

REDISTRICTING AND THE 2020 CENSUS

Presented To



SOUTH CAROLINA
ASSOCIATION OF COUNTIES

South Carolina Local Government Attorneys' Institute November 19, 2021

by

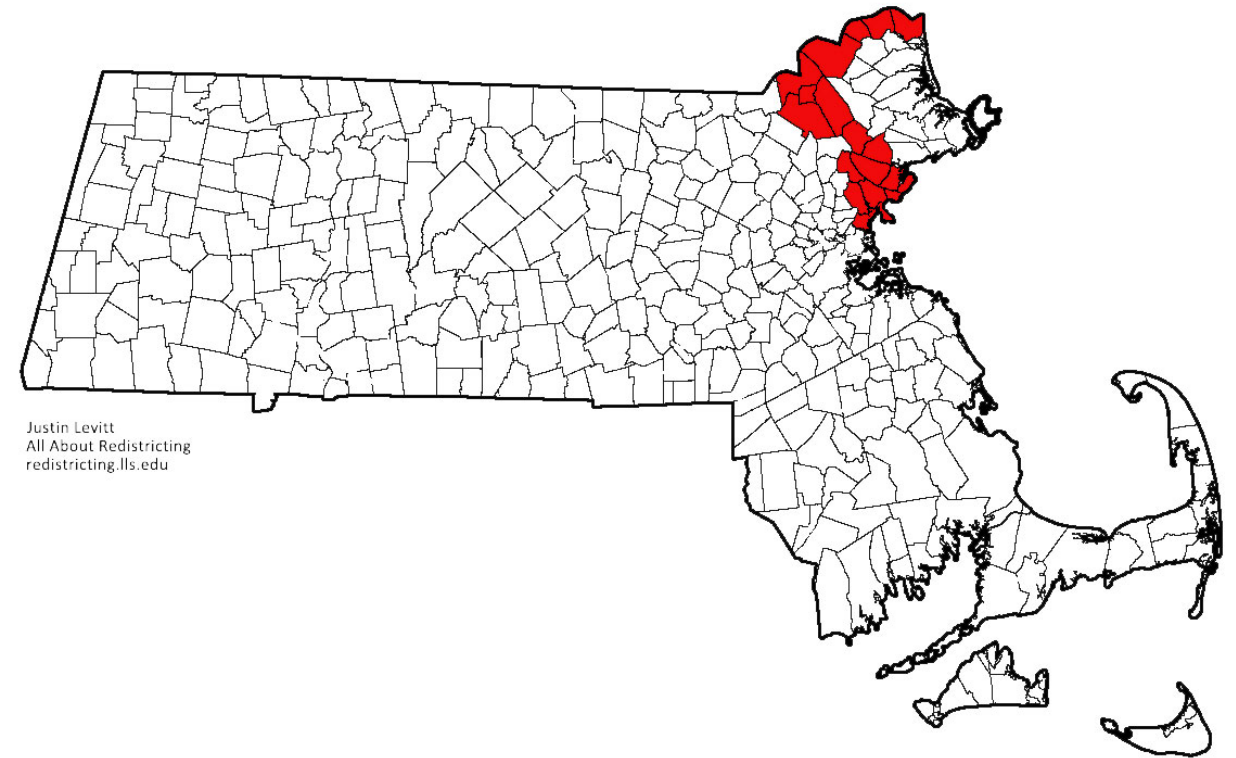
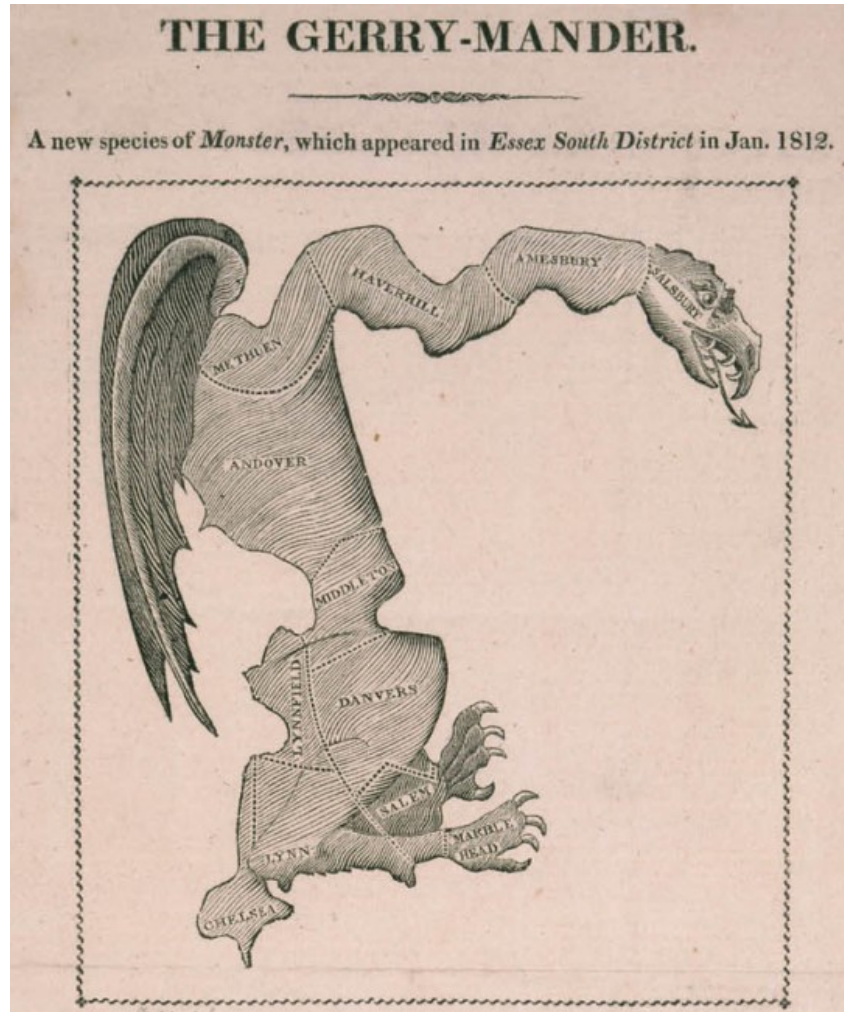
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The Honorable Elbridge Gerry (1744 – 1814)

Governor of Massachusetts, Vice-President under James Madison



Justin Levitt
All About Redistricting
redistricting.ils.edu

Reapportionment v. Redistricting

- Reapportionment – reallocation of Congressional seats based on decennial population
 - U.S. Constitution art. I, §2 – Sets apportionment of Congressional seats based on decennial census numbers.
 - Overseas residents are allocated to home state in determining population
- Redistricting – drawing of election districts to balance population

Redistricting – Presentation Outline

- Introduction to RFA
- Data, Tools, and Concepts
- Constitutional and Statutory Provisions
- Traditional Redistricting Principles
- 2020 Census – Data and Issues
- RFA Guidelines and Process – Assisting Local Governments

Revenue and Fiscal Affairs

An Introduction



Revenue and Fiscal Affairs Office

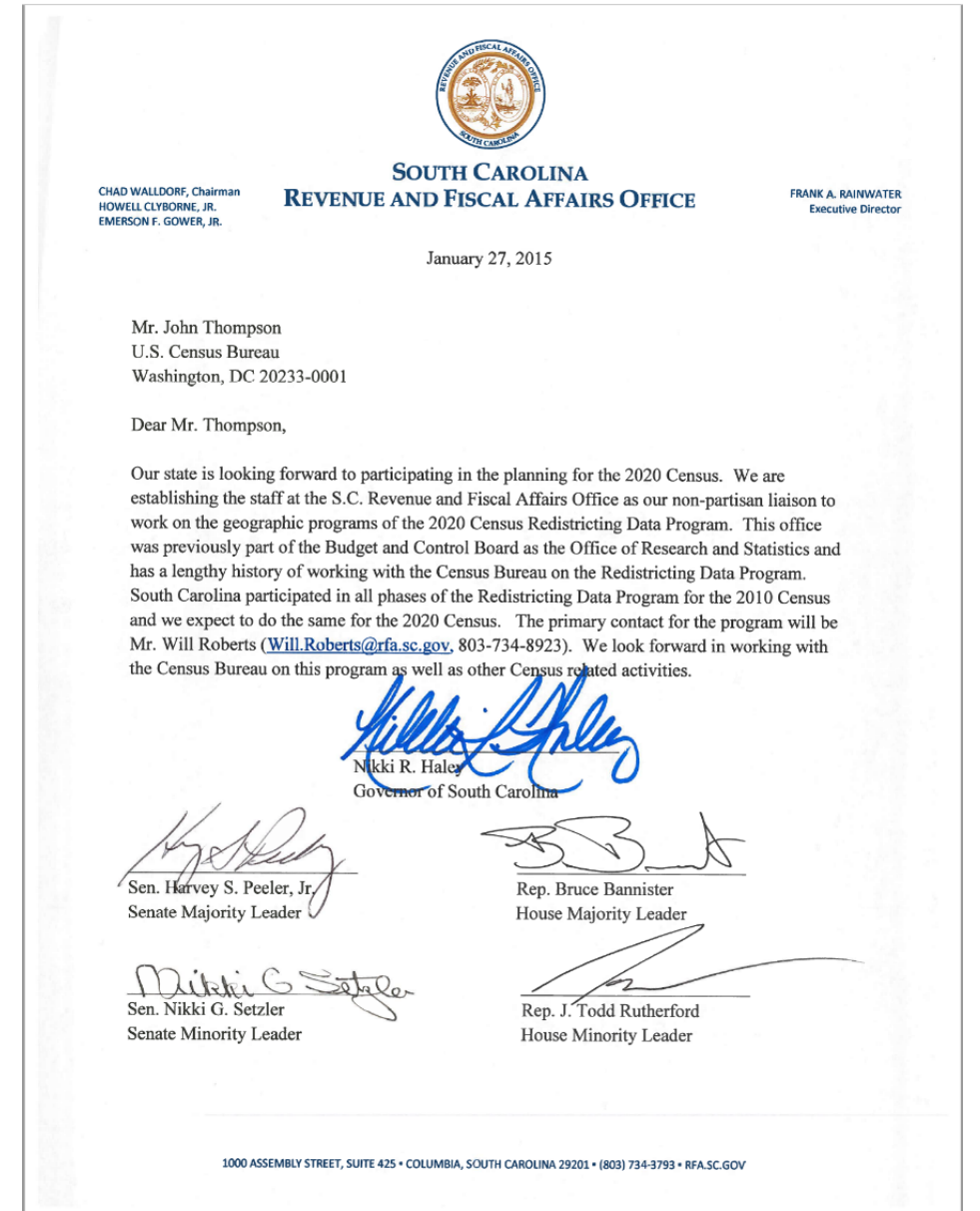
RFA is responsible for providing diverse sets of fiscal and statistical analyses, reports, mapping, and other services to the Governor, General Assembly, state and local government entities, the private sector, and the citizens of the state.

The agency has a staff of approximately seventy-five comprised of analysts, statisticians, epidemiologists, database administrators, web developers, GIS analysts, economists, surveyors, and project and program managers.



SC Revenue and Fiscal Affairs Office

- Official State Contact with Census
- Maintain official precinct maps (SC Code of Laws §7-7-30 et seq; 11-9-850)
- Coordination with other mapping programs
 - Jury Areas (SC Code of Laws §22-2-30)
 - Transportation Network Company (SC Code of Laws §58-23-1610) – Municipalities required to notify RFA of annexations within 30 days
 - Incorporation criteria (SC Code of Regs 113-200(A))
- Census Prep Work
 - Local Update of Census Addresses (LUCA)
 - Boundary and Annexation Program
- Served as technical advisors to the Federal Courts
- **Redistricting Services (No statutory mandate)**
 - **Provide redistricting services in accordance with redistricting law and principles**
 - **RFA is not providing legal advice**



Basic Responsibilities for County/Municipality Redistricting

Entity: County Council, City/Town Council

Why: Meet Constitutional requirement of one person, one vote

Who: Drawn by council (Home Rule)

How: Follow constitutional and statutory principals, and traditional redistricting principles;

Requires three/two readings with map and/or description passed by ordinance

When: Counties - before next general election (§4-9-90) – FILING DATE *

NOTE: Council has one shot at redistricting per decade. **Elliott v. Richland County 472 S.E.2d 256 (1996)**

NOTE: School Boards are creatures of the General Assembly; Legislature has authority over redistricting school boards. **Moye v. Caughman 217 S.E.2d 36 (1975)**

Data, Tools, and Concepts



Data - The Census

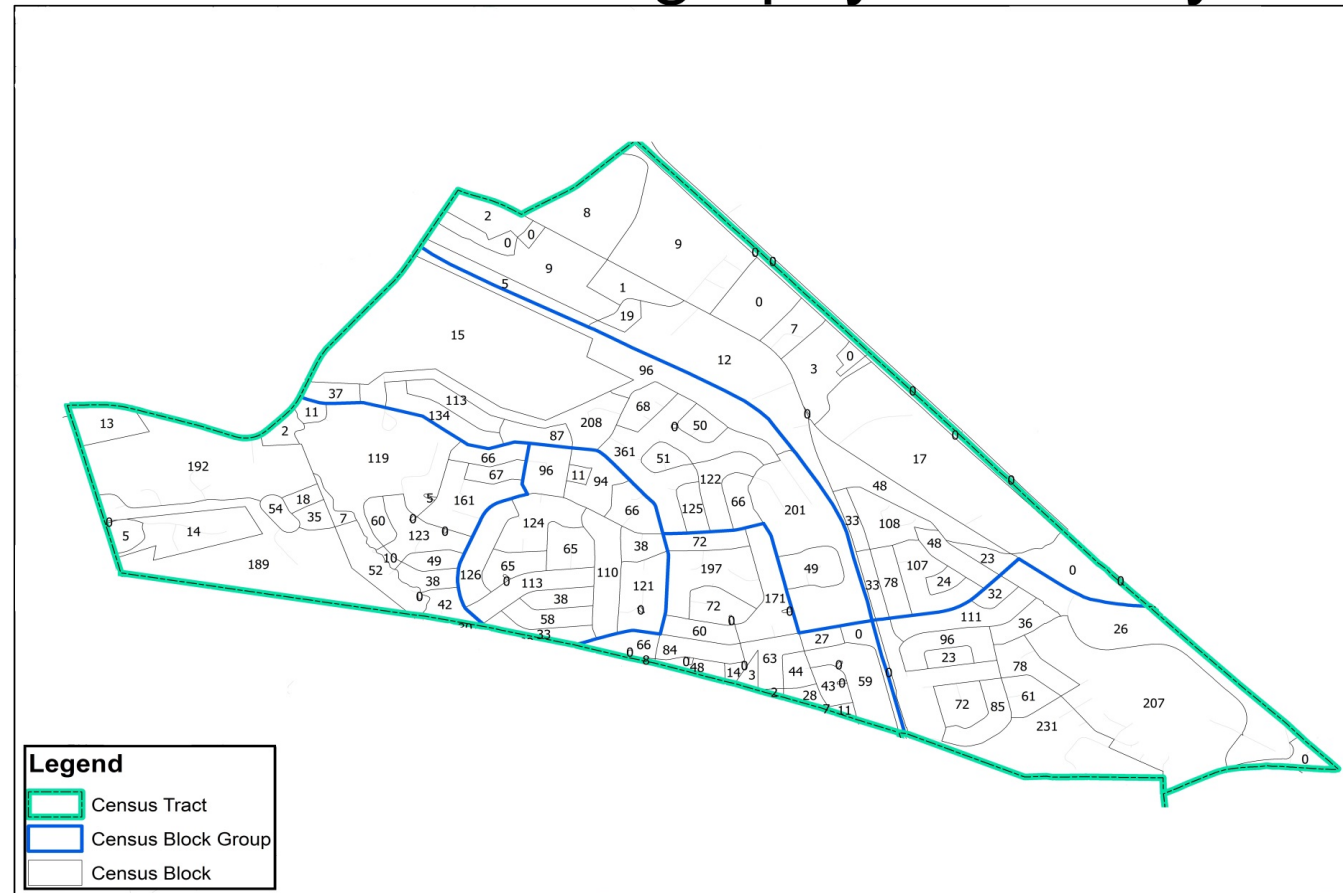
The Revenue and Fiscal Affairs Office uses the redistricting racial field guidelines as stated by the U.S. Justice Department in the Federal Register Vol.66, No. 12., Thursday, January 18, 2001, reaffirmed in 2011 by the USDOJ. Listed are the adopted guidelines.

Field	Details	Formula
Hispanic_O	Hispanic	
NH_WHT	Non-Hispanic White	
NH_DOJ_BLK	Non-Hispanic Black	Non-Hispanic Black + Non-Hispanic WhiteBlack
NH_DOJ_IND	Non-Hispanic American Indian and Alaska Native	Non-Hispanic Indian + Non-Hispanic WhiteIndian
NH_DOJ_ASN	Non-Hispanic Asian	Non-Hispanic Asian + Non-Hispanic WhiteAsian
NH_DOJ_HWN	Non-Hispanic Native Hawaiian and Other Pacific Islander	Non-Hispanic Hawaiian + Non-Hispanic WhiteHawaiian
NH_DOJ_OTH	Non-Hispanic Some Other Race	Non-Hispanic Other + Non-Hispanic WhiteOther
NH_DOJ_OMR	Non-Hispanic Other Multiple Race	Non-Hispanic Multiple Race-NH_WhiteBlack-NH_WhiteIndian-NH_WhiteAsian-NH_WhiteHawaiian-NH_WhiteOther

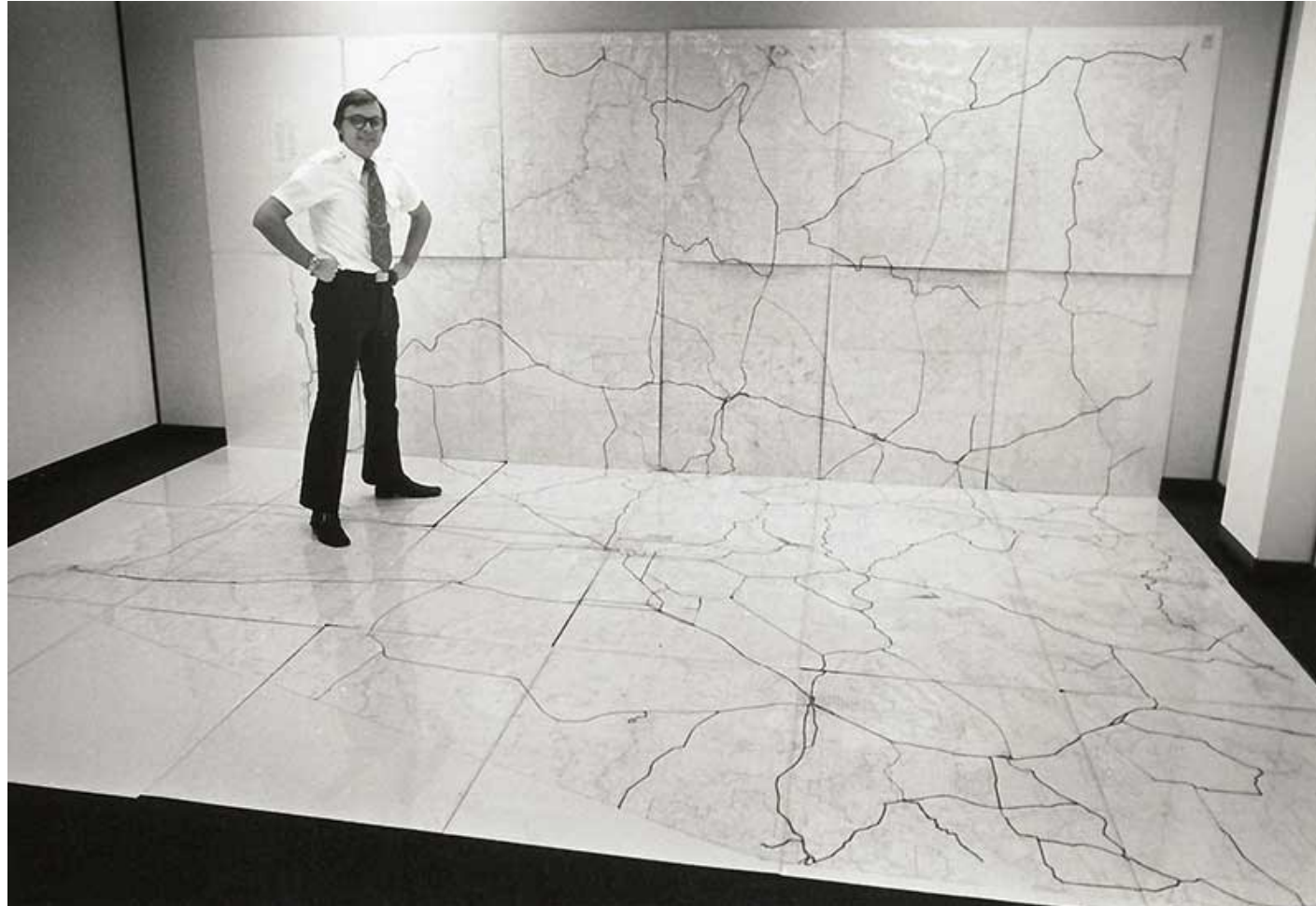
Data - Census Tract, Block Group, and Block

SC has 146,844 census blocks in 2020

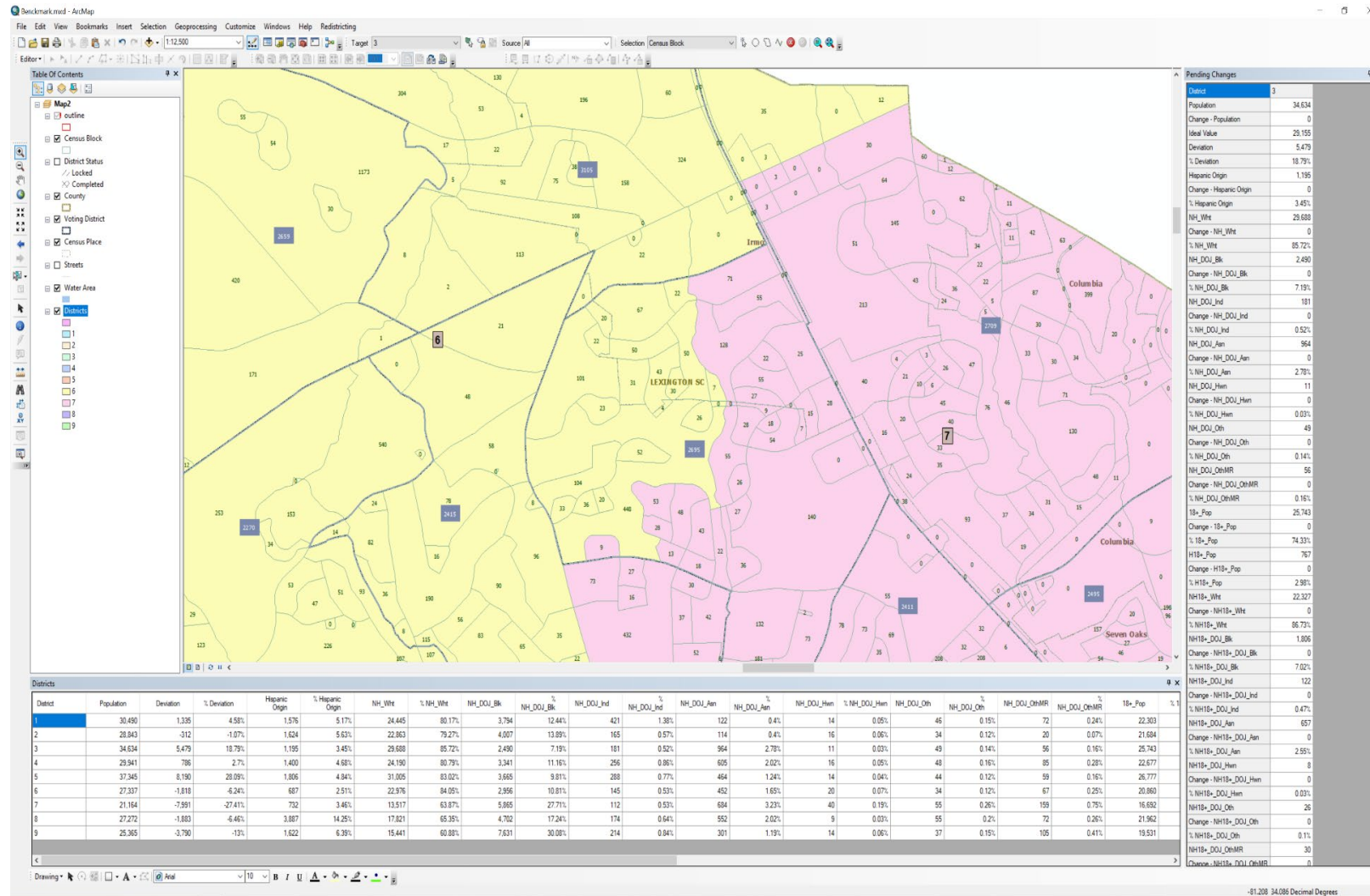
Census Geography Hierarchy



Redistricting tools in the early years



Tools – Software and Statistics



Concepts

- Domicile – residence is determined where the house is located.
 - Dukes v. Redmond, 357 S.C. 454 (2004) – “a person’s residence is the part of his property on which the dwelling is actually located.”
 - Other jurisdictions further specify the residence is where the main activities are performed while at home. NC has the “bedroom rule”(NC Gen Stat § 163-57)
 - SC Attorney General Opinion July 27, 1987 (Membership on the Forth Hill Natural Gas Authority) – “it is clear that courts look to the location of the residence, and in close cases the location of sleeping accommodations in the residence, to determine where one lives or resides.”

Trivia - SC is approximately 32,020 square miles. With 146,844 Census blocks, there are 4.6 blocks per square mile.

Constitutional and Statutory Provisions



Change and the Passage of Time

Redistricting and College Basketball - Same game, different rules



Key Principles – 14th Amendment Equal Protection

One Person, One Vote

- Total Population
 - Total population can be used for satisfying one person, one vote criteria. *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016)
- Race cannot be used as the predominate factor
 - Prohibition against separating citizens into different voting districts on the basis of race, without sufficient justification. *Miller v. Johnson*, 515 U.S. 900 (1995)
- *Bethune-Hill v. Virginia State Board of Elections*, 137 S.Ct. 788 (2017)
 - Focus on the actual considerations that provided the essential basis for the lines drawn, not post hoc justifications
 - Holistic analysis

Analysis – 14th Amendment

- Plaintiff bears burden of proof, through circumstantial or direct evidence, that race was the predominant factor . Miller 515 U.S.
 - Traditional race-neutral districting principles were subordinated to racial considerations. Bethune-Hill v. Virginia State Bd. Of Elections, 137 S. Ct. 788 (2017)
 - Prior discriminatory act not sufficient ... Evenwel v. Abbott 136 S. Ct. 1120 (2016)

Deviating from One Person, One Vote – Strict or 10% Range

- Congressional
 - **Wesberry v. Sanders, 376 U.S. 1 (1964)** – Congressional districts must be drawn “as nearly as practical” in equal population.
 - **Karcher v. Dagget 462 U.S. 725 (1983)** - “as nearly as practical” does not require “precise mathematical equality.” All deviation must be justified by a legitimate governmental interest; established a two prong test.
- **Reynolds v. Sims, 377 U.S. 533 (1964)** – Allows more population variance in legislative redistricting than congressional redistricting.
- **Gaffney v. Cummings, 412 U.S. 735 (1973)** – The 10% population variance is not a safe haven for a one person, one vote claim.
- S.C. Code of Laws §4-9-90 - County Council must redistrict to population of less than 10% deviation.

Calculating Deviation

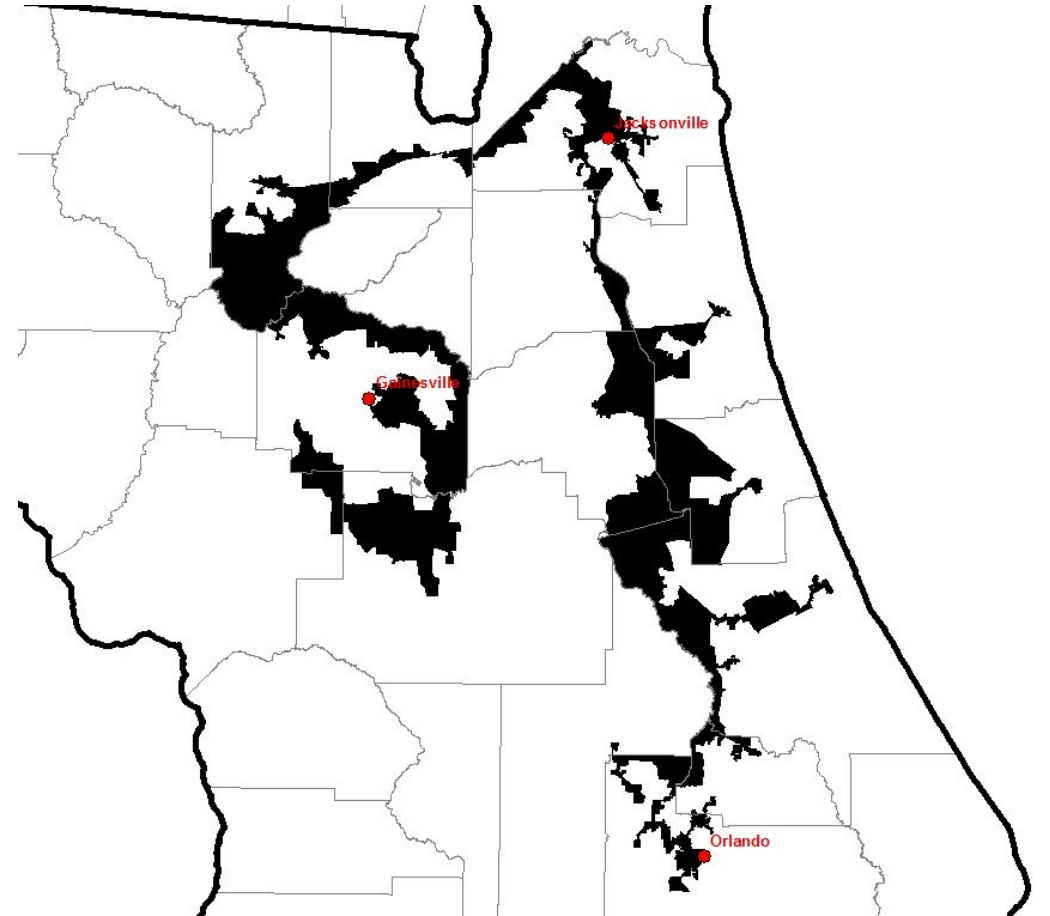
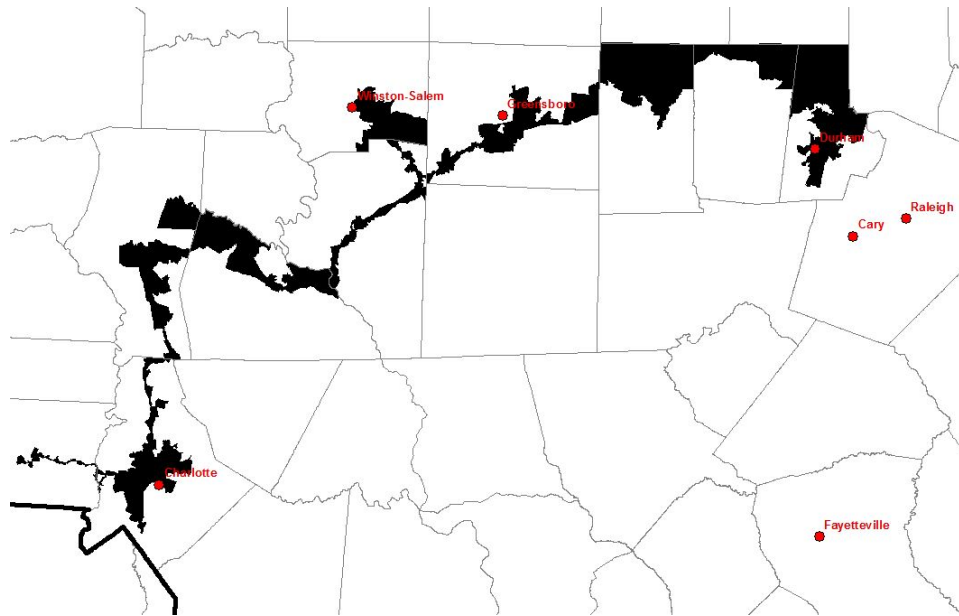
- Standard
 - Congressional – Strict Standard (one person variance)
 - State and Local – Deviations of less than ten percent are prima facie valid, but ...
- Ideal (Target) Population = Total Population/# of Districts
 - Example: $23,467 / 9 = 2,607$
- Absolute Deviation – *Number of persons* above or below the ideal population for a district
 - Example: District 1 is 648 below ideal; District 7 is 1,069 above ideal
- Relative Deviation – *Percentage of population* a district is over or under the ideal population for a district
 - Formula: $((\text{Population} - \text{Absolute deviation}) / \text{ideal population}) \times 100$.
 - Example District 1: $(648) / 2,607 = -24.86\%$
 - Example District 7: $1,069 / 2,607 = 41.00\%$
- Overall Range in Deviation – Total combined range of deviation for a redistricting plan.
 - Formula: Largest positive + |largest negative| = overall range deviation.
 - Example: $41.00\% + |-24.86| = 65.86\%$

Key Issues – Racial Gerrymandering



- Shaw v. Reno 509 U.S. 630 (1993) – First racial gerrymandering case to reach the Supreme Court. Court ruled racial gerrymandering was a violation of Equal Protection.
- Bush v. Vera 517 U.S. 952 (1996) – Race should not be a predominate factor in drawing plans. Race can be a factor, but must be subordinate to traditional redistricting principles. If redistricting principles were subordinate to race, then strict scrutiny can apply to a redistricting plan by the court.
- Strict scrutiny of a plan requires court to determine if the state had a compelling interest in creating a district with race as predominate factor.
- Alabama Legislative Black Caucus v. Alabama 135 S. Ct. 1257 (2015) “A racial gerrymandering claim, however, applies to the boundaries of individual districts.”

Examples of Racial Gerrymandering



Other Gerrymandering – Political Gerrymandering

- Political Gerrymandering is beyond the reach of federal courts
 - Rucho et al. v. Common Cause, 588 U.S (2019)

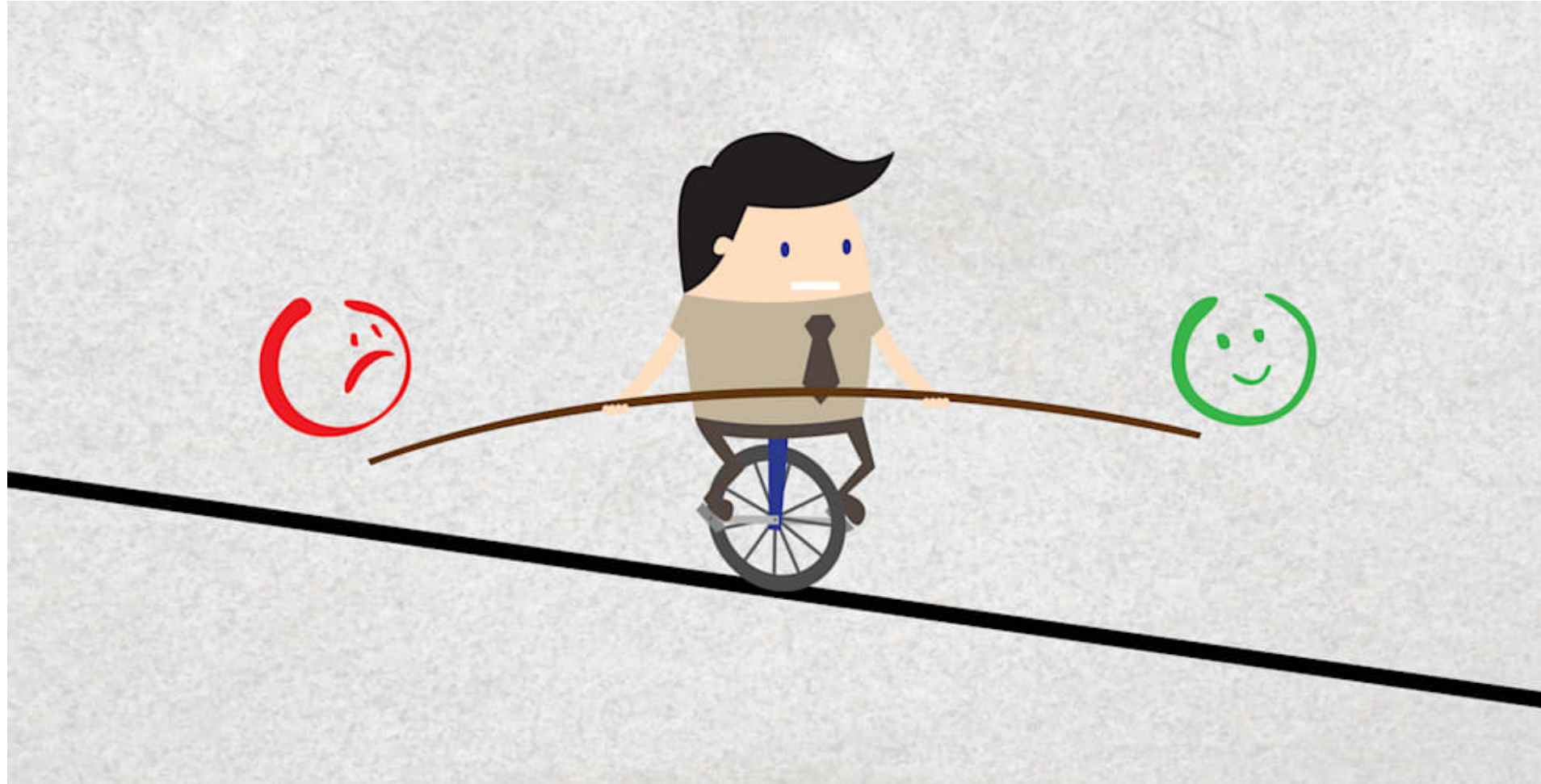
- SC Constitution, Article 1, Section 5

“All elections shall be free and open, and every inhabitant of this State possessing the qualifications provided for in this Constitution shall have an equal right to elect officers and be elected to fill public office.”

Other Gerrymandering – Prison Population

- Issue – incarcerated persons cannot vote and including this population in the redistricting process dilutes voting power
- Census counts incarcerated persons as residents of the location where they are confined
- March 16, 2016 - Calvin v. Jefferson County Board of Commissioners, 172 F. Supp. 3rd, 1292 (N.D. Fla 2016)
 - “to treat the inmates the same as actual constituents makes no sense under any theory of one person, one vote, and indeed under any theory of representative democracy.”
- April 4, 2016 - Evenwel v. Abbott, 136 S. Ct. 1120 (2016)
 - “it is plainly permissible for jurisdictions to measure equalization by the total population of the state or local legislative district.”
- September 21, 2016 - Davidson v. City of Cranston 837 F. 3d 135 (App. Ct. 1d Cir. 2016)
 - “the decision whether to include or exclude . . . prisoners in . . . apportionment is one for the political process.”
- Eleven states have begun reallocating at least some incarcerated persons to their residence prior to their incarceration
 - Maryland’s statute requiring incarcerated people to be counted at their home addresses for redistricting purposes was upheld. Fletcher v. Lamone 831 F. Supp 2d 887 (D. Md. 2011)
- Policy and practical implications
 - Size of prison
- *RFA’s goal is to provide consistency in the redistricting process and recommends excluding incarcerated residents from the population when determining one person, one vote standards*

Challenge – balancing competing requirements



Key Issues - Voting Rights Act, Section 5

- Administrative or Judicial review of plans
 - Any change in election law must be precleared by the U.S. Department of Justice or through a declaratory judgement filed in the United States District Court for the District of Columbia.
 - USDOJ would analyze the plan (preclearance) to ensure the plan did not dilute minorities opportunity to elect candidates of choice (retrogression)
- Applied to 9 states as a whole and parts of 6 other states (Section 4).
 - Section 4(b), the section containing the coverage formula for determining which jurisdictions are subject to preclearance based on their histories of discrimination was ruled unconstitutional, *Shelby County v. Holder*, 570 U.S. 529 (2013)

Key Issues - Voting Rights Act, Section 5

- Shelby v. Holder 570 U.S. 529 (2013) - U.S. Supreme Court ruled Section 4(b) of 1965 VRA was unconstitutional. This is the formula for which jurisdictions fall under Section 5 of the 1965 VRA. South Carolina is no longer under the provision of Section 5. Section 5 itself was not ruled upon and therefore still valid.
- Shelby does not apply to jurisdictions covered by Section 3(C) of the VRA.

Note: There is federal proposed legislation that may re-institute federal preclearance

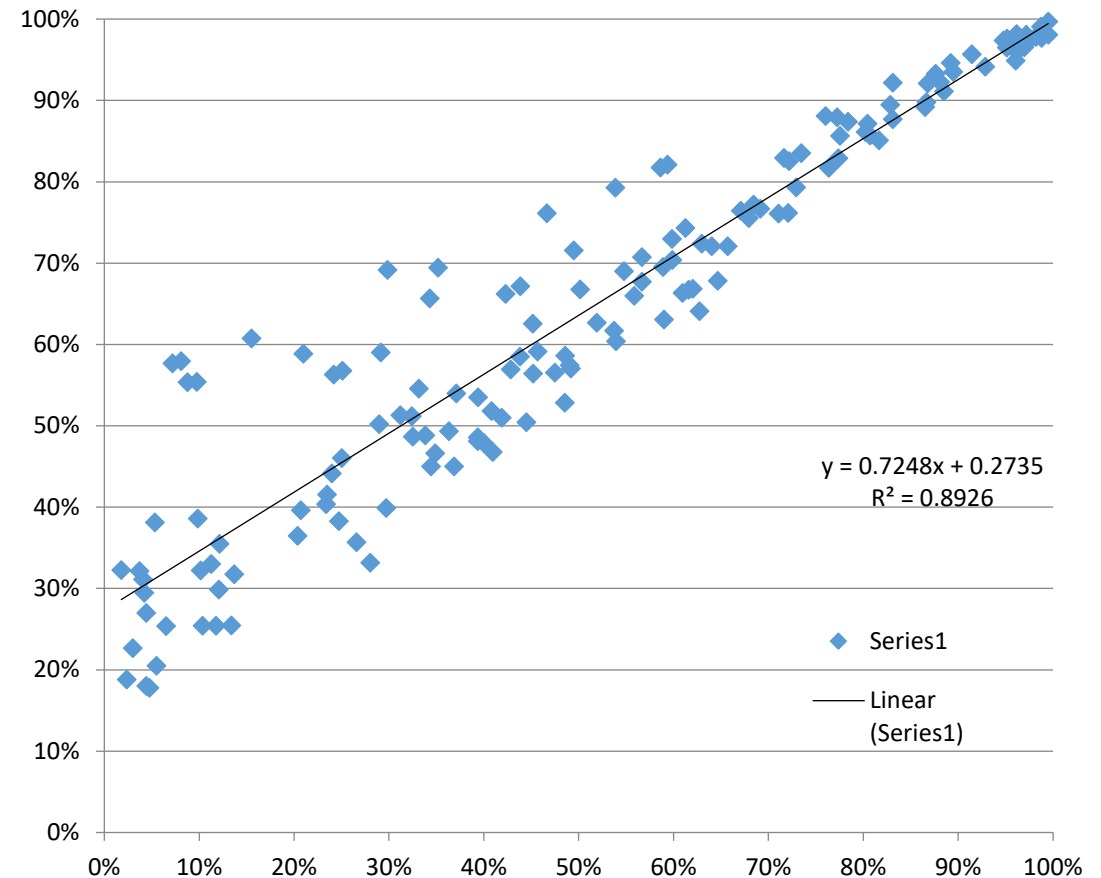
Key Issues - Voting Rights Act, Section 2



- Section 2 - protects the interest of the racial minority population.
- Burden of proof of a Section 2 claim on the plaintiffs, not on defendants
- “Totality of circumstances” must be used in a deciding a Section 2 violation. 52 USC 10301(b)
- City of Mobile v. Bolden, 446 U.S. 55 (1980) – while the plan did not have the intent of discrimination it had the effect.

Voting Rights Act – “packing” and “cracking” analysis

- Thornburg v. Gingles 478 U.S. 30 (1986) – 3 prong test for vote dilution claim.
 - 1) Minority group must be large and geographically compact to draw a majority-minority district. Minority district must be able to be drawn at +50% minority VAP – Bartlett v. Strickland 566 U.S. 1 (2009)
 - 2) The minority group must be “politically cohesive”.
 - 3) Block voting by the majority usually defeats the minority’s candidate of choice.



Voting Rights Act – “packing” and “cracking” analysis

- Minority district must be able to be drawn at +50% minority VAP – Bartlett v. Strickland 566 U.S. 1 (2009)

Bethune-Hill v. Virginia State Bd. Of Elections, 137 S. Ct. 788 (2017)

- However, there is no requirement to maintain the same population percentages in the majority-minority districts as in the prior plan.
- Section 5 is satisfied if the minority voters are able to elect their preferred candidate.
- It is unlikely that a reduction of a district’s BVAP from 70% to 65% would result in a significant impact on the minority voters’ ability to elect their preferred candidate
- Reducing the BVAP below 55% might result in the loss of a functional working majority in some cases

Traditional Redistricting Principles



Traditional Redistricting Principles

- **Contiguousness** – All parts of the districts must be touching. Point contiguity is acceptable.
- **Compactness** – Districts should be able to pass an “eye” test as well as can be measured by statistical models.
- **Constituent Consistency** – Preserving the core of existing districts and respecting incumbents is acceptable.
- **Communities of Interest** – Preserving areas where residents have common interests (ex - social, economic, neighborhoods, school zones).
- **Voting Precincts** – Avoid splitting precincts (as much as practical).

** The General Assembly has the authority to redraw voting precincts. Precincts are typically redrawn after redistricting has occurred or a large population change in one geographic area. *RFA is responsible for maintaining the official maps (§1-11-360).*

Redistricting – the Goldilocks approach



2020 Census Data and Issues



US Census

- US Constitution – Article 1, Section 2
 - ... the actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct.
- Utah v Evans, 536 U.S. 452 (2002)
 - Actual enumeration – accuracy
- No direct requirement on redistricting
 - Kirkpatrick v Preisler, 394 U.S. 526 (1929)

2020 Census Issues

- Citizenship
- Delay (from April 1)
- Differential Privacy i.e. “Statistical Noise”

Effect of Population Change from 2010 to 2020

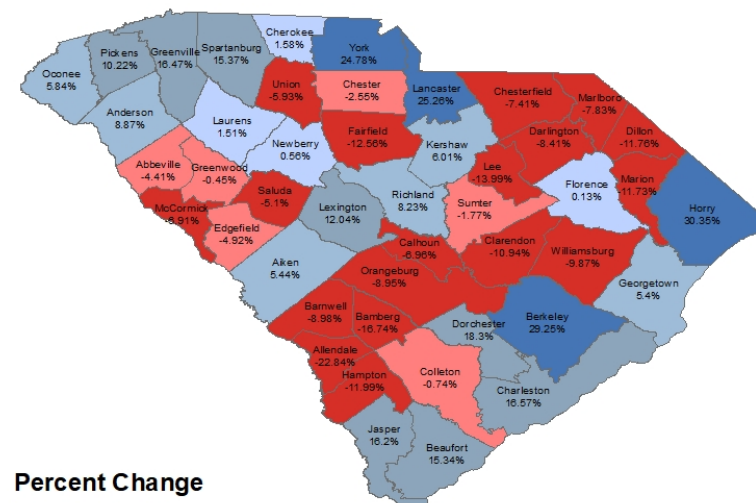
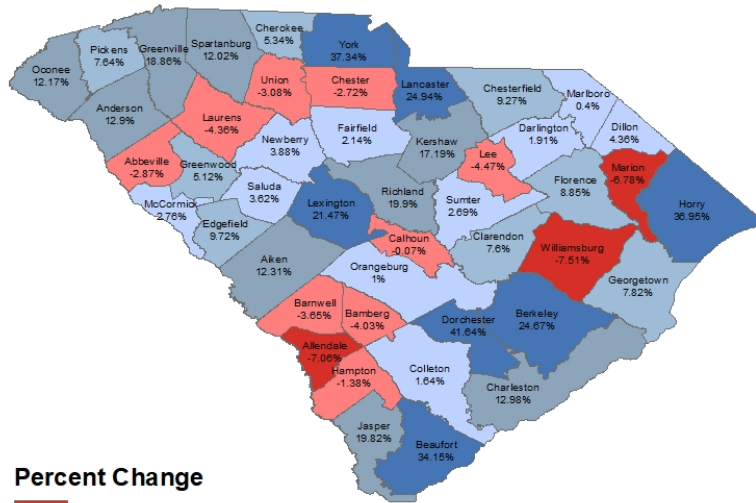
	2010	2020	Change
-SC Population	4,625,364	5,118,425	10.66%
-White, Non-Hispanic	2,962,740	3,178,552	7.28%
-Percent of Total	64.05%	62.10%	
-Black, Non-Hispanic	1,279,998	1,269,031	-0.86%
-Percent of Total	27.67%	24.79%	
-Multi-race, Other	382,626	670,852	75.33%
-Percent of Total	8.27%	13.11%	
-Ideal Senate District	100,551	111,270	
-Ideal House District	37,301	41,278	
-Ideal Congressional District	660,766	731,204	

SC Population Change by Census Tract

Percent Change in Census Population

2000 to 2010

2010 to 2020



Source: US Census Bureau Decennial Census Data

South Carolina Revenue and Fiscal Affairs Office

RFA Guidelines and Process For Assisting Local Governments



Key Steps – Before Drafting New Districts

- Educate council and citizens as soon as possible
- Look at timeline for the next general election and consider all the logistics (data release, drafting a plan, meeting schedule, public hearing, updating voter registration, filing periods)
- Contact our office or other professionals for assistance
- Verify record of local boundary, current election districts, addresses of incumbents
- Consider pending annexations
- Notify other affected entities of process and timeline
 - County Elections Office (needs time to process changes)
 - School Board or other entities that may follow same district lines
- Draft necessary ordinances, help with scheduling timeline
- **Hold Public Hearing**
- **Ensure proper documentation and retention of records**

Key Steps – Creating a baseline (Benchmark)

- Create Benchmark Report
 - Benchmark Plan – current districts with new population
 - Voting analysis – Gingles test
- Public Hearing
 - Seek public input - Transparency
 - Discussion and identification of Traditional Redistricting Principles (ex – acceptable deviation, communities of interest)

Key Steps – Setting the Criteria

- Adhere to the court ordered constitutional requirement of one person, one vote
 - County Councils must adhere to a state law of population variance under 10%
- Adherence to the 1965 Voting Rights Act as amended and by controlling court decisions
 - A redistricting plan should not have either the purpose or the effect of diluting minority voting strength and should otherwise comply with the Voting Rights Act, the Fourteenth and Fifteenth Amendments to the U.S. Constitution, and the decisions of the U.S. Supreme Court.
- Ensure that parts of the districts are contiguous
 - All districts will be composed of contiguous geography. Contiguity by water is acceptable . Point-to-point contiguity is acceptable so long as adjacent districts do not use the same vertex as points of transversal.
- Attempt to keep compact districts.
- Attempt to maintain constituent consistency
 - Efforts will be made to preserve cores of existing districts.
- Respect Communities of Interest
 - Where practical, districts should attempt to preserve communities of interest.
- Avoid splitting voting precincts

Key Steps - Drafting and Implementation

- Preliminary Plan
 - Based on criteria adopted by council
- Final Plan
 - Amendments to Preliminary Plan
 - Three readings (county), Two readings (municipality)
- Implementation
 - Coordinate with local elections board

Final Thoughts

- Be Transparent
- Be Proactive, not Reactive
- Document



**“You can’t always get what you want,
but if you try sometimes,
you might find,
you get what you need.”**

- The Rolling Stones



Questions?

Thank You!

For Further Information, Contact –

<https://rfa.sc.gov/programs-services/precinct-demographics>

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