Redistricting and Reapportionment

16

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REDISTRICTING AND REAPPORTIONMENT, ELECTION LAW 2002 PUBLISHED BY THE ILLINOIS INSTITUTE FOR CONTINUING LEGAL EDUCATION, THIS 2002 HANDBOOK IS AN UPDATE AND REVISION OF THE 1991 SUPPLEMENT. TO ORDER COPIES OF THE BOOK, PLEASE VISIT WWW.IICLE.COM.

I. [16.1] INTRODUCTION

It is well established that all federal, state, and local electoral district boundaries must be drawn and political representatives apportioned in accordance with the principle of "one person, one vote." *Gray v. Sanders,* 372 U.S. 368, 9 L.Ed.2d 821, 83 S.Ct. 801 (1963). This principle derives from the constitutional requirement that "[r]epresentatives . . . be apportioned among the several States . . . according to their respective Numbers." U.S.CONST. art. I, §2. Courts have interpreted this requirement to mandate that congressional districts contain equal populations. *Wesberry v. Sanders,* 376 U.S. 1, 11 L.Ed.2d 481, 84 S.Ct. 526 (1964). Generally, "one person, one vote" requires that both the apportionment of legislative seats and the configuration of all electoral districts fairly reflect the population so that no one's vote is diluted or "debased." *Id.*; *Reynolds v. Sims,* 377 U.S. 533, 12 L.Ed.2d 506, 84 S.Ct. 1362 (1964) (equal protection clause of Fourteenth Amendment requires states to construct legislative districts substantially equal in population); *Board of Estimate of City of New York v. Morris,* 489 U.S. 688, 103 L.Ed.2d 717, 109 S.Ct. 1433 (1988) (New York City Board inconsistent with equal protection clause of Fourteenth Amendment because equal representation given to boroughs of unequal population); *Fumarolo v. Chicago Board of Education,* 142 Ill.2d 54, 566 N.E.2d 1283, 153 Ill.Dec.177 (1990) (striking down Chicago School Reform Act on equal protection grounds because it provided for unequal voting in local school council elections).

Implementation of this constitutional imperative has produced mixed results. For example, after the 1980 decennial census, government officials in Illinois failed to draw constitutionally proper electoral districts for Congress, the General Assembly, or the Chicago City Council. Accordingly, judicial intervention was required to produce all three plans. *See In re Illinois Congressional Districts Reapportionment Cases,* 704 F.2d 380 (7th Cir. 1983) (history of litigation regarding congressional districting plan); *Rybicki v. State Board of Elections of State of Illinois,* 574 F.Supp. 1082 (N.D.Ill. 1982) (*Rybicki I*) (three-judge panel; state legislative redistricting plan adopted by Redistricting Commission intentionally discriminated against African Americans in the City of Chicago); *Ketchum v. Byrne,* 740 F.2d 1398 (7th Cir. 1984), *on remand,* 630 F.Supp. 551 (N.D.Ill. 1985) (ward map adopted by Chicago City Council in 1981 unfairly discriminated against African Americans and Hispanics).

The same mixed results ensued following the 1990 census. For example, after the General Assembly failed to approve a congressional redistricting plan, a three-judge panel found that both Democratic and Republican maps passed constitutional muster, but chose the Republican map because it resulted in districts more nearly equal in population. *Hastert v. Illinois State Board of Elections,* 777 F.Supp. 634 (N.D.Ill. 1991). In state legislative redistricting, the Illinois Supreme Court initially rejected a map adopted by the Legislative Redistricting Commission because the Commission failed to develop a factual record sufficient for assessing the map's constitutionality, then upheld a slightly modified map. *People ex rel. Burris v. Ryan,* 147 Ill.2d 270, 588 N.E.2d 1023, 167 Ill.Dec. 893 (1991) (*Ryan I*), *following remand,* 147 Ill.2d 270 (1992) (*Ryan II*). *See also Illinois Legislative Redistricting Commission v. LaPaille,* 786 F.Supp. 704 (N.D.Ill.), *aff'd sub nom. Gardner v. Illinois Legislative Redistricting Commission,* 506 U.S. 948, 121 L.Ed.2d 325, 113 S.Ct. 399 (1992) (upholding 1991 Illinois legislative map under Fourteenth Amendment and Voting Rights Act). In the City of Chicago's remapping of its wards, the Seventh Circuit found that the City of Chicago properly classified wards with an absolute majority of white voters as "majority white," rather than "multiethnic" wards. On remand, the trial court found that African Americans were underrepresented in terms of both citizen voting age population and

proportional voting power. *Barnett v. City of Chicago,* 141 F.3d 699 (7th Cir.), *on remand,* 17 F.Supp.2d 753 (N.D.Ill. 1998) (alternative map proposed by African-American voters created better balanced wards than City's map).

While the terms "apportionment" and "redistricting" often are used interchangeably, they are distinct concepts. "Apportionment" generally refers to the allocation of a predetermined number of seats among preexisting political units by means of some rule. For example, seats in the United States House of Representatives are apportioned among the 50 states according to their respective populations. By contrast, "redistricting" refers to the process of creating new political units with distinct geographic boundaries and substantially equal populations. Upon receiving notice of the size of its congressional delegation and census data showing shifts in population within its boundaries, a state redistricts its congressional seats to produce the appropriate number of equally populous political units.

In 1962, in the landmark case of *Baker v. Carr,* 369 U.S. 186, 7 L.Ed.2d 663, 82 S.Ct. 691 (1962), the United States Supreme Court began an era of reform in political redistricting and reapportionment when it held that a state's failure to allocate legislative seats on the basis of its enumerated population raised justiciable constitutional issues. In the years following *Baker,* federal courts struck down many outdated apportionment and districting plans. During the same period, federal courts also entertained numerous challenges to apportionment and districting plans on the grounds that they were motivated by an intent to discriminate against racial and other minority groups. These challenges generally were predicated on the equal protection clause of the Fourteenth Amendment and the Voting Rights Act of 1965, Pub.L. No. 89-110, 79 Stat. 437. *See, e.g., Ketchum v. Byrne, supra.*

In 1986, in *Davis v. Bandemer,* 478 U.S. 109, 92 L.Ed.2d 85, 106 S.Ct. 2797 (1986), the Court opened the door to yet another kind of litigation and electoral reform when it held that political gerrymandering was a justiciable issue. Although it seemed that *Bandemer* might do for political gerrymandering cases what *Baker* did for malapportionment cases, that has not proved to be the case to date. See §16.22 below.

Amendments to the Voting Rights Act passed in 1982 ensured that minority plaintiffs need no longer prove "discriminatory intent" in order to make out a violation of that Act. In recent years, African Americans and Hispanics have made increasing use of this Act to challenge redistricting practices such as "packing" and "fracturing" in attempts to preserve and enhance their political opportunities and power. *Compare Rybicki I* (redistricting plan intentionally discriminated against African Americans and unfairly minimized their voting strength) *with Rybicki v State Board of Elections of State of Illinois,* 574 F.Supp. 1147 (N.D.Ill. 1983) (*Rybicki II*) (applying new "results test" embodied in Voting Rights Act Amendments of 1982, Pub.L. No. 97-205, 96 Stat. 131, to expand relief ordered in *Rybicki I*); *Ketchum v. Byrne, supra* (new Chicago ward map violated Voting Rights Act because it denied African Americans and Hispanics reasonable and fair opportunity to elect candidates of their choice). These kinds of challenges to improper redistricting plans have produced a complex, specialized, and growing body of law. In the last decade, the Supreme Court's jurisprudence has increasingly addressed when a plan may be thrown out for making improper use of racial considerations. In *Shaw v. Reno,* 509 U.S. 630, 125 L.Ed.2d 511, 113 S.Ct. 2816 (1993), and its progeny, the Supreme Court held that although it is not per se unconstitutional for a legislature to create a district with a majority of minority voters, when racial considerations predominate over traditional districting

principles (such as compactness, contiguity of districts, geography, and respect for existing political subdivisions), then the plan is subject to strict scrutiny, and must be narrowly tailored to meet a compelling state interest.

II. APPLICABLE CONSTITUTIONAL AND STATUTORY MANDATES

A. [16.2] Reapportionment of Congressional Seats Among the States

Article I, §2, of the United States Constitution mandates that all but 50 of the seats in the House of Representatives be reapportioned among the states according to their respective populations after each decennial census:

> **[Representatives . . . shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.] The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Numbers of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative.**

Section 2 of the Fourteenth Amendment eliminated the "three fifths" provision of Article I, which had been applied to slaves, and required that "[r]epresentatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State." It also provided that if a state disenfranchised any group of voters other than convicted felons or participants in rebellion, the apportionment of representatives would be adjusted proportionately.

Reapportionment of congressional seats among the states is now determined by the "method of equal proportions." This method apportions 385 of the 435 congressional seats among the 50 states according to their respective populations. The first 50 seats are reserved to ensure that each state receives at least one seat. The method was developed to account for fractional shares of representative seats. The problem of how to account for and compensate a state for its fractional interest in representative seats produced a variety of allocation methods from 1792 until the early 20th century.

The "method of equal proportions" was adopted in 1941 and is codified at 2 U.S.C. §2a. This method takes each of the 385 seats to be allocated sequentially and determines which state will receive each successive seat according to a mathematical formula. This formula determines which of the 50 states is the highest priority recipient of each successive seat allocated. Following the 1990 census, Montana, which lost one of its two seats in the ensuing congressional reapportionment, challenged the constitutionality of the method of equal proportions, on the grounds that Montana's single remaining congressional seat deviated significantly from the ideal population, in violation of the "one person, one vote" principle. In *United States Department of Commerce v. Montana,* 503 U.S. 442, 118 L.Ed.2d 87, 112 S.Ct. 1415, 1426 – 1430 (1992), a unanimous Supreme Court recognized that because district lines may not cross state borders, the

constitutional mandate that each state receive at least one representative inevitably means that some congressional districts will deviate from the "ideal" population. Therefore, all methods of apportioning districts will result in some inequities. The "polestar of equal representation" in Article I, §2, the Court reasoned, does not provide sufficient guidance for a court to determine that there is only one acceptable method of apportioning districts when inequality exists. Therefore, as long as Congress employed in good faith a method that took into account its mandate to apportion districts according to population, Congress' method was entitled to deference.

B. [16.3] Redrawing Congressional Districts in Illinois

Every ten years, after the size of its congressional delegation has been determined by the method of equal proportions, the Illinois General Assembly draws the boundaries of the appropriate number of congressional districts within the state. *See Ryan v. State Board of Elections of State of Illinois,* 661 F.2d 1130, 1135 (7th Cir. 1981) (equitable relief from federal courts needed when General Assembly failed to replace outdated reapportionment plan); *Hastert v. State Board of Elections,* 777 F.Supp. 634, 637 (N.D.Ill. 1991) (same).

The population of each congressional district within a state must be as nearly equal as practicable. *Wesberry v. Sanders,* 376 U.S. 1, 11 L.Ed.2d 481, 84 S.Ct. 526, 530 (1964). No deviation from the equalized district population is permissible if it can reasonably be avoided. *Karcher v. Daggett,* 462 U.S. 725, 77 L.Ed.2d 133, 103 S.Ct. 2653, 2658 (1983). In theory, the General Assembly enacts a plan of congressional districts that remains in effect until the next decennial census provides new population data. In practice, however, the lack of bipartisanship and compromise usually prevents the General Assembly from enacting any plan at all.

If the Illinois General Assembly adjourns in the year following a decennial census without enacting a new plan of congressional districts, voters may bring suit under the equal protection clause of the Fourteenth Amendment and its statutory embodiment, 42 U.S.C. §1981, *et seq.,* as well as the Voting Rights Act, 42 U.S.C. §1971, *et seq.,* to have the old plan declared unconstitutional and obtain a court order that a new plan be adopted.

In *Ryan v. State Board of Elections of State of Illinois, supra,* the Seventh Circuit upheld the right of voters to obtain review of Illinois' outdated congressional districting plan by a three-judge panel under 28 U.S.C. §2284(a). In *Ryan,* the State Board of Elections conceded that retention of the prior, ten-year-old congressional districting plan was unconstitutional. The only issue at trial, therefore, was which of the various proposed redistricting plans should be implemented. *See In re Illinois Congressional District Reapportionment Cases,* 704 F.2d 380 (7th Cir. 1983). Approximately the same procedure obtained following the 1990 census. *Hastert v. Illinois State Board of Elections, supra.*

In contrast, after Illinois lost a seat following the 2000 census, the Illinois General Assembly passed a congressional redistricting plan in 2001. The downstate congressman who lost his seat unsuccessfully challenged the legislature's map in state court on grounds that the newly drawn congressional boundaries were not compact and were politically motivated. In *Phelps v. Illinois State Board of Elections,* No. 01-MR-440 (Circuit Court for the 7th Judicial District, Sangamon County, **Illinois,** Oct. 10, 2001), the court found that "the Illinois constitution does not require that congressional districts be compact," and that political factors are "legitimate legislative

concerns." The federal district court initially assumed parallel jurisdiction over the dispute, on the grounds that it retained jurisdiction over Illinois' congressional redistricting efforts following a settlement in the 1991 redistricting case. *Hastert v. Illinois State Board of Elections,* No. 91-CV-4028, (N.D.Ill. Aug. 20, 2001) (minute order). The federal court later determined that Illinois' congressional reapportionment following the 2000 decennial census meant that the 1991 redistricting order should no longer "have prospective application," released all parties from the 1991 judgment, and terminated the case. *Hastert v. Illinois State Board of Elections*, No. 91-CV-4028 (N.D. Ill. Jan. 25, 2002).

C. [16.4] Redrawing Illinois General Assembly Districts

Article IV of the Illinois Constitution requires that legislative power be vested in a General Assembly consisting of a Senate and a House of Representatives elected from 59 legislative districts and 118 representative districts. Article IV further requires that districts electing representatives to the Illinois General Assembly be redrawn every ten years, in the year following each federal decennial census. Article IV also provides that both legislative and representative districts "shall be compact, contiguous and substantially equal in population." ILL.CONST. art. IV, §3(a). (See §16.39 below for the full text of Article IV, §1.)

Article IV provides that, in the first instance, the state legislature has an opportunity to devise and adopt a plan that redistricts all seats in the Illinois House and Senate in accordance with the requirements of Article IV, §3(a). In practice, after receiving data from the federal decennial census, Democratic and Republican legislators generally develop separate districting plans in consultation with experts. These plans are then embodied in statutes and introduced for passage. In general, it is difficult for either party's plan to pass without compromise and bipartisan support. The General Assembly has never successfully enacted a plan since the adoption of the 1970 Illinois Constitution.

For example, in 1981, after the 1980 decennial census, Republicans and Democrats in the Illinois General Assembly produced separate partisan redistricting plans. The Republican plan was introduced in the House, the Democratic plan in the Senate. Neither of these partisan plans was passed, nor was a compromise plan adopted. In *Rybicki I,* the court speculated that the General Assembly failed to pass a bipartisan plan because Democratic legislators feared that Governor James Thompson, a Republican, might exercise amendatory veto power over the resulting bill. *Rybicki I,* 574 F.Supp. at 1086. Although both the United States and Illinois Supreme Courts have ruled that a redistricting statute falls within a Governor's general veto power (*Smiley v. Holm,* 285 U.S. 355, 76 L.Ed. 795, 52 S.Ct. 397 (1932); *Williams v. Kerner,* 30 Ill.2d 11, 195 N.E.2d 680 (1963)), whether the Governor has amendatory veto power over a redistricting plan passed by the General Assembly is an issue that remains unresolved.

Article IV further provides that if the legislature fails to adopt a redistricting plan by June 30 of the first year following the census, a "Legislative Redistricting Commission" must be formed no later than July 10 to attempt the task. This Redistricting Commission consists of eight individuals appointed by the Speaker and Minority Leader of the Illinois House and the President and Minority Leader of the Illinois Senate, each of whom appoints two members to the Commission. The Commission may not include more than four members from any one political party, nor may it include more than four members who hold seats in the General Assembly. Generally, this implies the creation of a Redistricting Commission with four Democrats and four

Republicans. Because the General Assembly has never produced a map since the ratification of the 1970 Illinois Constitution, a Redistricting Commission has been impaneled following the 1970, 1980, 1990, and 2000 census.

Article IV requires that the Redistricting Commission complete a plan of redistricting by August 10 of the year it is convened. However, only the 1971 Redistricting Commission reached agreement on a new districting plan — although the Illinois Supreme Court subsequently found that the 1971 Redistricting Commission itself was unconstitutionally constituted because the legislative leaders appointed themselves to the Commission. *People ex rel. Scott v. Grivetti,* 50 Ill.2d 156, 277 N.E.2d 881 (1972). In 1981 and 1991, Republican and Democratic members of the Commission split along party lines on both proposals generated. As a result, neither plan was passed. In 2001, neither side even proposed a new districting plan during the time allotted by the state constitution.

If the Redistricting Commission fails to agree on a redistricting plan within the time allowed, Article IV requires that the Illinois Supreme Court provide the Secretary of State with the names of two persons affiliated with disparate political parties no later than September 1. The Secretary of State then chooses one of these two persons by lot to become the ninth member of the Commission. The nine-member Commission must then file a redistricting plan approved by a majority of its members no later than October 5 of the year it was convened. *See Rybicki I,* 574 F.Supp. at 1085 – 1086. This generally means that if the eight-person Commission fails to adopt a compromise plan, either party has an even chance to win the draw for the ninth seat and impose its plan by a five-to-four majority vote.

This is what occurred in 1981, 1991, and 2001. After the 1980, 1990, and 2000 decennial census, the Illinois General Assembly failed to enact a legislative redistricting plan. The eight-member Legislative Redistricting Commission, which then took up the task, failed to produce a compromise plan. In litigation over the 1981 redistricting process, a federal three-judge panel speculated that the Commission's failure to produce a plan may have been attributable to the Republican commissioners' willingness to gamble that the additional member of the Commission selected by lot would be a Republican. *See Rybicki I,* 574 F.Supp. at 1088.

In 1981, the ninth member of the Redistricting Commission was a Democrat. The Redistricting Commission then passed a plan drafted by its Democratic members. The Democratic plan adopted by the Commission led to bitter litigation brought by African Americans, Hispanics, and Republicans. *See Rybicki I* (finding that Redistricting Commission intentionally discriminated against African Americans in City of Chicago).

In 1991, the ninth member of the Redistricting Commission was a Republican. The Redistricting Commission then passed a plan drafted by its Republican members. The Illinois Supreme Court initially rejected the map because the Redistricting Commission, which did not hold any hearings on the map it adopted, failed to provide the court with sufficient facts with which to assess the constitutionality of the map. *Ryan I,* 588 N.E.2d at 1029 – 1030. After further hearings, a revised Republican map was again presented to the Illinois Supreme Court. A divided court ruled that a map submitted by the Commission was presumed to be valid, and opponents to the Commission's map failed to establish that the Commission's map was against the manifest weight of the evidence. *Ryan II,* 588 N.E.2d at 1035 – 1036. However, the court also made clear its distaste for the tie-breaking procedure, condemning the "tortuous process" and stating that

"[w]e do not find that a lottery or a flip of a coin is in the best interest of anyone except the party which has won the toss." Three dissenting justices stated their belief that drawing the name of the tiebreaker by lot violated the due process clause of the federal Constitution. *Ryan II,* 588 N.E.2d at 1042 (Bilandic, J., dissenting). A reform commission established after the 1991 census failed to change the method by which ties in the Redistricting Commission were broken.

In 2001, while the eight-member Redistricting Commission was still meeting, a suit was filed in federal court alleging that the tie-breaking process violated the due process clause of the federal Constitution. *Winters v. Illinois State Board of Elections,* No. 01 C 50229, 2001 WL 1491581 (N.D.Ill. Nov. 20, 2001). Two other suits were filed in the Illinois Supreme Court and then consolidated. One, later dismissed as premature because it was filed before the tie-breaker was appointed, sought a declaratory judgment that the tie-breaking procedure passed constitutional muster. *Alexander v. Ryan,* No. 92002 (**Ill.** 2001). The other, which sought to have the tie-breaking procedure declared unconstitutional, was removed to federal court and consolidated with the *Winters* case. *Barnow v. Ryan*, No. 01 C 6566, 2001 WL 1104729 (N.D. Ill. Sept. 17, 2001 (denying motion to remand). A three-judge panel unanimously ruled that the tie-breaking provision did not violate either the equal protection or due process clause of the federal Constitution. *Winters,* 2001 WL 1491581. After the selection of the tie-breaker, a Democrat, enabled the Redistricting Commission to adopt a new legislative map by a 5-4 party-line vote, the Illinois Supreme Court allowed another complaint for declaratory relief to be filed, alleging that the Redistricting Commission's plan failed to meet the constitutional requirement for compact districts. The Supreme Court upheld the validity of the map under the Illinois constitution, ruling that the challengers failed to show how any of the proposed alternative maps met any of the constitutional requirements except compactness, and that the manifest weight of the evidence was not against the validity of the Redistricting Commission's map. *Cole-Randazzo v. Ryan,* 198 Ill. 2d 233, 762 N.E.2d 485, 487, 280 Ill. Dec. 826 (2001). **A federal court also upheld the map against claims that it violated the Voting Rights Act, ruling that the map provided African-Americans with an opportunity to elect representatives in proportion with their percentage of Illinois' total population. *Campuzano v. Illinois State Board of Elections*, No. 01 C 50376, 2002 WL 848818 (N.D. Ill. May 3, 2002).**

D. [16.5] Redrawing Wards in the City of Chicago

The City of Chicago is required by Article 21 of the Revised Cities and Villages Act of 1941, 65 ILCS 20/21-0.01, *et seq.,* to be divided into 50 wards of "nearly equal" populations. 65 ILCS 20/21-36. The City Council must redistrict the city's 50 wards by December 1 of the year following a national decennial census. 65 ILCS 20/21-38. These plans have been subjected to increasing scrutiny, particularly under the Voting Rights Act, 42 U.S.C. §1971. *See Ketchum v. Byrne,* 740 F.2d 1398, 1419 (7th Cir. 1984) (new Chicago ward map violated Voting Rights Act without any showing of discriminatory intent because it denied African Americans and Hispanics reasonable and fair opportunity to elect candidates of their choice); *Barnett v. City of Chicago,* 141 F.3d 699, 705 (7th Cir.), *on remand,* 17 F.Supp. 753 (N.D.Ill. 1998) (using citizen voting-age population as benchmark, ward map left African Americans underrepresented by one ward, but did not violate Voting Rights Act with respect to Hispanics). Following the 2000 Census, the City Council passed a new ward map with only one dissenting vote. As of this writing, only one legal challenge to the new map had been filed. *Polish American Congress v. City of Chicago*, No. 02-CV-1477 (N.D. Ill. 2001) (alleging that 2001 ward remap sught to maximize Hispanic representation at the expense of the City's Polish ethnic community).

The applicable statute also provides that within 15 days of the passage of a redistricting ordinance by the City Council, any ten aldermen opposed to the plan embodied in the ordinance may propose a substitute plan and cause the choice between the two plans to be submitted to a popular vote. 65 ILCS 20/21-39.

E. [16.6] Redistricting Under the Illinois Municipal Code

The Illinois Municipal Code (Municipal Code), 65 ILCS 5/1-1-1 *et seq.,* repealed the Revised Cities and Villages Act of 1941 except for Article 21, the so-called "Chicago Little Charter," and 14 sections which, by virtue of amendment, were saved from repeal. The Municipal Code, therefore, applies generally to all Illinois municipalities except Chicago. Under Article 5 of the Illinois Municipal Code, a city or village that adopts the managerial form of government must elect its mayor or village board president at large. Municipal Code §5-2-1.

In addition, Municipal Code §5-2-2 prescribes the number of a municipality's aldermen as a function of its population, as follows:

Population	Number of Aldermen
0 – 3,000	6
3,001 – 15,000	8
15,001 – 20,000	10
20,001 – 30,000	14
30,001 +	2 additional aldermen for every 20,000 inhabitants over 30,000

In all cities of fewer than 500,000 inhabitants, no more than 20 aldermen are permitted under the Municipal Code. Two aldermen represent each ward.

The Municipal Code further provides that every city shall have one-half as many wards as the total number of aldermen to which the city is entitled. The city council from time to time shall divide the city into that number of wards. In the formation of wards, the population of each shall be as nearly equal, and the wards shall be of as compact and contiguous territory, as practicable. Municipal Code §5-2-4.

The Municipal Code does not specify a fixed interval for mandatory redistricting. Rather, it requires redistricting in response to any officially published census:

> **Whenever an official publication of any national, state, school, or city census shows that any city contains more or less wards than it is entitled to, the city council of the city, by ordinance, shall redistrict the city into as many wards only as the city is entitled. This redistricting shall be completed in not less than 30 days before the first date fixed by law for the filing of candidate petitions for the next succeeding election for city officers. At this election there shall be elected the number of aldermen to which the city is entitled.** Municipal Code §5-2-5.

F. [16.7] Illinois Judicial Circuits

Illinois' Supreme Court and appellate court judges are selected from five judicial districts. Both Supreme Court and appellate court judges serve ten-year terms. ILL.CONST. art. VI, §10. Six months prior to the expiration of his or her term, a judge can request certification for a non-partisan retention election. If sixty percent of the electorate votes to retain the judge, the judge is elected to another term. ILL.CONST. art. VI, §12. The First Judicial District consists of Cook County; the rest of the state is divided into four judicial districts "of substantially equal population, each of which shall be compact and composed of contiguous counties." ILL.CONST. art. VI, §2; Judicial Districts Act, 705 ILCS 20/0.01, *et seq.* The Illinois Supreme Court has ruled that the framers of the Constitution intended that Cook County remain a single, undivided district for the purpose of electing both Supreme Court and appellate court judges. *People ex rel. Chicago Bar Association v. State Board of Elections,* 136 Ill.2d 513, 558 N.E.2d 89, 97, 146 Ill.Dec. 126 (1990) (appellate judges); *Cincinnati Insurance Co. v. Chapman,* 181 Ill.2d 65, 691 N.E.2d 374, 378, 229 Ill.Dec. 264 (1998) (Supreme Court judges; holding as unconstitutional Judicial Redistricting Act of 1997, 705 ILCS 21/1, *et seq.*).

Three of the seven judges on the Illinois Supreme Court are elected at large from Cook County; one judge is elected from each of the other four judicial districts. ILL.CONST. art. VI, §3. Cook County also elects 18 appellate judges at large to the First Judicial District; the other judicial districts elect six appellate judges each. 705 ILCS 25/1. The state is also divided into judicial circuits "consisting of one or more counties" for trial-level courts. ILL.CONST. art. VI, §7(a). The trial-level court in the First Judicial District is the Circuit Court of Cook County. Until 1991, Cook County Circuit Court judges were also elected at large, some in county-wide elections, some in at-large elections within the city of Chicago, and others in at-large elections from suburban Cook County. ILL.CONST. art. VI, §7(b). A federal court ruled that this system, and the at-large election of Supreme Court and appellate court judges, passed constitutional muster, and did not deprive African-American and Hispanic voters of the opportunity to elect judicial candidates of their choice. *Williams v. State Board of Elections,* 718 F.Supp. 1324 (N.D.Ill. 1989). Nonetheless, with the passage of the Cook County Circuit Apportionment Act of 1991, 705 ILCS 50/1, *et seq.,* the system of electing Cook County Circuit Court judges at large was replaced by a system of 15 judicial subcircuits. 705 ILCS 50/2. All circuit court judges serve six-year terms.

G. [16.8] Locally Elected Officials

The one person, one vote imperative also determines the constitutionality of elections held to select local officials such as school board members and representatives of taxing authorities. For example, in *Board of Estimate of City of New York v. Morris,* 489 U.S. 688, 103 L.Ed.2d 717, 109 S.Ct. 1433 (1988), the United States Supreme Court declared that the structure of the New York City Board of Estimate was inconsistent with the equal protection clause of the Fourteenth Amendment because it afforded equal representation to boroughs of unequal population. In that case, the Board of Estimate consisted of three members elected citywide and the presidents of each of the city's five boroughs, elected only by their respective boroughs. The Court struck down the structure of the Board because it afforded equal representation to each of the five boroughs in spite of their widely disparate populations.

Similarly, in *Fumarolo v. Chicago Board of Education,* 142 Ill.2d 54, 566 N.E.2d 1283, 153 Ill.Dec.177 (1990), the Illinois Supreme Court struck down the Chicago School Reform Act on equal protection grounds because it provided for unequal voting in local school council elections.

The voting structure violated the equal protection clause by affording disparate voting powers to parents of children enrolled in school, staff of the local school, and residents of the school's attendance area. The court held that the local school councils exercised "general governmental powers," and, therefore, any limitation on the fundamental right to vote in school council elections was subject to strict scrutiny. 566 N.E.2d at 1294 – 1295. The court then found that the disparate voting powers inherent in the councils' voting structure was neither necessary nor narrowly tailored to achieve the goals of the reform plan. 566 N.E.2d at 1299.

Another example of this principle arose following the redrawing of districts for the Madison County Board following the 2000 census. In *Hulme v. Madison County*, 188 F. Supp. 2d 1041, 1051 (S.D. Ill. 2001), the federal district court held that the Madison County Board, which held general governmental powers, failed to make an honest and good faith effort to construct districts whose population was as nearly equal as possible, and could not point to any rational justification for population deviations that resulted from a politically motivated redistricting process. Moreover, the Court held that although the federal constitution requires only that local governments create districts that are "substantially equal in population," *Avery v. Midland County, Texas*, 390 U.S. 474, 88 S.Ct. 1114, 20 L.Ed.2d 45 (1968), the Illinois Counties Code adopts the more stringent standard that each County Board district "shall be equal in population to each other district," 55 ILCS 5/2-3003(1), and thus the County Board could justify deviations in population from district to district only if greater equality of population was not "practicable given the current state of technology." *Hulme*, 188 F. Supp. 2d at 1054.

III. CENSUS ISSUES

A. [16.9] Federal Census Law

Congress has delegated the task of enumerating the population of the United States to the Department of Commerce. The applicable statute, codified at 13 U.S.C. §141, directs the Secretary of Commerce to "take a decennial census of population as of the first day of April . . . the 'decennial census date"' in 1980, 1990, 2000, and so on. The census must be completed within nine months, and the Secretary must report the results of the census to the President by December 31 of the decennial census year. In addition, the President is required to transmit to Congress, at the outset of its session in each year immediately following a decennial census, a statement apportioning congressional seats among the various states. *Id.*

Federal law requires that the Secretary of Commerce report the newly gathered population data to the state governors or other public officials charged with redrawing state legislative districts no later than April 1 of the year following a decennial census. 13 U.S.C. §141(c). The census reports furnished by the Secretary of Commerce contain detailed population data by geographic units (the smallest unit being the census block). These census maps provide the basis for congressional redistricting within each state. In addition, the census maps almost invariably form the basis for redistricting state and local electoral districts (such as city wards), although the states are not constitutionally required to use federal census data in reapportionment. *Young v. Klutznick,* 652 F.2d 617, 624 – 625 (6th Cir. 1981). The census enumeration is also the sole basis for allocating funds to the various states under many federal programs.

B. Who Is Counted in the Decennial Census?

1. [16.10] General Rule

The Bureau of the Census counts all persons whose "usual residence" is within one of the United States as of April 1 of a decennial census year.

2. [16.11] Undocumented Persons

Before the 1980 decennial census, the Bureau of the Census announced that, in enumerating the population of the various states, it would not attempt to determine whether persons counted were United States citizens. Rather, it would count all persons usually resident in the United States regardless of their immigration status. This policy was challenged. In *Federation for American Immigration Reform (FAIR) v. Klutznick,* 486 F.Supp. 564 (D.D.C.), *appeal dismissed,* 100 S.Ct. 3005 (1980), legislators including representatives from Kentucky, California, Illinois, Vermont, Pennsylvania, and one senator from Pennsylvania, as well as the Committee for Representative Government, joined FAIR in bringing suit against the United States Secretary of Commerce.

FAIR sought a declaration that the Census Bureau's proposal to count undocumented persons together with persons lawfully resident in the United States was unconstitutional. FAIR requested declaratory and injunctive relief, requiring the Census Bureau to use its "best efforts" to exclude undocumented persons from the apportionment base. The plaintiffs argued that the failure to exclude undocumented persons from the population base created by the decennial census would distort the apportionment of seats in the House of Representatives, the creation of congressional and state legislative districts in many states, and the allocation of federal funds for many programs. The plaintiffs further claimed that the federal Constitution required the exclusion of undocumented persons from the population base because its framers had contemplated that only lawful residents would be included in the population figures.

In its analysis, the United States District Court for the District of Columbia noted:

> **The constitutional core of plaintiffs' argument is that the phrase, "the whole number of persons," does not, in historical context, include illegal aliens, though they agree that the concept includes all *lawful* residents, citizen and alien alike . . . . The concept of illegal aliens was unknown to the Framers . . . . [**A**]n intent to grant representation to persons unlawfully within the country therefore cannot logically be attributed to the Framers. [**Emphasis in original.**]** 486 F.Supp. at 567.

Rather than reach the merits of this constitutional argument, however, the three-judge federal district court impaneled to hear the case decided it exclusively on procedural grounds. The court found that the plaintiffs failed to demonstrate that they would suffer any concrete harm as a result of the Census Bureau's policy. The court also found that the plaintiffs failed to demonstrate how the relief they requested would benefit them. Accordingly, the court found that plaintiffs lacked standing and dismissed the case.

Similarly, in *Ridge v. Verity,* 715 F.Supp. 1308 (W.D.Penn. 1989), the states of Alabama, Kansas, and Pennsylvania, as well as various members of the House of Representatives, the Coalition for Constitutional Reapportionment, and FAIR filed suit in the United States District Court for the Western District of Pennsylvania challenging the inclusion of "illegal aliens" in the 1990 census population figures for the purpose of reapportioning congressional seats among the states. The *Verity* court held that the plaintiffs failed to demonstrate injury-in-fact and, therefore, lacked standing. In dismissing the suit the court relied heavily on the earlier case of *Federation for American Immigration Reform (FAIR) v. Klutznick, supra,* holding:

> **As in *FAIR,* none of the plaintiffs in this case can show which states would gain and which would lose representation in Congress, and thus plaintiffs are unable to allege that the weight of his or her vote would *be affected* by the inclusion of illegal aliens in the census figures for purposes of apportionment of congressional seats. . . .**
>
> **Based on the evidence offered, it is sheer speculation as to the identities of the states that will be affected by the inclusion of illegal aliens in the census count for purposes of apportionment . . . . The speculative nature of these factors precludes plaintiffs from establishing the necessary injury-in-fact requirement of standing. [**Emphasis in original.**]** *Ridge, supra,* 715 F.Supp. at 1318.

Because no plaintiff has successfully passed the hurdle of showing that legislative seats would have been apportioned differently had illegal aliens not been counted, the constitutionality of including illegal aliens in the census enumeration has not been resolved.

3. [16.12] Overseas United States Citizens, Military Personnel, and Institutionalized Persons

Starting in 1970, the Census Bureau began attributing military personnel who are stationed overseas to their designated "home of record" (which may differ from their legal residence) for purposes of reapportionment. In 1990, this practice was expanded to include all overseas federal employees. Massachusetts, which lost a congressional seat due to reapportionment following the 1990 census, sought to have overseas personnel eliminated from the apportionment counts on the grounds that the Constitution required an "actual Enumeration" of people "in each State." U.S.CONST. art. I, §2; U.S.CONST. amend. XIV, §2. The Court ruled that the conclusion of the Secretary of Commerce that overseas personnel retained ties to their states and, therefore, should be included in the census was "consonant with, though not dictated by, the text and history of the Constitution." *Franklin v. Massachusetts,* 505 U.S. 788, 120 L.Ed. 2d 636, 112 S.Ct. 2767, 2778 (1992).

Other than federal employees, the Census Bureau does not attempt to count United States citizens residing outside the United States for extended periods. Similarly, the Census Bureau does not count foreign tourists visiting the United States. United States citizens who leave the country on vacation are counted at their usual place of residence. The United States Supreme Court has upheld this practice. *Utah v. Evans*, 143 F.Supp.2d 1290 (D. Utah), *aff'd* 151 L. Ed.2d 535, 122 S. Ct. 612 (2001) (rejecting challenge by Utah that failure to count the state's numerous overseas missionaries cost it a Congressional seat). The Census Bureau counts institutionalized persons in the institution where they usually reside (*e.g.,* prisoners are counted in the place where their penitentiary is located).

4. [16.13] Undercount Issues and Statistical Sampling

The 1980s and 1990s spawned a number of lawsuits over the Census Bureau's methodology, particularly the use of statistical sampling and adjusting the actual headcount to account for persistent undercounting of minorities. Before both the 1980 and 1990 decennial census, the Census Bureau announced that it would not statistically adjust census results for over- or undercounting by means of post-census review. A number of lawsuits were filed alleging that the Census Bureau's refusal to adjust the results would have a disproportionate and unfair impact on minority groups. The issue even caused dissension within the Department of Commerce. A survey taken after the 1990 census estimated an undercount of two percent, or approximately five million persons, most of them ethnic- or language-group minorities. However, on July 15, 1991, then-Commerce Secretary Robert Mosbacher announced that the 1990 census would not be adjusted to correct for an undercount. In choosing not to adjust the census, Mosbacher overruled Census Bureau Director Barbara Bryant and seven out of nine members of the Census Bureau's undercount steering committee, which had recommended the adjustment to correct the census' "historic problem" of undercounting African Americans, Hispanics, and Native Americans. Timothy Noah, *Mosbacher, While Admitting Undercount of Minorities, Won't Adjust 1990 Census*, Wall Street Journal July 16, 1991, p. 16. Secretary Mosbacher denied that political considerations were a factor in his decision.

Lawsuits on statistical sampling produced mixed results in the lower federal courts, with the courts disagreeing on the standard necessary for plaintiffs to state a claim. For example, in *Cuomo v. Baldrige,* 674 F.Supp. 1089 (S.D.N.Y. 1987), and *City of New York v. United States Department of Commerce,* 713 F.Supp. 48, 50 – 51 (E.D.N.Y. 1989), the courts ruled that plaintiffs must demonstrate the technical feasibility of adjusting the census results. In *Cuomo,* the district court ruled that the Census Bureau correctly determined that adjustment of the 1980 census was not feasible. In *City of New York,* the court ruled that because individual citizens, taxpayers, states, and municipalities sustained their burden of proving that adjusting the 1990 census was technically feasible, they had standing to challenge the census and seek an injunction requiring a "post-enumeration survey" to "create the most accurate census possible" in order to counteract the decennial census' persistent undercounting of minorities since 1940. *City of New York, supra,* 713 F.Supp. at 51. In contrast, in *Tucker v. United States Department of Commerce,* 958 F.2d 1411 (7th Cir. 1992), the Seventh Circuit ruled that the plaintiffs had no right to litigate the methods used by the Commerce Department in the 1990 census.

The Supreme Court resolved the issue in *Wisconsin v. City of New York,* 517 U.S. 1, 134 L.Ed.2d 167, 116 S.Ct. 1091, 1103 (1996), ruling that the Secretary's decision that an actual enumeration was more accurate than statistical adjustment fell within the "wide discretion bestowed by the Constitution upon Congress, and by Congress upon the Secretary." Therefore, the Secretary's decision was entitled to deference as long as it was consistent with the constitutional language and the constitutional goal of equal representation.

After the *Wisconsin* decision, Secretary of Commerce William Daley announced that the Census Bureau would use statistical sampling during the 2000 census to address chronic undercounting of minorities. Two sets of plaintiffs filed suit to enjoin the use of sampling. A three-judge panel for the District of Virginia issued a permanent injunction barring the use of such sampling in the actual enumeration used for apportioning congressional seats. The Supreme

Court affirmed. *Department of Commerce v. United States House of Representatives,* 525 U.S. 316, 141 L.Ed.2d 797, 119 S.Ct. 765 (1999). First, the Supreme Court found that the plaintiffs' expected loss of a congressional representative was sufficient to give them standing to sue. The Court then found that the Secretary's decision to use statistical sampling violated the Census Act, 13 U.S.C. §1, *et seq.,* which permits the use of sampling for gathering almost any type of information "*[e]xcept* for the determination of population for purposes of apportionment of Representatives in Congress among the several States." [Emphasis added.] 13 U.S.C. §195. Following the 2000 Census, in which North Carolina gained a Congressional seat while Utah lost a seat, Utah challenged the procedure of "imputation," under which the Census Bureau estimates the number of people living in homes where no-one responds to enumerators, as prohibited sampling. A federal district court ruled against Utah, *Utah v. Evans*, 182 F. Supp. 2d 1165 (2001), but the United States Supreme Court agreed to hear a direct appeal. As of this writing, the issue had not been resolved.

The Court did not reach the question of whether the reference to an "actual Enumeration" in Article I, §2 of the federal Constitution (as modified by the Fourteenth Amendment) precluded the use of statistical sampling to supplement data obtained through the traditional head count, such as the "census of population, housing, and matters relating to population and housing." 13 U.S.C. §141(g). Thus, as a result of the decision in *Department of Commerce,* if the Census Bureau determines that sampling is feasible, it may use sampling techniques to gather data on, for example, citizenship, ethnicity, marital status, or income, or housing, as long as congressional seats are apportioned on the basis of an actual enumeration. In 2001, however, the Census Bureau announced that it would not adjust census data for non-redistricting purposes, including the allocation of federal funds. The rationale for using unadjusted data was that the initial adjustment survey overstated the undercount by at least 3 million people because it did not properly consider erroneous and duplicative census enumeration.

C. [16.14] Alternative Population Bases for Redistricting

While most state redistricting plans are based on total population figures derived from the federal census, the Supreme Court has never expressly determined the appropriate population base for state legislative redistricting. In *Burns v. Richardson,* 384 U.S. 73, 16 L.Ed.2d 376, 86 S.Ct. 1286, 1296 (1966), the Court held:

> **We start with the proposition that the Equal Protection Clause does not require the States to use total population figures derived from the federal census as the standard by which this substantial population equivalency is to be measured. Although total population figures were in fact the basis of comparison in [***Reynolds v. Sims***] and most of the [**other cases**] decided that day, our discussion carefully left open the question what population was being referred to. At several points, we discussed substantial equivalence in terms of voter population or citizen population, making no distinction between the acceptability of such a test and a test based on total population.**

See also Chen v. City of Houston, 532 U.S. 1046, 149 L.Ed.2d 1017, 121 S.Ct. 2020, 2021 (2001) (*Chen I*) (Thomas, J., dissenting from denial of certiorari) (in light of upcoming 2001 redistrictings, Supreme Court should not "wait for further conflict to develop," but should decide "what measure of population," *i.e.,* total population, voting age population, or citizen voting age

population, "should be used for determining whether the population is equally distributed among the districts").

The Supreme Court has upheld, or at the very least tolerated, a number of redistricting plans based on counts of registered and eligible voters. For example, in *Burns, supra,* 86 S.Ct. at 1299, the Court upheld Hawaii's use of registered voters as the basis for redistricting its state legislature, even though the registered voter statistics differed significantly from total population figures in the federal census. Although the Court expressly disclaimed the use of registered voters "for all time or circumstances," it found that the large number of military personnel in Hawaii distorted the total population figures. Therefore, given the high percentage of registered voters in Hawaii, the "distribution of registered voters approximates distribution of state citizens or another permissible population base." *Burns, supra,* 86 S.Ct. at 1298. *See also Kirkpatrick v. Preisler,* 394 U.S. 526, 22 L.Ed.2d 519, 89 S.Ct. 1225 (1969) (upholding count of eligible voters as valid factor in state redistricting if properly identified and uniformly applied); *Ely v. Klahr,* 403 U.S. 108, 29 L.Ed.2d 352, 91 S.Ct. 1803, 1807 n.7 (1971) (upholding Arizona redistricting plan based on count of registered voters, but only if it produced distribution of legislators "not substantially different from that which would have resulted from the use of a permissible population basis"). *But see Travis v. King,* 552 F.Supp. 554, 563 – 573 (D. Hawaii 1982) (striking down Hawaii state and congressional redistricting plans based on count of registered voters because they did not "substantially approximate" results of plans based on total population).

In *Garza v. County of Los Angeles,* 918 F.2d 763 (9th Cir. 1990), the Ninth Circuit upheld a district court order requiring Los Angeles County to redistrict county supervisory districts between regularly scheduled decennial reapportionments to remedy unlawful dilution of Hispanic voting strength. *Garza, supra,* 918 F.2d at 772. On appeal, the county invoked *Burns, supra,* to argue that because it was based in part on statistics of total population rather than voting-age population, the district court's reapportionment plan was defective as a matter of law. *Garza, supra,* 918 F.2d at 773.

In *Garza,* the Ninth Circuit held that while *Burns* "seem[ed] to permit" states to use voting population as well as total population in constructing electoral districts, it did not require them to do so. *Garza, supra,* 918 F.2d at 774, citing *Burns, supra,* 86 S.Ct. 1296 – 1297. The Ninth Circuit also held that the trial court properly considered non-census data in finding that a five-district plan could be drawn in which Hispanics would comprise a majority of the voting age population in one of the five districts. *Garza, supra,* 918 F.2d at 772. *See also Garza v. County of Los Angeles,* 756 F.Supp. 1298, 1304 (C.D.Cal. 1990) (post-1980 estimates of voting age population reliable for purpose of proving that it was possible to create supervisory district with Hispanic voting-age majority). However, the Ninth Circuit went on to state that "[t]he purpose of redistricting is not only to protect the voting power of citizens; a coequal goal is to ensure 'equal representation for equal numbers of people.'" *Garza, supra,* 918 F.2d at 775, quoting *Kirkpatrick, supra,* 89 S.Ct. at 1229). The *Garza* court reasoned that people who are ineligible to vote, such as noncitizens and young people, are nonetheless entitled to equal access to their representatives, and that basing districts on voting population rather than total population disproportionately affects the rights of people who live in a district with, for example, a large number of Hispanic noncitizens. Therefore, the Ninth Circuit concluded that using citizen voting age population as the measure of population would violate equal protection. *Garza, supra,* 918 F.2d at 775 – 76. A vigorous dissent argued that because "the right being protected by the one person one vote

principle is personal and limited to citizens," states should use eligible voters as the appropriate population base. *Garza, supra,* 918 F.2d at 784 (Kozinski, J., dissenting).

The Fourth and Fifth Circuits have rejected both the majority and dissent in *Garza*. Instead, those courts hold that states engaged in redistricting are free to choose between electoral equality (voting age or citizen voting age population) and representational equality (total population). *Daly v. Hunt,* 93 F.3d 1212, 1227 (4th Cir.1996); *Chen v. City of Houston,* 206 F.3d 502 (5th Cir. 2000). As noted above, the Supreme Court has not resolved this split among the circuits. *See Chen I* (Thomas, J., dissenting from denial of certiorari). The Seventh Circuit has not ruled on this general question, but has held that in analyzing vote dilution challenges under the Voting Rights Act, citizen voting age population is the appropriate measure of population. *Barnett v. City of Chicago,* 141 F.3d 699, 705 (7th Cir. 1998). Following the 2000 Census, African-American and Hispanic litigants challenged the 2001 state legislative map on grounds that the Illinois Legislative Redistricting Commission should have used data on citizen voting-age population in redistricting the General Assembly. *Barnet v. Department of Commerce*, No. 01-CV-8347 (N.D. Ill. 2001). As of this writing, the litigation had not been resolved.

IV. THE REDISTRICTING PROCESS

A. Constitutional and Legislative Requirements for Redistricting

1. [16.15] Mandatory Considerations

In the landmark case of *Baker v. Carr,* 369 U.S. 186, 7 L.Ed.2d 663, 82 S.Ct. 691 (1962), persons qualified to vote in counties electing representatives to Tennessee's General Assembly brought suit in federal court seeking a declaratory judgment that Tennessee's 1901 apportionment statute was unconstitutional. The voters also sought an injunction to prevent state officers from conducting any further elections under the 1901 statute. The plaintiffs argued that by failing to replace the outdated 1901 statute Tennessee had arbitrarily and capriciously apportioned seats in its General Assembly among the state's 95 counties. Tennessee's failure to reapportion the seats in its General Assembly in spite of substantial growth and redistribution of the state's population had caused a "debasement" of the plaintiffs' votes. The plaintiffs argued that as a result of this debasement of their voting power, they had been denied the equal protection of the laws guaranteed to them by the Fourteenth Amendment.

A three-member federal district court dismissed the complaint for lack of subject matter jurisdiction and for failure to state a claim. In dismissing the complaint, the court relied heavily on *Colegrove v. Green,* 328 U.S. 549, 90 L.Ed. 1432, 66 S.Ct. 1198 (1946), for the proposition that the claims advanced by the plaintiffs constituted non-justiciable political questions. *Colegrove* and numerous similar state court decisions long served as a formidable barrier to judicial intervention in state apportionment or redistricting schemes. *See, e.g., People ex rel. Fergus v. Blackwell,* 342 Ill. 223, 173 N.E. 750, 751 (1930) (although General Assembly failed to redistrict itself following the 1910, 1920, and 1930 census, as required by Illinois Constitution, court had no power to coerce or direct legislature to reapportion state into districts, because redistricting was political question.)

In *Baker,* the United States Supreme Court established a new interpretation of *Colegrove* in holding that (a) federal district courts had subject matter jurisdiction over claims holding that outdated state apportionment schemes deprived voters of their right to equal protection under the Fourteenth Amendment; (b) voters had standing to challenge these schemes; and (c) the plaintiffs' claim that Tennessee's outdated apportionment statute denied them equal protection was a justiciable cause of action on which they were entitled to a trial and a decision.

Since the Supreme Court's ruling in *Baker,* Congress and the courts have fleshed out the contours of constitutionally permissible apportionment and districting schemes. Many of these factors were incorporated into the section on redistricting in the 1970 Illinois Constitution. In Illinois, the law now generally requires that all district boundaries be drawn in accordance with five fundamental principles: (a) one person, one vote; (b) fairness to minority groups; (c) compactness of districts; (d) contiguity; and (e) fairness to political parties. Each of these requirements is examined below.

a. One Person, One Vote

(1) [16.16] State and local legislative bodies

In *Wesberry v. Sanders,* 376 U.S. 1, 11 L.Ed.2d 481, 84 S.Ct. 526 (1964), voters filed a class action in federal court against the Governor and Secretary of State of Georgia under 42 U.S.C. §1983, and under the Voting Rights Act, 42 U.S.C. §1971, claiming that Georgia's congressional districts were outdated and unconstitutional. The plaintiff class asked that Georgia's apportionment statute be declared unconstitutional and that Georgia's Governor and Secretary of State be enjoined from conducting any further elections under it. The three-judge district court convened to hear the case dismissed the complaint because it raised a non-justiciable political issue.

The United States Supreme Court reversed, holding that federal district courts had jurisdiction over the alleged debasement of the plaintiffs' right to vote resulting from Georgia's outdated 1931 congressional apportionment statute and the failure of the Georgia state legislature to realign congressional districts to equalize their populations in the years since the 1931 statute had been passed. The *Wesberry* Court also held that an allegation that the right to vote in congressional elections had been debased as a result of an improper state congressional apportionment law was not subject to dismissal as a non-justiciable "political" question. The Court further held that the requirement in U.S.CONST. art. I, §2, that the House Representatives be chosen by "the People of the several States" meant that "as nearly as is practicable, one [person's] vote in a congressional election [must] be worth as much as another's." *Wesberry, supra,* 84 S.Ct. at 530. The following year, in *Reynolds v. Sims,* 377 U.S. 533, 12 L.Ed.2d 506, 84 S.Ct. 1362, 1383 (1964), the Court held that every person has an inalienable right to full and effective participation in the political process.

The requirement that a state's congressional districts contain substantially equal populations rests on a constitutional foundation that differs from that which requires states to form nearly equal legislative districts. In addition, the two types of districts are subject to differing degrees of judicial tolerance for variations in district population.

The equal population requirement for congressional districts arises from U.S.CONST. art. I, §2, and has been strictly interpreted as requiring that districts be as close to exactly equal in population as possible. *Wesberry, supra,* 84 S.Ct. at 530 (population of congressional districts within same state must be as nearly equal as practicable). In *Karcher v. Daggett,* 462 U.S. 725, 77 L.Ed.2d 133, 103 S.Ct. 2653 (1983), the Court held that no population variation among congressional districts was too small for judicial consideration and invalidated one redistricting plan that had an overall range of 0.698 percent in favor of an equally workable plan with a slightly smaller range of deviation. 103 S.Ct. at 2663 – 2665. *See also Hastert v. State Board of Elections,* 777 F.Supp. 634, 644 – 645 (N.D.Ill. 1991) (preferring map with 0.00017-percent deviation from ideal population over map with 0.00297-percent deviation, because even minute population deviations are legally significant).

In *Karcher,* the Court also held that in drawing congressional districts state officials could perhaps justify minor deviations from equal populations in order to further important state interests. The Court speculated that "[a]ny number of consistently applied legislative policies might justify some variance," including the need to make districts compact, respect municipal boundaries, preserve "the cores of prior districts," and avoid contests between incumbent representatives. 103 S.Ct. at 2663. The *Karcher* Court noted, however, that the state must "show with some specificity that a particular objective required the specific deviations in its plan, rather than simply relying on general assertions." 103 S.Ct. at 2664. Any deviation from equal population that can be reasonably avoided must be eradicated unless it is justified by some important countervailing state interest such as those listed by the court. *Id.* No state has yet been able to carry this heavy burden of proof.

By contrast, the requirement that state legislative districts have equal populations derives from the equal protection clause of the Fourteenth Amendment. In *Reynolds v. Sims, supra,* the United States Supreme Court noted that the equal protection clause requires that states construct legislative districts that are substantially equal in population. Later, in *Mahan v. Howell,* 410 U.S. 315, 35 L.Ed.2d 320, 93 S.Ct. 979 (1973), the Court held that "broader latitude has been afforded the States under the Equal Protection Clause in state legislative redistricting [than for congressional redistricting]." 93 S.Ct. at 984. In other words, state legislative districts may vary more in population than congressional districts without violating the Constitution.

The same year, in *Gaffney v. Cummings,* 412 U.S. 735, 37 L.Ed.2d 298, 93 S.Ct. 2321 (1973), the Court established ten percent as a benchmark for permissible population deviation among state legislative districts. Courts use a burden-shifting analysis to determine whether a plan passes muster under the equal protection clause. Thus, as the Court in *Brown v. Thomson,* 462 U.S. 835, 77 L.Ed.2d 214, 103 S.Ct. 2690, 2696 (1983), held "an apportionment plan with a maximum population deviation under 10% falls within th[e] category of minor deviations," and is prima facie evidence of compliance with the equal protection clause. *See White v. Regester,* 412 U.S. 755, 764, 37 L.Ed.2d 314, 93 S.Ct. 2332, 2338 – 2339 (1973). Once a plaintiff establishes that an apportionment plan has disparities of population greater than ten percent, the state must provide a justification for the deviations. *See Voinovich v. Quilter,* 507 U.S. 146, 122 L.Ed.2d 500, 113 S.Ct. 1149, 1159 (1993). The court is required to assess (a) whether the deviations reasonably advance a rational state policy; and, if so, (b) whether the resultant population disparities exceed constitutional limits. *Id.* In *Mahan,* the Court upheld a total deviation of over 16 percent when the deviation was justified by the rational objective of preserving the integrity of political subdivision lines. *Mahan, supra,* 93 S.Ct. at 986.

(2) [16.17] Judicial elections

Although many states, including Illinois, hold elections for the judicial branch, judges are not considered to be "representatives." Therefore, the "one person, one vote" principle does not apply to judicial elections. *Wells v. Edwards,* 347 F.Supp. 453 (M.D.La. 1972), *aff'd,* 93 S.Ct. 904 (1973). Nonetheless, the United States Supreme Court has held that even though the one person, one vote rule does not apply to judicial elections, judicial elections are not entirely immune from vote dilution claims under the Voting Rights Act. *Chisom v. Roemer,* 501 U.S. 380, 115 L.Ed.2d 348, 111 S.Ct. 2354 (1990) (remanding for trial African-American voters' challenge to Louisiana's system of electing judges at large from multimember districts).

In Illinois, Supreme Court and appellate court justices are selected from five judicial districts. The First Judicial District consists of Cook County, from which three Supreme Court justices and twenty-four appellate court justices are elected at large. This electoral scheme, along with a previous method of selecting Cook County Circuit Court judges at large (see §16.7 above), has survived a challenge under §2 of the Voting Rights Act that the at-large election of judges deprived African-American and Hispanic voters of the opportunity to elect the judicial candidates of their choice. *Williams v. State Board of Election,* 718 F.Supp. 1324 (N.D.Ill. 1989). The district court found that the at-large election of judges did not dilute the votes of minority voters, because the minority groups could not show that white bloc voting usually resulted in the defeat of the minority group's preferred candidates. 718 F.Supp. at 1331. Despite the ruling in *Williams,* the Illinois legislature replaced at-large election of Cook County Circuit Court judges with fifteen judicial subcircuits in 1991. 705 ILCS 50/2.

The rest of the state is divided into four judicial districts "of substantially equal population, each of which shall be compact and composed of contiguous counties." ILL.CONST. art. VI, §2 (see §16.7 above). In 1997, the General Assembly passed the Judicial Redistricting Act, 705 ILCS 21/1, *et seq.,* which divided Cook County into three separate judicial districts, and changed the boundaries of the remaining four judicial districts. The Illinois Supreme Court held that the entire Redistricting Act was unconstitutional because the state Constitution required that Cook County remain a single, undivided district for selection of both Supreme Court and appellate court judges. *Cincinnati Insurance Co. v. Chapman,* 181 Ill.2d 65, 691 N.E.2d 374, 378, 229 Ill.Dec. 264 (1998).

Subsequently, the Illinois Republican Party and its chairman sought a declaratory judgment that the at-large method of electing Supreme Court justices in Cook County violated the equal protection clause of the Fourteenth Amendment by denying suburban Cook County Republicans a fair opportunity to elect a candidate of their choice. *Smith v. Boyle,* 144 F.3d 1060, 1061 (7th Cir. 1998). The Seventh Circuit found that the question was justiciable, but dismissed the case because the plaintiffs could not show that at the time the 1970 Illinois Constitution was drafted and ratified the method prescribed was intended to discriminate against Republicans.

b. [16.18] Compactness of Legislative Districts

Article IV of the Illinois Constitution provides that "Legislative Districts shall be compact, contiguous and substantially equal in population." ILL.CONST. art. IV, §3(a). The Illinois Supreme Court has held that "compactness is an almost universally recognized anti-

gerrymandering standard." *Ryan I,* 588 N.E.2d at 1028, quoting *Schrage v. State Board of Elections,* 88 Ill.2d 87, 430 N.E.2d 483, 486, 58 Ill.Dec.451 (1981). However, while compactness is a constitutional requirement that cannot be ignored, it is nonetheless "clearly subservient to the dominant requirement of equality of population among legislative districts." *Ryan I,* 588 N.E.2d at 1028, quoting *People ex rel. Scott v. Grivetti,* 50 Ill.2d 156, 277 N.E.2d 881, 887 (1971).

Compliance with the compactness requirement in practice has proven to be difficult to define. In *Schrage v. State Board of Elections, supra,* the Illinois Supreme Court adopted an "eyeball" test to assess compliance with the compactness requirement. The court stated:

> **It is possible to establish a mathematically precise standard of compactness . . . However, we find it unnecessary to adopt such a procedure . . . Rather, we can rely on a visual examination of the questioned district as other courts have done . . . .**
>
> **A visual examination of [**the challenged district**] reveals a tortured, extremely elongated form which is not compact in any sense . . . Nor were the plaintiffs able to advance any reason which might possibly justify such a radical departure from the constitutional requirement of compactness. [**Citations omitted.**]** 430 N.E.2d at 487.

Courts have articulated other methods of testing compactness. One test compares a district's length to its width. Another, the "dispersion test," requires that a polygon or circle be drawn around a district; the area inside the district is then compared to the area outside the district but within the polygon or circle. A relatively large disparity between the two areas has been found to suggest a lack of compactness. *Rybicki I,* 574 F.Supp. at 1097, n.49. The Illinois Supreme Court reaffirmed its "eyeball" test following the 1990 decennial census. *Ryan I,* 588 N.E.2d at 1028. In analyzing a compactness challenge following the 2000 decennial census, the Illinois Supreme Court again used its "eyeball" test, but also considered quantitative analysis using both the "dispersion test," and a "perimeter test," measuring irregularities in the boundaries of districts. The Supreme Court found that all three tests yielded comparable results, and that the districts were sufficiently compact to pass constitutional muster. *Cole-Randazzo*, 762 N.E.2d at 486.

c. [16.19] Contiguity of Legislative Districts

The contiguity requirement embodied in Article IV, §3(a) of the Illinois Constitution mandates that each district be a distinct and unbroken unit. The contiguity requirement mandates that "the tracts of land in the territory must touch or adjoin one another in a reasonably substantial physical sense." *Ryan I,* 588 N.E.2d at 1028, quoting *Western National Bank v. Village of Kildeer,* 19 Ill.2d 342, 167 N.E.2d 169, 175 (1960). Whether a plan reasonably complies with the contiguity requirement must be determined from the facts of each case. *Ryan I.* However, compliance with this imperative is relatively easy to verify by a visual inspection of the districting plan.

d. Fairness to Minorities

(1) [16.20] Protection against vote dilution

Section 2 of the Voting Rights Act, 42 U.S.C. §1971, as amended by Pub.L. No. 97-205 (eff. June 29, 1982), prohibits any state or political subdivision from employing any "voting

qualification or prerequisite to voting or standard, practice, or procedure . . . which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2)." 42 U.S.C. §1973(a). The Voting Rights Act is further extended by 42 U.S.C. §1973b(f)(2) to members of language minorities, including Hispanic Americans, Asian Americans, and Native Americans. The Act requires that the political processes leading to the nomination and election of public officials be open equally to ethnic and language minorities. In determining whether a violation has occurred, courts consider the "totality of circumstances," including the extent to which members of a protected class have been elected to office in the state or political subdivision. 42 U.S.C. §1973(b).

Section 2 protects minority groups from practices that dilute and minimize their voting strength. The Voting Rights Act was strengthened significantly by the 1982 amendments, which eliminated the need for plaintiffs to demonstrate that the authors of a reapportionment or redistricting plan intended to discriminate against them. The 1982 amendments permit a court to find a violation if the plan has a discriminatory result. Because of the lesser burden of proof, the Voting Rights Act has generally superseded Article I and the Fourteenth Amendment as the principal ground to challenge reapportionment and redistricting plans.

Section 5 of the Voting Rights Act mandates that certain covered jurisdictions must preclear any changes in voting standards, practices, and procedures with either the Department of Justice or the federal District Court for the District of Columbia prior to implementation. 42 U.S.C. §1973c. The State of Illinois is not subject to §5 of the Voting Rights Act. Section 5 is generally applicable only to those states that, as of November 1, 1964, conditioned the right to vote with literacy, educational, or other prerequisites and had less than 50 percent of their voting age population registered to vote. Subsequent amendments to §5 expanded the number of covered jurisdictions.

African Americans and Hispanic Americans are not the only minority, ethnic, and language groups protected by the Voting Rights Act. For example, in *Stabler v. County of Thurston, Nebraska,* 129 F.3d 1015, 1022 – 1023 (8th Cir. 1987), the Eighth Circuit found that the totality of circumstances indicated that Native Americans did not have equal access to the county's political processes, and the county's districting plans for school board and village board elections were "attempts at gerrymandering in violation of equal protection" and §2 of the Voting Rights Act. Asian Americans are also protected by the Voting Rights Act, assuming that they can make out a prima facie showing of vote dilution. For example, in *Barnett v. City of Chicago,* 141 F.3d 699, 703 – 704 (7th Cir. 1998), the Seventh Circuit noted that white voters "appear also to have gotten all the wards that would have gone to Chicago's Asian-American residents if the Asian-Americans had a more concentrated residential pattern," but "even if Asians voted as a bloc their distribution throughout the City makes it impossible to create an Asian-majority ward."

It appears that members of other ethnic or religious minority groups are not protected by the Voting Rights Act. For example, in *United Jewish Organizations of Williamsburgh, Inc. v. Carey,* 430 U.S. 144, 51 L.Ed.2d 229, 97 S.Ct. 996 (1977), the United States Supreme Court rejected a constitutional challenge by Hasidic Jews to a redistricting plan for three counties in New York submitted for preclearance under §5 of the Voting Rights Act. In order to create 65 percent nonwhite supermajorities in three state electoral districts (see §16.35 below), the new districting plan split a Hasidic Jewish community between two state senate and two state assembly districts.

Previously, the Hasidic community had been located entirely within one assembly district (61 percent nonwhite) and within one state senate district (37 percent nonwhite).

Representatives of the Hasidic community brought suit on behalf of all Hasidic voters, claiming that splitting the Hasidic community among multiple districts had unconstitutionally diluted their voting power. Specifically, the voters argued that splitting their community violated the Fourteenth Amendment because it would dilute the value of each plaintiff's vote for the purpose of achieving a racial quota. The voters also argued that splitting their community to create nonwhite supermajorities also violated the Fifteenth Amendment because they had been assigned to electoral districts solely on the basis of their race.

The United States District Court for the Eastern District of New York dismissed the complaint, finding that, in the context of political redistricting and reapportionment, Hasidic Jews had no constitutional right to separate community recognition. The district court also found that the redistricting plan had not disenfranchised the Hasidic petitioners and that racial considerations favoring voters were permissible to correct past discrimination. On appeal, a divided Second Circuit affirmed the district court's holding. *United Jewish Organizations, Inc. v. Wilson,* 377 F.Supp. 1164, 1165 – 1166 (E.D.N.Y. 1974), *aff'd,* 510 F.2d 512 (2d Cir. 1975).

On certiorari, the United States Supreme Court affirmed the Second Circuit. In reaching its decision, the Court held that the Constitution did not prevent a state subject to §5 of the Voting Rights Act from deliberately creating or preserving majorities in particular districts in order to ensure that a reapportionment plan complied with the Act. The Court noted that both the old and the new districting plans had not cancelled out the voting strength of whites as a racial group. 97 S.Ct. at 1010. In other words, the Court did not treat the Hasidic community as a distinct, protected minority when it considered the constitutionality of the new plan. Rather, it viewed the Hasidic voters as a part of a homogeneous white population for purposes of assessing the constitutionality of the districting plan.

(2) [16.21] Improper use of racial considerations

The use of racial considerations in legislative redistricting, and how courts address the use of such considerations, has dominated the Supreme Court's redistricting cases in the last decade. Many of these opinions have been sharply divided 5-4 decisions. The seminal case is *Shaw v. Reno,* 509 U.S. 630, 125 L.Ed.2d 511, 113 S.Ct. 2816 (1993) (*Shaw I*), in which the Court held that redistricting legislation, like any other legislation that distinguishes among citizens on account of race, is subject to strict scrutiny.

Shaw I addressed an African-American majority district in North Carolina, which stretched for 160 miles through 12 counties, and was no wider than the highway corridor it followed. White voters challenged the map as an unconstitutional racial gerrymander in violation of the equal protection clause of the Fourteenth Amendment, which concentrated African-American voters arbitrarily, solely to ensure the election of two representatives, without regard to traditional redistricting principles such as compactness, contiguity, geographical boundaries, or political subdivisions. The Supreme Court found that the shape of the proposed district was so bizarre on its face that it could not be explained except as an effort to separate the races for voting purposes. The Court held that when such racial separation lacks sufficient justification, it is subject to strict scrutiny and must be narrowly tailored to further a compelling governmental interest. The Court

reasoned that racially-gerrymandered districts may perpetuate both racial stereotypes and the pattern of racial bloc voting that majority-minority districts are supposed to counteract.

On remand, the district court found that the district in question was narrowly tailored to further the state's compelling interest in avoiding liability under §2 of the Voting Rights Act. The Supreme Court again reversed, ruling that §2 applied only to geographically compact minority groups, and that the state's interest in avoiding liability was not compelling, particularly because there was no requirement to maximize the number of majority-minority districts. *Shaw v. Hunt,* 517 U.S. 899, 135 L.Ed.2d 207, 116 S.Ct. 1894 (1996) (*Shaw II*). After the second remand, North Carolina redrew the district, creating another majority-minority district that was somewhat less oddly shaped. The district court applied strict scrutiny and threw out the redrawn district without a hearing and before discovery. A unanimous Supreme Court reversed yet again, ruling that because the parties disputed whether the North Carolina legislature was motivated primarily by racial considerations or primarily by the desire to draw a strong Democratic district, summary judgment was improper. *Hunt v. Cromartie,* 526 U.S. 541, 145 L.Ed.2d 731, 119 S.Ct. 1545 (1999) (*Hunt I*).

On yet another remand, the district court found that racial considerations predominated and once more threw out the redrawn district. The Supreme Court held that the district court's finding was clearly erroneous, and reversed yet again. *Hunt v. Cromartie,* 532 U.S. 234, 149 L.Ed.2d 430, 121 S.Ct. 1452 (2001) (*Hunt II*). There was uncontroverted evidence, the Court reasoned, that race and political affiliation were highly correlated in North Carolina, and the white-majority precincts that were excluded from the district were not as reliably Democratic as the black-majority precincts that were included. Thus, the state had articulated a legitimate political explanation for its districting decision. The Court held that it was not enough for the white plaintiffs to show that race was a motivating factor; they had to show that it was the predominant factor. In other words, the state had engaged in constitutional political gerrymandering, not unconstitutional racial gerrymandering.

Other recent Supreme Court decisions have further refined and clarified the standards for assessing when a state has improperly used racial criteria in redistricting. For example, although the bizarre shape of the North Carolina district precipitated the litigation in *Shaw,* a party who alleges that race was improperly considered does not have to show that the district at issue is oddly shaped. *Miller v. Johnson,* 515 U.S. 900, 132 L.Ed.2d 762, 115 S.Ct. 2475 (1995). Moreover, an oddly-shaped district is not always sufficient to show that racial considerations were used improperly. Redistricting is always a fact-specific inquiry, and it is possible that application of a state's traditional redistricting principles will also result in oddly-shaped, non-compact districts. *Lawyer v. Department of Justice,* 521 U.S. 567, 138 L.Ed.2d 669, 117 S.Ct. 2186 (1997) (district court's approval of oddly-shaped, non-compact district that contained a higher percentage of African-American voters than surrounding districts was not clearly erroneous, because use of traditional Florida redistricting principles would have resulted in similarly irregular district).

In addition, the Court has cautioned — over a vigorous dissent — that not every majority-minority district is subject to strict scrutiny. First, states may create majority-minority districts for a variety of reasons, as long as they are also consonant with traditional state distracting principles. *Voinovich v. Quilter,* 507 U.S. 146, 122 L.Ed.2d 500, 113 S.Ct. 1149, 1156 (1993). (In contrast, because the federal government's authority to engage in redistricting derives not from the

Constitution, but instead derives solely from the Voting Rights Act, federal courts may order the creation of a majority-minority district only to remedy a violation of federal law. *Id.*) Because state legislatures engaged in redistricting must have discretion to exercise the political judgment necessary to balance competing interests, courts must exercise "extraordinary caution" in determining that a state has drawn district lines on the basis of race. *Miller, supra,* 115 S.Ct. at 2488. Second, racial considerations are subject to strict scrutiny only when it is shown that race predominates over traditional and permissible redistricting principles. *Id.* Third, strict scrutiny is unnecessary when state action (a) neither intends to nor does harm any particular group; (b) is designed to break down, rather than give effect to, irrational prejudice; and (c) uses race as a classification because race is relevant to the "benign goal" of the classification. *Bush v. Vera,* 517 U.S. 952, 135 L.Ed.2d 248, 116 S.Ct. 1941, 1978 (1996) (plurality opinion).

States are not required to maximize the number of majority-minority districts, even in the face of ongoing discrimination and racial bloc voting, as long as the number of districts in which minority voters form effective voting majorities is roughly proportional to the minorities' share of the voting age population. *Johnson v. De Grandy,* 512 U.S. 997, 129 L.Ed.2d 775, 114 S.Ct. 2647 (1994). *See also Abrams v. Johnson,* 521 U.S. 74, 138 L.Ed.2d 285, 117 S.Ct. 1925 (1997) (district court's remedial map eliminating two of three majority-minority districts did not disregard §5 of Voting Rights Act because §5 only aimed to prevent retrogression in voting position of racial minorities; district court's plan showed no retrogression from plan adopted following 1980 census). Indeed, the Supreme Court has found that the Justice Department exceeded its authority under the Voting Rights Act by requiring states to maximize the number of majority-minority districts in order to obtain preclearance under §5 of the Voting Rights Act. *Miller, supra,* 115 S.Ct. at 2492.

The Supreme Court's evolving jurisprudence on the role of race in redistricting resulted in significant litigation over Illinois' Fourth Congressional District. Following the 1990 census, the Illinois legislature was unable to agree on a congressional redistricting plan, and suit was brought asking the federal court to devise a plan. After examining plans submitted by competing parties, the court approved a plan that included a meandering, earmuff-shaped Hispanic-majority district, connecting two densely populated Hispanic areas. *Hastert v. State Board of Elections,* 777 F.Supp. 634, 637 (N.D.Ill. 1991). Although the odd shape of the Fourth District raised a red flag, the court approved it because the district was drawn to advance the goals of the Voting Rights Act.

Following the Supreme Court's decision in *Shaw I,* the Fourth District was challenged as violating the equal protection clause. In *King v. State Board of Elections,* 979 F.Supp. 582, 611 (N.D.Ill. 1996), a three-judge panel found that race played a predominant role in drawing the Fourth District's borders, but that the district survived strict scrutiny, because it was narrowly tailored to meet the state's compelling interest in complying with the goals of the Voting Rights Act. In *King v. State Board of Elections,* 519 U.S. 978, 136 L.Ed.2d 328, 117 S.Ct. 429 (1996) (mem.), the Supreme Court, however, vacated the district court's judgment, and remanded the case for further consideration in light of *Shaw II* and *Bush v. Vera, supra*. On remand, the district court concluded that under *Bush,* a state had a compelling interest in remedying an anticipated violation of §2 of the Voting Rights Act, and the Fourth District met this compelling interest. Further, the court found that the district was narrowly tailored because it considered race no more than reasonably necessary to achieve its remedial purpose. *See King v. State Board of Elections,* 979 F.Supp. 619, 626 (N.D.Ill. 1997). On appeal from the federal district court, this time the

Supreme Court summarily affirmed, although three justices would have set the case for oral argument. *See King v. State Board of Elections,* 522 U.S. 1087, 139 L.E.2d 866, 118 S.Ct. 877 (1998).

e. [16.22] Fairness to Political Parties

Before *Davis v. Bandemer,* 478 U.S. 109, 92 L.Ed.2d 85, 106 S.Ct. 2797 (1986), the Supreme Court had held that the influence of political motivations on state legislative and redistricting and reapportionment plans did not necessarily render them constitutionally defective. *See Gaffney v. Cummings,* 412 U.S. 735, 37 L.Ed.2d 298, 93 S.Ct. 2321, 2331 (1973) ("Politics and political considerations are inseparable from [state legislative] districting and apportionment . . . . The reality is that districting inevitably has and is intended to have substantial political consequences"); *Rybicki I,* 574 F.Supp. at 1102 – 1103 ("gerrymandered" state legislative districts drawn to maximize strength of one political party are not unconstitutional).

The *Rybicki I* court read *Gaffney* as holding that the 1981 Illinois state legislative redistricting plan did not necessarily have to be "politically fair" or motivated by political even-handedness to be constitutional. *Rybicki I,* 574 F.Supp. at 1102. Thus, a plan that reflected some partisan leanings on the part of its drafters was not constitutionally defective simply because its drafters had indulged some partisan political biases. *Id.* Similarly, before the 1982 amendments to the Voting Rights Act, the *Rybicki I* court held that adjustments of legislative districts to preserve incumbencies were permissible to the extent that they did not amount to purposeful racial discrimination. *Rybicki I,* 574 F.Supp. at 1110 – 1111 n.81.

In *Bandemer,* however, the Court retreated from *Gaffney* and held that charges of state political gerrymandering were justiciable under the equal protection clause. In that case, Indiana Democrats filed suit in federal district court against state officials alleging that the state legislature's 1981 reapportionment plan was politically gerrymandered to dilute Democratic voting strength thereby depriving members of that party equal protection under the Fourteenth Amendment. The district court agreed and invalidated the 1981 redistricting plan. On certiorari, the Court held that charges of state political gerrymandering are justiciable under the equal protection clause, but found that the Indiana Democrats failed to make an adequate threshold showing of discriminatory vote dilution. To state a claim for political gerrymandering, a plaintiff must show (1) an intentional discrimination against an identifiable political group; and (2) an actual discriminatory effect, which must be more than de minimis. *Bandemer, supra,* 106 S.Ct. at 2808 (plurality). Lower courts follow the plurality opinion because it provides the narrowest grounds for decision. *See Republican Party of North Carolina v. Martin,* 980 F.2d 943, 955 n.22 (4th Cir. 1993). Thus, *Bandemer* permits political parties and other groups not protected by §2 of the Voting Rights Act to bring suits in federal court to challenge discriminatory plans that dilute their voting strength.

That ability, however, has proved toothless in practice. Under *Bandemer,* it is not enough to show that a redistricting plan makes it more difficult for a particular group to win an election or elect representatives in proportion to a political party's overall number of voters. *Bandemer, supra,* 106 S.Ct. at 2819. The United States Supreme Court continues to recognize that political gerrymandering cases are justiciable (*See Hunt II*), but has shown increased tolerance for "constitutional political gerrymandering." In particular, the four justices who oppose the use of strict scrutiny in claims of racial gerrymandering have used the concept of "constitutional

political gerrymandering" as a means of upholding the constitutionality of majority-minority districts. ((*Hunt I,* 119 S.Ct. at 1551) (legislature constitutionally drew safe Democratic seat, even if most loyal Democrats happened to be African Americans and mapmakers were conscious of that fact)).

There have been no successful political gerrymandering cases in the years since *Bandemer,* and, as one court has complained, "[t]he law regarding political gerrymandering is about as firm as marshmallow cream." *LaPorte County Republican Central Committee v. Board of Commissioners of the County of LaPorte,* 851 F.Supp. 340, 342 (N.D.Ind.), *rev'd,* 43 F.3d 1126 (7th Cir. 1994). Even the North Carolina district that was found to be an unconstitutional racial gerrymander in *Shaw I* and *Shaw II* was found not to be an unconstitutional political gerrymander under *Bandemer*. *Pope v. Blue,* 809 F.Supp. 392 (W.D.N.C.), *aff'd,* 113 S.Ct. 30 (1992). In reversing the district court's opinion in *LaPorte,* the Seventh Circuit agreed that the plaintiffs failed to state a claim of political gerrymandering. However, the court held that some individual candidates had a viable claim under the federal Constitution, because the complaint alleged that the map was drawn for the purpose of preventing specific candidates from standing for election, and the right to vote encompassed the right to stand for office. *LaPorte, supra,* 43 F.3d at 1130**. In *Hulme v. Madison County Board,*, 188 F. Supp. 2d 1041, 1051 (S.D. Ill. 2001), the federal district court condemned a reapportionment process that had as one of its goals "to create districts that would not simply disadvantage Republican members of the Board, but 'cannibalize' their districts to the greatest extent possible." The court in *Hulme* did not, however, cite *Bandemer*, and ruled the Madison County redistricting process unconstitutional because it violated the "one person/one vote" requirement of the Equal Protection clause of the Fourteenth Amendment.**

2. [16.23] Permissive Considerations

The Supreme Court recognizes that states engaged in redistricting ordinarily employ certain traditional redistricting principles. These include (a) compactness and contiguity of districts, (b) respect for geographical boundaries, political subdivisions, or communities with actual shared interests, and (c) protection of incumbents. *See Hunt I,* 119 S.Ct. at 1549; *Lawyer v. Department of Justice,* 521 U.S. 567, 138 L.Ed.2d 699, 117 S.Ct. 2186, 2194 – 2195 (1997).

Since the Supreme Court's opinion in *Shaw I,* these "traditional redistricting principles" have become the benchmark for measuring whether a legislature has engaged in prohibited racial gerrymandering. However, in the pre-*Shaw* case of *Karcher v. Daggett,* 462 U.S. 725, 77 L.Ed.2d 133, 103 S.Ct. 2653 (1983), the Court suggested that these traditional principles might, if consistently applied, justify deviations from strict numerical equality in the drawing of congressional districts by state officials. *See Mahan v. Howell,* 410 U.S. 315, 35 L.Ed.2d 320, 93 S.Ct. 979, 986 (1973) (upholding total deviation of over 16 percent when justified by rational objective of preserving integrity of political subdivision lines); *Abrams v. Johnson,* 521 U.S. 74, 138 L.Ed.2d 285, 117 S.Ct. 1925 (1997) (slight deviation from ideal population justified by Georgia's strong historical preference for not splitting precincts, and not splitting counties outside Atlanta); *Voinovich v. Quilter,* 507 U.S. 146, 122 L.Ed.2d 500, 113 S.Ct. 1149, 1159 (1993) (remanding when district court failed to consider whether population deviations in excess of ten percent were justified by Ohio's policy favoring preservation of county boundaries).

B. [16.24] The Process of Redistricting

Most constitutional challenges to redistricting plans are made under the equal protection clause. The Voting Rights Act is generally interpreted in light of cases interpreting the equal protection clause. Nonetheless, the process of redistricting may itself give rise to challenges under the due process clause of either the federal or Illinois Constitutions. For example, in the first redistricting that took place under the Illinois Constitution of 1970, three of the state's legislative leaders appointed themselves and their aides to the eight-person Legislative Redistricting Commission. Although the state Constitution did not expressly forbid such actions, the Illinois Supreme Court found that a strong public policy against self-appointment meant that the Redistricting Commission's map was developed "completely at variance with the constitutional mandate." The court proceeded to consider the suitability of the map as a provisional plan based on the map's compliance "with other State and Federal Constitutional requirements." *People ex rel. Scott v. Grivetti,* 50 Ill.2d 156, 277 N.E.2d 881, 887 (1971).

In 1990, the Legislative Redistricting Commission was forced to resort to the tie-breaking procedures after the eight-person Commission was unable to agree on a map. The resulting five-person majority submitted a plan on October 1, 1991. The majority accepted written comments until October 3, when it heard testimony from a single witness and the four-person minority submitted a counterproposal. The majority's plan was amended the next day and passed by a 5-4 party-line vote. The majority then sought a declaratory judgment that the plan complied with applicable federal and state laws. The Illinois Supreme Court invoked *Grivetti*'s rule that a map formulated by procedures wholly at variance with the mandate of the state Constitution could not be recognized, and refused to accept the plan:

> **Since both sides submitted plans and amendments on the last two days, thereby thwarting any type of hearing, whether for expert testimony or public criticism, we cannot in good conscience approve any plan no matter how fair, compact, or contiguous and substantially equal the districts have been formed. This court finds that to do otherwise would circumvent the spirit and purpose of the Illinois Constitution.** *Ryan I,* 588 N.E.2d at 1029 – 1030.

The Supreme Court required that on remand (1) each submission be accompanied by a map, census geography descriptions, statistical summaries of minority population and voting age population, and an exchangeable computer diskette; (2) each side have seven days to file written objections; and (3) the Commission must hold an expedited hearing. *Ryan I,* 588 N.E.2d at 1030 – 1031. The court, thus, arguably created a constitutional right to reasonable notice, fact-finding hearings, and an opportunity to heard.

As previously noted in §16.4 above, before the 2001 redistricting process was complete, litigation was filed that challenged the tie-breaking procedure set forth in Article III, §4 of the Illinois Constitution, arguing that drawing a name by lot is so arbitrary and irrational that it violates the due process clause of the federal Constitution. A three-judge panel disagreed, and found that this provision of the Illinois Constitution passed muster under the federal Constitution. *Winters v. Illinois State Board of Elections* No. 01 C 50229/01 C 6566, 2001 WL 1491581 (N.D.Ill. Nov. 20, 2001).

Other than the requirements described in *Ryan I,* there is no constitutional or statutory mandate that the redistricting process be open or accessible to interested parties or to the general

public. Meetings of Illinois' Legislative Redistricting Commission, however, are open to the public, transcripts of hearings are kept, and members generally concede that the requirements of Illinois' Open Meetings Act, 5 ILCS 120/1.01, *et seq.,* apply. Indeed, courts frequently scrutinize redistricting plans that result from secretive and closed processes more closely than when the process is open to the public.

For example, in *Ketchum v. Byrne,* 740 F.2d 1398, 1401 (7th Cir. 1984), the United States Court of Appeals for the Seventh Circuit began its analysis by observing that a new ward map for the City of Chicago had been drafted by Thomas Keane, a former alderman, and Martin Murphy, Commissioner of Chicago's Department of Planning. The court further observed that Keane and Murphy had not submitted their citywide ward map to the City Council upon its completion and that the plan was publicly displayed on only one occasion, at which time Murphy incorrectly stated that the map provided for 19 black majority wards and 26 white majority wards. *Id.* (The correct figures were 18 and 24, respectively.) Moreover, the plan, with certain amendments, eventually was adopted by the City Council without giving substantial consideration to several alternative plans that had been proposed. *Id.* In addition, the City Council passed an ordinance requiring that 17 rather than 10 aldermen be required to vote against a redistricting ordinance before a substitute ordinance could be submitted to a public referendum. *Id.* See 65 ILCS 20/21-39.

The Seventh Circuit then scrutinized the plan to determine whether it violated §2 of the Voting Rights Act. For other reasons, the court found that the ward map did not grant minority citizens a fair and reasonable opportunity to elect candidates of their choice. 740 F.2d at 1406. *Ketchum* suggests that while there is no statutory or constitutional mandate requiring that the redistricting process be open and accessible to the general public, reviewing courts are nonetheless generally more receptive to redistricting plans created by an open process that included public hearings and the participation of community groups. *See Rybicki I,* 574 F.Supp. at 1086 – 1087.

V. CHALLENGING REDISTRICTING PLANS

A. The Voting Rights Act

1. In General

a. [16.25] General Principles

The Voting Rights Act of 1965, as amended in 1970, 1975, and 1982, and now codified at 42 U.S.C. §1971 *et seq.,* prohibits any redistricting plan or voting procedure that results in the denial or abridgement of any citizen's right to vote on account of his or her membership in a protected class of race, color, or language. Under the 1982 amendments, §2 of the Act prohibits any state or political subdivision from imposing any voting qualification, standard, practice, or procedure that results in the denial or abridgement of any citizen's right to vote on account of race, color, or status as a member of a language minority group. 42 U.S.C. §1973(a).

In passing the 1982 amendments, Congress legislatively overruled the United States Supreme Court's holding in *City of Mobile, Alabama v. Bolden,* 446 U.S. 55, 64 L.Ed.2d 47, 100 S.Ct.

1490, 1497 (1980). In that case, the Supreme Court stated that a showing of "racially discriminatory motivation" was necessary to prove a violation of the Voting Rights Act. The Court found that in passing §2 of the Voting Rights Act, Congress intended to provide no more protection against discriminatory practices than that provided by the Fifteenth Amendment. The Court observed that proof of discriminatory intent was necessary to make out a violation of the Fifteenth Amendment. By extension, the *Bolden* Court held that because Congress intended §2 of the Voting Rights Act to mirror the Fifteenth Amendment, a violation of §2 would also require proof of discriminatory intent. 100 S.Ct. at 1497 – 1498. *See also Ketchum v. Byrne,* 740 F.2d 1398, 1403 (7th Cir. 1984).

Congress acted quickly to overrule *Bolden* legislatively. In 1982, Congress amended §2 to prohibit any practice that results in an impairment of the voting rights of a protected group regardless of the actor's motivation for the impairment. Thus, after the 1982 amendments, a plaintiff need show only that a redistricting plan has a discriminatory result to bring an action under the Act. A plaintiff need not prove that the questionable practice was motivated by a racially discriminatory purpose.

b. [16.26] Standing To Sue

In order to challenge a redistricting plan, a party must demonstrate a cognizable injury in fact. *United States v. Hays,* 515 U.S. 737, 132 L.Ed.2d 635, 115 S.Ct. 2431 (1995). *See also Tucker v. United States Department of Commerce,* 958 F.2d 1411, 1415 (7th Cir. 1992) (to establish Article III case or controversy in redistricting case, plaintiff must demonstrate some probability of tangible benefit from winning suit). Statutorily protected ethnic and language-group minorities, have standing to sue under the Voting Rights Act. A white voter who resides in a majority-minority district has standing to raise a racial gerrymandering claim. *See Shaw II*. However, voters who do not live in a district lack standing to challenge a racial gerrymander unless they provide evidence that they personally were subjected to a racial classification, were assigned to their voting district on the basis of race, or were otherwise denied equal treatment under the law. *Hays, supra,* 115 S.Ct. at 2436. An anticipated loss of representation as a result of reapportionment is also sufficient to confer standing. *Department of Commerce v. United States House of Representatives,* 525 U.S. 316, 733 142, L.Ed.2d 797, 119 S.Ct. 765 (1999); *Tucker, supra,* 958 F.2d at 1415. *See also Ridge v. Verity,* 715 F.Supp. 1308 (W.D. Penn. 1989) (plaintiffs lacked standing to challenge inclusion of illegal aliens in federal census because they could not show who would gain or lose representation by including aliens in enumeration.) Also, a claim that a census undercount would result in a loss of federal funds may give a local government standing to challenge census methodology. *City of Detroit v. Franklin,* 4 F.3d 1367 (6th Cir. 1993); *Tucker, supra,* 958 F.2d at 1415.

c. Test for Vote Dilution Claims

(1) [16.27] The *Gingles* factors

In *Thornburg v. Gingles,* 478 U.S. 30, 92 L.Ed.2d 25, 106 S.Ct. 2752 (1986) (*Gingles*), the Supreme Court announced a three-part threshold test for determining whether a minority group states a claim for discriminatory vote dilution under §2 of the amended Voting Rights Act. Under this test, the minority group must prove that (a) "it is sufficiently large and geographically compact to constitute a majority in a single-member district;" (b) "it is politically cohesive," and

(c) "the white majority votes sufficiently as a bloc to enable it — in the absence of special circumstances, such as the minority candidate running unopposed . . . usually to defeat the minority's preferred candidate." [Citation omitted.] *Gingles,* 106 S.Ct. at 2766 – 2767.

Because the "*Gingles* factors" are a necessary precondition to maintaining a suit under the Voting Rights Act, failure to establish any one of the three factors will result in the dismissal of the suit. For example, in *McNeil v. Springfield Park District,* 851 F.2d 937 (7th Cir. 1988), African-American voters brought suit under §2 of the Voting Rights Act to challenge the multi-member district for electing members to the Springfield, Illinois, Park District and School Board. alleging that at-large election of Board members by plurality vote diluted minority votes. 851 F.2d at 938. The trial court dismissed because the plaintiffs could not show that the African-American minority group was "sufficiently large and geographically compact to constitute a majority in a single-member district." 851 F.2d at 939, quoting *Gingles,* 106 S.Ct. at 2766. The Seventh Circuit affirmed, concluding that a vote dilution action must meet each prong of the three-part *Gingles* test. 851 F.2d at 942 – 943. *See also Shaw II,* 116 S.Ct. at 1906 (1996) (legislature could not use geographically sprawling district to cure alleged vote dilution because §2 applies only to "geographically compact" minority groups); *Page v. Bartels,* 144 F.Supp.2d 346, 363 – 366 (D.N.J. 2001) (because evidence showed that white voters did not engage in racial bloc voting, plaintiffs could not make out prima facie case of vote dilution).

Gingles was a challenge to a multi-member district, and some courts initially questioned whether the *Gingles* factors applied outside the context of multi-member districts. *See, e.g., McNeil, supra,* 851 F.2d at 942 – 943. The Supreme Court has subsequently clarified that the same bright-line, three-part test applies in challenges to single-member districts. *Growe v. Emison,* 507 U.S. 25, 122 L.Ed.2d 388, 113 S.Ct. 1075, 1084 (1992).

(2) [16.28] The "results test"

Although the *Gingles* factors are necessary prerequisites, the Supreme Court has emphatically rejected the suggestion they are sufficient to establish a claim of vote dilution. *Johnson v. De Grandy,* 512 U.S. 997, 129 L.Ed.2d 775, 114 S.Ct. 2647, 2658 (1994) ("factfinders cannot rest uncritically on assumptions about the force of the *Gingles* factors in pointing to dilution"). Consequently, once a party has passed the threshold imposed by the *Gingles* factors, a court reviewing a redistricting or reapportionment plan should examine the plan under the "totality of circumstances" and strike it down if it has discriminatory results. *Teague v. Attala County, Mississippi,* 92 F.3d 283, 287 (5th Cir. 1996); *Gingles, supra,* 106 S.Ct. at 2763. Unlike a claim under the Fourteenth Amendment, under which the legislature's subjective motive in redistricting is a key factor (*Hunt I,* 119 S.Ct. at 1549), this "results test" is objective. *Gingles, supra,* 106 S.Ct. at 2763.

The 1982 Report of the Senate Judiciary Committee, supporting passage of the amendments to §2 of the Voting Rights Act, listed nine nonexclusive factors that courts may consider in determining whether, under the totality of the circumstances, an electoral structure has produced a discriminatory result. S.Rep. No. 417, 97th Cong., 2d Sess. 2 (1982), reprinted in 1982 U.S.C.C.A.N. 177. These factors include, inter alia, (a) patterns of racially polarized voting among districts; (b) a history of official discrimination in voting matters; (c) the extent to which the effects of discrimination in education, housing, employment, and health services affect the minority group's ability to participate in the electoral process; (d) the extent to which the political

subdivision has used voting practices or procedures that enhance the opportunity to discriminate against minorities; (e) the persistent use of overt or subtle racial appeals in political campaigns; (f) the fact that few members of a protected minority have been elected to public office; (g) the responsiveness of elected officials to the particular needs of the minority group; and (h) the extent to which the minority group has access to any party slate-making process. *Gingles,* 106 S.Ct. at 2763 – 2764; *Harper v. City of Chicago Heights,* 223 F.3d 593, 596 n.3, 600 (7th Cir. 2000) (approving use of nine "Senate Report factors" in analyzing totality of circumstances).

The Senate Report factors relevant to a finding of discriminatory result actually derive from case law predating the 1982 amendments to the Voting Rights Act. The factors were first discussed in *White v. Regester,* 412 U.S. 755, 37 L.Ed.2d 314, 93 S.Ct. 2332, 2339 (1973). In that case, the Court struck down a plan involving multimember electoral districts after finding that this structure had been used to systematically exclude African Americans and Hispanics from participation in local politics. The Court held that the district court had properly based its judgment on findings of a history of official discrimination against African Americans that had impaired their right to vote. With respect to Hispanics, the Court found that the district court had properly based its judgment on a history of invidious discrimination in education, employment, health, and politics. The Court also noted that Hispanic voters lived in areas of poor housing, had low income and high rates of unemployment, and suffered from cultural and linguistic barriers to full participation in politics. In addition, only five Mexican Americans since 1880 had served in the Texas legislature from the district under scrutiny. Based on these factors, the *White* Court held that the finding of discriminatory results was justified. 93 S.Ct. at 2340 – 2341.

2. Subterfuges Employed To Dilute Minority Voting Strength

a. [16.29] Fracturing

"Fracturing" occurs when portions of a block of minority voters are "fractured" off the minority block and added to several adjoining districts where the majority can routinely outvote them. *Voinovich v. Quilter,* 507 U.S. 146, 122 L.Ed.2d 500, 113 S.Ct. 1149, 1155 (1993). For example, in *Ketchum v. Byrne,* 740 F.2d 1398, 1408 (7th Cir. 1984), evidence showed that although Chicago's South Side had an population sufficient to produce 15 to 16 African-American wards with majorities in excess of 70 percent, the City Council map adopted in 1981 produced only 13 African-American majority wards, the smallest number of African-American wards mathematically possible on the South Side. See Colman and Brody, *Ketchum v. Byrne: The Hard Lessons of Discriminatory Redistricting in Chicago,* 64 Chi.-Kent L.Rev. 497, 507 (1988). The City Council achieved this result by splitting off substantial amounts of the African-American population from the edge of predominantly black areas and combining them with neighboring, nonblack wards. The same pattern was evident in the districting of predominantly African-American areas on the city's West Side and with respect to Hispanic areas on Chicago's Near Northwest Side. *Ketchum v. Byrne, supra,* 740 F.2d at 1408 – 1409.

In contrast, the district court in *Illinois Legislative Redistricting Commission v. LaPaille,* 786 F.Supp. 704 (N.D.Ill. 1992), found that the redistricting of Illinois legislative and representative districts following the 1990 decennial census did not fracture the Hispanic voting population outside Chicago. Even though it would have been possible to raise the percentage and, therefore, the influence of Hispanic voters in some districts, the Hispanic population was not sufficiently large to create majority-minority districts. The Hispanic voters, the court ruled, could not "clearly

show that a 13.0% minority population in a Springfield district would be significantly more influential than the 12.7% provided for, or that a 12.8% minority would be significantly more powerful than 11.9% in a Champaign-Urbana district." 786 F.Supp at 716. **Similarly, the district court in *Campuzano v. Illinois State Board of Elections*, No. 01 C 50376, 2002 WL 849819, *8 (N.D. Ill. May 3, 2002), ruled that the even when a redistricting plan divides a cohesive African-American community among multiple districts, no fracturing occurs as long as the plan gives African-Americans as a whole a reasonable opportunity to elect representatives in a number that is proportional to their population**

b. [16.30] Packing

"Packing" occurs when district lines are drawn to follow racially segregated housing patterns, concentrating or "packing" a supermajority of minority votes into one district, thereby "wasting" that minority's vote. *Voinovich v. Quilter,* 507 U.S. 146, 122 L.Ed.2d 500, 113 S.Ct. 1149, 1155 (1993); *Rybicki II,* 574 F.Supp. at 1153. In *Ketchum v. Byrne,* 740 F.2d 1398 (7th Cir. 1984), the plaintiffs presented evidence that packing was used by the Council's plan to dilute minority voting strength. Owing to the city's sizeable African-American population, it was inevitable that many ward elections would be controlled by African-American voters. In order to minimize African-American voting strength, the council plan "packed" African Americans into a small number of all-black wards.

Accordingly, of the 17 African-American majority wards produced by the Chicago City Council ward map, 14 contained African-American voting age populations exceeding 89 percent of the total. By contrast, in only 6 of the 20 white-majority wards produced by the map did the white voting age population exceed 89 percent. 740 F.2d at 1408 – 1409. Thus, by packing African-American citizens into the smallest number of wards possible, the City Council reduced African-American representation below that which would have resulted had black and white citizens been treated evenhandedly. *See also Hastert v. State Board of Elections,* 777 F.Supp. 634, 647 (N.D.Ill. 1991) (no evidence of packing when each of three African-American supermajority districts contained little more than 65-percent minority population necessary to provide reasonable opportunity to exercise political control).

c. [16.31] Retrogression

"Retrogression" occurs when a new districting plan or voting scheme decreases the "number of representatives which a minority group has a fair chance to elect." *Ketchum v. Byrne,* 740 F.2d 1398, 1402 n.2 (7th Cir. 1984). In the 1981 Chicago ward redistricting, retrogression of minority voting strength was inconsistent with the prior decade's increase in minority population. In *Ketchum,* the plaintiffs demonstrated retrogression by comparing the voting strength of African Americans and Hispanics under the 1970 ward map and under the City Council map based on the 1980 census figures. The 1981 City Council map was retrogressive because it provided only 17 wards with African-American majorities. Prior to the adoption of the new map, African Americans had constituted a majority in 19 wards.

The *Ketchum* plaintiffs also demonstrated that the city council could have adopted a redistricting plan that did not manipulate existing ward boundaries to preserve white incumbencies or result in the fracturing, packing, or retrogression that characterized the map

adopted. During the *Ketchum* trial, witnesses for both parties testified that 65 percent of the total population of a district is a widely recognized benchmark to ensure that minority groups have a fair and reasonable chance to elect representatives of their choice. 740 F.2d at 1415. As noted in §16.22 above, however, the United States Supreme Court has made it clear that the mandate to avoid "retrogression" only requires that a new map not make the position of minority groups worse; it does not translate into a mandate to maximize minority voting strength. *Johnson v. De Grandy,* 512 U.S. 997, 129 L.Ed.2d 775, 114 S.Ct. 2647 (1994); *Abrams v. Johnson,* 521 U.S. 74, 138 L.Ed.2d 285, 117 S.Ct. 1925 (1997).

d. [16.32] Multimember Districts

Multimember legislative districts are not per se unconstitutional but may be evidence of discrimination if they deny minorities' access to the political process. *White v. Regester,* 412 U.S. 755, 37 L.Ed.2d 314, 93 S.Ct. 2332, 2339 (1973). Additionally, in *Connor v. Johnson,* 402 U.S. 690, 29 L.Ed.2d 268, 91 S.Ct. 1760, 1762 (1971), the Court held that in court-ordered apportionment plans "single-member districts are preferable to large multi-member districts as a general matter."

B. [16.33] The Fourteenth and Fifteenth Amendments

In order to establish a violation of the Fourteenth and Fifteenth Amendments in the context of redistricting, a plaintiff must prove that the architects of a voting plan intentionally discriminated against an identifiable group. The "plaintiff must prove that the disputed plan was 'conceived or operated as [a] purposeful devic[e] to further racial . . . discrimination."' *City of Mobile, Alabama v. Bolden,* 446 U.S. 55, 64 L.Ed.2d 47, 100 S.Ct. 1490, 1499 (1980), quoting *Whitcomb v. Chavis,* 403 U.S. 124, 29 L.Ed.2d 363, 91 S.Ct. 1858, 1872 (1971).

A plaintiff need not, however, demonstrate that a discriminatory purpose was the only motive for the challenged redistricting plan as long as it was one of the motives. *Village of Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 50 L.Ed.2d 450, 97 S.Ct. 555 (1977); *Rybicki I,* 574 F.Supp. at 1106 – 1107; *Ketchum v. Byrne,* 740 F.2d 1398, 1406 (7th Cir. 1984). In *Rogers v. Lodge,* 458 U.S. 613, 73 L.Ed.2d 1012, 102 S.Ct. 3272, 3277 (1982), the Supreme Court affirmed a district court finding of intentional discrimination based on indirect and circumstantial evidence and endorsed the lower court's examination of "all the relevant facts" in reaching its conclusion.

The *Rogers* Court stated that a number of factors might be relevant to a finding of discriminatory intent. These factors include bloc voting along racial lines, low African-American voter registration, exclusion of minority participation in political processes, unresponsiveness of elected officials to the needs of minorities, and depressed socioeconomic status attributable to inferior education and employment and housing discrimination. 102 S.Ct. at 3278 – 3280. *See also Ketchum, supra,* 740 F.2d at 1406. The 1982 amendments to the Voting Rights Act make this intent analysis unnecessary for persons protected under §2 of that Act.

As a practical matter, most minority plaintiffs now challenge redistricting plans under §2 of the Voting Rights Act rather than under the Fourteenth and Fifteenth Amendments of the United States Constitution. This is because the Voting Rights Act does not require proof of intent to discriminate. Rather, the plaintiff must prove only a discriminatory result. Moreover, the Supreme

Court has recently questioned whether it is even possible to raise a vote dilution claim under the Fifteenth, as opposed to the Fourteenth, Amendment. *Voinovich v. Quilter,* 507 U.S. 146, 122 L.Ed.2d 500, 113 S.Ct. 1149, 1158 (1993) ("we never have held any legislative apportionment inconsistent with the Fifteenth Amendment"); *Reno v. Bossier Parish School Board,* 528 U.S. 320, 145 L.Ed.2d 845, 120 S.Ct. 866, 875, n.3 (2000) ("we have never held that vote dilution violates the Fifteenth Amendment.").

VI. REMEDIES FOR ILLEGAL REDISTRICTING

A. New Districts

1. [16.34] Redistricting by the Courts

Generally, the remedy for illegal redistricting is the establishment of a new districting plan that cures the prior map's constitutional defects. A court may exercise its traditional equitable powers to create its own redistricting plan. In a vote dilution case, the court should devise a plan that "completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice." *Ketchum v. Byrne,* 740 F.2d 1398, 1412 (7th Cir. 1984), quoting S.Rep. No. 417, 97th Cong., 2d Sess. (1982), reprinted in 1982 U.S.C.C.A.N. 177. In a racial gerrymandering case, the new map should subordinate racial considerations to traditional districting principles. *Abrams v. Johnson,* 521 U.S. 74, 138 L.Ed.2d 285, 117 S.Ct. 1925, 1933 (1997). Courts that engage in redistricting ordinarily must take legislative preferences into account, assuming that there exists a constitutional plan to which the court may defer. *Id.* (district court need not defer to unconstitutional maps created by state legislature under pressure from Justice Department).

2. [16.35] Federal Abstention and State Responsibility for Redistricting

The U.S. Constitution gives states, and not the federal court, primary responsibility for redistricting. Thus, "judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites after having had an adequate opportunity to do so." *Reynolds v. Sims,* 377 U.S. 533, 12 L.Ed.2d 506, 84 S.Ct. 1362, 1394 (1964). It is settled law that a federal court should afford a state legislature a reasonable opportunity to adopt a constitutional plan for redistricting and reapportionment before ordering into effect its own plan. Unsurprisingly, there has long been tension between the federal courts' authority to devise a remedial plan to resolve a dispute over legislative reapportionment and the need to afford a state legislature a reasonable opportunity to adopt a constitutional plan for redistricting and reapportionment. This tension is particularly acute when federal and state redistricting litigation proceeds simultaneously.

The Supreme Court revisited this issue in *Growe v. Emison,* 507 U.S. 25, 122 L.Ed.2d 388, 113 S.Ct. 1075 (1993), a case in which two groups of voters filed suit — one in state court, the other in federal court. Both groups claimed that Minnesota's congressional and state legislative districts were unconstitutional. The state court found that the state legislature's map was defective, and issued a preliminary remedial plan. The federal district court found that the state court's plan violated the Voting Rights Act, issued its own plan, and enjoined the state court from interfering with the adoption of the federal court's plan. The Supreme Court ruled that federal

courts have a duty to make sure that federal litigation does not impede the states' initial redistricting duties. Thus, in reapportionment cases, federal judges should defer, usually under the *Pullman* doctrine (*See Railroad Commission of Texas v. Pullman,* 312 U.S. 496, 85 L.Ed. 971, 61 S.Ct. 643 (1941)), from considering redistricting disputes that the state has already begun to address, either through its legislative or its judicial branches. However, a district court would be justified in issuing its own plan if there is evidence that the state legislature or judiciary will fail to perform their redistricting duties in a timely manner. 113 S.Ct. at 1081 – 1082. Moreover, the fact that primary responsibility for redistricting lies with the state does not deprive the federal courts of jurisdiction over federal questions related to redistricting.

The immediacy of upcoming elections complicates the question of when a court should act, because state and local governments need to know the borders of electoral districts far in advance of the actual election. In *Johnson v. Mortham,* 926 F.Supp. 1460, 1494 (N.D.Fla. 1996), one federal court pointed out:

> **The candidate filing deadlines are just a few months away. Potential candidates (including incumbents) will need to know the contours of the state's congressional districts, so they can organize their campaigns accordingly. Voters will need to know in which district they reside. The State . . . will need to set up the appropriate administrative features within its voting precinct structure. As a result, a new redistricting plan must be in place as soon as possible.**

The case law provides little guidance for determining when a court should act. *Compare Carstens v. Lamm,* 543 F.Supp. 68 (D.Colo. 1982) (federal court fashioned its own map after concluding that Colorado legislature and Governor could not resolve impasse over redistricting before pending elections) *with French v. Boner,* 963 F.2d 890, 891 (6th Cir 1991) (allowing election to proceed under clearly unconstitutional map, because five months between issuance of 1990 census data and scheduled city council elections did not give Nashville City Council reasonable opportunity to craft new map).

A different analysis applies when a state voluntarily participates in federal litigation. For example, following the 1990 decennial census, the Florida Supreme Court issued a redistricting plan after the state legislature could not agree on a map. Voters challenged the plan in federal court. The Florida legislature, represented by the state Attorney General, intervened in the federal litigation. A settlement was reached, which the district court approved over the Department of Justice's objections. The United States Supreme Court held that the district court did not deny Florida's legislature or Supreme Court an opportunity to make its own map; the State took its opportunity by entering the settlement agreement. *Lawyer v. Department of Justice,* 521 U.S. 567, 138 L.Ed.2d 669, 117 S.Ct. 2186, 2192 – 2193 (1997).

The pendency of elections also affects state court remedies for resolving redistricting disputes. For example, in the litigation that followed the 1990 census, in the face of pending election deadlines, the Illinois Supreme Court sua sponte raised the specter of a statewide at-large election. The court stated that "if a plan is not approved on or before January 6, 1992, the only alternative at that point in time will be for this court to declare an at-large election for the Illinois Senate and House, leaving the redistricting map for another day." *Ryan I,* 588 N.E.2d at 1031. In *Ryan II,* the court flatly rejected the option of drawing its own map, declaring that "time, staff and

budget demands do not permit this court to fashion its own redistricting plan that meets all of the objectives, no matter how desirable." *Ryan II,* 588 N.E.2d at 1034 – 1035.

B. [16.36] Sixty-Five Percent Supermajorities

Some courts have remedied discriminatory districting plans by redrawing plans to create districts in which minorities constitute "supermajorities." These supermajorities compensate for the generally younger median age of minority populations and the generally lower voter registration and turnout of those groups. At one time, the Department of Justice suggested that a district have a total minority population of 65 percent in order for minority voters to have a meaningful opportunity to elect a candidate of their choice. *See State of Mississippi v. United States,* 490 F.Supp. 569 (D.D.C. 1979), *aff'd,* 100 S.Ct. 994 (1980); Colman and Brody, *Ketchum v. Byrne: The Hard Lessons of Discriminatory Redistricting in Chicago,* 64 Chi.-Kent L.Rev. 497, 525 – 527 (1988). In *United Jewish Organizations, of Williamsburgh, Inc. v. Carey,* 430 U.S. 144, 51 L.Ed.2d 229, 97 S.Ct. 996 (1977), the United States Supreme Court upheld the creation of 65-percent supermajorities as a means of ensuring minorities a fair and reasonable opportunity to elect representatives of their choice. *See Hastert v. State Board of Elections,* 777 F.Supp. 634, 647 (N.D.Ill. 1991) (approving three districts with 65-percent African-American supermajorities because 65 percent was necessary to provide reasonable opportunity to exercise political control).

However, the failure to create a supermajority, or even changing a majority-minority district into a minority-influenced district or white-majority district, may not necessarily mean that a redistricting plan violates the Voting Rights Act. For example, following the 2000 census, New Jersey enacted a redistricting plan in which a district with a 53-percent African-American population, and an overall minority-majority of 68 percent, was changed into a district where African Americans were only 28 percent of the population, and the overall minority population was reduced to 42 percent. A neighboring district with a 76-percent white and 23-percent African-American population became 42-percent white and 35-percent African American under the new map. Certain African-American candidates and voters challenged the map as deliberately diluting the African-American vote, in violation §2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments. The court, however, found that the new map enhanced rather than diluted the minority vote. *Page v. Bartels,* 144 F.Supp.2d 346, 363 – 366 (D.N.J. 2001). The reason was that although the new map was racially less African-American, it was politically more Democratic. The court found that in both of the new districts, whoever won the Democratic primary would likely win the general election. Minority voters would still be able to elect the candidate of their choice because of their strong influence and bloc voting in the Democratic primary, coupled with the fact that white voters did not vote as a bloc, even in biracial elections. *Id.* The lack of white-bloc voting meant that the plaintiffs could not meet the requisite threshold showing under *Gingles,* let alone show intentional discrimination. ~~In Illinois, following the 2000 decennial census, a suit was filed alleging that the state legislative map created by the 2001 Illinois Legislative Redistricting Commission violated the Voting Rights Act because the Commission created African-American minority-majority districts in which the minority population was less than 65% of the total population or 60% of the voting age population. *Campuzano v. State Board of Elections*, No. 01 C 50376 (N.D. Ill. 2001). As of this writing, the litigation had not been resolved~~. **In Illinois, following the 2000 decennial census, a federal district court upheld the state legislative map created by the 2001 Illinois Legislative Redistricting Commission against claims that the map created African-**

American minority-majority districts in which the minority population was less than 65% of the total population or 60% of the voting age population. The court rejected use of the 65%/60% "rule of thumb" where other more reliable data were available, and held that patterns of voting behavior indicated that even where African-Americans did not constitute a super-majority, their ability to control the Democratic primary process nonetheless gave them sufficient districts with effective electoral opportunities. *Campuzano v. Illinois State Board of Elections*, No. 01 C 50736, 2002 WL 849819 (N.D. Ill. May 3, 2002).

C. [16.37] Influence Districts

Courts have generally been reluctant to create "influence districts," *i.e.,* a district in which a minority group constitutes a minority of voters in a given district, but an influential minority — as a remedy for vote dilution. The Supreme Court has thus far refused to decide whether a vote dilution claim may be brought for failure to create an influence district (*Holder v. Hall,* 512 U.S. 874, 129 L.Ed.2d 687, 114 S.Ct. 2581, 2596 n.8 (1994)) or whether the first *Gingles* factor — the existence of a sufficiently large and geographically compact minority group — may be satisfied by demonstrating that it is possible to create an influence district (*Johnson v. De Grandy,* 512 U.S. 997, 129 L.Ed.2d 775, 114 S.Ct. 2647, 2656 (1994). *See also Growe v. Emison,* 507 U.S. 25, 122 L.Ed.2d 388, 113 S.Ct. 1075, 1084 – 1085 (1993) (assuming, without deciding, that it was permissible to combine distinct ethnic and language minority groups for purposes of assessing compliance with §2 of Voting Rights Act). In *Illinois Legislative Redistricting Commission v. LaPaille,* 786 F.Supp. 704, 711 (N.D.Ill. 1992), the trial court found that very few courts had recognized influence districts, but nonetheless permitted Hispanic plaintiffs to bring a vote dilution claim based on the failure to create influence districts. However, the court eventually disallowed plaintiffs' claims. The court found that "the lack of an objective limit to such claims" limited the utility of "influence district" claims. 786 F.Supp at 715. The viability of "influence districts" as a remedy for vote dilution remains an open question.

D. [16.38] Special Elections

When racial discrimination has tainted the result of an election, it is the "established power of a Federal Court to extinguish its effects even to the point of setting aside the election." *Bell v. Southwell,* 376 F.2d 659, 664 (5th Cir. 1967). The power to order special elections should be exercised whenever there is a possibility that the illegal voting practice affected the election's outcome. *Smith v. Cherry,* 489 F.2d 1098, 1103 (7th Cir. 1973); *Ketchum v. City Council of City of Chicago, Illinois,* 630 F.Supp. 551, 565 (N.D.Ill. 1985) (when racial discrimination has affected conduct of election, it is established power of federal court to set it aside and order special election).

For a court to impose special elections, the plaintiffs must demonstrate that (1) there has been a serious and substantial violation of minorities' voting rights; (2) there is a "reasonable possibility" that the violation affected the outcome of the challenged elections; and (3) the plaintiffs exercised due diligence in seeking relief in advance of the challenged election. *Smith, supra,* 489 F.2d at 1103.

VII. [16.39] ILLINOIS CONSTITUTION ARTICLE IV, SECTION 1

Article IV, §1 of the Illinois Constitution of 1970 provides that, in Illinois:

The legislative power is vested in a General Assembly consisting of a Senate and a House of Representatives, elected by the electors from 59 Legislative Districts and 118 Representative Districts.

Article IV, §3, provides:

(a) Legislative Districts shall be compact, contiguous and substantially equal in population. Representative Districts shall be compact, contiguous, and substantially equal in population.

(b) In the year following each Federal decennial census year, the General Assembly by law shall redistrict the Legislative Districts and the Representative Districts.

If no redistricting plan becomes effective by June 30 of that year, a Legislative Redistricting Commission shall be constituted not later than July 10. The Commission shall consist of eight members, no more than four of whom shall be members of the same political party.

The Speaker and Minority Leader of the House of Representatives shall each appoint to the Commission one Representative and one person who is not a member of the General Assembly. The President and Minority Leader of the Senate shall each appoint to the Commission one Senator and one person who is not a member of the General Assembly.

The members shall be certified to the Secretary of State by the appointing authorities. A vacancy on the Commission shall be filled within five days by the authority that made the original appointment. A Chairman and Vice Chairman shall be chosen by a majority of all members of the Commission.

Not later than August 10, the Commission shall file with the Secretary of State a redistricting plan approved by at least five members.

If the Commission fails to file an approved redistricting plan, the Supreme Court shall submit the names of two persons, not of the same political party, to the Secretary of State not later than September 1.

Not later than September 5, the Secretary of State publicly shall draw by random selection the name of one of the two persons to serve as the ninth member of the Commission.

Not later than October 5, the Commission shall file with the Secretary of State a redistricting plan approved by at least five members.

An approved redistricting plan filed with the Secretary of State shall be presumed valid, shall have the force and effect of law and shall be published promptly by the Secretary of State.

The Supreme Court shall have original and exclusive jurisdiction over actions concerning redistricting the House and Senate, which shall be initiated in the name of the People of the State by the Attorney General.