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David E. Pozen

Columbia Law School, dpozen@law.columbia.edu

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HARDBALL AND/AS ANTI-HARDBALL

David E. Pozen*

Talk of constitutional hardball is in the air. Ever since Brett Kavanaugh's confirmation to the Supreme Court, liberal commentators have been pondering tactics such as impeachment,¹ jurisdiction stripping,² and especially "packing the court"³ to a degree that would have been unthinkable a few years ago. Senate Republicans have played vigorous hardball on Supreme Court appointments in the past two Congresses, most obviously by refusing to consider Merrick Garland's nomination, and there is a strong desire among many Democrats to respond with equal or greater vigor.⁴

* Professor of Law, Columbia Law School. This essay was originally published in a slightly different form as a blog post on October 11, 2018 and was discussed by the author at the *N.Y.U. Journal of Legislation and Public Policy's* November 15, 2018 symposium on "The Senate's (Changing) Role in Judicial Confirmations."

1. See, e.g., Lisa Graves, *I Wrote Some of the Stolen Memos That Brett Kavanaugh Lied to the Senate About*, SLATE (Sept. 7, 2018, 11:43 AM), <https://slate.com/news-and-politics/2018/09/judge-brett-kavanaugh-should-be-impeached-for-lying-during-his-confirmation-hearings.html>; Ronald J. Krotoszynski Jr., *The Case for Impeaching Kavanaugh*, N.Y. TIMES (Sept. 20, 2018), <https://www.nytimes.com/2018/09/20/opinion/kavanaugh-impeachment.html>; John Nichols, *Brett Kavanaugh Should Be Impeached*, NATION (Sept. 10, 2018), <https://www.thenation.com/article/brett-kavanaugh-should-be-impeached>.

2. See, e.g., Paul Blumenthal, *Kavanaugh and Gorsuch Confirmations Force Progressives to Rethink the Supreme Court*, HUFFPOST (Nov. 25, 2018, 11:07 AM), https://www.huffingtonpost.com/entry/supreme-court-kavanaugh-gorsuch_us_5bf806e3e4b0771fb6b8489a; Gregory Koger, *How a Democratic Congress Can Push Back Against the Supreme Court*, VOX (Nov. 12, 2018, 9:30 AM), <https://www.vox.com/mischiefs-of-faction/2018/11/12/18080622/democratic-congress-against-supreme-court>; Samuel Moyn, *Resisting the Juristocracy*, BOSTON REV. (Oct. 5, 2018), <http://bostonreview.net/law-justice/samuel-moyn-resisting-juristocracy>.

3. See, e.g., E.J. Dionne Jr., *We Need to Stay Angry About Kavanaugh*, WASH. POST (Oct. 7, 2018), https://www.washingtonpost.com/opinions/we-need-to-stay-angry-about-kavanaugh/2018/10/07/8385ec9e-ca5c-11e8-920f-dd52e1ae4570_story.html; David Faris, *Democrats Must Consider Court-Packing When They Regain Power. It's the Only Way to Save Democracy.*, WASH. POST (July 10, 2018), <https://www.washingtonpost.com/news/made-by-history/wp/2018/07/10/democrats-must-consider-court-packing-when-they-regain-power-its-the-only-way-to-save-democracy/>; Dylan Matthews, *Court-Packing, Democrats' Nuclear Option for the Supreme Court, Explained*, VOX (Oct. 5, 2018, 3:49 PM), <https://www.vox.com/2018/7/2/17513520/court-packing-explained-fdr-roosevelt-new-deal-democrats-supreme-court>.

4. For book-length analyses of what this Democratic project might look like, see generally DAVID FARIS, *IT'S TIME TO FIGHT DIRTY: HOW DEMOCRATS CAN BUILD A*

Even before the Kavanaugh conflagration, the concept of constitutional hardball seemed to be passing into common usage—a sobering sign of the times. Introducing the idea in 2004, Mark Tushnet defined constitutional hardball as “political claims and practices . . . that are without much question within the bounds of existing constitutional doctrine and practice but that are nonetheless in some tension with existing pre-constitutional understandings.”⁵ Building on Tushnet, Joseph Fishkin and I have suggested that a political maneuver can amount to constitutional hardball when it violates or strains constitutional conventions for partisan ends or when it attempts to shift settled understandings of the Constitution in an unusually aggressive or self-entrenching manner.⁶

The concept of *anti-hardball* is less familiar. I am just beginning to think it through myself.⁷ As a first cut, we might define anti-hardball measures as those that reduce the likelihood of constitutional hardball being played by either side. Hardball tactics invite retaliation and escalation; they raise the stakes of partisan conflict. Anti-hardball policies, in contrast, forestall or foreclose tit-for-tat cycles and lower the temperature of political disputes.

Consider partisan gerrymandering. Bold gerrymandering tactics may qualify as constitutional hardball, as when Republican representatives in Colorado,⁸ Georgia,⁹ and Texas¹⁰ passed redistricting plans in the mid-2000s, notwithstanding a norm that redistricting is done only at the beginning of a decade.¹¹ The anti-hardball solution? Take away the power to draw districts from elected legislators and turn it over to a politically neutral body. Most of the world follows this approach.¹²

LASTING MAJORITY IN AMERICAN POLITICS (2018); and GREG SARGENT, *AN UNCIVIL WAR: TAKING BACK OUR DEMOCRACY IN AN AGE OF TRUMPION DISINFORMATION AND THUNDERDOME POLITICS* (2018).

5. Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 523 (2004) (emphasis omitted).

6. Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 921–23 (2018).

7. Fishkin and I discuss the concept of anti-hardball briefly in *id.* at 981.

8. See Sasha Abramsky, *The Redistricting Wars*, NATION (Dec. 11, 2003), <https://www.thenation.com/article/redistricting-wars>.

9. See Alex J. Whitman, *Pinpoint Redistricting and the Minimization of Partisan Gerrymandering*, 59 EMORY L.J. 211, 213–14, 224–35 (2009).

10. See Jeffrey Toobin, *The Great Election Grab*, NEW YORKER (Dec. 8, 2003), <https://www.newyorker.com/magazine/2003/12/08/the-great-election-grab>.

11. See Adam B. Cox, *Partisan Fairness and Redistricting Politics*, 79 N.Y.U. L. REV. 751, 752–53 (2004) (discussing the origins and significance of the norm “that redistricting occurs on a fixed ten-year cycle”).

12. See Nicholas O. Stephanopoulos, *Our Electoral Exceptionalism*, 80 U. CHI. L. REV. 769, 772 (2013) (“In all other liberal democracies, constituencies are crafted by independent commissions, not politicians . . .”).

And in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, the Supreme Court clarified that voters may use ballot initiatives to force their states to rely on independent commissions for federal congressional districts as well as state legislative districts.¹³ The anti-hardball alternative to partisan gerrymandering is sitting in plain sight.

Another way to think about anti-hardball is as the set of “good-government” rules that both sides would prefer to adopt if they had to write the rules under a veil of ignorance. I suspect that most politically engaged people, asked to create a redistricting regime without knowing anything about the partisan composition of the legislature in question, would opt for a nonpartisan or bipartisan commission model. Republican and Democratic officeholders each sacrifice something when doing anti-hardball—they limit their own ability to game the system—but they, their successors, and the general public ultimately stand to benefit from the enhanced stability and legitimacy that mutual disarmament may afford.

* * *

Now let’s return to the Supreme Court confirmation wars. Here, too, a simple anti-hardball solution is already out there: regularizing the selection process by providing for new appointments every two years and transferring justices into some sort of senior or alternative status after they have served eighteen years.¹⁴ The details can be debated. But there is little doubt that this approach would yield less opportunistic behavior around the timing of retirements and hearings, among numerous other potential benefits. Conceivably, it could be designed in a manner that is widely seen to comport with Article III’s

13. 135 S. Ct. 2652, 2671–77 (2015). This ruling is most helpful in the eighteen states that allow voters to amend the constitution by popular vote, without any legislative or gubernatorial involvement. See *Amending State Constitutions*, BALLOTPEDIA, https://ballotpedia.org/Amending_state_constitutions (last visited Mar. 26, 2019).

14. See, e.g., Steven G. Calabresi & James Lindgren, *Term Limits for the Supreme Court: Life Tenure Reconsidered*, 29 HARV. J.L. & PUB. POL’Y 769, 822–42 (2006); Akhil Reed Amar & Steven G. Calabresi, *Term Limits for the High Court*, WASH. POST, Aug. 9, 2002, at A23; Jack Balkin, *Reforming the Supreme Court*, BALKINIZATION (Feb. 13, 2009), <https://balkin.blogspot.com/2009/02/reforming-supreme-court.html>; Paul D. Carrington, *Bring the Justices Back to Earth*, N.Y. TIMES (Apr. 9, 2012), <https://www.nytimes.com/2012/04/10/opinion/bring-the-justices-back-to-earth.html>; see also Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, VOX (Oct. 10, 2018, 11:25 AM), <https://www.vox.com/the-big-idea/2018/9/6/17827786/kavanaugh-vote-supreme-court-packing> (proposing that the Court be changed from nine permanent justices to a rotating group of appellate judges or that ten politically appointed justices pick five additional justices to sit with them on the Court each year).

Good Behavior Clause¹⁵ and Article II's Appointments Clause¹⁶ and therefore would not require a constitutional amendment, only ordinary legislation. Were such a scheme to be implemented, the odds seem good that the scheme would become functionally entrenched in light of the high costs of transitioning away from it and its likely popularity with political independents. "Court packing" would lose much of its appeal.

Does this anti-hardball solution have any chance of being adopted, though? Somewhat paradoxically, the only pathway may itself involve constitutional hardball, or at least the credible threat thereof. As long as Republicans enjoy control of the Senate and the presidency, they will be disinclined to upset the procedural status quo. Yet if Democrats become increasingly energized about "taking back" the Supreme Court at a juncture when they seem poised to take over Congress and the White House, Republicans may become increasingly interested in the eighteen-year plan or a comparable reform in order to head off a partisan power grab. The best argument for initiating a debate about court packing, then, is not necessarily to lay the groundwork for packing the Court—a dangerous move no matter what the justification. The best argument, from a systemic perspective, is that such a debate might alter the political bargaining environment and increase the odds of getting to an anti-hardball solution.¹⁷

The paradox generalizes to other contexts. Take national security. President Donald Trump has been playing a lot of hardball with the intelligence and law enforcement bureaucracies—the "Deep State"—in a manner intended to destroy their credibility and independence.¹⁸ Anti-hardball, in this context, plausibly involves maintaining a firm boundary between the routine work of these agencies and the play of partisan politics. How can that boundary be shored up against President Trump's assaults? As Jack Goldsmith has chronicled, Trump's targets in the intelligence community have been breaking various norms as a form of self-defense, such as by openly criticizing the pres-

15. U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . .").

16. *Id.* art. II, § 2, cl. 2 ("[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law . . .").

17. For a game-theoretic analysis to this effect, see Matthew A. Seligman, *Constitutional Politics, Court Packing, and Judicial Appointments Reform* (Cardozo Law Sch., Legal Studies Research Paper No. 548, 2018), <https://ssrn.com/abstract=3210665>.

18. See Rebecca Ingber, *Bureaucratic Resistance and the National Security State*, 104 IOWA L. REV. 139, 153, 214–19 (2018).

ident and by leaking foreign intelligence surveillance information in unprecedented ways.¹⁹ Whether or not these responses have been wise or worthwhile is a difficult question. But in general terms, this sort of institutional hardball may be most defensible when deployed as a countermeasure to achieve a broadly appealing, anti-hardball outcome.²⁰

Voting reform raises a similar conundrum. Any future Congress in which Democrats have the power to pack the Supreme Court is also a Congress in which they have the power to enact far-reaching—and long overdue—voting rights measures, including automatic voter registration, expanded early voting, and protections against improper purges,²¹ if not also statehood for the District of Columbia and Puerto Rico. (One irony of single-minded calls for court packing is that in some ways they don't go far enough, even as they arguably go too far in other respects: Why fixate on adding a couple of justiceships when the entire system of democratic representation could be reinvigorated?) Voting rights reforms would serve an anti-hardball function, as well as a popular-sovereignty-enhancing function, insofar as they decrease incentives or opportunities for partisan gamesmanship in areas such as voter identification and poll closures.

The difficulty, of course, is that at this moment in political time most proposals to make it easier to vote would advance not only “small-d” democratic values but also “big-D” Democratic interests, at least for a while. And so, congressional Republicans can be expected to fight them tooth and nail. Democratic majorities seeking to pass a transformative election law statute—a souped-up version of the current H.R. 1,²² say—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, including elimination of the legislative filibuster.²³

19. See, e.g., Jack Goldsmith, *The Dangers in the Trump-Brennan Confrontation*, LAWFARE (Aug. 20, 2018, 9:01 AM), <https://www.lawfareblog.com/dangers-trump-brennan-confrontation>; Jack Goldsmith, *The ‘Deep State’ Is Real. But Are Its Leaks Against Trump Justified?*, GUARDIAN (Apr. 22, 2018), <https://www.theguardian.com/commentisfree/2018/apr/22/leaks-trump-deep-state-fbi-cia-michael-flynn>.

20. See generally David E. Pozen, *Self-Help and the Separation of Powers*, 124 YALE L.J. 2 (2014).

21. See, e.g., *Voting Reform Agenda*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/issues/voting-reform-agenda> (last visited Mar. 26, 2019).

22. For the People Act of 2019, H.R. 1, 116th Cong.

23. Cf. Burgess Everett, *Warren Calls for Ending the Filibuster*, POLITICO (Apr. 5, 2019, 8:41 AM), <https://www.politico.com/story/2019/04/05/elizabeth-warren-filibuster-2020-election-1259196> (calling attention to an announcement by Democratic Senator and presidential candidate Elizabeth Warren that she supports eliminating the

One complication here is the possibility that hardball tactics, even if used in the service of anti-hardball ends, become less effective in our constitutional culture precisely to the extent that they are acknowledged as such.²⁴ Once a group has admitted that it is pursuing an extreme course of action with an eye toward a more moderate or inclusive equilibrium, the group may give up some of the leverage that pursuit of the extreme course would otherwise have offered. As a matter of political prudence, this possibility might counsel against flaunting one's instrumental willingness to violate norms.

Further complicating things, judicial reform and voting reform cannot be entirely separated, as an "unpacked" Roberts Court could strike down a new voting rights bill on the basis of any number of creative constitutional theories. The unanticipated emergence of the activity/inactivity distinction in *NFIB v. Sebelius*²⁵ and the "equal sovereignty" principle in *Shelby County v. Holder*²⁶ suggests what such creativity might look like. This possibility counsels in favor of keeping judicial reform on the agenda. Still, given Congress's broad authority under the Elections Clause²⁷ and the awkwardness of appearing to oppose voting rights, it could prove difficult for any future Supreme Court, packed or unpacked, to invalidate a comprehensive election law statute in whole or in large part. Voting-reform hardball may make sense even in the absence of judicial-reform hardball.²⁸

legislative filibuster, "[w]hen Democrats next have power," as a means to "fight back").

24. See Josh Chafetz & David E. Pozen, *How Constitutional Norms Break Down*, 65 *UCLA L. REV.* 1430, 1447–50 (2018).

25. 567 U.S. 519, 550–58 (2012).

26. 570 U.S. 529, 542–45 (2013).

27. U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations."); see also Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 *HARV. L. REV.* 95, 113 (2013) (observing that "the federal power under the Elections Clause is sufficiently broad to sweep all [of the major voting concerns of recent years] under the ambit of federal regulation"); Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 *S.C. L. REV.* 689, 727 n.261 (2006) ("The Elections Clause gives Congress the broad power to regulate congressional elections, including not only their time and place, but also registration, voter protection, fraud prevention, counting of votes, and the publication of election returns.") (citing *Smiley v. Holm*, 285 U.S. 355, 366 (1932)).

28. Cf. Joseph Fishkin & David E. Pozen, *Evaluating Constitutional Hardball: Two Fallacies and a Research Agenda*, 119 *COLUM. L. REV. ONLINE* 158, 171 (2019) ("[C]onstitutional 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.").

Implicit in this account is a belief that some amount of constitutional hardball is apt to be tolerable and indeed desirable at any given time. Norms should not be considered sacrosanct simply by virtue of being norms.²⁹ That said, the socially “optimal” amount of constitutional hardball will typically be low, and it is reasonable to assume that the United States today has significantly overshot the mark.³⁰ While anti-hardball policies (however brought into existence) can help move the political system closer toward an optimal overall level of hardball, that level is unlikely to be zero.

* * *

Anti-hardball is preferable to hardball, all else equal. As a rule, legal reformers should seek out anti-hardball solutions that align with their substantive political commitments. Many examples of constitutional hardball pursue narrow partisan gain and cannot plausibly be defended on good-government grounds; romanticizing ruthlessness is a big mistake.

But certain other examples confound this calculus. In a period of intense polarization and congressional gridlock, some of the most morally and democratically compelling forms of anti-hardball may be unattainable without the aid of hardball, whether as a means to bring both sides to the negotiating table or as a means to push through a depoliticizing reform. One important task for scholars, activists, and policymakers is to develop a better understanding of these dynamics—and to tether short-term hardball tactics, when feasible, to longer-term anti-hardball strategies.

29. See Chafetz & Pozen, *supra* note 24, at 1445–47; Jedediah Purdy, *Normcore*, *DISSENT* (Summer 2018), <https://www.dissentmagazine.org/article/normcore-trump-resistance-books-crisis-of-democracy>; Corey Robin, *Democracy Is Norm Erosion*, *JACOBIN* (Jan. 29, 2018), <https://www.jacobinmag.com/2018/01/democracy-trump-authoritarianism-levitsky-zillblatt-norms>.

30. Cf. Fishkin & Pozen, *supra* note 6, at 926 (“[N]o one seems to deny that we have been living with substantial amounts of constitutional hardball for decades now. At this point, it is the only world our politicians know.”).