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# **The Voting Rights Act and redistricting**

**Prof. Justin Levitt**  
**January 28, 2021**

# Redistricting background

- Professor of Law 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, commissions in 2 states
- Expert witness in California Voting Rights Act litigation
- Amicus participation in 11 SCOTUS redistricting / VRA 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



# **Race and ethnicity**



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# Rule One

(Also in Or. Rev. Stat. § 188.010)

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

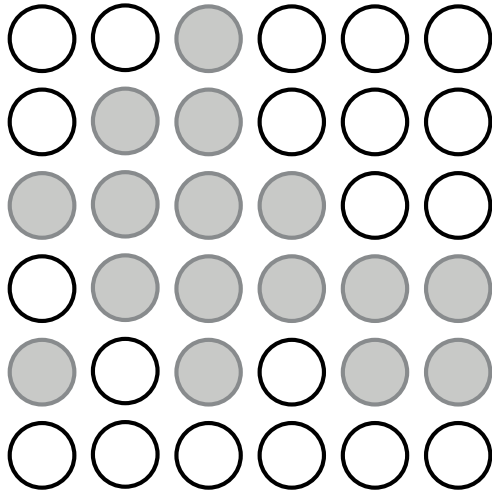


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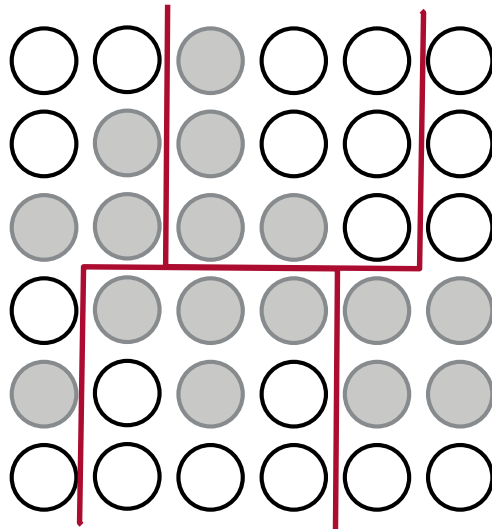


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“Cracking”

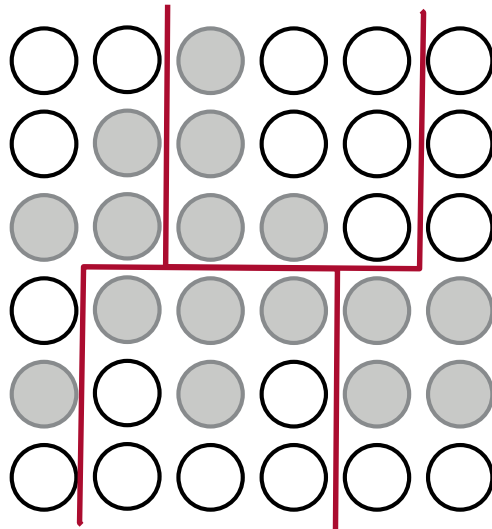


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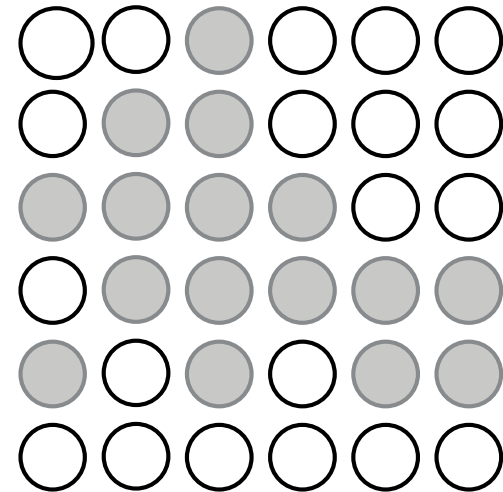
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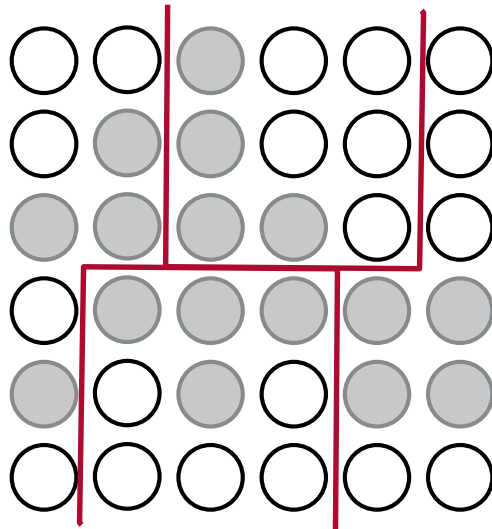
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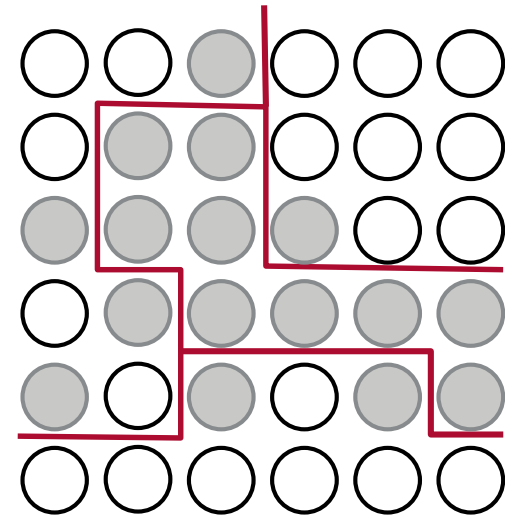
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“Cracking”



“Packing”

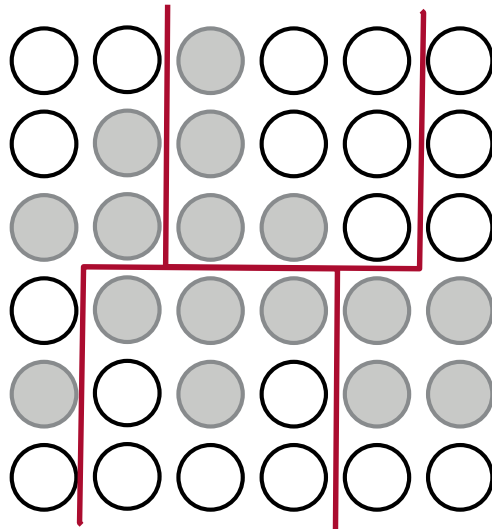




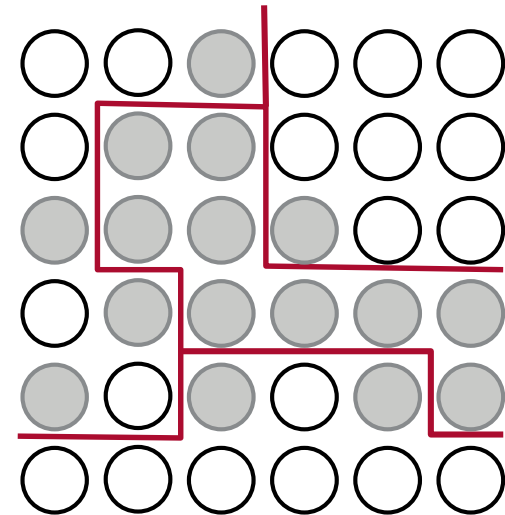
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**Don't set out to hurt voters based on their race or ethnicity**



“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.



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# **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



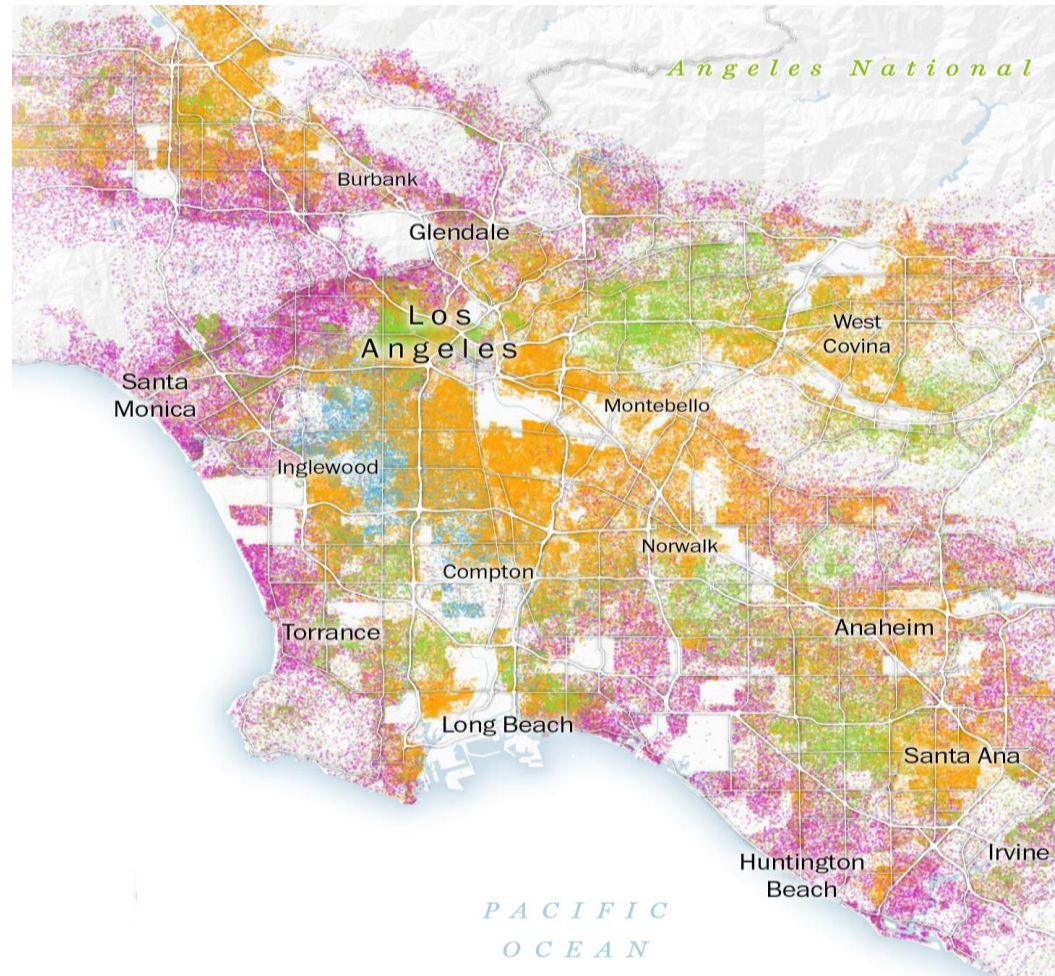
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# Voting Rights Act predicate

Are there sizable, relatively concentrated minority communities?

Los Angeles, 2016

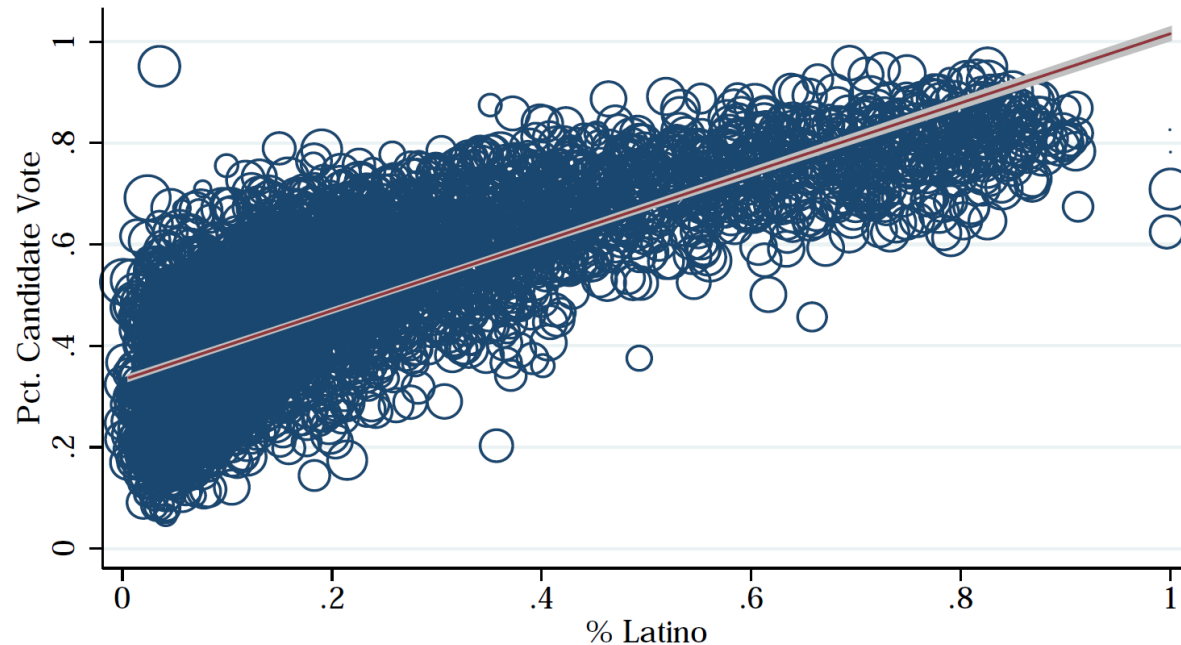
NH White  
Black  
Hispanic  
Asian



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# 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 (including criteria in state law)
- Repeat



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# Some bodies have struggled here

- Delaying training
- Delaying data acquisition
- Blinding selves to local voting results
- Ignoring path dependence
- Failing to consider blocs of multiple minorities
- Failing to relax appropriate population constraints
- Conflating electoral assessment with demographics

**Creating unnecessary risk by leaving VRA to final tweaks**



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# Rule Three

**Consider other factors at the same time**

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



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# Avoiding the improper use of race

- It's fine to consider race and ethnicity
- Don't set out to overpack
- Don't set out to divide / splinter
- Consider factors in addition to race / ethnicity (and explain those other factors)
  - Existing geographic and political bounds
  - Communities of interest
  - Transportation links
  - Other traditional criteria



# Avoiding insufficient attention to race

- Are local minority groups large enough to be > 50% “CVAP” (separately or together)
- Do local minority groups have distinct political preferences (separately or together, primaries or general elections)
- Is there a history of discrimination with lingering effects?
- Do minority groups have a meaningful opportunity in a proportional number of districts?
- What would it take for the local minority groups to have meaningful opportunities to elect candidates of their choice?

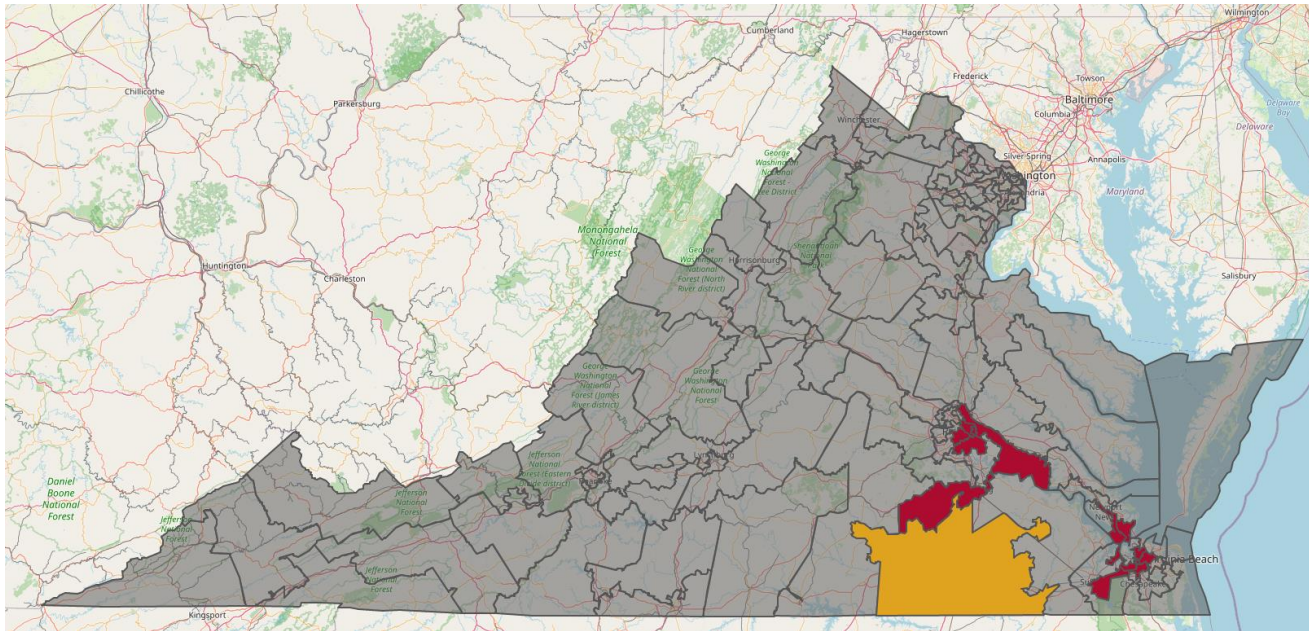




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# ***Bethune-Hill v. Va. State Bd. of Elections (2017)***

## **The wrong approach**



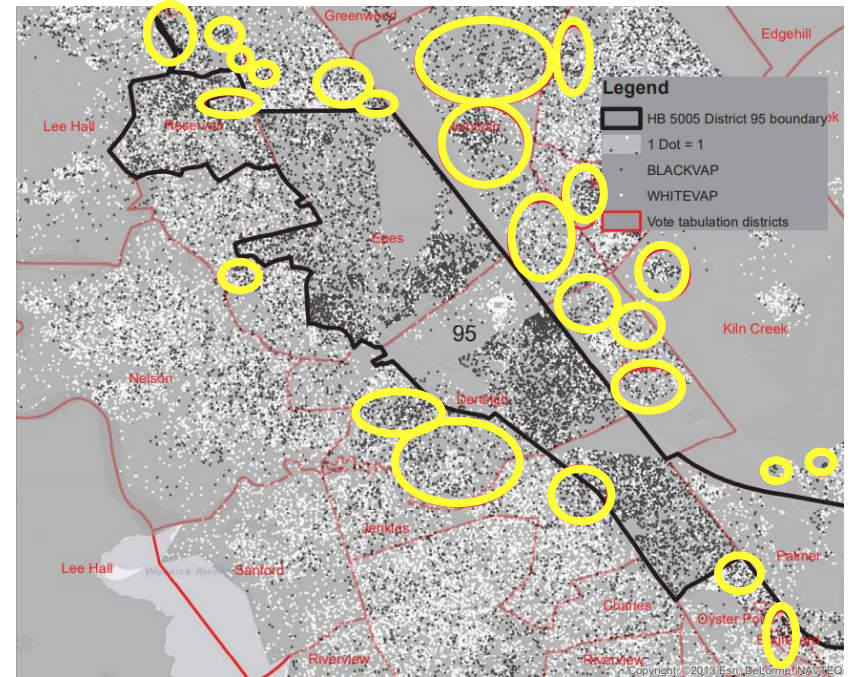
Dist.	BVAP%
63	59.5%
69	55.2%
70	56.4%
71	55.3%
74	57.2%
75	55.4%
77	58.8%
80	56.3%
89	55.5%
90	56.6%
92	60.7%
95	60.0%





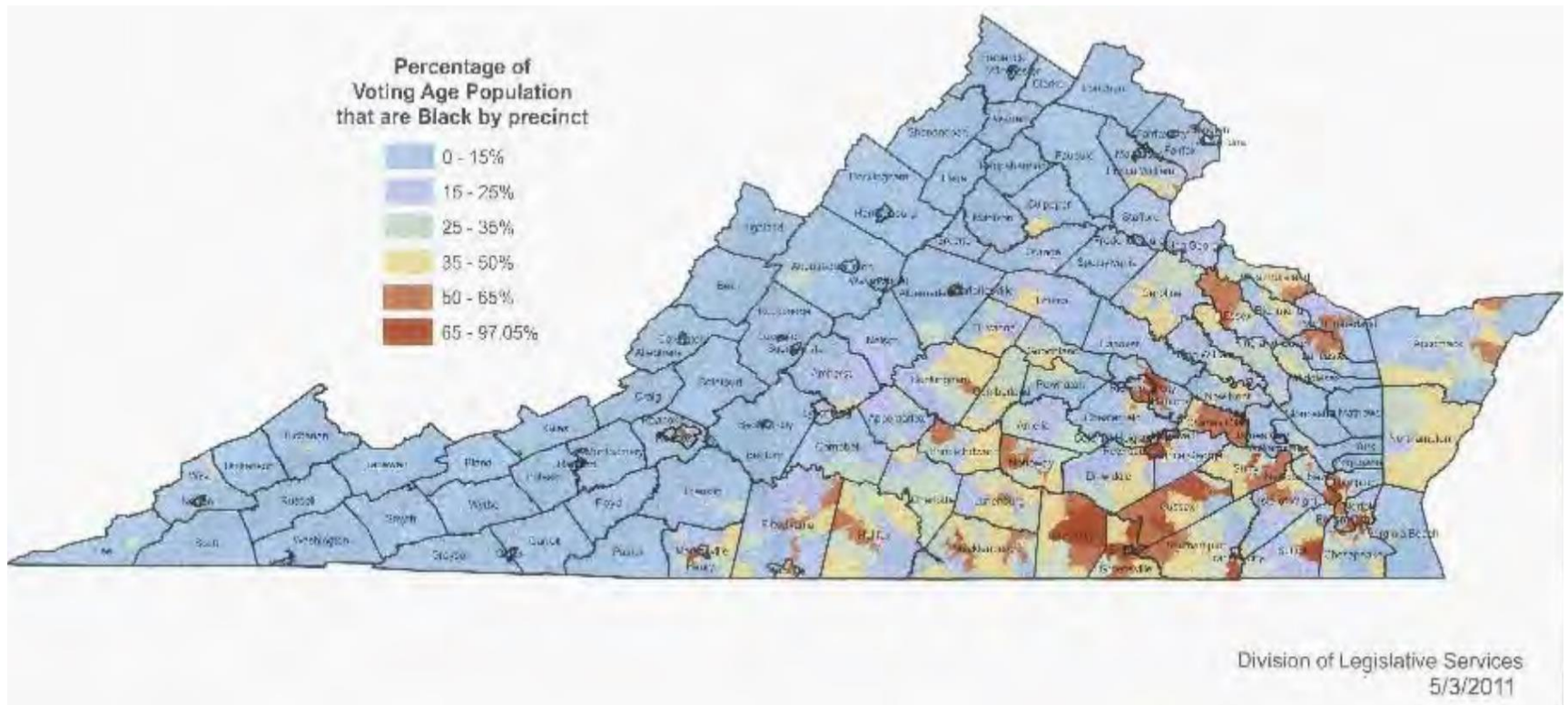
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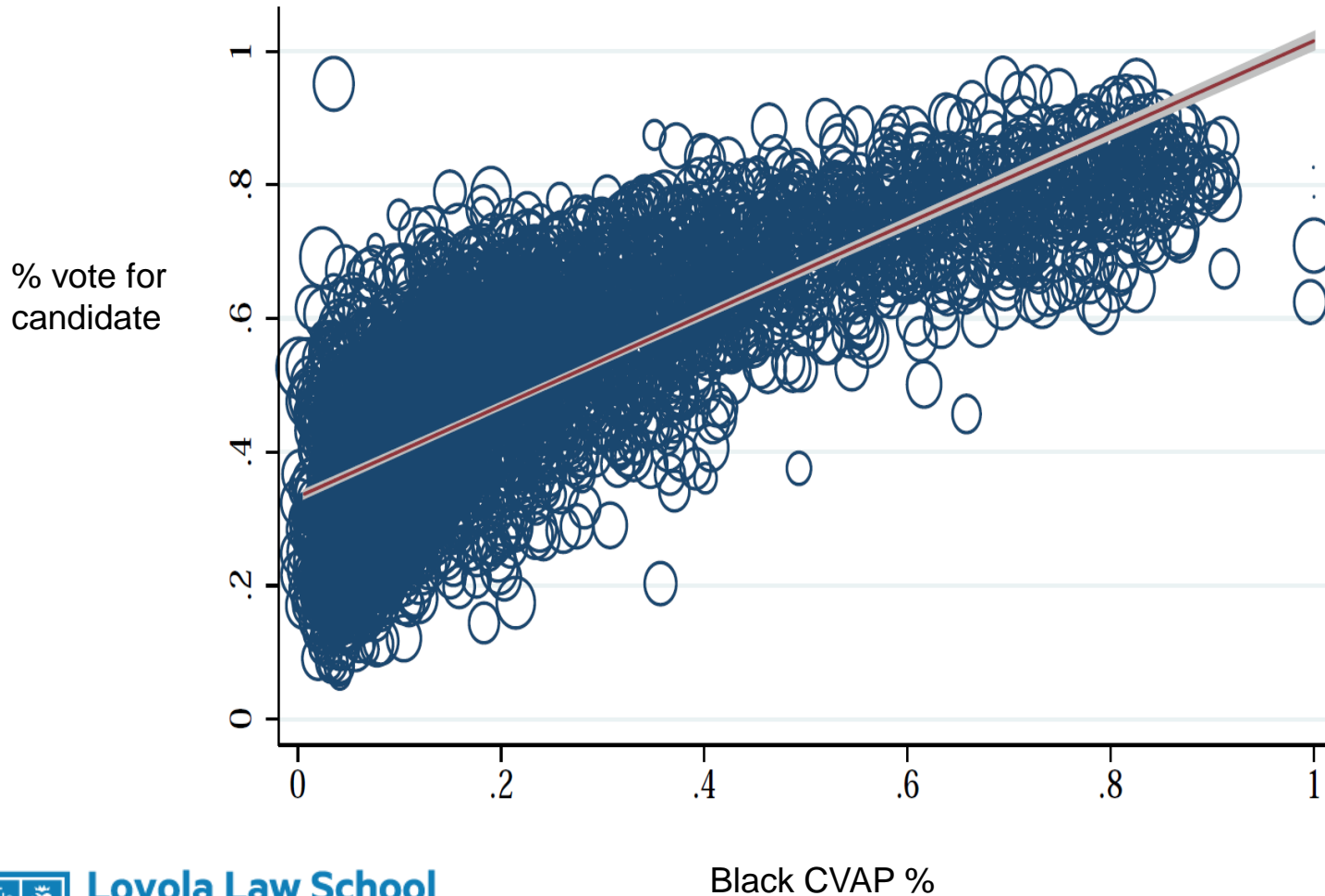
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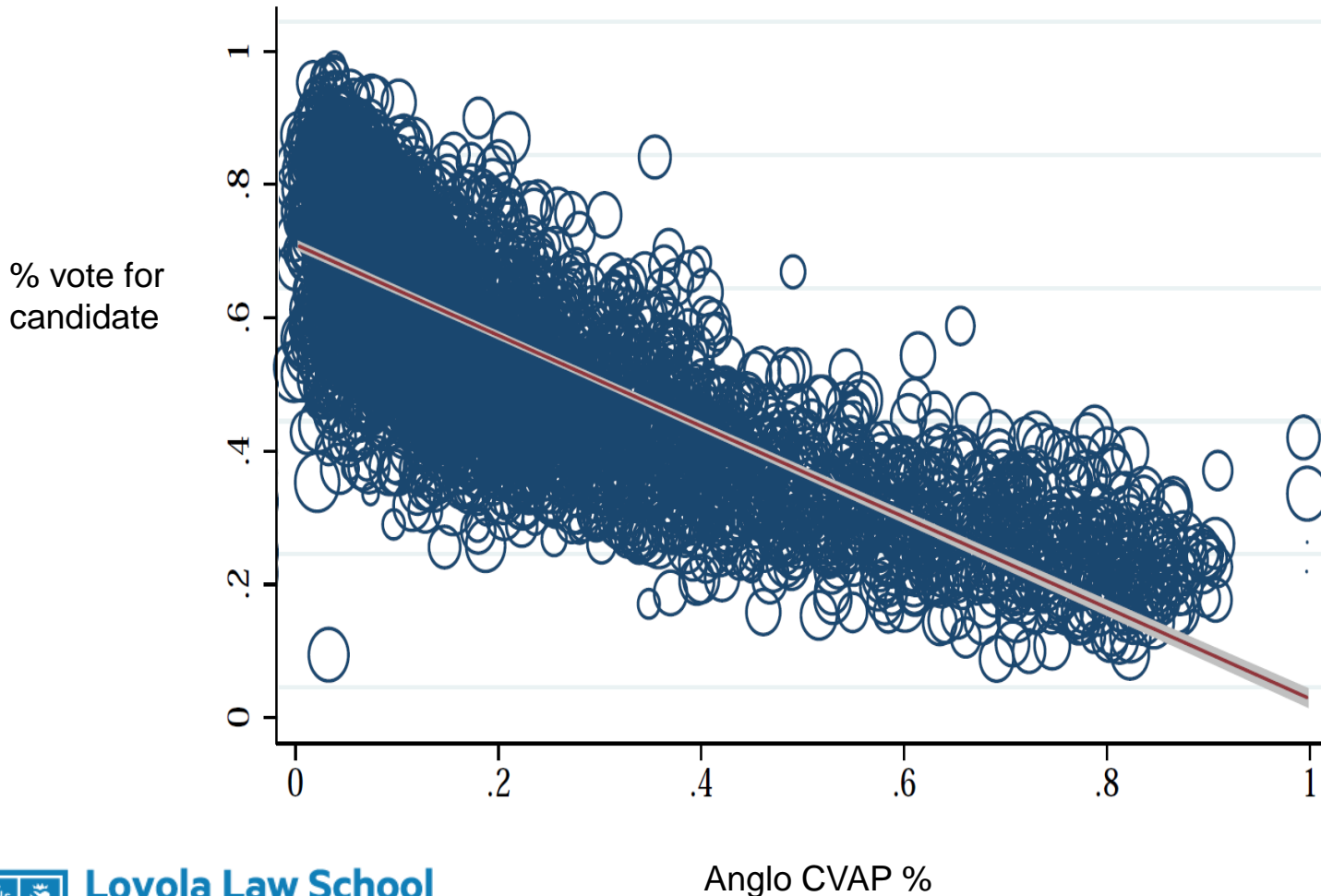
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# The right approach

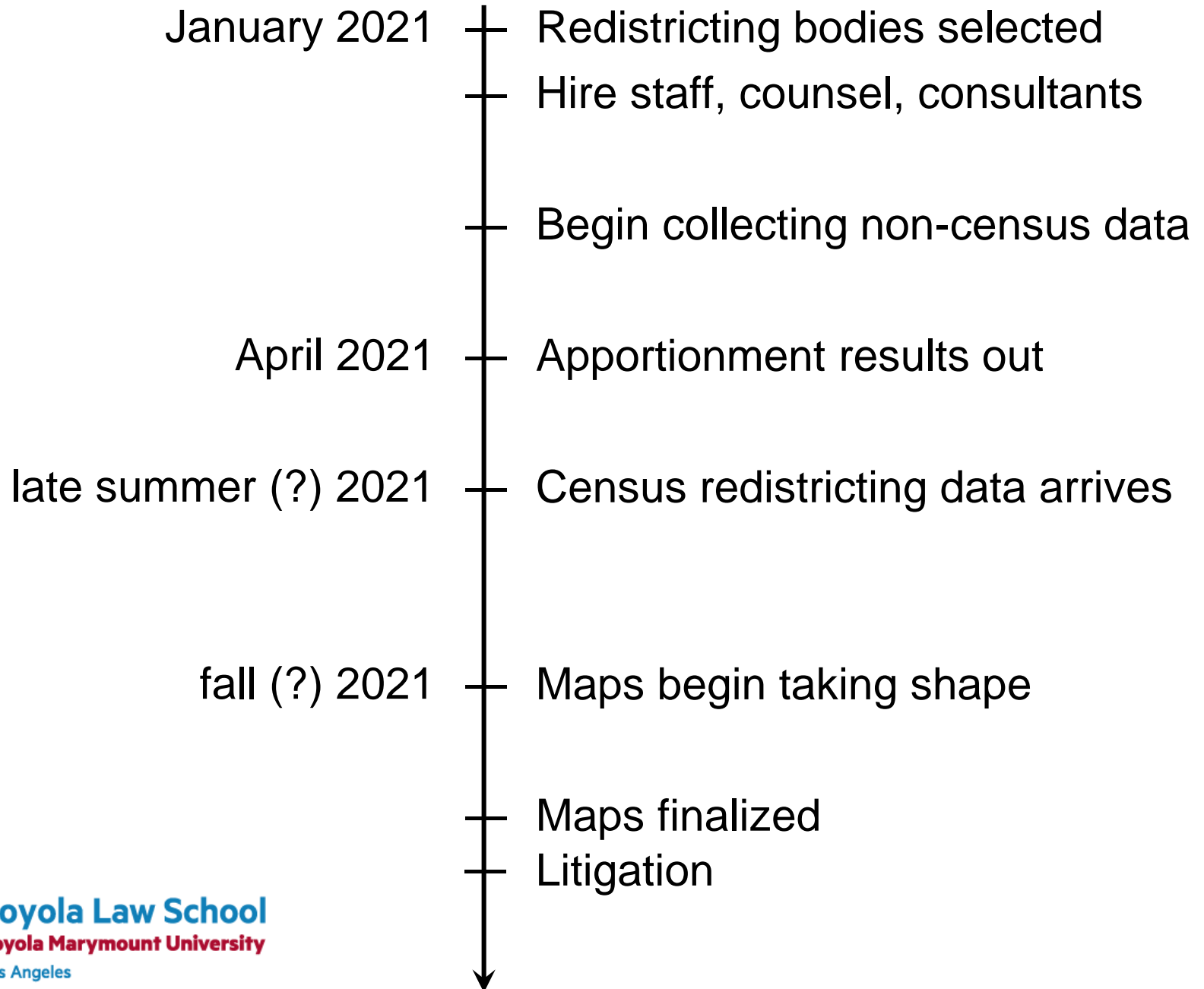
- Is there a history of discrimination?
- Do minority groups already have proportional opportunity?
- What's the appropriate local minority concentration that gives a reliable practical opportunity to elect?  
(doesn't have to be exact, but has to have "strong basis")
- Consider other factors too!
  - Existing geographic and political bounds
  - Communities of interest
  - Transportation links



# Early and often – it's iterative

- Start early with data
- Give time to consider blocs of multiple minority groups
- Give time to try different combinations





# One more thing



Malheur County: 0 % African-American

Malheur prisons: 9 % African-American

prisons = 10% of total Malheur population

permanent residence often not in Malheur County



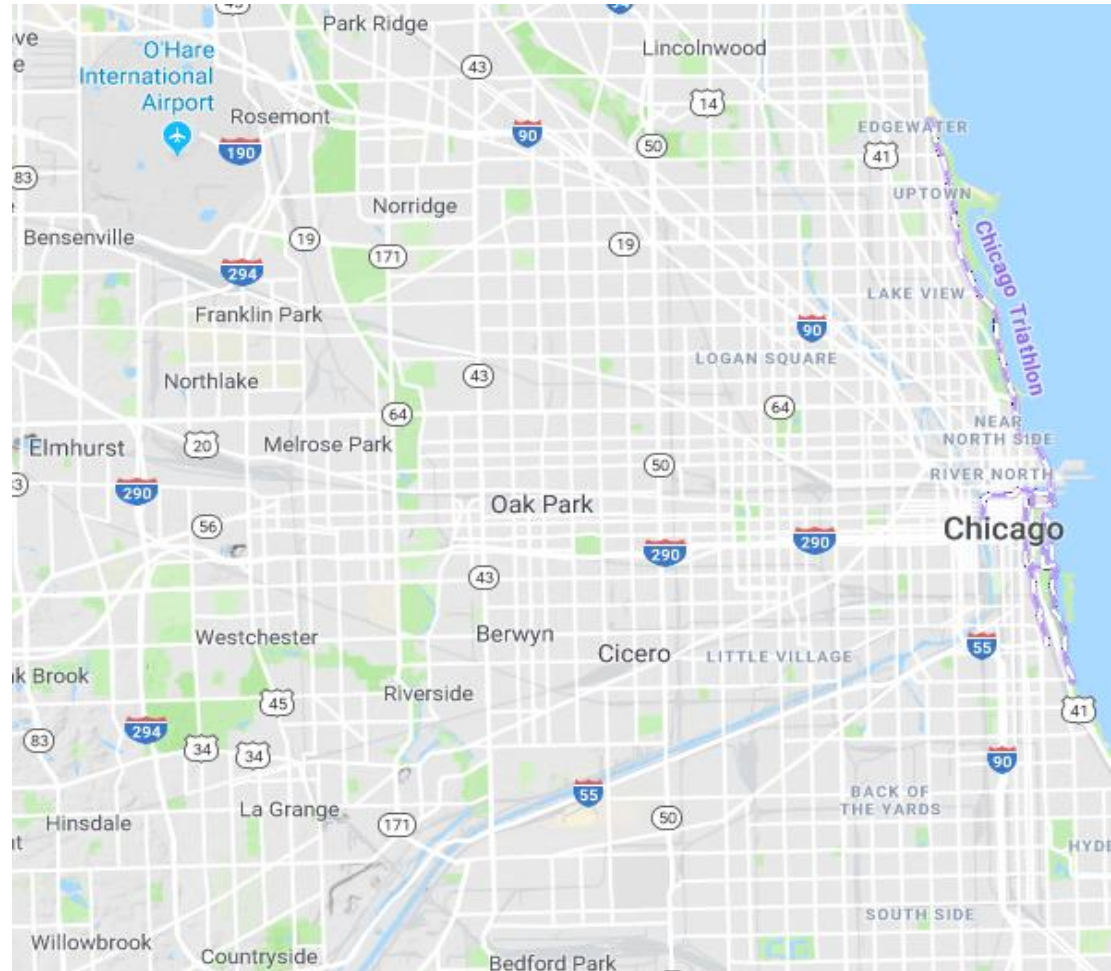
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# Race & ethnicity: a reminder

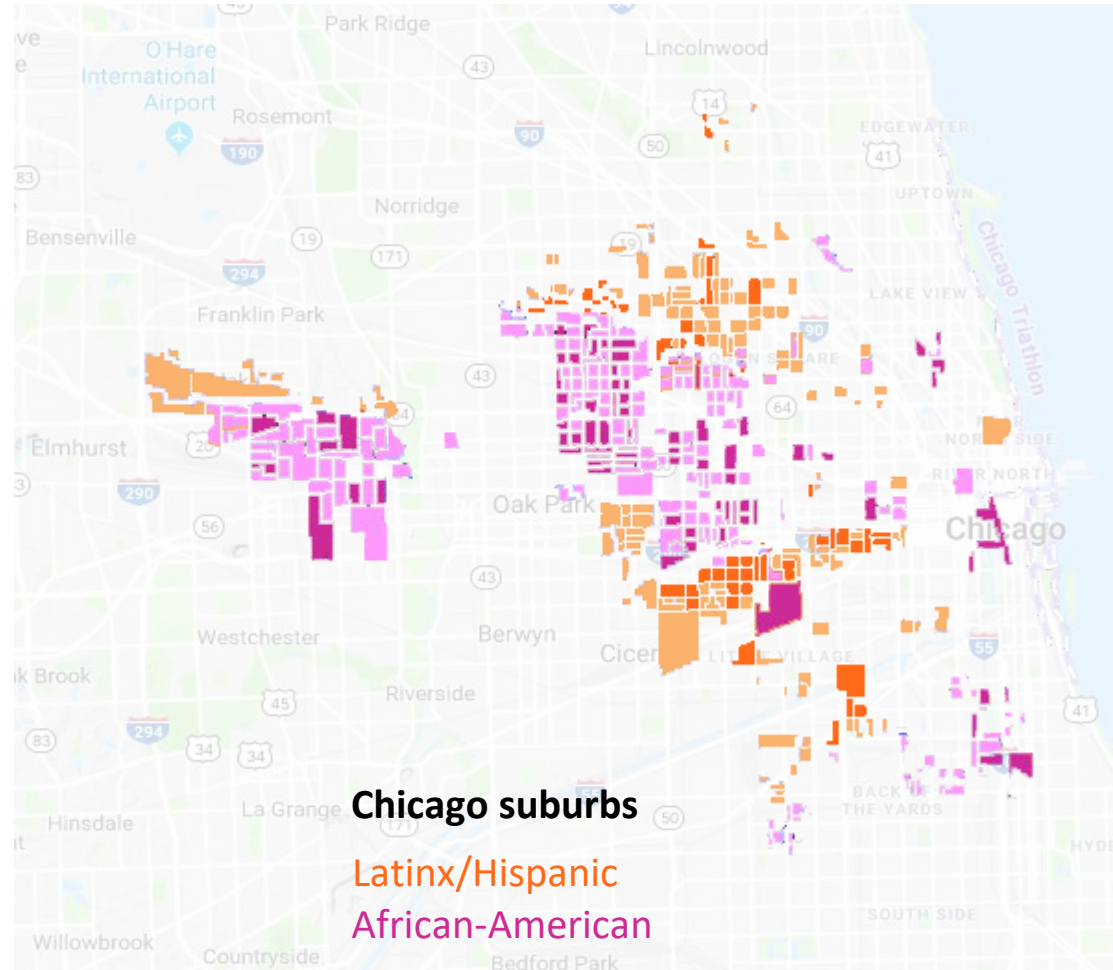
- May need to creatively reconcile rights of multiple minority communities
- May need comfort drawing districts with “strange” shapes





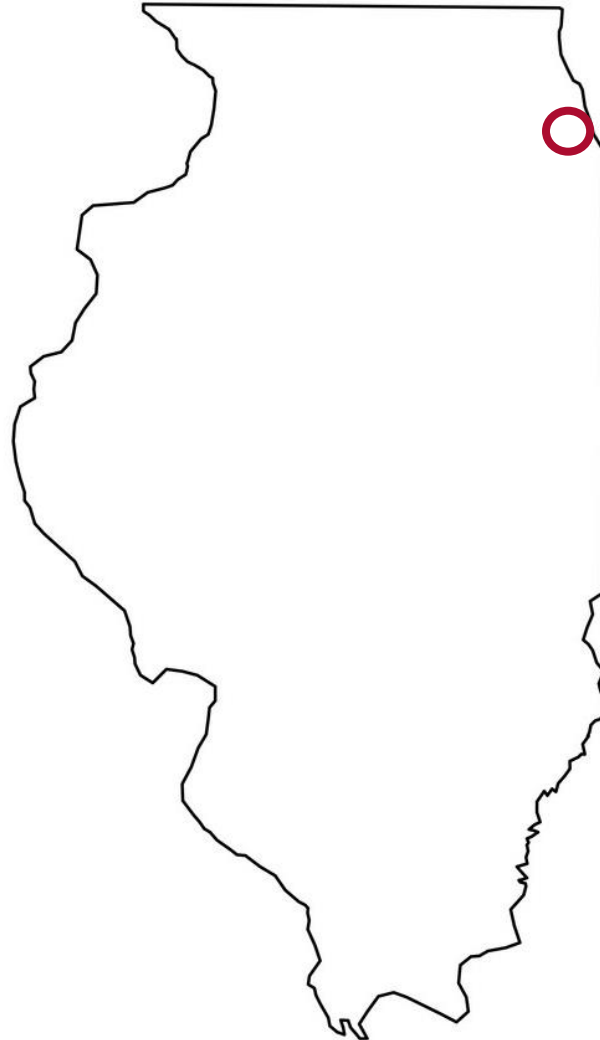
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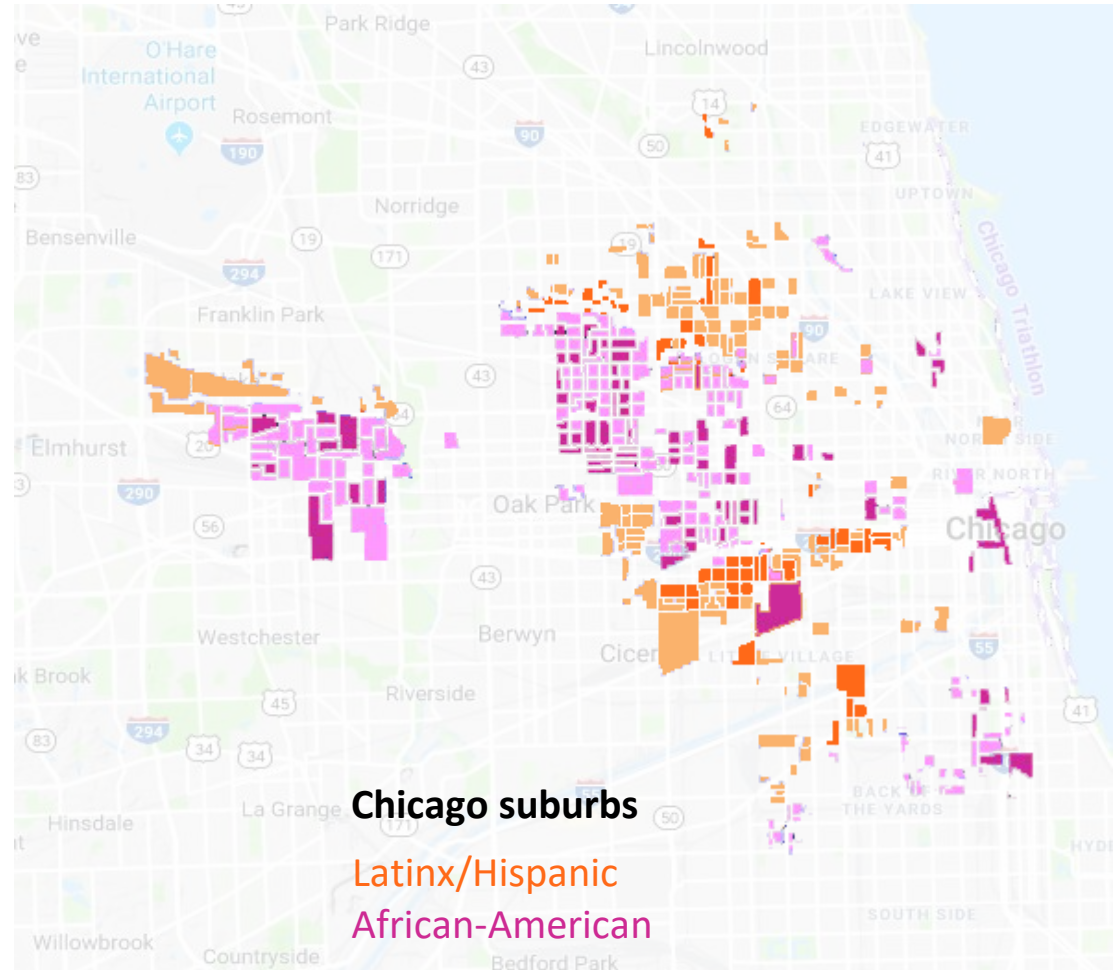
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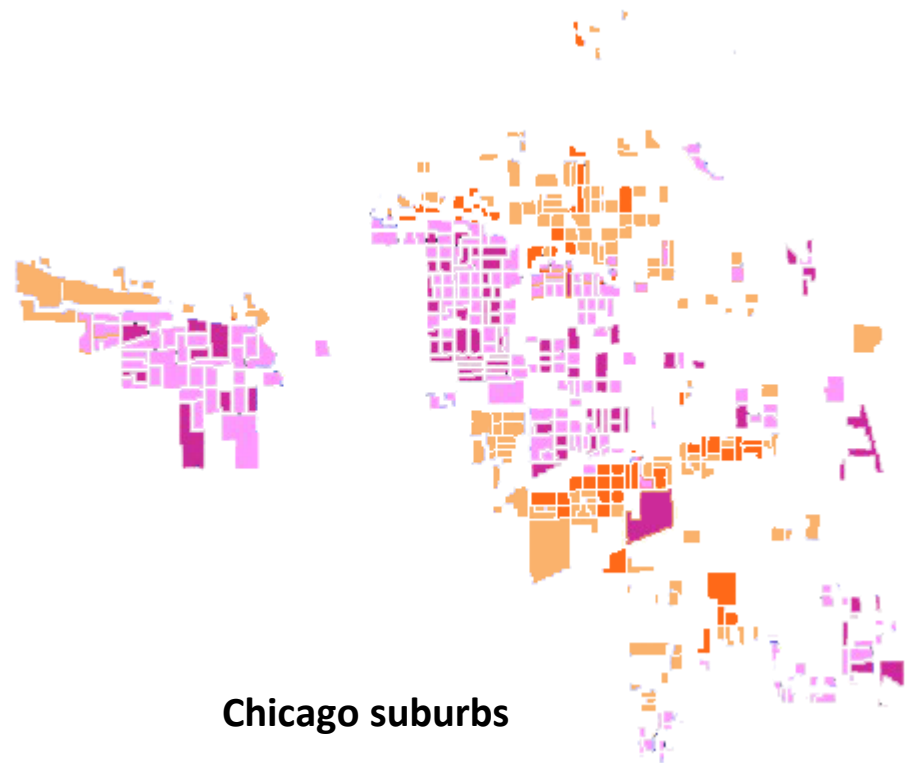
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**Chicago suburbs**

Latinx/Hispanic

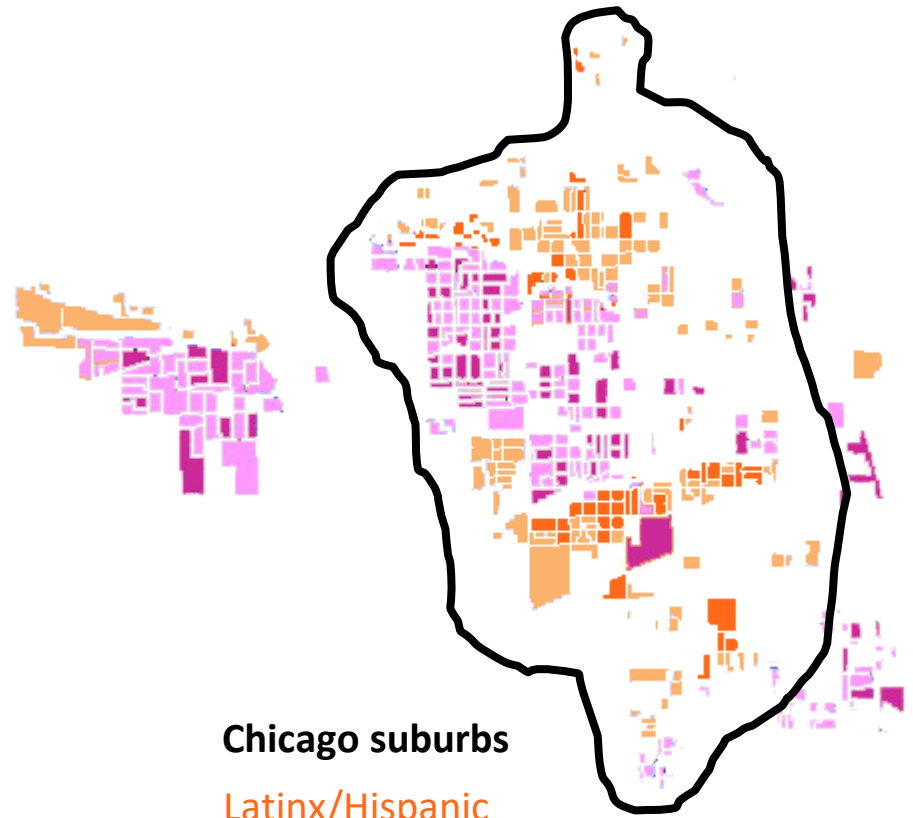
African-American



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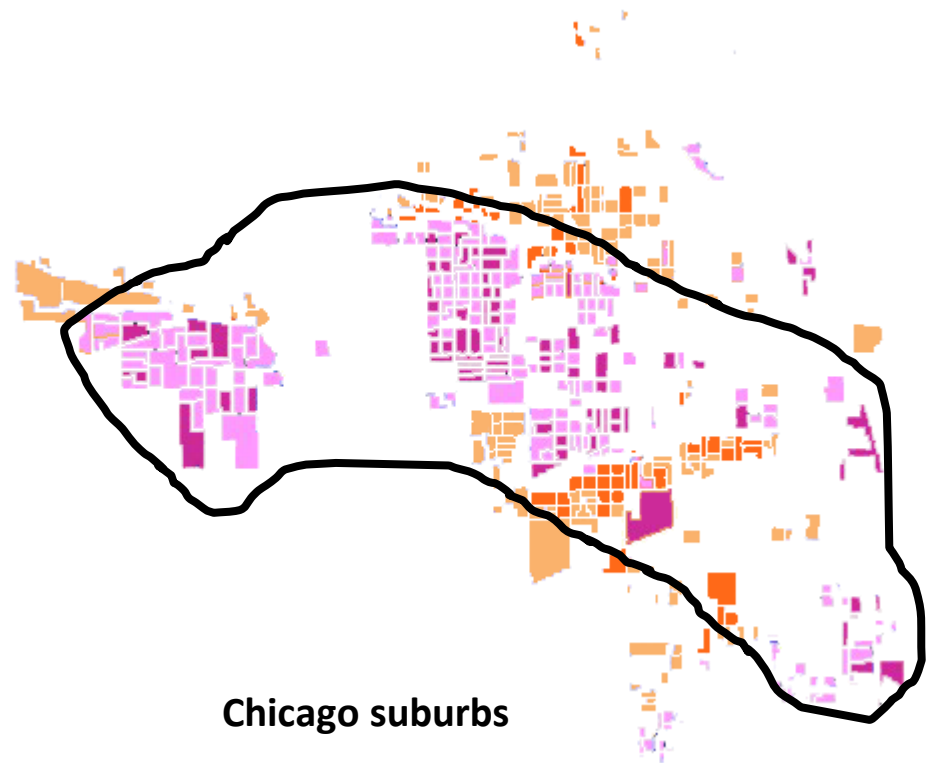
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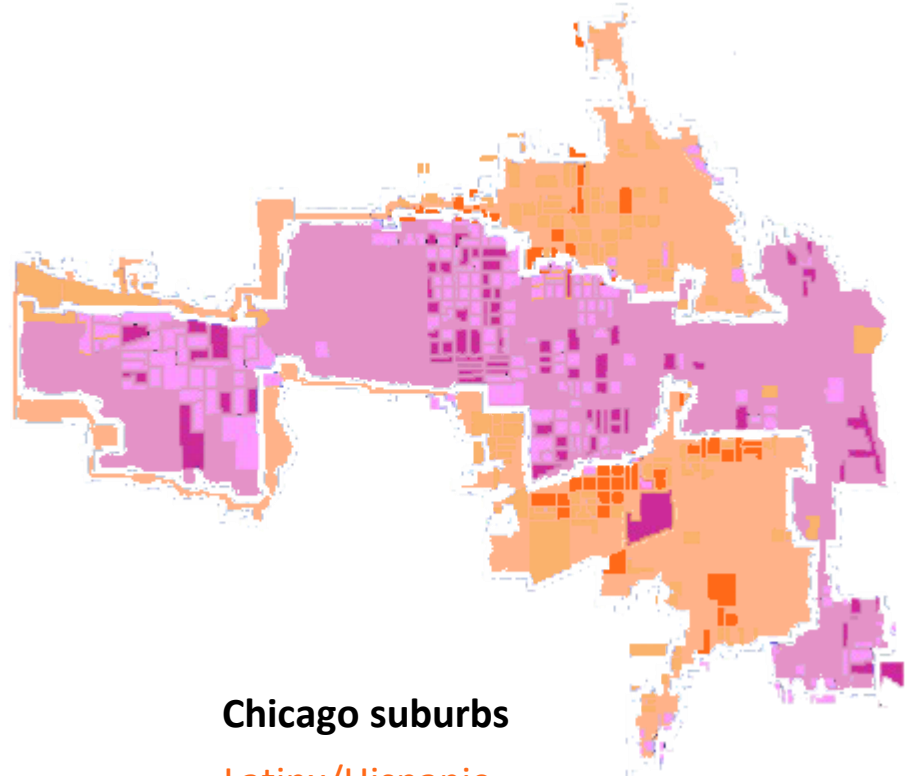
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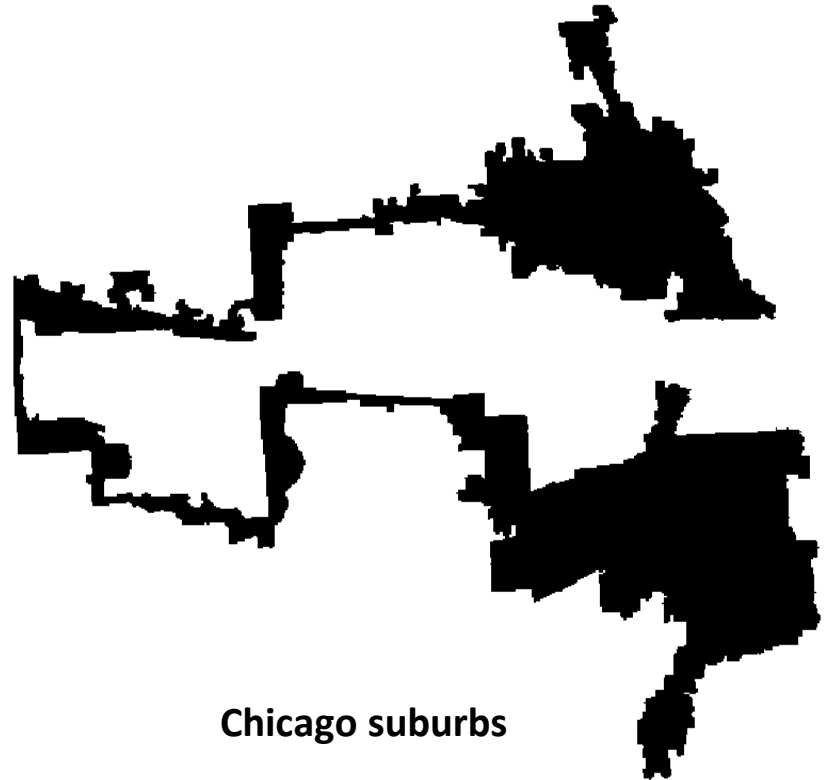
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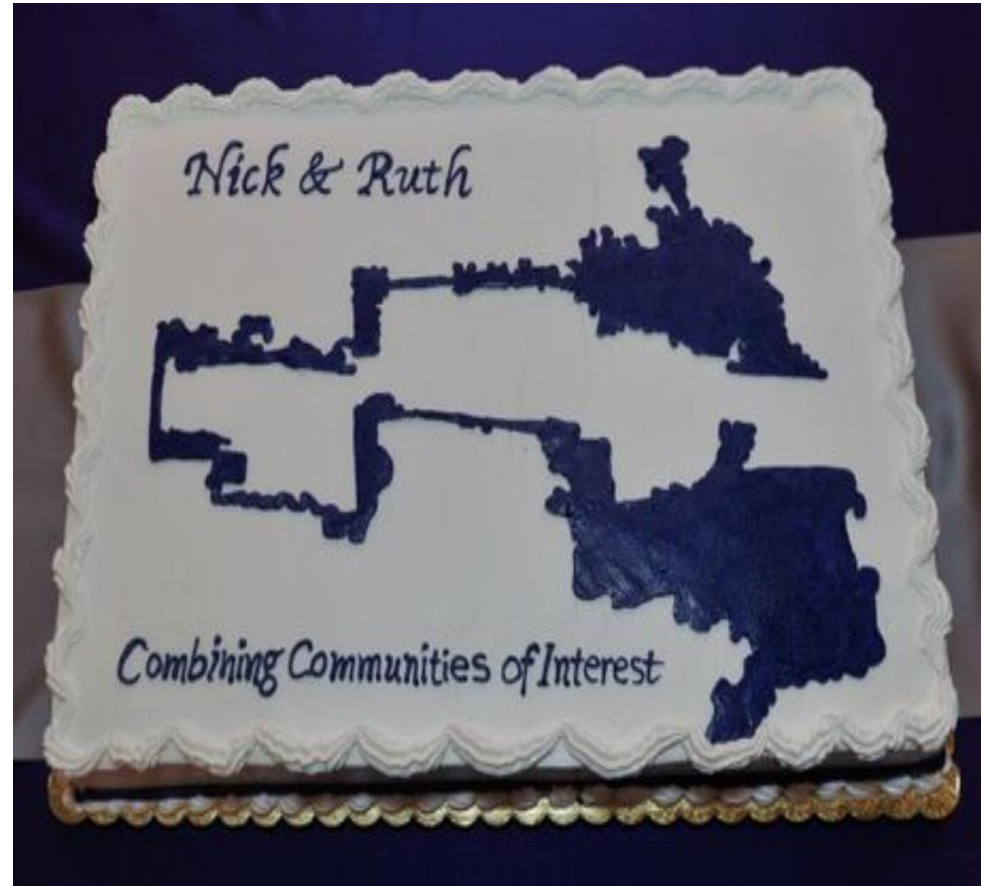
Chicago suburbs





# Race & ethnicity: a reminder

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# 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

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



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Credit: Andy Ruiz Jr. (@andy\_destroyer13)  
Matthew Horwood/Getty Images

# Watch out for learned human tendencies

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



97 %



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Credit: Andy Ruiz Jr. (@andy\_destroyer13)  
Matthew Horwood/Getty Images



# Watch out for learned human tendencies

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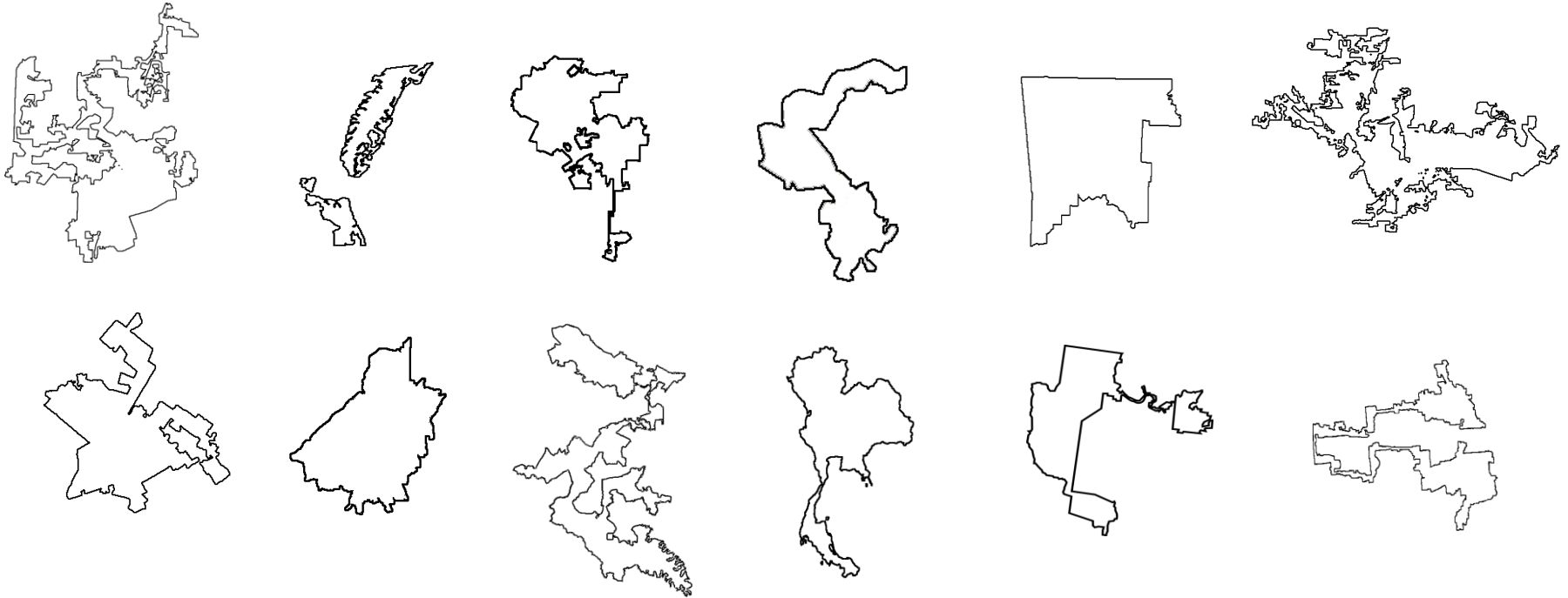


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Credit: Ed Mulholland / Matchroom Boxing

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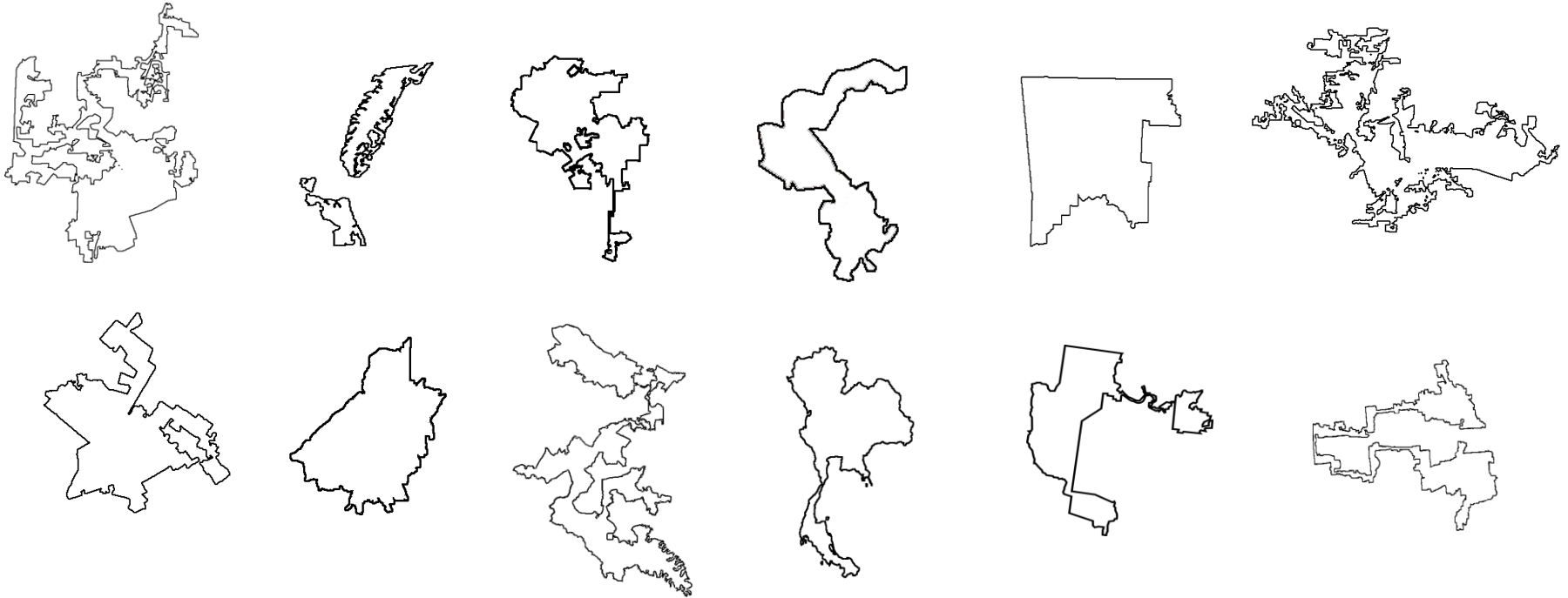
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Without more info,  
you can't know whether any of these are “good”



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# Further information

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[justin.levitt@lls.edu](mailto:justin.levitt@lls.edu)

[allaboutredistricting.org](http://allaboutredistricting.org)



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