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HARDBALL VS. BEANBALL: IDENTIFYING
FUNDAMENTALLY ANTIDEMOCRATIC TACTICS

*Jed Handelsman Shugerman**

The “constitutional hardball” metaphor used by legal scholars and political scientists illuminates an important phenomenon in American politics, but it obscures a crisis in American democracy. In baseball, hardball encompasses legitimate tactics: pitching inside to brush a batter back but not injure, hard slides, hard tags. Baseball fans celebrate hardball. Many of the constitutional hardball maneuvers previously identified by scholars have been legitimate, if aggressive, constitutional political moves. But the label “hardball” has been interpreted too broadly to include illegitimate, fundamentally undemocratic tactics. I suggest a different baseball metaphor for such tactics: beanball, pitches meant to injure and knock out the opposing player, against the basic rules of the game.

In this Reply to Fishkin, Pozen, and Bernstein, I first address Bernstein’s examples of President Barack Obama and Democrats engaging in hardball. I note that Fishkin and Pozen’s “asymmetry” thesis acknowledged clearly that Democrats play hardball, even if not as aggressively as Republicans have. I discuss government shutdowns, birtherism, debt ceiling threats, abuses of the Department of Justice (DOJ), and the contrasting manipulations leading to the Iraq War versus the Iran nuclear deal.

This Reply then identifies examples of Republicans’ fundamentally antidemocratic beanball: voter ID laws and other voting restrictions, extreme gerrymandering, marginalizing racial minorities, and abusing the DOJ. Beanball’s destructive politics reflect racial status anxiety, paranoia, and a panic over dispossession and the loss of historical privilege.

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INTRODUCTION

In *Asymmetric Constitutional Hardball*, Professors Joseph Fishkin and David Pozen offer a compelling argument, connecting the legal literature on “constitutional hardball” with the political science literature on asymmetric polarization.¹ “For a quarter of a century,” they contend, “Republican officials have been more willing than Democratic officials to play constitutional hardball . . . Democrats have also availed themselves of hardball throughout this period, but not with the same frequency or intensity.”² They argue that “[t]his partisan gap is in some ways analogous to the phenomenon of ‘asymmetric polarization’ that social scientists have documented” and “suggest that the two phenomena are intertwined.”³

Professor David Bernstein responds to their essay with three main points.⁴ First, government shutdowns—some of Fishkin and Pozen’s main examples of Republican constitutional hardball—are the fault of both parties and predate the 1995 Bill Clinton–Newt Gingrich hardball.⁵ Second, he offers more examples of President Obama’s hardball than Fishkin and Pozen presented.⁶ Third, he takes an extended dive into President Obama’s nuclear agreement with Iran as a “particularly important” and “aggressive” kind of constitutional hardball.⁷

This Reply to Bernstein first responds to each of these points directly, questioning some of the factual bases and interpretations of these events. This exchange exemplifies some of the challenges inherent in the discourse about partisan retaliation and tit-for-tat hardball. Each side can recite its grievances and give its own weight to them. Fishkin, Pozen, and Bernstein can each be questioned for which examples they categorize as hardball, the weight they give particular episodes, and what they omit. But Bernstein’s reminders about how Clinton and Obama played hardball miss Fishkin and Pozen’s point about reciprocity with asymmetry: Both sides are playing, but Republicans play hardball harder. A closer look at Bernstein’s examples, and his omissions, helps confirm Fishkin and Pozen’s argument.

Fishkin and Pozen acknowledge the “considerable” methodological challenges of studying chicken-and-egg escalation, both in terms of

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

2. *Id.* at 918.

3. *Id.* (footnote omitted).

4. See generally David E. Bernstein, *Constitutional Hardball Yes, Asymmetric Not So Much*, 118 Colum. L. Rev. Online 207 (2018), https://columbialawreview.org/wp-content/uploads/2018/12/Bernstein-CONSTITUTIONAL_HARDBALL_YES_ASYMMETRIC_NOT_SO_MUCH.pdf [<https://perma.cc/HVM8-VB8F>].

5. See *id.* at 210–11.

6. See *id.* at 214–16.

7. See *id.* at 209, 222–32.

historicizing it and of measuring it objectively.⁸ Their essay's goal was not to produce a definitive method of quantifying constitutional hardball or documenting its historical progression. The lived experience of the past three decades is probably sufficient to show that Republicans have played more aggressive hardball than Democrats. But if there is only one category of hardball, it's hard to debate competing partisan claims. My Reply intends to move the ball forward on hardball debates because sometimes the "hardball" metaphor falls short at the warning track.

In baseball, "hardball" is an aggressive but legitimate style of play: pitching inside, sliding hard, hard tags. All are part of the game. Mark Tushnet's original article introducing the "hardball" metaphor referred to "brushback" pitches intended to intimidate (but not strike) the batter, a legitimate, classic hardball tactic.⁹ But then there is beanball: throwing fastballs at batters' heads not just to brush back but to injure, to get retribution, or to knock the player out of the game. Beanball may happen, but it's against the rules, it's wrong, it's illegitimate, and it tends to lead to bench-clearing brawls.¹⁰ Much of what Fishkin and Pozen are debating with Bernstein are examples of hardball, but some of the debate is more helpfully categorized as a difference of kind rather than degree. Some hyperaggressive tactics are more like rigging the game or injuring the opposing players. What goes beyond hardball, becoming instead constitutional beanball? I suggest that political tactics that are fundamentally antidemocratic constitute beanball.

In baseball, the term "beanball" is not used as a subset of hardball. Teams playing hardball are not penalized, and they earn praise by most fans of the sport. But pitchers who deliberately throw beanballs are immediately ejected and fined.¹¹ Some fans might praise their own

8. See Fishkin & Pozen, *supra* note 1, at 927–28.

9. See Mark Tushnet, *Constitutional Hardball*, 37 J. Marshall L. Rev. 523, 544 (2004).

10. I looked for references to "constitutional beanball" in the legal literature but found none. In general political publications, I found the following concluding sentences in a *Salon* article by Paul Rosenberg: "Tushnet calls it 'constitutional hardball.' But at times like this, it feels like constitutional beanball, instead." Paul Rosenberg, *Ted Cruz Just Makes this Stuff Up: Scalia, the GOP and the Lies They Tell About the Constitution*, *Salon* (Feb. 20, 2016), https://www.salon.com/2016/02/20/ted_cruz_just_makes_this_stuff_up_scalia_the_gop_and_the_lies_they_tell_about_the_constitution/ [<https://perma.cc/VX35-4FWU>]; see also Paul Rosenberg, *Now They're Trying to Steal 2016: The Demented GOP Schemes to Rewire the Electoral College and Elect a Tea Party President*, *Salon* (Dec. 6, 2014), https://www.salon.com/2014/12/06/now_theyre_trying_to_steal_2016_the_demented_gop_schemes_to_rewire_the_electoral_college_and_elect_a_tea_party_president/ [<https://perma.cc/9PJ4-NU68>] ("It's not constitutional hardball, actually. It's constitutional beanball. *Batter up?*"). Following my posting of a draft of this Piece, Rosenberg published an endorsement. See Paul Rosenberg, *Welcome to the Era of Constitutional Beanball: How Republican Dirty Tricks Got Even Dirtier*, *Salon* (Feb. 9, 2019), <https://www.salon.com/2019/02/09/welcome-to-the-era-of-constitutional-beanball-how-republican-dirty-tricks-got-even-dirtier/> [<https://perma.cc/9RCD-N3C4>].

11. The unwritten rules and norms of baseball are a bit more complicated than what I have presented here. If one pitcher hits another team's player or if a player slides

pitchers' beanballs out of a sense of grievance or retribution in a specific rivalry, but such tactics are generally not respected by neutral observers or opposing fans. Similarly, one political party might praise its own leaders' extreme tactics, but when they cross the line into disenfranchisement, neutral observers would not defend them. The baseball analogy that brings these themes of beanball and politics together is the scene in the film *42* when Jackie Robinson bats against Fred Ostermueller.¹² Ostermueller, with racist intent, hits Robinson in the head to knock him out of the game.¹³ Some political tactics similarly intend to knock voters out of the game. Other sports metaphors could include flagrant fouls, targeting the head, a game misconduct, or a red-card foul. But let's stick with baseball.

Over the past several decades, Republicans have more frequently engaged in antidemocratic beanball, both by making voting more difficult for targeted groups and extreme gerrymandering.¹⁴ One might add the stigmatization and marginalization of racial minorities¹⁵ and the abuse of the Department of Justice (DOJ) for partisan prosecutions and protection along party lines.¹⁶ It is also worth noting times when leading Republicans such as President George W. Bush, and presidential nominees John McCain and Mitt Romney, admirably have refrained from hardball and beanball.¹⁷ Unfortunately, more recent history has been marked by a

aggressively enough to injure, the opposing team's pitcher will sometimes retaliate with a beanball, and many accept such retaliation as legitimate—but it is still against the rules and is grounds for ejection and fines. It also tends to lead to bench-clearing brawls. “Bench-clearing” is another baseball metaphor I've used for nineteenth-century partisan impeachment efforts and “ripper bills” that abolished courts. See Jed Handelsman Shugerman, *The People's Courts: Pursuing Judicial Independence in America* 66 (2012).

12. *42* (Legendary Pictures 2013); see also Don O'Brien, *Quincy Native Plays Key, Yet Unflattering Role in Robinson Biopic*, *Quincy Herald-Whig* (Apr. 28, 2013), <https://www.whig.com/story/22098867/quincy-native-plays-key-yet-unflattering-role-in-jackie-robinson-film#> [<https://perma.cc/84R6-KFZQ>].

13. In the actual game, Ostermueller hit Robinson on the wrist and denied racist intent. See O'Brien, *supra* note 12.

14. See *infra* Part II.

15. One important example is the “birther” conspiracy theory, a racist weaponization of the Natural-Born Citizen Clause. Donald Trump's promotion of the conspiracy theory played an important role in his rise to political prominence and is a core example of his appeals to white nationalism. See Ashley Parker & Steve Eder, *Inside the Six Weeks Donald Trump Was a Nonstop 'Birther'*, *N.Y. Times* (July 2, 2016), <https://www.nytimes.com/2016/07/03/us/politics/donald-trump-birther-obama.html> (on file with the *Columbia Law Review*) (describing how Trump harnessed “the discomfort, in some quarters of American society, with the election of the nation's first black President [reflected in the ‘birther’ movement] . . . for political gain”).

16. See *infra* notes 67–76 and accompanying text (describing the investigation into the George W. Bush Administration's firing of U.S. Attorneys for partisan reasons).

17. For example, to George W. Bush's credit, he did not demonize Arabs and Muslims after 9/11. See Mehdi Hasan, *Opinion, Why I Miss George W. Bush*, *N.Y. Times* (Nov. 30, 2015), <https://www.nytimes.com/2015/11/30/opinion/campaign-stops/why-i-miss-george-w-bush.html> (on file with the *Columbia Law Review*) (distinguishing Bush's rhetoric on Muslims from

resurgence of beanball. Identifying Republican beanball as a recurring practice over at least the past three decades, and perhaps longer, demonstrates that the antidemocratic tactics of Trumpism are not a break from the establishment Republican Party; rather, they are continuous, if only more extreme.

My Reply is not meant to serve as a neutral umpire to referee these pieces (sorry). Nor does my Reply try to fully document this historical beanball claim. Rather, it sketches out these themes and points toward some evidence for reframing this debate. Part I evaluates Bernstein's claims about Democratic hardball, suggesting that he does not take seriously the asymmetries in the history of government shutdowns or in the more aggressive Republican hardball tactics during the George W. Bush, Obama, and Trump Administrations. Part II fleshes out the concept of constitutional beanball and provides examples of the Republican Party engaging in such tactics. The bottom line is that Republicans have been more likely to engage in both hardball and beanball over the past few decades. Fishkin and Pozen highlight some structural reasons as well as some cultural and historical sources for this dynamic, citing historian Richard Hofstadter.¹⁸ I conclude by examining Hofstadter more closely on the paranoid politics of historical entitlement, dispossession, and racial status anxiety.

I. TAKING REPUBLICAN ASYMMETRIES SERIOUSLY

This Part evaluates Bernstein's examples of Democratic constitutional hardball in light of Fishkin and Pozen's thesis that the two parties play hardball asymmetrically. Section I.A reexamines the history of government shutdowns and questions Bernstein's characterization of them as a constitutional hardball tactic used by both parties. Section I.B recounts some of the unprecedented forms of Republican hardball the Obama Administration encountered throughout its existence. Section I.C discusses the Obama Administration's nuclear agreement with Iran, the example of Democratic constitutional hardball that Bernstein illustrates with greatest specificity, and suggests that the Obama Administration's

that of later Republican politicians). He did nevertheless grossly mishandle the Iraq War and use misinformation to build the case for that war. See *infra* notes 108, 126 and accompanying text.

McCain did not focus on Reverend Jeremiah Wright and rejected racist conspiracy theories about Obama during the 2008 presidential campaign. See *infra* notes 98–99, 102 and accompanying text.

Romney also did not raise Reverend Wright during his 2012 presidential campaign. He did, however, seek Trump's endorsement at a time when Trump's only political relevance was as the "Birther-in-Chief." See *infra* notes 100–101 and accompanying text.

18. Fishkin & Pozen, *supra* note 1, at 973, 975 (citing Richard Hofstadter, *The Paranoid Style in American Politics*, *Harper's Mag.* (Nov. 1964), <http://harpers.org/archive/1964/11/the-paranoid-style-in-american-politics> [<https://perma.cc/PR8R-SEV2>]).

hardball in this arena appears far less egregious when contextualized with the Republican hardball that preceded and followed it.

A. *Government Shutdowns: Details and Context Matter*

The timing of these essays is remarkable. As I write, a historic government shutdown has only recently concluded.¹⁹ And government shutdowns are the subject of Bernstein's first critique of Fishkin and Pozen's thesis. Bernstein writes: "The authors seem to believe that shutting down the government is something Republicans—but not Democrats—are inclined to do."²⁰ He asserts that both sides are to blame: "[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."²¹

But Fishkin and Pozen explicitly acknowledge that the Democrats triggered their own shutdown over the Deferred Action for Childhood Arrivals program (DACA):

In January 2018, Senate Democrats took the once-unthinkable (for Democrats) step of shutting down the government in a bid to prompt legislative action on the Deferred Action for Childhood Arrivals program that the Trump Administration had announced it would end. Yet to the dismay of their activist base, the Democrats "collapsed and accepted the Republican terms for reopening the government" within three days.²²

Bernstein does note that Fishkin and Pozen refer to the January 2018 shutdown.²³ But, recall that Fishkin and Pozen do not argue that only Republicans play hardball, nor do they argue that Presidents Clinton or Obama avoided hardball. This is a helpful moment to remember Fishkin and Pozen's thesis. They do not argue that only Republicans play hardball, nor do they argue that Presidents Clinton or Obama avoided hardball. Rather, Fishkin and Pozen recognize that "[c]onstitutional hardball remains

19. See Mihir Zaveri, Guilbert Gates & Karen Zraick, *The Government Shutdown Was the Longest Ever. Here's the History.*, N.Y. Times, <https://www.nytimes.com/interactive/2019/01/09/us/politics/longest-government-shutdown.html> (on file with the *Columbia Law Review*) (last updated Jan. 25, 2019) (describing the thirty-four-day government shutdown, which spanned from December 22, 2018, to January 25, 2019, as the longest ever).

20. Bernstein, *supra* note 4, at 210.

21. *Id.*

22. Fishkin & Pozen, *supra* note 1, at 919 n.13 (quoting Newt Gingrich, *Opinion*, *Newt Gingrich: Schumer Shutdown Turns into Schumer Surrender*, Fox News (Jan. 24, 2018), <https://www.foxnews.com/opinion/newt-gingrich-schumer-shutdown-turns-into-schumer-surrender.html> [<https://perma.cc/JNF8-QPKQ>]); see also *id.* at 961 (acknowledging that "[g]overnment shutdowns under both Clinton and Obama forced agencies to curtail nonessential operations and services for nontrivial periods of time").

23. See Bernstein, *supra* note 4, at 210 n.13.

reciprocal but not symmetrical,”²⁴ and that while “[Republican officeholders] appear to have a dominant market position” on constitutional hardball, they “clearly have no monopoly.”²⁵ Fishkin and Pozen highlight partisan escalation but emphasize its asymmetric dynamic. Bernstein is right to raise episodes of hardball that Fishkin and Pozen overlook or understate, but these reminders are not enough to overturn the balance of Fishkin and Pozen’s interpretation.

Bernstein’s own interpretation of the history of government shutdowns is a stretch. Bernstein observes that both sides bear responsibility for any shutdown; it takes two to tango.²⁶ He also criticizes Fishkin and Pozen for “ignoring the Reagan and Bush shutdowns.”²⁷ Let’s first take a closer look at those shutdowns. Before new DOJ interpretations of the Antideficiency Act in 1980 and 1981, the failure to pass a budget or a funding bill did not necessarily lead to a shutdown.²⁸ They often had no real-world effect because the departments and agencies kept running.²⁹ Bernstein then points to a “four-day shutdown” in 1981 and claims, “During the remaining Reagan and Bush years, the government shut down eight times after congressional Democrats refused to agree to the budgetary or policy demands of the Republican President.”³⁰ But Bernstein omits just how short each of these mini-shutdowns were. In fact, the 1981 shutdown lasted just two days,³¹ not four, and the resulting worker

24. Fishkin & Pozen, *supra* note 1, at 927 (emphasis omitted).

25. *Id.* at 935.

26. See Bernstein, *supra* note 4, at 210 (“At a minimum, if 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.”).

27. *Id.* at 212.

28. See Dylan Matthews, *Here Is Every Previous Government Shutdown, Why They Happened and How They Ended*, Wash. Post: Wonkblog (Sept. 25, 2013), <https://www.washingtonpost.com/news/wonk/wp/2013/09/25/here-is-every-previous-government-shutdown-why-they-happened-and-how-they-ended/> [https://perma.cc/CD8L-S7RJ] [hereinafter Matthews, *Every Previous Government Shutdown*]; see also Cong. Research Serv., RL34680, *Shutdown of the Federal Government: Causes, Processes, and Effects 4–8* (2018) [hereinafter CRS, *Federal Government Shutdown*], <https://fas.org/sgp/crs/misc/RL34680.pdf> [https://perma.cc/P6C7-DFF6] (describing DOJ’s changing legal interpretation of the Antideficiency Act’s requirements).

29. Matthews, *Every Previous Government Shutdown*, *supra* note 28; see also CRS, *Federal Government Shutdown*, *supra* note 28, at 2 (“Although a shutdown may result from a funding gap, the two events are distinct. This is because a funding gap may result in a shutdown of affected projects or activities in some instances but not others.”).

30. Bernstein, *supra* note 4, at 211.

31. See Matthews, *Every Previous Government Shutdown*, *supra* note 28; Ryan Struyk & Joyce Tseng, *The History of US Government Shutdowns in 1 Chart*, CNN (Jan. 13, 2018), <https://www.cnn.com/2018/01/13/politics/us-government-shutdowns-budget-chart/index.html> [https://perma.cc/QYC7-6RPG].

furlough was actually just one day long.³² The 1982 shutdown, the first in Bernstein's list of the additional eight, lasted just one day, and it doesn't fit Bernstein's description because it was an accidental shutdown resulting from scheduling conflicts with social events and fundraisers.³³ The remaining seven shutdowns under Reagan and Bush Sr. were not accidental, but they were remarkably short: three, three, two, one, one, one, and three days, respectively.³⁴

These shutdowns were so short and minor that when the *New York Times* wrote a "Looking Back" article on past government shutdowns as the Clinton–Gingrich shutdown loomed in 1995, it included only four of them described as times when "some Federal workers were sent home."³⁵ Funding gaps do not necessarily lead to furloughs or shutdowns with real-world impact. Notably, the "Looking Back" piece was one of the main sources for the article that Bernstein relied on for his shutdown history.³⁶ It is helpful to read the full article for context—and note how short it is:

Since 1981, the authority of Federal agencies to spend money has lapsed nine times after the Oct. 1 start of the new fiscal year. The gaps have ranged from a few hours to four days. On four occasions, some Federal workers were sent home.

NOV. 23, 1981—President Ronald Reagan, in a struggle with Congress, ordered the furlough of 241,000 of the Government's 2.1 million employees, those deemed nonessential to protect life, national security or Federal property. This was the first time a chief executive had ordered so large a shutdown of Federal operations. The Subcommittee on Civil Service of the House Committee on Post Office and Civil Service estimated that the *one-day furlough* cost taxpayers \$80 million to \$90 million in back pay and related expenses.

OCT. 4, 1984—An estimated 500,000 of the Government's 2.8 million civil servants were sent home at midday because Congress failed to approve a stopgap money bill. The furlough lasted *half a day*, and workers were back at their desks the next day. Back payments for the furlough were estimated at \$65 million.

32. See Monica Borkowski, Looking Back: Previous Government Shutdowns, *N.Y. Times* (Nov. 11, 1995), <https://www.nytimes.com/1995/11/11/us/looking-back-previous-government-shutdowns.html> (on file with the *Columbia Law Review*).

33. See Matthews, Every Previous Government Shutdown, *supra* note 28.

34. Struyk & Tseng, *supra* note 31.

35. Borkowski, *supra* note 32.

36. See Dylan Matthews, Government Shutdown 2019: All 20 Previous Government Shutdowns, Explained, *Vox* (Jan. 12, 2019), <https://www.vox.com/policy-and-politics/2018/1/19/16905584> [<https://perma.cc/VY88-LJFF>] [hereinafter Matthews, Government Shutdown 2019]; see also Bernstein, *supra* note 4, at 211 n.19 (citing an earlier iteration of Matthews, Government Shutdown 2019, *supra*, at least four times).

OCT. 17, 1986—At midday, the Government sent home 500,000 workers, all classified as nonessential, because Congress failed to pass a spending bill to keep their agencies running. *Again, the furlough lasted only half a day.* The time off was estimated by the House panel to have cost taxpayers more than \$61 million in lost work.

OCT. 6, 1990—The shutdown started on the *Saturday of the long Columbus Day weekend*. For three days the Statue of Liberty, national parks and museums were padlocked, but plans to send most of the 2.4 million Federal workers home on Tuesday, Oct. 9, were scuttled after Congress and President George Bush completed a budget deal before dawn. The General Accounting Office found that the estimated partial costs for the shutdown were \$1.7 million.³⁷

That's it. When the *New York Times* reviewed the history of these “shutdowns” for actual furloughs—periods when government workers were sent home—it found a grand total of one day, two afternoons, and a long weekend.³⁸

Why did the *New York Times* find only four furloughs if there were nine funding gaps as part of 1980s–1990s budget impasses? Media bias? No, it seems that short funding gaps are often not shutdowns at all. Consider the reporting on government closures during the 2018–2019 shutdown. According to *Politico*, federal departments and agencies did not actually run out of funds to continue their services for over a week. For ten days, departments “limped along on leftover money, coasted through the quiet days of the holidays and paid staff with checks already prepped before the lapse.”³⁹ Only in the New Year did the shutdown “get[] real”⁴⁰:

Many of the departments and agencies hit by the shutdown, which began Dec. 22, have reached a breaking point in their ability to go on with minimal disruption. They are running out of carryover cash and time to prep checks for the mid-month pay period during the lapse

. . . .

All the while, federal workers are left wondering whether they will get their next check on Jan. 11. While paychecks for federal employees went out last week after a pay period ended

37. Borkowski, *supra* note 32 (emphasis added).

38. I grew up in the Washington, D.C., area in the 1980s and early 1990s, the child of a nonessential federal employee, and I have no recollection of these furloughs, probably because they were nonevents.

39. Jennifer Scholtes, Caitlin Emma & Katy O'Donnell, How the Shutdown Is Reaching a Breaking Point, *Politico* (Jan. 1, 2019), <https://www.politico.com/story/2019/01/01/how-the-shutdown-is-reaching-a-breaking-point-1053885> [<https://perma.cc/WG4R-QABN>].

40. *Id.*

on Dec. 22, the pay period for that next check ends Saturday, and pay processing time varies from agency to agency.⁴¹

In light of these accounts, it makes sense that Fishkin and Pozen did not include these minor events—essentially a snow day, two half-days, and a long weekend—as examples of “hardball.”

But even if they are included, these shutdowns still undermine Bernstein’s claims. Bernstein’s view of these shutdowns is that they are all bipartisan. It takes both Congress and the President—and effectively, both parties—to tango: “At a minimum, if 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.”⁴²

However, this is not how shutdowns actually play out, practically, politically, or legislatively. When the President and Congress reach a budget impasse, the conventional next step is to pass a continuing resolution to keep the government funded at the status quo—to extend the same budgeting while budget negotiations continue.⁴³ Every once in a while, one side says, “No, no continuing resolution unless we get X, a change in the status quo.” Practically and politically, the side that rejects the continuing resolution status quo because of a demand to change the status quo is the side bearing more responsibility for the shutdown. In the 1980s and 1990s, Presidents Reagan and Bush were generally seeking changes to the status quo in terms of budget cuts, but Democrats often had their own demands, too.⁴⁴ Both sides usually shared responsibility, and each impasse was resolved quickly with minimal furloughs, if any.⁴⁵ There was not much hardball.

But the shutdowns of the 1990s and the twenty-first century have been different. In 1995, Gingrich and Senate Majority Leader Bob Dole passed not a status quo continuing resolution but rather one that increased Medicare premiums, deregulated the environment, and included a balanced budget requirement.⁴⁶ Clinton held out for the status quo and

41. *Id.*

42. Bernstein, *supra* note 4, at 210.

43. See Michael Doran, Legislative Entrenchment and Federal Fiscal Policy, 81 *Law & Contemp. Probs.*, no. 2, 2018, at 27, 51–52 (“[W]hen the [federal budget] process breaks down, as it often does, the preferred strategy is to enact a continuing resolution so that the budget status quo is held in place until the process successfully produces a new budget.”).

44. See Matthews, *Government Shutdown 2019*, *supra* note 36.

45. See Matthews, *Every Previous Government Shutdown*, *supra* note 28 (describing prior government shutdowns and noting that none during this period lasted more than three days).

46. See Matthews, *Government Shutdown 2019*, *supra* note 36 (“Gingrich and Dole sent Clinton a continuing resolution including hikes to Medicare premiums, rollbacks of environmental regulations, and a requirement to balance the budget within seven years. Clinton vetoed it, and the government went into shutdown.”).

clearly would have signed a status quo continuing resolution.⁴⁷ The two Gingrich–Clinton shutdowns, lasting a total of over five weeks, were far more significant than any shutdown that came before them. And they were more the result of Gingrich, Dole, and congressional Republicans’ strategy of taking this unusual step: hardball.⁴⁸ Yes, Clinton vetoed Republican spending bills, but he forcefully spoke out against shutdowns.⁴⁹ Of course, the norm of negotiating while passing continuing resolutions maintains the status quo, but the continuation of the status quo is the nature of norms and conventions generally while changing the status quo is the nature of hardball. Clinton sought to preserve the status quo substantively and procedurally (that is, no shutdowns), while Gingrich was seeking to upset the status quo substantively and procedurally with the first meaningful and extended shutdown in American history. That is consistent with the Fishkin and Pozen thesis.

Digging a bit deeper, Clinton played a kind of hardball against shutdowns in 1996. When Clinton gave his 1996 State of the Union speech months after the Oklahoma City bombing, in which right-wing extremist Timothy McVeigh killed 168 people, Clinton introduced Richard Dean, a Vietnam War veteran who worked in the federal building and rushed back in four times to rescue those trapped inside.⁵⁰ To widespread applause, Clinton continued:

But Richard Dean’s story doesn’t end there. This last November, he was forced out of his office when the government shut down. And the second time the government shut down, he continued helping Social Security recipients, but he was working

47. See Steven M. Gillon, *The Pact: Bill Clinton, Newt Gingrich, and the Rivalry that Defined a Generation* 159 (2008) (“[President Clinton] had asked Republicans to send him a ‘clean’ continuing resolution, essentially asking for a resolution to keep the government open without attaching any additional demands. Instead, [congressional Republicans] sent over to the White House a resolution that included a provision eliminating a scheduled drop in Medicare premiums.”).

48. See McKay Coppins, *The Man Who Broke Politics*, *Atlantic* (Nov. 2018), <https://www.theatlantic.com/magazine/archive/2018/11/newt-gingrich-says-youre-welcome/570832/> [<https://perma.cc/B49G-LGRM>] (“Gingrich’s famous budget battles with Bill Clinton in 1995 gave way to another great partisan invention: the weaponized government shutdown. . . . Gingrich’s shutdown . . . furloughed hundreds of thousands of government workers for several weeks . . . , so Republicans could use their paychecks as a bartering chip in negotiations with the White House.”).

49. See, e.g., clintonlibrary42, *President Clinton’s Remarks on the Government Shutdown* (1995), YouTube (July 16, 2013), <https://www.youtube.com/watch?v=9EUn5YwLtB0> (on file with the *Columbia Law Review*) (quoting President Clinton during a press conference on November 14, 1995) (“I vetoed the [latest] spending bill . . . because America can never accept under pressure what it would not accept in free and open debate. . . . [T]he Republicans are following a very explicit strategy . . . to use the threat of a government shutdown to force America to accept their [spending] cuts”); *infra* note 51 and accompanying text.

50. See Peter Keating, *Remembering Oklahoma City, and How Bill Clinton Saved His Presidency*, *N.Y. Mag.: Daily Intelligencer* (Apr. 19, 2010), https://nymag.com/intelligencer/2010/04/remembering_oklahoma_city_and.html [<https://perma.cc/9YAA-GR3M>].

without pay . . . I challenge all of you in this chamber: Never, ever shut the federal government down again.⁵¹

Clinton was implicitly signaling a link between the terrorist's extremism and the Republican shutdown's extremism. That's political hardball, but not constitutional hardball. Since it was also more of a hint than a direct link it does not constitute beanball.

The 2013 shutdown involved a similar dynamic: House Republicans were able to get Senate Majority Leader Harry Reid and President Obama to compromise closer to the Republican budget numbers.⁵² But Senator Ted Cruz and the "Tea Party" House members (later, the Freedom Caucus) blew up the deal in order to play hardball on defunding the Affordable Care Act (ACA) (also known as "Obamacare").⁵³ They were obviously never going to succeed, but the Tea Party wing was somehow able to convince Speaker John Boehner and the rest of the House Republicans to shut down the government for half of October.⁵⁴ The capacity of the Republican Party's right-wing backbenchers to have this level of control over party leadership in 2013 confirms Fishkin and Pozen's understanding of hardball.

Democrats were more responsible for the January 2018 shutdown because they were pushing for the change in the status quo in seeking immigration reform measures and protections for DACA recipients.⁵⁵ But this shutdown lasted only from a Saturday through a Monday, effectively

51. *Id.* (alteration in original) (quoting Clinton's 1996 State of the Union speech); see also Alison Mitchell, Clinton Offers Challenge to Nation, Declaring, 'Era of Big Government Is Over,' N.Y. Times (Jan. 24, 1996), <https://www.nytimes.com/1996/01/24/us/state-union-overview-clinton-offers-challenge-nation-declaring-era-big.html> [https://perma.cc/6F8Q-V3RF].

52. Democrats proposed \$1.058 trillion in discretionary spending, while Republicans proposed \$968 billion. See Dylan Matthews, Everything You Need to Know About Why the Government Might Shut Down, Wash. Post: Wonkblog (Sept. 18, 2013), <https://www.washingtonpost.com/news/wonk/wp/2013/09/18/everything-you-need-to-know-about-why-the-government-might-shut-down/> [https://perma.cc/HJ28-V48Z]. The two sides more or less had a deal at \$988 billion—three-quarters of the way toward the GOP position. See *id.*

53. See Manu Raju, Some Colleagues Angry with Cruz, Politico (Oct. 2, 2013), <https://www.politico.com/story/2013/10/ted-cruz-blasted-by-angry-gop-colleagues-government-shutdown-097753> [https://perma.cc/TN2G-XJWG].

54. See Jonathan Weisman & Ashley Parker, Republicans Back Down, Ending Crisis over Shutdown and Debt Limit, N.Y. Times (Oct. 16, 2013), <https://www.nytimes.com/2013/10/17/us/congress-budget-debate.html> (on file with the *Columbia Law Review*).

55. See Sheryl Gay Stolberg & Thomas Kaplan, Government Shutdown Begins as Budget Talks Falter in Senate, N.Y. Times (Jan. 19, 2018), <https://www.nytimes.com/2018/01/19/us/politics/senate-showdown-government-shutdown-trump.html> (on file with the *Columbia Law Review*).

constituting just a one-day furlough.⁵⁶ And the Democrats essentially folded without winning any concrete concessions.⁵⁷ So much for hardball.

The 2018–2019 shutdown is clearly the result of Trump playing hardball. He rejected the status quo of continuing resolutions in favor of funding for a wall on the U.S.–Mexican border. As Trump told Senate Minority Leader Chuck Schumer and then-House Minority Leader Nancy Pelosi, “I will be the one to shut it down. I’m not going to blame you for it.”⁵⁸

One more historical point: Bernstein actually did not go back far enough. In 1879, as a result of ex-Confederates in Congress trying to force out the remaining federal troops and end protections for African Americans in the South after Reconstruction, the federal government faced the very real threat of a shutdown. Historian Heather Cox Richardson writes:

In 1879, ex-Confederates in Congress, desperate to turn the direction of the nation, refused to fund the government unless the Republican president promised to abandon his party and do things their way. Republicans then saw the situation for what it was. “If this is not revolution,” House Minority Leader James Garfield concluded, “which if persisted in will destroy the government, [then] I am wholly wrong in my conception of both the word and the thing.”⁵⁹

In the end, President Rutherford Hayes refused to capitulate to the racist Southern ex-secessionists and the Democrats caved.⁶⁰ This shutdown fight followed the same pattern, with one side trying to use shutdowns to

56. Ted Barrett et al., *Trump Signs Bill Ending Shutdown, Official Says*, CNN (Jan. 23, 2018), <https://edition.cnn.com/2018/01/22/politics/senate-shutdown-vote-congress/index.html> [<https://perma.cc/8CNH-FPMB>].

57. See Sheryl Gay Stolberg & Thomas Kaplan, *Government Shutdown Ends After 3 Days of Recriminations*, N.Y. Times (Jan. 22, 2018), <https://www.nytimes.com/2018/01/22/us/politics/congress-votes-to-end-government-shutdown.html> (on file with the *Columbia Law Review*).

58. Josh Marshall (@joshtpm), Twitter (Dec. 29, 2018), <https://twitter.com/joshtpm/status/1079159121277001731> [<https://perma.cc/L4WZ-DL63>] (quoting President Trump speaking in a televised meeting with Democratic congressional leaders). For a full transcript of the meeting, see *Read the Full Transcript of the Meeting Between Trump, Pence, Pelosi, and Schumer*, Bos. Globe (Dec. 11, 2018), <https://www.bostonglobe.com/news/politics/2018/12/11/read-full-transcript-meeting-between-trump-pence-pelosi-and-schumer/ydozGoydBzB946pWLP3U1J/story.html> (on file with the *Columbia Law Review*).

59. Heather Cox Richardson, *GOP’s Shutdown Debacle Resembles Our First . . . in 1879!*, Salon (Oct. 1, 2013), https://www.salon.com/2013/09/30/gop_s_shutdown_debacle_resembles_our_first_in_1879/ [<https://perma.cc/4UDC-PRVN>] [hereinafter Richardson, *GOP’s Shutdown Debacle*] (alteration in original).

60. See *id.* (“Five times, Hayes vetoed the bill with the riders and, as popular opinion swung behind him, the Democrats backed down. . . . [The shutdown standoff] destroyed the Democrats in the upcoming election, when Republicans reversed their recent losses and [elected] Garfield [President], now famous for his stand against the riders . . .”).

change the status quo—in this case, the pro-South Democrats. They shouldered the blame and they failed.

At what point can shutdown tactics cross over from hardball to beanball? The Democrats of 1879 were playing beanball by using shutdowns for racist and secessionist—fundamentally antidemocratic—goals. If a shutdown is motivated by a desire to sabotage the government itself—perhaps to make an ideological point about minimizing the size and scope of the federal government, or alternatively with racist purposes lying behind either symbolic or concrete goals—it is beanball.

In the big picture, after recognizing the 1981–1990 period for the minor preview that it was, we now have three extended Republican shutdowns (1995–1996, 2013, and 2018–2019) compared with one Democratic shutdown lasting a single day (2018). Trump’s backing down from a shutdown and instead declaring an emergency for the wall is consistent with this interpretation for which side was responsible for escalating the conflict, but as I discuss below, the emergency declaration is constitutional hardball, not beanball.

B. *Obama Versus the Tea Party on Shutdowns, the Debt Ceiling, and Birtherism*

Bernstein’s response highlights President Obama’s engagement in hardball, and indeed he raises some good examples. But these examples actually underscore the reciprocal nature of constitutional hardball without undermining Fishkin and Pozen’s thesis that while both parties play hardball, the Republicans have played harder—*asymmetric* constitutional hardball. Obama’s hardball can be understood only in the context of Republican escalations of both hardball and beanball.

Bernstein offers some noteworthy examples of Obama’s hardball.⁶¹ Particularly intriguing is the Obama Administration’s nonexecution of statutes, from delays and waivers of ACA provisions, and the implementation of DACA, to refusing to defend the Defense of Marriage Act in court. New research shows that discussion of the “faithful execution” language in the Constitution’s Take Care Clause and the presidential oath has overlooked the language’s origins in English and colonial history that raise new questions about whether a President can ignore and categorically not enforce statutes.⁶² However, Obama is certainly not the first or last President to have a nonexecution problem. The rapidly

61. See Bernstein, *supra* note 4, at 213–16.

62. See Andrew Kent, Ethan J. Leib & Jed Shugerman, Faithful Execution and Article II, 132 Harv. L. Rev. (forthcoming June 2019) (manuscript at 72–75), <https://ssrn.com/abstract=3260593> (on file with the *Columbia Law Review*) (arguing that the “Faithful Execution Clauses” historical origins counsel against the President’s power to not enforce statutes based on policy disagreements, differing constitutional interpretations, or a systematic “suspension” through an assertion of prosecutorial discretion, but support executive nonenforcement when the congressional command is unfunded or overly vague).

increasing use of presidential signing statements from Reagan, Bush Sr., Clinton, and Bush Jr. raised this concern,⁶³ and Trump's nonexecution of the ACA has escalated it.⁶⁴

Bernstein offers long passages from Obama's Cabinet meetings and 2014 State of the Union address in which the President signals that he will use "executive orders" and "administrative actions" to promote his policies, "if Congress won't act soon."⁶⁵ But there was nothing unusual in these comments. Obama wasn't threatening in these examples to ignore or disobey Congress or to go beyond statutory authorization. These speeches reflected basic, conventional governance in the post-New Deal administrative state. If Bernstein thinks these are examples of hardball, then he probably regards the entire bipartisan construction of the administrative state over the past century as constitutional hardball. But then why single out Obama for blame?

Bernstein offers other examples of Obama Administration hardball which actually pale in comparison to Republican hardball tactics in those very same spheres. For example, Bernstein discusses politicized hiring in DOJ's Civil Rights Division under Obama⁶⁶ but fails to mention George W. Bush's far bigger DOJ scandal, the firing of U.S. Attorneys for insidiously partisan reasons. In 2006, nine U.S. Attorneys were relieved of their duties. Attorney General Alberto Gonzales and other White House officials were alleged to have fired four prosecutors for investigating Republican politicians and two others for not investigating Democratic politicians.⁶⁷ Although a report by DOJ's Inspector General did not definitively identify political retaliation as the reason behind the firings,⁶⁸

63. See Daniel B. Rodriguez, Edward H. Stiglitz & Barry R. Weingast, Executive Opportunism, Presidential Signing Statements, and the Separation of Powers, 8 J. Legal Analysis 95, 101 & fig.1 (2016) ("[P]residents issued relatively few substantive signing statements until the early 1980s. At that point, presidents dramatically increased their use of signing statements . . .").

64. See, e.g., Nicholas Bagley & Abbe R. Gluck, Opinion, Trump's Sabotage of Obamacare Is Illegal, N.Y. Times (Aug. 14, 2018), <https://www.nytimes.com/2018/08/14/opinion/trump-obamacare-illegal.html> (on file with the *Columbia Law Review*) (detailing the Trump Administration's efforts to undermine the ACA and arguing that they constitute a bad-faith and illegal effort to deliberately sabotage an act of Congress).

65. Bernstein, *supra* note 4, at 218 (first quoting Obama on Executive Actions: 'I've Got a Pen and I've Got a Phone,' CBS DC (Jan. 14, 2014), <https://washington.cbslocal.com/2014/01/14/obama-on-executive-actions-ive-got-a-pen-and-ive-got-a-phone> [<https://perma.cc/XM5E-XGH4>]; then quoting Ryan Grim, State of the Union Speech Promises Climate Change Executive Action, HuffPost (Feb. 13, 2013), https://www.huffingtonpost.com/2013/02/13/state-of-the-union_n_2673983.html [<https://perma.cc/2GSZ-ZK8F>]).

66. See *id.* at 215.

67. See, e.g., 153 Cong. Rec. 15,200 (2007) (statement of Sen. Conrad) (noting that U.S. Attorneys Carol Lam, Daniel Bogden, Bud Cummins, and Paul Charlton were dismissed shortly after investigating Republican politicians while David Iglesias and John McKay were dismissed after refusing to investigate Democratic politicians).

68. See Office of the Inspector Gen. & Office of Prof'l Responsibility, U.S. Dep't of Justice, An Investigation into the Removal of Nine U.S. Attorneys in 2006, at 331-36 (2008)

it noted gaps in the investigation because of the White House's refusal to turn over internal documents or to allow certain officials to be interviewed,⁶⁹ and concluded that there was "significant evidence that political partisan considerations were an important factor" in the firings.⁷⁰

Also in 2006, U.S. Attorney Steven Biskupic prosecuted Georgia Thompson, a career civil servant in Wisconsin, for allegedly steering a state contract to a travel agency owned by supporters of Democratic Governor Jim Doyle.⁷¹ Thompson's conviction for mail fraud and misapplication of federal funds became a centerpiece in the Republican campaign against Doyle.⁷² A year later, the Seventh Circuit Court of Appeals overturned the conviction, finding that the prosecution's case was "preposterous" and without evidence, that the agency had submitted the lowest bid, that there was "not so much as of a whiff of . . . impropriety," and that Thompson was "innocent."⁷³ The court ordered her immediate release.⁷⁴ It turns out that in 2005, Biskupic had been on a list of U.S. Attorneys to be considered for firing, compiled by the U.S. Attorney General's chief of staff, allegedly for not bringing voter fraud cases against Democrats.⁷⁵ After Biskupic indicted Thompson, his name came off of that list.⁷⁶ Bush and Gonzales's hardball abuses of the DOJ were so

[hereinafter DOJ IG Investigation], <https://oig.justice.gov/special/s0809a/final.pdf> [<https://perma.cc/3EAU-GBP5>].

69. See *id.* at 357.

70. *Id.* at 325.

71. See *United States v. Thompson*, 484 F.3d 877, 878–79, 883 (7th Cir. 2007); Jason Stein, *Georgia Thompson Acquitted, Set Free: Her Conviction in Travel Agency Case Is Overturned*, *Wis. St. J.* (Apr. 6, 2007), https://madison.com/news/georgia-thompson-acquitted-set-free-her-conviction-in-travel-agency/article_2b25e3db-767e-55a0-94f7-a7f28854feb6.html [<https://perma.cc/RR7L-U4DU>] (providing additional background on Thompson's prosecution).

72. See Adam Cohen, *Opinion, A Woman Wrongly Convicted and a U.S. Attorney Who Kept His Job*, *N.Y. Times* (Apr. 16, 2007), <https://www.nytimes.com/2007/04/16/opinion/16mon4.html> (on file with the *Columbia Law Review*) ("Opponents of Gov. Jim Doyle of Wisconsin spent \$4 million on ads last year trying to link the Democratic incumbent to a state employee who was sent to jail on corruption charges. The effort failed, and Mr. Doyle was re-elected . . .").

73. *Thompson*, 484 F.3d at 878–79, 883.

74. See *id.* at 878.

75. See DOJ IG Investigation, *supra* note 68, at 18–20, 19 n.19 (describing Biskupic's addition to, and subsequent removal from, a list of U.S. Attorneys to be considered for dismissal); Margaret Talev & Marisa Taylor, *White House Sought Investigations of Voter Fraud Allegations Before Elections*, *McClatchy* (May 10, 2007), <https://www.mcclatchydc.com/news/article24463096.html> [<https://perma.cc/MXZ8-3VWJ>] (describing the congressional investigations into whether the U.S. Attorneys were targeted "in part [due to] prosecutors' failure to bring voter-fraud charges against Democrats").

76. See Scott Horton, *Executive Privilege on the Firing Line*, *Harper's Mag.: Browsings* (Mar. 11, 2008), <https://harpers.org/blog/2008/03/executive-privilege-on-the-firing-line/> [<https://perma.cc/4WF3-MGLE>] ("[A White House] memo complain[ed] that Biskupic was 'not doing enough' to prosecute 'voter fraud' cases In fact Biskupic's

egregious and such an abuse of power in relation to basic democratic values that they crossed the line over to beanball. And Trump makes those abuses look like wiffle ball.

Bernstein is right that Democrats engaged in hardball tactics by passing the ACA over a Republican filibuster, making recess appointments, appointing “czars” to avoid Senate confirmation, and fighting over filibusters on judicial nominees.⁷⁷ But these hardball tactics were each a response to the Republican hardball of escalating the filibuster to new heights.⁷⁸ Tit for tat. On this question there may be rough symmetry, although one might still note that Republican use of the filibuster became common in all spheres. And while Obama found three areas in which to circumvent the filibuster, he couldn’t, or wouldn’t, circumvent it elsewhere. Moreover, “czars” and recess appointments were not new phenomena.⁷⁹ It is also notable how long Obama and Senator Reid took—five years—to address the filibuster of judicial nominees.⁸⁰

But on top of the filibuster, Obama had to deal with two other remarkable kinds of hardball: one financial, the other xenophobic. First, Republicans threatened not to raise the debt ceiling in 2011, threatening the United States with default on its debts.⁸¹ This was an unprecedented

name appeared on a list of U.S. attorneys to be fired, and subsequently disappeared after he brought a politically-motivated prosecution tailored to run parallel to an election contest.”).

77. See Bernstein, *supra* note 4, at 212–13, 216–17.

78. See Fishkin & Pozen, *supra* note 1, at 932 & n.70 (citing David E. Pozen, *Self-Help and the Separation of Powers*, 124 *Yale L.J.* 2, 39–40 (2014); Allison Graves, *Did Senate Republicans Filibuster Obama Court Nominees More than All Others Combined?*, *PolitiFact* (Apr. 9, 2017), <https://www.politifact.com/truth-o-meter/statements/2017/apr/09/ben-cardin/did-senate-republicans-filibuster-obama-court-nomi/> [<http://perma.cc/YUL6-T6UB>]).

79. President Obama’s thirty-two recess appointments are far fewer than George W. Bush’s 171 or Bill Clinton’s 139. Henry B. Hogue, *Cong. Research Serv.*, R42329, *Recess Appointments Made by President Barack Obama* 3 tbl.1 (2017), <https://fas.org/spp/crs/misc/R42329.pdf> [<https://perma.cc/KC3B-GYFM>]; see also *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2560–73 (2014) (describing the long historical practice of presidential recess appointments). For an explanation that the use of White House staff to exert control over the bureaucracy dates back at least to the Nixon Administration, and that “[e]ach modern President has designed his White House domestic policy shop idiosyncratically,” see Aaron J. Saiger, *Obama’s “Czars” for Domestic Policy and the Law of the White House Staff*, 79 *Fordham L. Rev.* 2577, 2584–86 (2014). But see *id.* at 2586–87 (explaining that the Obama Administration’s czars did differ from previous White House structures in having portfolios roughly parallel to Cabinet agencies and generally having policy, rather than political, backgrounds).

80. See 159 *Cong. Rec.* 17,826 (2013) (recording a 52-48 Senate vote that effectively lowered the threshold to overcome a filibuster for non-Supreme Court nominations from sixty-seven to fifty-one votes).

81. See Neil H. Buchanan & Michael C. Dorf, *Don’t End or Audit the Fed: Central Bank Independence in an Age of Austerity*, 102 *Cornell L. Rev.* 1, 3–4 (2016) (“Tea Party-affiliated congressional Republicans repeatedly threatened not to raise the debt ceiling—and thus raised the specter of a first-ever default by the government of the United States—in order to obtain deep cuts in government spending.”).

hardball threat that led to the downgrading of the United States' credit rating and, if the Republicans had followed through, would have permanently damaged the American financial system.⁸² Obama could have circumvented Congress with constitutional hardball by relying on the Fourteenth Amendment,⁸³ by asserting emergency powers to resolve conflicting legislation,⁸⁴ or even by minting a trillion-dollar coin.⁸⁵ However, he declined to go down that unprecedented path. Instead, he called the Republican bluff. It was one of the most striking episodes of hardball in the past three decades, and Fishkin and Pozen discussed it six times.⁸⁶ Bernstein didn't mention it once.

Obama also had to deal with a bizarre type of constitutional hardball: the birther conspiracy. It was a paradigmatic kind of *constitutional* hardball: weaponizing a clause of the Constitution, the "natural born citizen" requirement.⁸⁷ But it was also oddball hardball, a delusional and baseless

82. See Neil H. Buchanan & Michael C. Dorf, How to Choose the Least Unconstitutional Option: Lessons for the President (and Others) from the Debt Ceiling Standoff, 112 Colum. L. Rev. 1175, 1201 (2012) [hereinafter Buchanan & Dorf, Least Unconstitutional Option] ("Prior to 2011, everyone understood that the debt ceiling would ultimately be raised. . . . Taking a stand on the national debt was politically useful, but no one doubted that Congress would ultimately raise the debt ceiling."); Research Update: United States of America Long-Term Rating Lowered to 'AA+' on Political Risks and Rising Debt Burden; Outlook Negative, S&P Glob. (Aug. 5, 2011), https://www.standardandpoors.com/en_US/web/guest/article/-/view/sourceId/6802837 [<https://perma.cc/H5K2-Y9LW>] ("We lowered our long-term rating on the U.S. because . . . the prolonged controversy over raising the statutory debt ceiling . . . indicate[s] that further near-term progress on reaching an agreement [containing spending growth or] on raising revenues is less likely than we previously assumed and will remain a contentious and fitful process.").

83. See, e.g., Adam Liptak, The 14th Amendment, the Debt Ceiling and a Way Out, N.Y. Times (July 24, 2011), <https://www.nytimes.com/2011/07/25/us/politics/25legal.html> (on file with the *Columbia Law Review*) (arguing that Section Four of the Fourteenth Amendment may empower the President to unilaterally raise the debt ceiling).

84. See, e.g., Buchanan & Dorf, Least Unconstitutional Option, *supra* note 82, at 1205–17 (exploring the President's options when faced with a Congress unwilling to raise the debt ceiling and concluding that ignoring the debt ceiling would be the least unconstitutional option); Eric Posner, The President Has the Power to Raise the Debt Ceiling on His Own, Slate (Jan. 4, 2013), <https://slate.com/news-and-politics/2013/01/debt-ceiling-president-obama-has-the-power-to-raise-the-debt-limit-without-congress.html> [<https://perma.cc/P2Q3-QEA9>] ("If the economy were . . . [about to] collapse, [the President] could cite emergency powers sanctified by tradition as his authority for borrowing beyond the debt ceiling on his own. But a less drastic argument is that the power to resolve conflicting congressional orders is inherent in the president's administrative role.").

85. See, e.g., Matthew Yglesias, Mint the Coin, Slate (Sept. 27, 2013), http://www.slate.com/articles/business/moneybox/2013/01/_1_trillion_platinum_coin_the_debt_ceiling_standoff_can_be_averted_with.html [<https://perma.cc/6DLM-EJT5>] (arguing that 31 U.S.C. § 5112(k) (2012) empowers the Secretary of the Treasury to mint a platinum coin of any denomination).

86. See Fishkin & Pozen, *supra* note 1, at 929, 932–33, 938, 947 n.123, 961, 978.

87. U.S. Const. art. II, § 1, cl. 5 ("No Person except a natural born Citizen . . . shall be eligible to the Office of President . . .").

conspiracy theory driven by President Obama's race, which made him an illegitimate "other." It is also better understood as a kind of constitutional beanball, a tactic to delegitimize through appeals to racism. It started as a fringe conspiracy, promoted by the likes of Judge Roy Moore⁸⁸ and later Sheriff Joe Arpaio⁸⁹ but more establishment Republican politicians made it mainstream in 2009 with a mix of coy questions, hints, and validating off-hand comments, including vice presidential nominee Sarah Palin,⁹⁰ then-Congressman (and now Senator) Roy Blunt,⁹¹ Senator Richard Shelby,⁹² Senator David Vitter,⁹³ Congresswoman Michele Bachmann,⁹⁴

88. See Andrew Kaczynski & Paul LeBlanc, GOP Senate Candidate Roy Moore Has Said He Doesn't Believe Obama Is a Natural-Born Citizen, CNN (Aug. 23, 2017), <https://www.cnn.com/2017/08/22/politics/kfile-roy-moore-birther-comments/index.html> [<https://perma.cc/L33Z-AWK2>] (noting that Moore began questioning Obama's citizenship starting in 2008).

89. Matthew Hendley, Joe Arpaio *Really* Thinks President Obama's Birth Certificate Is Fake, Phx. New Times (Mar. 1, 2012), <https://www.phoenixnewtimes.com/news/joe-arpaio-really-thinks-president-obamas-birth-certificate-is-fake-6643333> [<https://perma.cc/U6A9-9X42>] ("A six-month-long investigation conducted by my Cold Case Posse had led me to believe . . . that President Barack Obama's long-form birth certificate released by the White House on April, 27, 2011, is a computer-generated forgery," Arpaio said at a press conference . . .); see also Kyle Cheney, No, Clinton Didn't Start the Birther Thing. This Guy Did., Politico (Sept. 16, 2016), <https://www.politico.com/story/2016/09/birther-movement-founder-trump-clinton-228304> [<https://perma.cc/ZGA2-NWH4>] (tracing the origins of the birther conspiracy theory to "innuendo by serial Illinois political candidate Andy Martin, who painted Obama as a closet Muslim in 2004").

90. See Garance Franke-Ruta, Palin Flirts with Obama Birth Certificate Question, Wash. Post (Dec. 4, 2009), <http://voices.washingtonpost.com/44/2009/12/palin-flirts-with-obama-birth.html> [<https://perma.cc/W6K4-69DU>] ("Former Alaska governor Sarah Palin gave support . . . to a conspiracy theory promoted by fringe groups, that President Obama may not have an American birth certificate, saying, 'I think the public rightfully is still making it an issue.'").

91. See David Weigel, And Now, Roy Blunt, Wash. Indep. (July 29, 2009), <https://web.archive.org/web/20090802212412/http://washingtonindependent.com/53127/and-now-roy-blunt> [<https://perma.cc/RNA3-KGLJ>] ("What I don't know is why the President can't produce a birth certificate. I don't know anybody else that can't produce one. And I think that's a legitimate question." (quoting Roy Blunt)).

92. See Derek Price, Shelby's Office Calls Times Report 'Distortion,' Cullman Times (Feb. 23, 2009), https://www.cullmantimes.com/community/shelby-s-office-calls-times-report-distortion/article_3e804a7b-480f-52ce-97b6-fa5a002eb697.html (on file with the *Columbia Law Review*) ("When asked . . . whether there was any truth to the rumor that Obama was not a . . . citizen, Shelby said, 'Well his father was Kenyan and they said he was born in Hawaii, but I haven't seen any birth certificate. You have to be born in America to be president.'").

93. See Ben Evans, Republican Senator Says He Backs Birther Lawsuits, Bos. Globe (July 13, 2010), http://archive.boston.com/news/nation/washington/articles/2010/07/13/republican_senator_says_he_backs_birther_lawsuits/ [<https://perma.cc/CKK8-Y2HP>] ("Republican Sen. David Vitter of Louisiana says he supports conservative organizations challenging President Barack Obama's citizenship in court.").

94. See Kendra Marr, Bachmann: No Birth Flap for Me, Politico (Mar. 14, 2011), <https://www.politico.com/story/2011/03/bachmann-no-birth-flap-for-me-051245> [<https://perma.cc/9RFB-XVF5>] ("[Bachmann] says she'd quickly establish her constitutional qualifications if she launches a White House bid. . . . Bachmann has previously sidestepped

Congressman Mike Coffman,⁹⁵ and Newt Gingrich,⁹⁶ among others. Then, of course, Donald Trump emerged as the Birther-in-Chief as his entry into American politics in 2011 and eventually rode that racist conspiracy theory to a racist presidential campaign.⁹⁷ On the one hand, prior Republican presidential nominees John McCain and Mitt Romney admirably never made a major campaign issue of Reverend Jeremiah Wright,⁹⁸ when it could have been a divisive racial theme.⁹⁹ But in the 2012 election, at a time when birtherism was Trump's sole political message, Romney sought out Trump's endorsement—a validation of the birther message and a pitch for those racist votes.¹⁰⁰ Romney was

opportunities to shoot down the so-called birther movement, rooted in discredited rumors that Obama is not a natural-born citizen.”).

95. See Mike Coffman Says Obama “Not an American” at Heart, then Apologizes, *Denver Post* (May 16, 2012), <https://www.denverpost.com/2012/05/16/mike-coffman-says-obama-not-an-american-at-heart-then-apologizes/> [<https://perma.cc/JZ5T-CPTF>] (“I don’t know whether Barack Obama was born in the United States of America. I don’t know that But I do know this, that in his heart, he’s not an American. He’s just not an American.” (internal quotation marks omitted) (quoting Coffman)).

96. See Robert Costa, Gingrich: Obama’s ‘Kenyan, Anti-Colonial’ Worldview, *Nat’l Rev.: Corner* (Sept. 12, 2010), <https://www.nationalreview.com/corner/gingrich-obamas-kenyan-anti-colonial-worldview-robert-costa/> [<https://perma.cc/FHZ9-MGD3>] (“What if [Obama] is so outside our comprehension, that only if you understand Kenyan, anti-colonial behavior, can you begin to piece together [his actions]? . . . That is the most accurate, predictive model for his behavior.” (first and second alterations in original) (internal quotation marks omitted) (quoting Gingrich)).

97. See Chris Megerian, What Donald Trump Has Said Through the Years About Where President Obama Was Born, *L.A. Times* (Sept. 16, 2016), <https://www.latimes.com/politics/la-na-pol-trump-birther-timeline-20160916-snap-htmstory.html> [<https://perma.cc/7BLL-8SGW>] (explaining that Trump began promoting the birther conspiracy in spring 2011, as he was considering a run for the presidency in the 2012 election).

98. In spring 2008, ABC News aired portions of incendiary sermons given by Reverend Wright, Barack Obama’s pastor of twenty years. Emerging in the middle of the presidential campaign, “this episode garnered major media coverage and caused a national uproar.” Brian D. McKenzie, Barack Obama, Jeremiah Wright, and Public Opinion in the 2008 Presidential Primaries, 32 *Pol. Psychol.* 943, 944 (2011).

99. See Anna Schechter, Eric Longabardi & Brian Ross, Watch: Rev. Wright TV Ad that McCain Would Not Run, *ABC* (Dec. 8, 2008), <https://abcnews.go.com/Blotter/Vote2008/story?id=6395775&page=1> [<https://perma.cc/X5AN-FK7K>] (“Even as his campaign fell far behind in the polls, Sen. John McCain refused to authorize the use of a fully-produced 30-second television commercial that criticized Barack Obama for his relationship with the controversial pastor, Reverend Jeremiah Wright.”); Donovan Slack & Patrick Reis, Romney Repudiates Jeremiah Wright Plan, *Politico* (May 17, 2012), <https://www.politico.com/blogs/politico44/2012/05/romney-repudiates-jeremiah-wright-plan-123737> [<https://perma.cc/K96N-LSJ9>] (“Mitt Romney’s campaign says it wants no part of a plan by Republican strategists to attack President Obama by highlighting his ties to pastor Jeremiah Wright.”).

100. See James Hohmann, Pataki Not Running—Perry Talking with Trump—Romney, Bachmann Staying the Course—Huntsman’s Purple Tie—Kimball: Never Quit—GOP Turning on Palin, *Politico: Morning Score* (Aug. 26, 2011), <https://www.politico.com/tipsheets/morning-score/2011/08/pataki-not-running-perry-talking-with-trump-romney-bachmann-staying-the-course-huntsmans-purple-tie-kimball-never-quit-gop-turning-on-palin-005952> [<https://perma.cc/3HJM-YECE>] (quoting Trump’s then-lawyer Michael Cohen as

enthusiastic: “There are some things that you just can’t imagine happening in your life This is one of them. Being in Donald Trump’s magnificent hotel and having his endorsement is a delight. I’m so honored and pleased to have his endorsement.”¹⁰¹

When John McCain was told by a voter in 2008, “I can’t trust Obama. I have read about him, and he’s not, he’s not uh—he’s an Arab,” McCain responded, “No, ma’am,” and immediately rejected such conspiracies.¹⁰² McCain might have won in 2008 with his own version of Willie Horton ads starring Reverend Wright, but he chose his dignity and legacy over an increased chance of victory.¹⁰³

But Romney did the opposite. He sought out the Birther-in-Chief for a coded, yet unmistakable, symbolic embrace of birther votes. It was unacceptable at the time and is only more so in hindsight, as birtherism prefigured the Trump campaign’s white nationalist messaging. In doing so Romney wasn’t just playing aggressive hardball; he was playing illegitimate beanball. Obama had to overcome the unusual challenge of being delegitimized as an American while trying to govern as President.

In fact, the birther strategy had the effect of constraining Obama’s range of political options.¹⁰⁴ He had to play nicer, given the stereotypes and the politics of race reinforced by this bad-faith conspiracy theory.¹⁰⁵ One of the definitive critiques of Obama’s presidency by the left was that

saying that Romney’s overtures demonstrated “the power that Trump controls or that Trump maintains with the American people, as now the current frontrunner is clearly seeking Mr. Trump’s endorsement” (internal quotation marks omitted)).

101. Reid J. Epstein, *Trump Endorses Mitt*, Politico (Feb. 2, 2012), <https://www.politico.com/story/2012/02/trump-to-endorse-mitt-072365> [https://perma.cc/AL4C-AA8U] (internal quotation marks omitted).

102. Jonathan Martin & Amie Parnes, *McCain: Obama Not an Arab, Crowd Boos*, Politico (Oct. 10, 2008), <https://www.politico.com/story/2008/10/mccain-obama-not-an-arab-crowd-boos-014479> [https://perma.cc/2ZWT-2PNF] (internal quotation marks omitted).

103. In 1988, an independent campaign committee aired ads supporting George H.W. Bush’s presidential campaign that featured “Willie Horton, a convicted murderer who had received a weekend furlough from prison under a Massachusetts program supported by then-governor Michael Dukakis [Bush’s opponent], only to commit rape and armed robbery. The ad . . . played perfectly on white voters’ racialized fears about violent crime.” Zachary Roth, *The Great Suppression: Voting Rights, Corporate Cash, and the Conservative Assault on Democracy* 56 (2016).

104. See Adam Serwer, *The Nationalist’s Delusion*, Atlantic (Nov. 20, 2017), <https://www.theatlantic.com/politics/archive/2017/11/the-nationalists-delusion/546356/> [https://perma.cc/A7E2-A74C] (“[Y]ou can draw a straight line between Obama and heightened racialization, and the emergence of Trump,” [political scientist Michael] Tesler told me. ‘Birtherism, the idea that Obama’s a Muslim, anti-Muslim sentiments—these are very strong components of Trump’s rise, and really what makes him popular . . . in the first place.’”).

105. See *id.* (explaining how Obama was uniquely “ill-equipped to stem the tide” of nativism because “the people he needs to speak to see him as the problem”).

he did not answer the Republican hardball with hardball.¹⁰⁶ But Obama's critics on the right often want it both ways: They want to portray him as weak and soft, but also as a dangerous, nefarious, and lawless threat. I suppose one could be both, but it strains credulity to suggest Obama was a remarkably aggressive practitioner of hardball in this era. He was not only less aggressive than other Presidents before and after, he was less aggressive than his Republican opponents at the time.

C. *The Iran Nuclear Agreement*

Bernstein also has legitimate complaints about how the Obama Administration pursued the Iran nuclear agreement, the Joint Comprehensive Plan of Action (JCPOA), which Fishkin and Pozen did not address. Bernstein is correct that the Administration lied about the process and engaged in questionable spin and problematic tactics.¹⁰⁷ But there are a number of problems with his analysis in this context. Again, Fishkin and Pozen acknowledge that Democrats play hardball but argue that they have not done so as aggressively as Republicans. Bernstein's example of Obama's most aggressive foreign policy hardball pales in comparison to the George W. Bush Administration's lies about weapons of mass destruction in pursuit of the Iraq War,¹⁰⁸ and to the string of lies and chaos in Trump's foreign policy.¹⁰⁹ The word "Iraq" does not appear in Bernstein's piece, but the discussion of the JCPOA takes up eleven of his twenty-six pages.¹¹⁰ This seems like a highly selective complaint, one made without the context and comparativism that are the point of Fishkin and Pozen's essay. One can certainly argue that lies in pursuit of a peace plan, while problematic, are not as egregious as lies in pursuit of war. It is remarkable that Bernstein focuses so narrowly on the Obama Administration's lies while ignoring the "asymmetric" lying of the Republican administrations immediately before and after.

The most constitutional of hardball questions the Iran agreement raises is whether the JCPOA should have been a treaty subject to Senate ratification; to Bernstein's credit, he cites experts who say that it did not

106. See, e.g., David Coates, Reflections on the Obama Presidency: The Price of Moderation, HuffPost (Dec. 12, 2016), https://www.huffingtonpost.com/david-coates/reflections-on-the-obama_b_13579602.html [<https://perma.cc/ZB9B-JWTL>] (providing progressive critiques of President Obama for being too timid).

107. See Bernstein, *supra* note 4, at 223–32.

108. See, e.g., *infra* note 126 and accompanying text. See generally Charles Lewis, 935 Lies: The Future of Truth and the Decline of America's Moral Integrity, at xiii (2014) (describing how George W. Bush and seven top Bush Administration officials "made at least 935 false statements about the national security threat posed by Iraq" in the period between 9/11 and the beginning of the Iraq War).

109. See, e.g., Stephen M. Walt, Does It Matter that Trump Is a Liar?, Foreign Pol'y (Sept. 17, 2018), <https://foreignpolicy.com/2018/09/17/does-it-matter-that-trump-is-a-liar/> [<https://perma.cc/SGS4-QLPA>] (detailing the impact of President Trump's repeated lies on American foreign policy).

110. See Bernstein, *supra* note 4, at 222–32.

need to be.¹¹¹ He also notes that Senator Tom Cotton and his Senate colleagues reacted dramatically:

By early 2015, some speculated that the Obama Administration’s plan was to get the United Nations Security Council to endorse a deal and then present the deal to Congress and the public as binding international law. This provoked Senator Tom Cotton to write an open letter signed by forty-seven Senators informing the Iranian government that any deal signed by Obama but not approved by Congress would not be binding U.S. law.¹¹²

This letter was condemned from many quarters—sometimes hyperbolically as being traitorous or mutinous, but also with some valid concerns that it crossed the line legally.¹¹³ Some commentators cited the Logan Act,¹¹⁴ a statute that prosecutors have used only twice to indict someone, but a legal line nevertheless.¹¹⁵ Conservative columnist Michael Gerson observed:

If Republican senators want to make the point that an Iran deal requires a treaty, they should make that case to the American people, not to the Iranians. Congress simply has no business conducting foreign policy with a foreign government, especially an adversarial one. Every Republican who pictures his or her feet up on the Resolute Desk should fear this precedent.¹¹⁶

111. See *id.* at 225 n.91 (citing Jack Goldsmith, *More Weak Arguments for the Illegality of the Iran Deal*, *Lawfare* (July 27, 2015), <https://www.lawfareblog.com/more-weak-arguments-illegality-iran-deal> [<https://perma.cc/4QSR-43QT>]; Marty Lederman, *Congress Hasn’t Ceded Any Constitutional Authority with Respect to the Iran JCPOA*, *Balkinization* (Aug. 8, 2015), <https://balkin.blogspot.com/2015/08/congress-hasnt-ceded-any-constitutional.html> [<https://perma.cc/J9GZ-DXJK>]).

112. *Id.* at 225 (footnote omitted).

113. See, e.g., Jonathan Capehart, *Opinion, Tom Cotton Picked Apart by Army General over ‘Mutinous’ Iran Letter*, *Wash. Post* (Mar. 13, 2015), <https://www.washingtonpost.com/blogs/post-partisan/wp/2015/03/13/tom-cotton-picked-apart-by-army-general-over-mutinous-iran-letter/> [<https://perma.cc/J43J-VZYS>] (quoting political commentators and retired military officers describing the letter as “mutinous” and the signers as “traitors”).

114. Act of Jan. 30, 1799, 1 Stat. 613 (codified as amended at 18 U.S.C. § 953 (2012)).

115. E.g., *Contemporary Practice of the United States Relating to International Law*, 109 *Am. J. Int’l L.* 407, 411–12 (Kristina Daugirdas & Julian Davis Mortenson eds., 2015) (noting that Senator Cotton’s letter “raise[d] questions under the 1799 Logan Act”); Peter Spiro, *GOP Iran Letter Might Be Unconstitutional. Is It Also Criminal?*, *Opinio Juris* (Mar. 9, 2015), <http://opiniojuris.org/2015/03/09/gop-iran-letter-might-be-unconstitutional-is-it-also-criminal/> [<https://perma.cc/D8NU-S8YU>] (“Most putative Logan Act violations violate the spirit and structural foundations of the Logan Act This one seems to squarely satisfy its elements. . . . [A]n initiative like the Cotton letter seems to cross a line, and perhaps it should be slapped back.”); see also Wilson C. Freeman, *Cong. Research Serv.*, *LSB10058, The Logan Act: An Overview of a Sometimes Forgotten 18th Century Law 1* (2018), <https://fas.org/sgp/crs/misc/LSB10058.pdf> [<https://perma.cc/PCB8-BBDT>] (“Prosecutors have only brought two Logan Act indictments since its enactment, neither of which led to conviction.”).

116. Michael Gerson, *Opinion, The True Scandal of the GOP Senators’ Letter to Iran*, *Wash. Post* (Mar. 12, 2015), <https://www.washingtonpost.com/opinions/a-half-baked-missive-from->

Did Obama push boundaries in pursuing a nuclear nonproliferation agreement? Yes. But could he plausibly be accused of committing a crime? No.¹¹⁷ This is not to suggest that Republican senators should have been prosecuted. But it is remarkable that some mainstream commentators could entertain the question of whether Republican senators had committed a crime and that commentators across the political spectrum identified this act as a serious breach of foreign policy norms. Some of the critiques may have been hyperbole, but the Senate Republicans crossed a line, and their letter to Iran was indicative of the fervor, intransigence, and ideological opposition that help explain why the Obama Administration chose to hide, lie, and misrepresent parts of the process. Furthermore, it seems unremarkable that an administration would hide or lie about whether highly sensitive diplomatic negotiations were happening, especially when the opposition was engaging in such tactics.

Were the Republicans' fervor, intransigence, and ideological opposition warranted? No, they were not. And was a nuclear agreement so urgent and necessary as to justify hardball tactics in anticipation of such ardent opposition? In a word, yes. The reasons for the urgency were so sensitive in diplomatic terms that any administration would need to hide them in order to get a deal done. And because of this sensitivity they have not been discussed widely in American media, but national-security and Israeli experts have explained how the international coalition for tight sanctions on Iran was inevitably dissolving.¹¹⁸ Reasonable people can disagree on this issue, but reasonable people should also acknowledge some often-overlooked facts forcing the Obama Administration's hand.

This Reply is not the place to fully litigate the merits of the Iran agreement, but a brief sketch of the issues is necessary context to answer Bernstein's complaints. The bottom line is that an international agreement initially put sanctions in place not because of Iran's support of terrorism but because of its military nuclear program.¹¹⁹ Russia and China had been the most reluctant members of the coalition.¹²⁰ Once Iran announced that it was willing to abandon its military uranium-enrichment program and accept frequent inspections the sanctions regime was not going to last. The choice the Obama Administration faced was between ineffective sanctions with essentially no inspections, on the one hand, or an

[the-gop/2015/03/12/ccf10b8e-c835-11e4-b2a1-bed1aaea2816_story.html](https://www.the-gop.com/2015/03/12/ccf10b8e-c835-11e4-b2a1-bed1aaea2816_story.html) [<https://perma.cc/7FU3-LJVP>].

117. But cf. Bernstein, *supra* note 4, at 227–31 (arguing that various Obama Administration efforts on behalf of the Iran deal violated the law).

118. See *infra* notes 121–122 and accompanying text.

119. See Zachary Laub, *International Sanctions on Iran*, Council on Foreign Relations, <https://www.cfr.org/backgrounder/international-sanctions-iran> [<https://perma.cc/UWH3-SPYZ>] (last updated July 15, 2015).

120. See Dina Esfandiary & Ariane Tabatabai, *Moscow and Beijing Have Tehran's Back*, *Foreign Pol'y* (July 25, 2018), <https://foreignpolicy.com/2018/07/25/moscow-and-beijing-have-tehrans-back/> [<https://perma.cc/FX7P-VUJF>] (describing Russia and China's "reluctant" membership).

internationally supervised inspection regime with rules for re-imposing sanctions on the other. Hardin Lang, a senior fellow at the Center for American Progress, and retired Israeli general Shlomo Brom, a senior fellow at the Institute for National Security Studies in Tel Aviv and a visiting fellow at the Center for American Progress, provide some behind-the-scenes realities:

[Myth:] The United States could have held out for a better deal.

[Reality:] This is a strong deal, negotiated between the major world powers and Iran. If the United States walks away, the hard-won international consensus on current sanctions would crumble. Russia and China would reopen trade with Iran, circumventing American and European sanctions. Inspectors would be kicked out, and Iran would have no effective restrictions on its nuclear program.¹²¹

Aaron David Miller, a former U.S. Middle East negotiator, now a vice president of the Woodrow Wilson International Center for Scholars, adds:

At best both the Russians and the Chinese never saw the Iranian nuclear program in as dire terms as the U.S. did. And the Germans were eager to resume their trade ties with Iran as well. Israel was reluctant to use force on its own. And the Iranian regime would have continued on its resistance economy—pain notwithstanding—unless it could justify a good deal for itself. In a galaxy far away, a better deal might have been possible, but not here on planet Earth and not under these circumstances.¹²²

The Obama Administration could not publicly blame its diplomatic allies in the midst of these sensitive negotiations. When Iran announced its compliance, the reality was that Russia and China were going to end their participation in sanctions, thereby ending the sanctions' effectiveness and opening the door for other countries to drop sanctions too. Russia and China wanted access to Iranian oil, and Iran's willingness to end its military nuclear program was sufficient excuse to get that oil.¹²³ Moreover, according to some reports, Germany was also signaling it would back off of sanctions.¹²⁴ The Obama Administration chose to be diplomatic in negotiating a new inspection regime, rather than publicly blaming

121. Hardin Lang & Shlomo Brom, 6 Biggest Myths About the Iran Nuclear Deal, *Nat'l Int.* (July 29, 2015), <https://nationalinterest.org/feature/6-biggest-myths-about-the-iran-nuclear-deal-13443> [<https://perma.cc/FN47-ELPB>].

122. Aaron David Miller, The 'Truth' About the Iran Deal, *N.Y. Jewish Week* (July 27, 2015), <http://jewishweek.timesofisrael.com/the-truth-about-the-iran-deal> [<https://perma.cc/RH2S-W34A>].

123. See Pavel K. Baev, The China Factor in Russian Support for the Iran Deal, *Brookings Inst.: Order from Chaos* (July 21, 2015), <https://www.brookings.edu/blog/order-from-chaos/2015/07/21/the-china-factor-in-russian-support-for-the-iran-deal/> [<https://perma.cc/8S45-48VF>] (discussing Russian and Chinese motivations for supporting the Iran deal).

124. See Miller, *supra* note 122.

Russia, China, and Germany. It would have been easy to score political points against these countries, but the blame game could have weakened or killed the deal. The choice for the Obama Administration was not the status quo sanctions regime versus a deal. The choice was either China and Russia ending sanctions and leaving very weak safeguards or an American-led deal with strong safeguards.¹²⁵ The Obama Administration made a weak position stronger. In this context, more of the Obama Administration's secrecy and even its lies and misrepresentations in the course of its international negotiations are understandable. And even though Bernstein is right that the Obama Administration played hardball, this episode doesn't hold a yellow-cake uranium candle or a Russian oil flame to the misrepresentations of the Bush and Trump Administrations in foreign policy.¹²⁶

II. CONSTITUTIONAL BEANBALL

Some hardball goes too far and becomes antidemocratic. At that point, it becomes beanball: more than just an aggressive, yet legitimate, style of play. Beanball breaks basic rules by trying to eliminate the other players from the game.

The paradigmatic example is efforts to suppress voting and restrict ballot access. Once upon a time, beanball of this type consisted of formal disenfranchisement. Today, this form of beanball is less explicit, instead taking the form of voting rules designed to disadvantage the opponents' voters. As Zachary Roth's *The Great Suppression* documents, Republican officials openly talk about the good old days when the franchise was far

125. Former Secretary of State John Kerry framed it this way:

[T]he choice we face today is not really a choice between some plan that's a fantasy. I mean, I've heard people say, why don't you just ratchet up the sanctions? Well, I'll tell you why: because China, Russia, and France and Germany and other countries don't think that's necessary if these guys are willing to negotiate and have a deal. People say crush them with sanctions. Well, folks, sanctions hasn't done anything to stop their program. What it's done is brought them to the table to negotiate, which is precisely what the sanctions were designed to do.

Assessing the Iran Nuclear Accord, Council on Foreign Relations (July 24, 2015), <https://www.cfr.org/event/assessing-iran-nuclear-accord> [<https://perma.cc/9FXC-RG9R>].

126. See, e.g., Seymour M. Hersh, Who Lied to Whom?, *New Yorker* (Mar. 31, 2003), <https://www.newyorker.com/magazine/2003/03/31/who-lied-to-whom> [<https://perma.cc/K3NC-FX5J>] (investigating the origins of false evidence that purported to prove the existence of a secret Iraqi nuclear program, which the Bush Administration cited to justify its 2003 invasion). For a more technical defense that Bush did not lie, see Brooks Jackson, Bush's "16 Words" on Iraq & Uranium: He May Have Been Wrong but He Wasn't Lying, *FactCheck* (July 26, 2004), <https://www.factcheck.org/2004/07/bushs-16-words-on-iraq-uranium/> [<https://perma.cc/Y72F-X8UV>]. For a discussion of the United States' loss of foreign policy credibility during the Trump Administration, see Keren Yarhi-Milo, After Credibility: American Foreign Policy in the Trump Era, *Foreign Affairs* (Jan./Feb. 2018), <https://www.foreignaffairs.com/articles/2017-12-12/after-credibility> (on file with the *Columbia Law Review*).

more restricted. Congressman Ted Yoho of Florida in 2012, for example: “I’ve had some radical ideas about voting, and it’s probably not a good time to tell you about them But you used to have to be a property owner to vote.”¹²⁷ Roth notes that this was the same state in which limited resources for casting and counting ballots led to the “recount fiasco” in the 2000 presidential election.¹²⁸ I’d add that even though Florida officials made many mistakes and Florida state judges did not inspire confidence, the Florida recount in 2000 illustrated Republicans playing a mix of hardball and beanball more aggressively than Democrats in terms of providing resources for voting and actually counting votes. Those problems unsurprisingly recurred in the 2018 Florida races for Senate and governor.¹²⁹ The scandal in North Carolina over stolen absentee ballots¹³⁰ and in Georgia by gubernatorial candidate and Secretary of State Brian Kemp’s self-dealing¹³¹ show these problems tend to have a partisan bent and seem to be getting worse.

For the past three decades, Republicans have tried to make access to the ballot and counting votes harder, while Democrats have tried to make access and counting easier.¹³² Some of these efforts, while imprudent, are

127. Roth, *supra* note 103, at 2 (internal quotation marks omitted); see also Greg Sargent, *An Uncivil War: Taking Back Our Democracy in an Age of Trumpian Disinformation and Thunderdome Politics* 37–44 (2018) (describing modern voter-suppression tactics).

128. See Roth, *supra* note 103, at 2.

129. See David Smiley, *How Florida’s Clear-Cut 2018 Midterms Devolved into a Recount Sequel*, *Miami Herald* (Nov. 20, 2018), <https://www.miamiherald.com/news/politics-government/state-politics/article221815280.html> [<https://perma.cc/KS2S-XCE4>] (providing an overview of the recounts in Florida’s 2018 gubernatorial and U.S. Senate elections).

130. In North Carolina’s Ninth Congressional District, the Republican candidate—and apparent winner of the 2018 election—Mark Harris, was not seated because of evidence that a contractor hired by his campaign engaged in an absentee-ballot-fraud scheme that may have affected the election’s outcome. See Amy Gardner & Beth Reinhard, *N.C. Congressional Candidate Sought Out Aide, Despite Warnings over Tactics*, *Wash. Post* (Dec. 13, 2018), https://www.washingtonpost.com/politics/nc-congressional-candidate-sought-out-aide-despite-warnings-of-voting-irregularities/2018/12/13/daea8338-fca1-11e8-83c0-b06139e540e5_story.html [<https://perma.cc/ZSZ4-KBYZ>]. After an investigation, the state board of elections ultimately ordered that a new election take place. See Alan Blinder, *New Election Ordered in North Carolina Race at Center of Fraud Inquiry*, *N.Y. Times* (Feb. 21, 2019), <https://www.nytimes.com/2019/02/21/us/mark-harris-nc-voter-fraud.html> (on file with the *Columbia Law Review*).

131. See Carol Anderson, *Brian Kemp’s Lead in Georgia Needs an Asterisk*, *Atlantic* (Nov. 7, 2018), <https://www.theatlantic.com/ideas/archive/2018/11/georgia-governor-kemp-abrams/575095/> [<https://perma.cc/X5HT-Q33Z>] (arguing that Brian Kemp’s oversight of an election he was himself running violates “the most fundamental principle of democratic elections—that the electoral process be managed by an independent and impartial election authority” (internal quotation marks omitted) (quoting President Jimmy Carter)).

132. See Richard L. Hasen, *The 2016 U.S. Voting Wars: From Bad to Worse*, 26 *Wm. & Mary Bill Rts. J.* 629, 631 (2018) (“Th[e] emergence of ‘red state election law’ and ‘blue state election law’ has meant that many states with Republican majorities have passed laws

arguably theoretically legitimate. Many on the left criticize voter-identification rules,¹³³ but in the abstract, such rules are legitimate, even if in-person voter fraud is only a myth.¹³⁴ In our fragmented, distrusting social environment, some will doubt the validity of election results without voter ID rules. Voter ID helps to address those concerns and makes election results appear fair and legitimate.¹³⁵ The inevitable problem is the leap from theory to beanball practice. In practice, Republicans have been turning voter ID and other new voting rules into the new poll tax. Republican state legislatures spread voter ID laws rapidly from 2004 to 2016,¹³⁶ often with rules that specifically benefited likely Republican voters over likely Democrats.¹³⁷ In Tennessee, for example, valid voter ID includes state-issued driver's licenses, U.S. passports, military IDs, and handgun carry permits with a photo, but not college student IDs.¹³⁸ Similarly, Texans can use gun permit licenses to vote but not student

making it harder to register and vote, and those states with Democratic majorities have passed laws making it easier to register and vote.”).

133. See, e.g., Democratic Platform Comm., 2016 Democratic Party Platform 22 (2016), https://democrats.org/wp-content/uploads/2018/10/2016_DNC_Platform.pdf [<https://perma.cc/2S9G-86KT>] (“[W]e will continue to fight against discriminatory voter identification laws, which disproportionately burden young voters, diverse communities, people of color, low-income families, people with disabilities, the elderly, and women.”).

134. See *infra* note 143.

135. See *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 197 (2008) (“[Indiana’s] interest in protecting public confidence ‘in the integrity and legitimacy of representative government’ [justifies its voter ID law] . . . because it encourages citizen participation in the democratic process . . . [and public confidence requires that] ‘safeguards exist to deter or detect fraud or to confirm the identity of voters.’” (citation omitted) (first quoting Brief for State Respondents at 53, *Crawford*, 553 U.S. 181 (Nos. 07-21, 07-25), 2007 WL 4232930; then quoting Comm’n on Fed. Election Reform, Building Confidence in U.S. Elections 1618 (2005), <https://www.eac.gov/assets/1/6/Exhibit%20M.PDF> [<https://perma.cc/7RRB-KSZU>])). But see Stephen Ansolabehere & Nathaniel Persily, Vote Fraud in the Eye of the Beholder: The Role of Public Opinion in the Challenge to Voter Identification Requirements, 121 Harv. L. Rev. 1737, 1754 (2008) (“Even if . . . fears [of voter fraud] do not reduce people’s likelihood of voting, . . . voter ID laws [might be] worth supporting if they bolster public confidence. However, the data that exist on the relationship between voter ID laws and fears of fraud do not support even this more modest argument.”).

136. See Jasmine C. Lee, How States Moved Toward Stricter Voter ID Laws, N.Y. Times (Nov. 3, 2016), <https://www.nytimes.com/interactive/2016/11/03/us/elections/how-states-moved-toward-stricter-voter-id-laws.html> (on file with the *Columbia Law Review*).

137. See Anthony J. Gaughan, Illiberal Democracy: The Toxic Mix of Fake News, Hyperpolarization, and Partisan Election Administration, 12 Duke J. Const. L. & Pub. Pol’y 57, 106 (2017) (“Many academic studies have concluded that the new voting restrictions represent a Republican strategy to mitigate the political influence of minority voters aligned with the Democratic Party.”).

138. See What ID Is Required When Voting?, Tenn. Sec’y of State, <https://sos.tn.gov/products/elections/what-id-required-when-voting> [<https://perma.cc/3B6J-XUH7>] (last visited Feb. 3, 2019).

IDs.¹³⁹ According to the Brennan Center for Justice, approximately eleven percent of American citizens do not have government-issued photo ID, with a disproportionate number of people of color, seniors, and young people lacking such documentation.¹⁴⁰ Judge Richard Posner, who wrote the Seventh Circuit decision that upheld Indiana’s voter ID law,¹⁴¹ has since disavowed voter ID laws as a kind of “voter suppression.”¹⁴² Given that widespread, in-person voter fraud is a myth,¹⁴³ it should not serve as a pretext for such vote rigging, even if voter ID legislation addresses some conspiratorial suspicions. The 2016 election had more widespread

139. See Required Identification for Voting in Person, Tex. Sec’y of State, <https://www.votetexas.gov/register-to-vote/need-id.html> [<https://perma.cc/5KGM-A2LX>] (last visited Feb. 7, 2019).

140. Brennan Ctr. for Justice, Citizens Without Proof: A Survey of Americans’ Possession of Documentary Proof of Citizenship and Photo Identification 3 (2006), http://www.brennancenter.org/sites/default/files/legacy/d/download_file_39242.pdf [<https://perma.cc/2T4N-XF8B>].

141. *Crawford v. Marion Cty. Election Bd.*, 472 F.3d 949 (7th Cir. 2007), *aff’d*, 553 U.S. 181.

142. John Schwartz, Judge in Landmark Case Disavows Support for Voter ID, *N.Y. Times* (Oct. 15, 2013), <https://www.nytimes.com/2013/10/16/us/politics/judge-in-landmark-case-disavows-support-for-voter-id.html> (on file with the *Columbia Law Review*) (“Asked whether the court had gotten its ruling wrong, Judge Posner responded: ‘Yes. Absolutely.’ Back in 2007, . . . ‘we weren’t really given strong indications that requiring additional voter identification would actually disenfranchise people entitled to vote.’ The member of the three-judge panel who dissented . . . ‘was right’ . . .”).

143. See Justin Levitt, Brennan Ctr. for Justice, The Truth About Voter Fraud 7 (2007), <https://www.brennancenter.org/sites/default/files/legacy/The%20Truth%20About%20Voter%20Fraud.pdf> [<https://perma.cc/9QGA-X2GX>] (“There have been a handful of substantiated cases of individual ineligible voters attempting to defraud the election system. But by any measure, voter fraud is extraordinarily rare.”); Lorraine C. Minnite, The Myth of Voter Fraud 129 (2010) (“I have established here that fraud itself is a relatively rare event. Rather, the problem is the *myth* of fraud that can influence the vote count and, more important, shapes the rules that erode voting rights.”); John S. Ahlquist, Kenneth R. Mayer & Simon Jackman, Alien Abduction and Voter Impersonation in the 2012 U.S. General Election: Evidence from a Survey List Experiment, 13 *Election L.J.* 460, 461 (2014) (“[W]e find no significant indicators of voter impersonation in the 2012 U.S. general election. We find no evidence of voter impersonation in contested states or among low income voters, subsets where vote fraud is alleged to be most common.”); Justin Levitt, A Comprehensive Investigation of Voter Impersonation Finds 31 Credible Incidents out of One Billion Ballots Cast, *Wash. Post* (Aug. 6, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/> [<https://perma.cc/33K3-MMPY>] (finding just thirty-one credible allegations of impersonation fraud in all “general, primary, special, and municipal elections” between 2000 and 2014); Heather Cox Richardson, ‘Voter Fraud’ Is a Myth that Helps Republicans Win, Even when Their Policies Aren’t Popular, *Bos. Globe* (Oct. 23, 2018), <https://www.bostonglobe.com/ideas/2018/10/23/voter-fraud-myth-helps-republicans-win-even-when-their-policies-aren-popular/dqYDx92NkJ1Ia4nvX2LuiK/story.html> (on file with the *Columbia Law Review*) (tracing the origins of the modern voter-fraud myth to a political strategy launched by the Republican Party in 1986).

restrictions than ever, driven by a Republican agenda against ballot access.¹⁴⁴

Beyond voter ID, Republicans have several long-standing strategies to make voting more difficult in other ways. Republicans largely opposed the commonsense Motor Voter Act that would have made sense if their voter ID agenda was in good faith.¹⁴⁵ Now Republicans employ a strategy of “voter caging,”¹⁴⁶ purging from the rolls voters whose mail is returned as undeliverable.¹⁴⁷ The Supreme Court, by a 5-4 vote, upheld this tactic—despite its lack of sufficient justification and all its obvious risks of selective enforcement.¹⁴⁸ Republicans like Kris Kobach, Kansas’s former secretary of state, championed the Crosscheck system—which, by 2017, more than thirty states participated in—to challenge voter registrations by searching for duplicate names across different jurisdictions, ostensibly to hunt for fraud.¹⁴⁹ However, “academics and states that use the program have found that its results are overrun with false positives, creating a high risk of disenfranchising legal voters.”¹⁵⁰ As Crosscheck flagged names, communities with more common shared names, like African Americans, Latinos, and Asians, are dramatically overrepresented

144. See Gaughan, *supra* note 137, at 105–11 (arguing that Republican-enacted measures that make voting harder and remove voters from registration rolls represent a deliberate strategy for political advantage); Lee, *supra* note 136 (documenting the spread of voter ID laws through 2016).

145. The National Voter Registration Act of 1991 passed the Senate and House with primarily Democratic support but was vetoed by President George H. W. Bush. See President Vetoes the ‘Motor-Voter’ Measure, *N.Y. Times* (July 3, 1992), <https://www.nytimes.com/1992/07/03/us/the-1992-campaign-president-vetoes-the-motor-voter-measure.html> (on file with the *Columbia Law Review*). A subsequent version of the bill was later enacted into law as the National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77 (codified as amended at 52 U.S.C. §§ 20501–20511 (2012)).

146. “Voter caging is the practice of sending mail to addresses on the voter rolls, compiling a list of the mail that is returned undelivered, and using that list to purge or challenge voters’ registrations [claiming] that the voters on the list do not legally reside at their registered addresses.” Justin Levitt & Andrew Allison, Brennan Ctr. for Justice, *A Guide to Voter Caging 1* (2007), https://www.brennancenter.org/sites/default/files/legacy/d/download_file_49608.pdf [<https://perma.cc/QD2D-EH5L>].

147. See, e.g., Vann R. Newkirk II, *The Republican Party Emerges from Decades of Court Supervision*, *Atlantic* (Jan. 9, 2018), <https://www.theatlantic.com/politics/archive/2018/01/the-gop-just-received-another-tool-for-suppressing-votes/550052/> [<https://perma.cc/H8YG-LQ8V>] (describing the renewed use of voter caging schemes).

148. See *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1846 (2018).

149. See Ari Berman, *The Man Behind Trump’s Voter-Fraud Obsession*, *N.Y. Times Mag.* (June 13, 2017), <https://www.nytimes.com/2017/06/13/magazine/the-man-behind-trumps-voter-fraud-obsession.html> (on file with the *Columbia Law Review*).

150. Christopher Berman, *This Anti-Voter-Fraud Program Gets It Wrong over 99 Percent of the Time. The GOP Wants to Take It Nationwide.*, *Wash. Post* (July 20, 2017), <https://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/> [<https://perma.cc/22B8-CDLM>].

and run the risk of being disenfranchised.¹⁵¹ Even without Crosscheck, voter caging runs similar obvious risks of disenfranchising eligible voters. Georgia's gubernatorial race in 2018 was the most notorious example of a white secretary of state, Brian Kemp, using these tools to rig an election over a black candidate, State Senator Stacey Abrams.¹⁵² The Georgia race also highlighted a widespread problem: Voting precincts serving more likely Democratic voters have worse technology, are less reliable, and have longer lines.¹⁵³

Republicans are also more likely to engage in, or reward, more direct minority-voter-suppression tactics. In a 2018 North Carolina congressional election, Republican operatives allegedly stole absentee ballots, with many of the apparent victims being elderly African American voters.¹⁵⁴ In fact, the Trump DOJ had been given notice of such election fraud almost a year in advance, and did nothing to prevent it,¹⁵⁵ all the while choosing to focus on in-person voter fraud propaganda and

151. See Greg Palast, *The GOP's Stealth War Against Voters*, *Rolling Stone* (Aug. 24, 2016), [https://www.rollingstone.com/politics/politics-features/the-gops-stealth-war-against-voters-247905/\[https://perma.cc/F3BB-UQZK\]](https://www.rollingstone.com/politics/politics-features/the-gops-stealth-war-against-voters-247905/[https://perma.cc/F3BB-UQZK]) (“[T]he Crosscheck list disproportionately threatens solid Democratic constituencies: young, black, Hispanic and Asian-American voters—with some of the biggest possible purges underway in Ohio and North Carolina, two crucial swing states with tight Senate races.”).

152. As secretary of state, Kemp oversaw a sustained spike in purges from Georgia's voter rolls, including a purge of 500,000 names in a single day in 2017, see Alan Judd, *Georgia's Strict Laws Lead to Large Purge of Voters*, *Atlanta J.-Const.* (Oct. 27, 2018), <https://www.ajc.com/news/state-regional-govt-politics/voter-purge-begs-question-what-the-matter-with-georgia/YAFvuk3Bu95kJMaDiDFq/> [<https://perma.cc/7CR8-GLFT>]; held up over 53,000 predominantly black voter registration applications at the 2018 registration deadline, see Ben Nadler, *Voting Rights Become a Flashpoint in Georgia Governor's Race*, *Associated Press* (Oct. 9, 2018), <https://apnews.com/fb011f39af3b40518b572c8cce6e906c> [<https://perma.cc/M784-AFNJ>]; and on the eve of the election, without evidence, accused Democrats of trying to hack into the state's voter registration system, see Richard Fausset & Alan Blinder, *Brian Kemp's Office, Without Citing Evidence, Investigates Georgia Democrats over Alleged 'Hack'*, *N.Y. Times* (Nov. 4, 2018), <https://www.nytimes.com/2018/11/04/us/politics/georgia-elections-kemp-voters-hack.html> (on file with the *Columbia Law Review*).

153. See Anna North, *Why Long Lines at Polling Places Are a Voting Rights Issue*, *Vox* (Nov. 6, 2018), <https://www.vox.com/2018/11/6/18068506/midterm-election-voting-lines-new-york-georgia> [<https://perma.cc/U75X-CGE3>].

154. See Gardner & Reinhard, *supra* note 130; Brianna Sacks & Otilia Steadman, *Inside the North Carolina Republican Vote Machine: Cash, Pills—and Ballots*, *BuzzFeed News* (Dec. 5, 2018), <https://www.buzzfeednews.com/article/briannasacks/dowless-britt-inside-north-carolina-absentee-ballot-machine> [<https://perma.cc/5GZH-BVL7>].

155. See Michael Biesecker & Gary D. Robertson, *North Carolina Asked Feds to Open Vote Fraud Case Last Year*, *Associated Press* (Dec. 21, 2018), <https://www.apnews.com/73c059acc31e4047a89cc0d1a8ce8710> [<https://perma.cc/L2RP-UFSY>]; Beth Reinhard, *Justice Officials Were Briefed Months Ago on Allegations Against Operative at the Center of N.C. Election Fraud Scandal*, *Wash. Post* (Jan. 11, 2019), https://www.washingtonpost.com/investigations/justice-officials-from-washington-were-briefed-months-ago-on-allegations-against-mccrae-dowless-operative-at-center-of-nc-election-fraud-scandal/2019/01/11/4c333722-15db-11e9-a896-f104373c7ffd_story.html [<https://perma.cc/E8BY-TGHT>].

scaremongering about noncitizens voting. Remarkably enough, President Trump nominated Thomas Farr, one such former alleged beanball player from North Carolina credibly accused of racially disenfranchising scare tactics, to the federal bench, and he was almost confirmed.¹⁵⁶

Fishkin and Pozen acknowledge a counterexample: Democrats have their own election-timing strategies, sometimes preferring to schedule an election off cycle to advantage Democratic turnout operations.¹⁵⁷ But they note this practice is rare and it “would be the sort of exception that proves the rule. Whatever their drawbacks, off-cycle elections do not actually block . . . anyone . . . from voting. If this is as far as Democrats will go, it highlights the limits of their use of hardball in the highly contested constitutional sphere of voting.”¹⁵⁸ I would go further and say that a comparison of these tactics shows that Democrats are generally reluctant to play hardball with voting rules, while Republicans have enthusiastically been playing beanball. These voter suppression tactics are likely to get far worse in 2020, particularly now that federal courts have lifted a consent decree forbidding the Republican National Committee from engaging in voter suppression efforts, as Professor Rick Hasen explains.¹⁵⁹ The consent decree was put in place precisely because the RNC has a history of such tactics. What’s past is prologue. RNC voter suppression is dead; long live RNC voter suppression.

Another example is extreme gerrymandering, more of a Republican project than a Democratic one.¹⁶⁰ Yes, Maryland’s congressional seats were extremely gerrymandered,¹⁶¹ but for every Maryland, there is a Wisconsin,¹⁶²

156. Farr worked on Jesse Helms’s 1990 U.S. Senate campaign in North Carolina, which was investigated by DOJ for sending tens of thousands of intimidating postcards to primarily African American voters. See Sean Sullivan, Trump Judicial Nominee Thomas Farr Advances in Senate Amid Racially Charged Controversy, *Wash. Post* (Nov. 28, 2018), https://www.washingtonpost.com/powerpost/trump-judicial-nominee-thomas-farr-advances-in-senate-amid-racially-charged-controversy/2018/11/28/459b0ca4-f322-11e8-aeaa-b85fd44449f5_story.html [<https://perma.cc/AR53-MUM5>].

157. See Fishkin & Pozen, *supra* note 1, at 938 n.98.

158. *Id.* at 939 n.98.

159. See Richard L. Hasen, Donald Trump Was Just Handed a Chance to Supercharge Voter Suppression in 2020, *Slate* (Jan. 8, 2019), <https://slate.com/news-and-politics/2019/01/donald-trump-voter-suppression-plan-2020.html> [<https://perma.cc/KT8S-GC97>] (“With Trump having taken over the RNC for the 2020 elections and with th[e] [1982] consent decree no longer standing in his way, we should be concerned about a new wave of voter suppression coming from the Republican Party during the upcoming election.”).

160. In the 115th Congress, Republicans derived a net benefit of at least sixteen to seventeen additional congressional seats based on the districts drawn after the 2010 census. See Laura Royden & Michael Li, Brennan Ctr. for Justice, *Extreme Maps 1* (2017), https://www.brennancenter.org/sites/default/files/publications/Extreme%20Maps%205.16_0.pdf [<https://perma.cc/Z98E-WQU7>].

161. See *Benisek v. Lamone*, 348 F. Supp. 3d 493, 497–98 (D. Md. 2018) (striking down Maryland’s congressional map as an unconstitutional partisan gerrymander favoring Democrats).

a Pennsylvania,¹⁶³ and a North Carolina.¹⁶⁴ As Fishkin and Pozen noted, Republicans broke norms in Texas and Colorado by redistricting and gerrymandering mid-decade in 2003.¹⁶⁵ But Republicans stepped up their efforts with the Republican State Leadership Committee and its Redistricting Majority Project, known as REDMAP.¹⁶⁶ Using a mix of computer programs and extreme partisanship, Republicans engaged in a national state-by-state strategy of extreme gerrymanders, starting in North Carolina and moving to Florida, Pennsylvania, Ohio, Michigan, and Virginia.¹⁶⁷ As a result, Republicans entrenched themselves and effectively marginalized Democratic voters, so that even when Democrats won statewide by large margins, the Republicans would keep the state legislature or the majority of congressional seats.¹⁶⁸ This is not legitimate hardball. This is indefensible beanball.

In the 2018 elections, voters in Wisconsin and Michigan replaced their Republican governors with Democratic ones.¹⁶⁹ The Republican lame-duck legislatures then enacted a series of changes weakening the incoming governors and increasing the legislatures' power.¹⁷⁰ Wisconsin included measures to limit early voting to a two-week window, even though a federal court had previously found a similar move to be racially

162. See Royden & Li, *supra* note 160, at 22, 25, 28 (showing a Republican skew in Wisconsin's congressional results in each election following the 2010 census across multiple metrics).

163. See *League of Women Voters v. Commonwealth*, 178 A.3d 737, 741–42 (Pa. 2018) (striking down Pennsylvania's congressional map as an illegal gerrymander, favoring Republicans, in violation of the state constitution).

164. See Royden & Li, *supra* note 160, at 1 (finding that North Carolina is one of three states that “consistently ha[s] the most extreme levels of partisan bias” in its congressional maps).

165. See Fishkin & Pozen, *supra* note 1, at 920.

166. See Roth, *supra* note 103, at 96–100. See generally David Daley, *Ratf**ked: Why Your Vote Doesn't Count* (2016) (detailing REDMAP's origins and efforts).

167. See Roth, *supra* note 103, at 98–99.

168. See, e.g., *id.* at 101 (noting that Democrats won more congressional votes in Michigan, Pennsylvania, North Carolina, and Wisconsin in 2012, yet Republicans won more congressional seats); Christopher Ingraham, *In at Least Three States, Republicans Lost the Popular Vote but Won the House*, *Wash. Post: Wonkblog* (Nov. 13, 2018), <https://www.washingtonpost.com/business/2018/11/13/least-three-states-republicans-lost-popular-vote-won-house/> [<https://perma.cc/78J6-BUTT>] (noting that Republicans won majorities in the Pennsylvania, Michigan, and North Carolina state houses in 2018 despite winning fewer votes).

169. See Dan Simmons & Felicia Sonmez, *Republicans in Wisconsin and Michigan, Defeated in November, Seek Payback by Limiting the Powers of Incoming Democrats*, *Wash. Post* (Dec. 3, 2018), https://www.washingtonpost.com/politics/republicans-in-wisconsin-and-michigan-defeated-in-november-seek-payback-by-limiting-the-powers-of-incoming-democrats/2018/12/03/393f478e-f72a-11e8-8c9a-860ce2a8148f_story.html [<https://perma.cc/BK73-R6VG>].

170. See *id.*

discriminatory.¹⁷¹ In a sign that some limits on hardball remain, Michigan's outgoing Republican governor vetoed a bill that would have stripped some power from incoming Democratic officeholders¹⁷² around the same time New Jersey Democrats also backed away from their attempt to engage in extreme gerrymandering.¹⁷³ Nevertheless, defeated lame-duck Wisconsin Governor Scott Walker did not exercise similar restraint.¹⁷⁴

These lame-duck power grabs are harder to categorize, but I'll hazard to call them hardball rather than beanball. If separation-of-powers arrangements are set by legislation rather than being constitutionally enshrined, then the state constitution invites some of this hardball. Early voting is helpful, but it is not limitless. States may validly limit how early voters can submit their votes in order to ensure the public has a chance to deliberate. Two weeks of early voting seems to be an acceptable balance.

What else can be distinguishable as hardball versus beanball? Republicans denying Judge Merrick Garland a hearing during his Supreme Court nomination was hardball and yet not beanball. Senate Republicans legitimately had enough votes to block Garland, and they chose an aggressive, norm-busting tactic to maximize their chances to prevent any defections.¹⁷⁵ It was unprecedented but not fundamentally antidemocratic to use their votes to block or delay a confirmation. To justify his extreme hardball, Senate Majority Leader Mitch McConnell falsely claimed that Presidents have not appointed Supreme Court Justices in presidential election years.¹⁷⁶ McConnell's willingness to make

171. See Dan Kaufman, Opinion, Wisconsin Is About to Make a Huge Mistake, *N.Y. Times* (Dec. 3, 2018), <https://www.nytimes.com/2018/12/03/opinion/wisconsin-legislature-republicans-evers.html> (on file with the *Columbia Law Review*).

172. See Jonathan Oosting, Snyder Veto Spree Takes Down GOP Power Play Proposal, 40 Other Bills, *Detroit News* (Dec. 28, 2018), <https://www.detroitnews.com/story/news/politics/2018/12/28/snyder-vetoes-lame-duck-bills/2435826002/> [<https://perma.cc/7KEX-WXEJ>].

173. See Alan Greenblatt, After Backlash from Own Party, New Jersey Democrats Drop Redistricting Plan, *Governing* (Dec. 17, 2018), <https://www.governing.com/topics/politics/gov-new-jersey-democrats-power-grab.html> [<https://perma.cc/JR5N-6CDJ>].

174. See Mitch Smith & Monica Davey, Wisconsin's Scott Walker Signs Bills Stripping Powers from Incoming Governor, *N.Y. Times* (Dec. 14, 2018), <https://www.nytimes.com/2018/12/14/us/wisconsin-governor-scott-walker.html> (on file with the *Columbia Law Review*).

175. See Ariane de Vogue, How McConnell Won, and Obama Lost, the Merrick Garland Fight, *CNN* (Nov. 9, 2016), <https://www.cnn.com/2016/11/09/politics/merrick-garland-supreme-court/index.html> [<https://perma.cc/5GNF-D9DG>].

176. See, e.g., McConnell Vows to Hold the Line Against Obama's SCOTUS Pick; Does John Kasich Have a Path to the GOP Nomination?, *Fox News* (Mar. 20, 2016), <https://www.foxnews.com/transcript/mcconnell-vows-to-hold-the-line-against-obamas-scotus-pick-does-john-kasich-have-a-path-to-the-gop-nomination> [<https://perma.cc/9E76-ZTRF>] (“[A]ll we’re doing . . . is following a long standing tradition of not filling vacancies on the Supreme Court in the middle of a presidential election year.” (quoting McConnell in a “Fox News Sunday” interview)). Some examples of presidential-election-year

patently false historical claims indicates that he knew he was shattering norms. However, lying in politics is too common to be considered beanball. Similarly, confirming Neil Gorsuch to the Supreme Court by eliminating the filibuster¹⁷⁷ was hardball, but not beanball.

But Brett Kavanaugh's Supreme Court confirmation was an example of constitutional beanball. The stakes for democracy of rushing a lifetime confirmation—without legitimate vetting—are much higher than denying or delaying an appointment. The Trump White House and Senate Republicans prevented Senate Democrats from receiving full access to Kavanaugh's records¹⁷⁸ or full answers to troubling questions about his conduct during the Whitewater investigation,¹⁷⁹ his time in the Bush Administration,¹⁸⁰ or mysterious debts that were suddenly paid off.¹⁸¹ Republicans also sharply limited the investigation into multiple allegations of sexual misconduct.¹⁸² Even if Kavanaugh's statements on

confirmations include Mahlon Pitney in 1912, Louis Brandeis and John Clarke in 1916, Benjamin Cardozo in 1932, Frank Murphy in 1940, and Anthony Kennedy in 1988. See Amy Howe, Supreme Court Vacancies in Presidential Election Years, SCOTUSblog (Feb. 13, 2016), <https://www.scotusblog.com/2016/02/supreme-court-vacancies-in-presidential-election-years/> [<https://perma.cc/S26S-ZCLG>].

177. See Matt Flegenheimer, Senate Republicans Deploy 'Nuclear Option' to Clear Path for Gorsuch, N.Y. Times (Apr. 6, 2017), <https://www.nytimes.com/2017/04/06/us/politics/neil-gorsuch-supreme-court-senate.html> (on file with the *Columbia Law Review*).

178. See Sheryl Gay Stolberg, White House Withholds 100,000 Pages of Judge Brett Kavanaugh's Records, N.Y. Times (Sept. 1, 2018), <https://www.nytimes.com/2018/09/01/us/politics/kavanaugh-records.html> (on file with the *Columbia Law Review*).

179. See Tom Hamburger, Robert Barnes & Robert O'Harrow Jr., Senate Democrats Want to Know Whether Kavanaugh Crossed Line as Source During Clinton Probe, Wash. Post (Aug. 22, 2018), https://www.washingtonpost.com/politics/senate-democrats-want-to-know-whether-kavanaugh-crossed-line-as-source-during-clinton-probe/2018/08/22/d5cadfce-a58a-11e8-a656-943eefab5daf_story.html [<https://perma.cc/BFP5-FMKU>].

180. See Burgess Everett, New Emails Show Kavanaugh's Involvement in Controversial Nomination, Politico (Sept. 12, 2018), <https://www.politico.com/story/2018/09/12/kavanaugh-emails-controversial-nomination-817798> [<https://perma.cc/7PY8-YNXS>]; Salvador Rizzo, Did Brett Kavanaugh Give False Testimony Under Oath?, Wash. Post (Sept. 17, 2018), <https://www.washingtonpost.com/politics/2018/09/17/did-brett-kavanaugh-give-false-testimony-under-oath/> [<https://perma.cc/9VXL-X9V3>]; Salvador Rizzo, Fact-Checking the Bipartisan Spinfest on Brett Kavanaugh's Time at the White House, Wash. Post (Aug. 15, 2018), <https://www.washingtonpost.com/politics/2018/08/15/fact-checking-bipartisan-spinfest-brett-kavanaughs-time-white-house/> [<https://perma.cc/EX4H-VCM7>].

181. See Amy Brittain, Supreme Court Nominee Brett Kavanaugh Piled Up Credit Card Debt by Purchasing Nationals Tickets, White House Says, Wash. Post (July 11, 2018), https://www.washingtonpost.com/investigations/supreme-court-nominee-brett-kavanaugh-piled-up-credit-card-debt-by-purchasing-nationals-tickets-white-house-says/2018/07/11/8e3ad7d6-8460-11e8-9e80-403a221946a7_story.html [<https://perma.cc/N8VR-B367>].

182. See Seung Min Kim & John Wagner, Kavanaugh Moves Closer to Senate Confirmation as GOP Argues FBI Report Exonerates the Judge, Wash. Post (Oct. 4, 2018), https://www.washingtonpost.com/politics/senators-prepare-to-review-fbi-report-on-kavanaugh-after-early-morning-arrival/2018/10/04/394dbaf8-c7be-11e8-b2b5-79270f9cce17_story.html [<https://perma.cc/U9HD-BLL6>].

these matters did not rise to the level of perjury, felony false statement, or other crimes, they surely warranted a more robust investigation and less stonewalling on records.

While it is common for political actors to play hardball with access to information and investigations, a nomination to a lifetime seat on the Supreme Court is a special case. The Supreme Court plays a unique role in American democracy because of its countermajoritarian function and the escalating importance of judicial review and judicial supremacy in the American political system. Confirmation hearings are the only chance to vet nominees for an office that will shape the United States for decades. Blocking valid investigations may be hardball in other contexts, but it was beanball in this context. These efforts to sharply limit inquiry and debate about a Supreme Court seat were antidemocratic and antideliberative—the result of a self-imposed deadline before the November election, a fear of public opinion, and an ardent refusal to consider another candidate because the country is stuck in a culture war.

The larger context surrounding the Supreme Court also matters. The Roberts Court has enabled beanball in its rulings upholding voter-ID legislation in *Crawford v. Marion County Election Board*,¹⁸³ in favor of a voter-caging law in *Husted v. A. Philip Randolph Institute*,¹⁸⁴ and striking down the Voting Rights Act's preclearance protections in *Shelby County v. Holder*.¹⁸⁵ The Kavanaugh confirmation solidifies a majority willing to open the door for beanball tactics.

Were Democrats playing hardball or beanball by releasing Dr. Christine Blasey Ford's letter, despite her request not to release it?¹⁸⁶ I will let others interpret that step in this episode.

As discussed above, the manipulations in George W. Bush's DOJ, leading to the firing of nine U.S. Attorneys, was beanball, because the DOJ was misused for partisan purposes to prosecute the opposition, protect political allies, and crack down on voting access.¹⁸⁷ Some of those prosecutions were warranted, some weren't; but the partisan pressure was illegitimate and unacceptable. Presidents have often appointed crony attorney generals, but President Nixon took his cronyism to the level of beanball with his management of the DOJ through John Mitchell, Richard Kleindienst, and Watergate.¹⁸⁸ Now we are seeing another

183. 553 U.S. 181, 203–04 (2008).

184. 138 S. Ct. 1833, 1840–41, 1848 (2018).

185. 133 S. Ct. 2612, 2631 (2013).

186. See Elana Schor & Burgess Everett, McConnell Calls for Investigation into Leak of Ford Letter, Politico (Oct. 7, 2018), <https://www.politico.com/story/2018/10/07/christine-blasey-ford-leak-investigation-880177> [<https://perma.cc/4X3E-KPTE>].

187. See *supra* notes 67–76 and accompanying text.

188. See Jed Shugerman, Opinion, Think Matthew Whitaker Is a Hack? He's One of Many., Wash. Post (Nov. 16, 2018), https://www.washingtonpost.com/opinions/think-matthew-whitaker-is-a-hack-hes-one-of-many/2018/11/16/5effb47c-e8f7-11e8-b8dc-66cca409c180_story.html

Republican President play beanball with the DOJ. When Obama's Attorney General Loretta Lynch crossed a line by meeting with Bill Clinton on the tarmac—even as Hillary Clinton was under investigation by the FBI for her use of a private email server while in office as Secretary of State—she announced she would accept the recommendations of career prosecutors and the FBI director rather than make the decision to prosecute herself.¹⁸⁹ Trump's November 2018 appointment of Matthew Whitaker as acting attorney general, on the other hand, may have been beanball, because Trump's unprecedented appointment¹⁹⁰ reflected an intent to impede investigations into the President and his associates and protect against indictments.¹⁹¹

Government shutdowns and bogus emergency declarations to build a wall are hardball, not beanball. They do not fundamentally undermine democratic participation. But a slippery slope is a legitimate worry: One can imagine other emergency declarations that could be used to manipulate elections or abuse minority rights.

CONCLUSION

One of the most important insights in Fishkin and Pozen's article was a discussion of something that preceded their timeframe of the past twenty-five years. They turned to Richard Hofstadter's 1964 essay, *The Paranoid Style in American Politics*, written in the midst of the Barry Goldwater phenomenon.¹⁹² They observe that Republicans are engaging in "existential politics," using rhetoric about a "plague" of Democratic

[<https://perma.cc/3PCE-QQUN>] ("Richard M. Nixon first appointed his campaign manager, John Mitchell, who could protect him from investigation into his 1968 campaign. Then Nixon appointed Richard G. Kleindienst as attorney general after the Watergate break-in was already being investigated. Kleindienst himself was already compromised as deputy attorney general . . .").

189. See Mark Landler, Matt Apuzzo & Amy Chozick, Loretta Lynch to Accept F.B.I. Recommendations in Clinton Email Inquiry, *N.Y. Times* (July 1, 2016), <https://www.nytimes.com/2016/07/02/us/politics/loretta-lynch-hillary-clinton-email-server.html> (on file with the *Columbia Law Review*).

190. See Memorandum of Constitutional Scholars as Amici Curiae in Support of the State of Maryland at 6, *Maryland v. United States*, No. ELH-18-2849, 2019 WL 410424 (D. Md. Feb. 1, 2019), 2018 WL 7201603 ("We are not aware of even a single previous instance when any president has appointed an acting Attorney General to lead the Department of Justice from a role that did not require Senate confirmation.").

191. See Editorial, Matthew Whitaker and the Corruption of Justice, *N.Y. Times* (Nov. 16, 2018), <https://www.nytimes.com/2018/11/16/opinion/sunday/matthew-whitaker-donald-trump-robert-mueller.html> (on file with the *Columbia Law Review*) ("The reason Mr. Trump [appointed] Mr. Whitaker seems clear . . . Whitaker is an avowed antagonist of [Special Counsel Robert] Mueller—he has called the investigation a witch hunt, said Mr. Mueller's team should not investigate Mr. Trump's finances and suggested that an attorney general could slash the special counsel's budget.").

192. See Fishkin & Pozen, *supra* note 1, at 973.

voters, apocalyptic themes, and the “Flight 93” metaphor of terror.¹⁹³ They quote Hofstadter on paranoid extremism: “[I]f ‘what is at stake is always a conflict between absolute good and absolute evil, what is necessary is not compromise but the will to fight things out to a finish.’”¹⁹⁴

I would add Hofstadter’s observations about dispossession, which ring truer today:

The spokesmen of those earlier [historical] movements felt that they stood for causes and personal types that were still in possession of their country—that they were fending off threats to a still established way of life. But the modern right wing, as Daniel Bell has put it, *feels dispossessed: America has been largely taken away from them and their kind, though they are determined to try to repossess it and to prevent the final destructive act of subversion.* The old American virtues have already been eaten away by cosmopolitans and intellectuals; the old competitive capitalism has been gradually undermined by socialistic and communistic schemers; the old national security and independence have been destroyed by treasonous plots, having as their most powerful agents not merely outsiders and foreigners as of old but major statesmen who are at the very centers of American power. Their predecessors had discovered conspiracies; the modern radical right finds conspiracy to be betrayal from on high.

Important changes may also be traced to the effects of the mass media. The villains of the modern right are much more vivid than those of their paranoid predecessors, much better known to the public; the literature of the paranoid style is by the same token richer and more circumstantial in personal description and personal invective.¹⁹⁵

From Gingrich to Trump, the right feels increasingly dispossessed, so it fights back with a sense of entitlement, existential anxiety, and extreme tactics.¹⁹⁶ “America has been largely taken away from them,” all the more so in 2016. “Make America Great Again” means to take America back, to repossess it from Obama and the conspiratorial elites, from people of color gaining in numbers and status, from women challenging the patriarchy. Changes in mass media drive the paranoia, from Fox News to social media platforms and their manipulations. These dispossessed seem to be saying, “This is my America, and if I can’t have it, no one can.” From that sense of entitlement, grievance, and resentment, it is not shocking that Republicans have been more aggressively playing hardball and beanball.

193. Id. at 974.

194. Id. at 975 (quoting Hofstadter, *supra* note 18).

195. Hofstadter, *supra* note 18 (emphasis added).

196. See Sargent, *supra* note 127, at 20–22, 26–28, 178–88, for additional background on the conservative movement’s extreme tactics and associated historical echoes with past extremism.