1986

Election Redistricting: A Call for Reform

Tracy D. Kasson

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Election Redistricting: A Call For Reform

I. INTRODUCTION

During the last twenty-four years, the judiciary has played an active role in monitoring election redistricting on the federal, state and local levels. Redistricting disputes have involved claims that newly created voting districts discriminated against a certain group by either containing population inequalities or having "gerry-mandered" districts. Throughout this period, the Supreme Court and the federal district courts have attempted to develop judicially manageable standards by which these claims can be tested. Unfortunately, these standards have failed to ensure "fair and effective" representation, and have promoted systemic inefficiency.

This comment discusses the methods that legislatures employ to dilute a particular group's voting strength. Next, it traces the Supreme Court's entry into the redistricting "thicket," and identifies the myriad of standards the Court has developed. The comment then analyzes the inadequacies of these standards and the unconstitutionality of current redistricting procedure, which gives the majority party of the legislative branch the power to draw the election districts. Finally, the comment suggests a more effective approach to redistricting.

II. BACKGROUND

A. Methods of Vote Dilution

The election process in the United States is primarily "district based"; legislative bodies are required to draw district boundaries for the election of political representatives. As a result, manipulation of the process often becomes an irresistible temptation. Legislatures have employed several techniques over the years to accomplish this end. Until 1964, legislatures often malapportioned election districts to dilute minority votes, that is, they established districts with widely varying populations. Since 1964, however,


The makeup of the Tennessee legislative districts at the time of Baker v. Carr, 369 U.S. 186 (1962), see infra notes 13-18 and accompanying text, is an example of malapportionment. The Tennessee legislative districts had not been apportioned (redrawn) since 1901.
the Supreme Court has required population equality among election districts within one political entity. In light of this requirement, legislatures have turned to equipopulous gerrymandering as a method of diluting the voting strength of particular groups.

Gerrymandering is discriminatory districting that unfairly increases one group’s political strength while decreasing that of another. Gerrymandering usually disperses votes of a targeted group in several districts where those votes will be wasted in support of losing candidates or concentrates the group in one district where it can only elect one candidate of its choice.

A massive shift in population from the rural counties to the urban counties occurred during the interim. Thus, extreme disparities existed in the number of voters in different districts. For example, Moore County (rural) had 2340 voters and elected one representative, while Shelby County (urban), with 312,345 voters, elected only seven. This scheme allowed voters in districts containing only 40% of the voting population to elect 63 of the 99 representatives and voters in districts containing only 37% of the population to elect 30 of the 33 senators. Neal, Baker v. Carr: Politics in Search of Law, 1962 Sup. CT. REV. 254. The rural population thus controlled the state legislature, even though most of the population had moved to the urban areas.

3. See infra notes 23-34.

4. Equipopulous gerrymandering is districting that satisfies the one person, one vote standard yet still uses gerrymandering techniques to discriminate against an identifiable group of voters. See Engstrom, supra note 2, at 278 n.5.


The practice that became known as gerrymandering dates back to 1705, when the Pennsylvania colonial legislature sought to keep political power in the rural eastern counties by using a representational structure that discriminated against Philadelphia residents. Engstrom, supra note 2, at 280.

The term “gerrymandering” was born in 1812, when Governor Elbridge Gerry permitted the Massachusett legislature to draw a “salamander-like” electoral district in Essex County. Clinton, supra note 1, at 1. This district was part of a statewide effort to dilute the effectiveness of Federalist voters. The effort was successful, as Democrats won 29 of 40 senate seats while losing the popular vote 50,164 to 51,766. Engstrom, supra note 2, at 279-80 (citing E. Griffith, The Rise and Development of the Gerrymander 20 (1907)).

6. The “targeted group” is a group that the current majority in the legislative branch is trying to keep underrepresented. In most cases, the targeted group is a racial or ethnic group or the current minority party. A target group will hereinafter be referred to as a “minority group.” These groups are represented by a minority of the legislature, but they may in fact comprise a majority of the population in a particular political unit. See supra note 2 and infra notes 14 and 27.

7. Clinton, supra note 1, at 3. This tactic is often called “fracturing.” See Ketchum v. Byrne, 740 F.2d 1398, 1408 n.8 (7th Cir. 1984), cert. denied, 105 S. Ct. 2673 (1985). Through fracturing, a targeted minority group which would have a sizeable majority in one district (thus enabling it to elect a representative) is split among two or more districts where the group is unable to elect a representative. See infra notes 150-82 and accompanying text for an example of the effects of fracturing.

8. This tactic is often called “packing.” Ketchum v. Byrne, 740 F.2d 1398, 1408 n.7 (7th Cir. 1984), cert. denied, 105 S. Ct. 2673 (1985). When a targeted minority group is packed into one or more districts (comprising 70% or more of the voting population)
Today, the Court treats equipopulous gerrymandering and malapportionment as two distinct issues. Malapportionment cases address how close to perfect population equality the districts must be, whereas equipopulous gerrymandering cases focus on whether a redistricting scheme unfairly inflates the political strength of one group at the expense of another, despite population equality among electoral districts.

B. Entering the Thicket

Prior to the 1960's, the Supreme Court refused to hear suits alleging that electoral district boundaries were malapportioned or gerrymandered. The Court dismissed these suits "for want of equity," holding that they involved political questions and were therefore not "meant for judicial determination." Consequently, the judiciary refused to enter the "political thicket" of redistricting.11

The Warren Court finally attacked the redistricting issue head on in Baker v. Carr.12 The plaintiffs in Baker claimed that the Tennessee reapportionment statute created gross population inequalities in the state's voting districts, resulting in a violation of the fourteenth amendment's equal protection clause.13 The Court in a 6-2 opinion held that the courts had jurisdiction over the subject

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10. Id. at 552.
11. Id. at 556.
12. Technically, the Court first entered the "thicket" in the 1960 gerrymandering case of Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960) (holding that an Alabama statute which sought to exclude eligible Black voters from the city of Tuskegee's boundaries violated the fifteenth amendment). Justice Frankfurter, who wrote the majority opinions in both Colegrove v. Green, 328 U.S. 549 (1946), see supra notes 9-11 and accompanying text, and Gomillion, distinguished Gomillion from Colegrove by noting that Colegrove involved discrimination under the fourteenth amendment's equal protection clause, whereas Gomillion relied on the fifteenth amendment. Gomillion, 364 U.S. at 346.
14. Id. at 187-88. The Tennessee legislature had last reapportioned the voting districts in 1901. By 1960, the number of voters in representative districts varied from 42,298 to 2340. R. DIXON, DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS 120 (1968); see also supra note 27.

For excellent discussions and analyses of the Baker decision, see R. DIXON, supra, at 119-71; Neal, supra note 2, at 253-377.
that the plaintiffs had standing to maintain the suit, and that the claims were justiciable. The Court then remanded the case to the district court. Unfortunately, beyond requiring that apportionment be “fair,” the Supreme Court, when it applied Baker in subsequent cases, failed to set forth standards for the lower courts to follow.

The Baker decision opened the floodgates for redistricting litigation. Subsequent cases may be divided into two major groups. The malapportioned district cases, which are quantitative in nature, distinguish between congressional districts and state legislative districts. The other cases address equipopulous gerrymandering and are qualitative in nature.

C. The Malapportionment Cases

1. The Origins of One Person, One Vote

Two years after Baker, the Court decided that fairness in redistricting required that “as nearly as is practicable, one man’s vote... is to be worth as much as another’s.” Thus, in order to ensure “fair and effective representation,” the one person, one vote standard, requiring substantial population equality among

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16. Id. at 206.
17. Id. at 237. The Court in Baker distinguished rather than overruled Colegrove, see supra notes 9-12 and accompanying text, stating that Colegrove was dismissed because of “want of equity,” not on justiciability grounds. Baker, 369 U.S. at 234.
20. After Baker, suits were filed in two-thirds of the states challenging the apportionment of state legislatures. R. Cushman, Cases in Constitutional Law 613 (1979).
21. These cases are quantitative in nature because they analyze the population variances among districts. See infra notes 23-59 and accompanying text.
22. These cases are qualitative in nature because although the districts have population equality, they are drawn so as to discriminate against a certain group. See infra notes 61-100 and accompanying text.
23. Wesberry v. Sanders, 376 U.S. 1, 8 (1964). The word “person” was substituted for the word “man” in Mahan v. Howell, 410 U.S. 315, 319, 330 (1973). Several commentators theorized that the Supreme Court changed the slogan in deference to the women’s rights movement. See Engstrom, supra note 2, at 278 n.3.
election districts, was born. In enunciating this principle in *Reynolds v. Sims*, a state legislature malapportionment case, the Court based its holding on the fourteenth amendment’s equal protection clause. The Court, acknowledging that it was dealing with a “new and developing area of the law,” did not develop a precise constitutional test to be followed by lower courts enforcing this one person, one vote standard. Rather, the Court preferred to deal with population disparities among election districts on a case-by-case basis. The Court adopted this approach because it believed varying circumstances could make what is permissible in one state unsatisfactory in another. Thus, after *Reynolds*, states were required to reapportion their districts according to the very general and undeveloped edict of substantial population equality among districts.

Furthermore, it was unclear whether the Court would utilize different standards for congressional and state reapportionment. In *Wesberry v. Sanders*, a congressional malapportionment case, the court reached the one person, one vote conclusion by relying, not on the fourteenth amendment as in *Reynolds*, but on article I,
This lack of consistency generated confusion and uncertainty when states reapportioned their congressional and legislative districts. It also led to years of litigation to determine what “substantial equality” among congressional and legislative districts meant.

2. Applying One Person, One Vote

a. Federal Elections

Following the Court’s enunciation of the one person, one vote standard, the analysis focused upon how much variance from absolute population equality would be tolerated. In congressional districting cases, the Court has strictly applied the one person, one vote principle. In Kirkpatrick v. Preisler, the Court developed a two-pronged test for determining when article I, section 2, under the “as nearly as practicable” standard, permits population variances among congressional districts. Under this test, variances will be upheld only if the state made a good-faith effort to achieve precise mathematical equality (the unavoidability prong), or if the state could justify each variance, no matter how small (the justification prong). The Court has, by rejecting almost every possible reason for population disparities among congressional districts, made it almost impossible for a state to meet the justification prong. The population equality requirement has thus become the sole criterion for determining the constitutionality of congressional redistricting under article I, section 2. The Court has used this absolute equality test to demand almost precise population equality.

34. Id. at 7-9. Article I, § 2 states in part: “The House of Representatives shall be composed of members chosen every second year by the people of the several States . . . .” U.S. CONST. art. I, § 2.
36. Id. at 530-31; Wells v. Rockefeller, 394 U.S. 542, 546 (1969).
37. Kirkpatrick, 394 U.S. at 530-31; see also Wells v. Rockefeller, 394 U.S. 542, 546 (1969). Under the unavoidability prong, the party challenging the redistricting legislation has the burden of showing that the legislature had plans with smaller maximum population deviations than the plan passed. If the party can do this, a lack of “good-faith” effort by the state has been demonstrated. Kirkpatrick, 394 U.S. at 531-33.
39. Id. at 531-33. The Court stated that the following reasons would not justify population disparities in congressional districting: Avoiding fragmented areas with distinct economic and social interests; avoiding partisan politics, thereby decreasing the opportunities for gerrymandering; avoiding fragmented political subdivisions; and attempting to ensure geographical “compactness” of the districts. Id. at 533-36. By contrast, the Court in Reynolds recognized that preserving political subdivisions and ensuring geographical “compactness” would justify deviations from population equality in state legislative redistricting. Reynolds, 377 U.S. at 578.
among congressional districts.\textsuperscript{41} Court application of this test has been accompanied by strong criticism. Dissenters have argued that the strict population equality standard may lead to gerrymandering\textsuperscript{42} and violate doctrines mandating separation of powers and judicial economy.\textsuperscript{43}

\textbf{b. State Elections\textsuperscript{44}}

After 1970, a clear dichotomy developed between the degree of population equality required among congressional districts and that required among state legislative districts.\textsuperscript{45} Population disparities among the state legislative districts are constitutional under the fourteenth amendment if they are "'[b]ased on legitimate consider-


Total maximum deviation is calculated by adding the total percentages by which the most populous and least populous districts vary from the mathematical ideal of perfect equality. For example, if the mathematical ideal is 10,000 people per district, and the largest district exceeds this ideal by two percent (10,200) while the smallest district is under the ideal by three percent (9700), the total maximum deviation will be five percent.

\textsuperscript{42} Justice Harlan in his \textit{Kirkpatrick} dissent stated:

\begin{quote}
[T]he rule of absolute equality is perfectly compatible with "gerrymandering" of the worst sort. A computer may grind out district lines which can totally frustrate the popular will on an overwhelming number of critical issues . . . .

[D]istrict lines are likely to be drawn to maximize the political advantage of the party temporarily dominant in public affairs.
\end{quote}

\textit{Kirkpatrick}, 394 U.S. at 551-52 (Harlan, J., dissenting).

\textsuperscript{43} Justice White in his \textit{Kirkpatrick} dissent observed: "Not only will the Court's new rule necessarily precipitate a new round of congressional and legislative districting, but also I fear that in the long run the courts, rather than the legislatures or nonpartisan commissions, will be making most of the districting decisions in the several states." \textit{Id.} at 556 (White, J., dissenting).

\textsuperscript{44} Although the application of the one person, one vote standard to local elections will not be discussed in this section, the Court has extended this doctrine to local government elections. See \textit{Hadley v. Junior College Dist.}, 397 U.S. 50 (1970), in which the court stated:

\begin{quote}
[A]s a general rule, whenever a state or local government decides to select persons by popular election to perform governmental functions [equal protection] requires that each qualified voter must be given an equal opportunity to participate in that election, and when members of an elected body are chosen from separate districts, each district must be established on a basis which will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials. \textit{Id.} at 56.
\end{quote}

Thus, after \textit{Hadley}, it became apparent that the Court would hold local governments to the same standards as state governments, \textit{see infra} notes 45-59 and accompanying text, with respect to redistricting.

ations incident to the effectuation of a rational state policy' 46 and if they do not exceed constitutional limits. 47 This test has been applied only when population deviations in state legislative districts exceed ten percent. 48 Deviations of less than ten percent do not require justification by the state (when population disparity is the sole claim) because such deviations are considered insufficient to create a prima facie case of invidious discrimination 49 under the fourteenth amendment's equal protection clause. 50 The Court has adopted this less stringent standard 51 to give states more flexibility in state legislative redistricting than is available in congressional redistricting. A majority of the Justices believe that greater flexibility is needed because there are significantly more state legislative election districts than congressional districts. 52

By applying this less exacting standard, the Court allows legislatures to follow political subdivision lines to establish election districts. This, the Court believes, is the easiest method available for creating numerous districts. 53 Furthermore, preserving political subdivisions ensures a voice in the state legislature for each political subdivision. This is an important consideration because many of the legislature's activities involve local legislation affecting only particular subdivisions. 54

The dissenters in these closely divided state legislative district decisions argued that the strict test applied to congressional districts should also be applied to state redistricting schemes. The dissenters believed that precise population equality is the paramount goal of reapportionment, and that the equal protection clause did not relegate this goal to secondary status for state legislative districts. 55 Furthermore, the dissenters objected to the


49. See infra notes 81-100 for a discussion of invidious discrimination.


51. See supra notes 35-41 for a discussion of the more stringent "absolute equality" test for congressional districts.


53. Id. at 321.

54. Id. at 321-22.

55. Gaffney v. Cummings, 412 U.S. 735, 776-77 (1973); White v. Regester (companion-
Court's apparently arbitrary adoption of a ten percent de minimis range deviation.\textsuperscript{56}

These two different reapportionment standards have created tremendous disparities between the population variations allowed for congressional and state legislative districts. For example, the "absolute equality" standard used for congressional districts has invalidated a redistricting plan with as little as a 0.69 percent total maximum population deviation,\textsuperscript{57} while application of the "rational justification" standard for state legislative districts has upheld a redistricting plan with an eighty-nine percent total maximum population deviation.\textsuperscript{58} Furthermore, since the "rational justification" standard depends on the particular state interest present in each factual setting, decisions upholding or invalidating a legislative redistricting plan will have limited precedential value.\textsuperscript{59} As a result, the question of how much deviation from equal population is constitutionally tolerable under the one person, one vote standard remains largely unanswered.

The one person, one vote standard has at least curbed the indiscriminate use of gross population disparities among districts to dilute the voting strength of targeted groups. Population inequality, however, is not the only way to dilute votes. Equipopulous gerrymandering, described by Justice Douglas as "the other half of \textit{Reynolds v. Sims},"\textsuperscript{60} has been used by state legislatures to dilute votes while adhering to the one person, one vote standard.

\section*{D. Equipopulous Gerrymandering}

The party controlling the election redistricting process can deflate the voting strength of many groups by gerrymandering the election districts. For example, gerrymandering tactics have been used to dilute the voting strength of racial minorities\textsuperscript{61} and minor-

\begin{itemize}
  \item Gaffney v. Cummings, 412 U.S. 735, 776-77 (1973); White v. Regester (companion case), 412 U.S. 755, 776-77 (1973). It appears that a 10\% de minimis range deviation exists since the districting plan in \textit{Regester} contained a 9.9\% total maximum deviation. \textit{Id.} at 761.
  \item Mahan v. Howell, 410 U.S. 315, 334 (1973) (Brennan, J., concurring in part, dissenting in part).\textsuperscript{57}
  \item Whitcomb v. Chavis, 403 U.S. 124, 176 (1971) (Douglas, J., dissenting).\textsuperscript{60}
  \item See infra notes 66-93, 150-82 and accompanying text. This practice is often called "racial gerrymandering." Racial gerrymandering has been attacked under the fourteenth and fifteenth amendments and section 2 of the Voting Rights Act. See supra note 12; infra notes 66-100, 150-82 and accompanying text.\textsuperscript{61}
\end{itemize}
Gerrymandering can be accomplished by unfairly delineating the district boundaries or by creating discriminatory multimember district schemes.63

1. Delineation of Representational District Boundaries

Whether discriminatory representational districting exists depends on whether a portion of a group’s population is fairly contained in an election district’s boundaries.65 Wright v. Rockefeller,66 the first case to address this representative districting issue, concerned a racial gerrymandering claim involving four congressional districts.67 The districts were allegedly drawn to concentrate Blacks and Puerto Ricans into one district.68 This resulted in one district comprised of 86.3 percent Blacks and Puerto Ricans, while the other three districts were comprised of only 5.1 percent, 28.5 percent and 27.5 percent Blacks and Puerto Ricans.70 Blacks and Puerto Ricans sued, claiming that the districting

62. See infra notes 75-78, 107-49 and accompanying text. This practice is often called “partisan gerrymandering.” Partisan gerrymandering has been attacked on fourteenth amendment grounds. Id.

63. Gerrymandering generally occurs when legislatures delineate district boundaries during the first year of each decade. Election districts in every state and city are reapportioned after each decennial census. In most states and cities, reapportionment is a legislative function. 62 C.J.S. States § 62 (1977). For example, the Illinois constitution provides: “In the year following each Federal decennial census year, the General Assembly by law shall redistrict the Legislative Districts.” ILL. CONST. art. IV, § 3(b) (1970).

Similarly, an Illinois statute provides that: “On or before the first day of December of the year following the year in which the national census is taken . . . the City Council [of Chicago] shall by ordinance redistrict the city on the basis of the national census of the preceding year.” ILL. REV. STAT. ch. 24, ¶¶ 21-38 (1985).

The majority party can discriminate against minority groups when it redistricts, because the majority, through its voting power, controls which map will be passed. See infra notes 140-45 and accompanying text.

64. A “group” can be a racial group, such as Blacks or Hispanics, or a partisan group such as Democrats or Republicans.


67. In Gomillion v. Lightfoot, 364 U.S. 339 (1960), the Court had previously addressed the issue of the constitutionality of district lines. During redistricting, the legislature changed the previously square-shaped city boundary into a twenty-eight-sided figure. The Court, relying on the fifteenth amendment, invalidated the district as a blatant attempt at racial gerrymandering designed to eliminate all Black voters from the city’s boundaries. Id. at 340-41, 347-48. Gomillion had little precedential value because it did not address the issue of representational districting. This issue was not addressed since all Blacks had been completely excluded from the district.


69. One of the districts had an eleven-sided, step-shaped boundary. Id. at 60 (Douglas, J., dissenting).

70. Id. at 59 (Goldberg, J., dissenting).

scheme created racially segregated districts in violation of the fourteenth and fifteenth amendments.\textsuperscript{71} The Court upheld the scheme because the plaintiffs failed to prove improper legislative intent.\textsuperscript{72} The Court stated that the plaintiffs failed to meet this burden because they did not show that the plan was intended by the state to segregate on the basis of race.\textsuperscript{73} This requirement of improper legislative intent was criticized by the dissent as establishing an impossible burden of proof for complainants.\textsuperscript{74}

The Court has also faced delineation issues involving partisan gerrymandering.\textsuperscript{75} The Court found that legislative redistricting plans prepared by a bipartisan committee which drew the districts with the goal of proportional state wide representation\textsuperscript{76} did not violate the fourteenth amendment.\textsuperscript{77} In fact, the Court has apparently endorsed such attempts at “political fairness.”\textsuperscript{78}

\begin{flushleft}
\textsuperscript{71} Wright, 376 U.S. at 54.
\textsuperscript{72} Id. at 56. This intent requirement has also been called the “invidious discrimination” requirement. In promulgating this intent standard, the Court stated that the plaintiff “failed to prove that the New York legislature was either motivated by racial considerations or in fact drew the districts on racial lines.” Id.
\textsuperscript{73} Id. at 58.
\textsuperscript{74} Id. at 73 (Goldberg, J., dissenting).
\textsuperscript{75} Gaffney v. Cummings, 412 U.S. 735 (1973).
\textsuperscript{76} Id. at 735, 738. The wasted voting strength of one political party, which was concentrated in one area of the state, was offset by constructing gerrymandered districts which wasted the opposing party’s votes in other areas of the state. Engstrom, supra note 2, at 293.
\textsuperscript{77} Gaffney v. Cummings, 412 U.S. 735, 752 (1973). The opposing party claimed that this plan was a political gerrymander which was invidiously discriminatory under the fourteenth amendment.
\textsuperscript{78} The Court in Gaffney v. Cummings stated: “The very essence of districting is to produce a different—a more ‘politically fair’—result than would be reached with elections at large . . . .” Gaffney v. Cummings, 412 U.S. 735, 753 (1973). The court continued: “[J]udicial interest should be at its lowest ebb when a State purports fairly to allocate political power to parties in accordance with their voting strength, and, within quite tolerable limits, succeeds in doing so.” Id. at 754.

A similar type of “fairness” gerrymander was challenged in United Jewish Org. v. Carey, 430 U.S. 144 (1977). New York, in a deliberate attempt to increase the non-white majority in certain state legislative districts in order to encourage the election of more non-white representatives, changed the size of non-white majorities in certain districts. Id. at 162-66. As a result, a community of Hasidic Jews, previously located entirely in one assembly district, was split between two assembly districts. Id. at 152. The plaintiffs alleged that the state’s use of racial criteria and quotas in developing the reapportionment plan violated the fourteenth and fifteenth amendment rights of the Jewish community by diluting the value of their vote by half. Id. at 152-53. The Court upheld the plan, finding that no racial or political groups were forced out of the political process and that Jewish voting strength was not invidiously minimized. Id. at 155-69. Relying on Gaffney, the court agreed that a plan “seeking to alleviate the consequences of racial voting at the polls and to achieve a fair allocation of political power between white and non-white voters in King County” was a legitimate state end and therefore constitutional. Id. at 167.
\end{flushleft}
2. Use of Multimember Districts

Another method of diluting the electoral impact of a minority group’s voting strength involves the use of multimember districts. In this system, two or more representatives are elected from a single district. The minority group, which might have been able to elect some representatives if the multimember districts had been broken down into several single-member districts, cannot elect any representatives in the larger district.

When the Court first addressed the multimember redistricting issue in the mid-1960’s, it held that multimember districts are not unconstitutional per se. A party challenging the use of multimember districting bears the burden of proving that the scheme is invidiously discriminatory. This can be accomplished by showing that the scheme operates to minimize or cancel out the voting strength of certain racial or political elements. For example, the plaintiffs might introduce evidence that the minority party would have won more seats if a single district system had been used.

In *Whitcomb v. Chavis,* the Court applied this invidious vote dilution test. The plaintiffs, primarily poor black residents of Marion County, Indiana, claimed that single-member districting would ensure that Marion County’s (including Indianapolis) ghetto could elect three members to the House and one to the Senate, whereas the multimember scheme enabled competing interest groups in the county to cancel out the Black vote. The plaintiffs

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For example, assume that State A has a population of 10,000 people per district. If the state contained all single-member districts, then one representative would be elected from each district. If a multimember district were created, then the district would contain 30,000 people from which three representatives would be elected at large.

The use of multimember districts is called “institutional gerrymandering.” It differs from the other form of vote dilution known as “delineation gerrymandering,” which is accomplished by the strategic drawing or placement of representational district boundaries to discriminate against a particular target group. Engstrom, *supra* note 2, at 280 n.20.


82. Burns v. Richardson, 384 U.S. 73, 88 (1966). The Court has noted that the term “political minority” includes partisan as well as racial minorities. *Id.* at 88 n.14.

83. *Id.* at 129.

84. 403 U.S. 124 (1971).

85. *Id.* at 129.
thus alleged that this scheme invidiously diluted their votes under the equal protection clause. After detailed fact finding, the district court, relying on the invidious discrimination test, found that poor voters in Marion County's ghetto area represented a cognizable interest group and that the plan diluted the effect of their votes.

The Supreme Court reversed, holding that the plaintiffs had failed to prove invidious discrimination. The Court recited the invidious discrimination test, but added a new element—whether the group in question had less opportunity than the other residents in the county to take part in the political process. The Court found nothing in the record to indicate that poor Blacks were not allowed to register and join the political party of their choice. The Court also found that the plaintiffs were not excluded from either major party's slates and that they were not denied the chance to occupy legislative seats. The dissent claimed that the invidious discrimination test was satisfied by a showing of invidious effects, and that the test did not require a showing of intentional racial discrimination by the legislature. The dissent argued that the new political participation test placed an impossible demand on Blacks.

For twelve years, a sharply divided Court continued to apply the *Whitcomb* invidious discrimination test, rejecting the argument that discriminatory impact alone was sufficient to prove vote dilution. During this time, only one multimember districting scheme was invalidated by the Court.

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86. *Id.*
88. *Whitcomb*, 403 U.S. at 149.
89. *Id.*
90. *Id.*
91. Justice Douglas wrote the dissent, joined by Justices Brennan and Marshall. *Id.* at 171.
93. *Id.* at 180. Justice Douglas stated: "It is asking the impossible for us to demand that the Blacks first show that the effect of the scheme was to discourage or prevent poor Blacks from voting or joining such party as they choose." *Id.*
94. *See* Mobile v. *Bolden*, 446 U.S. 55, 60 (1980) (plurality opinion) (noting that § 2 of the Voting Rights Act of 1965 simply reiterated the guarantees of the fifteenth amendment; thus invidious discrimination was still required).
95. *Id.*
96. White v. Regester, 412 U.S. 755 (1973). At issue in *Regester* was the creation of multimember legislative districts in two Texas counties. *Id.* at 756. The Court, in a
In 1982 Congress, unhappy with the Supreme Court's standard for racial gerrymandering claims under the fifteenth amendment and section 2 of the Voting Rights Act (judicially construed to parallel the fifteenth amendment), amended the act. Congress adopted a standard requiring plaintiffs to prove only that the result of the election scheme had an adverse impact on a racial minority. The legislative history of the amendment expressly stated that this "results test" was intended to replace the Court's invidious discrimination test. A Senate committee report listed numerous "typical" and "objective" factors which indicate discriminatory "results." These include examples of past discrimination in the political subdivision which have affected a minority group's ability to register, vote, or otherwise participate in the democratic process; and a history of lack of proportional representation.

III. DISCUSSION

After the Burger Court's round of redistricting cases in the 1970's, it is evident that members of the Court remain divided on this issue. The Court's standard varies depending upon whether the issue is malapportionment or gerrymandering. For malapportionment claims, the standards differ between state and congressional districting. The standards for gerrymandering claims also differ. Proof of invidious discrimination still is required for partisan gerrymandering claims under the fourteenth amendment, while only discriminatory results are necessary to prove racial gerrymandering under the fifteenth amendment and section 2 of the Voting Rights Act. Furthermore, these standards are constantly changing.

The 1980 census led to redistricting unanimous opinion, declared the plan unconstitutional because it violated the Whitcomb standards. The Court accepted the district court's finding of fact that there was a long history of official discrimination in Texas, which affected the rights of Blacks to register, vote and participate in the democratic process. See Mobile v. Bolden, 446 U.S. 55, 60 (1980). See infra note 158 for the text of the act.

100. SENATE REPORT, supra note 99, at 28-29, 143-44.
101. See Whitcomb, 403 U.S. at 165 (Harlan, J., concurring).
102. See supra notes 57-59, 97-100 and accompanying text.
103. See supra notes 23-59 and accompanying text.
104. See infra notes 169-70 and accompanying text.
105. See supra note 99 and accompanying text.
106. See supra notes 97-100 and accompanying text.
throughout the country and further litigation for the Court in the 1980's. The inadequacy of present approaches to these issues is demonstrated by the following cases.

A. Malapportionment—Karcher v. Daggett

The 1983 case of *Karcher v. Daggett* \(^\text{107}\) was the Court's first significant reapportionment case involving the redistricting that occurred after the 1980 census. At issue in *Karcher* was whether a New Jersey apportionment plan for congressional districts, with a total maximum deviation of less than one percent, is constitutional per se under article 1, section 2 of the Constitution.\(^\text{108}\) The Supreme Court, in a 5-4 plurality opinion,\(^\text{109}\) held that such a plan is not per se constitutional.\(^\text{110}\)

Justice Brennan, applying the *Kirkpatrick* absolute equality test,\(^\text{111}\) first addressed the issue of good faith in districting. The state contended that a maximum deviation of less than one percent was per se a good-faith effort to achieve population equality.\(^\text{112}\) The Court rejected this argument, stating that it would not adopt any de minimis population variations for congressional districting as being acceptable per se.\(^\text{113}\) Thus, the Court refused to overrule *Kirkpatrick*'s paramount objective of absolute population equality.\(^\text{114}\) Examining the apportionment plan at issue, the Court found an absence of good faith to achieve population equality because several plans were introduced into the legislature with smaller deviations.\(^\text{115}\)

Since the complainants proved that the state lacked good faith, the burden shifted to the state to justify the population devia-


\(^{108}\) *Id.* at 727. The plan contained a 0.6984% total maximum deviation. *Id.* at 728.


\(^{110}\) *Karcher*, 462 U.S. at 731, 743.

\(^{111}\) Reiterating the *Kirkpatrick* standard, Justice Brennan noted the two questions involved in congressional malapportionment cases. First, the court must analyze whether the population disparities among districts could have been reduced or eliminated by a good-faith effort to draw equipopulous districts. Parties challenging the redistricting scheme bear the burden of proof on this issue. If the plaintiffs meet this burden, then the state must prove that each significant variance among the districts was necessary to achieve a legitimate goal. *Id.* at 730-31.

\(^{112}\) *Id.* at 731.

\(^{113}\) *Id.* at 734.

\(^{114}\) *Id.* at 732-33.

\(^{115}\) *Id.* at 738-39.
The Court listed several legislative policies which might justify the variance, such as maintaining compact districts, following municipal boundaries, preserving the core of prior districts, and avoiding contests among incumbents. However, the state's sole justification for the plan was preserving the voting strength of racial minority groups. The Court found that the state had offered insufficient evidence to prove a causal relationship between this end and the population disparities. Consequently, the plan was struck down.

The critical portion of the *Karcher* opinion is dictum. Justice Stevens, the "decisive" vote in the case, wrote a concurring opinion in which he addressed the plaintiff's claim, advanced during oral argument, that the district's bizarre configuration was sufficient to demonstrate lack of good faith. Justice Stevens understood this as a political gerrymandering claim rather than a malapportionment claim. Because Justice Stevens believed that political gerrymandering constituted vote dilution under the fourteenth amendment's equal protection clause, he addressed at length the legal basis for gerrymandering and the standards for analyzing such a claim.

Justice Stevens contended that the judiciary's preoccupation with the goal of perfect population equality is an inadequate method of judging the constitutionality of any redistricting plan. He argued that absolute population equality does not guarantee equal representation because it is perfectly compatible with gerrymandering. Justice Stevens also criticized the invidious discrim-
ination standard for judging gerrymandering claims as inadequate.\(^\text{127}\) To remedy this inadequacy, he developed his own three-part test to determine the constitutionality of districting plans.\(^\text{128}\)

In the third part of Justice Stevens' concurrence, he explained why the New Jersey redistricting plan violated the equal protection clause. First, he described the district configurations as "uncouth" and "bizarre."\(^\text{129}\) Second, he believed that the procedural process leading to the map's adoption was not neutral because it was designed to increase the number of Democrats that the state would send to Congress in future years.\(^\text{130}\)

Justice White dissented in *Karcher*, protesting the Court's insistence on absolute population equality.\(^\text{131}\) He argued that this strict standard does not meet the *Reynolds* and *Wesberry* requirement of "fair and effective representation" of citizens because it does not prevent deliberate partisan gerrymandering.\(^\text{132}\) According to Justice White, the standards for dealing with state legislative apportionment are more sensible.\(^\text{133}\) Justice White also favored a permissible de minimis range of population deviation in congressional districting cases.\(^\text{134}\) Under Justice White's approach, cases with deviations falling within the allowed de minimis range would be per se constitutional, unless complainants could prove that the plan invidiously discriminated against a racial or political group.\(^\text{135}\)

Consequently, Justice White would have upheld the *Karcher* plan

\(^\text{127}\) *Karcher*, 462 U.S. at 752 (Stevens, J., concurring).

\(^\text{128}\) Id. at 762.

\(^\text{129}\) Id. at 763-64. The plan was sponsored by the Democratic party leadership, which controlled both houses of the state legislature. The governor, a Democrat, signed the plan into law the day before the inauguration of a Republican governor. Other more neutral plans were rejected because they did not "reflect the leadership's partisan concerns." Id. In sum, the record indicated that the map-making procedure was far from neutral. Id.

\(^\text{130}\) Id. at 766 (White, J., dissenting).

\(^\text{131}\) Id. at 776 n.12.

\(^\text{132}\) Id. at 771.

\(^\text{133}\) Id. at 780.

\(^\text{134}\) Id. at 783.
because it contained less than a one percent total maximum population deviation.

Justice Powell, in a separate dissent, also expressed concern that an absolute equality standard encourages partisan gerrymandering. Justice Powell stated that the injuries resulting from gerrymandering are unconstitutional because they violate the redistricting goal of "fair and effective representation." But since the issue of unconstitutional gerrymandering was not addressed in the district court, the Court, according to Justice Powell, could not directly rule on this issue.

The Court will address the constitutionality of partisan gerrymandering for the first time in Davis v. Bandemer, which was argued October 7, 1985. At issue in Davis is the 1980 redistricting of the Indiana General Assembly. The subcommittee in charge of redistricting the state was comprised entirely of members of the Republican Party, since they controlled both houses of the General Assembly. The Republican State Committee hired a computer firm to draw the subcommittee's proposed map. The map was revealed during the last week of the 1981 regular session, and Democrats were given only forty hours to review the entire map. Members of the committee stated that the goal of the map was "to save as many incumbent Republicans as possible." The redistricting bill was passed by both houses with voting following party lines. The governor, also a Republican, signed the bill in May of 1981. Democrats sued, claiming that the map was a partisan gerrymander which violated their rights under the fourteenth amendment's equal protection clause. The district court agreed,

136. *Id.* at 787 (Powell, J., dissenting). Justice Powell stated:

A legislator cannot represent his constituents properly—nor can voters from a fragmented district exercise the ballot intelligently—when a voting district is nothing more than an artificial unit divorced from, and indeed often in conflict with, the various communities established in the State . . . . I therefore am prepared to entertain constitutional challenges to partisan gerrymandering . . . .

*Id.*

137. *Id.* at 790.


139. *Id.* at 1482.

140. *Id.* at 1483.

141. *Id.* at 1483-84.

142. *Id.* at 1484.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 1482.
and ordered the state to redraw the maps by December 31, 1985.\textsuperscript{147} The Supreme Court noted probable jurisdiction\textsuperscript{148} and stayed the district court's order pending a Court decision on the merits.\textsuperscript{149}

**B. Equipopulous Gerrymandering—Ketchum v. Byrne**

*Ketchum v. Byrne*\textsuperscript{150} was an action contesting the 1981 Chicago City Council redistricting plan for the city's fifty aldermanic wards.\textsuperscript{151} In April and May of 1981, the Commissioner of the city's Planning Department and former alderman Thomas E. Keane\textsuperscript{152} drafted a new ward map following the 1980 census figures, which reflected significant increases in the Black and Hispanic populations during the past decade.\textsuperscript{153} In 1970, Blacks had a population majority in fifteen wards. By 1980, Blacks, under the 1970 ward map, had a majority in nineteen wards and a 49.3 percent plurality in another. In 1970, Hispanics had no majority ward. By 1980, under the 1970 map, they had four majority and two plurality wards.\textsuperscript{154} Thus, in 1980, non-Hispanic whites had a majority in twenty-two wards and a presumed plurality in two other wards under the 1970 map.\textsuperscript{155} The map drawn by Keane provided for twenty-four non-Hispanic White majority wards, seventeen Black majority wards, four Hispanic majority wards and five wards with no majority.\textsuperscript{156} The City Council adopted the map

\begin{table}[h]
\centering
\begin{tabular}{|l|c|c|}
\hline
 & 1970 & 1980 \\
\hline
Non-Hispanic White & 65.5\% & 43.2\% \\
Black & 32.7\% & 39.8\% \\
Hispanic & 7.3\% & 14.0\% \\
\hline
\end{tabular}
\caption{Population Changes in Ketchum, 740 F.2d at 1400.}
\end{table}

\textsuperscript{147} \textit{Id.} at 1496.
\textsuperscript{150} 740 F.2d 1398 (7th Cir. 1984), cert. denied, 105 S. Ct. 2673 (1985).
\textsuperscript{151} The City of Chicago is divided into fifty aldermanic wards. The City Council must redistrict the city based on new census data by the December 1 following the taking of a national census. \textit{Id.} at 1400.
\textsuperscript{152} During the Chicago "Machine" era, Keane "was acknowledge to be second only to Mayor Daley as a political power." Chi. Tribune, Feb. 26, 1986, \textsection{} 1, at 3, col. 1. In 1974, Keane was convicted of conspiracy and seventeen counts of mail fraud in connection with a "well-crafted, brilliantly conceived big money deal." \textit{Id.}
\textsuperscript{153} \textit{Ketchum}, 740 F.2d at 1400. The population changes were as follows:
\textsuperscript{154} \textit{Id.} at 1400-01.
\textsuperscript{155} \textit{Id.} at 1401.
\textsuperscript{156} \textit{Id.} Several other maps were proposed, but they received little consideration. Furthermore, the City Council, using its home rule powers, passed an ordinance requiring that seventeen, rather than ten, aldermen had to vote against the redistricting ordinance before a substitute ordinance could be submitted to public referendum. \textit{Id.}
on November 30, 1981. The plaintiffs alleged that the City Council map diluted majority voting strength by using four techniques: fracturing, packing, retrogression and boundary manipulation. The court based its decision on the fact that the City Council map caused "retrogression." The lower court rejected the plaintiffs' fourteenth and fifteenth amendment claims because the plaintiffs failed to prove "invidious discrimination" by the City Council. The district court, after a two-month trial, found that the plan violated section 2 of the Voting Rights Act. The court based its decision on the fact that the City Council map caused "retrogression." The lower court rejected the plaintiffs' fourteenth and fifteenth amendment claims because the plaintiffs failed to prove "invidious discrimination" by the City Council. The district court, after a two-month trial, found that the plan violated section 2 of the Voting Rights Act. 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court ordered the defendants to draw a new map, and required that a Black majority be restored in two wards and a Hispanic majority in four wards. In addition, the court required that one Hispanic ward be created. The district court approved the defendants’ revised map, which changed seven wards, on December 23, 1982. The plaintiffs appealed to the Seventh Circuit Court of Appeals, claiming that the district court map did not effectively remedy the alleged dilution of their voting strength. The plaintiffs also asked the appellate court to find that the City Council intentionally discriminated against the plaintiffs, violating their fourteenth amendment rights. The Seventh Circuit first addressed issues arising from the Voting Rights Act claim. The court approved the lower court’s finding of a section 2 violation, based on retrogression and the manipulation of the racial voting population to achieve retrogression. The court next turned to the fourteenth amendment issue. The court noted that the facts of this case were closely analogous to other cases in which intentional discrimination was found.

162. Ketchum, 740 F.2d at 1401-02.
163. Id. at 1402.
164. Id. at 1401-02. The changes were as follows (Blacks are represented by “B,” and Hispanics by “H”):

<table>
<thead>
<tr>
<th>Ward</th>
<th>1970 Map</th>
<th>1982 Court-approved Map</th>
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</thead>
<tbody>
<tr>
<td>15</td>
<td>66.36% B</td>
<td>60.09% B</td>
</tr>
<tr>
<td>37</td>
<td>76.39% B</td>
<td>61.65% B</td>
</tr>
<tr>
<td>22</td>
<td>62.80% H</td>
<td>75.55% H</td>
</tr>
<tr>
<td>25</td>
<td>51.10% H</td>
<td>65.37% H</td>
</tr>
<tr>
<td>26</td>
<td>50.70% H</td>
<td>58.83% H</td>
</tr>
<tr>
<td>31</td>
<td>53.61% H</td>
<td>57.38% H</td>
</tr>
<tr>
<td>32</td>
<td>47.90% H</td>
<td>46.30% H</td>
</tr>
</tbody>
</table>

Id. at 1411.
165. The plaintiffs claimed that the district court’s finding that a simple majority (more than 50%) of voting age population constituted the only criterion for determining whether a particular minority had a “reasonable opportunity to elect a candidate of his choice” was erroneous. Id. at 1402. The plaintiffs asked the appellate court to adopt a 65% minority population guideline for remedial purposes. Id.
166. Id. at 1402-03.
167. Id. at 1406. The appellate court analyzed the history of the Voting Rights Act in detail. Prior to amendment of section 2 of the Act, which had been judicially construed to follow the fifteenth amendment, a violation could be found only if invidious discrimination was proved. Id. at 1403 (citing City of Mobile v. Bolden, 446 U.S. 55, 60-61 (1980)). The 1982 amendment eliminated the invidious requirement by substituting a “results” test for the “purpose” test. Ketchum, 740 F.2d at 1403. Under this new standard, the court was to assess the impact of the challenged plan using objective factors and applying a “totality of circumstances” test. Id. The factors to be considered are derived from White v. Regester, 412 U.S. 755 (1973). Ketchum, 740 F.2d at 1404.
168. Ketchum, 740 F.2d at 1407-09. The court noted that several factors in this case...
Despite the similarities, the court found it unnecessary to make a formal finding that the 1981 map constituted intentional racial discrimination. The court was reluctant to apply the difficult fourteenth amendment analysis because Congress had rendered it superfluous by amending the Voting Rights Act.

The court then addressed the map approved by the district court in 1982, which attempted to remedy the racial discrimination that violated section 2 of the Voting Rights Act. The Seventh Circuit found the district court map inadequate because it did not completely eliminate the illegal dilution of minority voting strength caused by the City Council map. The appellate court held that the district court map did not give minority citizens a fair and reasonable opportunity to elect candidates of their choice. Therefore, since the Seventh Circuit did not have the authority to formulate its own redistricting plan, it remanded the case to the district court to remedy the voter dilution problems found in the 1982 district court map.

On remand, the district court on December 27, 1985 approved a settlement map drawn by the parties. The compromise map remedied the fracturing of the Hispanic community by creating four supermajority wards. The compromise map also further in-

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were similar to those in Rybicki v State Bd. of Elections, 574 F. Supp. 1082 (N.D. Ill. 1982), in which the district court held that the 1980 redistricting plan for the Illinois General Assembly unconstitutionally diluted Black voting strength in districts on Chicago's south and west sides. The Rybicki court ordered that adjustments in the map be made to remedy this dilution. The similar factors included: (1) retrogression; (2) boundary manipulation (by displacing Black majorities in two wards); (3) packing (by wasting Black votes through unnecessary concentration); and (4) fracturing (certain parts of the Black and Hispanic communities, which could have been used to form additional Black and Hispanic wards, were instead split to form sizeable Black and Hispanic minorities within White majority wards). Ketchum, 740 F.2d at 1409.

169. Ketchum, 740 F.2d at 1409.

170. Id. See supra note 167 for a discussion of the Voting Rights Act. The court noted that there appeared to be no difference in the available remedy regardless of how the discrimination was characterized. Ketchum, 740 F.2d at 1409-10.

171. Ketchum, 740 F.2d at 1412.

172. Id. The district court had rejected the use of any majority greater than 50% of the voting age population in most wards for determining what constituted an effective voting majority in Black and Hispanic wards. Id. at 1411. The appellate court found that this was an abuse of discretion because the district court should have considered the use of "supermajorities" (frequently 65% of total population or 60% of voting age population) to adjust for the unusually lower voter registration and turnout for certain minorities. Id. at 1413.

173. Id. at 1412. The appellate court did provide the district court with detailed guidelines to follow on remand. Id. at 1412-17.


175. Id. at 557-58. The changes in these four wards were as follows (the figures in
creased the Black population in two Black majority wards, while creating a Black majority in total population and a White majority in voting age population in a third ward. Three days later, the district court ordered special aldermanic and committee elections. The district court noted that dilution of minority voting strength may have affected the outcome of aldermanic and committee elections, and that the changes in these wards from the 1982 court-approved map could mean the difference between "illegal vote dilution and an effective opportunity for Blacks and Hispanics to participate fairly in the electoral process."

Parentheses are percentages of voting age population ("VAP") as opposed to percentages of total population ("TP"):  

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<tr>
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<tbody>
<tr>
<td>22</td>
<td>62.8 (56.7)</td>
<td>64.88 (59.88)</td>
<td>75.55 (69.0)</td>
<td>78.1 (71.77)</td>
</tr>
<tr>
<td>25</td>
<td>51.1 (44.9)</td>
<td>52.56 (46.16)</td>
<td>65.37 (59.5)</td>
<td>72.9 (66.74)</td>
</tr>
<tr>
<td>26</td>
<td>50.7 (41.9)</td>
<td>52.34 (43.68)</td>
<td>58.83 (50.0)</td>
<td>64.2 (57.69)</td>
</tr>
<tr>
<td>31</td>
<td>53.6 (48.4)</td>
<td>57.26 (52.41)</td>
<td>57.37 (50.6)</td>
<td>59.6 (52.35)</td>
</tr>
</tbody>
</table>

*Id.* at 560-61. The changes in these two wards were as follows:  

<table>
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<tr>
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</tr>
</thead>
<tbody>
<tr>
<td>15</td>
<td>66.36 (59.99)</td>
<td>41.69 (34.59)</td>
<td>60.09 (52.6)</td>
<td>74.5 (68.0)</td>
</tr>
<tr>
<td>37</td>
<td>76.39 (72.42)</td>
<td>36.84 (31.21)</td>
<td>61.65 (56.2)</td>
<td>80.4 (77.6)</td>
</tr>
</tbody>
</table>

*Id.* at 561. The percentage breakdown was as follows:  

<table>
<thead>
<tr>
<th>Ward</th>
<th>Black</th>
<th>White</th>
</tr>
</thead>
<tbody>
<tr>
<td>18</td>
<td>51.44 (46.6)</td>
<td>48.32 (50.3)</td>
</tr>
</tbody>
</table>

*Id.* at 562.  

*Id.* at 568.  

*Id.* at 565.  

*Id.* at 567. The changes, reflecting an establishment of "effective majorities," were as follows (these figures reflect percentage of total population ("TP"):  

<table>
<thead>
<tr>
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<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>15</td>
<td>66.36% B</td>
<td>69.09% B</td>
<td>74.29% B</td>
<td>14.20% B</td>
</tr>
<tr>
<td>18</td>
<td>49.30% B</td>
<td>46.37% B</td>
<td>50.03% B</td>
<td>3.66% B</td>
</tr>
<tr>
<td>37</td>
<td>76.39% B</td>
<td>61.65% B</td>
<td>80.45% B</td>
<td>18.80% B</td>
</tr>
<tr>
<td>22</td>
<td>62.81% H</td>
<td>75.55% H</td>
<td>78.11% H</td>
<td>2.56% H</td>
</tr>
<tr>
<td>25</td>
<td>51.10% H</td>
<td>65.37% H</td>
<td>72.95% H</td>
<td>7.58% H</td>
</tr>
<tr>
<td>26</td>
<td>50.66% H</td>
<td>58.33% H</td>
<td>64.20% H</td>
<td>5.37% H</td>
</tr>
<tr>
<td>31</td>
<td>53.61% H</td>
<td>57.38% H</td>
<td>59.59% H</td>
<td>2.21% H</td>
</tr>
</tbody>
</table>

*Id.*
court further noted that since the City Council remapped the city in 1981, there had been no fair aldermanic or committeemen elections in these seven wards. Finally, the district court stated that its order was motivated by the court's awareness of the importance of the right to vote and the deleterious consequences to a democracy that arise whenever racial discrimination is permitted to dilute and distort a group's voting strength.

IV. Analysis

The Supreme Court entered the redistricting "thicket" in the early 1960's to ensure fair and effective representation for all citizens. Unfortunately, the judicially created standards that were developed to attain this goal have created confusion, inefficiency and endless litigation. More importantly, however, even if judicially manageable and consistent standards are developed, fair and effective representation cannot be fully guaranteed by the courts as long as the majority party of the legislature is allowed to control the redistricting process.

A. The Inadequacy of Judicially Created Standards

Case-by-case adjudication of redistricting claims has produced a myriad of ever changing standards which make it difficult for legislatures, attorneys and lower courts to understand which redistricting schemes are constitutionally permissible. For example, in the congressional redistricting area, the Kirkpatrick v. Preisler decision, which developed the "absolute equality" standard, categorically rejected numerous state justifications for population inequality. According to the Kirkpatrick Court, preservation of political subdivisions and ensuring compact districts were not justifiable reasons for population inequality. Yet the Court in 1983, addressing the same issue in Karcher v. Daggett, stated that cer-

181. Id. at 568. City-wide elections were held in 1983 and 1984, using the 1982 court-approved plan. These were the elections that the plaintiffs were challenging. Id. at 565.
182. Id. at 568.
184. See infra notes 186-219.
185. See infra notes 221-32.
186. See supra notes 35-100 and accompanying text.
187. See infra notes 189-92.
188. 394 U.S. 526 (1969); see supra notes 35-43 and accompanying text.
189. Kirkpatrick v. Preisler, 344 U.S. 526, 533-36 (1969); see also supra note 39 and accompanying text.
190. 462 U.S. 725 (1983); see also supra notes 107-37 and accompanying text.
tain legislative policies, such as compact districts, respect for municipal boundaries, and preserving the core of prior districts, would justify population variances.\textsuperscript{191} Quite clearly, both the Court and Justice Brennan, who wrote the majority opinion in \textit{Kirkpatrick} and the plurality opinion in \textit{Karcher}, have changed their positions on this issue. Additionally, since all recent redistricting cases have led to closely divided decisions,\textsuperscript{192} further changes in redistricting standards may occur in 1990. Lastly, many of the Court’s decisions either upholding or invalidating redistricting plans have limited precedential value, because every reapportionment case has its own unique combination of circumstances.\textsuperscript{193}

The result of these various and unstable redistricting standards is endless litigation,\textsuperscript{194} in which the judiciary becomes a redistricting agency that draws almost as many redistricting maps as the legislatures.\textsuperscript{195} Whether cartographers redistricting congressional districts in 1990 can consider such policies as making districts compact and following municipal boundaries is unknown, since the statement in the \textit{Karcher} opinion that such policies are justifiable is dictum.\textsuperscript{196} This uncertainty will probably lead to extensive litigation in the early 1990’s, with states and cities again spending taxpayers’ money to defend these redistricting plans, and in some instances, to make new ones.\textsuperscript{197}

The judicial branch since \textit{Baker v. Carr}\textsuperscript{198} has become a policymaker in the redistricting process by attempting to develop redistricting standards on a case-by-case basis.\textsuperscript{199} One reason that the courts have developed so many constantly changing standards for redistricting is that legislatures have bombarded the Court with numerous schemes designed to dilute particular groups’ votes and thereby keep legislators in power.\textsuperscript{200} Furthermore, the standards

\textsuperscript{191} \textit{Karcher}, 462 U.S.. at 740.
\textsuperscript{194} See infra note 195.
\textsuperscript{195} The ABA estimates that 25% to 35% of current congressional districts were drawn by the courts. \textit{Karcher}, 462 U.S. at 778 (White, J., dissenting) (quoting AMERICAN BAR ASSOCIATION, CONGRESSIONAL REDISTRICTING 20 (1981)).
\textsuperscript{196} \textit{Karcher}, 762 U.S. at 740.
\textsuperscript{197} See Ketchum v. City Council, 630 F. Supp. 551 (N.D. Ill. 1985).
\textsuperscript{198} 369 U.S. 186 (1962); see supra notes 13-18 and accompanying text.
\textsuperscript{199} See supra notes 188-96 and accompanying text.
\textsuperscript{200} See supra notes 2-8 and accompanying text.
provided by the Court, even when capable of useful application, do not provide minority groups a swift and effective remedy for invalid redistricting schemes, since court-ordered maps are not typically redrawn until mid-decade. Since the judiciary’s attempts to develop consistent and manageable standards in the reapportionment area have been unsuccessful, Congress, as the branch best suited for efficient policymaking, must promulgate detailed and concrete reapportionment standards. Moreover, until redistricting is taken out of majority party control, fair and effective representation, which is the goal of redistricting, will not be achieved.

B. The Ineffectiveness of a Judicial Remedy

Discriminatory election districts are inevitable when the legislature’s majority party is allowed unfettered control of the redistricting process. Allowing representatives whose livelihoods depend upon reelection to draw their own districts invites unfairness. Incumbent legislators will always be tempted to find some method by which the system may be manipulated to their advantage, regardless of what the law states. Today, the tactic is equipopulous gerrymandering, accomplished with the aid of sophisticated computers. The majority party’s incumbent legislators can incorporate politically relevant information into the computer’s data base, generating a detailed political and racial profile of the political unit. The computer can then produce thousands of redistricting plans, with the majority incumbents selecting the one that

201. See infra notes 221-32 and accompanying text.
202. For example, Davis v. Bandemer was filed in January of 1982. The validity of the map was still in question in June of 1986 because the Supreme Court had not yet rendered its decision. Bandemer v. Davis, 603 F. Supp. 1479 (S.D. Ind. 1984). Ketchum v. Byrne was filed in the summer of 1982, and elections under the first valid map were held on March 18, 1986. Ketchum v. City Council, 630 F. Supp. 551 (N.D. Ill. 1985).
204. See supra notes 13-100 and accompanying text.
205. For instance, the Keane family controlled Chicago’s 31st ward from 1931-1978. Chi. Tribune, Mar. 3, 1986, § 1, at 9, col. 1. Special attention was given to this ward during redistricting. See Chicago City Council v. Cousins, 466 F.2d 830 (7th Cir.), cert. denied, 409 U.S. 893 (1972), aff’d in part, rev’d in part, 503 F.2d 912 (7th Cir. 1974).
206. See, e.g., supra notes 13-100 and accompanying text.
207. Engstrom, supra note 2, at 208-10. For a further discussion of the use of the computer to promote partisan and racial gerrymandering, see Karcher, 462 U.S. at 785 n.2 (Powell, J., dissenting); Bandemer v. Davis, 603 F. Supp. 1479, 1483-86 (S.D. Ind. 1984); supra note 26 and accompanying text.
Election Redistricting optimizes their chances of reelection.\textsuperscript{208} The computer makes vote dilution extremely difficult to prove. A few percentage points in each of several districts can alter the outcome of an election.\textsuperscript{209} Consequently, it is difficult to determine whether a redistricting plan illegally dilutes a group's vote until after an election has been held under the plan. As \textit{Ketchum v. Byrne}\textsuperscript{210} and \textit{Bandemer v. Davis}\textsuperscript{211} indicate, the majority party can effectively use the computer to maximize its stronghold, making it difficult for the judiciary to remedy the discriminatory effects until the middle of the decade.\textsuperscript{212}

Giving the majority party free reign in the redistricting process has several negative consequences. First, the current system wastes judicial and legislative resources. The American Bar Association estimates that thirty-five percent of current House district lines were drawn by the courts,\textsuperscript{213} with many cases taking over three years to litigate.\textsuperscript{214} Unfortunately, the courts will decennially perform this function under the current system. Both the 1970 and 1980 redistricting schemes in the City of Chicago and the State of Indiana involved extensive litigation, with the Indiana scheme reaching the Supreme Court both times.\textsuperscript{215} As an example of what

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  \item \textsuperscript{208} Justice Harlan foresaw the potential abuses of computers when he wrote in 1969: "A computer may grind out district lines which can totally frustrate the popular will on an overwhelming number of critical issues . . . [D]istrict lines are likely to be drawn to maximize the political advantage of the party temporarily dominant in public affairs." \textit{Kirkpatrick}, 394 U.S. at 551-52 (Harlan, J., dissenting).
  \item \textsuperscript{209} For instance, of the seven wards ordered to hold special elections in \textit{Ketchum v. City Council}, three contained population differences of less than four percent between the 1982 court-approved map and the 1985 compromise map. \textit{Ketchum v. Byrne}, 630 F. Supp. 551, 567 (N.D. Ill. 1985); see supra note 180.
  \item \textsuperscript{210} See supra notes 150-82 and accompanying text.
  \item \textsuperscript{211} See supra notes 138-45 and accompanying text.
  \item \textsuperscript{212} See supra note 202.
  \item \textsuperscript{213} See supra note 195.
  \item \textsuperscript{214} See supra note 202.
  \item \textsuperscript{215} The Chicago City council map drawn after the 1970 census was contested on grounds of racial and ethnic gerrymandering in \textit{Cousins v. City Council}, 322 F. Supp. 428 (N.D. Ill. 1971), rev'd, 466 F.2d 830 (7th Cir.), cert. denied, 409 U.S. 893 (1972). The district court in \textit{Cousins}, on remand, found that the 7th ward boundaries were the product of purposeful racial discrimination and ordered a remap and special election in the 7th ward. \textit{Cousins v. City Council}, 361 F. Supp. 530 (N.D. Ill. 1973). The appellate court reversed, finding that invidious discrimination had not been proved. \textit{Cousins v. City Council}, 503 F. 2d 912 (7th Cir. 1974).
  
  The \textit{Cousins} case, however, might be decided differently today since proof of invidious discrimination is no longer required. See supra notes 97-100 and accompanying text. In any event, litigation over the map, in a close case, took over three years.
  
  Interestingly, the 1970 City Council map was also drawn by Alderman Thomas Keane, who at the time was chairman of the Council Committee on Finance. The court found several instances in which Alderman Keane considered the race of residents when draw-
may be expected in 1990 if history repeats itself, the majority party or group in control of the Chicago City Council in 1990 will use the computer to devise a redistricting plan that will benefit the majority,\textsuperscript{216} and the minority party or group will in all likelihood challenge the plan as unconstitutionally discriminatory.\textsuperscript{217} In fact, if a Black majority gains control of the Chicago City Council and remaps the districts in 1990, the courts may face reverse discrimination claims filed by white voters. An entirely new group of challenges may arise, generating lengthy, complex and costly litigation.

The current system wastes legislative as well as judicial resources, because a redistricting plan invalidated by the courts is useless.\textsuperscript{218} A new map must be drawn, and special elections must be held in some instances.\textsuperscript{219} Consequently, the legislature may spend far more of the taxpayers’ money redistricting than it would have spent had a nondiscriminatory map been drawn at the outset.\textsuperscript{220}

Besides being inefficient, the current redistricting system pollutes the American electoral system, as well as our representational government’s basic ideal—a voter’s opportunity to immediately influence public policy through the election of a representative.\textsuperscript{221} Examples of this pollution are present in almost every redistricting scheme that has been invalidated.\textsuperscript{222} In Chicago, for example, voters in 1983 elected a Black mayor, Harold Washington. Gerrymandered districts could not prevent his election, since the mayoral election is based on the candidate receiving a plurality of

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the city-wide vote. Washington obtained this plurality mainly because Blacks comprised nearly forty percent of the city's population by 1980.\textsuperscript{223} However, the gerrymandered 1980 city election map possibly prevented Washington backers from gaining control of the City Council.\textsuperscript{224} After the 1983 election, the City Council contained 29 anti-Washington alderman (the "29" faction) and 21 pro-Washington aldermen (the "21" faction).\textsuperscript{225} As a result, most of the key City Council chairmanships went to the "29" faction, which until a recent special election controlled the City Council.\textsuperscript{226} The "29" faction stymied scores of Mayor Washington's appointments and programs.\textsuperscript{227} The situation caused heated battles between the Mayor and the "29" faction from the first day he took office.\textsuperscript{228} Since the court-ordered special election\textsuperscript{229} produced a pro-Washington majority in the City Council, it is clear that the 1980 City Council map unfairly prevented voters, for three years, from properly influencing public policy through the electoral system.\textsuperscript{230} Further, the City Council passed legislation for three years which did not reflect the true "majority will"\textsuperscript{231} of Chicago. This situation demonstrates that any judicial remedy will have a delayed effect, and that aggrieved voters may be powerless to prevent sev-

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  \item \textsuperscript{223} Ketchum v. Byrne, 740 F.2d 1398, 1400 (7th Cir. 1984).
  \item \textsuperscript{224} Washington and his backers did not gain control of the City Council until April 30, 1986. The breakthrough came after the court-ordered special elections, see Ketchum v. City Council, 630 F. Supp. 551 (N.D. Ill. 1985); \textit{supra} notes 174-82 and accompanying text, turned the Mayor's 21-29 disadvantage in the City Council into a 25-25 tie. Washington, with his tie-breaking vote as Mayor, thus achieved control of the City Council. Associated Press, May 26, 1986 (available June 1, 1986 on NEXIS, Associated Press Political Service file).
  \item \textsuperscript{225} Associated Press, Jan. 26, 1986 (available June 1, 1986 on NEXIS, Associated Press file).
  \item \textsuperscript{226} \textit{Id.}
  \item \textsuperscript{227} \textit{Id.}
  \item \textsuperscript{228} On May 2, 1983, Washington's first City Council session as Mayor, he adjourned the meeting without a voice vote. The "29" reconvened the meeting and awarded themselves powerful committee chairmanships. Associated Press, Oct. 1, 1984 (available June 1, 1986 on NEXIS, Associated Press file).
  \item \textsuperscript{229} Ketchum v. City Council, 630 F. Supp. 551 (N.D. Ill. 1985).
  \item \textsuperscript{230} The Chicago City Council committees were reorganized on June 6, 1986. This reorganization was possible because Mayor Washington and his supporters had control of the council through Washington's tie-breaking vote. Fifteen aldermen allied with Mayor Washington were installed as chairmen of key council committees previously headed by aldermen opposed to Washington. Thirteen of the remaining committees were structured so that each contained a pro-Washington majority. Chi. Tribune, Aug. 1, 1986, § 1, at 1, col. 5. Thus, legislation supported by Mayor Washington could be implemented for the first time since Washington's election in April of 1983.
  \item \textsuperscript{231} See Howard & Howard, \textit{The Dilemma of the Voting Rights Act—Recognizing the Emerging Political Equality Norm}, 83 COLUM. L. REV. 1615, 1619 n.23 (1983) for a discussion of the importance of majority will in political theory.
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eral years of illegitimate legislation\textsuperscript{232} passed while the constitutionality of an original map is litigated.

\section*{V. Alternatives}

In order to ensure fair and effective elections, Congress must develop a neutral redistricting system for congressional, state and municipal election districts, while also promulgating detailed standards to govern the redistricting procedure. Congress has the authority to enact such changes under article IV, section 4 of the Constitution (the "Guarantee Clause"), which provides that: "[t]he United States shall guarantee to every State in this Union a republican form of government. . ."\textsuperscript{233}

A republican government can be defined as a government which derives its powers from consent of the great body of society, not just a privileged few.\textsuperscript{234} For this consent to be derived from the great body of society, there must be an electorial process which ensures effective representation.\textsuperscript{235} State and city legislatures that are elected from malapportioned and gerrymandered election districts are, therefore, unrepublican governments.\textsuperscript{236} In fact, the Court has recognized that malapportioned or gerrymandered dis-

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\item \textsuperscript{232} Id.
\item \textsuperscript{233} U.S. CONST. art. IV, § 4.
\item \textsuperscript{234} Bonfield, \textit{The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude}, 46 MINN. L. REV. 513, 558-60 (1962).
\item \textsuperscript{235} Bonfield, \textit{supra} note 234, at 560; see also W. CROSSKEY, \textsc{Politics and the Constitution} 522-41 (1950).
\item Professor Crosskey provided an in-depth analysis of the Guarantee Clause. In analyzing the words "every State" in the clause, Crosskey believed that the words were intended to apply to the people of the states, not to their governments. \textit{Id.} at 522. Crosskey also believed that the Guarantee Clause can be used by Congress to regulate national, state and local elections. He stated:
\item For "Republican Government," beyond the possibility of argument, is representative government; and since the representative character of any government necessarily depends upon the popular right to vote, it inevitably results that the popular right of voting in the government of our states, and of voting therein in an effective way, is the thing to which this national guaranty most essentially appertains . . . And because unrepublican systems frequently begin with encroachments on the right to vote, prophylactic protections of this popular right of voting seem the manifest means by which the national guarantee against these unrepublican systems is to be peacefully performed. \textit{Id.} at 523.
\item Crosskey further noted that Congress, using the Guarantee Clause, could pass laws to wipe out unrepublican districting and gerrymandering. \textit{Id.}
\item Finally, Crosskey believed that Congress has the power to pass these laws because "as the 'supreme' organ of the nation, it has the duty, 'to make all laws which shall be necessary and proper' to guarantee this right of voting, to the people of 'every State.'" \textit{Id.}
\item \textsuperscript{236} Bonfield, \textit{supra} note 234, at 560.
\end{itemize}
Districts may be remedied by Congress under the Guarantee Clause. Congress, however, has not used the Guarantee Clause since the Civil War when it invoked the clause to pass and enforce the Reconstruction Acts. After the fourteenth amendment was passed to remedy many actions deemed unrepublican, Congress used the amendment to exert power over the states, and the Guarantee Clause became dormant.

Analysis of partisan gerrymandering claims under the fourteenth amendment, and racial gerrymandering claims under the fifteenth amendment, cannot guarantee a republican government. First, the amendments require unconstitutional "state action" before they can be invoked. For example, the fourteenth amendment's equal protection clause begins with: "No state shall make or enforce any law . . . ." Furthermore, the fifteenth amendment provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State . . . ." Because of the wording, these amendments have been almost exclusively used as negative limitations on state action, rather than affirmative obligations of state or local governments. Thus, the fourteenth and fifteenth amendments can only remedy invalid redistricting maps, rather than devising any procedure to make them valid from the outset. As a result, these amendments have been unsuccessful in remediating the unfairness a gerrymandered or malapportioned districting plan creates until the middle of the decade. Furthermore, courts have been unable to formulate judicially manageable standards.

Congress, using the Guarantee Clause, can promulgate detailed standards for congressional, state and local redistricting. Congress

237. See Baker v. Carr, 369 U.S. 186, 226-27 (1962) ("the appellants might conceivably have added a claim under the Guaranty Clause"). Justice Frankfurter in his dissent noted: "It [the plaintiff's claim] is, in effect, a Guarantee Clause claim masquerading under a different label." Id. at 297 (Frankfurter, J., dissenting). Justice Harlan in Reynolds noted that: "it can, I think, be shown beyond doubt that state legislative apportionments, as such, are wholly free of constitutional limitations, save such as may be imposed by the Republican Form of Government Clause . . . ." Reynolds v. Sims, 377 U.S. 533, 591 (Harlan, J., dissenting).

239. Id. at 514.
240. See supra notes 221-32.
241. Bonfield, supra note 234, at 514.
242. U.S. CONST. amend. XIV; Id.
243. U.S. CONST. amend. XV.
244. Bonfield, supra note 234, at 514; see, e.g., supra notes 150-82 and accompanying text.
245. See supra note 202.
246. See supra notes 186-203 and accompanying text.
can also use the Guarantee Clause to help ensure a republican form of government by making the redistricting process more neutral. At the very least, Congress should prohibit exclusive control by the majority party over the redistricting process.\textsuperscript{247} Congressional action would, it is hoped, help to ensure fair redistricting at the beginning of the decade, thus reducing the volume of litigation in the middle of the decade and the expense to taxpayers caused by invalidation of redistricting schemes.\textsuperscript{248} Courts, instead of being policymakers, would merely be called upon to determine whether congressional standards were followed by the cartographers. This would add stability and predictability to the very confused redistricting area.

\section*{VI. CONCLUSION}

The Court became involved in the redistricting issue in 1962, in an attempt to remedy the gross inequities in election districts. Although the Court’s one person, one vote standard has curbed the effects of malapportioned districts, it has been unable to effectively remedy the evils today’s computers can create through gerrymandered districts. As a result, voters are unable to exert their proper influence on public policy. Consequently, Lincoln’s vision of “government of the people, by the people, [and] for the people”\textsuperscript{249} too often becomes government of the incumbents, by the incumbents, and for the incumbents. In order to achieve a republi-

\textsuperscript{247} Professor Robert G. Dixon, Jr., the foremost expert in the reapportionment field, was a zealous advocate of bipartisan (or, in Chicago’s case, bifunctional) commissions as a way of improving redistricting procedures. Dixon believed that the use of a bipartisan commission with a tie-breaker device would operate as “an essential built-in check on both conscious and unconscious unfairness in the resulting districts.” Dixon analogized such a commission to the Federal Trade Commission (FTC). Just as the FTC considers all relevant data regarding competition and eliminates unfair competition on a case-by-case basis, a bipartisan commission would consider all data regarding political and electoral behavior. The two are analogous because “the bipartisan commission simply deals with competition in another form—political competition for political seats in the political assembly.” The goal of such a commission would be neutrality. This could be accomplished by considering all data on electoral behavior in order to test and discard plans which would create artificial majorities in the legislative assembly. Also, a plan developed by a bipartisan commission, although still subject to judicial review, would contain a strong presumption of representational fairness. Dixon, Establishing Legislative Districts, in Representation and Redistricting Issues 10-11 (B. Grofman, A. Lijphart, R. McKay, H. Scarrow eds. 1982).

\textsuperscript{248} See supra note 220.

\textsuperscript{249} Address by President Abraham Lincoln, Nov. 19, 1863, in Gettysburg, Pa., reprinted in Guide to American Law 420-21 (1985).
can government, Congress must make the redistricting process more neutral from the outset.

TRACY D. KASSON

AUTHOR'S NOTE

The Supreme Court decided *Davis v. Bandemer* after this comment went to press. The Court ruled 6-3 that partisan gerrymandering claims are justiciable under the equal protection clause. The Court then voted 7-2 to uphold the Indiana redistricting scheme because there was no showing that the Indiana electoral system, either statewide or locally, consistently degraded the Democrats' influence over the political process. See *Davis v. Bandemer*, 106 S. Ct. 2797 (1986).