

# A CITIZEN'S GUIDE TO REDISTRICTING REFORM IN VIRGINIA





February 1, 2020

Dear Virginia citizen:

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. In addition to describing the proposed amendment and possible enabling legislation, this Guide analyzes the number of bills that will be coming up for a vote in the General Assembly in the coming days and weeks. 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 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.

The Amendment, now introduced as SJ18, can be improved through enabling legislation. Such improvements should focus on four key areas: (1) how commission members are chosen, (2) criteria for drawing districts, (3) transparency to allow maximum public input and analysis, and (4) a Special Master requirement for the Supreme Court of Virginia when it acts as a failsafe mechanism. Enabling legislation embodying these improvements has been introduced this session and currently awaits further action by the General Assembly. SB203 contains the first three improvements while SB204 contains the fourth. SB975 and HB758 both combine the provisions of these two bills into single pieces of legislation. Other enabling legislation that has been introduced (HB381 and HB877) lack key provisions required for complete reform.

Finally, numerous alternative pieces of legislation have been introduced in this General Assembly session. Three alternative commission bills have been introduced, but because they are regular bills, as opposed to amendments, each of these commissions would be advisory. Although HB1256 presents some potential issues, it would create the best advisory commission out of the reforms offered this session. To be at its strongest, however, HB1256 should be amended to correct its voting requirement and selection process. Further, HB1256's criteria could use some bolstering, either through legislative amendment or by passing HB1255 or HB1054 alongside it. HB1255 and HB1054 are two of six criteria-specific bills introduced this session.

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, citizens must ensure that the newly elected legislature remains committed to reform, even though the Democrats now have unified control of the 2021 redistricting process. Citizens can keep up the pressure by asking their local Delegates and Senators about the issue and pushing them to support (1) both the amendment and enabling legislation or (2) the alternative advisory commission legislation proposed this session.



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# 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.<sup>1</sup> 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. In states like Virginia, **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.”<sup>2</sup> Former Supreme Court Justice Anthony Kennedy also recognized the potential dangers of advances in technology in 2004.<sup>3</sup> The rise of computer software now allows line-drawers 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 line-drawing 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 line-drawers 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.

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<sup>1</sup> 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>.

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

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

## 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 was redrawn in time for the November 2019 election and created 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.<sup>4</sup> 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 without packing them into fewer districts.<sup>5</sup> In short, the power of Virginia’s black community is maximized by building crossover districts rather than majority-minority 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.

## 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. Second, racial gerrymanders can be litigated in federal court while partisan ones cannot.<sup>6</sup> In the past, this has led to partisanship being used as a defense in some racial gerrymandering cases.<sup>7</sup> These concepts allow line-drawers to pack minority voters of one party into majority-minority districts while claiming that they are complying with the

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

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

<sup>6</sup> *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506-07 (2019).

<sup>7</sup> *Common Cause v. Rucho*, 318 F. Supp. 3d 777, 808 (M.D.N.C. 2018) (“Representative Lewis ‘acknowledge[d] freely that this would be a political gerrymander,’ which he maintained was ‘not against the law’”). Using race as a proxy for partisanship is no longer constitutional according to the Supreme Court in *Harris v. Cooper*. See 137 S. Ct. at 1473, n.7 (“the sorting of voters on the grounds of their race remains suspect even if race is meant to function as a proxy for other (including political) characteristics”).

Voting Rights Act and other federal law.<sup>8</sup> 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.<sup>9</sup> 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.

Virginia itself provides an example of packing leading to less representation for minority communities. The U.S. Supreme Court ruled certain House of Delegates districts as racial gerrymanders in 2017 in *Bethune-Hill v. Va. State Bd. of Elections*.<sup>10</sup> 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 federal district court in early 2019.<sup>11</sup>

## VIRGINIA’S RECENT HISTORY WITH GERRYMANDERING

Even before the 2019 *Bethune-Hill* ruling, the past few decades have been filled with partisan warfare in Virginia redistricting. In the 1990s, Republicans were the targets of gerrymandering, with Democrats drawing two popular incumbents into the same seventh congressional district.<sup>12</sup> Maps that decade were repeatedly vetoed by Democratic Governor Doug Wilder for underrepresenting black voters.<sup>13</sup>

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.<sup>14</sup> In 2011, the General Assembly was split between the parties, with Democrats controlling the Senate and Republicans controlling the House.<sup>15</sup> 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.<sup>16</sup>

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<sup>8</sup> 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/>.

<sup>9</sup> 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>.

<sup>10</sup> 137 S. Ct. 788 (2017).

<sup>11</sup> 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](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).

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

<sup>13</sup> *Id.*

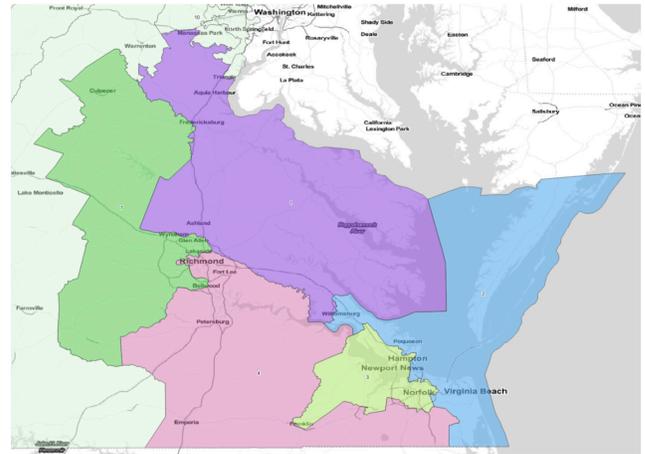
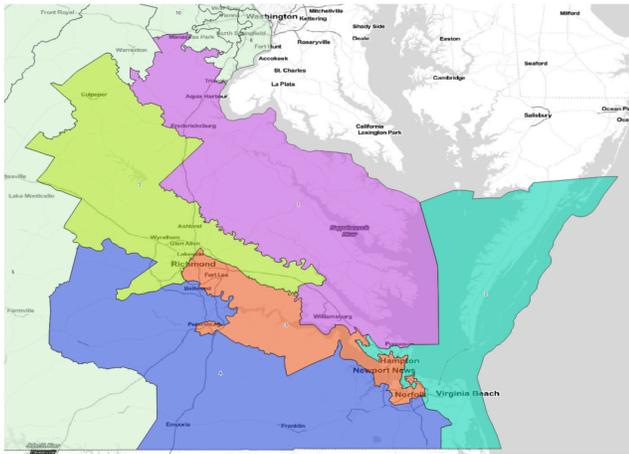
<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

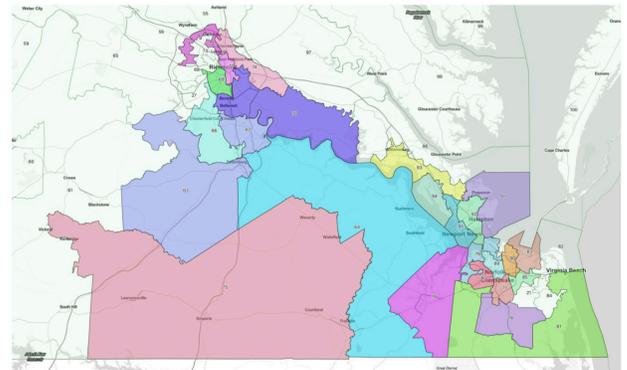
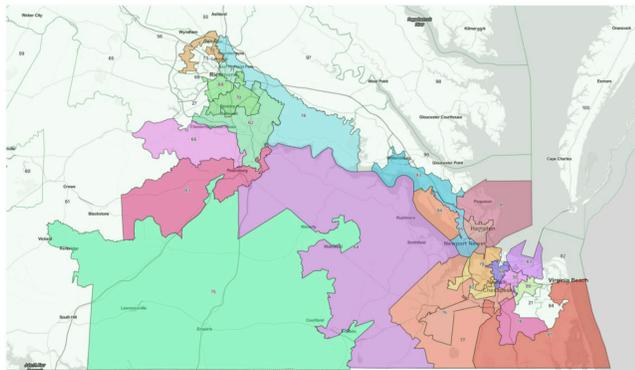
<sup>16</sup> *Id.* at 27.

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 the congressional redistricting process.<sup>17</sup> Later that decade, both the Congressional map and the House of Delegates map had to be redrawn after federal courts found that they were unconstitutional racial gerrymanders.<sup>18</sup> Both of these cases focused on the districts in the Piedmont and Tidewater regions of Virginia.

2012 Congressional Map vs. Personhuballah Remedial Map



2011 House of Delegates Map vs. Bethune-Hill Remedial Map

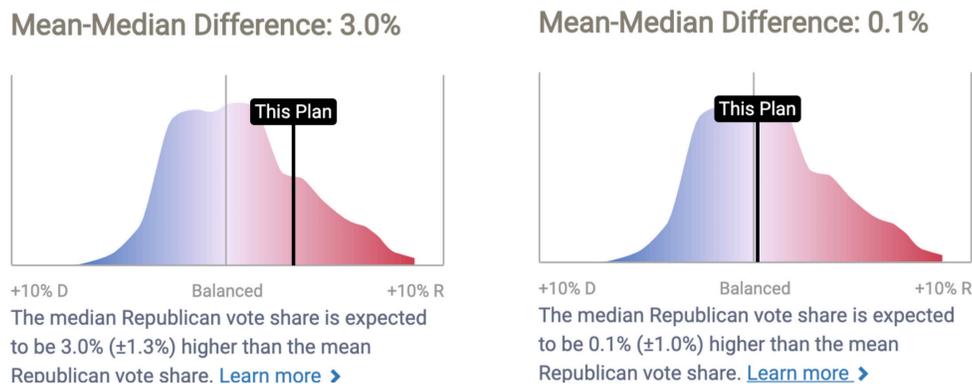


<sup>17</sup> *Id.* at 27-28.

<sup>18</sup> Moomaw, *supra* note 11; Cannon & Williams, *supra* note 12, at 28-29.

In *Bethune-Hill*, the redrawn lines provide 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.<sup>19</sup> Additionally, the affected districts are also more competitive based on PlanScore’s predictive model.<sup>20</sup> According to the metric of partisanship shown below and the 2019 election results, 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.**

*Mean-Median Difference: 2011 General Assembly Map vs. Bethune-Hill Remedial Map*



*After re-drawing, the degree of partisanship, as quantified by the mean-median difference, decreased dramatically.<sup>21</sup>*

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 15.9 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.**

<sup>19</sup> See Metric Geometry and Gerrymandering Group, *Comparison of Districting Plans for the Virginia House of Delegates* 3-4 (Nov. 2018), <https://maggg.org/VA-report.pdf>.

<sup>20</sup> 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 PlanScore model is a predictive one, useful in comparing plans for levels of partisanship but not for predicting the results of actual elections. For example, PlanScore does not take into account the effects of incumbency when judging a district’s predicted outcome.

<sup>21</sup> For an explanation of the mean-median difference, see Sam Wang, *Let Math Save Our Democracy*, N.Y. Times (Dec. 5, 2015), <https://www.nytimes.com/2015/12/06/opinion/sunday/let-math-save-our-democracy.html>; see also Sam Wang, *Three Tests for Practical Evaluation of Partisan Gerrymandering*, 68 Stan. L. Rev. 1263, 1304 (2016) [http://www.stanfordlawreview.org/wp-content/uploads/sites/3/2016/06/3\\_-\\_Wang\\_-\\_Stan.\\_L.\\_Rev.pdf#page=42](http://www.stanfordlawreview.org/wp-content/uploads/sites/3/2016/06/3_-_Wang_-_Stan._L._Rev.pdf#page=42).

*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)	Dem Vote Share% Change
Petersburg	63	59.3%	46.9%	-12.4%	73.5% (±6.1%)	57.6% (±4.7%)	-15.90%
Petersburg	66	18.5%	34.5%	16.0%	38.7% (±3.2%)	53.4% (±4.0%)	14.70%
Richmond	70	61.2%	56.2%	-5.0%	81.8% (±5.9%)	73.6% (±5.0%)	-8.20%
Norfolk	76	24.8%	41.9%	17.1%	44.4% (±3.4%)	57.4% (±4.9%)	13.00%
Norfolk	77	58.7%	40.2%	-18.5%	75.2% (±6.3%)	62.7% (±5.0%)	-12.50%
Norfolk	80	56.9%	51.4%	-5.5%	74.1% (±5.5%)	68.4% (±5.6%)	-5.70%
Norfolk	81	20.7%	25.2%	4.5%	39.2% (±3.6%)	46.5% (±4.1%)	7.30%
Norfolk	83	15.5%	22.9%	7.4%	47.2% (±4.0%)	53.8% (±4.3%)	6.60%
Norfolk	90	55.2%	42.7%	-12.5%	77.2% (±6.2%)	68.2% (±5.2%)	-9.00%
Peninsula	91	20.3%	32.5%	12.2%	44.5% (±3.6%)	52.6% (±4.2%)	8.10%
Peninsula	92	60.0%	54.2%	-5.8%	79.1% (±5.5%)	75.2% (±4.9%)	-3.90%
Peninsula	94	23.0%	31.6%	8.6%	48.0% (±4.4%)	50.9% (±5.1%)	2.90%
Peninsula	95	60.7%	48.9%	-11.8%	77.4% (±7.8%)	70.4% (±7.3%)	-7.00%

\*For an apples to apples comparison of the old and new maps, PlanScore estimates are used for all data.  
The margin of error is noted in parentheses.

## PRINCE WILLIAM COUNTY: AN EXAMPLE OF A SPLIT COMMUNITY

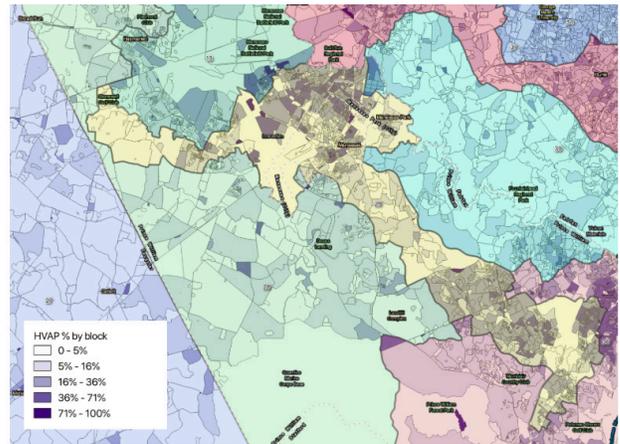
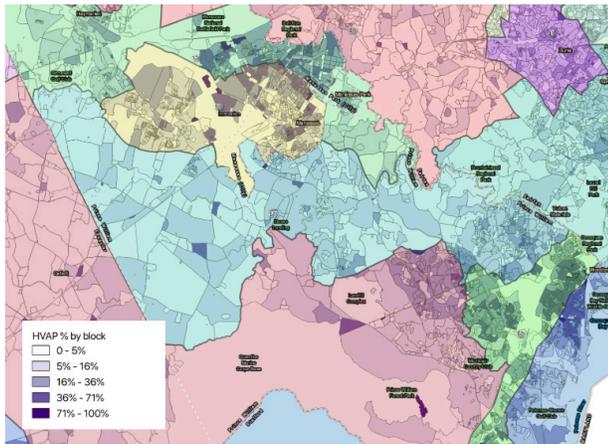
The split communities found by courts in the Richmond and Hampton Roads areas are not the only example of this problem in the Commonwealth. For example, in Northern Virginia, Prince William County has a significant Latinx population that could potentially be represented in a single district.<sup>22</sup> According to its Department of Economic Development, the County's population is majority-minority and has a higher percentage of Latinx than the statewide or national average.<sup>23</sup> Even so, the Latinx community is split in both the House of

<sup>22</sup> Bob Lewis, *Now that the Democrats own the 2021 redistricting, will they resist the temptation to derail it?*, Virginia Mercury (Nov. 18, 2019), <https://www.virginiamercury.com/2019/11/18/now-that-the-democrats-own-the-2021-redistricting-will-they-resist-the-temptation-to-derail-it/>.

<sup>23</sup> *Demographics: Racial & Ethnic Makeup*, Prince William Cty. Dept. of Econ. Dev., <http://www.pwcecondev.org/demographics>.

Delegates and Senate map. As can be seen in the map below, the 50th and 13th House districts split this Latinx community in half, bisecting parts of Manassas, Manassas Park, and Prince William County. Furthermore, this community was split by the Senate districts as well, ‘disenfranchis[ing] Prince William County, which is now a majority-minority community.’<sup>24</sup>

*Prince William County: House of Delegates Map (left) and Senate map (right)*



Virginia’s recent history shows that both parties will use the power to redistrict to serve their own needs, often to the detriment of communities. That said, the changes in the *Bethune-Hill* districts predicted by PlanScore 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. As shown below, the actual 2019 results corroborate this notion. To continue these steps forward, 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.

## BETHUNE-HILL’S EFFECT ON THE 2019 HOUSE OF DELEGATES ELECTION

Undoing the *Bethune-Hill* racial gerrymander was a major factor in the 2019 House of Delegates election, as seen in the competitiveness of the 25 redrawn districts. In the 2017 House election’s actual results, only four of the affected districts were within a competitive range of 45-55% voteshare for either party. In 2019, this number doubled to eight.<sup>25</sup> One of these districts (District 83) was decided by a margin of only 41 votes

<sup>24</sup> Jennifer Buske & Rosalind Helderman, *Corey Stewart gets NAACP support in fight against Va. senate redistricting map*, Wash. Post (Apr. 12, 2011), [https://www.washingtonpost.com/blogs/virginia-politics/post/corey-stewart-brings-naacp-into-fight-against-va-senate-redistricting-map/2011/04/12/AFJ0IVRD\\_blog.html](https://www.washingtonpost.com/blogs/virginia-politics/post/corey-stewart-brings-naacp-into-fight-against-va-senate-redistricting-map/2011/04/12/AFJ0IVRD_blog.html).

<sup>25</sup> *Compare Elections: House of Delegates (2017)*, Virginia Public Access Project, <https://www.vpap.org/election-results/20171107/house/> with *Election: House of Delegates (2019)*, Virginia Public Access Project, <https://www.vpap.org/election->

following a two-day recount.<sup>26</sup> Further, in 2017, there were fifteen uncontested races, but in 2019, there were only ten.<sup>27</sup> Typically, uncontested races are more common when districts perceived to be highly uncompetitive.<sup>28</sup>

A number of statistical measures were designed to evaluate the partisan fairness of a map. Using electoral data, these measures evaluate the opportunity within each party to elect a candidate of choice. Lopsided wins (t-test difference), mean-median difference, and efficiency gap are well-suited to describe the fairness of a map in a state like Virginia, where voters are divided near-evenly between Democrats and Republicans.

There is no universally agreed-upon way to assess whether a given map is gerrymandered, but there are several measures that can be used to quantify the extent of the gerrymander. For the purposes of this report, we include four: declination, the efficiency gap, partisan bias, and the t-test difference (more on why we chose these four below).

Declination assesses the possibility for winning and losing a certain district. A declination higher than 0.3 suggests a Republican gerrymander, while a declination lower than -0.3 suggests a Democratic gerrymander. The efficiency gap compares wasted votes by each party, where wasted votes are any votes cast above the 50% majority mark for the winner, plus all votes for the loser. Partisan bias is a comparison of the seat share, or representational outcome, at 50% of the statewide vote total. Finally, the t-test difference measures the average vote share from each party and compares them.

To assess the impact of *Bethune-Hill*, we calculate these four statistical tests of partisan fairness for the maps pre- and post-*Bethune Hill*. We compare these measures across the entire maps, within the 25 affected districts, and within the 75 unaffected districts. Partisan fairness should only be judged based on data from an entire state, and we isolate the 25 affected districts with caution. We analyze partial maps for the sole purpose of comparison.

Across the efficiency gap, partisan bias, and lopsided wins tests, we observe substantial marginal improvement in the 25 affected districts as compared to the state map in totality and the unaffected districts. Another common test is the mean-median difference, which we chose to exclude because of its sensitivity to the vote share of a single district. We include the declination metric because of its robustness to the same issue. The figure below illustrates these measures across three sub-groups: the entire map, within the 25 affected districts, and within the 75 unaffected districts.

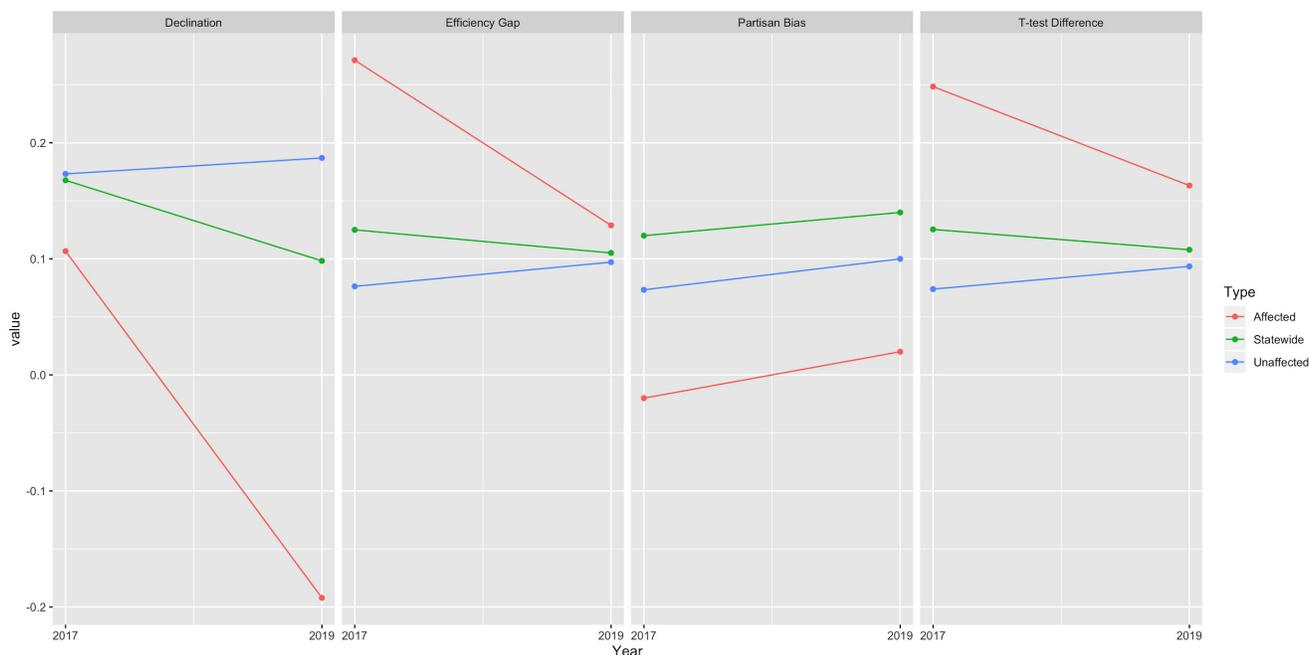
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<sup>26</sup> WAVY Web Staff, *Guy officially declared winner in 83rd House race after recount*, WAVY News (Dec. 18, 2019 2:25 PM), <https://www.wavy.com/news/local-news/guy-officially-declared-winner-in-83rd-house-race-after-recount/>.

<sup>27</sup> *Compare Elections: House of Delegates (2017)*, Virginia Public Access Project, <https://www.vpap.org/electionresults/20171107/house/> *with Election: House of Delegates (2019)*, Virginia Public Access Project, <https://www.vpap.org/electionresults/20191105/house/> (last updated Nov. 6, 2019 6:41 AM).

<sup>28</sup> Colleen Mathis et al., *The Arizona Independent Redistricting Commission: One State's Model for Gerrymandering Reform*, Harv. Kennedy Sch. 11-12, fig. 7 (Sept. 2019) (“Election results since 2004 show a clear relationship between the underlying level of competition in a district and the probability of an election being uncontested”).

### Partisan Metrics Before and After the Bethune-Hill Redraw



When compared to the overall map, the 25 districts affected by *Bethune-Hill* better approach quantitative fairness. We see this consistently within all four metrics displayed in the figure above, evaluated by closeness to zero. These results indicate that undoing the *Bethune-Hill* gerrymander increased the competitiveness, responsiveness, and overall fairness of the affected districts in particular and the state-wide map as a whole.

In 2019, six seats in the House of Delegates flipped from Republican to Democrat statewide.<sup>29</sup> Of these six flipped seats, four were districts redrawn in *Bethune-Hill*. Each of these four seats were in a district that saw a significant increase in BVAP (ranging from +7.4% to +17.1%). Stated another way, 66% of the seat changes in 2019 arose as a result of undoing the racial gerrymander.

In particular, Virginia's District 76 flipped from Republican to Democrat. According to PlanScore, this district's BVAP rose by 17.1% due to the *Bethune-Hill* redraw from 24.8% to 41.9%, and its predicted Democratic voteshare increased 13% from 44.4% to 57.4%. The actual results in 2019 largely matched these predictions: Clinton Jenkins (D) received 56.3% of the vote while Delegate Chris Jones (R) received 43.5%.<sup>30</sup> Aside from a third party challenger in 2005, this election was the first time Delegate Jones faced any real electoral competition since 2001.<sup>31</sup> Jones was the architect of the 2011 map that was undone in *Bethune-Hill* for improper use of the Voting Rights Act, and he was unseated by Clinton Jenkins, an African-American Democrat.

What these numbers show is that what is good for minority representation is good for political competition. While this increased competition was good for Democrats in this go-around, increased fairness in redistricting will aid both parties and prevent a recurrence of Virginia's troubled history with gerrymandering, both partisan and racial.

# THE 2020 SESSION: COMPARING THE AMENDMENT, ENABLING LEGISLATION, AND ALTERNATIVES

In 2019's *Rucho v. Common Cause*, the Supreme Court declined to intervene in partisan gerrymandering – but it did encourage states and state courts to step in.<sup>32</sup> Now, the best routes forward to reform depend on state laws and constitutions.<sup>33</sup> State-based routes are also a good avenue to pursue racial equity in light of the possibility that the Roberts Court may strike down Section 2 of the Voting Rights Act.<sup>34</sup>

In states like Pennsylvania<sup>35</sup> and North Carolina,<sup>36</sup> successful court challenges to gerrymanders have been brought under state constitutional provisions. In other states like Colorado and Michigan,<sup>37</sup> citizens have been able to create independent redistricting commissions through ballot initiatives.

In Virginia, reform has to take place by statute or constitutional amendment.<sup>38</sup> 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.

In February 2019, a redistricting reform amendment was passed by the General Assembly for the first time in history. Passed 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.

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 current session. If the Amendment passes during this session, it will then go to the voters this November, where it is likely to pass given the groundswell of popular support for this redistricting reform amendment in Virginia.<sup>39</sup> If it passes, the Virginia Redistricting Commission can be a model for other states where state legislatures must be involved in passing redistricting reform.

In addition to passing the amendment, another key component to reform is enabling legislation which can be passed by the General Assembly. Numerous pieces of enabling legislation have been filed this session, but SB203/204, SB975, and HB758 (all identical) exemplify the improvements discussed below. Legislators did

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<sup>32</sup> 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”).

<sup>33</sup> 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](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3335622)).

<sup>34</sup> 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>.

<sup>35</sup> *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018).

<sup>36</sup> *Common Cause v. Lewis*, 18-CVS-014001 (Wake Cty. Super. Ct. Sept. 3, 2019); see also Order on Injunctive Relief, Harper v. Lewis, 19-CVS-012667 (Wake Cty. Super. Ct. Oct. 24, 2019).

<sup>37</sup> Nat'l Conf. of State Legis., *Creation of Redistricting Commissions* (Apr. 6, 2018), <http://www.ncsl.org/research/redistricting/creation-of-redistricting-commissions.aspx>.

<sup>38</sup> Princeton Gerrymandering Project, *Reforms 2019: Virginia*, <http://gerrymander.princeton.edu/reforms2019/va/>.

<sup>39</sup> Wason Center, *State of the Commonwealth 2020 Survey Report*, (Dec. 16, 2019), <https://cnu.edu/wasoncenter/surveys/2019-12-16/>.

not agree to put these provisions in the amendment itself, but the newly elected General Assembly can fill the gaps – especially if citizens express their opinions on the subject.

Passage of the amendment and enabling legislation no longer presents the only path forward for the Commonwealth, though. Since the start of the new General Assembly session, a large number of bills have been introduced offering alternative paths to reform. While a combination of the constitutional amendment and the proposed enabling legislation would create reform in the Commonwealth, three proposed bills propose reform through citizen-led advisory Commissions, and a fourth would restart the constitutional process to create an independent commission that would not exist until 2031. Further, six other bills seek to codify redistricting criteria that would guide future line-drawers, whether the General Assembly or one of the many proposed Commissions.

With most of the potential reform bills now introduced, the Princeton Gerrymandering Project has been able to look at the numerous avenues to reform and offer a full evaluation of the possible reform landscape. As of this writing, two options present the best paths forward for the Commonwealth. First, passing SJ18 (formerly SJ306) alongside HB758/SB975, and second, passing HB1256, which creates a citizen-led advisory redistricting commission. If HB1256 were to pass, it would need to have its criteria strengthened either through legislative amendment or by being passed alongside another criteria bill like HB1255 or HB1054. Tables comparing all of these proposed reforms can be found in the Appendix.

When considering these proposals, a key difference between a constitutional amendment and a statute is the amount of change each can create and the binding effect of that change. The Virginia Constitution requires that “electoral districts [be] established by the General Assembly.”<sup>40</sup> A regular statute cannot change this requirement, meaning that any proposed bill’s approval and fallback mechanisms must remain with the legislature. In short, other bills creating alternative commission structure would only result in advisory commissions. In the 2011 process, Governor McDonnell created an advisory commission by executive order, which was ignored by the General Assembly.<sup>41</sup> An amendment, on the other hand, can more drastically change Virginia’s redistricting process by creating a commission with more power.

Furthermore, a statute can be more easily repealed than a constitutional provision. For example, were a redistricting reform bill to pass during the 2020 session rather than the amendment, the General Assembly could repeal it in 2021. This scenario would leave Virginia without any reform before redistricting begins in 2021. A constitutional amendment, on the other hand, would not be so easily repealed. Therefore, if the constitutional amendment passes, it would have more staying power than one of the other options.

Finally, by changing constitutional language to put in place specific dates, an amendment could better prevent future attempts of mid-decade redistricting than a statute. As mentioned above, the General Assembly waited to draw congressional lines until after the Virginia Senate was split 20-20 with the Republican Lieutenant Governor Bill Bolling casting the tying vote. In January 2013, the Senate brought forth a district plan that passed 20-19 while Democratic Senator Henry Marsh was attending President Obama’s second inauguration. This plan was halted by then-Speaker Bill Howell, a fellow Republican, through a parliamentary maneuver, but the precedent still exists.<sup>42</sup> By spelling out deadlines and limiting the General Assembly’s role in the process, an amendment can prevent a repeat of this type of mid-decade redistricting maneuver.

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<sup>40</sup> Va. Const. Art. II sec. 6.

<sup>41</sup> Cannon & Williams, *supra* note 12, at 26-27.

<sup>42</sup> Brian Cannon, *How Virginia’s move against partisan gerrymandering might be short-lived*, The Fulcrum (Jan. 28, 2020), <https://thefulcrum.us/redistricting/how-virginias-move-against-partisan-gerrymandering-might-be-short-lived>; *see also* League of United Latin American Citizens v. Perry, 548 U.S. 399, 412-14 (2006)(describing the 2003 mid-decade redistricting in Texas).

# THE FIRST PATH: THE AMENDMENT AND PROPOSED ENABLING LEGISLATION

## The Amendment

### 1. 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).<sup>43</sup>

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 would 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.

### 2. The Supreme Court of Virginia

Following the turnover of the General Assembly in November 2019, members of the new Democratic majority have been expressing concern about the fallback mechanism that places the Supreme Court of Virginia in charge of redistricting should the Commission process fail. The concern arises from a fear that the Republican General Assembly has stacked the Court with partisans over the last decade, creating anxiety that the Republican-leaning Court would draw a Republican-favoring map. The original, pre-conference version of SJ18 contained a similar fallback provision.<sup>44</sup> Based on the Court's own understanding of its power and on reforms from other states, this concern does not seem as dire as it has been made out to be. Additionally, the General Assembly would be within its constitutional power to direct the appointment of a Special Master.

To begin, without the proposed constitutional amendment, the Supreme Court of Virginia would still be the arbiter of a redistricting dispute. Were the Republican Party to challenge a new map, the Supreme Court would have the final word. And if it is as partisan as some Democrats fear, it would still find in favor of Republican challengers and draw its own map.

However, the Supreme Court of Virginia has been quite deferential to the General Assembly in redistricting disputes, only stepping in when there has been a clear constitutional violation.<sup>45</sup> The two times when it has

<sup>43</sup> 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/>.

<sup>44</sup> S. J. Res. 306 § 6-A(f) (as filed by Sen. Saslaw Jan. 9, 2019)(discussing that if the Commission process fails, “the chairman of the Commission shall promptly certify to the Chief Justice of the Supreme Court of Virginia that such failure has occurred, and the districts shall be decided by judicial decision”).

<sup>45</sup> *Compare Vesilind v. Va. State Bd. of Elections*, 813 S.E.2d 739, 748 (Va. 2018); *Wilkins v. West*, 571 S.E.2d 100, 108-09 (Va.

found violations, the Court has required at-large elections until the General Assembly enacted valid maps rather than draw its own.<sup>46</sup> The Supreme Court of Virginia itself has never redrawn district lines. As stated by Steve Emmert, who analyzes the Supreme Court of Virginia, “It’s a very conservative court[, but that] does not mean they’re partisan hacks. In fact, I would guess the last thing the current crop of justices would want is to adjudicate a map.”<sup>47</sup> Finally, a recent study has shown that courts typically draw more competitive districts than legislatures.<sup>48</sup>

Furthermore, the Court’s precedent and the Virginia Constitution enshrine a principle of separation of powers, where a constitutional violation occurs if a statute allows one branch of government to exercise the power of another in whole part. Such a violation is avoided when a “department exercise[s] the powers of another to a limited extent,”<sup>49</sup> and it is likely that a constitutional amendment, as opposed to a statute, would have more leeway in divvying up governmental power among the branches. In any event, the Court would be walking close to this separation-of-powers line in acting as the fallback line-drawer. As such, it is probable that the Court would restrain itself to what the Constitution and Code of Virginia require for line-drawing were the Commission to deadlock and send this responsibility to the Court. Taken together, its judicial restraint, its inexperience in drawing lines, and its proximity to a separation-of-powers issue all weigh heavily towards the Supreme Court of Virginia performing its fallback responsibility in a nonpartisan manner.

Aside from these legal arguments, the concerns about the Supreme Court can also be addressed through enabling legislation. As will be discussed further below, realization of the full potential of this reform will require enabling legislation to improve the amendment’s original text, including a Special Master requirement.

Finally, outside of Virginia, many reform states make their state supreme courts the fallback mechanism in case the normal redistricting commission process fails. For example, both Pennsylvania and Washington have had some form of redistricting commission for decades and both include a fallback provision similar to that in SJ18.<sup>50</sup> In addition, most of the redistricting reforms that passed in 2018 (Michigan, Colorado, and Utah) rely on their state supreme courts as the Commission’s failsafe provision, either giving them the power to

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2002); *Jamerson v. Womack*, 423 S.E.2d 180, 182 (Va. 1992) *with Wilkins v. Davis*, 139 S.E.2d 849, 855-56 (Va. 1965); *Brown v. Saunders*, 166 S.E. 105, 111 (Va. 1932).

<sup>46</sup> *Wilkins*, 139 S.E.2d at 856 (1965); *see also* *Brown*, 166 S.E. at 111.

<sup>47</sup> Laura Vozzella, *Some Virginia Democrats want to hit the brakes on nonpartisan redistricting plan*, Wash. Post (Dec. 29, 2019, 4:43 PM), [https://www.washingtonpost.com/local/virginia-politics/some-virginia-democrats-want-to-hit-the-brakes-on-nonpartisan-redistricting-plan/2019/12/29/6fd97e38-2279-11ea-bed5-880264cc91a9\\_story.html](https://www.washingtonpost.com/local/virginia-politics/some-virginia-democrats-want-to-hit-the-brakes-on-nonpartisan-redistricting-plan/2019/12/29/6fd97e38-2279-11ea-bed5-880264cc91a9_story.html). *See also* Gregory E. Lucyk, *Checks and balances: Why legislators shouldn’t fear the Supreme Court on redistricting*, Roanoke Times (Jan. 13, 2020), [https://www.roanoke.com/opinion/commentary/lucyk-checks-and-balances-why-legislators-shouldn-t-fear-the/article\\_9a61de55-95a1-5764-a9de-c0d9c2ee595b.html](https://www.roanoke.com/opinion/commentary/lucyk-checks-and-balances-why-legislators-shouldn-t-fear-the/article_9a61de55-95a1-5764-a9de-c0d9c2ee595b.html).

<sup>48</sup> Jamie L. Carson et. al, *Reevaluating the Effects of Redistricting on Electoral Competition, 1972–2012*, 14 State Pol. & Pol’y Q. 165, 167-68 (2014).

<sup>49</sup> *In re Phillips*, 574 S.E.2d 270, 273 (Va. 2003)(quoting *Winchester & Strasburg R.R. Co. v. Commonwealth*, 55 S.E. 692, 693 (Va. 1906)).

<sup>50</sup> Pa. Const. Art. 2, § 17(h) (“If a preliminary, revised or final reapportionment plan is not filed by the commission within the time prescribed by this section, unless the time be extended by the Supreme Court for cause shown, the Supreme Court shall immediately proceed on its own motion to reapportion the Commonwealth”); Wash. Const. Art. 2, § 43(6) (“If three of the voting members of the commission fail to approve a plan within the time limitations provided in this subsection, the supreme court shall adopt a plan by April 30th of the year ending in two in conformance with the standards set forth in subsection (5) of this section”).

review maps<sup>51</sup> or submitting the map directly for approval.<sup>52</sup> Proposed reforms in other states contain similar provisions that either provide the state supreme court with original jurisdiction over redistricting disputes or with fallback power to draw or approve district maps.<sup>53</sup>

### 3. 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 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 be considered public information, including the records and documents of any outside individuals or groups who are performing Commission functions or advising it.

## How Does the Proposed Enabling Legislation Improve the Amendment?

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. In the prior version of this Guide, we noted three key areas for improvement of this constitutional amendment: (1) Commissioner selection requirements; (2) clear criteria; and (3) public input and transparency requirements.<sup>54</sup> In addition, a fourth area of improvement has become clear, namely the inclusion of a Special Master requirement should the Supreme Court of Virginia end up drawing the district lines.

A number of bills have been filed seeking to add to the amendment's original structure, which are referred to as enabling legislation.<sup>55</sup> HB758 and SB975 are the most comprehensive, focusing on commissioner selection,

<sup>51</sup> Mich. Const. Art. 4, § 6 (convention comment) ("If a majority of the members of the commission cannot agree on a plan, then the members individually or jointly may submit a plan to the supreme court. The supreme court shall determine which plan complies most accurately with constitutional requirements and direct that it be adopted"); Utah Stat. sec. 20a-19-203(2).

<sup>52</sup> Colo. Const. Art. 5 §§ 44.5, 48.3 ("The supreme court shall review the submitted plan and determine whether the plan complies with the criteria listed in [the corresponding] section").

<sup>53</sup> *Indep. Redistricting Comm'n Initiative*, Okla. State Question 804, at (F) (available at <https://www.sos.ok.gov/documents/questions/804.pdf#page=11>); *Or. Indep. State & Cong. Redistricting Comm'n Initiative*, Or. Initiative No. 57 § 6-7 (available at <http://oregonvotes.org/irr/2020/057text.pdf#page=11>).

<sup>54</sup> For the discussion of our prior suggestions, see our Voter's Guide, available at [http://gerrymander.princeton.edu/assets/docs/VirginiaReport\\_October2019\\_PrincetonGerrymanderingProject.pdf#page=11](http://gerrymander.princeton.edu/assets/docs/VirginiaReport_October2019_PrincetonGerrymanderingProject.pdf#page=11).

<sup>55</sup> Other bills have been filed to offer alternatives to the amendment. These are discussed in the following section as well as compared in the Appendix.

criteria, public input, and the Special Master. SB203, HB381, and HB877 are all similarly comprehensive but either lack criteria or Special Master provisions. Another bill, SB204, is narrower and creates a Special Master requirement in the event that the Supreme Court of Virginia draws the lines. HB758 and SB975 combine the language of SB203 and SB204, so the latter two bills will not be discussed separately below. HB758 and SB975 better embody the four areas of improvement than HB381 or HB877. The Appendix contains a table comparing these proposed enabling legislation with the alternative advisory commission bills discussed below.

## **HB758/SB975**

### **a. Commission Selection**

One of the most notable additions of HB758 is the diversity requirement. The bill would require that consideration be given “to the racial, ethnic, geographic, and gender diversity of the Commonwealth.” Such language applies to both the Selection Committee of retired judges as well as the selection of both the legislator and citizen commissioners. This requirement pushes minority representation in Virginia redistricting from 16% of the General Assembly (23 members out of 140)<sup>56</sup> to a likely 18-25% of Commission membership (3 or 4 Commissioners out of 16). By having this requirement at each step of the process, this legislation would help ensure that the end product Commission is inclusive and representative of all Virginians rather than a small subsection.

The citizen-commissioner selection process would begin with the Chief Justice of the Supreme Court of Virginia sending a list of 10 or more retired Virginia circuit court judges to the legislative leadership in the General Assembly. Each leader would then choose one judge to serve on the “Redistricting Commission Selection Committee,” and these four retired judges would choose a fifth from the list, who would serve as the Committee chair.

Within three days, the Committee, with the aid of the Division of Legislative Services (DLS), would create an application and procedure by which citizen commissioners would be chosen. The application would require the disclosure of certain contact and demographic information as well as information related to the political activities and employment of the applicant and their relatives for the three-year period prior to application. The Commission may also require that the applicant submit three letters of recommendation. The application process itself would be advertised throughout the Commonwealth and be available in paper and electronic formats, beginning no later than December 1 and remaining open for four weeks.

To be eligible, HB758 would require that an applicant has voted in at least two of the last three general elections as well as has been a registered voter and resident of Virginia for the last three years. Further, it would prohibit certain people from serving as citizen commissioners: anyone who (1) holds, has held, or sought public or party office; (2) who is or was employed by the General Assembly or U.S. House or by a member of either; (3) who is or was employed by any federal, state, or local campaign; (4) who is or was employed by any political party or is a member of a party’s central committee; or (5) who is or was a registered lobbyist. It also would prohibit the relatives or cohabitants of the people described above.

Upon completion of the application period, DLS would check each applicant’s eligibility, removing ineligible applications. Two days after, DLS would transmit all eligible applications to the legislative leadership, who would each submit a list of at least sixteen citizen-applicants to the Selection Committee. The Committee

<sup>56</sup> Ned Oliver, *Virginia’s Legislative Black Caucus swells to 23. ‘We unleashed some of those black votes,’* Virginia Mercury (Nov. 6, 2019), <https://www.virginiamercury.com/blog-va/virginias-legislative-black-caucus-swells-to-23-we-unleashed-some-of-those-black-votes/>.

would be prohibited from speaking to General Assembly or U.S. House members following the receipt of the applications. Within two weeks, the Committee would choose two citizens per list by majority vote, for a total of eight citizen commissioners.

Further, HB758 creates the position of Commission chairperson, to be filled by one of the eight commissioners, who would be chosen at a public meeting, presumably by a majority vote (although it is unclear from the language). Once chosen, the citizen chairperson would “be responsible for coordinating the work of the Commission.” By placing a citizen in charge of the Commission rather than a legislator, HB758 would decrease the amount of legislative self-dealing typically found in the Commonwealth’s redistricting process.

## **b. Criteria**

In addition to clearing up the Commissioner selection process, HB758 would codify redistricting criteria, ranked in order of priority. Ranked highest are the requirements of equal population, compliance with federal constitution and federal law, and contiguity. The fourth criterion mirrors Voting Rights Act (VRA) language, requiring districts that give racial and language minorities “equal opportunity to participate” and that do not “dilute or diminish their ability to elect candidates of their choice.” What is notable about this language is that it allows for the creation of coalition districts, where sufficient crossover voting allows minority groups to elect their candidates of choice even when not a majority of a district’s population. In so doing, this language will allow a district plan to provide greater minority representation. Further, by adding VRA-esque language into the Virginia Code, plaintiffs will be able to bring VRA-type cases based on state law as opposed to vulnerable federal option.

In addition to the VRA language, HB758 would provide for protection of communities of interest (COIs). It defines a COI as “a homogenous neighborhood or any geographically defined group of people living in an area who share similar social, cultural, or economic interests.” The legislation would also prohibit the use of COIs as a workaround for partisanship by excluding partisan affiliation or a shared relationship with a party, incumbent, or candidate from the definition of a community. By protecting COIs, the resulting districts will be more concerned with representing the people who live in a district rather than making sure it looks aesthetically pleasing.

After COIs, the legislation would require respect for political boundaries, ranging from municipality boundaries to precinct boundaries. Districts that follow precinct boundaries would reduce the election administration burden for local officials. If necessary to comply with other criteria, a departure from political boundaries would have to be drawn using clearly observable boundaries as defined in the Virginia Code.<sup>57</sup> Essentially, these boundaries are roads, highways, waterways, or “any other natural or constructed or erected permanent physical feature” that appears on official maps. Following all of the above, districts would be required to be compact, but HB758 does not define the term.

Outside of this ranked list, HB758 would codify other requirements. First, it would prohibit the drawing of districts to favor or disfavor “any political party, incumbent legislator or member of Congress, or other individual or entity.” It would also double down on the prior prohibition on districts that deny or abridge “the right to vote on account of race, ethnicity, or color” or that restricts minority groups’ ability to participate or elect their candidate of choice. Finally, this legislation would prohibit the use of certain electoral data, except to “ensure that racial or ethnic minority groups are able to elect a preferred candidate of choice.”

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<sup>57</sup> Va. Code Ann. § 24.2-305 (defining “clearly observable boundaries”).

### **c. Public Input and Transparency**

HB758 also specifies that the meetings and records of the Commission, as well as of the Selection Committee, would be subject to Virginia's Freedom of Information Act and would be considered public information. Additionally, the Commissioners, staff, and any consultants would be barred from external communication about redistricting or reapportionment "outside of a public meeting or hearing."

Prior to proposing any draft plans and prior to voting to submit draft plans to the General Assembly, the Commission would hold at least three public hearings in different parts of the Commonwealth "to receive and consider comments from the public." It is not clear from the language whether the legislation means at least three total hearings or three prior to drafting and three prior to voting. These public comment hearings, and all other meetings and hearings, would be "advertised and planned to ensure the public is able to attend and participate fully." In advertising these meetings, the Commission would need to advertise in multiple languages "as practicable and appropriate."

This proposed legislation would also require the creation of a publicly available website to disseminate information, accept public comment, and publish draft plans. In addition, "all data used by the Commission in the drawing of districts shall be available to the public on its website . . . within three days of receipt by the Commission." This publicly released data includes "census data, precinct maps, election results, and shapefiles."

### **d. Special Master**

HB758 would also allow the Supreme Court of Virginia to adopt rules necessary to comply with the Amendment's fallback mechanism and that would require that the Court permit "[p]ublic participation in the Court's redistricting deliberations." It would also require the appointment of a Special Master in the event of a Commission failure to assist in the map drawing process. In addition to this appointment, the legislation would mandate that the Special Master play by the same rules as the Commission, both those listed in the Amendment and those in related legislation. By tying the hands of the Special Master in this way, HB758 would eliminate the efficacy of a gridlock strategy. It also should assuage Democratic concerns that the Supreme Court of Virginia would be able to act as a Republican sleeper agent.

Some have voiced concern about whether the General Assembly would be able to bind the Supreme Court in this way. However, Virginia case law upholds the idea that "the Constitution [of Virginia] does not grant power to the General Assembly; it only restricts power 'otherwise practically unlimited.'"<sup>58</sup> In essence, this established precedent allows the General Assembly to pass any law that does not conflict with the Constitution.<sup>59</sup> And when statutes come close to conflicting with the Constitution, the Court will find a violation "only where the statute in issue is 'plainly repugnant' to a constitutional provision."<sup>60</sup>

Here, the language of the Amendment states that in the event of a Commission failure, "the districts shall be established by the Supreme Court of Virginia." What it does not say is how the Court shall do so. Because the Amendment does not define the process by which the Supreme Court will establish these districts, the General Assembly, through enabling legislation like SB204, can mandate the appointment of a Special Master, who shall act in accordance with the criteria set forth by SJ18 and related legislation. HB758's Special Master

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<sup>58</sup> Va. A.G. Op. (July 15, 2015)(quoting *Lewis Trucking Corp. v. Commonwealth*, 207 Va. 23, 29, 147 S.E.2d 747, 751 (1966)).

<sup>59</sup> *Id.*

<sup>60</sup> *Jamerson v. Womack*, 423 S.E.2d 180, 182 (1992)(quoting *City of Charlottesville v. DeHaan*, 228 Va. 578, 583–84, 323 S.E.2d 131, 133 (1984)).

provision would not be “plainly repugnant” to SJ18’s failsafe mechanism, thus it should survive judicial scrutiny.<sup>61</sup>

## **HB381/HB877**

### **a. Commission Selection**

Because HB381 and HB877 are nearly identical, they will be discussed in tandem, with the few differences pointed out along the way. In the same vein, certain provisions of these bills are largely similar to HB758, so the discussion will focus on where they diverge. Unlike HB758, HB381 and HB877 would not require diversity on the Selection Committee, only on the Commission. That said, under either version of this requirement, it is likely that the Commission will reflect the diversity of the Commonwealth, allowing major input from every subsection of the population.

On the subject of diversity, one requirement makes HB877 unique as compared with the other proposed enabling legislation. It would require the Commission to hire an expert to perform a racial voting analysis and to review plans for compliance with the Voting Rights Act and the Equal Protection Clause. The expert would need to be approved by a majority of both legislative and citizen commissioners. By performing this analysis, this requirement would likely prevent a repeat of the issue in Bethune-Hill.

HB381 and HB877’s conflict provisions are less strict than those found in HB758. HB381 only prohibits the following people: (1) those who hold or have held partisan public office or political party office; (2) relatives or employees of legislators or members of Congress or those employed directly by Congress or the General Assembly; (3) employees or former employees of any local, state, or national campaign; and (4) registered lobbyists. It does not prohibit (1) candidates who have sought partisan public office or political party office; (2) current or former employees of political parties or of their central committees; nor (3) relatives and cohabitants of these people. Thus, where HB381 and HB877 limit outright partisans themselves from serving, HB758 does more to limit hidden partisanship on the Commission. Lastly, HB381 and HB877’s application processes are nearly identical to that in HB758 with the differences arising from HB758’s stricter eligibility rules.

### **b. Criteria**

On the criteria front, HB381 would create less meaningful guidelines than HB758, and HB877 has no criteria provisions at all. HB381 and HB758 share typical criteria provisions like equal population, following state and federal law, compactness, and contiguity. However, where HB758 only names these latter two concepts, HB381 defines them. For compactness, HB381 would prohibit oddly-shaped districts, except as needed to follow political boundaries. It also would require the maps to avoid fingers and tendrils at district edges as well as limit thin, elongated strips connecting district parts. Lastly, it would require the General Assembly to use one or more numerical measures of compactness. For contiguity, HB381 would allow for contiguity by water if there is a method of transport connecting the two sides. But connections by water downstream or upriver would not be considered contiguous.

Like HB758, HB381 has provisions about respecting political boundaries and communities of interest. But where HB758 ranks COIs above political boundaries, HB381 would require respecting political boundaries

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<sup>61</sup> *See id.*

“to the maximum extent possible,” likely placing more importance on county and city boundaries than on where people live. While the definitions of what a political boundary is and what to do when a departure is necessary are the same, HB381 describes these concepts more fully. The definition of COI is also largely similar between HB758 and HB381 but with two notable differences. First, HB758 defines shared interests as “similar social, cultural, and economic interests” while HB381 defines these as “transportation, employment, or culture.” Second, HB758 explicitly states that a shared “political affiliation or relationship with a political party, elected official, or candidate for office” is not a COI, but HB381 has no such provision.

The major differences arise in what criteria HB381 does not have. First and foremost, there is no criteria prohibiting the favoring or disfavoring of a party, incumbent, or candidate. It also does not contain any criteria mirroring the VRA or ensuring protection for minority communities. Thus, where HB758 provides increased protections for racial, ethnic, and political minority groups, HB381 does not.

### **c. Public Input and Transparency**

On public input and transparency, HB381 and HB877 would not go as far as HB758. All three bills have similar provisions regarding Virginia Freedom of Information Act and have the same public hearing requirement. But HB381 and HB877 do not contain the same broad advertising or multilingual provisions. Like HB758, HB381 and HB877 would require the creation of a website, but not the publication of redistricting data for free public use and access.

## **Alternative Paths Forward: Other Reform Bills**

Since the start of the new General Assembly session, a number of bills have been introduced offering alternative paths to reform: three creating advisory commissions, one restarting the constitutional amendment, and six putting redistricting criteria in place. While a combination of the constitutional amendment and the proposed enabling legislation would create reform in the Commonwealth, other proposed bills would do so through citizen-led advisory commissions or by codifying guidelines for future line-drawers, whether the General Assembly or one of these many Commissions. To reiterate, the statutes creating Commissions must have their maps go through the General Assembly for final approval. Only a constitutional amendment can change this requirement.

### **1. Commission Legislation**

Four bills have been filed to create commissions as alternatives to the Amendment: three would create advisory commissions and the fourth would amend the constitution for use in 2031. The first, HB1055, draws heavily from SJ18. The other two bills filed would both create citizen-led advisory commissions more independent of the General Assembly. Two versions of Delegate Levine’s 10-member Commission have been filed, a regular bill (HB1645) and a constitutional amendment (HJ143). Lastly, HB1256 was introduced by Delegate Price and creates an 11-member citizen commission. The Appendix contains a table comparing these bills and the proposed enabling legislation.

### **a. HB1055**

HB1055 creates the same 16-member hybrid Commission as SJ18 and is essentially identical to the Amendment with one major difference. Instead of placing the fallback mechanism with the Supreme Court of Virginia, HB1055 would give the General Assembly this responsibility. The Commission would have two chances to submit maps to the General Assembly for approval. If both attempts fail, then any member of the General Assembly would be able to submit their own map. Unlike the first two attempts where amendments would be limited to purely corrective ones, maps submitted in this third round would be subject to amendment in the same manner as any other bill. This fallback mechanism presents a clear problem: the General Assembly can reject the Commission's maps twice then submit its own with little constraint. This fallback mechanism is likely more vulnerable to a gerrymander than the Supreme Court of Virginia. Additionally, Levine's HB1055 does not include any of the improvements embodied in the proposed enabling legislation, giving it the same problems discussed in the prior version of this Guide.

### **b. HB1645/HJ143**

Delegate Levine has introduced another advisory commission bill (HB1645) and a first reading of a constitutional amendment (HJ143), both of which would create a 10-member citizen commission. HB1645's would be advisory while HJ143's would be independent for use in 2031. Either 10-member Commission would be made of three members of each major political party and four not affiliated with either. The Commission Selection Committee found in these bills would use the same procedure for selecting the retired judge panel as SJ18, but allows any retired judge to add or remove their name to the initial list.

Once chosen, the Selection Committee would create an application process and choose 22 potential Commissioners: five members of each major political party and twelve unaffiliated with either. From this list of 22 applicants, the four legislative leaders of the General Assembly would each strike one candidate of the opposite party and two unaffiliated candidates, striking a total of twelve to create the final 10-member Commission. Like many of the reform bills, consideration would have to be given to the diversity of the Commonwealth. The Commission chairperson would be chosen by a majority vote at a public meeting and would be one of the four unaffiliated commissioners. The bill would also require the creation of an application process and allows for the possibility of interviews.

As written now, this reform has no conflicts provisions, so lobbyists, former campaign staff, or even legislators could serve as commissioners. It is possible that the retired judges and the strike process could prevent such an outcome, but a prophylactic measure in the legislation itself would better serve this purpose. As such, conflict-of-interest language similar to that found in other bills introduced this session, like HB758 or HB1256, should be added.

Map approval requires a vote of seven commissioners with at least one vote per commissioner type. Under HB1645, once approved, the maps would be sent to the Governor and the General Assembly and get published to the Commission website. The General Assembly then votes on the bills embodying the maps with no chance for amendment. If the maps fail to pass, the Commission draws new maps and sends them back for legislative approval. As written, it seems that this cycle repeats until a map passes successfully. Unlike SJ18, this process also would also keep the Governor (and his veto power) involved in the line-drawing.

It is possible that the General Assembly or Governor could keep rejecting maps in an endless loop, and without a fallback mechanism for getting the maps drawn by the bill's deadline, there is no clear way to resolve this issue. The legislation describes no consequence for what happens if maps have not been approved in a timely

manner, and language should be added to address this uncertainty. Otherwise, the process could end up being delayed past the deadline, followed by a court case to force a new map. One possible solution is that, in addition to selecting the 22 commission candidates, the Selection Committee could craft a list of Special Masters to draw maps in case of Commission failure. The Special Master would draw the maps, which, because this is a statute and not an amendment, would still need General Assembly approval. A similar provision can be found in reform legislation proposed in North Carolina (H574, H827, S673).<sup>62</sup>

Under this proposal, commission meetings would be public, and at least three public comment hearings would be required prior to proposing plans and prior to voting on plans. The bill also would require a website for disseminating information, receiving comment, and publishing plans and comments. However, like SJ18, there is nothing requiring the public release of data (e.g. shapefiles, census data, etc.). As such, language should be added that requires the public release of digitally-readable redistricting data on the Commission's website. Furthermore, the Commission meetings should be live-streamed and archived on its website to ensure broad accessibility.

While HJ143 and HB1645 are largely identical, there are a few notable differences. First, and perhaps the most obvious, is that HJ143 is an amendment, meaning that it would need to go through the same lengthy process as SJ18. By virtue of being a constitutional amendment, HJ143 would create an independent commission rather than an advisory one. Additionally, an amendment can create more drastic change than the proposed bills but would not be of use until 2031. The proposed amendment would use this power to take the General Assembly and the Governor completely out of the map approval and drawing process, leaving only the Commission. This provision is unique to HJ143 within this session's universe of proposed reform. Lastly, while HB1645 makes no mention of conflict provisions, HJ143 leaves the possibility of eligibility requirements open, to be created by the General Assembly at a later date, but, like SJ18, it does not spell any out on its own.

The final difference between HB1645 and HJ143 is that HJ143 creates a list of ranked criteria, beginning with following state and federal legal requirements for districts. It then requires contiguity, allowing contiguity by water but disallowing connections by water running downstream or upriver. The third criterion largely mirrors the language of the 15th Amendment and Voting Rights Act. HJ143's requirement, like HB1255 below, is the most extensive version of this racial protection as it also lays out the VRA's totality of the circumstances test,<sup>63</sup> but at the state level. This provision would allow for a stronger state-level protection of racial and ethnic minorities than most of the other reform bills proposed this session.

After that, HJ143 would require equal population between districts to comply with one-person, one-vote. Fifth, this proposed amendment would require protection of political boundaries, but only applies this to the boundaries of counties, cities, and towns. Where a departure is needed, consideration would be given to natural geographic boundaries, physical boundaries, and communities of interest as well as clearly observable boundaries as defined in the Virginia Code. Sixth, HJ143 requires compact districts, but it names this concept without defining it.

The next ranked provision is to avoid the division of communities of interest. HJ143 defines this term in the same way as HB758 and other proposed enabling legislation, "homogeneous neighborhoods" or geographic areas that share "similar social, cultural, and economic interests." It also states that an area's political make up

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<sup>62</sup> See N.C. proposed legislation: H574 ("Fix Our Democracy")(available at <https://www.ncleg.gov/Sessions/2019/Bills/House/PDF/H574v1.pdf>); H827 ("N.C. Citizens Redistricting Commission")(available at <https://www.ncleg.gov/Sessions/2019/Bills/House/PDF/H827v1.pdf>); and S673 ("N.C. Citizens Redistricting Commission")(available at <https://www.ncleg.gov/Sessions/2019/Bills/Senate/PDF/S673v1.pdf>).

<sup>63</sup> 52 U.S.C. § 10301(b).

or prior “relationship with a political party, elected official, or candidate.” By ranking political boundaries and compactness above COIs, HJ143 would rank the shape of districts above the representation of people within them. The next two provisions deal with similar concepts: prohibiting “irregular or contorted perimeters” and requiring the minimization of precinct splits.

The most unique part of HJ143 is its final criterion, which attempts to limit partisan gerrymandering through a fairness formula, based on a dataset that would be created by an open-source computer algorithm. This formula would be based on the statistical measure of fairness called “partisan bias.” As mentioned in the discussion of *Bethune-Hill*'s effect on the 2019 election, partisan bias is a measure of a map's performance under a 50/50 split electoral condition. The open-source software would generate a hypothetical precinct-level election dataset resulting in this 50/50 split, and proposed maps would be evaluated under these conditions. If one political party has more than a one-seat advantage over the other, the proposed maps would be redrawn “until this statistical condition is met.” Using a measure of partisan bias makes sense in a closely contested state like Virginia. However, this proposed amendment should also contain an outright ban on favoring parties, incumbents, and candidates.

### **c. HB1256**

The third advisory commission bill, HB1256, creates the “Virginia Redistricting Advisory Commission,” an 11-member commission with four members from each major party and three members not affiliated with either. To fill these eleven spots, the bill creates an application process that would be run by the Auditor of Public Accounts, a four-year term position appointed by the General Assembly. The proposed bill contains the same eligibility requirements as HB758. The Auditor would use the Department of Elections' voter history information and public campaign finance records to ascertain an applicant's partisan affiliation. Using this data, the Auditor would create three applicant pools of twenty candidates each, broken down by partisan affiliation. In making these pools, the Auditor must ensure that they are representative of Virginia's geographic, racial, and gender diversity, as a whole.

These applicant pools would be sent to the four legislative leaders of the General Assembly with each choosing one person from the applicant pool corresponding to their party. Additionally, the Auditor would randomly and publicly choose one person from the unaffiliated applicant pool. These five selected commissioners would then choose the remaining six (two per partisan affiliation) by a four-fifths vote. In making these selections, the five Commissioners would have to ensure that the Commission is representative of Virginia's geographic, racial, and gender diversity.

There are two potential issues with this selection mechanism. First, the Auditor of Public Accounts is chosen by the General Assembly for a four-year term. A forward-thinking General Assembly dominated by one party could appoint a friendly Auditor, who could make an application process that works well for a particular party or fill the applicant pools in a way that would be agreeable to a particular party. Second, the selection mechanism gives a large amount of power to the legislative leaders. It would seem that, because of the four-fifths voting requirement for selection, the four commissioners chosen by the legislative leaders could pick the remaining six without any input from the single unaffiliated commissioner randomly chosen by the Auditor. This problem could be counteracted by requiring one vote from each of the three commissioner types.

The Commission would have a chair and a vice-chair. These positions would have to be filled by commissioners of different parties or by a commissioner of one party and one who is not affiliated with either major party. These would be chosen by a simple majority vote. Any vote for other actions taken by the full

Commission would have to be in public and require a seven-vote majority, including one commissioner per party affiliation.

Problematically, this voting requirement could erase the power of the three unaffiliated commissioners. By having a seven-vote majority requirement with one vote from each party, the eight partisans on the commission could draft a bipartisan gerrymander and push it through. All of that could be done without any input by the three independent commissioners. To counteract this, HB1256 should be amended to mirror HB1645's vote requirement, requiring the vote of one commissioner from each party affiliation and one of the unaffiliated commissioners.

Prior to the receipt of Census data, the Commission would have to conduct at least eight public hearings around the Commonwealth to receive public comment, particularly about communities of interest. HB1256 would require that all the Commission's meetings and hearings be advertised and planned to allow for full public participation, including advertising in multiple languages "where practicable and appropriate."

The bill also requires a website for disseminating information, receiving public comment and proposals, and posting meeting transcripts and video archives. "[A]ll data used . . . in the drawing of districts" would have to be published on the Commission's website, "including census data, precinct maps, election results, and shapefiles." Preliminary maps and reports would be published on the website and are required to be available for at least 14 days. The Commission would then hold at least five public hearings on the preliminary maps before drawing the finalized maps.

As stated above, the finalized maps would be approved by a vote of at least seven Commissioners, including one from each major party. A final report would be submitted to the General Assembly alongside the proposed maps that explains the Commission's basis for drawing districts, discusses how the plan complies with the bill's criteria, and summarizes public comment. Once submitted, the proposed plans for each district type would be voted on in separate bills with only purely corrective amendments allowed. If the Commission maps fail to get legislative approval, the Commission would have 14 days to submit new maps. After a third attempt, the bill embodying a proposed plan could be amended like any other bill. If the Commission fails to produce maps prior to HB1256's March 31st deadline, the General Assembly takes charge. In this scenario, the General Assembly would still need to comply with HB1256's criteria and standards. Just like with HB1055, this fallback mechanism is potentially problematic because the General Assembly could refuse to approve maps twice and then have free reign, albeit with more constraints than in HB1055.

HB1256's criteria include the usual requirements such as following federal and state laws, equal population, and contiguity. In addition, the bill would bolster Virginia's protections of racial and ethnic minorities by requiring equal opportunities to participate in the political process and to elect candidates of choice "whether alone or in coalition with others." HB1256 also creates protections for communities of interest, "defined as an area with recognized similarities of interests" and "not based on a common relationship with political parties or political candidates." In addition to protecting minorities and communities, this bill would also seek to limit the number of split counties, cities, and precincts.

Further, it prohibits a map that "unduly favor[s] or disfavor[s] any political party" at the statewide level and the use of incumbent addresses. It does not, however, prohibit drawing districts that favor particular incumbents or candidates. Districts can be drawn for this purpose with a rough estimation of where an incumbent or candidate lives, which would render the prohibition on addresses useless. Lastly, the Commission would be able to consider election data, but only after the initial public hearings on communities of interest have been held. Overall, HB1256's criteria are not as strong as they could be, so it may be prudent to bolster them through legislative amendment or by passing one of the criteria bills discussed below.

## **d. Conclusion**

Even with its problems, Delegate Price's HB1256 presents the best alternative to SJ18, and it most embodies the key areas of improvement discussed above. Unlike HB1055 or HB1645/HJ143, HB1256 contains strong conflict-prevention provisions, like those found in HB758. It would also require that the Commission's membership reflect the diversity of the Commonwealth. Further, HB1256 would create a set of criteria that would protect communities of interest and minority groups while also prohibiting partisan gerrymandering. Finally, HB1256 has the strongest public hearing and transparency requirements of any reform bills proposed this session, including the Amendment itself. Where HB1645 improves on HB1256 is in its partisan affiliation vote requirement and Commission selection through strikes. Again, each commission created by these proposed bills would suffer from a similar flaw: the General Assembly must have the final say.

## **2. Criteria Legislation**

Thus far, six bills have been introduced that would put redistricting criteria in place to guide future line-drawers, whether or not any of the proposed Commission structures are in place in 2021. Each of these six bills are slightly different with the exception of HB1255 and SB717, which are identical to one another. Of these six bills, only HB1054 has ranked criteria. Additionally, the Appendix has a table to compare the criteria found in each reform proposed this session.

### **a. SB56**

SB56 would require that districts be based on population, in line with federal and state law. State legislative districts must be "substantially equal" to each other while congressional districts must be "as nearly equal as is practicable." SB56 would also require that districts be drawn to meet federal and state laws regarding racial and ethnic fairness. Third, this bill would mandate that political boundaries, from large county boundaries to smaller voting precinct boundaries, "be respected to the maximum extent possible." When a departure is necessary, it would have to follow a clearly observable boundary, such as roads, waterways, or other defined structures. SB56 would also require contiguity, including by water, but only if the separated parts of the districts are accessible by "a common means of transport" or if the parts would still be contiguous if the water were removed. This definition does not include connections that only run downstream or upriver. SB56 would also define the concept of compactness by prohibiting "oddly shaped" districts with "contorted boundaries," unless justified by a political boundary. It also calls for avoiding extended tendrils and elongated connections of population centers. In addition, SB56 would require the use of "one or more standard numerical measures" of compactness. Lastly, SB56 states that "consideration may be given to communities of interest," defining them as "homogeneous neighborhoods" or groups of people with shared interests.

SB56 is a case of placing emphasis on shape over people: it would require following political boundaries "to the maximum extent possible" and would prohibit certain types of contorted districts, but it only states that communities may be considered rather than requiring that they be respected "to the maximum extent possible." Furthermore, SB56 does nothing to add protections for racial or ethnic minorities nor does it have any provision limiting partisanship in redistricting.

## **b. SB175**

SB175's provisions regarding equal population, federal/state laws of racial/ethnic fairness, compactness, contiguity, and political boundaries are all identical to those in SB56. Where these bills differ is in their treatment of communities of interest and partisanship. SB175 requires respecting COIs "to the maximum extent possible," on par with its provision about political boundaries. It also defines COIs more broadly, including not only "homogeneous neighborhoods" and areas with shared interest as well as other recognized areas. Importantly, SB175 makes clear that a shared "political affiliation or relationship with a [party, incumbent, or candidate]" does not create a COI. As for partisanship, where SB56 was silent, SB175 prohibits districts that are "drawn for the purpose of favoring or disfavoring any [party, incumbent, or candidate]." It would also prohibit the use of political data, except as necessary to comply with racial/ethnic requirements. By better protecting COIs and by prohibiting partisan offenses, SB175 represents a step above SB56.

## **c. SB241**

SB241's provisions requiring equal population, following federal/state laws of racial/ethnic fairness, and contiguity also mirror those found in SB56 and SB175. With regards to racial and ethnic minorities, SB241 goes further than these other two by including language similar to the 15th Amendment and parts of the Voting Rights Act Section 2. On compactness, SB241 makes no mention of the visual shape of districts, only requiring that "one or more numerical measures" of compactness be employed to assess a plan. Although it better protects racial/ethnic minority groups, SB241 is a step below SB175 because it lacks both COI protection and a prohibition of partisanship.

## **d. HB1054**

Unlike the other proposed criteria bills, HB1054 has ranked criteria. Top of its list is that districts follow federal/state laws regarding racial/ethnic fairness, which is then followed by SB56's language that mirrors the 15th Amendment and VRA Section 2. Third, HB1054 would require contiguous districts, including contiguity by water but prohibiting "connections by water running downstream or upriver." Fourth, this bill would require the use of the fairness formula discussed with HJ143 above, which is based on the partisan bias metric. HB1054 ranks district population requirements and allowable population deviation fifth, requiring a 1% total deviation for congressional districts and 5% for General Assembly. Next, the bill would require protecting "political boundaries of counties, cities and towns" but not to the maximum extent possible. Any departure would need to follow clearly observable boundaries. Seventh is an undefined compactness requirement. Then, HB1054 would require avoidance of splitting communities of interest with a definition similar to that in SB175: "homogeneous neighborhoods" and geographic groups of people with shared interests but not areas with a similar partisan lean or with a relationship to a party, incumbent, or candidate. Ninth, HB1054 would prohibit "contorted perimeters" unless justified by one of the above. And finally, the bill would require minimizing precinct splits.

Overall, HB1054 presents a good criteria bill with a clear ranking for line-drawers to follow. One potential problem is that the fairness formula is not as well-defined in HB1054 as it is in HJ143, but this is relatively small. A bigger concern with HB1054's partisanship provision is that there is no clear prohibition on districts that favor parties, incumbents, or candidates. The fairness formula may be able to limit partisan gerrymandering, but it may be beneficial for it to ban the practice outright as well. Another small issue is that boundaries

and compactness are ranked above COIs, which places emphasis on how districts look above where people actually live.

### **e. HB1255/SB717**

As these two bills are the same, they will be referred to by the first introduced, HB1255. The first provision listed in this bill would require contiguity, but its definition of this criterion is different than others. Instead of focusing on water, HB1255 would prohibit parts of districts being “entirely separated by the territory of another district” and would prohibit the division of populated census blocks, “unless it can be determined that the populated part of such block is within a single district.” The next provision of this bill would require the Commonwealth to count incarcerated persons at their last-known residential addresses, ending a practice known as prison gerrymandering where rural communities gain outsized influence because disenfranchised inmate populations are included in their total population counts. By making this change, urban, typically minority, communities with high incarceration rates will be more adequately counted and represented.

The next two provisions would also protect minority communities. First, as with each other bill, HB1255 would require districts that follow federal/state laws regarding racial/ethnic fairness. Second, HB1255 would codify language from the 15th Amendment and VRA Section 2, like some of the other criteria bills discussed. However, its language is broader in its scope, much like HJ143, as HB1255 would also include the VRA Section 2 totality-of-the-circumstances test, based on a number of factors.

After these protections, HB1255’s next provision combines a few different concepts. First, it would require that political boundaries be considered, but it does not define which. Next, this provision would prohibit the drawing of districts to favor “any [party, incumbent,] or other individual or entity. Third, it would prohibit the use of political data, except as necessary to meet federal/state law requirements regarding racial/ethnic fairness.

The last two subdivisions of HB1255 once again have concepts that appear in other bills, but that are defined in a unique way. First, it would require that “a district . . . unite communities defined by actual shared interests, taking into account . . . factors that indicate commonality of interests.” This definition would specifically exclude party affiliation or relationship with a party, incumbent, or candidate. It would also require that districts allow for “orderly and efficient” election administration. Lastly, HB1255 would require compact districts based upon specific numerical measures of geographical dispersion, perimeter length compared to areas, and population dispersion.

### **f. Conclusion**

SB175, HB1054, and HB1255 each propose good guardrails for line-drawers, whether the General Assembly or a proposed Commission. Each of these bills have some form of limit on partisan gerrymandering, whether through HB1054’s fairness formula or SB175 and HB1255’s prohibition on the practice. HB1054 and HB1255 are a step above SB175 because of their language creating increased protection for racial and ethnic minorities. Thus, either of these House bills would put in place the best criteria-based limitations.

# 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 the Amendment and its enabling legislation or by one of the alternative bills will be the most comprehensive reform ever to pass through a state legislative body.

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 the Amendment, proposed enabling legislation, and alternate reform bills. Rather than having state House members draw the lines with an unconstitutional floor for black voting-age population, a 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, the Amendment, the proposed enabling legislation, or many of the alternative reform bills would allow for a state-level racial challenge to the map instead of relying solely on the federal route.

More generally, most of the proposed paths forward 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 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.<sup>64</sup> 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.<sup>65</sup>

Such self-preserving priorities are especially probable in the new environment of unified Democratic control. 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 or by the other commission bills will be able to bring all parties to the line-drawing table, and in doing so, the end product will be able to better represent all Virginians.<sup>66</sup>

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<sup>64</sup> Mathis et al., *supra* note 27, at 10.

<sup>65</sup> *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)).

<sup>66</sup> 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”).

# WHAT CAN CITIZENS DO DURING THE GENERAL ASSEMBLY SESSION?

Now is the only time to get reform through the Virginia legislative process before the lines are redrawn in 2021. There are two paths forward on this limited timeline: (1) pass the Amendment and proposed enabling legislation or (2) pass an advisory Commission bill alongside a criteria bill. The Amendment was passed by the General Assembly in February 2019, but it must be passed again in the current session in order to go to the voters for approval this November. To that end, its passage depends on support from members of the newly-elected General Assembly. In order for the Amendment to be a complete reform, however, the General Assembly must also pass legislative improvements to it, embodied in proposed enabling legislation. If the General Assembly decides that the Amendment is not the proper route forward, it must approve one of the alternate advisory commission bills in order for the process to change in Virginia before 2021's redistricting process.

If the legislature decides to pass a statute, or indeed, if it does nothing at all, it could begin a new constitutional amendment process in 2020. Even though that process could not be completed until after the 2021 round of redistricting and ensuing House of Delegates election, starting this new process would be a showing of good faith that would lock the legislature into a second reading, assuring that reform is considered in the future rather than only relying on legislators' promises to do so.

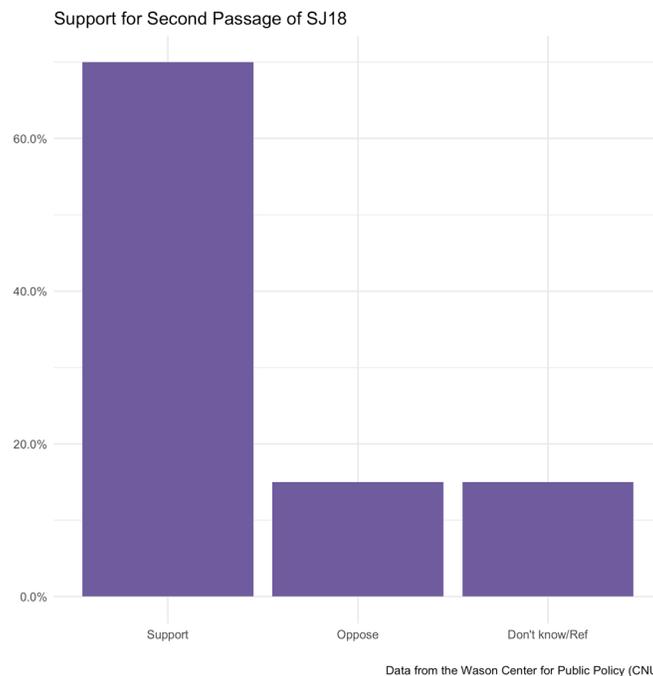
Democrats now have full control of the General Assembly and, therefore, the redistricting process in 2021. It is unlikely that this unified party control will prevent the Amendment or one of the other proposed bills from being passed by a coalition of reform-minded members of both parties and gerrymander-fearing Republican legislators. Indeed, House Republicans released a statement reaffirming their support of the Amendment.<sup>67</sup> In addition, the House and Senate Majority Leaders as well as Governor Northam have all expressed their support for the Amendment.<sup>68</sup> Alternatively, both HB1256 and HB1645/HJ143 would give equal power to Democrats and Republicans. A bipartisan coalition may be less likely for one of these citizen-led advisory commission bills than for the Amendment's hybrid commission, but that does not wholly rule out the possibility. The simple phenomenon of litigation exhaustion from the last decade may also work in favor of reform.

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<sup>67</sup> *House Republican Leaders Reaffirm Support for Nonpartisan Redistricting*, Virginia House GOP (Oct. 14, 2019), <https://virginia-house.gov/2019/10/14/house-republican-leaders-reaffirm-support-for-nonpartisan-redistricting/>.

<sup>68</sup> Michael Martz, *Incoming House majority leader backs nonpartisan redistricting*, Rich. Times-Dispatch (Dec. 5, 2019), [https://www.richmond.com/news/virginia/incoming-house-majority-leader-backs-nonpartisan-redistricting/article\\_a02c224e-8708-5013-9828-ea251344d9fd.html](https://www.richmond.com/news/virginia/incoming-house-majority-leader-backs-nonpartisan-redistricting/article_a02c224e-8708-5013-9828-ea251344d9fd.html).

If the Amendment is passed by voters in November 2020, this would reflect the will of a supermajority of Virginians who support this particular redistricting reform. According to a December 2019 Wason Center poll, 70% of Virginians polled support the General Assembly passing this redistricting reform amendment for a second time.<sup>69</sup> This supermajority is compared with only 15% of voters who oppose this reform with the remaining 15% unsure or declining to answer.<sup>70</sup>



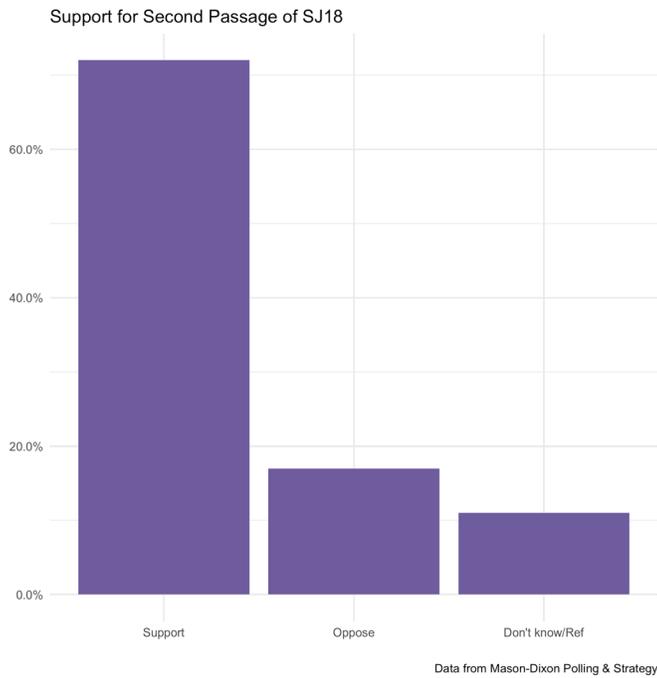
A second poll, performed by Mason-Dixon Polling & Strategy, corroborates the Wason Center numbers. Of the 625 Virginians polled, 72% supported the passage of the constitutional amendment with 17% opposing and 11% unsure.<sup>71</sup> The poll also reveals that this support is bipartisan with over 60% of Democrats, Republicans, and Independents in favor of the General Assembly passing the amendment a second time. Similar levels of support are also seen across the Commonwealth's regional and demographic divides.

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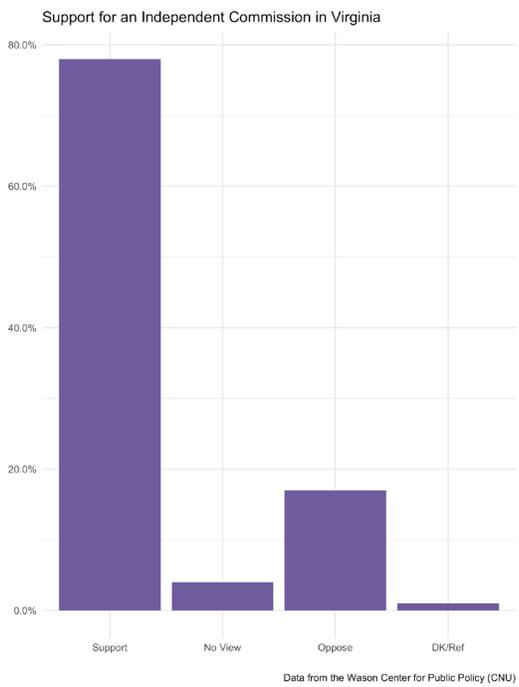
<sup>69</sup> Wason Center, *State of the Commonwealth 2020 Survey Report*, (Dec. 16, 2019), <https://cnu.edu/wasoncenter/surveys/2019-12-16/>.

<sup>70</sup> *Id.*

<sup>71</sup> Mason-Dixon Polling & Strategy, *December 2019 Virginia Poll*, 2 (Dec. 2019), [https://www.scribd.com/document/441504491/Mason-Dixon-Poll-on-Redistricting-Amendment#from\\_embed](https://www.scribd.com/document/441504491/Mason-Dixon-Poll-on-Redistricting-Amendment#from_embed).



Additionally, even if one of the citizen-led advisory commission bills were to pass, that outcome would still fall in line with the will of Virginia voters. A different Wason Center poll from 2018 found that a supermajority of the Commonwealth’s citizens were in favor of an independent redistricting commission.<sup>72</sup>



<sup>72</sup> 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 the Amendment and enabling legislation**

Citizens may ask their elected representatives whether they support the Amendment. Upon taking the majority in the General Assembly, some members of the newly-elected Democratic majority have been hesitant to voice support for the Amendment on its second reading in the upcoming session. Most of the hesitation has arisen in the House of Delegates rather than the Senate. As mentioned, the Democratic House majority leader, Charniele Herring, has stated her support of the amendment, but Speaker of the House Eileen Filler-Corn has yet to do so and other Delegates have been outspoken about their concerns. Citizens can reach out to their elected representatives and discuss whether they will vote for SJ18 on its second reading.

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 line-drawing and the process itself. We have identified four areas for improvement: (1) Commission member selection, (2) redistricting criteria, (3) transparency, and (4) a Special Master requirement. Legislation embodying these improvements has been introduced as HB758 and SB975. Citizens can reach out to their local Delegates and Senators regarding their support for these bills.

## **Advocate for alternate reforms**

In addition to passing the Amendment and enabling legislation, other paths toward redistricting reform have emerged during this session. These alternate bills fall into two categories: advisory commissions and criteria. Of the three proposed advisory commissions, Delegate Cia Price's HB1256 is the best as written, even though its voting requirement and selection process have potential issues. Further, because HB1256 does not have strong criteria, it either needs to be amended or passed along one of the better criteria bills introduced this session. Of these, Delegate Price's HB1255 and Delegate Levine's HB1054 create the most robust set of guardrails for line-drawers. Delegate Price's HB1256 could present an improvement on the current process, especially if passed with stronger criteria. Citizens can reach out to their legislators to support this reform.

## **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 SJ18, a constitutional amendment that would create a Virginia Redistricting Commission, a hybrid commission of legislators and citizens. Improvements to the Amendment can come in the form of enabling legislation, such as HB758 and SB975, in the current session. Reform can also come in the form of alternate legislation. Such reform should come by way of an amended version of Delegate Price's HB1256 passed alongside a strong criteria bill, either her own HB1255 or Delegate Levine's HB1054. Any of these reforms would be expected to lead to more competitive districts and better representation for minority communities. The proposals discussed in this guide present the last chance at redistricting reform in Virginia before 2021. If formed, any of these Commissions would be the most comprehensive redistricting reform ever to pass through a state legislature.

# APPENDIX: COMPARING THE REDISTRICTING BILLS

## Redistricting reform in Virginia: Enabling Legislation and Alternatives

Bill/resolution:	Amendment	Enabling Legislation					Legislative Alternatives			
	SJ18	SB203	SB204	HB758/SB975	HB381	HB877	HB1055	HB1645	HJ143*	HB1256
Sponsor:	Barker	Lucas/Locke		VanValkenburg/Hanger	Cole	Sickles	Levine			Price
Hybrid commission draws maps	✓	✓	✓	✓	✓	✓				
Independent commission (no role for G.A.)									✓	
Advisory commission								✓		✓
VA Supreme Court as fallback mechanism	✓	✓			✓	✓				
VA Supreme Court + special master as fallback			✓	✓						
Public website		✓		✓	✓	✓		✓	✓	✓
Public release of data		✓		✓						✓
Number of public hearings	3	3	3	3	3	3	3	3	3	13
Prevent commissioner conflicts-of-interest		✓		✓	✓	✓				✓
Commissioners must apply		✓		✓	✓	✓		✓	✓	✓
Commissioner diversity requirement		✓		✓	✓	✓		✓	✓	✓

\*HJ143 would take effect after 2031

February 2020

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## Redistricting bills before the Virginia General Assembly: Fairness Criteria

Bill/resolution:	Redistricting criteria only					Both redistricting criteria and process reform					
	SB56	SB175	SB241	HB1054	HB1255/SB717	SJ18	SB203/HB758/SB975	HB381	HB1055	HJ143	HB1256
Sponsor:	Suetterlein	Chase	Barker	Levine	Price/McClellan	Barker	Lucas/VanValkenburg/Hanger	Cole	Levine		Price
Meet federal and state laws on racial/ethnic fairness	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓
Contiguous, compact, and equal population	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	Not compactness
Respect or consider political boundaries	✓	✓		✓	✓		✓	✓		✓	✓
Respect or consider communities of interest	✓	✓		✓	✓		✓	✓		✓	✓
Reinforce 15th Amendment and Voting Rights Act			✓	✓	✓		✓			✓	✓
Minimize split precincts				✓			✓			✓	✓
Prohibit undue favor to party or incumbent		✓			✓		✓			✓	Party only
Restrictions on using political data		✓			✓		✓				✓
Mathematical formula to ensure fair maps				✓						✓	
Irregular boundaries only to meet other criteria				✓						✓	
Count prisoners in their home communities					✓						✓

\*SB204 and HB877 have no criteria provisions

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