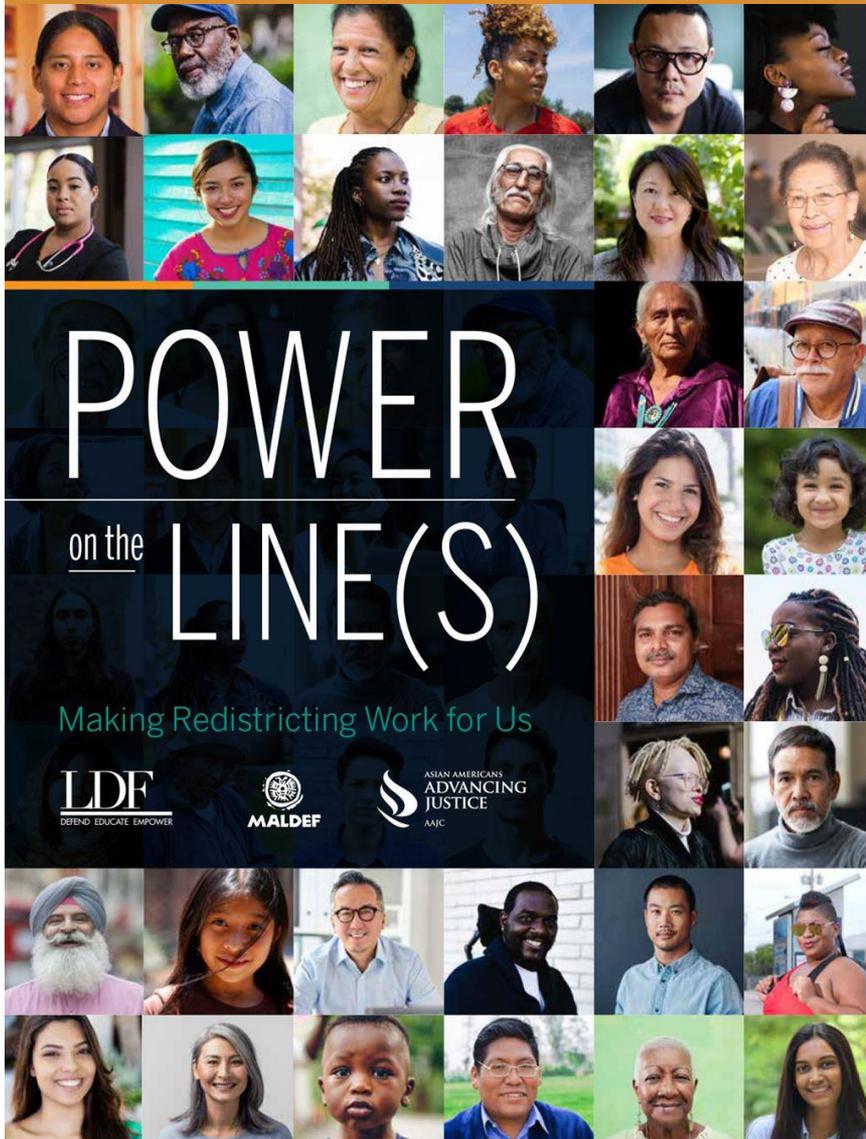


A Meaningful Vote

Our Lives Matter & Our
Votes Must Count & Have
Meaning: Post-2020
Redistricting Cycle

**CRTI (virtual) Panel,
October 15, 2021**

Leah C. Aden



Voting is a Fundamental Constitutional Right

- No Explicit Right to Vote in the U.S. Constitution
- Amendments are all written as “negative” rights. E.g.,
 - The Right to Vote has been read into the 1st and 14th Amendments
 - 14th A requires equal protection and due process (1868)
 - 15th A prohibits racial discrimination in voting (1870)
 - 15th A was a “dead letter” law
 - Almost no federal enforcement from 1876 - 1957

Century+ of Fierce Violence to Block Democracy & Our Resistance



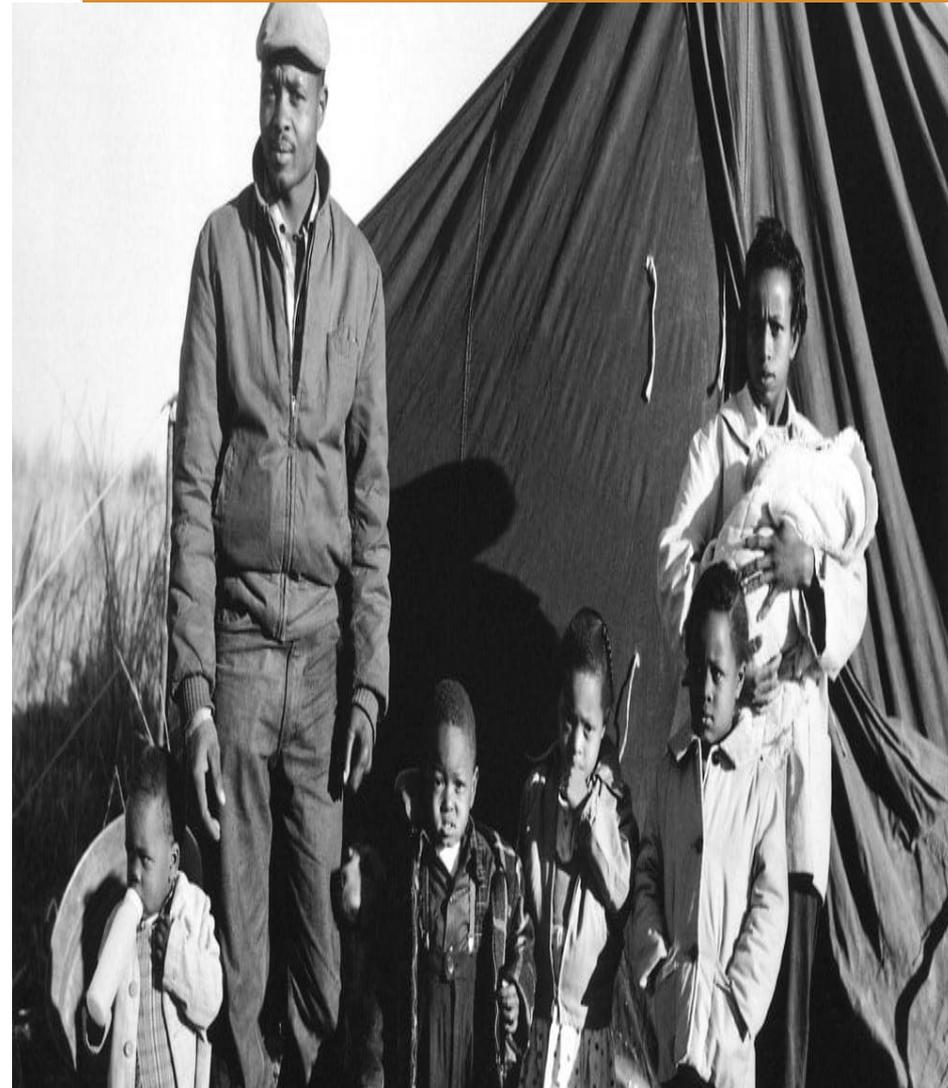
Century+ of Fierce Violence to Block Democracy & Our Resistance



Century+ of Fierce Violence to Block Democracy & Our Resistance



Century+ of Fierce Violence to Block Democracy & Our Resistance



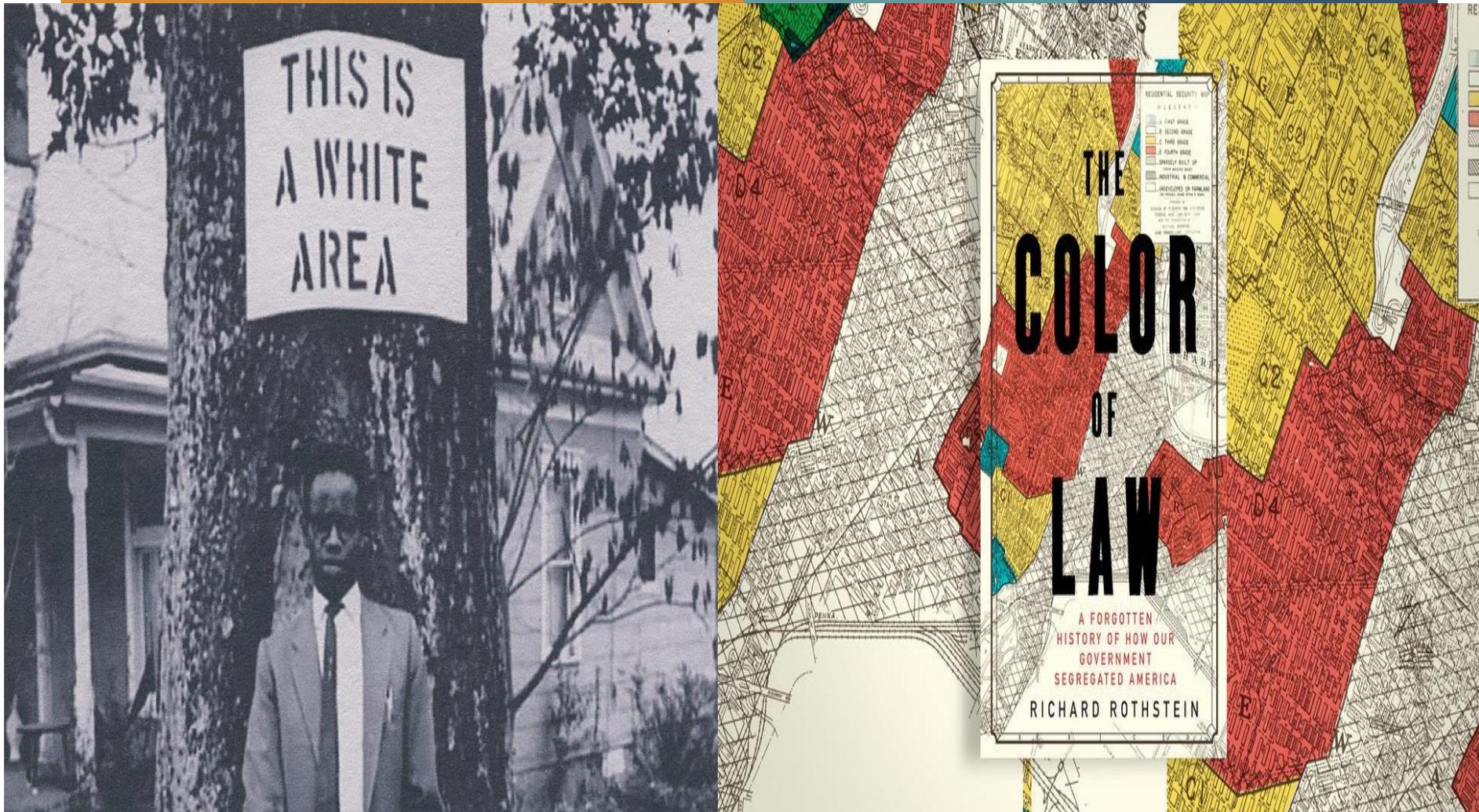
Voting Discrimination & Other Forms of Structural Racism



Voting Discrimination & Other Forms of Structural Racism



Voting Discrimination & Other Forms of Structural Racism



Century+ of Fierce Violence to Block Democracy & Our Resistance



Voting Rights Act of 1965



Sec. 5: The Heart of the VRA

- Section 5 of VRA required places with a record of discrimination in voting to seek “preclearance”
- Any changes or new voting laws had to be pre-approved by the U.S. Attorney General or a three-judge federal court in D.C.
- Covered all changes, e.g., polling place changes, candidate qualifications, statewide or local redistricting, voter qualifications (e.g., photo ID laws), etc.
- Renewed by Congress in 1970, 1975, 1982 and 2006

Section 4(b): The Coverage Provision of the VRA

FORMERLY COVERED JURISDICTIONS



Discrimination in Local Redistricting Blocked by Section 5

- **In Monterey County, CA, in 1993, Section 5 blocked a discriminatory redistricting plan that diluted Latino voting strength.**

- Though Latino voters comprised nearly 35% of Monterey's population, and voted cohesively, not a single Latino person had served on the board of supervisors for nearly 100 years.

- Through the Section 5 process, the DOJ required the implementation of a non-discriminatory plan that led to the election of a Latino member to the Board of Supervisors.

Discrimination in Statewide Redistricting Blocked by Section 5

- Section 5 of the Constitution blocked redistricting plans for congress and state houses in jurisdictions like Louisiana and Texas following *every* Census since the VRA applied to those states
 - b/c they would have minimized Latino and/or Black voting power in the state

Section 5's effectiveness

- Between 1982-2006, Section 5 blocked more than 1,000 proposed discriminatory voting changes.
- 85% of Section 5 preclearance work involved local voting changes.
- According to the DOJ, it processed 44,790 Section 5 submissions between 2010 and 2013 alone

Section 2: The Active Sword of the VRA

- *Section 2* prohibits *any* “voting qualification or prerequisite to voting or standard, practice, or procedure . . . imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color” or language minority status. 52 U.S.C. § 10301(a).
 - Section 2 = sword (affirmative)
 - Section 5 = was the shield (defensive)

Section 2 of Voting Rights Act

- From 1965 to 1980, Section 2 was coterminous with the Fourteenth and Fifteenth Amendments
- Unlike Section 5, Section 2 did not mention “effect”
- The US Supreme Court in *White v. Regester* and the En Banc Fifth Circuit in *Zimmer v. McKeithen* in 1973 came up with a list of factors to identify vote dilution (regardless of intent).
- These “Zimmer” factors are similar to the Senate Factors

Section 2 of Voting Rights Act

- After *Washington v. Davis* (1976) and *Arlington Heights* (1977), SCOTUS ruled in *Mobile v. Bolden* (1980) that voting cases under the Constitution and Section 2 also required discriminatory intent
- In 1982, Congress passed the amended Section 2 to make clear that “discriminatory results,” not intent, violated the VRA
- In 1986, SCOTUS decided *Thornburg v. Gingles*

Section 2: Active Provisions of the VRA

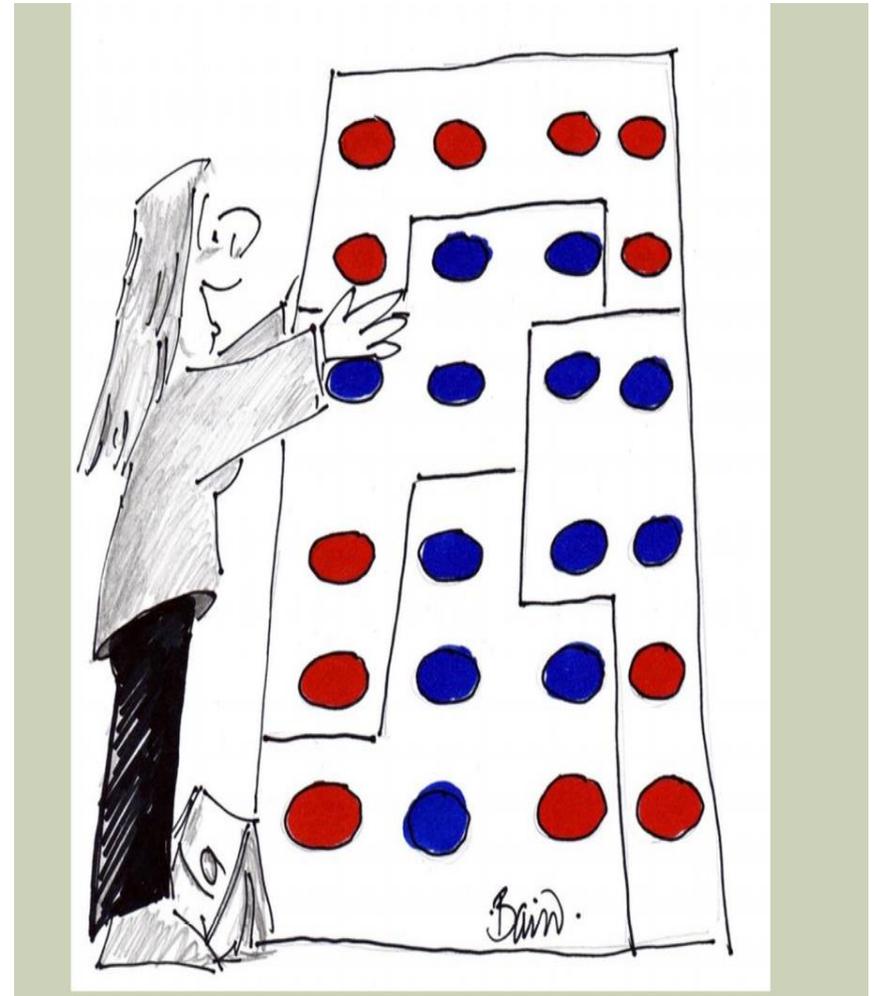
- Section 2: Prohibits racial discrimination in voting whether because of intent or “results” (i.e., effect)
- “Plaintiffs must either prove [discriminatory] intent, or, alternatively, must show that the challenged system or practice, in the context of all the circumstances in the jurisdiction in question, results in minorities being denied equal access to the political process.” *Chisom v. Roemer* (1991).

Section 2 of the VRA

- Section 2 prohibits **vote denial & vote dilution**—e.g., the packing or cracking of minority voters among or within districts and the use of any electoral scheme, such as an at-large electoral method, that weakens the voting strength of voters of color.

Section 2: Vote Dilution

- Vote dilution occurs when a redistricting scheme or electoral structure is drawn, intentionally or not, so that people of color do not have an equal opportunity – as others – to elect a candidate of their choice.
 - Cracking - “Crack” communities to avoid majority-minority districts
 - Packing – “Pack” communities into one or more “super” majority-minority districts (e.g., 70%, 80% or 90% Black) to avoid creating multiple additional majority-minority districts
 - At-Large electoral system (50% + 1 gets all the seats)



Section 2: all levels of government

- *Section 2* can apply to elections for city council and county commission members, school board members, water board members, members of congress and state legislatures, etc.
- *and* elected judges, *Chisom v. Roemer*, 501 U.S. 380 (1991)

Section 2: Vote Dilution

- ***Gingles* Preconditions.**
- **Plaintiffs have the burden of**
 - First, drawing one or more majority minority districts?
 - **Majority minority district must be 50%+1**
 - *Bartlett v. Strickland* (2009)
 - **One person, one vote**
 - *Reynolds v. Sims* (1964)
 - **Prohibition on unconstitutional racial gerrymandering**
 - *Cooper v. Harris* (2016)
 - **Considering state redistricting principles**

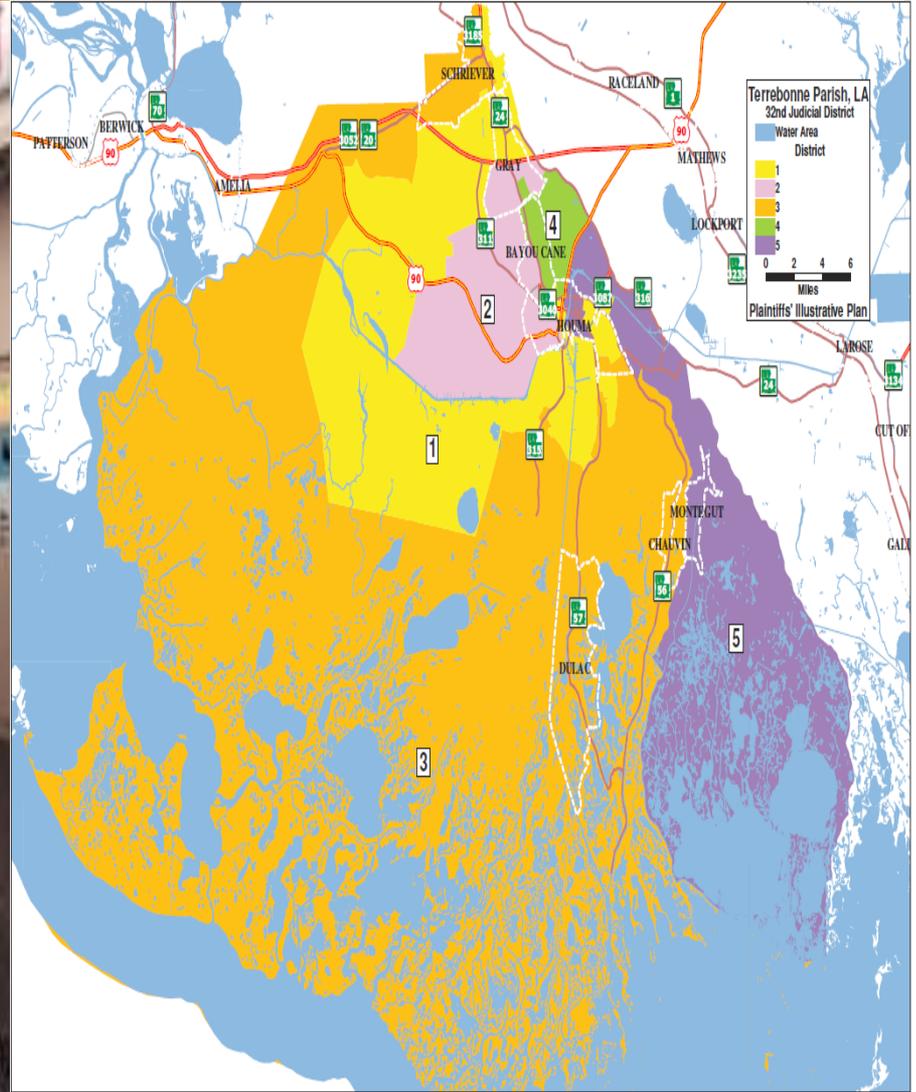
“One Person One Vote”

- ***Baker v. Carr*** (1962): The constitutionality of state legislative districts is a question that can be decided by the courts and redistricting is not a political question. (Tennessee had not redistricted in 60 years)
- ***Reynolds v. Sims*** (1964): Equal protection requires that state legislative districts should be comprised of roughly equal populations if possible. (Alabama had not redistricted in 60 years).
- ***Wesberry v. Sanders*** (1964): The constitutionality of congressional districts is a question that can be decided by the courts. Congressional districts must be draw so that “as nearly as is practicable one man’s vote in a congressional election is worth as much as another’s.” (Wesberry resided in a Georgia Congressional district with a population two to three times greater than that of other congressional districts in the state.)

Refining the Equal Population Principle

- ***Karcher v. Daggett*** (1983): Congressional districts must be mathematically equal in population, unless necessary to achieve a legitimate state objective.
- ***Gaffney v. Cummings*** (1973): The court upheld a legislative redistricting plan in which the total deviation was 1.81 percent for the Senate and 7.83 percent for the House. This indicates that legislative plans with a total deviation of 10% or less are presumptively constitutional, although 10 percent is not a safe harbor.

Casting a Meaningful Vote in one or more Single-Member Districts



Section 2: Vote Dilution

- *Gingles* Preconditions.
- Plaintiffs have the burden to show
 - Second. Do minority voters (usually POC) tend to vote together as a bloc
 - Third. Does the majority (usually white voters) vote together as a bloc to *usually* defeat the minority preferred candidate?
- The 2nd & 3rd preconditions are known as racially polarized voting (RPV)

What is racially polarized voting?

- RPV occurs where minority voters cast their votes for a preferred candidate (Black or any other race) and majority voters (usually white) use their voting power to *consistently* defeat the minority preferred candidate.
- E.g., In a 5 member at-large city council in a city that is 40% Black and 60% white. Black people run, but never get more than 10% of the white vote (i.e., 6% of the total vote), but always get 90% of the Black vote (36% of the total).
- White candidates win no matter their political affiliations or their lack of credentials.

What is racially polarized voting?

Case 3:14-cv-00069-JJB-EWD Document 289 08/17/17 Page 43 of 91

	Black Candidate and Party Affiliation	Number of White Opponents and Party Affiliation	Dr. Engstrom's Point Estimate of Percentage of Black Voters Who Supported Black Candidate	Dr. Engstrom's Point Estimate of Percentage of Non-Black Voters Who Supported Black Candidate	Dr. Weber's Point Estimate of Percentage of Black Voters Who Supported Black Candidate	Dr. Weber's Point Estimate of Percentage of Non-Black Voters Who Supported Black Candidate
1993 First Circuit Court of Appeal Election	Anthony Lewis (Democrat)	1 Democrat	99.2%	10.5%	98.8%	9.9%
1994 32nd JDC Election	Anthony Lewis (Democrat)	4 Democrats, 1 Republican	72.8%	1.1%	71.2%	1.2%
2008 Presidential Election	Barack Obama (Democrat)	1 Republican	99.6%	13.7%	98.8%	13.0%
2011 Tax Assessor Election	Clarence Williams (Affiliation listed as "O")	1 Republican, 1 Democrat, and 1 whose affiliation was listed as "N"	71.4%	2.6%	67.3%	1.6%
2012 Presidential Election	Barack Obama (Democrat)	1 Republican	99.8%	12.8%	98.1%	12.3%
2014 City Marshal Election	David Mosely (Democrat)	4 Republicans, 1 Democrat	81.8%	5.5%	82.0%	5.3%
2014 City Court Election	Sharon Carter (Republican)	2 Republicans	85.1%	8.3%	84.5%	6.1%

Section 2: Senate Factors

- If the *Gingles* preconditions are met, then you move onto the Senate Factors or “totality of circumstances.” *Gingles*, 478 U.S. at 30
- ***Totality of the Circumstances.*** Do Black voters have less opportunity than other members of the electorate to participate in the political process and elect their preferred candidates?
- ***It’s the rare case to establish Gingles prongs & not totality of circumstances.***

Section 2: Senate Factors

- Courts conduct a *searching evaluation of the past and present reality to determine whether the political process is open to voters of color*
 - **First. History of Discrimination in voting**
 - **Second. Racially polarized voting**
 - Third. Enhancing factors (numbered posts, large districts, etc.)
 - Fourth. Slating.
 - Fifth. History of Public or Private Discrimination in education, employment, healthcare, etc.

Section 2: Senate Factors

- Sixth. Overt or subtle racial appeals?
- **Seventh. Number of minority elected officials?**
- Eighth. Lack of responsiveness of officials?
- Ninth. Tenuousness justifications for the challenged law?

SF5: public and private discrimination

The state of Louisiana has been no less resistant to efforts to desegregate its system of higher public education. According to Nikki Brown, Associate Professor of History at the University of New Orleans, “Louisiana was ordered -- on at least ten occasions from 1965 to 1998 -- to integrate segregated universities and professional schools or compensate the state’s historically black colleges and universities for generations of neglect.”¹²⁰

SF6: racial campaign appeals

- In 2020, former Georgia Rep. Paul Broun who was running to return to Congress, released an ad warning that “in uncertain times like these,” it’s important to protect yourself against “looting hordes from Atlanta”



SF6: racial campaign appeals



Lamar White, Jr. 

@LamarWhiteJr



"If he invited me to a public hanging, I'd be on the front row"- Sen. Cindy Hyde-Smith says in Tupelo, MS after Colin Hutchinson, cattle rancher, praises her.

Hyde-Smith is in a runoff on Nov 27th against Mike Espy.



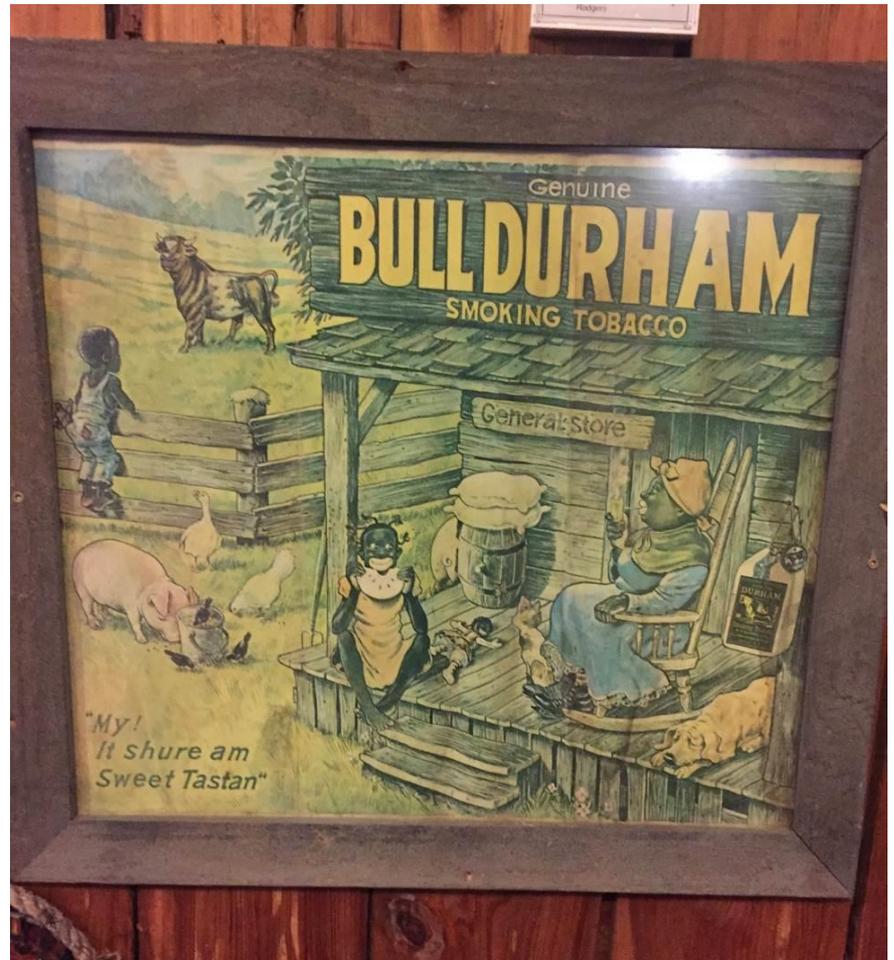
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SF6: racial campaign appeals

- In 2006, a white candidate ran countywide “to keep Fayette County the way that it has always been.”
- This same candidate referred to certain members of his constituency, namely Black children, as “colored kids.”

SF8: responsiveness



Section 2: Senate Factors

- In vote dilution cases, factors 1, 2, and 7 are the most important. They show disparate impact and link it to discrimination.

Discriminatory Intent: Section 2 & the 14th & 15th As

- Section 2 of VRA – purpose
- U.S. Constitution
 - 14th A. EPC
 - 15th A.
- Racial discrimination must be *a motivating purpose for*
 - *adoption, use, and/or maintenance of* challenged scheme

Proving Discriminatory Intent

- **Direct Evidence**
- Circumstantial Evidence:
 - the **impact** of the official action and whether “a clear pattern, unexplainable on grounds other than race emerges from the effect of the state action even when the governing legislation appears neutral on its face;”
 - the **historical background** of the decision;
 - the specific **sequence of events** leading up to the challenged decision;
 - **departures** from the **normal procedural sequence**;
 - **departures** from **normal substantive considerations**;
 - **legislative** or administrative **history**

Arlington Heights, 429 U.S. 252, 264-68 (1977)

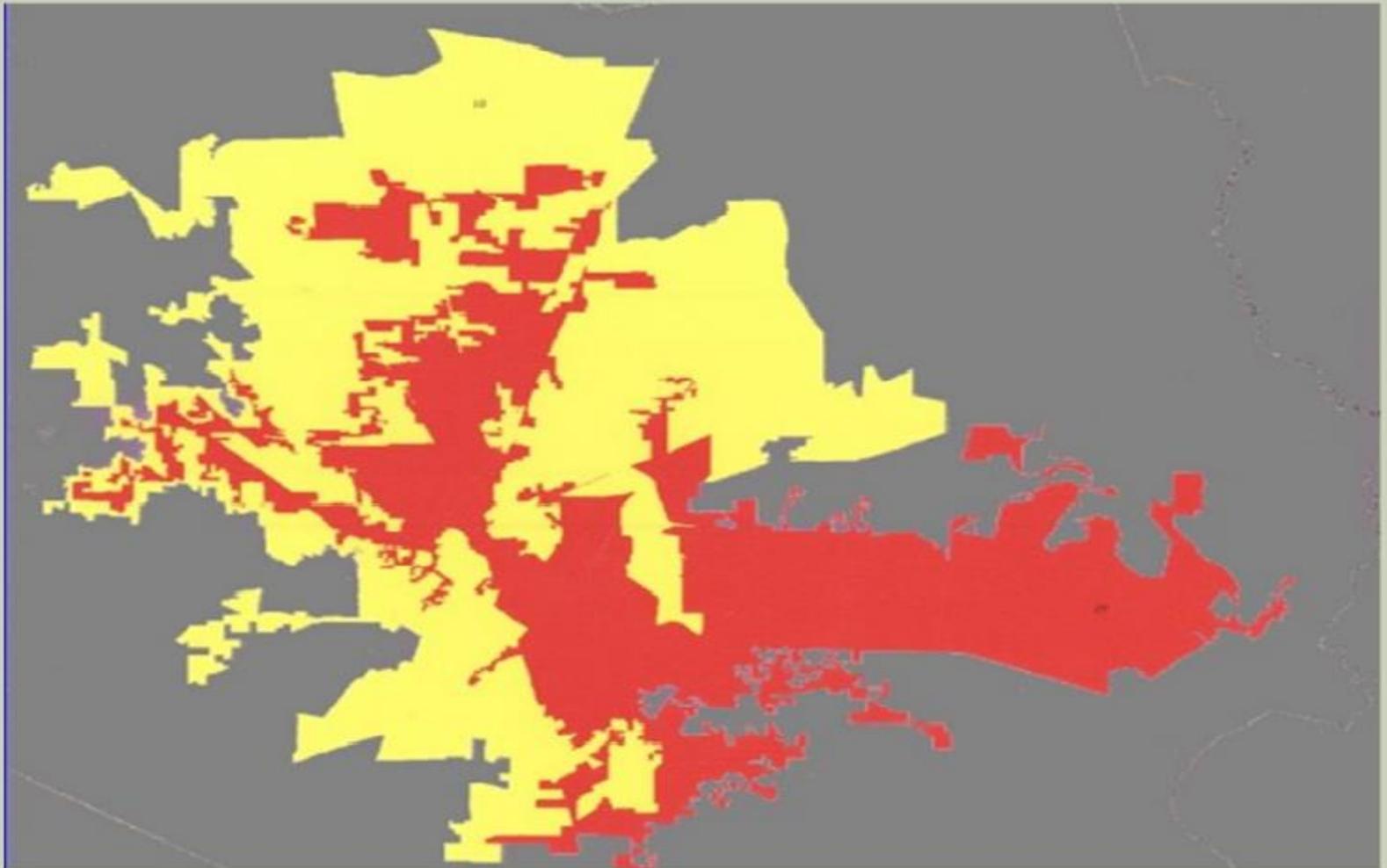
Experts to Demonstrate Violations of Section 2 & the 14th & 15th As

- To conduct Section 2 and/or constitutional analyses during redistricting, it is typical to work w/ experts like
 - Mapmakers
 - Demographers
 - Political scientists
 - historians

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Racial Gerrymanders (Don't Do Them)



Shaw v. Hunt, 517 U.S. 899 (1996)



Shaw v. Hunt, 517 U.S. 899 (1996)

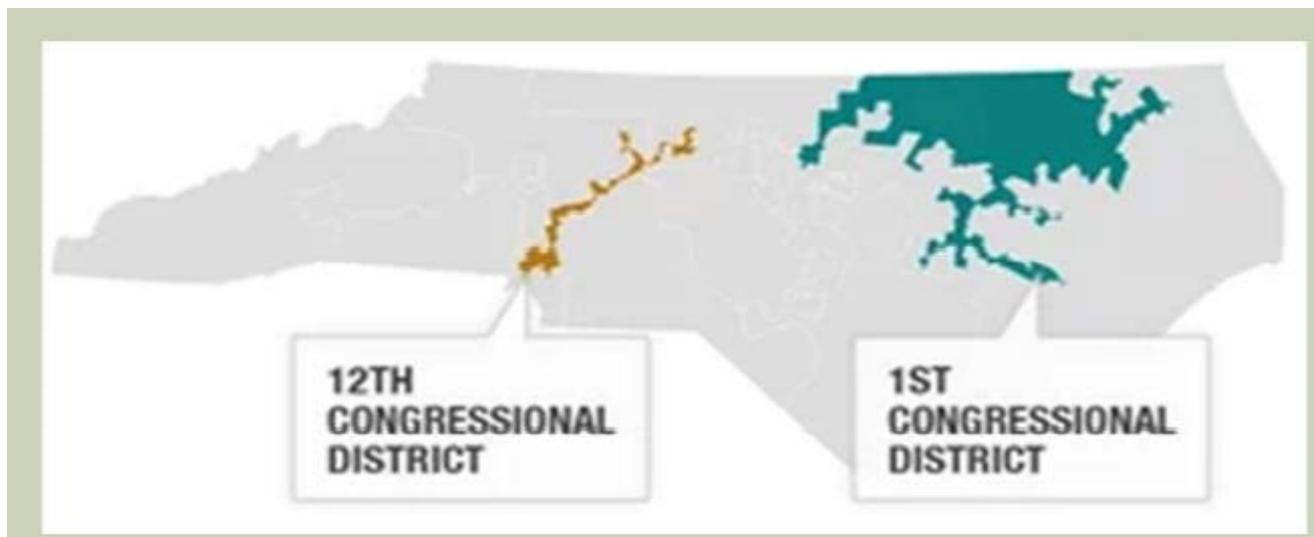
- After the 1990 census, North Carolina created CD 12, a district comprised of a majority of Black voters
- Plaintiffs sue and, on remand from the U.S. Supreme Court, the trial court held that the district is race-conscious, but it is also constitutional because it is narrowly tailored to further the State's compelling interests in complying with Sections 2 and 5 of the VRA. Plaintiffs appealed again.
- **HELD:** CD 12 is unconstitutional. "District 12, as drawn, is not a remedy narrowly tailored to the State's professed interest in avoiding § 2 liability."
- **REASONING:** even if NC wanted to avoid liability under Sec. 2, it should have located CD12 elsewhere where the *Gingles* factors were satisfied.

Bethune-Hill v. Virginia State Bd. of Elections, 137 S.Ct. 788 (2017)

- Where the plaintiff establishes “racial predominance,” the burden shifts to the State to “demonstrate that its districting legislation is narrowly tailored to achieve a compelling interest.”
- **If the state claims that a district was necessary to comply with the VRA, the state must show it had good reasons to believe its use of race was needed in order to satisfy the VRA.**
- A district can be a racial gerrymander even if it doesn’t look strange. Plaintiffs can show racial predominance “either through circumstantial evidence of a district’s shape and demographics or more direct evidence going to legislative purpose,” [*Miller*] and race may not predominate even when a plan respects traditional principles.

Cooper v. Harris, 137 S.Ct. 1455 (2017)

- REASONING. Race furnished the predominant rational for District 1's redesign and the State's interest in complying with the VRA could not justify that consideration of race. North Carolina's belief that it was compelled to redraw District 1 (a successful crossover district) as a majority-minority district was a mistake. Also, race, not politics, accounted for District 12's reconfiguration into a district comprised of a majority of Black voters.



Democratic Expansion



- *10,000+* Black, *6,000+* Latino, and *1,000+* Asian American elected officials at all levels of government nationwide

Shelby County, Alabama v. Holder



Hurricane SCOTUS: *Shelby County, Alabama v. Holder*

- Supreme Court struck as unconstitutional Section 4(b) of the Voting Rights Act.
- Ruling immobilized Section 5, our democracy's discrimination checkpoint.
- Decision akin leaving car, but taking keys.

Hurricane SCOTUS: *Shelby County, Alabama v. Holder*



HURRICANE SCOTUS

Shelby County v. Holder, June 25, 2013

Blocking the Vote (again) in the 21st Century

Why?

(1) Political participation by voters of color e.g., in 2008, 2012, 2020, 2021 Ga runoff...;

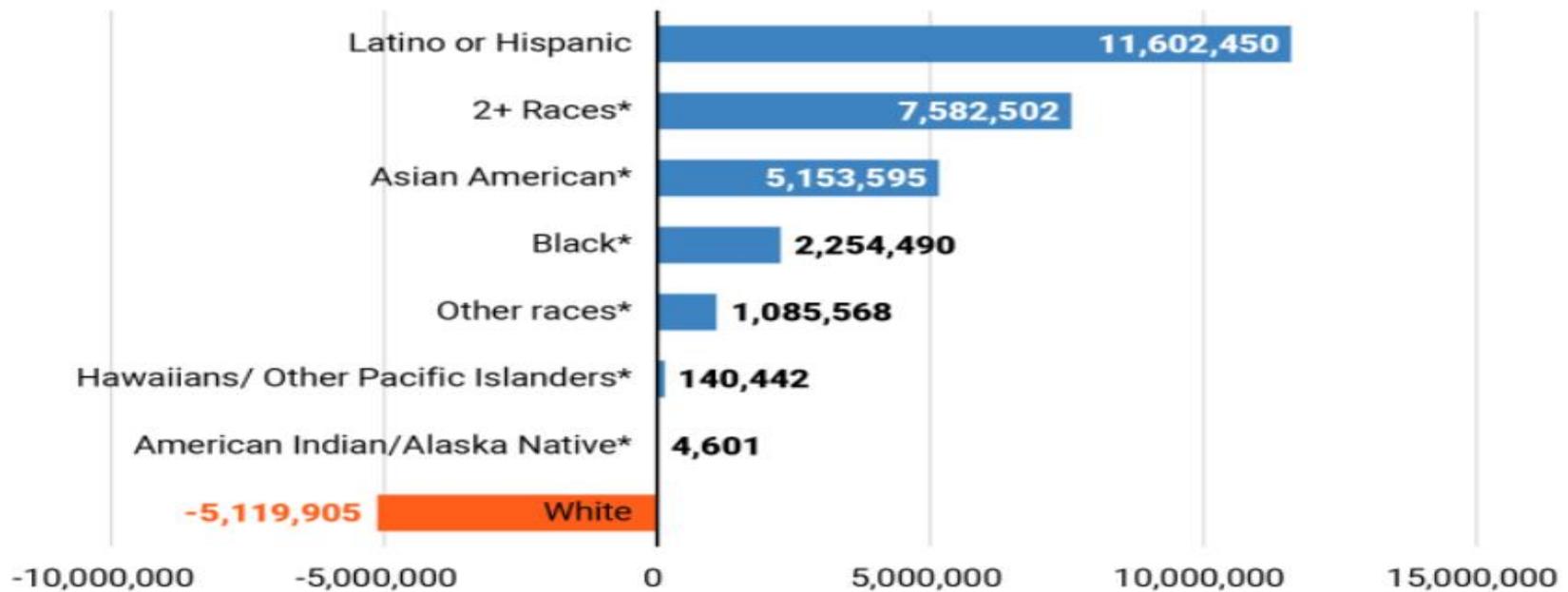
(2) The recent Censuses and other demographic data reflecting our becoming a majority POC nation;

(3) 2013 *Shelby County, Alabama v. Holder* and other decisions (e.g., *Crawford*, *Perez v. Abbott*, *Rucho*); and

(4) what the 45th president and his counterparts in state and local gov't represent

2020 Census

Figure 2. Change in US population for race and ethnic groups, 2010-2020



* non-Latino or Hispanic members of racial group

Source: William H. Frey analysis of 2010 and 2020 U.S. decennial censuses.

Democratic Contraction: Barriers to the Ballot

In the face of these demographic trends & loss of federal protection, **states and localities** have erected and maintained barriers to political opportunity at *every phase of the political process.*

Democratic Contraction: Barriers to the Ballot

Who gets to register and vote?

- felony disenfranchisement
- onerous voter registration
- Voter purges

Democratic Contraction: Barriers to the Ballot

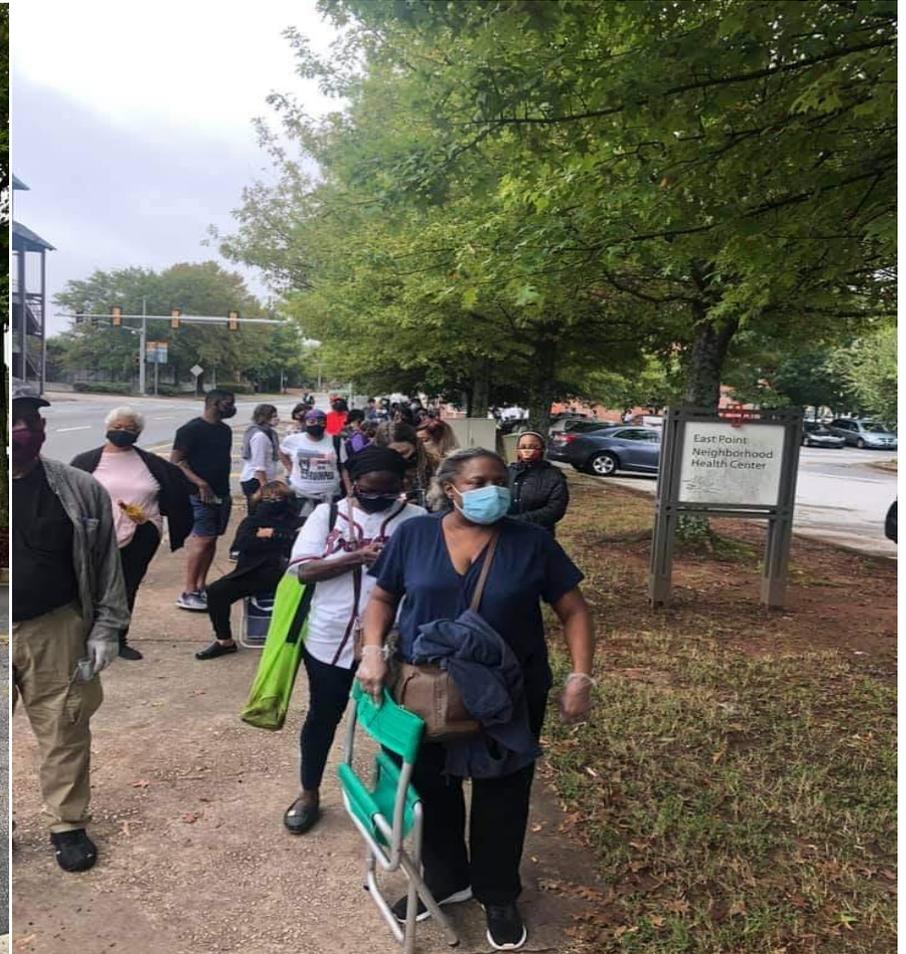
- For example, in 2017, 534,000 registered voters were removed from Georgia's voter rolls, the largest removal of registrations in U.S. history.

Democratic Contraction: Barriers to the Ballot

*Do I have an opportunity to vote and what
do I need to vote?*

- restrictions on early voting
- Changes to polling places
- Strict photo ID & proof of citizenship requirements
- failure to provide translated materials & language assistance

Democratic Contraction: Barriers to the Ballot



Democratic Contraction: Barriers to the Ballot

Is my vote meaningful?

- Discriminatory electoral methods
- Discriminatory redistricting plans

Redistricting post-2020: Unprecedented Challenges

- Since *Shelby County*, Section 5 will no longer scrutinize most redistricting plans in most jurisdictions where it once did
- Since *Rucho v. Common Cause*, litigators cannot challenge partisan gerrymandering, which often has racial impact, in federal court
- Shifts in the federal judiciary -> even steeper burdens on plaintiffs, difficulty in obtaining preliminary relief, and failures in remedying harm close to elections
- More precise redistricting data and technology can make it easier to dilute Black voting power

Power on the Lines

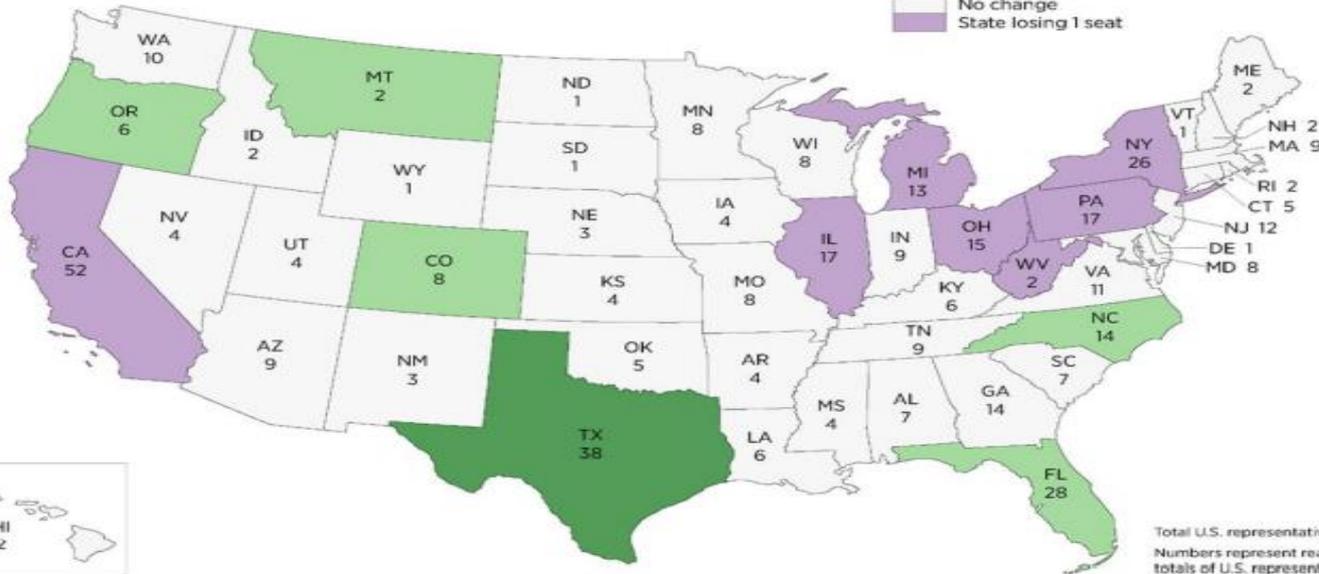


2020 Census Congressional Apportionment



**Apportionment of the U.S. House of Representatives
Based on the 2020 Census**

Change from 2010 to 2020
State gaining 2 seats
State gaining 1 seat
No change
State losing 1 seat



Total U.S. representatives: 435
Numbers represent reapportioned totals of U.S. representatives.

Voting Rights Working Group (VRWG)

The Voting Rights Working Group is a loose consortium of the nation's most prominent and experienced nonprofit organizations pursuing voting rights litigation on behalf of racial minorities. Our member organizations are *nonpartisan* legal advocacy groups with decades of experience in using the law to promote and protect the voting rights of people of color.



Redistricting w/ a Racial Justice Focus

Redistricting with a racial justice focus requires recognition of the longstanding and undemocratic efforts to control and reduce the electoral power of racial minorities in this country. This means placing top priority on compliance with the federal Voting Rights Act, and its core principle that communities of color should have a full and equal opportunity to elect their candidates of choice. This means a commitment to develop majority-minority districts where necessary to provide opportunities to elect minority-preferred candidates and where the legal conditions are met for the creation of those districts. This also means prioritizing the creation of minority influence, and minority coalition districts, where the legal conditions are not sufficient for the creation of majority-minority districts, or the communities seek those structures. At the same time, compliance with the Voting Rights Act is a nuanced, fact-specific inquiry and simplistic and crude interpretations of the Act should not be used as pretextual excuse for disadvantaging communities of color.

Keys to Building a Legislative Record

Critique Proposed Maps &/or Offer Alternative Proposals

- Force the other side to defend their maps

Be specific about harms

- Name communities that are harmed by packing/cracking
- Be as specific as possible

Challenge counterarguments

- Partisanship/communities of interest as a proxy for race

Keys to Building a Legislative Record

- **Work in solidarity** and partnership with other communities of color to explore whether it is possible to draw a “unity map” that would be supported by various groups.⁶⁷
- **Using your prior research** into the laws governing redistricting in your jurisdiction, consider the ways in which your redistricting plan may violate the legal code, and consider whether or not your map would be able to withstand a legal challenge.
- **Analyze data** on the voting patterns of different racial groups (also known as racially polarized or racial bloc voting, discussed in more detail in **Chapter 4**) to consider how maps will perform for minority voters. This may help you to understand whether the demographics of a proposed new district will enable voters of color to elect candidates of their choice.
- **Monitor** state and local legislative sessions (and official websites) to learn about proposed plans under consideration.

If proposed maps are discriminatory, sound the alarm by bringing public attention to the redistricting plans on social media and to officials, journalists, and local, state, and national organizations (like LDF, MALDEF, and Advancing Justice – AAJC). It is important to ensure that the public record reflects whether certain legislative procedures are broken, people are kept out of the redistricting process, or particular communities will be harmed by a map.

⁶⁷ See, e.g., Asian Pacific American Legal Center, *Asian Americans, Latinos and African Americans Submit Joint Mapping Proposal to California Redistricting Commission* (June 30, 2011), <https://www.advancingjustice-la.org/sites/default/files/Unity-MapRelease063011.pdf>; Asian American Legal Defense Fund, *Civil Rights Groups Announce Unity Map for NYC Council Redistricting and 9/4 Press Conference* (Aug. 30, 2012), <https://www.aaldef.org/press-release/civil-rights-groups-announce-unity-map-for-nyc-council-redistricting-and-9-4-press-conference/>.

Provide **verbal and written feedback** to officials, including at public hearings, about:

THE IMPACT OF THOSE PLANS ON YOUR COMMUNITY (i.e., will the proposed maps harm voting power of communities of color), including asking officials to publicly analyze the impact of the plans on your community.

YOUR PERSPECTIVE REGARDING THE FACTS AND PROCESSES leading up to the creation and adoption of a proposed redistricting plan or other voting change (i.e., were the processes transparent, did they consider and incorporate the feedback of communities of color and the officials and groups that represent them).

ANY CONTEMPORANEOUS STATEMENTS by the people who drew or approved the map that implicitly or expressly are **racially discriminatory, xenophobic, etc.**

THE HISTORY OF RACIAL DISCRIMINATION IN VOTING IN YOUR COMMUNITY and why that requires a fair redistricting map in the current cycle.



SOUND THE ALARM IF PROPOSED MAPS ARE DISCRIMINATORY

Power on the Lines



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