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## Constitutional Hardball, 37 J. Marshall L. Rev. 523 (2004)

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# CONSTITUTIONAL HARDBALL

MARK TUSHNET\*

## I. INTRODUCTION: THE CONCEPT OF CONSTITUTIONAL HARDBALL, WITH SOME EXAMPLES

For the past several years I have been noticing a phenomenon that seems to me new in my lifetime as a scholar of constitutional law. I call the phenomenon *constitutional hardball*. This Essay develops the idea that there is such a practice, that there is a sense in which it is new, and that its emergence (or re-emergence) is interesting because it signals that political actors understand that they are in a position to put in place a new set of deep institutional arrangements of a sort I call a constitutional order.<sup>1</sup> A shorthand sketch of constitutional hardball is this: it consists of political claims and practices—legislative and executive initiatives—that are without much question within the bounds of existing constitutional doctrine and practice but that are nonetheless in some tension with existing *pre*-constitutional understandings.<sup>2</sup> It is *hardball* because its practitioners see themselves as playing for keeps in a special kind of way; they believe the stakes of the political controversy their actions provoke are quite high, and that their defeat and their opponents' victory would be a serious, perhaps permanent setback to the political positions they hold.<sup>3</sup>

The Essay begins in this Part with some examples of constitutional hardball, followed by a description of the practice in

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1. For my discussion of the idea of a constitutional order, on which the analysis in this Essay builds, see MARK TUSHNET, *THE NEW CONSTITUTIONAL ORDER* (2003).

2. By this I mean the “go without saying” assumptions that underpin working systems of constitutional government. They are hard to identify outside of times of crisis precisely because they go without saying. (An alternative term would be *conventions*.) These assumptions are *conceptually* prior to the Constitution (thus, “pre”-constitutional), not necessarily temporally prior.

3. For a parallel investigation, dealing however with situations in which the stakes are quite substantially higher than they have been in the United States, see José María Maravall, *The Rule of Law as a Political Weapon*, in *DEMOCRACY AND THE RULE OF LAW* 261 (José María Maravall & Adam Przeworski eds., 2003).

more general terms. Part II develops the connection, asserted in this Part, between constitutional hardball and changes in fundamental constitutional arrangements or, in my own terms, constitutional orders. Part III then describes the events surrounding *Marbury v. Madison* as an episode of constitutional hardball. Part IV offers further elaborations of the concept, emphasizing in particular the ways in which constitutional hardball can fail and defending the concept against the charge that it does not in fact single out a practice that is different from ordinary constitutional politics. Finally, Part V provides some modest normative reflections on constitutional hardball.

#### A. *Some Examples of Constitutional Hardball*

Examples of constitutional hardball may give readers a better sense of the practices I have in mind.<sup>4</sup> Perhaps the best example is the filibuster mounted by the Senate's Democrats against several judicial nominations made by President George W. Bush in 2002-03.<sup>5</sup> The Democrats' actions were clearly within the bounds set by the Senate's rules, and the Constitution expressly authorizes the Senate to adopt rules to govern its operation.<sup>6</sup> Republicans responded to the filibuster by developing an argument that it was unconstitutional because it interfered with the ability of the Senate to decide, by majority vote, whether to consent to a

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4. I note at the outset that I approach the materials from a partisan stance on the left. I believe that my political position makes me more attuned to examples of hardball practices I see on the right. The structure of my argument, though, strongly suggests that when one side starts to play constitutional hardball, the other side will join in. So, I am confident that someone who looked at contemporary politics from the right would be able to locate examples of constitutional hardball being played by liberals and progressives. There is a sense in which my argument suggests that conservatives must have started the contemporary game of constitutional hardball, although I suspect that it would be quite difficult to identify the *first* instance of constitutional hardball, and I refrain from trying. For the same reason I have avoided another possible approach to identifying constitutional hardball, suggested to me by Vicki Jackson. Her thought is that constitutional hardball originates in a sense of unfairness: people who thought they had been playing by the rules discover that their opponents have changed tactics in ways that put them at a disadvantage. They then adopt a tit-for-tat strategy of retaliation. The difficulty with this approach is that it turns crucially on identifying the *first* departure from prior understandings. Once constitutional hardball begins, participants—and observers who will have their own partisan predispositions—will disagree over that identification for precisely the same reasons that they engage in constitutional hardball.

5. The example is better than others precisely because it has a bipartisan character: The actions on both sides of the Senate's aisle have the key attributes of constitutional hardball.

6. U.S. CONST. art. I, § 5, cl. 2. "Each House may determine the Rules of its Proceedings". *Id.*

nomination. I believe that argument to be strained,<sup>7</sup> because it requires one to distinguish between filibusters of judicial nominations and filibusters of ordinary legislation recommended by the President to Congress pursuant to his duty to do so.<sup>8</sup> Still, there *are* not-implausible distinctions available,<sup>9</sup> and some versions of arguments against the constitutionality of a Senate rule authorizing filibusters generally are not at all insubstantial.<sup>10</sup> The Republicans' arguments, then, were within constitutional bounds as well.

At the same time, some aspects of the Democrats' and the Republicans' behavior were unusual. The Democratic filibusters were, if not unique,<sup>11</sup> quite unusual. We might compare the nomination filibuster to recess appointments to the federal courts. The Constitution clearly authorizes such appointments,<sup>12</sup> and presidential use of the power was not unusual.<sup>13</sup> But, presidents have come to refrain from using their undoubtedly constitutional power to make recess appointments, in part out of concern about possible intrusions on judicial independence that arise from the possibility that a recess nominee will not receive a permanent

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7. It is developed in *Judicial Nominations, Filibusters, and the Constitution: When a Majority is Denied its Right to Consent: Before the Senate Judiciary Subcommittee on the Constitution*, 2003 [hereinafter Eastman's Testimony] (statement of John C. Eastman, Professor of Constitutional Law, Chapman University School of Law, and Director, The Claremont Institute Center for Constitutional Jurisprudence available at <http://www.claremont.org/static/pdf/eastmantestimony.pdf> (last visited September 3, 2003)).

8. U.S. CONST. art. II, § 3. "He *shall* from time to time . . . recommend to their Consideration such Measures as he shall judge necessary and expedient". *Id.* (emphasis added).

9. For example, as Professor Eastman's testimony, *supra* note 8, suggests, the President's power to nominate judges implicates a different, and perhaps more important, set of separation-of-powers concerns than does the power to recommend legislation.

10. For an overview, see Erwin Chemerinsky & Catherine Fisk, *The Filibuster*, 49 STAN. L. REV. 181 (1997). The strongest arguments are against using a rule authorizing filibusters to insulate that very rule from change by a majority of the Senate.

11. Republicans had mounted a filibuster when Lyndon Johnson nominated Associate Justice Abe Fortas to succeed Earl Warren as Chief Justice. For a description, see LAURA KALMAN, ABE FORTAS 355 (1990). Professor Eastman's testimony asserts that the Democratic filibusters are "even more problematic than the one successfully waged against Fortas, because Fortas never received majority support on a cloture vote." Eastman's testimony, *supra* note 8, at 23 n.36. According to Kalman, "When [Senate majority leader] Mansfield called for a vote on October 1, only forty-five of the eighty-eight Senators present voted for cloture." KALMAN, *supra* at 355.

12. U.S. CONST. art. II, § 2, cl. 3. "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate." *Id.*

13. For a discussion, see Louis Fisher, *Recess Appointments of Federal Judges*, CONG. RESEARCH SERV. (Sept. 5, 2001), available at <http://www.senate.gov/reference/resources/pdf/RL31112.pdf> (last visited Nov. 14, 2003).

position unless he or she carries favor with the president.<sup>14</sup> This restraint on the use of acknowledged power might even amount to a weak pre-constitutional convention against recess appointments to the courts. Similarly, one might say, that the Senate had adopted a pre-constitutional convention against using the filibuster on judicial nominations since the Fortas nomination. The Democrats' filibuster is then a repudiation of a settled pre-constitutional understanding.

The Republican response is similar, though on a lower level. Some Republicans suggested that were the filibusters to persist they would support litigation aimed at establishing the unconstitutionality of the practice.<sup>15</sup> What was unusual about this threat is that Senators typically have been quite jealous about refraining from submitting intra-house disputes to judicial supervision. The Senate leadership has often filed papers asserting that individual Senators lack standing to challenge Senate procedures, for example. The preferred course—perhaps, again, amounting to a pre-constitutional convention—is for the Senate to resolve these internal disputes internally.<sup>16</sup>

I believe that constitutional hardball is more prevalent than a single example indicates. The successful effort in Colorado, and the parallel one in Texas, to revisit districting decisions made after the 2000 census is similar in structure. Legislatures have an undoubted right to alter district lines as often as they want. The case for doing so in Colorado and Texas was not frivolous; in each state the first set of districts was devised not by an elected legislature but by a court acting after the state legislature had failed to act.<sup>17</sup> Still, in each round of districting since the 1970s

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14. The practice of recess appointments to Article III courts was suspended for about twenty years, then was revived by President Jimmy Carter in 1980 (a recess appointment of a district judge, whose name was not resubmitted when the appointment expired), and, after another twenty-year period, by President William Clinton in 2000 (a recess appointment of Roger Gregory, who was subsequently renominated by President George W. Bush and confirmed by the Senate). *Id.* at 19-24.

15. For a copy of the complaint that was filed by Judicial Watch, see [http://www.judicialwatch.org/complaint\\_051403.shtml](http://www.judicialwatch.org/complaint_051403.shtml) (last visited Nov. 12, 2003).

16. The Republicans' threat to support litigation was a milder "repudiation" of the pre-constitutional understanding than the Democrats' filibuster because it was—at least to the present—only a threat. President Bush's recess appointment of the filibustered nominee Charles Pickering would seem to be stronger repudiation of the possible (weak) pre-constitutional understanding limiting the use of recess appointment.

17. For Colorado, see T.R. Reid, *Texans Back Colorado Democrats in Redistricting Case*, THE WASH. POST, Sept. 9, 2003, at A2. "The state legislature, divided between the two parties, could not settle on a new district plan in time for the 2002 election, so a state court drew the map." *Id.* For Texas, see Chris Cilizza, *Redistricting Two-Step to Resume Monday*, ROLL CALL, Sept. 11, 2003. "After Texas legislators deadlocked in their attempts to

legislators have generally taken the first set of districts to be fixed until the next census or until they were ordered to draw a new set of districts by a court. The Republican actions in Colorado and Texas are constitutional hardball because they are inconsistent with what seemed to be a settled pre-constitutional understanding.<sup>18</sup> The Democrats' response in Texas—absenting themselves from the legislature and the state—was a defensive form of constitutional hardball, inconsistent with what most people would think were the obligations of elected representatives.<sup>19</sup>

A final example is the impeachment of President Clinton.<sup>20</sup> Here too there was at least substantial constitutional support for the proposition that the House of Representatives had the power to impeach Clinton for what its members concluded he had done.<sup>21</sup> Of course, impeachment, particularly of a president, is serious business. Prior to the Clinton impeachment, House members filed papers aimed at instituting impeachment proceedings of other

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redraw the lines in 2001, a federal court adopted a plan that upheld the status quo in the 2002 elections." *Id.*

18. Supplementing the hardball of the districting efforts themselves is the suggestion by Representative Tom DeLay that the *failure* to enact new district lines is itself a constitutional violation, of the asserted constitutional requirement that district lines be drawn by legislatures whenever possible. For DeLay's statement, see *Fox News Sunday*, (Fox television broadcast, Aug. 17, 2003) stating "We're supposed to, by Constitution, apportion or redistrict every 10 years." *Id.*

19. Although I would qualify this a bit by noting that the obligations of representatives arise out of a duty to constituents to consider the range of issues that legislatures deal with, whereas the Democrats left the state to avoid sitting in a special legislative session dealing only with the issue of apportionment.

20. Robert Reich uses the examples of impeachment, some aspects of the 2000 Florida election controversy, and the California recall election to support his argument that the United States has begun to experience what he calls a permanent election (as distinguished from a permanent election campaign), in which the outcomes reached on Election Day are not taken to settle the election itself. Robert B. Reich, *The Permanent Election*, THE AMERICAN PROSPECT, Sept. 1, 2003 available at <http://www.prospect.org/print/V14/8/reich-r.html> (last visited Nov. 14, 2003). Reich's idea is similar to mine, but it probably has a broader reach than the idea of constitutional hardball.

21. They could reasonably have believed that his false statements were a high crime or misdemeanor according to accepted interpretations of those terms (as referring to serious criminal misconduct or to misconduct, whether or not amounting to a serious crime, that cast doubt on the president's fitness to continue in office), or that the House had the power to impeach a president whenever it judged, according to whatever standards it chose, that he had committed a high crime or misdemeanor (a position associated with then-Representative Gerald Ford, in remarks made in 1970, quoted in GEOFFREY STONE ET AL., CONSTITUTIONAL LAW 362 (4th ed. 2001) ("an impeachable offense is whatever a majority of the House of Representatives considers it to be at a given moment in history")).

presidents.<sup>22</sup> Those attempts were never pursued with any seriousness. One can combine that fact with the evidence from impeachments of federal judges to identify yet another pre-constitutional understanding: the House of Representatives should not aggressively carry out an impeachment inquiry unless, from the outset, there is a reasonable probability that the inquiry will result in the target's removal from office. The Clinton impeachment was inconsistent with that understanding.

Constitutional hardball has another characteristic. The stakes are quite high when politicians play it. The Democrats' filibusters are designed in the first instance to prevent the President from transforming the federal circuit courts by appointing a large number of judges whom the Democrats regard as far too conservative for the nation's good.<sup>23</sup> The Republicans' districting efforts are designed to increase the number of seats that Republican candidates are likely to win, thereby enhancing the likelihood that Republicans will retain control of the House of Representatives through the next census and ensuing redistricting. The case of the Clinton impeachment is a bit more complicated. Then-Vice President Al Gore would have replaced Clinton as president had the impeachment been followed by a conviction. There would have been no change in partisan control of the executive branch. Still, the Republican leadership in the House of Representatives might reasonably have believed that Clinton's impeachment would substantially weaken the political position of the White House's occupant, whether that person be Clinton or Gore.<sup>24</sup>

I have described constitutional hardball as a strategy rational politicians adopt.<sup>25</sup> It comes in an *offensive* form, when politicians

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22. For example, such papers were filed in connection with the Iran-contra affair. See Jonathan Turley, *Senate Trials and Factional Disputes: Impeachment as a Madisonian Device*, 49 DUKE L.J. 1, 77 n.366 (1999) (describing a resolution on impeachment that was filed and referred to the Judiciary Committee, which took no further action).

23. Although I have no direct evidence of this, I believe that the filibusters are aimed—perhaps more importantly—at deterring the president from nominating an equally conservative person for a vacancy on the Supreme Court, should one appear prior to the 2004 elections.

24. For additional discussion of the Clinton impeachment, see *infra* note 72.

25. Louis Michael Seidman has suggested to me that there is another form of constitutional hardball, which he believes is more important. In the alternative version, politicians play constitutional hardball out of an essentially *irrational* belief that their political opponents are so deeply wrong that their continuation in office, or the possibility of their becoming dominant, is a threat to everything for which the nation stands. Seidman points to the impeachment example, where the Republicans in the House of Representative must have known that they had no chance of removing Clinton from office (and that, if they did, they would get Al Gore in his place). My argument, that the House Republicans had an eye on the 2000 presidential elections, seems

from a minority party see the opportunity open for a (possible) permanent transformation of their status. Such politicians play constitutional hardball to change their status. It also comes in a *defensive* form, when politicians in a dominant party see the possibility that they may be permanently displaced from power. These politicians play constitutional hardball to preserve their status.

### B. *Constitutional Hardball and Partisan Entrenchment*

The high-stakes characteristic of constitutional hardball shows that hardball is an element of the more general phenomenon Jack Balkin and Sanford Levinson identified as partisan entrenchment.<sup>26</sup> According to Balkin and Levinson, large-scale changes in deep institutional arrangements occur through a process of partisan entrenchment.

Balkin and Levinson focus on partisan entrenchment in the courts. "When a party wins the White House, it can stock the federal judiciary with members of its own party, assuming a relatively acquiescent Senate."<sup>27</sup> In doing so, the president extends his party's policy positions, and its positions on the meaning of the Constitution, over a much longer period than his own presidency. And, once the judges are in place, "they start to change the understandings of the Constitution that appear in positive law."<sup>28</sup> For Balkin and Levinson, partisan entrenchment means that "[p]arties who control the presidency install jurists of their liking—given whatever counterweight the Senate provides."<sup>29</sup>

The process of partisan entrenchment should, I believe, be understood more broadly than in Balkin and Levinson's initial presentation.<sup>30</sup> The full process of partisan entrenchment has

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strained to him. Seidman and I agree that both forms of constitutional hardball might well occur.

26. Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001).

27. *Id.* at 1067.

28. *Id.*

29. *Id.* at 1076.

30. Agreeing as I do with much of Balkin and Levinson's approach, I may seem a bit churlish in noting that, despite their acknowledgement that constitutional understandings develop outside the courts, their analysis is focused almost exclusively on the courts as locations for constitutional transformation. Perhaps it has that focus because Balkin and Levinson see *Bush v. Gore* as a much more important part of the story of partisan entrenchment than I do, and so minimize the importance of the games of constitutional hardball that were being played elsewhere. For another work acknowledging the value of Balkin and Levinson's work while criticizing it for some omissions, see Howard Gillman, *Constitutional Law as Partisan Entrenchment: The Political Origins of Liberal Judicial Activism* (unpublished paper in author's possession) available at <http://www.yale.edu/law/tw/papers/Hw-gillman.pdf> (last visited Nov. 14, 2003).



several stages, in which control of the courts is only one phase.<sup>31</sup> First, proponents of a particular set of arrangements gain control over one component of the government.<sup>32</sup> They then use that control to devise mechanisms that ensure their continued control of that component. For example, they might develop ways of implementing civil service regulations, intended to eliminate partisan influence on the lower levels of the executive bureaucracy, so that lower-level bureaucrats are in fact committed to a particular partisan program.<sup>33</sup> Or, perhaps more important, they set their substantive legislative or executive agenda to attract strong support from some, and to demobilize their opponents.<sup>34</sup> Further, those who control one component of the government try to leverage that control into taking control of other components. Balkin and Levinson focus in particular on the ability of a partisan coalition that takes narrow control of the Senate and the presidency to gain much more extensive control over the judiciary, for a long term.<sup>35</sup>

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31. A signal of the need for a more expansive view of the process is the phrase *assuming a relatively acquiescent Senate* in Balkin and Levinson's account of partisan entrenchment in the courts. Balkin & Levinson, *supra* note 26, at 1067. The Democratic filibuster shows that we need not make such an assumption, even when the same party as the presidency formally controls the Senate. Compare with Balkin & Levinson, *supra* note 26, at 1083 (describing *Bush v. Gore* as a case in which "five members of the Court us[ed] their powers of judicial review to entrench their party in the Presidency, and thus, *in effect*, in the judiciary as well, because of the President's appointments power.") (emphasis added).

32. My presentation contrasts with Balkin and Levinson's in part because I treat the courts as simply one of several components of the political system, all of which can play the leading role in partisan entrenchment.

It is perfectly normal for Presidents to entrench members of their party in the judiciary as a means of shaping constitutional interpretation. That is the way most constitutional change occurs. It is quite another matter for members of the federal judiciary to select a president who will entrench like-minded colleagues in the judiciary.

*Id.* at 1083.

I note as well that Balkin and Levinson properly emphasize the temporal extent of entrenchment. The sense in which *Bush v. Gore* "entrenched" a Republican president is quite different from the sense in which a president entrenches his party's supporters in the courts.

33. The techniques are familiar: exile to undesirable postings, assignment to unrewarding tasks, and unacknowledged political screening of applicants for appointment and promotion.

34. An example might be development of legislative restrictions on the kinds of cases that lawyers supported by the Legal Services Corporation can bring, sometimes described as one of several means of "defunding the left." For the Supreme Court's consideration of a very small portion of those restrictions, see *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001).

35. And, of course, the process of partisan entrenchment might continue were the judiciary then to interpret the Constitution in ways that further entrenched the partisans in the presidency and Senate who put the judges in place.

The stakes are high when politicians play political hardball, that is, because the politicians believe that the winners might end up with permanent control (meaning, control for the full time-horizon of today's politicians) of the entire government. The winner of constitutional hardball takes everything, and the loser loses everything. The next Part of this Essay examines the possibility that this characteristic of constitutional hardball can explain its emergence in particular political conjunctures (and its absence in others).

## II. ACCOUNTING FOR CONSTITUTIONAL HARDBALL

This Part describes various aspects of constitutional hardball in more detail. I begin by expanding the argument that constitutional hardball is associated with changes from one constitutional order to another. I do so by examining the way constitutional hardball can be played with respect to institutional arrangements and with respect to substantive principles. The Part concludes by describing how the courts can play constitutional hardball.

### A. *Constitutional Hardball and Institutional Arrangements*

The characteristics of constitutional hardball help explain its emergence. Consider, first, the fact that hardball arguments are not frivolous. The important point here is that this characteristic in itself cannot possibly identify an interesting phenomenon. Congress enacts constitutionally questionable legislation all the time, for which there are nonetheless non-frivolous arguments supporting constitutionality.<sup>36</sup> When Congress does so, it is acting in a constitutionally *ordinary* way: enacting unconstitutional statutes that supporters believe to be constitutional.

The term *ordinary* signals what we need to distinguish constitutional hardball, because it evokes Bruce Ackerman's distinction between ordinary politics and constitutional moments.<sup>37</sup>

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36. One obvious recent example is the federal flag burning statute enacted in the wake of *Texas v. Johnson*, 491 U.S. 397 (1989), and held unconstitutional in *United States v. Eichmann*, 486 U.S. 310 (1990). I believe that the Court's decisions were compelled by all coherent First Amendment theories, and that the federal statute was indistinguishable in principle from the state one earlier held unconstitutional. Even so, four justices would have upheld the federal statute against constitutional attack. Or, to take another example, the Communications Decency Act, held unconstitutional by a Court that was unanimous on the central issues in *Reno v. ACLU*, 521 U.S. 844 (1997), strikes me as, again, unconstitutional under any reasonable general First Amendment theory, but I can imagine developing a narrowly defined exception to standard theory for the communications covered by the Act.

37. One need not accept Ackerman's analysis in all its glory (I do not) to acknowledge that he has identified something important in our constitutional practices by distinguishing between the ordinary and the extraordinary.

For present purposes, what matters in Ackerman's account is his description of U.S. constitutional history as consisting of long periods of ordinary politics separated by shorter periods, which Ackerman calls constitutional moments. On the descriptive level, the nation's fundamental institutional arrangements—the relations between President and Congress, the mechanisms by which politicians organize support among the public, and the principles that politicians take to guide the development of public policy—differ after a constitutional moment has passed. So, for example, interest groups played one role in national politics before the New Deal, a different one after the New Deal constitutional transformation was completed.<sup>38</sup>

My suggestion is that constitutional hardball is the way constitutional law is practiced distinctively during periods of constitutional transformation.<sup>39</sup> I do not mean to imply that it is the *only* way constitutional law is practiced during such periods. Precisely because such periods can be extended, a great deal of ordinary legislation will be enacted during each one, and some of that legislation will be subject to ordinary constitutional challenge. Rather, I suggest, constitutional hardball singles out constitutional practices associated with constitutional transformation. One important implication follows from this suggestion: one should not be able to observe episodes of constitutional hardball during periods of ordinary politics.<sup>40</sup>

Here the relevance of the second characteristic of constitutional hardball becomes apparent. One way to distinguish periods of ordinary politics from periods of transformation is that during the former pre-constitutional understandings are taken for granted, whereas during the latter such understandings are brought into question. The idea is that the institutional arrangements characteristic of a particular constitutional order—characteristic, that is, of each specific period of ordinary politics—are the presuppositions accepted by all politically significant actors in that period, whereas the whole point of constitutional transformation is to alter the previously taken-for-granted institutional arrangements. Of course the proponents of transformation are going to place pre-constitutional understandings in question, because they want to replace those

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38. For my account of the differences, see TUSHNET, *supra* note 1, at 12.

39. My primary disagreement with Ackerman is that he believes (for good reasons within his own project) that constitutional moments must occur in relatively compressed time frames (as the term *moments* suggests), while I believe that constitutional transformations can occur over substantially extended periods. For a discussion of this disagreement, see *id.* at 3.

40. For a discussion, see *infra* text accompanying notes 82-85. To adopt scientific terminology that I think inappropriate for this subject, one might say that finding constitutional hardball during periods of ordinary politics would refute the hypothesis I am suggesting.

understandings with others. A crude example, far more crude than a full analysis would be: prior to the New Deal, Congress initiated legislation subject to modest review by the President, whereas after the New Deal the President initiated legislation subject to modest review by Congress. And, *during* the transformative period when Franklin D. Roosevelt was attempting to construct a new constitutional order, his efforts to seize the legislative initiative were understood to be challenges to settled pre-constitutional understandings about the relation between President and Congress—and, as such, revolutionary.

The association between constitutional hardball and constitutional transformation explains, finally, the fact that the stakes are high when a game of constitutional hardball is underway. The stakes are high because those who benefit from the institutional arrangements in place, and challenged by proponents of dramatically different institutional arrangements, reasonably fear that they will *permanently* lose political power if new institutional arrangements are put in place. After all, the proponents of new arrangements are *politicians* seeking power by offering their vision of the public good to the public for consideration and adoption. Of course the politicians holding power during one period of ordinary politics are afraid that they will lose power if new institutional arrangements are put in place, because the people who seek to construct those new arrangements are their opponents in ordinary politics who have found themselves unable to prevail under the existing arrangements.

So far my exposition of constitutional hardball has emphasized proposals for departing from settled pre-constitutional understandings about institutional arrangements themselves. The relation between constitutional hardball and constitutional transformation should be apparent in that context. Only slightly different are the examples I used to illustrate the idea of constitutional hardball. There constitutional hardball is directed at settled *processes* for adopting public policy. Proponents of constitutional transformation play constitutional hardball when they try to displace settled processes with ones that would make it easier for them to put in place the new institutional arrangements they favor.

Consider some examples used earlier in this Essay. Revisiting congressional districting to enhance the probability that one party will gain a more stable majority in the House of Representatives is this kind of constitutional hardball. So too is the very term *entrenchment* used by Balkin and Levinson. It shows that the goal partisans seek is control over substantive policy during the extended period of ordinary politics they hope will follow once their control is entrenched.

The example Balkin and Levinson use—using narrow

majorities to gain control over the judiciary—is a bit more complex. I believe that its structure is two-fold. First, an entrenched judiciary is in a position to insulate from constitutional challenge partisan victories narrowly won on substantive legislation. As we will see, such substantive legislation might itself form the platform for extending partisan control in the legislature. Second, an entrenched judiciary might be in a position to secure victories that a partisan coalition is unable to achieve in the legislature.<sup>41</sup> The classic example of this phenomenon is the mutually reinforcing role of Congress and the Supreme Court during the Second Reconstruction of the 1960s. The courts acted to assist the civil rights movement at points where, for reasons the adherents of the Democratic majority believed entirely contingent,<sup>42</sup> Congress was unable to act.

### *B. Constitutional Hardball and Substantive Principles*

The example of the Second Reconstruction introduces an important aspect of constitutional hardball that my exposition so far has failed to discuss. That aspect is the use of constitutional hardball on matters of substance rather than matters of institutional arrangements or matters of the policy-making process.

Constitutional orders combine enduring institutional arrangements with principles of public policy that guide decision-makers as they operate within those institutions. So, for example, a president will propose new statutes that implement the constitutional order's principles,<sup>43</sup> members of Congress will do so as well,<sup>44</sup> and the courts will uphold statutes that are consistent with the order's principles and invalidate those that are not.<sup>45</sup>

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41. Obviously, its ability to do so depends importantly on the constitutional theory of judicial power associated with the constitutional understandings held by the proponents of constitutional transformation. More specifically, this mechanism of partisan entrenchment will be unavailable to those who propose to entrench institutional arrangements that minimize the role of courts in policy-making (unless, as may be possible, their principles distinguish between the judicial role during the period of transition and that role during the ensuing period of ordinary politics).

42. That is, the difficulty of overcoming a filibuster conducted by a minority in the Senate.

43. Where, that is, one of the constitutional order's institutional arrangements gives the president a large role in initiating public policy.

44. And may reject presidential proposals they believe to be inconsistent with the order's guiding principles.

45. This accounts for the widely noted phenomenon that most of what the Supreme Court does is to invalidate "old" statutes—those enacted before the current constitutional order came into being—or statutes that are "outliers," in force only in states or localities that have not (yet) been touched by the constitutional transformation that led other states to take similar statutes off the books.

Political actors can play constitutional hardball with substantive principles. Proponents of a constitutional transformation will propose legislation that pushes the envelope of existing constitutional doctrine. The proposed statutes will not be obviously unconstitutional,<sup>46</sup> because constitutional hardball consists of actions that are plausibly defensible under existing constitutional doctrine. But, they will signal that their proponents have a substantially different understanding of government's role than had seemed settled. And, importantly, the proposals, if enacted, might have the effect of enhancing the political strength of the coalition seeking to change the constitutional order.

The New Deal provides good examples of how political actors can play constitutional hardball on substantive matters, the Great Society other examples that are a bit less effective. The New Deal's labor legislation was questionable under existing doctrine. The Supreme Court invalidated the wage-and-hour provisions of the Bituminous Coal Conservation Act of 1935 in *Carter v. Carter Coal Co.*,<sup>47</sup> holding that Congress lacked the power under the Commerce Clause to regulate such "local" economic activities. That holding clearly threatened the National Labor Relations Act, the centerpiece of New Deal labor legislation, which established a structure for regulating labor relations that progressives and labor unions had been seeking for years. As Peter Irons and Barry Cushman have shown, the NLRA was not patently unconstitutional under existing doctrine.<sup>48</sup> Yet, the lawyers working on the statute and the cases that arose after its enactment knew that they had their work cut out for them, because they knew that the statute pushed aggressively against the constitutional limits the Court had established.

Further, the NLRA rested on assumptions about the role of government in labor relations that differed substantially from the assumptions previously held. The NLRA substituted government supervision of bargaining between employers and employees, pursuant to legislatively specified procedures and subject to some legislatively specified constraints on tactics, for bargaining—whether individual or collective—regulated solely by the participants' power in the marketplace, subject to standard common law rules regarding force and fraud. And, finally, the NLRA was likely to extend the Democratic party's political hold in two ways. Labor unions whose organizing task was eased by the NLRA could be expected to reward the Democratic party by giving

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46. Although they might be quite questionable.

47. 298 U.S. 238 (1936).

48. BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT: THE STRUCTURE OF A CONSTITUTIONAL REVOLUTION* (1998); PETER H. IRONS, *THE NEW DEAL LAWYERS* (1982).

it political support.<sup>49</sup> And, progressives who favored professional management of society could be expected to do the same, finding the NLRA's regulatory principles consonant with their professionalist presuppositions.

The Voting Rights Act of 1965 provides a parallel, albeit less crisp, example.<sup>50</sup> The political effects of the Act, its proponents believed, would benefit the Democratic party by offsetting the party's losses in the South due to its support of the civil rights movement. The Act displaced state control over voting procedures, substituting regulation by federal bureaucrats in the Department of Justice through the Act's "preclearance" mechanism. The Act challenged pre-constitutional understandings about "states' rights." The pre-constitutional understanding that states *had* such rights had, for all practical purposes, disappeared when Congress acted to regulate the national economy, but they remained embedded with respect to much else that states did.<sup>51</sup> Those pre-constitutional understandings were reflected in constitutional doctrine that suggested the impropriety of congressional action displacing the *mechanisms* of state government even as Congress's power to displace the substance of what those governments did was clearly established.<sup>52</sup>

The Supreme Court, of course, upheld the constitutionality of the NLRA<sup>53</sup> and the Voting Rights Act.<sup>54</sup> In doing so, it acted pursuant to yet another principle guiding the New Deal and Great Society's constitutional order, one that blended institutional arrangements with matters of substance. That principle was that the courts and the political branches should be collaborators in developing public policy.<sup>55</sup> This principle simply states what

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49. It is worth emphasizing that prior to the New Deal members of the skilled trades who were organized into unions provided significant support to Republican candidates. See JOSEPH G. RAYBACK, *A HISTORY OF AMERICAN LABOR* 298-99 (1966).

50. The example is less crisp because the Great Society was an extension rather than a repudiation of the New Deal.

51. As late as 1961, Herbert Wechsler continued to defend the proposition that state regulation was the norm in our constitutional system, federal regulation the exception. See HERBERT WECHSLER, *PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW* 52 (1961) ("National action has . . . always been regarded as exceptional in our polity . . . [T]hose who would advocate its exercise must . . . answer the preliminary question why the matter should not be left to the states.") (reprinting an article originally published in 1954).

52. For a description of the doctrines that could be called upon to challenge aspects of the Voting Rights Act, see *South Carolina v. Katzenbach*, 383 U.S. 301, 358-62 (1966) (Black, J., concurring and dissenting).

53. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

54. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

55. For a more extensive discussion, see Mark Tushnet, *The Supreme Court and the National Political Order: Collaboration and Confrontation*, in *THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT* (Ronald Kahn & Ken Kersch eds., forthcoming).

happens once a constitutional order is in place: all of the government's institutions operate harmoniously, implementing the order's characteristic substantive principles and dividing labor according to the order's characteristic institutional arrangements.<sup>56</sup>

### C. *The Courts in Constitutional Hardball*

The flip-side of collaboration during constitutional orders is conflict during the transition between one constitutional order and another. That possibility has been implicit in my account so far. The very fact that the proposals offered by proponents of constitutional transformation are constitutionally questionable implies that there is a decent chance that the courts will find them unconstitutional if enacted. But, an upsurge of conflict suggests more than substantive disagreement. It may be the distinctive way in which the courts play constitutional hardball. Again, we have to figure out some way to distinguish between ordinary constitutional invalidations, of a sort that will occur during periods when a constitutional order is stable, and invalidations that indicate deeper, potentially transformative conflicts.

I offer a suggestion for such a method of distinguishing, qualified by the observation that it may reflect both a preoccupation with recent events, and my view that we have been in an extended period of constitutional transformation. The suggestion is that we can identify judicial constitutional hardball by observing the courts expressly denying that the Constitution imposes an obligation of collaboration on them. That denial might occur in judicial rhetoric or in constitutional doctrine. The first possibility is suggested by the argument captured in the titles of two recent articles by Ruth Colker and her co-authors: "Dissing Congress" and "Dissing States."<sup>57</sup> The second is suggested by the Supreme Court's recent decisions on the scope of Congress's power to enforce Section One of the Fourteenth Amendment. Particularly telling is the tension between Justice Anthony Kennedy's observation that Congress has "the duty to make its own informed judgment on the meaning and force of the Constitution," although that duty arises only when "Congress acts within its sphere of power and responsibilities,"<sup>58</sup> and the holding of the case in which he made that observation, which was that the

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56. In my view, a system of more or less permanently divided government can be a harmoniously operating constitutional order, when the parties controlling the different branches agree to keep their disagreements within understood bounds, and accept that each will win only small victories.

57. Ruth Colker & James Brudney, *Dissing Congress*, 100 MICH. L. REV. 80 (2001); Ruth Colker & Kevin M. Scott, *Dissing States: Invalidation of State Action During the Rehnquist Era*, 88 VA. L. REV. 1301 (2002).

58. *City of Boerne v. Flores*, 521 U.S. 507, 535 (1997).



Supreme Court would decide whether Congress had discharged that responsibility in a manner conforming to the Constitution. As Reva Siegel and Robert Post have forcefully argued, the Court's decisions are best understood precisely as articulating a doctrine denying that collaboration between the courts and the political branches is a constitutionally mandated mechanism for elaborating the Constitution's meaning.<sup>59</sup>

### III. MARBURY V. MADISON AS CONSTITUTIONAL HARDBALL

*Marbury v. Madison* can be understood as one event in a longer episode of constitutional hardball, with one important qualification that I mention at the outset. Constitutional hardball involves practices and arguments that are inconsistent with settled pre-constitutional understandings. But, the U.S. Constitution was still young in 1801. Pre-constitutional understandings were *not* settled at all, and indeed the longer episode of which *Marbury* was part might be understood as a conflict over what the nation's first pre-constitutional understandings were to be—particularly, whether our constitutional arrangements should be predicated on the assumption that political conflict on the national level would be conducted through political parties that united factions in various states around a common program. It is not inconsistent with the general idea of constitutional hardball to modify my specification of its characteristics to include the possibility that the conflict would be, not inconsistent with, but about pre-constitutional understandings. Still, the modification seems to me *ad hoc*, and I prefer simply to note the difference between *Marbury's* context and the other examples of constitutional hardball I have provided.<sup>60</sup>

As Sanford Levinson has lamented, basic law school courses in constitutional law often fail to set *Marbury* in its larger context.<sup>61</sup> That context begins with the emergence of national political parties in the 1790s, quite contrary to the Framers' expectations about how national politics would be organized. The

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59. Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation After Morrison and Kimel*, 110 YALE L.J. 441 (2000); Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1 (2003); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003).

60. Of course, were others to identify additional examples of conflicts over pre-constitutional understandings, I would happily modify my description of constitutional hardball's defining characteristics.

61. Sanford Levinson, *Why I Do Not Teach Marbury (Except to Eastern Europeans) and Why You Shouldn't Either*, 38 WAKE FOREST L. REV. 553 (2003).

Federalist party, centered on Alexander Hamilton's ambitious program for creating a centralized commercial republic with strong ties to Great Britain, confronted the Democratic-Republican party, centered on Thomas Jefferson's vision of a republic of sturdy and independent yeomen, sympathetic to the spread of republican sentiment they saw occurring in France.

The presidential election of 1796 saw the first nationally organized campaigns. John Adams won a narrow electoral college victory over Jefferson, with the candidates' support quite concentrated regionally (Adams' in the North, Jefferson's in the South). Article II reflected the Framers' failure to anticipate the emergence of nationally organized political parties, providing that the president would be the person who received the most votes in the electoral college and the vice-president the person who received the next highest number of votes.<sup>62</sup> Article II meant that Adams became president, Jefferson vice president in 1796.

Partisan conflict continued, exemplified by the Federalists' enactment of the Sedition Act of 1798, which made it an offense to publish "false, scandalous, and malicious" criticisms of the national government, Congress, or the president—but not the vice president—and which was sunsetted so that it expired on March 4, 1801, the day the president to be elected in 1800 would take office. The candidates in the 1800 election were Adams and Jefferson, and, as historian Paul Finkelman puts it, "If Adams won reelection, he would not need the law; and if Jefferson won, he could not turn the law on Adams's supporters."<sup>63</sup>

Article II's defects in a world of nationally organized political parties came home to roost in the election. The Democratic-Republicans got more electoral votes than the Federalists. The problem was that the members of the electoral college could not cast their votes separately for a president and a vice president. A well-organized party would agree that all its supporters in the electoral college would cast their votes for the party's presidential candidate, and all but one would vote for the party's vice presidential candidate. And, indeed, that is what the Federalists did. The Jeffersonians were not that well-organized, though, and Jefferson and his party's vice presidential candidate Aaron Burr received the same number of votes. The ambitious Burr saw this as an opportunity to become president and refused to accede to pressure that he allow Jefferson to assume the presidency. That

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62. The provisions of Article II are even more complicated, because they also reflected the Framers' assumption that it would be rare for the person with the highest number of votes to have a majority of the electoral votes as well (because, they thought, many candidates would be "favorite sons" with support only in their home states).

63. Paul Finkelman, *Election, Presidential, 1800*, in 2 *ENCYCLOPEDIA OF THE AMERICAN PRESIDENCY* 421 (Leonard W. Levy & Louis Fisher eds., 1994).

cast the election to the House of Representatives, where the first play of constitutional hardball occurred. Adams's party saw its opportunity in Burr's ambition, and six states with Federalist majorities in their House delegations cast their votes for Burr. Because two states were divided between Federalists and Democratic-Republicans, Jefferson received only eight votes in the House, one short of the required majority. After about a week of unsuccessful maneuvering, the Federalists backed down. The Federalist representatives in the two divided states abstained from voting, giving their states' votes to Jefferson, and the Federalists in two states with Federalist majorities cast blank ballots. Jefferson thereby received ten votes and became president. Jefferson's party also became the majority party in the House and Senate.

The Federalists may have acted like statesmen with respect to the presidency, but they were not done yet. The Constitution provided for quite a long period between the time when a new president was elected and the time he took office, in this case from November 1800 to March 4, 1801. The previous Congress, dominated by Federalists, and Adams remained in place, empowered to enact whatever laws they could. Pursuing a program of court reform to which they had been committed before the election, the Federalists enacted the Judiciary Act of 1801, which President Adams signed on February 13. The Act abolished the existing circuit courts, which consisted of a district judge and two Supreme Court justices, and created six new circuit courts in their place, with new positions for sixteen circuit judges. The Act also reduced the number of Supreme Court justices from six to five, to take effect as soon as a sitting justice left office. It also substantially increased the scope of federal jurisdiction, consistent with the Federalists' centralizing program. Some aspects of the 1801 Judiciary Act, particularly the abolition of the duty imposed by the original Judiciary Act of 1789 on Supreme Court justices to sit on circuit courts, were sensible reforms. But, the political context meant that most of the Act's provisions were seen by Jeffersonians as an attempt by Federalists to entrench themselves in the courts as they were forced to depart from the presidency and control of Congress. To Jeffersonians, that is, the 1801 Act was constitutional hardball.

Jeffersonians responded in kind. Once they controlled Congress and the presidency, they repealed the 1801 Act. The Judiciary Act of 1802 abolished the new circuit courts. Jeffersonians knew that the repeal was constitutionally questionable. True, Article III vested the nation's judicial power in the Supreme Court "and in such inferior Courts as the Congress

may from time to time ordain and establish.”<sup>64</sup> But, abolishing the circuit courts meant eliminating the new circuit judges, which might have been taken to violate the Constitution’s guarantee that federal judges hold office “during good Behavior.”<sup>65</sup> Concerned that the Supreme Court might agree that eliminating the new courts was unconstitutional, Jeffersonians enacted another statute that postponed the Supreme Court’s next term, hoping that, the circuit judges having been out of office (or at least out of money) for a year or more, the issue would have faded by the time the Court considered the 1802 Act’s constitutionality.<sup>66</sup>

The big fights in 1801 and 1802 were thus over statutes that substantially reorganized the federal judiciary. *Marbury* involved another statute enacted entirely, enacted two weeks after the 1801 Judiciary Act, which created forty-two positions for justices of the peace in the District of Columbia. President Adams and the Senate rushed through nominations and confirmations, and Adams signed the commissions for all the new magistrates. As I have noted, the nation’s government was still young and, importantly, small. The Secretary of State, in addition to his duties in foreign affairs, was given the duty to transmit commissions to federal officials; it made sense for him to do so for ambassadors, after all, and why duplicate bureaucracies for judicial appointments? John Marshall became Adams’s Secretary of State in May 1800. He was nominated for Chief Justice on January 20, 1801—after Jefferson’s election, of course—and confirmed by the Senate on January 27. Roughly six weeks remained before Jefferson took office, and Marshall continued to serve as Secretary of State for a brief period even after he took the oath of office as Chief Justice.<sup>67</sup> He put the seal of the United States on the commissions and started shipping them out. Four remained undelivered on the morning of March 4, 1801, when Marshall left the office to swear Jefferson in as president. James Madison, the new Secretary of State, found the commissions on

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64. U.S. CONST. art. III, § 1.

65. *Id.*

66. Even the postponement of the Court’s term, of course, was constitutional hardball, because there were substantial arguments that Congress lacks the power to control the details of administration within the judicial branch. The Supreme Court acceded to Congress’s direction and postponed its term. In itself, that action did not confirm Congress’s power, because the Court’s action could be interpreted as a decision taken by the Court itself, informed by and consonant with Congress’s views but not—from the Court’s point of view—an action compelled by Congress.

67. I do not believe Marshall’s dual office holding is an example of constitutional hardball. Jefferson asked that Marshall stay on as Secretary of State. See R. KENT NEWMYER, *JOHN MARSHALL AND THE HEROIC AGE OF THE SUPREME COURT* 141 (2001) (referring to Jefferson’s request). In any event, the rudimentary structure of the national government required more flexibility in staffing national offices than we have come to think appropriate.

the desk when he arrived on March 5. Jefferson directed that the commissions be withheld. *Marbury v. Madison* ensued.

The stakes are high in constitutional hardball. The Judiciary Acts of 1801 and 1802 were episodes of constitutional hardball because the stakes there were the control of the national government as a whole. If the Jeffersonians prevailed, they would have control over all three branches of the national government, while if the Federalists did, the Federalists would have a foothold in the judiciary, which they could use to constrain what Congress and, especially, the president did. *Marbury* was constitutional hardball too, not because the statute creating justices of peace in the District of Columbia had any real importance, but because it raised the question of whether the Federalists would be able to use their control of the judiciary to discipline Congress and the president.

Indeed, the question in *Marbury* was even more refined. The power of the federal courts to enforce constitutional limitations on congressional power was essentially unquestioned when *Marbury* was decided. Two things *were* contested, though, and *Marbury* brought them together. The courts could invalidate congressional legislation when a constitutional question was brought before them in a proper case. So, for example, the courts could refuse to enforce a criminal statute that was, in their view, unconstitutional because, by implicating the courts in enforcement, Congress necessarily acceded to giving the courts the last word on constitutionality. The first contested question was, where Congress acted on its own, that is, did not call on the courts for assistance in implementing public policy, could the courts somehow find Congress's actions unconstitutional? The second contested question distinguished Congress from the presidency. Assuming that the courts can hold federal statutes unconstitutional, could they find executive actions taken pursuant to statutory law—actions that were not *ultra vires* the statutes—but not compelled by statute unlawful and therefore subject to judicial control?

Jefferson's refusal to deliver Marbury's commission raised both contested questions. In the ordinary course, courts were not involved in delivering or withholding commissions. And, obviously, no statute compelled Jefferson's decision. Marshall played hardball in *Marbury* by resolving both contested questions in a way that allowed the (Federalist-dominated) courts to be continuing supervisors of the actions taken by the (Jeffersonian-dominated) Congress and presidency. He did so by construing the federal statutes defining the federal courts' jurisdiction to authorize the federal courts to issue writs of mandamus to high executive officials, where the courts concluded that the statutes regulating the officials' actions limited their discretion.

Marshall's move has a certain brilliance to it. On its face, a mandamus proceeding differs from a criminal prosecution because in the latter the government—the executive, authorized by Congress—comes to the courts and asks for their help, whereas in the former a private party asks the court to help him or her against an executive official. Marshall's move was to assimilate the two cases by saying that in both Congress has authorized someone to ask the courts for help, and having done so allows the courts to supervise what Congress and executive officials have done. Judicial *review* for constitutionality in appropriate cases was uncontroversial in the early 1800s, but judicial *supremacy* in constitutional interpretation was. By creating a jurisdictional regime in which private parties could bring federal officials into court, Marshall moved far in the direction of establishing judicial supremacy.<sup>68</sup>

*Marbury* itself was an episode of constitutional hardball for many reasons. The logic of Marshall's opinion is, as every student of the case knows, hardly iron-clad. Yet, like all examples of constitutional hardball, the arguments Marshall made, while perhaps strained, were at no point frivolous. Marshall made the stakes high by treating the case as one implicating the power of the courts, the last bastion of Federalist control, to supervise the other branches, controlled by Jeffersonians. And, of course, Marshall managed to establish the power of the courts to control the other branches in a decision that made it impossible for Jefferson to fight back directly. Marshall ended up saying that the courts had the power to impose the Constitution's disciplines on the president without actually doing so on *Marbury's* behalf.

Yet, it remains an open question whether Marshall actually succeeded in the short- to medium-run. Of course *Marbury* is taken to establish the power of judicial review, but no one really disputed that. What Marshall wanted, as a player of constitutional hardball, was to discipline the Jeffersonians. But, the Jeffersonians and their successors, the Jacksonian Democrats, controlled national policy-making for decades after 1803. Marshall remained on the Court until 1835, and during his tenure the Court never held unconstitutional any federal statute important to the Jeffersonian-Jacksonian program.<sup>69</sup>

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68. Far, but not all the way. Even on Marshall's analysis, Congress could insulate its programs from constitutional supervision by the courts if it figured out some way to eliminate the possibility of a private party's offensive suit against the government—eliminating the writ of mandamus in a class of cases, for example (although doing so might be quite difficult, in light of the ability of a recalcitrant judiciary to construe the jurisdictional statutes creatively).

69. It is not even clear to me that the Marshall Court's invalidations of state laws, some of which were part of Democratic initiatives, were all that important either. For an analysis, see Michael Klarman, *How Great Were the "Great" Marshall Court Decisions?*, 87 VA. L. REV. 1111 (2001).

## IV. ELABORATIONS: BRUSHBACKS AND FAILURES

I have described constitutional hardball as a symptom of the possibility of a shift in the governing assumptions of a constitutional order. Political leaders play hardball when they believe that they are in a position to shift from one order to another, or when they believe themselves to be threatened with the possibility of such a shift. But, we might observe constitutional hardball in a number of variants because initiating hardball depends on *perceptions* by political leaders of possibilities, and not on some objectively ascertainable conditions.

A. *The First Variant: Brushbacks*

Franklin D. Roosevelt's court-packing plan of 1937 is an example of what we could call the *brushback*. Roosevelt proposed to expand the size of the Supreme Court, nominally to provide elderly justices with assistance in performing the Court's work by allowing them to spread the workload across a larger Court with younger members. Everyone knew, though, that this rationale for expanding the Court was not the real one. Roosevelt wanted to expand the Court so that he could appoint enough new members to guarantee that New Deal programs, subject to non-trivial constitutional challenges under then-existing doctrine, would be upheld as constitutional.

The court-packing plan satisfies the conditions I have given for constitutional hardball. Nothing in the Constitution expressly limits the power of the political branches to set the size of the Supreme Court. Perhaps we might devise an argument that changes in the size of the Court are constitutionally permissible only when they are motivated by policy concerns about the Court's efficient operation,<sup>70</sup> but even if we did it would remain true that the court-packing plan was constitutionally defensible within

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70. There would be difficulty both in doing so generally, and applying any such criterion to the court-packing plan itself. Prior to the New Deal the political branches *had* adjusted the Court's size because of purely political considerations, shrinking its size as vacancies occurred during the presidency of Andrew Johnson and expanding it once Johnson left office. Moreover, Roosevelt's stated rationale for the plan would satisfy *any* requirement that expansions be justified by public policy concerns. It could be attacked only if we had a robust doctrine allowing challenges to statutes whose stated rationales, while acceptable in themselves, are pretexts for impermissible goals. But, although the Court has stated such a doctrine, the doctrine is hardly robust. See, e.g., *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423 (1819) (stating "should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government[,] it would become the painful duty of this tribunal . . . to say that such an act was not the law of the land"); *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922) (relying on the "pretext" doctrine to invalidate the federal Child Labor Tax Act).

existing doctrine. But, of course, the plan was inconsistent with a pre-constitutional understanding that the Court's size should not be manipulated for merely political purposes, and, particularly, simply to guarantee that a reconstituted Court would reach politically desirable results. And, finally, Roosevelt proposed the plan because he believed that he was in position to bring about a constitutional transformation.

What is interesting about the Court-packing plan is that, while Roosevelt's belief about the prospect of constitutional transformation was (or turned out to be) correct, the plan itself failed. The conventional story, though, is that the Court-packing plan brought about the transformation, as the Court's majority—or, more precisely, Justice Owen Roberts—changed its views in reaction to the threat the plan posed. Recent scholarship has persuasively challenged that story in its most pristine form,<sup>71</sup> but that challenge is irrelevant here. The Court-packing plan illustrates the possibility that an episode of constitutional hardball can produce constitutional transformation by intimidating the political opposition. That is why I call the possibility one of a brushback, which in baseball is a pitch designed to intimidate the batter.

### B. A Second Variant: Failures

The brushback shows that particular instances of constitutional hardball can fail in the small but succeed in the large.<sup>72</sup> There is another interesting category, where a political actor plays constitutional hardball and simply fails.

Some examples of failed constitutional hardball are these. (1) In the late 1960s Richard Nixon attempted to impound money Congress had appropriated for specific purposes, arguing that as president he had a constitutional obligation to control spending in the service of the macroeconomic goal of controlling inflation. Again, the conditions for constitutional hardball existed. Nixon's constitutional claims were something of a stretch under existing doctrine,<sup>73</sup> but they were not frivolous. The prevailing pre-constitutional understanding, though, was that the president had to spend what Congress appropriated, because there was

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71. See CUSHMAN, *supra* note 48, at 33.

72. I think it plausible to treat the impeachment of Bill Clinton as a brushback, which achieved its effect not in the removal of Clinton from office, but in weakening the political position of the presidential Democratic party in the 2000 presidential elections.

73. I believe that the scholarly consensus is that Nixon's claim of presidential authority was not well-founded. See Philip B. Kurland, *Impoundment of Funds* in 2 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 967 (Leonard W. Levy ed., 1986) (noting "Where Congress has mandated the expenditure of funds in support of a legislative program, the President has no choice but to effectuate Congress's will").



something distasteful about a president signing legislation with his fingers crossed, that is, with the thought that, no matter what the legislation said, the president could later decide against complying with it. Finally, Nixon's effort was part of a more general strategy among Republicans to wrest control over national policy from the Democrats who dominated Congress. The strategy, for present purposes, had two components. The Republican party's electoral strategy was to increase its representation in the South, gaining enough seats there to take control of Congress. Its constitutional strategy was to shift power in the national government from Congress, while it remained under Democratic control, to the presidency and the states, which Republicans could at least occasionally control. The only problem, of course, was that Nixon failed to transform the constitutional order.<sup>74</sup> He *believed* that he was in a position to do so, but his analysis was wrong.

(2) A decade and a half later, facing a judiciary that he and his administration believed controlled by its political opponents on substantive issues crucial to the administration's transformative agenda, Attorney General Edwin Meese asserted the president's right, under the Constitution, to advance his own constitutional views even in the face of contrary declarations by the Supreme Court.<sup>75</sup> Meese's position was not constitutionally frivolous.<sup>76</sup> It generated enormous controversy, though,<sup>77</sup> because it was inconsistent with settled understandings about the supremacy of the Court's constitutional interpretations. And, once again, the Reagan administration may have initiated a constitutional transformation, as I believe,<sup>78</sup> or it may merely have attempted to do so, as its supporters believe, but it did not complete the transformation or, on other views, even succeed in starting one.

(3) In the 1830s Andrew Jackson's political opponents believed they had an opportunity to push the Jacksonians out of power. The Federalist party had disintegrated in the 1810s, and the Jeffersonians had been transformed by Jackson's presidency. Henry Clay, among others, thought that it might be possible to revive something like the Federalist party. The Jacksonians were strongly opposed to the Bank of the United States, believing it to

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74. My view is that it took Ronald Reagan and Newt Gingrich, assisted by Bill Clinton, to do that. See TUSHNET, *supra* note 1, at 9-11. But, even if I am wrong in my claim that a new constitutional order has come into being, the point about Nixon's failure remains accurate.

75. Edwin Meese, *The Law of the Constitution*, 61 TUL. L. REV. 979 (1987).

76. Indeed, I believe it to be correct. See Mark Tushnet, *The Supreme Court, the Supreme Law of the Land, and Attorney General Meese: A Comment*, 61 TUL. L. REV. 1017 (1987).

77. For illustrations, see Symposium, *Perspectives on the Authoritativeness of Supreme Court Decisions*, 61 TUL. L. REV. 977 (1987).

78. See TUSHNET, *supra* note 1, at 9.

be a tool by which moneyed elites oppressed ordinary people. Clay pushed a bill rechartering the Bank through Congress several years before necessary, to create an issue on which he and his political allies could go to the country in the presidential election of 1832. Jackson thereupon vetoed the rechartering. Jackson's veto relied on a combination of policy-based objections to the Bank and an argument against its constitutionality, notwithstanding the Supreme Court's decision otherwise in *McCulloch v. Maryland*.<sup>79</sup> Jackson decisively won the 1832 election, and Clay's party, eventually known as the Whigs, did not gain control of the government until more than a decade later.

The bank-recharter episode fits my definition of constitutional hardball. Obviously, the timing of the Bank's renewal was entirely within Congress's constitutional power, and yet enacting legislation several years before it has any effect is in tension with ordinary practices. The president arguably has the bare constitutional authority to veto legislation on any ground whatever, and yet Jackson's veto message was inconsistent with the usual understandings about the veto power in two ways. It invoked policy grounds, whereas prior presidents had a strong though not uniform record of vetoing legislation only on constitutional grounds.<sup>80</sup> In addition, the constitutional reasons Jackson provided had been rejected by the Supreme Court, and asserting a constitutional ground in the face of a contrary Supreme Court decision was, again, unusual at the time.

The examples of impoundment under Nixon, Meese's position on the president's authority to interpret the Constitution, and the bank recharter controversy show that constitutional hardball can fail. Political actors play constitutional hardball when they *believe* that a shift in constitutional orders is possible. They fail when that belief turns out to be mistaken.

### C. *Do Failures Show That Constitutional Hardball Is Not Extraordinary?*

The possibility of failure, though, might suggest that the very concept of constitutional hardball is not that useful. The difficulty is that the possibility of failure means that political actors might play constitutional hardball all the time. If they do, the concept fails to differentiate between ordinary forms of politics and extraordinary ones, and yet doing so is precisely what the concept is designed for.

Here the role of perception and belief, and the willingness to

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79. For the veto message, see Andrew Jackson, *Veto Message*, in 2 MESSAGES AND PAPERS OF THE PRESIDENTS 576 (James D. Richardson ed., 1900).

80. On veto practices, see LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 141-47 (1985).

act on perceptions and beliefs, matters a great deal. The testing case would be whether we could identify periods during which political leaders of the party out of power did not believe that they were in a position to transform the constitutional order and permanently regain power in a transformed order. In these periods political leaders believe the existing order to be quite stable.<sup>81</sup> During them, we would expect to see the opposition's political leaders accepting the existing order's institutions and organizing principles, and claiming only that they would be better at running those institutions and implementing those principles than the current incumbents. And, we would not expect to see the opposition's leaders trying to play constitutional hardball.

Fortunately for me, I think there are such periods, and that the concept of constitutional hardball therefore retains some utility. The presidential campaigns of 1952 and 1960 are the easiest examples I can offer. In both the Republican presidential candidates accepted the principles of the New Deal constitutional order. The contrast between the campaigns of Richard Nixon in 1960 and 1968 is particularly instructive here. In 1960 Nixon presented his program as more of the same—more of the competent administration of New Deal programs that Dwight Eisenhower's presidency had provided. The 1968 campaign was different. Nixon was influenced by Barry Goldwater's contention that the American people deserved a choice, not an echo,<sup>82</sup> and by his own understanding that he had to at least co-opt Goldwater's supporters if he was to win the party's nomination. Nixon also concluded that the decaying of the New Deal coalition under the pressure of the civil rights movement and the Vietnam War provided an opportunity for a real shift in the constitutional order. His successful 1968 campaign put the possibility of dramatic change on the political table.<sup>83</sup>

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81. I have considered whether I ought to add another criterion, that the existing order actually *be* stable during these periods, and in the end concluded that I should not. I am not sure we could identify criteria, independent of the judgment of political leaders, to identify "true" stability. And, in any event, political leaders out of power have a strong incentive to act on beliefs that a transformation is possible, if they hold them. So, the beliefs political leaders hold will almost certainly be a good proxy for true stability anyway.

82. The slogan Goldwater supporter Phyllis Schlafly used to describe his candidacy in a 1964 campaign publication. PHYLLIS SCHLAFLY, A CHOICE NOT AN ECHO (1964).

83. I do not mean to suggest that Nixon campaigned openly on the possibility of constitutional transformation (except perhaps with respect to the roles of Congress and the president in determining national domestic policy), but only that his victory opened up possibilities that Nixon understood, because he had had to accommodate himself to the increasingly powerful Goldwater conservatives in the Republican party. After his election he acknowledged this accommodation, and its implications for basic

Putting this analysis in the terms I have developed, Nixon believed in 1968 that there was a possibility of constitutional transformation, and therefore began to play constitutional hardball. As it happened, Nixon misjudged either the situation or his own ability to win at constitutional hardball. But, the difference between his 1960 and 1968 campaigns shows that constitutional hardball need not be the ordinary condition of politics.

Yet, the concept of constitutional hardball does seem to describe a lot of recent, that is, post-1980, political practices. The reason, I believe, that that we have been experiencing a quite extended period of constitutional transformation. Consider how things would look if we combined my idea of constitutional hardball with the descriptive portion of Bruce Ackerman's account of constitutional moments. In my terms, Ackerman's constitutional moments are concentrated periods during which our constitutional order shifts rapidly from one form to another. We would then expect to see constitutional hardball in the brief period surrounding a constitutional moment—just before it, as pre-constitutional assumptions are brought into question, and just after it, as new pre-constitutional assumptions are put in place. And then, during the extended periods of what Ackerman calls ordinary politics, we would observe ordinary constitutional politics, that is, policy initiatives that might raise ordinary constitutional questions without challenging settled pre-constitutional assumptions.

The picture is different if constitutional transformation can take place over an extended period, as I believe it may have been since around 1980.<sup>84</sup> Then we would observe an equally extended period in which political leaders played constitutional hardball. Indeed, it might come to seem as if constitutional hardball was the *normal* state of things rather than a symptom of the possibility of constitutional transformation. Transformation might seem like an ever-receding light at the end of the tunnel, and constitutional hardball the way politicians play day-to-day politics.

## V. SOME POSSIBLE NORMATIVE IMPLICATIONS

So far I have tried to keep my analysis as descriptive as possible. Still, I suspect that most readers are likely to think that there is something distasteful about constitutional hardball as a

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constitutional understandings, by ceding large parts of the Department of Justice to Goldwater conservatives.

84. See generally TUSHNET, *supra* note 1, where I argue that our present set of fundamental arrangements deserve to be described as a constitutional order but acknowledge the cogency of claims that what we are experiencing is an extended transitional period.

process.<sup>85</sup> After all, playing for keeps in politics is, it might be thought, a recipe for social disaster, leading at the extreme to genocide and annihilation of the enemy.<sup>86</sup> Even short of that, constitutional hardball might lead to unpleasant personal relations among politically active people. And, as L. Michael Seidman has emphasized, playing for keeps might be wrong just because it fails to acknowledge the possibility that one's political-constitutional opponents might actually be right about the Constitution—a possibility that, according to Seidman, is ever-present.<sup>87</sup>

Note, though, that some of these normative questions are not about constitutional hardball in itself, but are about what happens when someone wins the game. Consider, for example, the sheer distastefulness of constitutional hardball. That problem could be eliminated after constitutional transformation occurs—after, that is, we emerge from the tunnel into the new constitutional order. Then, the politicians having control of the government can revert to ordinary constitutional politics, and their opponents can, like Eisenhower and Nixon in 1960, play the game on the winners' terms, hoping to pick up a victory or two themselves. If our normative misgivings are founded in simple distaste for constitutional hardball, exacerbated by the fact that politicians have been playing it for more than twenty years now, we can take solace in the possibility that someday the Republicans might win.<sup>88</sup>

The normative problems associated with playing for keeps are different. The solutions to those normative problems are usually apparent. In its most general form, the solution is for political-constitutional actors to behave like grown-ups. So, for example, the solution to the problem created by the tie vote in the 2000 presidential election—one that would be obvious in other democratic constitutional systems—would have been the negotiation of a coalition government, with some agreement, perhaps memorialized in a coalition document, about which Cabinet offices each party would control, with assurances that,

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85. If not about any particular examples I have used. Again, the problem of perspective intervenes. I suspect that people are likely to view what I describe as instances of constitutional hardball as entirely sensible legal-political strategies when conducted by the side they favor, and as distasteful hardball only when conducted by the other side.

86. That certainly is the practical implication that the German (and Nazi) legal theorist Carl Schmitt drew from his analysis of politics as combat between enemies.

87. LOUIS MICHAEL SEIDMAN, *OUR UNSETTLED CONSTITUTION* (2001).

88. Or, less likely, that Republicans come to accept the fact—if it is one—that their prospects of complete victory are slim, and so come to accept the small victories and small losses that I argue elsewhere are characteristic of the present constitutional order (which should not be understood as an extended period of transition).

taken as a whole, the portfolios of the Democrats and Republicans would be roughly equivalent in social and political importance. Similarly, the mature solution to the problem of polarizing judicial nominations followed by filibusters is an agreement by the president not to submit nominations about which a substantial number of Senators have deep reservations, coupled with an agreement by Senators to confirm all nominees who clear this vetting process.<sup>89</sup>

The problem, then, does not lie in identifying outcomes that avoid the perils of constitutional hardball. Rather, it lies in reaching those outcomes through the ordinary means of politics. Several inadequate possibilities deserve mention.

First, we could simply hope that, once the systemic phenomenon of constitutional hardball is identified and named, political actors will decide not to play the game. They will give up the aspiration to achieve total victory over their opponents. This is a possibility I have identified elsewhere as nattering by constitutional theorists—identifying normatively attractive solutions to real problems and hoping that their sheer normative attractiveness will induce political actors to adopt them.<sup>90</sup> As my label for the hope suggests, this does not seem to me a promising strategy.

Second, we could hope that political actors will in fact be sufficiently mature to adopt the obvious solutions. In Madison's terms, we could hope that our political leaders would be "enlightened statesmen."<sup>91</sup> But, as Madison immediately observed, "enlightened statesmen will not always be at the helm."<sup>92</sup> And, our contemporary circumstances suggest that enlightened statesmen might *never* be at the helm. The reason lies in the structure of our present party system.<sup>93</sup> For structural reasons that system produces highly partisan and ideologically polarized political leaders. Simplifying a complex reality: each party selects its

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89. Reaching such an agreement would require each side to forgo making strong claims about the constitutional prerogatives of the president (to nominate whoever he deems fit for office) and the Senate (to refuse to confirm nominees on whatever grounds a sufficient number of Senators deem appropriate). For an interesting example of a failed compromise over the composition of the federal judiciary, see Gillman, *supra* note 30, at 8-9 (describing attempts by Republican Attorney General Herbert Brownell to achieve a compromise with Senate Democrats over increasing the number of federal judges and allocating appointments by party).

90. MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 155 (1999). "A lot of scholarly writing about the Supreme Court . . . seems to assume that if academics and journalists natter at the justices long enough, they will wake up and see the light we are offering them." *Id.*

91. THE FEDERALIST NO. 10 (James Madison).

92. *Id.*

93. Madison of course did not anticipate the emergence of nationally organized parties, much less the particular party system we have today.

candidates in a party primary in which the voters are drawn from the party's more ideologically extreme wing. Elections then pit a quite conservative Republican against a quite liberal Democrat. In the aggregate, we end up with a House of Representatives and a Senate in which there is, for all practical purposes, no center. The partisans we elect are then inclined to play constitutional hardball—or, at least, are unlikely to be enlightened statesmen in the required sense.

Third, we might hope that political actors will realize that the worm will turn someday. That is, they might correctly believe that by playing constitutional hardball today they may be able to take control of all the levers of governing power, but they might realize that someday their opponents will seize the opportunity to play constitutional hardball in return, gain power, and shut *them* out of power. The problem here is with the time-horizon of political actors. They will not care if the worm turns after their politically active lives are over—after they die, retire, or assume the role of elder statesman or -woman. And, if history is a guide, the life span of a constitutional order is longer than the time-horizon of most active political actors. I would not want to be held to the following judgments, but consider the possibility that the Jeffersonian-Jacksonian order lasted from around 1801 to somewhere in the late 1840s or early 1850s, that the post-Reconstruction order lasted from around 1876 to somewhere in the 1930s, and that the New Deal-Great Society order lasted from the mid-1930s to the mid-1970s. At every point the remaining life span of each constitutional order is longer than the time horizon of almost every political actor—with the exception of the time when a constitutional order is visibly in decay, which is precisely when the political opposition will see the advantages of starting to play hardball and the dominant party will play hardball to shore up its decaying foundations.

Are there any ways that politics might produce politicians who refuse to play constitutional hardball? The answer, I suspect, lies in breaking out of the confines of conventional politics. The dynamics I have described occur because the two major parties are ideologically polarized. One institutional solution would be the creation of a third party, an energized center.<sup>94</sup> Because the emergence of such a party seems extremely unlikely,<sup>95</sup> I suspect

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94. For a moment, it seemed as if the Reform Party might play such a role. Jesse Ventura's decision to refrain from running for re-election (with the possibility of a later campaign for the presidency) seems to have eliminated that possibility.

95. The Supreme Court's decision in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), eliminated one promising method by which such a third party might have emerged. And, more generally, the Court's decisions on political parties have increasingly endorsed the two-party system,

that we are going to experience constitutional hardball until the Republican party establishes its dominance in all branches, or until its leaders realize that they are not likely to do so in the foreseeable future.

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justifying state laws that protect the duopoly. For a discussion, see Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998).



