



PENNSYLVANIA'S CONGRESSIONAL REDISTRICTING SAGA

**The Journey From Census To The
United States Supreme Court**

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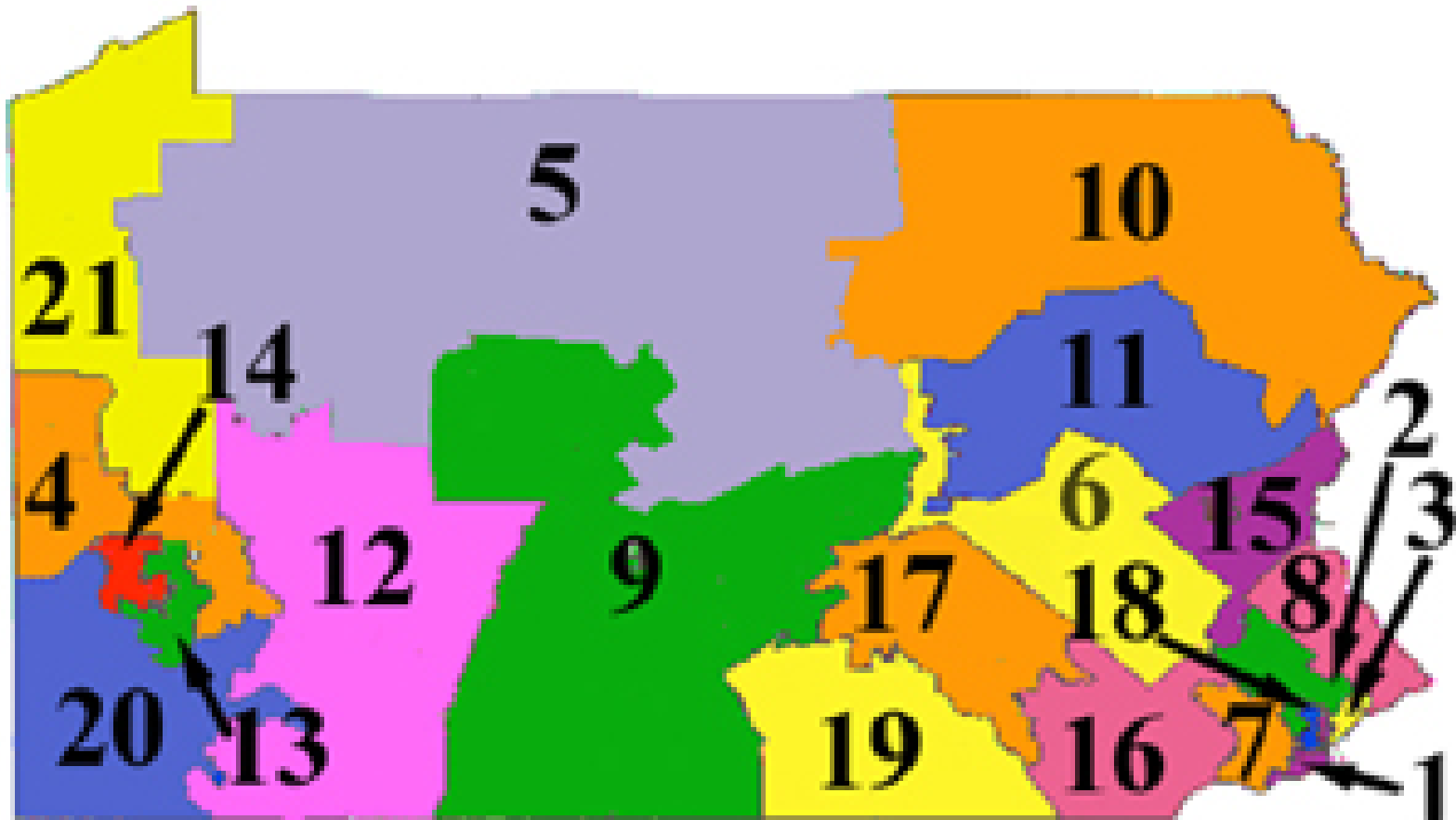
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Pa.'s House Delegation 1992-2000

- During the '90s Pennsylvania had 21 seats in the U.S. House of Representatives.
- During most of the decade, Democrats held 11 seats, Republicans 10.
- In 2000, Republicans won 11 seats, although Democrats received a majority (50.04%) of total votes.



Congressional Districts 1991-2000



Census 2000

- Reapportionment cost PA two seats.
- Big cities, Democrat strongholds, lost population.
- Population shifted into eastward into traditional Republican strongholds.
- Philadelphia could no longer contain the majority of three seats but two majority-minority districts were still viable in Philadelphia area.



Pa. Politics in 2000

- Liberal Democrat won 50.6% of vote for President
- Conservative Republican won 52.4% of vote for US Senate
- In statewide offices, conservative Republican elected Attorney General; liberal Republican elected State Treasurer, & conservative Democrat elected Auditor General
- Republicans strengthened control of state Senate & House
- Democrats had 500,000 more registered voters than Republicans
- Mid-term Governor moderate Republican



Redistricting: whose job?

- U.S.Const., art. I, sec. 4: “The Times, Places and Manner of holding Elections for ... Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations”
- The Constitutional Convention unanimously approved giving states the power.



Founding Fathers: Philosophers or Politicians in Powdered Wigs?

- In 1787, some opposed giving Congress supervisory power over federal elections.
- Madison defended giving Congress supervision, noting that they were giving states the power “so to mould their regulations as to favor the candidates they wished to succeed.”



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- Delegate Elbridge Gerry of Massachusetts:
 - opposed the Constitution because it gave Congress too much power over states.
 - Delegate George Mason of Virginia:
 - wanted the House of Representatives to mirror the people so precisely that even “the diseases of the people shld. be represented.”
 - didn’t get what he wanted and opposed ratification of the Constitution. He said the House was “not the substance but the shadow only of representation . . .”



U.S. House: Mirror of the People?

- Art. I, sec. 2 (House of Representatives) makes compromises:
 - Age and residency requirements.
 - “Three-fifths of a person” rule.
 - Uses state legislative voting requirements.
 - Using state boundaries means unequal district populations: using 2000 census data, there is a difference of 408,413 people between smallest and largest congressional district in US



Redistricting Statutory Law

- Congress has required single member districts since 1842.
- Congress once required districts to be compact and contiguous but abandoned the requirement in 1929.
- Congress has done nothing lately, although bills are often introduced.



Key Cases on Redistricting

- *Reynolds v. Sims* (1964): Substantial equality of population in state legislature's districts. Based on 14th Amendment.
- *Wesberry v. Sanders* (1964): Equality of population in a state's congressional districts. Based on Art. I, sec. 2, not 14th Amendment. Justice Black sees "solemn promise" of equal population in sec. 2. Justice Harlan dissents.
- *Mahan v. Howell* (1973): exact equality in state legislative districts not needed. Subsequent cases say 10% deviation is a safe harbor.



- *Karcher v. Daggett* (1983): state must make good faith effort to achieve absolute population equality in congressional districts, unless it has a good reason. Good reasons include: protecting incumbents, respecting political subdivision boundaries, compliance with the Voting Rights Act, etc.
- *Davis v. Bandemer* (1986): Partisanship is inherent in redistricting, but extreme partisan gerrymandering is justiciable. Standard not defined. Plurality sets high bar: exclusion from political process. Powell & Stevens wanted totality of circumstances test, using “searching and sensitive inquiry.” O’Connor and Rehnquist said it should be non-justiciable.



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- *U.S. Term Limits, Inc. v. Thornton* (1995):
 - Striking down state-imposed term limits on congressional candidates.
 - In *dictum* Justice Kennedy said: “the Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and not . . . to dictate electoral outcomes, to favor or disfavor a class of candidates . . .”
 - *Cf.* Justice Kennedy with James Madison.



Voting Rights Law: The North Carolina Saga

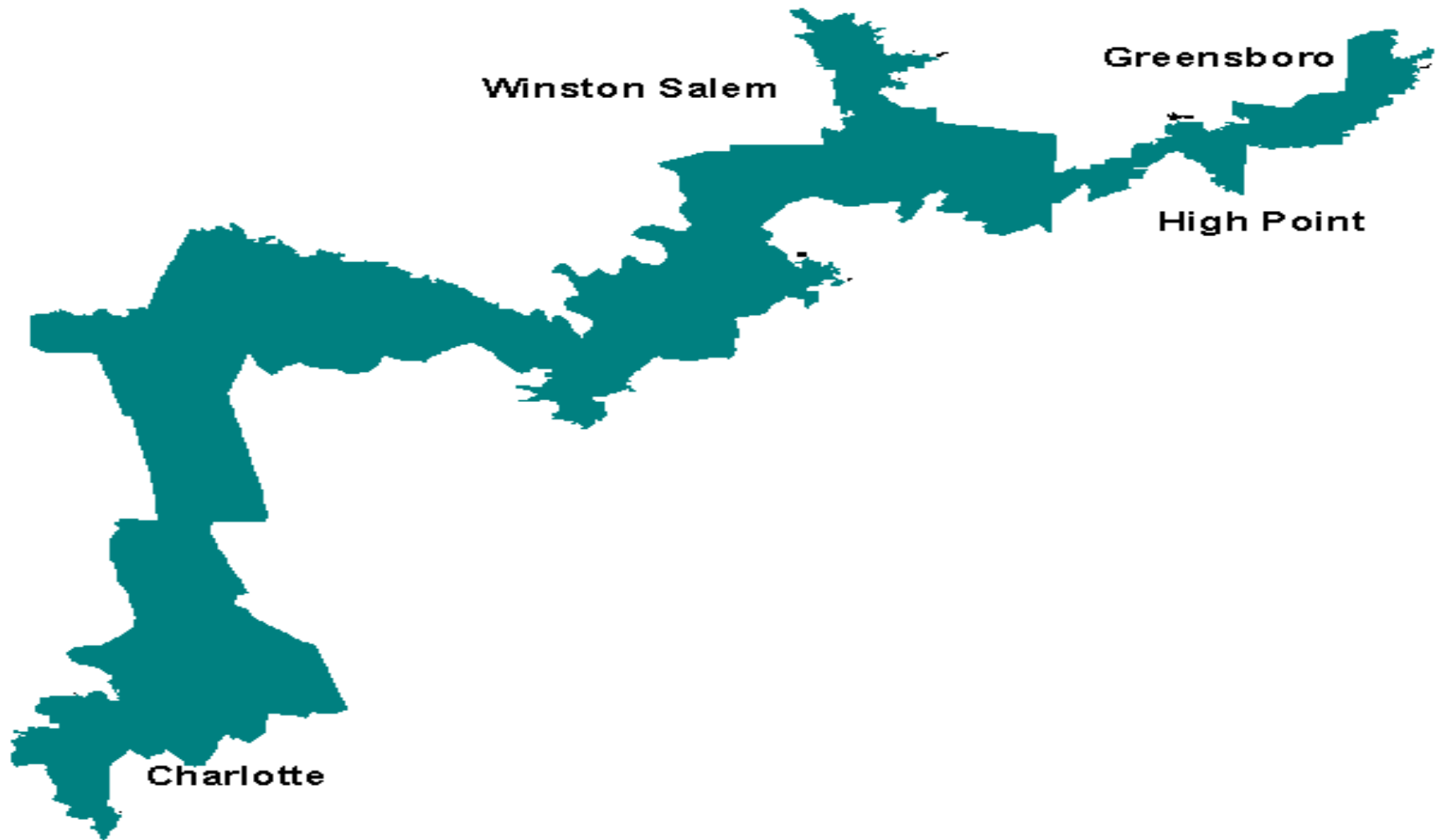
- *Shaw I* (1993), *Shaw II* (1996), *Hunt v. Cromartie* (2001).
- N.Carolina's 12th District snakes through the state. Is it predominantly racially motivated (ergo bad) or partisan motivated (ergo ok)?
- Courts treat legislative intent as question answerable by testimony from legislators.



NC 12th: 1992 Gerrymandered



NC 12th: 1997 Gerrymandered



NC 12th: 1998 Gerrymandered



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- *Easley v. Cromartie* (2001): Finale of the North Carolina Saga. Held:
 - the 12th District was the result of extreme *partisan* gerrymandering and therefore ok.
 - not extreme *racial* gerrymandering and therefore bad,
 - black voters have high partisan fidelity to the Democratic Party.
 - Stevens, Breyer, Ginsberg, Souter and O'Connor in majority.
 - Thomas dissenting, joined by Rehnquist, Scalia and Kennedy.





The Pennsylvania General Assembly's Enactments Related to Redistricting after 2000 Census



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Background: Pennsylvania Precincts

- Pa. has over 9,000 election districts, a/k/a “precincts.”
- Census data are conformed to precinct boundaries.
- Data are then used for state legislative and congressional redistricting.

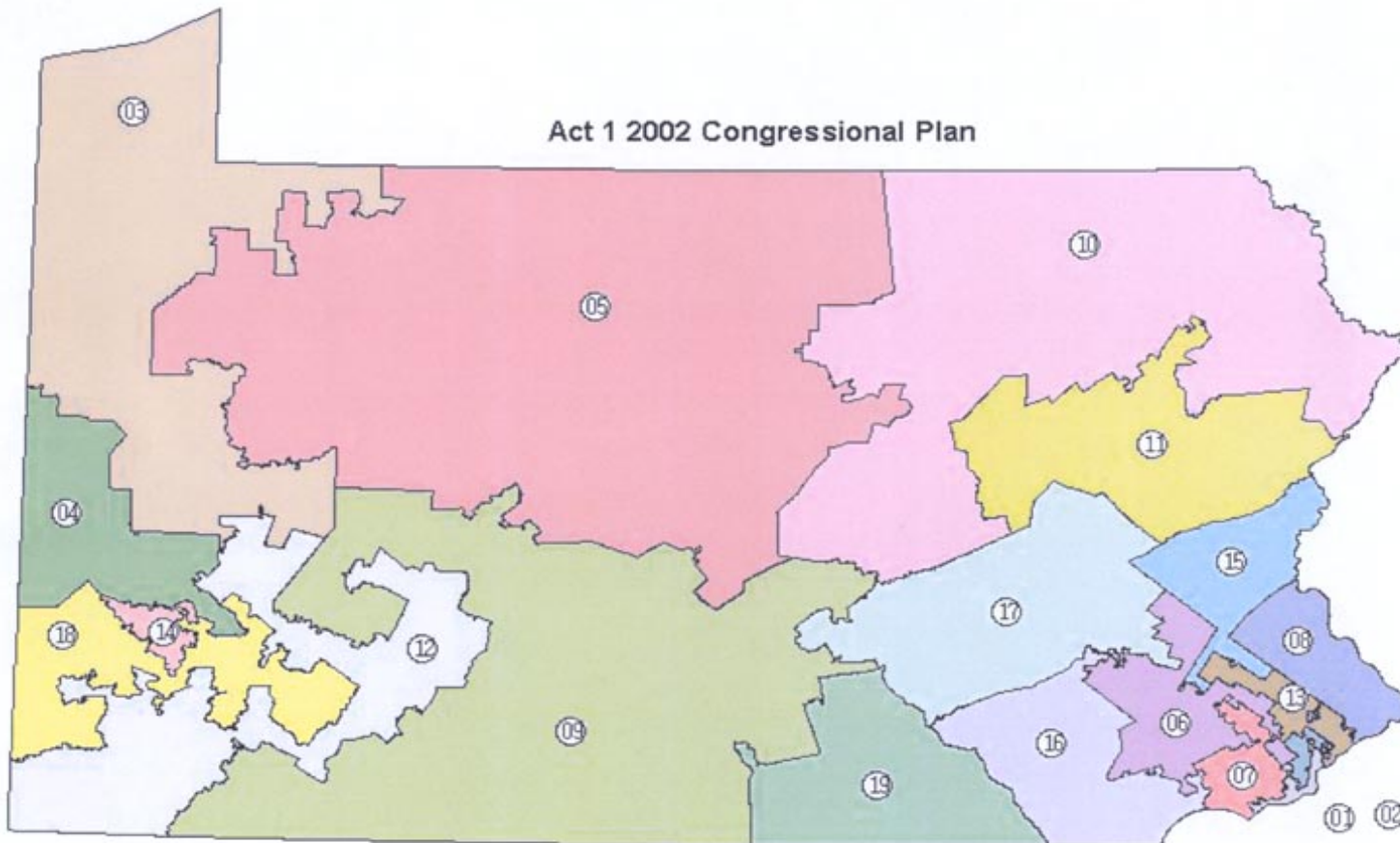


Election Code Provisions re Precincts

- 25 P.S. 2702 allows Common Pleas Courts to divide election districts, but only if “wholly contained within any larger district from which any Federal . . . officers are elected.”
- 1999 amendment enacting 25 P.S. 2746: “there shall be no power to establish, abolish, divide or consolidate an election district during the period from June 1, 2000, through April 30, 2002.”



January 7, 2001: 1st Enacted Plan



The Lawsuits

- State court: claiming state constitutional violations. None found. *Erfer v. Com.* (2002).
- Federal court: claiming one-person, one-vote and gerrymandering.
- Plaintiffs: registered Democrats who usually (but not always) prefer Democrat candidates.
- Federal claims tried before three-judge court, appointed by Chief Judge of Circuit.
- Extended inquiry into sausage-making.



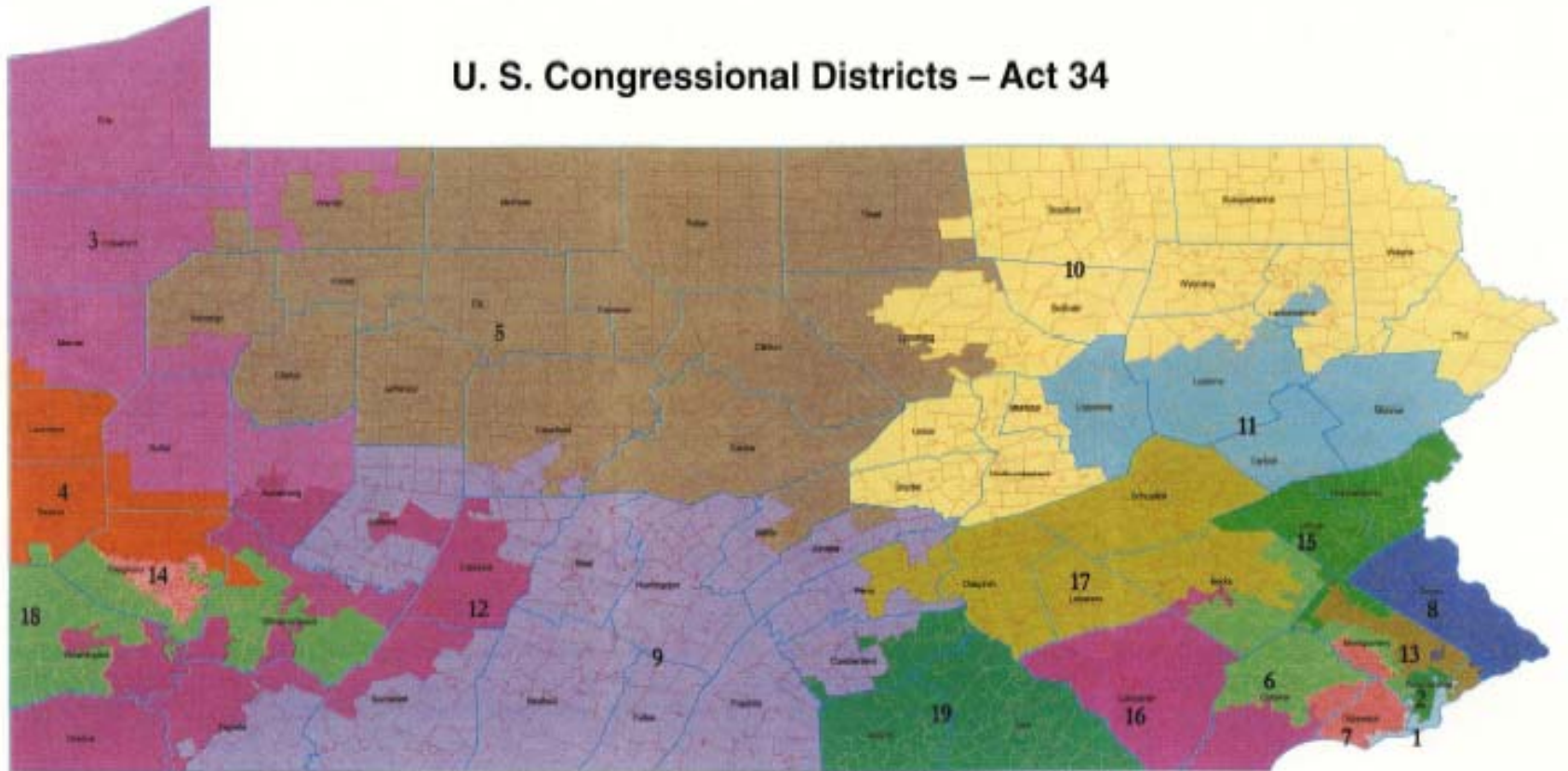
April 8, 2002: District Court Order

- Act 1 has a deviation of 19 persons across congressional districts
- There is no justification for the deviation
- The Court enjoins congressional elections

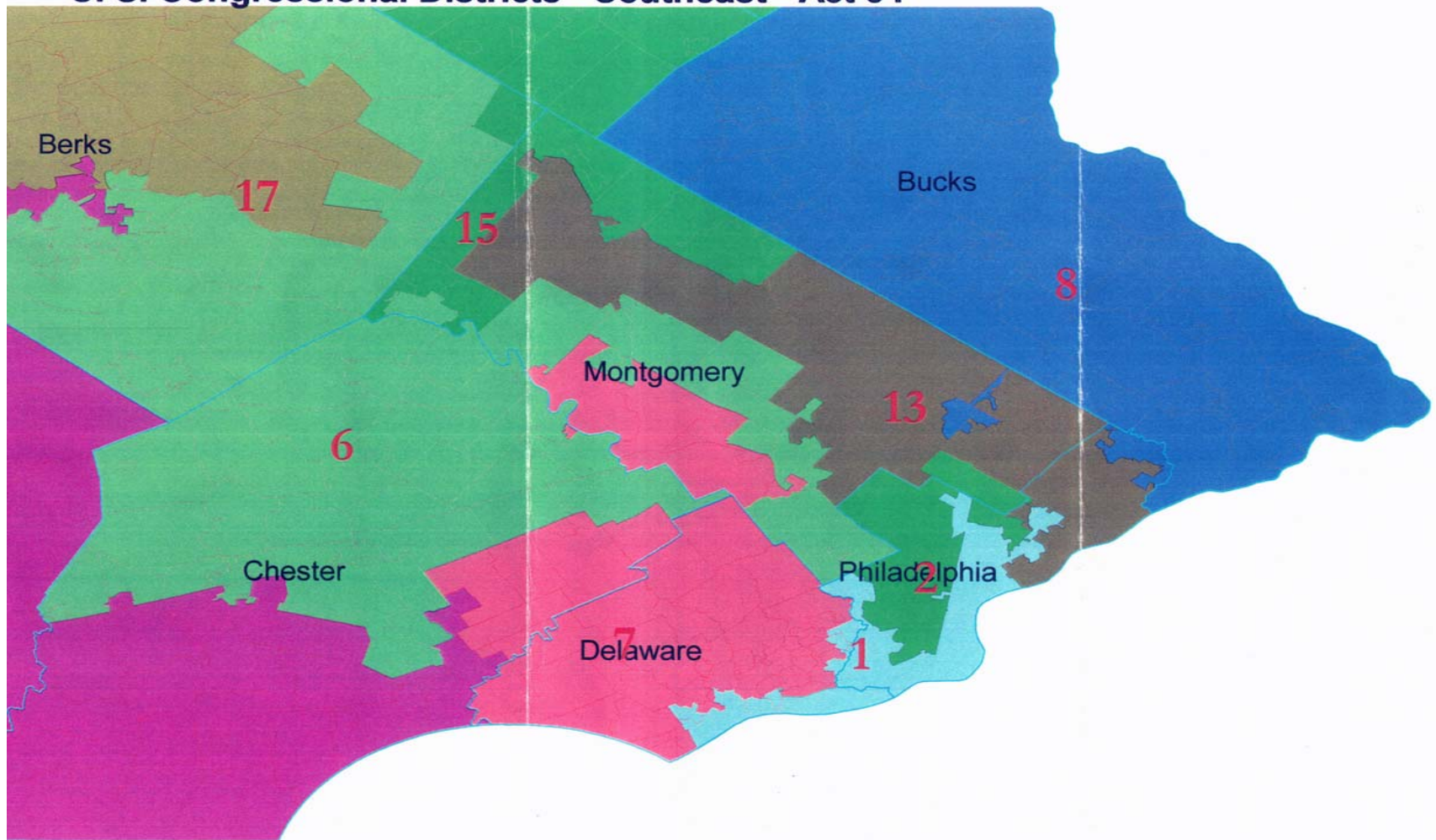


April 17, 2001: 2nd Enacted Plan

U. S. Congressional Districts – Act 34

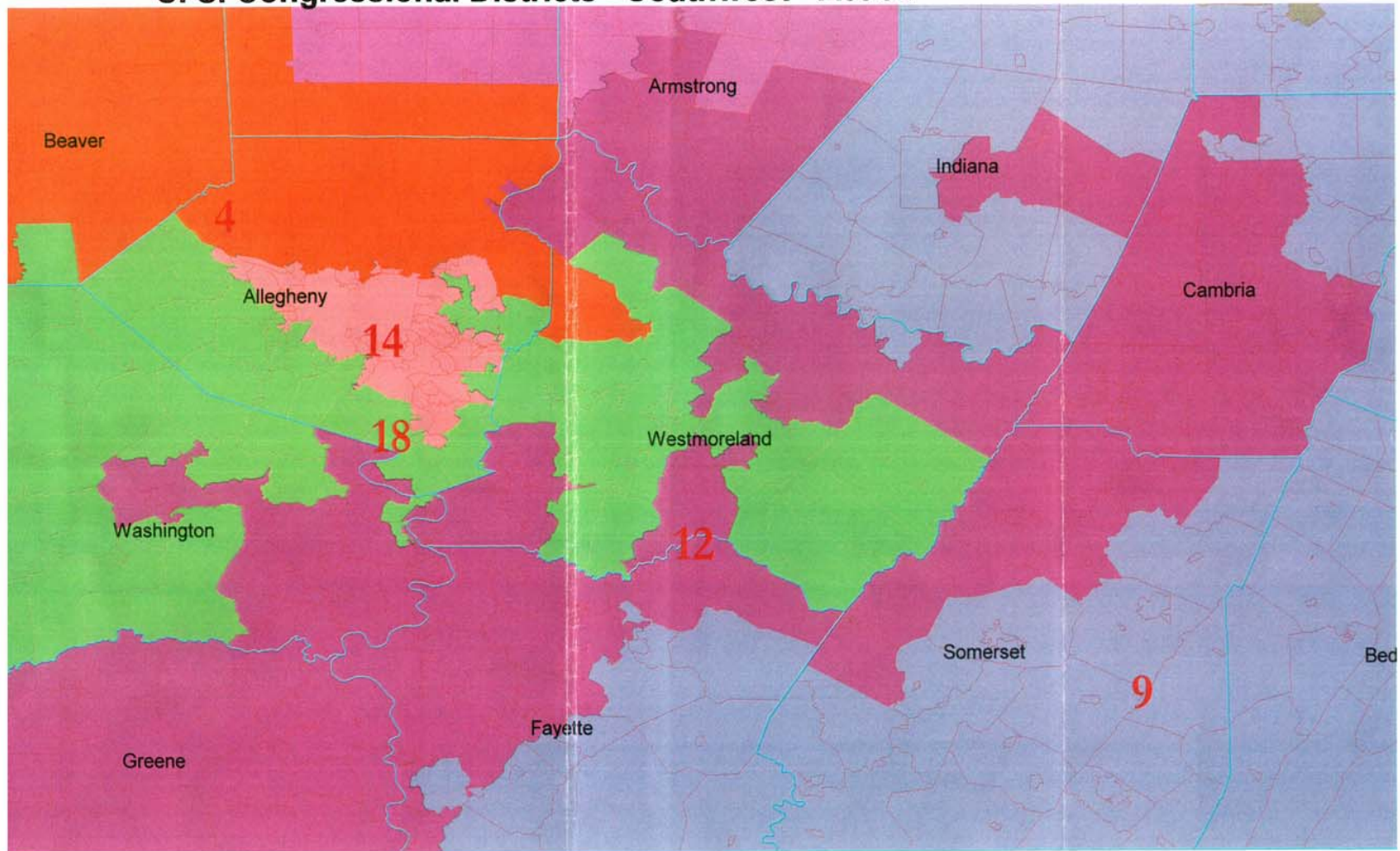


U. S. Congressional Districts - Southeast - Act 34



U. S. Congressional Districts - Southwest - Act 34

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APPENDIX J



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April 23, 2002: Court Stays Injunction

- Act 34 presumptively constitutional
- *White v. Weiser* (1973) (requiring courts to follow legislative policy decisions embodied in plan)
- Court cancels “remedial hearing”
- Fear Factor? Gubernatorial primary might have been delayed by Gen. Assembly



Complications in S. Buffalo Twp.

- Act 1 (and Act 34) split an industrial park in South Buffalo Township, Armstrong County.
- County and local officials wanted all of the industrial part in Rep. Murtha's district.
- The County petitioned Common Pleas to alter the boundary. Granted, March 15, 2002.
- The alteration would have resulted in Act 34 having a 49-person deviation instead of zero.
- The Court and Defendants found out on April 22.



May 16, 2002: Act 44

- Amends Election Code, Section 536.
- Makes clear that there is no power to “alter in any manner” an election district from June 1, 2000, through June 30, 2002 “or through resolution of all judicial appeals to the 2002 congressional reapportionment plan, whichever occurs later.”



May 21, 2002: Primary Election

- Held under Act 1 plan, after Court stayed its injunction, following enactment of Act 34.
- Mayor Rendell defeats Auditor General Casey for Democrat nomination for governor.



December 9, 2002: Act 150

- Adds Section 506 to the Election Code.
- Requires county boards of election to use, as the boundaries of precincts that border congressional or state legislative districts, the precinct boundaries used by the Legislative Reapportionment Commission in its final plan.



January 24, 2003: 3-Judge Court upholds Act 34

- Act 34 is a zero-deviation plan.
- But, even if it weren't, "Act 34, Act 44, and Act 150 represent 'a good faith effort to draw districts of equal population.' *Karcher*, 462 U.S. at 730."
- Reaffirms dismissal of partisan gerrymandering claim, but expresses distaste for failure to use any "neutral" factors in districting.



December 8, 2003: Argument in the U.S. Supreme Court

- Direct appeal *only* on gerrymandering issue.
- But why didn't the Court summarily affirm, like every other case since *Bandemer*?
- Oral argument discloses Justices' positions.
- Precedent not debated. Policy concerns predominate.
- Are there "neutral" principles for redistricting?



May 28, 2004: U.S. Supreme Court Decision in *Vieth v. Jubelirer*

- Scalia, Rehnquist, Thomas, O'Connor: Gerrymandering is nonjusticiable because there is no manageable judicial standard. *Bandemer* should be reversed.
- Kennedy: Nobody has come up with a manageable judicial standard, so Pa. plan is upheld. But maybe someone will come up with a standard someday. Suggests 1st Amendment?
- Stevens: Still likes Powell's test in *Bandemer*. Also, racial gerrymandering cases give standard.



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- Breyer: “Traditional” districting principles not neutral. Politics ok, but gerrymandering that entrenches a minority in power not ok. Test: majority of voters fails once (or twice) to elect majority of seats and no neutral explanation exists.
 - Souter & Ginsberg: Can’t say how much politics is too much, but:
 - “Instead of coming up with a verbal formula for too much, then, the Court’s job must be to identify clues . . . indicating that partisan competition has reached an extremity of unfairness.”
 - Use 5-prong test.
 - Some clues to look at: compactness, political subdivision boundaries, packing, cracking, legislative intent.
 - None of the Justices mention in *Vieth* the holding in *Easley v. Cromartie*.



Aftermath

- Texas case: Texas's legislature redistricted in 2003, after a federal court did it due to legislative gridlock.
 - Republicans took control of the state house in 2002 and didn't like the federal court's plan.
 - The federal court's plan relied heavily on previous districts, created in 1991 by a Democrat gerrymander.
 - Texas legislature relives Pa. process in 1787-1794.
 - New legislative enactment upheld by 3-judge court.
 - On 10/18/04, U.S. Supreme Court vacated and remanded for consideration in light of *Vieth*.



- *Cox v. Larios* (July 2004): summarily affirms district court's invalidation of Georgia state legislature's districts.
 - Districts were within 10% safe harbor, but district court found partisan bias against Republicans.
 - Scalia dissents, would have given full review.
 - Stevens & Breyer concur: “After our recent decision in *Vieth* ... the equal-population principle remains the only clear limitation on improper districting practices, and we must be careful not to dilute its strength. It bears emphasis, however, that had the Court in *Vieth* adopted a standard for adjudicating partisan gerrymandering claims, the standard likely would have been satisfied in this case.”

