

LEGISLATIVE APPORTIONMENT IN NEW JERSEY 2022: A HISTORIC RESULT

*The Honorable Philip S. Carchman**

THE 37TH ANNUAL CHIEF JUSTICE JOSEPH WEINTRAUB LECTURE

RUTGERS SCHOOL OF LAW – NEWARK

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We are joined by Chief Justice Stuart Rabner, Chief Justice Deborah Poritz, Chief Justice James Zazzali, and members of the New Jersey Supreme Court, both past and present; my former colleagues on the bench and bar, Dean Rose Cuison-Villazor, Mr. Omar Barentto; my friends and other guests who are here tonight in person or on the livestream. I want to thank my family for being here and on livestream and especially two of my four grandchildren who are in the audience and my other two on livestream. You all honor me with your presence. I am humbled to join the many extraordinary judges and lawyers who have presented this lecture in the past. I especially want to thank Rutgers Law School, the *Rutgers University Law Review*, and Dean Rob Steinbaum, who has worked tirelessly to bring us to this evening.

As I reflected on this lecture, I came to realize that I am one of a diminishing number of lawyers who have had any direct professional interaction with Chief Justice Joseph Weintraub.

I remember my first encounter well. Just two years out of law school, I had my first opportunity to argue before the Weintraub Court.¹ I recall a specific exchange with the Chief Justice. I was the cross-appellant in a case where the New Jersey Appellate Division had granted relief that, in my youthful view, was contrary to the clear language of the statute. Chief Justice Weintraub called on me to justify my legal position. I answered

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1. *Fosgate v. Strelecki*, 247 A.2d 881 (N.J. 1968), *aff'g* 247 A.2d 489 (N.J. Super. Ct. App. Div. 1968).

earnestly that I was relying on the language of the statute, concluding that this was the law! The Chief leaned forward and advised me in words that resonate with me to this day, “we will tell you what the law is!” Just a few years earlier, I had studied Chief Justice John Marshall’s opinion in the 1803 United States Supreme Court case of *Marbury v. Madison*² and read Chief Justice Marshall’s words saying very much the same thing;³ but it is one thing to read it in a casebook and another to hear it as a stake in the heart of one’s theory of the case. My later appearances before the Weintraub Court were less memorable, but that first encounter remains indelibly etched in my mind.

While my interaction with Chief Justice Weintraub was limited to my appearances before the New Jersey Supreme Court, I would not realize how much influence he would have on my efforts until some fifty or so years later, when I was selected by his successor six times removed,⁴ Chief Justice Stuart Rabner, to serve as the eleventh member of the 2021–22 New Jersey Apportionment Commission.⁵ For it was Chief Justice Weintraub who, through his judicial opinions, not only laid the foundation but also built the structure for the legislative apportionment process that now governs New Jersey’s obligation to fulfill the constitutional mandate of “one person, one vote.”⁶

I have divided this evening’s discussion into two parts. The first part will address a brief history of the Apportionment Commission and the case law that informed the Commission as to what the law is, for I believe to understand the present, we must study the past. For the second part, I will provide a first-person account of my service as the eleventh member of the 2021-22 Legislative Apportionment Commission.

2. 5 U.S. (1 Cranch) 137 (1803).

3. *Id.* at 177 (Chief Justice Marshall stated, “[i]t is emphatically the province and duty of the judicial department to say what the law is”).

4. Chief Justice Rabner’s predecessors after the 1966 constitutional convention were Chief Justice James Zazzali, Chief Justice Deborah Poritz, Chief Justice Robert Wilentz, Chief Justice Richard Hughes, Chief Justice Pierre Garven, and Chief Justice Joseph Weintraub. Chief Justice Arthur Vanderbilt’s service preceded the 1966 constitutional convention, but he was the first chief justice of the modern Supreme Court as newly constituted by the 1947 constitutional convention. *History of Appointments to the New Jersey Supreme Court*, N.J. SUP. CT. VIRTUAL MUSEUM (Apr. 20, 2022), <https://archive.njcourts.gov/courts/supreme/vm/scfamilytree.html>.

5. Press Release, Stuart Rabner, C.J., New Jersey Sup. Ct., Statement of Chief Justice Stuart Rabner on Legislative Apportionment Commission (Oct. 7, 2021), <https://www.njcourts.gov/sites/default/files/press-release/2021/10/pr100721a.pdf>.

6. *Jackman v. Bodine* (*Jackman I*), 205 A.2d 713, 722 (N.J. 1964).

I. THE HISTORY AND THE LAW

Any history of modern legislative apportionment must highlight the judicial oversight that has been the hallmark of the modern New Jersey Supreme Court;⁷ however, a court's role in the process was not always a given. In 1946, United States Supreme Court Justice Felix Frankfurter, in *Colegrove v. Green*,⁸ writing for a three-judge plurality, declared that the federal courts would not venture into the "political thicket" of congressional redistricting.⁹ He urged that "[t]he remedy for unfairness in districting is to secure State legislatures that will apportion properly, or to invoke the ample powers of Congress."¹⁰ According to Justice Frankfurter, the issue was not justiciable and the United States Supreme Court would demur.¹¹ This was despite the fact that the offender State of Illinois had not redistricted in forty-five years.¹² More to our focus tonight, *Colegrove* filed a second action challenging the more malapportioned state legislative districts, and the United States Supreme Court dismissed this second case, *Colegrove v. Barrett*, "for want of a substantial federal question."¹³

Colegrove v. Green would remain the law for thirty-six years until a favorite son of New Jersey, Justice William J. Brennan, Jr.,¹⁴ authored what Chief Justice Earl Warren would later call the most important opinion of his United States Supreme Court tenure,¹⁵ *Baker v. Carr*,¹⁶ rejecting *Colegrove* and concluding that the issue of redistricting was justiciable.¹⁷ The genius of Justice Brennan was that he deferred the

7. Throughout this Article, I refer to both the United States Supreme Court and the New Jersey Supreme Court. For ease of reference, any reference to "Supreme Court" or "Court" refers to the New Jersey Supreme Court. References to the United States Supreme Court will be specific to that court.

8. 328 U.S. 549 (1946).

9. *Id.* at 556.

10. *Id.*

11. *Id.* ("The Constitution has many commands that are not enforceable by courts because they clearly fall outside the conditions and purposes that circumscribe judicial action.")

12. *Id.* at 567 (Black, J., dissenting).

13. 330 U.S. 804, 804 (1947) (per curiam).

14. Justice Brennan served on the New Jersey Supreme Court until his appointment to the United States Supreme Court in 1956. KIM ISAAC EISLER, *THE LAST LIBERAL: JUSTICE WILLIAM J. BRENNAN, JR. AND THE DECISIONS THAT TRANSFORMED AMERICA* 71, 86–87 (2003).

15. *Id.* at 168.

16. 369 U.S. 186 (1962).

17. *Id.* at 237 ("We conclude that the complaint's allegations of a denial of equal protection present a justiciable constitutional cause of action upon which appellants are entitled to a trial and a decision. The right asserted is within the reach of judicial protection under the Fourteenth Amendment.")

discussion of standards to be applied in the redistricting process to future courts.¹⁸ But the die was cast. Other United States Supreme Court cases soon followed, including *Wesberry v. Sanders*,¹⁹ decided in 1964, where Justice Hugo Black, declared that Article I required “as nearly as is practicable one man’s vote in a congressional election is to be worth as much as another’s.”²⁰ A few months later in June 1964, Chief Justice Earl Warren wrote in *Reynolds v. Sims*²¹ that the obligation to redistrict applied to state legislatures as well as congressional districts; he observed: “[l]egislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests.”²²

The issue of justiciability of reapportionment was not new to the New Jersey Supreme Court. Even before the United States Supreme Court had overruled *Colegrove* in *Baker v. Carr*,²³ the issue of the nineteen-year failure of the legislature to reapportion General Assembly seats was before the court in *Asbury Park Press, Inc. v. Woolley*, decided in 1960.²⁴ Justice John Francis observed that when a sacred right is transgressed by legislative action, the final decision as to the invalidity of such action rests with the courts.²⁵ He had previously observed the “department has imposed [sic] upon it the solemn duty to interpret the laws in the last resort. However delicate that duty may be, we are not at liberty to surrender, or to ignore, or to waive it.”²⁶

It would not take long for Chief Justice Weintraub and the Court to advise the legislature and the public as to “what the law is.” Even before

18. *See id.*

19. 376 U.S. 1 (1964).

20. *Id.* at 7–8.

21. 377 U.S. 533 (1964).

22. *Id.* at 562.

23. *Baker*, 369 U.S. at 186.

24. 161 A.2d 705, 707 (N.J. 1960).

25. *See id.* at 710.

But when legislative action exceeds the boundaries of the authority delegated by the *Constitution*, and transgresses a sacred right guaranteed to a citizen, final decision as to the invalidity of such action must rest exclusively with the courts. It cannot be forgotten that ours is a government of laws and not of men, and that the judicial department has imposed [sic] upon it the solemn duty to interpret the laws in the last resort. However delicate that duty may be, we are not at liberty to surrender, or to ignore, or to waive it. The authority and the duty to act when our jurisdiction is invoked in cases like the present, in the words of Chief Justice Beasley in *State v. Rogers* . . . is ‘so entirely established as not to be debatable.’ And as the present Chief Justice said in *Village of Ridgefield Park v. Bergen Co. Bd. of Taxation* . . . when it is regularly invoked we cannot ‘properly look the other way.’ *Id.* at 710–11 (emphasis added).

26. *Id.* at 710. Of particular interest, the Court did not determine the remedy to be applied but deferred to the legislature to address the issues explored in the opinion. *See id.* at 715–16.

Reynolds was decided, the issue of the constitutionality of New Jersey's legislative scheme, and particularly the apportionment of one senator to each county, was squarely before the court.²⁷ A lawsuit had been instituted claiming that this constitutional allocation violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.²⁸ After the Chancery Division rejected the claim, the New Jersey Supreme Court certified the case before consideration by the Appellate Division.²⁹ While it was pending, *Reynolds* was decided,³⁰ and the Court moved quickly.

As with so many of Chief Justice Weintraub's judicial opinions, his seminal opinion in *Jackman v. Bodine (Jackman I)*³¹ was succinct and to the point. The New Jersey constitutional scheme of one senator for each county without regard to population was unconstitutional.³² And what about the General Assembly? The Chief Justice disposed of the issue directly.³³ Relying on the United States Supreme Court decision in *Lucas v. Forty-Fourth General Assembly of Colorado*,³⁴ he declared that if one house of the legislature is malapportioned "the deficiency vitiates the entire legislative structure," and both houses of the legislature would need to be reapportioned.³⁵

27. See *Jackman I*, 205 A.2d 713, 714–15 (N.J. 1964).

28. Within weeks of the United States Supreme Court decision in *Baker v. Carr*, Christopher Jackman of Hudson County and Winfield Chasmar, Jr. of Essex County filed an action in the New Jersey Superior Court, Chancery Division, against John M. Bodine, the County Clerk of Warren County, and others, asserting that the New Jersey Constitution's provisions apportioning the State Senate as well as the General Assembly discriminated against residences of more heavily populated counties because it disregarded population, land area, and economic interests, constituting an arbitrary and irrational plan of representation. The trial judge, Morris Pashman, who would later serve as a Justice of the New Jersey Supreme Court, rejected plaintiffs' arguments and dismissed the lawsuit. See *Jackman v. Bodine*, 188 A.2d 642, 643, 651–52 (N.J. Super. Ct. Ch. Div. 1963).

29. See *Jackman I*, 205 A.2d at 715.

30. *Reynolds v. Sims*, 377 U.S. 533 (1964).

31. *Jackman I*, 205 A.2d at 713.

32. See *id.* at 724–26.

33. See *id.* at 715–16.

34. *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713, 735 (1964).

35. *Jackman I*, 205 A.2d at 717.

If the Senate is malapportioned, we need not consider whether the General Assembly could pass muster. In *Lucas*, the [United States] Supreme Court held that if one house is malapportioned, the deficiency vitiates the entire legislative structure, obviating the need for considering whether the second house could withstand an attack upon it if it were the sole legislative body. The reason is that a court cannot fairly assume the people would have intended the one house to survive as the lone repository of the legislative power. Hence, if the Senate is fatally constituted, an expression by us upon the General Assembly would be wholly advisory, there being no remedial proposal before us continuing a legislative body structured as is the General Assembly.

After disposing of the merits, the Chief Justice addressed the remedy.³⁶ He observed that the apportionment must be accomplished through the legislature, cautioning that “the prescription of a [new] plan of apportionment is laden with political controversy from which the judiciary cannot be too distant.”³⁷ He discussed alternative solutions pressing the legislature to consider a constitutional convention, observing that exigencies allowed the convention to be convened without the seemingly required legislative vote,³⁸ and then he applied the coup de gras as to the timing of this effort. An interim legislature was established to comply with the New Jersey Supreme Court’s mandate, but the legislature had no choice but to convene the constitutional convention of 1966.³⁹ The Court would not yield oversight; it retained jurisdiction to resolve future disputes.⁴⁰ In fact, there would be eight opinions in *Jackman v. Bodine*⁴¹ addressing myriad issues that required resolution. Six of the opinions were per curiam; the only signed opinions—*Jackman I* and *Jackman VIII*—were authored by the Chief Justice.⁴²

The work of the convention is a lecture unto itself. The late Rutgers Professor Ernest Reock’s history of the convention⁴³ reveals that a number of contentious issues dominated the deliberations: would New Jersey have a bicameral versus a unicameral legislature; what would be the size of each legislative house; would the districts be multi-member or single member.⁴⁴ Initial reapportionment remained unresolved until the convention agreed to a compromise fashioned in part by a delegate,

Id. (emphasis added) (citation omitted).

36. *See id.*

37. *Id.* at 724.

38. *Id.* at 724–76. Chief Justice Weintraub observed that the New Jersey Constitution is silent with regards to calling a constitutional convention but noted that the legislature had done so before. *Id.* at 724.

39. *See* ERNEST C. REOCK, UNFINISHED BUSINESS: THE NEW JERSEY CONSTITUTIONAL CONVENTION OF 1966, at 23–26, 30–31 (2003).

40. *Jackman I*, 205 A.2d at 724.

41. *See, e.g., id.* at 713; *Jackman v. Bodine (Jackman II)*, 205 A.2d 735 (N.J. 1964) (per curiam); *Jackman v. Bodine (Jackman III)*, 208 A.2d 648 (N.J. 1965) (per curiam); *Jackman v. Bodine (Jackman IV)*, 209 A.2d 825 (N.J. 1965) (per curiam); *Jackman v. Bodine (Jackman V)*, 231 A.2d 193 (N.J. 1967) (per curiam); *Jackman v. Bodine (Jackman VI)*, 232 A.2d 419 (N.J. 1967) (per curiam); *Jackman v. Bodine (Jackman VII)*, 252 A.2d 209 (N.J. 1969) (per curiam); *Jackman v. Bodine (Jackman VIII)*, 262 A.2d 389 (N.J. 1970).

42. *See* sources cited *supra* note 41.

43. *See* REOCK, *supra* note 39, at 23–26, 30–31.

44. *See id.* at 98–99 (noting that these disputes were known even at the outset). Reock discusses in detail the possibility of a unicameral legislature in New Jersey, including the invitation to Nebraska legislatures to appear before the convention, concluding that while it did have some support, the effort was not supported by the majority. *See id.* at 114–21.

Senator Wesley Lance,⁴⁵ who had previously served as delegate to the 1947 convention. Among other resolved issues, New Jersey would have a bicameral legislature consisting of forty equally populated districts with one senator and two members of the General Assembly.⁴⁶ And whole counties would be the focal point of each district.⁴⁷

Surprisingly, what was not contentious was the question of how state legislative districts would be apportioned in the future.

Unlike the majority of states where state legislatures retained the apportionment authority,⁴⁸ the convention delegates from both parties strongly supported a bipartisan apportionment commission, independent of the legislature.⁴⁹

The new Apportionment Commission structure was simple.⁵⁰ The Commission would consist of ten members—five from each of the two parties whose candidates received the largest number of votes in the most recent gubernatorial election.⁵¹ Of course, this translated into five Democrats and five Republicans, with each delegation chosen by the respective party state chairs.⁵² The Commission would be in place by November.⁵³ The head of each delegation would serve as co-chairs.⁵⁴ The Commission would start its deliberative process, and in the event that the delegations were unable to reach a timely agreement as to an

45. See N.J. Exec. Order No. 80 (Aug. 29, 2007), https://nj.gov/infobank/circular/eojsc_codev80.htm. Senator Lance from Hunterdon County was identified by Professor Reock as one of the “influentials.” REOCK, *supra* note 39, at 153. Senator Lance’s impact on the convention was confirmed by my conversation with Senator Lance’s son—former Congressman and State Senator Leonard Lance.

46. See N.J. CONST. art. IV, § 2, cl. 1.

47. *Id.*

48. In thirty-three states, state legislatures play the dominant role in state legislative redistricting. *State-by-State Redistricting Procedures*, BALLOTPEdia, https://ballotpedia.org/State-by-state_redistricting_procedures (last visited Apr. 22, 2023). Commissions draw state legislative district lines in fourteen states. *Id.* In three states, hybrid systems are used. *Id.*

49. REOCK, *supra* note 39, at 218.

50. N.J. CONST. art. IV, §§ 2–3.

51. *Id.* § 2.

52. *Id.* The first Commission under the revised constitution of 1966 consisted of five Democrats: Senator William Musto of Hudson County, Senator Nicholas Femicola of Essex County, Senator Anthony Andora of Bergen County, Public Utility Commissioner and later Attorney General William F. Hyland of Camden County, and former State Senator Robert H. Weber of Cumberland County. The Republican members included Senator Frederick Scholz of Camden County, Burlington County Republican Chairman John Dimon of Burlington, Bergen County Republican Chairman and later Senator Nelson Gross, Assembly Minority Leader Frank X. McDermott of Union County, and Anthony Scala of Essex County. REOCK, *supra* note 39, at 224; N.J. CONST. art. IV, § 3, para. 4.

53. N.J. CONST. art. IV, § 3, para. 1.

54. *Id.*

apportionment plan, the Commission would inform the Chief Justice; the Chief Justice would then appoint an eleventh member.⁵⁵ The appointment would be late in the process—one month before the Commission was required to certify a final apportionment plan.⁵⁶ The plan was to be filed by March 1st.⁵⁷

Among its other attributes, the majority of delegates saw the bipartisan commission as a method of minimizing the gerrymandering of districts.⁵⁸ Others would comment that the bipartisan commission would insulate legislators against a claim of conflict of interest—legislators would not be apportioning their own districts (but legislators could serve on the Commission as delegates);⁵⁹ ceding appointment power to the state chairs recognized the statewide political nature of the process;⁶⁰ equal party representation provided a check against a scenario where the majority party could control the apportionment process for two decades;⁶¹ and finally, the appointment of the eleventh member by the Chief Justice suggested that the convention sought fairness in the outcome of their process.⁶²

The constitution also included four mandates that would be applied during reapportionment: equal population, compactness, contiguity, and respect for county and municipal lines.⁶³ Exceptions were made for counties and municipalities whose population exceeded 1/40th of the state population.⁶⁴ As applied to municipalities, only Newark and Jersey City would be affected.⁶⁵

By November 1966, the first Commission was in place.⁶⁶ Soon thereafter, a stalemate occurred and the Commission notified Chief Justice Weintraub that an eleventh member was necessary.⁶⁷ In a pattern that would continue for the next five eleventh-member appointments, the Chief Justice selected an academic, Dean Marver

55. *Id.* art. IV, § 3, para. 4.

56. *Id.*

57. *Id.*

58. See REOCK, *supra* note 39, at 218.

59. DONALD E. STOKES, LEGISLATIVE REAPPORTIONMENT IN NEW JERSEY 6 (1991).

60. *Id.* at 6–7.

61. *Id.* at 7.

62. *Id.*

63. N.J. CONST. art. IV, § 2, para. 3.

64. *Id.*

65. REOCK, *supra* note 39, at 235–36.

66. *Id.* at 224–25.

67. *Jackman V*, 231 A.2d 193, 195 (N.J. 1967) (per curiam). In reaction to the necessity of the appointment of the eleventh member, Professor Reock reports that Chief Justice Weintraub was less than enthusiastic and stated, “I don’t like this chore attached to my office one bit.” REOCK, *supra* note 39, at 225.

Bernstein⁶⁸ of the now-renamed School of Public and International Affairs at Princeton University.⁶⁹ During the one month with the eleventh member, the Commission agreed on a compromise map,⁷⁰ but in *Jackman V*, the Court performed a detailed analysis of the districts and concluded that the map was unconstitutional, as population deviations exceeded constitutional tolerances.⁷¹ After remanding the map to the Commission for revisions, in *Jackman VII*, the Court questioned the conflict of maintaining county boundaries and fulfilling the mandate of population equality.⁷² Finally, a new plan was submitted to the Court and approved in *Jackman VIII*⁷³ in time for the 1969 legislative elections.⁷⁴ The initial 1966 reapportionment effort came to an end.⁷⁵ But a few years later, a census-driven 1971 legislative reapportionment was looming.⁷⁶

The initial Commission struggled with unmooring itself from reliance on the dominance of counties in the political process. Yes, *Jackman* had upended the 1844 constitutional provision that apportioned one senator to each county,⁷⁷ but still, the newly enacted amendments focused on preservation of county dominance.⁷⁸ Counties were seen as the building blocks for apportionment.⁷⁹ From a political perspective, county organizations were dominant and were critical to New Jersey's political

68. Dean Marver Bernstein was appointed by Chief Justice Weintraub as the first eleventh member of the New Jersey Apportionment Commission. Dean Bernstein served as dean of the Princeton School of Public and International Affairs. After leaving Princeton University, he served as president of Brandeis University and then as a professor at Georgetown University's Edmund A. Walsh School of Foreign Service. Peter B. Flint, *Marver Bernstein Is Fire Victim; Former Brandeis Leader Was 71*, N.Y. TIMES (Mar. 6, 1990), <https://www.nytimes.com/1990/03/06/obituaries/marver-bernstein-is-fire-victim-former-brandeis-leader-was-71.html>.

69. On June 26, 2020, the Board of Trustees of Princeton University changed the name of the Woodrow Wilson School of Public and International Affairs to the Princeton School of Public and International Affairs. For more detail regarding this change, see *Board of Trustees' Decision on Removing Woodrow Wilson's Name from Public Policy School and Residential College*, PRINCETON UNIV. (June 27, 2020, 12:29 PM), <https://www.princeton.edu/news/2020/06/27/board-trustees-decision-removing-woodrow-wilsons-name-public-policy-school-and>.

70. REOCK, *supra* note 39, at 226.

71. *Jackman V*, 231 A.2d at 195–201.

72. *Jackman VII*, 252 A.2d 209, 210 (N.J. 1969) (per curiam).

73. *Jackman VIII*, 262 A.2d 389, 397–98 (N.J. 1970).

74. REOCK, *supra* note 39, at 232–33.

75. *Id.* at 233.

76. *Id.* at 233–34.

77. *Jackman I*, 205 A.2d 713, 724 (N.J. 1964).

78. REOCK, *supra* note 39, at 11.

79. *Id.*

infrastructure.⁸⁰ The 1971 Commission would not yet extricate itself from the old model.⁸¹

The 1971 Commission, by a nine to one vote, agreed on a map without the necessity of an eleventh member.⁸² Yet, that map, too, did not survive constitutional scrutiny.⁸³ The decisive issue, again, was the constitutional requirement that, where possible, districts consist of whole counties,⁸⁴ a critical consideration in the 1966 convention compromise.⁸⁵ But as the Court considered the newly-proposed map,⁸⁶ honoring the constitutional concept of whole counties conflicted with the overriding principle of “[o]ne person—one vote.”⁸⁷ The Court, again with Chief Justice Weintraub as the author of a series of opinions, first in *Scrimminger v. Sherwin*⁸⁸ and later in *Davenport v. Apportionment Commission (Davenport I)*,⁸⁹ informed the Commission as to “what the law is.”⁹⁰ The requirement of whole county districts was no longer a viable constitutional standard.⁹¹

The opinion in *Davenport I* would be Chief Justice Weintraub’s last opinion addressing apportionment.⁹² But his writings for the court in *Jackman I*, *Jackman VIII*, *Scrimminger*, and *Davenport I*, would be the legacy of the early apportionment process and would be the core for decisions addressing future maps.⁹³

Finally, the 1971 Commission map was approved in *Davenport v. Apportionment Commission (Davenport II)*.⁹⁴ The opinion would be written by Justice Mark Sullivan for a court now headed by Chief Justice Richard Hughes.⁹⁵ While he did not write the *Davenport II* opinion, Chief

80. *Id.*

81. *Id.* at 233–35; *see also* *Scrimminger v. Sherwin*, 291 A.2d 134, 137 (N.J. 1972) (“The command for adherence to county lines generates the issue before us.”).

82. REOCK, *supra* note 39, at 233.

83. *See* N.J. CONST. art. IV, § 2, para. 1.

84. *See id.*; *Scrimminger*, 291 A.2d at 136.

85. REOCK, *supra* note 39, at 234.

86. *Scrimminger*, 291 A.2d at 136–38.

87. REOCK, *supra* note 39, at 234–36.

88. *Scrimminger*, 291 A.2d at 137–38.

89. *Davenport v. Apportionment Comm’n (Davenport I)*, 308 A.2d 3 (N.J. 1973).

90. *See* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

91. *See Scrimminger*, 291 A.2d at 141; *Davenport I*, 308 A.2d at 9.

92. *See* Dominick A. Mazzagetti, *Chief Justice Joseph Weintraub: The New Jersey Supreme Court 1957-1973*, 59 CORNELL L. REV. 197, 220 n.96 (1974).

93. *See generally id.* at 213–20 (analyzing subsequent apportionment cases).

94. *Davenport v. Apportionment Comm’n (Davenport II)*, 319 A.2d 718, 723 (N.J. 1974).

95. *Id.* at 719. Chief Justice Weintraub retired on August 31, 1973, and was replaced by Chief Justice Pierre Garvin. *See* John B. Wefing, *The New Jersey Supreme Court 1948-1998: Fifty Years of Independence and Activism*, 29 RUTGERS L.J. 701, 726 (1998); Ronald Sullivan, *Weintraub to Step Down As Chief Justice In Jersey*, N.Y. TIMES (Mar. 27, 1973), <https://www.nytimes.com/1973/03/27/archives/weintraub-to-step-down-as-chief-justice-in->

Justice Hughes was well-acquainted with the apportionment process. As governor, he never attended the 1966 convention, but his strong views were well-presented by a highly respected delegate, David Goldberg,⁹⁶ acting on the governor's behalf, and it was through the governor's substantial influence that the compromise resulting in the constitutional amendments was supported by the Democratic delegates.⁹⁷

Davenport II would mark the end of the post-convention decisions and although successor courts would weigh-in on other apportionment issues,⁹⁸ these initial cases would set the framework for the future.

The 1981 and 1991 Commissions would again require the appointment of an eleventh member. In both instances, consistent with the earlier appointment of Dean Bernstein, Chief Justice Robert Wilentz appointed another academic, Dean Donald Stokes,⁹⁹ who, like Dean Bernstein, served as dean of the Princeton University School of Public and International Affairs. In 1981, Dean Stokes would make history, as with a divided Commission, he would be the first eleventh member to act as a tie-breaker to cast his vote in favor of a partisan map.¹⁰⁰ In reflecting on his experience as the eleventh member, he made a critical

jersey-tough.html. Unfortunately, Chief Justice Garvin passed away within six months. See Wefing, *supra*, at 726. Governor William T. Cahill then appointed the former Governor of New Jersey, Richard J. Hughes, as chief justice. *Id.* Chief Justice Hughes presided over the court that decided *Davenport II*. *See id.*

96. David Goldberg, a well-respected Mercer County lawyer, served first as counsel to then-Governor Hughes and then as commissioner of transportation. According to Professor Reock, the delegates to the 1966 convention knew and understood that Goldberg was speaking for the governor during the term of the convention. REOCK, *supra* note 39, at 153 n.74, 214 (citing Interview with Adrian M. Foley, Jr., Highest-Ranking Non-Legislator Delegate, 1966 New Jersey Constitutional Convention). Foley, a prominent Essex County attorney, previously served as president of the New Jersey State Bar Association and was an active Democrat. *Adrian Foley Obituary*, STAR-LEDGER, <https://obits.nj.com/us/obituaries/starledger/name/adrian-foley-obituary?id=33183341> (last visited Apr. 22, 2023). He was chosen to serve as president of the convention. *Id.*

97. REOCK, *supra* note 39, at 251–52.

98. *See, e.g.,* McNeil v. Legis. Apportionment Comm'n, 828 A.2d 840, 846–48 (N.J. 2003); *see also* William Z. Shulman, *Legislative Reapportionment: From Jackman to Davenport—End of a Decade*, 28 RUTGERS L. REV. 272, 272 (1974).

99. Dean Donald Stokes served as Dean of the Princeton School of Public and International Affairs. *Former Graduate School Dean Donald E. Stokes Has Died*, UNIV. OF MICH. (May 14, 1997), <https://news.umich.edu/former-graduate-school-dean-donald-e-stokes-has-died/>. He was an expert in voting behavior and was cited by former Princeton University President Harold Shapiro as “a pioneer in the development of modern political science.” *Id.*; *Professor of Politics and Public Affairs Donald E. Stokes Dies; Led Woodrow Wilson School for 18 Years*, PRINCETON UNIV. (Jan. 27, 1997), <https://pr.princeton.edu/news/97/q1/0127stok.html>.

100. *See* REOCK, *supra* note 39, at 240. Dean Stokes' predecessor as eleventh member, Dean Bernstein, had not needed to break a tie during his tenure. *See id.* at 226.

observation.¹⁰¹ He noted that he was unable to achieve a consensus map because of his late appointment as eleventh member, one month before the map would be filed.¹⁰² Time prevented him from working with the parties to resolve the nuanced differences between the partisan maps.¹⁰³ He suggested that the final map was generally agreed to by the parties, but political realities caused the delegations to split five to five on the final vote, prompting him to cast the sixth vote for the Democratic map.¹⁰⁴ Ten years later, in 1991, another tie-breaker was required. This time, Dean Stokes would cast the tie-breaking vote for the Republican map.¹⁰⁵

In 2001, Chief Justice Deborah Poritz would choose another Princeton University professor, Larry Bartels,¹⁰⁶ to serve as the eleventh member. He would cast his vote for the Democratic map, but the vote would be six to one, as four of the Republican Commissioners boycotted the final vote.¹⁰⁷ This map withstood challenges in the federal courts,¹⁰⁸ but a more significant challenge was resolved by the New Jersey Supreme Court in *McNeil v. Legislative Apportionment Commission*, where Justice James Coleman, writing for the majority, concluded that notwithstanding the constitutional provision allowing the splitting of Newark and Jersey City into two districts, the adopted map properly divided Jersey City and Newark into three districts.¹⁰⁹ The reason advanced for deviation from the constitution was compliance with the provisions of section 2 of the federal Voting Rights Act of 1965¹¹⁰ and the Supremacy Clause of the United States Constitution.¹¹¹ The *McNeil*

101. See STOKES, *supra* note 59, at 8–10 (discussing Stokes' time as the eleventh member of the 1981 Commission).

102. *Id.*

103. *Id.*

104. See *id.* at 9–10.

105. Sam Hirsch, *Unpacking Page v. Bartels: A Fresh Redistricting Paradigm Emerges in New Jersey*, 1 ELECTION L.J. 7, 9 (2002).

106. *Id.* Professor Larry Bartels previously served as the Donald E. Stokes Professor of Public Policy and International Relations and founding director of the Center for the Study of Democratic Politics at the Princeton School of Public and International Affairs. *Id.* Professor Bartels presently serves as co-director of the Center for the Study of Democratic Institutions at Vanderbilt University. *Larry Bartels Biography*, VAND. UNIV., <https://my.vanderbilt.edu/larrybartels/about-me/> (last visited Apr. 22, 2023).

107. See *Page v. Bartels*, 144 F. Supp. 2d 346, 349, n.2 (D.N.J. 2001); REOCK, *supra* note 39, at 240.

108. See *Page*, 144 F. Supp. 2d at 369; *Robertson v. Bartels*, 148 F. Supp. 2d 443, 462 (D.N.J. 2001).

109. *McNeil v. Legis. Apportionment Comm'n*, 828 A.2d 840, 845 (N.J. 2003).

110. *Id.* at 381; 42 U.S.C. § 1973.

111. U.S. CONST. art. VI, cl. 2; *McNeil*, 828 A.2d at 849–50 (“Based on the Supremacy Clause, U.S. Const. art. VI, cl. 2, Article IV, Section 2, Paragraph 3 of the New Jersey Constitution dealing with legislative apportionment and redistricting, may not violate the federal Voting Rights Act, 42 U.S.C.A. § 1973 . . .”).

decision would later play an important part in the promulgation of the 2022 map.¹¹²

The next decade saw the Commission agreeing on the eleventh member, and in 2011, Chief Justice Rabner appointed Professor Alan Rosenthal of Rutgers University to serve in that role.¹¹³ At the end of the process, Professor Rosenthal cast the tie-breaking vote to provide for a six to five majority for the Democratic map.¹¹⁴ The challenge to the map would be rejected by the Appellate Division in *Gonzalez v. State Apportionment Commission*.¹¹⁵ In an opinion written by Judge Mary Catherine Cuff, the Appellate Division rejected a redux of the county arguments previously rejected in *Scrimminger*¹¹⁶ and *Davenport I*.¹¹⁷

Of particular note, in all instances since *Davenport I*, all of the maps that had been decided on a partisan vote by the eleventh member as tiebreaker withstood a court challenge,¹¹⁸ a contrast with the earlier 1966 and 1971 consensus maps that, in each instance, failed to survive judicial scrutiny.¹¹⁹ Much of this seeming disparity in outcome is attributable, in part, to the evolution and development of the law and the New Jersey Supreme Court decisions, from *Jackman* to *Davenport II*, establishing priorities as to the constitutional apportionment standards as well as the population deviations that would conform to the overarching principle of “one-person, one-vote.”¹²⁰ The United States Supreme Court would

112. *McNeil*, 828 A.2d at 849–50; see *infra* notes 218–20 and accompanying text.

113. Darryl Isherwood, *Rosenthal Appointed 11th Member*, OBSERVER (Mar. 3, 2011, 5:11 PM), <https://observer.com/2011/03/rosenthal-appointed-11th-member/>. Professor Alan Rosenthal was a member of the Rutgers faculty at the Eagleton Institute of Politics. He previously served as director of the Institute from 1974 until 1993. *Rutgers Mourns Passing of Professor Alan Rosenthal, Redistricting Tiebreaker*, RUTGERS EDWARD J. BLOUSTEIN SCH. OF PLAN. & PUB. POL’Y, <https://bloustein.rutgers.edu/rutgers-mourns-passing-of-professor-alan-rosenthal-redistricting-tiebreaker/> (last visited Apr. 22, 2023). Professor Rosenthal was the nation’s leading scholar on state legislatures and served as a consultant to thirty-five states. *Id.*

114. Max Pizarro, *Rosenthal Votes with Democratic Commissioners to Give D Map the 6-5 Victory*, OBSERVER (Apr. 3, 2011, 1:09 PM), <https://observer.com/2011/04/rosenthal-votes-with-democratic-commissioners-to-give-d-map-the-6-5-victory/>.

115. *Gonzalez v. State Apportionment Comm’n*, 53 A.3d 1230, 1250 (N.J. Super. Ct. App. Div. 2012).

116. *Scrimminger v. Sherwin*, 291 A.2d 134, 137 (N.J. 1972).

117. See *Gonzalez*, 53 A.3d at 1249–50; *Davenport I*, 308 A.2d 3, 10 (N.J. 1973).

118. Dean Stokes voted for the 1981 and 1991 maps. See *supra* notes 100–05 and accompanying text. Professor Bartels voted for the 2001 map. See *supra* note 107 and accompanying text. Professor Rosenthal voted for the 2011 map. See *supra* note 114 and accompanying text.

119. See *infra* note 228 and accompanying text.

120. See *Jackman I*, 205 A.2d 713, 714–15 (N.J. 1964); *Jackman III*, 208 A.2d 648, 649 (N.J. 1965) (per curiam); *Jackman IV*, 209 A.2d 825, 826 (N.J. 1965) (per curiam); *Jackman*

tolerate a 10% deviation,¹²¹ while the New Jersey Supreme Court looked to 5% as an acceptable population deviation.¹²²

At this point, I will take a detour and briefly address the sometimes public confusion about the differences between the structure of the Apportionment Commission and the New Jersey Redistricting Commission, which is charged with the responsibility of redistricting the congressional districts rather than state legislative districts. First, these are two different independent commissions that operate under different provisions of the constitution.¹²³ The two commissions are not only different in size, but selection of the tiebreaker is dramatically different. Unlike the ten-member Apportionment Commission, the Redistricting Commission consists of thirteen members¹²⁴ with the selection of the twelve partisan commissioners made by legislators and party leaders.¹²⁵ The twelve partisan members—six from each major political party—then select the thirteenth member.¹²⁶ If they are unable to agree on a thirteenth member, they advise the New Jersey Supreme Court of the impasse and each side submits one name of a potential thirteenth member.¹²⁷ Unlike the Apportionment Commission, the Supreme Court *as a whole*, not the Chief Justice, selects one of the two names,¹²⁸ and the thirteenth member serves as the chair of the Commission.¹²⁹ While the Redistricting Commission and Apportionment Commission are bound by similar constitutional mandates, there is one key substantive difference: the Redistricting Commission is not bound to honor municipal boundaries and may split municipalities.¹³⁰

VII, 252 A.2d 209, 211 (N.J. 1969) (per curiam); *Jackman VIII*, 262 A.2d 389, 394–96 (N.J. 1970); *Davenport I*, 308 A.2d 3, 4 (N.J. 1973); *Davenport II*, 319 A.2d 718, 723 (N.J. 1974).

121. *Brown v. Thomson*, 462 U.S. 835, 842 (1983) (citing *Connor v. Finch*, 431 U.S. 407, 418 (1977); *White v. Regester*, 412 U.S. 755, 764 (1973)).

122. *See Davenport II*, 319 A.2d at 723 (accepting plan with 4.24% deviation).

123. The New Jersey Redistricting Commission operates pursuant to N.J. CONST. art. II, § 2, while the New Jersey Apportionment Commission operates pursuant to N.J. CONST. art. IV, §§ 2–3. *See supra* note 50 and accompanying text.

124. N.J. CONST. art. II, § 2, para. 1(a).

125. *Id.* art. II, § 2, para. 1(b).

126. *See id.* art. II, § 2, para. 1(b)–(c).

127. *Id.*

128. *Id.*

129. *Id.* art. II, § 2, para. 2.

130. *See id.* Article II does not contain the same limitation on honoring municipal boundaries that is found in article IV, as applied to the New Jersey Apportionment Commission. *See* N.J. CONST. art. IV, § 2, para. 3.

II. THE NEW JERSEY APPORTIONMENT COMMISSION: 2021–22

I raise the distinctions between the two commissions now as, in recent years, there have been attempts to recast the Apportionment Commission. In 2018, a legislative initiative changing, inter alia, the selection, structure, and operation of the Apportionment Commission, including increasing the Commission to thirteen members,¹³¹ never made it to the ballot.

A year later in 2019, a group of six renowned scholars,¹³² including Professor Ronald Chen here at Rutgers Law School, whose Constitutional Rights Clinic was an important contributor to our efforts, and Professor Sam Wang of Princeton University, who would serve as part of our 2021 Apportionment Commission team, advocated for a thirteen-member commission, including three independent members appointed by the Chief Justice.¹³³ The proposals also examined and reprioritized the standards that had been included as part of 1966 constitutional amendments and added additional standards.¹³⁴ While many of their suggestions still warrant serious consideration, one critical recommendation found its way, in part, into the constitution: the early appointment of the independent member,¹³⁵ a position previously urged by Dean Stokes.¹³⁶

The scholars' recommendation, together with a late delivery of the census and the pandemic, generated an amendment to the

131. See S. Con. Res. 43, 218th Leg., 2018 Sess. (N.J. 2018); S. Con. Res. 152, 218th Leg., Reg. Sess. (N.J. 2018); Assemb. Con. Res. 205, 218th Leg., Reg. Sess. (N.J. 2018). There was strong opposition to the proposed amendments. See Colleen O'Dea, *Dems' Decision to Push Ahead with Redistricting Bill Has Blue Base Fighting Mad*, N.J. SPOTLIGHT NEWS (Dec. 6, 2018), <https://www.njspotlightnews.org/2018/12/18-12-05-dems-decision-to-push-ahead-with-redistricting-bill-has-blue-base-fighting-mad/>.

132. The proponents of the proposed changes were Patrick Murray, M.A., Director, Monmouth University Polling Institute, Monmouth University; Samuel Wang, Ph.D., Professor of Neuroscience and Director of the Princeton Gerrymandering Project, Princeton University; Yuri Rudensky, J.D., Redistricting Counsel, Brennan Center for Justice, New York University School of Law; Brigid Callahan Harrison, Ph.D., Professor of Political Science and Law, Montclair State University; Ronald Chen, J.D., University Professor and Distinguished Professor of Law, Rutgers Law School; and Ben Williams, J.D., Legal Analyst, Princeton Gerrymandering Project, Princeton University. PATRICK MURRAY ET AL., *IMPROVING NEW JERSEY'S LEGISLATIVE APPORTIONMENT PROCESS: RECOMMENDATIONS TO INCREASE TRANSPARENCY, ACCOUNTABILITY, AND REPRESENTATION* i (2019), https://www.monmouth.edu/polling-institute/documents/improving_nj_legapportion_july2019.pdf.

133. *Id.* at 5.

134. *Id.* at 10–11.

135. *Id.* at 17.

136. STOKES, *supra* note 59, at 21.

constitution.¹³⁷ The impact of the amendment was immediate. In September 2021, the census report was received by the governor. The eleventh member would be appointed by October 2021 instead of March 2022. The Commission had notified the Chief Justice earlier of the need for an eleventh member.

As was his practice in the last apportionment cycle resulting in the consensus appointment of Alan Rosenthal, Chief Justice Rabner asked the political chairs to submit a list of proposed eleventh members to a retired Supreme Court Justice designated by the Chief Justice.¹³⁸ The names would remain anonymous, even to the Chief Justice. If advised that there was a match, the Chief Justice, as he had done ten years earlier, would probably appoint the agreed-upon name. Unfortunately, despite the care taken by the Chief Justice to shield potential nominees, the names were leaked to the press and became public.¹³⁹ For this cycle, the parties submitted separate lists totaling eleven names including retired justices and judges, former cabinet members, and academics.¹⁴⁰ No common name appeared on the lists.¹⁴¹

The Chief Justice then appointed what I proudly refer to as the twelfth choice to serve as the eleventh member. On October 7, 2021, I was appointed as the eleventh member.

This appointment broke the pattern of the past. As I have described, the four prior eleventh-member appointees—Professor Rosenthal in 2011, Professor Bartels in 2001, Dean Stokes in 1981 and 1991, and Dean Bernstein in 1967—were all seasoned political science scholars. In performing their function as tiebreakers, Dean Stokes and Professors Bartels and Rosenthal all came with a studied view of both process and standards. Each would openly advance a particular area of emphasis in their deliberative process. Dean Stokes emphasized partisan fairness;¹⁴²

137. N.J. CONST. art. IV, § 3, para. 4 (amended 2020) (“The commission shall begin conducting its business upon the receipt by the Governor of the official decennial census of the United States for New Jersey, and the eleventh member of the commission shall be appointed by the Chief Justice of the Supreme Court of New Jersey within one month of the Governor’s receipt of that census data.”).

138. The retired justice was Honorable Stewart Pollack, who served on the New Jersey Supreme Court from 1979 until 1999. *Stewart G. Pollock*, RIKER DANZIG LLP, <https://riker.com/attorneys/stewart-g-pollock/> (last visited Apr. 22, 2022).

139. David Wildstein, *Here Are the Candidates for Legislative Redistricting Tiebreaker. There Are No Matches*, N.J. GLOBE (Aug. 17, 2021, 12:19 PM), <https://newjerseyglobe.com/redistricting/here-are-the-candidates-for-legislative-redistricting-tiebreaker-there-is-no-match/>.

140. *Id.*

141. *Id.*

142. See STOKES, *supra* note 59, at 10–16.

Professor Bartels focused on minority representation;¹⁴³ Professor Rosenthal agreed with partisan fairness but also added continuity of representation and preserving core districts as critical concerns.¹⁴⁴

Let us look at what happened from October 2021 until the adoption of a map in February 2022. Let us examine what the Commission did, how we did it, and what decisions were made in the process.

We start by acknowledging that the schedule for next four months was relentless—filled with intensity, challenges and ultimately, immersion in a process with which few, except those interested in the outcome, are fully familiar. Each day, a new issue or crisis would emerge that would prompt a response, a Zoom meeting, or a consultation with my counsel, the Commission co-chairs, their attorneys or staff, or even the whole Commission.

I came to the process with neither the academic background nor the political science expertise of my predecessors. My early appointment gave me some immediate advantages. It allowed me time to reacquaint myself with the relevant law (my learning curve was almost vertical), speak to those who had been involved in the process before, meet with representatives from the New Jersey Office of Legislative Services charged with fulfilling the myriad administrative tasks required in this process, and of course, introduce myself to the Commission co-chairs, their attorneys and staff, and the Commission itself. At my first meeting with the Commission, I described my objectives; I told them that the best outcome would be a consensus map agreed to by the parties, but short of that, I would hope that the maps would be so close as to make my vote a difficult one.¹⁴⁵

One thing I learned quickly: despite the eleventh member just being a single member of the Commission, the position carries with it a direct role in the process. As the potential tiebreaker, the eleventh member can significantly influence the functional performance of the Commission.

One of my earliest priorities was to assemble a staff. And as I knew from my years at the bar, the first thing one always needs is a good lawyer.

143. See Sarah Harney, *Larry Bartels: Playing Solomon*, GOVERNING (Oct. 24, 2010), <https://www.governing.com/archive/larry-bartels-playing-solomon.html>.

144. See N.J. APPORTIONMENT COMM'N, MARCH 10, 2011 COMMISSION MEETING 3–7 (2011), <https://www.apportionmentcommission.org/Documents/03-10-11%20APPC%20Trenton%20Complete.pdf>.

145. N.J. LEGIS. APPORTIONMENT COMM'N, OCTOBER 15, 2021 COMMISSION MEETING 4 (2021), <https://www.apportionmentcommission.org/Documents/2021/APPC%20Transcript%2010-15-21.pdf>.

I had a number of extraordinary candidates from in state and out. I settled on a young man who proved to be more than I could have anticipated—Andrew Gimigliano.¹⁴⁶ Andy came with stellar credentials: he graduated magna cum laude from this great law school, was Editor-in-Chief of the *Rutgers Law Review*, and clerked for another proud Rutgers Law School graduate, Justice Jaynee LaVecchia of the New Jersey Supreme Court.¹⁴⁷ But what set him apart from the other candidates was that, while a law student, he had served on the legal staff of John Farmer, Jr., the chair of the 2010 Congressional Redistricting Commission. Unlike me, and to quote Lin-Manuel Miranda, Andy had been in “the room where it happens,”¹⁴⁸ and that proved to be invaluable to me. Andy served as my sounding board and advisor on every decision made over the next four months. And, of course, he was charged with the responsibility of talking me down off the ledge when the circumstances required it. Andy reached out to Professor Chen¹⁴⁹ at the Constitutional Rights Clinic at Rutgers Law School and Dean Farmer,¹⁵⁰ currently heading the Eagleton Institute of Politics at Rutgers University. Rutgers Law School students and an Eagleton student would assist us,¹⁵¹ and their service was instrumental.

We had our legal team in place, and our next effort was securing our experts. We, likewise, had a number of candidates from across the

146. *Andrew Gimigliano*, MANDELBAUM BARRETT PC, <https://www.mblawfirm.com/professionals/andrew-gimigliano/> (last visited Apr. 22, 2023).

147. *See id.*

148. LIN-MANUEL MIRANDA, *The Room Where It Happens, on HAMILTON (ORIGINAL BROADWAY CAST RECORDING)* (Atl. Recording Co. 2015).

149. University Professor, Distinguished Professor of Law and Judge Leonard I. Garth Scholar at Rutgers Law School. *See Ronald K. Chen*, RUTGERS L. SCH., <https://law.rutgers.edu/directory/view/ronchen> (last visited Apr. 22, 2023). Until August 2018, he was co-dean of Rutgers Law School and previously served as the New Jersey Public Advocate. *See id.*

150. Director, Eagleton Institute of Politics at Rutgers University. *See John J. Farmer, Jr.*, EAGLETON INST. OF POL., <https://eagleton.rutgers.edu/staff/john-j-farmer-jr/> (last visited Apr. 22, 2023). In 2011, Dean Farmer served as the thirteenth member of the New Jersey Redistricting Commission and then served as counsel to Professor Alan Rosenthal, then-eleventh member of the New Jersey Apportionment Commission. *See id.*; *Gonzalez v. State Apportionment Comm'n*, 53 A.3d 1230, 1232 (N.J. Super. Ct. App. Div. 2012). Among his other achievements, Dean Farmer previously served as attorney general of New Jersey, senior counsel to the 9/11 Commission, and dean of Rutgers Law School – Newark. *See John J. Farmer, Jr., supra.*

151. The Rutgers Law School students were Ryan Brinkerhoff, Christian Callegari, Zohar Hasson, and Kimberly Jackson. The Eagleton student was Kevin Cheung. For more on the Eagleton fellowship program, see *About the Graduate Fellowship Program*, EAGLETON INST. OF POL., <https://eagleton.rutgers.edu/grad-fellowships/> (last visited Apr. 22, 2023).

country but retained the services of Princeton Professor Sam Wang¹⁵² and the Princeton Gerrymandering Project. Sam had a nationwide reputation as an expert analyst of election maps and had been involved in other state reapportionment and redistricting efforts.¹⁵³ He brought together a team of smart people whose analytic skills were critical to our work, including a retired lawyer, Rick Ober,¹⁵⁴ from Princeton who focused on communities of interest, Jesse Clark, a Princeton University post-doctoral student, and another Princeton University student, Nathaniel Moore. Our map team included an eighteen-year-old Eagleton student, Kevin Cheung, whose skill at map drawing and analysis defied his age. This was our team.

As I mentioned earlier, consistent with the constitution, the make-up of the Commission was partisan: five Democrats¹⁵⁵ including former Senator Steven Sweeney, and five Republicans,¹⁵⁶ including two

152. Professor of Molecular Biology and Neuroscience, Princeton University. See *Samuel S. Wang, Biography*, PRINCETON UNIV., <https://molbio.princeton.edu/people/samuel-s-wang> (last visited Apr. 22, 2023). Professor Wang founded the Princeton Gerrymandering Project and Princeton University's Electoral Innovation Lab, which provides nonpartisan analyses of state voting map plans. *Meet the Team*, GERRYMANDERING PROJECT, <https://gerrymander.princeton.edu/team> (last visited Apr. 22, 2023); *Sam Wang, Ph.D., ELECTORAL INNOVATION LAB*, <https://www.electoral-lab.org/sam-wang> (last visited May 30, 2023). He has participated in submitting amicus curiae briefs in a number of gerrymandering cases in various courts, including the United States Supreme Court. See, e.g., Brief of Amici Curiae Professors Wesley Pegden, Jonathan Rodden and Samuel S.-H. Wang in Support of Appellees, *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019) (No. 18-422).

153. In 2022, Professor Wang advised the special masters in the redistricting efforts in North Carolina. Bryan Anderson, *Princeton Redistricting Expert Who Analyzed NC Voting Maps Faces University Investigation*, WRAL NEWS (Apr. 28, 2022, 3:49 PM), <https://www.wral.com/princeton-redistricting-expert-who-analyzed-nc-voting-maps-faces-university-investigation/20256616/>.

154. Mr. Ober is a Princeton University and Yale Law School graduate who previously served as research director for the New Jersey campaign staffs of Dick Zimmer for U.S. Senate and DeForest "Buster" Soaries for U.S. House of Representatives. *Meet the Team*, *supra* note 152. Rick's expertise in identifying communities of interest was invaluable to our effort.

155. The Democratic commissioners were Chairman Leroy Jones of Essex County, Dr. Cosmo Cirillo of Hudson County, Gary Taffet of Middlesex County, and Diane T. Testa of Bergen County. See *Apportionment Commission Members*, N.J. LEGIS. APPORTIONMENT COMM'N, <https://www.apportionmentcommission.org/default.asp> (last visited Apr. 22, 2023). Senator Sweeney of Gloucester County was replaced by Laura Matos of Monmouth County on January 26, 2022. See *id.*

156. The Republican commissioners were Chairman Al Barlas of Essex County, Assembly Minority Leader John M. Bramnick of Union County, Linda A. DuBois of Salem County, Senator Thomas Kean, Jr. of Union County, and Michael Lavery of Warren County. See *id.*

legislators, now-Congressman Thomas Kean, Jr.¹⁵⁷ and now-State Senator Jon Bramnick of Union County.¹⁵⁸ The other Commissioners were from all parts of the state, but the most important and critical players were the respective chairs of the two delegations, both extraordinary men: Essex County Republican Chairman Al Barlas¹⁵⁹ and State Democratic Chairman Leroy Jones.¹⁶⁰ These were two very smart and politically savvy individuals who knew the politics of New Jersey down to the details of every hamlet and burg in the state. What was critical was that they knew each other and trusted each other's word. This presented a challenge for me.

They had no idea who I was, and my objective was to build trust with them. I told them up front that I would be completely open and candid with them. If I was going to announce an initiative, they would hear about it first. I would not be issuing press releases, and any public statements from me would be seen by them first and would be made on the record at a public hearing rather than in conversation with reporters. As I anticipated, they vetted me as well, bringing me regards from people I had not seen nor spoken to in, in some instances, twenty or more years. They, too, brought with them a solid team of lawyers,¹⁶¹ experts, and

157. At the time of his service on the Commission, Commissioner Kean was a state senator representing the twenty-first legislative district. See *Thomas H. Kean, Jr.*, N.J. LEGIS. APPORTIONMENT COMM'N, <https://www.apportionmentcommission.org/Kean.asp> (last visited Apr. 22, 2023).

158. See *Jon M. Bramnick*, N.J. LEGIS. APPORTIONMENT COMM'N, <https://www.apportionmentcommission.org/Bramnick.asp> (last visited Apr. 22, 2023). At the time of his service on the Commission, Senator Bramnick was a member of the General Assembly representing the twenty-first legislative district. See *id.*

159. See *Al Barlas*, N.J. LEGIS. APPORTIONMENT COMM'N, <https://www.apportionmentcommission.org/Barlas.asp> (last visited Apr. 22, 2023). Chairman Barlas has extensive experience with the legislature, including service as chief of staff to State Senator Kevin O'Toole. *Id.* He currently serves as the chairman of the Essex County Republican Committee, and, following his service as co-chair of the Commission, he declared his candidacy for a seat in the General Assembly. See *id.*

160. See *LeRoy J. Jones, Jr.*, N.J. LEGIS. APPORTIONMENT COMM'N, <https://www.apportionmentcommission.org/Jones.asp> (last visited Apr. 22, 2023). Chairman Jones presently serves as chair of the New Jersey Democratic State Committee and the Essex County Democratic Committee. *Id.* He has previously served as a four-term member of the General Assembly, county commissioner, and a municipal government administrator. See *id.* He also served on the State House Commission. *Id.*

161. The Democratic commissioners were represented by Angelo J. Genova, Esq. and Rajiv D. Parikh, Esq. of Genova Burns LLC. Both Mr. Genova and Mr. Parikh are well-respected members of the New Jersey bar and have developed a well-earned reputation both in New Jersey and nationally in addressing election and political legal matters. See *Angelo J. Genova*, GENOVA BURNS LLC, <https://www.genovaburns.com/attorneys/angelo-j-genova> (last visited Apr. 22, 2023); *Rajiv D. Parikh*, GENOVA BURNS LLC, <https://www.genovaburns.com/attorneys/rajiv-d-parikh> (last visited Apr. 22, 2023). The Republican Commissioners were represented by Jason Torchinsky, Esq. of Holtzman Vogel

professional staff who worked hard with us in achieving an important outcome.

The commission work started in earnest.

As I mentioned earlier, there are standards that must be followed in apportionment. While the constitution set out four mandates to be adhered to,¹⁶² through its decisions, the New Jersey Supreme Court eliminated some and modified the rigid application of others.¹⁶³ The Commission was entitled to know how I weighed the standards. With Andy, I drafted and presented them with a document detailing the requested information.¹⁶⁴ I will spare you the full document and simply provide the executive summary:

1. The districts must be of equal population of 232,075 people with a general deviation tolerance of 5%.¹⁶⁵

in Washington, D.C. See *Jason Torchinsky*, HOLTZMAN VOGEL, <https://www.holtzmanvogel.com/attorneys/jason-torchinsky> (last visited Apr. 22, 2023). Mr. Torchinsky is a member of the Virginia and District of Columbia bars, and, like Mr. Genova and Mr. Parikh, is a well-regarded, nationwide expert in election matters and has represented litigants throughout the United States on election and constitutional matters. See *id.* The quality and skills of the attorneys on both sides of the issue were an important factor in the ultimate outcome of the Commission's work.

162. The mandated standards were set forth in article IV of the New Jersey Constitution: The Assembly districts shall be composed of contiguous territory, as nearly compact and equal in the number of their inhabitants as possible, and in no event shall each such district contain less than eighty per cent nor more than one hundred twenty per cent of one-fortieth of the total number of inhabitants of the State as reported in the last preceding decennial census of the United States. Unless necessary to meet the foregoing requirements, no county or municipality shall be divided among Assembly districts unless it shall contain more than one-fortieth of the total number of inhabitants of the State, and no county or municipality shall be divided among a number of Assembly districts larger than one plus the whole number obtained by dividing the number of inhabitants in the county or municipality by one-fortieth of the total number of inhabitants of the State.

N.J. CONST. art. IV, § 2, para. 3.

163. *Jackman V*, 231 A.2d 193, 199–201 (N.J. 1967) (per curiam); *Scrimminger v. Sherwin*, 291 A.2d 134, 139 (N.J. 1972); *Davenport II*, 319 A.2d 718, 721 (N.J. 1974) (regarding the elimination of the prohibition against splitting counties). *McNeil v. Legislative Apportionment Commission* allows splitting Newark and Jersey City into more than two districts. See 828 A.2d 840 (N.J. 2003); see also *Gonzalez v. State Apportionment Comm'n*, 53 A.3d 1230, 1254 (N.J. Super. Ct. App. Div. 2012).

164. See generally STATEMENT OF STANDARDS OF PHILIP S. CARCHMAN, 11TH MEMBER OF THE NEW JERSEY LEGISLATIVE APPORTIONMENT COMMISSION (2022), <https://www.apportionmentcommission.org/Documents/2021/Statement%20of%20Standards%20of%20Philip%20S.%20Carchman,%2011th%20Member%20of%20the%20New%20Jersey%20Legislative%20Apportionment%20Commission.pdf>.

165. *Id.* at 2–3.

2. The districts must be contiguous. All parts of a district must connect with each other.¹⁶⁶
3. While districts must be as “compact as possible,” the Weintraub Court had minimized the importance of this standard, and it would yield to population equality.¹⁶⁷
4. Municipal boundaries must remain intact, with the exception of Newark and Jersey City, which, under the constitution, could be divided into two districts.¹⁶⁸

These were the constitutional requirements, but additional principles have developed from federal law, case law, and historic practice. These were included in my statement.

5. The map must comply with section 2 of the Voting Rights Act of 1965;¹⁶⁹ the map would include “opportunity-to-elect” legislative districts that provide minorities with a reasonable opportunity to elect representatives of their choice.¹⁷⁰ This was especially important in a state with a 48% minority population.¹⁷¹
6. The map would reflect communities of interest. I offered a more expansive definition of communities of interest than had been used before. In addition to ethnic, cultural, religious, or linguistic communities, we added communities that shared economic, infrastructure, environmental concerns, or shared industry.¹⁷²
7. I included district competitiveness as an important standard but cautioned that competitiveness in all districts was unrealistic.¹⁷³

166. *Id.* at 3.

167. *Id.*; *Scrimminger*, 291 A.2d at 136.

168. STATEMENT OF STANDARDS OF PHILIP S. CARCHMAN, *supra* note 164, at 3.

169. *Id.* at 3–4; *see also* Voting Rights Act of 1965, 52 U.S.C. § 10301.

170. *See* STATEMENT OF STANDARDS OF PHILIP S. CARCHMAN, *supra* note 164, at 4.

171. Joey Fox, *Carchman Says 5% Population Deviation Will Be Permissible for Legislative Map*, N.J. GLOBE (Jan. 8, 2022, 7:49 PM), <https://newjerseyglobe.com/redistricting/carchman-says-5-population-deviation-will-be-permissible-for-legislative-map/>.

172. *See* STATEMENT OF STANDARDS OF PHILIP S. CARCHMAN, *supra* note 164, at 4–5.

173. *Id.* at 5.

8. I included continuity of representation as another standard, but, again, it could not be a dominant factor to the exclusion of others.¹⁷⁴
9. Lastly, I included the somewhat elusive standard of achieving partisan fairness¹⁷⁵—a standard emphasized by Dean Stokes that promotes fairness between the parties and considers the relationship between popular support and control of the legislature by examining the outcome of past elections.¹⁷⁶

The document discussed the standards in-depth but strongly emphasized that they were integrated—no one standard could be applied without consideration of the others.¹⁷⁷

I informed the chairs that I would be announcing the standards at the next public meeting, but consistent with my commitment to them, I sent my statement to the chairs the day before the public meeting so there would be no surprises. They were received without comment and announced the next day.

Not specifically addressed in the public document but discussed within the Commission and our team was gerrymandering. A bit of history: in 1812, the Governor of Massachusetts, Elbridge Gerry, drew the Massachusetts State Senate redistricting map to favor his political allies in the upcoming election.¹⁷⁸ The map was the subject of a cartoon in the *Boston Gazette* and the term “gerrymandering” (a portmanteau of Elbridge Gerry and “salamander”) became Gerry’s signature contribution to history.¹⁷⁹ The term describes districts that are designed to favor a particular political party.¹⁸⁰ Gerrymandering has a well-earned negative connotation when advancing partisan political objectives, and partisan gerrymandering can skew election results to create an unfair outcome in

174. *Id.* at 5–6.

175. *Id.* at 6.

176. STOKES, *supra* note 59, at 10–16; STATEMENT OF STANDARDS OF PHILIP S. CARCHMAN, *supra* note 164, at 6.

177. STATEMENT OF STANDARDS OF PHILIP S. CARCHMAN, *supra* note 164, at 2 (“While some may view the standards as separate and discrete, I see them as integrated, so that no one standard can dominate to the exclusion of the others. Tensions exist between some of the standards, but no absolutist view of one standard can negate the application of the other standards.”).

178. Brian Duignan, *Gerrymandering*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/gerrymandering> (Mar. 14, 2023).

179. *Id.*

180. *See id.*

favor of a political party.¹⁸¹ Nevertheless, the United States Supreme Court recently held in *Rucho v. Common Cause*¹⁸² that a legal challenge to partisan gerrymandering is non-justiciable,¹⁸³ hearkening back to *Colegrove v. Green*.¹⁸⁴ However, there is at least one instance when gerrymandering plays an important positive part: to ensure compliance with section 2 of the Voting Rights Act.¹⁸⁵

The practice of gerrymandering exposes two negatives that must be considered by the map drafters.

Most attempts to gerrymander can best be understood through the lens of two basic mapping techniques: cracking and packing.¹⁸⁶ Cracking splits groups of people with similar characteristics, such as voters of the same political party or racial group, across multiple districts.¹⁸⁷ With their voting strength divided, these groups struggle to elect their preferred candidates in any of the districts.¹⁸⁸ Packing is the opposite of cracking: map creators cram certain groups of voters, such as minorities, into as few districts as possible.¹⁸⁹ In these few districts, the “packed” groups are likely to elect their preferred candidates, but the groups’ voting strength is weakened everywhere else.¹⁹⁰ While neither packing nor cracking are mentioned specifically in the standards, we were sensitive to minimizing the impact of these two factors.

After our recurring meetings with the chairs and counsel, points of contention emerged. Among them was the issue of what data was going to be used in drafting the maps. Obviously, the results of past legislative elections were relevant, but how many past elections should be considered? Should we go back three elections or a decade since the last map? Should the results of federal elections be considered, or were they irrelevant to our deliberations? In my view, wherever the negotiations led us, everyone would be exchanging and using the same data and after much discussion and negotiation, that is what happened.

181. *See id.*

182. 139 S. Ct. 2484 (2019).

183. *Id.* at 2506–07 (discussing non-justiciability).

184. *Id.* at 2496 (citing *Colegrove v. Green*, 328 U.S. 549, 555–56 (1946)) (discussing non-justiciability).

185. *Id.* at 2508.

186. Julia Kirschenbaum & Michael Li, *Gerrymandering Explained*, BRENNAN INST. FOR JUST. (Aug. 10, 2021), <https://www.brennancenter.org/our-work/research-reports/gerrymandering-explained>.

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

Then there was the issue of metrics: what statistical methodology would be used for analyzing the data.¹⁹¹ This would not be a negotiation, as the parties had different methodologies and were free to analyze the data using any method that they deemed appropriate. They also pressed me to reveal how our experts would be analyzing the data to arrive at a decision as to which map to support. Ultimately, the issue became moot as the movement towards a consensus map would obviate our need to go further on the issue. Nevertheless, as the process unfolded, I relied on Sam and his team to advise us as to whether the maps were meeting the standards that I presented to the parties.

Sam had developed a methodology for scoring the maps internally. A fair map would treat the major political parties symmetrically. For example, if they were to switch places in terms of number of votes won statewide, they would ideally switch overall outcomes. Sam's team used computer simulations and formulae to arrive at a fair map. Even the description of the process is daunting, but I am pleased to report that, using Sam's model, the final map scored well.

We then moved on to another issue which proved to be far more contentious and, ultimately, impactful. I advised the chairs that I wanted to release proposed maps to the public for comment. This had not been done before, and it generated strong resistance from both sides. I had prepared a public statement regarding the release, which was to be presented at the next scheduled public meeting. I circulated it to the chairs and counsel but I agreed to delay my public statement to allow all of the players to weigh in. Over the next few days, we discussed the nature of the maps, final v. preliminary, timing (how it would impact on our constitutionally mandated report date), and other related issues. After some extensive and, in some instances, spirited negotiations, we reached an agreement as to the release. Each delegation would present a separate map for release to the public. The next issue provided the comic relief that often follows any difficult negotiation.

I informed the parties that I did not want a party label attached to either map. The issue became what to designate each map. We met with both sides and opened the floor for suggestions. Some of the proposals included naming the maps after the first New Jersey Governors James Paterson and William Livingston, which was rejected since we had cities with those names, and it would have been confusing; for the second

191. For an expansive discussion of the alternative metrics used in analyzing election data, see generally Samuel S.-H. Wang et al., *An Antidote for Gobbledygook: Organizing the Judge's Partisan Gerrymandering Toolkit into Tests of Opportunity and Outcome*, 17 *ELECTION L.J.* 302 (2018).

choice, one of the parties suggested Case Pork Roll v. Taylor Pork Roll.¹⁹² I exercised my veto power because as I explained, I would have to answer to my late mother as to why I was agreeing to a pork product.¹⁹³ Another option was Springsteen v. Bon Jovi; however, as much as the public would have enjoyed it, it was rejected because of their political views.¹⁹⁴ Finally we agreed on the Turnpike Map v. the Parkway Map. For the first time in apportionment history, preliminary maps from the Apportionment Commission were presented to the public.¹⁹⁵ Of course, within minutes of the release of the maps, the media easily identified which party generated which map.¹⁹⁶ Nevertheless, it had its intended impact.¹⁹⁷ The public response to the maps was overwhelming, and two public hearings were scheduled to hear the comments from the 160 people who registered to speak at these two meetings.¹⁹⁸

The Commission held a record number of eleven public hearings, with all but two on Zoom. The hearings were particularly helpful in identifying communities of interest. We learned, for example, about the historic Arab populations of Paterson County and Passaic County,¹⁹⁹ the importance to the African-American community of linking Merchantville

192. For a brief history of the influence of pork roll in New Jersey, see generally Vicki Hyman, *How New Jersey Saved Civilization: Taylor Ham*, NJ.COM (Apr. 16, 2009, 4:05 AM), https://www.nj.com/insidejersey/2009/04/how_new_jersey_saved_civilizat_5.html.

193. See *Leviticus* 11:3.

194. See Chris Jordan, *Springsteen, Bon Jovi: Trump Is a Lying Moron*, USA TODAY (Sept. 23, 2016, 11:51 PM), <https://www.usatoday.com/story/news/nation-now/2016/09/23/bruce-springsteen-bon-jovi-donald-trump-racist-lying-moron/90993436/>.

195. David Wildstein, *Highlights of the Democratic and Republican Legislative Redistricting Maps*, N.J. GLOBE (Feb. 7, 2022, 1:25 PM), <https://newjerseyglobe.com/redistricting/highlights-of-the-democratic-and-republican-legislative-redistricting-maps/>.

196. *Id.*

197. FAIR DISTRICTS NEW JERSEY, DRAWING NEW LINES: HOW ADVOCATES IN NEW JERSEY PUT COMMUNITIES ON THE REDISTRICTING MAP 41 (2023), <https://www.fundfornj.org/news/2015?year%5Bvalue%5D%5Byear%5D=2023>.

198. *Id.* On February 9, 2022, before the public hearings, Fair Districts New Jersey presented to me and the partisan delegations an extraordinary sixty-nine-page document entitled “Fair Districts Coalition Community Maps—2022.” The document graphically displayed maps depicting the various communities of interest throughout the state. See *id.* app. at 57–61. The information contained in the materials was incorporated in the testimony of various witnesses who testified during the public hearings. See *id.* app. at 61–63, 69.

199. See N.J. LEGIS. APPORTIONMENT COMM’N, JANUARY 26, 2022 COMMISSION MEETING 9–10, 15–16 (2022) (statement of Andre Sayegh, Mayor of Paterson & Abed Awad, Nat’l Bd. of Am. Arab Anti-Discrimination Comm. and Member, Palestinian Am. Cmty. Ctr. of Passaic Cnty.); N.J. LEGIS. APPORTIONMENT COMM’N, FEBRUARY 5, 2022 COMMISSION MEETING 9–10 (2022); see N.J. LEGIS. APPORTIONMENT COMM’N, FEBRUARY 9, 2022 COMMISSION MEETING 111 (2022) (numerous witnesses).

and Pennsauken with Camden,²⁰⁰ the linkage between Vineland Millville and Bridgeton to the Hispanic/Latinx community,²⁰¹ linking Freehold with the shore communities in Monmouth County;²⁰² and the influence of the Asian communities in Middlesex, Somerset, and Mercer counties.²⁰³ I cite these as just a few.

In all, hundreds of people testified at our public hearings or submitted comments and maps.²⁰⁴ We heard from high school, college, and graduate students, politicians, ethnic, and religious groups, and most important, just New Jerseyans who wanted to participate and have an opportunity to weigh in as to what we were doing.²⁰⁵

In addition to the public hearings, we met with interest groups who shared their views with us. One group proved to be especially well-organized and substantive. Fair Districts New Jersey,²⁰⁶ an

200. See FEBRUARY 5, 2022 COMMISSION MEETING, *supra* note 199, at 26–27, 86–87 (statement of Susan Druckenbrod, Co-Chair, Comm. on Racial & Econ. Equity & Charlene D. Walker, Exec. Dir., Faith in N.J.).

201. There were multiple witnesses at various hearing who testified to this point. See, e.g., FEBRUARY 9, 2022 COMMISSION MEETING, *supra* note 199, at 25–26, 30–32; N.J. LEGIS. APPORTIONMENT COMM’N, FEBRUARY 11, 2022 COMMISSION MEETING 5 (2022).

202. There are multiple witnesses at various hearings who all testified to this point. See, e.g., FEBRUARY 9, 2022 COMMISSION MEETING, *supra* note 199, at 31–32.

203. There are multiple witnesses at various hearings who all testified to this point. See, e.g., N.J. LEGIS. APPORTIONMENT COMM’N, NOVEMBER 6, 2021 COMMISSION MEETING 12, 27–28 (2021); N.J. LEGIS. APPORTIONMENT COMM’N, NOVEMBER 16, 2021 COMMISSION MEETING 11–14 (2021); N.J. LEGIS. APPORTIONMENT COMM’N, DECEMBER 10, 2021 COMMISSION MEETING 12–13, 22, 30 (2021); N.J. LEGIS. APPORTIONMENT COMM’N, JANUARY 26, 2022 COMMISSION MEETING 8, 12–13, 74–76 (2022); FEBRUARY 9, 2022 COMMISSION MEETING, *supra* note 199, at 6, 13, 35, 60; FEBRUARY 11, 2022 COMMISSION MEETING, *supra* note 201, at 11, 22, 49–50.

204. For the full transcripts of these testimonies, see generally *Public Hearing Transcripts 2022*, N.J. LEGISLATURE, <https://www.njleg.state.nj.us/public-hearings#APPC> (last visited Apr. 22, 2023) (choose “Public Hearing Transcripts 2022” from dropdown; then click “Apportionment Commission” under “Legislative Commissions”).

205. See *id.*

206. The Fair Districts New Jersey is “dedicated to ensuring that New Jersey’s voting districts are drawn in a way that is transparent, representative, community-driven and fair. The coalition is led by the *League of Women Voters of New Jersey*, a nonpartisan nonprofit organization that encourages informed and active participation in government.” *About Us*, FAIR DIST. N.J., <https://www.fairdistrictsnj.org/about> (last visited Apr. 22, 2023). The Fair Districts New Jersey members were active participants and contributors to the work of the Commission. See, e.g., Diccon Hyatt, *Redistricting Group Wants to Make NJ Elections Fair*, CMTY. NEWS (Nov. 13, 2019), https://www.communitynews.org/princetoninfo/business/survivalguide/redistricting-group-wants-to-make-nj-elections-fair/article_db80cfb-32c9-5bd5-a075-a99aef940f90.html. During the course of the deliberative process, members of the coalition, especially Ms. Henal Patel from the Institute of Social Justice and Philip Hensley from the League of Women Voters of New Jersey, met and consulted with the various delegations

extraordinary amalgam of various ethnic, racial, and non-partisan organizations, met with us and presented a listing of communities of interest²⁰⁷ and then exhibited a map to the entire Commission reflecting a coalition of minority groups, which represent 48% of the New Jersey population.²⁰⁸ These were smart, talented, and thoughtful advocates whose hard work and advocacy had an impact on the final map.

We had citizens providing maps using free, statistically reliable software that was readily available on the internet.²⁰⁹ Andy had told me that ten years before, maps were being drawn with magic markers; for this cycle, the maps submitted by the public were computer assembled, sophisticated, and plentiful.²¹⁰

As in any political process, there were diversions not directly related to the work of the Commission. On January 26 at 6:30 AM, I received a call from Andy that Senator Sweeney was being removed from the Commission.²¹¹ Senator Sweeney then filed a lawsuit on January 27, 2022, seeking reinstatement as well as an injunction against the

and the eleventh member. *See, e.g., Leadership & Staff*, LEAGUE OF WOMEN VOTERS OF N.J., <https://www.lwvnj.org/about/leadership-and-staff> (last visited Apr. 22, 2023).

207. *See* FEBRUARY 5, 2022 COMMISSION MEETING, *supra* note 199, at 11, 26, 37, 60.

208. *See id.*; FAIR DISTRICTS NEW JERSEY, *supra* note 197, at 38–41; Colleen O’Dea, *Flap Over How Redistricting Commission Chose Dems’ Map*, N.J. SPOTLIGHT NEWS (Dec. 23, 2021), <https://www.njspotlightnews.org/2021/12/redistricting-map-democrat-republican-complaints-playing-politics-districts-protect-dems-now-in-place/>. On February 5, 2022, Fair Districts New Jersey presented a “unity map” to the Commission. *See New Jersey Legislative Unity Map*, FAIR DIST. N.J., <https://www.fairdistrictsnj.org/state-legislative-unity-map> (last visited Apr. 22, 2023). The map represented the work of members of this extraordinary coalition. *See id.* The participants included the following groups:

Fair Share Housing Center; Latino Action Network; Latino Coalition of New Jersey; League of Women Voters of New Jersey; Latinas United for Political Empowerment (L.U.P.E.) Fund; NAACP State Conference; the New Jersey Alliance for Immigrant Justice; New Jersey Institute for Social Justice; New Jersey League of Conservation Voters; New Jersey Appleseed Public Interest Law Center; New Jersey Working Families; the Palestinian American Community Center; Salvation and Social Justice and Sikh American Legal Defense and Education Fund.

Id.

209. One particular software program was Dave’s Redistricting App, which was available to the public at no cost. *See Welcome to Dave’s Redistricting*, DRA2020, <https://davesredistricting.org/maps#home> (last visited Apr. 22, 2023). The majority of public submissions were made using this software program.

210. *See generally* Kristian Hernández, *DIY Redistricting Allows Public to Draw Maps in More States*, PEW (Aug. 31, 2021), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2021/08/31/diy-redistricting-allows-public-to-draw-maps-in-more-states> (describing the positive civic impact of allowing members of the public to draw and submit their own redistricting maps).

211. *See* David Wildstein, *Sweeney Dumped from Democratic Legislative Redistricting Commission*, N.J. GLOBE (Jan. 26, 2022, 9:15 AM), <https://newjerseyglobe.com/fr/sweeney-dumped-from-democratic-legislative-redistricting-commission/>.

Commission.²¹² Our position was simple: as to the removal, the issue was an internal political issue, and we would take no position on the merits; however, we opposed delaying the process and filed a brief in opposition to the injunction.²¹³ Ultimately, the lawsuit was dismissed.²¹⁴

A second sideshow involved a series of escalating attacks against our expert Sam Wang.²¹⁵ It is difficult to refrain from engaging with the press and answering spurious allegations, but as I had been taught through my experience at the Administrative Office of the Courts, never make a one-day story into a three-day story.²¹⁶ It was a difficult time for Sam, but we assured him that *he was our expert*, and eventually the press went on to other things.

We went back to business. I mentioned that there are two exceptions to the unified municipality rule. Newark and Jersey City could be split into two districts;²¹⁷ however, as mentioned earlier, in the *McNeil* case, the court allowed a split of the cities into three districts.²¹⁸ During our deliberative process, this became an issue. Were we willing to split Jersey City into three districts? I determined that notwithstanding *McNeil*, I was reluctant to support this split. The argument to split it was to

212. See David Wildstein, *Sweeney Headed to Court in Bid to Regain Redistricting Commission Seat*, N.J. GLOBE (Jan. 27, 2022, 10:51 AM), <https://newjerseyglobe.com/redistricting/sweeney-headed-to-court-in-bid-to-regain-redistricting-commission-seat/>.

213. David Wildstein, *Tiebreaker Opposes Injunction on Sweeney Bid to Reclaim Redistricting Seat*, N.J. GLOBE (Jan. 31, 2022, 1:45 PM), <https://newjerseyglobe.com/fr/tiebreaker-opposes-injunction-on-sweeney-bid-to-reclaim-redistricting-seat/>.

214. On February 1, 2022, The Honorable Robert Lougy, Assignment Judge of the Superior Court, Mercer County, denied relief to Senator Sweeney, and the case was dismissed. See Joey Fox, *Judge Denies Sweeney Bid to Reclaim Seat on Redistricting Commission*, N.J. GLOBE (Feb. 1, 2022, 5:56 PM), <https://newjerseyglobe.com/redistricting/judge-denies-sweeney-bid-to-reclaim-seat-on-redistricting-commission/>.

215. See, e.g., David Wildstein, *Princeton Team Advising Carchman Could Have a Conflict*, N.J. GLOBE (Jan. 19, 2022, 12:49 AM), <https://newjerseyglobe.com/redistricting/princeton-team-advising-carchman-could-have-a-conflict/>; David Wildstein, *Princeton University Investigating Sam Wang for Research Misconduct, Toxic Workplace Issues*, N.J. GLOBE (Apr. 28, 2022, 9:01 AM), <https://newjerseyglobe.com/redistricting/princeton-university-investigating-sam-wang-for-research-misconduct-toxic-workplace-issues/>; Matt Friedman, *The Literal Princeton Gerrymandering Project?*, POLITICO (Apr. 29, 2022, 6:55 AM), <https://www.politico.com/newsletters/new-jersey-playbook/2022/04/29/the-literal-princeton-gerrymandering-project-00028840>.

216. While I was serving as acting administrative director of the Courts, the then-director of communications and community relations of the Administrative Office of the Courts, Winnie Comfort, advised me to follow this basic tenet whenever possible.

217. See N.J. CONST. art. IV, § 2, para. 3.

218. See *McNeil v. Legis. Apportionment Comm'n*, 828 A.2d 840, 850 (N.J. 2003).

preserve a minority district consistent with section 2 of the Voting Rights Act of 1965.²¹⁹ My decision was, in part, premised on a legal development taking place away from New Jersey. Earlier in the week, the United States Supreme Court, in a case called *Merrill v. Milligan*,²²⁰ granted a stay against the enforcement of a three-judge court order requiring Alabama to generate a map creating two majority-minority congressional districts.²²¹ Even though no reasons were given for Justice Clarence Thomas granting the stay, in a concurring opinion written by Justice Brett Kavanaugh and joined by Justice Samuel Alito,²²² together with a dissent by Chief Justice John Roberts,²²³ the viability of section 2 of the Voting Rights Act was at issue.²²⁴ Andy and I discussed the cases and worked with our technical staff, including our young mapmaker, Kevin Cheung, and concluded that a map could be drafted to preserve the minority districts in Jersey City without the necessity of the three-way split. While *Merrill* was a congressional redistricting case, we had little doubt that the United States Supreme Court would, at some point, question section 2 of the Voting Rights Act as applied to state legislative districts. The New Jersey legislative map could be jeopardized, and we said no! In the end, the final map was drawn, consistent with the constitution, with only a two-way split.

The last week of the Commission deliberative process is called hotel week. All of us—Commissioners, counsel, staff—closet ourselves in a hotel²²⁵ and go non-stop until we reach a resolution. Time and privilege prevent me from going too deep into the weeds as to what transpired during hotel week, but I will try to give you a sense of what happened.

The first day, February 15, 2022, was map immersion day. Consistent with my past practice, I met with the co-chairs to discuss the agenda for the day. I would first meet with the Commission as a whole, and then we would hear map presentations from each side, adjourn, and reconvene to offer comments about the proposed maps. With the chairs, we discussed

219. See 52 U.S.C. § 10301.

220. *Merrill v. Milligan*, 142 S. Ct. 879 (2022) (mem.). On June 8, 2023, subsequent to the presentation of this Weintraub Lecture, the United States Supreme Court by a 5–4 vote affirmed the decision of the three-judge panel of the District Court concluding that plaintiffs demonstrated a reasonable likelihood of success on their claim that the districting plan adopted by the state of Alabama for its 2022 congressional elections likely violated Section 2 of the Voting Rights Act. See *Allen v. Milligan*, 143 S. Ct. 1487, 1498 (2023). Because the Court had previously granted a stay of the District Court’s decision, the 2022 Congressional election was conducted using the now rejected map. See *id.*

221. See *Merrill*, 142 S. Ct. at 879, 881–82 (Kavanaugh, J., concurring).

222. *Id.* at 879.

223. *Id.* at 882 (Roberts, C.J., dissenting).

224. *Id.* at 881 (Kavanaugh, J., concurring); *id.* at 882 (Roberts, C.J., dissenting).

225. The Marriott at Forrester in Plainsboro, New Jersey.

procedural issues such as each side exchanging maps with each other (another first) and the nature of the presentation, as well as more subjective issues. Everyone agreed that the interactions would continue to be professional, and the tone would reflect that objective. Finally, we agreed that we would continue a discussion that we had started earlier in our meetings: the possibility of a consensus map!

The rest of the day followed the agenda with extensive discussion of various map proposals, our team reactions, and the redrafting of maps. Each iteration of a map requires detailed analysis as to each of the forty districts, which must be scrutinized to make sure they fit in the total picture, and within a district, there are nuances that serve as justifications for a proposed change from the past.²²⁶ Each adjustment requires a readjustment in some other districts.

During the week, I would meet individually with delegations but most regularly, with the chairs. Issues arose on the hour that required our input, but it became apparent that we were operating on two tracks. The parties were developing their own partisan maps, while our team analyzed, scored, and prepared comments for each iteration. At the same time we were focusing on partisan maps, the negotiations for a consensus map became more intense. These are two different role plays for the eleventh member. One is arbitrator and the other is mediator, and both come with a vote as a member of the Commission. Any discussion with the chairs always circled back to the issue of a consensus map. But time was running out, as we had a deadline for production of a final map.²²⁷

As with any negotiation process, there were constant ups and downs; one moment we were making progress on a consensus map and the next, we had no chance for an agreement. At the same time that we were negotiating a consensus map, we were calling on the parties to produce their final partisan maps for analysis where I would cast a vote. Then late on Thursday afternoon, it all came to a head when the parties indicated they were close to an agreement but at an impasse. Much of the disagreement stemmed from Democratic and Republican views of the final map but we also intuited, and then confirmed, that there were significant internal conflicts within the caucuses. My role shifted again; I now had to meet with and champion the Commission as a whole on the advantages of a consensus map. The room was tense as I explained how unique and important the moment was; most important, “this was an opportunity to control one’s destiny.” “The time was now.” Finally, I told the parties that they had one hour to resolve their issues or produce their

226. See N.J. CONST. art. IV, § 3, para. 4.

227. Under the 2020 amendment to the constitution, the final map was due on March 1, 2022. See N.J. CONST. art. IV, § 3, para. 4.

competing maps, as I would be preparing to make a call on a map that neither side would be happy about. Since my appointment, I kept a detailed journal recording my experience as the eleventh member. The entries for the first few months consume a notebook, and the entries for hotel week fill yet another. The entry for February 18, 2022, at 6:10 PM has a page of its own; it contains one word: “Deal!” We had a map! There was still lots of work to do. But we had our consensus map. Our team met, reviewed, and scored the map, and the Commission made history with a consensus map that satisfied all of the constitutional and court-imposed mandates, as well as the standards that I had presented to the Commission.²²⁸

The next day, on February 19, 2022, the New Jersey Apportionment Commission met in Trenton and voted by a bipartisan vote of nine to two (four Democratic Commissioners, four Republican Commissioners, and myself) to approve a new legislative map.²²⁹ One Republican²³⁰ and one Democrat voted no.²³¹ One newspaper wrote that the vote was “an unprecedented compromise for a commission that has historically relied on a court-appointed tiebreaker to end partisan gridlock.”²³² This map takes effect for New Jersey’s 2023 legislative elections.²³³

The reactions to this map have been generally positive with some limited criticism.²³⁴ Chairman Barlas and Chairman Jones, whose leadership made this result happen, expressed pride for what had been accomplished, recognizing that a result like this generates hard and tough decisions, especially by them and their delegations.²³⁵ As expected,

228. Nikita Biryukov, *Democrats, GOP Agree on New Legislative Map for N.J.*, N.J. MONITOR (Feb. 18, 2022, 4:38 PM), <https://newjerseymonitor.com/2022/02/18/democrats-gop-agree-on-new-legislative-map-for-n-j/>. The first two legislative commissions in 1966 and 1971 reached agreements as to a consensus map. The difference, however, was that neither map survived subsequent judicial scrutiny, with the 1966 map being rejected by the Supreme Court in *Jackman I* and the 1971 map being rejected by the Supreme Court in *Davenport I*. See *Jackman I*, 205 A.2d 713, 721, 726–28 (N.J. 1964); *Davenport I*, 308 A.2d 3, 8, 10 (N.J. 1973).

229. Biryukov, *supra* note 228.

230. *Id.* (referring to former State Senator Thomas Kean, Jr.).

231. *Id.* (referring to Commissioner Cosmo Cirillo). Neither Senator Kean nor Commissioner Cirillo set forth reasons on the record. See N.J. LEGIS. APPORTIONMENT COMM’N, FEBRUARY 18, 2022 COMMISSION MEETING 12 (2022).

232. Biryukov, *supra* note 228; see also Colleen O’Dea, *A New Way for a New Map?*, N.J. SPOTLIGHT NEWS (Feb. 23, 2022), <https://www.njspotlightnews.org/2022/02/nj-redistricting-political-legislative-census-reapportionment-state-elections/>.

233. See N.J. CONST. art. IV, § 3, para. 1.

234. See generally Matt Friedman, *New Jersey’s New State Legislative District Map Adopted in Bipartisan Vote*, POLITICO (Feb. 21, 2022, 6:52 PM), <https://www.politico.com/news/2022/02/21/by-9-2-vote-n-j-gets-a-new-state-legislative-district-map-00010236> (describing reactions to the new map).

235. See Biryukov, *supra* note 228.

there was some negative reaction for the map falling short of Fair District New Jersey's goal of twenty majority-minority districts.²³⁶ However, the map has a record number of seventeen such districts with two more providing realistic election opportunities for minorities.²³⁷

With the reflection that time affords, the most important outcome is that the process worked as intended. The constitution provides for a system where the Commission can agree on a map without the eleventh member serving as the tiebreaker.²³⁸ All that is necessary is that majority of the Commissioners agree.²³⁹ That is what the drafters envisioned. And that is what happened.

We achieved some unique firsts: a record number of public hearings, the first public release of maps for public reaction and comment, and a consensus map that was never challenged in court. Further, unlike the consensus maps of the late sixties, this map meets the standards imposed by the constitution and the courts.²⁴⁰

For me, it proved to be a unique experience. I was exposed to two fierce and strong advocates in Chairmen Barlas and Jones, true leaders and gentlemen, who, despite the tensions and pressures of the moment, were respectful, civil, candid, and tough but fair and seized the moment to make history. I was fortunate to have an extraordinary lawyer and map expert and team that worked hard and well together, spoke their individual minds openly and candidly, and never lost sight of the Commission's role or purpose.

The Brennan Institute for Justice has noted that done right, apportionment is a chance to create maps that, in the words of John Adams, are an exact portrait, "a miniature' of the people as a whole."²⁴¹ Was the map perfect? Did we produce an exact portrait of New Jersey? No! There will never be a perfect map, nor a perfect portrait. What was accomplished is a fair map, a constitutional map, a bipartisan map approved by Commissioners on both sides of the aisle; a map designed to last for a decade, and for that, we are proud.

236. *See id.*

237. *See id.*

238. Katie Sobko, *What the New NJ Legislative Districts Will Look Like After Historic Map Compromise*, NORTHJERSEY.COM (Feb. 18, 2022, 6:41 PM), <https://www.northjersey.com/story/news/new-jersey/2022/02/18/nj-legislative-map-approved-historic-bipartisan-compromise/6843571001/>.

239. *See id.*

240. *See supra* note 228 and accompanying text.

241. *Redistricting*, BRENNAN CTR. FOR JUST., <https://www.brennancenter.org/issues/gerrymandering-fair-representation/redistricting> (last visited Apr. 22, 2023).