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### The Dance of Partisanship and Districting

Nicholas O. Stephanopoulos

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# The Dance of Partisanship and Districting

Nicholas O. Stephanopoulos\*

*Academic studies of redistricting tend to be either doctrinal or empirical, but not both. As a result, the literature overlooks some of the most important aspects of the mapmaking process and its judicial supervision, like how they relate to the broader American political context. In this Article, I try to fill this gap. I first observe that the half-century in which federal courts have decided redistricting cases can be divided into two periods: one lasting from the 1960s to the 1980s, in which voters and politicians were both comparatively nonpartisan; and another reaching from the 1990s to the present day, which amounts to perhaps the most hyperpartisan era in our country's history. I then explore how redistricting law has responded to the ebbs and flows of partisanship. In the earlier timeframe, courts (properly) focused on nonpartisan line-drawing problems like rural overrepresentation and racial discrimination. In the hyperpartisan present, on the other hand, courts have (regrettably) refrained from confronting directly the threat, partisan gerrymandering, that now looms above all others. Instead, courts have either shut their eyes to the danger or sought to curb it indirectly through the redeployment of nonpartisan legal theories.*

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## INTRODUCTION

Suppose you live in a relatively nonpartisan period: an era in which voters and politicians are not highly motivated, or divided, by partisanship. Suppose also that you are asked to design a district map for some jurisdiction. How would you approach your task? Odds are you would *not* try to gerrymander in favor of your preferred party. Partisan advantage would not top your list of priorities in this nonpartisan age, and gerrymandering could be futile anyway due to voters' and politicians' unstable partisan attachments. Instead, you might follow traditional redistricting criteria like compactness and respect for political subdivisions. Or you might aim to protect incum-

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bents of both parties. Or, more deviously, you might seek to reduce other groups' representation by dispersing or highly concentrating their voters. Not *partisan* groups, mind you, but rather blocs defined by more salient cleavages like region, ethnicity, or race.

Now imagine that you are still the designated line-drawer, but that you live in a hyperpartisan period in which party trumps all other factors for the electorate and the political elite. In this scenario, you would have a nearly irresistible incentive to gerrymander. Partisan gain would take precedence over your other redistricting objectives. Gerrymandering would also be both feasible (due to voters' predictable behavior) and consequential (since most candidates would toe the party line after being elected). In contrast, you would have little reason to heed traditional criteria, to shield the other party's incumbents, or to try to harm regional, ethnic, or racial groups. These goals would pale compared to the imperative of benefiting your party and handicapping the opposition.

Next, put yourself in the shoes not of a mapmaker but rather of a judge evaluating a district map. Posit, too, that you are at least somewhat public-minded—aspiring to enforce the Constitution, statutory requirements, and basic democratic values—and not fully in the thrall of a party or another political faction. In a less partisan era, you would probably not be very concerned about partisan gerrymandering. You would recognize that it is both an infrequent act and one that often backfires on its architects. On the other hand, you might be quite worried about nonpartisan redistricting abuses, like efforts to underrepresent urban or minority voters. These tactics could be more common, and more effective, in an age when region, ethnicity, and race are the key political fault lines.

In a hyperpartisan period, lastly, your judicial agenda would likely be quite different. Partisan gerrymandering would pose a greater danger, while nonpartisan redistricting schemes would be less threatening, and it would be sensible for your case law to reflect this reality. But *how* would your doctrine adapt? The most obvious response would be a direct one: the invalidation of district maps precisely because their motives, or consequences, are overly partisan. Remember, though, that you are only reasonably public-minded, not a profile in impartiality or courage. You might therefore shy away from a direct response because it could require you to rule against your preferred party or to face intense resistance from legislators desperate to keep their seats. Instead of frontal confrontation, you might choose to do nothing: to avoid judicial intervention and to uphold district maps whenever they are challenged on partisan grounds. Or, somewhat more boldly, you might opt for an indirect response. In this mode, you would still refrain from striking down maps because they are partisan gerrymanders, but you would deploy *other* legal theories—*nonpartisan* ones—to check the partisan manipulation of district lines.

I have a normative perspective about which of these options is best. In my view, election law should focus on whichever cleavage happens to dominate a given era's politics. It should vigilantly guard against attempts to ex-

plot this cleavage in favor of one group and against other factions. In a hyperpartisan age, this means election law should be highly sensitive to the problem of partisan gerrymandering. It also means the field should grapple openly with gerrymandering, not try to address it obliquely through half-measures unlikely to succeed.

But this normative terrain is ground I have previously covered.<sup>1</sup> Here, I want to tackle a related descriptive question: How *have* courts responded—not how *should* they respond—to the ebb and flow of partisanship over American history, in the redistricting context in particular? Have they largely ignored partisan gerrymandering in relatively nonpartisan periods (as above I suggested they might)? What about in hyperpartisan times—what steps have courts taken then? Have they sought to curb gerrymandering directly, to fight it by repackaging nonpartisan causes of action, or to retreat entirely from the field of battle?

Before engaging with this question, it is necessary to know how partisanship has, in fact, waxed and waned in American politics. For present purposes, the relevant era can be taken to start in the early 1960s, when the Supreme Court held, for the first time, that redistricting disputes are justiciable.<sup>2</sup> From that date through the 1980s, voters and politicians were both startlingly nonpartisan. Many voters split their tickets to back different parties' candidates, changed their votes from one election to another, and evaluated both major parties favorably. Officeholders too were remarkably fluid in their partisan and ideological allegiances. They often bucked their parties and espoused moderate positions, causing congressional polarization to fall to its modern nadir.

As even a casual observer can attest, this description does not come close to capturing the present day. To the contrary, from the 1990s onward, the partisanship of the American political system steadily intensified, and has now reached unprecedented heights. Voters today are less likely to split their tickets, more apt to back the same party from year to year, and more negative in their impressions of the opposing party, than at any point since the advent of polling. Members of Congress, likewise, are more divided along party lines than ever before. Not only is there no ideological overlap between the parties' respective legislators, but a vast ideological gulf separates the typical Democratic representative from the typical Republican.

With this background established, we can return to my central inquiry: the interplay between partisanship and judicial behavior in the redistricting domain. I claim here that in the comparatively nonpartisan 1960s, 1970s, and 1980s, courts indeed directed their energies at issues other than partisan

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<sup>1</sup> See, e.g., Nicholas O. Stephanopoulos, *Elections and Alignment*, 114 COLUM. L. REV. 283 (2014) (arguing that election law should aim for the alignment of policy outcomes with popular preferences); Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831 (2015) (contending that this general alignment principle requires judicial action against partisan gerrymandering, using result-oriented measures like the efficiency gap).

<sup>2</sup> See *Baker v. Carr*, 369 U.S. 186, 208–37 (1962).

gerrymandering. They neither intended to combat partisan line-drawing abuses, nor did their decisions have the effect of advantaging either party. Consider the one person, one vote rule, announced by the Supreme Court in the mid-1960s and requiring a jurisdiction's districts to have approximately the same population.<sup>3</sup> In nearly every state, the malapportionment that prompted the Court to step in favored rural (not necessarily Democratic or Republican) areas. So by compelling equally populated districts, the Court did not expect to benefit either party. But it did anticipate making representation fairer for urban and suburban voters throughout the country.

Or take the Court's efforts to protect minority voters against schemes that diluted the impact of their ballots or otherwise reduced their electoral influence.<sup>4</sup> Most of these efforts involved laws enacted in the (still) Solid South—a region that elected almost no Republicans, at any level, for the century after the end of Reconstruction. By eliminating practices that undermined African Americans' political clout, the Court thus exchanged some white Democratic officeholders for black Democrats. But at least in the short run, the Court did not give a comparable boost to Republican electoral fortunes.

In the short run is an important qualifier. Eventually, the rise of black political power in the South helped to terminate the less partisan Cold War period, and to bring about the very different age in which we now live. The causal sequence was as follows: In response to the growing sway of African Americans, southern white voters began to support Republican candidates in ever increasing numbers. Over time, this trend resulted in the virtual extinction of moderate white Democratic politicians in the South, and their replacement by conservative white Republicans. This substitution hastened the sorting of America's political elites. Democratic officeholders became more uniformly liberal, and Republicans more consistently conservative. The country's voters, in turn, reacted to the sorting of the elites by rearranging themselves too. Party affiliations and policy views, previously linked only tenuously, developed a much stronger bond, such that most Democratic voters placed themselves on the left side of the ideological spectrum, and most Republicans on the right.<sup>5</sup>

The hyperpartisanship fueled by these trends created a quandary for redistricting law. How would it respond to voters and politicians who no longer behaved like their predecessors? I argue here that, for the most part, the field adapted in two distinctive ways. Certain doctrines went into dormancy, deployed unsuccessfully (or not at all) as the nonpartisan concerns that originally animated them declined in salience. Certain doctrines—including some of the previously quiescent theories—also evolved into vehicles for partisan grievances, used to challenge policies motivated by, and resulting in, partisan advantage.

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<sup>3</sup> See *Reynolds v. Sims*, 377 U.S. 533 (1964).

<sup>4</sup> See, e.g., *White v. Regester*, 412 U.S. 755 (1973).

<sup>5</sup> See, e.g., Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 288 (2011).

Reconsider one person, one vote. For about twenty years (from the mid-1980s to the mid-2000s), few plaintiffs sued on the basis of malapportionment, and fewer still prevailed. Districts' populations were far more equal in this era, and the variances that remained did not consistently favor any particular group. Then, in the last decade, the Supreme Court breathed new life into this cause of action. It became available, for the first time, when the mapmaking party's districts are modestly underpopulated and the opposing party's districts have somewhat more residents than they need.

The same sequence of dormancy followed by partisan revival unfolded in the racial gerrymandering context. In the 2000s, when such cases were brought, courts generally concluded that districting decisions were made for partisan, not racial, reasons. There seemed to be little place for a race-based theory in a world dominated by party. In the 2010s, though, racial gerrymandering suits made a striking comeback. Over and over, they were used to invalidate *partisan* gerrymanders that had been constructed, in part, by packing black Democrats into a small number of districts.

In the face of hyperpartisanship, then, redistricting law either went into abeyance or sought to curb it indirectly, through doctrines designed to serve other ends. What courts did *not* do (with a few notable exceptions) is what I think they should have done: namely, confront partisan gerrymandering frontally by invalidating maps because of their partisan purposes or effects. The Supreme Court, for instance, came close to deeming the cause of action nonjusticiable in a 2004 case;<sup>6</sup> then expressed skepticism that empirical measures could assist its analysis in 2006;<sup>7</sup> and in its most recent term, twice found creative ways to avoid facing the merits of gerrymandering suits.<sup>8</sup> At every turn, the Court resembled the timorous judge I portrayed earlier: concerned about partisan line-drawing abuses—but not so worried as actually to do something about them.

But I fear I am lapsing into normative judgment again, while my aim here is to describe (not to criticize) the judicial response first to the relative nonpartisanship of the Cold War, and then to the hyperpartisanship of the last generation. Because there are two periods in which I am interested, this article proceeds in two parts. Each part starts by briefly summarizing the political science literature about the partisanship and polarization of voters and officeholders in the relevant timeframe. These discussions are short because other scholars (including legal academics) have already surveyed this scholarship.<sup>9</sup> Each part then delves deeply into the redistricting case law, examining the doctrines of malapportionment, racial vote dilution, retrogression, racial gerrymandering, and partisan gerrymandering. The first part's

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<sup>6</sup> See *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

<sup>7</sup> See *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006).

<sup>8</sup> See *Benisek v. Lamone*, 138 S. Ct. 1942 (2018); *Gill v. Whitford*, 138 S. Ct. 1916 (2018).

<sup>9</sup> Prominent surveys by law professors include Cynthia R. Farina, *Congressional Polarization: Terminal Constitutional Dysfunction?*, 115 COLUM. L. REV. 1689 (2015); Pildes, *supra* note 5; and David Schleicher, *Things Aren't Going That Well Over There Either: Party Polarization and Election Law in Comparative Perspective*, U. CHI. LEGAL F. 433 (2015).

contention, again, is that courts in the less partisan 1960s, 1970s, and 1980s neither tried to, nor unintentionally did, address the partisan aspects of redistricting. The second part's thesis, likewise, is that courts in the hyperpartisan present have embraced the dormancy and repackaging responses to partisan gerrymandering, but not (so far) the direct response. Lastly, the conclusion argues that frontal judicial confrontation is more effective than repackaging because it cannot be circumvented by self-interested legislators.

### I. THE SECOND ERA OF GOOD FEELINGS

Beginning with the 1960s, 1970s, and 1980s, I refer to these three decades as the second era of good feelings. The original Era of Good Feelings unfolded during the presidency of James Monroe, and earned its label due to its unusually nonpartisan politics.<sup>10</sup> The Federalist Party was a spent force by the second decade of the nineteenth century; in fact, it failed even to run a presidential candidate in the election of 1820. Monroe also pursued a policy of "amalgamation" that sought to combine the Federalist Party's remnants with the dominant Democratic-Republican Party. In Congress too, polarization reached an all-time low during Monroe's second term, with little separating the body's few Federalists from its Democratic-Republican supermajority.<sup>11</sup>

What is the evidence that the second era of good feelings resembled the first? Without purporting to be exhaustive, here are some revealing findings from political scientists about the period's subdued partisanship and polarization. More than one-fourth of voters split their tickets in federal elections in the 1970s and 1980s, compared to less than one-sixth in the more partisan 1950s.<sup>12</sup> The correlation between voters' presidential and congressional choices therefore fell from roughly 0.8 in the 1950s to about 0.6 in the 1970s and 1980s.<sup>13</sup> Survey respondents also assigned middling—but not awful—ratings to the opposing party in the 1970s and 1980s: between 45 and 50 on a scale from 0 (most negative) to 100 (most positive).<sup>14</sup> Unsurprisingly, given these tepid views, only a tiny minority of respondents (around 5%) objected to inter-party marriage in the 1960s.<sup>15</sup> And when asked to report their ideologies on a seven-point scale from very liberal to very conservative, most vot-

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<sup>10</sup> For a book-length treatment, see GEORGE DANGERFIELD, *THE ERA OF GOOD FEELINGS* (Ivan R. Dee 1989) (1952).

<sup>11</sup> See *Parties Overview*, VOTEVIEW, <https://voteview.com/parties/all> [<https://perma.cc/EU5G-VT8Z>].

<sup>12</sup> See, e.g., Kenneth Mulligan, *Partisan Ambivalence, Split-Ticket Voting, and Divided Government*, 32 *POL. PSYCHOL.* 505, 513 (2011).

<sup>13</sup> See, e.g., Gary C. Jacobson, *Partisan Polarization in Presidential Support: The Electoral Connection*, 30 *CONGRESS & PRESIDENCY* 1, 14 (2003).

<sup>14</sup> See, e.g., Shanto Iyengar et al., *Affect, Not Ideology: A Social Identity Perspective on Polarization*, 76 *PUB. OPINION Q.* 405, 413 (2012).

<sup>15</sup> See *id.* at 417.

ers in the 1970s and 1980s said they were moderates.<sup>16</sup> Voters' views thus barely differed based on (and had only a tenuous link to) their party affiliations.<sup>17</sup>

With respect to officeholders, similarly, Keith Poole and Howard Rosenthal have compiled every vote ever taken in Congress.<sup>18</sup> They have used this vast database to estimate legislators' ideal points (or preferred sets of policy positions) from the 1st Congress (1789–91) to the 115th (2017–19).<sup>19</sup> In the 1960s, 1970s, and 1980s, the difference in ideal points between the median Democratic member of Congress and the median Republican was lower than at any time since the original Era of Good Feelings.<sup>20</sup> There was also significant ideological overlap between congressional Democrats and Republicans in this period. Roughly one-fifth of House members—and one-third of senators—were more conservative (in the case of Democrats) or liberal (in Republicans' case) than at least 10% of their colleagues across the aisle.<sup>21</sup>

As voters and politicians achieved this rare state of relative comity, the Supreme Court suddenly entered the “political thicket” of redistricting: the domain so dubbed by Justice Frankfurter because of its complexity and proximity to partisan politics.<sup>22</sup> Starting in 1962, the Court announced, in short order, causes of action for malapportionment, racial vote dilution, retrogression, racial gerrymandering, and partisan gerrymandering. I argue below that all of these doctrines (except, of course, for partisan gerrymandering) tried to solve nonpartisan problems that loomed large in this era, especially rural overrepresentation and racial discrimination. More controversially, I contend that none of the doctrines (including partisan gerrymandering) had significant partisan consequences. As befitted a less partisan age, the Court's intervention was therefore nonpartisan in both intent and effect.

### A. Malapportionment

I begin with the one person, one vote revolution of the 1960s: the series of landmark decisions in which the Court declared that all electoral dis-

<sup>16</sup> See, e.g., MATTHEW LEVENDUSKY, *THE PARTISAN SORT: HOW LIBERALS BECAME DEMOCRATS AND CONSERVATIVES BECAME REPUBLICANS* 71–72 (2009).

<sup>17</sup> See, e.g., Marc J. Hetherington, *Putting Polarization in Perspective*, 39 BRIT. J. POL. SCI. 413, 437 (2009).

<sup>18</sup> See VOTEVIEW, <https://voteview.com/> [<https://perma.cc/U5CN-NPEH>].

<sup>19</sup> See *id.*

<sup>20</sup> See *Parties Overview*, *supra* note 11; *The Polarization of the Congressional Parties*, VOTEVIEW (Jan. 30, 2016), [https://legacy.voteview.com/political\\_polarization\\_2015.htm](https://legacy.voteview.com/political_polarization_2015.htm). [<https://perma.cc/8NQY-UY2U>]. This period of low polarization actually stretched from the 1930s through the 1980s. See *The Polarization of the Congressional Parties*, VOTEVIEW (Jan. 30, 2016), [https://legacy.voteview.com/political\\_polarization\\_2015.htm](https://legacy.voteview.com/political_polarization_2015.htm). [<https://perma.cc/8NQY-UY2U>].

<sup>21</sup> See Hahrie Han & David W. Brady, *A Delayed Return to Historical Norms: Congressional Party Polarization After the Second World War*, 37 BRIT. J. POL. SCI. 505, 510–11 (2007).

<sup>22</sup> *Colegrove v. Green*, 328 U.S. 549, 556 (1946).



tricts—congressional,<sup>23</sup> state legislative,<sup>24</sup> and local<sup>25</sup>—must be approximately equal in population. In these cases, the Court stressed that the malapportionment that was then rampant across the country was not random, but rather exhibited the same pattern in almost every state: the underpopulation (and overrepresentation) of rural areas, and the overpopulation (and underrepresentation) of cities and suburbs.<sup>26</sup> It was this persistent rural advantage, more than any partisan aspect of malapportionment, that seemed undemocratic to the Court and that drove its foray into the thicket.<sup>27</sup>

Consider *Reynolds v. Sims*,<sup>28</sup> the most prominent of the one person, one vote cases. Alabama had failed to redraw its state legislative maps for more than sixty years, resulting in ratios of around 16-to-1 between the largest and smallest districts in the state house and about 41-to-1 in the state senate.<sup>29</sup> These enormous population deviations had no partisan valence, because Democrats held all 106 state house seats and all 35 state senate seats in the early 1960s.<sup>30</sup> But the deviations massively benefited “rural counties [that had] incurred sizable losses in population,” while equally handicapping “urban counties” where “[v]irtually all of the population gain [had] occurred.”<sup>31</sup> Indeed, the deviations gave rise to a “rural strangle hold [sic]” on the state legislature, prompting the Court’s remark that “[a] citizen, a qualified voter, is no more nor no less so because he lives in the city or on the farm.”<sup>32</sup> The Court continued: “[A]pportionment controversies are generally viewed as involving urban-rural conflicts . . . . [T]he thrust of state legislative malapportionment . . . is underrepresentation of urban and suburban areas.”<sup>33</sup>

Or take *Gray v. Sanders*,<sup>34</sup> where the Court invalidated Georgia’s “county unit system” for primary elections for the governorship and other statewide offices.<sup>35</sup> This system allotted units (or votes) to each county based on its representation in the state house.<sup>36</sup> Because the state house was malapportioned in favor of rural counties, the system “weight[ed] the rural vote more heavily than the urban vote.”<sup>37</sup> The system did not, however, advantage

<sup>23</sup> See *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964).

<sup>24</sup> See *Reynolds v. Sims*, 377 U.S. 533, 568 (1964).

<sup>25</sup> See *Avery v. Midland City*, 390 U.S. 474, 484–85 (1968).

<sup>26</sup> See, e.g., *Reynolds*, 377 U.S. at 567.

<sup>27</sup> Today’s Court continues to understand its intervention half a century earlier in these terms. See *Evenwel v. Abbott*, 136 S. Ct. 1120, 1123 (2016) (observing that malapportionment “left many rural districts significantly underpopulated in comparison with urban and suburban districts”).

<sup>28</sup> 377 U.S. 533 (1964).

<sup>29</sup> See *id.* at 545.

<sup>30</sup> See Carl Klarner, *State Partisan Balance Data, 1937–2011*, HARVARD DATAVERSE (2013), <https://hdl.handle.net/1902.1/20403> [<https://perma.cc/QN39-BUET>].

<sup>31</sup> *Reynolds*, 377 U.S. at 542 n.7.

<sup>32</sup> *Id.* at 543, 570.

<sup>33</sup> *Id.* at 567 n.43.

<sup>34</sup> 372 U.S. 368 (1963).

<sup>35</sup> *Id.* at 368.

<sup>36</sup> See *id.* at 371.

<sup>37</sup> *Id.* at 379.

either party; no such edge was possible in a one-party state where Democrats won almost every election.<sup>38</sup> Consistent with the system's regional (rather than partisan) skew, the Court trained its criticism on rural overrepresentation. "How then can one person be given twice or 10 times the voting power of another person in a statewide election merely because he lives in a rural area or because he lives in the smallest rural county?"<sup>39</sup>

Notably, the Court freely admitted that its one person, one vote rule did not aim to correct partisan distortions. In a 1973 case, the Court faced a Connecticut plan whose population deviations were small but that was nevertheless alleged to be "nothing less than a gigantic political gerrymander."<sup>40</sup> The Court upheld the map, commenting that it had "not ventured far or attempted" to "extirpat[e] politics from what are the essentially political processes of the sovereign States."<sup>41</sup> In a 1983 case, similarly, a dissenting Justice pointed out that "absolute [population] equality is perfectly compatible with "gerrymandering" of the worst sort."<sup>42</sup> The Court essentially agreed with the observation, conceding that equal district population "does little to prevent what is known as gerrymandering" and "is far less ambitious than what would be required to address gerrymandering on a constitutional level."<sup>43</sup>

Also strikingly, the dissenters in the great one person, one vote cases shared the majority's belief that region, not party, was the critical cleavage. The dissenters diverged from the majority only in their position that rural advantage was a valid justification for malapportionment. Justice Frankfurter thus emphasized in *Baker v. Carr*<sup>44</sup> (in the last opinion he would ever write) that "the pattern of according greater per capita representation to rural, relatively sparsely populated areas" was ubiquitous both in America and abroad.<sup>45</sup> In his view, the pattern's prevalence confirmed its constitutionality.<sup>46</sup> Likewise, Justice Harlan argued in *Gray* that "a State might rationally conclude that its general welfare was best served by apportioning more seats in the legislature to agricultural communities than to urban centers."<sup>47</sup> This policy would prevent "the legitimate interests of the former" from being "submerged in the stronger electoral voice of the latter."<sup>48</sup>

The Justices' consensus turns out to have been empirically sound. As the majority hoped (and the dissenters feared), the one person, one vote

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<sup>38</sup> For example, Democrats held the Georgia governorship (the most important office elected using the county unit system) for the entire twentieth century. See Klarner, *supra* note 30.

<sup>39</sup> *Gray v. Sanders*, 372 U.S. 368, 379 (1963).

<sup>40</sup> *Gaffney v. Cummings*, 412 U.S. 735, 752 (1973).

<sup>41</sup> *Id.* at 754.

<sup>42</sup> *Karcher v. Daggett*, 462 U.S. 725, 776 (1983) (White, J., dissenting) (quoting *Wells v. Rockefeller*, 394 U.S. 542, 551 (1969) (Harlan, J., dissenting)).

<sup>43</sup> *Id.* at 734 n.6.

<sup>44</sup> 369 U.S. 186 (1962).

<sup>45</sup> *Id.* at 320 (Frankfurter, J., dissenting).

<sup>46</sup> See *id.*

<sup>47</sup> *Gray v. Sanders*, 372 U.S. 368, 386 (1963) (Harlan, J., dissenting).

<sup>48</sup> *Id.*

revolution shattered rural legislative power and vastly increased the sway of urban and suburban voters. Over less than a decade, thousands of rural districts were dismantled and similar numbers of urban and suburban constituencies were created.<sup>49</sup> Rural legislative majorities consequently disappeared in seventeen states.<sup>50</sup> And along with these majorities vanished the governmental largesse that rural areas had previously enjoyed. Counties that were overrepresented in the legislature in 1960 received larger per-capita transfers of state funds than underrepresented counties—but by 1968, after districts had been redrawn across the country, this relationship had evaporated.<sup>51</sup>

As the Justices also expected, this upheaval did *not* accrue to the benefit of either party. To the contrary, the average partisan bias of district plans nationwide was close to zero both before and after the Court's intervention.<sup>52</sup> How could all of the mapmaking activity not have moved the partisan needle? The answer is that it did move it—only in different directions in different regions, which canceled out when aggregated. In the South, reapportionment shrank the enormous skews that had long favored Democrats, the party of rural Dixie voters.<sup>53</sup> But in the Northeast and the Midwest, equal district population disadvantaged Republicans, who dominated the rural vote in those parts of the country.<sup>54</sup> These offsetting partisan effects may explain why both parties regarded the one person, one vote rule with such equanimity. The chairman of the Democratic National Committee called it “something the Democratic Party has long advocated, and fought for, and certainly welcomes.”<sup>55</sup> Not to be outdone, the Republican chair thought it was “in the national interest and in the Party's interest.”<sup>56</sup> With respect to the country as a whole, neither official was wrong.

### B. Race and Redistricting

I turn next to the set of doctrines that regulate race and redistricting. The cause of action for racial vote dilution, recognized under the Constitution in 1973<sup>57</sup> and explicated under the Voting Rights Act (VRA) in 1986,<sup>58</sup>

<sup>49</sup> See STEPHEN ANSOLABEHRE & JAMES M. SNYDER, JR., *THE END OF INEQUALITY: ONE PERSON, ONE VOTE, AND THE TRANSFORMATION OF AMERICAN POLITICS* 12 (2008).

<sup>50</sup> See *id.* at 188.

<sup>51</sup> See Stephen Ansolabehere et al., *Equal Votes, Equal Money: Court-Ordered Redistricting and Public Expenditures in the American States*, 96 AM. POL. SCI. REV. 767, 772–73 (2002).

<sup>52</sup> See ANSOLABEHRE & SNYDER, JR., *supra* note 49, at 75. Partisan bias is the share of legislative seats a party would win in a hypothetical, perfectly tied election minus fifty percent. See Stephanopoulos & McGhee, *supra* note 1, at 835.

<sup>53</sup> See ANSOLABEHRE & SNYDER, JR., *supra* note 49, at 77, 254.

<sup>54</sup> See *id.* at 78, 254; see also GARY W. COX & JONATHAN N. KATZ, *ELBRIDGE GERRY'S SALAMANDER: THE ELECTORAL CONSEQUENCES OF THE REAPPORTIONMENT REVOLUTION* 59–60 (2002) (showing the elimination of the pro-Republican bias in non-southern states between 1960 and 1966).

<sup>55</sup> J. DOUGLAS SMITH, *ON DEMOCRACY'S DOORSTEP: THE INSIDE STORY OF HOW THE SUPREME COURT BROUGHT “ONE PERSON, ONE VOTE” TO THE UNITED STATES* 220 (2014).

<sup>56</sup> *Id.*

<sup>57</sup> See *White v. Regester*, 412 U.S. 755, 765–66 (1973).

prohibits certain electoral practices that make it more difficult for minority voters to elect their preferred candidates. The anti-retrogression principle, announced under the VRA in 1976,<sup>59</sup> forbids particular jurisdictions from changing their election laws with the intent or effect of reducing the electoral influence of minority voters. And the theory of racial gerrymandering, hinted at earlier<sup>60</sup> but not endorsed by the Supreme Court until 1993<sup>61</sup>—just after the second era of good feelings—renders presumptively unlawful districts drawn for primarily racial reasons.

My first point about these doctrines may not be very surprising. When the Court articulated them, its professed goals of promoting minority representation and avoiding racial essentialism pertained to race but not party. For instance, in the first successful vote dilution case, *White v. Regester*, the Court defined the constitutional injury as the use of electoral practices “invidiously to cancel out or minimize the voting strength of racial groups.”<sup>62</sup> This harm plainly did not extend to the erosion of the voting strength of *partisan* groups. Similarly, in the case that introduced the concept of retrogression, *Beer v. United States*, the Court conceived of it as a worsening “in the position of racial minorities with respect to their effective exercise of the electoral franchise.”<sup>63</sup> If it was *partisan* minorities whose exercise of the franchise was undermined, that was not retrogression. In the first racial gerrymandering case as well, *Shaw v. Reno*, the Court objected to “the deliberate segregation of voters into separate districts on the basis of race.”<sup>64</sup> The Court did not criticize the intentional sorting of voters on *partisan* grounds.<sup>65</sup>

Consistent with its racial focus in this period, the Court rebuffed the one vote dilution challenge that it sensed was actually a vehicle for a partisan grievance. In *Whitcomb v. Chavis*,<sup>66</sup> African Americans in Indianapolis complained about a multimember district that, through its winner-take-all voting system, frequently prevented them from electing any of their preferred candidates.<sup>67</sup> The Court observed that the black “ghetto voted heavily Democratic and that ghetto votes were critical to Democratic Party success.”<sup>68</sup> The Court further noted that, “had the Democrats won all of the elections or even most of them, the ghetto would have had no justifiable complaints about representation.”<sup>69</sup> Accordingly, “the failure of the ghetto to have legis-

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<sup>58</sup> See *Thornburg v. Gingles*, 478 U.S. 30, 35–37 (1986).

<sup>59</sup> See *Beer v. United States*, 425 U.S. 130, 141 (1976).

<sup>60</sup> See *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 165–66 (1977).

<sup>61</sup> See *Shaw v. Reno*, 509 U.S. 630 (1993).

<sup>62</sup> *White*, 412 U.S. at 765; see also *Thornburg*, 478 U.S. at 47 (deeming “the essence of a [statutory vote dilution] claim . . . that a certain electoral law . . . interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by *black and white voters* to elect their preferred representatives” (emphasis added)).

<sup>63</sup> *Beer*, 425 U.S. at 141.

<sup>64</sup> *Shaw*, 509 U.S. at 641.

<sup>65</sup> See *id.* at 650 (“[N]othing in our history compels the conclusion that racial and political gerrymanders are subject to precisely the same constitutional scrutiny.”).

<sup>66</sup> 403 U.S. 124 (1971).

<sup>67</sup> *Id.* at 128–29.

<sup>68</sup> *Id.* at 150.

<sup>69</sup> *Id.* at 152.

lative seats in proportion to its population[ ]” was more “a function of losing elections than of built-in bias against poor Negroes.”<sup>70</sup> The plaintiffs’ claim of vote dilution was merely a “euphemism for political defeat at the polls.”<sup>71</sup>

My second point about the Court’s race-related doctrines may be more counterintuitive. Not only was their intent nonpartisan, but so was their effect. This was because the theories applied almost exclusively to the South, which remained under supermajority Democratic control in this period. Successful suits thus replaced white Democratic officeholders with minority Democratic politicians—not with Republicans.<sup>72</sup> Consider *White*, in which the Court struck down multimember state house districts in Dallas and San Antonio because they diluted the votes of blacks and Latinos, respectively.<sup>73</sup> As a result of the decision, Texas had to create twenty-nine new single-member districts.<sup>74</sup> This remedy significantly boosted minority representation, but it did not even cause a ripple in the state house’s partisan balance. Democrats slightly increased their advantage in the chamber in the first election after relief was granted, from 133–17 to 135–15.<sup>75</sup>

Or take *Thornburg v. Gingles*,<sup>76</sup> the breakthrough case in which the Court set forth the test for vote dilution under the VRA.<sup>77</sup> Due to the decision, North Carolina had to split four multimember state house districts, occupying much of Charlotte and Raleigh-Durham, into twenty-three single-member districts.<sup>78</sup> Again, black representation surged in the wake of this redistricting; and again, the Democratic edge in the state house stayed essentially the same, inching upward from 82–38 to 84–36.<sup>79</sup> Even *Shaw*, handed down at the dawn of the hyperpartisan present, fits this pattern. In 1991, North Carolina designed the two black-majority districts whose odd shapes the Court subsequently criticized.<sup>80</sup> Yet in the 1992 election, Repub-

<sup>70</sup> *Id.* at 153.

<sup>71</sup> *Id.*; see also Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 547 (2004) (arguing that in *Whitcomb* “the Court treated partisan politics as an explanatory factor that could defeat a claim of unconstitutional racial vote dilution”).

<sup>72</sup> For a similar argument, see Samuel Issacharoff, *Ballot Bedlam*, 64 DUKE L.J. 1363, 1397 (2015) (“The secret undercurrent of the [early race-and-redistricting] cases is that they addressed only claims of exclusive Democratic control of southern jurisdictions . . .”). But note that the minority Democrats elected thanks to the Court’s intervention were generally more liberal than the white Democrats they replaced. See, e.g., David Epstein et al., *Estimating the Effect of Redistricting on Minority Substantive Representation*, 23 J.L. ECON. & ORG. 499, 514 (2007).

<sup>73</sup> See *White v. Regester*, 412 U.S. 755, 765–69 (1973).

<sup>74</sup> See *id.* at 770.

<sup>75</sup> See Klarner, *supra* note 30 (reporting the 1973–74 and 1975–76 figures).

<sup>76</sup> 478 U.S. 30 (1986).

<sup>77</sup> *Id.* at 56.

<sup>78</sup> See *id.* at 77 (reversing the district court’s judgment with respect to a three-member district); see also *Gingles v. Edmisten*, 590 F. Supp. 345, 377–79 (E.D.N.C. 1984) (requiring other districts comprising twenty-three seats to be redrawn).

<sup>79</sup> See Klarner, *supra* note 30 (reporting the 1985–86 and 1987–88 figures).

<sup>80</sup> See *Shaw v. Reno*, 509 U.S. 630, 634–36 (1993).

licans kept their four congressional seats, and Democrats improved their tally by one (from seven to eight).<sup>81</sup>

Generalizing from these cases, the proportion of southern state house seats held by African Americans rose from 3% in 1970 to 13% in 1990.<sup>82</sup> This growth was fueled by the VRA (and by the Court's interpretations of the statute, especially in *Gingles*).<sup>83</sup> Over the same two decades, the share of southern state house seats held by Democrats never fell below 70%.<sup>84</sup> There was therefore no link in this period between the Court's race-related doctrines and the partisan composition of southern legislatures. The doctrines' use did not threaten the Democrats' hegemony.

### C. Partisan Gerrymandering

The last redistricting theory I cover is partisan gerrymandering: the drawing of district lines to benefit one party and handicap the opposing party. I acknowledge that my argument about judicial intent does not apply neatly to this theory. The Supreme Court announced the cause of action for partisan gerrymandering in the 1986 case of *Davis v. Bandemer*<sup>85</sup>—firmly within the second era of good feelings. Yet the Court's only possible motive for doing so was concern about the partisan manipulation of district boundaries. Plainly, *nonpartisan* cleavages like region and race could not have explained the Court's creation of a doctrine about *party* abuse of the mapmaking process.

Nevertheless, I find it revealing that the Court stressed the nonpartisanship of voters and legislators even as it endorsed an inherently partisan theory. The plurality remarked that “[v]oters sometimes prefer Democratic candidates, and sometimes Republican,”<sup>86</sup> and Justice O'Connor added that “voters can—and often do—move from one party to the other or support candidates from both parties.”<sup>87</sup> As I demonstrated earlier, these statements were accurate with respect to the quite fickle electorate of the 1960s, 1970s, and 1980s.<sup>88</sup> The plurality further asserted that “a group of individuals who votes for a losing candidate is usually . . . adequately represented by the winning candidate” and has “as much opportunity to influence that candidate as other voters in the district.”<sup>89</sup> As I also showed above, this claim too

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<sup>81</sup> See Expert Report Dataset of Dr. Simon Jackman, League of Women Voters of N.C. v. Rucho, No. 1:16-CV-1164 (M.D.N.C. Apr. 18, 2017) [hereinafter Jackman *Rucho* Dataset] (compiling congressional election results). Democrats lost seats, of course, in the Republican wave election of 1994, but over the decade as a whole, North Carolina's congressional plan remained slightly tilted in a Democratic direction. See *id.*

<sup>82</sup> See Nicholas O. Stephanopoulos, *Race, Place, and Power*, 68 STAN. L. REV. 1323, 1369 (2016).

<sup>83</sup> See *id.* at 1371–80.

<sup>84</sup> See *id.* at 1387.

<sup>85</sup> 478 U.S. 109 (1986).

<sup>86</sup> *Id.* at 135 (plurality opinion).

<sup>87</sup> *Id.* at 156 (O'Connor, J., concurring).

<sup>88</sup> See *supra* notes 11–21 and accompanying text.

<sup>89</sup> *Bandemer*, 478 U.S. at 132 (plurality opinion).

was correct with respect to the more moderate officeholders of this period. They did represent most of their constituents reasonably well, even constituents who backed their opponents.<sup>90</sup> The Court's comments therefore suggest some ambivalence about the cause of action it recognized. The Court seemed to want the *availability* of relief but its denial when voters and legislators behaved in their usual nonpartisan fashion.<sup>91</sup>

Whatever the Court's thinking was, the impact of *Bandemer*—or, rather, the lack thereof—was undeniable. Every single challenge that relied on the case failed.<sup>92</sup> As the Court later put it, *Bandemer's* “application . . . invariably produced the same result . . . as would have obtained if the question were nonjusticiable: Judicial intervention [was] refused.”<sup>93</sup> Why were all of these suits unsuccessful? One problem for plaintiffs was *Bandemer's* requirement that a plan “consistently degrade” the electoral influence of a group of voters.<sup>94</sup> This condition precluded claims brought prior to the first election under a map, or even after one or two elections. Courts simply could not be sure that a party's electoral disadvantage was durable rather than transient.<sup>95</sup> The other difficulty for plaintiffs was their obligation under *Bandemer* to show diminished influence “on the political process *as a whole*.”<sup>96</sup> This language persuaded courts that redistricting alone was not enough to call a plan into question. Unfair district lines had to be combined with efforts to prevent a party's supporters from registering or voting—efforts that did not commonly occur in this era.<sup>97</sup>

The futility of partisan gerrymandering litigation after *Bandemer* is consistent with my argument that judicial activity in this period did not have significant partisan implications. It is also consistent with the empirical evidence about the severity and persistence of gerrymandering in the 1980s. At both the state legislative and congressional levels, 1980s district plans were, on net, the least skewed in either party's direction of all maps from 1972 to

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<sup>90</sup> See *supra* notes 11–21 and accompanying text.

<sup>91</sup> My view is shared by the law clerk who worked with Justice White on his opinion in *Bandemer*. See Palma Joy Strand, *Time to Protect Our Democracy*, SLATE (Sept. 19, 2017, 1:43 PM), <https://slate.com/news-and-politics/2017/09/if-anthony-kennedy-follows-precedent-hell-strike-down-partisan-gerrymandering.html> [https://perma.cc/MY6A-P73V] (“[*Bandemer*] served as a placeholder for the court to enter the institutional conversation about the parameters for redistricting if and when partisan gerrymandering . . . evolved to the level of entrenched partisan dominance.”).

<sup>92</sup> See *Vieth v. Jubelirer*, 541 U.S. 267, 279–80 (2004) (plurality opinion) (“[I]n all of the cases we are aware of involving that most common form of political gerrymandering [that is, through redistricting], relief was denied.”).

<sup>93</sup> *Id.* at 279.

<sup>94</sup> *Bandemer*, 478 U.S. at 132 (plurality opinion) (emphasis added).

<sup>95</sup> See, e.g., *La Porte City Republican Cent. Comm. v. Bd. of Comm'rs*, 43 F.3d 1126, 1128 (7th Cir. 1994) (“Plaintiffs have not offered to prove that the districts in La Porte County have frustrated the will of a majority (or even a minority) of voters, for even one election.”).

<sup>96</sup> *Bandemer*, 478 U.S. at 132 (plurality opinion) (emphasis added).

<sup>97</sup> See, e.g., *Badham v. Eu*, 694 F. Supp. 664, 670 (N.D. Cal. 1988) (“[N]or are there allegations that anyone has ever interfered with Republican registration, organizing, voting, fund-raising, or campaigning.”).

the present.<sup>98</sup> At the congressional level, 1980s plans were also the most volatile. In this decade, there was almost no correlation between a map's skew in its first election and the tilt it would go on to exhibit in later elections.<sup>99</sup> The judiciary's discretion after *Bandemer*, then, was perhaps the better part of valor. Courts simply did not need to intervene in an era when most gerrymanders were mild and ephemeral.

## II. THE HYPERPARTISAN PRESENT

Times change, though. After three of the least tribal decades in American history, partisanship and polarization began to intensify in the 1990s. They then rose steadily over the next generation, reaching unprecedented levels for both voters and politicians by the 2010s. Again, I do not try to describe all of the voluminous political science literature on this topic. But again, just a few of the literature's findings should suffice to show how different the hyperpartisan present is from the era of good feelings that preceded it.

Consider the behavior of contemporary voters. The rate of ticket splitting in federal elections fell from 25–30% in the 1970s and 1980s, to about 15% in the 1990s and 2000s, to below 10% in the 2010s.<sup>100</sup> The correlation between voters' presidential and congressional choices increased in tandem: from around 0.6 in the 1970s and 1980s, to roughly 0.8 in the 1990s and 2000s, to above 0.9 in the 2010s.<sup>101</sup> Similarly, the ratings that survey respondents assign to the opposing party, which had hovered in the upper 40s (out of 100) in the 1970s and 1980s, dipped to the low 40s in the 1990s, the upper 30s in the 2000s, and the low 20s in the 2010s.<sup>102</sup> About one-third of Democratic respondents and one-half of Republicans in the 2010s also said they would be upset if a child of theirs entered into an inter-party marriage; this fraction had been just one-twentieth in the 1960s.<sup>103</sup> And when prompted to state their ideologies on a seven-point scale, fewer voters called themselves moderates in the 2010s than in the 1970s and 1980s, and more

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<sup>98</sup> See Assessing the Current Wisconsin State Legislative Redistricting Plan at 47, *Whitford v. Nichol*, No. 3:15-cv-421 (W.D. Wis. July 7, 2015), ECF No. 1-3 [hereinafter *Jackman Whitford Rep.*]; Assessing the Current North Carolina Congressional Districting Plan: amended report at 30, *League of Women Voters of N.C. v. Rucho*, No. 1:16-CV-1164 (M.D.N.C. Apr. 18, 2017) [hereinafter *Jackman Rucho Rep.*].

<sup>99</sup> See Eric McGhee et al., *The Role of Partisan Gerrymandering in U.S. Elections* 11 (Aug. 29, 2017) (unpublished manuscript) (on file with author).

<sup>100</sup> See, e.g., Gary C. Jacobson, *It's Nothing Personal: The Decline of the Incumbency Advantage in US House Elections*, 77 J. POL. 861, 864 (2015).

<sup>101</sup> See, e.g., Alan I. Abramowitz & Steven Webster, *The Rise of Negative Partisanship and the Nationalization of U.S. Elections in the 21st Century*, 41 ELECTORAL STUD. 12, 18 (2016).

<sup>102</sup> See, e.g., Jonathan Haidt & Marc J. Hetherington, *Look How Far We've Come Apart*, N.Y. TIMES (Sept. 17, 2012, 9:48 PM), <https://campaignstops.blogs.nytimes.com/2012/09/17/look-how-far-weve-come-apart/> [<https://perma.cc/PYX8-2Z56>].

<sup>103</sup> See Iyengar et al., *supra* note 14, at 417.



identified as liberals or conservatives.<sup>104</sup> The ideological distance between the average Democrat and the average Republican thus doubled,<sup>105</sup> and the correlation between voters' views and their party identifications climbed even more rapidly.<sup>106</sup>

Take legislators' voting records too. Starting around 1980, and accelerating after 1990, the difference in ideal points between the median Democratic member of Congress and the median Republican grew almost every term.<sup>107</sup> The House of Representatives now sitting (the 115th) features the largest inter-party gap ever recorded—breaking a record previously set by each of the last eight Houses.<sup>108</sup> Thanks to this unparalleled polarization, not one Democratic (Republican) member of Congress today is more conservative (liberal) than even a single legislator from the opposing party.<sup>109</sup> To the contrary, the distribution of congressional ideal points is almost perfectly bimodal. There are liberal and conservative spires and a yawning void between them.

As I noted at the outset, redistricting law could have responded to these developments in three distinct ways. First, it could have gone into remission, rarely being invoked (even less often successfully) as partisanship became increasingly salient. Call this the *dormancy* response. Second, nonpartisan causes of action could have been deployed to fight the partisan manipulation of district lines. These claims could have been sustained even when the real grievance was partisan—and not, say, unequal district population, the reduction of minority representation, or racial essentialism. Think of this as the *repackaging* response. And third, redistricting law could have tackled partisan gerrymandering head-on, by evaluating district plans based on their partisan intent and/or effect. This would be the *direct* response to modern hyperpartisanship.

I maintain below that only the first two of these responses have, in fact, materialized in the Supreme Court's case law. At times over the last generation, the Court's redistricting doctrines have declined precipitously in their use and efficacy. At other times (especially more recently), the doctrines have been redirected at partisan abuses far afield from their original domains. But never has the Court (and only very infrequently have other courts) struck down partisan gerrymanders *because* they are partisan gerrymanders, rather than due to some other legal defect.

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<sup>104</sup> See, e.g., DONALD R. KINDER & NATHAN P. KALMOE, NEITHER LIBERAL NOR CONSERVATIVE: IDEOLOGICAL INNOCENCE IN THE AMERICAN PUBLIC 54 (2017).

<sup>105</sup> See, e.g., Hetherington, *supra* note 17, at 442.

<sup>106</sup> See, e.g., Gerald C. Wright & Nathaniel Birkhead, *The Macro Sort of the State Electorates*, 67 POL. RES. Q. 426, 426 (2014).

<sup>107</sup> See *Parties Overview*, *supra* note 11; *The Polarization of the Congressional Parties*, *supra* note 20.

<sup>108</sup> See *Parties Overview*, *supra* note 11; *The Polarization of the Congressional Parties*, *supra* note 20.

<sup>109</sup> See Han & Brady, *supra* note 21, at 510–11.

*A. Malapportionment*

Beginning again with one person, one vote, the area has exhibited a classic dormancy response over the last three decades. By my count, the Court has decided just two traditional malapportionment cases, involving statewide plans challenged due to their large population variances, in this period. And in both of these cases, the Court upheld the disputed map. In a 1993 case, the Court sustained an Ohio state house plan whose total population deviation exceeded the 10% threshold for presumptive constitutionality, but was attributable to the state's effort to respect county boundaries.<sup>110</sup> Likewise, in a 2012 case, the Court ratified a West Virginia congressional map whose total population variance was more than *de minimis*, but stemmed from legitimate goals like following county lines and preserving the cores of existing districts.<sup>111</sup>

The paucity of recent one person, one vote cases has a clear explanation. After having many of their plans invalidated in earlier decades,<sup>112</sup> states learned to draw districts with very similar populations. In the current cycle, for example, ninety-three of ninety-nine state legislative maps have total population deviations at or below the 10% cutoff.<sup>113</sup> At the congressional level, every single plan has a total population variance below 1%, and the districts in twenty-eight states differ in population by no more than one *person*.<sup>114</sup> Population inequalities this small do not plausibly threaten the injury that triggered the Court's intervention in the 1960s: rural overrepresentation and urban and suburban political weakness. As this harm has receded, so has the volume of judicial activity.

Notwithstanding this overall trend, a repackaging response has also appeared in the malapportionment case law. One person, one vote claims have occasionally been used to strike down partisan gerrymanders whose population deviations were small but aimed at partisan gain.<sup>115</sup> The Court's 2004 decision, *Cox v. Larios*,<sup>116</sup> remains the best illustration of this doctrinal reaction.<sup>117</sup> Georgia Democrats, still clinging to power in 2001 despite the state's pro-Republican drift, enacted an aggressive pro-Democratic gerrymander.<sup>118</sup>

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<sup>110</sup> More specifically, the Court held that the lower court had erred in assuming that a total population deviation above 10% is automatically unconstitutional. *See Voinovich v. Quilter*, 507 U.S. 146, 161–62 (1993).

<sup>111</sup> *See Tennant v. Jefferson City Comm'n*, 567 U.S. 758, 764–65 (2012).

<sup>112</sup> *See COX & KATZ*, *supra* note 54, at 4 (observing that almost every map in the country was redrawn during the one person, one vote revolution of the 1960s).

<sup>113</sup> *See 2010 Redistricting Deviation Table*, NAT'L CONF. OF STATE LEGISLATURES (July 6, 2018), <http://www.ncsl.org/research/redistricting/2010-ncsl-redistricting-deviation-table.aspx> [<https://perma.cc/R6YF-7QFT>].

<sup>114</sup> *See id.*

<sup>115</sup> For other scholars noticing this development, *see* Issacharoff & Karlan, *supra* note 71, at 567–69; and Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 MICH. L. REV. 351, 384–86 (2017).

<sup>116</sup> 542 U.S. 947 (2004) (mem.).

<sup>117</sup> *Id.*

<sup>118</sup> *See id.* at 947–49 (Stevens, J., concurring).

This map cracked (or dispersed) and packed (or overconcentrated) Republican voters, generating a large pro-Democratic skew in the 2002 election.<sup>119</sup> More relevant here, the map also “systematically underpopulat[ed] the districts held by incumbent Democrats” and “overpopulat[ed] those of Republicans.”<sup>120</sup> “Republican-leaning districts” were thus “vastly more overpopulated as a whole than Democratic-leaning districts,” “with many of the large positive population deviations in districts that paired Republican incumbents against each other.”<sup>121</sup> Even though the plan’s total population variance was less than 10%, the Court found it unlawful. “[T]he drafters’ desire to give an electoral advantage . . . to certain incumbents . . . did not justify the conceded deviations from the principle of one person, one vote.”<sup>122</sup>

*Larios* was arguably idiosyncratic in that the Court summarily affirmed the lower court’s judgment,<sup>123</sup> and so did not issue a clearly precedential ruling.<sup>124</sup> But in the 2016 case of *Harris v. Arizona Independent Redistricting Commission*,<sup>125</sup> the Court gave plenary consideration to a claim that “almost all the Democratic-leaning districts [in Arizona’s legislature] are somewhat underpopulated and almost all the Republican-leaning districts are somewhat overpopulated.”<sup>126</sup> The Court rejected the claim because the reason for the pattern was the commission’s desire to comply with the VRA—not an intent to benefit Democrats.<sup>127</sup> In denying the claim, though, the Court confirmed its legal availability. If “it is more probable than not that a deviation of less than 10% reflects the predominance of illegitimate reapportionment factors,” such as “partisanship,” then a map is unconstitutional.<sup>128</sup>

Since *Harris*, several lower courts have invalidated partisan gerrymanders on malapportionment grounds. In North Carolina, in particular, a trio of county-level plans have been nullified, all designed by the Republican legislature and featuring underpopulated Republican districts and overpopulated Democratic districts.<sup>129</sup> The Supreme Court’s 1983 dictum that one person, one vote “is far less ambitious than would be required to address

<sup>119</sup> See *id.*; see also Simon Jackman Dataset, *Whitford v. Nichol*, No. 3:15-cv-00421 (W.D. Wis. July 8, 2015) [hereinafter Jackman *Whitford* Dataset] (recording a pro-Democratic efficiency gap of 7% in Georgia’s 2002 election).

<sup>120</sup> *Larios*, 542 U.S. at 947 (Stevens, J., concurring) (quoting *Larios v. Cox*, 300 F. Supp. 2d 1320, 1329 (N.D. Ga. 2004)).

<sup>121</sup> *Id.* at 949 (Stevens, J., concurring) (quoting *Larios*, 300 F. Supp. 2d at 1331).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 947.

<sup>124</sup> *Comptroller of Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1800 (2015) (“[A] summary affirmance . . . has considerably less precedential value than an opinion on the merits.”) (internal quotations omitted).

<sup>125</sup> 136 S. Ct. 1301 (2016).

<sup>126</sup> *Id.* at 1309.

<sup>127</sup> See *id.* at 1309–10. The Latino-majority districts the commission drew to abide by the VRA were mostly underpopulated and Democratic-leaning. See *id.*

<sup>128</sup> *Id.* at 1307, 1310.

<sup>129</sup> Two of these plans were struck down after *Harris*. See *Raleigh Wake Citizens Ass’n v. Wake City Bd. of Elections*, 827 F.3d 333, 345–51 (4th Cir. 2016); *City of Greensboro v. Guilford City Bd. of Elections*, 251 F. Supp. 3d 935, 942–49 (M.D.N.C. 2017). One plan was struck down shortly before *Harris*. See *Wright v. North Carolina*, 787 F.3d 256, 263–68 (4th Cir. 2015).

gerrymandering”<sup>130</sup> therefore no longer seems operative. Thanks to *Larios* and *Harris*, the doctrine’s ambition now extends to gerrymanders that differentially populate each party’s districts.

### B. Race and Redistricting

#### 1. Dormancy

Turning to race and redistricting, all of the relevant legal theories have been deployed less often, and to less effect, over the last generation. In my terminology, the theories have undergone a dormancy response as partisanship has eclipsed and subsumed concerns about minority representation and racial essentialism. Racial vote dilution decisions, first, peaked in frequency in 1992 and have become progressively rarer ever since.<sup>131</sup> Moreover, “[a]s the number of [vote dilution] cases has fallen over time, the rate of plaintiff success has also declined.”<sup>132</sup> More than two-fifths of vote dilution plaintiffs were victorious in the 1980s, compared to about a quarter in the 1990s and less than one-fifth in the 2000s.<sup>133</sup>

In the Supreme Court, the 2009 case of *Bartlett v. Strickland*<sup>134</sup> is emblematic of the hyperpartisan present.<sup>135</sup> In its controlling opinion, the plurality refused to authorize vote dilution claims in areas where only “crossover” districts could be drawn: districts in which minority voters make up less than a majority of the population, but are still able to elect their preferred candidates thanks to support from white voters.<sup>136</sup> The plurality’s reason for not permitting crossover claims was that, in its view, they would be used to improve representation for parties rather than for minority voters. “The easiest and most likely alliance for a group of minority voters is one with a political party,” the plurality reasoned.<sup>137</sup> Crossover claims would thus

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<sup>130</sup> *Karcher v. Daggett*, 462 U.S. 725, 734 n.6 (1983).

<sup>131</sup> See Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 14 (2008).

<sup>132</sup> *Id.*; see also Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J.L. REFORM 643, 656 (2006) (“Courts identified violations of Section 2 more frequently between 1982 and 1992 than in the years since.”).

<sup>133</sup> See Cox & Miles, *supra* note 131, at 14; see also Katz et al., *supra* note 132, at 656.

<sup>134</sup> 556 U.S. 1 (2009).

<sup>135</sup> In the lower courts, the most notable case in this vein is *League of United Latin Am. Citizens v. Clements*, 999 F.2d 831 (5th Cir. 1993) (en banc), in which the Fifth Circuit declared that unlawful vote dilution occurs “only where Democrats lose because they are black, not where blacks lose because they are Democrats,” *id.* at 854. Also worth flagging is the Supreme Court’s decision this past term in *Abbott v. Perez*, 138 S. Ct. 2305 (2018), a case involving both racial vote dilution and racial gerrymandering claims. In discussing the vote dilution claims, the Court observed that “a voter’s race sometimes correlates closely with political party preference,” and that in the case at hand, “the two factors were virtually indistinguishable.” *Id.* at 2314. These remarks may help explain why the Court ruled against the vote dilution claims. See *id.* at 2330–34. The claims may have seemed to the Court like thinly disguised partisan grievances.

<sup>136</sup> See *Bartlett*, 556 U.S. at 13.

<sup>137</sup> *Id.* at 22.

produce a “fusion of race and party affiliation”<sup>138</sup> and “result in political party entitlement . . . to a certain number of seats.”<sup>139</sup> “[R]elying on a combination of race and party,” the claims “would involve the law and courts in a perilous enterprise” and “distort and frustrate” the nonpartisan goals of vote dilution law.<sup>140</sup>

Second, the proportion of election laws blocked by the Department of Justice (DOJ) because of their retrogressive intent or effect dropped even more quickly than the volume of vote dilution litigation over the last three decades. Indeed, this fraction ultimately fell to zero after the Supreme Court neutered the VRA provision requiring certain (mostly southern) jurisdictions to obtain preclearance before changing their electoral practices.<sup>141</sup> From the mid-1960s to the mid-1970s, about 6% of new voting measures in covered jurisdictions were objected to by the DOJ.<sup>142</sup> This percentage declined to just over 1% from the mid-1970s to the early 1980s, and to 0.6% from the early 1980s to the mid-2000s.<sup>143</sup> In the 1990s and 2000s specifically, the share was even lower: a miniscule 0.1%.<sup>144</sup> And since the Court’s 2013 decision in *Shelby County v. Holder*<sup>145</sup> (about which more in a moment), the DOJ has lacked the authority to stop any retrogressive laws.<sup>146</sup>

Even before the VRA’s preclearance provision was annulled, it was hobbled by its interaction with hyperpartisanship. In the 2003 case of *Georgia v. Ashcroft*,<sup>147</sup> the same Georgia Democrats who manipulated districts’ populations in Larios “reduced by five the number of districts with a black voting age population in excess of 60%.”<sup>148</sup> Although this reduction made it “more difficult for minority voters to elect their candidate of choice” in these districts, the Court deemed the plan non-retrogressive.<sup>149</sup> Why? Because the potential decline in black representation was more than offset by the likely gain in Democratic representation.<sup>150</sup> The map “increase[d] the number of Democratic Senate seats,” and so “increase[d] the prospects of Democratic victory.”<sup>151</sup> And in the Court’s opinion, it was permissible for Georgia to trade some black legislators for more Democratic ones. “The State may choose . . . that it is better to risk having fewer minority representatives in

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* (quoting Richard H. Pildes, *Is Voting Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517, 1539 (2002)).

<sup>140</sup> *Id.* at 22–23.

<sup>141</sup> This provision is Section 5 of the VRA. See 52 U.S.C. § 10304 (2012).

<sup>142</sup> U.S. COMM’N ON CIVIL RIGHTS, VOTING RIGHTS ENFORCEMENT & REAUTHORIZATION, at 27 (2006), <https://www.usccr.gov/pubs/docs/051006VRASatReport.pdf> [<https://perma.cc/8NM2-CT7Z>].

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> 570 U.S. 529 (2013).

<sup>146</sup> *Id.* at 556–57.

<sup>147</sup> 539 U.S. 461 (2003).

<sup>148</sup> *Id.* at 470.

<sup>149</sup> *Id.* at 487.

<sup>150</sup> *Id.* at 489.

<sup>151</sup> *Id.* at 469, 489.

order to . . . increase[e] the number of [Democratic] representatives sympathetic to the interests of minority voters.”<sup>152</sup>

After Georgia eroded the anti-retrogression principle, *Shelby County* administered the coup de grâce. In nullifying the VRA’s preclearance formula, the Court insisted that racial discrimination in voting is not as severe a problem in the hyperpartisan present as it was in the less partisan (but more racist) past.<sup>153</sup> “[H]istory did not end in 1965,” the Court reminded its readers.<sup>154</sup> “Nearly 50 years later, things have changed dramatically,” and “[t]here is no denying . . . that the conditions that originally justified [the anti-retrogression rule] no longer characterize voting in the covered jurisdictions.”<sup>155</sup> In particular, “voter registration and turnout numbers in the covered States have risen dramatically,” such that “the Nation is no longer divided along those lines.”<sup>156</sup> The Nation may well be divided along other lines—partisan ones—but it is not split on the basis of race, at least not according to the Court.<sup>157</sup>

And third, like activity under the VRA, racial gerrymandering suits have become less common and less successful in recent years. Between the doctrine’s creation in 1993 and the Supreme Court’s 2001 decision in *Easley v. Cromartie*,<sup>158</sup> federal and state courts resolved twenty-nine racial gerrymandering cases, striking down districts in seventeen of them.<sup>159</sup> In the cycle after *Cromartie*, though, courts issued judgments in just eleven racial gerrymandering cases, and invalidated districts in only two of them.<sup>160</sup> The volume of litigation thus fell by more than 60%, and plaintiffs’ win rate by almost 70%.

Why was *Cromartie* so pivotal? Because in it, the Court recognized partisanship as a defense to a charge of racial gerrymandering.<sup>161</sup> The plaintiffs contended that a contorted North Carolina district (another iteration of the district previously rejected in *Shaw v. Reno*) was designed primarily for racial reasons.<sup>162</sup> The defendants responded that “the creation of a safe Democratic seat” was the essential motivation for the district’s construction.<sup>163</sup> And the

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<sup>152</sup> *Id.* at 483. While the Court allowed this tradeoff in theory, the state actually managed to increase the number of Democratic seats without reducing the number of black-majority districts. *See id.* at 470–71. Additionally, the portion of *Georgia* permitting the sacrifice of minority-ability districts was later overturned by Congress. *See* 52 U.S.C. § 10304(b) (barring any retrogression in “the ability” of minority citizens “to elect their preferred candidates of choice”).

<sup>153</sup> *Shelby County*, 570 U.S. at 551.

<sup>154</sup> *Id.* at 552.

<sup>155</sup> *Id.* at 534, 547.

<sup>156</sup> *Id.* at 551.

<sup>157</sup> *See id.*

<sup>158</sup> 532 U.S. 234 (2001).

<sup>159</sup> These figures are based on a dataset compiled by Morgan Kousser and on file with the author.

<sup>160</sup> I again derive these figures from Kousser’s dataset. I also stop this analysis in the 2000s because, as I discuss below, racial gerrymandering doctrine has experienced a strong repackaging response in the 2010s.

<sup>161</sup> *See Cromartie*, 532 U.S. at 244–57.

<sup>162</sup> *See id.* (discussing in detail the plaintiffs’ evidence).

<sup>163</sup> *Id.* at 239.

Court agreed with them, in the process finding clear error in the district court's contrary conclusion and announcing that, to prevail, a litigant must prove that "race rather than politics predominantly explains [a district's] boundaries."<sup>164</sup> Needless to say, such a showing can seldom be made in an era when most mapmakers are preoccupied with partisan advantage. As Bruce Cain and Emily Zhang have written, "[t]his requirement likely encompasses so few redistricting scenarios as to almost entirely neutralize any effect that the racial gerrymandering doctrine might have."<sup>165</sup>

There is compelling evidence of a dormancy response, then, in the law of race and redistricting. Decisions like *Bartlett*, *Georgia*, *Shelby County*, and *Cromartie* also suggest an explanation for this response: the Court's view that partisanship is the preeminent cleavage in modern American politics, and that claims of racial vote dilution, retrogression, and racial gerrymandering are often linked to—or a façade for—partisan ploys. If partisanship is the actual driver of nominally racial challenges, it is sensible for a judiciary that wants to avoid partisan entanglements to refrain from intervention.

## 2. Repackaging

Another option, of course, for a judiciary that wants to curb partisan abuses rather than to dodge them, is to use race-related theories to attack partisan gerrymandering. This is the repackaging response, and it too has been evident in the Court's case law on vote dilution and racial gerrymandering (though not retrogression<sup>166</sup>). The Court's 2006 decision in *League of United Latin American Citizens (LULAC) v. Perry*<sup>167</sup> exemplifies the redeployment of vote dilution doctrine.<sup>168</sup> As part of a mid-decade re-redistricting, Texas Republicans eliminated a Latino-majority district in order to "serve[] the dual goal of increasing Republican seats in general and protecting [the Republican incumbent] in particular."<sup>169</sup> Even though "the State's action was taken primarily for political, not racial, reasons,"<sup>170</sup> the Court found it "a denial of opportunity in the real sense of that term," and hence unlawful under the VRA.<sup>171</sup>

The *LULAC* Court also devised a rule that rendered irrelevant the new Latino-majority district that Texas created to compensate for the destruction of the old one. The new district's flaw—an error previously unknown to vote

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<sup>164</sup> *Id.* at 243.

<sup>165</sup> Bruce E. Cain & Emily R. Zhang, *Blurred Lines: Conjoined Polarization and Voting Rights*, 77 OHIO ST. L.J. 867, 886 (2016); see also Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 69 n.178 (2004) (discussing the role of *Cromartie* in reducing racial gerrymandering litigation in the 2000s).

<sup>166</sup> An exception in the lower courts is *Texas v. United States*, 887 F. Supp. 2d 133 (D.D.C. 2012), *vacated* 570 U.S. 928 (2013), a pre-*Shelby County* case that denied preclearance to a set of pro-Republican district plans in Texas.

<sup>167</sup> 548 U.S. 399 (2006).

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* at 425.

<sup>170</sup> *Id.* at 440.

<sup>171</sup> *Id.* at 429.

dilution law—was that it combined Latinos with “different characteristics, needs, and interests.”<sup>172</sup> So novel was this “cultural noncompactness”<sup>173</sup> argument that it induced bafflement in Chief Justice Roberts’s dissent: “Whatever the majority believes it is fighting with its holding, it is not vote dilution on the basis of race or ethnicity.”<sup>174</sup> And indeed, vote dilution was not the evil the Court sought to combat. Rather, it was the perceived unfairness of voters being on the verge of ousting their unpopular incumbent but being prevented from doing so by the politically motivated redrawing of their district.

The Court’s racial gerrymandering cases in the current cycle are another example of repackaging.<sup>175</sup> In 2011, Republican mapmakers in several southern states with large African American populations adopted the same strategy: concentrating black voters (who reliably support Democratic candidates) in a small number of districts, and dispersing white Republican voters more efficiently across the remaining districts.<sup>176</sup> In a 2015 decision, the Court rejected the variant of this tactic used by Alabama: “maintain[ing] roughly the same black population percentage in existing majority-minority districts.”<sup>177</sup> In a 2017 case, the Court objected to Virginia’s analogous approach: “ensuring that each district would have a black voting age population . . . of at least 55%.”<sup>178</sup> As a result, about two dozen state legislative districts, all components of Republican gerrymanders, had to be reconfigured.<sup>179</sup>

Also in 2017, the Court confronted North Carolina’s “racial target” that “African-Americans should make up no less than a majority of the voting-age population” in two congressional districts.<sup>180</sup> In *Cooper v. Harris*,<sup>181</sup> the

<sup>172</sup> *Id.* at 434; *see also id.* at 424 (observing that the Latinos in the district “have divergent ‘needs and interests’ . . . owing to ‘differences in socio-economic status, education, employment, health, and other characteristics’”) (quoting *Sessions v. Perry*, 298 F. Supp. 2d 451, 502, 512 (E.D. Tex. 2004)).

<sup>173</sup> *See* Daniel R. Ortiz, *Cultural Compactness*, 105 MICH. L. REV. FIRST IMPRESSIONS 48 (2006) (coining the term); *see also* Nicholas O. Stephanopoulos, *Spatial Diversity*, 125 HARV. L. REV. 1903, 1975–80 (2012) (commenting on the “spatial diversity” of the Latino population in the new Latino-majority district).

<sup>174</sup> *LULAC*, 548 U.S. at 511 (Roberts, C.J., concurring in part, concurring in the judgment in part, and dissenting in part).

<sup>175</sup> The possibility of using racial gerrymandering doctrine to pursue partisan goals was noted much earlier (albeit in dissent). *See Shaw v. Hunt*, 517 U.S. 899, 920–21 (1996) (Stevens, J., dissenting) (“[I]t is inevitable that allegations of racial gerrymandering will become a standard means by which unsuccessful . . . parties[] will seek to obtain judicially what they could not obtain electorally.”).

<sup>176</sup> For more on the Republican redistricting strategy in the current cycle, *see* DAVID DALEY, *RATF\*\*KED: WHY YOUR VOTE DOESN’T COUNT* (2016).

<sup>177</sup> *Ala. Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1263 (2015).

<sup>178</sup> *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 794 (2017).

<sup>179</sup> *See id.* at 795 (vacating and remanding as to eleven districts); *Bethune-Hill v. Va. State Bd. of Elections*, No. 3:14-CV-852, 2018 WL 3133819, at \*1 (E.D. Va. June 26, 2018) (striking down these eleven districts on remand); *Ala. Legislative Black Caucus v. Alabama*, 231 F. Supp. 3d 1026, 1033–34 (M.D. Ala. 2017) (invalidating twelve districts on remand).

<sup>180</sup> *Cooper v. Harris*, 137 S. Ct. 1455, 1468 (2017). And in the Court’s most recent term, it struck down a Texas state house district that was formed when “the Legislature moved Latinos into the district to bring the Latino population back above 50%.” *Abbott v. Perez*, 138 S. Ct. 2305, 2334 (2018).



Court deemed this 50% black threshold as racially motivated as Virginia's 55% black cutoff and Alabama's freezing of black population shares.<sup>182</sup> The Court also rebuffed North Carolina's defense that Republican gain, not race, was the impetus for one of the two districts. "[I]f legislators use race as their predominant districting criterion with the end goal of advancing their partisan interests . . . their action still triggers strict scrutiny."<sup>183</sup> "[T]he sorting of voters on the grounds of their race remains suspect even if race is meant to function as a proxy for other (including political) characteristics."<sup>184</sup>

I have added the italics for a reason. In this passage, the Court effectively abandoned the position it had adopted in *Cromartie*: that race and politics are conceptually distinct purposes, and that a district is unconstitutional only if "race rather than politics predominantly explains [its] boundaries."<sup>185</sup> In place of that artificial separation, the Court now acknowledged that race and politics are tightly interwoven (especially in the South), and that race can therefore be used to craft a partisan gerrymander. When race is so used, a district is presumptively unlawful, even if the mapmaker's ultimate goal is partisan advantage rather than racial essentialism. The partisan aim does not rescue the district—in fact, it condemns it—so long as the end is achieved through racial means.<sup>186</sup>

### C. Partisan Gerrymandering

This leaves the cause of action for partisan gerrymandering, whose defining feature has been disuse: in my vocabulary, the absence of a direct response to the rise of hyperpartisanship. After *Bandemer*, the Supreme Court decided two more partisan gerrymandering cases on the merits: *Vieth v. Jubelirer*<sup>187</sup> in 2004 and *LULAC* in 2006. This past term, the Court resolved two further partisan gerrymandering disputes on procedural grounds: *Gill v. Whitford*<sup>188</sup> and *Benisek v. Lamone*.<sup>189</sup> In *none* of these suits did the Court rule in favor of the plaintiffs.

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<sup>181</sup> 137 S. Ct. 1455 (2017).

<sup>182</sup> See *id.* at 1469.

<sup>183</sup> *Id.* at 1473 n.7 (emphasis added).

<sup>184</sup> *Id.* (emphasis added); see also *id.* at 1464 n.1 ("A plaintiff succeeds . . . even if . . . a legislature elevated race to the predominant criterion in order to advance other goals, including political ones.")

<sup>185</sup> *Easley v. Cromartie*, 532 U.S. 234, 243 (2001).

<sup>186</sup> For another scholar making a similar observation, see Richard L. Hasen, *Race or Party, Race as Party, or Party All the Time: Three Uneasy Approaches to Conjoined Polarization in Redistricting and Voting Cases*, 59 WM. & MARY L. REV. 1837, 1854 (2018) ("[T]he racial gerrymandering cause of action has been repurposed for new partisan warfare . . ."). In his dissent in *Harris*, Justice Alito sharply objected to the partisan repackaging of the racial gerrymandering cause of action. Through this repackaging, in his view, "the federal courts will be transformed into weapons of political warfare," and "the losers in the redistricting process [will] seek to obtain in court what they could not achieve in the political arena." 137 S. Ct. at 1490 (Alito, J., concurring in part and dissenting in part).

<sup>187</sup> 541 U.S. 267 (2004).

<sup>188</sup> 138 S. Ct. 1916 (2018).

In *Vieth*, first, the Court did not merely uphold the challenged Pennsylvania plan. The Court also discarded the test it had adopted in *Bandemer*—whether a map “consistently degrade[s] . . . a group of voters’ influence on the political process as a whole”<sup>190</sup>—and came within one vote of declaring the doctrine nonjusticiable.<sup>191</sup> In *LULAC*, similarly, the Court was unmoved by the mid-decade timing of Texas’s re-redistricting, which made it unusually easy to infer the state’s partisan purpose.<sup>192</sup> The Court was unwilling as well to embrace a quantitative measure of partisan asymmetry proposed by a group of political scientist amici.<sup>193</sup>

In *Whitford*, too, the Court avoided engaging with the appellees’ proposed legal standard by holding that they had not yet proven their standing to sue.<sup>194</sup> In a striking display of passivity, the Court also replied to the appellees’ argument that only the judiciary is “capable of solving this problem” by stating that “[s]uch invitations must be answered with care.”<sup>195</sup> Neither the “default of politically accountable officers”<sup>196</sup> nor a “failure of political will”<sup>197</sup> necessitates judicial intervention. The Court further characterized the consequence of partisan gerrymandering—a legislature whose partisan composition diverges sharply from that of the electorate—as “a collective political interest, not an individual legal interest.”<sup>198</sup> In the Court’s view, it was “not responsible for vindicating” such “generalized partisan preferences.”<sup>199</sup>

And in *Benisek*, the Court managed to dispose of the case on an even more technical basis. According to the Court, the appellants had been tardy in mounting their challenge, and by the summer of 2018 it was too late “to

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<sup>189</sup> 138 S. Ct. 1942 (2018). And in a third partisan gerrymandering case, the Court summarily vacated the lower court’s judgment for reconsideration in light of *Whitford*. See *Common Cause v. Rucho*, 279 F. Supp. 3d 587 (M.D.N.C. 2018), *vacated*, 138 S. Ct. 2679 (2018) (mem.).

<sup>190</sup> *Davis v. Bandemer*, 478 U.S. 109, 132 (1986) (plurality opinion).

<sup>191</sup> See *Vieth*, 541 U.S. at 281–84 (plurality opinion) (rejecting the *Bandemer* test); *id.* at 306 (“declin[ing] to adjudicate these political gerrymandering claims.”).

<sup>192</sup> See *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 419 (2006) (Kennedy, J., joined by Alito, J.) (“[T]here is nothing inherently suspect about a legislature’s decision to replace mid-decade a court-ordered plan with one of its own.”).

<sup>193</sup> See *id.* at 420 (“I would conclude asymmetry alone is not a reliable measure of unconstitutional partisanship.”).

<sup>194</sup> See *Gill v. Whitford*, 138 S. Ct. 1916, 1929–34 (2018). Because of its ruling on standing, the Court “express[ed] no view on the merits of the plaintiffs’ case.” *Id.* at 1934. The Court acknowledged that “the contours and justiciability of [partisan gerrymandering claims] are unresolved”—and left them equally murky. *Id.* at 1922.

<sup>195</sup> *Id.* at 1929 (internal quotation marks and alterations omitted).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* (quoting *Clinton v. City of New York*, 524 U.S. 417, 449 (1998) (Kennedy, J., concurring)).

<sup>198</sup> *Id.* at 1932.

<sup>199</sup> *Id.* at 1933. In her concurring opinion, however, Justice Kagan accurately observed “the death-knell of bipartisanship, creating a legislative environment that is ‘toxic’ and ‘tribal.’” *Id.* at 1940 (Kagan, J., concurring) (citation omitted). She further noted that “[g]errymanders have thus become ever more extreme and durable,” with “[t]he 2010 redistricting cycle produc[ing] some of the worst partisan gerrymanders on record.” *Id.* at 1941. But this awareness of modern hyperpartisanship was nowhere to be found in the majority opinion.

ensure the timely completion of a new districting scheme in advance of the 2018 election season.”<sup>200</sup> The Court therefore declined to issue a preliminary injunction barring Maryland’s plan from being used again.<sup>201</sup>

Unsurprisingly, lower courts have largely followed the Supreme Court’s lead. Just as every suit that relied on the *Bandemer* test failed,<sup>202</sup> so did every partisan gerrymandering claim in federal court between 2004 (when *Vieth* was decided) and 2016.<sup>203</sup> Indeed, “claimants’ record over this generation-long period [was] roughly zero wins and fifty losses.”<sup>204</sup> Prior to 2016, the only glimmers of hope for plaintiffs were a series of Florida state court cases won under a Florida constitutional provision banning redistricting with partisan intent.<sup>205</sup> Since 2016, plaintiffs have succeeded in one more state court case, this time under the Pennsylvania constitution,<sup>206</sup> and preliminarily in two federal cases: one against Wisconsin’s state house plan,<sup>207</sup> the other against North Carolina’s congressional map.<sup>208</sup> I helped to litigate the federal cases—both of whose judgments were recently vacated by the Supreme Court and remanded for further proceedings—and I say more about them below.

First, though, I highlight certain comments the Court made about voter and legislator behavior in *Vieth*, its most important modern decision on partisan gerrymandering. These remarks, in my view, reveal the Court’s failure to grasp the realities of the hyperpartisan present. As to voters, the Court asserted that “[p]olitical affiliation is not an immutable characteristic, but may shift from one election to the next; and even within a given election, not all voters follow the party line.”<sup>209</sup> This was true enough of voters in the 1960s, 1970s, and 1980s, who often switched their party allegiances and split their tickets.<sup>210</sup> But as I discussed earlier, it is mostly false with respect to today’s far more loyal voters.<sup>211</sup> The election-to-election stability of voters’ choices is now extremely high, and only a tiny fraction of voters in federal elections now split their tickets.<sup>212</sup>

As to legislators, the Court stated that “the Constitution does not answer the question whether it is better for Democratic voters to have their

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<sup>200</sup> *Benisek v. Lamone*, 138 S. Ct. 1942, 1945 (2018).

<sup>201</sup> *See id.*

<sup>202</sup> *See supra* notes 91–96 and accompanying text.

<sup>203</sup> *See* Stephanopoulos & McGhee, *supra* note 1, at 840–41, 846–49.

<sup>204</sup> *Id.* at 833.

<sup>205</sup> *See* FLA. CONST. art. III, § 20(a); *see also* *League of Women Voters of Fla. v. Detzner*, 172 So. 3d 363 (Fla. 2015); *In re* Senate Joint Resolution of Legislative Apportionment 1176, 83 So. 3d 597 (Fla. 2012).

<sup>206</sup> *See* *League of Women Voters of Pa. v. Commonwealth of Pennsylvania*, 178 A.3d 737 (Pa. 2018).

<sup>207</sup> *See* *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016), *vacated*, 138 S. Ct. 1916 (2018).

<sup>208</sup> *See* *Common Cause v. Rucho*, 279 F. Supp. 3d 587 (M.D.N.C. 2018), *vacated*, 138 S. Ct. 2679 (U.S. 2018) (mem.).

<sup>209</sup> *Vieth v. Jubelirer*, 541 U.S. 267, 287 (2004) (plurality opinion).

<sup>210</sup> *See supra* notes 9–16 and accompanying text.

<sup>211</sup> *See supra* notes 98–104 and accompanying text.

<sup>212</sup> *See supra* notes 98–104 and accompanying text.

State's congressional delegation include 10 wishy-washy Democrats . . . or 5 hardcore Democrats."<sup>213</sup> This was indeed a dilemma a generation ago, when many liberal, moderate, and conservative Democrats were elected to Congress, and Democratic voters could plausibly choose between these different models of representation.<sup>214</sup> But as I also showed above, it is no longer a quandary today, because every single Democratic member of Congress is now more liberal than every single Republican.<sup>215</sup> Under modern political conditions, the choice is thus not between "10 wishy-washy Democrats" and "5 hardcore Democrats." Rather, it is between 10 *liberal* Democrats and 5 *liberal* Democrats—which is hardly a choice at all for Democratic voters.

Notably, the federal courts that recently ruled in favor of partisan gerrymandering plaintiffs recognized the partisanship of contemporary voters and legislators. As to voters, the North Carolina court favorably cited witness testimony that "past voting behavior,' as reflected in 'past election results,' is 'the best predictor of future election success.'"<sup>216</sup> Because voters' partisan preferences are so consistent, "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," and "[t]he same would be true for Republican precincts."<sup>217</sup> As to legislators, the Wisconsin court found that Republican representatives "who win by slimmer margins" are not "more receptive to the needs of their Democratic constituents."<sup>218</sup> This is because a "strong caucus system" exists in the Wisconsin legislature, resulting in "very little effort to woo colleagues from 'across the aisle.'"<sup>219</sup> Based on my earlier empirical survey,<sup>220</sup> I have little doubt that these courts are correct (and that the Supreme Court's contrary views are outdated and wrong).

The North Carolina and Wisconsin courts were also presented with evidence that the severity and persistence of partisan gerrymandering have increased sharply. At both the state legislative and congressional levels, the average district plan in the current cycle is more skewed than at any point

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<sup>213</sup> *Vieth*, 541 U.S. at 288 n.9 (plurality opinion). The Court also assumed that legislator ideology is a function of district composition. *See id.* This too is wrong. *See* Nicholas O. Stephanopoulos & Eric M. McGhee, *The Measure of a Metric: The Debate over Quantifying Partisan Gerrymandering*, 70 STAN. L. REV. 1503, 1549–51 (surveying the literature showing that legislators are almost equally extreme no matter how close or safe their seats are).

<sup>214</sup> *See supra* notes 17–20 and accompanying text.

<sup>215</sup> *See supra* notes 106–108 and accompanying text.

<sup>216</sup> *Common Cause v. Rucho*, 279 F. Supp. 3d 587, 600 (M.D.N.C. 2018), *vacated*, 138 S. Ct. 2679 (2018) (mem.).

<sup>217</sup> *Id.* at 602; *see also* *Whitford v. Gill*, 218 F. Supp. 3d 837, 848 (W.D. Wis. 2016), *vacated*, 138 S. Ct. 1916 (2018) (noting the "almost perfect" relationship between two different measures of Wisconsin voters' partisanship).

<sup>218</sup> *Whitford*, 218 F. Supp. 3d at 901 n.266.

<sup>219</sup> *Id.* at 895 n.227, 901 n.266; *see also* *League of Women Voters of Pa. v. Commonwealth of Pennsylvania*, 178 A.3d 737, 790 (Pa. 2018) ("[G]iven the extreme political polarization between the two political parties, Republican representatives will not adequately represent Democrats' interests, thus shutting Democratic voters out of the political process.").

<sup>220</sup> *See supra* notes 98–107 and accompanying text.

since 1972.<sup>221</sup> The 2012 election, in particular, saw the largest partisan tilts in modern history.<sup>222</sup> At both electoral levels, too, the correlation between a map's initial skew and the tilt it goes on to exhibit subsequently has never been stronger.<sup>223</sup> It is now above 0.8 for congressional plans, for instance, compared to less than 0.1 in the 1980s.<sup>224</sup> These developments likely stem from voters' heightened partisanship, which makes their behavior easier for mapmakers to forecast. And while the trends have yet to elicit a direct response from the Supreme Court, they may well be responsible for the North Carolina and Wisconsin courts' decisions to trek further into the thicket.

#### CONCLUSION

I did not try to hide my normative views in the preceding section: that the Supreme Court's failure to respond directly to partisan gerrymandering in a hyperpartisan age is deeply problematic, and that the North Carolina and Wisconsin courts were right to strike down the challenged maps. Because I have explained my position elsewhere,<sup>225</sup> I do not wish to repeat the case for judicial intervention here. But I do want to close by making a related point: that despite the superficial appeal of trying to curb gerrymandering through less controversial, nonpartisan legal theories, a repackaging response is not ultimately a viable strategy. A direct judicial response to gerrymandering is therefore necessary, even though it requires courts to grab the live wire of partisan politics.

What is the problem with a repackaging response? In a nutshell, that in most circumstances it does not actually solve the problem. Precisely because the legal theory invoked is nonpartisan, mapmakers can generally cure the constitutional or statutory violation while preserving their party's advantage. They are not compelled to take the steps—uncracking and unpacking the opposing party's voters—that would, in fact, produce a balanced plan.

Consider a *Larios*-style one person, one vote claim: that a partisan gerrymander overpopulates one party's (and underpopulates the other party's) districts. When such a claim succeeds, the line-drawing party can easily eliminate the malapportionment but still distribute its voters much more efficiently across the revised map's districts. Indeed, this is almost exactly what happened in the lower court litigation that preceded the Supreme Court's

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<sup>221</sup> See Jackman *Rucho* Rep., *supra* note 98, at 30; Jackman *Whitford* Rep., *supra* note 98, at 47; see also Anthony J. McGann et al., *Gerrymandering in America: the House of Representatives, the Supreme Court, and the Future of Popular Sovereignty* 4–5, 97–98 (2016) (reporting similar findings using partisan bias as a metric).

<sup>222</sup> See Jackman *Rucho* Rep., *supra* note 98, at 30; Jackman *Whitford* Rep., *supra* note 98, at 47.

<sup>223</sup> See McGhee et al., *supra* note 99, at 11.

<sup>224</sup> See *id.*

<sup>225</sup> See Stephanopoulos, *supra* note 1; Stephanopoulos & McGhee, *supra* note 1.

decision in *Vieth*.<sup>226</sup> Pennsylvania's original congressional plan was struck down in early 2002 due to a total population deviation of nineteen persons.<sup>227</sup> Pennsylvania Republicans subsequently rectified this (tiny) variance while maintaining the map's (enormous) pro-Republican tilt.<sup>228</sup> The initial plan was expected to give Republicans a supermajority share of the state's districts,<sup>229</sup> and the amended map did enable them to win twelve of nineteen seats in the 2002 election.<sup>230</sup>

Or take race-related challenges like those in *LULAC* and in *Harris*. After their original congressional plan was found to dilute the electoral influence of Latino voters in 2006, Texas Republicans replaced the offending Latino-majority district—the one that joined Latinos with “different characteristics, needs, and interests”<sup>231</sup>—with a new Latino-majority district that lacked this flaw.<sup>232</sup> The revised map was no longer unlawfully dilutive, but it was every bit as skewed in Republicans' favor. Its pro-Republican tilt in the 2006 election actually exceeded that of its predecessor.<sup>233</sup> Similarly, after two of their initial congressional districts were deemed racial gerrymanders in 2016, North Carolina Republicans redrew the state's entire plan, this time ignoring race but explicitly requiring “[t]he partisan makeup of the congressional delegation” to be “10 Republicans and 3 Democrats.”<sup>234</sup> Sure enough, ten Republicans and three Democrats were elected in the 2016 election, resulting in the largest partisan skew of any map in the country.<sup>235</sup>

Indeed, there is only one scenario in which a repackaging response is likely to be effective: when the original plan was enacted by a single party in full control of the state government, but the balance of power shifted prior to the court decision invalidating the map. In this situation, no party has enough sway to pass a partisan gerrymander, so the remedial plan must be either a bipartisan compromise or a court-imposed solution. This series of events is not entirely unheard of. It occurred, for example, after the Supreme Court's decision in *Larios*, because by 2004 Republicans had won a majority in one chamber of the Georgia legislature. Consequently, after the elected branches failed to agree on a remedy, a special master crafted a map that was more neutral than the previous pro-Democratic gerrymander.<sup>236</sup> But even though the sequence is plausible, it is far from common. Typically, the ger-

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<sup>226</sup> It is not exactly what happened because the original plan was invalidated on conventional (not *Larios*-style) malapportionment grounds. See *Vieth v. Pennsylvania*, 195 F. Supp. 2d 672, 675–78 (M.D. Pa. 2002). But this in no way affects my point.

<sup>227</sup> See *id.*

<sup>228</sup> See *Vieth v. Pennsylvania*, 241 F. Supp. 2d 478, 483 (M.D. Pa. 2003).

<sup>229</sup> See *Vieth v. Pennsylvania*, 188 F. Supp. 2d 532, 536 (M.D. Pa. 2002).

<sup>230</sup> See Jackman *Rucho* Dataset, *supra* note 79.

<sup>231</sup> *LULAC v. Perry*, 548 U.S. 399, 434 (2006).

<sup>232</sup> See *LULAC v. Perry*, 457 F. Supp. 2d 716, 718–20 (E.D. Tex. 2006).

<sup>233</sup> See Jackman *Rucho* Dataset, *supra* note 79 (recording a pro-Republican efficiency gap of 9.5% in 2006, compared to 9.0% in 2004).

<sup>234</sup> *Common Cause v. Rucho*, 279 F. Supp. 3d 587, 603 (M.D.N.C. 2018), *vacated*, 138 S. Ct. 2679 (2018) (mem.).

<sup>235</sup> See *id.* at 660.

<sup>236</sup> See *Larios v. Cox*, 314 F. Supp. 2d 1357, 1364–73 (N.D. Ga. 2004) (approving the special master's plan); see also Jackman *Whitford* Dataset, *supra* note 119 (showing that the

rymandering party does *not* lose control of the state government halfway through the decade—precisely because of the edge it gains from its carefully carved boundaries.<sup>237</sup> The occasional successes of repackaging thus do not render it a feasible judicial strategy. The wins are simply too rare and politically contingent.

In contrast, when courts respond directly to partisan gerrymandering, their judgments neither can be circumvented nor depend on quirks of political fate. Say a party reenacts a highly skewed plan after its initial handiwork was rejected due to excessive partisanship. Any court worth its salt would rebuff the proposed remedy as well, and then would design the new map itself rather than give the party another bite at the apple.<sup>238</sup> At least, any reasonable court would do so in a case, like the North Carolina and Wisconsin suits, litigated on an effect-based theory of partisan gerrymandering. If the original plan was struck down because of its large and durable partisan asymmetry, it follows that any remedial map that remains severely and persistently asymmetric would be equally unlawful. Any such map would have failed to “eliminate . . . all vestiges” of the underlying violation.<sup>239</sup>

On an intent-based theory of partisan gerrymandering, too, a court would be unlikely to accept a reenacted plan that is about as skewed as its antecedent. The mapmaking party might profess that its motives are now pure, but its claim would hardly be believable if it would retain its advantage under its proposed remedy. That an intent-focused approach can, in fact, produce a substantial gain in partisan fairness is evident from the Florida

Georgia state house plan’s average efficiency gap was about half as large from 2004 to 2010 as in 2002).

<sup>237</sup> See *supra* notes 221–222 and accompanying text (discussing the increased durability of contemporary gerrymanders).

<sup>238</sup> See, e.g., *Common Cause*, 279 F. Supp. 3d at 690, *vacated*, 138 S. Ct. 2679 (2018) (mem.) (“[C]ourts generally do not afford a legislature a second ‘bite-at-the-apple’ to enact a constitutionally compliant plan.”). Almost this sequence of events recently played out in Pennsylvania. After their original congressional plan was invalidated, Republican legislative leaders proposed a remedial map that was nearly as skewed. Christopher Ingraham, *Pennsylvania Republicans Have Drawn a New Congressional Map That is Just as Gerrymandered as the Old One*, WASH. POST, (Feb. 11, 2018), [https://www.washingtonpost.com/news/wonk/wp/2018/02/11/pennsylvania-republicans-have-drawn-a-new-congressional-map-that-is-just-as-gerrymandered-as-the-old-one/?noredirect=on&utm\\_term=.53732ec7113f](https://www.washingtonpost.com/news/wonk/wp/2018/02/11/pennsylvania-republicans-have-drawn-a-new-congressional-map-that-is-just-as-gerrymandered-as-the-old-one/?noredirect=on&utm_term=.53732ec7113f) [https://perma.cc/T6RW-B8RB]. See *Pennsylvania U.S. House Plan Uploaded on 2/13/2018*, PLANSORE, <http://planscore.org/plan.html?PA-Joint-Submission-2018-02-JP> [https://perma.cc/6WE4-TRU2]. The Democratic governor, however, refused to sign this map into law, and the court also declined to adopt it. See Katie Meyer, *Wolf Administration Rejects GOP Congressional Map Proposal* [updated], WHYY (Feb. 13, 2018), <https://whyy.org/segments/wolf-administration-rejects-gop-congressional-map-proposal/> [https://perma.cc/VVL2-HS4G]. Instead, the court imposed its own remedy: a far more balanced map that actually cured the constitutional violation. See Christopher Ingraham, *Pennsylvania Supreme Court draws ‘much more competitive’ district map to overturn Republican gerrymander*, WASH. POST (Feb. 20, 2018), [https://www.washingtonpost.com/news/wonk/wp/2018/02/19/pennsylvania-supreme-court-draws-a-much-more-competitive-district-map-to-overturn-republican-gerrymander/?utm\\_term=.33c3c3024a8e](https://www.washingtonpost.com/news/wonk/wp/2018/02/19/pennsylvania-supreme-court-draws-a-much-more-competitive-district-map-to-overturn-republican-gerrymander/?utm_term=.33c3c3024a8e) [https://perma.cc/JY9V-2DXA]; see also *Pennsylvania U.S. House Plan Uploaded on 2/19/2018*, PLANSORE, <http://www.planscore.org/plan.html?20180219T202039.596761160Z> [https://perma.cc/2VZM-VQJ6].

<sup>239</sup> *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971).

state court litigation. Florida Republicans were required to redraw eight congressional districts that were “tainted by unconstitutional intent.”<sup>240</sup> The Florida Supreme Court subsequently turned down “the Legislature’s proposed configuration” for these districts because it was “even more favorable to the Republican Party than the enacted [plan].”<sup>241</sup> Instead, the court approved the trial court’s alternative—and “objectively better”—arrangement.<sup>242</sup> Under this scheme, the partisan tilt of Florida’s congressional map shrank almost in half in the 2016 election, to its lowest level in more than twenty years.<sup>243</sup>

As in life, then, there are no shortcuts in redistricting litigation. A repackaging response, in particular, is akin to a sugar high for a court that selects this option. It gives the court the immediate gratification of invalidating an objectionable plan, but its benefits tend to dissipate quickly when the jurisdiction designs a new map that is just as skewed but no longer vulnerable on nonpartisan grounds. A direct response, in contrast, is more like eating one’s vegetables. It’s unpleasant at the time (because of its greater risks of confrontation with the elected branches), but in the long run it’s worth it (because it promises actually to thwart partisan gerrymandering).

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<sup>240</sup> League of Women Voters of Fla. v. Detzner, 172 So. 3d 363, 406 (Fla. 2015).

<sup>241</sup> League of Women Voters of Fla. v. Detzner, 179 So. 3d 258, 279–80 (Fla. 2015).

<sup>242</sup> *Id.* at 276.

<sup>243</sup> See Jackman *Rucho* Dataset, *supra* note 81 (recording a pro-Republican efficiency gap of 4.6% in 2016, compared to 8.0% in 2014).