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Redistricting 101

**Legal Concepts That Apply to the Work of
California's Citizens Redistricting Commission**

Prof. Justin Levitt
September 1, 2020

Redistricting background

- Professor of Law and Associate Dean for Research at Loyola Law School
- Deputy Assistant Attorney General for Civil Rights, U.S. Dep't of Justice
- Counsel at Brennan Center for Justice at NYU School of Law

- Testimony related to redistricting before U.S. Senate and House, U.S. Civil Rights Commission, legislative bodies in 8 states
- Expert witness in California Voting Rights Act litigation
- Amicus participation in 11 SCOTUS redistricting cases
- Author of 15 scholarly publications on redistricting
- Administrator of All About Redistricting website tracking developments
- Informal counsel for legislators and administrators of both major parties and neither (and those whose affiliation I do not know), and of individuals and nonprofits seeking legal compliance
- Training of Applicant Review Panel & first 8 Commissioners, 2010 & 2020



Today's conversation

Focus on the laws that you will need to apply

- Specific to laws governing California districts
- Specific to Congress, State legislature, Board of Equalization (Commission doesn't draw local district lines)
- Legal requirements and concepts, but not legal jargon
- Requirements of California law, not advocacy



Today's conversation

Focus on the laws that you will need to apply

- Why ?
- Where ?
- What ?
- When ?

Who, of course, is already set...



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Today's conversation

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Redistricting

Drawing (and re-drawing) the lines that determine which voters are represented by each legislative seat



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Why redraw district lines?



- Communities grow and shrink
- People are born, and die, and move
- Areas where there were once roughly the same number of people ... become lopsided



Constitutional mandate to redraw lines

Baker v. Carr, 1962



Districts have to provide roughly equal representation



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And so...

1990	Census
1991	Redistricting
2000	Census
2001	Redistricting
2010	Census
2011	Redistricting
2020	Census
2021	Redistricting



Today's conversation

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- Why ?
- **Where ?**
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Who, of course, is already set...



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Equal representation



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Equal representation

- Federal constitution
- State constitution
- State statute



Equal representation: federal law

“Reasonably equal” number of people in each district

Congressional districts

- Art. I, § 2
- “Small” differences OK if for legitimate reason

State districts

- Equal Protection Clause
- < 10% difference OK if for legitimate reason



Calculating equal population

	Population	Deviation
District 1	1,010	+ 1.0 %
District 2	1,035	+ 3.5 %
District 3	980	- 2.0 %
District 4	940	- 6.0 %
District 5	1,005	+ 0.5 %
District 6	990	- 1.0 %
District 7	965	- 3.5 %
District 8	1,020	+ 2.0 %
District 9	1,050	+ 5.0 %
District 10	995	- 0.5 %

Total population 10,000
Average ("ideal") pop. 1,000

***Total deviation* 11.0%**



Equal representation: state law

“Reasonably equal” number of people in each district

Congressional districts

- “As nearly as is practicable”

State districts

- Reasonably equal population, “except where deviation is required to comply with the federal Voting Rights Act or allowable by law”



The 2010 Commission struggled here

State districts

- Legal requirement: Reasonably equal population, except where deviation is required by Voting Rights Act or allowable by law
- 1973 California Supreme Court set rules for *itself*: $\pm 2\%$.
(old California Constitution language now superseded)
- 2010 Commission:
 - $\pm 2\%$
 - $\pm 5\%$, with explanation $> 2\%$
 - as little as possible, up to 5% total
 - 1% total
 - 2% total, with more for Voting Rights Act
 - 2% total (final)



Every decision has tradeoffs

- Maintaining reasonably equal population
- Providing equitable opportunity for minority voting power
- Preserving city / county / neighborhood / community bounds
- Preserving compact districts
- Preserving districts that are nested



The Census may be . . . rocky

United States[®]
Census
2020



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Equal representation: upshot

- The law allows the Commission to set a default threshold for population variation, but the standard need not be tiny
- If Census results are less accurate, a tiny default threshold only achieves the illusion of equal representation
- Particularly for state districts, the law requires the Commission to depart from the default to achieve other objectives

“except where deviation is required to comply with the federal Voting Rights Act or allowable by law”



Equal representation: one more thing



Lassen County: 1% African-American, 11% Latino
Lassen prisons: 27% African-American, 35% Latino

prisons = 27% of total Lassen population
permanent residence often not in Lassen County

Equal representation: corrections

Cal. Elec. Code § 21003:

“The Legislature hereby requests the Citizens Redistricting Commission to deem each incarcerated person as residing at his or her last known place of residence. . . .”



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Equal representation: to remember

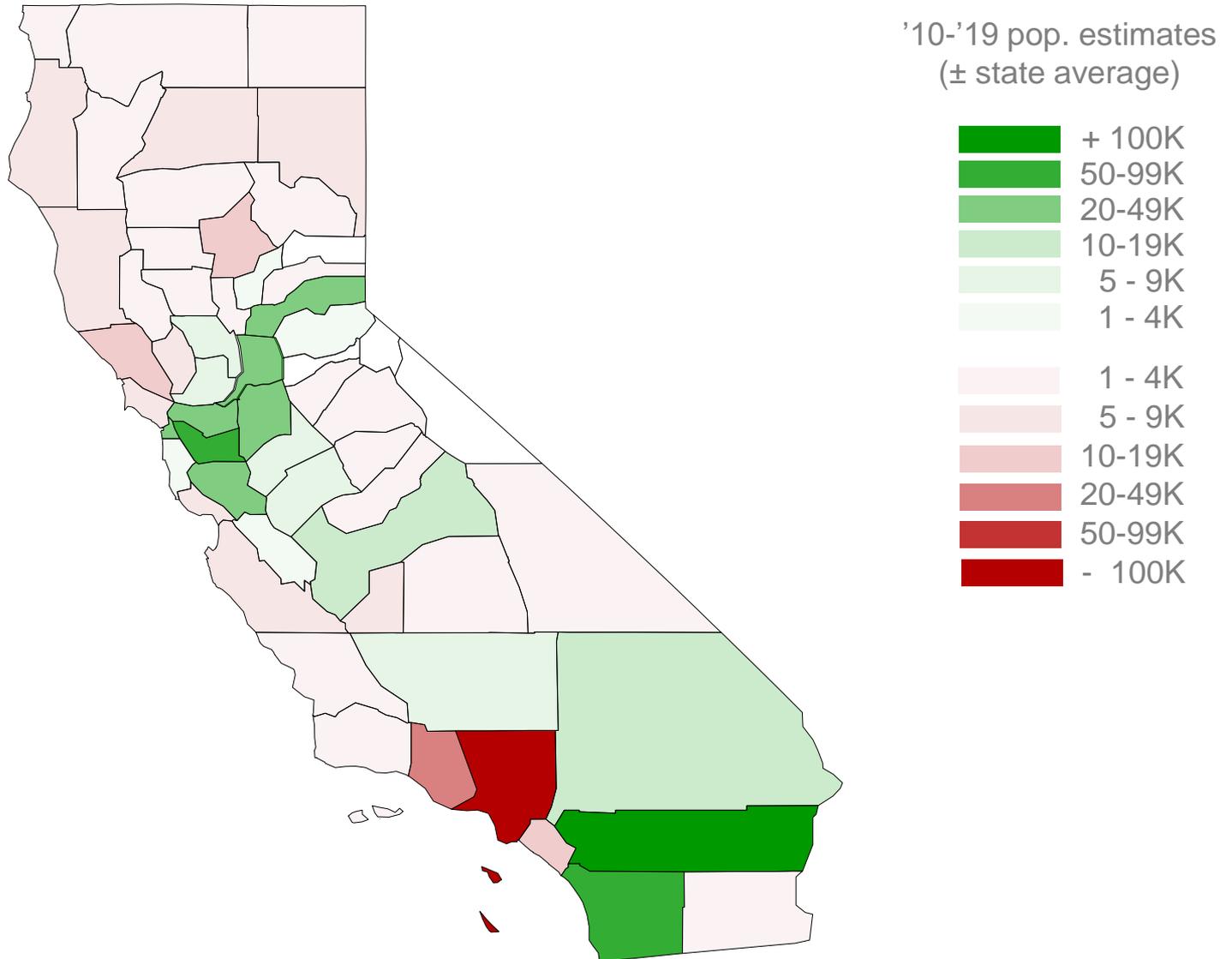
- Understand the limits of your data
- Remember that the “cleanest” answer isn’t always best (and may not even be legal)



The existence of a maximum doesn't mean that the minimum is preferable



You don't have to wait to get started



Race and ethnicity



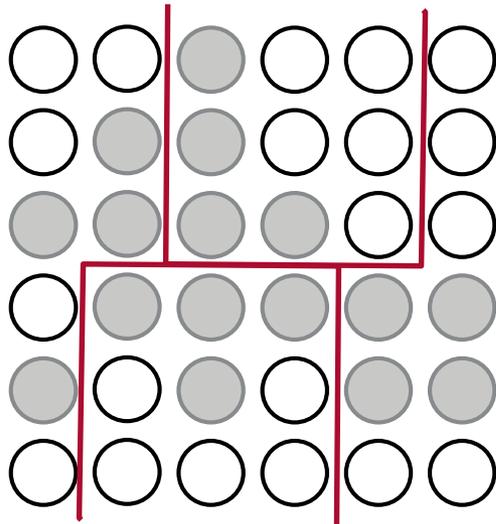
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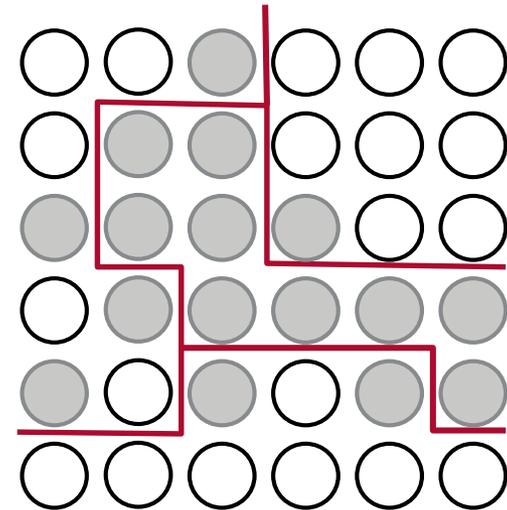
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Rule One

Don't set out to hurt voters based on their race or ethnicity



“Cracking”



“Packing”

- No matter if lines are “pretty”
- No matter the ultimate motive



Rule Two

Comply with the Voting Rights Act

Under certain conditions, jurisdictions may have the federal responsibility to design districts so that they provide equitable electoral opportunity based on race or language minority status.



Voting Rights Act predicate

- Are there sizable, relatively concentrated minority communities?
- Do the minority communities have distinct electoral preferences?
- Did (or do) underrepresented minorities face discrimination?
- Can we design districts to give minorities a fair shot?



Voting Rights Act predicate

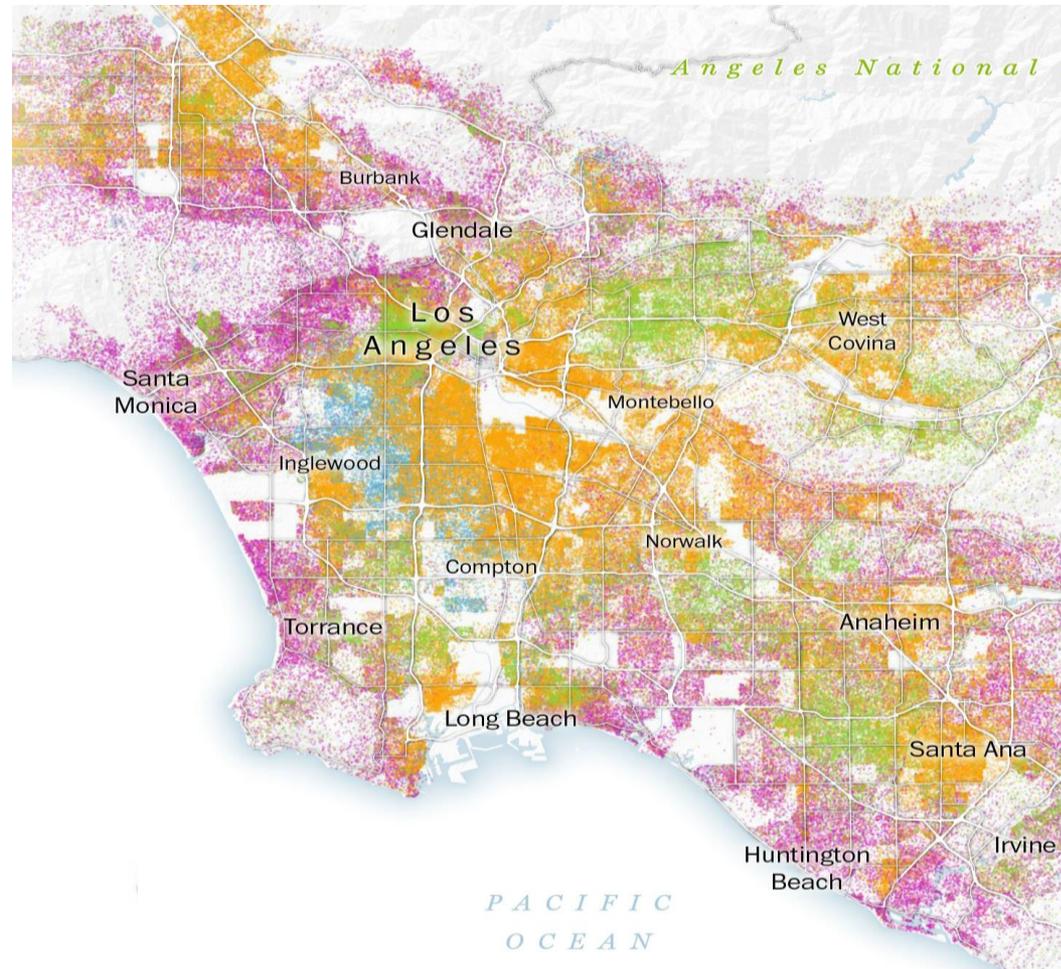
Are there sizable, relatively concentrated minority communities?

- > 50% of the electorate in a district-sized population



Voting Rights Act predicate

Are there sizable, relatively concentrated minority communities?

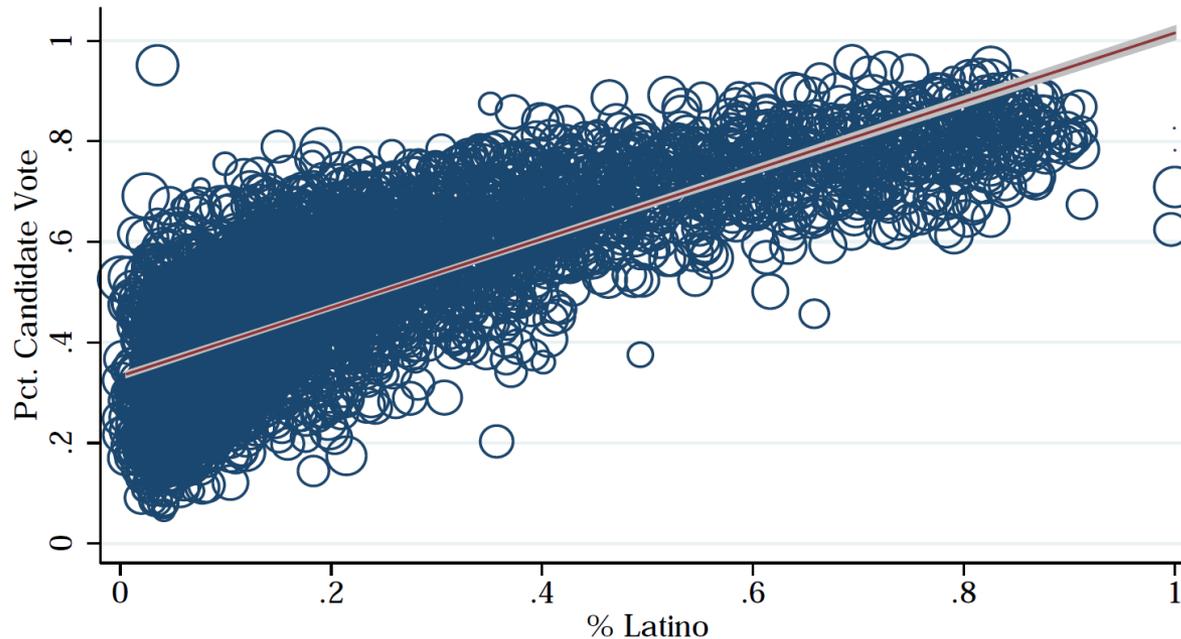


Los Angeles, 2016

NH White
Black
Hispanic
Asian

Voting Rights Act predicate

Do the minority communities have distinct electoral preferences?



Voting Rights Act predicate

Did (or do) underrepresented minorities face discrimination?

- rough overall proportionality in the jurisdiction
- history of voting-related discrimination
- extent of racially polarized voting
- extent of discriminatory voting practices or procedures
- exclusion of minorities from candidate slating
- extent to which minorities bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process
- extent to which minorities have been elected
- extent to which elected officials are unresponsive to the particularized needs of minorities
- etc.



Voting Rights Act responsibility

Can we design districts to give minorities a fair shot?

Iterative process

- Determine approximate localized threshold for electoral effectiveness (not just 50% demographic)
- Seek pockets of population containing communities with effective electoral strength
- Consider other criteria at the same time
- Repeat



The 2010 Commission struggled here too

- Delayed training
- Delayed data acquisition
- Flirted with blinding itself to local voting results
- Gave short shrift to path dependence
- Failed to consider blocs of multiple minorities
- Failed to relax appropriate population constraints
- Conflated electoral assessment with demographics

- **Created unnecessary risk by leaving VRA to final tweaks**



Rule Three

Consider other factors at the same time

Race can only “predominate” if there’s a really good reason



California Voting Rights Act

Only applies to jurisdictions with at-large elections,
not where all candidates are elected from single-
member districts



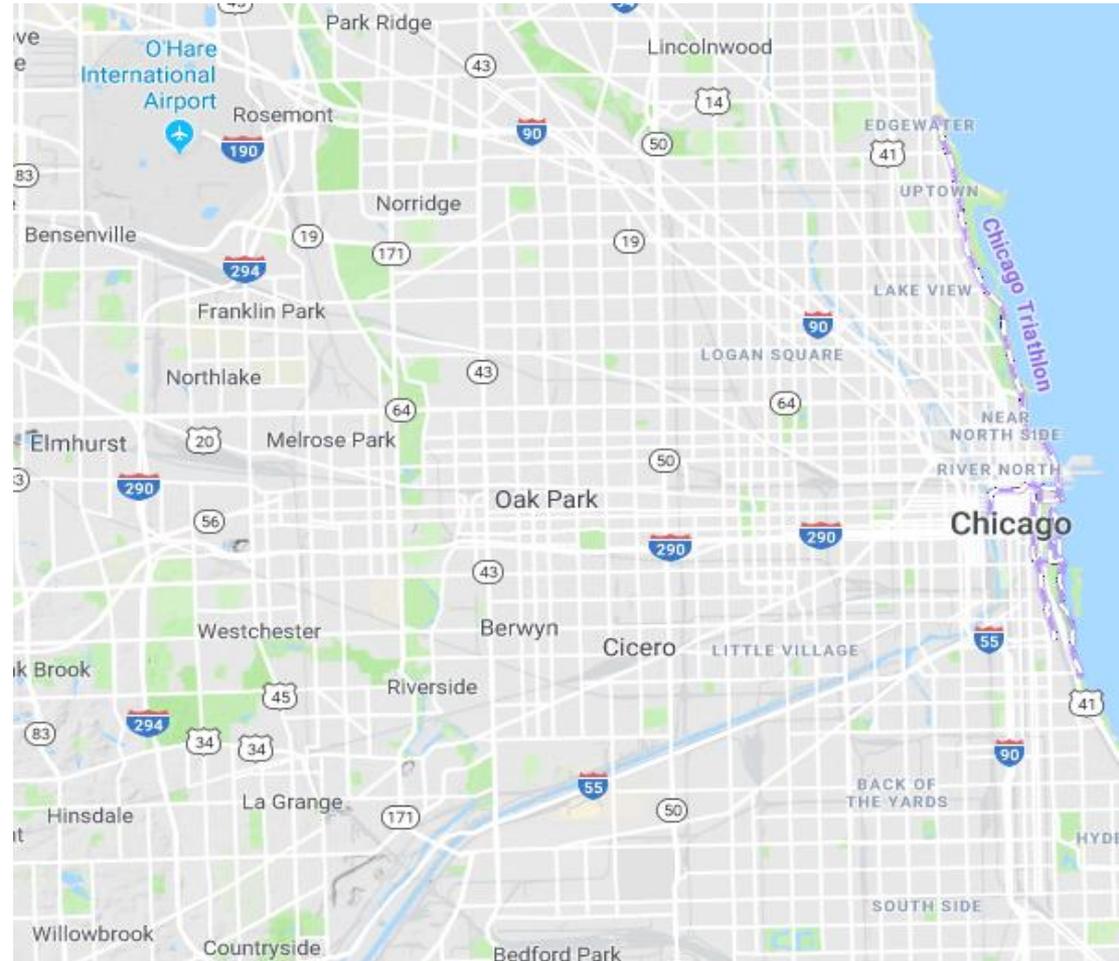
Race & ethnicity: to remember

- Ask hard questions of your experts:
 - Minority proportion of citizen voting-age population
 - Voting patterns by race in that region
 - Practical opportunity to elect candidates of choice
 - Qualitative and historical context
- Understand the limits of your data
- Remember that the “cleanest” answer isn’t always best (and may not even be legal)



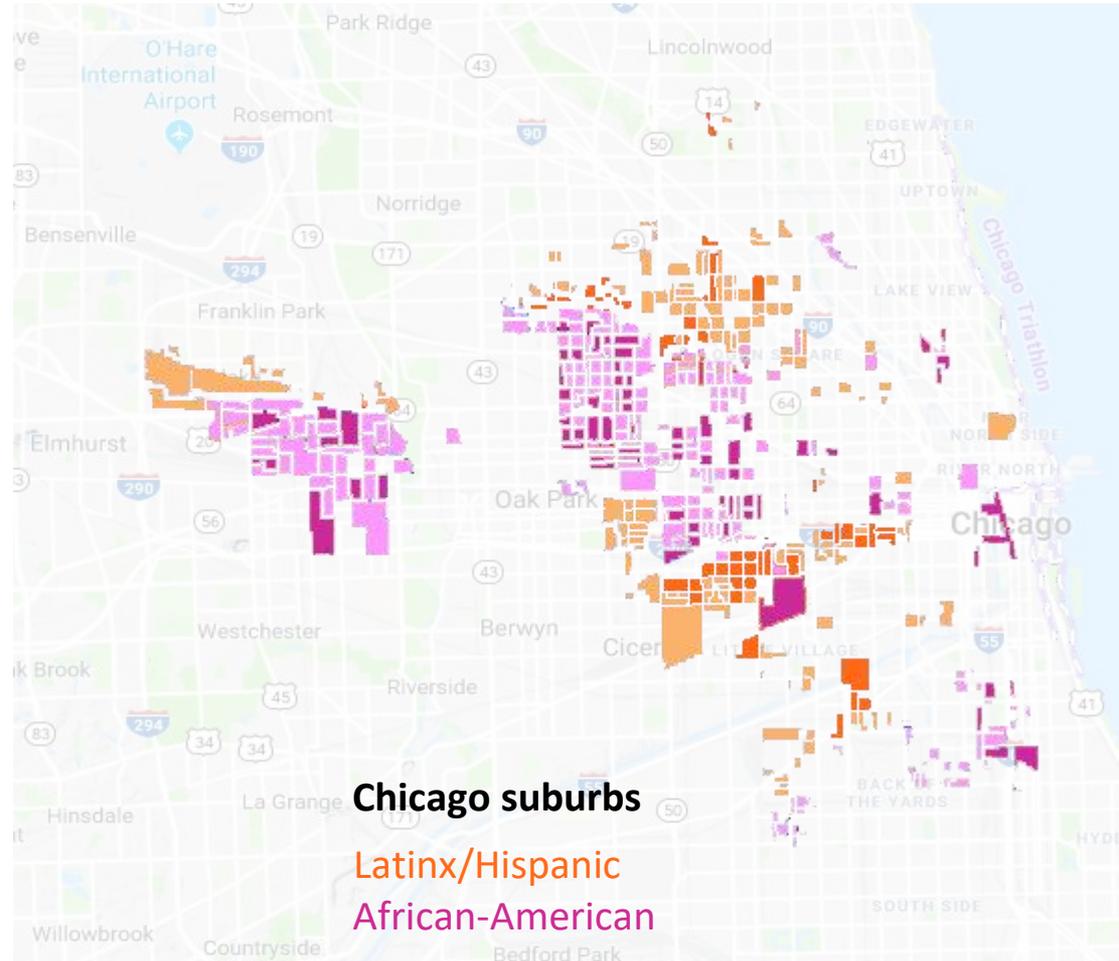
Race & ethnicity: to remember

- Need to creatively reconcile rights of multiple minority communities
- Need comfort drawing districts with “strange” shapes



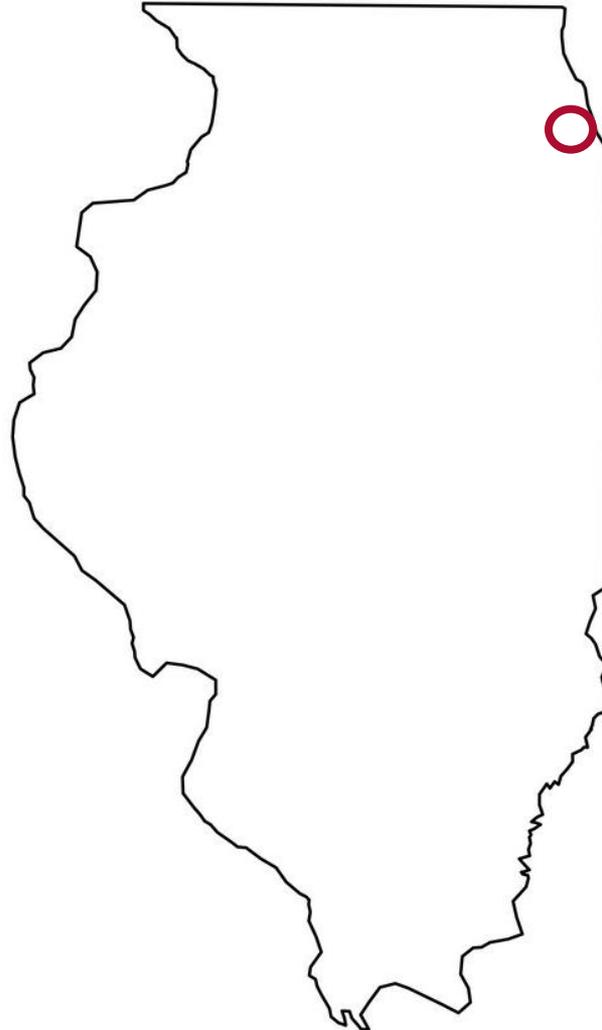
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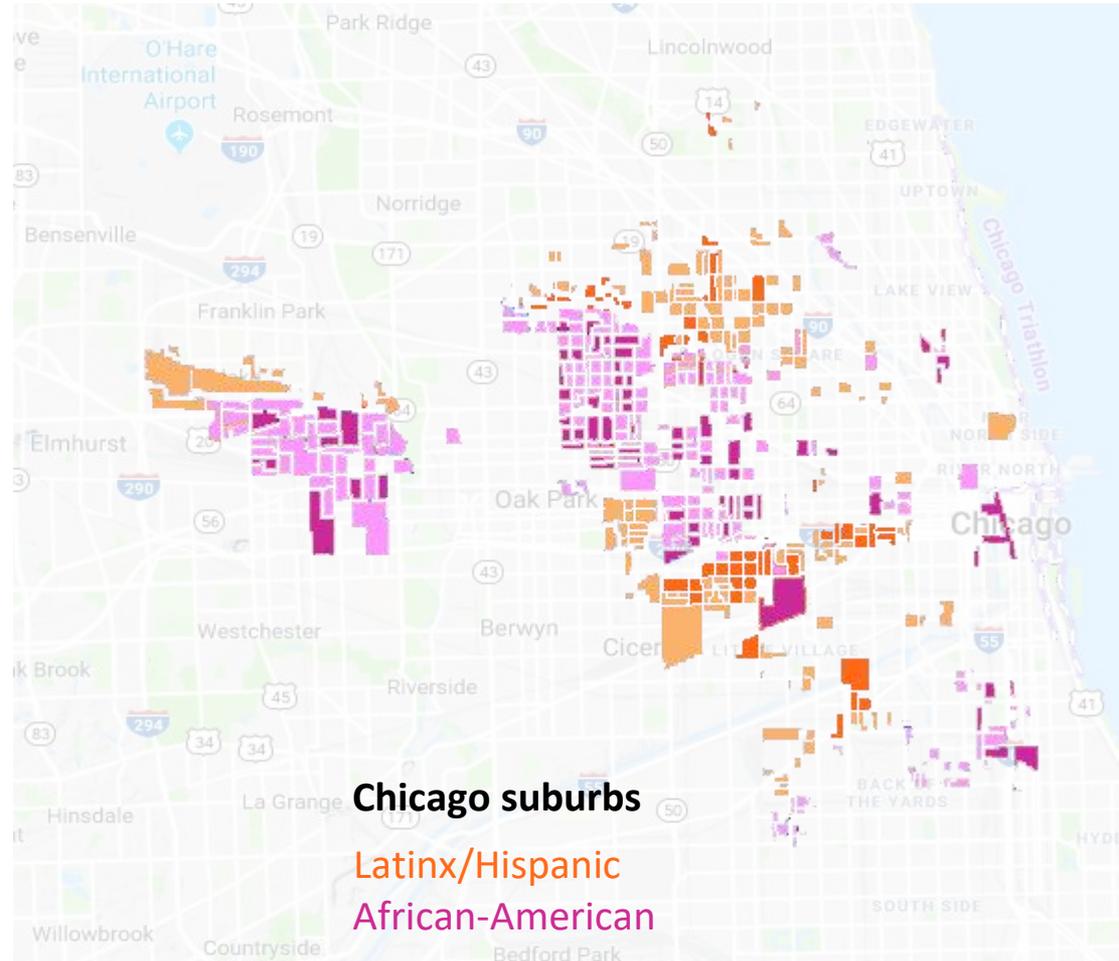
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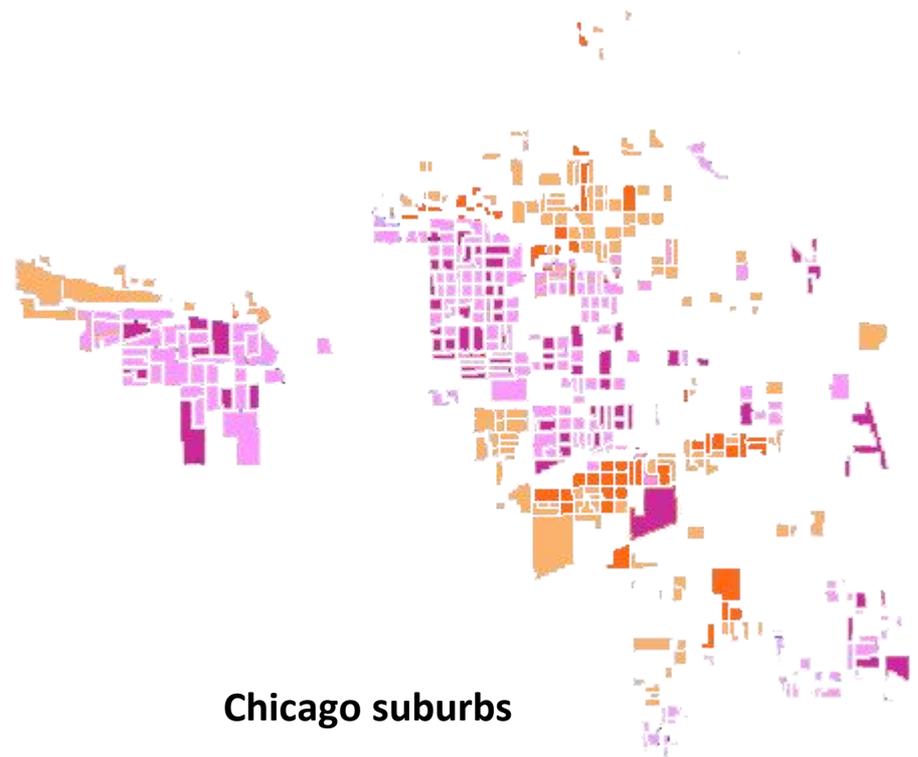
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Chicago suburbs

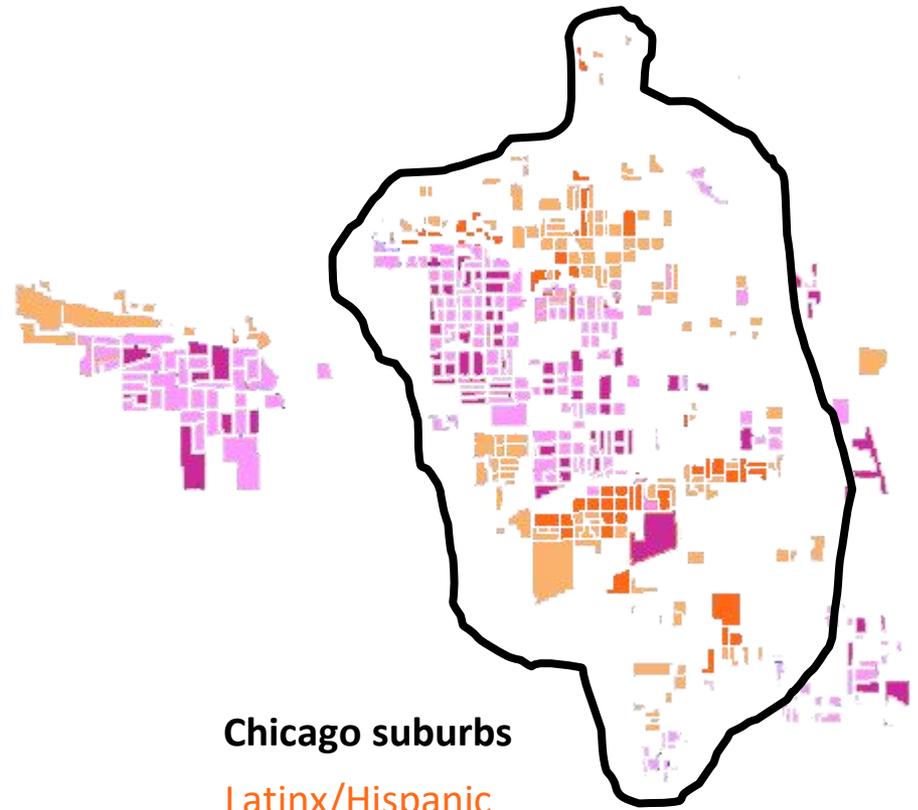
Latinx/Hispanic

African-American



Race & ethnicity: to remember

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Chicago suburbs

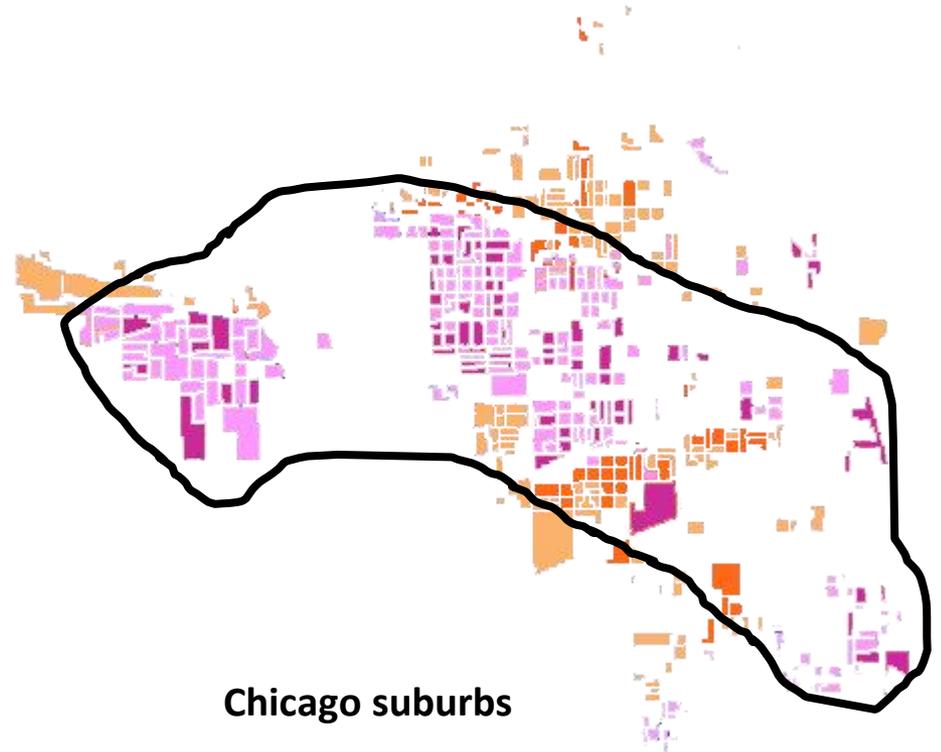
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Chicago suburbs

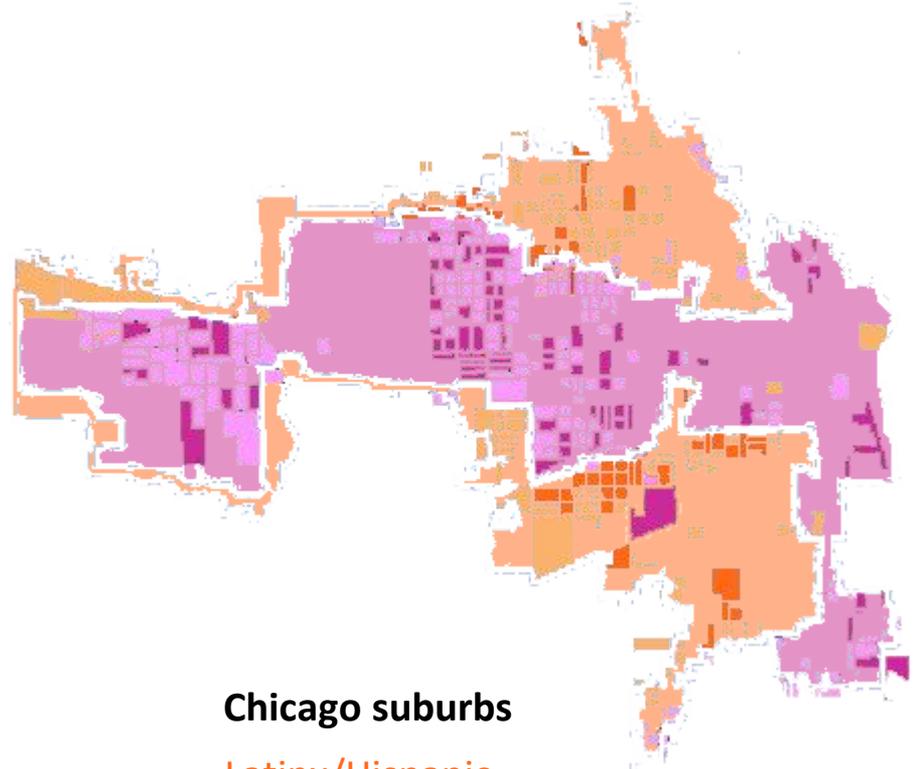
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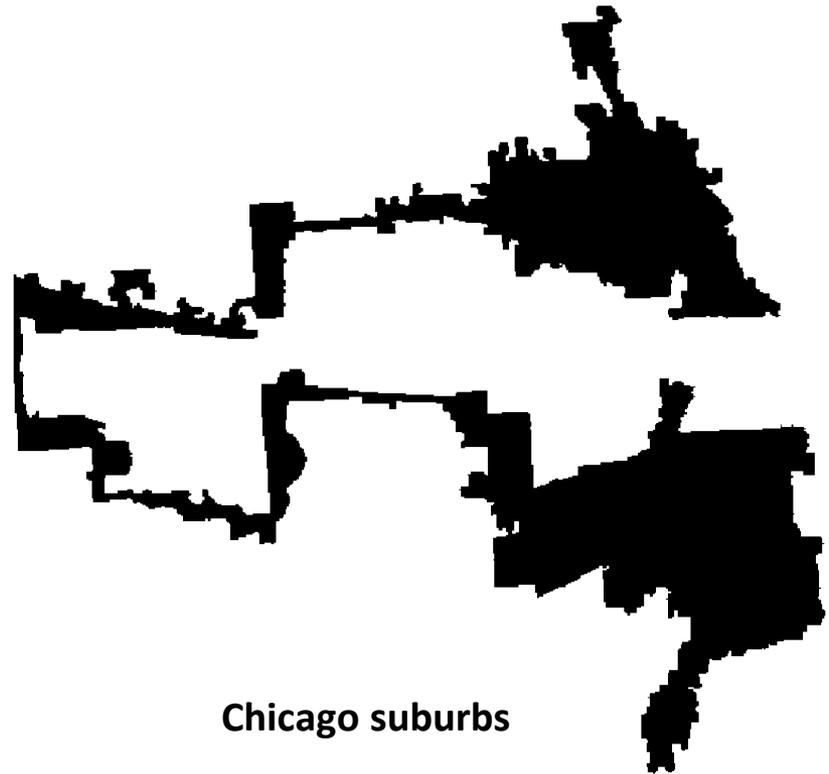
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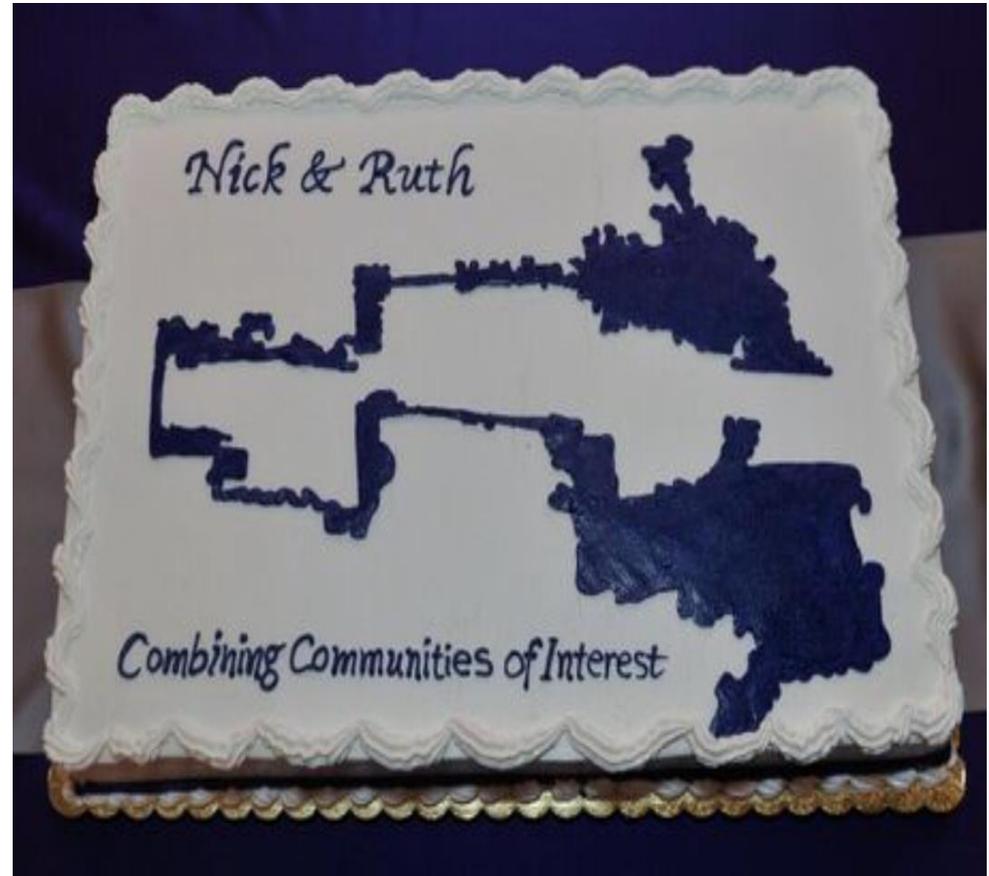


Chicago suburbs



Race & ethnicity: to remember

- Need to creatively reconcile rights of multiple minority communities
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Rules in state law



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Where to draw the lines?

- Equal population Federal / state
- Race and ethnicity Federal
- Contiguity State
- Municipal geography State
- Compactness State
- Nesting State
- Candidates & parties State

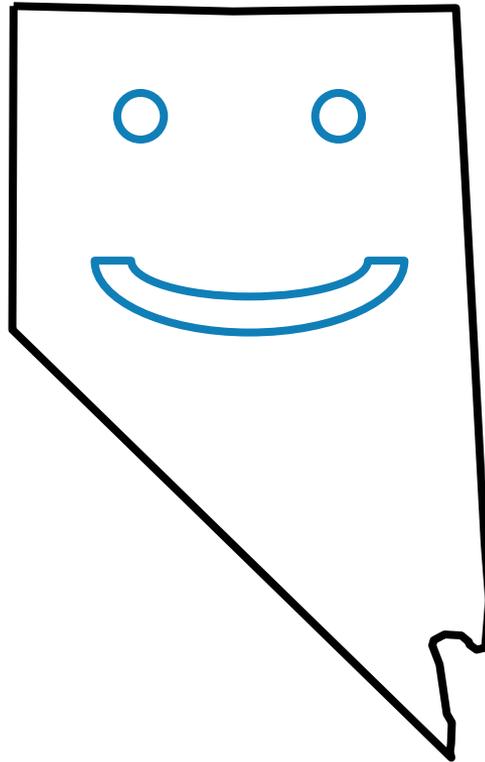


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Contiguity

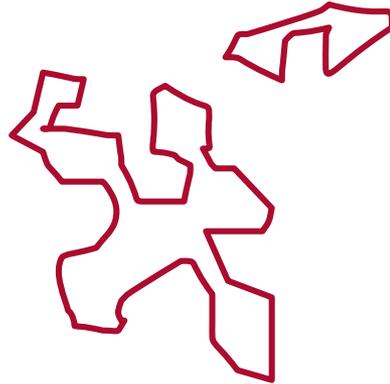


Contiguity

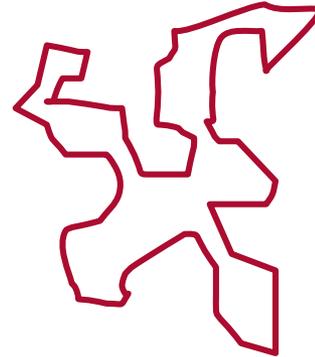


Contiguity

All parts of the district are connected to each other



No



Yes



Contiguity

Islands create special conditions



Where to draw the lines?

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Municipal geography

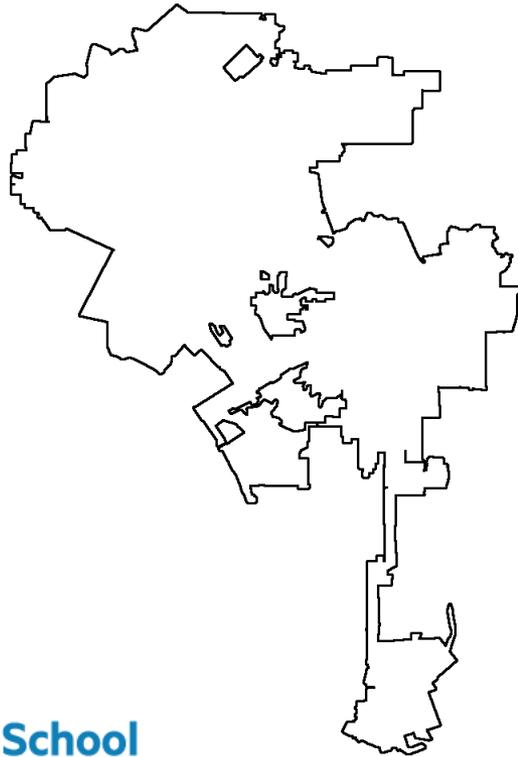
- City
- County
- Neighborhood
- Community of interest

“A community of interest is a contiguous population which shares common social and economic interests that should be included within a single district for purposes of its effective and fair representation. Examples of such shared interests are those common to an urban area, a rural area, an industrial area, or an agricultural area, and those common to areas in which the people share similar living standards, use the same transportation facilities, have similar work opportunities, or have access to the same media of communication relevant to the election process. Communities of interest shall not include relationships with political parties, incumbents, or political candidates.”



These lines may be irregular

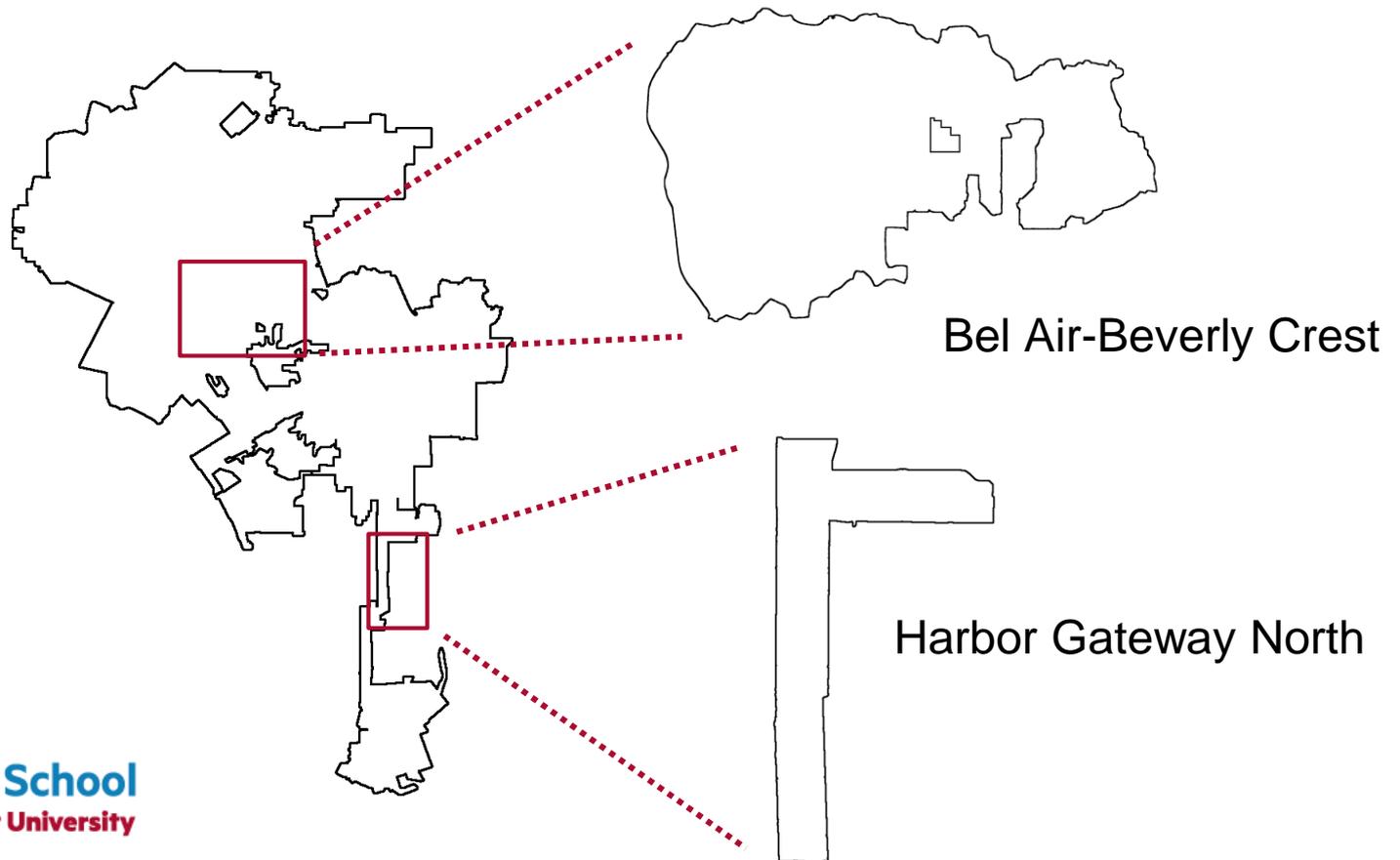
City of Los Angeles



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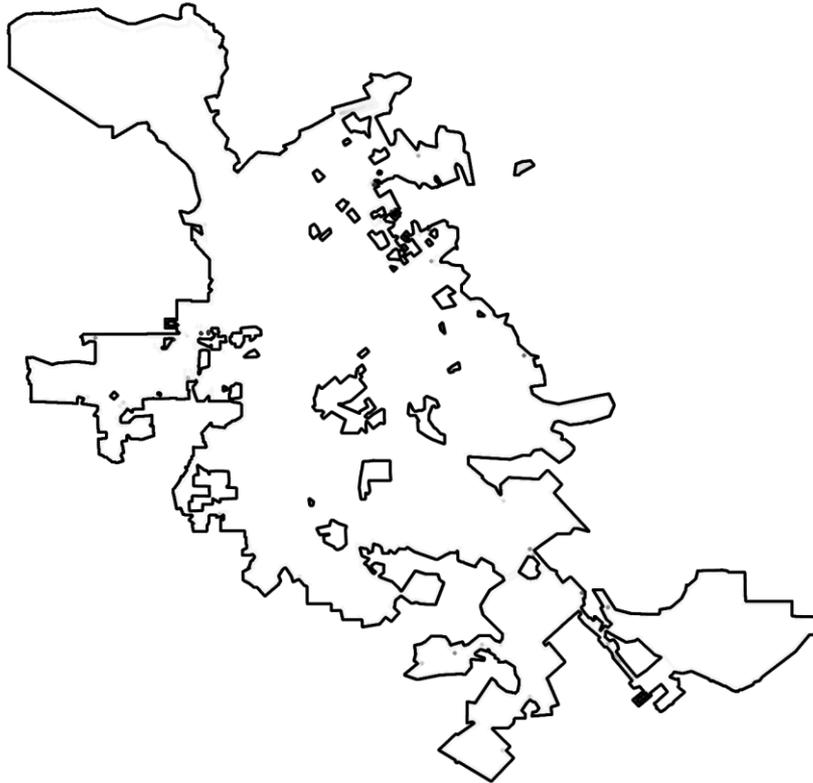
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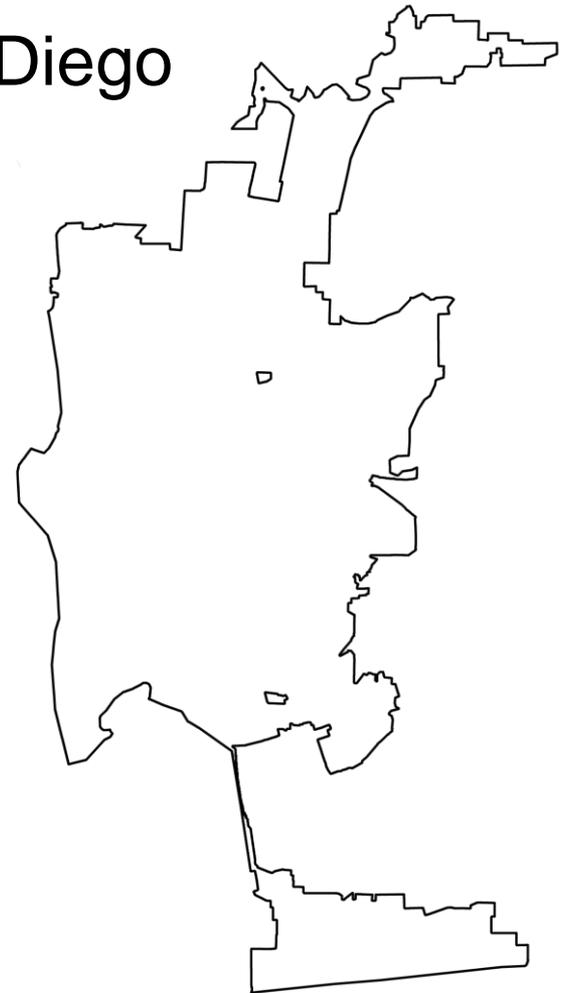
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These lines may be irregular

San Jose

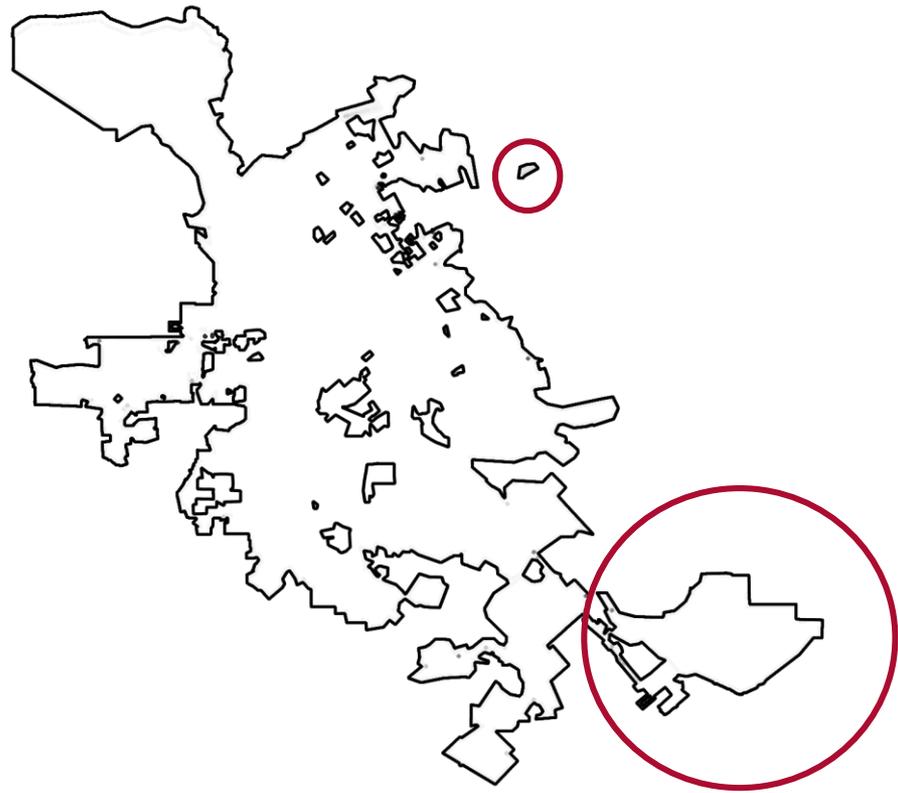


San Diego

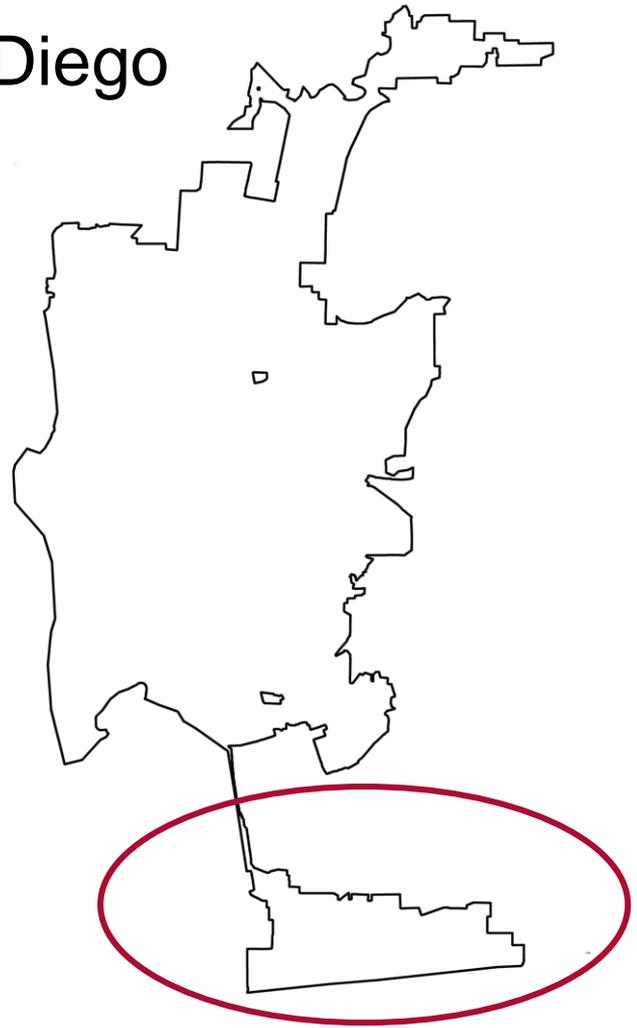


These lines may be irregular

San Jose



San Diego



These lines may not be precisely defined

“A community of interest is a contiguous population which shares common social and economic interests that should be included within a single district for purposes of its effective and fair representation.”

- Census data
- Hearing testimony (2700 speakers, 22,000 submissions)
- Other submissions to the commission



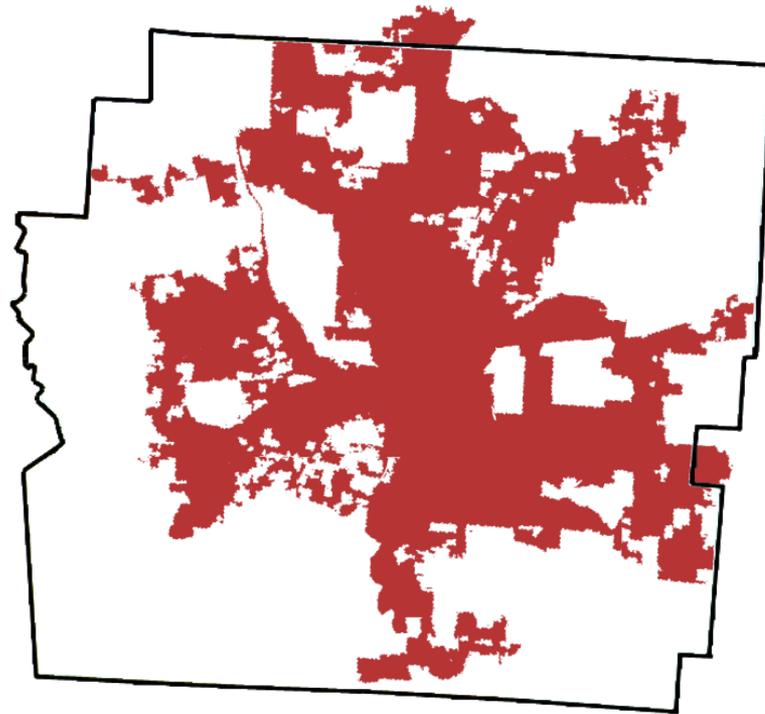
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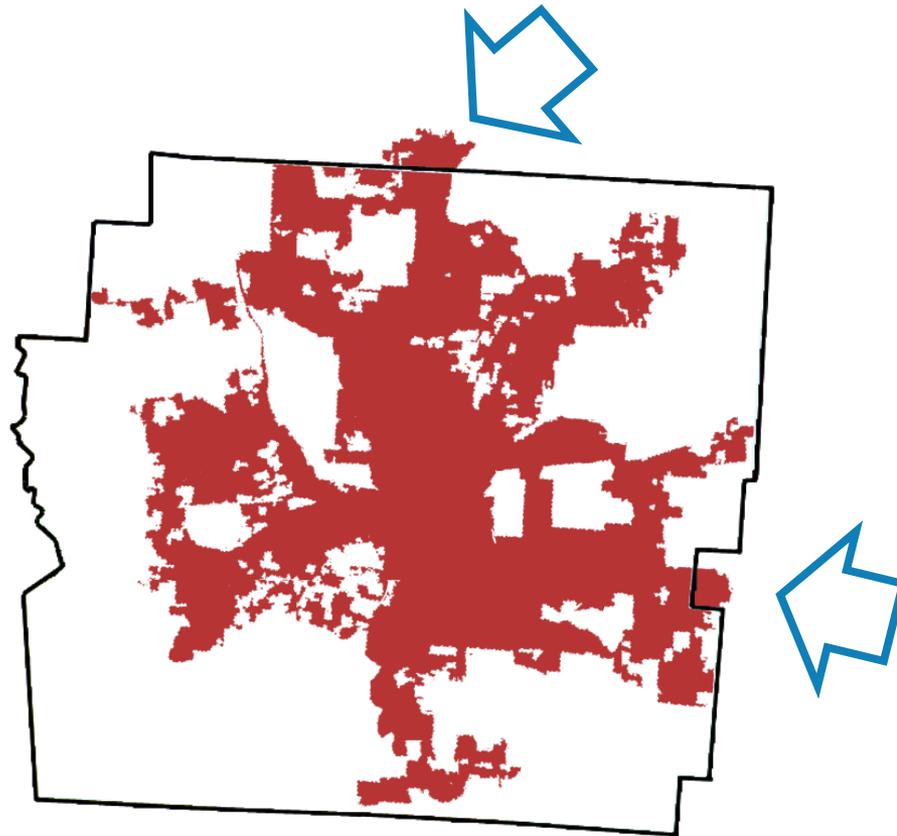


These lines may conflict



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These lines may conflict



Municipal geography: to remember

- Need to be able to distill and assess testimony
- Need to reconcile potential conflicts in testimony, even when there is no “right” or “wrong”
- Need to be comfortable determining borders that are not pre-defined
- Need to be comfortable with “strange” shapes
- Need to reconcile potential conflicts among geographies



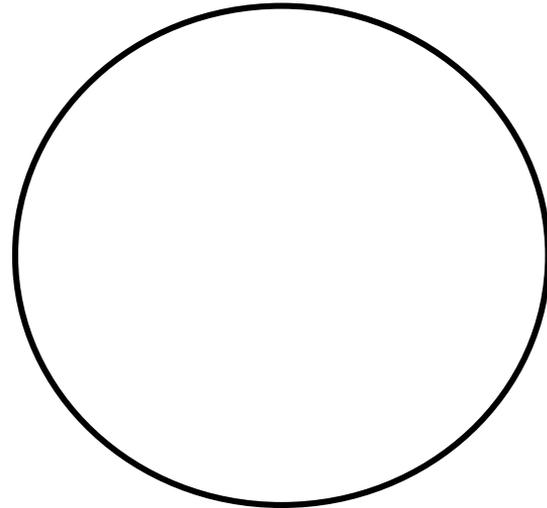
Where to draw the lines?

- Equal population Federal / state
- Race and ethnicity Federal
- Contiguity State
- Municipal geography State
- Compactness State
- Nesting State
- Candidates & parties State



Compactness

Many think of “compactness” in terms of abstract shapes



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But that doesn't fit California law

Compactness

Some think of “compactness” in terms of formulas

- Total perimeter length
- Area v. area of circle with same perimeter (Cox/Polsby-Popper)
- Area v. area of circumscribing circle (Reock)
- Area v. area of circumscribing convex hull (Niemi)
- Diameter of circumscribing circle (Frolov)
- Moment of inertia / distance to center of gravity (Boyce-Clark)
- Significant corners (Kaufman-King)
- Inward-bending v. outward-bending angles (Taylor)
- Shortest path remaining in district (Chambers-Miller)

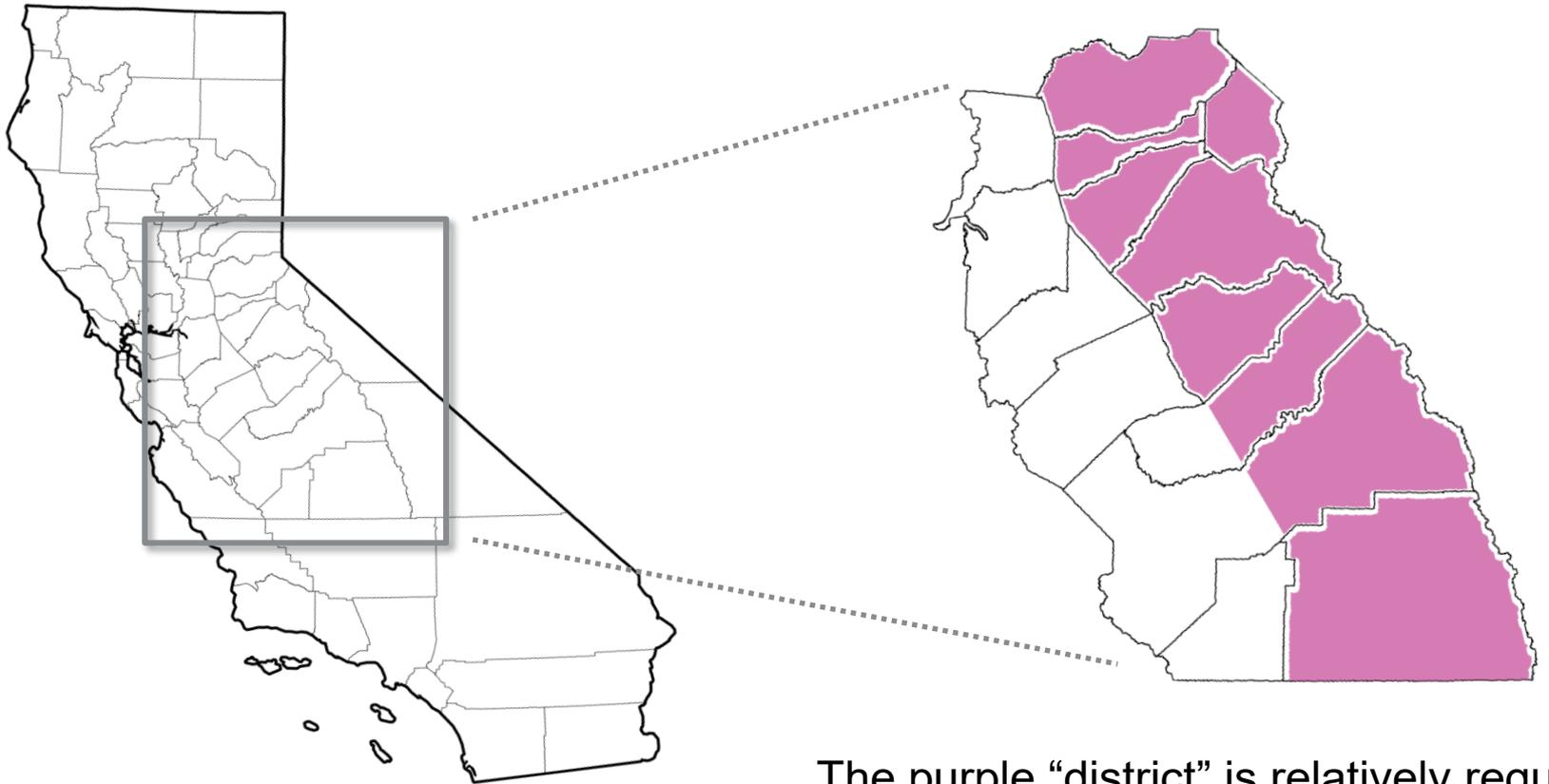
Compactness

California standard: Don't bypass nearby population



Compactness

California standard: Don't bypass nearby population

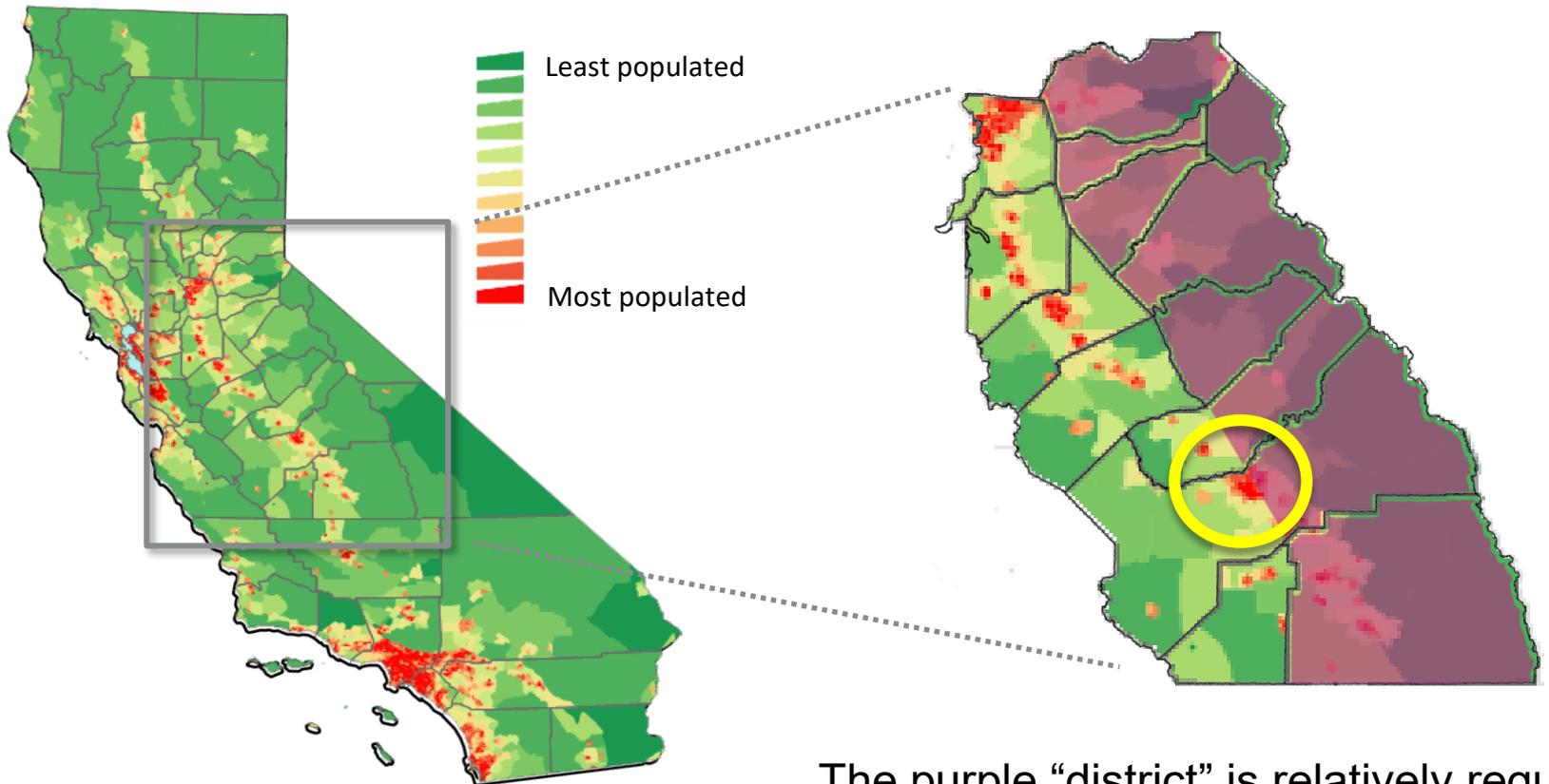


The purple “district” is relatively regular



Compactness

California standard: Don't bypass nearby population



The purple “district” is relatively regular, but not compact under California law

Compactness: to remember

- Be comfortable with “strange” shapes
- Remember that the “cleanest” answer isn’t always best (and may not even be legal)



Where to draw the lines?

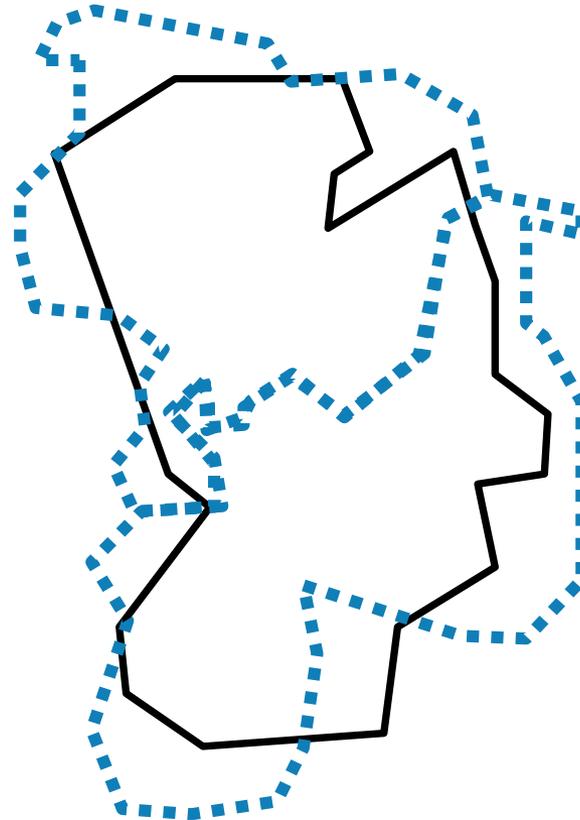
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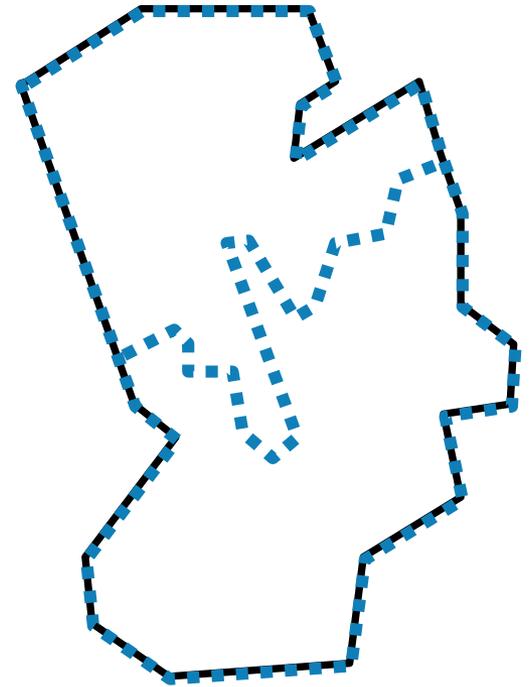
Nesting

Senate ———
Assembly ·····

Not nested

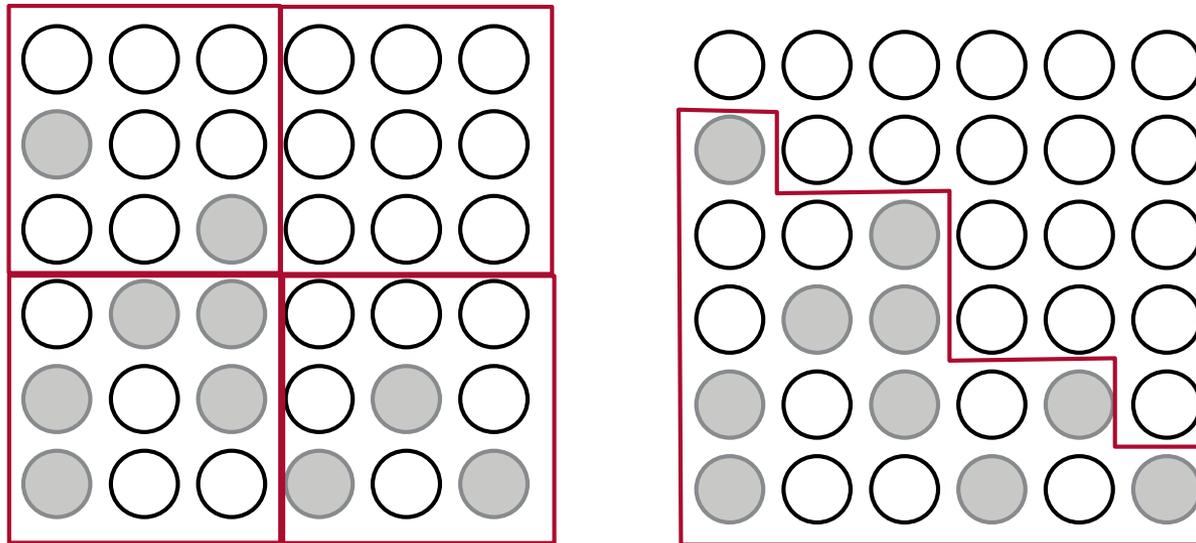


Nested



Nesting

A valid map for state Senate, Assembly, or Board of Equalization can lead to an **invalid** map for one or more of the others



Nesting: to remember

- You may have to re-evaluate one valid map if it inevitably produces an invalid map for a different chamber
- Be comfortable with deviating from nesting where necessary
- Remember that the “cleanest” answer isn’t always best (and may not even be legal)



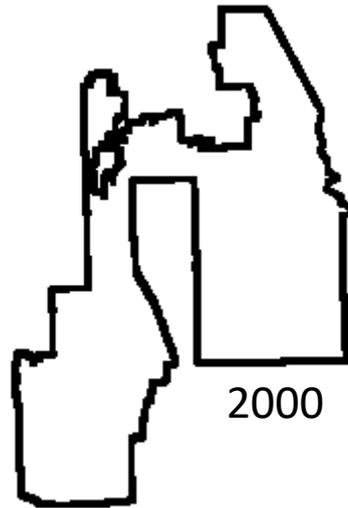
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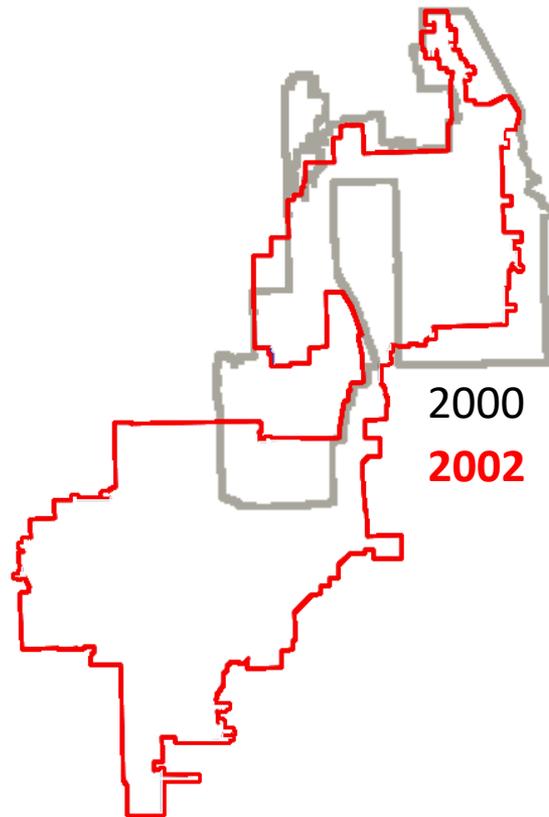
Candidates and parties

- Shall not consider candidate residence



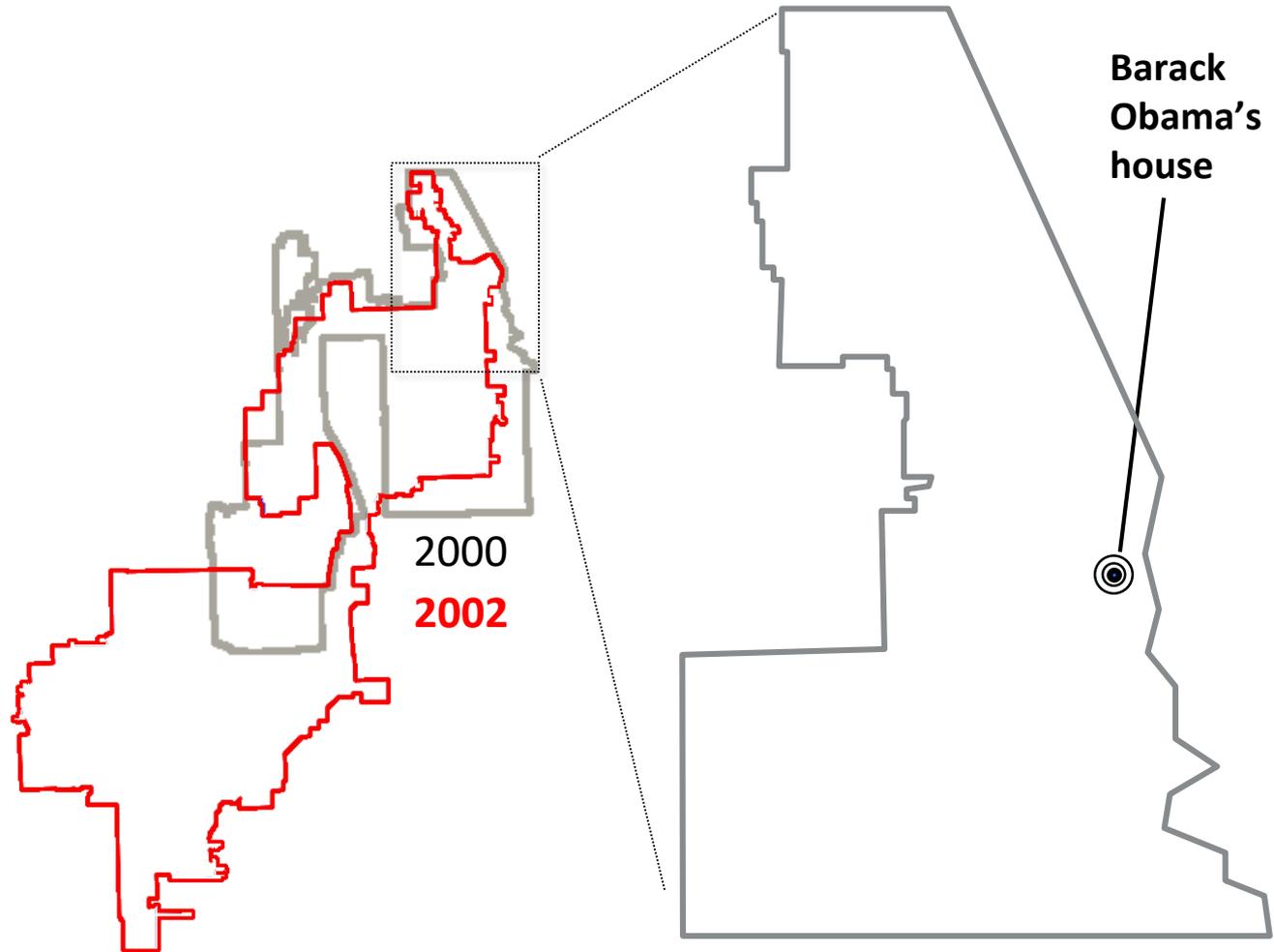
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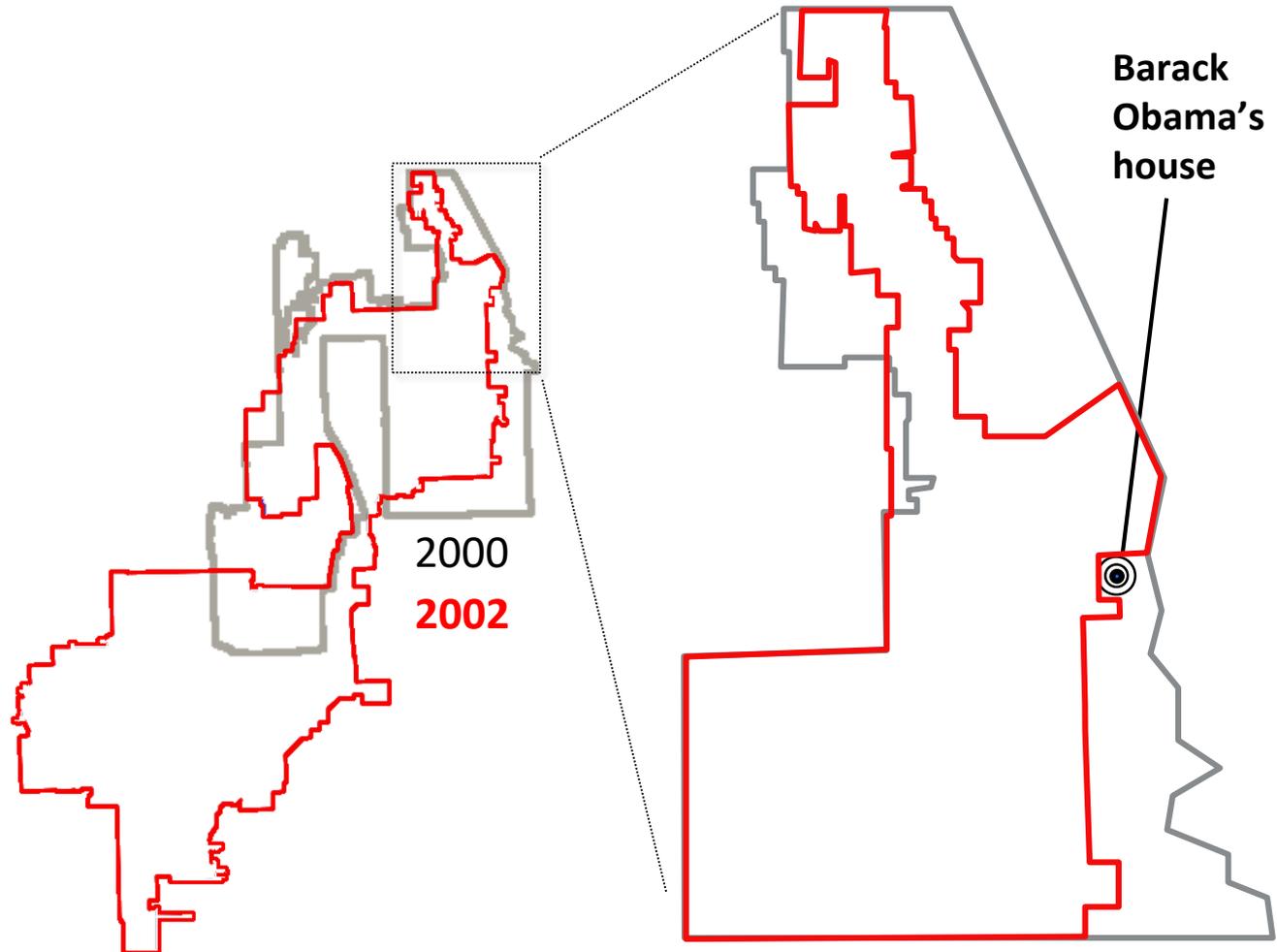
Candidates and parties

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Candidates and parties

- Shall not consider candidate residence



Candidates and parties

- Shall not consider candidate residence

2012: The “__erman” seat



Candidates and parties

- Shall not consider candidate residence
- Shall not be drawn for the purpose of favoring or discriminating against a candidate or party

Not a mandate for districts intentionally drawn to be competitive



Candidates and parties

- Shall not consider candidate residence
- Shall not be drawn for the purpose of favoring or discriminating against a candidate or party

Not a mandate for districts intentionally drawn to be symmetric



Candidates and parties

- Shall not consider candidate residence
- Shall not be drawn for the purpose of favoring or discriminating against a candidate or party

Not a mandate for districts intentionally drawn to achieve a particular score on a quantitative measure of partisanship



Candidates and parties: to remember

- It's fine to have a personal partisan affiliation, but districts may not be drawn to favor party
- Don't add extra criteria to the detriment of criteria actually in the law



Where to draw the lines?

- Equal population
- Race and ethnicity
- Contiguity
- Municipal geography
- Compactness
- Nesting
- Candidates & parties



- Be ready to consider and resolve conflicts
- Understand that you don't have to resolve conflicts in the same way everywhere
- Be ready to reconsider assumptions (particularly in light of path dependence)



Watch out for natural human tendencies

- It's natural to prefer clarity to ambiguity
- It's natural to spend less mental effort on more ambiguous concepts

But in some instances, the law makes ambiguous concepts just as important as clear ones

(e.g., county boundaries v. community boundaries)



Watch out for natural human tendencies

- Facing difficult choices, many people prefer to constrain their own discretion

But in some instances, the law intentionally leaves discretion, to further other objectives

(e.g., “reasonably equal” population may allow greater compliance with other criteria than strictly equal population)

Watch out for learned human tendencies

- Many people have preconceived notions about what “good” looks like



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Watch out for learned human tendencies

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Watch out for learned human tendencies

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Watch out for learned human tendencies

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Watch out for learned human tendencies

- Many people have preconceived notions about what “good” looks like



97 %



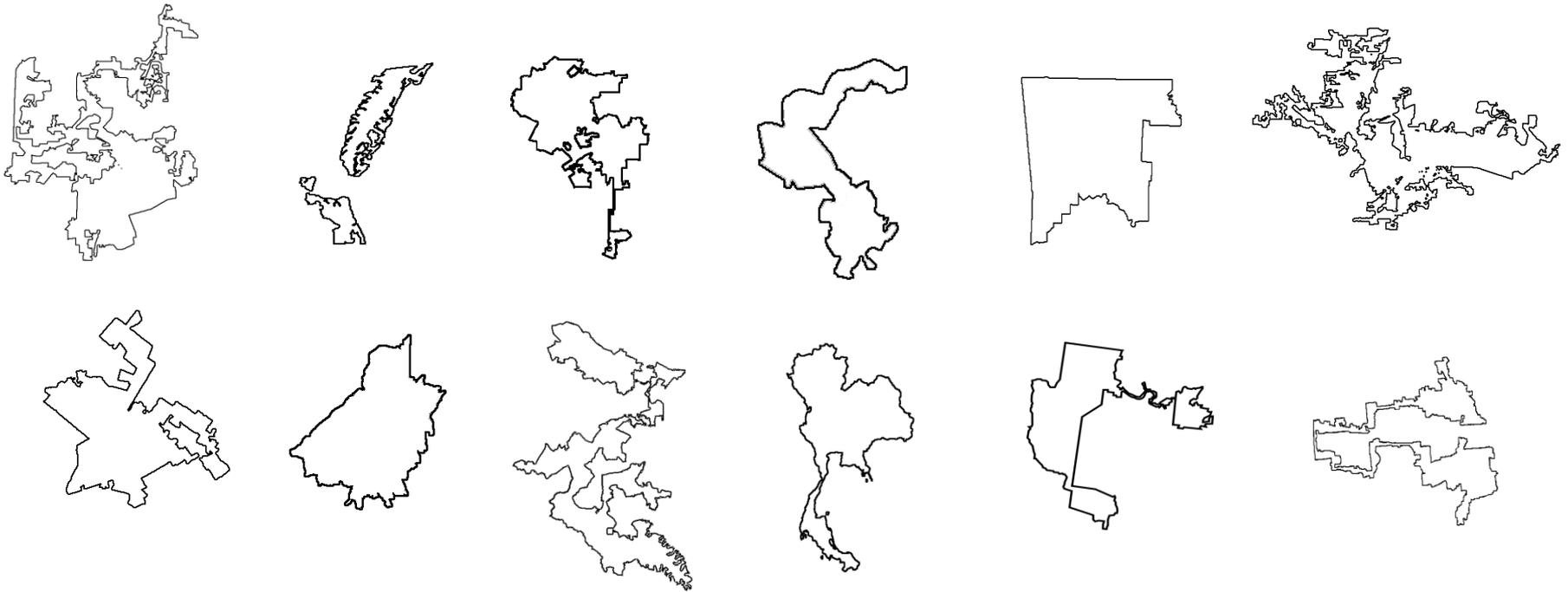
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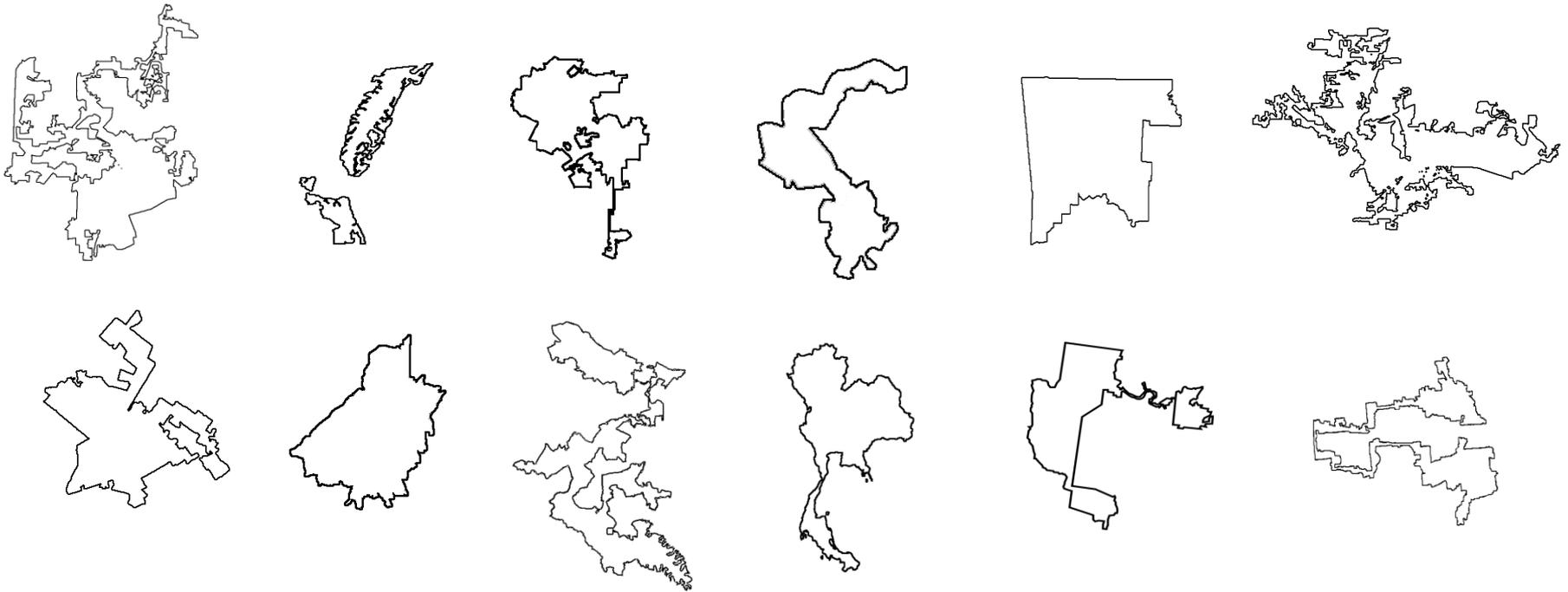
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Watch out for learned human tendencies

- Many people have preconceived notions about what “good” looks like



Watch out for learned human tendencies

- Many people have preconceived notions about what “good” looks like
- But the law asks for a careful balance of factors that doesn't privilege any one picture of a good district



Watch out for learned human tendencies

- Some people have preconceived notions about what certain redistricting criteria mean
- But in some instances, the law instructs how a factor should be measured, and that instruction is different

(e.g., compactness is not about shape, but about nearby areas of population)



Watch out for learned human tendencies

- Some people have preconceived notions about what certain redistricting criteria mean
- And in other places, the commission as a whole must arrive at a further understanding

(e.g., does “to the extent possible” have the same meaning as “to the extent practicable”)



These tendencies exist.

**They can be overcome in the
decisionmaking process.**

Just stay attuned to them.



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Today's conversation

- Why ?
- Where ?
- **What ?**
- When ?

Who, of course, is already set...



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Commissioners draw lines

But Commissioners don't just draw lines

- Seek training
- Hire (and supervise) staff, counsel, consultants
- Collect data
- Conduct outreach
- Establish hearing and public review process
- Work with legislature on funding, access to data
- Manage budget
- Make broad policy decisions
- Produce report including defined terms / standards
- Defend litigation



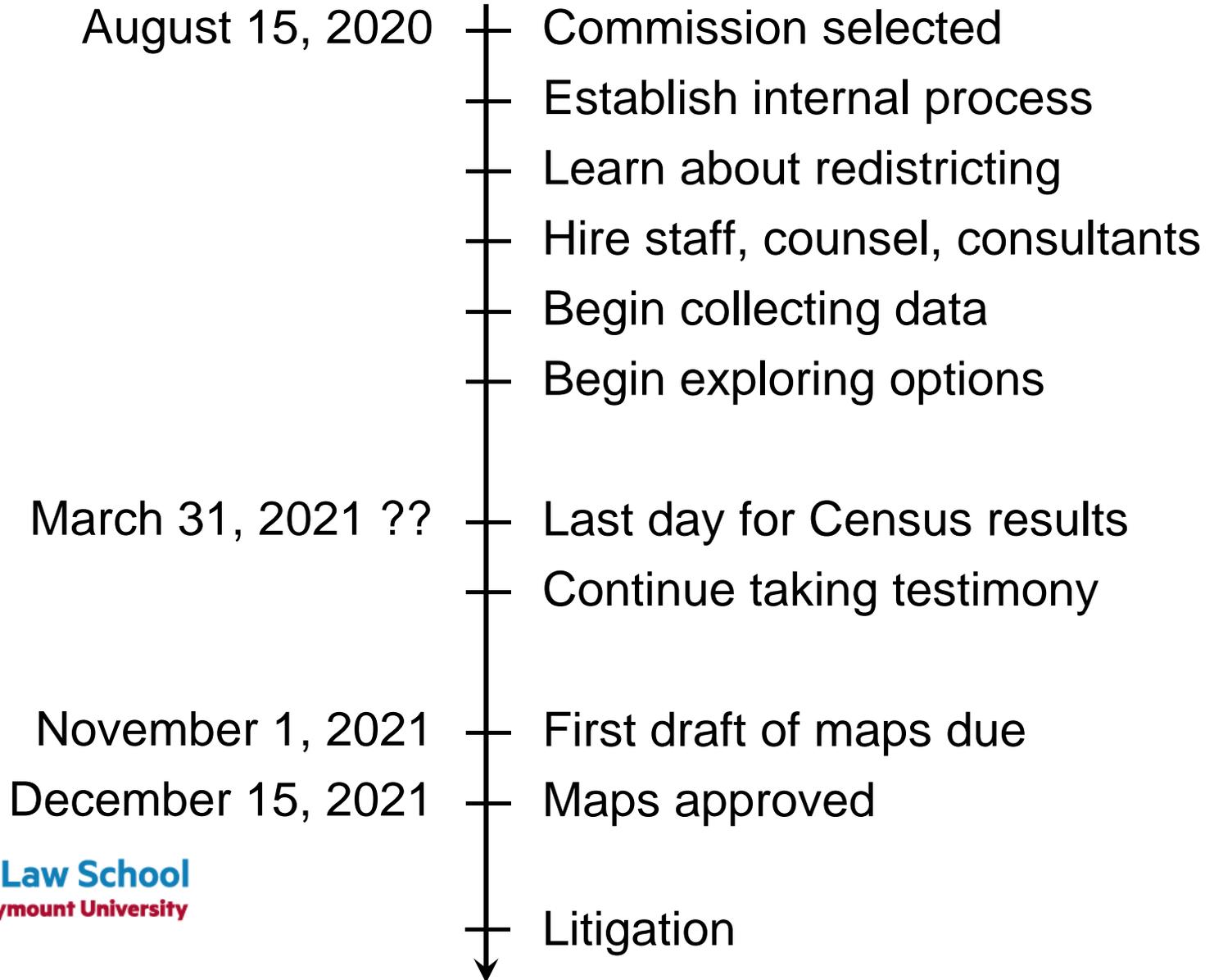
Today's conversation

- Why ?
- Where ?
- What ?
- **When ?**

Who, of course, is already set...



The timeline is quite short



Good luck!



Loyola Law School
Loyola Marymount University
Los Angeles

Further information

Justin Levitt

justin.levitt@lls.edu

allaboutredistricting.org



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Loyola Marymount University
Los Angeles