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2021 REDISTRICTING IN VIRGINIA: EVALUATING THE
EFFECTIVENESS OF REFORMS

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ABSTRACT

The redistricting cycle that followed the 2020 census provided the first test of Virginia's redistricting reforms that were enacted when voters approved the constitutional amendment in the 2020 General Election. The centerpiece of these reforms is the bipartisan Virginia Redistricting Commission, comprised of eight citizen and eight legislator members. This article details how the 2021 redistricting occurred under the new reforms, and it evaluates the maps that were ultimately approved.

While the selection of the commissioners unfolded successfully and in accordance with the law, the work of the commission was mired by partisan fighting and dysfunction. Nevertheless, a statistical analysis of the maps drafted by the Republican and Democratic commissioners suggests that they were largely free of one-party bias, in contrast to the maps approved during the previous redistricting cycle, when Republicans racially gerrymandered the congressional and House of Delegates maps to achieve a partisan advantage. Ultimately, the Commission deadlocked, and redistricting shifted to the Supreme Court of Virginia (SCOVA), which appointed two special masters to draw the maps. The maps drawn by the special masters and approved by SCOVA are free of extreme partisan bias and advance the goals of minority representation, competitiveness, and partisan neutrality. In the selection of the special masters and subsequent approval of their maps, the Supreme Court demonstrated a commitment to fairness and transparency, and to redistricting standards approved by the General Assembly in 2020. In sum, the 2020 redistricting reforms succeeded in preventing gerrymandering. However, the redistricting process can be further improved by establishing multimember districts with a single transferable vote rule, and by replacing politician members of the Virginia Redistricting Commission with citizen members with no partisan preference.

INTRODUCTION

In November 2020, Virginia voters approved a constitutional amendment to reform the redistricting process.¹ The centerpiece of these reforms was a bipartisan redistricting commission, staffed jointly by legislators and citizens tasked with redrawing the congressional and state legislative election district maps. This new process was put to the test during the 2021 redistricting cycle that followed the 2020 census. This article evaluates the outcomes of 2021 redistricting, including the process that unfolded and the maps that were

¹ 2020 November General, VA. DEP'T. OF ELECTIONS, (Jan. 21, 2021), <https://results.elections.virginia.gov/vaelections/2020%20November%20General/Site/Referendums.html>.

ultimately approved. During the 2021 redistricting process, considerable media attention was given to the failure of the commission to approve any maps, due to the division along party lines by commissioners.² Consequently, redistricting shifted to the Supreme Court of Virginia (“SCOVA”), which appointed two special masters to draw the lines.

Despite the dysfunction and partisan conflict that characterized the redistricting process, the maps that the commission and the special masters drafted were largely free of party bias and advanced minority representation, and the plans approved by the Court gave no preference to incumbent interests. By contrast, the House of Delegates and U.S. House of Representatives maps that the General Assembly approved and Republican Governor Bob McDonnell signed into law after the 2010 census (before the enactment of the redistricting amendment) were biased in favor of Republicans and unlawfully diluted the votes of African American voters.³ In this context, the 2020 reforms succeeded in preventing extreme partisan and racial gerrymandering.

I. 2011 GERRYMANDERING AND REDISTRICTING REFORM

A decade ago, the prospects of redistricting reform in Virginia were dim. Before the 2020 constitutional amendment, the General Assembly was unilaterally empowered to draft and approve redistricting maps for the House of Delegates, Virginia Senate, and the U.S. House of Representative elections, subject to veto by the governor.⁴ In practice, this meant that the redistricting process was heavily politicized and subject to extreme partisan and racial gerrymandering.⁵ This was the case in 2011, when control of the General Assembly was split between Republicans, who controlled a majority in the House of Delegates, and Democrats, who had a narrow majority in the

² E.g., Katie Barlow, *Virginia Redistricting Commission Misses Deadline to Redraw State House, Senate Lines*, FOX 5 DC (Oct. 11, 2021), <https://www.fox5dc.com/news/virginia-redistricting-commission-misses-deadline-to-redraw-state-house-senate-lines>; Megan Flynn, *Partisan Biases Laid Bare on Virginia Redistricting Commission as More Gridlock Stymies Congressional Map*, WASH. POST (Oct. 20, 2021), <https://www.washingtonpost.com/dc-md-va/2021/10/20/virginia-congressional-redistricting-gridlock/>.

³ See *Wittman v. Personhuballah*, 578 U.S. 541, 545-46 (2016); ANTHONY MCGANN, ET AL., *GERRYMANDERING IN AMERICA: THE HOUSE OF REPRESENTATIVES, THE SUPREME COURT AND THE FUTURE OF POPULAR SOVEREIGNTY*, at 56, 79 (2016).

⁴ Henry L. Chambers Jr., *The Fight Over Virginia Redistricting Commission*, 24 RICH. PUB. INT. L. REV. 81, 82-83 (2021).

⁵ See ANTHONY MCGANN, ET AL., *GERRYMANDERING IN AMERICA: THE HOUSE OF REPRESENTATIVES, THE SUPREME COURT AND THE FUTURE OF POPULAR SOVEREIGNTY* 148 (2016).

Senate.⁶

Because majority approval of both houses was required to advance a map to the governor's desk, both parties were forced to work together to pass a map.⁷ In 2011, the two parties in Richmond appeared to have brokered an agreement to let the majority party in each house draw its own map.⁸ Accordingly, Republicans advanced a House of Delegates plan that heavily favored Republican candidates, while Democrats passed a Senate plan that gave Democrats a modest advantage.⁹ To aid with redistricting, Republican Governor Bob McDonnell convened a redistricting advisory commission; however, the commission had no legal authority and its decisions were nonbinding.¹⁰ The advisory commission renounced both the Republican and Democratic plans as gerrymandered.¹¹ Citing the assessment of his advisory commission, Governor McDonnell vetoed the Democrats' Senate plan, which he described as a partisan gerrymander.¹² However, he did not object to the House plan, despite similar objections by the advisory commission that it too was aggressively gerrymandered.¹³ Senate Democrats put forward a revised Senate map that was largely free of one-party bias, which the governor approved, along with the Republicans' House of Delegates plan.¹⁴ Both the 2011 House plan and the 2012 U.S. House plan, the latter of which was passed without Democratic support after Republicans won control of the Senate in 2011, gave Republicans a durable electoral advantage by "packing" Democrats in urban districts.¹⁵

Ultimately, both the House of Delegates and U.S. House maps were redrawn by federal courts. In 2016, a federal district court found that the Third U.S. House District unconstitutionally diluted the votes of Black residents in

⁶ Rosalind Helderman & Anita Kumar, *Virginia assembly approves new legislative map*, WASH. POST (Apr. 7, 2011), https://www.washingtonpost.com/local/politics/virginia-assembly-approves-new-legislative-maps/2011/04/07/AFRjhrxC_story.html.

⁷ See ALEX KEENA ET AL., *GERRYMANDERING THE STATES: PARTISANSHIP, RACE, AND THE TRANSFORMATION OF AMERICAN FEDERALISM* 50-51 (2021).

⁸ Anita Kumar & Rosalind Helderman, *McDonnell vetoes state redistricting bill*, WASH. POST (Apr. 15, 2011), https://www.washingtonpost.com/local/politics/mcdonnell-vetoes-state-redistricting-bill/2011/04/14/AFOO2HID_story.html.

⁹ See KEENA ET AL., *supra* note 7, at 69-70.

¹⁰ Richard Cohen, *Va. House Delegation Protects Itself*, POLITICO (Mar. 14, 2011), <https://www.politico.com/story/2011/03/va-house-delegation-protects-itself-051212>.

¹¹ Kumar & Helderman, *supra* note 8.

¹² *Id.*

¹³ *Id.*

¹⁴ Michael Sluss, *McDonnell Signs Redistricting Bill*, ROANOKE TIMES (Apr. 30, 2011), https://roanoke.com/news/politics/mcdonnell-signs-redistricting-bill/article_f0e3af1c-5d18-5400-9f7f-f6a50cb6cdef.html.

¹⁵ KEENA ET AL., *supra* note 7, at 88-89.

central and southern Virginia.¹⁶ This had the effect of hurting Democrats in neighboring districts. The court appointed a special master to revise the Third District, and consequently, the lines of the neighboring districts shifted.¹⁷ Democrats were able to flip the revised Fourth District in the 2016 U.S. House elections, and the redrawn Seventh District in the 2018 U.S. House elections, largely because the court-mandated redistricting eroded the Republicans' advantage.¹⁸ Like the congressional plan, the House of Delegates map was challenged as an illegal racial gerrymander, and in 2018, the federal courts redrew the lines, which leveled the playing field for Democrats.¹⁹

In the years that followed 2011 redistricting—and in the wake of litigation that destabilized Virginia politics—interest groups began mobilizing support for redistricting reform, and public opinion shifted substantially in favor of taking redistricting power away from the General Assembly.²⁰ However, establishing a new redistricting procedure required a constitutional amendment. As with many other state constitutions, the Virginia Constitution imposes a strict threshold for amending the constitution.²¹ First, the General Assembly must propose an amendment by resolution passed with a simple majority in both houses of the General Assembly.²² The proposed amendment must again be passed by resolution with a simple majority in the first regular session following the next general election.²³ After this condition is satisfied, the proposed amendment goes before voters in the next general election and is adopted upon majority approval by voters.²⁴

In February 2019, the Republican-controlled General Assembly approved a first reading of the text of the constitutional amendment, which passed with only one nay vote in the Senate, and with only fifteen nay votes in the House.²⁵ In February 2020, a Democratic-controlled General Assembly passed a second reading of the amendment. While the reading passed with

¹⁶ *Page v. Va. State Bd. of Elections*, 58 F. Supp. 3d 533, 550 (E.D. Va. 2014); *see Personhuballah*, 578 U.S. at 541-42.

¹⁷ Simone Pathé, *Judges Select New Virginia Congressional Map*, ROLL CALL (Jan. 7, 2016), <https://rollcall.com/2016/01/07/judges-select-new-virginia-congressional-map/>.

¹⁸ *Id.*

¹⁹ KEENA ET AL., *supra* note 7, at 148-62.

²⁰ Trimel Gomes, *VA Redistricting Reformers Push for End to Gerrymandering*, PUB. NEWS SERV. (Mar. 5, 2018) <https://publicnewsservice.org/2018-03-05/civic-engagement/va-redistricting-reformers-push-for-end-to-gerrymandering/a61702-1>.

²¹ *See Amending State Constitutions*, BALLOTPEdia, https://ballotpedia.org/Amending_state_constitutions (last visited Sept. 18, 2022).

²² VA. CONST. art. XII, § 1; VA. CODE ANN. § 30-19 (2022).

²³ VA. CONST. art. XII, § 1; VA. CODE ANN. § 30-19.

²⁴ VA. CONST. art. XII, § 1; VA. CODE ANN. § 30-19.

²⁵ *S.J. 306 Constitutional Amendment; Virginia Redistricting Commission (First Reference)*, VA. LEGIS. INFO. SYS., <https://lis.virginia.gov/cgi-bin/legp604.exe?191+sum+SJ306> (last visited Sept. 17, 2022).

overwhelming support in the Senate, it passed the House only narrowly, with all but nine Democrats opposing it.²⁶ With the passage of the second reading, the amendment shifted to voters for final approval. In the November 2020 General Election, Virginia voters approved the amendment by a margin of nearly two-to-one in support.²⁷

II. THE NEW REDISTRICTING PROCESS

The amendment created the Virginia Redistricting Commission, a sixteen-member redistricting commission, which was empowered to draw the maps subject to approval by the General Assembly.²⁸ Half of the members are drafted from the General Assembly, including two lawmakers from each of the two largest parties in the House and two largest parties in the Senate.²⁹ The other eight commissioners are citizens selected by a group of retired judges from a list of citizen-candidates populated by the legislative leaders of the House and Senate.³⁰

Once convened, the commission is given forty-five days from the delivery of U.S. census data to approve new House of Delegates and Senate plans, and sixty days from the delivery of the U.S. census data to approve a new U.S. House plan, and their deliberations must be open to the public.³¹ If the commission fails to meet one of these deadlines, it is given an additional fourteen-day grace period to approve a plan.³² Approving a plan requires a supermajority of at least six of the eight citizen commissioners, as well as six of the eight legislators.³³ Approval of the Senate and House plans, respectively, requires approval from at least three of the four legislative members from the Senate and House, respectively.³⁴ Upon approval, the plan is subject to majority approval by the General Assembly within a period of fifteen days. If the General Assembly declines to approve the plan, the commission has

²⁶ 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/>.

²⁷ Daniella Cheslow, *Virginia Voters Approve Redistricting Amendment Against Pleas from Democratic Leadership*, WAMU 88.5 AM. U. RADIO (Nov. 4, 2020), <https://wamu.org/story/20/11/04/virginia-voters-approve-redistricting-amendment-against-please-from-democratic-leadership/>.

²⁸ VA. CONST. art. II, § 6-A, cl. (a)–(b).

²⁹ *Id.* at § 6-A, cl. (b)(1)–(b)(1)(A), (C).

³⁰ *Id.* at § 6-A, cl. (b)(2)–(b)(2)(A).

³¹ *Id.* at § 6-A, cl. (d), (h).

³² *Id.* at § 6-A, cl. (g).

³³ *Id.* at § 6-A, cl. (d)(1).

³⁴ *Id.* at § 6-A, cl. (d)(2)–(3).

fourteen days to approve a second plan.³⁵ If the General Assembly declines to approve the second plan within seven days or if the commission deadlocks, redistricting control shifts to the Supreme Court of Virginia.³⁶

III. VIRGINIA'S REFORMS COMPARED TO OTHER STATES

The process spelled out in the 2020 constitutional amendment shares common features with many other states. Like several other states, it delegates primary redistricting authority to a commission.³⁷ As in Washington and New York, the state legislature can override the commission's plans.³⁸ And, like many other states that delegate contingency authority to a state court in the case of deadlock or automatic judicial review, the 2020 amendment delegates "back up" redistricting authority to the state supreme court.³⁹

However, the design of the Virginia Redistricting Commission is unique because unlike other state commissions, it is comprised of both unelected citizens and partisan legislators.⁴⁰ Several states staff their redistricting commissions solely with elected politicians. Some of these states, like Ohio and Arkansas, are effectively controlled by politicians from one party through a voting majority.⁴¹ Others, like New Jersey's state legislative and congressional redistricting commissions, are bipartisan insofar as they give equal representation to Democrats and Republicans.⁴² Other commissions bar politicians altogether and appoint unelected citizens to serve. This is the case in Alaska, California, Idaho, and Montana, as well as other states.⁴³ In these "independent" redistricting commissions, elected officials appoint citizens to serve and impose eligibility criteria to prevent undue political influence in the process.⁴⁴ Iowa uses a process that is somewhat unique, where a

³⁵ *Id.* at § 6-A, cl. (f).

³⁶ *Id.* at § 6-A, cl. (g).

³⁷ *Redistricting Commissions: Congressional Plans*, NAT'L CONF. STATE LEGISLATURES (Dec. 10, 2021), <https://www.ncsl.org/research/redistricting/redistricting-commissions-congressional-plans.aspx>; *Redistricting Commissions: State Legislative Plans*, NAT'L CONF. STATE LEGISLATURES (Dec. 10, 2021), <https://www.ncsl.org/research/redistricting/2009-redistricting-commissions-table.aspx>.

³⁸ Doug Spencer, *Guide to Drawing the Electoral Lines: Who Draws the Lines?*, LOYOLA L. SCH., <https://redistricting.lls.edu/redistricting-101/who-draws-the-lines/> (last visited Sept. 11, 2022).

³⁹ See KEENA ET AL., *supra* note 7, at 53-54 (showing that several other states use their state courts as back up authority).

⁴⁰ *Id.* at 164.

⁴¹ Spencer, *supra* note 38.

⁴² *Id.*

⁴³ *Redistricting Commissions: State Legislative Plans*, NAT'L CONF. STATE LEGISLATURES (Dec. 10, 2021), <https://www.ncsl.org/research/redistricting/2009-redistricting-commissions-table.aspx>.

⁴⁴ See Liz Kennedy et al., *Redistricting and Representation*, CTR. FOR AM. PROGRESS, (Dec. 5, 2016), <https://www.americanprogress.org/article/redistricting-and-representation/>.

bureaucracy within the state government charges a commission of citizens to draw the lines.⁴⁵ These measures are effective at neutralizing the motive to draw extreme partisan gerrymanders. This was evidenced by the 2011 state legislative redistricting cycle, where plans drawn by citizen commissions were largely free of one-party bias.⁴⁶

The same cannot be said of politician commissions. During the 2011 cycle in Virginia, one-party controlled politician commissions approved several maps with extreme partisan bias.⁴⁷ Additionally, while “bipartisan” commissions tend to produce maps with less bias, several notable examples suggest that they tend to favor the interests of incumbents from both parties through the drawing of noncompetitive districts.⁴⁸

Accordingly, the Virginia model of commission is a hybrid of a bipartisan commission and an independent citizen commission. Importantly, the supermajority decision-making rule outlined in the 2020 Virginia constitutional amendment ensures that no map will advance to the General Assembly without support from at least half of the legislators from each party.⁴⁹ In practice, this makes it highly unlikely that the commission will approve an extreme partisan gerrymander that serves the interest of one party over another. Additionally, because at least six citizen-commissioners must approve a map before it advances, this model may also prevent “incumbent protection” schemes that undermine competitive elections. However, this high threshold also means that it is possible for three legislator-commissioners (or three citizen-commissioners) to deadlock the commission by withholding their support. Notwithstanding this possibility, the supermajority threshold is not unique to Virginia—indeed, a similar rule is in place in California, which managed to approve maps through its citizen commission in 2021 and in 2011.⁵⁰

In sum, Virginia’s new redistricting process shares many features that have been successfully employed in other states. However, because it gives legislators from the General Assembly equal representation with citizens, the model is distinct from both citizen commissions, which tend to be effective at preventing partisan gerrymandering, and bipartisan political commissions, which are vulnerable to “bipartisan” gerrymandering. Accordingly, the

⁴⁵ See *The “Iowa Model” for Redistricting*, NAT’L CONF. STATE LEGISLATURES, (Mar. 25, 2021), <https://www.ncsl.org/research/redistricting/the-iowa-model-for-redistricting.aspx>.

⁴⁶ See KEENA ET AL., *supra* note 7, at 178-79.

⁴⁷ *Id.* at 69.

⁴⁸ *Id.* at 73.

⁴⁹ H.D. 784, Gen. Assemb., Reg. Sess. (Va. 2020).

⁵⁰ Doug Spencer, *California*, ALL ABOUT REDISTRICTING, <https://redistricting.ils.edu/state/california> (last visited Sep. 11, 2022).

reforms are a significant improvement over the previous process, when members of a single party could dictate redistricting decisions; yet they do not entirely guarantee that political interests are removed from the decision making.

IV. THE POLITICS BEHIND THE REFORMS

The reforms embodied in the constitutional amendment represent a political compromise and diverge significantly from what reformers originally wanted. While interest groups, such as One Virginia 2021, Common Cause, and the League of Women Voters endorsed the amendment and lobbied for its passage in 2020,⁵¹ anti-gerrymandering advocates had originally lobbied for a commission comprised solely of citizens that would not be subject to approval by the General Assembly.⁵² Opponents of the constitutional amendment expressed skepticism about giving legislators equal representation with citizens on the commission, giving the General Assembly veto power over the commission’s maps, and delegating “back up” authority to SCOVA.⁵³

However, because the General Assembly is a “first-mover” in the constitutional amendment process in Virginia—that is, it must take the first step in advancing an amendment—a citizen commission model was not politically viable.⁵⁴ Indeed, states like California and Arizona that have adopted citizen redistricting reforms have done so through the ballot box, due to state constitutional procedures that make it relatively easy to send proposed constitutional amendments to voters.⁵⁵ Consequently, the decision by the drafters of the amendment to give the General Assembly equal representation on the

⁵¹ *Support for Virginia’s Redistricting Amendment*, FAIR MAPS VA., <https://www.fairmapsva.org/endorsements/> (last visited Sept. 29, 2022); Evan Watson, *Virginia Group Reveals New Amendment to Change Redistricting Process, Fight Gerrymandering*, 13 NEWS NOW (Nov. 30, 2018), <https://www.13newsnow.com/article/news/local/virginia/virginia-group-reveals-new-amendment-to-change-redistricting-process-fight-gerrymandering/291-619164625> (last visited Sept. 11, 2022).

⁵² Evan Watson, *Virginia Group Reveals New Amendment to Change Redistricting Process, Fight Gerrymandering*, 13 NEWS NOW (Nov. 30, 2018), <https://www.13newsnow.com/article/news/local/virginia/virginia-group-reveals-new-amendment-to-change-redistricting-process-fight-gerrymandering/291-619164625>.

⁵³ Daniella Cheslow, *In Virginia, Democrats Urge Voters to Reject Redistricting Reform They Once Backed*, NPR (Oct. 12, 2020), <https://www.npr.org/local/305/2020/10/12/922991632/in-virginia-democrats-urge-voters-to-reject-redistricting-reform-they-once-backed>.

⁵⁴ See Mechelle Hankerson, *‘Taking Redistricting Into a Smoke-Filled Room:’ Why Democrats Are Pushing Back On Reform Measure*, VA. MERCURY (Feb. 7, 2019), <https://www.virginiamercury.com/2019/02/07/taking-redistricting-into-a-smoke-filled-room-why-democrats-are-pushing-back-on-reform-measure/>; see generally KEENA ET AL., *supra* note 7, at 1-13 (discussing the politics behind the reforms).

⁵⁵ Peter Miller & Bernard Grofman, *Redistricting Commissions in the Western United States*, 3 U.C. IRVINE L. REV. 637, 666 (2013).

commission and veto power over the maps approved by the commission represents a political compromise designed to gain support from lawmakers who were reluctant to cede redistricting power to an independent body.

In early 2019, when the Republican-led General Assembly approved the first reading of the constitutional amendment, the Republicans were at risk of losing their majorities in the 2019 state legislative elections.⁵⁶ Control of the General Assembly would give Democrats a dominant hand in 2021 redistricting and prevent Republicans from being able to assert their will as they had done in 2011 and 2012. Indeed, a Democratic takeover of the House and Senate would leave Republicans without any check on redistricting—a worst case scenario for Republicans. Thus, supporting the constitutional amendment provided a hedge against a Democratic gerrymander.

The Democrats, on the other hand, were in the minority in both the House and the Senate; supporting the first reading of the redistricting amendment entailed few risks in advance of election day. However, after Democrats won control of the House and the Senate in the 2019 state legislative elections, their calculus changed. While the support for the second reading of the amendment was nearly unanimous among Democrats in the Senate, in the House, several Democrats objected to the reforms.⁵⁷ Members of the Legislative Black Caucus argued that the reforms did not go far enough in ensuring racial diversity among commissioners selected, and the NAACP of Virginia opposed the amendment.⁵⁸ Others argued that the commission was designed to deadlock so that the process would shift to SCOVA. At the time, the majority of justices on the bench had been appointed by Republican-controlled General Assemblies, meaning that Republican senators who negotiated the amendment believed that SCOVA would be more likely to draw Republican gerrymanders.⁵⁹

Democratic members of the House instead proposed alternative measures—for example, Delegate Mark Lavine introduced a bill that would

⁵⁶ *With Control of Both Chambers on the Line, Virginia Voters Are Tuned Into Upcoming State Legislative Elections*, THE WASON CTR. (Apr. 9, 2019), <https://cnu.edu/wasoncenter/surveys/archive/2019-04-09.html>.

⁵⁷ Mark Levine & Lamont Bagby, *Amendment Would Enshrine Gerrymandering*, RICHMOND-TIMES DISPATCH (Sept. 12, 2020), https://richmond.com/opinion/columnists/mark-levine-and-lamont-bagby-column-vote-no-amendment-would-enshrine-gerrymandering/article_8ef7ec9c-f2ba-5979-b248-b6cd10a58b35.html.

⁵⁸ Graham Moomaw, *'A Lot At Stake For Communities Of Color': Race Takes Central Role In Redistricting Fight*, VA. MERCURY (Oct. 15, 2020), <https://www.virginiamercury.com/2020/10/15/a-lot-at-stake-for-communities-of-color-race-takes-central-role-in-redistricting-fight/>.

⁵⁹ Mark Levine, *Why I Oppose a Partisan Judicial Gerrymander*, WASH. POST (Dec. 11, 2019), https://www.washingtonpost.com/opinions/local-opinions/why-i-oppose-a-partisan-judicial-virginia-gerrymander/2019/12/11/000777c8-1b9d-11ea-87f7-f2e91143c60d_story.html.

have established an “independent” commission, made up of citizens.⁶⁰ However, the proposed legislation was effectively non-binding—Democrats would have been able to reject the maps approved by the commission and draw their own if they objected to the plans.⁶¹ Ultimately, the second reading would pass by a narrow margin in the House, since nine Democratic delegates voted with Republicans, whose support for the second reading was unanimous in both the House and the Senate.⁶²

Along with the passage of the second reading, Democrats approved enabling legislation to put the amendment on the 2020 General Election ballot,⁶³ along with SB717, which codified standards governing how the maps would be drawn under the new process in order to ameliorate the concerns raised by members of the Legislative Black Caucus.⁶⁴ The legislation requires that mapmakers protect “communities of interest,” ban racial vote dilution, and draw districts “to give racial and language minorities an equal opportunity to participate in the political process.”⁶⁵ Additionally, the legislation bars the undue favoring or disfavoring of political parties and “mid cycle” redistricting, and it ends the practice of “prison gerrymandering” by requiring the Division of Legislative Services to adjust the U.S. Census data by counting incarcerated individuals “in the locality of their address at the time of incarceration.”⁶⁶ These provisions imposed constraints on how the commission or SCOVA would draw the districts, and ensured that redistricting decisions would be governed by a set of clear standards. Ultimately, voters approved the constitutional amendment in the November 2020 General Election, by a two-to-one margin.⁶⁷ This triggered the start of 2021 redistricting.⁶⁸

⁶⁰ H.D.J. Res. 143, Reg. Sess. (Va. 2020).

⁶¹ Moomaw, *supra* note 26.

⁶² *Id.*

⁶³ *SB 236 Constitutional Amendment; Apportionment, Virginia Redistricting Commission (Voter Referendum)*, VA. LEGIS. INFO. SYS., <https://lis.virginia.gov/cgi-bin/legp604.exe?201+sum+SB236> (last visited Sept. 27, 2022).

⁶⁴ *SB 717 Congressional and State Legislative Districts; Standards and Criteria*, VA. LEGIS. INFO. SYS., <https://lis.virginia.gov/cgi-bin/legp604.exe?201+sum+SB717> (last visited Sept. 27, 2022).

⁶⁵ S. 717, 2020 Gen. Assemb., Reg. Sess. (Va. 2020).

⁶⁶ *Id.*

⁶⁷ THE VA. PUB. ACCESS PROJECT., *Live Election Results for Ballot Questions in Virginia's 2020 Election*, <https://www.vpap.org/electionresults/20201103/referenda/> (last visited Sept. 15, 2022).

⁶⁸ S. 236, 2020 Gen. Assemb., Reg. Sess. (Va. 2020).

V. APPOINTMENT PROCESS FOR THE VIRGINIA REDISTRICTING COMMISSION

Under the approved reforms, redistricting begins the selection of the members of the Virginia Redistricting Commission. The selection of eight citizen members of the commission begins with an application process, which is overseen by a committee of five retired Virginia circuit court judges called the Redistricting Commission Selection Committee (“Selection Committee”).⁶⁹ The establishment of the Selection Committee is initiated by the Chief Justice of SCOVA, who compiles a list of at least ten retired circuit court judges to be sent to the majority and minority leaders of the House and Senate by November 15 of the census year.⁷⁰ The judges must be willing to serve on the Selection Committee and must not have an immediate family member or member of their household serving in Congress or in the General Assembly.⁷¹ The legislative leaders of the two major parties in the House and Senate each select one judge from this list, giving consideration to racial, ethnic, geographic, and gender diversity in their selection.⁷² Then, the four appointed judges select a fifth judge from the list to serve as chairperson of the Selection Committee.⁷³

Once convened, the Selection Committee establishes an application process for soliciting nominations for citizen commissioners, with assistance from the Division of Legislative Services.⁷⁴ To be eligible, citizen members must have been registered to vote in Virginia for the previous three years and must have voted in two of the previous three general elections.⁷⁵ Applicants must disclose information about their income, age, ethnicity, education level, and employment history, as well as their ties with political parties and social organizations.⁷⁶ Specially barred are those who have held or sought partisan public office, those currently or previously employed by Congress or the General Assembly and its members, and those who have worked on political campaigns, political parties or as lobbyists within the past five years, as well as their family members.⁷⁷

After a four-week application period closes, the Selection Committee provides a list of all eligible applicants to the majority and minority party leaders

⁶⁹ VA. CONST. art. II, § 6-A(b)(2)(A); VA. CODE ANN. § 30-393(A) (2022).

⁷⁰ VA. CONST. art. II, § 6-A; VA. CODE ANN. § 30-393(B).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ VA. CODE ANN. § 30-394(A) (2022).

⁷⁵ *Id.* § 30-394(B).

⁷⁶ *Id.* § 30-394(A).

⁷⁷ *Id.* § 30-394(B).

of the House and Senate, each of whom compiles a list of sixteen applicants by January 1, considering geographic, racial, ethnic, and gender diversity.⁷⁸ Then, within two weeks of receipt of the lists, the Selection Committee chooses two citizen candidates from each of the four lists.⁷⁹

In contrast to the complex process that governs the appointment of citizen members, the Virginia Constitution delegates the task of appointing the eight legislative members of the commission to the majority and minority leaders of the House and Senate by December 1 of the census year.⁸⁰ In selecting legislators to serve on the commission, the legislative leaders are required to consider racial, ethnic, gender, and geographic diversity, although it is unclear how such measures are to be enforced.⁸¹ Once all of the sixteen commissioners are appointed, they must hold a public meeting by February 1 to select a chairperson from its members. The chairperson must be a citizen member and is appointed by majority vote.⁸²

VI. 2021 REDISTRICTING: THE COMMISSION'S FIRST TEST

While there were no notable delays in establishing the commission, the work of the Virginia Redistricting Commission was delayed due to challenges with the 2020 census count, stemming from political interference by former President Donald Trump and the COVID-19 pandemic, which sidelined census workers for several weeks in early 2020.⁸³ In February of 2021, the U.S. Census Bureau indicated that it could not guarantee delivery of data until September 30, 2021.⁸⁴ Thus, several months passed between the commission's first meeting on January 21, 2021, and August of 2021, when the Census Bureau finally delivered the population data to the Commonwealth.⁸⁵ The Virginia Constitution mandates that redistricting of state legislative maps occur within forty-five days of the delivery of this data, and the drawing of congressional maps must occur within sixty days.⁸⁶ This gave the

⁷⁸ *Id.* § 30-394(C).

⁷⁹ *Id.*

⁸⁰ VA. CONST. art. II, § 6-A, cl. (b)(1).

⁸¹ VA. CODE ANN. § 30-392(B) (2022); VA. CODE ANN. § 30-393(B) (2022).

⁸² VA. CODE ANN. §§ 30-393(A)-(B) (2022).

⁸³ Jeffrey Mervis, *Delays in the 2020 U.S. Census Generate Rare Consensus*, SCIENCE (Apr. 14, 2020), <https://www.science.org/content/article/delays-2020-us-census-generate-rare-consensus>.

⁸⁴ *The Census Data is Delayed: What Does That Mean For the Commission?*, VA. REDISTRICTING, <https://www.virginiaredistricting.org/2021/Data/news/HowCensusDelayImpactsVirginia.pdf>.

⁸⁵ *2020 Census Statistics Highlight Local Population Changes and Nation's Racial and Ethnic Diversity*, U.S. CENSUS BUREAU (Aug. 12, 2021), <https://www.census.gov/newsroom/press-releases/2021/population-changes-nations-diversity.html>.

⁸⁶ VA. CONST. art. II § 6-A, cl. d.

commission a deadline of October 10 for approving state legislative maps and October 25 for approving U.S. House maps.⁸⁷

However, even before the commission began working on the new maps, the commissioners began to divide into partisan camps.⁸⁸ One of the first responsibilities of the commission is to appoint a chairperson from among its citizen members. However, during its first meeting on January 21, 2021, the commission opted instead to appoint two co-chairs: one Republican and one Democrat.⁸⁹ Similarly, when the commission met in June to hire legal counsel, they rejected the preferences of Democratic citizen commissioners to hire one single, nonpartisan counsel.⁹⁰ Instead, two Democratic legislator members joined with the Republicans to vote in favor of hiring two separate counsels to represent the Republicans and Democrats on the commission.⁹¹ This decision was pivotal in setting a partisan tone to the deliberations in the weeks that followed.

In August, the commission declined an offer of technical assistance from a team of geography specialists at the University of Richmond's Spatial Analysis Lab, on a party line vote.⁹² While the Democrats were open to the group's offer of support, the Republican counsel recommended against it, arguing that the team did not specialize in redistricting and therefore could not be trusted.⁹³ Legislator member Sen. Ryan McDougle went further, implying that academics would not be impartial.⁹⁴ Instead, the commission opted to hire two separate teams of redistricting experts, ensuring the

⁸⁷ Jahd Khalil, *Redistricting Commission to Miss Last Deadline; Supreme Court to Choose Special Masters*, RADIO IQ, WVTF (Nov. 8, 2021), <https://www.wvtf.org/news/2021-11-08/redistricting-commission-to-miss-last-deadline-supreme-court-to-choose-special-masters>; see Barlow, *supra* note 2.

⁸⁸ Sara Fitzgerald, *Redistricting Commission Picks Two Women as Co-Chairs*, LEAGUE WOMEN VOTERS VA. (Jan. 21, 2021), <https://lwv-va.org/2021/01/21/redistricting-commission-picks-two-women-as-co-chairs/>.

⁸⁹ *Id.*

⁹⁰ Fran Larkins, *Decision on Hiring Legal Counsel "First Real Test" for Commission*, LEAGUE WOMEN VOTERS VA. (June 7, 2021), <https://lwv-va.org/2021/06/07/decision-on-hiring-legal-counsel-first-real-test-for-commission/>.

⁹¹ *Id.*

⁹² Graham Moomaw, *Va. Redistricting Commission Votes to Allow Use of Political Data, Reject University Map-Drawers*, VA. MERCURY (Aug. 17, 2021), <https://www.virginiamercury.com/2021/08/17/va-redistricting-commission-votes-to-allow-use-of-political-data-reject-university-map-drawers/>.

⁹³ *Id.*

⁹⁴ *Id.*

decision-making would splinter along party lines.⁹⁵ Of the few decisions that the commission was able to agree on, the commission decided to scrap the 2011 cycle maps and start from scratch, and to allow the use of political information in the drawing of the new maps.⁹⁶ However, these decisions arguably made the task more complex and more subject to partisan conflict, and very likely exacerbated the tensions between Democrat and Republican members.

The Redistricting Commission's website shows that in total, it drew forty-two draft plans that were subject to consideration: fourteen House of Delegates maps (seven drawn by each party); fourteen state Senate plans (seven drawn by each party); and a total of eleven congressional maps, which include maps drawn by Republicans, Democrats, Sen. Barker, and Sen. Dougle.⁹⁷ However, the two sides were unable to agree on a single one of these maps.⁹⁸ The biggest sticking point during the deliberations was interpreting the requirements of the Voting Rights Act for the drawing of districts that advanced minority representation.⁹⁹ The Democratic team sought to expand the number of Black opportunity districts with a Black voting-age population between 40 and 50%. By contrast, the Republican counsel argued that maximizing the number of Black opportunity districts risked violating the Voting Rights Act.¹⁰⁰ Republican legislator member Sen. Stanley expressed concern that the Democrats' motives were not to expand racial representation, but to create an advantage for Democrats.¹⁰¹

⁹⁵ *Id.*; Mel Leonor, *Tensions Mount for Comm'n on Redistricting*, RICHMOND-TIMES DISPATCH (Aug. 18, 2021), https://richmond.com/news/state-and-regional/govt-and-politics/splitting-the-baby-partisan-tension-roils-virginia-redistricting-commission/article_e103b98f-ca42-5908-a7be-b76393904c82.html#tracking-source=home-top-story-1; Jakob Cordes, *Virginia Electoral Redistricting Comm'n Stumbles Into Partisan Deadlock*, WRIC 8 NEWS RICHMOND (Aug. 17, 2021), <https://www.wric.com/news/politics/local-election-hq/virginia-electoral-redistricting-commission-stumbles-into-partisan-deadlock/>.

⁹⁶ John Hood, *Virginia Redistricting Comm'n Votes to Start with Blank Slate*, WHSV 3 NEWS RICH. (Aug. 25, 2021), <https://www.wHSV.com/2021/08/25/virginia-redistricting-commission-votes-start-with-blank-slate/>.

⁹⁷ *MyDistricting: Virginia*, CITYGATE GIS, https://www.virginiaredistricting.org/legdistricting/virginia/comment_links (last visited Sept. 17, 2022).

⁹⁸ Peter Galuszka, *Virginia Supreme Court Rejects Map Drawers*, VA. MERCURY (Nov. 12, 2021) <https://www.virginiamercury.com/2021/11/12/virginia-supreme-court-rejects-map-drawers/>.

⁹⁹ Graham Moomaw, *'We're Sort Of Stuck: Va. Redistricting Commission Divided Over Race As Deadline Looms*, VA. MERCURY (Oct. 5, 2021) <https://www.virginiamercury.com/2021/10/05/were-sort-of-stuck-va-redistricting-commission-divided-over-race-as-deadline-looms/>; The Voting Rights Act of 1965 requires state governments to draw districts that advance minority representation. Before 2021 redistricting, this meant the drawing of majority-minority districts. Micah Altman & Michael McDonald, *The Voting Rights Act*, PUBLIC MAPPING PROJECT, http://www.publicmapping.org/what-is-redistricting/redistricting-criteria-the-voting-rights-act_ (last visited Sept. 18, 2022). Since *Alabama Legislative Black Caucus v. Alabama* (2015), federal courts have interpreted the Voting Rights Act to require the drawing of "minority-opportunity" districts.

¹⁰⁰ Moomaw, *supra* note 99.

¹⁰¹ *Id.*

Ultimately, conflict over minority representation culminated in a dramatic moment on October 8, when Democratic members walked out of a meeting just two days before the constitutionally-imposed deadline for approving the state legislative maps.¹⁰² The failure of the commission to pass the state legislative and congressional maps by their respective deadlines triggered automatic fourteen-day grace periods. When these deadlines passed without the commission approving any maps, the process shifted to SCOVA.¹⁰³

VII. 2021 REDISTRICTING: A TEST FOR THE COURT

The enabling legislation passed by the General Assembly in 2020 requires SCOVA to appoint two special masters to draw maps in compliance with criteria established in § 24.2-304.04 of the Virginia Code and Article II, Section 6 of the Virginia Constitution. In contrast with 2011-2012 redistricting, these new rules effectively prohibit mapmakers from drawing partisan and racial gerrymanders. They also require that the maps preserve communities of interest and advance representation for racial and language minorities.¹⁰⁴

The selection of the special masters to draft the Court's plans must begin within a week after the commission's final deadline passes.¹⁰⁵ Party leaders from the two largest parties in the House and Senate nominate at least three experts each, detailing their biography and experience.¹⁰⁶ The proposed special masters must have "requisite qualifications and experiences," and be free of conflicts of interest.¹⁰⁷ Then, the Court selects one person from each party's list of nominees, giving consideration to their "experience in the Commonwealth...and in the field of redistricting."¹⁰⁸

In November 2021, the Court disqualified all three of the Republican nominees, citing their involvement in partisan politics and concerns over their

¹⁰² Ned Oliver, *'We have had the Airing of the Grievances'; Virginia Redistricting Commission Moves on to Congress Maps*, VA. MERCURY (Oct. 11, 2021), <https://www.virginiamercury.com/blog-va/we-have-had-the-airing-of-the-grievances-va-redistricting-commission-moves-onto-congressional-maps/>; Dean Mirshahi, *Virginia Redistricting Commission Members Walk out of Meeting as Panel Remains Stuck in Partisan Impasse*, ABC 8 NEWS (Oct. 9, 2021), <https://www.wric.com/news/politics/capitol-connection/virginia-redistricting-commission-members-walk-out-of-meeting-as-panel-remains-stuck-in-partisan-impasse/>.

¹⁰³ Galuszka, *supra* note 98.

¹⁰⁴ VA. CODE ANN. § 24.2-304.04(3) (2022).

¹⁰⁵ *Id.* § 30-399(F).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

ability to serve the Court with impartiality.¹⁰⁹ The Court similarly rejected one of the Democratic nominees and instructed the Republicans to provide three additional nominees and the Democrats to provide one additional nominee.¹¹⁰ Once the parties selected new nominees, SCOVA selected Bernard Grofman from the Democrats' list—a redistricting expert and political science professor at the University of California, Irvine who had served as special master for the court-ordered revisions of the U.S. House map in 2016 and the House of Delegates map in 2019.¹¹¹ From the Republicans' second list, the Court chose Sean Trende, an elections analyst and Virginia resident.¹¹² In contrast to the commission, which was plagued by partisan fighting, the special masters were able to agree on a set of maps that was unanimously approved by SCOVA on December 28.¹¹³

VIII. EVALUATING THE REDISTRICTING PLANS

This section evaluates the plans that were approved by the Court that were drawn by the special masters, as well as twelve of the draft plans prepared by the Virginia Redistricting Commission that were ultimately never adopted. The maps are analyzed in terms of partisan fairness, competitiveness, and inclusion of Black opportunity districts.

In evaluating partisan fairness, it is important to consider how each map treats both parties, which can be done using two measures: partisan symmetry and the efficiency gap. Partisan symmetry is the oldest and most widely accepted measure of fairness in districting and is based on the concept that a map should treat both parties similarly under similar circumstances.¹¹⁴ That

¹⁰⁹ Teo Armos, *Virginia Supreme Court Disqualifies One GOP Nominee Tapped to Redistrict Maps*, WASH. POST (Nov. 12, 2021), <https://www.washingtonpost.com/dc-md-va/2021/11/12/virginia-redistricting-gop-special-masters/>; see also Galuszka, *supra* note 98.

¹¹⁰ Armos, *supra* note 109; see also Galuszka, *supra* note 98.

¹¹¹ Peter Galuszka, *Political Analyst and University Professor Chosen to Redraw Virginia Political Districts*, VA. MERCURY (Nov. 19, 2021), <https://www.virginiamercury.com/blog-va/political-analyst-and-university-professor-chosen-to-redraw-virginia-political-districts/>.

¹¹² Frank Green, *Four New Redistricting Special Master Nominees Forwarded to Virginia Supreme Court for State Redistricting*, THE NEWS & ADVANCE, (Nov. 18, 2021), https://newsadvance.com/news/state-and-regional/four-new-redistricting-special-master-nominees-forwarded-to-virginia-supreme-court-for-state-redistricting/article_35fffadd-db99-5a60-b124-6473f1947a8c.html.

¹¹³ VA., REDISTRICTING FINAL ORDER AND APPROVED MAPS (2021).

¹¹⁴ Andrew Gelman & Gary King, *Estimating the Electoral Consequences of Legislative Redistricting*, 85 J. AM. STAT. ASS'N 274, 276 (1990); Bernard Grofman & Gary King, *The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering after LULAC v. Perry*, 6 ELECTION LAW J. 2, 6 (2007); Jonathan N. Katz et al., *Theoretical Foundations and Empirical Evaluations of Partisan Fairness in District-Based Democracies*, 114 Kam. Pol. Sci. Rev. 164, 164 (2020); see also Edward R. Tufte, *The Relationship Between Seats and Votes in Two-Party Systems*, 67 AM. POL. SCI. REV. 540, 540-554 (1973).

is, if one party achieves a certain statewide vote share (e.g. 55%) and as a consequence wins a certain share of the vote (e.g. 65%), then a symmetrical map must award the other party the same seat share if it wins that vote share.¹¹⁵ Partisan symmetry is a logical extension of the principle of political equality—that is, that all voters’ choices are treated equally, regardless of whether the names of the candidates or political parties are switched.¹¹⁶ In order to satisfy the principle of political equality, a districting plan must necessarily award a majority of the seats to the party that wins a majority of the vote. In this regard, partisan symmetry identifies violations of the political equality principle, one of the bedrock principles in democracy, and violations of partisan symmetry indicate violations of political equality.

An alternative measure of partisan fairness is the “efficiency gap,” which was developed by Nicholas O. Stephanopoulos and Eric M. McGhee, and is widely used among practitioners.¹¹⁷ The efficiency gap measures imbalances in the allocation of “wasted votes”—that is, the excess votes received by the winning party, and votes received by the losing party.¹¹⁸ The appeal of the efficiency gap is that it is simple to calculate and it addresses an objection by Justice Kennedy that a partisan gerrymandering metric should not rely on “counterfactual reasoning.”¹¹⁹ The metric was used successfully by the plaintiffs challenging the 2011 Wisconsin state legislative redistricting maps, before the district court’s decision was overturned by the Supreme Court in 2018.¹²⁰ Although the efficiency gap is not a reliable measure of partisan gerrymandering and is prone to producing volatile results when one party tends wins substantially more votes statewide than the other,¹²¹ it can produce reasonable results when the statewide two-party vote share is relatively close.

In addition to evaluating partisan fairness, this section considers the competitiveness of the redistricting plans by counting the number of districts in which the estimated two-party vote differential is less than or equal to 10%. That is, if Democrats make up 55% of the population and Republicans make up 45%, the district is considered competitive. This section also accounts for the number of “Black opportunity” districts by counting the number of

¹¹⁵ See ANTHONY MCGANN, ET AL., *supra* note 5, at 65-66. Jonathan Katz et al., *Theoretical Foundations and Empirical Evaluations of Partisan Fairness in District-Based Democracies*, 114 AM. POL. SCI. REV. 164, 165 (2020).

¹¹⁶ Jonathan N. Katz et al., *Theoretical Foundations and Empirical Evaluations of Partisan Fairness in District-Based Democracies*, 144 AM. POL. SCI. L. REV. 1, 2 (2019).

¹¹⁷ Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 843 (2015).

¹¹⁸ *Id.*

¹¹⁹ *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 420 (2006).

¹²⁰ *Gill v. Whiteford*, 138 S. Ct. 1916, 1917, 1925 (U.S. 2018).

¹²¹ See Ellen Veomett, *Efficiency Gap, Voter Turnout, and the Efficiency Principle*, 17 ELEC. LAW. J. 249, 254-55 (2018).

districts in each plan where the Black voting-age population (“VAP”) exceeds 40%. Interpreting the line between what is permissible and impermissible in the use of race data has long been a challenge for redistricting authorities.¹²² In the past decade, the Supreme Court has signaled a shift away from drawing “majority-minority” districts.¹²³ The Court’s ruling in *Legislative Black Caucus v. Alabama* explicitly invalidated districts where mapmakers sought to achieve a mathematical threshold of Black voting population.¹²⁴ Since then, mapmakers have pivoted to the drawing of “minority opportunity” districts, an approach the Supreme Court appears to have blessed in *Bethune Hill*.¹²⁵ Accordingly, comparing the relative number of districts with a Black VAP of 40% or greater provides some insight into compliance of a map to Voting Rights Act standards.

These analyses draw upon data published by the Campaign Legal Center’s “Plan Score” webpage, which evaluates maps submitted by users in states across the country during the 2021 cycle.¹²⁶ Because the website does not include an estimate of partisan symmetry, this section uses a method to estimate the symmetry in the distribution of seats based on the partisan composition of each district relative to the statewide two-party vote share.¹²⁷

Estimating the partisan symmetry score of a plan involves some relatively simple math—it is the difference in the number of districts where Democratic support is at least 5% higher than the statewide vote share, minus the number of districts where Republican support is greater than 5% more than their statewide vote share. This difference is divided by the total number of districts. A positive value signifies a Democratic advantage, while a negative value signifies a Republican advantage. A symmetry score in excess of 10% or below -10% is indicative of extreme partisan gerrymandering.¹²⁸

In estimating the statewide two-party vote share, the analysis for this article involved averaging the two-party vote for the five top-of-the-ticket statewide contests held between 2016 and 2021.¹²⁹ This yielded an estimated Democratic statewide vote share of about 53.8% and a Republican statewide vote share of about 46.2%. In estimating the two-party vote share in each

¹²² See DAVID LUBLIN, *THE PARADOX OF REPRESENTATION: RACIAL GERRYMANDERING AND MINORITY INTERESTS IN CONGRESS 120-21, 124, 128* (2020).

¹²³ KEENA ET AL., *supra* note 7, at 96.

¹²⁴ *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 272-73 (2015).

¹²⁵ *Bethune-Hill v. Virginia State Board of Elections*, 578 U.S. 178, 195 (2017).

¹²⁶ *What is PlanScore*, CAMPAIGN LEGAL CTR., <https://planscore.campaignlegal.org/about/> (last visited Sept. 25, 2022).

¹²⁷ KEENA ET AL., *supra* note 7, at 30-31.

¹²⁸ *Id.*

¹²⁹ See *Election Results*, VA. DEP’T OF ELECTIONS, <https://www.elections.virginia.gov/results-reports/election-results/> (last visited Sept. 18, 2022).

district for each map, the estimates published by the Campaign Legal Center's Plan Score website were drawn upon, which also includes the efficiency gap estimates for each plan. In total, this article's analysis took into account fifteen maps: the House of Delegates, Virginia Senate, and U.S. House of Representatives maps drawn by the special masters, along with the twelve maps drawn by the Virginia Redistricting Commission.

IX. FINDINGS

In spite of the well documented partisan tensions that plagued the commission's deliberations, the maps drafted by the commission were largely free of gerrymandering.¹³⁰ Indeed, the Democratic and Republican drawn maps were strikingly similar in their performance. For example, the two draft U.S. House maps drawn by Democrats and presented to the commission on October 20 (named B5 and C1-B) have symmetry scores of 0% and -9%, respectively, and efficiency gap scores of 3.2 and 2.8, respectively, indicating they were free of extreme one-party bias. In addition, both maps included two districts with a Black VAP of more than 40% and had between two and three competitive districts. The Republican U.S. House drafts (A5 and C1-A) were comparable, with symmetry scores -9% and only negligible efficiency gap scores. Like the Democratic drafts, they both included two districts with Black VAP over 40%. However, the C1-A draft had only one competitive district, compared with Democrats' three competitive districts in C1-B.

The commission's draft plans are remarkably similar to the outcomes observed in the special masters' map that was approved by SCOVA. That plan includes no extreme bias in terms of symmetry or efficiency gap, along with three competitive districts and two districts with a Black VAP over 40%. In this regard, the maps drafted by the commission and the special masters represent a significant improvement over the congressional map approved during the previous redistricting cycle. For comparison, the congressional map that was signed into law in 2012 by Republican Governor Bob McDonnell (and eventually invalidated by a federal court in 2016) had a symmetry score of about -36%, indicating an extreme Republican gerrymander.¹³¹ In sum, it is clear that the reformed redistricting process, in spite of its flaws, achieved outcomes that were much less unfair than the maps drawn during the previous decade, when Republicans in the General Assembly used their dominant position in redistricting to draw extreme gerrymanders.

¹³⁰ The full results are reported in Table 1 of the Appendix.

¹³¹ This estimate is based on the results of the 2012 and 2014 U.S. House elections.

Similarly, not one of the Republican or Democratically drawn House of Delegates and Senate draft plans can be characterized as an extreme partisan gerrymander. While all of the maps appear to give Republicans a modest advantage in terms of their symmetry scores, the efficiency gap measure suggests only a trivial imbalance in wasted votes, to the Democrats' advantage. None of the maps have levels of bias that would suggest an extreme or durable advantage for one party over another. Additionally, despite the contentious debate within the commission over the drawing of Black opportunity districts, which culminated in the deadlock, the Republican and Democrat drafts are remarkably similar in the number of Black opportunity districts drawn. Indeed, all Republican and Democratic Senate and House of Delegates plans included the same number of districts with BVAP over 40%. However, the Republican and Democratic plans did vary in the number of competitive districts they included. In general, the Republicans' state legislative plans appear to have had more competitive districts than those of the Democrats, although a closer inspection of these districts shows that they tend to give Republican candidates a narrow edge. Presumably, Republican drafters believed these narrow majorities would give them a seat-share advantage; yet the statistical analyses do not support this conclusion.

Like the commission's draft plans, the special masters' House and Senate maps were free of extreme partisan bias. However, by comparison, their House and Senate plans included a greater number of competitive districts and Black opportunity districts than either the Democrats' or the Republicans' plans. Thus, it appears that the special masters' decision-making prioritized competition between parties while maximizing the number of minority opportunity redistricts in compliance with the Court's most recent interpretation of the VRA.

One of the biggest critiques of the maps drawn by the special masters is that, in many cases, two incumbents are paired into the same district, while there are many new districts drawn with no incumbents.¹³² Indeed, the congressional map completely upends the political status quo, suggesting a complete disregard of incumbent interests by the special masters.¹³³ Out of eleven districts in the congressional map, for example, three were drawn without any incumbents living within the district boundaries, while two other districts put two incumbents together.¹³⁴ Similarly, in the House and Senate plans, dozens

¹³² Mel Leonor, *Incumbents are an Afterthought in Proposed Maps for State House and Senate*, RICHMOND TIMES-DISPATCH, (Dec. 10, 2021), https://richmond.com/news/state-and-regional/govt-and-politics/incumbents-are-an-afterthought-in-proposed-maps-for-state-house-and-senate/article_634d3898-390f-550d-9146-be16d282754f.html#tncms-source=signup.

¹³³ *Id.*

¹³⁴ See *Virginia Redistricting 2021: US House*, VPAP, <https://www.vpap.org/redistricting/plan/us-house-of-representatives/> (last visited Sept. 17, 2022).

of incumbents are paired together in single districts, while dozens of other districts do not currently have any incumbents residing within them.¹³⁵ This has created some instability as the parties scramble to decide who will run and where they will run. In principle, it undermines the representative relationships between citizens and legislators that incumbents have worked hard to develop.¹³⁶

X. DISCUSSION

While there are many lessons to learn from the 2021 redistricting cycle, the outcomes suggest that the reforms, though imperfect, have succeeded in achieving what reformers sought—the prevention of gerrymandering. In this regard, the reforms are nothing short of a success insofar as they have neutralized the motive and opportunity to draw partisan and racial gerrymanders, increased competition, strengthened minority representation, and have, for the first time, mandated that redistricting deliberations be open to the public. The outcomes of 2021 redistricting additionally emphasize the importance of redistricting as a process. Though most of the public and media attention focused on the design and deliberations of the Virginia Redistricting Commission, in the end, it was the Court that was tasked with redrawing the lines. This underscores the importance of establishing clear contingency procedures in redistricting.

Nevertheless, in spite of the successes of the 2020 redistricting reforms, there are a few ways that the process could be further improved. First, one of the fatal flaws of the commission's design was that it included legislators as members. While the deliberations suggest that legislator members were comfortable engaging in long hours of debate and deliberation and were used to interparty conflict as a normal mode of operating, their perspectives and interests as elected officials were very different from the priorities of the citizen members.¹³⁷ Although another constitutional amendment before 2031 seems politically unlikely, the design of the commission could be improved by removing the legislator members and replacing them with a slate of citizen members with no partisan preference. This is comparable to the design of the

¹³⁵ See *id.*

¹³⁶ See Laura Vozzella & Meagan Flynn, *Virginia Redistricting Proposals Leave Incumbents Vulnerable, Candidates Scrambling to Rethink Campaigns*, WASH. POST. (Dec. 9, 2021), <https://www.washingtonpost.com/dc-md-va/2021/12/09/virginia-redistricting-maps-incumbents/>.

¹³⁷ See Graham Moomaw, *Va. Redistricting Commission Implodes as Republicans Reject Compromise and Democrats Walk Out*, VA. MERCURY (Oct. 8, 2021), <https://www.virginiamercury.com/2021/10/08/va-redistricting-commission-implodes-as-republicans-reject-compromise-and-democrats-walk-out/>.

California citizen commission, which has a track record of drawing maps that are largely free of partisan bias.¹³⁸

Moreover, the commission's debate over balancing minority representation with partisan fairness and preserving communities of interest underscore fundamental problems with single-member districts. While single-member districts have the benefit of advancing localized representation and, since the 1960s, have been an effective vehicle for expanding minority representation, they are uniquely vulnerable to political manipulation through the redistricting process and prone to demographic biases stemming from the geographic distribution of voters. For example, the House of Delegates map that was passed by the General Assembly in 2011 was anti-majoritarian in that it allowed Republicans to win a majority of seats in 2017 despite losing the popular vote.¹³⁹ Additionally, the district boundaries diluted the voting power of African American citizens and Democrats, who tend to live in densely populated urban areas.¹⁴⁰

Although a federal court would eventually invalidate these districts, it took four election cycles for this to happen.¹⁴¹ Lastly, nearly all of the maps enacted with single member districts present a problem of preserving political boundaries and communities of interest, while maintaining other goals such as population equity, partisan symmetry, competition, and compactness. When the number of districts is small, as is the case with the congressional map in Virginia, it becomes increasingly difficult to balance all these goals at once.

The obvious solution for these problems is a shift to multimember districts with a single-transferable vote rule.¹⁴² In contrast to multimember districts, which were used across the South during the Jim Crow era to disenfranchise African Americans through the use of a "winner-takes-all" decision rule, a single-transferable vote system would provide a form of proportional representation when used with multi-member districts. This would make the debate over minority-majority versus minority-opportunity districts moot, as sizable communities of interests would be able to elect candidates of their choosing, even if they do not amount to a mathematical majority of the electorate. In addition, the use of multimember districts would reduce the number

¹³⁸ KEENA ET AL., *supra* note 7, at 172.

¹³⁹ *Id.* at 4.

¹⁴⁰ *Id.* at 104-05.

¹⁴¹ *Id.* at 150-51.

¹⁴² Andrea Benjamin et al., *Achieving Multiracial, Multiparty Democracy*, UNION OF CONCERNED SCIENTISTS 16-17 (2022), <https://www.ucsusa.org/sites/default/files/2022-07/achieving-multiracial-multiparty-democracy.pdf>.

of districts needed to be drawn, and thus impose a ceiling on partisan bias.¹⁴³ For example, the Commonwealth of Virginia could be drawn with three districts representing regional or cultural areas (e.g., Northern Virginia, Blue Ridge, and Central-Tidewater districts) and a number of seats could be assigned based on relative population of each district. This would balance the often-conflicting goals of localized representation, district compactness, population equity, community preservation, partisan fairness, proportionality, and responsiveness, while providing an additional backstop against gerrymandering.¹⁴⁴

In sum, the lessons of 2020 redistricting reforms in Virginia show that no reforms are perfect and that there is room for further improvement to the redistricting process. However, they also suggest that even marginal changes to the process, like preventing political parties from dominating redistricting, can yield big improvements in terms of democratic fairness and election integrity.

¹⁴³ KEENA ET AL., *supra* note 7 at 113-14.

¹⁴⁴ *See generally id.* at 96-117.

APPENDIX A
Table 1: Proposed 2021 Redistricting Plans

Map Authors	Date Created	Plan	Status	Chamber	# of districts \leq 10% vote margin	# of districts >40% Black VAP	Symmetry score	Efficiency Gap
SCOVA (Special Masters)	12/28/21	Final	Adopted	US House	3	2	-9%	2.6 D
Commission (Republicans)	10/20/21	A5	draft	US House	2	2	-9%	1.6 R
Commission (Democrats)	10/20/21	B5	draft	US House	2	2	0%	3.2 D
Commission (Republicans)	10/20/21	C1-A	draft	US House	1	2	-9%	0.2 R
Commission (Democrats)	10/20/21	C1-B	draft	US House	3	2	-9%	2.8 D
Commission (Democrats)	10/8/21	B5	draft	Senate	8	5	-3%	1.7 D
Commission (Republicans)	10/3/21	A5	draft	Senate	9	5	-5%	0.1 D
Commission (Democrats)	10/2/21	B4	draft	Senate	7	5	-8%	2.0 D
Commission (Republicans)	10/2/21	A4	draft	Senate	8	5	-3%	0.6 D
SCOVA (Special Masters)	12/28/21	Final	Adopted	Senate	9	7	-5%	2.7 D
Commission (Democrats)	10/7/21	B7	draft	House of Delegates	18	12	-1%	3.0 D
Commission (Republicans)	10/3/21	A7	draft	House of Delegates	24	12	-4%	1.3 D
Commission (Democrats)	10/2/21	B6	draft	House of Delegates	19	12	-1%	2.7 D
Commission (Republicans)	10/2/21	A6	draft	House of Delegates	24	12	-5%	1.3 D
SCOVA (Special Masters)	12/28/21	Final	Adopted	House of Delegates	27	13	-5%	1.8 D

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