PINPOINT REDISTRICTING AND THE MINIMIZATION OF PARTISAN GERRYMANDERING[†]

ABSTRACT

For over twenty years, the political gerrymandering claim under the Equal Protection Clause of the Fourteenth Amendment has been mired in ambiguity because the Supreme Court and lower courts have failed to come up with a clear standard to determine whether a redistricting plan is unconstitutional. In 2006, however, a new phenomenon that this Comment terms "pinpoint redistricting" was used by Georgia's Republican-dominated state legislature to alter the boundaries of a small group of districts rather than all of the state's district boundaries, severely weakening the strength of Democratic voters in the affected districts. The pinpoint redistricting changed the affected districts from competitive to strongly Republican, and as a result, the redistricting party's candidates achieved sizable victories in the 2006 elections.

In the context of this novel form of redistricting, this Comment proposes a new approach to the political gerrymandering claim. All of the Supreme Court's previous cases examined political gerrymanders that redrew all of a state's boundaries and addressed the harm to political groups in statewide terms. Pinpoint redistricting's effect on a limited number of districts should allow courts to shift to a district-based approach to judge these gerrymanders. Such an approach would be tailored to the facts of pinpoint redistricting, drawing from Justice Stevens's proposal to adapt the Court's racial gerrymandering jurisprudence from the Shaw v. Reno *line of cases to the political gerrymandering claim, elements of the original political gerrymandering standard from* Davis v. Bandemer*, and Justice Kennedy's elusive view on what would be an applicable standard for certain narrowly defined situations. Under this new standard, an extreme political gerrymander, identifiable by the unusual nature of its implementation, would be unconstitutional if partisan intent guided every major aspect of drawing the new district lines and resulted in active degradation of a political group's electoral strength in a specific district through substantial weakening of the*

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group's political performance in successive elections. While this standard is designed to correct the danger of pinpoint redistricting, it can serve as a model for an effective district-based approach to future political gerrymandering claims.

INTRODUCTION

Over the past decade, partisan gerrymandering has made competitive legislative elections a rarity.[1] Only a small fraction of seats have seen meaningful competition in recent elections; the vast majority of elections are decided the day the district maps are drawn.[2] Partisan gerrymanders, drawn to perfection by state legislators, provide a major advantage to the party controlling the redistricting process as opposition party politicians find themselves running in districts where they could not possibly win,[3] and friendly incumbents run for reelection in impregnable districts.[4] Across the political spectrum, observers criticize the practice of partisan gerrymandering as a major threat to American democracy,[5] allowing those who draw the district lines to control the electoral system rather than the people themselves.[6]

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[1] *See* Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting*, 2 ELECTION L. J. 179, 179 (2003) (calling the round of redistricting after the 2000 census "the most incumbent-friendly in modern American history"). In 2006, only 55 out of 435 House races were considered competitive. Ronald A. Klain, *Success Changes Nothing: The 2006 Election Results and the Undiminished Need for a Progressive Response to Political Gerrymandering*, 1 HARV. L. & POL'Y REV. 75, 81 (2007).

[2] *See* David Lublin & Michael P. McDonald, *Is It Time to Draw the Line?: The Impact of Redistricting on Competition in State House Elections*, 5 ELECTION L. J. 144, 157 (2006) (observing "an overall pattern indicating that partisan gerrymandering . . . has a dampening effect on competition"); Erwin Chemerinsky, *The Kennedy Court: OCTOBER TERM 2005*, 9 GREEN BAG 2D 335, 343 (2006) (noting that there are few legislative races that are even contested due to gerrymandering).

[3] *See* Jeffrey Toobin, *The Great Election Grab: When Does Gerrymandering Become a Threat to Democracy?*, NEW YORKER, Dec. 8, 2003, at 63 (describing how a Republican-engineered partisan gerrymander in Texas essentially doomed the reelection chances of several veteran Democratic congressmen).

[4] *See* Michael S. Kang, *The Bright Side of Partisan Gerrymandering*, 14 CORNELL J.L. & PUB. POL'Y 443, 446 (2005) ("Incumbents rig their re-election prospects by packing their own districts with friendly voters, which scares off or trounces challengers attempting to take their seats.").

[5] *See* Thomas E. Mann, *Redistricting Reform: What Is Desirable? Possible?*, *in* PARTY LINES: COMPETITION, PARTISANSHIP, AND CONGRESSIONAL REDISTRICTING 92, 92 (Thomas E. Mann & Bruce E. Cain eds., 2005) (calling the impact of gerrymandering on recent elections a threat to the "legitimacy of the American electoral system" and accusing partisanship in the redistricting process of causing serious problems in American democracy); *see generally* David S. Broder, *No Vote Necessary: Redistricting Is Creating a U.S. House of Lords*, WASH. POST, Nov. 11, 2004, at A37 (discussing how gerrymandering harms the representative nature of the House of Representatives).

[6] As Justice Stevens wrote, through partisan gerrymanders, "the will of the cartographers rather than the will of the people will govern." Vieth v. Jubelirer, 541 U.S. 267, 331 (2004) (Stevens, J., dissenting).

Despite the widespread harmful effects of partisan gerrymandering, the Supreme Court's attempts to restrain excessive partisanship can only be described as impotent.[7] Since establishing the political gerrymandering claim in *Davis v. Bandemer* in 1986,[8] the Court has maintained the option of striking down a partisan gerrymander, but it has never exercised that option or even articulated a clear standard to guide courts and litigants.[9] The culmination of the Court's inaction came in the 2006 *LULAC v. Perry* decision, when the Court declined to strike down an unprecedented and egregiously partisan mid-decade redistricting in Texas.[10] This unfortunate demonstration of the Court's unwillingness to intervene opened the door to more frequent and even more partisan gerrymanders.[11]

A more subtle incident in 2006, however, marked a crucial development in the history of partisan gerrymandering and has the potential to revolutionize the judicial approach to this troubled constitutional claim. Georgia's Senate District 46 was a rare competitive seat in a mostly Republican state;[12] the 2004 election was decided by about 1,800 votes out of over 47,000 cast.[13] The Republican incumbent had announced he would not run for reelection in 2006, and popular Democratic State Representative Jane Kidd announced her candidacy for the open seat.[14] Before the 2006 election, however,[15] the Republican-dominated state legislature of Georgia implemented what this

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[7] *See* Nathaniel Persily, *Forty Years in the Political Thicket: Judicial Review of the Redistricting Process Since* Reynolds v. Sims, *in* PARTY LINES, *supra* note 5, at 67, 78 (calling the political gerrymandering claim "toothless").

[8] *See* Davis v. Bandemer, 478 U.S. 109, 119–27 (1986) (determining that political gerrymandering claims are justiciable).

[9] As one court colorfully put it, "The law regarding political gerrymandering is about as firm as marshmallow cream." LaPorte County Republican Cent. Comm. v. Bd. of Comm'rs of the County of LaPorte, 851 F. Supp. 340, 342 (N.D. Ind. 1994).

[10] *See* League of United Latin Am. Citizens (LULAC) v. Perry, 548 U.S. 399, 423 (2006) (declining to strike down the Texas mid-decade redistricting as unconstitutional); Mitchell N. Berman, *Managing Gerrymandering*, 83 TEX. L. REV. 781, 845–47 (2005) (discussing the "unprecedented" Texas mid-decade redistricting and noting that its partisan motivation was "both extreme and avowed"); Pamela S. Karlan, *New Beginnings and Dead Ends in the Law of Democracy*, 68 OHIO ST. L.J. 743, 756 (2007) (calling the Texas mid-decade redistricting "both procedurally and geographically an ugly piece of work").

[11] Persily, *supra* note 7, at 80.

[12] *See* Allison Floyd, *Athens Democrat Jane Kidd to Seek State Senate Seat; Brian Kemp Wants to Be Agriculture Commissioner; He'll Give Up Senate Post*, FLA. TIMES-UNION, May 21, 2005, at B2 (calling District 46 "up for grabs" and "politically balanced").

[13] Kidd v. Cox, No. 1:06-CV-0997-BBM, 2006 U.S. Dist. LEXIS 29689, at *7 (N.D. Ga. May 16, 2006).

[14] Floyd, *supra* note 12, at B2.

[15] Kidd announced her candidacy in May 2005. *Id.* The pinpoint redistricting of Senate District 46 was signed into law in March 2006. Walter C. Jones, *Perdue OKs Split of Athens Districts; Democrats Claim the Remap Is a Ploy to Help Republican Candidates*, FLORIDA TIMES-UNION, Mar. 3, 2006, at B5.

Comment calls a "pinpoint redistricting," a new form of partisan gerrymandering that alters an isolated group of districts rather than the entire state map. The Georgia state legislature's partisan gerrymander affected only District 46 and two of its neighboring districts.[16] While political gerrymandering has had a major impact on state and national politics for centuries,[17] an isolated gerrymander tailored to affect a political party or candidate in a single district was a new phenomenon. Every previously adjudicated political gerrymandering claim, including all of the Supreme Court's prior decisions, addressed a traditional redistricting plan that redrew all of a state's districts.[18] The Georgia state legislature minimized the partisan gerrymander to change the political character of a single competitive seat.[19] The pinpoint redistricting was successful—in a race where Kidd had a good chance to win before the alteration of the district,[20] she lost to the Republican candidate by a double-digit margin.[21]

Pinpoint redistricting represents a serious threat to what little competitiveness remains in legislative elections[22] because it allows partisan actors to thwart any threat to their control of individual seats at any time without the attention or accountability to an entire state's voters, which a statewide gerrymander would have. Despite its devastating potential, however, this new form of partisan gerrymandering is ultimately an opportunity for courts to develop an effective political gerrymandering standard. For over twenty years, the Supreme Court and lower courts have addressed political

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16 *Kidd*, 2006 U.S. Dist. LEXIS 29689, at *8.

17 *See* Vieth v. Jubelirer, 541 U.S. 267, 274–75 (2004) (noting that "[p]olitical gerrymanders are not new to the American scene" and discussing the history of gerrymandering stretching back to the founding days of our nation); *see also* DAVID BUTLER & BRUCE CAIN, CONGRESSIONAL REDISTRICTING: COMPARATIVE AND THEORETICAL PERSPECTIVES 17–40 (1992) (tracing the long and controversial history of redistricting practices in the United States from the 1790s to the 1990s); GARY W. COX & JONATHAN N. KATZ, ELBRIDGE GERRY'S SALAMANDER: THE ELECTORAL CONSEQUENCES OF THE REAPPORTIONMENT REVOLUTION 3 (2002) (attributing the origins of the term "gerrymander" to Massachusetts Governor Elbridge Gerry's manipulation of districts in the early 1800s).

18 *See generally* League of United Latin Am. Citizens (LULAC) v. Perry, 548 U.S. 399 (2006) (judging a statewide Texas plan); *Vieth*, 541 U.S. 267 (judging a statewide Pennsylvania plan); Davis v. Bandemer, 478 U.S. 109 (1986) (judging a statewide Indiana plan); *see also* Gaffney v. Cummings, 412 U.S. 735 (1973) (judging a statewide bipartisan gerrymander in Connecticut).

19 *See* Walter C. Jones, *GOP Might Miss Power to Remap*, FLA. TIMES-UNION, Mar. 5, 2006, at B1 (observing that the "new lines put a more Republican tilt to District 46").

20 Floyd, *supra* note 12, at B2.

21 Georgia Secretary of State, Georgia Election Results, Official Results of the Tuesday, November 7, 2006 General Election (Nov. 16, 2006), http://sos.georgia.gov/elections/election_results/2006_1107/075.htm (showing election results from State Senate, District 46).

22 *See supra* notes 1–6 and accompanying text.

gerrymandering by looking at the statewide impact of a redistricting plan, but using this approach, they have failed to establish a clear or meaningful standard.[23] Pinpoint redistricting, however, only affects distinct and isolated districts rather than the entire state. Therefore, courts should formulate a new, district-based standard based on the factual scenario of pinpoint redistricting, which can then serve as a model for an effective, judicially manageable standard for all political gerrymandering claims. With the round of redistricting following the 2010 census fast approaching, a clear, relevant, and innovative approach to modern pinpoint partisan gerrymanders is necessary to stem the tide of excessive partisan abuses in drawing district lines.

Part I of this Comment traces the development of the political gerrymandering claim and describes the changing nature of political gerrymandering with the appearance of mid-decade redistricting in the 2000s. Part II describes the first appearance of pinpoint redistricting in Georgia and its likely use elsewhere in the future. Part III discusses why the traditional statewide approach to adjudicating political gerrymandering claims should not apply to pinpoint redistricting and argues that a new, district-based standard is needed to address pinpoint redistricting effectively. Part IV draws upon existing sources, including a modification of the framework of *Davis v. Bandemer* and an adaptation of the *Shaw v. Reno* line of cases to partisan gerrymandering, to formulate a district-based standard. It ultimately proposes a new standard for political gerrymandering claims based on the facts of pinpoint redistricting and addresses discrimination in an individual district. This new approach can provide a template for an effective district-based standard for all future political gerrymandering claims.

I. BROAD FOUNDATIONS: THE TRADITIONAL STATEWIDE APPROACH TO POLITICAL GERRYMANDERING CLAIMS

Political gerrymandering is the manipulation of electoral districts by elected officials to give the redistricting party an unfair advantage over the opposition party.[24] This is done by deliberately drawing districts to dilute the

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[23] *See* Aaron Brooks, *The Court's Missed Opportunity to Draw the Line on Partisan Gerrymandering:* LULAC v. Perry*, 126 S. Ct. 2594 (2006)*, 30 HARV. J.L. & PUB. POL'Y 781, 781–82 (2007) (discussing the Supreme Court's failure to establish a standard in three different cases).

[24] COX & KATZ, *supra* note 17, at 18. One of the earliest judicial definitions of political gerrymandering was provided by Justice Fortas: "the deliberate and arbitrary distortion of district boundaries and populations for partisan or personal political purposes." Kirkpatrick v. Preisler, 394 U.S. 526, 538 (1969) (Fortas, J., concurring). Justice Scalia, taking his definition from *Black's Law Dictionary*, defined political

power of the opposing party, often by grouping a large number of members of one political party into a small number of districts to limit their victories (known as "packing") or spreading a political party's members across a number of districts to deny them a chance of winning in as many districts as possible (known as "cracking").[25] In the landmark 1964 decision of *Reynolds v. Sims*, the Supreme Court established the "one-person, one-vote" standard, which prescribes that, under the Equal Protection Clause of the Fourteenth Amendment, all legislative districts are required to represent approximately equal numbers of people to ensure that each person's vote has equal value.[26] *Reynolds* required all state legislatures to redraw congressional and state legislative districts' boundaries upon the release of new census numbers at the beginning of each decade.[27] During this "Reapportionment Revolution,"[28] however, state legislators controlling the redistricting process inevitably injected partisan and personal political goals into drawing new district boundaries,[29] resulting in partisan gerrymanders heavily skewed in favor of the party that created the plan.[30]

Partisan gerrymandering was criticized for decades after *Reynolds*,[31] but the round of redistricting after the 2000 census truly demonstrated its detrimental influence on American legislative elections.[32] As the partisan bent of the post-

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gerrymandering as "[t]he practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition's voting strength." Vieth v. Jubelirer, 541 U.S. 267, 271 n.1 (quoting BLACK'S LAW DICTIONARY 696 (7th ed. 1999)).

[25] Michael D. McDonald & Richard L. Engstrom, *Detecting Gerrymandering*, *in* POLITICAL GERRYMANDERING AND THE COURTS 178, 178–79 (Bernard Grofman ed., 1990).

[26] Reynolds v. Sims, 377 U.S. 533, 558, 561–63 (1964). *Reynolds* showed that if one district contained far fewer voters than another, the votes of individuals in the first district would be more meaningful than the votes of individuals in a more populous district. The Court held that under the Equal Protection Clause, each person's vote must count equally, and therefore districts should have equal populations. *Id.*

[27] *See* Richard L. Engstrom, *The Political Thicket, Electoral Reform, and Minority Voting Rights*, *in* FAIR AND EFFECTIVE REPRESENTATION? DEBATING ELECTORAL REFORM AND MINORITY RIGHTS 3, 7 (Mark E. Rush & Richard L. Engstrom eds., 2001) ("New census figures almost always reveal that districts no longer satisfy this [one-person, one-vote] requirement and therefore need to be rearranged.").

[28] COX & KATZ, *supra* note 17, at 12.

[29] *See* Gaffney v. Cummings, 412 U.S. 735, 753 (1973) ("Politics and political considerations are inseparable from districting and apportionment.").

[30] *See* COX & KATZ, *supra* note 17, at 18–19 (describing partisan gerrymanders after *Reynolds* that "maximize[d] the gain of the redistricting party").

[31] *See* BUTLER & CAIN, *supra* note 17, at 36–39 (discussing the controversy associated with the role of partisanship in redistricting in the 1970s and 1980s); McDonald & Engstrom, *supra* note 25, at 178 (calling gerrymandering "a noxious political practice").

[32] *See* Mann, *supra* note 5, at 92 (citing the post-2000 redistricting cycle as promoting the "maladies in American democracy," which include "an unusually high degree of incumbent safety, a precipitous decline in competitiveness, growing ideological polarization, and a fierce struggle between the major parties to

2000 gerrymanders strengthened, the competitiveness of legislative elections declined to the point that genuinely competitive districts became rare.[33] In 2004, for example, only 5 of the 401 incumbents running for reelection to the House of Representatives were defeated.[34] Intertwined with the issue of competitiveness is the extensive use of sophisticated computer models,[35] which allow state legislators to create district maps incredibly attuned to political, racial, and socio-economic patterns and interests.[36] As partisan gerrymandering became more pervasive, this technology was crucial in determining the outcomes of elections.[37] Despite considerable public outcry[38] and widespread criticism of partisan gerrymandering,[39] legal challenges to partisan gerrymandering have thus far been completely unsuccessful.[40]

This Part provides an overview of the legal foundations of the political gerrymandering claim, first tracing the Supreme Court's development of the political gerrymandering claim, then discussing the onset of mid-decade redistricting in the 2000s, which shattered the custom of limiting redistricting to the beginning of a decade and permitted the advent of pinpoint redistricting.

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manipulate the rules of the game to achieve, maintain, or enlarge majority control of the [House of Representatives]").

[33] *See* Kang, *supra* note 4, at 446 ("The proportion of House races decided by competitive margins was lower in 2002 and 2004 than in any other election years during the postwar period.").

[34] *Id.*

[35] *See* Chemerinsky, *supra* note 2, at 343 ("With increasingly sophisticated computer programs to draw safe districts, there are few contested races for seats in the House of Representatives and many state legislatures.").

[36] *See* MARK MONMONIER, BUSHMANDERS & BULLWINKLES: HOW POLITICIANS MANIPULATE ELECTRONIC MAPS AND CENSUS DATA TO WIN ELECTIONS 104–20 (2001) (describing the astounding capabilities of computer programs in drawing maps of electoral districts).

[37] *See* David G. Savage, *High Court Upholds Texas Redistricting*, L.A. TIMES, June 29, 2006, at A1 ("In recent decades, computers have given politicians an ever more powerful tool to shape the outcome of elections by shifting voters among districts.").

[38] *See, e.g.*, Bruce E. Cain et al., *From Equality to Fairness: The Path of Political Reform Since* Baker v. Carr, *in* PARTY LINES, *supra* note 5, at 6, 17 ("Following the 2001 round [of redistricting], political observers from across the political spectrum . . . denounced the power of district boundaries to predetermine election outcomes.").

[39] *See* Christopher J. Roederer, *The Noble Business of "Incumbantocracy:" A Response to* The Sordid Business of Democracy, 34 OHIO N.U. L. REV. 373, 389 (2008) (arguing that partisan gerrymandering "undermine[s] citizen participation and republican self governance"); Hirsch, *supra* note 1, at 215 (contending that partisan gerrymandering is "threatening to transform what should be our most dynamically democratic institution [the House of Representatives] into something sclerotic and skewed").

[40] *See infra* Parts I.A and I.B (discussing the Supreme Court's political gerrymandering cases).

A. *Political Gerrymandering and the Supreme Court: Looking at the Big Picture*

Despite the prominent role of political gerrymandering in American politics, the Supreme Court's approach to claims of partisan gerrymandering has doomed any legal challenge's chance of success. The Court first recognized the political gerrymandering claim under the Equal Protection Clause in the 1986 decision of *Davis v. Bandemer*.[41] In that case, Indiana's Republican-controlled General Assembly passed a redistricting plan following the 1980 census, which gave their party a significant advantage.[42] Democratic candidates received 51.9% of Indiana's votes for state house seats in the 1982 elections, but as a result of the redistricting, only 43 Democrats were elected out of 100 seats.[43] Several Indiana Democrats filed suit, claiming that the Republicans had instituted an unconstitutional political gerrymander that discriminated against Indiana Democrats as a political group.[44]

Justice White, writing for the majority, declared that political gerrymandering claims were justiciable[45] over Justice O'Connor's objection that political gerrymandering is a nonjusticiable political question.[46] Political groups, like racial groups, have the right to elect representatives of their choice, free from unconstitutional discrimination.[47] A violation of the Equal Protection Clause occurs if the group implementing a gerrymander gains enough of an unfair advantage over the political process.[48] However, the Court ruled that the discrimination against the Indiana Democrats was not "sufficiently adverse" to declare the Republican partisan gerrymander unconstitutional.[49] Justice White established that a plaintiff must prove "both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group" to find a political gerrymander unconstitutional under the Equal Protection Clause.[50] White noted that it was

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[41] Davis v. Bandemer, 478 U.S. 109 (1986).

[42] *Id.* at 113.

[43] *Id.* at 115.

[44] Bandemer v. Davis, 603 F. Supp. 1479, 1482 (S.D. Ind. 1984).

[45] *Bandemer*, 478 U.S. at 119–21.

[46] *See infra* notes 180–183 and accompanying text (discussing Justice O'Connor's concurrence).

[47] *See Bandemer*, 478 U.S. at 124–25 (establishing that claims brought by political groups alleging unconstitutional discrimination are justiciable).

[48] Charles Backstrom et al., *Establishing a Statewide Electoral Effects Baseline*, *in* POLITICAL GERRYMANDERING AND THE COURTS, *supra* note 25, at 145, 148.

[49] *Bandemer*, 478 U.S. at 129.

[50] *Id.* at 127.

fairly easy to satisfy the discriminatory intent prong,[51] but, as observed by Mark Rush, "[r]egardless of the motivations of the legislators who drew the district lines, *results* are the key component of an unconstitutional gerrymander."[52] White stated that "unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole."[53] White further explained that "such a finding of unconstitutionality must be supported by evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process."[54]

Bandemer thus established a heavy burden for a plaintiff to overcome to prove discriminatory effect.[55] While the Court took the important step of allowing litigants to bring political gerrymandering claims, the Court's standard was so difficult to satisfy that there was, in Professor Samuel Issacharoff's words, "virtually no meaningful application."[56] Litigants and lower courts found *Bandemer* notoriously difficult to interpret; Issacharoff wrote that the test "seemed designed to be impossible to apply."[57] Over the next eighteen years, no federal court, at any level, ruled that a redistricting plan was an unconstitutional political gerrymander.[58] When the Court granted certiorari to hear *Vieth v. Jubelirer*, a political gerrymandering claim out of Pennsylvania during the 2003–2004 term, many critics of the extreme use of partisanship in redistricting saw the case as an opportunity for the Court to

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[51] *See id.* at 129 ("As long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended.").

[52] MARK E. RUSH, DOES REDISTRICTING MAKE A DIFFERENCE?: PARTISAN REPRESENTATION AND ELECTORAL BEHAVIOR 4–5 (Lexington Books 2000) (1993) (emphasis in original).

[53] *Bandemer*, 478 U.S. at 132.

[54] *Id.* at 133.

[55] Justice White himself acknowledged that courts and plaintiffs would not have an easy time finding a political gerrymander to be unconstitutional, noting, "We recognize that our own view may be difficult of application. Determining when an electoral system has been 'arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole' is of necessity a difficult inquiry." *Id.* at 142–43 (citation omitted).

[56] Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 598 (2002).

[57] Samuel Issacharoff, *Supreme Court Destabilization of Single-Member Districts*, 1995 U. CHI. LEGAL F. 205, 235 (1995).

[58] *See* Vieth v. Jubelirer, 541 U.S. 267, 280 n.6 (2004) (listing cases dismissing political gerrymandering claims). The only case that ever actually found an unconstitutional political gerrymander was reversed because Republican candidates succeeded in districts they claimed were gerrymandered against them five days after the lower court's decision. Republican Party of N.C. v. Hunt, No. 94-2410, 1996 U.S. App. LEXIS 2029, at *13 (4th Cir. Feb. 12, 1996) (per curiam).

finally clarify its earlier decision.[59] Instead, *Vieth* nearly marked the death of the political gerrymandering claim.[60]

In *Vieth*, several Pennsylvania Democratic voters filed a lawsuit alleging that the Republican-dominated state legislature's heavily partisan 2001 congressional redistricting plan, which resulted in twelve Republicans being elected to nineteen seats, was an unconstitutional political gerrymander.[61] Relying on the Supreme Court's decision in *Bandemer*, the District Court granted the defendants' motion to dismiss the political gerrymandering claim, and the plaintiffs appealed to the Supreme Court.[62] Justice Scalia, writing for a plurality of the Court, criticized *Bandemer*'s creation of a cause of action for political gerrymandering and declared that "no judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged."[63] Basing his decision on the subsequent history of the political gerrymandering claim and significant criticism of the Court's leap into the political thicket, Scalia concluded that *Bandemer* was wrongly decided and that political gerrymandering claims were nonjusticiable.[64] Four Justices dissented, including Justice Stevens, who proposed adapting the Court's examination of individual districts in its racial gerrymandering jurisprudence to political gerrymandering claims.[65]

Justice Kennedy's concurrence represented the deciding vote.[66] Although he agreed with the Justice Scalia's plurality that the Pennsylvania gerrymander was constitutional, he sided with Justices Stevens, Ginsburg, Breyer, and Souter on the issue of justiciability, writing, "I would not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting

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[59] *See* Toobin, *supra* note 3, at 65 (calling the then-upcoming *Vieth* decision the "one chance to change the cycle" of extreme partisan gerrymandering).

[60] *See* Kidd v. Cox, No. 1:06-CV-0997-BBM, 2006 U.S. Dist. LEXIS 29689, at *44 (N.D. Ga. May 16, 2006) ("*Vieth* comes close to establishing that political gerrymandering cases are not justiciable.").

[61] Kang, *supra* note 4, at 448.

[62] *Vieth*, 541 U.S. at 272–73.

[63] *Id.* at 281.

[64] *Id.*

[65] *Id.* at 327 (Stevens, J., dissenting). Racial gerrymandering is the use of packing and cracking to distribute minority voters into specific districts. The Court began looking at individual districts that plaintiffs alleged to be racial gerrymanders in the 1990s. *E.g.*, *Shaw v. Reno*, 509 U.S. 630 (1993). Justice Stevens's proposal to take a cue from this approach in terms of partisan gerrymandering is discussed *infra* Part IV.A.

[66] *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring); Richard L. Hasen, *No Exit? The Roberts Court and the Future of Election Law*, 57 S.C. L. REV. 669, 682–83 (2006).

cases."[67] While far from an enthusiastic endorsement of striking down partisan gerrymanders, Justice Kennedy's concurrence nonetheless kept the political gerrymandering cause of action alive in the hope that proper judicially manageable standards for an unconstitutional partisan gerrymander might yet be discovered.[68] Unfortunately, Kennedy did not provide a standard in his opinion, and the political gerrymandering claim remained mired in ambiguity.[69]

B. Shock to the System: The Rise of Mid-Decade Redistricting

The appearance of mid-decade redistricting in the early 2000s brought "a sudden shock to the ritual of redistricting politics."[70] The traditional custom of only redistricting at the beginning of a decade upon the release of new census numbers abruptly changed after the 2002 elections,[71] when Republican state legislators in Texas and Colorado proposed implementing new congressional redistricting plans that heavily favored Republicans less than two years after traditional decennial plans had been applied.[72] While the Colorado plan was overturned by the Colorado Supreme Court,[73] the fierce political battle over the more successful Texas gerrymander attracted national attention.[74]

The Texas Republicans' mid-decade redistricting, passed in 2003 after months of partisan jockeying, threats, stalemate, and Democratic legislators

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[67] *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring).

[68] *See id.* at 309–10 ("It is not in our tradition to foreclose the judicial process from the attempt to define standards and remedies where it is alleged that a constitutional right is burdened or denied."); *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 138 (3d ed. 2006) (noting that the view on political gerrymandering claims post-*Vieth*, as per Justice Kennedy's controlling opinion, is that "when standards are developed, such cases can be heard"). Interestingly, Justice Kennedy recognized the merits of the arguments against allowing the justiciability of political gerrymandering claims, even conceding that "those arguments may prevail in the long run." *Vieth*, 541 U.S. at 309 (Kennedy, J., concurring).

[69] *See* Kang, *supra* note 4, at 444 (noting that the Court in *Vieth* "failed again to decide upon a meaningful standard for such [partisan gerrymandering] claims").

[70] Adam Cox, *Partisan Fairness and Redistricting Politics*, 79 N.Y.U. L. REV. 751, 751 (2004).

[71] *See* Mann, *supra* note 5, at 92 (noting that mid-decade redistricting "violated a century-long norm against undertaking more than one round of redistricting after each decennial census").

[72] Juliet Eilperin, *GOP's New Push on Redistricting; House Gains Are at Stake in Colo., Tex.*, WASH. POST, May 9, 2003, at A4.

[73] People *ex rel.* Salazar v. Davidson, 79 P.3d 1221, 1237–40 (Colo. 2003) (finding mid-decade redistricting unconstitutional under the Colorado Constitution).

[74] The Texas re-redistricting was a saga that had its roots in decades of Texas politics, culminating with the Republican ascendancy in that state in the early 2000s. The story of the redistricting is one of the most colorful, fascinating, and brutally partisan tales in American political history. For an excellent account of what happened in Texas, see STEVE BICKERSTAFF, LINES IN THE SAND: CONGRESSIONAL REDISTRICTING IN TEXAS AND THE DOWNFALL OF TOM DELAY (2007).

fleeing the state to prevent a quorum,[75] radically changed the complexion of the state's congressional delegation. The 2002 elections produced seventeen Democrats and fifteen Republicans; after the 2004 elections, Texas sent eleven Democrats and twenty-one Republicans to Washington.[76] A federal district court rejected a legal challenge asserting that the mid-decade redistricting was an unconstitutional partisan gerrymander,[77] and the plaintiffs appealed to the Supreme Court. In 2006, the Court held in *LULAC* that the Republicans' mid-decade redistricting was not an unconstitutional partisan gerrymander.[78]

The plaintiffs in *LULAC* unsuccessfully argued that the Court could finally formulate a standard for judging political gerrymanders based on the facts of the Texas mid-decade redistricting. The plaintiffs contended that the fact that the gerrymander was done mid-decade justified a presumption of invalidity due to its unusual timing and clearly partisan intent.[79] A ban on mid-decade redistricting would have the advantage of simplicity, allowing a court to avoid the tricky question of proving discriminatory effect that had plagued the political gerrymandering claim since *Bandemer*.[80] As Justice Kennedy put it, the plaintiffs' proposed solution would "challenge[] the decision to redistrict at all."[81]

Despite a series of facts showing the most outrageous known partisan gerrymander to date,[82] Justice Kennedy declined to use the facts of *LULAC* as the basis for a clear standard for an unconstitutional political gerrymander. Justice Kennedy first rejected the appellants' proposed standard that mid-decade gerrymanders with the "sole motivation" of partisanship should be

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[75] *Id.* at 141–43.

[76] League of United Latin Am. Citizens (LULAC) v. Perry, 548 U.S. 399, 412, 413 (2006). While some increase in Republican representation in Texas's congressional delegation was perhaps justified, "Texas Republicans and Democrats privately agree[d] a fair map would produce eighteen Republican and fourteen Democratic seats." JULIET EILPERIN, FIGHT CLUB POLITICS: HOW PARTISANSHIP IS POISONING THE HOUSE OF REPRESENTATIVES 104 (2006).

[77] *LULAC*, 548 U.S. at 409.

[78] *Id.* at 423.

[79] *Id.* at 417.

[80] *Id.*

[81] *Id.*

[82] The League of United Latin American Citizens' brief included evidence of extreme partisanship in the redistricting process, including clear statements by Republican leaders indicating the sole partisan intent of the mid-decade redistricting; Republican leaders abandoning the long-standing traditions of the Texas state legislature to pass the plan; specific targeting of no less than seven Democratic congressmen for defeat; shifting over eight million Texas voters into new districts; and creating numerous bizarrely shaped districts that split up even more counties than the previous plan. Appellant's Brief on the Merits at 6–10, *LULAC*, 548 U.S. at 399, No. 05-204; *see also supra* text accompanying notes 74–76.

unconstitutional.[83] He then refused to declare that mid-decade redistricting was presumptively unconstitutional, arguing that, under such a theory, "a highly effective partisan gerrymander that coincided with decennial redistricting would receive less scrutiny than a bumbling, yet solely partisan, mid-decade redistricting."[84] Kennedy further indicated that an outright ban on mid-decade redistricting could "encourage partisan excess at the outset of the decade" because a "sole motivation" standard would only apply to mid-decade redistricting claims.[85] Once again, Justice Kennedy declined to set his own standard based on the facts of *LULAC*,[86] allowing perhaps the most partisan redistricting plan ever before a court to stand.[87]

LULAC demonstrated the Court's reluctance to truly commit to combating partisan gerrymandering.[88] Although presented with an opportunity to establish a clear standard based on the unique facts of a severely partisan redistricting that was outside the decennial redistricting cycle, the Court once again declined to intervene.[89] The effect of the Court's decision was psychological as well as political; state legislators could conclude that the courts would not intervene as long as they did not go as far as the Texas mid-decade redistricting did. The Court's failure to act prompted "an escalation in partisan warfare."[90] Several state legislatures redistricted their own boundaries,[91] and Georgia Republicans instituted a mid-decade congressional redistricting of their own.[92] Democrats threatened to retaliate by redistricting the congressional boundaries of states where they controlled the state

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[83] *LULAC*, 548 U.S. at 417–20.

[84] *Id.* at 419. Kennedy believed that it would be unfair to strike down the 2003 Republican partisan gerrymander as unconstitutional while preserving the 1991 Democratic gerrymander that had served as the basis for the traditional decennial plan and was significantly partisan as well. *Id.*

[85] *Id.* at 420.

[86] *Id.* at 423.

[87] S*ee* Berman, *supra* note 10 at 844–45, 848–49 (calling the Texas mid-decade redistricting a "textbook example" of a gerrymander implemented with "unconstitutionally excessive partisanship").

[88] *See* Karlan, *supra* note 10, at 763 (commenting that the Court "remains unwilling or unable" to intervene on behalf of political groups that allege they have been discriminated against).

[89] *See* Scot Powe & Steve Bickerstaff, *Anthony Kennedy's Blind Quest*, 105 MICH. L. REV. FIRST IMPRESSIONS 63, 63 (2006), http://students.law.umich.edu/mlr/firstimpressions/vol105/powe.pdf ("When far superior tests [to those rejected by Kennedy in *Vieth*] were offered in *LULAC*, he rejected them too.").

[90] *See* Savage, *supra* note 36, at A1.

[91] Michael P. McDonald, *Supreme Court Lets the Politicians Run Wild*, ROLL CALL, June 29, 2006, at 4.

[92] Tom Baxter & Sonji Jacobs, *Legislature '05: Senate OKs New Map for Congress; Proposed Districts Favor GOP; Senate Approves Congressional Map*, ATLANTA J.-CONST., Mar. 22, 2005, at 1B.

legislature and governor's office,[93] though none of the proposals came to fruition.[94] The reluctance of the Court to make good on Justice White's contention that political groups are entitled to protection under the Equal Protection Clause[95] resulted in outrageous levels of partisanship in drawing district lines, culminating in perhaps the most unique and distinctly partisan form of political gerrymandering to date: pinpoint redistricting.

II. MINIMIZING THE GERRYMANDER: THE 2006 GEORGIA PINPOINT REDISTRICTING

Now that the Supreme Court has established that mid-decade redistricting is not necessarily unconstitutional, political operatives have the ability to explore more options in the fight for partisan dominance of state legislatures and congressional delegations. Nathaniel Persily observed that "the recent Texas re-redistricting has demonstrated[] [that] judicial noninvolvement in this area has left majority parties with the feeling that they can redraw districts to their advantage with abandon."[96] Persily's prediction was most obviously fulfilled in 2006 when Georgia's state legislature introduced the political world to pinpoint redistricting.

Pinpoint redistricting is localized mid-decade redistricting; it is a form of political gerrymandering that affects only a small number of districts rather than redrawing the entire map. Pinpoint redistricting adjusts an existing map in an isolated area to advantage or disadvantage a candidate's or political party's strength in a single district.[97] Pinpoint redistricting is reactionary; drawing upon evidence of past election results, political developments, or

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[93] *See, e.g.*, EILPERIN, *supra* note 76, at 107 (noting that the Republicans' Texas maneuver and efforts in Colorado and Georgia left Democrats "spoiling for a fight in states like Illinois, Louisiana, New Mexico, and New York, where they've gained political ground since the start of the decade").

[94] *See* Charles Babington, *Democrats Not Eager to Emulate Texas's Redistricting*, WASH. POST, July 5, 2006, at A7 (observing that, although the *LULAC* decision presented Democrats with their own opportunity to redistrict mid-decade, "early indications are that Democrats will probably resist the temptation to do unto Republicans as Republicans did unto them"). Several well-known Democrats fiercely but unsuccessfully advocated redrawing districts in their favor, including former Illinois Congressman and current White House Chief of Staff Rahm Emanuel. *Id.*

[95] Davis v. Bandemer, 478 U.S. 109, 124–25 (1986).

[96] Persily, *supra* note 7, at 80.

[97] The pinpoint redistricting of Georgia State Senate District 46, discussed below, was an example of targeting a single candidate. *See* Justin Levitt & Michael P. McDonald, *Taking the "Re" Out of Redistricting: State Constitutional Provisions on Redistricting Timing*, 95 GEO. L.J. 1247, 1276 n.150 (2007) ("Three senate districts in the Athens area were redrawn to fragment Democratic voters after a Democratic representative announced her candidacy for an open seat.").

emerging voter trends, it responds to a party's weakness in a single district.[98] This Part first discusses the Georgia General Assembly's 2006 pinpoint redistricting of Georgia State Senate Districts 46, 47, and 49 and 8 of Georgia's 180 State House Districts, focusing on the formerly competitive District 48, and subsequently analyzes the effects of pinpoint redistricting on the political process and its potential use in the future by partisan state legislators.

A. Senate Bill 386: Pinpoint Redistricting and Senate District 46

The first challenged instance of pinpoint redistricting was seen in Georgia prior to the 2006 elections. Georgia's Senate District 46 was a competitive district, containing the Democratic stronghold of the city of Athens, Georgia, home to the University of Georgia.[99] The 2004 election in District 46 was extremely tight; incumbent Republican State Senator Brian Kemp barely defeated his Democratic opponent, Becky Vaughn, with 51.6% of the vote to her 48.4%.[100] The competitive nature of this district changed, however, in January 2006 when the Republican-dominated Georgia State Senate passed Senate Bill 386, which altered the boundaries of Districts 46, 47, and 49[101] in what Georgia's Democratic Party called a "naked power grab."[102]

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[98] *See infra* Part II.A (discussing how the Georgia state legislature's pinpoint redistricting of Senate District 46 was a reaction to the district's classification as competitive in the previous election).

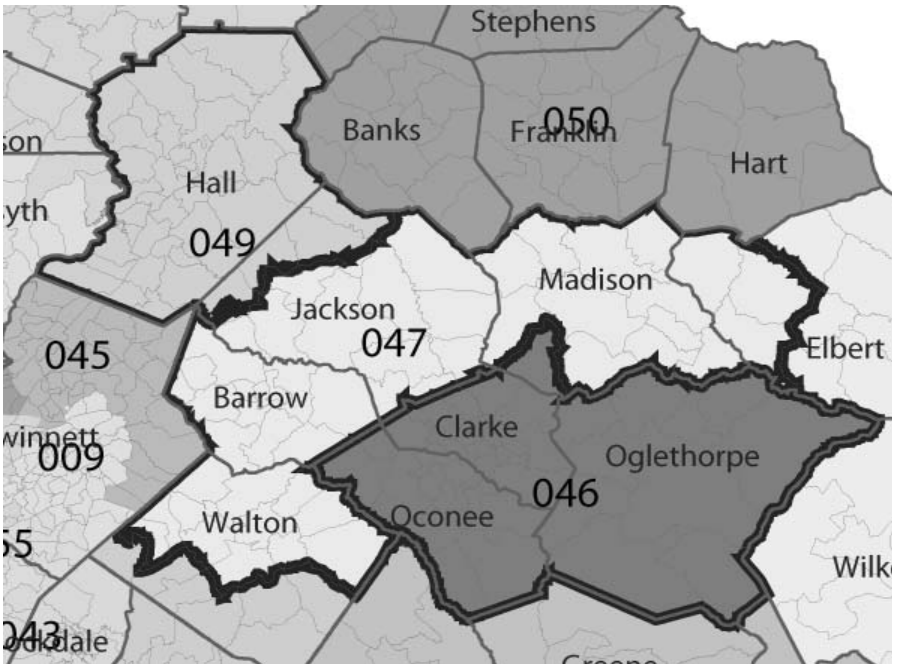
[99] Kidd v. Cox, No. 1:06-CV-0997-BBM, 2006 U.S. Dist. LEXIS 29689, at *5, *10 (N.D. Ga. May 16, 2006).

[100] *Id.* at *7.

[101] *Id.* at *8.

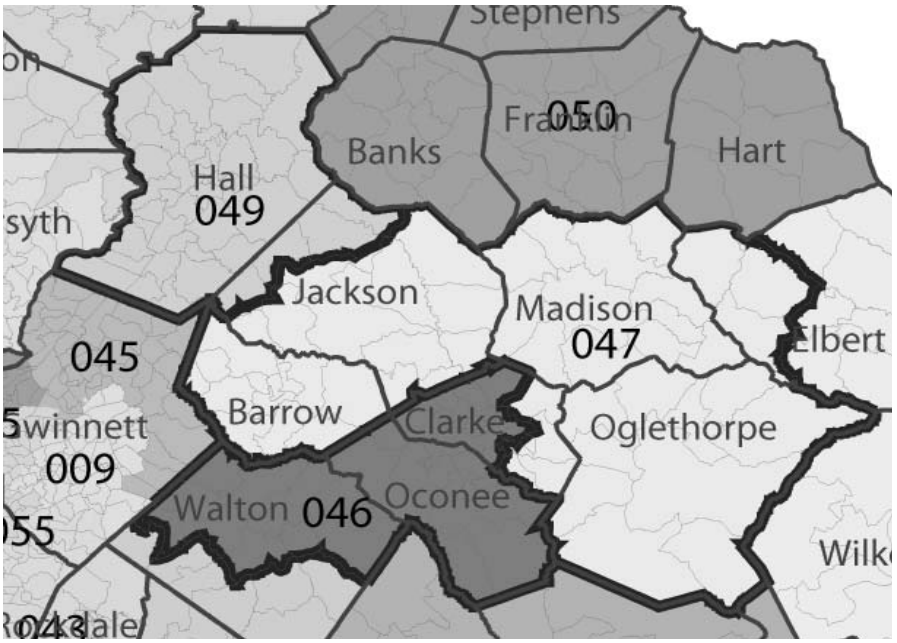
[102] Sonji Jacobs, *Legislature 2006: In Brief*, ATLANTA J.-CONST., Jan. 13, 2006, at D6.

Figure 1: Georgia Senate Districts 46, 47, and 49 in 2004



Source: Georgia Redistricting Services Office, Carl Vinson Institute of Government, Atlanta, Georgia.

Figure 2: Georgia Senate Districts 46, 47, and 49 in 2006



Source: Georgia Redistricting Services Office, Carl Vinson Institute of Government, Atlanta, Georgia.

Figure 1 shows the Georgia Senate Districts in 2004. District 46 consisted of a small part of Madison County and all of Oglethorpe, Oconee, and Clarke Counties.[103] District 47 consisted of all of Barrow County, large portions of Walton, Elbert, and Jackson Counties, and the remaining part of Madison County.[104] District 49 consisted of Hall County and a small part of Jackson County.[105] Figure 2 shows the boundaries after the passage of Senate Bill 386 in 2006. Major changes were made to Districts 46 and 47; most importantly, the pinpoint redistricting split Clarke County between Districts 46 and 47,[106] diluting the strength of the county's solid Democratic base.[107] The only whole

[103] *See supra* fig.1. Clarke County includes the entire city of Athens.

[104] *See supra* fig.1.

[105] *See supra* fig.1.

[106] *See supra* fig.2.

[107] *See* Brandon Larrabee, *Task Force Proposes Commission*, AUGUSTA CHRON., Nov. 15, 2006, at 6B (noting that, before the pinpoint redistricting, "Clarke County was the center of a district that tilted Democratic").

county in District 46 is now Oconee County, and the remainder of the District contains the part of Walton County that was formerly in District 47.[108] District 47 now contains the other half of Clarke County and all of Barrow, Madison, and Oglethorpe Counties and retains the portions of Elberth and Jackson Counties that were included prior to 2006.[109] Minor changes were made to District 49—mostly miniscule gains of territory around I-85's route through Jackson County.[110]

Senate Bill 386 changed the political complexion of District 46 from competitive to Republican-leaning.[111] The Democratic core of the district in Clarke County, including Athens and the University of Georgia, was split directly in half, severely diluting the electoral strength of District 46's potential Democratic voters.[112] While the Republicans defended the boundary adjustment as a legitimate move uniting Madison County and increasing Athens's representation in the State Senate, it was strongly opposed by Democrats and advocacy groups, such as Common Cause Georgia, who "felt it was enacted only for the purpose of increasing the chances of keeping these three seats in Republican hands."[113] By splitting the Democratic-leaning Clarke County into two districts, the gerrymander directly harmed Democratic State Representative Jane Kidd's bid for the Senate seat, which was being vacated by the Republican incumbent.[114] Kidd, who had defeated the Republican candidate, Bill Cowsert, in a State House race in 2004 and was considered a strong candidate for the seat, was reported as the "primary target

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[108] *See supra* fig.2.

[109] *See supra* fig.2.

[110] *See supra* fig.2.

[111] *See* Tom Crawford, *Senate Republicans Redraw Three Districts*, GA. REP., Jan. 9, 2006, http://www.ciclt.net/garpt/main.asp?PT=n_detail&Client=garpt&N_ID=400918 (on file with author) (observing that the redistricting would make "District 46, which is now a competitive district up for grabs between Democrats and Republicans, a more Republican-leaning district in terms of voter performance in recent elections").

[112] *See* Larrabee, *supra* note 107, at 6B (describing Senate Bill 386 as "dividing Clarke County [the center of a district that tilted Democratic] between two Republican leaning Senate districts"); Jones, *supra* note 15, at B5 (summarizing the Democratic view of the bill "as a GOP ploy to place more Republican-leaning voters in [Districts 46 and 47] by diluting with a split the more liberal area of the University of Georgia-influenced county of Clarke").

[113] The 2006 Georgia State Senate Races, http://www.commoncause.org/atf/cf/%7B8A2D1D15-C65A-46D4-8CBB-2073440751B5%7D/The%202006%20Senate%20Races_1.htm (last visited Feb. 16, 2009); *see also* Brandon Larrabee, *Dems, Watchdogs Decry Redistricting*, ATHENS BANNER-HERALD, Feb. 5, 2006, at D3 ("Supporters say the proposal would place all of the less-populous Madison County into one Senate district; opponents say it is a thinly-veiled attempt to hurt state Rep. Jane Kidd, D-Athens, in her bid to succeed state Sen. Brian Kemp, an Athens Republican expected to run for agriculture commissioner.").

[114] Jacobs, *supra* note 102, at D6.

of the map change."[115] Cracking the Democratic stronghold in Clarke County produced very favorable results for Republicans in the 2006 general election. Cowsert[116] defeated Kidd by a margin of 11.4% (55.7% to 44.3%),[117] far greater than the 3.2% margin of defeat for the Democratic candidate in District 46 in 2004, before the pinpoint redistricting had been implemented.

Kidd filed a lawsuit in federal court challenging the pinpoint redistricting shortly after Senate Bill 386 was passed, alleging an unconstitutional partisan gerrymander, violation of the one-person, one-vote standard, and violation of the Georgia constitution.[118] The three-judge panel that heard the case ruled against Kidd and upheld the plan instituted by Senate Bill 386,[119] but did not address (and the plaintiff apparently did not argue) the issue of making individual changes to a districting plan.[120] In fact, it seems that the plaintiffs did not have much faith in the political gerrymandering claim at all; the court noted that the plaintiffs "[did] not make a distinct political gerrymandering claim in their complaint" and that the issue was raised only during arguments before the court.[121] While a pinpoint redistricting for partisan advantage took place, there was never a significant legal battle over its constitutionality, and no federal appellate court had the opportunity to address the issue.[122]

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[115] Tom Baxter, *Athens' New State Senate Lines OK'd*, ATLANTA J.-CONST., Apr. 21, 2006, at D3; s*ee also* Bill Shipp, Editorial, *Assessing Kidd's Chances for Leading Democrats in Georgia*, ATHENS BANNER-HERALD, Jan. 3, 2007, at A6 (observing that District 46 was "openly gerrymandered to end Kidd's political career"). Mark Monmonier called similar gerrymandering practices that targeted a specific candidate "cartoassassination." MONMONIER, *supra* note 36, at 95.

[116] The fact that Cowsert was the Republican candidate suggests a nepotistic motivation for redrawing the lines. Cowsert had run against Kidd for her State House seat in 2004 and lost by a fairly wide margin—56% to 44%. Kidd v. Cox, No. 1:06-CV-0997-BBM, 2006 U.S. Dist. LEXIS 29689, at *7 (N.D. Ga. May 16, 2006). Cowsert intended to run against Kidd again for the District 46 State Senate seat in 2006 upon the retirement of the incumbent, Senator Brian Kemp. Walter C. Jones, *GOP Blunders Not Helping Perdue; Governor Shows Signs of Frustration*, FLA. TIMES UNION, Feb. 5, 2006, at B1. Kemp, a supporter of Senate Bill 386, was Cowsert's brother-in-law. *Kidd*, 2006 U.S. Dist. LEXIS 29689, at *7.

[117] Georgia Secretary of State, *supra* note 21.

[118] *Kidd*, 2006 U.S. Dist. LEXIS 29689, at *2, *11.

[119] *Id.* at *59.

[120] The plaintiffs apparently focused much of their argument on one-person, one-vote and First Amendment grounds, as the court noted that the plaintiffs only raised their Equal Protection partisan gerrymandering claim in oral argument, not in their complaint. *Id.* at *2. The court did not discuss the issue of the changes being a pinpointed, isolated redistricting.

[121] *Id.* at *40.

[122] The court did address the issue that the redistricting was in the middle of the decade, but based its decision to dismiss Kidd's complaint on Georgia's State Constitution. *Id.* at *34–*39 (interpreting the Georgia Constitution as not limiting redistricting to following each census). In a subsequent related proceeding, the Supreme Court of Georgia came to a similar conclusion. *See* Blum v. Schrader, 637 S.E.2d 396, 399 (Ga. 2006) (declaring that the frequency of reapportionment is a matter of legislative discretion and that the Georgia Constitution does not limit the state legislature's ability to redistrict to once a decade).

B. House Bill 1137: Pinpoint Redistricting and House District 48

The Georgia House executed a similar pinpoint redistricting of several of its own districts in 2006. House Bill 1137 adjusted the boundaries of eight of Georgia's 180 House districts, leaving the rest of the map intact.[123] Democrats accused the Republican majority of targeting these districts to affect upcoming elections by strengthening the Republican incumbents in those districts.[124] Critics of the bill specifically cited House District 48,[125] which provides a good example of the direct effect of this pinpoint redistricting when comparing the results of successive elections. Democrat Jan Hackney had lost to incumbent Republican Representative Harry Geisinger in 2004 by a margin of 53.4% to 46.6%.[126] In 2006, widely regarded as a good year for Democrats,[127] a rematch between Hackney and Geisinger under the redrawn district, District 48, resulted in a victory for Geisinger by a much wider margin of 59.1% to 40.9%.[128] The pinpoint redistricting achieved the Republicans' objective of securing the seat of a potentially vulnerable Republican incumbent.

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[123] *See* H.B. 1137, 152d Gen. Assem., Reg. Sess. (Ga. 2006) (specifically changing House Districts 5, 12, 46, 48, 50, 51, 167, and 179, while leaving all other districts intact); *see also infra* figs.3 & 4 (documenting the changes in Districts 46, 48, 50, and 51 in the Atlanta metropolitan area).

[124] Sonji Jacobs, *Legislature 2006: GOP Denies Self-Serving Remap*, ATLANTA J.-CONST., Feb. 22, 2006, at B3.

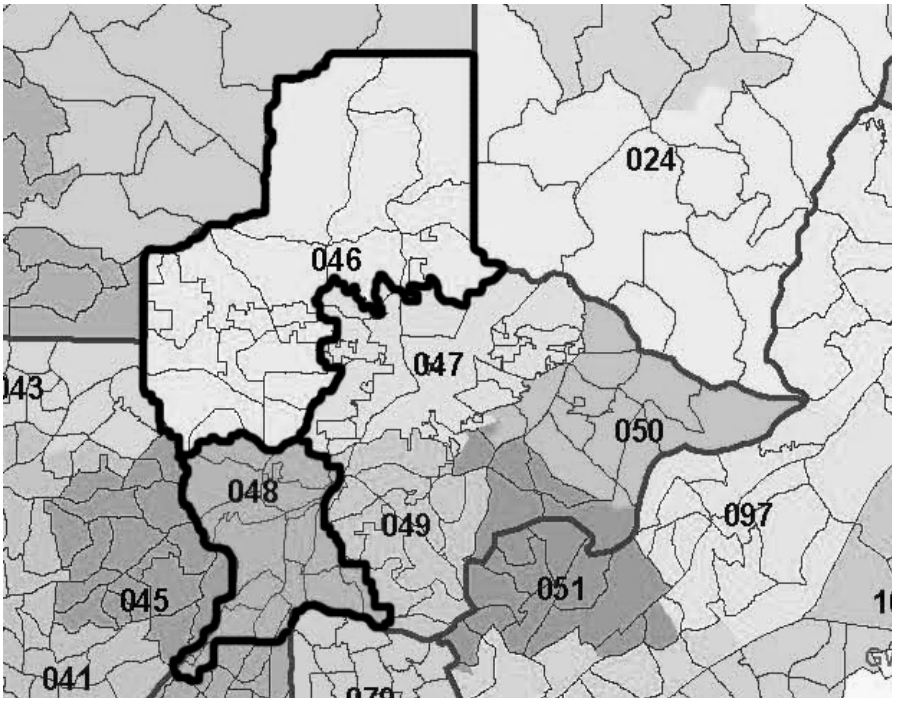
[125] *See id.* ("Democrats contend that HB 1137 is targeted toward a likely race later this year between Rep. Harry Geisinger (R-Roswell) and Jan Hackney, a Democrat."). *Compare* fig.3 *infra* (2004 Georgia House Districts in Atlanta area), *with* fig.4 *infra* (2006 Georgia House Districts in Atlanta area).

[126] Georgia Secretary of State, Georgia Election Results, Official Results of the Tuesday, November 2, 2004 General Election, http://sos.georgia.gov/elections/election_results/2004_1102/120.htm (last visited July 14, 2009).

[127] Michael Hill, *The Middle-of-the-Roaders Get Their Turn; Political Scientist Says Last Week's Election Results Showed the Benefits of Counting on Consensus Instead of Polarization*, BALT. SUN, Nov. 12, 2006, at 1F.

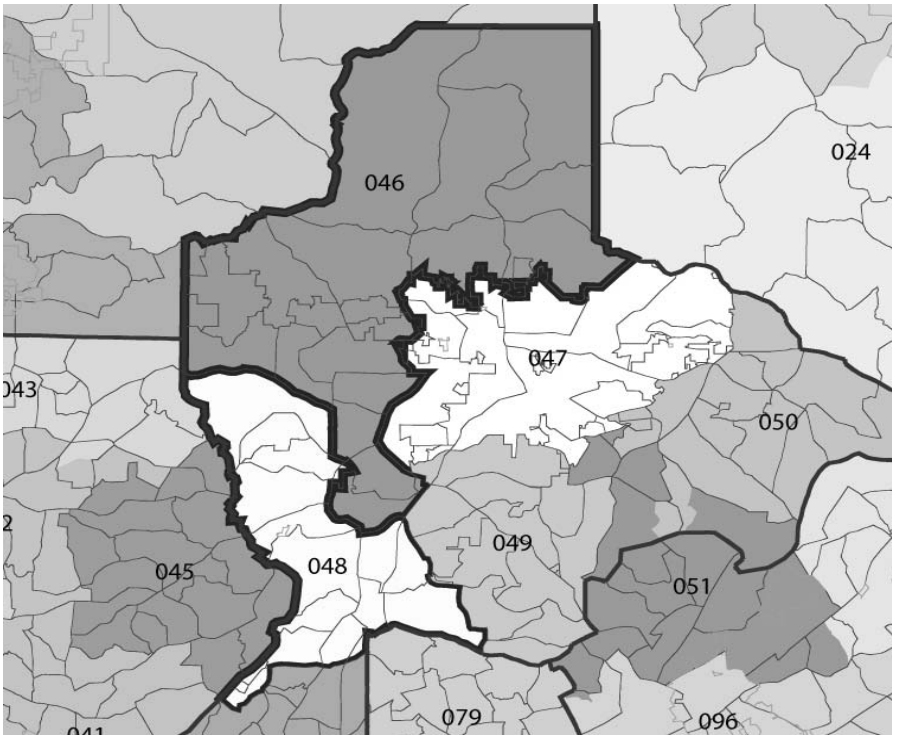
[128] Georgia Secretary of State, Georgia Election Results, Official Results of the Tuesday, November 07, 2006 General Election, http://sos.georgia.gov/elections/election_results/2006_1107/133.htm (last visited Jul. 14, 2009) (showing election results for State Senate, District 46). . Geisinger himself sponsored the bill that changed the boundaries of his district. Jacobs, *supra* note 124, at B3.

Figure 3: Georgia House Districts 46 and 48 in the Atlanta Area in 2004



Source: Georgia Redistricting Services Office, Carl Vinson Institute of Government, Atlanta, Georgia.

Figure 4: Georgia House Districts 46 and 48 in the Atlanta Area in 2006



Source: Georgia Redistricting Services Office, Carl Vinson Institute of Government, Atlanta, Georgia.

C. Pitfalls and Potential: The Future of Pinpoint Redistricting

Pinpoint redistricting has several negative effects on the democratic process. As the Supreme Court has recognized, stability is crucial to an effective democratic system.[129] Untimely and isolated changes to district boundaries disrupt and destabilize established electoral boundaries, causing disorder among voters and making politicians less accountable to the people who elected them as certain geographical areas are shifted out of their

[129] *See* Reynolds v. Sims, 377 U.S. 533, 583 (1964) (noting that "[l]imitations on the frequency of reapportionment are justified by the need for *stability and continuity in the organization of the legislative system*" (emphasis added)). Samuel Issacharoff has more recently written that "a number of Supreme Court opinions express concern with the stability of the political order." Issacharoff, *supra* note 57, at 234.

districts.[130] Changing the boundary lines of isolated districts creates voter confusion, especially if the changes are increasingly frequent.[131] Politicians become less aware of who their constituents are and attempt to appeal to voters that will come within the new boundaries in upcoming elections rather than those they were elected to represent.[132]

Perhaps most significant, pinpoint redistricting encourages a public perception that the democratic process is illegitimate or rigged.[133] The manipulation of an individual district with no discernable purpose other than partisanship decreases voters' confidence in the relevance of their votes and the system itself.[134] In Georgia, for example, Athens voters affected by pinpoint redistricting felt manipulated and "helpless" as they made futile efforts to halt the state legislature's partisan efforts.[135] Pinpoint redistricting opens the door for politicians to engage in consistent manipulation of their constituencies, fueling the public's disillusionment with a system perceived to be controlled by self-serving politicians.[136] As one article notes, "Popular acquiescence in and support for laws in a democracy . . . depends on the faith on the part of the losers in this legislative election that they have a fair chance

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[130] Issacharoff, *supra* note 56, at 629–30. Political expert Norman J. Ornstein commented on mid-decade redistricting's "profound" effect on the voters and the political process: "If you don't know from election to election who your representative is, because your district may change, and may change two or three times, it makes for any sense of accountability in this process being, basically, devastated." *Morning Edition: Supreme Court Gives States Redistricting Leeway* (NPR radio broadcast June 29, 2006), *available at* http://www.npr.org/templates/story/story.php?storyId=5520371.

[131] *See* Levitt & McDonald, *supra* note 97, at 1277 (noting that frequent redistricting could "foster confusion among voters"). Furthermore, in a case addressing the rights of political parties, the Supreme Court recognized that "preventing voter confusion" is a legitimate state interest. Tashjian v. Republican Party of Conn., 479 U.S. 208, 221–22 (1986).

[132] *See* People *ex rel.* Salazar v. Davidson, 79 P.3d 1221, 1242 (Colo. 2003) (observing that, when district boundaries are shifted, "a congressperson [will] be torn between effectively representing the current constituents and currying the favor of future constituents").

[133] Justice Kennedy acknowledged the "unfortunate" validity of this concern in his concurrence to *Vieth*, quoting a North Carolina state senator as saying, "We are in the business of rigging elections." Vieth v. Jubelirer, 541 U.S. 267, 317 (2004) (Kennedy, J., concurring).

[134] *See* J. Gerald Hebert & David G. Vance, *Redistricting Must Be Fixed Before Census*, ROLL CALL, July 29, 2008, at 4 (observing that excessive gerrymandering "fuel[s] voter apathy").

[135] Brandon Larrabee, *Democrats Seek End to Redistricting Fights*, AUGUSTA CHRON., Feb. 6, 2006, at 2B. A retired teacher from Athens who accompanied local officials to the state capitol to protest the pinpoint redistricting said, "We feel like something's been done to us." *Id.*

[136] *See* Powe & Bickerstaff, *supra* note 89, at 65 ("*LULAC* opens the door to rolling redistricting and not only on the Congressional level. . . . Politicians [at any level] will walk through that opening and this will exacerbate the corrosive cynicism that Americans have acquired believing that politics is rigged by and for the politicians.").

to be the victors in the next."[137] When political actors engage in active and untimely manipulation of a district's boundaries between elections, the result is the loss of that faith through public disillusion and mistrust of the democratic system.[138]

Pinpoint redistricting is an especially attractive tactic to politically-minded legislators because of its subtlety—through pinpoint redistricting, politicians can accomplish their partisan goals without accountability to an entire state's voters.[139] A party conducting a statewide mid-decade redistricting will inevitably face a firestorm of controversy and negative publicity.[140] In fact, fear of a political backlash can cause politicians to hesitate before engaging in a politically risky statewide mid-decade redistricting.[141] Isolating the gerrymander to a few districts, however, limits the controversy, localizing the outrage to the affected districts.[142] Engaging in pinpoint redistricting allows politicians to accomplish their political goals through redrawing districts while avoiding the accountability that accompanies statewide partisan gerrymanders.[143] The use of redistricting software makes this process even

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[137] Backstrom et al., *supra* note 48, at 148. The authors continued, "If gerrymandering has unfairly made much more likely an erstwhile majority's ten-year control of the legislature, this consensus would be lost, and the result would be corrosive of the political compact." *Id.* That criticism is even more relevant when considered in the context of consistent manipulation of a district throughout a decade rather than just at its outset.

[138] The use of pinpoint redistricting for political gain is particularly relevant in the context of preventing corruption or the appearance of corruption in the political process. The Supreme Court recognized the importance of preventing corruption, or the appearance of corruption, in its decisions regarding campaign finance legislation. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 136–37 (2003); Buckley v. Valeo, 424 U.S. 1, 26–27 (1976).

[139] *See* Daniel H. Lowenstein, Vieth*'s Gap: Has the Supreme Court Gone from Bad to Worse on Partisan Gerrymandering?*, 14 CORNELL J.L. & PUB. POL'Y 367, 387 (2005) ("For the ordinary citizen, the shifting of a few legislative seats is a matter of small consequence.").

[140] *See* BICKERSTAFF, *supra* note 74, at 122–23 (describing the almost universal condemnation of the Texas mid-decade redistricting proposal by the local and national press in 2003); Louis Jacobson, *Back to the Redrawing Board?*, 35 NAT'L J. 1173, 1174 (2003) (observing that "voters generally seem to view undertaking a new round of redistricting [mid-decade] as unseemly").

[141] *See* Jacobson, *supra* note 140, at 1174–75 (discussing how widespread criticism makes many politicians wary of engaging in or publicizing mid-decade redistricting).

[142] *See* Jim Thompson, Editorial, *Thompson: Kidd Just Might Have "Right Stuff" for Senate Run*, ATHENS BANNER-HERALD, Mar. 5, 2006, at A8 (reporting that visiting State Senators supporting the pinpoint redistricting of an Athens district "found . . . a community stirred up about the redistricting. What they didn't find was the massive community support which, I'm convinced, [Republican State Senator Ralph] Hudgens had told them was there for the proposal").

[143] For example, the Georgia redistricting that redrew the statewide congressional districts in 2005 caused a major uproar in the state, attracting extensive press coverage and public debate. By contrast, the state legislature's 2006 pinpoint redistricting of Senate District 46 attracted barely any attention other than discontent in the affected districts. *Compare* Lauren W. Whittington, *Perdue Signs New Congressional Map*,

easier; a click of a mouse can show how district lines can be most effectively manipulated to alter the partisan balance of power.[144]

Political signals indicate that the use of pinpoint redistricting will grow in the coming years. In the specific context of Georgia's pinpoint redistricting, Professor Michael McDonald suggests that it is likely that other states with single party control of the state legislature and governor's office (similar to Georgia) will attempt isolated redistrictings aimed at single districts or candidates.[145] In response to Republican mid-decade redistrictings of federal congressional districts in Texas and Georgia, Democrats threatened to retaliate with pinpoint redistricting in states they controlled, including a proposed pinpoint redistricting to unseat a vulnerable Republican incumbent in New Mexico.[146] As the likelihood of pinpoint redistricting increases, courts must adapt the political gerrymandering claim to meet the district-specific circumstances of this new trend.

ROLL CALL, May 4, 2005, at 11 (discussing widespread discussion and controversy among Georgia political figures over statewide mid-decade redistricting), *with Democrats Protest Athens Redistricting*, MACON TELEGRAPH, Jan. 24, 2006, at 9B (observing political protest over the Georgia pinpoint redistricting among citizens and politicians of Athens, Georgia). For further discussion of how pinpoint redistricting's lack of accountability to a state's voters undermines the legal rationale for judicial noninterference with partisan gerrymandering, see *infra* Part III.B.

144 *See* Sasha Abramsky, *The Redistricting Wars*, NATION, Dec. 29, 2003, at 15, 18 (quoting Howard Simkowitz, the product manager of a high-tech redistricting software program, as saying, "It's become a lot easier to build districts that are lopsided districts, because people can understand the data so much better. You're able to really manipulate the data quickly, to try different scenarios, to move the boundaries around and see what that means.").

145 Professor McDonald wrote:

> Recently, Georgia enacted a new state Senate map that modified the existing state legislative-approved map. This new map was designed to cripple the election chances of a single Democrat living in the University of Georgia area. Given how easy it is now to draw maps, this sort of activity is likely to continue in states with unified government and no prohibition on mid-decade redistricting.

McDonald, *supra* note 91, at 4.

146 *See* Chris Cillizza, *Democrats Eye Remap Payback; Leaders Target Illinois, N.M.*, ROLL CALL, Feb. 22, 2005, at 1 ("[Republican Rep. Heather] Wilson's Albuquerque-based 1st district is almost evenly divided along party lines and even the slightest addition of Democrats from Rep. Tom Udall's (D) northern New Mexico 3rd district could tilt the balance away from the Republican Member.").

III. MODERNIZING THE POLITICAL GERRYMANDERING CLAIM: WHY PINPOINT REDISTRICTING REQUIRES COURTS TO RESORT TO A DISTRICT-BASED APPROACH

Pinpoint redistricting differs greatly from past political gerrymanders analyzed by the courts. Most importantly, its effects are not statewide, which distinguishes it from the redistricting plans that the Supreme Court analyzed in *Bandemer*, *Vieth*, and *LULAC*.[147] When a political gerrymander centers on a single district,[148] an assessment using the Supreme Court's statewide approach is inadequate. This Part first demonstrates that the statewide approach to political gerrymandering claims is ineffectual when applied to pinpoint redistricting, and then shows that pinpoint redistricting undermines the rationale for the judiciary to refrain from taking a strong stance against political gerrymandering. In its final section, this Part explains that formulating a new approach in response to pinpoint redistricting will reinvigorate the political gerrymandering claim and help reestablish its beneficial deterrent effect. All of these factors demonstrate that pinpoint redistricting should be addressed in a district-specific context.

A. Why the Statewide Approach Is Inadequate for Pinpoint Redistricting

Throughout its history, courts have approached the political gerrymandering claim from a statewide perspective, assessing discrimination against identifiable political groups based on the groups' standing throughout the entire state.[149] The Supreme Court's first foray into political gerrymandering in *Bandemer* approached the claim in the broadest sense possible by looking at discrimination from a statewide perspective.[150] In assessing whether the Indiana Republicans' political gerrymander was unconstitutional, Justice White specifically cited the statewide percentages of votes received by Democratic candidates instead of the number of Democratic candidates elected,[151] analyzing the claim in the context of statewide results.[152]

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147 *See supra* note 18 (noting the statewide scope of the Court's previous decisions).

148 *See supra* Parts II.A and II.B (discussing the Georgia pinpoint redistrictings).

149 *See* RUSH, *supra* note 52, at 73 ("Analyses of gerrymandering frequently use a state's partisan split as a benchmark for measuring the fairness of a given redistricting scheme.").

150 *See* Davis v. Bandemer, 478 U.S. 109, 127 (1986) (declaring that "the claim made by the appellees in this case is a claim that the 1981 apportionment discriminates against Democrats on a *statewide* basis" (emphasis added)).

151 *See id.* at 115 (noting that in the 1982 elections, the Democratic share of the vote for State House seats was 51.9% of the vote, but only 43 of the 100 elected representatives were Democrats).

152 *Id.* at 133.

As opposed to looking at discrimination in an "individual district," the majority opinion in *Bandemer* chose to focus on statewide discrimination against Democrats.[153] Even as the Court's approach to racial gerrymandering evolved into a district-based analysis over the next two decades,[154] the Court continued to follow the statewide approach in both of its subsequent rulings on political gerrymandering. *Vieth* addressed a Republican political gerrymander by examining the partisan divide in the statewide congressional delegation,[155] and Justice Kennedy assessed the degree of partisanship in *LULAC* in terms of "statewide party power."[156] Lower courts followed the Supreme Court's lead and assessed political gerrymandering in statewide terms.[157]

Assessing discrimination based on party affiliation through a statewide lens is essentially fatal to any political gerrymandering claim. Even in states where one party is dominant,[158] the minority party may still garner a significant percentage of the vote, often elects a strong minority of representatives, and is active in state politics.[159] Because *Bandemer* indicates that a successful political gerrymandering claim must show that a political group is "shut out of the political process as a whole,"[160] the mere presence of minority

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[153] *See id.* at 127 (declaring that "the appellees' claim, as we understand it, is that Democratic voters over the State as a whole, not Democratic voters in particular districts, have been subjected to unconstitutional discrimination").

[154] *See infra* Part IV.A (discussing the potential use of doctrines developed in racial gerrymandering cases in future political gerrymandering claims).

[155] Vieth v. Jubelirer, 541 U.S. 267, 327–28 (2004) (Stevens, J., dissenting) (distinguishing the plaintiffs' statewide claim and emphasizing a more valid district-based claim).

[156] League of United Latin Am. Citizens (LULAC) v. Perry, 548 U.S. 399, 419 (2006).

[157] The district court in *Vieth*, for example, noted:

> Although [a political gerrymander] involves, to a certain extent, the manipulation of individual district lines, the injury is done to the entire identifiable political group. The constitutional injury lies not in inequality among various individual districts, but rather in the configuration of the districts as a whole when they serve to disadvantage a certain class of voters.

Vieth v. Pennsylvania, 188 F. Supp. 2d 532, 540 (M.D. Pa. 2002). *See also* Marylanders for Fair Representation v. Schaefer, 849 F. Supp. 1022, 1039 (D. Md. 1994) (beginning its analysis of the discriminatory effects prong of the *Bandemer* test with emphasis that it concerns "*statewide* political gerrymandering" (emphasis added)); Badham v. Eu, 694 F. Supp. 664, 672 (N.D. Cal. 1988), *aff'd mem.*, 488 U.S. 1024 (1989) (noting that "*California Republicans* represent so potent a political force that it is unnecessary for the judiciary to intervene" (emphasis added)).

[158] *See, e.g.*, Burdick v. Takushi, 504 U.S. 428, 442 (1992) (Kennedy, J., dissenting) (noting that in Hawaii, "one party, the Democratic Party, is predominant").

[159] *See Badham*, 694 F. Supp. at 672 (discussing the extensive influence of the Republican Party in California despite being the target of a statewide gerrymander).

[160] *See* Davis v. Bandemer, 478 U.S. 109, 139–40 (1986) (analogizing the political gerrymandering inquiry to the Court's approach to race-based equal protection claims, which requires that the group be "shut out of the political process"). In her concurring opinion, Justice O'Connor interpreted the controlling opinion

representation in government is enough to defeat such a claim.[161] As Richard L. Engstrom observed, "[T]he effects portion of the *Bandemer* test . . . is impossible for the supporters of one of the two major parties to meet."[162] Because fellow members of the group claiming that a gerrymander discriminated against them can be elected elsewhere in the state, Engstrom's criticism accurately represents the statewide approach's ineffectiveness.[163]

The statewide approach ignores the actual effects of political gerrymanders. The victims of political gerrymanders are not the marginalized statewide political parties; these groups will almost certainly be represented in some capacity at the state capitol or in Washington.[164] The real victims are the marginalized voters in the districts most affected by egregious partisan gerrymanders. However, courts that assess political gerrymanders from a statewide perspective allow the rights of those being discriminated against to be ignored because a statewide group will still receive significant representation in the legislature.[165] Furthermore, political groups are made up of individuals, and the equal protection claim itself was intended to protect individual rights.[166] Courts taking the statewide approach overlook the rights of individuals, who experience the effects of the gerrymander in their own

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as seemingly "requir[ing] that the political group be 'essentially . . . shut out of the political process' before a constitutional violation will be found." *Id.* at 158 (O'Connor, J., concurring) (citation omitted).

[161] *Badham*, 694 F. Supp. at 672.

[162] Richard L. Engstrom, *Missing the Target: The Supreme Court, "One Person, One Vote," and Partisan Gerrymandering*, *in* REDISTRICTING IN THE NEW MILLENNIUM 313, 324 (Peter F. Galderisi ed., 2005).

[163] *Id.*

[164] *See Bandemer*, 478 U.S. at 115–16 (noting that Democrats maintained substantial statewide political power); League of United Latin Am. Citizens (LULAC) v. Perry, 548 U.S. 399, 419 (2006) (justifying the 2003 Texas gerrymander "as making the party balance more congruent to statewide party power," despite significantly decreasing the number of Democrats in the Texas congressional delegation).

[165] One California district court demonstrated the significance of a party's statewide power in political gerrymandering claims:

> Chief among our observations is our undisputed knowledge that California Republicans still hold 40% of the congressional seats, a sizeable bloc that is far more than mere token representation. . . . We also note that California has a Republican governor, and one of its two senators is a Republican. Given also that a recent former Republican governor of California has for seven years been President of the United States, we see the fulcrum of political power to be such as to belie any attempt of plaintiffs to claim that they are bereft of the ability to exercise potent power in "the political process as a whole" because of the paralysis of an unfair gerrymander.

Badham, 694 F. Supp. at 672.

[166] *See* Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 351 (1938) ("It is the individual who is entitled to the equal protection of the laws . . . .").

individual districts.[167] Therefore, a statewide perspective to judging political gerrymanders ignores the true victims of the partisan gerrymander because assessing a party's statewide strength says nothing about whether an individual district was gerrymandered.[168]

The established political gerrymandering claim is even less effective at properly assessing a gerrymandering plan's harms when the gerrymander is a pinpoint redistricting. When the actual effects of a gerrymander are limited to a small portion of the state, assessing the representational harms by looking at statewide figures is misguided and irrelevant. Georgia's pinpoint redistricting shows the disconnect between the current approach of assessing the effects of partisan gerrymanders on political groups and individuals who are actually harmed. The interests of Georgia's Democratic voters, a political group that encompasses all of the party's voters or affiliated members throughout the state, were only marginally affected by Senate Bill 386 because they continued to be represented by twenty-two out of Georgia's fifty-six state senators after the 2006 elections.[169] In reality, the pinpoint redistricting discriminated against a smaller group consisting of Democratic voters within District 46.[170] This particular group, which came within less than 2,000 votes of victory in 2004,[171] was genuinely affected by the legislature's manipulation of their district to harm the Democratic candidate's prospects in the upcoming election.[172] Under *Bandemer* and its progeny, the pinpoint redistricting of District 46 would not rise to the level of a constitutional violation; the Democrats were not "shut out of the political process"[173] because the party as a whole maintained some representation statewide.[174] On a local level, however, the Democrats of the affected districts were "shut out" of the political process—the pinpoint redistricting destroyed the strong chance they had of

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[167] *See supra* notes 135, 142 (discussing the effects of pinpoint redistricting on voters in an individual district).

[168] *See* Issacharoff, *supra* note 56, at 603–04 (observing that "a broad-level measure of statewide support provides little specific information about whether any particular district was gerrymandered").

[169] Georgia Secretary of State, Georgia Election Results, Official Results of the Tuesday, November 07, 2006 General Election http://sos.georgia.gov/elections/election_results/2006_1107/swgasenate.htm (last visited Sept. 26, 2009).

[170] *See* Kidd v. Cox, No. 1:06-CV-0997-BBM, 2006 U.S. Dist. LEXIS 29689, at *7–*8 (N.D. Ga. May 16, 2006) (explaining that the gerrymander's effect was limited to three Senate districts).

[171] *Id.* at *7.

[172] *See supra* text accompanying notes 111–17 (discussing the effects of the Georgia pinpoint redistricting).

[173] Davis v. Bandemer, 478 U.S. 109, 132, 139 (1986).

[174] *See supra* note 169 and accompanying text.

being represented in at least one of the altered districts.[175] Courts need to address pinpoint redistricting by looking at the effects on the district-specific group of party-affiliated voters, rather than allowing their claim to be overshadowed by that party's statewide voters, who suffered a comparatively marginal injury.[176]

The unique circumstances of pinpoint redistricting not only permit but *require* a different analysis than the statewide approach pursued by the Supreme Court in *Bandemer* and its progeny. When the Court allowed the Indiana gerrymander in *Bandemer*, the Court noted, "Statewide . . . the inquiry centers on the voters' direct or indirect influence *on the elections of the state legislature as a whole*."[177] The Georgia State Senate's pinpoint redistricting, however, only affected elections to the state legislature in three districts.[178] Where the discrimination is suffered by voters in individual districts, but there is almost no statewide effect, the logic of the statewide political gerrymandering approach simply does not apply. Under a claim based on *Bandemer*, changes to a small group of districts would most likely be irrelevant because of the state-wide strength of the political party.[179] Pinpoint redistricting must therefore be distinguished from previous political gerrymandering claims and analyzed under a standard that recognizes its unique qualities.

B. The End of Self-Correction

In her concurrence to the *Bandemer* decision, Justice O'Connor argued that political gerrymandering claims should be declared nonjusticiable and that such matters belong in the domain of state legislatures.[180] Outlining one of the

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[175] *See supra* notes 115–117 and accompanying text. Republican candidates were victorious in all three of the districts affected by the pinpoint redistricting. Georgia Secretary of State, *supra* note 169.

[176] *See supra* note 169 and accompanying text.

[177] *Bandemer*, 478 U.S. at 133 (emphasis added).

[178] *Kidd*, 2006 U.S. Dist. LEXIS 29689, at *8.

[179] *See supra* note 165 (noting the weight a district court gave to a political party's statewide strength).

[180] *See Bandemer*, 478 U.S. at 144 (O'Connor, J., concurring) ("I would hold that the partisan gerrymandering claims of major political parties raise a nonjusticiable political question that the judiciary should leave to the legislative branch as the Framers of the Constitution unquestionably intended."). Justice O'Connor brought a unique perspective to the Court's evaluation of political gerrymandering. Prior to her appointment to the Court by President Reagan in 1981, Justice O'Connor was a Republican state senator in her home state of Arizona. At the time of the *Bandemer* decision, she was the only member of the Court to have served in one of the "political branches" and was intimately familiar with the partisan nature of business in a state legislature. For a fascinating account of Justice O'Connor's politics, see JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 141–44 (2007).

most compelling reasons for judicial non-interference with political gerrymandering, Justice O'Connor expressed her view that political gerrymandering was a "self-limiting enterprise."[181] She believed that the negative effects of a political gerrymander could be effectively remedied through avenues other than a constitutional challenge, particularly the political process itself.[182] Justice O'Connor explained the potential for a political gerrymander to be self-defeating:

> In order to gerrymander, the legislative majority must weaken some of its safe seats, thus exposing its own incumbents to greater risks of defeat . . . . Similarly, an overambitious gerrymander can lead to disaster for the legislative majority: because it has created more seats in which it hopes to win relatively narrow victories, the same swing in overall voting strength will tend to cost the legislative majority more and more seats as the gerrymander becomes more ambitious.[183]

In the context of decennial statewide redistricting, there is merit to Justice O'Connor's theory of self-correction.[184] Statewide gerrymanders are vulnerable to being overcome by three factors: (1) potential political backlash against the redistricting party; (2) the likelihood of the gerrymander overextending itself; and (3) the probability that the gerrymander can be overcome over the course of the decade. All three of these realities act as checks on partisan gerrymandering by weakening their effectiveness and sustainability. Pinpoint redistricting, however, undermines all three of these principles that support Justice O'Connor's theory.

1. Political Backlash and Accountability

Political backlash, whether actual or potential, acts as perhaps the most important check on partisan gerrymandering by ensuring the redistricting

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[181] *Bandemer*, 478 U.S. at 152 (O'Connor, J., concurring).

[182] *See id.* ("There is no proof before us that political gerrymandering is an evil that cannot be checked or cured by the people or by the parties themselves.").

[183] *Id.* (citations omitted). For a prophetic example that demonstrated the accuracy of Justice O'Connor's analysis, see *infra* note 184.

[184] Justice O'Connor's view was vindicated by an egregious case of partisan overstretch in Georgia after the 2000 census, where a Democratic gerrymander actually led to the defeat of prominent Democratic backers of the plan and a Republican majority in the State Senate in the first election after its implementation in 2002. Pamela S. Karlan, Georgia v. Ashcroft *and the Retrogression of Retrogression*, 3 ELECTION L. J. 21, 29 (2004). This gerrymander was the subject of the Supreme Court's decision in *Georgia v. Ashcroft*, 539 U.S. 461 (2003). Justice O'Connor wrote the majority opinion in *Ashcroft*; appropriately, the results of the gerrymander in the 2002 elections supported her faith in self-correction.

party's accountability to their constituents.[185] Public reactions to decennial statewide partisan gerrymandering, especially mid-decade redistricting, are almost universally negative. The mid-decade congressional redistrictings in Texas in 2003 and, to a lesser extent, Georgia in 2005 attracted national attention, were almost universally condemned in the press, and met ridicule and disapproval from the voting public.[186] Furthermore, while some partisan actors feel that the benefit of securing advantages for their party through mid-decade redistricting outweighs the cost of bad publicity,[187] the fear of political backlash causes many politicians to restrain their impulses to engage in such politically risky behavior.[188] The potential political price of retaliating for Republican mid-decade redistricting efforts discouraged many Democratic politicians in other states from moving forward with mid-decade redistrictings of their own.[189] Accountability to the voting public thus acts as a deterrent to gerrymandering.

Pinpoint redistricting, however, destroys any significant political accountability to the voters because it minimizes the political backlash. Because the gerrymander is limited to a small part of the state, it is unlikely that there will be a widespread negative reaction to the legislature's manipulations. Pinpoint redistricting therefore gives politicians the opportunity to achieve partisan goals through gerrymandering without hesitating at the possibility of a public relations nightmare. In Georgia, the pinpoint redistricting of Senate District 46 attracted barely any attention outside of Athens (especially compared to the statewide mid-decade redistricting of the previous year),[190] and the Republicans accomplished their

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185 *See* Richard H. Pildes, *The Constitution and Political Competition*, 30 NOVA L. REV. 253, 256 (2006) (noting the urgent need to protect "the electoral accountability of officeholders to voters" in light of *LULAC*).

186 *See, e.g.*, Jeffrey Toobin, *Drawing the Line: Will Tom DeLay's Redistricting in Texas Cost Him His Seat?*, NEW YORKER, Mar. 6, 2006, at 32, 37 (quoting Samuel Issacharoff as saying that the common perception of the Texas mid-decade redistricting is that it was a "national scandal"); *see also supra* text accompanying notes 140, 143 (discussing the political backlash against the Texas and Georgia mid-decade congressional redistrictings).

187 *See* BICKERSTAFF, *supra* note 74, at 126–27 (discussing Republican attempts to promote a mid-decade redistricting plan in Texas despite statewide "negative PR").

188 *See* Jacobson, *supra* note 140, at 1175 ("Despite being pressured a bit by national party leaders, many state lawmakers seem to be taking the bad press that new redistricting proposals are generating as a warning—even in cases where their own party could benefit from a new map.")

189 *See* Babington, *supra* note 94, at A7 (noting some Democratic politicians' unwillingness to engage in mid-decade redistricting in retaliation of Republican efforts in Texas and Georgia for fear of stoking controversy and voter outrage).

190 *See supra* note 143.

goal of securing a vulnerable seat.[191] By eliminating any substantial political risk and accountability, the subtlety of pinpoint redistricting makes it even more harmful than mid-decade partisan gerrymanders conducted statewide.

2. *Overextension*

As Justice O'Connor explained, a redistricting party can fall victim to overextension when it spreads out friendly partisan voters over too many districts to maximize its advantage.[192] While the redistricting party may be aiming for political advantage through such a gerrymander, districts drawn with only a slim majority of friendly voters can backfire as the opposing party's voters are able to overcome these tenuous majorities.[193] A party's own ambition can therefore lead to its demise.[194]

Pinpoint redistricting can eliminate this weakness of partisan gerrymandering. There is little risk of overextension because the scope of the gerrymander is so small. For example, the two state senate districts mainly affected by the Georgia pinpoint redistricting previously consisted of the competitive District 46 and the solidly Republican District 47.[195] The pinpoint redistricting turned both of these districts into secure Republican seats without risking either one; the Republican voters brought into the formerly competitive District 46 came from a district where the Republican candidate won over 70% of the vote in 2004.[196] Rather than distributing friendly voters throughout the state, Republican state legislators were able to pick their battlefield and shift the boundaries in an area where there was no risk of overextension.

3. *The Element of Time*

Justice O'Connor's insistence that gerrymandering is "self-correcting"[197] also depends upon the element of time. While a decennial statewide

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191 *See supra* text accompanying notes 111–117.

192 Davis v. Bandemer, 478 U.S. 109, 152 (1986) (O'Connor, J., concurring).

193 *See* Lublin & McDonald, *supra* note 2, at 155 ("The failure of the Georgia Democrats, who had won legislative majorities with a minority of votes in several elections during the 1990s, to hold on to their majority in 2002 despite aggressive efforts to protect it through redistricting seemingly confirms [Justice O'Connor's] assertion [that partisan gerrymanders are 'self-limiting'].").

194 *Bandemer*, 478 U.S. at 152 (O'Connor, J., concurring).

195 *See supra* notes 99–102, 111–17 and accompanying text.

196 Kidd v. Cox, No. 1:06-CV-0997-BBM, 2006 U.S. Dist. LEXIS 29689, at *7 (N.D. Ga. May 16, 2006). In 2006, Republican candidates won the races in Districts 46 and 47 by double-digit margins. Georgia Secretary of State, *supra* note 169.

197 *See supra* text accompanying note 181.

redistricting can give a major advantage to the redistricting party, the variable of time, encompassing shifts in political fortunes, ensured that the system could not be permanently rigged.[198] Over the course of a decade in an unchanged system, control of the electoral process shifts from the powerful parties to the people as the effects of the initial partisan gerrymander gradually erode through population shifts and political trends.[199] Adam Cox has called this "beneficial uncertainty."[200] Arguing for limiting redistricting to once a decade, Cox observes that redistricting multiple times in a decade allows state legislators to consistently adapt a state's district boundaries to prevent the effects of variations in voters' preferences.[201]

Legislators can do everything in their power to manipulate district lines most favorably to their party at the start of a decade, but their power to control voters over time is limited for several reasons. First, politics is unpredictable. A party that has been suppressed throughout the state or a veteran politician in a supposedly secure district can face a sudden turn in fortune and be swept in or out of power by events no one could have predicted when the district lines were drawn.[202] This happened on a national scale in 2006; many believed that congressional districts were so heavily gerrymandered in favor of Republicans that even a tidal wave of Democratic support could not give the Democrats a majority.[203] Instead, Democrats scored victories in many traditionally conservative or Republican districts.[204] Second, shifts in political, geographical, or socioeconomic factors can overcome a political gerrymander

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198 *Cf.* Michael J. Kasper, *The Almost Rise and Not Quite Fall of the Political Gerrymander*, 27 N. ILL. U. L. REV. 409, 424–25 (2007) (arguing that the mood of the voting public can overcome gerrymandering).

199 Cox, *supra* note 70, at 772; s*ee also* Levitt & McDonald, *supra* note 97, at 1276 ("Natural population shifts over the course of a decade inject a degree of uncertainty into the broad calculations of those who draw the lines, and generally moderate the effects of an initial redistricting.").

200 Cox, *supra* note 70, at 769.

201 *Id.* at 770.

202 For example, Republican Congressman Mark Foley represented a gerrymandered district in South Florida that was considered securely Republican with a very conservative bent. Nonetheless, a high-profile scandal forced his resignation in 2006, and one of the more conservative districts in Florida went to a Democrat in that year's election. Josh Kraushaar, *GOP Sees Shot at Regaining Foley's Former Seat*, POLITICO, Feb. 28, 2007, http://www.politico.com/news/stories/0207/2954.html.

203 *See* Klain, *supra* note 1, at 75 (noting that, after *LULAC*, "any remaining hope that enough congressional races would be competitive in 2006 to change the balance of power in the House seemed all but extinguished"); McDonald, *supra* note 91 (noting that extreme partisan gerrymandering "has contributed to a reduction in electoral competition to the point where we are wondering if the Democrats will win the 15 seats they need to gain majority control [in] the House, despite President Bush's approval rating dropping to the 30s").

204 Klain, *supra* note 1, at 75–76.

drawn to conditions that existed at the time the map was drawn.[205] Even an initially successful gerrymander can result in a majority for the opposition party several years after it is implemented.[206] This "beneficial uncertainty"[207] gradually allows the voting population to overcome the manipulative actions of their representatives.

The advent of pinpoint redistricting, however, eliminates unpredictability. Legislators can now halt "self-correcting" trends against partisan gerrymanders by identifying threats to their parties' candidates or incumbents in districts that are showing signs of becoming more competitive and conducting the political equivalent of a surgical strike. They can shift the lines of an isolated group of districts to eliminate the threat of meaningful competition.[208] Since legislators can change the lines at any time and in any part of the state that they want, self-correction can be stopped in its tracks because elections are no longer unpredictable. Pinpoint redistricting therefore makes Justice O'Connor's theory of self-correction obsolete.[209] Political players can undermine any natural self-correction by manipulating voters' emerging chances to elect new representatives.[210] The emergence of pinpoint redistricting has dealt a fatal blow to the logic of Justice O'Connor's theory that political gerrymandering is a "self-limiting enterprise."[211]

C. Reestablishing the Bandemer *Stopgap*

The rise of mid-decade redistricting, coupled with the Supreme Court's acquiescence, allows partisan-minded legislators to redraw district lines to the

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[205] *See* Cox, *supra* note 70, at 771–72 (discussing the role of shifts in parties' political fortunes, geographic factors, voting trends, and other influences in eroding the effects of a partisan gerrymander).

[206] *See, e.g.*, Frank Jossi, *Blood Sport: Redistricting Promises to Be Difficult Again as Lawmakers Await 2010 Census*, SAINT PAUL LEGAL LEDGER CAPITOL REP., Dec. 8, 2008, at 3 ("[T]he myth that a plan to gerrymander the state could create a one-party rule doesn't work, at least not in Minnesota. The [Democratic-Farmer-Labor] plan in the 1990s led to a Republican-led house in 1996 and lasted a decade. The 2000 plan, created by a panel of judges led by a Republican, resulted in a dominant [Democratic-Farmer-Labor] house by 2006.").

[207] *See supra* note 200 and accompanying text.

[208] *E.g.*, Kidd v. Cox, No. 1:06-CV-0997-BBM, 2006 U.S. Dist. LEXIS 29689, at *7–*8 (N.D. Ga. May 16, 2006).

[209] *See* Pildes, *supra* note 185, at 275 (observing that "[m]id-decade redistricting destroys [the] inherent, structural check" of gerrymandering being a self-limiting enterprise); *see also* Cox, *supra* note 70, at 776 (noting that "self-limitation is much weaker where the parties are free to redistrict frequently").

[210] *See* Cox, *supra* note 70, at 775 (noting that a ban on mid-decade redistricting "will prevent parties in control of the redistricting process from frequently adjusting district boundaries to shore up their control in districts where their margin of victory has eroded or is otherwise dangerously slim").

[211] *See supra* text accompanying notes 181–183.

smallest detail with virtually no fear of recrimination from federal courts.[212] The Supreme Court's most recent cases regarding political gerrymandering make pinpoint redistricting a much more attractive option because the Court stubbornly continues to look at political gerrymanders through a statewide lens. The *LULAC* decision in particular opened the floodgates for legislators to redistrict at will[213] and practically destroyed the deterrent effect that previously prevented partisan gerrymanders from going too far.

Bandemer held that an unconstitutional political gerrymander could be found only when a gerrymander arranged the electoral system "in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole."[214] This high threshold established what some have called an "unmanageable standard" for finding a political gerrymander to be unconstitutional.[215] While *Bandemer*'s standard imposed a heavy burden for political gerrymandering plaintiffs, its ambiguity forced partisan-minded legislators to be cautious; at any point, the Court could have declared a particularly zealous partisan gerrymander unconstitutional.[216] Professor Richard Hasen interpreted the *Bandemer* decision's tack as an effective strategic move: by allowing political gerrymandering claims to be justiciable with an extremely high standard, Hasen argued, *Bandemer* "serves as a backstop (and perhaps as a deterrent) to police the most egregious forms of partisan gerrymandering."[217] In essence, the threat of judicial intervention can be just as effective as intervention itself.[218]

In his 2005 assessment of the state of the political gerrymandering claim, Nathaniel Persily suggested that redistricters defending their plan "should beware of [arguing that their plan was based upon partisanship rather than race] because in a nearby thicket lies the Supreme Court, perhaps with a new rule against partisan gerrymandering that will force them back to the drawing board."[219] However, any deterrent effect produced by the fear of judicial

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212 *See supra* text accompanying note 96.

213 *See* BICKERSTAFF, *supra* note 74, at 387 ("[T]he door has been opened by the Supreme Court for mid-decade redistricting by state and local governments nationwide.").

214 Davis v. Bandemer, 478 U.S. 109, 132 (1986).

215 RICHARD L. HASEN, THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM *BAKER V. CARR* TO *BUSH V. GORE* 70 (2003).

216 *See infra* text accompanying note 219 (*quoting* Persily, *supra* note 7, at 89).

217 HASEN, *supra* note 215, at 71. Maintaining this "unmanageable standard" with the option to intervene as a deterrent to political gerrymandering may have been Justice Kennedy's motive for maintaining the justiciability of political gerrymandering claims in *Vieth* and *LULAC*.

218 *Id.*

219 Persily, *supra* note 7, at 89.

intervention ended with *LULAC*, when the Court allowed the most egregious partisan gerrymander on record.[220] The fear of judicial intervention, which served as a deterrent to particularly excessive partisan gerrymanders,[221] essentially no longer exists.[222] As Michael Kasper ominously put it, "after *LULAC*, the political gerrymandering claim is dead in all but name."[223]

Pinpoint redistricting presents courts with an opportunity to breathe life back into the political gerrymandering claim by shifting from a statewide to a district-based approach. Because the effects of pinpoint redistricting are limited to a small number of isolated districts, courts would have to discard much of the rationale underlying past gerrymandering claims and formulate a new approach focusing on harms produced by partisan gerrymanders in districts rather than entire states. This would restore the stopgap that *Bandemer* established, *Vieth* maintained, and *LULAC* destroyed. The potential for judicial intervention can be revived as an important check on overzealous legislators hoping to redistrict the opposing party into powerlessness.[224] By creating and applying a district-based standard to instances of pinpoint redistricting, the value of the political gerrymandering claim would gain a firmer foundation and again force state legislators to act cautiously when redrawing the lines.

IV. ESTABLISHING A DISTRICT-BASED STANDARD

The advent of pinpoint redistricting presents an opportunity to depart from the statewide view of political gerrymandering claims and formulate a new district-based approach, which could evolve into a broader application to all instances of political gerrymandering. This Comment, reacting to pinpoint redistricting, proposes incorporating and adapting the Supreme Court's gerrymandering jurisprudence to formulate a new and effective district-based standard: a severe political gerrymander, identifiable by the extremely unusual nature of its implementation, would be unconstitutional if partisan intent

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220 *See supra* Part II.B.

221 *See supra* text accompanying note 217 (noting the "deterrent" effect of *Bandemer*).

222 *See supra* text accompanying note 96 (observing that majority parties in state legislatures feel that they can "redraw districts to their advantage with abandon" in light of the Texas mid-decade redistricting).

223 Kasper, *supra* note 198, at 423. In its current state, the political gerrymandering claim is largely seen as a lost cause. *See, e.g.*, Chemerinsky, *supra* note 2, at 343 (observing that after *Vieth* and *LULAC*, "it is hard to imagine any successful challenge when the political party controlling a legislature draws districts to maximize its safe seats").

224 *See supra* text accompanying note 219.

guided every major aspect of drawing the new district lines and the gerrymander resulted in "active degradation" of a political group's electoral strength in a specific district through substantial weakening of the group's political performance in successive elections. Although this new standard is tailored to address the problem of pinpoint redistricting, it can serve as a model for future statewide political gerrymandering claims.

This Part first discusses how the *Shaw* line of cases can be integrated into the realm of political gerrymandering, as suggested by Justice Stevens in his dissent to *Vieth*, and uses the unusual circumstances of pinpoint redistricting to create a potential district-based standard for detecting unconstitutional gerrymanders. The next section proposes adapting the *Bandemer* standard to account for the unique nature of pinpoint redistricting and incorporating its assessment of the effects of a gerrymander into this new standard. The third section looks at the views of Justice Kennedy, the most crucial vote on the current Court, and concludes that the specific circumstances of pinpoint redistricting could satisfy his requirements for an appropriate standard. The final section integrates these sources into a district-based standard that would effectively address pinpoint redistricting and could serve as the basis for a more effective universal political gerrymandering standard.

A. "Circumstantial Bizarreness": Adapting Racial Gerrymandering Jurisprudence

The most promising and appropriate source to draw from in formulating a district-based political gerrymandering standard is the Supreme Court's racial gerrymandering jurisprudence, which now looks at individual districts rather than statewide plans. Unlike its relatively weak approach to political gerrymandering, the Supreme Court has acted much more aggressively against attempts to pack and crack minority voters through racial gerrymandering.[225] State legislators, especially in states with a history of discrimination, had long engaged in redistricting practices clearly aimed at diluting the strength of or outright excluding minority voters.[226] The Voting Rights Act of 1965, as well as its subsequent amendments and judicial interpretations, require that minority

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[225] Courts can better identify the harms of racial gerrymandering because racial groups are far more easily defined than political groups, and this has translated to a stronger and clearer limitation on racial gerrymandering. RUSH, *supra* note 52, at 5–6.

[226] *See* Gomillon v. Lightfoot, 364 U.S. 339, 340 (1960) (striking down an "uncouth twenty-eight-sided figure" in a new districting plan obviously drawn to exclude black voters from a district in Tuskegee, Alabama).

voters in these states be given the opportunity to elect representatives of their choice,[227] which led to a number of oddly shaped districts spanning large swaths of territory, gathering dispersed minority voters into a district where they could constitute a majority.[228] In the 1990s, in a line of cases emanating from *Shaw v. Reno*,[229] the Supreme Court began addressing bizarrely shaped individual districts that litigants claimed were unconstitutionally based on racial factors.[230] The Court developed a district-based standard to apply to these claims, declaring that race could not be the "predominant factor" in drawing the boundaries of the district.[231] For a district to be unconstitutional, all other factors must have been subordinated to race.[232]

The claims raised in the *Shaw* cases arose from obvious indications of racial gerrymandering through the shapes of challenged districts. In *Shaw*, the Court recognized a cause of action under the Equal Protection Clause when the redistricting legislation was "so extremely irregular on its face" that it could only be viewed as gerrymandering voters on the basis of race.[233] The irregularity that prompted the Court's recognition of a potential equal protection violation was the extremely unusual or "bizarre" shape of the district.[234] In essence, the appearance of a district was an indicator or warning sign of discrimination.

In his dissent in *Vieth*, Justice Stevens wished to align the Court's approach to political gerrymandering with its progress in the arena of racial gerrymandering by adapting the *Shaw* line of cases' district-based standard to political gerrymandering cases.[235] Stevens proposed that a state legislature has

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227 DAVID T. CANON, RACE, REDISTRICTING, AND REPRESENTATION: THE UNINTENDED CONSEQUENCES OF BLACK MAJORITY DISTRICTS 72–73 (1999).

228 Engstrom, *supra* note 27, at 11.

229 Shaw v. Reno, 509 U.S. 630 (1993).

230 *Id.*; *accord* Easley v. Cromartie, 532 U.S. 234 (2001); Bush v. Vera, 517 U.S. 952 (1996); Miller v. Johnson, 515 U.S. 900 (1995).

231 *Easley*, 532 U.S. at 241.

232 *Miller*, 515 U.S. at 916. Ironically, these gerrymandering claims were directed *against* districts that were drawn to provide an advantage to minorities who had been discriminated against in the past. Engstrom, *supra* note 27, at 59.

233 *Shaw*, 509 U.S. at 642.

234 *Id.* at 644.

235 *See* Vieth v. Jubelirer, 541 U.S. 267, 327 (2004) (Stevens, J., dissenting) (arguing that "racial and political gerrymanders are species of the same constitutional concern"). Two of the other dissenters, Justices Souter and Breyer, also proposed standards to govern political gerrymandering claims. Justice Souter advocated a five-part test that the plaintiffs would have to meet with regard to individual districts, including violations of "traditional districting principles," drawing a more acceptable hypothetical district, and demonstrating intent to pack or crack the plaintiff's political group. *Id.* at 347–51 (Souter, J., dissenting).

a "fundamental duty to govern impartially"[236] and argued that political affiliation should not be used to exclude voters from districts.[237] Stevens's *Shaw*-based proposal for a standard would invalidate a political gerrymander if "the legislature allowed partisan considerations to dominate and control the lines drawn, forsaking all neutral principles."[238]

Expanding upon Justice Stevens's proposal, the *Shaw* line of cases' methods of indicating potentially unconstitutional use of race could be adapted to craft an effective and manageable standard to detect a potentially unconstitutional political gerrymander. As the Court noted in *Shaw*, the redrawing of district lines is "one area in which appearances do matter."[239] The appearances that matter in pinpoint redistricting would not be the appearance of the district itself, but the *circumstances under which it was drawn*. The discriminatory intent wing of a district-based standard would consist of a circumstantial analog to the *Shaw* cases' rejection of "bizarre" district shapes.[240]

To find that unconstitutional political gerrymandering occurred, a predominant motivation of partisanship would have to be combined with extremely unusual circumstances directed toward accomplishing that partisan goal. This would be an analog to the "extreme irregularity" of a district shape in a *Shaw* claim.[241] Those unusual conditions would be the circumstances of a pinpoint redistricting: a political gerrymander in the middle of a decade with the limited effect of changing the boundaries of an isolated district or group of districts. This "circumstantial bizarreness" would apply to the Georgia state legislature's unique pinpoint redistricting, which contained three irregular characteristics: (1) it was done mid-decade, (2) it was isolated to three districts rather than the whole state, and (3) the city of Athens, Georgia, known to be a Democratic stronghold, was suddenly split down the middle.[242] These bizarre characteristics are indicators of a strong discriminatory intent for partisan

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Justice Breyer proposed overturning a partisan gerrymander resulting in "unjustified entrenchment," in which a political minority is only in power because of the partisan manipulation and no other factors. *Id.* at 360–62 (Breyer, J., dissenting) (emphasis omitted). However, unlike Justice Stevens's proposal, neither suggestion draws upon the Court's tested racial gerrymandering jurisprudence. Both proposals therefore fail to utilize the most effective source for developing a district-based standard.

236 *Id.* at 341 (Stevens, J., dissenting).

237 *Id.* at 325.

238 *Id.* at 339.

239 Shaw v. Reno, 509 U.S. 630, 647 (1993).

240 *Id.* at 644.

241 *Id.* at 642.

242 *See supra* Part II.A (describing the circumstances and effects of Senate Bill 386).

purposes, and present the circumstances naturally leading into the inquiry of discriminatory effect.

B. "Active Degradation": Modifying Bandemer

The Supreme Court has emphasized that the discriminatory effect of a partisan gerrymander is the key to finding it unconstitutional. As Professor Mark Rush put it, "A partisan-gerrymander claim . . . requires a showing that the representational opportunity of partisan voters has been denied or impaired as a result of the redrawing of district lines."[243] While the aforementioned adaptation of *Shaw* would assist in detecting the circumstances of an unconstitutional political gerrymander under this proposed standard,[244] *Bandemer*, which remains relevant to any analysis of the political gerrymandering claim,[245] provides the only existing guidance from the Court on what evidence could prove discriminatory effect.[246] Justice White declared that a political gerrymander is not unconstitutional "unless the redistricting does in fact disadvantage it at the polls."[247] Any evidence that would meet Justice White's standard must show "consistent" degradation of a political group's ability to influence the political process;[248] courts and scholars have interpreted this language as saying that a successful political gerrymandering claim must analyze the results of multiple elections.[249]

More than any other factual scenario adjudicated in the past, pinpoint redistricting can meet the requirements of "consistent degradation." In the context of pinpoint redistricting, plaintiffs can show a clear difference in election results in a particular district before and after its alteration, meeting Justice White's evidentiary threshold requiring the results of multiple

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243 RUSH, s*upra* note 52, at 6.

244 *See supra* Part IV.A.

245 *See* Lowenstein, *supra* note 139, at 394 (arguing that, after *Vieth*, "*Bandemer* is still binding precedent").

246 *See* Charles S. Bullock III, *Redistricting: Racial and Partisan Considerations*, *in* LAW AND ELECTION POLITICS: THE RULES OF THE GAME 151, 168 (Matthew J. Streb ed., 2005) (noting that one of the major unsolved issues in the law of political gerrymandering is "what evidence would suffice to win a claim alleging a partisan gerrymander").

247 Davis v. Bandemer, 478 U.S. 109, 139 (1986).

248 *Id.* at 132.

249 As Erwin Chemerinsky noted, "[*Bandemer*] was clear that a single election is not sufficient." CHEMERINSKY, *supra* note 68, at 889. *See also* Pope v. Blue, 809 F. Supp. 392, 396 (W.D.N.C. 1992) ("We note that in *Bandemer* the plurality held that the results of a single election were insufficient to establish discriminatory effect.").

elections.[250] However, pinpoint redistricting goes even further than a decennial political gerrymander because it *actively* degrades a political group's ability to influence the process in a single district by building further partisan advantage upon a plan that already benefits the majority party.[251] In addition to its more focused partisan nature, a political gerrymandering claim based on pinpoint redistricting can much more effectively show this active form of "consistent degradation" by comparing district-specific election results in successive elections.

A new standard tailored to the circumstances of pinpoint redistricting should therefore reveal what this Comment terms "active degradation" of a political group's standing in a single district. The results of successive elections in districts affected by pinpoint redistricting would satisfy the Court's long-established desire to examine the *effects* of a partisan gerrymander to determine its unconstitutionality.[252] Furthermore, this modification of *Bandemer* provides a clearer evidentiary foundation than a pure adaptation of *Shaw* to the political gerrymandering claim. Justice Stevens proposed adapting to political gerrymandering claims the *Shaw* line of cases' idea of preventing "representational harms," which defined the harm of a gerrymander as constituents being represented by an officeholder who felt beholden to those who drew the lines.[253] This rationale is relevant to pinpoint redistricting, as a representative whose district is altered may, as Stevens feared, feel beholden to the party that redrew the lines solely to benefit his own candidacy.[254] However, because pinpoint redistricting affects isolated districts, looking at results in those districts' successive elections gives courts tangible evidence of discriminatory effect. Therefore, a standard focusing on evidence of "active degradation" would be much more manageable.

The Georgia examples provide an excellent demonstration of "active degradation" of a political group's influence in specific districts. The election

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[250] CHEMERINSKY, *supra* note 68, at 889.

[251] *E.g.*, Kidd v. Cox, No. 1:06-CV-0997-BBM, 2006 U.S. Dist. LEXIS 29689, at *7–*8 (N.D. Ga. May 16, 2006).

[252] *E.g.*, *Bandemer*, 478 U.S. at 139.

[253] *See* Vieth v. Jubelirer, 541 U.S. 267, 331 (Stevens, J., dissenting) ("The . . . danger of a partisan gerrymander is that the representative will perceive that the people who put her in power are those who drew the map rather than those who cast ballots, and she will feel beholden not to a subset of her constituency, but to no part of her constituency at all.").

[254] *See id.* at 330 (Stevens, J., dissenting) ("Gerrymanders subvert [the] representative norm [of legislators being elected by voters] because the winner of an election in a gerrymandered district inevitably will infer that her success is primarily attributable to the architect of the district rather than to a constituency defined by neutral principles.").

results in Senate District 46 before and after Senate Bill 386 altered its boundaries show that the Democratic candidate's margin of loss increased from 3.2% under the original boundary lines in 2004 to 11.4% under the altered district boundaries in 2006, clearly indicating that the pinpoint redistricting disadvantaged the Democrats of that district at the polls.[255] The effects of House Bill 1137 provide an even stronger showing of "active degradation" because the results in one of the changed districts, House District 48, involved the same two candidates both before and after the pinpoint redistricting.[256] In both 2004 and 2006, Republican Harry Geisinger defeated Democrat Jan Hackney, but the margin of victory changed from a relatively close 6.8% in 2004 to a decisive 18.2% in 2006.[257] This concrete evidence, combined with the knowledge that the districts were adjusted between elections, is a compelling demonstration of the discriminatory effect of a political gerrymander through results of multiple elections.[258] A court presented with this evidence could certainly see not just *consistent* but *active* degradation of Democratic voters' ability to influence the political process.[259]

C. The Swing Vote: Convincing Justice Kennedy

Justice Kennedy sits at the center of a Supreme Court divided on political gerrymandering. The four dissenters in *Vieth* and *LULAC* supported taking some kind of stand to police political gerrymanders,[260] while the plurality in *Vieth*, followed by Justices Scalia and Thomas in *LULAC*, argued that political gerrymandering is not justiciable at all.[261] Justice Kennedy has effectively

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255 *See supra* text accompanying note 117 (noting the comparison of the margins of defeat for Democratic candidates in Senate District 46 in the 2004 and 2006 elections).

256 *Supra* text accompanying notes 126–128.

257 Georgia Secretary of State, *supra* note 128.

258 As Adam Cox has observed, "continuing losses across several election cycles simply help confirm that the partisan gerrymander, and not other potential causal factors, is responsible for the voter losses observed in the first period." Adam B. Cox, *The Temporal Dimension of Voting Rights*, 93 VA. L. REV. 361, 379 (2007).

259 Davis v. Bandemer, 478 U.S. 109, 132, 133 (1986).

260 The four dissenters in *Vieth* and *LULAC*, Justices Stevens, Souter, Ginsburg, and Breyer, would almost certainly have backed any manageable standard that would provide a meaningful check on partisan gerrymandering. Richard L. Hasen, *Looking for Standards (In All the Wrong Places): Partisan Gerrymandering Claims After* Vieth, 3 ELECTION L. J. 626, 627 (2004).

261 Interestingly, the two most recent appointees to the Court, Chief Justice Roberts and Justice Alito sidestepped the justiciability issue in *LULAC*. League of United Latin Am. Citizens (LULAC) v. Perry, 548 U.S. 399, 492 (2006) (Roberts, C.J., concurring and dissenting) ("The question of whether [any reliable standard for identifying unconstitutional partisan gerrymanders] exists—that is, whether a challenge to a political gerrymander presents a justiciable case or controversy—has not been argued in these cases. I therefore take no position on that question . . . ."). This implies that the justiciability of the political gerrymandering claim may be more secure than it was after *Vieth*; of the current composition on the Court,

straddled the fence: he sided with the dissenters on the justiciability of political gerrymandering claims, but wrote the controlling opinion that upheld both recent plans to go before the Court.[262] While he has never voted to strike down a partisan gerrymander, it was his crucial vote that kept the claim alive in both *Vieth* and *LULAC*.[263] Any political gerrymandering claim that goes before the Court must, above all else, convince Justice Kennedy.[264]

Justice Kennedy has indicated that he is open to the possibility of establishing a judicially manageable standard for adjudicating political gerrymandering claims "within narrowly circumscribed situations."[265] Justice Kennedy's opinion in *LULAC* shows that he is looking for something more than mid-decade redistricting, even if its predominant goal is gaining partisan advantage.[266] However, he cryptically hinted in *LULAC* at what would satisfy his personal, as-yet-unknown standard: "The legislature does seem to have decided to redistrict with the sole purpose of achieving a Republican congressional majority, *but partisan aims did not guide every line it drew*."[267]

Statewide redistricting plans inevitably take numerous factors into account, such as geography, satisfying the Voting Rights Act, and incumbent protection.[268] It would be almost impossible to satisfy Justice Kennedy's desired standard of totally partisan objectives when analyzing a statewide plan. Pinpoint redistricting, however, with its limited scope, motives, and objectives, might meet Justice Kennedy's proposed scenario for an unconstitutional partisan gerrymander. Pinpoint redistricting is focused solely on a small number of districts; there are far fewer considerations in drawing the lines than

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only Justices Scalia and Thomas have explicitly argued that political gerrymandering claims are nonjusticiable. Kasper, *supra* note 198, at 423.

262 *See supra* text accompanying notes 66–69, 83–87 (discussing Justice Kennedy's role in the *Vieth* and *LULAC* decisions).

263 *See supra* Parts I.A and I.B.

264 *See generally* John Gibeaut, *All over the Map: Politics and Law Mix as High Court Weighs Jumping into Gerrymandering Flap*, A.B.A. J., Mar. 2006, at 18, 18–19 (discussing the importance of Justice Kennedy's role as the deciding vote in political gerrymandering cases).

265 Roederer, *supra* note 39, at 389.

266 *See* text accompanying notes 83–85 (discussing Justice Kennedy's rationale in declining to strike down the Texas mid-decade redistricting).

267 League of United Latin Am. Citizens (LULAC) v. Perry, 548 U.S. 399, 417 (2006) (emphasis added).

268 *See* Bush v. Vera, 517 U.S. 952, 963–64 (1996) (discussing various factors used in drawing district boundaries, including incumbency protection, urban centers of districts, racial considerations, and political groupings); *see also LULAC*, 548 U.S. at 417–18 (noting that "mundane and local interests" guided the drawing of some district boundaries).

there are in statewide redistricting.[269] It is therefore much easier to determine that the few lines redrawn in a pinpoint redistricting were solely backed by partisan aims.

Justice Kennedy has also emphasized that clear proof of discriminatory partisan *effect* is key to his approval of an unconstitutional political gerrymandering standard.[270] As the previous section demonstrates, pinpoint redistricting provides clearer, more focused evidence of discriminatory effect than previous statewide claims by comparing before-and-after election results in a district affected by the pinpoint redistricting.[271] For the first time, plaintiffs can demonstrate clear evidence of the effects of a partisan gerrymander through successive election results in a single altered district, uninfluenced by election results throughout the rest of the state.[272] This demonstration can provide Justice Kennedy with his much-desired evidence of discriminatory effect.

D. The District-Based Standard

A judicially manageable standard that would effectively address pinpoint redistricting should incorporate and adapt elements of all of the aforementioned sources: racial gerrymandering jurisprudence and Justice Stevens's dissent in *Vieth*, the *Bandemer* standard, and Justice Kennedy's elusive concept of unconstitutional political gerrymandering. This district-based standard would effectively address pinpoint redistricting and would have a strong focus on both discriminatory intent and effect. Under this standard, a severe political gerrymander, identifiable by the extremely unusual circumstances of its implementation, would be unconstitutional if partisan intent guided every major aspect of drawing the new district lines and resulted in active degradation of a political group's electoral strength in a specific district evidenced by substantial weakening of the group's political performance in successive elections.

This standard is specifically tailored to the factual circumstances of pinpoint redistricting, which can much more easily meet these elements than a

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269 *See* Kidd v. Cox, No. 1:06-CV-0997-BBM, 2006 U.S. Dist. LEXIS 29689, at *8 (N.D. Ga. May 16, 2006) (discussing how the changes implemented by Senate Bill 386 were limited to affected three districts).

270 *See LULAC*, 548 U.S. at 418 ("We should be skeptical . . . of a claim that seeks to invalidate a statute based on a legislature's unlawful motive but does so without reference to the content of the legislation enacted.").

271 *See supra* Part IV.B.

272 *See supra* text accompanying notes 252–257.

statewide redistricting plan. The Georgia examples of pinpoint redistricting would be unconstitutional political gerrymanders under this standard. The Georgia state legislature's minor changes to Senate District 46 and House District 48 were clearly guided by partisanship; in fact, specific partisan aims motivated the lines it drew.[273] Specifically, the newly drawn lines of Senate District 46 fragmented the core Democratic constituency in Athens and the University of Georgia that formerly made up the base of Democratic support in that district[274] and severely degraded the Democratic voters of that district's ability to elect their candidate.[275] The effects prong is also satisfied in both of these situations, demonstrated by the results of successive elections in the affected districts. The margin of victory for the Republican candidate over the Democratic candidate in both Senate District 46 and House District 48 increased from highly competitive margins in 2004 to near-landslide margins in 2006.[276] These election results clearly show active degradation of Democratic voters' electoral potential in the targeted districts because the pinpoint redistricting directly and substantially decreased their chances for success.

CONCLUSION

Pinpoint redistricting presents an opportunity for courts to shift the paradigm of political gerrymandering claims from a statewide perspective to a more appropriate district-based assessment. In his concurrence to the *Vieth* decision, Justice Kennedy refused to consign the political gerrymandering claim to the graveyard, hoping that some "limited and precise rationale" would someday arise to provide a basis for a clear standard.[277] The unique circumstances of pinpoint redistricting finally present that precise rationale for the judiciary to bring the political gerrymandering claim out of the wilderness and develop a workable standard that would provide clearer guidance to courts and litigants. The limited scope of pinpoint redistricting would force courts to consider the impact of gerrymandering in the individual affected districts.

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273 *See supra* Part II.A (discussing the motives of Senate Bill 386 to "crack" a Democratic stronghold and hurt a Democrat's bid for the District 46 seat); *see also* Jones, *supra* note 116, at B1 (discussing how the pinpoint redistricting of Senate District 46 was perceived as a political ploy to help a politically connected Republican candidate win a competitive election).

274 *See supra* note 112.

275 *See* Levitt & McDonald, *supra* note 97, at 1276 n.150 (noting the Georgia pinpoint redistricting's goal of "fragment[ing]" Democratic voters to harm a Democratic candidate's chances of success).

276 *See supra* text accompanying notes 117, 128.

277 Vieth v. Jubelirer, 541 U.S. 267, 306 (2004) (Kennedy, J., concurring).

Pinpoint redistricting emphasizes the fact that the true harms of gerrymandering lie in individual districts and the individuals that reside in those districts rather than entire states, and courts can apply that assessment to individual districts affected in more conventional statewide gerrymanders. Therefore, while this proposed approach is aimed at addressing pinpoint redistricting, it can provide a stepping stone for an effective, judicially manageable district-based standard for all future political gerrymandering claims, focusing on the instances in which gerrymandering does the most damage.

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