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# Counter-Majoritarian Constitutional Hardball

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# COUNTER-MAJORITARIAN CONSTITUTIONAL HARDBALL

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## INTRODUCTION

This Essay defines and describes *counter-majoritarian constitutional hardball*. Counter-majoritarian constitutional hardball occurs when legislators bend lawmaking rules to win a legislative majority without winning an electoral majority. Counter-majoritarian constitutional hardball is a specific type of constitutional hardball. Constitutional hardball describes the manipulation of lawmaking rules for partisan gain.[1] Hardball bends lawmaking norms without breaking overt constitutional rules. Lawmakers use hardball tactics to durably entrench their party's institutional power. These measures are therefore often baldly partisan. Hardball lawmaking can also entail a tit-for-tat pattern—when one party bends procedure, the other will do the same in reprisal, eroding constitutional rules.

Consider the following examples. In 2013, Democrats, holding a slight Senate majority, exempted their lower court and executive office nominees from the Republican filibuster, filling these seats by simple majority vote. Taking the Senate in 2014, Republicans blocked Democratic court nominees—including Supreme Court nominee Merrick Garland—claiming his nomination fell too close to a presidential election, thereby opportunistically creating a new norm for confirmation hearings. Republicans took the presidency in 2016 and exempted their Supreme Court nominees from the filibuster, appointing Neil Gorsuch, Brett Kavanaugh, and Amy Coney Barret by narrow margins. By confirming Barrett only days before the 2020 election, they abandoned their own norm on confirmation.

Scholarly work on constitutional hardball is relatively new and primarily descriptive. Mark Tushnet introduced the term "constitutional hardball" to describe Republicans' 2003 threat to confirm judicial nominees by abolishing the filibuster.[2] Scholars have since described increasing



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1. *See* Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 523 (2004).

2. *Id.*; Jack M. Balkin, *Constitutional Hardball and Constitutional Crises*, 26 QLR 579, 579–90 (2008).

congressional polarization, narrowing congressional majorities, and congressional majority leadership's subsequent willingness to circumvent supermajority passage requirements on high-stakes policy, budget, tax, and judicial confirmation votes.[3] Some scholars describe this procedural wrangling as evidence of norm erosion or constitutional "rot."[4] Others note that while hardball can entail a reciprocal tit-for-tat pattern, Republicans, who took congressional and state legislative majorities after 2010, were especially successful in playing hardball against Democratic chamber minorities—particularly through state-level gerrymandering and voting restrictions. In 2018, Joseph Fishkin and David Pozen described this as "asymmetric" constitutional hardball, through which congressional Republicans dismantled Democrats' administrative programs and electoral base.[5] Democratic minorities, especially at the state level, have largely been unable or unwilling to reciprocate.[6]

Hardball is a function of legislative power—larger chamber majorities better empower leadership to procedurally strong-arm the chamber minority. Some scholars have therefore described constitutional hardball as a majoritarian lawmaking tactic, recounting the rare landslide electoral victories and attendant legislative supermajorities that let coalitions periodically transform American constitutionalism through hardball lawmaking.[7] Historical case studies describe and celebrate majoritarian hardball. For example, scholars recount radical Republicans' 1867 Military

3. Though note that Lee and Curry find that these high-stakes measures are exceptional and that ordinary legislation still garners bipartisan support. FRANCES E. LEE, INSECURE MAJORITIES: CONGRESS AND THE PERPETUAL CAMPAIGN (2016); JAMES M. CURRY & FRANCES E. LEE, THE LIMITS OF PARTY: CONGRESS AND LAWMAKING IN A POLARIZED ERA ch. 1–2 (2020); *see also* MORRIS P. FIORINA, UNSTABLE MAJORITIES: POLARIZATION, PARTY SORTING, AND POLITICAL STALEMATE (2017).

4. *See, e.g.*, Jack M. Balkin, *Constitutional Crisis and Constitutional Rot*, 77 MD. L. REV. 147, 147 (2017); Josh Chafetz & David E. Pozen, *How Constitutional Norms Break Down*, 65 UCLA L. REV. 1430, 1432 (2018); Jack M. Balkin, *The Recent Unpleasantness: Understanding the Cycles of Constitutional Time*, 94 IND. L.J. 253, 257 (2019) [hereinafter Balkin, *Recent Unpleasantness*]; JACK M. BALKIN, THE CYCLES OF CONSTITUTIONAL TIME 3 (2020) [hereinafter BALKIN, CYCLES].

5. Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 919 (2018).

6. *See id.* at 936; David E. Pozen, *Hardball and/as Anti-Hardball*, 21 N.Y.U. J. LEGIS. & PUB. POL'Y 949, 953 (2019). Note that David Bernstein urges Democrats to attempt hardball lawmaking, and David Faris has recently made the normative case for Democrats to adopt hardball tactics on judicial and electoral reform measures. *See* David E. Bernstein, *Constitutional Hardball Yes, Asymmetric Not So Much*, 118 COLUM. L. REV. ONLINE 207, 208 (2018); DAVID FARIS, IT'S TIME TO FIGHT DIRTY: HOW DEMOCRATS CAN BUILD A LASTING MAJORITY IN AMERICAN POLITICS x–xxv (2018); *see also* Jed Handelsman Shugerman, *Hardball vs. Beanball: Identifying Fundamentally Antidemocratic Tactics*, 119 COLUM. L. REV. ONLINE 85, 86 (2019).

7. *See generally* BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATION (1998); BRUCE ACKERMAN, WE THE PEOPLE: THE CIVIL RIGHTS REVOLUTION (2014).

Reconstruction Acts or bullish New Deal Democrats' 1937 Judicial Procedures Reform Bill.[8]

This Essay identifies *counter-majoritarian* constitutional hardball, in which lawmakers bend rules to win a legislative majority without winning an electoral majority.[9] Several characteristics distinguish counter-majoritarian hardball from majoritarian hardball. First, counter-majoritarian hardball is not used by secure lawmaking majorities, but rather by narrow or tenuous legislative majorities that lack a clear electoral mandate. Using this tactic, narrow legislative majorities entrench their seats and their chamber control from future losses to opposed electoral or voting majorities—thus resulting in the counter-majoritarian outcomes. As a result, second, counter-majoritarian hardball often does not entail a tit-for-tat pattern. If successful, counter-majoritarian hardball, aimed at entrenching legislative control against electoral swings, precludes electoral shifts and reprisal by opposing lawmakers. Federal courts have often deferred to Congress and the state legislatures on political questions of voting, districting, apportionment, and election administration, narrowing grounds for judicial intervention against counter-majoritarian hardball. Counter-majoritarian hardball is therefore often self-reinforcing, tending to snowball. By using these tactics to inflate and entrench their legislative seat share, partisan lawmakers position themselves for future rounds of counter-majoritarian hardball. State legislators, for example, gerrymander to entrench their seats, which allows for future gerrymandering in a self-reinforcing cycle.[10]

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8. Ackerman ties hardball to constitutional transformation. And Tushnet states: "constitutional hardball is the way constitutional law is practiced distinctively during periods of constitutional transformation . . . one should not be able to observe episodes of constitutional hardball during periods of ordinary politics." Tushnet, *supra* note 1, at 532. Balkin rightly objects to this argument in passing: "Tushnet's initial surmise was too confined. Constitutional hardball is not limited to periods of extraordinary politics, but rather occurs throughout American history." Balkin, *supra* note 2, at 589.

9. A counter-majoritarian outcome occurs when a party wins a majority of legislative seats but does not win a majority of the electoral vote share. Conversely, a majoritarian outcome occurs when a party wins a majority of legislative seats and an electoral majority. Note that this definition of counter-majoritarianism concerns legislative seat share but not judicial seat share or judicial power. For a discussion of counter-majoritarian state legislative outcomes, see Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733 (2021). For a discussion of counter-majoritarian outcomes and judicial decision-making, see Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 291 (1957); ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (1986); Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 35–37 (1993); RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM (2009).

10. Gerrymandering or legislative malapportionment, though often counter-majoritarian, are longstanding, normal lawmaking practices. Instances of gerrymandering or malapportionment only qualify as counter-majoritarian hardball if passed using abnormal or constitutionally suspect methods. For example, between 1901 and 1962, Tennessee legislators, primarily representing rural districts, chose not to act on a constitutional requirement to reapportion seats, refusing seats to the

This Essay proceeds in three steps. First, the Essay proposes a cyclical pattern in counter-majoritarian constitutional hardball in Congress.[11] Second, the Essay offers a brief descriptive case study of counter-majoritarian hardball through the Enabling Act of 1889 and the Admission Act of 1890.[12] The Essay concludes by describing current counter-majoritarian constitutional hardball.[13]

## I. PATTERNS IN COUNTER-MAJORITARIAN HARDBALL

This Part describes a pattern in which recurring partisan realignment incentivizes counter-majoritarian hardball in Congress. Constitutional reform requires legislative supermajorities. The United States Constitution poses supermajority requirements for amendment, the highest requirements of any national constitution.[14] Federal judges, insulated from electoral swings by life tenure, can reinterpret the Constitution, but often do so gradually. Because they often seek to maintain the platforms of the past presidents and Congresses that appointed them, radical swings in interpretation are rare and are sometimes associated with constraint from the executive or Congress.[15] And Congress can reform constitutional rules by passing so-called "super-statutes"—landmark acts that guide subsequent lawmaking. But these laws, which win support and passage from rare congressional supermajorities, pass infrequently.[16]

These high barriers to constitutional reform intersect with a cyclical pattern in congressional party composition and seat share. The electoral strength of the major parties has waxed and waned, periodically granting

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state's growing electoral majority of urban and suburban areas, a case of counter-majoritarian hardball. *See* TENN. CONST. of 1870, art. II, § 4; Baker v. Carr, 369 U.S. 186, 187–95 (1962). In contrast, in 2003 Republicans captured the Texas state legislature, and, through an unusual mid-decade redistricting scheme, drew boundaries to win a majority of U.S. House seats in 2004. This redistricting was an unorthodox, hardball measure that exaggerated Republicans' legislative seat share, but since Republicans had won a majority of the electoral vote share, this hardball was not counter-majoritarian. *See* Ralph Blumenthal, *After Bitter Fight, Texas Senate Redraws Congressional Districts*, N.Y. TIMES (Oct. 13, 2003), https://www.nytimes.com/2003/10/13/us/after-bitter-fight-texas-senate-redraws-congressional-districts.html.

11. *See infra* Part I.

12. *See infra* Part II.

13. *See infra* Part III.

14. ZACHARY ELKINS, TOM GINSBURG & JAMES MELTON, THE ENDURANCE OF NATIONAL CONSTITUTIONS 162–67 (2009).

15. Dahl, *supra* note 9, at 293–94; BICKEL, *supra* note 9, at 133–42; KEITH E. WHITTINGTON, POLITICAL FOUNDATIONS OF JUDICIAL SUPREMACY: THE PRESIDENCY, THE SUPREME COURT, AND CONSTITUTIONAL LEADERSHIP IN U.S. HISTORY ch. 3 (2007).

16. William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1216–17 (2001). Eskridge and Ferejohn explain: "Super-statutes have a claim to expression of the considered judgment of the nation as a whole." *Id.* at 1274.

parties bicameral supermajorities in Congress.[17] These moments are rare. More often, the majority party holds less than two-thirds of congressional seats in either chamber or three-quarters of state legislatures, discouraging federal constitutional amendment or sweeping statutory reform.

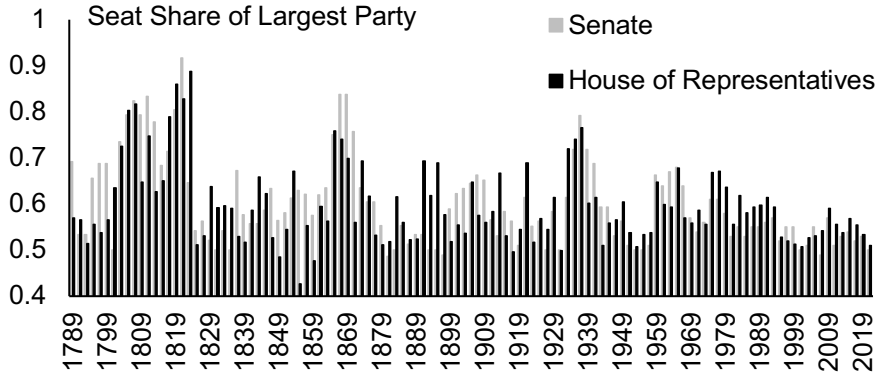


**Figure 1: Partisan Seat Share in Congress, 1789–2021**

The intersection of cyclical party realignment and constant supermajority barriers to constitutional reform creates two alternating conditions. In moments of one-party dominance or low party polarization, legislators can clear bicameral supermajorities requirements and revise constitutional rules by amendment, super-statute, or court reform.[18] Alternatively, conditions of party parity and high polarization thwart formation of the legislative supermajorities needed to change constitutional rules by amendment, super-statute, or by forcing aggressive court reform. In these periods, legislators are more likely to attempt reform through hardball, including through counter-majoritarian hardball.

Constitutional hardball is more likely when one or both congressional chambers are highly polarized and evenly split. Two periods of party parity and high polarization satisfy these conditions—the 1880s–1920s and 1990s–

17. On gradual electoral realignment, see V.O. Key, Jr., *Secular Realignment and the Party System*, 21 J. POL. 198 (1959); EDWARD G. CARMINES & JAMES A. STIMSON, ISSUE EVOLUTION: RACE AND THE TRANSFORMATION OF AMERICAN POLITICS (1989); DAVID R. MAYHEW, ELECTORAL REALIGNMENTS: A CRITIQUE OF AN AMERICAN GENRE (2002).

18. Below the two-thirds congressional supermajority threshold is a "gridlock interval" discouraging Article V amendment passage. Polarization increases the salience of these thresholds for amendment passage. For another model on the interaction of partisan realignment and constitutional change, see Balkin, *Recent Unpleasantness*, *supra* note 4, at 253–70; BALKIN, CYCLES, *supra* note 4, at 3–38.

2010s.[19] These were not transformative periods of formal constitutional reform but were eras of ordinary politics with near party parity. Instances of counter-majoritarian hardball during these periods of congressional party parity would give some evidence for this Essay's claims on the timing of counter-majoritarian hardball. Since constitutional norms vary by era, identifying norm violation through constitutional hardball is easiest through historically rooted case studies.[20] This Essay therefore offers a short, illustrative case study on the Enabling and Admissions Acts of 1889 and 1890.

## II. THE ENABLING AND ADMISSION ACTS OF 1889 AND 1890

Through the nineteenth century, Congress admitted new states and added House, Senate, and Electoral College seats. Between 1791 and 1819, Congress admitted four free states and five slave states, expressly formalizing paired admission under the 1820 Missouri Compromise.[21] With Abraham Lincoln's election on a Free-Soil platform in 1860, Republicans overrode Congress's Democratic minority and passed acts to admit five Republican-leaning states between 1861 and 1867. For example, the Republican Congress admitted Nevada, with only 21,000 residents, on the eve of the 1864 election to pad the Party's Electoral College majority.[22]

The readmission of Democratic-leaning ex-Confederate states through the 1870s and 1880s sapped Republican power in Congress. By the Fiftieth Congress of 1887–1889, Republicans held a narrow one-seat Senate majority

19. I posit that a congress is at party parity if the majority party in one or both houses holds fifty-five percent or less of the chamber, observing only congresses after the emergence of the two-party system in the 1830s. For an approximate measure of party polarization, the Essay relies on Jeffrey B. Lewis, Keith T. Poole, and Howard Rosenthal's DW-NOMINATE score in VOTEVIEW, voteview.com/about (last visited July 18, 2021).

20. As Balkin nicely puts it, "the internal norms of good legal argument are a moving target; they are constantly in the process of changing in response to political, social, and historical forces." Balkin, *supra* note 2, at 579. Similarly, Fishkin and Pozen note "[t]hese judgments as to what is conventional or unconventional, norm-abiding or norm-defying, are to some extent endogenous to constitutional practice." Fishkin & Pozen, *supra* note 5, at 928.

21. In early 1819, New York Representative James Tallmadge, Jr. proposed abolition in Missouri. Fellow New Yorker John W. Taylor sought abolition in the neighboring Arkansas Territory, while Arthur Livermore of New Hampshire proposed a constitutional amendment to the same effect. Northerners voted nine to one for Tallmadge's plan, while Southerners uniformly opposed it. By December 1819, Northerners deescalated by admitting Alabama under a proslavery state constitution, which aided the subsequent Missouri Compromise. *See* DON E. FEHRENBACHER, THE SLAVEHOLDING REPUBLIC: AN ACCOUNT OF THE UNITED STATES GOVERNMENT'S RELATIONS TO SLAVERY 263 (Ward M. McAfee ed., 2001); MARK A. GRABER, DRED SCOTT AND THE PROBLEM OF CONSTITUTIONAL EVIL 120–23 (2006); MATTHEW MASON, SLAVERY AND POLITICS IN THE EARLY AMERICAN REPUBLIC 177–212 (2006); JOHN CRAIG HAMMOND, SLAVERY, FREEDOM, AND EXPANSION IN THE EARLY AMERICAN WEST 3, 55–75, 150–67 (2007).

22. Between 1861 and 1867, Congress also moved to admit Kansas, West Virginia, Nebraska, and Colorado, though President Andrew Johnson vetoed the Colorado statehood bill.

and a nineteen-seat House deficit. Meeting in the summer of 1890, delegates to Mississippi's state constitutional convention developed a facially race-neutral poll tax and residency, literacy, and understanding requirement clauses to disenfranchise Black voters.[23] Other Southern states soon imitated this "Mississippi Plan." Hoping to stanch the loss of Southern Black Republican voters and Republican U.S. House seats, Henry Cabot Lodge proposed a Federal Elections Bill to let federal judges supervise Southern registrars, but Democrats blocked the bill in July 1890, stalling passage until the 1890 election.[24]

Republicans looked west for new voters and seats. The western electorate was rural, white, and in the upper territories, predominantly Republican. Congressional Republicans first admitted these territories through the Enabling Act of 1889.[25] The Act granted statehood to Montana and Washington and split the Dakota Territory into two new states. These four states yielded eight new senators. Passage of admission bills for Idaho and Wyoming months later added four more reliably Republican Senate seats. These acts sent twelve Republicans to the Senate between 1889 and 1890, creating a Republican Senate majority that lasted nearly uninterrupted for the next four decades, ending only with the New Deal. But were these acts cases of counter-majoritarian constitutional hardball? In passing the enabling and admission bills of 1889 and 1890, did Republican members of Congress knowingly violate a lawmaking norm in order to entrench their seats against electoral losses?

Answering this requires considering congressional norms surrounding the admission of states. By Colorado's 1876 admission, Republicans split congressional control with Democrats and invoked the antebellum custom of factional compromise in admitting new states. In a concession to the House's Democratic majority, Republicans paired admission for Republican-leaning Colorado with an enabling act for Democratic-leaning New Mexico. The Colorado bill narrowly passed while the New Mexico bill narrowly failed.[26]

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23. PAUL E. HERRON, FRAMING THE SOLID SOUTH: THE STATE CONSTITUTIONAL CONVENTIONS OF SECESSION, RECONSTRUCTION AND REDEMPTION: 1860–1902, at 189 (2017).

24. William D. Blake, *"One Difficulty . . . of a Serious Nature": The Overlooked Racial Dynamics of the Electoral College*, 17 FORUM 315, 323–24 (2019); ROBINSON WOODWARD-BURNS, HIDDEN LAWS: HOW STATE CONSTITUTIONS STABILIZE AMERICAN POLITICS 139–40 (2021).

25. Black Americans faced discrimination under some western territorial organic acts and state constitutions, and generally did not opt to claim land under the 1862 Homestead Act. As a result, the western territorial electorate became predominantly white. Blake, *supra* note 24, at 324–26.

26. But note the Colorado bill passed on March 3, 1875, the final day before Democrats assumed control under the incoming Forty-Fourth Congress, with the stipulation that only the Republican President Grant, and not the new Democratic Congress, could approve the proposed Colorado constitution. 3 CONG. REC. 2230–31, 2237–39, 2255 (2d Sess. 1875); Charles Stewart III & Barry R. Weingast, *Stacking the Senate, Changing the Nation: Republican Rotten Boroughs,*

Divided evenly by party, Congress also refused statehood to Democratic-leaning Utah and Republican-leaning Washington in the 1870s, granting neither party special advantage.[27]

Republicans defected from the paired admission norm during debates over admitting the Dakota Territory. In 1888, Senate Republicans carried a party-line vote to split Dakota into two states. Missouri Democrat George Vest objected, arguing that such a split was unprecedented, and South Carolina Democrat Matthew Butler decried the measure as a Republican attempt to inflate the Party's Senate majority.[28] Warning against splitting Dakota on baldly political grounds, the moderate Wisconsin Republican John Spooner appealed to the old norm of pairing admission acts. He recalled:

> [I]t came about, not unnaturally, that a slave State must be brought into the Union alongside of a free State. . . . [T]he relative position of political parties to-day in this country is not changed with the disappearance of [slavery]. It seems that to-day as in ante-bellum days the exigency of Democracy . . . demands that no Territory which will be Republican in its politics, which will send Republican Senators into this Chamber, shall be permitted to come into the Union unless alongside of it is admitted, regardless of its possessing elements of statehood, a Territory which shall be surely Democratic . . . .[29]

Rather than violate this norm and admit the Dakotas alongside New Mexico, the population of which "belong[ed] to a different race than the Anglo-Saxon, sp[oke] a different language, [and] ha[d] a different civilization," Spooner advocated delaying statehood for the Dakotas and New Mexico until party passions cooled.[30] The Democratic House Territories Committee then killed the bill.[31]

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*Statehood Politics, and American Political Development*, 6 STUD. AM. POL. DEV. 223, 236 n.33 (1992).

27. In preparation for statehood, Utah drafted a constitution in 1872 and Washington drafted one in 1878. Utah's statehood efforts were also derailed when Grant, in his 1875 message to Congress, warned admitting Mormon Utah would threaten "free, enlightened, and Christian" American customs. Ulysses Grant, *Seventh Annual Message to Congress*, *in* 4 CONG. REC. 180 (1st Sess. 1876); *see also* Stewart & Weingast, *supra* note 26, at 237.

28. Arguing that a majority of Dakotans had not condoned the proposed split, Butler claimed the Republican bill's true intent and "effect, so far as the Senate is concerned, would be to seat upon this floor two gentlemen who claim to have been elected to the United States Senate." 19 CONG. REC. 2835 (1st Sess. 1888). Missouri Democrat George Vest put it more plainly: "it is unfair for the Republican party to undertake the division of this Territory." *Id.* at 3037. He added that there had not been a "single instance of the twenty-five new States admitted into this Union since 1789 where any people of a Territory but those of Dakota undertook to divide their own area and then demand admission as a State." *Id.*

29. *Id.* at 3003.

30. *Id.*

31. *Id.*

But in November 1888, Republicans gained twenty-two House seats and a narrow House majority, now poised to take the House Territories Committee while retaining their one-seat Senate majority. The Committee's Democratic minority proposed an omnibus compromise bill to admit Dakota as a single state alongside the Republican-leaning Washington and the Democratic-leaning New Mexico and Montana, per mutual concession norms.[32]

Emboldened by their electoral victory, in early 1889, Republicans rebuffed the Democrats' concession bill. They rejected New Mexico statehood and moved to split the Dakota Territory and admit Montana and Washington, adding three Republican states with only one single, narrowly Democratic-leaning state—Montana. New York Democrat Francis Spinola objected:

> [W]e are about bringing in three or four Republican States to put the Senate of the United States where the Democratic party can not regain control of it in the next quarter of a century—let us at least insist upon this one point: there will be no more Territories to come in to make new States, and therefore we shall have to fight the battle upon common ground and shall have to carry some of the Republican States . . . .[33]

With the session closing, some Democrats were absent for the vote, which let Republicans force passage. Republicans promised Democrats consideration of New Mexico statehood at the opening of the next Congress.[34] Spinola doubted the Republican promise:

> It is all very well to talk about what the next Congress will do, but my experience has taught me to believe that when the next Congress comes into power this side of the House may look for but very few favors, and they will get no consideration whatever for any measure which will have the least shadow of a tendency towards strengthening the Democratic party in this country.[35]

In late 1889 and early 1890, Republicans swept all eight Senate seats from the Dakotas, Washington, and Montana. Resulting Republican congressional majorities now denied New Mexico statehood, instead proposing statehood bills for Idaho and Wyoming—two relatively uninhabited, Republican-leaning territories. Pro-statehood factions in Idaho and Wyoming expedited the process by drafting state constitutions without formal congressional approval by enabling act. Congress's Democratic

32. The bill stipulated Dakota voters could split their territory by popular referendum. Stewart & Weingast, *supra* note 26, at 236–39.

33. 20 CONG. REC. 1907 (1889).

34. *Id.* at 1906.

35. *Id.*

minority attempted reciprocal hardball. They tried to block approval of the proposed Idaho and Wyoming constitutions, and when that failed, tried to prevent quorum needed for passage. But, bolstered by their new seats, the Republican Senate and House carried the bills on a party-line vote, overriding Democrats' attempted hardball reprisal.[36]

By violating the old compromise norm of paired state admission, a core constitutional rule, Republicans entrenched their seat share against majoritarian electoral swings. These six new white, rural states immediately yielded twelve Republican Senate seats, insulating Republicans' Senate majority. Democrats swept the House in 1890 but remained locked out of the Senate. The entrenchment proved durable. As Stewart and Weingast show, while Democrats' presidential popular vote share ranged between 51.7% in 1892 and 46.8% in 1900, their Senate class seat share declined precipitously to a nadir of 29.2% by 1898 when the Party that year captured, respectively, 49.6% and 48.9% of the House vote and seat share.[37] Republicans then used their Senate hegemony to keep blocking reciprocal Democratic statehood hardball. The Republican Senate blocked admission for polygamist and heavily Democratic Utah until 1896 and for Democratic-leaning New Mexico and Arizona until 1912. Save for two brief interruptions, Republicans held a Senate majority, usually substantial, until the New Deal.[38]

The 1889 and 1890 Enabling and Admission Acts, which violated old lawmaking norms, qualify as constitutional hardball, and entrenching Republican seats against Democratic reprisal or electoral gains, consistently secured counter-majoritarian electoral outcomes. The 1889 and 1890 acts repudiated the longstanding rule of bipartisan support for admission of new states, creating a new rule under which Congress granted or denied statehood on baldly partisan grounds through the 1890s, 1900s, and 1910s. They also biased Senate apportionment to rural, white, Republican states. This hardball, though during a period of ordinary congressional politics, durably shifted institutional structure and rules.

36. Note the 1889 omnibus bill garnered some Democratic support and Republicans likely had only a slim advantage in turnout in Idaho and New Mexico territorial delegate elections per Stewart and Schiller's estimates. Merle W. Wells, *The Idaho Admission Movement, 1888–1890*, 56 OR. HIST. Q. 27, 34–35 (1955); Stewart & Weingast, *supra* note 26, at 239–42; Nolan McCarty, Keith T. Poole & Howard Rosenthal, Congress and the Territorial Expansion of the United States 43–45 (July 4, 1999) (unpublished manuscript), https://ssrn.com/abstract=1154168.

37. Stewart & Weingast, *supra* note 26, at 246.

38. *Id*.; McCarty et al., *supra* note 36, at 45–47.

## III. CONTEMPORARY COUNTER-MAJORITARIAN HARDBALL

This concluding Part proposes that contemporary Republicans use constitutional hardball to inflate their federal and state legislative seat share, increasing the likelihood of counter-majoritarian outcomes in congressional and state legislative elections. Contemporary congressional polarization and narrowing congressional majorities likely incentivize constitutional hardball, and modern congressional Republicans have been especially successful in playing hardball, particularly in challenging longstanding federal election law.[39] In 2006, a majority of House Republicans backed amendments limiting Voting Rights Act (VRA) enforcement, which the Supreme Court further weakened in 2013, restricting federal appeals against vote suppression.[40] As federal oversight waned, Republicans captured state legislatures through the 2010s. In states like Michigan, North Carolina, Ohio, and Wisconsin, Republicans subsequently gerrymandered legislative districts to inflate their U.S. House delegations and state legislative majorities. For example, in Wisconsin in 2018, Republicans won only 45% of the votes cast in state assembly races but won 63% of assembly seats. Similarly, the Trump Administration proposed excluding undocumented persons in census allocation of U.S. House seats, potentially inflating Republican U.S. House seat share.[41] Congressional Republicans have occasionally explicitly stated the advantages of bending electoral rules. As Senate Minority Leader Mitch McConnell put it: "[I]f you can write the rules, you can win the game."[42]

In late 2020 and early 2021, the Trump campaign and congressional Republicans used unprecedented hardball and extralegal tactics to contest Donald Trump's loss of the popular vote and Electoral College. Trump lost the 2020 presidential election by seventy-four Electoral College votes and seven million ballots. Nevertheless, Trump's loss in Arizona, Georgia, Michigan, Nevada, Pennsylvania, and Wisconsin was narrow and clear only

39. Fishkin & Pozen, *supra* note 5 and accompanying text.

40. Shelby Cnty. v. Holder, 570 U.S. 529, 557 (2013).

41. In March 2018, Secretary of Commerce Wilbur Ross informed Congress that the 2020 Census would reinstate a citizenship question. Then, in July 2020, the Trump Administration directed Secretary Ross not to count undocumented persons in allocating House seats, which would in some jurisdictions bias apportionment toward Republicans. Secretary Ross asserted the citizenship question would aid VRA enforcement; the Supreme Court held this rationale "seems to have been contrived." Dep't. of Com. v. New York, 139 S. Ct. 2551, 2575 (2019); 71 CONG. REC. 2065–68, 2078–83 (1929); Margo Anderson, *The Ghosts of Census Past and Their Relevance for 2020*, 163 PROC. AM. PHIL. SOC'Y 227, 235–39 (2019); Memorandum to the Secretary of Commerce: Excluding Illegal Aliens from the Apportionment Base Following the 2020 Census, 2020 DAILY COMP. PRES. DOC. 1 (July 21, 2020).

42. *McConnell at S. 1 Markup: "We Aren't Going to Let One Party Take Over Our Democracy,"* MITCH MCCONNELL REPUBLICAN LEADER (May 11, 2021), https://republicanleader.senate.gov/newsroom/remarks/mcconnell-at-s-1-markup-we-arent-going-to-let-one-party-take-over-our-democracy-may-2021.

after several days of mail-in ballot counting.[43] The Trump campaign, backed by the Republican Senate Majority Leader, Republican House Minority Leader, and Republican National Committee, refused to concede. Without evidence, the campaign alleged widespread voter fraud and ballot canvassing irregularities, appealing dozens of times for federal judges to invalidate swing-state ballots, often from Democratic counties. By late November, as these appeals, rife with errors, uniformly failed, the Trump campaign began additionally pressuring Republican lawmakers and election administrators in Arizona, Georgia, Michigan, Pennsylvania, and Wisconsin to block certification electors for Democratic candidate Joe Biden and to endorse an alternate slate of electors to grant Trump the presidency.[44] This gambit, relying on a marginal theory that state legislators are unbound by their state popular vote in selecting presidential electors, also failed. An amicus brief from the Texas Attorney General asked the Supreme Court to overturn Trump's losses in Georgia, Michigan, Pennsylvania, and Wisconsin.[45] When that failed, on January 2, 2021, Trump pressured the Georgia Secretary of State to "find" enough votes to flip the state in his favor.[46] And when that too failed, a supermajority of the House Republican caucus attempted to block certification of the Electoral College results. Lacking the votes to block certification, on January 6, Trump pressured Vice President Mike Pence to use his ceremonial role as President of the Senate to stall certification. Rebuffed by Pence, Trump rallied a mob which then stormed the Capitol to stop certification by force. These acts, attempting to reallocate electors to override the popular vote, blurred the line between counter-majoritarian hardball and outright violation of constitutional and legal rules, the January 6 insurrection verging on an attempted coup.

Republicans play hardball partly because of contemporary congressional polarization and narrowing congressional majorities, but also because the Republican Party is increasingly bound to a narrowing electoral

43. Jeremy Herb & Fredreka Schouten, *Workers Whittle Down Piles of Uncounted Ballots in Key States*, CNN (Nov. 5, 2020, 12:28 AM), https://cnn.com/2020/11/04/politics/mail-in-ballots-pennsylvania-georgia-michigan-wisconsin/index.html.

44. Amy Gardner, Josh Dawsey & Rachael Bade, *Trump Asks Pennsylvania House Speaker for Help Overturning Election Results, Personally Intervening in a Third State*, WASH. POST (Dec. 8, 2020, 7:51 AM), https://washingtonpost.com/politics/trump-pennsylvania-speaker-call/2020/12/07/d65fe8c4-38bf-11eb-98c4-25dc9f4987e8_story.html.

45. The brief was signed by the Republican House Minority Leader, most Republican House members and most Republican state attorneys general. *See* Brief of State of Missouri and 16 Other States as *Amici Curiae* in Support of Plaintiff's Motion for Leave to File Bill of Complaint, Texas v. Pennsylvania, 141 S. Ct. 1230 (2020) (No. 155).

46. Amy Gardner, *'I Just Want to Find 11,780 Votes': In Extraordinary Hour-Long Call, Trump Pressures Georgia Secretary of State to Recalculate the Vote in His Favor*, WASH. POST (Jan. 3, 2021, 12:59 PM), https://washingtonpost.com/politics/trump-raffensperger-call-georgia-vote/2021/01/03/d45acb92-4dc4-11eb-bda4-615aaefd0555_story.html.

base. Over the last two decades, the Republican Party has often overperformed with non-college educated and rural white voters, albeit as these groups decline as a proportion of the national electorate.[47] Capture of the white, non-college educated and rural vote has helped Republicans better leverage rural, underpopulated states' disproportionate Senate representation, increasing the likelihood of counter-majoritarian outcomes in Senate elections. In 2016 and 2018, Republicans lost the national popular vote across Senate elections but retained control of the chamber.[48] Republicans' Senate popular vote deficit has widened over the last three decades.[49] Based on population growth projections, low-population and rural states will likely continue to hold a disproportionate Senate seat share.[50]

Paired with hardball, this legislative malapportionment has helped Republicans entrench power nationally. With luck and slight overrepresentation of rural, white states in the Electoral College, Republicans won the presidency in 2000 and 2016 despite losing the popular vote.[51] Coinciding Republican Senate and White House control let Republicans shape federal court appointment. In the years after the 1988 election, Republicans have won the presidential popular vote once but claimed seven of eleven Supreme Court appointments. Most sitting Supreme Court justices and half of Article III federal judges were appointed by a Republican president who lost the national popular vote.[52] These appointees, backed by

47. PEW RSCH. CTR., WIDE GENDER GAP, GROWING EDUCATIONAL DIVIDE IN VOTERS' PARTY IDENTIFICATION 22–23 (2018); Ford Fessenden & Lazaro Gamio, *The Relentless Shrinking of Trump's Base*, N.Y. TIMES (Oct. 22, 2020), https://nytimes.com/interactive/2020/10/22/us/politics/trump-voters-demographics.html.

48. In 2020, Democrats lost the national popular vote in Senate contests, but split seats with Republicans. Recently, malapportionment of Senate seats has more often inflated Republican seat share. Senate elections are staggered, with only a third of Senate seats opening for each biennial election. But one can approximate the combined national popular vote for all elections for Senate seats in a given Congress by totaling popular vote in the prior three biennial Senate contests and any special elections. Across the last fourteen Congresses, Republicans have won this three-cycle national popular vote total only once but have won control of the Senate nine times.

49. Democrats' three-cycle popular vote lead has consistently grown, from an average of 0.3% in the 1990s to 3.8% in the 2000s to 4.9% in the 2010s, coinciding with Republicans' overperformance in rural, low-population states. DAVE LEIP'S ATLAS OF U.S. PRESIDENTIAL ELECTIONS, https://uselectionatlas.org (last visited July 22, 2021).

50. Senate reapportionment would require an Article V subject to veto by underpopulated states. *See* U.S. CONST. art. V; Philip Bump, *By 2040, Two-Thirds of Americans Will Be Represented by 30 Percent of the Senate*, WASH. POST (Nov. 28, 2017 12:23 PM), https://www.washingtonpost.com/news/politics/wp/2017/11/28/by-2040-two-thirds-of-americans-will-be-represented-by-30-percent-of-the-senate/; Shonel Sen, *National Population Projections: 2020, 2030, 2040*, STAT CHATE (Feb. 11, 2019), http://statchatva.org/2019/02/11/national-population-projections-2020-2030-2040/.

51. Blake, *supra* note 24, at 331–32.

52. Max Rust, *How Trump Reset the Federal Judiciary*, WALL ST. J. (Oct. 15, 2020, 2:13 PM), https://wsj.com/articles/how-trump-reset-the-federal-judiciary-11602785250; *Current Federal Judges by Appointing President and Circuit*, BALLOTPEDIA,

a robust conservative legal movement, affirmed House and state legislative gerrymandering and voting restrictions.[53] The modern Republican Party, frequently defeated in contests for the national popular vote, is not clearly a populist coalition, but rather one that uses hardball to inflate and entrench legislative seat share, increasing the likelihood of counter-majoritarian outcomes in federal and state legislative elections. Counter-majoritarian constitutional hardball thus shapes modern elections and policymaking.

https://ballotpedia.org/Current_federal_judges_by_appointing_president_and_circuit (last visited Oct. 1, 2021).

53. Rucho v. Common Cause, 139 S. Ct. 2484, 2508 (2019); *see generally* Thomas M. Keck, *Activism and Restraint on the Rehnquist Court: Timing, Sequence, and Conjuncture in Constitutional Development*, 35 POLITY 121 (2002); THOMAS M. KECK, THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM (2004); STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW (2008); AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION (2015).