Jentleson, Senate Democrats Have the Power to Stop Trump. All They Have to Do Is Use It., Wash. Post (Jan. 27, 2017), http://wapo.st/2jFGKGP?tid=ss [http://perma.cc/WJN9-6ZBL] ("The kind of universal obstruction pioneered by McConnell during Obama's presidency is not in Democrats' nature: They believe in the smooth functioning of government.").

197. See supra note 187 and accompanying text.

198. Cf. Richard H. Fallon, Jr., Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age, 96 Tex. L. Rev. 487, 548 (2018) ("Through much, though not all, of our history, individual and institutional norms of accommodation and restraint have played invaluable roles in averting both governmental paralysis and constitutional crises.").

199. Of course, Republican officeholders may seek to expand various public-sector functions (for instance, law enforcement and national security), while Democratic officeholders may seek to limit various other public-sector functions for reasons of principle or political calculation (as with welfare reform under President Clinton). Still, the two parties differ starkly in their rhetoric, framing, and self-conception in relation to the general project of governance.

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framed primarily in terms that demand government action would, as a general matter, be warier of constitutional hardball.

2. *Originalism, Constitutional Restorationism, and Forms of Fidelity.* — In addition to becoming more ideologically coherent and distinct, the parties have also become more *constitutionally* coherent and distinct over the past several decades. As numerous scholars have observed, the Republican Party has been associated since the 1980s with the interpretive theory of originalism,[200] often paired in political discourse with a commitment to judicial restraint and strict construction of the federal government's powers.[201] The rise of the Tea Party only intensified these associations.[202] The Democratic Party, on the other hand, has been identified with a philosophy of "living constitutionalism" that is pluralistic as to interpretive method but generally concerned to construe the Constitution in a manner that safeguards canonical precedents and supports contemporary needs and values.[203]

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200. See, e.g., Jamal Greene et al., Profiling Originalism, 111 Colum. L. Rev. 356, 373 (2011) ("Eighty-five percent of originalists [in surveys from 2009 and 2010] identify as or lean toward Republican . . . , whereas 21% of nonoriginalists identify as or lean toward Republican . . . ."); id. at 398 ("[A]mong those who identify as 'strong Republicans,' 59% are originalists, and among those who identify as 'extremely conservative,' 78% are originalists."); John O. McGinnis & Michael B. Rappaport, Supermajority Rules and the Judicial Confirmation Process, 26 Cardozo L. Rev. 543, 554 (2005) ("[O]ur parties now seem to be divided on originalism, with the Republican Party much more sympathetic to originalism and the Democratic Party opposed."); Robert Post & Reva Siegel, Originalism as a Political Practice: The Right's Living Constitution, 75 Fordham L. Rev. 545, 554–74 (2006) (discussing the rise of originalism as a political practice on the right). "Beginning . . . in the 1980s, originalism gave conservative activists a language in which to attack the progressive case law of the Warren Court on the grounds that it had 'almost nothing to do with the Constitution' and was merely an effort to enact 'the political agenda of the American left.'" Post & Siegel, supra, at 555 (quoting Lino A. Graglia, "Constitutional Theory": The Attempted Justification for the Supreme Court's Liberal Political Program, 65 Tex. L. Rev. 789, 789 (1987)).

201. See Neil S. Siegel, Interring the Rhetoric of Judicial Activism, 59 DePaul L. Rev. 555, 557–74 (2010) (describing the development of these themes in Republican political rhetoric).

202. See Greene et al., supra note 200, at 356 ("Two of the largest Tea Party organizations have been at odds on occasion, but they both agree on a commitment to the intentions of the Framers."); Kate Zernike, In Justice Confirmation Hearings, Echoes of the Tea Party, N.Y. Times (July 2, 2010), http://www.nytimes.com/2010/07/03/us/politics/03constitution.html (on file with the *Columbia Law Review*) ("The Tea Party is often called 'loosely organized,' but the unifying philosophy for groups across the country is a belief that the nation can solve its problems—primarily its economic problems, which is what its supporters care most about—if lawmakers stick to a strict interpretation of the Constitution.").

203. See, e.g., 2 Howard Gillman et al., American Constitutionalism: Rights and Liberties 690 (2d ed. 2017) ("Democrats retain . . . constitutional commitments from the New Deal/Great Society Era. Liberal . . . commentators either insist on a living Constitution or devise an originalism that requires constitutional interpreters to understand the original meaning of constitutional language in terms of contemporary understandings of the principles laid down in 1791 or 1868."); Mark A. Graber, Judicial Supremacy and the Structure of Partisan Conflict, 50 Ind. L. Rev. 141, 168 (2016) ("The

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This partisan divide is itself asymmetric. While both coalitions have developed increasingly clear views about the basic direction in which they would like to see constitutional law go,[204] Republican politicians and activists have promoted their themes—originalism, strict construction, judicial restraint—far more vigorously than Democrats have promoted any alternative high-level constitutional vision.[205] Republican and Democratic voters show the same asymmetry, whether as a consequence of their politicians' rhetoric or a cause of it or both. Significantly more Republicans tell pollsters that they regard the Supreme Court as an important or the most important issue when they vote for President,[206] and the content of their views about the Court indicates that "originalism has been translated into common parlance with some success."[207]

As suggested above,[208] the Republican Party's embrace of originalism and its denigration of living constitutionalism may be relevant to its propensity to play constitutional hardball, in at least two ways. Rhetorically, these arguments have contributed to a narrative of constitutional corruption that authorizes, and maybe even requires, bold moves to recover a prelapsarian past. Conceptually, these arguments frame constitutional fidelity in a manner that heavily discounts the importance of judicial precedent and of unwritten norms that have developed over time to structure and facilitate the government's work. The combination supplies both motivation and justification for acts of hardball that aim to deprive Democrats of the opportunity to make or apply constitutional law.

Uniting its stances on constitutional interpretation, constitutional history, and the proper role of government, we might say that the

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contemporary Republican and Democratic Parties champion very different constitutional approaches and visions. Republicans are originalists while Democrats celebrate a living constitution.").

204. See H.W. Perry, Jr. & L.A. Powe, Jr., The Political Battle for the Constitution, 21 Const. Comment. 641, 641–45, 649–89 (2004) (detailing how the two parties have developed "fundamentally different" constitutional philosophies and agendas since the Warren Court era).

205. See Simon Lazarus, Hertz or Avis? Progressives' Quest to Reclaim the Constitution and the Courts, 72 Ohio St. L.J. 1201, 1214 (2011) ("During the last three decades, while . . . conservative advocates, politicians, and judges never missed an opportunity to trumpet their fealty to the 'original' Constitution, the Framers' intent, 'strict construction,' and 'judges who do not legislate from the bench,' their . . . progressive adversaries were all but mute on these issues.").

206. See, e.g., Karlyn Bowman, Reading the Polls: Supreme Court Nominations, Public Opinion and Litmus Tests, Forbes (Jan. 30, 2017), http://www.forbes.com/sites/bowmanmarsico/2017/01/30/reading-the-polls-supreme-court-nominations-public-opinion-and-litmus-tests [http://perma.cc/6MH4-TA2C] (reporting on 2016 national exit-poll data showing that voters who said Court appointments were the most important factor in their vote split 56% to 41% for Trump, whereas voters who said Court appointments were not a factor at all in their vote split 55% to 37% for Clinton).

207. Greene et al., supra note 200, at 417.

208. See supra notes 107–108 and accompanying text.

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Republican Party has cultivated a politics of *constitutional restorationism*. One extreme form of this politics centers on the "Constitution in exile," or the belief that the entire edifice of New Deal precedents enabling the growth of congressional and administrative power is unsupportable and ought to be overturned.[209] But well short of the Constitution-in-exile position, Republican activists have mobilized around ideas and tropes of constitutional restorationism for years now.[210] In political time, in other words, it seems that both sides' basic constitutional outlooks remain the ones that were forged in the 1970s and '80s, when a more rightward-leaning Supreme Court began to reshape the jurisprudence of the previous era. Wielding the charge of judicial activism and, subsequently, the theory of originalism, Republican officials going back to President Nixon have agreed on the necessity of restoring the Constitution's true, real, lost meaning in the face of subversion by liberal judges and politicians.

This view lends itself naturally to engaging in constitutional hardball. The more illegitimate the other side's constitutional usurpations, the more legitimate are the measures taken to counter them[211]—up to and including "united and unyielding opposition" to a President's agenda[212] or flatly refusing to consider a Supreme Court nominee.[213] And if the key inputs into constitutional analysis are those that illuminate the meaning of the text at the time of its adoption, then the institutional norms and settlements that developed over the course of the twentieth century are not necessarily owed any constitutional respect, whether as a matter of precedent, prudence, or epistemic insight.

None of this is to suggest that Republicans' views on constitutional hardball and their ideas about originalism or the lost Constitution will

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209. See generally Symposium, The Constitution in Exile, 51 Duke L.J. 1 (2001). For a classic statement of these themes, see Douglas H. Ginsburg, Delegation Running Riot, Regulation, Winter 1995, at 83, 84 (book review) (contending that "for 60 years the nondelegation doctrine" and related doctrines such as "enumerated powers" have been "banished for standing in opposition to unlimited government" and hence have "existed only as part of the Constitution-in-exile").

210. See Peter Beinart, The Republican Obsession with 'Restoring' America, Atlantic (Nov. 13, 2014), http://www.theatlantic.com/politics/archive/2014/11/the-republican-obsession-with-restoring-america/382689 [http://perma.cc/5ZCM-8UY6] (noting that conservative politicians "love the word 'restore'" and that the 2012 "Republican platform promised the 'Restoring of the American Dream' and the 'Restoration of Constitutional Government'"); see also Randy Barnett, Constitution in Exile?, Legal Affairs: Debate Club (May 2, 2005), http://legalaffairs.org/webexclusive/debateclub_cie0505.msp [http://perma.cc/V8ZQ-Q38Y] (denying that there is a "'Constitution in Exile' movement" but defending originalism and linking it to the idea of the "Lost Constitution," which "is about restoring various provisions of the written text that have been gutted or weakened by judicial decisions"). For a more recent example, see generally Senator Mike Lee, Our Lost Constitution: The Willful Subversion of America's Founding Document (2015).

211. See generally Pozen, Self-Help, supra note 22, at 61–76 (describing norms of proportionality that have traditionally constrained "constitutional countermeasures").

212. See supra note 69 and accompanying text.

213. See supra notes 1–5 and accompanying text.

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always or necessarily be in perfect alignment. Most people's constitutional beliefs seem to be motivated in complex and often unconscious ways by their political preferences, moral values, and cultural worldviews,[214] and there is no reason to think that partisans on the right (or left) would be an exception.[215] People's views about the efficacy and desirability of constitutional hardball are likewise the product of a range of factors. But at a minimum, ideas about originalism and the lost Constitution furnish a powerful legal vocabulary and conceptual toolkit with which to explain, defend, and rally around constitutional hardball.

Along with its resonance with conservative voters' moral and cultural commitments, part of what makes originalist talk of constitutional restoration such a powerful discursive mode, and one that creates such a hospitable climate for constitutional hardball, is that it works on different levels for different audiences. Some appeals to originalism function as a kind of "value-laden . . . symbolic language" for the Republican electorate,[216] while others are highly nuanced—indeed, far more nuanced than the opinions of the Supreme Court—and suitable for debate among legal theorists, historians, and philosophers of language.[217] The more sophisticated versions cast a vague legitimating halo over the less sophisticated versions.[218] Ordinary voters may not know the difference between original expected application and original public meaning, but they get the message that liberal courts have gone wild, administrative agencies have ballooned, and drastic measures are needed to rein them in.[219]

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214. See Pozen, Bad Faith, supra note 22, at 934–39.

215. Cf. Greene et al., supra note 200, at 375–85 (presenting survey evidence showing that originalists tend to be "more religious, conservative," "morally traditionalist, and economically libertarian" and "to hold the predictably conservative views on the 'hot' constitutional controversies of the day," including abortion, gay rights, gun rights, school prayer, and the death penalty).

216. Jamal Greene, How Constitutional Theory Matters, 72 Ohio St. L.J. 1183, 1192 (2011).

217. See, e.g., Lawrence B. Solum, Originalist Methodology, 84 U. Chi. L. Rev. 269, 269–72 (2017) (offering an account of originalist methodology that draws on "legal theory and theoretical linguistics," using three meanings of the word "meaning," two conceptions of "content," and a master distinction between "constitutional interpretation" and "constitutional construction"). Without taking anything away from the impressiveness or importance of work of this kind, it is fair to assume that most voters and politicians who endorse "originalism" are unaware of these distinctions.

218. See Jeremy K. Kessler & David E. Pozen, Working Themselves Impure: A Life Cycle Theory of Legal Theories, 83 U. Chi. L. Rev. 1819, 1886 (2016) (discussing "the potentially productive tension between byzantine academic defenses of a [legal] theory and the existence in popular discourse of a simpler, idealized version of that theory" and noting that "scholars have posited just such a double life in the case of originalism").

219. Republican Senators routinely draw a connection between nonoriginalism and judicial activism in arguments addressed to their supporters and constituents. See, e.g., Press Release, Sen. Marco Rubio, Rubio Praises Nomination of Judge Neil Gorsuch to the U.S. Supreme Court (Jan. 31, 2017), http://www.rubio.senate.gov/public/index.cfm/press-releases?id=FA887AB9-2CC7-4C0A-8797-45AB8A05350E [http://perma.cc/9PFX-8N7T] ("Most importantly, [Judge Gorsuch] is committed to the principles of original intent and

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Originalist talk of constitutional restoration simultaneously provides professional respectability and populist ballast for a political coalition that, while conceiving of itself as an insurgent challenger to a left-wing judiciary, has controlled the Supreme Court for over forty years.[220] The Court's conservatism, in turn, feeds back into the dynamics of constitutional hardball by decreasing the odds (real or perceived) that Republican hardball will be met with a judicial rebuke.[221]

This same historical trajectory has had a very different effect on the other major political coalition and its orientation toward the Constitution. Democrats have been on the defensive in American constitutional politics since the late 1970s, and this has put a premium on articulating arguments for leaving past gains in place.[222] Like conservatives, liberals have come to insist on particular forms of constitutional fidelity. But instead of aligning themselves with the Founders' Constitution and advancing claims about its "true" meaning, they tend to align themselves with the constitutional law that has developed in certain transformative periods of American history, especially Reconstruction and the Second Reconstruction that took place from 1954 through the early 1970s. Liberals argue for fidelity to, among other things, the Reconstruction Amendments;[223] *Brown v. Board of Education*'s promise of racial

judicial restraint. This is critical, because too many in the federal judiciary today believe it is appropriate for judges to invent new policies and rights instead of interpreting and defending the Constitution as it is written.").

220. See Erwin Chemerinsky, Opinion, The Conservative Era of the Supreme Court Is Over [sic], L.A. Times (June 29, 2016), http://www.latimes.com/opinion/op-ed/la-oe-chemerinsky-end-of-conservative-supreme-court-20160628-snap-story.html (on file with the *Columbia Law Review*) ("From the time President Nixon's fourth court nominee was confirmed in 1971 until Justice Antonin Scalia's death in February [2016], there have always been five ideologically conservative Republican appointees on the bench.").

221. Cf. Lee Epstein, Some Thoughts on the Study of Judicial Behavior, 57 Wm. & Mary L. Rev. 2017, 2041–44 (2016) (reviewing empirical research showing that "[n]o matter how we measure it, ideology plays a role in judicial decisions," although adding that "ideological (or partisan) motivations have their limits"); Michael S. Kang & Joanna M. Shepherd, The Long Shadow of *Bush v. Gore*: Judicial Partisanship in Election Cases, 68 Stan. L. Rev. 1411, 1424 (2016) (observing that "the partisanship of the many judges and political actors in the 2000 postelection process uncannily predicted their decisionmaking for and against Bush and Gore").

222. The point transcends constitutional politics. See Tony Judt, What Is Living and What Is Dead in Social Democracy?, *in* When the Facts Change: Essays, 1995–2010, at 319, 337 (Jennifer Homans ed., 2015) ("The Left, to be quite blunt about it, has something to conserve. It is the *Right* that has inherited the ambitious modernist urge to destroy and innovate in the name of a universal project.").

223. See Pozen, Bad Faith, supra note 22, at 927 (noting the "strain of commentary on the political left [that] accuses conservatives of refusing to accept the full scope of constitutional change wrought by the Reconstruction Amendments"); cf. Kermit Roosevelt III, Reconstruction and Resistance, 91 Tex. L. Rev. 121, 141–42 (2012) (book review) (discussing the "constant struggle" in constitutional politics "between the values of the Founding and the values of Reconstruction," in which "Reconstruction stands for equality, for broader federal authority, for federal rights and federal laws protecting individuals from their own states").

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integration;[224] *Roe v. Wade*'s promise of reproductive autonomy;[225] and the precedents of the Warren Court that set the high-water mark for liberal constitutional interpretation in a variety of spheres, especially those having to do with electoral representation and the rights of the politically disempowered.[226]

From the perspective of this sort of fidelity, plenty has been lost in recent decades, and there is plenty to restore. A few recent Supreme Court decisions, above all *Citizens United v. FEC*, have stirred Democratic voters and politicians to call for dramatic change, such as a constitutional amendment or a judicial reversal.[227] But for the most part, liberal constitutionalism in recent decades has instead emphasized fidelity to mid-twentieth-century precedents and to the established order.[228] If anything,

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224. 347 U.S. 483 (1954); see, e.g., Pamela S. Karlan, Constitutional Law as Trademark, 43 U.C. Davis L. Rev. 385, 401–05 (2009) (discussing the political struggle over *Brown*'s legacy and liberals' commitment to an "antisubordination" account that "sees the promise of *Brown* as the full integration of African Americans (and other historically excluded groups) into American society, rather than the abolition of formal racial distinctions").

225. 410 U.S. 113 (1973); see Perry & Powe, supra note 204, at 670–78 (reviewing the development of the parties' positions on constitutional abortion rights since *Roe*). Compare, e.g., Democratic Nat'l Comm., Moving America Forward: 2012 Democratic National Platform 18 (2012), http://www.presidency.ucsb.edu/papers_pdf/101962.pdf [http://perma.cc/93NF-S9E3] ("The Democratic Party strongly and unequivocally supports *Roe v. Wade* and a woman's right to make decisions regarding her pregnancy . . . . We oppose any and all efforts to weaken or undermine that right."), with Republican Nat'l Comm., We Believe in America: 2012 Republican Platform 13–14 (2012), http://www.presidency.ucsb.edu/papers_pdf/101961.pdf [http://perma.cc/XA4F-F7R4] ("We support a human life amendment to the Constitution and endorse legislation to make clear that the Fourteenth Amendment's protections apply to unborn children.").

226. See, e.g., Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 728, 730 (2006) (statement of "veteran civil rights attorney" Fred D. Gray) ("I cannot overstate to this Committee the importance of [the Warren Court voting rights] cases, for they laid the foundation for our democracy . . . . A nominee to the Supreme Court who has a judicial philosophy . . . set against . . . the reapportionment cases is . . . saying that he would turn the clock back."). In Professor James Fleming's terms, liberals are more likely to conceive of constitutional fidelity as a matter of "*honoring*" the Constitution's "aspirational principles," rather than "*following*" the document's "concrete original meanings." James E. Fleming, Fidelity to Our Imperfect Constitution: For Moral Readings and Against Originalisms 20 (2015).

227. 558 U.S. 310 (2010); see, e.g., John Nichols, Her First 30 Days: Clinton Will Propose an Amendment to Overturn 'Citizens United,' Nation (July 16, 2016), http://www.thenation.com/article/her-first-30-days-clinton-will-propose-amendment-to-overturn-citizens-united [http://perma.cc/224W-R2NU] (describing Hillary Clinton's pledge, if elected President, to propose an amendment "to overturn the Supreme Court's *Citizens United* decision" and the positive response this pledge received from Senator Bernie Sanders and "progressive activists").

228. See Post & Siegel, supra note 200, at 571 ("[I]n recent years, it has been liberals, rather than conservatives, who have been unable to find ways to connect constitutional vision to living political values."); id. ("In recent confirmation hearings, . . . liberals have

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the erosion of that order has prompted liberals to become even more staunchly protective of what remains. The net result for the Democratic Party has been a small-c conservative orientation toward the Constitution. It is an orientation that emphasizes incremental progress, the insulation of law from politics, and respect for the prevailing conventions and understandings of constitutional practice—and that, as such, is distinctively unsuited to constitutional hardball. If the Republican Party's dominant conception of constitutional fidelity has emboldened its officials to play hardball, the Democratic Party's "defensive crouch"[229] since losing the Supreme Court has made its officials wary of staking bold claims on the Constitution.[230]

3. *Existential Politics.* — Constitutional narratives of debasement and restoration are consonant with a broader type of narrative in contemporary conservative politics: a story that something has gone fundamentally awry in the republic, on the order of an existential crisis, and that unpatriotic liberals have allowed or caused it to happen. We use the phrase *type of narrative* because it is not a single story. Within the conservative movement, there are some who worry deeply about the unsustainability of the national debt and excessive government spending; others focused on the perceived threat of unchecked immigration; others concerned that a growing bureaucratic state is stifling private enterprise; others who decry a deterioration in respect for institutions like the family or the police; and still others who believe their side to be losing the "culture wars" in ways that threaten the nation's moral

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defended the constitutional values of the Warren Court by invoking stare decisis and by emphasizing the importance of protecting constitutional law from the taint of politics.").

229. Cf. Mark Tushnet, Abandoning Defensive Crouch Liberal Constitutionalism, Balkinization (May 6, 2016), http://balkin.blogspot.com/2016/05/abandoning-defensive-crouch-liberal.html [http://perma.cc/PDJ5-LB6R] ("Several generations of law students and their teachers grew up with federal courts dominated by conservatives. . . . The result: Defensive-crouch constitutionalism, with every liberal position asserted nervously, its proponents looking over their shoulders for retaliation by conservatives . . . .").

230. Although this is more speculative, the tenets of liberal constitutionalism itself may have evolved in a manner that reinforces this divide. It is arguably constitutive of post–Warren Court liberal constitutionalism (and characterological of contemporary legal liberals) to venerate, on the one hand, procedural regularity and, on the other, "commonsense notions of fairness" that can accommodate a wide range of values and groups. See, e.g., David A. Strauss, The Living Constitution 34 (2010) (discussing and defending the central role of "precedents" and "commonsense notions of fairness" in American constitutional practice). These commitments suggest a deferential stance toward the unwritten rules of the political game; they fit poorly with efforts to upend longstanding norms in the name of building a better constitutional order. To be sure, there will always be context-specific reasons that can be adduced to justify a given act of constitutional hardball. Democratic politicians who have used hardball tactics have hardly hung their heads in shame. But in general, plausible accusations that one's own side has used "forceful uncompromising methods" in pursuit of partisan gain, see supra note 20 and accompanying text (defining hardball), would seem especially uncomfortable for liberals whose constitutional commitments, as they have developed since the Warren Court era, especially emphasize pluralism, procedural regularity, and procedural fairness.

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fabric.[231] Although it has become more ideologically coherent in recent decades, the conservative movement remains far from monolithic. Many who hold conservative positions on such issues do not frame them in existential terms. But many Republican Party activists and politicians do. As fears of the Party's own "demographic extinction"[232] have mounted in recent years, a significant proportion of the Party's most influential media personalities and legislators, from Rush Limbaugh to House Speaker Paul Ryan to Senator Ted Cruz (a famously fierce constitutional hardball player[233]), have drawn repeatedly on these themes when describing the stakes of partisan politics.[234]

President Obama aroused a great deal of existential alarm on the right. Republican politicians questioned his commitment to principles

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231. For journalistic accounts of such narratives, see, for example, Conor Friedersdorf, How the Conservative Movement Enabled the Rise of Trump, Atlantic (Feb. 25, 2016), http://www.theatlantic.com/politics/archive/2016/02/how-the-conservative-movement-enabled-donald-trumps-rise/470727 [http://perma.cc/D2J9-MX7G] (describing strains in the conservative movement that portray the United States as "under siege," elites as conspiring to "have illegal aliens overrun the nation," and Democratic Party leaders as plotting "to deliberately destroy the country"); Jeet Heer, Apocalypse Now and Then, New Republic (Jan. 14, 2016), http://newrepublic.com/article/127778/apocalypse-now [http://perma.cc/MW8J-38D4] ("The Republican Party is often portrayed as deeply divided against itself . . . . But the [presidential primary] debate in South Carolina on Thursday night made clear there is one idea that unifies the party: the strong conviction that we are all doomed.").

232. Jonathan Chait, 2012 or Never, N.Y. Mag. (Feb. 26, 2012), http://nymag.com/news/features/gop-primary-chait-2012-3 [http://perma.cc/ZP5Y-SPVL] (describing "apocalyptic rhetoric" as "the premise" of the Republican Party's 2012 electoral strategy and arguing that such rhetoric reflects the Party's fear of "its own demographic extinction").

233. See, e.g., Pozen, Self-Help, supra note 22, at 45 (noting that Senator Cruz "employed a battery of unorthodox procedural maneuvers in a campaign to defund 'Obamacare'").

234. See, e.g., Paul D. Ryan, A Roadmap for America's Future: Version 2.0, at 3 (2010), http://paulryan.house.gov/uploadedfiles/rfafv2.0.pdf [http://perma.cc/M2DE-CARD] ("Now America is approaching a 'tipping point' beyond which the Nation will be unable to change course—and this will lead to disastrous fiscal consequences, and an erosion of economic prosperity and the American character itself. The current administration and Congress are propelling the Nation to the brink . . . ."); Paul Egan, GOP Candidate Sen. Ted Cruz: "Our Country Is in Crisis," Det. Free Press (Sept. 19, 2015), http://www.freep.com/story/news/2015/09/19/gop-candidate-sen-ted-cruz-our-country-crisis/72468618 [http://perma.cc/3F4A-SD8F] (quoting Senator Cruz as telling Republican voters, "It's now or never. We are bankrupting our kids and grandkids, our constitutional rights are under assault from Washington and America has receded from leadership in the world and it's made the world a much more dangerous place" (internal quotation marks omitted)); Must Hear!!! Rush Blows the Lights Out in the Final Hour! What This Election Is Really About and What's Really at Stake, Rush Limbaugh Show (Feb. 23, 2016), http://www.rushlimbaugh.com/daily/2016/02/23/must_hear_rush_blows_the_lights_out_in_the_final_hour_what_this_election_is_really_about_and_what_s_really_at_stake [http://perma.cc/5P8C-H2RP] ("[The 2016 election is] a last chance, a last-gasp effort at preserving the culture that developed after the founding . . . . It's no more complicated than that, folks. The country's under siege from all quarters, and recently the Democrat[ic] Party has joined those who have put the country under siege.").

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such as free-market capitalism[235] and American exceptionalism,[236] and they encouraged a "birther" movement that insisted he was born in Kenya and therefore ineligible to hold office.[237] If one widens the historical lens, however, it is apparent that this general brand of racially charged alarmism laced with conspiracy theory was not simply a product of what some called Obama Derangement Syndrome.[238] Bolstered by the rise of fundamentalist groups and a conservative-media echo chamber, the "paranoid style in American politics"[239] had been making inroads into the Republican coalition for some time before President Obama was elected.[240] Republican officials at the state and national level, for

235. See, e.g., Newt Gingrich with Joe DeSantis, To Save America: Stopping Obama's Secular-Socialist Machine (2010).

236. See, e.g., Darren Samuelsohn, Giuliani: Obama Doesn't Love America, Politico (Feb. 18, 2015), http://www.politico.com/story/2015/02/rudy-giuliani-president-obama-doesnt-love-america-115309.html [http://perma.cc/B9CS-LL55].

237. The most prominent such advocate, of course, was President Trump. See Barack Obama Citizenship Conspiracy Theories, Wikipedia, http://en.wikipedia.org/wiki/Barack_Obama_citizenship_conspiracy_theories [http://perma.cc/F3DK-348D] (last visited July 20, 2017) (reviewing the development of the birther movement into a significant political force and listing numerous Republican politicians among "[n]otable advocates of the view that Obama may not be eligible for the Presidency"); see also Rosenberg, supra note 61 (suggesting that "the birther hysteria over Obama is perhaps the sharpest reminde[r] of just how radical the GOP's commitment to constitutional hardball really is" and that this commitment is rooted in contemporary conservatives' "apocalyptic turn of mind").

238. See, e.g., Eric Boehlert, Obama Derangement Syndrome Is Terminal: The GOP Is Going to Make the Next Year a Living Hell, Salon (Jan. 14, 2016), http://www.salon.com/2016/01/14/obama_derangement_syndrome_is_terminal_the_gop_is_going_to_make_the_next_year_a_living_hell_partner [http://perma.cc/4G7P-B65T]. The proliferation of "derangement syndrome" labels in our public discourse (Clinton, Bush, Obama, and perhaps now or soon Trump Derangement Syndrome) is itself an interesting indication of the fact that the story is not only about Obama but also about longer-run trends in American politics. Coded appeals to white racial anxieties, in particular, have been a strand of Republican electoral politics ever since Richard Nixon's "southern strategy," see Thomas Byrne Edsall & Mary D. Edsall, Chain Reaction: The Impact of Race, Rights, and Taxes on American Politics 74–98 (1991); Ian Haney López, Dog Whistle Politics: How Coded Racial Appeals Have Reinvented Racism and Wrecked the Middle Class 17–34 (2014); Tali Mendelberg, The Race Card: Campaign Strategy, Implicit Messages, and the Norm of Equality 134–65 (2001), and demographic change has likely sharpened some of the anxieties that underlie this type of political strategy.

239. Richard Hofstadter, The Paranoid Style in American Politics, Harper's Mag. (Nov. 1964), http://harpers.org/archive/1964/11/the-paranoid-style-in-american-politics [http://perma.cc/PR8R-SEV2].

240. See Cary C. Franklin, The Paranoid "Fringe" in American Politics, Jotwell (Dec. 6, 2017), http://conlaw.jotwell.com/the-paranoid-fringe-in-american-politics [http://perma.cc/46PG-GX4H]; see also supra section III.A.3 (discussing the rise of right-wing media). Insofar as media outlets such as Fox News set out to undermine the credibility of their "mainstream" counterparts and the liberal establishment generally, it appears this project has been highly successful on the right. According to a recent Pew survey, liberals trust a "large[] mix of news outlets." Pew Research Ctr., Political Polarization and Media Habits, supra note 164, at 5. "Consistently conservative" individuals, in contrast, tend to trust only Fox News and a small number of other identifiably conservative news sources

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instance, have been warning since *Bush v. Gore*, without any good evidence, of a "plague" of Democratic voter fraud that imperils the electoral system.[241] In the 2016 election cycle, a prominent politician on the right edge of the Republican Party argued explicitly that if Hillary Clinton were to win the presidency in 2016, it would be "the last election" the country would ever hold, as Democrats would finally go ahead and end American democracy.[242] A widely cited conservative essay described the Trump–Clinton contest as "the Flight 93 election," in which American voters must "charge the cockpit or . . . die."[243] Assertions like these make *political* sense only in the context of a coalition in which existential (or eschatological) thinking and profound suspicion of the other side play an important, and perhaps unifying, role.[244]

(including *The Sean Hannity Show*, *The Rush Limbaugh Show*, and *The Glenn Beck Program*), and they strongly distrust *all* of the major broadcast networks and national newspapers. Id. at 53.

241. U.S. Senate Republican Policy Comm., Putting an End to Voter Fraud 1 (2005), http://www.votelaw.com/blog/blogdocs/Voter%20Fraud%20Paper%20(no%20sig).pdf [http://perma.cc/8CKY-GCTR]; see also Lorraine C. Minnite, The Myth of Voter Fraud 89 (2010) (describing "Republican efforts to tar the Democrats with . . . fraud allegations"); Thomas B. Edsall, Opinion, The Paranoid Style in American Politics Is Back, N.Y. Times (Sept. 8, 2016), http://www.nytimes.com/2016/09/08/opinion/campaign-stops/the-paranoid-style-in-american-politics-is-back.html (on file with the *Columbia Law Review*) (characterizing Republican claims of voter fraud and vote-rigging as an instance of the "paranoid style").

242. See Nikita Vladimirov, Bachmann: If Clinton Wins, 2016 Will Be "Last Election," Hill (Sept. 2, 2016), http://thehill.com/blogs/ballot-box/presidential-races/294283-bachmann-if-clinton-wins-2016-will-be-last-election [http://perma.cc/SWT7-2VCU] (quoting former Representative Michele Bachmann as saying, "I don't want to be melodramatic but I do want to be truthful. I believe without a shadow of a doubt this is the last election" (internal quotation marks omitted)).

243. Publius Decius Mus, The Flight 93 Election, Claremont Rev. Books (Sept. 5, 2016), http://www.claremont.org/crb/basicpage/the-flight-93-election [http://perma.cc/649R-LAS3]; see also id. ("To compound the metaphor: a Hillary Clinton presidency is Russian Roulette with a semi-auto."). The author of this essay is now reportedly "a senior national-security official in the Trump White House." Michael Warren, The Anonymous Pro-Trump "Decius" Now Works Inside the White House, Wkly. Standard (Feb. 2, 2017), http://www.weeklystandard.com/the-anonymous-pro-trump-decius-now-works-inside-the-white-house/article/2006623 [http://perma.cc/Q37M-87SW].

244. Narratives of existential threat need not be entirely congruent with one another to help sustain a collective sense of Manichean conflict between the two parties, especially if they resonate with the general worldview or psychology of a party's base. That is, even if some members of the conservative coalition do not share or even find credible all of the precise fears that motivate various other members, this kind of politics has a certain internal momentum. If many people on your side believe that the stakes are high and clear, the two sides are good and evil, and the time to act is now, then there is little to be gained by insisting, instead, that the situation is nuanced, the other side has some good ideas, and the best approach is to cut a deal.

Although we put no great weight on it, a growing body of evidence suggests that liberals and conservatives have different "cognitive styles," with conservatives more likely on average to focus on clear, stable, and persistent overall patterns in the world, and liberals more likely to be "responsive to informational complexity, ambiguity[,] and novelty."

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Existential politics is not genteel. For obvious reasons, it does not facilitate bipartisan compromise or foster respect for the prevailing norms of governance. If enough of an elected official's supporters conceive of politics in existential terms, the fact that a particular tactic flouts constitutional conventions or settled constitutional understandings may count *in its favor*. The question is whether that flouting can be linked to a politically credible claim that extraordinary threats to the republic call for an extraordinary response. As Richard Hofstadter argued in his famous essay on the paranoid style, if "what is at stake is always a conflict between absolute good and absolute evil, what is necessary is not compromise but the will to fight things out to a finish."[245]

Existential themes have not played nearly so prominent a role in liberal political discourse in recent decades—which gives us one more clue as to why constitutional hardball did not similarly take hold in the Democratic Party during this period. The closest analogy on the Democratic side is telling. Many liberals with strong environmental commitments view climate change as quite literally an existential threat to humanity, with apocalyptic implications if current trends are not reversed.[246] Yet while environmental groups have long been important actors in the Democratic political coalition, Democratic officeholders have largely resisted framing the climate change issue in dire terms.[247]

David M. Amodio et al., Neurocognitive Correlates of Liberalism and Conservatism, 10 Nature Neuroscience 1246, 1246 (2007); see also, e.g., Serge Caparos et al., The Tree to the Left, the Forest to the Right: Political Attitude and Perceptual Bias, 134 Cognition 155, 155 (2015) (finding, across a range of perceptual tasks, that conservatives have "a stronger bias towards global perception" and "that this stronger bias is linked to higher cognitive rigidity"). In any event, the Republican coalition's disparate existential narratives—from creeping socialism to rising debt to the loss of national identity—share a common emotional valence. They evoke a sense of willful subversion by liberals and a politics of fear. Cf. John R. Hibbing et al., Differences in Negativity Bias Underlie Variations in Political Ideology, 37 Behav. & Brain Sci. 297, 303–04 (2014) (finding a correlation between conservatism and the tendency to put more weight on negative stimuli, including those that induce fear).

245. Hofstadter, supra note 239. If these are the stakes in the eyes of the key voters, donors, or mediating institutions, then a rational reelection-seeking officeholder—regardless of her own views—ought to respond with both the reality and, if at all possible, the appearance of engaging in constitutional hardball.

246. See generally, e.g., James Hansen, Storms of My Grandchildren: The Truth About the Coming Climate Catastrophe and Our Last Chance to Save Humanity (2010); Naomi Klein, This Changes Everything: Capitalism vs. the Climate (2014).

247. Indeed, it is a common lament of environmental activists that the Democratic Party has failed to adopt an appropriately existential perspective on climate change. See, e.g., James Hansen, Isolation of 1600 Pennsylvania Avenue: Part I, at 2 (2015), http://www.columbia.edu/~jeh1/mailings/2015/20151127_Isolation.pdf [http://perma.cc/7D8U-Y59W] ("The scientific community agrees on a crucial fact: we must leave most remaining fossil fuels in the ground, or our children and future generations are screwed. Yet Obama is not proposing the action required for the essential change in energy policy direction . . . ."); id. (describing the Obama Administration's expressed optimism about climate policy as "unadulterated 100% pure *bullshit*").

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The presidency of Donald Trump, on the other hand, has both unified the coalition on the left (including some independents in the middle) and generated a raft of apocalyptic rhetoric among liberal elites.[248] This presents an interesting test case, albeit one that is in certain respects sui generis. The short-term question is whether President Trump will inspire liberals in the same way that President Obama inspired conservatives—leading them to embrace a more existential view of politics and, on that basis, a correspondingly greater willingness, even eagerness, to engage in constitutional hardball in opposition to the President. This question quickly leads to several others. If President Trump does prove galvanizing in this way, will the partisan asymmetry in constitutional hardball that has been a defining feature of our politics for the past quarter century disappear or even reverse itself? Would such a change, if it occurs, prove more durable than the Trump presidency? And finally, would it be a good thing for the country? We conclude with some thoughts on these questions.

CONCLUSION: THE FUTURE OF CONSTITUTIONAL HARDBALL—AND THE REPUBLIC

The central organizing claim of this Essay is that the Republican Party has played constitutional hardball with greater intensity and efficacy than the Democratic Party over the past quarter century or so. As the Essay has tried to show throughout, it is simply impossible to understand contemporary constitutional politics in the United States without understanding this point. Our project has been primarily descriptive and explanatory: to illustrate what asymmetric constitutional hardball has meant in practice; to set this asymmetry in a larger historical, institutional, and intellectual context; and to examine a range of factors that have likely contributed to it. We expect that some right-leaning readers may remain skeptical of the asymmetry thesis, while some left-leaning readers may feel we have enacted something analogous to the very Democratic tendencies we discuss, by being overly anxious to identify caveats and complications. Yet even if we cannot hope to garner agreement on all the particulars of our argument, we hope this Essay will spur sustained reflection from scholars of all stripes on the phenomenon of asymmetric constitutional hardball.

Although our aims in this Essay have been primarily descriptive and explanatory, the analysis also has predictive implications for whether Republicans will continue to play more constitutional hardball than Democrats in the years ahead. The evidence from President Trump's first year in office has been mixed. Moreover, American politics is sufficiently

248. See, e.g., Jessica Mendoza, In Age of Trump, Apocalyptic Rhetoric Becomes Mainstream, Christian Sci. Monitor (Feb. 22, 2017), http://www.csmonitor.com/USA/Politics/2017/0222/In-age-of-Trump-apocalyptic-rhetoric-becomes-mainstream [http://perma.cc/RJE9-NLB8].

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unsettled right now that its future course seems even harder than usual to predict. It is quite possible, as Balkin has argued, that we are nearing the end of the long Reagan regime in American political time and will soon begin a very different era.[249] However, the factors identified in Part III are stubborn; despite our unsettled present, they show few signs of imminent change. Taken together, they give good cause to believe that the basic asymmetry explored in this Essay will persist through and beyond the Trump Administration. These factors illuminate preconditions that may need to be met for Democrats to eliminate the constitutional hardball gap. At this writing, they have not been met.

Briefly consider a few of them. The financial engine that drives a number of the central institutional players on the right, such as the Koch brothers' network and the Heritage Foundation, continues to hum. The prospects for an equal and opposite counterweight on the left—a dramatic revival of the power of unions, say, or a decision by wealthy liberals to begin investing in political advocacy on a Koch-network-like scale—appear unlikely at this juncture.[250] In the media, the story is more equivocal. There has been a recent uptick in viewers for programs such as *The Rachel Maddow Show* that are unabashedly partisan on the left,[251] and some have suggested that mainstream outlets might respond with a sharper-edged, more liberal brand of news.[252] Even still, the conservative media bubble is likely to remain more insular than the liberal one for the foreseeable future, given the way each side's news organizations and think tanks have been shaped by their development in political time.[253] Barring a major rearrangement in Democratic funding patterns or media

249. See Jack M. Balkin, Constitutional Rot, *in* Can It Happen Here? Authoritarianism in America 19, 32–35 (Cass R. Sunstein ed., 2018); Balkin, Last Days of Disco, supra note 109, at 1169–77.

250. Although this could change, the most significant anti-Trump groups that have emerged since his election have strived "'to maintain [their] independence both from the funders and from the [Democratic] party.'" Kenneth P. Vogel, The 'Resistance,' Raising Big Money, Upends Liberal Politics, N.Y. Times (Oct. 7, 2017), http://www.nytimes.com/2017/10/07/us/politics/democrats-resistance-fundraising.html (on file with the *Columbia Law Review*) (quoting an official from Indivisible). Tom Steyer's multimillion-dollar campaign to impeach President Trump may reflect a new boldness on his part, cf. supra note 130 and accompanying text, but it has been even more disconnected from Democratic Party politics. See Mark Z. Barabak, Tom Steyer Has Gathered More than 3 Million Signatures to Impeach President Trump. So Why Are Democrats So Annoyed?, L.A. Times (Nov. 30, 2017), http://www.latimes.com/politics/la-pol-ca-on-politics-column-20171130-story.html (on file with the *Columbia Law Review*) (quoting numerous Democratic Party leaders who have criticized Steyer's campaign as a distraction with "precisely zero chance of success").

251. See supra note 168.

252. See, e.g., Jonathan Mahler, CNN Had a Problem. Donald Trump Solved It., N.Y. Times Mag. (Apr. 4, 2017), http://www.nytimes.com/2017/04/04/magazine/cnn-had-a-problem-donald-trump-solved-it.html (on file with the *Columbia Law Review*) (arguing that conflict with Trump pushed CNN into a posture that was "no longer neutral programming" from the perspective of viewers).

253. See supra section III.A.3.

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consumption habits, it is hard to see what could generate and sustain a wave of primary challenges from the left to rival the Tea Party wave of challenges to Republican incumbents from the right.

Moreover, the two party coalitions seem set to retain their underlying attitudes about government. There will be no near-term reversal in the identity of the party that feels more keenly the danger of a prolonged government shutdown, a debt ceiling standoff, or the destruction of small-c constitutional norms that facilitate negotiation and legislation. Contemporary Democrats and liberals believe, centrally, in the promise and usefulness of government; outside of certain domains such as the military, contemporary Republicans and conservatives do not.[254] President Trump's victory might have been thought to presage a radical realignment in this regard: the possible emergence of a populist conservatism that favors the welfare state and direct public spending on domestic infrastructure. Soon after his inauguration, however, it became clear that this (always remote) possibility was not occurring.[255] Democrats are likely to continue to see greater risk than Republicans in the numerous types of constitutional hardball that threaten to disable the machinery of government.

Perhaps even more importantly, the two party coalitions seem set to retain their views of the constitutional order. Notwithstanding the emergence of liberal versions of originalism within the legal academy, Democrats today largely continue to defend a doctrinal regime built up in accretive steps through Reconstruction, the New Deal, and the Warren Court era,[256] while conservatives largely continue to advocate fundamental revisions to the prevailing constitutional order. Conservatives may disagree internally about exactly which form of constitutional "restorationism" is preferable, but for our purposes these disagreements are unimportant. Any of the available options, or any combination of them, will do the work of justifying constitutional hardball.

As noted above, President Trump certainly seems to have moved the needle on liberals' receptiveness to what we have called existential politics.[257] But some caution is in order. The existential alarm about Trump has fixated on him and his Administration, not on the

254. See supra section III.B.1.

255. See Matt Grossmann & David A. Hopkins, Trump Isn't Changing the Republican Party. The Republican Party Is Changing Trump., Wash. Post: Monkey Cage (Aug. 2, 2017), http://wapo.st/2vnFFNn [http://perma.cc/9ZGD-523M]; John Wagner & Juliet Eilperin, Once a Populist, Trump Governs Like a Conservative Republican, Wash. Post (Dec. 6, 2017), http://wapo.st/2BCTrdR [http://perma.cc/XVW4-SVXP].

256. For a prominent recent statement of this position, see Confirmation Hearing on the Nomination of Neil M. Gorsuch to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 115th Cong. 4 (2017) (statement of Sen. Dianne Feinstein) ("This is personal, but I find this 'originalist' judicial philosophy to be really troubling . . . . I firmly believe the American Constitution is a living document intended to evolve as our country evolves.").

257. See supra note 248 and accompanying text.

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Republican Party. It lacks the Manichean quality of the existential alarm that has been directed at Democrats and is therefore less apt to prove durable. Far from appearing the leader of a well-oiled national machine, President Trump appears to liberals (as well as to some members of his own party) a frightening and solitary sower of chaos. The resulting sense of crisis seems unlikely to survive without Trump in the Oval Office.

For all these reasons, we anticipate that the deep forces that drive asymmetric constitutional hardball will outlast the Trump Administration. They are too closely linked to the main disagreements that define the current party coalitions. Some liberal voices will continue to call on Democratic officeholders to "fight like Republicans" and play more constitutional hardball.[258] And in the short run, with Trump as President, they may occasionally get their wish. But in the medium and long run, any such hopes for equalizing the practice of constitutional hardball will be realized only if far-reaching institutional or ideological shifts have first altered the landscape this Essay has described. It is always possible that unanticipated new developments will reconfigure American constitutional politics. Our point is that these developments would have to be quite fundamental to remake the dynamics of constitutional hardball.

Finally, even if they were able to ramp up the practice of constitutional hardball in the medium and long run, it is not obvious to us that it would be wise for Democrats to do so. There are two basic game-theoretic models for the interaction between the parties' approaches to constitutional hardball. According to one model, Republicans continue to deviate from cooperative strategies in part *because* Democrats—at least since the advent of Clintonian triangulation[259]—have failed to respond proportionately. More forceful "punishments" might have imposed political costs sufficient to compel Republicans to let up. This first model

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258. Lithwick & Cohen, supra note 96; see also, e.g., David Faris, Opinion, Obstruct and Delay Trump: Opposing View, USA Today (Jan. 4, 2017), http://www.usatoday.com/story/opinion/2017/01/04/congress-donald-trump-president-obama-editorials-debates/96166892 [http://perma.cc/GB3M-ZAST] ("Democrats must . . . adopt the GOP's scorched-earth philosophy."); Jonathan Martin & Alexander Burns, Democratic Leaders Try to Slow Calls to Impeach Trump, N.Y. Times (May 18, 2017), http://www.nytimes.com/2017/05/18/us/politics/democrats-trump-impeachment.html (on file with the *Columbia Law Review*) (describing the efforts of Democratic leaders in Congress to tamp down calls by "liberal activists" for President Trump's impeachment); cf. Michael Tomasky, The Resistance So Far, N.Y. Rev. Books (Nov. 9, 2017), http://www.nybooks.com/articles/2017/11/09/the-resistance-so-far [http://perma.cc/6MAM-SCRM] ("The Democrats are showing more resolve partly because of the extreme nature of this presidency, but mostly because their base is getting a bit—a bit—more like the Republican base.").

259. See Mark Tushnet, The Supreme Court, 1998 Term—Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration, 113 Harv. L. Rev. 29, 39 n.37 (1999) (discussing President Clinton's "political strategy of triangulation, in which he distanced himself both from what he characterized as the rigid and excessive conservatism of the Republicans who controlled Congress, and from what he characterized as the old-fashioned New Deal/Great Society liberalism of many Democrats in Congress").

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suggests that greater Democratic constitutional hardball would ultimately lead to an equilibrium with less Republican constitutional hardball. Prominent liberal law professors have urged greater Democratic constitutional hardball based implicitly on this model.[260]

The second model, however, is one of tit-for-tat escalation with no obvious endpoint. According to this model, greater use of constitutional hardball by Democrats now would, if anything, tend to increase even further the use of constitutional hardball by Republicans, as members of both parties successively shred cooperative norms, shrink the space for bipartisan policy solutions, and make governance more difficult—all without paying a significant political price because of current levels of partisan polarization. The general observed pattern of mutual escalation of constitutional hardball over the past generation lends some support to the second model over the first, even though this escalation has so far been asymmetric.[261]

Ramping up constitutional hardball, then, is a dangerous game to play over any extended period of time. It *might* bring the other side to the bargaining table. But especially if it does not produce immediate payoffs, it might also undermine the constitutional system and leave everyone worse off.[262]

For liberals who are troubled by this Essay's asymmetry thesis and yet also worry that sustained Democratic hardball is as likely to lead to

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260. See Fontana, supra note 47, at 307 ("This Essay argues that the tactical roots of . . . failures to do more on judicial nominations during the Obama Administration reside in a common tactical error made by political leaders in the Democratic Party: excessive cooperation with political forces that do not manifest the same behavioral patterns of cooperation."); Jack M. Balkin, Declaring a Payroll Tax Holiday, Balkinization (Dec. 3, 2010), http://balkin.blogspot.com/2010/12/declaring-payroll-tax-holiday.html [http://perma.cc/VK5G-N58Y] ("[W]hen your opponents engage in constitutional hardball . . . the correct response is not to wring your hands and urge them to play fair . . . . Rather, the correct response . . . is to engage in constitutional hardball of your own, in order to make the other side come to the bargaining table . . . .").

261. Game theory itself cannot answer which model is more plausible. A set of well-known results in game theory, often referred to as folk theorems, suggests that virtually any set of strategies that Pareto-dominate the one-shot uncooperative outcome (constitutional hardball by both sides) may constitute a repeat-play equilibrium, so long as the players are sufficiently patient. See Peter T. Leeson, The Laws of Lawlessness, 38 J. Legal Stud. 471, 480 (2009) ("The folk theorem suggests that when play is infinitely repeated and players are sufficiently patient, the shadow of the future can support the cooperative equilibrium . . . . Of course, as the folk theorem also suggests, other equilibria, including violent equilibria, are also possible when play is infinitely repeated.").

262. In a book that came out while this Essay was in production, Professors Steven Levitsky and Daniel Ziblatt draw on experiences abroad to argue that "the idea that Democrats should 'fight like Republicans' is misguided," as it is liable to "play[] directly into the hands of authoritarians" and leave American politics "dangerously unmoored." Steven Levitsky & Daniel Ziblatt, How Democracies Die 215–17 (2018); see also Whittington, supra note 48 (asserting that the "constitutional system functions best if the formal rules are supplemented by a robust set of norms and practices that deter government officials from using all the political weapons at their disposal").

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mutual escalation as to de-escalation or Democratic electoral gains,[263] there are at least two other possible responses to the present asymmetry. First, liberals could try to work toward the sort of fundamental realignment of the political system—either a fracturing of the Republican coalition[264] or a wholesale reorientation of the Democratic one—that might alter the underlying drivers of constitutional hardball.[265] It goes without saying that any such effort would face immense challenges. We do not purport to know how best to tackle these challenges, although we hope this Essay has helped to clarify some of them.

A second possible response is not to play constitutional hardball whenever the opportunity arises, but instead to use temporary points of leverage to press for procedural changes that amount to *anti-hardball*. For instance, independent redistricting commissions, professionalized nonpartisan election bureaucracies, and the like, while far from optimal in terms of maximizing political advantage, have the effect of taking certain types of constitutional hardball off the table (and also, in the case of the redistricting commissions, of altering the constituencies of Republican and Democratic representatives alike so that elected officials would have somewhat less to fear from ideological primary challengers and thus from being seen as moderate, an effect that would likely be more transformative on the Republican side). Unfortunately and paradoxically, the "voting wars" have reached such a high temperature that even effectuating these temperature-lowering, anti-hardball solutions might in some cases require constitutional hardball.

Our analysis raises a different set of strategic questions for conservatives. The Republican coalition, this Essay has suggested, has increasingly been built around a set of narratives, beliefs, and institutional structures that justify and demand constitutional hardball. Indeed, this orientation toward constitutional hardball seems to be doing important work to unify a Republican coalition of considerable internal

263. For an eloquent statement of this anxiety from a leading liberal constitutional law scholar, see Richard Primus, Rulebooks, Playgrounds, and Endgames: A Constitutional Analysis of the Calabresi-Hirji Judgeship Proposal, Harv. L. Rev. Blog (Nov. 24, 2017), http://blog.harvardlawreview.org/rulebooks-playgrounds-and-endgames-a-constitutional-analysis-of-the-calabresi-hirji-judgeship-proposal [http://perma.cc/S3QQ-APK4] ("One of the nice things about living in post-Reconstruction America has been that conflict between the major political parties has not escalated all the way to the point of ultimate crisis. I'd like us to keep that going.").

264. Cf. Levitsky & Ziblatt, supra note 262, at 223 (suggesting that restoring norms of mutual tolerance and forbearance "requires that the Republican Party be reformed, if not refounded outright").

265. Certain revisions to the Constitution itself might also alter the underlying drivers of constitutional hardball—for instance, revisions designed to break up the two-party duopoly or to reduce the number of vetogates in the legislative process. We bracket this possibility because Article V amendments of this sort are such an unlikely route to effecting change in our polarized political system. But the broader question of how the structure of the hard-wired Constitution bears on the practice of constitutional hardball, and on the prospects for asymmetric constitutional hardball, deserves further study.

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complexity. That is a major benefit, but there are also costs. Constitutional hardball has internal as well as external feedback effects. Engaging in hardball normalizes hardball; arguments offered in its defense put a premium on ideological purity and make it tougher to compromise at a later date. The more your side plays hardball, the less it even feels like you are playing hardball.

The appeal of flouting Washington norms is now very strong among Republican voters, and it takes no great public-opinion expertise to see that this appeal was central to the electoral success of President Trump.[266] The long-term problem is that organizing a coalition (in part) around constitutional hardball puts continual pressure on the conventions at the foundations of governance. If the ultimate goal is to build a broad and effective legislative majority, it is not at all clear that the Republican Party's optimal strategy is to engage in continued escalation of the most polarizing forms of constitutional politics. And yet, for the reasons this Essay has discussed, it will often be risky for Republican officeholders to resist the incentives our system currently provides to engage in constitutional hardball.

Our conclusion is thus depressing for all sides—but asymmetrically so. Liberals have the strongest cause for despair. As long as the two major party coalitions and their institutional infrastructures look roughly as they do now, calls for Democratic officeholders to engage in persistent, Republican-style constitutional hardball are unlikely to succeed, while strategies that aim to reduce the overall amount of hardball face daunting odds. Conservatives, however, have reason to worry as well. It is possible for a political coalition to become too devoted to hardball culture for its own good, let alone the good of the republic. Constitutional hardball may have helped Republicans win a number of partisan skirmishes in recent decades, but it has also fueled demand for a mode of governance that makes governance itself more difficult. Breaking out of this vicious cycle will be one of the great challenges for American constitutionalism in the twenty-first century.

266. In office, President Trump has continued the pattern. See Emily Bazelon, How Do We Contend with Trump's Defiance of 'Norms'?, N.Y. Times Mag. (July 11, 2017), http://www.nytimes.com/2017/07/11/magazine/how-do-we-contend-with-trumps-defiance-of-norms.html (on file with the *Columbia Law Review*) ("Trump's flouting of norms was the siren song of his candidacy, and it has become a defining feature of his presidency."). Perhaps the most unifying action he has taken to date—the action that most appeals to the disparate strands of the Republican coalition—is the move with which we began this Essay: pushing through ideologically conservative judicial nominees, in particular Justice Gorsuch, under the banner of constitutional restorationism.

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