

STATE CONSTITUTIONS, FAIR REDISTRICTING, AND REPUBLICAN PARTY ENTRENCHMENT

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Over the last fifty years, the Republican Party has gradually claimed a majority of state legislative seats and chambers. What explains this? Scholars point to Republican grassroots mobilization of conservative voters in the late-twentieth century. This Essay adds another explanation: Republicans win disproportionate state legislative seat shares by winning rural districts by narrow, efficient margins and by changing state legislative redistricting practices, sometimes by state constitutional amendment. This Essay recounts this history, noting how in the mid-twentieth century, rural-dominated state legislatures failed to mandate fair, regular reapportionment, prompting the Supreme Court in 1964 to force the states to reapportion their legislatures and entrench fair redistricting and voting rights provisions in their state constitutions. Reapportionment added conservative, suburban districts, expanding Republicans' state legislative seat share in the 1970s, 1980s, and 1990s. With subsequent urban-rural polarization and realignment, Republicans began winning rural districts by narrow, efficient margins, while Democrats won urban districts by wide, inefficient margins, letting Republicans win a greater statewide legislative seat share than popular vote share. Insulated from the popular vote, especially in competitive states, Republican state legislators entrenched their seats by changing elections and redistricting practices, sometimes through state constitutional reform that weakened earlier voting rights and redistricting provisions.

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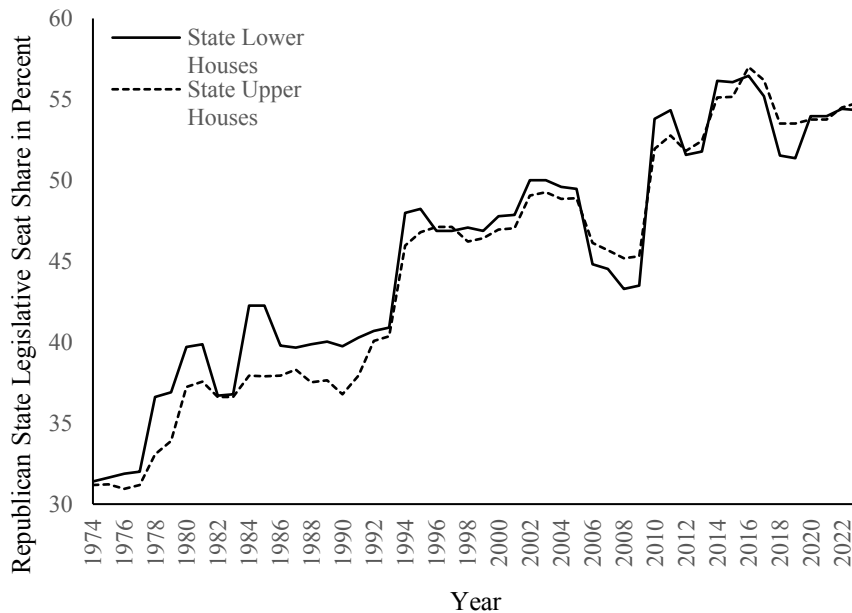
INTRODUCTION

Over the past half-century, Republicans have steadily claimed state legislative seats. The Republican Party has increased its share of state upper house seats in thirty-eight of the past fifty years and lower house seats in

* Copyright © 2024 by Robinson Woodward-Burns, Associate Professor of Political Science, Howard University. Thanks to William Blake, Mark Graber, Anthony Grasso, Julie Novkov, Joanna Wuest and participants in the 2021 University of Maryland Discussion Group on Constitutionalism, the 2023 meetings of the American and Northeastern Political Science Associations, the 2024 Policy History Conference, and 2024 Promise and Limits of State Constitutionalism Conference at New York University Law School.

thirty-two of those years. Infrequent, modest Democratic gains failed to reverse Republicans' march. In 1974, Republicans held 31.2% of state upper house seats and 31.4% of lower house seats.¹ By 2024, Republicans held 54.8% of upper house seats and 54.3% of lower house seats.² Republican capture of the state legislatures is now a defining element of American politics. What explains this phenomenon?

FIGURE 1. Republican Control of State Legislatures, 1974–2023 (Klarner, *State Partisan Balance Data*; NAT'L CONF. OF STATE LEGISLATURES)



Republicans flipped the state legislatures in a few ways. The Party won state seats partly by winning a growing conservative electorate. In the late twentieth century, Republicans rode voter backlash against increased

¹ See Carl Klarner, *State Partisan Balance Data, 1937–2011*, HARVARD DATAVERSE (2013) <https://dataverse.harvard.edu/dataset.xhtml?persistentId=hdl:1902.1/20403> [<https://perma.cc/C8QB-QF38>].

² For state lower house partisan composition data from 1968 to 2010, see *id.* For data from 2011 to 2023, see *2024 State & Legislative Partisan Composition*, NAT'L CONF. OF STATE LEGISLATURES (Apr. 29, 2024), https://documents.ncsl.org/wwwncsl/About-State-Legislatures/Legis_Control_2023_4.29.24.pdf [<https://perma.cc/V6UJ-ESZT>].

property taxes,³ school desegregation and busing,⁴ secularism and multiculturalism,⁵ and abortion access,⁶ especially in growing suburbs.⁷ These voters elected Republican state lawmakers, but Republicans' state legislative gains also reflect biases in state legislative redistricting and election practices. The "one person, one vote" principle mandates that state legislative districts hold equal populations.⁸ Under this rule, all else equal, a party's share of the statewide vote should be proportionate to the party's share of state legislative seats.⁹ But Republicans consistently win more state legislative seats than voters give them. Over the last decade, across state lower house elections, Republican seat share has exceeded their vote share by a percentage point.¹⁰ This suggests a stable, national bias in the allocation

³ See generally DAVID O. SEARS & JACK CITRIN, *TAX REVOLT: SOMETHING FOR NOTHING IN CALIFORNIA* (1985); ISAAC W. MARTIN, *THE PERMANENT TAX REVOLT: HOW THE PROPERTY TAX TRANSFORMED AMERICAN POLITICS* (2008).

⁴ See generally MATTHEW F. DELMONT, *WHY BUSING FAILED: RACE, MEDIA, AND THE NATIONAL RESISTANCE TO SCHOOL DESEGREGATION* (2016); NANCY MACLEAN, *DEMOCRACY IN CHAINS: THE DEEP HISTORY OF THE RADICAL RIGHT'S STEALTH PLAN FOR AMERICA* (2017).

⁵ See generally DANIEL T. RODGERS, *AGE OF FRACTURE* (2011).

⁶ See generally MARY ZIEGLER, *DOLLARS FOR LIFE: THE ANTI-ABORTION MOVEMENT AND THE FALL OF THE REPUBLICAN ESTABLISHMENT* (2022).

⁷ See generally LISA MCGIRR, *SUBURBAN WARRIORS: THE ORIGINS OF THE NEW AMERICAN RIGHT* (2001) [hereinafter MCGIRR, *SUBURBAN WARRIORS*]; MATTHEW D. LASSITER, *THE SILENT MAJORITY: SUBURBAN POLITICS IN THE SUNBELT SOUTH* (2006).

⁸ For a statement of the principle, see *Gray v. Sanders*, 372 U.S. 368, 380 (1963), and as applied to the state legislatures, see *Reynolds v. Sims*, 377 U.S. 533, 568 (1964), holding "seats in both houses of a bicameral state legislature must be apportioned on a population basis."

⁹ Statewide vote share is not *directly* proportionate to statewide seat share in state legislatures. Bernard Grofman & Gary King, *The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering After LULAC v. Perry*, 6 ELECTION L.J. 2, 8–9 (2007). Most states select legislators from single-member districts in a first-past-the-post election, such that the majority party's statewide seat share often exceeds the vote share in a "winner's bonus." Deviation from the expected winner's bonus can be measured by Gelman and King's "seats-votes" curve or by Stephanopoulos and McGhee's simpler "efficiency gap." See Andrew Gelman & Gary King, *A Unified Method of Evaluating Electoral Systems and Redistricting Plans*, 38 AM. J. OF POL. SCI. 514, 534–35 (1994); Eric McGhee, *Measuring Partisan Bias in Single-Member District Electoral Systems*, 39 LEGIS. STUD. Q. 55, 55 (2014). A disproportionate gap suggests bias in election administration. Nicholas O. Stephanopoulos & Eric McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 831 (2015).

¹⁰ For 2011 to 2020, on average across lower houses, Republican seat share exceeded vote share by 0.997 percentage points. State lower house election return data for 1968 to 1970 is from Carl Klarner, for 1971 to 2018 is from the Princeton University Gerrymandering Project, for 2019 from the Virginia and New Jersey departments of elections, and for 2020 is from the MIT Election Data and Science Lab. Klarner, *supra* note 1; *State Legislative Elections, 1971–2018*, PRINCETON GERRYMANDERING PROJECT (2019), github.com/PrincetonUniversity/historic_state_legislative_election_results?tab=readme-ov-file [https://perma.cc/F79A-9FX]; *State Precinct-Level Returns 2020*, MIT ELECTION DATA & SCI. LAB (2023), dataverse.harvard.edu/dataset.xhtml?persistentId=doi:10.7910/DVN/OKL2K1 [https://perma.cc/KD3M-ESLG]; Election Results Archive, NEW JERSEY DEPARTMENT OF STATE, DIVISION OF ELECTIONS, nj.gov/state/elections/election-information-results.shtml

of state legislative seats in Republicans' favor. With the national electorate and many state electorates evenly divided, this bias matters. In 2016, Republicans won a greater share of seats than votes in thirty-two states, including by three percentage points nationwide.¹¹ Occasionally, Republicans win state legislative control while losing the statewide popular vote. This occurred in lower house elections in Michigan, Pennsylvania, and Wisconsin in 2012, New Mexico in 2014, Michigan and Minnesota in 2016, Virginia in 2017, and Michigan, North Carolina, and Wisconsin in 2018. In Wisconsin in 2018, Republicans captured 63% of lower house seats despite winning only 45% of the popular vote.¹²

Republicans win disproportionate state legislative seats partly by revising state elections and redistricting practices. Political geography incentivizes this legislative behavior. Often, Republicans win rural state legislative districts by narrow, efficient margins while Democrats win urban and suburban districts by wide, inefficient margins, such that in competitive states, Republicans often win more seats than votes statewide, and occasionally, win legislative control without winning the popular vote.¹³ Gerrymandering exacerbates this. For legislators in these states, reelection may not depend on maintaining majoritarian democracy at the state level.¹⁴ This can encourage legislators to entrench their seats by revising redistricting

[<https://perma.cc/T9H8-3489>]; Election Results, VA. DEP'T OF ELECTIONS, [apps.elections.virginia.gov/SBE_CSV/ELECTIONS/ELECTIONRESULTS](https://perma.cc/KF2N-X3DW) [<https://perma.cc/KF2N-X3DW>].

¹¹ In 2016, on average across lower houses, Republican seat share exceeded vote share by 3.02 percentage points. See sources cited *supra* note 10. Republican lower house seat share exceeded vote share in most states in 2012, 2014, and 2016 but in only half of states in 2018 and 2020. *Id.*

¹² See sources cited *supra* note 10. Between 2010 and 2018, Democrats won lower house control while losing the statewide popular vote in Arkansas, Kentucky, New Mexico, Nevada, and Washington in 2010, Kentucky and New Hampshire in 2012, New Jersey in 2013, Colorado, Connecticut, Illinois, Kentucky, and Maine in 2014, Connecticut, Illinois, and Kentucky in 2016, and Illinois, Massachusetts, Nevada, and Vermont in 2018. *Id.* This is a slightly higher incidence of counter-majoritarian outcomes for Democrats, likely driven, in some cases, by Democratic gerrymandering. In the 2010 to 2018 period, forty-nine states (excluding Nebraska's nonpartisan unicameral legislature) held 234 partisan elections for lower houses for which data is available. *Id.* In twenty-nine of these, a party won lower house control without winning the statewide popular vote. Seifter finds a similar rate of counter-majoritarian lower house outcomes for 1968 to 2016. See Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733, 1764 (2021). Overall, counter-majoritarian outcomes are thus not the norm. More common is for statewide seat share to exceed statewide vote share, more often in these years in Republicans' favor.

¹³ See ERIK J. ENGSTROM, PARTISAN GERRYMANDERING AND THE CONSTRUCTION OF AMERICAN DEMOCRACY 148–50, 155–58, 169 (2013); DAVID A. HOPKINS, RED FIGHTING BLUE: HOW GEOGRAPHY AND ELECTORAL RULES POLARIZE AMERICAN POL. 198–202 (2017); see generally JONATHAN RODDEN, WHY CITIES LOSE (2018).

¹⁴ Rodden notes that this maldistribution of Democratic votes eases reelection for both Republican and Democratic state legislative incumbents, so that incumbents from both parties accept this counter-majoritarian maldistribution. See RODDEN, *supra* note 13, at 196. These Republican majorities can veto Democratic governors and legislate instead for their own more conservative constituency. See Seifter, *supra* note 12, at 1784.

and election law. Further, recent Supreme Court decisions limit federal oversight of state election and redistricting reform.¹⁵ Republicans, with better, partisan and interest group redistricting and election organizing,¹⁶ are better positioned to entrench their seats by revising state election and redistricting practices.

While federal courts have broadly deferred to state lawmakers, state constitutions forbid some election and redistricting reform. All state constitutions, save Arizona's, guarantee the right to vote, thirty state constitutions guarantee free elections, and many constitutions include equal protection, due process, free expression, and fair redistricting provisions.¹⁷ These empower litigants. For example, between 2021 and 2022, litigants in fifteen states used these state clauses to challenge state voting or elections bills.¹⁸

However, lawmakers can reverse or preempt litigation by amending state constitutional voting and election law. During the 1990s, 2000s, and 2010s, interest groups such as the American Legislative Exchange Council, Americans for Prosperity, the State Policy Network, and party organs—including the Republican National Committee and the Republican State Leadership Committee—protected Republican incumbents by helping change state voting and redistricting practices, sometimes through state constitutional amendment.¹⁹ Partly by weakening state constitutional voting and redistricting provisions and by winning rural districts by efficient margins, Republicans have won a disproportionate share of state legislative

¹⁵ In *Shelby County v. Holder*, the Court invalidated the 1965 Voting Rights Act's Section 4(b) coverage formula as outdated, foreclosing Section 5 federal oversight of state election reform. See 570 U.S. 529, 556–57 (2013). In *Rucho v. Common Cause*, the Court held that partisan gerrymandering was nonjusticiable, and in *Abbott v. Perez*, it held that in potential cases of race-targeted gerrymandering, judges cannot presume discriminatory legislative intent. See 588 U.S. 684, 698–99 (2019); 585 U.S. 579, 581–82 (2018). But note that in *Allen v. Milligan*, the Court interpreted Section 2 of the Voting Rights Act to invalidate the Alabama legislature's proposed congressional map as an impermissible racial gerrymander denying Black Alabamans a second majority-minority district. 599 U.S. 1 (2023).

¹⁶ See ZACHARY ROTH, *THE GREAT SUPPRESSION: VOTING RIGHTS, CORPORATE CASH, AND THE CONSERVATIVE ASSAULT ON DEMOCRACY* 96–103 (2016); ALEXANDER HERTEL-FERNANDEZ, *STATE CAPTURE: HOW CONSERVATIVE ACTIVISTS, BIG BUSINESSES, AND WEALTHY DONORS RESHAPED THE AMERICAN STATES—AND THE NATION* 7–17 (2019).

¹⁷ See JOHN DINAN, *STATE CONSTITUTIONAL POLITICS: GOVERNING BY AMENDMENT IN THE AMERICAN STATES* 67–68 (2018) [hereinafter DINAN, *STATE CONSTITUTIONAL POLITICS*]; *Free and Equal Election Clauses in State Constitutions*, NATIONAL CONFERENCE OF STATE LEGISLATURES (2019), ncsl.org/redistricting-and-census/free-and-equal-election-clauses-in-state-constitutions [<https://perma.cc/7C76-HZT8>]; Wilfred U. Codrington III, *Voting Rights Under State Constitutions, Explained*, STATE COURT REPORT (2023), statecourtreport.org/our-work/analysis-opinion/voting-rights-under-state-constitutions-explained [<https://perma.cc/P5Z4-TBUD>].

¹⁸ See *Voting Rights Litigation Tracker*, BRENNAN CTR. FOR JUST. (2022), www.brennancenter.org/our-work/research-reports/voting-rights-litigation-tracker [<https://perma.cc/2SHW-2K8V>].

¹⁹ See HERTEL-FERNANDEZ, *supra* note 16, at 6, 252; *infra* Part IV.

seats.

The present era thus looks like the first half of the twentieth century. In the first half of the twentieth century, rural state legislators packed urban voters into overpopulated, gerrymandered multimember districts. This diluted the urban vote, decreased state legislative competitiveness, and gave extra seats to rural legislators, who were often Democrats in the South and Republicans outside of the South. Both parties benefitted from rural overrepresentation. The Supreme Court forbade this malapportionment and multimember district vote dilution in 1964 and 1966²⁰ but refused to forbid partisan gerrymandering. Modern urban-rural polarization lets Republicans win rural districts by narrow, efficient margins, positioning Republicans in competitive states to win legislative control while losing or only narrowly winning the statewide popular vote. Detachment from the statewide popular vote primes the Republican Party to entrench seats through counter-majoritarian gerrymandering and election reform. Like in the first half of the twentieth century, rural districts now claim disproportionate state legislative seat share. But now, rather than benefiting both parties, rural overrepresentation primarily benefits one party, turning the party in some states against majoritarian democracy.

The Essay briefly recounts this history, emphasizing how contemporary state legislators entrench their seats through state constitutional and statutory election reform and how under this regime, Republican state legislators win a disproportionate share of state legislative seats. The Essay proceeds in four chronological steps. The Essay begins with the 1920 census, in which the national urban population first eclipsed the rural population, prompting rural legislators to block reapportionment to growing urban districts. Second, the Essay explains how Supreme Court decisions in 1962 and 1964 forced state lawmakers to redress this malapportionment, with nearly all states completing reapportionment by 1966 and adding new state constitutional voting rights and fair redistricting protections.²¹ The Essay then describes Republicans' electoral gains after after this "reapportionment revolution," and finally, Republicans' attempts to entrench their state legislative seats by modifying elections and redistricting practices around the 1990, 2000, and 2010 redistricting cycles.

²⁰ See *Baker v. Carr*, 369 U.S. 186, 236 (1962); *Burns v. Richardson*, 384 U.S. 73, 97–98 (1966).

²¹ See *Baker*, 369 U.S. at 236; *Wesberry v. Sanders*, 376 U.S. 1, 4 (1964).

I

STATE CONSTITUTIONS AND STATE LEGISLATIVE GERRYMANDERING AND
MALAPPORTIONMENT: 1920–1962

In the early twentieth century, most states constitutionally required regular, fair state legislative reapportionment.²² Entering the 1920 census, eighteen states constitutionally mandated decennial bicameral reapportionment on the basis of population.²³ Twenty-four states adopted this system with modifications—in some of these states, constitutional framers insulated redistricting from legislative interference by apportioning districts into fixed, equal geographic units.²⁴ California voters, for example, amended their constitution to apportion their senate by equal units.²⁵ The remaining six state constitutions used idiosyncratic apportionment systems, with Rhode Island, Connecticut, and Vermont apportioning by town or county, and Delaware in 1897, detailing district lines in the state constitutional text.²⁶ Additionally, in some states, constitutional provisions guaranteed free and equal elections, letting petitioners challenge unequal apportionment schemes.²⁷

The 1920 census tested legislators' commitment to fair reapportionment. Between 1910 and 1920, the nation's rural population declined by five million while the urban population grew by nineteen million, buoyed in the industrial Northeast by eastern and southern European

²² Prior to these clauses, voters called state constitutional conventions to reapportion legislatures. In 1851, Ohio and Virginia convention delegates provided fair reapportionment mechanisms for future redistricting cycles, Ohio through the nation's first independent redistricting board. *See* OHIO CONST. of 1851, art. XI, §§ 1–11; VA. CONST. of 1851, art. IV, §§ 5–6; DINAN, STATE CONSTITUTIONAL POLITICS, *supra* note 17, at 65–66.

²³ Counts as of 1915. Per James Q. Dealey, this included California, Colorado, Illinois, Indiana, Kentucky, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Tennessee, Washington, and Wisconsin. JAMES Q. DEALEY, GROWTH OF AMERICAN STATE CONSTITUTIONS FROM 1776 TO THE END OF THE YEAR 1914, 196 (1915).

²⁴ Dealey lists Alabama, Arizona, Arkansas, Florida, Idaho, Iowa, Kansas, Louisiana, Maine, Mississippi, Missouri, Montana, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Texas, Utah, Virginia, West Virginia, and Wyoming. *Id.* at 196–204.

²⁵ *See* CAL. CONST. of 1879, art. IV, § 6; JOHN DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION 367 n.177 (2006) [hereinafter DINAN, STATE CONSTITUTIONAL TRADITION].

²⁶ Maryland and Georgia also used unorthodox, malapportioned systems. *See* DEALEY, *supra* note 23, at 204–07; *see* CONN. CONST. of 1818, art. III, §§ 3, 5; DEL. CONST. of 1897, art. II, § 2; R.I. CONST. of 1842, art. V, § 1; VT. CONST. of 1793 §§ 13, 18; Essays of Amendment, art. IV; *id.* at 96–97; G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 145 (1998).

²⁷ *See, e.g.*, ILL. CONST. of 1870, art. II, § 18 (promising “[a]ll elections shall be free and equal”).

immigration and Black immigration from the rural South.²⁸ The 1920 Census was the first in which the urban population exceeded the rural population.²⁹ Reapportioning districts to include cities threatened agrarians, nativists, anticommunists, prohibitionists, and moral traditionalists, who relied on the rural vote and opposed expanding the urban, immigrant, progressive vote.³⁰ State lawmakers struggled to update districting schemes cemented in state constitutional texts. Increasingly, between the 1920s and 1960s, they apportioned upper houses on the basis of geographic units, thereby exacerbating malapportionment.³¹

The urban-rural tension was especially pronounced in Congress, where both Republican and Democratic members from rural districts stood to lose seats. In December 1920, the Census Bureau released reapportionment figures that would strip eleven seats from ten rural states and give them to eight urbanizing states.³² The Sixty-Sixth Congress subsequently ignored the federal Constitution's mandate to decennially reapportion U.S. House seats, as did the Sixty-Seventh Congress, seated in 1921.³³ The Sixty-Eighth

²⁸ Pamela S. Karlan, *Reapportionment, Nonapportionment, and Recovering Some Lost History of One Person, One Vote*, 59 WM. & MARY L. REV. 1921, 1935–36 (2018). Republicans, having recaptured the House in 1918, were loath to lose their majority by empowering Democratic-leaning cities. See MARGO J. ANDERSON, *THE AMERICAN CENSUS: A SOCIAL HISTORY* 133–34 (2015). Representatives from rural districts alleged the census, taken in January 1920 when itinerant farm workers lived in cities, overcounted urban areas and undercounted rural ones. Further, by 1920, nearly three-quarters of immigrants lived in cities. *Id.* Nativists drew on burgeoning Darwinist social science, demography, and academic statistics, warning that urban immigrant and Black population growth would outpace native, white, and rural growth. *Id.* at 145. With rising inflation and declining real wage income, urban workers went on strike in 1919 and 1920, raising the specter of an urban communism abetted by eastern European radicalism and immigration. *Id.* at 134; see also DAVID E. KYVIG, *EXPLICIT AND AUTHENTIC ACTS: AMENDING THE U.S. CONSTITUTION, 1776–1995*, at 220–21 (1996); Walter R. Farley, *100 Years Ago, Congress Threw Out Results of the Census*, *THE CONVERSATION* (Feb. 4, 2020), <https://theconversation.com/100-years-ago-congress-threw-out-results-of-the-census-129954> [<https://perma.cc/63NC-E4UL>].

²⁹ ENGSTROM, *supra* note 13, at 174.

³⁰ Prohibitionists, with their electoral base in rural dry counties, particularly in the Midwest and South, worried that reapportionment toward pro-liquor Northeastern cities would turn the House against a prohibition amendment. See K. AUSTIN KERR, *ORGANIZED FOR PROHIBITION: A NEW HISTORY OF THE ANTI-SALOON LEAGUE* 139–59, 187–94 (1985); JACK S. BLOCKER JR., *AMERICAN TEMPERANCE MOVEMENTS: CYCLES OF REFORM* 124 (1989); LISA MCGIRR, *THE WAR ON ALCOHOL: PROHIBITION AND THE RISE OF THE AMERICAN STATE* 21–22 (2016).

³¹ DINAN, *STATE CONSTITUTIONAL TRADITION*, *supra* note 25, at 173.

³² ANDERSON, *supra* note 28, at 140.

³³ Census Bureau figures also showed Republican-leaning New England losing three seats while the solidly Democratic South lost none. The House Census Committee suggested rebalancing the chamber by adding urban seats without stripping rural ones, increasing the House from 435 to 483 seats. *Id.* This had been the norm, as Congress had before created new House seats for urban constituencies without reducing rural seats, expanding the House from 292 to 435 members between 1880 and 1910. *Id.* But in January 1921, the House decisively voted against expanding the now crowded chamber, and the 435-seat reapportionment bill died with the session's conclusion

Congress's House Census Committee also failed to report a reapportionment bill.³⁴ The delay had become an embarrassment—between 1790 and 1910, Congress reallocated House seats within twenty-four months of each census's completion—so President Calvin Coolidge requested the Sixty-Ninth Congress act before adjourning in March 1927.³⁵ Since the last reapportionment, based on the 1910 Census, the national urban population growth had far outpaced rural population growth.³⁶ Reapportionment therefore promised to add seventy-two representatives to urban areas, transferring sixteen seats to growing states from thirteen others in 1927. This only hardened the resolve of rural legislators against reapportionment.³⁷ The Seventieth Congress likewise delayed consideration of another reapportionment bill until January of 1929, which after redrafting in committee through February, was abandoned following a threatened filibuster from those states losing seats. Only in June 1929, when Herbert Hoover called a special session to resolve the matter, did Congress pass the Reapportionment and Census Act of 1929.³⁸ In 1941, the Roosevelt

the following March. *Id.* at 140–48. The Sixty-Seventh Congress, seated March 1921, granted Republicans a 300 to 132 House majority and 59 to 39 Senate majority. *Id.* Torn between competing apportionment formulas, the Republican Congress in 1922 derailed reapportionment debates by proposing using the Fourteenth Amendment to strip House seats from those Southern Democratic states disenfranchising men on the basis of race. *Id.* Within weeks of convening, the Sixty-Seventh Congress also passed the 1921 Emergency Quota Act to stem European immigration, and in 1924 Congress's National Origins Act apportioned immigration quotas by national origin, cherry-picking 1890 Census data to slow eastern and southern European immigration. *Id.*; see also U.S. CONST. art. I, § 2, cl. 3.

³⁴ ANDERSON, *supra* note 28, at 151.

³⁵ Prior members of Congress had insulated census staffing, administration, and reapportionment from political interference or delay. In 1879, Congress delegated authority over field office hiring and management to the Census Office, forming a permanent Census Bureau in 1902 to continuously collect statistics. ANDERSON, *supra* note 28, at 86. Congressional Republicans tended to support professionalization of the census, and Bureau and field office staff grew, incorporating mechanized tabulation by academic statisticians and social scientists. *Id.* at 124–25. Thanks to quick, impartial census administration, as the historian Margo Anderson notes, the “reapportionment process was fairly routine as Congress enlarged the size of the House each decade.” *Id.* at 110. Even the 1900 Census, reallocating presidential electors during a contentious presidential election, saw quick reporting of reapportionment figures and a normal reapportionment process. *Id.* at 112. Similarly, at Theodore Roosevelt's behest, in July 1909 Congress rejected a bill for patronage staffing of the 1910 Census in favor of hiring of civil service staffers, passing a reapportionment act within a year of the 1910 Census's completion. *Id.* at 124; see also Zechariah Chafee, *Congressional Reapportionment*, 42 HARV. L. REV. 1015, 1015–16 (1929); Karlan, *supra* note 28, at 1932.

³⁶ See ENGSTROM, *supra* note 13, at 174.

³⁷ ENGSTROM, *supra* note 13, at 174.

³⁸ See REAPPORTIONMENT ACT OF 1929, PUB. L. NO. 71-13, 46 STAT. 21 (1929); CHARLES W. EAGLES, *DEMOCRACY DELAYED: CONGRESSIONAL REAPPORTIONMENT AND URBAN-RURAL CONFLICT IN THE 1920S* 75–80 (1990); ANDERSON, *supra* note 28, at 154; Margo J. Anderson, *The Ghosts of Census Past and Their Relevance for 2020*, 163 PROC. AM. PHIL. SOC'Y 227, 233–34 (2019); Karlan, *supra* note 28, at 1938; Gerard N. Magliocca, *Our Unconstitutional Reapportionment Process*, 86 GEO. WASH. L. REV. 774, 779–83 (2018).

Administration preempted future delays by circumventing the House committee system and sending Census Bureau figures instead to the Clerk of the House, who was bound to transmit these certified figures to the state governors within two weeks. This has been the process since.³⁹

State legislators found workarounds. Mississippi lawmakers drew a malapportioned congressional map in which the predominantly Black Third District held roughly four hundred thousand people while the Fourth held fewer than two hundred thousand. Evaluating the map in the 1932 *Wood v. Broom* case, the Supreme Court noted that the Reapportionment and Census Act of 1929 did not require House districts to be equal in population or be compact or contiguous.⁴⁰ This allowed partisan gerrymandering of legislative districts. In states in which they drew district maps, Democrats' expected legislative seat significantly exceeded their vote share, particularly in the South, as did Republicans' in non-Southern states in which they controlled districting.⁴¹ Parallel to this, as rural depopulation continued, malapportionment worsened. Between 1930 and 1960, twelve state upper chambers and twelve state lower chambers wholly refused redistricting.⁴² Rural lawmakers drew cities into multimember state legislative districts, further weakening the urban vote.⁴³ By the midcentury years, most rural districts had significantly lower population per representative than did urban districts.⁴⁴ Because rural Southern Democrats and rural non-Southern Republicans needed gerrymandered, malapportioned maps to get reelected, both parties maintained the status quo.

State politics ossified. State legislative party competition steadily declined through the first half of the twentieth century.⁴⁵ Prior to 1965, in at least forty-two states, it was possible to win a legislative majority in one or both chambers with less than forty percent of the statewide popular vote.⁴⁶ Rural elites—Democrats in Southern states and typically Republicans outside the South—controlled state politics. Rural malapportionment in

³⁹ Though note Congress reserved the right to block transmission of the certificates to the state governors. Karlan, *supra* note 28, at 1923–24.

⁴⁰ See 287 U.S. 1, 6 (1932); Karlan, *supra* note 28, at 1941–47. In contrast, Section 3 of the 1911 reapportionment act mandated congressional districts be equally apportioned by population.

⁴¹ ENGSTROM, *supra* note 13, at 177–78.

⁴² ROBERT G. DIXON, JR., DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS 84 (1968). States added at-large congressional districts as needed according to census figures. Gary W. Cox & Jonathan N. Katz, *The Reapportionment Revolution and Bias in U.S. Congressional Elections*, 43 AM. J. POL. SCI. 812, 817 (1999).

⁴³ ROBINSON WOODWARD-BURNS, HIDDEN LAWS: HOW STATE CONSTITUTIONS STABILIZE AMERICAN POLITICS 166 (2021).

⁴⁴ *Id.*

⁴⁵ ENGSTROM, *supra* note 13, at 173 fig.9.2.

⁴⁶ Data for 1961–1965 from the National Municipal League in *Congressional Quarterly*. See Cong. Q., *Senate Lets Reapportionment Ruling Stand*, 22 CQ ALMANAC 505 (1967), <http://library.cqpress.com/cqalmanac/cqal66-1301890> [<https://perma.cc/EJ7H-CN9M>].

these years benefitted both parties to the detriment of urban voters nationwide. As the Federal Advisory Commission on Intergovernmental Relations noted in a 1962 study, “[i]n most instances where significantly less than a majority of a State’s population can elect 50 percent or more of the legislators, it is the suburban or entire metropolitan areas which are underrepresented.”⁴⁷ This was particularly true in the disproportionately agrarian South. Mississippi’s state constitutional framers had introduced the facially race-neutral poll tax in 1890—by 1902, every ex-Confederate state adopted such a provision and imposed literacy tests and residency requirements on prospective voters.⁴⁸ Alabama’s framers added a character test to their constitution.⁴⁹ These state constitutional provisions, as well as the all-white primary, disenfranchised most voters in the poor, majority-Black, agrarian “blackbelt” counties cutting across the deep South.⁵⁰ With artificially low blackbelt turnout, Democrats won blackbelt districts and, consequently, state legislative majorities, sometimes without winning the statewide popular vote.⁵¹ Biased districting and targeted disenfranchisement gave conservative rural lawmakers outsized power in state politics.

Even outside the South, lawmakers drew biased state legislative districts, and state courts deferred to legislatures. For example, in 1941 the Illinois Supreme Court held that the state constitution’s fair elections clause did not grant petitioners an enforceable right to challenge the legislature’s 1931 maps.⁵² Citing *Wood v. Broom*, the United States Supreme Court similarly refused to overrule the Illinois maps, holding such questions were nonjusticiable and reiterating that districts need not be compact, contiguous, or equal in population.⁵³ Consequently, Illinois did not redistrict between 1902 and 1948.⁵⁴ Across Northern and Midwestern states, Republicans

⁴⁷ ADVISORY COMM’N ON INTERGOVERNMENTAL RELS., APPORTIONMENT OF STATE LEGISLATURES 15 (1962).

⁴⁸ See MISS. CONST. of 1890, art. VIII, § 206, art. XII, §§ 241–45 (repealed 1975).

⁴⁹ See ALA. CONST., art. VIII, §§ 180–88 (repealed 1996).

⁵⁰ V. O. KEY JR., SOUTHERN POLITICS IN STATE AND NATION 8 (1949).

⁵¹ Per Robert S. Erikson in 1972: “[T]he Democrats are the party most likely to win a majority of the seats with only a minority of the votes, because the low turnout rate in the traditionally Democratic South allows the Democrats to win many seats (often uncontested) with relatively few votes.” Robert S. Erikson, *Malapportionment, Gerrymandering, and Party Fortunes in Congressional Elections*, 66 AM. POL. SCI. REV. 1234, 1234 (1972).

⁵² See ILL. CONST. of 1870, art. II, § 18; *Daly v. Madison County*, 38 N.E.2d 160, 164 (Ill. 1941). This reversed *Moran v. Bowley*, 179 N.E. 526, 531–32 (Ill. 1932). Karlan, *supra* note 28, at 1950–53.

⁵³ See *Colegrove v. Green*, 328 U.S. 549, 551–52 (1946); Karlan, *supra* note 28, at 1952–55.

⁵⁴ ENGSTROM, *supra* note 13, at 171. Though the state did add two at-large congressional districts to conform to federal reapportionment requirements. *Id.* at 174. Note also that both state legislative chambers switched party control at least once between 1936 and 1948, suggesting some party competition.

overperformed with rural voters and drew biased maps.⁵⁵ During the 1940 and 1950 redistricting cycles, Republicans controlled most Northern state legislatures and, aided by the concentration of Democratic voters in cities, gerrymandered congressional districts to overrepresent rural Republican voters.⁵⁶ Among Northern states, Republican congressional seat share exceeded vote share for much of the 1952–1964 period.⁵⁷ Their seats safely entrenched, state legislators across the country refused calls to revise state constitutions. Between 1930 and 1960, only four state constitutional conventions ratified new constitutions.⁵⁸ As a result of this state constitutional stasis, in 1962, only fifteen states constitutionally required bicameral apportionment on the basis of population, roughly the same number of states as did at the century’s start. The first half of the twentieth century was a period of stagnation in state government. Rural legislators, representing a minority of the national electorate, used gerrymandering and malapportionment to dominate state politics. This entrenched rural Democrats in the South and rural Republicans outside the South. Since neither party was disproportionately harmed by pro-rural gerrymandering or malapportionment, neither party opposed rural overrepresentation.

II

THE REAPPORTIONMENT REVOLUTION AND STATE CONSTITUTIONAL REFORM: 1962–1966

The Supreme Court eventually forced reapportionment in 1962. Pressure for reapportionment came initially from urban, voting rights, and good governance groups. Municipal and civil rights interests, including the United States Conference of Mayors, the Advisory Commission on Intergovernmental Relations, Americans for Democratic Action, and the National Association for the Advancement of Colored People (NAACP) sought fair redistricting.⁵⁹ Similarly, the National Municipal League, the National Governors’ Conference, and the League of Women Voters called for updating state constitutions.⁶⁰ As the Eisenhower Administration’s 1955 Kestenbaum Commission noted, reapportionment required state constitutional reform: longstanding “legislative neglect of urban communities,” called for a “fundamental review and revision of [state]

⁵⁵ *Id.* at 177–79.

⁵⁶ Erikson, *supra* note 51, at 1242; Cox & Katz, *supra* note 42, at 834 (“Prior to the 1960s, the vast bulk of nonsouthern redistricting plans were partisan Republican plans . . .”).

⁵⁷ By Erikson’s count, Republicans controlled ten of eleven Northern legislatures during the 1940 and 1950 redistricting cycles. Erikson, *supra* note 51, at 1242. *See also* Cox & Katz, *supra* note 42, at 834.

⁵⁸ WOODWARD-BURNS, *supra* note 43, at 166.

⁵⁹ Cong. Q., *supra* note 46.

⁶⁰ DIXON, *supra* note 42, at 261–89; TARR, *supra* note 26, at 152–55.

constitutions.”⁶¹ Institute of Public Administration Director Charlton Chute added in 1960 that “many present-day state constitutions were designed to meet nineteenth-century rural problems; they were adopted at a time when the development of a single metropolitan area, not to speak of a chain or cluster of contiguous metropolitan areas, was unforeseen.”⁶²

Interest groups also pushed Southern states to repeal their constitutions’ disenfranchisement clauses. North Carolina’s western Appalachian counties outvoted eastern blackbelt counties in passing a poll-tax repeal amendment in 1920.⁶³ Louisiana Governor Huey Long worked with the American Federation of Labor to re-enfranchise the state’s poor with a poll tax repeal amendment in 1934.⁶⁴ And Florida repealed in 1936 to prevent vote-buying. Under pressure from the NAACP and the National Committee to Abolish the Poll Tax, Arkansas repealed the tax in 1944 as Black servicemen returned home, as did South Carolina in 1951.⁶⁵ With Tennessee’s repeal amendment of 1953, all but three ex-Confederate states voluntarily abolished the poll tax.⁶⁶ In the remaining three states, the poll tax, constitutionally fixed at a dollar or two, became defunct with inflation.⁶⁷ Repeal of the poll tax and of the white primary in 1944 made Southern state legislative elections more competitive.⁶⁸

Thanks partly to interest group litigation, the Supreme Court finally broke the logjam. The Court determined districting plans were subject to judicial challenge in *Baker* in 1962, and had to conform to a one-person, one-vote principle in *Wesberry* and *Reynolds* in 1964.⁶⁹ In *Wesberry*, the Court rejected Tennessee’s malapportioned congressional maps, in which the largest district contained 627,019 people while the smallest contained

⁶¹ COMM’N ON INTERGOVERNMENTAL RELS., A REPORT TO THE PRESIDENT FOR TRANSMITTAL TO THE CONGRESS 37, 39–40, 56 (1955).

⁶² Charlton F. Chute, *New Constitutions for a New Era in State Government*, in MAJOR PROBLEMS IN STATE CONST. REVISION 265, 273 (W. Brooke Graves ed., 1960).

⁶³ WOODWARD-BURNS, *supra* note 43, at 162.

⁶⁴ *Id.*

⁶⁵ *Id.* at 162–63.

⁶⁶ See N.C. CONST. of 1868 amend. of 1920, art. VI, § 4; TENN. CONST. of 1870 amend. of 1953, art. II, § 4; ARK. CONST. of 1874; S.C. CONST. of 1895 amend. of 1951; LA. CONST. of 1921 amend. of 1940, art. VIII, § 2. See generally FREDERIC D. OGDEN, THE POLL TAX IN THE SOUTH 178–280 (1958); RALPH J. BUNCHE, THE POLITICAL STATUS OF THE NEGRO IN THE AGE OF FDR 328–83 (1973).

⁶⁷ Only Alabama, Virginia, and Texas maintained the tax after 1953. The Supreme Court would not overturn the defunct poll tax for another decade, waiting until *Harper v. Va. Board of Elections*, 383 U.S. 663 (1966). See WOODWARD-BURNS, *supra* note 43, at 160–63.

⁶⁸ *Id.* at 162–65.

⁶⁹ See *Baker v. Carr*, 369 U.S. 186, 237 (1962); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964); see also *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (holding that the redefining of a municipal boundary with the inevitable effect of excluding black voters is justiciable and violated the Fifteenth Amendment). For the Court’s statement of the “one person, one vote” principle, see *Gray v. Sanders*, 372 U.S. 368, 381 (1963).

223,387. Tennessee was not an outlier—across the states, on average, the largest district was twice as populous as the smallest district.⁷⁰ As such, the Court required states to evenly apportion U.S. House districts on the basis of population, such that each district held equal population.⁷¹ In *Reynolds*, the Court determined state legislative apportionment plans had to follow a “one person, one vote” principle, overruling Alabama’s legislature, which had ignored state constitutional reapportionment requirements since 1901.⁷² Invalidating literacy tests in 1966 and residency requirements in 1972 further weakened the counter-majoritarian power of rural state legislators.⁷³

States reapportioned their legislatures in response. By 1964, twenty-six states approved reapportionment schemes, and by 1966, forty-six states had completed reapportionment, with Hawaii, Louisiana, Maine, and Mississippi slated to follow.⁷⁴ Federal preclearance denials under the 1965 Voting Rights Act also forced states to divide multimember urban districts into multiple single-member districts, as did an accompanying Supreme Court decision.⁷⁵ As a result, urban areas gained districts.⁷⁶ Consequently, between 1961 and 1966, seventy-seven of eighty state legislative chambers increased in competitiveness.⁷⁷

Progressive Democrats gained state legislative seats. Court-directed reapportionment loosened Republican control over redistricting in non-Southern states, allowing increased bipartisan or Democratic control of the redistricting process in the redistricting cycle of the late 1960s.⁷⁸ While *Baker* and *Reynolds* forbade state legislative malapportionment, they did not

⁷⁰ ENGSTROM, *supra* note 13, at 181.

⁷¹ *Id.* at 180.

⁷² The Court in *Baker* overruled similar longstanding malapportionment in Tennessee. DIXON, *supra* note 42, at 84–90. See TENN. CONST. of 1870, art. II, §§ 3–6; ALA. CONST. of 1901, art. IV, § 50; *id.* art. IX, §§ 197–200; *id.* art. XVIII, §284.

⁷³ See *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (literacy tests); *Dunn v. Blumstein*, 405 U.S. 330 (1972) (residence requirements); TARR, *supra* note 26, at 146–47.

⁷⁴ Cong. Q., *supra* note 46; DINAN, STATE CONSTITUTIONAL TRADITION, *supra* note 25, at 172–73.

⁷⁵ The Court forbade multimember state legislative districts that were “designed to or would operate to minimize or cancel out the voting strength of racial or political elements of the voting population.” See *Burns v. Richardson*, 384 U.S. 73, 89 (1966).

⁷⁶ WOODWARD-BURNS, *supra* note 43, at 167.

⁷⁷ See Cong. Q., *supra* note 46. In 1966, *Congressional Quarterly* used National Municipal League data to measure state legislative competitiveness as the statewide vote share needed to win a chamber majority. *Id.* For seventy-seven of eighty chambers for which *Congressional Quarterly* had data, between 1961 and 1966, the vote share needed for a chamber majority grew closer to fifty percent. *Id.* This made it less likely that a minority of voters could select a majority of legislators in a given chamber. *Id.* For the same data, see also Anthony Lewis, *Districts Ruling Shocks Capital; Many Surprised by Court’s Decision on Legislatures*, N.Y. TIMES (June 17, 1964), nytimes.com/1964/06/17/archives/districts-ruling-shocks-capital-many-surprised-by-courts-decision.html [https://perma.cc/A8GL-YT8P].

⁷⁸ Cox & Katz, *supra* note 42, at 815–16.

prevent gerrymandering, and consequent Democratic gerrymandering contributed to the party's initial urban gains outside of the South.⁷⁹ Robert Dixon and Gordon Hatheway saw as much in 1969, noting this "reapportionment revolution" could be a "boon to the gerrymanderer, because it gives him carte blanche to ignore traditional boundaries and draw fresh lines with an eye to political profile data."⁸⁰ Northern and Midwestern rural Republicans lost seats, as did rural Southern Democrats, while nationwide, urban Democrats expected to gain state legislative and congressional seats.⁸¹ Two days after *Reynolds*, Democratic National Committee Chair John M. Bailey told the *New York Times* reapportionment was "something the Democratic party has long advocated and fought for and certainly welcomes."⁸² As Erik Engstrom concludes, the "reapportionment revolution created, for the first time, a metropolitan majority in the House [E]radication of malapportionment increased the legislative numbers, and, therefore, political power, of liberal members of the Democratic caucus."⁸³

To protect their new districts, these state legislators added fair apportionment provisions to the state constitutions. While the town or county had once represented a distinct political community of interest requiring a dedicated legislative district, by the mid-twentieth century, communities of interest, like racial, national, or religious groups, had come to span states and regions, such that local units like the town or county claimed no special representative priority in the eyes of legislators and judges.⁸⁴ State legislators rewrote their constitutions, abolishing recognition of the town or county in the redistricting process. Between 1962 and 1979, the states called thirty-nine state constitutional commissions, twelve state constitutional conventions, and six legislative sessions to draft or amend constitutions, often in direct response to *Baker* and *Reynolds*. These bodies ratified nine

⁷⁹ Gerrymandering, more than fair apportionment, drove Democratic gains. See Erikson, *supra* note 51, at 1244; Cox & Katz, *supra* note 42, at 814–20.

⁸⁰ Robert G. Dixon & Gordon W. Hatheway Jr., *The Seminal Issue in State Constitutional Revision: Reapportionment Method and Standards*, 10 WM. & MARY L. REV. 888, 889 (1969).

⁸¹ See Erikson, *supra* note 51; Cox & Katz, *supra* note 42, at 814–20. As Virginia state Senate Democrat Henry E. Howell Jr. noted, "with fair reapportionment in the state, urban areas will be predominant in the state legislature." *Changes Due in Alabama*, N.Y. TIMES, June 17, 1964.

⁸² Lewis, *supra* note 77.

⁸³ ENGSTROM, *supra* note 13, at 183.

⁸⁴ As Warren noted: "The fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote," adding "[p]olitical subdivisions of States—counties, cities or whatever—never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions." *Reynolds v. Sims*, 377 U.S. 533, 567, 575 (1964). The Warren Court instead often protected discrete and insular minority groups earlier identified in *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

new state constitutions.⁸⁵ Conventions in Michigan in 1961–1962, New Jersey in 1966, Pennsylvania in 1967–1968, Hawaii in 1968, and Montana in 1971–1972 provided for independent redistricting commissions.⁸⁶ Convention delegates in Rhode Island in 1964–1965, Connecticut in 1965, Hawaii in 1968, Illinois in 1969–1970, and North Dakota in 1971–1972 rejected nineteenth-century arguments and plans for apportioning state senates on the basis of geographic units or to protect the state’s propertied classes.⁸⁷ Similarly, between 1968 and 1979, the states proposed 141 elections and franchise amendments, ratifying 100.⁸⁸ Voters in Colorado in 1974, for example, initiated an amendment creating an independent redistricting commission and voters passed legislatively-referred amendments in Maine in 1975 and Washington in 1983.⁸⁹ Widespread state constitutional reform also let framers protect new civil and voting rights unrelated to fair apportionment.⁹⁰ State constitutional revisions cemented the reapportionment revolution.⁹¹

III

REPUBLICAN GAINS AFTER REAPPORTIONMENT: 1966–1990

Following the completion of reapportionment—nearly all states had reapportioned by 1966—suburbs grew in population. As the Advisory Commission on Intergovernmental Relations noted in 1962, prior to reapportionment, under “the present distribution of seats in many State

⁸⁵ WOODWARD-BURNS, *supra* note 43, at 167.

⁸⁶ See MICH. CONST. of 1964, art. IV, § 6; N.J. CONST. of 1947, art. IV, § 3 (amended 1966); PA. CONST. of 1968, art. II, § 17; HAW. CONST. of 1959, art. III, § 4 (amended 1968); MONT. CONST. of 1972, art. V, § 14. In contrast, Florida’s independent 1968 constitutional revision commission failed to provide for independent reapportionment. FLA. CONST. of 1968, art. III, §§ 1, 16; Dixon & Hatheway, *supra* note 80, at 890–900; DINAN, STATE CONSTITUTIONAL POLITICS, *supra* note 17, at 66.

⁸⁷ Nineteenth-century property and taxpaying qualifications to vote for the state upper house in principle made the chamber more responsive to the needs of the state’s propertied class. DINAN, STATE CONSTITUTIONAL TRADITION, *supra* note 25, at 174–75.

⁸⁸ State constitutional amendment data from *The Book of the States Table 1.4: Constitutional Amendment Procedure: By the Legislature, Constitutional Provisions*, THE COUNCIL OF STATE GOVERNMENTS (2024), <https://bookofthestates.org/tables/constitutional-amendment-procedure-by-the-legislature-constitutional-provisions/> [<https://perma.cc/RH4P-ZTZ2>].

⁸⁹ See COLO. CONST. of 1876, art. V, § 48 (amended 1974); ME. CONST. of 1820, art. IV, pt. III, § 1-A (amended 1975); WASH. CONST. of 1889, art. II, §43 (amended 1983). But note voters rejected redistricting amendments in Oklahoma in 1960 and 1962 and North Dakota in 1973. DINAN, STATE CONSTITUTIONAL POLITICS, *supra* note 17, at 66–67.

⁹⁰ See John Dinan, *Policy Provisions in State Constitutions: The Standards and Practice of State Constitution-Making in the Post-Baker v. Carr Era*, 60 WAYNE L. REV. 155, 157 (2014) (highlighting provisions banning sex discrimination, imposing term limits, and more).

⁹¹ See DEALLEY, *supra* note 23, at 196 (summarizing state constitutional reapportionment procedures); ADVISORY COMM’N ON INTERGOVERNMENTAL RELS., APPORTIONMENT OF STATE LEGISLATURES, 12, A1–A6 (1962) (presenting data on the reapportionment schemes of the fifty states).

legislatures it is the suburban area and not the city that is most underrepresented.”⁹² Reapportionment thus benefitted suburbs. On January 31, 1966, after reapportionment, the *Wall Street Journal* agreed that the “great gain of the suburbs is already evident and can only become more obvious. The metropolitan areas may in time come to dominate the State legislatures, but the domination will be by a combination of city and suburb—it will not be the central city.”⁹³ Progressive voting and civil rights groups and urban interests that advocated reapportionment in the late 1950s and early 1960s did not anticipate the suburban population boom of the 1960s.⁹⁴

Suburban voters became more conservative in the 1970s and 1980s. Suburban homeowners, rankled at state legislative increases on property taxes, elected conservative antitax legislators and circumvented pro-tax state legislators—in 1978, seventeen states proposed tax reform initiatives, and by 1981, forty-three states had stabilized or reduced taxes.⁹⁵ Court-mandated desegregation and school bussing plans in the early 1970s similarly frustrated white suburban parents, who had bought suburban homes precisely to avoid integrated schools.⁹⁶ Suburban mothers joined Phyllis Schlafly’s STOP ERA campaign in 1974 and 1975,⁹⁷ which tarred the pending Equal Rights Amendment as a radical plan by “an elitist minority fringe that didn’t give a damn about homemakers” to legalize abortion, prostitution, and same-sex marriage.⁹⁸ As the federal amendment faltered in 1978, states considered substitute state constitutional equal rights amendments, so in August 1979 Schlafly’s Eagle Forum called members to rally against progressive state legislators and judges.⁹⁹ These campaigns swung suburban voters and new suburban districts to the right. As Maryland

⁹² ADVISORY COMM’N ON INTERGOVERNMENTAL RELS., *supra* note 47, at 24.

⁹³ Quoted by Millard Tydings in 112 THE CONG. REC.: EIGHTY-NINTH CONG., SECOND SESSION 8568 (1966).

⁹⁴ See WOODWARD-BURNS, *supra* note 43, at 167–68.

⁹⁵ WOODWARD-BURNS, *supra* note 43, at 185–86. California Propositions 4 and 13 led the revolt, as did Michigan Proposal E. See SEARS & CITRIN, *supra* note 3, at 19–72; ARTHUR O’SULLIVAN, TERRI A. SEXTON & STEVEN M. SHEFFRIN, PROPERTY TAXES AND TAX REVOLTS: THE LEGACY OF PROPOSITION 13 1–14 (1995); MARTIN, *supra* note 3, at 115–18; CAL. CONST. OF 1879, art. XIII, A and B, amendments of 1978 and 1979; MICH. CONST. OF 1963, art. IX, §26, amendment of 1978.

⁹⁶ MCGIRR, SUBURBAN WARRIORS, *supra* note 7; LASSITER, *supra* note 7; DELMONT, *supra* note 4; MACLEAN, *supra* note 4.

⁹⁷ See WOODWARD-BURNS, *supra* note 43, at 174–75.

⁹⁸ Martha Weinman Lear, “You’ll Probably Think I’m Stupid,” N.Y. TIMES MAGAZINE (Apr. 11, 1976), <https://www.nytimes.com/1976/04/11/archives/youll-probably-think-im-stupid-era.html> [<https://perma.cc/8J48-EVQW>].

⁹⁹ See WOODWARD-BURNS, *supra* note 43, at 174–75; Phyllis Schlafly, *The Effect of ERAs in State Constitutions*, 13 PHYLLIS SCHLAFLY REPORT (Aug. 1979), <https://eagleforum.org/publications/psr/aug1979.html> [<https://perma.cc/Q5F3-QZ63>];

Democrat Millard Tydings concluded, “conservative suburbs have been the real gainers in the 40 States which have already reapportioned on the one-man, one-vote principle . . . the suburbs, not the cities, and the suburbanites, not ‘city bosses,’ gain the most influence in fair apportionment.”¹⁰⁰

Republican leadership targeted newly formed conservative suburban districts. The nonpartisan Advisory Commission on Intergovernmental Relations noted in 1962 that “underrepresented suburbs in [non-Southern] States tend to support the Republican Party.”¹⁰¹ Similarly, a 1963 internal memorandum from Republican National Committee Research Director William B. Prendergast to Republican congressional leadership noted that pre-*Baker*, rural malapportionment “on balance, gives a substantial advantage to the Democrats,” such that in many states, particularly in the South, Democratic seat share exceeded vote share. Prendergast calculated that rural malapportionment cost Republicans at least thirty-three seats in the 1962 congressional midterms.¹⁰² But reapportionment promised to shift districts to areas that “include medium-sized cities or are suburban in character.” Prendergast urged fair reapportionment toward suburban districts and for Republican leadership to note the potential voting strength in “suburban areas includ[ing] the environs of Chicago, Detroit, Baltimore, Washington, Philadelphia, Los Angeles, [and] New York.”¹⁰³ The *New York Times* speculated in 1964 that the “suburbs will be the biggest gainers,” and Republican National Committee Chair William E. Miller stated that suburban reapportionment was “in the Republican party’s interest.”¹⁰⁴

Redistricting began shifting suburban, white voters and state legislative districts to the Republican Party.¹⁰⁵ As New York Republican Senator Jacob Javits observed in 1967,

The fact is that in the 1966 election, the first since reapportionment has been completed, Republicans made a net gain of 153 seats in State senates and 387 seats in State lower houses. The party now holds 40.9 percent of all seats in the State legislatures, in contrast to only 33 percent in 1964. Last year Republicans made a net gain of eight governorships, and significantly won or maintained control in five of the nation’s seven most populous states.¹⁰⁶

¹⁰⁰ 112 THE CONG. REC.: EIGHTY-NINTH CONG., SECOND SESSION, *supra* note 93, at 8568.

¹⁰¹ ADVISORY COMM’N ON INTERGOVERNMENTAL RELS., *supra* note 47, at 28.

¹⁰² William B. Prendergast, *Memorandum on Congressional Redistricting*, in REAPPORTIONMENT 201, 201 (Glendon Schubert ed., 1965).

¹⁰³ *Id.* at 204.

¹⁰⁴ Lewis, *supra* note 77, at 29.

¹⁰⁵ ANGIE MAXWELL & TODD SHIELDS, *THE LONG SOUTHERN STRATEGY: HOW CHASING WHITE VOTERS IN THE SOUTH CHANGED AMERICAN POLITICS* (2019); KEVIN M. KRUSE & JULIAN E. ZELIZER, *FAULT LINES: A HISTORY OF THE UNITED STATES SINCE 1974* (2019).

¹⁰⁶ 113 THE CONGRESSIONAL RECORD: NINETIETH CONGRESS, FIRST SESSION, 9342 (1967).

Republicans maintained these gains for a decade.¹⁰⁷ With Ronald Reagan's landslide 1980 election, Republicans added sixty-seven seats in state upper houses and 155 seats in state lower houses.¹⁰⁸

Republicans held Reagan-era seat gains through the 1980s.¹⁰⁹ Further, Congress in 1982 amended Section 2 of the Voting Rights Act to forbid denying a protected class of citizens equal opportunity "to participate in the political process and to elect representatives of their choice,"¹¹⁰ which the Supreme Court interpreted to prohibit denying racial groups seats during congressional redistricting.¹¹¹ Southern legislatures gerrymandered Black voters into majority-minority districts, and urban voters into compact districts detached from surrounding suburbs. Democrats won such districts by wide, inefficient margins, while Republicans won surrounding suburbs by narrower, stable margins, helping bias statewide districting in Republicans' favor.¹¹² While Democrats held a substantial majority of lower and upper house seats through the 1980s, and thus an edge in legislative gerrymandering, Republicans had made steady gains from the early 1970s.¹¹³ The 1962–1966 reapportionment revolution and 1965 Voting Rights Act had, by the late 1980s, empowered white, conservative suburbs.

IV

STATE CONSTITUTIONAL AMENDMENT, REDISTRICTING REFORM, AND REPUBLICAN ENTRENCHMENT: 1990–2024

Democrats, particularly in the South, blunted the growth of the suburban and urban electorate through gerrymandering, which was not forbidden under *Reynolds* and *Baker*. Thus, in the 1980s, Democratic seat share exceeded vote share by six percentage points in Southern states.¹¹⁴ Conservative interest groups sought to redress this, starting with the 1990 redistricting cycle. In a 1987 white paper, American Legislative Exchange Council (ALEC) Executive Director Constance Heckman lamented that Democratic state legislative majorities had "gerrymandered [Republicans] out of about 15 or 20 House seats in the 1984 election." The election forced

Current data suggests in 1966 Republicans gained 159 state upper house seats and 418 lower house seats.

¹⁰⁷ Specifically, Republicans' nationwide share of state upper and lower houses did not decline significantly until the 1974 midterms.

¹⁰⁸ See Carl Klarner, *supra* note 1.

¹⁰⁹ See *id.*

¹¹⁰ 52 U.S.C. § 10301.

¹¹¹ See *Thornburg v. Gingles*, 478 U.S. 30 (1986), which was limited by *Shaw v. Reno*, 509 U.S. 630 (1993).

¹¹² RODDEN, *supra* note 13, at 140, 173; ROTH, *supra* note 16, at 96–103.

¹¹³ See Carl Klarner, *supra* note 1.

¹¹⁴ On average across Southern states, for 1981–1990, Democratic seat share exceeded vote share by 6.10 percentage points.

“conservatives to wake up, take a look at what is happening in the states, and realize that state politics is vital for advancing the conservative agenda in this country.”¹¹⁵ Achieving Republicans’ congressional agenda required controlling congressional districting in 1990, which in turn required winning state legislative seats. As Heckman explained, state legislators “have tremendous jurisdiction over the way in which elections are conducted, including campaign financing and redistricting,” and, as Heckman noted, over state constitutional amendment.¹¹⁶ Even if Reagan’s agenda failed in Congress, conservatives could pursue education, judicial, fiscal, and welfare reform through state constitutional amendment. Heckman urged “picking the right battles. . . . [State politics] has been neglected by both sides, liberal and conservative. But state politics can be the next frontier where conservatives can establish a governing majority.”¹¹⁷ Subsequent ALEC Executive Director Sam Brunelli echoed this in a May 31, 1990, address to the Heritage Foundation, anticipating the coming redistricting cycle. Brunelli agreed that “conservatives have concentrated too much of their attention and energy on Washington,” such that “the liberal special interests are gaining legislative seats for themselves.”¹¹⁸ But noting ALEC’s growing membership of 2,400 conservative legislators, Brunelli concluded that “America’s state capitals are the battlefields upon which conservatives must fight and win.”¹¹⁹

Like ALEC, Republican leadership sought to control state legislative redistricting. In planning for the 1990 cycle, incoming RNC Chief Counsel Benjamin Ginsberg “began looking at the data, and . . . saw that white Southern Democrats had dominated the redistricting process literally since the Civil War.” Republican strategist Lee Atwater’s advice to Ginsberg was simple: “Do something about redistricting.”¹²⁰ Noting that the 1982 Voting Rights Act amendments and the Supreme Court’s supporting 1986 *Thornburg* decision allowed drawing Southern Black, Democratic voters into a few inefficient districts, Ginsberg began efficiently packing Democratic congressional districts in the South. He also remarked that the

¹¹⁵ Amy Moritz, Connie Heckman & Frank Lavin, *The War in the Trenches, in THE THIRD GENERATION: YOUNG CONSERVATIVE LEADERS LOOK TO THE FUTURE*, 143–44 (Benjamin Hart ed., 1987).

¹¹⁶ *Id.* at 146.

¹¹⁷ *Id.* at 147.

¹¹⁸ Brunelli added: “While we conservatives were focusing on Washington and issuing our nineteen hundredth white paper bemoaning the federal deficit, the liberals successfully shifted the real policy battleground to the fifty states . . . the Left moved the battlefield to Albany and Austin, Sacramento and Springfield.” SAM BRUNELLI, *State Legislatures: The Next Conservative Battleground*, 1, 2–4 (1990), <https://www.heritage.org/report/state-legislatures-the-next-conservative-battleground> [<https://perma.cc/CU4A-LZLB>].

¹¹⁹ *Id.* at 1, 4. For more on the role of ALEC, Americans for Prosperity, and the State Policy Network in revising state elections and redistricting law, see HERTEL-FERNANDEZ, *supra* note 16, at 252–53.

¹²⁰ Michael Kelly, *Segregation Anxiety*, NEW YORKER, Nov. 20, 1995, at 43, 46.

newly available “computer was a great advantage over having to rely on colored crayon maps . . . [W]e directed our state parties, and they came up with relatively inexpensive state-mapping systems.”¹²¹ Black incumbent Democrats often welcomed their new, safe seats under Republican plans. White Democratic incumbents, caught flatfooted, lost twelve districts in 1992 and sixteen more districts in 1994.¹²² This accelerated Democrats’ decline in the South.

Redistricting likely helped Republicans sweep congressional and state legislative elections in 1994. With the gradual increase in polarization and straight-ticket voting, Republicans’ 1994 congressional landslide trickled down to the state legislatures. The Party gained 111 state upper house seats and 385 state lower house seats, now controlling forty-six percent of state upper house seats and forty-eight percent of state lower house seats, the highest margins since 1953.¹²³ Republicans gained fifteen chambers, controlling twenty-four of forty-nine state upper houses and twenty-two of forty-nine lower houses.¹²⁴ This helped position Republicans to direct subsequent redistricting cycles.

Republicans focused not only on redistricting and state constitutional reform, but also on winning rural voters. While suburbs tacked conservative in the 1960s and 1970s,¹²⁵ suburbs became more competitive starting in the 1990s, as rapid population growth in the suburbs diluted the power of Democratic votes in cities and forced Democrats to rely on suburban voters to maintain electoral power around metropolitan areas; today, Democrats’ vote share is generally strongest in states “in which a large proportion of the population resides within large metropolitan areas.”¹²⁶ Republicans in competitive states increasingly won rural areas.¹²⁷ Republicans won these rural districts by narrow, efficient margins while Democrats won urban districts by wide, inefficient margins, so that in competitive states, Republicans often won proportionally more state legislative seats than share of the vote.¹²⁸ In competitive states, this maldistribution helped both Democratic and Republican incumbents entrench their seats, and primed

¹²¹ *Id.*

¹²² *Id.*; DAVID DALEY, *RATF**KED: THE TRUE STORY BEHIND THE SECRET PLAN TO STEAL AMERICA’S DEMOCRACY* xvi (2016).

¹²³ See Carl Klarner, *supra* note 1.

¹²⁴ Data excludes Nebraska’s nonpartisan unicameral legislature. Data from National Conference of State Legislatures in Sam Howe Verhovek, *Republican Tide Brings New Look to Legislatures*, N.Y. TIMES, Nov. 12, 1994, at 1.

¹²⁵ See MCGIRR, *SUBURBAN WARRIORS*, *supra* note 7, at 4; see also LASSITER, *supra* note 7, at 4.

¹²⁶ HOPKINS, *supra* note 13, at 194–98.

¹²⁷ *Id.* at 198–201; see also RODDEN, *supra* note 13.

¹²⁸ ENGSTROM, *supra* note 13, at 148–50, 155–56, 169 (explaining the concept and impact of efficient voting margins); HOPKINS, *supra* note 13, at 198–202; see also RODDEN, *supra* note 13.

Republicans to maintain legislative control while losing or only narrowly winning the statewide popular vote. Further, the Democratic vote, now concentrated in urban and suburban areas, became even easier for Republican state lawmakers to dilute through gerrymandering.¹²⁹

Entering the 2010 redistricting cycle, Republican leadership again targeted the state legislatures. The president's party often underperforms in the president's first midterm election.¹³⁰ Republican State Leadership Committee (RSLC) strategist Chris Jankowski thus rightly predicted that in Barack Obama's first midterm in 2010, Democrats would lose state legislative seats. Benefitting from straight ticket voting and RSLC funding against vulnerable Democrats, Republicans captured 131 state senate seats, 558 state house seats, and, for the first time since 1953, controlled a majority of state legislative seats.¹³¹ After 2010, Republicans held legislative majorities in twenty-five states, including ten of the fifteen states slated to gain or lose seats under legislatively controlled redistricting, and in most swing states, including Florida, Pennsylvania, Ohio, Michigan, North Carolina, and Virginia.¹³²

Party and interest groups pushed legislators to reform election practices during the subsequent 2010 redistricting cycle. The Supreme Court upheld voter identification laws in *Crawford* in 2008, leading ALEC to draft a model identification bill in 2009, when only three states required voter identification.¹³³ Between 2011 and 2012, lawmakers in thirty-two states, most of them ALEC members, introduced sixty-two voter identification bills.¹³⁴ In the days after the Court announced *Shelby* in 2013, Alabama, North Carolina, and Texas, now partly or wholly released from Voting Rights Act Section 4(b) and 5 federal oversight, proposed identification

¹²⁹ On incumbents' benefits, see RODDEN, *supra* note 13, at 131–96. See also Seifter, *supra* note 12; DAVID PEPPER, LABORATORIES OF AUTOCRACY: A WAKE-UP CALL FROM BEHIND THE LINES (2021); JACOB M. GRUMBACH, LABORATORIES AGAINST DEMOCRACY: HOW NATIONAL PARTIES TRANSFORMED STATE POLITICS (2022).

¹³⁰ See Samuel Kernell, *Presidential Popularity and Negative Voting: An Alternative Explanation of the Midterm Congressional Decline of the President's Party*, 71 AM. POL. SCI. REV. 44, 45 (1977) (explaining that the waning of tagalong enthusiasm for the President's party that may have carried that party to legislative victory often results in the President's party losing congressional seats in the subsequent midterm election).

¹³¹ See Carl Klarnet, *supra* note 1.

¹³² DALEY, *supra* note 122, at xiii–xxi; ROTH, *supra* note 16, at 96–103.

¹³³ *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008).

¹³⁴ ARI BERMAN, GIVE US THE BALLOT: THE MODERN STRUGGLE FOR VOTING RIGHTS IN AMERICA 260–61, 286–99, 308–09 (2015); see also ROTH, *supra* note 16, at 39–41 (describing growing momentum for voter ID laws and the motivations behind these laws as excluding minority voters); HERTEL-FERNANDEZ, *supra* note 16, at 246–48 (explaining how ALEC succeeded due to its strategy of drafting bills and providing logistical support to increase impact).

bills.¹³⁵ Parallel to this, the RSLC targeted state redistricting. The RSLC's Redistricting Majority Project helped Republican legislators efficiently redraw district lines during the 2010 cycle. Resulting gerrymandered maps invited judicial challenges through the 2010s, culminating in the 2019 *Rucho* decision. In *Rucho*, North Carolina Democratic voters claimed that a 2016 congressional map drawn by the Republican-controlled legislature denied their rights guaranteed under the federal First Amendment, Fourteenth Amendment Equal Protection Clause, and Elections Clause.¹³⁶ The U.S. Supreme Court affirmed that political questions, including ones on the fairness of partisan gerrymandering, were nonjusticiable, thus granting the states broad leeway in redistricting, including in cases of ostensible partisan gerrymandering.¹³⁷ The decision, however, did not preempt judicial challenges to legislative maps under the state constitutions, as the Court later noted.¹³⁸ In many states, post-*Baker* and -*Reynolds* state constitutional provisions required free and fair elections, protected voting rights, or mandated unbiased redistricting, sometimes by an independent body. Litigants have challenged these laws by citing state constitutional voting and elections protections.¹³⁹

State legislators can amend the state constitutional text with relative

¹³⁵ See 570 U.S. 529 (2013); BERMAN, *supra* note 134 at 260–61, 286–99, 308–9 (2015); ROTH, *supra* note 16, at 38–41; HERTEL-FERNANDEZ, *supra* note 16, at 246–48; David M. Konisky & Paul Nolette, *The State of American Federalism 2021–2022: Federal Courts, State Legislatures, and the Conservative Turn in the Law*, 52 PUBLIUS: J. OF FEDERALISM 353, 368 (2022) (noting that in the aftermath of *Crawford* and *Shelby*, states leapt to enact new voter ID laws); *Report: Voter ID Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES, ncsl.org/elections-and-campaigns/voter-id [https://perma.cc/RV3Q-76US] (last updated Feb. 2, 2024).

¹³⁶ See U.S. CONST. amend I, amend XIV cl. 1.

¹³⁷ In *Rucho v. Common Cause*, on matters of redistricting, the Court noted that the federal framers made “no suggestion that the federal courts had a role to play.” But the Court added, “In two areas—one-person, one-vote and racial gerrymandering—our cases have held that there is a role for the courts with respect to at least some issues that could arise from a State’s drawing of congressional districts.” See 588 U.S. 684, 685, 699 (2019). In this sense, *Rucho* echoes an element of *Wood v. Broom*—while *Rucho*, unlike *Wood*, forbade uneven allocation of persons across districts, both decisions allow state legislatures to draw non-compact, gerrymandered legislative districts that favor one party. Compare *Rucho*, 588 U.S. at 731 with *Wood*, 287 U.S. 1, 5, 8 (1932). The Court also addressed gerrymandering in *Abbott v. Perez*, which placed the burden of proof of alleged racial gerrymandering on the petitioner: “Whenever a challenger claims that a state law was enacted with discriminatory intent, the burden of proof lies with the challenger, not the State.” 585 U.S. 579, 603 (2018). Nevertheless, in the recent *Allen v. Milligan* case, the Court invalidated a congressional map proposed by the Alabama legislature for denying Black voters the opportunity to elect a representative of their choice, thus violating the 1982 amendments to the Section 2 of the 1965 Voting Rights Act. See 599 U.S. 1 (2023); see also Aziz Z. Huq, *The Supreme Court and the Dynamics of Democratic Backsliding*, 699 ANNALS AM. ACAD. POL. & SOC. SCI. 50, 59–61 (2022); Konisky & Nolette, *supra* note 135, at 368–69.

¹³⁸ See *Moore v. Harper*, 600 U.S. 1, 29–30 (2023).

¹³⁹ *Voting Rights Litigation Tracker*, BRENNAN CENTER FOR JUSTICE (Oct. 3, 2022), www.brennancenter.org/our-work/research-reports/voting-rights-litigation-tracker [https://perma.cc/UV6S-URPN].

ease.¹⁴⁰ In some states, legislators have recently attempted to reform state constitutional redistricting practices or to otherwise constrain state courts. In 2020, the Missouri legislature passed an amendment shifting redistricting authority to a gubernatorially-appointed commission, taking this power away from the independent nonpartisan demographer Missouri voters in 2018 charged with redistricting.¹⁴¹ Similarly, in 2021, the New York legislature proposed an amendment to expand legislative redistricting powers and weaken an advisory commission created by amendment in 2014.¹⁴² And in 2023, the Wisconsin legislature threatened to impeach incoming state Supreme Court Justice Janet Protasiewicz after she refused to recuse herself from an upcoming redistricting case.¹⁴³ However, the South Dakota legislature proposed an amendment in 2016 to create an independent redistricting commission, and in 2018 Colorado, Michigan, and Ohio created redistricting commissions by amendment, as did Virginia in 2020.¹⁴⁴

State legislators have also restricted ballot access by amendment.¹⁴⁵ State legislatures have passed amendments to protect suspect voter

¹⁴⁰ Seventeen states require only a simple legislative majority to approve a proposed amendment and nine states require only a three-fifths majority. *The Book of the States Table 1.4: Constitutional Amendment Procedure: By the Legislature, Constitutional Provisions*, THE COUNCIL OF STATE GOVERNMENTS (2024), <https://bookofthestates.org/tables/constitutional-amendment-procedure-by-the-legislature-constitutional-provisions> [https://perma.cc/RH4P-ZTZ2]. In nearly all states, ratification requires only a simple majority of voters. *Id.*

¹⁴¹ THE COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 4 (vol. 53, 2021).

¹⁴² John Dinan & The Council of State Gov'ts, *Table 1.2: Themes and Patterns in Amendment Activity in 2021*, THE BOOK OF THE STATES (2022), <https://bookofthestates.org/tables/themes-and-patterns-in-amendment-activity-in-2021> [https://perma.cc/77R3-LLB6].

¹⁴³ The legislature ultimately backed down. Reid J. Epstein & Julie Bosman, *As Wisconsin Supreme Court Takes Up Maps Case, Impeachment Threat Looms*, N.Y. TIMES (Oct. 6, 2023) <https://www.nytimes.com/2023/10/06/us/politics/wisconsin-maps-janet-protasiewicz.html> [https://perma.cc/3PF2-E5RF].

¹⁴⁴ Ohio proposed related amendments in 2012 and 2015. DINAN, STATE CONSTITUTIONAL POLITICS, *supra* note 17, at 67–68. THE COUNCIL OF STATE GOV'TS, *supra* note 141, at 4; THE COUNCIL OF STATE GOV'TS, THE BOOK OF THE STATES 4 (vol. 51, 2019); John Dinan, *State Constitutional Developments in 2016*, in 49 THE BOOK OF THE STATES 3, 7 (2017).

¹⁴⁵ But note states have also by amendment eased absentee and early voting and election-day registration and expanded voting rights for felons, youths under eighteen, and the disabled.

identification¹⁴⁶ and citizenship requirements from judicial reversal.¹⁴⁷ These identification and citizenship requirements may depress turnout.¹⁴⁸ Decreased turnout and increased state legislative gerrymandering have decreased the number of districts that parties and donors contest,¹⁴⁹ entrenching incumbent state legislators. This primes incumbents for future cycles of counter-majoritarian gerrymandering, especially in Republican-controlled states,¹⁵⁰ helping Republican state legislators claim disproportionate state legislative seat share. Republican gains in the state legislatures over the last fifty years reflect not only Republicans' success in garnering votes, but also the Party's capture of the overrepresented rural vote and skill in partisan gerrymandering and in reforming state constitutional redistricting and voting practices.

How did Republicans capture the state legislatures? Republican state legislative gains reflect changes in political geography and redistricting practices. Through the mid-twentieth century, rural state legislators packed urban voters into gerrymandered, malapportioned, multimember districts. The Court in *Wood* upheld state legislative gerrymandering. Rural legislators used gerrymandering and malapportionment to claim disproportionate seats in the state legislatures and to some degree, Congress. Republicans won overrepresented Northern and Midwestern rural voters,¹⁵¹ and Democrats

¹⁴⁶ See MISS. CONST. of 1890, art. XII, § 249A (amended 2011); ARK. CONST., amendment 51 of 2018, §§ 5–6; N.C. CONST. art. VI, §§ 2–3 (amended 2018); NEB. CONST. art. I, § 22 (amend. 2022). Note that the Mississippi and Nebraska measures passed by initiative and that a similar amendment failed in Minnesota in 2012. *How Minnesota's Voter ID Amendment Was Defeated*, BRENNAN CENTER FOR JUSTICE (Nov. 9, 2012), <https://www.brennancenter.org/our-work/analysis-opinion/how-minnesotas-voter-id-amendment-was-defeated> [<https://perma.cc/265U-CM59>]. There has been a broader statutory push for voter identification. Following the Supreme Court's *Crawford* decision, thirty-six states required or allowed voter identification at polling places, which can burden younger voters, poorer voters, and voters of color. See *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008); Konisky & Nolette, *supra* note 135, at 368; *Voter ID Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES (2023), www.ncsl.org/elections-and-campaigns/voter-id [<https://perma.cc/V72X-5FKM>].

¹⁴⁷ See N.D. CONST. art. II, § 1 (amended 2018); ALA. CONST., art. VII, § 177 (amended 2020); COLO. CONST. art. VII, § 1 (amended 2020); FLA. CONST. art. VI, § 2 (amended 2020); LA. CONST. art. I, § 10 (amended 2022) OHIO CONST. of 1851, art. V, § 1 (amended 2022). Note the North Dakota and Colorado measures passed by initiative. Statutory measures in other states impose citizenship ballot access requirements, reduce polling locations and hours, limit early voting, trim voting rolls, or restrict mail ballot distribution, assistance, and application and delivery deadlines and drop boxes. See *Voting Laws Roundup: December 2021*, BRENNAN CENTER FOR JUSTICE (Jan. 12, 2022), www.brennancenter.org/our-work/research-reports/voting-laws-roundup-december-2021 [<https://perma.cc/UR7A-WEGP>]; *Voting Laws Roundup: December 2022*, BRENNAN CENTER FOR JUSTICE (Feb. 1, 2023), www.brennancenter.org/our-work/research-reports/voting-laws-roundup-december-2022 [<https://perma.cc/8M88-SS8N>].

¹⁴⁸ BERMAN, *supra* note 134, at 286–99, 308–09; ROTH, *supra* note 16, at 38–41.

¹⁴⁹ Nicholas O. Stephanopoulos & Christopher Warshaw, *The Impact of Partisan Gerrymandering on Political Parties*, 45 LEGIS. STUD. Q. 609, 634 (2020).

¹⁵⁰ See Seifter, *supra* note 12; GRUMBACH, *supra* note 129.

¹⁵¹ Erikson, *supra* note 51, at 1234–35, 1237–44; Cox & Katz, *supra* note 42.

won overrepresented Southern rural voters.¹⁵² This biased both parties toward rural interests. For much of the twentieth century, legislative policymaking from both parties favored rural spending.¹⁵³

The Supreme Court forbade state legislative malapportionment and multimember district vote dilution in 1964 and 1966. Resulting legislative competition and parallel suburban growth increased Republican state legislative seat share. In the early twenty-first century, Republicans captured Democrats' share of the rural vote, particularly in the South, while losing urban voters. By winning rural districts by narrow, efficient margins, and through better party and interest group organizing around gerrymandering, Republicans have recently captured a disproportionate share of state legislative seats nationwide. The Supreme Court in *Rucho* has allowed partisan state legislative gerrymandering. In competitive states, Republicans now can win legislative control while losing or only narrowly winning the popular vote. Abetted by Supreme Court decisions limiting federal oversight, state legislators revise redistricting and election law, sometimes through constitutional amendments that override or reverse state courts.

Underlying this change is a realignment of the rural vote. Rural voters have been a national minority since the 1920 census. At the state level, rural voters have thus often resisted majoritarian democracy. For much of the twentieth century, both parties harbored a rural, counter-majoritarian faction. Now one party claims the rural vote. And the rural vote now claims a political party. The capture of a national party by rural, counter-majoritarian interests is new and presents a problem for majoritarian democracy. Rural overrepresentation has shifted from a bias in legislative policymaking and appropriations, to a partisan bias in legislative seat allocation, positioning Republicans in competitive states against statewide electoral majorities. Put differently, rural capture of the Republican Party, shifted rural overrepresentation from a policy problem to a democracy problem. This is bad for the Republican Party—the Party limits itself when it neglects or overrides voting majorities. And, in positioning the Party against majoritarian democracy, this weakens elections nationwide.

¹⁵² See KEY, *supra* note 50; Erikson, *supra* note 51, at 1234.

¹⁵³ See FRANCES E. LEE & BRUCE I. OPPENHEIMER, *SIZING UP THE SENATE: THE UNEQUAL CONSEQUENCES OF EQUAL REPRESENTATION* (1999); ENGSTROM, *supra* note 13, at 182–83.