

The Simon Review

Redistricting In Illinois: A Comparative View on State Redistricting

By: Joseph A. Cervantez and Logan Fentress
Paper #30
April 2012

A Publication of the Paul Simon Public Policy Institute
Southern Illinois University Carbondale

Redistricting In Illinois: A Comparative View on State Redistricting

Joseph A. Cervantez and Logan Fentress

Introduction

States regularly redraw the boundaries of their congressional districts and their legislative districts. The United States Constitution requires this process to be conducted every ten years, directly following the census.¹ The idea behind regular redistricting efforts is centered on ensuring that each person is equally represented in our government. As populations change, redistricting efforts are meant to ensure that voters continue to be represented equally. However, the process of redistricting has always been a topic of controversy because it has been freighted with concerns the process is unfair, partial, and corrupt.

The average citizen tends to overlook the state redistricting process, despite the fact few legislative practices provide a greater potential for unfairness, inequality, dispute, conflict of interest, and little to no accountability to those represented. However, in recent years there has been a growing interest nationwide in reforming the redistricting process. The goal of this reform movement is to maximize the equality and fairness in redistricting and protect the value of each citizen's vote.

Not surprisingly, political considerations play a major part in the process. Individual legislators struggle to maintain their status as incumbents by drawing "safe" districts; legislative leaders seek to strengthen their positions by rewarding supporters with improved district boundaries or by punishing their opponents with "competitive" districts; majority parties develop plans to perpetuate their majority status and to shelter their members in the future.

In order to reform the redistricting process, experts have pushed for the task to be taken out of the hands of legislative bodies and put into the hands of more neutral parties or committees to eliminate the obvious conflicts of interest. Supporters of the prevailing legislative redistricting procedure, in opposition to the reformers, argue that the creation of districts is an inherently political process. However, in just the last decade, 22 of the 28 states that use only their legislatures for redistricting have created independent redistricting commissions. Illinois is one of the few states that continues to use primarily its legislature for redistricting, but not without controversy.

In 2011, a controversial redistricting map of newly reapportioned congressional districts, drawn by a Democratic majority legislature, was signed into law in Illinois by Democratic Governor Pat Quinn. Republicans were quick to criticize the map. The new

¹ United States Constitution, Article 1, Section 2

redistricting plan is such that the GOP could lose as many as five U.S. House seats as a result of it. Illinois's Democratic governor defends the map claiming that it maintains the current competitiveness within congressional districts while protecting the rights of minority communities. Republicans on the other hand argue the map is partisan and a product of political engineering. They claim the same map divides communities and diminishes the votes of its citizens.

As the nationwide interest in reforming the redistricting process grows, Illinois will inevitably be faced with a decision on how it will take on the challenge. Several states have already implemented new redistricting guidelines and processes and could be used as examples to suggest how Illinois can move forward. For example, Arizona and Iowa have handed their redistricting processes over to independent commissions. Similarly, recent constitutional amendments to the Florida and California constitutions reshaped their redistricting processes and have gained them nation-wide attention. These redistricting plans could serve as templates for future reform in Illinois.

In Florida, voters passed a constitutional amendment that keeps the power to draw district lines in the hands of the state legislature but sets specific criteria thus limiting the power of the legislature to favor one political party or candidate.

Californians on the other hand took the task of redistricting away from their legislature. They passed a proposition in 2010 that places redistricting efforts in the hands of an independent bipartisan commission which is elected and formed solely for the purpose of drawing congressional district lines.

Similar commissions have been implemented in Arizona and Iowa. Both states utilize independent commissions to redistrict, but are very different from each other. Iowa has adopted a system which utilizes a commission to assist their legislature in redistricting. Arizona has adopted a commission which is permitted by the legislature to conduct redistricting independently.

Before analyzing whether these state reforms would be workable models for Illinois, it would be helpful to briefly review the history of redistricting as well as some of the fundamental and highly contested issues involved in it.

I. A Brief History of Redistricting

In the decades since enactment of the Federal Voting Rights Act of 1965, four major issues have come to constitute the legal basis of the redistricting process in relation to the standards to be followed and the procedures in which relief can be properly sought. The four issues that have been the subject of controversy and litigation regarding the redistricting process are: 1) initially, whether or not federal courts had the authority to hear cases having to do with state redistricting matters; 2) whether the standard of fairness should apply when redistricting on the basis of population; 3) whether racial minorities could be favored in the state redistricting process; and 4)

the permissibility of redistricting on the basis of political or partisan affiliations. Since the passage of the Voting Rights Act in 1965, the Supreme Court has and continues to weigh in on these fundamental issues.

A. Judicial Review and Equal Population

Until 1964 Illinois had failed to redistrict itself since 1901.² The legislators' reasons for maintaining the status quo were self-serving. The state's population had become increasingly urban and predominantly rural legislators refused to cede power to the areas where the population growth had taken place. Drawing of new lines adds an element of uncertainty in the political process and the politicians' ultimate goals were to be reelected. However, an increase in population and migration to urban areas severely altered the balance of population within the state. Population disparities increased to a point where a district may have been ten times more populated than its neighboring district yet possess the same voting power in the legislature.

The problem is with individual voting rights. Reformers claimed the severe population disparities diminished citizen's votes and therefore were a violation of the Fourteenth Amendment's equal protection clause. Reformers sought relief in several actions but were rejected in the state courts. In 1946, the question came before the United States Supreme Court in *Colegrove v. Green*, a case which originated in Illinois.³

Colegrove alleged the congressional districts created by Illinois law lacked the necessary equality of population afforded to them by the U.S. Constitution. This was another complaint that a failure to redistrict was a violation of the Fourteenth Amendment's equal protection clause. Despite the obvious inequalities, the Supreme Court held that the issue of redistricting was a non-justiciable question.⁴ Justice Felix Frankfurter in his opinion explained that it was not the place of the federal courts to interfere in what was essentially a "political question" for the states.⁵

Reform efforts stalled for much of the next decade. Many states maintained the status quo after the federal judiciary had wiped its hands of the issue, leaving redistricting efforts to be determined by the individual states and the executive and legislative branches to address.

A few cases such as *Magraw v. Donovan* broke away from the holding in *Colegrove* explaining that the federal courts could review the case, not on the claim of the state's failure to redistrict, but on the constitutionality of its failure to redistrict.⁶ This provided a solid complaint for Charles Baker and other Tennessee reformers to push on with their case against Tennessee Secretary of State, Joe Carr.

In the 1962 Supreme Court case, *Baker v. Carr*, Baker along with other reformers representing several urban districts of Tennessee, brought their familiar complaint before the court that the

² Governor William Stratton succeeded in passing the first redistricting legislation in fifty four years.

³ *Colegrove v. Green*, 328 U.S. 549 (1946)

⁴ Whether an issue is justiciable seeks to address whether a court possesses the ability to provide adequate resolution of the dispute; where a court feels it cannot offer such a final determination, the matter is not justiciable.

⁵ *Colegrove v. Green*, 66 S. Ct. 1198, 632 (1946)

⁶ *Magraw v. Donovan*, 159 F. Supp. 901 (1958)

state had denied them the equal protection of the laws afforded by the Fourteenth Amendment.⁷ Baker's complaint alleged that the Tennessee legislature, like many other states, had not redrawn its legislative districts since 1901. This was in violation of the Tennessee State Constitution which required redistricting according to the federal census every 10 years. The Plaintiffs in *Baker v. Carr*, lived in an urban part of the state. They asserted that the demographics of the state had changed, shifting a greater proportion of the population to the cities, thereby diluting their vote in violation of the Equal Protection Clause of the Fourteenth Amendment.

This time, the Warren court declared redistricting issues justiciable by the federal courts and held that the issue was not avoidable as a "political question" but one asserting matters of constitutionally protected individual rights.⁸ The Court explained that the mere fact that a suit seeks protection of a political right does not mean it presents a political question. The Warren court went on to explain that the legislature's inaction was a violation of Tennessee citizens' voting rights. The court held that the equal protection clause of the Fourteenth Amendment is violated, not only when a state discriminates with regard to race, but whenever it makes an arbitrary and unreasonable classification.

The decision in *Baker* defined a clear and objective goal for state redistricting. The fundamental purpose of the process was now centered on a state's responsibility to draw district lines, ensuring to the extent possible, equal population in each of their representative districts.

Two years later, in the 1964 U.S. Supreme Court case, *Wesberry v. Sanders*, the court ruled that population differences among Georgia's congressional districts were so great that they violated the constitution. They explained that congressional districts should be drawn to be approximately equal in population. Specifically, the Court stated districts should be "equal as nearly as practicable and that one man's vote in a congressional election is to be worth as much as another's." The "one person, one vote" doctrine was stamped and in effect.⁹

The same year, the U.S. Supreme Court held in *Reynolds v. Sims* that seats in both houses of a state legislature must also satisfy the equal protection clause and represent the individual districts as equal in population as practicably possible.¹⁰

Subsequent cases would now challenge situations in which differences in population among intrastate legislative districts were so great that they were unfair. The question is: how much population deviation should be allowed before considering it to be unfair?

In *Gaffney v. Cummings*, a 1973 case, the U.S. Supreme Court developed a standard of population equality requiring state legislative districts to differ by no more than 10 percent from the smallest to the largest districts, unless justified by some rational state policy.¹¹ Later, the Court would rule that state redistricting plans are held to a lower standard for population equality than Congressional districts. Under this case law, state redistricting has a significant degree of flexibility not found on the federal level.

⁷ Baker v. Carr, 369 U.S. 186 (1962)

⁸ Baker v. Carr, 82 S. Ct. 691, 824 (1962)

⁹ Wesberry v. Sanders, 376 U.S. 1 (1964)

¹⁰ Reynolds v. Sims, 377 U.S. 533 (1964)

¹¹ Gaffney v. Cummings 412 U.S. 735 (1973)

The congressional districts have far more stringent criteria of deviation. In the 1982 case of *Karcher v. Daggett*, the Court developed a standard of equality for congressional districts that required them to be mathematically equal, unless justified by some “legitimate state objective.”¹²

In summary, the Supreme Court has held that Article I, Section 2, of the U.S. Constitution requires the population of all the congressional districts in a state be as nearly equal in population as practicable. All minimum variations between districts must be explained with reasonable justification.

Additionally, the Supreme Court has held that, under the Equal Protection Clause of the 14th Amendment, both houses of a state legislature must have districts that are substantially equal in population. As previously mentioned, they have distinguished between congressional and state representative districts.

B. Racial Minorities in Redistricting

On February 3, 1870, the Fifteenth Amendment was ratified by the U.S. Congress. The amendment was designed to ensure that a person's race, color, or prior history could not be used to bar that person from voting. Unfortunately, it had little effect for quite some time, as many states found ways to prevent minorities from voting.

Often claimed as one of the most successful pieces of civil rights legislation in history, the Voting Rights Act of 1965 helped to give voice and action to the Fifteenth Amendment. Section 2 of the act stated that it was specifically enacted by Congress to enforce the Fifteenth Amendment.¹³ There is no doubt that it had an immediate impact on the voting rights of minorities. After the passage of the Voting Rights Act, the percentage of eligible blacks registered to vote rose from 29% to over 52%.¹⁴

Despite guaranteeing that ballot boxes would be opened for minorities, the Voting Rights Act did not intend to function as a guarantor of minority political success. Justices expressed this idea neatly in the 1998 case of *Barnett v. The City of Chicago*, when they stated that section 2 of the Voting Rights Act protects minorities against stacked decks, but does not a guarantee a winning hand.¹⁵

Many of the cases after the Voting Rights Act dealt with the dilution of minority votes. While the previously discussed, “one person, one vote” cases established the rule on equal population, they failed to discuss how this would impact the minority vote. So while each minority may have been assured to have one vote, it was never assured to the same voter that his or her vote would not be diluted.

¹² *Karcher v. Dagget*, 455 U.S. 1303 (1982), 103 S. Ct. 2653, 978 (1982)

¹³ 42 U.S.C. 1973 §2

¹⁴ *Resolving the Dilemma*, C.L.R. 92 Cal. L. Rev. 1989

¹⁵ *Barnett v. City of Chicago*, 141 F.3d 699 (7th Cir. 1998)

Minority votes can be unfairly diluted in a couple of different ways. There may be a minority population large enough to constitute a majority in one district but through redistricting, may be broken up into two or more districts where they become the minority in those districts. This is referred to as “cracking” the minority voting power. Conversely, two or more districts that have minorities as the majority population may be combined to form one district thereby losing a representative. This is referred to as “stacking” the minority voting power.

There is a fine line however, between what constitutes impermissible dilution and what is merely the consequence of balancing population between districts. In the 1980 U.S. Supreme Court case, *City of Mobile v. Bolden*, black residents claimed Mobile, Alabama’s practice of electing commissioners citywide diluted minority voting strength, thus violating the 14th and 15th Amendments as well as Section 2 of the Voting Rights Act. The Court held that racially discriminatory intent is necessary to violate the Fifteenth Amendment.¹⁶

Congress explained that the standard handed down by the Supreme Court in the Bolden decision was inappropriate and indicated that the proper judicial focus should be on election outcomes, not on discriminatory intent. Congress suggested an amendment to Section 2 of the Voting Rights Act which was ultimately passed in 1982. The result was an amended legislative intent which provided that if the outcome or effect of the act was to dilute minority voting rights then the act was illegal.¹⁷

The question left was how the courts were going to determine whether a redistricting plan would have discriminatory results? In the 1986 Supreme Court case of *Thornburg v. Gingles*, the Court set forth preconditions a minority group must prove in order to establish a violation of Section 2.¹⁸ First, the minority group must be sufficiently large and geographically compact to constitute a majority in a single-member district. Second, the minority group must be politically cohesive or usually voting for the same candidates. Third, in the absence of special circumstances, bloc voting by the white majority must be shown to usually defeat the minority's preferred candidate. The court would look at the “totality of the circumstances” to determine if the process resulted in the dilution of electoral votes.¹⁹

Several cases since continued to mold the current legal guidelines of drawing majority-minority districts. Two 1993 cases further outlined the parameters of redistricting. In *Voinovich v. Quilter*, the Supreme Court explained that a state is perfectly free to draw majority-minority districts as long as in doing so they do not violate the law.²⁰

In *Shaw v. Reno*, a 1993 Supreme Court case, white voters challenged two majority black districts in North Carolina claiming that “race conscious” redistricting violated the Fourteenth Amendment. The Supreme Court held that North Carolina's redistricting legislation was so extremely irregular on its face that it could rationally be viewed only as an effort to segregate races for the purpose of voting, without regard to traditional districting principles, and without

¹⁶ *City of Mobile v. Bolden*, 466 U.S. 55 (1980)

¹⁷ 42 U.S.C. §1973(1)

¹⁸ *Thornburg v. Gingles*, 478 U.S. 30 (1930)

¹⁹ *Thornburg v. Gingles*, 478 U.S. 30, 623 (1930)

²⁰ *Voinovich v. Quilter*, 507 U.S. 146 (1993)

sufficiently compelling justification. The key here was the court’s recognition of a wrong if there was an absence of the traditional redistricting principles.²¹

In summary, the goal became to create districts that are equal in terms of population but did not unfairly favor or discriminate against minorities and dilute their vote. The creation of majority-minority districts has been held to be constitutional but there is a standard. The courts have interpreted the Voting Rights Act of 1965 to mean that the proper judicial focus should be on election outcomes, not on discriminatory intent. The Court in *Thornburg v. Gingles* set forth three preconditions a minority group must prove in order to establish a violation of Section 2. Additionally, in drawing majority-minority districts, there must be traditional redistricting methods and compelling justification present for the new districts to be constitutional.

C. Political Gerrymandering

Political gerrymandering is the drawing of representative district lines in a manner that favors one political party and discriminates against another political party. Courts recognize that politics are an inherent part of any redistricting plan. In fact, in the 1973 Supreme Court case, *Gaffney v. Cumming*, Justice Brennan explained that “politics and political considerations are inseparable from redistricting and apportionment.” The question is how much partisan gerrymandering is allowable so as not to violate an individual’s voting rights.²²

In *Gaffney*, the District Court held that the policy of partisan political structuring cannot be approved as a reason for violating requirements of population equality in redistricting. The Supreme Court reversed the lower court’s decision explaining that political boundaries and political fairness could justify deviations from perfect population equality in state legislative districts. Specifically, the average deviation of 1.9% and the maximum of 7.83% were found to be acceptable. Exact equality between districts is not required for state redistricting as it is for Congressional districts. There can be a deviation between state legislative districts, but the deviations must be justified.

In the 1986 U.S. Supreme Court case, *Davis v. Bandemer*, Justice White held that claims of partisan gerrymandering are properly justiciable under the Equal Protection Clause. The Court concluded that there were “judicially discernible and manageable standards” by which political gerrymandering cases could be decided.²³ The issue would arise later on what those standards are. Many courts have since attempted to articulate and outline those standards without much success.

In *Vieth v. Jubelirer*, a 2004 Supreme Court case, voters brought an action against the commonwealth of Pennsylvania challenging the constitutionality of the state’s redistricting plan. Chief Justice, Justice O’Conner, Justice Scalia, and Justice Thomas held that political gerrymandering claims were non-justiciable because “no judicially discernible and manageable

²¹ *Shaw v. Reno*, 509 U.S. 630 (1993)

²² *Gaffney v. Cumming*, 412 U.S. 735 (1973)

²³ *Davis v. Bandemer*, 407 U.S. 109 (1986)

standards for adjudicating such claims exist.”²⁴ Particularly noteworthy, Justice Scalia explained that a claim of political unfairness rests upon the principle that groups have a right to equal and proportional representation. However, the constitution guarantees equal protection of the law to persons, not to groups he said.

Justice Kennedy, in his concurring opinion, includes the possibility that these types of claims may be justiciable at a later time. Kennedy expressed two main points on why political (or partisan) gerrymandering claims are non-justiciable.

First, he explains his concern for unnecessary judicial interference with politics. He explains that judicial decisions on district lines would “commit federal and state courts to unprecedented intervention in the American political process.”²⁵ However, he went on to explain that, he would “not foreclose the possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the constitution.”²⁶

Second, Justice Kennedy agreed with the majority opinion explaining that no judicially discernible and manageable standards for adjudicating such claims exist. Kennedy explained:

“A determination that a gerrymander violates the law must rest on something more than the conclusion that political classifications were applied. It must rest instead on a conclusion that the classifications, though generally permissible, were applied in an invidious manner or in a way unrelated to any legitimate legislative objective.”²⁷

However, he explained that even though no such standard exists, it does not follow that none will emerge in the future.²⁸ Justice Kennedy articulated a genuine concern that if courts refused to entertain any claims of partisan gerrymandering, then the use of partisan gerrymandering in an unconstitutional manner could increase.²⁹

The U.S. Supreme Court attempted to adjudicate another partisan gerrymandering claim in the 2006 case, *League of United Latin American Citizens v. Perry*.³⁰ Justiciability is not at issue in *Perry*. Justice Kennedy reminds us that the Supreme Court in *Vieth* ruled that a political gerrymander could present a justiciable case; they just failed to agree on what standard to apply. The main issue in *Perry* was whether the appellants offered a manageable, reliable measure of fairness for determining whether a partisan gerrymandering was unconstitutional.³¹ Justice Kennedy, joined by the Chief Justice and Justice Alito held that the Appellant failed to provide a reliable standard for identifying unconstitutional gerrymandering.³² Justice Scalia, joined by Justice Thomas referred back to *Vieth* and concluded that claims of unconstitutional political

²⁴ *Vieth v. Jubelirer*, 541 U.S. 267, 124 S.Ct. 1770 (2004)

²⁵ *Id.* at 1793

²⁶ *Id.* at 1794

²⁷ *Id.* at 1793

²⁸ *Id.* at 1796

²⁹ *Id.* at 1796

³⁰ *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006)

³¹ *League of United Latin American Citizens v. Perry*, 548, 642 U.S. 399, 126 S.Ct. 2597 (2006)

³² *League of United Latin American Citizens v. Perry*, 548, 642 U.S. 399, 126 S.Ct. 2603 (2006)

gerrymandering do not present a justiciable case or controversy. Again, the court failed to agree on a sufficient standard to apply.³³

Whether partisan gerrymandering claims are justiciable and may be adjudicated remains an unresolved issue in the eyes of the Supreme Court. The main issue over claims of political gerrymandering is whether a workable standard for litigating partisan gerrymandering can be established. Initially, the court in *Davis v. Bandemer* held that it was a justiciable issue. Subsequent courts have held otherwise. However, no court has accepted a standard to identify an unconstitutional gerrymander. The Supreme Court has expressed that plaintiffs must overcome the burden of proving how much dominance the plan in question actually achieves and whether that outcome is fair. Despite the uncertainty, political parties continue to litigate claiming the unconstitutionality of partisan gerrymandering. The question remains as to what standards to apply.

A manageable and reliable standard that the Supreme Court could apply in order to determine whether a political gerrymander is unconstitutional could consist of a systematic juxtaposition of statewide constitutional officer election outcomes with local legislative and congressional election outcomes. For example, in order to determine whether state legislative districts have been unconstitutionally gerrymandered, the popular results of a gubernatorial race, taking place in the same election cycle, can be compared to the election results of all of the state legislative districts. A difference of 20 or more percentage points would constitute an obvious political gerrymander and an unconstitutional violation of the equal protection clause. To explain further, if, in a given state election cycle, a governor of one political party garners 60% of the vote while that same political party only garners 40% of the legislative seats up for reelection then a political gerrymander will be deemed to have taken place.

On a congressional basis, a different standard could be applied whereby the percentage of a political party's makeup in the state's congressional delegation, following a congressional election cycle, could be compared to the percentage of overall votes cast in the state for each political party. For example, if, in state X which has approximately 20 congressional seats, party Y wins elections to 16 (80%) of those seats while opposing party Z garnered 60% of all votes cast statewide in congressional elections then an unconstitutional gerrymander could be deemed to have taken place.

Of course the percentage differential could be toyed with—we use 20% merely to illustrate the point. However, the inherent problem with such a standard is that it presupposes that every voter in every state votes strictly on a partisan basis in every election. The aforementioned congressional standard would be less susceptible to this critique however on a gubernatorial level this standard is open to criticism on the basis that it doesn't take into consideration the diversity of substance among candidates in a given legislative district. Also, by applying such a standard it is difficult to incorporate the separate geographic and diverse cultural subparts of a given state that may account for such discrepancies in election results. It is no surprise that the Supreme Court, despite the eclectic experience and knowledge that it has brought to bear on this subject, has been unable to ascertain a universally coherent standard that can be applied to cases in which a political gerrymander is thought to have taken place.

³³ Idim.

II. Redistricting in Illinois

A. Brief History and Current Process

The redistricting process in Illinois has always been a source of unrivaled political gamesmanship as the state's own redistricting procedure helps to accommodate partisanship. This is the inevitable outcome in a state with two very competitive parties and a long history of political conflict.

The Illinois Constitution, as adopted in 1970, gave the state legislature the initial responsibility of redistricting the House and Senate. The state legislature and governor initially control the congressional and state legislative redistricting. According to the state constitution, Article IV Section 3, the legislature and governor are supposed to pass a redistricting plan through the normal bill enactment process. It specifies that in the year following each Federal decennial census year, the General Assembly by law shall redistrict. The new plan must become effective by June 30 of that year.

If the General Assembly fails to pass a plan by June 30, a commission which consists of eight members, no more than four from each political party, must take on the task.³⁴ The Speaker, the Minority Leader of the House of Representatives, the President of the Senate and the Minority Leader of the Senate, each appoint two members of the commission. By August 10th the commission must file a redistricting plan which has been approved by at least five members of the commission with the Secretary of State. If the committee can agree on a plan, it is adopted; if not, a tie-breaker is initiated.³⁵

The Illinois Supreme Court is handed the task of selecting two candidates for the committee, one from each party, one of which is to be randomly selected by the Secretary of State. By October 5, the commission must file a plan approved by at least five members. Five votes are required for the authorization of a final plan, and the ninth member of the committee is vested with a tie-breaking vote.³⁶

Since the current system was put in place in 1970, the legislature has failed to meet the deadline every redistricting cycle after the 1971 redistricting. However, in 2011, Democrats controlled both houses of the Legislature and the Governor's office, so for the first time since 1971, the backup commission was not necessary, and because of the current political make-up, neither were Illinois Republicans.

In 1981, the state's constitutional plan underwent its first real test as the legislative stalemate produced, for the first time, the invocation of the tie-breaking provision meant to settle the impasse created by the legislative commission. Former governors Sam Shapiro (D) and Richard

³⁴ Ill. Const. art. IV § 3.

³⁵ Ill. Const. art. IV § 3.

³⁶ Ill. Const. art. IV § 3.

Ogilvie (R), nominated by the Illinois Supreme Court, subsequently had their names thrown into a hat wherein the Secretary of State randomly selected Shapiro and thus the new redistricting maps were eventually drawn to favor the Democratic Party.³⁷

A similar thing occurred in 1991 when, after the failure of the state legislature to create a map to the governor's liking, the Secretary of State randomly selected a Republican as the ninth member of the commission which eventually resulted in the creation of Republican leaning maps. Despite the Republicans' initial success, the Democrats were able to marginalize this slight setback with the help of the Illinois Supreme Court which, in a partly line vote (4-3), remanded the maps back to the commission for readjustments.³⁸

The results of the 1981 and 1991 cycles sparked the creation of a Redistricting Process Review Commission (the Ladd Commission) to study the Illinois redistricting process and to make the necessary recommendations. The commission's recommendations, issued in 1992, though noble and practicable, not surprisingly fell upon deaf ears in the General Assembly, and eventually led to the same process and result in 2001 when the tie breaking provision was again implemented to the benefit of the Democrats after Secretary of State Jessie White randomly drew from the hat the name of a Democrat.³⁹ This then led to the adoption of a map favorable to the Democrats for the elections of 2002 and most of that decade.

B. Analysis

The current Illinois redistricting process has serious flaws. The legislature is tasked with passing a redistricting plan. The plan is meant to proceed through the typical legislative process. It is submitted, voted on, and signed by the governor. However, unless both houses and the governor's office are controlled by a single party, a plan will rarely be agreed upon. Drafters of Illinois's redistricting provisions should have been aware of the slim possibility of a redistricting plan passing in a bipartisan manner. Drafters must have known that it would almost always be submitted and debated through a secondary process. In Illinois, the secondary process is a commission made up of four Democrats and four Republicans. Again, with so much at stake for individual politicians, drafters could never have expected five or more members of a committee to agree on a single plan, and in fact, since 1971, they never have. So in essence, the first two stages can be considered a mere time consuming formality.

As mentioned, Democrats controlled both houses of the legislature and the governor's office in 2011. So for the first time since 1971, the backup commission was not necessary and a redistricting plan was pushed through both chambers and signed by the governor. As a result, Republican complaints concerning this redistricting cycle were numerous. The results of this partisan redistricting plan could have very negative results for the Republican Party in Illinois as it may affect several congressional districts.

The new plan stretches eight districts out from Chicago which combines heavily Democratic

³⁷ John S. Jackson and Lourenke Prozesky, Redistricting in Illinois, Paul Simon Public Policy Institute Southern Illinois University Carbondale, Illinois (April, 2005).

³⁸ Idim.,

³⁹ Idim.,

districts in Chicago with Republican districts in the suburbs. The argument against this plan is that Democrats have intentionally drawn these districts to diminish the votes of Republicans by adding them to heavily Democratic ones. The new map has been drawn so that several Republican representatives no longer live in the districts they represent or now reside in Democratic controlled districts. However, the test of fairness may ultimately depend upon the competitiveness of the races and not just on the potential for changing of partisan control. In total five congressional seats could change hands in 2012. While five seats may not sound like a drastic shift, it is when you consider Illinois will only have 18 total seats in 2012. So as a result of a partisan redistricting plan, the Illinois legislature may have changed the outcome in almost one third of the total districts in Illinois.

Illinois Democrats fared well in the 2010 elections despite the animosity toward the party on a national level. Democrats won the governorship and control of the state legislature. However, Illinois Republicans did well in the U.S. Congressional races. What's concerning to Republicans is that six months after an election which yielded positive results for the GOP, the Illinois state legislature may diminish those results by redrawing the districts. It must be taken into account that Illinois is demographically a Democratic state. However, these outcomes are more difficult to defend as fair when Democrats are in full control of the process.

Several law suits contesting the new Illinois map have already run their course. State GOP Chair Pat Brady and the Illinois State Republican Party filed a lawsuit asking the Supreme Court to declare the redistricting tie breaking provision in violation of the state constitution.⁴⁰ The Illinois Supreme Court declined to take the case.⁴¹ A claim was filed against Governor Pat Quinn by The League of Women Voters of Illinois. The suit argues that Democrats violated the First Amendment by using partisan voting information to redraw district boundaries, stating, "The General Assembly and governor have unlawfully selected residents to speak, debate, assemble and vote in these districts based upon their political viewpoints and opinions."⁴² The court upholds the new map by citing *Gaffney v. Cummings*, explaining that the Supreme Court has long recognized that some "burdening" of partisan viewpoints is an inevitable part of drawing district lines.⁴³

Senate Republican leader Christine Radogno and House GOP leader Tom Cross filed a federal lawsuit also attempting to invalidate the newly drawn legislative maps on their unconstitutionality due to political gerrymandering under the First and Fourteenth Amendments. The court upheld the decisions in *Vieth* and *League of United Latin American Citizens* explaining that "gerrymandering claims are justiciable in principle, but currently unsolvable."⁴⁴ Additionally, the court reviews claims of minority vote dilution and the constitutionality of the Illinois Voting Rights Act.⁴⁵ Several of the claims were dismissed or remanded.

⁴⁰ Daily Herald, "Illinois GOP files suit challenging remap process," May 12, 2011

⁴¹ www.redistricting.ils.edu/states-IL

⁴² ABC 7, "League of Women Voters sues of remap," August 16, 2011

⁴³ *League of Women Voters v. Quinn*, 1:11-CV-5569, 2011 WL 5143044 (N.D. Ill. Oct. 28, 2011)

⁴⁴ *Radogno v. Illinois State Bd. of Elections*, 1:11-CV-04884, 2011 WL 5025251 (N.D. Ill. Oct. 21, 2011)

⁴⁵ Idim

Democratic and Republican controlled states consistently face complaints of unfair redistricting practices from the minority party. Petitioners have found it difficult to challenge redistricting maps as they struggle to determine acceptable standards for a “fair” redistricting plan. However, several states have already reformed their redistricting processes by adopting more politically inclusive plans, some of which could be used as blueprints for Illinois to follow in order to diminish the complaints that inevitably surface after each redistricting cycle. Iowa, Arizona, Florida and California are all excellent examples.

III. Redistricting in Florida

A. Brief History

The ethnically, economically, and politically diverse confines of Florida have created a dilemma in the state for decades and the state’s redistricting procedure has evolved with the state’s unique political demography. By the second half of the twentieth century it had become clear that the evolving rate of urban diversity within the state had outgrown the rural implications of the state’s original constitution. Article VII of the Florida Constitution, as adopted in 1885, required that state senatorial districts be as equal in population as was practicable and also that each senatorial district be composed of contiguous counties.

The original Constitution also gave the legislature the power to apportion the representation in the state House of Representatives by allowing “three (3) Representatives to each of the five most populous counties, two (2) Representatives to each of the next eighteen more populous counties, and one Representative to each of the remaining counties of the State at the time of such apportionment.”⁴⁶ The results of this system of apportionment allowed a small percentage of the electorate to elect a majority of the state’s legislature. However, these strict requirements did not apply to the apportionment of Congressional districts, the standards of which had been and always were to be regulated by the U.S. Constitution.

In 1961, the Florida legislature enacted the Congressional Reapportionment Act in response to the 1960 decennial U.S. census which awarded the state four more congressional districts; bringing their then total to 12 (Florida currently has 25 Congressional districts and will have 27 when the 113th Congress is officially seated in 2013). Following the enactment of the Congressional Reapportionment Act, in 1962 the Florida Supreme Court upheld the law on the basis that “Neither the Federal nor State Constitutions, nor the Federal nor State statutes, require that the Florida Legislature apportion Congressional districts upon the basis of numerical equality.”⁴⁷ The Florida Supreme Court also announced that, along with population, other important factors in determining Congressional apportionment were: economic elements, geography, and means of transportation, along with industrial and agricultural considerations. The responsibility of marking out reasonable boundaries that could best serve the state’s public welfare was a responsibility that belonged to the State Legislature.⁴⁸

⁴⁶ Fla. Const. 1885 art. VII, § 3.

⁴⁷ Lund v. Mathas, 145 So. 2d 871, 873 (Fla. 1962).

⁴⁸ Id. at 873 & 874.

With the evolution of the U.S Supreme Court's stance on representative equality in the mid twentieth century, the Florida Constitution came under fire for its obvious violation of the equal protection clause of the Fourteenth Amendment which the Supreme Court, for decades, had refused to recognize. Further, passage of the Voting Rights Act of 1965 brought with it challenges to the inequality of Florida's state apportionment scheme and with it unwanted litigation. As a result, Florida revised its Constitution in 1968 by stipulating that the reapportionment of state districts be in accordance with the state and Federal Constitutions-the latter of which having evolved more liberally in recent decades to the benefit of previously oppressed minority groups.⁴⁹

The first test for the revised Florida Constitution came in 1972 when the Attorney General petitioned the Florida Supreme Court for a declaratory judgment to determine the validity of a joint legislative resolution which apportioned the state legislature. In *In re Apportionment Law Appearing as Senate Joint Resolution No. 1305, 1972 Regular Session*, the Florida Supreme Court ruled that "there is no requirement that district lines follow precinct or county lines, for the constitutional mandate (Fla. Const., art. III, s 16 (a), F.S.A.) is that the state be apportioned into districts of either contiguous, overlapping or identical territory."⁵⁰ The Court also ruled that mathematical exactness, in regard to population deviations, is not an absolute requirement in state apportionment plans and that multi-member districts were permissible in certain circumstances.⁵¹

The Court, in *In re Apportionment Law* (1972) also established a standard for judicial relief by stating that: "Judicial relief becomes appropriate only when a legislature fails to reapportion according to federal and state constitutional requisites."⁵² Further, recent precedents by the Florida Supreme Court have established circuit courts as competent courts of jurisdiction capable of deciding redistricting cases.⁵³

In 1982 the Florida legislature conducted a more transparent approach to redistricting that even included input from outside interest groups. A House Select Committee on Reapportionment eventually approved a plan that required the Legislature to convene a special session to achieve a constitutional mandate; stipulated single-member districts for all forty Senate seats and all 120 House seats in order to diminish the possibility that the voting strength of minority groups would be diminished; provided detailed consideration for the representation of the Black and Hispanic populations; and also stipulated that the redistricting plan had to be submitted to the Department of Justice for preclearance under Section 5 of the Voting Rights Act of 1965.⁵⁴

⁴⁹ Fla. Const. art. III § 16(a) (West).

⁵⁰ *In re Apportionment Law Appearing as Senate Joint Resolution Number 1305, 1972 Regular Session*, 263 So. 2d 797, 801 (Fla. 1972).

⁵¹ *Id.* at 802 and 806-807.

⁵² *Id.* At 800.

⁵³ *Brown v. Butterworth*, 831 So. 2d 683, 686 (Fla. 2002). ADKINS, Justice: "We find nothing in the Florida Constitution that expressly and clearly vests all apportioned claims in some court other than the circuit court."

⁵⁴ George L. Waas, *The Process and Politics of Legislative Reapportionment and Redistricting Under the Florida Constitution*, 18 *Nova L. Rev.* 1001, 1018-1019 (1994).

But in recent decades, due to unprecedented population growth, amendments to the Voting Rights Act of 1965, and the increase of partisan politics, Florida's redistricting plans have come under heavy scrutiny resulting in strong public demands for change and fairness.

B. Current Process

To summarize the extent to which party politics was playing a hand in the Florida redistricting process, not a single legislative or congressional incumbent in the entire state lost a bid for re-election in 2008.⁵⁵ In November of 2010, Floridians approved Amendments 5 and 6 to the Florida Constitution by referendum with over 63% of the vote.⁵⁶ On May 31, 2011 the U.S. Department of Justice approved the language of the constitutional amendments.⁵⁷

Amendment 5 and 6 alter Article III of the Florida Constitution by adding sections 20 and 21. Sections 20 and 21 create standards for establishing congressional district boundaries (section 20) and legislative district boundaries (section 21). The language of each section is identical and states, in the pertinent parts, that:

(a) No apportionment plan or district shall be drawn with the intent to favor or disfavor a political party or an incumbent; and districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial language minorities to participate in the political process or to diminish their ability to elect representatives of their choice; and districts shall consist of contiguous territory.⁵⁸

Subsection (b) further states that, "districts shall be as nearly equal in population as practicable; districts shall be compact; and districts shall, where feasible, utilize existing political and geographical boundaries." Section (c) states that the standards established in subsections (a) and (b) "shall not be read to establish any priority of one standard over the other within that subsection."⁵⁹

Section 16 of Article III of the Florida Constitution dictates the procedure by which the state's legislature is apportioned. In the second year following each decennial census, the legislature, at its regular session, apportions the state in accordance with both the constitution of the state and the Federal Constitution. Restricted by the specific standards previously mentioned in sections 20 and 21 of Article III of the Florida Constitution, the legislature is responsible for apportioning between 30 and 40 senatorial districts and between 80 and 120 representative districts, both at their discretion. In the event that the legislative session adjourns without having adopted a resolution, the governor has the authority to reconvene the legislature for a special apportionment session not to exceed 30 days.⁶⁰

If the special apportionment session fails to adopt a joint resolution, the state's attorney general reserves the authority to, within five days, petition the state's supreme court to make the

⁵⁵ Scott Maxwell, Florida's Gerrymandered Districts Ensure Re-election, *Orlando Sentinel* (6/26/2011).

⁵⁶ Fairdistrictsnow.org

⁵⁷ *Orlando Sentinel*, "DOJ has approved FairDistricts amendments," May 31, 2011

⁵⁸ Fla. Const. art. III § 20(a) (West).

⁵⁹ *Id.* at § 20(b) & (c).

⁶⁰ Fla. Const. art. III § 16(a) (West).

appropriate apportionment. Within fifteen days after the passage of the joint resolution of apportionment, the attorney general is required to petition the supreme court of the state for a declaratory judgment determining the validity of the apportionment.⁶¹

In the event that the state's supreme court rules that the apportionment resolution is invalid, the governor, by proclamation, must reconvene the legislature for an extraordinary apportionment session, for up to five days, in order to conform the apportionment resolution with the supreme court's ruling. Within fifteen days after the adjournment of the extraordinary apportionment session, the attorney general must file a petition in the state's supreme court with the revised apportionment resolution or a report stating the legislature's failure to do so.

If, within 60 days after receiving the petition from the attorney general, the legislature has still failed to adopt a plan or conform the resolution to the state's supreme court's previous ruling then that court then reserves the power to take matters into its own hands by filing with the custodian of state records an order making the appropriate apportionment.⁶²

C. Florida Analysis

The revisions to the Florida constitution identify four main points which must be followed during redistricting. First, redistricting must not have intent to favor or disfavor a political party or an incumbent. Second, redistricting must not be drawn with the intent or result of denying or abridging the equal opportunity of racial language minorities. Third, districts shall consist of contiguous territories, nearly equal in population as practicable, compact, and where feasible, utilize existing political and geographical boundaries.⁶³ Fourth, the standards established shall not be read to establish any priority of one standard over the other.⁶⁴

The four points address the areas of dispute within the process of redistricting which have been discussed previously: race, political gerrymandering, and equal population. These are the main issues that encompass virtually all redistricting litigation. Florida has simply recognized the reasons why redistricting has had a high volume of litigation and controversy and prohibited those reasons by amending their constitution. While this seems to be a noble effort on the part of Florida leaders, the attempt may prove to be naive and aspirational at best.

For instance, it has been well documented that justices have held that politics are inherent in redistricting efforts. Justice Brennan explained in *Gaffney v. Cummings* that “politics and political considerations are inseparable from redistricting and apportionment.”⁶⁵ Rest assured that experts are anxiously yet pessimistically awaiting a plan that is drawn to not favor one political party or another.

One of the goals of adopting a new redistricting plan is to reduce the amount of litigation challenging the fairness of the process. The recent Florida amendments which prohibit such

⁶¹ Id. at § 16(b) & (c).

⁶² Id. at § 16(d), (e), & (f).

⁶³ Fla. Const. art. III § 20(a) (West).

⁶⁴ Id. at § 20(b) & (c).

⁶⁵ *Gaffney v. Cummings*, 412 U.S. 735, 922 (1973)

intent and result which justices have held are inherent in the process will not mitigate litigation. Conversely, the amendments, while well intentioned, may create more questions of fairness thus increasing litigation. Experts fail to explain how redistricting in Florida, which is drafted solely by the legislature, for the purposes and benefits of the legislature, can draft a redistricting plan without partiality to one particular party.

In fact, litigation over the constitutionality of Florida's constitutional amendments was already in full swing shortly after the amendment. Recently, attorneys representing two Florida legislators argued in a Miami Federal Court that the amendment was not approved by state legislators, and thus violated the U.S. Constitution's Elections Clause. The Elections Clause states that the "times, places and manner of holding elections for senators and representatives shall be prescribed in each state by the Legislature thereof."⁶⁶

Amendments 5 and 6 violate the clause, they contended, because it was not approved by state lawmakers but by voters acting independently. The Federal Court ruled against the claim but attorneys for the plaintiff have already signaled their intention to bring the case to the Supreme Court.⁶⁷

Opposition to the race provision also surfaced among Floridians. Some groups such as the NAACP and ACLU have members who believe that traditional redistricting principles, such as maintaining minority access districts, will become irrelevant now that the new amendments have been implemented, primarily because of the Amendments' requirement of 'compact districts.' Minority communities do not live in compact, cookie-cutter areas, and so district 'compactness' would defeat the ability of the state Legislature to create majority-minority districts, since minority communities would become fragmented across the state.⁶⁸ Even lawmakers argued that the proposed measures could reduce election opportunities for minorities, which they argued was contrary to the measures' summaries.⁶⁹ Additionally, Former NAACP Chairman Dr. Benjamin F. Chavis, Jr., is categorically opposed to Constitutional Amendments 5 and 6 because they "fundamentally violate the voting rights of all Floridians, especially minority voters."⁷⁰

Florida has clearly recognized the need for reform. However, their attempt to remedy the unfairness of the redistricting process through amendments to their constitution fails to deal with the heart of the matter. Unfairness in the process has stemmed from legislators using the process as a political weapon. Proper reform will involve removing the process from the hands of the legislature.

The reform of Florida's redistricting process was a step in the right direction. The amendments to the Florida constitution show awareness by leaders, and voters in general, that changes must be instituted, and elected officials must be held accountable. However, the amendments to the constitution are naive. At the end of the day redistricting in Florida remains in the hands of the

⁶⁶ Rose Institute of State and Local Government; Fed court approves Florida's redistricting (2011)

⁶⁷ Rose Institute of State and Local Government; Fed court approves Florida's redistricting (2011)

⁶⁸ Politico, "Florida districting fight heads to court, as expected," November 3, 2010

⁶⁹ Miami New Times, "Republicans Want Fair Districts Initiatives off Ballot, December 10, 2009

⁷⁰ Rose Institute of State and Local Government; Fed court approves Florida's redistricting (2011)

legislature. Florida politicians will continue drawing the map of their own districts, citizens will continue to contest the fairness, and attorneys will continue to litigate.

D. Florida's Plan for Illinois?

Experts agree that as long as the legislature has full control of a state's redistricting process, claims of partiality and unfairness will arise. Illinois will see a dozen or more lawsuits contesting the new 2011 legislative map. A claim in Texas went to the Supreme Court of the United States in 2006 due to a mid-decade redistricting effort led by Congressman Tom Delay that led to the ousting of six Democratic incumbent congressmen. Republicans gained control of the Texas Legislature but were challenged in court for claims of political gerrymandering. The famous "fajita district," or Congressional District 23, was ordered by the Supreme Court of the United States to be redrawn.⁷¹ The current Illinois map could also cause the ousting of five incumbents. The situation in Texas in 2004 and the one currently in Illinois are similar in that both plans affected six or more seats.

Florida's amendments prohibiting political gerrymandering are in direct conflict with the efforts of elected officials to remain elected. If Illinois has an opportunity to reform its redistricting process it should incorporate a complete and comprehensive redistricting plan by looking to states that have amended their constitutions to include the use of redistricting commissions.

IV. Redistricting Commissions

Historically, the responsibility of redistricting rested exclusively in the hands of the state legislatures. Several states have implemented new redistricting methods since the 1960s. One of the methods adopted by the states has been the implementation of redistricting commissions. Since 1964, seventeen states have adopted some type of redistricting commission.⁷² However, the commissions vary greatly in their composition and purpose.

The ultimate purpose of redistricting commissions is to efficiently draw new district maps that are less partisan than those which would be created by legislators while adhering to federal and state mandates. In thirty-six states, the state legislature is still granted the exclusive responsibility of redistricting. These states are typically embattled in law suits shortly after new redistricting maps are presented. Illinois, as mentioned, has several law suits pending since the finalization of its 2011 map.

Redistricting commissions have been sought to improve the process but many legislators and election experts debate on which type of commission would yield the best results. States which have gone to some type of commission continue to have their redistricting efforts challenged. The reason seems to be that certain commissions continue to be tied to some sort of partiality. In many cases, legislators have created commissions while hanging on to some type of command and control whether by appointment of commission members, or final veto power.

⁷¹ League of United Latin American Citizens v. Perry, 548 U.S. 399 (2006)

⁷² The Case for Redistricting, 75 Tex. L. Rev. 837

It is easy to find conflicting data on the number of states which use redistricting commissions. The reason behind this is that some commissions are simply set up as a mere component of the legislative redistricting effort while others like Arizona and California are almost completely independent. A state may boast that it employs a redistricting commission, but the commission's internal structure and authority may be entirely partial or dependent on state legislators diminishing its ability to attain a fair, balanced, and effective result.

Whether a commission is capable of attaining a fair, balanced and effective redistricting plan depends upon its internal structure and its authority. When analyzing a particular commission's internal structure, it is important to understand who the members are and how they are selected. When analyzing a commission's authority, it is also important to determine the stage of the redistricting process at which the commission acts and to what extent the legislature may amend the commission's work. These important factors alone can determine the commission's effectiveness.

The two most predominate types of commissions are bipartisan commissions and state office commissions. The bipartisan commission is comprised of equal members from a state's two political parties plus a tie breaking chairman. The members are usually chosen by the majority and minority leaders of the state senate and the Speaker and the minority leader of the state house of representatives. The tie-breaking chairman is either chosen by vote of the legislature, or appointment by the Governor or by the state supreme court. An obvious problem with this type of commission is that the controlling state party will usually have the tie breaking vote.

Some states employ a bipartisan commission without an initial tie-breaking vote. Illinois utilizes this type of commission and it has almost always ended in a deadlock. This type of commission by design seems to invite deadlock so that the decision is kicked somewhere else for a final decision.⁷³ Illinois uses a tie-breaking provision meant to settle the impasse created by the legislative commission. The Illinois Supreme court nominates two individuals and their names are drawn out of a hat.⁷⁴ The person randomly chosen then becomes the tie-breaker.

The second type of commission is a state office commission. The state office commission generally consists of various occupants of various state offices. A commission of this type might include the lieutenant governor, speaker of the house, attorney general, secretary of state, and the comptroller. Critics of this type of commission point out that more often than not, all of these offices are of the same political affiliation. This of course causes the same type of partisan results which commissions are created to prevent.

A third type of commission though not yet popular, is an independent commission. The independent commission, chosen in a number of different ways, is usually made up of a mix of both political office holders and non-office holders. Arizona's independent redistricting commission has gathered much attention for not allowing any political office holders to serve on the commission. This seems to be the fairest method to comprise a commission but are state legislators prepared to give up the responsibility?

⁷³ Congressional Redistricting: Comparative and Theoretical Perspectives, David Butler (1991)

⁷⁴ Ill. Const. art. IV § 3.

Another consideration is the type of authority that commissions are given by the state legislature. Some commissions are simply responsible for drafting the bill and redrawing the maps but must then pass the plan to the state legislature for approval. In all cases, the state legislature then may adjust and manipulate the plan before passing a finalized version. Other commissions are simply used as a backup plan. If lawmakers fail to agree on a redistricting plan, they must then pass the plan to a commission. In either case, one of the two political parties will possess the advantage.

The independent commission is an attempt to eliminate the ability of one particular party to possess a dominating advantage. California and Arizona have recently employed the use of an independent redistricting commission. Both states have moved to the center of the redistricting debate as experts continue to examine their bold efforts to truly move toward a fair and impartial redistricting process.

V. Iowa

Iowa has adopted a system in which the state's Legislative Services agency is given the responsibility of drawing the redistricting maps with assistance, upon request, from a redistricting commission made up of civilians appointed by the legislature.

By December 31 of each year ending in zero, the Legislative Services Agency has the responsibility of obtaining from the United States Census Bureau all of the relevant information regarding geographic and political units in the state. The Legislative Services Agency then uses that data to prepare maps of counties, cities, and other geographic units within the state, which can then be used to create and illustrate the locations of legislative and congressional district boundaries.⁷⁵ All of this must be done in compliance with certain standards. Legislative and congressional districts must be established on the basis of population. They must be composed of convenient contiguous territory and must be reasonably compact in form. No district can be drawn for the purpose of favoring a political party, incumbent, or other person or group, or for the purpose of augmenting or diluting the voting strength of a language or racial minority group.⁷⁶

No later than February 15 of each year ending in one, the five member redistricting commission is to be established, its first four members being appointed by the majority and minority leaders of the state house and senate. The four commission members then select, by a vote of at least three members, the fifth commission member, who serves as the commission's chairperson. No person can be appointed to the commission who is not an eligible elector of the state at the time of selection; holds partisan public office or political party office; or is a relative of or is employed directly or by a member of the state legislature or the U.S. Congress.⁷⁷

The purpose of the commission is to respond to request from the Legislative Services Agency in preparing redistricting plans. Upon the submission of plans by the Legislative Services Agency to the state legislature, the redistricting advisory commission is required to schedule and conduct at least three public hearings, in different geographic regions of the state, regarding the plan

⁷⁵ Iowa Code Ann. § 42.2(1)-(3) (West).

⁷⁶ Id. at § 42.4(1)-(5).

⁷⁷ Id. at § 42.5(1)-(2).

delivered to the state legislature by the Legislative Services Agency. Following the hearings, the commission is further required to prepare and submit to the state legislature a report summarizing information and testimony previously received and conducted by the commission through the course of the hearings.⁷⁸

Three days after the report of the commission is received by the state legislature the Legislative Services Agency is permitted to deliver their plans to the legislature to be submitted for final approval. It is then voted on without amendment. If the legislature objects to the proposal it can then request that the Legislative Services Agency draft a second plan that also is not amenable. If the second plan is rejected, a third plan, which is amenable, is submitted by the services agency. If, after three failed attempts in which the Legislative Services Agency's plan is not approved by the legislature, then the legislature itself must approve a plan by September first or the Iowa Supreme Court will take responsibility.⁷⁹

On April 19, 2011 Iowa's Republican governor Terry Branstad signed into law the state's bipartisan redistricting plan which reduces the state's congressional districts from five to four; an alteration that will likely disadvantage a couple of incumbent Republicans who have since considered relocating to other districts in order to escape primary challenges.⁸⁰ In 2001, Iowa's legislature rejected the first map but approved the second. The new map was not challenged in court.

VI. Arizona

Arizona's Constitution provides a more bipartisan and effective procedure by which their state's Independent Redistricting Commission is appointed and by which it is permitted to conduct itself. The state's redistricting commission is established in the early months that immediately proceed each year that ends in one, following the decennial census of the United States. The commission is made up of five members and no more than two can be of the same political party. Further, of the first four members appointed, no more than two shall reside in the same county. Each member must be a registered voter and have been registered with the same political party or unaffiliated with a political party for three or more years immediately preceding their appointment. Within those three years, no member shall have been appointed to, elected to, or have been a candidate for any other public office, or have served as an officer of a political party, or served as a registered paid lobbyist.⁸¹

The state's commission on appellate court appointments is responsible for nominating candidates for appointment to the Independent Redistricting Commission by establishing a pool of willing and qualified candidates consisting of twenty-five nominees; ten (10) nominees from each of the two largest political parties and five (5) nominees who are not registered with either of the two major parties.⁸²

⁷⁸ Id. at § 42.6(1)-(3).

⁷⁹ Id. at §42.3(1)-(3).

⁸⁰ Andrew Stern, Iowa Enacts Redistricting Law, Eliminating House Seat, www.reuters.com (4/19/11).

⁸¹ Ariz. Const. art. 4 Pt. 2 § 1(3) (West).

⁸² Id. at § 1(4)-(5).

The actual appointments to the redistricting commission are made by the two legislative leaders of each major party, the majority and minority leaders of the state House and Senate, from the pool of twenty-five nominees. The four Independent Redistricting Commission members then select, by a majority vote from the nomination pool, a fifth and final member, to serve as chair of the commission, who is not registered with the two major political parties. A member of the Independent Redistricting Commission can be removed by the governor with the concurrence of two-thirds of the Senate but only for substantial neglect of duty, gross misconduct in office, or an inability to discharge the duties of the office.⁸³

Only three of the five commissioners are necessary to constitute a quorum and only three affirmative votes are required for any official action. The Independent Redistricting Commission, in establishing the state's congressional and legislative districts, is required to create districts of equal population in a grid-like pattern across the state in accordance with the following standards:

- (a) Districts must comply with the U.S. Constitution and the U.S. voting rights act;
- (b) Both congressional and legislative districts must have equal populations to a practicable extent;
- (c) Districts must be geographically compact and contiguous to a practicable extent;
- (d) District boundaries must respect communities of interest to the extent practicable;
- (e) District lines must use visible geographic features, city, town and county boundaries, and undivided census tracts to a practicable extent;
- (f) To the extent practicable, competitive districts should be favored where to do so would create no significant detriment to other goals.⁸⁴

Upon completing its maps for the state's legislative and congressional districts, the commission is required to advertise its results to the public. There, the legislature is allowed the opportunity to make recommendations which must be considered by the commission. The commission's results are finalized once the final maps are certified to the Secretary of State.⁸⁵

Arizona's redistricting process has come under fire from Tea Party groups upset with the nomination of the current independent chairwoman of the commission who was unanimously selected by the other four members. Even before the process began, Arizona Tea Party groups argued that the implementation of the current process would only benefit progressive Democrats. Regardless of the final outcome the independent chairperson of the commission will likely always be the target of scorn from both sides of the political spectrum.⁸⁶

It is important to know that Arizona is a section 5 state and must submit its final plan to the U.S. Department of Justice for approval under the Voting rights Act. No matter the commission's outcome, there is a check and balance system in place to guard against erroneous outcomes.

⁸³ Id. at § 1(6), (8), (10).

⁸⁴ Id. at § 1(14).

⁸⁵ Id. at § 1(16)-(17).

⁸⁶ Ted Robbins, Politics Still Play a Role in Arizona Redistricting, www.npr.org (8/18/11).

Still, Governor Jan Brewer and the GOP-controlled state Senate sparked a legal battle as they took an unprecedented step to remove the chairwoman of the Arizona Independent Redistricting Commission. Arizona Republicans gave the Governor the votes she needed to remove the chair of the commission on grounds of gross misconduct. Specifically, the complaint alleged that the chairwoman failed to conduct meetings publicly and failed to properly adjust the grid map which is the starting point for each new redistricting. The attempt to impeach the chairwoman of the redistricting commission was later quashed by the Arizona Supreme Court in late 2011. Those who defended the chairwoman claim that this was only a thinly veiled partisan attack that is based strictly on the opponents' dissatisfaction with the results.⁸⁷

Still, of all of the blueprints for Illinois to copy, Arizona's is the one with the most promise. Since its inception in 2002 Arizona has had less litigation than any other state with more than one district. The reason is that the Arizona commission is truly independent because they may redraw the maps and need no authority to complete the process. However, the recent legal battle between the governor and the commission will have experts involved in a new debate on how independent the five person commission really is.

Iowa also provides an excellent blueprint to copy and one that may seem more realistic to Illinois legislators. Iowa's plan is favorable because it utilizes a commission but still incorporates adjustments by the legislature prior to finalization. While not the best plan, it may very well be the most widely accepted of the commission plans.

VII. Redistricting in California

A. Brief History

Originally California's constitution provided that both houses of the state legislature were to be apportioned solely on the basis of population. By the end of the first quarter of the twentieth century the state's population had migrated south shifting the status of the general population from rural to urban. Consequently, in 1926, the Federal Plan was enacted, which apportioned the lower house on the basis of population and the upper house on the basis of territory—exactly as the federal government apportions Congress. The Federal Plan adopted by California bestowed the duty of reapportioning upon the legislature with the approval of the state's governor. Upon the failure of the legislative and executive branches to adopt a plan the California Supreme Court acquired discretion to establish the reapportionment boundaries.⁸⁸

The evolution of redistricting standards established by the United States Supreme Court in the 1960's created future controversies that, in some cases, eventually resulted in the legislature's failure to adopt a plan. In 1970 and 1971 the California Supreme Court adopted its own apportionment plan after Governor Ronald Reagan vetoed the legislature's plan. In 1981, unhappy with the maps created by the Democratic majority in the legislature, California

⁸⁷ Redistricting Chief Ousted (The Arizona Republic November 06, 2011) Mary Jo Pitzl

⁸⁸ George Passantino, Redistricting in California: Competitive Elections and the Effects of Proposition 11, Reason Foundation Policy Brief 72, Oct. 1, 2008, p. 2.

Republicans succeeded in rejecting the proposal by way of referendums.⁸⁹ The bipartisan nature of the 1981 plan brought forth Proposition 14 in 1982 which attempted to establish a ten-member bipartisan commission appointed by representatives and an appellate court panel. Proposition 14 eventually lost by ten percent of the vote.⁹⁰

Other attempts at reform followed in the years after Proposition 14's failure. In 1984 Proposition 39 sought to establish a ten-member bipartisan redistricting commission made up of retired judges evenly split between the two major parties, but as with Proposition 14, Proposition 39 was defeated due to political partisanship. A similar plan, which also ultimately failed to pass, was offered again in 1990. Proposition 119, which sought to establish a twelve-member redistricting commission, the members of which were to be selected by retired appellate judges from a list of individuals nominated by nonprofit public interest groups, failed despite its creatively unique and noble intentions having only received 36% of the electorate's approval.⁹¹

In 1991, the legislature again failed to adopt a plan due to its inability to override the governor's veto power. As a result, the California Supreme Court appointed a panel that developed a plan that the court then adopted earlier the next year. In 2000 Proposition 24, sought to turn over, once and for all, reapportionment authority to the California Supreme Court. However, the measure was eventually removed from the ballot for having violated the state's single subject rule. With the fate of redistricting firmly in the hands of the legislature, the redistricting plan signed into law by Governor Gray Davis in 2001 had its intended effect as no seat changed party hands in the state's Congressional, Senate, or Assembly rolls in the 2004 elections—all 53 Congressional incumbents as well as 100 state legislative officeholders were reelected.⁹²

The results of the 2004 elections forced the legislature and then Governor Arnold Schwarzenegger to play the hand of reform. Endorsed by Governor Schwarzenegger and a number of bipartisan public interest groups, Proposition 77 failed after only receiving 40% of the vote on the 2005 ballot. This measure stipulated that future reapportionment plans would be drawn by a panel of three retired federal or state judges and that each plan drawn by the aforementioned panel would have to be approved by all three members before becoming effective law.⁹³ Proposition 77 faced unprecedented opposition from both California Democrats and Republicans as each vied to retain their political prospects by way of the gerrymandering sword. The state's Congressional delegation, in bipartisan fashion, even succeeded in lobbying the Federal Election Commission to allow them to raise unlimited 'soft money' contributions in order to fight Proposition 77. All told, nearly \$9 million of opposition funds were directed against Proposition 77 through the use of misleading television advertisements meant to confuse the electorate.⁹⁴

⁸⁹ *Idim.*, at 3-4.

⁹⁰ Nicholas D. Mosich, *Judging the Three-Judge Panel: An Evaluation of California's Proposed Redistricting Commission*, 79 S. Cal. L. Rev. 165, 199 (2005).

⁹¹ *Id.*

⁹² George Passantino, *Redistricting in California: Competitive Elections and the Effects of Proposition 11*, Reason Foundation Policy Brief 72, Oct. 1, 2008, p. 4.

⁹³ www.smarvoter.org/ca/state/ (Archives)

⁹⁴ Nicholas D. Mosich, *Judging the Three-Judge Panel: An Evaluation of California's Proposed Redistricting Commission*, 79 S. Cal. L. Rev. 165, 201 (2005).

In 2008, Proposition 11, which sought to create a 14-member independent commission, was placed on the November ballot. The process for appointing the 14 members of the independent commission took on a multi-step process. First, any registered California voter would be eligible to apply for a seat on the commission so long as the individual had voted in two of the last three statewide general elections. Further, eligibility to serve on the commission required that the applicant had been continuously registered with the same political party or had been unaffiliated with a party for the past five years; and had not been a political candidate for state or federal office, a lobbyist, an individual with a prior financial interest or family relationship with the governor, a state legislator, member of Congress, or Board of Equalization member. Also, any applicant who had been a contributor of at least \$2,000, in any year, to a political candidate was disqualified from serving on the commission.⁹⁵

Of all the applicants, the independent State Auditor would then select, randomly from a pool of independent auditors employed by the state and licensed by the California Board of Accountancy, a panel of three independent auditors to screen the applicants. It would then be further required that this three-person panel be composed of one Democrat, one Republican, and one Independent. This bipartisan panel of auditors would then be charged with the task of choosing 60 of the most qualified applicants by placing them into three designated “sub-pools” of 20 persons-20 Democrats, 20 Republicans, and 20 Independents.⁹⁶

The four state legislative leaders, comprising the Assembly Speaker, the Assembly Minority Leader, the Senate President pro Tem, and the Senate Minority Leader, would each have the ability to strike two people from each 20 person sub-pool for a maximum of 24 strikes, which could, at most, reduce the overall 60 person pool to 36. Of the remaining applicants-those that have not been struck by the state’s legislative leaders-the three auditors would then be in charge of randomly selecting eight commissioners: three Democrats, three Republicans, and two Independents. These eight randomly selected commissioners would then be handed the task of selecting the remaining six members of the independent commission from the three designated sub-pools, on the basis of relevant analytical skills, impartiality, racial, ethnic and geographic diversity and gender. The final 14-member Citizens Redistricting Commission would be composed of five Democrats, five Republicans, and four Independents.⁹⁷

In 2008, Proposition 11 narrowly succeeded with 50.9% of the electorate voting in favor of the measure to 49.1% voting against it. Of the nearly 12 million votes cast, those in favor of Proposition 11 exceeded those against by a mere 197,000 votes.⁹⁸

Proposition 11 did not concern the responsibility of reapportioning the boundaries for California’s Congressional districts, a privilege that was still bestowed upon the state legislature. In 2010, Proposition 20 was placed on the ballot and sought to take the responsibility of determining the boundaries for Congressional districts away from the legislature by placing the responsibility solely in the hands of the independent 14-member redistricting commission established by Proposition 11. Ultimately Proposition 20 glided to approval by a much wider

⁹⁵ Center for Governmental Studies, Redistricting Reform in California: Proposition 11 on the November 2008 California Ballot, p. 14.

⁹⁶ Idim., at p. 11.

⁹⁷ Idim., at p. 11-12.

⁹⁸ www.ballotpedia.org

margin than its predecessor by receiving approval from 61.3% of the voting electorate to only 38.7% opposed.⁹⁹

B. Basic Process

Propositions 11 and 20 succeeded in amending Article XXI of the California Constitution. The current status of the state's redistricting process is now governed by the three sections of the aforementioned article of the California Constitution. First, in the year following the year in which the national census is taken under the direction of Congress at the beginning of each decade, the 14-member Citizens Redistricting Commission is responsible for adjusting the boundary lines of the Congressional, State Senatorial, Assembly, and Board of Equalization districts in conformance with the standards and process set forth in the proceeding sections of Article XXI.¹⁰⁰

Second, Section Two of Article XXI requires that the commission conduct an open and transparent process that enables full public consideration of and comment on the drawing of the district lines. Along with being required to "conduct themselves with integrity and fairness" the commission is also responsible for drawing the district lines in accordance with the specific criteria set out in the proceeding subsections of Article XXI Section Two. The criteria that are set forth instructs the commission to establish single member districts for the Senate, Assembly, Congress, and State Board of Equalization using the following standards in the following order of priority:

- (1) The districts shall comply with the United States Constitution, with Congressional districts achieving population equality as nearly as is practicable, and Senatorial, Assembly, and State Board of Equalization districts receiving reasonably equal population with other districts for the same office, except where deviation is required to comply with the federal Voting Rights Act.
- (2) The districts shall comply with the federal Voting Rights Act.
- (3) The districts shall be geographically contiguous.
- (4) The geographic integrity of any city, county, local neighborhood, or local community of interest shall be respected in a manner that minimizes their division to the extent possible without violating the requirements of any of the preceding subdivisions; in other words, communities of interest must be preserved.
- (5) The districts shall be drawn to encourage geographical compactness.
- (6) Each Senate district shall be comprised of two whole, complete, and adjacent assembly districts, and each Board of Equalization district shall be comprised of 10 whole, complete, and adjacent Senate districts.¹⁰¹

⁹⁹ *Idim.*,

¹⁰⁰ Cal. Const. art. XXI § 1 (West).

¹⁰¹ *Id.* at § 2(a)-(d).

Also, the commission is specifically instructed not to consider, in the creation of an apportionment map, the place of residence of any incumbent or political candidate so as not to discriminate against or favor any particular candidate or political party.¹⁰²

In each year ending in the number one, the commission must approve four final maps that separately set forth the district boundary lines for the Congressional, Senatorial, Assembly, and State Board of Equalization districts by certifying the maps with the authorization of the California Secretary of State.

The commission must also issue a report that explains the basis on which its decisions were made regarding the four maps in achieving compliance with the criteria listed above. Further, each certified final map is subject to referendum in the same manner that a state statute is subject to referendum pursuant to Section 9 of Article II of the California Constitution.

In the event that the commission does not approve a final map by the requisite nine affirmative votes, or if the voters disapprove of a certified final map in a referendum, then the Secretary of State shall immediately petition the California Supreme Court for an order directing the appointment of Special Masters to adjust the boundary lines of a particular map in accordance with the redistricting criteria and requirements set forth in Article XXI Section Two of the California Constitution.¹⁰³

The third and final section of Article XXI pertains to the defense of final certified districting maps and the jurisdiction in which proceedings challenging the final maps are to transpire. Regarding any action in defense of a certified final map the commission is granted the sole legal standing to defend any action; the legislature is required to provide adequate funding for the commission's defense.

Any registered voter in California can file a petition for a writ of mandate or writ of prohibition within 45 days after the commission has certified a final map to the Secretary of State on the basis that the filed plan would violate the California Constitution, the U.S. Constitution, or any federal or state statute.

If the California Supreme Court, which has original and exclusive jurisdiction in all proceedings in which a final map is challenged, determines that a final certified map is in violation of the aforementioned standards and does not comply with the requisite constitutions and statutes, the court has the authority to fashion any relief that it deems appropriate.¹⁰⁴

C. Analysis

The passage of Propositions 11 and 20 culminating in the amendments to Article XXI of the California Constitution were initially launched with high hopes of achieving fairness and

¹⁰² Id. at § 2(e).

¹⁰³ Id. at § 2(g)-(j).

¹⁰⁴ Id. at § 3(a)-(b).

equality. The Independent Redistricting Commission was created for the purposes of giving the people of California an alternative redistricting procedure that would eliminate, once and for all, the politically partisan nature of reapportionment that is distinctly inherent within every state. But as it stands, the new maps drawn by the commission will create a likely scenario in which 39 of the state's 53 congressional districts will be Democratic leaning, an increase from 33. The new maps would also create one Democratic leaning district in both the state Senate and Assembly.

Although the results of the maps drawn by the Independent Redistricting Commission seem to be influenced by partisan determinations, the final votes of the 14-member commission suggests otherwise. The vote on the maps for the state Assembly, Senate, and Board of Equalization were all approved by a vote of 13 to 1, and the vote on the map for the reapportionment of the state's Congressional districts was approved by a vote of 12 to 2, meaning two of the four Republicans voted for the measure with the potential for increasing Democratic representation in the state.¹⁰⁵

As with any plan, the losing side, in this case the California Republicans, is often prepared to challenge the final plan in a referendum. Thomas A. Saenz, the president of the Mexican American Legal Defense and Educational Fund, has said that his organization is also considering taking the redistricting commission to court on the basis that the commission failed to create enough new districts with Latinos as the majority of voters.¹⁰⁶

Regardless of the redistricting plan that is adopted in any state, resulting conflicts will inevitably ensue as one political party will always stand to benefit at the expense of the other, whether brought on by political partisanship or natural occurrences. The potential passage of any proposition in California, especially those regarding redistricting, also shows the effects that the lobbying influences can and will continue to have upon the process. The defeat of Proposition 77 in 2005 is an example.

D. California's Process for Illinois?

The newly implemented redistricting process of California, which involves a 14 member civilian commission made up of qualified and informed members of the public, has resulted in a procedure that has successfully mitigated the political partisanship inherent within the process. The recent results in California produced redistricting maps approved by 13 of the 14 members of the civilian commission with 3 of the 4 registered Republicans on the commission having voted to approve the final product for the historically Democratic state.

Illinois, like California, is a state in which the Democratic Party essentially dominates the state's voter registration ratio as compared to the minority Republican Party. The goal should be to ensure that every individual, regardless of political affiliation though conscious of equal ethnic representation, is properly protected and represented in the redistricting process. A means to this end could perhaps be achieved by displacing the politician in the redistricting process for the informed civilian with less at stake politically and more at stake legally and individually.

¹⁰⁵ Phillip Ung, District Maps Adopted on 8/15/11; California's Common Cause Press Release, 2011

¹⁰⁶ Bryan Llenas, California's New Election Map Draws Fire from GOP and Latino Groups, FoxNewsLatino.com (Aug. 16, 2011).

Following the California model embodied in Proposition 11 and now codified in Article XXI of the California Constitution, Illinois could greatly benefit from the implementation of a redistricting process by which a 14 member independent commission is delegated the responsibility of redistricting on the basis of such standards:

- (a) Any registered Illinois voter would be eligible to apply for a seat on the commission so long as the individual had voted in two of the last three statewide general elections; had been continuously registered with the same political party or had been unaffiliated with a party for the past five years; and had not been a political candidate for state or federal office, a lobbyist; an individual with a prior financial interest or family relationship with the governor, a state legislator, or member of Congress, or a contributor of \$1,000 or more, in any year, to a political candidate.
- (b) Of all the applicants, the Illinois Supreme Court would select, randomly, from a pool of independent auditors employed by the state and legally licensed in the state of Illinois, a panel of three independent auditors to screen the applicants.
- (c) The three-person panel of auditors could be composed of one Democrat, one Republican, and one Independent. This bipartisan panel of auditors could then be charged with the task of choosing 60 of the most qualified applicants by placing them into three designated “sub-pools” of 20 persons-20 Democrats, 20 Republicans, and 20 Independents.
- (d) The four state legislative leaders, comprising the Speaker of the House, the House Minority Leader, the Senate President pro Tem, and the Senate Minority Leader, would each have the ability to strike two people from each 20 person sub-pool for a maximum of 24 strikes, which could, at most, reduce the overall 60 person pool to 36. Of the remaining applicants-those that have not been struck by the state’s legislative leaders-the three auditors would then be in charge of randomly selecting eight commissioners: three Democrats, three Republicans, and two Independents.
- (e) These eight randomly selected commissioners could then be handed the task of selecting the remaining six members of the independent commission from the three designated sub-pools, on the basis of relevant analytical skills, impartiality, racial, ethnic and geographic diversity and gender.
- (f) The final 14-member Citizens Redistricting Commission could be composed of five Democrats, five Republicans, and four Independents.

As with any redistricting plan, the procedure should be done only once a decade, immediately following the release of the U.S. Census. Also, under such an independent commission the workings of the commission should be open to the public.

The independent redistricting commission could have exclusive authority to produce and finalize the redistricted maps with the approval of 10 of the commission’s 14 members. Such a high approval standard (slightly above 70%) would help to ensure that at least a majority (5 of 9) of the minority representation of the commission would approve the plans-with at least one member of the opposing establishment party included.

In the event the maps conceived by the independent commission do not garner the requisite 10 votes, the Chief Justice of the Illinois Supreme Court could have the discretion of selecting two retired state judges, one from each party, to modify the plans created by the commission. The final plans modified by these two retired state judges selected by the Chief Justice could then be resubmitted to the commission in order to be authorized with the approval of 10 affirmative votes from the commission.

If the commission again fails to garner the 10 requisite votes, then the two retired judges again will attempt to modify the plans based on the complaints and reports submitted to them by the non-approving and approving members of the commission. The modifications made by the two judges, and based on the complaints and recommendations of the commission, could then be submitted to the Illinois Supreme Court which would then approve the modified and finalized plan by a majority vote.

Like California, Illinois has a similar political makeup, a diverse population, and is irregularly shaped. While complicated, using the California plan in Illinois would incorporate the discretion, knowledge, and abilities of both the public and the judiciary, and would also incorporate several different entities, further helping to reduce the involvement of politicians in the process. This system so far has rendered positive results in California where final plans must also conform to the Voting Rights Act. The setup of the California commission allows for this accommodation. However, unlike California, judges in Illinois are not appointed but are instead elected on a partisan basis. Politically, this slight difference could hamper the prospect of achieving completely in Illinois the successes that have been witnessed in California.

VIII. An Alternate Solution for Illinois

Essentially, there are three ways in which the redistricting process can be commenced: (1) at the discretion of state legislators and politicians, (2) with the assistance of informed civilians, or (3) at the hands of knowledgeable third parties harboring little allegiance to the passionate whims of political instincts (i.e. retired judges). The variations of these processes can and have been welded into hybrid forms consisting of, on a state by state basis, the use of such techniques as commissions, either legislative or civilian, often at the discretion of either governors, judges, or state legislative leaders.

Implementing a commission of judges, whether retired or not, has been suggested in many different forums. The idea behind it parallels the classic checks and balance system of the federal and state governments. Currently, most state legislatures have maintained the power granted to them to redraw their own districts. The evidence of the overwhelming abuse of this process is apparent. Handing the process to the judiciary would immediately implement a system of checks and balances on the legislature that could help to prevent abuses in the election process.

Independent Judicial Commission

Although not widely implemented, the idea of bestowing the redistricting process upon a panel of independent retired judges is not new. In 2005 California Governor Arnold Schwarzenegger, as previously noted, failed to get enough support for a solution to California's redistricting

problem which involved the creation of a panel of three retired judges. The defeat, in California, of proposition 77 in 2005 essentially marked the beginning and the end of the concept of redistricting reform by way of independent judges.

As with any plan that could potentially infringe upon their powers, the legislators of California, both state and Congressional, led a successful and expensive campaign against the threat to democracy that such a proposal supposedly embodied. Political implications and subjectivity aside, the concept of assigning the duty of redistricting to an independent panel of retired judges is not a policy that is as inherently threatening to the principles of democracy as one might unobjectively imagine. Instead such a policy could more objectively be interpreted as a protective safeguard against the passionate partisan whims of the public and the politicians.

A state such as Illinois, harboring as it does such a large population, and therefore an abundance of judges and legal institutions, could be better capable of protecting the democratic rights of its citizens by adopting a redistricting procedure based on these guidelines:

- (a) The creation of a retired three judge panel, exclusively assigned the task of congressional and legislative redistricting with no more than two of the judges being affiliated with the same political party.
- (b) The retired judges would be nominated by the governor, who would have the discretion of appointing either retired state or federal judges having exclusively presided in the state of Illinois throughout their respective judgeships.
- (c) To restrict the governor from making nominations from the same geographic pool, he would be required to select each of the three judges for the panel from the three federal judicial districts comprising the state; in other words, the panel would consist of one retired judge from the northern district; one retired judge from the central district; and one retired judge from the southern district.
- (d) In order to further diminish the governor's political power in making appointments, each nomination would have to be approved by a three-fourths majority of the General Assembly. Essentially, the purpose of this high approval standard is to encourage bipartisan approval and to diminish the likelihood of a single party's exclusive political control.
- (e) The governor should be allowed two chances to nominate a judge for each panel seat however in the event that the governor's nominations are not approved by the General Assembly by the required three-fourths majority then the appointment(s) is to be made by the Chief Justice of the Illinois Supreme Court regardless of the approval of the General Assembly. The three judges appointed to the panel have the privilege of serving in that capacity for life on good behavior with the current governor always holding the privilege of appointing a new judge to the panel upon the removal or retirement of the respective judges.
- (f) The retired three judge panel, once selected, acquires the responsibility of drawing the congressional and legislative districts once every decade following the U.S. decennial census.
- (g) Ratification of the panel's plans would require the unanimous approval of all three judges

- (h) In the event that the judges are unable to approve a final plan within a designated time, the responsibility of redrawing the maps will devolve upon the Illinois Supreme Court wherein a mere majority would constitute approval.

Slight deviations and additions to this specific proposal could include the use of active judges currently serving in Illinois. Illinois judges would be informed that during their tenure they may be selected, and if so, required to serve on a panel of five judges who would make up the redistricting commission. Implementation of stricter guidelines to the process, such as appointment timelines for the governor predicated on the basis of attempting to mitigate the potential lobbying effect upon certain appointees to the panel, might also help to achieve the appropriate ends. Further, the discretion of the panel in making the redistricting decisions should be established by certain, though not overly burdensome, restrictive guidelines which could be drafted by the General Assembly. Such guidelines could allow the panel to consult the aid of certain informed authorities such as the Illinois State Geological Survey and the Illinois State Board of Elections. Consultations with such informed organizations as these could present an instrumental advantage to the actual redrawing process, relieving certain burdens upon the judges.

Conclusion

The changes to the Florida constitution are inherently flawed. The changes may have temporarily appeased many Florida voters, but the practical application of the new plan will continue to raise issues for years to come. The problem with the redistricting process, the legislature redrawing the districts themselves, is the very same process that remains intact.

Excellent examples of possible redistricting plans utilizing independent commissions have been implemented in Arizona, Iowa, and California. Each of the plans has distanced the redistricting efforts from legislators. The difference between them is the degree in which they are distanced. The plans must protect the voting rights of citizens and demonstrate fairness in doing so.

The Arizona plan would be difficult for a diverse state such as Illinois to adopt but is the most independent and fair of the commissions. The Arizona plan provides the least amount of legislative and gubernatorial discretion. An attempt to impeach the chairwoman of the redistricting commission by the Republican controlled legislature and Governor Jan Brewer was quashed by the Arizona Supreme Court in late 2011.¹⁰⁷ This demonstrates how an independent commission, if structured to be independent and bipartisan, can withstand the forces of political gamesmanship.

The Iowa plan is a strong attempt to implement an independent commission. A major flaw is that it allows for too much government discretion. If, after three failed attempts in which the commission's plan is not approved by the legislature, then the Iowa State Supreme Court must develop and submit a plan. The process has worked for Iowa well. Recently, no significant redistricting challenges have been brought before the courts. However, Illinois is much more diverse than Iowa. This difference in diversity challenges Illinois more when complying with the requirements of the Voting Rights Act.

¹⁰⁷ The Associated Press, Arizona: Court Orders Redistricting Official Reinstated, November 18, 2011

A version of the California plan, suggested in this paper, is a viable solution for Illinois. Like California, Illinois is a predominantly Democratic arena and is similarly diverse. Illinois could implement this plan with far less push back than other plans suggested. If Illinois leaders and citizens are serious about redistricting reform in the near future, then California's plan may be the best blueprint for them to advocate.

The truth may be there is no way to completely remove politics from the redistricting process. It is possible to mitigate political influence. Ultimately the defense and preservation of democratic rights are at the discretion of the people who must act in their own interest to protect their vote. Changes must be implemented to reduce political gamesmanship and protect the voting rights of every individual citizen.

A Biographical Note on the Authors

Joseph Cervantez is currently completing his Juris Doctrate from Southern Illinois University School of Law. He resides in Carterville, Illinois. His professional career prior to academia included serving as an infantry leader in the U. S. Marines, working abroad as a NATO Weapons Advisor, and leading executives as the Division Director of Robert Half International.

Logan Fentress is from Paducah, Kentucky and is currently completing his Juris Doctrate from Southern Illinois University School of Law.