Justice Hasted Is Justice Wasted: *League of Women Voters v. Commonwealth*

Carrie R. Garrison

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Justice Hasted Is Justice Wasted: *League of Women Voters v. Commonwealth*

*Carrie R. Garrison*

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* Carrie Garrison is a current third-year student at Duquesne University School of Law. She received her B.M. in Violin Performance and B.A. in Multiplatform Journalism from Duquesne University. Thank you to my parents for their endless support and to my advisor, Professor Bruce Ledewitz, for his guidance and encouragement.
I. INTRODUCTION

"[T]he way of progress is neither swift nor easy . . . ."1 The Pennsylvania Supreme Court’s near groundbreaking decision in *League of Women Voters of Pennsylvania v. Commonwealth*2 marked another case where the Pennsylvania Constitution gave its citizens vastly broader rights than that of the United States Constitution.3 Indeed, the Court correctly decided that a perfectly gerrymandered congressional districting map was a clear, plain, and palpable violation of the state constitution.4 However, the haste underlying the entirety of the decision limited the impact of the case.5

Almost every aspect of the decision was the product of impatience.6 First, the Pennsylvania Supreme Court exercised extraordinary jurisdiction7 over the case, refusing to wait for the United States Supreme Court’s guidance in *Gill v. Whitford*.8 Then, the Court ordered the Pennsylvania Commonwealth Court9 to complete fact-finding in a mere fifty-three days.10 Lastly, in issuing its remedy, the Court anticipated the legislative and executive branches’ unwillingness to redraw the state congressional districts11 and dictated that, in such circumstances, the Court itself “would fashion a

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3. *See, e.g.*, Commonwealth v. Matos, 672 A.2d 769, 776 (Pa. 1996) (finding rights afforded by the United States Constitution to be inconsistent with the constitutional protections under the Pennsylvania Constitution); Commonwealth v. Edmunds, 586 A.2d 887, 888 (Pa. 1991) (reversing a conviction because under the Pennsylvania Constitution there is no “good faith” exception to the exclusionary rule).
6. *Id.* (explaining the Court’s exigency played a role in the chief justice’s decision to dissent).
7. 42 PA. CONS. STAT. § 726 (2015) (noting the Pennsylvania “Supreme Court may, on its own motion or upon petition of any party, in any matter pending before any court or magisterial district judge of this Commonwealth involving an issue of immediate public importance, assume plenary jurisdiction of such matter at any stage thereof and enter a final order or otherwise cause right and justice to be done”).
11. *Id.* at 821.
justice remedial plan.” Justifying its actions by use of the “imminently approaching primary elections,” and distinguishable precedent from 1966, where the Court gave the legislature nearly a year to redraw the map, the Court ordered the legislature to do an impossible task: redraw the congressional district map in only three weeks. As the Court expected, the legislature could not meet this deadline and the Court redrew the map itself.

The haste of this decision sets dangerous precedent as it endorses blatant separation of powers violations and manifests the state judiciary’s charge into the political thicket. Moreover, the case sets ambiguous precedent as the Court provided only a “floor” of neutral criteria that must be met for such a map to pass constitutional muster. This “floor” provided no “ceiling” to the state legislature which it could use as guidance in redrawing the map.

This article will first lay out the background of important foundational concepts. Then, it will go on to explain the majority and dissenting opinions of the Pennsylvania Supreme Court’s decision in League of Women Voters of Pennsylvania. Finally, it will explain why the haste of the Court was apparent in almost every aspect of this case. From the grant of extraordinary jurisdiction and accelerated fact-finding to the ultimate decision to redraw the map, it is clear that judicial restraint in this inherently political area would have averted most of the controversial aspects of this decision.

12. Id.
13. Id. at 822; see also id. at 791 (noting the primary elections were scheduled for May 15, 2018).
16. League of Women Voters of Pa., 178 A.3d at 823.
18. League of Women Voters of Pa., 178 A.3d at 831 (Saylor, J., dissenting) (noting the inherently political nature of redistricting).
19. Id. at 817 (majority opinion).
20. Id. (noting these neutral criteria are “not the exclusive means by which a violation of Article I, Section 5 may be established”); see also Who Draws the Maps? Legislative and Congressional Redistricting, BRENNAN CTR. FOR JUST. (Jan. 30, 2019), https://www.brennancenter.org/our-work/research-reports/who-draws-maps-legislative-and-congressional-redistricting (noting this information is current as of December 2018).
21. Id. at 834 (Saylor, J., dissenting) (noting the “process [been] an ordinary deliberative one,” he would have been more inclined to agree with the majority opinion).
II. BACKGROUND INFORMATION

A. What Is Gerrymandering and Why Is It Political?

The word “gerrymander” is both a noun and a verb and is derived from the name “Elbridge Gerry,” a former governor of Massachusetts, and the word “salamander,” which describes the shape of an election district formed during Gerry’s time in office. The word carries with it a distinct political meaning: “to divide or arrange (an area) into political units to give special advantages to one group.” In theory, one would expect that districts would be drawn to reflect the distributions of populations, but in practice this process reflects the ideals of the party in charge, thus making it an inherently political process. Indeed, “[b]y its definition, gerrymandering is manipulating district boundaries for political gain of one political party or another.” Parties use techniques such as “cracking” and “packing,” which ultimately dilute an opposing party’s vote by spreading out their supporters among various districts, which they will narrowly lose, or concentrating them into districts, which they will overwhelmingly win, thereby “wasting” the opposing party’s votes. In fact, many scholars describe the process of redistricting as a “bloodsport of politics,” or an opportunity for “political players [to] game the system.”

B. The Difference Between Reapportionment and Redistricting

The terms reapportionment and redistricting are often confused. “Reapportionment is the process of deciding how many seats a state will have in the U.S. House of Representatives when its population

24. Id. (emphasis added).
25. League of Women Voters of Pa., 178 A.3d at 831 (Saylor, J. dissenting) (finding redistricting to have an inherently political character).
The act of reapportionment determines how many of the 435 seats each state receives. After this is done, redistricting takes place, which is the subject of this article. Redistricting involves “drawing maps that divide each jurisdiction into sections (districts) of voters.” This is the process by which new congressional and state legislative districts are drawn.

C. Congressional v. State Redistricting

There are two distinct types of redistricting: congressional and state legislative. The former is the subject of this article. In thirty-seven states, including Pennsylvania, congressional redistricting is the duty of state legislatures. In four states, independent commissions create the congressional districts. In two states, political commissions draw these lines, and in the remaining seven states, congressional redistricting is unnecessary because these states contain only one congressional district each.

State legislative districts are also drawn by differing actors depending on the state. In thirty-seven states, the state legislature draws these districts. In six states, independent commissions draw the lines. In the remaining seven states, including Pennsylvania, political commissions are in charge of creating the state legislative districts. Political commissions vary from state to state but are often comprised of elected officials or incumbent law makers.

33. PUB. AFFAIRS RESEARCH COUNCIL OF LA., supra note 30, at 2.
34. League of Women Voters of Pa., 178 A.3d at 741.
35. PUB. AFFAIRS RESEARCH COUNCIL OF LA., supra note 30, at 1.
37. Id.
38. Id.
39. Id.
40. Id.
41. Id.
42. Id.
43. Id.
44. Id.
D. Federal Redistricting Criteria

When redistricting congressional or state legislative districts, the designated redistricting party must comply with the federal constitutional requirements. These include restraints on population and anti-discrimination. For instance, the “Apportionment Clause of Article 1, Section 2, . . . requires that all districts be as nearly equal in population as practicable.” The Voting Rights Act also “prohibits plans that intentionally or inadvertently discriminate on the basis of race, which could dilute the minority vote.”

In Pennsylvania, the traditional districting criteria include “population equality; contiguity; compactness; absence of splits within municipalities, unless necessary; and absence of splits within counties, unless necessary.” The Pennsylvania Supreme Court used these criteria as an analogy to state legislative districting requirements because the Pennsylvania Constitution was originally interpreted as not providing heightened voter protection. In theory, when drawing the redistricting map, these criteria should be prioritized; however, in practice, the party in charge tries to give itself “a numeric advantage over their opponents” within the bounds of these criteria. This is called partisan gerrymandering.

III. LEAGUE OF WOMEN VOTERS V. COMMONWEALTH

The Pennsylvania Supreme Court was divided when it decided that a gerrymandered congressional map, the 2011 Plan, which favored the Republican Party, was a violation of the Pennsylvania Constitution. The majority held that the 2011 Plan violated the

46. Id.
47. Id.
48. Id.
52. Id.
54. League of Women Voters of Pa. v. Commonwealth, 178 A.3d 737, 825 (Pa. 2018) (showing Justices Donohue, Dougherty, and Wecht joined the majority opinion written by Justice Todd while Justice Baer wrote a concurring and dissenting opinion. Chief Justice Saylor wrote a dissenting opinion, in which Justice Mundy joined, and Justice Mundy wrote a dissenting opinion).
Free and Equal Elections clause of the Pennsylvania Constitution and agreed that, in the legislative and executive branches' failure to act, the Court should redraw the congressional map itself. Two justices, including the chief justice, dissented, primarily noting the rush to overturn the map in time for the “imminent approaching primary elections.”

A. The 2011 Plan

The subject of this case, the 2011 Plan, was enacted on December 22, 2011, following the 2010 federal census which reduced Pennsylvania’s seats in the House of Representatives from nineteen to eighteen. This triggered the creation of new congressional districts, which were tasked to the Republican General Assembly, members of which were elected in the November 2010 general election. Pennsylvania’s congressional districts are drawn by the state legislature and are subject to gubernatorial veto. Thus, the results of the 2010 general election placed the responsibility of drawing the congressional district map in the hands of the Republican majority in the legislature and subject to a Republican governor’s veto, that of Tom Corbett. The map began as a bill, originally receiving some Democratic support, and was eventually passed by the Senate and signed into law as Act 131 of 2011.

B. The Claims

In response to the 2011 Plan, Petitioners filed a complaint on June 15, 2017 in the Pennsylvania Commonwealth Court alleging

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55. See PA. CONST. art. I, § 5; see also Ledewitz, supra note 5 (noting the majority’s four votes “were cast by . . . Christine Donahue, Kevin Dougherty and David Wecht-joined by holdover Democratic Justice Debra Todd . . . Max Baer[] concurred in the judgment, dissenting from the timetable set out in the order and on other grounds.”).
56. Ledewitz, supra note 5 (noting “[t]he Republicans on the Court, Chief Justice Thomas Saylor and Sallie Mundy, both dissented”).
57. League of Women Voters of Pa., 178 A.3d at 822.
58. Id. at 742 (noting a census is taken every ten years, per U.S. CONST. art. I, § 2, and the census reduced the number of people in the House of Representatives, resulting in a need for the congressional district map to be redrawn).
59. Id. at 743.
60. Id.
61. Id. at 742.
62. Id. at 743.
64. League of Women Voters of Pa., 178 A.3d at 744.
two counts of state constitutional violations. Foreshadowing the haste of the Pennsylvania Supreme Court, the Petitioners brought this challenge right before the 2018 primary elections and after six years of being subject to the map. The Petitioners, the League of Women Voters of Pennsylvania and eighteen registered Democrat voters from each of the congressional districts, brought two counts against respondents: Governor Thomas W. Wolf; Lieutenant Governor Michael J. Stack, III; Secretary Robert Torres; Commissioner Jonathan M. Marks and the General Assembly; Senate President Pro Tempore Joseph B. Scarnati, III; and House Speaker Michael C. Turzai, arguing that the 2011 Plan infringed on their right to vote.

In count one, Petitioners argued the 2011 Plan violated their rights under article I, sections 7 and 20 of the Pennsylvania Constitution, the rights to free expression and association. More specifically, Petitioners alleged the General Assembly created the 2011 Plan by “expressly and deliberately consider[ing] the political views, voting histories, and party affiliations of Petitioners and other Democratic voters’ with the intent to burden and disfavor Petitioners’ and other Democratic voters’ rights to free expression and association.” In count two, the Petitioners alleged the 2011 Plan was an unconstitutional partisan gerrymander, violating equal protection under article I, sections 1, 5, and 26 of the Pennsylvania Constitution. Petitioners alleged the Plan intentionally discriminated against Petitioners and other Democratic voters by using “re-districting to maximize Republican seats in Congress and entrench [those] Republican members in power.”

65. Id. at 766.
66. Id. at 791 (noting the primary elections were scheduled for May 15, 2018).
68. League of Women Voters of Pa., 178 A.3d at 737, 741 (stating the eighteen registered Democrats were from each state congressional district).
70. League of Women Voters of Pa., 178 A.3d at 741-42.
71. League of Women Voters of Pa., 178 A.3d at 765.
72. Id. (quoting Petition for Review at ¶ 105, League of Women Voters of Pa., 178 A.3d 737 (No. 159 MM 2017)).
73. Id. at 766.
74. Id. (quoting Petition for Review at ¶ 116, League of Women Voters of Pa., 178 A.3d 737 (No. 159 MM 2017)).
C. The Rush of Discovery

This case involved congressional redistricting, and thus, federal law dictated its base constitutional requirements. The Pennsylvania Supreme Court found, for the first time, that the Pennsylvania Constitution provides heightened requirements for congressional redistricting maps. Before this ruling, the Pennsylvania Supreme Court rejected heightened protection, holding the Pennsylvania Constitution was consistent with federal law in this area. With this precedent in mind, Judge Dan Pellegrini of the Pennsylvania Commonwealth Court granted a stay of proceedings pending the United States Supreme Court’s decision in Gill v. Whitford, which asked the Court for federal criteria by which to judge congressional districting maps. These criteria were particularly important as, before this time, the United States Supreme Court had stated that partisan gerrymandering claims were justiciable but failed to agree on a clear standard for judicial review.

During this stay, the Petitioners filed an application for extraordinary relief with the Pennsylvania Supreme Court, asking for an exercise of extraordinary jurisdiction over the matter. The Court, in its urgency, granted this petition on November 9, 2017 and assumed plenary jurisdiction over the matter while remanding it to the commonwealth court for discovery. This, however, was done without a formal overruling of Erfer, which stated the Pennsylvania Constitution does not provide heightened protection to voters. Moreover, the commonwealth court was given a mere fifty-three days to submit findings of fact and conclusions of law to the Pennsylvania Supreme Court. However, it completed this task in fifty-

75. See Erfer v. Commonwealth, 794 A.2d 325, 331 (Pa. 2002) (stating that the Pennsylvania Supreme Court’s “new view on the justiciability of political gerrymandering claims was predicated on the U.S. Supreme Court’s decision in Davis v. Bandemer, 478 U.S. 109, 126 (1986)”).
77. Id.
79. Id. (remanding Petitioners’ claims of partisan gerrymandering to gather evidence of individualized injuries that would demonstrate burden on particular votes).
80. Bandemer, 478 U.S. at 127.
81. Petition for Extraordinary Relief Law and Legal Definition, USLEGAL, https://definitions.uslegal.com/p/petition-for-extraordinary-relief/ (last visited Feb. 7, 2019) (noting a “Petition for Extraordinary Relief can be filed when there is no other plain, speedy and adequate remedy available to a person”).
82. League of Women Voters of Pa., 178 A.3d at 766.
83. Id.
85. League of Women Voters of Pa., 178 A.3d at 766 (emphasis added).
one days after a four-day nonjury trial. This haste showed in the opinion; the Pennsylvania Commonwealth Court’s fact-finding lacked depth by which to judge the constitutional violation.

The Pennsylvania Supreme Court then reviewed the sparse findings of the commonwealth court and began to analyze the state constitution, hastily accepting the commonwealth court’s conclusion that Erfer should be abrogated. Thus, the Court found for the first time that the Pennsylvania Constitution provides heightened protection to state voters. The Court began its analysis by noting that the Pennsylvania Constitution “was adopted over a full decade before the United States Constitution [and] served as the foundation—the template—for the federal charter.” Additionally, the Pennsylvania Constitution “stands as a self-contained and self-governing body of constitutional law, and acts as a wholly independent protector of the rights of the citizens of [the] Commonwealth.” The Court also foreshadowed the majority’s usurpation of legislative power, stating, “the General Assembly’s police power is not absolute, as legislative power is subject to restrictions enumerated in the Constitution and to limitations inherent in the form of government chosen by the people of [the] Commonwealth.”

Turning next to the language of the Pennsylvania Constitution, the Court found the United States Constitution does not provide this level of protection, stating, “the United States Constitution . . . does not contain, nor has it ever contained, an analogous provision.” The Court found the words of article I, section 5 to be a clear and unambiguous mandate “that all elections conducted in this Commonwealth must be ‘free and equal.’” The Court interpreted this broadly, finding it included all aspects of the electoral process, including “a voter’s right to equal participation in the electoral process for the selection of his or her representatives in government.” This was bolstered by history which indicated that the clause was incorporated into the constitution as part of a framework.

86. Id. at 769 (emphasis added) (explaining that Democratic voters testified at the trial as to their belief that the 2011 plan compromised their ability to elect a candidate who was representative of their interests).
87. Id. at 771 (noting the Pennsylvania Supreme Court did not adopt the fact finding of the commonwealth court, it merely recounted it; this indicates that the fact-finding lacked depth).
88. Id. at 785.
89. Id. at 800.
90. Id. at 802.
91. Id.
92. Id. at 803.
93. Id. at 804.
94. Id.
95. Id. (emphasis added).
to “secure access to the election process by all people with an interest in the communities in which they lived.”

This interpretation was not groundbreaking as the Court first interpreted this clause nearly 150 years ago in *Patterson v. Barlow*. In *Patterson*, the Court held constitutional a legislative act that established eligibility qualifications for electors to vote in all elections held in Philadelphia. Building off this interpretation, the Court found the Pennsylvania Constitution to provide broad protection to the Commonwealth’s voters, noting, “[the Pennsylvania] Constitution gives to the General Assembly the power to promulgate laws governing elections, [but] those enactments are nonetheless subject to the requirements of the Free and Equal Elections Clause of [the Pennsylvania] Constitution.”

The Court then paved the way for its ruling, stating, “any legislative scheme which has the effect of impermissibly diluting the potency of an individual's vote for candidates for elective office relative to that of other voters will violate the guarantee of ‘free and equal’ elections afforded by Article I, Section 5.” Therefore, any congressional district map which dilutes an individual’s vote is a violation of the Pennsylvania Constitution.

**D. The Majority Decision: The Neutral Criteria**

Based on its interpretation of the Pennsylvania Constitution, the Court found that the 2011 Plan “clear[ly], plain[ly], and palpab[ly] subordinat[ed] the traditional redistricting criteria in the service of partisan advantage, and thereby deprive[d] Petitioners of their state constitutional right to free and equal elections.”

The Court reached this decision by developing “neutral criteria” from which to judge the constitutional violation, derived from the Framers’ intent and knowledge of the 1873 Constitutional Convention. These criteria were used both to judge the 2011 Plan’s violation of the Pennsylvania Constitution and to provide guidance to the legislature for future congressional maps.

Relying on tradition, the Court first explained, by analogy, that certain neutral criteria have been utilized to judge state legislative

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96. *Id.* at 807.
98. *League of Women Voters of Pa.*, 178 A.3d at 809 (interpreting *Patterson*, 60 Pa. at 75).
99. *Id.*
100. *Id.*
101. *Id.* at 818.
102. *Id.* at 815.
103. *Id.* at 817.
districts. These criteria “place the greatest emphasis on creating representational districts that both maintain the geographical and social cohesion of the communities.” The Court then applied this to congressional districts, finding that the authors of the Free and Equal Elections Clause, the Framers of the 1790 Constitution, included a contiguous and compact requirement, stating, “[the Framers] included a mandatory requirement therein for the legislature’s formation of state senatorial districts covering multiple counties, namely that the counties must adjoin one another.” This was further confirmed by the 1873 Constitutional Convention where delegates explicitly adopted certain requirements for the purpose of preventing vote dilution through gerrymandering. Relying on this, the Court announced these neutral criteria dictate the “floor” of Pennsylvania constitutional standards, stating:

(1) the population of such districts must be equal, to the extent possible; (2) the district that is created must be comprised of compact and contiguous geographical territory; and (3) the district respects the boundaries of existing political subdivisions contained therein, such that the district divides as few of those subdivisions as possible.

However, the majority conceded that these neutral criteria are “not the exclusive means by which a violation of Article I, Section 5 may be established.” This became a point of contention among the dissenting justices as this holding seemed to omit hidden criteria from which to judge a congressional map and implied that the Court intended to redraw this map, as a remedy, all along.

The Court explained that these neutral criteria prohibit “the use of compactness, contiguity, and the maintenance of the integrity of the boundaries of political subdivisions . . . [to dilute] the strength of an individual’s vote in electing a congressional representative.” Emphasizing the fairness of these criteria, the Court found that this interpretation of the constitution “simply achieves the constitutional goal of fair and equal elections for all our Commonwealth’s voters.” Additionally, this criteria comports with the minimum

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104. Id. at 814.
105. Id.
106. Id. at 815.
107. Id.
108. Id. (citing PA. CONST. of 1874, art. 2, § 16).
109. Id. at 817 (emphasis added).
110. Id. at 827 (Baer, J., concurring and dissenting).
111. Id. at 816 (majority opinion).
112. Id.
standards guaranteed by the United States Constitution.\textsuperscript{113} Thus, the Court adopted the “neutral criteria of compactness, contiguity, minimization of the division of political subdivisions, and maintenance of population equality among congressional districts.”\textsuperscript{114} The endorsement of these criteria was a decision made by the majority in lieu of waiting for the United States Supreme Court’s guidance in \textit{Gill v. Whitford},\textsuperscript{115} which would have dictated the federal requirements. The Pennsylvania Supreme Court could have supplemented these federal requirements with state constitutional requirements. Thus, this is another indicator of the impatience underlying this entire opinion.\textsuperscript{116}

In applying these neutral criteria, the Court relied on the arguments of Petitioners.\textsuperscript{117} The Court found most persuasive the expert testimony of Dr. Jowei Chen,\textsuperscript{118} a scholar in the field of redistricting and political geography.\textsuperscript{119} This testimony detailed two sets of 500 computer-simulated Pennsylvania redistricting plans, which more closely adhered to the neutral redistricting criteria than the 2011 Plan.\textsuperscript{120} This was supported by Dr. Christopher Warshaw’s testimony, an expert in the field of American politics, which found that the districts in the 2011 Plan increased the Republican “advantage to between 15 to 24% relative to statewide vote share.”\textsuperscript{121} This, and other expert evidence,\textsuperscript{122} led the Court to conclude that the 2011 Plan could not, “as a statistical matter, be a plan directed at complying with traditional redistricting requirements.”\textsuperscript{123} Thus, the Court concluded that the 2011 Plan undermined voters’ ability to exercise their right to vote and violated the Free and Equal Elections Clause of the Pennsylvania Constitution.\textsuperscript{124}

\begin{thebibliography}{99}
\bibitem{113} Id. (citing Wesberry v. Sanders, 376 U.S. 1, 18 (1964)).
\bibitem{114} Id. at 817.
\bibitem{116} Ledewitz, \textit{supra} note 5 (finding that the majority’s rush was a result of their decision to apply the map to the 2018 primaries).
\bibitem{117} \textit{League of Women Voters of Pa.}, 178 A.3d at 768, 818.
\bibitem{118} Id. at 768.
\bibitem{119} Id. at 770.
\bibitem{120} Id. (relying on expert testimony that compared the 2011 Plan to computer simulated maps that utilized traditional Pennsylvania districting criteria).
\bibitem{121} Id. at 820.
\bibitem{122} Id. at 820-21 (finding the expert testimony of Dr. Chen and Dr. Kennedy to be the most persuasive).
\bibitem{123} Id. at 820.
\bibitem{124} Id. at 821.
\end{thebibliography}
E. The Remedy

As previously stated, the Court paved the way for its remedy throughout the entire opinion as it dictated a “floor” of constitutional requirements, the neutral criteria, and conceded that these criteria were “not the exclusive means by which a violation of Article I, Section 5 may be established.”125 This statement indicated to the state legislature that there was no “right” way to redraw the map, as part of the criteria by which it would be judged was hidden.126 In this vein, Justice Baer’s proposed standard, a map that demonstrates partisan advantage as the predominant factor is unconstitutional, is clearly better as it lays out exactly what standard should be used to judge a congressional districting map.127

Anticipating the legislature’s inability to redraw the map, the Court issued an order on January 22, 2018 to remedy the unconstitutional map.128 This order invited the legislative and executive branches “to take action, through the enactment of a remedial congressional districting plan.”129 However, in that same order, the Court prematurely indicated that, should the legislature and executive be “unwilling or unable to act,” the Court would draw the map itself.130 This action impliedly said to the legislature that they did not have to agree to a remedial map as the Court was willing to redraw it.131 This also took away power and incentive from the governor, who possesses the power of veto in such instance, because he no longer had the encouragement to cooperate.132 While the Court correctly claimed that legislative and executive action is the “preferred path,”133 the Court found that the “imminent approaching primary elections for 2018” dictated the allowance “for the prospect of a judicially-imposed remedial plan.”134

125. *Id.* at 817.
126. *Id.* at 828-29 (Baer, J., concurring and dissenting).
127. *Id.* at 826 (finding “that extreme partisan gerrymandering occurs when, in the creation of a districting plan, partisan considerations predominate over all other valid districting criteria relevant to the voting community and result in the dilution of a particular group’s vote”).
130. *Id.* (emphasis added).
131. *Id.* (noting the “possibility that the legislature and executive would be unwilling or unable to act” in the compressed time frame).
132. *League of Women Voters Order*, 175 A.3d at 284 (noting the plan has to be approved by the Governor and submitted within twenty-five days of the order).
134. *Id.* at 822.
The Court cited precedent that was distinguishable, primarily *Butcher v. Bloom*, where it “made clear that a failure to act by the General Assembly by a date certain would result in judicial action ‘to ensure that the individual voters of this Commonwealth are afforded their constitutional right to cast an equally weighted vote.’” However, in that case, the judiciary gave the legislature ample time, nearly a year, to redraw the map and exercised judicial restraint, stating:

> [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. 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.

Moreover, in the *Butcher Order*, the Court did not prematurely dictate that it would redraw the map if the legislature failed to do so. Additionally, the *League of Women Voters of Pennsylvania* majority found support for its remedy in *Baker v. Carr*, *Growe v. Emison*, *Scott v. Germano*, and *Wise v. Lipscomb*, stating, “[t]he power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged.” However, the Court correctly noted the “unwelcome obligation” of the judiciary into the political thicket, stating:

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137. *Id.* at 830 (Baer, J., concurring and dissenting).
139. *Id.* at 458-59 (majority opinion).
140. *Id.* (noting the absence of this premature language in this order).
[l]egislative bodies should not leave their reapportionment tasks to the federal courts; but when those with legislative responsibilities do not respond, or the imminence of a state election makes it impractical for them to do so, it becomes the “unwelcome obligation” of the federal court to devise and impose a reapportionment plan pending later legislative action.\(^\text{146}\)

Finally, the Court relied on persuasive authority as support for its ruling, noting, “virtually every other state that has considered the issue looked, when necessary, to the state judiciary to... formulate a valid reapportionment plan.”\(^\text{147}\)

IV. THE COMPETING POSITIONS

A. Justice Baer’s Concurring and Dissenting Opinion

Justice Baer joined several of the majority’s conclusions.\(^\text{148}\) He agreed that the 2011 Plan violated the Pennsylvania Constitution and concurred in the majority’s explanation of the Free and Equal Elections Clause.\(^\text{149}\) However, the justice dissented from the majority’s decision to “impose court-designated districting criteria on the Legislature.”\(^\text{150}\) Further, he disagreed with the majority’s remedy to redraw the redistricting map in the legislature’s failure to do so.\(^\text{151}\)

For Justice Baer, the court-imposed “neutral criteria”\(^\text{152}\) was incorrect and, when applied, violated Article I, Section 4\(^\text{153}\) of the United States Constitution.\(^\text{154}\) Instead, the justice stated he would have held “that extreme partisan gerrymandering occurs when, in the creation of a districting plan, partisan considerations predominate over all other valid districting criteria relevant to the voting community and result in the dilution of a particular group’s vote.”\(^\text{155}\) Further, he claimed these neutral criteria, when applied, violated

\(^{146}\) Id. (quoting Connor v. Finch, 431 U.S. 407, 415 (1977); Wise, 437 U.S. at 540).

\(^{147}\) Id.

\(^{148}\) Id. at 825 (Baer, J., concurring and dissenting).

\(^{149}\) Id.

\(^{150}\) Id. at 826.

\(^{151}\) Id.

\(^{152}\) Id. at 817 (majority opinion).


\(^{154}\) League of Women Voters of Pa., 178 A.3d at 826 (Baer, J., concurring and dissenting) (noting the neutral criteria is in conflict with Article I, Section 4 of the United States Constitution, which concerns the time, matter, and places of elections and does not address the size of shape of districts; thus, the Pennsylvania Constitution criteria created by the majority is in conflict with the United States Constitution as it instructs the legislature as to the “manner of holding elections” (quoting U.S. CONST. art. I, § 4, cl. 1)).

\(^{155}\) Id. (emphasis added).
Article I, Section 4, explaining, "courts lack the authority to prescribe the 'times, places, and manner of holding' congressional elections." The justice also stated that the Pennsylvania Constitution "does not address the size or shape of districts," and, therefore, the "criteria for the drawing of congressional districts [is not appropriate] when the framers chose not to include such provisions despite unquestionably being aware of both the General Assembly's responsibility for congressional redistricting and the dangers of gerrymandering." However, the justice did agree with the majority's position that the Free and Equal Elections Clause protects against the dilution of votes and was therefore violated by the 2011 Plan.

As to the remedy, Justice Baer noted that redrawing the map was unnecessary, stating:

I continue to suggest respectfully that the Court reconsider its decision given the substantial uncertainty, if not outright chaos, currently unfolding in this Commonwealth regarding the impending elections, in addition to the likely further delays that will result from the continuing litigation before this Court and, potentially, the United States Supreme Court, as well as from the map-drawing process and the litigation that process will inevitably engender.

The justice further noted that the legislature does not have a fair opportunity to act as, in this case, it had only twenty-five days to develop a new plan and respond to the majority's argument. He noted that the 2011 Plan itself took a long time to develop, stating, "[w]hile it is true that the Legislature technically enacted the 2011 Plan in two weeks, it is naive to think that the legislators created the map in that short period of time, as opposed to developing and negotiating details of the map over prior months." In fact, the majority observed correctly that the development of the map took at least eight months as hearings for it began in May of 2011.

156. League of Women Voters of Pa., 178 A.3d at 827.
158. Id.
159. Id.
160. Id. at 829.
161. Ledewitz, supra note 5 (emphasis added) (noting that the holding was announced on January 22, 2018 which "directed that if the General Assembly and the Governor could not agree on a new plan by February 15, 2018, the Court would itself draft a congressional redistricting plan.
162. League of Women Voters of Pa., 178 A.3d at 829 (Baer, J., concurring and dissenting).
163. Id. (citing id. at 743 (majority opinion)).
Further, the justice observed that the majority overstepped by preparing for the “possible eventuality that the Legislature cannot act in this compressed time frame.”\textsuperscript{164} He bolstered this claim by explaining that judicial restraint needed to be exercised in this case as it was not necessary for the Court to formulate a redistricting plan.\textsuperscript{165} Further, he noted the time frame given to the legislature was inadequate, stating, “judicial restraint [was needed] to allow [the] legislature a reasonable period of time, which should be measured in months rather than weeks.”\textsuperscript{166} The justice also pointed out that the majority’s reliance on \textit{Butcher v. Bloom}\textsuperscript{167} was unfounded as in that case the Court gave the legislature nearly a year to redraw the map, whereas here the legislature was given only twenty-five days.\textsuperscript{168} This, he stated, may result in “[s]erious disruption of orderly state election processes and basic governmental functions”\textsuperscript{169} and there was potential that even political candidates would be harmed by this rush.\textsuperscript{170}

Justice Baer also raised concerns about due process, finding that the Court’s procedure for drawing the map would allow parties to submit a map without the “ability to respond to alternative plans, potentially by submitting additional evidence or cross-examining witnesses.”\textsuperscript{171} He noted that this remedy did not contain any provision that would allow the parties to respond to the Court’s map, which did not allow for advising of “potential oversights or infirmities in the map itself.”\textsuperscript{172} Thus, Justice Baer found that the Court’s rush to redraw the map raised constitutional concerns.\textsuperscript{173}

\textbf{B. Chief Justice Saylor’s Dissent}

Chief Justice Saylor, joined by Justice Mundy,\textsuperscript{174} dissented from the majority’s decision, specifically noting the decision was the product of haste.\textsuperscript{175} In this dissent, most notably, Chief Justice Saylor explained he would have joined the majority opinion if it had not been the product of rashness, stating:

\textsuperscript{164} Id.
\textsuperscript{165} Id.
\textsuperscript{166} Id. (emphasis added).
\textsuperscript{167} Butcher Order, 216 A.2d 457, 459 (Pa. 1966).
\textsuperscript{168} League of Women Voters of Pa., 178 A.3d at 830 (Baer, J., concurring and dissenting).
\textsuperscript{169} Id. at 831 (quoting Butcher v. Bloom, 203 A.2d 556, 568 (Pa. 1964)).
\textsuperscript{170} Id.
\textsuperscript{171} Id. at 830.
\textsuperscript{172} Id.
\textsuperscript{173} Id.
\textsuperscript{174} Id. at 834 (Saylor, J., dissenting).
\textsuperscript{175} Id. (noting the Court’s acceptance of Petitioners’ “entreaty to proceed with extreme exigency”).
where the present process an ordinary deliberative one, I would proceed to sift through the array of potential standards to determine if there was one which I could conclude would be judicially manageable.\footnote{Id.}

Thus, the chief justice found the majority’s haste to be the main source of contention in this near groundbreaking decision.\footnote{Id.} Additionally, Chief Justice Saylor found the court-imposed neutral criteria “overprotective”\footnote{Id. at 832.} and noted the task of redistricting should have been left to the legislature.\footnote{Id. at 834.}

As to the neutral criteria, the chief justice found these were an overstep, stating, “[it] amount[ed] to a non-textual, judicial imposition of a prophylactic rule.”\footnote{Id. at 832.} Explaining that prophylactic rules may be “legitimate in certain contexts,”\footnote{Id. at 833; see also Thomas G. Saylor, Prophylaxis in Modern State Constitutionalism: New Judicial Federalism and the Acknowledged, Prophylactic Rule, 59 N.Y.U. ANN. SURV. AM. L. 283, 284 (2003).} the chief justice found this to not be such a situation, stating, “[t]he consideration of whether this sort of rule should be imposed by the judiciary upon a process committed by the federal Constitution to another branch of government seems to me to require particular caution and restraint.”\footnote{League of Women Voters of Pa., 178 A.3d at 833 (Saylor, J., dissenting).} Further, the justice noted, these criteria were “overprotective, in that [they] guard[] not only against intentional discrimination, but also against legislative prioritization of any factor or factors other than those delineated in Article II, Section 16, including legitimate ones.”\footnote{Id. at 832.}

Further, the chief justice pointed out that the task of redistricting should traditionally be left to the legislature, noting, “the appropriate litmus for judicial review of redistricting should take into account the inherently political character of the work of the General Assembly, to which the task of redistricting has been assigned by the United States Constitution.”\footnote{Id. at 831.} The justice found this judicial overstep was a result of the majority who “fail[ed] to sufficiently account for the fundamental character of redistricting, its allocation under the United States Constitution to the political branch, and the many drawbacks of constitutionalizing a non-textual judicial

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\footnote{176. Id.}
\footnote{177. Id. (noting he would have agreed with the majority if the legislature “ha[d] been adequately apprised of what [was] being required of it and afforded sufficient time to comply”).}
\footnote{178. Id. at 832.}
\footnote{179. Id. at 834.}
\footnote{180. Id. at 832.}
\footnote{181. Id. at 833; see also Thomas G. Saylor, Prophylaxis in Modern State Constitutionalism: New Judicial Federalism and the Acknowledged, Prophylactic Rule, 59 N.Y.U. ANN. SURV. AM. L. 283, 284 (2003).}
\footnote{182. League of Women Voters of Pa., 178 A.3d at 833 (Saylor, J., dissenting).}
\footnote{183. Id. at 832.}
\footnote{184. Id. at 831.}
rule.”185 In this same vein, the majority’s reliance on Erfer v. Commonwealth186 incorrectly led the Court to “focus on a limited range of traditional districting factors [which allocated] too much discretion to the judiciary to discern violations in the absence of proof of intentional discrimination.”187 This point acknowledged that the Pennsylvania Commonwealth Court did not have enough time to entirely conduct fact finding regarding the issue of intent.188 Thus, the issue of intentional discrimination could not be fully evaluated as a result of the Court’s haste.189

Chief Justice Saylor claimed the majority’s haste was the main error in the decision, stating, “the acceptance of Petitioners’ entreaty to proceed with extreme exigency present[ed] too great of an impingement on the deliberative process to allow for a considered judgement on my part in this complex and politically-charged area of the law.”190 However, the justice found that judicial intervention may sometimes be justified “where a constitutional violation is established based on the application of clear standards pertaining to intentional discrimination and dilution of voting power.”191 He dissented from the majority because he found that situation “is simply not what has happened here.”192

C. Justice Mundy’s Dissenting Opinion

In addition to joining the concerns of Chief Justice Saylor, Justice Mundy wrote her own dissenting opinion.193 Justice Mundy disagreed with the majority’s abrogation of Erfer v. Commonwealth194 and found the majority’s adoption of the neutral criteria undermined its holding.195 If the Court had followed Erfer, the state con-

185. Id. at 834.
187. League of Women Voters of Pa., 178 A.3d at 834 (Saylor, J., dissenting) (emphasis added).
188. Id. at 767, 773 (majority opinion) (noting that the Pennsylvania Supreme Court ordered the Pennsylvania Commonwealth Court to fact-find on an expedited basis and its findings included that partisan intent predominated the district lines; however, this finding was recounted, not adopted, by the Pennsylvania Supreme Court).
189. Id. at 767.
190. Id. at 834 (Saylor, J., dissenting).
191. Id.
192. Id.
193. Id. at 834 (Mundy, J., dissenting).
194. 794 A.2d 325 (Pa. 2002).
195. League of Women Voters of Pa., 178 A.3d at 835 (Mundy, J., dissenting) (noting it is possible to comply with the majority’s neutral criteria and yet still dilute an individual’s vote).
stitution would have been interpreted as providing the same protection to voters as the federal constitution, not more.\textsuperscript{196} Further, Justice Mundy disagreed with the majority’s remedy, joining the concerns of Chief Justice Saylor and the dissent of Justice Baer.\textsuperscript{197} Justice Mundy particularly disagreed with the majority’s decision to strike down the 2011 Plan on the eve of the 2018 midterm election, because it overlooked precedent.\textsuperscript{198} The justice also found the remedy to be unsupported.\textsuperscript{199} Indeed, the justice found that the \textit{Butcher} decision allowed the General Assembly eleven months to redraw the map, which is distinguishable from the twenty-five days given in this case.\textsuperscript{200} Additionally, the justice agreed with Justice Baer’s conclusion that the majority’s remedy was inconsistent when applied to federal law.\textsuperscript{201}

First, as to \textit{Erfer}, the justice opined that “\textit{stare decisis} principles require us to give \textit{Erfer} full effect.”\textsuperscript{202} \textit{Erfer} held that the Free and Equal Elections Clause did not provide any heightened protections to Pennsylvania voters.\textsuperscript{203} Second, the justice noted that the neutral criteria, proposed by the Court, undermined the majority’s conclusion that the 2011 Plan violates the Pennsylvania Constitution.\textsuperscript{204} This is because, as the majority conceded, “it is possible for the General Assembly to draw a map that fully complies with the Majority’s ‘neutral criteria’ but still ‘operate[s] to unfairly dilute the power of a particular group’s vote for a congressional representative.”\textsuperscript{205} Moreover, the majority noted these criteria were \textit{not the entire basis by which to judge a congressional district map}.\textsuperscript{206} Third, the justice disagreed with the remedy imposed by the majority.\textsuperscript{207} While she agreed that the Court had the authority to impose that the legislature redraw the map, she disagreed with the majority’s haste to redraw the map before the upcoming elections.\textsuperscript{208} Noting that precedent dictated waiting to redraw the map, Justice Mundy joined in the concerns of Chief Justice Saylor and Justice Baer.\textsuperscript{209}

\begin{itemize}
\item \textsuperscript{196} \textit{Erfer}, 794 A.2d at 332.
\item \textsuperscript{197} \textit{League of Women Voters of Pa.}, 178 A.3d at 835 (Mundy, J., dissenting).
\item \textsuperscript{198} \textit{Id.} (citing \textit{Butcher v. Bloom}, 203 A.2d 556, 568 (Pa. 1964)).
\item \textsuperscript{199} \textit{Id.} at 835-36.
\item \textsuperscript{200} \textit{Id.} at 836.
\item \textsuperscript{201} \textit{Id.}
\item \textsuperscript{202} \textit{League of Women Voters of Pa.}, 178 A.3d at 835 (Mundy, J., dissenting).
\item \textsuperscript{203} \textit{Erfer}, 794 A.2d at 332.
\item \textsuperscript{204} \textit{League of Women Voters of Pa.}, 178 A.3d at 835 (Mundy, J., dissenting).
\item \textsuperscript{205} \textit{Id.} (emphasis added) (citing \textit{id.} at 817 (majority opinion)).
\item \textsuperscript{206} \textit{Id.} at 817 (majority opinion).
\item \textsuperscript{207} \textit{Id.} at 835 (Mundy, J., dissenting).
\item \textsuperscript{208} \textit{Id.} at 835-36.
\item \textsuperscript{209} \textit{Id.} at 835.
\end{itemize}
Last, the justice agreed with Justice Baer in noting that the majority's remedy was inconsistent with the Elections Clause of the Federal Constitution, noting, “redistricting is a legislative function, to be performed in accordance with the State’s prescriptions for lawmaking.” Further, the justice found that none of the United States Supreme Court cases cited by the majority supported this remedy. In *Scott v. Germano* and *Groue v. Emison* the Elections Clause was not even contemplated. Further, the justice stated the majority’s reliance on *Wise v. Lipscomb* was misplaced because that case involved Texas local districiting which is outside the purview of the Elections Clause.

V. WHO IS RIGHT? THE MAJORITY’S PREMATURITY GOVERNED BY HASTE

As almost every aspect of the majority’s opinion reflects, this decision was the result of haste. This was especially clear, as the dissenting justices correctly noted, in the procedural ruling of the majority. This was marked by the Court’s premature order dictating that, in the legislature’s failure to act, the Court would redraw the map itself. This instruction was a blatant separation of powers violation as it took away power and incentive from the governor and the legislature. By reviewing the separation of powers, as defined by the Pennsylvania Constitution, the political nature of redistricting, and specific aspects of the majority’s opinion, it is clear that judicial restraint in this inherently political area would have averted most of the controversial aspects of this decision.

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211. *Id.* at 837-38.
217. See Ledewitz, *supra* note 5 (finding the rush by the majority was apparent early in the litigation).
218. *League of Women Voters of Pa., 178 A.3d at 830* (Baer, J., concurring and dissenting); *id.* at 834 (Saylor, J., dissenting); *id.* at 835 (Mundy, J., dissenting).
219. See *id.* at 830 (Baer, J., concurring and dissenting).
220. *League of Women Voters Order, 175 A.3d 282, 284* (Pa. 2018) (noting the plan has to be approved by the Governor and submitted within twenty-five days of the order).
221. *League of Women Voters of Pa., 178 A.3d at 834* (Saylor, J., dissenting) (noting had the “process [been] an ordinary deliberative one,” he would have been more inclined to agree with the majority opinion).
A. *Separation of Powers*

The separation of powers in Pennsylvania dictate that judicial power is broad, stating:

The judicial power of the Commonwealth shall be vested in a unified judicial system consisting of the Supreme Court, the Superior Court, the Commonwealth Court, courts of common pleas, community courts, municipal courts in the City of Philadelphia, such other courts as may be provided by law and justices of the peace.222

The Pennsylvania Supreme Court has often confronted issues involving the separation of powers and has articulated the particular powers of each branch, noting, “under the separation of powers doctrine, the legislature’s function [is] to enact laws; the judiciary’s role [is] to interpret the laws; and the executive [is] entrusted to execute the laws.”223 Using this framework, the Court itself has admitted that redrawing a district map “is intended to be a legislative power.”224

B. *The Inherently Political Process*

It is a long-standing principle that “state and federal courts consistently recognize that redistricting is an inherently political process and therefore allow state legislative bodies significant latitude in rendering political decisions with respect to the redrawing of district lines.”225 The Pennsylvania Supreme Court recognized this principle in *Costello v. Rice*, stating, “the courts are not authorized to reapportion legislative districts.”226 Further, in the Pennsylvania Supreme Court’s own words, “the role of the Court in reviewing a reapportionment plan is not to substitute a more ‘preferable’ plan for that of the Commission, but only to assure that constitutional requirements have been met.”227 Additionally, the Pennsylvania State Constitution emphasizes that these districts are to be drawn

222. PA. CONST. art. V, § 1.
by the legislature by placing the criteria for districts in article II, section 16 entitled “Legislative Districts.” 228

The judiciary lacks certain political powers delegated to state legislatures. 229 It is essential to democracy that elected officials conduct these representative processes. 230 As the United States Supreme Court emphasized, redistricting is “committed to the political branch and is inherently political.” 231 Relying on United States Supreme Court precedent, Chief Justice Saylor noted in his dissenting opinion that “redistricting, and concomitant separation-of-powers concerns, warrant special caution on the part of the judiciary in considering regulation and intervention.” 232 The chief justice then cited Colorado General Assembly v. Salazar 233 and Vieth v. Jubelirer, 234 noting that court intervention into the drawing of state lines would “commit federal and state courts to unprecedented intervention in the American political process.” 235

C. Judicial Restraint

While it was not inherently incorrect for the Pennsylvania Supreme Court to redraw the congressional districting map, the Court’s haste in doing so limited the holding of the case. 236 Indeed, the Pennsylvania Supreme Court’s review of the state’s legislative districting scheme was a valid exercise of judicial review. 237 This is something that should be done as the judiciary should be the check on the other branches of government. 238 However, the Court’s premature order dictating that it would be the final creator of the map was an overstep, as the state constitution manifestly committed this to another branch and the precedent relied upon did not support this confined timeline. 239

228. PA. CONST. art. II, § 16 (emphasis added).
230. Id.
232. Id. at 833.
235. Id. (quoting Vieth, 541 U.S. at 306 (Kennedy, J., concurring)).
236. See Ledewitz, supra note 5.
238. League of Women Voters of Pa., 178 A.3d at 786 (finding that the Court provides a “check on extreme partisan gerrymandering”).
239. Stern, supra note 242, at 166.
D. The Majority's Lack of Judicial Restraint

1. The Neutral Criteria

The majority's neutral criteria states that each legislative district should be as compact as possible, however, the standard that the criteria impose would not necessarily be satisfied by compactness as the majority conceded this was not the exclusive means by which to judge a constitutional violation. The Court stated the “neutral criteria of compactness, contiguity, minimization of the division of political subdivisions . . . provide a 'floor' of protection for an individual against the dilution of his or her vote in the creation of such districts.” These criteria would not necessarily be satisfied by a compact district: for example, a district that is compact and contiguous with minimization of division between the political subdivisions would still not necessarily pass constitutional muster. This indicates that the neutral criteria are necessary but not sufficient to protect the right to vote in Pennsylvania.

Thus, it seems that the majority intended to adopt Justice Baer's proposed standards, which are consistent with the Pennsylvania Constitution. Baer's standards require more fact-finding than was allowed in this case, as the Pennsylvania Commonwealth Court was given a mere fifty-three days to fact-find. Justice Baer's criteria would be violated when "partisan considerations predominate over all other valid districting criteria relevant to the voting community and result in the dilution of a particular group's vote." He noted that these criteria are consistent with the Pennsylvania Constitution, which does not address the size or shapes of districts. Thus, these criteria would still allow for the protection of the 2020
2. Abrogation of Erfer

The Court’s abrogation of Erfer\textsuperscript{251} was another indication of its haste.\textsuperscript{252} The majority recounted the conclusions of law and fact submitted by the Pennsylvania Commonwealth Court and among these was the abrogation of Erfer.\textsuperscript{253} The commonwealth court, in its hurry to submit conclusions to the Pennsylvania Supreme Court, found that the tests from Davis v. Bandemer\textsuperscript{254} and Erfer v. Commonwealth\textsuperscript{255} were abrogated by Vieth v. Jubelirer\textsuperscript{256} as a matter of federal law.\textsuperscript{257} While this was a finding of the lower court, the ultimate blame for this brisk abrogation rests on the Pennsylvania Supreme Court, which ordered the commonwealth court to fact-find on an “expedited basis.”\textsuperscript{258} This abrogation was done without any hearing, consideration, or oral argument; it was merely a result of these conclusory findings submitted by the rushed commonwealth court.\textsuperscript{259}

3. The Legislature’s Impossible Task

The majority’s order, a premature indication of their eventual decision to redraw the map, was also a result of haste.\textsuperscript{260} The Court gave the majority a mere twenty-five days to complete the impossible task of redrawing a legislative district map.\textsuperscript{261} Moreover, in the same order, the Court antagonistically indicated it intended to redraw the map itself.\textsuperscript{262} This not only represented a blatant usurpation of the separation of powers principle, but also took away power and incentive from the governor and political parties who realized

\textsuperscript{249} PA. CONST. art. I, § 5.
\textsuperscript{250} League of Women Voters of Pa., 178 A.3d at 827 (Baer, J., concurring and dissenting).
\textsuperscript{251} Erfer v. Commonwealth, 794 A.2d 325 (Pa. 2002).
\textsuperscript{252} League of Women Voters of Pa., 178 A.3d at 813 (noting the Pennsylvania Supreme Court accepted this finding without oral argument or any other formal process).
\textsuperscript{253} Id. at 785 (stating that the Free and Equal Elections Clause did not provide any heightened protections to Pennsylvania voters).
\textsuperscript{254} 478 U.S. 109, 127 (1986).
\textsuperscript{255} 794 A.2d at 332.
\textsuperscript{256} 541 U.S. 267, 289-91 (2004).
\textsuperscript{257} League of Women Voters of Pa., 178 A.3d at 785.
\textsuperscript{258} Id. at 767.
\textsuperscript{259} See id.
\textsuperscript{260} League of Women Voters Order, 175 A.3d 282, 284 (Pa. 2018) (noting the Court anticipated the legislature’s unwillingness or inability to act).
\textsuperscript{261} Id.
\textsuperscript{262} Id.
they did not have to agree on a map because the Court already had decided to redraw it. 263

VI. CONCLUSION

This fragmented decision had the power to set powerful precedent in an area of contention: partisan gerrymandering. 264 However, the Court failed to do so because of its collective haste. 265 This impatience limited the holding of this case and represented the Pennsylvania judiciary’s charge into the political thicket. 266 While the decision was ultimately correct, it is clear that judicial restraint is needed in this inherently political area of the law. 267 Moreover, the Court would have benefitted from judicial restraint, as it would have strengthened the majority opinion and averted the decision’s controversial nature. 268

263. Id. (finding that if the legislature and executive were unable or unwilling to act, the Court would redraw the map itself).
264. See Ledewitz, supra note 5 (noting Chief Justice Saylor’s vote on the majority would have instigated a “candid national conversation about gerrymandering”).
265. Id.
266. Moore, supra note 17, at 124.
267. See League of Women Voters of Pa. v. Commonwealth, 178 A.3d 737, 834 (Pa. 2018) (Saylor, J., dissenting) (noting had the “process [been] an ordinary deliberative one” he would have been more inclined to agree with the majority opinion).
268. Id.