

APPENDIX B



# Redistricting Presentation to the North Dakota Legislature

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August 26, 2021

**Exhibit 6**



Strengthening  
the legislative  
institution.

Serving 7,383  
legislators and  
25,000 staff.

## Today's Outline



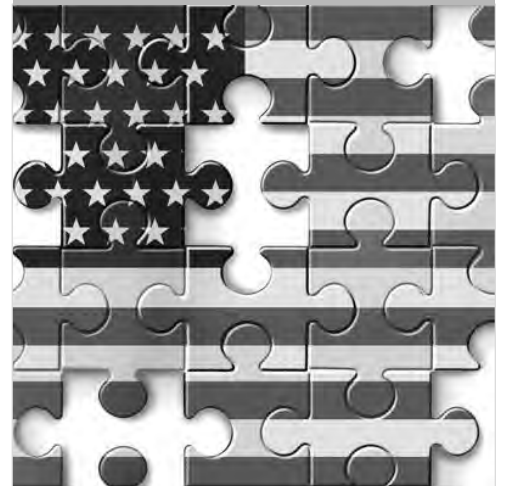
### Fundamentals & Census



### Legal Doctrines



### Criteria/Principles



## Why We Redistrict



## Fundamentals: Who is a person?



- Supreme Court has never answered definitively
- Assumption since reconstruction has been all residents of the United States
- Key Case: *Evenwel v. Abbott* (2016)
  - Person = total population, regardless of legal status or age
  - But left door open to other interpretations...

# Fundamentals: Who Draws Legislative Districts

Statutory or constitutional only; excludes commissions set up under other authorities



# Fundamentals: Who Draws Congressional Districts

Statutory or constitutional only; excludes commissions set up under other authorities



- People living in the United States:  
331,449,281
- Growth since 2010: 7.4%
- Nearly all population increase in metropolitan and micropolitan areas; ND is major exception to this!
- 47/50 states saw population growth this decade
- Only three states saw their populations shrink this decade:
  - Illinois (-0.1%)
  - Mississippi (-0.2%)
  - West Virginia (-3.2%)



## 2020 Census Takeaways

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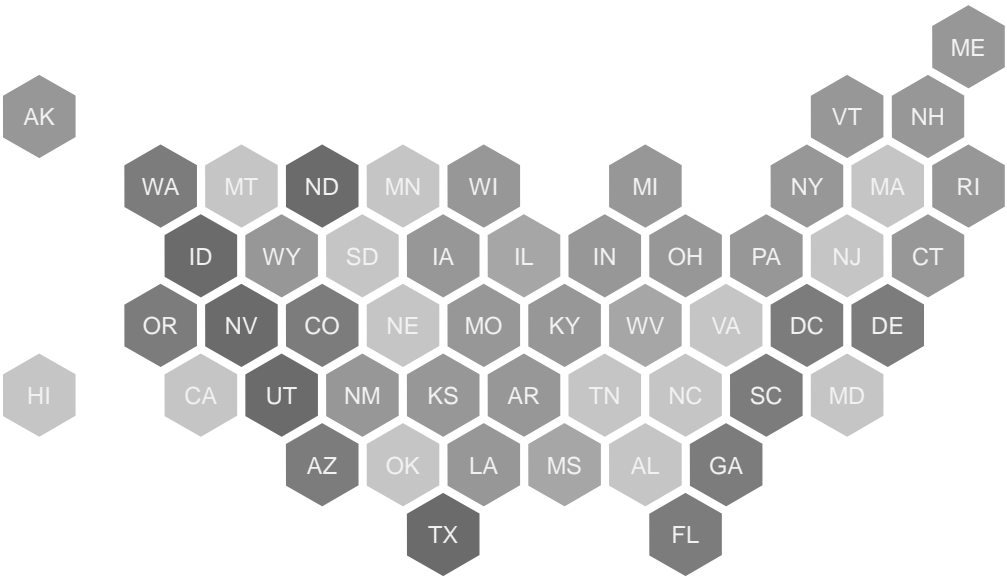
# 2020 Census Results

## Population Changes by State



North Dakota's population grew by 15.8% between 2010 and 2020.

- + > 15% (Very Fast Growth)
- + 10-15% (Fast Growth)
- + 5-10% (Moderate Growth)
- + 0-5% (Slow Growth)
- Population Decrease

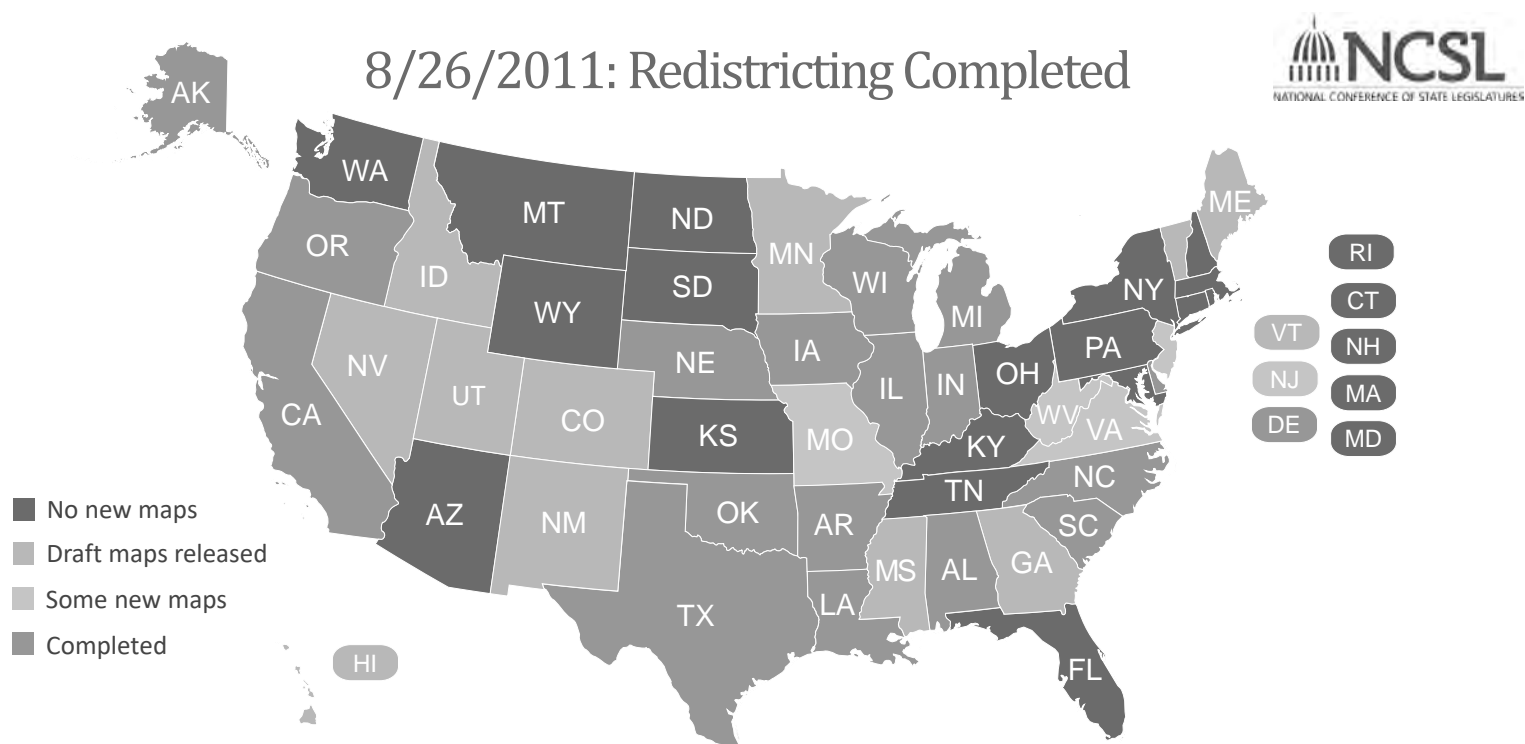


- The pandemic
- Fires
- Floods
- Policy changes

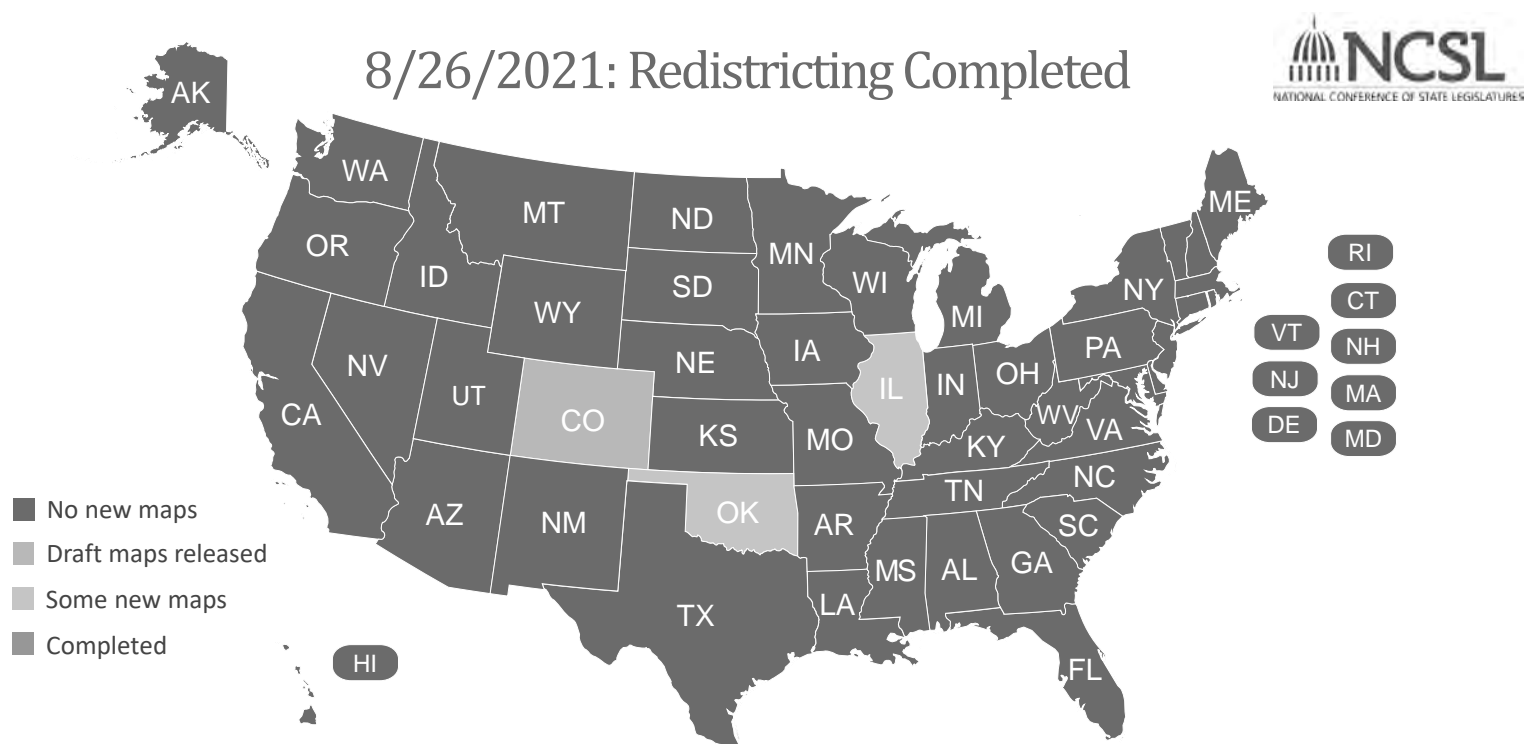


## Delays

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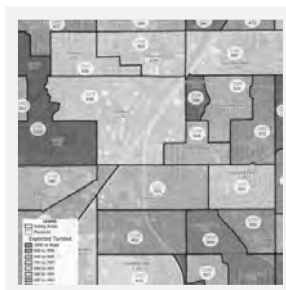


Source: All About Redistricting; Ballotpedia



## The Problem With Delays: Less Time to Redistrict

It isn't just drawing new maps



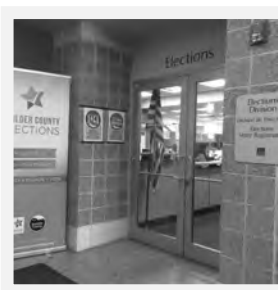
Processing



Filing Deadlines



Residency



Local Prep



Primaries

## State Redistricting Deadlines by Date



5

By July 1, 2021

19

By Dec. 31, 2021

26

Other/None

## Disclosure avoidance

- Federal statutes require the protection of respondents' information\*
- The previous system proved to be breakable
- Any system to protect privacy reduces accuracy and usability

*\*There's a federal requirement to provide population data at the block level too*



 **NCSL**

## Data Suppression



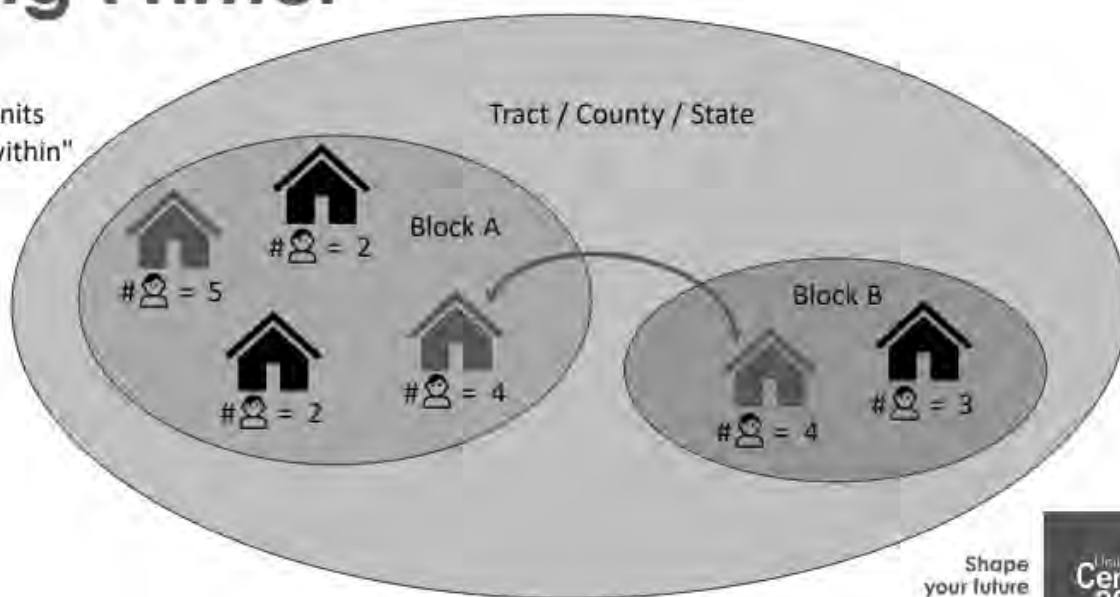
Fake Census Block Populations				
8	18	13	2	15
42	1	3	16	18
4	14	15	6	3
24	18	6	1	3
14	4	8	2	3

Fake Census Block Populations				
8	18	13	2	15
42	S	3	16	18
4	14	15	6	3
24	18	6	S	3
14	4	8	S	3

- Data that could expose personal information is simply not provided
- Used in 1980 for individual cells and for whole tables

# Swapping Primer

1. Determine key to match units
2. Choose "between" and "within" geographies
3. Determine units to swap
4. Select swap rate
5. Find swap pairs



2020CENSUS.GOV

Shape  
your future  
START HERE >

United States  
Census  
2020

# Noise

Inserting error to increase uncertainty.

14	41	50	58	65
15	24	26	30	25
52	53	66	47	51
68	6	44	17	32
38	26	33	42	64



13	41	51	58	65
15	24	25	30	24
51	54	66	48	51
68	6	44	16	32
38	25	33	42	65



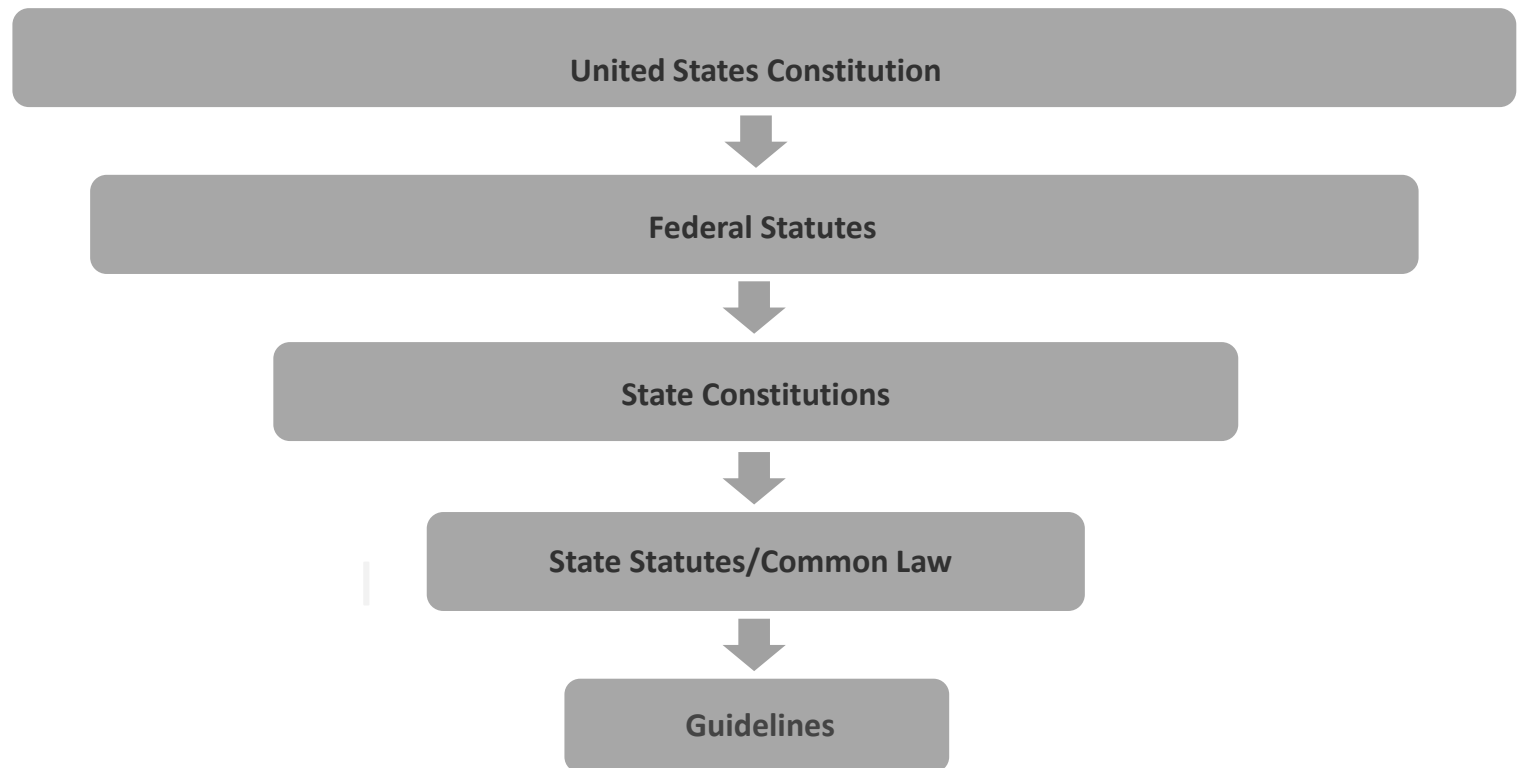
## Using differential privacy to protect data means...

- Only state total population will be reported without “noise”
- Distortions in rural areas are likely to be greater than in urban areas
- Distortions in small racial/ethnic groups are likely to be larger than in others

## Legal Doctrines

Federal and State



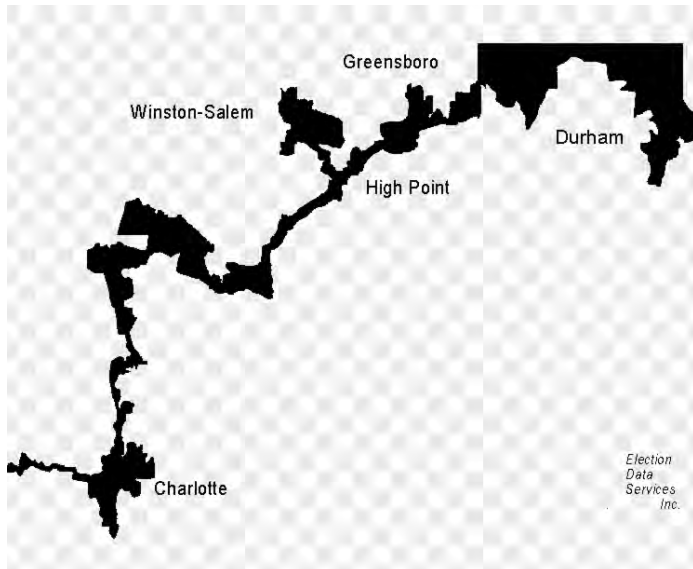


## US Constitution: One Person, One Vote



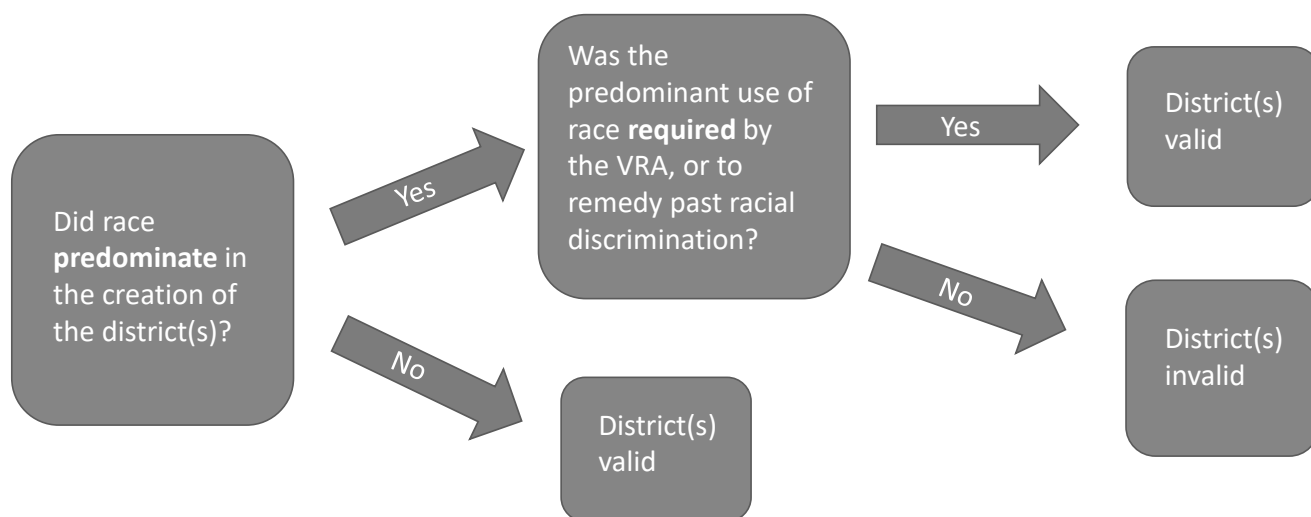
- **Principle:** Equal Protection requires that votes for legislators and congressmembers hold equal weight
  - Congressional Districts: *Wesberry v. Sanders* (1964)
  - State Legislative Districts: *Reynolds v. Sims* (1964)
- **Application:** Varies depending on district type
  - Congressional Districts: Exact numerical equality
  - State Legislative Districts: 10% deviation if justified by compliance with traditional criteria

## US Constitution: Racial Gerrymandering



- Equal Protection Clause claim
- Origin: *Shaw v. Reno* (1993)
- Claim has evolved over time
- Test: **Predominance**
  - Was race the predominant factor in the construction of a particular district?

## US Constitution: Racial Gerrymandering



## US Constitution: Partisan Gerrymandering



- Major focus at SCOTUS this decade
- Claims based on 1<sup>st</sup> and 14<sup>th</sup> Amendments
- No longer justiciable in federal courts
- But theories from these cases have successfully been used in state courts



## Key Sections of the VRA



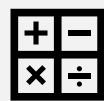
### Section 2

Private and Federal  
Cause of Action



### Section 3

The "Bail-In" Remedy for  
Violating Federal Law



### Section 4

The Preclearance  
Coverage Formula



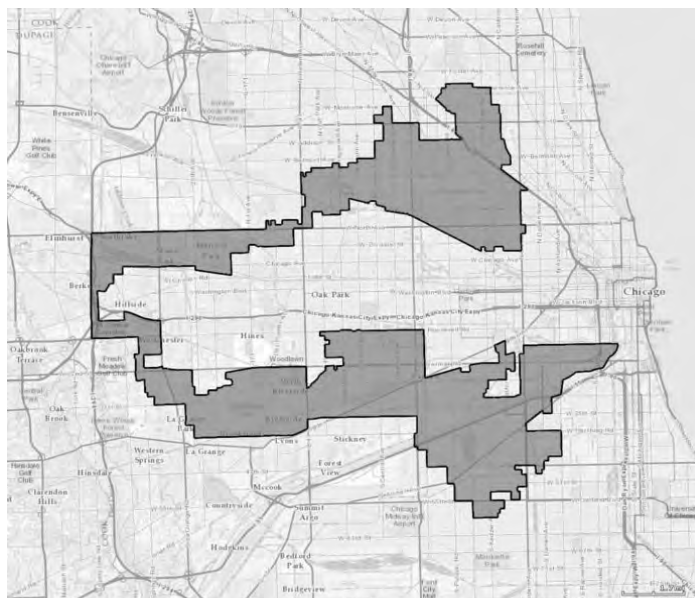
### Section 5

The Preclearance  
Regime

## Section 2: Overview



- Prohibits Vote Dilution
- Applies Nationwide
- Requires litigation (not prophylactic)
- Burden of Proof: Discriminatory Effect
  - Plaintiffs do not need to prove discriminatory intent



## Section 2: When Applies

### *Gingles* Preconditions

**Sufficiently large and geographically compact** to constitute majority

Minority group is **politically cohesive**

**White voters act as a bloc** to defeat minority group's candidate of choice

### Senate Factors

- History of official discrimination
- Racially polarized voting in the state
- Minority vote diluting election procedures
- Minority exclusion from the candidate slating process
- Discrimination in health education and employment
- Subtle or overt racial appeals in campaigns
- Extent of minority success being elected to public office



## Key Distinction: Vote Denial vs. Vote Dilution

### **Vote Denial (Elections)**

- Applies to laws denying or abridging the right to vote on account of race or color
- Localized or statewide impact of challenged law on denial of right to vote
- Key Supreme Court case:
  - *Brnovich v. Democratic National Committee* (2021)

### **Vote Dilution (Redistricting)**

- Applies to districting plans that hinder a minority group's opportunity to elect its candidate of choice
- Individual district-by-district analysis
- Some key Supreme Court cases:
  - *Mobile v. Bolden* (1980)
  - *Thornburg v. Gingles* (1986)
  - *Bartlett v. Strickland* (2009)

## Section 3: “Bail-In”

- **What:** Remedy available from courts who find violation Fourteenth or Fifteenth Amendments to U.S. Constitution.
- **How:** Judge orders jurisdiction subject to preclearance for future election law changes *if* it finds proof of discriminatory intent by a defendant.
- **When:** Limited duration set by judge; not permanent like Sections 4 and 5. Judge has significant discretion in crafting remedy.
- **Prevalence:** Rare



## Sections 4 and 5



### SUPREME COURT OF THE UNITED STATES

#### Syllabus

SHELBY COUNTY, ALABAMA v. HOLDER, ATTORNEY  
GENERAL, ET AL.

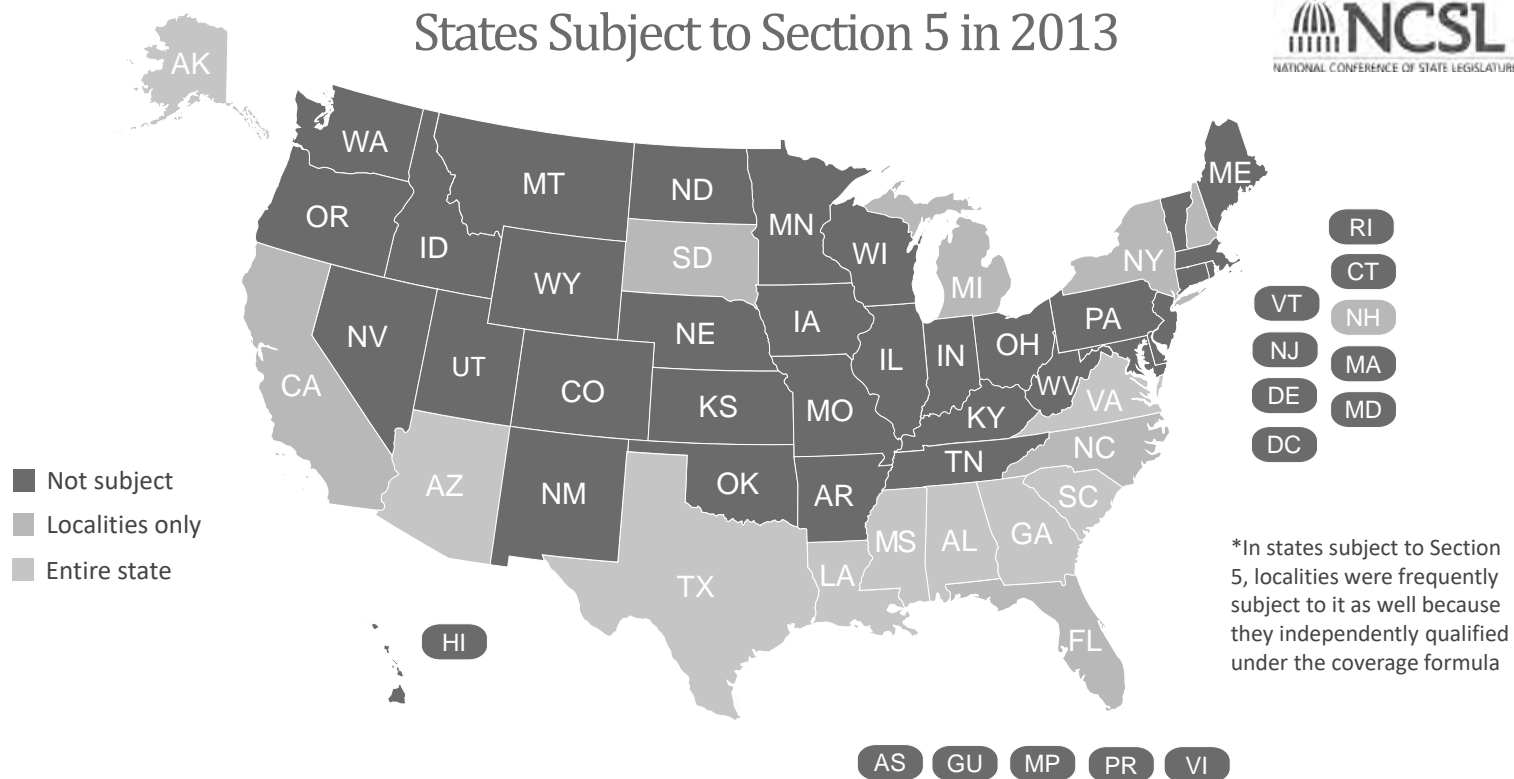
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR  
THE DISTRICT OF COLUMBIA CIRCUIT

No. 12–96. Argued February 27, 2013—Decided June 25, 2013

The Voting Rights Act of 1965 was enacted to address entrenched racial discrimination in voting, “an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting and ingenious defiance of the Constitution.” *South Carolina v. Katzenbach*, 383 U.S. 301, 309. Section 2 of the Act, which bans any “standard, practice, or procedure” that “results in a denial or abridgement of the right of any citizen . . . to vote on account of race



## States Subject to Section 5 in 2013



## State Constitutions: Free and Equal Elections Clauses



### POLITICO



The request to stay the ruling from the Pennsylvania state Supreme Court was denied without comment or recorded dissent. | Jacqueline Martin/AP Photo

#### **Supreme Court won't block new Pennsylvania congressional map**

By ELENA SCHNEIDER and STEVEN SHEPARD | 03/19/2019 03:51 PM EDT | Updated 03/19/2019

- 30 state constitutions require elections to be some combination of free, equal and fair
- PA and NC courts read this clause to include prohibition on partisan gerrymandering
- North Dakota's constitution does not contain this clause



# Criteria/Principles

NATIONAL CONFERENCE OF STATE LEGISLATURES

## Federal Statute: Single-Member Districts



“In each State entitled . . . to more than one Representative . . . there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative.” – 2 U.S.C. 2a

## \*Criteria/Principles: Compactness



○ Common traditional principle (40 states)

○ Two common ways to measure:

- Polsby-Popper :  $\frac{\text{Area of District}}{\text{Area of Circle with Same Perimeter as District}}$
- Reock :  $\frac{\text{Area of District}}{\text{Area of Smallest Encompassing Circle}}$



## \*Criteria/Principles: Contiguity



- Most common principle (all 50 states)
- **General Rule:** Must be able to go to every part of the district without leaving it
- Where issues arise:
  - Non-contiguous locality boundaries (usually arises with annexations)
  - Water



## Criteria/Principles: Preserving Political Subdivisions



### **General Application**

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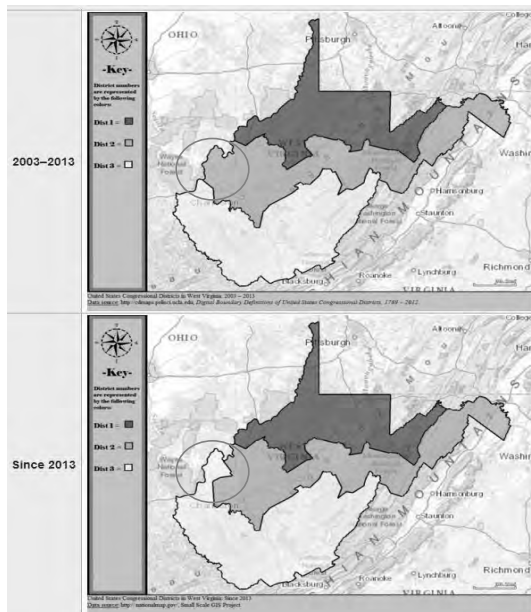
- Common traditional principle (45 states)
- Unless specified, could refer to any type of subdivision
  - County, City, School District, City Council Wards, etc.
- A stand-in for communities of interest or compactness?
- Importance of local political boundaries varies throughout the U.S.

### **Specific Application: Counties**

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- Sometimes codified (e.g., Idaho)
- Sometimes judicial (e.g., North Carolina)
- **General Idea:** keep counties or groups of counties together wherever possible. Only deviate from county borders when necessary to comply with federal laws like the Voting Rights Act or One Person, One Vote

## Criteria/Principles: Preserving Cores of Prior Districts



- Somewhat infrequent traditional principle (10 states)
- Rationale: don't unnecessarily break up peoples' relationships with their representatives
- Usually permitted but not required
- Some states (e.g., Arizona) explicitly reject this principle and draw districts anew each decade

## Other criteria NCSL tracks



- Preserving communities of interest (25 states)
- Prohibition on favoring/disfavoring an incumbent/party/candidate (17 states)
- Avoid pairing incumbents (11 states)
- Prohibition on using partisan data (5 states)
- Competitiveness (5 states)
- Proportionality (2 states)
- Symmetry (0 states, after repealed by Missouri voters in 2020)

## All of this could change via litigation...



- Legal doctrines are always evolving; what's true today may not be tomorrow
- Already there's litigation about:
  - Census Bureau's failure to deliver redistricting data on schedule
    - Alabama
    - Ohio
  - Use of alternative data
    - Illinois
  - Predicted failure to redistrict
    - Minnesota
    - Louisiana
    - Wisconsin
    - Pennsylvania

## Stay Connected

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**Reach out anytime!**

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Redistricting

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