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THE FIGHT OVER THE VIRGINIA REDISTRICTING
COMMISSION

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ABSTRACT

In its 2020 regular session, Virginia's General Assembly debated whether to send to Virginians a constitutional amendment that transfers the General Assembly's redistricting responsibility to a newly created Virginia Redistricting Commission (VRC). The VRC is a bipartisan commission of legislators and citizens that will redraw electoral districts before sending them to the General Assembly for up-or-down ratification without alteration. If a supermajority of the VRC fails to agree on redistricted maps or the General Assembly fails to approve the maps, the Virginia Supreme Court will draw the districts. The amendment triggered a fight over how to redistrict, how to end partisan gerrymandering and how to protect minority voting rights. Virginians ratified the amendment in November 2020, but the disagreements over the amendment and the VRC linger. The amendment and the VRC do not fix Virginia's redistricting problems. The VRC will end partisan gerrymandering but does not preclude bipartisan gerrymandering. The VRC may help protect minority voting rights but may do so no more effectively or vigorously than the General Assembly would. Finally, the amendment forces mapmakers – the VRC or the Virginia Supreme Court – to resolve policy issues regarding representation the General Assembly should have addressed before jettisoning its redistricting responsibilities. The constitutional amendment reflects vigorous action but may not yield much progress toward resolving Virginia's redistricting problems.

INTRODUCTION

The most contentious issue in the 2020 General Assembly session may have been the vote to send the constitutional amendment creating the Virginia Redistricting Commission (VRC) to Virginians for ratification. Ratified in the November 2020 general election, the amendment transfers the constitutional responsibility to draw electoral maps for the House of Delegates, the state Senate, and Virginia's congressional delegation from the General Assembly to the VRC.¹ The VRC will draw the maps, which the General Assembly must approve without amendment to become effective.² If the VRC fails to agree on the maps or if the General Assembly fails to approve the

¹ VA. CONST. art. II, § 6; VA. CONST. art. II, § 6-A; Rachel Weiner, *Virginians approve turning redistricting over to bipartisan commission*, WASH. POST (Nov. 4, 2020), https://www.washingtonpost.com/local/virginia-politics/virginia-redistricting-amendment-results/2020/11/02/5d1ef242-19f8-11eb-befb-8864259bd2d8_story.html.

² VA. CONST. art. II, § 6-A(e).

maps, the Supreme Court of Virginia (SCOVA) will draw the maps.³ The Governor no longer has a direct role in redistricting.⁴ If the amendment had been rejected, the General Assembly would have retained its responsibility to draw the maps through the regular legislative process, with the Governor ultimately approving or vetoing the maps.⁵

The amendment attempts to resolve the partisanship that has plagued Virginia redistricting for decades and was particularly intense during the post-2010 Census redistricting.⁶ During that redistricting, the House of Delegates, controlled by Republicans, was primarily responsible for redistricting the House.⁷ The state Senate, controlled by Democrats, was primarily responsible for redistricting the Senate.⁸ The electoral maps for the House and the Senate were passed by both chambers and combined into one bill.⁹ Governor McDonnell vetoed the bill, arguing the Senate redistricting was insufficiently bipartisan.¹⁰ About two weeks later, he signed a second set of maps the General Assembly passed.¹¹ Disagreement between the House of Delegates and state Senate regarding the congressional map delayed that map's passage until 2012, even though the Virginia Constitution mandated redistricting occur in 2011.¹² All three maps were challenged in court, with the Senate map being

³ *Id.* § 6-A(g).

⁴ *See id.* § 6-A (providing no role for governor in selecting members of the Virginia Redistricting Commission or approving the work of the mapmakers).

⁵ *See* Will Gonzalez, *Virginia voters, legislators split on redistricting amendment*, PRINCE WILLIAM TIMES (Nov. 1, 2020), https://www.princewilliamtimes.com/news/virginia-voters-legislators-split-on-redistricting-amendment/article_25abbb86-1c4d-11eb-a14e-b75e28d07c46.html.

⁶ *See* Jeff E. Schapiro, *Schapiro: Democrats behaving like Republicans on redistricting*, RICH. TIMES-DISPATCH (Feb. 21, 2020), <https://richmond.com/news/plus/schapiro-democrats-behaving-like-republicans-on-redistricting/article>; *see also* Mark Joseph Stern, *Virginia Democrats' Victory Proves That Gerrymandering Matters*, SLATE (Nov. 6, 2019), <https://slate.com/news-and-politics/2019/11/virginia-democrats-victory-after-killing-racial-gerrymander.html> (describing the redistricting issues after the 2010 census).

⁷ *See* Andrew Cain, *Wittman urges GA to reach redistricting deal*, RICH. TIMES-DISPATCH (Aug. 26, 2011), https://richmond.com/news/wittman-urges-ga-to-reach-redistricting-deal/article_28731806-d03e-5e57-b8a9-9c6a20c41daa.html (describing redistricting maps made by the House).

⁸ *See id.*

⁹ Rosalind S. Helderman & Anita Kumar, *Virginia assembly approves new legislative maps*, WASH. POST (Apr. 7, 2011), https://www.washingtonpost.com/local/politics/virginia-assembly-approves-new-legislative-maps/2011/04/07/AFRjhrxC_story.html.

¹⁰ *See* Letter from Robert McDonnell, Virginia Governor, to Virginia House of Delegates (Apr. 15, 2011) (on file with the Office of the Governor); *see also* Tyler Whitley, *McDonnell vetoes legislature's redistricting plan*, RICH. TIMES-DISPATCH (Apr. 16, 2011), https://richmond.com/news/mcdonnell-vetoes-legislatures-redistricting-plan/article_9ed0ccef-14f7-51e3-b04e-b92120a851a0.html (discussing the Governor's original veto).

¹¹ *See* Andrew Cain, *McDonnell signs redistricting bill*, RICH. TIMES-DISPATCH (Apr. 30, 2011), https://richmond.com/news/mcdonnell-signs-redistricting-bill/article_32689192-4ee1-525e-9f5d-6d7517a7c968.html (noting that Gov. McDonnell ultimately signed the resubmitted redistricting bill).

¹² VA. CONST. art. II, § 6 (amended 2020) ("The General Assembly shall reapportion the Commonwealth

the only map to survive without significant judicial alteration.¹³ The House map and the congressional map were embroiled in litigation, with portions of each map being redrawn by a special master.¹⁴ The current congressional districts were not finalized until 2016;¹⁵ the current House districts were not finalized until 2019.¹⁶

The campaign for a constitutional amendment to create a redistricting commission that would curtail the General Assembly's role in redistricting lasted years.¹⁷ An amendment to the Virginia Constitution must pass the General Assembly twice, with a House of Delegates general election held between the two approvals, before being sent to Virginians for ratification.¹⁸ In its 2019 session, the General Assembly approved the amendment for the first time.¹⁹ A House of Delegates general election was held in November 2019.²⁰ In 2020, the House of Delegates voted 54-46, and the Senate voted 38-2, to approve the amendment and send it to the electorate for a referendum on the November 2020 ballot.²¹

The 2020 General Assembly votes suggest a disagreement between the House of Delegates and the Senate, but the real divide was among Democrats.²² Republicans in the General Assembly fully supported the

into electoral districts in accordance with this section in the year 2011 and every ten years thereafter.”).

¹³ *Vesilind v. Va. State Bd. of Elections*, 813 S.E.2d 739, 742 (Va. 2018) (challenging the Senate and House of Delegates maps but leading to no alterations); *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 794 (2017) (challenging the House of Delegates map); *Wittman v. Personhuballah*, 136 S. Ct. 1732, 1734 (2016) (appealing a judgment striking down the congressional redistricting plan).

¹⁴ *Bethune-Hill v. Va. State Bd. of Elections*, 368 F. Supp. 3d 872, 873 (E.D. Va. 2019); *Personhuballah v. Alcorn*, 155 F. Supp. 3d 552, 555–56 (E.D. Va. 2016).

¹⁵ *See Alcorn*, 155 F. Supp. 3d at 555, 565.

¹⁶ *See Bethune-Hill*, 368 F. Supp. 3d at 874.

¹⁷ *See, e.g., About Us*, ONEVIRGINIA2021 (2020), <https://www.onevirginia2021.org/about-us/>; S.J. Res. 18, 2020 Gen. Assemb., Reg. Sess. (Va. 2020).

¹⁸ VA. CONST. art. XII, § 1.

¹⁹ *See* S.J. Res. 306, 2019 Gen. Assemb., Reg. Sess. (Va. 2019). Though the vote in favor was overwhelming in the House and Senate, there was dissent, largely from African American representatives. *See* Graham Moomaw, *General Assembly approves independent redistricting commission, despite objections from black lawmakers*, RICH. TIMES-DISPATCH (Feb. 23, 2019), https://richmond.com/news/local/government-politics/general-assembly-approves-independent-redistricting-c%20lawmakers/article_b7c595db-503a-55d8-abb9-316c368ef9be.html (noting concerns among African American legislators regarding the possibility of insufficient minority representation on the Commission).

²⁰ *See Elections*, VA. DEP'T OF ELECTIONS (2019), https://historical.elections.virginia.gov/elections/search/year_from:2019/year_to:2019, for the November 2019 election results.

²¹ *Virginia Question 1, Redistricting Commission Amendment*, BALLOTPEDIA (2020), [https://ballotpedia.org/Virginia_Question_1_Redistricting_Commission_Amendment_\(2020\)](https://ballotpedia.org/Virginia_Question_1_Redistricting_Commission_Amendment_(2020)).

²² Mel Leonor, *House opponents launch late bid to block amendment on redistricting by submitting new plan*, RICH. TIMES-DISPATCH (Mar. 5, 2020), https://richmond.com/news/plus/house-opponents-launch-late-bid-to-block-amendment-on-redistricting-by-submitting-new-plan/article_b3565c14-9a86-5a8d-a17c-ae21e45b5adf.html.

amendment.²³ Their support was sensible. Given Democratic control over the House of Delegates, the state Senate, and the governorship, the VRC – with its equal number of Republicans and Democrats – provides Republicans more power over redistricting than they would have otherwise.²⁴ Conversely, the Democratic Caucus was deeply divided over the amendment.²⁵

The disagreement among the Democrats centered on a dispute regarding minority voting rights and partisan gerrymandering.²⁶ The Democrats who voted against sending the amendment to a referendum – a group that included most House Democrats, all House of Delegates members who represent majority African American districts, and a few Senate Democrats – argued the amendment will not protect minority voting rights fully.²⁷ The Democrats who supported sending the amendment to a referendum – a group that included nearly all Senate Democrats and a small portion of House Democrats – argued the VRC will eliminate partisan gerrymandering while protecting minority voting rights.²⁸ They suggest legislation the General Assembly passed during the 2020 session defining redistricting criteria combines with the amendment to guarantee minority voting rights will be fully protected.²⁹

²³ Schapiro, *supra* note 6.

²⁴ See Mel Leonor, *Efforts intensify to sway voters on redistricting plan*, RICH. TIMES-DISPATCH (July 26, 2020) <https://www.pressreader.com/usa/richmond-times-dispatch-week-end/20200726/281479278739128> (“Republicans broadly support the amendment, which they see as their best shot at having a seat at the redistricting table now that they are in the minority. Republican lawmakers, who for years gerrymandered Virginia’s maps and blocked reform efforts, compromised on the amendment in the 2019 session as elections loomed.”); see also Schapiro, *supra* note 6 (“Republican support for independent redistricting – after years of resisting it – might be a sly attempt to erect a procedural obstacle to a further decline in their ranks.”).

²⁵ Leonor, *supra* note 22.

²⁶ *Id.*

²⁷ See Mel Leonor, *House Panel Approves Redistricting Measure*, RICH. TIMES-DISPATCH, Mar. 3, 2020, at A5 (noting Delegate Marcia Price’s (D-Newport News) concerns regarding protecting minority voting rights).

²⁸ Mel Leonor, *Redistricting fight heats up with statewide referendum looming*, RICH. TIMES-DISPATCH (July 24, 2020), https://richmond.com/news/virginia/redistricting-fight-heats-up-with-statewide-referendum-looming/article_872ab696-76a2-5a7a-8d06-449af6af8510.html (noting support for amendment from Senate Democrats); Graham Moomaw, *Virginia Democratic Party urges voters to defeat redistricting reform amendment*, VA. MERCURY (June 24, 2020), <https://www.virginiamercury.com/2020/06/24/virginia-democratic-party-urges-voters-to-defeat-redistricting-reform-amendment/>.

²⁹ Schuyler VanValkenburg, *Schuyler VanValkenburg column: It’s now or never on redistricting*, RICH. TIMES-DISPATCH (Feb. 19, 2020), https://richmond.com/opinion/columnists/schuyler-vanvalkenburg-column-it-s-now-or-never-onredistricting/article_36552d82-bb7e-5644-beb3-54f5e2c7969d.html (declaring support for the amendment and urging the House of Delegates to pass the amendment for the second time); Graham Moomaw, *Virginia House passes redistricting reform measure, sending constitutional amendment to voters*, VA. MERCURY (Mar. 6, 2020), <https://www.virginiamercury.com/2020/03/06/virginia-house-passes-redistricting-reform-measure-sending-constitutional-amendment-to-voters/> (discussing House vote on amendment and quoting Sen. Jennifer McClellan (D-Richmond) regarding enabling

The dispute over minority voting rights and partisan gerrymandering is real,³⁰ but it obscures a deeper issue regarding what entity should draw the lines that control how voters will be represented. The constitutional amendment removes the General Assembly – other than the eight legislator members of the VRC – from the map drawing portion of the redistricting process in favor of the VRC, completely removes the governor from the redistricting process, and requires the Supreme Court of Virginia (“SCOVA”) draw the electoral districts in cases of disagreement.³¹ Though electoral maps reflect policy choices, the constitutional amendment removes those policy choices from elected representatives and places them with unelected bodies.³² That is controversial and may be problematic.

This essay explores the disputes surrounding the VRC and the redistricting process. Part I of this essay reviews the rules of redistricting in effect in Virginia before the 2020 General Assembly session. Part II discusses how the constitutional amendment and the legislation the 2020 General Assembly passed delineating redistricting criteria may combine to create a new redistricting regime in Virginia. Part III considers whether the new regime eliminates partisan gerrymandering, protects minority voting rights, and gives redistricting, policymaking authority to appropriate entities.

I. Redistricting Before the 2020 General Assembly Session

Before the recent amendment establishing the VRC passed, the Virginia Constitution required the General Assembly redistrict the House of Delegates, the state Senate, and Virginia’s congressional delegation the year after each U.S. decennial Census.³³ The Virginia Constitution requires electoral districts contain nearly equal population and be comprised of compact and contiguous territory.³⁴ Each districting map must also comply with the 14th

legislation). In its special session in November 2020, the General Assembly passed legislation specifying procedures for the Virginia Redistricting Commission that ensure minority representation on the VRC. See VA. CODE § 30-393(B) (2020) (requiring the judges who choose citizen members of the VRC consider “the racial, ethnic, geographic, and gender diversity of the Commonwealth” when doing so).

³⁰ See Mel Leonor, *House of Delegates backs constitutional amendment on redistricting, paving the way for referendum*, RICH. TIMES-DISPATCH (Mar. 6, 2020), https://richmond.com/news/plus/house-of-delegates-backs-constitutional-amendment-on-redistricting-paving-the-way-for-referendum/article_5f5f76b8-644b-55bf-b7d8-ff5a8125d07e.html.

³¹ VA. CONST. art. II, § 6-A.

³² See generally Henry L. Chambers, Jr., *Enclave Districting*, 8 WM. & MARY BILL RTS. J. 135, 153–58 (1999) (discussing contiguity and the policy choices that accompany districting).

³³ VA. CONST. art. II, § 6 (amended 2020) (“Members of the House of Representatives of the United States and members of the Senate and of the House of Delegates of the General Assembly shall be elected from electoral districts established by the General Assembly.”).

³⁴ *Id.* (amended 2020) (“Every electoral district shall be composed of contiguous and compact territory

Amendment of the U.S. Constitution and the Voting Rights Act of 1965 (VRA).³⁵ Typically, including in 2011, the General Assembly (or the Privileges and Elections Committee in each of the General Assembly's chambers) passed resolutions which summarized the legal requirements for redistricting and provided additional redistricting criteria for the General Assembly.³⁶ Though the redistricting rules and laws limited the General Assembly, the General Assembly retained significant latitude in redistricting.³⁷ Understanding the key disputes regarding the VRC requires knowing how Virginia redistricted after the 2010 Census and how the law changed the redistricting landscape in Virginia prior to the General Assembly's 2020 session.

A. The Law Applicable to Virginia's 2011 and 2012 Redistricting

1. Equipopulous Districts

Consistent with the U.S. Constitution's one person, one vote doctrine and the Virginia Constitution, mapmakers must draw districts with populations as equal as practicable to guarantee voters enjoy an equally weighted vote.³⁸ However, courts allow district populations to deviate somewhat from perfect equality when the application of districting principles that might keep communities of interest together, such as respect for political boundaries, yield a set of appropriate and cohesive districts.³⁹ State legislative districts may

and shall be so constituted as to give, as nearly as is practicable, representation in proportion to the population of the district.”).

³⁵ *Id.*

³⁶ See, e.g., S. Comm. on Privileges & Elections, Comm. Res. No. 2 (Va. 2001) (providing the Senate Committee on Privileges and Elections' redistricting rules); H.D. Comm. on Privileges & Elections, Comm. Res. No. 1 (Va. 2011) (providing the House Committee on Privileges and Elections' redistricting rules); J. Reapportionment Comm. Res. (Va. 2015) (providing the Joint Reapportionment Committee's redistricting rules).

³⁷ See, e.g., *Wilkins v. West*, 571 S.E.2d 100, 108 (Va. 2002) (discussing the latitude the General Assembly had to draw districts consistent with multiple redistricting criteria).

³⁸ *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964). In the early 1900s, some states stopped redistricting after each decennial Census. See, e.g., *Baker v. Carr*, 369 U.S. 186, 191 (1962) (noting no reapportionment in Tennessee from 1901 to 1961). As districts became ever more malapportioned, voters from large districts argued their vote had less power than voters from small districts and claimed that violated the equal protection clause. *Colegrove v. Green*, 328 U.S. 549, 567–68 (1946) (Black, J., dissenting). After initially ruling the claim involved political questions in the 1960s, the Court found a right to an equally weighted vote and operationalized the right by requiring districts be of nearly equal population. See *id.* at 552 (majority opinion); see also *Reynolds v. Sims*, 377 U.S. 533, 560–61 (1964).

³⁹ See, e.g., *Mahan v. Howell*, 410 U.S. 315, 323 (1973) (noting that “absolute equality” may impair the normal functioning of government). Some argue the need to keep jurisdictions together when redistricting is a core value. See, e.g., Ryan McDougle, *Sen. Ryan McDougle: Respecting local borders is a foundation for sound redistricting*, RICH. TIMES-DISPATCH (Feb. 3, 2018), https://richmond.com/opinion/columnists/sen-ryan-mcdougle-respecting-local-borders-is-a-foundation-for-sound-redistricting/article_22e93f1f-2bda-5dd2-b91f-01388bff7a0d.html (arguing to maintain political boundaries as district

deviate from their target population more than congressional districts.⁴⁰ The districting principles that lead to deviations from strict population equality tend to be more relevant when state legislative districts are at issue than when congressional districts are at issue.⁴¹ Nonetheless, the equipopulous district requirement makes redistricting primarily a task of moving district lines to capture a target population inside of a district.⁴²

2. Compactness and Contiguousness

Virginia's electoral districts must be comprised of compact and contiguous territory.⁴³ The limitations appear material, but they have not been significant redistricting constraints.⁴⁴ Contiguousness requires all parts of a district be accessible to all other parts of the district without leaving the district.⁴⁵ A district can be contiguous if parts of the district are separated by water or even if the easiest way to get from one part of the district to another part of the district is through a different district, if the district is cohesive.⁴⁶ Functionally, if an unbroken line can be drawn around a district and encompass only the district's territory, the district is contiguous.⁴⁷

Compactness would appear to be more constraining than contiguousness. However, it may not be because compact districts need not be as compact as possible.⁴⁸ A compact district may be oddly shaped if the shape can be explained by other districting principles, such as the desire to keep political subdivisions together or a preference to provide common representation to a community of interest.⁴⁹ Compactness is a principle but has not been much

boundaries).

⁴⁰ See, e.g., *Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1306 (2016) ("The Fourteenth Amendment's Equal Protection Clause requires States to 'make an honest and good faith effort to construct [legislative] districts . . . as nearly of equal population as is practicable . . . ' The Constitution, however, does not demand mathematical perfection.").

⁴¹ See *id.* at 1307 (discussing deviations regarding state legislative redistricting); see also *Tennant v. Jefferson Cnty. Comm'n*, 567 U.S. 758, 761–62 (2012) (noting deviations in congressional redistricting).

⁴² See, e.g., *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 265 (2015) (focusing on how voters were moved into and out of districts to create equipopulous districts).

⁴³ VA. CONST. art. II, § 6.

⁴⁴ See Frederick McBride & Meredith Bell-Platts, *Extreme Makeover: Racial Consideration and the Voting Rights Act in the Politics of Redistricting*, 1 STAN. J. C.R. & C.L. 327, 349–51 (2005), for a discussion of why compactness and contiguity do not drive redistricting.

⁴⁵ See *Wilkins v. West*, 571 S.E.2d 100, 109 (Va. 2002).

⁴⁶ See *id.*

⁴⁷ See *id.* at 108; Chambers, Jr., *supra* note 32, at 159.

⁴⁸ See *Jamerson v. Womack*, 423 S.E.2d 180, 185 (Va. 1992).

⁴⁹ See *Wilkins*, 571 S.E.2d at 108–09; see also *Jamerson*, 423 S.E.2d at 186.

of a districting limitation.⁵⁰

3. Race, Redistricting, and the Voting Rights Act

Race is always an issue in redistricting but determining its appropriate use in redistricting is tricky. Race typically may not be used by the government when making laws.⁵¹ The Fourteenth Amendment's Equal Protection Clause narrowly limits a state's use of race, subjecting its intentional use to strict scrutiny.⁵² To survive strict scrutiny, the use of race must serve a compelling state interest and be narrowly tailored to serve that interest.⁵³ The Supreme Court recognizes mapmakers are usually aware of race whenever they redistrict and may use race to help minority citizens exercise their right to vote and to participate fully in the political system.⁵⁴ Rather than require all uses of race in districting survive strict scrutiny, the Court deems the use of race to trigger strict scrutiny only when race is a predominant factor in redistricting.⁵⁵ Race predominates when it subordinates other redistricting factors.⁵⁶ The Court has not specified precisely how and when the use of race becomes a predominant factor.⁵⁷ When redistricting, jurisdictions may avoid constitutional scrutiny by using race in a limited fashion.⁵⁸

However, jurisdictions may need to use race as a predominant factor when necessary to vindicate minority voting rights under the Voting Rights Act (VRA). When a jurisdiction does so, the use of race will be subject to strict

⁵⁰ See *Wilkins*, 571 S.E.2d at 108 (“In summary, if the validity of the legislature's reconciliation of various criteria is fairly debatable and not clearly erroneous, arbitrary, or wholly unwarranted, neither the court below nor this Court can conclude that the resulting electoral district fails to comply with the compactness and contiguous requirements of Article II, § 6.”).

⁵¹ See Henry L. Chambers, Jr., *Retooling the Intent Requirement under the Fourteenth Amendment*, 13 *TEMPLE POL. & C.R. L. REV.* 611, 611–14 (2004), for a general discussion of Fourteenth Amendment limitations on the use of race.

⁵² *Shaw v. Reno*, 509 U.S. 630, 653 (1993) (discussing strict scrutiny in redistricting context).

⁵³ See generally *Abrams v. Johnson*, 521 U.S. 74, 91 (1997).

⁵⁴ See *Bush v. Vera*, 517 U.S. 952, 958 (1996). See generally Henry L. Chambers, Jr., *Colorblindness, Race Neutrality, and Voting Rights*, 51 *EMORY L. J.* 1397, 1418–19 (2002) (discussing the relationship between the 14th and 15th Amendments and the right to vote).

⁵⁵ See *Miller v. Johnson*, 515 U.S. 900, 905 (1995); see also *Reno*, 509 U.S. at 642.

⁵⁶ See *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 797 (2017).

⁵⁷ For additional discussion of race predominance, see Part I.B, *infra*. Before the post-2010 Census redistricting cycle, race predominance had been used primarily to stop the use of race in redistricting that helped minority voters. See, e.g., *Shaw v. Hunt*, 517 U.S. 899, 931 (1996); *Miller*, 515 U.S. at 920.

⁵⁸ See Richard L. Hasen, *Race or Party, Race as Party, or Party All the Time: Three Uneasy Approaches to Conjoined Polarization in Redistricting and Voting Cases*, 59 *WM. & MARY L. REV.* 1837, 1882–84 (2018) (discussing the use of race without race predominance); see also Justin Levitt, *Race, Redistricting, and the Manufactured Conundrum*, 50 *LOY. L.A. L. REV.* 555, 566–67 (2017) (recognizing redistricting bodies with draw districts with race in mind).

scrutiny.⁵⁹ The VRA protects the voting rights of minority voters against discrimination on the basis of race by safeguarding those voters' ability to elect their representative of choice on an equal basis as other voters.⁶⁰ In the post-2010 Census redistricting, sections 2 and 5 of the VRA were the key provisions relevant to redistricting.⁶¹ Section 2 of the VRA bars laws and procedures that intentionally discriminate or have the effect of discriminating in the provision of voting rights on the basis of race.⁶² Section 5 of the VRA required certain jurisdictions, defined by section 4 of the VRA, have their voting changes precleared by the Justice Department or a three-judge panel of the District Court of the District of Columbia before those changes became effective.⁶³ Those requirements helped drive the post-2010 Census redistricting.⁶⁴

a. Section 2 of the VRA

Section 2 ensures minority voters can exercise their right to vote as fully as other voters, in part, by requiring minority voters be able to elect their candidate of choice as easily as other voters.⁶⁵ In *Thornburg v. Gingles*,⁶⁶ the Supreme Court attempted to create a structure for distinguishing situations in which minority voters are unable to elect their representative of choice because of their race from those in which minority voters are unable to elect their representative of choice because they are a numerical minority. The *Gingles* Court created three preconditions for a section 2 redistricting violation.⁶⁷ The first precondition requires minority voters be able to constitute a majority in a compact single-member district.⁶⁸ The second requires those

⁵⁹ See *Vera*, 517 U.S. at 977.

⁶⁰ 52 U.S.C. § 10301. See generally *History of Federal Voting Rights Laws*, DEP'T OF JUST. (July 28, 2017), <https://www.justice.gov/crt/history-federal-voting-rights-laws> (discussing the Voting Rights Act reauthorization in 1970, 1975, 1982, and 2006).

⁶¹ See, e.g., *Abbott v. Perez*, 138 S. Ct. 2305, 2316 (2018) (analyzing application of §2 and §5 of the Voting Rights Act while considering legality of Texas redistricting).

⁶² § 10301(a) ("No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . .").

⁶³ § 10304(a).

⁶⁴ See U.S. COMM'N ON C.R., REDISTRICTING AND THE 2010 CENSUS: ENFORCING SECTION 5 OF THE VOTING RIGHTS ACT 5 (2012).

⁶⁵ See § 10301(b) ("A violation of [section 2(a)] is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.").

⁶⁶ *Thornburg v. Gingles*, 478 U.S. 30, 34 (1986).

⁶⁷ *Id.* at 50–51.

⁶⁸ *Id.* at 50.

minority voters be politically cohesive and generally choose the same candidate of choice.⁶⁹ The third requires racial bloc voting exist such that nonminority voters usually vote to defeat the candidate of choice of minority voters.⁷⁰ If the preconditions are not met, in theory, minority voters are unable to elect their candidates of choice because they are a numerical minority in any fairly drawn district or because they split their vote or because they fail to build coalitions with other willing voters to support the minority voters' candidate of choice.⁷¹ If the preconditions are met, a court must consider an additional set of factors to determine if minority voters have been subject to discrimination.⁷² However, the preconditions are often the key to finding a section 2 violation.⁷³

A jurisdiction may remedy a section 2 violation or potential violation by drawing a majority-minority district in which the minority voters can elect their candidate of choice without help from other voters or by drawing one or more crossover districts – districts in which minority voters can join with reliable non-minority voters who will vote to elect the minority voters' candidate of choice.⁷⁴ A jurisdiction may be required to draw a majority-minority district to remedy or avoid a section 2 violation.⁷⁵ A jurisdiction cannot be required to draw a crossover district to remedy a section 2 violation.⁷⁶

b. Section 5 of the VRA

During the post-2010 Census redistricting cycle, section 5 of the VRA required jurisdictions covered under section 4 – including Virginia – to ask permission of the Department of Justice or a three-judge panel of the Federal District Court of the District of Columbia before using any new voting or election laws.⁷⁷ Preclearance ensures jurisdictions with troublesome voting

⁶⁹ *Id.* at 51.

⁷⁰ *Id.* at 50.

⁷¹ *Id.* at 50 n.17.

⁷² See *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 425–26 (2006).

⁷³ See, e.g., *Abbott v. Perez*, 138 S. Ct. 2305, 2330–31, 2335 (2018) (holding that a Texas voting district was an impermissible racial gerrymander after applying the three *Gingles* factors).

⁷⁴ See *Cooper v. Harris*, 137 S. Ct. 1455, 1471–72 (2017) (discussing redistricting obligations under § 2); see also *Bartlett v. Strickland*, 556 U.S. 1, 17, 23–24 (2009) (discussing the potential curative effects of majority-minority and crossover districts).

⁷⁵ See *Perry*, 548 U.S. at 430–31 (discussing need to match a §2 remedy to a §2 violation).

⁷⁶ *Bartlett*, 556 U.S. at 23–24; see generally Dale E. Ho, *Two Fs for Formalism: Interpreting Section 2 of the Voting Rights Act in Light of Changing Demographics and Electoral Patterns*, 50 HARV. C.R.-C.L. L. REV. 404, 414–19 (2015) (analyzing *Bartlett v. Strickland*).

⁷⁷ See 52 U.S.C. § 10304; *About Section 5 Of The Voting Rights Act*, DEP'T OF JUST. (Sept. 11, 2020), <https://www.justice.gov/crt/about-section-5-voting-rights-act>.

rights histories do not backslide with respect to providing equal voting rights for minority voters.⁷⁸ Voting changes are reviewed to ensure they do not lead to retrogression in the ability of minority voters to exercise their right to vote and elect their candidates of choice.⁷⁹ In the redistricting context, non-retrogression typically requires a new electoral map maintain the number of districts in which minority voters can elect their candidates of choice.⁸⁰ Whether section 5 retrogression doctrine should consider only majority-minority districts in which minority voters can elect their candidates of choice on their own or should also consider crossover districts in which minority voters can usually elect their candidates of choice with help from others is complicated and was not clear in the post-2010 Census redistricting cycle.⁸¹

4. 2011 Redistricting Criteria

The House Committee on Privileges and Elections and the Senate Committee on Privileges and Elections passed resolutions on districting criteria before beginning the redistricting process after the 2010 Census, one each for House redistricting, Senate redistricting, and congressional redistricting.⁸² The resolutions incorporated the redistricting laws the General Assembly was required to follow, requiring single-member districts of roughly equal population comprised of contiguous and compact territory that complied with the Voting Rights Act and the U.S. Constitution.⁸³ The only difference among the resolutions were their district population deviation allowances.⁸⁴ The resolutions allowed a +/- 1% deviation from population equality for House districts, a +/- 2% deviation for Senate districts, and no specific deviation from equality for congressional districts which needed to be as equal as practicable.⁸⁵

⁷⁸ See *Beer v. United States*, 425 U.S. 130, 140–41 (1976).

⁷⁹ See *id.* at 141; see also *City of Lockhart v. United States*, 460 U.S. 125, 134–35 (1983) (introducing the test for whether redistricting had discriminatory retrogressive effect).

⁸⁰ *Bethune-Hill v. Va. State Bd. of Elections*, 326 F. Supp. 3d 128, 138 (E.D. Va. 2018) (noting non-retrogression requires jurisdiction to maintain the number of districts in which minority voters can elect their candidate of choice).

⁸¹ See *id.* The VRA's 2006 Amendments measure a minority group's voting power under the VRA by how many of its preferred candidates the group could elect. See § 10304(b) (noting section 5's purpose is "to protect the ability of such citizens to elect their preferred candidates of choice.").

⁸² See generally H.D. Comm. on Privileges & Elections, Comm. Res. No. 1 (Va. 2011); S. Comm. on Privileges & Elections, Comm. Res. No. 2 (Va. 2011).

⁸³ See Va. Comm. Res. No. 1.

⁸⁴ See Chambers, Jr., *supra* note 32, at 163–64, for a discussion of the value of having different districting principles for districting different legislatures.

⁸⁵ See VA. DIV. OF LEG. SERV., DRAWING THE LINE 2011: REDISTRICTING IN VIRGINIA NO. 2, at 1 (2011), <http://redistricting.dls.virginia.gov/2010/data/publications/2011Draw2.pdf>.

In addition to the legal requirements, the resolutions noted districts should be based on communities of interest, defining them to include “economic factors, social factors, cultural factors, geographic features, governmental jurisdictions and service delivery areas, political beliefs, voting trends, and incumbency considerations.”⁸⁶ However, the resolutions noted governmental jurisdiction and precinct lines were no more probative of the existence of a community of interest than any other factor mentioned.⁸⁷ As important, the resolutions suggested that weighing the factors that trigger a finding of a community of interest “is an intensely political process best carried out by elected representatives of the people.”⁸⁸ Recognizing the inevitable clash of districting criteria, the resolutions noted “population equality among districts and compliance with federal and state constitutional requirements and the Voting Rights Acts of 1965 shall be given priority in the event of conflict among the criteria.”⁸⁹ The resolutions constrained mapmakers but provided mapmakers sufficient discretion to draw the districts they believed proper.⁹⁰

5. How the General Assembly Redistricted in 2011 and 2012

The General Assembly faced a difficult set of issues when redistricting after the 2010 Census. Its tasks were to draw 100 equipopulous House of Delegates districts, 40 equipopulous state Senate districts, and 11 equipopulous congressional districts.⁹¹ All districts needed to be compact and comprised of contiguous territory.⁹² The General Assembly also needed to consider race enough to comport with the Voting Rights Act, but not so much that the redistricting would violate the 14th Amendment.⁹³ The General Assembly redistricted around two key issues: incumbency protection and the preservation of majority-minority districts.⁹⁴ The process produced political wrangling and charges of partisan gerrymandering, as well as lawsuits that

⁸⁶ Va. Comm. Res. No. 1. See Chambers, Jr., *supra* note 32, at 179–80 (discussing communities of interest).

⁸⁷ See, e.g., Va. Comm. Res. No. 1 (“Local government jurisdiction and precinct lines may reflect communities of interest to be balanced, but they are entitled to no greater weight as a matter of state policy than other identifiable communities of interest.”).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ See *id.*

⁹¹ See VA. DIV. OF LEG. SERV., DRAWING THE LINE 2011: REDISTRICTING IN VIRGINIA NO. 1, at 17 (2011), <http://redistricting.dls.virginia.gov/2010/data/publications/2011Draw1.pdf> (specifying the General Assembly’s redistricting tasks and the population totals that would guide the tasks).

⁹² Va. Comm. Res. No. 1.

⁹³ See *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 795 (2017).

⁹⁴ See *id.* at 794–96; see also Helderman & Kumar, *supra* note 9.

led to special masters redrawing some districts in the House of Delegates map and in the congressional map.⁹⁵

In the post-2010 Census redistricting, partisan gerrymandering and incumbency protection, though different, may have dovetailed.⁹⁶ Partisan gerrymandering occurs when one party seeks to increase its electoral advantage unfairly by drawing electoral districts that favor its members.⁹⁷ Incumbency protection shields current legislators from competition and entrenches the electoral status quo.⁹⁸ The General Assembly's redistricting criteria allowed incumbency protection.⁹⁹ When incumbency protection is overlaid on a state with parties of shifting popularity, the result appears to be partisan gerrymandering.¹⁰⁰ Maintaining the status quo in that situation limits the electoral gains that should go to the party with increasing popularity and has the same effect as partisan gerrymandering, even if the motivation is different.¹⁰¹ That may have occurred in the 2011/2012 redistricting.¹⁰²

The preservation of majority-minority districts was also a core issue in the 2011/2012 redistricting.¹⁰³ Consistent with section 2 of the VRA, the criteria barred unwarranted retrogression in the ability of minority voters to elect their candidates of choice.¹⁰⁴ The General Assembly did that by maintaining the majority-minority districts in their approximate geographic locations.¹⁰⁵

⁹⁵ See *Bethune-Hill v. Va. State Bd. of Elections*, 368 F. Supp. 3d 872, 873 (E.D. Va. 2019) (ordering the House of Delegates to adopt a new redistricting plan); see also *Personhuballah v. Alcorn*, 155 F. Supp. 3d 552, 556 (E.D. Va. 2016) (ordering the General Assembly to devise new congressional districts).

⁹⁶ See Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Challenges to Racial Redistricting in the New Millennium: Hunt v. Cromartie as a Case Study*, 58 WASH. & LEE L. REV. 227, 285–86 (2001), for a discussion of the relatedness of partisan gerrymandering and incumbency protection.

⁹⁷ See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2491, 2493 (2019) (discussing partisan gerrymanders).

⁹⁸ See *id.* at 2500 (noting incumbent entrenchment); see also Stephen Ansolabehere & James Snyder, Jr., *The Effects of Redistricting on Incumbents*, 11 ELECTION L.J. 490, 491 (2012).

⁹⁹ H.D. Comm. on Privileges & Elections, Comm. Res. No. 1 (Va. 2011).

¹⁰⁰ See *Rucho*, 139 S. Ct. at 2500–01 (discussing incumbency protection and partisan gerrymandering).

¹⁰¹ See *id.* at 2499–500.

¹⁰² For example, that would explain how the partisan split in the Virginia House of Delegates changed from a 67-32 Republican majority in 2011 to a 55-44 Democratic majority in 2019. See *Virginia General Assembly*, BALLOTPEDIA, https://ballotpedia.org/Virginia_General_Assembly (last visited Feb. 11, 2021).

¹⁰³ See Va. Comm. Res. No. 1; see also *Redistricting in Virginia after the 2010 census*, BALLOTPEDIA, https://ballotpedia.org/Redistricting_in_Virginia_after_the_2010_census (last visited Oct. 2, 2020).

¹⁰⁴ Va. Comm. Res. No. 1.

¹⁰⁵ See *Page v. Va. State Bd. of Elections*, No. 3:13CV678, 2015 WL 3604029, at *4 (E.D. Va. June 5, 2015) (comparing BVAP from single majority-minority congressional district on 2001 map with single majority-minority congressional district on 2011 map); Complaint for Declaratory Judgment and Request for Three-Judge Court with Expedited Review at 29–30, *Virginia v. Holder*, No. 1:11-CV-00885, 2011 WL 9203778 (D.D.C. May 9, 2011) (aligning majority-minority state legislative districts from 2001 map with those in 2011 maps).

The redistricting for the House, the Senate, and the congressional delegations followed a simple process: use the existing districts from the 2001 redistricting as a baseline, be sensitive to incumbents, and repopulate and maintain majority-minority districts.¹⁰⁶ The mapmakers for the House of Delegates and the congressional districts went one step farther by using a 55% Black Voting Age Population (BVAP) minimum when redistricting majority-minority districts.¹⁰⁷ Those who redistricted the Senate did not use the BVAP minimum.¹⁰⁸

Litigation regarding the House and congressional redistricting maps ensued, culminating in *Bethune-Hill v. Virginia State Board of Elections*¹⁰⁹ and *Wittman v. Personhuballah*¹¹⁰ respectively. The key question regarding the House and congressional maps was whether race predominated.¹¹¹ In both cases, the trial courts found race was a predominant factor in the redistricting.¹¹² Some districts were redrawn on both maps.¹¹³

The remnants of incumbency protection, possible partisan gerrymandering, and the protection of majority-minority districts from the 2011 and 2012 redistricting linger in the collection of oddly shaped districts that helped trigger the amendment that created the VRC.¹¹⁴ Some may argue incumbency protection is inherently unstable because redistricting lasts for 10 years. Over time, the population that lives in a district may change demographically or electorally, with a safe district becoming unsafe or flipping altogether.¹¹⁵ If

¹⁰⁶ See, e.g., *Page*, 2015 WL 3604029, at *1 (noting the congressional redistricting architect's plan included speaking with each member of the Virginia congressional delegation about the redistricting and ensuring the majority-minority district did not retrogress); see also *id.* at *20 (Payne, J., dissenting) (discussing congressional districting: "As I understand the record, the redistricting decision here was driven by a desire to protect incumbents and by the application of traditional redistricting precepts even though race was considered because the legislature had to be certain that the plan complied with federal law, including the Voting Rights Act of 196532 ("VRA") and, in particular, the non-retrogression provision of Section 5 of the VRA.").

¹⁰⁷ *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 794 (2017). BVAP is used as a rough guide to determine when a district can be controlled by African American voters. See *Cooper v. Harris*, 137 S. Ct. 1455, 1474–76 (2007).

¹⁰⁸ See Plaintiff's Post-Trial Opening Brief at 35, *Bethune-Hill v. Va. State Bd. of Elections*, No. 3:14-cv-00852-REP-GBL-BMK (E.D. Va. July 20, 2015).

¹⁰⁹ *Bethune-Hill*, 137 S. Ct. at 794.

¹¹⁰ *Wittman v. Personhuballah*, 136 S. Ct. 1732, 1735 (2016).

¹¹¹ *Bethune-Hill*, 137 S. Ct. at 800; *Wittman*, 136 S. Ct. at 1735.

¹¹² *Page v. Va. State Bd. of Elections*, No. 3:13CV678, 2015 WL 3604029, at *19 (E.D. Va. June 5, 2015); *Bethune-Hill v. Va. State Bd. of Elections*, 326 F. Supp. 3d 128, 137 (E.D. Va. 2018).

¹¹³ *Personhuballah v. Alcorn*, 155 F. Supp. 3d 557, 563 (E.D. Va. 2016); *Bethune-Hill v. Va. State Bd. of Elections*, 368 F. Supp. 3d 872, 885–86 (E.D. Va. 2019).

¹¹⁴ See S.J. Res. 18, 2020 Gen. Assemb., Reg. Sess. (Va. 2020) (enacted into law in the Acts of Assembly Chapter 1196).

¹¹⁵ See *Virginia House of Delegates District 72*, BALLOTPEdia, https://ballotpedia.org/Virginia_House_of_Delegates_District_72 (last visited Sept. 19, 2020) (showing Virginia House District 72

Republican gerrymandering drove redistricting in 2011 and 2012, some might argue the gerrymander did not work well because Democrats now control both chambers of the General Assembly. To the contrary, partisan gerrymandering may have worked well if Republicans retained power for one or two election cycles longer than they would in the gerrymandering's absence. Regardless, the focus on gerrymandering illuminates the constitutional amendment.¹¹⁶

B. Legal Clarifications Since the Post-2010 Census Redistricting

Since the post-2010 Census redistricting, the Supreme Court has altered legal doctrine, substantively changing redistricting in the process.¹¹⁷ For example, the Court clarified partisan gerrymandering, section 5 preclearance, and race predominance.¹¹⁸

In *Rucho v. Common Cause*,¹¹⁹ the Court ruled partisan gerrymandering does not violate the United States Constitution.¹²⁰ The Court suggested partisan gerrymandering is inconsistent with constitutional principles.¹²¹ However, it deemed partisan gerrymandering nonjusticiable, asserting no judicially manageable standards exist to remedy it.¹²² The Court noted states could remedy partisan gerrymandering with state laws and redistricting commissions.¹²³

In *Shelby County v. Holder*,¹²⁴ the Court gutted preclearance and section 5 of the VRA. It deemed section 4 – the section that determined which

evolved from having a Republican delegate who faced no opponent in his primary or general election to having a Democrat win the seat in a contested race in 2017 and be reelected in 2019); *see also Virginia House of Delegates District 73*, BALLOTPEDIA, https://ballotpedia.org/Virginia_House_of_Delegates_District_73 (last visited Sept. 19, 2020) (showing Virginia House District 73 evolved from being presented by an incumbent Republican to being represented by a Democratic delegate in 2017 and by a different Democratic delegate in 2019).

¹¹⁶ See Va. S.J. Res. 18 (enacted into law in the Acts of Assembly Chapter 1196).

¹¹⁷ See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019); *Shelby Cnty. v. Holder*, 570 U.S. 529, 556–57 (2013); *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 271–73 (2015).

¹¹⁸ See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019); *Shelby Cnty. v. Holder*, 570 U.S. 529, 556–57 (2013); *Ala. Legislative Black Caucus v. Alabama*, 575 U.S. 254, 271–73 (2015).

¹¹⁹ *Rucho*, 139 S. Ct. at 2484.

¹²⁰ *Id.* at 2506-07 (ruling partisan gerrymandering claims are political questions that the federal courts have no jurisdiction to resolve, but suggesting various alternatives to states, including cabining redistricting discretion though state law or redistricting commissions).

¹²¹ *Id.*

¹²² *Id.* at 2491. Over the past three decades, the Court contemplated finding a cause of action based on partisan gerrymandering, but never did. *See Vieth v. Jubelirer*, 541 U.S. 267, 309–10 (2004); *Davis v. Bandemer*, 478 U.S. 109, 119 (1986); *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018).

¹²³ *Rucho*, 139 S.Ct. at 2507–08.

¹²⁴ *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013).

jurisdictions were subject to section 5 – unconstitutional.¹²⁵ That released jurisdictions such as Virginia from their preclearance obligation.¹²⁶ Section 5 and preclearance were technically untouched, but section 5 preclearance does not currently apply to any jurisdictions formerly covered under section 4.¹²⁷ For the first time in decades, Virginia need not worry about preclearing its redistricted maps or whether those maps are retrogressive with respect to protecting minority voting rights.¹²⁸

In multiple cases since 2012, the Court confirmed the racial predominance doctrine in redistricting, indicating the inquiry is fact-specific and not formulaic. In *Alabama Legislative Black Caucus (ALBC) v. Alabama*,¹²⁹ the Court found that Alabama moved large numbers of African American voters into multiple districts to keep the BVAP% in those districts higher than necessary to ensure non-retrogression. Though moving people into districts because of their race was the constitutional violation in *Shaw v. Reno*¹³⁰ that triggered the racial predominance structure, the *ALBC* Court declined to rule that race predominated in that case, leaving the issue for the trial court to determine.¹³¹ Similarly, in *Bethune-Hill v. Virginia State Board of Elections*,¹³² the Court declined to find the movement of many African American voters into districts to effectuate a BVAP % minimum sufficient to prove racial predominance, leaving the matter to the trial court.¹³³ Those cases clarify that states may explicitly use race in redistricting if such use does not subordinate other traditional districting principles and that the subordination decision is a case-by-case determination.

Whether the use of race predominates matters because a finding of race predominance triggers strict scrutiny.¹³⁴ Surviving strict scrutiny requires the use of race serve a compelling state interest and be narrowly tailored to serve the state interest.¹³⁵ Traditionally, the need to comply with section 2 or 5 of

¹²⁵ *Id.* at 557.

¹²⁶ *Id.*

¹²⁷ *Id.* at 540; *Jurisdictions Previously Covered by Section 5*, DEP'T OF JUST. (Sept. 11, 2020), <https://www.justice.gov/crt/jurisdictions-previously-covered-section-5>.

¹²⁸ See *Shelby Cnty. v. Holder*, 570 U.S. 529, 552–53 (2013). Virginia had been subject to preclearance since 1965. See *Jurisdictions Previously Covered by Section 5*, *supra* note 127.

¹²⁹ *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 265 (2015).

¹³⁰ See *Shaw v. Reno*, 509 U.S. 630, 642–44 (1993).

¹³¹ See *Ala. Legis. Black Caucus*, 575 U.S. at 264.

¹³² *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788 (2017).

¹³³ *Id.* at 802.

¹³⁴ *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 285 (1986) (O'Connor, J., Concurring) (noting race predominance triggers strict scrutiny).

¹³⁵ *Cooper v. Harris*, 137 S. Ct. 1455, 1469 (2017).

the VRA has been considered a compelling state interest.¹³⁶ Section 5's pre-clearance provision is no longer operable and complying with it is no longer a compelling state interest.¹³⁷ Compliance with section 2 may remain a compelling state interest, but a jurisdiction must have a strong basis to believe it needs to use race to comply with section 2 to meet the narrow tailoring prong.¹³⁸ If section 2's coverage narrows – as it may – asserting compliance with it to be a compelling state interest will become more difficult.

Just before the General Assembly's 2020 session, the rules of redistricting were in flux. The traditional requirements of equal populations, compactness, and contiguity remained.¹³⁹ The requirement that race be used as much as necessary to protect minority voting under the VRA, but not so much that it offended the race predominance limitation under the 14th Amendment, also remained.¹⁴⁰ If the redistricting criteria from 2011 were to be used, incumbency protection and possible partisan gerrymandering could be part of the redistricting process. The General Assembly stepped into that morass and changed the rules.¹⁴¹ Part II discusses how the General Assembly attempted to restructure the redistricting process during its 2020 session by advancing the constitutional amendment and passing legislation that redefines the criteria for redistricting.

II. General Assembly 2020

The General Assembly took two key actions in its 2020 regular session to address perceived problems with the redistricting process. It approved the constitutional amendment creating the VRC and it passed redistricting criteria to govern the redistricting process.¹⁴² The legislation provides the VRC the equivalent of the redistricting criteria the House and Senate Privileges and Elections Committees traditionally provided before each decennial redistricting.¹⁴³ The General Assembly inserted its redistricting policy preferences

¹³⁶ *Id.*; *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 475 (2006) (Stevens, J., concurring).

¹³⁷ KAREN SHANTON, NAT'L CONF. OF STATE. LEGISLATURES, VOTER ID IN THE COURTS 4 (2014).

¹³⁸ *See Cooper*, 137 S. Ct. at 1472 (finding that states cannot use race as a predominant factor in redistricting when the state had no reason to believe it needed to use race to comply with section 2 of the Voting Rights Act).

¹³⁹ *See* H.D. 758, 2020 Gen. Assemb., Reg. Sess. (Va. 2020).

¹⁴⁰ *See id.*

¹⁴¹ *See* MARY SPAIN, DRAWING THE LINE 2011: REDISTRICTING IN VIRGINIA, NO. 1, at 24 (2010); *see also* Va. H.D. 758.

¹⁴² *See* S.J. Res. 18, 2020 Gen. Assemb., Reg. Sess. (Va. 2020). In a special session, the General Assembly passed legislation specifying the VRC's procedures. *See* VA. CODE ANN. § 30-391 (2020).

¹⁴³ *Compare* VA. CODE ANN. § 24.2-304.04 (2020), with H. Comm. on Privileges & Elections, Comm. Res. No. 1 (Va. 2011).

into law, regulating the redistricting process regardless of the entity that ultimately redistricts.¹⁴⁴

The amendment and the legislation require minority voting rights be protected.¹⁴⁵ Supporters of the VRC argue the amendment and the legislation guarantee the VRC will protect minority voting rights and end partisan gerrymandering.¹⁴⁶ Opponents argue the VRC is not structured to ensure minority voting rights are protected and that nothing in the amendment or the legislation guarantees minority voting rights will be fully protected.¹⁴⁷

A. *Virginia Redistricting Commission*

The constitutional amendment creates the VRC, a bipartisan redistricting commission.¹⁴⁸ The VRC consists of 16 members – eight legislators and eight citizens.¹⁴⁹ The legislators will be two Democratic Delegates, two Republican Delegates, two Democratic Senators, and two Republican Senators.¹⁵⁰ Each legislator is deemed to “represent [a] political party[.]”¹⁵¹ Whether the legislators are supposed to represent their party’s interests or are deemed to represent their party because they were chosen by a party leader is unclear. The citizen members will be chosen by retired state Circuit Court judges from lists provided by the Speaker of the House, the minority leader in the House, the President pro tempore of the Senate, and the minority leader in the Senate.¹⁵² Two citizens will be chosen from each list.

The VRC requires bipartisan agreement, with each redistricting map requiring a slightly different 75% supermajority before it is approved and sent to the General Assembly.¹⁵³ At least six of the legislator members and six of the citizen members must agree to a congressional redistricting map before the map is submitted to the General Assembly for an up-or-down vote with no changes.¹⁵⁴ The House of Delegates map must be approved by at least six legislators – which must include at least three of four Delegates – and six

¹⁴⁴ See generally VanValkenburg, *supra* note 29; see also § 30-399(E) (noting the Virginia Supreme Court must follow VA. CODE § 24.2-304.04 if it redistricts).

¹⁴⁵ See § 24.2-304.04; see also VA. CONST. art. II, § 6.

¹⁴⁶ See VanValkenburg, *supra* note 29.

¹⁴⁷ See Leonor, *supra* note 30.

¹⁴⁸ VA. CONST. art. II, § 6-A.

¹⁴⁹ *Id.* § 6-A(b).

¹⁵⁰ *Id.* § 6-A(b)(1)(A)–(D).

¹⁵¹ *Id.*

¹⁵² *Id.* § 6-A(b)(2)(A)–(B).

¹⁵³ See *id.* § 6-A(d)(1)–(3).

¹⁵⁴ *Id.* § 6-A(d)(1)–(2).

citizen members.¹⁵⁵ The Senate map must be approved by at least six legislators – which must include three of four Senators – and six citizen members.¹⁵⁶ If the commission agrees to a House map and a Senate map, the maps will be combined into one package and sent to the General Assembly for acceptance or rejection, without amendment.¹⁵⁷

The Supreme Court of Virginia (SCOVA) may ultimately draw the maps. If the VRC cannot agree on maps to submit to the General Assembly, the SCOVA will draw the maps.¹⁵⁸ If the General Assembly rejects the VRC's maps, and then rejects the maps the VRC resubmits for reconsideration, the SCOVA will draw the maps.¹⁵⁹ VRC members may consider SCOVA's backstopping role when agreeing to or declining to agree to maps. Commission members may feel an obligation to negotiate and act in good faith, but they have no obligation to agree to a map they do not like.¹⁶⁰ A commission member may reasonably decline to approve a map if the member believes the SCOVA will draw a better or more appropriate map. The possibility of gridlock is a feature of a process that requires a 75% supermajority, not a bug.¹⁶¹ The SCOVA is the designated backup when the VRC or the General Assembly cannot reach consensus.¹⁶²

The amendment contains two provisions designed to protect minority rights. The first requires each electoral district be “drawn in accordance with the requirements of federal and state laws that address racial and ethnic fairness . . . and judicial decisions interpreting such laws.”¹⁶³ That provision is arguably superfluous, merely requiring districts be consistent with existing law. The second provision requires districts be drawn to “provide, where practicable, opportunities for racial and ethnic communities to elect candidates of their choice.”¹⁶⁴ That provision may suggest the VRC must do more than merely comply with the legal requirement that minority voters be allowed to elect their representatives of choice. However, the clause “where practicable” can be interpreted to suggest the VRC should determine when it should do more than the minimum required to protect minority voting rights,

¹⁵⁵ *Id.* § 6-A(d)(3).

¹⁵⁶ *Id.* § 6-A(d)(2).

¹⁵⁷ *Id.* § 6-A(e)–(f).

¹⁵⁸ *Id.* § 6-A(g).

¹⁵⁹ *Id.* § 6-A(f).

¹⁶⁰ *See id.* (delegating redistricting to the Supreme Court of Virginia if the General Assembly fails to agree).

¹⁶¹ *See id.* § 6-A(d)(1)–(3).

¹⁶² *See id.* § 6-A(f)–(g).

¹⁶³ *Id.* § 6.

¹⁶⁴ *Id.*

leaving anything more than minimal protection for voting rights dependent on the good intentions of the VRC. Anything more than minimal protection for minority voting rights may require the good intentions of the SCOVA, if the SCOVA must redistrict.¹⁶⁵

B. Legislating Redistricting Criteria

The 2020 General Assembly passed legislation that specifies redistricting criteria. The criteria are sensible, but the legislation does not indicate precisely how the criteria are to be used.¹⁶⁶ The legislation provides rules and principles but does not indicate which rules are most important or how they should be balanced against one another.¹⁶⁷ Unless additional criteria or explanations of the criteria are forthcoming, the mapmaker will need to make choices about significant policy issues that the criteria do not address. The entities that might be responsible for redistricting – the VRC or the SCOVA – may have different views about how to resolve those policy issues.

1. Equipopulous Districts

The legislation requires equipopulous districts, with allowable population deviations.¹⁶⁸ State legislative districts are allowed population deviations up to plus or minus five percent, allowing a 10% total maximum deviation consistent with the U.S. Supreme Court's doctrine on the issue.¹⁶⁹ The legislation does not afford congressional districts any specific population deviation.¹⁷⁰ That is narrower than federal law, which allows congressional districts small, reasonable deviations from population equality if the deviations can be justified.¹⁷¹

2. Contiguousness and Compactness

The legislation suggests a stronger emphasis on the Virginia Constitution's contiguousness and compactness requirements than in past

¹⁶⁵ See *id.* § 6-A(f)–(g).

¹⁶⁶ See generally VA. CODE ANN. § 24.2-304.04 (2020).

¹⁶⁷ See H. Comm. on Privileges & Elections, Comm. Res. No. 1 (Va. 2011).

¹⁶⁸ See § 24.2-304.04(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.”).

¹⁶⁹ See *Harris v. Ariz. Indep. Redistricting Comm’n*, 136 S. Ct. 1301, 1305, 1307 (2016).

¹⁷⁰ See § 24.2-304.04(1).

¹⁷¹ See *Tennant v. Jefferson Cnty. Comm’n*, 567 U.S. 758, 759 (2012).

redistricting, but the mapmakers may be no more constrained by the new principles than prior criteria that operationalized the constitutional requirements.¹⁷² The 2011 redistricting resolutions deemed contiguousness to include contiguousness by water.¹⁷³ The 2020 legislation redefines contiguousness by water to exclude contiguousness solely “by connections by water running downstream or upriver.”¹⁷⁴ The new requirement appears to require a mapmaker ensure parts of a district separated by water lie directly across the body of water from one another.¹⁷⁵ The contiguousness requirement may have been tightened, but compliance with it appears relatively easy.

The new law appears to strengthen the compactness requirement by requiring mapmakers consider actual compactness measures when drawing districts.¹⁷⁶ That appears to provide an impetus for mapmakers to ensure a district is comprised of compact territory. However, the legislation does not require a district be as compact as possible or meet a minimum level of compactness to be deemed compact.¹⁷⁷ The legislation’s approach differs somewhat from the SCOVA’s approach to compactness – which is indeterminate and provides no standard for compactness – but similarly provides no firm standard.¹⁷⁸ The legislation appears to provide a duty that mapmakers consider compactness and contiguousness more rigorously, but provides little basis for a court to determine whether mapmakers have done so adequately.

3. Race and Redistricting

The legislation tracks the proposed constitutional amendment regarding race and redistricting. Districts must comply with state and federal law, including the Voting Rights Act, and “relevant judicial decisions relating to racial and ethnic fairness.”¹⁷⁹ The legislation also provides a basis for

¹⁷² See § 24.2-304.04(6).

¹⁷³ See H. Comm. on Privileges and Elections, Comm. Res. No. 1 (Va. 2011).

¹⁷⁴ § 24.2-304.04(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.”).

¹⁷⁵ See *id.*

¹⁷⁶ § 24.2-304.04(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.”).

¹⁷⁷ See *id.*

¹⁷⁸ See *Vesilind v. Va. State Bd. of Elections*, 813 S.E.2d 739, 748 (Va. 2018).

¹⁷⁹ § 24.2-304.04(2). The legislation explicitly bars cracking and packing. See *Vieth v. Jubelirer*, 541 U.S. 267, 286–87 n.7 (2004) (“‘Packing’ refers to the practice of filling a district with a supermajority of a given group or party. ‘Cracking’ involves the splitting of a group or party among several districts to deny that group or party a majority in any of those districts.”); see also § 24.2-304.04(3) (“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

mapmakers to protect minority voting rights more vigorously than the law requires, noting: “[D]istricts 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.”¹⁸⁰ That language is consistent with allowing mapmakers to draw crossover districts where sensible. However, it might not force mapmakers to draw crossover districts whenever and wherever the mapmaker can, especially when doing so conflicts with other redistricting criteria.

4. Communities of Interest

Consistent with the 2011 redistricting criteria, the legislation treats communities of interest as the building blocks of districts.¹⁸¹ However, the 2020 legislation defines communities of interest quite differently than the 2011 criteria did, likely triggering a different style of redistricting. The legislation retains part of the definition of communities of interest from the 2011 redistricting criteria but jettisons other parts.¹⁸² Both the new law and the 2011 redistricting criteria deem shared economic, social, and cultural interests to help create geographical communities of interest.¹⁸³ However, whereas the 2011 criteria note that “political beliefs, voting trends, and incumbency considerations” are relevant to the creation of communities of interest, the new law asserts a community of interest is not “a community based upon political affiliation or relationship with a political party, elected official, or candidate for office.”¹⁸⁴

The new law’s exclusion is ironic, but not surprising. A geographically defined group that has similar “social, cultural and economic interests” might share a political affiliation and a community of interest, without regard to

which they constitute an ineffective minority of voters or are concentrated into districts where they constitute an excessive majority.”). However, such limitations have been a part of VRA section 2 doctrine for years. *Shaw v. Reno*, 509 U.S. 630, 670 (1993) (White, J., dissenting) (discussing racial gerrymanders and cracking and packing); *see Voinovich v. Quilter*, 507 U.S. 146, 153 (1993).

¹⁸⁰ § 24.2-304.04(4).

¹⁸¹ *See* § 24.2-304.04(5) (“Districts shall be drawn to preserve communities of interest.”).

¹⁸² *Compare* S. Comm. on Privileges & Elections, Comm. Res. No. 1 (Va. 2011) (including economic, social, and cultural factors as well as “political beliefs, voting trends, and incumbency considerations”), *with* VA. CODE ANN. § 24.2-304.04(5) (including “social, cultural, and economic interests” but excluding “political affiliation or relationship with a political party, elected official, or candidate for office”).

¹⁸³ *See* § 24.2-304.04(5).

¹⁸⁴ *Compare* *Bethune-Hill v. Va. State Bd. of Elections*, 368 F. Supp. 3d 872, 877 n.5 (E.D. Va. 2019), *with* VA. CODE ANN. § 24.2-304.04(5).

how the criteria defines community of interest.¹⁸⁵ The General Assembly's removal of political affiliation and incumbency protection from the list of factors that could create a community of interest is unsurprising, because the constitutional amendment focuses on removing partisanship from the redistricting process.¹⁸⁶ The removal of political factors may be reasonable, but deeming a community of interest to not include political considerations may not reflect reality.

Ironically, removing politics from the definition of communities of interest may be at cross purposes with protecting minority voters' rights. The *Gingles* preconditions that were devised to determine if minority voters have been subject to discrimination require the existence of a geographically compact, politically cohesive group of minority voters who are usually unable to elect their candidate of choice because of racial bloc voting.¹⁸⁷ Those preconditions appear to assume politically based communities of interest may exist.¹⁸⁸ Indeed, majority-minority and crossover districts cluster minority voters to allow them to elect their representative of choice because they can form politically cohesive communities.¹⁸⁹ If mapmakers want to draw a majority-minority or crossover district, the new law's definition of community of interest suggests that the minority voters' race should be considered in redistricting but their political cohesiveness should not be.¹⁹⁰ That is odd.

5. Partisan Gerrymandering

The legislation bans partisan gerrymandering by barring statewide maps that "unduly favor or disfavor any political party."¹⁹¹ How undue favor would be defined and how the limitation would be enforced is unclear. Determining how much partisan gerrymandering is too much partisan gerrymandering is difficult.¹⁹² A mapmaker's intentional partisan favoritism or a finding that a map represents a substantial deviation from proportional representation

¹⁸⁵ § 24.2-304.04(5).

¹⁸⁶ See VA. CONST. art. II, § 6-A (creating bipartisan commission). Compare S. Comm. on Privileges & Elections, Comm. Res. No. 1 (Va. 2011) (including economic, social, and cultural factors as well as "political beliefs, voting trends, and incumbency considerations"), with § 24.2-304.04(5) (including "social, cultural, and economic interests" but excluding "political affiliation or relationship with a political party, elected official, or candidate for office").

¹⁸⁷ *Thornburg v. Gingles*, 478 U.S. 30, 49 (1986).

¹⁸⁸ See *id.* at 83 (White, J., concurring).

¹⁸⁹ See *id.* at 51 (majority opinion) (noting political cohesion is the second *Gingles* factor).

¹⁹⁰ § 24.2-304.04(5).

¹⁹¹ § 24.2-304.04(8).

¹⁹² See *Rucho v. Common Cause*, 139 U.S. 2484, 2506–07 (2019) (suggesting the impossibility of determining how much partisan gerrymandering is constitutionally suspect).

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might seem sufficient to trigger a finding of unfair partisan advantage, but the legislation provides no hint regarding whether either would.¹⁹³ The legislation indicates disdain for partisan gerrymandering but provides no legal standard for defining it.¹⁹⁴

C. Redistricting in 2021

Redistricting in 2021 in Virginia has been designed to be quite different than redistricting in 2011 and 2012. The redistricting criteria differ significantly in tone and direction from the redistricting criteria used to redistrict after the 2010 Census.¹⁹⁵ The legislation encourages deeper consideration of compactness and contiguity.¹⁹⁶ The legislation eliminates political considerations and incumbency considerations from the definition of communities of interest.¹⁹⁷ Both the amendment and the legislation suggest mapmakers should protect minority voting rights somewhat aggressively, at least more than the law minimally requires.¹⁹⁸ Lastly, the amendment's creation of the VRC removes the balancing of redistricting criteria that informs mapmaking from elected representatives and places it with unelected entities.¹⁹⁹ The 2021 mapmakers, whether the VRC or the SCOVA, face a different set of rules than the 2011 General Assembly faced. Presumably, the General Assembly wants to see a different outcome.

Part III considers whether the General Assembly's actions in its 2020 session fix the redistricting problems it sought to fix and whether those actions may have created other problems.

III. Why the Fight Matters

The constitutional amendment passed in November 2020; the rift the

¹⁹³ See *Gill v. Whitford*, 138 U.S. 1916, 1924 (2018) (discussing statistics and political partisanship); see also § 24.2-304.04.

¹⁹⁴ See Gregory Schneider, *Divided Democrats in Virginia House Pass Proposed Amendment for Redistricting Commission*, WASH. POST (Mar. 6, 2020), https://www.washingtonpost.com/local/virginia-politics/virginia-house-passes-anti-gerrymandering-amendment/2020/03/06/8794ac56-5f04-11ea-b014-4fafa866bb81_story.html.

¹⁹⁵ Compare H. Comm. on Privileges & Elections, Comm. Res. No. 1 (Va. 2011), with § 24.2-304.04.

¹⁹⁶ See § 24.2-304.04(6)–(7).

¹⁹⁷ See § 24.2-304.04(5).

¹⁹⁸ See § 24.2-304.04; VA. CONST. art. II, § 6.

¹⁹⁹ See VA. CONST. art. II, § 6-A(b)(2) (assigning redistricting to the VRC or to SCOVA if the General Assembly does not approve the VRC's maps).

amendment caused in the Democratic Party may linger.²⁰⁰ This Part addresses four questions that illuminate the dispute. First, is the VRC necessary? Second, does the VRC cure partisan gerrymandering? Third, does the VRC fully protect minority voting rights? Fourth, are policy issues given to the VRC or the SCOVA better left with the General Assembly? Only after considering these issues can one fully evaluate the substance of the disagreement regarding the VRC.

A. *Is the VRC necessary?*

If the VRC is not necessary, the amendment creating the VRC is unnecessary. Supporters of the amendment have argued that allowing the General Assembly to redistrict itself triggers an inherent conflict of interest.²⁰¹ Redistricting supposedly involves the General Assembly picking its voters.²⁰² That is clever, but misleading. Apportionment provides common representation to geographic territory and the people who live on that land.²⁰³ A district's voters change over time and a politician must win those voters in primaries and in each general election.²⁰⁴ Drawing district lines does not amount to choosing one's voters for a decade and does not ensure retaining one's seat.²⁰⁵ As important, the asserted conflict of interest does not apply to congressional redistricting; General Assembly members do not serve in Congress. In

²⁰⁰ The Democratic Party of Virginia opposed the constitutional amendment. See Moomaw, *supra* note 28.

²⁰¹ See, e.g., *About Us*, *supra* note 17 ("It is a conflict of interest for the legislature to be the sole decider when their own district lines are redrawn."); see generally Ryan Snow, *Legislative Control Over Redistricting as Conflicts of Interest: Addressing The Problem of Partisan Gerrymandering Using State Conflicts Of Interest Law*, 165 U. PA. L. REV. ONLINE 147 (2017).

²⁰² See, e.g., Bobby Vassar & Wyatt Durette, *Bobby Vassar and Wyatt Durette column: On redistricting, Virginia can do better*, RICH. TIMES-DISPATCH (July 20, 2020), https://richmond.com/opinion/columnists/bobby-vassar-and-wyatt-durette-column-on-redistricting-virginia-can-do-better/article_0da23a05-0ea7-5ebc-b710-03427269d620.html.

²⁰³ See Chambers, Jr., *supra* note 32, at 137.

²⁰⁴ See Jenna Portnoy et al., *Webb wins Democratic VA05 nomination in landslide; Gade wins GOP Senate primary*, WASH. POST (June 23, 2020), https://www.washingtonpost.com/local/virginia-politics/virginia-primary-voters-head-to-the-polls-amid-coronavirus/2020/06/22/2c114f64-b49b-11ea-aca5-ebb63d27e1ff_story.html.

²⁰⁵ See Philip Bump, *Eric Cantor didn't lose because of low turnout. He lost because turnout was so high*, WASH. POST (June 12, 2014), <https://www.washingtonpost.com/news/the-fix/wp/2014/06/12/cantor-didnt-lose-because-of-low-turnout-he-lost-because-turnout-was-so-high/> (discussing House Majority Leader Eric Cantor's primary loss to Dave Brat). Indeed, one's party may not retain the seat. See Stephen J. Farnsworth & Stephen Hanna, *How Spanberger won a district drawn by and for republicans*, RICH. TIMES-DISPATCH (Dec. 1, 2018), https://richmond.com/opinion/columnists/stephen-j-farnsworth-and-stephen-hanna-column-how-spanberger-won-a-district-drawn-by-and-for-republicans/article_83c85c0e-ecf2-5ac1-b06c-ad7fc4f7413c.html (discussing how Democratic Rep. Spanberger won her seat from Republican Rep. Dave Brat).

addition, the Virginia Governor, who is now excluded from the redistricting process, is limited to one term, is elected statewide, and does not choose his voters. The amendment addresses more than the supposed problem.²⁰⁶

If the VRC is ostensibly necessary because the General Assembly is unable to redistrict properly due to its conflict of interest, the General Assembly and its members should be completely removed from the redistricting process. The amendment's failure to do so suggests the conflict of interest argument is weak or nonexistent. Half of the VRC's members are legislators chosen by party leaders to serve.²⁰⁷ At least six of eight legislators must vote in favor of a VRC map before it can be sent to the General Assembly for approval.²⁰⁸ The amendment gives a veto to legislators serving on the VRC and gives the General Assembly a veto over the VRC's maps.²⁰⁹ The General Assembly can reject a map once, leaving the VRC the opportunity to resubmit the map for approval.²¹⁰ That presumably allows the General Assembly to send an explicit or implicit message regarding why it rejected the map and what it wants the map to look like when the map is resubmitted to the General Assembly. If the General Assembly should be removed from substantive redistricting decision-making, the amendment does not resolve the problem.

As the General Assembly's continuing presence in the redistricting process suggests, the conflict-of-interest argument is not about an institutional conflict.²¹¹ However, the argument may suggest personal conflicts of interest. That conflict may occur when a representative encourages the mapmakers to draw a district that is favorable to the representative.²¹² That may appear problematic but is not as problematic as it seems; voters must vote for the legislator if the legislator is to remain in office.²¹³ Nonetheless, if legislators are concerned about the effect their input may have on their district's boundaries, they can stop providing input on how their districts should be drawn. That might be unfortunate if insight from a representative about the communities of interest inside the representative's district might be helpful in constructing a district. Not surprisingly, neither the constitutional amendment

²⁰⁶ See generally VA. CONST. art. II, § 6-A (noting the purpose of establishing districts).

²⁰⁷ See *id.* § 6-A(b)(1).

²⁰⁸ *Id.* § 6-A(d)(3).

²⁰⁹ See *id.* § 6-A(d), (f).

²¹⁰ See *id.* § 6-A(f)–(g).

²¹¹ See Katherine R. Schroth, *Preparing for the Next Decade: Evaluating the Potential Redistricting Commission in Virginia*, 23 RICH. PUB. INT. L. REV. 57, 70 (2019) (“Although the purpose of the Commission is to remove politics from the process, the General Assembly does not totally give up its current redistricting power.”).

²¹² See *id.*

²¹³ See VA. CONST. art. IV, §§ 2–3.

nor the legislation creating the VRC's procedures appears to bar legislators from providing input on their districts to the VRC or its members.²¹⁴ If the General Assembly believes legislator input is inappropriate, it could deem the provision of such input an ethics violation. Rather than eliminate conflicts of interest, the amendment embeds them in the process.

The General Assembly may lack the will to redistrict properly. It knows what good non-gerrymandered redistricting looks like, as the VRC is charged with engaging in such redistricting.²¹⁵ The General Assembly can tap as much expertise as it wants. It could engage experts to draw maps it could modify or adopt. During the redistricting process in 2011, Governor McDonnell created the Independent Bipartisan Advisory Commission on Redistricting, which made recommendations to the General Assembly.²¹⁶ The General Assembly declined to enact those recommendations.²¹⁷

The General Assembly could agree on maps that are fair, protect minority voting rights, and honor other important redistricting principles if it desired. Giving the map drawing duties to the VRC suggests members of the General Assembly believe it should not be trusted with redistricting in 2021. The General Assembly's attempted withdrawal from its responsibility to draw fair electoral districts based on the fear that it will draw electoral maps improperly is an easy way out, but it is not strictly necessary.

B. Do the VRC and Redistricting Legislation End Partisan Gerrymandering?

The constitutional amendment and legislation limit partisan gerrymandering in multiple ways. The legislation limits partisan gerrymandering explicitly and implicitly.²¹⁸ It explicitly limits partisan favoritism in redistricting in its text and implicitly limits partisan favoritism by eliminating political

²¹⁴ See VA. CODE ANN. § 30-392(G) ("Commissioners, staff of the Commission, and any other advisor or consultant to the Commission shall not communicate with any person outside the Commission about matters related to reapportionment or redistricting outside of a public meeting or hearing. Written public comments submitted to the Commission, staff of the Commission, or any other advisor or consultant to the Commission shall not be a violation of this subsection.").

²¹⁵ See VA. CONST. art. II, § 6-A(a); VA. CODE ANN. § 24.2-304.04.

²¹⁶ Va. Off. of the Governor, Executive Order No. 31 (Jan. 10, 2011); see also 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, 780, 792–94 (2013) (discussing history of redistricting in Virginia including gubernatorial redistricting commissions).

²¹⁷ 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, 780, 794–95 (2013).

²¹⁸ § 24.2-304.04(4), (8).

considerations from the communities of interest analysis.²¹⁹ In combination, those limitations, if taken seriously by the mapmakers, will eliminate partisan gerrymandering from Virginia redistricting in 2021.²²⁰

The VRC's structure guarantees it will not engage in explicit partisan gerrymandering. The VRC's legislators will be half Democrats and half Republicans.²²¹ The 75% supermajority requirement ensures that if Democrats are unanimous, at least half of the Republicans and 75% of the citizen members must agree on a map.²²² Similarly, if the Republicans are unanimous, at least half of the Democrats and 75% of the citizen members of the VRC must agree on the map.²²³ The VRC's voting rules suggest it will not pass an explicit partisan gerrymander.

The supermajority requirement guarantees intentional partisan gerrymanders will not occur but may trigger other effects that might allow for the perpetuation of the effects of past partisan gerrymanders. At least three possible outcomes could flow from the requirement: entrenchment of current districts, simplistic redistricting, or gridlock leading to the SCOVA redistricting.²²⁴

Entrenchment is possible if the status quo is the only basis for consensus agreement. The VRC might decide a complete overhaul of districting is untenable and use current districts as a baseline. Starting with the current districts as the baseline will tend to entrench the current districts in place. If the electoral districts are currently gerrymandered – as some of the supporters of the constitutional amendment claim – or just poorly constructed, entrenchment continues the problem.²²⁵

Simplistic districting is possible and may sound reasonable. However, such districting stems from the overemphasis of simple or easy to understand redistricting criteria and may lead to unintended effects. For example, the VRC could emphasize compact districts that respect jurisdictional boundaries as much as possible.²²⁶ That emphasis would create districts that are

²¹⁹ § 24.2-304.04(5).

²²⁰ See generally § 24.2-304.04.

²²¹ VA. CONST. art. II, § 6-A(b)(1) (noting half of the VRC's legislative members will be chosen by the party with the most members in the House and Senate and the other half chosen by the party with the second most members in the House and Senate).

²²² *Id.*

²²³ *Id.*

²²⁴ See *id.* § 6-A(b)(1), (f)–(g) (including a supermajority requirement and empowering SCOVA to draw the maps if the commission is unable).

²²⁵ See generally *The Problem*, ONEVIRGINIA2021, <https://www.onevirginia2021.org/the-problem/> (last visited Sept. 17, 2020) (arguing that both main political parties engage in gerrymandering).

²²⁶ See VA. CODE ANN. § 24.2-304.04(5)–(7); see also Nicholas O. Stephanopoulos, *The Consequences*

cohesive and would appear ungerrymandered. It could also lead to heavily Democratic urban districts coupled with less heavily Republican suburban and rural districts.²²⁷ That could create a set of districts that might provide Democrats with less than proportional representation in the General Assembly and provide Republicans with more than proportional representation in the General Assembly.²²⁸ The maps might be impervious to challenge on partisan grounds because the simplistic districting would not necessarily suggest undue partisan favoritism. Nonetheless, the simplistic districting would provide a headwind for one political party that would act as an unintentional mild partisan gerrymander.²²⁹ That might not be what voters thought they ratified when they supported the constitutional amendment.

The supermajority requirement may trigger gridlock, which may lead to the SCOVA redistricting. Gridlock does not require bad faith by the VRC members. Presumably, the VRC members will be chosen for their experiences, their point of view, and their judgment. Refusing to agree to a map that is not as favorable to one's point of view as the map that the member believes would otherwise be approved is not bad faith. Accepting gridlock to push redistricting to the SCOVA does not necessarily suggest bad faith if one believes the alternative would require accepting a map that would not be as faithful to the requirements of Virginia law as the SCOVA's maps. Republican members may be willing to force gridlock if they believe they would get a better map from SCOVA than from the VRC. Democratic VRC members presumably will compromise until they believe the VRC map they are asked to approve is less favorable than the map they believe the SCOVA will draw.

None of this suggests the SCOVA will gerrymander; it will not. The legislation bars partisan gerrymandering; the SCOVA will follow the law.²³⁰ However, the SCOVA may engage in redistricting that is least likely to enmesh it in explicit political decision-making. That could suggest districting using the status quo as a baseline, thereby entrenching gerrymandering in new districts. Conversely, the SCOVA could choose simplistic districting that may be easy but may not reflect the districting principles the General

of Consequentialist Criteria, 3 U.C. IRVINE L. REV. 669, 692 (2013) (describing potential unintended effects of emphasizing jurisdictional boundaries or compactness).

²²⁷ See, e.g., Stephanopoulos, *supra* note 226, at 675, 706 (describing potential unintended effects of emphasizing jurisdictional boundaries or compactness); see also Altman & McDonald, *supra* note 216, at 828–30 (discussing history of redistricting in Virginia including gubernatorial redistricting commissions).

²²⁸ See Stephanopoulos, *supra* note 226, at 706 (“[C]ompact districts tend to pack Democrats and to result in unfair and uncompetitive district plans.”).

²²⁹ See *id.* at 675 (asserting that underlying political geography can lead to districts with an unequal partisan effect, even absent partisan intent).

²³⁰ See § 24.2-304.04(8).

Assembly – the people’s representatives – would prioritize. The special masters the SCOVA must use if it redistricts could move the SCOVA in a different direction.²³¹ However, the special masters are unelected, and their advice may not reflect the General Assembly’s prioritization of districting criteria.

C. Will the VRC and Redistricting Criteria Fully Protect Minority Voting Rights?

The constitutional amendment and the redistricting criteria the General Assembly passed are designed to protect minority voting rights.²³² The redistricting criteria encourage the VRC to protect minority voting rights but do not appear to require the VRC do so.²³³ The legislation bans intentionally diminishing the ability of minority voters to elect their candidates of choice, but it does not indicate whether the VRC must affirmatively increase the ability of minority voters to elect their candidates of choice.²³⁴ It hints at barring retrogression but may not effectively do so.²³⁵ What the VRC can do and what the VRC must do are different. The protection of minority voting rights depends on the VRC’s or the SCOVA’s inclination to protect minority voting rights.

The VRC is unlikely to protect minority voting rights in the same manner as the General Assembly. Six of eight legislators and six of eight citizen-members must agree to a map.²³⁶ The legislator who is 3rd least protective of minority voting rights or the citizen member who is the 3rd least protective of minority voting rights on the VRC can veto a proposed plan. That takes the protection of minority voting rights away from the median members of the democratically elected General Assembly – who are likely in the Democratic Caucus – and likely places it into the hands of the median members of the Republican Party.

The issue is not whether Republicans are more hostile to minority voting rights than Democrats, but how different groups are willing to use race in redistricting. That depends on how the groups view race predominance and how they prioritize minority voting rights among redistricting criteria.

²³¹ See § 30-399(F).

²³² Both do so explicitly. See VA. CONST. art. II, § 6; VA. CODE ANN. § 24.2-304.04(3)–(4).

²³³ See VA. CONST. art. II, § 6; VA. CODE ANN. § 24.2-304.04(3)–(4).

²³⁴ See § 24.2-304.04(3)–(4).

²³⁵ See *id.*; see also *Bethune-Hill v. Va. State Bd. of Elections*, 326 F. Supp. 3d 128, 138 (E.D. Va. 2018) (noting non-retrogression requires jurisdiction to maintain number districts in which minority voters can elect their candidate of choice).

²³⁶ See VA. CONST. art. II, § 6-A(d)(3).

Republicans and Democrats will seek to avoid a finding of race predominance, because such a finding can trigger the judicial redrawing of districts.²³⁷ How groups prioritize minority voting rights will affect how maps are drawn.

Race predominance is problematic for mapmakers because it triggers strict scrutiny, which is very difficult to survive.²³⁸ As noted in Part I, race predominance occurs when race subverts other redistricting principles.²³⁹ However, the Supreme Court has not clarified precisely when race sufficiently subordinates other principles to trigger a finding of race predominance.²⁴⁰ Consequently, mapmakers must guess when race predominance has occurred. Those who do not want to use race in redistricting may be more likely to believe race has predominated whenever race is used in redistricting. They may be willing to veto maps that use race sparingly, even if that use protects minority voting rights. Those who believe race may need to be used to protect minority voting rights will likely tolerate a more robust use of race before determining race has predominated. If a dispute between such groups arises and leads to gridlock, the SCOVA may resolve the issue when it redistricts.

Even if the members of the VRC agree race should be used to protect minority voting rights, members may disagree on how minority voting rights should be prioritized. The Democratic Caucus in the General Assembly may prioritize the protection of minority voting rights differently than the median members of the Republican Party on the VRC. Those who argue this is not an issue because the General Assembly's 2020 legislation requires the VRC prioritize and maximize minority voting rights because the legislation states the VRC *shall* do so ignore the legislation's requirement that the VRC *shall* take each redistricting criterion into account when redistricting.²⁴¹ Minority voting rights – over and above what must be protected under the Fourteenth and Fifteenth Amendments and the VRA – are arguably no more privileged than other redistricting criteria. Ironically, the legislation does not include a rule of priority requiring adherence to specific criteria in the event of conflict between redistricting criteria as the 2011 redistricting resolutions did.²⁴² Neither side is necessarily correct regarding their prioritization of minority voting rights. However, those differing preferences may lead to gridlock and the

²³⁷ See *Bethune-Hill v. Va. State Bd. of Elections*, 368 F. Supp. 3d 872, 885 (E.D. Va. 2019); *Personhullah v. Alcorn*, 155 F.Supp. 3d 522, 563 (E.D. Va. 2016).

²³⁸ See *Bush v. Vera*, 517 U.S. 952, 978 (1996) (“Strict scrutiny remains, nonetheless, strict.”); see also *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017) (“The burden thus shifts to the State to prove that its race-based sorting of voters serves a “compelling interest” and is “narrowly tailored” to that end.”).

²³⁹ See *Abrams v. Johnson*, 521 U.S. 74, 90–91 (1996).

²⁴⁰ See Part I.B.

²⁴¹ See VA. CODE ANN. § 24.2-304.04 (prefacing each districting criteria with “shall”).

²⁴² Compare § 24.2-304.04, with S. Comm. on Privileges & Elections, Comm. Res. No. 1 (Va. 2011).

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SCOVA redistricting.²⁴³

If SCOVA redistricts, the same concerns regarding the protection of minority voting rights arise. The SCOVA will not be hostile to minority voting rights. However, they may prioritize the protection of minority voting rights differently than the General Assembly. The result may be maps that differ significantly from the maps the General Assembly would have drawn. If a tradeoff between highly compact districts and districts that maximally protect voting rights must be made, the VRC or the SCOVA might choose a different tradeoff than the General Assembly would.

An example may be helpful. Currently, Virginia Congressional District 3 (CD3) is represented by Rep. Robert (Bobby) Scott and Congressional District 4 (CD4) is represented by Rep. A. Donald (Don) McEachin.²⁴⁴ Both districts are crossover districts in the Richmond/Hampton Roads area.²⁴⁵ In 2012, the General Assembly declined to draw a congressional map that contained two crossover districts in the Richmond/Hampton Roads area.²⁴⁶ Instead, it drew a map with a single majority-minority district centered on Rep. Scott's district drawn in the prior redistricting cycle and used a 55% minimum BVAP to do so; litigation ensued.²⁴⁷ Consistent with the Fourteenth Amendment and the Voting Rights Act (VRA) in effect when the districts were drawn in 2012, the litigation deconstructed the majority-minority CD3 to create a new CD3 and CD4 as crossover districts with Rep. McEachin eventually representing CD4.²⁴⁸

The VRA has changed since the post-2010 Census redistricting.²⁴⁹ Section 5's non-retrogression requirement no longer applies to Virginia, though

²⁴³ See VA. CONST. art. II, § 6-A(g) ("If the General Assembly fails to adopt such a bill by this deadline, the districts shall be established by the Supreme Court of Virginia.").

²⁴⁴ *Biography*, CONGRESSMAN BOBBY SCOTT, <https://bobbyscott.house.gov/> (last visited Jan. 28, 2021); *About Donald*, CONGRESSMAN A. DONALD MCEACHIN, <https://mceachin.house.gov/> (last visited Jan. 28, 2021).

²⁴⁵ See Mamie Locke, *Time has come for fair districts*, VIRGINIAN-PILOT (Apr. 20, 2011), https://www.pilotonline.com/opinion/columns/article_d72128d5-16be-5e2d-afe9-4d0412d9059a.html (discussing redistricting plan that included CD3 as an "influence district" and CD4 as a majority-minority district in the Richmond/Hampton Roads area).

²⁴⁶ See S. 5004, 2011 Gen. Assemb., 1st Spec. Sess. (Va. 2011) (bill rejected); Locke, *supra* note 245.

²⁴⁷ See *Personhuballah v. Alcorn*, 155 F. Supp. 3d 552, 556–57 (E.D. Va. 2016); Andrew Cain, *Judges impose new Va. congressional map, redrawing 3rd, 4th Districts*, RICH. TIMES-DISPATCH (Jan. 7, 2016), https://richmond.com/news/local/government-politics/judges-impose-new-va-congressional-map-redrawing-3rd-4th-districts/article_0ad5053b-6818-5d7e-b96e-c9ce02ad45cb.html (discussing litigation).

²⁴⁸ *About Donald*, *supra* note 244.

²⁴⁹ See Part I.B.; Nicholas O. Stephanopoulos, *The South after Shelby County*, 2013 SUP. CT. REV. 55, 55–56 (2013) (discussing changes Shelby County brought to section 2 and section 5 of the Voting Rights Act).

Section 2 does.²⁵⁰ The first question regarding the redistricting of CD3 and CD4 should be whether Virginia must continue to draw the districts to avoid a section 2 violation.²⁵¹ If so, the mapmakers could decide to keep CD3 and CD4 as they are because they appear to be lawful remedies for a continuing potential section 2 violation. Conversely, the mapmakers could revert to the old CD3 and draw a single majority-minority congressional district around the minority voters who would help meet the first *Gingles* precondition – a group of minority voters who would be a majority in a compact single-member district – then redistrict the rest of the area around that district.²⁵²

However, Virginia may no longer have a lurking section 2 violation regarding African American voters in Richmond/Hampton Roads with respect to congressional redistricting.²⁵³ CD3 and CD4 are crossover districts with African American congressmen who appear to be the representatives of choice for the African American communities in the districts.²⁵⁴ The third *Gingles* precondition – racial bloc voting that could defeat the minority voters’ representative of choice – is probably not met in the general area around CD3 and CD4. Crossover districts involve a plurality of minority voters who join with non-minority voters to elect the minority voters’ representative of choice.²⁵⁵ Proving the existence of racial bloc voting that would generally defeat the minority voters’ candidates of choice – Rep. Scott and Rep. McEachin – in a context in which nonminority voters already join with African American voters to elect the minority group’s candidates of choice is very difficult, if not impossible.²⁵⁶ If no section 2 violation exists, a mapmaker may be under no section 2 obligation to draw a majority-minority or a

²⁵⁰ See Stephanopoulos, *supra* note 249, at 55–62 (discussing application of section 2 and section 5 post-Shelby County).

²⁵¹ See Noel H. Johnson, *Resurrecting Retrogression: Will Section 2 of the Voting Rights Act Revive Pre-clearance Nationwide?*, 12 DUKE J. CONST. L. & PUB. POL’Y 1, 1–2 (2017). Congressional District Three was originally drawn to remedy a potential section 2 violation. See also Altman & McDonald, *supra* note 216, at 789–90 (discussing the formation of the Third Congressional District).

²⁵² *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986).

²⁵³ See *Personhuballah v. Alcorn*, 155 F. Supp. 3d 552, 565 (E.D. Va. 2016) (citing *Abrams v. Johnson*, 521 U.S. 74, 91 (1997)) (indicating a Section 2 challenge regarding CD4 would fail because of a lack of racial bloc voting). That may not be true with respect to smaller electoral districts, e.g., House of Delegates and state Senate districts. See Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act after Shelby County*, 115 COLUM. L. REV. 2143, 2195–201 (2015) (discussing how to identify differences in racial attitudes relevant to section 2 findings in subjurisdictions).

²⁵⁴ See *Alcorn*, 155 F. Supp. 3d at 565 (citing *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 276 (2014)) (discussing likelihood African American voters could elect their representative of choice in CD3 and CD4).

²⁵⁵ *Bartlett v. Strickland*, 556 U.S. 1, 13 (2009) (defining a crossover district as one in which the minority group can “elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority’s preferred candidate.”).

²⁵⁶ See, e.g., *Cooper v. Harris*, 137 S. Ct. 1455, 1470 (2017).

crossover district merely because one can be drawn.²⁵⁷

The mapmaker would remain obligated to draw districts consistent with the legislative redistricting criteria.²⁵⁸ That would include considering minority voting rights but may not include keeping CD3 and CD4 as they are.²⁵⁹ Given incumbency protection and political cohesion are no longer a part of the community of interest analysis, the mapmaker arguably should disregard Rep. Scott's nearly three decades of seniority that may serve Virginia and Rep. Scott's constituents well in Congress.²⁶⁰ If CD3 and CD4 arise organically based on redistricting principles embedded in the legislation, keeping them as is might be required.²⁶¹ If CD3 and CD4 are maintained explicitly because they are crossover districts, race predominance – the subversion of other redistricting criteria – may arise.

Alternatively, the VRC could focus primarily on creating compact districts given the redistricting legislation's increased emphasis on compactness and the overarching belief that non-compact or ill-shaped districts are the hallmark of political gerrymandering.²⁶² CD3 is relatively compact, but CD4 arguably is not especially compact.²⁶³ More importantly, other districts adjacent to CD3 or CD4 do not appear to be compact. For example, CD5 – to the west of CD4 – stretches from Washington, D.C.'s far suburbs to the North Carolina border.²⁶⁴ It should be redrawn to comply with compactness principles. Redrawing it may affect voters in CD3 or CD4 or CD7 or all by causing the mapmaker to shift land and voters into and out of each of those districts in a manner that may make two reliable crossover districts in the Richmond/Hampton Roads area impossible. Those who support maximizing minority voting rights might create a map that looks quite different than the map produced by those who prioritize minority voting rights differently.

²⁵⁷ See *id.* at 1472 (noting if Gingles preconditions are not met, state has no reason to believe it must draw majority-minority district).

²⁵⁸ See VA. CODE ANN. § 24.2-304.04.

²⁵⁹ See *id.*

²⁶⁰ See *Biography*, *supra* note 244.

²⁶¹ See § 24.2-304.04; see also Altman & McDonald, *supra* note 216, at 786–88, 816–17.

²⁶² For example, many Virginia commentators appear to believe oddly shaped districts are necessarily gerrymandered. See, e.g., Stephen Nash & Mary Peyton Baskin, *After the deal goes down: crooked alpacas replace Virginia democracy*, RICH. TIMES-DISPATCH (Aug. 12, 2017), https://richmond.com/opinion/columnists/stephen-nash-and-mary-peyton-baskin-after-the-deal-goes-down-crooked-alpacas-replace-virginia/article_05e0815d-39e7-5d2e-8877-a5dd6d1e38a2.html (disapproving of redistricting due to the shape of districts); see also *The Problem*, *supra* note 225.

²⁶³ See *Virginia*, GOVTRACK, <https://www.govtrack.us/congress/members/VA#map> (last visited Sept. 19, 2020), for a map of CD3 and CD4.

²⁶⁴ See *id.* for a map of CD5.

D. What Policy Issues Might the VRC or the SCOVA Address That the General Assembly Should Resolve?

The discussion above involves policy decisions. Some policy decisions are broad; some are granular. One broad decision involves whether the mapmaker should start from scratch or use the current districts as a starting point. A granular issue relates to how to construct specific districts.

If Virginia's electoral districts are gerrymandered and incumbency protection has been erased from the redistricting criteria, mapmakers arguably should scrap the current districts and rebuild the electoral maps from scratch. The mapmaker would eliminate gerrymandered and poorly constructed districts at one time. However, scrapping districts and starting over is a policy issue the General Assembly should decide but has not yet decided. In the wake of the amendment's passage, the mapmaker – the VRC or the SCOVA – will implicitly decide the issue as it redistricts.²⁶⁵

Where district lines are drawn are policy matters. Another example may help. Henrico County wraps around the City of Richmond to the west, north, and east.²⁶⁶ Given various conflicting districting principles, whether the east end of Richmond should be in the same district with the east end of Henrico County (with which it may share many racial, economic, cultural, and social interests, and demographic similarities) or with the west end of Richmond (with which it shares a jurisdiction, but with which it shares fewer economic, cultural, and social interests, and less demographic similarity) is not clear.²⁶⁷ The question may not have a right answer, but the answer may be better given by a politically accountable General Assembly than by a politically unaccountable VRC or SCOVA.

In 2021, the VRC or the SCOVA will redistrict General Assembly and Congressional seats. They will do so making policy decisions that have not been resolved by the General Assembly or the redistricting criteria. The General Assembly's actions suggest it would prefer the VRC or the SCOVA make these policy decisions. However, policy decisions regarding redistricting are policy decisions regarding governing that should usually be made by the General Assembly. Giving that responsibility to the VRC or the SCOVA may be characterized more as an abdication of duty than a thoughtful ceding

²⁶⁵ See VA. CONST. art. VI, § 6-A(a), (g) (placing responsibility for drawing district lines with the Virginia Redistricting Commission or the Virginia Supreme Court).

²⁶⁶ See *2011 Magisterial Districts*, HENRICO CNTY. (Aug. 2, 2011), <https://henrico.us/pdfs/planning/maps/base.pdf> (showing the Henrico County district boundaries surrounding the City of Richmond).

²⁶⁷ See Henry L. Chambers Jr., *Is Race Legitimate Grounds for Drawing Districts?*, RICH. TIMES-DISPATCH, Sept. 5, 2010, at E5 (discussing hypothetical redistricting of Richmond and Henrico County).

of power to an entity better able to exercise it.

CONCLUSION

By approving the constitutional amendment creating the VRC for a referendum, the General Assembly suggested the prior method of redistricting in the Virginia Constitution was irretrievably broken. Undoubtedly, Virginia's post-2010 Census redistricting was problematic, with litigation keeping congressional districts uncertain until 2016 and House of Delegates districts uncertain until 2019.²⁶⁸ In the wake of that debacle, the General Assembly could have reformed the General Assembly's redistricting process. It could have required transparency regarding the redistricting process and the input General Assembly members provide to influence the redistricting process. It could have required the General Assembly use special masters to guide it during the redistricting process. It could have forced itself to stand behind its decisions. Those who supported the constitutional amendment might argue the suggestions above have never been a part of the Virginia way of redistricting. That is why such simple changes would qualify as real redistricting reform. Rather than fixing the redistricting system so it could discharge its duty, the General Assembly abandoned its responsibility and gave its job to a politically unaccountable entity.

This essay began by noting the dispute in the General Assembly regarding the VRC is about minority voting rights and partisan gerrymandering; in part, it is. However, it is also a dispute about redistricting policy and what entity should make that policy while redistricting. Redistricting is about policy choices and priorities. The constitutional amendment that creates the VRC takes policy decisions away from the General Assembly and places them in the VRC or the SCOVA.²⁶⁹ That may seem sensible, but the amendment's passage will likely create redistricting maps for the next decade with a different set of priorities than the General Assembly's. Given the General Assembly is the elected manifestation of the people, that is a problem.

²⁶⁸ See *Personhuballah v. Alcorn*, 155 F. Supp. 3d 552, 555, 565 (E.D. Va. 2016) (adopting special master's congressional redistricting changes); *Bethune-Hill v. Va. State Bd. of Elections*, 368 F. Supp. 3d 872, 874 (E.D. Va. 2019) (adopting special master's House of Delegates redistricting changes).

²⁶⁹ See VA. CONST. art. VI, § 6-A(a), (g).

