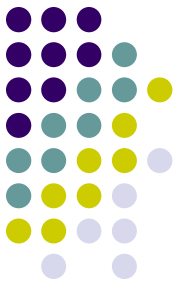


Redistricting: Legal Issues

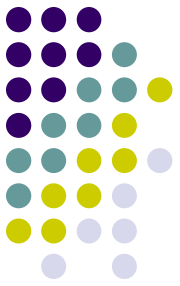
Montgomery County Redistricting Commission
March 10, 2021



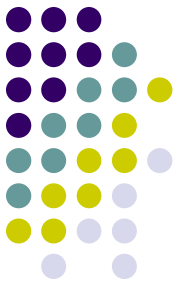
Procedural Matters

- County Charter Section 104: Timeline for Redistricting Procedure: plan and report to Council by November 15; public hearing within 30 days; law after 90 days if Council does not take action.
- County Code Section 2-149: Meetings may be conducted informally but to take “formal action or decide controversial matters,” Roberts Rules of Order govern.
- County Code Section 2-149: Meetings open to public in accordance with Open Meetings Act
 - Notice requirements
 - Rules regarding conduct of public in attendance
 - Closure of meeting to preserve attorney-client privilege

Redistricting: Laws Governing

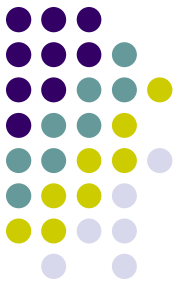


1. County Charter and Traditional Districting Criteria
2. U.S. Constitution and Federal laws implementing same
 - A. Equal Protection Clause of 14th Amendment to U.S. Constitution:
Equal Population – “one person, one vote” doctrine
 - B. 15th Amendment to U.S. Constitution and Voting Rights Act of 1965
 - C. Equal Protection Clause of 14th Amendment to U.S. Constitution
(**Again**):
 1. Racial Gerrymander
 2. Political Gerrymander



County Charter

- Sections 102 and 103: County Council Composition and Election / Council Districts
 - MODIFIED BY 2020 ELECTION QUESTION C
 - This Commission needs to draw **7 districts**. New Council will have 11 council members, 4 at large; 7 from districts.
 - Change from existing 5 districts / 9 councilmembers, 4 at large, 5 from districts.
- Section 103: Council Districts:
 - Each of the districts “shall be **compact in form** and be **composed of adjoining territory**. **Populations** of the council districts shall be **substantially equal**.”



Traditional Districting Criteria

- The Supreme Court Recognizes These Traditional Districting Criteria:
 - Respect for political subdivisions
 - Preservation of communities of interest
 - Incumbency protection
 - Geography
 - Compactness (County Charter)
 - Contiguity (County Charter's “adjoining territory”)

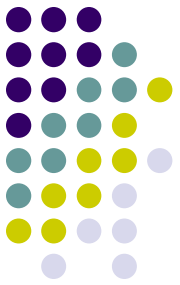
County Charter: Compact, Contiguous, Equal Population



- Compact requirement: close union of territory is key; does not require equidistance from the center or mathematical precision
- Contiguity (“composed of adjoining territory”): territory touching, adjoining, and connected
- Compact and Contiguous are subject to constraint to equal population – Will ultimately be judged by U.S. Constitution’s 14th Amendment Equal Protection Standards

United States Constitution

14th Amendment; Section 1

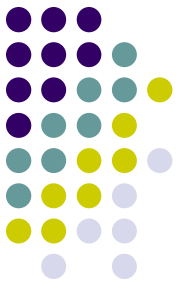


“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. **No State shall** make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor **deny to any person within its jurisdiction the equal protection of the laws.**”

As applied to voting districts by the courts:

- Protects from overpopulating one district vs. another so as to give one voter's more weight than another.
- Protects from racial discrimination.
- Until 2019, was invoked to protect from political gerrymander....

14th Amendment Equal Protection Clause: Mandates Equal Population Between Districts



- Population between districts must be equal – “one person, one vote”
- Judged by maximum population deviation:
 - Calculate size of “ideal district”
 - Add percentage variation between largest and smallest district in comparison to ideal district.
 - EXAMPLE: If the largest district is 4% overpopulated, and the smallest district is 2% underpopulated, the map’s maximum population deviation is 6%.
 - If percentage variation total is less than 10%, “*de minimis*,” will not itself support vote dilution claim.
 - If percentage variation total is over 10%, presumptively invalid: burden shifts to government to show substantial justification for the deviation.
 - 16.4% deviation is close to having no possible justification under the Equal Protection Clause.

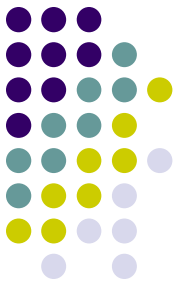
Cases: 14th Amendment – Equal Protection Clause Equal Population and “One Person, One Vote”



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

- Equal protection clause applies to state legislative districts to ensure equality of votes.
- Equality of votes demands that districts must be population-based; apportioning in Alabama State legislature was on County-basis and districting had not occurred in over 60 years, population changes not reflected in representation.
- Equal protection in voting = all citizens’ votes are treated equally. “A citizen, a qualified voter, is no more nor no less so because he lives in the city or on the farm.”

Ajamian v. Montgomery County, 99 Md. App. 665 (1994). Court rejected challenge that Montgomery County Council District plan was not sufficiently compact because one district was much larger geographically than others. The population deviation was within the acceptable 10% deviation, so the greater geographical area did not affect voting strength.

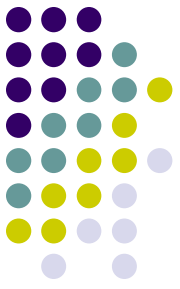


Compactness – Not Mandated But Used As a Factor In Federal Claims

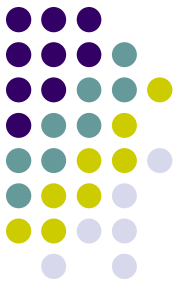
- Compactness is not mandated by the U.S. Constitution but it is a factor that is taken into account in both Equal Protection and Voting Rights Act claims.
- Equal Protection: compactness focuses on the contours of district lines to determine **whether race was the predominant factor in drawing district lines**.
- Voting Rights Act: Requires a court to review **whether the minority population is in a geographically compact area**; not a review of the district lines. Did the district lines slice through the compact minority area?

Perry, 548 U.S. 399 (2006)

15th Amendment and Section 2 of the Voting Rights Act

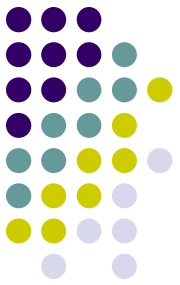


- 15th Amendment –
 - Sec. 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
 - Sec. 2. The Congress shall have power to enforce this article by appropriate legislation.
- Despite 15th Amendment, as of 1964, registration of eligible black voters ran 50% behind that of whites. *South Carolina v. Katzenbach*, 383 U.S. 301, 313 (1966).
- Voting Rights Act of 1965 – Enacted to enforce the 15th Amendment in 1965 after it became clear that districting was being used as a tool to weaken the voice of minorities in elections.
- Section 2 (52 U.S.C. § 10301) – Districting plan cannot have the effect of denying or abridging right to vote on the basis of race.
 - Section 5 (52 U.S.C. . § 10304) – Not an issue for the County; requires some jurisdictions to obtain federal approval before altering districting plans.



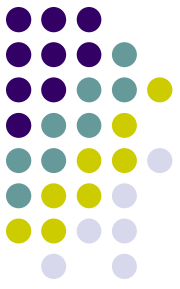
Voting Rights Act – Section 2 Claim

- When will a redistricting plan subject to challenge under Section 2?
- If a plaintiff can show the effect of the plan impedes the equal opportunity of minority voters to elect candidates of their choice.
- Note that intent is not a consideration.
- The Supreme Court's test: **3 preconditions** and “**totality of the circumstances**”



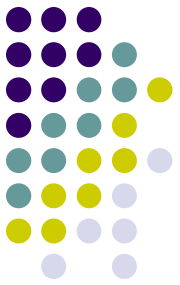
Voting Rights Act – Section 2 Claim

- **Three preconditions** to a successful Section 2 claim by a minority group – plaintiff must show:
 1. Minority group is large and compact enough to constitute a majority in the district;
 2. Minority group is politically cohesive; and
 3. White majority votes as a bloc to defeat minority’s preferred candidate
- Plaintiff must then show under the “**totality of the circumstances,**” that the plan results in an electoral system not equally open to participation by members of plaintiff’s class.



Voting Rights Act – Section 2 Claim

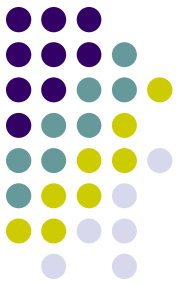
- **“Totality of the circumstances”**: Many factors reviewed. No requirement that any particular number of factors be proved; some may be more relevant than others.
- Key factors identified by the Court:
 - Extent of racially polarized voting.
 - The extent to which members of the minority group have been elected to public office.
 - Proportionality: is the minority group’s elected representation proportionate to their presence in the population?



Terminology

- “Majority minority” – Minority group composes a majority of the population
- “Vote Dilution” – weakening strength of a group’s vote through methods such as:
 - “Packing” – concentrating group into district so they are excessive majority.
 - “Cracking” – dispersing group into districts in which they are an ineffective minority.
- “Influence district” – minorities have enough political heft to exert influence in an election, but not enough to win.
- “Coalition district” or “Crossover district” – minorities can elect candidate of their choice with the support of crossover majority voters.

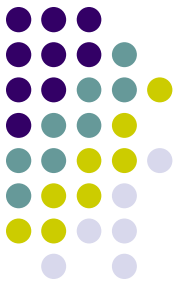
Case: Voting Rights Act – Section 2 Violation Found



- *Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F.Supp. 1022 (1994): Court found Section 2 of the Voting Rights Act was violated by State legislature districting plan adopted in 1992.
 - Preconditions met: Bloc-voting white majority consistently defeated candidates supported by the lower Eastern Shore’s politically cohesive, geographically compact black community.
 - Plan adopted “cracked” cohesive black community between two districts, submerging them in majority-white districts
 - Totality of circumstances: Court observed that historically, blacks had less opportunity to participate in the political process and elect candidates of their choice – in 200 years, had not elected black representative.
 - Court required submission of plan that complied with Section 2 – that created majority-minority district on the Eastern Shore.

In the revised plan, the total population deviation was 14.8%, but since the deviation was due to the creation of the majority-minority district on the Eastern Shore, it was deemed permissible by the court. 849 F.Supp. 1072, 1075 (1994).

Case: Voting Rights Act – Section 2 Violation Found

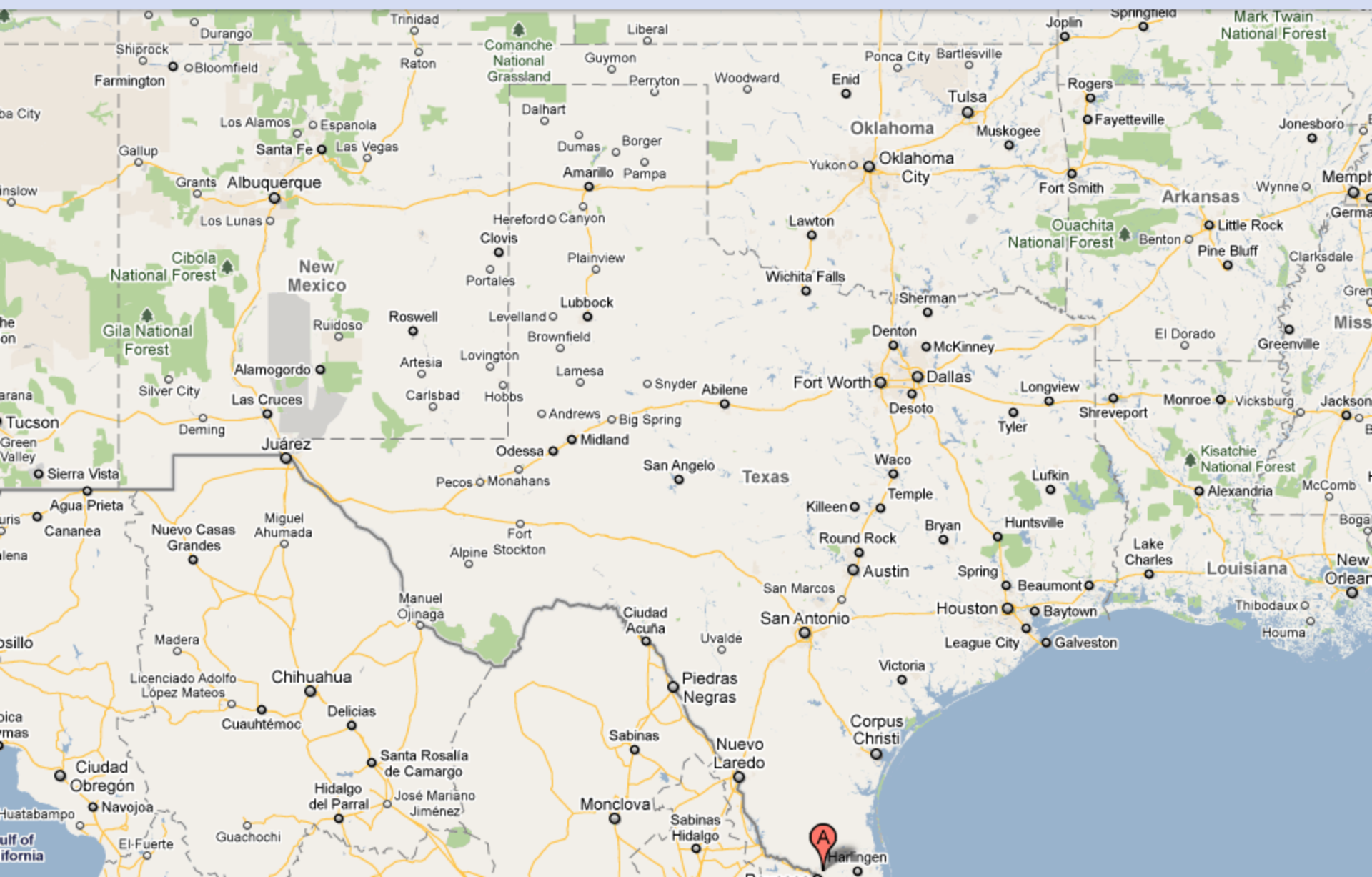


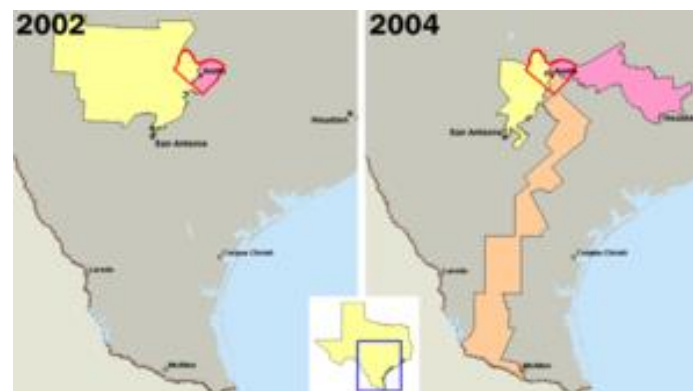
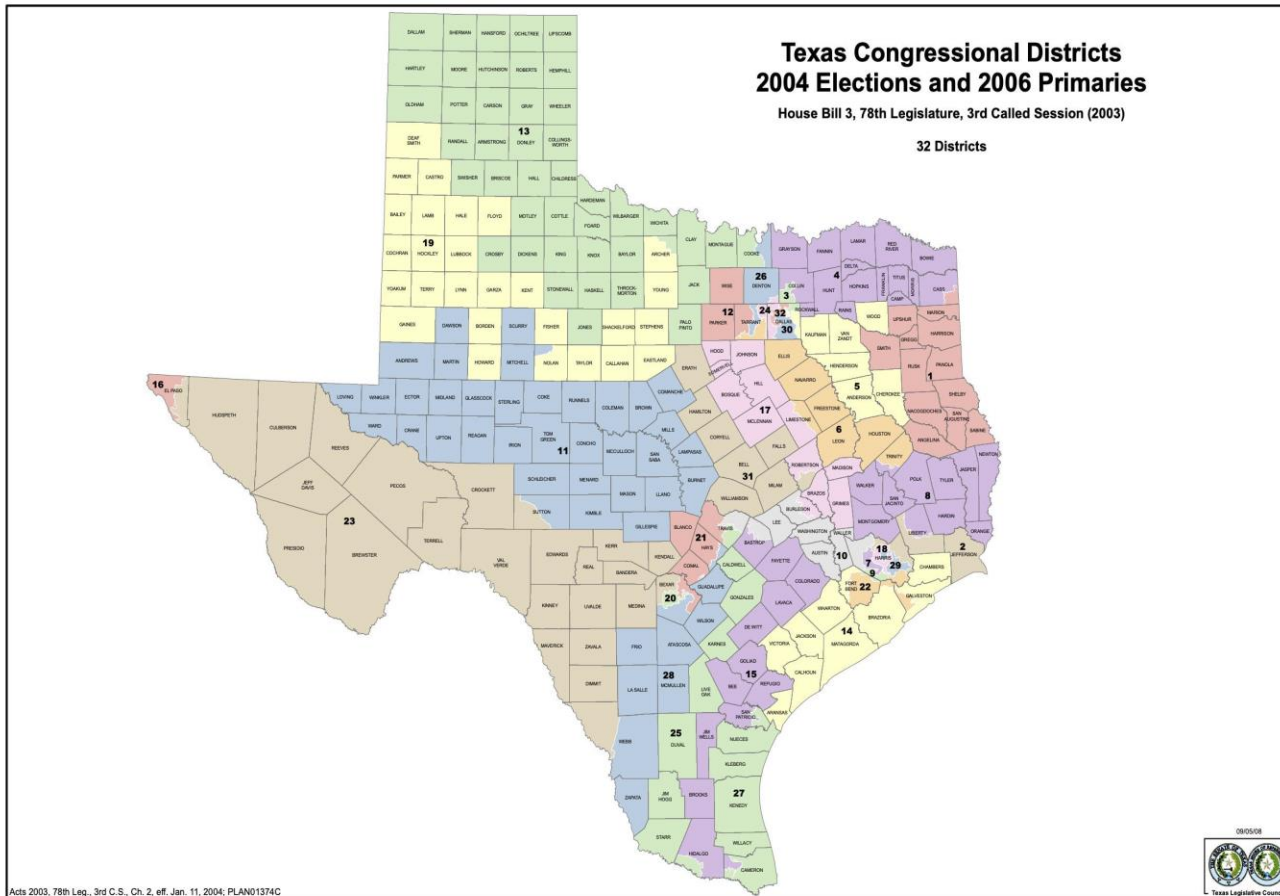
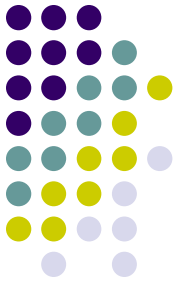
League of United Latin American Citizens v. Perry, 548 U.S. 399 (2006).

Section 2 violation existed where State “cracked” / broke apart a majority-minority Latino district to protect an incumbent congressman from the growing dissatisfaction of the cohesive and politically active Latino community in the district.

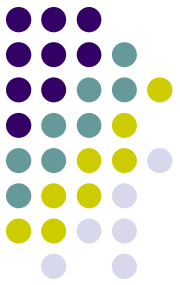
State purported to compensate cracking by creating an entirely new district that combined two groups of Latinos, hundreds of miles apart, that represent different communities of interest.

Did not meet compact requirement of Section 2 and did not remedy Section 2 violation in original, cracked district.





Case: Voting Rights Act – Section 2 Violation Not Found

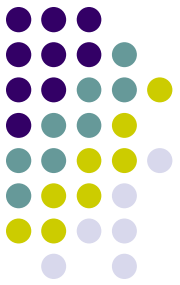


- *Hall v. Virginia*, 385 F.3d 421 (4th Cir. 2004): Plaintiffs could not establish black voters were denied an equal opportunity to elect candidate of their choice when redistricting plan reduced voting-age population of blacks in their district from 37.8% to 32.3%.
 - Plaintiffs “could only form a minority of the voters in the Fourth District even before the Plan’s enactment, the ability to elect candidates of their own choice was never within plaintiffs’ grasp.” at 430.
 - Black voters had no less opportunity in comparison to other voters of similar strength to elect a candidate of their choice.
 - Fourth Circuit found Voting Rights Act did not protect a coalition or crossover district.

(NOTE: Supreme Court in 2016 held ***total population***, not just voting-age population, may be used in districting. November 8, 2016 general election. *Evenwel v. Abbott*, __ U.S. __, 136 S. Ct. 1120, 194 L. Ed. 2d 291 (2016).)

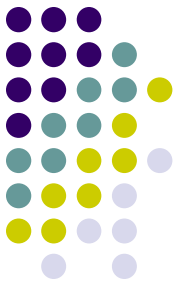
Case: Voting Rights Act –

Section 2: Violation Not Found



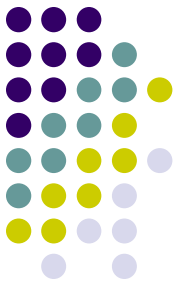
- ***League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006).**
Court rejected challenge to district around Dallas area of Texas, where blacks had constituted 25% of population in district. Plaintiffs alleged changed district diluted their influence.
 - Even if voted as a block they could at best influence the election; recognizing such a claim would extend scope of Section 2 and inject race into every redistricting plan.
 - Section 2 of Voting Rights Act did not require the creation of influence district.
 - Plurality decision.
- ***Bartlett v. Strickland*, 556 U.S. 1, 129 S.Ct. 1231 (2009).**
 - Court found a minority group must constitute a *numerical majority* (50% or more) in a compact geographical area in order for Section 2 to require a legislative district to be created or protected to prevent dilution of voting strength.
 - Does not apply to cases in which there is intentional discrimination against a minority.
 - Plurality decision.

14th Amendment Equal Protection Clause: Prohibits Racial Discrimination in Districting



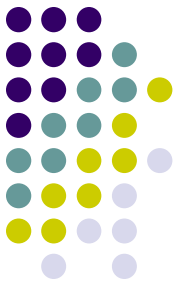
- Prohibits intentional discrimination on the basis of race.
- **Race may be *a* factor, but not the *predominant* factor:**
- If traditional, race-neutral districting principles are **subordinated** to race, courts will apply ***STRICT SCRUTINY*** to the district plan: Government must prove a “compelling government interest” and the plan must be narrowly tailored, using the least restrictive alternative, to meet that interest.
- Strict scrutiny triggered:
 - Through direct evidence, if evidence shows race was intentionally used to draw lines; or
 - Circumstantial evidence, where a districting plan is so irregular it can only be viewed as an effort to segregate on the basis of race.

14th Amendment Equal Protection Clause: Compliance with Section 2 of Voting Rights Act (District Lines Drawn Using Race) as Compelling Government Interest



- Compliance with Section 2 the Voting Rights Act is a compelling government interest (permitting race as predominant factor), but government must have **strong evidence of liability** under Section 2 of the Voting Rights Act. (must be able to show 3 preconditions and absent district plan, “totality of circumstances” would show system not open to plaintiff’s minority group)
- Even then, race may not be a predominant factor **substantially more than is reasonably necessary to avoid liability under Voting Rights Act.**
- To be “narrowly tailored” to comply with Voting Rights Act, government must be able to show how plan as drawn remedied non-compliance with Voting Rights Act.

Case: 14th Amendment – Equal Protection Clause – Racial Gerrymandering: District Shape Triggered Strict Scrutiny



- North Carolina’s districting deemed “so bizarre on its face that it is unexplainable on grounds other than race” *Shaw v. Reno*, 509 US 630 (1993).

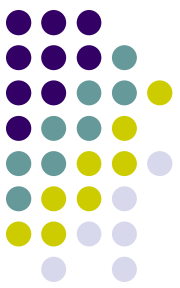
ONE DISTRICT – “a Rorschach ink blot test” / “a bug splattered on a windshield”

ANOTHER DISTRICT: “snakelike”

- 160 miles long and for much of its length no wider than an interstate corridor, winding “in snakelike fashion through tobacco country, financial centers, and manufacturing until it gobbles in enough enclaves of black neighborhoods”
- “if you drove down the interstate with both car doors open, you’d kill most of the people in the district”

Districts were created in an attempt to create majority-minority districts / comply with Voting Rights Act; **court withheld judgment in this case on whether that Section 2 compliance was a compelling state interest.** (Even if it was, these districts as drawn were not narrowly tailored to meet it.)

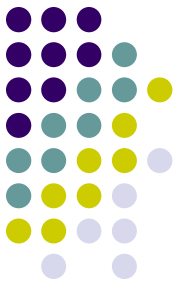
Case: 14th Amendment – Equal Protection Clause – Racial Gerrymandering: District shape triggering strict scrutiny, lines not “narrowly tailored” to meet “compelling government interest”



The Texas “sacred Mayan Bird” and “jigsaw puzzle” districts:

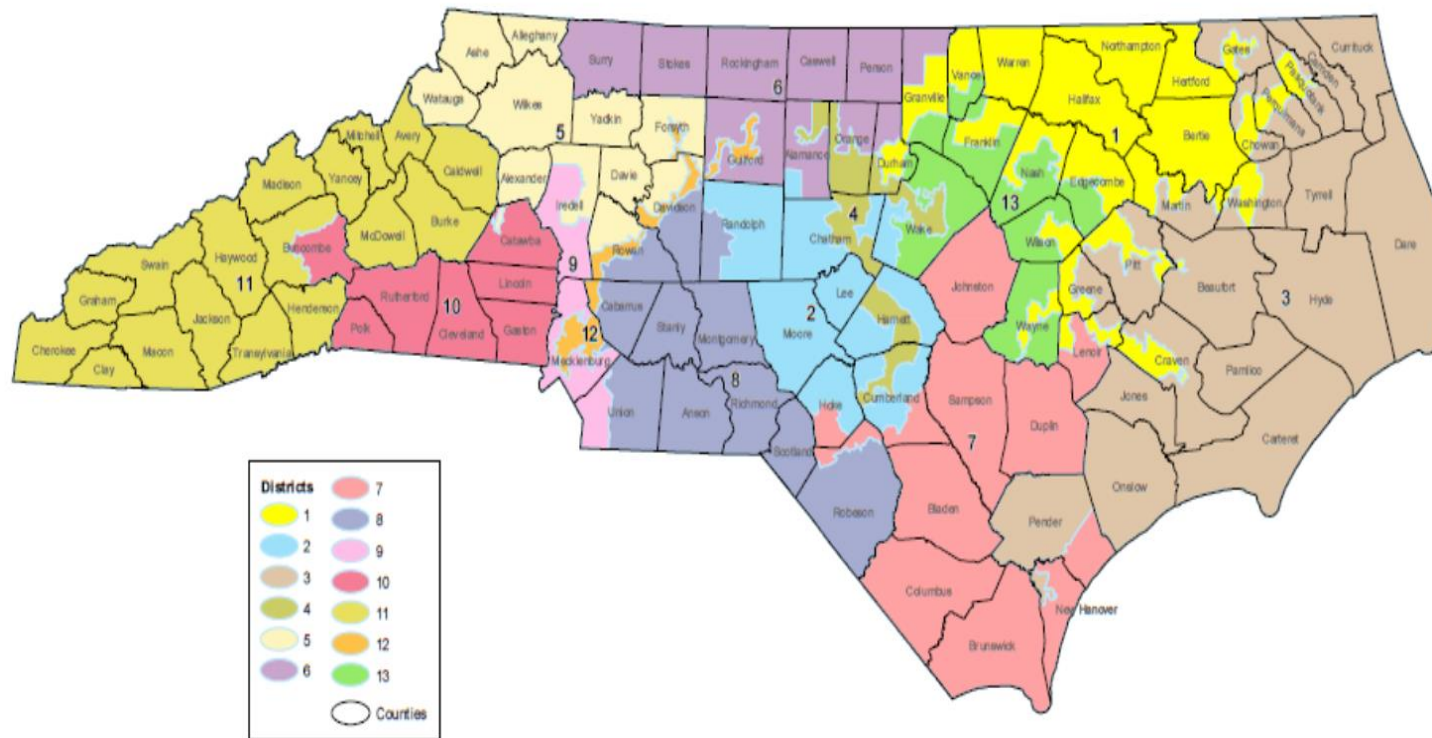
***Bush v. Vera*, 517 U.S. 952 (1996)**

- Supreme Court held congressional districts unconstitutional because race was the predominant factor in drawing challenged districts.
- The decision to create a “majority-minority” district to comply with Voting Rights Act was one of “several essential ingredients” to why race was predominant and therefore strict scrutiny applied:
 - Used computer program that provided “**block by block racial data**”, and correlation between same and boundaries was “nearly perfect”
 - No apparent attempt to compile or refer to data re: communities of interest; disregarded city limits
- Not narrowly tailored to comply with Voting Rights Act – district was so bizarrely shaped, minority group was not compact, one of the preconditions to protection under Voting Rights Act.

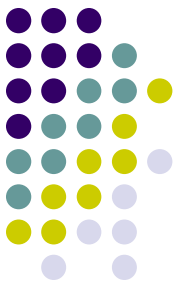


Cooper v. Harris

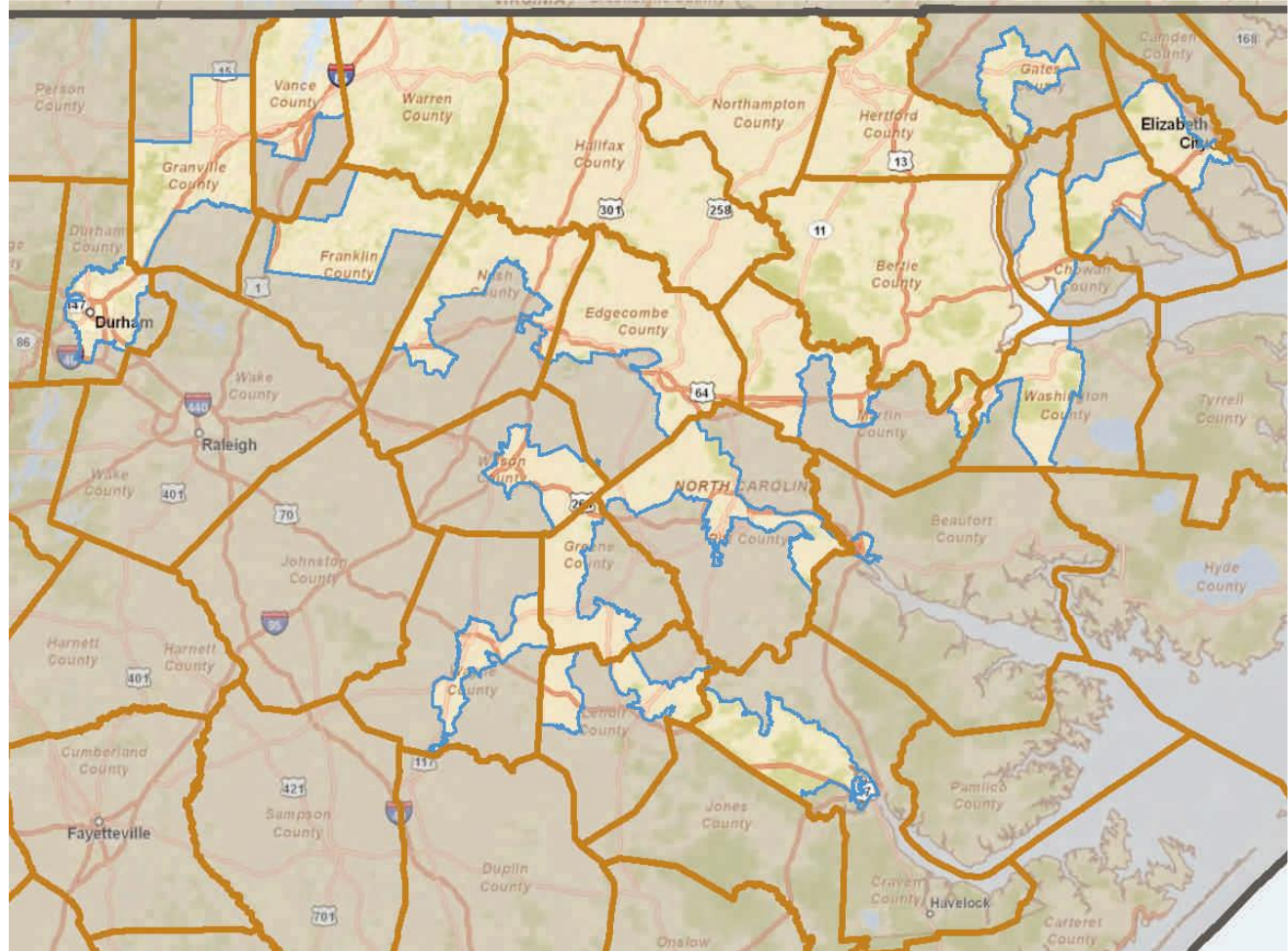
- Congressional districting by NC legislature
- Race was the predominant factor, subordinated other traditional districting principles.
- Strict scrutiny applied. State could not show strong evidence of liability under Voting Rights Act.

[*1483] [\[**869\]](#) APPENDIX TO OPINION OF THE COURT

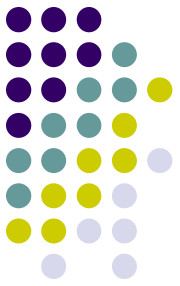
Cooper v. Harris – District 1



“It weaves through 24 counties, and contains only five whole counties.”

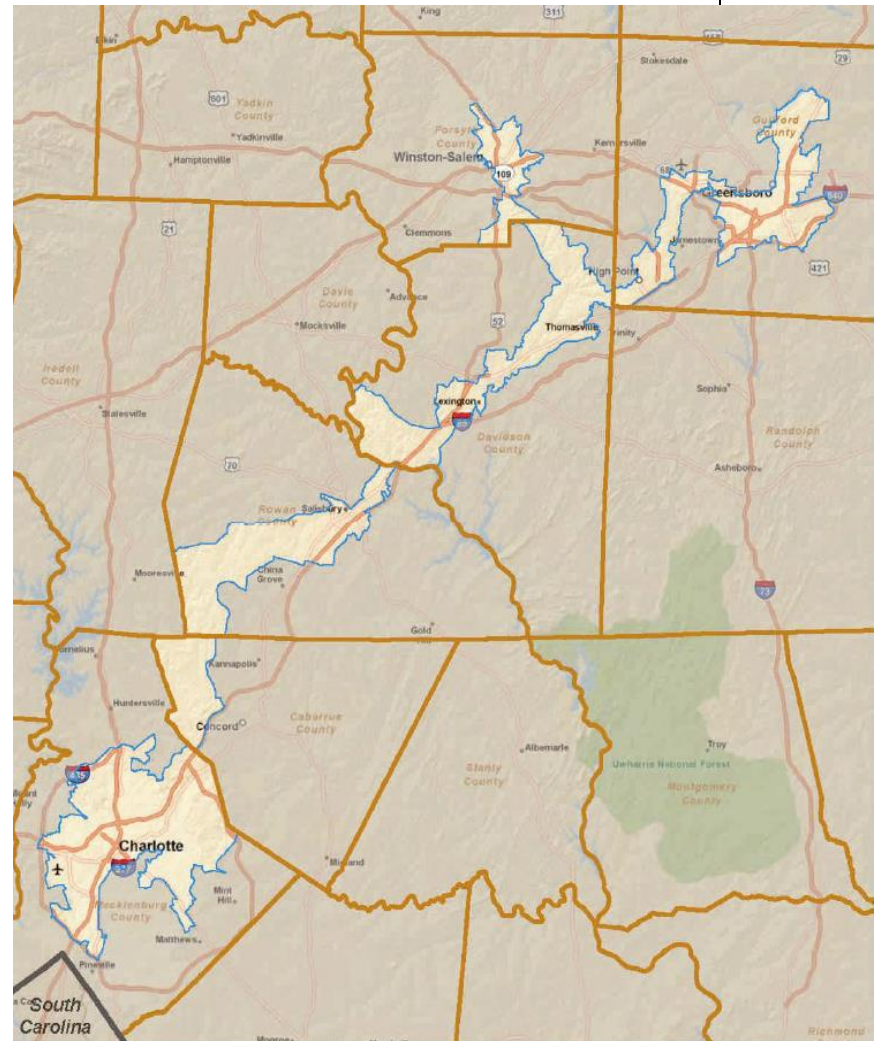


Cooper v. Harris – District 12

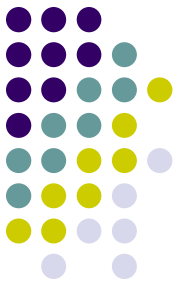


NOT compact:

“The district is 120 miles long but only 20 miles wide at its widest part. It includes chunks of Charlotte and Greensboro connected by a thin strip—averaging only a few miles wide—that traces Interstate 85. A person traveling on Interstate 85 between the two cities would exit the district multiple times, as the district’s boundaries zig and zag to encircle African-American communities.”

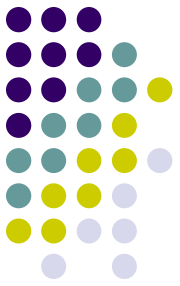


14th Amendment Equal Protection Clause: Political Gerrymandering



- *Rucho v. Common Cause*: Federal courts will no longer entertain claims of political gerrymander under 14th Amendment Equal Protection Clause
 - Courts never been able to develop a clear test to apply
 - Constitution empowers Congress to rein in political gerrymandering (did in past; routinely introduce bills to do so)
 - Not a controversy to be resolved in judicial arena, but rather presents a “nonjusticiable political question”
- Keep in context: Charter’s requirements; equal population requirements; and traditional redistricting criteria.

REDISTRICTING ENSURES EVERY PERSON HAS A VOICE:



- No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges that right.

Reynolds v. Sims, 377 U.S. 533, 560 (1964).

- The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing -- one person, one vote.

Gray v. Sanders, 372 U.S. 368, 379 (1963).