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**THE PROTECTION IS IN THE PROCESS:
THE LEGISLATIVE REAPPORTIONMENT COMMISSION,
COMMUNITIES OF INTEREST, AND WHY OUR MODERN
FOUNDING FATHERS GOT IT RIGHT**

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INTRODUCTION

The American experiment in representative democracy is rooted in the fundamental concept that the people speak through the legislative branch. The United States Supreme Court has held that achieving the objective of “one person, one vote” necessarily requires that legislative districts in the various states be substantially equal in population and that the states must provide for

periodic readjustment of districts.¹ The Pennsylvania Constitutional Convention of 1967–1968 took both this fundamental democratic principle and the directives provided by the United States Supreme Court and conceived the Legislative Reapportionment Commission.

This Article explores the history of reapportionment in Pennsylvania, the concurrent formulation of the explicit standards and implicit protections of the Commission process, the application of those standards to the 2011–2012 reapportionment, and in the end, why our modern founding fathers got it right.²

I. REAPPORTIONMENT DEFINED

Reapportionment, in this context, is the decennial process of realigning the 203 legislative and 50 senatorial districts in the Pennsylvania General Assembly to reflect changes in population.³ It is the physical manifestation of the democratic principle of “one person, one vote.” It is a vital part of our republican form of government.

A. Pre-1968 Reapportionment in Pennsylvania

It is important to ground any discussion of legislative apportionment in Pennsylvania in the appropriate historical context. From the days of the American Revolution, the size of the legislature and the parameters applicable to the drawing of districts have changed. The one constant, however, was the fundamental concept that reapportionment was a legislative prerogative.

The Pennsylvania Constitution of 1776 provided for a unicameral legislature⁴ and established septennial reapportionment (every seven years)

¹ These concepts were recently explored by the United States Supreme Court in *Evenwel v. Abbott*, 136 S. Ct. 1120, 1124 (2016) (citations omitted), which stated that “jurisdictions must design both congressional and state-legislative districts with equal populations, and must regularly reapportion districts to prevent malapportionment.”

² During the 2011-2012 legislative reapportionment, the authors of this Article contributed significantly to the combined work product of the Pennsylvania Legislative Reapportionment Commission and the Amicus filing on behalf of then-Majority Leader Michael Turzai before the Pennsylvania Supreme Court. To the extent that such contributions also appear in this Article, citations to the Commission’s or others’ prior use of these contributions may not be reflected herein.

³ While it has been offered that “redistricting” is arguably the more technically correct term, the Pennsylvania Constitution uses the term reapportionment. PA. CONST. art. II, § 17(a) (“[A] Legislative Reapportionment Commission shall be constituted for the purpose of reapportioning the Commonwealth.”).

⁴ “The supreme legislative power shall be vested in a house of representatives of the freemen of the commonwealth or state of Pennsylvania.” PA. CONST. of 1776, Ch. II § 2.

based on the number of taxable inhabitants in Philadelphia and each county.⁵ The Pennsylvania Constitution of 1790 shifted to a bicameral legislature⁶ and, as described by Reference Manual No. 6 prepared for the 1967–1968 Pennsylvania Constitutional Convention:

[P]rovisions respecting representation in the lower house were carried over from the 1776 Constitution. . . . The requirement that each county should have at least one representative was also added; this guarantee did not apply to any county that might be created in the future. . . .

. . .

The Constitution directed the Legislature to divide the state into senatorial districts and permitted multi-member districts, although no district could elect more than four Senators. Neither the City of Philadelphia nor any county could be divided in the creation of a [Senatorial] district. . . . A [Senatorial] district could be composed of two or more counties if they were adjoining.⁷

The Pennsylvania Constitution of 1838 “continued the septennial reapportionment and redistricting of both houses according to the number of taxable inhabitants,” although “[t]he provisions for Senatorial apportionment were changed.”⁸

⁵ “The city of Philadelphia and each county of this commonwealth respectively, shall . . . choose six persons to represent them in general assembly. But as representation in proportion to the number of taxable inhabitants is the only principle which can at all times secure liberty, and make the voice of a majority of the people the law of the land; therefore the general assembly shall cause complete lists of the taxable inhabitants in the city and each county in the commonwealth respectively, to be taken and returned to them on or before the last meeting of the assembly elected in the year one thousand seven hundred and seventy-eight, who shall appoint a representative to each, in proportion to the number of taxables in such returns; which representation shall continue for the next seven years afterwards at the end of which, a new return of the taxable inhabitants shall be made, and a representation agreeable thereto appointed by the said assembly, and so on septennially forever.” PA. CONST. of 1776, § 17.

⁶ “The legislative power of this commonwealth shall be vested in a general assembly, which shall consist of a senate and house of representatives.” PA. CONST. of 1790, art. I, Ch. II § 1.

⁷ PREPARATORY COMM’N FOR THE PA. CONSTITUTION 1967–1968, LEGISLATIVE APPORTIONMENT, REF. MANUAL NO. 6, at 11–12 (1968) (footnotes omitted). *See also* PA. CONST. of 1790, art. I, §§ 4, 6–7.

⁸ LEGISLATIVE APPORTIONMENT, *supra* note 7, at 12. *See also* PA. CONST. of 1838, art. I, §§ 4, 6–7 (requiring an enumeration of the taxable inhabitants for apportionment of Representative and Senatorial members).

In 1857, amendments to the Pennsylvania Constitution guaranteed each county with at least 3,500 taxable inhabitants its own representative, stated that no more than three counties could be joined in a legislative district, and prohibited the division of any county in the formation of a legislative district.⁹ With respect to the Senate, the 1857 amendments allowed Philadelphia to be divided. While outside the City senatorial districts were composed of between two and four senators, the 1857 amendments limited Philadelphia to single senatorial districts.¹⁰

Significant changes were made in the Pennsylvania Constitution of 1873.¹¹ These included decennial reapportionment after the United States census,¹² use of total population rather than taxable inhabitants as the basis for districts,¹³ complex formulas to establish representation,¹⁴ and restrictions on representation from populous counties.¹⁵ The proscription on dividing county borders in the formation of House districts which had been added by amendment in 1857 did not survive into the 1873 constitution.

⁹ PA. CONST. of 1838, art. I, § 4 (Amendment of 1857).

¹⁰ *Id.* at § 7 (Amendment of 1857).

¹¹ “At various times and in various publications . . . the [then] present Constitution[] has been referred to both as the ‘Constitution of 1873’ and/or the ‘Constitution of 1874.’ This ambiguity is explained by the fact that it was adopted by the Constitutional Convention in 1873, approved by the people in 1873 to become effective January 1, 1874.” PREPARATORY COMM’N FOR THE PA. CONSTITUTION 1967–1968, CONSTITUTIONS OF PENNSYLVANIA, REF. MANUAL NO. 2, at 9, n.1 (1968).

¹² “The General Assembly at its first session after the adoption of this Constitution, and immediately after each United States decennial census, shall apportion the State into senatorial and representative districts agreeably to the provisions of the two next preceding sections [of the Constitution].” PA. CONST. of 1873, art. II, § 18.

¹³ *Id.* at art. II, §§ 16–17 (using state population to determine representative and senatorial districts).

¹⁴ “The members of the House of Representatives shall be apportioned among the several counties, on a ratio obtained by dividing the population of the State as ascertained by the most recent United States census by two hundred. Every county containing less than five ratios shall have one representative for every full ratio, and an additional representative when the surplus exceeds half a ratio; but each county shall have at least one representative. Every county containing five ratios or more shall have one representative for every full ratio. Every city containing a population equal to a ratio shall elect separately its proportion of the representatives allotted to the county in which it is located. Every city entitled to more than four representatives, and every county having over one hundred thousand inhabitants shall be divided into districts of compact and contiguous territory, each district to elect its proportion of representatives according to its population, but no district shall elect more than four representatives.” *Id.* at art. II, § 17. See *id.* at art. II, § 16 for the formula for Senatorial districts.

¹⁵ PA. CONST. of 1873, art. II, § 16 (limiting senatorial apportionment to no greater than one sixth of the whole number of senators). See also LEGISLATIVE APPORTIONMENT, *supra* note 7, at 12 (describing how the 1873 Constitution changed Philadelphia’s apportionment by “prohibiting any city or county from having more than one-sixth of the total number of Senators”).

As will be further discussed below, the Pennsylvania General Assembly often failed to meet the requirement for decennial reapportionment.¹⁶

B. State and Federal Jurisprudence in the 1960s

In the 1960s, the United States Supreme Court stepped into the swirling waters of reapportionment. The case law began with *Baker v. Carr*, in which the United States Supreme Court held that equal protection claims challenging state reapportionment statutes are justiciable under the Fourteenth Amendment to the U.S. Constitution.¹⁷

Shortly after its opinion in *Baker v. Carr*, the United State Supreme Court heard a dispute in which a Georgia redistricting plan “employed a system which in end result weighted rural votes more heavily than urban votes and weighted some small rural counties heavier than other larger rural counties.”¹⁸ In announcing the United States Supreme Court’s 1963 decision, Justice Douglas declared “[t]he conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.”¹⁹

In 1964, the United States Supreme Court held that congressional districts must be redrawn so that “as nearly as is practicable one man’s vote in a congressional election is . . . worth as much as another’s.”²⁰ In that same year, in its landmark decision in *Reynolds v. Sims*, the United States Supreme Court held that the boundaries of state legislative districts must be redrawn and that the **“overriding objective must be substantial equality of population among the various districts**, so that the vote of any citizen is approximately

¹⁶ “The blunt fact is that past General Assemblies of Pennsylvania have been derelict in the duty specifically imposed on them by the Constitution of Pennsylvania in failing to pass reapportionment acts as required by the express mandate of the Pennsylvania Constitution.” *Remmey v. Smith*, 102 F. Supp. 708, 710 (E.D. Pa. 1951), *appeal dismissed*, 342 U.S. 916 (1952). *See also* *Costello v. Rice*, 153 A.2d 888, 892 (Pa. 1959) (explaining that “[w]hether the legislature should be disciplined for dereliction in the discharge of the duty laid upon it by Article II, Section 18, of the Constitution, to apportion the State decennially into senatorial and legislative districts, presents a political and not a justiciable question . . .”); *Butcher v. Rice*, 153 A.2d 869, 876 (Pa. 1959) (Bell, J., dissenting) (footnote omitted) (noting “that the last Senatorial Reapportionment was by Act of May 10, 1921, and that the last Reapportionment for the House of Representatives was made . . . by Act of July 29, 1953”).

¹⁷ *Baker v. Carr*, 369 U.S. 186, 237 (1962).

¹⁸ *Gray v. Sanders*, 372 U.S. 368, 368 (1963).

¹⁹ *Id.* at 381.

²⁰ *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964).

equal in weight to that of any other citizen in the State.”²¹ The *Reynolds* Court explained: “**Legislators represent people**, not trees or acres. **Legislators are elected by voters, not farms or cities** or economic interests.”²²

During this period in our nation’s history, many state supreme courts were beginning their own foray into these same waters. Pennsylvania was no exception. In March 1962, the General Assembly had not yet reapportioned the Pennsylvania House and Senate under the 1960 decennial census. The House had been reapportioned following the 1950 decennial census.²³ However, the Senate had not been reapportioned since 1921.²⁴ In *Butcher v. Bloom (Butcher I)*, a group of voters from the southeast brought an action in equity in the Dauphin County Court of Common Pleas to prevent the Secretary of the Commonwealth from holding legislative elections using the reapportionment enacted ten and forty years earlier.²⁵ In its decision—issued prior to *Baker v. Carr* and *Gray v. Sanders*—the lower court found that the issues were justiciable, but “refused to adjudicate them until the Legislature had an opportunity to enact appropriate legislation at its forthcoming sessions.”²⁶ The county court retained jurisdiction of the matter.²⁷

The General Assembly responded with the passage of reapportionment bills for the House and the Senate, and the bills were approved by the Governor on January 9, 1964, becoming Acts 1 and 2 of that year.²⁸ Immediately thereafter, the *Butcher* plaintiffs petitioned the Pennsylvania Supreme Court to take jurisdiction. The Pennsylvania Supreme Court granted the Special Writ of Certiorari and held that the House and Senate reapportionment bills enacted in 1964 were unconstitutional in light of the United States Supreme Court’s

²¹ 377 U.S. 533, 579 (1964) (emphasis added). The United States Supreme Court further explained, “We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual’s right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living on other parts of the State.” *Id.* at 568.

²² *Id.* at 562 (emphasis added).

²³ Act No. 232, 1953 Pa. Laws 956 (fixing and apportioning the number of representatives).

²⁴ Act No. 217, 1921 Pa. Laws 449. “The lower Court found, and all parties agree that the last Senatorial Reapportionment was by Act of May 10, 1921, and that the last Reapportionment for the House of Representatives was made on the basis of the United States decennial census of 1950 by Act of July 29, 1953.” *Butcher v. Rice*, 153 A.2d 869, 876 (Pa. 1959) (Bell, J., dissenting).

²⁵ *Butcher v. Bloom (Butcher I)*, 203 A.2d 556, 558 (Pa. 1964) (footnote omitted).

²⁶ *Id.* (summarizing the disposition of the lower court ruling).

²⁷ *Id.*

²⁸ Act No. 1, 1963 Pa. Laws 1419 (fixing the number of representatives in the General Assembly and apportioning the representatives into districts); Act No. 2, 1963 Pa. Laws 1432 (fixing the number of senators in the General Assembly and apportioning the senators into districts).

decision in *Reynolds v. Sims*.²⁹ The Pennsylvania Supreme Court ordered that the legislative elections should nonetheless be held using the districts as recently enacted; and, the General Assembly should reapportion the House and Senate for the 1966 elections in a way that would not violate the mandate of “one-person, one-vote” enunciated in *Reynolds*.³⁰ The Pennsylvania Supreme Court issued a deadline for the General Assembly to pass new plans by September 1, 1965.³¹ The General Assembly was unable to produce new districts by the Pennsylvania Supreme Court’s deadline.³²

In February 1966, the Pennsylvania Supreme Court set about drawing new districts with the recently enunciated standards provided by the United States Supreme Court in the line of cases that included *Baker, Reynolds*³³ and *Westberry*.

In *Butcher II*, the Pennsylvania Supreme Court reviewed thirty proposed plans to reapportion the House and Senate.³⁴ But, the Pennsylvania Supreme Court ultimately opted for its own plan, which it viewed as “constitutionally valid and sound.”³⁵ The Pennsylvania Supreme Court identified “substantial equality of population among legislative districts” as the primary concern in redistricting.³⁶ Simultaneously, the Pennsylvania Supreme Court “sought to maintain the integrity of political subdivisions and to create compact districts of contiguous territory, insofar as these goals could be realized under the circumstances of the population distribution of this Commonwealth.”³⁷

The Pennsylvania Supreme Court ordered that the House and Senate Plans adopted in *Butcher II* be used in the 1966 primary and general elections.³⁸ All 203 seats in the House of Representatives and all 50 seats in the Senate would be filled in a single election. The Pennsylvania Supreme Court ordered

²⁹ *Butcher I*, 203 A.2d at 567.

³⁰ *Id.* at 568-69.

³¹ *Id.* at 573.

³² *Butcher v. Bloom (Butcher II)*, 216 A.2d 457, 459 (Pa. 1966).

³³ In its most recent term, the United States Supreme Court referenced *Reynolds* when it clarified that partisan-gerrymandering Equal Protection claims are “individual and personal in nature,” and thus only plaintiffs that feel the vote dilution as an individual in their district, rather than on a statewide basis, have standing to sue. *Gill v. Whitford*, 138 S.Ct. 1916, 1920 (2018) (quoting *Reynolds*, 377 U.S. at 561 (1964)). See also *Benisek v. Lamone*, 138 S.Ct. 1942, 1944 (2018) (holding that a delay of “six years, and three general elections” before seeking a preliminary injunction does not make a showing of irreparable harm). While *Gill* and *Benisek* are included here to provide the current state of the law regarding partisan gerrymandering claims, they are of no moment to the subject matter of this article.

³⁴ *Butcher II*, 216 A.2d at 457.

³⁵ *Id.* at 459.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

that “senators representing odd numbered senatorial districts shall be elected to serve a two year term and senators representing even number (sic) senatorial districts shall be elected to serve for a constitutional four year term.”³⁹

These court decisions set the stage for major changes in how Pennsylvania determined new legislative and senatorial districts as well as the guideposts for drawing those district lines. These changes would occur at Pennsylvania’s 1967–1968 Constitutional Convention.

C. 1967–1968 Pennsylvania Constitutional Convention

The two current sections of the Pennsylvania Constitution that govern reapportionment of state legislative and senatorial districts were a product of the Pennsylvania Constitutional Convention, which took place in 1967 and 1968. Article II, Section 16,⁴⁰ provides express standards for the redrawing of district lines. Article II, Section 17,⁴¹ contains numerous procedural requirements as well as additional standards implicit in the nonpartisan political mechanism that was adopted.⁴² Endorsed by the people of Pennsylvania at the ballot box on April 23, 1968, the development of these two interrelated sections at the convention is further explored in parts II and III below.

II. THE EXPLICIT REAPPORTIONMENT STANDARDS IN ARTICLE II § 16 OF THE PENNSYLVANIA CONSTITUTION

A. Equality of Population

Article II, § 16 of the Pennsylvania Constitution specifically provides that, when reapportioning the Commonwealth, it “shall be divided into 50 senatorial and 203 representative districts . . . as nearly equal in population as practicable.”⁴³

³⁹ *Id.*

⁴⁰ The Commonwealth’s legislative districts are divided “into 50 senatorial and 203 representative districts, which shall be composed of compact and contiguous territory as nearly equal in population as practicable. Each senatorial district shall elect one Senator, and each representative district one Representative. Unless absolutely necessary no county, city, incorporated town, borough, township or ward shall be divided in forming either a senatorial or representative district.” PA. CONST. art II, § 16.

⁴¹ PA. CONST. art II, § 17 (outlining the composition of a Legislative Reapportionment Commission, providing a cause of action for aggrieved persons, and setting the timeline for a reapportionment plan, *inter alia*).

⁴² Since the convention, Section 17 has been amended to clarify the timeline in relation to the decennial census (in 1981) and to provide for a new election in any senatorial district that is moved mid-term so that it no longer contains the residence of the sitting Senator (in 2001). PA. CONST., art. II, § 17 (amended 1981, 2001). Neither change is particularly relevant to this discussion.

⁴³ PA. CONST. art II, § 16.

Population equality has to be the lodestar of reapportionment. If not for the overriding need for population equality and resulting equality of representation in the General Assembly, there would be no obligation to go through the effort and the Commonwealth could have continued operating under Article II, § 17 of the Constitution of 1873.⁴⁴

In contrast to the current approach, the 1873 language had established a ratio system which guaranteed each county at least one representative. As noted by Delegate Michael in her remarks at Pennsylvania's most recent Constitutional Convention, "Back in 1964, before the Supreme Court ruled the one-man one-vote apportionment," the House District from Forest County had approximately 4,500 people.⁴⁵ This contrasted with 80,000 people in other districts.⁴⁶

As noted by the Pennsylvania Supreme Court in 1972, 1981, 1992 and 2002, the controlling consideration in the apportionment of legislative seats is substantial equality of population, that is, districts "as nearly equal in population as practicable."⁴⁷ Regardless of the admonition in the Pennsylvania Supreme Court's 2012 opinion that the "overriding objective" of equality of population "does not require that reapportionment plans pursue the narrowest possible deviation,"⁴⁸ population equality was, is, and must continue to be the *raison d'être* of reapportionment.

B. Compactness and Contiguity

Section 16 also requires that districts "shall be composed of compact and contiguous territory."⁴⁹ In *Specter* (concerning the 1971 reapportionment), the Pennsylvania Supreme Court held that there is a certain degree of unavoidable

⁴⁴ PA. CONST. of 1873, art. II, § 17.

⁴⁵ Statement of Del. Michael, in 1 DEBATES OF THE PENNSYLVANIA CONSTITUTIONAL CONVENTION OF 1967–1968, at 457 (1968). Del. Mildred Michael (R) from York County taught speech debate and English at the University of Pittsburgh. *Section 5 Constitutional Convention Delegates and Executive Staff*, in 1 DEBATES OF THE PENNSYLVANIA CONSTITUTIONAL CONVENTION OF 1967–1968, at 12 (1968).

⁴⁶ DEBATES OF THE PENNSYLVANIA CONSTITUTIONAL CONVENTION OF 1967–1968, *supra* note 45, at 457 (remarks of Del. Fagan) (noting that there were "nearly 80,000 voters for each Representative in Clearfield, Armstrong, Centre, Dauphin and Indiana Counties").

⁴⁷ *Albert v. 2001 Legislative Reapportionment Comm'n*, 790 A.2d 989, 993 (Pa. 2002); *In re 1991 Pa. Legislative Reapportionment Comm'n*, 609 A.2d 132, 136–37 (Pa. 1992); *In re Reapportionment Plan for Pa. Gen. Assembly*, 442 A.2d 661, 665 (Pa. 1981); *Specter v. Levin*, 293 A.2d 15, 18 (Pa. 1972). *But see Holt v. 2011 Legis. Reapportionment Comm'n (Holt I)*, 38 A.3d 711, 759 (Pa. 2012) ("Contrary to the suggestion of the Court in *In re 1991 Plan*, Article II, Section 16 by its terms does not 'require that the overriding objective of reapportionment is equality of population.'").

⁴⁸ *Holt I*, 38 A.3d at 760.

⁴⁹ PA. CONST., art. II, § 16.

non-compactness in any apportionment scheme because: (1) the population density of the state is quite uneven, so attempts to achieve the overriding objective of substantial equality of population will usually require the drawing of districts that are not models of geometric compactness; and (2) attempts to maintain the integrity of the boundaries of political subdivisions will add another increment of unavoidable non-compactness, since a great many subdivisions in the Commonwealth have a geographic shape which falls far short of ideal mathematical compactness.⁵⁰

To comply with the requirement of contiguity, a person must be able to go from any point within the district to any other point within the district without leaving the district.⁵¹

C. Integrity of Political Subdivisions

Finally, Article II, Section 16 goes on to explain that, “[u]nless absolutely necessary no county, city, incorporated town, borough, township or ward shall be divided in forming either a senatorial or representative district.”⁵² It is interesting to note that these boundary lines were not held out for special consideration in the creation of House districts in the 1873 Constitution.⁵³

These explicit standards, however, do not exist in a vacuum. They operate in tandem with other considerations inherent in the Commission process.

III. THE PROTECTION IS IN THE PROCESS: ARTICLE II § 17 OF THE PENNSYLVANIA CONSTITUTION

Reapportionment of the Commonwealth’s House and Senate districts, while not traditionally “legislative” in the sense that it requires a bill passed by both chambers and signed by the Governor, is nevertheless a legislative process. Failure to appreciate the value of legislative input, and its recognition of communities and constituency groups across the Commonwealth, is the fatal conceit of those who would draw maps simply as an abstract mathematical exercise. These communities and constituency groups are commonly referred to in reapportionment parlance as communities of interest. Communities of interest⁵⁴ include “[s]ocial, cultural, racial, ethnic, and economic interests

⁵⁰ *Specter*, 293 A.2d at 18–19.

⁵¹ *Id.* at 23 (citation omitted).

⁵² PA. CONST. art. II, § 16.

⁵³ Pennsylvania’s 1873 Constitution prohibited division of wards, boroughs or townships for Senate districts but not House Districts. *See* PA. CONST. of 1873 art. II, §§ 16–17.

⁵⁴ The National Conference of State Legislatures has noted that preservation of communities of interest is among the generally recognized principles of redistricting. NAT’L CONFERENCE

common to the population of the area” and may be reflected in the cores of existing districts.⁵⁵

Any review of Pennsylvania’s reapportionment plans has generally focused on the explicit constitutional standards found in Article II, § 16 of the Pennsylvania Constitution.⁵⁶ Equally important are the implicit political questions which are an inherent part of the process of reapportionment established in Article II, § 17. The drafters of Section 17 had these implicit, nonpartisan political considerations in mind when they determined the composition of the Commission would include the majority and minority leaders of both chambers of the General Assembly. Commission consideration and preservation of communities of interest ensures that implicit communities are not destroyed by explicit, but invisible and sometimes outdated, municipal boundaries.

Any system of reapportionment must find a way to take all of the influences and interests, from those focused on limited, provincial concerns to those of statewide significance, and harness them to positive effect. In other words, **the protection is, and has to be, in the process.**

A. Pennsylvania Constitutional Convention

The delegates to the 1967–1968 Pennsylvania Constitutional Convention understood the relationship between the two constitutional provisions. The Convention considered two proposals related to reapportionment:

- Proposal No. 1 (*which would form the basis for Article II, § 16 of the Pennsylvania Constitution*) concerned the number of senatorial and legislative districts as well as the explicit standards for creating those districts.⁵⁷
- Proposal No. 2 (*which would form the basis for Article II, § 17 of the Pennsylvania Constitution*) concerned the creation of the Legislative Reapportionment Commission.⁵⁸

OF STATE LEGISLATURES, *Redistricting Law* 2010, at 105–06 (2009), http://www.ncsl.org/Portals/1/Documents/Redistricting/Redistricting_2010.pdf.

⁵⁵ *Id.* at 106, 184 (discussing these same concepts generally). See also Justin Levitt, *A Citizen’s Guide to Redistricting*, BRENNAN CTR. FOR JUSTICE 56 (2010), <http://www.brennancenter.org/sites/default/files/analysis/a-citizens-guide-to-redistricting.pdf> (explaining that many consider communities of interest to serve one of the main purposes of redistricting: grouping together people with shared interests and priorities).

⁵⁶ See *supra* text accompanying note 40 for the text of PA. CONST. art. II, § 16.

⁵⁷ 1 DEBATES OF THE PENNSYLVANIA CONSTITUTIONAL CONVENTION OF 1967–1968, at 385 (Jan. 22, 1968).

⁵⁸ *Id.* at 417-18.

While Proposal No. 1 was generally regarded as more substantive and Proposal No. 2 generally regarded as more procedural, both contained elements of the other and formed a cogent whole. One did not, and does not, make sense without the other.⁵⁹

This inherent connection even influenced the process whereby the proposals were considered. On January 25, 1968, the delegates to the convention overwhelmingly approved a motion to postpone further consideration of Proposal No. 1 until Proposal No. 2 could be considered. The motion to postpone was defined as follows:

[U]ntil such time as a Proposal on Method of Apportionment still in the Committee on Legislative Apportionment has been reported out of that Committee and has been placed in the same reading position on the calendar as that of Proposal No. 1.⁶⁰

On February 7, 1968, Delegate Fagan offered the reasoning of the committees⁶¹ behind Proposal No. 2 (Article II, § 17). As a starting point, he explained that the legislature was “the appropriate group to make this change [reapportionment] . . . because of the fact that they are more conversant with the State and also the legislative and senatorial districts and the method in which it should be divided in the best interests of the citizens of Pennsylvania.”⁶² The delegates who served on the Committee on Legislative Apportionment understood that the nature of the legislature and its elected officials was such that legislators knew about the communities of interest within the Commonwealth as well as the particular legislative district lines which would best represent those interests.

However, the entire legislature, in the past, had trouble reaching agreement on a final reapportionment map. Delegate Fagan stated, “because of the fact that in past considerations by this body [the legislature] they have been

⁵⁹ See also *Jubelirer v. Rendell*, 953 A.2d 514, 528 (Pa. 2008) (citation omitted) (holding where two provisions of the State Constitution relate to the same subject matter, they are to be read in *pari materia*).

⁶⁰ DEBATES OF THE PENNSYLVANIA CONSTITUTIONAL CONVENTION OF 1967–1968, *supra* note 45, at 398 (remarks of Del. Fagan). As the co-chair of the Committee on Legislative Apportionment, *id.* at 81, Delegate Fagan was particularly suited to speak on these matters. Delegate Thomas Fagan (D) was President of Teamsters Union Local 249 in Allegheny County. *Section 5 Constitutional Convention Delegates and Executive Staff*, *in id.* at 6.

⁶¹ Delgate Fagan referred to this group as “the Committee on Method of Apportionment and the Standing Committee on Legislative Apportionment.” DEBATES OF THE PENNSYLVANIA CONSTITUTIONAL CONVENTION OF 1967–1968, *supra* note 45, at 525. Later in the day, Delegate Baldrige referred to it as the “Subcommittee on Method of Reapportionment.” *Id.* at 533.

⁶² *Id.* at *supra* note 60 at 525.

unable to conclude an agreement among themselves . . . the duty was passed on to the Pennsylvania State Supreme Court.”⁶³ This problem was the impetus for the creation of a Legislative Reapportionment Commission.

Proposal No. 2 offered a hybrid, intended to take the unique and important perspective of the legislature and create a smaller body which could more expeditiously act within the reapportionment timelines.

Under this proposal it establishes a commission. The commission is composed of members of both the House of Representatives and the leaders in the Senate

. . . .
[W]e feel that by giving it to this commission that they can come up with the proper decisions of reapportionment that are in the best interest of all the citizens of Pennsylvania

. . . .
We feel that after giving consideration to all the proposals, to all those who appeared at our public hearings that this concept we have in this proposal sets forth the best ideas and principles and will serve the best interests of the citizens of the Commonwealth of Pennsylvania.⁶⁴

In response to an amendment,⁶⁵ Delegate Baldrige explained that “there are no people in Pennsylvania who know the legislative or senatorial districts better than the members” of the House and Senate.⁶⁶ In that same exchange, Delegate Goldman⁶⁷ continued:

I do not believe this plan denies the legislators, the Assembly, the right to reapportion themselves. The only thing this plan does is establish who will speak in behalf of these bodies, rather than have the bodies speak for themselves in toto. I believe the

⁶³ *Id.*

⁶⁴ *Id.* at 525–26.

⁶⁵ Delegate Baldrige was responding to the Powell amendment, which failed by a vote of 49 yeas to 86 nays and 28 not voting. *Id.* at 538–39. Delegate Jerry Powell (R) was a director at Electronic Data Processing in Bucks County. *Section 5 Constitutional Convention Delegates and Executive Staff*, in DEBATES OF THE PENNSYLVANIA CONSTITUTIONAL CONVENTION OF 1967–1968, *supra* note 45, at 15.

⁶⁶ DEBATES OF THE PENNSYLVANIA CONSTITUTIONAL CONVENTION OF 1967–1968, *supra* note 45, at 533. Delegate Robert Baldrige (R) was a lawyer and farmer in Indiana County. *Section 5 Constitutional Convention Delegates and Executive Staff*, in *id.* at 1.

⁶⁷ Delegate Harold Goldman (R) was an attorney in Allegheny County. *Id.* at 8.

sessions that we have had in the past several years have clearly indicated that when given such a politically oriented and base issue as apportionment, the legislature will undoubtedly become tied up and impossibly deadlocked in this vital task.

I suggest that . . . the basic proposal, Proposal No. 2, be accepted . . .⁶⁸

Later in the day, Delegate Croop⁶⁹ offered,

It was not with any disrespect [to the legislature] that we narrowed it down to the two leaders in the House and the two leaders in the Senate . . . We merely narrowed it down to save work. We knew that they would speak for their constituents in each branch of the government. . . .

. . . .
[T]he legislature does have the knowledge and the know-how and it was merely that we were narrowing it down.⁷⁰

Our modern-day founding fathers understood the need to protect communities even if their geographical reach crossed subdivision borders. The Commission process ensures that, when reapportionment occurs, a myopic focus on boundary lines does not lose the forest for the trees.

B. Pennsylvania Supreme Court

Time and again, the Pennsylvania Supreme Court has recognized reapportionment both as a legislative prerogative and as a means of preserving interests which may not be readily apparent from reading a map or computer printout. Before the creation of the first Commission, the Pennsylvania Supreme Court explained that “[t]he task of reapportionment is not only the responsibility of the Legislature, it is also a function which can be best accomplished by that elected branch of government.”⁷¹

⁶⁸ DEBATES OF THE PENNSYLVANIA CONSTITUTIONAL CONVENTION OF 1967–1968, *supra* note 45, at 536.

⁶⁹ Delegate Frank Croop (R) was an insurance agent and broker in Columbia County. *Section 5 Constitutional Convention Delegates and Executive Staff*, in *id.* at 5.

⁷⁰ DEBATES OF THE PENNSYLVANIA CONSTITUTIONAL CONVENTION OF 1967–1968, *supra* note 45, at 541.

⁷¹ *Butcher v. Bloom (Butcher I)*, 203 A.2d 556, 569 (Pa. 1964).

The unique advantages of the Commission, as a legislative process, were noted in the first Pennsylvania Supreme Court case considering the work of a Legislative Reapportionment Commission. In *Commonwealth ex rel. Specter v. Levin*, the Pennsylvania Supreme Court offered the following description of the new method:

Prior to 1968 reapportionment of the Pennsylvania Legislature was effected by act of the General Assembly. . . .

. . . .

The advantages of assignment (sic) the responsibility for reapportioning the Legislature to such a commission are quite obvious, and several other states have recently adopted or considered proposals for similar commissions. The equal representation on the Commission provided to the majority and minority members of each house precludes the reapportionment process from being unfairly dominated by the party in power at the moment of apportionment. In addition, the provision for a chairman who can act as a “tie-breaker” eliminates the possibility of a legislative deadlock on reapportionment such as the one that occurred in the Legislature of this Commonwealth in 1965 and compelled this Court to undertake the task of reapportionment. At the same time the Legislature’s expertise in reapportionment matters is essentially retained.⁷²

In 1981, the Pennsylvania Supreme Court stated:

The principle that reapportionment is a legislative function is evident from the plain language of this state’s Constitution. Article II, Section 17(d) directs not only that the Legislative Reapportionment Commission file a reapportionment plan but also that, in the event a final plan is determined by this Court to be invalid, the plan be remanded to the Commission for a second attempt at reapportionment.⁷³

In 2002, the Pennsylvania Supreme Court’s opinion in *Albert v. 2001 Legislative Reapportionment Commission* reiterated the same themes which influenced the Convention:

⁷² *Specter v. Levin*, 293 A.2d 17, 17–18 (Pa. 1972) (footnotes omitted).

⁷³ *In re Reapportionment Plan for Pa. Gen. Assembly*, 442 A.2d 661, 665 (Pa. 1981).

The legislative process envisioned by the Pennsylvania Constitution is particularly suited to the considerations of community interests that appellants claimed were overlooked. *See Butcher v. Bloom*, 415 Pa. 438, 203 A.2d 556, 569 (1964) (“The composition of the Legislature, the knowledge which its members from every part of the state bring to its deliberations, its techniques for gathering information, and other factors inherent in the legislative process, make it the most appropriate body for the drawing of lines dividing the state into senatorial and representative districts.”).⁷⁴

In fact, the *Albert* court went so far regarding the Commission’s invaluable expertise on these points as to discount claims by appellants based on the same concepts.⁷⁵

In *Holt I*, the Pennsylvania Supreme Court noted: “It is true, of course, that redistricting has an inevitably legislative, and therefore an inevitably political, element”⁷⁶

Quoting the *Holt I* opinion and hearkening back to even earlier precedent, the *Holt II* court noted that the constitution “vests discretion in the judgment of the commissioner members, and it does so with a deliberate scheme where four of the five commissioners are the party leaders so as to, *inter alia*, ‘essentially retain[]’ ‘the Legislature’s expertise in reapportionment matters.’”⁷⁷

The *Holt I* court juxtaposed this “political” element with a discussion of the conceptual appeal of a homogenous district “in order to facilitate the functioning of a representative form of government” as discussed in the brief of a pro se appellant.⁷⁸ The reality, however, is that this “political” element often serves to foster homogeneity and communities of interest in circumstances where the municipal lines may not further those purposes.

The *Holt I* court cited with approval a discussion of communities of interest by Dean Gormley. While Gormley offers some words of caution against the misuse of the “communities of interest” label, he also recognizes it as a useful and legitimate redistricting tool. He states that “[t]he fundamental districting principles that the [U.S. Supreme] Court has deemed legitimate over the years include, but are not limited to, ‘compactness, contiguity, and respect for political

⁷⁴ *Albert v. 2001 Legislative Reapportionment Comm’n*, 790 A.2d 989, 999–1000 (Pa. 2002).

⁷⁵ *See id.* at 999.

⁷⁶ *Holt v. 2011 Legislative Reapportionment Comm’n (Holt I)*, 38 A.3d 711, 745 (Pa. 2012).

⁷⁷ *Holt v. 2011 Legislative Reapportionment Comm’n (Holt II)*, 67 A.3d 1211, 1240 (Pa. 2013) (quoting *Holt I*, 38 A.3d at 745).

⁷⁸ *Holt I*, 38 A.3d at 745 (citation omitted).

subdivisions **or communities defined by actual shared interests . . .**”⁷⁹ As one of the more extensive uses of quoted material in the *Holt I* opinion, the Gormley explanation continued:

Historically, reapportionment bodies have considered “communities of interest” as one legitimate factor in drawing fair and politically sensitive districts. A redistricting body need not draw rigid squares of equal population; in fact, few states do so. Rather, redistricting bodies traditionally take into account a host of intangible communities, seeking to give them, where practicable, a voice in the government without unduly fracturing that voice. Thus, school districts, religious communities, ethnic communities, geographic communities which share common bonds due to locations of rivers, mountains and highways, and a host of other “communities of interest” are routinely considered by districting bodies in order to construct fair and effective maps. Shared racial background, along with political affiliation, ethnic identity, religious affiliation, occupational background, all can converge to create bona fide communities of interest, to the extent that the redistricting body makes an honest effort to draw lines around geographically compact groups in order to give them a voice in the governmental process.

. . . At the same time, states have historically considered a broad range of such imprecise communities of interest (many of which are naturally intertwined) in exercising their sound discretion. They do so to satisfy constituents. They do so to sweep together a host of generally identifiable interest groups that wish to be given a unified voice. This is perfectly healthy and permissible. It is an important aspect of the state’s prerogative, when it comes to structuring its own form of government.⁸⁰

Addressing the concept of communities of interest in *Holt II*, the Pennsylvania Supreme Court again quoted extensively from Dean Gormley and provided this observation: “[W]e do not discount that redistricting efforts

⁷⁹ *Id.* at 745–46 (emphasis added) (quoting Ken Gormley, *Racial Mind-Games and Reapportionment: When Can Race Be Considered (Legitimately) in Redistricting?*, 4 U. PA. J. CONST. L. 735, 779–81 (2002)).

⁸⁰ *Id.* at 746 (quoting Gormley, *supra* note 79, at 779–81 (2002)).

may properly seek to preserve communities of interest which may not dovetail precisely with the static lines of political subdivisions.”⁸¹

Pennsylvania courts have recognized communities of interest as a legitimate consideration in reapportionment, and further, have recognized the legislature’s role in identifying those communities. The communities of interest contemplated by prior reapportionment efforts are reflected in the continuation of the cores of many legislative districts, whether as “historically unified subdivisions” or historically unified ethnic or religious neighborhoods which straddle the unseen civic borders separating neighbor from neighbor.⁸²

C. Explicit Municipalities and Implicit Communities

Communities of interest are often the building block of neighborhoods. Certain communities enjoy specific protection under federal law in spite of any municipal boundaries which might divide them. For example, Section 2 of the Voting Rights Act (42 U.S.C. § 1973) offers protection for communities defined by race, color or minority language status.⁸³ As explained in the context of the Voting Rights Act, the geographic compactness of a “community” is not limited by municipal boundaries. Shared values, interests and other important connections, rather than municipalities, are the focus.

A municipality is a political construct which may, or may not, accurately reflect the communities of interest within it. It can be argued that the larger the municipality, the more divergent the interests. Even within municipalities of relatively small population, however, there may be interests which more closely align with neighbors just across a township border than

⁸¹ *Holt II*, 67 A.3d at 1241. This contrasts sharply with the *Holt II* court’s rejection of Commission arguments which were based on respect for the democratic process found in recognition of continuity of representation and the cores of existing districts. *Id.* at 1234-37.

⁸² The Pennsylvania Supreme Court’s recent decision in *League of Women Voters of Pennsylvania* casts aspersions on *Holt II*’s respect for communities of interest. *See League of Women Voters of Pennsylvania v. Pennsylvania*, 178 A.3d 737, 775 (Pa. 2018). There, the Court held that the 2011 congressional redistricting plan violated the Pennsylvania Constitution’s Free and Equal Elections Clause by drawing districts that did not properly weigh criteria like equal population, compactness and contiguity against protecting communities of interest. *Id.* at 790–800, 818. The practical import of the case is to read the traditional districting criteria laid out expressly for only state apportionment in the Pennsylvania Constitution into Commonwealth constitutional jurisprudence regarding congressional redistricting. *Compare League of Women Voters*, 178 A.3d at 818 (requiring “equally populous, compact, and contiguous districts which divide political subdivisions only as necessary to ensure equal population”), with PA. CONST. art. II, § 16 (stating that each district “shall be composed of compact and contiguous territory as nearly equal in population as practicable”). Still, *League* is of limited prospective value in the state redistricting context because it concerns congressional redistricting and provides little in the way of actual guidance to legislative map-drawers.

⁸³ Voting Rights Act, 52 U.S.C. § 10301 (2012).

with those located miles away but still within the far-flung geographic reach of the municipal boundary.

The consideration of municipal borders is important, as noted by its inclusion in the explicit standards of Article II, § 16. The consideration of communities of interest, often as reflected in existing districts, deserves acknowledgment as an implicit and integral part of the process under § 17. While the Pennsylvania Supreme Court may take issue with this notion, consideration of communities of interest does not appear in § 16's enumerated list precisely because it is inherent in the process of § 17. They are two halves which make a whole in the same manner that Sections 16 and 17 work together to provide a complete framework for drawing new legislative districts every ten years. The process protects the interests of the people.

D. The Importance of the Chair

The Pennsylvania Constitution provides a process by which the four legislative members of the Commission select the fifth member who “shall serve as chairman of the commission.”⁸⁴ If the legislative members are unable to agree on a fifth member, “a majority of the entire membership of the Supreme Court . . . shall appoint the chairman.”⁸⁵ During the 1967–68 Constitutional Convention, the delegates appeared to recognize how important the fifth member of the Commission would be to the process. In defense of the proposal, Delegate Prendergast⁸⁶ argued:

Under this plan we have the majority leader and minority leader in both Houses, plus the fifth member to be selected by them. I cannot believe that they will not get together and select a fifth member as chairman—a **nonpolitical person**—within 45 days. If necessary, of course, it does go to the Supreme Court and this is a check-and-balance sort of thing.⁸⁷

Delegate Croop argued in favor of the Commission process and stated, “[w]e thought they stood a better chance—**with their fifth man as a chair-**

⁸⁴ PA. CONST. art II, § 17(b).

⁸⁵ *Id.*

⁸⁶ Delegate James Prendergast (D) from Northampton County served in the Pennsylvania House of Representatives from 1959 to 1978. See *James F. Prendergast*, PA. HOUSE OF REPRESENTATIVES, <https://www.legis.state.pa.us/cfdocs/legis/BiosHistory/MemBio.cfm?ID=657&body=H> [<https://perma.cc/PFB7-SPYH>] (last visited Mar. 25, 2019).

⁸⁷ DEBATES OF THE PENNSYLVANIA CONSTITUTIONAL CONVENTION OF 1967–1968, *supra* note 45, at 535 (1968) (emphasis added).

man—of reaching a conclusion than to put the entire body up.”⁸⁸ And, as earlier stated in this Article, the Pennsylvania Supreme Court described the importance of the chair in *Specter* as follows: “[T]he provision for a chairman who can act as a ‘tie-breaker’ eliminates the possibility of a legislative dead-lock on reapportionment such as the one that occurred in the Legislature of this Commonwealth in 1965 and compelled this Court to undertake the task of reapportionment.”⁸⁹

Over the course of the Pennsylvania Reapportionment Commission’s 50-year history, there have been five distinguished individuals who have filled the role of Commission Chair.⁹⁰ Each of them accomplished attorneys in their own right, two of whom were well-regarded jurists and two others skilled academicians from one of Pennsylvania’s most prestigious law schools. One was appointed by the legislative members of the Commission. In the other four instances, the Chair was appointed by the Pennsylvania Supreme Court.

Regardless of the means of appointment, though, the Chair fills a vital role on the Commission. The Chair is more than a tie-breaking vote. In practice, the Chair is the arbiter of disputes; the director of all Commission-related traffic (such as meeting schedules between the leaders of the two chambers of the General Assembly, as well as when and where Commission hearings take place); and, the moderator of partisan ambition.

Critics of Pennsylvania’s commission process argue that it benefits the party that holds the Majority in the House and Senate. However, the *Specter* Court (above) correctly pointed out that the two Majority and two Minority leaders are on exactly equal footing during the commission process.⁹¹ The legislative commission members bring an expertise in such things as geography and communities of interest to the redistricting process. The Chair,

⁸⁸ *Id.* at 540–41 (emphasis added).

⁸⁹ *Specter v. Levin*, 293 A.2d 15, 17 (Pa. 1972).

⁹⁰ The 1971 Commission Chair, selected by the Pennsylvania Supreme Court, was Professor A. Leo Levin of the Pennsylvania University School of Law. In 1981, the Commission selected Pennsylvania University School of Law Dean James O. Freedman. In 1991, after the Commission’s selection for Chair, Pittsburgh University Dean Robert Nordenburg, was subsequently appointed to a position with the administration, the Pennsylvania Supreme Court selected former United States Attorney for the Western District of Pennsylvania Robert J. Cindrich. In 2001, the Pennsylvania Supreme Court appointed retired Pennsylvania Supreme Court Justice Frank J. Montemuro, Jr. Finally, in 2011, the Pennsylvania Supreme Court appointed retired Pennsylvania Superior Court President Judge Emeritus Stephen J. McEwen, Jr. See *Legislative Reapportionment Commission to Hold First Public Meeting on March 23*, PA. REDISTRICTING (Mar. 16, 2011), <http://www.redistricting.state.pa.us/Press/ViewArticle.cfm?ID=1006> [<https://perma.cc/4GAU-F72G>] (summarizing the prior Commission chairs).

⁹¹ *Specter*, 293 A.2d at 17 (“The equal representation on the Commission provided to the majority and minority members of each house precludes the reapportionment process from being unfairly dominated by the party in power at the moment of apportionment.”).

who must be devoid of parochial partisan agendas of his or her own, assists the leaders in navigating the journey.

IV. THE PENNSYLVANIA SUPREME COURT'S 2012 "RECALIBRATION"

It is worthwhile to provide some background regarding how the state legislative reapportionment process occurred in the wake of the 2010 Census.⁹² For those unfamiliar with the specifics, the first reapportionment plan (2011 Final Plan, including both the House and Senate Plans), was remanded by the Pennsylvania Supreme Court as "contrary to law."⁹³ The basis for the remand was primarily focused on the integrity of political subdivisions in the 2011 Final Plan.⁹⁴

Some commentators who participated in the 2011–2012 reapportionment process consistently exalted municipal or other boundaries over population equality.⁹⁵ This seems to miss the point of reapportionment. People (equality of representation) are more important than dotted lines on a map.

A. The 2011 Final Plan Was Better Than Its Predecessor

The 2011 Final Plan remanded by the Pennsylvania Supreme Court was constitutionally sound based on 40 years of Pennsylvania Supreme Court precedent. The 2011 Final Plan was better than the 2001 Final Plan which had

⁹² An abbreviated timeline of notable events:

- December 12, 2011 - The Legislative Reapportionment Commission filed the 2011 Final Plan.
- January 25, 2012 - After challenges were filed and heard, the Pennsylvania Supreme Court issued a per curiam order declaring the 2011 Final Plan "contrary to law" and remanding the matter back to the Commission. The Pennsylvania Supreme Court's opinion was released on February 3, 2012.
- June 8, 2012 - The Commission adopted the 2012 Final Plan.
- May 8, 2013 - After challenges were filed and heard, the Pennsylvania Supreme Court upheld the 2012 Final Plan.

A more extensive timeline is available at *Legislative Reapportionment Commission Meetings and Updates*, PA. REDISTRICTING, <http://www.redistricting.state.pa.us/Commission/Commission.cfm> [<https://perma.cc/S2DM-82K6>] (last visited Jan. 20, 2019).

⁹³ *Holt v. 2011 Legislative Reapportionment Comm'n* (Holt I), 38 A.3d 711, 756 (Pa. 2012).

⁹⁴ *Id.* at 756–57 (discussing the unnecessary subdivision splits made by the 2011 Final Plan).

⁹⁵ See *Public Hearing of the Legislative Reapportionment Comm'n*, Volume XIII (May 2, 2012) (see testimony of Representative Greg Vitali, at 547-551, Mayor Leo Scoda, at 568-571, Mayor Carolyn Comitta, at 571-575, and Amanda Holt, at 580-587) (copy of transcript on file with author); *Public Hearing of the Legislative Reapportionment Comm'n*, Volume XIV, at 666-670 (May 7, 2012) (see testimony of Patty Kim, then Democratic candidate) (copy of transcript on file with author).

been upheld by the court in 2002. More specifically, the 2011 (House) Final Plan had population deviations within the historical range, complied with the federal Voting Rights Act, contained 14 fewer split municipalities than the 2001 (House) Final Plan, and had more compact districts than those which passed muster in 2001.

Beyond a mere recitation of the plan's parameters, the Pennsylvania Supreme Court agreed that the 2011 Final Plan was better than the 2001 effort. In the court's February 3, 2012, *Holt I* opinion, Chief Justice Castille wrote, "[a]gain, we do not doubt that this Final Plan is an improvement over the 2001 Final Plan."⁹⁶ Justice Saylor explained that, "[m]oreover, with regard to the 2011 Final Plan, I agree with the majority that it is an improvement over the 2001 plan . . . which surmounted the challenges raised in the appeals before this Court."⁹⁷ Justice Eakin concluded that "[t]he 2011 plan has fewer problems than the plan we found constitutional in *Albert*; it is not unconstitutional under existing precedent."⁹⁸

The 2011 Final Plan was constitutional based on all of the case law which existed prior to 2011. In *Holt I*, however, the Pennsylvania Supreme Court decided to invalidate the maps.

In the majority opinion in *Holt I*, Chief Justice Castille wrote that the "LRC's [Commission's] reliance on prior cases as creating an expectation that its Final Plan would be found constitutional, is untenable."⁹⁹ He further explained that a "prospective recalibration of certain of our precedents would be salutary and helpful in this unusual area of law . . ." ¹⁰⁰ In fact, he went so far as to explain "our governing precedent in deciding these appeals has led us to conclude that it should be recalibrated to allow the LRC more flexibility in formulating plans, and particularly with respect to population deviation . . . Our prior precedent sounds in constitutional law; to the extent it is erroneous or unclear, or falls in tension with intervening developments, this Court has primary responsibility to address the circumstance."¹⁰¹

In a footnote, and despite a fairly consistent theme over 40 years of jurisprudence since the 1967–1968 convention, the Chief Justice noted that the Pennsylvania Supreme Court was not "constrained to closely and blindly re-affirm constitutional interpretations of prior decisions which have proven to be unworkable or badly reasoned."¹⁰²

⁹⁶ *Id.* at 755.

⁹⁷ *Id.* at 762 (Saylor, J., concurring and dissenting) (citation omitted).

⁹⁸ *Id.* at 763 (Eakin, J., concurring and dissenting).

⁹⁹ *Id.* at 736.

¹⁰⁰ *Id.* at 758.

¹⁰¹ *Id.* at 759.

¹⁰² *Id.* at 759 n.38.

B. A Little More of This, A Little Less of That

Despite the Pennsylvania Supreme Court's pretensions of fundamental change, and 87 pages of discussion in the majority opinion, *Holt I* provided no real standards to guide the then-extant or future Legislative Reapportionment Commissions. Instead, the Pennsylvania Supreme Court offered this vague shift in direction away from population equality:

First, and most simply, we reemphasize the importance of each of the mandates in Article II, Section 16. Contrary to the suggestion of the Court in *In re 1991 Plan*, Article II, Section 16 by its terms does not “require that the overriding objective of reapportionment is equality of population.” . . . Rather, the Constitution lists multiple imperatives in redistricting, which must be balanced. . . .

Accordingly, we take this opportunity to reaffirm the importance of the multiple commands in Article II, Section 16, which embrace contiguity, compactness, and the integrity of political subdivisions, no less than the command to create legislative districts as nearly equal in population as “practicable.” Although we recognize the difficulty in balancing, we do not view the first three constitutional requirements as being at war, or in tension, with the fourth. To be sure, federal law remains, and that overlay still requires, as *Reynolds* taught, that equality of population is the “overriding objective.” But, as later cases from the High Court have made clear, that overriding objective does not require that reapportionment plans pursue the narrowest possible deviation, at the expense of other, legitimate state objectives, such as are reflected in our charter of government

We trust that our recalibration of the emphasis respecting population equality to afford greater flexibility in reapportioning legislative districts by population should create sufficient latitude that the 2011 LRC, and future such bodies, may avoid many of the complaints that citizens have raised over the years, particularly respecting compactness and divisions of political subdivisions. Like the U.S. Supreme Court, we do not direct a specific range for the deviation from population equality, or purport to pre-approve redistricting plans that fall within that range. Nor do we direct the LRC to develop a reapportionment plan that tests the outer limits of acceptable deviations.¹⁰³

¹⁰³ *Id.* at 759–61 (citations omitted).

The Pennsylvania Supreme Court struck the map, ordered the Commission to sacrifice some portion of the democratic principle of representational equality on the altar of municipal boundary lines¹⁰⁴ and told the Commission to try again.

C. Perpetuating Unconstitutional Lines (The Perfect as the Enemy of the Good, or at Least Better)

Setting aside all of the precedent and accepting that the Pennsylvania Supreme Court wanted to “recalibrate” reapportionment objectives, the appropriate remedy would have been to make the changes prospective. Justice Eakin captured this concept in his concurring and dissenting opinion in *Holt I* when he said, “[w]hile I do not quarrel with the majority’s reordering of constitutional priorities, I do not find a need to make that reordering retroactive.”¹⁰⁵

The Pennsylvania Supreme Court had at least two options concerning prospective application. Under the first option, the Pennsylvania Supreme Court could have simply established new, prospective rules for the 2021 Legislative Reapportionment Commission.

The second option involved allowing the 2012 election to be run on the new, more constitutional lines of the 2011 Final Plan and directing that a new plan be created in time for the 2014 elections. This was the process followed by the federal courts during the challenges to Congressional redistricting in 2002.¹⁰⁶ Pennsylvania voters were allowed better district lines while the General Assembly went back to the drawing board.¹⁰⁷ This was also the remedy for Pennsylvania voters in the 1964 state legislative elections. The *Holt I* opinion recognized:

¹⁰⁴ While *Holt I* also raised questions regarding compactness, the Pennsylvania Supreme Court focused on “three particular Senate districts” and noted that these questions might be related to the overarching concern with split subdivisions. *Id.* at 757.

¹⁰⁵ *Id.* at 763 (Eakin, J., concurring and dissenting).

¹⁰⁶ See *infra* text accompanying note 107.

¹⁰⁷ These districts were from the line of *Vieth* cases, which culminated in the U.S. Supreme Court’s decision in *Vieth v. Jubelirer*, 541 U.S. 267 (2004). Leading up to that decision, the U.S. District Court for the Middle District of Pennsylvania issued an order on Feb. 22, 2002, dismissing plaintiffs’ claims except for the one person-one vote claim. *Vieth v. Pennsylvania*, 188 F. Supp. 2d 532, 549 (M.D. Pa. 2002). On April 8, 2002, the Middle District of Pennsylvania determined that Act 1 (Congressional reapportionment) violated one person-one vote and gave the General Assembly three weeks to craft a new plan. *Vieth v. Pennsylvania*, 195 F. Supp. 2d 672, 679 (M.D. Pa. 2002). On April 18, 2002, Governor Schweiker signed Act 34 (replacing Act 1). 25 PA. STAT. ANN. § 3595.301. “Defendants then petitioned the court to stay its decision regarding Act 1 and to allow the 2002 congressional elections to proceed under Act 1’s boundaries. *Because primary elections were set to be held on May 21, 2002, the court agreed to stay its decision regarding Act 1 in order to allow the primary election to take place as scheduled.* Therefore, Act 34 was not in operation for the congressional elections that took place in November of 2002.” *Vieth v. Pennsylvania*, 241 F.Supp.2d 478, 480 (M.D. Pa. 2003) (emphasis added).

Time constraints precluded the *Butcher I* Court from fashioning any remedy with regard to the 1964 plan. The *Butcher I* Court's solution was to direct that the 1964 elections proceed under the infirm legislation, retain jurisdiction, and direct the General Assembly to correct course and devise a constitutionally valid plan for the 1966 election cycle no later than September 1, 1965.¹⁰⁸

In *Holt I*, however, the Pennsylvania Supreme Court ignored both options. The reluctance of a federal court to intervene in this electoral process notwithstanding,¹⁰⁹ the result of the *Holt I* Court's order had a temporary, but significant, detrimental impact on two distinct components of the Commonwealth's electorate.

The first portion of the population impacted were those citizens living in districts that were overpopulated under the old 2001 lines. Use of these old lines in the 2012 House elections perpetuated a population deviation that was wildly off-kilter. Under the 2001 lines, House District 24 remained a minus 19.7% (51,007 population) and House District 134 remained a plus 24.45% (77,873 population). Therefore, the overall deviation in district population using the 2001 House lines with 2010 population numbers was 44.15%. This compares to an overall deviation in the 2011 (House) Final Plan of 5.97%. The Supreme Court's perpetuation of a 44.15% deviation was a far cry from "one person, one vote."

The second group of citizens directly affected by the Pennsylvania Supreme Court's decision were Hispanics living in new Hispanic majority-minority districts created by the 2011 (House) Final Plan. Pennsylvania is covered by Section 2 of the Federal Voting Rights Act.¹¹⁰ This federal statute was enacted to prohibit voting practices which interfered with equal access for minorities. The two new Hispanic majority-minority districts were delayed until the 2014 elections and this resulted in a federal lawsuit.¹¹¹

¹⁰⁸ *Holt I*, 38 A.3d at 744.

¹⁰⁹ "After the *Holt I* decision was filed, Senator Dominic Pileggi and Representative Michael Turzai—both members of the LRC by virtue of their positions as majority leaders of their respective caucuses—filed suit in federal court seeking to enjoin this Court's directive that existing districts should be used in the 2012 election cycle and until the Court approved a constitutional reapportionment plan. In a February 8, 2011 order, the federal district court denied relief and concluded that the 2012 elections must proceed under the only existing map, the 2001 Plan." *Holt v. 2011 Legislative Reapportionment Comm'n (Holt II)*, 67 A.3d 1211, 1216 (Pa. 2012).

¹¹⁰ Voting Rights Act, 52 U.S.C. § 10301 (2012).

¹¹¹ *Garcia v. 2011 Legislative Reapportionment Comm'n*, 938 F. Supp. 2d 542 (E.D. Pa. 2013), *aff'd*, 559 F. App'x 128 (3d Cir. 2014) (dismissing the complaint for failure to state a claim where plaintiffs alleged that under the 2001 Plan populations were malapportioned, and that Latino voting strength was unconstitutionally diluted).

V. THE 2012 (HOUSE) FINAL PLAN

As a result of the new general direction announced by the Pennsylvania Supreme Court, the Legislative Reapportionment Commission went back to the drawing board. The Commission worked to reach agreement on the 2012 Final Plan, which passed constitutional muster on May 8, 2013.¹¹²

Under Article II, § 17 of the Pennsylvania Constitution, both House and Senate maps are adopted in a single vote as one “reapportionment plan.” The authors of this Article were, as one would expect, more familiar and involved with House districts in the 2012 Final Plan. Importantly, there was agreement on the House districts between the Majority and Minority House Leaders on the 2011 Final Plan, the 2012 Preliminary Plan and the 2012 Final Plan. Therefore, the focus of the analysis which follows will exclusively be the House component of the overall reapportionment plan approved by the Court in *Holt II*,¹¹³ and will be based in large part on the authors’ own observations and corresponding conclusions. All calculations relating to population are based on United States Census data.

A. Equality of Population and Seat Movement

From 2000 until 2010, the Commonwealth experienced a population growth of 3.43%.¹¹⁴ Further, excluding portions of Philadelphia, there had generally been a significant shift of the population center to the east. The growth and shift completely reconfigured the population of municipalities across the Commonwealth and influenced all of the districts in the 2012 (House) Final Plan.

Equality of population can be measured by either the deviation from the ideal district population or the deviation in population from the least populous district to the most populous district.¹¹⁵ Painting with a broad brush,

¹¹² *Holt II*, 67 A.3d at 1242 (holding that the LRC “sufficiently heeded” the court’s ruling in *Holt I* and dismissing the appeals).

¹¹³ Details of the 2012 (Senate) Final Plan are available at the Commission’s website. *Senate Legislative Interactive District Map*, PA. REDISTRICTING, <http://www.redistricting.state.pa.us/Maps/Senate.cfm> [https://perma.cc/4WDM-4U2A] (last accessed Feb. 12, 2019).

¹¹⁴ Pennsylvania’s total population, as reported by the 2010 Census, was 12,702,379. *Profile of General Population and Housing Characteristics: 2010 Pennsylvania*, U.S. BUREAU OF THE CENSUS, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC10_DP_DPDP1&prodType=table [https://perma.cc/898V-7EWS] (last visited Feb. 12, 2019).

¹¹⁵ See *Albert v. 2001 Legislative Reapportionment Comm’n*, 790 A.2d 989, 998–99 (Pa. 2002) (“The Commission cogently notes that the range of deviation from the ideal population, as well as the population ratio from the least populous to the most populous district, compares favorably to those in other plans found to be constitutional by this Court and the United States Supreme Court.”).

a population deviation of less than 10% in a state legislative reapportionment plan will generally pass muster under federal constitutional analysis.¹¹⁶

Given a total population of 12,702,379 and 203 House Districts, the target population for a legislative district in the 2011–2012 reapportionment was 62,573. Assuming an 8% deviation, 4% above and 4% below the target, the upper population number would be 65,076 and the lower population number would be 60,070.

Population equality could not have been achieved, however, without the movement of legislative seats from areas of population loss to areas of population growth. In this case, the movement of House seats in the 2012 (House) Final Plan was driven by both population and the request of the House Democratic Leader to change seat movement from that endorsed by the 2011 (House) Final Plan. It is noteworthy that seat movement was not one of the issues which arose in the *Holt I* Opinion.

In order to provide context to this discussion, below is a table which illustrates the population change from 2000 to 2010 in Republican House districts versus Democratic House districts.

Categories	Population Change 2000 – 2010
All Republican House Districts (statewide)	Gain of 463,340
All Democratic House Districts (statewide)	Loss of 42,015

The population change in all Democratic Districts (statewide) in the 10 years preceding the 2011–2012 reapportionment had been a loss of 42,015. Under the 2011 (House) Preliminary Plan approved by the Commission, two Democratic seats were moving to two Democratic areas. After public input and comment, and with the endorsement of the House Democratic Leader, the 2011(House) Final Plan moved a third Democratic seat to a Democratic area.

¹¹⁶ The U.S. Supreme Court has described a population deviation of 10% or less as meeting “prima facie constitutional validity;” however, this presumption is rebuttable with evidence that the deviation did not result from traditional redistricting criteria but from a systematic effort to underpopulate certain types of districts for partisan advantage. *See Larios v. Cox*, 300 F. Supp. 2d 1320, 1341–42 (N.D. Ga. 2004), *summarily aff’d*, 542 U.S. 947 (2004); *see also Harris v. Arizona Indep. Redistricting Comm’n*, 136 S. Ct. 1301, 1307 (2016) (“[T]hose attacking a state-approved plan must show that it is more probable than not that a deviation of less than 10% reflects the predominance of illegitimate reapportionment factors rather than the ‘legitimate considerations’ to which we have referred in *Reynolds* and later cases.”).

In the 2011 (House) Final Plan:

- District 22, a Democratic district in Allegheny County, was moved to a Democratic area in Lehigh County.
- District 45, a Democratic district in Allegheny County, was moved to a Democratic area in Chester County.
- District 115, a Democratic district from Lackawanna and Wayne Counties, was moved to a Democratic area in Monroe County.

The population change in all Republican Districts (statewide) in the 10 years preceding the 2011–2012 reapportionment had been a gain of 463,340. Nevertheless, under the 2011 (House) Final Plan, two Republican seats were moving to two Republican areas. Republicans were relocating two of the five seats which were moving, even though the population gains in the state, in the aggregate, had been in Republican Districts.

In the 2011 (House) Final Plan:

- District 5, a Republican seat from Crawford and Erie Counties, was moved to a Republican area in Berks County.
- District 169, a Republican seat from Philadelphia County, was moved to a Republican Area in York County.

To the casual observer looking solely at the statewide population shift, moving two Republican seats when the vast majority of population movement occurred in Democratic areas of the Commonwealth might not seem objectively fair to Republicans. Seat movement, however, is a product of both geography and the negotiated commission process. All seat movements in the 2011 (House) Final Plan were agreed to by both House Leaders.

Moving the 74th District to Chester County (Geography, Population Loss and Negotiated Agreement):

In the 2012 (House) Final Plan, there was a change in seat movement from the 2011 (House) Final Plan at the request of the House Democratic Leader. Rather than move District 45 to Chester County, the Democratic Leader requested the movement of District 74 to a Democratic area in Chester County. This change reflected the retirement of Rep. Camille “Bud” George from Clearfield County.

Population numbers drove the decision to move the majority of seats from the west. The only regions of Pennsylvania to lose overall population in the 10 years preceding the 2010 Census were the Northwest and Southwest. The greatest loss of population in Western districts¹¹⁷ occurred in districts held by Democrats.

¹¹⁷ Western seats are numbered 1–75, with the exception of seats 13 and 26 (Chester); 18, 29 and 31 (Bucks); 37, 41 and 43 (Lancaster); 47 (York); 53, 61 and 70 (Montgomery); 68 (Bradford/Tioga).

Categories	Population Change 2000 – 2010
Western Republican House Districts	Loss of 6,163
Western Democratic House Districts	Loss of 104,874

The aggregate Western numbers did not tell the whole story. When considering where the greatest population loss had occurred in the west, it became clear that the Southwest Democrats had experienced more aggregate population loss than Northwest Democrats.

Categories	Population Change 2000 – 2010
Northwest¹¹⁸ Democratic House Districts	Loss of 7,732
Southwest¹¹⁹ Democratic House Districts	Loss of 97,142

There were 28 Democratic districts in the Southwest and seven Democratic districts in the Northwest. Five of seven Northwest Democratic seats lost population. Twenty-six of twenty-eight Southwest Democratic seats lost population. Therefore, it was also worth considering the loss of population in Democratic areas attendant to the Southwest.

Democratic districts in the Northwest, but bordering the Southwest, included Districts 9, 10 and 74. All of these districts lost population over the 10-year period preceding the 2011–2012 reapportionment and ended up well below the minimum number to maintain an 8% overall deviation. As such, it was not unreasonable to consider changes to these districts in order to reflect population loss in Southwest Democratic districts.

Ten of eleven Northwest Republican seats lost population. Six of sixteen Southwest Republican seats gained population.

Categories	Population Change 2000 – 2010
Northwest¹²⁰ Republican House Districts	Loss of 16,176
Southwest¹²¹ Republican House Districts	Gain of 10,013

¹¹⁸ Districts 1, 2, 3, 7, 9, 10, 74.

¹¹⁹ Districts 16, 19 – 25, 27, 32–36, 38, 42, 45, 46, 48–52, 55, 58, 71–73.

¹²⁰ Districts 4, 5, 6, 8, 17, 63–67, 75.

¹²¹ Districts 11, 12, 14, 15, 28, 30, 39, 40, 44, 54, 56, 57, 59, 60, 62, 69.

The overwhelming loss of population in all Western Pennsylvania districts (87.5%) occurred in districts held by Southwest Democrats.¹²² Aggregate Republican losses in the Northwest were slightly higher than Northwest Democratic losses (8,444 more losses in Republican Districts); therefore, the Republicans moved a seat from the Northwest. Aggregate Democratic losses in the Southwest (97,142 total loss) had to be compared to Republican gains in the Southwest (10,013 total gain). The 2011 (House) Final Plan reflected these population numbers and moved two Democratic seats from Southwest Pennsylvania. As noted above, this changed in the 2012 (House) Final Plan.

At the request of the House Democratic Leader, in part as a result of the announced retirement of Representative George from the 74th District, the 2012 (House) Final Plan moved District 74 to a Democratic area in Chester County. At the time of the 2011–2012 reapportionment, the 74th lacked sufficient population for a legislative district.¹²³ This was, therefore, a reasonable compromise to address population loss in this area and others adjacent to it.

Since the change in seat movement was in response to the House Democratic Leader's request, as well as reflective of population loss in District 74, the 2012 (House) Final Plan minimized movement in Northwest districts with the obvious exception of District 74. Much of the migration and shift of House district boundaries to reflect this new seat movement occurred in Southwest Democrat districts. As part of the negotiated process, House Republicans did concede to some changes to several Republican districts in the area.

In the end, the 2012 (House) Final Plan had a deviation of 7.88%.¹²⁴ It ranged from a minus 3.94% to a plus 3.94%. As the *Holt II* Court noted, there was “no population equality challenge” raised against the 2012 (House) Final Plan.¹²⁵

B. Compactness and Contiguity

As previously discussed, the Pennsylvania Supreme Court held that there is a certain degree of unavoidable non-compactness in any apportionment scheme.

While the *Holt I* Court cited *Specter*, it also explained that the “Court did not sanction abandonment of the compactness constitutional mandate in favor of a population equality absolute.”¹²⁶ Therefore, the 2012 (House) Final

¹²² Total aggregate population loss in western districts was 111,037. Aggregate loss in districts held by southwestern Democrats was 97,142. 97,142 is 87.5% of 111,037.

¹²³ 58,607.

¹²⁴ District 71 had a population of 65,036 (2,463 over target). District 21 had a population of 60,110 (2,463 under target). See 2011 LEGISLATIVE REAPPORTIONMENT COMM'N, FINAL REPORT OF THE 2011 LEGISLATIVE REAPPORTIONMENT COMMISSION, 27 and n.73 (2014).

¹²⁵ *Holt v. 2011 Legislative Reapportionment Comm'n (Holt II)*, 67 A.3d 1211, 1239 (Pa. 2013).

¹²⁶ *Holt v. 2011 Legislative Reapportionment Comm'n (Holt I)*, 38 A.3d 711, 758 (Pa. 2012).

Plan aimed to improve upon the overall compactness measurements of both the 2001 (House) Final Plan and the 2011 (House) Final Plan.

The average compactness of the 2001 (House) Final Plan was 25.348% (.25348) as measured by the Reock Test.¹²⁷ The average compactness of the 2011 (House) Final Plan, as measured by the Reock Test, improved to 25.407% (.25407). Finally, the average compactness of the 2012 (House) Final Plan improved again, as measured by the Reock Test, to 25.866% (.25866).

To comply with the requirement of contiguity, a person must be able to “go from any point within the district to any other point (within the district) without leaving the district.”¹²⁸

Forty-seven municipalities in the Commonwealth had, at the time of the 2011–2012 reapportionment, precincts which were not physically connected to the rest of the municipality.¹²⁹ Those 47 municipalities were made up of 120 total “parcels,” including the main portion of the municipality. Subtracting the main portion of the municipality (the municipality itself) left 73 of these noncontiguous parcels. They are geographic anomalies, i.e., part of the municipality but geographically disconnected from it. The creation and/or continuation of these geographic anomalies are the result of choices by the affected local governments and their residents.

These geographic anomalies had not caused a concern in prior reapportionments and were not mentioned in the *Holt I* opinion. Nevertheless, there was a concerted effort to eliminate these pre-existing non-contiguities as much as possible without increasing subdivision splits.

The 2011 (House) Final Plan had eight noncontiguous precincts which resulted in eight legislative districts with noncontiguous areas. The 2012 (House)

¹²⁷ [T]he Reock Test . . . first determines the two points on the district’s boundary that are farthest apart and calculates the area of a circle that would have the line between these two points as its diameter. The polygon area of the district is then divided by the area of that circle to produce a ratio between zero (0) and one (1). The closer the ratio is to one, the more compact the district.

In re Colorado General Assembly, 828 P.2d 185, 198 (Colo. 1992) (citing Ernest C. Reock, Jr., *Measuring Compactness as a Requirement of Legislative Apportionment*, 5 MIDWEST J. POL. SCI. 70 (1961).

“Polygon area” is defined by the Commission as “[t]he sum of the areas of all census units (tracts and blocks) assigned to each district.” *Id.* at 198 n.14.

¹²⁸ *Specter v. Levin*, 293 A.2d 15, 23 (Pa. 1972) (citing *Reapportionment*, 79 HARV. L. REV. 1228, 1284 (1966)).

¹²⁹ This number was reported as 48 in Br. of Amicus Curiae for Michael Turzai as a Member of the 2011 Pennsylvania Legislative Reapportionment Commission in Support of Respondent 2011 Legislative Reapportionment Commission, n.22, Aug. 20, 2012. Upon further analysis, the actual number was determined to be 47.

Final Plan had eight noncontiguous precincts¹³⁰ which resulted in seven legislative districts¹³¹ with noncontiguous areas.

A number of the legislative districts with noncontiguous areas in the 2012 (House) Final Plan did not contain any population. The legislative districts with noncontiguous areas contained populations including Taylor Township in Lawrence County, Allentown in Lehigh County, and Lancaster Township and Mount Joy Township in Lancaster County. The total population in these noncontiguous precincts was 68 people.¹³² It is noteworthy that addressing non-contiguity in some of these areas would have created additional municipal splits.

C. Integrity of Political Subdivisions

The Pennsylvania Supreme Court has acknowledged that a certain amount of subdivision fragmentation is unavoidable.¹³³ As explained in the *Albert* case, some “fragmentation is inevitable since most political subdivisions will not have the ‘ideal’ population for a House or Senate district.”¹³⁴

In *Holt I*, the Pennsylvania Supreme Court considered both split subdivisions and “fractures” within those split subdivisions.¹³⁵ This concept of “fractures” was roundly and correctly criticized by the Commission as an over count which artificially inflated the number of splits.¹³⁶

¹³⁰ Taylor, Mount Joy Cloverleaf, East Lampeter 8, Lancaster 8, Manheim 17 and 19, West Brunswick South, Cumru 1, Allentown 17-4 and Birmingham 2.

¹³¹ Districts 10, 37, 43, 97, 124, 128 and 156. Note, in the 2011 Final Plan: Districts 30, 99 and 125 had noncontiguous areas, while district 156 did not have noncontiguous areas.

¹³² The Commission Final Report in 2014 listed the total population of noncontiguous precincts as 45. 2011 LEGISLATIVE REAPPORTIONMENT COMM’N, *supra* note 124, at 29-30. But, it seems the Final Report missed 23 people, including 2 people in block 2015 in Taylor Township, Lawrence County, and 21 people (10 in block 3017 and 11 in block 2037) in Lancaster Township, Lancaster County.

¹³³ “It should also be noted that under any scheme of reapportionment that aims at substantial equality of population, a certain amount of subdivision fragmentation is inevitable.” *Specter*, 293 A.2d at 23. *Accord In re* 1991 Pa. Legislative Reapportionment Comm’n, 609 A.2d 132, 138 (Pa. 1992) (noting that apportioning legislative districts requires “a certain degree of unavoidable non-compactness and a certain amount of subdivision fragmentation [that] is inevitable”); *In re* Reapportionment Plan for Pa. Gen. Assembly, 442 A.2d 661, 666 (Pa. 1981) (citing *Specter*, 293 A.2d at 23).

¹³⁴ *Albert*, 790 A.2d at 993, citing *Specter*, 293 A.2d at 23.

¹³⁵ *Holt I*, 38 A.3d at 753–54, 755 n.37.

¹³⁶ See *Holt II*, 67 A.3d, at 1226. The Legislative Data Processing Center (LDPC) “Total Splits” calculation is based on the actual number of “splits” within a municipality. Each municipality across the Commonwealth is represented by at least one legislative district. If a municipality is represented by one district, there is no split. If a municipality is represented by two districts, there is one split. Three districts result in two splits, etc. Therefore, when counting “Total Splits” within any municipality, it is simply the number of legislative districts minus 1 (the original district). The *Holt* Appellants, based on the calculations in their brief challenging the 2011 Final Plan, counted the first (original) district in any municipality as a “split.” Considering the 2011 Plan, LDPC

Despite improvements over the 2001 Final Plan, the concern expressed was with the “raw number difference in subdivision splits.”¹³⁷ While the Commission was not required to use any alternative proposed plan, the *Holt I* Court made clear that the overall numbers on splits needed to be reduced.¹³⁸ The Pennsylvania Supreme Court rejected “the invitation to set firm parameters” concerning an acceptable number of splits.¹³⁹

1. Split Subdivisions

To add some perspective to the discussion of splits, it is important to keep in mind that a number of municipalities and counties have to be split solely as a product of the math, i.e., they are larger than the maximum size of a legislative district.

Pennsylvania has a total of 2,574 municipalities.¹⁴⁰ Within Pennsylvania, there are seven municipalities that had to be split solely as a product of popula-

calculated 108 split municipalities and 163 total splits. Adding those together (108 + 163), the correct total is 271. The Holt Appellants’ calculation of “Total Municipal Splits” for the 2011 Final Plan was 270. Again, they were simply counting the districts, rather than the “splits.” Using this method of calculation, EVERY municipality in the Commonwealth would have at least one “split” because every municipality is represented by at least one legislative district.

To reiterate:

- LDPC Total Splits = The number of times a county, municipality or ward is “split” between legislative districts, e.g., two districts is one “split.”
- Holt Fractures (Total Municipal Splits) = The number of legislative districts among which a county, municipality or ward is split, e.g., two districts is two “fractures,” one district is one “fracture.”

The *Holt I* Court, assuming the Holt Appellants counted correctly, adopted this inflated “Total Municipal Splits” number and termed it “fractures.” Based on the information submitted at the Commission hearing on the 2012 Preliminary Plan and the subsequent court challenge, it appears this method of miscounting may have been discovered and corrected. See *Holt II*, 67 A.3d, at 1218.

¹³⁷ *Holt I*, 38 A.3d, at 753–54.

¹³⁸ *Id.* at 754 n.35, 756–57.

¹³⁹ *Id.* at 757.

¹⁴⁰ 2,574 was used for reapportionment purposes because it reflected the manner in which counties report municipal boundary lines to the Census. Municipalities which cross county borders are reported individually by each county. For example, Cumberland County only reports to the Census that portion of Shippensburg which is located in the county and does not include the portion of Shippensburg which is in Franklin County. Therefore, the number of municipalities in a reapportionment context may be slightly higher than other sources. While the brief submitted by the Commission in support of the 2011 Final Plan used the number 2,563 (Commission Brief, p. 11), the Final Report of the Commission used 2,574. Final Report, p. 21. The Pennsylvania State Data Center listed the number as 2,562 total municipalities. Pennsylvania State Data Center, *Pennsylvania Facts 2014* (Penn State Harrisburg, 2014).

tion.¹⁴¹ This means that 2,567 municipalities could have been, if considered without reference to any other municipality, wholly contained within a legislative district.

The 2012 House Final Plan split only 61 of these 2,567 municipalities (2.37%).¹⁴² In other words, of the universe of municipalities that *could* be kept whole, only 2.37% were split in the 2012 (House) Final Plan.

Using an 8%¹⁴³ deviation, 40 of Pennsylvania's 67 counties (60%) had to be split solely as a product of population. Many of those had to be split multiple times. Only 10 of the remaining 27 counties (37%) were split in the 2012 (House) Final Plan. In contrast, the 2011 (House) Final Plan split 12 of those 27 counties (44%).

The 2012 (House) Final Plan contained only one split county seat other than those county seats that were split as a result of population, i.e., county seats that had more population than a legislative district. Pottsville, in Schuylkill County, remained split. Pottsville was not, however, a historically unified subdivision. It was split in both the 1980 and 2001 reapportionments. Pottsville Mayor John D.W. Reiley testified at the May 7, 2012, hearing of the Commission that the city was in favor of remaining split between the 123rd and 125th Legislative Districts.¹⁴⁴ Further, four members of the Pottsville City Council sent a letter to the Commission explaining that the split between the 123rd and 125th Legislative Districts "has always worked well for Pottsville" and offered that city residents were "used to this structure, and like how it works."¹⁴⁵

Ostensibly, the Pennsylvania Supreme Court overturned the 2011 House map because of split municipalities. Of the 2,567 municipalities that could be contained in a singular House seat (7 municipalities had to be split due to population), 101 were split in the 2011 House map. That is 3.93% of those 2,567 municipalities. By comparison, there were 2,569 municipalities in 2001, 8 of

¹⁴¹ The seven municipalities are: Philadelphia, Pittsburgh, Allentown, Erie, Reading, Upper Darby and Scranton.

¹⁴² Sixty-eight split municipalities, but seven of those were split as a result of their population. See Br. of Amicus Curiae for Michael Turzai, *supra* note 129, at n.16.

¹⁴³ Or 7.88%. The smallest county which had to be split due to population was Carbon County with 65,249 people. The largest county which did not have to be split was Bradford County with 62,622 people.

¹⁴⁴ "The city of Pottsville has had a rich history of effective representation from the 123rd and 125th Legislative Districts. In addition to successful bipartisan cooperation, dual representation has benefitted the city of Pottsville and the State of Pennsylvania . . . Promoting bipartisan and multi-municipal solutions to local problems has proven successful for Pottsville. Maintaining representation from the 123rd and 125th Districts should continue to be a model for effective governance." (see testimony of Mayor Reiley, at 680-83).

¹⁴⁵ Letter from Mark Atkinson, Councilman, City of Pottsville, Pennsylvania, to Hon. Stephen J. McEwen, Jr., Chairman, Legislative Reapportionment Comm'n (May 1, 2012) (on file with author).

which had to be split due to population, leaving 2,561 municipalities. In the 2001 House map, which was upheld by the Pennsylvania Supreme Court in 2002, 114 of those 2,561 municipalities were split, which meant 4.45% of those municipalities were split. Thus so, there were less percentage splits in 2011 at 3.93% which was overturned than in 2001 at 4.45% which was upheld. Even presuming the relevance of municipal splits when compared to equality of population as a factor, the authors contend that neither the 2001 nor the 2011 municipal split percentage was close to being materially violative of any standard.

The 2012 Final House Plan demonstrated improvement over the 2011 Final Plan (which was remanded) and the 2001 Final House Plan (which was approved) concerning split subdivisions. The numbers are in the table below.¹⁴⁶

	2001 (House) Final Plan	2011 (House) Final Plan	2012 (House) Final Plan
Split Wards	140	130	103
Split Municipalities	122 ¹⁴⁷	108	68
Split Counties	49	52	50

2. Total Splits

The 2012 (House) Final Plan also demonstrated improvement over the 2011 (House) Final Plan and the 2001 (House) Final Plan concerning ward total splits, municipal total splits and county total splits. The Legislative Data Processing Center (LDPC) “Total Splits” calculation is based on the actual number of “splits” within a municipality. In other words, the “Total Splits” count is the number of times a ward, municipality or county is “split” between legislative districts. The numbers are in the table below.¹⁴⁸

	2001 (House) Final Plan	2011 (House) Final Plan	2012 (House) Final Plan
Ward Total Splits	174	169	122
Municipal Total Splits	179 ¹⁴⁹	163	115
County Total Splits	219	232	221

¹⁴⁶ 2011 LEGISLATIVE REAPPORTIONMENT COMM’N, *supra* note 124, at 23.

¹⁴⁷ While LDPC reports list this number as 122, the Commission Final Report in 2014 listed the number as 121. *Id.*

¹⁴⁸ 2011 LEGISLATIVE REAPPORTIONMENT COMM’N, *supra* note 124, at 23.

¹⁴⁹ While LDPC reports list this number as 179, the Commission Final Report filed in 2014 listed the number as 178. *Id.*

The reduction in splits between the 2011 (House) Final Plan and the 2012 (House) Final Plan was negotiated between the House Republican and Democratic Leaders. If the effort at crafting a revised reapportionment plan with bipartisan agreement was to succeed, fundamental fairness in changes had to be the order of the day. While House Republicans took a greater share of the burden on split reduction in the 2012 (House) Final Plan as compared to the agreed-to 2011 (House) Final Plan, it was deemed an acceptable result for a negotiated product.

In its endorsement of the 2012 Final Plan, the *Holt II* Court offered:

We agree with the. . . [Commission] that the number of splits, over and above those numbers which would be inevitable even in the absence of other constitutional factors, is remarkably small Moreover, respecting the point that it may be possible to produce maps with fewer subdivision splits, that circumstance alone proves little, since respect for the integrity of political subdivisions is but one of multiple state constitutional and federal commands that must be accommodated.¹⁵⁰

D. Voting Rights Act

Pennsylvania is covered by Section 2 of the Federal Voting Rights Act. As determined by the United States Supreme Court in *Thornburg v. Gingles*,¹⁵¹ the prerequisites to any challenge to a redistricting plan under Section 2 are:

- a sufficiently large and geographically compact minority population,
- that is politically cohesive, and
- a majority voting bloc which would usually defeat the minority-preferred candidate if the minority population were fragmented.

In short, a Section 2 question arises if a geographically compact minority group¹⁵² would consist of 50% or more of the voting age population in a potential legislative district.¹⁵³ After the *Gingles* prongs are satisfied, the court will

¹⁵⁰ *Holt II*, 67 A.3d at 1240.

¹⁵¹ 478 U.S. 30, 50–51 (1986), made applicable to single-member districts by *Grove v. Emison*, 507 U.S. 25, 40 (1993).

¹⁵² In 2006, the United States Supreme Court stated that while no precise rule governs Section 2 compactness, “inquiry should take into account ‘traditional districting principles such as maintaining communities of interest and traditional boundaries.’” *League of United Latin American Citizens (LULAC) v. Perry*, 548 U.S. 399, 433 (2006), quoting *Abrams v. Johnson*, 521 U.S. 74, 92 (1997).

¹⁵³ *Bartlett v. Strickland*, 556 U.S. 1 (2009); *See Voinovich v. Quilter*, 507 U.S. 146, 153–54 (1993).

consider the totality of the circumstances¹⁵⁴ to determine if a violation of the Voting Rights Act has occurred. Additionally, the United States Supreme Court recently clarified that a “strong basis in evidence” is necessary to pass strict scrutiny when a legislature employs race as the predominant factor in drawing a majority-minority district for Section 2 compliance.¹⁵⁵

The 2012 (House) Final Plan observed traditional redistricting principles¹⁵⁶ and the requirements of the Voting Rights Act to establish: thirteen (13) Majority-Minority African-American Districts; three (3) Majority-Minority Hispanic Districts; three (3) Influence Districts with a combined African-American and Hispanic voting age population of greater than 50%; and three (3) African-American Influence Districts.

VI. A WORD ON ALTERNATIVE PLANS

Winston Churchill offered, “the maxim, ‘nothing prevails but perfection,’ may be spelled paralysis.” This observation is both accurate and applicable to the question of legislative reapportionment. As with Part V, much of the analysis which follows is based on the authors’ own unpublished analysis.

At the 1967-1968 Pennsylvania Constitutional Convention, Delegate Powell pointed out:

¹⁵⁴ The “totality of the circumstances” includes, among other factors, the extent of historical discrimination in voting and in other areas, and the extent to which minorities have been able to elect their chosen candidates anyway. *Gingles*, 478 U.S. at 36–38, 44–45, 79–80. In the legislative history of the 1982 amendments to the Voting Rights Act, the Senate enumerated several factors that might be relevant to an evaluation of challenges made under Section 2. These factors are, “(1) . . . history of racial discrimination; (2) . . . racial vote polarization; (3) . . . (use of) voting practices or procedures that would increase the opportunity for discrimination; (4) whether minority group members had been denied access to a candidate slating process; (5) the extent to which minority group members suffered the effects of discrimination in other areas such as education, which (affected) . . . the political process; (6) whether political campaigns had been marked by racial appeals; and (7) the extent to which minority candidates had been elected . . .”

¹⁵⁵ *Cooper v. Harris*, 137 S. Ct. 1455, 1497 (2017) (quoting *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257, 1274 (2015)); see also *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788 (2017) (same as to VRA Section 5 compliance).

¹⁵⁶ Historically, the Commission’s methodology has been one in which the commission members examine the existing boundary lines for House and Senate members to do the following: Determine the areas in which population has changed over the course of the previous decade; move legislative seats when required given the changes in population; adjust existing lines to accommodate population shifts and equalize representation within acceptable deviations; split municipalities only when absolutely necessary; and, preserve the communities of interest represented by the cores of existing legislative districts. All of these “guideposts” in the LRC’s redistricting methodology are commanded by the State and Federal Constitutions or accepted redistricting practices implicitly authorized in the State Constitution and historical precedent.

The perfect reapportionment plan is impossible to draft. . . . It became obvious, upon actually working on an apportionment plan, that the final result, even in the best plan, will fall far short of perfection. **This will be true regardless of the agency actually responsible for the drafting of the plan.** The greatest difficulty in drafting a good plan lies in the vast amount of information necessary for the . . . best possible districts.

The population statistics are readily available, but use of these figures alone will not provide a good plan. They will not indicate which wards of cities will best combine with adjoining suburbs. They will not indicate which . . . areas of adjacent counties have the greatest community of interest, or which areas within a county have worked and organized together.

This information is available in only one existing governmental body, the legislature. It is the only body in which the peculiar and diverse interests and characteristics of every area of the Commonwealth are represented. It is, therefore, uniquely able to accumulate the information necessary for the preparation of a good plan.¹⁵⁷

The use of the leaders of the majority and minority in each chamber was intended to serve both as an opportunity to harness the voices and statewide expertise of the entire General Assembly and as a check and balance.¹⁵⁸ By forcing the representatives of diverse interests to work together in order to obtain a majority vote, the Commission system requires compromise.

As noted in the *Amicus Curiae* brief submitted to the Pennsylvania Supreme Court on behalf of Commissioner Turzai in August 2012:

¹⁵⁷ 1 DEBATES OF THE PENNSYLVANIA CONSTITUTIONAL CONVENTION OF 1967–1968, at 532 (Feb. 7, 1968) (emphasis added) (providing that although Del. Powell was making this argument in favor of an amendment which would have allowed the entire legislature an opportunity to reapportion the Commonwealth and would only default to a Commission if the legislature could not accomplish the goal in 90 days, the principles he espoused are as applicable to the eventually adopted Proposal No. 2).

¹⁵⁸ See *Holt II*, 67 A.3d at 1223 (citation omitted) (describing a similar argument offered by the Commission in its defense of the 2012 Final Plan, “[c]iting to the same historical source, the LRC further notes the intention behind having partisan leaders from the General Assembly centrally involved in the reapportionment process: ‘The use of the partisan leaders of each [legislative] chamber was intended to serve both as an opportunity to harness the voices of all legislators of both parties through their leaders, and as a check and balance.’”).

Technology has allowed individuals incredible access to information and the ability to process such information. Anyone with a computer and the relevant census data can create his or her own reapportionment plan. In the instant series of cases, numerous Petitioners produced their own privately created reapportionment plans. Some of these private plans attempted to reapportion the entire Commonwealth, while others were limited to localized challenges. . . . However, unvetted plans created by private citizens are not necessarily viable alternatives and should not be treated as such.¹⁵⁹

Comparing those plans to a Commission-produced plan is, procedurally speaking, an apples to oranges comparison. The *Holt II* decision specifically recognized that such plans, which have not been scrutinized in the same fashion as a Commission plan, should not be accorded the same value.¹⁶⁰

Alternative plans are not produced through the legislative process and do not require the cooperation and compromise of Commissioners representing opposing political caucuses.¹⁶¹ These plans do not have the built-in checks and balances of the democratic process. They are neither subject to the notice and comment procedures created by the Pennsylvania Constitution, nor are they subject to the legislative process.¹⁶² They are computerized projections created in a vacuum without reference to the people they affect.¹⁶³

In this light, it is worth reviewing the efforts of some of the alternatives to the Commission process and product, both within the recent Pennsylvania experience and as against a national backdrop.

¹⁵⁹ Br. of Amicus Curiae Michael Turzai, *supra* note 129, at 4.

¹⁶⁰ *Holt II*, 67 A.3d. at 1230–31.

¹⁶¹ *See id.* at 1224 (describing a similar argument offered by the Commission defending the 2012 Final Plan, “[w]ith regard to alternative plans presented by various appellants, the LRC complains that these plans were not subject to public review or comment—they were completely unvetted.”).

¹⁶² Those outside the Commission process can, and sometimes do, change plans on a whim without regard to public input, transparency, hearings or any of the other important milestones observed by the Commission.

¹⁶³ As is discussed in detail in the Commission’s defense of the 2012 Final Plan, each alternative plan appeared to have been created with the drafter’s own self-interested motives in mind. This can be seen by the fact that each plan drew the drafter’s area in the way most favorable to the drafter. The Holt plan reunited the township in which she lived while splitting the neighboring municipality. The Costa plan purported to be politically stronger for Costa appellants. The plans submitted by the Schiffer, Brown and Sabatina Petitioners did the same. Unlike the Commission, these drafters were not forced to defend the motives and biases of their plans. *Holt II*, 67 A.3d. at 1226–29 (discussing the Commission’s criticism of alternative plans) and at 1231 (“The LRC has engaged aspects of the various alternate plans, and in the process has made legitimate points in criticism.”).

A. *No Perfect Plan*

The *Holt II* Court explained that the Commission “has engaged aspects of the various alternate plans, and in the process has made legitimate points in criticism.”¹⁶⁴ The lead appeals to the 2011 Final Plan and 2012 Final Plan were docketed as “Holt.”¹⁶⁵ As this was the primary challenge levelled against the Commission’s plans, it is worth exploring just a few of the ways in which the Revised Holt Plan¹⁶⁶ failed various communities of interest.

As an initial matter, the Revised Holt Plan used a methodology which completely discarded existing legislative and senatorial districts and started the process of reapportioning the Commonwealth from scratch. This “etch-a-sketch” method used in drawing legislative lines discards the communities of interest which historically shaped, and continue to impact, legislative districts. The Revised Holt Plan created “Potemkin Villages”¹⁶⁷ based on the premise that only fewer splits of political subdivisions make for a sound reapportionment plan.

By her own admission, Amanda Holt (the initiator of the appeal which bears her name) set out to develop “an impartial and nonpartisan way to create districts that met the rules.”¹⁶⁸ Therefore, the only considerations when drawing legislative districts, after removing the split in her own municipality and adding a split to the neighboring one, were equal representation within acceptable deviations and a basic understanding of the federal Voting Rights Act. As noted

¹⁶⁴ *Id.* at 1231.

¹⁶⁵ “In the lead appeal docketed at 7 MM 2012 (*Holt*), the appellants describe themselves as individual voters, registered Democrats and Republicans, hailing from Allegheny, Chester, Delaware, Lehigh, and Philadelphia Counties.” *Holt I*, 38 A.3d at 725. “[A]s with the 2011 Final Plan litigation, the lead appeal in the instant matter, captioned *Holt v. LRC* and docketed at 133 MM 2012, was filed by “voters in the Commonwealth of Pennsylvania who live in the Commonwealth’s wards, municipalities, and counties the [2012 Final Plan] split, often multiple times, to form Senate and House of Representatives Districts [which the voters claim was] in violation of Article II, Section 16.” *Holt II*, 67 A.3d at 1217.

¹⁶⁶ Both the *Holt I* and *Holt II* opinions explained that the appropriate parameters of any appeal are tied to that which were available to the Commission. “[W]e will not consider claims that were not raised before the LRC.” *Holt I*, 38 A.3d at 733 (*citation omitted*). “[W]e will not consider claims that were not raised before the LRC.” *Holt II*, 67 A.3d at 1216 (*citations omitted*).

¹⁶⁷ An “impressive façade or show designed to hide an undesirable fact or condition” named after “Gregori Potemkin who supposedly built impressive fake villages along a route Catherine the Great was to travel.” *Potemkin Village*, MERRIAM-WEBSTER ONLINE DICTIONARY, <http://www.merriam-webster.com/dictionary/Potemkin%20village> [<https://perma.cc/C7QL-MEVQ>].

¹⁶⁸ Amy McConnell Schaarsmith, *Lehigh County woman helped upset proposed state reapportionment map*, PITTSBURGH POST-GAZETTE (Feb. 7, 2012), <http://www.post-gazette.com/news/state/2012/02/07/Lehigh-County-woman-helped-upset-proposed-state-reapportionment-map/stories/201202070356> [<https://perma.cc/UN4G-8CV6>].

in the Holt II Petition for Review, Holt “created the Revised Holt Plan in essentially the same manner that she created the Holt Plan addressed in the Court’s prior decision . . .”¹⁶⁹

1. How Coal and a River Shaped Two Legislative Districts

Economic activity, and the culture which surrounds economic activity, often shapes the lives of those in and around it. These factors often create their own communities of interest. Regional pride and identity are often associated with specific economic activities.

In one example, the areas which make up both the 2001-2012 and current 107th Legislative Districts have focused, in large part, on the coal industry. The old (2001-2012) 107th contained 146 coal mining operations. The 107th under the approved 2012 (House) Final Plan contained 148 coal mining operations. Both figures were derived from comparing the information available at the Pennsylvania Spatial Data Access website,¹⁷⁰ with the geographical boundaries of the former and current 107th Legislative districts.

Additionally, the culture and identity of the 107th Legislative District has been, and will continue to be, shaped by this industry. The Anthracite Heritage Festival of the Arts in Shamokin celebrates the region’s association with coal. Whether visiting the Mining Museum in Knoebels Amusement Resort or viewing the remains of the Franklin Furnace, the area’s identity has been forged by this history.

In contrast, the neighboring 108th Legislative District has historically been focused on the economic and cultural draw of the Susquehanna River. From the Sunbury River Festival to the world’s longest inflatable dam at the Shikellamy State Park Marina, the 108th has always been, and continues to be, associated with the Susquehanna.

Understanding these distinctions, the 2012 (House) Final Plan included only four coal mining operations in the current 108th Legislative District. In contrast, the Revised Holt Plan moved the boundaries of the 108th to incorporate 48¹⁷¹ coal mining operations and failed to honor the identity of communities of interest in this area.

¹⁶⁹ Pet. for Review at 14, ¶ 39, *Holt II*.

¹⁷⁰ Pennsylvania Spatial Data Access (Originator, Pennsylvania Department of Environmental Protection), *Coal Mining Operations*, PENNSYLVANIA GEOSPATIAL DATA CLEARINGHOUSE (July 2014), <https://www.pasda.psu.edu/>.

¹⁷¹ In the 2012 (House) Final Plan, 43 of those 48 coal mining operations which the Holt revised plan would have moved to the 108th continue to reside in the 107th, maintaining the economic and cultural identity of the 107th.

2. School Districts

The vast majority of legislative districts drawn in the 2012 (House) Final Plan contained substantial populations of the “old” district (the 2001 Plan) in an effort to maintain a connection based on school districts. While school districts are not afforded the explicit constitutional protection enjoyed by counties, cities, incorporated towns, boroughs, townships and wards,¹⁷² they often form the backbone of the communities they serve. Taking the populations in each school district as they were in the 2001 House Plan and comparing them to both the Revised Holt Plan and the 2012 (House) Final Plan, the 2012 (House) Final Plan did a substantially better job at maintaining these communities of interest in legislative districts.

In the 2012 (House) Final Plan, only 13 legislative districts had more than 50% new school district population when compared to the 2001 lines (this included the 5 legislative districts that were moved due to population changes). Forty-two legislative districts under the 2012 (House) Final Plan contained between 25% and 50% new school district population; and the remaining 148 legislative districts contained at least 75% commonality between the school populations of the old and new districts.

The Revised Holt Plan, however, had 45 legislative districts that contained at least 50% new school district population. Seventy-one legislative districts contained between 25% and 50% new school district population when compared to the 2001 House Plan; and the remaining 87 contained at least 75% of the existing school district population.

The average percentage of new school population in the 2012 (House) Final Plan was 18.72% while new school population in the Revised Holt Plan amounted to 32.83%.

3. Seat Movement

In every redistricting effort since the 1967-1968 Constitutional Convention, the most disruptive consequence of the process has been the movement of seats.¹⁷³ Such movement not only deprives voters of the candidate of their choice, it also has a regional impact in that there may be fewer representatives advocating for a particular area of the Commonwealth.

¹⁷² See PA. CONST. art. II, § 16 (indicating that “[u]nless absolutely necessary no county, city, incorporated town, borough, township or ward shall be divided in forming either a senatorial or representative district”).

¹⁷³ In the 1971 reapportionment, five House seats were moved. Eight House seats were moved in 1981. In 1991, six House seats were moved. 2001 saw four House seats moved.

As previously discussed, the process of House seat movement was negotiated between the Republican and Democratic Leaders of the House. Except for the purpose of accommodating the change in population over the last decade, the 2012 (House) Final Plan did not take away the voters' "candidate of choice." Much like the seat movement in the 2011 (House) Final Plan, all seat movement in the 2012 (House) Final Plan had a direct and substantial relationship to the losses and gains of population in the Commonwealth.

The Revised Holt Plan moved a substantial number of seats away from the communities with which they had long been identified. For the purposes of this analysis, a legislative district was considered "completely moved" if the "new" district and the "old" district shared no population at all; and, a district was considered "substantially moved" if there would be less than 30% common population between the "old" and "new" districts.

Under the Revised Holt Plan, nine legislative districts would have been completely moved; and, another fifteen seats would have been substantially moved from the communities with which they have been associated.¹⁷⁴

The movement of the legislative seats causes great consternation on the part of the electorate and the communities that are served by these legislative districts. For example, multiple news stories were published when one proposed plan included the movement of the 22nd Legislative District from Allegheny County to an area with population growth in the Eastern part of the state.¹⁷⁵ Beyond the multitude of news stories, the proposed movement of the 45th Senatorial District in Allegheny and Westmoreland Counties inspired legal challenges to the 2011 Final Plan by the Senate Minority Leader and (all) sitting Senate Democrats.¹⁷⁶ One can only imagine the voter angst, and the number of appeals that would have been filed to the 2012 (House) Final Plan, had the Commission opted for a redistricting model that dislocated twenty-four House seats from the communities they serve.

B. A Survey of States and the California Citizens Commission

There are four categories of redistricting processes discussed in this section. They include states in which the legislative branch completes their state's redistricting through the traditional legislative process; other states, like

¹⁷⁴ The Holt Revised Plan completely moved the following House Districts: 5, 22, 37, 74, 116, 154, 161, 169 and 197; and substantially moved 21, 31, 54, 73, 104, 115, 123, 124, 133, 134, 138, 172, 174, 178 and 191.

¹⁷⁵ Tom Barnes, *Legislative redistricting map angers Democrats*, PITTSBURGH POST-GAZETTE (Nov. 1, 2011), <https://www.post-gazette.com/news/state/2011/11/01/Legislative-redistricting-map-angers-Democrats/stories/201111010256> [<https://perma.cc/775X-EGCP>].

¹⁷⁶ *Id.*; Br. of Petitioners Senator Jay Costa, et.al, in Support of Petition for Review, Aug. 6, 2012.

Pennsylvania, that utilize a representative sample of the legislature (or their proxies) to accomplish this task (commonly referred to as a “hybrid” commission); one state that has adopted an effort to accomplish redistricting via a “nonpartisan citizens commission”; and, finally, a small group of states which do not fit within the other three methods of redistricting.

Thirty-five states vest the authority to approve their state legislative districts in the legislature¹⁷⁷ Six of those states provide for an “advisory” commission process of some type, where an appointed commission develops a redistricting plan and presents that plan to the legislature.¹⁷⁸ In these states, the legislature is vested with the authority to approve or disapprove the plan and some of these states provide for circumstances under which the legislature can amend the commission’s work product.¹⁷⁹ Two of those states, Connecticut and Maine require a super-majority vote of the legislature.¹⁸⁰ Five of those states provide for a default alternative (i.e. a “backup” commission process) in instances where the legislature fails to pass a plan.¹⁸¹

Some sources have difficulty characterizing the Iowa process for redistricting.¹⁸² In Iowa, a non-partisan legislative staff is tasked with drawing state legislative redistricting plans.¹⁸³ Given that the work product is internal to the legislature, voted upon by the members of the Iowa General Assembly and approved by the Governor, it is most like states in this first category than the other three described herein.

Eleven states have adopted some form of a “hybrid” commission plan, similar to Pennsylvania, for redistricting of state house and senate seats. These

¹⁷⁷ Those states include: Alabama, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, Wisconsin and Wyoming. See *Who Draws the Maps? Legislative and Congressional Redistricting*, BRENNAN CENTER FOR JUSTICE (Jan. 30, 2019), <http://www.brennancenter.org/analysis/who-draws-maps-states-redrawing-congressional-and-state-district-lines> [<https://perma.cc/9AHC-K6L4>]. See also *Redistricting Commissions: State Legislative Plans*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Jan. 21, 2019), <http://www.ncsl.org/research/redistricting/2009-redistricting-commissions-table.aspx> [<https://perma.cc/A46V-ABPT>].

¹⁷⁸ ME. CONST. art. IV, Pt 3, § 1-A; N.Y. LEGIS. LAW §§ 93-94 (McKinney); 2011 R.I. LAWS Ch. 106, § 1, 2011 R.I. LAWS Ch. 100, § 1; VT. STAT. ANN. Tit. 34A, § 1904; VA. Executive Order No. 31 (2011).

¹⁷⁹ *Id.*

¹⁸⁰ CONN. CONST. art. III, § 6a; ME. CONST. art IV, Pt. 3, § 1-A.

¹⁸¹ CONN. CONST. art. III, § 6b; ILL. CONST. art. IV, § 3; MISS. CONST., § 254; OKLA. CONST. art. V, § 11A; OR. CONST. art. IV, § 6; TEX. CONST. art. III, § 28.

¹⁸² *Redistricting Commissions*, *supra* note 177.

¹⁸³ IOWA CODE ANN. §§ 42.2 -42.3.

states include Alaska, Arizona, Arkansas, Colorado, Hawaii, Idaho, Maine, Montana, Ohio, Pennsylvania, and Washington.¹⁸⁴ For purposes of this review, a “hybrid model” is one in which the legislative leaders serve on the commission directly or appoint members to serve on their behalf. The legislative, or legislatively appointed, commissioners typically make up the majority of the commission;¹⁸⁵ who then appoint one or more additional members, one of whom typically serves as chair.

Among those that provide for legislatively appointed, non-legislator commission members, states typically prohibit persons who are public officials from serving and some states provide that commission members be selected from varying geographical areas.¹⁸⁶ Most states which provide for legislatively appointed members, however, do not otherwise limit the pool of potential appointees in any meaningful way. Though vested with the authority to approve plans, two states require their commissions to submit plans to the legislature.¹⁸⁷ In Washington, a plan may be amended by the legislature if two-thirds of each house approves.¹⁸⁸ In Montana, the legislature returns its recommendations to the commission which then produces final maps.¹⁸⁹

There are those that may argue that, because the commission members are non-legislators appointed by legislative leaders, the states of Alaska, Arizona, Idaho, Montana and Washington should be considered “independent commissions” akin to California, detailed below.¹⁹⁰ For purposes of this Article, these states are categorized here as using a “hybrid” method because the appointees arrive at their position by virtue of their party registration and their selection by a legislative leader. These five states effectively adopted a “hybrid commission by proxy” method of redistricting.

¹⁸⁴ ALA. CONST. art. VI, § 8; ARIZ. CONST. art. IV, Pt. 2 § 1; ARK. CONST. art. V, § 1; COLO. CONST. art. V, § 48; HAW. CONST. art. IV, § 2; IDAHO CONST. art. III, § 2; ME. CONST. art. IV, Pt. 3, § 1-A; MONT. CONST. art. V, § 14; OHIO. CONST. art. XI, § 1; PA. CONST. art. II, § 17; WASH. CONST. art. II, § 43.

¹⁸⁵ Alaska is included in this group; however, the legislatively appointed commissioners make up two of the five members (which also includes two gubernatorial appointees and one for the state’s Chief Justice). ALA. CONST. art. VI, § 8.

¹⁸⁶ Arizona’s law, created by ballot initiative in 2000, limits possible appointees from which legislative leaders could choose 10 Republicans, 10 Democrats and 5 persons not registered with either party, who are nominated by the state’s commission on appellate court appointments. ARIZ. CONST. art. IV, Pt. 2 § 1.

¹⁸⁷ WASH. CONST. art. II, § 43; MONT. CONST. art. V, § 14(4).

¹⁸⁸ WASH. CONST. art. II, § 43(7).

¹⁸⁹ MONT. CONST. art. V, § 14(4).

¹⁹⁰ Justin Levitt & Jeff Wice, *All About Redistricting*, LOYOLA LAW SCHOOL, <http://redistricting.lls.edu/who.php> [<https://perma.cc/P486-7J2J>] (2016).

Three states are difficult to categorize as using a “hybrid” commission method for redistricting. In Missouri and New Jersey, the state political parties appoint members to serve on their redistricting commissions.¹⁹¹ New Jersey’s commission, for example, consists of ten members appointed from two political parties.¹⁹² If the ten members are unable to certify establishment and apportionment, then the state Supreme Court Chief Justice appoints an eleventh member to the Commission.¹⁹³ In Arkansas, the Governor, Attorney General and Secretary of State draw legislative districts.¹⁹⁴

Finally, in 2008, California adopted a 14-person, “nonpartisan citizens commission” process. Eight citizens are selected at random from a pool of 20 Democrats, 20 Republicans and 20 electors of other parties.¹⁹⁵ Those eight then select six members from the remaining pool of voters from other parties.¹⁹⁶ The majority and minority leaders of the California House and Senate are empowered to eliminate two nominees from each of the three pools of voters.¹⁹⁷ In the end, the commission consists of five Democrats, five Republicans and four electors who are from other parties.¹⁹⁸

Proponents of citizens commissions typically point to two basic arguments for states to abandon their current process of redistricting in favor of this process. First, proponents argue that California’s process ensures against gerrymandering. Second, a citizens commission would establish legislative districts that would be substantially more competitive than those established under either the legislative or hybrid method of redistricting. The nation’s only true example of a citizens commission, however, indicates that neither goal was realized.

The use of a citizens commission in California demonstrates that even the most nonpartisan process¹⁹⁹ is susceptible to undue influence specifically because such commissions do not have the longstanding, statewide perspective available to a legislative body such as the Commonwealth’s General Assembly.

An article on ProPublica’s website, entitled “How Democrats Fooled California’s Redistricting Commission,”²⁰⁰ outlines the problems. Reviewing e-

¹⁹¹ MO. CONST. art. III, § 2; N.J. CONST. art. IV, § 3, ¶ 1–2; 17 V.S.A. § 1904.

¹⁹² N.J. CONST. art. IV, § 3, ¶ 1.

¹⁹³ N.J. CONST. art. IV, § 3, ¶ 2.

¹⁹⁴ ARK. CONST. art. VIII, § 1.

¹⁹⁵ CAL. CONST. art. XXI, § 2.

¹⁹⁶ Cal. Gov’t Code § 8252(g).

¹⁹⁷ *Id.* at § 8252(e).

¹⁹⁸ *Id.* at § 8252(e)-(g).

¹⁹⁹ The irony of portraying a process as nonpartisan when a commission’s makeup is entirely dependent upon political affiliation (five Democrats, five Republicans and four others) should not be lost on the reader.

²⁰⁰ Olga Pierce & Jeff Larson, *How Democrats Fooled California’s Redistricting Commission*, PROPUBLICA (Dec. 21, 2011), <http://www.propublica.org/article/how-democrats-fooled-californias-redistricting-commission> [<https://perma.cc/V6SW-9N7D>].

mail correspondence and internal memos, as well as interviewing participants in California's redistricting process, the article describes a concerted, and successful, effort by California Democrats to directly influence the work of the Commission. Several quotes from this article describe this effort:

[I]n 2010, California voters put redistricting in the hands of a citizens' commission where decisions would be guided by public testimony and open debate. . . .

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, 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.

In one instance, party operatives invented a local group to advocate for the Democrats' map. . . .²⁰¹

This resulted in a gerrymandered map which did not reflect population growth in Republican areas.

As noted by the delegates who participated in the 1967-1968 Pennsylvania Constitutional Convention, legislators know the communities of interest all across the state and can apply that knowledge to the redistricting process. A citizens commission, attempting to acquire that knowledge in a very short period, is at a substantial disadvantage. As evidenced in California, this inexperience can be detrimental to the voters and can result in significant and severe gerrymanders.

As to the question of whether the California citizens commission created more competitive districts, the answer appears to be, "no." According to the nonpartisan, non-profit organization FairVote, the citizen's commission in California did result in an "unusually high degree of incumbency turnover

²⁰¹ *Id.*

in 2012.”²⁰² Most commentators take note of the 2011 election cycle when arguing in support of the California model.²⁰³ However, FairVote’s analysis revealed that, beyond displacing certain incumbents in the first election cycle after the new districts took effect, “the overall competitiveness of the state’s map has not increased.”²⁰⁴

The organization went on to explain:

In fact, there were exactly as many competitive districts (that is, districts that voted within 3% of the presidential candidates’ national margins) in 2012 as there were in 2008: 5. There were also just as many safe districts (which voted at least 10% more for one candidate than did the nation as a whole) in both elections.²⁰⁵

While the organization was unable to control for shifting voter preferences in their study, the data suggests that the “Citizens Redistricting Commission had no effect on district competitiveness whatsoever. . . .”²⁰⁶

CONCLUSION

The nature of drawing lines, making distinctions or making changes to the settled order is that someone is always going to be upset with the result. This truth underlies any effort at reapportionment. There is no perfect answer. There is no reapportionment plan which, when viewed through the jeweler’s eye, is not weighed, measured, and found wanting in some way.

²⁰² See *Did the California Citizens Redistricting Commission Really Create More Competitive Districts?*, FAIRVOTE (Nov. 26, 2013), <http://www.fairvote.org/did-the-california-citizens-redistricting-commission-really-create-more-competitive-districts> [https://perma.cc/EG2C-MFJ2] (explaining that five incumbents were defeated in the 2012 general election while another nine members of the general assembly chose not to run).

²⁰³ See Steve Westly, *Washington Should Follow California’s Lead on Political Reform*, HUFFINGTON POST (last updated Jan. 23, 2014), http://www.huffingtonpost.com/steve-westly/washington-should-follow-california_b_4269611.html [https://perma.cc/998B-PCYS] (arguing that the rest of the nation should follow California’s lead in its redistricting model); see also Kim Soffen, *Independently Drawn Districts Have Proved to Be More Competitive*, NEW YORK TIMES (July 1, 2015), <http://www.nytimes.com/2015/07/02/upshot/independently-drawn-districts-have-proved-to-be-more-competitive.html> [https://perma.cc/SN3S-JX4G] (comparing Arizona and California’s redistricting initiatives).

²⁰⁴ *Did the California Citizens Redistricting Commission Really Create More Competitive Districts?*, *supra* note 202.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

As noted in the Commission brief and recognized in the *Holt II* opinion, the “other” plans which levelled challenges at the 2012 Final Plan were all subject to legitimate criticism. Each focused on one particular interest or one particular community, whether it was the self-serving plan put forward by one Caucus of the General Assembly or the Holt plan motivated by the desire to put one township back together at the expense of a neighboring municipality. Each started with the premise of benefitting a particular subset of the Commonwealth.

The Commission, as a democratic institution, has proven time and again that it is particularly suited to comprehend all of the various communities of interest across the Commonwealth. In concert with the explicit standards of Article II, § 16 of the Pennsylvania Constitution, it is the Commission process in § 17 which protects us all.