

VOTING RIGHTS FROM JUDGE FRANK JOHNSON TO MODERN HYPERPOLARIZATION

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*Michael S. Kang**

Judge Frank Johnson Jr.'s early decisions on voting rights helped inaugurate the field of election law. They championed a constitutional right to vote in the face of racially motivated restriction by the state. Today, however, the political context for voting rights law has shifted dramatically, in part because of this progress on race. The historically unusual bipartisan peace of the Cold War, which I outline in the Article, has been replaced by today's hyperpartisanship as the backdrop and motivation for state regulation of the political process.

INTRODUCTION

Judge Frank Johnson Jr.'s greatness tracked American history. Ruling from the heart of Jim Crow country, Frank Johnson's decisions protected the Freedom Riders and authorized the civil rights march from Selma to Montgomery. He would shepherd school desegregation in the South and reform Alabama's state mental hospitals and prisons. His courageous rulings on race led the Ku Klux Klan to call him "the most hated man in Alabama," and George Wallace to call him an "integrating, carpet-bagging, scalawagging, race-mixing, bald-faced liar."¹ Judge Johnson could wear these epithets from these quarters as badges of honor in the judgment of American history. But Judge Johnson's involvement with the birth of election law is easy to overlook in the historical significance of his career. Judge Johnson decided *Gomillion v. Lightfoot*² and *Sims v. Frank*³ as a district court judge, and his decision in *United States v. Penton*⁴ presaged the preclearance provisions of the Voting Rights Act.

Judge Johnson's election law cases were early days for election law and voting rights. The pressing problems of the day were questions of racial discrimination and inequality. There were moral, not just constitutional, imperatives at play. Election law, as it developed over the years, particularly under the Voting

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1. John Lewis, *Reflections on Judge Frank M. Johnson, Jr.*, 109 YALE L.J. 1253, 1253 (2000) (quoting TINSLEY E. YARBROUGH, JUDGE FRANK JOHNSON AND HUMAN RIGHTS IN ALABAMA 87 (1981)).

2. 167 F. Supp. 405 (M.D. Ala. 1958), *aff'd*, 270 F.2d 594 (5th Cir. 1959), *rev'd*, 364 U.S. 339 (1960).

3. 208 F. Supp. 431 (M.D. Ala. 1962), *aff'd sub nom.* Reynolds v. Sims, 377 U.S. 553 (1964).

4. 212 F. Supp. 193 (M.D. Ala. 1962).

Rights Act, helped transform the South. Famous for his promise of “segregation forever” in 1963, George Wallace would campaign for African-American votes by the end of the decade.

Now it has been more than fifty years since the Civil Rights Movement and Frank Johnson’s early career. The Voting Rights Act prohibited discriminatory tests and devices from the Jim Crow era and boosted minority voter registration, participation, and electoral success,⁵ as the Court eagerly pointed out in *Shelby County v. Holder*. Section 5 by this measure was, as Sam Issacharoff put it, a victim of its own success.⁶ Racial progress in voting rights and election administration, for which the Court credited the Voting Rights Act itself, fed the Court’s belief that Section 5 was no longer necessary. The Supreme Court, while striking down Section 5 of the Voting Rights Act in *Shelby County v. Holder*, declared that “[n]early 50 years later, things have changed dramatically.”⁷

Election restrictions that once might have been straightforward questions of racial discrimination in Judge Johnson’s time have become more complicated cases today. Judge Johnson operated in a one-party Dixiecrat South without significant partisan consequences from election decisions. Democrats won before and after transformational legal changes to the election process, including “one person, one vote” and the Voting Rights Act. The Cold War featured an historically unusual lull in the partisan warfare that has more generally characterized American politics over the country’s history. As a result, election law, born and developed during Judge Johnson’s career from the 1960s into the 1980s, grew up largely uncomplicated by partisan consequences and without partisanship as a central consideration. But as the South, and indeed the whole country, became more competitive politically between fiercely opposed Democrats and Republicans, partisanship returned as a salient interest in election law.

This symposium Article begins with Judge Johnson’s Cold War era, when racial and regional considerations overshadowed partisanship and explains how election law kicked off as a significant area of constitutional law during this unusual era of low partisanship. Election law, for this reason, focused on problems of race and region with a blind spot for the potential problem of overweening partisanship that would soon reemerge. By the 1990s, following the end of the Cold War, partisanship finally returned with a vengeance. The major parties were back at each other’s throats in what we recognize today as modern hyperpartisanship. The quest for partisan motivation filtered quickly into election law, as partisan actors began seeking political advantage through strategic manipulation of the electoral rules of the game.

5. See generally ARI BERMAN, *GIVE US THE BALLOT: THE MODERN STRUGGLE FOR VOTING RIGHTS IN AMERICA* (2015).

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

7. *Shelby County v. Holder*, 570 U.S. 529, 547 (2013).

Our inherited election law, though, struggles to address this modern challenge even for sympathetic courts eager to cabin overweening partisanship. Election law's blind spot for partisanship, thus far, limits doctrinal opportunities for courts to intervene against even obvious attempts by the government to rig election law in the governing party's favor. In other work, I discuss this evolution for redistricting,⁸ but here I focus on election administration: the vast array of regulations that specify how elections are conducted and, in particular, who may vote and under what conditions.

I. EARLY ELECTION LAW DURING THE COLD WAR ERA

When Judge Johnson decided *Gomillion v. Lightfoot* in 1958 as a young district court judge, there was hardly such a thing that could be called election law. Courts rarely intervened into so-called political cases that concerned redistricting, voting rights, or election administration. Courts routinely avoided these cases, citing deference to the political branches, and the Supreme Court warned against intervention into “matters that bring courts into immediate and active relations with party contests.”⁹ Just a year after Judge Johnson heard *Gomillion*, the Supreme Court upheld the constitutionality of North Carolina's literacy test in deference to the state's “broad powers to determine the conditions under which the right of suffrage may be exercised.”¹⁰

Against this background, *Gomillion v. Lightfoot* was therefore a much harder case for Judge Johnson than it might seem today. To be sure, racial discrimination in *Gomillion* was quite clear. The Alabama legislature redefined the boundaries of the city of Tuskegee from a square to what the Supreme Court described as a “strangely irregular twenty-eight-sided figure”¹¹ roughly in the shape of a sea dragon.¹² The effect of the redefinition was to remove from the city proper “all but four or five” of the 5,397 African-American voters who had previously lived within the city boundaries, while removing none of the white voters.¹³ It was, as the plaintiffs alleged, an obvious “attempt to disenfranchise Negro citizens not only of their right to vote in municipal elections and participate in municipal affairs, but also of their right of free speech and press.”¹⁴

8. See generally Michael S. Kang, *Hyperpartisan Gerrymandering*, 61 B.C. L. REV. (forthcoming 2020).

9. *Colegrove v. Green*, 328 U.S. 549, 553 (1946).

10. *Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45, 50 (1959).

11. *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960).

12. *Gomillion v. Lightfoot*, 167 F. Supp. 405, 407 (M.D. Ala. 1958), *aff'd*, 270 F.3d 594 (5th Cir. 1959), *rev'd*, 364 U.S. 339 (1960).

13. *Id.*

14. *Id.*

However, the statute redefining Tuskegee's city boundaries was race-neutral on its face, and there was no direct evidence of racially discriminatory intent.¹⁵ Given the broad deference usually afforded the state, Judge Johnson dismissed the plaintiffs' claim on the ground that his court had "no control over, no supervision over, and no power to change any boundaries . . . fixed by a duly convened and elected legislative body."¹⁶

It was only after the Supreme Court reversed in *Gomillion* that election law grew into a cognizable area of constitutional law. The Supreme Court called out the redefinition of Tuskegee's boundaries for what it clearly was—a racially discriminatory attempt to deny African-American voters their constitutional rights.¹⁷ As Justice Frankfurter's majority opinion put it, the deference afforded the state on political questions "is not carried over when state power is used as an instrument for circumventing a federally protected right."¹⁸ *Gomillion* marked the beginning of a shift from judicial reluctance in election law cases to increasing federal-court intervention that would accelerate in the 1960s with the "one person, one vote" cases still to come.

Still, *Gomillion* reflected the hesitance accompanying that shift. Justice Whitaker, in concurrence, argued persuasively that *Gomillion* should have been decided under the Equal Protection Clause rather than the Fifteenth Amendment.¹⁹ The Fifteenth Amendment protects only against denial of the right to vote on account of race. The redefinition of Tuskegee's boundaries was discriminatory but technically did not deny African-Americans the right to vote. They lost only the right to vote in Tuskegee municipal matters, not the right to vote as a general matter. What is more, as a technical matter, they were denied the right to vote there only on the basis of nonresidency, as citizens living outside the new city boundaries. Of course, as Justice Whittaker explained, the deprivation was nonetheless unconstitutional but, he argued, as an equal protection violation, not as a straightforward Fifteenth Amendment problem.²⁰

For Justice Frankfurter, though, the Fourteenth Amendment route was perilous for courts. Questions of vote dilution, as we would later call them, asked courts to "first define[] a standard of reference as to what a vote should be worth."²¹ For Justice Frankfurter, such decisions were simply not judicially manageable in the absence of a clear denial of constitutional rights based on race. Outside of clear cases like *Gomillion*, these election cases require courts "to choose among competing bases of representation—ultimately, really, among

15. *Id.* at 409–10.

16. *Id.* at 410.

17. *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960).

18. *Id.*

19. *Id.* at 349 (Whittaker, J., dissenting).

20. *Id.*

21. *Baker v. Carr*, 369 U.S. 186, 300 (1962) (Frankfurter, J., dissenting).

competing theories of political philosophy—in order to establish an appropriate frame of government.”²² So, Justice Frankfurter intervened against the obvious injustice in *Gomillion* but at the same time cabined the departure from the usual deference on election matters by deciding it under the narrower auspices of the Fifteenth Amendment, notwithstanding Justice Whittaker’s concerns.

On this question of racial discrimination in voting, Judge Johnson decided his two most famous election cases in rapid succession, shortly after *Gomillion*. In *United States v. Alabama*, Judge Johnson addressed the discriminatory application of Alabama’s literacy test in Macon County, Alabama.²³ Judge Johnson himself would later observe that “Macon County was the case that began to give blacks the right to vote.”²⁴ He found that the Macon County Board of Registrars had aided white voters such that virtually all white applicants successfully passed the literacy test, while it unconstitutionally discriminated against African-Americans such that less than 10% of African-American eligible voters were registered in the county.²⁵ He applied the Civil Rights Act of 1957, as newly amended in 1960, to forbid such discriminatory practices, place unsuccessful African-American applicants on the voting rolls immediately, and put the board of registrars under state supervision.²⁶

In *United States v. Penton*,²⁷ Judge Johnson went further in a similar case by striking down neighboring Montgomery County’s discriminatory practices against African-American voters. Judge Johnson introduced a novel “freezing doctrine” to enjoin past discriminatory maneuvers to disenfranchise African-Americans but also to lock into place clear and fixed “qualification standards,” which the board of registrars would apply to all future applicants.²⁸ As Kathy Abrams discusses in her contribution to this symposium, the innovation of preemptively freezing the county’s registration practices prevented the board from constantly changing the means of discrimination just ahead of a court injunction in a perpetual cat-and-mouse game.²⁹

The historical tradition of judicial deference on election administration crumbled even further with the passage of the Voting Rights Act. The Voting Rights Act authorized enormous federal oversight of state and local election administration as a necessary response to Southern obstruction of African-American voting rights. The Voting Rights Act not only prohibited the use of

22. *Id.*

23. *United States v. Alabama*, 192 F. Supp. 677 (M.D. Ala. 1961), *aff’d*, 304 F.2d 583 (5th Cir.), *aff’d*, 371 U.S. 37 (1962) (per curiam).

24. FRANK SIKORA, *THE JUDGE: THE LIFE & OPINIONS OF ALABAMA’S FRANK M. JOHNSON, JR.* 96 (1992) (quoting Judge Johnson).

25. *Id.*

26. *Alabama*, 192 F. Supp. at 682–83.

27. 212 F. Supp. 193, 200 (M.D. Ala. 1962).

28. *Id.* at 200–02.

29. Kathryn Abrams, *Bridging Past and Future: Judge Frank Johnson and Minority Vote Suppression*, 71 ALA. L. REV. 819 (2020).

literacy tests and other devices historically used to disenfranchise African-Americans but also required covered jurisdictions to preclear any election law changes with the U.S. Department of Justice before implementation.³⁰ This preclearance provision largely adopted Judge Johnson's freezing doctrine from *United States v. Penton*.

As a consequence of the Voting Rights Act, federal courts became deeply involved with overseeing elections despite long-standing sensitivities about judicial involvement with elections and long-standing deference to states and localities. In response to Jim Crow, courts grew willing to liberalize the usual judicial posture concerning standing, ripeness, and other rules about justiciability to oversee questions of election administration under the Voting Rights Act.³¹ Suddenly, courts considered the permissibility, under the Voting Rights Act and the Fourteenth Amendment, of every aspect of election administration, from the form of the ballot to candidate eligibility to the number and location of polling places.³²

The law of the Voting Rights Act, however, addressed only questions of racial exclusion and dilution, mainly in the one-party Jim Crow South.³³ Within Section 5 preclearance, courts asked whether changes to election law had a discriminatory purpose or effect on the voting rights of racial minority voters. In parallel, courts would also consider under Section 2 of the Voting Rights Act whether a challenged election law had a discriminatory purpose or discriminatory effect of denying or diluting racial minority voting rights.³⁴ As courts applied the Voting Rights Act during the 1960s through the 1980s, the decided majority of covered jurisdictions in the South began the era as single-party Democratic regimes.³⁵ As Sam Issacharoff describes, judicial application of the Voting Rights Act in this one-party context could not implicate or consider any partisan dynamics of election administration.³⁶

Questions of partisan manipulation were wholly excluded from judicial development of voting rights law because there were no partisan consequences or

30. Voting Rights Act of 1965, Pub. L. No. 89-110, § 4-5, 79 Stat. 437, 438-39.

31. Cf. Samuel Issacharoff, *Judging in the Time of the Extraordinary*, 47 HOUS. L. REV. 533, 536, 540-41 (2010) (comparing modern courts to courts in the voting rights era).

32. See, e.g., *Anderson v. Celebrezze*, 460 U.S. 780, 782 (1983) (candidate eligibility); *Perkins v. Matthews*, 400 U.S. 379, 387-88 (1971) (location of polling places); *Arroyo v. Tucker*, 372 F. Supp. 764, 765 (E.D. Pa. 1972) (form of ballot).

33. See Samuel Issacharoff, *Voter Welfare: An Emerging Rule of Reason in Voting Rights Law*, 92 IND. L.J. 299, 306 (2016) ("Voting rights law was premised on constitutional and statutory concerns that the animating purpose of many franchise regulations was the continued subjugation of minority voters, particularly under the remnants of Jim Crow.").

34. See generally Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663 (2001).

35. See Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 59 (2004).

36. See Issacharoff, *supra* note 33, at 317-18.

cause for partisan manipulation where just one party fielded competitive candidates and won elective offices. Only later—when the South became politically contested between an evolving Democratic Party and a resurgent Republican Party newly populated by erstwhile Democrats—did the partisan implications of voting rights and election administration complicate the law.³⁷

The moral imperative of racial justice, especially in the context of the Civil Rights Movement, helped drive the expansion of election law, but partisanship as a fundamental problem in election law was an afterthought. Take, for instance, the example of *Reynolds v. Sims*, another case Judge Johnson decided as part of a three-judge panel.³⁸ Following *Baker v. Carr*, the Court examined a half-century's worth of malapportionment in the state, producing an inter-district population disparity of forty-one to one in the Alabama state senate.³⁹ The Court imposed the new constitutional requirement of “one person, one vote” on both houses of the Alabama state legislature and therefore required the re-drawing of every legislative district for the first time in sixty years.⁴⁰

Even so, the Court's historic intervention had no immediate partisan consequences. Alabama at the time was a solidly one-party state where Democrats held every state house and senate seat immediately before and after *Reynolds v. Sims*. Of course, the “one person, one vote” requirement did produce a massive shift in political power from rural counties to urban and suburban ones, but all of this transformation occurred *within* the Democratic Party.⁴¹ State Republicans wouldn't become politically competitive in the state legislature for almost two more decades.⁴² As a consequence, election law originated and developed at the outset in the absence of salient partisan consequences. Other considerations, such as race and regional disparities, were more central, and partisanship hardly would have factored into the judicial analysis.

The case law on election administration outside the Voting Rights Act likewise directed no attention to partisanship as a core concern. The law on election administration developed, as with the rest of election law generally, only after *Baker v. Carr* opened the door to judicial intervention during the 1960s when partisan competition between Republicans and Democrats was at an historically low ebb. The years preceding *Baker v. Carr* represented a “period of stasis in the legal and political history of the right to vote.”⁴³ The Republican Party retained secure control of the Midwest and Northeast, while the Democratic Party monopolized political power in the South, with cross-cutting ideological loyalties

37. See Pildes, *supra* note 35, at 86–93 (2004) (narrating this shift).

38. See *Sims v. Frink*, 208 F. Supp. 431 (M.D. Ala. 1962).

39. *Reynolds v. Sims*, 377 U.S. 533, 545 (1964).

40. *Id.* at 568, 586–87.

41. See generally ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* (2000).

42. See Pildes, *supra* note 35, at 59.

43. KEYSSAR, *supra* note 41, at 230.

undermining the prospects for cohesive and polarized national parties at each other's throats.⁴⁴ If the core concern under the Voting Rights Act was a then-nonpartisan worry about racial inclusion, the core concern in election administration outside the Voting Rights Act was likewise less about partisanship than about the nonpartisan expansion of the right to vote.

The Cold War era, as a general matter, featured historically high levels of bipartisanship and low levels of partisan polarization.⁴⁵ Judges like Frank Johnson did not face a great deal of political complication from partisanship in deciding election cases in this era. Not only was the country divided into partisan fiefdoms, but also the major parties cooperated on foreign policy during the Cold War, enacted landmark national legislation like the Civil Rights and Voting Rights Acts, and regularly voted across party lines.⁴⁶ As a consequence, as Frances Lee put it, “the Congress of the mid-twentieth century is often seen as one characterized by cozy bipartisanship and reduced party polarization.”⁴⁷ Congressional polarization during the era, for example, fell to modern lows as an empirical matter. The ideological gap between Republicans and Democrats in Congress fell to its lowest point since the early nineteenth century. Indeed, for the only prolonged stretch in American history, congressional Republicans and Democrats overlapped ideologically to a significant degree during the Cold War.⁴⁸

Under these historically unusual conditions, courts were rarely asked to consider partisanship—and certainly not today's breed of hyperpartisanship—as a salient concern in election cases. Indeed, election law might have developed more easily, with courts more willing to address election cases, when partisan consequences were at a low ebb. The partisan calm of the Cold War, though, would soon recede.

II. ELECTION ADMINISTRATION AND HYPERPARTISANSHIP

Times have changed since the early days of Judge Johnson's judicial career. Following the Supreme Court's early decisions in election-administration law during the 1960s, 1970s, and 1980s, courts intervened to stop racial restrictions of the franchise, as well as duopolistic restrictions that restricted minor parties from effectively competing. During this era, the Court had few occasions to consider partisan restrictions by which one major party sought to hinder the

44. *Cf. id.* at 230–33.

45. *See* Kang, *supra* note 8 (reviewing the empirical literature and history).

46. *Id.*

47. FRANCES E. LEE, *INSECURE MAJORITIES: CONGRESS AND THE PERPETUAL CAMPAIGN* 22 (2016).

48. *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, 512–16 (2007).

opposing party's supporters from casting ballots. However, the unusual bipartisanship of the Cold War slowly gave way by the 1990s to the restoration of the usual hyperpartisanship that actually characterizes most of American history.

The resulting blind spot for partisanship in the law of election administration would prove costly as hyperpartisanship returned. As we turned to election-administration cases from the last decade, most cases suddenly featured new voter-identification requirements and cutbacks to early voting with clear and purposeful consequences for partisan advantage. Hamstrung by election law's blind spot for hyperpartisanship, courts have either ignored the law's partisan character or inconsistently addressed it under alternate doctrines primarily directed toward other concerns.

A. Racial and Nonpartisan Restrictions of the Franchise

For most of American history, there was very little of what we today would call state and local administration of elections. Political parties long distributed their own printed ballots to their voters such that any major legal concerns surrounding voting were largely about who was entitled to vote, not so much the process by which citizens voted.⁴⁹ There was thus only a modicum of formal state-run election administration until the widespread introduction of the state-provided Australian ballot around the turn of the twentieth century.⁵⁰ These reform initiatives were early responses to mass incorporation of urban immigrants into city machine politics through the mid- to late 1800s.⁵¹

The rapid influx of new voters largely into the Democratic Party instigated a familiar partisan dynamic between Democrats in favor of liberalized election administration and Republicans wary and hypersensitive to risks of voter fraud.⁵² Major innovations, such as the Australian ballot and advance voter registration, reflected reformist impulses in election administration and triggered partisan tensions over urban corruption. Voter registration, for instance, was legislatively mandated, at the start, only in big cities—not in rural areas where Republicans predominated, had no partisan suspicions about voter fraud, and had no motivation to suppress participation.⁵³ All this partisan wrangling aside,

49. See, e.g., *Kineen v. Wells*, 11 N.E. 916 (Mass. 1887) (presenting the right to vote as a constitutional question but permitting legislative discretion to establish reasonable, uniform, and impartial regulation of elections); *Capen v. Foster*, 29 Mass. 485 (1832) (upholding preelection voter registration as merely regulating the time and mode of voting).

50. See *Burson v. Freeman*, 504 U.S. 191, 200–03 (1992). See generally Richard Briffault, *Bush v. Gore as an Equal Protection Case*, 29 FLA. ST. U. L. REV. 325, 350–51 (2001) (describing the decentralized nature of early election administration).

51. See KEYSSAR, *supra* note 41, at 120–21, 142–43.

52. See *id.* at 65–146.

53. See Daniel P. Tokaji, *Voter Registration and Election Reform*, 17 WM. & MARY BILL RTS. J. 453, 457–58 (2008).

courts still lurched away from judicial engagement with election questions as essentially nonjudicial and inherently political.⁵⁴ Judges of the time, long before *Baker v. Carr* opened the door to judicial oversight, remained reluctant to intrude on local prerogatives to conduct elections as best suited their particular interests.

By contrast, the extensive Supreme Court case law on voting in the decades following *Baker v. Carr* repeatedly struck down restrictions on voting, including poll taxes,⁵⁵ bona fide residency,⁵⁶ durational requirements,⁵⁷ and property requirements.⁵⁸ In these cases, though, the Court's constitutional analysis focused on questions of state constriction of individual-level political participation and did not identify or consider strategic partisan motivations underlying these requirements. In *Carrington v. Rash*, the Court came closest to discussing strategic motivations by the state for excluding military personnel from voting.⁵⁹ The Court observed that the state "[f]encing out' from the franchise a sector of the population . . . because of a fear of [their] political views" would be "constitutionally impermissible."⁶⁰ However, these suspicions of the state were not the usual partisan loyalties but instead highly idiosyncratic to military voters who, the state worried, might feel compelled to follow the political preferences of their base commander or be unwilling, as transient residents, to invest in the long-term welfare of the local community.⁶¹

The resulting constitutional regime protected racial minorities and guarded against state attempts to restrict rights of political participation, but it had little opportunity to regard partisan mischief as an important state motivation in gaming election administration. In the foundational case law considering ballot-access restrictions from the 1960s into the 1990s, the Court focused primarily on the question of fair opportunity for minor parties and independents rather than guarding against partisan aggression between the major parties.

In *Williams v. Rhodes*, the Court struck down Ohio's statutory requirement that minor parties gather, as a condition of ballot access, petition signatures from a number of voters equal to 15% of the ballots cast in the previous gubernatorial election.⁶² The Court immediately concluded that the Ohio law gave "the two old, established parties a decided advantage over any new parties . . . and thus place[d] substantially unequal burdens on both the right to vote and

54. See, e.g., *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (describing the "political thicket"); *Breedlove v. Suttles*, 302 U.S. 277, 283 (1937) (upholding the poll tax as a "familiar and reasonable regulation . . . enforced . . . for more than a century").

55. See *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966).

56. See *Carrington v. Rash*, 380 U.S. 89 (1965).

57. See *Dunn v. Blumstein*, 405 U.S. 330 (1972).

58. See *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969).

59. 380 U.S. at 93–95.

60. *Id.* at 94.

61. *Id.* at 93–94.

62. 393 U.S. 23, 24–25 (1968).

the right to associate.”⁶³ Given that those two old, established parties were responsible for lawmaking in Ohio, the Court rightly rejected the state’s claimed interest in a “two-party system in order to encourage compromise and political stability” when it amounted to Democrats and Republicans combining to discriminate against minor-party and independent competition through restrictive election administration.⁶⁴ In *Williams v. Rhodes* and its progeny, the Court checked duopolistic regulation by the major parties against minor-party and independent challengers. However, the Court scarcely had occasion to consider strategic manipulation of election administration by one major party *against* the other.⁶⁵ In this time of relative partisan calm between the major parties, perhaps these types of cases simply did not arise as frequently as they later would.

The tiered constitutional analysis that emerged from these decisions applied judicial scrutiny to election administration, which put into play racial concerns or unreasonable discrimination against minor-party or independent challengers, but otherwise, the rest of election administration would be analyzed under a much more deferential standard.⁶⁶ The Court recognized the need for “substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.”⁶⁷ As a consequence, election administration that imposes only reasonable, nondiscriminatory restrictions on voting, as the case law defined them, required only important regulatory interests and did not need to be narrowly tailored to those interests. Of course, any restrictions on voting would impose differential burdens on different citizens, but unless the differential impact produces a severe burden—a decidedly high standard—or otherwise falls along the lines of a suspect classification, the deferential standard of rational basis would apply.⁶⁸ This framework left most of election administration, as intended, “with little judicial oversight,” understood by courts not to raise constitutional worries and regarded largely as “administrative and virtually immune from review.”⁶⁹

As a consequence, courts generally did not concern themselves with claims of unconstitutional partisanship for almost the entire country’s history. Courts largely abstained or deferred on election matters until the Cold War era. When courts finally tackled election law, in the form of racial cases like *Gomillion* or “one person, one vote” cases like *Reynolds v. Sims*, they did so during an era of

63. *Id.* at 31.

64. *Id.* at 31–32.

65. Instead, the Court heard cases about restrictions burdening minor parties or independent candidates. See *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986); *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Storer v. Brown*, 415 U.S. 724 (1974); *Bullock v. Carter*, 405 U.S. 134 (1972); *Jenness v. Fortson*, 403 U.S. 431 (1971).

66. See *Burdick v. Takushi*, 504 U.S. 428, 433–34 (1992); *Anderson*, 460 U.S. at 786–90.

67. *Anderson*, 460 U.S. at 788 (quoting *Storer*, 415 U.S. at 730).

68. See *Frank v. Walker*, 768 F.3d 744, 748–49 (7th Cir. 2014) (explaining that “any procedural step filters out some potential voters”).

69. Samuel Issacharoff, *supra* note 33, at 308 (2016).

partisan calm almost singular in American history. Race or regional rivalry, as I explained earlier, was far more prominent in these early cases than partisanship. For this reason, election law developed sensitivities to these other considerations but generally not to overweening partisanship.

This blind spot to partisanship, however, has become exceedingly important because partisanship has skyrocketed in intensity since the 1990s.⁷⁰ The bipartisanship of the Cold War quickly dissipated with the Cold War's ending. The Civil Rights Movement triggered an ideological realignment of the major parties that resulted in the neat sorting of conservatives uniformly into the Republican Party and liberals into the Democratic Party.⁷¹ By the 1990s, the unusual ideological overlap in Congress from the Cold War evaporated as the major parties realigned into cohesive, fiercely opposed teams across all levels of American politics. Cold War bipartisanship metastasized into today's intense hyperpartisanship.

By the 2000s, this hyperpartisanship had firmly taken root in American politics. Not only had the congressional ideological overlap from the Cold War disappeared, the ideological gap between Republicans and Democrats more than doubled and actually grew to the largest ever.⁷² As Rick Pildes puts it, "American democracy over the last generation has had one defining attribute: the rise of extreme partisan polarization."⁷³ The parties in Congress rapidly became more homogeneous internally while diverging further apart from each other ideologically at the same time.⁷⁴ As a result, partisanship has not been so predictive of congressional voting in a hundred years. Partisan voters similarly became more ideologically homogeneous. While ideology was weakly predictive of partisanship during the Cold War, the correlation between individual ideology and partisanship more than doubled from the 1970s to 2004.⁷⁵

In addition, partisan animus grew dramatically over the same period. About a third of Democratic and Republican identifiers believe that the opposing party is "so misguided that [it] threaten[s] the nation's well-being," with half from both sides reporting that they are fearful of the other side.⁷⁶ Around 1960, only 4% to 5% of partisan identifiers said they would be "displeased" if their child

70. See generally ALAN I. ABRAMOWITZ, *THE DISAPPEARING CENTER* (2010); LEE, *supra* note 47; BARBARA SINCLAIR, *PARTY WAR: POLARIZATION AND THE POLITICS OF NATIONAL POLICY MAKING* (2006).

71. See generally EDWARD G. CARMINES & JAMES A. STIMSON, *ISSUE EVOLUTION: RACE AND THE TRANSFORMATION OF AMERICAN POLITICS* (1989); MATTHEW LEVENDUSKY, *THE PARTISAN SORT: HOW LIBERALS BECAME DEMOCRATS AND CONSERVATIVES BECAME REPUBLICANS* (2009).

72. See Marc J. Hetherington, *Putting Polarization in Perspective*, 39 *BRIT. J. POL. SCI.* 413, 437 (2009).

73. Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 *CALIF. L. REV.* 273, 275 (2011).

74. See Geoffrey C. Layman et al., *Party Polarization in American Politics: Characteristics, Causes, and Consequences*, 9 *ANN. REV. POL. SCI.* 83, 87 (2006).

75. See Hetherington, *supra* note 72, at 437.

76. See Nolan D. McCaskill, *Pew Study: Partisan Divide Widest in 25 Years*, *POLITICO* (June 22, 2016, 12:00 PM), <https://www.politico.com/story/2016/06/partisan-divide-pew-study-224650>.

married someone from the other party.⁷⁷ By 2010, the percentage of identifiers who would be displeased by interparty marriage surged to a half of all Republicans and a third of Democrats.⁷⁸ By contrast, from 1986 to 2011, the percentage of Americans who could accept interracial marriage within their family declined from 65% to just 6% for whites and 3% for African-Americans.⁷⁹ With the rise of modern hyperpartisanship, the percentages for race and party on this measure had switched places since the Cold War. Today's inherited election law from the very different Cold War era, though, ignored the rise of hyperpartisanship as anything but a central worry.

The blind spot in election law for this sort of partisanship was evident as early as *Bush v. Gore*.⁸⁰ The most famous election law case in history focused on the most banal questions of state election administration. The initial vote tabulation for the 2000 Florida presidential election, upon which the national election hinged, placed Republican nominee George W. Bush ahead of Democratic nominee Al Gore by just 1,784 votes.⁸¹ This narrow and contested margin triggered the beginning of a long, winding recount process, punctuated with several federal and state judicial interventions that ended with the U.S. Supreme Court's decision to stop the recount a month and a half later.⁸² The Court's equal-protection reasoning for halting the recount turned on the majority's rejection of the Florida Supreme Court's mandate that recounted votes be judged for the "intent of the voter."⁸³ As the majority saw it, this inexact standard meant that "the standards for accepting or rejecting contested ballots might vary not only from county to county but also within a single county from one recount team to another."⁸⁴

It was difficult to square the majority's concern—serious enough to halt a recount that would decide a presidential election—with the fact that the decentralized, intensely localized character of election administration meant ballots were already counted differently from one county to another in the first place. The physical ballots themselves, as well as the rest of the election procedures, were regularly different from county to county before any consideration of the recount.⁸⁵ It was unclear why the differential recount standard ordered by the Florida Supreme Court violated equal protection when all the innumerable differences in balloting and election administration from county to county did not

77. Shanto Iyengar et al., *Affect, Not Ideology: A Social Identity Perspective on Polarization*, 76 PUB. OPINION Q. 405, 416 (2012).

78. *See id.* at 419.

79. *See* Cass R. Sunstein, *Partisanship*, 2015 U. CHI. LEGAL F. 1, 5.

80. 531 U.S. 98 (2000).

81. *Id.* at 100–01.

82. *Id.* at 101, 111.

83. *Id.* at 105.

84. *Id.* at 106.

85. *See* Briffault, *supra* note 50, at 350.

implicate any similar concerns. Indeed, *Bush v. Gore* took pains to disclaim the application of its equal protection analysis to “election processes generally” and limited it, puzzlingly and very specifically, to “the special instance of a statewide recount under the authority of a single state judicial officer.”⁸⁶

The best construction of *Bush v. Gore*’s equal protection reasoning is that it guarded against partisan manipulation under the specific circumstances of a high-stakes, determinative recount where it would be most likely and consequential. Notwithstanding its aspirational rhetoric about the constitutional guarantee of the “equal weight accorded to each vote and the equal dignity owed to each voter,”⁸⁷ the majority restricted the equal protection decision essentially to the factual circumstances of the case itself, which is largely why *Bush v. Gore* has been cited only once, in a dissenting footnote, by any of the justices.⁸⁸ Rick Pildes argues persuasively, however, that the equal protection rationale should be understood less about the right to an equal vote and instead as cabining the “unconstitutional risk of partisan manipulation” in the Florida recount.⁸⁹ Even if uneven balloting standards are part and parcel of American election administration, administrative discretion about standards—unspecified in advance and within the specific context of a presidential election recount—impermissibly invited the risk that election workers would select standards that best led to their preferred partisan outcome.

This concern about “partisan, self-interested manipulation,” according to this reading, explains the confusing, cabined sensitivity about differential standards in *Bush v. Gore*.⁹⁰ But if this is the case, it is strange that the majority opinion itself does not foreground such partisan concerns by any measure.⁹¹ And *Bush v. Gore* would remain an odd duck among the Court’s election-administration decisions, which evidenced little sensitivity about partisanship as a core concern. The blind spot for partisanship in this case law meant that the majority, to justify its judgment, had no precedential foundation from which to draw in a case with extraordinary historical significance and public attention where precedential support would have been helpful. As a result, regardless of the majority’s *sub rosa* substantive concerns, the majority strained to fit a putative emphasis on an equal individual vote into *Bush v. Gore*’s central reasoning.

Bush v. Gore did not change the law significantly one way or the other. Indeed, it was explicitly crafted to have no precedential impact. However, it ended

86. *Bush*, 531 U.S. at 109.

87. *Id.* at 104.

88. See *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 35 n.2 (2013) (Thomas, J., dissenting); see also Chad Flanders, *Please Don't Cite This Case!: The Precedential Value of Bush v. Gore*, 116 YALE L.J. POCKET PART 141 (2006), <https://www.yalelawjournal.org/forum/please-dona8217t-cite-this-case-the-precedential-value-of-bush-v-gore>.

89. Pildes, *supra* note 37, at 49.

90. *Id.*

91. See Pamela S. Karlan, *Nothing Personal: The Evolution of the Newest Equal Protection from Shaw v. Reno to Bush v. Gore*, 79 N.C. L. REV. 1345, 1359–60 (2001).

the political stigma for contesting election results and ushered in a new era of election litigation just as hyperpartisanship and the manipulation of election administration began to heat up to today's levels. "Simply put, federal courts were open for business when it came to adjudicating election administration claims, and the post-2000 era witnessed an immense growth in election-related litigation."⁹² Another part of the story was that Congress enacted the Help America Vote Act of 2002 (HAVA), the most extensive federal regulation of election administration thus far, following *Bush v. Gore*.⁹³

Even more important to the surge in election-related litigation was the nascent hyperpartisanship that infected both parties' attitudes toward election administration and its potentially determinative influence on election outcomes. Lawmakers more aggressively changed election rules affirmatively to boost their side and depress the other.⁹⁴ Members of both major parties became justifiably more suspicious of and more likely to challenge decisions by election administrators.⁹⁵ Nevertheless, election law, developed decades earlier for a different age, still exhibits a blind spot to partisan legislation ill-suited for the new problems of toxic hyperpartisanship.

B. *Evolving Responses to Modern Restrictions*

The archetypal issue of modern election administration is the proliferation of new statutory requirements to show voter identification before being permitted to cast a ballot. Laws requiring production of personal identification as a qualification to vote were rare until recently, but they rapidly spread across the country over the last decade.⁹⁶ The most stringent of these voter-identification laws required production of a government-issued photo identification at the polls before an otherwise eligible and registered voter is allowed to vote.⁹⁷ The ostensible government interest behind voter-identification laws was the

92. Issacharoff, *supra* note 31, at 540.

93. Daniel Tokaji & Owen Wolfe, Baker, Bush, and Ballot Boards: *The Federalization of Election Administration*, 62 CASE W. RES. L. REV. 969, 984 (2012) (describing HAVA as "the most extensive federal intervention in election administration in U.S. history"); Jeffrey Zaino & Jeanne Zaino, *Election by Litigation: The Electoral Process Post-Bush v. Gore*, 62 DISP. RESOL. J. 72, 75 (2007) ("This legislation represented the federal government's first substantial investment in election administration in American history, authorizing more than \$3.86 billion over three years to improve state electoral processes.").

94. See, e.g., Samuel Issacharoff, *Ballot Bedlam*, 64 DUKE L.J. 1363, 1404–08 (2015) (describing this so-called "ballot bedlam" along partisan lines).

95. See, e.g., RICHARD L. HASEN, *THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN* 135–36, 154 (2012); cf. Stephen Ansolabehere & Nathaniel Persily, *Vote Fraud in the Eye of the Beholder: The Role of Public Opinion in the Challenge to Voter Identification Requirements*, 121 HARV. L. REV. 1737, 1746–47 (2008).

96. See Daniel R. Biggers & Michael J. Hanmer, *Understanding the Adoption of Voter Identification Laws in the American States*, 45 AM. POL. RES. 1, 12–13 (2017).

97. *Id.* at 2.

prevention of in-person voter impersonation.⁹⁸ State governments claimed that the requirement of a government-issued identification, especially a photo identification, deters an impersonator from appearing in person at the polls, claiming successfully to be someone else, and casting a fraudulent vote in their name.⁹⁹

However, there was virtually no credible evidence that this type of in-person voter impersonation, which voter-identification laws were intended to prevent, actually happens at all. Indeed, empirical studies of voter fraud in general found little evidence of most forms of alleged voter fraud, but there was a nearly total absence of concrete cases of in-person voter impersonation in particular that anyone could find.¹⁰⁰ Justin Levitt's study of in-person fraud investigated every publicized allegation of voter impersonation between 2000 and 2014 and definitively ruled out all but a maximum of thirty-one possible incidents out of more than a billion votes cast that might have been prevented by a voter-identification requirement.¹⁰¹ An update to Levitt's study found, at most, an "infinitesimal" rate of alleged voter impersonation over the same period through 2016.¹⁰² All other credible studies of voter impersonation have concluded the same. As former U.S. Attorney David Iglesias concluded, after being fired by the Bush Administration for not prosecuting voter fraud more aggressively, "[Voter fraud]'s like the boogeymen parents use to scare their children It's very frightening, and it doesn't exist."¹⁰³

Instead, state passage of voter-identification laws appeared to be motivated more by aggressive partisanship than by any convincing evidence of in-person voter fraud. Voter-identification laws, particularly early on, were passed on virtually straight party-line votes exclusively in states under Republican legislative control.¹⁰⁴ From 2005 to 2007, during the early introduction of these laws, 95.3% of 1,222 Republican state legislators who voted on voter-identification bills—each one sponsored by Republicans—voted in favor of passage.¹⁰⁵ Only 2.1% of 796 Democratic legislators in the minority voted with their Republican

98. See, e.g., *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008).

99. See, e.g., *id.* at 194–95.

100. See generally LORRAINE C. MINNITE, *THE MYTH OF VOTER FRAUD* (2010); Ian Urbina, *Fraudulent Voting Re-Emerges as a Partisan Issue*, N.Y. TIMES (Oct. 26, 2010), <https://www.nytimes.com/2010/10/27/us/politics/27fraud.html>.

101. Justin Levitt, *A Comprehensive Investigation of Voter Impersonation Finds 31 Credible Incidents Out of One Billion Ballots Cast*, WASH. POST (Aug. 6, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/>.

102. Sami Edge, *Review of States with Voter ID Laws Found No Impersonation Fraud*, TEX. TRIB. (Aug. 21, 2016), <https://www.texastribune.org/2016/08/21/review-states-voter-id-laws-found-no-voter-imperso/>.

103. BERMAN, *supra* note 5, at 231 (quoting David Iglesias).

104. See Robert S. Erikson & Lorraine C. Minnite, *Modeling Problems in the Voter Identification–Voter Turnout Debate*, 8 ELECTION L.J. 85, 86 (2009).

105. See *id.*

counterparts.¹⁰⁶ Every state government that enacted the most stringent requirement of photo identification was under unified Republican legislative control at the time of passage.¹⁰⁷ Subsequent research on the politics of voter-identification laws estimated that Republican control was the best predictor of adoption. The likelihood of a new photo-identification requirement was sixteen times higher under unified-Republican control than Democratic or mixed-legislative control.¹⁰⁸

Why were Republicans eager to impose voter-identification laws, while Democrats were equally opposed to them? To be fair, both sides may be motivated in part by ideological beliefs about voter fraud and the right to vote.¹⁰⁹ Still, both sides also quite clearly believe that voter-identification laws affect the balance of power in a hyperpartisan environment where both Republicans and Democrats are mindful of every aspect of political advantage through election administration.¹¹⁰ Both sides expected voter-identification requirements to hurt Democratic candidates by complicating the voting process for certain groups who are least likely to possess requisite voter identification on their own, because those groups tend overwhelmingly to vote for Democrats over Republicans. Economically disadvantaged and racial-minority voters are less likely to own qualifying identification and are more likely than other voters to be required by poll workers to show identification before voting.¹¹¹ Indeed, likely for these reasons, voter-identification laws tended to be overwhelmingly more likely to be enacted—and enacted earlier—in states with larger, politically competitive minority populations but with legislatures controlled by a Republican majority at the time of enactment.¹¹²

The expansion of modern partisan hardball into election administration is all too predictable under conditions of hyperpartisanship. As previously explained, Congress experienced an historically unusual era of ideological overlap

106. *See id.*

107. Biggers & Hanmer, *supra* note 96, at 21; *see also* Keith G. Bentele & Erin E. O'Brien, *Jim Crow 2.0? Why States Consider and Adopt Restrictive Voter Access Policies*, 11 *PERSP. POL.* 1088, 1099–100 (2013); William D. Hicks, et al., *A Principle or Strategy? Voter Identification Laws and Partisan Competition in the American States*, 68 *POL. RES. Q.* 18, 29 (2015).

108. Rene R. Rocha & Tetsuya Matsubayashi, *The Politics of Race and Voter ID Laws in the States: The Return of Jim Crow?*, 67 *POL. RES. Q.* 666, 671 (2014); *see also* Biggers & Hanmer, *supra* note 96, at 14.

109. *See* Ansolabehere & Persily, *supra* note 95, at 1747.

110. *See* Issacharoff, *supra* note 94, at 1370 (concluding “that both political parties have a similar understanding of the relation between turnout and electoral outcomes, and both parties understand voting access as a threshold determinant of turnout”).

111. *See, e.g.*, Stephen Ansolabehere, *Effects of Identification Requirements on Voting: Evidence from the Experiences of Voters on Election Day*, 42 *PS: POL. SCI. & POL.* 127, 127–28 (2009); Matt A. Barreto et al., *The Disproportionate Impact of Voter ID Requirements on the Electorate: New Evidence from Indiana*, 42 *PS: POL. SCI. & POL.* 111, 113–14 (2009); Bentele & O'Brien, *supra* note 107; Zoltan Hajnal et al., *Voter Identification Laws and the Suppression of Minority Votes*, 79 *J. POL.* 363, 377 (2017).

112. *See* Bentele & O'Brien, *supra* note 107, at 1098–100; Hicks, et al., *supra* note 107, at 26–29.

and bipartisanship during the mid-twentieth century, but in the years since, politicians in both parties have sorted into ideologically cohesive, polarized teams with virtually no ideological overlap between them.¹¹³ Voters followed their partisan officeholders and candidates by becoming themselves more polarized ideologically along partisan lines. The result is that hyperpartisanship has produced an electorate that is more cleanly divided into partisan camps than it has been in at least a century.¹¹⁴ Even among voters who self-identify as independents, most tend to vote for candidates from one party with predictable consistency.¹¹⁵

What is more, as one political scientist summarizes, “the distance between ideological self-placement of the average Democrat and Republican . . . has increased dramatically, and . . . so, too has the correlation between partisanship and ideology.”¹¹⁶ In other words, partisan affiliation is more predictive of ideology and vice versa, as the ideological gap has increased between the major parties at both the officeholder and voter levels.¹¹⁷ And this clean sorting among voters between the major parties has occurred now, when computing power, quantitative expertise, and individual-level data about voters is more robust than ever.¹¹⁸ As a consequence of these converging trends, the major parties can predict with historically unprecedented accuracy how individual citizens will vote and what types of voters favor which party and its candidates.

Because the major parties can so accurately predict which voters will vote for and against them, seeking partisan advantage through election administration makes more sense than ever. The major parties have shifted their campaign strategy away from wooing swing voters and toward mobilizing their base precisely for these reasons.¹¹⁹ They are increasingly focused on increasing turnout from friendly voters who will vote for their candidates but, just as importantly, discouraging turnout from out-party voters who will vote against them. As a

113. See *supra* Part I.

114. See Larry M. Bartels, *Partisanship and Voting Behavior, 1952–1996*, 44 AM. J. POL. SCI. 35, 42 (2000); Marc J. Hetherington, *Resurgent Mass Partisanship: The Role of Elite Polarization*, 95 AM. POL. SCI. REV. 619, 622 (2001); Judd R. Thornton, *The Impact of Elite Polarization on Partisan Ambivalence and Indifference*, 35 POL. BEHAV. 409, 421 (2013).

115. See Layman et al., *supra* note 74, at 102.

116. Hetherington, *supra* note 72, at 437.

117. See Delia Baldassarri & Andrew Gelman, *Partisans Without Constraint: Political Polarization and Trends in American Public Opinion*, 114 AM. J. SOC. 408, 426–27 (2008); Hetherington, *supra* note 72, at 477 (“In general, it is important to remember that elite stimulus is at the root of this change in mass behavior.”); Matthew S. Levendusky, *Clearer Cues, More Consistent Voters: A Benefit of Elite Polarization*, 32 POL. BEHAV. 111, 114–16 (2010).

118. See generally SASHA ISSENBERG, *THE VICTORY LAB: THE SECRET SCIENCE OF WINNING CAMPAIGNS* 243–71 (2012); David W. Nickerson & Todd Rogers, *Political Campaigns and Big Data*, 28 J. ECON. PERSP. 51 (2014).

119. See, e.g., LEVENDUSKY, *supra* note 71, at 9; Ryan D. Enos & Anthony Fowler, *Aggregate Effects of Large-Scale Campaigns on Voter Turnout*, 6 POL. SCI. RES. & METHODS 733, 742 (2018); Costas Panagopoulos, *All About that Base: Changing Campaign Strategies in U.S. Presidential Elections*, 22 PARTY POL. 179, 180 (2016).

result, election-administration rules that make it easier or harder for certain select groups to vote are obvious tools for strategic manipulation in the party competition over voter turnout.

Despite these rules' obvious partisanship, courts have struggled to deal effectively with modern election law. Consider again voter-identification laws, probably the best example of the distortion of election administration for partisan ends. The Seventh Circuit, in a majority opinion written by Judge Richard Posner, upheld Indiana's voter-identification law, one of the earliest in the most recent wave, in *Crawford v. Marion County*.¹²⁰ Judge Posner did not dispute Judge Terence Evans's dissent that the law was a "not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic."¹²¹ Instead, Judge Posner dismissed the observation as essentially irrelevant, which it probably was under the applicable precedent. He admitted that most people who don't have photo identification "are more likely to vote for Democratic than Republican candidates," but the inherited election law limited strict scrutiny to the most severe burdens on voting and problems of racial discrimination.¹²² Where, as in *Crawford*, the burdens were comparatively minor, the law permitted states a relatively free hand to regulate elections as they wished, and the Seventh Circuit upheld the law on that basis. The fact that the law "injures the Democratic Party by compelling the party to devote resources to getting to the polls those of its supporters who would otherwise be discouraged by the new law," even if this was a purpose for the law, was legally insignificant in the decision.¹²³

No surprise, then, that the Supreme Court upheld the law again on the same basis despite a straight party-line vote for the law's enactment that the district court had deemed a "partisan dispute that had 'spilled out of the state house into the courts.'"¹²⁴ The Court agreed that "partisan considerations may have played a significant role in the decision to enact" the law but still sustained the law on the basis of broad judicial deference to state interests in election administration, namely the prevention of fraud.¹²⁵

The operation of the law of election administration thus disregards the actual partisan politics driving the enactment of voter identification in deference to a phantom state interest in the prevention of fraud for which there is virtually no evidence. As the number of states under Republican control enacting voter-identification laws grew in stubborn defiance of any trace of voter fraud against which these laws were ostensibly aimed, it became objectively impossible to

120. 472 F.3d 949, 954 (7th Cir. 2007).

121. *Id.* (Evans, J., dissenting).

122. *Id.* at 951–54 (majority opinion).

123. *Id.*

124. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 203 (2008).

125. *Id.* at 203–04.

pretend that Republicans enacted these requirements for much other than partisan purposes.¹²⁶

Judge Posner, for one, reversed his view on voter-identification laws for this reason. Assessing Wisconsin's voter-identification requirement in *Frank v. Walker*, he newly praised Judge Evans's prescience in calling out the partisanship behind Indiana's law in *Cranford*.¹²⁷ He now concluded that six years of "experience and academic study" since *Cranford* had established that such laws targeted a nonexistent form of voter fraud and were enacted almost exclusively where Republicans controlled lawmaking, with a net effect of "imped[ing] voting by people . . . most of whom probably lean Democratic."¹²⁸ As a consequence, "[t]here is only one motivation" for voter-identification laws, "and that is to discourage voting by persons likely to vote against the party responsible for imposing the burdens."¹²⁹ Judge Posner later added in an interview that the fact of hyperpartisanship was pivotal in changing his views. He explained, "There's always been strong competition between the parties, but it hadn't reached the peak of ferocity that it's since achieved," and as a result, "[o]ne wasn't alert to this kind of trickery, even though it's age old in the [d]emocratic process."¹³⁰ But Judge Posner aside, the law of election administration had not similarly adapted to the changed circumstances of hyperpartisanship. Judge Posner protested only in dissent in *Frank v. Walker*.

By contrast, when courts analyze voter-identification laws and early-voting cutbacks under the Voting Rights Act, they readily strike them down.¹³¹ The availability of an established doctrinal hook and well-developed precedent protecting racial minority voters offered a political and legal foundation for courts to countermand what amounted to partisan efforts to restrict voting opportunities. When the framing of the problem better resembled the recognized racial trigger for the law of election administration, courts regularly acted against these overweening legislative efforts to restrict voting rights in the name of make-weight government interests.¹³² The political realities under the Voting Rights

126. See, e.g., *One Wis. Inst., Inc. v. Thomsen*, 198 F. Supp. 3d 896, 912 (W.D. Wis. 2016) (characterizing the notion that voter ID laws prevent voter fraud as a "dubious proposition" and concluding "there is utterly no evidence that this is a systematic problem, or even a common occurrence in Wisconsin or anywhere in the United States"); *Frank v. Walker*, 17 F. Supp. 3d 837, 847 (E.D. Wis. 2014) (finding "virtually no voter impersonation occurs in Wisconsin and it is exceedingly unlikely that voter impersonation will become a problem in Wisconsin in the foreseeable future"), *rev'd*, 768 F.3d 744 (7th Cir. 2014).

127. *Frank v. Walker*, 773 F.3d 783, 784 (7th Cir. 2014) (Posner, J., dissenting).

128. *Id.* at 791, 795.

129. *Id.* at 796.

130. John Schwartz, *Judge in Landmark Case Disavows Support for Voter ID*, N.Y. TIMES (Oct. 15, 2013), <https://www.nytimes.com/2013/10/16/us/politics/judge-in-landmark-case-disavows-support-for-voter-id.html>.

131. See, e.g., *N.C. State Conference of NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016); *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (en banc); *Frank*, 17 F. Supp. 3d 837; *Texas v. Holder*, 888 F. Supp. 2d 113 (D.D.C. 2012), *vacated*, 570 U.S. 928 (2013) (mem.).

132. See, e.g., Issacharoff, *supra* note 94, at 1405–08; Pamela S. Karlan, *Turnout, Tenuousness, and Getting Results in Section 2 Vote Denial Claims*, 77 OHIO ST. L.J. 763, 765–67 (2016).

Act (or outside it) were often the same—racial-minority voters who vote cohesively for Democratic candidates were likely to be discouraged from voting as a result of these new restrictions, which appeared to be enacted largely for that purpose. However, outside of Voting Rights Act claims, courts lacked the off-the-shelf doctrinal repertoire to address the question and instead resorted to judicial indirection in terms of doctrinal justification to intervene (if they did at all).¹³³

Obama for America v. Husted is a good example.¹³⁴ Before 2010, Democrats in Ohio benefitted from early in-person voting and, in particular, from early voting during the three days immediately preceding election day. African-American churches famously organized “Souls to the Polls” programs for the 2008 election to bus voters directly from church to early voting centers on the critical Sunday before election day, much to the Democratic Party’s benefit.¹³⁵ Unsurprisingly, after Republicans won consolidated control of Ohio’s state government in 2010, the Republican legislature and secretary of state promptly repealed early voting during these three days immediately preceding election day for most voters, while leaving in place early voting during that period only for military voters.¹³⁶ The upshot was that Republicans in government eliminated early voting immediately preceding the election that had previously benefitted Democrats but effectively exempted military voters who tend to vote Republican, all in the name of vague, pretextual interests in cost savings.¹³⁷

Democrats brought suit to challenge these developments in a lawsuit rightly characterized by Ned Foley as a “‘Hail Mary’ pass.”¹³⁸ The problem for their constitutional challenge was that Ohio owed no legal obligation to offer early voting at all, much less the three days before the election.¹³⁹ Even without those three days, Ohio still offered twenty-three days of early voting, more than the

133. One notable exception is the district court’s initial decision to strike down Georgia’s voter-identification requirement in *Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005). Georgia’s voter-identification law, before later revision, required voters to present a government-issued photo identification as a condition for voting and charged a fee for a voter-identification card needed by voters who did not already have a government-issued identification such as a driver’s license. *Id.* at 1331, 1337. The district court reasoned that the required fee constituted a poll tax in violation of the Twenty-Fourth Amendment and Equal Protection Clause. *Id.* at 1370. However, the Georgia legislature subsequently amended the law to issue voter-identification cards for free and cured the poll-tax concern. *Common Cause/Georgia v. Billups*, 554 F.3d 1340 (11th Cir. 2009).

134. 697 F.3d 423 (6th Cir. 2012).

135. See Richard L. Hasen, *The 2012 Voting Wars, Judicial Backstops, and the Resurrection of Bush v. Gore*, 81 GEO. WASH. L. REV. 1865, 1879 (2013).

136. See Edward B. Foley, *Voting Rules and Constitutional Law*, 81 GEO. WASH. L. REV. 1836, 1840–44 (2013) (detailing this history).

137. See *Ohio State Conference of NAACP v. Husted*, 768 F.3d 524, 548 (6th Cir. 2014), *vacated*, No. 14-3877, 2014 U.S. App. LEXIS 24472 (6th Cir. Oct. 1, 2014); *Obama for Am. v. Husted*, 697 F.3d 423, 432–33 (6th Cir. 2012).

138. Hasen, *supra* note 135, at 1880.

139. See *id.* at 1881.

average among the thirty-two states that then permitted early voting at all.¹⁴⁰ That said, the state had enacted a set of legislative adjustments that made little sense other than as an attempt to shift partisan advantage marginally, but importantly.

The Democratic lawsuit was therefore based not on a claimed withdrawal of a constitutional entitlement to early voting but instead on the state's discriminatory purpose against Democratic-leaning voters. Particularly, in the absence of a meaningful governmental justification, the differential treatment of Democrats and Republicans by a state government under unified Republican control suggested partisan advantage as the state's primary motivation. Unfortunately for the Democrats, though, the law of election administration as it stood simply did not track this sort of discrimination among voters as a constitutional concern.¹⁴¹ As Sam Issacharoff, one of the Obama campaign's lawyers in the lawsuit, admitted, "[T]he line of demarcation of military versus civilians did not trigger easy equal-protection lines of division along familiar categories such as race or national origin."¹⁴²

The district court, in an upset, nonetheless enjoined the legislative reduction in early voting while quoting *Bush v. Gore* for the proposition that the state could not "by later arbitrary and disparate treatment, value one person's vote over that of another."¹⁴³ The Sixth Circuit affirmed and warned that without judicial intervention, "[p]artisan state legislatures could give extra early voting time to groups that traditionally support the party in power and impose corresponding burdens on the other party's core constituents."¹⁴⁴ The Sixth Circuit then demanded a more "sufficiently weighty" governmental justification than usually required in cases like *Crawford* and *Williams v. Rhodes* for election administration and certainly greater than the state of Ohio could offer in the present case.¹⁴⁵

Ironically, if *Husted* was wrongly decided as a legal matter based on the precedent, it was still rightly decided as a normative one. *Husted* is best understood as judicial intervention to limit "misuse of state authority to attempt to alter election outcomes" along party lines during political times defined by hyperpartisanship.¹⁴⁶ Still, it is difficult to discern the precedential grounds for the intervention based on the law of election administration I have described. The reduction in early voting could not be said to result in a severe burden when voters still had twenty-three days of early voting before election day, nor did

140. *See id.* at 1879.

141. *See, e.g.*, Issacharoff, *supra* note 33, at 321 ("[C]ourts have steered clear of doctrinal engagements with the question of excessive partisanship.")

142. *Id.* at 311.

143. *Obama for Am. v. Husted*, 888 F. Supp. 2d 897, 910 (S.D. Ohio 2012) (emphasis omitted) (quoting *Bush v. Gore*, 531 U.S. 98, 104–05 (2000)).

144. *Obama for Am. V. Husted*, 697 F.3d 423, 435 (6th Cir. 2012).

145. *Id.* at 436.

146. Issacharoff, *supra* note 33, at 311.

the differential treatment implicate any suspect classification. Under rational basis, then, courts typically apply a highly deferential standard that bends to the government's judgment on questions of voter fraud, cost efficiency, and election administration in general.

This enormous deference explains why the Court upheld the voter-identification law in *Crawford* despite Indiana's failure to identify a single case of voter impersonation in the state's history. Even *Bush v. Gore*, to which *Husted* cites for support, refers vaguely to a right to an equal vote rather than concerns about partisan discrimination. If *Husted* is difficult to square with the law of election administration, it is *not* because *Husted* was wrongly decided as a normative matter but because the law of election administration has been inexcusably blind to the defining problem of hyperpartisanship that I highlight.

To the degree that courts today strike against hyperpartisanship, as in *Husted*, it would be better for them to be explicit about their constitutional concerns and foreground hyperpartisanship in the law of election administration. As *Husted* helps demonstrate, courts have been forced to confront hyperpartisan election administration since *Bush v. Gore* and reacted instinctively at times, and rightly, to enforce a basic constitutional expectation of partisan nondiscrimination.¹⁴⁷ In these efforts, courts have been hamstrung by the law's blind spot and often been forced to smuggle their intervention through the back door of other concerns. As Issacharoff puts it, "[c]ourts are searching for the consequences of partisan excess without being able to ferret out the root cause."¹⁴⁸

Not only does this mean that courts engage in an odd dance with the problem of partisanship, regulating it *sub silentio* under the guise of minding other constitutional concerns, but also this mismatch between the law and politics of hyperpartisanship relies on the vast discretion of judges who already are influenced by their own partisan leanings in election cases.¹⁴⁹ Courts normally defer to makeweight government justifications under rational basis review—except when they don't—and in the absence of a constitutional framework that explicitly incorporates hyperpartisanship, courts will vary unpredictably in when they apply the type of intermediate scrutiny that the *Husted* court unexpectedly exercised.¹⁵⁰ Explicit judicial recognition of hyperpartisanship as a constitutional focus in these cases, where hyperpartisanship motivates election-administration

147. See Foley, *supra* note 136, at 1837–40; Hasen, *supra* note 135, at 1868 (describing judicial backstopping against partisan overreach); Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 MICH. L. REV. 351, 384–86 (2017).

148. Issacharoff, *supra* note 33, at 324.

149. See, e.g., Neal Devins & Lawrence Baum, *Split Definitive: How Party Polarization Turned the Supreme Court into a Partisan Court*, 2016 SUP. CT. REV. 301; Michael S. Kang & Joanna M. Shepherd, *The Long Shadow of Bush v. Gore: Judicial Partisanship in Election Cases*, 68 STAN. L. REV. 1411 (2016).

150. See Foley, *supra* note 136, at 1860–64 (offering a due process principle of fair play for assessing partisan overreach); Issacharoff, *supra* note 33 (analogizing from antitrust law to propose a rule of reason for partisan election administration); Karlan, *supra* note 132, at 783–89 (suggesting a tenuousness analysis of the government justifications of election administration under the Voting Rights Act).

lawmaking, would consolidate and orient the law toward what should be the dominant worry about election administration in the modern era.

In the redistricting context, I have argued that lawmaking must be in pursuance of a legitimate government interest as a basic requirement of constitutional law.¹⁵¹ Partisanship by itself does not suffice as one. Partisan gerrymanders, therefore, should be struck down as unconstitutional unless the government can explain its lawmaking choices, including deliberately partisan consequences, as a necessary result of its government interests. I do not belabor these points here, but a similar regime ought to apply for partisan election administration. The state should be required to substantiate that its election-administration lawmaking serves legitimate government interests beyond makeweight justifications like those proffered for voter-identification requirements so far.

CONCLUSION

America has changed since Judge Frank Johnson's pathbreaking judicial career—and with it, election law, too. The principal challenges in election law for courts during the 1950s and 1960s, during Judge Johnson's early career, revolved around the problem of race and racial discrimination, primarily Jim Crow exclusion of African-Americans from the electoral process in the South. Since then, the Voting Rights Act helped remake American politics and shift, both directly and indirectly, the judicial challenges in election law from race to what I describe here and elsewhere as hyperpartisanship.

Part of the historical narrative is American progress on questions of race discrimination. I argue that the questions of race discrimination in the electoral process have shifted and become more subtle with a more diverse citizenry rather than ameliorating altogether as the Court's triumphalism in *Shelby County* implies.¹⁵² However, the challenges for election law have shifted, too, in part because of clear progress on race discrimination and in part because of the dramatically different partisan politics of today as compared to the state of affairs when judicial oversight of American election law began during Judge Johnson's early career.

During the Cold War, when the "one person, one vote" cases inaugurated judicial oversight of election law, America was a thoroughly bipartisan country in most respects. It is no surprise then, looking back, that politicians did not routinely manipulate election law rules for partisan advantage. The problems in election law revolved on race rather than partisanship, not only because racial

151. Kang, *supra* note 147, at 354.

152. See, e.g., Enbar Toledano, Comment, *Section 5 of the Voting Rights Act and Its Place in "Post-Racial" America*, 61 EMORY L.J. 389 (2011).

discrimination was so severe during the 1950s and 1960s compared to today but also because levels of partisanship were so historically tame.

As any observer of modern American politics can testify, partisanship is no longer dormant today. Partisanship has transmogrified into what I call hyperpartisanship here and elsewhere.¹⁵³ It looms over American politics, especially election law, where political actors constantly manipulate rules of the game for partisan gain. Unfortunately, the election law borne during the Cold War, a period of unusual bipartisanship, is ill-equipped to confront hyperpartisan manipulation of election law and befuddles courts that try to address the problem.

We await a new generation of judges like Frank Johnson, prepared to rise to the present challenge and modernize election law beyond the outdated perspective it inherits from the Cold War. Judge Johnson needed to think pragmatically about political realities beyond the formalist limitations of past cases and act forcefully to cabin strategic manipulation of election rules to thwart the democratic process. Today's judges likewise must adapt to address the hyperpartisanship of American election law in the twenty-first century.

153. See Kang, *supra* note 147, at 411.