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## SLAYING THE GERRYMANDER: HOW REFORM WILL HAPPEN IN THE COMMONWEALTH

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## ABSTRACT

*Gerrymandering is a political tool that snuck its way into Virginia politics long ago. It has become problematic over time, threatening true democracy in the Commonwealth. This article outlines what those problems are, how other states reacted to similar issues, and what Virginia politicians have done to respond to gerrymandering. It offers proposed solutions to the issues, and calls upon the Virginia General Assembly and elected governor to take action.*

## INTRODUCTION

The word “gerrymander” is a familiar one in the American lexicon, but its origins are known by very few. Its dictionary definition is “to divide [a territorial unit] into election districts to give one political party an electoral majority in a larger number of districts while concentrating the voting strength of the opposition into as few districts as possible.”<sup>1</sup> It is a portmanteau of the last name of the Ninth Governor of Massachusetts, Elbridge Gerry, and a salamander—a reference to the grotesque, salamander-esque districts Gerry approved of while Governor to give his Democratic-Republicans electoral dominance in the Bay State.

The practice of gerrymandering actually began a generation before Gerry’s fateful foray into rigging his state’s congressional and legislative districts. Its first known use was by the honorable Virginia gentleman Patrick Henry, who redrew a district in 1788—just after Virginia voted to ratify the U.S. Constitution—to force his political rival James Madison into a district with James Monroe.<sup>2</sup> While Henry’s trick was ultimately unsuccessful and Madison held onto his seat, it reaffirms the fact that, like most things American, the practice of gerrymandering is first and foremost Virginian.<sup>3</sup>

From the early republic to the present day, gerrymandering has played a continued role in political life. But its severity has increased in recent years,

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<sup>1</sup> *Gerrymander*, MERRIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/dictionary/gerrymander> (last visited Oct. 14, 2017).

<sup>2</sup> Robert Draper, *The League of Dangerous Mapmakers: Who’s Most to Blame for our Divisive Politics?*, THE ATLANTIC (Oct. 2012), <https://www.theatlantic.com/magazine/archive/2012/10/the-league-of/309084/>.

<sup>3</sup> *GerryRIGGED: Turning Democracy on its Head*, ONEVIRGINIA2021 (Feb. 16, 2017), <https://www.onevirginia2021.org/about/gerryrigged/>.

as the two main political parties have become more ideologically polarized.<sup>4</sup> This polarization has only been exacerbated by the rise in advanced mapping software which allows for gerrymandering to be done with a precision never before seen.<sup>5</sup> As the slippery slope of gerrymandered partisan extremism leads America downward into the abyss, only two entities can save us: (a) an engaged polity which makes supporting reform a prerequisite to securing reelection, and (b) the courts. OneVirginia2021 believes that while the courts can help to create legal standards which alleviate the worst excesses of partisanship, the legislature is—ultimately—the only way to permanently banish gerrymandering from our political culture.<sup>6</sup>

Part I of this article will discuss the recent history of gerrymandering in Virginia, with an eye to the shared culpability among the two major parties. It will then dive into the major legal challenges to the post-2010 census maps in Virginia and how they have already resulted in courts declaring the legislature's grotesque creations unconstitutional. It will then delve further into explaining the role of technology in gerrymandering and how the structure of Virginia's government makes reform more difficult than it is in many other states. Part II of this article will discuss OneVirginia2021's "three tiers" of reforms, with examples of states which have achieved them and leaders in the General Assembly who want to see them enacted here. It concludes with advice to the future governor of Virginia, who will be elected in November 2017 and take office in January 2018.

## I. HISTORY OF GERRYMANDERING & CURRENT ISSUES

### A. Recent History of Gerrymandering in Virginia

For most of the 20th Century, the rural-urban divide provided the main tension in Virginia's redistricting.<sup>7</sup> After passage of civil rights legislation 1960s<sup>8</sup> and the one person-one vote jurisprudence in the early 1980s,<sup>9</sup> Vir-

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<sup>4</sup> See, e.g., *Political Polarization in the American Public: How Increasing Ideological Uniformity and Partisan Antipathy Affects Politics, Compromise and Everyday Life*, PEW RESEARCH CENTER (Sept. 29, 2017), <http://www.people-press.org/2014/06/12/political-polarization-in-the-american-public/>.

<sup>5</sup> See DAVID DALEY, RATF\*\*KED: THE TRUE STORY BEHIND THE SECRET PLAN TO STEAL AMERICA'S DEMOCRACY 51–82 (Liveright Pub. 2016).

<sup>6</sup> See *GerryRIGGED: Turning Democracy on its Head*, *supra* note 3 (discussing the merits of the legislative and litigation strategies utilized by reformers to end gerrymandering in Virginia).

<sup>7</sup> Micah Altman & Michael P. McDonald, *A Half-Century of Virginia Redistricting Battles: Shifting from Rural Malapportionment to Voting Rights to Public Participation*, 47 U. RICH. L. REV. 771, 782–90 (2013).

<sup>8</sup> *Id.* at 779–82.

<sup>9</sup> *Id.* at 782–87.

ginia's multi-member districting system was struck down.<sup>10</sup> This forced a special election for the House of Delegates in 1982.<sup>11</sup> Less than a decade later, the 1991 redistricting was particularly vicious to Republicans. For example, in Virginia's seventh congressional district, George Allen was gerrymandered into a district with a popular colleague by some creative cartography within weeks of his special election to Congress.<sup>12</sup> On top of this, Governor Douglas Wilder repeatedly vetoed proposed General Assembly district maps and favored the creation of majority African-American districts.<sup>13</sup>

Redistricting in the 1990s produced the long-anticipated republican-controlled General Assembly. Prior to this, Democrats controlled the General Assembly uninterrupted until the late 1990s, while Republicans controlled the 2001 redistricting completely.<sup>14</sup> Republicans not only controlled the General Assembly, but also elected Governor Jim Gilmore who held (but did not use) the veto pen that might have been used by a Democratic governor.<sup>15</sup> In response to a loss of control, Democrats filed multiple lawsuits that ultimately amounted to nothing.<sup>16</sup> The 2001 redistricting further cemented the GOP control of the General Assembly.

In 2011, there was a promising potential for redistricting reform, because neither party had a monopoly on the redistricting process. It was a unique moment in Virginia's redistricting history, because it was the first time since 1900 that the General Assembly's partisan control was split during a redistricting year.<sup>17</sup> Democrats controlled the Senate and Republicans controlled the House of Delegates.<sup>18</sup> Urged by supporters of fair redistricting, Governor Bob McDonnell appointed the Independent Bipartisan Advisory Redistricting Commission (IBARC) through Executive Order No. 31.<sup>19</sup> IBARC held multiple public meetings that provided them with input on good government principles as applied to the unique challenges in Virgin-

<sup>10</sup> See generally *Cosner v. Dalton*, 552 F. Supp. 350 (E.D. Va. 1981) (holding that population deviations violated the Equal Protection Clause without justification).

<sup>11</sup> Altman & McDonald, *supra* note 7, at 786.

<sup>12</sup> EDWARD A. LYNCH, *STARTING OVER: A POLITICAL BIOGRAPHY OF GEORGE ALLEN* 66 (2010).

<sup>13</sup> John F. Harris, *Wilder Draws Praise in Redrawing Congressional Map*, WASH. POST (Dec. 3, 1991), [https://www.washingtonpost.com/archive/local/1991/12/03/wilder-draws-praise-in-redrawing-congressional-map/c7a28d4e-cc93-4e73-9fed-cdd57d4820fb/?utm\\_term=.6a47e9d797d5](https://www.washingtonpost.com/archive/local/1991/12/03/wilder-draws-praise-in-redrawing-congressional-map/c7a28d4e-cc93-4e73-9fed-cdd57d4820fb/?utm_term=.6a47e9d797d5).

<sup>14</sup> Altman & McDonald, *supra* note 7, at 790–91.

<sup>15</sup> *Id.* at 790.

<sup>16</sup> *Id.* at 790–91.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 795.

<sup>19</sup> Robert F. McDonnell, Gov. of Va., Exec. Order No. 31 (Jan. 10, 2011), <https://commonwealth.virginia.gov/media/2196/Gubernatorial-Documents.pdf>.

ia's redistricting.<sup>20</sup> As a result, IBARC produced a report with multiple recommendations for the General Assembly.<sup>21</sup>

Simultaneously, professors from Christopher Newport University and George Mason University teamed up to create a college student redistricting competition across the state.<sup>22</sup> This was "the first time in American history that such a competition was held while a state's redistricting process was underway, and the first to generate a legal plan."<sup>23</sup> The students were given the new census data and technology similar to that used by the redistricting professionals.<sup>24</sup> The student competition generated 16 teams and 55 different maps.<sup>25</sup> In their article "A Half-Century of Virginia Redistricting Battles: Shifting from Rural Malapportionment to Voting Rights to Public Participation," Altman and McDonald analyzed the various plans and found the student maps were superior to the partisan maps that were ultimately adopted on multiple good-governance criteria such as compactness.<sup>26</sup> However, the General Assembly's split chambers ignored both the IBARC recommendations and student maps, and drew a district map that eventually produced a 100 percent re-election rate for the entire incumbent class of General Assembly members in 2015.<sup>27</sup> It also triggered multiple lawsuits.<sup>28</sup>

The General Assembly did not redraw the congressional districts in 2011, however, preferring to redraw them during the 2012 session.<sup>29</sup> After the intervening General Assembly elections in November 2011, Republicans took control of the Virginia Senate and possessed a political monopoly to complete the decennial redistricting in 2012.<sup>30</sup> Democrats challenged

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<sup>20</sup> INDEP. BIPARTISAN ADVISORY COMM'N ON REDISTRICTING, COMMONWEALTH OF VA., THE PUBLIC INTEREST IN REDISTRICTING 10 (2011).

<sup>21</sup> *Id.* at 20.

<sup>22</sup> Altman & McDonald, *supra* note 7, at 792.

<sup>23</sup> *Id.* at 793.

<sup>24</sup> *Id.*

<sup>25</sup> See VIRGINIA REDISTRICTING COMPETITION,

<https://sites.google.com/a/varedistrictingcompetition.org/public/> (last visited Oct. 13, 2017).

<sup>26</sup> Altman & McDonald, *supra* note 7, at 793.

<sup>27</sup> Stephen J. Farnsworth, *The 2015 Election in Virginia: A Tribute to Gerrymandering*, WASH. POST (Nov. 5, 2015), [https://www.washingtonpost.com/news/the-fix/wp/2015/11/05/the-2015-election-in-virginia-a-tribute-to-gerrymandering/?utm\\_term=.127e690deca7](https://www.washingtonpost.com/news/the-fix/wp/2015/11/05/the-2015-election-in-virginia-a-tribute-to-gerrymandering/?utm_term=.127e690deca7).

<sup>28</sup> See Jenna Portnoy, *A Third Redistricting Lawsuit Targets Va. Elections Map*, WASH. POST (Sept. 14, 2015), [https://www.washingtonpost.com/local/virginia-politics/a-third-redistricting-lawsuit-targets-va-elections-map/2015/09/14/6eacaed0-5afb-11e5-9757-e49273f05f65\\_story.html?utm\\_term=.732f249207fb](https://www.washingtonpost.com/local/virginia-politics/a-third-redistricting-lawsuit-targets-va-elections-map/2015/09/14/6eacaed0-5afb-11e5-9757-e49273f05f65_story.html?utm_term=.732f249207fb)

<sup>29</sup> See, e.g., VA. CODE ANN. § 2.2-508 (2017).

<sup>30</sup> See Geoffrey Skelley, *Virginia's Redistricting History: What's Past is Prologue*, UNIV. OF VA. CTR. FOR POLITICS: SABATO'S CRYSTAL BALL (June 18, 2015), <http://www.centerforpolitics.org/crystalball/articles/virginias-redistricting-history-whats-past-is-prologue/>.

this maneuver, but the suit was dismissed by a circuit court in February 2012.<sup>31</sup>

## B. Post-2011 Legal Challenges to Gerrymanders

After Democrats gerrymandered the Senate, Republicans gerrymandered the House of Delegates, and both rejected independent map proposals, the only possible outlet for voters to vindicate their rights lay in the courts. These cases can be divided into three categories: (i) racial gerrymandering claims against the congressional map; (ii) racial gerrymandering claims against the House of Delegates map; and (iii) compactness claims against the Senate and House of Delegates maps.

### 1. Racial Gerrymandering of the Congressional Map

The major racial gerrymandering case against the Congressional map is *Personhuballah v. Alcorn*.<sup>32</sup> The plaintiffs, a group of residents in Virginia's third congressional district, filed suit alleging that their district was an unconstitutional racial gerrymander, because race had been the predominant factor in its creation.<sup>33</sup> Citing *Shelby County v. Holder*, their complaint argued that African-American populations in the surrounding districts were reduced, because the congressional map "packed" black voters into the third district.<sup>34</sup> Additionally, the complaint noted that the 56.3 percent black makeup of the third district was far more than necessary to satisfy Section 2 of the Voting Rights Act, which was the only significant provision remaining in the Voting Rights Act after the coverage formula of Section 5 was found to be unconstitutional.<sup>35</sup>

Just over a year after filing the complaint, a three-judge District Court panel found for the plaintiffs and struck down the third district boundary lines as an unconstitutional racial gerrymander, because it was not narrowly tailored to its compelling interest in gaining preclearance under the then-vaild Section 5 scheme.<sup>36</sup> The United States Supreme Court vacated the

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<sup>31</sup> Little v. Va. St. Bd. of Elections, No. CL11-5253, slip op. at 1, 13 (Va. Cir. Ct. Feb. 27, 2012).

<sup>32</sup> Personhuballah v. Alcorn, 155 F. Supp. 3d 552 (E.D. Va. 2016).

<sup>33</sup> *Id.* at 556.

<sup>34</sup> Complaint at 1–2, Page v. Va. St. Bd. of Elections, 2015 U.S. Dist. LEXIS 73514 (E.D. Va. 2015) (No. 3:13CV678) (citing *Shelby County v. Holder*, 133 S. Ct. 2612 (2013)) (holding the coverage formula provided in Section 4(b) of the Voting Rights Act as unconstitutional) [hereinafter *Page II*].

<sup>35</sup> *Id.* at 9; see also *Shelby County*, 133 S. Ct. 2612 (overturning the coverage formula found in Section 4(b) of the Voting Rights Act, which delineated the jurisdictions subject to preclearance under Section 5).

<sup>36</sup> Page v. Va. St. Bd. of Elections, 58 F. Supp. 3d 533, 541 (E.D. Va. 2014), *vacated sub nom.* Cantor v. Personhuballah, 135 S. Ct. 1699 (2015) [hereinafter *Page I*].

District Court panel's opinion in light of *Alabama Legislative Black Caucus v. Alabama* and remanded the case for reconsideration consistent with that opinion.<sup>37</sup> Following the remand, the same three-judge District Court panel again struck down the map as a racial gerrymander and determined that the plan was not narrowly tailored to the Commonwealth's compelling interest in complying with the Voting Rights Act.<sup>38</sup>

## 2. Racial Gerrymandering of the General Assembly Map

Currently, *Bethune-Hill v. Virginia Board of Elections* is a racial gerrymandering case against the House of Delegates map.<sup>39</sup> The plaintiffs are residents of majority-minority House of Delegates districts, which were subject to a 55 percent black racial threshold to avoid retrogression under Section 5 of the Voting Rights Act.<sup>40</sup> In a memorandum opinion, a three-judge District Court panel found that all but one of the challenged districts did not constitute a racial gerrymander.<sup>41</sup> They The court sided with the Commonwealth and dismissed plaintiffs' complaints.<sup>42</sup> Plaintiffs appealed to the United States Supreme Court, which vacated the panel's opinion on 11 of the 12 House of Delegates districts and remanded it for further consideration consistent with *Alabama Legislative Black Caucus*.<sup>43</sup> The case is currently before the District Court panel again.<sup>44</sup>

## 3. Compactness Challenge to the General Assembly Map

*Vesilind v. Virginia State Board of Elections* is the third case challenging the 2011 maps drawn by the General Assembly, and it involves a challenge under the delineated criteria for district drawing in the Virginia Constitution.<sup>45</sup> Article II, Section 6 of the Virginia Constitution contains the only mandatory criteria for redistricting at the state level: the districts must be

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<sup>37</sup> *Id.*

<sup>38</sup> *Page II*, 2015 U.S. Dist. LEXIS 73514, at \*18–19.

<sup>39</sup> *See Bethune-Hill v. Va. St. Bd. of Elections*, 137 S. Ct. 788 (2017).

<sup>40</sup> Complaint at 1–2, *Bethune-Hill*, 137 S. Ct. 788 (No. 3:14CV852).

<sup>41</sup> *See Bethune-Hill v. Va. St. Bd. of Elections*, 141 F. Supp. 3d 505 (E.D. Va. 2015).

<sup>42</sup> *Id.* at 571.

<sup>43</sup> *Bethune-Hill*, 137 S. Ct. at 802.

<sup>44</sup> Order Setting Hearing Date, *Bethune-Hill v. Va. St. Bd. of Elections*, No. 3:14CV852 (E.D. Va. Aug. 24, 2017). In addition to the remanding order from the case, the Supreme Court's opinion in *Cooper v. Harris* will further impact the analysis of the three-judge district court panel. An important footnote in *Harris* said that "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." *See Cooper v. Harris*, 137 S. Ct. 1455, 1473–74 (2017).

<sup>45</sup> *See Vesilind v. Va. St. Bd. of Elections*, No. CL15-3886 (Va. Cir. 2016).

contiguous, compact, and be as equal in population as is practicable.<sup>46</sup> The case was brought by plaintiffs residing in six House of Delegates districts and five Senate districts that the complaint argues were extremely non-compact.<sup>47</sup>

Plaintiffs used the "predominance test" theory to advance their argument.<sup>48</sup> The theory suggests two types criteria that can be used to structure redistricting: "mandatory" criteria and non-mandatory "discretionary" criteria. "Mandatory" criteria include requirements of the U.S. Constitution, federal statutory law, and the state constitution. This includes "one person, one vote" and prohibitions on racial gerrymandering handed down by the U.S. Supreme Court,<sup>49</sup> as well as Section 2 of the Voting Rights Act, which prohibits redistricting plans that dilute the votes of minority voters.<sup>50</sup> Additionally, the Virginia Constitution requires contiguity, compactness, and populations as equal across districts as practicable.<sup>51</sup> "Discretionary" criteria include protecting incumbents or gaining partisan advantage. Under this theory, discretionary criteria cannot be given more weight than mandatory criteria.<sup>52</sup> Thus, a proposed map would be compared district-by-district against a "max-compact" plan, which creates districts that are as compact as practicable while complying with federal criteria. The plaintiffs argued that if the compactness of the districts in the proposed maps are less than half of the level of compactness in the max-compact plan, then one would conclude that discretionary criteria predominated over compactness and the districts should be struck down as violations of the Virginia Constitution.<sup>53</sup>

After a three-day trial, Judge W. Reilly Marchant of the Richmond City Circuit Court issued an opinion largely siding with plaintiffs' assertions.<sup>54</sup> He even noted that plaintiffs' predominance theory of compactness "merit[s] serious consideration."<sup>55</sup> However, Judge Marchant ruled that the "fairly debatable" standard of review for redistricting plans passed by the General Assembly forced him to uphold the map.<sup>56</sup> Under the "fairly debatable"

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<sup>46</sup> VA. CONST. art. II, § 6. OneVirginia2021 supported the plaintiffs throughout this lawsuit and continues to do so while it is on appeal.

<sup>47</sup> Opinion & Order at 5–6, *Vesilind v. Va. St. Bd. of Elections*, No. CL15-3886 (Va. Cir. Mar. 31, 2017).

<sup>48</sup> *Id.* at 13–14.

<sup>49</sup> *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 558 (1963).

<sup>50</sup> 52 U.S.C. § 10,301; *see, e.g., Thornburg v. Gingles*, 478 U.S. 30 (1986) (describing the conditions under which Section 2 would require the creation of an additional majority-minority district).

<sup>51</sup> VA. CONST. art. II, § 6.

<sup>52</sup> *See* Opinion & Order, *supra* note 47, at 5.

<sup>53</sup> *Id.* at 5–6.

<sup>54</sup> *Id.* at 13–14.

<sup>55</sup> *Id.* at 14–15.

<sup>56</sup> *Id.* at 14.

standard of review, “if the evidence offered by both sides of the case would lead reasonable and objective persons to reach different conclusions, then the legislative determination is ‘fairly debatable’ and must be upheld.”<sup>57</sup> Judge Marchant concluded, thus, that under that lenient standard, the districts were constitutionally compact. The case is currently on appeal to the Virginia Supreme Court.<sup>58</sup>

### C. Why Gerrymandering Matters

Political and social scientists frequently note the increase in American political polarization since the 1990’s.<sup>59</sup> A 2014 Pew study found an increase in polarization and activism among those at either end of the political spectrum, a declining political center, and an increased apathy for politics.<sup>60</sup> In *The Partisan Divide: Congress in Crisis*, former Congressmen Tom Davis and Martin Frost, along with their co-author Richard Cohen, present the likely reasons behind these trends.<sup>61</sup> They group the systemic challenges to self-governance into four categories: residential sorting, intellectual sorting, money in politics, and gerrymandering.<sup>62</sup> Each presents problems for drawing voting districts.

Residential sorting happens when people who share common interests (often political and socio-economic) cluster together away from diversity.<sup>63</sup> In *The Big Sort*, Bill Bishop describes this phenomenon and the major implications it presents for our society and government.<sup>64</sup> Bishop paints a picture of a diverse society from a macro view, like cities, that clusters into like-minded group on a micro level, like boroughs or neighborhoods.<sup>65</sup> Notably, Americans have sorted themselves into gated communities or neighborhoods of people with similar educational backgrounds and earning po-

<sup>57</sup> Opinion & Order, *supra* note 47, at 14.

<sup>58</sup> Evanne Armour, *Group to File Appeal in Gerrymandering Lawsuit*, WAVY-TV (Apr. 25, 2017, 10:03 PM), <http://wavy.com/2017/04/25/group-to-file-appeal-in-gerrymandering-lawsuit/>.

<sup>59</sup> Matthew Gentzkow, Jesse M. Shapiro, & Matt Taddy, *Measuring Polarization in High-Dimensional Data: Method and Application to Congressional Speech* 3 (Nat’l Bureau of Econ. Res., Working Paper No. w22423) (May 2017), <https://web.stanford.edu/~gentzkow/research/politext.pdf>.

<sup>60</sup> *Political Polarization in the American Republic: How Increasing Ideological Uniformity and Partisan Antipathy Affect Politics, Compromise and Everyday Life*, PEW RESEARCH CENTER (June 12, 2014), <http://www.peoplepress.org/2014/06/12/political-polarization-in-the-american-public/>.

<sup>61</sup> TOM DAVIS, MARTIN FROST, & RICHARD COHEN, *THE PARTISAN DIVIDE: CONGRESS IN CRISIS* 2–3 (2013).

<sup>62</sup> *Id.* at xiv–xv.

<sup>63</sup> *Id.* at xv.

<sup>64</sup> BILL BISHOP, *THE BIG SORT: WHY THE CLUSTERING OF LIKE-MINDED AMERICA IS TEARING US APART* 5–6 (2008).

<sup>65</sup> *Id.* at 5.

tential.<sup>66</sup> Likewise, intellectual sorting occurs through media and social media bubbles. Facebook newsfeeds pre-populate with opinions and articles that we are inclined to “like” and, thereby, agree with and share.<sup>67</sup> Over the past decade, major media, like TV and print, changed leaving a distorted picture of our country with ample room for the emergence of “fake news.”<sup>68</sup> These two types of sorting drive polarization as our beliefs are continually reinforced by our contacts. When combined with our high penchant for moving and self-sorting, polarization becomes inevitable.<sup>69</sup>

In addition to sorting, there is also more money in American politics than ever before and its effects on elections are quantifiable.<sup>70</sup> Political action committees (PACs), super PACs, and outside spending have eclipsed the candidate committees which they indirectly support.<sup>71</sup> Davis and Frost detail the ways extreme amounts of money can be contributed to any race in the country or be use to target any audience.<sup>72</sup> Smart companies like Cambridge Analytica are driving this micro-targeting to self-sorting neighbors in their own media bubbles with almost limitless cash.<sup>73</sup> Yet the biggest prize in any election is control of the redistricting process. Any time and money “invested” targeting specific voters with specific messages from outside organizations can be recouped if the district is drawn to maximize the incumbent’s “return.” Politicians can even draw-out their political opponents and colleagues, and draw-in their supporters and donors using software designed to deliver victories for the map-makers.<sup>74</sup>

What makes gerrymandering unique among these several challenges to self-governance is that it is the only challenge without First Amendment protection. For example, campaign finance reform, like the McCain-Feingold Act, faced historic defeats in the U.S. Supreme Court, because the

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<sup>66</sup> *Id.* at 50–51.

<sup>67</sup> Mostafa M. El-Bermawy, *Your Filter Bubble is Destroying Democracy*, WIRED (Nov. 18, 2016, 5:45 AM), <https://www.wired.com/2016/11/filter-bubble-destroying-democracy/>.

<sup>68</sup> Jack Shafer & Tucker Doherty, *The Media Bubble Is Worse Than You Think*, POLITICO MAGAZINE (May/June 2017), <http://www.politico.com/magazine/story/2017/04/25/media-bubble-real-journalism-jobs-east-coast-215048>.

<sup>69</sup> Adam Chandler, *Why Do Americans Move So Much More Than Europeans?*, THE ATLANTIC (Oct. 21, 2016) <https://www.theatlantic.com/business/archive/2016/10/us-geographic-mobility/504968/>.

<sup>70</sup> Drew Desliver & Patrick Van Kessel, *As More Money Flows into Campaigns, Americans Worry About Its Influence*, PEW RESEARCH CENTER (Dec. 7, 2015), <http://www.pewresearch.org/fact-tank/2015/12/07/as-more-money-flows-into-campaigns-americans-worry-about-its-influence/>.

<sup>71</sup> *Id.*

<sup>72</sup> Tom Davis & Richard Cohen, *Moneyball*, in THE PARTISAN DIVIDE: CONGRESS IN CRISIS 74, 74–81 (2014).

<sup>73</sup> Alexander Nix, *How big data got the better of Donald Trump*, CAMPAIGN (Feb. 10, 2016), <http://www.campaignlive.co.uk/article/big-data-better-donald-trump/1383025>.

<sup>74</sup> *Id.*

Court determined that money is speech protected by the First Amendment.<sup>75</sup> Similarly, choosing where to live or what to "like" on Facebook is also protected by the First Amendment.<sup>76</sup> But legislators cannot defend their gerrymandering on the basis of the First or Fourteenth Amendment, which offers reformers an opportunity to change the system without fear that courts will gut those reforms in the name of the First Amendment.<sup>77</sup>

#### D. Evolving Technology & the "Perfection" of Gerrymandering

Early on, legislators poured over room-sized maps and used rudimentary calculators or solved equations by hand to draw district lines.<sup>78</sup> Even if legislators wanted to draw maps to their advantage, technological limits made precision in gerrymandering practically impossible.<sup>79</sup> This all changed with the technological and computer revolutions. The same pioneers that brought the world the iMac, Microsoft, and the Internet also brought redistricting software into being and provided wide-spread access to it online.<sup>80</sup> Some of this software ultimately became available online, as exemplified by The Redistricting Game.<sup>81</sup> One program came to dominate the redistricting world for its ability to target individual voters: Maptitude.<sup>82</sup>

Karl Rove pioneered the use of this technology for political gain.<sup>83</sup> Then, already involved in what would become the GOP's post-2010 redistricting strategy called REDMAP, Rove authored an article in the Wall Street Journal titled, "The GOP Targets State Legislatures," with the subheading, "He who controls redistricting can control congress."<sup>84</sup> By targeting the takeover of state legislatures in states that would gain or lose congressional seats (forcing them to make major revisions to their district maps), Republicans, Rove argued, would be in a position to lock in a majority in Congress and halt the agenda of President Obama.<sup>85</sup> While Republicans ultimately took control of Congress riding the Tea Party wave in 2010, the counter-wave in

<sup>75</sup> Jeremy P. Jacobs, *The Passion of McCain-Feingold*, CAMPAIGNS AND ELECTIONS (Apr. 25, 2010), <https://www.campaignsandelections.com/campaign-insider/the-passion-of-mccain-feingold>.

<sup>76</sup> *Bland v. Roberts*, 730 F.3d 368, 386 (4th Cir. 2013).

<sup>77</sup> *Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004).

<sup>78</sup> DALEY, *supra* note 5.

<sup>79</sup> *Id.*

<sup>80</sup> See THE REDISTRICTING GAME, <http://www.redistrictinggame.org/> (last visited Sept. 14, 2017).

<sup>81</sup> *Id.*

<sup>82</sup> See DALEY, *supra* note 5, at 51–82 (discussing how RedMap architects used Maptitude to gerrymander at a level not previously possible).

<sup>83</sup> *Id.* at xvii.

<sup>84</sup> See Karl Rove, *The GOP Targets State Legislatures: He who controls redistricting can control congress*, THE WALL ST. J. (Mar. 4, 2010, 5:01 AM), <https://www.wsj.com/articles/SB10001424052748703862704575099670689398044>.

<sup>85</sup> *Id.*

2012 saw Democrats retain control of the White House and increase their margins in the Senate.<sup>86</sup> However, Republicans held on to the House despite receiving over one-million fewer votes nationwide.<sup>87</sup> With these election results in the books and seven years of Republican control of the House of Representatives when they received fewer national vote totals than Democrats in both 2012 and 2016,<sup>88</sup> it begs the question: what about REDMAP made it so devastatingly effective? To be sure, Democrats had attempted their own gerrymandering following 2010, particularly in Illinois and Maryland, but as a whole their efforts were less effective.<sup>89</sup> Perhaps no better evidence of this exists than the Virginia Senate, which Democrats gerrymandered in 2011, only to promptly lose control of the chamber.<sup>90</sup>

What was REDMAP's secret? REDMAP utilized advanced computer software which could predict with striking accuracy the changes in demographics that would occur over time in certain states.<sup>91</sup> For example, a computer could take information on the average income of certain neighborhoods and developers' long-term plans for future regions (including the prices of homes and condominiums in those areas) to predict the demographic makeup of those areas six, eight, or even ten years in the future.<sup>92</sup> When that information was compared against advanced statistical analyses of how specific types of people were likely to vote, mapmakers could predict the partisan performance of individual blocks, neighborhoods, cities, and entire districts years into the future.<sup>93</sup> With all of this data, Maptitude could produce maps which would statistically be the most advanced partisan maps possible.<sup>94</sup>

When Democrats were burned by REDMAP in 2010, they made reversing the Republican Party's gerrymandering one of its top priorities in the upcoming years.<sup>95</sup> The key problem is that one party or the other fighting

<sup>86</sup> See David Daley, *The House the GOP Built: How Republicans Used Soft Money, Big Data, and High-Tech Mapping to Take Control of Congress and Increase Partisanship*, N.Y. MAG. (Apr. 24, 2016, 9:02 PM), <http://nymag.com/daily/intelligencer/2016/04/gops-house-seats-are-safe-heres-why.html> [hereinafter Daley, *The House the GOP Built*].

<sup>87</sup> See *id.*

<sup>88</sup> *Id.*

<sup>89</sup> DALEY, *supra* note 5, at 216.

<sup>90</sup> See Trip Gabriel, *Redistricting in Virginia Hurts Blacks, Democrats Say*, N.Y. TIMES (Jan. 23, 2013), <https://www.nytimes.com/2013/01/24/us/politics/virginia-senates-redistricting-is-protected.html>.

<sup>91</sup> See 'Gerrymandering on Steroids': *How Republicans Stacked the Nation's Statehouses*, NPR: HERE & NOW (July 19, 2016), <http://www.wbur.org/hereandnow/2016/07/19/gerrymandering-republicans-redmap>.

<sup>92</sup> See Daley, *The House the GOP Built*, *supra* note 85.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> See Edward-Isaac Dove, *Obama, Holder to Lead Post-Trump Redistricting Campaign*, POLITICO (Oct. 17, 2016, 5:06 AM), <http://www.politico.com/story/2016/10/obama-holder-redistricting->

for control of the redistricting process will never end gerrymandering, especially as Democrats have proven themselves completely willing to gerrymander when given the chance.<sup>96</sup> This means that if Republicans in blue states or Democrats in red states ever want to end gerrymandering once and for all, the key will be to shift control away from legislators and their conflicts of interest and to independent redistricting commissions.<sup>97</sup> Absolute power corrupts absolutely, and the only way, we argue, to slay the gerrymander is to eliminate the power of the gerrymanderers to draw district lines in the first place.

#### E. “Binding the Hands of Future Legislatures” and the Constitutional Problem

Late in the summer of 2015, many staffers and supporters of the OneVirginia2021 team were working on a criteria bill to present to the General Assembly. During the drafting process, a key procedural question often left unanswered but critically important emerged: can the General Assembly pass irreversible redistricting reform statutorily? The answer lies in a poorly defined concept that is generally understood as “binding the hands of future legislators.” The Virginia Constitution describes the authority of the General Assembly as extending to “all subjects of legislation not herein forbidden or restricted; and a specific grant of this authority in this Constitution upon a subject *shall not work a restriction of its authority upon the same or any other subject.*”<sup>98</sup> This means that the General Assembly possesses the power to pass laws regarding criteria to be considered during reapportionment. Additionally, “the General Assembly shall enact general laws. *Any general law shall be subject to amendment or repeal. . . .*”<sup>99</sup> Generally, this provision and the prior one dovetail with the presumption that the Virginia Constitution provides a broad grant of power to the Assembly, limited only by specifically enumerated prohibitions within the Constitution itself. That is, “The [Virginia] Constitution does not grant power to the General Assembly [. . .] it only restricts powers ‘otherwise practically unlimited.’”<sup>100</sup> Under this framework, the General Assembly’s power to pass laws regarding redistricting criteria (or any other matter) must be subject to the General

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gerrymandering-229868.

<sup>96</sup> See *Last Week Tonight with John Oliver: Gerrymandering* (O television broadcast Apr. 9, 2017).

<sup>97</sup> See Benjamin Williams, *Crafting Competitive Criteria: The Institution is Critical*, WM & MARY ELECTION L. SOC’Y (Oct. 5, 2016), <http://electls.blogs.wm.edu/2016/10/05/crafting-competitive-criteria-the-institution-is-critical/>.

<sup>98</sup> VA. CONST. art. IV, § 14 (emphasis added).

<sup>99</sup> *Id.* at § 15 (emphasis added).

<sup>100</sup> *FFW Enterprises v. Fairfax County*, 701 S.E.2d 795, 801 (Va. 2010) (quoting *Lewis Trucking Corp. v. Commonwealth*, 147 S.E.2d 747, 751 (Va. 1966)).

Assembly's equal power of repeal, as an irrevocable command would be a non-constitutional reduction in the General Assembly's plenary powers.<sup>101</sup>

The concept of "binding the hands of future legislatures" has been a part of Virginia law since Reconstruction. As early as 1872, the Virginia Supreme Court held that the legislature cannot be bound or controlled by an action of a previous legislature.<sup>102</sup> Virginia's Division of Legislative Services endorsed the concept in a brief it issued to legislators in 1996.<sup>103</sup> Composed by a senior attorney, the brief compared a Nebraska budget law to a Virginia budget law.<sup>104</sup> The brief noted that every Virginia budget contains a clause declaring that the budget supersedes all other statutory provisions with which it is in conflict, thus, preventing the "binding of hands" problem from ever occurring.<sup>105</sup>

## II. PROPOSED SOLUTIONS

### A. OneVirginia2021's "Three Tiers" of Reforms

Reformers at OneVirginia2021 adopted a three-tiered strategy that recognizes the often incremental approach legislation takes in Virginia. Based on meetings with supporting organizations and legislators, OneVirginia2021 adopted a "gold, silver, and bronze" plan approach to reform.<sup>106</sup> Collectively, these plans account for various degrees of skepticism inherent in reluctant legislators to give up their power to an independent commission. Bills falling in this tier structure have had senior Republican and Democratic sponsorship in the General Assembly.<sup>107</sup>

The "bronze plan" is a constitutional amendment, which adds a single line to Article II, Section 6 of the Virginia Constitution, prohibiting political gerrymandering by stating: "No electoral district shall be drawn for the pur-

<sup>101</sup> VA. CONST. art. IV, § 15.

<sup>102</sup> See *Antoni v. Wright*, 63 Va. (22 Gratt.) 833, 848 (1872) ("It is unquestionably true, that one legislature cannot, by an act of ordinary legislation, bind or control, in any manner, subsequent Legislatures. Such acts of legislation are, and of right should be, always subject to amendment or repeal.").

<sup>103</sup> JOAN E. PUTNEY, COMMONWEALTH OF VA. DIV. OF LEGISLATIVE SERVICES, BINDING THE HANDS OF FUTURE LEGISLATORS: THE NEBRASKA V. MOORE CASE 3 (1996), <http://dls.virginia.gov/pubs/briefs/BRIEF15.HTM>.

<sup>104</sup> *Id.* at 2–3.

<sup>105</sup> See *id.* at 3.

<sup>106</sup> See generally *Fair Criteria*, ONEVIRGINIA2021 (2016), <https://www.onevirginia2021.org/about/fair-criteria/> (describing bi-partisan support for redistricting legislation and the work of the coalition).

<sup>107</sup> See, e.g., S.J. Res. 290, 2017 Gen. Assemb., Reg. Sess. (Va. 2017); S.J. Res. 231, 2017 Gen. Assemb., Reg. Sess. (Va. 2017); S.B. 846, 2017 Gen. Assemb., Reg. Sess. (Va. 2017); H.R.J. Res. 763, 2017 Gen. Assemb., Reg. Sess. (Va. 2017); H.R.J. Res. 696, 2017 Gen. Assemb., Reg. Sess. (Va. 2017).

pose of favoring or disfavoring any political party, incumbent legislator, member of Congress, or other individual or entity.”<sup>108</sup> This would not completely eliminate the conflict of interest that arises from districts being drawn by those whose jobs directly depend on those districts. However, it does curb the worst excesses of gerrymandering by mandating that there be a compelling reason for drawing the lines other than for the benefit of a party or politician.<sup>109</sup> It also gives the courts a standard to use when evaluating the reasoning behind the maps. The “purpose” language is a slightly elevated standard that should also serve to minimize frivolous litigation. It is a higher standard than any other element of Article II, Section 6 of the Virginia Constitution.<sup>110</sup> While the act of drawing a line will always benefit some to the detriment of others, this minimalist approach would curb the more brazen partisanship and incumbency protection schemes so common in the General Assembly and as evinced by court cases this decade.<sup>111</sup>

The “silver plan” uses the same language as above but adds additional proscriptive, non-partisan criteria that must be followed when drawing district maps. These criteria include the existing requirements that districts be contiguous, compact, and of equal population, plus new ones such as honoring preexisting political subdivisions, keeping voting precincts from being split, and keeping communities of interest together.<sup>112</sup> Florida is the best example of a state that has enacted silver-plan-style reforms by using “identical territory” for keeping communities of interest together.<sup>113</sup> Although it does not include a commission, it is proscriptive enough to make blatant gerrymandering illegal and difficult to achieve.<sup>114</sup>

The “gold plan” combines the above non-partisan criteria, but also addresses the conflict of interest issue by creating an independent commission.<sup>115</sup> The proposed independent commission is comprised of seven members: four partisans and three non-partisans. Here, “independent” means that the members are not part of the General Assembly, but not necessarily politically independent. The four partisans would be appointed by

<sup>108</sup> S.J. Res. 290, 2017 Gen. Assemb., Reg. Sess. (Va. 2017).

<sup>109</sup> For recent literature on the idea of partisan intent and the invidiousness of drawing lines for such purposes, see Justin Levitt, *Intent is Enough: Invidious Partisanship in Redistricting*, 59 W&M L. Rev.

\_\_\_\_\_(forthcoming 2017) (currently available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3011062](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3011062)).

<sup>110</sup> VA. CONST. art. II, § 6.

<sup>111</sup> See, e.g., *Bethune-Hill*, No. 3:14CV852 ; *Vesilind*, No. CL15-3886.

<sup>112</sup> S.J. Res 290, 2017 Gen. Assemb., Reg. Sess. (Va. 2017) (proposed amendment to the Virginia Constitution that incorporates OneVirginia2021’s “Silver Plan”).

<sup>113</sup> FLA. CONST. art. III, § 16.

<sup>114</sup> S.J. Res. 290, 2017 Gen. Assemb., Reg. Sess. (Va. 2017).

<sup>115</sup> S.J. Res. 231, 2017 Gen. Assemb., Reg. Sess. (Va. 2017) (proposed resolution that encompassed the independent commission from OneVirginia2021’s “Gold Plan”).

the General Assembly, one each by the majority and minority party in both chambers. These members cannot be legislators, their spouses, or lobbyists.

The other three members of the commission would be bureaucrats who are accustomed to operating in their roles as non-partisan actors: the Inspector General, the Auditor of Public Accounts, and the Executive Director of the State Bar Association. They also derive their appointments from each of the three branches of government. The Inspector General is appointed by the Governor and confirmed by the General Assembly.<sup>116</sup> The Auditor of Public Accounts is entirely selected by the General Assembly.<sup>117</sup> The Director of the Bar is selected by the Virginia Bar Association itself and confirmed by the Supreme Court of Virginia.<sup>118</sup>

Many commissions fall short by requiring a simple majority of votes to pass a map, thus making one person a “swing” vote on the commission. This method vests a great deal of authority in one person. Thus, the proposed commission would require a supermajority of five votes, and the two “no” votes could not be the two Democratic appointees or the two Republican appointees. This allows each party enough votes to veto a map, but not enough to force a partisan map through.<sup>119</sup>

#### B. Reform Bills in the 2017 General Assembly

With these reform plans in mind, we can consider legislative approaches to reform that were introduced in the General Assembly this year. Some only included criteria,<sup>120</sup> others only included structure and procedure rules for commissions,<sup>121</sup> and one included everything and fits the approach of the gold plan.<sup>122</sup> Unfortunately, all of these bills have one thing in common: they failed to pass the General Assembly. While the Senate bills passed that chamber, all of the bills died in House committees in the early hours of the morning.<sup>123</sup> One of the reasons these bills all died was a lack of political trust between the parties. Until the parties are able to trust that the other is not attempting to undermine the other, a system based on trust, such as the system Iowa uses, seems out of reach in Virginia.

<sup>116</sup> VA. CODE ANN. § 2.2-308 (2011).

<sup>117</sup> *Id.* § 30-130 (2001).

<sup>118</sup> *Id.* § 54.1-3910 (2002); VA. SUP. CT. R. PT. 6, § 4 (2011).

<sup>119</sup> S.J. Res. 284, 2015 Gen. Assemb., Reg. Sess. (Va. 2015) (proposing to amend Section 6 of Article II of the Virginia Constitution).

<sup>120</sup> *See, e.g.*, S.B. 1410, 2017 Gen. Assemb., Reg. Sess. (Va. 2017).

<sup>121</sup> *See, e.g.*, S.B. 1133, 2017 Gen. Assemb., Reg. Sess. (Va. 2017).

<sup>122</sup> *See* S.J. Res. 231, 2017 Gen. Assemb., Reg. Sess. (Va. 2017).

<sup>123</sup> *Id.*

While many of the above bills would be preferable to Virginia's current redistricting system had they not died in committee, none of them came close to what some have called a model for redistricting reformers: the Iowa system.<sup>124</sup> Alone among the 50 states, Iowa delegates the primary duty of drawing district lines to its nonpartisan legislative services staff. In Iowa, the Department of Legislative Services (DLS) committee tasked with redistricting is forbidden from considering the addresses of incumbents, prior maps, or partisan political data.<sup>125</sup> The result is maps that can change radically from decade-to-decade. But in Iowa, trust in the system is so high that the legislature has never reverted to passing one of its own maps, even though they would be entirely within their rights to do so. Iowa's system only gives DLS three attempts to draw maps the legislature can approve; if they fail, the legislature will draw its own maps.<sup>126</sup> Additionally, this statutory system could be repealed by the Iowa Legislature at any time. In the General Assembly in 2017, Sen. Lynwood Lewis (D-Accomac) introduced a bill that would have brought Virginia one step closer to the Iowa plan by adding stringent criteria to the Virginia Constitution.<sup>127</sup>

Unfortunately, the Iowa system contains several problems which make its compatibility with Virginia improbable. First, it requires a political culture of relative comity and trust in nonpartisan institutions. Virginia's pull-no-punches politics may one day become the genteel culture some like to pretend it is and always has been, but at the present time it is hard to imagine the General Assembly coalescing around a statutory solution to redistricting that relies on political trust between the parties. Second, Iowa's system grants original jurisdiction to the state Supreme Court to resolve any redistricting problems.<sup>128</sup> Virginia's appointment and retention system creates a tug of authority over its Supreme Court justices, which would likely make them highly reluctant to strike down one thing legislators care about most: district lines.

Alternatively, in 2017, Delegate Marcia Price (D-Newport News) introduced House Joint Resolution No. 696, called "Proposing an amendment to Section 6 of Article II of the Constitution of Virginia, relating to apportionment; certain prohibitions; scope of legislative privilege."<sup>129</sup> This plan is

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<sup>124</sup> See DALEY, *supra* note 5.

<sup>125</sup> Tracy Jan, *Iowa Keeping Partisanship Off the Map*, BOSTON GLOBE, (DEC. 8, 2013), <https://www.bostonglobe.com/news/politics/2013/12/08/iowa-redistricting-takes-partisanship-out-mapmaking/efehCnJvNtLMIAFSQ8gp7I/story.html>.

<sup>126</sup> *Public Policy in Iowa*, BALLOTPEdia, [https://ballotpedia.org/Redistricting\\_in\\_Iowa#cite\\_note-iowaloyola-33](https://ballotpedia.org/Redistricting_in_Iowa#cite_note-iowaloyola-33) (last visited Oct. 12, 2017).

<sup>127</sup> See S.J. Res. 280, 2017 Gen. Assemb., Reg. Sess. (Va. 2017).

<sup>128</sup> IOWA CONST. art. III, § 36.

<sup>129</sup> H.R.J. Res. 696, 2017 Gen. Assemb., Reg. Sess. (Va. 2017).

most similar to the “silver” Florida-style plan discussed above. The resolution would have amended Article II of the Virginia Constitution by adding three new subsections. The first of these would prohibit the drawing of districts for the purpose of favoring or disfavoring any political party, incumbent legislator or member of Congress, or potential candidate.<sup>130</sup> This language closely mirrors the language of Florida’s “Fair Districts” Amendment.<sup>131</sup>

Florida’s example reminds us that even when constitutional criteria exist, leaving redistricting in the hands of redistricting stakeholders (legislators) means an inherent conflict of interest is always possible. Thus, the other two additions contain language that go beyond Florida’s scope: protections for minorities and reductions in the scope of legislative privilege.<sup>132</sup> First, Delegate Price’s proposed section 6(c) would incorporate Section 2 of the Voting Rights Act into the Virginia Constitution by prohibiting the drawing of districts to deny the ability of any racial or language minority to participate in the political process and elect a preferred candidate of choice.<sup>133</sup> Next, her proposed section 6(d) would except communications or documents made in the process of redistricting from the otherwise broad-reaching executive privilege.<sup>134</sup>

Delegate Price’s bill provides a section on executive privilege due to a suit filed by OneVirginia2021, on behalf of plaintiffs, against the 2011 General Assembly maps.<sup>135</sup> During the discovery process, several legislators, their staffers, and the Department of Legislative Services, all of whom had been involved in the 2011 redistricting process, refused to produce documentation and recordings of communications related to that redistricting, citing the Virginia Constitution’s protection of legislative privilege.<sup>136</sup> Circuit Court Judge W. Reilly Marchant held that the privilege did not extend to DLS and was not all-encompassing for other parties, and subsequently, ordered the production of the requested documents.<sup>137</sup> The Virginia Senators and DLS then asked to be held in contempt of court to enable them to perform an interlocutory appeal directly to the Supreme Court of Virginia.

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<sup>130</sup> *Id.*

<sup>131</sup> FLA. CONST. art. III, §§ 20–21 (codifying Amendments 5 and 6 to Florida’s Constitution).

<sup>132</sup> H.R.J. Res. 696, 2017 Gen. Assemb., Reg. Sess. (Va. 2017).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> H.R.J. Res. 696, 2017 Gen. Assemb., Reg. Sess. (Va. 2017) (relying on the holding in *Vesilind v. Va. St. Bd. of Elections*, 91 Va. Cir. 490 (2016)).

<sup>136</sup> See *Edwards v. Vesilind*, 292 Va. 510, 517–18 (2016).

<sup>137</sup> *Id.* at 515.

The Supreme Court of Virginia vacated in part Judge Marchant's ruling, holding that the legislative privilege was extraordinarily broad and applied to legislators' discussions both on the floor and "communications integral to the sphere of legitimate legislative activity, whether in an official legislative proceeding or not."<sup>138</sup> The Court then proceeded to analyze the requested communications to determine whether they were within the "sphere of legitimate legislative activity."<sup>139</sup> It held that the communications from the legislators themselves were protected by the immunity, and that communications by others *sometimes* were covered because there is no categorical bar on the privilege covering the communications of legislators with third parties.<sup>140</sup> The ruling extends from the same structural makeup that creates the "binding the hands of future legislatures" problem. Because Virginia's General Assembly is all-powerful, the only way to limit its powers and privileges is to amend the state constitution, which grants it plenary powers. Delegate Price's bill would have added these limitations while removing the veil that shields legislators from the consequences of their malicious intent.

In addition to the bills already discussed, there were three additional bills introduced in the General Assembly that were worth noting. The first of these was Senator Louise Lucas's (D-Portsmouth) Interim Commission bill, S.B. 846.<sup>141</sup> It would statutorily create an interim redistricting commission and establish criteria for remedial redistricting plans, but would leave the legislative redistricting process untouched.<sup>142</sup> However, if any part of a legislatively enacted redistricting plan were to be struck down by a court as unconstitutional, the drawing of remedial maps would fall to the interim commission.<sup>143</sup> It would be made up of the appointees of the leadership of each party in each chamber of the General Assembly, as well as the Auditor of Public Accounts, the State Inspector General, and the Executive Director of the Virginia State Bar.<sup>144</sup> The decisions of the commission would require five votes, and their plans would be submitted to the legislature for approval.<sup>145</sup> Critically, the bill establishes criteria which would have to be followed by the interim commission, including a prohibition on drawing districts with the intent of favoring any political party, challenger, or

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<sup>138</sup> *Id.* at 528.

<sup>139</sup> *Id.* at 527–35.

<sup>140</sup> *Id.* at 534–35.

<sup>141</sup> S.B. 846, 2017 Gen. Assemb., Reg. Sess. (Va. 2017).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

incumbent.<sup>146</sup> It would also prohibit the use of political data in the crafting of the district lines, except where necessary to comply with the Voting Rights Act and the Equal Protection Clause of the Fourteenth Amendment.<sup>147</sup>

Another bill worth noting is Senator George Barker's (D-Fairfax) bill, S.J. 260, which would have amended the Virginia Constitution to establish an independent redistricting commission.<sup>148</sup> It would require districts to be drawn in a way that encourages competitiveness and conforms to the relative partisan performance of past elections in the Commonwealth.<sup>149</sup> Its membership would be two members each appointed by the leaders of both political parties in each chamber of the General Assembly, creating an even-numbered commission.<sup>150</sup> Any map ultimately produced by the commission would require a three-fourths majority vote, and the two plans with the most votes in favor would be submitted to the Supreme Court of Virginia, which would certify to the Secretary of the Commonwealth one of the two plans.<sup>151</sup> Because the bill lacked any criteria by which districts must be drawn (except for competitiveness), OneVirginia2021 declined to endorse it in the 2017 session.

Finally, Delegate Ken Plum's (D-Reston) bill, H.J. 628, would have created a redistricting commission.<sup>152</sup> This is the same bill that was introduced originally in 1982, and would establish membership in the same way as Senator Barker's bill.<sup>153</sup> However, the key difference between Barker's bill and Plum's is that Plum's would add six additional members: four for the party who won the governorship in the last election and two for the party who came in second in the most recent gubernatorial election.<sup>154</sup> This would create a partisan commission with an imbalance (8-6) in favor of the party holding the Governor's Mansion. These fourteen members would then select an independent person to serve as the fifteenth member and chair of the commission, who could break theoretical 7-7 ties.<sup>155</sup> The bill is heavy on procedure and transparency rules, but does not include any criteria which the commission must follow in creating new maps.

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<sup>146</sup> S.B. 846, 2017 Gen. Assemb., Reg. Sess. (Va. 2017).

<sup>147</sup> *Id.*

<sup>148</sup> S.J. Res. 260, 2017 Gen. Assemb., Reg. Sess. (Va. 2017).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> H.J. Res. 628, 2017 Gen. Assemb., Reg. Sess. (Va. 2017).

<sup>153</sup> Compare H.J. Res. 628, 2017 Gen. Assemb., Reg. Sess. (Va. 2017), with S.J. Res. 260, 2017 Gen. Assemb., Reg. Sess. (Va. 2017).

<sup>154</sup> H.J. Res. 628, 2017 Gen. Assemb., Reg. Sess. (Va. 2017).

<sup>155</sup> *Id.*

### C. Advice to the Next Governor of Virginia

As of this writing, Virginia has three main choices for its next governor: Republican Ed Gillespie, Democrat Ralph Northam, and Libertarian Cliff Hyra. Given the status of the *Bethune-Hill* re-hearing and potential ruling by the end of 2017, Virginia may be under court order to redraw the eleven majority-minority districts at issue in the case.<sup>156</sup> This would be the first major issue before the 73rd Governor of Virginia. Then, in 2021, the last year of their term, the Governor will oversee the decennial redistricting.

Based on the history and issues presented by gerrymandering, and the solutions proposed by OneVirginia2021 or suggested in General Assembly bills, the next Governor should consider several key trends happening around the country when deciding how to proceed with redistricting in Virginia. The first trend is the rolling back of majority-minority districts into minority-opportunity districts under *Cooper v. Harris*.<sup>157</sup> The other trend is state legislatures voluntarily giving up or minimizing their influence in the redistricting process. While the first recent wave of redistricting reform came in citizen initiatives throughout mostly western states, the second wave of reform has come through eastern state legislatures in the past five years. For example, New York Governor Andrew Cuomo changed the Empire State's process in 2012 for the upcoming 2020 redistricting cycle.<sup>158</sup> Ohio Governor John Kasich shepherded through legislation in their state house that enabled Ohio voters to overwhelmingly approve a referendum for redistricting reform in November 2015.<sup>159</sup> Further west, Nebraska's unicameral legislature passed redistricting reform 29-15, but Governor Pete Ricketts vetoed the plan several days later.<sup>160</sup>

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<sup>156</sup> Graham Moomaw, *U.S. Supreme Court orders reexamination of Virginia General Assembly racial gerrymandering case*, RICHMOND TIMES DISPATCH (Mar. 1, 2017), [http://www.richmond.com/news/virginia/u-s-supreme-court-orders-reexamination-of-virginia-general-assembly/article\\_1e33e1b7-6b65-5f35-a7ce-0fde991a5daf.html](http://www.richmond.com/news/virginia/u-s-supreme-court-orders-reexamination-of-virginia-general-assembly/article_1e33e1b7-6b65-5f35-a7ce-0fde991a5daf.html).

<sup>157</sup> See *Cooper*, 137 S. Ct. 1455.

<sup>158</sup> *Governor Cuomo Announces Passage of Constitutional Amendment and Legal Statute That Permanently Reforms Redistricting Process*, N.Y. ST. (Mar. 15, 2012), <https://www.governor.ny.gov/news/governor-cuomo-announces-passage-constitutional-amendment-and-legal-statute-permanently-reforms>.

<sup>159</sup> Jim Siegel, *Voters Approve Issue to Reform Ohio's Redistricting Process*, COLUMBUS DISPATCH (Nov. 3 2015, 12:01 AM), <http://www.dispatch.com/article/20151103/NEWS/311039760> (last updated Nov. 4, 2015, 3:00 PM).

<sup>160</sup> Don Walton, *Legislature approves redistricting reform plan*, LINCOLN JOURNAL STAR (Apr. 13, 2016), [http://journalstar.com/legislature/legislature-approves-redistricting-reform-plan/article\\_efbc66c8-44cf-562e-ad69-0b4a25d084e4.html](http://journalstar.com/legislature/legislature-approves-redistricting-reform-plan/article_efbc66c8-44cf-562e-ad69-0b4a25d084e4.html); Don Walton, *Ricketts Vetoes Redistricting Reform*, LINCOLN JOURNAL STAR (Apr. 18, 2016), [http://journalstar.com/legislature/ricketts-vetoes-redistricting-reform/article\\_2feb534e-0c03-59a8-8e40-2ba4cbe1604b.html](http://journalstar.com/legislature/ricketts-vetoes-redistricting-reform/article_2feb534e-0c03-59a8-8e40-2ba4cbe1604b.html).

Alternatively, if the court in *Bethune-Hill* orders a redraw of eleven packed majority-minority House of Delegates districts, it remains likely that court will grant the legislature some window of time to remedy the violation itself. However, replacing a racial gerrymander with any other type of gerrymander goes against the desires of the people of Virginia. Reformers like OneVirginia2021 see this as an opportunity for a test run of a commission. This test-commission would not be mandatory, because a constitutional amendment is impossible in this time, but it could become de facto mandatory if the Governor pledges to veto any map the General Assembly sends his way that did not come from the commission. While the test-commission would be merely advisory, this test run would lend significant credibility to such a process. The other component of the commission's credibility would come from the fair, non-partisan group of people serving on it. The McDonnell commission from 2011 can serve as a good template.<sup>161</sup>

There are three potential options in this veto scenario. One possibility is that the General Assembly overrides the Governor's veto with a two-thirds majority in each chamber and passes a gerrymandered map. This scenario seems unlikely given the strong support for redistricting reform in the Senate of Virginia and the partisan parity in that body. Equally unlikely, given the House of Delegates' leadership's current opposition to reform, is their adoption of a map from the advisory commission. The most likely scenario if the Governor vetoed the legislature's gerrymandered remedy is that the time would run out on the court's window for a legislative remedy. This is what happened in 2015 in *Personhuballah*, when the court gave Virginia until September 1st to remedy the racially gerrymandered third congressional district.<sup>162</sup> When the legislature and Governor were unable to agree on a map, the time expired and the court reclaimed the right to remedy the violation.<sup>163</sup>

This is when the power of the advisory commission - or any quality maps from transparent and reliable sources - comes into play. The court, and any special master appointed by the court to draw the lines, will have those maps before them as potential remedies. The strength of their maps, transparency, and the integrity of the process could serve as persuasive exhibit in the remedy phase of any trial.

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<sup>161</sup> McDonnell, *supra* note 19.

<sup>162</sup> Simone Pathé, *Uncertainty Reigns as Court Takes Over Virginia Redistricting*, ROLL CALL (Aug. 18, 2015, 3:17 PM), <http://www.rollcall.com/news/home/uncertainty-reigns-court-takes-virginia-redistricting>.

<sup>163</sup> *Id.*

This same logic of the advisory commission supported by a veto is the best chance to stop gerrymandering in 2021 in Virginia, short of a constitutional amendment. The current decade has seen a major uptick in redistricting litigation.<sup>164</sup> With the arms race between the parties over redistricting currently ongoing, the next cycle promises a continuation of this litigation. A quality advisory commission supported by a governor's veto could prove to be a temporary winning formula for states in the next redistricting cycle, which will buy more time for more permanent reforms.

### CONCLUSION

Gerrymandering has a long and storied history in Virginia. From Patrick Henry to the present day, Virginians of all ideological stripes have dabbled in this darkest of political arts. But reformers are organizing, and only together can we eliminate this scourge from the commonwealth once and for all. With brave politicians from both parties in the General Assembly leading the charge for reform, the future looks bright. If the momentum of recent years is indicative, the authors' hopes are high that the 2010s will be the last time Virginia will ever be gerrymandered.

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<sup>164</sup> *Id.*

