Hardball Republic: Constitutional Hardball During Periods of Ordinary Politics

Robinson Woodward-Burns
Assistant Professor of Political Science
Howard University

Abstract

Since the 1980s, congressional parties have traded increasingly narrow majorities, forgoing interparty compromise for unabashedly partisan lawmaking tactics. This includes "constitutional hardball," in which lawmakers entrench their party position on high stakes votes by bending normal lawmaking procedure. These measures often concern electoral rules and judicial confirmations. Scholars point to Democrats' 2013 confirmation of executive nominees by overriding a Republican filibuster, Republicans' refusal to consider Democrats' Supreme Court nominee Merrick Garland in 2016, and Republicans' 2017 and 2018 override of the Democratic filibuster against Supreme Court nominees. Constitutional hardball also affects voting rights and the makeup of the electorate. In 2006, Republicans blocked the Voting Rights Act's reauthorization, and currently may benefit from House malapportionment through 2020 Census under-implementation. Measures like these threaten the democratic responsiveness of American state and federal legislatures.

The modern Congress increasingly relies on constitutional hardball, but the literature on the topic is new and descriptive (Balkin 2017, Fishkin and Pozen 2018, Pozen 2018), suggesting that hardball occurs briefly, during rare moments of fundamental constitutional and partisan transformation (Tushnet 2003, Ackerman 1993, 1998, 2014). I argue that constitutional hardball is a durable, regular feature of congressional struggles over judicial nominations and voting rights. Specifically, I argue that given Article V's high barriers to amendment, members of Congress unable to pass formal amendments have instead used hardball measures to achieve quasi-constitutional reform on judicial powers and voting rights. To test this claim, I offer case studies on the Enabling Act of 1889, House reapportionment after the 1920 Census, and contemporary Article V amendment proposals. Second, using an original database of all 11,970

constitutional amendments proposed from 1788 to 2020, I show that after 1970, constitutional hardball has become a congressional norm. Members of Congress have increasingly proposed federal constitutional amendments to constrain the judiciary and limit voting rights, rather than to solve common, structural constitutional issues. Polarization and constitutional hardball will likely remain a central feature of and liability for American democracy.

Introduction

Constitutional hardball describes the manipulation of lawmaking procedure for long-term partisan gain. Hardball measures bend procedural and constitutional norms without overtly violating or revising constitutional rules. Lawmakers use these hardball tactics to durably entrench their party's institutional power, particularly in the judiciary or electorate. Hardball lawmaking also entails a tit-for-tat pattern. For example, members of Congress from both parties have increasingly used hardball tactics to cement judicial power. In 2013, Democrats stacked lower federal courts by overriding a Republican filibuster, and in 2016, Republicans refused hearings for Democrats' Supreme Court nominee Merrick Garland. In 2017 and 2018, Republicans forbade a Democratic filibuster against their Supreme Court nominees. Constitutional hardball also shapes voting rights and the electorate. In 2006, Republicans refused to reauthorize the Voting Rights Act and in July 2020, the Trump Administration, ignoring Supreme Court instructions, ordered the Census Bureau to undercount undocumented persons, potentially malapportioning U.S. House seats in favor of Republicans. In an extreme, if symbolic measure, in July 2020, House Republicans introduced a resolution to ban the Democratic Party nationally.

Scholarly literature on constitutional hardball is preliminary and anecdotal, leaving several questions unanswered. What explains variation in congressional constitutional hardball over time? Why does Congress sometimes attempt to *bend* informal constitutional rules through hardball and at other times try to *break* and replace formal constitutional rules through amendment or statutory revision? Answering these questions can help explain the contemporary Congress' reliance on constitutional hardball. This era, after all, looks much like the late nineteenth century, when Democrats regularly won the national popular vote, including in

presidential elections, but were denied House, Senate, and Electoral College seats by Republican constitutional hardball.[1]

Scholarly work on constitutional hardball, emerging only recently, is primarily descriptive. When Senate Democrats filibustered Republican judicial nominees in 2003, Republicans threatened to forbid such a filibuster. Mark Tushnet introduced the term "constitutional hardball" to describe these attempts to bend lawmaking procedure for partisan gain. Jack Balkin further elaborated Tushnet's definition in 2008. Since then, congressional polarization and congressional hardball have increased. As Frances Lee shows, congressional parties now trade narrow, bitterly contested majorities. Others have noted that congressional leadership has shown an increasing willingness to violate or degrade procedural norms, including those around interparty cooperation.[2] Scholars have pinned this degradation in part on hardball tactics.[3] For example, in 2018, Joseph Fishkin and David Pozen described "asymmetric" constitutional hardball, through which congressional Republicans have dismantled Democrats' administrative programs and electoral base. Democrats, they argue, have largely avoided reciprocal hardball, though David Bernstein alleges Democrats to attempt hardball lawmaking, and David Faris has recently made the normative case for Democrats to adopt hardball tactics on judicial and electoral measures.[4]

This scholarly work usefully identifies and describes a pattern in contemporary congressional negotiation and politics. But this literatue is preliminary, primarily addressing recent measures. Historical analysis of constitutional norm violation is limited, focusing often on Franklin Delano Roosevelt's unprecedented court packing plan and third presidential run. The work is also descriptive, giving little insight into the broader casual patterns in constitutional hardball. What,

[1] As Stewart and Weingast note, though "the Democrats were (narrowly) the majority party in terms of popular sentiments for the twenty years starting in 1875, it was nearly impossible for Democrats to make inroads into the control of administration, patronage, and Supreme Court appointments." Stewart and Weingast, "Stacking the Senate, Changing the Nation," 228.
[2] Chafetz and Pozen, "How Constitutional Norms Break Down"; Balkin, "Constitutional Crisis and Constitutional Rot"; Balkin, "The Recent Unpleasantness."
[3] Tushnet, "Constitutional Hardball"; Balkin, "Constitutional Hardball and Constitutional Crises"; Lee, *Insecure Majorities*; Fiorina, *Unstable Majorities*.
[4] Fishkin and Pozen, "Asymetric Constitutional Hardball"; Pozen, "Hardball and/as Anti-Hardball"; Faris, *It's Time to Fight Dirty*; Bernstein, "Constitutional Hardball Yes, Asymmetric Not So Much"; Shugerman, "Hardball vs. Beanball."

then, is driving the current increase in constitutional hardball, and how does this era compare to previous ones?

Theory

This paper aims to describe and explain a recurrent, enduring pattern of congressional constitutional hardball. Specifically, I propose that consistent, inflexible barriers to textual constitutional reform intersect with congressional party realignment cycles to periodically incentivize constitutional hardball.

Congress faces high, inflexible barriers to textual constitutional reform. Under Article V, a proposed constitutional amendment must pass both houses of Congress with two-thirds majorities, or pass a convention called by two-thirds of the states on petition to Congress, and then be ratified by the legislatures or ratifying conventions of three-fourths of the states. This is the most stringent amendment process of any national constitution. Congress has proposed hundreds of amendments to reform or ease the Article V process, but none have cleared these supermajority thresholds. Article V has thus been a self-reinforcing, constant constraint on American constitutional development, as parties in Congress rarely break the two-thirds supermajority barrier needed for amendment.[5] Alternately, Congress can reform constitutional rules by passing sweeping, quasi-constitutional "super statutes." Like an Article V amendment, comprehensive statutory reform requires supermajority control, broad bipartisan compromise, or both, and so is similarly rare.[6]

Additionally, we observe a cyclical pattern of party realignment. Periodic electoral realignment, whether gradual or abrupt, occasionally grants one party congressional supermajorities.[7]

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[5] Strauss, "The Irrelevance of Constitutional Amendments"; Levinson, *Our Undemocratic Constitution*; Elkins, Ginsburg, and Melton, *The Endurance of National Constitutions*; Eskridge and Ferejohn, "Super Statutes Special Symposium Issue."

[6] Eskridge and Ferejohn explain: "Although they do not exhibit the super-majoritarian features of Article V constitutional amendments and are not formally ratified by the states, the laws we are calling super-statutes are both principled and deliberative," adding that "Super-statutes reflect deliberative majority judgments… Super-statutes have a claim to expression of the considered judgment of the nation as a whole." Eskridge and Ferejohn, "Super-Statutes Special Symposium Issue," 1217, 1274.

[7] Burnham, "Party Systems and the Political Process"; Carmines and Stimson, *Issue Evolution*.

Sometimes these supermajorities near or clear Article V's two-thirds threshold, allowing revision of constitutional rules by amendment or super statute. These moments are rare. More often, the majority party holds less than two-thirds of seats in either chamber, precluding systematic reform by amendment or statute.[8] Figure 1 shows the interaction of party realignment and formal amendment rules.[9]

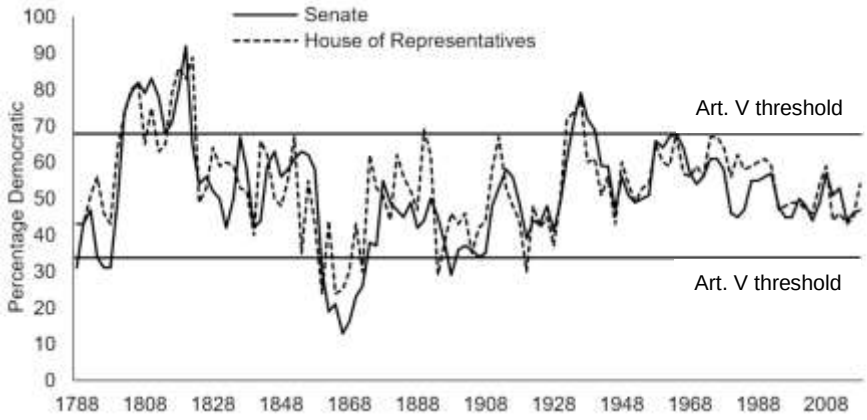

Figure 1: Cyclical Patterns in Congressional Party Vote Share, 1788-2020.
Pre-1828 data indicates percentage Anti-Administration/Democratic-Republican.

The intersection of amendment rules and cyclical party realignment creates two conditions. Under conditions of one-party dominance and/or low party polarization, Congress can muster the bicameral supermajorities needed to revise constitutional rules by amendment or super statue. These conditions are rare and momentary, requiring quick reform, sometimes via violation and wholesale replacement of old constitutional rules. Alternately, under conditions of party parity and high polarization, congressional party leadership cannot build bicameral supermajorities for amendment or super statue passage, and instead rely on constitutional hardball. When congressional polarization is high and congressional majorities are slim and vulnerable, congressional leaders are more likely to use hardball tactics. Put differently, per Figure 1, Congress is more likely to attempt hardball when party majorities lie between Article V

[8] Ackerman, *We the People: Foundations*; Ackerman, *We the People: Transformations*; Ackerman, *We the People: The Civil Rights Revolution*.
[9] Balkin, "The Recent Unpleasantness."

thresholds and parties are polarized, and Congress is more likely to attempt amendment or super-statutory reform when majorities near or exceed these Article V thresholds.

These conditions cycle with periodic national partisan realignment. Therefore, reliance on constitutional amendment and super statute on one hand, and on constitutional hardball on the other, should also vary cyclically. Constitutional hardball should increase during periods of high polarization with slim majorities and decrease as one party claims larger congressional majorities or as parties converge.

There are several implications to this hypothesis on cyclical hardball. First, constitutional hardball is a feature of ordinary politics, with ordinary politics defined as periods of congressional party parity. This rebuts other scholars' claims. Scholars note that partisan realignment yields fleeting congressional supermajorities, and, according to Bruce Ackerman, constitutional transformation. Tushnet suggests that during these transformative moments, bullish congressional supermajorities play constitutional hardball: "constitutional hardball is the way constitutional law is practiced distinctively during periods of constitutional transformation… one should not be able to observe episodes of constitutional hardball during periods of ordinary politics." Yet the contemporary era of party parity, one of ordinary politics and congressional parity, has seen regular constitutional hardball. This runs counter to Tushnet's theory.[10]

Against Tushnet's claims, I assert that long, periodic doldrums of party parity, polarization, and gridlock incentivize regular constitutional hardball.[11] The point here is not to challenge Ackerman or Tushnet, but rather to note that high Article V barriers incentivize Congress to regularly attempt and achieve hardball measures in ways that durably shift electoral and judicial

[10] Balkin notes as much. Balkin, "Constitutional Hardball and Constitutional Crises," 588–90.
[11] Tushnet holds that hardball can occur swiftly, during Ackerman's transformative constitutional moments, but also gradually. But as Tushnet notes, observing extended period(s) of hardball, including repeated failed hardball measures, would suggest "that political actors might play constitutional hardball all the time." This, he grants, would significantly undermine his claims about periodic, transormative constitutional hardball. Balkin notes this possibility in passing: "Tushnet's initial surmise was too confined. Constitutional hardball is not limited to periods of extraordinary politics, but rather occurs throughout American history." Burnham, "Party Systems and the Political Process"; Ackerman, "Storrs Lectures"; Wolin, "Fugitive Democracy"; Tushnet, "Constitutional Hardball," 531–34, 545–49; Balkin, "Constitutional Hardball and Constitutional Crises," 589.

rules and power. These durable shifts in governing authority happen more frequently, continuously, and trivially than admitted by the mainstream accounts of American constitutional development that privilege grand transformative moments.

Second, during transformative moments, in which one party clears congressional supermajority thresholds, members of Congress have more incentive to attempt amendment or super statutory reform than to attempt constitutional hardball. Amendments and super statutes, framing new, durable textual constitutional rules, can better entrench party power than constitutional hardball, which merely bends or degrades extratextual constitutional norms. Amendments and super statutes, and not constitutional hardball, are the hallmarks of transformative constitutional moments. This is not to say that hardball does not occur during transformative moments – it does – but rather that during these moments, congress often uses hardball to pass or buttress proposed amendments or super statutes. For example, Congress imposed military election oversight to assure ratification of the Reconstruction Amendments and proposed the Judicial Procedures Reform Bill of 1937 to preserve New Deal super statutes, in both cases bending extratextual customs to affirm their revision of textual constitutional rules.

Third, in bending constitutional norms, hardball reshapes constitutional rules. This reshaping occurs in two ways. *Substantive* hardball tactics change constitutional meaning by expressly shifting institutional power, perhaps between branches. For example, Roosevelt's 1937 court packing bill would have let Congress restructure and thus better control Supreme Court membership. When scholars call hardball "playing for keeps," this institutional reform is often what they mean.[12]

Procedural hardball changes constitutional meaning by changing lawmaking rules. Constitutional rules exist not only in constitutional and super-statutory texts, but also in norms outside these texts.[13] These extratextual constitutional norms include norms of legislative procedure. For example, procedural supermajority requirements, like the Senate's three-fifths cloture rule, incentivize compromise, binding actors to common aims. The Missouri

[12] Tushnet, "Constitutional Hardball"; Balkin, "Constitutional Hardball and Constitutional Crises."
[13] By constitutional "norm," I mean a rule that uniformly binds political actors.

Compromise, in which Congress paired enabling acts for free and slave states, was another norm procedural norm that preserved antebellum constitutionalism. By committing different actors to the same aim, consensus-building legislative procedural rules qualify as extratextual constitutional rules.[14]

Some of these extratextual procedural rules are fundamental to American constitutional design. The Missouri Compromise is one such example. In another example, while the Constitution lets the president prorogue Congress, doing so on baldly partisan grounds would strain the fundamental, extratextual norm of legislative independence. Flouting or bending a fundamental procedural norm can shift American constitutional meaning and identity.[15] Existing outside constitutional and statutory texts, procedural norms gain meaning through interpretation and use, and thus are especially subject to gradual modification by disuse via constitutional hardball.[16] Procedural constitutional hardball is akin to jujitsu, bending barriers, and thus changing American constitutionalism, rather than plowing through barriers head-on, as might a reconstructive president and Congress. Though less spectacular and less studied than the reconstructive amendments or super-statutes that come during party realignment, procedural hardball entails a regular, common, and understudied pathway in American constitutional development, one by which Congress reshapes constitutional meaning.

Finally, as a corollary, contemporary congressional hardball, reflecting the interaction of inflexible constitutional rules and cyclical partisan shifts, will likely continue until polarization decreases or one party claims bicameral congressional supermajorities. While Democrats have built a demographically and ideologically broad, heterogenous electoral coalition, under the Trump Administration, the Republican base has shrunk to a demographically and ideologically homogenous core that is relatively whiter, older, more male, and less educated. Republicans,

[14] Among other things, a constitution is a contract binding actors to the common good. Elster, *Ulysses and the Sirens*; Hardin, "Why a Constitution"; Ordeshook, "Constitutional Stability"; Weingast, "The Political Foundations of Democracy and the Rule of Law"; Mittal and Weingast, "Self-Enforcing Constitutions."
[15] Pitkin, "The Idea of a Constitution"; Jacobsohn, "Constitutional Identity," June 2006; Jacobsohn, *Constitutional Identity*, 2010. As Whittington has noted, extratextual norms are subject to debate and reconstruction, and so do not bind actors to the same extent as textual rules. Whittington, "The Status of Unwritten Constitutional Conventions in the United States."
[16] Chafetz and Pozen usefully describe norm change though outright destruction, subtler decomposition, and official displacement by codification of the norm into law. Chafetz and Pozen, "How Constitutional Norms Break Down," 1435–38.

now consistently unable to capture national electoral majorities, especially in presidential elections, maintain power through counter-majoritarian institutions, like the Electoral College and Senate, and counter-majoritarian hardball, tempering Democratic power in the electorate and judiciary. Contemporary Republicans are perhaps rational to use hardball, opportunistically bending constitutional rules without disrupting the counter-majoritarian constitutional structures that preserve their waning electoral power.

A few caveats. This brief paper describes only how congressional hardball changes constitutional meaning, and does not address how the executive, courts, states, or other bodies approach constitutional change. Second, political actors differ in interpreting extratextual constitutional norms, which often slip over time. Since constitutional norms are tough to observe and track, so too is constitutional hardball.[17] Third, the paper presents ideal hypotheses on the conditions for and outcomes of constitutional hardball. In practice, constitutional revision by amendment or super statute can overlap with constitutional hardball, such that members of Congress may blend methods. Classifying individual cases of constitutional change therefore requires close case studies.

Methods

To observe long-term patterns in constitutional hardball, I rely on qualitative case studies and a longitudinal dataset of proposed Article V amendments. I hypothesize that constitutional hardball is more likely when one or both congressional chambers are highly polarized and evenly split. Several periods of congressional polarization and party parity satisfy these conditions – the 1880-1890s, 1910-1920s, and 1990-2010s.[18] Similarly, between 1870 and 1900, Democrats

[17] As Balkin puts it, "the internal norms of good legal argument are a moving target; they are constantly in the process of changing in response to political, social, and historical forces." Similarly, Fishkin and Pozen note "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." Balkin, "Constitutional Hardball and Constitutional Crises," 579; Fishkin and Pozen, "Asymetric Constitutional Hardball," 928; Fishkin and Pozen, "Asymetric Constitutional Hardball."

[18] I hold a congress is at party parity if the majority party in one or both houses holds 55% or less of the chamber, observing only congresses after the emergence of the two-party system in the 1830s. For an approximate measure of party polarization, I rely on Poole and Rosenthal's DW-NOMINATE score. Poole, Rosenthal, and Lewis, "Voteview Project."

averaged 50.7% of the two-party congressional vote share and 49.7% of the House seat share.[19] By Ackerman or Tushnet's standards, these were not transformative periods, but were eras of ordinary politics.[20] Observing constitutional hardball in these years gives tentative evidence that hardball occurs outside of rare, transformative moments.

I point to three cases of constitutional hardball – the Enabling Act of 1889, the 1920 Census and failed House reapportionment, and contemporary Article V amendment proposals. Since these cases fall within periods of ordinary politics, this suggests that constitutional hardball can be a feature of congressional lawmaking and constitutional reform during periods of ordinary politics.

Further, these cases might give us some leverage to understand contemporary hardball. House Democrats' attempt in June 2020 to regain Senate control by granting statehood to the left-leaning District of Columbia, if symbolic, echo Republicans' admission of Montana, Washington, and the Dakotas in 1889, yielding eight new Senate seats and a durable Republican Senate majority. And the Trump Administration memo instructing the Census Bureau to undercount undocumented immigrants in the 2020 Census mirrors intentional immigrant undercounts and House malapportionment after the 1920 Census. By studying hardball in prior periods of polarization and party parity, perhaps we can better understand the similar current era.

Additionally, I use an original database of all 11,970 constitutional amendments proposed from 1788 to 2020. I coded this database to include amendments' date, resolution type, resolution number, chamber, committee, sponsor, sponsor state, and content description. The data shows that the number and nature of attempts to amend the Constitution varies cyclically, increasing as parties near or clear Article V supermajority thresholds, and decreasing as parties fail to clear these thresholds and instead rely on quasi-constitutional hardball tactics. This gives tentative support for my hypothesis that in periods of supermajority control Congress is more likely to attempt amendment. It also supports anecdotal scholarly claims that constitutional hardball has

[19] Stewart and Weingast, "Stacking the Senate, Changing the Nation," 246; Engstrom, "Stacking the States, Stacking the House," 419–22.
[20] While Tushnet speculates the 1980-2000s may have constituted a period of extended Ackermanian transformation, Balkin rightly notes that Ackermanian transformation occurs momentarily, such that this extended period likely cannot be called a transformative one. Tushnet, "Constitutional Hardball"; Balkin, "Constitutional Hardball and Constitutional Crises."

increased over the last decades. Using the data, I show that since the 1960s, members of Congress have increasingly proposed Article V constitutional amendments not to solve common, structural constitutional issues, but rather to coerce or overrule federal judges while engaging in partisan position taking. These amendments, overriding norms of judicial independence for partisan gain, likely constitute constitutional hardball hardball. This suggests that in the contemporary era of party polarization, Article V proposals have themselves become a measure, largely symbolic, for hardball lawmaking.

Electoral Hardball: The Enabling Act of 1889 and the 1920 Census

Through the nineteenth century, the admission of new states shaped House, Senate, and Electoral College apportionment. Congress' 1820 Missouri Compromise first negotiated the free and slave state split. Under this extratextual procedural norm, Congress paired enabling acts admitting free and slave states, balancing national antislavery and proslavery seats.[21] Similarly, Congress' 1850 Compromise and 1854 Kansas-Nebraska Act allowed admission of new Western states to counterbalance growing Northern free state majorities. Instead, lawmakers in Utah, New Mexico, Oregon, Kansas, Minnesota, and Iowa proposed or ratified antislavery state constitutions. Consequent Civil War and Reconstruction-era Republican congressional supermajorities reformed national constitutionalism by amendment and super-statue, excluding ex-Confederate states from Congress to artificially inflate Republican majorities. Unchallenged, congressional Republicans instead admitted four Republican-leaning states.[22]

[21] Congress had failed to address through the original Northwest and Southwest Ordinances.28 New York's James Tallmadge, Jr. proposed emancipation in Missouri,; John W. Taylor, also of New York, called for abolition in the neighboring Arkansas Territory,; and New Hampshire's Arthur Livermore proposed a similar national constitutional amendment. Northerners abandoned party bonds and the old bisectional compromise, voting nine to one for Tallmadge's plan, with Southerners uniformly opposed. Congress rejected all three measures for fear of upsetting norms of bisectional compromise. *The Debates and Proceedings in the Congress of the United States: Fifteenth Congress, First Session*, 1675–76. See also Fehrenbacher, *The Slaveholding Republic*, 263; Graber, *Dred Scott and the Problem of Constitutional Evil*, 120–23; Mason, *Slavery and Politics in the Early American Republic*, 177–212; Hammond, *Slavery, Freedom, and Expansion in the Early American West*, 3, 55–75, 150–67.

[22] The ratification of the three Reconstruction Amendments required readmission of ex-Confederate states through constitutional convention, elections for which were subject to military oversight. These unconventional elections, violating procedural norms, were cases of constitutional hardball in service to, and subsidiary to, textual reform by Article V amendment.

By the mid-1870s, the readmission of ex-Confederate states under Reconstruction sapped Republican power. With state Republican parties split, Southern "Redeemer" Democrats in Tennessee's 1870 state constitutional convention and Arkansas's 1874 convention attempted re-enfranchising ex-Confederates. Texan, Alabaman, and North Carolinian Democrats ousted their Republican governors and state legislators and called state constitutional conventions in 1875 to replace their egalitarian Reconstruction constitutions. Federal troops' withdrawal from the old Confederacy in 1877 and the Supreme Court's deferential 1883 Civil Rights Cases helped constitutional convention delegates erode Reconstruction in Georgia in 1877, Louisiana in 1879, and Florida in 1885. By the Fiftieth Congress of 1887-1889, with congressional parties deeply divided over rollback of the Black vote, and to a lesser degree, by economic and agrarian policy debates, Republicans held a narrow one-seat Senate majority and a nineteen seat House deficit.

Republicans then passed the Enabling Act of 1889. The Act admitted Montana and Washington and split the Dakota Territory into two new, essentially indistinguishable states. These four states yielded eight new senators. Enabling acts for Idaho and Wyoming months later added four more reliably Republican Senate seats. These acts together yielded a Republican Senate majority that lasted nearly uninterrupted for the next four decades, ending only with the New Deal. But were these acts cases of constitutional hardball? In instances of constitutional hardball, legislators knowingly violate lawmaking norms to entrench partisan power. Did the enabling acts of 1889-90 meet these criteria? That is, did Republican members of Congress violate an old norm of lawmaking procedure, and if so, did they do so knowingly, intending to durably entrench party interests?

What, then, were the congressional norms surrounding the admission of states in the late nineteenth century? While Republican congressmen inflated party majorities by admitting four new, Republican-leaning states in the 1860s, members understood these cases as exceptional, perhaps unconstitutional emergency wartime acts that gave little precedent for postwar lawmaking norms.[23] Postwar norms, like prewar ones, dictated compromise. By the admission of

[23] Kansas entered in 1861, West Virginia in 1863, Nevada in 1864, and Nebraska in 1867. Kansas, in a state of internal civil war, was governed by two competing legislatures between 1855 and 1859. The creation of West Virginia from Union-occupied Virginia in 1863 received assent from Virginia's Union-loyal, though largely symbolic, state legislature, but not from the operating Confederate state legislature, making the state's admission

the next state, Colorado, in 1876, Republicans split congressional control with Democrats, and members reverted to the longstanding nineteenth-century custom that congressional party parity dictated bipartisan concessions in admitting new states. Republicans, burdened by Grant administration scandals, faced poor electoral odds in 1876, and moved to admit Republican-leaning Colorado to gain seats. In a concession to the House's Democratic majority, they introduced a parallel enabling act for Democratic-leaning New Mexico. The Colorado bill narrowly passed while the New Mexico bill narrowly failed.[24] Divided evenly by party, Congress also refused statehood to Democratic-leaning Utah and Republican-leaning Washington in the 1870s, granting neither party special advantage.[25]

The passage of the 1889 Enabling Act defied this norm. In 1888, the Republican-controlled Senate moved to split the relatively populous Dakota Territory into two states, overriding an opposed Democratic amendment and passing the measure on a narrow party-line vote. The Democratic-controlled House Territories Committee then killed the bill. But in November, Republicans gained twenty-two House seats and a narrow House majority, retaining their one-seat Senate majority. Hoping to preempt a two-state Dakota bill in the incoming Congress, Democrats in the House Territories Committee proposed an omnibus bill to admit Dakota as a single state alongside the Republican-leaning Washington and the Democratic-leaning New Mexico and Montana.[26] The bill, pairing two Republican and two Democratic states, attempted to maintain the old norm of mutual concession in admitting new states.[27]

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constitutionally suspect under Article IV. Members of Congress noted as much. As Kansas Representative Martin Conway put it: "I don not regard this proposed division of Virginia as having received that assent from the Legislature of the State which the Constitution requires." Nevada statehood was another wartime measure, planned in 1864 by Benjamin Wade alongside readmission of the ex-Confederate states. Lincoln also attempted admitting Colorado in 1864, but territorial voters rejected a proposed state constitution, and Andrew Johnson subsequently blocked statehood. See Article IV, Section 3, Clause 1 and *The Congressional Globe: Thirty-Seventh Congress, Third Session*, 37–38; Collins and Oesterle, *The Colorado State Constitution: A Reference Guide*, 8–10.

[24] The Colorado bill carried 164-76 with 48 abstentions and the New Mexico bill failed 154-87 with 47 abstentions. Note also the Colorado bill passed on March 3, 1875, the final day before Democrats assumed control under the incoming Forty-Fourth Congress, and with the stipulation that only the Republican President Grant, and not the new Democratic Congress, could approve the proposed Colorado constitution. *The Congressional Record: Forty-Third Congress, Second Session*, 2230–31, 2237–39, 2255; Stewart and Weingast, "Stacking the Senate, Changing the Nation," 236n33.

[25] In preparation for statehood, Utah drafted a constitution in 1872 and Washington one in 1878. Utah's statehood efforts were also derailed when Grant in his 1875 message to Congress warned admitting Mormon Utah would threaten "free, enlightened, and Christian" American customs. Grant, "Seventh Annual Message to Congress"; Stewart and Weingast, "Stacking the Senate, Changing the Nation," 237.

[26] The bill stipulated Dakota voters could split their territory by popular referendum.

[27] Stewart and Weingast, "Stacking the Senate, Changing the Nation," 236–39.

Emboldened by their electoral victory, Republicans rejected the Democratic concession bill, instead proposing to split South Dakota without admitting New Mexico. Admission of Spanish-speaking, Catholic New Mexico proved unpalatable to Republicans, who had favored Protestant settlement of the West at least since Grant's 1875 message to Congress. Democrats, with their Catholic immigrant constituencies in the East, had fewer grounds for opposing New Mexico statehood. But underlying the New Mexico question was the foundational issue of partisan balance. The Republican bill added three Republican states but only a single, narrowly Democratic state – Montana. With the session closing and Democrats disproportionately absent and fractured, with some voting for the bill, the measure passed. Emboldened by this and by their 1888 win, the following year Republicans passed enabling acts for Idaho and Wyoming, two relatively uninhabited, Republican-leaning territories.[28]

Republicans knowingly violated the old norm of compromise. Warning against admitting the Dakota Territory on baldly political grounds, Wisconsin Republican John Spooner appealed to the norm's long history:

> "the relative position of political parties to-day in this country is not changed with the disappearance of [slavery]. It seems that to-day as in antebellum days the exigency of Democracy… demands that no Territory which will be Republican in its politics, which will send Republican Senators into the Chamber, shall be permitted to come into the Union unless alongside of it is admitted, regardless of its possessing elements of statehood, a Territory which shall be surely Democratic."

Rather than violate this norm and admit Dakota alongside New Mexico, the population of which "belong to a different race than the Anglo-Saxon, speak a different language, and have a different civilization," Spooner advocated delaying Dakota statehood. Republicans instead skirted the New Mexico question by detaching the Dakota statehood measure, and in so doing abandoned the old bipartisan norm.[29]

[28] Stewart and Weingast, 239–42.
[29] *The Congressional Record: Fiftieth Congress, First Session*, 3003.

By violating these procedural norms, Republicans durably entrenched their electoral interests. The new six states yielded twelve Republican senators and seven Republican representatives. As Stewart and Weingast show, Republicans reaped rewards immediately. While Democrats' presidential popular vote share ranged between 51.7% in 1892 and 46.8% in 1900, their Senate class seat share declined precipitously to a nadir of 29.2% by 1898, made all the more remarkable because the party that year captured, respectively, 49.6% and 48.9% of the House vote and seat share. Republican Senate hegemony also blocked the admission of heavily Democratic Utah until 1896 and of Democratic-leaning Arizona and New Mexico until 1912. Save for two brief interruptions, Republicans held a substantial Senate majority until the New Deal. Effectively, the 1889 Enabling Act created two new constitutional rules. First, the Act repudiated the longstanding, extratextual procedural lawmaking rule dictating bisectionalism or bipartisanship in the admission of new states. After 1889, the Republican-led Congress granted and denied statehood petitions on grounds more baldly partisan than those used before. Second, it repudiated normative arguments that Senate seat share ought to reflect House or presidential vote share. The resulting senatorial "rotten boroughs" later gave credibility to progressive attacks on senatorial detachment in the years prior to the ratification of the Seventeenth Amendment.[30]

Republicans entrenched party power by violating longstanding procedural norms through the 1889 and 1890 enabling acts. These acts thus qualify as a case of constitutional hardball. Importantly, this was a case of hardball during a period of party parity and polarization, a period of unremarkable, ordinary politics. Yet the effects of the Act on American constitutional development were transformative and durable, shifting party power and constitutional rules for nearly half a century. Mundane periods of congressional polarization and party parity, through hardball, can yield transformative institutional change.

Perhaps the enabling acts of 1889-90 are lone, aberrant cases. This section concludes with a brief digression on another potential case of constitutional hardball during a period of ordinary politics. The 1910s and 1920s saw moderate polarization and relative party parity, with Congress split between a Republican Senate and Democratic House. Following the 1920 Census, rural and Republican congressmen refused to reapportion House seats to growing urban areas, delaying the

[30] Article I, Section 2 and Stewart and Weingast, "Stacking the Senate, Changing the Nation," 242–59.

process until 1929. This was unprecedented, the only time the House failed to reapportion after a census. But was this hardball? Did members of Congress knowingly violate procedural norms to entrench party interests?

The Constitution's text dictates a decennial census to reapportion of House seats. While state legislatures often gerrymandered these seats through the late nineteenth century, extratextual legislative norms forbade other forms of interference in the reapportionment process, such that post-Civil War reapportionment, even if delayed by implementation struggles, came with little partisan interference.[31] Even in this era of Gilded Age polarization and corruption, lawmakers reapportioned seats with little partisan foot-dragging.

Population shifts on the eve of the 1920 Census encouraged Republicans to defect from this norm. The 1920 Census differed from previous ones – between 1910 and 1920, the nation's rural population declined by five million while the urban population, buoyed eastern and southern European immigration, grew by nineteen million. This census was the first in which the urban population exceeded the rural population, such that reapportionment threatened rural districts and interests. This spurred anxieties in several corners By 1920, nearly three-quarters of immigrants lived in cities. Nativists drew on Darwinist social science, demography, and academic statistics, warning that urban immigrant and Black population growth would outpace native, white, and rural growth. Predicting Anglo-Saxon decline, Madison Grant's 1916 *The Passing of the Great Race* and Lothrop Stoddard's 1920 *The Rising Tide of Color* gained widespread readership, featuring even in F. Scott Fitzgerald's *Great Gatsby* in 1925. With rising inflation and declining real wage income, urban workers went on strike in 1919 and 1920, raising the specter of an urban communism abetted by eastern European radicalism. As Bolsheviks overtook tsarist Russia, Republican Attorney General Mitchell Palmer, fearing an American revolution, violated constitutional norms and textual protections in detaining thousands of suspected radicals. For Palmer, bending constitutional rules was necessary to preserve the constitutional system. Prohibitionists, their electoral base in rural dry counties, worried that reapportionment toward

[31] Engstrom, "Stacking the States, Stacking the House."

pro-liquor cities would turn the House against a prohibition amendment. And Republicans, recapturing the House in 1918, were loath to empower Democratic-leaning cities.[32]

Congressional Republicans understood the stakes of reapportionment. The old nineteenth century division between Western free and slave or Democratic and Republican states, determining House, Senate, and Electoral College apportionment, faded with the full incorporation of the West in 1912, giving new emphasis to the division between urban and rural states and districts, with congressional Republicans increasingly relying on the latter. Early congressional reapportionment figures from the 1920 Census showed Republican-leaning New England losing three seats while the solidly Democratic South lost none. Ten rural states would lose seats and eight urbanizing states would gain seats. Old tools to insulate rural power against urban population growth now failed. Declining rural districts, rather than losing House seats to cities during decennial reapportionment, had instead retained seats as Congress created new House seats for urban constituencies, expanding the House from 292 to 435 members between 1880 and 1910. But by 1920, members refused to add seats to the now crowded chamber. With the Senate tied, Republican counter-majoritarian tactics had begun faltering.[33]

The Republican-controlled Congress delayed reapportionment. During the Sixty-Sixth Congress, senators from rural states blocked a House-sponsored bill to cap House membership at 435 and reapportion seats from rural to urban states. In November 1920, Republicans captured a 300 to 132 House majority and 59 to 39 Senate majority for the Sixty-Seventh Congress. Torn between competing apportionment formulas, in 1921 the new Republican Congress instead focused on capping eastern and southern European immigration and in 1922 derailed reapportionment by proposing using the Fourteenth Amendment to strip House seats from those Southern states disenfranchising men on the basis of race.[34] The House Census Committee took no action under

[32] Richmond Hobson, a former congressman, joined the prohibitionist Anti-Saloon League after losing reelection to Congress, and in March 1917 encouraged League legislative strategist Ernest Cherrington to seek amendment passage before the 1920 Census. In *Gatsby*, Fitzgerald refers to "*The Rise of the Colored Empires* by this man Goddard." Kerr, *Organized for Prohibition*, 139–59, 187–94; Blocker, *American Temperance Movements: Cycles of Reform*, 111–19; Kyvig, *Explicit and Authentic Acts*, 220–21; McGirr, *The War on Alcohol*, 22–23; Anderson, *The American Census*, 133–36.
[33] Anderson, *The American Census*, 136–40.
[34] Within weeks of convening, the Sixty-Seventh Congress passed the 1921 Emergency Quota Act to stem European immigration, and in 1924 Congress' National Origins Act apportioned immigration quotas by national origin, cherry-picking 1890 Census data to slow eastern and southern European immigration. Anderson, 140–48.

the Sixty-Eight Congress, and by the Sixty-Ninth Congress, the House twice rejected procedural motions to circumvent the Committee and vote directly on reapportionment. Only in June 1929, when Herbert Hoover called a special session to resolve the matter, did Congress pass a bill, which was quickly superseded by the 1930 Census, reported six months later. Even so, the Supreme Court interpreted the 1929 act to allow gerrymandering and malapportionment that entrenched rural power until the Court's watershed 1960 reapportionment decisions. During the 1920s, congressional polarization, parity, and gridlock allowed rural and Republican members to intentionally delay census reapportionment, violating longstanding procedural norms, in order to durably entrench factional interests and shift institutional arrangements.[35]

Coda: Hardball and Court-Constraining Amendments

Constitutional hardball occurs when officials bend or manipulate lawmaking procedure for partisan gain. This essay concludes with a digression considering whether contemporary congressional use of the Article V amendment process qualifies as constitutional hardball. While members of Congress had long used the Article V amendment process with relative sincerity, proposing amendments to solve common, structural constitutional problems, in the mid-1960s, proposals for Article V amendments shifted in several ways. The number of proposed amendments increased as members began proposing more amendments, often by the hundreds. Further, while prior proposal of amendments followed a "random walk" pattern through the year, with amendments proposed haphazard, addressing passing problems and issues, by the 1960s, members increasingly proposed amendments the first days of each session, often then abandoning these proposals.

[35]*Ward v. Broom*, 287 U.S. 1 (1932); Baker v. Carr, 369 U.S. 186 (1962); Wesberry v. Sanders, 376 U.S. 1 (1964); Reynolds v. Sims, 377 U.S. 533 (1964); Anderson, 148–55.

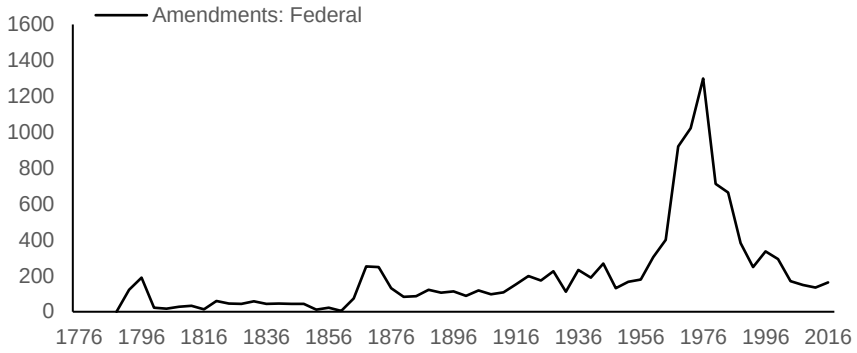

Figure 2: Proposed Federal Amendments, 1788-2014

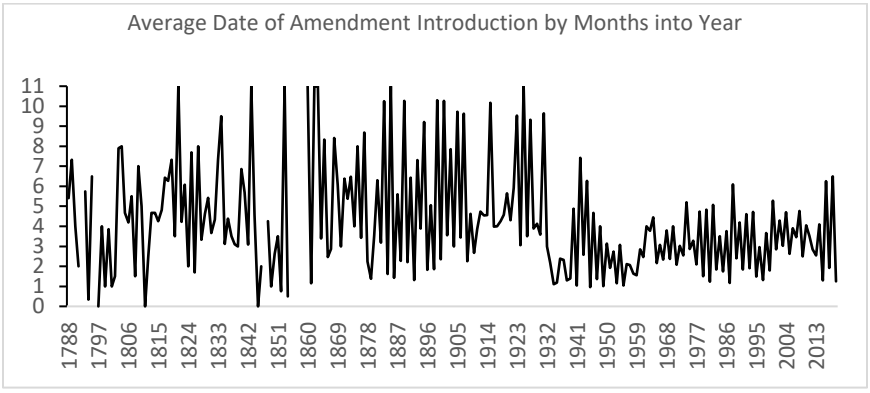

Figure 3: Proposed Amendments by Date of Introduction, 1788-2014

Finally, and most importantly, the content of amendments changed. Increasingly, members, especially Republicans, proposed amendments to override evidently liberal Warren and Burger Court decisions. Conservatives proposed dozens of amendments overriding court-mandated legislative reapportionment after *Reynolds v. Sims*, forbidding bussing after *Swan v. Charlotte-Mecklenburg Board of Education*, outlawing abortion after *Roe v. Wade*, and prohibiting flag burning after *Texas v. Johnson*. Members used these amendments as position-taking tools to please partisan constituents and better their reelection chances. For example, in the decade following the 1962 *Engel v. Vitale* decision outlawing public school prayer, members proposed 559 amendments to legalize the practice, having proposed only eighteen amendments on the topic before.[36] These amendments stood little chance of clearing Article V supermajority thresholds but did help mobilize Republicans' growing evangelical base in the 1970s. As such,

[36] *Engel v. Vitale*, 370 US 421 (1962); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Swann v. Charlotte-Mecklenburg Board of Education*, 402 US 1 (1971); *Roe v. Wade*, 410 U.S. 113 (1973); *Texas v. Johnson*, 491 U.S. 397 (1989).

the amendments were largely symbolic. As Arkansas senator Dale Bumper out it: "Constitutional amendments are palpable nonsense," because they are "all crafted for political advantage." In proposing these symbolic, partisan amendments, members abandoned the longstanding lawmaking norm that Article V proposals be offered in earnest, and often, though not always, in ways that recognize separation of powers. Members' neglect of lawmaking norms for the sake of partisan electoral gain may qualify as constitutional hardball. In future work, I plan to expand this case.[37]

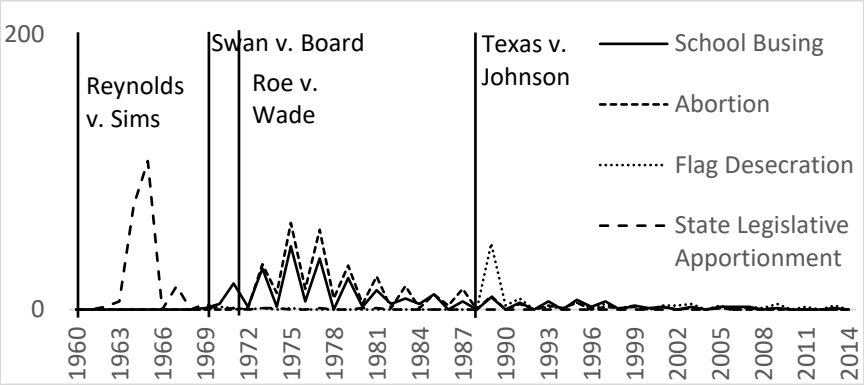

Figure 4: Proposed Court-Curbing Amendments, 1960-2014

From this paper we can draw a few conclusions on the practice of constitutional hardball. First, constitutional hardball seems endemic to congressional lawmaking. As Ackerman and Tushnet show, members of Congress use hardball tactics to entrench party interests during moments of partisan and constitutional transformation – consider the 1867 Military Reconstruction Act or 1937 Judicial Procedures Reform bill. But members often use hardball during long periods of congressional party parity, polarization, and gridlock. Sustained stalemate, impeding the normal legislative process, can even encourage hardball. Gridlock during 1920 Census reapportionment debates let rural and Republican members of Congress abdicate their responsibility to shift House and Electoral College seats toward urbanizing states, thereby violating lawmaking norms while entrenching their electoral interests. Second, relatedly, partisan entrenchment of electoral and judicial power, durably shaping political arrangements and constitutional rules and norms, occurs outside of transformative moments. This suggests that significant constitutional reform,

[37] Mayhew, *Congress*; Clymer, "Dale Bumpers, Liberal Stalwart of Arkansas Politics, Dies at 90."

rather than following abrupt the punctuated equilibrium described by scholars of party development, instead occurs more continuously. Finally, case studies from the late nineteenth and early twentieth century may have us better leverage to understand contemporary politics. Modern economic inequality, racial unrest, urban-rural divides, and congressional polarization, party parity, and gridlock recall the turn of the twentieth century, as does the current Republican Party's retention of power through counter-majoritarian hardball. Should Democrats take bicameral congressional control in November 2020, they would have strong precedent to use these narrow majorities to attempt hardball measures like, for example, statehood for the District of Columbia or Puerto Rico. The violation of procedural norms is perhaps more normal than we realize.

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