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Hyperpartisan Gerrymandering

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HYPERPARTISAN GERRYMANDERING

MICHAEL S. KANG

INTRODUCTION	1380
I. THE HISTORY OF GERRYMANDERING	1387
<i>A. The Hyperpartisan Past: Gerrymandering During the Nineteenth Century</i>	1388
<i>B. Redistricting into the Cold War Era</i>	1394
II. THE UNUSUAL BIPARTISANSHIP OF THE COLD WAR	1399
<i>A. One Person, One Vote and the Beginning of Redistricting Law</i>	1400
<i>B. Partisanship and Party Politics During the Cold War</i>	1404
<i>C. Early Redistricting Law During the Cold War</i>	1411
III. MODERN HYPERPARTISANSHIP AND REDISTRICTING	1416
<i>A. The New Hyperpartisanship</i>	1416
<i>B. Modern Gerrymandering</i>	1421
IV. THE MISMATCHED LAW OF PARTISAN GERRYMANDERING	1426
<i>A. The Law of Partisan Gerrymandering</i>	1426
<i>B. The Cold War Baseline: Mismatched Understandings About Partisanship and Gerrymandering</i>	1433
CONCLUSION	1445

HYPERTARTISAN GERRYMANDERING

MICHAEL S. KANG*

Abstract: To modern observers of American politics, our current hyperpartisan era appears historically extreme, even bizarrely partisan. The preceding Cold War era was far less partisan and ideologically polarized. Spanning roughly from World War II through the 1980s, it offers a hopeful model for a better, less partisan American politics. However, this historical baseline is badly misleading. Partisanship for most of American history was much more similar to today's hyperpartisanship than the Cold War. And legislative redistricting, for most of American history, was just as intensely partisan as today's hyperpartisan gerrymandering. But it was precisely during the Cold War era of partisan peace that courts inaugurated election law and began overseeing redistricting. The development of redistricting law, and indeed most of election law, therefore occurred during the unusual circumstance of historically low partisanship when partisan complications largely receded from judicial attention. As a result, our inherited law of redistricting developed by courts during the Cold War era is fundamentally mismatched to today's hyperpartisanship and hyperpartisan gerrymandering. Moored to outdated Cold War assumptions, the Supreme Court badly underestimates hyperpartisanship and the effectiveness of hyperpartisan gerrymandering.

INTRODUCTION

We live in hyperpartisan times. Democrats and Republicans have not been more bitterly divided along partisan lines since Reconstruction, nor more aggressively hostile to each other in the history of the two major parties.¹ Rank-

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¹ See Cynthia R. Farina, *Congressional Polarization: Terminal Constitutional Dysfunction?*, 115 COLUM. L. REV. 1689, 1692–1702 (2015) (summarizing the political science literature and concluding that “congressional polarization has been steadily and consistently increasing since the 1980s”); *Ornstein Says There’s No One Cause for Dysfunctional Government*, CLAREMONT COURIER (Mar. 23, 2013), <https://www.claremont-courier.com/articles/opinion/t6911-ornstein> [<https://perma.cc/V9U5-SFDR>]; *Partisan Antipathy: More Intense, More Personal*, PEW RES. CTR. (Oct. 10, 2019), <https://www.people-press.org/2019/10/10/partisan-antipathy-more-intense-more-personal/> [<https://perma.cc/6J6L-83MS>] [hereinafter *Partisan Antipathy*] (detailing how increasing shares of partisans view members of the opposing party as associated with negative traits like “immorality” and being “unpatriotic”).

and-file voters increasingly vote for one party over the other up and down the ballot, election after election. Voter animosity against members of the opposing party has risen so sharply since the 1980s that prejudice against one's out-party surpasses racial prejudice today.² Roughly a third of Democratic and Republican voters feel that the opposing party is "so misguided that [it] threaten[s] the nation's well-being," with roughly half of partisans from both sides reporting they feel fearful of the other side.³ Democrats and Republicans in Congress are not only antagonistic, but more ideologically polarized than they have been in over a century.⁴ Following a long process of ideological realignment over the past fifty years, the major parties have transformed from heterogeneous coalitions into internally unified teams with clear ideological views on a wide spectrum of issues.⁵ Democrats and Republicans now represent two cohesive and hostile camps—two internally unified teams with clear, contrary positions.⁶ And when they engage in legislative redistricting and other forms of election law, Democrats and Republicans regularly rig the rules of the game in their favor and gouge the other party in outrageous fashion.

For almost anyone today, our current era seems like a historically extreme, even bizarrely partisan age.⁷ By comparison, the preceding era of mid-twentieth-century America was far less partisan and far less ideologically polarized.⁸ The major parties cooperated on national policy during the Cold War, passed landmark legislation on a bipartisan basis, and regularly bridged partisan rivalry across ideological and regional lines. Voters during this era were startlingly nonpartisan by today's standards. Many split their tickets to back different parties' candidates, changed their votes from one election to another,

² See Shanto Iyengar & Sean J. Westwood, *Fear and Loathing Across Party Lines: New Evidence on Group Polarization*, 59 AM. J. POL. SCI. 690, 690 (2015); see also Patrick R. Miller & Pamela Johnston Conover, *Red and Blue States of Mind: Partisan Hostility and Voting in the United States*, 68 POL. RES. Q. 225, 235–37 (2015).

³ Nolan D. McCaskill, *Pew Study: Partisan Divide Widest in 25 Years*, POLITICO (June 22, 2016), <https://www.politico.com/story/2016/06/partisan-divide-pew-study-224650> [<https://perma.cc/5KWJ-YA74>].

⁴ See Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CAL. L. REV. 273, 276–77 (2011).

⁵ See, e.g., Stefan Krassa & Mattias Polborn, *Policy Divergence and Voter Polarization in a Structural Model of Elections*, 57 J.L. & ECON. 31, 48–52 (2014); Pildes, *supra* note 4, at 277.

⁶ See *infra* notes 230–295 and accompanying text.

⁷ See *Partisan Antipathy*, *supra* note 1 (detailing how "[m]ajorities of Americans describe both parties as 'too extreme'").

⁸ By "partisan" and "partisanship," I refer to the tendency of party identifiers to associate strongly with their party and vote or otherwise align politically along party lines. "Partisan animus" refers to affective distaste for the other major party, which tends to reinforce partisanship. Finally, "polarization" refers to increased distance between the ideological positions of the major parties, as measured by various methods. Hyperpartisanship is a magnified form of partisanship, and as I explain, modern partisan animus and polarization both contribute to and are exaggerated by hyperpartisanship.

and regarded both major parties favorably. Politicians too were remarkably fluid in their partisan and ideological allegiances. They regularly bucked their parties and assumed moderate positions at odds with their party leadership. Congressional polarization, as measured by political scientists, fell to its modern lows. For today's critics of modern hyperpartisanship, this earlier era of bipartisanship, spanning roughly from World War II through the 1980s, offers a hopeful model for a better, less partisan American politics.⁹

This Cold War baseline is understandably salient but badly misleading. The bipartisanship of the Cold War, not today's hyperpartisanship, is the dramatic outlier in American history. Congressional polarization for most of American history was comparable to today's levels of hyperpartisanship, and voters were nearly as loyal to their parties as they are now.¹⁰ Voters rarely split their tickets, and their partisan identification likewise stayed consistent from election to election. In Congress, similarly, more than a hundred years of striking polarization preceded the Cold War window of partisan peace in the mid-twentieth century. America in the nineteenth and early twentieth century was as split along partisan lines as it is today in the twenty-first century.¹¹ As political scientist Marc Hetherington summarizes, "[I]f one views the entire history of the nation rather than just the most recent sixty years, partisan polarization appears to be more the rule than the exception."¹² It is no surprise, then, that the process of legislative redistricting, for most of American history, was just as intensely partisan as the rest of American politics.

This Article introduces this history of redistricting to the legal scholarship. Although largely forgotten today, it is a remarkably relevant tale of extreme gerrymandering featuring as egregious partisanship as today's hyperpartisan times.¹³ Understanding this history reveals that it is actually *today's* hyperpartisanship, and hyperpartisan gerrymandering, that are closer to the his-

⁹ See, e.g., David S. Broder, Opinion, *President Shouldn't Give Up on Bipartisanship*, SEATTLE TIMES (Feb. 18, 2009), <https://www.seattletimes.com/opinion/president-obama-shouldnt-give-up-on-bipartisanship/> [<https://perma.cc/Z8VM-3UKN>] (urging President Obama to engage Republicans on Obamacare and citing Cold War examples of the Marshall Plan and Civil Rights Act as models of bipartisanship); Pietro S. Nivola, *Partisanship in Perspective*, NAT'L AFF., Fall 2010, at 91, 93 (citing in the same vein Medicare and the civil rights bills of the 1960s).

¹⁰ See Hahrie Han & David Brady, *A Delayed Return to Historical Norms: Congressional Party Polarization After the Second World War*, 37 BRIT. J. POL. SCI. 505, 512–16, 531 (2007) [hereinafter Han & Brady, *A Delayed Return*]; see also Kevin Baker, *The Myth of Normal America*, NEW REPUBLIC (Feb. 15, 2018), <https://newrepublic.com/article/146915/american-politics-has-never-been-normal> [<https://perma.cc/QT4H-SFMN>] (“The way democracy is conducted today may have hit a new low in the lifetime of most Americans—but not in the life of the republic. The United States *has* been here before.”).

¹¹ Marc J. Hetherington, *Putting Polarization in Perspective*, 39 BRIT. J. POL. SCI. 413, 417 (2009).

¹² *Id.* at 419.

¹³ See *infra* notes 38–137 and accompanying text.

torical norm. The bipartisanship of the Cold War era is the exception.¹⁴ As political scientists David Brady and Hahrie Han have documented, congressional polarization during the nineteenth and early twentieth century was similar to today's hyperpartisanship but began to decline sharply following World War II.¹⁵ Indeed, the American Political Science Association's Committee on Political Parties during the 1950s contended that the major parties were, if anything, *insufficiently* partisan and too ideologically *compatible*.¹⁶ Of course, opportunities for bipartisanship were almost uniquely available when the major parties overlapped ideologically by significant margins. For the same reason, partisan gerrymandering hit historical lows during this period. But this rare window of partisan quiescence is virturally singular in American history.¹⁷ Almost never before nor since the Cold War has partisanship dipped to these unusual lows.

It was during this era of partisan peace that courts initiated election law and began overseeing the redistricting process. The Supreme Court's introduction of the one person, one vote doctrine, starting with *Baker v. Carr* in 1962, began regular judicial oversight of the political process.¹⁸ The one person, one vote cases, though, assumed no partisan dimension to its requirement of equipopulosity, nor did the political parties believe one person, one vote would have a partisan skew when applied nationwide.¹⁹ At the time, regional and racial concerns dominated over partisan interests, which were in an unusual abeyance during the era. The same would be true for the Court's subsequent development through the 1980s of vote dilution law, other Voting Rights Act questions, and eventually constitutional claims of partisan gerrymandering. Thus, the development of redistricting law, and indeed most of election law, occurred during an era of historically low partisanship where partisan concerns largely receded from judicial attention.

But by the 1990s, Cold War bipartisanship gave way to what metastasized into today's unrelenting hyperpartisanship. The hyperpartisanship from most of American history returned with a vengeance following the Civil Rights Move-

¹⁴ See *infra* notes 42–134 and accompanying text.

¹⁵ Han & Brady, *A Delayed Return*, *supra* note 10, at 512–16, 531; see also Baker, *supra* note 10.

¹⁶ See COMM. ON POL. PARTIES, AM. POL. SCI. ASS'N, TOWARD A MORE RESPONSIBLE TWO-PARTY SYSTEM 1–14 (1950); Mark Wickham-Jones, *This 1950 Political Science Report Keeps Popping Up in the News. Here's the Story Behind It.*, WASH. POST (July 24, 2018), <https://www.washingtonpost.com/news/monkey-cage/wp/2018/07/24/this-1950-political-science-report-keeps-popping-up-in-the-news-heres-the-story-behind-it/> [https://perma.cc/E65A-8LS4].

¹⁷ See, e.g., Megan M. Moeller & Sean M. Theriault, *Partisan Polarization in the U.S. Congress*, in OXFORD BIBLIOGRAPHIES OF POLITICAL SCIENCE (Rick Valelly ed., 2014) (“The congresses after the 1964 election and into the 1970s were some of the least polarized in modern history.”).

¹⁸ 369 U.S. 186 (1962).

¹⁹ See *infra* notes 135–167 and accompanying text.

ment, as the major parties realigned neatly into homogeneous ideological coalitions with scant political crossover by voters or politicians.²⁰ Conservatives, once scattered across both parties during the Cold War, now reliably populated only the Republican Party, while liberals and progressives abandoned the Republicans and reliably populated only the Democratic Party. The regular ideological overlap among voters and politicians from the earlier era disappeared, along with associated opportunities for bipartisan compromise and moderation. What's more, party animus on both sides mushroomed dramatically and fueled a resurgence of partisan gerrymandering over the past thirty years.²¹

The payoffs from this understanding of the history of partisanship, gerrymandering, and election law are two-fold. First, the law of redistricting developed by courts during the Cold War era is fundamentally mismatched to today's hyperpartisanship and the intensity of today's hyperpartisan gerrymandering. The Court's historic interventions into electoral politics during the 1960s, and its proverbial dive into the "political thicket" under the one person, one vote doctrine, were motivated by then-dominant problems of racial and regional discrimination and not at all informed by concerns about excessive partisanship that dominate today. The ensuing law of redistricting has thus grown up during an era of unusual bipartisanship and has been shaped by judges and lawyers of the same experience, when partisanship and gerrymandering were the least prevalent in American history.

As a consequence, the law of gerrymandering is now badly unsuited to the intense hyperpartisanship and polarization that has emerged well beyond the earlier twentieth-century experience. Justice Scalia once argued that "[y]ou cannot really tell until after the election is done how many Republicans and how many Democrats there are in each district."²² Gerrymandering therefore confronts what he called a "sea of imponderables."²³ This skepticism about the political science reached its obvious apex in *Rucho v. Common Cause*, when the Court finally ruled political gerrymandering to be constitutionally nonjusticiable.²⁴ Chief Justice Roberts echoed Justice Scalia in concluding that adjudication of gerrymandering claims "risks basing constitutional holdings on unstable ground outside judicial expertise."²⁵ Separately quoting Justice O'Connor's belief from 1986, he argued that any supposition about how voters will vote "invites 'findings' on matters as to which neither judges nor anyone else can have

²⁰ Han & Brady, *A Delayed Return*, *supra* note 10, at 512–16.

²¹ *See infra* Part III.

²² Oral Argument at 14:43, *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (No. 02-1580), <https://www.oyez.org/cases/2003/02-1580> [<https://perma.cc/Y22E-QJ9K>].

²³ *Vieth v. Jubelirer*, 541 U.S. 267, 290 (2004).

²⁴ 139 S. Ct. 2484, 2506–07 (2019).

²⁵ *Id.* at 2503–04.

any confidence.”²⁶ As he explained it, voters choose how to vote election by election, based on the issues, tone of campaigns, national events, and local issues, rather than more predictably based on partisanship, such that many voters split their tickets or switch parties from year to year.²⁷

If this was ever quite true, today’s levels of hyperpartisanship ensure that it is far less true than it has been for generations, and certainly considerably less true than during the Cold War. Modern voting is eminently more predictable based purely on partisanship, and it has allowed gerrymandering to become more aggressive, precise, and durable over time. Redistricting law now needs a basic reorientation to these realities of hyperpartisanship, which has returned as the defining interest in American politics and election law.

Second, today’s hyperpartisanship, and today’s breed of hyperpartisan gerrymandering, are not going away any time soon.²⁸ Hyperpartisanship appears the normal state of American politics, and just as importantly, the pernicious practices of partisan gerrymandering are nothing new in terms of partisan intensity and actually quite familiar over the longer run of American history. Neither hyperpartisanship nor today’s gerrymandering practices are simply a unique symptom of social media, campaign finance, a declining local press, or lack of social interaction among party leaders, among the many contributing causes alleged by critics of modern politics.²⁹ Instead, today’s hyperpartisanship and hyperpartisan gerrymandering are likely to be enduring features of American politics that courts regulating the political process must assume as regular and permanent conditions.

Partisanship is not nearly as fluid or unstable as courts seem to imagine, which means gerrymandering is far more effective and durable today than it has ever been. This uncontroversial conclusion is deeply substantiated by sophisticated social science, even if Chief Justice Roberts has breezily tried to dismiss this empirical consensus as “sociological gobbledygook.”³⁰ As Justice

²⁶ *Id.* at 2502 (quoting *Bandemer v. Davis*, 478 U.S. 109, 160 (1986) (O’Connor, J., concurring)).

²⁷ *Id.* at 2503.

²⁸ See McCaskill, *supra* note 3.

²⁹ See, e.g., Joshua P. Darr et al., *When Newspapers Close, Voters Become More Partisan*, THE CONVERSATION (Feb. 11, 2019), <https://theconversation.com/when-newspapers-close-voters-become-more-partisan-108416> [<https://perma.cc/93XA-AF5A>]; Joe Lieberman, Opinion, *Social Media Is Distorting What Politicians Believe Is Real*, TIME (May 16, 2018), <https://time.com/5279157/social-media-partisanship-problem-solvers-caucus/> [<https://perma.cc/E5KG-4U64>]; Olga Pierce et al., *How Dark Money Is Redrawing the Political Map*, MOTHER JONES (Sept. 26, 2011), <https://www.motherjones.com/politics/2011/09/corporate-donations-redistricting-influence/> [<https://perma.cc/B28Z-S6JH>]; Bob Stephens, Opinion, *Why Have Congressmen Become Overly Partisan?*, COLO. SPRINGS BUS. J. (Aug. 17, 2007), <https://www.csbj.com/2007/08/17/why-have-congressmen-become-overly-partisan/> [<https://perma.cc/JCT4-NSSK>].

³⁰ Oral Argument at 35:21, *Gill v. Whitford*, 138 S. Ct. 1916 (2018) (No. 16-1161), <https://www.oyez.org/cases/2017/16-1161> [<https://perma.cc/9J24-VP6T>].

Kagan in dissent pointed out, the science of gerrymandering today is deeply “evidence-based, data-based, statistics-based” in response to Chief Justice Roberts’s “unsupported and out-of-date musings about the predictability of the American voter.”³¹ The durability and effectiveness of the gerrymanders in *Gill v. Whitford* and *Rucho*, based on this science, speak for themselves. Gerrymandering’s increasing effectiveness has meant it entails little tradeoff in terms of ideological moderation or incumbent safety that perhaps made it more “self-limiting” in the past. These unchecked partisan benefits have encouraged gerrymanders to grow more aggressive, durable, and popular in the absence of meaningful judicial constraint.

More than a decade ago, constitutional law scholar Samuel Issacharoff argued that the emergence of partisan competition in the South since 1965 undercut the continuing imperative for the Voting Rights Act.³² The Voting Rights Act was borne of the systematic exclusion of African American voters from electoral opportunity under one-party Democratic rule in the Jim Crow South. The Voting Rights Act in this context thus “could alter the racial dimension of political power, but not the partisan divide.”³³ Its passage and enforcement targeted racial deprivations in isolation from partisan considerations, at least initially. However, as Republicans challenged Democrats in newly competitive southern politics, electoral subsidies for African Americans under the Voting Rights Act became consequential for partisan control and too tempting for political actors not to game for partisan advantage. In Issacharoff’s telling, the Voting Rights Act, a tool designed entirely for racial redress, became overrun by modern partisanship and grew constitutionally vulnerable in significant part for this reason.³⁴

I propose a parallel story for redistricting law more generally, but on a far larger scale that spans national, rather than specifically Southern, history and politics. Redistricting law was borne of the same era as the Voting Rights Act, a time of ahistorical nonpartisanship, and likewise has become mismatched with today’s strikingly different party politics. Although the Supreme Court has largely adopted Issacharoff’s account of Southern partisanship and the Voting Rights Act, it has yet to recognize a similar disjunction for national partisanship and redistricting law.

In Part I, I relate the history of American redistricting from the Founding into the Cold War.³⁵ This lost history of redistricting features fierce partisan-

³¹ *Rucho*, 139 S. Ct. at 2519 (Kagan, J., dissenting).

³² Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710, 1714 (2004).

³³ *Id.* at 1713.

³⁴ *See id.* at 1713–14.

³⁵ *See infra* notes 39–134 and accompanying text.

ship common to American politics before the Cold War and unrestrained gerrymandering that is strikingly familiar today. In Part II, I describe the unusual bipartisanship of the Cold War era, virtually unique to American history, under which the Supreme Court first seriously engaged redistricting and election law.³⁶ Early redistricting law, therefore, encountered little complication or concern with partisanship despite its historical salience.

In Part III, I explain how hyperpartisanship has re-emerged since its Cold War eclipse and coincided with the return of the gerrymandering practices from the nineteenth century that far exceed anything encountered during the Cold War.³⁷ Finally, in Part IV, I argue that the law of partisan gerrymandering now has a blind spot to the challenges of modern hyperpartisanship and gerrymandering.³⁸ Courts today still imagine the lesser partisanship and milder redistricting practices of the bygone Cold War era during which the justices and judges came of age. As a result, the Supreme Court refused to check the rise of hyperpartisan gerrymandering, even as its obvious democratic pathologies escalated. But, unlike the gerrymandering of the nineteenth and twentieth centuries, today's hyperpartisan gerrymandering has been bolstered by more sophisticated practices that have produced unprecedented durability and effectiveness.

I. THE HISTORY OF GERRYMANDERING

To paraphrase the late constitutional law scholar Robert G. Dixon, Jr., the history of redistricting is a history of partisan gerrymandering.³⁹ Gerrymandering was common and intense from the beginning of the Republic to the twentieth century. It mirrored the intense partisanship of the times and occurred well before courts offered any check on gerrymandering practices or judged election law at all. As this Part will show, this hyperpartisan history strikingly mirrors our modern era of extreme partisanship and gerrymandering in a way that represents most of American history but that we have largely forgotten. It was only during the Cold War era, coincidentally at the very moment when courts began engaging the redistricting process, that hyperpartisanship and gerrymandering broke this historical pattern.

³⁶ See *infra* notes 136–229 and accompanying text.

³⁷ See *infra* notes 230–295 and accompanying text.

³⁸ See *infra* notes 297–413 and accompanying text.

³⁹ See ROBERT G. DIXON, JR., DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS 462 (1968) (quipping that “all [re]districting is ‘gerrymandering’”).

*A. The Hyperpartisan Past: Gerrymandering During
the Nineteenth Century*

Gerrymandering during the nineteenth century long preceded the Supreme Court's dive into the "political thicket" with *Baker* and the one person, one vote cases of the 1960s. Redistricting in this earlier era occurred almost entirely without legal constraints on gerrymandering.⁴⁰ There was no basic requirement of equipopulosity among districts that is today the bedrock of reapportionment and redistricting.⁴¹ Nor were there other requirements of equal protection law that apply today. There were no Voting Rights Act considerations or constitutional questions of vote dilution. No judicial imposition of even conceptual limitations for line drawing along partisan, racial, regional, or other bases. As historian Erik J. Engstrom put it, "Without a meddling judiciary peering over their shoulders, state legislatures were free to draw districts almost however they wanted."⁴²

Indeed, state legislatures generally had discretion whether to draw legislative districts at all. To start, the most basic state legislative decision, at least for congressional reapportionment, was whether to elect congressional representatives to the U.S. House by district, or by a statewide, at-large election known at the time as election by "general ticket."⁴³ By "general ticket" election, states could eschew individual districts and instead allow voters to cast as many votes as the particular state had House seats to fill by election, with all candidates listed on a single slate and recipients of the highest vote totals filling the available seats.⁴⁴ The practical result was that the party receiving a statewide majority of votes typically swept up all available House seats.⁴⁵ By contrast, in districted elections, voters would select representatives by geographic district—providing a minority party with an opportunity to win districts where its voters constituted a local majority, even if it lacked a statewide advantage.

Compared to districted elections, the general ticket election therefore favored the majority party.⁴⁶ According to one count, the general ticket elections led to a unified, one-party congressional delegation in 95% of elections held from 1800 to 1840; by contrast, districted elections resulted in a unified con-

⁴⁰ See *id.* at 59.

⁴¹ *Id.*

⁴² ERIK J. ENGSTROM, PARTISAN GERRYMANDERING AND THE CONSTRUCTION OF AMERICAN DEMOCRACY 194 (2013).

⁴³ See *id.* at 22–28; ROSEMARIE ZAGARRI, THE POLITICS OF SIZE: REPRESENTATION IN THE UNITED STATES, 1776–1850, at 105–06 (1987).

⁴⁴ See ZAGARRI, *supra* note 43, at 105.

⁴⁵ Stephen Calabrese, *Multimember District Congressional Elections*, 25 LEGIS. STUD. Q. 611, 628–30 (2000).

⁴⁶ *Id.*

gressional delegation just 28% of the time.⁴⁷ Thus, in the early days of the Republic, the choice between election by general ticket or district was subject to obvious political calculation by the majority party in the legislature. Anticipating the emergence of a Democratic-Republican majority in the New York elections of 1800, Alexander Hamilton famously but unsuccessfully urged then-Governor John Jay to switch pre-emptively from the general ticket to districted elections for state legislature.⁴⁸ Hamilton hoped the Federalists might retain a minority of seats under districted elections that would be lost under the winner-take-all, general ticket.⁴⁹ Federalists in New Jersey had just executed this stratagem in their state ahead of the 1798 election to preserve a minority position for their party despite an advancing Democratic-Republican electoral majority.⁵⁰

Partisan conflict over the choice between general ticket and districted elections came to a head with the Apportionment Act of 1842. Intense two-party competition blossomed with the growth of the Andrew Jackson's Democratic Party during the 1820s in opposition to the National Republicans and then the Whig Party.⁵¹ Although Democrats controlled both houses in every Congress but one from 1825 to 1841, two national parties annually competed for votes in most states.⁵² By 1840, the statewide vote margin in congressional races between the Whigs and Democrats was less than 10% in roughly 80% of the states.⁵³ The 1840 elections, however, were a landslide victory for the Whigs, and a catastrophe for the Democrats, who handed over unified control of the federal government.⁵⁴ This Whig majority in the twenty-seventh Congress passed the Apportionment Act of 1842, which required states to elect their House representatives "by districts composed of contiguous territory equal in number of Representatives to which said State may be entitled, no one district electing more than one Representative."⁵⁵

Why did the new Whig congressional majority enact a federal requirement of districted elections for the first time? Again, partisan calculation

⁴⁷ See ENGSTROM, *supra* note 42, at 25.

⁴⁸ See ELMER C. GRIFFITH, *THE RISE AND DEVELOPMENT OF THE GERRYMANDER* 47 (1907).

⁴⁹ *Id.*

⁵⁰ See *id.* at 47–50.

⁵¹ See generally JOHN H. ALDRICH, *WHY PARTIES?* (1995) (detailing the re-emergence and then rapid growth of competing political parties in the mid-nineteenth century).

⁵² *Id.*

⁵³ ENGSTROM, *supra* note 42, at 44–45.

⁵⁴ See generally MICHAEL F. HOLT, *THE RISE AND FALL OF THE AMERICAN WHIG PARTY: JACKSONIAN POLITICS AND THE ONSET OF THE CIVIL WAR* (1999) (discussing the Whig Party's remarkable success in the congressional elections of 1840).

⁵⁵ Act of June 25, 1842, ch. 47, 5 Stat. 491, 491, *amended by* Act of May 23, 1850, ch. 11, 9 Stat. 428, 433.

amidst intense partisan competition provides the best explanation.⁵⁶ Among states that elected U.S. House members by general ticket, ones with Democratic majorities were conservatively expected to net seven new seats from the 1842 reapportionment while such states with Whig majorities were expected to lose three net seats.⁵⁷ By requiring districted elections under the Act of 1842, Whigs prospectively limited Democratic gains from these states in their battle for the House.⁵⁸ What's more, the Act of 1842 preempted Democratic attempts to make new potential gains by switching to the general ticket in their states that did not already use it for congressional elections. The Whigs were outraged by the political maneuvering before the 1840 elections, when Democrats in Alabama switched from districted congressional elections to the general ticket and swept all five of the state's House seats.⁵⁹ The Whigs may have been particularly worried that they would perform poorly in the upcoming presidential midterm elections and wanted to prevent the Democrats from switching to the general ticket elsewhere and replicating their Alabama triumph in other states.⁶⁰ Unsurprisingly, congressional voting on the districting requirement reflected this "party question" and the fact "that the Whig party would derive a positive advantage" from it.⁶¹ Most Whigs voted in favor of the districting requirement, while Democrats were almost unanimously opposed.⁶²

Even after single-member districts were mandated by law, states still retained legal discretion over whether ever to redistrict.⁶³ The nineteenth century pre-dated one person, one vote, so states remained free to retain their existing district maps regardless of population shifts and resulting malapportionment across districts. There was not yet any constitutional duty to update district

⁵⁶ See Martin H. Quitt, *Congressional (Partisan) Constitutionalism: The Apportionment Act Debates of 1842 and 1844*, 28 J. EARLY REPUBLIC 627, 638 (2008) ("Districting would enable Whigs to win additional seats, but not control. Being shut out of at-large delegations, rather than calculations of continued domination, probably motivated them.").

⁵⁷ See ENGSTROM, *supra* note 42, at 50.

⁵⁸ See Quitt, *supra* note 56, at 638.

⁵⁹ See ZAGARRI, *supra* note 43, at 130; Johanna Nicol Shields, *Whigs Reform the "Bear Garden": Representation and the Apportionment Act of 1842*, 5 J. EARLY REPUBLIC 355, 362 (1985).

⁶⁰ See Stephen Calabrese, *An Explanation of the Continuing Federal Government Mandate of Single-Member Congressional Districts*, 130 PUB. CHOICE 23, 31 (2007) (proposing a model comparing districted and general ticket elections that would "predict that in general the Whigs would support the [Act of 1842], while the Democrats would oppose it").

⁶¹ ENGSTROM, *supra* note 42, at 49 (quoting Senator Lewis Linn, a Democrat from Missouri).

⁶² See *id.* at 52–54.

⁶³ Despite the clear requirement of single-member districts prescribed by the Act of 1842, a number of states nonetheless continued to elect members of Congress by general ticket. See Quitt, *supra* note 56, at 646–51. These states for years defied efforts by the Whigs to refuse seating those states' congressional delegations, as well as angry Whig charges of unconstitutional nullification. *Id.* This continued until general ticket elections for Congress died out by the 1850s. *Id.*

lines to maintain one person, one vote.⁶⁴ As a result, states whose representation in the U.S. House had not changed following each decennial census had little incentive or need to change districts lines unless the majority party in the state legislature saw political advantage in doing so. This choice whether to redraw district lines, following a new census or otherwise, was itself a political calculation by the majority party in the state legislature.⁶⁵

States sometimes chose not to redistrict at all if partisan control appeared secure.⁶⁶ Why would the majority party de-stabilize districts that could be expected to continue delivering majority control? The state of Connecticut elected not to redraw its congressional districts for *seventy years*, from 1842 to 1912.⁶⁷ The Connecticut Republicans controlled the process and saw no need to redraw lines that played to their benefit for the better part of a century, even though it produced massive malapportionment. By 1900, Connecticut's Second Congressional District swelled to more than 300,000 residents compared to just 130,000 in the Third Congressional District. Democratic voters around New Haven were packed into the Second District, diluting Democratic voting strength.⁶⁸ The less populated, rural Third District reliably elected Republican congressmen despite far fewer residents by comparison.⁶⁹ Of course, during this period, a state might redistrict if it gained congressional seats following a decennial census, finding the need to redraw the lines to fit one or more new district into its district map.⁷⁰ But even new districts did not necessarily obligate states to redraw their maps. After an 1872 amendment to the 1842 requirement of single-member districts, some states chose to maintain their existing district lines and simply elect all their new representatives at-large.⁷¹

However, where majority control was contested and partisan competition greater, states redistricted at a rate that seems almost unimaginable today. Mid-decade redistricting subsequent to the routine decennial reapportionment was jarring to modern sensibilities when states like Texas, Colorado, and Georgia recently chose to redraw district lines more than once between censuses.⁷²

⁶⁴ James Gardner, *Representation Without Party: Lessons from State Constitutional Attempts to Control Gerrymandering*, 37 RUTGERS L.J. 881, 893–94 (2006).

⁶⁵ See *id.*

⁶⁶ See *id.* at 893 (“Although rigging district lines through gerrymandering was a tool generally available to state legislatures, it was, in comparison to other practices that produced similar results, unobtrusive and often unnecessary.”) (footnote omitted).

⁶⁷ ENGSTROM, *supra* note 42, at 156.

⁶⁸ *Id.* at 72, 156.

⁶⁹ *Id.*

⁷⁰ *Id.* at 62, 72.

⁷¹ See *id.* at 62, 72–75.

⁷² See generally Justin Levitt & Michael P. McDonald, *Taking the “Re” Out of Redistricting: State Constitutional Provisions on Redistricting Timing*, 95 GEO. L.J. 1247 (2007) (detailing instances of state legislatures choosing to redistrict even when un prompted by the census).

What modern observers forget today is that mid-decade redistricting during the nineteenth century was absolutely commonplace and routinely exercised for partisan advantage. Between 1862 and 1896, at least one state in the country redistricted its congressional lines during *every election year but one* in that span.⁷³ The state of Ohio by itself redistricted seven times between 1878 and 1892.⁷⁴ As control of state government oscillated between major parties under intense partisan competition of the era, each partisan takeover led immediately to attempts by the new majority to entrench itself as best as it could before the next election.⁷⁵ The result was that Ohio once held six consecutive congressional elections under a new district plan as party control of state government continually flip-flopped.⁷⁶ The hyperpartisan competition of the era drove gerrymandering to such extremes.

None of this hyperpartisanship is surprising to political science. As political scientist Walter Dean Burnham described it, the major parties of the nineteenth century were “armies drawn up for combat” with “both highly stable partisan commitments in the mass electorate and a parallel cultural pattern of intense participation extending quite beyond even the very large turnout percentages of the era.”⁷⁷ Given an electorate divided into loyal factions of committed partisans, the parties focused on militarist mobilization focused on turning out the maximum number of party faithful to the polls. Turnout for presidential election therefore averaged just under 80% of eligible voters between 1868 and 1892 with some states like Indiana reaching as high as 83%.⁷⁸ As Burnham explained, “Little was to be gained by attempting to convert a large ‘floating’ or independent vote, for the good reason that almost none existed.”⁷⁹ The “rational party strategy” therefore was overwhelmingly oriented toward mobilization, rather than persuasion, because persuasion was limited by “the thoroughly mobilized and closely balanced ‘committed’ electorate.”⁸⁰ To a modern observer, Burnham might well have been describing our current state of politics, but it fit the equally intense partisanship of the nineteenth century just as well.

Voters of the nineteenth century not only turned out reliably at rates that are difficult to imagine today, but they also voted reliably for their party.⁸¹ The

⁷³ ENGSTROM, *supra* note 42, at 61–62.

⁷⁴ *Id.* at 62.

⁷⁵ *See id.*

⁷⁶ *Id.* at 62, 70.

⁷⁷ WALTER DEAN BURNHAM, *CRITICAL ELECTIONS AND THE MAINSPRINGS OF AMERICAN POLITICS* 72–73 (1970).

⁷⁸ *Id.* at 21; JOEL H. SILBEY, *THE AMERICAN POLITICAL NATION, 1838–1893*, at 219 (1991).

⁷⁹ BURNHAM, *supra* note 77, at 73.

⁸⁰ *Id.*

⁸¹ *See* SILBEY, *supra* note 78, at 153.

partisan vote for state legislative races, for governor, and for president regularly correlated at higher than 90%.⁸² Historical assessments also estimate that roughly 90% or more of the electorate voted consistently for the same party in consecutive elections.⁸³ In other words, even with exceptionally high turnout by modern standards, very few voters during the era split their ballots or switched parties between elections.

Politicians from both parties displayed similar intensity of partisanship as their voters. Partisanship was famously high from the Founding onward, with a brief lull during the 1810s throughout the Era of Good Feelings. With the birth of the first mass Jacksonian party in the 1830s through the rest of the nineteenth century, partisanship among party elites was extremely high.⁸⁴ Historian Joanne Freeman explains that during the nineteenth century, “[i]n Congress, party politics could be a matter of life and death,” and identifies more than seventy violent incidents between congressmen from 1830 to 1860 in an era of pitched partisanship.⁸⁵ Congressional voting was strikingly divided along party lines by any available measure. From at least the mid-nineteenth century onward, there was no ideological overlap between elected congressmen and senators across major parties, with the ideological distance between party medians peaking in 1895.⁸⁶ Political scientists Michael Barber and Nolan McCarty demonstrate that partisanship could predict more than 85% of roll-call voting in the U.S House from the late nineteenth century into the early twentieth century.⁸⁷

Indeed, partisanship dominated national politics for almost all of American history. As a statistical matter, a simple left-right partisan dimension accounts for roughly 94% of congressional Republican voting and 84% of congressional Democratic voting from 1879 to 2004.⁸⁸ Over the full course of American history, the only significant period when partisanship does not ex-

⁸² *Id.*

⁸³ See, e.g., PAUL KLEPPNER ET AL., *THE EVOLUTION OF AMERICAN ELECTORAL SYSTEMS* 18 (1981); Thomas P. Alexander, *The Dimension of Voter Partisan Constancy in Presidential Elections from 1840 to 1860*, in *ESSAYS ON AMERICAN ANTEBELLUM POLITICS 1840–1860*, at 70, 113 (Stephen E. Maizlish & John J. Kushma eds., 1982); see also Edward L. Glaeser & Bryce A. Ward, *Myths and Realities of American Political Geography*, *J. ECON. PERSP.*, Spring 2006, at 119, 125 (2006) (reporting that correlation of the Republican vote in consecutive elections never dropped significantly below 80% from 1880 to 1964).

⁸⁴ See ALDRICH, *supra* note 51, at 97–156.

⁸⁵ JOANNE B. FREEMAN, *THE FIELD OF BLOOD: VIOLENCE IN CONGRESS AND THE ROAD TO CIVIL WAR 5*, 83 (2018).

⁸⁶ Han & Brady, *A Delayed Return*, *supra* note 10, at 508–09; Michael Barber & Nolan McCarty, *Causes and Consequences of Polarization*, in *NEGOTIATING AGREEMENT IN POLITICS* 19, 40 (Jane Mansbridge & Cathie Jo Martin eds., 2013).

⁸⁷ Barber & McCarty, *supra* note 86, at 22.

⁸⁸ Keith T. Poole, *The Decline and Rise of Party Polarization in Congress During the 20th Century* 4 (Oct. 2005), http://voteview.uga.edu/pdf/Carl_Albert_Extensions_Essay_2005.pdf [<https://perma.cc/5NUK-AQWB>] (unpublished manuscript).

plain most congressional voting were the brief Era of Good Feelings and, of course, the longer Cold War era during the mid-twentieth century, which will be discussed later in the next Part.⁸⁹ Extreme gerrymandering during the nineteenth century, therefore, was part and parcel of this earlier hyperpartisan era.

B. Redistricting into the Cold War Era

Redistricting slowly began to change around the turn of the twentieth century. No student of one person, one vote could miss the fact that many states conducted their last statewide redistricting in the first decade of the century and then not again until *Baker v. Carr*. For example, in *Colegrove v. Green*, the Supreme Court considered the legality of Illinois' congressional district map, enacted first in 1901 and left in place for almost half a century until 1948.⁹⁰ And in *Baker* itself, the Court reviewed the constitutionality of Tennessee's state legislative district map, which had been in place for more than sixty years since 1901.⁹¹ Likewise, in *Reynolds v. Sims*, the Court considered an Alabama state legislative district map that was based on the 1901 census and which had, despite a state law that required decennial redistricting, been in place for more than fifty years.⁹² Overall, fewer than half the states redrew their congressional districts in a typical decennial redistricting cycle over the six decades from 1902 until the dawn of one person, one vote in 1962.⁹³ By the end of that stretch, states averaged a span of twenty-two years since their last state legislative redistricting.⁹⁴ Oregon went a half-century without redistricting after 1907.⁹⁵ Even Ohio, which continually redrew its congressional districts through the 1870s and 1880s, went forty years from 1914 to 1952 without redistricting.⁹⁶

The intense gerrymandering of the nineteenth century was gradually giving way to a long era of partisan calm. As Engstrom put it, "Following the landslide elections of the mid-1890s, many state legislatures became the politi-

⁸⁹ See *id.* at 2–5 (explaining that the Era of Good Feelings and the Cold War era are the lone exceptions to the general rule that partisanship alone can predict voting patterns in Congress).

⁹⁰ *Colegrove v. Green*, 328 U.S. 549 (1946). Illinois attempted to redistrict its congressional seats in 1931, but the state's redistricting act never went into effect after the state supreme court invalidated it in *Moran v. Bowley*, 179 N.E. 526 (Ill. 1932); see Pamela S. Karlan, *Reapportionment, Nonapportionment, and Recovering Some Lost History of One Person One Vote*, 59 WM. & MARY L. REV. 1921, 1950–51 (2018) [hereinafter Karlan, *Reapportionment*] (discussing the 1931 redistricting and subsequent litigation).

⁹¹ *Baker v. Carr*, 369 U.S. 186 (1962).

⁹² *Reynolds v. Sims*, 377 U.S. 533 (1964).

⁹³ ENGSTROM, *supra* note 42, at 171.

⁹⁴ *Id.* at 175.

⁹⁵ See J. DOUGLAS SMITH, ON DEMOCRACY'S DOORSTEP: THE INSIDE STORY OF HOW THE SUPREME COURT BROUGHT "ONE PERSON, ONE VOTE" TO THE UNITED STATES 16 (2015).

⁹⁶ ENGSTROM, *supra* note 42, at 172.

cal preserves of a single party.”⁹⁷ Certainly the Democratic Party dominated the South, largely achieved by disenfranchising African-Americans almost completely.⁹⁸ In Louisiana, Democrats occupied every single seat in the state legislature from 1900 to 1964 and consequently went from 1912 to 1966 without bothering to redistrict.⁹⁹ Similarly, Republicans dominated much of the North, albeit to a lesser extent than Democratic control in the South. In Michigan, Republicans occupied every seat in the state senate for a decade from 1918 to 1928, while Republicans in Pennsylvania likewise won 83% of state assembly seats from 1910 to 1932.¹⁰⁰

The only short-lived precedent for this early-twentieth-century quiescence was the brief Era of Good Feelings following the War of 1812. Partisanship reached its lowest historical ebb, with Republicans dominating national politics and President Monroe re-elected in 1820 with every electoral vote but one.¹⁰¹ During this short window, gerrymandering was apparently less frequent, and indeed, several states seriously mulled legal restrictions on gerrymandering.¹⁰² Just so, the emerging partisan quiescence of the early twentieth century begat an era of political scientist V.O. Key’s “silent gerrymander,” or gerrymander by omission, where states with safe party majorities saw little need or desire to redistrict at all.¹⁰³ With states divided into regional fiefdoms and little national partisan competition, the usual incentives for partisan gerrymandering largely disappeared.¹⁰⁴

Instead, during the first half of the twentieth century, a fundamental rural-urban split influenced national politics and cross-cut rather than coincided with major party lines. Immigration and domestic migration helped swell American cities during this period such that the 1920 census found that more Americans lived in urban areas than rural areas for the first time.¹⁰⁵ The Democratic Party, in particular, was undergoing a gradual shift from a largely rural constituency in the nineteenth century to an increasingly urban one as the twentieth century

⁹⁷ *Id.*

⁹⁸ See, e.g., David W. Brady & Bernard Grofman, *Sectional Differences in Partisan Bias and Electoral Responsiveness in US House Elections, 1850–1980*, 21 BRIT. J. POL. SCI. 247, 251–53 (1991) (documenting the lack of partisan competition in the South during the period).

⁹⁹ ENGSTROM, *supra* note 42, at 172.

¹⁰⁰ *Id.*

¹⁰¹ See generally Harry Ammon, *James Monroe and the Era of Good Feelings*, 66 VA. MAG. HIST. & BIOGRAPHY 387, 395 (1958) (describing the Republican Party’s preeminence during much of Monroe’s presidency and a “lasting unity of sentiment” in national politics which allowed Monroe to run unopposed for president in 1820).

¹⁰² See GRIFFITH, *supra* note 48, at 95–98.

¹⁰³ V.O. KEY, JR., *AMERICAN STATE POLITICS: AN INTRODUCTION* 65 (1956).

¹⁰⁴ See ENGSTROM, *supra* note 42, at 172–75.

¹⁰⁵ MARGO J. ANDERSON, *THE AMERICAN CENSUS: A SOCIAL HISTORY* 136 (1988).

progressed.¹⁰⁶ Racial and religious issues strained national politics and cross-cut the major parties, such that the Ku Klux Klan, at the height of its popularity, maintained a prominent presence in both the Republican and Democratic Parties, wherever each was regionally dominant.¹⁰⁷ The major parties, as political scientist John Aldrich describes it, “entered a long, slow period of decline” from this period through the Cold War.¹⁰⁸ This urban-rural split and related tensions cross-cut the major parties and diversified both ideologically, submerging the usual pattern of partisan conflict and ideological disagreement that preceded.¹⁰⁹

These dynamics explain the extraordinary failure of Congress to reapportion at all during the 1920s. Congress’s usual practice for decades was to decide the size of the House of Representatives and each state’s apportionment of the total in light of updated population figures from each new decennial census.¹¹⁰ Following the 1920 census, however, Congress stalemated and simply failed through the entire decade to reapportion the House, despite many repeated attempts.¹¹¹ The long stalemate over reapportionment had little to do with partisanship: Republicans controlled Congress and the White House for the entire decade, but nonetheless failed to reapportion by the subsequent census. Supporters and opponents of reapportionment were generally divided not by partisan interests but the familiar rural-urban split within both parties. Particularly at the start, most opposition to reapportionment came from rural representatives, Republicans and Democrats alike.¹¹² On the first roll call vote, 23% of Republicans and 20% of Democrats opposed reapportionment, with Republicans constituting 62% of the opposition.¹¹³ Over the decade on nine separate roll call votes for major reapportionment bills, Republicans gradually became more supportive and Democrats more opposed, but even by the final vote in 1929, Republicans and Democrats represented similar shares of the opposition.¹¹⁴

Far more predictive than partisanship was the rural-urban divide. Almost 90% of opposition against the final bill came from congressmen representing

¹⁰⁶ See DAVID BURNER, *THE POLITICS OF PROVINCIALISM: THE DEMOCRATIC PARTY IN TRANSITION, 1918–1932*, at 18–27 (1986).

¹⁰⁷ *Id.* at 84–85.

¹⁰⁸ ALDRICH, *supra* note 51, at 159.

¹⁰⁹ See generally JAMES MACGREGOR BURNS, *THE DEADLOCK OF DEMOCRACY* (1963).

¹¹⁰ Karlan, *Reapportionment*, *supra* note 90, at 1928.

¹¹¹ *Id.* at 1935–41.

¹¹² CHARLES W. EAGLES, *DEMOCRACY DELAYED: CONGRESSIONAL REAPPORTIONMENT AND URBAN-RURAL CONFLICT IN THE 1920S*, at 108–11 (1990).

¹¹³ *Id.* at 110.

¹¹⁴ See *id.* at 110–11 (reporting that Democrats contributed 58% and Republicans 42% of the opposition votes on the final reapportionment bill in 1929).

rural districts, many from states expected to lose seats in the 1920 reapportionment.¹¹⁵ Conversely, congressmen representing urban and metropolitan districts, across both parties, were overwhelmingly supportive, with very few hailing from states expected to lose seats.¹¹⁶ Ninety-two percent of congressmen from urban districts and 100% of congressmen from metropolitan districts voted in favor of the final reapportionment bill.¹¹⁷ This support, again, split both parties. Ninety percent of Democrats and 93% of Republicans representing urban districts voted in favor, while congressmen from metro districts voted unanimously in favor as well.¹¹⁸ As historian Charles W. Eagles concluded, “rural representatives made up the overwhelming majority of the congressmen resisting reapportionment,” and “rural opposition seemed unaffected by party.”¹¹⁹

The Supreme Court’s reapportionment revolution also began during this historically unusual period. The one person, one vote cases were decided in post-World War II America when the intense gerrymandering and partisan conflict were distant memories from the nineteenth century. The Democrats would control the U.S. House of Representatives through a forty-year stretch from 1954 to 1994. Bob Michel, a Republican congressman and legislative leader from the era, regularly pointed out in speeches that no Republican who served during his career in the House from 1957 to 1994 had ever been part of the majority.¹²⁰ Indeed, from 1952 to 1982, there were always more than one-and-a-half times more self-identified Democrats than Republicans in the electorate, giving the Democrats an enormous advantage throughout the Cold War.¹²¹ As one political scientist summarized, “When party control of the House was almost a foregone conclusion, as it was for much of the post-World War II era, the incentives to aggressively pursue gerrymanders receded.”¹²²

Redistricting, once a frequent occurrence during the nineteenth century, became far less frequent by the 1960s. A 1958 survey of American redistricting found that only seventeen states had redistricted their congressional districts since the end of World War II. Of those seventeen, fifteen had no choice but to

¹¹⁵ *Id.* at 110, 113.

¹¹⁶ *Id.* at 112–13.

¹¹⁷ *Id.* at 92.

¹¹⁸ EAGLES, *supra* note 112, at 94.

¹¹⁹ *Id.* at 114.

¹²⁰ TOM DELAY & STEPHEN MANSFIELD, *NO RETREAT, NO SURRENDER: ONE AMERICAN’S FIGHT 77* (2007); *see also* JOHN A. LAWRENCE, *THE CLASS OF ’74: CONGRESS AFTER WATERGATE AND THE ROOTS OF PARTISANSHIP 182* (2018) (quoting Republican Representative Bill Gradison as saying that the GOP members’ “mindset was we would always be in the minority”).

¹²¹ *See* FRANCES E. LEE, *INSECURE MAJORITIES: CONGRESS AND THE PERPETUAL CAMPAIGN 24* (2016) [hereinafter LEE, *INSECURE MAJORITIES*].

¹²² ENGSTROM, *supra* note 42, at 203.

redistrict after gaining or losing seats as a result of population change.¹²³ Mid-decade gerrymanders, so common during the late nineteenth century, became exceptionally rare. For this reason, the average duration between congressional redistrictings ballooned from less than a decade in 1890 to twenty-one years by 1930, and bit higher to twenty-two years by 1960.¹²⁴

By the time of the one person, one vote cases in the 1960s, the contemporary experience with redistricting was therefore not the active gerrymandering of the nineteenth century (and today), but rather V.O. Key's silent gerrymander and long-term malapportionment. The chronic failure of many states to redistrict after each decennial census meant malapportionment grew outrageous over a half-century of desuetude. One 1946 estimate found that twenty-six of forty-one states that used single-member districts had malapportioned districts, with a maximum population deviation of at least 150%.¹²⁵ By 1962, the national average for maximum population deviation had grown to 270,748, such that a state's largest congressional district was twice as large on average as its smallest.¹²⁶

In stark contrast to today's politics, malapportionment across the rural-urban divide during the mid-twentieth century yielded no consistent partisan advantage nationwide. Instead, as contemporary critic Anthony Lewis put it, "The direct effect of maldistricting is to tighten the grip of the historically dominant party—Republicans in the North, Democrats in the South."¹²⁷ Later studies similarly found that Republicans may have benefitted outside the South from malapportionment in the two decades preceding *Baker*, but, by 1962, the advantage appeared largely offset by a rising Democratic advantage from malapportionment in other states.¹²⁸ *Newsweek* thus predicted shortly after *Baker* that the one person, one vote cases would produce gains for Democrats in twenty states and Republicans in eleven.¹²⁹ Democratic Party Chairman John Bailey applauded the early one person, one vote decisions as "something the Democratic Party had long advocated, and fought for, and certainly welcomes."¹³⁰ Republican Party Chairman William Miller answered that the decisions were "in the

¹²³ Anthony Lewis, *Legislative Apportionment and the Federal Courts*, 71 HARV. L. REV. 1057, 1061 (1958).

¹²⁴ ENGSTROM, *supra* note 42, at 175.

¹²⁵ Gertrude C.K. Leighton, Note, *Constitutional Right to Congressional Districts of Equal Population*, 56 YALE L.J. 127, 127 (1946). Twelve years later, this number had grown to thirty states. Lewis, *supra* note 123, at 1062.

¹²⁶ ENGSTROM, *supra* note 42, at 180.

¹²⁷ Lewis, *supra* note 123, at 1063.

¹²⁸ ENGSTROM, *supra* note 42, at 181–82. Along these lines, commentator Gertrude Leighton reported in 1946 that in the fifteen non-southern states with the greatest malapportionment, unequal districting appeared to favor Republicans in eight and Democrats in the other seven. Leighton, *supra* note 125, at 128.

¹²⁹ See SMITH, *supra* note 95, at 220.

¹³⁰ *Id.* (quoting John Bailey).

national interest and in the [Republican] Party's interest."¹³¹ The intense partisanship and partisan gerrymandering of an earlier era had been relegated, at least temporarily, to the dustbin of nineteenth-century history.

Indeed, subsequent analysis confirmed that the average national partisan bias from redistricting immediately before, as well as after the one person, one vote decisions, was roughly zero.¹³² In other words, neither party benefitted electorally from malapportionment in the aggregate, nor did either party yield a net advantage from the correction of malapportionment after the one person, one vote decisions. Republicans benefitted in some states from malapportionment, while Democrats benefitted in others such that the one person, one vote doctrine advantaged neither side overall.

This contemporary history may account for Chief Justice Earl Warren's over-optimism about what one person, one vote would achieve for voter equality.¹³³ Though the one person, one vote doctrine redressed malapportionment, gerrymandering would grow more sophisticated and effective with every subsequent decennial redistricting cycle. The requirement of equal population was not enough to thwart the clever manipulation of district lines to systematically advantage certain voters and dilute the voting strength of others.¹³⁴ Perhaps Chief Justice Warren could not have anticipated the sort of gerrymandering of the next half-century, at least in part because neither he nor others of his generation had much relevant experience with gerrymandering, as opposed to simple malapportionment.

II. THE UNUSUAL BIPARTISANSHIP OF THE COLD WAR

The Supreme Court's intervention into election law and redistricting occurred at an unusual low point for partisanship, polarization, and gerrymandering in American history. Although partisanship was the defining axis for American politics for most of the nation's history, the Court's early redistricting decisions during the era were aimed at the racial and regional inequalities resulting from the era's malapportionment—unsurprising, given the relative nonpartisanship. As a result, the resulting law of redistricting simply overlooked the

¹³¹ *Id.* (quoting William B. Miller, then-chairman of the Republican National Committee).

¹³² STEPHEN ANSOLABEHERE & JAMES M. SNYDER, JR., *THE END OF INEQUALITY: ONE PERSON, ONE VOTE, AND THE TRANSFORMATION OF AMERICAN POLITICS* 75 (2008); Brady & Grofman, *supra* note 98, at 253–56.

¹³³ See John Hart Ely, *The Chief*, 88 HARV. L. REV. 11, 12 (1974) (explaining that Chief Justice Warren “used to say that if *Reynolds v. Sims* had been decided before 1954, *Brown v. Board of Education* would have been unnecessary”).

¹³⁴ See, e.g., Pamela S. Karlan, *The Alabama Foundations of the Law of Democracy*, 67 ALA. L. REV. 415, 417 (2015) [hereinafter Karlan, *Alabama Foundations*] (discussing the increased efficacy of gerrymandering following the one person, one vote decisions).

pernicious threat to the democratic process that partisanship potentially posed. Today's redistricting law has inherited this blind spot to the historically characteristic forms of American partisanship and gerrymandering even after they emerged again from their Cold War eclipse.

A. One Person, One Vote and the Beginning of Redistricting Law

Modern judicial oversight of the political process began with *Baker v. Carr* in 1962. Before *Baker*, courts almost entirely abstained under the political question doctrine in redistricting cases that might draw the judicial branch into the "political thicket."¹³⁵ Famously, in *Colegrove v. Green*, Justice Frankfurter warned that redistricting was "beyond [the Court's] competence" because the matter was "of a peculiarly political nature and therefore not meet for judicial determination."¹³⁶ Justice Frankfurter worried that addressing the malapportionment of Illinois's congressional districts in that case would "bring courts into immediate and active relations with party contests" and announced that "[c]ourts ought not to enter this political thicket."¹³⁷ Heeding this caution, courts refused jurisdiction in redistricting cases and routinely declared them nonjusticiable under this political question doctrine.¹³⁸

By 1962, almost twenty years later, the Court confronted overwhelming malapportionment in a series of cases that eventually convinced the justices to permit courts to intervene under the Equal Protection Clause. In *Baker*, the Court considered a challenge to Tennessee's state legislative districts, which had not been redrawn for six decades.¹³⁹ Justice Brennan's opinion in *Baker* first redefined the political question doctrine spelled out earlier by Frankfurter in *Colegrove*. Justice Brennan rejected the notion that reapportionment necessarily presented a political question and was nonjusticiable per se.¹⁴⁰ He explained instead that the political question doctrine applied when a question is textually committed to a political branch of government, besides the judiciary, or when there is a lack of judicially discoverable and manageable standards for judicial determination.¹⁴¹ Reapportionment, or in this case malapportionment, hardly fell under these categories.

¹³⁵ Rachel E. Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 263–67 (2002).

¹³⁶ *Colegrove v. Green*, 328 U.S. 549, 552 (1946).

¹³⁷ *Id.* at 553, 556.

¹³⁸ See, e.g., *Remmy v. Smith*, 342 U.S. 916 (1952); *South v. Peters*, 339 U.S. 276 (1950); *MacDougall v. Green*, 335 U.S. 281 (1948); *Colegrove v. Barrett*, 330 U.S. 804 (1947); *Cook v. Fortson*, 329 U.S. 675 (1946) (per curiam); *Turman v. Duckworth*, 329 U.S. 675 (1946).

¹³⁹ 369 U.S. 186 (1962).

¹⁴⁰ *Id.* at 208–09.

¹⁴¹ *Id.* at 217.

Tennessee's malapportionment instead presented a simple case of equal protection. The state legislature discriminated against voters in heavily populated areas to the advantage of voters in less populated rural ones by refusing to reapportion for sixty years. The result was that citizens from districts which had grown in population in the interim had less voting power and representation than citizens from less populated districts, the smallest of which had twenty-three times fewer residents than the largest district. The fact that this claim implicated the "allocation of political power within a State," Brennan reasoned, did not render the case a nonjusticiable political question.¹⁴²

Partisan considerations were not mentioned at all in the early one person, one vote cases. In *Baker*, Tennessee's apportionment scheme favored small counties over large ones and rural counties over urban ones.¹⁴³ The state's malapportionment resulted in a minority population of 37% electing twenty of thirty-three state Senate seats, and a minority of 40% electing sixty-three of ninety-nine House seats.¹⁴⁴ This ensured that a rural minority would comfortably control a legislative majority. As the federal government's brief framed the case, the state violated equal protection in its deliberate "underrepresentation of urban voters" that resulted in the "discrimination by the State legislature against urban areas in the State's exercise of its governmental powers."¹⁴⁵

Despite the enormous political stakes in the balance, this was not a question of partisan control in any event. Democrats were firmly in majority control of the Tennessee legislature before *Baker* and would remain so after it. Democrats held a 27–6 advantage in the state Senate and 80–19 advantage in the House after the 1960 elections; these party majorities would be largely unchanged in the elections following *Baker*.¹⁴⁶ Nor, apparently, did the justices consider the partisan consequences to be important enough even for mention in their conference deliberations.¹⁴⁷ If anything, the justices recognized the *sub rosa* racial implications of newly empowering urban areas in much of the country, and especially the American South. Justice Tom Clark, for instance, argued in conference, according to Justice Brennan, that "what really was at stake here was, at least in the South, the whites' control of the power struc-

¹⁴² *Id.* at 226–27.

¹⁴³ *Id.* at 254–56 (Clark, J., concurring).

¹⁴⁴ *Id.* at 253.

¹⁴⁵ Brief for the United States as Amicus Curiae on Reargument at 18, *Baker*, 369 U.S. 186 (No. 6), 1961 WL 64796, at *18.

¹⁴⁶ Carl Klarner, *State Partisan Balance Data, 1937–2011*, HARV. DATAVERSE (2013), <https://dataverse.harvard.edu/dataset.xhtml?persistentId=hdl:1902.1/20403> [<https://perma.cc/X273-TPP6>]. Tennessee Republicans made gains in the lower house by the 1966 elections, though still very little in the Senate. *Id.*

¹⁴⁷ SMITH, *supra* note 95, at 86.

ture.”¹⁴⁸ And Chief Justice Warren went to his grave believing that the Civil Rights Movement might not have been necessary if the Court had addressed malapportionment earlier for the same reasons.¹⁴⁹ In any event, these regional and racial considerations dominated judicial and political reasoning about one person, one vote. Partisan considerations were not prominent.

This point was even clearer in *Reynolds v. Sims*, a decision handed down two years after *Baker*.¹⁵⁰ At the time, Alabama was entirely a one-party state in which every elected state and federal official was a Democrat. Alabama, like Tennessee, had not redistricted since 1901 in a longstanding political arrangement between so-called Black Belt politicians from underpopulated rural areas and the Big Mules, industrial leaders from the densely populated, urban north. Big Mules consented to the malapportionment that enabled Black Belt politicians to continue controlling state government, provided they delivered anti-union legislation and low taxes for Big Mule business interests.¹⁵¹ As a result, there were absolutely no partisan stakes involved in *Reynolds*, at least in the immediate term. Every seat in both houses of the Alabama state legislature was held by a Democrat both before and after *Reynolds*.¹⁵² Indeed, in the Court’s view, the case was entirely about the “rural strangle hold” on state government made possible only through the gross underrepresentation of urban areas in the industrialized north.¹⁵³ The Court concluded there was no ground for a voter having superior voting power “merely because he lives in a rural area or because he lives in the smallest rural county[.]”¹⁵⁴

To be sure, application of the one person, one vote doctrine had profound implications for American politics. For one thing, just as contemplated, judicial enforcement of equal population across districts effectuated a massive shift in political power from rural areas to densely populated urban centers in every state.¹⁵⁵ Michigan, for instance, was the first state to reapportion under one person, one vote. Only fifteen incumbents out of the thirty-eight-member state senate actually retained their seats in the next election, with fourteen incumbents choosing to retire rather than run for re-election at all.¹⁵⁶ In states like

¹⁴⁸ *Id.*

¹⁴⁹ Karlan, *Alabama Foundations*, *supra* note 134, at 416–18.

¹⁵⁰ *Reynolds v. Sims*, 377 U.S. 533 (1964).

¹⁵¹ SMITH, *supra* note 95, at 116.

¹⁵² Klarner, *supra* note 146.

¹⁵³ *Reynolds*, 377 U.S. at 543.

¹⁵⁴ *Id.* at 557 (quoting *Gray v. Sanders*, 372 U.S. 368 (1962)).

¹⁵⁵ See, e.g., Thomas Brunell & Bernard Grofman, *The Partisan Consequences of Baker v. Carr and the One Person, One Vote Revolution 1*, <http://www.socsci.uci.edu/~bgrofman/R106%20Brunell-Grofman-Partisan%20Consequences.pdf> [<https://perma.cc/JHM2-6K93>] (unpublished manuscript) (“[T]he post-one person, one vote period was a period in which urban interests gained in strength in the U.S. House . . .”).

¹⁵⁶ See SMITH, *supra* note 95, at 226.

Michigan, power and legislative control shifted suddenly to urban constituencies, which were no longer forced to subsidize rural ones as they long had.¹⁵⁷ But as explained above, the net partisan effect of one person, one vote across the country was essentially zero. Malapportionment benefitted the Republicans in some states and Democrats in other states. Where the one person, one vote doctrine boosted Democrats in certain states like Michigan, it hurt them in other states like Oklahoma, such that partisan advantage cancelled out nationwide.¹⁵⁸ In still other states, namely the one-party Dixiecrat South, one person, one vote had virtually no immediate partisan consequences, as power merely shifted from rural Democrats to urban ones.

The same was true for vote dilution law as it developed under the Equal Protection clause and Voting Rights Act shortly afterward. The Court recognized a vote dilution claim under the Fourteenth Amendment for the first time in *White v. Regester* in 1973.¹⁵⁹ The Court upheld a district court's finding that Texas's use of multimember districts for the state legislature diluted the voting strength of African-American and Latino voters in Texas and thus violated equal protection.¹⁶⁰ The targeted use of multimember districts, as opposed to single-member districts used elsewhere in the state, tended to cancel out or minimize racial minority voting strength.¹⁶¹ This dilutive effect of multimember districts, when coupled with evidence of racial discrimination and an absence of political success for minorities, required the use of single-member districts, what became known as majority-minority districts, to allow minorities to effectively participate in the political process.¹⁶²

Just as in *Reynolds v. Sims*, the Court focused entirely on discrimination unrelated to partisan considerations. Texas, like Alabama during the 1960s, was basically a one-party Democratic state.¹⁶³ The dilution of African-American and Latino votes constituted unlawful racial discrimination, but it had no partisan consequences at the time. As law professor Nicholas Stephanopoulos points out, the dilution remedy after *White* was the creation of twenty-nine single-member districts to accommodate African-American and Latino

¹⁵⁷ See generally Stephen Ansolabehere et al., *Equal Votes, Equal Money: Court-Ordered Redistricting and Public Expenditures in the American States*, 96 AM. POL. SCI. REV. 767 (2002) [hereinafter Ansolabehere et al., *Equal Votes, Equal Money*] (finding that government spending between rural and urban counties was equalized after *Baker*). Before one person, one vote, malapportionment meant, as one Tennessee rural politician observed, "collecting the taxes where the money is—in the cities—and spending it where it's needed—in the country." SMITH, *supra* note 95, at 54 (quoting James H. Cummings).

¹⁵⁸ SMITH, *supra* note 95, at 226.

¹⁵⁹ 412 U.S. 755 (1973).

¹⁶⁰ *Id.* at 767.

¹⁶¹ See *id.* at 765–67.

¹⁶² See *id.* at 769–70.

¹⁶³ Klamer, *supra* note 146.

voting interests.¹⁶⁴ The remedy dramatically increased minority representation, just as intended, but it made virtually no difference in terms of the partisan balance of power. Democrats, in fact, slightly increased their state house majority from 133–17 to 135–15.¹⁶⁵ Texas continued on, for the time being, as a one-party state. Indeed, beyond the state of Texas, the first two decades of vote dilution made little difference for the partisan balance of power in southern states.¹⁶⁶ Although state house seats controlled by African Americans quadrupled from 1970 to 1990, in important part because of judicial intervention under the Fourteenth Amendment, the share of state house seats held by Democrats never fell below 70%.¹⁶⁷

B. Partisanship and Party Politics During the Cold War

Why were party politics and partisan considerations so absent from the Court's redistricting jurisprudence through the Court's first quarter-century? Today, by contrast, partisanship and partisan advantage predominate over consideration of almost any election law question.¹⁶⁸ Certainly questions of redistricting today are invariably viewed through the prism of partisan self-interest and partisan consequences. But the Cold War era, during which the Court initiated election law, presented a unique historical break from the normal hyperpartisanship that preceded and followed the period. As a result, the Court's early engagement with redistricting occurred at a low point in partisanship and party polarization, during which partisan considerations and partisan balance of power receded to the background in comparison to the rest of American history.

Voter partisanship during the period was historically low by almost any measure. Political scientists Norman Nie, Sid Verba, and John Petrocik famously summarized in 1976 that "the most dramatic political change in the American public over the past two decades has been the decline of partisanship."¹⁶⁹ The number of Americans identifying as independent, rather than affiliated with a major party, increased during this era, while identification with the Republicans or Democrats decreased, and especially so for "strong" identi-

¹⁶⁴ Nicholas O. Stephanopoulos, *The Dance of Partisanship and Districting*, 13 HARV. L. & POL'Y REV. 507, 518 (2019).

¹⁶⁵ *Id.*

¹⁶⁶ Nicholas O. Stephanopoulos, *Race, Place, and Power*, 68 STAN. L. REV. 1323, 1369–87 (2016) [hereinafter Stephanopoulos, *Race, Place, and Power*].

¹⁶⁷ *See id.*

¹⁶⁸ *See, e.g.*, Geoffrey Skelley, *Abolishing the Electoral College Used to Be a Bipartisan Position. Not Anymore.*, FIVETHIRTYEIGHT (Apr. 2, 2019), <https://fivethirtyeight.com/features/abolishing-the-electoral-college-used-to-be-bipartisan-position-not-anymore/> [<https://perma.cc/C6RM-HYVH>].

¹⁶⁹ NORMAN H. NIE, SIDNEY VERBA, & JOHN R. PETROCIK, *THE CHANGING AMERICAN VOTER* 47 (1976).

fication with either party.¹⁷⁰ In addition, partisanship was unusually unpredictable for voting even for partisan identifiers during this time.¹⁷¹ Voters became increasingly likely to vote for a different party's presidential candidate from election to election and more likely to split their vote between presidential and congressional candidates from different parties.¹⁷² As a consequence, the number of House districts that split their congressional and presidential support had been basically zero at the start of the twentieth century but increased steadily from 1948 to 1972.¹⁷³

An individual voter's ideology during this era was not reliably predictive of party identification or vote choice. In other words, conservative voters were not certain to identify more strongly with Republicans than with Democrats, or vice versa.¹⁷⁴ The average Democrat and average Republican did not differ markedly in terms of ideological beliefs. In 1972, they differed by just 0.66 points on the seven-point ideological scale of the National Election Survey, and ideology and partisanship were correlated at just 0.28.¹⁷⁵ By way of rough illustration, a third of voters voted in presidential and in congressional elections for the party further away from them on racial issues in 1956.¹⁷⁶ About a quarter voted in presidential and congressional elections for the party further away from them ideologically about the role of government in society.¹⁷⁷

Even more strikingly, politicians were likewise less partisan in their voting and orientation than perhaps they have ever been in American history. As Figure 1 illustrates, the average distance between ideal points for Republicans and Democrats in Congress was historically low from the 1930s through the 1970s, using DW-NOMINATE scores.¹⁷⁸

¹⁷⁰ See generally Richard G. Niemi & Herbert F. Weisberg, *Are Parties Becoming Irrelevant?*, in *CONTROVERSIES IN AMERICAN VOTING BEHAVIOR* (Richard G. Niemi & Herbert F. Weisberg eds., 1976) (discussing trends in party identification/affiliation among American voters).

¹⁷¹ See, e.g., Joseph Bafumi & Robert Y. Shapiro, *A New Partisan Voter*, 71 J. POL. 1, 5–6 (2009); Larry M. Bartels, *Partisanship and Voting Behavior, 1952–1996*, 44 AM. J. POL. SCI. 35, 37–40 (2000).

¹⁷² BARRY C. BURDEN & DAVID C. KIMBALL, *WHY AMERICANS SPLIT THEIR TICKETS* 67 (2002); see also Hetherington, *supra* note 11, at 423; Kenneth Mulligan, *Partisan Ambivalence, Split-Ticket Voting, and Divided Government*, 32 POL. PSYCH. 505, 512–18 (2011).

¹⁷³ See generally BURDEN & KIMBALL, *supra* note 172.

¹⁷⁴ See Hetherington, *supra* note 11, at 436–41.

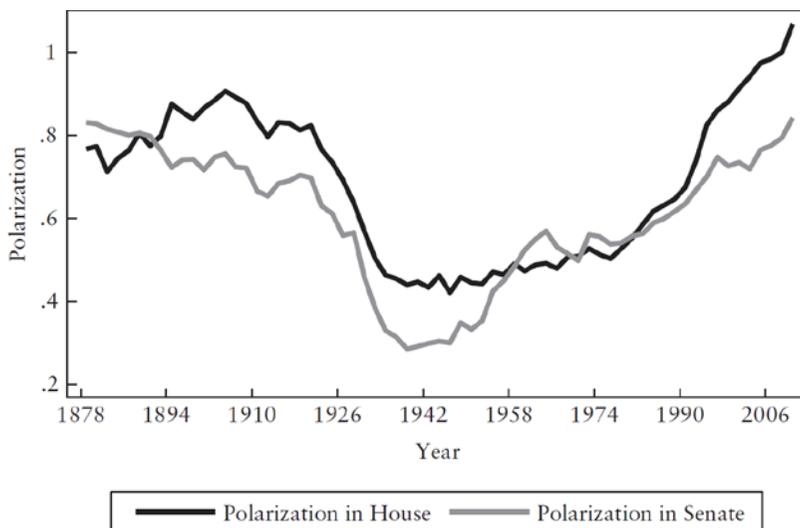
¹⁷⁵ *Id.* at 437.

¹⁷⁶ Han & Brady, *A Delayed Return*, *supra* note 10, at 513–14.

¹⁷⁷ *Id.*

¹⁷⁸ Barber & McCarty, *supra* note 86, at 39–40. DW-NOMINATE is a standard political science estimate of legislator ideal points based on roll-call voting that offers a statistical measure of ideological positioning. See, e.g., Keith T. Poole & Howard Rosenthal, *D-NOMINATE After 10 Years: A Comparative Update to Congress: A Political Economic History of Roll-Call Voting*, 26 LEGIS. STUD. Q. 5, 6 (2001).

Figure 1: Average Distance Between the Parties using DW-NOMINATE Scores
(Source: Barber & McCarty, *supra* note 86, at 40.)



This pattern of low polarization was true for both Houses of Congress, and particularly true for the Senate. Party-line voting in the U.S. House had been quite high in the late nineteenth century, but steadily declined to an unprecedented low for a three-decade period from 1940 through 1968.¹⁷⁹ With national partisan pressures at low ebb, local district pressures exerted a historically outsized influence on politician positioning during this period.¹⁸⁰ In other words, diverging sharply from the historical norm, politicians were far more responsive to district influences relative to national party differences during the 1940s through the 1970s. Party affiliation simply reflected the traditional lines of division among members of Congress less and less as partisan polarization fell to these historical lows. For all these reasons, political scientist Frances Lee observes that “the Congress of the mid-twentieth century is often seen as one characterized by cozy bipartisanship and reduced party polarization.”¹⁸¹

The minimal polarization of the period produced an unprecedented degree of ideological overlap between congressional Republicans and Democrats. As Hahrie Han and David Brady have documented, there was virtually no party overlap between Republicans and Democrats in Congress before the 1920s,

¹⁷⁹ David W. Brady et al., *The Decline of Party in the U.S. House of Representatives, 1887–1968*, 4 LEGIS. STUD. Q. 381, 383–86 (1979).

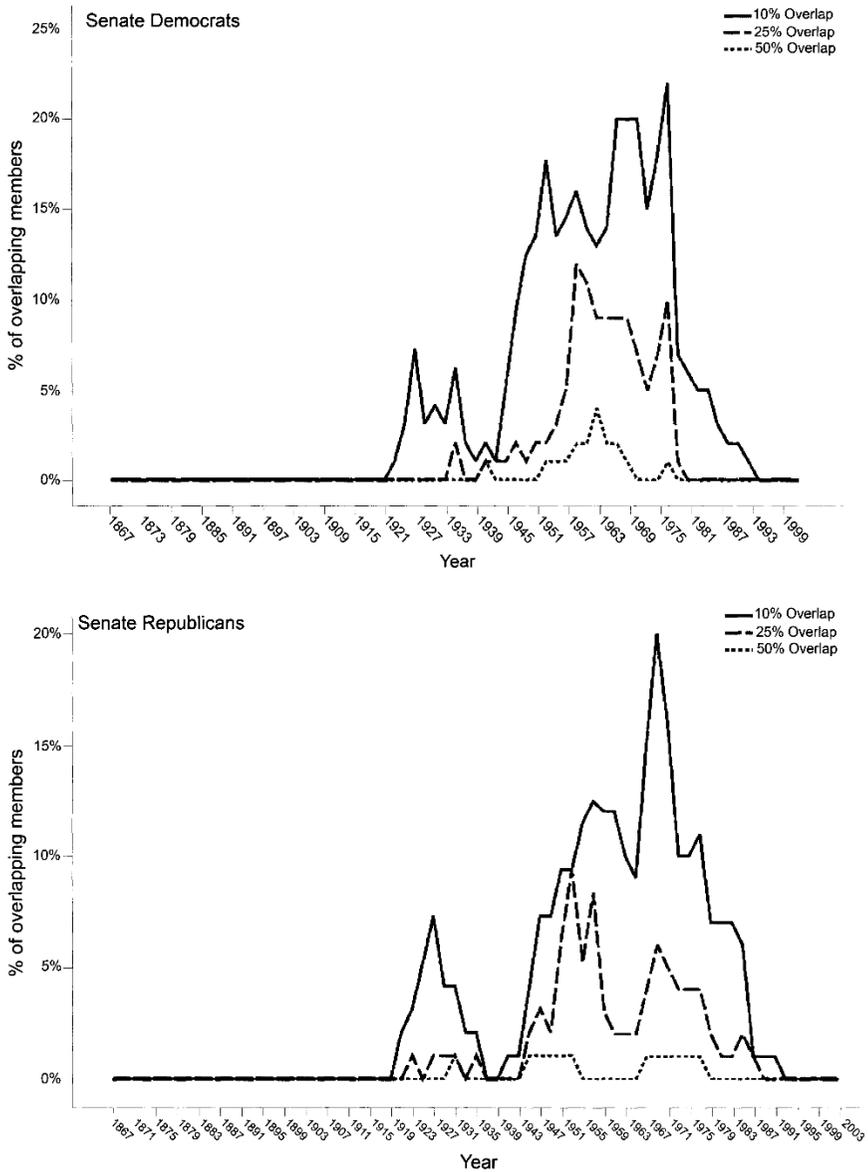
¹⁸⁰ Stephen Ansolabehere et al., *Candidate Positioning in U.S. House Elections*, 45 AM. J. POL. SCI. 136, 149–50 (2001).

¹⁸¹ LEE, INSECURE MAJORITIES, *supra* note 121, at 22.

particularly in the House.¹⁸² That is, there was almost never a Democrat more conservative than the most liberal Republican, or vice versa, never a Republican more liberal than the most conservative Democrat across the spectrum of issues. By 1949, however, almost 10% of House Democrats were more conservative than the most liberal 10% of House Republicans. And by 1969, roughly 20% of Democratic Senators were more conservative than the most liberal Republicans and roughly 20% of Republicans were more liberal than the most conservative Democrats. In other words, the ideal points for almost half the U.S. Senate fell within the ideological spectrum of the opposite party. This pattern of overlap for the Senate is illustrated in Figure 2 below.

¹⁸² Han & Brady, *A Delayed Return*, *supra* note 10, at 509.

Figure 2: Cross-Partisan Overlap in the U.S. Senate by DW-NOMINATE Scores
(Source: Han & Brady, *A Delayed Return*, *supra* note 10, at 510.)



This degree of partisan overlap may be remembered nostalgically today by many as the “normal” circumstances of American politics. Even at the time in 1971, journalist David Broder recognized these developments in his book,

The Party's Over, celebrating the decline of partisanship during the Cold War.¹⁸³ As national politics became far more polarized and increasingly gridlocked, Broder would yearn for the bipartisanship of the mid-twentieth century and wax nostalgic about the success of the Marshall Plan, the Civil Rights Act of 1964, and Ronald Reagan's first budget and tax bill in 1981.¹⁸⁴ But these bipartisan compromises occurred in a very different political context that commentators like Broder may have mistaken for the historical norm.¹⁸⁵ It is understandable to assume that one's era reflects the broader historical norm, particularly when one's relevant era stretched for the better part of a century. Indeed, there is some evidence that voters of Broder's generation remained less partisan and ideological than successive generations such that modern hyperpolarization may have seemed particularly puzzling to them.¹⁸⁶ Still, the bipartisanship of the mid-twentieth century was indisputably exceptional within the broader historical context of American politics.

America of this era reflected an unusual four-party system definitively described by political scientist James McGregor Burns.¹⁸⁷ Although Democrats thoroughly dominated national politics during the mid-twentieth century, the party split ideologically between conservative southern Democrats and more progressive northern Democrats, such that conservative Republicans and more moderate northeastern Republicans completed a swirling political landscape where cross-party deals were common and necessary for national legislation.¹⁸⁸ The most important issue in this context was civil rights. Southern Democrats regularly allied across the aisle with conservative Republicans to block liberal legislation to redress racial discrimination.¹⁸⁹ This cross-party alliance on race complicated any simple polarization of national politics be-

¹⁸³ See generally DAVID BRODER, *THE PARTY'S OVER: THE FAILURE OF POLITICS IN AMERICA* (1972).

¹⁸⁴ Broder, *supra* note 9.

¹⁸⁵ See Han & Brady, *A Delayed Return*, *supra* note 10, at 512 (observing that "most research has sought to explain the final decades of the twentieth century as the unique period").

¹⁸⁶ See Laura Stoker & M. Kent Jennings, *Of Time and the Development of Partisan Polarization*, 52 AM. J. POL. SCI. 619, 629–33 (2008) (explaining how Americans who came of age during the 1990s and early 2000s tend to hold more partisan views than Americans who came of age during the Cold War era).

¹⁸⁷ See generally JAMES MACGREGOR BURNS, *THE DEADLOCK OF DEMOCRACY: FOUR-PARTY POLITICS IN AMERICA* (1963) (contending that each of the two major parties were broken up into "congressional" and "presidential" parties).

¹⁸⁸ See *id.* at 257–61; see also Charles A. Kupchan & Peter L. Trubowitz, *Dead Center: The Demise of Liberal Internationalism in the United States*, INT'L SECURITY, Fall 2007, at 7, 20 ("Conservative Democrats (mostly from the South) regularly aligned with Republicans as part of the so-called Conservative Coalition, while liberal Republicans (mostly from the eastern seaboard) reached out to the left, aligning with northern Democrats.").

¹⁸⁹ See EDWARD G. CARMINES & JAMES A. STIMSON, *ISSUE EVOLUTION: RACE AND THE TRANSFORMATION OF AMERICAN POLITICS* 44–50 (1989).

tween conservatives and liberals that had characterized American history in various guises until the mid-twentieth century. This intense polarization would again return once partisan loyalties realigned with policy preferences on civil rights and race in the wake of the Civil Rights Movement.¹⁹⁰

The cross-cutting influence of race on partisanship was reinforced during the post-World War II period by Cold War politics. Both Democrats and Republicans took a similarly hard line on national defense and foreign policy against the Soviet bloc under the banner of American leadership in world affairs.¹⁹¹ The economic prosperity of the post-war era may have softened ideological tensions between the major parties and encouraged bipartisanship, particularly on foreign policy.¹⁹² Democratic and Republican voters generally agreed on national policy against the Soviet Union, and presidents regularly appointed members of the opposition party to their foreign policy cabinet and staff.¹⁹³ Bipartisan consensus during the Cold War appears to have unraveled around disagreement over the Vietnam War but only later on.¹⁹⁴ Elite disillusionment about the war from prominent Democratic elected officials led their party leadership away from the Cold War consensus and gradually fractured

¹⁹⁰ See *id.* at 184–85.

¹⁹¹ See, e.g., I.M. DESTLER ET AL., *OUR OWN WORST ENEMY: THE UNMASKING OF AMERICAN FOREIGN POLICY* (1985); OLE R. HOLSTI & JAMES ROSENAU, *AMERICAN LEADERSHIP IN WORLD AFFAIRS: VIETNAM AND THE BREAKDOWN OF CONSENSUS* (1984); Kupchan & Trubowitz, *supra* note 188, at 19–23 (describing the bipartisan consensus on American liberal internationalism during the Cold War).

¹⁹² See PETER H. LINDERT & JEFFREY G. WILLIAMSON, *UNEQUAL GAINS: AMERICAN GROWTH AND INEQUALITY SINCE 1700*, at 194–205 (2016) (describing the leveling of income inequality in the United States during this period); David W. Brady & Hahrie C. Han, *Polarization Then and Now*, in *1 RED AND BLUE NATION? CHARACTERISTICS AND CAUSES OF AMERICA'S POLARIZED POLITICS* 119, 140 (Pietro S. Nivola & David W. Brady eds., 2006) (stating that “[r]ight after World War II, the distinctions between parties on key national issues such as race, national defense, and the role of the government were not very clear”); Peter Trubowitz & Nicole Mellow, “*Going Bipartisan*”: *Politics by Other Means*, 120 *POL. SCI. Q.* 433, 448 (2005).

¹⁹³ See, e.g., WALTER ISAACSON & EVAN THOMAS, *THE WISE MEN: SIX FRIENDS AND THE WORLD THEY MADE* (1986) (exemplifying presidents appointing members of the opposing party to cabinet and staff positions); JOHN R. ZALLER, *THE NATURE AND ORIGINS OF MASS OPINION* 174–75 (1992) (describing the convergence between Democrats and Republicans following World War II); Roger G. Brown, *Party and Bureaucracy: From Kennedy to Reagan*, 97 *POL. SCI. Q.* 279, 282–86 (1982); Kupchan & Trubowitz, *supra* note 188, at 19–23 (outlining a cross-party voter agreement on foreign policy towards the Soviet Union).

¹⁹⁴ See Eugene R. Wittkopf & James M. McCormick, *Congress, the President and the End of the Cold War: Has Anything Changed?*, 42 *J. CONFLICT RESOL.* 440, 442 (1998). *But see* James M. McCormick & Eugene R. Wittkopf, *Bipartisanship, Partisanship, and Ideology in Congressional-Executive Foreign Policy Relations, 1947–1988*, 52 *J. POL.* 1077, 1097 (1990) (“[T]he evidence also suggests that the decline in bipartisanship is consistent with the Vietnam casualty hypothesis, but it does not support the often claimed hypothesis that the war, by itself, was a watershed in postwar American bipartisanship.”).

public support for the war along partisan lines.¹⁹⁵ That said, a partisan division on foreign policy did not immediately transform party identification on a sweeping basis across rank-and-file voters, but like racial issues, it fed partisan realignment and the restoration of hyperpartisanship over the longer term.

C. Early Redistricting Law During the Cold War

An important byproduct of the unusual bipartisanship of the mid-twentieth century was that judicial intervention into redistricting disputes was hardly as messy as Justice Frankfurter anticipated in *Colegrove*.¹⁹⁶ The stakes for one person, one vote were regional and did not provoke partisan conflict. Of course, judicial imposition of one person, one vote across the country disrupted the rural stranglehold over government by shifting political power dramatically toward urban centers that suddenly received equal per capita representation for the first time in decades. The consequences were instant and dramatic. Rural legislative majorities in a third of the states promptly vanished as a result of one person, one vote.¹⁹⁷ And newly constituted state legislatures almost immediately eliminated the historical redistribution of state funding toward sparsely populated rural counties that had resulted from the rural stranglehold over state government.¹⁹⁸ But Democrats and Republicans shared the gains and losses from the redistribution of power such that courts were right not to cast one person, one vote in partisan terms.

Similarly, early case law under the Voting Rights Act was largely free of partisan considerations. The Voting Rights Act targeted the one-party Democratic South where its remedies were enormously successful in dismantling the mechanisms of Jim Crow and enfranchising African Americans.¹⁹⁹ However, at least in the short term, the Voting Rights Act did not shift power from Democrats to Republicans for a simple reason: there was effectively no Republican Party in the South during the era. As a result, the Voting Rights Act implicated no immediate partisan interests and would not be used to help or hurt one party or the other in the South where it would be applied.²⁰⁰ The absence of significant partisan interests therefore simplified concerns about the deep federal intervention into local political affairs that the Voting Rights Act authorized. Of course, Lyndon Johnson and other prescient observers of southern politics might have anticipated the long-term ramifications of the Act for partisan poli-

¹⁹⁵ ZALLER, *supra* note 193, at 175–80.

¹⁹⁶ See 328 U.S. at 552–54.

¹⁹⁷ ANSOLABEHRE & SNYDER, *supra* note 132, at 188.

¹⁹⁸ Ansolabehere et al., *Equal Votes, Equal Money*, *supra* note 157, at 772.

¹⁹⁹ See Issacharoff, *supra* note 32, at 1713–14.

²⁰⁰ *Id.*

tics, but the eventual emergence of the Republican Party in the South remained more than a decade off.²⁰¹ Thus, at least in the short term, Congress could focus itself on the racial and federalism concerns raised by the Act without the distraction of any partisan calculations it might have raised.

More importantly, the absence of partisan considerations from the Voting Rights Act simplified the doctrinal analysis for courts. The Voting Rights Act's focus on minority voters' preferred candidates of choice, under Sections 2 and 5, were uncomplicated by partisan affiliations.²⁰² Their candidates of choice constituted a one-party field, at best a choice among Democrats rather than between major party nominees. Exclusion from Democratic Party politics was therefore, put simply, exclusion from electoral politics. The Court rightly regarded African American exclusion from the Democratic Party under these circumstances as unconstitutional, from the *White Primary Cases* through *White v. Regester* in one-party southern jurisdictions like Texas.²⁰³ The Court, in *White*, regarded the absence of African American opportunity in the Democratic Party and Democratic racial campaigning to defeat minority preferred candidates as decisive evidence of invidious election practices that cancelled out or minimized African-American voting strength.²⁰⁴ The Court did not bother to consider actions by or opportunities within the Republican Party because the local Republican Party during the period, as V.O. Key would put it, "scarcely deserve[d] the name of party."²⁰⁵

During this period of low partisanship and low partisan competition, it is unsurprising that partisan gerrymandering was less pervasive and extreme than during the far more partisan era of the nineteenth century. With partisan competition low during the early twentieth century, incentives to gerrymander decreased. Indeed, incentives diminished dramatically to redistrict at all, during this time before one person, one vote. Ohio had redistricted constantly during the late nineteenth century—seven times between 1878 and 1892 alone—in the midst of intense partisan competition and swings in majority control.²⁰⁶ But during the early twentieth century, unchallenged Republican dominance meant that the state did not bother to redistrict at all from 1914 to 1952.²⁰⁷ Remember

²⁰¹ See, e.g., ARI BERMAN, GIVE US THE BALLOT: THE MODERN STRUGGLE FOR VOTING RIGHTS IN AMERICA 38 (2015).

²⁰² See Voting Rights Act of 1965, Pub. L. No. 89-110, §§ 2 & 5, 79 Stat. 437 & 439 (codified throughout scattered sections of 52 U.S.C.).

²⁰³ The *White Primary Cases* were a series of cases in the early- to mid-twentieth century: *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allright*, 321 U.S. 649 (1944); *Nixon v. Herndon*, 273 U.S. 536 (1927).

²⁰⁴ *White*, 412 U.S. at 765–67.

²⁰⁵ V.O. KEY, JR., SOUTHERN POLITICS IN STATE AND NATION 277 (1949).

²⁰⁶ ENGSTROM, *supra* note 42, at 62.

²⁰⁷ *Id.* at 172.

also that between 1862 and 1896, at least one state redistricted its congressional districts in all but a single election year during that span.²⁰⁸ By contrast, from 1902 to 1962, no more than half the states bothered to redistrict even following decennial census. For this reason, most of the one person, one vote cases arose in states where redistricting had not occurred since roughly the turn of the twentieth century.

In addition, the severity of gerrymandering, even when it was pursued, also seemed to decrease during the early twentieth century. Stephen Engstrom reports that only 52% of redistricting maps before 1900 maintained the partisan status quo. Following the turn of the century, though, 65% of maps maintained the status quo, evidencing fewer aggressive partisan gerrymanders that flipped partisan control.²⁰⁹ Between 1840 and 1900, there were forty-five wholesale partisan transitions where one party's map was replaced by a map drawn by the other party, which accounted for 34% of all plans over that stretch.²¹⁰ Between 1900 and 1962, there were only sixteen such transitions, accounting for just 13% of plans.²¹¹ Political scientists Steve Ansolabehere and Maxwell Palmer also report measures of partisan bias from gerrymandering based on district noncompactness and reach consistent findings about the limited effects of plans during the twentieth century.²¹² Non-compactness remained fairly constant for most of the twentieth century until roughly the 1970s.

It is surprising, then, given the low levels of partisanship during the period, that the Supreme Court first declared partisan gerrymandering claims justiciable in 1986.²¹³ Gerrymandering was nowhere near the levels of the nineteenth century at this time, and courts had never seriously entertained an equal protection claim along these lines. Still, gerrymandering was steadily increasing in the aftermath of the one person, one vote revolution. Remember that gerrymandering was largely unnecessary before one person, one vote, with malapportionment doing the dirty work of entrenching incumbents in office. The new requirement of one person, one vote now required incumbents to do more than simply leave in place their old district lines decade after decade.

²⁰⁸ *Id.* at 61–62.

²⁰⁹ *Id.* at 176.

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² Stephen Ansolabehere & Maxwell Palmer, *A Two Hundred-Year Statistical History of the Gerrymander*, 77 OHIO ST. L.J. 741, 753–58 (2016). District noncompactness can be understood as a “highly irregular” shape where the physical geography of a district is “stretched too thin, when it is twisted, turned, and tortured.” Richard H. Pildes & Richard G. Niemi, *Expressive Harms*, “Bizarre Districts,” and *Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 485–86 (1993). Ansolabehere and Palmer describe and apply four different methods of measuring noncompactness.

²¹³ *Davis v. Bandemer*, 478 U.S. 109 (1986).

Instead, governments now had to revise their districts at least once every decade to reflect updated population figures from each decennial census. As a consequence, to retain their seats with the desired level of security, incumbents turned to more aggressive gerrymandering to ensure reelection. The Indiana gerrymander in *Davis v. Bandemer*, for example, enabled Republicans to win eighteen of twenty-one state house seats in Marion and Allen Counties despite winning just 47% of the vote there.²¹⁴

While not nearly as widespread, egregious, or predictable as partisan gerrymandering would soon become, partisan gerrymandering by the 1980s had worsened—as evidenced by then-notorious partisan gerrymanders, not only in Indiana but California, Arizona, and several other states.²¹⁵ Judicial intervention in *Bandemer* therefore might have reflected some anxiety about the rebirth of gerrymandering that Chief Justice Warren seemed not to have fully anticipated out of the one person, one vote decisions. What’s more, though the magnitude of 1980s gerrymandering seems quaint by today’s standards, it might have been more alarming at the time to justices whose political expectations and sensibilities were established during the partisan quietude and respite from gerrymandering of the mid-twentieth century.

All that said, the timidity of the Court’s intervention against partisan gerrymandering in *Bandemer* certainly reflected its Cold War expectations about partisanship and gerrymandering. The seminal Columbia University studies of mid-twentieth century introduced the concept of the “cross-pressured” voter to modern political science. They identified a cross-pressured voter as someone with “opinions or views simultaneously supporting different sides” of an election, such that some factors “may influence him toward the Republicans while others may operate in favor of the Democrats.”²¹⁶ Cross-pressured voters were more ambivalent, later to make up their mind, and most likely to switch party allegiance in a given election than typical partisans.²¹⁷ The notion of the persuadable cross-pressured voter “with a foot in each candidate’s camp” has been central to American politics and campaigns at least since then.²¹⁸ Along these lines, political scientists Sunshine Hillygus and Todd Shields contended that roughly one-third of the presidential electorate could be classified as persuada-

²¹⁴ *Id.* at 134.

²¹⁵ See generally Bruce E. Cain & Janet C. Campagna, *Predicting Partisan Redistricting Disputes*, 12 LEGIS. STUD. Q. 265 (1987) (noting the upswing in partisan gerrymandering during the 1982 redistricting cycle but analyzing its inconsistent occurrence across states).

²¹⁶ BERNARD R. BERELSON ET AL., VOTING: A STUDY OF OPINION FORMATION IN A PRESIDENTIAL CAMPAIGN 19 (1954); PAUL F. LAZARSFELD ET AL., THE PEOPLE’S CHOICE: HOW THE VOTER MAKES UP HIS MIND IN A PRESIDENTIAL CAMPAIGN 53 (1948).

²¹⁷ BERELSON ET AL. *supra* note 216, at 52–72; LAZARSFELD ET AL., *supra* note 216, at 19–33.

²¹⁸ D. SUNSHINE HILLYGUS & TODD G. SHIELDS, THE PERSUADABLE VOTER: WEDGE ISSUES IN PRESIDENTIAL CAMPAIGNS 5 (2007).

ble cross-pressured voters and that the number of “persuadables” in the electorate was larger than the winning margin in ten of fourteen presidential elections through this era.²¹⁹ As political scientist Matthew Levendusky summarized, “For fifty years, political scientists—and political pundits—argued that campaigns should focus on identifying and converting undecided voters: the ‘swing’ voters.”²²⁰

Just so, the *Bandemer* Court crafted a standard for unconstitutional gerrymandering that could be violated only when one party had been “essentially . . . shut out of the political process” as a whole on a durable basis.²²¹ Under this standard, no trial court for almost twenty years ultimately found that a partisan gerrymander shut a party out of the political process. As Daniel Lowenstein put it, *Bandemer* required the virtually permanent exclusion of a majority group from the political process as a whole, a standard that was practically impossible to meet.²²² Why such an extreme standard? The Court observed in *Bandemer* that “Indiana is a swing State” where “[v]oters sometimes prefer Democratic candidates, and sometimes Republican.”²²³ The Court explained that Democrats could overcome the Republican gerrymander against them in future elections by receiving “an additional few percentage points of the votes cast” and were not consigned to “minority status in the Assembly throughout the 1980s” as a result.²²⁴ Justice O’Connor went further in her concurrence. Emphasizing that “voters can—and often do—move from one party to the other or support candidates from both parties,” she doubted the ability to predict voting strength based on partisanship and questioned the returns from gerrymandering as “a self-limiting enterprise” over time because voters so vacillated from party to party.²²⁵

At the time, this faith in the fluidity of partisanship was more justifiable and undergirded a standard for partisan gerrymandering that hardly any plaintiff could meet for decades. The lone exception only served to underscore this faith. In *Republican Party of North Carolina v. Hunt*, the district court found that the state’s system for electing superior court judges unconstitutionally pre-

²¹⁹ *Id.* at 8.

²²⁰ MATTHEW S. LEVENDUSKY, THE PARTISAN SORT: HOW LIBERALS BECAME DEMOCRATS AND CONSERVATIVES BECAME REPUBLICANS 9 (2009); see also Ryan Lizza, *The Final Push*, NEW YORKER (Oct. 22, 2012), <https://www.newyorker.com/magazine/2012/10/29/the-final-push> [<https://perma.cc/3WT8-7WXA>] (“For decades, persuasion was considered the key to winning, and the gurus and the consultants promised candidates that they could craft messages to win over uncommitted voters.”).

²²¹ 478 U.S. at 139.

²²² Daniel H. Lowenstein, *Vieth’s Gap: Has the Supreme Court Gone from Bad to Worse on Partisan Gerrymandering?*, 14 CORNELL J.L. & PUB. POL’Y 367, 378 (2005).

²²³ 478 U.S. at 135.

²²⁴ *Id.*

²²⁵ *Id.* at 152, 156 (O’Connor, J., concurring).

cluded Republican electoral success under the *Bandemer* standard.²²⁶ However, in an election held five days after the decision, Republican candidates swept every superior court judgeship where they ran for office. This reversal led the Fourth Circuit to remand for reconsideration.²²⁷ Justice Scalia would later invoke the *Hunt* litigation as a “delicious illustration” that partisan affiliation “may shift from one election to the next; and even within a given election, not all voters follow the party line.”²²⁸ Confident in this faith, the Court did nothing to bolster partisan gerrymandering claims when it revisited the question in *Vieth v. Jubelirer*, nearly twenty years after *Bandemer*.²²⁹

Even by then, as I explain in the next Part, partisanship already had resurged, as had partisan gerrymandering. But the cast of partisan gerrymandering law already had been set, as were the justices’ foundational assumptions on these basic questions about partisanship. The justices’ assumptions and the redistricting law that followed from them were grounded in an earlier, less partisan era that was rapidly disappearing.

III. MODERN HYPERPARTISANSHIP AND REDISTRICTING

By the 1990s, hyperpartisanship re-emerged in American politics. The Republican and Democratic Parties underwent an ideological realignment from heterogeneous coalitions into cohesive units with clear positions on a wider spectrum of issues. Although the re-emergence of hyperpartisanship was startling to contemporary observers, it was familiar to any diligent student of American history. The aberrational bipartisanship of the Cold War had ended.

With the re-emergence of hyperpartisanship came the re-emergence of hyperpartisan redistricting. In fact, modern gerrymandering is even more severe than that of the nineteenth century, now aided by computer technology and rich new data never before available to re-districters. However the inherited law of redistricting, created during the Cold War era, is terribly miscalibrated for the magnitude of hyperpartisan gerrymandering of today.

A. *The New Hyperpartisanship*

The Civil Rights Movement of the 1960s, during the heart of the Cold War period, initiated a gradual process of ideological realignment within the

²²⁶ *Republican Party of N.C. v. Hunt*, 77 F.3d 470, No. 94-2410, 1996 WL 60439, at *2-4 (4th Cir. Feb. 12, 1996) (per curiam) (unpublished decision).

²²⁷ *Id.*

²²⁸ *Vieth v. Jubelirer*, 541 U.S. 267, 280, 287 n.8 (2004).

²²⁹ *Id.* at 305-06.

major parties whose full effects were not apparent until the 1990s.²³⁰ In short, conservative Democrats, mainly in the South, slowly became Republicans, while liberal Republicans, mainly in the Northeast, slowly became Democrats, such that both parties were more ideologically cohesive and well-sorted by political belief than they had been in at least a century. Race, again, was critical to the story of partisanship. The Democratic Party's leadership on civil rights during the 1960s disaffected Southern Democrats from the party. Over a decades-long process of generational replacement and partisan conversion, conservatives left the Democratic Party, while liberals left the Republican Party.²³¹ The result transformed both major parties into ideologically cohesive, highly competitive factions at the level of both voters and politicians with virtually none of the ideological overlap that characterized the preceding Cold War period.²³²

This partisan realignment was part of a comprehensive restoration of hyperpartisanship in American politics. The number of voters who identify with the major parties grew dramatically from the 1970s onward, while fewer and fewer people placed themselves in the middle of the partisan spectrum. Since the 1970s, substantially more Americans are identifying as strong Republicans or strong Democrats.²³³ Meanwhile, the number of voters who identify as independents decreased by half from 1952 to 2004.²³⁴

What's more, partisan identification has become increasingly predictive of voting since the 1970s. Even by 1996, partisanship was already 77% more predictive of presidential voting than in 1972 and 60% more predictive of congressional voting.²³⁵ Ticket splitting, so common during the 1970s, decreased by more than two-thirds by the last decade as voters displayed stronger loyalty to their party up and down their ballot, as well as election to election.²³⁶ As a consequence, only 8% of voters in 2004 reported voting for a different presi-

²³⁰ Pildes, *supra* note 4, at 287. See generally CARMINES & STIMSON, *supra* note 189 (detailing the gradual trend whereby liberal northern Republicans gravitated to the Democratic Party, and conservative southern Democrats gravitated toward the Republican Party, resulting in less ideological heterogeneity within the parties).

²³¹ See, e.g., LEVENDUSKY, *supra* note 220, at 147; Alan I. Abramowitz & Kyle L. Saunders, *Ideological Realignment in the U.S. Electorate*, 60 J. POL. 634, 638 (1998) [hereinafter Abramowitz & Saunders, *Ideological Realignment*]; Geoffrey C. Layman et al., *Activists and Conflict Extension in American Party Politics*, 104 AM. POL. SCI. REV. 324, 327 (2010) [hereinafter Layman et al., *Activists and Conflict*]. See generally DONALD GREEN ET AL., PARTISAN HEARTS AND MINDS: POLITICAL PARTIES AND THE SOCIAL IDENTITIES OF VOTERS (2002).

²³² See Pildes, *supra* note 4, at 326.

²³³ Bafumi & Shapiro, *supra* note 171, at 4.

²³⁴ *Id.*

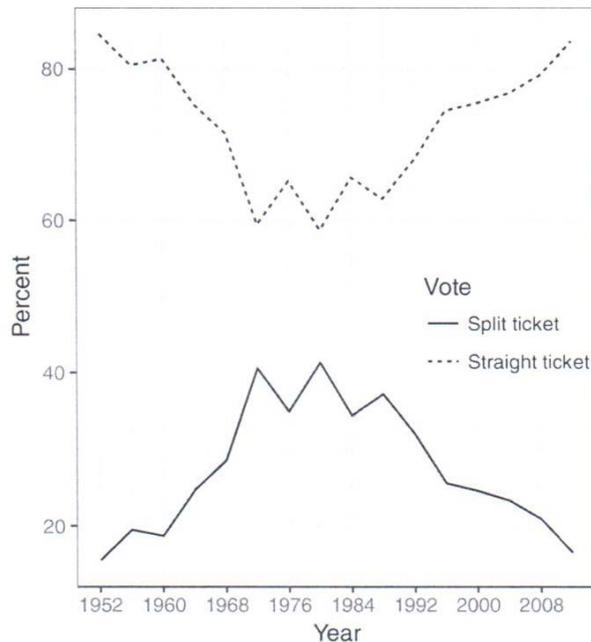
²³⁵ Bartels, *supra* note 171.

²³⁶ Mark D. Brewer, *The Rise of Partisanship and the Expansion of Partisan Conflict Within the American Electorate*, 58 POL. RES. Q. 219, 367 (2005); Mulligan, *supra* note 172, at 513.

dential candidate in 2008 than in 2004, the lowest percentage in successive elections since the National Election Studies began tracking responses in 1956.²³⁷

Split-party voting between presidential and congressional voting at the state level dropped off dramatically since the 1970s as well. In 1976, roughly half the states had a split-party Senate delegation. By 2004, only thirteen states had one.²³⁸ Of the states that had a unified Senate delegation in 1976, just sixteen of twenty-six actually voted for the same party's nominee in that year's presidential election.²³⁹ By contrast, thirty-one of the thirty-seven states with a unified Senate delegation in 2004 also voted for the same party's presidential nominee that year. Over the same period, as Figure 3 illustrates, straight-ticket voting on a partisan basis increased dramatically. Republicans today vote consistently for Republicans, and Democrats today vote consistently for Democrats.

Figure 3: Split-Ticket and Straight-Ticket Voting from 1952 to 2012
(Source: Alan Abramowitz & Steven W. Webster, *Negative Partisanship: Why Americans Dislike Parties but Behave Like Rabid Partisans*, 39 *ADVANCES POL. PSYCH.* 119, 131 (2018))



²³⁷ Brewer, *supra* note 236, at 367; Corwin D. Smidt, *Polarization and the Decline of the American Floating Voter*, 61 *AM. J. POL. SCI.* 365, 379 (2017).

²³⁸ See Hetherington, *supra* note 11, at 423.

²³⁹ *See id.*

Consistent with partisan realignment, today's partisans are also far more supportive of their party's ideological direction and agenda than voters during the mid-twentieth century.²⁴⁰ In 1978, only 32% of Republicans described themselves as politically conservative as opposed to moderate or liberal. Already by 1994, the number basically doubled to 63%.²⁴¹ Similarly, the percentage of Democrats who describe themselves as conservative shrank by half over the same period. In 1978, 56% of Democrats said they were politically conservative but only 28% of Democrats self-identified as conservative by 1994. As a result, the correlation between ideology and party identification basically doubled, with party identifiers much more attuned to the ideological positions of the major parties.²⁴² This correlation is particularly true for party activists, but also quite true for rank-and-file voters.²⁴³ Indeed, disagreement between Democrats and Republicans on salient cultural questions now surpasses disagreement between southerners and non-southerners during the 1960s on civil rights.²⁴⁴ So it is no surprise that percentages of the public who see important differences between the parties and care which party wins the presidency have grown dramatically since the 1970s and indeed, reached historical highs for the sixty-year history of the National Election Studies.²⁴⁵

Congress is more polarized today than it has been in more than 125 years as measured by DW-NOMINATE scores.²⁴⁶ What is even more striking is that today's polarization emerged from the historically low partisanship of the mid-twentieth century. The distance between the ideal points of the mean Democrat and mean Republican in the House was a historically low 0.51 to 0.62 during the late 1950s into the 1980s.²⁴⁷ But from the late 1980s onward, the ideological distance between the parties has basically doubled, to 0.91 by 2007, with most of the growth occurring over the final decade of that period. In the early 1970s, House members were clustered in the middle, with 58% within the middle third of the DW-NOMINATE distribution. By 2004, only 20% fell within the middle.²⁴⁸ Because this process accelerated in years since then, there

²⁴⁰ See, e.g., Brewer, *supra* note 236, at 221–27; Layman et al., *Activists and Conflict*, *supra* note 231, at 324–25.

²⁴¹ Abramowitz & Saunders, *Ideological Realignment*, *supra* note 231, at 647.

²⁴² *Id.* at 644; Alan I. Abramowitz & Kyle L. Saunders, *Is Polarization a Myth?*, 70 J. POL. 542, 547 (2005).

²⁴³ See Layman et al., *Activists and Conflict*, *supra* note 231, at 326–27; Geoffrey Layman et al., *Party Polarization in American Politics: Characteristics, Causes, and Consequences*, 9 ANN. REV. POL. SCI. 83, 96–100 (2006).

²⁴⁴ Hetherington, *supra* note 11, at 434.

²⁴⁵ Brewer, *supra* note 236, at 221.

²⁴⁶ See Barber & McCarty, *supra* note 86, at 40.

²⁴⁷ Hetherington, *supra* note 11, at 417.

²⁴⁸ Sean M. Theriault, *Party Polarization in the U.S. Congress: Member Replacement and Member Adaptation*, 12 PARTY POL. 483, 486 (2006).

is virtually no ideological middle in Congress between the party caucuses.²⁴⁹ A similar pattern of sharp partisan divergence has been demonstrated among state legislators and even among the Justices of the Supreme Court.²⁵⁰

As a consequence, there is no longer any ideological overlap between congressional Republicans and Democrats. Recall that during the 1960s, roughly 20% of Republican senators were more liberal than the most conservative Democrats, and the same percentage of Democratic senators were more conservative than the most liberal Republicans.²⁵¹ This ideological overlap was completely gone by the last decade.²⁵² So, it is utterly unsurprising that bipartisan cooperation has declined in the modern era of hyperpartisanship. The bargaining space across the aisle between Republicans and Democrats has simply disappeared.²⁵³

In other words, hyperpartisanship now dominates American politics in a way that might have been difficult to imagine during the Cold War. It has been, in Richard Pildes's words, the "defining attribute" of American democracy over the last generation.²⁵⁴ It is also no surprise then that the re-emergence of hyperpartisanship gave rise to the re-emergence of hyperpartisan gerrymandering during the twenty-first century.

²⁴⁹ See, e.g., Chris Cillizza, *The Ideological Middle Is Dead in Congress. Really Dead.*, WASH. POST (Apr. 10, 2014), <https://www.washingtonpost.com/news/the-fix/wp/2014/04/10/the-ideological-middle-is-dead-in-congress-really-dead/> [https://perma.cc/695H-92X5].

²⁵⁰ Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301, 301–02; Boris Shor & Nolan McCarty, *The Ideological Mapping of American Legislatures*, 105 AM. POL. SCI. REV. 530, 546 (2011) (“[P]olarization at the state legislative level is real, at least for the previous 15 years.”); see also Cassandra Burke Robertson, *Judicial Impartiality in a Partisan Era*, 70 FLA. L. REV. 739, 740 (2018) (observing that “[i]n an increasingly partisan era . . . there is a growing skepticism of the judiciary’s neutrality on politically sensitive issues”). See generally NEAL DEVINS & LAWRENCE BAUM, *THE COMPANY THEY KEEP: HOW PARTISAN DIVISIONS CAME TO THE SUPREME COURT* (2019) (arguing that Justices are more likely to follow the lead of the elite social networks that they are a part of than they are to bend to the pressures of the other political branches, but that, in an era of hyperpartisanship, these elite circles are becoming themselves more and more aligned with partisan party politics).

²⁵¹ Han & Brady, *A Delayed Return*, *supra* note 10, at 510. See generally NOLAN MCCARTY ET AL., *POLARIZED AMERICA: THE DANCE OF IDEOLOGY AND UNEQUAL RICHES* (2006) (discussing increased polarization of the parties and arguing that increased polarization contributes to increased income inequality).

²⁵² See Han & Brady, *A Delayed Return*, *supra* note 10, at 511–12.

²⁵³ Neal Devins and Lawrence Baum make a similar argument about partisanship and ideology among Supreme Court Justices. See generally DEVINS & BAUM, *supra* note 250 (arguing that partisanship was not terribly predictive of justices’ ideology during the Cold War era, but has become more so since the mid-1990s).

²⁵⁴ Pildes, *supra* note 4, at 275.

B. Modern Gerrymandering

By every measure, the hyperpartisan intensity of nineteenth-century gerrymandering has returned. The magnitude of partisan bias resulting from gerrymandering has soared upward since the 1980s, but spiked noticeably in the 2010 redistricting cycle.²⁵⁵ Although redistricting today is encumbered by far more legal restrictions today than it was in the nineteenth century, gerrymandering is characterized by similar partisan intentions as that earlier era and sharply distinct from the partisan calm that reigned during the Cold War.

Law professor Nicholas Stephanopoulos and political scientist Eric McGhee documented this rise of gerrymandering from 1972 to 2012 in terms of McGhee's efficiency gap measure.²⁵⁶ The efficiency gap tracks the net difference in "wasted votes" between the major parties for a given district map.²⁵⁷ Wasted votes are votes cast (i) for a losing candidate or (ii) for a winning candidate in excess of the necessary winning margin in her district.²⁵⁸ The difference in total wasted votes, aggregated across elections, then can be used to indicate how many extra seats are gained by the gerrymandering party as a result of this efficiency advantage.²⁵⁹ This efficiency gap provides a metric for the severity of partisan disadvantage suffered by the gerrymandered out-party. By this measure, the average efficiency gap for congressional and state house elections has risen since the 1980s and abruptly shot upward after the 2011 redistricting cycle in time for the 2012 elections.²⁶⁰ The average congressional efficiency gap jumped from 1.02 seats from 1972 to 2010, suddenly up to 1.58 seats in 2012.²⁶¹ For state house, the average efficiency gap jumped from 4.94% of seats from 1972 to 2010 to 6.07% in 2012.²⁶²

The absolute number of severe gerrymanders as measured by the efficiency gap has also increased sharply in the most recent redistricting cycle. In the 1970s, there were only two state congressional district maps with an average gap of more than two seats.²⁶³ This grew to four plans in each of the next three decennial redistricting cycles. However, there were seven maps in 2012 with

²⁵⁵ Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 835–36 (2015).

²⁵⁶ *Id.*

²⁵⁷ *See id.* at 849–55; *see also* Eric McGhee, *Measuring Partisan Bias in Single-Member District Electoral Systems*, 39 LEGIS. STUD. Q. 55, 56 (2014) (introducing the measure but under a different name).

²⁵⁸ Stephanopoulos & McGhee, *supra* note 255, at 851–52.

²⁵⁹ *Id.*

²⁶⁰ *See id.* at 872–73.

²⁶¹ *Id.* at 872.

²⁶² *Id.*

²⁶³ *Id.* at 876.

an average gap of at least two seats, all pro-Republican.²⁶⁴ It's the same story for state house maps. There were just six state house maps in the 1970s with an average gap of 8% or more.²⁶⁵ By 2012, there were fourteen state house maps with such an average gap, twelve pro-Republican, two pro-Democratic.²⁶⁶ As Stephanopoulos and McGhee summarize, it is "clear that the scale and skew of today's gerrymandering are unprecedented in modern history."²⁶⁷

The results using a different but also well-established measure of partisan gerrymandering, called partisan bias, point to exactly the same conclusions. Partisan bias measures the difference in seats each major party would be expected to win if it earns 50% of the two-party statewide vote.²⁶⁸ For example, if Republicans in a given state win 55% of seats with 50% of the vote—and Democrats win the remaining 50% of the vote but 45% of seats—then Republicans enjoy a +/- 5% advantage in partisan bias.²⁶⁹ In other words, Republicans would win 10% more seats with the same percentage of the two-party vote. In fact, this difference was essentially the partisan bias in favor of Republicans after the 2010-11 redistricting cycle.²⁷⁰ The nearly 10% advantage in favor of Republicans was almost three times the level from the previous decennial redistricting in 2002.²⁷¹

These increases in partisan bias were the direct result of more aggressive gerrymandering. Political scientist Anthony McGann and his co-authors locate partisan bias from redistricting almost exclusively in states where one party had both opportunity and motivation to gerrymander.²⁷² They find demonstrable partisan bias in the eighteen states where (i) the legislative process was responsible for redistricting; (ii) one party had unified control of government; and (iii) there was two-party competition in federal elections, modestly defined as a margin of 25% or less in the presidential election.²⁷³

Furthermore, McGann and his co-authors find that the partisan bias from gerrymandering increased sharply from 2002 to 2012. In nine states already gerrymandered in favor of Republicans from the previous redistricting, partisan bias increased even further and accounted for almost half the growth in

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ ANTHONY J. MCGANN ET AL., GERRYMANDERING IN AMERICA: THE HOUSE OF REPRESENTATIVES, THE SUPREME COURT, AND THE FUTURE OF POPULAR SOVEREIGNTY 56–67 (2016).

²⁶⁹ *See id.* at 71.

²⁷⁰ *See id.* (reporting a 9.4% partisan asymmetry in favor of Republicans).

²⁷¹ *Id.* at 87.

²⁷² *See id.* at 156–58.

²⁷³ *Id.* at 156.

partisan bias toward Republicans in the 2011–12 cycle.²⁷⁴ During this time, partisan bias doubled in Alabama, Georgia, and Pennsylvania.²⁷⁵ And partisan bias toward the Republicans quadrupled in Missouri from 2002 to 2012.²⁷⁶ In other states where Republicans took over government from Democratic control, partisan bias swung from Democratic advantage in 2002 to a much larger Republican advantage in 2012.²⁷⁷ In both North Carolina and Tennessee, for instance, the partisan bias was roughly 10% in favor of Democrats in 2002 but jumped to 28% in Tennessee and 36% in North Carolina in favor of the Republicans after the 2011–12 redistricting.²⁷⁸ Partisan gerrymandering had been supercharged into today’s hyperpartisan gerrymandering.

Why has gerrymandering accelerated recently? The simple answer is hyperpartisanship. Indeed, national party intervention already began ramping up with the 2001–02 redistricting cycle. The renewal of hyperpartisanship, with control of Congress potentially on the line, motivated the Republican national party to push for more aggressive gerrymandering where extra seats could be gained.²⁷⁹ In Texas, Republicans won control of state government, and a new congressional redistricting map was already put in place following the 2000 Census. However, Republican national party leaders, including House Speaker Tom DeLay and Karl Rove, pressured reluctant state leaders to engage in a gerrymandering practice that had not been seen since the days of nineteenth-century hyperpartisanship: a mid-decade *re*-redistricting.²⁸⁰

State leaders initially balked; the Lieutenant Governor of Texas at the time, David Dewhurst, described the prospect of redistricting a second time in the same decade as unappealing as a “contagious flu.”²⁸¹ Then-Governor Rick Perry dismissed the idea by asking rhetorically: “It’s like, ‘Do you want to go run your wind sprints again?’”²⁸² But the 2001–02 redistricting cycle marked a new era in gerrymandering. It was the first redistricting cycle under one person, one vote where both parties viewed congressional control as up for

²⁷⁴ *Id.* at 160.

²⁷⁵ *Id.* at 161.

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 162 (discussing Tennessee and North Carolina as examples).

²⁷⁸ *Id.*

²⁷⁹ See Sasha Abramsky, *The Redistricting Wars*, THE NATION (Dec. 11, 2003), <https://www.the-nation.com/article/archive/redistricting-wars/> [<https://perma.cc/W4QV-3434>].

²⁸⁰ See Michael S. Kang, *The Bright Side of Partisan Gerrymandering*, 14 CORNELL J.L. & PUB. POL’Y 443, 465–68 (2005) (discussing the politics of the Texas 2003 re-redistricting).

²⁸¹ R.G. Ratcliffe, *Plan Shuffles Millions of Texans; DeLay’s Investment Pays Off*, HOUS. CHRON., Oct. 10, 2003, at A01 (quoting Lieutenant Governor Dewhurst).

²⁸² Lou DuBose & Jan Reid, *The Man with the Plan*, TEX. MONTHLY (Aug. 2004), <https://www.texasmonthly.com/politics/the-man-with-the-plan/> [<https://perma.cc/R6RR-7X3V>].

grabs.²⁸³ State Republicans eventually followed the pattern of their nineteenth-century counterparts and redistricted their congressional districts again according to the national party's direction.²⁸⁴ A similar series of events occurred for mid-decade re-redistricting in Colorado the same year, though that plan was struck down under the state constitution.²⁸⁵ Georgia Republicans re-redistricted mid-decade but did so only for a few specific vulnerable incumbents, rather than redrawing the entire state map, a practice that continued into the following decade.²⁸⁶

To be sure, Republicans are not the only political party to engage in gerrymandering. However, specifically for the 2011–12 cycle, Republicans better anticipated and seized the crucial advantages from gerrymandering in today's polarized, highly-competitive environment. They famously initiated the Redistricting Majority Project—nicknamed Project REDMAP—to pour unprecedented resources and coordination into the 2011–12 redistricting cycle.²⁸⁷ The first step was to gear up for the 2010 midterm elections at the state legislative level and win control over as many state legislatures in advance of the crucial redistricting following the 2010 Census. As GOP political strategist Karl Rove predicted at the time, these state races would “determine who redraws congressional district lines after [the 2010] census, a process that could determine which party controls upwards of 20 seats and whether many other seats will be competitive.”²⁸⁸ After the 2010 elections, Republicans gained almost 700 state legislative seats and held majorities in ten of the fifteen states where state legislatures controlled redistricting and were scheduled to gain or lose congress-

²⁸³ Richard Pildes, Analysis, *Why Gerrymandering Is Going to Get Even Worse*, WASH. POST (Apr. 26, 2018), <https://www.washingtonpost.com/news/monkey-cage/wp/2018/04/26/yes-gerrymandering-is-getting-worse-and-will-get-worse-still-this-explains-why/> [<https://perma.cc/A6UA-RNPS>] (explaining that one reason why partisan gerrymandering will increase in severity is that control of Congress is now regularly up for grabs—something that was not true from the New Deal era through the new millennium).

²⁸⁴ See, e.g., *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006) (ruling on the legality of Texas state officials' redistricting of U.S. congressional districts between the 2000 and 2010 censuses).

²⁸⁵ *People ex. rel. Salazar v. Davidson*, 79 P.3d 1221, 1243 (Col. 2003); see also Juliet Eilperin, *GOP's New Push on Redistricting: House Gains Are at Stake in Colorado, Texas*, WASH. POST, May 9, 2003, at A4.

²⁸⁶ Alex J. Whitman, *Pinpoint Redistricting and the Minimization of Partisan Gerrymandering*, 59 EMORY L.J. 211, 213–14 (2009); Thomas Wheatley, *How Redrawing Districts Has Kept Georgia Incumbents in Power*, ATLANTA MAG. (Jan. 12, 2018), <https://www.atlantamagazine.com/news-culture-articles/redrawing-districts-kept-georgia-incumbents-power/> [<https://perma.cc/FZK9-W6Z2>].

²⁸⁷ See generally DAVID DALEY, *RAT**KED: THE TRUE STORY BEHIND THE SECRET PLAN TO STEAL AMERICA'S DEMOCRACY* (2016) (describing Republican operatives' plan to “turn red” as many state legislatures as possible before the 2010 census, and then use those newly-Republican legislatures to redraw congressional and state legislative districts to ensure they stay in power and push a conservative agenda).

²⁸⁸ *Id.* at xvii.

sional seats under reapportionment.²⁸⁹ Republicans had exclusive authority to draw districts for 193 House seats, compared to just forty-four for the Democrats.²⁹⁰ The next step was to focus on gerrymandering to the hilt in states where Republicans had won control of redistricting, such as North Carolina, Wisconsin, and Ohio, to lock in state legislative majorities and the Republican House majority.²⁹¹

The competitive pressures of this hyperpartisan era fueled the renewed intensity of gerrymandering. Long gone was James McGregor Burns's sleepy four-party system and its regional fiefdoms that persisted into the Cold War. By the 2000s, the South was newly competitive between regnant Democrats and a rising Republican Party better aligned with conservative southern voters.²⁹² Although Democrats attempted to hold off the Republican majority with gerrymanders of their own throughout the 1990s into the 2000s, Republicans quickly replaced them with even more effective gerrymanders upon taking power in states like Texas. Because of the one person, one vote doctrine, states could no longer go more than a decade without redistricting, but mid-decade redistricting, once a regular nineteenth-century practice, was now back again. As was the aggressive gerrymandering of that earlier era as well.

For the upcoming 2021 redistricting cycle, Democrats promise to match the Republicans' organization and investment. Even before the end of the Obama presidency, President Obama and former Attorney General Eric Holder identified redistricting as a Democratic priority in advance of the 2020 elections.²⁹³ Holder chairs the newly created, well-funded National Democratic Redistricting Committee to serve as a Democratic answer to Project RED-MAP.²⁹⁴ Within a month after the 2018 elections, Democrats in New Jersey had already proposed a new state constitutional amendment to give the majority more control over the state redistricting committee and require the commit-

²⁸⁹ *Id.* at xx.

²⁹⁰ *Id.* at xx–xxi. The remaining seats (191) were subject to redistricting either by commission or through a bipartisan scheme. *Id.*

²⁹¹ *Id.* at xxi.

²⁹² See generally EARL BLACK & MERLE BLACK, *THE RISE OF SOUTHERN REPUBLICANS* (2003) (detailing the collapse of the solid “Democratic South,” the ascendancy of the Republican Party, and the new reality of two permanently competitive national parties in the region).

²⁹³ See, e.g., Deborah Barfield Berry, *Eric Holder: We're Going to Republican States and We're Bringing Obama with Us*, USA TODAY (Feb. 7, 2018), <https://www.usatoday.com/story/news/politics/onpolitics/2018/02/07/eric-holder-were-going-republican-states-and-were-bringing-obama-us/315007002/> [https://perma.cc/Q99C-Y54Y].

²⁹⁴ Edward-Isaac Dove, *Obama, Holder to Lead Post-Trump Redistricting Campaign*, POLITICO (Oct. 17, 2016), <https://www.politico.com/story/2016/10/obama-holder-redistricting-gerrymandering-229868> [https://perma.cc/CQ62-V6PF].

tee to entrench the state majority.²⁹⁵ The intensity of partisan gerrymandering, now joined in full by the Democrats, will only increase in the coming years.

IV. THE MISMATCHED LAW OF PARTISAN GERRYMANDERING

The law of redistricting is mismatched to the new realities of hyperpartisanship that have emerged since the end of the Cold War era. As the normal hyperpartisanship has returned to American politics, so too has hyperpartisan gerrymandering. The law of redistricting, however, the foundations of which were set during the Cold War, reflects the bipartisan norms and politics of a previous age and its largely outdated assumptions about partisanship. Saddled by empirical understandings from the Cold War era, the Supreme Court remains doubtful about the concreteness of representational harms from gerrymandering and underestimates the effectiveness, durability, and aggressiveness of today's gerrymandering. Hyperpartisan gerrymandering, like hyperpartisanship itself, is likely to be a permanent condition of American democracy, and the law of redistricting simply lags behind this present reality.

A. *The Law of Partisan Gerrymandering*

The law of partisan gerrymandering, like the rest of election law, began during the Cold War before hyperpartisanship re-emerged. The Court in *Davis v. Bandemer* first announced the justiciability of an equal protection challenge to partisan gerrymandering toward the end of the Cold War in 1986, but it did so by a splintered decision, which articulated an exceedingly difficult standard that no plaintiff met for almost two decades.²⁹⁶ On its face, the *Bandemer* standard required the plaintiffs to prove intentional discrimination against an identifiable political group, such as a political party, and establish actual discriminatory effect on that group that consistently degrades the groups' influence on the political process.²⁹⁷ As applied by lower courts, the standard effectively required that the plaintiff minority party be shut out of the political process as a whole on a persistent basis.²⁹⁸ *Bandemer* therefore reflected the prevailing assumptions about partisanship and voting from the Cold War. Gerry-

²⁹⁵ Nick Corasaniti, *Democrats in New Jersey Have a Firm Grip on Power. They Want Even More.*, N.Y. TIMES (Dec. 13, 2018), <https://www.nytimes.com/2018/12/13/nyregion/redistricting-new-jersey-democrats-republicans.html> [https://perma.cc/5QWB-TA77]; see also Michael Wines, *Republicans Rewrote Voting Laws for 8 Years. Now Democrats Say It's Their Turn.*, N.Y. TIMES (Feb. 1, 2019), <https://www.nytimes.com/2019/02/01/us/voting-rights-laws-elections.html> [https://perma.cc/W4L2-CFHC].

²⁹⁶ See Stephanopoulos & McGhee, *supra* note 255, at 832–33 (“Since 1986, not a single plaintiff has managed to persuade a court to strike down a plan on this basis. By our count, claimants’ record over this generation-long period is roughly zero wins and fifty losses.”) (footnote omitted).

²⁹⁷ *Davis v. Bandemer*, 478 U.S. 109, 127–32 (1986).

²⁹⁸ Lowenstein, *supra* note 222.

mandering, as Justice O'Connor argued in her concurrence, was a "self-limiting enterprise" because "voters can—and often do—move from one party to the other or support candidates from both parties."²⁹⁹ Fluid partisanship of this sort ensured that gerrymanders could not deliver a reliable or lasting advantage that ought to concern courts, at least absent exceptional circumstances that lower courts never managed to find.

When the Supreme Court scheduled *Vieth v. Jubelirer* for oral argument almost two decades after *Bandemer*, the Court appeared ready either to declare gerrymandering claims to be non-justiciable or announce a more attainable standard for such claims.³⁰⁰ In a fractured decision, however, the Court did nothing to clarify the law in either direction. Announcing the Court's judgment and writing for four justices, Justice Scalia dismissed the plaintiffs' equal protection challenge to Pennsylvania's congressional redistricting and argued against justiciability under any standard. For Justice Scalia, some level of partisanship was constitutionally permissible and practically unavoidable as "a lawful and common practice."³⁰¹ As a result, Justice Scalia argued that "[t]he central problem is determining when political gerrymandering has gone too far."³⁰² The fact that the majority enjoys a significant advantage is insufficient because it is "assuredly not true" that partisanship is the "only factor determining voting behavior at all levels."³⁰³ Devising a standard to answer "the original unanswerable question (How much political motivation and effect is too much?)" was, for Justice Scalia, judicially unmanageable and therefore nonjusticiable.³⁰⁴

Justice Scalia notwithstanding, it was Justice Kennedy's concurrence, the opinion in support of the Court's judgment on the narrowest grounds, that decided the reasoning of *Vieth*. Justice Kennedy refused to overrule *Bandemer* and joined the four dissenters in favor of continuing the "possibility of judicial relief" for partisan gerrymandering claims.³⁰⁵ That said, Justice Kennedy refused to join the four dissenters in selecting a standard for judging the constitutionality of partisan gerrymanders and also declined to articulate one of his own.³⁰⁶ Like Justice Scalia, however, Justice Kennedy appeared skeptical

²⁹⁹ *Bandemer*, 478 U.S. at 152, 156 (O'Connor, J., concurring).

³⁰⁰ David E. Rosenbaum, *Justices Bow to Legislators in Political Gerrymander Case*, N.Y. TIMES (Apr. 29, 2004), <https://www.nytimes.com/2004/04/29/us/supreme-court-decision-justices-bow-legislators-political-gerrymander-case.html> [<https://perma.cc/NB6U-SWCT>] (comparing Justice Scalia's and Justice Stevens' divergent views on the justiciability of gerrymandering claims, but noting neither view won out in light of Justice Kennedy's concurrence).

³⁰¹ *Vieth v. Jubelirer*, 541 U.S. 267, 286 (2004).

³⁰² *Id.* at 296.

³⁰³ *Id.* at 288.

³⁰⁴ *Id.* 296–97.

³⁰⁵ *Id.* at 306 (Kennedy, J., concurring).

³⁰⁶ *See id.* at 306–17.

about the effectiveness of modern gerrymandering and any constitutional threat to political representation. Justice Kennedy remained uncertain about how well courts could identify “the precise nature of the burdens gerrymanders impose on the representational rights of voters and parties.”³⁰⁷ For Justice Kennedy, the Pennsylvania gerrymander was not sufficiently extreme to violate the Constitution, but he hoped that social and computer scientists could develop “clear, manageable, and politically neutral standards” for courts to apply in future gerrymandering cases.³⁰⁸ Again, though, the murky law lower courts were left to decipher after *Vieth* did nothing to slow down the accelerating pace of gerrymandering.³⁰⁹ A dozen years passed during which courts consistently dismissed partisan gerrymandering challenges, including cases in at least eight states following the 2011 redistricting cycle.³¹⁰

Until *Whitford v. Gill*. The Wisconsin gerrymander challenged in *Whitford* was representative of modern hyperpartisan gerrymandering. Partisan control of the state government toggled back and forth during the late 2000s. Democrats temporarily won unified control of the state legislature in 2008, but Republicans won it back in 2010 and then set out to create a district map that would, as the district court found it, “entrench[] the Republicans’ control of the Assembly.”³¹¹ They successfully did so, producing a map rated as one of the most biased partisan gerrymanders in the country since the one person, one vote decisions.³¹² The mapmakers offered the Republican leadership at least six alternative maps that ranged from “basic” to “assertive” to “aggressive” in terms of the partisan advantage it provided Republicans. The leadership tinkered with the most aggressive option until it achieved the maximal partisan advantage. Republicans anticipated that the enacted map would maintain a Republican majority under any likely electoral outcome.³¹³ Keith Gaddie, the Republicans’ redistricting consultant, estimated that the Republicans needed only 48% of the statewide vote to retain a firm majority of fifty-four out of ninety-nine seats, while the Democrats would need more than 54% to win that many seats.³¹⁴

³⁰⁷ *Id.* at 313.

³⁰⁸ *Id.* at 307–08.

³⁰⁹ See, e.g., *Ga. St. Conf. of NAACP v. Georgia*, 269 F. Supp. 3d 1266, 1284 (N.D. Ga. 2017) (“As we’ve said, the Supreme Court has made clear that political gerrymandering claims are justiciable. But since it has not yet arrived at such a method for measuring discriminatory effect in partisan gerrymandering, the lower courts are left to search for one.”).

³¹⁰ Stephanopoulos & McGhee, *supra* note 255, at 847 n.90 (collecting cases).

³¹¹ *Whitford v. Gill*, 218 F. Supp. 3d 837, 898 (W.D. Wis. 2017), *vacated and remanded*, *Gill v. Whitford*, 138 S. Ct. 1916, 1921 (2018).

³¹² *Id.* at 922–28.

³¹³ *Id.* at 899.

³¹⁴ *Id.*

In fact, the *Whitford* gerrymander performed even better than expected. In 2012, Republicans gained only 48.6% of the two-party vote statewide, but still won sixty of ninety-nine seats in the assembly. The vote totals, within the range of realistic outcomes, did not seem to have a significant bearing on majority control. For example, when Republican candidates ran substantially better in 2014 with 52% of the vote, they gained only three more assembly seats because the gerrymander had already secured almost every attainable seat regardless of likely election outcome. Whether the Republicans won 48% of the vote or 52%, they held the legislative supermajority. In 2018, Democrats enjoyed a boom election year, winning 54% of the aggregate vote in state assembly races, and sweeping all four statewide offices up for election.³¹⁵ Even so, Republicans successfully maintained their five-to-three congressional advantage, narrowly lost just one seat off their sixty-four-to-thirty-five assembly majority, and actually *increased* their eighteen-to-fifteen state senate majority by one seat.³¹⁶ The effect of the *Whitford* gerrymander was not only robust but exceedingly durable, with a powerful bias on election outcomes seven years after the district map was redrawn.

As a result, the *Whitford* plaintiffs challenged the gerrymander on equal protection grounds and won a district court trial—a breakthrough victory for partisan gerrymandering plaintiffs after years of failure in federal court.³¹⁷ The plaintiffs argued that partisan intent and effect in their case were not only clear, but extreme. Wisconsin Republicans redistricted the state legislative map without any Democratic input or involvement and produced a map that guaranteed them a legislative supermajority almost regardless of realistic election outcome.³¹⁸ Their social science evidence indicated that partisan advantage from the gerrymander, measured by any metric, ranked among the most severe in the country. What’s more, computer simulations showed that such severe partisan bias from redistricting would not have resulted from the government’s service of legitimate lawmaking interests; only extreme partisanship could explain how extremely favorable the Wisconsin map was for Republicans.³¹⁹

However, the U.S. Supreme Court in *Gill v. Whitford*, vacated the district court’s verdict on standing grounds and remanded the equal protection

³¹⁵ Dan Kaufman, Opinion, *Wisconsin Is About to Make a Huge Mistake*, N.Y. TIMES (Dec. 3, 2018), <https://www.nytimes.com/2018/12/03/opinion/wisconsin-legislature-republicans-evers.html> [https://perma.cc/P73E-7T98].

³¹⁶ *Id.*

³¹⁷ See *Whitford*, 218 F. Supp. at 926–27.

³¹⁸ *Id.* at 898.

³¹⁹ See Jowei Chen & Jonathan Rodden, *Cutting Through the Thicket: Redistricting Simulations and the Detection of Partisan Gerrymanders*, 14 ELECTION L.J. 331, 333–34 (2015) (explaining that after *LULAC*, courts have generally required a plaintiff to show that a gerrymandered map is not justified by “legitimate” or “compelling” state interests).

claims.³²⁰ In a brief opinion for the Court, Chief Justice Roberts concluded that the plaintiffs' claims that their party's representation was diluted by the Republican gerrymander were more "conjectural or hypothetical," than "actual or imminent," for purposes of establishing injury in fact.³²¹ This twist in the Court's reasoning was largely unexpected and diverged from how the Court had previously handled gerrymandering claims as vote dilution problems.³²² *Gill* was anomalous in constitutional law in this sense, because the Court addressed standing without first addressing definitively whether there is first a constitutional injury under its new, shifted perspective on the claim.³²³ Arguably, the Court's muddled position on standing reflected "a skepticism of some members of the Court and a deep disagreement about the justiciability of the plaintiffs' claim"³²⁴

The foundation for the Court's equivocation on gerrymandering claims was again rooted in a familiar Cold War skepticism about the power of partisanship and the anticipated harms from gerrymandering. As Chief Justice Roberts put it, federal courts need to play a "proper—and properly limited—role . . . in a democratic society" and therefore could intervene only when plaintiffs "prove concrete and particularized injuries using evidence . . . that would tend to demonstrate a burden on their individual votes."³²⁵ Evidence that the plaintiffs' party was injured by the gerrymander offered only "an average measure" that did not "address the effect that a gerrymander has on the votes of particular citizens."³²⁶ The Court therefore refused to authorize further judicial intervention against partisan gerrymandering, even as lower court rulings chafing at the Court's resistance continued to pile up below.³²⁷

³²⁰ *Gill v. Whitford*, 138 S. Ct. 1916, 1921 (2018).

³²¹ *Id.* at 1932 (internal quotation marks omitted).

³²² See Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *Judicial Intervention as Judicial Restraint*, 132 HARV. L. REV. 236, 252 (2018) ("Prior to *Gill*, standing doctrine had not been determinative in any of the Court's forays into the political thicket."); Adam Liptak, *Supreme Court Avoids an Answer on Partisan Gerrymandering*, N.Y. TIMES (June 18, 2018), <https://www.nytimes.com/2018/06/18/us/politics/supreme-court-wisconsin-maryland-gerrymander-vote.html> [<https://perma.cc/P9RD-N7VA>] ("By ruling only on standing, the court sidestepped the central questions in the case of whether the Constitution forbids gerrymandering and, if it does, what standard the courts should use to draw a constitutional line.").

³²³ Charles & Fuentes-Rohwer, *supra* note 322, at 252.

³²⁴ *Id.* at 253.

³²⁵ *Gill*, 138 S. Ct. at 1929, 1934.

³²⁶ *Id.* at 1933.

³²⁷ See, e.g., *Benisek v. Lamone*, 348 F. Supp. 3d 493 (D. Md. 2018), *vacated and remanded*, *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) (ruling on summary judgment that plaintiffs had standing and that Maryland's congressional map burdened plaintiffs' associational and representational interests); *Ohio A. Philip Randolph Inst. v. Smith*, 335 F. Supp. 3d 988 (S.D. Ohio 2018) (allowing partisan gerrymandering claims under the First and Fourteenth Amendments to proceed); *Common Cause v. Rucho*, 318 F. Supp. 3d 777 (M.D.N.C. 2018) (ruling that North Carolina's congressional redistricting plan was

Just one term later, the Court finally declared political gerrymandering to be constitutionally nonjusticiable in *Rucho v. Common Cause*.³²⁸ There, the Court reviewed North Carolina's gerrymander of its congressional districts that engineered a ten-to-three Republican advantage in the delegation despite a reasonably even split of the two-party vote.³²⁹ The partisan purpose to create such Republican advantage in *Rucho* was particularly clear even by the gross standards of partisan gerrymandering. One of the Republican co-chairs of North Carolina legislature's redistricting committee had boasted outright that his committee would make "all reasonable efforts" to maintain a ten-to-three partisan split of congressional districts and explained that the split would not be eleven-to-two only because the co-chair did "not believe it [would be] possible to draw a map with 11 Republicans and 2 Democrats."³³⁰ What government interest could he offer in support of the gerrymander? The co-chair answered, "I think electing Republicans is better than electing Democrats. So I drew this map to help foster what I think is better for the country."³³¹

Republican gerrymandering in North Carolina this decade, like its counterpart in Wisconsin, performed exactly as hoped. With just 49% of the statewide vote in 2012, which was a relatively rough year for their party, Republicans still managed to win nine of thirteen congressional seats.³³² The total increased to ten of thirteen seats in 2014 when they won 55% of the vote.³³³ The *Rucho* gerrymander was designed to lock in this advantage even after the state was legally required in 2015 to redraw its congressional districts for the 2016 elections. And again, the Republicans won ten of thirteen seats in 2016 with 53% of the statewide vote, and still held nine of thirteen seats in 2018 despite winning just 50% of the vote in a down year for Republicans.³³⁴ The district court in *Rucho* struck down this gerrymander based on its obvious partisan intent and effects. Its findings were bolstered by computer simulations that showed absent partisanship, redistricting of the state's congressional lines led to at least one more Democratic seat in every one of 3,000 redistricting

unconstitutional); *League of Women Voters of Mich. v. Johnson*, 352 F. Supp. 3d 777 (E.D. Mich. 2018), *rev'd and remanded*, *League of Women Voters of Mich. v. Johnson*, No. 18-2383, 2018 WL 10096237 (6th Cir. Dec. 20, 2018) (ruling that organization-plaintiff had standing to bring equal protection, representational, and associational challenges to Michigan's congressional and state legislative districts).

³²⁸ 139 S. Ct. 2484 (2019).

³²⁹ Adam Liptak, *Supreme Court Bars Challenges to Partisan Gerrymandering*, N.Y. TIMES (June 27, 2019), <https://www.nytimes.com/2019/06/27/us/politics/supreme-court-gerrymandering.html> [<https://perma.cc/4H28-YLJP>].

³³⁰ *Rucho*, 318 F. Supp. 3d at 808 (alteration in original) (quoting Rep. David Lewis).

³³¹ *Id.* at 809.

³³² *Id.* at 804.

³³³ *Id.*

³³⁴ *Id.* at 810.

simulations by one expert, and at least one more (and usually two or more) in over 99% of another expert's 24,518 simulations.³³⁵

But the Supreme Court reversed and finally dealt a fatal blow—for at least a generation—to the justiciability of partisan gerrymandering claims under the federal Constitution. The Court declared non-justiciable the *Rucho* plaintiffs' constitutional claims, as well as the plaintiffs' First Amendment claims in a companion case out of Maryland, *Lamone v. Benesek*. Admitting that both gerrymanders were "highly partisan, by any measure," Chief Justice Roberts's majority opinion nonetheless parroted all of Justice Scalia's reservations from *Vieth*, fifteen years earlier.³³⁶ Chief Justice Roberts again claimed the operative question was: "How to provid[e] a standard for deciding how much partisan dominance is too much?"³³⁷ To do so, courts would be required to "make their own political judgment about how much representation particular political parties *deserve*—based on the votes of their supporters."³³⁸ Not only would this overstep the judiciary's institutional role, as Chief Justice Roberts saw it, but it also demanded that courts wade into Justice Scalia's "sea of imponderables."

Predictions of voting behavior, based in important part on partisanship, are the necessary foundation for effective gerrymandering. But when it came to courts engaging in the same type of analysis to assess the constitutionality of gerrymandering, Chief Justice Roberts shared Justice Scalia's doubts from *Vieth* and Justice O'Connor's doubts from *Bandemer*, all many years earlier. He explained that "[v]oters elect individual candidates in individual districts, and their selections depend on the issues that matter to them, the quality of the candidates, the tone of the candidates' campaigns, the performance of an incumbent, national events or local issues that drive voter turnout, and other considerations."³³⁹ Chief Justice Roberts dismissed the weight of modern hyperpartisanship by echoing the outdated conventional wisdom of Cold War party politics. As he saw it, "Many voters split their tickets. Others never register with a political party, and vote for candidates from both major parties at different points during their lifetimes."³⁴⁰

Never mind the growing sophistication of partisan gerrymandering and of expert capacity for measuring a gerrymander's effectiveness and durability, the Chief Justice instead concluded that "asking judges to predict how a particular districting map will perform in future elections risks basing constitutional

³³⁵ *Id.* at 875–76, 893–94.

³³⁶ *Rucho*, 139 S. Ct. at 2491.

³³⁷ *Id.* at 2498 (internal quotations marks omitted).

³³⁸ *Id.* at 2499.

³³⁹ *Id.* at 2503.

³⁴⁰ *Id.*

holdings on unstable ground outside judicial expertise.”³⁴¹ Justice Scalia could not have put it better, unless he already had in *Vieth* fifteen years earlier in 2004. Apparently, in the majority’s view, nothing much relevant had changed since then in American politics.

*B. The Cold War Baseline: Mismatched Understandings
About Partisanship and Gerrymandering*

The Court’s political gerrymandering decisions reflect Cold War complacency about partisanship that no longer tracks today’s politics. The Court resists judicial intervention into what it sees as an inherently political and messy process of redistricting, but this resistance is rooted in a broad skepticism about how well partisanship predicts voting such that concrete representational harms can be attributed to gerrymandering. The majority’s political priors, which underpin this resistance to judicial intervention, all date from an earlier era when neither partisanship nor gerrymandering were as intense and persistent as today’s versions. These foundational assumptions no longer reflect the basic empirical reality.

First, the inherited law of political gerrymandering assumes that partisanship is far more fluid, and voting less predictable, than they are today. Of course, Justice O’Connor argued in *Bandemer* that voters change partisanship and vote for different parties from election to election, but even two decades later, Justice Scalia in *Vieth* complained about the unpredictable fluidity of partisan affiliation. Partisan loyalty, he claimed, “may shift from one election to the next; and even within a given election, not all voters follow the party line.”³⁴² Along these lines, a federal circuit court noted that a losing candidate “need only wait one term to put together a different coalition if the elected representative proves to be unresponsive to any group of constituents.”³⁴³ As a consequence, Justice Scalia asserted that prediction of partisan outcomes required “a sea of imponderables” and “determinations that not even election experts can agree upon.”³⁴⁴ One district court, dismissing gerrymandering claims against a congressional plan as “highly impractical,” likewise agreed that “[v]oting statistics for past elections . . . can be grossly unreliable when used for prognostication.”³⁴⁵ In *Gill*, decided in 2018, the Court still rejected overwhelming evidence about the partisan effects of the Wisconsin gerrymander as “conjectural or hypothetical,” insufficient to provide injury in fact and

³⁴¹ *Id.* at 2503–04.

³⁴² *Vieth*, 541 U.S. at 287.

³⁴³ *Houston v. Haley*, 859 F.2d 341, 343 (5th Cir. 1988).

³⁴⁴ *Vieth*, 541 U.S. at 290.

³⁴⁵ *Wendler v. Stone*, 350 F. Supp. 838, 840 (S.D. Fla. 1972).

standing for the plaintiffs in the case.³⁴⁶ And of course, in *Rucho*, the Court still believed, quoting *Bandemer*, that “prognostications as to the outcome of future elections . . . invites findings on matters as to which neither judges nor anyone else can have any confidence.”³⁴⁷ The Court in *Rucho* explained that ticket splitting and party switching, among other considerations, made reliance on partisanship to predict voting “unstable ground” for constitutional law.³⁴⁸

But if it were true that partisanship was fluid and unpredictable during the Cold War, it is quite less true today. Admittedly, voters *were* less predictable during the bipartisan Cold War, as they more frequently split their ticket or otherwise voted against their party identification depending on the candidate. That said, voters *today* are far more likely to display consistent voting patterns in favor of one party over the other than voters did during the Cold War.³⁴⁹ As I have detailed, modern voters are quite unlikely to split their ticket or switch parties between elections. Like nineteenth-century voters, today’s voters tend overwhelmingly to be consistent and loyal partisans from election to election. In fact, it is this predictability among today’s voters that makes it easier and safer to gerrymander aggressively with certainty about how a redistricting map will perform. As the redistricting consultant for North Carolina’s 2011 and 2016 gerrymanders testified, “the underlying political nature of the precincts in the state does not change no matter what race you use to analyze it” and as a result, “once a precinct is found to be a strong Democratic precinct, it’s probably going to act as a strong Democratic precinct in every subsequent election.”³⁵⁰ And what’s true for North Carolina is truer everywhere else than it has been in more than a century. Indeed, even political scientist Ronald Gaddie, himself a co-creator of the *Whitford* gerrymander in Wisconsin, agreed that voters’ predictable partisanship makes it “relatively straightforward for competent experts to provide their assessments” of how a gerrymander will perform.³⁵¹ Indeed, he urged the Court to intervene against partisan gerrymanders like his own handiwork in Wisconsin.³⁵² The Court’s skepticism about the pre-

³⁴⁶ *Gill*, 138 S. Ct. at 1932 (internal quotation marks omitted); see also *Benisek*, 348 F. Supp. 3d at 527 (Bredar, C.J., concurring) (“The inherent uncertainty in what causes individuals to vote as they do in a particular election makes it challenging—perhaps impossible—to conclude that a given instance of partisan gerrymandering caused an election to turn out as it did.”).

³⁴⁷ *Rucho*, 139 S. Ct. at 2502 (alteration in original).

³⁴⁸ *Id.* at 2504.

³⁴⁹ See Alan I. Abramowitz & Steven W. Webster, *Negative Partisanship: Why Americans Dislike Parties but Behave Like Rabid Partisans*, 39 *ADVANCES POL. PSYCH.* 119, 131 (2018).

³⁵⁰ *Rucho*, 318 F. Supp. 3d at 806.

³⁵¹ Brief of Bernard Grofman & Ronald Keith Gaddie as Amici Curiae in Support of Neither Party at 32, *Gill*, 138 S. Ct. 1916 (2018) (No. 16-1161).

³⁵² Brief of Bernard Grofman and Ronald Keith Gaddie as Amici Curiae in Support of Neither Party at 32, *Rucho*, 139 S. Ct. 2484 (2019) (No. 16-1161).

dictability of voters is not shared by the engineers of these gerrymanders who exploit it to unprecedented effectiveness.

Second, because voters are more predictably partisan than they were during the Cold War, gerrymandering is far more effective today than it was then. Modern hyperpartisanship means that voters too are more identifiably distinct and predictable based on their partisanship.³⁵³ In *Bandemer* itself, though, Justice O'Connor argued that partisan gerrymanders had limited effect because they were inherently a "self-limiting enterprise."³⁵⁴ Self-limiting in the sense that an aggressive gerrymander exposes "its own incumbents to greater risks of defeat."³⁵⁵ Citing *Bandemer*'s warning that an "overambitious gerrymander can lead to disaster for the legislative majority," a district court concurred that the minority should "take solace in the fact that even the best laid plans often go astray" in redistricting.³⁵⁶ As a consequence, courts have comfortably concluded that they need not be "in business to compensate for political errors, misfortunes or strokes of fate, which may leave political parties at some temporary disadvantage."³⁵⁷

This argument once resonated in an earlier age when partisanship and partisan voting was less predictable; I myself sympathized with a similar claim not so long ago.³⁵⁸ But any past tradeoff between electoral security and legislative seats in gerrymandering appears to be far less today than even a decade ago. As we have seen in Wisconsin, North Carolina, and other states, gerrymanders today are far more durable and lasting in their partisan bias than they once were. Still, the Supreme Court majority has yet to acknowledge any need to revisit its empirical assumptions over the course of its gerrymandering decisions, even as lower courts continue to shift in favor of plaintiffs below.³⁵⁹ In *Rucho*, Chief Justice Roberts actually persisted in citing the chief example of the Indiana gerrymander in *Bandemer*, from three decades prior, to illustrate

³⁵³ See *supra* notes 235–245 and accompanying text.

³⁵⁴ *Bandemer*, 478 U.S. at 152 (O'Connor, J., concurring).

³⁵⁵ *Id.*

³⁵⁶ *Pope v. Blue*, 809 F. Supp. 392, 399 (W.D.N.C. 1992).

³⁵⁷ *Rybicki v. State Bd. of Elections of Ill.*, 574 F. Supp. 1082, 1104 (N.D. Ill. 1982).

³⁵⁸ See generally Kang, *supra* note 280 (describing this former tradeoff).

³⁵⁹ See generally *Rucho*, 139 S. Ct. 2484 (ruling partisan gerrymandering claims non-justiciable); *Gill*, 138 S. Ct. 1916 (finding lack of standing and declining to consider merits of partisan gerrymandering claims); *Vieth*, 541 U.S. 267 (declining to consider merits of partisan gerrymandering claim but leaving open possibility of such future claims). Before *Rucho*, courts were allowing partisan gerrymandering claims to proceed and at times ruling in plaintiff's favor. See, e.g., *Ohio A. Philip Randolph Inst. v. Householder*, 367 F. Supp. 3d 697, 722 (S.D. Ohio 2019); *Rucho*, 318 F. Supp. 3d at 941; *Whitford*, 218 F. Supp. 3d at 926–27; *League of Women Voters v. Commonwealth*, 178 A.3d 737, 801–02 (Pa. 2018).

his point that gerrymanders are inherently unstable and can backfire when the partisan tides reverse.³⁶⁰

In fact, the durability of the *Whitford* gerrymander, Gaddie's own work, testifies to the advances in gerrymandering. Four election cycles later, Wisconsin Democrats have been unable to dent the *Whitford* gerrymander despite winning decisively at the statewide level in 2018.³⁶¹ The *Whitford* plaintiffs, in fact, rested their constitutional case on their social-scientific showing that the gerrymander's efficiency gap of 10% to 13% was among the highest ever by historical comparison and likely to "exhibit a large and durable advantage in favor of Republicans over the rest of the decade."³⁶² Democrats were similarly thwarted in other states with highly effective Republican gerrymanders, including North Carolina and Ohio.³⁶³ No longer, if ever, is gerrymandering a "self-limiting" enterprise whose effects could backfire as the decade progresses.³⁶⁴ Again, the majority's political assumptions, developed during the Cold War experience, no longer held true.

Third, the inherited law of partisan gerrymandering assumes that gerrymandering requires the majority party to moderate itself as the price of winning more seats. In *Vieth*, Justice Scalia explicitly foregrounded this tradeoff as a check on the majority party's aggressiveness. He explained that gerrymandering requires the majority to assume greater electoral risk by spreading its voters more thinly and thus creating more competitive districts in which the majority would be more vulnerable. Justice Scalia assumed that more competitive districts also would be more centrist and therefore prone to elect more moderate candidates, whether Democrats or Republicans. On this point, he complained that the Equal Protection Clause did not take sides on whether Democrats should have "10 wishy-washy Democrats . . . or 5 hardcore Demo-

³⁶⁰ *Rucho*, 139 S. Ct. at 2503.

³⁶¹ See *supra* notes 311–316 and accompanying text.

³⁶² *Whiford*, 218 F. Supp. 3d at 861 (quoting plaintiffs' expert Simon Jackman).

³⁶³ See William T. Adler & Stuart A. Thompson, Opinion, *The 'Blue Wave' Wasn't Enough to Overcome Republican Gerrymanders*, N.Y. TIMES (Nov. 7, 2018), <https://www.nytimes.com/interactive/2018/11/07/opinion/midterm-elections-2018-republican-gerrymandering.html> [<https://perma.cc/NT8B-JCJ7>]; Maggie Astor & K.K. Rebecca Lai, *What's Stronger Than a Blue Wave? Gerrymandered Districts*, N.Y. TIMES (Nov. 29, 2018), <https://www.nytimes.com/interactive/2018/11/29/us/politics/north-carolina-gerrymandering.html> [<https://perma.cc/ZE8W-2BHP>]; see also David A. Lieb, *Redistricting Edge Saved GOP from Deeper Midterm Losses*, ASSOCIATED PRESS (Mar. 23, 2019), <https://talkingpointsmemo.com/news/gop-redistricting-edge-moderated-democrats-midterms-gains> [<https://perma.cc/DU9Q-ULCE>] (estimating that gerrymandering enabled Republicans to win sixteen more House seats and control seven more state houses than would have been expected based on their share of the vote).

³⁶⁴ The so-called "dummymanders" that backfire on the majority are far less likely today. See generally Bernard Grofman & Thomas L. Brunell, *The Art of the Dummymander*, in REDISTRICTING IN THE NEW MILLENNIUM 183 (Peter Galderisi ed., 2005); see also *Rucho*, 139 S. Ct. at 2512–13 (Kagan, J., dissenting).

crats.”³⁶⁵ That is, Justice Scalia reasoned that aggressive gerrymandering necessarily requires dilution of a party’s ideological purity as the offset price of doing business.

Again, if that were true in 2004, it appears much less true today. There is little empirical evidence suggesting that district composition today influences ideological polarization, all while gerrymandering has become more aggressive and common.³⁶⁶ Whether a district is competitive or safe seems to have virtually no impact on legislator ideology because there are almost no “wishy-washy” Democrats or Republicans elected to Congress today—regardless of district competitiveness. What matters ideologically is whether a Democrat or a Republican represents the district and whether a Democratic or Republican majority controls the legislature.³⁶⁷ The complete disappearance of ideological overlap between Republicans and Democrats in Congress and the widening ideological distance between the parties, coinciding with the worsening intensity of gerrymandering, testifies to the obsolescence of these assumptions about redistricting politics.

Courts occasionally even claim that independent voters in the partisan middle should be responsible for policing aggressive partisan gerrymandering by one side or the other. One district court, dismissing a gerrymandering claim, argued that gerrymandering must be “dealt with not by this court, but by the electorate, however their hearts and minds lead them.”³⁶⁸ By this logic, independent voters in the political middle—offended that “those in power are corrupting the free political process through anti-democratic . . . practices”—should punish the majority for its overreach.³⁶⁹ According to this court, “it is up to an offended and affronted electorate to make things right.”³⁷⁰ But in today’s politics, there are fewer and fewer independent voters in the middle to dole out such punishment to the majority party. Instead, even independent vot-

³⁶⁵ *Vieth*, 541 U.S. at 288 n.9.

³⁶⁶ *See, e.g.*, Devin Caughey et al., *Partisan Gerrymandering and the Political Process: Effects on Roll-Call Voting and State Policies*, 16 *ELECTION L.J.* 453, 456 (2017); David S. Lee et al., *Do Voters Affect or Elect Policies? Evidence from the U.S. House*, 119 *Q.J. ECON.* 807, 810 (2004); Nolan McCarty et al., *Does Gerrymandering Cause Polarization?*, 53 *AM. J. POL. SCI.* 666, 667 (2009). *See generally* Thomas L. Brunell et al., *Replacement in the U.S. House: An Outlier Chasing Model*, 22 *PARTY POL.* 440 (2016) (explaining that the parties target centrist legislators of the other party and thereby hollow out the ideological middle).

³⁶⁷ *See* Caughey, *supra* note 366, at 460–61.

³⁶⁸ *LaPorte Cty. Republican Cent. Comm. v. Bd. of Com’rs*, 851 F. Supp. 340, 343 (N.D. Ind. 1994); *see also* *Agre v. Wolf*, 284 F. Supp. 3d 591, 629 (E.D. Pa. 2018) (“[N]o partisan map can overcome the will of a broad electorate that seeks such fundamental change.”).

³⁶⁹ *LaPorte*, 851 F. Supp. at 344.

³⁷⁰ *Id.* at 345.

ers display consistent partisan loyalties and vote according to those leanings, which makes them nearly as predictable as partisan voters.³⁷¹

Indeed, political stigma from one's own party, imagined by courts, for playing hardball and gerrymandering the other side has evaporated. Partisan animus has increased sharply with hyperpartisanship. Partisans on both sides actively dislike and distrust their opponents more than they have since pollsters have measured such sentiment. Fifty years ago, about 5% of partisans reported that they would be displeased if their child married someone from the opposing party. Today, half of Republicans and a third of Democrats say they would be displeased.³⁷² Forty-two percent of partisans say they view the opposition as "downright evil," and almost 20% of partisans agree "that the country would be better off if large numbers of opposing partisans in the public today 'just died.'"³⁷³

Consistent with this animus for the opposite party, legislators have become startlingly brazen in their open admissions of partisan intent to gerrymander. For example as noted above, the state redistricting chair, in *Rucho*, declared in a public session that the redistricting would be a political gerrymander because "electing Republicans is better than electing Democrats."³⁷⁴ All these hyperpartisan pressures mean that there are only increasing political incentives to gerrymander the other side, with few remaining political checks on the practice.³⁷⁵ Partisan voters may be as likely to root for redistricting advantages that boost their side as they would be to decry them for their anti-democratic results.³⁷⁶

Fourth, for all these reasons, the national frequency and magnitude of gerrymandering has expanded far beyond what the Court must have imagined when it began considering these cases during the Cold War. Today, not only is

³⁷¹ See, e.g., Bartels, *supra* note 171, at 36; Layman et al., *Activists and Conflict*, *supra* note 231, at 324–26. Justice Kagan attempted to make this point during oral argument in *Gill*. Transcript of Oral Argument at 53–54, *Gill*, 138 S. Ct. 1916 (2018) (No. 16-1161).

³⁷² Steven Levitsky & Daniel Ziblatt, Opinion, *How Wobbly Is Our Democracy?*, N.Y. TIMES (Jan. 27, 2018), <https://www.nytimes.com/2018/01/27/opinion/sunday/democracy-polarization.html> [<https://perma.cc/5WHP-9H7R>]; see also *Partisanship and Political Animosity in 2016*, PEW RES. CTR. (June 22, 2016), <https://www.people-press.org/2016/06/22/partisanship-and-political-animosity-in-2016/> [<https://perma.cc/PVY5-VULP>] (finding that 49% of Republicans and 55% of Democrats say the other party makes them "afraid").

³⁷³ See Nathan P. Kalmoe & Liliana Mason, *Lethal Mass Partisanship 22* (Jan. 2019) (unpublished manuscript), https://www.dannyhayes.org/uploads/6/9/8/5/69858539/kalmoe___mason_ncapsa_2019_-_lethal_partisanship_-_final_lmedit.pdf [<https://perma.cc/MH93-BQKR>] (presented at the January 2019 National Capital Area Political Science Association American Politics Meeting).

³⁷⁴ *Rucho*, 318 F. Supp. 3d at 801, 809.

³⁷⁵ See Charles & Fuentes-Rohwer, *supra* note 322, at 267–71.

³⁷⁶ See, e.g., Miller & Conover, *supra* note 2, at 225 (explaining that "the behavior of partisans resembles that of sports team members acting to preserve the status of their teams rather than thoughtful citizens participating in the political process for the broader good").

the majority party better at maximizing partisan advantage through redistricting, it is also much more likely to gerrymander in the first place. An important study of gerrymandering in the 1980s found not only that partisan bias from gerrymandering during that era was modest by today's standards, but also that the net national effect was barely distinguishable from zero.³⁷⁷ However, since then, the number of severe gerrymanders at the state legislative level, whether measured by efficiency gap or partisan bias, has more than doubled.³⁷⁸ Basically the same is true for congressional redistricting, as well.³⁷⁹

Partisan gerrymandering has not been this pervasive and widespread in more than a century. Modern gerrymandering today has spread to more states, with a stronger partisan bias on average per state. In addition, the *net national* level of bias in Congress is now greater than that of the average state-level gerrymander during the 1980s.³⁸⁰ In other words, Congress as a whole is today more biased by Republican gerrymandering in favor of Republicans than the average state legislature gerrymandered under unified party control was biased in the majority party's favor during the 1980s.

Gerrymandering is not only worse today in scope and intensity, but it also results in a national partisan skew that did not exist in the 1980s when *Bandemer* was decided. At both the state legislative and congressional levels, the average district plan in the current cycle is more skewed than at any point since 1972.³⁸¹ The 2012 election, in particular, saw the largest partisan tilts in modern history.³⁸² At both electoral levels, the correlation between a map's initial skew and its subsequent tilt over time has never been stronger.³⁸³ For example, this correlation is now above 0.8 for congressional plans, nearly a one-to-one correlation that is eight times higher than it was in the 1980s.³⁸⁴ The point is not that courts should care whether Republicans, as opposed to Democrats, benefit from gerrymandering. They should not. My point instead is that the partisan advantage that has emerged makes it much harder to dismiss gerrymandering today as inconsequential when it potentially determines parti-

³⁷⁷ Janet Campagna & Bernard Grofman, *Party Control and Partisan Bias in 1980s Congressional Redistricting*, 52 J. POL. 1242, 1253 (1990).

³⁷⁸ See *supra* notes 272–279 and accompanying text.

³⁷⁹ See *supra* notes 272–279 and accompanying text.

³⁸⁰ MCGANN ET AL., *supra* note 268, at 87.

³⁸¹ See generally Exhibit 3: Expert Report by Simon Jackson Assessing the Current Wisconsin State Legislative Districting Plan, *Whitford v. Gill*, 402 F. Supp. 3d 529 (W.D. Wis. 2019) (No. 1-3); MCGANN ET AL., *supra* note 268, at 4–5, 97–98 (reporting similar findings using partisan bias as a metric).

³⁸² See MCGANN ET AL., *supra* note 268, at 4–5, 97–98.

³⁸³ See Eric McGhee, *The Role of Partisan Gerrymandering in U.S. Elections 11* (Mar. 19, 2019) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3341696 [<https://perma.cc/5NJB-ETEA>].

³⁸⁴ See *id.*

san control of Congress between two fiercely opposed and highly competitive national parties.³⁸⁵

The modern acceleration of gerrymandering is not surprising because the policy incentives to gerrymander under hyperpartisan competition are so much greater today than during the Cold War. From 1931 to 1994, Democrats controlled the House of Representatives for thirty of thirty-two Congresses, a period which spanned the entire Cold War era. However, since the end of that stretch, control of the House has flipped four times in twenty-five years. What is more, the sense that congressional control was up for grabs has increased dramatically during the modern era; there was virtually no belief that Republicans, once regarded as a permanent minority, could seize the majority from the Democrats during the Cold War.³⁸⁶ Today, all that has changed, with neither party ever securely in the majority, and each perpetually protective of narrower majorities than those the Democrats enjoyed during the Cold War. As a result, both parties have far stronger incentives to strive for extra seats through aggressive gerrymandering, just as they did a century ago. Control of Congress, for instance, is constantly on the line in a way that had never been true during the Cold War era, but marks a return to the earlier run of American history. The same is largely true for the battles over state legislative control.³⁸⁷

Not only are the prospects for swinging majority control greater today, the policy payoffs from doing so are also much greater than they were during the Cold War. As I have explained, the average ideological distance between Republicans and Democrats has increased dramatically since the Cold War.³⁸⁸ As a result, the anticipated policy swing from one party to the other, or vice versa, even for control of a single seat, let alone the legislative majority, is far more meaningful than it once was. Given the diminishing policy overlap between the parties, bipartisan compromises with the legislative minority are far less

³⁸⁵ See generally Adam B. Cox, *Partisan Gerrymandering and Disaggregated Redistricting*, 2004 SUP. CT. REV. 409 (arguing that democratic distortion for congressional gerrymandering should be evaluated Congress-wide rather than state-by-state).

³⁸⁶ LEE, INSECURE MAJORITIES, *supra* note 121, at 28–36; see also LAWRENCE, *supra* note 120, at 296 (describing a “central premise of mid-twentieth-century House politics: that Democrats would retain majority control of the House indefinitely”).

³⁸⁷ See LEE, INSECURE MAJORITIES, *supra* note 121, at 180–97; MALCOLM E. JEWELL & SARAH M. MOREHOUSE, POLITICAL PARTIES AND ELECTIONS IN AMERICAN STATES 201–26 (2001). The battle for state legislative control has actually come down a single vote in a single house election twice in the last two years. Jose A. Del Real & Jill Cowan, *A Close Race, a Mysterious Ballot and Control of Alaska’s House at Stake*, N.Y. TIMES (Nov. 30, 2018), <https://www.nytimes.com/2018/11/30/us/alaska-house-race-recount-ballot.html> [<https://perma.cc/92X6-AN3V>]; Trip Gabriel, *A One-Vote Victory in Virginia Lasts One Day as Judges Declare a Tie*, N.Y. TIMES (Dec. 20, 2017), <https://www.nytimes.com/2017/12/20/us/virginia-house-election-tie.html> [<https://perma.cc/H6MV-E49J>].

³⁸⁸ See *supra* notes 246–254 and accompanying text.

likely today,³⁸⁹ and minority parties are more likely to obstruct the majority and block potential legislative victories in hopes of winning the next election and the legislative majority for itself.³⁹⁰ Even nonideological issues such as disaster relief and pandemic response appear driven by partisanship.³⁹¹

Finally, gerrymandering has become more effective, in part because redistricting technology and data has improved so much since the courts began deciding partisan gerrymandering cases during the Cold War. Although the intense pressure to gerrymander is not entirely new to American politics, today's hyperpartisanship can now be married to new redistricting computer technology—and even *super*computing technology—that would have boggled the minds of nineteenth-century politicians. Even as recently as the 1980s, map drawers worked with pen, paper, and precinct-level aggregate data that limited the effectiveness of their handiwork. Their modern counterparts have supercomputing power for simulations, individual-level data on voters and households, and redistricting software so easy to use that schoolchildren literally can use it to draw their own maps.³⁹² Speaking from direct experience, Professors Bernard Grofman and Ronald Gaddie warned in their amicus brief in *Gill*, “With vastly improved computer speed, memory, and storage, map drawers can design district lines so precisely that they simultaneously maximize their party’s gains and eliminate most competitive districts—ensuring . . . an electoral advantage that endures throughout the following decade.”³⁹³ Simply put, new computer capability has coincided with the re-emergence of hyperpartisanship to produce gerrymanders of unimaginable effectiveness. As Justice Kagan warned in her *Rucho* dissent, “These are not your grandfather’s—let alone the Framers’—gerrymanders.”³⁹⁴

³⁸⁹ See generally FRANCES E. LEE, *BEYOND IDEOLOGY: POLITICS, PRINCIPLES AND PARTISANSHIP IN THE U.S. SENATE* (2009) [hereinafter LEE, *BEYOND IDEOLOGY*] (arguing that many partisan battles stem from the competition for power rather than genuine policy disagreement or differing views of the rightful role of government—a dynamic that makes bipartisan compromise less likely). *But see generally* LAUREL HARBRIDGE, *IS BIPARTISANSHIP DEAD? POLICY AGREEMENT AND AGENDA SETTING IN THE HOUSE OF REPRESENTATIVES* (2015).

³⁹⁰ See generally LEE, *BEYOND IDEOLOGY*, *supra* note 389.

³⁹¹ See, e.g., Mark Z. Barabak, *No Immunity from Political Attacks as Coronavirus Sweeps the Country*, *LA TIMES* (Mar. 23, 2020), <https://www.latimes.com/politics/story/2020-03-23/coronavirus-politics-partisan-fighting> [https://perma.cc/8CAZ-E9J2]; Janet Hook, *Even the Coronavirus Crisis Can't Bridge America's Partisan Divide*, *LA TIMES* (Mar. 20, 2020), <https://www.latimes.com/politics/story/2020-03-20/coronavirus-crisis-cant-bridge-partisan-divide> [https://perma.cc/KBT8-KTRQ]; Matt Viser & Seung Min Kim, *For Trump Even Disaster Response Is Colored in Red and Blue*, *WASH. POST* (Nov. 13, 2018), https://www.washingtonpost.com/politics/president-trump-again-blames-california-for-a-natural-disaster-adding-to-his-public-denunciations-of-the-strongly-democratic-state/2018/11/12/811626de-e6ab-11e8-bbdb-72fdbf9d4fed_story.html [https://perma.cc/6VHT-3FU9].

³⁹² See, e.g., DALEY, *supra* note 287, at 51–60.

³⁹³ Grofman & Gaddie, *supra* note 352, at 4–5.

³⁹⁴ *Rucho*, 139 S. Ct. at 2513 (Kagan, J., dissenting).

Ironically, Justice Kennedy anticipated the impact of technological advances on redistricting in his *Vieth* opinion. There, he pointed to the potential of new technology for future solutions. He acknowledged the “rapid evolution of technologies in the apportionment field” and that “[c]omputer assisted districting ha[d] become so routine and sophisticated that legislatures, experts, and courts [could] use databases to map electoral districts in a matter of hours, not months.”³⁹⁵ He thus viewed technology as “both a threat and a promise.”³⁹⁶ He foresaw how technology could exacerbate the partisan bias from gerrymandering and make the practice easier and more pervasive, just as it has become. Nonetheless, he also foresaw that new technology could “produce new methods of analysis that make more evident the precise nature of the burdens gerrymanders impose on the representational rights of voters and parties.”³⁹⁷ It therefore could “facilitate court efforts” by providing judicially manageable standards for judging the representational burdens inflicted by a challenged gerrymander.³⁹⁸

Indeed, Justice Kennedy was right on both predictions. As I have explained, computer technology and better data have made gerrymanders more effective and durable in the decade and a half since *Vieth*. Computer technology and better data have also advanced the ability of political scientists and statisticians to quantify the representational burdens imposed by partisan gerrymanders in a historical context.³⁹⁹ *Gill* and *Rucho*, in fact, featured a series of amicus briefs from academics all agreeing with Professor Gaddie that “statistical tools for detecting and measuring partisan gerrymanders [had] improved greatly” over the past decade.⁴⁰⁰ Not only have statistical metrics for measuring the severity of gerrymandering advanced since *Vieth*, but a whole new field of supercomputing simulations have developed for testing the partisan effect of gerrymanders.⁴⁰¹ Supercomputers can use traditional redistricting criteria to generate thousands of redistricting plans by algorithm and thereby demonstrate

³⁹⁵ *Vieth*, 541 U.S. at 312 (Kennedy, J., concurring in part, dissenting in part).

³⁹⁶ *Id.*

³⁹⁷ *Id.* at 313.

³⁹⁸ *Id.*

³⁹⁹ See, e.g., Michael Wines, *Just How Bad Is Partisan Gerrymandering? Ask the Mapmakers*, N.Y. TIMES (Jan. 29, 2018), <https://www.nytimes.com/2018/01/29/us/gerrymander-political-maps-maryland.html> [<https://perma.cc/6Q89-LBJ6>] (describing the existence of a “cottage industry of statisticians, computer jockeys and political sages whose business is to turn demographic data into electoral maps”).

⁴⁰⁰ Grofman & Gaddie, *supra* note 351, at 7.

⁴⁰¹ See generally Bruce E. Cain, et al., *A Reasonable Bias Approach to Gerrymandering: Using Automated Plan Generation to Evaluate Redistricting Proposals*, 59 WM. & MARY L. REV. 1521 (2018) (presenting a statistical model that allows re-districters to generate legislative maps that would be objectively constitutional); Chen & Rodden, *supra* note 319 (demonstrating how re-districting algorithms can be used to measure whether a particular legislative map is constitutional).

for litigation purposes the exceptionality and egregiousness of the partisan bias produced by actual gerrymanders. Such simulation data were cited extensively in litigation over gerrymanders in Michigan, North Carolina, Pennsylvania, and Wisconsin.⁴⁰² *Whitford* and *Rucho* were virtual referenda on the new field of gerrymandering science.

The Court, by refusing to accept any of the many new social science methods for measuring partisan effect, disabled only one side of the arms race between redistricters and their watchdogs. Now, after *Rucho*, the Court has withdrawn entirely from the field despite the abundance of sophisticated social science methods for measuring and policing partisan bias⁴⁰³—which Justice Roberts dismissed as “sociological gobbledegook.”⁴⁰⁴ Even as gerrymandering becomes more sophisticated and powerful in the 2020s, lower courts will be sidelined by the Supreme Court’s outdated understandings and refusal to intervene. Meanwhile, all the hired guns who design today’s modern gerrymanders enjoy the full, increasing benefit of these technological advances and are able to draw more biased maps for the legislative majority. All this expertise makes gerrymandering worse, while *Rucho* permits no countervailing opportunity under the federal Constitution to apply this expertise on the side of regulation.

Some of these outdated assumptions about partisanship are understandable for many of us. Almost any federal judge today came of age and has spent most of her adult life during the Cold War era before hyperpartisanship returned. Indeed, for those of the Cold War generation, the era understandably influences our expectations and norms about partisanship and bipartisan cooperation.⁴⁰⁵ Bipartisanship remains powerfully attractive even in today’s politics, and gentlemanly figures from the Cold War are remembered fondly as “leader[s] of the old school who tried to work with others to get things done and disdained the kind of go-for-the-jugular politics so common today.”⁴⁰⁶ To-

⁴⁰² See generally *Raleigh Wake Citizens Ass’n v. Wake Cty. Bd. of Elections*, 827 F.3d 333 (4th Cir. 2016); *Johnson*, 352 F. Supp. 3d at 777; *Rucho*, 318 F. Supp. 3d at 777; *Common Cause v. Rucho*, 284 F. Supp. 3d 780 (M.D.N.C. 2018); *Whitford*, 218 F. Supp. 3d at 837; *League of Women Voters*, 178 A.3d at 737.

⁴⁰³ See Michael S. Kang, *The End of Challenges to Partisan Gerrymandering*, REG. REV. (July 17, 2018), <https://www.theregreview.org/2018/07/17/kang-end-challenges-partisan-gerrymandering/> [<https://perma.cc/2LRY-CHWN>] (“It is easy now to foresee that the Court will sooner close the door altogether on gerrymandering claims than provide any new constitutional restraints on partisan gerrymandering in the future.”).

⁴⁰⁴ Oral Argument at 35:21, *Gill*, 138 S. Ct. 1916 (2018) (No. 16-1161), <https://www.oyez.org/cases/2017/16-1161> [<https://perma.cc/65XQ-E6WK>].

⁴⁰⁵ See generally Stoker & Jennings, *supra* note 186 (finding significant generational differences in intensity of partisanship).

⁴⁰⁶ Kenneth T. Walsh, *George H.W. Bush’s Passing Is the End of an Era*, U.S. NEWS (Dec. 1, 2018), <https://www.usnews.com/news/national-news/articles/2018-12-01/george-hw-bush-41st-president-of-the-united-states-dies-at-94> [<https://perma.cc/KS3P-RL2H>]; see, e.g., Sean J. Westwood, *The Partisanship of Bipartisanship: How Representatives Use Bipartisan Assertions to Cultivate Support*,

day's inherited election law still reflects its earlier roots in this era and its understandings of partisanship, voting, and redistricting.

However, these assumptions today are outmoded and underestimate the democratic challenges posed by modern hyperpartisan gerrymandering in almost every respect. Modern hyperpartisanship, and hyperpartisan gerrymandering, are a different breed of politics than what prevailed during the Cold War. Over the course of American history, it is the Cold War era that stands out as historically unusual in terms of the partisanship and redistricting. The earlier American history more resembles today's hyperpartisanship than the Cold War bipartisanship that many fondly remember and pine for. Today's hyperpartisanship is not simply a function of certain bad actors or a temporary confluence of odd events.⁴⁰⁷ Hyperpartisanship and its attendant hyperpartisan gerrymandering are likely to be permanent conditions of American politics, a reversion back to the historical norm, and require judicial adjustment to the law of partisan gerrymandering. Worse, continued judicial acquiescence to modern hyperpartisanship tacitly permits its greatest excesses to spread more widely and become more intense across not just election law, but all public law.⁴⁰⁸

I have argued elsewhere how courts should confront modern gerrymandering.⁴⁰⁹ After *Rucho*, there is no justiciable federal constitutional claim any longer, and even state courts under state constitutional law may permit the government to gerrymander freely for partisan advantage unless its partisan effect "has gone too far."⁴¹⁰ Courts still often defer to the government on the discretionary matter of redistricting as "quintessentially a political process."⁴¹¹ I argue that, as a basic matter of constitutional law, the state must justify its redistricting decisions in terms of a legitimate government lawmaking interest. Partisan advantage for its own sake ought not to count as a legitimate government interest, just as it does not in other areas of constitutional law.⁴¹² Correcting the law to disallow the government from asserting bare partisanship as a basis for lawmaking would curb partisan gerrymandering under a clear, manageable standard, without complicating judicial involvement in redistricting.

<http://www.dartmouth.edu/~seanjwestwood/papers/bipartisan.pdf> [https://perma.cc/UQM6-8F9U] (unpublished manuscript). Despite the hyperpartisan nature of politics today, many Americans still recall wistfully and hold in high regard bipartisan leaders of the Cold War era.

⁴⁰⁷ See generally Pildes, *supra* note 4 (detailing several different factors accounting for America's increasingly hyperpartisan politics).

⁴⁰⁸ Charles & Fuentes-Rohwer, *supra* note 322, at 258–75.

⁴⁰⁹ Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 MICH. L. REV. 351, 403 (2017).

⁴¹⁰ See *Vieth*, 541 U.S. at 291; see also *Rucho*, 139 S. Ct. at 2484; *O'Leary v. Miller*, 222 F. Supp. 2d 850, 855 (E.D. Mich. 2002).

⁴¹¹ *Benisek*, 348 F. Supp. 3d at 511–12.

⁴¹² See Kang, *supra* note 409, at 378–402.

My purpose in this Article, however, is simply to expose the broken assumptions underlying the existing law of partisan gerrymandering as it has evolved. Perhaps the Court's expectation is that gerrymandering becomes less pervasive and less intense over time, as its gerrymandering decisions seem to suggest is inevitable. Nonetheless, the underlying conditions that drive modern hyperpartisan gerrymandering, namely today's hyperpartisanship, are strikingly different from the American politics that many assume as a baseline expectation about partisanship, and these conditions are exceptionally likely to persist for the foreseeable future as the normal state of American politics.

CONCLUSION

Courts began and developed redistricting law during the Cold War, a period when partisanship was exceptionally low by the historical standards of American history. The resulting blind spot in redistricting law deeply underestimates the magnitude, pervasiveness, and durability of modern gerrymandering, which now has reverted back to its historical norm along with the usual hyperpartisanship that has characterized American politics before the Cold War. This Article exposes the roots of this blind spot and the courts' stubborn resistance to addressing partisan gerrymandering in the modern age, culminating in *Rucho*.

This story of the Cold War's influence on law is not limited to redistricting law, or even election law. Most of modern American public law was likewise developed over the past eighty years. Virtually all administrative law, environmental law, much of free speech, media, and national security law, and certainly the rest of election law was decided over the same period of historically exceptional bipartisanship when the parties were comparatively at peace. The re-emergence of modern hyperpartisanship mismatches this inherited public law with the political circumstances assumed at its origination and may require a similar reckoning across many areas of law within our entirely different hyperpartisan context.⁴¹³ It is law that requires adjustment, if anything, because these politics are familiar to American history and likely here to stay.

⁴¹³ Rick Pildes and Daryl Levinson present a related but different argument, contending that, from the Founding onward, unified and cohesive parties swamped the institutional rivalry between different branches of government assumed by the Madisonian conception of separation of powers. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311 (2006).

