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Cover Page Footnote

* Professor of Political Science, Department of Political Science, The University of Oklahoma. We thank the editors of the Fordham Urban Law Journal for inviting our submission, and for their comments and help in preparation in finalizing the Article. An earlier version of this paper was presented at the annual meeting of the Southern Political Science Association, New Orleans, LA, January 5-9, 2005. We thank Alan Abramowitz, Bruce I. Oppenheimer, and Richard Forgette for their comments and suggestions, though they bear no responsibility for the opinions or interpretation contained herein.

FROM ASHCROFT TO LARIOS: RECENT REDISTRICTING LESSONS FROM GEORGIA

Ronald Keith Gaddie and Charles S. Bullock, III***

Redistricting is the most nakedly partisan activity in American politics. The decennial activity of allocating political power results in conflict among regional, partisan, racial, and ethnic communities of interest.¹ Political science research generally acknowledges that when one party completely controls the redistricting process it will perpetuate its majority even if doing so unfairly disadvantages the minority party.² Tendencies toward political excess are most likely to be deterred when redistricting is done by (1) a non-partisan commission; (2) a divided government, forcing bipartisan cooperation; or (3) the judiciary, working with third-party, neutral mapmakers to check majority excesses.³

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1. See generally DAVID LUBLIN, *THE PARADOX OF REPRESENTATION* (1999); MARK E. RUSH, *DOES REDISTRICTING MAKE A DIFFERENCE? PARTISAN REPRESENTATION AND ELECTORAL BEHAVIOR* (1993) (discussing the gerrymandering controversy). But see generally Kevin A. Hill, *Does the Creation of Majority Black Districts Aid Republicans? An Analysis of the 1992 Congressional Elections in Eight Southern States*, 57 J. POL. 384 (1995) (arguing that the creation of majority-black electoral districts in the south aids Republicans); L. Marvin Overby & Kenneth M. Cosgrove, *Unintended Consequences? Racial Redistricting and the Representation of Minority Interests*, 58 J. POL. 540 (1996) (arguing that “packing” minority constituents into “majority-minority” districts results in representatives becoming less sensitive to the concerns of the black community).

2. See, e.g., Alan A. Abramowitz, *Partisan Redistricting and the 1982 Congressional Elections*, 45 J. POL. 767, 770 (1983).

3. See BRUCE CAIN, *THE REAPPORTIONMENT PUZZLE 2-4* (1984) (discussing all three methods); see also DAVID BUTLER & BRUCE CAIN, *CONGRESSIONAL REDISTRICTING: COMPARATIVE AND THEORETICAL PERSPECTIVES* 113-14, 145-48 (1992) (discussing the role of the judiciary and non-partisan redistricting bodies). But see Richard G. Niemi & Alan A. Abramowitz, *Partisan Redistricting and the 1992 Con-*

The 2001 Georgia redistricting was a blatant exercise of power by a political majority bent on self-perpetuation.⁴ By the mid-1990s, Democrats had ceased to attract a majority of the votes for state legislators, yet they continued to win a majority of seats in both chambers.⁵ When confronted with the need to redistrict, Democrats sought not simply to hold their own but to increase their share of the seats. The redistricting led to two judicial challenges, two trips to the U.S. Supreme Court,⁶ a modification of the non-retrogression standard of Section 5 of the Voting Rights Act by the United States Supreme Court,⁷ and, ultimately, invalidation of the districts for violating the one-person, one-vote principle.⁸

In *Larios v. Cox*, the court implemented a replacement map crafted by a special master named by the three-judge panel.⁹ The court largely ignored political factors in deference to traditional redistricting principles and on April 14, 2004, produced a map with population deviations of less than +/-1%.¹⁰ After the implementation of this politically-neutral plan, the Democratic party lost control of the Georgia House of Representatives for the first time

gressional Elections, 56 J. POL. 813 (1994) (discussing the effects of partisan control of state government on partisan gains from redistricting).

4. See David Pendered, *Senate Passes Redrawn Districts*, ATLANTA J.-CONST., Aug. 11, 2001, at A1 [hereinafter Pendered, *Redrawn Districts*].

5. Charles S. Bullock, III, *Georgia: Still the Most Democratic State in the South?*, in THE NEW POLITICS OF THE OLD SOUTH 53, 65 (Charles S. Bullock, III & Mark J. Rozell eds., 2d ed. 2003) [hereinafter Bullock, *Still the Most Democratic State in the South?*].

6. See *Cox v. Larios*, 542 U.S. 947 (2004); *Georgia v. Ashcroft*, 539 U.S. 461 (2003).

7. See *Ashcroft*, 539 U.S. at 479-85 (interpreting Sections 2 and 5 of the Voting Rights Act to uphold Georgia's actions).

8. See *Larios v. Cox*, 300 F. Supp. 2d 1320, 1322 (N.D. Ga. 2004). Georgia has had some of its legislative districts overturned by federal courts in each of the last two decades. In the 1990s, two of the state's congressional districts were rejected due to race-based gerrymandering in *Miller v. Johnson*, 515 U.S. 900 (1995). More recently, state legislative districts were struck down for population violations in *Larios*, 300 F. Supp. 2d 1320. See generally Charles S. Bullock, III, *Two Generations of Redistricting: An Overview*, EXTENSIONS (Fall 2004), available at <http://www.ou.edu/special/albertctr/extensions/fall2004/Bullock.html>.

9. See *Larios*, 300 F. Supp. 2d at 1358; see also Rhonda Cook, *Legislature 2004: Reprieve for Some; Races Among Colleagues Are Reduced*, ATLANTA J.-CONST., Mar. 25, 2004, at E4; Rhonda Cook, *Maps Ready, Parties Set to Fight*, ATLANTA J.-CONST., Mar. 26, 2004, at A1.

10. See *Larios*, 300 F. Supp. 2d at 1349. Court-crafted maps are held to a de minimus standard for population deviations—as small as is reasonably possible. No bright line figure exists for this determination, but because the central constitutional defect of the maps in this litigation was population deviations, the very small deviations of the court's remedy are worth noting. See *infra* text accompanying notes 335-336.

since Reconstruction.¹¹ Statistical patterns present in the 2002 legislative elections, when applied to the demographic and structural changes in the new districts, projected a Republican majority with a shift in the expected partisan majority between ten and thirteen districts.¹² In actuality Republicans gained far more seats, and only about half of the seats changing hands can be attributed to the remap.¹³ The remap demonstrates the potential consequences of undoing a partisan gerrymander and helps define the limitations enunciated by the courts regarding their ability to recognize and undo partisan gerrymanders.

In this Article, we explore the impact of a court-ordered and implemented re-crafting of state legislative districts in the state of Georgia. First, we explore the notion of “fairness” in legislative redistricting and identify the factors associated with a “fair” map. We then describe the partisan nature of the 2001 Georgia state legislative redistricting and the political consequences of this most effective gerrymander. We also describe the two legal challenges to the Georgia maps—*Georgia v. Ashcroft* and *Larios v. Cox*—and discuss the path of both cases to the U.S. Supreme Court. We then explore the expected and observed consequences of the Court-ordered and implemented redistricting that undid the unconstitutional Georgia gerrymander, and draw conclusions regarding the prospect for how court remedies can affect partisan bias in redistricting plans.

WHAT ARE “FAIR” LEGISLATIVE MAPS?

The controversies arising in redistricting relate to a pair of primary questions: what are the motives of the map-maker, and how do these motives affect the “fairness” of a map? These questions are difficult to address because the notion of fairness is arbitrary and relative.¹⁴ The term “gerrymander” means to craft legislative

11. See Charles S. Bullock, III, *Georgia: The GOP Finally Takes Over*, in *THE NEW POLITICS OF THE OLD SOUTH* 49, 51 (Charles S. Bullock, III & Mark J. Rozell eds., 3d ed. 2007) [hereinafter Bullock, *GOP Finally Takes Over*].

12. The analytic foundation for this statement appears in tbl. 7, *infra*.

13. A remap is the act of re-crafting legislative districts; remaps usually occur only every ten years, after the census, or in order to correct a legal defect in the existing maps that must be corrected.

14. For an overview of these issues, see CAIN, *supra* note 3, at 74-77; RUSH, *supra* note 1, at 59-63; see generally MARK E. RUSH & RICHARD L. ENGSTROM, *FAIR AND EFFECTIVE REPRESENTATION? DEBATING ELECTORAL REFORM AND MINORITY RIGHTS* (2001).

boundaries for political advantage.¹⁵ In popular parlance, contorted, oddly-shaped districts resembling mythical beasts, windshield-splattered bugs, or elongated barbells are considered to indicate something facially “unfair.”¹⁶ Districts of conventional geometric shape, such as squares, rectangles, and hexagons, are less questionable.¹⁷ It is also possible to gerrymander for advantage without violating compactness and using normal shapes, but to do so is far from easy and likely leads to some waste relative to the goals of those who gerrymander.¹⁸ The Georgia redistricting of 2001 raised all of these questions, as legislative districts became less compact, less respectful of political subdivisions, stretched notions of contiguity, and tested the limits of population inequality.¹⁹

Population Equality

Once the judiciary decided to ignore Justice Frankfurter’s admonition to avoid the political thicket and not interfere with legislative decisions allocation,²⁰ the courts’ initial concern focused on differences in the numbers of residents per district.²¹ Courts interpreted the Equal Protection Clause and Article I of the U.S. Constitution to require that all collegial bodies that chose representatives from districts equalize the population among their districts.²² *Karcher v. Daggett* reiterated the standard for population variations in congressional districts, stating, “absolute population equality [must] be the paramount objective of apportionment

15. While this is a commonly-accepted definition, it can be found in WEBSTER’S UNABRIDGED DICTIONARY (2d ed. 1987).

16. See, e.g., *Miller v. Johnson*, 515 U.S. 900, 913 (1995); *Shaw v. Hunt*, 861 F. Supp. 408, 431 (E.D.N.C. 1994); *Hays v. Louisiana*, 839 F. Supp. 1188, 1195 (W.D. La. 1993), *vacated*, 512 U.S. 1230 (1994).

17. See Richard H. Pildes & Richard G. Niemi, *Expressive Harm*, “Bizarre Districts,” and *Voting Rights: Evaluating Election-District Appearance After Shaw v. Reno*, 92 MICH. L. REV. 483, 549 (1993) (stating that districts may be judged by the “regularity or length of their perimeters”).

18. See generally Richard G. Niemi et al., *Measuring Compactness and the Role of Compactness Standards in a Test for Partisan and Racial Gerrymandering*, 52 J. POL. 1155 (1990); see also generally Micah Altman, *Traditional Redistricting Principles: Judicial Myths v. Reality*, 22 SOC. SCI. HIST. 159, 163-66 (1998).

19. See Tom Baxter, *Democrats’ Map Draws GOP Venom*, ATLANTA J.-CONST., Aug. 7, 2004, at B8; Pendered, *Redrawn Districts*, *supra* note 4, at A6; David Pendered, *Senate Remap Vote Set Today*, ATLANTA J.-CONST., Aug. 8, 2004, at B4.

20. See *Colegrove v. Green*, 328 U.S. 549, 552 (1946) (holding a challenge to population inequality among districts non-justiciable).

21. See *Baker v. Carr*, 369 U.S. 186, 206 (1962) (finding a Tennessee challenge to population differences among districts justiciable).

22. See, e.g., *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969); *Wesberry v. Sanders*, 376 U.S. 1 (1964).

2007] *REDISTRICTING LESSONS FROM GEORGIA* 1001

[because] the command of Art. I, § 2 as regards the national legislature outweighs the local interests that a State may deem relevant in apportioning districts for representatives to state and local legislatures.”²³ Ultimately, the Supreme Court signaled that state legislative plans that limited the range in population across their districts to no more than 10% were presumed to comply with the equal population requirement.²⁴

Dilution of Minority Political Influence

After population equality, the second most important requirement when assessing districting plans is that they not dilute minority political influence. Georgia, along with Alabama, Louisiana, Mississippi, South Carolina, Virginia, about half of North Carolina, and parts of eight other states must prove the racial fairness of their districting plans as a result of being subject to Section 5 of the 1965 Voting Rights Act.²⁵ This legislation and its subsequent amendments require jurisdictions with low levels of participation in the 1960s and 1970s to submit all legislation that changes election laws or procedures to either the Attorney General of the United States or the district court of the District of Columbia for review and approval before implementation (“preclearance”).²⁶ Districting plans are among the types of legislative changes requiring federal approval.²⁷ The initial legislation sought to protect African-Americans, but the 1975 amendments expanded preclearance requirements to linguistic minorities such as Latinos, Native Americans, and Asian Americans.²⁸

Districting plans in jurisdictions not subject to the preclearance provision of the Voting Rights Act may be challenged by minorities who believe that their political influence has been diluted, or by

23. *See* 462 U.S. 725, 732-33 (1983).

24. *See, e.g.*, *Voinovich v. Quilter*, 507 U.S. 146 (1993) (stating that a maximum deviation of 10% is a minor one); *Brown v. Thomson*, 462 U.S. 835, 842 (1983) (same).

25. Voting Rights Act of 1965, Pub. L. No. 89-110, tit. I, § 5, 79 Stat. 437, 439. Subsequent revisions of Section 4 of the statute extended coverage to Alaska, Arizona, Texas, and parts of Florida, South Dakota, New Hampshire, Michigan, California, and New York. Pub. L. No. 94-73, tit. 2, § 206, 89 Stat. 400 (1975).

26. § 5, 79 Stat. 439.

27. *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969) (prohibiting a state from enacting “any voting qualification” not in force before November 1, 1964 without first submitting the change for preclearance review).

28. § 206, 89 Stat. 402; *see generally* ABIGAIL THERNSTROM, *WHOSE VOTES COUNT?* (1987).

the U.S. Attorney General.²⁹ The preclearance provision of Section 5 applies to only 16 states; the entire nation is subject to Section 2 of the Voting Rights Act as amended in 1982.³⁰

The standard applied by federal authorities in the course of preclearance has been non-retrogression.³¹ For most of the time since its inception, non-retrogression has barred new maps that reduce the number of districts in which a protected minority constituted a majority of the population. A second application forbade reducing the minority population percentage in districts in which they constituted a majority.³² This has allowed federal authorities to ensure that concentrations of minority group members not be dispersed in the course of redistricting.³³

Continuity of Representation

Several additional factors may be considered in the course of drawing new districts, although these are afforded less significance than equal population and the fair treatment of minorities.³⁴ An additional consideration has been the treatment of incumbents and their constituencies, with attention specifically on questions of political or partisan fairness.³⁵ The treatment of incumbents usually focuses on three aspects:

(1) Continuity of representation: what proportion of an incumbent's new constituency comes from the old constituency, i.e. does the new map retain the core of the old district?³⁶

29. § 5, 79 Stat. 439.

30. Pub. L. No. 97-205, § 3, 96 Stat. 131 (1982).

31. See *Reno v. Bossier Parish Sch. Bd. (Bossier Parish II)*, 528 U.S. 320 (2000); *Beer v. United States*, 425 U.S. 130 (1976).

32. This requirement was most recently reaffirmed in *League of United Latin American Citizens (LULAC) v. Perry*, 126 S. Ct. 2594 (2006). The oddity of this decision is that most believed that a district which performed for minority voters (Texas congressional district 25) was implicitly overturned in order to reconstitute a district that could potentially perform for minority voters but did not (Texas congressional district 23), ostensibly because it was less compact. *Id.* at 2626. But, an even less-compact minority district that performed was retained in the map as legal (Texas congressional district 15). *Id.* at 2656 (Roberts, C.J., dissenting).

33. See *Beer*, 425 U.S. at 130.

34. See *Upham v. Seamon*, 456 U.S. 37, 39 (1982) (per curiam).

35. See *Good v. Austin*, 800 F. Supp. 557, 567 (E.D. Mich. 1992).

36. See *White v. Weiser*, 412 U.S. 783, 790 (1973) (discussing state interest in preserving "constituency-representative relations").

(2) Political balance and continuity of the reelection constituency: how does the partisanship of the new district compare to the old district?³⁷

(3) Pairings: are incumbents paired so they must run against each other? Are the pairings competitive? Are they party-neutral or do the pairings advantage one party over the other?³⁸

On the other hand, protection of incumbents is a traditional districting principle that a legislature may consider.³⁹ Incumbent protection is limited to the extent that it must give way in the face of higher priorities that have been recognized by courts—equal population and equitable treatment of minorities.⁴⁰ In assessing the fairness of maps, biased treatment of incumbents by region or party can be important. Treatment of incumbents may indicate a general partisan bias in map design. When changes in party competitiveness, core retention, and incumbent pairing fall disproportionately and detrimentally on incumbents of one party, and are not a product of the pursuit of population equality, racial fairness, or other traditional redistricting principles, this can constitute evidence of partisan gerrymandering.⁴¹ Thus, incumbency may be subordinated to other redistricting principles.

Partisan Fairness

Of all the fairness concerns in redistricting, none has proven more elusive than partisan fairness. Representative political systems rest on a presumption that preferences will be efficiently translated into government, and, more specifically, that majority preferences will translate into majority government. The earliest successful challenges to malapportioned legislatures came in the

37. See *Gaffney v. Cummings*, 412 U.S. 735, 735 (1973) (holding interest in “political balancing” not to be an infirmity to an otherwise constitutional redistricting plan).

38. See *Karcher v. Daggett*, 462 U.S. 725, 740 (1983).

39. See *Bush v. Vera*, 517 U.S. 952, 964 (1996). Incumbent protection must be consistent and neutral. See, e.g., *Brown v. Thomson*, 462 U.S. 835, 845-46 (1983).

40. See *Abrams v. Johnson*, 521 U.S. 74 (1997) (discussing traditional principles and their subordination); *Voinovich v. Quilter*, 507 U.S. 146, 153 (1993) (same).

41. See *Cox v. Larios*, 542 U.S. 947, 949 (2004) (Stevens, J., concurring) (“The district court correctly held that the drafters’ desire to give an electoral advantage to . . . certain incumbents . . . did not justify the conceded deviations from the principle of one person, one vote.”); see also *LULAC v. Perry*, 126 S. Ct. 2594, 2636 n.5 (2006) (Stevens, J., dissenting in part and concurring in part) (describing “regional favoritism” and “discriminatory protection of . . . incumbents” as impermissible factors).

one-party states of Tennessee, Alabama, and Georgia.⁴² While the motivation for these suits was not partisan, the notion that a system of fair representation should not disfranchise the majority to benefit a geographic minority assumed a new place in constitutional law.

Partisan fairness has gained little traction in the courts as a factor for evaluating gerrymanders. A majority of the Supreme Court appears to believe that partisan gerrymanders are justiciable, but the court has never enunciated a standard that a plaintiff has been able to meet. Most recently in the case of *Vieth v. Jubelirer*, congressional redistricting in Pennsylvania gave the Court an opportunity to revisit issues of partisan fairness. Pennsylvania's Republican-controlled state legislature and governor implemented a congressional map that resulted in Republican advantage across numerous more districts. Litigation made its way to the Supreme Court, which indicated that a constitutional standard has not been obtained by those who seek to eliminate partisan bias in district designs.⁴³

The Supreme Court, in *Davis v. Bandemer*, held that partisan gerrymanders were illegal only if they precluded all hope of success and all input by the minority party into the political process, a standard so impossibly high that no redistricting product has been invalidated.⁴⁴ Indeed, partisan unfairness is recognized as a reason for crafting constituencies that might otherwise be seen as illegal racial gerrymanders. In *Easley v. Cromartie*, the Supreme Court found no violation of the Equal Protection Clause in an alleged racial gerrymander because partisanship was as good an explanation as race for the shape of the challenged congressional district.⁴⁵

When re-drawing electoral maps, courts take partisan fairness into consideration. When forced to correct defective maps, courts have taken pains to avoid advantaging one political party, lest the court be guilty of gerrymandering.⁴⁶ These same courts have asserted, however, that because their job is to remedy legal defects

42. See generally *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Baker v. Carr*, 206 F. Supp. 341, 349 (C.D. Tenn. 1962) (reviewing state legislative redistricting plan on remand from U.S. Supreme Court).

43. See *LULAC*, 126 S. Ct. at 2607 (remarking on the lack of a manageable, recognizable standard for observing and adjudicating partisan gerrymanders); *Vieth v. Jubelirer*, 541 U.S. 267, 271 (2004) (plurality opinion).

44. 478 U.S. 109, 132-33 (1986) (plurality opinion).

45. 532 U.S. 234, 243-44 (2001).

46. *Abrams v. Johnson*, 521 U.S. 74, 90 (1997) (“[T]he trial court acted well within its discretion in deciding it could not draw two majority-black districts without itself engaging in racial gerrymandering.”); *Upham v. Seamon*, 456 U.S. 37, 41-42 (1982)

2007] *REDISTRICTING LESSONS FROM GEORGIA* 1005

rather than to correct political defects, they will make no proactive effort to undo political bias in previously legal maps.⁴⁷ Rather, when courts have to draw maps after a legislature fails to discharge this responsibility, each court uses as its starting point the last legal map for the jurisdiction, and the court-prepared maps aspire to partisan neutrality.⁴⁸

GEORGIA REDISTRICTING 2001: DEMOCRATS' LAST STAND

Georgia Democrats entered the 2001 redistricting process confronting unprecedented challenges. For the first time since immediately after the Civil War, they faced the possibility of losing control of the legislature.⁴⁹ For the better part of a decade, Democratic support among white voters had eroded, changing Georgia from a state completely dominated by Democrats to a competitive one.⁵⁰ During the 1990s, Democrats lost their majority in the state's congressional delegation.⁵¹ When struggling to secure Department of Justice ("DOJ") approval of a congressional plan in the early 1990s, Democrats held all but one of the ten congressional seats.⁵² By 1995, Republicans filled eight of the enlarged delegation's eleven seats. Republicans defeated Democrats in seven contests, while picking up an eighth seat when Rep. Nathan Deal changed parties.⁵³ With Deal's conversion, Georgia's delegation consisted of eight white Republicans and three African-American Democrats.⁵⁴

(per curiam) (directing judicial deference to state policy goals in the reapportionment arena).

47. In *Balderas v. State*, No. Civ. A. 6:01CV158, 2001 WL 34104836, at *2 (E.D. Tex. Nov. 28, 2001), the court's remap applied a check to ensure that the effort to keep the court's thumb off the (political) scale was more than an illusion. This effort retained some residual elements of the 1991 Democratic gerrymander, because the focus of the corrections, according to the court, was to maintain existing minority opportunities, place the new seats gained by Texas, and otherwise minimize their impact on the map when equalizing district populations. *Id.*

48. *Abrams*, 521 U.S. at 96-97.

49. Bullock, *Still the Most Democratic State in the South?*, *supra* note 5, at 67-70; Affidavit of Linda Meggers at 17-19, *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004) (03-CV-0693), 2003 WL 24226520.

50. Bullock, *Still the Most Democratic State in the South?*, *supra* note 5, at 60-65.

51. *Id.*

52. MICHAEL BARONE & GRANT UJIFUSA, *THE ALMANAC OF AMERICAN POLITICS* 1992, at 304-25 (1991).

53. Charles S. Bullock, III, *Georgia: Election Rules and Partisan Conflict*, in *THE NEW POLITICS OF THE OLD SOUTH* 54-55 (Charles S. Bullock, III & Mark J. Rozell eds., 1st ed. 1998).

54. *Id.* at 59.

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For the first time in more than a century, Republicans won three of the state's statewide constitutional offices, retaining two of those offices in 2001.⁵⁵ Republicans also won a majority of the five-person Public Service Commission ("PSC").⁵⁶ In 1991 Republicans held 35 of the 180 state House seats and 11 of the 56 state Senate seats.⁵⁷ A decade later Republicans controlled 74 House and 24 Senate seats.⁵⁸

Democrats' retention of majorities in both legislative chambers owed much to the districting plan.⁵⁹ Although they continued to come up short in bids to take control of a chamber, GOP candidates consistently won majorities of the legislative votes cast statewide (the aggregation of all votes cast for all candidates, by party, across all districts).⁶⁰ As shown in Table 1, after the General Assembly adopted new districts in 1996, Republicans won 52% of the statewide vote for senators.⁶¹ This marked the first time the GOP polled a majority of the ballots cast for all legislative seats in the Senate, but this breakthrough gave them only one more seat, leaving them with less than 40% of the chamber.⁶² In 2000, the Republicans' top priority was to win a Senate majority in order to thwart gerrymandering by Democrats.⁶³ The GOP boosted its vote share to 55% but got only 45% of the seats.⁶⁴

The pattern for the House in Table 1 is similar to that of the Senate. Even though the GOP won the bulk of the vote, it managed to win barely 40% of the seats.⁶⁵ In the election that chose the members who would redraw the House in 2001, Republicans won 42% of the seats with 52% of the vote.⁶⁶ Republican inability to win control of a legislative chamber, despite taking the bulk of the vote, contradicted the usual pattern for single-member systems

55. *Id.* at 61-64.

56. Matthew C. Quinn, *Public Service Commission: Republicans on Cusp of 4-1 Edge*, ATLANTA J.-CONST., Nov. 7, 2002, at D6.

57. Bullock, *Still the Most Democratic State in the South?*, *supra* note 5, at 55.

58. *Id.*

59. *Id.* at 65.

60. *See infra* data in tbl. 1.

61. *Id.*

62. *Id.*; *see* Bullock, *Still the Most Democratic State in the South?*, *supra* note 5, at 55.

63. Dave Williams, *Parties Staking Claim on Valuable Seats in General Assembly*, ATHENS BANNER HERALD, Oct. 2, 2000, at B1; Interview with Eric Johnson, Georgia State Senate Minority Leader, in Atlanta, Ga. (Oct. 19, 2000).

64. Bullock, *Still the Most Democratic State in the South?*, *supra* note 5, at 65.

65. *See infra* tbl. 1.

66. *Id.*; *see also* Bullock, *Still the Most Democratic State in the South?*, *supra* note 5, at 55.

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TABLE 1: REPUBLICAN SHARES OF VOTES AND SEATS IN GENERAL ASSEMBLY ELECTIONS (ALL NUMBERS ARE PERCENTAGES)

| | SENATE | | HOUSE | |
|--------------------------------|--------|-------|-------|-------|
| | Votes | Seats | Votes | Seats |
| 1992 | 40 | 27 | — | 29 |
| 1994 | 45 | 38 | — | 37 |
| Redistricting of both chambers | | | | |
| 1996 | 52 | 39 | 51 | 41 |
| 1998 | 51 | 39 | 53 | 43 |
| 2000 | 55 | 43 | 52 | 42 |
| Redistricting of both chambers | | | | |
| 2002 | 55 | 46 | 52 | 41 |
| Redistricting of both chambers | | | | |
| 2004 | 57 | 61 | 57 | 53 |

Source: Computed by authors from official election returns. See Georgia Secretary of State, Georgia Election Returns, available at www.sos.state.ga.us/elections/election_returns/default.htm (last visited Apr. 11, 2007).

like that used in Georgia during the 1990s.⁶⁷ The principle, well recognized for a century, that the majority party gets a bonus in seats, has sometimes been referred to as the “cube law of politics.”⁶⁸

But just the opposite was happening in Georgia. Demographic shifts during the 1990s compounded the challenges confronting Democrats. The suburban areas experiencing the most rapid growth tended to vote Republican.⁶⁹ The 2000 census showed the Columbus, Savannah, and Augusta areas each had approximately one more representative than their population would justify.⁷⁰ The

67. Cf. DOUGLAS RAE, *THE POLITICAL CONSEQUENCES OF ELECTORAL LAWS* 27 (1967) (discussing calculation of electoral votes).

68. See generally Andrew Gelman & Gary King, *Enhancing Democracy Through Legislative Redistricting*, 88 AM. POL. SCI. REV. 541, 543 (1994); M. G. Kendall & A. Stuart, *The Law of the Cubic Proportion in Election Results*, BRITISH J. SOC. 183, 183 (1950). But see Edward Tufte, *The Relationship Between Seats and Votes in Two-Party Systems*, 67 AM. POL. SCI. REV. 540, 540-547 (1973).

69. *Larios v. Cox*, 300 F. Supp. 2d 1320, 1323 (N.D. Ga. 2004) (“[T]he fastest-growing counties in the state over the past decade are Republican-leaning.”); see also Expert Report of Ronald K. Gaddie at 7, *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004) (No. 03-CV-0693) [hereinafter Gaddie Expert Report] (supporting plaintiff).

70. The ideal population is the state’s population divided by the number of seats in a chamber. The 2000 census recorded Georgia’s total population as 8,186,453, and there are 180 seats in the Georgia House of Representatives, which indicates an ideal population of 45,480 people per Representative. See U.S. Census Bureau, Georgia by County 2000, http://factfinder.census.gov/servlet/GCTTable?_bm=n&_lang=en&mt_name=DEC_2000_PL_U_GCTPL_ST2&format=ST-2&_box_head_nbr=GCT-PL&ds

populations of Macon, Albany, and the combination of DeKalb and Rockdale Counties east of Atlanta each came up short of the one person, one vote standard by about three-fourths of a representative.⁷¹ On the other hand, the population of suburban counties where Republicans have prospered were under-represented. For example, the 2000 population entitled Cobb County northwest of Atlanta to an additional House seat while the combination of suburban Gwinnett and Forsyth Counties on the northeast side was under-represented by approximately four seats.⁷²

The House seats held by African-Americans at the time of the 2000 census were under-populated by a quarter of a million peo-

_name=DEC_2000_PL_U&geo_id=04000US13 (last visited Apr. 16, 2007) [hereinafter Georgia County Census Data]. In 2000, the counties in which Columbus, Savannah, and Augusta are located had populations of 186,291 (Muscogee County), 232,048 (Chatham County), and 199,775 (Richmond County), respectively. *See id.* These populations entitled Columbus to four seats, Savannah to five seats, and Augusta to four seats. At the time of the 2000 census, Columbus constituted the bulk of five districts and part of a sixth, Savannah had six House seats, and Augusta had four districts and large parts of two others. *Compare* Georgia Representative Districts, Carl Vinson Inst. of Gov't, Univ. of Georgia (1996), available at <http://www.cviog.uga.edu/Projects/gainfo/pdf/99house.pdf> [hereinafter Pre-2000 Georgia Representative District Map] (outlining districts), with Georgia Metropolitan Statistical Areas Before 2003, Carl Vinson Inst. of Gov't, Univ. of Georgia (2002), available at <http://www.cviog.uga.edu/Projects/gainfo/pdf/msa2002map.pdf> [hereinafter Pre-2003 Metropolitan Statistical Areas Map] (highlighting greater Columbus, Savannah, and Augusta metropolitan areas).

71. The 2000 population of Bibb County, where Macon is located, was 153,887; Dougherty County, where Albany is located, had a population of 96,065. Georgia County Census Data, *supra* note 70. DeKalb and Rockdale counties had a combined population of 735,976. *Id.* The population of Macon entitled it to 3.4 House members; Albany's population entitled it to two members. The combined populations of DeKalb and Rockdale Counties justified 16.2 representatives. At the time of the census, Macon had four House seats and part of a fifth. *Compare* Pre-2000 Georgia Representative District Map, *supra* note 70, with Pre-2003 Metropolitan Statistical Areas Map, *supra* note 70. Albany had two representatives and provided 75% of the population for a third district. *Id.* DeKalb and Rockdale Counties accounted for 17 seats. *Id.*

72. In 2000, Cobb County's population of 607,701 entitled it to 13.4 seats. *See* Georgia County Census Data, *supra* note 70. Its delegation before the 2000 elections had eleven Republicans and one Democrat. *See* Georgia Secretary of State, Georgia State House of Representatives 1998 Election Results, Nov. 3, 1998, http://www.sos.state.ga.us/elections/election_results/1998_1103/house.htm [hereinafter Georgia State House 1998 Election Results]. Atlanta Democrat Don Wix represented two Cobb precincts in District 33. *See id.* Gwinnett and Forsyth Counties had a total population of 686,855, which justified 15 House seats. Georgia County Census Data, *supra* note 70. The representatives for these counties consisted of 11 Republicans and one Democrat, with two legislators representing parts of counties other than Gwinnett or Forsyth. Georgia State House 1998 Election Results, *supra*.

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2007] REDISTRICTING LESSONS FROM GEORGIA 1009

ple.⁷³ This would translate into 5.5 seats. The seats held by white Democrats at the time of the census were under-populated by a combined 3.6 seats.⁷⁴ If the redistricting plan had simply reallocated seats so as to reflect the current incumbents in the seats, Republicans might have picked up nine seats. The Georgia House of Representatives has 180 members, while the Georgia Senate has 56 members. With nine additional seats, Republicans would have come close to half the membership in the House, reaching 87 seats.

In the Senate, 12 of 13 majority-black districts were under-populated as of 2000.⁷⁵ The sum of the population in these districts could justify only ten districts.⁷⁶ The population in the districts held by white Democrats also came up one seat short of what would be required under one person, one vote.⁷⁷ On the other hand, the 24 districts represented by Republicans had the population that would justify 27 seats—one short of half the 56-person chamber.⁷⁸ One heavily Republican Senate district had twice the ideal population.⁷⁹ These figures suggest that redistributing the population across the existing Senate districts to eliminate deviations could bring the GOP right to the brink of a majority. Combining the recent electoral performances with the demographic shifts indicate that the Democrats who controlled the process had

73. The 33 districts represented by African-Americans before the 2000 elections had a total population of 1,250,743, sufficient for 27.5 seats. See GEORGIA LEGIS. REAPPORTIONMENT OFFICE, GEORGIA HOUSE OF REPRESENTATIVES DISTRICTS BEFORE REDISTRICTING (2000) [hereinafter GEORGIA HOUSE OF REPRESENTATIVES DISTRICTS BEFORE REDISTRICTING] (on file with authors). To justify 33 seats, the districts should have had a population of 1,500,840.

74. The 69 districts represented by white Democrats in 2000 had a combined population of 2,973,606, sufficient for 65.4 seats. See Georgia Secretary of State, Georgia State Representative Election Results, Nov. 3, 1998, http://www.sos.state.ga.us/elections/election_results/1998_1103/house.htm [hereinafter Georgia State House 1998 Election Results]; see also GEORGIA HOUSE OF REPRESENTATIVES DISTRICTS BEFORE REDISTRICTING, *supra* note 73. To justify 69 districts, the combined population should have been 3,138,120.

75. GEORGIA LEGIS. REAPPORTIONMENT OFFICE, GEORGIA STATE SENATE DISTRICTS BEFORE REDISTRICTING (2000) [hereinafter GEORGIA SENATE DISTRICTS BEFORE REDISTRICTING] (on file with authors).

76. The total population of these 13 districts was 1,589,921. *Id.*

77. See Georgia Secretary of State, Georgia State Senate Election Results, Nov. 3, 1998, http://www.sos.state.ga.us/elections/election_results/1998_1103/senate.htm [hereinafter Georgia State Senate 1998 Election Results].

78. See *id.*; see also GEORGIA SENATE DISTRICTS BEFORE REDISTRICTING, *supra* note 75.

79. District 48 had 311,367 people. See GEORGIA SENATE DISTRICTS BEFORE REDISTRICTING, *supra* note 75. The ideal population for a Senate district based on the 2000 census would be 146,187 people per Senator. See Georgia County Census Data, *supra* note 70.

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little margin for error if they were to retain control of the legislature.

Past governors had taken a hands-off approach to redistricting.⁸⁰ Governor Roy Barnes broke with tradition, assuming a central role in the 2001 map making, and made a particularly great impact on the Senate map.⁸¹ In previous decades, much of the work of composing and tweaking maps to accommodate the concerns of powerful legislators took place in the Legislative Reapportionment Office.⁸² In 2001 Senate maps were drawn under the watchful eye of an out-of-state consultant.⁸³ Democratic legislators were shown how the map treated their districts, but even they did not get a glimpse at the entire plan for the state.⁸⁴

House Speaker Tom Murphy, who had often clashed with governors during his quarter century leading the chamber, insisted on making changes to the Governor's map.⁸⁵ As the minority party, Republicans had no input into the maps, but unlike in the past, many Democratic legislators also had minimal input.⁸⁶

The 2001 Plans

Democrats had to distribute their minority of the vote statewide to maximum advantage to force Republicans to squander their electoral advantage. As one step to maximize the influence of the dwindling Democratic electorate, the House plan resurrected multi-member districts ("MMDs") that had been eliminated in 1992.⁸⁷ In the new plan, MMDs contained just over one-third of

80. Rhonda Cook, *Governor's Part in Redistricting Upsets GOP*, ATLANTA J.-CONST., Aug. 3, 2001, at C3.

81. See Jim Galloway, *Governor's Redistricting Role Unique*, ATLANTA J.-CONST., Oct. 1, 2001, at B1; Dick Pettys, *Democrats, Barnes at Odds over Redistricting*, ATHENS BANNER-HERALD, Aug. 3, 2001; Transcript of Trial Proceedings at 503-05, *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004) (No. 03-CV-0693) (testimony of Sen. Daniel W. Lee).

82. See Affidavit of Linda Meggers, *supra* note 49, at 2-10. The court in *Johnson v. Miller* characterized Linda Meggers, head of the Legislative Reapportionment Office from 1978-2001, as "probably the single most knowledgeable person available on the subject of Georgian redistricting." 864 F. Supp. 1354, 1361 (S.D. Ga. 1994).

83. Interview with David Sutton, Press Secretary to Ga. Lt. Gov. Mark Taylor, in Atlanta, Ga. (Oct. 16, 2001).

84. Interview with Anne Lewis, Attorney, and Brian Tyson, Director of Policy & Research, Georgia House Republican Caucus, in Atlanta, Ga. (Aug. 31, 2005).

85. Don Schanche, Jr., *Redistricting Maps Kept Under Wraps*, Macon Telegraph, Aug. 3, 2001, at B1; see also Pettys, *supra* note 81.

86. Galloway, *supra* note 81, at B3.

87. See Charles S. Bullock, III & Ronald Keith Gaddie, *Changing from Multi Member to Single Member Districts: Partisan, Racial, and Gender Impacts*, STATE & LOCAL GOV'T REV., Fall 1993, at 155.

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2007] REDISTRICTING LESSONS FROM GEORGIA 1011

the 180 legislators in the chamber.⁸⁸ Several MMDs were designed to defeat a Republican incumbent by swamping a concentration of GOP voters in a part of the district with greater numbers of Democrats elsewhere in the district.⁸⁹ For example, Henry County, one of the nation's fastest growing counties during the 1990s,⁹⁰ had a Republican representative. The new map placed the Republican in a three-person district dominated by Democratic voters in southern DeKalb County.⁹¹ Once the Republican understood the impossible situation into which he had been placed, he aborted his reelection bid.⁹² A four-person district was drawn to protect Atlanta Rep. Kathy Ashe, who had switched party affiliation from

88. See, e.g., Georgia Secretary of State, Georgia State House of Representatives 2002 Election Results, Nov. 5, 2002, available at http://www.sos.state.ga.us/elections/elelection_results/2002_1105/house.htm [hereinafter Georgia State House 2002 Election Results] (detailing results of MMD elections after redistricting); see also Ben Smith, *Multimember Districts Confusing, Challenging*, ATLANTA J.-CONST., May 23, 2002, at A1.

89. Gaddie Expert Report, *supra* note 69 at 27-28.

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90. Henry County is the fourth fastest-growing county in the United States. See U.S. Census Bureau, Estimates for the 100 Fastest Growing U.S. Counties in 2003, <http://www.census.gov/popest/counties/CO-EST2003-09.html> (showing 25.7% growth in Henry County between 2000 and 2003).

91. Prior to the plan implemented in the 2002 election, House District 108 was wholly in Henry County. See Pre-2000 Georgia Representative District Map, *supra* note 70. With a population of 70,337, it exceeded the ideal House district population by 54.7%. See GEORGIA HOUSE OF REPRESENTATIVES DISTRICTS BEFORE REDISTRICTING, *supra* note 73. Because Henry County had a population of 119,341 (circa the 2000 census), it would have been appropriate to have two districts wholly within the county, and most of a third. Instead, the new map split the county among four districts: 59, 60, 84, and 85. See Carl Vinson Inst. of Gov't, Univ. of Georgia, Georgia Representative Districts Metro Area Detail Map, Effective 2002 Election (2002), available at <http://www.cviog.uga.edu/Projects/gainfo/pdf/gahouse2002b.pdf> [hereinafter 2002 Representative Metro Area Detail Map]. Each of these four districts was an MMD, so that Henry County was represented by a total of ten legislators. See Georgia State House 2002 Election Results, *supra* note 88 (listing results of all elections). Had Henry been used as the base for two districts, this suburban county would likely have elected two Republicans, because two-thirds of the county voted for George W. Bush for president in 2000. Instead, 81% of the county's population ended up represented by Democrats. While Henry County's 2000 population was less than 15% black, see Georgia County Census Data, *supra* note 70, 71,222 of its Republican-leaning whites were placed in two MMDs (Districts 59 and 60) dominated by DeKalb County. These MMDs were more than 61% black and safely Democratic. See GEORGIA LEGIS. REAPPORTIONMENT OFFICE, GEORGIA HOUSE OF REPRESENTATIVES DISTRICTS AFTER REDISTRICTING (2002) (on file with authors) (furnishing figures that demonstrate that 162,617 of the total 260,870 residents of Districts 59 and 60 were black).

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92. Kevin Duffy, *District 60, State House: Redistricting Blamed in Decision to Quit Race*, ATLANTA J.-CONST., Aug. 2, 2002, at D8.

Republican to Democrat.⁹³ Had she sought reelection in her old Single Member District (“SMD”), Republicans angered by her defection might have turned her out. The new district contained what had been three Democratic districts, along with Rep. Ashe’s former district.⁹⁴

A second Democratic strategy—used in both chambers—overpopulated Republican districts while under-populating those with histories of voting Democratic.⁹⁵ If the districts had approached a normal distribution, there would be many districts slightly over- or under-populated, with a few districts approaching what are thought to be the allowable extremes of + 5% from the ideal population.⁹⁶ Half of the House districts had populations that deviated by at least + 4% from the ideal population of 45,980.⁹⁷ A third of the districts had population deviations of + 4.5% and 20 of the seats were in districts where the population was + 4.9%.⁹⁸ Of the 180 House seats, 11 were overpopulated by 4.9% or more while nine were under-populated by a like amount.⁹⁹ In subsequent litigation, a federal court concluded that

The other major cause of the deviations in both plans was an intentional effort to allow incumbent Democrats to maintain or increase their delegation, primarily by systematically under-populating the districts held by incumbent Democrats, by overpopulating those of Republicans, and by deliberately pairing numerous Republican incumbents against one another.¹⁰⁰

Instead of a party-neutral distribution, Republicans were packed into districts overpopulated by 4-5% while Democratic districts were frequently under-populated by 4-5%.¹⁰¹ Of 107 districts won by Democrats in 2002, 37 (34.9%) had population deviations of at least 4%, but only 30 of the districts won by Democrats (28.3%)

93. Dick Pettys, *Democrats Look to Protect Party-Switcher*, ATHENS BANNER-HERALD, June 29, 2001.

94. The district in question was State Representative District 42. See Georgia State House 2002 Election Results, *supra* note 88.

95. Gaddie Expert Report, *supra* note 69, at 11.

96. See *infra* notes 181-82 and accompanying text.

97. Gaddie Expert Report, *supra* note 69, at 9.

98. *Id.*

99. *Id.*

100. *Larios v. Cox*, 300 F. Supp. 2d 1320, 1329 (N.D. Ga. 2004).

101. The practice of overpopulating Republican districts while under-populating Democratic districts was not new to Georgia legislative districting. The proportion of districts placed at the limits of the ten-point range, however, had increased with each legislative redistricting since the 1980s, as Democrats strove to stall Republican growth. Transcript of Trial Proceedings, *supra* note 81, at 79-80 (testimony of Ronald K. Gaddie).

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2007] REDISTRICTING LESSONS FROM GEORGIA 1013

had populations *above* the ideal, and only a dozen (11.3%) were more than 4% above the ideal population.¹⁰² In contrast, Republican legislators were in 37 of 72 instances (50.7%) elected from districts overpopulated by at least four percent. More than three-quarters of the most populous districts elected Republicans.¹⁰³

The results of the 2002 legislative elections affirmed the goals of the Democrats' designs. Most seats won by Republicans in the election subsequent to the redistricting in 2002 were overpopulated by more than four percent. In contrast, just over 10% of the seats won by Democrats were overpopulated by more than four percent.¹⁰⁴ Ten of 72 Republican districts were overpopulated by at least 4.9% compared with only one of the districts won by a Democrat.¹⁰⁵ At the other extreme, only 5.5% of the Republican seats were under-populated by 4% compared with 34.6% of the Democratic seats that were under-populated by more than four percent.¹⁰⁶ Of the 39 seats held by African-Americans, 16 (41%) were under-populated by at least four percent.¹⁰⁷

Ten of the Senate districts won by Republicans in 2002 (38.5%) had populations at least 4.9% above the ideal.¹⁰⁸ Of 18 districts overpopulated by at least 4.25%, all but two elected Republicans.¹⁰⁹ Nineteen districts were under-populated by at least 4% and all but two of these districts elected Democrats although two of these soon switched to the GOP.¹¹⁰ The average population for

102. Gaddie Expert Report, *supra* note 69, at 29.

103. *Id.* at 29-30.

104. See Georgia Secretary of State, Georgia State Senate Election Results, Nov. 5, 2002, available at http://www.sos.state.ga.us/elections/election_results/2002_1105/senate.htm [hereinafter Georgia State Senate 2002 Election Results] (displaying those districts won by Republicans); see also GEORGIA LEGIS. REAPPORTIONMENT OFFICE, GEORGIA STATE SENATE DISTRICTS AFTER REDISTRICTING (2002) (on file with authors) [hereinafter GEORGIA STATE SENATE DISTRICTS AFTER REDISTRICTING] (displaying which districts were over- and under-populated, and by what amounts).

105. See Georgia State Senate 2002 Election Results, *supra* note 104; see also GEORGIA STATE SENATE DISTRICTS AFTER REDISTRICTING, *supra* note 104.

106. See Georgia State Senate 2002 Election Results, *supra* note 104; see also GEORGIA STATE SENATE DISTRICTS AFTER REDISTRICTING, *supra* note 104.

107. See Georgia State Senate 2002 Election Results, *supra* note 104; see also GEORGIA STATE SENATE DISTRICTS AFTER REDISTRICTING, *supra* note 104.

108. *Larios v. Cox*, 300 F. Supp. 2d 1320, 1327 (N.D. Ga. 2004). Here the numerator is the 26 districts won by Republicans, exclusive of the four Democrats who changed party immediately after the election. See Andy Peters & Charlie Lanter, *Ray Looking at Future GOP Switch: Representative from Peach Might Make Move in Two Years*, MACON TELEGRAPH, Dec. 20, 2002, at B1 (noting that State Senators Rooney Brown, Don Cheeks, Jack Hill, and Dan Lee became Republicans shortly after the elections).

109. See generally Gaddie Expert Report, *supra* note 69.

110. *Id.*

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the 26 districts that elected Republicans was + 2.5%, while the average district that elected an African-American was under-populated by four percent.¹¹¹ The 20 districts that elected white Democrats were under-populated by an average of 1.2 percent. Four of six districts that elected white Democrats and which were overpopulated by as much as 2% were also adjacent to heavily black districts. The adjacent black districts were, on average, under-populated by 4.4% as these loyal Democrats were distributed to bolster Democratic prospects in nearby districts.¹¹² Only five districts were + 1% of the ideal population.¹¹³

A third Democratic strategy paired Republican incumbents while Democratic incumbents received separate districts in which to run, or faced Republican incumbents before solidly Democratic constituencies. A non-partisan plan would presumably have more often paired Democrats whose districts needed to gain population, while GOP incumbents would have usually avoided their neighbors as their districts shed population.¹¹⁴ As Table 2 shows, nine House districts housed two Republican incumbents while four districts forced three Republicans to compete for just two seats.¹¹⁵ One member at least would have to go. Another Republican found himself in a two-seat, heavily black district, competing with two Democratic incumbents.¹¹⁶ The net result was the elimination of 14 Republicans (19% of the caucus).¹¹⁷ Four SMDs paired a Democrat with a Republican, but to the dismay of the mapmakers, Republicans won three of these contests.¹¹⁸ Only one new district forced two Democrats to compete for a single seat.¹¹⁹ Sometimes a district pairing Republican incumbents was adjacent to an open seat in a district that tilted toward the GOP.¹²⁰

The Senate plan paired three sets of Republicans and created two other pairings consisting of one incumbent from each party.¹²¹ Democrats sought not just to replace Republicans with Democrats but to reduce the ranks of experienced opponents,¹²² which ex-

111. *Id.*

112. *Id.*

113. *Id.*

114. *Larios v. Cox*, 300 F. Supp. 2d 1320, 1347-48 (N.D. Ga. 2004).

115. *See infra* tbl. 2.

116. Gaddie Expert Report, *supra* note 69, at 29-30.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 29.

122. *Id.*

TABLE 2: GEORGIA STATE HOUSE INCUMBENT PAIRINGS 2002

| District* | Paired Incumbents | Pop.Dev. (%) | '00 PSC Average |
|-------------|---|--------------|-----------------|
| 3 (2 Post) | Hammontree (R), Williams (R), Forster (R) | 4.740 | 61.80 |
| 14 (2 Post) | Pinholster (R), C. Smith (R), Knox (R) | 3.990 | 51.04 |
| 17 | Scheid (R), Franklin (R) | 4.820 | 71.25 |
| 30 | Cooper (R), Kaye (R) | 4.570 | 70.47 |
| 35 | Wiles (R), Hines (R) | 4.990 | 64.13 |
| 44 | McKinney (D), Collins (R) | -.680 | 36.26 |
| 46 | Snelling (R), Hembree (R) | 4.240 | 60.46 |
| 52 | Millar (R), Davis (R) | 2.000 | 61.62 |
| 61(3 Post) | Ragas (D), Sailor (D), J. Williams (R)* | -.740 | 31.56 |
| 67 (2 Post) | Mills (R), Coan (R), Reese (R) | 4.950 | 69.58 |
| 76 | Hudgens (R), B. Smith (R) | -1.460 | 58.96 |
| 85 (2 Post) | Cox (R), Yates (R), Lunsford (R) | 4.300 | 69.28 |
| 97 | Burmeister (R), Allen (D) | -4.290 | 34.11 |
| 106 | Graves (R), Reichert (D) | 4.470 | 60.32 |
| 110 | V. Smith (R), Roberts (R) | .570 | 62.19 |
| 113 | Hugley (D), Taylor (D) | -3.680 | 24.76 |
| 126 | Mueller (R), Day (R) | 4.790 | 68.57 |
| 127 | Lanier (R), DeLoach (I) | 4.800 | 51.79 |
| 137 | Everett (R), Bulloch (R) | 4.450 | 61.31 |
| 138 | Holland (D), Scott (R) | 3.100 | 46.55 |

* In "2 Post" districts, two seats were available; three seats were available in "3 Post" districts. Source: Compiled from data in Expert report of Ronald K. Gaddie, *supra* note 67.

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plains why some pairings occurred next to open seats likely to elect a Republican.¹²³ The pairing of Republican incumbents removed 51 years of legislative experience from the Senate that assembled in 2003.¹²⁴

As a consequence of packing of voters likely to vote Republican, pairing Republican incumbents, and strategically allocating black voters, legislative districts often split counties and assumed strange shapes.¹²⁵ At times packing Republican voters involved uniting widely separated GOP enclaves in a single district. For example, Senate District 51, originally in the suburbs north of Atlanta, had been overpopulated by almost 21,000.¹²⁶ Instead of contracting the district, the new map transformed this district into a horseshoe shape that extended from Atlanta's northern suburbs to the state

123. *Id.*

124. *Id.* ("The direct result of these pairings was the elimination of four Republican incumbents from the party's caucus.")

125. Tom Baxter, *Democrats Following "Philosophy" in House*, ATLANTA J.-CONST., Aug. 14, 2001, at B4; Jim Wooten, *Redistricting Fiasco Will Drive Campaign Costs Through Roof*, ATLANTA J.-CONST., Aug. 15, 2001, at A14.

126. See GEORGIA SENATE DISTRICTS BEFORE REDISTRICTING, *supra* note 75 (showing that District 51 had a population deviation of 20,982).

line, and then ran along most of Georgia's northern boundary over to South Carolina, occupying the state's northeastern corner.¹²⁷ The 200-mile long district, which took almost eight hours to traverse, narrowed at one point to a width equal only to two football fields.¹²⁸ A similar contortion changed the form of the district represented by the Senate's Republican leader Eric Johnson, who had represented the Savannah suburbs located in two counties. In the new map, Johnson's district ran the entire length of Georgia's coast, stretching across parts of eight counties.¹²⁹ In this example of "duck contiguity" the district jumped from one barrier island to the next while avoiding the mainland.¹³⁰

An additional technique applied to the state legislative maps reduced the size of the black majorities in some districts in order to redistribute reliable Democratic voters to tilt nearby marginal districts. African-Americans, presumed to be faithful voters for Democratic candidates,¹³¹ were reallocated to offset whites, most of whom now voted Republican. This effectively packed white Republicans into districts that had to be conceded, while strategically adding black votes to districts where they could provide the margin of victory for white Democrats.¹³²

The twelve majority-black Senate districts had an average black voting age population ("VAP") of 66.6% at the time of the 2000

127. See Carl Vinson Inst. of Gov't, Univ. of Georgia, Georgia Senatorial Districts Effective 2002 Election, available at http://www.cviog.uga.edu/Projects/gaininfo/pdf/ga_senate2002a.pdf [hereinafter 2002 Georgia State Senate District Map].

128. Jim Galloway, *Redrawn District Takes All Day to Tour*, ATLANTA J.-CONST., Aug. 11, 2001, at A6. The width of two football fields is 600 feet.

129. See 2002 Georgia State Senate District Map, *supra* note 127; see also David Pendered, *GOP Vows to Challenge Map Plan*, ATLANTA J.-CONST., Aug. 7, 2001, at B8. The counties that came within District 1 under the 2002 plan were Brantley, Bryan, Camden, Chatham, Glynn, Liberty, McIntosh, and Pierce. See Counties Within Georgia Senate Districts, Reapportionment Services Unit, Georgia General Assembly (April 2002), available at <http://ga2000.itos.uga.edu/redistricting/SenateByDistrict.pdf>.

130. The expression "duck contiguity" refers to those districts where one could not traverse the district while staying on dry land, but a duck could go from one end to the other; the court in *Larios* referred to this phenomenon as "water contiguity." See *Larios v. Cox*, 300 F. Supp. 2d 1320, 1332 (N.D. Ga. 2004) (referring, *inter alia*, to Senator Johnson's District 1).

131. Cf. Charles S. Bullock, III & Richard E. Dunn, *The Demise of Racial Districting and the Future of Black Representation*, 48 EMORY L. J. 1209, 1226-39 (1999) (describing black voting patterns in Florida).

132. See Jim Galloway, *Redistricting Expands White Base*, ATLANTA J.-CONST., Aug. 16, 2001, at A1 [hereinafter Galloway, *White Base*]; see also Affidavit of Linda Meggers, *supra* note 49, at 21.

2007] REDISTRICTING LESSONS FROM GEORGIA 1017

census.¹³³ The 2001 plan reduced that average to 56.3 percent.¹³⁴ Five districts emerged with VAPs that were less than 51.5% African-American.¹³⁵ Before being redrawn four of these districts were more than 60% black VAP¹³⁶ and in the fifth, blacks had constituted 55.3% of the voting age population.¹³⁷ Black leaders supported the redistribution of the black population in order to advance Democratic candidates in 2001.¹³⁸ Legislative Black Caucus (“LBC”) leaders accepted the governor’s explanation that this was the price to pay, for the number of African-American committee chairs and greater legislative responsiveness to the policy concerns of black voters that followed from maintaining Democratic dominance.¹³⁹

THE FIRST CHALLENGE: ASHCROFT

Despite some Democrats’ unhappiness with the districts handed to them by Governor Barnes, the Democratic party shoved the Senate maps through over Republicans’ futile objections.¹⁴⁰ Democrats did not accept Barnes’s proposals in their entirety, and also imposed a Democratic gerrymander in the House.¹⁴¹ The primary selling point was that the careful analysis of past voting patterns indicated that these maps would continue to keep Republicans at bay.¹⁴²

Georgia has been subject to Section 5 of the Voting Rights Act since 1965 and must get federal approval of redistricting plans before implementation.¹⁴³ Rather than sending the map to the

133. Charles S. Bullock, III & Ronald Keith Gaddie, *Voting Rights Progress in Georgia*, N.Y.U. J. LEGIS. & PUB. POL’Y (forthcoming), at tbl. 8.

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. Direct Testimony of Charles Walker at 18-19, *Georgia v. Ashcroft*, 195 F. Supp. 2d 25 (D.D.C. 2002) (No. 01-2111); Jim Wooten, *Secret Deals Silence Voices of Many Voters*, ATLANTA J.-CONST., Aug. 12, 2001, at C8.

139. See Galloway, *White Base*, *supra* note 132, at A14.

140. See Pendered, *Redrawn Districts*, *supra* note 4, at A6; Don Schanche, Jr., *House Approves ‘Partisan’ Redistricting Map*, MACON TELEGRAPH, Aug. 16, 2001, at A1 [hereinafter Schanche, ‘Partisan’ Map].

141. See Rhonda Cook, *House Panel Approves New Map*, ATLANTA J.-CONST., Aug. 14, 2001, at B1.

142. See *id.*; Bill Shipp, *Dems Crow Now, But May Be Eating Crow in 2002*, ATHENS BANNER-HERALD, Aug. 18, 2001, available at http://www.onlineathens.com/stories/081901/opi_0819010005.shtml; see also Schanche, ‘Partisan’ Map, *supra* note 140.

143. See Voting Rights Act of 1965, Pub. L. No. 89-110, tit. I, § 5, 79 Stat. 437, 439; see also *supra* notes 25-30 and accompanying text.

U.S. Attorney General for review as it had in the past, Georgia filed suit in the District Court for the District of Columbia seeking a declaratory judgment that the maps did not discriminate against minorities.¹⁴⁴ The state presumably feared that the DOJ under the Bush Administration might react negatively to its handiwork. Georgia Democrats likely anticipated an advantage in taking a judicial, rather than administrative, route because they could predict a greater likelihood of success with the DOJ as competing litigant, rather than allowing the DOJ to reject the maps on its own. The DOJ would have to compete as an equal adversary before the courts, while under administrative review Georgia would have to convince the agency that the maps were racially fair to achieve preclearance.¹⁴⁵ Republicans in the legislature objected to the maps for reducing black concentrations in a number of districts, as noted above.¹⁴⁶

To the disappointment of Republicans, the DOJ raised no objections to the congressional or state House maps.¹⁴⁷ The DOJ did, however, find the reduction in the concentration of African-Americans in three Senate districts unsettling.¹⁴⁸ In these districts, the percentage of the black VAP dropped below 51 percent.¹⁴⁹ Before being redrawn, the black VAP in two of the districts exceeded 60%, and stood at 55% in the third.¹⁵⁰ The DOJ contended that the reduction in the black concentrations in these three districts violated Section 5.¹⁵¹ Somewhat surprisingly, the DOJ did not oppose reductions in African-American concentrations in two other Senate districts that dropped their African-American share of the VAP to just above 50 percent. The DOJ distinguished between the districts it accepted and those to which it objected on the grounds that in the latter, the prospects for electing candidates preferred by African-Americans had been compromised.¹⁵²

144. *Georgia v. Ashcroft*, 195 F. Supp. 2d 25, 25 (D.D.C. 2002); Hal Gulliver, *Democrats Fret over Redistricting Case*, BILL SHIPP'S GEORGIA, Mar. 4, 2002, at 2.

145. *See Georgia v. United States*, 411 U.S. 526 (1973) (holding that any future elections under the disputed reapportionment plan were to be enjoined, pending Georgia's compliance with federal approval requirements).

146. *See supra* notes 131-42 and accompanying text.

147. Bill Shipp, *Will Redistricting Really Matter?*, BILL SHIPP'S GEORGIA, Apr. 15, 2002, at 5 [hereinafter Shipp, *Will Redistricting Really Matter?*].

148. *Georgia v. Ashcroft*, 539 U.S. 461, 472 (2003).

149. *See Bullock & Gaddie*, *supra* note 133, at tbl. 8.

150. *Id.*

151. *Ashcroft*, 539 U.S. at 472.

152. *Id.*

To justify reducing the black concentrations, Georgia offered the analysis of Columbia University political scientist David Epstein. Epstein presented probit models¹⁵³ that estimated the percentage of the black vote at which the candidate preferred by African-Americans had a 50/50 probability of success—a point he estimated to be at 44.3% of the VAP.¹⁵⁴ Epstein’s analysis provided a foundation for the state to argue that districts in which black VAP exceeded 50% should be acceptable, because there was a 75% probability that those districts would elect the candidate preferred by black voters.¹⁵⁵ Critically, all but one of the African-American senators approved of the creation of these “influence districts.”¹⁵⁶ Had the Legislative Black Caucus opposed the reductions in black concentrations, perhaps the DOJ might have objected to additional districts, and perhaps have influenced the court’s assessment.

Although Georgia prevailed on most of its claims before the District of Columbia panel,¹⁵⁷ the state appealed to the Supreme Court. In a five to four decision, the Court reversed and remanded to the district court for further consideration of the reduction in black concentration in the three districts at issue.¹⁵⁸ Justice Sandra Day O’Connor, writing for the majority, found the testimony of U.S. Representative John Lewis persuasive.¹⁵⁹ Rep. Lewis, the civil rights veteran, testified in favor of the reduction of black concentrations in the Senate plan, and explained that “‘giving real power to black voters comes from the kind of redistricting efforts the State of Georgia has made,’ and that the Senate plan ‘will give real meaning to voting for African-Americans’ because ‘you have a greater chance of putting in office people that are going to be responsive.’”¹⁶⁰

The *Ashcroft* decision took on immediate political significance in Texas. Democrats in Texas, bracing for litigation against the com-

153. A probit model applies an inverse cumulative distribution function of the normal distribution to the general linear model. The estimator, instead of generating a slope coefficient of the change in the value of an interval-level dependent variable, instead estimates the prospect of obtaining one or the other outcome in a dichotomous dependent variable.

154. Expert Report of David Epstein at 8-16, *Georgia v. Ashcroft*, 539 U.S. 461 (2003) (No. 1:01-CV-2111).

155. *Id.* at 16.

156. *Ashcroft*, 539 U.S. at 461.

157. Only three of the 249 districts submitted for approval failed. Shipp, *Will Redistricting Really Matter?*, *supra* note 147, at 5.

158. *Ashcroft*, 539 U.S. at 490-91.

159. *Id.* at 489.

160. *Id.*

ing congressional redistricting, advanced an argument in July 2003 hearings before the Texas State Senate reapportionment committee that any district in Texas where minorities bloc-voted to elect a Democrat constituted an *Ashcroft*-based coalition district, regardless of the size of the minority population.¹⁶¹ The particular target of the redistricting, as alleged by Democrats, was the 24th congressional district of Rep. Martin Frost, Democratic caucus chair in the U.S. House of Representatives; Frost's district had no one majority ethnic or racial bloc, but instead had a predominantly black, Democratic primary electorate and a predominantly white general election electorate with a largely non-voting 40% Hispanic population in residence.¹⁶² In the subsequent preclearance process for the Texas remap, the DOJ's professional staff applied a broad-based definition of the benchmark of minority electoral opportunity that incorporated the concept of coalitional districts.¹⁶³ The plaintiffs in *Sessions v. Perry*, forerunner to the LULAC case, argued that Section 2 of the Voting Rights Act necessitated drawing the coalition districts, again drawing on the logic of the *Ashcroft* decision.¹⁶⁴ The Texas district court did not accept this argument.¹⁶⁵

THE SECOND CHALLENGE: ONE PERSON, ONE VOTE

Once the courts approved the new maps and rejected claims that they diluted minority political influence in Georgia, the plaintiffs raised two new challenges in *Larios v. Cox*.¹⁶⁶ First, the Republicans claimed to be victims of an illegal partisan gerrymander.¹⁶⁷ Second, they asserted that the new maps violated the one-person, one-vote requirement which had been established by the Supreme

161. *Redistricting Hearing, Dallas: Hearing Before the S. Jurisprudence Comm.*, 2003 Leg., 78th Sess. 35-36 (Tex. 2003) (statement of Rep. Martin Frost) (discussing reception of *Ashcroft* case); see also Ronald Keith Gaddie, *The Texas Redistricting, Measure for Measure*, EXTENSIONS, Fall 2004, at 19, available at <http://www.ou.edu/special/albertctr/extensions/fall2004/Gaddie.html> [hereinafter Gaddie *Texas Redistricting*] (discussing hearings).

162. Gaddie, *Texas Redistricting*, *supra* note 161, at 19.

163. Tim Mellett et al., U.S. Dep't of Justice, Section 5 Recommendation Memorandum (Dec. 12, 2003), available at <http://www.washingtonpost.com/wp-srv/nation/documents/texasDOJmemo.pdf> (last visited Apr. 16, 2007).

164. *Sessions v. Perry*, 298 F. Supp. 2d 451, 480 (E.D. Tex. 2004).

165. *Id.* at 481 ("Plaintiffs' understandable efforts to freeze this 'coalition' by locating some duty under § 2 not to redraw the district is a transparent effort to use race as a shield from a partisan gerrymander when the district itself was a child of identical efforts to gerrymander.").

166. *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004).

167. *Id.* at 1321-22.

2007] REDISTRICTING LESSONS FROM GEORGIA 1021

Court as a constitutional right in *Baker v. Carr* and *Wesberry v. Sanders*, four decades earlier.¹⁶⁸

The *Larios* panel dismissed the partisan gerrymandering claim and focused exclusively on the population deviations.¹⁶⁹ The Supreme Court's ruling in *Karcher v. Daggett* has given an advantage to congressional plans that have the smallest populations deviations.¹⁷⁰ A number of states have sought to close off the possibility of an equal-population challenge by reducing the deviations in their plans to a single individual.¹⁷¹ Since Georgia's plan had a total population deviation of seventy-two persons, it appeared vulnerable.¹⁷² In 2002, a federal district court had invalidated a Pennsylvania congressional map prepared by Republicans, which had a population range of seventeen people, in favor of the Democratic alternative that zeroed out the population differences.¹⁷³

Courts had tolerated wider deviations in state and local legislative plans. Democrats who drafted Georgia's plans presumed that their plans would be acceptable if the total deviation did not exceed ten points (traditionally expressed as +/- 5%).¹⁷⁴ Georgia had scrupulously conformed to that standard.¹⁷⁵ Nonetheless, almost a third of the Georgia State Senate districts and more than one in ten House districts had population deviations of + 4.9% or greater, with some approaching + 4.99 percent.¹⁷⁶

Although some courts have interpreted a ten-point range of deviation as a safe harbor for districting plans,¹⁷⁷ the *Larios* court considered numbers within the range to create a rebuttable presumption of constitutionality.¹⁷⁸ While the Supreme Court has not interpreted the "one person, one vote" standard as requiring abso-

168. *Id.* See generally *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Baker v. Carr*, 369 U.S. 186 (1962).

169. *Larios*, 300 F. Supp. 2d at 1322. A three-judge panel is provided for by 28 U.S.C. § 2284(a) (1984).

170. 462 U.S. 725, 740-41 (1983).

171. Nineteen states report congressional maps with population deviations of one person or less based on the 2000 census. See Nat'l Conf. of State Legislatures, Redistricting Population Deviation 2000, <http://www.ncsl.org/programs/legismgt/redistrict/redistpopdev.htm>.

172. See *id.*

173. *Vieth v. Pennsylvania*, 195 F. Supp. 2d 672 (M.D. Pa. 2002).

174. *Larios*, 300 F. Supp. 2d at 1341.

175. *Id.*

176. *Id.* at 1327.

177. *Id.* at 1340 n.12 (citing *Wright v. City of Albany*, 306 F. Supp. 2d 1228, 1231 n.5 (M.D. Ga. 2003)).

178. *Id.* at 1340-41.

lute population equality among state legislative districts, deviations must be justified in terms of a legitimate state interest.¹⁷⁹

The *Larios* court explored the state's rationale offered to justify the deviations in the three maps. Linda Meggers, the respected director of Georgia's Legislative Reapportionment Office, testified that it would be possible to zero out population differences in the congressional plan while splitting fewer counties and precincts and creating more compact districts.¹⁸⁰ Despite Meggers's testimony, Georgia contended that any efforts to reduce population deviations would necessitate additional precinct splits, and that congressional boundaries in some of the divided precincts would not be easily recognizable.¹⁸¹ The court accepted that justification as a legitimate state interest.¹⁸²

The court found Georgia's explanations for the population variations in the legislative plans less convincing. Witnesses for the state acknowledged that in crafting these plans, Georgia had not considered traditional districting principles such as compactness, contiguity, adherence to county boundaries, or maintenance of communities of interest.¹⁸³ Instead, the most over- or under-populated districts were often the ones that were the least compact and strained to achieve contiguity.¹⁸⁴ Six House districts and 17 Senate districts had "duck contiguity," with the disparate parts linked across bodies of water not linked by bridges or causeways.¹⁸⁵ Another five House districts and one Senate district could be considered to be contiguous only at a touch-point.¹⁸⁶ The rationale for stretching the concept of contiguity was not justified by promoting population equality, as two of the touch-point districts were at least 4.5% off of the ideal population.¹⁸⁷ Nor could it be argued that the population deviations resulted from efforts to honor county bound-

179. *Id.* at 1339 (citing *Reynolds v. Sims*, 377 U.S. 533, 579 (1964)).

180. *Id.* at 1335.

181. *Id.* at 1336.

182. *Id.* at 1356.

183. *Id.* at 1349-50.

184. *Id.* at 1350.

185. *Id.* at 1332; Gaddie Expert Report, *supra* note 67, at 16.

186. Touch-point contiguity means that two districts are contiguous only in the sense that the diagonal black squares on a checkerboard are contiguous. *See Larios*, 300 F. Supp. 2d at 1332.

187. *Id.* (stating that "the majority of the districts that are contiguous only by reason of water or touch-point contiguity are overpopulated").

2007] REDISTRICTING LESSONS FROM GEORGIA 1023

aries.¹⁸⁸ The House plan split 80 counties, eight more than in the plan that it replaced.¹⁸⁹ The Senate plan split 81 counties.¹⁹⁰

Georgia offered three state interests to justify the redistricting:

(1) to protect the interests of rural South Georgia, which for decades had grown more slowly than the rest of the state by eliminating as few districts in that region as possible;¹⁹¹

(2) to protect inner-city Atlanta by reducing the number of districts it would lose;¹⁹²

(3) to protect Democratic incumbents who participated in the redistricting process.¹⁹³

The plaintiffs questioned the validity of these interests. One plaintiffs' expert's report articulated:

The conclusion to be drawn from this remap is a simple one, summed up in an anonymous quote regarding Georgia's county unit system, published in 1961: "the situation is simply this: we've got the power and you haven't, and we ain't going to give it up!"

The crafting of legislative districts in Georgia has defied nearly every convention of redistricting and subverted every traditional redistricting principle. Why? Every redistricting principle—incumbent protection, compactness, contiguity, core retention, county integrity—is subverted to plans with large population deviations, and which under-populate many districts while overpopulating many others in an arbitrary fashion, based on geography and politics. The deviations are not justified by any traditional redistricting criterion.¹⁹⁴

The court found that Georgia's rationales for population deviations were not legitimate state interests.¹⁹⁵ Instead, the efforts to advantage certain parts of the state—rural South Georgia and inner-city Atlanta—were as unconstitutional as the efforts struck down forty years earlier in *Reynolds v. Sims*.¹⁹⁶ The *Larios* court concluded that:

188. *Id.* at 1333.

189. *Id.*

190. *Id.*

191. *Id.* at 1328.

192. *Id.* at 1328 n.3.

193. *Id.* at 1329.

194. Gaddie Expert Report, *supra* note 69, at 31 (quoting William G. Cornelius, *The County Unit System of Georgia: Facts and Prospects*, 14 W. POL. Q. 942 (1961)).

195. *Larios*, 300 F. Supp. 2d at 1341-42.

196. 377 U.S. 533 (1964).

In short, the deliberate regional favoritism built into the Georgia House and Senate Plans created more than a taint of arbitrariness and discrimination, violating Equal Protection by diluting the votes of citizens of the suburban and exurban party of northern Georgia and overweighing the votes of citizens in rural Georgia and inner-city Atlanta.¹⁹⁷

While protecting incumbents may be an acceptable state interest, the *Larios* court noted that it “is a permissible cause of population deviations *only* when it is limited to the avoidance of contests between incumbents and is applied in a consistent and nondiscriminatory manner.”¹⁹⁸ The 2000 census had shown Republican districts to be the most overpopulated, yet the new maps combined parts of overpopulated Republican districts, pairing GOP incumbents in districts that pushed the Equal Population envelope.¹⁹⁹ In contrast, Democratic districts that were under-populated had people added to those districts, and the result was achieved without placing the residences of multiple Democrats within the same district. Some districts had to be torturously shaped to avoid having the district boundaries encompass the homes of multiple Democratic incumbents.

The best evidence of the Georgia legislative maps as a partisan gerrymander, achieved via the exploitation of population deviations, comes from an examination of the relationship of the population deviations in the districts relative to the strength of the Republican electorate in the districts. In Figure 1 these authors plot the percentage of population deviation from the ideal for each of the 180 seats in the Georgia House of Representatives in 2002, against the proportion of votes cast for Republicans for PSC in 2004 (the diamond-shaped markers indicate each observed case).²⁰⁰ The coefficient of determination between the two variables is a respectable .348.²⁰¹ When one plots the population deviation against the *probability* of the district voting a majority Republican for PSC in 2000 (the circle-shaped markers in Figure 1), the relationship is

197. *Larios*, 300 F. Supp. 2d at 1347.

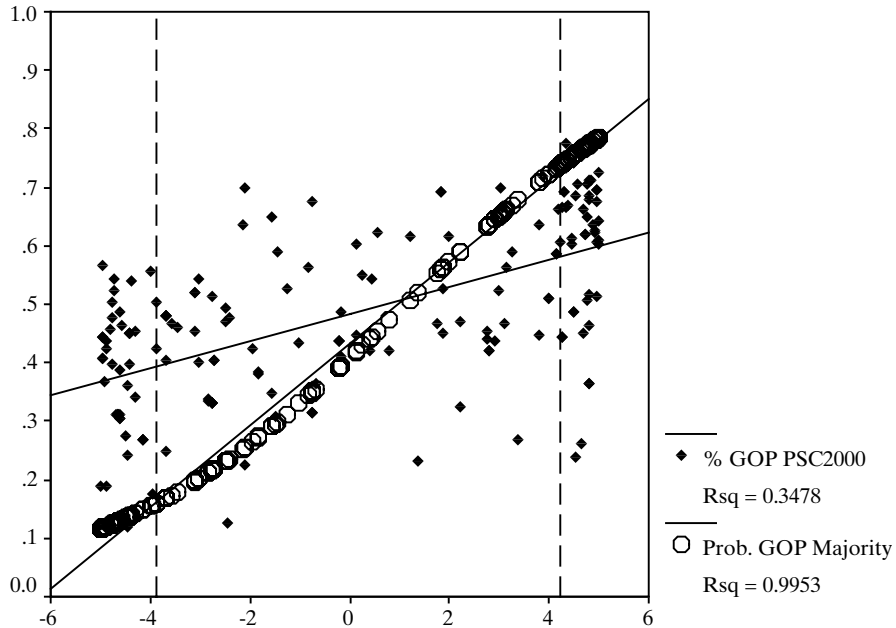
198. *Id.* at 1338.

199. *Id.* at 1347-48.

200. *See infra* fig.1.

201. The coefficient of determination (multiple R-square) indicates the proportion of variation in an interval-level dependent variable that is accounted for by controlling for the independent variables in a statistical model, in this case the general linear model as applied through ordinary least squares regression. A value of 0 indicates no explained variation, while a value of 1 (which is rarely observed) means that all of the variation in values of the dependent variable is accounted for by the predictor variables in the model.

FIGURE 1: POPULATION DEVIATIONS \times %GOP FOR PUBLIC SERVICE COMMISSION, PROBABILITY OF A DISTRICT VOTING MAJORITY GOP FOR PSC, IN 2000



*At least one incumbent had previously announced plans to retire or seek other office.

so strongly related to the size and direction of the district population deviation as to be nearly perfectly linear. The relationship affirms the partisan goal of the map. Democratic mapmakers set what they viewed as a legally-defined ceiling on the population of a district and then packed as many Republican voters as possible into those districts in order to minimize the impact of Republican voters on other districts. Democratic voters were spread across as many districts as possible, set at the lowest possible population floor in order to maximize their influence across districts. The power of the relationship between district partisanship and population deviation affirms the presence of the strategy. The power and significance of the relationship indicate it could not have happened by chance, but rather had to be a product of design.

CRAFTING THE NEW MAPS

Lawyers for the Democrats appealed the panel's decision to the U.S. Supreme Court, which affirmed the judgment.²⁰² Implementation of the state's previous appellate victory in *Ashcroft* was forestalled. Georgia had to create new legislative districts in time for the 2004 elections. Since filing for election in Georgia was scheduled for the last week of April, the trial court gave the legislature less than three weeks, until March 1, to design replacement plans.²⁰³

Despite the gerrymander designed to increase the Democratic Party's Senate contingent by five, Republicans took control of the upper chamber after the 2002 election.²⁰⁴ Republicans passed a new Senate redistricting plan in 2003 only to see it languish in a House committee.²⁰⁵ After *Larios*, the Senate successfully enacted a plan.²⁰⁶ In the past, each chamber had deferred to the other when it came to districting its own chamber.²⁰⁷ Despite the court order invalidating the existing maps, the House ignored the non-interference norm in 2004 as it had in the previous year.²⁰⁸

The House Legislative and Congressional Reapportionment Committee not only balked at accepting the Senate plan, it never released a plan for its own chamber.²⁰⁹ Although Democrats had a sizable advantage, holding 107 of 180 seats, they doubted whether they could hold their ranks and enact a plan.²¹⁰ They feared that Republicans would cut deals with enough rural, conservative Democrats to substitute a GOP alternative to any plan that the Democratic leadership offered.²¹¹

202. *Cox v. Larios*, 542 U.S. 947 (2004).

203. *Larios*, 300 F. Supp. 2d at 1356.

204. The Democratic gerrymander resulted in Democrats winning 30 of 56 Senate seats—two fewer than before the election. Newly-elected Republican Governor Sonny Perdue convinced four Democrats to change parties. Bullock, *GOP Finally Takes Over*, *supra* note 11, at 68-69.

205. Jim Tharpe, *Gridlock 2003? Time Is Passing But Bills Aren't*, ATLANTA J.-CONST., Mar. 15, 2003, at A1.

206. Rhonda Cook, *Mapmakers Unveil Redistrict Lines Today*, ATLANTA J.-CONST., Mar. 15, 2004, at D4.

207. Brandon Larrabee, *Senate Approves New Maps*, Athens Banner Herald, Feb. 21, 2004, at A1, A4.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

2007] REDISTRICTING LESSONS FROM GEORGIA 1027

When the legislature failed to act, the court appointed retired federal judge Joseph Hatchett to serve as special master.²¹² The judge, assisted by Professor of Law Nathaniel Persily, drew maps for the General Assembly that had deviations of + 1%.²¹³ The initial maps did not consider incumbency and, as reported in Table 3, paired 66 representatives.²¹⁴ In contrast with the Democratic map that disproportionately paired Republicans, the court's map paired 45 Democrats (40.4% of the Democratic caucus) along with 20 Republicans (30% of the GOP caucus) and the one Independent.²¹⁵ A number of pairings occurred adjacent to districts that had no incumbent.²¹⁶ Ironically, the chair of the House Reapportionment Committee, who had refused to present a map, ended up sharing a district with two of the House's most powerful members, the chairs of the Appropriations and Rules Committees.²¹⁷ The court's first House map would have created 47 seats without incumbents.²¹⁸ The Senate map would have created eleven open seats with 20 paired senators.²¹⁹

The court responded to numerous suggestions from the two political parties, and when a pairing could be undone with little difficulty and would not result in another pairing, the court approved changes.²²⁰ Members of the LBC claimed that they had been singled out for pairing even though the new maps resulted in the same number of majority-black districts as the maps being replaced.²²¹ In the end, 33 House incumbents—20 Democrats, 12 Republicans,

212. Rhonda Cook, *Court Redraws Capitol Careers*, ATLANTA J.-CONST., Mar. 16, 2004, at A1.

213. *Id.*

214. *See infra* tbl. 3.

215. *See infra* tbl. 3.

216. Rhonda Cook, *Attorneys Protest New District Maps*, ATLANTA J.-CONST., Mar. 20, 2004, at E1 [hereinafter Cook, *Attorneys Protest*].

217. Jim Galloway, *Power up for Grabs*, ATLANTA J.-CONST., Mar. 17, 2004, at D1.

218. Rhonda Cook, *Lawmakers Get One Last Shot to Pass Own Maps*, ATLANTA J.-CONST., Mar. 17, 2004, at D6.

219. Cook, *Attorneys Protest*, *supra* note 216, at E1, E3.

220. Tom Baxter & Jim Galloway, *Put Those Muskets Down: The Devolution Has Been Called on Account of Rain*, *ajc.com*, Mar. 24, 2004, <http://www.ajc.com/metro/content/metro/insider/0304a/032404.html>.

221. *See* Rhonda Cook, *Democrats Stall Map Decision*, ATLANTA J.-CONST., May 18, 2004, at D5 (discussing the argument that "pairing African-American lawmakers with other legislators, especially other members of the black caucus, would be a step back for minority constituencies."). Of the 38 seats elected from majority black districts in 2002, 17 represented districts under-populated by more than 4% while only seven had populations above the ideal. The geographic concentration of these districts contributed to the initial pairing of black incumbents elected from these districts.

TABLE 3: GEORGIA STATE HOUSE INCUMBENT PAIRINGS 2004

| District* | Paired Incumbents, 1st Map | Paired Incumbents, 2d Map |
|-----------|---|--|
| 149 | G. Green (D) and Hugh Broome (D) B. Mitchell (D) and M. Henson (D) P. Smith (D) and B. Childers (D) D. Wix (D) and A. Thomas (D) | G. Green (D) and Hugh Broome (D) |
| 57 | D. Teper (D) and P. Gardner (D) | D. Teper (D) and P. Gardner (D) |
| 84 | S. Benefield (D), J. McClinton (D) and G. Maddox (D) R. Teilet (D) and J. Noel (D) T. Brooks (D) and B. Holmes (D) K. Ashe (D) and D. Dean (D) G. Sinkfield (D) and R. Dodson (D) | B. Mobley (D), J. McClinton (D) and G. Maddox (D)* |
| 92 | P. Stephenson (D), S. Watson (D), and T Greene-Johnson (D) V. Hill (D) and D. Jordan (D) J. Skipper (D) and D. Buckner (D) T. Buck (D), C. Smyre (D), and C. Hugley (D) | P. Stephenson (D) and T Greene-Johnson (D)* |
| 161 | L. Jackson (D) and M. Stephens (D) P. Houston (D) and J. Shaw (D) | L. Jackson (D) and M. Stephens (D) P. Houston (D) and J. Shaw (D) |
| 34 | D. Stoner (D) and R. Golick (D) | D. Stoner (D) and R. Golick (R) |
| 93 | R. Sailor (D) and B. Bunn (D) | R. Sailor (D) and B. Bunn (R) |
| 99 | D. Casas (R) , H. Floyd (D), and C. Bannister (D) | C. Thompson (D) and H. Floyd (D)* |
| 146 | L. Walker (D)* and L. O'Neal (R) | L. Walker (D) and L. O'Neal (R)* |
| 166 | T. Barnard (R) and B. Oliver (D) | T. Barnard (R) and B. Oliver (D) |
| 165 | B. DeLoach (I) and A. Williams (D) B. Hanner (D) and E. Rynders (R) R. Forster (R) and R. Williams (R) | B. DeLoach (I) and A. Williams (D) R. Forster (R) and R. Williams (R) |
| 7 | J. White (R) and D. Ralston (R) T. Knox (R) and J. Murphy (R) | J. White (R) and D. Ralston(R)* |
| 18 | M. Butler (R) and C. Harper (R) M. Coan (R) and D. Sheldon (R) | M. Butler(R) and C. Harper(R) |
| 17 | B. Heath (R) and R. Maxwell (R) D. Parsons (R) and M. Dollar (R) M. Burkhalter (R) and T. Rice (R) | B. Heath (R) and R. Maxwell (R) |

*At least one incumbent had previously announced plans to retire or seek other office.

**Note: District numbers are included only for final pairings. The numbering of the initial, proposed districts by the federal court's special master did not conform to the final district numbering, and included districts numbered only with letters or letters and numbers.

Source: Data compiled by authors.

2007] *REDISTRICTING LESSONS FROM GEORGIA* 1029

and the sole Independent—were paired as reported in Table 3.²²² The final Senate plan paired two sets of Republicans, paired one Democrat set, and created three districts that housed a Democrat and a Republican. The new maps resulted in a number of open seats, which boosted Republican hopes of winning a majority in the House and thereby taking control of both branches of the Georgia legislature.²²³

Judicial Finality

The final decision on the Georgia redistricting came on June 30, 2004, when the U.S. Supreme Court affirmed the judgment of the district court by an eight to one vote.²²⁴ Three of the justices signed opinions. In a concurring opinion joined by Justice Stephen Breyer, Justice John Paul Stevens strongly defended the principle of one person, one vote, and reiterated the role of region and party:

The District Court's findings disclose two reasons for the unconstitutional population deviations in the state legislative reapportionment plans. The first was "a deliberate and systematic policy of favoring rural and inner-city interests at the expense of suburban areas north, east, and west of Atlanta." The second was "an intentional effort to allow incumbent Democrats to maintain or increase their delegation, primarily by systematically underpopulating the districts held by incumbent Democrats, by overpopulating those of Republicans, and by deliberately pairing numerous Republican incumbents against one another."²²⁵

Justice Stevens went on to list indicators of partisan shenanigans that defied the traditional norms of "good government" redistricting principles—such as those we described in our discussion of "fair" maps, above.²²⁶ Justice Stevens was not satisfied only to affirm the need for rigorous population equity, as was articulated in *Karcher* and *Reynolds*, but proceeded to analyze ground debated just weeks before in *Vieth v. Jubelirer*²²⁷:

222. *See supra* tbl. 3.

223. Brian Basinger, *Judges OK New Districts*, *ATHENS BANNER HERALD*, Mar. 26, 2004, at A1.

224. *Cox v. Larios*, 542 U.S. 947 (2004).

225. *Id.* (Stevens, J., concurring) (internal citations omitted).

226. *Id.* at 948-51; *see also supra* notes 14-48 and accompanying text. Justice Stevens would revisit these issues in his dissent in the final iteration of the Texas congressional redistricting case of the 2000s, *see LULAC v. Perry*, 126 S. Ct. 2594 (2006).

227. 541 U.S. 267 (2004).

[H]ad the Court in *Vieth* adopted a standard for adjudicating partisan gerrymandering claims, the standard likely would have been satisfied in this case. . . . [A]n impermissible partisan gerrymander is visible to the judicial eye and subject to judicially manageable standards . . . Drawing district lines that have no neutral justification in order to place two incumbents of the opposite party in the same district is probative of the same impermissible intent as the “uncouth twenty-eight-sided figure” that defined the boundary of Tuskegee, Alabama in *Gomillion v. Lightfoot*.²²⁸

Justice Stevens found oddly-shaped constituencies not only aesthetically offensive, but also, when combined with a political agenda, legally offensive.²²⁹ Justice Stevens effectively invited additional challenges to redistricting plans on the basis of partisanship if the machinations of the sort used in the Georgia legislative maps were at issue.

Larios undercut the notion of a + 5% safe harbor. Simply because it is possible to craft a map within a ten-point range of the ideal population for districts, it does not follow that the map in question will be legal, unless those deviations are justified by some “neutral” public policy or pursuit of a neutral redistricting principle. If other courts embrace this element of the decision of the Georgia district court—that population deviations within the ten-point range must be justified by neutral principle or policy—then jurisdictions must be prepared to explain population deviations that had formerly gone largely un-scrutinized. The Court has placed this one small constraint on the increasingly artistic, creative maps of partisan political geographers, that they be as true as possible to equal population.

THE ELECTORAL CONSEQUENCES OF THE 2004 REMAP

The political consequences of the remap were far-reaching. In the House, 26 Democratic incumbents did not compete in the general election, and another six lost reelection bids.²³⁰ In contrast, Republicans reelected 63 of their 65 incumbents and dominated the open seats, winning 28 of 37.²³¹ When the dust of the November election settled, Democrats had lost a net of 21 seats, compared

228. *Larios*, 542 U.S. at 950 (Stevens, J. concurring) (internal citations omitted).

229. *Id.* at 948-49.

230. Cameron McWhirter, *Republicans Run the Electoral Table*, ATLANTA J.-CONST., Nov. 4, 2004, at A1.

231. *Id.*

2007] REDISTRICTING LESSONS FROM GEORGIA 1031

to 22 gained by Republicans (added to the defeat of one Independent), leaving Republicans with a 95-85 majority in the House.²³²

In 2002, 136 incumbents ran in the general election: 87 of 107 Democrats (81.4%) and 49 of 72 Republicans (68.1%).²³³ In 2004, 143 incumbents stood in the general election: 81 of 109 Democrats (74.3%) and 63 of 70 Republicans (88.5%).²³⁴

Republican House gains flowed partially from the redistricting pairings in the federal court map. Of the 180 new SMDs, 65 hosted one Republican incumbent, 85 had one Democratic incumbent, four districts contained two Republican incumbents, six districts included two or more Democratic incumbents, and four districts boasted an incumbent from each major party, though at least one incumbent in each of these districts chose not to compete.²³⁵ At least four Republican incumbents and seven Democratic incumbents would not return for the next session as a consequence of this redistricting.²³⁶ The remaining districts were true open seats.²³⁷

The Senate plan had fewer pairings. Two pairings contained a Democrat and Republican each.²³⁸ The problems, however, were less significant than it might appear. Two of these representatives left the state legislature to make runs at the U.S. Congress.²³⁹ The nation’s longest serving state legislator, Hugh Gillis—who first won a seat in the Georgia General Assembly in 1940—left public life.²⁴⁰

232. The majority would grow in the coming weeks as four South Georgia Democrats switched to the GOP, boosting its ranks to 99 of 180 seats. Nancy Badertscher, *Another House Democrat Joins GOP*, ATLANTA J.-CONST., Nov. 10, 2004, at B4.

233. Compare Georgia Secretary of State, Georgia House of Representatives Election Results, Nov. 7, 2000, http://www.sos.state.ga.us/elections/election_results/2000_1107/house.htm, with Georgia State House 2002 Election Results, *supra* note 88; compare Georgia Secretary of State, Georgia State Senate Election Results, Nov. 7, 2000, http://www.sos.state.ga.us/elections/election_results/2000_1107/senate.htm, with Georgia State Senate 2002 Election Results, *supra* note 104.

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234. Compare Georgia Secretary of State, Georgia House of Representatives Election Results, Nov. 2, 2004, http://www.sos.state.ga.us/elections/election_results/2004_1102/house.htm [hereinafter Georgia State House 2004 Election Results], with Georgia State House 2002 Election Results, *supra* note 88; compare Georgia Secretary of State, Georgia State Senate 2004 Election Results, Nov. 2, 2004, http://www.sos.state.ga.us/elections/election_results/2004_1102/senate.htm, with Georgia State Senate 2002 Election Results, *supra* note 104.

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235. See *supra* tbl. 3.

236. *Id.*

237. *Id.*

238. *Id.* (“Senate President pro-tem Eric Johnson (R-Savannah) against Rene Kemp (D-Hinesville); and 59-year-old Jack Hill (R-Reidsville) against 85-year-old Hugh Gillis (D-Soperton).”).

239. *Id.*

240. See Bill Torpy, *Old Friends Clash in New District: Remap Pits Senators Against Each Other*, ATLANTA J.-CONST., Mar. 21, 2004, at A1.

Thus, the only electoral pairing involved two Republicans.²⁴¹ Ironically the loser in that match-up was a Democrat who had switched parties in 2002 in order to give Republicans their Senate majority.²⁴²

The Two-Incumbent Pairings

As reported in Table 4,²⁴³ three of the five districts that paired a Democratic incumbent with a Republican had given at least 55% of its votes to Democrats for the PSC in 2000, and were between 32% and 61% black VAP.²⁴⁴ The other two districts voted Republican for the PSC in 2000 and had black VAPs below 22 percent. Republicans carried the two Republican-leaning districts and also District 166, which had voted 55% for the Democrats for PSC in 2000.²⁴⁵

Democrats retained all six districts that contained two or more Democratic incumbents.²⁴⁶ Democratic PSC candidates polled at least 63% of the vote in these districts. In three districts in which Epstein’s analysis projected that African-Americans could elect their preferred candidate, an African-American candidate was elected.²⁴⁷

The GOP prevailed in the four districts having two Republican incumbents.²⁴⁸ Each district had voted Republican for the PSC in 2000, with three voting over 60% Republican.²⁴⁹ None of the districts had a black VAP above 17%, and one had only 0.19% black VAP.²⁵⁰

241. See Georgia Secretary of State, Official Results of the July 20, 2004 Primary Election, http://www.sos.state.ga.us/elections/election_results/2004_0720/senate.htm (detailing defeat of Sen. Dan Lee by Sen. Seth Harp).

242. See Rhonda Cook, *Election 2004: Legislative Primaries: 5 Incumbents Won’t Return to Capitol*, ATLANTA J.-CONST., July 22, 2004, at B3.

243. See *infra* tbl.4.

244. Computed by authors from data in tbl. 4, *infra*. Public Service Commission contests are often viewed as providing a good perspective on the relative strength of the two parties in a district, because PSC contests tend to attract little media coverage and the candidates are not usually well known. Consequently, most voters in PSC contests rely heavily on the party labels. Gaddie Expert Report, *supra* note 69, at 11.

245. See *infra* tbl.4.

246. See *infra* tbl.4.

247. Compare generally Expert Report of David Epstein, *supra* note 154, with Georgia State House 2004 Election Results, *supra* note 234.

248. See Doug Gross, *GOP Takes Control of G.A. House*, ASSOCIATED PRESS, Nov. 3, 2004, at A4.

249. Computed by authors from data in tbl.5, *infra*.

250. See *infra* tbl.5.

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TABLE 4: DISTRICT PROFILES WHERE INCUMBENTS WERE PAIRED

A. Bipartisan Pairings (n = 5)

| District | Black VAP | PSC 2000 | GOP Win? |
|----------|-----------|----------|----------|
| 34 | 21.26 | 50.36 | Yes |
| 93 | 61.54 | 32.73 | No |
| 146 | 18.13 | 58.89 | Yes |
| 165 | 45.59 | 33.04 | No* |
| 166 | 32.55 | 44.17 | Yes |

B. Democrats - Only Pairings (n = 6)

| District | Black VAP | PSC 2000 | GOP Win? |
|----------|-----------|----------|----------|
| 57 | 8.52 | 34.65 | No |
| 84 | 71.97 | 12.40 | No |
| 92 | 58.92 | 31.81 | No |
| 99 | 25.51 | 36.54 | No |
| 149 | 43.22 | 35.69 | No |
| 161 | 56.39 | 31.87 | No |

C. Republicans - Only pairings (n = 4)

| District | Black VAP | PSC 2000 | GOP Win? |
|----------|-----------|----------|----------|
| 7 | .19 | 61.38 | Yes |
| 17 | 5.93 | 60.79 | Yes |
| 18 | 16.92 | 51.48 | Yes |
| 32 | 8.08 | 68.42 | Yes |

*Pairing included independent Buddy DeLoach, who lost to incumbent Democrat Al Williams in the general election. No Republican was included in this pairing.

Source: Expert report of Ronald K. Gaddie, *supra* note 67.

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One-Incumbent Districts

Republicans retained 63 (96.9%) of the 65 districts having a single GOP incumbent.²⁵¹ Incumbents sought reelection in 53 of these very safe GOP constituencies.²⁵² The average vote for the PSC in 2000 in these districts was 61.3%, and the average VAP was only 11.4% black.²⁵³

The 85 districts housing a single Democratic incumbent showed more political volatility. Incumbents competed in 73 of these districts but Republicans prevailed in six.²⁵⁴ Republicans won another 7 of the 13 districts where Democratic incumbents retired.²⁵⁵ The average Democratic vote for PSC in 2000 in districts with Demo-

251. See *infra* tbl.5.

252. See *infra* tbl.5.

253. See *infra* tbl 5.

254. See *infra* tbl.5.

255. See *infra* tbl.5.

cratic incumbents was over 61%, and the average percentage black VAP exceeded 40 percent.²⁵⁶

The Open Seats

Republicans captured 12 of the 15 open seats created by redistricting in 2004.²⁵⁷ On average these were very Republican districts, with a mean Republican PSC 2000 vote of 56.9% and an average percentage black VAP of just 16.9%.²⁵⁸ Seven Republicans ran unopposed in the general election.²⁵⁹

In the absence of incumbents, Republicans dominated the 2004 Georgia House elections, winning 28 of the 37 open seats.²⁶⁰ Of the 28 open seats won, 17 were taken without opposition from the Democrats, and Republicans conceded just three open seats (all majority-black VAP). Republicans won 11 of 17 contested open seats.²⁶¹

Descriptive Change: Black Population Concentrations

The court maps affected the distribution and concentration of black voters. As indicated in Table 5, part A,²⁶² the map rejected by the federal court included 38 black-majority-VAP districts and another ten districts which had 40-50% black VAP.²⁶³ These could be assumed to be safely Democratic even if they did not elect the black candidates of choice.²⁶⁴ Among the remaining districts, 82 were less than 20% black VAP and 50 were less than 10% black VAP.²⁶⁵

The change in state legislative boundaries scattered the selective packing and placement of black voters on the state legislative map. As indicated in part B of Table 5, the court plan increased the number of districts less than 20% black VAP from 82 to eighty-nine.²⁶⁶ Majority-black VAP districts increased by one to 39, and the number of districts between 40% and 50% black VAP increased by

256. *See infra* tbl.5.

257. *See infra* tbl.5.

258. *See infra* tbl.5.

259. *See infra* tbl.5.

260. *See infra* tbl.5.

261. *See infra* tbl.5.

262. *See infra* tbl.5.

263. *See infra* tbl.5.

264. *See generally* EARL BLACK & MERLE BLACK, *THE RISE OF SOUTHERN REPUBLICANS* (2002); DAVID LUBLIN, *THE REPUBLICAN SOUTH* (2004).

265. Computed by authors from data presented in tbl. 5, *infra*.

266. *See infra* tbl.5.

2007] REDISTRICTING LESSONS FROM GEORGIA 1035

TABLE 5: PARTISAN CONTROL OF LEGISLATIVE SEATS BY AFRICAN-AMERICAN VOTING AGE POPULATION, 2002 AND 2004

| HOUSE | | | | | | |
|----------|-----------------------|----|-----|------|------------------|-------------------|
| A. 2002* | <i>Winning Party:</i> | | | | | |
| | | N* | Dem | GOP | % GOP | |
| | < 10% | 50 | 5 | 45 | 90.0 | |
| | 10-20% | 32 | 15 | 17 | 53.1 | |
| | 20-30%** | 28 | 21 | 6 | 21.4 | |
| | 30-40% | 22 | 20 | 2*** | 9.1 | |
| | 40-50% | 10 | 10 | 0 | 0.0 | |
| | 50-60% | 20 | 20 | 0 | 0.0 | |
| 60%+ | 18 | 18 | 0 | 0.0 | | |
| B. 2004 | <i>Winning Party:</i> | | | | | |
| | | N | Dem | GOP | %GOP | Net Δ from 2002 |
| | < 10% | 52 | 7 | 45 | 86.5 | +2 total, +0 GOP |
| | 10-20% | 37 | 6 | 31 | 83.8 | +5 total, +14 GOP |
| | 20-30% | 22 | 11 | 11 | 50.0 | -6 total, +5 GOP |
| | 30-40%**** | 18 | 10 | 8 | 44.4 | -4 total, +6 GOP |
| | 40-50% | 12 | 12 | 0 | 0.0 | +2 total, +0 GOP |
| | 50-60% | 18 | 18 | 0 | 0.0 | -2 total, +0 GOP |
| 60%+ | 21 | 21 | 0 | 0.0 | +3 total, +0 GOP | |
| SENATE | | | | | | |
| C. 2002 | <i>Winning Party:</i> | | | | | |
| | | N* | Dem | GOP | % GOP | |
| | < 10% | 17 | 1 | 16 | 94.1 | |
| | 10-20% | 5 | 2 | 3 | 60.0 | |
| | 20-30%** | 9 | 3 | 6 | 66.7 | |
| | 30-40% | 12 | 8 | 4 | 33.3 | |
| | 40-50% | 0 | | | | |
| 50-60%++ | 8 | 7 | 1 | 12.5 | | |
| 60%+ | 5 | 5 | 0 | 0.0 | | |
| D. 2004 | <i>Winning Party:</i> | | | | | |
| | | N* | Dem | GOP | % GOP | |
| | < 10% | 15 | 0 | 15 | 100 | |
| | 10-20% | 10 | 0 | 10 | 100 | |
| | 20-30%** | 10 | 2 | 8 | 80.0 | |
| | 30-40% | 7 | 6 | 1 | 16.7 | |
| | 40-50% | 1 | 1 | 0 | 0 | |
| | 50-60%++ | 10 | 10 | 0 | 0 | |
| 60%+ | 3 | 3 | 0 | 0 | | |

*In 2002 180 seats were elected in 147 districts, including 66 seats elected in multimember districts ("MMDs"). The "N" for each category represents the number of seats elected from a category, rather than the number of districts (an MMD with three seats counts as three districts with identical racial demographics).

**One seat was carried by independent Buddy DeLoach.

***Highest % black won by a Republican was 34.4%.

****Highest % black won by a Republican was 37.2%

++Highest % black won by a Republican was 51.5%

Source: Data compiled by authors.

two.²⁶⁷ The number of districts between 20% and 30% black VAP decreased by 6, while the number of 30-40% black VAP districts decreased by four.²⁶⁸

Table 5 points out the strong structural role of race in determining the composition of the General Assembly. In 2002, Republicans won none of the 48 districts more than 40% black VAP but carried 90% of the 50 districts that were less than 10% black.²⁶⁹ Republicans only won 23 of the 60 districts (38.3%) between 10% to 30% black VAP, including just a bare majority (17 of 32 seats) of districts with 10-20% black VAP.²⁷⁰ While Republicans came to dominate congressional districts in the Deep South with less than 35% black VAP,²⁷¹ it was only in overwhelmingly white areas that Republicans dominated Georgia State House elections in 2002.²⁷²

The political impact of the shifts exceeds the demographic changes. In 2004, Republicans continued to dominate districts that were less than 10% black, winning 86.5% of these seats.²⁷³ A major change from 2002 was that Republicans did almost as well in districts 10% to 20% black.²⁷⁴ They also took half the seats in 20-30% black districts, and even won 44.4% of those 30-40% black.²⁷⁵ Redistricting created more constituencies that were favorable, based on racial demographics, to Republicans than existed under the old map, yet Republican gains exceeded the expectations given previous GOP success in state legislative districts on the basis of race.²⁷⁶

The linkage between the racial makeup of the district and partisanship is even more pronounced in the Senate, as shown in Table 5.²⁷⁷ Following the 2004 election, Republicans held 33 of 35 Senate seats in districts less than 30% black VAP.²⁷⁸ In districts with larger black concentrations, Democrats held all but one seat.²⁷⁹

267. *See supra* tbl.5.

268. *See supra* tbl.5.

269. *See supra* tbl.5.

270. *See supra* tbl.5.

271. *See supra* tbl.5.

272. *See supra* tbl.5.

273. *See supra* tbl.5.

274. *See supra* tbl.5.

275. *See supra* tbl.5.

276. The most likely source of Republican gains outside the redistricting effects is the ongoing realignment of white Southern voters to the Republican Party. *See* Charles S. Bullock III, Donna R. Hoffman & Ronald Keith Gaddie, *The Consolidation of the White Southern Congressional Vote*, 58 POL. RES. Q. 231, 240-41 (2005).

277. *See supra* tbl.5.

278. *See supra* tbl.5.

279. *See supra* tbl.5.

2007] REDISTRICTING LESSONS FROM GEORGIA 1037

The 2004 elections clearly divided Republican and Democratic districts in terms of racial composition. But a comparison to the previous election in 2002 reveals that the race-partisanship relationship was not as clearly defined in the recent past. While Table 5 shows Republicans winning 16 of 17 seats in districts that were less than 10% black, they managed only to win approximately 64% of seats in districts 10-30% black.²⁸⁰ Republicans did win four districts that were more than 30% black, and even won a majority-black district seat by ousting the Senate majority leader.²⁸¹ The majority leader had become vulnerable after rumors of unethical and even illegal behavior within his party—rumors that proved true when a federal jury found him guilty of more than 100 criminal charges.²⁸²

Descriptive Change: Underlying Republican Partisanship

The changes in legislative boundaries also shifted the underlying partisan makeup of the districts. Of the 180 State House districts created in 2001, Table 6 shows that 78 voted Republican for the PSC in 2000.²⁸³ PSC results indicate 42 competitive districts with 18 districts that cast 45-55% of their ballots for Democrats.²⁸⁴ The GOP won 57 of the 60 most-Republican districts in 2002.²⁸⁵ Democrats won 74 of 78 districts that voted more than 55% Democratic for PSC and all 47 of the safest Democratic districts.²⁸⁶ Only five of 102 districts that voted Democratic for PSC sent a Republican to the legislature in 2002.²⁸⁷

The 2004 map substantially altered the distribution of partisans and the number of districts dominated by either party. With Republicans no longer packed under the new map, 89 districts voted Republican for the PSC.²⁸⁸ As shown in Table 6, Republi-

280. See *supra* tbl.5.

281. Mike Wynn, *Numbers Tell Story of Walker's Loss*, AUGUSTA CHRON., Nov. 7, 2002, at A-1.

282. James Salzer, *Federal Prison Awaits Walker: Ex Legislator Gets Ten Years for Fraud*, ATLANTA J.-CONST., Nov. 30, 2005, at A1.

283. Data compiled by authors from tbl. 6, *infra*.

284. See *infra* tbl.6.

285. These were districts voting less than 45% Democratic for the PSC in 2000. See Georgia Secretary of State, Official Results of the November 7, 2000 General Election, http://www.sos.state.ga.us/elections/election_results/2000_1107/default (follow hyperlinks on left side for results of contests for Public Service Commission, seats 1 and 2).

286. These districts voted over 60% Democratic for PSC. *Id.*

287. Compare *id.*, with Georgia State House 2002 Election Results, *supra* note 88.

288. See *infra* tbl.6.

**TABLE 6: DEMOCRATIC TENDENCY OF DISTRICTS,
PSC2000 VOTE, 2002 AND 2004**

| A. 2002 <i>Winning Party:</i> | | | | | |
|-------------------------------|----|-----|------|-------|--------------------|
| | N | Dem | GOP | %GOP | |
| < 40% | 51 | 3 | 48 | 94.1 | |
| 40-45% | 9 | 0 | 9 | 100.0 | |
| 45-50% | 18 | 9 | 0 8* | 44.4 | |
| 50-55% | 24 | 23 | 1 | 4.2 | |
| 55-60% | 31 | 27 | 4 | 12.9 | |
| >60% | 47 | 47 | 0 | 0.0 | |
| B. 2004 <i>Winning Party:</i> | | | | | |
| | N | Dem | GOP | %GOP | Net Δ from 2002 |
| < 40% | 52 | 1 | 51 | 98.1 | +1 total, +3 GOP |
| 40-45% | 22 | 1 | 21 | 95.5 | +13 total, +12 GOP |
| 45-50% | 15 | 6 | 9 | 60.0 | -3 total, +1 GOP |
| 50-55% | 23 | 14 | 9 | 39.1 | -1 total, +8 GOP |
| 55-60% | 16 | 12 | 4 | 25.0 | -15 total, +0 GOP |
| >60% | 53 | 52 | 1 | 18.9 | -6 total, +1 GOP |

*One district was carried by independent Buddy DeLoach.

Source: data for 2002 from Expert report of Ronald K. Gaddie, *supra* note 67; data for 2004 compiled by authors.

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cans dominated GOP-leaning districts, winning 72 of 74 districts where their PSC candidates got at least 45% of the vote and nine of 15 districts that had narrowly backed the GOP for PSC.²⁸⁹ GOP wins in districts that voted Democratic for PSC increased from five to fourteen.²⁹⁰

Multivariate Analysis

The court’s 2004 redistricting was incumbent-neutral, but its more compact districts redistributed Democratic voters so as to create opportunities for Republicans. In contrast, the Democratic redistricting strategy in 2001 distributed black voters, other Democrats, and incumbents so as to maximize their prospects while minimizing Republican incumbency effects and conceding a minimum number of districts packed with Republicans.²⁹¹ The factors that guided the Democrats’ efforts can be represented by a set of five variables. *Party potential* is measured by the vote in the 2000 Public Service Commission elections. Two PSC seats were contested in 2000.²⁹² The second element, *minority voter concentration*, is mea-

289. See *infra* tbl.6.

290. See *infra* tbl.6.

291. See *supra* notes 95-113 and accompanying text.

292. Patricia M. LaHay, *Incumbents Win PSC Seats*, MACON TELEGRAPH, Nov. 8, 2000.

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2007] REDISTRICTING LESSONS FROM GEORGIA 1039

sured by the percent black VAP and the percent Latino VAP (respectively) in each district. *Incumbency* is measured using a pair of dichotomous variables, one each to indicate the presence or absence of a Republican or Democratic incumbent.

Table 7²⁹³ shows two estimates of the Republican share of the vote in contested House districts. In the first estimate (part A), the 2000 PSC vote and controls for the presence of Democratic and Republican incumbents are introduced.²⁹⁴ The second estimate retains the incumbency controls along with controls for the black and Latino voting age populations (part B).²⁹⁵ The racial controls and the PSC 2000 vote are not included in the same model because black VAP is highly correlated with the PSC vote at the district level (adjusted- $R^2 = .85$).²⁹⁶ The analysis reveals a strong correlation between partisanship in the closely contested, low-profile PSC contests and the vote for House members in 2002.²⁹⁷ Both analyses show that incumbency acts in the expected directions but with the impact of a Democratic incumbent about twice that of a Republican incumbent.²⁹⁸ The strategic placement of Democratic incumbents and the elimination of Republican incumbent contenders could affect the expected vote distribution by four to seven points, controlling for base partisanship.

The same models are estimated for 2004 (Table 7, parts C and D). The 2004 model is as robust as in 2002. The most notable change is in the effect of incumbency. In 2002, the impact of Democratic incumbency was twice that of Republican incumbency in both regression estimates.²⁹⁹ In other words, Democrats got twice the electoral benefit of placing their incumbents in a district than Republicans got from the presence in an election of a GOP incumbent. The Republican and Democratic slopes in 2004 are of roughly the same magnitude though in opposite directions—Democratic and Republican incumbents had about the same impact on the vote for their respective parties, with Democratic incumbents enhancing the Democratic vote and Republican incumbents diminishing the Democratic vote.³⁰⁰ The slope coefficient for PSC is somewhat attenuated ($b = .833$ in 2004 as opposed to $b = 1.106$ in

293. See *infra* tbl.7.

294. See *infra* tbl.7.

295. See *infra* tbl.7.

296. See *infra* tbl.7.

297. See *infra* tbl.7.

298. See *infra* tbl.7.

299. See *infra* tbl.7.

300. See *infra* tbl.7.

**TABLE 7: PARTISAN, RACIAL, AND INCUMBENCY INFLUENCES
IN GEORGIA HOUSE ELECTIONS**

Contested seats in 2002

A.

| | B | s.e. _b | t |
|-------------------------|--------|-------------------|-----------|
| Intercept | -2.007 | 3.726 | -.539 |
| PSC 2000 | 1.106 | .072 | 15.277*** |
| Dem. Incumbent | -7.048 | 1.617 | -4.358*** |
| Rep. Incumbent | 3.978 | 2.099 | 1.895* |
| Adjusted R ² | .835 | | |
| N | 71 | | |

B.

| | B | s.e. _b | t |
|-------------------------|---------|-------------------|-----------|
| Intercept | 68.466 | 3.048 | 22.463 |
| Dem. Incumbent | -10.230 | 2.378 | -4.302*** |
| Rep. Incumbent | 4.996 | 3.013 | 1.658* |
| % Black VAP | -.557 | .061 | -9.103*** |
| % Latino VAP | -.365 | .218 | -1.680* |
| Adjusted R ² | .668 | | |
| N | 71 | | |

Contested Seats in 2004

C.

| | B | s.e. _b | t |
|-------------------------|--------|-------------------|----------|
| Intercept | 12.089 | 5.336 | 2.265* |
| PSC 2000 | .833 | .100 | 8.348*** |
| Dem. Incumbent | -7.546 | 2.334 | -3.233** |
| Rep. Incumbent | 6.704 | 2.566 | 2.613** |
| Adjusted R ² | .785 | | |
| N | 71 | | |

D.

| | B | s.e. _b | t |
|-------------------------|--------|-------------------|-----------|
| Intercept | 65.166 | 2.818 | 23.127 |
| Dem. Incumbent | -9.863 | 2.703 | -3.649*** |
| Rep. Incumbent | 10.971 | 2.971 | 3.693*** |
| % Black VAP | -.409 | .076 | -5.380*** |
| % Latino VAP | -.315 | .129 | -2.443** |
| Adjusted R ² | .702 | | |
| N | 71 | | |

***p < .001

**p < .01

*p < .05

Source: Electoral data are from Expert Report of Ronald K. Gaddie, *supra* note 67; racial and ethnic are from US Census; incumbency data compiled by authors.

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2002)—for every percentage point Republican for PSC in 2000, the GOP vote for the legislature went up 1.106 points in 2002, but in 2004 the translation of a percentage point Republican for the PSC only resulted in a .886 point increase in the GOP vote for the legis-

2007] REDISTRICTING LESSONS FROM GEORGIA 1041

lature.³⁰¹ In the racial analysis, the slope for black VAP is somewhat attenuated but still highly significant.³⁰²

In Table 8³⁰³ the dependent variable is whether a Republican won the district's House seat in 2002. The political, racial, and incumbency variables are initially tested separately on the outcome of interest—whether the GOP wins a seat—in the first three columns of the table, and then the five variables are combined into a single estimate in the fourth column.³⁰⁴ Finally, a reduced, combined model that eliminates insignificant predictors appears in the last column of the table. The 2002 election outcomes were strongly structured by the underlying partisanship of the district and by the presence of a Democratic incumbent.³⁰⁵ The political model in Table 8 reveals that the PSC 2000 vote alone reduced 80% of the predictive error in determining which party won a district.³⁰⁶ The racial/ethnic variables alone reduced the predictive error by 60%, though only black VAP was statistically significant.³⁰⁷ Incumbency controls reduced the predictive error by just over 47 percent.³⁰⁸ When the five variables are combined in a single estimate, only the PSC vote and the presence of a Democratic incumbent significantly affected the party winning the seat, though the predictive error reduction is less than for the PSC variable alone.³⁰⁹ The combined two-variable model reduced the predictive error by 89 percent.³¹⁰

The 2004 elections were also determined in part by the underlying partisanship of the district. The PSC vote alone reduced the predictive error in who won a state House seat by 79%—if one were to try to determine the share of cases where one would not predict the result right based on chance, and then determined how many of those we were able to predict correctly based on knowing the PSC vote in the district, the proportion of incorrect predictions would be reduced by 79 percent. Knowledge of only racial/ethnic variables in Table 9³¹¹ reduced the predictive error by about 65%, though again black VAP is the only significant predictor.³¹²

301. *See infra* tbl.8.

302. *See infra* tbl.8.

303. *See infra* tbl.8.

304. *See infra* tbl.8.

305. *See infra* tbl.8.

306. *See infra* tbl.8.

307. *See infra* tbl.8.

308. *See infra* tbl.8.

309. *See infra* tbl.8.

310. *See infra* tbl.8.

311. *See infra* tbl.9.

312. *See infra* tbl.9.

TABLE 8: LOGISTIC REGRESSION ESTIMATES OF PARTY WINNING SEAT, 2002 GEORGIA HOUSE

| | Political Model | Racial/Ethnic Model | Incumbency Model | Combined Model | Reduced, Combined Model |
|----------------------|-----------------|---------------------|------------------|----------------|-------------------------|
| Constant | -14.812 | 2.991 | -.000 | -8.721 | -12.149 |
| PSC 2000 | .279*** | | | .189** | .243*** |
| Black % VAP | | -.157*** | | .045 | |
| Latino % VAP | | -.064 | | .001 | |
| Inc. Democrat | | | -2.436*** | -1.538* | -1.596** |
| Inc. Republican | | | 1.634** | .544 | |
| log-likelihood | 85.59 | 121.655 | 87.257 | 77.354 | 79.361 |
| null prediction | 61.11% | 61.11% | 61.11% | 61.11% | 61.11% |
| % Correct Prediction | 92.22% | 84.44% | 79.44% | 91.67% | 92.22% |
| PRE | .800 | .600 | .471 | .654 | .894 |

n = 180

***p < .001

**p < .01

*p < .05

+p < .10

Source: Electoral data are from Expert Report of Ronald K. Gaddie, *supra* note 67; racial and ethnic are from US Census; incumbency data compiled by authors.

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Knowledge of where incumbents from each party ran reduced predictive error by 80 percent.³¹³ And, when one has knowledge of all five variables, the incumbency and partisanship variables are statistically significant—the relationships likely do not exist by chance—and the predictive error is reduced by 89%;³¹⁴ eliminating Latino VAP results in black population attaining significance in the reduced, combined model.³¹⁵ In other words, of the possible mistakes one might make in guessing at a result in ignorance, nearly nine out of ten guessing mistakes can be avoided by knowing the partisanship, incumbency, and ethnic and racial composition of the districts.

How much of the Democrats' undoing is a product of the court-ordered remap? As a check on the impact of redistricting, these authors used the results of the regression analyses for 2002 to estimate expected GOP vote shares for each district in 2004. The authors first estimated GOP vote shares for all 180 seats in 2002, based on the racial or partisan data for those districts and the cir-

313. See *infra* tbl.9.

314. See *infra* tbl.9.

315. See *infra* tbl.9.

TABLE 9: LOGISTIC REGRESSION ESTIMATES OF PARTY WINNING SEAT, 2004 GEORGIA HOUSE

| | Political Model | Racial/Ethnic Model | Incumbency Model | Combined Model | Reduced, Combined Model |
|----------------------|-----------------|---------------------|------------------|----------------|-------------------------|
| Constant | -13.424*** | 3.162 | 1.123 | -21.765 | -21.445 |
| PSC 2000 | .276*** | | | .417*** | .413*** |
| Black % VAP | | -.116*** | | .090 | .088* |
| Latino % VAP | | -.031 | | .010 | |
| Inc. Democrat | | | -3.764*** | -2.283* | -2.313** |
| Inc. Republican | | | 3.370* | 4.901** | 4.953** |
| log-likelihood | 88.24 | 137.29 | 90.177 | 48.541 | 48.560 |
| null prediction | 52.78% | 52.78% | 52.78% | 52.78% | 52.78% |
| % Correct prediction | 90.00% | 83.33% | 90.56% | 95.00% | 95.00% |
| PRE | .788 | .647 | .800 | .894 | .894 |

n = 180

***p < .001

**p < .01

*p < .05

+p < .10

Source: Electoral data are from Expert Report of Ronald K. Gaddie, *supra* note 67; racial and ethnic are from US Census; incumbency data compiled by authors.

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cumstance of incumbency in the election.³¹⁶ The estimates from Table 7, part A—the PSC 2000 vote with incumbency controls—indicated an expected result in 2002 of 74 GOP seats and 106 Democratic seats.³¹⁷ The estimates from Table 7, part B—the racial demographics with incumbency controls—predicted 83 GOP seats and 97 Democratic seats for 2002.³¹⁸

Applying the regression equation results for 2002 to the data and incumbency circumstances for 2004 indicates the substantial impact of redistricting on the political balance in the Georgia House. Republicans were projected to win 92 districts based on the PSC 2000/incumbency model; the racial/incumbency model predicted 102 GOP and 78 Democratic seats.³¹⁹ Of the 92 seats predicted to go to Republicans by the PSC 2000/incumbency model for 2002, 86

316. See RONALD KEITH GADDIE & CHARLES S. BULLOCK, III, ELECTIONS TO OPEN SEATS IN THE U.S. HOUSE: WHERE THE ACTION IS 1-12 (2000) (noting the theory and methodology on applying these models); see generally J. Morgan Kousser, *Estimating the Partisan Consequences of Redistricting Plans—Simply*, 21 LEG. STUD. Q. 521 (1996).

317. Seventy-three Republicans, 106 Democrats, and one Independent won election. See Georgia State House 2002 Election Results, *supra* note 88; see, e.g., Larry Hartstein, *Election 2002*, ATLANTA J.-CONST., Nov. 7, 2002, at J1.

318. See *supra* tbl.7.

319. Computed from data in tbl.7, *supra*.

did in fact elect a Republican; of the 102 seats expected to elect a Republican in 2004 based on the racial/incumbency model for 2002, 91 did so.³²⁰ If we assume Republicans won every district in which either regression equation predicted a GOP majority, then we made 91 correct predictions and 16 incorrect predictions, which means the authors were 85% successful. Four districts expected to vote Democratic elected Republicans and 12 expected to vote Republican chose Democrats.³²¹

Taking the analysis a step further, eliminating incumbency influence by suppressing it to zero when applying the equations from Table 7, parts A and B provide a feel for the role of incumbency in promoting Democratic control of the House. In 2002, Democrats retained the lower chamber based largely on the creative placement of core Democrats (especially minority voters), and the power of Democratic incumbents.³²² According to estimated vote shares from the equation in Table 7, part A and holding incumbency to zero (assuming all contested, open seats), in 2002 Republicans and Democrats should have each taken 90 seats in the lower chamber.³²³ The estimates from the racial model—Table 7, part B—indicate a Republican advantage in 101 districts.³²⁴

Democrats face weakened prospects under the new map. When incumbents are removed from the equations as applied to the map for 2004, the regression estimates indicate that Republicans would be expected to win 103 districts, based on the PSC 2000 equation in Table 7, part A, and expected to win 113 districts based on the racial equation.³²⁵ Thus, a shift of between 10 and 13 seats from Democrats to the Republicans occurred as a result of redistricting, laying aside the secondary effects of incumbency.

CONCLUSION

Georgia's 2001 redistricting has been identified as an example of political creativity that pushed the envelope of redistricting technology and the law in pursuit of political advantage.³²⁶ Nearly every convention of redistricting was set aside. In order to imple-

320. *See supra* tbl.7.

321. *See supra* tbl.7.

322. *See* Gelman and King, *supra* note 68, at 553 (discussing incumbency advantage); *see also* Gaddie Expert Report, *supra* note 69, at 21.

323. *See supra* tbl.7.

324. *See supra* tbl.7.

325. *See supra* tbl.7.

326. MICHAEL BARONE & RICHARD E. COHEN, *THE ALMANAC OF AMERICAN POLITICS* 454 (2003).

2007] REDISTRICTING LESSONS FROM GEORGIA 1045

ment their initial plan, Democrats took the unusual step of pursuing judicial review for preclearance under the Voting Rights Act. The U.S. Supreme Court ignored its long-established definition of retrogression in order to uphold Georgia's actions. Ultimately the map was undone by the state's inability to justify seemingly legal population deviations to the satisfaction of the courts.

The defects in Georgia's legislative maps illustrate how far a party that has lost public favor will go in an effort to retain power. The Democrats' desperation may have derived from their unfamiliarity with the minority role—a status Georgia Democrats had not experienced since 1872.³²⁷ Once a court redrew the state's districts to meet de minimus population deviations, while observing traditional redistricting criteria, the carefully-crafted political advantages of the gerrymander came undone. The court knocked the tripod of the gerrymander—strategic placement of Democratic incumbents and the strategic dislocation of Republican incumbents, together with the careful placement of black and Democratic voters, respectively, and the packing of Republican voters into few, homogenous districts—out from under the Democratic majority in the General Assembly.

The litigation spawned by the Georgia redistricting is politically and legally significant. The political significance is self-evident, because it disrupted the political strategy designed to continue the control of a party that had lost its popular majority. The three-judge panel in the northern district of Georgia, which sought to minimize the detrimental effects on incumbents to the greatest extent possible while crafting a neutral-principles map, nonetheless denied Democrats a sufficient number of incumbents and attractive districts in which to run. This analysis indicates that Democrats have not yet reached bottom in the state House.³²⁸ They could conceivably fall to just over one-third of seats based on the alignment of current districts and the continuing trend of realignment among white voters toward the Republican Party.³²⁹

The larger legal question of whether the judiciary should intervene in partisan gerrymanders was not resolved by *Larios*. From a legal standpoint, however, the Georgia remap can serve as a poten-

327. See Bullock, *GOP Finally Takes Over*, *supra* note 11, at 70.

328. In 2006 Republicans had a net gain of two House seats. Compare Georgia Secretary of State, Georgia State House of Representatives Election Results, Nov. 7, 2006, http://www.sos.state.ga.us/elections/election_results/2006_1107/swgahouse.htm, with Georgia State House 2004 Election Results, *supra* note 234.

329. See generally Bullock, Hoffman, & Gaddie, *supra* note 276.

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tial roadmap for the courts to assess and rectify partisan gerrymanders. Justice Breyer stated that the evidence of partisan bias displayed by the Georgia maps demonstrated that a gerrymander is “visible to the judicial eye” and the Georgia map would meet the standards of an illegal gerrymander according to the minority’s standard in the *Vieth* case.³³⁰ The three-judge panel in the Northern District for the District of Georgia has shown the propriety of a neutral-principles map, at least in this case, as a solution to a partisan gerrymander. The compact, incumbent-neutral map (in which the court nonetheless took pains to retroactively uncouple many paired incumbents) resulted in the party that won a majority of votes getting a majority of seats.³³¹ In the Senate, the new plans finally enabled Republicans to get the kind of bonus usually enjoyed by the party that wins a majority of the popular vote.³³²

Not all of the Republican gains in Georgia in 2004 are a product of redistricting, however, the analysis presented here indicates that roughly half of the gains by Republicans can be attributed to the placement of incumbents and the change in partisan and racial composition of the legislative districts. The remaining gains are likely the product of other political forces, long held in check by the efforts of the declining Democratic legislative majority. As demonstrated in this Article, federal judges acting in a non-partisan manner produced significant partisan changes in Georgia.³³³ Yet, a federal three-judge panel in Texas, charged with redrawing the Texas congressional districts in 2001, came to a very different result.³³⁴ The Texas redistricting plan drew the two districts gained by the state as a result of its rapid population growth to have a Republican majority.³³⁵ Even with the two additional Republican districts, the Texas congressional delegation continued to be predominately Democratic, with the Democrats having a 17 to 15 ad-

330. *See Cox v. Larios*, 542 U.S. 947, 950 (2004) (Stevens, J., concurring).

331. Republican State House candidates garnered 57% of the votes in 2004 and won 53% of seats. *See supra* tbl.1.

332. Republicans presently hold 34 of 56 Senate seats. *See* The Georgia State Senate, Members by Name, http://www.legis.state.ga.us/legis/2007_08/senate/senatelist.php (last visited Apr. 16, 2007).

333. *See supra* notes 212-223.

334. *Balderas v. Texas*, No. 6:01CV158, 2001 WL 35673968, at *6 (E.D. Tex. Nov. 14, 2001).

335. *Id.*

2007] *REDISTRICTING LESSONS FROM GEORGIA* 1047

vantage.³³⁶ The popular voting in Texas, like in Georgia, was predominately Republican at the end of the 20th century.³³⁷

How did such different results come about when both plans were drawn by federal courts that sought to avoid conferring a partisan advantage? The two courts came to different results because they began at different places. The *Larios* court began by instructing the special master to fill in a blank map, without considering where incumbents lived.³³⁸ It appears that the court did instruct the special master to ensure that the number of majority-black districts not be reduced in either the House or Senate plans.

The *Baldares* court approached its task much as the federal district court for the Southern District of Georgia had in *Miller v. Johnson*, when it removed traces of the illegal racial gerrymandering of Georgia's congressional districts in the mid-1990s.³³⁹ As the Georgia court explained its subsequent actions, it went back to the last legal districting plan which it used as its baseline and made minimal changes from that plan.³⁴⁰ The *Baldares* court first drew the two districts that had elected African-Americans and then drew the districts that had elected Hispanics to Congress.³⁴¹ Next, the court placed the two new districts that Texas received as a result of reapportionment into areas of the state that had experienced the most rapid growth during the 1990s.³⁴² Then the court sought to fit the district of the current incumbents around what they had already been placed on the map so as to give all incumbents districts they could reasonably expect to win.³⁴³ Consequently, the effects of the Democratic gerrymander drawn under the watchful eye of Rep. Martin Frost a decade earlier continued to influence the 2002 elections.³⁴⁴ As a result, Republicans received 55% of the popular

336. BARONE & COHEN, *supra* note 326, at 11.

337. CHARLES S. BULLOCK, III & RONALD K. GADDIE, *AN ASSESSMENT OF VOTING RIGHTS PROGRESS IN TEXAS* (Am. Enterprise Inst. Policy Series, 2005), available at http://www.aie.org/publications/pubID.23863/pub_detail.asp (follow link to study in pdf format).

338. Rhonda Cook, *Voting Maps to be Redrawn*, ATLANTA J.-CONST., Mar. 23, 2004, at B4.

339. *See generally* *Miller v. Johnson*, 515 U.S. 900 (1995).

340. *See generally* *Abrams v. Johnson*, 521 U.S. 74 (1997).

341. *Balderas v. Texas*, No. 6:01CV158, 2001 WL 35673968, at *5-6 (E.D. Tex. Nov. 14, 2001).

342. The court explained that it approached the problem in such a manner because Texas is subject to the Voting Rights Act. *Id.*

343. BARONE & COHEN, *supra* note 326, at 1511.

344. *Id.* at 1510-11; *see also supra* note 162 and accompanying text.

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congressional vote in Texas in 2002, but managed to win only 47% of the seats.³⁴⁵

The approach taken by the *Larios* district court—ignoring the most recent legal plan to instead institute a de novo map—breaks with what had been done by district courts in Georgia and Texas during the previous decade when correcting problems due to racial gerrymandering. Had the *Balderes* district court followed the approach of the *Larios* judges, Texas might have received a congressional map where Republicans won a share of seats in line with the majority of the vote, which their party had been winning beginning in 1994. Had the *Balderes* court designed a plan under which Republicans won 55% of the seats, Republicans would have enjoyed an 18 to 14 advantage and Rep. Tom DeLay might have had less incentive to embark upon the mid-decade redistricting that produced new congressional districts in 2003.

345. See Texas Legislative Council, District Election Analysis, 2002 General Election, http://www.tlc.state.tx.us/redist/pdf/c1440_2002General.pdf.