



# BROAD + LIBERTY

# REDISTRICTING IN PENNSYLVANIA: THE PAST, PRESENT, AND FUTURE.

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## PART 1 - REDISTRICTING IN PENNSYLVANIA, 1790-2011



## PART 2 - THE 2010S: SAME CHALLENGES, NEW COURT



## PART 3 - LOOKING AHEAD

## ABSTRACT:

Who gets to be represented in government? In every democratic society, the structure of a political system involves splitting governmental responsibilities and decision-making authority among "representatives" of various constituent groups—be they tribal elders, military or religious leaders, or, in a democracy, elected leadership. With that decision of where and how to split power arises debate and factionalism among groups that naturally want to increase their own clout relative to their rivals. Such is the nature of human behavior.

In the United States, contentious debates about where and how to divide political power predate our Constitution itself. In this paper, we will track the history of how our country has created district-based representation—known as "redistricting" or "gerrymandering"—from colonial times to the present, with a specific emphasis on the "Keystone State" of Pennsylvania. Unsurprisingly, debates about who is represented, and how, are not new to our commonwealth, although for a variety of reasons the subject has become more controversial in recent decades.

We will take a particularly close look at how an activist Pennsylvania Supreme Court, supported by a pliant media corps and a collapse in civics knowledge among voters, was able to take power away from our state Legislature and grant itself the power to redraw Pennsylvania's federal district maps in 2017 and 2018. We will argue for the map-drawing power to be placed back into the hands of *the people* through their elected Legislature, as is clearly delineated in the state constitution. We will also offer solutions, including ideas for federal districts that comply with the state Supreme Court's stated criterion for "fair maps" moving into the next decade.

We will advance a few key arguments in this report. First, the process of drawing maps is inherently political, and moving the map-drawing abilities to "experts," academics, or courts merely moves the political decision-making further from the people without making the process less political. Second, with the rules set out by the state Supreme Court, the Legislature can draw maps that produce nearly *any* desired partisan outcome. Third, civics education matters, and therefore, we will continue to see poor outcomes when voters do not understand the systems that have been established to represent them. And finally, the court's usurpation of the legislative redistricting power cries out for a legislative *solution*, most likely in the form of a constitutional amendment.

This report was produced by *Broad + Liberty,* a nonprofit media publication and think tank founded in 2019 dedicated to the free exchange of ideas, protecting our civil liberties, and educating the public on issues that matter in our own backyards of southeastern Pennsylvania and beyond. The primary authors of this report are Kyle Sammin, a Philadelphia-based lawyer, researcher, and writer, and Albert Eisenberg, a strategist, writer and commentator, and the co-founder and digital director of *Broad + Liberty.*

# REDISTRICTING IN PENNSYLVANIA, 1790–2011

## COLONIAL TIMES TO THE COMPUTER ERA

Ever since there have been legislatures, there have been complaints about legislative districts. The problem predates the United States—reformers complained about "rotten boroughs" in Great Britain's Parliament in the 1700s, citing towns that had parliamentary representation despite their populations having dwindled drastically. By the time of the Great Reform Act of 1832, some British constituencies had no residents at all, with the members of Parliament being elected by whomever owned the vacant land.

But the contemporary version of the problem in the United States began with the development of a system that reapportioned congressional seats every decade based on federal census results. Early American states avoided the worst of Britain's errors in assigning representatives by *district*, rather than by municipality, but that still left plenty of room for judgment calls about *how* to draw those districts, a judgement typically exercised in favor of whichever party controlled the state legislature in question. This has been especially true in the drawing of state legislative lines; while courts have permitted only a minimal variation in population between congressional districts, they have allowed much higher deviation in populations for state legislative districts (provided that there are no concomitant racial gerrymandering concerns).[1]

The Founding Fathers were not blind to the problems of line-drawing. In the elections leading to the first Congress in 1788, supporters of James Madison—who eventually formed the Federalist Party, though he did not join it—alleged that Governor Patrick Henry and his allies in the Virginia Legislature drew the state's districts in a manner that maximized support for their candidate, James Monroe, and disadvantaged Madison. Madison won anyway and held the seat for four terms—not the last time in American history that complaints about district lines turned out to be overblown.

In Pennsylvania's colonial era, a similar factionalism—understood innately by our Founders, most particularly Madison[2]—imprinted itself on our government before, during, and after the formation of the United States and the ratification of the new Constitution by Pennsylvania in 1789. Political battles among factions in the commonwealth, both in allocating district and county representation and in deciding such foundational questions such as "who gets a vote" (only landholders, or all free men?), split along geographic, religious, class, and ethnic lines. During Pennsylvania's constitutional phase, English Anglicans from Chester, Bucks, and Philadelphia counties dominated colonial government in the "Proprietary Party,"[3] irritating groups such as German immigrants in northeastern Pennsylvania and Scots-Irish further into Lancaster, York, and western Pennsylvania. These latter groups joined with Philadelphia Quakers, disillusioned with Anglican dominance, into the "Anti-Proprietary Party" in the lead-

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[1] See, for example, *Brown v. Thomson*, 462 U.S. 835 (1983), holding reapportionment that permitted major population discrepancies within counties did not violate the Equal Protection Clause; *Mahan v. Howell*, 410 U.S. 315, 93 S.Ct. 979, 35 L.Ed.2d 320 (1973), upholding a Virginia redistricting plan with a total population deviation between districts of 16.4%.

[2] See "factions"—*Federalist #10*, James Madison, 1787.

[3] *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737 (Pa. 2018).

up to the American Revolution. Clearly, factionalism and splits among demographic groups in divvying up power and representation are nothing new in Pennsylvania.

Debate raged between shifting factions in the evolving commonwealth. The more working-class and western counties favored a unicameral legislature to avoid an "elite" upper house that would serve the interests of entrenched aristocracies; genteel Quakers, overrepresented among the wealthy banking class, favored granting suffrage to landholders only. After the ratification of the U.S. Constitution in 1789, delegations representing 16 of Pennsylvania's 21 counties came together to draft a constitution that amounted to a broad compromise document, including a *bicameral* legislature, an executive with veto power, popular elections among all free men,[4] and a clause in Article I, Section 5 that "elections shall be free and equal"—a subject of much debate and discussion since.

As the nascent republic began to mature, the formation of political lines provoked discussion and debate. In 1812, one Founding Father, Massachusetts Governor Elbridge Gerry, signed off on his Democratic-Republican Party's redistricting plan in the Bay State, including the South Essex district that would soon become linked with his name forever. Seeing the bizarre shape of the district (pictured below), Gerry's political opponents said it looked like a salamander—or, more specifically, a Gerry-mander. A successful bit of political messaging, the word has remained in the American political lexicon ever since.


**Figure 1: The original "gerry-mander," Massachusetts, 1812.**

Pennsylvania, like most states, followed a similar course in its redistricting over the centuries. After the Civil War, the Republican Party of the victorious Union controlled the state, and district lines tended to

[4] Not subject to discrimination based on socioeconomic status, geography, or religious beliefs.

benefit their candidates. The advantages could run both ways, though: Democrat Samuel J. Randall, who served as Speaker of the U.S. House from 1876 to 1881 (when Democrats had retaken the chamber), held a safe Democratic seat because majority-Republican wards in Philadelphia were excluded from it to benefit GOP representatives from the rest of the city. His 1st District, shown here, is a mild gerrymander compared to our 21st-century versions. This drawing of lines to create safe seats on *both* sides—benefitting incumbents of both parties—has become something of an American political tradition in the insider game of drawing district maps.

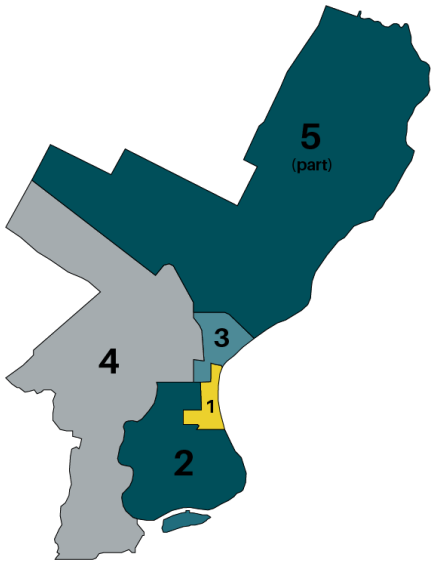


**Figure 2: Representative Samuel J. Randall's safe Democratic seat, in yellow, in Republican-leaning Philadelphia proper.**

Democrats more often had the upper hand in Pennsylvania map-drawing between the 1950s and the early 1990s, but toward the turn of the century, the GOP in Harrisburg began to control the process. Increasingly sophisticated computers in the late 20th century allowed single parties to draw more and more advantageous maps.[5] With the advent of computer-aided mapping, districts across the nation became more precisely drawn to further their drafters' intentions while also meeting the prevailing federal and state requirements. Pennsylvania was no different, and by the turn of the century, redistricting had become a political cause in its own right.

The redistricting plan that followed the 2000 census was designed by Pennsylvania's Republican majority in the state Legislature, and was hotly contested by the commonwealth's Democrats. The court challenges culminated in a Supreme Court case, *Vieth v. Jubelirer,* decided in 2004.[6] In that case, **the court held that claims of political gerrymandering were beyond the court's power to address** because there was no discernible and manageable standard for determining whether a political group was harmed—that is to say, there is no bright line that can be drawn between a "good" district and a "bad" one, and no set of rules that could allow a court to decide between them on a politically neutral basis. **The crafting of political maps is inherently political, and courts had traditionally tried to avoid it.**

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[5] See, for example, Arthur J. Anderson and William S. Dahlstrom, "Technological Gerrymandering: How Computers Can Be Used in the Redistricting Process to Comply with Judicial Criteria," *The Urban Lawyer* (Winter 1990), pp. 59–77.

[6] *Vieth v. Jubelirer,* 541 U.S. 267 (2004).

This fundamental question of deciding whether a district is legitimate or not has stymied federal legal challenges to redistricting plans ever since. As Professor Robert G. Dixon wrote on the point, “the primary difficulty is that in a generic sense all districting is gerrymandering. A near-infinite number of ‘equal’ districts may be drawn in any state; each set, however, having a quite different effect in terms of overall party balance and minority representation.”[7]

## FEDERAL REQUIREMENTS FOR CONGRESSIONAL DISTRICTS

Federal law provides for reapportionment of congressional seats after every decennial census—that is, an allocation of a specific number of seats to each state. Naturally, if the number of seats to which a state was entitled increased or decreased after a decennial census, the state legislature would redistrict the congressional seats. However, if the number of seats in Congress allotted to a state was not altered by the decennial census, states could—and often did—forego redistricting. In fact, this practice was upheld as recently as *Colegrove v. Green*, 328 U.S. 549 (1946), at which time the Illinois Legislature had failed to enact a congressional redistricting plan since 1901. Similarly, until 1962, states had broad discretion in deciding the method and timing of redistricting their state legislative districts. While some state constitutions included provisions requiring decennial redistricting, others did not. That all changed with the Supreme Court’s decision in *Baker v. Carr*, 369 U.S. 186 (1962), when the U.S. Supreme Court held for the first time that unequal population distribution among state legislative districts was a cognizable claim under the Equal Protection Clause of the 14th Amendment. Notably in this case, the Tennessee General Assembly had also failed to reapportion seats in the State Senate and House of Representatives since 1901.

That 6–3 decision, authored by influential liberal Justice William J. Brennan, held for the first time that courts could have a say in redistricting. Two years later, in the cases of *Wesberry v. Sanders*[8] and *Reynolds v. Sims,*[9] the court pronounced the now-famous ruling that districts must be drawn on the basis of “one man, one vote.” Chief Justice Earl Warren, a Republican appointee who greatly expanded the court's role in American political life, wrote in *Reynolds:* "Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests."

Since that time, federal courts have been deeply entwined in the line-drawing process. **How close to equal-sized is good enough?** We have never been given an exact answer, but as Paige Whitaker wrote for the Congressional Research Service in 2015, “the Court emphasized that this burden is ‘flexible,’ and depends on the size of the population deviations, the importance of the state’s interests, the consistency with which the plan reflects those interests, and whether alternatives exist that might substantially serve those interests while achieving greater population equality.” Deviations as small as 0.69% between largest and smallest districts have been struck down, while others as large as 0.79% have been upheld.[10]

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[7] Robert G. Dixon, Jr., *Democratic Representation: Reapportionment in Law and Politics* (1968), p. 462.

[8] *Wesberry v. Sanders,* 376 U.S. 1 (1964).

[9] *Reynolds v. Sims,* 377 U.S. 533 (1964).

[10] L. Paige Whitaker, *Congressional Redistricting: Legal and Constitutional Issues* (2015), pp. 4–5.

In other words, U.S. courts have struggled to determine hard-and-fast rules to define what is excessive partisan gerrymandering and what is allowable by state legislatures. Along with trends in software mapping and judicial activism at state and federal court levels, this has opened up the public debate and increased the number of court interventions of existing maps across the country.

The federal Voting Rights Act of 1965 went beyond just one man, one vote by also imposing rules with regard to the racial makeup of congressional districts. Passed at the height of the U.S. civil rights movement less than two years after the assassination of President John F. Kennedy, the act sought to end racial discrimination in voting and was passed over Southern "Dixiecrat" objections. As applied to the drawing of district lines, courts interpreted this to mean that states could no longer purposely divide up a minority population among many districts in order to *dilute* their voting power. **Concentrating minority voters into majority-minority districts, therefore, would be viewed as a *progressive* development in giving the black community (especially) political representation**—as discussed below. In *Thornburg v. Gingles* (1986), the Supreme Court laid out a three-factor test by which to assess such districts, but many court challenges followed because each case had its own unique issues.[11]

In 1982, the Voting Rights Act was amended to bar any voting practice that had a discriminatory effect, whether or not the practice was enacted for a discriminatory purpose. The federal response beginning with the 1990 round of redistricting was to encourage states to create more majority-minority seats to avoid the problem of dilution of minority votes.[12] North Carolina—a state with district lines challenged even more often than Pennsylvania's—did exactly this for its 1991 apportionment, adding a second, oddly shaped district with a majority-black population. Those lines were the subject of *Shaw v. Reno,* the first of many Supreme Court cases concerning race-based districting.

For decades, national Democrats tended to favor this system because it resulted in more black members of Congress, especially in the South. More recently, however, progressives have come to oppose this method of drawing the lines, with the political argument inverting itself for expediency. Republicans have, in effect, become the bigger advocates of majority-minority districts in practice: black voters, especially, have formed the largest Democratic voting bloc in recent decades, and drawing one district around as many black voters as possible would consequently leave the rest of the pool of voters much more Republican-leaning.[13] In Pennsylvania, this type of map-drawing has yielded two Philadelphia-area majority-minority districts in each round of districting since the 1990s—although former Democratic Rep. Bob Brady, a product of both Philadelphia's Italian and Irish political constituencies, represented one of these seats for decades.

As of this current round of redistricting, the political views on packing black voters into majority-minority districts had completed its full inversion, with the Congressional Black Caucus in September 2021 urging

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[11] *Thornburg v. Gingles,* 478 U.S. 30 (1986).

[12] See Samuel Issacharoff, Pamela S. Karlan, and Richard H. Pildes, *The Law of Democracy: Legal Structure of the Political Process,* 2d. Ed., (2002), p. 908.

[13] See *id.* at 916-917.

the distribution of black voters into *more* districts,[14] a shift that "could help Democrats push for maps that make the party more competitive in some states by distributing black voters—the party's most supportive voting bloc—across more House districts."

# THE 2010S: SAME LEGAL CHALLENGES, NEW COURT

## THE LEAGUE OF WOMEN VOTERS CASE

The 2011 round of redistricting in Pennsylvania was similar to that of a decade earlier, yielding a 13–5 congressional split in favor of the Republicans, but the Supreme Court's ruling in *Vieth* seemingly foreclosed any court challenge on the grounds of political gerrymandering. After having lived with the 2011 lines for three election cycles, however, state Democrats and the left-leaning League of Women Voters took another bite at the apple by filing a lawsuit in state court in 2017.

That suit, *League of Women Voters of Pennsylvania v. Commonwealth,* alleged that the 2011 lines violated the Pennsylvania Constitution based, in part, on a novel theory of law known as the "efficiency gap."[15] The theory is centered on the argument that the statewide percent of the vote for each party should equate to the percentage of seats won by that party. The efficiency gap is calculated with a concept of "wasted votes"—any vote over the 50% needed to win for the party, and all votes for the losing party—between political parties at a statewide level. It tends to focus on districts where a vast majority of voters chose one party or another, meaning that those voters may have been "packed" in by map-drawers. But an efficiency gap could arise from a much more benign phenomenon: a natural and growing tendency among voters of the same political orientation and background to cluster into their own communities. Federal courts had no time for the "efficiency gap" theory—a Wisconsin case based on the same theory failed in the Supreme Court that year[16]—but the commonwealth's high court found merit in it.

*LWVPA v. Commonwealth* dramatically reshaped Pennsylvania's redistricting process, with the state supreme court assigning to itself functions previously entrusted to the Legislature at a critical time in the elections process, leaving it unable to respond to the decisions of the court. The plaintiffs were aided significantly by a state Supreme Court dominated by the Democratic Party since 2015, when that party successful elected three new judges to the court, resulting in a partisan split of five Democrats and two Republicans.

The manner in which the *League* case unfolded was troubling. During a hearing held on October 4, 2017, Judge Dan Pelligrini of the Commonwealth Court made it clear that the matter would not be resolved in time for the 2018 election, and he ultimately stayed the action pending the resolution of *Gill v. Whitford* in

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[14] Aaron Zitner, "Black Lawmakers, Now Winning in White Communities, Call for End to Packing Black Voters in House Districts," *Wall Street Journal*, September 8, 2021.

[15] *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737 (Pa. 2018).

[16] *Gill v. Whitford*, 585 U.S. ___ (2018).

the U.S. Supreme Court. The petitioners then filed an application requesting that the U.S. Supreme Court exercise extraordinary jurisdiction over the matter.[17]

On November 9, 2017, the court granted that application and directed the state's Commonwealth Court to appoint one of its commissioned judges to act, in essence, as a trial court judge and to submit proposed findings of fact and conclusions of law. The parties conducted discovery, submitted expert reports, and a trial was held on December 15 before Judge Kevin Brobson. On December 29, 2017, Judge Brobson issued his proposed findings of fact and conclusions of law, advising the court that, in his view, the matter was not able to be decided through these legal proceedings. On January 17, the state Supreme Court heard oral arguments, and on January 22, the court issued a *per curiam* order holding that the maps were unconstitutional but offering only the following guidance: "To comply with this Order, any congressional districting plan shall consist of: congressional districts composed of compact and contiguous territory; as nearly equal in population as practicable; and which do not divide any county, city, incorporated town, borough, township, or ward, except where necessary to ensure equality of population."

**The Republican-led General Assembly was then given an impossible deadline by the majority-Democrat court**: submit a remedial plan by February 9, 2018 to the governor, who was in turn given until February 15, 2018 to approve or disapprove the plan. The actual opinion detailing the perceived unconstitutionalities in the map was not issued until February 7, 2018—two days before the General Assembly was instructed to submit a remedial plan. Because the governor did not "approve" the legislative plan, the court assumed the map-drawing task and issued its map on February 19.

Against this backdrop, there was also a special election being fought for Pa.'s 18th District, whose boundaries were clearly unknown, including by the candidates. While Conor Lamb (D) and Rick Saccone (R) were campaigning, petitions were being circulated for the May primary for a district that would be much different than the old 18th.

**A consideration of the timing brings the gross abuse of judicial power into sharper focus.** The near six-year delay in bringing a court challenge would ordinarily have resulted in the court refusing to entertain the claim under the time-honored doctrine of laches—denial of a case due to an unreasonable time having passed before the plaintiff filed suit. At a minimum, the extraordinary nature of the ruling should have necessitated a longer timeline; even where courts find a redistricting scheme unconstitutional, they are loath to enjoin it so close to the election, particularly when the constitutional violation is based on a newly articulated principle. And in all cases, courts must provide the legislature an "adequate opportunity" to submit a remedial plan.[18]

The opportunity afforded to the General Assembly by the court was hardly adequate. Given the dearth of guidance in the January 22 order, the Legislature could not have begun formulating a new plan in earnest

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[17] An unusual procedural vehicle available under Pennsylvania law that has its roots in the English King's Bench.

[18] *Upham v. Seamon*, 456 U.S. 37, 41 (1982); *accord Valenti v. Mitchell*, 962 F.2d 288, 298 (3d Cir. 1992).

until February 7, leaving it with only *two days* to submit a remedial plan to the governor. Not only was the timeframe insufficient as a practical matter, but it was also constitutionally *impossible* for the General Assembly to pass legislation, in light of the state constitution's requirement that bills must be "read" in each chamber on three separate days.[19] Moreover, the court's order did not afford the General Assembly the opportunity to override the veto. These concerns were the basis for a subsequent lawsuit, captioned *Corman v. Torres*, filed in the Middle District of Pennsylvania.

Finally, the lack of transparency and the haste with which the court adopted its own plan was alarming and was one of the main reasons why then-Justice (now Chief Justice) Max Baer, a Democrat, dissented from the remedy ordered by the court, which was to grant itself the map-drawing powers.

## THE PENNSYLVANIA SUPREME COURT'S "NEW" POWERS

In striking down Pennsylvania's existing maps and creating a situation in which the court itself would be drawing congressional districts, the state Supreme Court had derived for itself an entire new set of powers. To justify its actions, the court grafted criteria for drawing *state* districts onto *federal* districts: it took a line from the state constitution and decided to apply it to federal districts when it clearly did not. The provision in question expressly and unambiguously deals with state districts, but the court made it apply to federal ones. In the state constitution, there is no ambiguity about whether it applies broadly.

Pennsylvania's highest court interpreted the state constitutional guarantee of "free and equal elections"[20] to mean that no political party could draw a map based on purely political concerns. While recognizing that "the primary responsibility and authority for drawing federal congressional legislative districts rests squarely with the state Legislature," the court decided that the 2011 plan was "aimed at achieving unfair partisan gain" in this newly invented limitation on the Legislature and "undermine[d] voters' ability to exercise their right to vote in free and 'equal' elections."[21] The court struck down the 2010 map by a 5–2 vote and then set up a timeline that was dead in the cradle,[22] establishing the lines in place today. The Supreme Court's decision affected only federal legislative districts directly. State House and Senate districts remained the same from the 2010 lines, though the effects of the state court's rulings remain unknown for the forthcoming round of legislative districts. The court's 2017 decision simply added uncertainty to the entire process.

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[19] At a minimum, the Legislature needed seven days to pass legislation. The third day in one chamber and the first day in the other chamber may overlap. In addition, under the state constitution, the governor is allotted 10 days, not the seven days given in the order, to either sign or veto a bill.

[20] Pa. Const., Art. 1, § 5. ("Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.").

[21] *League of Women Voters of Pa. v. Commonwealth* at 821.

[22] Justice Max Baer concurred in the majority's decision that the map was unconstitutional, but he was the only Democrat on the court to dissent from the remedy ordered by the majority. Baer wrote that the 2018 election should have proceeded under the *old* map, and that the Legislature should be required to develop a new plan for the 2020 election that would comply with the criteria established by the court.

The court's decision relied on academic arguments and a pseudo-scientific review of districting. Pennsylvania state law, until recently, left federal districting entirely to the Legislature. Although the state constitution requires that state legislative districts "be composed of compact and contiguous territory as nearly equal in population as practicable,"[23] no such requirements bound the Legislature in their construction of *federal* districts.

In declaring the 2011 map unconstitutional, the court offered a lengthy rendition of Pennsylvania's election law history, but cited no statute and relied principally on one constitutional provision—the above-referenced "free and equal elections" clause of Article 1—to hold that the state constitution prohibits "partisan gerrymandering." The court acknowledged the novelty of its ruling, stating that "[w]hile it is true that our Court has not heretofore held that a redistricting plan violates the Free and Equal Elections Clause—for example, because it is the product of politically-motivated gerrymandering—we have never precluded such a claim in our jurisprudence."[24]

Such "new powers" from the court in effect removed the constitutional map-drawing powers from the Legislature. One possible way to gain these powers back would be a state constitutional amendment reaffirming the Legislature's existing powers, as they were intended to be, in response to the court's ruling.

## THE "SCIENCE" OF REDISTRICTING

Discerning whether a particular plan violates the state constitution remains a difficult task. The court acknowledged as much.[25] Casting about for some standard, it ultimately settled on Article II, Section 16, which imposed three general requirements on *state* legislative districts: (1) equal population to the degree "practicable;" (2) "compact and contiguous" geographical territory; and (3) avoidance of splitting municipalities.[26]

The first prong—equal population—is largely superfluous in this context since that requirement is even more stringent for congressional districts under *Baker vs. Carr* than for state legislative districts. Similarly, since the contiguity requirement simply means that the districts must be geographically connected, that aspect is also easily satisfied, and the prior map that was ruled unconstitutional did not run afoul of this requirement. However, the two remaining elements—compactness and avoidance of municipal splits—formed the basis on which the court redrew the maps.

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[23] Pa. Const., Art. 2, § 16.

[24] *League of Women Voters of Pa. v. Commonwealth* at 811.

[25] See 178 A.3d at 814 ("Neither Article I, Section 5, nor any other provision of our Constitution, articulates explicit standards which are to be used in the creation of congressional districts.").

[26] See Pa. Const. art. II, § 16 ("Unless absolutely necessary no county, city, incorporated town, borough, township or ward shall be divided in forming either a senatorial or representative district.").

As it pertains to compactness, the various commonly used "tests" for compactness, some of which are recited in the Pennsylvania Supreme Court's decision, are flawed for a number of reasons. To begin, each of these "tests" is based on a different conception of what the "ideally" compact district would look like[27]; thus, according to scholars Stephen Ansolabehere and Maxwell Palmer, "[a] district may be non-compact on one measure but compact on another."[28] As explained, "[f]or example, a spiral-shaped district will be relatively compact using both of the dispersion measures, but extremely non-compact on the perimeter measures. A triangle is perfectly compact using the convex hull ratio, but non-compact using Reock."[29] **The various tests cited by experts, litigants, and the media amount to social science, not hard science, and are completely subjective; they were referred to as "sociological gobbledygook" by Chief Justice Roberts during oral arguments in *Gill v. Whitford*.**

Ironically, Dr. Jowei Chen, whose testimony the court found particularly helpful, recently co-authored an article cautioning *against* dogmatic adherence to "science" in this realm, writing that in the analysis of districts,[30]

> Scholars are correct to be concerned about judicial legislation. For one thing, this Article was motivated by a particularly malignant strain of that exact phenomenon: conflicted interests attempting to legislate expedient districting criteria through court rulings. Moreover, scholars … are correct to be concerned about quantitative metrics making judicial legislation even harder to detect, because judges are not usually trained to know when **expert witnesses are trying to sneak legislation past them hidden underneath a heap of numbers**, Greek letters, and coding jargon. Scholars have already documented how academics, politicians, and even entire nations have suffered from blindly accepting ideas presented with illusory quantitative authority.
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> There is no need [to] put[] a thumb on the scales simply because a model is expressed quantitatively. That is the legal equivalent of putting a white lab coat on an attorney to lure in unsuspecting onlookers with equations and formulae.

Despite expressing hesitation on the "science" of redistricting as recently as this year, however, Dr. Chen's testimony at the time of the trial enticed not just the justices of the Pennsylvania Supreme Court, but also sympathetic media outlets such as *WITF*, the Harrisburg region's publicly funded NPR affiliate-—specifically with regards to the "science" of not splitting political municipalities: "Congressional maps have to follow certain rules, such as distributing equal numbers of voters between districts. Advocates for fairer

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[27] For example, with the frequently cited "Reock" measure, a perfectly circular district receives a score of "1," a perfect square receives a score of "0.64," and less compact districts receive smaller scores. With the "Schwartzberg perimeter measure," a perfect circle receives a score of "1," and less compact districts receive higher scores. With other measures, such as the ratio of the district area to the perimeter, there is no "ideal" district shape to use as a benchmark; districts are only assessed relative to each other.

[28] Stephen Ansolabehere & Maxwell Palmer, *A Two Hundred-Year Statistical History of the Gerrymander*, 77 Ohio St. L.J. 741, 744 (2016).

[29] *Id.* at 747.

[30] Yunsieg P. Kim & Jowei Chen, *Gerrymandered by Definition: The Distortion of "Traditional" Districting Criteria and A Proposal for Their Empirical Redefinition*, 2021 Wis. L. Rev. 101, 151 (2021).

congressional maps say it's also a best practice to avoid dividing counties and municipalities when drawing district boundary lines . . . [and] this clearly wasn't adhered to in Pennsylvania."[31]

The *Philadelphia Inquirer* echoed the scientific angle in its coverage of the case as well: "Under the court's redrawn map, districts more closely align with county lines, and only 13 counties are split among two or three districts. By contrast, under the last map, enacted by the legislature in 2011, more than twice as many counties were split among multiple districts."[32]

**Our finding that the "science" of redistricting is really a malleable pseudo-science leads us to be skeptical of its usage in map-drawing.** For example, Professor Melissa Saunders proposes determining whether a district is constitutionally compact using two specific metrics of compactness, even though those two metrics can return wildly different evaluations of the same district. Professor Michael McDonald submits an entirely new numerical measure of compactness, which, stripped of the jargon, would merely permit districts to be half as compact as they can feasibly be. The goal of achieving the court's stated goals, such as a high "compactness score," could often directly conflict with the goal of not splitting municipalities, which were drawn with political and geographic considerations that are not always visible on a map. But splitting municipalities is something that the court has instructed the Legislature to avoid "unless absolutely necessary"—so which of the two key prongs of a "fair" district, compactness or not splitting geographical constituencies, is to be valued over the other?

Consider, for instance, that if Pennsylvania's 67 counties were subjected to the panoply of "efficiency tests" for compactness, many of them would score relatively low on at least some of those measurements. Thus, in many ways, the General Assembly was instructed using impossible guidelines: do not split noncompact counties unless absolutely necessary, but make sure that these noncompact "building blocks" ultimately produce compact districts.

The state Supreme Court cited the work of a host of experts when it struck down the 2011 map and drew its own, but each had different theories on why the old map was unconstitutional. *Compactness* was mentioned frequently, not as a goal in and of itself but as an indicator of partisan intent. Again, one test of fairness ran into another, as the "efficiency gap" argument relying on "wasted votes" would directly conflict with the mandate for compact districts, since in modern Pennsylvania (and national) politics, significant numbers of Democratic voters tend to cluster together. Thus, drawing *compact* urban districts can have the effect of concentrating Democratic votes, leading to less "efficient" results for Democrats statewide.

The court called for future districts to be judged on "the use of compactness, contiguity, and the maintenance of the integrity of the boundaries of political subdivisions"—and commissioned a group of

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[31] Emily Previti, "Lawsuit challenging Pa.'s congressional map begins in state court," *WITF*. December 11, 2017.

[32] Jonathan Lai and Liz Navratil, "Pa. gerrymandering case: State Supreme Court releases new congressional map for 2018 elections," *Philadelphia Inquirer.* February 29, 2018.

academics to draw their own map accordingly. For any map to pass muster using the 2020 census numbers, these requirements must be considered, at least according to the court in its current make-up. What *exactly* that means for the Legislature, and what to do when one of the new requirements contradicts another, **will undoubtedly be the subject of the next lawsuit, decided once again by the Democratic majority on the court, likely at the expense of the Republican majority in the Legislature.**

Of course, the court left open the possibility that a future map could comply with the state-level conditions now being applied to federal districts but *still* violate Article I, Section 5—leaving any new map, ostensibly, up to the court's discretion, forever:[33]

> However, this [ignoring the "neutral" criteria of compactness and respect for municipal boundaries] **is not the exclusive means by which a violation of Article I, Section 5 may be established**. As we have repeatedly emphasized throughout our discussion, the overarching objective of this provision of our constitution is to prevent dilution of an individual's vote by mandating that the power of his or her vote in the selection of representatives be equalized to the greatest degree possible with all other Pennsylvania citizens. We recognize, then, that there exists the possibility that advances in map drawing technology and analytical software can potentially allow mapmakers, in the future, to engineer congressional districting maps, which, **although minimally comporting with these neutral 'floor' criteria, nevertheless operate to unfairly dilute the power of a particular group's vote for a congressional representative.**… However, as the case at bar may be resolved solely on the basis of consideration of the degree to which neutral criteria were subordinated to the pursuit of partisan political advantage, as discussed below, we need not address at this juncture the possibility of such future claims.

An "unfair" map, in the elected justice's eyes, will presumably be any map that results in congressional representation that does not favor their political party.

Still, using the court's own criteria, state mapmakers could draw maps of nearly any proposed partisan lean, as is illustrated in the last section of this report. Would a Democratic-majority court object to a lean-Republican map that is still contiguous and compact? Most likely, but it would have less political justification to spin the objection out of whole cloth. Meanwhile, as stated earlier, the state Legislature could pursue a constitutional amendment, with support could cut across partisan constituencies, to reaffirm the rights of the Legislature to draw maps without partisan court interference.

## 2018: THE COURT TIPS THE SCALES

The way most people think of gerrymandering (to the extent that they think of it at all) is in terms of the shape of the districts. If geographic compactness is a political virtue, the 2018 lines are an improvement over those of 2011 or 2001. The court's decision, however, while mentioning compactness and other

[33] *League of Women Voters v. Commonwealth*, 178 A.3d 737, 817 (Pa. 2018).

traditional touchstones of districting, was based on the legal challenge that relied on the novel "efficiency gap" theory. Their contention was that the lines drawn by Republicans kept Democrats from winning their "fair share" of U.S. House seats, which violated the "free and equal elections" clause of the state constitution.

Were they right? Possibly not. An analysis by Keystone Crossroads in 2019 showed that Democrats probably would have picked up five seats that year *even under the old district lines* in the "blue wave" 2018 election.[34] The new lines and the old lines would have had the same result: nine Democrats and nine Republicans elected to Congress. Changed lines mean changed circumstances and, perhaps, an easier go for state and regional party committees. Some upstart candidates would not have run under the old lines. But another fact drives home the point: three of the five *new* Democrats elected in 2018 first won their seats in special elections under the *old* district boundaries.[35]

If not for the knowledge that the results were the same under either set of lines, the Democrats' 2018 congressional gains, amid a "blue wave" of momentum against incumbent President Trump, may have been chalked up to a map that was made favorable to their party—not a "neutral" map, as its drafters claimed. **The Democratic majority on the court cleverly used neutral-sounding principles to strike down the Pennsylvania Legislature's 2011 map, which favored Republicans. But in drawing their own map, they made equally political choices.**

Indeed, Pennsylvania's high court reinforced Professor Dixon's underlying point that "all districting is gerrymandering." The principles of mapmaking are often in conflict and choosing which to emphasize and in which geographic area to emphasize them is more art than science, not one amenable to any sort of neutral expertise. Each choice presented to the court in its 2018 redistricting effort was answered in a way that would benefit state Democrats. Each effort to stop the court from assuming for itself a new power in map-drawing was opposed by state Republicans—on the grounds that it was unconstitutional, of course, but likely to maintain their partisan advantage as well. The left-leaning media corps, particularly in the commonwealth's major metropolitan areas, and "good-government" groups heaped praise on the new map. In fact, many media outlets led the cheering section for courts to redraw the maps for years prior to *League of Women Voters vs. Commonwealth*.[36] **The outcome of the new map was as politically determined as that of the old map.**

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[34] Emily Previti, "Pa. Dems would have made gains even under old congressional map, analysis suggests," *WHYY.* January 31, 2019.

[35] Now-incumbent Reps. Conor Lamb, Susan Wild, and Mary Gay Scanlon were all first elected in special elections in 2018, with the latter two occurring in conjunction with the 2018 general election.

[36] See, local to Philadelphia: *WHYY*, "Why Pennsylvania is home to some of the nation's worst gerrymanders," November 13, 2017; *Philadelphia Magazine,* "The State Supreme Court's Map Slap," January 27, 2018. Nationally, *Huffington Post* was exemplary: "Pennsylvania Supreme Court Issues New Congressional Map to Replace Gerrymandered One,"

Consider the Philadelphia region. The five counties of Philadelphia, Bucks, Chester, Delaware, and Montgomery together counted just over 4 million people in the 2010 census—enough for five and two-thirds of Pennsylvania's 18 congressional districts. That would mean at maximum five districts comprising *only* Philadelphia and its four collar counties, with a sixth district to be by necessity drawn with some surrounding population incorporated to complete it.

**How Pennsylvania's State Supreme Court drew this sixth district is very revealing.** Expanding beyond Chester County, the court looped in the heavily Democratic city of Reading, while excluding the Republican areas to its north and west. The shape was not outlandish compared to previous maps—the district was somewhat *compact*—but it split Berks County on partisan lines, in a way that ensured a Chester County–based district would lean heavily Democratic. The portion of Berks County that went to the 6th District had, over the course of the past few elections, voted Democratic by a 13-point margin. The part left in the 9th District voted Republican over the same span by 17 points.

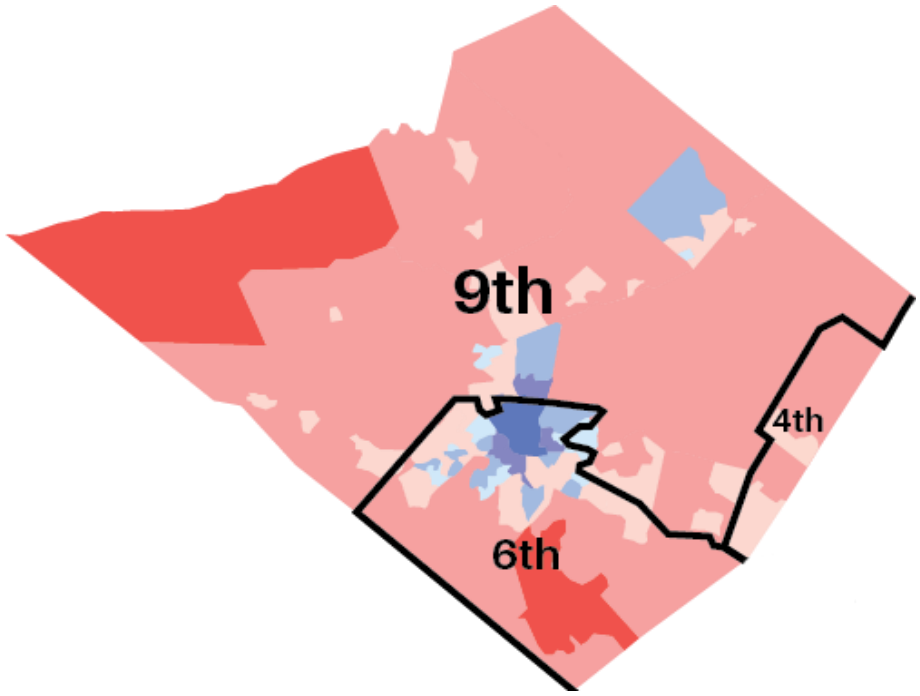


**Figure 3: Berks County divided among three districts, with deep-blue Reading buttressing a traditionally swing, Chester County-based congressional district.**


**Figure 4: The new 6th congressional district, with a Democratic-leaning portion of Berks County**

Central Pennsylvania saw another district drawn by the Democrat-majority court to become more Democratic. In the new 10th District, the judges based a district around politically competitive Dauphin County and dragged in the eastern half of Cumberland County and *just enough* of York County to include the city of York, more Democratic than its environs. The rest of York County was packed into the 11th District with Lancaster County, creating an overwhelmingly Republican district. As with previous gerrymanders, the court's efforts may have fallen short when incumbent Republican Scott Perry eked out a three-point win in 2018. Perry has been a consistent Democratic target since his district was redrawn.

**There are many other examples, but the most egregious change in the state was in the district based on Bucks County** (formerly the 8th, now the 1st). It was the least bizarre in the state—Bucks County's population was just short of enough population for its own district, so the 2011 lines included the entire county and a few townships in neighboring Montgomery County. **The court followed the same model in 2018 but changed the portion of Montgomery County to one that was significantly more Democratic.** Taking away the Republican townships of Upper Hanover and Marlborough, the justices added Lansdale, one of most Democratic portions of Montgomery County that was contiguous to Bucks County. There was no neutral principle that demanded this change—only gratuitous partisanship.

But here, again, partisan intent fell short—Republican Brian Fitzpatrick won the district, despite the judges stacking the deck against him, in one of the most expensive congressional races in history.[37]

[37] Karl Evers-Hillstrom, "Each of the five most expensive House races ever took place in 2018,"

*Open Secrets*, December 10, 2018.

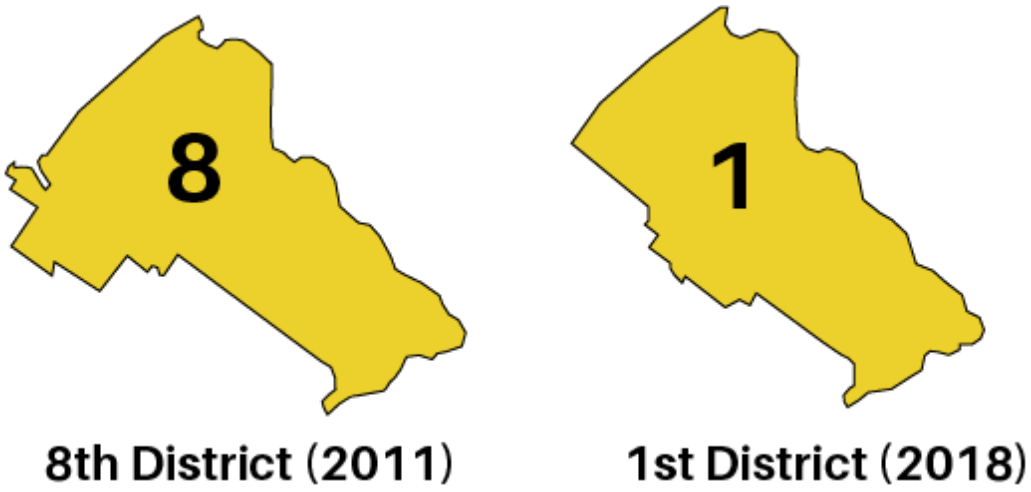


**Figure 5**

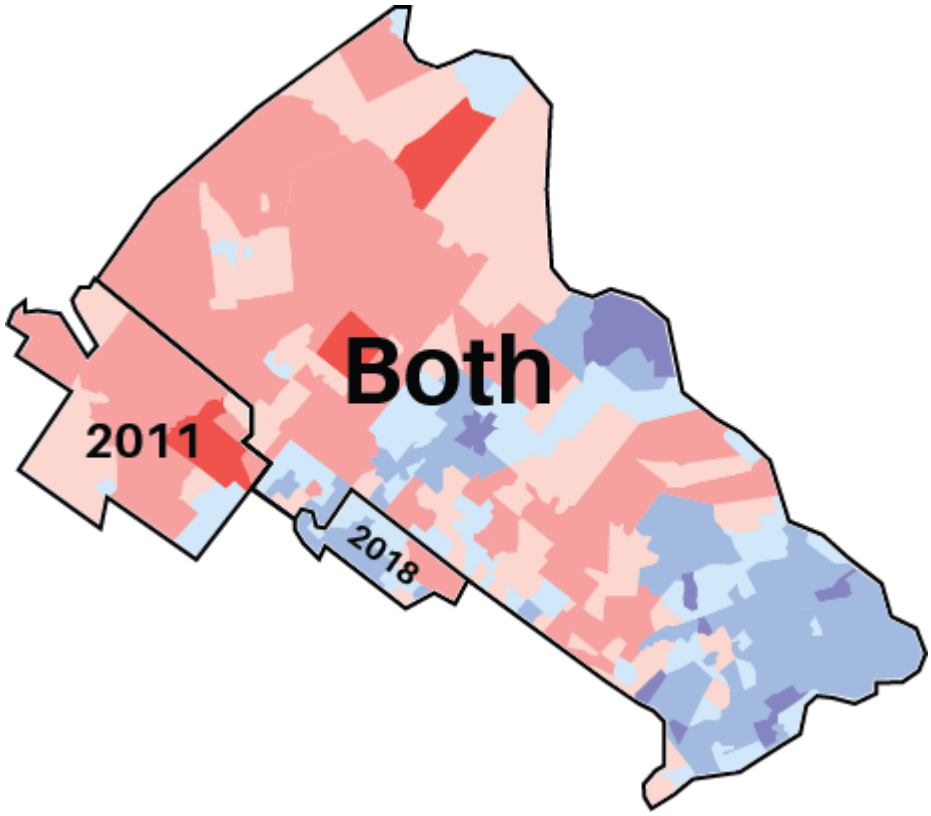


**Figure 6: 2018: *The* Democratic-dominated *Pennsylvania Supreme Court assigns a more Democratic-leaning portion of Montgomery County to endangered Republican incumbent Rep. Brian Fitzpatrick. Map coloration shows the average partisan vote at a precinct level, with darker blue indicating more Democratic-leaning precincts and darker red indicating more Republican-leaning precincts***

## HOW DOES PENNSYLVANIA COMPARE WITH ITS NEIGHBORS?

In the lead-up to the 2017 *League of Women Voters* case, a litany of news coverage in the commonwealth would lead a consumer of news to think that Pennsylvania was unique or particularly egregious in its congressional line drawing. But just over the Mason-Dixon line, in Maryland, lies one of the worst examples of partisan gerrymandering in the nation. If Pennsylvania's districts seemed to flout geographical or county lines, Maryland's (pictured below) eschewed reality entirely, in favor of the state's Democrats who drew the lines. Because of the slant of today's media corps, the Maryland lines were mostly ignored, except by aggrieved Maryland Republicans and some small good-government voices, like Martin Austermuhle of the website *DCist*, who suggested that the term gerrymandering might be better replaced with "Marymandering."[38]

Were voters in our region well-served by such media coverage, which often obscured the Pennsylvania state constitution's mandate for the state Legislature to draw districts, and often ignored the strong partisan Democratic lean of states like Maryland? Likely not, but that is the reason that our civics knowledge in the United States has collapsed.

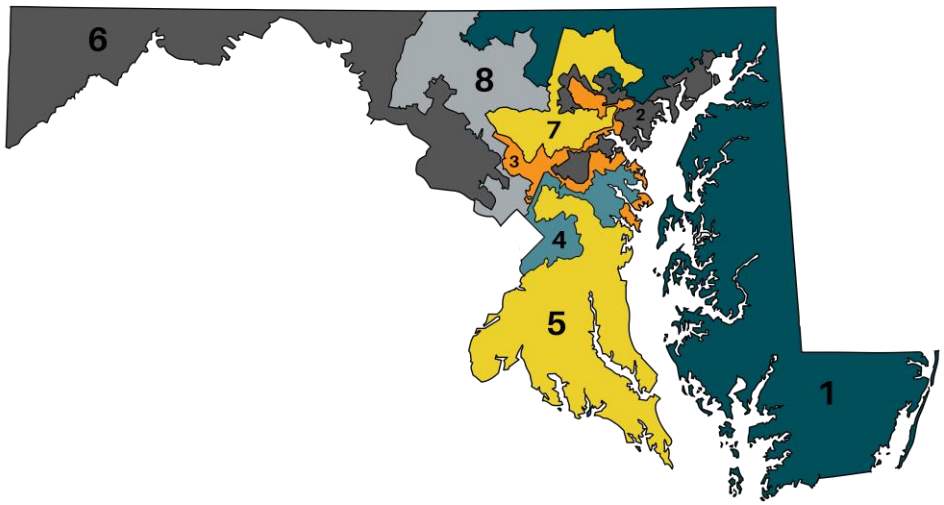


**Figure 7: The "Marymander" yielding a 7-1 map that favors Maryland Democrats.**

Ohio and New York also have districts that, like Pennsylvania, were constructed by politicians for political ends, the former by Republicans and the latter by Democrats. New Jersey's plan was a great deal like Pennsylvania's, an ostensibly pro-Republican plan that ended up benefiting Democrats by the end of the decade, since narrow Republican-held seats shifted blue fairly quickly during the Obama and Trump administrations (see following section). By the end of the last decade, a number of Garden State seats had flipped from narrow Republican holds to narrow Democratic holds.

[38] Martin Austermuhle, "They Should Call It Marymandering," *DCist*, January 5, 2012.

Pollster and academic Larry Sabato of the Center for Politics at the University of Virginia names both New Jersey and Maryland as among the top states where Democrats overperform their U.S. House "vote share" in the form of seats captured; Ohio lands near the top of the list for Republican overperformance, indicating a pro-GOP gerrymander in the Buckeye State.

The myth of "independent commissions," too, has been largely exposed by observers, though is often trumpeted as another solution to voters. Multiple states have found stalemates between members of such commissions. In Virginia, talks have already collapsed between appointed Republicans and Democrats. And in California, a pioneer of such commissions, the nonprofit outlet *ProPublica* found that state Democrats had successfully and pervasively gamed the supposedly non-partisan commission in 2011, by placing partisan actors posing as constituent groups or concerned citizens before the relevant districting committee—thus ensuring a congressional delegation skewed heavily towards Democrats:[39]

> The citizens' commission had pledged to create districts based on testimony from the communities themselves, not from parties or statewide political players. To get around that, [California] Democrats surreptitiously enlisted local voters, elected officials, labor unions and community groups to testify in support of configurations that coincided with the party's interests.
>
> When they appeared before the commission, those groups identified themselves as ordinary Californians and did not disclose their ties to the party. One woman who purported to represent the Asian community of the San Gabriel Valley was actually a lobbyist who grew up in rural Idaho, and lives in Sacramento.

Where there are opportunities to allocate political power, partisans—whether sitting on or lobbying "independent commissions," in state Legislatures, or elected to courts—will exercise such power to benefit themselves. It is up to the people to pay attention and punish the most flagrant abuses of power and up to the media to consistently and fairly report on what is happening.

# LOOKING AHEAD

## EXTREME GERRYMANDERS CAN BE SELF-DEFEATING

The Pennsylvania Supreme Court scrambled centuries of law and tradition for a short-term partisan gain that would have happened even if it had done nothing. But in doing so, the justices reinforced some important lessons of redistricting. Computer-aided mapping gave state legislatures the power to draw districts that stretched partisan advantage to the limits while staying within the legal bounds of previous court decisions. In doing so, however, they often sowed the seeds of their own destruction.

Consider Pennsylvania's 2001 congressional lines. At the time the lines were drawn, Republicans held 11 of the state's 21 House seats, and the state was set to lose two of them after the 2000 census. While maintaining the two majority-minority seats demanded by the Voting Rights Act, the Legislature also maximized Republican advantages. In two instances, two Democratic Congressmen found their homes

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[39] Olga Pierce and Jeff Larson, "How Democrats Fooled California's Redistricting Commission," *ProPublica,* December 21, 2011.

redrawn into the same districts. In another part of the state, a new district was designed so that it would be easy for a Republican candidate (who, in that instance, was naturally a state legislator) to win. The result was this map:

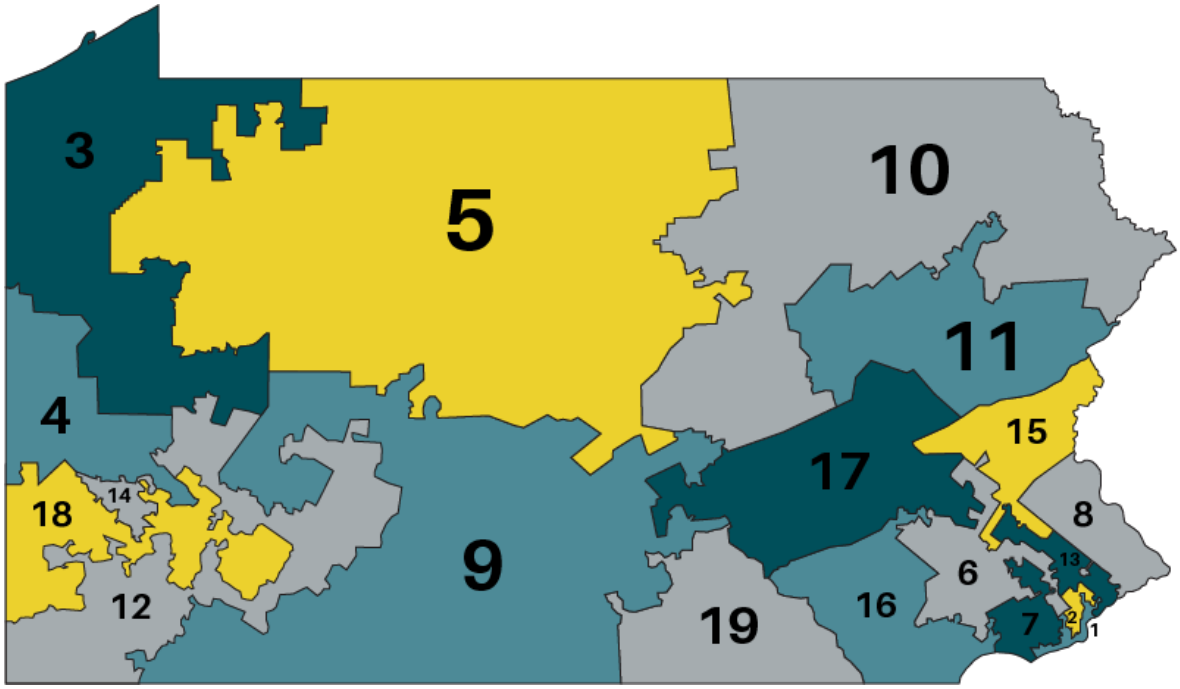


**Figure 8: The 2010s in Pennsylvania.**

In the 2002 and 2004 elections, the results were as intended: Republicans won twelve of nineteen seats while taking a slim majority of the statewide House vote. But stretching a majority so thinly across districts meant that a *slight decrease* in the statewide Republican vote share would doom many incumbents. In 2006, the midterm election went against the Republicans, and they won only eight of 19, a loss of a third of their seats. In 2008, the effect was even more pronounced, with Republicans winning just seven seats. That year, **the Republican-drawn lines functioned as a Democratic gerrymander, handing the latter party 63.16% of the seats after winning just 55.45% of the statewide U.S. House vote.**

In 2010, the Republican advantage was restored, and the party regained everything it had lost since 2004, but once again, the unreliability of the so-called “favorable districts” would be exposed. Nevertheless, the same experiment was repeated after the 2010 census. After once again losing a seat, the Legislature came up with a map that looked like this:

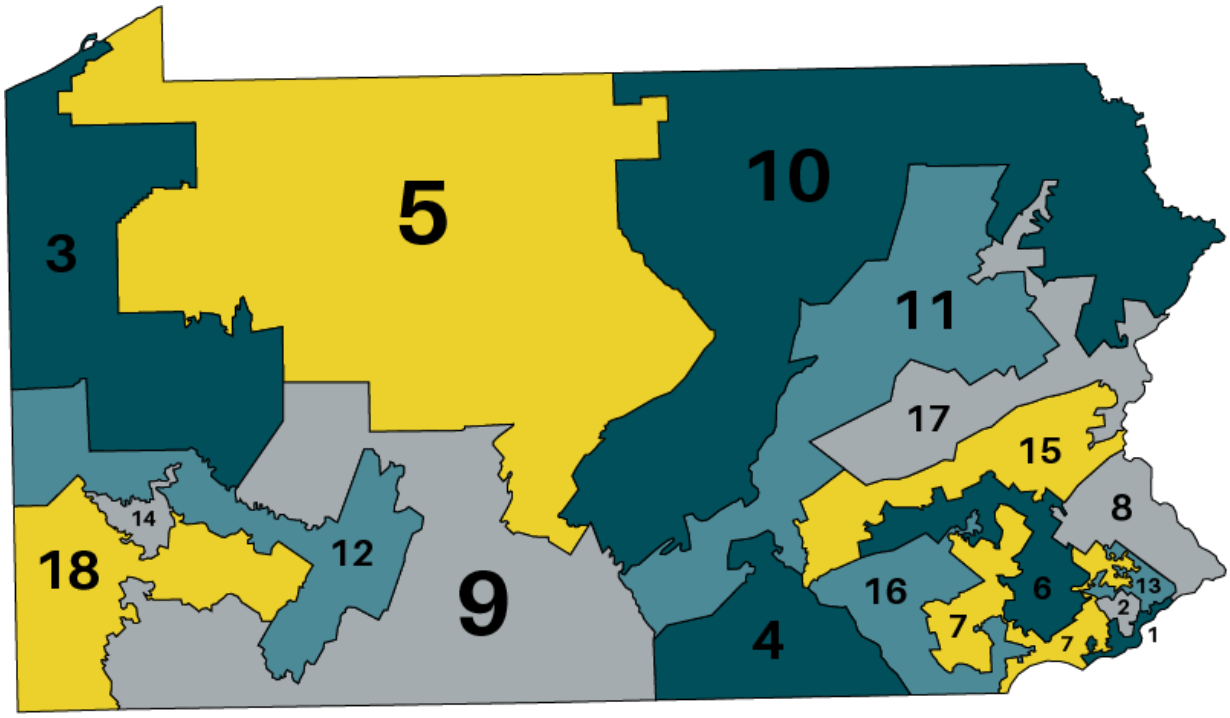


**Figure 9: The 2010s: Congressional lines that were in effect until February 2018.**

In 2012, 2014, and 2016, Republicans won around half the statewide vote but captured 13 out of 18 seats. In 2018, as the Keystone Crossroads analysis showed, Republicans would have suffered the same fate under the old lines as they did in 2006 and 2008, losing five seats in total. That they did so under the new, court-drawn lines made no difference to the result. As the chart below shows, the correlation between statewide vote and number of seats won is greatest in 2006 and 2020—the former under a legislative map, the latter under a judicial map.

| Year | Republican % of U.S. House Vote in Pa. | % of U.S. House Seats Won by Republicans in Pa. |
|---|---|---|
| 2002 | 57.14% | 63.16% |
| 2004 | 50.60% | 63.16% |
| 2006 | 43.73% | 42.11% |
| 2008 | 43.99% | 36.84% |
| 2010 | 51.94% | 63.16% |
| 2012 | 49.24% | 72.22% |
| 2014 | 55.54% | 72.22% |
| 2016 | 54.06% | 72.22% |
| 2018 | 44.76% | 50.00% |
| 2020 | 50.63% | 50.00% |

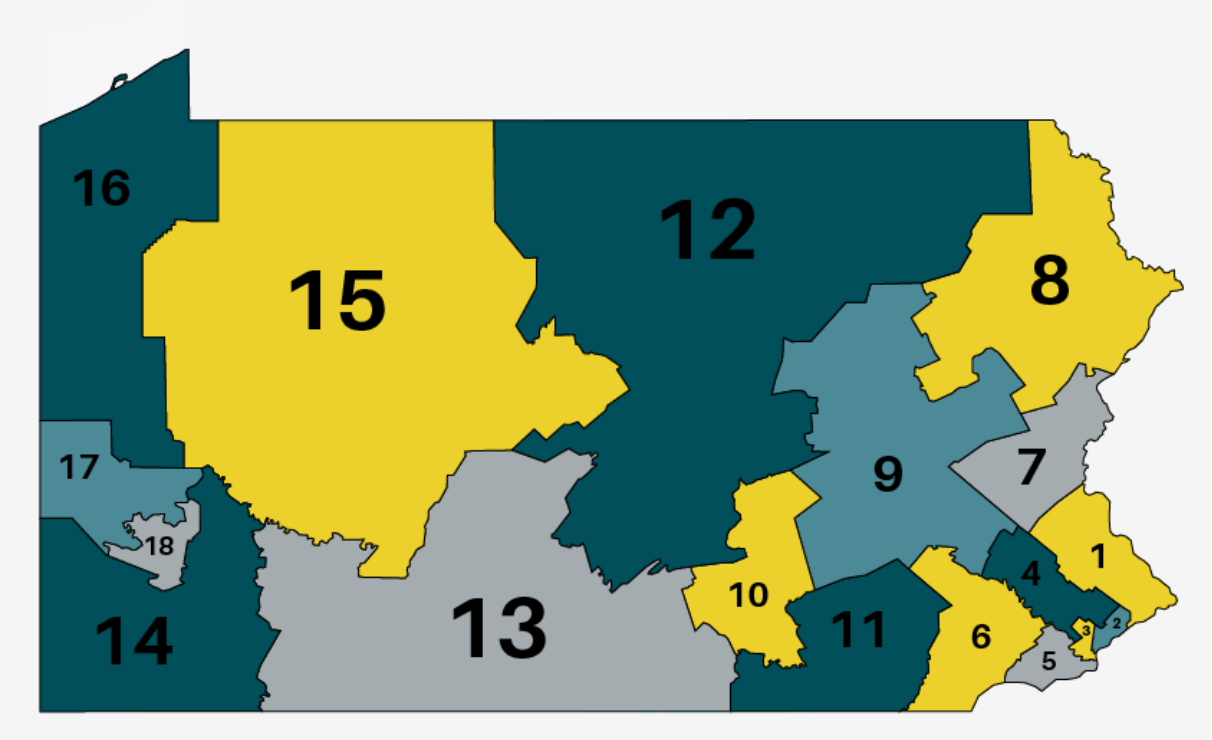


**Figure 10: The 2018 state Supreme Court–drawn map.**

The point is clear: **over the past two decades, partisan gerrymanders have been effective for the party in power about 60% of the time.** When they have failed, they have collapsed all at once due to the tenuous nature of over-extended partisan maps—disproportionately *benefitting* the party they were supposed to *disadvantage,* as in the Garden State, where a number of narrow Republican holds flipped to the Democratic Party over the latter half of the prior decade. Now, with the Pennsylvania Supreme Court once again threatening to redraw districts that show excessive partisan advantage at the expense of contiguity and community cohesion, there are few practical benefits in trying to stretch the limits of computer-aided map design, as previous Legislatures have done.

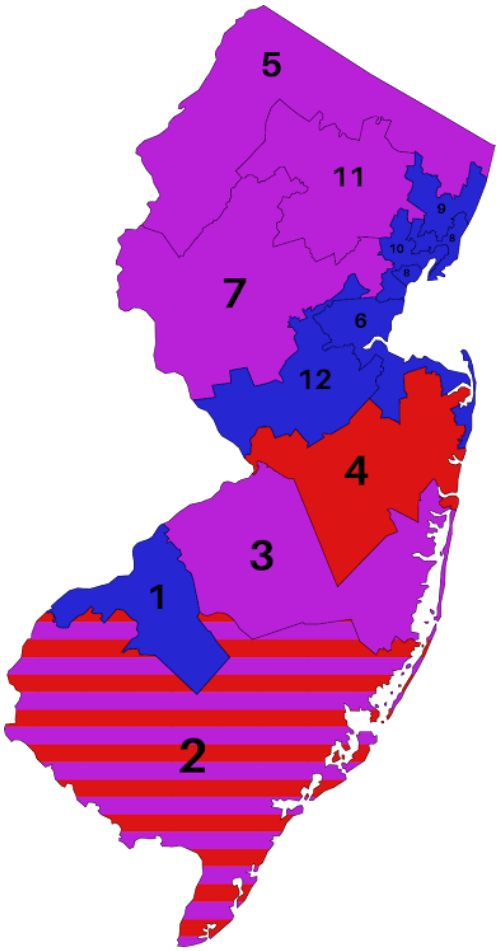


**Figure 11: New Jersey's self-defeating "Republican" gerrymander. Blue: consistent Democratic districts, 2010–2020; Red: consistent Republican districts, 2010–2020; Purple: flipped R to D from 2012–2018; Stripes: flipped back and forth, now Republican.**

## MOVING FORWARD: MAPS FOR THE 2020S:

As the state court clearly showed in its own 2018 map, there is no need to ignore reality—or to pretend that our legislators, or whomever is drawing the maps, would not work to advantage themselves while remaining within the bounds of the "new normal" in redistricting. If state Republicans draw a map in the style of 2000 or 2010, this will result in the Democratic-dominated court imposing its own map, which will obviously reflect the partisan makeup of the bench and not the Legislature, as was presaged in the statement of the court in its majority decision:

> We recognize, then, that there exists the possibility that advances in map drawing technology and analytical software can potentially allow mapmakers, in the future, to engineer congressional districting maps, which, although minimally comporting with these neutral 'floor' criteria [established by the state supreme court], nevertheless operate to unfairly dilute the power of a particular group's vote for a congressional representative.… However, as the case at bar may be resolved solely on the basis of consideration of the degree to which neutral criteria were subordinated to the pursuit of partisan political advantage, as discussed below, we need not address at this juncture the possibility of such future claims.

The principles the court laid out are not necessarily designed to benefit Democrats only. **Compact districts that avoid splitting communities can produce a map favorable to Republicans, as well**. A map like the one below is as much in line with those ideals as the court's 2018 redrawing but without the choices that favored the Democrats. In fact, it splits fewer municipalities and is more compact across the board.

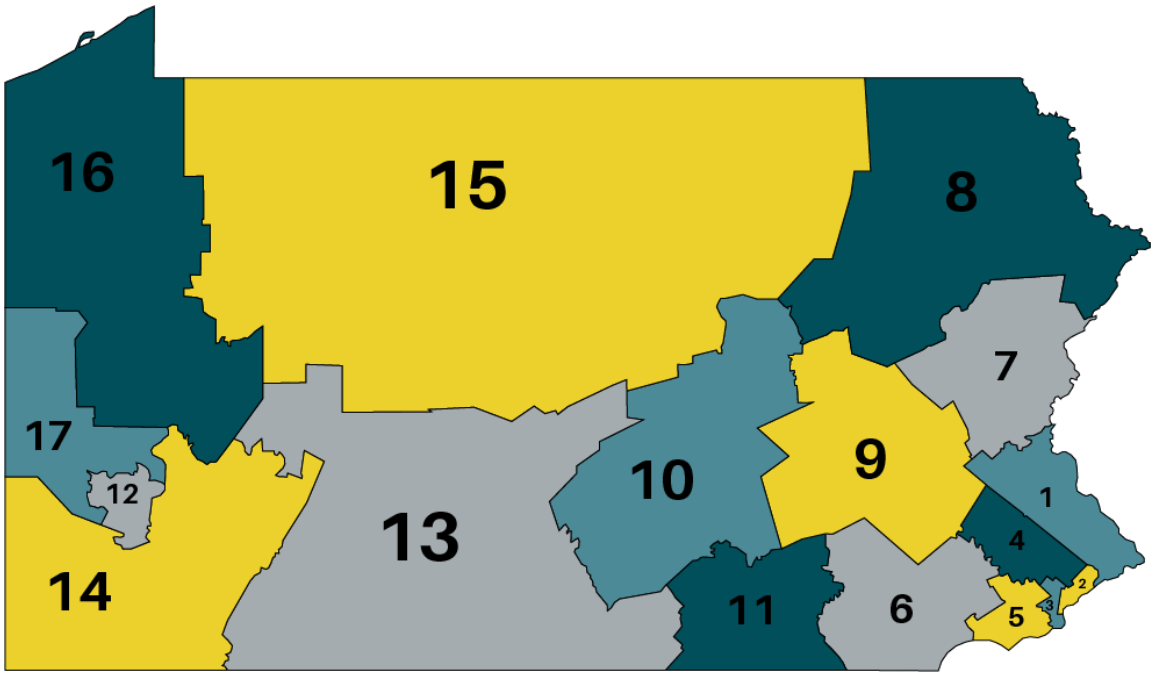


**Figure 12: A map for 2020: Compact districts, Republican lean.**

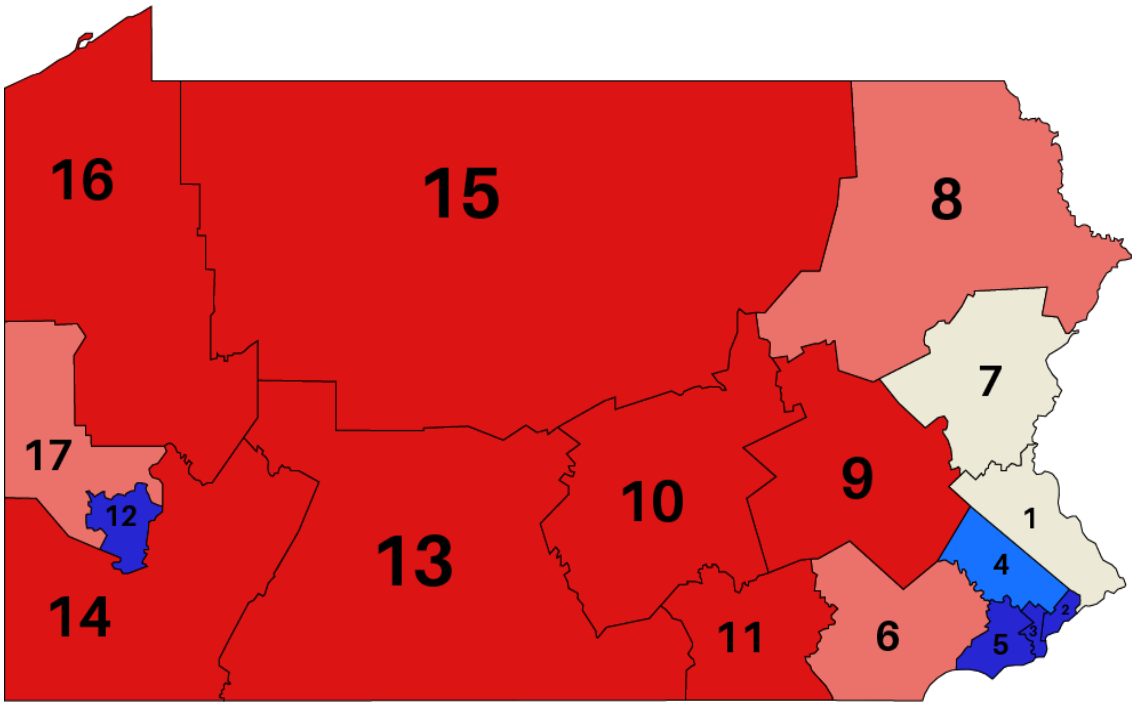


**Figure 13: The partisan lean of a proposed 2020 "compact" map; Result: five Democratic districts, 10 Republican districts, and two toss-ups.**

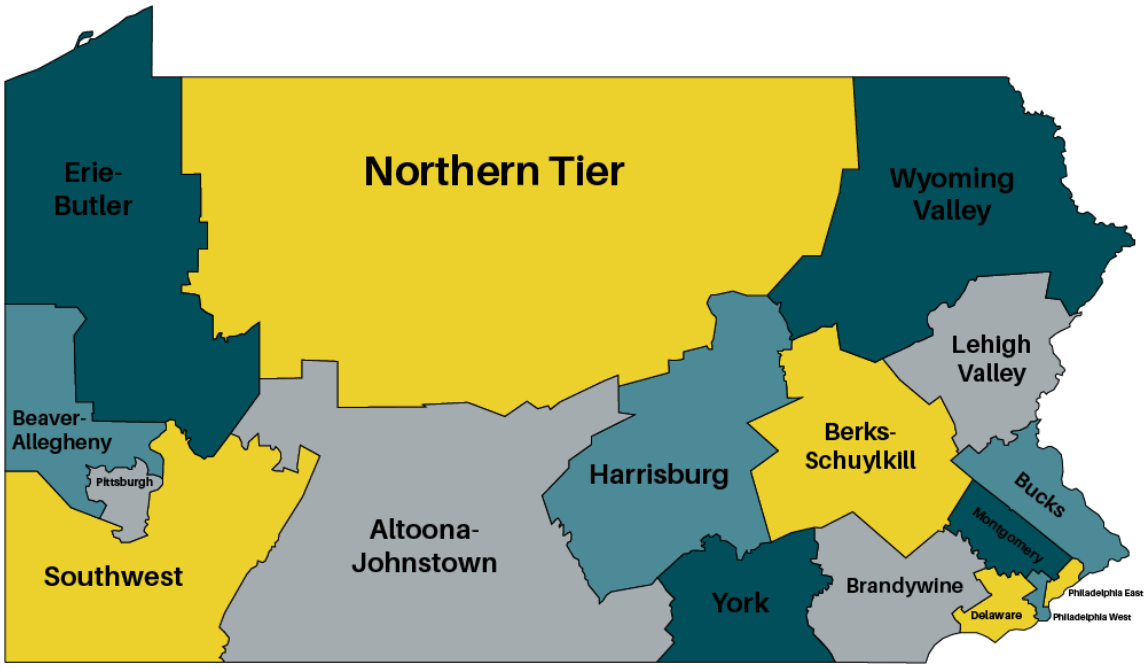


**Figure 14: A labeled "Compact" map—with geographic cohesion intact.**

And while considering such a map, our state Legislature may also consider a constitutional amendment, likely popular with voters across the political spectrum, to clarify and affirm the role of the Legislature, not the courts, in drawing maps. As the state Supreme Court has intoned in its majority opinion, "there exists the possibility" that the Legislature would draw maps "comporting with these neutral 'floor' criteria," but still not appealing in the court's judgment. Only further legislative action, likely by pursuing a constitutional amendment, would proactively combat this partisan interference from state courts.

## MOVING FORWARD: CANDIDATES STILL MATTER

Of course, when discussing mapmaking, voters in groups, and overall partisanship of districts, the tendency is toward the abstract. **And yet, examining all of the efforts to draw districts, be they by "independent" commissions, partisan legislatures, or (as in the cases of Pennsylvania and North Carolina) partisan courts, we may draw one other obvious, final conclusion: more often than not, candidates and contemporary public policy considerations still matter a great deal.**

Although partisanship and political polarization have grown, local races have become nationalized, and fewer voters "split their tickets" (that is, choose candidates of different parties at different levels of government), a meaningful number of voters still do so.[40] This is particularly true in districts where candidates have established themselves as well-respected local advocates with some independence of their national parties. Two obvious examples in Pennsylvania are **Representative Brian Fitzpatrick (R)**, one of only *three* Clinton-district Republicans in the nation to survive the "blue wave" 2018 election, and **Representative Matt Cartright (D)**, one of only *seven* Democrats in the U.S. House representing districts won by former President Trump in 2020.

The former outperformed President Trump by 19 points[41] in his competitive district, among the strongest showings for a congressman in the country, which includes politically moderate Bucks County and a small sliver of blue-leaning Montgomery County (see previous section, *2018: The Court Tips the Scales*). The latter reflects an inverse pattern: a Democrat from ancestrally Democratic, but now Republican-leaning, northeast Pennsylvania who ran ahead of Biden in his Trump-won district by *eight* points. **If candidates Fitzpatrick and Cartright represented more generic, partisan brands, the partisan control of these congressional districts would almost certainly flip**. Pennsylvania's 1st District would presumably be represented by a coal-county Republican, while the 8th District would have sent a suburban Democrat to Washington. Further, it remains to be seen how the recent elimination of straight-ticket voting in the commonwealth affects voter behavior.

For all the talk about convoluted districts and "splitting up communities of interest," activists on the Left have changed their tune on the issue entirely. As Republicans worked to codify that principle in law, Democrats now *favor* splitting communities, as explained in the historical analysis of this paper, *if* the result is more Democratic members of Congress. In *LWVPA v. Commonwealth,* the court held that

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[40] See, for example, Kyle Sammin, "Philly ticket splitters make big impact in PA row office results," *Broad + Liberty,* November 17, 2020. This report's own author has closely examined the continued role of ticket splitters in Pennsylvania elections.

[41] J. Miles Coleman, "2020's Crossover Districts," Center for Politics at the University of Virginia, February 4, 2021.

districts should be compact and contiguous and should not divide municipalities and wards unless absolutely necessary.

But now John Nagle, a self-taught mapmaker who works with the left-leaning group Fair Districts PA, states that "as long as non-splitting [of municipalities] is a tier one criterion, one can't draw a fair map in Pennsylvania."[42] Such groups are moving the goalposts, as it is now preferred to *split* and scatter dense, left-leaning constituencies in order to spread these highly concentrated voters to multiple districts.

One suspects that when it comes to district-drawing, there are and have never really been any neutral principles—only partisan brinkmanship and angling for political advantage. As Pennsylvania enters yet another round of redistricting, leaders of the commonwealth would be wise to draw maps that abide by the state Supreme Court's "floor" criteria while also bracing for further judicial action, and proactively combatting it by considering a constitutional amendment to clarify the Legislature's primacy in drawing district lines at both the state and federal levels.

In addition, citizens and leaders must remember that a democracy such as ours is as good as its citizenry; as civics education declines, and partisans in the media and on the bench push actions that are plainly unconstitutional but support their objectives, leaders must be aware of the dynamics at play on the ground. We must reinvest in civics education so that our neighbors understand the structures that have been established in our system of government—structures put in place to combat the factionalism inherent in ruling a complex society. Without this investment, the prior rounds of political recriminations will only echo into the future no matter what map is drawn for the 2020s.

[42] Katie Meyer, "Will this round of Pa. redistricting be another all-out war? It's all in the details," *WHYY*, July 28, 2021.

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Albert's writing has been featured in *Fox News*, *RealClearPolitics*, *National Review*, *Washington Examiner*, and the *Philadelphia Inquirer*, where he was the youngest regular op-ed columnist (and only conservative!) before being defenestrated for wrong-think in 2020.