

THE LAW OF REDISTRICTING, DOJ, AND CAUTIONARY TALES

By Bruce L. Adelson, Esq.

Michigan Constitution Article IV, § 6

- Districts shall be of equal population as mandated by the United States constitution, and shall comply with the voting rights act and other federal laws.
- (b) Districts shall be geographically contiguous. Island areas are considered to be contiguous by land to the county of which they are a part.
- (c) Districts shall reflect the state's diverse population and communities of interest. Communities of interest may include, but shall not be limited to, populations that share cultural or historical characteristics or economic interests. Communities of interest do not include relationships with political parties, incumbents, or political candidates.
- (d) Districts shall not provide a disproportionate advantage to any political party. A disproportionate advantage to a political party shall be determined using accepted measures of partisan fairness.
- (e) Districts shall not favor or disfavor an incumbent elected official or a candidate.
- (f) Districts shall reflect consideration of county, city, and township boundaries.
- (g) Districts shall be reasonably compact.

Redistricting, DOJ, & Cautionary Tales

“It is common ground that state election-law requirements... may be superseded by federal law.”

Bartlett v. Strickland 556 U. S. 1, 7 (2009)

And

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

Redistricting, DOJ, & Cautionary Tales

7th out of 7 criteria in priority order

(g) Districts shall be reasonably compact.

However....

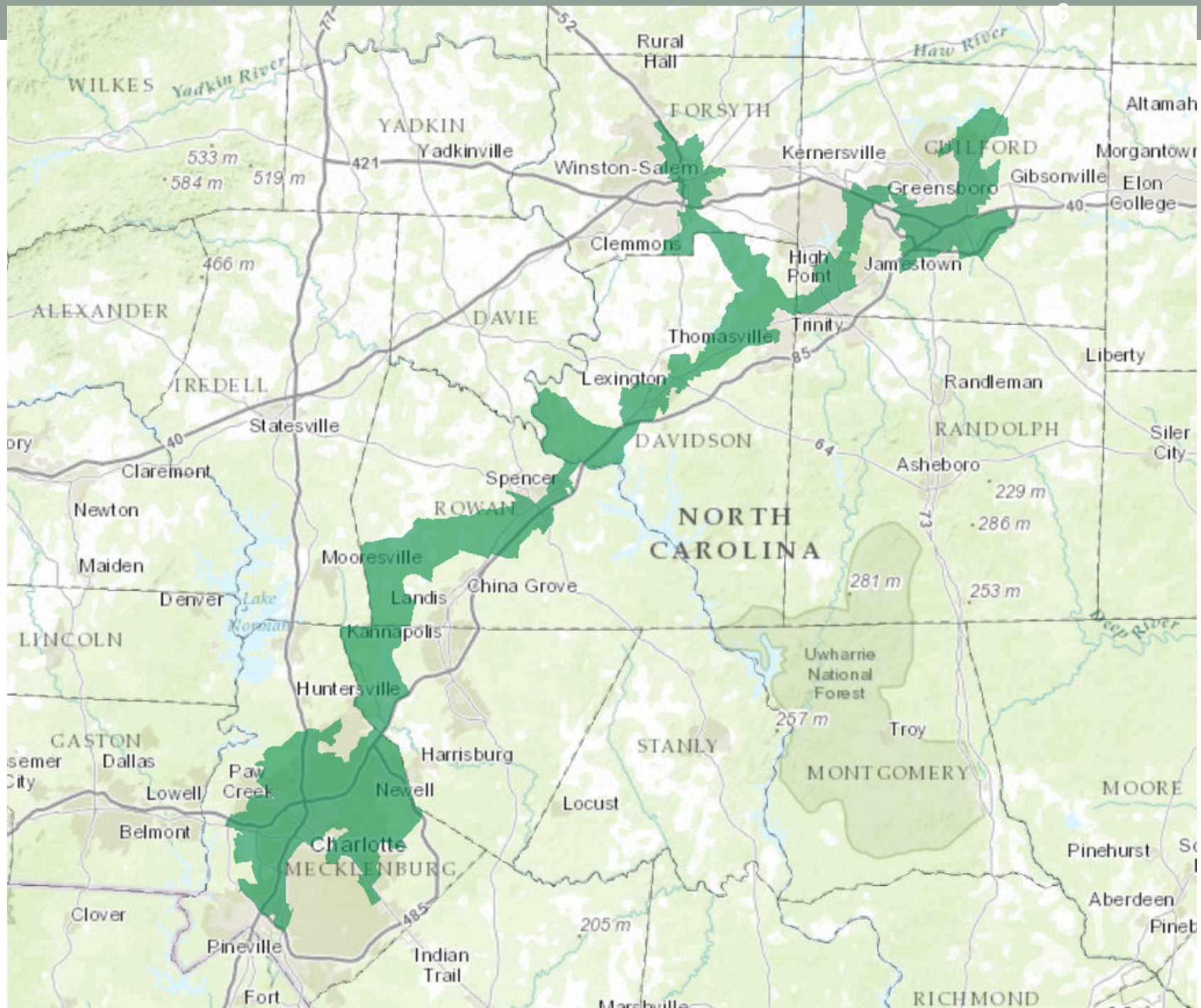
“A State cannot remedy a §2 violation through the creation of a noncompact district.”

LEAGUE OF UNITED LATIN AMERICAN
CITIZENS(LULAC) v. Perry, 548 U.S. 399 (2006)

Redistricting, DOJ, & Cautionary Tales

The lower court found the “serpentine” 12th to be so “contorted and contrived” by the legislature that it may be the least geographically compact of all the nation’s many gerrymandered districts.

2016



Redistricting, DOJ, & Cautionary Tales

Supreme Court struck down District 12. The design of that "serpentine" district, we held, was nothing if not race-centric, and could not be justified as a reasonable attempt to comply with the VRA.

Shaw v. Reno (Shaw II), 517 U.S. 899, 116 S.Ct. 1894, 135 L.Ed.2d 207.



Redistricting, DOJ, & Cautionary Tales

Districts shall reflect the state's diverse population and communities of interest

“A neighborhood, community, or group of people who would benefit from being maintained in a single district because of shared interests, views, policy concerns, or characteristics.”



Redistricting, DOJ, & Cautionary Tales

A district that “reaches out to grab small and apparently isolated minority communities” is not reasonably compact.

The recognition of nonracial communities of interest reflects the principle that a State may not “assum[e] from a group of voters’ race that they ‘think alike, share the same political interests, and will prefer the same candidates at the polls.’”

LEAGUE OF UNITED LATIN AMERICAN CITIZENS(LULAC) v. Perry, 548 U.S. 399 (2006) Shaw v. Reno, 509 U. S. 630, 647 (1993).

Redistricting, DOJ, & Cautionary Tales

“We also accept that in some cases members of a racial group in different areas—for example, rural and urban communities—could share similar interests and therefore form a compact district if the areas are in reasonably close proximity.”

LULAC v. Perry



Redistricting, DOJ, & Cautionary Tales

Dilutive and discriminatory effect

Demographics necessary for your COI overlays

What is legal impact of including each COI?

How do you handle **DIVERSE** requirement of Third Criteria?

Redistricting, DOJ, & Cautionary Tales

1. the state of being diverse; variety.
2. the practice or quality of including or involving people from a range of different social and ethnic backgrounds and of different genders, sexual orientations, etc.

Oxford Dictionary

Detroit — Keep voting districts diverse but don't gerrymander them to fracture minority communities and weaken their power, representation and resources, residents told a redistricting panel Thursday night.

Detroit News, June 17, 2021

Redistricting, DOJ, & Cautionary Tales

A “community of interest” is just a group of people with a common interest (usually, a common interest that legislation might benefit). [Kansas](#)’ 2002 guidelines offered a fairly typical definition: “[s]ocial, cultural, racial, ethnic, and economic interests common to the population of the area, which are probable subjects of legislation.”



Redistricting, DOJ, & Cautionary Tales

Requirement to follow county boundaries may be based on assumption that citizens within a county share some common interests relevant to legislative representation.

Similarly, compactness requirement may be based on a similar assumption that people who live close to each other have shared legislative ends.

Computer-drawn map to optimize compactness



Redistricting, DOJ, & Cautionary Tales

But each of these proxies may also be imperfect: people with common interests don't generally look to geometric shapes — or even strict political lines — when they consider where they want to live.

Considering communities of interest directly helps move beyond the proxy.



Redistricting, DOJ, & Cautionary Tales

The Supreme Court has held that Constitution requires skeptical look at redistricting plans when race is the “predominant” reason for putting a significant number of people in or out of a district.

Fourteenth Amendment forbids use of race as predominant district boundary-drawing factor.

ALABAMA LEGISLATIVE BLACK CAUCUS ET AL. v.
ALABAMA ET AL. (2015)

Redistricting, DOJ, & Cautionary Tales

That Alabama expressly adopted and applied a policy of prioritizing mechanical racial targets above all other districting criteria (save one-person, one-vote) provides evidence that race motivated the drawing of particular lines in multiple districts in the State.

The record makes clear that both the District Court and the legislature relied heavily upon a mechanically numerical view



Redistricting, DOJ, & Cautionary Tales

This does not mean that race can't be considered, or that when districts drawn primarily based on race are invalid. It means that there has to be a really good reason for subordinating all other districting considerations to race. Court has repeatedly implied that one such compelling reason is compliance with the Voting Rights Act

Compelling, legally acceptable reason for use of race in redistricting is compliance with the Constitution and Voting Rights Act: Harris v Arizona Independent Redistricting Commission, 136 S. Ct. 1301, 194 L. Ed. 2d 497 (2016).

Redistricting, DOJ, & Cautionary Tales

State must establish that it had "good reasons" to think that it would transgress the Act if it did not draw race-based district lines. That "strong basis" (or "good reasons") standard gives States "breathing room" to adopt reasonable compliance measures that may prove, in perfect hindsight, not to have been needed. *Bethune–Hill*, 580 U.S., at ———, 137 S.Ct., at 802

Cooper v. Harris, 137 S. Ct. 1455, 197 L.Ed.2d 837 (2017)

Redistricting, DOJ, & Cautionary Tales

If a State has good reason to think that all the "Gingles preconditions" are met, then so too it has good reason to believe that § 2 requires drawing a majority-minority district. See *Bush v. Vera*, 517 U.S. 952, 978, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996) (plurality opinion).

But if not, then not.



Redistricting, DOJ, & Cautionary Tales

Here, electoral history provided no evidence that a § 2 plaintiff could demonstrate the third Gingles prerequisite—effective white bloc-voting.

For most of the twenty years prior to the new plan's adoption, African–Americans had made up less than a majority of District 1's voters; the district's BVAP usually hovered between 46% and 48%.

Yet throughout those two decades, as the District Court noted, District 1 was "an extraordinarily safe district for African–American preferred candidates."

Redistricting, DOJ, & Cautionary Tales

Meaningful number of white voters joined a politically cohesive black community to elect that group's favored candidate. In the lingo of voting law, District 1 functioned, election year in and election year out, as a "crossover" district, in which members of the majority help a "large enough" minority to elect its candidate of choice.

Cooper v. Harris, 137 S. Ct. 1455, 197 L.Ed.2d 837 (2017)



Redistricting, DOJ, & Cautionary Tales

To have a strong basis in evidence to conclude that § 2 demands race-based steps, the State must carefully evaluate whether a plaintiff could establish the Gingles preconditions—including effective white bloc voting—in a new district created without those measures.

We see nothing in the legislative record that fits that description.

North Carolina's belief that it was compelled to redraw District 1 (a successful crossover district) as a majority-minority district rested not on a "strong basis in evidence," but instead on a pure error of law.

Redistricting, DOJ, & Cautionary Tales

In practice, no racial predominance means that those drawing lines should avoid letting racial considerations “predominate,” by considering other factors at the same time.

This is not difficult

There are many considerations that go into deciding where to draw a district line: residential clustering of groups of voters with common interests, locations of municipal boundaries or physical geographic features, or desire to keep district relatively close together, or Mich. Const. Art IV, Section 6: Districts shall reflect the state's diverse population and communities of interest

Redistricting, DOJ, & Cautionary Tales

Are Arabs and Iranians white?
Census says yes, but many disagree

LA TIMES

MARCH 28, 2019



Redistricting, DOJ, & Cautionary Tales

- When asked to mark her race, Damavandi will encounter options for white, black, Asian, American Indian and Native Hawaiian — but nothing that she believes represents her family's Iranian heritage. She will either have to choose white, or identify as “some other race.”
 - “It erases the community,” she said.
- Roughly 3 million people of Southwest Asian, Middle Eastern or North African descent live in the United States, according to a Los Angeles Times analysis of U.S. Census Bureau data. No county is home to more of these communities than Los Angeles, where more than 350,000 people can trace their roots to a region that stretches from Mauritania to the mountains of Afghanistan.

Redistricting, DOJ, & Cautionary Tales

Source: NHGIS, Times Analysis

* New York City combines New York, Bronx, Kings, Queens and Richmond counties

Rank	County	Population
1	L.A. County, CA	389,905
2	New York City, NY	163,165
3	Wayne County, MI	102,350
4	Cook County, IL	101,300
5	Orange County, CA	92,354

Redistricting, DOJ, & Cautionary Tales

This action arises out of the general election that took place in Hamtramck, Michigan, on November 2, 1999.

In that. election, more than forty dark-skinned or Arab-American citizens were required to take an oath as a condition to voting, a requirement that was not imposed on white voters. Because the Attorney General finds that this race-based prerequisite violates federal laws designed to enforce the voting guarantees of the Fourteenth and Fifteenth Amendments, the United States of America brings this action

United States of America v. City of Hamtramck et. al. (2000)

Redistricting, DOJ, & Cautionary Tales

- Bangladesh is noted for the ethnic homogeneity of its population. Over 98 percent of the people are Bengalis, predominantly Bangla-speaking peoples. People speaking Arabic, Persian, and Turkic languages also have contributed to the ethnic characteristics of the region.
- A member of the Indo-European family of languages, Bangla (sometimes called Bengali) is the official language of Bangladesh. Bangladeshis closely identify themselves with their national language.
- Library of Congress

Redistricting, DOJ, & Cautionary Tales

- American Community Survey can be a very useful data source for Voting Rights Act compliance and certain preliminary map-drawing tasks.
- The VRA requires states to draw districts that give communities of color an equal opportunity to elect their candidates of choice. Part of that process involves looking to see whether particular racial groups are sufficiently large to sustain districts. The ACS estimates demographic characteristics helpful to making this determination. But, even in this context, the ACS serves as just one component of a broader inquiry that relies on numerous data sources, including the census.

Redistricting, DOJ, & Cautionary Tales

- ACS can be used to identify areas with changing populations. **It can also be a helpful tool in defining communities of interest given the level of racial, ethnic, social, and economic detail that it provides.**
- Using the ACS could make for a smoother redistricting process that produces fair maps once census data are available.

Redistricting, DOJ, & Cautionary Tales

Minority-Coalition Districts:

A minority-coalition district is a type of majority-minority district in which two or more minority groups combine to form a majority in a district. A district that is 25% African-American, 20% Latino and 6% Asian American is a majority-minority district, but it is not a single group majority district.

The Supreme Court has not ruled whether VRA Section 2 requires coalition districts.

Redistricting, DOJ, & Cautionary Tales

Crossover Districts: Minorities do not form a numerical majority but can still reliably control outcome of the election with some non-minority voters “crossing over” to vote with the minority group.

Supreme Court in 2009 held that Voting Rights Act does not require crossover districts



Redistricting, DOJ, & Cautionary Tales

Influence Districts: Large number of minority voters but fewer than would allow minority group voters to control the result of the election when voting as a bloc.

Number or proportion necessary to allow a minority group to influence or shape an election outcome is determined by a review and analysis of past Michigan elections.

Influence electoral outcomes through coalitions but not determine outcome

Redistricting, DOJ, & Cautionary Tales

Think about driving a car. It's important to keep to the speed limit. If you obsess over your speed, and stare only at the speedometer, subordinating every other stimulus, you're likely to crash.

But if you pay attention to the road, and surrounding traffic, and the directions to your destination, and signaling when you change lanes, and the car temperature, and the amount of gas you've got left, and the weather, and the music on the radio — and also check in on your speed from time to time — then your attention to the speed doesn't "predominate."

Redistricting, DOJ, & Cautionary Tales

Rural Districts

Urban Districts



Redistricting, DOJ, & Cautionary Tales

Area	Number of 2010 Urban Areas	Population		Percentage of Total Population	
		2010	2000	2010	2000
United States	3,573	308,745,538	281,421,906		
Urban		249,253,271	222,360,539	80.7%	79.0%
Urbanized Areas	486	219,922,123	192,323,824	71.2%	68.3%
Urban Clusters	3,087	29,331,148	30,036,715	9.5%	10.7%
Rural		59,492,267	59,061,367	19.3%	21.0%

Redistricting, DOJ, & Cautionary Tales

For 2010 Census, an urban area will comprise a densely settled core of census tracts and/or census blocks that meet minimum population density requirements, along with adjacent territory containing non-residential urban land uses as well as territory with low population density included to link outlying densely settled territory with the densely settled core.

The Census Bureau identifies two types of urban areas:

- Urbanized Areas (UAs) of 50,000 or more people;
- Urban Clusters (UCs) of at least 2,500 and less than 50,000 people.

“Rural” encompasses all population, housing, and territory not included within an urban area.

Redistricting, DOJ, & Cautionary Tales

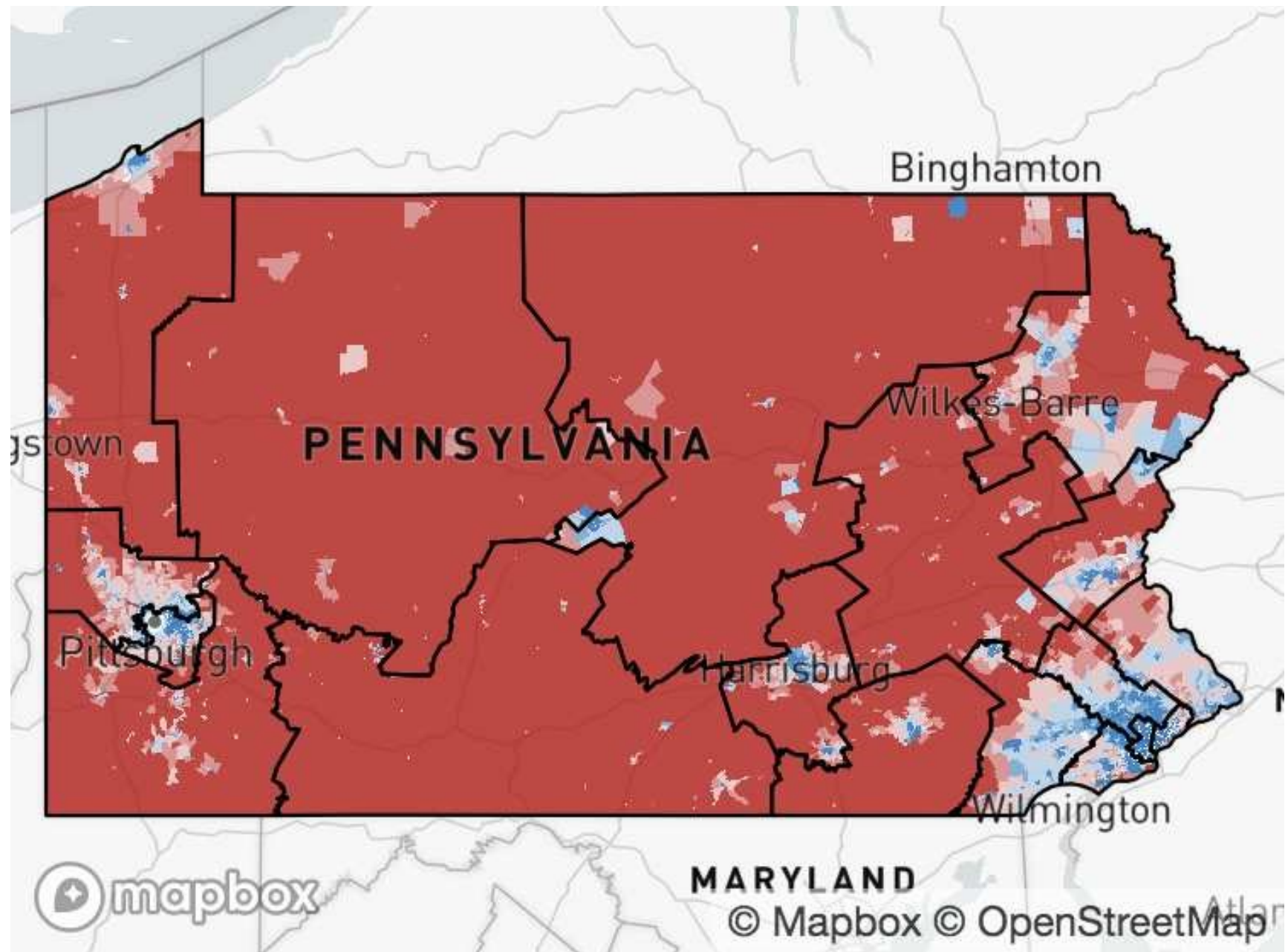
Many rural districts will turn out to have fewer residents than the target population and will need to expand in geographic size to take in enough people to reach the target.



Redistricting, DOJ, & Cautionary Tales

- An issue that highlights the divide between rural and urban interests is the environment, according to Elizabeth Bennion, professor of political science at Indiana University South Bend. Residents of the metropolitan area, for example, are concerned about pollution and confined animal feeding operations while farmers have concerns about regulations affecting their ability to grow food and make a living.

The Indiana Lawyer, May 2021



Redistricting, DOJ, & Cautionary Tales

Partisan Fairness

Districts shall not provide a disproportionate advantage to any political party. A disproportionate advantage to a political party shall be determined using accepted measures of partisan fairness

Redistricting, DOJ, & Cautionary Tales

“The dissent proposes using a State’s own districting criteria as a neutral baseline from which to measure how extreme a partisan gerrymander is. The dissent would have us line up all the possible maps drawn using those criteria according to the partisan distribution they would produce. Distance from the “median” map would indicate whether a particular districting plan harms supporters of one party to an unconstitutional extent.”

RUCHO ET AL. v. COMMON CAUSE ET AL.

2019

Redistricting, DOJ, & Cautionary Tales

“In the District Court, the plaintiffs’ case rested largely on a particular measure of partisan asymmetry—the “efficiency gap” of wasted votes. That measure was first developed in two academic articles published shortly before the initiation of this lawsuit. See Stephanopoulos & McGhee, Partisan Gerrymandering and the Efficiency Gap, 82 U. Chi. L. Rev. 831 (2015); McGhee, Measuring Partisan Bias in Single-Member District Electoral Systems, 39 Leg. Studies Q. 55 (2014)”

GILL ET AL. v. WHITFORD ET AL. 2018

Redistricting, DOJ, & Cautionary Tales

“Efficiency gap captures in a single number all of a district plan’s cracking and packing.”

That number is calculated by subtracting the statewide sum of one party’s wasted votes from the statewide sum of the other party’s wasted votes and dividing the result by the statewide sum of all votes cast, where “wasted votes” are defined as all votes cast for a losing candidate and all votes cast for a winning candidate beyond the 50% plus one that ensures victory

The larger the number produced by that calculation, the greater the asymmetry between the parties in their efficiency in converting votes into legislative seats.

Redistricting, DOJ, & Cautionary Tales

In LULAC, Justice Kennedy commented on a proposal to adopt a partisan-bias standard, which would compare how the two major parties “would fare hypothetically if they each (in turn) had received a given percentage of the vote.” 548 U.S. at 419 (opinion of Kennedy, J.) (internal quotation marks omitted).

Justice Kennedy explained that, [e]ven assuming a court could choose reliably among different models of shifting voter preferences, we are wary of adopting a constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs. Presumably such a challenge could be litigated if and when the feared inequity arose.”

Redistricting, DOJ, & Cautionary Tales

Professor Gaddie's "S" curves and Professor Mayer's swing analysis, like a partisan-bias analysis, depend upon a hypothetical state of affairs: they assume a uniform increase or decrease in vote share across all districts—something that does not occur in actual elections. Here, however, the predictive work of the professors is combined with the results of two actual elections in which the feared inequity did arise.

Whitford v. Gill (US District Court/Western Dist. Of Wisc.)
2016



Redistricting, DOJ, & Cautionary Tales

A cautionary tale....

Americans with Disabilities Act discrimination in health care case.

Deaf parents brought their young children to hospital for non-emergent care

Parents claimed hospital did not provide them with effective communications.

Redistricting, DOJ, & Cautionary Tales

Parents testified about their concern for their children.

We subpoenaed parents' texts and emails.

During one medical examination of their children, parents texted each other about the money they could win in a lawsuit they were planning.

Texted each other about possible lawyers they could retain

Redistricting, DOJ, & Cautionary Tales

Jury trial set

We planned to introduce texts as evidence to rebut parents' claims that they were anxious about children's health. Relevant to counter claims for intentional discrimination damages

Won the case without a trial.

Redistricting, DOJ, & Cautionary Tales

Be mindful of what you say, write, text, post on social media, email.....

All is discoverable in a lawsuit



Redistricting, DOJ, & Cautionary Tales



