

# A COMMISSIONER'S GUIDE TO REDISTRICTING IN VIRGINIA



# A Commissioner's Guide to Redistricting in Virginia



**PRINCETON  
GERRYMANDERING  
PROJECT**

Fixing bugs in democracy

January 2021

January 21, 2021

Dear Virginia Redistricting Commissioner:

Congratulations on your selection to serve on the first Virginia Redistricting Commission! Virginia was the site of the first gerrymander in 1789. In 2021, you get a chance to forge a new future for the Commonwealth.

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 the redistricting process will work under your guidance. It begins with an introduction to gerrymandering and its history in Virginia. It then proceeds by discussing the Amendment and enabling legislation, which have established the Commission and provide guidance to its operation. The report clarifies how the Commissioners were selected, your timeline for the consideration and production of maps for the election of representatives to the State House of Delegates, State Senate, and the U.S. House of Representatives, and the transparency requirements of the process to ensure that the process is open to the public. It then provides detailed information regarding the criteria you must consider in drawing and weighing these maps,



This report was written by Aaron Barden, Hannah Wheelen, Hope Johnson, Adam Podowitz-Thomas 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, and Jamaa Bickley-King of New Virginia Majority.

I hope you find this report helpful.

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. The same amendment was passed on its second reading in March 2020, and was placed before the voters in November 2020, where it was approved by the electorate. During a special session in November 2020, the Virginia legislature passed enabling legislation, which created the new bipartisan commission of legislators and citizens jointly placed in charge of the Commonwealth's redistricting process. Thus, the process in which you are engaged is guided by a combination of the Virginia Constitution, as amended in 2020, and the recently enacted enabling legislation, codified at Va. Code Ann. §§ 24.2-304.04 and 30-391, et seq.

Virginia has endured a decade of redistricting litigation, but it need not be this way. By putting redistricting power in the hands of a Commission, **you**, Virginia has the opportunity to remove self-dealing and partisanship from the process in 2021. This guide seeks to provide an overview of the history of gerrymandering in Virginia, the process and timeline the Commission is to follow to create its proposed maps, and the criteria the Commission is tasked with using.

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# Background: The Gerrymandering 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 historically placed line-drawing power with the General Assembly, legislators could 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

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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).

competition occurs in party primaries, leaving power in the hands of one party's base rather than all the voters.

## Racial Gerrymandering

In addition to rearranging boundaries for partisan gain, legislators have also drawn district lines to minimize the voting power of minority groups. Such racial gerrymandering was the subject of a recent major lawsuit in Virginia, the *Bethune-Hill* case. That case, concerning House of Delegates districts, found that Virginia legislators had violated the Equal Protection Clause of the U.S. Constitution by misapplying the Voting Rights Act. The map 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 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>

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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

These concepts allow line-drawers to pack minority voters of one party into majority-minority districts while claiming that they are complying with the 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

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(“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”).

<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.*

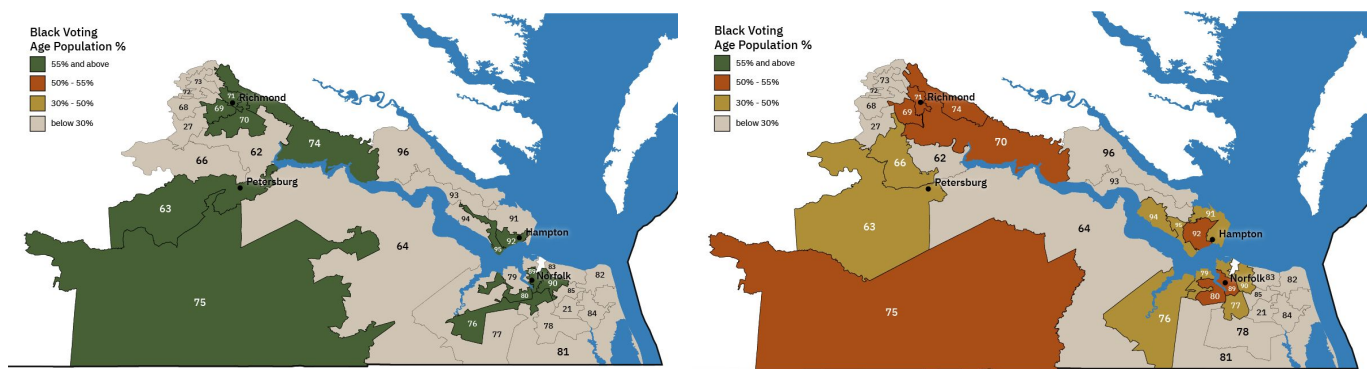
<sup>14</sup> *Id.*



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>

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.

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



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.**

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

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

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

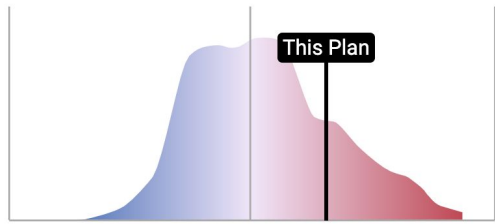
<sup>18</sup> Moomaw, *supra* note 11; Cannon & Williams, *supra* note 12, at 28-29.

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

<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.

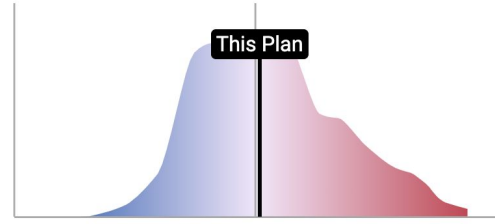
*Mean-Median Difference: 2011 General Assembly Map vs. Bethune-Hill Remedial Map*

Mean-Median Difference: 3.0%



+10% D      Balanced      +10% R  
The median Republican vote share is expected to be 3.0% ( $\pm 1.3\%$ ) higher than the mean Republican vote share. [Learn more >](#)

Mean-Median Difference: 0.1%



+10% D      Balanced      +10% R  
The median Republican vote share is expected to be 0.1% ( $\pm 1.0\%$ ) higher than the mean Republican vote share. [Learn more >](#)

*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.**

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<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).

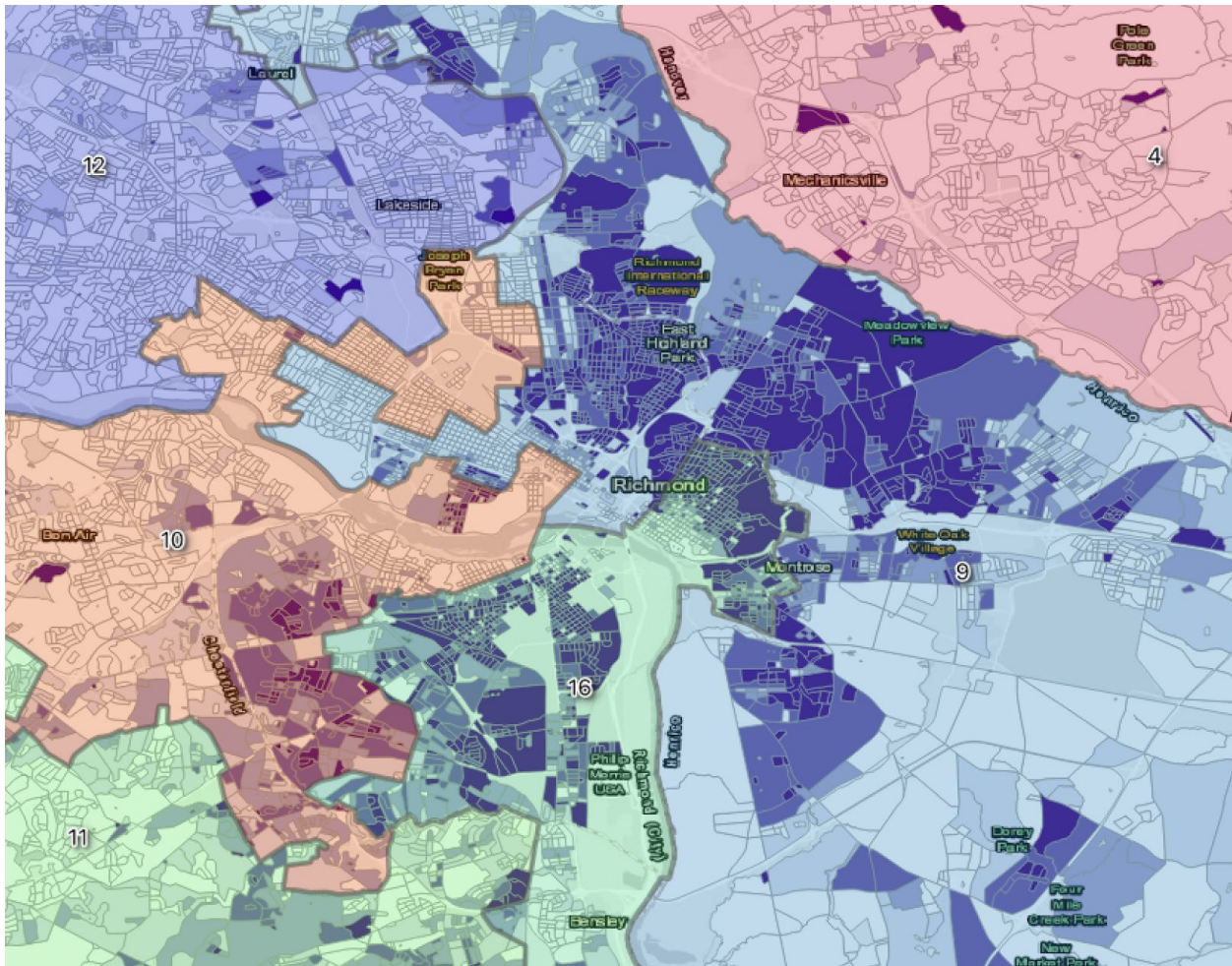
*Table of Significant Changes (±5%) Due to Bethune-Hill Redraw*

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 Map)	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.							

## Examples of Split Communities Around the Commonwealth

Although the Congressional and House of Delegates maps both redrew districts in between Richmond and Hampton Roads as unconstitutional racial gerrymanders, the state Senate map of this region contains examples of communities being split as well. For example, in the map of Richmond below, the 16th Senate District comes up from the south side of the city through the predominantly black neighborhood of Manchester and crosses the river to pick up Church Hill in Richmond’s East End. The 9th District, on the other hand, circles around the East End to pick up large parts of the Northside of the city. The 9th District also connects the Northside of Richmond to pick up the neighborhoods surrounding Byrd Park and Maymont.

## Richmond Senate Districts



The split communities found 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 Delegates 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.

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<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., available at <http://www.pwcecondev.org/demographics>.





fifteen uncontested races, but in 2019, there were only ten.<sup>26</sup> Typically, uncontested races are more common when districts perceived to be highly uncompetitive.<sup>27</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.

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 we've utilized, 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.

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<sup>26</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>27</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").

In 2019, six seats in the House of Delegates flipped from Republican to Democrat statewide.<sup>28</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.

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 Process of Redistricting Under the Amendment and Enabling Legislation

As stated above, the fall of 2020 brought a new redistricting process to Virginia, through the establishment of the Virginia Redistricting Commission, a 16-member commission composed of both citizens and legislators. In addition, the legislature passed enabling legislation during a special session, which has been codified at Va. Code Ann. §§ 24.2-304.04 and 30-391, et seq.

## 1. The Commission

The Amendment created 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 have been 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>29</sup>

### a. Getting Started

Though Commissioners should not be expected to become experts in all topics related to redistricting, they should be able to understand (a) the key steps to setting up a government agency, (b) how to make use of expert staff, (c) best practices for conducting public hearings, and (d) the legally required criteria for redistricting. Training should start soon after the appointment of Commissioners and will take at least five full days.

## PROVIDE A CRASH COURSE, REDISTRICTING COMMISSIONS 101

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<sup>28</sup> Virginia Public Access Project, *Election: House of Delegates* (2019), <https://www.vpap.org/electionresults/20191105/house/> (last updated Nov. 6, 2019 6:41 AM).

<sup>29</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/>.

Commissioners need sufficient background and understanding of redistricting issues in order to be effective. Topics that should be covered in the training are:

- Census information: Commissioners need to be familiar with the Census and the data it produces. This portion of the training should be led by an expert familiar with redistricting.
- Voting Rights Act (VRA) Compliance: All district maps must comply with the federal Voting Rights Act. An academic expert on the Voting Rights Act should conduct several days of training. The aim of the training should be that Commissioners understand key concepts and have sufficient knowledge to work with their Voting Rights Act counsel.
- Virginia criteria: Training should also include a deep dive into the redistricting criteria established in the Amendment and enabling legislation, and the trade-offs that come with each. Commissioners will benefit from focused training with a redistricting expert. Commissioners can try to draw districts to get a feeling for the challenges of meeting the criteria. The training should include ways to detect when the criteria are being gamed for partisan advantage.
- How to conduct hearings and public meetings: Commissioners should receive training on how to conduct and manage hearings and large public meetings. They may want to look to resources like Robert's Rules of Order for an organizing framework. Commissioners from other states are a valuable source of advice.
- Organizing logistics: Numerous decisions need to be made about where in the state meetings should be held, how the public will be notified, hearing locations and times, and what kind of security is needed. Commissioners should be aware of the logistical, financial, and personal demands on them resulting from these hearings.

#### **b. Chairperson**

The legislation created the position of Commission chairperson, to be filled by one of the eight commissioners, who will be chosen at a public meeting, presumably by a majority vote (although it is unclear from the language).<sup>30</sup> Once chosen, the citizen chairperson would “be responsible for coordinating the work of the Commission.”

#### **RECOMMENDATIONS:**

- The Commission should clearly designate the responsibilities and role of the chair (for example, lead the process to develop rules of procedure).
- Document publicly the process by which a chair will be elected, what his/her responsibilities shall be, and the vote count.
- Follow the California model of a rotating chair with set terms, which creates logistical challenges but builds trust and balance.

#### **RISKS:**

- There is a risk that Commissioners will not have had ample time to judge the quality or character of the first chair.

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<sup>30</sup> Va. Code Ann. § 30-392(E).



### **c. Process for Passage of the Maps**

The Commission's timeline for production of the maps begins with the receipt of Census data. After such receipt, the Commission has 45 days to submit state-level maps and 60 days to submit a Congressional map.<sup>31</sup> If the Commission misses either of these initial deadlines, it has 14 additional days to produce the plan.<sup>32</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.<sup>33</sup> Additionally, three of the Senator-commissioners must vote in favor of the proposed Senate map and three of the Delegate-commissioners for the proposed House of Delegates map.

After passing the Commission, the proposed maps then go to the full General Assembly with no chance for amendment. The maps do not go to the Governor for approval. If certain deadlines are not met by the Commission and General Assembly along the way, the Supreme Court of Virginia will be placed in charge of drawing the maps. For additional information regarding the criteria that must be used to draw the maps, see the Criteria section, below.

### **BUILDING TRUST AND COLLABORATION**

It is essential for Commissioners to establish a collegial environment. This will make the process run more smoothly and will decrease the chances of later conflict. It is highly recommended that the Commission and Commissioners commit to a set of processes to foster trust, openness, and bipartisanship. This is important for both effective deliberation and to reassure the public of the Commission's integrity and intent.

### **RECOMMENDATIONS:**

- When traveling to meetings, hearings, or other official Commission events, ensure that there is a balance from the three pools of Commissioners in each vehicle (for example Republican, Democratic, and unaffiliated).
- Organize informal and after-hour dinners and socializing events to enhance camaraderie and bonding. It is permissible for Commissioners to gather outside of their working time to bond socially. However Commissioners should reserve this time such that it is strictly social, and that it includes no discussion related to the work of the Commission.
- Hire a professional team-building consultant to provide at least half a day of training. Seek guidance on resolving conflict and establishing trust.
- When possible, ensure that all public documents are signed and endorsed by a balanced representation of Commissioners from each of the three pools.
- When conducting meetings, hearings, or other official events, seat Commissioners in mixed order according to the three pools of Commissioners.

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<sup>31</sup> Va. Code Ann. § 30-397(A)-(B).

<sup>32</sup> Id. at (C).

<sup>33</sup> Id. at (A).

## ENGAGING AND EDUCATING FELLOW CITIZENS

The Commission is tasked with informing the public about the redistricting process and the purpose and responsibilities of the Commission. Outreach makes sure that the process reflects publicly expressed priorities and builds the legitimacy of the Commission. The Commission must create a plan (to be executed by the public relations manager) on best practices for public and media engagement. This process should give access to communities across the state for public comment, access to hearings, and online maps and data.

### RECOMMENDATIONS:

- Organize a course taught by experts from Virginia public universities about the new redistricting process and the responsibilities and timelines for the Commission. Make this course available to the public.
- Conduct the public hearings at accessible venues (for example high schools, universities, public libraries, or town halls).
- Structure each hearing to include a component that informs about the process and responsibilities of the Commission.
- Incorporate an internship program to allow undergraduate and graduate students to support the work of the Commission.
- Publish a collection of resources for citizens to learn about redistricting.
- Provide tools for citizens to examine data and contribute maps of their own communities of interest. See the Resources section below for some possible tools.
- Conduct outreach to call attention to the Commission and its work.
- Issue guidelines for public comment in advance of hearings. This will make the experience more fruitful for both Commissioners and community members. The California Commission released comment guidelines which aided their process.
- When giving comment at a public hearing, citizens should always be asked to state their name, county of residence, and any group that they represent.
- Comments should be kept to a maximum two-minute time limit.
- Citizens should seek to create comments that are as concrete as possible. Indicating where lines should be, or what they consider the boundaries of their neighborhood, is significantly more useful than vague or general comments.
- Whenever possible, maps or drawings of maps should be submitted, particularly ones delineating communities of interest. Even a hand-drawn map is more useful to Commissioners than comments alone. Maps also save time.
- The Commission should set up locations where the public draw its own maps with the help of technical experts. Citizens should also be encouraged to draw maps using free software or by hand.
- Set rules for how the Commission will handle emails, social media input, and contributed testimony and maps. For example, Commissioners could set a standard that they do not directly respond to any message, and notify citizens that correspondence becomes part of the public record.

## RISKS:

- Public comment may be exploited by partisan or incumbent interests in the guise of a concerned citizen group. Commissioners should ask questions to determine if comments are disproportionately driven by one or a few interest groups.
- The Commission must be prepared to deal with a large volume of comments. For example, during the 2010 redistricting cycle, the California Commission received over 20,000 pieces of public comment.

## DRAWING MAPS

A key task for the Virginia Commission will be to agree on its process for researching, drafting, and finalizing maps. The following are some recommendations for the actual map-drawing process.

## RECOMMENDATIONS:

- Commissioners should practice drawing maps during training.
- Commissioners may want to draw draft maps on their own using free tools like Dave's Redistricting App or DistrictBuilder, which can analyze partisanship and other important measures. They can give a draft map to staff with instructions on how to move forward. Staff can then use more sophisticated tools like ESRI or Maptitude to finalize maps and meet population-equality and federal requirements.
- Map drawing should start with areas subject to Voting Rights Act requirements.
- Commissioners should establish transparent procedures for the iterative process of drafting and re-drafting maps.
- Communities of interest play a central role in drawing maps. Where possible, they should be established following the public comment period and before district-drawing begins. This discourages their use as after-the-fact rationalizations for line drawing decisions.
- Map drafts should be scored according to an agreed-upon list of statistical measures of partisanship.
- Commissioners should prioritize the measures and criteria for proposing and adopting each plan, including how to resolve instances when two or more criteria are in conflict.
- After initial drafts are created and refined by staff, additional choices and edits should be made in a public setting. No challenging or potentially controversial decisions should be made outside of the public eye.

## DATA VISUALIZATION AND GRAPHICS

The importance of maps and data visualization cannot be overemphasized in understanding the redistricting process. Both maps and numerical measures provide rapid ways for evaluating a plan. Good visualizations also allow Commissioners to see communities of interest and political boundaries and how they fit into the process. Much of how the public perceives a redistricting plan will be based on the map's appearance. Commissioners should consider the way that color choice and fonts present a map and instruct the consulting staff to try various options. Maps should let citizens locate their homes to understand which district they are in. Therefore the Commission should overlay major roads, counties, cities, other political subdivisions, or some combination onto the maps. Commissioners themselves should initially avoid focusing on how a district map looks superficially. This is especially the case in densely populated areas such as metropolitan Northern

Virginia and Richmond, where achieving partisan balance and accommodating communities of interest can lead to uneven district shapes.

## 2. The Supreme Court of Virginia

As stated above, should the Commission or the General Assembly fail to meet the deadlines enshrined in the statute, the Supreme Court of Virginia would then be tasked with drawing the district lines for the redistricting process. In general, 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>34</sup> The two times when it has found violations, the Court has required at-large elections until the General Assembly enacted valid maps rather than draw its own.<sup>35</sup> The Supreme Court of Virginia itself has never redrawn district lines.

The enabling legislation requires that the Court appoint two special masters to assist it with drawing any maps necessary.<sup>36</sup> These special masters must play by the same rules as the Commission, both those listed in the Amendment and those in related legislation. Additionally, the special masters must be selected from lists generated by the respective leaders of the General Assembly and Senate, one from each list, to ensure partisan balance in the advising of the Supreme Court.

Taken together, the Court's judicial restraint and its inexperience in drawing lines, along with the expertise provided by the special masters, all weigh heavily towards the Supreme Court of Virginia performing its fallback responsibility in a nonpartisan manner.

## 3. Transparency

On the transparency front, the Amendment makes the Commonwealth's redistricting process more visible and more open to public input. Under the Amendment, all of the Commission's hearings are open to the public.<sup>37</sup> It also requires that at least three public hearings be held around Virginia for the Commission to receive and consider public comment. 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."

The legislation also requires the creation of a publicly available website to disseminate information, accept public comment, and publish draft plans.<sup>38</sup> 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

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<sup>34</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. 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>35</sup> *Wilkins*, 139 S.E.2d at 856 (1965); see also *Brown*, 166 S.E. at 111.

<sup>36</sup> Va. Code Ann. § 30-399(F).

<sup>37</sup> Va. Code Ann. § 30-396(A).

<sup>38</sup> *Id.* at (D).

by the Commission.” This publicly released data includes “census data, precinct maps, election results, and shapefiles.”

Lastly, the Amendment requires that all meetings, records, and documents of the Commission are considered public information, including the records and documents of any outside individuals or groups who are performing Commission functions or advising it, and thus are subject to Virginia’s Freedom of Information Act.<sup>39</sup> Additionally, the Commissioners, staff, and any consultants are barred from external communication about redistricting or reapportionment “outside of a public meeting or hearing.”

#### RECOMMENDATIONS:

When working on a particular section of a map, Commissioners may want to instruct consultants and staff to utilize one or a few maps as an initial reference for the start of the public meeting. Additional adjustments should be made in a public setting. Consultants should sit with a screen in public view and follow the directions of Commissioners to move specific lines. Though this can be a time-intensive process, previous Commissions have found that it provides transparency and allows for the public to witness the complexities of drawing fair districts. When Commissioners struggle with a particularly challenging portion of the map, they can solicit public input—either through live comment or a chat thread. Transparency may reduce the threat of future legal challenges by making it harder to challenge the process.

The Commission should build a comprehensive web platform with a Virginia government URL that will serve as a repository for all relevant information produced by the Commission. The web platform must provide the same opportunity for input that citizens who attend the in-person hearings receive. Sections on this website should include, but are not limited to:

- Biographies of each Commissioner.
- Contact information with guidelines for submitting non-anonymous feedback, information, and comments.
- Meeting notes, agendas, and documentation of all correspondence and information subject to the Freedom of Information Act.
- An integrated platform where citizens can view official maps and search for their respective congressional and legislative districts.
- An integrated mapping platform where citizens can suggest communities of interest.
- Copies of codes of conduct, civility pledges, press releases, audio recordings, contracts, and consultancy information.
- Budget allocations and expenditures.
- Video and audio archives of meetings, public hearings, and other relevant recordings.

If members representing a particular political party—either a member of the public or Commissioners—propose conflicting plans, let other members of the public and Commission review the plans and submit public comment. Then, the Commission should allow the original group to respond to those comments. This process gives people a chance to weigh in on the process and express concerns about choices they feel unduly disadvantage their party. Responses to

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<sup>39</sup> Va. Code Ann. § 30-392(F).

comments leave room for judgment about which comments are justified and which may be a result of gamesmanship. Comments from major communities of interest should also be encouraged, for instance from community groups with contrasting views on how their geographic area should be divided.

Every public meeting and hearing should be transcribed, recorded, and on live streamed, if possible. The Commission could also set up a Twitter hashtag or another mechanism for the public to respond with feedback in real time. Having a full transcript of meetings has also helped in court challenges faced by other Commissions because it can provide solid evidence whether or not partisan factors influenced the process.

It is critical for the Commission to set up a system for managing and analyzing the volume of public comment. The Commission should record and tag all comments in a database. For example, comments could be tagged based on which criteria they address (for example partisan fairness, communities of interest), what region of the state they are addressing, and the group or citizen responsible for the comment.

The system should also have a way to show how many times a comment was submitted. For example, if the same form comment was submitted 20 times, the system should show the comment and indicate that it was submitted 20 times, rather than showing the comment 20 times. This will mitigate the sheer volume of comments (and especially form comments—identical comments submitted by multiple people) overshadowing individual comments. Overall, the system should allow Commissioners to search and view comments so that they can see the body of feedback for themselves. The database of comments should be available to the public, so that the public can also see what kinds of comments are being submitted and who they are coming from. This extra transparency will help ensure that the Commission adequately considers and judges the comments that it receives.

#### RISKS:

- Overreliance on a web platform to deal with transparency, accountability, and publicity concerns may unintentionally exclude input or concerns from citizens who do not have access to the internet or computers.
- Maintaining a web platform requires significant time and money

## Criteria for Consideration

Virginia's constitutional amendment and enabling legislation lays out redistricting criteria that the Commission must abide by when drawing its Congressional, state Senate, and state General Assembly maps. The following sections explain each criterion. We focus on tests for compliance, tradeoffs between criteria, and potential pitfalls.

## 1. Equal Population & the Voting Rights Act

### STATUTORY LANGUAGE:

1. *Districts shall be so constituted as to give, as nearly as is practicable, representation in proportion to the population of the district. A deviation of no more than five percent shall be permitted for state legislative districts.*

2. *Districts shall be drawn in accordance with the requirements of the Constitution of the United States, including the Equal Protection Clause of the Fourteenth Amendment, and the Constitution of Virginia; federal and state laws, including the federal Voting Rights Act of 1965, as amended; and relevant judicial decisions relating to racial and ethnic fairness.*

3. *No district shall be drawn that results in a denial or abridgement of the right of any citizen to vote on account of race or color or membership in a language minority group. No district shall be drawn that results in a denial or abridgement of the rights of any racial or language minority group to participate in the political process and to elect representatives of their choice. A violation of this subdivision is established if, on the basis of the totality of the circumstances, it is shown that districts were drawn in such a way that members of a racial or language minority group are dispersed into districts in which they constitute an ineffective minority of voters or are concentrated into districts where they constitute an excessive majority. The extent to which members of a racial or language minority group have been elected to office in the state or the political subdivision is one circumstance that may be considered. Nothing in this subdivision shall establish a right to have members of a racial or language minority group elected in numbers equal to their proportion in the population.*

4. *Districts shall be drawn to give racial and language minorities an equal opportunity to participate in the political process and shall not dilute or diminish their ability to elect candidates of choice either alone or in coalition with others.*

<sup>40</sup>

Next, the statute 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.”<sup>41</sup> 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 doing so, this language will allow a district plan to provide greater minority representation. However, it is also important to note that the legislation provides, “Nothing in this subdivision shall establish a right to have members of a racial or language minority group elected in numbers equal to their proportion in the population.”

### RECOMMENDATIONS:

- Hire expert counsel on voting rights and the use of race in redistricting. Legal counsel is crucial for compliance and reduction of legal risk.
- Receive onboarding training to build Commissioners’ confidence in asking counsel the right questions on Voting Rights Act compliance, the use of race in redistricting, and other legal issues.

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<sup>40</sup> Va. Code Ann. § 24.2-304.04(1)-(4).

<sup>41</sup> Va. Code Ann. § 24.2-304.04(3).

- Congressional districts are held to a tighter legal standard of population equality than legislative districts. Excessive emphasis on population equality for legislative districts may interfere with fair representation.
- Current interpretations of the Voting Rights Act Section 2 may require the creation of opportunity-to-elect districts. But despite common nomenclature, these do not necessarily need to be majority-minority.

#### BACKGROUND:

The most meaningful federal constraints on redistricting are equal population requirements and the Voting Rights Act. Federal voting rights compliance is fairly settled law. A good-faith effort to comply with Voting Rights Act requirements is likely to hold up against a legal challenge. The following subsection highlights questions that members of the Commission should ask counsel.<sup>42</sup>

#### TRADEOFFS:

In state legislative districts, excessive attention to equal population leaves less flexibility to satisfy other criteria. For example, it can become harder to preserve a community of interest if the Commission decides to maintain strict population equality. Allowing population to vary within the legal range provides flexibility to meet the other criteria.

Under current federal law, it is not always mandatory for opportunity-to-elect districts to have a majority of minority voters. This is why this report uses the term “Voting Rights Act Section 2 Districts.” Indeed, a map composed of majority-minority districts in Virginia was found to be a racial gerrymander because it packed black voters more than necessary to elect representatives.

Majority-minority districts, opportunity-to-elect districts, and Voting Rights Act Section 2 Districts all refer to the same goal: minorities ought to have the opportunity to elect a candidate of their choice. However, the term majority-minority district may leave the false impression that the Voting Rights Act always requires a district created under the Act to consist of at least 50 percent of voting age persons of the protected minority group. Majority-minority districts are not necessarily compliant with federal law.

The Commission can draw a congressional or state legislative district in compliance with Section 2 where the minority voting age population of the district falls below half of the population as long as enough non-minority voters are also likely to vote for a candidate who is the minority’s preferred choice. Consider, for example, a district composed of 40 percent minority voters who tend to support candidate A and 60 percent white voters who mostly—but not entirely—support candidate B. If enough white voters tend to vote for candidate A, then the minority group has the opportunity to elect its preferred candidate and the district may be an appropriate remedial district under Section 2 grounds.

However, even though the district is legal, the state may need to defend the plan in court. If someone can draw a district with more than half of the district’s population from the same minority

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<sup>42</sup> National Conference of State Legislatures. “2010 Redistricting Deviation Table.” National Conference of State Legislatures. Last modified July 6, 2018.  
<http://www.ncsl.org/research/redistricting/2010-ncsl-redistricting-deviation-table.aspx>



group in a place where a VRA Section 2 District does not exist, then he/ she can take the plan to court. The court could overturn the map on these grounds – or alternatively decide that no changes need to be made because the voters are not too racially polarized.

#### TESTS FOR COMPLIANCE:

##### **Population**

Congressional districts must be close to equal in population size.<sup>43</sup> A district’s population can only deviate by more than one person from the ideal population with good reason.

The federal requirements for state legislative districts are looser. The rule of thumb is that the population of the largest district is unlikely to be a problem if it is no more than 10 percent larger than the smallest district. The Commission may also choose a stricter standard, but this will constrain other objectives.

During the course of our interviews, one legal expert noted that the Census population count itself may have inaccuracies as great as 2 percent. It would not be logical to require population counts to adhere precisely to an inherently uncertain count. On these grounds alone, the Commission may justifiably go beyond a 2 percent population deviation standard for state legislative districts.

##### **How do Courts Evaluate a Voting Rights Act Section 2 Claim?**

Generally, one must go through two steps. In the first step, one must answer yes to the following questions—commonly called the Gingles criteria—to create an opportunity-to-elect district:

1. Are half of the potential voters in a concentrated area minorities?
2. Would they generally vote together?
3. Would the rest of the voters in the area generally choose different candidates?

The first question aims to understand if the minority population is big enough in a compact area to merit an intervention. For example, African-American voters in the Detroit area qualify when creating congressional districts.

The second and third questions aim to understand if voters are racially polarized. The extreme scenario would be that all white voters vote for one party and all minority voters vote for an opposing party. A less extreme example of racially polarized voting would be if 70 percent of white voters choose candidate A and 70 percent of minority voters choose candidate B. Experts use several statistical measures that capture the degree of racial polarization.

In the second step, a court asks if the minority voters are otherwise protected in the “totality of the circumstances.” If not, the opportunity-to-elect district is needed. As Congress passed the 1982 VRA Amendment, the Senate Committee on the Judiciary suggested the court consider the following circumstances to understand whether an opportunity-to-elect district is necessary. The courts use these so-called “Senate Factors”:

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<sup>43</sup> *Tennant v. Jefferson County*, 567 U.S. \_\_\_ (2012) (holding that minor deviations from exact population equality in a congressional districting plan are permissible to achieve a legitimate state objective, such as maintaining preexisting county boundaries).

- Has there been a history of voting-related discrimination?
- What is the extent of existing discriminatory voting practices?
- How racially polarized is the vote?
- Are minority groups excluded from how the party candidate gets chosen?
- How much does the minority group bear the effects of past discrimination for education, employment, and health which hinder their ability to participate in the political process?
- How many minority members have been elected in the past?
- How responsive are current elected officials to the specific needs of the minority group?

The three numbered questions above combined with the “Senate Factors” constitute the Gingles standard. Any voting rights analysis will ask the kind of questions shown above.

If a state plan discriminates against a minority group, it does not matter if the discrimination was intentional or not. In either case, what matters is if the plan has the effect of discrimination. This is easier to demonstrate to a court than proving discriminatory intent.

## 2. Communities of Interest

### STATUTORY LANGUAGE:

*5. Districts shall be drawn to preserve communities of interest. For purposes of this subdivision, a "community of interest" means a neighborhood or any geographically defined group of people living in an area who share similar social, cultural, and economic interests. A "community of interest" does not include a community based upon political affiliation or relationship with a political party, elected official, or candidate for office.<sup>44</sup>*

The legislation then provides protections for communities of interest (COIs).<sup>45</sup> It defines a COI as “a neighborhood or any geographically defined group of people living in an area who share similar social, cultural, and 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.

### RECOMMENDATIONS:

- Seek out and evaluate public input on communities of interest.
- Structure requests for public input to encourage standardized feedback, including maps.
- Provide software tools for the public to contribute maps showing communities of interest.

### BACKGROUND:

Communities of interest are a top criterion for drawing districts in Virginia. Defining them will require more investigative work by the Commission than any other criterion. Communities of interest generally refer to groups of residents with common legislative interests that may be, but are

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<sup>44</sup> Va. Code Ann. § 24.2-304.04(5).

<sup>45</sup> Id. at (5).

not necessarily, captured by geographic or administrative boundaries, such as counties or cities. Virginia has defined community of interest as “a neighborhood or any geographically defined group of people living in an area who share similar social, cultural, and economic interests.”

The Commission’s role in identifying communities of interest is subjective, but must also be based on reason and evidence. Through public hearings, citizens can provide testimony explaining where their communities are located and how their interests are relevant to legislative representation. In recognizing these communities, the Commission can give a voice to local groups who might otherwise have little power.<sup>46</sup>

#### TRADEOFFS:

Grouping residents with common interests into one district increases the incentive for an individual legislator to be more responsive to that community’s needs. However, this approach also creates more homogenous districts and concentrates a given group’s power into fewer overall districts. Concentration, or packing if done intentionally, can reduce the number of representatives that advocate on that community’s behalf, thus minimizing its influence in the legislature.

The Commission may need to strike a balance between providing representation for multiple communities of interest at once.

A district may take on an unusual shape in order to ensure representation of a community. One way of representing a community could require joining parts of multiple towns. Religious communities, ethnic and minority groups, transportation corridors, industrial areas, school boards, and economic development zones could all be considered communities of interest. Due to the high ranking of the communities of interest criterion, the Commission’s interpretation will be critical.

#### TESTS FOR COMPLIANCE:

The new Virginia law requires that the Commission draw districts that reflect Virginia’s diverse population and communities of interest by using input from communities themselves through public hearings and input submissions. As a result, this criterion is oriented toward process rather than outcome. Public records will reveal to what extent the Commission took communities of interest into account in creating its final maps.

#### RISKS:

##### **Ambiguity**

How the public sees a community of interest will likely vary. Input from the most vocal and organized residents may command the most attention. The Commission has the discretion and should seek to identify communities that are less vocal. The Commission can solicit multiple rounds of public input before and after drafting district maps to incorporate maximum feedback.

The Commission may have to incorporate potentially contradictory communities when drawing district lines. One possible solution to this problem is to honor one community of interest when drawing Senate lines, and another when drawing House lines.

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<sup>46</sup> Levitt, Justin. “All About Redistricting Guide”. <http://redistricting.lls.edu/mywork.php>.

The Commission should structure requests for public input to encourage standardized feedback and visualizations. The Commission should develop a standardized system to manage large volumes of input electronically. The Commission could describe the most useful kinds of input or structure its website to categorize input upon submission. The Commission could also consider a process by which the public presents or submits maps along with testimony.

Each Commissioner will have individual regional expertise and demographic knowledge. Such knowledge will help assess legitimate communities of interest.<sup>47</sup> Finally, Census information and Virginia state agency data can provide essential context.

The Commission should provide tools for citizens to draw and see their communities of interest. Access to redistricting software will allow citizens to draw their own communities of interest. The California Commission set up six access centers across the state where residents could sit down with technical experts to use redistricting software to create maps of their own communities of interest. In addition, some citizens drew maps by hand or used Google Maps. In all cases, defining the boundaries was an efficient way to provide input to the Commission.

### **Partisanship**

Because communities of interest rank high among the criteria, incumbents and political parties may attempt to manipulate public input to create advantageous districts. For a new commission traveling across the state for the first time, it may be difficult to distinguish genuine community concerns from political self-dealing.

Drawing on their diverse regional backgrounds and professional experiences, Commissioners can offer insight on the legitimacy of information presented by the public about their communities. The Commissioners can also probe the information presented in public hearings to understand both the content and the source of the testimony.

Key questions could include but are not limited to whether a given community of interest holds regular meetings, how long it existed, whether it receives external funding, and whether that funding may be from partisan sources. Open evaluation by other local groups may also expose partisan interests posing as community concerns. In this way, the Commission may choose to use local knowledge to flush out partisan interests.

## **3. Contiguity**

### **STATUTORY LANGUAGE:**

*6. Districts shall be composed of contiguous territory, with no district contiguous only by connections by water running downstream or upriver, and political boundaries may be considered.*<sup>48</sup>

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<sup>47</sup> Sonenshein, Raphael J. "When the People Draw the Lines: An Examination of the California Citizens Redistricting Commission." League of Women Voters. 2013.  
<https://cavotes.org/sites/default/files/jobs/RedistrictingCommission%20Report6122013.pdf>.

<sup>48</sup> Va. Code Ann. § 24.2-304(6).

The contiguity factor permits the Commission to consider political 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>49</sup> Essentially, these boundaries are roads, highways, waterways, or “any other natural or constructed or erected permanent physical feature” that appears on official maps.

#### RECOMMENDATIONS:

- Districts must be drawn such that all parts of a district are connected.

#### BACKGROUND

Contiguity is the most straightforward criterion in redistricting. Simply put, all parts of a district must be connected. Nearly every state requires state legislative districts to be contiguous. Contiguity is understood as a traditional redistricting principle by the U.S. Supreme Court, and this idea aligns with most people’s common sense notion of what a legislative district should look like.<sup>50</sup>

- **Minimum Contiguity:** Portions of a district should generally be connected by more than a single point. Two areas that touch only at a corner may not be considered contiguous.
- **Contiguity Over Water:** Usually, districts are considered contiguous over water as long as both sides of the district are connected by a bridge (or less commonly, a ferry route).<sup>51</sup>

#### TRADEOFFS

There may be times when it is acceptable to draw a district that is just barely contiguous in order to comply with other criteria. In 2001, Arizona’s Commission prioritized providing the people of the Navajo Nation and those of the Hopi reservation with two separate districts due to differences in political priorities. The Arizona portion of Navajo territory entirely surrounds Hopi territory, but the Commission connected the Hopi reservation to the 2nd Congressional District via a thin, contiguous stretch of land, only as wide as the Colorado River in some sections. This slender connector ensured that the 2nd District met the contiguity requirement.

#### TESTING FOR COMPLIANCE

Commissioners can visually inspect a map to verify that it complies with the contiguity criterion.

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<sup>49</sup> Va. Code Ann. § 24.2-305 (defining “clearly observable boundaries”).

<sup>50</sup> For example, in the majority decision for *Shaw v. Reno* (1993), Justice Sandra Day O’Connor highlighted the fact that “at one point,” North Carolina’s 12th Congressional District “remains contiguous only because it intersects at a single point with two other districts before crossing over them” as evidence that the district was “unusually shaped” and an “unconstitutional racial gerrymander.”

<sup>51</sup> Levitt, Justin. “A Citizen’s Guide to Redistricting.” Brennan Center for Justice. July 2008. <https://www.brennancenter.org/publication/citizens-guide-redistricting>.

## 4. Compactness

### STATUTORY LANGUAGE:

*7. Districts shall be composed of compact territory and shall be drawn employing one or more standard numerical measures of individual and average district compactness, both statewide and district by district.*<sup>52</sup>

### RECOMMENDATIONS:

- Compactness may have to be sacrificed to comply with other criteria, particularly in densely populated areas.
- Compactness can be measured quantitatively, but it is also important to consider how the public will view or perceive districts.
- If oddly shaped districts are unavoidable, be prepared to justify them in terms of other criteria.

### BACKGROUND:

One intuitive way to define compactness is in terms of geometric shape, where a square or a circle is considered most compact. Other measures of compactness also take into account where people live, thus defining a district's compactness in terms of how close its residents live to one another. Though there is no federal requirement for compactness and the number of definitions of compactness are legion, the U.S. Supreme Court has long considered compactness to be a traditional redistricting criterion. A majority of states require legislative districts to be reasonably compact.

### TRADEOFFS:

Compact shapes are not necessarily a sign of fairness. Districts drawn in the shape of a “creepy lizard”<sup>53</sup> or “Goofy kicking Donald Duck,”<sup>54</sup> attract ridicule, but visual shapes alone do not provide information about whether districts are drawn fairly. With current technology it is entirely possible to gerrymander a map while maintaining compact districts.<sup>55</sup>

Compactness is not a panacea. Even a pretty map can disenfranchise certain voters or benefit a political party, and some maps that look strange when viewed as wall art actually produce superior representation.

It may be necessary and even justifiable to sacrifice some degree of compactness to comply with higher-ranked criteria. Ensuring that districts reflect communities of interest and do not provide disproportionate advantages to any political party may mean that some districts are not as compact

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<sup>52</sup> Va. Code. Ann. § 24.2-304.04(7).

<sup>53</sup> Gray, Kathleen. “Redistricting Debate: Creepy Lizard or Compact Lines?” Detroit Free Press. April 2, 2017. <https://www.freep.com/story/news/politics/2017/04/02/redistricting-michigan-districts-census/99881080>

<sup>54</sup> Weiss, Brennan. “This Pennsylvania Congressional District Looks Like ‘Goofy kicking Donald Duck.’” Business Insider. January 27, 2018.

<https://www.businessinsider.com/pennsylvania-7th-district-goofy-kicking-donald-duck-shows-gerrymandering-2018-1>.

<sup>55</sup> In a concurring opinion to *Gill v. Whitford* (2018), Supreme Court Justice Elena Kagan remarked that modern software makes it possible to “capture every last bit of partisan advantage” in the redistricting process while still meeting traditional redistricting requirements.

as they otherwise could be. For example, Chicago, Illinois’s 4th Congressional District, sometimes termed the “earmuffs” district, looks quite strange at first glance. However, the district was drawn in this way to ensure that Latinos in Chicago had a political voice. The 4th District connects Humboldt Park, a neighborhood with many Puerto Rican voters, to Pilsen and Little Village, areas with large numbers of Mexican American voters, without cutting through the heart of an African American neighborhood.<sup>56</sup> By including them in a single district, voters were afforded the opportunity to elect a representative responsive to their needs.

If it is impossible to comply with the other criteria while drawing compact districts, less compact shapes can be justified. Still, it will serve the Commission well to make every effort to draw districts that pass the compactness compliance tests and, perhaps more importantly, look good to a reasonable person. Non-compact districts will be subject to a greater degree of scrutiny by citizens, politicians, and the courts. Aesthetically pleasing maps without strangely shaped districts are more likely to be supported by the general public and less likely to be challenged in the courts as contradictory to traditional redistricting principles.

#### TESTS FOR COMPLIANCE:

Though most states require the principle of compactness in redistricting, few formally define compactness. There are at least thirty different methods for testing the compactness of a district or redistricting plan. The most important test for compliance may be the visual ‘common sense’ test to see if a district is likely to create unnecessary controversy. Below are two popular tests for compactness.

#### **Reock Score**

Coming into broad use in the 1990s, the Reock (REE-ock) score compares the area of a district to the area of the smallest possible circle that can be drawn around it. This compares the district to a perfectly compact shape, a circle. Scores range from 0.00 to 1.00, with 1.00 being most compact.

#### **Polsby-Popper Score**

The Polsby-Popper Score measures the smoothness of the perimeter. It compares the area of a district to the area of a circle of equal perimeter. Districts with smooth borders and regular shapes score higher, and districts with squiggly borders will score lower. Scores range from 0.00 to 1.00, with 1.00 being the most compact.

#### RISKS:

To avoid potential controversy, if the Commission believes it is important to draw a district in an unusual shape to comply with other redistricting criteria, it should clearly articulate why such a shape is necessary.

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<sup>56</sup> Puente, Michael. “Illinois’ 4th Congressional District: Fight For the ‘Latino Earmuffs.’” WBEZ News. March 19, 2018.  
<https://www.wbez.org/shows/wbez-news/illinois-4th-congressional-district-fight-for-the-latino-earmuffs/da984dc6-9325-4e25-b506-33adc1045f37>.

## 5. Partisanship

### STATUTORY LANGUAGE:

8. *A map of districts shall not, when considered on a statewide basis, unduly favor or disfavor any political party.*<sup>57</sup>

### RECOMMENDATIONS:

- Create first-draft maps that give the two major parties similar opportunities to elect representatives, using historical voting data as needed.
- Adopt statistical measures that evaluate partisan fairness for statewide maps as a whole, not on a district-by-district basis.
- Avoid partisan packing of districts to the greatest extent practicable.

### BACKGROUND:

Additionally the Commission must consider while drawing district maps is avoiding favoring or disfavoring any political party, also referred to as partisan fairness. Thus, in addition to a stringent process for drawing lines, not only is the redistricting process now designed to remove partisan advantage from any one party, but also the outcome of the process—the district maps—cannot provide unequal benefit to either party.

As the Commissioners set to the task of drawing district maps, they should be aware of several interrelated ideas that affect partisan fairness. Two concepts, symmetry and responsiveness, have emerged as ways to identify undue partisan advantage.<sup>58</sup>

**Symmetry** is the extent to which voter success for both parties translates to the same electoral success. For example, in a state where Republicans won 53 percent of the statewide vote and 9 out of 13 congressional races, would the same outcome occur for Democrats if they won 53 percent of the statewide vote? If not, then this hypothetical map would be said to provide asymmetric opportunities to the two parties.

**Responsiveness** is defined as how much electoral outcomes change with shifting voter preferences. In a responsive map, if a party wins an increased share of votes statewide, its share of seats will also increase. However, if voters of that party have been concentrated in a few districts, as occurs in a partisan gerrymander, an increase or decrease in overall votes for that party would not alter the number of seats won.

This report will emphasize several statewide measures, appropriate to Virginia, which can be used to identify undue partisan advantage. Additional measures may be suggested to the Commission by technical staff.

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<sup>57</sup> Va. Code Ann. § 24.2-304.04(8).

<sup>58</sup> Campaign Legal Center. “Designing Independent Redistricting Commissions.” July 2018. [https://campaignlegal.org/sites/default/files/2018-07/Designing\\_IRC\\_Report2\\_FINAL\\_Print.pdf](https://campaignlegal.org/sites/default/files/2018-07/Designing_IRC_Report2_FINAL_Print.pdf).



### **Look at Maps as a Whole**

Partisan fairness must be determined by looking at maps as a whole. If one district is particularly favorable or competitive to either major party, this may have arisen incidentally from party-blind factors such as population patterns or the intent to honor a community of interest. An advantage to a whole political party can only be identified by examining the map in totality. Therefore, tests for partisan advantage almost always focus on statewide measures. Are one side's winning districts systematically packed to be enormously lopsided? Are the other side's wins closer but more numerous? These questions can be answered by well-established mathematical tests, some of which have been in use by the scientific community for over a hundred years. In a map without substantial partisan bias, the majority of a congressional delegation or legislative chamber will broadly reflect the statewide partisan vote. However, the seat share will generally not be exactly proportional to the vote share. The reason is that in a system with winner-take-all elections, even a moderate overall advantage will translate to many individual wins. For example, in a neutral plan, it would be historically reasonable for one party to win 60 percent of the statewide vote and 70 percent of the seats.

### **Examine Tradeoffs between Partisan Fairness and Superseding Criteria**

In the Commission's efforts to obey federal law and represent communities of interest, it may inadvertently introduce partisan bias. For example, a statewide pattern of partisan advantage may arise if some districts are drawn to be excessively majority-minority.<sup>59</sup> This arises because a majority-minority district with some white voters who vote with the minority is packed with voters of a single party. In several federal lawsuits, partisans have defended their packing of opposing voters into a few districts by saying they were attempting to comply with federal law. This defense has not prevented court-ordered redrawing of congressional and legislative maps. Commissioners must be wary of the potential to provide unintentional partisan advantage by creating excessively concentrated communities of interest.

Based on the natural sorting of voters, it is inevitable that some congressional and legislative districts will be safely Republican or Democratic.<sup>60</sup> The Commission should not amplify partisan asymmetry by creating even more uncompetitive districts for one side where unnecessary to satisfy other criteria.

### **TESTS FOR COMPLIANCE:**

Statistical measures can be used to measure partisan fairness after a map has been drawn. These tests focus on determining fairness at a statewide level. In a map without substantial partisan bias, both parties will have similar opportunities to win elections. Certain tests are well suited for Virginia, where statewide levels of partisan vote share have tended to be close to even- that is, roughly split evenly between Democrats and Republicans.

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<sup>59</sup> Lublin, David, *The Paradox of Representation: Racial Gerrymandering and Minority Interests In Congress*. Princeton, N.J.: Princeton University Press. 1997.

<sup>60</sup> Avoiding partisan packing while respecting communities of interest come into conflict because communities of interest often vote along the same lines and, in conjunction with majority-group voters within a district may lead to partisan packing of the district. After drawing individual districts that honor communities of interest, it is also necessary to avoid inadvertent creation of a statewide partisan advantage for one party.

In a map where elections have not yet been held, these measures can be estimated by using precinct-level results from past elections. These measures work particularly well for state legislative districts, which are so numerous that small happenstance differences will average out when the map is considered at a statewide level.

### **Lopsided Wins**<sup>61</sup>

In a closely-divided state, inequality of opportunity would be evident in the form of excessively large wins for one party, a sign that its voters have been packed into a few districts. This can be tested using the lopsided wins test. For example, if party A typically wins elections with an average of 71 percent of the vote, while party B wins with an average of 61 percent, then party A's wins are lopsided.<sup>62</sup>

### **Mean-Median Difference (Consistent Advantage)**<sup>63</sup>

In Virginia, a pattern of artificially engineered advantage would have the feature that the median district will have a substantially different vote from the statewide average (also known as mean) vote. Perhaps surprisingly, it is possible through partisan actions for more than three-fourths of the districts of a state to be above average for one party—an anomalously consistent advantage.<sup>64</sup> If a map treated the two major parties symmetrically, the difference between the mean and median would be close to zero percent.

### **Efficiency Gap**<sup>65</sup>

The efficiency gap is a measure of the net fraction of “wasted” votes that parties receive across districts in a given map, divided by the total votes. Political scientists have defined wasted votes as those cast in a losing election or those cast for winners in excess of the minimum 50 percent (plus one vote) required to win. For any given map of districts, both parties will receive wasted votes; the net difference is used to calculate the efficiency gap. In maps that are biased to favor one party, the more the victimized party's votes are wasted through both packing and cracking.

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<sup>61</sup> Wang, Samuel and Brian Remlinger. “An Antidote for Gobbledygook: Organizing the Judge's Partisan Gerrymandering Toolkit into a Two-Part Framework.” April 15, 2018. <https://prospect.org/article/slaying-partisan-gerrymander>.

<sup>62</sup> Wang, Samuel. “Three Tests for Practical Evaluation of Partisan Gerrymandering.” *Stanford Law Review*. 68, no. 6. 2016: 1263. If it appears that one party's wins are more lopsided than the other's, a well-established statistical test, “Student's t-test,” has been proposed to demonstrate in court that the difference is unlikely to have arisen by chance. However, the Commission does not have to simply avoid setting off this test; it can go further. To minimize partisanship, the Commission can work toward drawing a map that leads the two parties to achieve near-equal-sized wins when averaged across all districts. This allows some districts to be big wins and others to be smaller wins, while still maintaining overall equality of opportunity between the parties on a statewide level.

<sup>63</sup> Wang, Samuel and Brian Remlinger. “An Antidote for Gobbledygook: Organizing the Judge's Partisan Gerrymandering Toolkit into a Two-Part Framework.” April 15, 2018. <https://ssrn.com/abstract=3158123>.

<sup>64</sup> Emamdjomeh, Armand, Ann Gerhart, and Tim Meko. “Why North Carolina's House district lines have been upended – again.” *The Washington Post*. August 31, 2018. [https://www.washingtonpost.com/graphics/2018/politics/north-carolinaredistricting/?noredirect=on&utm\\_term=.3ae9c6a5a1f4](https://www.washingtonpost.com/graphics/2018/politics/north-carolinaredistricting/?noredirect=on&utm_term=.3ae9c6a5a1f4).

<sup>65</sup> Stephanopoulos, Nicholas, and Eric McGhee. “Partisan Gerrymandering and the Efficiency Gap.” *Public Law and Legal Theory Working Paper*. No. 493, 2014. <http://ssrn.com/abstract=2457468>.

Commissioners should make an effort to minimize the degree of lopsided wins, mean-median difference, and the efficiency gap while being consistent with other higher-ranked criteria.

## 6. Prison Gerrymandering

It is also worth noting that the new statutory language explicitly requires that “Persons incarcerated in a federal, state, or local correctional facility shall be counted in the locality of their address at the time of incarceration.”<sup>66</sup> In other words, it bars the use of prison gerrymandering.

# Resources Available

## 1. Representable

[Representable](#) is a free, open-source, nonpartisan platform for creating and aggregating maps for Communities of Interest (COI) — groups of individuals who share common social and economic interests, who are likely to have similar political concerns. Its goal is to work closely with organizations to gather community maps along with information about the shared interests of the community. This data can then be used by map drawers, journalists, analysts, and activists to create and evaluate proposed district maps. It is likely that the Commission will receive proposed Communities of Interest from members of the public for its consideration in redistricting.

## 2. Princeton Gerrymandering Project

The Princeton Gerrymandering Project does nonpartisan analysis to understand and eliminate partisan gerrymandering at a state-by-state level. Its interdisciplinary team aims to give activists and legislators the tools they need to detect offenses and craft bulletproof, bipartisan reform. In essence, PGP translates math into law, and law into math.

To harness the power of data, PGP has built [OpenPrecincts](#), which will be the nation’s most accurate and comprehensive database for redistricting. OpenPrecincts will be a collaborative open-source database housing election precinct geographies for all 50 states, the District of Columbia, and Puerto Rico. By providing data to free online redistricting programs, OpenPrecincts will empower citizens with the tools necessary to have a meaningful say in the 2021 redistricting process.

## 3. MGGG

The MGGG Redistricting Lab is a research group at Tisch College of Tufts University that grew out of an informal research collective called the Metric Geometry and Gerrymandering Group. Their goals are to pursue cutting-edge research in the basic science and practically relevant applications of geometry, topology, and computing to the redistricting problem; to build open-source tools and

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<sup>66</sup> Id. at (9).

resources that create public access and analytical power for better understanding districts and their consequences; to partner with civil rights organizations to reexamine and strengthen the quantitative toolkit for protecting voting rights; and to offer formal and informal expert consulting to stakeholders on all sides. MGGG has developed a free online tool, [Districtr](#), which enables individuals to create district plans and map Communities of Interest for use in redistricting.

## Conclusion

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, the Commission established by the Amendment and its enabling legislation is 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 and the enabling legislation would allow for a state-level racial challenge to the map instead of relying solely on the federal route.

More generally, the new Commission has an opportunity to 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>67</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>68</sup> The process created by the Amendment will bring all parties to the line-drawing table, and in doing so, the end product will be able to better represent all Virginians.<sup>69</sup>

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<sup>67</sup> Mathis et al., *supra* note 27, at 10.

<sup>68</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>69</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”).