

Democratic Backsliding via Constitutional Adherence: An Application to Contemporary American Politics

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Abstract

Existing theories of self-enforcing democracy cannot explain cases of democratic backsliding like the contemporary United States: politicians adhere to yet exploit constitutional limits to gain an undemocratic advantage. We present a game theoretic model that examines strategic incentives for party leaders, who interact over an infinite horizon, to exploit legal opportunities to bias elections in their favor. Three conditions explain democratic backsliding via constitutional adherence. 1. Wide legal leeway creates opportunities for anti-democratic tilting. 2. Constraints on tilting must asymmetrically favor supporters of one party to cause a breakdown of deterrence against anti-democratic tactics. 3. High partisan sorting enables politicians to exploit these latent advantages. This mechanism helps to explain American parties' asymmetric usage of anti-democratic tactics across disparate institutions. Given the ideological sorting between the two parties, Republican politicians enjoy greater opportunities to punish Democratic supporters than do Democratic politicians to punish Republican supporters, resulting in considerable tilting by Republican politicians.

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1 INTRODUCTION

Stable democracy requires that no relevant political actors benefit from undermining the rules of the game (Przeworski, 1991, 2003). Some models of self-enforcing democracy highlight the necessity of citizens keeping political leaders in check by punishing transgressions (Weingast, 1997; Fearon, 2011), whereas others analyze how the masses can mitigate coup threats by anti-democratic elites (Acemoglu and Robinson, 2006). Yet these accounts cannot explain the particular mode of democratic backsliding occurring in the contemporary United States. There is no credible threat of a military coup, and in any context it is difficult for citizens—who tend to be relatively uninformed about policy and politics—to hold in check politicians that seek to distort the democratic system.

Survey evidence from a wide range of sources, including Freedom House, V-Dem, the Economist, and Bright Line Watch, highlight a disturbing downward trend in the health of American democracy. Many scholars and pundits focus specifically on frequent actions by Republican politicians to gain undemocratic advantages through means such as voter suppression, extreme gerrymandering, and stripping the powers of incoming Democratic governors (Fishkin and Pozen, 2018; Levitsky and Ziblatt, 2018; Dionne Jr, Ornstein and Mann, 2017). Yet, rather than openly violate the U.S. federal constitution, these tactics adhere to textual limits of and judicial interpretations of the law; and, when they are judged to overstep, they comply with court rulings. Furthermore, contrary to expectations from standard models of cooperation (e.g., repeated prisoner’s dilemma), Democrats have largely not responded in kind. This divides critics between bemoaning Democrats’ unwillingness or ineptitude to “play dirty” (Faris, 2018; Belkin, 1999) and exhorting both sides to respect democratic rules (Levitsky and Ziblatt, 2018). These patterns beg two general questions. Under what conditions do insider party elites exploit the legal limits of a democratic constitution to tilt the electoral playing field in their favor?¹ And why would attempts at democratic gamesmanship ever be asymmetric? Comprehending these patterns requires a new theory of democratic backsliding via constitutional adherence.

Leading explanations for contemporary democratic problems in the United States focus on hyper-polarization. By the 1990s, decades of realignment had yielded a Republican party with a nearly uniform conservative

¹Although the election of Donald Trump in 2016 has raised important concerns about populist *outsiders* eroding democracy, the insider-driven electoral tactics that we highlight predate his election.

coalition and a Democratic party with a similarly solid liberal coalition (McCarty, 2019). These trends, reinforced by highly competitive national elections, have contributed to diminished inter-party cooperation and a dysfunctional federal government (Lee, 2016). To explain asymmetric anti-democratic behavior, scholars have analyzed contributors such as asymmetric polarization (Republican congressional voting patterns have moved more strongly to the right than Democrats to the left), fear of future decline by Republicans given their largely older and white base (Levitsky and Ziblatt, 2018), and pressures from more extreme media outlets on the right (Fishkin and Pozen, 2018), among other factors.

We do not reject accounts based on divergent preferences and normative commitments by politicians in and constituents of the two parties, but these in of themselves cannot explain democratic backsliding via constitutional adherence. Instead, we offer a new strategically rooted perspective of how the legally permissible *opportunities and constraints* to tilt the playing field vary between the two parties, and we highlight unique aspects of the U.S. federal constitution that facilitate democratic backsliding. Our game theoretic model examines general strategic incentives leaders of any two parties, who interact over an infinite horizon, to exploit legal opportunities to bias elections in their favor by overweighting favorable voter constituencies. The analysis explicates three individually necessary and jointly sufficient conditions for democratic backsliding via constitutional adherence. First, the country's constitution must allow **wide legal leeway** for politicians to take actions that diminish the electoral weight of a particular voting bloc. For example, important legal bounds on drawing U.S. House districts are that Congress determines the total number of seats per state based on a biennial census; and the districts are single member, equal sized, contiguous, and do not artificially crack areas with a majority population of minority groups. But because the Supreme Court over the past few decades has ruled most partisan gerrymandering cases as non-judicable, political actors retain wide leeway to implement unfair districting schemes while remaining within these legal bounds.

Second, these legal bounds must be **asymmetric** between the two parties. Deterrence against either side pursuing anti-democratic tactics breaks down when one side enjoys considerable leeway to tilt the electoral playing field toward favorable voter blocs, but the other party enjoys few legal recourses to retaliate. Continuing the U.S. gerrymandering example, in principle, either party could exploit legally permissible yet anti-democratic tactics to overweight supporters of their party. However, in practice, the concentration of Democratic supporters into cities makes it easy for Republicans to gerrymander districts to greatly favor their party, whereas Democrats face severe constraints even when they draw the lines.

Third, **partisan sorting** must be considerable. By contrast, if partisan sorting is low—implying that major societal groups spread their electoral preferences across both parties—then even the party whose supporters are legally favored would gain relatively little from tilting the rules toward those groups. Thus, continuing the U.S. gerrymandering example, it is not sufficient for Democrats to have a small comparative advantage among urban voters. Instead, the hyper-polarization between urban and rural areas in contemporary America creates incentives for Republicans to draw districts that significantly bias against cities—beyond what geography would dictate—while undermining Democrats’ ability to retaliate.

In sum, the core strategic insight is that anti-democratic tactics emerge endogenously from politicians who simultaneously *adhere to and exploit the limits imposed by a democratic constitution*. Consequently, *asymmetric* usage of anti-democratic tactics is not puzzling; asymmetric legal opportunities create the strongest incentives for anti-democratic electoral tilting. Although deviating from democratic cooperation triggers long-term punishments, deterrence breaks down in equilibrium precisely because one side enjoys wide legal leeway but the other side cannot effectively punish them. Nor are deviations necessarily short-term power grabs followed by long-term costs. Contrary to the (symmetric) repeated prisoner’s dilemma, one side may actually gain over the long run from anti-democratic deviations if the other side enjoys few legal recourses to punishment. Partisan sorting matters in our account not by shaping the preferences of party leaders, but instead because it affects the opportunities and constraints they face to tilting elections in their favor. Viewed from this perspective, Democrats in the contemporary United States need not be angels. Even if the Left would like to retaliate, their limited scope to punish Republican transgressions prevents them from doing so without violating legal limits.

This theoretical understanding of how asymmetric constitutional bounds contribute to democratic backsliding informs many aspects of contemporary American politics. Here, we examine voting rights, gerrymandering U.S. House districts, the separation of powers between governors and statehouses, and statehood expansion. The first three create asymmetric bounds that favor Republicans. For voting rights and gerrymandering, Republicans enjoy advantages at the state level to enacting discriminatory policies that help them to win federal elections, whereas Democrats would need to control all branches of the federal government to retaliate. Furthermore, most possible retaliatory measures would constitute “anti-hardball” policies (Pozen 2019) that work toward a more neutral electoral playing field rather than to create systematic biases that favor Democrats. Finally, although the fourth issue—statehood expansion—could potentially favor

Democrats, we consider reasons why they have not exploited this asymmetry.

In addition to offering a strategic rationale for important trends in contemporary American politics, we also situate the U.S. federal constitution in comparative perspective. Regarding the three theoretical conditions that explain democratic backsliding via constitutional adherence, the U.S. constitution features perhaps the worst-case scenario for the first two. Unlike modern constitutions, the document is vague about many core tenets of democracy, such as voting rights and gerrymandering.² This creates wide legal leeway for politicians to discriminate against certain voting blocs. However, high hurdles to amending the document and broad judicial review powers make asymmetries in discrimination possibilities difficult to change. The Fifteenth Amendment of the U.S. Constitution, which prohibits voter discrimination along racial lines, provides a useful example. Although this amendment did pass, Radical Republicans wrote a water-downed version that they rushed to pass in Congress and then send to the states before more Democratic congressmen took office following the 1870 elections (Foner, 2019). The vague language of the amendment provided legal cover for southern states to exclude essentially all African Americans from voting in southern states between the 1890s and 1960s, therefore eviscerating the spirit of the amendment without overstepping legal rulings. By contrast, the unwritten British constitution generates stronger deterrence against anti-democratic tactics by creating more symmetric opportunities for the major parties to tilt the electoral playing field—if one party tries to tilt, the other would face few impediments to retaliating when it retakes the majority. Amending the British constitution is no different than passing a normal statute law via majority vote in a unicameral chamber whose statutes are (mostly) not subject to judicial review, and the majoritarian electoral system usually yields a majority party in the House of Commons (Loughlin, 2013).

Moving to contemporary problems with American democracy, latent asymmetries in the U.S. Constitution combined with the hyper-sorting that has occurred in recent decades has engendered two parties sharply divided not only on ideological lines—the focus of much of the literature—but also with regard to legal leeway to favor their supporters, on which we focus. Therefore, although the U.S. Constitution predates political parties and was thus not designed to favor any party over others, the current constitutional order enables considerable advantages that Republicans have capitalized on in recent decades, causing democratic backsliding despite constitutional adherence.

²Levinson (2012) and Ginsburg and Huq (2018) offer useful comparisons between the U.S. and more recent constitutions.

2 CONTRIBUTIONS TO EXISTING RESEARCH

We extend the burgeoning literature on democratic backsliding in several respects. First, we precisely define backsliding as legally permissible actions by one or both parties to overweight the electoral influence of supportive voting blocs beyond what their population weight would dictate. Our working definition of democratic backsliding is narrower than conventional approaches that include elements such as populist rhetoric, charismatic outsiders, nationalism, and/or xenophobia (e.g., see the checklist developed by Levitsky and Ziblatt 2018), but flexible enough to encompass numerous anti-democratic measures or instances of norm-breaking across multiple political institutions, including many forms of behavior that legal scholars have labeled as examples of “constitutional hardball” (Tushnet, 2003; Fishkin and Pozen, 2018).

Second, by highlighting how elites can manipulate party support within the bounds of the constitutional order, we articulate novel incentives for democratic backsliding. The classic regime transitions literature analyzes dramatic events such as military coups that clearly constitute democratic reversals (Linz and Stepan, 1978; Acemoglu and Robinson, 2006), but no serious scholar or pundit believes that this is likely in the contemporary United States. Others highlight the perverse effects of populist outsiders that try to consolidate power (Nalepa, Vanberg and Chiopris 2018; Buisseret and van Weelden 2019; Przeworski and Luo 2019), which are relevant given the election of President Donald Trump, but broader undemocratic behavior by Republican elites such as voter suppression and massive partisan gerrymandering accelerated before 2017. Another strand of research analyzes voters rather than elites and seeks to understand why citizens would fail to punish politicians that transgress democratic norms (Graham and Svobik, 2019; Carey et al., 2019), whereas we focus on the incentives faced by political elites while abstracting away from normative commitments of the electorate.

Third, whereas most formal models treat constitutions as coordination or commitment devices (Przeworski, 1991, 2003; Fearon, 2011; Weingast, 1997), we emphasize that constitutions can become tools for undermining rather than upholding democracy. As such, our vision of constitutions shares at least superficial similarities with qualitative critiques of the U.S. Constitution and American democratic history (Levinson, 2012; Mickey, 2015; Lepore, 2018). These scholars draw attention to the anti-democratic roots of the U.S. Constitution—which can be traced to the Framers’ desire to build a republic, not a democracy in the modern understanding of the word—and to the various institutional features that have previously and in some cases

continue to distort American democracy. In fact, this exhibits similarities with many other countries where outgoing elites shaped the constitution to protect their interests (Albertus and Menaldo, 2018).

In highlighting how elites might exploit certain silences or gaps within the U.S. constitution to erode democracy, our overarching argument is perhaps most similar to Ginsburg and Huq (2018). However, their discussion focuses mainly on executive power outlined in Article II of the Constitution and they stress that “the range of possible alternate specifications of constitutional rules is almost unlimited, given the majestic vagueness of much of the document’s text and the plasticity of historical sources” (138). We instead contend that not all constitutional provisions are equally malleable. When the boundaries bind, our analysis promises considerable traction on how the extent of constitutional leeway and its asymmetry affects decisions by party elites to favor their party to the detriment of democratic representation.

Fourth, our model relates to research on the evolution of U.S. democratic institutions. Although many theories take institutions as given constructs, many institutional rules are endogenous to conscious choices by politicians. For example, although the “pivotal politics” model takes the filibuster pivot in the Senate (60 votes) as a fixed constraint for passing policies or approving appointees, senators can vote to change this rule—and, indeed, have for some types of federal appointees in the past decade. Koger (2010) departs from the static approach by arguing that the filibuster has persisted because (1) historically, politicians have exhibited constraint in its usage (or what Levitsky and Ziblatt 2018 call “institutional forbearance”), and (2) it also allows politicians to shift the blame on failed policies. Shepsle (2017) also rejects static models of institutions and instead argues that “what humans devise, they may revise or defy,” supported by examples of political actors transgressing rules developed earlier. Binder (2018) and others delve into the conditions under which politicians will bend the rules. Our paper advances these considerations by studying strategic motivations for politicians to distort democratic institutions.

3 THEORY

Using a game theoretic model, we explain how the interaction of asymmetric legal opportunities and high partisan sorting causes the legally favored party to deviate to anti-democratic tactics in equilibrium. The model is intentionally spare to isolate this core logic. Besides legal bounds, the parties are symmetric in all respects: they are unitary actors who receive the same rents from winning and pay the same cost to

changing the electoral weight of different voting groups. Therefore, we intentionally omit many differences between politicians in and constituents of the real-life Republican and Democratic parties to concentrate on the effects of asymmetric legal bounds. We provide numerous concrete examples of legal bounds in the next section.

3.1 SETUP

We formally analyze a strategic interaction between long-lived representative agents of two political parties, P_R and P_D . The two parties interact in an infinite time horizon with time denoted by $t \in \mathbb{Z}_+$, and they discount future periods by a common factor $\delta \in (0, 1)$. In each period t , Nature chooses one of the two parties as the winner of an election. After the in-party power consumes its benefit associated with ruling, this party then chooses how much electoral weight to allow for different societal members, which affects election outcomes in period $t + 1$.

Society contains two groups of voters, V_R and V_D . Each member of both groups participates in the election in every period and votes sincerely for their most-preferred party, P_R or P_D .³ To eliminate unnecessary moving pieces for the analysis, we assume that total societal support for the two parties is 50-50, but we allow the amount of partisan sorting to vary. Specifically, members of V_R and V_D each compose half the electorate, and $s \in (0.5, 1)$ percent of V_R voters and $1 - s$ percent of V_D voters each prefer P_R . The complementary set of voters prefer P_D . Therefore, P_R has a comparative advantage among V_R voters, and the magnitude of this comparative advantage—i.e., the degree of partisan sorting—increases in s .

Each voter's electoral influence in any period t depends on electoral bias, determined by the strategic choice of the party in power in period $t - 1$. Specifically, the vote of each V_D member is weighted by $\omega_t \in [\omega_R, \omega_D]$, for the legal bounds $0 < \omega_R < \omega_D$. To focus attention solely on the *bias* induced by non-equal voting weights, we assume that the mapping from P_R 's weighted voting share to its probability of winning the election in any period t is perfectly proportional:

$$q(\omega_t) = \frac{\underbrace{V_R\text{'s votes from } P_R}_s + \underbrace{V_R\text{'s weighted votes from } P_D}_{\omega_t \cdot (1 - s)}}{\underbrace{1 + \omega_t}_{\text{Effective size of the electorate}}}, \quad (1)$$

³That is, the voters are not strategic players, and we do not explicitly model their consumption.

and P_D wins with complementary probability $1 - q(\omega_t)$. Because of P_R 's comparative advantage among V_R voters, $q(\omega_t)$ obtains its highest value at $\omega_t = \omega_R$, the lowest possible legally permissible weight for V_D voters. Conversely, $q(\omega_t)$ obtains its lowest value at $\omega_t = \omega_D$, the highest possible legally permissible weight for V_D voters. At $\omega_t = 1$, votes are fairly weighted. By contrast, any $\omega_t < 1$ biases against P_D and any $\omega_t > 1$ biases against P_R . At the extremes, $q(0) = s$, implying that members of V_D are disenfranchised; and $\lim_{\omega_t \rightarrow \infty} q(\omega_t) = 1 - s$, implying that members of V_R are disenfranchised. We assume the game starts without bias, $\omega_0 = 1$.

We highlight three important assumptions about the legal bounds. First, the parties are circumscribed to choose policies that lie within legal limits, as opposed to taking actions such as coups that blatantly violate the constitution. Although relevant in some substantive contexts, these types of outside options are not viable in the contemporary United States. Second, we assume the legal bounds are common knowledge. Although, in reality, the limits of the law are imprecisely known, as long as actors have accurate assessments of the expected legal bounds, the strategic logic would not change. If we introduced incomplete information about the bounds, it would be possible for a party to pass a law that subsequently gets struck down. Then, our assumption about following the law would be that parties adhere to the courts' decisions. Third, the legal bounds are fixed across the infinite horizon. We discuss this assumption and possible extensions in the conclusion.

In any period t , the out-of-power party consumes 0. The in-power party consumes 1 if $\omega_t = \omega_{t-1}$ and $1 - \phi$ otherwise, for $\phi \in (0, 1)$. That is, if the party in power at time $t - 1$ did not alter the electoral weight of V_D , then the party that wins the election in period t enjoys full consumption, whereas changing the rules in period $t - 1$ engenders a cost for the in-power party in period t . Importantly, although the strategic choice by the in-power party in period $t - 1$ determines the *probability* with which it will win re-election, that party does not know the *realization* of which party will win in period t .

Various substantive factors could generate the cost that actors incur to changing the institutional rules: the possibility of a constitutional crisis, greater difficulties to finding Pareto-improving policy compromises, and engendering general distrust with government given contestation over the rules of the game. Specifically in the context of legislative districting, gerrymandering spirals can be costly for incumbent representatives because, by cutting the margins in their districts, they are more likely to lose their seats even if the expected

number of seats for the entire party is greater.⁴ Alternatively, if we assumed that the legal bounds were probabilistic rather than deterministic, there could be a cost associated with a positive probability of a court overturning an attempt at tilting the playing field.

In sum, the timing of events in every period t is:

- Nature chooses the winner of the election; P_R wins with probability $q(\omega_t)$.
- Winning party consumes 1 if $\omega_t = \omega_{t-1}$, and $1 - \phi$ otherwise.
- Winning party chooses ω_{t+1} .

3.2 ANALYSIS

Appendix Section A.1 presents the incentive-compatibility constraints for either party to uphold democratic cooperation—that is, retain the status quo of no bias—rather than to deviate to anti-democratic tactics.⁵ A party that deviates gains an immediate electoral advantage, but this triggers each party to tilt maximally in their favor in all subsequent periods, implying that P_R chooses $\omega_t = \omega_R$ and P_D chooses $\omega_t = \omega_D$ in every period. These grim trigger punishments engender a long-term cost because ϕ is lost in every period following a rule change.

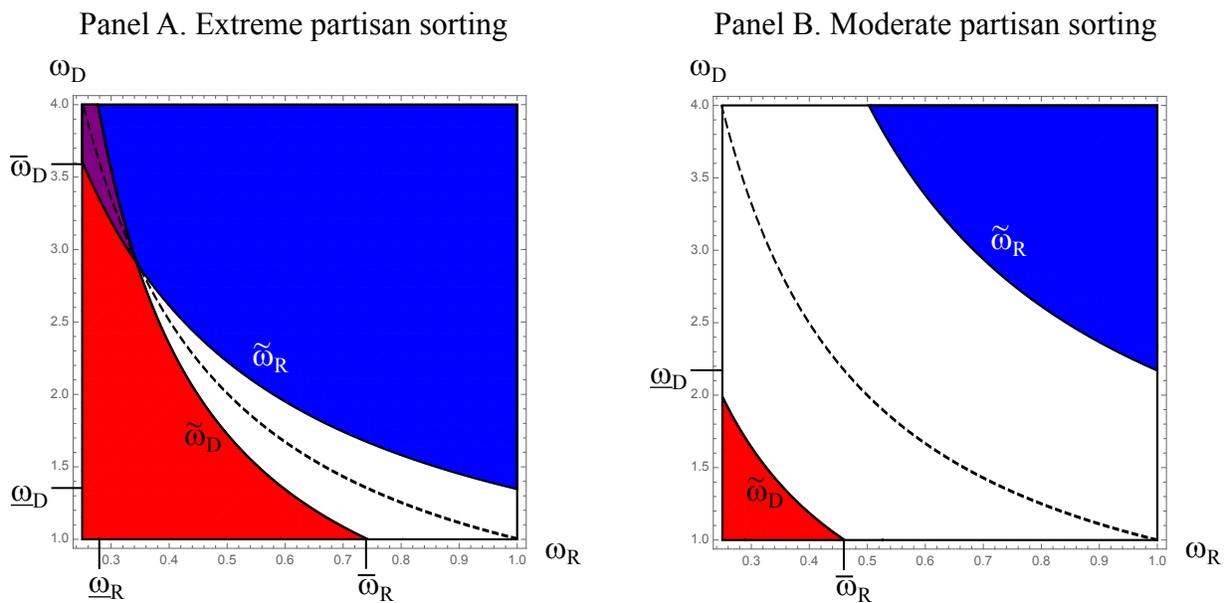
We characterize the conditions in which a cooperative equilibrium exists in terms of the legal bounds ω_R and ω_D . Our main result shows why asymmetric legal bounds cause one party to take anti-democratic actions in equilibrium. Figure 1 provides visual intuition by presenting region plots with ω_R on the horizontal axis and ω_D on the vertical axis. We allow the axes to range between perfectly fair weights ($\omega_D = \omega_R = 1$) and the possibility of each party overweighting their supporters to have four times the voting weight of the

⁴This is indeed what happened in the highly competitive U.S. House in the 1870s and 1880s. Democrats and Republicans each drew districts to maximize their number of seats, implying that their incumbents were expected to win with razor-thin margins. Swings of several hundred seats occurred multiple times. However, ϕ was relatively low for party leaders because the modern seniority system had not yet emerged (Engstrom, 2013).

⁵We use the *non-cooperative* game theoretic solution concept of subgame perfect Nash equilibrium, but following terminology for the prisoner’s dilemma, it is convenient to refer to the social welfare-maximizing outcome as “cooperative.”

disfavored group ($\omega_D = \frac{1}{\omega_R} = 4$). Note, however, that it is logically possible to allow either ω_R or ω_D to range between 0 and infinity. A higher absolute value of either ω_R or ω_D corresponds with greater legal leeway for either P_R or P_D , respectively, to tilt institutions in its favor. The dashed black curve $\omega_D = \frac{1}{\omega_R}$ expresses parameter values at which each party's legal leeway to tilt institutions in their favor is symmetric. Above this curve, P_D enjoys greater legal leeway than P_R to shift institutions in its favor, whereas the opposite is true below the curve of symmetry. The white region indicates values of ω_R and ω_D for which both parties cooperate, that is, the incentive-compatibility constraints presented in Appendix Equations A.1 and A.6 both hold. In the red region, P_R can profitably deviate to anti-democratic tactics (Equation A.1 fails); in the blue region, P_D can profitably deviate to anti-democratic tactics (Equation A.6 fails); and in the purple region, both parties can profitably deviate (both equations fail). In Panel A, the two groups are perfectly sorted into parties: $s = 1$. By contrast, in Panel B, some members of each group support different parties: $s = 0.7$. We fix the other parameters at values stated in the note accompanying the figure.

Figure 1: Legal Bounds and Cooperative Equilibrium



Notes: Figure 1 sets $\delta = 0.9$ and $\phi = 0.08$. In Panel A, $s = 1$. In Panel B, $s = 0.7$.

The interaction of asymmetric legal bounds and high partisan sorting causes at least one party to deviate to anti-democratic tactics. To highlight the role of asymmetry, consider P_R 's incentives to deviate in Panel A.⁶ If P_R has high leeway to tilt institutions in its favor (low ω_R) and P_D has only minimal ability to

⁶The analysis of P_D 's incentives to deviate is isomorphic.

retaliate (low ω_D), then P_R will deviate to anti-democratic tactics. Even though deviating triggers a spiral of anti-democratic actions by both sides, P_R will fare well in this punishment phase given asymmetric punishment opportunities. Thus, P_D 's weak punishment threat disables it from deterring P_R against using anti-democratic tactics.

More precisely, there exists an intermediate range $\omega_R \in (\underline{\omega}_R, \bar{\omega}_R)$ such that P_R will deviate if and only if ω_D is lower than a threshold, denoted as $\tilde{\omega}_D$. The range of ω_D values small enough to spark P_R to deviate increases as ω_R decreases because then P_R has more leeway to tilt the playing field in its favor. Outside the intermediate range, if $\omega_R > \bar{\omega}_R$, then P_R will not deviate regardless of ω_D . The cost of changing the rules is too high to justify P_R 's modest gains from pushing the (relatively tightly constrained) legal envelope. Alternatively, if $\omega_R < \underline{\omega}_R$, then P_R will deviate regardless of ω_D . Very low ω_R enables P_R to effectively end the game by playing undemocratically because once it has tilted institutions maximally in its favor, its probability of winning the next election is very high—despite the underlying 50-50 voter support for each party. Proposition 1 formalizes this logic, stated in terms of these threshold values.

Proposition 1 (Equilibrium). *If ϕ is low enough, then there exist unique thresholds with the following properties.*

- **No tilting opportunity.** *If $\omega_R > \bar{\omega}_R$, then P_R does not initiate anti-democratic tactics (Appendix Equation A.1 holds).*
- **Undeterrable cheating.** *If $\omega_R < \underline{\omega}_R$, then P_R deviates to anti-democratic tactics (Appendix Equation A.1 fails).*
- *If $\omega_R \in (\underline{\omega}_R, \bar{\omega}_R)$, then:*
 - **Symmetric legal bounds and deterred cheating.** *If $\omega_D > \tilde{\omega}_D$, then P_R does not initiate anti-democratic tactics (Appendix Equation A.1 holds).*
 - **Asymmetric legal bounds and cheating.** *If $\omega_D < \tilde{\omega}_D$, then P_R initiates anti-democratic tactics (Appendix Equation A.1 fails).*

However, absent partisan sorting, asymmetric legal leeway to affect the electoral weight of the two voting blocs will not trigger hardball. Even if the law, for example, allows wide leeway for a party to overweight members of P_R and minimal leeway to overweight members of P_D , if s is close to 0.5, then P_R would gain only a minimal electoral advantage from exploiting the legal bounds to favor its voting bloc. Comparing Panels A and B highlights the importance of partisan sorting. The deviation regions are smaller in Panel B, which assumes lower partisan sorting than in Panel A. It is instructive to consider the point $(\omega_R, \omega_D) =$

(0.5, 1.5), at which P_R deviates in Panel A but not in Panel B. Extreme partisan sorting in Panel A implies that P_R reaps considerable benefits even when the bounds are relatively symmetric— P_R can overweight its preferred group by a magnitude of 2, compared to 1.5 for P_D —whereas in Panel B, some of the gains from biasing elections in favor of V_R 's preferred group accrue to P_D because of less severe partisan sorting. This is strategically equivalent to fixing the amount of partisan sorting while making the legal bounds more restrictive.

Proposition 2 (Partisan sorting). *Greater partisan sorting increases the range of ω_D values low enough that P_R initiates hardball: $\frac{\partial \tilde{\omega}_D}{\partial s} > 0$.*

The analysis also delivers an important implication about the patience of the two parties, that is, the discount factor δ . Many influential ideas about sustaining cooperation are premised on the logic of a repeated prisoner's dilemma with a grim trigger punishment strategy. In that model, when considering whether to cooperate or transgress, players trade off between the short-term gains and long-term costs of transgressing. The benefit to a player from defecting is that it can leave the other player with the “sucker's payoff” by taking an individually beneficial action that yields a short-term gain for itself while leaving its opponent out to dry. However, starting in the next period, the “sucker” responds by punishing the transgressor in every future period, causing the transgressor to consume less in every future period compared to the alternative scenario in which it had never transgressed. One key implication is that more patient players can sustain cooperation because they put higher weight on the long-term costs of defecting compared to the short-term gains.

However, in our game, if the legal bounds are sufficiently asymmetric, then cooperation is impossible even as the parties become perfectly patient, $\delta \rightarrow 1$. Asymmetric legal bounds create asymmetric ability for the parties to punish each other. Consequently, one party may achieve *higher* payoffs in the long run from initiating an anti-democratic spiral if it enjoys wide scope to tilt institutions in its favor but the other party does not. Consequently, long-lived parties that highly value the future may still engage in undemocratic behavior. Proposition 3 presents the main result about long-term incentives and Appendix Section A.2 provides additional technical details.

Proposition 3 (Long-term incentives for anti-democratic tilting). *If $\phi < \tilde{\phi}$ (defined in Appendix Lemma A.2), then a cooperative equilibrium does not exist for any $\delta \in (0, 1)$.*

3.3 FEDERAL VERSUS STATE LAWS

The core model highlights the key intuition about asymmetric legal bounds and partisan sorting in a simple setting with a unitary government. However, as we discuss in the next section on substantive applications, there are important differences between laws that parties can enact at the state versus federal levels. In reality in the United States, the bicameral Congress and separate presidential elections create the possibility of split government at the federal level, and thousands of additional elections occur at the state and lower levels. To more closely connect the application to the model, we can relax the assumption that one party “wins” an election in each period. Suppose that when a party is in power, only probabilistically will they have an opportunity to tilt the playing field in their favor. Denote these probabilities as $\sigma_R \in (0, 1)$ for P_R and $\sigma_D \in (0, 1)$ for P_D . Now, even if the legal bounds are symmetric ($\omega_D = \frac{1}{\omega_R}$), one party enjoys an advantage over the other if $\sigma_R \neq \sigma_D$. Thus, our core insights about asymmetry and legal deterrence also apply even if the government is not unitary.

4 APPLICATION TO CONTEMPORARY U.S. INSTITUTIONS

Understanding how asymmetric constitutional bounds contribute to democratic backsliding informs many aspects of contemporary American politics. Here we examine voting rights, gerrymandering U.S. House districts, the separation of powers between governors and statehouses, and statehood expansion. The first three create asymmetric bounds that favor Republicans. For voting rights and gerrymandering, Republicans enjoy advantages at the state level to enacting discriminatory policies that help them to win federal elections, whereas Democrats would need to control all branches of the federal government to retaliate. Furthermore, most possible retaliatory measures would constitute “anti-hardball” policies (Pozen 2019) that work toward a more neutral electoral playing field rather than create systematic bias that favors Democrats. Finally, the fourth issue, statehood expansion, could potentially favor Democrats, but we consider reasons that they have not exploited this asymmetry.

4.1 VOTING RIGHTS

Perhaps the most important political struggle in U.S. history has been the right to vote (Keyssar, 2000). Despite considerable increases in the size of the electorate over time, voting rights are considerably less secure in the United States than in other advanced democracies. To defend voter suppression measures, Republi-

cans frequently appeal to widespread voter fraud. A poll taken of prospective voters in 2016 found that 69% of Trump supporters believed that voter fraud occurs “very/somewhat often” compared to 28% of Clinton supporters,⁷ despite the fact that scholarly empirical evidence consistently rejects allegations of widespread voter fraud (Ahlquist, Mayer and Jackman, 2014). By contrast, Democrats use the language of the country’s struggle for civil rights for African Americans and other minorities (or women) to motivate the need for greater voter protections, and often accuse Republicans of perpetuating Jim Crow-type policies.

We do not doubt that constituents and politicians in the two parties differ in their normative assessments of voter suppression measures. But an underemphasized component of the gap between the two parties in voter suppression measures is the differential constraints that they face to punishing the other party with disenfranchisement schemes. At the state level, the existing legal bounds create asymmetric opportunities for the parties to tilt the electoral playing field in their favor; and even if they controlled the federal government, Democrats would still face important impediments to halting Republican voter suppression measures. That is, even if we impose the (unrealistic) model assumption that the only goal of leaders of the two parties is to gain a competitive advantage in elections, we can help to explain patterns in current voting restrictions.

The main contemporary legal bounds on voting rights arise from various federal amendments and the Voting Rights Act.⁸ States cannot deny the right to vote based on race (Fifteenth Amendment; 1870), gender (Nineteenth Amendment; 1920), or age above 18 (Twenty-sixth Amendment; 1971). However, until the passage in the 1960s of the Twenty-fourth Amendment (eliminated poll taxes) and of the Voting Rights Act, southern states—with some emulation in other states—concocted devious work-arounds that effectively disenfranchised most African Americans.⁹ Yet even with crucial advancements since the 1960s, states continue to enjoy leeway to enact various voter-suppressing laws. These include disenfranchising incarcerated felons as well as (under certain conditions) formerly incarcerated felons,¹⁰ requiring voters to have specific forms

⁷<https://www.washingtonpost.com/news/the-fix/wp/2016/09/15/poll-nearly-half-of-americans-say-voter-fraud-occurs-often/>.

⁸The original U.S. Constitution contains no positive right to vote, and the founders delegated decisions over voter eligibility to the states.

⁹Keyssar (2000) provides a detailed history.

¹⁰The Thirteenth Amendment specifically allows this exception: “Neither slavery nor involuntary servitude, *except as a punishment for crime whereof the party shall have been duly convicted*, shall exist within

of allowable identification to cast a vote, and purging from the voting rolls those that have not voted within a certain number of years.

These legal bounds favor Republicans for two reasons. First, the known legal loopholes to disenfranchising voters disproportionately impact racial minorities, in particular African Americans—who tend to vote Democratic. We provide supportive evidence for felon disenfranchisement, voter-roll purges, and voter ID laws. As of 2016, approximately 6.1 million people nationwide are disenfranchised because of felony convictions, which equals 2.5% of the country’s voting-age population.¹¹ However, disenfranchised African Americans in this sample constitute 7.4% of their voting age-eligible population, and in four states this figure exceeds 20%. Between 2016 and 2018, the Brennan Center estimates that at least 17 million voters were purged from their states’ voting rolls between 2016 and 2018.¹² Although they cannot assess how many voters were improperly purged, as opposed to correctly removed from the rolls because they died or moved, they do show that the purge rate in counties previously covered by the preclearance provisions in Section 5 of the Voting Rights Act (which the 2013 Supreme Court decision *Shelby County v. Holder* effectively struck down) was 40% higher than in other counties. The federal government originally targeted these counties for preclearance because, historically, officials had systematically excluded large black populations from voting. This is suggestive evidence that the recent voter purges disproportionately target African Americans. In the run-up to Georgia’s 2018 gubernatorial election, for example, Georgia officials were more than five times more likely to remove blacks than other voters from the voter roll for failing a stringent exact-match signature test.¹³ Similarly, studies consistently show that African Americans, Hispanics, and Native Americans are less likely to possess the types of identification cards that typical voter ID laws require (e.g., Barreto et al., 2019). Furthermore, these laws often favor the types of IDs usually held by Republican rather than Democratic voting blocs, for example, allowing hunting licenses but not student IDs.

Second, Republicans have dominated statehouses for the past decade (for reasons discussed below in the gerrymandering section). This has provided the *opportunity* to pass laws that disproportionately target Democrats in the United States, or any place subject to their jurisdiction” [emphasis added].

¹¹<https://www.sentencingproject.org/publications/6-million-lost-voters-state-level/>

¹²<https://www.brennancenter.org/our-work/analysis-opinion/voter-purge-rates-remain-high-analysis-finds>.

voter-purge-rates-remain-high-analysis-finds.

¹³<https://www.nytimes.com/2019/05/15/opinion/stacey-abrams-voting.html>.

html.

cratic voters. Empirically, Republican-controlled states are more likely to implement voter-suppression measures. The evidence is clearest for implementing voter ID laws. In 2000, 14 states requested some identification from voters, and by 2016 this had more than doubled to 32 states.¹⁴ And whereas all earlier laws requested but did not require an ID or photo ID to vote, between 2006 and 2015, 15 states passed laws that *required* a photo ID in order for one’s vote to count, although court challenges prevented some of these provisions from becoming law. In 14 of the 15 states, Republicans controlled all three branches of state government.¹⁵ In the fifteenth, Arkansas, a Republican-dominated legislature overrode a veto by a Democratic governor to enact the law (Highton, 2017, 153). Statistical analyses of correlates of adopting voter ID and related voter restrictions consistently find evidence demonstrating a positive, statistically significant, and substantively large estimated effect of Republican state control, and this effect is larger in states with more African Americans or that exhibit higher partisan contestation (Bentele and O’Brien, 2013).¹⁶ However, despite clear partisan *intent* behind these laws, the partisan *consequences* remain uncertain. Several recent studies show no effect of these laws (Grimmer et al. 2018; Cantoni and Pons 2019), although Highton (2017, 163) note that the most stringent photo ID laws were not yet in place in many states during the time periods these studies analyzed. Fewer political science studies analyze causes of felon disenfranchisement or voter-roll purges, but evidence presented in Appendix Section B.3 is consistent with Republican-initiated disenfranchisement.

By contrast, Democrats enjoy few opportunities to play tit-for-tat by restricting Republican-leaning groups from voting. This is a crucial consideration for understanding the off-the-equilibrium path actions that influence the actors’ equilibrium choices. Consider elderly voters. In the 2016 presidential election, exit polls showed that 58% of whites 65 and older voted for Donald Trump (although this pales in comparison to the most Democratic-leaning groups; for example, 89% of African Americans voted for Hillary Clinton). Ignoring the moral outrage that progressives would likely express in response to deliberate attempts to disenfranchise the elderly—and instead focusing purely on legally viable opportunities—implementing such

¹⁴<https://www.nytimes.com/interactive/2016/11/03/us/elections/how-states-moved-toward-stricter-voter-id-laws.html>

¹⁵Although Virginia’s upper house was split in 2013 when it passed the law, there was effectively a Republican majority because the lieutenant governor that broke the tie was Republican (and, in fact, cast the deciding vote).

¹⁶Numerous additional authors cited in Highton (2017) provide similar results.

schemes would be tricky given the Twenty-sixth amendment and the lack of historical precedents on which to draw. We found one example of an attempt to make it more difficult specifically for retirement communities to vote, but this was *Republican*-sponsored. A bill in the Florida legislature in 2009 (which eventually failed) would have disallowed IDs that retirement communities provide for their members (Scher, 2015). In their discussion of asymmetric voter suppression, Fishkin and Pozen (2018) list one example of Democratic tilting: Democratic attempts to push local school board elections to off-cycle years. This tactic increases the expected share of teacher-union members in the electorate because they are highly motivated to participate in these elections whereas other voters are not.¹⁷ And, even in this case: “Whatever their drawbacks, off-cycle elections do not actually block Republicans, or anyone else, from voting. If this is as far as Democrats will go, it highlights the limits of their use of hardball in the highly contested constitutional sphere of voting” (Fishkin and Pozen, 2018, 939).

Instead, the most realistic possibilities for Democrats to neutralize their disadvantages are to pass new voting right laws at the federal level. Rather than punishing Republicans by disenfranchising their supporters, these laws would *reduce* legal leeway for voter suppression, which Pozen (2019) refers to as “anti-hardball.” In 2019, the Democratic-controlled House passed HR1, whose voting rights provisions include introducing a national voter-registration program, making Election Day a federal holiday, requiring non-partisan commissions to draw electoral districts, and limiting efforts to purge voting rolls. However, given divergent partisan preferences over voting rights, it seems unlikely that this bill will become law unless, in the future, Democrats win the presidential electoral college, retain/regain a majority in the House, and either win 60 Senate seats (highly unlikely) or gain a majority in the Senate and eliminate the filibuster. And even then, the law would garner serious court challenges for overstepping the power of the federal government to regulate states’ electoral procedures.

4.2 GERRYMANDERING IN THE U.S. HOUSE

Democrats express considerable normative outrage about unfair districting plans, which Republicans do not share. For example, in 2018, New Jersey Democrats proposed a “diabolical” gerrymandering scheme that nearly immediately garnered widespread condemnation from *progressive* activists and politicians, leading

¹⁷<https://fivethirtyeight.com/features/how-democrats-suppress-the-vote/>.

them to scrap the plan.¹⁸ Conversely, when North Carolina Republicans defended their districting scheme in court, they shamelessly touted its intentional partisan effects while arguing specifically that it was not *racially* motivated. Representative David Lewis stated that North Carolina Republicans held a 10-3 advantage in the U.S. House—despite rough partisan balance in statewide vote share—“because I do not believe it’s possible to draw a map with 11 Republicans and two Democrats,” which Lewis reaffirmed in 2019.¹⁹

Once again, we do not doubt that leaders and supporters of the different parties exhibit distinct normative commitments, but an underemphasized component of the gerrymandering gap between the two parties is the differential constraints that they face to punishing the other party with partisan districting schemes. The reasons resemble those for voting rights: at the state level, the existing legal bounds create asymmetric opportunities for the parties to tilt the electoral playing field in their favor; and even if they controlled the federal government, Democrats would still face impediments to halting pro-Republican gerrymandering.

The legal bounds for U.S. House districts follow from certain provisions in the Constitution, various federal statutes, and landmark Supreme Court rulings. These bounds include elections for each seat every two years; Congress determines the total number of seats per state based on a biennial census; and the districts are single member, equal sized, contiguous, and do not artificially crack areas with a majority population of minority groups (Appendix Section C.1 provides historical background). Yet despite these legal restrictions on districting plans, politicians still enjoy relatively wide leeway to draw districts to gain a partisan advantage. This is mainly because, since the 1980s, the conservative-leaning Supreme Court has refused to apply to districting the one-person one-vote standards that the Warren Court used to strike down malapportioned House districts. In recent cases such as *Vieth v. Jubelirer* (2004), *Rucho v. Common Cause* (2019), and *Lamone v. Benisek* (2019), 5-4 majorities on the Court ruled that partisan gerrymandering claims are not justiciable (i.e., they are political, not judicial, questions, and thus cannot be struck down by the courts).²⁰

As Chief Justice John Roberts stated in the majority opinion, “To hold that legislators cannot take partisan interests into account when drawing district lines would essentially countermand the Framers’ decision to

¹⁸<https://slate.com/news-and-politics/2018/12/new-jersey-democratic-partisan-gerrymandering>
html

¹⁹<https://www.theatlantic.com/ideas/archive/2019/03/ralph-hise-and-david-lewis-nc-gerrymandering/585619>.

²⁰For a lengthier discussion, see chapter 2 in McGann et al. (2016).

entrust districting to political entities” (*Rucho v. Common Cause* 18-422, 588, 2019, pg. 12). Associate Justice Elena Kagan’s dissent in this case highlights why these rulings are contested: “the partisan gerrymanders in these cases deprived citizens of the most fundamental of their constitutional rights: the right to participate equally in the political process, to join with others to advance political beliefs, and to choose their political representatives” (*Rucho v. Common Cause* 18-422, 588, 2019 (Kagan, E., dissenting)). Furthermore, for post-2010 redistricting, the legislature played a role in drawing the borders in 37 of the 43 states with more than one House representative (McGann et al., 2016, 153). Therefore, in most states, the existing districting process allows politicians to exploit leeway in the legal bounds for partisan advantages.

These legal bounds favor Republicans for two reasons related to contemporary partisan geography.²¹ First, Democratic voters are primarily concentrated in urban areas and racial minorities vote overwhelmingly for Democrats. Even without partisan gerrymandering, this distribution of support naturally creates “packed” areas with an inefficiently large percentage of Democratic voters, at least from the perspective of Democratic politicians that would prefer to spread out their supporters across the state. But this usually is advantageous for Republican politicians that indeed wish to pack Democrats in as few districts as possible to enable Republicans to win the remainder of the districts by more efficient margins.²² Rodden (2019, 148-56) provides a detailed discussion of districting in Pennsylvania and describes how Republicans strategically packed areas around Philadelphia and cracked smaller cities such as Redding and Harrisburg.

By contrast, when Democrats draw the maps, they often face impediments to even getting the map back to neutral. For example, there is considerable evidence that Illinois Democrats during post-2010 redistricting engaged in a “great deal of cartographical creativity” amid a “deliberate [search] to maximize partisan advantage” (McGann et al., 2016, 105). However, the efficiency gap for districts in Illinois slightly favors *Republicans*, given the inability to spread out Democratic support from the heavily Democratic city of Chicago in the northeast corner of the state. Even for the aforementioned proposal to rig New Jersey’s House seats in favor of Democrats, the Princeton Election Consortium argues that the plan would not have locked

²¹ Appendix Section C.2 formalizes some of these ideas by introducing explicit terminology for districting into the formal model.

²²The exception are states that are overwhelmingly Republican in which Republicans might be forced to concede one Democratic district because it is unable to break up a concentrated urban area (e.g., Salt Lake City in Utah) or a majority-minority area (e.g., Birmingham in Alabama). See Rodden (2019, 174-5).

in a Democratic majority. Instead, it would have made the relationship between statewide votes and seats more disproportional—leaving Democrats vulnerable in wave elections that favor Republicans.²³

To provide supportive quantitative evidence for the claim that—given the current demographic makeup of the parties—the legal bounds favor Republicans over Democrats for gerrymandering, we used data from Fivethirtyeight’s gerrymandering project.²⁴ Using online tools, they computed the efficiency gap (a commonly used measure of the extent of biased districting, which higher values indicating greater bias) under alternative districting schemes for each state. The two that are relevant for us since they correspond with our concepts of legal bounds are the best districting schemes for either Republicans or Democrats, and we computed the difference in efficiency gap for each.²⁵ For example, in North Carolina, the bounds range from a 24% efficiency gap in favor of Republicans to a 16% gap in favor of Democrats, yielding a net 8% advantage for Republicans. In fact, the Republican advantage in North Carolina resembles that for the entire sample. Among the 38 states that have three or more congressional districts, the average difference in efficiency gap favors Republicans by 9% (median is 10%).²⁶

The second factor that favors Republicans is their disproportionate control of drawing maps for post-2010 redistricting. Of the 435 House districts, Republicans had a trifecta in government for states that totaled 193 seats, compared to only 44 for Democrats (Daley, 2017, xx-xxi).²⁷ Three factors appear particularly important for explaining this Republican advantage. First, the median state is more conservative than the median national voter. Second, the same geographic and racial factors that naturally pack Democratic voters

²³<http://election.princeton.edu/2018/12/15/nj-redistricting-amendment-mistakes-in>

²⁴<https://fivethirtyeight.com/tag/the-gerrymandering-project/>.

²⁵They follow the relevant legal bounds on district drawing such as contiguity and preserving majority-minority districts.

²⁶See also evidence from Chapter 6 of Rodden (2019). The literature debates the extent to which factors such as geography matter for hindering Democrats in the House. However, our evidence is consistent even with skeptics such as Altman and McDonald (2015), who argue that it is possible in states like Florida to draw neutral districting plans despite the supposed geographical hindrances to Democrats. Our analysis of the Fivethirtyeight data supports this conclusion. We instead contend that Democrats are constrained from *proportionately punishing* Republicans in districting plans, i.e., Republicans face greater opportunities for extreme gerrymanders in their favor.

²⁷The remaining districts were in states with independent commissions or divided government.

into inefficiently Democratic House districts create similar disadvantages in state houses and senates. Third, conservative activists and donors combined with the Republican State Leadership Committee (RSLC), a Super PAC that invented the Redistricting Majority Project (REDMAP). This project explicitly aimed to “keep or win Republican control of state legislatures with the largest impact on congressional redistricting” and spent considerable money to target states and implement this strategy for the 2010 elections (Hertel-Fernandez, 2019). Republicans immediately capitalized on the *Citizens United* ruling earlier in 2010 to spend considerably more than was typical in midterm election years (Daley, 2017).

Republican advantages created by the geographic and racial concentration of Democrat support and reinforced by partisan Republican districting plans have created sizable Republican advantages in the U.S. House since 2010. To document this point systematically, we analyzed efficiency gap data from Fivethirtyeight based on the current post-2010 district borders. Across 38 states with at least three congressional districts, the mean gap was 7% in favor of Republicans and the median was 10%. In fact, this average difference of 7% is right at the threshold that political scientists commonly use for indicating substantial partisan bias. Furthermore, among individual states with an efficiency gap of at least 7% in favor of one party, only five favor Democrats compared to 23 that favor Republicans. Of course, aggregate efficiency gap measures conflate various contributors, including concerted partisan motives and geographical features. To better isolate intentionality, we also compared the efficiency gaps between states where Republicans controlled districting versus not (Democrat-controlled, divided court-drawn, independent commission). The average efficiency gap for Republican-drawn boundaries was 16% in favor of Republicans versus 0% in other states, and the difference in means is statistically significant at 1%. This evidence is consistent with recent studies that show a sizable Republican bias in the U.S. House since 2014 (Stephanopoulos and McGhee, 2015), whereas prominent older studies on gerrymandering show minimal effects when analyzing the period of party realignment between the 1960s and 1990s (Engstrom 2013 reviews this literature).

We have already suggested the limitations that Democrats face to playing tit-for-tat with partisan gerrymandering. We also consider the difficulty that Democrats face to implementing “anti-hardball” strategies that would neutralize their geographical disadvantages, once again considering the off-the-equilibrium path actions that influence the actors’ equilibrium choices. Given the 5-4 splits in recent relevant Court rulings, a majority of Democratic-appointed justices on the Supreme Court would likely lead to a considerable narrowing of the legal bounds for gerrymandering, but this would require controlling both the presidency and

the Senate likely for several electoral cycles.²⁸ Beyond changing the composition of the Court, if Democrats controlled the federal government, they could pass federal statutes to (1) mandate independent districting commissions for each state, (2) eliminate single-member districts, (3) create additional seats elected by a proportional representation list, or (4) eliminate the contiguity requirement. For space reasons, we include this discussion Appendix Section C.3. Briefly, the first two options might not help Democrats considerably, and the latter two are politically infeasible. We also evaluate a counterfactual scenario—which uses comparisons to districting in the 1870s and 1880s—to illustrate the plausibility that if the legal bounds on gerrymandering were more symmetric, Republicans would likely be deterred from this representation-distorting strategy (Appendix Section C.4).

4.3 STATE-LEVEL SEPARATION OF POWERS

IN PROGRESS

4.4 STATE EXPANSION

Another important component of contemporary debates over voting rights and representation is the prospect of statehood for Washington, D.C. and Puerto Rico. This discussion is somewhat more speculative because it concerns only actions that actors have *not* yet taken, but it is informative because it offers a clear example of how Democrats could bias institutions in their favor given the expectation that both states would tend to elect Democrats.²⁹ Once again, the parties exhibit different normative commitments. Democrats tout the need for residents of these territories to gain full representation in Congress and the Electoral College, in particular to correct previous wrongs driven by racism. For example, in 2019 amid hearings in the House about D.C. statehood, Democratic House representative Alexandria Ocasio-Cortez contended: “Where the disenfranchisement of Puerto Ricans was rooted in the colonialist and imperialistic history that we’ve had in policies of the United States, the issue of D.C. statehood is rooted in a different evil in our history, which is the history of slavery in the United States,” referencing that D.C. gained its black majority population after

²⁸We discuss the Supreme Court in more depth in the conclusion.

²⁹Washington D.C. currently chooses three electors for the Electoral College and the vote share for the Democratic presidential candidate routinely exceeds 90%.

becoming the first territory in the Union to free slaves during the Civil War.³⁰ By contrast, Republicans use thinly veiled racial language such as “crime” and “socialism” when arguing against statehood admission. In 1993, in a bill for D.C. statehood, Republican House representative Tom DeLay declared, “The District, a liberal bastion of corruption and crime, doesn’t even come close to meeting statehood requirements.”³¹ In 2019, Republican Senate majority leader Mitch McConnell decried Democrats’ “plan to make the District of Columbia a state—that’d give them two new Democratic senators—Puerto Rico a state, that would give them two more new Democratic senators . . . this is a full bore socialism on the march in the House.”³²

It is informative to look beyond distinct normative commitments and to analyze the constraints that Democrats have and continue to face to adding these territories as states. Article IV, Section 3 of the federal constitution provides one relevant legal bound: “New States may be admitted by the Congress into this Union; but no new States shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.” The Constitution does not impose any supermajority requirements for adding states, which implies that after a state applies for admission, the federal government can add the state via a normal bill. The Northwest Ordinance of 1787 sets guidelines for minimum state size, although these were routinely violated in the nineteenth century (Appendix Section C.1 provides historical background on Republican “state-packing” in the nineteenth century). Additionally, a relevant constitutional provision for D.C. is Article I, Section 8, which states that Congress will exercise exclusive jurisdiction of a federal “District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States.”

Combining these legal bounds with the demographics of the two territories creates three main constraints for Democrats, again informing off-the-equilibrium path actions. The first and most obvious is that Republican opposition to statehood for D.C. or Puerto Rico would require Democrats to control the federal government. This contrasts with our discussions of dimensions that favored Republicans, such as voter suppression and

³⁰<https://www.usatoday.com/story/news/politics/2019/09/19/>

[ocasio-cortez-disenfranchisement-d-c-rooted-legacy-slavery/2375336001/](https://www.usatoday.com/story/news/politics/2019/09/19/ocasio-cortez-disenfranchisement-d-c-rooted-legacy-slavery/2375336001/).

³¹<https://washingtonmonthly.com/magazine/july-august-2018/>

[political-capital/](https://washingtonmonthly.com/magazine/july-august-2018/political-capital/)

³²<http://nymag.com/intelligencer/2019/06/mcconnell-representative-democracy-is-fu>

[html](http://nymag.com/intelligencer/2019/06/mcconnell-representative-democracy-is-fu.html)

gerrymandering, in which they could exploit latent advantages by controlling *statehouses*.

Second, D.C. raises specific constitutional issues if added by the normal process—as opposed to via an amendment—because (a) the Constitution requires a separate federal district, (b) Maryland ceded land intended for a federal district rather than for a separate state, and (c) the Twenty-third amendment already grants D.C. three electoral votes. Appendix Section C.2 analyzes these issues in more depth by summarizing opinions by various constitutional scholars. Collectively, these suggest that Congress could likely, but not definitely, add D.C. by the normal statehood process.

Third, the malapportioned Senate requires Democrats to win in some red states to gain a majority because the median state is more conservative than the median national voter. Democratic senators in red states could face pressure to vote against D.C. and Puerto Rico statehood given the racial considerations summarized above. Historically, states that were not overwhelmingly white and English-speaking faced considerable delays to gaining statehood, and usually gained admission only after the white/English-speaking population increased (Arizona, New Mexico, Oklahoma, Alaska, Hawaii). African Americans are the plurality group in D.C. and, historically, have been a majority. Therefore, a statehood push for D.C. would “risk antagonizing white swing-state voters who may be less sympathetic to the plight of a city whose two major constituencies are African Americans and white liberal elites. Picking up two reliably blue Senate seats might not matter if the Claire McCaskills or Joe Manchins of the Senate lose theirs in the process.”³³ Puerto Rico is primarily Spanish-speaking, non-Anglo, and is considerably poorer than any other state in the Union. Its admission as a state would likely animate fears of white decline, which many scholars argue is an important source of Republican voter support (Mutz, 2018). Perhaps for these reasons, Democrats did not push to add these states in 2009 when they controlled the presidency, the House, and a filibuster-proof majority in the Senate. Other contributing factors were the very short window over which Democrats had 60 senators as well as a lack of preparedness for the necessary steps to add states, given their main legislative priority of health care overhaul (Faris, 2018, 54).

³³<https://washingtonmonthly.com/magazine/july-august-2018/political-capital/>. NB: Manchin but not McCaskill won re-election in 2018.

5 CONCLUSION

We provide a new theoretical framework for understanding democratic backsliding in the contemporary United States. In contrast with cases of democratic collapse via coups, revolution, or even more subtle “competitive authoritarian” tactics, the U.S. constitution itself enables considerable legal leeway to tilt the electoral playing field. Although all constitutions are incomplete contracts with gaps that enable opportunities for self-entrenchment, the U.S. federal constitution yields considerably more legal leeway than standard modern constitutions. The particular challenges to U.S. democracy today arise because of considerable asymmetries in legal leeway across the two major parties. Such asymmetries cause a breakdown of deterrence against rigging the rules—even if actors highly value the future—because the legally privileged party anticipates minimal retaliation from their opponent. In particular, the high degree of ideological sorting into the Democratic and Republican parties has yielded a Democratic coalition for which the legal bounds allow considerable discrimination, whereas there is minimal legal leeway to tilt the electoral playing field away from Republican constituents. We illustrate these asymmetries using examples of voter suppression, gerrymandering, and state-level separation of powers.

Our analysis of democratic backsliding relates to research on constitutional hardball and the breakdown of forbearance, that is, politicians taking actions that are legally permissible but violate existing norms and understandings of the rules (Fishkin and Pozen, 2018; Levitsky and Ziblatt, 2018). In highlighting the strategic incentives provided by the formal institutional rules, we offer an alternative theory of democratic erosion that does not rely on assuming that party leaders and constituents from one party have different preferences and normative commitments from those in the other party.

Our approach can be expanded in several directions. Although we explain how asymmetric legal bounds can explain the onset of hardball spirals, our formal model does not address either escalating or ending hardball. We could alter the model such that the costs of changing the rules strictly increase in the magnitude of change. Thus, rather than assuming fixed legal bounds, we could assume that different laws and norms create varying costs to changing the rules. Enriching the setup may highlight additional dynamics of hardball, such as initiation followed by future escalation by the disfavored party. In the contemporary United States, for example, it is possible that Democrats will respond to their present disadvantages in legal bounds by adding justices to the Supreme Court, which also speaks to future extensions of the theory in

which actors can alter the legal bounds. Such actions could either exacerbate a party's unfair advantage, or constitute "anti-hardball" tactics that generate a more even playing field (Pozen 2019). For example, the rulings of the Warren Court starting in the 1950s that challenged racially discriminatory laws and eliminated malapportioned U.S. House districts, followed by the Civil Rights Act and Voting Rights Act of the 1960s, constituted alterations of the legal bounds that reduced the ability to electorally discriminate against African American and urban citizens.

A related consideration would be to model more complicated strategic choices for elites to play hardball across multiple arenas simultaneously. For example, court-packing by the Right may be met by state expansion on the Left. To the extent that credible threats of retaliation can be linked and thus deterred across issues, the core question is whether and under what conditions such linkages help to restore mutual deterrence or instead feed escalation.

Future work could also apply this framework to place the contemporary United States in historical and comparative perspective. The extent of anti-democratic tactics since the mid-1990s is striking in comparison to the preceding three decades that featured considerable expansion of the franchise, improved registration access, and minimal gerrymandering. But the tactics today—albeit in considerably milder form—exhibit comparisons to prior periods of intense partisan polarization (e.g., 1790s, 1850s, 1880s) that ended with the collapse of the existing party system, revolutions (pro- or anti-democratic) in voting rights, and/or mass violence. These periods may provide insights into prospects for contemporary anti-democratic tactics to either escalate or end.

Finally, despite the strong tradition of constitutional rule in U.S. history, our strategic framework also highlights comparative shortcomings of the U.S. constitution. Most post-1945 constitutions in other countries contain clearer and stronger provisions for voting rights, fair districting, appointments to higher courts, and legal limits on the power of the executive, among others. These types of provisions help to limit the legal leeway to discriminate against political opponents. However, the extremely high hurdles to amending the U.S. federal constitution coupled with the political advantages that some actors derive from these incomplete provisions make it difficult to align the United States with modern constitutions. On the other extreme are unwritten constitutions such as those in the United Kingdom. Although this system permits wide leeway to tilt the rules, our framework suggests that the relative symmetry of opportunities for Conservative or Labour politicians should deter either from taking egregiously anti-democratic actions. Thus, the par-

ticular combination of fixed and malleable provisions of the U.S. constitution may make the United States uniquely susceptible to the mode of democratic backsliding we examine here: politicians that adhere to but simultaneously exploit the limits imposed by a democratic constitution.

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