

A Voter's Guide to Redistricting Reform in Virginia



**PRINCETON
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Princeton Gerrymandering Project
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Dear Virginia voter:

Virginia was the site of the first gerrymander in 1789. In 2020, you get a chance to make today's maps Virginia's last gerrymander. It depends on you – and your legislators.

Patrick Henry was a great American and a great Virginian – but he was also a political animal. In 1789, he drew district lines to make it harder for James Madison to win a seat in the legislature. Madison overcame that offense, but the offense lived on and grew, eventually being named “gerrymandering” after Elbridge Gerry of Massachusetts in 1812.

This report describes how gerrymandering lives on in 2019 in the Old Dominion – and how it can be stopped. An amendment to the state constitution can end gerrymandering permanently. If passed by the General Assembly in January 2020 and approved by voters in November, it would lead to the formation of a Virginia Redistricting Commission that would give citizens a seat at the table for redistricting in 2021.



There are steps both you and your legislators can take. Tell your legislators know how important reform is. Your legislators can pass the amendment. They can also pass enabling legislation to help the commission succeed – by making sure it represents diverse interests in the Commonwealth and by setting rules that will treat all communities fairly.

This report was written by Aaron Barden, Hannah Wheelen, and Hope Johnson, and myself. We thank the many people we spoke with: Brian Cannon of OneVirginia2021, Tony Fairfax of CensusChannel, Rebecca Green of William and Mary Law School, Jamaa Bickley-King of New Virginia Majority.

I hope you find this report helpful. Use it to inform your neighbors and legislative candidates!

Yours sincerely,

A handwritten signature in black ink that reads "Samuel S.-H. Wang". The signature is written in a cursive, flowing style.

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Summary

In February 2019, the General Assembly passed SJ306, the first reading of a constitutional amendment that would create the Virginia Redistricting Commission. Under Virginia's constitutional amendment process, the General Assembly must pass it a second time, verbatim, in the upcoming 60-day, January 2020 session. If it passes, it will go to the voters in November 2020. The new Commission would be a bipartisan commission of legislators and citizens jointly placed in charge of the Commonwealth's redistricting process. This Amendment presents Virginia's last chance for meaningful redistricting reform before the lines are redrawn in 2021. The Amendment can be improved through enabling legislation. Such improvements should focus on three key areas: (1) how commission members are chosen, (2) criteria for drawing districts, and (3) transparency to allow maximum public input and analysis.

Virginia has endured a decade of redistricting litigation, but it need not be this way. Putting redistricting power in the hands of a commission can remove self-dealing and partisanship from the process in 2021. To that end, voters must make candidates' support for the Amendment and its enabling legislation a key issue in this November's election. Voters can keep up the pressure by asking their local House and Senate candidates on the issue and pushing them to support reform.

The Problem

It is well-known that the word "gerrymandering" arose as a result of Massachusetts Governor Elbridge Gerry in 1812. What is less known is that practice itself originated in Virginia. In 1789, Patrick Henry sought to prevent James Madison, a Federalist, from winning a seat in Congress, thereby blocking the adoption of the Bill of Rights and forcing a second constitutional convention.¹ Patrick Henry's attempt failed, but the practice has persisted. More than two hundred years later, gerrymandering, defined as the practice of drawing district lines to favor one group over another, is widespread. Gerrymandering can target not only individuals such as James Madison, but whole groups, including political parties (partisan gerrymandering) and entire racial or ethnic groups (racial gerrymandering).

Importantly, these two forms of group gerrymandering can be the same. Lines drawn to protect one party's political interests can also reduce representation of racial minorities on the other side, and vice versa. **Racial gerrymandering is partisan gerrymandering, and partisan gerrymandering is racial gerrymandering.**

Partisan Gerrymandering

Much has changed since the gerrymanders of 1789 and 1812. As noted by Supreme Court Justice Elena Kagan, "[t]hese are not your grandfather's—let alone the Framers'—gerrymanders."² Former Supreme Court Justice Anthony Kennedy also recognized the potential dangers of advances in

¹ Richard Labunski, *How a Gerrymander Nearly Cost Us the Bill of Rights*, Politico (Aug. 18, 2019), <https://www.politico.com/magazine/story/2019/08/18/gerrymander-the-bill-of-rights-227626>.

² *Rucho v. Common Cause*, 139 S. Ct. 2484, 2513 (2019)(Kagan, J., dissenting).

technology in 2004.³ The rise of computer software now allows linedrawers to pick and choose voters with pinpoint accuracy based on a wealth of available data. This practice has transformed the less-durable gerrymanders of the past into near-permanent victories that rig elections for one party for a decade at a time. And because Virginia currently places linedrawing power with the General Assembly, legislators can pick their voters and keep themselves in power.

Gerrymandering is achieved through “packing” and “cracking.” Packing occurs when linedrawers stuff many voters of one party or group into a single district, guaranteeing one win but eliminating the targeted group’s influence in neighboring districts. Cracking splits up a party or group’s voters between multiple districts, making it impossible for that party or group to be the deciding factor in any district.

Both packing and cracking lead to safe districts for legislators, insulating them from political pressure and separating them from the needs of their constituents. The only meaningful electoral competition occurs in party primaries, leaving power in the hands of one party’s base rather than all the voters.

Racial Gerrymandering

In addition to rearranging boundaries for partisan gain, legislators have also drawn district lines to minimize the voting power of minority groups. Such racial gerrymandering was the subject of a recent major lawsuit in Virginia, the *Bethune-Hill* case. That case, concerning House of Delegates districts, found that Virginia legislators had violated the Equal Protection Clause of the U.S. Constitution by misapplying the Voting Rights Act. The map has been redrawn in time for next week’s election, creating new opportunities for black candidates – but only after four elections had already been held under a gerrymandered map.

The question under the Voting Rights Act (“VRA”) asks whether a sufficiently large and compact minority group can both (1) effectively participate in the electoral process, and (2) have a sufficient opportunity to elect its candidates of choice. For the past few decades, VRA compliance has required the creation of “majority-minority” districts, in which minority voters can make up over 50% of a district’s population.⁴ In many instances, however, minority voters (in Virginia’s case black voters) vote together with white Democrats often enough that they can make their voice heard even if they form less than 50% of the district. These “crossover” districts give the minority group the ability to effectively vote for its candidate of choice.⁵ In short, the power of Virginia’s black community is maximized by building crossover districts.

Racial gerrymandering can also be attacked using the Equal Protection Clause, which asks whether race predominated over other criteria when legislators drew districts. Courts have found such districts to be unconstitutional racial gerrymanders. From a legal standpoint, the Voting Rights Act comes into play when the lines have cracked minority voters and diluted their voting power. The Equal Protection Clause applies when race predominated in redistricting, typically in cases where packing occurred.

³ *Vieth v. Jubelirer*, 541 U.S. 267, 312-13 (2004)(Kennedy, J., concurring).

⁴ *Bartlett v. Strickland*, 556 U.S. 1, 19-20 (2009).

⁵ *See Cooper v. Harris*, 137 S. Ct. 1455, 1472 (2017).

Partisan Gerrymanders = Racial Gerrymanders (and vice versa)

Frequently, partisan gerrymanders and racial gerrymanders are interchangeable for two main reasons. First, when a minority group in an area votes cohesively for one party while the majority group largely votes for a different party, this racial polarization can be used to build an advantage for one party. Linedrawers can pack minority voters of one party into majority-minority districts while claiming that they are complying with the Voting Rights Act.⁶ Although this conflicts with the concept of crossover districts, this tactic is common. Partisan operatives spoke of this exact tactic at a recent American Legislative Exchange Council (“ALEC”) panel called “How to Survive Redistricting.”

During the presentation, members of the panel openly discussed weaponizing the VRA to pack black Democrats and make surrounding districts more white and more Republican.⁷ This shows that the packing of black voters can lead to the packing of Democratic voters, and conversely, that the packing of Democratic voters can lead to the packing of black voters. While some individual black legislators may individually end up with more comfortable wins, there will be fewer of them – and less representation for their communities.

Second, racial gerrymanders can be litigated in federal court. The Supreme Court ruled certain House of Delegates districts as racial gerrymanders in 2017 in *Bethune-Hill v. Va. State Bd. of Elections*.⁸ In that case, the Court found that the General Assembly had set a uniform floor percentage of black voters needed for certain districts and that such a floor was unconstitutional under the Equal Protection Clause. As a result, the affected districts were redrawn by a Special Master and adopted by a court earlier this year.⁹

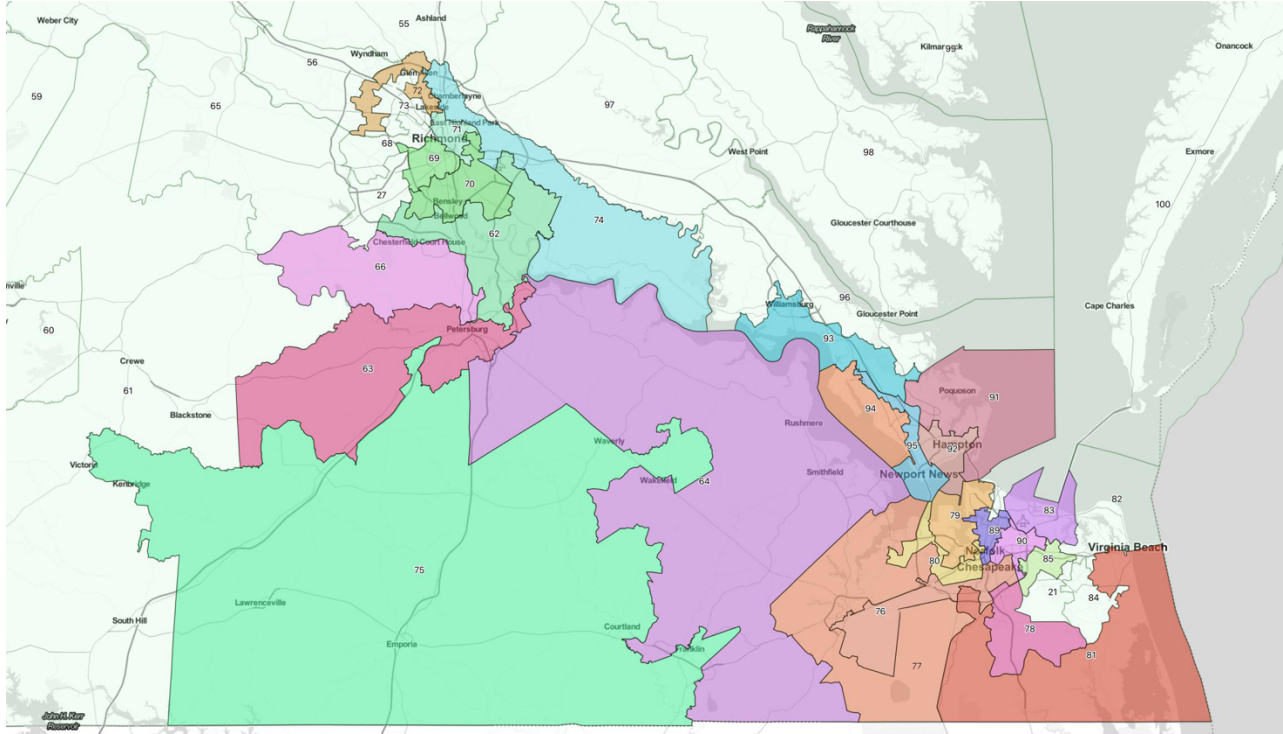
⁶ David Daley, “Worth This Investment”: Memos Reveal The Scope And Racial Animus Of GOP Gerrymandering Ambitions, *The Intercept* (Sept. 27, 2019, 10:21 AM), <https://theintercept.com/2019/09/27/gerrymandering-gop-hofeller-memos/>.

⁷ David Daley, *How to Get Away with Gerrymandering*, *Slate* (Oct. 2, 2019, 1:16 PM), <https://slate.com/news-and-politics/2019/10/alec-meeting-gerrymandering-audio-recording.html>.

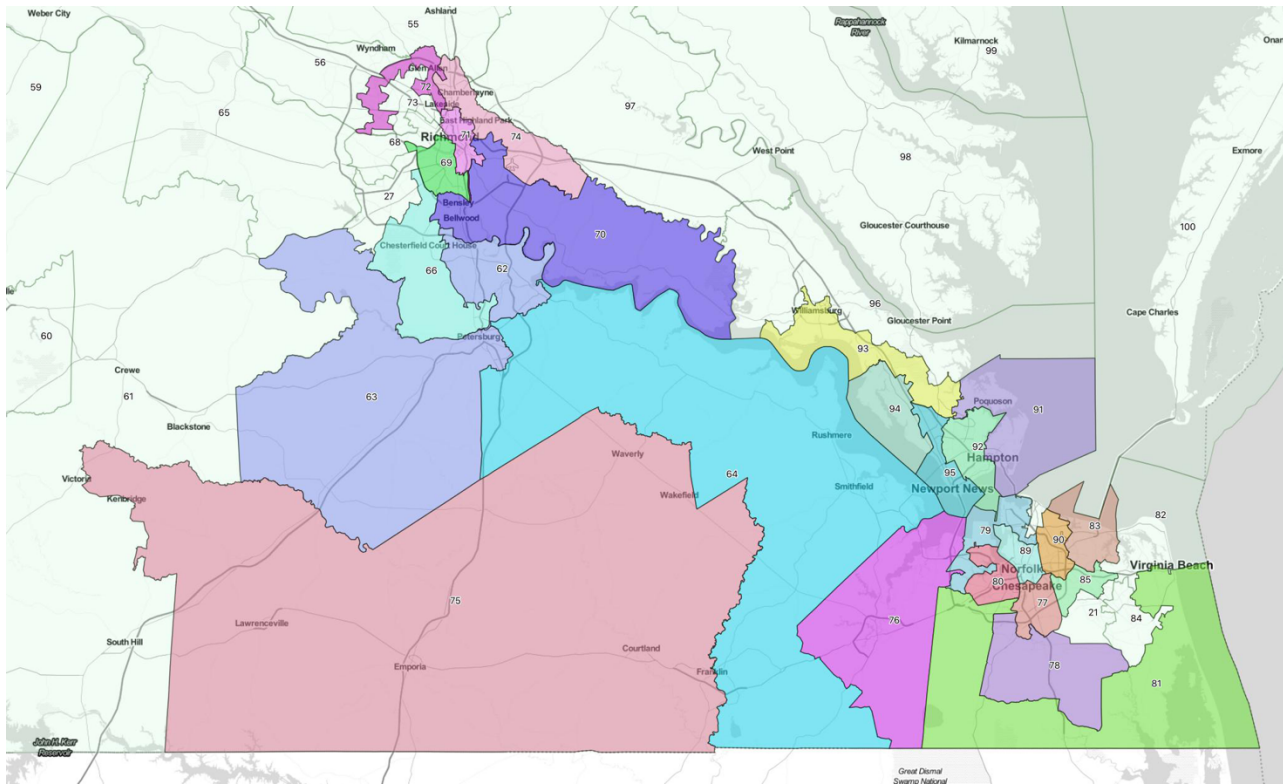
⁸ 137 S. Ct. 788 (2017).

⁹ Graham Moomaw, *Federal court picks redrawn Va. House map that boosts Democrats' chances of taking control*, *Rich. Times-Dispatch* (Jan. 23, 2019), https://www.richmond.com/news/local/government-politics/federal-court-picks-redrawn-va-house-map-that-boosts-democrats/article_6b727239-4d46-592d-99c7-f2b544c5e045.html.

2011 House of Delegates Map



Bethune-Hill Remedial Map

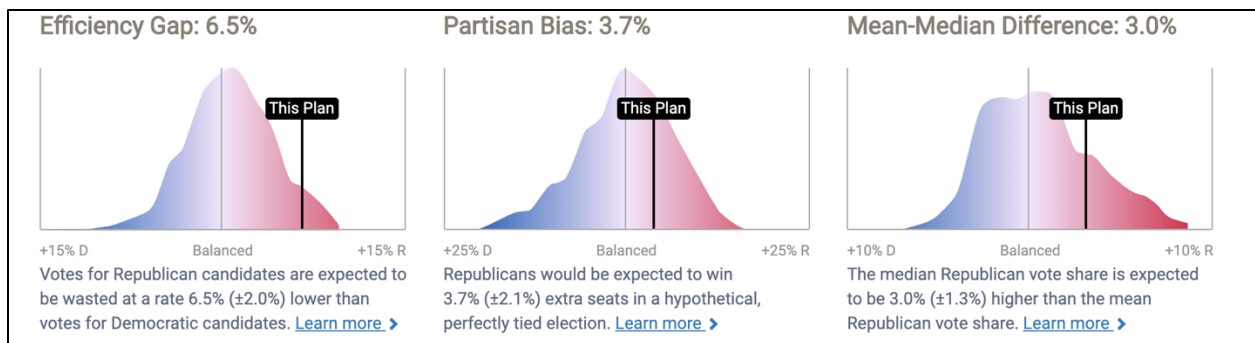


By undoing the racial gerrymander, the redrawn lines have better representation for black communities by ensuring that they are not all packed into a few districts. Instead, these communities make up large percentages of voting populations in numerous districts with a sufficient amount of crossover voting to allow them to vote for their candidates of choice.¹⁰ Additionally, the affected districts are also more competitive.¹¹

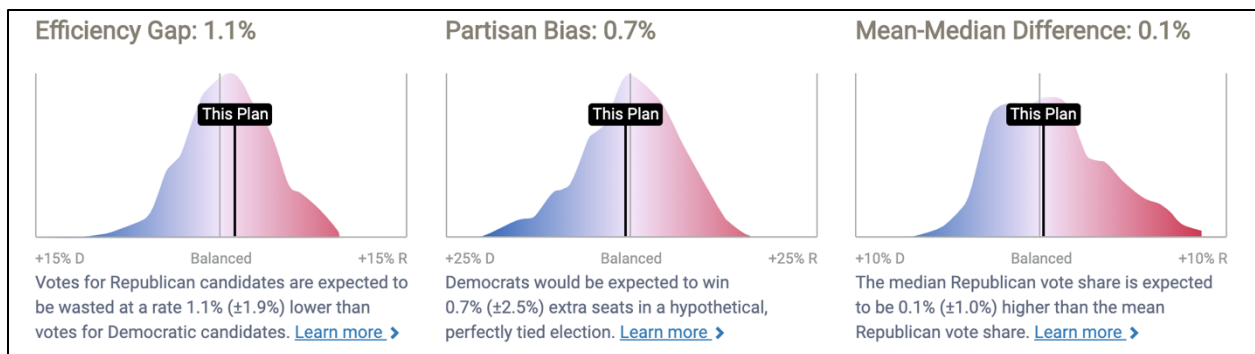
Of the twenty-five districts redrawn in *Bethune-Hill*, the maps enacted by the General Assembly only had five districts that fell within a competitive range of 45-55% vote share for either party. The court’s redraw, however, increased that number to eight competitive districts out of twenty-five. According to metrics of partisanship shown below, the redrawing of the racially gerrymandered districts led to a map that treats the two major parties more equally. In other words, **undoing the racial gerrymander in *Bethune-Hill* also undid a partisan gerrymander.**

These changes also show that taking the redistricting responsibility out of legislators’ hands and placing it with a more independent actor can increase both minority representation and electoral competition.

General Assembly Map PlanScore



Bethune-Hill Remedial Map PlanScore



¹⁰ See Metric Geometry and Gerrymandering Group, *Comparison of Districting Plans for the Virginia House of Delegates 3-4* (Nov. 2018), <https://mggg.org/VA-report.pdf>.

¹¹ Compare Virginia 2011 Map, PlanScore, <https://planscore.org/plan.html?20181013T231353.690915974Z> with Bethune-Hill Remedial Map, PlanScore, <https://planscore.org/plan.html?20191010T173820.540718998Z>.

The redrawn districts have significantly improved representation for black voters by unpacking the black voting age population (“BVAP”). In twelve districts with significant unpacking of black voters, the median BVAP of these districts fell by 13.3%. With only a few exceptions, these districts also have increased levels of partisan competitiveness. In a district where the predicted Democratic vote share was 73.5%, it fell by 15 points to a more closely competitive 57.6% estimated vote share. In the whole redrawn map, where there were smaller BVAP changes, the average win fell by only 8% total. This shows that significant increases in minority representation can also often lead to significant increases in partisan competitiveness.

Table of Significant Changes (±5%) Due to Bethune-Hill Redraw

Districts Seeing Substantial Changes in Racial Representation and Competitiveness*							
Special Master Region	District Number	BVAP 2015 (Prior Map)	BVAP 2015 (Court Map)	BVAP% Change	Dem Vote Share (Prior Map)	Dem Vote Share (Court Map)	Dem Vote Share% Change
Petersburg	63	59.3%	46.9%	-12.4%	73.5%	57.6%	-15.90%
Petersburg	66	18.5%	34.5%	16.0%	38.7%	53.4%	14.70%
Richmond	70	61.2%	56.2%	-5.0%	81.8%	73.6%	-8.20%
Norfolk	76	24.8%	41.9%	17.1%	44.4%	57.4%	13.00%
Norfolk	77	58.7%	40.2%	-18.5%	75.2%	62.7%	-12.50%
Norfolk	80	56.9%	51.4%	-5.5%	74.1%	68.4%	-5.70%
Norfolk	81	20.7%	25.2%	4.5%	39.2%	46.5%	7.30%
Norfolk	83	15.5%	22.9%	7.4%	47.2%	53.8%	6.60%
Norfolk	90	55.2%	42.7%	-12.5%	77.2%	68.2%	-9.00%
Peninsula	91	20.3%	32.5%	12.2%	44.5%	52.6%	8.10%
Peninsula	92	60.0%	54.2%	-5.8%	79.1%	75.2%	-3.90%
Peninsula	94	23.0%	31.6%	8.6%	48.0%	50.9%	2.90%
Peninsula	95	60.7%	48.9%	-11.8%	77.4%	70.4%	-7.00%

*For an apples to apples comparison of the old and new maps, PlanScore estimates are used for all data.

Virginia’s Recent History with Gerrymandering

The past few decades have been filled with partisan warfare in redistricting. In the 1990s, Republicans were the targets of gerrymandering, with Democrats drawing two popular incumbents into the same seventh congressional district.¹² Maps that decade were repeatedly vetoed by Democratic Governor Doug Wilder for underrepresenting black voters.¹³

By 2001, the Republicans had seized control over the government—and, thus, over redistricting for the 2000s. The following decade was filled with lawsuits filed by Democrats.¹⁴ In 2011, the General Assembly was split between the parties, with Democrats controlling the Senate and Republicans

¹² Brian Cannon & Ben Williams, *Slaying the Gerrymander: How Reform Will Happen in the Commonwealth*, 21 Rich. Pub. Int. L. Rev. 23, 26 (2017).

¹³ *Id.*

¹⁴ *Id.*

controlling the House.¹⁵ Rather than following through on calls for reform, the General Assembly drew a bipartisan gerrymander that protected incumbents of both parties producing a 100 percent re-election rate in 2015.¹⁶

The General Assembly did not redraw Congressional districts until 2012 – by which time Republicans had gained control of the state Senate, giving them full control over redistricting.¹⁷ However, both the Congressional map and the House of Delegates map had to be redrawn after federal courts found that they were unconstitutional racial gerrymanders.¹⁸

Taken together, this history shows that both parties will use the power to redistrict to serve their own needs. To combat this, redistricting in Virginia must be done by a more independent body, with checks on the legislators’ power and enough public disclosure to cast sunlight on the map-drawing process.

Virginia’s Route to Reform: A Constitutional Amendment

Earlier this year in *Rucho v. Common Cause*, the Supreme Court declined to intervene in partisan gerrymandering – but they did encourage states and state courts to step in.¹⁹ Now, the best routes forward to reform depend on state laws and constitutions.²⁰ State-based routes are also a good route to pursue racial equity in light of the possibility for the Roberts Court to strike down Section 2 of the Voting Rights Act.²¹

In states like Pennsylvania²² and North Carolina,²³ successful court challenges to gerrymanders have been brought under state constitutional provisions. In other states like Colorado and Michigan,²⁴ citizens have been able to create independent redistricting commissions through ballot initiatives.

In Virginia, reform has to take place by constitutional amendment.²⁵ Virginia lacks a ballot initiative process, and its constitution has no provisions protecting the right to vote. Therefore, reform requires the consent of legislators – a process that has already begun.

¹⁵ *Id.*

¹⁶ *Id.* at 27.

¹⁷ *Id.* at 27-28.

¹⁸ Moomaw, *supra* note 7; Cannon & Williams, *supra* note 9, at 28-29.

¹⁹ 139 S. Ct. 2484, 2507-08 (2019) (“Nor does our conclusion condemn complaints about districting to echo into a void. The States, for example, are actively addressing the issue on a number of fronts”).

²⁰ Samuel S.-H. Wang et al., *Laboratories of Democracy Reform: State Constitutions and Partisan Gerrymandering*, 22 U. Penn. J. Con. Law (forthcoming 2019)(manuscript at 5)(available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3335622).

²¹ Mark Joseph Stern, *The Supreme Court May Soon Deal a Final, Fatal Blow to the Voting Rights Act*, Slate (Oct. 10, 2019, 5:45AM), <https://slate.com/news-and-politics/2019/10/supreme-court-voting-rights-act-obliteration.html>.

²² *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018).

²³ *Common Cause v. Lewis*, 18-CVS-014001 (Wake Cty. Super. Ct. Sept. 3, 2019).

²⁴ Nat’l Conf. of State Legis., *Creation of Redistricting Commissions* (Apr. 6, 2018), <http://www.ncsl.org/research/redistricting/creation-of-redistricting-commissions.aspx>.

²⁵ Princeton Gerrymandering Project, *Reforms 2019: Virginia*, <http://gerrymander.princeton.edu/reforms2019/va/>.

This past February, a redistricting reform amendment was passed by the General Assembly for the first time in history. Passed overwhelmingly on a bipartisan basis, it would create the Virginia Redistricting Commission, a 16-member commission composed of both citizens and legislators. This hybrid structure lets state legislators still have a seat at the table, keeping some of their redistricting power, a necessary component of securing their support. This Amendment presents the best, and perhaps only, way forward for redistricting reform in the Commonwealth by 2021.

Because of Virginia's amendment process, the Amendment is still only one-third of the way to becoming part of the Virginia Constitution. The next step is for the Amendment to pass through the General Assembly again, verbatim, in the January 2020 session. If the Amendment passes in January, it will then go to the voters next November, where it is likely to pass given the groundswell of popular support for redistricting reform in Virginia.²⁶ If it passes, the Virginia Redistricting Commission can be a model for other states where state legislatures must be involved in passing redistricting reform.

If the amendment passes, the other key component to reform is enabling legislation which can be passed by the General Assembly. Legislators did not agree to put these provisions in the amendment itself, but the new General Assembly can fill the gaps – especially if voters express their opinions on the subject.

What is the Commission?

The Amendment creates the Virginia Redistricting Commission, a hybrid commission made up of sixteen members: four Senators (two per party), four Delegates (two per party), and eight citizens. These eight citizens will be chosen by a panel of retired judges, working from lists submitted by each leader of the two major parties in the General Assembly (four lists total).²⁷

For each type of map to pass (U.S. House, Virginia Senate, and Virginia House of Delegates), six out of eight legislators and six out of eight citizens must vote to approve. Additionally, three of the Senator-commissioners must vote in favor of the proposed Senate map and three of the Delegate-commissioners for the proposed House of Delegates map. After passing the Commission, the proposed maps then go to the full General Assembly with no chance for amendment. The maps do not go to the governor for approval. If certain deadlines are not met by the Commission and General Assembly along the way, the Supreme Court of Virginia will be placed in charge of drawing the maps.

Criteria & Transparency

In addition to creating the Commission, the proposed amendment would enshrine certain federal redistricting requirements in the Virginia Constitution and create new transparency requirements. The amendment adds the Voting Rights Act and federal Equal Protection Clause requirements into the Virginia Constitution, requirements that the Commonwealth is already subject to. The Virginia

²⁶ Wason Center, *Wason Center's State of the Commonwealth Survey Finds Virginia Voters are...Happy?*, (Dec. 5, 2018), <http://cnu.edu/wasoncenter/surveys/2018-12-05-state-of-the-commonwealth/>.

²⁷ For a more detailed description of the Commission selection process, see Graham Moomaw, *Virginia took a step toward redistricting reform. With power up for grabs, will lawmakers follow through?*, *Virginia Mercury* (Oct. 14, 2019), <https://www.virginiamercury.com/2019/10/14/virginia-took-a-step-toward-redistricting-reform-with-power-up-for-grabs-will-lawmakers-follow-through/>.

Constitution already requires compactness, contiguity, and equal population. The Amendment adds a new key requirement: it requires districts that respect racial and ethnic communities' opportunities to elect candidates of their choice "where practicable."

On the transparency front, the amendment would make the Commonwealth's redistricting process more visible and more open to public input. Under the Amendment, all of the Commission's hearings would be open to the public. It also requires that at least three public hearings be held around Virginia for the Commission to receive and consider public comment. Lastly, the Amendment requires that all records and documents of the Commission will be considered public information, including the records and documents of any outside individuals or groups who are performing Commission functions or advising it.

Room for Improvement: Enabling Legislation

While this Amendment is a good first step towards reform in Virginia, it has room for improvement. The General Assembly is able to vote for these improvements through the Amendment's enabling legislation. Governor Northam will also have a significant role to play here because of his veto and amendment power over potential legislation. Improvements should address three key areas: (1) Commission selection requirements, (2) criteria, and (3) transparency.

1. Adding Commission Selection Requirements

As written now, the Amendment only requires that commissioners not be current members of Congress or of the General Assembly. This limitation does not ensure the Commission's diversity or independence. But the Amendment does require the General Assembly to "establish [criteria] . . . by general law" to govern selection of Commission members.

The General Assembly can pass legislation **requiring that the membership of the Commission reflect the racial, ethnic, and geographic makeup of the Commonwealth**. Such a diversity requirement is common in redistricting reform language in other states. When drawing lines for Virginia, major input can then come from every subsection of the population by way of a Commission that reflects the diversity of the Commonwealth.

Leaders from both parties have stated that commissioner diversity is a priority for legislative improvements this January. Democratic leaders in the House of Delegates have stated that "ensur[ing] minority representation on the redistricting commission" will be a "top priority" of the Democratic caucus in January's session. Steve Landes (R-Augusta) predicted that the General Assembly will be able to make this improvement.²⁸ If such a law does pass, minority representation in Virginia redistricting would jump from 15% of the General Assembly (21 members out of 140) to a likely 18-25% of Commission membership (3 or 4 Commissioners out of 16). In short, **the right enabling legislation will give minority groups in Virginia a greater voice than the status quo.**

²⁸ Mechelle Henkerson, *Redistricting reform clears first major hurdle with General Assembly approval*, Virginia Mercury (Feb. 25, 2019), <https://www.virginiamercury.com/2019/02/25/redistricting-reform-clears-first-major-hurdle-with-general-assembly-approval/>.

Second, the General Assembly could ensure that the commissioners are not hidden partisan agents. The Amendment itself can prevent a gerrymander by one party or the other. However, it may allow the parties to work together to craft an incumbency protection plan, as they did in 2011.²⁹ Therefore, it may be prudent to push legislation that places further restrictions on citizen commissioners' relationship to current legislators and partisan actors. The General Assembly could **prohibit major campaign donors, relatives of elected officials, and other potential political operatives from serving on the citizen side of the Commission.**

Third, the enabling legislation could **require an application process for Commission membership.** The four lists submitted to the panel of retired judges should be populated from a pool of interested Virginians with nonpartisan experience in civic engagement. Leaving this process at the discretion of the four party leaders in the General Assembly will likely lead to them turning to friendly partisans. By requiring an applicant pool, however, the Commission's independence would be better ensured. Such an application process should also be disseminated to a broad audience to ensure an applicant pool that is representative of Virginia. This applicant pool could also include a jury-strike selection process (like the one included in SJ274),³⁰ allowing each side to remove the others' potential partisans.

2. Adding Criteria for Fair Districting

In addition to improving the Commission's selection requirements, the General Assembly should pass criteria-based legislation in order to guide the Commission's work. Right now, Virginia's only required criteria are compactness, contiguity, and equal population. As noted, the Amendment would provide "opportunities for racial and ethnic communities to elect candidates of their choice." The efficacy of this latter language is undercut by only requiring these opportunities "where practicable" and by concerns that the Supreme Court may find dilution claims under Section 2 of the Voting Rights Act unconstitutional. Because the proposed criteria alone are not enough to guide the Commission's work, the following criteria should be added to ensure that political and racial minorities are fairly represented by the Commission's end-product.³¹

First, to prevent partisan gerrymandering, a criterion can be added to **prohibit the drawing of lines to favor or disfavor any party or incumbent.** Most other states with a redistricting commission have this restriction.³²

²⁹ Vann R. Newkirk, *Democrats Win Phase One of the Redistricting Wars*, The Atlantic (Nov. 9, 2017), <https://www.theatlantic.com/politics/archive/2017/11/democrats-win-phase-one-of-the-redistricting-wars/545366/>.

³⁰ Virginia Citizens Redistricting Commission, S.J. 274 (2019), <http://lis.virginia.gov/cgi-bin/legp604.exe?191+ful+SJ274/>

³¹ Some of these criteria are specifically borrowed from SJ274, which was the work of OneVirginia2021 and a bipartisan drafting commission. Marie Albiges, *10-member bipartisan commission proposed to redraw district lines*, Daily Press (Nov. 29, 2018, 1:55 PM), <https://www.dailypress.com/government/dp-nws-redistricting-commission-constitutional-amendment-20181127-story.html>.

³² See Nat'l Conf. of State Legis., *Redistricting Criteria* (Apr. 23, 2019), <http://www.ncsl.org/research/redistricting/redistricting-criteria.aspx>; Nat'l Conf. of State Legis., *Creation of Redistricting Commissions* (Apr. 6, 2018), <http://www.ncsl.org/research/redistricting/creation-of-redistricting-commissions.aspx>.

And an emphasis on fairness—by **mandating a goal of equal opportunity to elect between the two largest parties**—would also be useful. This type of language would not only proactively limit the amount of partisan skew in the Commission’s maps, but it would also allow plaintiffs to challenge maps on a partisan basis in potential future litigation.

Second, a criterion should be added to **emphasize the role of communities of interest**. Adding a stricter requirement would better protect racial and ethnic communities, as already required in the Amendment, while also improving representation for other types of communities in Virginia. Such a requirement should specify that political ideology does not form a community of interest, but that other shared priorities do.

This criterion should **require public input when defining communities and their boundaries**. Currently, there are incredibly useful public web tools³³ that will allow citizens to draw their own communities of interest in a way that would be digitally useful to the Commission. Such a criterion could also suggest **the use of political subdivisions as a guide to protecting communities of interest when public input is lacking**.

Third, compactness should be defined in a way that allows for respecting other criteria but that prevents sprawling districts. Defining compactness is essential because in *Vesilind v. State Board of Elections*, the Supreme Court of Virginia reaffirmed that compactness is whatever the General Assembly says it is.³⁴ By adding this criterion, the General Assembly would be following the holding of the Court by defining compactness through the legislative process. Defining compactness must be done in concert with other criteria, however, because “constraining compactness . . . may be fairly ineffective at remedying racial or partisan gerrymandering.”³⁵

3. Requiring Transparency

The Amendment makes strides toward transparency in the redistricting process by requiring public input and hearings. As was seen in North Carolina’s remedial process (described briefly below), however, a transparent process can still confuse the public if certain features are not required.

Currently, the Amendment only states that the records and documents of the Commission—and commendably, those of outside advisors and consultants—“shall be considered public information.” What is unclear from this language, however, is if this “public information” will be affirmatively released or if it will be subject to Virginia’s Freedom of Information Act (FOIA). If the latter, then citizens would have to take the extra step of making FOIA requests to the Commission, and the Commission would have to put forth extra effort to comply with those requests. Depending on the amount of time between when maps are proposed and when public information is available for request, a delay may be created in their dissemination, hindering the kind of rapid analysis of plans necessary in Virginia’s expedited process.

³³ See, e.g., Districtr.org, *Where would you like to identify a community?*, district.org/community; Representable.org, *What is Representable?*, representable.org.

³⁴ 813 S.E.2d 739, 749 (Va. 2018).

³⁵ Metric Geometry and Gerrymandering Group, *supra* note 8, at 21.

Instead, the General Assembly should **add further transparency requirements**, including (1) the release of usable, digital versions of draft maps (e.g. shapefiles, geoJSONs, etc.); (2) the online live-streaming and digital archiving of meetings; and (3) the creation of a website for taking in public input and disseminating the Commission’s work. More specifically, draft maps should be released as some digitally-readable file, so that the public can properly judge them through publicly available software like PlanScore. Additionally, all work done by the Commission should be required to be fully audible on the live-streams. Adding these requirements would help ensure that the process is not only open and transparent, but also understandable and digestible.

Transparency should not be theatrical, but real. This problem was on clear view in North Carolina when the remedial committees brought in the North Carolina State Lottery machine to “randomly” choose maps drawn by the plaintiffs’ expert, Dr. Jowei Chen. This process seemed open, random, and transparent but most likely involved the use of a deck stacked in favor of Republicans because of the random maps’ inherent algorithmic bias towards Republicans.³⁶ Furthermore, in the same ALEC redistricting panel mentioned above, panelists suggested that state legislators “make their processes appear as open as possible, even though they are driven by partisanship behind closed doors.”³⁷

What Will Redistricting Reform Accomplish?

By changing the process, redistricting in the Commonwealth will become fairer than it has been since Patrick Henry’s first attempted gerrymander in 1789. By providing a check on legislative self-dealing, a Commission established by constitutional amendment will be the most comprehensive reform ever to pass through a state legislative body, especially if passed alongside enabling legislation to improve it.

Returning to *Bethune-Hill* as an example, the challenged racial gerrymander in that case would not have occurred if there had been fair redistricting requirements in 2011 like those found in this Amendment. Rather than having state House members draw the lines with an unconstitutional floor for black voting-age population, the Commission would have been able to hear public input about how much black voting-age population was needed in each district to give those minority communities proper representation under the Voting Rights Act. Such input would be public, allowing communities to keep commissioners accountable. Even if a racial gerrymander were attempted again in 2021, this Amendment would allow for a state-level racial challenge to the map instead of relying solely on the federal route.

More generally, the Commission will likely give minority groups and minority political parties a fairer deal than they would get if the process was left in the hands of the legislators. The reason for this is a tension commonly found in redistricting: the communities of interest around the Commonwealth may want or deserve seats that are more representative of their community, but all legislators want safe

³⁶ Brief for Princeton Gerrymandering Project at 7, *Common Cause v. Lewis*, 18-CVS-041001 (Wake Cty. Super. Ct. Sept. 3, 2019), available at https://web.math.princeton.edu/~sswang/Wang-PGP-brief_CommonCause-v-Lewis_27sep2019_evaluating-GA-remedial-plans.pdf.

³⁷ David Daley, *How to Get Away With Gerrymandering*, *The Intercept* (Oct. 2, 2019, 1:16PM), <https://slate.com/news-and-politics/2019/10/alec-meeting-gerrymandering-audio-recording.html>.

wins in future elections. These competing interests manifest through a legislator prioritizing their needs over those of the communities they represent. In more competitive districts, however, it is more likely that legislators will be responsive to the people they represent and that they will be willing to work across the aisle.³⁸ Speaking to this point, one study in particular showed that redistricting commissions create a higher percentage of competitive districts than legislators do on their own.³⁹

Such self-preserving priorities are especially probable in an environment of unified party control, which seems increasingly likely in 2021.⁴⁰ Because of this, it is now more important than ever to ensure that redistricting in Virginia is done in a different, more independent way. The process created by the Amendment will be able to bring all parties to the linedrawing table, and in doing so, the end-product of the Commission will be able to better represent all Virginians.⁴¹

What Can Citizens Do This November?

Now is the only time to get reform through the Virginia constitutional process before the lines are redrawn in 2021. The Amendment was passed by the General Assembly in February 2019, but it must be passed again in January 2020. If it passes, it will then go to the voters for approval in November 2020. To that end, it is paramount to make sure that whoever ends up serving in the General Assembly's 2020 session will support this Amendment as well as legislative improvements to it.

Whether Democrats take full control of both houses of the General Assembly, or the Senate comes under Democratic control while the House remains Republican, the Amendment can be passed by a coalition of reform-minded members of both parties and gerrymander-fearing Republican legislators. For example, the Amendment gives House Republicans a seat at the table while taking Democratic Governor Northam out of the redistricting process. The simple phenomenon of litigation exhaustion from the last decade may also work in favor of the Amendment's passage. Indeed, House Republicans have released a statement reaffirming their support of the Amendment.⁴²

If the Amendment is passed by voters in November 2020, this would reflect the will of a supermajority of Virginians who support redistricting reform. According to a Wason Center poll, 71% of Virginians polled are in favor of redistricting reform when told about the current process, and of that supermajority, 78% support an independent commission.⁴³

³⁸ Colleen Mathis et al., *The Arizona Independent Redistricting Commission: One State's Model for Gerrymandering Reform*, Harv. Kennedy Sch. 10 (Sept. 2019).

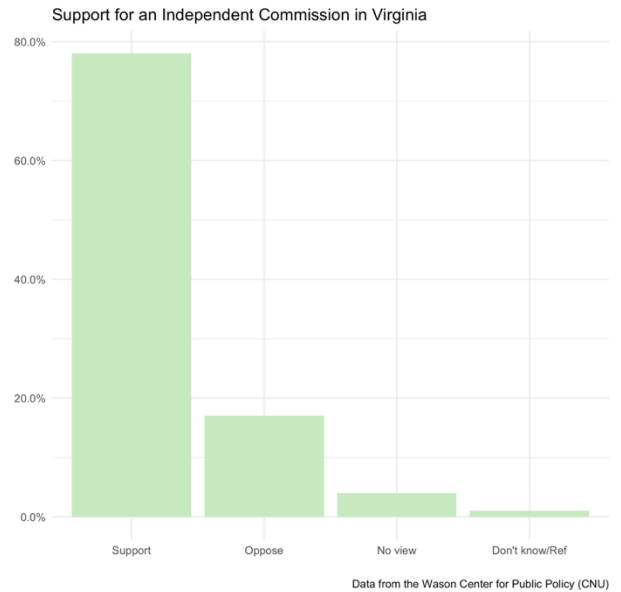
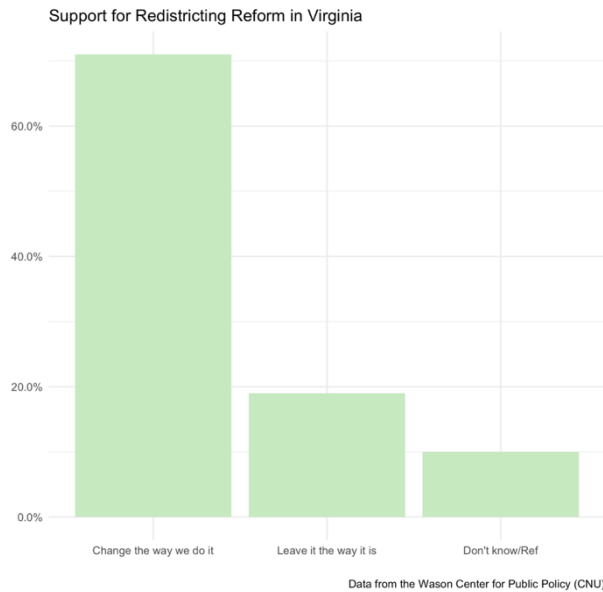
³⁹ *Id.* at 7 (citing Jamie L. Carson et al., *Reevaluating the effects of redistricting on electoral competition, 1972–2012*, 14 *State Politics & Policy Quarterly* 165, (2014)).

⁴⁰ Wason Center, *2019 Virginia Legislative Election Survey* (Oct. 7, 2019), <http://cnu.edu/wasoncenter/surveys/2019-10-07-va-leg-1/> (“Picking up both [legislative chambers] would give Democrats a governing trifecta and control of the state’s 2021 reapportionment and redistricting process”).

⁴¹ See David Daley, *How to Get Away with Gerrymandering*, *Slate* (Oct. 2, 2019, 1:16 PM), <https://slate.com/news-and-politics/2019/10/alec-meeting-gerrymandering-audio-recording.html> (“Three-quarters of the seats that flipped during the 2018 U.S. House elections were drawn by commissions or courts. Studies show that maps become more representative and equitable when more parties have a seat at the table”).

⁴² *House Republican Leaders Reaffirm Support for Nonpartisan Redistricting*, Virginia House GOP (Oct. 14, 2019), <https://virginiahouse.gop/2019/10/14/house-republican-leaders-reaffirm-support-for-nonpartisan-redistricting/>.

⁴³ Wason Center, *Wason Center's State of the Commonwealth Survey Finds Virginia Voters are...Happy?*, (Dec. 5, 2018), <http://cnu.edu/wasoncenter/surveys/2018-12-05-state-of-the-commonwealth/>.



Ask legislators if they support this amendment

Voters may ask candidates whether they support this Amendment. Candidates are especially likely to respond to voter opinion in competitive districts and in districts where new candidates are running. Of the 70 contested House districts this November, 20 are predicted to fall within a competitive range of 45-55% for either major party based on PlanScore results,⁴⁴ and 13 districts will be contested without an incumbent.⁴⁵ Of the 29 contested Senate districts, 7 fall within the competitive range based on 2016 presidential result data, and 4 are without incumbents.⁴⁶ Maps showing competitive districts and districts without an incumbent are at the end of this report.

Advocate for legislative improvements

Although the Amendment itself must pass again verbatim, the General Assembly has the ability to pass enabling legislation in the upcoming January session. In the last General Assembly session, some incumbents rejected many of the criteria suggested here, which had existed in prior versions of the Amendment. Their rejection has left an Amendment without many requirements to guide the Commission's linedrawing and the process itself. We have identified three areas for improvement: (1) Commission member selection, (2) redistricting criteria, and (3) transparency. Voters can reach out to their local House of Delegates and Senate candidates regarding this enabling legislation.

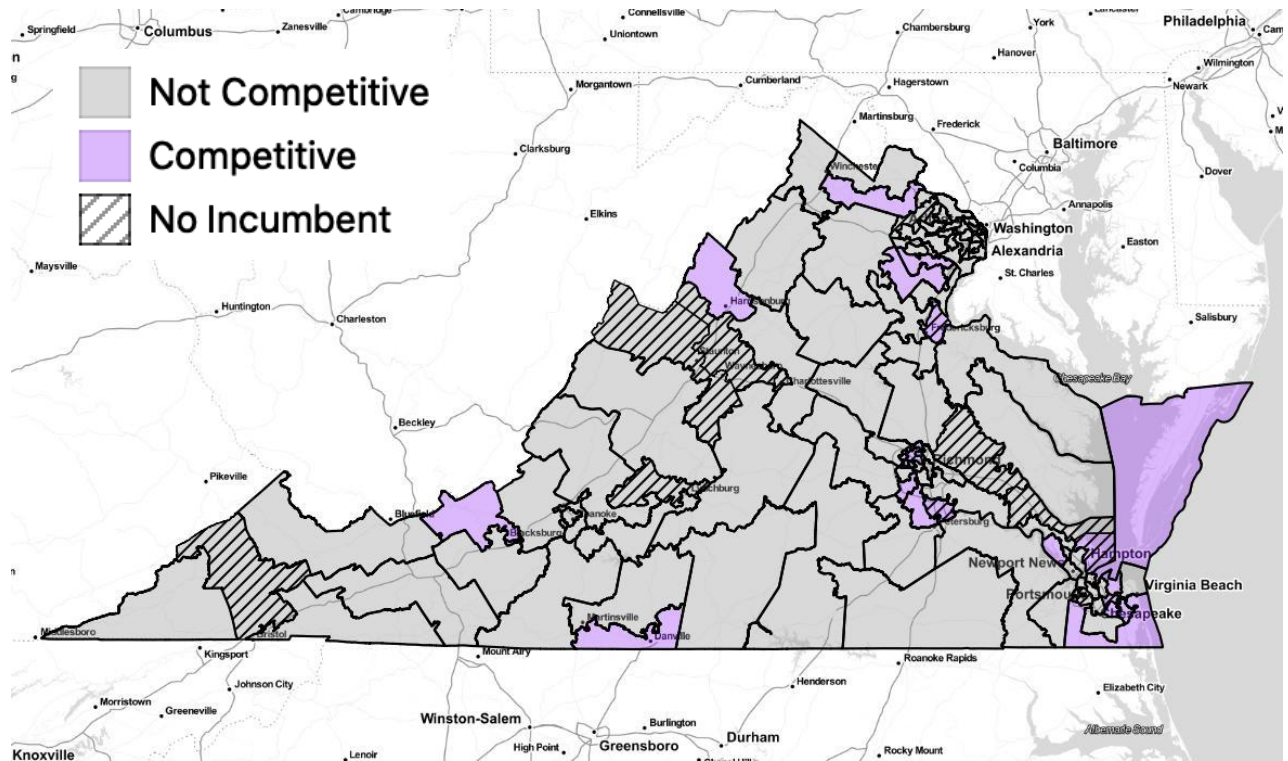
⁴⁴ Bethune-Hill Remedial Map, PlanScore, <https://planscore.org/plan.html?20191010T173820.540718998Z>.

⁴⁵ Virginia Public Access Project, *Elections: House of Delegates*, <https://www.vpap.org/elections/house/>.

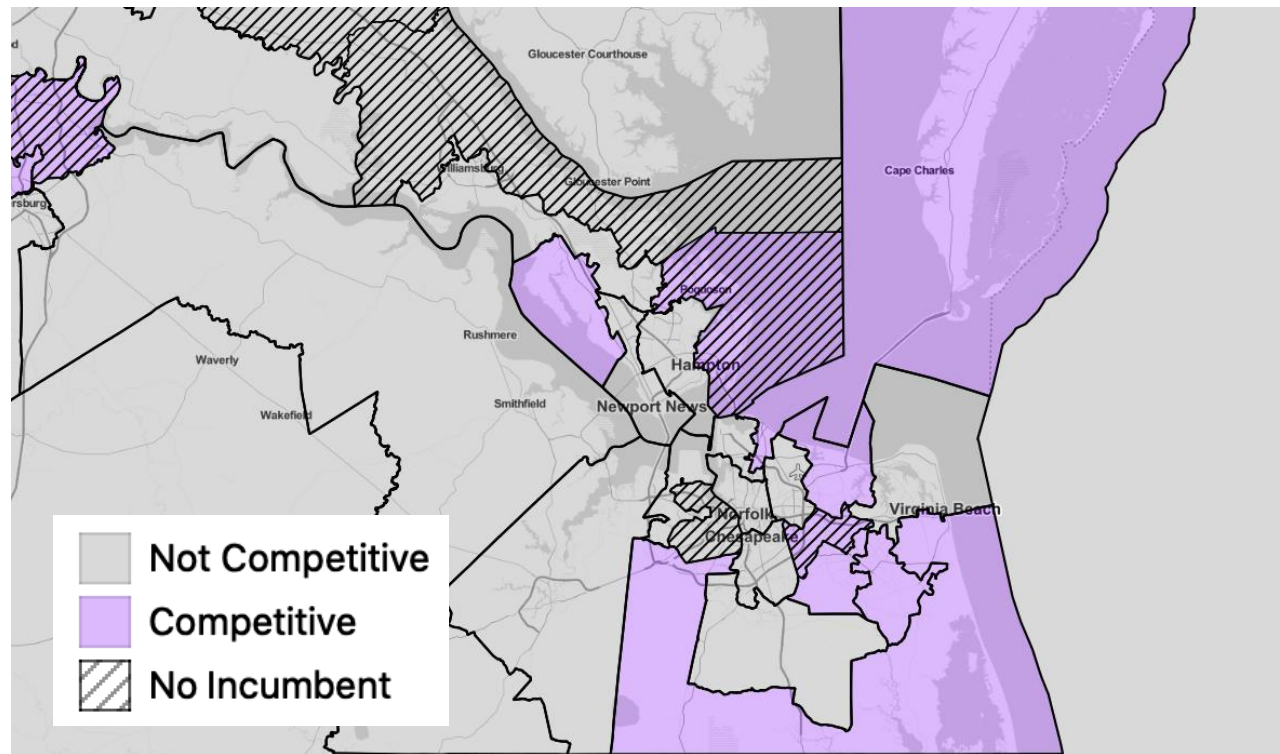
⁴⁶ Virginia Public Access Project, *Elections: State Senate*, <https://www.vpap.org/elections/senate/>.

Conclusion

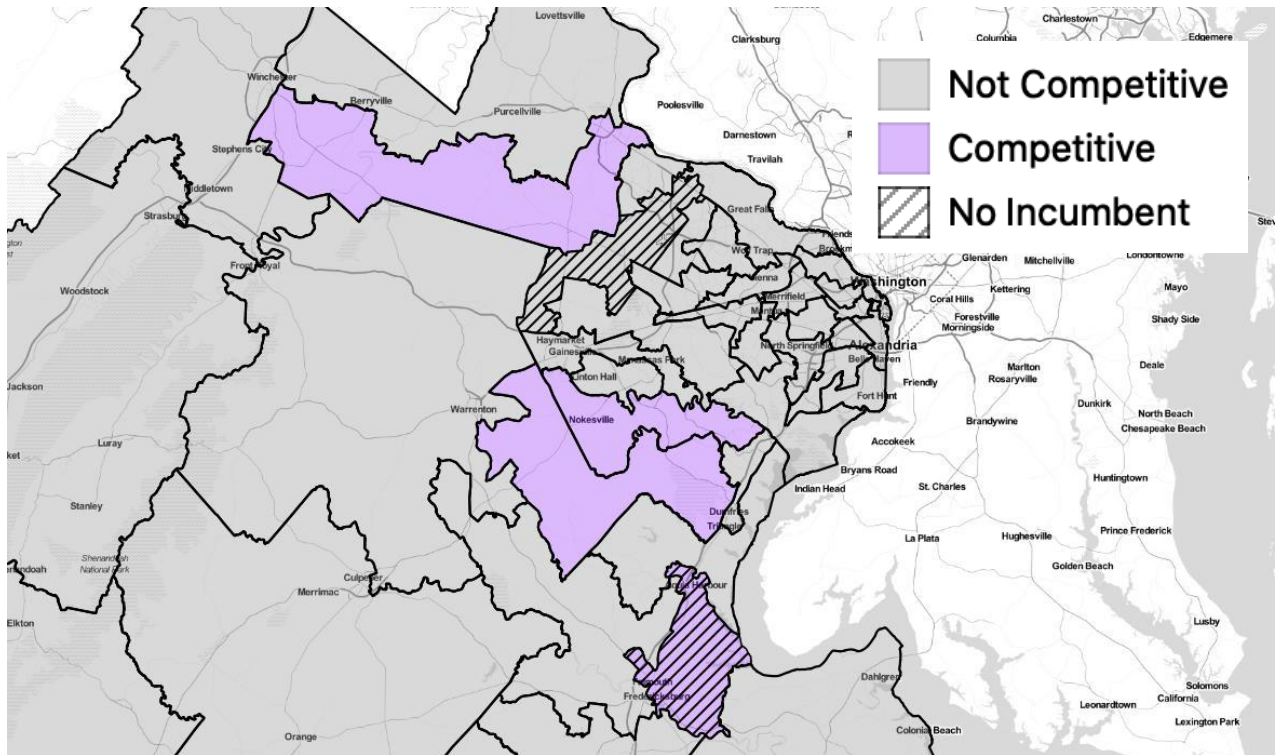
Virginia has been home to gerrymandering since Patrick Henry tried to sabotage James Madison with the practice in 1789. Since then, the rise of precise computer software has allowed legislators in Virginia to pick their voters rather than voters picking their legislators. The result is gerrymandering, both partisan and racial. Gerrymandering can be ended by SJ306, a constitutional amendment that would create a Virginia Redistricting Commission, a hybrid commission of legislators and citizens. Redistricting reform is expected to lead to more competitive districts and better representation for minority communities. Improvements to the Amendment can come in the form of enabling legislation in the upcoming session. This Amendment presents the last chance at redistricting reform in Virginia before 2021. If formed, the Commission would be the most comprehensive redistricting reform ever to pass through a state legislature.



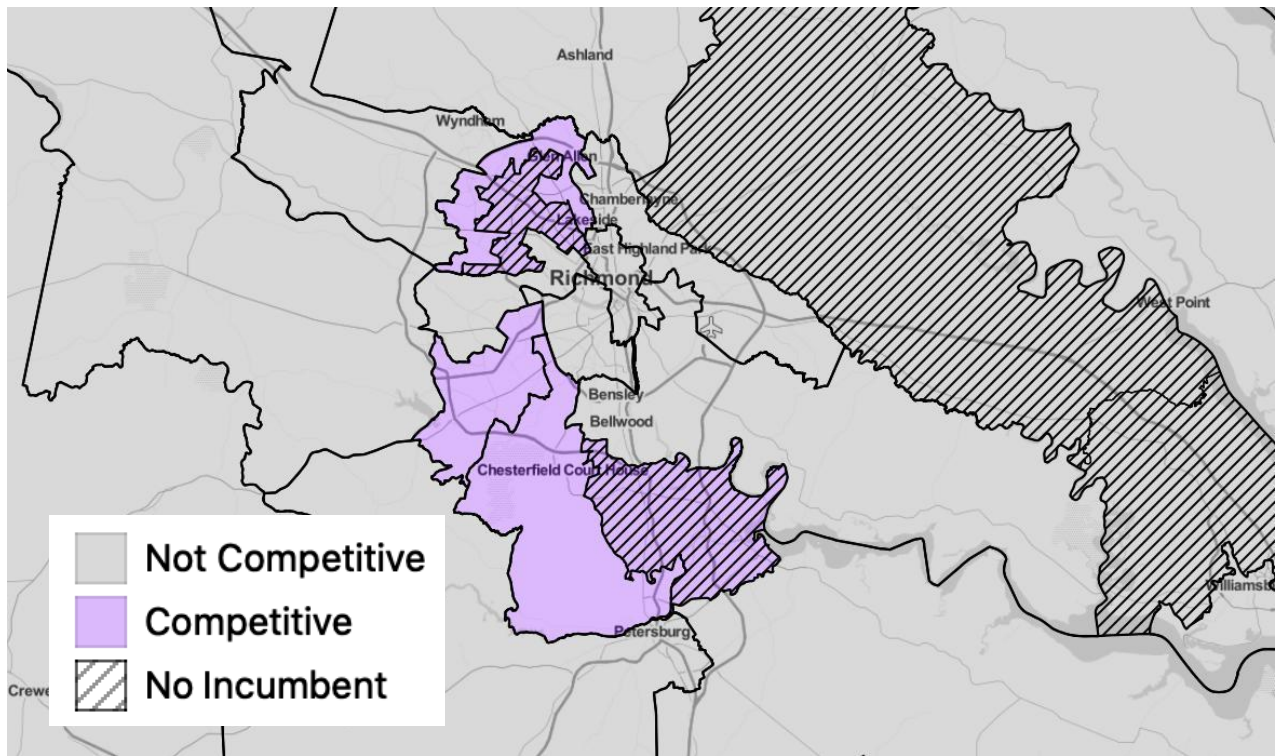
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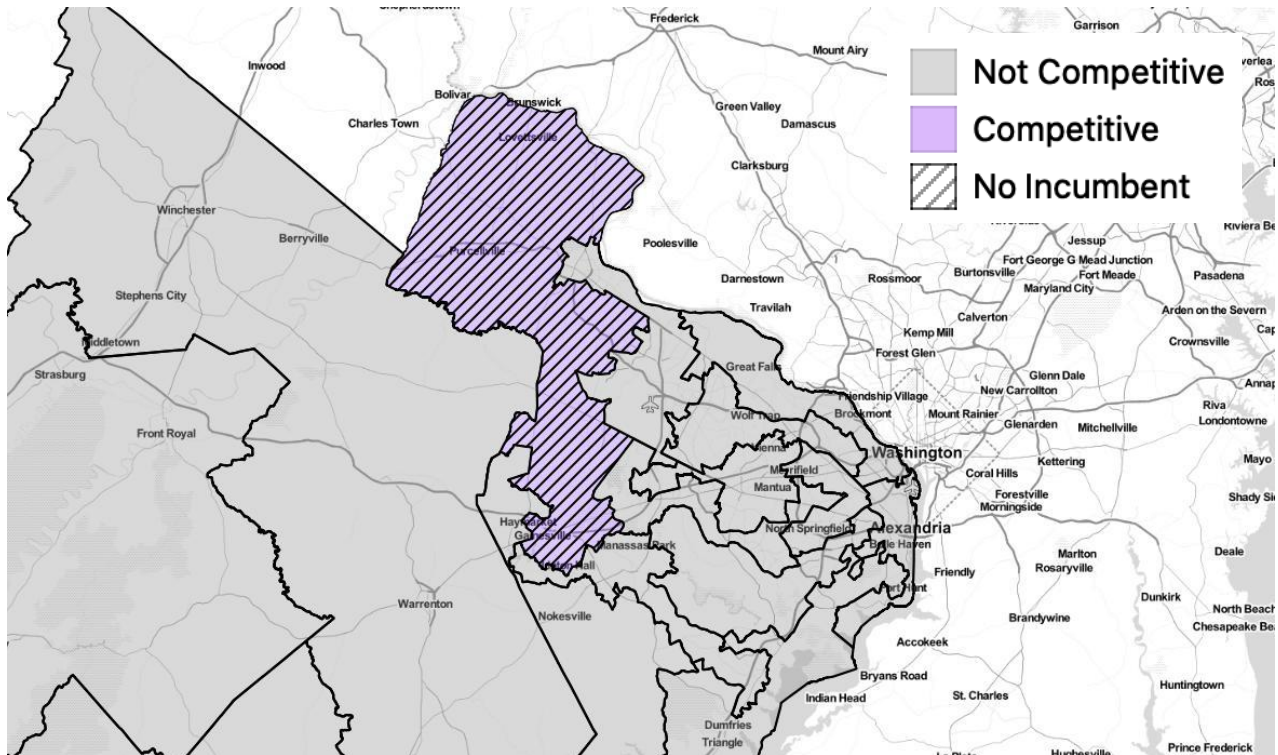
House of Delegates – Northern Virginia



House of Delegates – Richmond



Senate: Competitiveness



Senate: Competitiveness – Richmond

