To: Jonathan Cervas, Ph.D. & Bernard Grofman, Ph.D.

From: Scott Matsuda

Date: 10/18/2022

Case Briefing **[PENNSYLVANIA]**

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| **Citation** | * *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737 (Pa. 2018). |
| **Judicial Breakdown / Partisan or Nonpartisan** | * Justice Todd (D) issued the 5-2 opinion, joined by Justices Donohue (D), Dougherty (D), and Wecht (D).   + Justice Baer (D) filed a concurring and dissenting opinion.   + Chief Justice Saylor (R) filed a dissenting opinion, joined by Justice Mundy (R).   + Justice Mundy filed a dissenting opinion. |
| **Procedural History** | * On 6/15/2017, Petitioners, the League of Women Voters and 18 voters—all registered Democrats—filed suit against the Commonwealth.   + Count 1: Petitioners alleged that the 2011 Plan violates their rights to free expression and association under Article I, §§ 731 and 2032 of the Pennsylvania Constitution, because:     - The General Assembly created the 2011 Plan by "expressly and deliberately consider[ing] the political views, voting histories, and party affiliations of Petitioners and other Democratic voters" with the intent to burden and disfavor Petitioners' and other Democratic voters' rights to free expression and association.     - The Plan "also violates the Pennsylvania Constitution's prohibition against retaliation against individuals who exercise their rights under" these articles.   + Count 2: Petitioners alleged the Plan violates the equal protection provisions of Article 1, §§ 1 and 2633 of the Pennsylvania Constitution, and the Free and Equal Elections Clause of Article I, Section 534 of the Pennsylvania Constitution, because:     - The Plan intentionally discriminates against Petitioners and other Democratic voters by using "redistricting to maximize Republican seats in Congress and entrench [those] Republican members in power." * On 10/16/2017, Judge Dan Pellegrini granted a stay of the Commonwealth Court [trial court] proceedings pending the United States Supreme Court's decision in *Gill v. Whitford*, No. 16-1161 (U.S. argued Oct. 3, 2017).   + However, Petitioners filed with this Court an application for extraordinary relief, asking that we exercise extraordinary jurisdiction over the matter, and the Court granted that application on 11/9/2017.     - The Court thereafter remanded the matter to the Commonwealth Court to "conduct all necessary and appropriate discovery, pre-trial and trial proceedings so as to create an evidentiary record on which Petitioners' claims may be decided." * The Commonwealth Court, by the Honorable P. Kevin Brobson, conducted a nonjury trial from 12/11 through 12/15, and submitted to the Court its recommended findings of fact and conclusions of law on 12/29/2017.[[1]](#footnote-1)   + The Commonwealth Court first rejected Petitioners' argument that the 2011 Plan violated their rights to free speech and free assembly.     - The Commonwealth Court characterized Petitioners' claims as actually seeking a declaration that they are entitled to a redistricting plan "free of any and all partisan considerations," noting that such a right was "not apparent in the Pennsylvania Constitution or in the history of gerrymandering decisions in Pennsylvania or throughout the country," and that both the United States Supreme Court and this Court have previously acknowledged that partisan considerations may play some role in redistricting.   + Next, the Commonwealth Court noted that courts must have some judicially administrable standard by which to appraise partisan gerrymanders, and found that Petitioners presented no such standard.   + Also, even assuming arguendo that Petitioners' putative retaliation claim was cognizable under Pennsylvania law, the Commonwealth Court found that Petitioners failed to establish the same.     - Petitioners failed to establish that the General Assembly caused them to suffer any injury that would chill a person of ordinary firmness from continuing to engage in such activity, essentially because they remained politically active.     - Petitioners failed to establish that the General Assembly's adoption of the 2011 Plan was motivated in part as a response to Petitioners' participation in the political process, essentially reasoning that intent to gain a partisan advantage over a rival faction is not equivalent to an intent to punish the faction's voters, that gleaning the intent of the General Assembly as a body was largely impossible, and that the fact that some Democratic state representatives voted in favor of the 2011 Plan undermined the notion that its intent was to punish Democratic voters.   + Next, the Commonwealth Court rejected Petitioners' argument that the 2011 Plan violated their rights to equal protection and their right to free and equal elections.     - The Commonwealth Court opined that, "[i]n the context of partisan gerrymandering, the Pennsylvania Supreme Court has stated that the Equal Protection Guarantee is coterminous with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution[.]"     - Although acknowledging that Petitioners had established intentional discrimination—in that the General Assembly was likely aware of, and intended, the 2011 Plan's political consequences—the Commonwealth Court determined that Petitioners could not establish that they constituted an identifiable political group.     - Moreover, the Commonwealth Court found that Petitioners had failed to establish that they would be disadvantaged at the polls or would lack political power or fair representation, noting that they remain free to participate in democratic processes. * Thereafter, the Court ordered expedited briefing, and held oral argument on 1/17/2018. |
| **Disposition** | * Remanded to the legislative and executive branches to take action through the enactment of a remedial congressional districting plan. However, if the legislature and executive are unwilling or unable, the Court will fashion a judicial remedial plan.[[2]](#footnote-2) |
| **Facts** | * Following the 2010 federal census, PA’s share in the House was reduced from 19 to 18 members.   + As a result, the Commonwealth was required to redraw its congressional district map. * In 2011, the Republican-led General Assembly was tasked with reconstituting Pennsylvania's congressional districts. * On 9/14/2011, Senate Bill 1249 (SB 1249), principally sponsored by the Republican leadership, was introduced; on 12/14/2011, the bill was referred to the Senate State Government Committee, amended to include the proposed congressional boundaries, and was referred to the Senate Appropriations Committee.   + The Senate declined to adopt an amendment proposed by Democratic Senator Jay Costa, and passed SB 1249, in a 26-24 vote, with all Democrats voting against passage; the bill was passed to the House of Representatives [House State Government Committee], on the same day.   + On 12/15/2011, SB 1249 was brought up for first consideration, and, for second consideration on 12/19/2011. * On 12/20/2011, the bill was referred to the House Appropriations Committee and passed in a 136-61 vote, with 36 Democrats voting in favor of passage. * On 12/22/2011, SB 1249 proceeded to the governor's desk where then-Governor Corbett signed it into law as Act 131 of 2011 (the 2011 Plan).   + Notably, of the 67 counties in Pennsylvania, the 2011 Plan divided a total of 28 counties between at least two different congressional districts.   + Additionally, whereas, prior to 1992, no municipalities in PA were divided among multiple congressional districts, the 2011 Plan divided 68, or 2.66%, of PA’s municipalities between at least two Congressional districts.   + Lastly, in reducing the numbers of seats from 19 to 18 in accordance with the census reapportionment, the 2011 Plan placed then-Democratic Congressman for the 12th Congressional District Mark Critz and then-Democratic Congressman for the 4th Congressional District Jason Altmire into the same district. |
| **Issue(s) or**  **Question(s)**  **Presented** | * Whether the 2011 Plan clearly, plainly, and palpably violates the Free and Equal Elections Clause, Article I, § 5 of the Pennsylvania Constitution. |
| **The Rule(s)** | * Presumption of the Validity of Statutes   + A statute is presumed to be valid, and will be declared unconstitutional only if the challenging parties carry the heavy burden of proof that the enactment "clearly, palpably, and plainly violates the Constitution." * Free and Equal Elections Clause, Pa. Const. art. I, § 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.”   + When viewed against the backdrop of the intense and seemingly unending regional, ideological, and sectarian strife detailed . . ., which bitterly divided the people of various regions of our state, this provision must be understood then as a salutary effort by the learned delegates to the 1790 convention to end, once and for all, the primary cause of popular dissatisfaction which undermined the governance of Pennsylvania: namely, the dilution of the right of the people of this Commonwealth to select representatives to govern their affairs based on considerations of the region of the state in which they lived, and the religious and political beliefs to which they adhered.   + It is axiomatic that a diluted vote is not an equal vote, as all voters do not have an equal opportunity to translate their votes into representation. |
| **Holding(s)** | * Court held that the 2011 Plan clearly, plainly, and palpably violates the Free and Equal Elections Clause, Article I, § 5 of the Pennsylvania Constitution. |
| **Rationale** | * **PA case law supports an expansive interpretation of the Free and Equal Elections Clause, Pa. Const. art. I, § 5.**   + In *Patterson v. Barlow*, 60 Pa. 54 (Pa. 1869), the court held that while the Constitution gives to the General Assembly the power to promulgate laws governing elections, those enactments are nonetheless subject to the requirements of the Free and Equal Elections Clause of our Constitution, and, hence, may be invalidated by the Court "in a case of plain, palpable and clear abuse of the power which actually infringes the rights of the electors."     - *See also Winston v. Moore*, 91 A. 520 (Pa. 1914) (reaffirming that the clause protected a voter's individual right to an equal, nondiscriminatory electoral process); *In re New Britain Borough School District*, 145 A. 597 (Pa.1929) (emphasizing that the rights protected by this provision may not be taken away by an act of the legislature, and that that body is prohibited by this clause from interfering with the exercise of those rights, even if the interference occurs by inadvertence).   + While it is true that the court had not heretofore held that a redistricting plan violates the Free and Equal Elections Clause based on partisan gerrymandering, the court has never precluded such a claim in its jurisprudence.     - In *Erfer*, the court rebuffed the argument that Article I, Section 5 was limited in its scope of application to only elections of Commonwealth officials, inasmuch as there was nothing in the plain text of this provision which would so limit it.       * *Erfer* did not foreclose future challenges under Article I, Section 5 resting solely on independent state grounds.   + We reject Justice Mundy's assertion that *Erfer* requires us, under the principles of stare decisis, to utilize the same standard to adjudicate a claim of violation of the Free and Equal Elections Clause and the federal Equal Protection Clause.     - To the extent that *Erfer* can be read for that proposition, we expressly disavow it, and presently reaffirm that, in accord with *Shankey* and the particular history of the Free and Equal Elections Clause, recounted above, the two distinct claims remain subject to entirely separate jurisprudential considerations. * **The Court formally adopts historical neutral traditional redistricting criteria[[3]](#footnote-3) to measure compliance with the Free and Fair Elections Clause.**   + 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.     - However, since the inclusion of the Free and Equal Elections Clause in our Constitution in 1790, certain neutral criteria have, as a general matter, been traditionally utilized to guide the formation of our Commonwealth's legislative districts in order to prevent the dilution of an individual's vote for a representative in the General Assembly.   + Because these factors [*see* footnote 3] are deeply rooted in the organic law of our Commonwealth, and continue to be the foundational requirements which state legislative districts must meet under the Pennsylvania Constitution, we find these neutral benchmarks to be particularly suitable as a measure in assessing whether a congressional districting plan dilutes the potency of an individual's ability to select the congressional representative of his or her choice. . . .     - They are wholly consistent with the overarching intent of the framers of the 1790 Constitution.     - Because the character of these factors is fundamentally impartial in nature, their utilization reduces the likelihood of the creation of congressional districts which confer on any voter an unequal advantage.     - Use of these objective factors substantially reduces the risk that a voter in a particular congressional district will unfairly suffer the dilution of the power of his or her vote.     - These standards also comport with the minimum requirements for congressional districts guaranteed by the United States Constitution, as interpreted by the United States Supreme Court in *Wesberry v. Sanders*.   + We recognize that other factors have historically played a role in the drawing of legislative districts, such as the preservation of prior district lines, protection of incumbents, or the maintenance of the political balance which existed after the prior reapportionment.     - However, we view these factors to be wholly subordinate to the neutral criteria.       * It is [now] sufficient to establish a violation of this section to show that these traditional criteria were subordinated to other factors. * **It was clear, plain, and palpable that the 2011 Plan subordinates the traditional redistricting criteria in the service of partisan advantage.**   + Compelling expert statistical evidence presented before the Commonwealth Court, in combination with and illustrated by an examination of the Plan itself and the remainder of the evidence . . ., demonstrates that the Plan cannot plausibly be directed at drawing equally populous, compact, and contiguous districts which divide political subdivisions only as necessary to ensure equal population.     - All of Dr. Chen's Simulated Set 1 plans . . . were more compact and split fewer political subdivisions than the 2011 Plan, establishing that a process satisfying these traditional criteria would not lead to the 2011 Plan's adoption.     - Lay examination of the Plan reveals tortuously drawn districts that cause plainly unnecessary political-subdivision splits.       * These districts often rend municipalities from their surrounding metropolitan areas and quizzically divide small municipalities which could easily be incorporated into single districts without detriment to the traditional redistricting criteria.     - Dr. Chen also credibly rejected the notion that the 2011 Plan's outlier status in this regard was attributable to an attempt to account for Pennsylvania's political geography, to protect incumbent congresspersons, or to establish the 2011 Plan's majority-African American district.       * [H]e explicitly concluded that the traditional redistricting criteria were jettisoned in favor of unfair partisan gain.     - At the district-by-district level, the 2011 Plan's geospatial oddities and divisions of political subdivisions and their wards effectively serve to establish a few overwhelmingly Democratic districts and a large majority of less strong, but nevertheless likely Republican districts. |
| **Arguments of Parties** | * [The arguments of the parties were in large part the same as those detailed in the Procedural History section, *supra*. However, Petitioners and various amici did make new arguments in direct response to the Commonwealth Court’s conclusions of law and fact, which were excluded from this case brief for brevity. *See Id.* at 787–801.] |
| **Concurring and Dissenting: Baer, J.** | * I continue to join the Majority's conclusion that the 2011 Plan violates the Pennsylvania Constitution . . . [and] I concur with the Majority's explication of the Free and Equal Election Clause and the Court's ultimate conclusion. * However, I diverge from the Majority, which I read to impose court-designated districting criteria on the Legislature.   + U.S. Const. art. I, § 4 does not encompass the judicial branch, and thus, courts lack the authority to prescribe the "times, places, and manner of holding" congressional elections.   + In contrast to the state legislative and municipal districts, the Constitution is silent in regard to the criteria to be applied by the Legislature in establishing congressional districts.     - This language obviously does not address the size or shape of districts.     - Moreover, there is nothing inherent in a compact or contiguous district that insures a free and equal election, as is evidenced by claims of unconstitutional gerrymandering raised in challenges to redistricting plans of other states which employ maps created in compliance with the traditional districting criteria of compact and contiguous territory, equality of population, and minimization of municipal line division.   + I do not view . . . the utilization of traditional districting criteria as dispositive in every redistricting case. * Rather, I would hold that extreme partisan gerrymandering occurs when, in the creation of a districting plan, partisan considerations predominate over all other valid districting criteria relevant to the voting community and result in the dilution of a particular group's vote.   + On this basis, Petitioners in the case at bar clearly, plainly and palpably demonstrated that partisan considerations predominated over other relevant districting criteria in the drawing of the 2011 Plan and resulted in extreme partisan gerrymandering in violation of Pennsylvania's Free and Equal Election Clause. * I additionally dissent from the portions of the Majority Opinion which enjoin the use of the 2011 Plan for the 2018 election cycle and set forth a procedure for implementing a new map for the May 2018 primary.   + In my view . . . the Court's remedy threatens the separation of powers . . . by failing to allow our sister branches sufficient time to legislate a new congressional districting map, potentially impinges upon the due process rights of the parties at bar as well as other interested parties, and foments unnecessary confusion in the current election cycle.   + I continue to suggest respectfully that the Court reconsider its decision given the substantial uncertainty, if not outright chaos, currently unfolding in this Commonwealth regarding the impending elections, in addition to the likely further delays that will result from the continuing litigation before this Court and, potentially, the United States Supreme Court, as well as from the map-drawing process and the litigation that process will inevitably engender.     - The Legislature does not have a fair opportunity to act "in the first instance" where it has less than three weeks to develop a plan.       * While it is true that the Legislature technically enacted the 2011 Plan in two weeks, it is naïve to think that the legislators created the map in that short period of time—the Legislature began hearings on the districting map as early as 5/2011, suggesting that the development of the map spanned at least eight months.       * In *Butcher*, of which the Majority relies, the Court in 1964 had provided the Legislature nearly one year to enact a valid map.         + In contrast, this Court has provided the Legislature three weeks from the initial order to produce a new map.     - This case does not present a situation where the election cannot go forward under the current map, such as presumably would occur if the plan provided for more representatives than could be seated in Congress.       * Indeed, the current map has been utilized for three election cycles, and the Majority is allowing it to be employed again in the upcoming special election for the 18th District.       * It is, therefore, unnecessary to act prior to the 2018 elections.     - I do not agree that allowing parties to submit a map comports with due process absent their ability to respond to alternative plans, potentially by submitting additional evidence or cross-examining witnesses.       * Moreover, the Majority's remedy lacks any provision for the parties to object following the release of the Court's map, which may indeed be necessary to advise the Court of any potential oversights or infirmities in the map itself.     - I object to the lack of transparency of [the potential judicial map creation] process and urge the Court to provide the parties and the public constitutionally-mandated due process by allowing an opportunity to object to any plan that the Court may adopt. |
| **Dissenting: Saylor, C.J.** | * In summary, I believe that:   + The present exercise of extraordinary jurisdiction was improvident;   + This Court's review would benefit from anticipated guidance from the Supreme Court of the United States;   + Awaiting such guidance is particularly appropriate given the delay, until 2017, of Petitioners' challenge to a 2011 redistricting plan; and   + The appropriate litmus for judicial review of redistricting should take into account the inherently political character of the work of the General Assembly, to which the task of redistricting has been assigned by the United States Constitution. * The Supreme Court of the United States has . . . emphasized . . . that redistricting is committed to the political branch and is inherently political.   + Since these considerations [of how much gerrymandering is too much] are not constitutional commands applicable to congressional redistricting, the majority's approach amounts to a non-textual, judicial imposition of a prophylactic rule.     - In this regard, it is significant that the majority's new rule is overprotective. * Moreover, in terms of the individual-rights component—and contrary to the majority's perspective—there is no right to an "equally effective power" of voters in elections. . . .   + "[T]he [federal] Constitution . . . guarantees equal protection of the law to persons, not equal representation in government to equivalently sized groups.   + It nowhere says that farmers or urban dwellers, Christian fundamentalists or Jews, Republicans or Democrats, must be accorded political strength proportionate to their numbers." * I would abide by the Court's previous determination [in *Erfer*], in the redistricting setting, that the Free and Equal Elections Clause provides no greater protection than the state charter's Equal Protection Clauses, which have been deemed coterminous with the protection provided by the United States Constitution. * The majority's focus on a limited range of traditional districting factors allocates too much discretion to the judiciary to discern violations in the absence of proof of intentional discrimination.   + The discretion belongs to the Legislature, which should be accorded appropriate deference and comity, as reflected in the majority's initial articulation of the presumption of constitutionality and the heavy burden borne by challengers. * In my judgment . . . Petitioners' entreaty to proceed with extreme exigency presents too great of an impingement on the deliberative process to allow for a considered judgment on my part in this complex and politically-charged area of the law. * Finally, as to the remedy, I disapprove of the imposition of a judicially-drawn map for the above reasons. |
| **Dissenting: Mundy, J.** | * In *Erfer*, the court noted that the petitioners had failed to persuade us "why we should, at this juncture, interpret our constitution in such a fashion that the right to vote is more expansive than the guarantee found in the federal constitution."   + Despite the fact that *Erfer* established the Free and Equal Elections Clause did not provide any heightened protections to Pennsylvania voters, the Majority fails to provide legal justification for its disapproval of *Erfer*, other than citing to *Shankey*, which pre-dates *Erfer* by 33 years.   + In my view, stare decisis principles require us to give *Erfer* full effect. * While establishing its neutral criteria test, the Majority admits that it is possible for the General Assembly to draw a map that fully complies with the . . . "neutral criteria" but still "operate[s] to unfairly dilute the power of a particular group's vote for a congressional representative."   + This undermines the conclusion that there is a clear, plain, and palpable constitutional violation in this case. * I also have grave concerns about the Majority's remedy.   + I am troubled by the Majority's decision to strike down the 2011 congressional map on the eve of the 2018 midterm election. . . . [p]articularly its disregard for precedent which supports deferring redistricting until after the 2018 election.     - This is a political process [and] the General Assembly should be afforded the full opportunity and adequate time to address.     - The Majority cites *Butcher* as support for its remedy, but omits that the Court in *Butcher* granted the General Assembly 11 months to draft a new map before intervening, yet it nevertheless concludes its remedy is "entirely consistent with . . . *Butcher*."     - This Court has always had the pragmatic option to utilize the current congressional maps for the 2018 election, while allowing the General Assembly the appropriate amount of time to redraw our legislative districts.   + Further, . . . the magnitude and breadth of the Majority's remedy is inconsistent with the restraints imposed by federal law.     - The Elections Clause [U.S. Const. art. I, § 4] at its core, grants the authority to draw a state's congressional districts to the state legislatures, Congress, or an independent redistricting commission.     - While this Court is certainly the final arbiter of the meaning of the Pennsylvania Constitution, it may not remedy any violations of our state charter, in a manner, that the Federal Constitution prohibits.     - Further, [t]urning to the cases of the Supreme Court of the United States cited by the Majority, none of them support the remedy contemplated here.       * Distinguishing *Scott*, *Growe*, and *Wise* from the instant case. |
| **Notes/**  **Reactions** | * N/a. |

1. The expert testimony from Dr. Jowei Chen, Dr. John Kennedy, Dr. Wesley Pegden, and Dr. Christopher Warshaw (petitioners), and Dr. Wendy K. Tam Cho and Dr. Nolan McCarty (respondents), was discussed at length at pp. 737–80. [↑](#footnote-ref-1)
2. Should the PA General Assembly choose to submit a congressional districting plan that satisfies the requirements of the PA Constitution, it shall submit such plan for consideration by the Governor on or before 2/9/2018. If the Governor accepts the General Assembly's congressional districting plan, it shall be submitted to this Court on or before 2/15/2018. Should the General Assembly not submit a congressional districting plan, or should the Governor not approve the General Assembly's plan, this Court shall proceed expeditiously to adopt a plan based on the evidentiary record developed in the Commonwealth Court. In anticipation of that eventuality, the parties shall have the opportunity to be heard; to wit, all parties and intervenors may submit to the Court proposed remedial districting plans on or before 2/15/2018. [↑](#footnote-ref-2)
3. The neutral traditional redistricting criteria that the Court adopted to measure compliance with Article I, Section 5 were as follows: whether the congressional districts created under a redistricting plan are (1) composed of compact and contiguous territory; (2) as nearly equal in population as practicable; and (3) which do not divide any county, city, incorporated town, borough, township, or ward, except where necessary to ensure equality of population. *Id.* at 816–17. Importantly, however, the Court noted that the neutral traditional redistricting criteria are “not the exclusive means by which a violation of Article I, Section 5 may be established.” [↑](#footnote-ref-3)