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## Evaluating Constitutional Hardball: Two Fallacies and a Research Agenda

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EVALUATING CONSTITUTIONAL HARDBALL: TWO  
FALLACIES AND A RESEARCH AGENDA

*Joseph Fishkin\** & *David E. Pozen\*\**

*This Reply addresses the responses by Professors David Bernstein and Jed Shugerman to our essay Asymmetric Constitutional Hardball. Bernstein’s response, we argue, commits the common fallacy of equating reciprocity with symmetry: assuming that because constitutional hardball often “takes two” to play, both sides must be playing it in a similar manner. Shugerman’s response, on the other hand, helps combat the common fallacy of equating aggressiveness with wrongfulness: assuming that because all acts of constitutional hardball strain norms of governance, all are similarly damaging to democracy. We suggest that whereas Bernstein’s approach would set back the burgeoning effort to study constitutional hardball, Shugerman’s distinction between hardball and “beanball” provides a useful starting point for theorizing the conditions under which constitutional hardball may be more or less justified as a matter of political and constitutional morality.*

## INTRODUCTION

In our essay *Asymmetric Constitutional Hardball*, we argue that from the mid-1990s to the present, both Republican and Democratic officials have engaged in significant amounts of constitutional hardball, often in response to each other, but that this practice has not been symmetric. Republicans have engaged in more frequent and intense constitutional hardball than Democrats. Our essay offers a multilevel explanation for this asymmetry, which we think is crucial for understanding the past quarter century of American politics.<sup>1</sup>

From the moment we began this project, we knew it would entail serious methodological challenges. There are many kinds of constitutional hardball and few straightforward ways to quantify most of them. Assessing particular cases is not only inherently complex but also deeply entangled with the sometimes-vehement claims of partisans and participants themselves about how different episodes ought to be characterized—claims

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1. Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 *Colum. L. Rev.* 915 (2018).

that are endemic to the practice of constitutional hardball. Nevertheless, we concluded that the evidence of asymmetric constitutional hardball is sufficiently robust, and the stakes of understanding its causes and effects sufficiently high, that we ought to move ahead with our analysis.

We are thankful to Professors David Bernstein and Jed Shugerman for thoughtful and detailed responses to our essay. They come at the subject from opposite directions. Bernstein contests our claim that there is a current asymmetry in the practice of constitutional hardball. He argues that when one considers certain examples of Democratic constitutional hardball that we did not discuss, and in addition when one reallocates more of the responsibility for various government shutdowns to Democrats, the appearance of partisan imbalance disappears.<sup>2</sup> Shugerman argues the reverse. According to Shugerman, our essay substantially *understates* the degree of asymmetry, both by omitting certain examples of Republican constitutional hardball and by failing to emphasize the distinctiveness and severity of some of the examples we do discuss.<sup>3</sup>

The responses differ, as well, in their methodological approaches. Bernstein is intensely skeptical of the proposition that it is ever possible to determine whether one side is playing more aggressive constitutional hardball, at least in situations where both sides are playing to some extent.<sup>4</sup> He is particularly skeptical that it is ever possible to apportion greater responsibility for a government shutdown to one side over another, given that shutdowns necessarily involve the failure of two sides to reach an agreement.<sup>5</sup>

Shugerman, on the other hand, agrees with our basic asymmetry thesis but insists that some instances of constitutional hardball are so much more egregious than others as to require an additional conceptual category.<sup>6</sup> He calls this category “beanball.” Roughly, beanball consists of political actors breaching norms of constitutional politics in an especially antidemocratic fashion, attempting, as it were, to knock their opponents

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2. David E. Bernstein, *Constitutional Hardball Yes, Asymmetric Not So Much*, 118 *Colum. L. Rev. Online* 207 (2018) [hereinafter Bernstein, *Constitutional Hardball*], [http://columbialawreview.org/wp-content/uploads/2018/12/Bernstein-CONSTITUTIONAL\\_HARDBALL\\_YES\\_ASYMMETRIC\\_NOT\\_SO\\_MUCH.pdf](http://columbialawreview.org/wp-content/uploads/2018/12/Bernstein-CONSTITUTIONAL_HARDBALL_YES_ASYMMETRIC_NOT_SO_MUCH.pdf) [<http://perma.cc/SSA8-XZXM>].

3. Jed Handelsman Shugerman, *Hardball vs. Beanball: Identifying Fundamentally Antidemocratic Tactics*, 119 *Colum. L. Rev. Online* 85 (2019), <http://columbialawreview.org/content/hardball-vs-beanball-identifying-fundamentally-antidemocratic-tactics/> [<http://perma.cc/PU76-PVMF>]. The basic disagreement between Bernstein and Shugerman bears out a prediction made in the conclusion of *Asymmetric Constitutional Hardball*: “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.” Fishkin & Pozen, *supra* note 1, at 976.

4. See Bernstein, *Constitutional Hardball*, *supra* note 2, at 208–11.

5. See *id.* at 210–11.

6. See Shugerman, *supra* note 3, at 87–89.

out of the game.<sup>7</sup> Whereas Bernstein would seemingly lump all hardball acts and actors together—not only denying the existence of any meaningful partisan discrepancy but also abandoning the entire endeavor of investigating patterns of distribution or questions of responsibility—Shugerman would split the field further—not only distinguishing constitutional hardball from ordinary politics but also distinguishing ordinary hardball from extraordinary beanball.

The contrast between these two responses is illuminating. We believe that much of Bernstein's analysis is based on a fundamentally flawed premise: that whenever it can be shown that constitutional hardball is *reciprocal*, in the sense that both sides are playing, it follows that such hardball is also *symmetrical*, in the sense that both sides are playing in a similar manner. We can understand the appeal of this premise. It seems to offer an escape from the difficulty of evaluating which political maneuvers place more or less strain on existing norms of governance and which political actors bear more or less responsibility for such strain. Unfortunately, however, that escape route is a mirage. The student of constitutional hardball cannot avoid making these kinds of contestable judgments—and indeed, they are at the heart of Bernstein's own account of recent political history. Even if evaluating practices of hardball may be an irreducibly interpretive enterprise,<sup>8</sup> certain interpretations of the record are bound to be better supported, both by the contextual evidence and by the relevant legal and political science literatures. Sober analysis in the service of identifying these interpretations is essential to making sense of our constitutional life.

Shugerman's key methodological move holds considerably more promise for the burgeoning effort, which our essay seeks to advance, to deepen understanding of constitutional hardball.<sup>9</sup> The concept of beanball needs further clarification and development, in our view. But it supplies a thought-provoking starting point for refining normative

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7. See *id.* at 88.

8. Cf. Josh Chafetz & David E. Pozen, How Constitutional Norms Break Down, 65 *UCLA L. Rev.* 1430, 1439 (2018) (noting that “all judgments about norm following and norm violating are subject to . . . interpretive contestation,” “usually in the absence of an authoritative adjudicator”).

9. In addition to our own essay and Professor Mark Tushnet's foundational piece, Mark Tushnet, *Constitutional Hardball*, 37 *J. Marshall L. Rev.* 523 (2004), see, for example, Steven Levitsky & Daniel Ziblatt, *How Democracies Die* 106–27 (2018); Greg Sargent, *An Uncivil War: Taking Back Our Democracy in an Age of Trumpian Disinformation and Thunderdome Politics* 145–52 (2018); John M. Carey et al., *Searching for Bright Lines in the Trump Presidency*, 17 *Persp. on Pol.*, no. 3, 2019, at 1, <http://doi.org/10.7910/DVN/IYWXMF> [<http://perma.cc/EA5J-4WNM>]; and Matthew A. Seligman, *Constitutional Politics, Court Packing, and Judicial Appointments Reform* (Cardozo Law Sch., Legal Studies Research Paper No. 548, 2018), <http://ssrn.com/abstract=3210665> (on file with the *Columbia Law Review*).

assessments of the government shutdowns, showdowns, and myriad other forms of hardball that the nation is likely to face in the near future.

### I. RECIPROCAL YES, SYMMETRICAL NOT SO MUCH

Bernstein challenges *Asymmetric Constitutional Hardball's* descriptive thesis in two main ways: by enumerating some examples of alleged Democratic constitutional hardball, especially by the Obama Administration, that are missing from our analysis<sup>10</sup> and by contesting our claim that congressional Republicans bear greater responsibility than Democrats for government shutdowns and threatened shutdowns during the Clinton and Obama Administrations.<sup>11</sup> Shugerman's response exposes a number of serious problems with Bernstein's examples as well as a host of important "omissions" in his historical narrative.<sup>12</sup> We agree with Shugerman's critiques and will not tax readers' patience by repeating them here. (We have additional disagreements with Bernstein that we discuss briefly in section I.B.) Let us focus, instead, on the question that Bernstein poses to frame his response: "Who [is] to [b]lame for a '[s]hutdown'?"<sup>13</sup>

#### A. *Responsibility for Government Shutdowns*

As we write this sentence, on January 23, 2019, the U.S. government is in the midst of the longest partial shutdown on record.<sup>14</sup> Hundreds of thousands of government employees have been furloughed or forced to work for extended periods without pay. Untold numbers of other Americans have had their lives and livelihoods unsettled. In terms of sheer length and magnitude of disruption, this shutdown appears to be at least a modest escalation of the shutdown hardball that has occurred in recent decades. But who is doing the escalating? Is there any way to tell?

Bernstein's central critique of our essay is that assessing responsibility for acts of constitutional hardball is a hopelessly subjective exercise. Comparative analyses such as ours, he asserts, are doomed to "dubious empirical validity."<sup>15</sup> To support this assertion, Bernstein focuses on our discussion of government shutdowns, which he notes are "one of the . . . primary examples" we give of an area in which constitutional hardball has been asymmetric.<sup>16</sup> We suggest in our essay that House Speaker Newt Gingrich and his Republican allies in Congress played harder hardball

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10. Bernstein, *Constitutional Hardball*, supra note 2, at 209, 212–17.

11. *Id.* at 210–12.

12. Shugerman, supra note 3, at 86.

13. Bernstein, *Constitutional Hardball*, supra note 2, at 210.

14. See generally *The Longest Shutdown*, NBC News, <http://www.nbcnews.com/holidayshutdown> [<http://perma.cc/8P8V-QH8N>] (last visited Jan. 24, 2019).

15. Bernstein, *Constitutional Hardball*, supra note 2, at 208.

16. *Id.* at 209.

than President Bill Clinton when the government shut down in 1995.<sup>17</sup> Bernstein questions our appraisal of this episode and submits that, in important respects, Clinton was the aggressor.<sup>18</sup> Similarly, with regard to the most recent shutdown, one might ask whether it is fair to lay more of the blame at the feet of President Donald Trump rather than House Speaker Nancy Pelosi and her Democratic allies in Congress. Every government shutdown involves some sort of bargaining breakdown in which at least two political factions make choices that fail to result in an agreement. There is thus a kind of formal symmetry between the bargainers, in that each has failed to accede to the other's demands. As the Associated Press put it in a much-discussed (and quasi-retracted<sup>19</sup>) tweet: "[I]t takes two to tango. Trump's demand for \$5.7 billion for his border wall is one reason for the budget impasse. The Democrats['] refusal to approve the money is another."<sup>20</sup> The Associated Press's tweet mirrors Bernstein's approach.<sup>21</sup>

Is this really the best that a fair-minded political observer can do? We doubt it. Any number of pieces of evidence might be marshalled in support of a more substantive allocative assessment. With regard to the most recent shutdown, for instance, the first clue is the President's own words. "I am proud to shut down the government for border security," Trump said in a high-profile televised meeting with Democratic congressional leaders.<sup>22</sup> "If we don't get what we want . . . I will shut down the government, absolutely. . . . And I'll tell you what, I am proud to shut down the government for border security . . . . So I will take the mantle. I will be the [one] to shut it down."<sup>23</sup> While not conclusive evidence, these statements

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17. Fishkin & Pozen, *supra* note 1, at 930, 963.

18. See Bernstein, *Constitutional Hardball*, *supra* note 2, at 210 ("From a purely constitutional perspective, if Congress passes a spending bill that would keep the government open and the President vetoes it, then the President—not Congress—has shut down the government.").

19. See Erik Wemple, *Update: AP Walks Back Tweet That Blamed Both Sides for Government Shutdown*, *Wash. Post* (Jan. 9, 2019), <http://www.washingtonpost.com/opinions/2019/01/09/associated-press-stands-by-tweet-blaming-both-sides-government-shutdown> [<http://perma.cc/L3KC-WLDY>].

20. AP Politics (@AP\_Politics), *Twitter* (Jan. 8, 2019), [http://twitter.com/AP\\_Politics/status/1082857277084893184](http://twitter.com/AP_Politics/status/1082857277084893184) [<http://perma.cc/6ZTA-EQ9R>].

21. Compare *id.*, with Bernstein, *Constitutional Hardball*, *supra* note 2, at 210 ("[I]f the President and Congress are unable to reach a compromise that would lead the President to sign a spending bill passed by Congress, both the President and Congress played constitutional hardball to shut down the government.").

22. Aaron Blake, *Trump's Extraordinary Oval Office Squabble with Chuck Schumer and Nancy Pelosi, Annotated*, *Wash. Post* (Dec. 11, 2018), <http://www.washingtonpost.com/politics/2018/12/11/trumps-extraordinary-oval-office-squabble-with-chuck-schumer-nancy-pelosi-annotated> [<http://perma.cc/QSP9-78QF>].

23. *Id.* Bernstein acknowledges that in the 1995 episode "some congressional Republicans, including Speaker Gingrich, made public statements essentially welcoming a shutdown." Bernstein, *Constitutional Hardball*, *supra* note 2, at 212.

strongly support the proposition that the President intended to cause a shutdown, that he was “proud” to play this form of constitutional hardball in order to “get what we want.”

President Trump’s claim of responsibility is also supported by undisputed facts. A government shutdown might arise because each side seeks reforms to the budget or the budgetmaking process that the other side refuses to accept. This was not that sort of shutdown. In this case, one side (here, the Democrats) repeatedly passed “clean” continuing resolutions to reopen the government, with no demands for changes to the baseline of budgets hammered out in prior rounds of negotiation, while the other side (here, the President supported by Senate Republicans) pressed for a significant change to that baseline (specifically, \$5.7 billion in funding for “the wall”) and insisted that it would not allow the government to be reopened until this singular demand was met.<sup>24</sup> Only one side was using the shutdown as a means to push through a high-priority political objective. For reasons we discuss in *Asymmetric Constitutional Hardball*, it is not altogether surprising that a party ideologically committed to attacking the federal government on a variety of fronts might find federal government shutdowns an appealing form of policy leverage.<sup>25</sup> Seeing this requires the sort of context-sensitive, political-sociological analysis that Bernstein wishes to discredit.

Historical events are susceptible to multiple interpretations, both immediately and over time. But some interpretations may nevertheless be superior to others.<sup>26</sup> Bernstein’s retrospective reimagining of the Clinton–Gingrich confrontation inadvertently illustrates this point quite

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24. See, e.g., Juliegrace Brufke, House Votes on 10th Bill to Reopen Government, Hill (Jan. 23, 2019), <http://thehill.com/homenews/house/426666-house-passes-eighth-bill-to-reopen-government> [<http://perma.cc/K52M-7HJD>] (discussing “the 10th clean-funding measure that Democrats have voted on to end the partial government shutdown, with most of them passing in the chamber”); Burgess Everett & Marianne Levine, Senate Set to Reject Government Funding Plan It Once Embraced, Politico (Jan. 23, 2019), <http://www.politico.com/story/2019/01/23/senate-government-funding-votes-fail-1121640> [<http://perma.cc/F2YY-GCLW>] (recounting some of this history and reporting that, according to an anonymous Republican Senator, “GOP leaders are trying to crush the [latest] ‘continuing resolution’ to force Democrats to negotiate on Trump’s border wall”). The “clean” continuing resolutions play a useful role here as an objective indicator of which side was insisting on changes to the status quo. By themselves, these resolutions are not dispositive evidence of their opponents’ playing harder hardball. But they are strong evidence, particularly in the absence of some exigency so recent that it could not have been dealt with in the last budget agreement and so significant that it calls into question the relevance of the previously agreed-upon budget baseline.

25. See Fishkin & Pozen, *supra* note 1, at 961–65.

26. Cf. Martin S. Flaherty, History “Lite” in Modern American Constitutionalism, 95 Colum. L. Rev. 523, 551 (1995) (noting that while historians do not necessarily “determine what is historically true,” “they commonly resolve what is historically convincing”); Thomas L. Haskell, Objectivity Is Not Neutrality: Rhetoric vs. Practice in Peter Novick’s *That Noble Dream*, 29 Hist. & Theory 129, 134 (1990) (defending a “conception of objectivity,” implicitly shared by most historians, that is “compatible with strong political commitment”).

well. Because Shugerman refutes Bernstein's account of this confrontation at some length,<sup>27</sup> we will not belabor it here. But the view that Clinton broke more rules of normal constitutional politics than Gingrich during the 1995 shutdown is simply a poor interpretation of what happened. The preexisting patterns of legislative-executive budgetary negotiations, the parties' rhetoric about their actions, the parties' goals and intentions (to the extent they can be discerned), and the contemporaneous responses of knowledgeable observers can each inform a judgment about the extent to which either side is playing constitutional hardball.<sup>28</sup> In the shutdowns of the mid-1990s, these factors all point toward Gingrich as the disrupter of the constitutional status quo and the harder hardball player.<sup>29</sup>

Accordingly, Bernstein's suggestion that Clinton was equally or even more responsible than Gingrich for shutting down the government does not demonstrate what Bernstein implies it demonstrates: that assessing the partisan distribution of constitutional hardball is a fool's errand. On the contrary, Bernstein's own chief example demonstrates that such assessments can be made with reasonable empirical validity and without compromising norms of scholarly objectivity. There is a broad consensus that Gingrich was the principal constitutional norm-breaker in this instance, a consensus buttressed by multiple overlapping forms of evidence.

And so, rather than flip one of our main examples on its head, Bernstein's discussion of government shutdowns devolves into a recapitulation of points we ourselves emphasize in *Asymmetric Constitutional Hardball*: that "constitutional hardball is by nature reciprocal" and that "both Democratic and Republican officeholders engage in it to some substantial extent."<sup>30</sup> No one disputes this. It is a fallacy, however, to conflate this observation about hardball *reciprocity* with a conclusion of hardball *symmetry*.<sup>31</sup> As we stress in our essay, "even if constitutional hardball is by

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27. Shugerman, *supra* note 3, at 94–96.

28. *Asymmetric Constitutional Hardball* canvasses dozens of historical examples, without dwelling at length on any, and it examines possible drivers of hardball asymmetry at a wholesale rather than a retail level. But for any given constitutional confrontation, these same sorts of factors can be analyzed to help get purchase on which side, if any, is playing hardball and to what degree.

29. In addition to Shugerman's valuable discussion of this episode, see Fishkin & Pozen, *supra* note 1, at 961–65, 963 n.189 (quoting Gingrich and other Republican leaders as expressing excitement about closing the government and explaining why contemporary Republicans are more predisposed than Democrats to support shutdowns); and 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) (describing ways in which Gingrich's behavior during the 1995 shutdown "dramatically . . . departed from conventional inter-branch practice" as well as public sentiment).

30. Fishkin & Pozen, *supra* note 1, at 927.

31. When President Trump declared after the lethal violence at the August 2017 Unite the Right rally in Charlottesville, Virginia, that "there is blame on both sides," Full Text:

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.”<sup>32</sup> Nothing in Bernstein’s response addresses this possibility, much less refutes it.

B. *Additional Errors and an Instructive Example*

Bernstein’s other efforts to refute the asymmetry thesis miss the mark in more obvious respects. Bernstein contends, for instance, that our “focus on the twenty-five-year period beginning in 1993 . . . does not excuse ignoring the Reagan and Bush shutdowns.”<sup>33</sup> On its face, this contention seems odd: To focus on a certain historical period is, by definition, to pay less attention to other periods. The gravamen of Bernstein’s charge must therefore be that our *real* claim (assumed or implied) is that constitutional hardball has been asymmetric for much longer than twenty-five years, but that we have cherry-picked the post-1993 period in order to elide inconvenient counterexamples.

This reflects a fundamental misreading of our essay. *Asymmetric Constitutional Hardball* explicitly notes that “[a] historical study with a 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.”<sup>34</sup> The asymmetry that the essay describes and diagnoses is a story about the past quarter century

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Trump’s Comments on White Supremacists, ‘Alt-Left’ in Charlottesville, Politico (Aug. 15, 2017), <http://www.politico.com/story/2017/08/15/full-text-trump-comments-white-supremacists-alt-left-transcript-241662> [<http://perma.cc/K4YQ-A33C>], he was widely ridiculed for committing a related fallacy. It is true that it takes two “sides” (or more) to have any conflict. But it is a logical error to infer from this that the sides bear equal moral responsibility for the conflict, just as it is a logical error to assume that they must be fighting in a similar manner.

32. Fishkin & Pozen, *supra* note 1, at 927. We go on to detail many reasons, grounded in the legal and political science literatures, to suspect that this possibility has been realized in recent U.S. experience. *Id.* at 938–76. Bernstein does not attempt to dispute any of these reasons, which constitute the core of our argument.

33. Bernstein, *Constitutional Hardball*, *supra* note 2, at 212.

34. Fishkin & Pozen, *supra* note 1, at 933–34; see also *id.* at 942 n.110 (“As we have suggested, built-in counterdynamics may tend to complicate or reverse the directionality of asymmetric constitutional hardball over long political cycles.”).

or so, since the Gingrich Revolution.<sup>35</sup> We chose this period deliberately and defended the choice. Earlier periods may be different.<sup>36</sup>

Bernstein's response also focuses almost exclusively on Obama-era executive actions rather than on congressional machinations, notwithstanding our essay's argument that the clearest asymmetries can be found in legislative contexts.<sup>37</sup> He provides only one example of legislative hardball that our essay failed to consider. In support of the claim that "congressional Democrats . . . did sometimes play constitutional hardball during the Obama years,"<sup>38</sup> he calls attention to Senate Democrats' (largely symbolic) vote in 2014 in favor of a constitutional amendment to overturn *Citizens United v. FEC*.<sup>39</sup>

This reflects a fundamental misunderstanding of constitutional hardball. Absent very unusual circumstances, proposing a formal amendment to the Constitution does not "break the perceived rules of normal constitutional politics," as all acts of hardball definitionally do.<sup>40</sup> It is the epitome of playing by the rules.

The bulk of Bernstein's examples take the form of recharacterizing Obama Administration initiatives in ways that make them seem more norm-shattering, more ruthless, or otherwise more nefarious than our essay suggested. Bernstein is the legal academy's most unrelenting critic of the Obama Administration. If one believes, as he does, that this Administration was uniquely craven and "lawless"<sup>41</sup>—a view that is

35. "The way he saw it," recalls a recent chronicle of Gingrich's rise to power, "Republicans would never be able to take back the House as long as they kept compromising with the Democrats out of some high-minded civic desire to keep congressional business humming along." McKay Coppins, *The Man Who Broke Politics*, Atlantic (Nov. 2018), <http://www.theatlantic.com/magazine/archive/2018/11/newt-gingrich-says-youre-welcome/570832> [<http://perma.cc/DP4D-UTK5>] (last updated Oct. 17, 2018). Gingrich's "strategy was to blow up the bipartisan coalitions that were essential to legislating, and then seize on the resulting dysfunction to wage a populist crusade against the institution of Congress itself." *Id.*

36. Although we acknowledge Shugerman's careful dissection of what occurred during the shutdowns of the Reagan and Bush years, we do not take the position (and here we may differ with Shugerman) that the present pattern of asymmetric constitutional hardball necessarily predates Gingrich's speakership. The constitutional-governance dynamics of those years were distinct, in no small part because of a less polarized Congress.

37. See, e.g., Fishkin & Pozen, *supra* note 1, at 920 ("[T]he 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."); *id.* at 937 n.95 ("[W]e observe greater asymmetry [in Congress].").

38. Bernstein, *Constitutional Hardball*, *supra* note 2, at 217.

39. 558 U.S. 310 (2010).

40. Fishkin & Pozen, *supra* note 1, at 925. More formally, we define constitutional hardball as political maneuvers that "violate[] or strain[] constitutional conventions for partisan ends" or "attempt[] to shift settled understandings of the Constitution in an unusually aggressive or self-entrenching manner." *Id.* at 921–23 (emphasis omitted).

41. See generally David E. Bernstein, *Lawless: The Obama Administration's Unprecedented Assault on the Constitution and the Rule of Law* (2015).

commonplace in right-wing media but that has little correspondence with reality as most everyone outside that epistemic community sees it—then reading many of President Obama’s behaviors as outrageous instances of constitutional hardball may make some sense. Absent that belief, Bernstein’s catalog of “unilateralist tactics”<sup>42</sup> looks far less compelling. Like all of his recent predecessors, President Obama engaged in some forms of executive action that pressed various envelopes. Unlike his predecessors, Obama generally did so in response to “unyielding opposition” by congresspersons from the other party to his policies and to the legitimacy of his presidency.<sup>43</sup> Bernstein’s portrait of rampant lawlessness under President Obama’s watch is not simply uncharitable; it carries overtones of the “paranoid” political worldview identified by Richard Hofstadter<sup>44</sup> and foregrounded by Shugerman.<sup>45</sup>

Consider for a moment the central charge in Bernstein’s bill of particulars. His depiction of the Obama Administration’s efforts to reach a nuclear nonproliferation deal with Iran as “a particularly important example of Democratic constitutional hardball”<sup>46</sup> not only rests on a hyperbolic account of the deal’s development (and one that entirely ignores the extreme tactics of its opponents) but also glosses over the critical detail that the Administration framed the deal as a legally nonbinding “political commitment.”<sup>47</sup> As Professor Marty Lederman explained at the time, “Presidents and their diplomatic agents have been entering into such nonbinding political agreements on behalf of the U.S. for over a century,” in all cases without congressional approval, to the point that such agreements are now “ubiquitous.”<sup>48</sup> As Professor Jack Goldsmith has highlighted, the nonbinding formulation also made the deal relatively easy to undo, “pav[ing] the way for President Trump to withdraw from it” unilaterally.<sup>49</sup> Constitutional hardball by the Obama

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42. Bernstein, *Constitutional Hardball*, supra note 2, at 219.

43. Robert Draper, *Do Not Ask What Good We Do: Inside the U.S. House of Representatives*, at xix (2012); see also Fishkin & Pozen, supra note 1, at 932–33 (elaborating on this point); David E. Pozen, *Self-Help and the Separation of Powers*, 124 *Yale L.J.* 2, 6–8 (2014) (same).

44. See Fishkin & Pozen, supra note 1, at 973–75 (discussing Richard Hofstadter, *The Paranoid Style in American Politics*, *Harper’s Mag.*, Nov. 1964, at 77).

45. Shugerman, supra note 3, at 89, 121–22.

46. Bernstein, *Constitutional Hardball*, supra note 2, at 222.

47. Curtis A. Bradley & Jack L. Goldsmith, *Presidential Control over International Law*, 131 *Harv. L. Rev.* 1201, 1220 (2018).

48. Marty Lederman, *Congress Hasn’t Ceded Any Constitutional Authority with Respect to the Iran JCPOA*, *Balkinization* (Aug. 8, 2015), <http://balkin.blogspot.com/2015/08/congress-hasnt-ceded-any-constitutional.html> [<http://perma.cc/V7JE-26HN>].

49. Jack Goldsmith, *The Trump Administration Reaps What the Obama Administration Sowed in the Iran Deal*, *Lawfare* (May 9, 2018), <http://www.lawfareblog.com/trump-administration-reaps-what-obama-administration-sowed-iran-deal> [<http://perma.cc/M2Y9-S279>].

Administration? Debatably. Hardball so “vigorous”<sup>50</sup> as to upend the whole asymmetry thesis? Hardly.

At almost the exact same time that Bernstein’s response was published (on December 7, 2018), before the most recent federal government shut-down, American politics supplied an instructive example of asymmetric constitutional hardball at the state level. Following a template used in 2016 by their North Carolina counterparts, outgoing Republican legislators in Michigan and Wisconsin passed bills to strip authority from their states’ newly elected Democratic governors.<sup>51</sup> Meanwhile, Democrats in New Jersey proposed a reform to their state’s legislative redistricting process that many observers, though not all,<sup>52</sup> characterized as a ploy to “writ[e] gerrymandering into the State Constitution.”<sup>53</sup> Yet the New Jersey Democrats quickly backed down after being blasted by leading Democratic Party figures,<sup>54</sup> liberal media outlets,<sup>55</sup> and liberal advocacy groups<sup>56</sup> for an attempted “partisan power grab[.]”<sup>57</sup> Leaders in the Republican national network did not likewise revolt, or say much of anything, against the Michigan, North Carolina, or Wisconsin measures.<sup>58</sup>

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50. Bernstein, *Constitutional Hardball*, supra note 2, at 232.

51. See Russell Berman, ‘Wisconsin Has Never Seen Anything Like This,’ *Atlantic* (Dec. 5, 2018), <http://www.theatlantic.com/politics/archive/2018/12/wisconsin-gop-seeks-to-limit-democrat-everss-powers/577411> [<http://perma.cc/F4ZW-LDMK>]; Max Boot, *America Now Has a Party of Authoritarianism—It’s the GOP*, *Wash. Post* (Dec. 11, 2018), <http://www.washingtonpost.com/opinions/2018/12/11/america-now-has-party-authoritarianism-its-gop> [<http://perma.cc/YJ46-WQV3>]. Our essay focuses on the federal government, but it gives reasons to “expect that most of our claims about asymmetric constitutional hardball are likely to hold at the subfederal level as well.” Fishkin & Pozen, supra note 1, at 930 n.55.

52. See, e.g., Michael McDonald (@ElectProject), *Twitter* (Dec. 14, 2018), <http://twitter.com/electproject/status/1073822375093907456> [<http://perma.cc/D3NX-NZKY>] (arguing that the New Jersey Democrats’ proposed reform was based on “a cornerstone of just about every partisan fairness metric”).

53. Nick Corasaniti, *After Backlash, Democrats in New Jersey Rethink Redistricting Plans*, *N.Y. Times* (Dec. 16, 2018), <http://www.nytimes.com/2018/12/16/nyregion/redistricting-nj-democrats-republicans.html> [<http://perma.cc/NZL7-3ADE>].

54. See *id.* (discussing opposition to the proposal by Democratic Party leaders including former Attorney General Eric H. Holder Jr. as well as “progressive activists and academics”).

55. See, e.g., Mark Joseph Stern, *New Jersey Democrats’ Diabolical Gerrymandering Scheme Is an Affront to Democracy*, *Slate* (Dec. 13, 2018), <http://slate.com/news-and-politics/2018/12/new-jersey-gerrymandering-plan-bad.html> [<http://perma.cc/K8QG-TJZW>].

56. See, e.g., Tim Lau, *New Jersey’s Flawed Redistricting Measure*, *Brennan Ctr. for Justice* (Dec. 14, 2018), <http://www.brennancenter.org/blog/new-jerseys-flawed-redistricting-measure> [<http://perma.cc/WA7J-RSFK>].

57. Stern, supra note 55.

58. See Jon Green (@Jon\_Green), *Twitter* (Dec. 14, 2018), [http://twitter.com/\\_Jon\\_Green/status/1073613360707579904](http://twitter.com/_Jon_Green/status/1073613360707579904) [<http://perma.cc/62NY-CUCQ>] (calling attention to this discrepancy and its relevance for “asymmetric hardball”). It should be noted that unlike his Wisconsin counterpart Scott Walker, the outgoing Republican Governor of Michigan, Rick Snyder, vetoed some of the most contentious lame-duck legislation in late December. See Mitch Smith, *Fears of Republican Power Grab in Michigan Fade as Governor*

*Asymmetric Constitutional Hardball* emphasizes that hardball practices are shaped by a broad set of actors within each party's coalition.<sup>59</sup> As these state-level developments reflect, over the past several decades there have been more significant actors within the Democratic coalition who are apt to discourage rather than encourage various forms of constitutional hardball. Virtually any group of politicians in a two-party system will be tempted to play constitutional hardball at least semiregularly, and sometimes will go ahead and do it. Again, no one disputes this. But again, it does not follow that every group therefore approaches constitutional hardball with the same incentives and constraints or employs it with the same success.

## II. "BEANBALL" AND THE NORMATIVE EVALUATION OF HARDBALL

If the fallacy of conflating reciprocity with symmetry threatens to get in the way of clear-eyed empirical assessments of constitutional hardball, a different fallacy threatens to get in the way of clear-eyed normative assessments. Simply put, it is a mistake to assume that constitutional hardball is inevitably or irredeemably bad.<sup>60</sup> As we argue in *Asymmetric Constitutional Hardball*, "[w]hile all acts of constitutional hardball create systemic risks, . . . 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."<sup>61</sup>

*Asymmetric Constitutional Hardball* does not develop this analysis much further.<sup>62</sup> Clearly there is a great deal of work to be done, on both sides of the equation. On one side: Which kinds of contextual reasons may make constitutional hardball more defensible on democratic, legal, or other grounds? On the opposite side, equally important: Which kinds of constitutional hardball are more damaging than others, such that the reasons needed to justify them must be stronger—perhaps, in some cases, so strong that these forms of hardball will almost never be justified?

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Vetoes Bill, N.Y. Times (Dec. 28, 2018), <http://www.nytimes.com/2018/12/28/us/michigan-snyder-power-veto.html> [<http://perma.cc/NBJ9J5JT>].

59. See Fishkin & Pozen, *supra* note 1, at 943–59.

60. On the importance of not fetishizing constitutional and political norms simply in virtue of their being norms, see Chafetz & Pozen, *supra* note 8, at 1445–47; Jedediah Purdy, Normcore, *Dissent* (Summer 2018), <http://www.dissentmagazine.org/article/normcore-trump-resistance-books-crisis-of-democracy> [<http://perma.cc/5UHQ-SUK5>]; and Corey Robin, Democracy Is Norm Erosion, *Jacobin* (Jan. 29, 2018), <http://www.jacobinmag.com/2018/01/democracy-trump-authoritarianism-levitsky-zillblatt-norms> [<http://perma.cc/SND9-X7S9>].

61. Fishkin & Pozen, *supra* note 1, at 925.

62. See *id.* at 925 n.39 (“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.”).

Shugerman's distinction between hardball and beanball seeks to advance analysis of the second question. He argues that certain forms of norm-breaching behaviors, the ones he calls beanball, are different in kind from the rest in that they are "fundamentally antidemocratic"<sup>63</sup>: They aim to undermine political opponents' ability to participate in the democratic process. Voter suppression is Shugerman's paradigm case of beanball, but he maintains that a variety of other tactics, from extreme gerrymandering to racialized appeals to white constituents to the politicization of the Department of Justice, should also qualify.<sup>64</sup>

We are skeptical that the hardball/beanball distinction can be demarcated with a bright line. While Shugerman seems to suggest that hardball and beanball are distinct phenomena,<sup>65</sup> it seems to us that beanball is better understood as a subset of hardball. Shugerman's framework also raises complex and interesting issues about what qualifies as "fundamentally antidemocratic"—a test that implicates large questions of democratic theory and would be central to drawing any workable boundary around the category of examples that Shugerman groups as beanball.

That said, we think Shugerman's core point is powerful and correct. In constitutional politics, there are many different norms that members of either party might breach, and many different means for those in power to entrench their preferred view of the Constitution. But not all of these potential hardball maneuvers impose the same costs on the constitutional system. Consider two examples near the extreme ends of the spectrum. Suppose, first, that a majority party unilaterally abandons or dilutes the "blue-slip" custom through which home-state Senators have historically been allowed to block certain judges. Senate Republicans did just this in the most recent Congress,<sup>66</sup> and it clearly counts as constitutional hardball—one more foray in the long-running judicial confirmation wars. Like all constitutional hardball, such a move might be viewed as unfair, and it has the potential to undermine institutional values ranging from trust to civility to comity to cooperation. The democratic value of the blue-slip custom itself, however, was always rather dubious;<sup>67</sup> in the

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63. Shugerman, *supra* note 3, at 87.

64. *Id.* at 88, 110–21.

65. See, e.g., *id.* at 87 (describing beanball as "[w]hat goes beyond hardball").

66. See Fishkin & Pozen, *supra* note 1, at 950–51 & n.137; Fred Barnes, Mitch McConnell Goes to the Mattresses for Trump's Judicial Nominees, *Wkly. Standard* (Oct. 11, 2017), <http://www.weeklystandard.com/fred-barnes/mitch-mcconnell-goes-to-the-mattresses-for-trumps-judicial-nominees> [<http://perma.cc/U2AG-KTF6>].

67. See, e.g., *The Selection and Confirmation of Federal Judges (Part 1): Hearing Before the S. Comm. on the Judiciary, 96th Cong. 62 (1979)* (statement of David Cohen, President, Common Cause) ("The present blue slip system serves narrow political aims and should be abandoned. A selection process so rooted in personal politics is an act of political self-indulgence and inevitably undermines public respect for the judicial system . . ."); Brannon P. Denning, *The Judicial Confirmation Process and the Blue Slip*, 85 *Judicature* 218, 225 (2002) ("Despite the difficulty one has pronouncing the process

abstract, many partisans on both sides of the aisle might agree that the judicial confirmation process is better off without it.

Now consider an effort to purge the voter rolls. Suppose that election officials from one political party employ an imprecise scheme of name-and-birthday matching in order to achieve the predictable consequence of un-registering many voters who were lawfully registered, in a manner that will redound on net to the benefit of the election officials' party. Suppose as well that because of the makeup of the relevant courts, this initiative can proceed without a high risk of meaningful judicial pushback. In broad strokes, state Republican officials have been accused of spearheading such efforts in recent years.<sup>68</sup> This second example is also a form of constitutional hardball. But it differs along a number of salient axes from the first example, the most obvious of which is that to the extent that it works, it does so by (differentially) disenfranchising some of the other party's voters.

Shugerman wants us to stop calling the second example hardball and start calling it beanball. On his account, this sort of example is not simply norm-breaking; it is democracy-breaking. We agree. Anyone trying to defend such behaviors faces a very high, and perhaps insurmountable, burden of justification. Whether or not we need an entirely separate label for this category, we have compelling reasons to repudiate constitutional hardball that operates by disenfranchising political opponents. (Conversely, constitutional hardball that operates by improving the system of democratic representation, such as by enfranchising people who ought to be enfranchised but have not been, may be especially defensible.<sup>69</sup>) Even if certain other forms of hardball are equally effective at entrenching incumbents, the democratic harm of outright disenfranchisement is arguably unique.

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*unconstitutional*, the blue slip is clearly at odds with the advertised benefits of dividing responsibility for nomination and confirmation between the president and the Senate.”).

68. See Christopher Ingraham, This Anti-Voter-Fraud Program Gets It Wrong over 99 Percent of the Time. The GOP Wants to Take It Nationwide., Wash. Post: Wonkblog (July 20, 2017), <http://www.washingtonpost.com/news/wonk/wp/2017/07/20/this-anti-voter-fraud-program-gets-it-wrong-over-99-of-the-time-the-gop-wants-to-take-it-nationwide> [<http://perma.cc/X4J7-XZRQ>].

69. For a preliminary exploration of when constitutional hardball may be most defensible, see David Pozen, Hardball and/as Anti-Hardball, *Lawfare* (Oct. 11, 2018), <http://www.lawfareblog.com/hardball-and-as-anti-hardball> [<http://perma.cc/T4NC-N6HS>]. As that essay notes, future “Democratic majorities [in Congress] seeking to pass a transformative election law statute may run up against a welter of blocking ploys, from filibusters to secret holds to denials of committee quorums, unless and until they themselves resort to constitutional hardball.” Id.

## CONCLUSION

The project of *Asymmetric Constitutional Hardball* is, as the essay states, “primarily descriptive and explanatory”<sup>70</sup>: not to condemn constitutional hardball but to try to understand it better. Identifying any given behavior as constitutional hardball is only the beginning of analysis. The careful study of the phenomenon depends on an appreciation of this point.

Shugerman suggests that “fundamentally antidemocratic” modes of constitutional hardball should be judged especially harshly.<sup>71</sup> Fundamentally prodemocratic modes, in contrast, merit an opposite response. But what counts as fundamentally antidemocratic or prodemocratic, and what should we make of all the cases that lie in between? To date, there has not been much work on the question of when and why certain types of constitutional hardball may be justified as a matter of political morality. Nor has there been much work on the important question Shugerman raises of when and why certain types of constitutional hardball must be seen as beyond the pale. Developing criteria to guide both sets of judgments is a vital task for scholars and reformers alike.

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70. See Fishkin & Pozen, *supra* note 1, at 976.

71. Shugerman, *supra* note 3, at 87.