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### The History of Redistricting in Georgia

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## THE HISTORY OF REDISTRICTING IN GEORGIA

*Charles S. Bullock III\**

*In his memoirs, Chief Justice Earl Warren singled out the redistricting cases as the most significant decisions of his tenure on the Court.<sup>1</sup> A review of the changes redistricting introduced in Georgia supports Warren's assessment. Not only have the obligations to equalize populations across districts and to do so in a racially fair manner transformed the makeup of the state's collegial bodies, Georgia has provided the setting for multiple cases that have defined the requirements to be met when designing districts.*

*Other than the very first adjustments that occurred in the 1960s, changes in Georgia plans had to secure approval from the federal government pursuant to the Voting Rights Act. Also, the first four decades of the Redistricting Revolution occurred with a Democratic legislature and governor in place. Not surprisingly, the partisans in control of redistricting sought to protect their own and as that became difficult they employed more extreme measures.*

*When in the minority, Republicans had no chance to enact plans on their own. Beginning in the 1980s and peaking a decade later, Republicans joined forces with black Democrats to devise alternatives to the proposals of white Democrats. The biracial, bipartisan coalition never had sufficient numbers to enact its ideas. After striking out in the legislature, African-Americans appealed to the U.S. Attorney General alleging that the plans enacted were less favorable to black interests than alternatives*

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<sup>1</sup> EARL WARREN, THE MEMOIRS OF EARL WARREN 306 (1977).

*offered by the coalition. Every iteration, save for the plans drawn in the 1960s and 2011, bore the marks of what the Department of Justice (DOJ) believed necessary to secure equal treatment of African-Americans. As will become clear in the course of this Article, the DOJ's perspective has changed over time.*

*This Article is arranged chronologically and examines each of the major rounds of redistricting. Aside from adjusting for population shifts, which remain constant, a different concern or theme dominated each round. In the 1960s, Georgia and other states were like individuals who had begun flexing long-ignored muscles as they set about adjusting lines that had gone unchanged for decades. In the 1970s, as the need for redistricting merged with demands from the Voting Rights Act, pushback occurred as it did in the many other aspects of racial interaction as the nation finally began to take seriously its commitment to equality. A decade later, Georgia encountered a DOJ that had precise quantitative goals for what was necessary to provide African-Americans an opportunity to elect their preferences. In the 1990s, DOJ incorporated Section 2 of the Voting Rights Act into its preclearance reviews and demanded that Georgia enhance the number of majority-black districts and that it maximize the black percentage in those districts. The turn of the new century found the generations-long Democratic control of Georgia slipping away and the majority party pulled out all the stops desperately trying to cling to power. Democratic efforts could not withstand the tide of partisan realignment and court challenges so that in 2011 Republicans sat at the computer terminals and redistricted Georgia. Republicans attempted to maximize their control over the legislature by devising plans that might produce super-majorities with two-thirds of the seats in each chamber.*

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## I. IN THE BEGINNING

Prior to the Redistricting Revolution, virtually every legislative body in the nation deviated from the one-person, one-vote standard.<sup>2</sup> Some states had greater deviations than others, and Georgia ranked toward the upper end of this distribution.<sup>3</sup> The state House allotted at least one representative to each county with the eight most populous getting two bonus seats and the next thirty in size each having a pair of legislators.<sup>4</sup> State senators, with rare exceptions, represented three-county districts with senators selected on a rotation basis.<sup>5</sup> Under this rule, with each election the choice of the senator rotated to another county in the district with only voters in that county allowed to vote so that every third election even the least populous county selected a senator.<sup>6</sup> The least populous Senate district had fewer than 15,000 residents; the most populous—Fulton County, which was the only county to have a senator to itself—had a population of 556,326 in 1960.<sup>7</sup> Congressional districts that had not been redrawn since the 1930 reapportionment shrank the delegation from twelve to ten.<sup>8</sup>

Advocates for what became known as the Redistricting Revolution computed multiple measures to show how far state legislative chambers deviated from having districts with equal populations. The David and Eisenberg measure calculated the ratio

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<sup>2</sup> See Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL'Y 103, 105 (2000) ("Almost every state legislature in the Union was malapportioned, as were the delegations to the U.S. House of Representatives." (first citing *Reynolds v. Sims*, 377 U.S. 533, 589 & n.2 (1964) (Harlan, J., dissenting); then citing *Wesberry v. Sanders*, 376 U.S. 1 (1976))).

<sup>3</sup> See *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964) ("It would be extraordinary to suggest that in such statewide elections the votes of inhabitants of some parts of a State, for example, Georgia's thinly populated Ninth District, could be weighted at two or three times the value of the votes of people living in more populous parts of the State, for example, the Fifth District around Atlanta.").

<sup>4</sup> GA. CONST. of 1945, art. III, § III, para. 1.

<sup>5</sup> CHARLES S. BULLOCK, III ET AL., *THE THREE GOVERNORS CONTROVERSY: SKULLDUGGERY, MACHINATIONS, AND THE DECLINE OF GEORGIA'S PROGRESSIVE POLITICS* 166 (2015) [hereinafter BULLOCK, *THREE GOVERNORS CONTROVERSY*].

<sup>6</sup> *Id.* Occasionally a county would pass on its turn as occurred in 1960 when Carl Sanders was allowed to serve a second consecutive term in anticipation of his bid for statewide office. Peyton McCrary & Steven F. Lawson, *Race and Reapportionment, 1962: The Case of Georgia Senate Redistricting*, 12 J. POL'Y HIST. 293 (2000).

<sup>7</sup> J. DOUGLAS SMITH, *ON DEMOCRACY'S DOORSTEP: THE INSIDE STORY OF HOW THE SUPREME COURT BROUGHT "ONE PERSON, ONE VOTE" TO THE UNITED STATES* 16 (2014).

<sup>8</sup> *Id.* at 154.

of the most to the least populous district.<sup>9</sup> By this measure the most populous Georgia House district had almost 100 times the population of the least populous while the ratio in the Senate was 42.6 to one.<sup>10</sup> A second approach calculated the share of the population represented by a majority of the legislature if one began with the least populous district and worked up to a majority of the chamber.<sup>11</sup> By this measure just over a quarter of the population could elect a majority in each of Georgia's chambers.<sup>12</sup> A more complicated measure based on skewness and kurtosis of the distribution of the population of legislative districts had a perfect score of 100 if all districts had the same population.<sup>13</sup> Georgia ranked next to last on this measure with a score of -4.<sup>14</sup>

Unlike other states, which gave an advantage to rural areas just in the legislature, Georgia gave a similar advantage over the choice of the leadership of the executive branch.<sup>15</sup> Democratic primaries for statewide and congressional positions required that winners secure a majority of the county unit votes.<sup>16</sup> Each county had twice as many unit votes as its House delegation.<sup>17</sup> The county unit system incentivized candidates for statewide office to seek support in rural counties, many of which were boss-controlled, and ignore

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<sup>9</sup> See 2 PAUL T. DAVID & RALPH EISENBERG, *DEVALUATION OF THE URBAN AND SUBURBAN VOTE: A STATISTICAL INVESTIGATION OF LONG-TERM TRENDS IN STATE LEGISLATIVE REPRESENTATION*, at *Introduction* (1962) ("The concept of relative values of the right to vote...measures the extent to which population size of legislative districts deviates from what ideal state norms for legislative districts in each state legislative chamber should be.").

<sup>10</sup> 1 PAUL T. DAVID & RALPH EISENBERG, *DEVALUATION OF THE URBAN AND SUBURBAN VOTE: A STATISTICAL INVESTIGATION OF LONG-TERM TRENDS IN STATE LEGISLATIVE REPRESENTATION* 3 tbl.2 (1961).

<sup>11</sup> See GORDON E. BAKER, *RURAL VERSUS URBAN POLITICAL POWER* 15, 16–17 tbl.1 (1955) (showing Georgia as the state with the greatest underrepresentation of urban populations).

<sup>12</sup> *Id.*

<sup>13</sup> See Glendon Shubert & Charles Press, *Measuring Malapportionment*, 58 AM. POL. SCI. REV. 302, 303 (1964) ("[W]e assume that what is to be measured is deviation from the ideal of equal representation for populations of equal size.").

<sup>14</sup> *Id.* at 326 tbl.IV.

<sup>15</sup> See BULLOCK, *THREE GOVERNORS CONTROVERSY*, *supra* note 5, at 10 ("Statewide candidates could win with exclusively rural support.").

<sup>16</sup> See *id.* ("Winning nominations in the decisive Democratic primary for statewide offices and in some congressional districts required accumulating [a majority of the] county unit votes.").

<sup>17</sup> See *id.* ("The 121 rural counties had a total of 242 unit votes and, if united, could easily outvote the urbanized counties.").

urban counties.<sup>18</sup> Winning three counties with hundreds of voters easily offset the loss of tens of thousands of city votes.<sup>19</sup>

Following the Supreme Court decision in the Tennessee case, *Baker v. Carr*,<sup>20</sup> urban Georgia voters filed two suits. *Sanders v. Gray* attacked the county unit system.<sup>21</sup> *Toombs v. Fortson*, like *Baker* and litigation in many other states, challenged population deviations in the state legislature.<sup>22</sup> The courts decided quickly, ruling against the county unit system<sup>23</sup> and ruling that one chamber of the legislature must be based on population when the 1963 session convened.<sup>24</sup> A special session of the legislature acted with a speed unimaginable today and redistricted the Senate, necessitating a new round of Democratic primaries.<sup>25</sup>

The 1962 plan eliminated the three-county districts and resulted in Fulton County having seven districts while each of the other major urban counties got at least two senators.<sup>26</sup> Allocating senators to urban areas did more than simply produce a more urban membership. The plan created two majority-black districts in Fulton, one of which elected Leroy Johnson, the first African-American legislator anywhere in the South in decades.<sup>27</sup> Joining Johnson were three Republicans.<sup>28</sup> Heretofore Republicans got to the Senate only when one of two mountain counties got to select a senator.

In 1964 the Supreme Court extended the one-person, one-vote standard to the second chamber of a state legislature<sup>29</sup> and to congressional delegations, the latter ruling coming in a Georgia

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<sup>18</sup> See *id.* at 12 (“Candidates had an additional incentive to concentrate their efforts on rural counties. Joseph L. Bernd estimates that at least twenty-one counties were boss-controlled.”).

<sup>19</sup> See *id.* (“Successfully courting the sheriff or whoever yielded power in three rural counties could take the place of the expensive and time-consuming investment needed to win a six-vote county.”).

<sup>20</sup> 369 U.S. 186 (1962).

<sup>21</sup> 203 F. Supp. 158, 170 (N.D. Ga. 1962).

<sup>22</sup> 205 F. Supp. 248, 249 (N.D. Ga. 1962).

<sup>23</sup> *Sanders*, 203 F. Supp. at 170 (N.D. Ga. 1962).

<sup>24</sup> *Toombs*, 205 F. Supp. at 259 (N.D. Ga. 1962).

<sup>25</sup> See JIMMY CARTER, TURNING POINT 50–51 (1992) (“When the General Assembly convened for the special session . . . [i]t called for the fifty-four Senate nominees to be chosen by majority vote in a special Democratic primary . . .”).

<sup>26</sup> 1961–1962 GA. SECRETARY OF ST. OFFICIAL REGISTER 411.

<sup>27</sup> CARTER, *supra* note 25, at 65 (1992).

<sup>28</sup> CHARLES S. BULLOCK III, REDISTRICTING: THE MOST POLITICAL ACTIVITY IN AMERICA 141 (2010) [hereinafter BULLOCK, REDISTRICTING].

<sup>29</sup> *Reynolds v. Sims*, 377 U.S. 533, 568 (1964).

case, *Wesberry v. Sanders*.<sup>30</sup> Filed by a senator elected to one of the recently-allocated Fulton districts, *Wesberry* resulted in splitting the Fifth District, which had consisted of Fulton, DeKalb, and Rockdale Counties,<sup>31</sup> and with 823,680 residents was the second most populous of any congressional district in the nation.<sup>32</sup> Two years later, the DeKalb-based Fourth District chose a Republican.<sup>33</sup>

Pursuant to *Reynolds*, Georgia drew new House districts. The 1965 special election diversified the chamber with the election of twenty-three Republicans and seven African-Americans.<sup>34</sup> A second redistricting took place prior to the 1968 election that made only minor changes in the Senate but increased the number of multi-county, multi-member House districts from seven to twenty-six.<sup>35</sup> With the 1968 remap, GOP ranks in the House swelled to twenty-one<sup>36</sup> along with a dozen African-Americans.<sup>37</sup>

Requiring population equalization strained the tradition of basing representation on counties. In implementing the judicial mandates, Georgia sought to maintain county-based representation as much as possible. The post-*Wesberry* congressional plan kept every county intact except for Fulton, which lost a sliver to bring up the population of the new Fourth District.<sup>38</sup> The post-*Toombs* Senate plan kept every district in a single county with Fulton awarded seven seats, Chatham and DeKalb awarded three seats each, and Bibb, Cobb, Muscogee, and Richmond awarded two each.<sup>39</sup> Each senator had a single-member district.<sup>40</sup> When the House redistricted, many rural counties lost their representative but the new districts respected county lines.<sup>41</sup> The plan allowed sixty-five counties to elect at least one representative; other counties found

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<sup>30</sup> 376 U.S. 1, 7 (1964).

<sup>31</sup> LAUGHLIN McDONALD, *A VOTING RIGHTS ODYSSEY: BLACK ENFRANCHISEMENT IN GEORGIA* 89–90 (2003).

<sup>32</sup> BULLOCK, REDISTRICTING, *supra* note 28, at 141.

<sup>33</sup> 1967–1968 GA. SECRETARY OF ST. OFFICIAL REGISTER 1674.

<sup>34</sup> BULLOCK, REDISTRICTING, *supra* note 28, at 141.

<sup>35</sup> Charles S. Bullock, III, *Representation and Seat Distribution in Multi-County Legislative Districts*, GA. POL. SCI. ASS'N J., SEPT. 1974, at 29, 32 [hereinafter Bullock, *Multi-County Legislative Districts*].

<sup>36</sup> See 1969–1970 GA. SECRETARY OF ST. OFFICIAL REGISTER 1719–50 (showing twenty-one victorious Republicans in the 1970 general election for the Georgia House of Representatives).

<sup>37</sup> See *id.* at 407–519 (providing a full roster of the 1969–1970 Georgia House).

<sup>38</sup> See *supra* notes 31–32 and accompanying text.

<sup>39</sup> See 1963–1964 GA. SECRETARY OF ST. OFFICIAL REGISTER 367 (showing the 1962 Senate reapportionment by county).

<sup>40</sup> Bullock, *Multi-County Legislative Districts*, *supra* note 35, at 32.

<sup>41</sup> *Id.* at 31.



themselves in a multi-county district that elected one or more legislators at-large.<sup>42</sup> The most populous counties in multi-member districts usually achieved over-representation as they tended to win a disproportionate share—often all—of the seats.<sup>43</sup> Few candidates from smaller counties competed, and in some instances incumbents from small counties in multi-county districts opted not to seek reelection.<sup>44</sup> In urban areas, districts remained in a single county, as with the Senate plan.<sup>45</sup> Some suburban counties with multiple members, like Clayton and Fayette, elected legislators at-large.<sup>46</sup> More populous counties like Bibb, Chatham, DeKalb, Muscogee, and Richmond had several multi-member districts.<sup>47</sup> Fulton had twenty-one single-member districts but also a floterial district that elected three countywide.<sup>48</sup>

Equalizing populations across districts resulted in more urban legislators<sup>49</sup> and these new representatives raised the educational level of the chambers.<sup>50</sup> The average age of legislators declined<sup>51</sup> and the membership began slowly to diversify as African-Americans and Republicans acquired seats.<sup>52</sup> The first round of redistricting did not, however, facilitate the election of women.<sup>53</sup>

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 35.

<sup>44</sup> *Id.* at 35–36.

<sup>45</sup> See 1965–66 GA. SECRETARY OF ST. OFFICIAL REGISTER 366 (providing that there were “three [representatives] from each of the eight largest populated counties”).

<sup>46</sup> See *id.* at 1703–04 (showing Clayton and Fayette Counties collectively electing representatives for all three posts in District 35).

<sup>47</sup> See *id.* at 1716–20 (showing Bibb County with one such district, Chatham with four, and DeKalb, Muscogee, and Richmond with three each).

<sup>48</sup> See *id.* at 1720–23 (showing twenty-two total Fulton County districts); see also *id.* at 584–85 (showing Fulton’s District 123 divided between three posts).

<sup>49</sup> Thomas R. Dye, *The Impact of Reapportionment on the Representation Afforded Various Constituencies in Georgia*, in REAPPORTIONMENT IN GEORGIA 33, 33 (Brett W. Hawkins ed., 1970) [hereinafter Dye, *Various Constituencies*].

<sup>50</sup> Bullock, *Multi-County Legislative Districts*, *supra* note 13, at 40.

<sup>51</sup> Thomas R. Dye, *The Impact of Reapportionment on the Characteristics of Georgia Legislators*, in REAPPORTIONMENT IN GEORGIA 43, 44 (Brett W. Hawkins ed., 1970) [hereinafter Dye, *Characteristics of Georgia Legislators*].

<sup>52</sup> See Dye, *Various Constituencies*, *supra* note 49, at 40–42 (discussing African-American legislators); Dye, *Characteristics of Georgia Legislators*, *supra* note 51, at 49–50 (discussing both African-American and Republican legislators).

<sup>53</sup> See Dye, *Characteristics of Georgia Legislators*, *supra* note 51, at 49 (“Georgia is no exception to the national pattern of feminine underrepresentation. Only two women served in the House in 1965-66.”).

## II. MAINTAINING WHITE SUPREMACY

The Civil Rights Revolution, which produced major legislation in 1964 and 1965, began bearing fruit just as the Redistricting Revolution gathered speed. Section 5 of the 1965 Voting Rights Act specified that states like Georgia, which had a literacy test or other prerequisites to registration and in which less than half the voting age population had registered or voted in the 1964 presidential election, must get federal approval before implementing changes in election laws.<sup>54</sup> Initially it was thought that only changes directly impacting registration or voting needed preclearance, but in 1969 the Supreme Court interpreted Section 5 broadly to include all changes that touched on the political process.<sup>55</sup> Then in *Georgia v. United States*, the Supreme Court held that Section 5 extended to redistricting plans and that to prevail the creator of the plan had to prove it was non-discriminatory.<sup>56</sup> Although not part of the *Georgia v. United States* decision, the standard for assessing the acceptability of a redistricting plan was non-retrogression.<sup>57</sup> Applying this standard, the Department of Justice (DOJ) rejected plans that eliminated majority-black districts by “cracking,” or dispersing a minority concentration among multiple districts.<sup>58</sup>

Andy Young had run unsuccessfully for the Fifth Congressional District in 1970.<sup>59</sup> Following release of the 1970 census, the legislature redesigned the district at 38.3% black but excluded the homes of both Young and Maynard Jackson, who had challenged

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<sup>54</sup> See Voting Rights Act of 1965 § 5, 52 U.S.C. § 10304(b) (2012) (“Any voting qualifications or prerequisite to voting, or standard, practice, or procedure with respect to voting that has the purpose of or will have the effect of diminishing the ability of any citizens of the United States on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, to elect their preferred candidates of choice denies or abridges the right to vote within the meaning of subsection (a) of this section.”).

<sup>55</sup> *Allen v. State Bd. of Elections*, 393 U.S. 544, 565 (1969).

<sup>56</sup> See 411 U.S. 526, 532, 538-539 (1973) (applying Section 5 to Georgia’s redistricting plan and holding it was reasonable for the plaintiff state to have the burden of proof).

<sup>57</sup> See *Beer v. United States*, 425 U.S. 130, 141 (1976) (“[T]he purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.”).

<sup>58</sup> See Noel H. Johnson, *Resurrecting Retrogression: Will Section 2 of the Voting Rights Act Revive Preclearance Nationwide?*, DUKE J. CONST. L. & PUB. POL’Y 1, 6 (2017) (“In practice, the Department of Justice . . . would look to the status quo and then analyze whether the new change in the law would diminish the electoral strength of minorities.”).

<sup>59</sup> Robert A. Holmes, *Reapportionment Politics in Georgia: A Case Study*, 45 PHYLON 179, 179 (1984) [hereinafter Holmes, *Case Study* (1984)].

Senator Herman Talmadge in the 1968 Democratic primary.<sup>60</sup> DOJ objected, prompting the legislature to boost the district to 44.2% black and include the homes of the two potential challengers.<sup>61</sup> In 1972, Young joined Houston's Barbara Jordan as the first African-Americans elected to Congress from the South in the twentieth century.<sup>62</sup>

In an effort to reduce population deviations, plans for the General Assembly implemented in 1972 began creating districts by combining parts of counties, where districts previously had kept counties whole. The new plan split twenty-six counties between Senate districts and a third of the counties were split between House districts.<sup>63</sup> Counties that had one or more legislators were less likely to be in multi-county districts, and if they were divided it was likely that at least one district would be wholly within the county.<sup>64</sup> In rejecting the House plans, DOJ focused on the use of numbered posts for multi-member districts and the majority-vote requirement.<sup>65</sup>

Despite taking steps toward greater population equality among districts, Georgia had to redraw state legislative districts prior to the 1974 election. The new maps created more majority-black districts, which facilitated the election of five more African-Americans to the lower chamber.<sup>66</sup> The plan created twenty-four House districts with black majorities, although no more than twenty-one African-Americans were elected during the decade.<sup>67</sup> Republicans made no gains in either chamber during the decade as they faced the challenges of Watergate and Carter's presidential campaign.

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<sup>60</sup> *Id.*; see also Ronald Smothers, *Maynard Jackson Wins in Atlanta*, N.Y. TIMES (Oct. 5, 1989), <http://www.nytimes.com/1989/10/05/us/maynard-jackson-wins-in-atlanta.html> (detailing Jackson's run for Senate).

<sup>61</sup> Holmes, *Case Study* (1984), *supra* note 59, at 179 (discussing the legislative action).

<sup>62</sup> BULLOCK, REDISTRICTING, *supra* note 28, at 142.

<sup>63</sup> Bullock, *Multi-County Legislative Districts*, *supra* note 35, at 41–42 n.16. Previously only one House and two Senate districts were composed of parts of counties. *Id.*

<sup>64</sup> *Id.* at 36 (outlining the scheme of division).

<sup>65</sup> Letter from David L. Norman, Assistant Attorney Gen., Dep't of Justice Civil Rights Div., to Arthur K. Bolton, Attorney Gen., State of Ga. 2 (Mar. 3 1972), <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/GA-1150.pdf>.

<sup>66</sup> McDONALD, *supra* note 31, at 148.

<sup>67</sup> *Id.*

### III. THE 65% RULE

A new coalition appeared in the special session convened to draw districts in the wake of the 1980 census. According to Rep. Robert Holmes (D), a political science professor at Clark Atlanta University, “Blacks and Republicans realized that they had mutual interests in creating a majority Black 5th [Congressional] District because it would offer the opportunity to elect a Republican in the adjacent 4th District.”<sup>68</sup> Two ambitious senators were the key players in the coalition, African-American Julian Bond (D) and Paul Coverdell (R), who later served in the U.S. Senate.<sup>69</sup> The coalition of African-Americans and Republicans would be even more active in the next round of redistricting.

To understand the environment in which the congressional redistricting after the 1980 Census took place requires some background. In 1977, the Supreme Court seemed to affirm a back-of-the-envelope calculation that for a district to be likely to elect an African-American it should be at least 65% black in total population.<sup>70</sup> Although DOJ has denied ever operating under a 65% rule, it played a major role in the assessment of Georgia’s 1981 congressional plan. Going into the special session, Georgia’s Office of the Legislative Counsel advised, “The Justice Department considers a district with a 65% minority population as one which is capable of electing a minority candidate.”<sup>71</sup> Much of the controversy in this round of redistricting focused on the state’s failure to attain this threshold.

The district that elected Andy Young three times in the 1970s was drawn to be 44.2% black.<sup>72</sup> Due to population shifts, by the time of the 1980 census, the district had a narrow 52% black majority but had lost 10% of its population, leaving it underpopulated by about 125,000.<sup>73</sup> While Young had won in a majority-white district, Wyche

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<sup>68</sup> Robert A. Holmes, *The Politics of Reapportionment, 1981: A Case Study of Georgia*, 8 URB. RES. REV. 1, 2 (1982) [hereinafter Holmes, *Case Study* (1982)].

<sup>69</sup> McDONALD, *supra* note 31, at 169 (discussing Bond’s introduction of the bill that created a majority-black 5th District).

<sup>70</sup> See United Jewish Orgs. of Williamsburgh, Inc. v. Carey, 430 U.S. 144, 164 (1977) (“We think it was reasonable for the Attorney General to conclude in this case that a *substantial* nonwhite population majority—in the vicinity of 65%—would be required to achieve a nonwhite majority of eligible voters.”).

<sup>71</sup> Holmes, *Case Study* (1984), *supra* note 59, at 181.

<sup>72</sup> Holmes, *Case Study* (1982), *supra* note 68, at 1.

<sup>73</sup> *Id.*

Fowler, who is white, defeated John Lewis by 24 percentage points in the special election to replace Young upon the latter's confirmation as Ambassador to the United Nations.<sup>74</sup> In the next two Democratic primaries, Fowler held off African-American challengers.<sup>75</sup> In redrawing Fowler's district, the Legislative Black Caucus (LBC) sought to maximize the black concentration and offered plans that had the district well above 70% black.<sup>76</sup>

The House plan avoided retrogression by keeping the black concentration at 51.7%.<sup>77</sup> The Senate, in an agreement between the sponsor Senator Julian Bond and Majority Leader Tom Allgood, approved an alternative that made the Fifth District 69% black.<sup>78</sup> Bond agreed that he and the other black senator would not object to lowering the black percentage in Allgood's Senate district from 50% to 46% if Allgood could get the chamber to approve Bond's congressional proposal.<sup>79</sup> After extensive wrangling and considering at least twenty alternatives, the conference committee approved a 57.1% black congressional district.<sup>80</sup> Bond found the conference plan unacceptable since, based on the most recent election data, 54% of the registrants and 59% of the voters were white.<sup>81</sup>

DOJ acknowledged that the congressional plan passed the non-retrogression test, but the assistant attorney general asked why the 69% black alternative had been rejected.<sup>82</sup> The rejection letter suggested that the state intentionally kept the black percentage lower "in order to dilute minority voting strength and to minimize the chances of that community's electing a candidate of its choice to Congress."<sup>83</sup> DOJ rejected the state's justification for why the Fifth

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<sup>74</sup> *Id.*

<sup>75</sup> William E. Schmidt, *Incumbents Winning Georgia Democratic Primary*, N.Y. TIMES (Aug. 15, 1984), <https://www.nytimes.com/1984/08/15/us/incumbents-winning-georgia-democratic-primary.html>.

<sup>76</sup> Holmes, *Case Study* (1984), *supra* note 59, at 182.

<sup>77</sup> Holmes, *Case Study* (1982), *supra* note 68, at 2.

<sup>78</sup> Holmes, *Case Study* (1984), *supra* note 59, at 182.

<sup>79</sup> Holmes, *Case Study* (1982), *supra* note 68, at 2.

<sup>80</sup> Holmes, *Case Study* (1984), *supra* note 59, at 183.

<sup>81</sup> *Id.* at 184.

<sup>82</sup> Letter from William Bradford Reynolds, Assistant Attorney Gen., Dep't of Justice Civil Rights Div., to Michael Bowers, Attorney Gen., State of Ga. 2 (Feb. 11, 1982), <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/GA-1870.pdf> [hereinafter DOJ Rejection Letter (Feb. 11, 1982)].

<sup>83</sup> *Id.*

District had not included south DeKalb's growing black electorate.<sup>84</sup> The state had explained that it was trying to fashion new districts along the lines of their predecessors as much as possible and therefore had retained the Fulton-DeKalb line to separate the Fourth and Fifth Districts.<sup>85</sup> Democrats, sensitive to Coverdell's strategy, wanted to keep the Fourth District at least 20% black.<sup>86</sup>

Following DOJ's rejection, Georgia sought approval from the District Court of the District of Columbia in *Busbee v. Smith*.<sup>87</sup> The three-judge panel also rejected the plan concluding that there was no non-discriminatory explanation for the failure to approve a more heavily black district.<sup>88</sup> To justify a finding of intentional discrimination, the court pointed to the statement by the chair of the House Redistricting Committee, "I don't want to draw n\*\*\*\*\* districts."<sup>89</sup> Other evidence included the failure of the conference committee to include legislators who had voted for the more heavily black Fifth District, the exclusion of African-Americans from the conference committee, and the opposition of legislative leaders to higher black percentages in the Fifth District.<sup>90</sup> The state had ignored a warning from DOJ "that because a larger percentage of whites vote than do blacks, for blacks to cast a majority of votes in a given election, at least 65% of the population in a district would have to be black."<sup>91</sup>

After the Supreme Court affirmed,<sup>92</sup> a special session of the legislature upped the Fifth District black population to 65.02% with almost 60% of the registrants African-American, and DOJ approved.<sup>93</sup> The Fifth District reelected Fowler despite its much higher black concentration until he ran for the Senate.<sup>94</sup> John Lewis won the open seat over Portia Scott in 1986.<sup>95</sup> Two years earlier the Fourth District, where the black population had fallen from 28% to

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<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> BULLOCK, REDISTRICTING, *supra* note 28, at 144.

<sup>87</sup> 549 F. Supp. 494 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1983).

<sup>88</sup> *Id.* at 498.

<sup>89</sup> *Id.* at 501.

<sup>90</sup> *Id.* at 518.

<sup>91</sup> *Id.* at 501.

<sup>92</sup> *Busbee v. Smith*, 459 U.S. 1166 (1983).

<sup>93</sup> Holmes, *Case Study* (1984), *supra* note 59, 186–187.

<sup>94</sup> Fowler, Wyche, Jr. (1940-), BIOGRAPHICAL DIRECTORY OF THE U.S. CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=f000329> (last visited Apr. 20, 2018).

<sup>95</sup> DALLAS L. DENDY, JR., STATISTICS OF THE CONGRESSIONAL ELECTION OF NOVEMBER 4, 1986, H.R. DOC. NO. 65-752, at 9 (1987).

11%, saw Republican Pat Swindall oust the Democratic incumbent.<sup>96</sup>

The LBC and GOP also worked together on plans for the General Assembly and urged DOJ to reject the legislature's plans, which did little to promote black representation.<sup>97</sup> DOJ largely accepted the legislative plans, limiting its concerns to two Senate districts and the House plan for Dougherty County.<sup>98</sup> The 1970s plan had had thirty majority-black House districts and eight in the Senate; the LBC devised a new plan with forty-three total majority black districts.<sup>99</sup> In 1982, blacks added two Senate seats but made no gains in the House.<sup>100</sup> Black Senate gains coincided with the creation of six more majority-black districts after keeping the number at two for years.<sup>101</sup> Republicans also added a brace of Senate seats but held constant with twenty-four in the House.<sup>102</sup> During the decade when these plans were in place, both of the allies saw their ranks swell as the LBC grew by four senators and six representatives.<sup>103</sup> The GOP added four senators and expanded to thirty-five representatives.<sup>104</sup>

#### IV. MAXBLACK

The 1990s saw the strange bedfellows' coalition that first appeared a decade earlier come to full flower. Black and Republican legislators wanted more seats and the seats they coveted had white Democratic occupants. The LBC, however, was divided in how aggressively to push for more seats.<sup>105</sup>

Republicans, distrustful of the state's Legislative Reapportionment Office, invested in the software and hardware

<sup>96</sup> THOMAS E. LADD, STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTIONS OF NOVEMBER 6, 1984, at 12 (1985).

<sup>97</sup> See Holmes, *Case Study* (1984), *supra* note 59, at 180–82 (describing the nature of the LBC's and GOP's cooperation).

<sup>98</sup> DOJ Rejection Letter (Feb. 11, 1982), *supra* note 82, at 2–3.

<sup>99</sup> BULLOCK, REDISTRICTING, *supra* note R, at 145.

<sup>100</sup> *Id.*

<sup>101</sup> See *id.* at 143 tbl.6.1, 145 (showing two majority-black districts from 1974 to 1980, but eight in the 1982 plan).

<sup>102</sup> See Charles S. Bullock III, *Redistricting and Changes in the Partisan and Racial Composition of Southern Legislatures*, 19 ST. & LOC. GOV'T REV. 62, 65 tbl.3 (1987) (showing Republican stagnation in several states houses—including Georgia's—but relative growth in state senates).

<sup>103</sup> BULLOCK, REDISTRICTING, *supra* note R, at 170–71.

<sup>104</sup> *Id.* at 153.

<sup>105</sup> *Id.* at 147.

needed to design redistricting plans.<sup>106</sup> Republicans offered use of their equipment to the LBC, and its attorney Kathy Wilde and Rep. Cynthia McKinney spent hours at the GOP facility testing multiple configurations with the goal of maximizing the number of districts likely to elect African-Americans, including Rep. McKinney.<sup>107</sup> Republicans were also busy using the mapping software trying to get more districts they could win. Since the GOP drew support almost exclusively from whites, attainment of the party's goals involved bleaching districts by aggregating black concentrations.<sup>108</sup>

The 1990 reapportionment awarded Georgia an eleventh congressional district.<sup>109</sup> In the special session convened late in the summer of 1991, Democrats created a new 60.6% black-majority district by linking African-American concentrations in south DeKalb, Augusta, and Macon.<sup>110</sup> This plan also had a 39.5% black Second District in southwest Georgia and maintained the black majority in the Fifth District.<sup>111</sup> Black Caucus leaders like Mike Thurmond and Calvin Smyre recognized the potential costs for the Democratic Party associated with creating more majority-black districts and approved the map that, in the Senate, came out of a committee chaired by an African-American.<sup>112</sup> Thurmond and Gene Walker, the African-American who chaired the Senate Reapportionment Committee, defended the maps in meetings with DOJ attorneys.<sup>113</sup> But a minority of the LBC, led by Reps. Cynthia McKinney and Tyrone Brooks sought to maximize the number of majority-black districts.<sup>114</sup>

According to rumors, since the addition of a majority-black district was obviously not retrogression, DOJ was on the verge of approving the plan.<sup>115</sup> Accounts differ over who discovered a way to

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<sup>106</sup> See *id.* at 146–47 (detailing the Republicans' use of technology in the new decade, as an effort to avoid trusting the Legislative Reapportionment Office).

<sup>107</sup> See *Johnson v. Miller*, 864 F. Supp. 1354, 1361–67 (S.D. Ga. 1994) (recounting this coordinated effort), *aff'd*, 515 U.S. 900 (1995).

<sup>108</sup> See BULLOCK, REDISTRICTING, *supra* note 28, at 147 (discussing the resulting plan, which included three heavily consolidated majority-black districts).

<sup>109</sup> *Johnson*, 864 F. Supp. at 1360.

<sup>110</sup> *Id.* at 1363 n.5.

<sup>111</sup> *Id.*

<sup>112</sup> TOMMY HILLS, RED STATE RISING: TRIUMPH OF THE REPUBLICAN PARTY IN GEORGIA 56–57 (2009).

<sup>113</sup> *Id.* at 57.

<sup>114</sup> *Id.* at 56.

<sup>115</sup> See BULLOCK, REDISTRICTING, *supra* note 28, at 147 (“The careerists at DOJ had long supported increasing the numbers of black officials . . . . Republicans named by President



create a third majority-black congressional district. Some credit House Republican Bart Ladd, others say Rep. McKinney came up with the plan,<sup>116</sup> and the opinion invalidating part of the plan credited Kathy Wilde, the ACLU attorney working with the Black Caucus.<sup>117</sup> Regardless of who first figured out that a district stretching from DeKalb to Savannah while picking up Augusta's black population would create another majority-black district in southwest Georgia, it was either Ladd, a Delta pilot, or Bob Holmes who took the alternative to DOJ.<sup>118</sup> The map showed the three majority-black districts but had not fleshed out the other eight districts.<sup>119</sup> Ladd was given a weekend to see if he could fit in the other districts, a challenge that required several all-nighters.<sup>120</sup> The plan with three majority-black districts had to be transmitted from the GOP computer to the state computer.<sup>121</sup> In the days before the Internet, transferring a file involved downloading it to a floppy disk and inserting it into another computer.<sup>122</sup> At that time, file names could contain no more than eight characters.<sup>123</sup> The file that Republicans took to the Capitol had the name MAXBLACK.<sup>124</sup>

DOJ rejected the state's two-district proposal for not maximizing black concentrations in the two majority-black districts.<sup>125</sup> DOJ also questioned the failure to increase the black percentage in the southwest corner district.<sup>126</sup> In rejecting the plan for the state House, the letter incorporated language from Section 2 noting that alternatives had been proposed that "provide black voters more effectively with an opportunity to participate in the political process

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George H.W. Bush to run the Justice Department saw how promoting black interests could also advance the GOP . . .").

<sup>116</sup> *Id.* at 146.

<sup>117</sup> *Johnson v. Miller*, 864 F. Supp. 1354, 1365 (S.D. Ga. 1994), *aff'd*, 515 U.S. 900 (1995).

<sup>118</sup> BULLOCK, REDISTRICTING, *supra* note 28, at 146; Robert A. Holmes, *Reapportionment Strategies in the 1990s: The Case of Georgia*, in RACE AND REDISTRICTING IN THE 1990S, at 191, 197 (Bernard Grofman ed., 1998) [hereinafter Holmes, *Reapportionment Strategies*].

<sup>119</sup> BULLOCK, REDISTRICTING, *supra* note 28, at 146.

<sup>120</sup> *Id.* at 146–47.

<sup>121</sup> *Id.* at 147.

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

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

<sup>124</sup> *Id.*

<sup>125</sup> Letter from John R. Dunne, Assistant Attorney Gen., Dep't of Justice Civil Rights Div., to Mark H. Cohen, Senior Assistant Attorney Gen., State of Ga. 5–6 (Jan. 21, 1992), <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/GA-2330.pdf> [hereinafter DOJ Rejection Letter (Jan. 21, 1992)].

<sup>126</sup> *Id.* at 5.

and to elect candidates of their choice.”<sup>127</sup> DOJ criticized plans for both chambers of the General Assembly for protecting white incumbents rather than drawing additional majority-black districts.<sup>128</sup>

The General Assembly came up with a new plan that increased the black concentration in the Second Congressional District from 39.4% to 49.1% by adding Columbus’ black population.<sup>129</sup> DOJ rejected this plan on March 20, 1992.<sup>130</sup> This second rejection letter raised the ante for the southwest district by asking why Macon’s black population was not included.<sup>131</sup> Shifting Macon’s African-Americans into the Second District would remove them from the Eleventh District.<sup>132</sup> DOJ’s objection letter broached a concern not in the first rejection as it called on the state to incorporate the black population of Screven, Effingham, and Chatham Counties into the Eleventh District.<sup>133</sup> DOJ’s letter observed that such a plan had passed the Senate but not the House.<sup>134</sup>

DOJ rejected the state House plan for not creating three majority-black districts around Muscogee and Chattahoochee Counties, two majority-black districts in Houston County, or a Richmond County delegation having equal numbers of black and white legislators.<sup>135</sup> The Senate plan failed to satisfy DOJ demands

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<sup>127</sup> *Id.* at 3. In place of “candidates” Section 2 has “representatives.” Voting Rights Act of 1965 § 2, 52 U.S.C. § 10301(b) (2012).

<sup>128</sup> DOJ Rejection Letter (Jan. 21, 1992), *supra* note 125, at 3–5.

<sup>129</sup> BULLOCK, REDISTRICTING, *supra* note 28, at 148.

<sup>130</sup> Letter from John R. Dunne, Assistant Attorney Gen., Dep’t of Justice Civil Rights Div., to Mark H. Cohen, Senior Assistant Attorney Gen., State of Ga. 4 (Mar. 20, 1992), <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/GA-2360.pdf> [hereinafter DOJ Rejection Letter (Mar. 20, 1992)].

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 3.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 2. County delegations determine the fate of local legislation, i.e., legislation affecting a single county, a practice known as local courtesy. Binny Miller, *Who Shall Rule and Govern? Local Legislative Delegations, Racial Politics, and the Voting Rights Act*, 102 YALE L.J. 105, 121 (1992). Redistricting plans regularly take this into consideration and design configurations likely to give the majority party a majority of the legislators from multi-member urban counties. *See id.* at 162 (noting that Georgia’s 1991 reapportionment plan had the result that “[t]he [local] delegation’s expansion to include a fourth white member, coupled with the prevailing practice of local courtesy, could neutralize black voting strength in Dougherty County because this new white legislator could vote with the other white member of the delegation to thwart the desires of black residents in Dougherty County”).

for one additional majority-black district in DeKalb and another one in southwest Georgia.<sup>136</sup>

Receipt of the second rejection letter came near the end of the legislative session.<sup>137</sup> Rather than holding a special session, the General Assembly hurriedly made changes to all three plans and finally succumbed to DOJ demands by creating a third majority-black congressional district, with Speaker Tom Murphy providing the critical ninety-first vote.<sup>138</sup> To maximize the black percentage in the southwest district after adding heavily black areas of Macon, two teams went around the district's boundary adding majority-black census blocks and excluding majority-white ones.<sup>139</sup> This third iteration of the congressional map rendered Atlanta's Fifth District 62% black, the Second District in the southwest corner 57% black, and the Eleventh District that stretched from DeKalb to Savannah 64% black.<sup>140</sup>

In line with the MAXBLACK approach, the state Senate plan DOJ approved had thirteen majority-black districts, up from eight in the plan drawn a decade earlier.<sup>141</sup> The House plan had forty-one majority-black districts, an increase of twelve.<sup>142</sup> Tyrone Brooks, one of the LBC leaders demanding more black districts, celebrated: "We got 98 percent of what we were fighting for."<sup>143</sup>

The majority-black congressional districts performed and Georgia sent three African-Americans to Congress.<sup>144</sup> Republicans benefitted from bleaching districts adjacent to the ones that elected African-Americans, and three new Republicans joined Newt Gingrich in Congress in 1993.<sup>145</sup> Two years later, three more Republicans won election but these successes did not come exclusively in districts bleached to create the Second and Eleventh Districts.<sup>146</sup> However, redistricting had a role. Political scientists John Petrocik and Scott Desposato attribute some of the GOP

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<sup>136</sup> DOJ Rejection Letter (Mar. 20, 1992), *supra* note 125, at 2–3.

<sup>137</sup> BULLOCK, REDISTRICTING, *supra* note 28, at 149.

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

<sup>139</sup> *Id.* at 149–50.

<sup>140</sup> *Id.* at 149.

<sup>141</sup> Holmes, *Reapportionment Strategies*, *supra* note 118, at 206.

<sup>142</sup> *Id.*

<sup>143</sup> Bob Holmes, *Reapportionment/Redistricting Politics in Georgia in the 1990s and 2001–2002*, in VOTING RIGHTS AND MINORITY REPRESENTATION: REDISTRICTING, 1992–2002, at 87, 91 (David A. Bositis ed., 2006).

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

<sup>145</sup> BULLOCK, REDISTRICTING, *supra* note 28, at 151; *see also infra* Table 1.

<sup>146</sup> BULLOCK, REDISTRICTING, *supra* note 28, at 152.

successes in the South in the 1994 election to the extreme disruptions as distant black populations were united to form frequently non-compact districts.<sup>147</sup> White Democratic members of Congress, who emerged from redistricting with drastically altered districts, had insufficient time to develop ties with their new constituents before the wave election that gave Republicans their first House majority in decades.<sup>148</sup> After Nathan Deal changed parties in the spring of 1995, Georgia’s congressional delegation had eight Republicans and three African-American Democrats.<sup>149</sup> The 1992 collaboration had advanced the interests of both members but Republicans had been the bigger winners. In the course of less than two and a half years, Georgia’s congressional delegation had gone from eight white Democrats, one black Democrat, and one Republican, to three black Democrats and eight Republicans.<sup>150</sup>

Table 1<sup>151</sup>

COMPARISON OF CONGRESSIONAL DISTRICTS BEFORE  
AND AFTER IMPLEMENTATION OF 1992 REDISTRICTING

District	Percent Black		Legislator		Year of Change
	Old	New	Old	New	
1	32	23	Thomas (D)	Kingston (R)	1992
2	37	57	Hatcher (D)	Bishop (D)	1992
3	35	18	Ray (D)	Collins (R)	1992
4	25	12	Jones (D)	Linder (R)	1992

<sup>147</sup> John R. Petrocik & Scott W. Desposato, *The Partisan Consequences of Majority-Minority Redistricting in the South, 1992 and 1994*, 60 J. POLS. 613, 616 (1988).

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

<sup>149</sup> *Georgia Rep. Nathan Deal Moves to GOP*, L.A. TIMES, Apr. 11, 1995, [http://articles.latimes.com/1995-04-11/news/mn-53466\\_1\\_nathan-deal](http://articles.latimes.com/1995-04-11/news/mn-53466_1_nathan-deal).

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

<sup>151</sup> See MICHAEL BARONE & GRANT UJIFUSA, THE ALMANAC OF AMERICAN POLITICS 1992, at 304–26 (Eleanor D. Evans ed. 1991) (providing pre-1992 demographic data and representatives for Georgia’s ten congressional districts) [hereinafter BARONE & UJIFUSA, ALMANAC 1992]; MICHAEL BARONE & GRANT UJIFUSA, THE ALMANAC OF AMERICAN POLITICS 1994, at 334–58 (Eleanor Evans ed. 1993) (providing demographic data and representatives for Georgia’s congressional districts, including the newly granted Eleventh District, following the 1992 reapportionment) [hereinafter BARONE & UJIFUSA, ALMANAC 1994].

5	67	62	Lewis (D)	Lewis (D)	N/A
6	20	6	Gingrich (R)	Gingrich (R)	N/A
7	9	13	Darden (D)	Barr (R)	1994
8	36	21	Rowland (D)	Chambliss (R)	1994
9	5	4	Jenkins (D)	Deal (D/R)*	1995
10	23	18	Barnard (D)	Johnson (D) Norwood (R)	1992 1994
11	N/A	64	N/A	McKinney (D)	N/A

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\*Nathan Deal changed parties in April 1995.<sup>152</sup>

The prolonged tug-of-war with DOJ and the need to debate numerous plans sowed seeds of dissention among Democrats. Heretofore, the Democratic leadership had succeeded in tamping down racial differences and getting their members to promote education and other programs that widely distributed benefits without regard to race.<sup>153</sup> But LBC demands for more majority-black districts and the neighboring whiter districts electing more Republicans brought racial tensions among Democrats to the surface.<sup>154</sup> Racial divisions became more apparent and colored even some types of decisions that had not been seen as racial in the past.<sup>155</sup>

When the Supreme Court responded to Duke Professor Robinson Everett's challenge to North Carolina's I-85 district and held that the concerns raised were justiciable,<sup>156</sup> critics of Georgia's congressional plan filed a challenge to the Eleventh District.<sup>157</sup> As part of a stinging rebuke of DOJ, the three-judge panel criticized as "an embarrassment" and "an impropriety" the cozy relationship between DOJ and Kathy Wilde, the ACLU attorney who advocated

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<sup>152</sup> *Georgia Rep. Nathan Deal Moves to GOP*, *supra* note 149.

<sup>153</sup> Interview with Mark Burkhalter, Ga. House of Representatives (Feb. 18, 1993); Interview with Matt Towery, Georgia House of Representatives (June 15, 1993); Interview with Cathy Cox, Sec'y of State (October 22, 1993).

<sup>154</sup> Interview with Mark Burkhalter, *supra* note 153; Interview with Matt Towery, *supra* note 153; Interview with Cathy Cox, *supra* note 153.

<sup>155</sup> Interview with Mark Burkhalter, *supra* note 153; Interview with Matt Towery, *supra* note 153; Interview with Cathy Cox, *supra* note 153.

<sup>156</sup> *Shaw v. Reno*, 509 U.S. 630, 649–50 (1993).

<sup>157</sup> *2nd District Has to Be Redrawn, Judges Rule*, ATLANTA J.-CONST., Dec. 2, 1995, at D10. The Second District was subsequently successfully challenged. *Id.*

the three-district solution for members of the Black Caucus, and the amnesia that had wiped out the memories of the Justice Department attorneys.<sup>158</sup> In *Miller v. Johnson*, the Supreme Court elaborated on the *Shaw* opinion, which emphasized the shape of North Carolina's Twelfth District.<sup>159</sup> The *Miller* court identified the problem occurring when "race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines."<sup>160</sup> Applying this standard, the Court upheld the district court's finding that Georgia's Eleventh District was unconstitutional.<sup>161</sup>

The court focused on the constitutionality of the plan. But in the deposition that Assistant Attorney General John Dunne gave in *Miller*, he acknowledged a partisanship motivation behind DOJ pressure for MAXBLACK:

You know, I can't tell you that I was sort of like a monk hidden away in a monastery with only the most pure of intentions. I am a Republican. I was part of a Republican administration. And to tell you that at no moment during the course of my [career], the discharge of my responsibilities, was I totally immune or insensitive to political consideration, I don't think would justify anybody's belief.<sup>162</sup>

At trial Dunne acknowledged that before Georgia had prepared plans he met with leaders of the NAACP to point out that the NAACP and Republicans could pursue a mutually beneficial strategy.<sup>163</sup>

The challenge to replace the discredited congressional map proved insurmountable for the legislature. The LBC demanded "3 seats, no retreat."<sup>164</sup> Republicans and black clergy who had promoted the unconstitutional plan continued to call for three

<sup>158</sup> *Johnson v. Miller*, 864 F. Supp. 1354, 1368 (S.D. Ga. 1994), *aff'd*, 515 U.S. 900 (1995).

<sup>159</sup> *Miller v. Johnson*, 515 U.S. 900, 910–15 (1995).

<sup>160</sup> *Id.* at 913.

<sup>161</sup> *Id.* at 917.

<sup>162</sup> BULLOCK, REDISTRICTING, *supra* note 28, at 72 (citing Deposition of John Dunne at 22, *Johnson*, 864 F. Supp. 1354 (No. 194-008)).

<sup>163</sup> Rhonda Cook, *11th District Suit Looks at Justice Department Role*, ATLANTA J.-CONST., July 24, 1994, at B3.

<sup>164</sup> Holmes, *Reapportionment Strategies*, *supra* note 118, at 213.

majority-black districts.<sup>165</sup> Speaker Tom Murphy tried to unite the Democratic Party, which had splintered along racial lines in 1991 and 1992, and hoped to see the legislature adopt a replacement plan with a pair of majority-black districts, musing that some of his colleagues “don’t understand we need to comply with the court decision.”<sup>166</sup> As the House struggled to come up with a three-district plan that would satisfy judicial concerns, the Senate passed a plan with a single majority-black district.<sup>167</sup>

The debate over how many majority-black districts a plan should have further strained racial bonds in the Democratic Party.<sup>168</sup> The concerns were fueled by the belief that African-Americans needed majority-black districts to win.<sup>169</sup> Proposals that would leave only John Lewis with a black majority prompted an outburst from Rep. Billy McKinney, whose daughter represented the unconstitutional Eleventh District: “It’s racism.... That crowd would rather have no black elected officials.”<sup>170</sup> Black political scientist Robert Holmes claimed, “white Democrats are not willing to go to the mat, so to speak, to protect [black members of Congress] or assist them.”<sup>171</sup> Some black leaders called on African-Americans to vote against white Democratic legislators who had not demanded more majority-black districts.<sup>172</sup>

Once the legislature gave up, the trial court prepared a replacement that reunited all but six of the two-dozen counties split

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<sup>165</sup> Ken Foksett & Kathey Alexander, *Redistricting Foes to Meet Today*, ATLANTA J.-CONST., July 15, 1995, at C3; James Salzer, *Black Clergy Fight to Keep 3 Districts*, ATHENS BANNER-HERALD, July 22, 1995, at 1A, 10A; Mark Sherman, *Blacks, GOP Work to Save Districts*, ATLANTA J.-CONST., Aug. 1, 1995, at B1.

<sup>166</sup> Mark Sherman, *Murphy Says Redrawing Effort Likely to Fail; Others ‘Not Ready to Give Up’*, ATLANTA J.-CONST., Aug. 10, 1995, at B1.

<sup>167</sup> Holmes, *Reapportionment Strategies*, *supra* note 118, at 215–16.

<sup>168</sup> *Pigs Get Fat; Hogs Get Slaughtered*, 9 BILL SHIPP’S GA., Sept. 18, 1995, at 1–2; Tom Baxter, *New Year Blows in Two-Party Politics*, ATLANTA J.-CONST., Jan. 8, 1996, at B4.

<sup>169</sup> Mark Sherman & Kathey Alexander, *Map Called a Disaster for Black Voters*, ATLANTA J.-CONST., Dec. 14, 1995, at D4.

<sup>170</sup> James Salzer, *Number of Black Districts Cut in Reapportionment Proposals*, ATHENS BANNER-HERALD, Aug. 11, 1995, at 6; *see also* Jeff Dickerson, Editorial, *Is Payback for Party Loyalty Just One District?*, ATLANTA J., Aug. 16, 1995, at A16 (“We ought to be able to [fix the Eleventh District] without destroying coalitions and diluting voting gains.”).

<sup>171</sup> Mark Sherman, *Diluting Black Votes for a Stronger Voice*, ATLANTA J.-CONST., Dec. 17, 1995, at G3.

<sup>172</sup> James Salzer, *Blacks Target Democrats in Redistricting Battle*, ATHENS BANNER-HERALD, Mar. 23, 1996, at 8A.

in the unconstitutional plan, but it had only one black district.<sup>173</sup> The replacement plan substantially reduced black concentrations in two districts represented by African-Americans.<sup>174</sup> The ACLU and DOJ challenged this plan as retrogressive and asked for a second black district.<sup>175</sup> The Supreme Court rejected the claim.<sup>176</sup> In explaining why it accepted the one-district plan, the high court pointed to the last constitutional plan, which dated from 1982 and had one black district so that the new plan did not reduce the number of majority-black districts.<sup>177</sup> DOJ, which also objected to the state’s earlier plans, had no basis for demanding two black districts since it had rejected that solution when offered by the state in 1992.<sup>178</sup> Efforts to get a second majority-black district failed to meet the first prong from *Thornburg v. Gingles*<sup>179</sup> since Georgia’s black population was not sufficiently concentrated.<sup>180</sup>

Table 2<sup>181</sup>

AFRICAN-AMERICAN CONCENTRATIONS IN AFFIRMATIVE  
ACTION CONGRESSIONAL DISTRICTS BASED ON 1990  
POPULATIONS (all numbers in percent)

District	Previous Plan	1992 Plan	Post- <i>Miller</i> Plan
2	37	57	39
5	67	62	62
11*	N/A	64	37

<sup>173</sup> See *Miller v. Johnson*, 922 F. Supp. 1557, 1570–71 app. A (S.D. Ga. 1995), *aff’d sub nom.* *Abrams v. Johnson*, 521 U.S. 74 (1997) (showing the Fifth District as the only majority-black district).

<sup>174</sup> See *infra* Table 2.

<sup>175</sup> *Abrams v. Johnson*, 521 U.S. 74, 83 (1997).

<sup>176</sup> *Id.* at 90.

<sup>177</sup> *Id.* at 97.

<sup>178</sup> *Id.* at 80.

<sup>179</sup> 478 U.S. 30, 50–51 (1986).

<sup>180</sup> *Abrams*, 521 U.S. at 90–92.

<sup>181</sup> See BARONE & UJIFUSA, ALMANAC 1992, *supra* note DB, at 306, 313 (providing pre-1992 concentration levels); BARONE & UJIFUSA, ALMANAC 1994, *supra* note DB, at 337, 344, 357 (providing 1992 concentration levels); MICHAEL BARONE ET AL., THE ALMANAC OF AMERICAN POLITICS 2000, at 465, 470, 473 (Eleanor Evans ed. 1999) (providing post-*Miller* concentration levels).



\*Georgia received an 11th district pursuant to the 1990 reapportionment. The remedial plan from 1996 renumbered District 11 to District 4 and the 1996 figure in the table is for District 4.

Concerns that African-Americans could not win in the new configurations proved inaccurate. Both McKinney and Sanford Bishop continued to win reelection easily.<sup>182</sup> The success in these districts with white majorities foreshadowed the claims that have been made increasingly by civil rights groups: with so many whites voting in GOP primaries, African-Americans do not need majority-black districts to win, and black concentrations once demanded by the Department of Justice now often constitute packing.

In the wake of the *Miller* decision, Georgia Attorney General Mike Bowers warned the legislature that it needed to review the state legislative maps or be prepared to defend some of the districts against challenges.<sup>183</sup> The attorney who brought *Miller* believed that a dozen Senate districts, and twice as many in the House, were vulnerable.<sup>184</sup> The legislature accepted Bowers' challenge and came up with a configuration that protected all senators even before the unsuccessful effort to design a new congressional map.<sup>185</sup> The number of majority-black Senate districts declined by two to eleven and four majority-black House districts were eliminated, leaving thirty-seven.<sup>186</sup> Under the new plans, each chamber welcomed an additional African-American while Republicans picked up eight seats in the House and gained one senator.<sup>187</sup>

## V. SAVE THE DEMOCRATIC PARTY

Although Democrats still dominated the General Assembly and held most statewide constitutional offices, political allegiances were changing. Republicans had held the majority of the congressional delegation since 1995.<sup>188</sup> The 1990s' greatest population growth had

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<sup>182</sup> BULLOCK, REDISTRICTING, *supra* note 28, at 156.

<sup>183</sup> M. Elizabeth Neal, *Remap Panels to Start from Scratch*, 8 BILL SHIPP'S GA., July 17, 1995, at 3.

<sup>184</sup> James Salzer, *Redistricting Battle Headed to High Court*, ATHENS BANNER-HERALD, Jan. 27, 1996, at 16A.

<sup>185</sup> BULLOCK, REDISTRICTING, *supra* note 28, at 156.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 157.

come in areas where Republicans did well, while the population in Democratic areas had often stagnated and, in some places, actually declined.<sup>189</sup> Compounding the challenge facing Democrats, who would redraw the state in 2001, was that in each of the three most recent elections, Republicans won a majority of the statewide vote for both the state House and Senate.<sup>190</sup> Yet due to the maps in place, Democrats retained about 60% of the seats.<sup>191</sup> The GOP effort to win a Senate majority in 2000 fell short as they won twenty-four seats but lost another five by a combined total of 1,200 votes.<sup>192</sup> David Ralston has characterized the Democrats’ challenge in 2001 as an “attempt to hang on to their majorities in a gravity defying way.”<sup>193</sup> Any hope of maintaining majorities under the Gold Dome would require extraordinary gerrymandering.

Table 3<sup>194</sup>

GEORGIA GOP PERCENTAGES OF VOTES AND SEATS

	Senate		House	
	Votes	Seats	Votes	Seats
Both Chambers Redistricted				
1996	52	39	51	41
1998	51	39	53	43
2000	55	43	52	42
Both Chambers Redistricted				
2002	55	46	52	41
2004	57	61	57	53
2006	67	61	59	59

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> See *infra* Table 3.

<sup>192</sup> HILLS, *supra* note 112, at 83.

<sup>193</sup> Telephone interview by Joshua Bearden with David Ralston, Ga. House of Representatives (Nov. 2, 2017).

<sup>194</sup> See generally *Current and Past Election Results*, GA. SEC`Y OF STATE, [http://sos.ga.gov/index.php/Elections/current\\_and\\_past\\_elections\\_results](http://sos.ga.gov/index.php/Elections/current_and_past_elections_results) (last visited May 26, 2018).

With so much at stake, Governor Roy Barnes became much more involved than previous governors in redistricting.<sup>195</sup> He sought to sail against the tide and expand Democratic seats in the General Assembly and enable Democrats to win nine seats in the expanded thirteen-member congressional delegation.<sup>196</sup> The Senate map was drawn under Barnes' supervision and accepted with few, if any, changes.<sup>197</sup> Republicans had no input and even Democrats were kept out of the process; simply shown a draft with a warning that, if they objected, their district would be made worse.<sup>198</sup> In the House, Speaker Tom Murphy pushed back and made changes to protect his friends, even at his own expense.<sup>199</sup>

Unlike in the two previous decades, a united Democratic Party faced the challenge as the LBC declined the invitation to join forces with GOP legislators. Even as the post-*Miller* redistricting was underway, some recognized that the LBC coalition with Republicans had been a pact with the devil. Sen. Charles Walker fretted that: "We're helping elect Republicans, and they're not helping us."<sup>200</sup> David Bositis of the Joint Center for Political Studies, a black think tank, characterized the Republican gains that resulted from MAXBLACK as "arguably the biggest loss of black political power, ever."<sup>201</sup> The LBC, whose members chaired seven Senate and five House committees including the powerful Rules Committee, recognized that these and the associated influence over

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<sup>195</sup> See HILLS, *supra* note 112, at 90 ("[Bob] Irvin also criticized Roy Barnes . . . . 'There had never been a reapportionment session where the governor had gotten so involved . . . .'"). In contrast Zell Miller took no part in efforts to adjust congressional or state legislative district boundaries in the mid-1990s. *Slaughter on Capitol Square: Democrats Dig in for Republican Onslaught*, 8 BILL SHIPP'S GA., Aug. 14, 1995, at 2.

<sup>196</sup> Interview with Bryan Tyson, Strickland Brockington Lewis LLP, in Athens, Ga. (Nov. 8, 2007) [hereinafter Interview with Bryan Tyson (Nov. 8, 2007)].

<sup>197</sup> See HILLS, *supra* note 112, at 89 ("Subsequently, the Senate approved the committee maps . . . . Upon receipt of the Senate reapportionment legislation, Governor Barnes hurriedly signed the bill on August 24, 2001.").

<sup>198</sup> See David Pendered and Rhonda Cook, *Creative Legislators Draw New Congressional Map*, ATLANTA J.-CONST., Sept. 29, 2001, at A1 ("Republicans, in the minority and shut out of the decision-making, heaped criticism on the map and the process used to devise it. Linda Hamrick, who coordinated the GOP redistricting team, said the map is the product 'of a group of Democratic candidates drawing districts for themselves.'").

<sup>199</sup> Telephone Interview with Ray Holland, Ga. House of Representatives (Apr. 16, 2003) (explaining that designing a better district for his colleague Bill Cummings and a district with more Republicans for himself contributed to Murphy's defeat).

<sup>200</sup> Jeff Dickerson, *Is Black-Vote Dilution Key to Democrats' Survival?*, ATLANTA J.-CONST., Aug. 23, 1995, at A10.

<sup>201</sup> Tom Baxter, *Strange Company*, ATLANTA J.-CONST., Aug. 20, 1995, at B2.

legislation would all disappear should Republicans take control of the legislature—a feat the GOP had already achieved in neighboring South Carolina’s House and both chambers in Florida.<sup>202</sup> The two African-Americans in the House majority party leadership would become less significant players should Democrats become the minority. Consequently, the LBC’s objective in 2001 differed dramatically from previous decades. It sought to maximize black concentrations in districts likely to elect African-Americans and to maximize the number of districts favoring the election of African-Americans.

In 2001, the priority was to retain Democratic majorities. One way to do so was to reduce black concentrations in districts thought secure for African-American legislators and to redistribute excess black voters to help elect white Democrats.<sup>203</sup> The goal of creating districts with enough black voters to defeat a Republican, but not enough to elect an African-American, was exactly the strategy that the LBC had criticized in the past. The Senate plan reduced black concentrations in a dozen majority-black districts so that all eleven black senators would have more whites in their new districts.<sup>204</sup> Seven districts saw a reduction of more than ten percentage points in the black voting age population (VAP), with the largest reduction coming in a south DeKalb district that went from 88.4% to 62.6% black.<sup>205</sup> Four of the districts ceased to have a black majority among registered voters.<sup>206</sup> No Senate district was 65% black, down from six such districts in the previous plan.<sup>207</sup> The House plan reduced

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<sup>202</sup> *South Carolina State Legislature*, BALLOTPEDIA, [https://ballotpedia.org/South\\_Carolina\\_State\\_Legislature](https://ballotpedia.org/South_Carolina_State_Legislature), (last visited Mar. 9, 2018); *Party Control of Florida State Government*, BALLOTPEDIA, [https://ballotpedia.org/Party\\_control\\_of\\_Florida\\_state\\_government](https://ballotpedia.org/Party_control_of_Florida_state_government) (last visited Mar. 9, 2018).

<sup>203</sup> See Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of its Own Success?*, 104 COLUM. L. REV. 1710, 1716 (2004) (“Part of the [Georgia] Democrats’ strategy was not only to keep the same number of majority-minority districts, but to leverage black voting strength by diminishing the concentration of black voters in minority-dominated districts.”).

<sup>204</sup> See *id.* (citing *Georgia v. Ashcroft*, 539 U.S. 461, 470 (2003)) (“The key to the Senate plan was, in the Court’s words, to ‘unpack’ the black-concentrated districts, distribute the black vote around more Democratic districts, and actually increase the number of districts that were majority-black in voting-age population.”).

<sup>205</sup> See Charles S. Bullock III & Ronald Keith Gaddie, *Voting Rights Progress in Georgia*, 10 N.Y.U. J. LEGIS. & PUB. POL’Y 1, 36, 37 tbl.8 (2006) (showing the change in African-American VAP in majority-black districts produced by the first 2001 Senate plan).

<sup>206</sup> *Id.*

<sup>207</sup> See *infra* Table 4.

the numbers of majority-black districts from forty-two to thirty-one, and cut the number of districts with heavy black concentrations, reversing the ratcheting that had taken place under the non-retrogression rule.<sup>208</sup> Districts in the 40%–49.9% black range—which had almost been eliminated under MAXBLACK—increased to a dozen.<sup>209</sup>

**Table 4**  
NUMBERS OF GENERAL ASSEMBLY DISTRICTS IN  
REDISTRICTING PLANS BY THE BLACK POPULATION  
PERCENTAGE IN THE DISTRICT

%	1964	1968	1972	1974	1980s	1990s	2002	2004	2012
<u>Senate</u>									
40-49.9	8	8	8	10	5	1	3	3	0
>50	2	2	2	2	8	13	13	13	15
>65	1	2	2	2	5	6	0	0	4
>80	1	2	2	2	1	0	0	0	0
<u>House</u>									
40-49.9	15	13	14	14	13	1	12	15	7
>50	20	24	19	30	30	42	31	41	49
>65	7	12	9	15	19	21	10	16	19
>80	7	11	7	10	10	13	4	2	0

When redrawing districts in the face of daunting challenges, Democrats employed all of the tools in the gerrymanderer's tool kit.

<sup>208</sup> See *infra* Table 4.

<sup>209</sup> See *infra* Table 4.

In one instance, stacking was used. A Republican district combined with two Democratic districts and multi-member districts (MMDs) were reinstituted in the House a decade after their elimination.<sup>210</sup>

With the coming of the Redistricting Revolution, county boundaries ceased to be inviolable. But in rural areas where districts consisted of multiple counties, small counties were infrequently split.<sup>211</sup> The new maps did not honor that tradition. The Senate map split eighty-one counties and 189 precincts.<sup>212</sup> In an extreme case, Candler County, with a population of only 9,577, was divided among four House districts in order to eliminate a Republican legislator.<sup>213</sup> Slicing and dicing rural counties outraged the leadership in these communities.<sup>214</sup> Small county residents complained that what little influence they had over a legislator was further reduced when the county was not maintained as a unit.<sup>215</sup> Anger over having their counties divided among legislative districts contributed to the forces that denied Roy Barnes reelection.<sup>216</sup>

Democrats also engaged in the gerrymandering technique of pairing opponents. John Linder (R), whose congressional district extended from the northeast side of the metro Atlanta area to the South Carolina border, found himself paired with Bob Barr (R), whose district had reached from the west side of Atlanta to the Alabama border.<sup>217</sup> At no point had these two districts touched.<sup>218</sup> The new Seventh District linked Linder's Gwinnett County base with Barr's Smyrna residence in an arc that united Republican precincts in parts of five counties, while extracting Democrats with the intention of fashioning two new seats for Democrats.<sup>219</sup>

A pairing of GOP incumbents in South Georgia backfired on Democratic mapmakers. The new plan eliminated one of the three congressional districts in the southern half of the state and

<sup>210</sup> BULLOCK, REDISTRICTING, *supra* note 28, at 160.

<sup>211</sup> *Id.*

<sup>212</sup> HILLS, *supra* note 112, at 88.

<sup>213</sup> Interview with Bryan Tyson (Nov. 8, 2007), *supra* note 196.

<sup>214</sup> HILLS, *supra* note 112, at 91.

<sup>215</sup> Charles S. Bullock III, *It's a Sonny Day in Georgia*, in MIDTERM MADNESS: THE ELECTIONS OF 2002, at 177, 180 (Larry J. Sabato ed., 2003).

<sup>216</sup> *Id.*

<sup>217</sup> Adam Clymer, *Conservatives' Factions Vie in Georgia Primary*, N.Y. TIMES (Aug. 7, 2002), <http://www.nytimes.com/2002/08/07/us/conservatives-factions-vie-in-georgia-primary.html>.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.*

extended Jack Kingston's First District west of I-75 with a finger snaking into Colquitt County to Saxby Chambliss' home.<sup>220</sup> In contrast with the Barr-Linder situation, where they competed in the GOP primary, Chambliss left the First District to Kingston, ran for the Senate, and defeated Democratic incumbent Max Cleland.<sup>221</sup>

Pairing also eliminated Republican state legislators as thirty-five of the seventy-six GOP House members ended up sharing districts.<sup>222</sup> Nine House districts paired Republicans, four districts forced three Republican incumbents to compete for two seats in MMDs, and another four Republicans got paired with Democrats in districts strongly favoring the latter.<sup>223</sup> Nine of the districts that paired Republicans were over-populated by at least 4.2%.<sup>224</sup> Sonny Perdue, who led Senate Democrats until changing parties prior to the 1998 election, was punished by having his district dismantled.<sup>225</sup> He exacted revenge by running for governor and defeating Roy Barnes.<sup>226</sup> Pairing also resulted in Republicans leaving the legislature and winning elections for state school superintendent and a seat on the Public Service Commission—additional evidence that Georgia was becoming a Republican state.<sup>227</sup>

The maps showed little concern for communities of interest. The Thirteenth Congressional District shown in Figure 1 was one of two new seats reapportioned to Georgia.<sup>228</sup> It became known as the “dead cat on the expressway” district for its convoluted shape that united black concentrations in nine counties south and east of

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<sup>220</sup> David M Halbfinger & Jim Yardley, *The 2002 Elections: The South; Vote Solidifies Shift of South to the G.O.P.*, N.Y. TIMES (Nov. 7, 2002), <http://www.nytimes.com/2002/11/07/us/the-2002-elections-the-south-vote-solidifies-shift-of-south-to-the-gop.html>.

<sup>221</sup> *Id.*

<sup>222</sup> Ronald Keith Gaddie & Charles S. Bullock III, *From Ashcroft to Larios: Recent Redistricting Lessons From Georgia*, 34 FORDHAM URB. L.J. 997, 1015 tbl.2 (2007).

<sup>223</sup> *Id.* at 1014–15.

<sup>224</sup> *Id.* at 1015 tbl.2.

<sup>225</sup> HILLS, *supra* note 112, at 82, 89, 91.

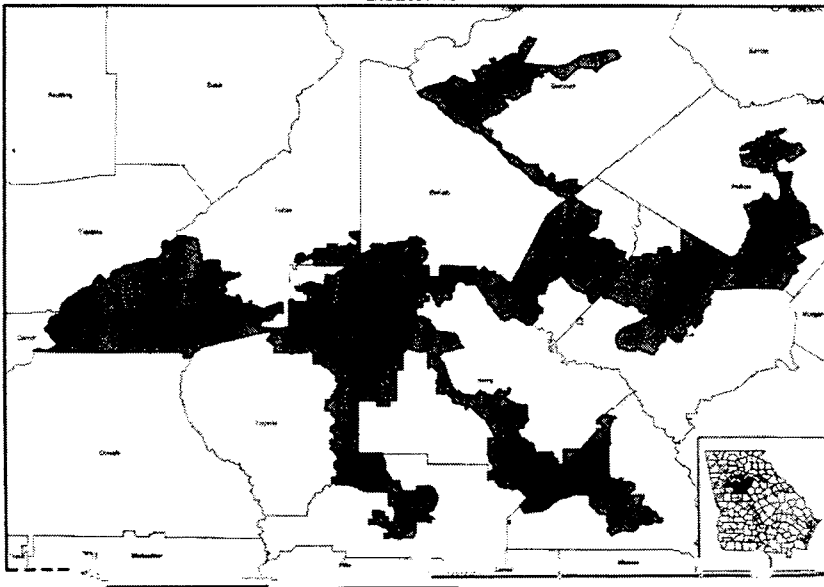
<sup>226</sup> See generally Danny Hayes & Seth C. McKee, *Booting Barnes: Explaining the Historical Upset in the 2002 Georgia Gubernatorial Election*, 32 POLS. & POL'Y 708 (2004).

<sup>227</sup> Interview with Bryan Tyson (Nov. 8, 2007), *supra* note 196; Interview with Bryan Tyson, Strickland Brockington Lewis LLP, in Athens, Ga. (Feb. 10, 2011) [hereinafter Interview with Bryan Tyson (Feb. 10, 2011)].

<sup>228</sup> Charles S. Bullock III, *Redistricting the Peach State*, in THE POLITICAL BATTLE OVER CONGRESSIONAL REDISTRICTING 87, 87 (William J. Miller & Jeremy D. Walling eds., 2013) [hereinafter Bullock, *Peach State*].

Atlanta in order to get the black population above 40%, which proved sufficient to send a fourth African-American to Congress.<sup>229</sup>

**Figure 1**<sup>230</sup>  
**Georgia Congressional, 2002**  
 District 13



Some Republicans were given districts that they could win but not effectively represent. Joey Brush saw what had been a compact Senate district between Augusta and Athens replaced by a monstrosity, anchored in Columbia County, but snaking westward across nine counties before ending south of Griffin.<sup>231</sup> The western part of the Brush district sat atop another GOP district, the

<sup>229</sup> *Id.* at 94.

<sup>230</sup> Plaintiff's Demonstrative Exhibits, *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004) (No. 03-cv-693).

<sup>231</sup> See BULLOCK, REDISTRICTING, *supra* note 28, at 164–65, 164 fig.6.6 (elaborating on the reconfigured twenty-fourth senate district).



Sixteenth, which had been a Columbus district.<sup>232</sup> It now stretched eastward across nine counties to include part of Macon before ending near Perry.<sup>233</sup>

As it turned out, packing was the fatal flaw in the Democrats' state legislative plans. Operating under the assumption that courts would defer to the legislature's actions as long as the districts were within five percentage points of the ideal population, Democrats systematically over-populated Republican districts while under-populating their own districts.<sup>234</sup> Rather than having something approaching a normal distribution around the ideal population, the population distribution for seats based on population was just the opposite, with a trough in the middle.<sup>235</sup> Most Republican Senate districts were over-populated by 4.25% and ten of these were at least 4.9% above the ideal.<sup>236</sup> Democrats represented fewer people; seventeen of thirty districts won by Democrats were under-populated by 4% or more.<sup>237</sup> Similar patterns characterized the House plan.<sup>238</sup>

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<sup>232</sup> Interview with Bryan Tyson (Nov. 8, 2007), *supra* note 196.

<sup>233</sup> *Id.*

<sup>234</sup> BULLOCK, REDISTRICTING, *supra* note 28, at 160–61.

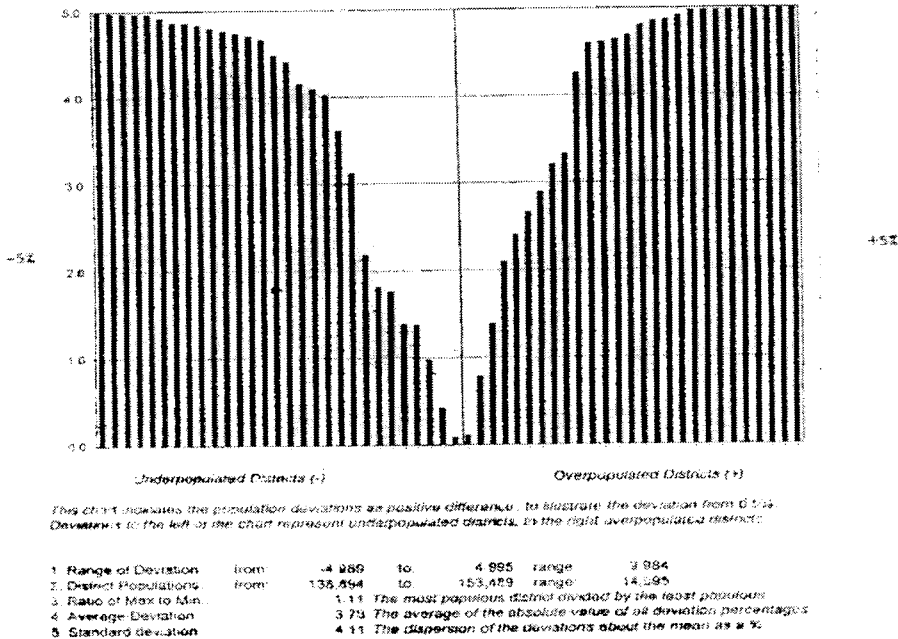
<sup>235</sup> *Id.*; see also *infra* Figure 2.

<sup>236</sup> BULLOCK, REDISTRICTING, *supra* note 28, at 160–61.

<sup>237</sup> *Id.* at 161.

<sup>238</sup> *Id.*

**Figure 2<sup>239</sup>**  
**SENATE DISTRICTS DISTRIBUTED ON THE BASIS OF**  
**POPULATION DEVIATIONS FROM -5% TO +5%**  
 (Each bar represents one district)



The maps perpetuated the Democratic advantage. Democrats continued to hold 58% of state House seats despite losing the popular vote and elected thirty senators with 45% of the popular vote.<sup>240</sup> The Democrats' Senate advantage proved short-lived when four Democrats converted to the GOP in the wake of Sonny Perdue's (R) upset victory as governor.<sup>241</sup> Democrats also added two

<sup>239</sup> Plaintiff's Demonstrative Exhibits, *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004) (No. 03-cv-693).

<sup>240</sup> *Georgia Election Results: Official Results of the November 5, 2002 General Election*, GA. SEC'Y OF STATE, [http://sos.ga.gov/elections/election\\_results/2002\\_1105/summary.htm](http://sos.ga.gov/elections/election_results/2002_1105/summary.htm) (last updated Dec. 24, 2002).

<sup>241</sup> David S. Broder, *For Perdue and Georgia GOP, It's Worth the Wait*, WASH. POST (Jan. 14, 2003), [https://www.washingtonpost.com/archive/politics/2003/01/14/for-perdue-and-georgia-gop-its-worth-the-wait/a740a224-1c61-4e2c-9fd3-4f7656600970/?utm\\_term=.8dcfa298ba00](https://www.washingtonpost.com/archive/politics/2003/01/14/for-perdue-and-georgia-gop-its-worth-the-wait/a740a224-1c61-4e2c-9fd3-4f7656600970/?utm_term=.8dcfa298ba00).

congressional seats<sup>242</sup> and might have won another had one of their candidates not had an arrest record that rivaled his office-holding record.<sup>243</sup>

The legislative maps sparked two kinds of challenges. DOJ objected to three Senate districts<sup>244</sup> and Republicans went to court challenging both the congressional and General Assembly plans.<sup>245</sup>

Because the plans were such blatant partisan gerrymanders, Georgia opted to seek approval from the District of Columbia court rather than submitting them to George Bush's Justice Department, where they feared partisan concerns might influence the assessment.<sup>246</sup> At the hearing on the plans, DOJ accepted the redesigns for Congress and the state House but balked at three Senate districts reduced to less than 50% black VAP.<sup>247</sup> Two of the predecessor districts had exceeded 60% and the other was above 55%.<sup>248</sup> The trial court accepted DOJ's concerns.<sup>249</sup>

On appeal, the Supreme Court reversed, raising questions about the Section 5 non-retrogression standard.<sup>250</sup> The Court explained:

[A] State may choose to create a certain number of "safe" districts, in which it is highly likely that minority voters will be able to elect the candidate of their choice. Alternatively, a State may choose to create a greater number of districts in which it is likely—although perhaps not quite as likely as under the benchmark plan—that minority voters will be able to elect candidates of their choice.<sup>251</sup>

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<sup>242</sup> Jeffrey Toobin, *The Great Election Grab*, THE NEW YORKER (Dec. 8, 2003), <https://www.newyorker.com/magazine/2003/12/08/the-great-election-grab>.

<sup>243</sup> See Bullock, *Peach State*, *supra* note 228, at 91 ("[Champ Walker] had been arrested multiple times for offenses including leaving the scene of an accident, driving without a license, and shoplifting. Although Walker pointed out that he had never been convicted, that explanation did not reassure voters.").

<sup>244</sup> *Georgia v. Ashcroft*, 195 F. Supp. 2d 25, 37 (D.D.C. 2002), *vacated*, 539 U.S. 461 (2003).

<sup>245</sup> *Larios v. Cox*, 300 F. Supp. 2d 1320, 1321–22 (N.D. Ga.), *aff'd*, 542 U.S. 947 (2004).

<sup>246</sup> BULLOCK, REDISTRICTING, *supra* note 28, at 165.

<sup>247</sup> See *Georgia v. Ashcroft*, 195 F. Supp. 2d at 72 ("The Attorney General eventually identified only the Senate redistricting plan as objectionable, and, in particular, proposed Senate Districts 2, 12 and 26.").

<sup>248</sup> See *id.* at 56 (showing the predecessor districts' black VAPs to be 60.58%, 55.43%, and 62.45%, respectively).

<sup>249</sup> *Id.* at 93–94.

<sup>250</sup> *Georgia v. Ashcroft*, 539 U.S. 461, 490 (2004).

<sup>251</sup> *Id.* at 480 (first citing *Thornburg v. Gingles*, 478 U.S. 30, 48–49 (1986); then citing *Gingles*, 478 U.S. at 88–89 (O'Connor, J., concurring)).

The state's case was helped by the favorable evaluation given the plan by Rep. John Lewis, whose support for civil rights was beyond question.<sup>252</sup> At his deposition, Lewis explained why he did not object to lowering black concentrations in districts, including his own:

[Georgia] is not the same state it was. It's not the same state that it was in 1965 or in 1975, or even in 1980 or 1990. We have changed. We've come a great distance. . . . [I]t's not just in Georgia, but in the American South, I think people are preparing to lay down the burden of race.<sup>253</sup>

Further evidence that reducing black concentrations was done with no intent to discriminate was that all but one black senator backed the plan.<sup>254</sup> Helping convince members of the LBC that reducing black concentrations would not imperil the group's incumbents was research done by David Epstein, an expert retained by the state, who calculated that black candidates were more likely than not to win so long as the district was at least 44% black in adult population.<sup>255</sup>

Republicans, still chafing from their inability to win control of either legislative chamber despite winning a majority of the statewide vote, went to court to challenge the Democratic gerrymander.<sup>256</sup> Representatives for the state justified over-populating Republican districts and under-populating Democratic areas as necessary to allow South Georgia and Atlanta to retain more legislators.<sup>257</sup> In *Larios v. Cox*, a three-judge federal panel struck down the maps, reminding the state that it was unacceptable to favor some areas at the expense of other areas.<sup>258</sup> The court pointed to the 9.98% range in district populations and the under-populating of some parts of the state to the disadvantage of other areas.<sup>259</sup> The Supreme Court summarily affirmed the decision, but

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<sup>252</sup> *Id.* at 489.

<sup>253</sup> BULLOCK, REDISTRICTING, *supra* note 28, at 139 (citing Testimony of John Lewis, Georgia v. Ashcroft, 204 F. Supp. 2d 4 (2002) (No. 01-civ-2111)).

<sup>254</sup> Georgia v. Ashcroft, 195 F. Supp. 2d at 129 (Oberdorfer, J., concurring in part and dissenting in part).

<sup>255</sup> *Id.* at 66 (majority opinion).

<sup>256</sup> Larios v. Cox, 300 F. Supp. 2d 1320, 1321–22 (N.D. Ga.), *aff'd*, 542 U.S. 947 (2004).

<sup>257</sup> *Id.* at 1325.

<sup>258</sup> *Id.* at 1338 (citing Reynolds v. Sims, 377 U.S. 533 (1964)).

<sup>259</sup> *Id.* at 1322.

Justices Stevens and Breyer volunteered that they thought that Democrats had engaged in illegal partisan gerrymandering.<sup>260</sup>

The GOP-controlled Senate redrew its districts, but Democrats, who controlled the House, could not agree on a plan since compliance with the court order would eliminate some of their members.<sup>261</sup> Democrats refused to bring a plan up for a vote after the GOP leader in the House bragged that he had the votes to replace a Democratic plan with one that would both produce a Republican majority and protect some Democratic incumbents.<sup>262</sup>

When the legislature failed to redraw the maps, the court stepped in and hired retired federal judge Joseph Hatchett, who was assisted by redistricting expert Nathaniel Persily, a law professor at the University of Pennsylvania.<sup>263</sup> Their plans reduced the population range from 10% in the old maps to 2% and eliminated multi-member House districts.<sup>264</sup> Critics asserted that the new maps seemed to give little deference to county boundaries.<sup>265</sup> The court directed its consultant to “reconcil[e] the demands of the Constitution, the Voting Rights Act, and the redistricting principles traditionally recognized by the State of Georgia.”<sup>266</sup> Since creating separate districts for each incumbent was not part of the charge, the court’s plans paired twenty senators and sixty-seven representatives with three House districts containing the homes of three legislators each.<sup>267</sup> Unlike the pairing done by Democrats in the discredited maps, the new ones inflicted pain on both parties and threw several chamber leaders into shared districts.<sup>268</sup> The maps especially endangered African-American members, half of

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<sup>260</sup> Cox v. Larios, 542 U.S. 947, 950–51 (2004) (Stevens, J., concurring).

<sup>261</sup> HILLS, *supra* note 112, at 165.

<sup>262</sup> See *id.* at 167 (detailing Republican Glenn Richardson’s perspective on how he “outmaneuvered the Democrats” by having a redistricting plan ready that a number of Democrats preferred).

<sup>263</sup> Gaddie & Bullock, *supra* note 222, at 1028.

<sup>264</sup> Report and Recommendation of the Special Master at 18, 25, *Larios*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004) (No. 1:03-cv-693) (filed Mar. 15, 2004).

<sup>265</sup> Bill Shipp, Opinion, *Shipp: Redistricting: How to Get Lost with a Map*, ATHENS BANNER-HERALD, Mar. 21, 2004, at A9.

<sup>266</sup> Order Appointing Special Master at 2, *Larios*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004) (No. 1:03-CV-693-CAP) (filed Mar. 1, 2004).

<sup>267</sup> Rhonda Cook, *Voting Maps to be Redrawn*, ATLANTA J.-CONST., Mar. 23, 2004, at B1; see also *Proposed Legislation Districts*, ATLANTA J.-CONST., Mar. 16, 2004, at D5 (listing the Senate and House pairings under the court’s plans).

<sup>268</sup> See Cook, *supra* note 267 (noting that “[t]here are now 24 Republicans and 24 Democrats pitted against colleagues”).

whom shared a district with one or two incumbents.<sup>269</sup> These radical changes evoked a bipartisan request that the court separate incumbents when an open seat was adjacent to a pairing.<sup>270</sup> The judges granted some relief so that in the final plans, eight senators and sixteen representatives remained paired.<sup>271</sup> Moving to an open district is not an option for Georgia legislators who must live in a district for a year before serving.<sup>272</sup>

Not all legislators who shared a district with another incumbent competed in the 2004 election. Among those who called it quits was Sen. Hugh Gillis (D), who first won election to the House in 1940 and had served in the Senate continuously since 1963 when rotation was eliminated.<sup>273</sup> With new districts in place, Republicans won a majority in the House and, after some party switches, had ninety-nine seats.<sup>274</sup> They also picked up four Senate seats.<sup>275</sup> White Democrats paid the price for the shift in partisan control of the legislature as blacks gained a seat in each chamber.<sup>276</sup>

The shift in partisan control of the House rooted out the last vestiges of the archaic county-unit system. Although the courts had invalidated county-based apportionment decades earlier,<sup>277</sup> urban legislators had never attained proportional power. Speaker Tom Murphy (D) kept Atlanta-area legislators away from the most powerful positions. In Murphy's last session as speaker (2002), none of the Democratic Party leaders or chairs of the most powerful committees came from Atlanta.<sup>278</sup> No woman served in any of these posts<sup>279</sup> and, on average, those holding leadership offices had served

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<sup>269</sup> Rhonda Cook, *Attorneys Protest New District Maps*, ATLANTA J.-CONST., Mar. 20, 2004, at E1.

<sup>270</sup> *Id.*

<sup>271</sup> BULLOCK, REDISTRICTING, *supra* note 28, at 167.

<sup>272</sup> See GA. CONST. art. III, § 2, para. 3 (requiring that members of the both the Senate and the House "shall have been legal residents of the territory embraced within the district from which elected for at least one year.").

<sup>273</sup> Michelle E. Shaw, *Hugh M. Gillis Sr., 94: Longest-Serving Legislator in Georgia*, ATLANTA J.-CONST. (Jan. 2, 2013), <https://www.ajc.com/news/local-obituaries/hugh-gillis-longest-serving-legislator-georgia/mIt4Fqvks1T6jnfgnVFPO/>.

<sup>274</sup> Nancy Badertscher, *Another House Democrat Joins GOP*, ATLANTA J.-CONST., Nov. 10, 2004, at B4.

<sup>275</sup> BULLOCK, REDISTRICTING, *supra* note 28, at 167.

<sup>276</sup> See *id.* at 173 (noting that "black Democrats outnumbered white Democrats by . . . twelve to ten in the senate, and forty-one to thirty-four in the state house").

<sup>277</sup> See *id.* at 140 (summarizing the decisions leading to the end of the county-unit system).

<sup>278</sup> *Id.* at 9.

<sup>279</sup> GA. GEN. ASSEMBLY, MEMBERS OF THE GENERAL ASSEMBLY OF GEORGIA 35, 103–113 (2002).

twenty-eight years.<sup>280</sup> When Republicans organized the House in 2005, four leaders came from metro Atlanta, including a woman, and the average seniority was eight years.<sup>281</sup>

Having gained control of the legislature, Republicans turned their attention to the congressional districts. The plan that emerged involved extensive consultation with the Republicans in the congressional delegation.<sup>282</sup> Although Republican redistricting guru Bryan Tyson showed that it was possible to draw a map that would likely elect ten Republicans, the GOP pursued a more modest objective of, in Rep. Lynn Westmoreland's words, "[putting] Georgia back together" by drawing more compact districts.<sup>283</sup> Less contorted districts were their top objective.<sup>284</sup> A second goal was to bolster Phil Gingrey, who won a seat Democrats had designed to be one of theirs.<sup>285</sup> A third goal was to knock off the two white Democratic incumbents.<sup>286</sup>

Republicans' mid-decade redistricting solidified Gingrey, reducing his district's black concentration from 28.2%<sup>287</sup> to 11.7%.<sup>288</sup>

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<sup>280</sup> Ways and Means Committee Chairman Thomas Buck had served since 1967. 1989–1990 GA. SEC'Y OF ST. OFFICIAL & STAT. REGISTER 115. Murphy, Majority Leader Larry Walker, and Appropriations Committee Chairman Terry Coleman had served since 1973. *Id.* at 103, 117. Calvin Smyre, who chaired both the Majority Caucus and Rules Committee, had served since 1975. *Id.* at 114. Speaker Pro Tempore Jack Connell had served since 1977. *Id.* at 103. Finally, Majority Whip Jimmy Skipper had served since 1990. CHARLES S. BULLOCK, III, THE GEORGIA POLITICAL ALMANAC: THE GENERAL ASSEMBLY 183 (1991).

<sup>281</sup> *Id.* at 13 ("Four years later when Republicans won their first majority in more than 130 years, the speaker came from the Atlanta suburbs, as did the speaker pro tempore and the chair of the powerful Rules Committee."). The positions examined here are speaker, speaker pro tempore, majority leader, majority whip, majority caucus chair, and the chairs of the Appropriations, Rules, and Ways and Means Committees.

<sup>282</sup> See e.g. M. V. Hood III & Seth C. McKee, *Trying to Thread the Needle: The Effects of Redistricting in a Georgia Congressional District*, 42 PS: POL. SCI. & POLS. 679, 685–86 n.3 (2009) (discussing the coordination between General Assembly Republicans and congressman Lynn Westmoreland).

<sup>283</sup> Interview with Bryan Tyson (Nov. 8, 2007), *supra* note 196.

<sup>284</sup> See Hood & McKee, *supra* note 282, at 680 ("The erstwhile Democratic map required a high-powered microscope to divine several of the district boundaries in the greater Atlanta metropolitan area. By contrast, the Republican map's dividing lines are visible to the naked eye—with 34 county splits out of a total of 159 counties reduced to 19.").

<sup>285</sup> See *id.* at 681 ("[T]he primary beneficiary of a more aesthetically appealing map was Republican Phil Gingrey . . .").

<sup>286</sup> See *id.* at 680 ("Georgia Republicans expected to net one or two districts: District 8 and District 12."); cf. Interview with Bryan Tyson (Feb. 10, 2011), *supra* note 227 (asserting that Republicans were primarily targeting the 12th district).

<sup>287</sup> MICHAEL BARONE & RICHARD E. COHEN, THE ALMANAC OF AMERICAN POLITICS 2004, at 486 (Charles Mahtesian ed., 2003) [hereinafter BARONE & COHEN, ALMANAC 2004].

<sup>288</sup> MICHAEL BARONE & RICHARD E. COHEN, THE ALMANAC OF AMERICAN POLITICS 2008, at 488 (Charles Mahtesian ed., 2007) [hereinafter BARONE & COHEN, ALMANAC 2008].

Districts also became much more compact. For example, the Mountain District that Democrats had extended south into Rockdale County now had its southern boundary at Hall, where it had traditionally ended.<sup>289</sup> The Eleventh District, which had split eleven of seventeen counties as it twisted and turned from Rome to Columbus with a finger extended into Marietta, now split only three of nine counties.<sup>290</sup> Focusing on two measures of compactness, the new plan increased districts' average perimeter score to .25 and dispersion score to .45, compared with average scores of .12 and .32 in the Democratic plan.<sup>291</sup> Democrat Jim Marshall's district that had run east-west returned to the north-south axis traditional for this district,<sup>292</sup> and Republicans reduced its black percentage from 39.8%<sup>293</sup> to 32.4%.<sup>294</sup> The other white Democrat, John Barrow, saw his Athens home removed from the district as it shifted south and picked up more of rural middle Georgia.<sup>295</sup> As a result of Republicans not giving top priority to eliminating the white Democrats, Marshall survived until 2010<sup>296</sup> while Barrow made it until 2014, when another redistricting ended his tenure.<sup>297</sup>

## VI. GOP SUPER-MAJORITY

Receipt of the 2010 Census marked the first time that Republicans redistricted both the General Assembly and the state's congressional seats. The GOP had firm control of Georgia as the last Democrats holding statewide office vacated their posts in 2010, leaving Republicans with 36 Senate, 113 House, and 8 congressional seats.<sup>298</sup> In sharp contrast with Democrats a decade earlier, who tried desperately to hold onto a majority, the GOP had loftier ambitions. They hoped to emerge with super-majorities, that is,

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<sup>289</sup> See Hood & McKee, *supra* note 93, at 680 fig.1 (depicting the difference between the old Tenth District and the new Ninth District).

<sup>290</sup> *Id.*

<sup>291</sup> BULLOCK, REDISTRICTING, *supra* note 28, at 169 tbl.6.4.

<sup>292</sup> Hood & McKee, *supra* note 93, at 681.

<sup>293</sup> BARONE & COHEN, ALMANAC 2004, *supra* note FS, at 467.

<sup>294</sup> BARONE & COHEN, ALMANAC 2008, *supra* note FT, at 481.

<sup>295</sup> Blake Aued, *John Barrow is Moving Back to Athens*, FLAGPOLE (Nov. 10, 2014), <http://flagpole.com/news/in-the-loop/john-barrow-is-moving-back-to-athens>.

<sup>296</sup> Josephine Bennett, *Marshall Loses Seat in Congress*, GA. PUB. BROADCASTING (Nov. 2, 2010), <http://www.gpb.org/news/2010/11/03/marshall-loses-seat-in-congress>.

<sup>297</sup> Blake Aued, *Why the Republicans Won Big Again*, FLAGPOLE (Nov. 12, 2014), <http://flagpole.com/news/city-dope/2014/11/12/why-the-republicans-won-big-again>.

<sup>298</sup> Bullock, *Peach State*, *supra* note 228, at 94.



two-thirds of the seats in each chamber, and to defeat John Barrow, the last white Democrat in the congressional delegation.<sup>299</sup>

The new legislative plans bolstered black influence in districts that currently had African-American legislators. For the first time, all four African-Americans serving in Congress had districts in which most registered voters were black.<sup>300</sup> Barrow saw his district transformed again. The new map removed Savannah with its black neighborhoods and replaced them with the Republican suburbanites of Augusta and parts of rural southeast Georgia.<sup>301</sup> Barrow migrated with his district, moving from Savannah to Augusta.<sup>302</sup> The last rural, white Democrat in the upper chamber of the General Assembly, Dean of the Senate George Hooks, who had served for twenty-two years following a decade in the House, retired after his district in the slow-growing southwest quadrant was split in two.<sup>303</sup>

Republicans, much like Democrats a decade earlier, were allowed to see their districts, but not the entire maps, and request changes prior to the release of the maps.<sup>304</sup> Democrats criticized the GOP handiwork, much as Republicans had criticized Democrats a decade earlier. Rep. Scott Holcomb (D) claimed that his new district ignored communities of interest, packed African-Americans, and paired him with another Democrat.<sup>305</sup> House Minority Leader Stacey Abrams (D) offered a broader critique, charging that the GOP maps “silence whites and isolate minorities into enclaves where no racial coalition can exist. This amounts to a resegregation of Georgia into a party of white Republicans and black Democrats,

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<sup>299</sup> *Id.* at 94, 97–99.

<sup>300</sup> *Id.* at 99.

<sup>301</sup> Dan Hirschhorn, *Ga. Redistricting Plan Imperils Barrow*, POLITICO (Aug. 22, 2011), <https://www.politico.com/story/2011/08/ga-redistricting-plan-imperils-barrow-061861>.

<sup>302</sup> Russ Bynum, *John Barrow Leaves Savannah for Augusta*, SAVANNAH MORNING NEWS (Apr. 5, 2012), <http://www.savannahnow.com/article/20120405/NEWS/304059795>.

<sup>303</sup> See Kristina Torres, *George Hooks Leaves Georgia's Board of Regents*, ATLANTA J.-CONST. (Oct. 16, 2013), <https://www.ajc.com/news/state--regional-govt--politics/george-hooks-leaves-georgia-board-regents/SGyTRPSWbF9V36LaGI0MSI/> (“[Hooks] retired from the state Legislature at the end of 2012 as one of its longest-serving members. A former state representative first elected to the General Assembly in 1980, he left as Dean of the Senate, a title denoting his tenure in that chamber. . . . Hooks . . . was one of the Legislature’s few remaining white rural Democrats, and his district had just been redrawn into a Republican stronghold.”).

<sup>304</sup> Kristina Torres, *Lawmakers Draw New Maps Atop Political Minefield*, ATLANTA J.-CONST., Aug. 14, 2011, at A14.

<sup>305</sup> Scott Holcomb, *A Plan to Oust White Democrats at Capital*, ATLANTA J.-CONST., Aug. 19, 2011, at A17.

leaving Latinos and Asians to fend for themselves.”<sup>306</sup> Democrats tried but failed to create “influence districts,” or districts with too few blacks to elect an African-American but sufficient to elect a white Democrat who would be responsive to black concerns.<sup>307</sup> Black legislators’ concern that the GOP plan would defeat white Democrats showed how far the black members had migrated from the 1991 alliance with Republicans, when they devised maps that defeated white Democrats. Every Democrat in the General Assembly voted nay on the maps.<sup>308</sup> To hold ranks, Minority Leader Abrams threatened that any Democrat who voted for the GOP plans would get a primary challenge in 2012.<sup>309</sup>

The state had concerns in 2011 much like those in 2001. The attorney general and the creators of Georgia’s maps belonged to opposing parties and the state feared that politics might torpedo the maps at DOJ.<sup>310</sup> To expedite the process, should an appeal from an unfavorable DOJ ruling be necessary, Georgia adopted a dual submission strategy: sending the plans to DOJ as well as the District of Columbia District Court.<sup>311</sup> The new plans increased the numbers of districts with black majorities among registrants by two congressional districts, three Senate districts, and six House districts.<sup>312</sup> Both the Senate and House had record numbers of majority-black districts.<sup>313</sup> While these Republican maps did not maximize black concentrations, as had been done under MAXBLACK, by giving these districts black majorities they solidified GOP strength in adjoining districts.<sup>314</sup> DOJ acted more quickly than the court and for the first time since passage of the

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<sup>306</sup> Bullock, *Peach State*, *supra* note 228, at 103 (citing Stacey Abrams, *Integrate, Don’t Resegregate*, ATL. J.-CONST., Dept. 8, 2011, at A14).

<sup>307</sup> Jim Galloway et al., *Redrawn Districts May Polarize More*, ATLANTA J.-CONST., Aug. 28, 2011, at A1.

<sup>308</sup> Kristina Torres & Aaron Gould Sheinin, *Political Boundaries Easily Win Approval*, ATLANTA J.-CONST., Aug. 19, 2011, at B1.

<sup>309</sup> *Id.*

<sup>310</sup> *Id.*

<sup>311</sup> Bullock, *Peach State*, *supra* note 228, at 106.

<sup>312</sup> CHARLES S. BULLOCK, III & RONALD KEITH GADDIE, *GEORGIA POLITICS IN A STATE OF CHANGE* 160–61 (2d ed. 2013).

<sup>313</sup> *See supra* Table 4.

<sup>314</sup> *See* Bullock, *Peach State*, *supra* note 228, at 102 (“If the new districts perform as expected based on past election results, Republicans will sweep everything except the four districts represented by African Americans.”).

initial Voting Rights Act, Georgia's maps secured Section 5 approval on the first try.<sup>315</sup>

The GOP achieved only one of its goals in 2012 as it added two Senate seats to secure two-thirds of the seats.<sup>316</sup> In the House, Republicans came up one seat short at 119.<sup>317</sup> Hard-working John Barrow dodged a bullet when the Republicans' nominee refused to debate Barrow and had several slips of the tongue.<sup>318</sup> Barrow survived in a district that Republican presidential candidate Mitt Romney carried with 55% of the vote, achieving a Cook Partisan Voting Index of R +9<sup>319</sup> only to lose in 2014.<sup>320</sup>

African-Americans added five House seats and held their own in the other two delegations.<sup>321</sup> The Democratic delegations were now overwhelmingly African-American after the 2012 election, including thirteen of eighteen Democratic senators, forty-seven of sixty representatives, and four of five members of Congress.<sup>322</sup> Democratic legislators were also overwhelmingly from urban areas, and were beginning to chip away at the GOP dominance of Atlanta suburbs by winning some older areas experiencing population diversification.<sup>323</sup>

Election results from 2016, augmented by special elections in 2017, suggest strongly that the GOP tide that had risen largely unabated for more than three decades has crested. The GOP lost its Senate super-majority in a 2017 special election.<sup>324</sup> In 2016, Democrats took back one House seat in Gwinnett County and came

<sup>315</sup> *Id.* at 107.

<sup>316</sup> *Georgia State Senate Elections, 2012*, BALLOTPEDIA, [https://ballotpedia.org/Georgia\\_State\\_Senate\\_elections,\\_2012](https://ballotpedia.org/Georgia_State_Senate_elections,_2012) (last visited May 30, 2018).

<sup>317</sup> *Georgia House of Representatives Elections, 2012*, BALLOTPEDIA, [https://ballotpedia.org/Georgia\\_House\\_of\\_Representatives\\_elections,\\_2012](https://ballotpedia.org/Georgia_House_of_Representatives_elections,_2012) (last visited May 30, 2018).

<sup>318</sup> Larry Peterson, *John Barrow Says Lee Anderson is Ducking 12<sup>th</sup> Congressional District Debates*, SAVANNAH MORNING NEWS (Sept. 13, 2012), <http://www.savannahnow.com/article/20120913/NEWS/309139785>.

<sup>319</sup> DAVID WASSERMAN, *THE COOK POLITICAL REPORT, INTRODUCING THE 2012 COOK POLITICAL REPORT PARTISAN VOTER INDEX 8* (2012), <http://redistricting.ils.edu/files/MD%20shapiro%2020170531%20MSJ%20app%20exhXX.pdf>.

<sup>320</sup> Aued, *supra* note 295.

<sup>321</sup> Dan O'Connor, interview with the author, June 11, 2018.

<sup>322</sup> The House had one black Republican and one Hispanic Democrat leaving a dozen white Democrats.

<sup>323</sup> Dan O'Connor interview with the author, June 11, 2018.

<sup>324</sup> Max Greenwood, *Georgia GOP Loses State Senate Supermajority*, THE HILL (Dec. 6, 2017), <http://thehill.com/homenews/state-watch/363501-georgia-gop-loses-state-senate-supermajority>.

within a handful of votes of winning another.<sup>325</sup> Special elections to replace two Republicans in the Athens area saw both snared by Democrats.<sup>326</sup>

In 2015, the General Assembly rushed to help two Republicans hard-pressed in the previous election. Legislation tweaked the endangered districts to swap out Democrats for Republicans in neighboring districts.<sup>327</sup> Democrats went to court to challenge these mid-decade remaps.<sup>328</sup>

## VII. CONSEQUENCES

Redistricting served as a catalyst. It transformed a legislature dominated by white, rural, male Democrats into a body with a Republican majority in which most Democrats are African-Americans. The growth of the GOP and the advances made by African-Americans are closely related.<sup>329</sup> Rural legislators became scarcer with each redistricting, and women now exceed 25% of the membership.<sup>330</sup> In the redistricting battles of the 1980s and 1990s, Republicans and black Democrats joined hands across the ideological chasm. Aided by the courts, as in *Busbee v. Smith*, and DOJ's Section 5 reviews, these two groups, which even when united fell far short of a legislative majority, made gains at the expense of white Democrats and began the unraveling of the Democratic majority.

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<sup>325</sup> See James Salzer, *Democrats Win Georgia Senate Seat, the House is Largely a Wash Tuesday*, ATLANTA J.-CONST. (Nov. 9, 2016), <https://www.ajc.com/news/state--regional-govt--politics/democrats-win-georgia-senate-seat-the-house-largely-wash-tuesday/LEyDMBnweGOZ54oL7Q5YnI/> (noting Sam Park's victory in Gwinnett and Donna McLeod's last-minute loss to incumbent Joyce Chandler).

<sup>326</sup> See Maya Prabhu, *Georgia Democrats Pick Up Three Legislative Seats in Special Elections*, ATLANTA J.-CONST. (Nov. 7, 2017), <https://www.ajc.com/news/state--regional-govt--politics/georgia-democrats-pick-three-legislative-seats-special-elections/9KdkpqNX1CrVKyfal4qj7N/> (reporting victories by Deborah Gonzalez and Jonathan Wallace).

<sup>327</sup> See Kristina Torres, *Lawsuit Claims GA House Districts Drawn to Remove Minority Voters*, ATLANTA J.-CONST. (Oct. 3, 2017), <https://www.ajc.com/news/state--regional-govt--politics/lawsuit-claims-house-districts-drawn-remove-minority-voters/vgigym4Y2zCgbbTieeIJ3K/> (describing litigation challenging the gerrymander).

<sup>328</sup> *Id.*

<sup>329</sup> See generally M.V. HOOD III ET AL., *THE RATIONAL SOUTHERNER* (2012).

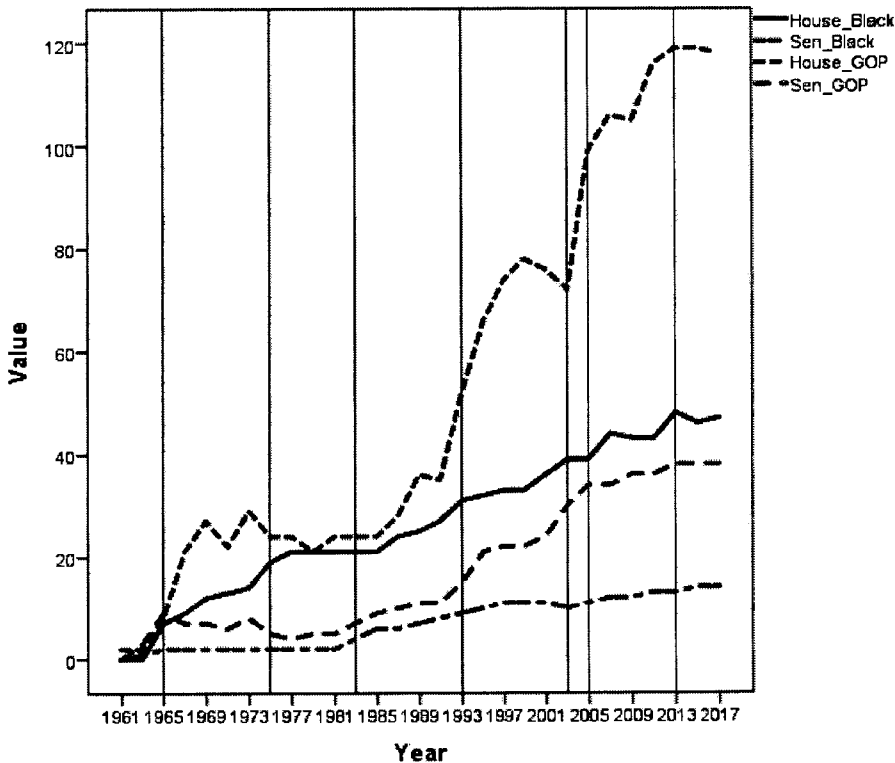
<sup>330</sup> See *Women in State Legislatures for 2018*, NAT'L CONF. OF ST. LEGISLATURES (Mar. 14, 2018), <http://www.ncsl.org/legislators-staff/legislators/womens-legislative-network/women-in-state-legislatures-for-2018.aspx> (showing that Georgia's state chambers are 26.7% women).

The transformation began with the initial round of redistricting, which ushered in the first African-Americans in decades and saw the first urban Republicans winning office. Maps introduced in 1965, 1993, 2005, and 2013 boosted Republican presence in the General Assembly.<sup>331</sup> African-Americans made gains under maps implemented in 1965, 1975, 1993, 2003, and 2013. Gains for both groups tend to be more pronounced in the House than in the Senate with its much smaller membership. During the 1970s, neither group added many seats, and even after some initial gains they ended the decade with about the same number of seats, a pattern that has persisted for African-American Senate seats. Thanks to Section 5 of the Voting Rights Act and the non-retrogression standard used when assessing the likely impact of plans, new maps did not reduce the black presence in the legislature. The same cannot be said for Republicans who saw their ranks in the House reduced in the wake of Watergate and the 2001 Democratic gerrymander.

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<sup>331</sup> See *infra* Figure 3.

**Figure 3**  
**BLACK AND REPUBLICAN SEATS IN THE HOUSE AND SENATE, 1961–2017, WITH VERTICAL LINES SHOWING WHEN MAJOR REDISTRICTING PLANS TOOK EFFECT**



Far more dramatic than the evidence that redistricting helped end the reign of white Democrats in the General Assembly are the results for the congressional delegation. Each addition of an African-American member of Congress coincided with a new plan designed to facilitate the election of a black congressman—a phenomenon replicated across the South. Rejection of the state plan in 1972 helped Andy Young become the first black Georgian to go to Congress since Jefferson Long left a century earlier.<sup>332</sup> Sanford Bishop and Cynthia McKinney won districts in which the black

<sup>332</sup> See MAURINE CHRISTOPHER, *AMERICA'S BLACK CONGRESSMEN* 267–69 (1971) (listing Jefferson Long as the only black congressman from Georgia before 1972).

population had been maximized to all but assure the election of an African-American. The district that elected David Scott in 2002 had nearly equal numbers of blacks and whites,<sup>333</sup> which facilitated the nomination of an African-American in the Democratic primary while making it unlikely that a Republican could get a large enough share of the white vote to win the general election.

Bleaching neighboring districts to create the ones won by Bishop and McKinney cleared the way for three GOP victories in the whiter districts, boosting the Republicans to their largest congressional delegation from Georgia since 1874. In 1994, Republicans gained three more seats, in part as a reaction to the support that Democratic representatives had given to tax increases in President Clinton's deficit reduction package, and in part due to the unprecedented changes in districts necessitated by the creation of the majority-black districts two years earlier.<sup>334</sup>

Republicans effectively exploited the opportunities offered by federal demands that districts have equal populations and that African-Americans get opportunities to elect their preferred candidates. Shifting legislative seats from counties to where people lived paved the way for GOP gains. Republicans joined forces with ambitious African-Americans. Republicans operating alone could

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<sup>333</sup> See BARONE & COHEN, ALMANAC 2004, *supra* note 287, at 491 (showing a 42.1% white concentration and a 40.7% black concentration in Rep. Scott's Thirteenth District).

<sup>334</sup> Representatives Buddy Darden (D-7) and Don Johnson (D-10) voted for the Clinton bill and it seriously hurt their reelection prospects. Kenneth J. Cooper, *Democrats on Defensive in Georgia Where GOP Has High Expectations*, WASH. POST (Oct. 28, 1994), [https://www.washingtonpost.com/archive/politics/1994/10/28/democrats-on-defensive-in-georgia-where-gop-has-high-expectations/c9459e0a-0b80-4e8b-ad0f-4c335d52027b/?utm\\_term=.1b7e2f8b433d](https://www.washingtonpost.com/archive/politics/1994/10/28/democrats-on-defensive-in-georgia-where-gop-has-high-expectations/c9459e0a-0b80-4e8b-ad0f-4c335d52027b/?utm_term=.1b7e2f8b433d). The district Johnson represented had gone down from 23% to 18% black as a result of the 1992 plan. See *supra* Table 1. In the Eighth District, which also elected a Republican in 1994, the black population had declined from 36% to 21%. See *supra* Table 1. The Seventh District in northwest Georgia actually became more heavily black with the new plan, increasing from 9% to 13%. See *supra* Table 1. However, Darden found himself representing many new constituents. Cobb County, Darden's home and 62% of the district's population in the old map, was divided. See BARONE & UJIFUSA, ALMANAC 1994, *supra* note 151, at 348 (noting that the district only included part of western Cobb County, while also including a stretch from LaGrange to Rome and to Cartersville to the east). Three other counties Darden represented were removed and the district expanded to include seven new counties. See BARONE & UJIFUSA, ALMANAC 1992, *supra* note 151, at 318 (describing the old Seventh District as being dominated by Cobb County, while also including Dalton and the Georgia suburbs of Chattanooga, Tennessee). This reconfiguration nicely illustrates that a major factor in Democrats losing control of the House, where they had had majorities for all but four of the previous sixty-four years, was Democratic incumbents having to try to withstand a Republican wave election in districts where the Democrats had had little opportunity to develop ties.

not have gotten the number of favorable districts they achieved by having black legislators like Julian Bond, Cynthia McKinney, and Tyrone Brooks intercede with DOJ. Partisans asking the courts for more seats have yet to succeed. But as Republicans recognized as early as 1981, blacks asking for more seats had a good chance for success at DOJ, but also in federal court. Had the counsel of black legislative leaders like Michael Thurmond, Calvin Smyre, and Eugene Walker prevailed in 1991 when they rejected calls for MAXBLACK,<sup>335</sup> the bitterness that eroded the bonds of a biracial Democratic Party might have been avoided. In light of the partisan realignment that has swept the South, Republicans would almost certainly have gotten the upper hand in the legislature but that shift might have been delayed several more electoral cycles, as it was in ten other southern legislative chambers.<sup>336</sup> Moreover, in the absence of MAXBLACK, Republicans would have made fewer gains since there would have been fewer bleached districts.

Democratic hubris also contributed to the emergence of a GOP behemoth. In the effort not simply to retain majorities, but to punish Republicans by pairing as many incumbents as possible in 2001, Democrats sowed dragon's teeth that generated the Republican challengers who defeated the sitting governor and U.S. senator.

Georgia's redistricting experiences have also helped shape the law in this area beginning with *Wesberry v. Sanders*, which extended the one-person, one-vote standard from state legislatures to the U.S. House. *Georgia v. United States* made clear that redistricting plans had to secure approval pursuant to Section 5 of the Voting Rights Act and that the jurisdiction had the responsibility of proving that the new plan did not discriminate against minorities. In *Miller v. Johnson*, the Supreme Court provided clarity to the concerns raised in *Shaw v. Reno*, explaining that it was not the shape alone that was the problem, but that if race trumped all other considerations when designing a plan, the

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<sup>335</sup> Holmes, *Reapportionment Strategies*, *supra* note 118, at 192.

<sup>336</sup> Republicans did not gain majorities in the following chambers until after they took over the Georgia General Assembly: Alabama Senate (2009); Alabama House (2011); Arkansas Senate and House (2013); Louisiana Senate (2012); Louisiana House (2010); Mississippi House and Senate (2012); North Carolina Senate (2011); Tennessee House (2009). *Partisan Composition of State Legislatures 2002–2014*, NAT'L CONF. OF ST. LEGISLATURES, [http://www.ncsl.org/documents/statevote/legiscontrol\\_2002\\_2014.pdf](http://www.ncsl.org/documents/statevote/legiscontrol_2002_2014.pdf) (last visited June 1, 2018).



plan was unconstitutional. In *Georgia v. Ashcroft*, the Supreme Court approved reductions in black concentrations, thus challenging the non-retrogression standard that had guided reviews of new plans under Section 5 of the Voting Rights Act. *Larios v. Cox* moved consideration of state legislative plans toward requiring narrower tolerances of population deviations by challenging the idea that plans with deviations less than  $\pm 5\%$  offered a safe harbor.