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Hyperpartisan Campaign Finance

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HYPERPARTISAN CAMPAIGN FINANCE

*Michael S. Kang**

ABSTRACT

Hyperpartisanship dominates modern American politics and government, but today's politics are strikingly different from the preceding period of American history, a Cold War Era when bipartisanship and ideological moderation predominated. Hyperpartisanship was not the salient dynamic in American politics when campaign finance law began, and as a result, campaign finance law developed under strikingly different assumptions about American politics than the current prevailing circumstances. Today's campaign finance law, inherited from this preceding era, is thus mismatched to the campaign finance of today. Campaign finance law focuses on individual candidates as the central actors in fundraising and misses the role of parties in organizing the campaign finance landscape. It therefore both systematically underestimates the risk that parties pose in collectivizing the potential for campaign finance corruption and overestimates the First Amendment values promoted by modern campaign finance when the parties today focus so heavily on mobilizing their base and preaching to the choir.

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INTRODUCTION

Hyperpartisanship dominates modern American politics and government.¹ American politicians and voters are more sharply divided along party lines in how they identify, vote, and think about politics than they have in more than a century. Today's politics, though, are strikingly different from the preceding period of American history, a Cold War Era when bipartisanship and ideological moderation dominated the scene. And today's campaign finance law, inherited from this preceding era, is poorly suited for today's new world of hyperpartisan campaign finance.

During the Cold War Era, American politics were not nearly so partisan, let alone hyperpartisan. The contemporary notion of "hyperpartisanship," which I adopt here, assumes something like the Cold War baseline of bipartisanship as the norm, in line with the way that Americans born and raised during that era still understand its milder partisanship as historically regular.² Compared to today, the major parties were more centrist and not nearly so ideologically well-defined. Voters were less clearly divided along party lines and ideology. Voters who identified with one party voted nonetheless for candidates of the other party, routinely splitting their ballots on election day.³

Elite bipartisanship mirrored bipartisanship among voters. When *Baker v. Carr*⁴ was decided during the heart of the Cold War, the two major parties overlapped ideologically in the U.S. Senate to a shocking degree by today's standards. Republican and Democratic politicians regularly coalesced into bipartisan coalitions opposing bipartisan coalitions, particularly on civil rights and foreign policy.⁵ Almost a quarter of Republicans were more liberal than the most conservative Democrat, and almost a quarter of Democrats were more

¹ There is a substantive distinction between hyperpolarization, characterized by extreme differentiation between the major parties, and hyperpartisanship, characterized by extreme antagonism between the major parties. I do not explore this distinction here and treat the two together as hyperpartisanship for my purposes in this Article.

² See, e.g., Laura Stoker & M. Kent Jennings, *Of Time and the Development of Partisan Polarization*, 52 AM. J. POL. SCI. 619 (2008) (explaining generational differences in partisan polarization).

³ See Amber Phillips, *Is Split-Ticket Voting Officially Dead?*, WASH. POST (Nov. 17, 2016, 9:41 AM), <https://www.washingtonpost.com/news/the-fix/wp/2016/11/17/is-split-ticket-voting-officially-dead> (demonstrating the rise in split-ticket voting from 1968 to 1992).

⁴ 369 U.S. 186 (1962).

⁵ See Drew Desilver, *The Polarized Congress of Today Has Its Roots in the 1970s*, PEW RSCH. CTR. (June 12, 2014), <https://www.pewresearch.org/fact-tank/2014/06/12/polarized-politics-in-congress-began-in-the-1970s-and-has-been-getting-worse-ever-since>; see also *Ideological Breakdown of Congressional Vote on the Civil Rights Act of 1964*, GOVTRACK, <https://www.govtrack.us/congress/votes/88-1964/h182> (last visited May 30, 2021) (showing bipartisan voting support for the Civil Rights Act of 1964).

conservative than the most liberal Republican.⁶ The pressing questions of election law surrounded race and regional discrimination, not overweening partisanship and manipulation of election rules for party advantage. This Cold War bipartisanship was virtually unprecedented in American politics and strikingly different than today's conditions of hyperpartisanship.

Modern campaign finance law began, like all the rest of election law, during this Cold War period. Until the 1960s, federal courts abstained almost completely from "political" cases under versions of the political question doctrine. It was not until the one-person, one-vote cases, beginning with *Baker v. Carr* in 1962, when federal courts began engaging with election law. The 1965 passage of the Voting Rights Act further required courts to decide questions of state and local election law, and along with the one-person, one-vote cases, opened the door to broader judicial engagement with the right to vote under the First and Fourteenth Amendments. Following the Watergate scandals, Congress enacted comprehensive campaign finance regulation that quickly required courts to develop the constitutional law of campaign finance under the First Amendment.⁷ All this election law development happened to occur when American politics featured the lowest levels of partisanship in American history.

Election law, including campaign finance law, therefore began and developed within a Cold War political context where the parties managed to cooperate, overlapped ideologically to a significant degree, and won elections by competing for undecided centrist voters in a way that has been nearly forgotten today. As a consequence, election law created during this Cold War window of bipartisanship never confronted or contemplated the intensity of partisanship that has reemerged today, nor the party politics and campaign finance that today's partisanship has spawned.

To overgeneralize only a bit, today's parties reflexively oppose each other, do not overlap ideologically at all, and focus on mobilizing their base (or demobilizing the other party's base) rather than winning over undecided centrists. Following the Cold War, the parties neatly sorted into ideologically cohesive teams of voters and politicians that remain doggedly loyal to their party, election after election, up and down the ballot. Party affiliation has increased among voters since the Cold War, while partisanship increasingly dictates how people vote.⁸ The party switching and split-ticket voting that were

⁶ See Desilver, *supra* note 5.

⁷ See Anthony J. Gaughan, *The Forty Year War on Money in Politics: Watergate, FECA, and the Future of Campaign Finance Reform*, 77 OHIO ST. L.J. 791, 804 (2016).

⁸ See Nathaniel Rakich, *Everything Is Partisan and Correlated and Boring*, FIVETHIRTYEIGHT (Nov. 20,

relatively common during the Cold War largely disappeared, as voters stick with their party throughout their ballot and from year to year.⁹ Partisan animus also rose sharply, with roughly half of partisans today feeling “fearful” of the opposing party, and roughly a third feeling that the other side is “so misguided that [it] threaten[s] the nation’s well-being.”¹⁰ Voter partisanship again mirrors hyperpartisanship among politicians. Democrats and Republicans in Congress, for instance, are more polarized than they have been in more than a century.¹¹ The ideological overlap that characterized Congress at the time of *Baker v. Carr* is completely gone today.¹²

Campaign finance law is thus mismatched to the party politics of today, and therefore, the party campaign finance of today. Today’s politics, and campaign finance, are far more party-centered than they were when the Federal Election Campaign Act (FECA)¹³ was enacted, comprehensively amended, and subsequently interpreted by courts. In addition, today’s campaign finance spending tends toward base mobilization—preaching to and motivating the choir, rather than converting the undecided—far more than it did during the Cold War Era.¹⁴ Rather than tacking to the center and engaging each other for undecided voters, the parties today turn inward during campaign season and further polarize toward the ideological extremes far more than they once did. However, today’s campaign finance law, borne of a less partisan, less party-centered era, still targets quid pro quo corruption between individual donor and particular candidate, while largely looking past the potential for collective corruption mediated through political parties that are now at the heart of national politics.¹⁵ I explore these developments here.

2018, 6:58 AM), <https://fivethirtyeight.com/features/everything-is-partisan-and-correlated-and-boring>.

⁹ See Alan Abramowitz & Steven W. Webster, *Negative Partisanship: Why Americans Dislike Parties but Behave Like Rabid Partisans*, 39 ADVANCES POL. PSYCH. 119, 119–20 (2018).

¹⁰ 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>.

¹¹ See Richard H. Pildes, *Why the Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CALIF. L. REV. 273, 277 (2011).

¹² See Hahrie Han & David Brady, *A Delayed Return to Historical Norms: Congressional Party Polarization After the Second World War*, 37 BRIT. J. POL. SCI. 505, 506 (2007).

¹³ 52 U.S.C. §§ 30101–30146.

¹⁴ See Jonah Goldberg, *Appealing to the Center Is No Longer a Winnable Strategy to Lure Voters*, CHI. TRIB. (Aug. 20, 2018, 8:00 AM), <https://www.chicagotribune.com/opinion/commentary/ct-perspec-goldberg-moderate-voters-bad-voting-strategy-0820-story.html>.

¹⁵ See Karl Evers-Hillstrom, *Super PACs Outmaneuver Outdated Rules to Leave Voters in the Dark*, OPENSECRETS (Mar. 18, 2020, 1:47 PM), <https://www.opensecrets.org/news/2020/03/sunshine-week-2020-super-pacs-loophole>.

In Part I, I briefly survey the history of American partisanship from the intensity of the nineteenth century through its Cold War recession, before its resurgence since the 1990s into today. I survey this history only briefly because I have written about this history in great detail elsewhere.¹⁶ In Part II, I explain how the coincidence of the Cold War lull in partisanship and the beginning of election law helped shape campaign finance law in certain directions. Hyperpartisanship was not a salient dynamic in American politics when campaign finance law began, and as a result, campaign finance law developed under strikingly different assumptions about American politics than the current prevailing circumstances. Under modern hyperpartisanship, our newly centralized and ideologically cohesive parties grew into the central hub for modern campaign finance.

In Part III, I describe the consequences of the mismatch between campaign finance law from the Cold War and modern campaign finance of today. Campaign finance law still focuses on individual candidates as the central actors in fundraising and misses the role of parties in organizing the campaign finance landscape. It therefore both systematically underestimates the risk that parties pose in collectivizing the potential for campaign finance corruption and overestimates the First Amendment values promoted by modern campaign finance when the parties today focus so heavily on mobilizing their base and preaching to the choir.

I. THE COLD WAR ORIGIN OF CAMPAIGN FINANCE LAW

The Cold War was a nearly singular era in American politics, characterized by an unprecedented period of bipartisanship and ideological moderation between the major parties. This Part describes Cold War party politics and how the development of campaign finance law during the era was tailored to and based on Cold War political conditions.

A. *A History of American Partisanship Through the Cold War*

American history is a history of American partisanship. Despite the Framers' famous antipathy for factions, the Founding Generation immediately broke into rival parties over the very ratification of the Constitution. The Federalists and Anti-Federalists campaigned against each other from the start and continued in

¹⁶ See Michael S. Kang, *Hyperpartisan Gerrymandering*, 61 B.C. L. REV. 1379 (2020) [hereinafter Kang, *Hyperpartisan Gerrymandering*]; Michael S. Kang, *Voting Rights from Judge Frank Johnson to Modern Hyperpolarization*, 71 ALA. L. REV. 793 (2020) [hereinafter Kang, *Voting Rights*].

roughly the same alignment in the form of the Federalist and Democratic-Republican Parties following the constitutional setup.

Partisanship of the early era was startlingly intense even by modern standards and would continue nearly as intensely for more than a century. American politics enjoyed a short break from partisanship during the so-called Era of Good Feelings of the 1810s, when what we today call hyperpartisanship receded for its only respite until the Cold War. This short break from partisanship during the Monroe Presidency promptly gave way to the birth of mass democratic parties under Presidents Andrew Jackson and Martin Van Buren. These mass parties broke from earlier political tradition and engaged in popular organization and mass mobilization of committed voters. Walter Dean Burnham would later describe nineteenth century politics as militaristic partisanship between two “armies drawn up for combat” with “highly stable partisan commitments in the mass electorate and a parallel cultural pattern of intense participation.”¹⁷

The robust partisanship of the nineteenth century into the early twentieth century dictated that the major parties focus on mobilization of their base rather than conversion of any undecided voters. As Burnham put it, “Little was to be gained by attempting to convert a large ‘floating’ or independent vote, for the good reason that almost none existed.”¹⁸ Under these conditions, voter turnout routinely approached 80% of eligible voters by the end of the nineteenth century.¹⁹ What’s more, our best historical estimates are that voters tended overwhelmingly to vote the party ticket up and down the ballot over multiple elections. The partisan vote for state legislative, gubernatorial, and presidential races correlated at higher than 90%, with roughly 90% of voters consistently voting for the same party in consecutive elections.²⁰ In other words, party affiliation among voters became common and robust, with little ballot splitting or party switching between elections.

¹⁷ WALTER DEAN BURNHAM, *CRITICAL ELECTIONS AND THE MAINSPRINGS OF AMERICAN POLITICS* 72–73 (1970).

¹⁸ *Id.* at 73.

¹⁹ See *Voter Turnout in Presidential Elections*, AM. PRESIDENCY PROJECT, <https://www.presidency.ucsb.edu/statistics/data/voter-turnout-in-presidential-elections> (last visited May 30, 2021).

²⁰ See, e.g., JOEL H. SILBEY, *THE AMERICAN POLITICAL NATION, 1838–1893*, at 153 (1991); PAUL KLEPPNER, WALTER DEAN BURNHAM, RONALD P. FORMISANO, SAMUEL P. HAYS, RICHARD JENSEN & WILLIAM G. SHADE, *THE EVOLUTION OF AMERICAN ELECTORAL SYSTEMS* 18 (1981); Thomas P. Alexander, *The Dimension of Voter Partisan Constancy in Presidential Elections from 1840 to 1860*, in *ESSAYS ON AMERICAN ANTEBELLUM POLITICS 1840–1860*, at 70, 113 (Stephen E. Maizlish & John J. Kushma eds., 1982); Edward L. Glaeser & Bryce A. Ward, *Myths and Realities of American Political Geography*, 20 *J. ECON. PERSPS.* 119, 125 (2006).

Sharp partisanship among voters was no surprise because politicians from the major parties were similarly polarized. Congressional voting was highly partisan from nearly the beginning of the Republic. From at least the mid-nineteenth century through the early twentieth century, political scientists identify no ideological overlap between elected congressmen and senators across the major parties based on their voting records.²¹ Indeed, Michael Barber and Nolan McCarty show that partisanship explains more than 85% of U.S. House roll-call voting from the era.²² Joanne Freeman has highlighted the frequency of partisan violence between congressional representatives and has located more than seventy incidents of physical attacks between congressmen from 1830 to 1860 during a stretch of elevated partisanship leading up to the Civil War.²³ As a consequence, national politics featured two polarized parties with strong internal cohesion and few incentives to reach out to the other side.

Still, this form of hyperpartisanship began to shift subtly around the turn of the twentieth century. The country split into what James McGregor Burns termed as a four-party system, an organization of regional fiefdoms within which partisan competition ebbed.²⁴ The Democratic Party dominated the South in one-party rule, distorted by the politics of white supremacy, based on Black disenfranchisement and exploitation.²⁵ The feeble Republican Party of the era, in V.O. Key's words, "scarcely deserve[d] the name of party" in the South.²⁶ Republicans instead enjoyed greater success in the Midwest and Northeast, split between moderates on the eastern seaboard and conservatives in the rest of the country.²⁷ Democrats and Republicans were less ideologically polarized as the Cold War kicked off. Conservative Republicans and Dixiecrat Democrats commonly joined forces against civil rights legislation pushed by moderate Republicans and liberal Democrats outside the South.

²¹ Han & Brady, *supra* note 12, at 505, 508–09; Michael Barber & Nolan McCarty, *Causes and Consequences of Polarization*, in *NEGOTIATING AGREEMENT IN POLITICS* 19, 21 (Jane Mansbridge & Cathie Jo Martin eds., 2013).

²² Barber & McCarty, *supra* note 21, at 20.

²³ JOANNE B. FREEMAN, *THE FIELD OF BLOOD: VIOLENCE IN CONGRESS AND THE ROAD TO CIVIL WAR* 55 (2018).

²⁴ JAMES MCGREGOR BURNS, *THE DEADLOCK OF DEMOCRACY: FOUR-PARTY POLITICS IN AMERICA* 257 (1963).

²⁵ See Boris Heersink & Jeffrey A. Jenkins, *The Republican Party Is White and Southern: How Did That Happen?*, WASH. POST (Feb. 7, 2020, 7:00 AM), <https://www.washingtonpost.com/politics/2020/02/07/republican-party-is-white-southern-how-did-that-happen/>.

²⁶ V.O. KEY, JR., *SOUTHERN POLITICS IN STATE AND NATION* 277 (1949).

²⁷ See, e.g., *Historical Elections of the House of Representatives: The Election of 1900*, U. RICH., <https://dsl.richmond.edu/panorama/congress/#show=winner&view=map&year=1900&xyz=0.5/0.5/1Rich>. (last visited May 30, 2021).

By the mid-twentieth century and the start of the Cold War, American partisanship had shifted importantly from its history. As Hahrie Han and David Brady document, congressional polarization sharply declined from the 1920s onward such that the parties ideologically overlapped to a significant degree in Congress for the first time.²⁸ Before the 1920s, basically no Democrat was more conservative in terms of congressional roll-call voting than the most liberal Republican, and vice versa, no Republican was more liberal than the most conservative Democrat.²⁹ By 1949, however, about 10% of House Democrats were more conservative than the most liberal 10% of House Republicans.³⁰ By 1969, almost a quarter of Democratic Senators were more conservative than the most liberal Republicans, and vice versa.³¹

It is no surprise then that Republicans and Democrats were able to cooperate across the aisle in ways that had been earlier unthinkable. Republicans and Democrats routinely crossed party lines on matters of civil rights and foreign policy. The parties were so little defined by ideology that the American Political Science Association famously declared in 1950 that the major parties were insufficiently polarized and too ideologically compatible.³² Indeed, as a sign of the times, both major parties recruited the same person, General Dwight Eisenhower, as their presidential nominee for the 1952 election.

For all these reasons, this Cold War period marked a singularly bipartisan stretch of American politics when the two major parties collaborated in unprecedented fashion. Broad bipartisan coalitions enacted the Marshall Plan, Civil Rights Act of 1964, Voting Rights Act of 1965, and comprehensive amendments to the Federal Election Campaign Act during the time. Regional and racial concerns cross-cut party lines and dominated over partisan considerations. What's more, the major parties were internally diverse and less cohesive than today. State- and local-level Republicans and Democrats did not necessarily agree ideologically with their national-level counterparts. Socially conservative, urban Democrats might have much more in common with conservative Republicans than their liberal party comrades, and Southern Democrats might have more in common with conservative Republicans from the West or Midwest than their northeastern counterparts.

²⁸ Han & Brady, *supra* note 12, at 512–16, 531.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² See Committee on Political Parties, *Toward a More Responsible Two-Party System*, 44 AM. POL. SCI. REV. 1, 1–14 (1950).

American voters were less partisan during the Cold War as well. Partisan self-identification was historically low by any measure. The percentage of Americans who identified as independent rather than associated with a major party increased during the Cold War while partisan identification with either major party decreased, particularly so for “strong” party identification.³³ Furthermore, partisan identification was less predictive of vote choice during the Cold War, with voters regularly voting for a different party’s presidential candidate from year to year and more likely to split their ballot even in a given election among candidates from different parties.³⁴ Roughly a quarter of self-identified partisans cast a vote for the other party’s candidates in the 1970s.³⁵ In fact, in 1972, 36% of Democrats reported that they actually voted for the Republican presidential candidate Richard Nixon,³⁶ who managed to win 49 of 50 states in that year’s presidential election. As recently as the 1984 presidential election, late in the Cold War, Ronald Reagan matched Nixon’s landslide victory by winning almost 59% of the popular vote and 49 of 50 states over his opponent Walter Mondale, who managed to win narrowly only his home state of Minnesota.³⁷ Party identification was not terribly predictive of a voter’s ideological beliefs. The average Democrat and Republican identifier did not differ dramatically by today’s standards, with partisanship and ideology correlating at just 0.28.³⁸

As a consequence, party politics revolved much more around competition for a cross-party or swing vote than they had in the militaristic mobilization politics of the nineteenth century (or as a preview, under today’s hyperpartisanship).³⁹ The foundational Columbia University studies of American voters during the early Cold War introduced the notion of the “cross-pressured” voter whose demographics, social context, and inherited partisan

³³ See e.g., NORMAN H. NIE, SIDNEY VERBA & JOHN R. PETROCIK, *THE CHANGING AMERICAN VOTER* 363 (1976).

³⁴ See BARRY C. BURDEN & DAVID C. KIMBALL, *WHY AMERICANS SPLIT THEIR TICKETS* 67 (2002); Joseph Bafumi & Robert Y. Shapiro, *A New Partisan Voter*, 71 *J. POL.* 1, 5 (2009); Kenneth Mulligan, *Partisan Ambivalence, Split-Ticket Voting, and Divided Government*, 32 *POL. PSYCH.* 505, 514 (2011).

³⁵ Pietro S. Nivola & William A. Galston, *The Great Divide*, *AM. INT.* (Nov. 1, 2020), <https://www.the-american-interest.com/2006/11/01/the-great-divide>.

³⁶ See Jack Rosenthal, *Desertion Rate Doubles*, *N.Y. TIMES* (Nov. 9, 1972), <https://www.nytimes.com/1972/11/09/archives/new-jersey-pages-desertion-rate-doubles-defectors-gave-nixon.html>.

³⁷ See *1984 Electoral Map*, 270TOWIN, https://www.270towin.com/1984_Election/ (last visited May 30, 2021).

³⁸ Marc J. Hetherington, *Resurgent Mass Partisanship: The Role of Elite Polarization*, 95 *AM. POL. SCI. REV.* 619, 626 (2001).

³⁹ See MATTHEW S. LEVENDUSKY, *THE PARTISAN SORT: HOW LIBERALS BECAME DEMOCRATS AND CONSERVATIVES BECAME REPUBLICANS* 9 (2009) (“For fifty years, political scientists—and political pundits—argued that campaigns should focus on identifying and converting undecided voters: the ‘swing’ voters.”).

affiliation “simultaneously support[] different sides” of the partisan divide.⁴⁰ Such cross-pressured voters seemed less sure of their vote, took longer to decide how to vote, and were less loyal to their chosen party than other voters.⁴¹ The notion of the persuadable cross-pressured voter “with a foot in each candidate’s camp” has been central to American politics and campaigns at least since then.⁴² Along these lines, Sunshine Hillygus and Todd Shields contend that roughly a third of the presidential electorate would have been classified as persuadable cross-pressured voters over this period, routinely larger than the winning margin in presidential elections.⁴³ The Cold War thus featured two ideologically overlapping, centrist parties that tended to focus on what they saw as persuadable swing voters as the key to winning elections.

B. The Birth of Campaign Finance Law

Campaign finance law largely began with the Federal Election Campaign Act of 1971 as comprehensively amended in 1974 following Watergate. Before FECA, federal law long prohibited union and corporate electioneering and restricted the campaign activities of government employees and contractors. But under FECA, the federal government for the first time comprehensively regulated federal campaign contributions and expenditures, imposed clear source restrictions, and required financial disclosures for all campaign finance actors from candidates to contributors to political committees and parties.⁴⁴ Even after the Court in *Buckley v. Valeo* struck down restrictions on independent expenditures, the resulting constitutional regime for campaign finance law still thoroughly regulated campaign contributions and left source restrictions and disclosure obligations largely in place.⁴⁵

This birth of campaign finance law coincided with the birth of the rest of election law. As I have detailed elsewhere,⁴⁶ for most of their history, American courts almost always abstained from what they saw as “political” cases under some form of the political question doctrine.⁴⁷ Courts feared the lack of

⁴⁰ BERNARD R. BERELSON, PAUL F. LAZARFELD & WILLIAM N. MCPHEE, *VOTING: A STUDY OF OPINION FORMATION IN A PRESIDENTIAL CAMPAIGN* 19 (1954).

⁴¹ *See id.* at 52–72; PAUL F. LAZARFELD, BERNARD BERELSON & HAZEL GAUDET, *THE PEOPLE’S CHOICE: HOW THE VOTER MAKES UP HIS MIND IN A PRESIDENTIAL CAMPAIGN* 19–33 (1948).

⁴² D. SUNSHINE HILLYGUS & TODD G. SHIELDS, *THE PERSUADABLE VOTER: WEDGE ISSUES IN PRESIDENTIAL CAMPAIGNS* 5 (2008).

⁴³ *Id.* at 8.

⁴⁴ 52 U.S.C. § 30101.

⁴⁵ *Buckley v. Valeo*, 424 U.S. 1, 58 (1976).

⁴⁶ *See, e.g.,* Kang, *Voting Rights*, *supra* note 16, at 804.

⁴⁷ *See Baker v. Carr*, 369 U.S. 186, 198 (1962); *Colegrove v. Green*, 328 U.S. 549, 554 (1946).

judicially manageable standards and judicial entanglement with the “political thicket” of partisan politics if they intervened into cases that would restructure the political process.⁴⁸ However, federal courts broke their reluctance with the one-person, one-vote cases in the 1960s, beginning with *Baker v. Carr*.⁴⁹ In these cases, the Supreme Court struck down the legislative districting scheme for virtually every state legislative and congressional seat as violative of the Equal Protection Clause and mandated equal numbers of residents in each district.⁵⁰ So began the federal courts’ comprehensive oversight of the American election process. Around the same time, Congress enacted the Voting Rights Act of 1965, which necessitated judicial attention to nearly every aspect of the election process. Federal courts likewise began entertaining challenges to various hindrances to voting and promptly struck down restrictions based on poll taxes,⁵¹ bona fide residency,⁵² durational requirements,⁵³ and property requirements.⁵⁴

The passage of FECA and the concomitant development of campaign finance law under the First Amendment occurred during this period. Just as with redistricting and election administration, the comprehensive regulation of federal campaign finance and the judicial establishment of the applicable constitutional framework occurred at a historically low watermark for partisanship during the Cold War. With the decline of partisanship, electoral politics transitioned from the patronage-driven, party-centered era of the early twentieth century to a new era of candidate-centered campaigns and elections.

With the growing pervasiveness of television, candidates relied less and less on party organizations to mobilize winning majorities on their behalf and became increasingly able to reach voters directly through campaign advertising.⁵⁵ Cold War voters, as I described, were less defined by ideology than earlier partisans, and much more likely to vote based on the individual candidate rather than faithful partisanship up and down the ballot from election to election. Candidates could, and needed to, cultivate a campaign presence through which voters could personally identify and support specific candidates above and beyond party loyalty and party mobilization. At the same time, direct

⁴⁸ *Colegrove*, 328 U.S. at 556.

⁴⁹ *See Baker*, 369 U.S. at 237.

⁵⁰ *See id.*

⁵¹ *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966).

⁵² *Carrington v. Rash*, 380 U.S. 89, 96 (1965).

⁵³ *Dunn v. Blumstein*, 405 U.S. 330, 360 (1972).

⁵⁴ *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 633 (1969).

⁵⁵ *See generally* JOHN H. ALDRICH, *WHY PARTIES? THE ORIGIN AND TRANSFORMATION OF POLITICAL PARTIES IN AMERICA* (1995) (tracing the historical transition from party-centric mobilization to candidate-centric media politics).

primaries were replacing boss-dominated nomination processes such that candidates' personal popularity with voters grew more critical than personal favor from party bosses and their organizations. As a result, campaign financing to pay for television advertising and appeals directly to voters superseded party bosses and organizations in central importance at the very moment modern campaign finance law was being created.⁵⁶ The traditional role of parties had apparently passed, so much so that political scientists of the time lamented "the ruins of the traditional partisan regime."⁵⁷ Martin Wattenberg's book, *The Decline of American Political Parties*,⁵⁸ later encapsulated the widespread sense of the time that "the two major parties are no longer as central as they once were in tying people's everyday concerns to their choice in the political system."⁵⁹

Under these conditions, political parties may have seemed incidental to campaign finance law relative to the prominent center stage of candidate-focused fundraising. As one political scientist put it, parties at the time "seemed so irrelevant or unpopular that candidates often avoided using the party label in campaigns while party organizations seemed almost absent in elections."⁶⁰ As a result, "[r]egulating parties appeared as an afterthought" in congressional deliberations over the FECA amendments of 1974, and the far greater attention to the regulation of candidate committees and PACs "revealed the marginalized position of American political parties."⁶¹ According to Ray La Raja's account of the legislative history, a late version of the FECA amendment bill lumped in political parties with non-party political committees and subjected them to exactly the same \$5,000 contribution limit on donations to any PAC.⁶² Only a last-minute amendment from Republicans, who benefitted from stronger party campaign finance, raised the contribution limit for parties to \$10,000.⁶³

As a consequence, modern campaign finance law happened to begin during a Cold War period when parties and partisanship were far less salient and

⁵⁶ See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 26 (1976) ("The increasing importance of the communications media and sophisticated mass-mailing and polling operations to effective campaigning make the raising of large sums of money an ever more essential ingredient of an effective candidacy.").

⁵⁷ Walter Dean Burnham, *The Reagan Heritage*, in *THE ELECTION OF 1988: REPORTS AND INTERPRETATIONS* 24 (Gerald M. Pomper ed., 1989).

⁵⁸ See generally MARTIN P. WATTENBERG, *THE DECLINE OF AMERICAN POLITICAL PARTIES, 1952–1992* (1994) (assessing the nature and reasons for the decline of political partisanship in the electorate).

⁵⁹ EDWARD S. GREENBERG & BENJAMIN I. PAGE, *THE STRUGGLE FOR DEMOCRACY* 269 (1997).

⁶⁰ Raymond J. La Raja, *Campaign Finance and Partisan Polarization in the United States Congress*, 9 *DUKE J. CONST. L. & PUB. POL'Y* 223, 231 (2014).

⁶¹ RAYMOND LA RAJA, *SMALL CHANGE: MONEY, POLITICAL PARTIES, AND CAMPAIGN FINANCE REFORM* 77 (2008); see FRANK J. SORAUF, *INSIDE CAMPAIGN FINANCE MYTHS AND REALITIES* (1992).

⁶² LA RAJA, *supra* note 61, at 77.

⁶³ See *id.*

important than they had been in American politics, and far less salient and important than they would soon become again. Candidates realized they needed to carve out a personal constituency with their individual campaigning because they could not rely exclusively on party grassroots mobilization as they once had. And modern campaigning had shifted during the television age toward broadcast advertising that was both expensive and aimed at a broad, heterogeneous audience. Candidates needed to raise money to pay for their own broadcast advertising and use their advertising to win over persuadable uncommitted voters in the absence of strong partisanship in the electorate. All these elements of the American political process, however, began to shift around the end of the Cold War.

II. THE RISE OF HYPERPARTISANSHIP AFTER THE COLD WAR

Hyperpartisanship reemerged from its Cold War slumber by the 1990s. The Civil Rights Movement of the 1960s triggered a mass realignment of the major parties that reordered their ideological composition and restored the highly polarized party politics that reigned for most of American history until the Cold War era.⁶⁴ Conservative Democrats, particularly in the South, gradually became Republicans, while liberal Republicans eventually filtered into the Democratic Party such that both parties became more ideologically cohesive and homogeneous than they had been since the nineteenth century.⁶⁵ As a result, the percentage of Republicans who described themselves as conservative doubled from 1978 to 1994, while the percentage of Democrats who said they were conservative shrank by half over the same period.⁶⁶

Partisan identification, which had shrunk through the Cold War, began to rise again around the 1970s onward, with more and more Americans self-identifying with one of the major parties, particularly so for Americans who “strongly” identified with a party.⁶⁷ Conversely, the number of voters identifying as independent began to decrease from their Cold War percentages.⁶⁸ With party identification both more common and more tightly aligned with ideological belief, partisanship by the 1990s became more predictive of voting

⁶⁴ See generally EDWARD G. CARMINES & JAMES A. STIMSON, *ISSUE EVOLUTION: RACE AND THE TRANSFORMATION OF AMERICAN POLITICS* (1989).

⁶⁵ See, e.g., *id.*; LEVENDUSKY, *supra* note 39, at 147; Alan I. Abramowitz & Kyle L. Saunders, *Ideological Realignment in the U.S. Electorate*, 60 J. POL. 634, 638 (1998); Geoffrey C. Layman, Thomas M. Carsey, John C. Green, Richard Herrera & Rosalyn Cooperman, *Activists and Conflict Extension in American Party Politics*, 104 AM. POL. SCI. REV. 324, 327 (2010).

⁶⁶ See Abramowitz & Saunders, *supra* note 65, at 647.

⁶⁷ See Bafumi & Shapiro, *supra* note 34, at 4.

⁶⁸ See *id.*

behavior than it had in more than a century. By one measure, partisanship was 77% more predictive of presidential voting in 1996 than it had been in 1972.⁶⁹

Ticket splitting, quite common during the Cold War, decreased by more than two-thirds, with voters exercising greater party loyalty to their party across their ballot and election to election.⁷⁰ Conversely, straight-ticket voting on a partisan basis, where voters vote exclusively for their own party's candidates, increased dramatically from Cold War levels.⁷¹ Republicans became more reliably conservative and more consistently voted for Republican candidates, and Democrats more reliably liberal and more consistently voted for Democratic candidates, than they had been in modern memory.⁷² The landslide presidential victories of the Cold War, with a significant percentage of voters crossing party lines to vote for the other party's candidates, became unimaginable in the years since.⁷³

Elected politicians from both parties mirrored the hyperpartisanship of the electorate.⁷⁴ Congress, for instance, is more polarized now than it had been since the nineteenth century.⁷⁵ The unusual degree of ideological overlap between the parties in Congress during the Cold War had disappeared by the 1990s.⁷⁶ By any of the usual measures, no Democrat in Congress today is as conservative as the most liberal Republican.⁷⁷ Just as partisan voters had sharply divided into ideologically cohesive, fiercely opposed teams, Republican and Democratic politicians crystalized into rigidly polarized, ideologically unified teams at nearly all levels of government.⁷⁸ Not only were the Republicans and Democrats more ideologically homogeneous, but they each grew even further apart from the other party at the same time.⁷⁹ Partisanship, as a result, has not been so predictive of congressional voting in more than a century.⁸⁰

⁶⁹ See Larry M. Bartels, *Partisanship and Voting Behavior, 1952–1996*, 44 AM. J. POL. SCI. 37 (2000).

⁷⁰ See Mark D. Brewer, *The Rise of Partisanship and the Expansion of Partisan Conflict Within the American Electorate*, 58 POL. RSCH. Q. 219, 221 (2005); Mulligan, *supra* note 34, at 513–14.

⁷¹ See Abramowitz & Webster, *supra* note 9, at 119, 130–31.

⁷² See *id.* at 130.

⁷³ See *id.*

⁷⁴ See *id.*

⁷⁵ See Christopher Hare & Keith T. Poole, *The Polarization of Contemporary American Politics*, 46 POLITY 411, 413 (2014).

⁷⁶ See Abramowitz & Webster, *supra* note 9, at 130.

⁷⁷ See THOMAS E. MANN & NORMAN J. ORNSTEIN, IT'S EVEN WORSE THAN IT LOOKS: HOW THE AMERICAN CONSTITUTIONAL SYSTEM COLLIDED WITH THE NEW POLITICS OF EXTREMISM 45 (2012).

⁷⁸ See Hare & Poole, *supra* note 75, at 415–16.

⁷⁹ See, e.g., Geoffrey C. Layman, Thomas M. Carsey & Juliana Menasce Horowitz, *Party Polarization in American Politics: Characteristics, Causes, and Consequences*, 9 ANN. REV. POL. SCI. 83, 87 (2006).

⁸⁰ See Bartels, *supra* note 69, at 41–43.

This hyperpolarized cohesion means that party politicians share in their party's fortunes far more than they did in the bipartisan era of the Cold War.⁸¹ Internal homogeneity within a party increases agreement on policy aims and unifies the party's political agenda.⁸² Under these conditions, party coordination and leadership becomes easier, as students of Conditional Party Government have demonstrated.⁸³ Today's hyperpolarized parties engage in what Frances Lee calls partisan "teamship," where they see the parties' fortunes as a zero-sum game and refuse to compromise if it would grant the other side any sort of political triumph.⁸⁴ Republican Senate leader Mitch McConnell made this posture explicit when he publicly identified President Barack Obama's re-election defeat as his party's "single most-important" goal during Obama's first term.⁸⁵

Not only are today's parties more unified and polarized than their Cold War counterparts, they are locked in a perpetual fight for majority control that intensifies partisan competition.⁸⁶ Since the end of the Cold War, partisan control of the U.S. House of Representatives has changed hands four times in a quarter century.⁸⁷ The Senate switched party control six times over the same period, and eight times since 1980.⁸⁸ The parties now conduct politics with the sense that every election cycle might swing the legislative majority away from them, or back into their hands, so partisan politics has become what McConnell describes as "a whole lot of close races, a massive amount of spending on both sides . . . a knife fight in an alley."⁸⁹

⁸¹ See Kang, *Hyperpartisan Gerrymandering*, *supra* note 16, at 1416.

⁸² See *id.* at 1381.

⁸³ See generally John H. Aldrich & David W. Rohde, *The Consequences of Party Organization in the House: The Role of the Majority and Minority Parties in Conditional Party Government*, in *POLARIZED POLITICS: CONGRESS AND THE PRESIDENT IN A PARTISAN ERA* (Jon R. Bond & Richard Fleisher eds., 2000); DAVID W. ROHDE, *PARTIES AND LEADERS IN THE POST REFORM HOUSE* 31 (Benjamin I. Page ed., 1991).

⁸⁴ See FRANCES E. LEE, *BEYOND IDEOLOGY: POLITICS, PRINCIPLES, AND PARTISANSHIP IN THE U.S. SENATE 47–73* (2009).

⁸⁵ Major Garrett, *Top GOP Priority: Make Obama a One-Term President*, *NAT'L J.* (Nov. 4, 2010), <https://www.nationaljournal.com/member/magazine/top-gop-priority-make-obama-a-one-term-president-20101023/> ("The single most important thing we want to achieve is for President Obama to be a one-term president." (quoting Senator McConnell)).

⁸⁶ Kang, *Hyperpartisan Gerrymandering*, *supra* note 16, at 1440.

⁸⁷ Charles Apple, *Control of House and Senate Since 1990*, *SPOKESMAN-REV.*, <https://www.spokesman.com/stories/2020/jun/25/control-house-and-senate-1900/> (last visited May 30, 2021).

⁸⁸ *Id.*

⁸⁹ Carl Hulse, *Democrats Hold Edge as Battle for Senate Majority Becomes 'Knife Fight'*, *N.Y. TIMES* (Aug. 9, 2020), <https://www.nytimes.com/2020/08/09/us/democrats-senate-majority-election.html> (quoting Senator McConnell).

By contrast, Cold War politics presented little of this constant fight for partisan control of Congress or state legislatures.⁹⁰ Prior to 1980, the Democrats controlled *both* the House and Senate for a quarter century, nearly the entire Cold War period, typically by commanding margins.⁹¹ From 1952 to 1982, Democrats always enjoyed at least a 50% advantage in party self-identification among American voters.⁹² It is no surprise then, that Frances Lee's historical work demonstrates there was virtually no expectation over that stretch that Republicans, seen at the time as the permanent congressional minority, could wrest control away from the Democratic Party.⁹³

For these reasons, today's Republican and Democratic politicians see their political interests as bound up with their respective parties' electoral success as they never did during the Cold War.⁹⁴ Party leaders during the Cold War era tended toward ideological centrism and promoted the party's overall electability.⁹⁵ Under today's hyperpolarization, increasingly extreme politicians have ascended to congressional leadership.⁹⁶ Part of the reason for the leadership's ideological extremism is that the party caucuses themselves have become more extreme and polarized, such that the shift in leadership simply represents a shift in the party membership's views.⁹⁷ That said, another important reason appears to be that ideologically extreme politicians are more effective fundraisers, and fundraising has become a particularly important part of party leadership today.⁹⁸

Party campaign finance is a primary means for today's highly cohesive parties to pool resources and coordinate political action. Politicians once limited their contributions to the party committees and resisted party requests to pool resources for the party's coordinated efforts.⁹⁹ However, as Robin Kolodny and

⁹⁰ See Apple, *supra* note 87.

⁹¹ *Id.*

⁹² See LEE, *supra* note 84, at 24.

⁹³ See, e.g., *id.* at 151.

⁹⁴ See Kang, *Hyperpartisan Gerrymandering*, *supra* note 16, at 1417, 1420.

⁹⁵ *Id.* at 1381–82.

⁹⁶ See, e.g., Bernard Grofman, William Koetzle & Anthony J. McGann, *Congressional Leadership 1965–96: A New Look at the Extremism Versus Centrality Debate*, 11 LEGIS. STUD. Q. 87, 87–88, 93 (2002); Eric Heberlig, Marc Hetherington & Bruce Larson, *The Price of Leadership: Campaign Money and the Polarization of Congressional Parties*, 68 J. POL. 992, 992–93 (2006).

⁹⁷ Heberlig et al., *supra* note 96, at 993, 995.

⁹⁸ See *id.* at 993–94; Bertram Johnson, *Individual Contributions: A Fundraising Advantage for the Ideologically Extreme*, 38 AM. POL. RSCH. 890, 903–06 (2010); Walter J. Stone & Elizabeth N. Simas, *Candidate Valence and Ideological Positions in the U.S. House Elections*, 54 AM. J. POL. SCI. 371, 381 (2010).

⁹⁹ See Robin Kolodny & Diana Dwyre, *Party-Orchestrated Activities for Legislative Party Goals: Campaigns for Majorities in the US House of Representatives in the 1990s*, 4 PARTY POL. 275, 289 (1998).

Debra Dwyre report, the Republican takeover of the House in 1994 shocked congressional politicians into realizing that the congressional majority would be at stake every election cycle and they needed to invest in their party's collective outcomes if they wanted to enjoy majority control.¹⁰⁰ The parties subsequently reorganized party campaign finance to better require, monitor, and incentivize party politicians to raise and share campaign money with their respective party caucuses.¹⁰¹ Eric Heberlig and Bruce Larson summarize that "it is now an expectation that incumbents who desire any influence in the House regularly make substantial campaign contributions to the party's congressional campaign committee and to fellow party candidates."¹⁰² The percentage of congressional incumbents who contributed from their individual accounts to the party committees thus has increased from roughly half of the membership in 1992 to roughly 90% by 2006.¹⁰³ One result is that campaign finance support for congressional challengers has increased sharply since 1994, in large part because of new party support.¹⁰⁴

Modern campaign finance is therefore strikingly different than it was at the time of FECA and the first quarter century of campaign finance law during the Cold War. Today's campaign finance is highly coordinated among officeholders and candidates, official party committees, and other party-affiliated organizations. The world of campaign finance in 1974, when FECA was comprehensively amended, was highly candidate-centered without today's financial coordination and direction by party organizations.¹⁰⁵ As Ray La Raja has characterized it, FECA's drafters "designed accountability mechanisms, such as disclosure and contribution limits, with the focus on candidate committees" because "[p]arty organizations and political action committees (PACs) were seen as playing a supportive but circumscribed role in financing elections."¹⁰⁶ Remember that parties struggled to adjust to the decline of patronage and the rise of media politics, among other things, at least initially.¹⁰⁷

¹⁰⁰ *Id.* at 292.

¹⁰¹ See generally ERIC S. HEBERLIG & BRUCE A. LARSON, CONGRESSIONAL PARTIES, INSTITUTIONAL AMBITION, AND THE FINANCING OF MAJORITY CONTROL (2012); Vincent G. Moscardelli, Moshe Haspel & Richard S. Wike, *Party Building Through Campaign Finance Reform: Conditional Party Government in the 104th Congress*, 60 J. POL. 691 (1998).

¹⁰² HEBERLIG & LARSON, *supra* note 101, at 3.

¹⁰³ See *id.* at 104; Raymond J. La Raja, *Why Super PACs: How the American Party System Outgrew the Campaign Finance System*, 10 FORUM 91, 99 (2012).

¹⁰⁴ See La Raja, *supra* note 103, at 97.

¹⁰⁵ See *id.* at 92–94.

¹⁰⁶ *Id.* at 93.

¹⁰⁷ Michael S. Kang, *The Brave New World of Party Campaign Finance Law*, 101 CORNELL L. REV. 531, 552–53 (2016).

Campaign finance reformers thus did not focus on party campaign finance in part because “[t]he concern of many observers in the 1970s, curiously, was that the Democratic and Republican Parties were too weak.”¹⁰⁸

Even so, the major parties were already beginning to pivot under the fresh realities of FECA. The Republicans had already begun a well-funded strategy of building up their state organizations through training local operatives, expanding their donor network, and tightening coordination between the national party and its state and local counterparts.¹⁰⁹ Similar efforts on both Democratic and Republican sides were helped by the 1979 federal deregulation of so-called “soft money” fundraising to finance local grass-roots activities, such as voter registration and turnout operations, and later FEC advisory opinions to permit soft money fundraising for other joint federal-state campaign activities and issue advocacy.¹¹⁰ Party investment in campaign fundraising and legal deregulation of party campaign finance combined by the 1990s to fuel a period of “party-centered” financing in which the national parties dramatically expanded their fundraising capacities.¹¹¹ The parties shifted fully from the traditional focus of the earlier party organizations to what political scientists newly characterized as “the party in service to the candidate.”¹¹²

Critical to our story, growing partisan polarization by the 1990s had important consequences for party campaign finance. The internal ideological cohesion of the major parties surged at both the elite and mass levels with the party realignment that followed the Civil Rights Movement.¹¹³ Parties were more unified ideologically and evolved for the modern campaign finance era.¹¹⁴ Central to this evolution was the cultivation and maintenance of an infrastructure comprising a dedicated network of wealthy supporters with the financial

¹⁰⁸ Glenn Hubbard & Tim Kane, *In Defense of Citizens United: Why Campaign Finance Reform Threatens American Democracy*, 92 FOREIGN AFFS. 126, 129 (2013).

¹⁰⁹ See Paul S. Herrnson, *Party Leadership and Party Organizational Change*, in POLITICS, PROFESSIONALISM, AND POWER: MODERN PARTY ORGANIZATION AND THE LEGACY OF RAY C. BLISS 186, 194–96, 198 (John C. Green ed., 1994); M. Margaret Conway, *Republican Party Nationalization, Campaign Activities, and Their Implications for the Party System*, 13 PUBLIUS 1 (1983); LA RAJA, *supra* note 61, at 71.

¹¹⁰ *McConnell v. FEC*, 540 U.S. 93, 123–24 (2003), see La Raja, *supra* note 103, at 78; Laura MacCleery, *Goodbye Soft Money, Hello Grassroots: How Campaign Finance Reform Restructured Campaigns and the Political World*, 58 CATH. L. REV. 965, 977 (2009).

¹¹¹ See Daniel J. Galvin, *The Transformation of Political Institutions: Investments in Institutional Resources and Gradual Change in the National Party Committees*, 26 AM. POL. DEV. 50, 57–69 (2012) (describing explosion of fundraising by political parties).

¹¹² See ALDRICH, *supra* note 55, at 269.

¹¹³ See Gary C. Jacobson, *Party Polarization in National Politics: The Electoral Connection*, in POLARIZED POLITICS: CONGRESS AND THE PRESIDENT IN A PARTISAN ERA 9, 15–16 (Jon R. Bond & Richard Fleisher eds., 2000).

¹¹⁴ *Id.* at 22.

resources and willingness to fund their party.¹¹⁵ This donor class loyally invests in their respective party, not only by giving to formal party committees but directly to party candidates and even allied groups involved with party activity.¹¹⁶

Right about this time and continuing through today, ideological and partisan polarization among party activists and engaged partisans, which is the category of citizens most likely to contribute money, grew substantially to mirror similarly increasing ideological and partisan polarization among politicians from both parties.¹¹⁷ The major parties during most of the twentieth century were loosely unified, ideologically muddled, and could be described as “essentially constituent parties . . . neither structured nor widely perceived as a cohesive policy link between voters and officials.”¹¹⁸ By contrast, the major parties of this modern era of campaign finance developed into ideologically cohesive teams, increasingly unified by shared policy goals and linked by campaign finance, across officeholders, candidates, and donors at the national, state, and local levels.

Individual campaign contributors, who today comprise the donor class, are highly polarized and highly motivated by ideology in their political spending.¹¹⁹ These individual donors tend overwhelmingly to be more ideologically extreme in their political leanings and favor candidates who are similarly extreme.¹²⁰ Unlike business groups interested primarily in legislative access to incumbent

¹¹⁵ See PETER L. FRANCIA, JOHN C. GREEN, PAUL S. HERRNSON, LYNDY W. POWELL & CLYDE WILCOX, THE FINANCIERS OF CONGRESSIONAL ELECTIONS: INVESTORS, IDEOLOGUES, AND INTIMATES 18 (2003); Paul S. Herrnsen & Stephanie Perry Curtis, *Financing the 2008 Congressional Elections*, in FINANCING THE 2008 ELECTION 166, 169–70 (David B. Magelby & Anthony Corrado eds., 2011); MARTY COHEN, DAVID KAROL, HANS NOEL & JOHN ZALLER, THE PARTY DECIDES: PRESIDENTIAL NOMINATIONS BEFORE AND AFTER REFORM 5–7 (2008); SETH E. MASKET, NO MIDDLE GROUND: HOW INFORMAL PARTY ORGANIZATIONS CONTROL NOMINATIONS AND POLARIZE LEGISLATURES 43–44 (2009).

¹¹⁶ FRANCIA ET AL., *supra* note 115, at 19.

¹¹⁷ See Layman et al., *supra* note 65, at 324; Alan I. Abramowitz & Kyle L. Saunders, *Is Polarization a Myth?*, 70 J. POL. SCI. 542, 544–48 (2008); Jacobson, *supra* note 113, at 9; Thomas M. Carsey & Geoffrey C. Layman, *A Dynamic Model of Political Change Among Party Activists*, 21 POL. BEHAV. 17, 33 (1999). *But see* Raymond J. La Raja & David L. Wiltse, *Don't Blame Donors for Ideological Polarization of Political Parties: Ideological Change and Stability Among Political Contributors, 1972–2008*, 20 AM. POL. RSCH. 1, 19–21 (2011) (conceding that donors are and have become increasingly more ideological, at least since 2002, but contending that ideological extremism does not necessarily predict campaign finance giving).

¹¹⁸ BURNHAM, *supra* note 17, at 9.

¹¹⁹ Michael J. Barber, Brandice Canes-Wrone & Sharece Thrower, *Ideologically Sophisticated Donors: Which Candidates Do Individual Contributors Finance?*, 61 AM. J. POL. SCI. 271, 285 (2017).

¹²⁰ See Adam Bonica, *Ideology and Interest in the Political Marketplace*, 57 AM. J. POL. SCI. 294, 301–08 (2013); Barber et al., *supra* note 119, at 285; Joseph Bafumi & Michael Herron, *Leapfrog Representation and Extremism: A Study of American Voters and Their Members in Congress*, 104 AM. POL. SCI. REV. 519 (2010); Stone & Simas, *supra* note 98.

officeholders from both parties, wealthy individuals are instead motivated primarily by their ideological preferences, care little about incumbency, and tend to donate exclusively to candidates from one party.¹²¹ Indeed, individual donors who give exclusively to one party dominate campaign finance and contributed roughly 85% of federal campaign finance money for the 2016 and 2020 election cycles.¹²² Just 1% of federal campaign finance money came from individual contributors who split their donations more or less evenly between the major parties.¹²³ As a result, studies find that ideological polarization increases when legal limits on individual contributions at the state level are higher or not imposed at all.¹²⁴ Where there are higher limits, or none at all, individual contributors channel more money overwhelmingly to only one party, and disproportionately to the most ideologically extreme candidates of that party.¹²⁵ Party contributors, like party voters, cleanly sort into more ideologically homogeneous coalitions in support of more polarized and extreme candidates.¹²⁶

Because individual donors are ideologically polarized and ideologically motivated, the more ideologically extreme the candidate is, the more he or she tends to draw in individual contributions.¹²⁷ More conservative Republicans draw more money on average than less extreme Republicans, while more liberal Democrats draw more money than less extreme Democrats.¹²⁸ Along the same lines, a related dynamic has emerged for party leadership. Historically, party leadership tended to rise from ideological moderates within their parties who could mediate a centrist position among and between various ideological interests inside the party coalition.¹²⁹ More recently, however, party leadership has increasingly come from the ideological extremes of their parties.¹³⁰

¹²¹ See Michael Barber, *Donation Motivations: Testing Theories of Access and Ideology*, 69 POL. RSCH. Q. 148, 152–56 (2016).

¹²² See *Donor Demographics*, OPENSECRETS, <https://www.opensecrets.org/elections-overview/donor-demographics?cycle=2016&display=A> (last visited May 30, 2021) (reporting FEC figures for individual contributions of \$200 or more during the 2015–16 and 2019–20 cycles).

¹²³ See *id.* (reporting the FEC total for “double givers” who gave at least a third of their contributed money to each party).

¹²⁴ See RAYMOND J. LA RAJA & BRIAN F. SCHAFFNER, *CAMPAIGN FINANCE AND POLITICAL POLARIZATION: WHEN PURISTS PREVAIL* 106 (2015).

¹²⁵ *Id.*

¹²⁶ *Id.* at 114.

¹²⁷ See Michael J. Ensley, *Individual Campaign Contributions and Candidate Ideology*, 138 PUB. CHOICE 221, 229 (2009).

¹²⁸ See *id.*

¹²⁹ See D. RODERICK KIEWIET & MATHEW D. MCCUBBINS, *THE LOGIC OF DELEGATION: CONGRESSIONAL PARTIES AND THE APPROPRIATION PROCESS* 47–55 (1991).

¹³⁰ See Heberlig et al., *supra* note 96, at 996 (“The conclusion is unmistakable; extremists are significantly more likely to win leadership elections today than in the 1980s and early 1990s.”); Stephanie Stamm, *Paul Ryan Would Be the Most Conservative House Speaker in Recent History*, NAT’L J. (Oct. 22, 2015),

Campaign finance again plays an important role. Leadership hopefuls since the 1990s have advanced their leadership prospects through their superior fundraising capacities.¹³¹ Party leadership is expected and, in fact, more likely to contribute money to party committees out of their own campaign accounts and to broker contributions to the party from their personal donor network.¹³² Ideologically extreme officeholders enjoy greater capacity to raise contributions from individual donors because individual donors favor more ideologically extreme candidates.¹³³ As a result, ideologically extreme officeholders with leadership ambitions can leverage their fundraising advantages to rise in the party hierarchy by raising more money for party committees and fellow party candidates.¹³⁴

The major parties now market themselves as tight-knit, cohesive teams whose ideological consistency among their candidates and officeholders nicely matches the ideological cohesion and motivations of their campaign finance donors. To be sure, campaign finance donors are an important part of the party coalition, well-aligned with their parties' respective ideological agendas and invested in their missions. The major parties connect donors with their candidates across the country to advance their agendas irrespective of district lines and state borders.¹³⁵ Since 1980, the average share of a congressional candidate's total fundraising that comes from individual donors has grown from less than half to nearly three-quarters of total fundraising.¹³⁶ Furthermore, candidate fundraising has increasingly drawn on contributors who live outside

<https://www.nationaljournal.com/s/91166/paul-ryan-would-be-most-conservative-house-speaker-recent-history> (reporting that House Speakers have been progressively more polarized by DW-NOMINATE score since 1994, peaking for the moment with Paul Ryan ranking as the most conservative Speaker across at least the last 40 Congresses).

¹³¹ See Eric S. Heberlig, Bruce A. Larson, Daniel A. Smith & Kristen L. Soltis, *Look Who's Coming to Dinner: Direct Versus Brokered Member Campaign Contributions to the NRCC*, 36 AM. POL. RSCH. 433, 433–34 (2008).

¹³² See *id.* at 444–46.

¹³³ See Heberlig et al., *supra* note 96, at 1002–03.

¹³⁴ See *id.* at 1001–03; Eric S. Heberlig & Bruce A. Larson, *Redistributing Campaign Funds by U.S. House Members: The Spiraling Costs of the Permanent Campaign*, 30 LEGIS. STUD. Q. 597 (2005); Christopher J. Deering & Paul J. Wahlbeck, *Determinants of House Committee Chair Selection*, 34 AM. POL. RSCH. 1, 9 (2006); Eric S. Heberlig & Bruce A. Larson, *Congressional Parties and the Mobilization of Leadership PAC Contributions*, 16 PARTY POL. 451, 454 (2010) (“Generous givers are rewarded with prestigious committee assignments, committee leadership positions, extended leadership positions and, in the majority party, with greater floor access for their legislation.” (citations omitted)).

¹³⁵ See James G. Gimpel, Frances E. Lee & Shanna Pearson-Merkowitz, *The Check Is in the Mail: Interdistrict Funding Flows in Congressional Elections*, 52 AM. J. POL. SCI. 373, 392 (2008) (“Donations from nonresident individuals flowing into competitive districts are steered there, directly and indirectly, by parties ultimately seeking to maintain or take control of Congress.”).

¹³⁶ See Barber & McCarty, *supra* note 21, at 37, 57.

the candidate's district, presumably relying on party and ideological networks for support over the same time period.¹³⁷ Party donors want to "contribute their money in close contests in order to maximize the number of legislators who support their political positions."¹³⁸ Candidates and contributors operate now more than ever as an integrated nationwide network that connects likeminded campaign finance recipients and donors.

III. THE MISMATCH BETWEEN CAMPAIGN FINANCE LAW AND MODERN HYPERPARTISANSHIP

This Part explains the mismatch between Cold War campaign finance law and today's modern campaign finance practice. Campaign finance law, inherited from the Cold War, focuses on individual candidates and generally overlooks the sophisticated role of major parties in coordinating the sprawling, interconnected coalition of party actors in modern campaign finance. Campaign finance law today, as a result, underestimates the corruption risk that parties may present in collectivizing the potential for quid pro quo, while it also overestimates the First Amendment interests in deregulated campaign finance as the parties focus increasingly on consolidating their bases rather than traditional persuasion.

A. *What Has Changed in Campaign Finance?*

The campaign finance jurisprudence has been slow to keep up with the rise of hyperpartisanship following the Cold War's end. As hyperpartisanship developed, the major parties regained their position at the center of national politics and national campaign finance. Parties comprise critical networks that connect donors, candidates, affiliated organizations, and officeholders and direct money where it will most help the parties' coordinated efforts. However, campaign finance law developed to regulate largely dyadic relationships between individual donors and candidates as the focus, while largely overlooking the central role that parties now have carved out.

In an important early misstep during the 1990s, the Court struck down as unconstitutional FECA limits on independent expenditures by political parties in connection with a general election campaign for congressional office.¹³⁹ FECA had limited party independent expenditures, notwithstanding a general

¹³⁷ See *id.* (citations omitted).

¹³⁸ FRANCIA ET AL., *supra* note 115, at 51.

¹³⁹ Colo. Republican Fed. Campaign Comm. v. FEC, 518 U.S. 604, 604 (1996).

prohibition on expenditure limits under *Buckley*, because parties are so intertwined with their candidates that party expenditures were deemed as coordinated with their candidates as a matter of law.¹⁴⁰ Even in the absence of any formal coordination between party and candidate regarding the timing or content of party expenditures on the candidate's behalf, party expenditures were nonetheless subject to restriction and limited to certain FEC state-specific caps.¹⁴¹ Put simply, parties were understood to be alliances of interconnected activists, donors, and candidates dedicated to electing party candidates and therefore could hardly be expected to act truly independently from their candidates in their shared mission of winning elections. What's more, in the case of formal party committees, candidates and officeholders are almost always directly involved in the fundraising and spending of their campaign finance money. Candidates were not simply entwined with their parties; in the case of party committee campaign finance, candidates quite literally were the party in almost every case.¹⁴²

Nevertheless, instead of identifying parties as the central hub of campaign finance for both candidates and donors, the Court explained it was not aware of any special worries about coordination with parties that were not addressed by the requisite "absence of prearrangement and coordination" applicable to any political committee.¹⁴³ The Court seemed blind to the obvious and pervasive role that party committees and officials played in coordinating party campaign finance throughout the party network of candidates and donors. Campaign finance expenditures by political parties thus could be treated legally as no different than those by independent interest groups without any formal connections to candidates and officeholders. This, despite the fact that "[t]he candidate is typically a member of the party, has been active in the party, and, once nominated, bears the party label, uses the party's place on the ballot, and necessarily benefits from the loyalty and support of party activists."¹⁴⁴ As the Court explained it, it could not see how it could treat parties differently from "ordinary political committees."¹⁴⁵

¹⁴⁰ *See id.* at 619.

¹⁴¹ *See id.* at 621.

¹⁴² *See, e.g.,* Kang, *supra* note 107, at 565 n.155 (reporting that roughly half the membership of the Republican and Democratic National Committees at the time were current or former candidates for office).

¹⁴³ *Colo. Republican Fed. Campaign Comm.*, 518 U.S. at 616 (quotation marks omitted).

¹⁴⁴ Richard Briffault, *The Political Parties and Campaign Finance Reform*, 100 COLUM. L. REV. 620, 639 (2000).

¹⁴⁵ *Colo. Republican Fed. Campaign Comm.*, 518 U.S. at 618.

Admittedly, the Rehnquist Court briefly recognized the risk of campaign finance corruption through the modern political party. The 1990s featured an explosion in soft money fundraising to the point that the major parties together raised almost half a billion dollars in soft money in 2000 and in 2002, accounting for roughly half of national Democratic Party fundraising and one-third of national Republican fundraising.¹⁴⁶ Congress responded by enacting the Bipartisan Campaign Reform Act of 2002 (BCRA), which in part prohibited the receipt of soft money by the national party committees.¹⁴⁷ In *McConnell v. FEC*, the Court upheld the prohibition and acknowledged that the “close connection and alignment of interests” between the national parties and their federal officeholders raised concerns about “actual or apparent indebtedness” by officeholders in return for soft money contributions to the parties.¹⁴⁸ Even if the parties themselves could not formally wield government authority or directly offer quid pro quo favors to soft money donors, the parties’ “special relationship and unity of interest” with their officeholders created the risk that their officeholders would do so in their stead.¹⁴⁹ The upshot for campaign finance law should have been that earlier assumptions about the major parties’ independence from candidates and freestanding constitutional First Amendment rights appear far less persuasive today than they did before hyperpolarization began taking root.

But recognition of the central role of the major parties in today’s hyperpolarized campaign finance was quickly left behind by the Roberts Court. In *McCutcheon v. FEC*, the Court struck down the longstanding aggregate cap on total contributions by a single individual for a given federal election cycle.¹⁵⁰ Shaun McCutcheon, the plaintiff in the case, had contributed to sixteen Republican candidates, all three national Republican Party committees, and several conservative PACs for the 2011–12 election cycle, but he was prevented from contributing to even more candidates because his contribution total for the cycle had already reached the \$117,000 aggregate cap.¹⁵¹ In striking down the aggregate cap, the Court reasoned that there was no particular quid pro quo risk from someone like Shaun McCutcheon giving a contribution to more candidates than the aggregate limit had allowed. If McCutcheon was permitted to give a

¹⁴⁶ See Anthony Corrado, *Party Finance in the 2000 Elections: The Federal Role of Soft Money Financing*, 34 ARIZ. ST. L.J. 1025, 1035 (2002).

¹⁴⁷ The Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 2 U.S.C., 18 U.S.C., 28 U.S.C., 36 U.S.C., and 47 U.S.C.).

¹⁴⁸ *McConnell v. FEC*, 540 US. 93, 155 (2003).

¹⁴⁹ *Id.* at 145.

¹⁵⁰ *McCutcheon v. FEC*, 572 U.S. 185, 193 (2014).

¹⁵¹ See *McCutcheon v. FEC*, 893 F. Supp. 2d 133, 136 (D.D.C. 2012).

four-figure amount to sixteen candidates in a cycle, the Court puzzled why he could be constitutionally limited from giving the same amount to a seventeenth candidate, or an eighteenth, and so on.¹⁵² Absent a demonstrable risk that money channels back from the new recipients, the Court could not see why the candidates who already received money from McCutcheon would care whether he gave to additional candidates beyond themselves. The Court concluded the aggregate cap therefore did not further any quid pro quo corruption risk and struck it down as unconstitutional.¹⁵³

Of course, officeholders and candidates who receive campaign donations care quite a bit whether their party committees, allied officeholders, and fellow candidates receive campaign contributions from major donors. Today's parties are ideologically cohesive networks that connect likeminded officeholders and candidates with each other and with generous, committed donors willing to spread their money throughout party networks to advance their shared goals. Officeholders and candidates care most about their own campaign accounts, but at the same time, they see obvious value in seeing major donors like McCutcheon contributing beyond their own campaigns to their party committees and fellow party candidates.

For this very reason, officeholders and candidates invest heavily in party fundraising and organization, and increasingly so in today's hyperpolarized environment when party actors appear more tightly linked than an era ago. Major donors like McCutcheon are a crucial part of their party networks. Today's parties are increasingly "money-centered, technical" operations that exist to serve candidates and subsist on a reliable base of committed activists like McCutcheon who identify with one party and bankroll its costs.¹⁵⁴ In this context, it is easy to imagine why candidates care whether a major donor contributes not just to them but to their party and fellow party candidates, all of whom are aligned closely in common cause. The *McCutcheon* Court could not see, or declined to acknowledge, how party actors are tightly linked together through party campaign finance in today's hyperpolarized politics. And encouraged by the Court's myopia toward parties, regulation of party campaign finance has only further loosened since *McCutcheon*.¹⁵⁵

¹⁵² *McCutcheon*, 572 U.S. at 208.

¹⁵³ *Id.* at 227.

¹⁵⁴ See Daniel M. Shea, *The Passing of Realignment and the Advent of the "Base-less" Party System*, 27 AM. POL. Q. 33, 48 (1999).

¹⁵⁵ See, e.g., Carrie Levine, *Murky Rules Boost Political Parties' Rich Donor 'Slush Funds'*, NBC NEWS (Aug. 3, 2015, 5:01 AM), <https://www.nbcnews.com/news/us-news/murky-rules-boost-political-parties-rich-donor-slush-funds-n401736>; Matea Gold, *FEC Says Convention Donations Will Not Count Against Cap on*

B. *The First Amendment Consequences of Hyperpartisanship*

One result of campaign finance in today's hyperpolarized politics is that the parties and their officeholders increasingly reflect the policy preferences of the wealthy. A growing body of political science literature overwhelmingly demonstrates how and why the preferences of the wealthy are massively overrepresented as hyperpolarization and campaign finance spending have grown since the 1960s and 1970s.¹⁵⁶ Studies of congressional voting consistently find that the policy preferences of poor and middle-class citizens exert little to no influence on the roll call voting of Senators and Representatives, while the preferences of wealthy citizens are disproportionately reflected in both roll-call votes and actual legislative outcomes.¹⁵⁷ Other studies confirm that same pattern occurs at the state level across a range of policy issues.¹⁵⁸ More tellingly, work by Adam Bonica, Joseph Bafumi, and Michael Herron strongly suggests campaign finance-based explanations for the disproportionate influence of the wealthy.¹⁵⁹ Ideal point distributions for campaign finance donors and members of Congress are similarly bimodal, clustering in liberal and conservative peaks, in sharp contrast from the central, single-peaked normal distribution of the general public.¹⁶⁰ Furthermore, Senators from both parties deviate dramatically

Party Contributions, WASH. POST (Oct. 9, 2014), https://www.washingtonpost.com/politics/fec-says-convention-donations-will-not-count-against-cap-on-party-contributions/2014/10/09/d4642d96-4fe1-11e4-8c24-487e92bc997b_story.html; James Anderson, *Court: Colorado GOP's Creation of Super PAC Was Legal*, GAZETTE (Feb. 25, 2016), https://gazette.com/government/court-colorado-gops-creation-of-super-pac-was-legal/article_c646641d-96f3-54d7-8c8d-43e62a588b16.html.

¹⁵⁶ See generally Nicholas O. Stephanopoulos, *Aligning Campaign Finance Law*, 101 VA. L. REV. 1425, 1468–79 (2015) (summarizing the literature).

¹⁵⁷ See LARRY M. BARTELS, *UNEQUAL DEMOCRACY: THE POLITICAL ECONOMY OF THE NEW GILDED AGE* 253–62 (2008); MARIN GILENS, *AFFLUENCE AND INFLUENCE: ECONOMIC INEQUALITY AND POLITICAL POWER IN AMERICA* 80 (2012); Christopher Ellis, *Social Context and Economic Biases in Representation*, 75 J. POL. 773, 783–85 (2013); Chris Tausanovitch, *Income, Ideology, and Representation*, 2 RUSSELL SAGE FOUND. J. SOC. SCI. 33, 49 (2016); Christopher Ellis, *Understanding Economic Biases in Representation: Income, Resources, and Policy Representation in the 110th House*, 65 POL. RSCH. Q. 938, 948 (2012) [hereinafter Ellis, *Understanding Economic Biases*].

¹⁵⁸ Patrick Flavin, *Income Inequality and Policy Representation in the American States*, 40 AM. POL. RSCH. 29, 44, 46 (2011); Elizabeth Rigby & Gerald C. Wright, *Whose Statehouse Democracy?: Policy Responsiveness to Poor Versus Rich Constituents in Poor Versus Rich States*, in WHO GETS REPRESENTED 189, 217 (Peter K. Enns & Christopher Wlezien eds., 2011).

¹⁵⁹ See generally Adam Bonica, *Avenues of Influence: On the Political Expenditures of Corporations and Their Directors and Executives*, 18 BUS. & POL. 367, 392 (2016) (showing how corporate elites have an outsized influence on ideological position of political candidates); Adam Bonica, *Mapping the Ideological Marketplace*, 58 AM. J. POL. SCI. 367 (2014) (demonstrating a high degree of ideological cohesion among professionals from high-paying industries); Bafumi & Herron, *supra* note 120 (positing campaign finance as one explanation for increasing ideological extremism among U.S. legislators).

¹⁶⁰ See Bafumi & Herron, *supra* note 120, at 536–37; Bonica, *supra* note 159, at 379–80.

from the median voter from their respective state but match “nearly perfect[ly]”¹⁶¹ the preferences of campaign finance donors from their party.¹⁶²

In this sense, far more so than for other areas of election law, modern campaign finance is both a manifestation of hyperpolarized partisanship as well as one of its likely contributing causes.¹⁶³ As I have argued, hyperpolarization has tightened the bonds among partisan actors and increased the efficiencies and payoffs from campaign finance cooperation.¹⁶⁴ It is a basic tenet from the logic of collective action that greater internal homogeneity brings important advantages for greater in-group coordination and organization.¹⁶⁵ As party officeholders, candidates, and activists have become more homogeneous and ideologically polarized, the incentives increase to cooperate and pool resources.¹⁶⁶ The parties increasingly could offer a more ideologically extreme and consistent product, in the form of a more ideologically unified set of leadership, officeholders, and other candidates, to attract financial sponsorship from more ideologically well-sorted and motivated wealthy donors.¹⁶⁷

The surge in hyperpolarization coincided with a judicial deregulation of campaign finance. Wealthy donors, with extreme ideological preferences, have enjoyed growing opportunities to invest incredible amounts of money into politics at the same time that hyperpolarization has manifested.¹⁶⁸ Soft money donations were just the beginning in the 1990s, such that even after BCRA cut off soft money, it was quickly replaced, first by unlimited donations to nonconnected Section 527 committees, and then after *Citizens United*, by

¹⁶¹ Michael J. Barber, *Representing the Preferences of Donors, Partisans, and Voters in the US Senate*, 80 PUB. OP. Q. 225, 238 (2016).

¹⁶² *Id.*; see also Ellis, *Understanding Economic Biases*, *supra* note 157, at 945 (showing ideological cohesion between campaign finance donors and their political party). Even conservative intellectuals may feel similar pressure to conform to the preferences of funders. See Sam Tanenhaus, *On the Front Lines of the GOP’s Civil War*, ESQUIRE (Dec. 20, 2017), <https://www.esquire.com/news-politics/a14428464/gop-never-trump/> (quoting conservatives who describe conservative thought as “tightly leashed by wealthy donors” and worry that donors will cut off conservative dissenters); Max Kutner, *Will Bannon’s Split from Trump, Breitbart and the Mercers Ignite a GOP Civil War?*, NEWSWEEK (Jan. 10, 2018, 10:02 AM), <https://www.newsweek.com/steve-bannon-breitbart-mercere-fire-fury-michael-wolff-776408> (describing Steve Bannon’s ouster and defunding by the Mercer family after his apostasy).

¹⁶³ Barber, *supra* note 161, at 244.

¹⁶⁴ Kang, *supra* note 107, at 560–61.

¹⁶⁵ See, e.g., MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 5–65 (1971) (articulating the classic logic of collective action); ROHDE, *supra* note 83, at 167–68 (demonstrating how party homogeneity facilitated reforms in party organization during the 1970s); William R. Lowry & Charles R. Shipan, *Party Differentiation in Congress*, 27 LEGIS. STUD. Q. 33, 43 (2002) (finding legislative cohesion increases with homogeneity among voters).

¹⁶⁶ Kang, *supra* note 107, at 550–51.

¹⁶⁷ *Id.* at 601.

¹⁶⁸ *Id.* at 602.

unlimited donations to Super PACs and Section 501(c) organizations.¹⁶⁹ Individual donors today possess more capacity to spend on electioneering than they have during the modern campaign finance era since FECA.¹⁷⁰ As a consequence, hyperpolarization has encouraged investment and cooperation in campaign finance through party networks, but the growing importance of campaign finance has likewise handed greater and greater influence over the parties and party officeholders to wealthy ideological donors.¹⁷¹ Wealthy ideologues now push the parties, officeholders, and candidates further toward the ideological, hyperpolarized extremes and exercise more capacity to do so through campaign finance than they ever have under modern campaign finance law.¹⁷²

The resulting representational misalignment between officeholders and the public has normative, perhaps even constitutional salience.¹⁷³ Campaign finance law developed meaningfully first in the 1970s when parties played such a limited role in campaign finance that party committees were almost classified, until a last-minute intervention, as nothing more than any other generic political committee with the same contribution limits as non-party entities. However, as parties assumed heavier campaign finance responsibilities and became dramatically more hyperpolarized in the process, they thoroughly outgrew the modest role in campaign finance originally imagined for them in the prior era.¹⁷⁴ Like election law in other areas, today's campaign finance law no longer fits the role courts suppose that the parties and party relationships play in modern campaign finance.¹⁷⁵ One consequence is that courts should recognize a government interest in preventing aggregate corruption where party linkages tie together the interests of candidates in campaign finance beyond the usual quid pro quo framework that the Court originally conceived in *Buckley v. Valeo* in 1976.¹⁷⁶ And if there ever is a cognizable interest in redressing representational misalignment through campaign finance law,¹⁷⁷ it is rooted in the hyperpolarized

¹⁶⁹ See generally Michael S. Kang, *The Year of the Super PAC*, 81 GEO. WASH. L. REV. 1902, 1914–19 (2013) (describing this evolution).

¹⁷⁰ See generally Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1 (2012) (reviewing the transformation of campaign finance law under the Roberts Court).

¹⁷¹ See Kang, *supra* note 107, at 599–606.

¹⁷² *Id.* at 602.

¹⁷³ See Stephanopoulos, *supra* note 156, at 1441–42, 1444; Nicholas O. Stephanopoulos, *Elections and Alignment*, 114 COLUM. L. REV. 283, 321 (2014) [hereinafter Stephanopoulos, *Elections and Alignment*].

¹⁷⁴ Kang, *supra* note 107, at 553.

¹⁷⁵ See Briffault, *supra* note 144, at 620.

¹⁷⁶ See Kang, *supra* note 107.

¹⁷⁷ See Stephanopoulos, *Elections and Alignment*, *supra* note 173.

nature of modern campaign finance and stronger today than it has been for perhaps a century.

An irony of hyperpolarization is that campaign finance serves traditional First Amendment interests, in enhancing “the ability of the citizenry to make informed choices among candidates for office,” perhaps less ever since FECA’s passage.¹⁷⁸ Campaign finance law, as the Supreme Court has developed it, invests First Amendment importance in campaign spending and ultimately entrusts the electorate with “the responsibility for judging and evaluating the relative merits of conflicting arguments.”¹⁷⁹ The Court has applied strict scrutiny to restrictions on campaign spending as a result, in the interest of entrusting final judgment of public debates with the voters, cognizant that “if there be any danger that the people cannot evaluate the information and arguments advanced . . . it is a danger contemplated by the Framers of the First Amendment.”¹⁸⁰

This paradigmatic framework was particularly well-suited to the Cold War Era’s focus on undecided voters in elections. It nicely fit the First Amendment understanding of campaign discourse as a competition between Republicans and Democrats to persuade voters to their side through a robust public debate.¹⁸¹ Restrictions, under this understanding, would only reduce information for voters to make their ultimate decisions and were heavily disfavored under strict scrutiny.¹⁸² By contrast, disclosure requirements were useful because they “allow[] voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches.”¹⁸³ In a bipartisan era when the parties were more difficult to distinguish, and voters more focused on candidates than parties, campaign finance law sensibly aimed at increasing the free flow of persuasive campaign speech.¹⁸⁴ After all, classic First Amendment-style, candidate-specific persuasion did appear to be the parties’ and candidates’ aims.¹⁸⁵ Voters were more ambivalent, later to make up their mind, and more likely to switch party allegiance in a given election than typical partisans.¹⁸⁶ Cross-pressured voters of the era held “opinions or views simultaneously supporting different sides” of an

¹⁷⁸ *Buckley v. Valeo*, 424 U.S. 1, 14–15 (1976) (per curiam).

¹⁷⁹ *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 791 (1978).

¹⁸⁰ *Id.* at 792.

¹⁸¹ *Buckley*, 424 U.S. at 14.

¹⁸² *Id.* at 19.

¹⁸³ *Id.* at 67.

¹⁸⁴ Ryan Lizza, *The Final Push: The Obama Team’s High-Risk Strategy*, *NEW YORKER* (Oct. 22, 2012), <https://www.newyorker.com/magazine/2012/10/29/the-final-push>.

¹⁸⁵ LEVENDUSKY, *supra* note 39, at 9.

¹⁸⁶ See BERELSON ET AL., *supra* note 40, at 52–72; LAZARFELD ET AL., *supra* note 41, at 19–33.

election,¹⁸⁷ such that some factors “may influence [them] toward the Republicans while others may operate in favor of the Democrats.”¹⁸⁸ As one political scientist summarizes, “For fifty years, political scientists—and political pundits—argued that campaigns should focus on identifying and converting undecided voters: the ‘swing’ voters.”¹⁸⁹

By contrast, hyperpolarization has meant that the electorate has predictably trended toward rigid partisan and ideological polarization. Marc Hetherington explains that “[g]reater ideological polarization in Congress has clarified public perceptions of party ideology, which has produced a more partisan electorate.”¹⁹⁰ Voters have a clearer sense of both parties’ agendas and positions and have increasingly aligned themselves with one party. In short, there are fewer voters who cannot distinguish clearly between the major parties,¹⁹¹ and fewer voters undecided between them.¹⁹² What’s more, partisan voters more reliably vote in favor of their chosen party’s candidates than they have in the past.¹⁹³ As another political scientist summarized, “With a larger base, the marginal return on mobilizing the committed increases relative to the return on converting swing voters.”¹⁹⁴ It is simply logical for campaigns to focus more on mobilizing their base and less on persuading undecided voters as the former group increases and the latter group decreases in size.

¹⁸⁷ BERELSON ET AL., *supra* note 40, at 19.

¹⁸⁸ LAZARSFELD ET AL., *supra* note 41, at 53.

¹⁸⁹ LEVENDUSKY, *supra* note 39, at 9; Lizza, *supra* note 184 (“For decades, persuasion was considered the key to winning, and the gurus and the consultants promised candidates that they could craft messages to win over uncommitted voters.”).

¹⁹⁰ Marc J. Hetherington, *Resurgent Mass Partisanship: The Role of Elite Polarization*, 95 AM. POL. SCI. REV. 619, 629 (2001).

¹⁹¹ See generally BRUCE E. KEITH, CANDACE J. NELSON, MARK C. WESTLYE & RAYMOND E. WOLFINGER, *THE MYTH OF THE INDEPENDENT VOTER* (1992) (demonstrating that voters have trouble distinguishing the major parties and weakly partisan positions); Judd R. Thornton, *The Impact of Elite Polarization on Partisan Ambivalence and Indifference*, 35 POL. BEHAV. 409 (2013) (showing that independents are indifferent to political and elite polarization).

¹⁹² See generally Bartels, *supra* note 69 (showing increasingly partisan voting pattern); Hetherington, *supra* note 190, at 620 (same); Brewer, *supra* note 70, at 220–21 (same); Bafumi & Shapiro, *supra* note 34 (same).

¹⁹³ See, e.g., Matthew S. Levendusky, Jeremy C. Pope & Simon D. Jackman, *Measuring District-Level Partisanship with Implications for the Analysis of U.S. Elections*, 70 J. POL. 736, 750 (2008) (validating increasingly reliable partisan voting patterns); Bartels, *supra* note 69, at 44 (same); Bafumi & Shapiro, *supra* note 34, at 1 (same); Delia Baldassarri & Andrew Gelman, *Partisans Without Constraint: Political Polarization and Trends in American Public Opinion*, 114 AM. J. SOCIO. 408, 414 (2008) (“[P]artisan loyalties have started to count more, to the point that, in the middle of the 1990s, their impact on voting behavior reached its highest level in at least 50 years.”); Corwin D. Smidt, *Polarization and the Decline of the American Floating Voter*, 61 AM. J. POL. SCI. 365, 379 (2017) (“Americans now exhibit the highest observed rates of party allegiance when voting across successive presidential elections.”).

¹⁹⁴ LEVENDUSKY, *supra* note 39, at 9.

Mass hyperpolarization also has made voter persuasion more difficult even when campaigns make the effort to sway whatever undecided and persuadable voters remain out there. Realignment of liberal and conservative voters has sorted liberals into a liberal Democratic Party and conservatives into a conservative Republican Party.¹⁹⁵ The Pew Research Center estimates that just 7% of the entire electorate could be characterized as a persuadable independent.¹⁹⁶ Not only are there fewer mismatched and therefore “cross-pressured” voters susceptible to campaign persuasion, but partisan voters today are more entrenched in their party-consensus views across a broader range of issues.¹⁹⁷ Even independent voters display greater ideological consistency today and more fixed orientations toward the major parties.¹⁹⁸ Campaign finance thus purchases less persuasive advocacy today than it did during the Cold War because there are not as many persuadable voters out there to receive it.

As a result, persuasive appeals to undecided voters are less effective under current conditions of hyperpolarization. Campaigning simply encourages hyperpolarized voters to resist contrary advocacy and to retreat to their partisan sides. When partisanship is activated, as it always is during election campaigning,¹⁹⁹ political scientists find in experimental and survey analyses that partisan voters actually double down on their partisanship.²⁰⁰ Rather than challenge their partisan predispositions, partisan voters facing cross-pressures instead engage in motivated reasoning, ignore strength of substantive argument, and express greater loyalty to their original partisan position.²⁰¹

¹⁹⁵ See Matthew S. Levendusky, *The Microfoundations of Mass Polarization*, 17 POL. ANALYSIS 162, 174 (2009); Matthew S. Levendusky, *Clearer Cues, More Consistent Voters: A Benefit of Elite Polarization*, 32 POL. BEHAV. 111, 117 (2010) [hereinafter Levendusky, *Clearer Cues*].

¹⁹⁶ See Julia Manchester, *Partisan Divisions Sharpen as Independent Voters Fade*, HILL (Sept. 17, 2019, 6:00 AM), <https://thehill.com/homenews/campaign/461669-partisan-divisions-sharpen-as-independent-voters-fade>; see also Aaron Blake, *A Record Number of Americans Claim to Be Independent. They Are Kidding Themselves.*, WASH. POST (Jan. 8, 2015, 6:30 AM), <https://www.washingtonpost.com/news/the-fix/wp/2015/01/08/a-record-number-of-americans-claim-to-be-independent-they-are-kidding-themselves/>.

¹⁹⁷ See, e.g., Baldassari & Gelman, *supra* note 193, at 440 (“[T]he relation between people’s political attitudes and their party identification of political ideology has tightened.”); Andrew Garner & Harvey Palmer, *Polarization and Issue Consistency over Time*, 33 POL. BEHAV. 225, 226 (2011); Levendusky, *Clearer Cues*, *supra* note 195, at 117; Layman et al., *supra* note 65.

¹⁹⁸ See Smidt, *supra* note 193, at 379.

¹⁹⁹ See Gary C. Jacobson, *How Do Campaigns Matter?*, 18 ANN. REV. POL. SCI. 31, 40 (2015) (explaining that campaigns prime partisans and that presidential elections in particular are polarizing events).

²⁰⁰ See James N. Druckman, Erik Peterson & Rune Slothuus, *How Elite Partisan Polarization Affects Public Opinion Formation*, 107 AM. POL. SCI. REV. 57, 68 (2013); Alan S. Gerber, Gregory A. Huber & Ebonya Washington, *Party Affiliation, Partisanship, and Political Beliefs: A Field Experiment*, 104 AM. POL. SCI. REV. 720, 742 (2010); Geoffrey L. Cohen, *Party Over Policy: The Dominating Impact of Group Influence on Political Beliefs*, 85 J. PERSONALITY & SOC. PSYCH. 808, 819 (2003); Levendusky, *Clearer Cues*, *supra* note 195, at 117.

²⁰¹ See, e.g., Druckman et al., *supra* note 200, at 68; Benjamin E. Lauderdale, *Partisan Disagreements*

Hyperpolarization therefore complicates traditional campaign efforts to expand one's partisan base by persuading cross-pressured voters.

In response to hyperpolarization, modern campaigns have shifted their traditional focus toward turnout rather than persuasion. As Costas Panagopoulos observes, “campaigns are devoting growing attention to mobilizing devoted partisans rather than to convincing ‘swing’ or otherwise persuadable voters.”²⁰² He found that the parties contacted strong partisan and independent voters at roughly the same rate from 1956 to 1996, reflecting equal interest in wooing uncommitted voters and in mobilizing their partisan base.²⁰³ Since then, the parties have placed growing emphasis on base mobilization such that the major parties have increased their contact rate for strong partisans at twice the rate for independents.²⁰⁴ In the process, the parties and their campaigns are implementing insights from empirical studies that established campaign spending is best used to boost partisan turnout rather than persuade swing voters. By the 2000s, political science had demonstrated conclusively that traditional campaign efforts to influence most voters' preferences over candidates were basically ineffective.²⁰⁵ By contrast, however, political science revealed that campaign efforts to stimulate voter turnout among sympathetic voters had comparatively large effects, particularly when done through face-to-face contact.²⁰⁶

Arising from Rationalization of Common Information, 4 POL. SCI. RSCH. & METHODS 477, 490 (2016).

²⁰² Costas Panagopoulos, *All About That Base: Changing Campaign Strategies in U.S. Presidential Elections*, 22 PARTY POL. 179, 180 (2016); see also Lizza, *supra* note 184 (“[A]s the electorate has become increasingly polarized, campaign tacticians have become [focused] more on getting their own voters to the polls than on persuading others to change their allegiance.”).

²⁰³ Panagopoulos, *supra* note 202, at 183–84.

²⁰⁴ See *id.*; see also Ryan D. Enos & Anthony Fowler, *Aggregate Effects of Large-Scale Campaigns on Voter Turnout*, 6 POL. SCI. RSCH. & METHODS 733, 747–48 (2016) (finding statistical impact of new emphasis on base mobilization in the increasing turnout differential between battleground and non-battleground states beginning in 2000).

²⁰⁵ See generally Joshua L. Kalla & David E. Broockman, *The Minimal Persuasive Effects of Campaign Contact in General Elections: Evidence from 49 Field Experiments*, 112 AM. POL. SCI. REV. 148, 148 (2018) (estimating the persuasive effects of campaign contact and advertising in general elections as “zero”); Alan S. Gerber, James G. Gimpel, Donald P. Green & Daron R. Shaw, *How Large and Long-Lasting Are the Persuasive Effects of Televised Campaign Ads? Results from a Randomized Field Experiment*, 105 AM. POL. SCI. REV. 135 (2011) (finding an advertisement's effects to “have all but disappeared” after a week or two). *But see* Michael M. Franz & Travis Ridout, *Does Political Advertising Persuade?*, 29 POL. BEHAV. 465, 475 (2007) (demonstrating that political advertisements persuade); James N. Druckman, *Priming the Vote: Campaign Effects in a U.S. Senate Election*, 25 POL. PSYCH. 577, 591–92 (2004) (same).

²⁰⁶ Druckman, *supra* note 205, at 591; Enos & Fowler, *supra* note 204, at 735, 743–44; Alan S. Gerber & Donald P. Green, *The Effects of Canvassing, Telephone Calls, and Direct Mail on Voter Turnout: A Field Experiment*, 94 AM. POL. SCI. REV. 653, 661 (2000).

New advances in computing and voter data, along with new willingness to implement social scientific approaches, produced unprecedented sophistication in outreach to boost turnout among friendly voters.²⁰⁷ The parties and their campaigns were suddenly able to micro-target specific voters, identified for their favorable demographics and observable behavior, as potential in-party voters and tailor face-to-face or Internet outreach specifically to encourage them to vote.²⁰⁸ No longer were campaigns limited to mass advertising, mainly through network television, with the same message received by committed partisans, undecided independents, and out-party voters alike.²⁰⁹ This shifting campaign focus toward base mobilization was both inspired by hyperpolarization and by helping to “creat[e] an electorate comprised increasingly of committed partisans and ideologues.”²¹⁰ Campaign finance thus preaches to the converted more than it did during the Cold War and arguably serves First Amendment interests less, or at least far differently, today than it did during the Cold War.²¹¹ More recent shifts to campaign spending on social media, rather than broadcast advertising, have accelerated all these trends even further.²¹²

In sum, the limited Cold War conception of corruption in campaign finance has become outdated by today’s party politics, and the countervailing case against regulation based on the First Amendment interests served by campaign finance has become correspondingly weaker. For these reasons, the Cold War constitutional framework for campaign finance law no longer captures the constitutional stakes surrounding today’s hyperpolarized campaign finance and party politics.

That said, if the constitutional case for campaign finance regulation is stronger today under hyperpolarization than it was during the Cold War Era, there is at least one Cold War rationale for regulation that does seem *weaker*

²⁰⁷ See generally SASHA ISSENBERG, *THE VICTORY LAB: THE SECRET SCIENCE OF WINNING CAMPAIGNS* (2013) (showing how technology and data are used to maximize voter turnout); David W. Nickerson & Todd Rogers, *Political Campaigns and Big Data*, 28 J. ECON. PERSPS. 51, 70 (2014) (same).

²⁰⁸ See HILLYGUS & SHIELDS, *supra* note 42, at 160 (quoting a political consultant explaining that “[y]ou don’t have to shotgun anymore. You can now bullet.”); Nickerson & Rogers, *supra* note 207, at 58 (“[C]ampaigns are able to predict with greater accuracy which citizens will *support* their candidates and issues better than which citizens will *oppose* their candidates or issues.”).

²⁰⁹ See Vincent Raynauld & André Turcotte, “*Different Strokes for Different Folks*”: *Implications of Voter Micro-Targeting and Appeal in the Age of Donald Trump*, in *POLITICAL MARKETING IN THE 2016 U.S. PRESIDENTIAL ELECTION* 11, 15–16 (Jamie Gillies ed., 2018).

²¹⁰ Panagopoulos, *supra* note 202, at 188.

²¹¹ Briffault, *supra* note 144, at 626–27.

²¹² See Kate Gibson, *Spending on U.S. Digital Political Ads to Top \$1 Billion for First Time*, CBS NEWS (Feb. 12, 2020, 6:10 PM), <https://www.cbsnews.com/news/spending-on-us-digital-political-ads-to-cross-1-billion-for-first-time/>.

today.²¹³ In the 1990 case *Austin v. Michigan Chamber of Commerce*, the Court upheld a state ban on independent expenditures by corporations based on what has been described as an anti-distortion interest in campaign finance regulation.²¹⁴ The anti-distortion interest targets the prevention of a “different type of corruption in the political arena” than the usual quid pro quo conception articulated in *Buckley*.²¹⁵ Instead, this anti-distortion interest, as the Court explained in *Austin*, allowed the government to offset “the corrosive and distorting effects of immense aggregations of wealth” through the corporate form and therefore “have little or no correlation to the public’s support for the corporation’s political ideas.”²¹⁶ The Court agreed the government had a legitimate concern about “the threat that huge corporate treasuries . . . will be used to influence unfairly the outcome of elections.”²¹⁷ *Austin* was overruled twenty years later by *Citizens United*,²¹⁸ but its anti-distortion rationale remains a touchstone in campaign finance law for reformers who worry that the “wealthy and powerful” may be able to “exert an undue influence” on election results by “drown[ing] out other points of view.”²¹⁹

Although there is more than one plausible construction of *Austin*’s anti-distortion rationale,²²⁰ I focus on anti-distortion as primarily aimed at protecting the integrity of election outcomes. From this perspective, a government interest in anti-distortion targets the potential translation of corporate spending advantages into unfair influence over voters and thus ultimately into election outcomes skewed toward corporate preferences.²²¹ This concern, that corporate wealth will successfully “fund communications to convince voters to select certain candidates over others,” is a common worry in campaign finance.²²² As Dan Ortiz famously framed the concern, it presupposes disengaged voters—so-called “civic slackers”—decide how to vote by responding to campaign advertising without deeper reflection about their interests and civic responsibility, and therefore will be particularly susceptible to asymmetric

²¹³ Thanks to Nick Stephanopoulos for his help with this insight on an earlier version of this project.

²¹⁴ *Austin v. Mich. State Chamber of Com.*, 494 U.S. 652, 659–60 (1990).

²¹⁵ *Id.*

²¹⁶ *Id.* at 660.

²¹⁷ *Id.* at 669.

²¹⁸ *Citizens United v. FEC*, 558 U.S. 310, 365 (2010).

²¹⁹ *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 789 (1978).

²²⁰ See, e.g., RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE* 111–14 (2003) (arguing that *Austin*’s anti-distortion rationale simply repackaged equality rationales for campaign finance regulation).

²²¹ See Stephanopoulos, *Elections and Alignment*, *supra* note 173, at 1460.

²²² *McConnell v. FEC*, 540 U.S. 93, 274 (2003) (Thomas, J., concurring in part and dissenting in part).

spending that corporations would threaten to pour into elections.²²³ However salient this worry is in the abstract, the rise of hyperpolarization actually makes these anti-distortion concerns *less* credible today than they have been since *Buckley*. The reason is that hyperpolarization has incentivized the major parties and their candidates to be less focused on persuading so-called undecided voters, Ortiz's civic slackers, than they have been in decades.²²⁴

Against this background, it is harder to sustain an argument that campaign finance regulation is necessary for anti-distortion purposes. Campaign finance spending is increasingly used to mobilize nonvoters to vote precisely because they are likely to vote according to their predictably partisan preferences.²²⁵ In this sense, campaign spending in today's hyperpolarized politics appear *less* likely to produce election results that "have little or no correlation to the public's support."²²⁶ The spending of the major parties is directed not at persuading voters against their likely preferences or interests and thereby distorting election outcomes, but instead is directed at activating likely partisans simply to turn out and vote according to their interests and preexisting predispositions. Voting by newly activated citizens along these lines cannot be indicted as the voting by "careless way" that Dan Ortiz cautions against in his exposition on civic slackers and campaign finance law.²²⁷ Their votes are targeted for partisan mobilization and likely to be responsive to mobilization outreach, because they do not require persuasion and instead predictably mirror voting patterns by similarly situated citizens who reliably vote along partisan lines.²²⁸ They quietly possess partisan leanings in the first place and already were predisposed to vote as the parties prevail on them to do. Campaign spending by the major parties arguably makes election results *more* democratically representative, in this particular respect, by underwriting participation and shaping the electorate to more closely match the overall population. As the parties redirect campaign finance toward partisan

²²³ Daniel R. Ortiz, *The Democratic Paradox of Campaign Finance Reform*, 50 STAN. L. REV. 893, 902–04 (1998).

²²⁴ David Freedlander, *An Unsettling New Theory: There Is No Swing Voter*, POLITICO (Feb. 6, 2020, 5:09 AM), <https://www.politico.com/news/magazine/2020/02/06/rachel-bitecofer-profile-election-forecasting-new-theory-108944> (quoting political scientist Rachel Bitecofer's assessment that, "[i]n the polarized era, the outcome isn't really about the candidates. What matters is what percentage of the electorate is Republican and Republican leaners, and what percentage is Democratic and Democratic leaners, and how they get activated").

²²⁵ See *id.*

²²⁶ *Austin v. Mich. State Chamber of Com.*, 494 U.S. 652, 660 (1990).

²²⁷ Ortiz, *supra* note 223, at 913. That said, partisan mobilization of previous inactive voters still may not fulfill the deliberative ideals Ortiz sets forth as democratically normative. *Id.* at 901–05.

²²⁸ See ISSENBERG, *supra* note 207, at 48; Nickerson & Rogers, *supra* note 207, at 54–55 (discussing predictive scores); HILLYGUS & SHIELDS, *supra* note 42, at 157–61 (explaining how campaigns identify friendly voters for micro-targeting).

mobilization instead of persuasion, the case for anti-distortion as a regulatory rationale seems to become less compelling in this limited sense.

CONCLUSION

Hyperpolarization has important consequences for both campaign finance and campaign finance law. On the one hand, the origins of modern campaign finance law during the 1970s assumed political parties as important, but less pivotal than the critical hubs for campaign finance activity than they are now. Campaign finance law, as a result, misses crucial ways that the parties and party relationships mediate so much of how modern campaign finance operates, as well as how and why political money flows through the channels it does today. Furthermore, as the number of uncommitted voters has shrunk and campaign practices has correspondingly shifted, campaign finance no longer serves the First Amendment interest in public persuasion and political education quite as strongly as it did during the Cold War Era. On the other hand, the specific case for campaign finance regulation based on anti-distortion, a classic intuition from *Austin* about how political spending skews election outcomes from the underlying distribution of public opinion, appears somehow less compelling today for much the same reasons.

The important upshot is that campaign finance law, just like the law of redistricting and election administration, originated during an exceptional period of American history marked by unusually low levels of partisanship and polarization that no longer applies today. Like the other areas of election law, campaign finance law, too, would function more sensibly if it challenges and updates its underlying assumptions about the central role parties and partisanship play in today's hyperpolarized political environment.

Campaign finance law itself has been a viciously partisan battlefield, with Democrats favoring regulation and Republicans staking out an aggressively deregulatory posture on campaign finance regulation. The Federal Election Commission has been largely deadlocked in a partisan stalemate for a decade as a result.²²⁹ That said, at least by comparison to redistricting and election administration, campaign finance law arguably has been somewhat less prone to strategic manipulation of election rules for partisan advantage. The major

²²⁹ See, e.g., Kate M. Harris, Case Note, *Judicial Review of Deadlock Votes*: Campaign Legal Center & Democracy 21 v. Federal Election Commission (*D.C. Cir. 2020*), U. CHI. L. REV. ONLINE (Aug. 18, 2020), <https://lawreviewblog.uchicago.edu/2020/08/18/fec-deadlock-harris/>; Editorial, *Elections in Peril with Decimated Federal Election Commission*, SEATTLE TIMES (Sept. 3, 2019), <https://www.seattletimes.com/opinion/editorials/elections-in-peril-with-decimated-fec/>.

parties' positions on campaign finance law seem driven by ideology as much as partisan self-interest. The parties' opposed positions on the Bipartisan Campaign Reform Act, for instance, are hard to explain otherwise.²³⁰ As polarized as the parties remain, however, the next stage for the hyperpartisan development of campaign finance law may be exactly the same strategic manipulation of election rules that we have seen in redistricting and election administration. The partisan incentives are the same in campaign finance law, and the opportunities likely no less.

²³⁰ See Evan Stephenson, Note, *Game Theory and the Passage of McCain-Feingold: Why the Democrats Willingly and Rationally Disadvantaged Themselves*, 19 J.L. & POL. 425, 426 (2003). But see ALEC MACGILLIS, *THE CYNIC: THE POLITICAL EDUCATION OF MITCH MCCONNELL* 54, 64–65 (2014) (arguing that Mitch McConnell's campaign finance positions were motivated by partisan self-interest).