

## LAW WEEK 2018 CURRICULUM

### *Current Events that May Impact Your Right to Vote*

1. Each of you has been assigned a classroom at a specific high school. The schedule you were provided has contact information for the teacher. Please make contact with your assigned teacher prior to the presentation (this is also a good time to find out about class size, and any other specifics of interest to you). Be creative and interactive with your presentations. The discussion questions and classroom demonstrations and exercises at the end of the materials are just suggestions. Once you touch base with the teacher, feel free to create whatever format you think will be most engaging.
2. Most of you will present in pairs. Please coordinate with your co-presenter.
3. You will have approximately 1 hour to present and engage in discussions. Time available may change at each location. Please verify the time available to speak when you make contact with the teacher.
4. You should plan to spend a little time, either at the beginning or the end of the presentation, discussing the legal profession and your personal careers.
5. These materials are presented in an outlined format, but you need not follow that order. A lot of information is provided here; take what you wish, adapt it to fit your presentation, and supplement if you so desire.

On behalf of the Law Week Committee, including Valerie Perdue and Jack Sanford, we would like to thank all of you for participating in Law Week 2018. Proceed and enjoy!

Carmen Sinigiani and Marci Reichbach, SCBA Law Week Co-Chairs &  
Rebecca Gallagher, Sonoma County Office of Education

*A very special thanks to: Susan Demers at the Sonoma County Bar Association for her extraordinary and seamless work behind the scenes to make Law Week happen and to Suzanne Babb, the SCBA Law Week Chair for the past several years.*

# *Current Events that May Impact Your Right to Vote*

## **I. Introduction**

Democracy depends on people voting.

In addition to racial minorities and women, young people did not always have the right to vote.

During World War II, President Franklin D. Roosevelt lowered the minimum age for the military draft age to 18, at a time when the minimum voting age (as determined by the individual states) had historically been 21. “Old enough to fight, old enough to vote” became a common slogan for a youth voting rights movement, and in 1943 Georgia became the first state to lower its voting age in state and local elections from 21 to 18.

The movement to lower the voting age did not gain significant traction, however, until the late 1960s when the Vietnam War draft sent people to war who lacked the right to vote. In 1970, when Congress passed a bill extending and amending the Voting Rights Act of 1965, it contained a provision that lowered the voting age to 18 in federal, state and local elections. But in the 1970 case *Oregon v. Mitchell*, the U.S. Supreme Court held that Congress did not have the right to regulate the minimum age in State and local elections, but only in federal elections. Even the question about Congress’s authority to regulate federal elections was a divisive issue for the Supreme Court: the vote was 5-4 that Congress *could* set requirements for voting in *federal* elections, and a different 5-4 majority held that Congress *could not* set requirements for voting in *local and state* elections.

Following that case, support built up for a Constitutional amendment that would set a uniform national voting age of 18 in all elections.

On March 10, 1971, the U.S. Senate voted unanimously in favor of the proposed amendment. After an overwhelming House vote in favor on March 23, the 26th Amendment went to the states for ratification. In just over two months—the shortest period of time for any amendment in U.S. history—the necessary three-fourths of state legislatures (or 38 states) ratified the 26th Amendment, and President Nixon signed it into law that July.

At a White House ceremony attended by 500 newly eligible voters, Nixon declared: “The reason I believe that your generation, the 11 million new voters, will do so much for America at home is that you will infuse into this nation some

idealism, some courage, some stamina, some high moral purpose, that this country always needs.”<sup>1</sup>

### **So why don't more people vote? Especially younger people?**

Low voter turnout in the United States has confounded politicians, activists and academics seeking to reverse a trend that puts the country behind many of the world's developed nations in participation at the polls.<sup>2</sup>

In August, 2016, the Pew Research Center ranked the U.S. 31st out of 35 countries for voter turnout based on the voting age populace, among the mostly democratic nations that are a part of the Organization for Economic Cooperation and Development.

In recent history, participation in the U.S. has peaked during presidential elections, when the last several decades show about 55 to 60 percent of the eligible electorate will vote. But those numbers trail off during non-presidential years and in primary races. In terms of the youth vote, after a 55.4 percent turnout in 1972, youth turnout steadily declined, reaching 36 percent in the 1988 presidential election. Though the 1992 election of Bill Clinton saw a slight rebound, voting rates of 18- to 24-year-olds remained well behind the turnout of older voters. The 2008 presidential election of Barack Obama saw a voter turnout of some 49 percent of 18- to 24 year-olds, the second highest in history.

Internationally, Belgium had the highest participatory rate in its most recent election at 87 percent, followed by Turkey at 84 percent and Sweden at 82 percent. The study found that compulsory voting often had an impact on voter turnout, which was the case with three of the top five ranked countries, including Belgium and Turkey. While mandatory voting is unlikely to happen in the U.S., some states are looking to improve those statistics, even though many concede the reasons for low voter turnout are both varied and elusive.

Although no one fully understands why voter turnout is so low in the United States, “[a]ccording to interviews with research institutions, advocacy groups and legislators involved in those efforts, restrictive voting laws in some states discourage the electorate from registering to vote. Additionally, they said gerrymandered districts cut across party lines reducing the number of competitive

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<sup>1</sup> <http://www.history.com/topics/the-26th-amendment>

<sup>2</sup> <https://www.pbs.org/newshour/politics/voter-turnout-united-states>. Much of this section is derived from that article.

racism and interest, and disgruntled citizens, fed up with the often contentious nature of politics, can choose not to participate.”<sup>3</sup>

This year’s law week focuses on voter suppression and gerrymandering, offering both a historical perspective and a summary of current events.

## **II. VOTER SUPPRESSION AND THE VOTING RIGHTS ACT: HISTORICAL PERSPECTIVE AND CURRENT EVENTS**

### **A. INTRODUCTION**

Voter suppression is a strategy that places limits on the exercise of the right to vote, with the intent and/or effect of discouraging and preventing individuals from voting. It’s used to influence the outcome of an election. Because the original U.S. Constitution and Bill of Rights did not specify voter eligibility criteria, it was left to the states to determine.

### **B. HISTORY OF VOTER SUPPRESSION**

Most states initially limited voting to property-owning white males. Freed African-American slaves in Delaware, Maryland, and Pennsylvania were also permitted to vote in the late 1770s, and New York in 1777. Some states began to allow women to vote - so long as they owned property or in some cases limited to local elections only. In the mid 1800s, states began taking away the right to vote for African Americans regardless of property ownership.

It was not until passage of the 15<sup>th</sup> Amendment in 1870 after the Civil War which prohibited denying the right to vote based upon “race, color or previous condition of servitude”. Despite the ratification of this Amendment, the Democratic Party regained power and strengthened efforts to suppress African American votes through Jim Crow laws.

#### **1. Jim Crow Laws in General**

Jim Crow Laws is a phrase used to describe laws designed to systematically segregate and discriminate against African Americans and passed in the Democratic-controlled southern states in the late 1800s. These laws included requirements of literacy and comprehension tests, poll taxes, residency requirements, and other prerequisites to voting in order to discourage participation in and deny voting among African Americans. In 1959, the U.S. Supreme Court in *Lassiter v. Northampton*

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<sup>3</sup> *Id.*

*County Board of Elections* upheld a literacy test in North Carolina, stating that since it was applied equally all races, it did not violate the Fourteenth or Fifteenth Amendments. It was not until the passage of the Voting Rights Act of 1965—discussed in greater detail below—that such devices were banned.

The intended impact and result was a drastic reduction in African American voting in the South. In Louisiana, for example, the number of African American voters was 730, or 0.5% of eligible African American voters, despite a majority of the population in Louisiana being African American. These laws were passed in spite of the 15<sup>th</sup> Amendment and further intimidation and violence was used against African Americans that attempted to exercise their right to vote. In 1940 only 3% of voting-age African Americans in the south were registered to vote.

## 2. Mississippi as a Case Study

In 1890, Mississippi held a convention to write a new state constitution to replace the one in force since Reconstruction. The white leaders of the convention were clear about their intentions. "We came here to exclude the Negro," declared the convention president. Because of the 15th Amendment, they could not ban blacks from voting. Instead, they wrote into the state constitution a number of voter restrictions making it difficult for most blacks to register to vote.

First, the new constitution required an **annual poll tax**, which voters had to pay for two years before the election. This was a difficult economic burden to place on black Mississippians, who made up the poorest part of the state's population. Many simply couldn't pay it.

But the most formidable voting barrier put into the state constitution was the **literacy test**. It required a person seeking to register to vote to read a section of the state constitution and explain it to the county clerk who processed voter registrations. This clerk, who was always white, decided whether a citizen was literate or not.

The literacy test did not just exclude the 60 percent of voting-age black men (most of them ex-slaves) who could not read. It excluded almost all black men, because the clerk would select complicated technical passages for them to interpret. By contrast, the clerk would pass whites by picking simple sentences in the state constitution for them to explain.

Mississippi also enacted a "**grandfather clause**" that permitted registering anyone whose grandfather was qualified to vote before the Civil War. Obviously, this benefited only white citizens. The "grandfather clause" as well as the other legal

barriers to black voter registration worked. Mississippi cut the percentage of black voting-age men registered to vote from over 90 percent during Reconstruction to less than 6 percent in 1892. These measures were copied by most of the other states in the South.

By the turn of the century, the white Southern Democratic Party held nearly all elected offices in the former Confederate states. The Southern Republican Party, mostly made up of blacks, barely existed and rarely even ran candidates against the Democrats. As a result, the real political contests took place within the Democratic Party primary elections. Whoever won the Democratic primary was just about guaranteed victory in the general election.

In 1902, Mississippi passed a law that declared political parties to be private organizations outside the authority of the 15th Amendment. This permitted the Mississippi Democratic Party to exclude black citizens from membership and participation in its primaries. The "white primary," which was soon imitated in most other Southern states, effectively prevented the small number of blacks registered to vote from having any say in who got elected to partisan offices--from the local sheriff to the governor and members of Congress.

When poll taxes, literacy tests, "grandfather clauses," and "white primaries" did not stop blacks from registering and voting, intimidation often did the job. An African-American citizen attempting to exercise his right to vote would often be threatened with losing his job. Denial of credit, threats of eviction, and verbal abuse by white voting clerks also prevented black Southerners from voting. When all else failed, mob violence and even lynching kept black people away from the ballot box.<sup>4</sup>

### **3. Other Voting Rights Laws and Amendments**

The right to vote was further protected with passage of the 19<sup>th</sup>, 24<sup>th</sup>, and 26<sup>th</sup> Amendments to the Constitution and other laws:

- 19<sup>th</sup> Amendment in 1920 prohibiting its denial based upon sex,
- 24<sup>th</sup> Amendment in 1964 prohibited denying the right to vote in federal elections based upon one's failure to pay taxes, and
- the 26<sup>th</sup> Amendment in 1971 prohibited denying the right to vote based upon age to anyone 18 years of age or older.
- Indian Citizenship Act of 1924 made all Indians born in the United States citizens and thus granting them the right to vote;

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<sup>4</sup> <http://www.crf-usa.org/brown-v-board-50th-anniversary/race-and-voting.html>

- The repeal of the Chinese Exclusion Act gave Chinese immigrants the right to vote.

Despite the passage of these and other laws, including the Voting Rights Act of 1965, the right to vote in the United States continued to be weakened by stringent laws remaining on the books, and in many cases recently enacted, in many jurisdictions that result in discouraging and suppressing voting, primarily among minorities. Recent passage of such laws are in large part due to the 2013 Supreme Court case of *Shelby County v. Holder*, which removed the DOJ's pre-clearance requirement of such laws for jurisdictions with historical records of voter discrimination. That case is discussed in greater detail below.

#### **4. The Voting Rights Act**

The Voting Rights Act of 1965, signed into law by President Lyndon B. Johnson, aimed to overcome legal barriers at the state and local levels that prevented African Americans from exercising their right to vote as guaranteed under the 15th Amendment to the U.S. Constitution. The Voting Rights Act is considered one of the most far-reaching pieces of civil rights legislation in U.S. history.

Its impact on minority representation was immediately felt. In 1965, at the time of the passage of the Voting Rights Act, there were six African-American members of the U.S. House of Representatives and no blacks in the U.S. Senate. By 1971, there were 13 members of the House and one black member of the Senate.<sup>5</sup>

##### **a. Passage of the Voting Rights Act**

After the Civil War, the 15th Amendment, ratified in 1870, prohibited states from denying a male citizen the right to vote based on “race, color or previous condition of servitude.” Nevertheless, in the ensuing decades, various discriminatory practices were used to prevent African Americans, particularly those in the South, from exercising their right to vote.

During the civil rights movement of the 1950s and 1960s, voting rights activists in the South were subjected to various forms of mistreatment and violence. One event that outraged many Americans occurred on March 7, 1965, when peaceful participants in a Selma to Montgomery march for voting rights were met by Alabama state troopers who attacked them with nightsticks, tear gas and whips after they refused to turn back.

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<sup>5</sup> <http://www.history.com/topics/black-history/voting-rights-act>

Some protesters were severely beaten and bloodied, and others ran for their lives. The incident was captured on national television.

In the wake of the shocking incident, Johnson called for comprehensive voting rights legislation. In a speech to a joint session of Congress on March 15, 1965, the president outlined the devious ways in which election officials denied African-American citizens the vote.<sup>6</sup>

The voting rights bill was passed in the U.S. Senate by a 77-19 vote on May 26, 1965. After debating the bill for more than a month, the U.S. House of Representatives passed the bill by a vote of 333-85 on July 9.

Johnson signed the Voting Rights Act into law on August 6, 1965, with Martin Luther King Jr. and other civil rights leaders present at the ceremony.

The act banned the use of literacy tests, provided for federal oversight of voter registration in areas where less than 50 percent of the non-white population had not registered to vote, and authorized the U.S. attorney general to investigate the use of poll taxes in state and local elections.

In 1964, the 24th Amendment made poll taxes illegal in federal elections; poll taxes in state elections were banned in 1966 by the U.S. Supreme Court.

### **b. How Does it Work?**

What kinds of racial discrimination in voting are there, and what does the Voting Rights Act do about them?

The VRA is not limited to discrimination that literally excludes minority voters from the polls. Section 2 of the Act makes it illegal for any state or local government to use election processes that are not equally open to minority voters, or that give minority voters less opportunity than other voters to participate in the political process and elect representatives of their choice to public office. Section 2 makes it illegal for state and local governments to **"dilute" the votes of** racial minority groups, that is, to have an election system that makes minority voters' votes less effective than those of other voters. One of many forms of minority vote dilution is the drawing of district lines that divide minority communities and keep them from putting enough votes together to elect representatives of their choice to public office. Depending on the circumstances, dilution can also result from at-large voting for governmental bodies. When coupled with a long-standing pattern

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<sup>6</sup> <http://www.history.com/topics/black-history/voting-rights-act>

of racial discrimination in the community, these and other election schemes can deny minority voters a fair chance to elect their preferred candidates.

To show vote dilution in these situations, there must be a geographically concentrated minority population and voting that is polarized by race, that is, a pattern in which minority voters and white voters tend to vote differently as groups. It must also be shown that white voters, by voting as a bloc against minority-choice candidates, usually beat those candidates even if minority voters are unified or cohesive at the polls.

Anyone aggrieved by minority vote dilution **can bring a federal lawsuit** to stop it. If the court decides that the effect of an election system, in combination with all the local circumstances, is to make minority votes less effective than white votes, it can order a change in the election system. For example, courts have ordered states and localities to adopt districting plans to replace at-large voting, or to redraw their election district lines in a way that gives minority voters the same opportunity as other voters to elect representatives of their choice.<sup>7</sup>

## C. CURRENT ISSUES

### 1. Erosion of the Voting Rights Act

In 2013, the Supreme Court struck down a portion of the 1965 Voting Rights Act in the case *Shelby County, Alabama v. Holder, Attorney General*.

*Shelby County v. Holder* dealt with a challenge to the certain sections of the Voting Rights Act of 1965 which required certain states that had less than 50% voter turnout and a voting test in place in 1964 or earlier, to obtain authorization from the Attorney General or a three-judge panel before changing their election laws and procedures. The states would be required to prove that any newly enacted law would have the purpose or effect of negatively impacting anyone's right to vote based upon their race or minority status. This section was reenacted routinely from the inception of the Voting Rights Act, until challenged by Shelby County, Alabama. The Supreme Court eventually ruled on the challenge and found section 4 unconstitutional (Section 4 laid out the formula defining which jurisdictions were subject to the pre-authorization requirement of section 5). Section 5 (containing the pre-authorization language) was essentially meaningless without Section 4, resulting in no jurisdictions being required to obtain the clearance before enacting the new voting laws.

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<sup>7</sup> <http://civilrights.findlaw.com/other-constitutional-rights/voting-rights-and-discrimination-faq.html>

More specifically, Section 5 of the Voting Rights Act had authorized the federal government to monitor voting procedures enacted by states, and Section 4 of the Act allowed the federal government to do so in particular states and counties that had a history of attempting to block the non-white vote. In its ruling, the Court's majority opinion pointed to near equal levels of white and black voter registration in the monitored jurisdictions as justification for nullifying this portion of the Voting Rights Act. The justices who disagreed with this position cited the importance of earlier intervention by the U.S. Department of Justice to achieve these high numbers of registrations for African-American voters. The dissenting justices also considered the troubling gap between white and non-white registered voters in other parts of the country as evidence of the need for continued monitoring.

Majority Opinion (excerpted): The Voting Rights Act of 1965 employed extraordinary measures to address an extraordinary problem. Section 5 of the Act required States to obtain federal permission before enacting any law related to voting—a drastic departure from basic principles of federalism. And Section 4 of the Act applied that requirement only to some States—an equally dramatic departure from the principle that all States enjoy equal sovereignty. This was strong medicine, but Congress determined it was needed to address entrenched racial discrimination in voting... There is no denying, however, that the conditions that originally justified these measures no longer characterize voting in the covered jurisdictions... At the same time, voting discrimination still exists; no one doubts that. The question is whether the Act's extraordinary measures, including its disparate treatment of the States, continue to satisfy constitutional requirements...As we put it a short time ago, “the Act imposes current burdens and must be justified by current needs.”...The formula in that section (4b) can no longer be used as a basis for subjecting jurisdictions to preclearance.

Minority/Dissent Opinion (excerpted): The stated purpose of the Civil War Amendments was to arm Congress with the power and authority to protect all persons within the Nation from violations of their rights by the States. In exercising that power, then, Congress may use “all means which are appropriate, which are plainly adapted” to the constitutional ends declared by these Amendments...So when Congress acts to enforce the right to vote free from racial discrimination, we ask not whether Congress has chosen the means most wise, but whether Congress has rationally selected means appropriate to a legitimate end...the Court today terminates the remedy that proved to be best suited to block that discrimination.

(The following is an example from the dissent opinion of the effectiveness of Section 5 of the Voting Rights Act): In 2001, the mayor and all-white five-member Board of Aldermen of Kilmichael, Mississippi abruptly canceled the town’s election after “an unprecedented number” of African-American candidates announced they were running for office. The Department of Justice required an election, and the town elected its first black mayor and three black aldermen (town councilmen).<sup>8</sup>

In **May 2017**, the Supreme Court dealt with two cases related to voting rights. In *Cooper v. Harris*, the Court held that North Carolina had drawn legislative boundaries to limit the influence of African-American voters. (There is more about gerrymandering below.) The Supreme Court also allowed a lower court’s decision to stand that determined North Carolina’s voting procedures to be discriminatory to African-Americans.

These recent cases, along with *Shelby*, raise questions about the relative authority of the states and the federal government when it comes to setting voting procedures within a state.<sup>9</sup> But it seems without question that the consequence of the *Shelby County v. Holder* decision lead to an increase in laws regulating voting across the United States.

## **2. State Laws Implicating Voter Suppression: Types of Voter Suppression and Current Legal Issues**

### **a. Voter I.D. Laws**

Voter I.D. laws require voters to show some form of identification prior to voting or registering to vote. The general premise is that, by having a person “prove” they are who they say they are, the one-vote-per-person system is ensured. Voter I.D. requirements cut down on deceased voters, voters submitting ballots in multiple jurisdictions and/or multiple times, and non-citizen voting. *To date, 34 states have laws that either request or require voters to present I.D.* 18 states require photo I.D.’s. The I.D.’s usually required are state-issued identification cards, drivers’ licenses, or military identification.

Among the states that require identification, some are “**strict**” compliance – meaning, voters without the I.D. required can only cast a provisional ballot – and others are “**non-strict**” and allow the voter to sign a statement attesting to their

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<sup>8</sup> <http://chssp.ucdavis.edu/blog/voting-and-civil-rights?searchterm=Is+Voting+a+Civil+Rights>

<sup>9</sup> <https://drive.google.com/file/d/18qb40kHRAn6feT-Z3O-E4x-cl4i12xyU/view>

identity, or provide some other information identifying them as an eligible voter, and are permitted to cast a regular ballot upon satisfactory showing.

The downside of voter I.D. requirements is the disproportionate impact on minorities, and particularly African Americans and Hispanics. However, the laws also tend to reduce the number of elderly and student voters as well. The ACLU estimates that 11% of Americans do not have photo I.D.'s. The cost of applying for the ID, and required travel time and/or lost work time adds up and ends up discouraging people from voting and resulting in an estimated 2-3% decline in turnout. The impact on minority votes is much greater as minorities are more likely to lack ID - an estimated 25% of African Americans of voting age lack I.D. In addition, the types of I.D.'s accepted result in disproportionate negative impacts on minorities. In Texas, concealed weapons permits are accepted while Student I.D.'s are not. North Carolina prohibited public assistance I.D.'s until it was struck down. And, minority voters are more likely to be questioned about their identification than white voters.

California does not have a Voter ID requirement.

#### **b. Purging the Rolls**

Election officials are required by law to remove registered voters that have lost their eligibility to vote from their voter rolls. This includes those that have died, moved outside of the jurisdiction, and those convicted of felonies.

How do election officials purge the rolls? By conducting a name-matching exercise from lists of registered voters compared with lists of those deceased, felons, or individuals otherwise ineligible. The result? Voters identified as possible or probably ineligible due to death, status as a felon, or other form of ineligibility, are prohibited from voting until they prove otherwise.

In some jurisdictions, notices are mailed to registered voters based upon certain criteria, asking the voter to respond and confirm their eligibility to vote. This method is commonly used for voters suspected of moving. Although federal law prohibits removing names from voting rolls of those who have failed to vote, a failure to vote is one factor resulting in registered voters being flagged and mailed requests for confirmation of their eligibility status - based on the presumption that since the person has not voted, they might have moved outside the jurisdiction.

**Current Issue:** In Ohio, voters were sent this notice if they skipped one federal election. If there is not a response to the notice, and the person did not vote in the next four years, their name is removed from the rolls. Ohio's process was

challenged and argument was heard at the Supreme Court in January, in a case titled *Husted v. A. Philip Randolph Institute*. A Reuters study from 2016 found that in Ohio, voters names were purged in democratic areas at almost twice the rate as in Republican areas. The result is a far greater number of minorities, African Americans, and the poor being removed from the rolls than white people.

**Current Issue:** In Georgia, voters were purged from the rolls because the information on their registration forms was not an exact match the database information the State used, including simple errors and typos resulting in the database having the incorrect information. 35,000 such registration forms were cancelled or placed in “pending status” between 2013 and 2016 and 64% of those forms were submitted by African Americans.

### c. Other Examples

**Same-Day Registration:** Same day registration results in increased voter turnout. In particular, for individuals who move more frequently, this makes voting more convenient without regard to the timing of their move - particularly for younger voters who tend to move a lot due to school or job changes. Eliminating this results in more provisional ballots being issued (and rejected if the registration can't be verified) and decreases voter turnout overall.

**Pre-Registration for individuals almost of voting age:** If same-day registration is unavailable, youth who turn 18 outside of the timeframe required for registration are prevented from voting. North Carolina ended pre-registration for 16 and 17 year olds in 2013, among other laws enacted further regulating the right to vote.

**Early Voting:** The elderly, people with disabilities, and individuals that work during poll times may be unable or discouraged from voting due to their schedule, transportation issues, or mobility issues. Early voting hours allows people to vote at their convenience that face challenges to getting to the polls during ordinary hours. Cutting back on early voting, particularly Sunday, weekend, and evening voting, reduces turnout and disproportionately impacts African American voters who are most likely to use early voting when it is offered.

### **III. GERRYMANDERING**

#### **A. INTRODUCTION AND HISTORY OF GERRYMANDERING**

##### **1. Why are boundary lines redrawn?**

Article 1, Section 2, of the United States Constitution requires that Congressional representatives be apportioned to the states on the basis of population. There are 435 seats in the United States House of Representatives and each state is allotted a portion of these seats based on the size of its population relative to the other states. This is determined based on the census, which is taken every ten years. The census determines how many congressional representatives each state gets of the total 435 seats. If a state grows, relative to other states, it gets more of those representatives. If a state shrinks, relative to the other states, it gets fewer. It is then up to the states who gain or lose seats to “redistrict,” meaning redraw electoral boundaries from which each representative is elected. This is due to the one-person, one-vote principle of the Equal Protection Clause.

Redistricting will necessarily happen every ten years, as populations shifts across the country are recorded. The process also occurs on the state level for state legislatures, reflecting population movement within the state.

Each state has its own process for redistricting. In most states, state legislators draw up maps used for state and federal elections, and the governor has the power to veto them. A few states have independent commissions that create the maps. The creation of independent commissions reflect an attempt to depoliticize the process of redrawing lines.

In California, prior to 2008, the California State Legislature set electoral district boundaries at the state and federal level. A 2008 ballot initiative, Proposition 11, authorized the creation of the 14-member California Citizens Redistricting Commission and gave it the authority to set the geographic boundaries of the *state's* 120 legislative districts and four Board of Equalization districts. It is comprised of 5 Republican, 5 Democrat, and 4 Independent citizens.

Then, in 2010, Proposition 20 passed. It added the task of re-drawing the boundaries of California's U.S. Congressional districts to the same California Citizens Redistricting Commission which was first created by Proposition 11.

The other states which exclusively use independent commissions to redistrict both Congressional districts and state legislative districts are: Arizona, Hawaii, Idaho, Montana, New Jersey, and Washington.

## **2. What is the difference between redistricting and gerrymandering?**

Gerrymandering is the name of the practice of deliberately setting boundaries for voting districts—manipulating their size and shape—in a way that benefits one group over another in elections. Often, this means dividing districts up along highly irregular lines to ensure that voters from each political party are concentrated in the “right” areas and spread thin in others. This causes members of the party that is not in power to “waste” their votes by casting them in a limited number of easily won districts.

Republicans and Democrats both engage in party gerrymandering. After all, *all* politicians have a vested interest to favor themselves, and their parties. They want to be re-elected, and they want to strengthen the influence of their party on the state and national level.

Partisan gerrymandering raises concerns about the democratic process, because the effect of gerrymandering is that not all votes count equally. The message from the United States Supreme Court on partisan gerrymandering has been mixed, and the Supreme Court has never stricken down a strictly partisan gerrymander. As explained in the “Current Events” section, partisan gerrymandering is currently before the Supreme Court, and the hope is that the Supreme Court will articulate a test or standard for partisan gerrymandering.

Worse, redistricting can be done along racial or ethnic lines to dilute the political power of minority groups. Racial gerrymandering is unconstitutional. Additionally, the passage of the Voting Rights Act of 1965 and its subsequent amendments prohibit redistricting to carve maps to intentionally diminish the power of voters who are in a racial or linguistic minority. The Voting Rights Act was amended by Congress in the 1980s to “make states redraw maps if they have a discriminatory effect.” Racial gerrymandering cases are also before the Supreme Court.

## **3. Where does the term gerrymandering come from?**

Gerrymandering has a long tradition in the United States that precedes even the 1789 election of the first U.S. Congress.

The term “gerrymandering” comes from the name Elbridge Gerry the fifth vice president of the United States and the governor of Massachusetts. As the governor of Massachusetts, he signed a bill that created the first curiously misshapen district in the state designed to elect Democratic-Republicans over Federalists in 1812.

Portraitist Gilbert C. Stuart noted that one new election district had the shape of a salamander. (Gerry + salamander = gerrymander.) Stuart drew an outline of the district, put a salamander's head on one end, and called the creature a Gerrymander.



#### 4. How is gerrymandering accomplished?

The two primary methods of gerrymandering are “packing” and “cracking.”

- “Packing” moves supporters of one political party into certain districts to reduce their influence in others. This gives the group concentrated

representation in a single district while denying them representation across districts.

- “Cracking” spreads supporters out among several districts, to reduce their voting power overall. Spreading like-minded voters apart across multiple districts dilutes their voting power in each, denying the group representation in multiple districts.

To “pack,” a state would draw district lines clustering opposition party voters together in one district in order to concentrate their votes so that they influence only a few seats.

To “crack” a state would draw district lines which spread opposition voters into districts where the other party has a strong majority, making it very difficult for the opposing party to win elections there.

## **5. Why does it matter that politicians engage in gerrymandering?**

Racial gerrymandering disenfranchises minorities.

Even political gerrymandering is problematic because it leads to a distortion between the proportion of voters supporting one party and the number of seats that party has. And fundamentally, it distorts the representation that legislators provide to their constituents.

Gerrymandering leads to an increase in political polarization. When political districts are “safe” for one party, candidates are less inclined to compromise with the opposing party and tend to become more extreme. It “reduces voter choices and leads to fewer competitive elections and elected officials who are less accountable to their constituents.”<sup>10</sup>

As one law professor explains: “The location of district lines decide which voters vote for which representative. Changing the lines will change the relevant voters, and can change the identity, allegiance, and political priorities of a district’s representative, and of the legislative delegation as a whole.”<sup>11</sup>

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<sup>10</sup> <https://www.fairdistrictsohio.org/what-is-gerrymandering.html>

<sup>11</sup> <http://redistricting.ills.edu/why.php>. Many of the examples that follow are from this website.

His illustrations<sup>12</sup> show that the consequences of gerrymandering include all of the following:

- a. **It has allowed incumbents to cherry-pick their voters, ensuring their re-election, instead of allowing the voters to pick their representatives.**

In California, for example, prior to the passage of Proposition 11 in 2008 switching responsibility for redistricting from the state legislature to an independent commission, many incumbents each paid a consultant at least \$20,000 after the 2000 census to have their districts custom-designed for safety.

- b. **It has allowed politicians to eliminate incumbents (or challengers) by drawing them out of their home districts.**

After the 2000 election, Republicans who controlled the redistricting process targeted Richard Cranwell, the Democratic leader in the state House of Delegates, who had represented his constituents for 29 years. They carved his house out of the district he had represented, and placed it in the district of another long-time Democrat, Chip Woodrum. “Woodrum’s district looked like it had a tiny grasping hand reaching out to grab Cranwell's home.” As a result, Cranwell decided not to run for reelection.

After then-state senator Barack Obama had a good showing but lost the 2000 primary for an Illinois congressional seat, the state legislators deferred to incumbent members of Congress in connection with re-districting, including the incumbent Obama had challenged. Following redistricting was done, the block around Obama's home was carved out of the district, forcing him to move if he wanted to run again and challenge that same incumbent.

- c. **It has skewed statewide representation so that the percentage of representatives a party has in a particular state far exceeds the party’s percentage statewide of voters.**

In 1991, the Democrats in charge of the redistricting process in Texas packed Republican voters, including creating a district that spanned hundreds of miles,

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<sup>12</sup> Many of the examples that follow are from Professor Justin Levitt’s website, <http://redistricting.ils.edu/why.php>

with small slivers of land from five counties. So in 1992, although Republicans and Democrats each won about 49% of the Texas statewide vote (showing that the population was nearly equally divided) Democrats won 70% of the state's Congressional races.

In Pennsylvania's 2014 Congressional races, 44% of voters chose Democratic candidates, but 13 of the state's 18 districts (72% of the seats) are represented by Republican Congressmen.

**d. It has diluted minority votes so they cannot exercise voting power in proportion to their population size.**

When Republicans re-districted Texas in 2003, they moved about 100,000 Latino voters out of one district, in which they had become the majority, in order to protect an incumbent Republican who was beginning to lose the support of the Latino population. As Justice Kennedy wrote in the 2006 decision *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006): "In essence the State took away the Latinos' opportunity because Latinos were about to exercise it. This bears the mark of intentional discrimination that could give rise to an equal protection violation. Even if we accept the District Court's finding that the State's action was taken primarily for political, not racial, reasons, *Session, supra*, at 508, the redrawing of the district lines was damaging to the Latinos in District 23. The State not only made fruitless the Latinos' mobilization efforts but also acted against those Latinos who were becoming most politically active, dividing them with a district line through the middle of Laredo."

**e. It has split up communities so no representative is compelled to address issues that predominate in a smaller area since it makes up a very small area of multiple districts instead of a relatively larger area of a single district.**

A "community of interest" is defined by FairVote as a "group of people in a geographical area, such as a specific region or neighborhood, who have common political, social or economic interests." Gerrymandering by cracking in particular can cause lack of cohesion and sense of community, and disillusionment by voters. Gerrymandered districts can be represented by someone who lives far from other residents, and someone of a different ethnic or socioeconomic background from most residents of an area.

For example, the 1992 race riots in Los Angeles took a heavy financial toll on businesses in many neighborhoods, including the area known as Koreatown. But the redistricting map had fractured Koreatown—an area barely over one square mile—into four City Council districts and five state Assembly districts. So, when residents of Koreatown appealed to their elected representatives for assistance with the cleanup and recovery effort, each of their purported representatives claimed that the area was really a part of some other official’s district: no legislator felt responsible to the Asian-American community.

## **6. What *should* districts look like?**

Even experts who criticize gerrymandering have difficulty agreeing what districts *should* look like, and it is getting easier to gerrymander.

Common goals for creating districts include:

- having politically competitive districts so there is less polarization;
- having geographically compact districts so that constituents within a district live as near to one another as practicable; and
- representation for “communities of interest.”

These goals are sometimes at odds with one another.

With technology being what it is, state legislators are able to predict votes and therefore control which party’s supporters ends up in a particular district with more precision than ever before. While we’re in the “golden age” of gerrymandering, the Supreme Court *may* be stepping in to stop it.

## **B. CURRENT ISSUES**

### **1. The Supreme Court**

It is an eventful time for the controversial issue of gerrymandering. There is currently no law against partisan gerrymandering. The U.S. Supreme Court has considered the issue several times. In *Davis v. Bandemer* (1986), the Supreme Court held that partisan gerrymandering violated the Equal Protection Clause, but the court could not agree on the appropriate constitutional standard for how legal claims of partisan gerrymandering should be evaluated. In *Vieth v. Jubelirer* (2004) 541 U.S. 267, the plurality opinion determined that partisan gerrymandering claims were non-justiciable because there was no discernible and manageable standard for "adjudicating political gerrymandering claims." However, there are

currently three gerrymandering cases that the court has agreed to rule on in the current term: *Abbot v. Perez*, *Gill v. Whitford*, and *Benisek v. Lamone*.

*Abbot v. Perez* is a racial gerrymandering case. It involves a claim that the Texas congressional and house district boundaries were drawn by the Republican controlled state government in a way that discriminated against African-American and Latino voters. The plaintiffs allege that the district maps were intentionally redrawn to dilute the voting strength of voters of color, particularly that of Latino voters because of their growing population and voting power in Texas over the past decade. The plaintiffs claim the redrawn maps violate the Equal Protection Clause of the U.S. Constitution and Section 2 of the Voting Rights Act. Texas argues that its district map was drawn in good faith and does not dilute the voting power of minority voters. The Supreme Court is scheduled to hear oral argument in the case in April 2018 and a decision is likely by the fall of 2018.

*Gill v. Whitford* is a partisan gerrymandering case. It involves a claim that the Wisconsin legislative map drawn in 2011 by the state's Republican leadership was done to intentionally give Republicans a significant advantage. Elections under the 2011 map resulted in Republicans winning 60 of the 99 state assembly seats despite Democrats having a majority of the statewide vote. Democratic voters claimed that the map, as drawn, violated their Constitutional rights under the First and Fourteenth Amendments. The State of Wisconsin argued that their maps were drawn in good faith and according to the law. Wisconsin further argues that the courts are not the proper venue for determination of whether a district map was drawn properly and that it should continue to be left to state legislators. In late 2016, the plaintiffs won at trial — the first time in over three decades that a map has been struck down as a partisan gerrymander. The lower court ruled that the plan was “an aggressive partisan gerrymander” that locked in a Republican majority in the state assembly under “any likely electoral scenario.” The U.S. Supreme Court heard oral argument in October 2017 and a decision is expected by June 2018.

*Benisek v. Lamone* is a partisan gerrymandering case in which the plaintiffs (Republican voters) argue that the 6<sup>th</sup> congressional district map in Maryland was drawn to give Democrats an advantage. The arguments are similar to those made in *Gill v. Whitford*, though the legal issue on appeal is narrower. The U.S. Supreme Court will hear oral argument on March 28, 2018.

The Supreme Court's willingness to consider these three cases indicates that the court may finally have a workable constitutional standard for determining when gerrymandered district map violates the constitution. The court's decision could

have a significant impact on the balance of power in state and federal legislatures across the country. The gerrymandering cases will likely come down to Supreme Court Justice and frequent swing-voter Anthony M. Kennedy, who seemed critical of Wisconsin's 2011 redistricting plan during oral arguments of the *Gill v. Whitford* case.

## **2. The Executive Branch**

Another interesting development is that Donald Trump's initial pick to run the 2020 Census has defended racially based gerrymandering. Districts are redrawn after each census is taken every ten years. Thomas Brunell will be appointed deputy director of the U.S. Census Bureau and put in charge of the efforts to count every person in America. He has no government experience, has provided testimony supporting Republican redistricting cases and wrote the 2008 book "Redistricting and Representation: Why Competitive Elections Are Bad for America." He argues that packing minority voters into certain districts ensures their voices are heard. His defense of North Carolina's Congressional districts along those lines were struck down by a court in 2017, which said he had a "misunderstanding" of the Voting Rights Act. This was obviously a concerning development to opponents of gerrymandering.

Brunell withdrew his name from consideration on February 12, 2018, but Donald Trump may attempt another partisan appointment.

## **3. At-large versus district elections in Santa Rosa**

Santa Rosa has recently had to confront an issue of the adequacy of representation in connection with how the city elects council members. Historically, Santa Rosa elected city council members through an "at-large" election rather than by districts. The city received a formal letter from a law firm in 2017 claiming that the "at-large" elections violated the California Voting Rights Act because it disadvantaged certain Santa Rosa neighborhoods from electing council members that represented their interests. In response, the City agreed to move toward district elections. The city must now draw district maps and each district will elect a city council member.

#### **IV. DISCUSSION QUESTIONS ABOUT THE VOTING RIGHTS ACT AND VOTER SUPPRESSION**

**All states have some voting restrictions. Are they necessary? Below are five traditional restrictions on the right to vote. Ask:**

- A. What are some reasons favoring the restriction?
- B. What are some reasons against the restriction?

In order to vote, you must...

1. Reside in a voting district for at least one month.
2. Be at least 18 years of age.
3. Not be in prison or on parole for a felony conviction.
4. Be a U.S. citizen.
5. Register to vote.

**Do you think an increase in certain types of voter requirements – whether it be requiring an I.D., elimination of voting on Sunday, or some other requirement – is designed to influence the outcome of an election?**

**Why is it a problem to require someone to present a photo ID to vote?**

Does it cost money to obtain a photo ID?

What if the ID had to be issued by a particular government agency (i.e., the DMV)? Would that make it more restrictive?

What are some reasons someone might not have a photo ID, but also be an eligible voter?

A teenager without a driver's license?

Someone who can't afford to pay for the application to obtain the ID?

Someone who is unable to physically apply for the ID?

Who else?

Should the States standardize I.D.'s, or should we have national I.D.'s that can be used for voting?

**What if you showed up to vote on election day during the next Presidential election, and were told you were not eligible because you were flagged as a convicted felon?**

How would you prove otherwise?

**Should election officials be permitted to mail registered voters requests to confirm their eligibility, and if they aren't returned, remove the voter from the rolls if they fail to vote?**

Is that different than removing someone from the rolls because of their failure to vote, which is prohibited by federal law? How is it different?

**What are reliable methods for verifying voter eligibility?**

Using DMV records?

Using post office records?

**Should the United States make a failure to vote illegal in order to reduce voter fraud?**

What about uninformed voters casting ballots?

Is not voting ever justified?

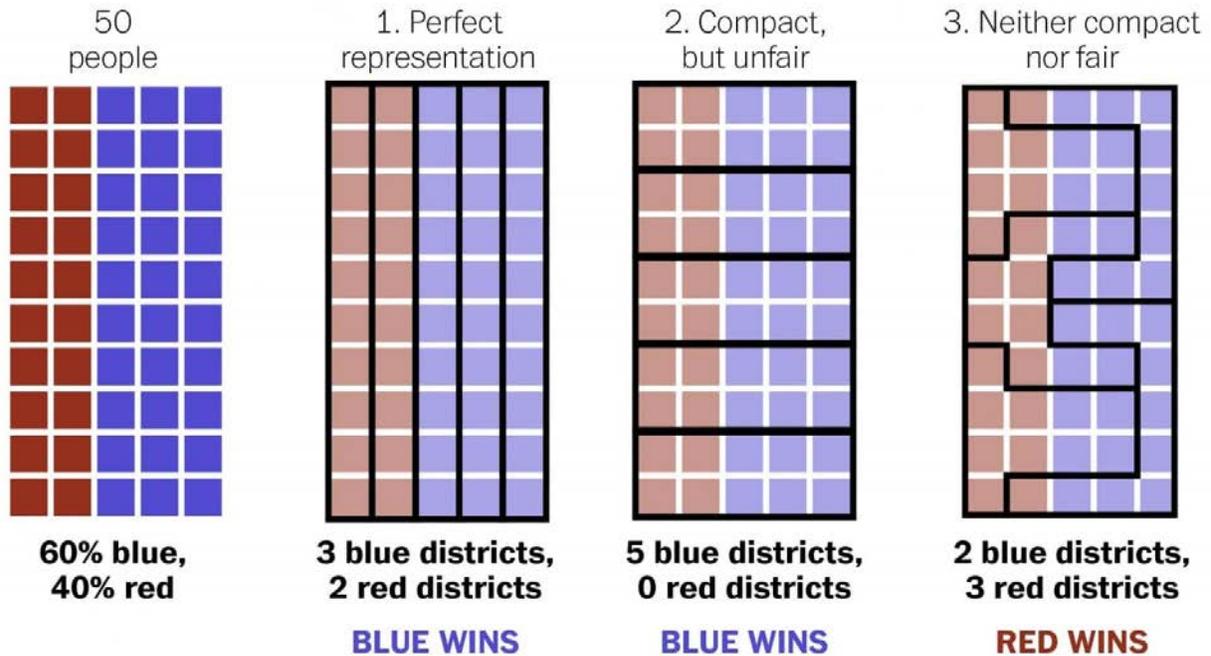
## V. DISCUSSION QUESTIONS ABOUT GERRYMANDERING

- a. What are the goals in drawing political districts?
- b. What are reasons for gerrymandering? Why do politicians do it?
- c. What are reasons against gerrymandering? Why do people oppose it?
- d. Do you think gerrymandering should be against the law? Why?
- e. What would be a better alternative to state legislature's re-drawing congressional districts?
  - Potential solutions: Independent/non-partisan commissions (such as California), computer algorithms based on # of voters and compactness, change political voting system from individual districts (one rep for each district) to a proportional representation (40% of state votes for democrats, then 40% of representatives would have to be democrat.)
- f. Should courts play a role in determining how a particular state should draw their district maps?
- g. What are your thoughts on the challenge to Santa Rosa's city wide/"at-large" council elections? Do you think it is a good idea to have district elections instead of at large elections? What impact do you think this change will have on the make- up of the city council?
- h. What are your favorite congressional district maps? (*See maps below.*)

## VI. DEMONSTRATIONS AND CLASSROOM EXERCISES ABOUT GERRYMANDERING

### Gerrymandering, explained

Three different ways to divide 50 people into five districts



WASHINGTONPOST.COM/[WONKBLOG](#)

Adapted from Stephen Nass

Suppose we have a very tiny state of fifty people. Thirty of them belong to the Blue Party, and 20 belong to the Red Party. And just our luck, they all live in a nice even grid with the Blues on one side of the state and the Reds on the other.

Now, let's say we need to divide this state into five districts. Each district will send one representative to the House to represent the people. Ideally, we want the representation to be proportional: if 60 percent of our residents are Blue and 40 percent are Red, those five seats should be divvied up the same way.

Fortunately, because our citizens live in a neatly ordered grid, it's easy to draw five lengthy districts -- two for the Reds, and three for the Blues. Voila! **Perfectly proportional representation, just as the Founders intended. That's grid 1 above, "perfect representation."**

Now, let's say instead that the Blue Party controls the state government, and they get to decide how the lines are drawn. Rather than draw districts vertically they draw them horizontally, so that in each district there are six Blues and four Reds. **You can see that in grid 2 above, "compact but unfair."**

With a comfortable Blue majority in this state, each district elects a blue candidate to the House. The Blues win 5 seats and the Reds don't get a single one. Oh well! All's fair in love and politics.

Finally, what if the Red Party controls the state government? The Reds know they're at a numeric disadvantage. But with some creative boundary drawing -- **the type you see in grid 3, "neither compact nor fair"** -- they can slice the Blue population up such that they only get a majority in two districts. So despite making up 40 percent of the population, the Reds win 60 percent of the seats. Not bad!

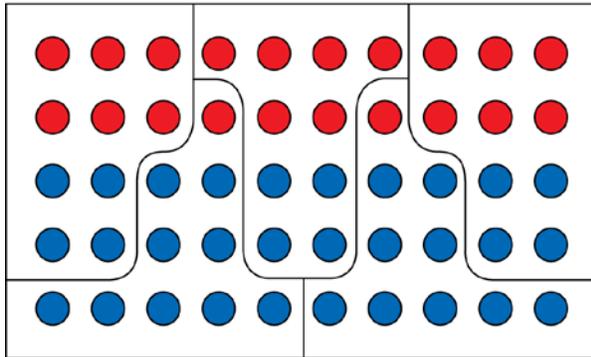
Divide up the students in the class into districts.

Divide the members evenly between boys and girls, t-shirts versus long-sleeved shirts, or short hair versus long hair, and show how, if distributed in certain ways, that one group will have a larger advantage over the other.

# How to Game a District

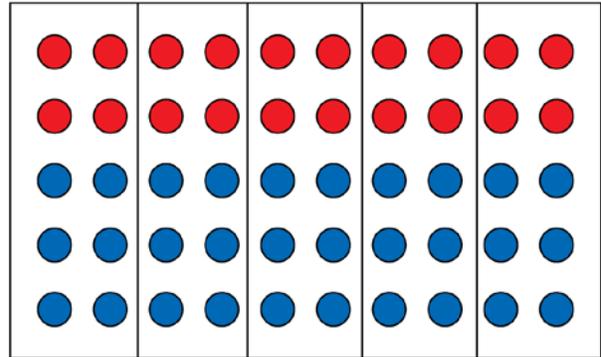
A beginner's guide to gerrymandering from the *Journal of Law & Politics*

## REPUBLICAN PLAN



Republicans account for 40 percent of the voters in this hypothetical state but still manage to have majorities in three of the five congressional districts. They do this by drawing the boundaries to “pack” the majority Democrats into just two of the districts.

## DEMOCRATIC PLAN

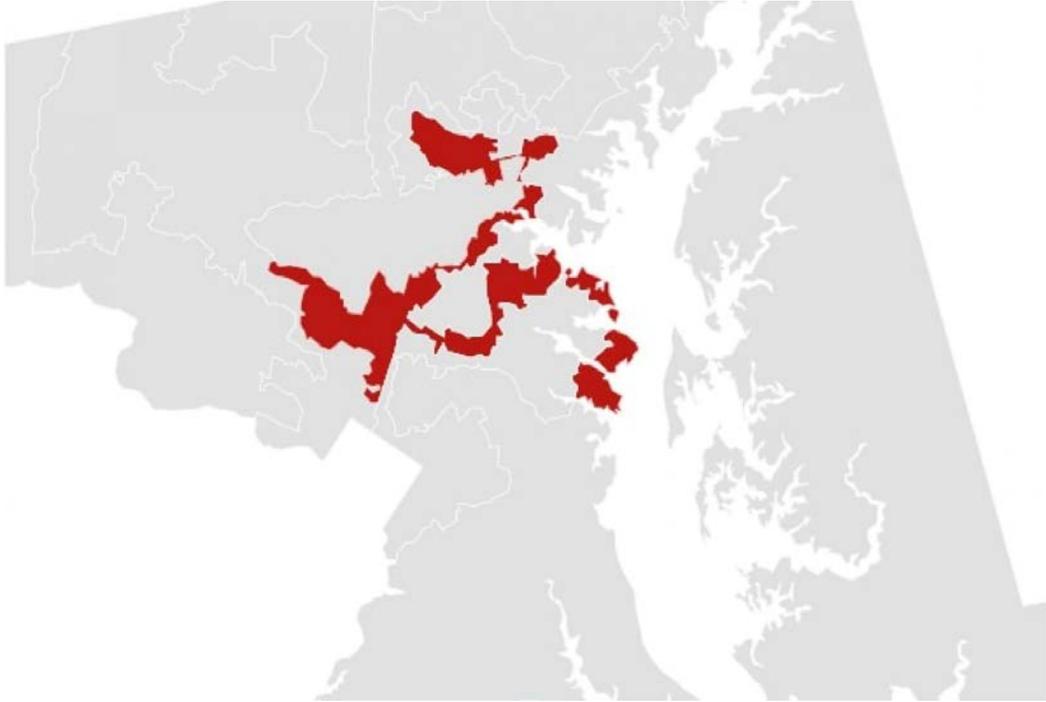


In the same hypothetical state, Democrats make up 60 percent of the voters, but they have majorities in all five of the congressional districts. How? By drawing the boundaries to “crack” concentrations of Republican voters, making them a minority in each district.

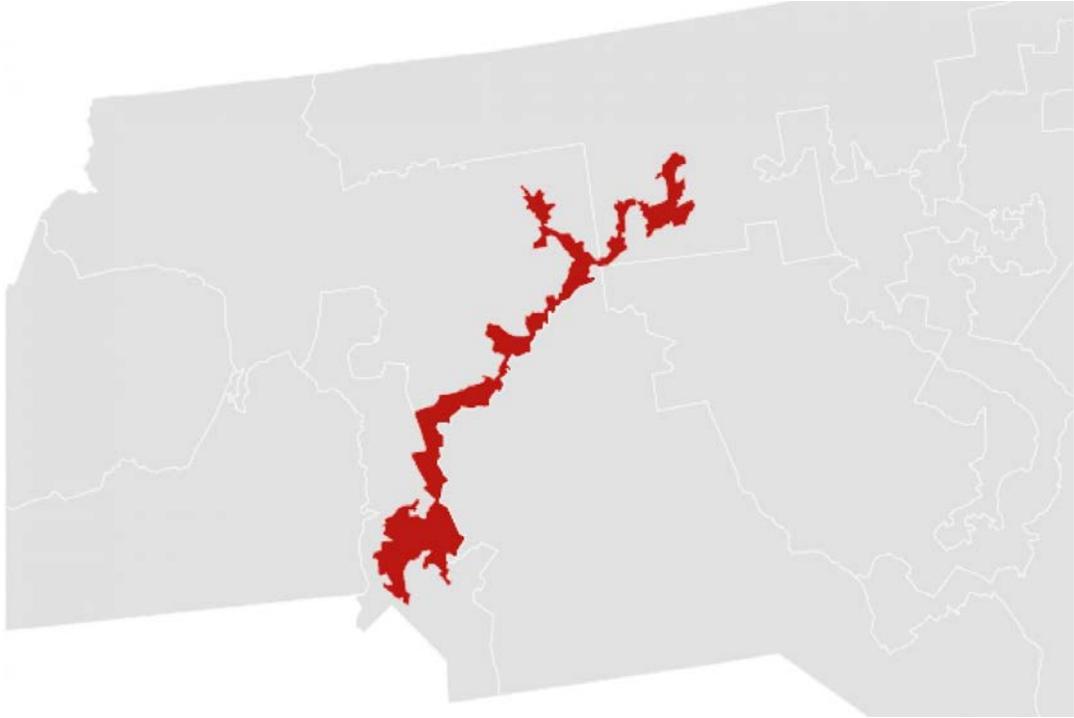
GRAPHIC BY BLOOMBERG BUSINESSWEEK



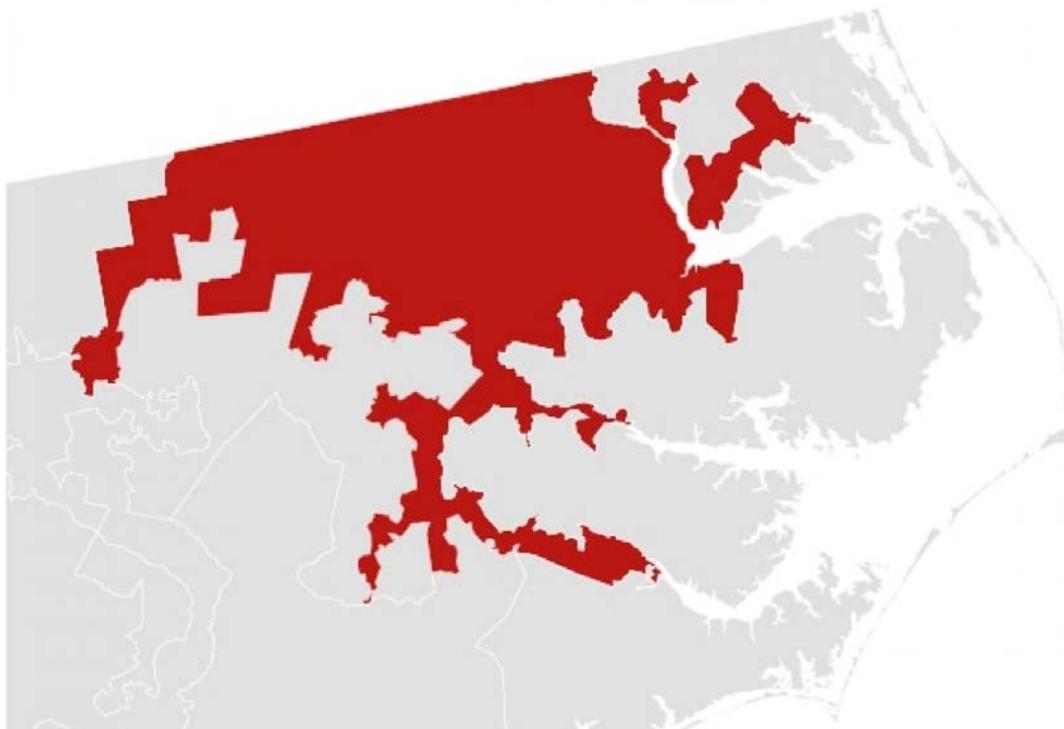
**MARYLAND'S 3RD DISTRICT ("THE PRAYING MANTIS")**



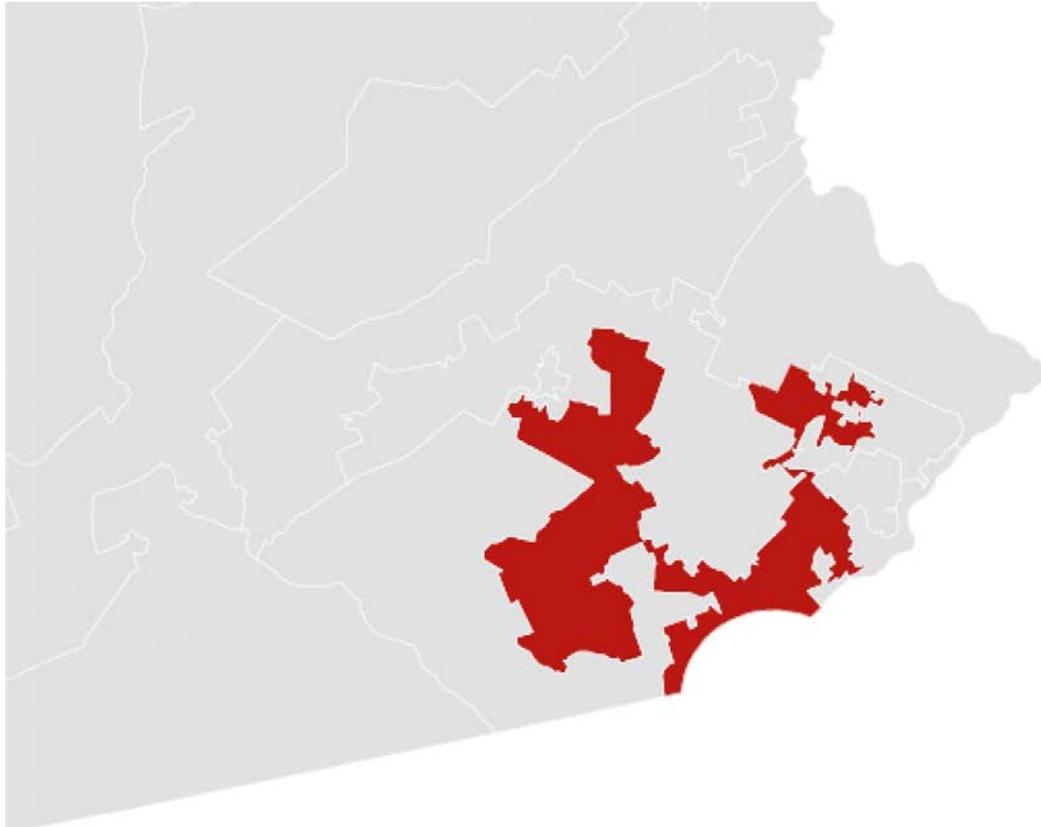
**NORTH CAROLINA'S 12<sup>TH</sup> DISTRICT**



**NORTH CAROLINA'S 1<sup>ST</sup> DISTRICT**



**PENNSYLVANIA’S 7<sup>TH</sup> DISTRICT (“GOOFY KICKING DONALD DUCK”)**



# Texas 33rd District

115th Congress

