

## READYING VIRGINIA FOR REDISTRICTING AFTER A DECADE OF ELECTION LAW UPHEAVAL

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### INTRODUCTION

Until Virginians approved Constitutional Amendment 1 in November 2020, the Virginia Constitution required the General Assembly redraw Virginia's state legislative and congressional electoral districts every ten years in the wake of the national census.<sup>1</sup> Redistricting culminated in the adoption of legislation redefining those districts.<sup>2</sup> If the redistricting process had worked as intended after the 2010 census, electoral districts would have been redrawn and adopted by the General Assembly in 2011, approved by the Governor, and used for the ensuing decade.<sup>3</sup> The redistricting process did not work as the Virginia Constitution contemplated. The General Assembly redrew, and the Governor approved, state Senate and House of Delegates districts in 2011.<sup>4</sup> The state Senate districts remained substantially unchanged during the 2010s. Conversely, pursuant to litigation, a court-appointed special master

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1. VA. CONST. art. II, § 6; 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](https://www.washingtonpost.com/local/virginia-politics/virginia-redistricting-amendment-results/2020/11/02/5d1ef242-19f8-11eb-befb-8864259bd2d8_story.html) [<https://perma.cc/A4VM-FNAE>].

2. See VA. CODE ANN. §§ 24.2-302.2 (congressional districts), -303.3 (state Senate districts), -304.03 (House of Delegates districts) (Repl. Vol. 2016 & Cum. Supp. 2020).

3. See VA. CONST. art. II, § 6 ("The General Assembly shall reapportion the Commonwealth into electoral districts in accordance with this section in the year 2011 and every ten years thereafter.").

4. See *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 795 (2017); *Bethune-Hill v. Va. State Bd. of Elections*, 141 F. Supp. 3d 505, 522 (E.D. Va. 2015).

redrew many of the House of Delegates districts the General Assembly had drawn in 2011.<sup>5</sup> The current House of Delegates districts were finally fully implemented in 2019.<sup>6</sup> The General Assembly redrew, and the Governor approved, Virginia's congressional districts in 2012, one year after the Virginia Constitution mandated.<sup>7</sup> Pursuant to litigation, a court-appointed special master redrew multiple districts in that plan.<sup>8</sup> The current congressional districts were finally fully implemented in 2016.<sup>9</sup>

The chaos surrounding the post-2010 census redistricting process has led to uncertainty regarding the post-2020 census redistricting process. The last redistricting process helped trigger a constitutional amendment that gives primary redistricting responsibility to a newly created Virginia Redistricting Commission ("VRC").<sup>10</sup> The Virginia Constitution now requires the VRC redraw electoral districts in the wake of the 2020 census, approve the districts by supermajority, and submit them to the General Assembly. The General Assembly must enact the VRC's redistricted maps without changes before the new districts can be used.<sup>11</sup> The Supreme Court of Virginia would draw the districts if the VRC could not agree on maps to submit to the General Assembly or if the General Assembly declined to approve the VRC's maps.<sup>12</sup> The Governor of Virginia no longer has any role in redistricting.<sup>13</sup>

Post-2020 census redistricting is uncertain because the substantive law of redistricting has changed over the last decade. The laws that governed redistricting a decade ago—the Virginia Constitution, the Fourteenth and Fifteenth Amendments, and the Federal Voting Rights Act—will govern redistricting in 2021. However, significant legal developments in the last decade have changed and clarified the doctrine regarding those enactments. For example,

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5. *See* *Bethune-Hill v. Va. State Bd. of Elections*, 368 F. Supp. 3d 872, 873–74 (E.D. Va. 2019) (discussing Dr. Bernard Grofman's work drawing maps as a special master for House of Delegates redistricting).

6. *Id.* at 874.

7. *See* *Page v. Va. State Bd. of Elections*, No. 3:13cv678, 2015 U.S. Dist. LEXIS 73514, at \*11 (E.D. Va. June 5, 2015).

8. *Personhuballah v. Alcorn*, 155 F. Supp. 3d 552, 556 (E.D. Va. 2016) (adopting Dr. Bernard Grofman's maps drawn as special master for congressional redistricting).

9. *Id.* at 565 (ordering use of the plan proposed by the special master).

10. *See* Act of Apr. 10, 2020, ch. 1071, 2020 Va. Acts \_\_, \_\_.

11. S.J. Res. 18, Va. Gen. Assembly (Reg. Sess. 2020) (proposed amendment to VA. CONST. art. II, § 6-A(a), (d)–(e)).

12. *Id.* (proposed amendment to VA. CONST. art. II, § 6-A(f)–(g)).

13. *See id.*

the Supreme Court of the United States deemed part of the Voting Rights Act unconstitutional, releasing Virginia from compliance with the Act's preclearance requirement to which Virginia had been subject for over fifty years.<sup>14</sup> Preclearance required certain jurisdictions to ask permission from the United States Department of Justice ("DOJ") or the United States District Court for the District of Columbia before using new election laws or making voting changes, such as using new redistricting maps to ensure those changes did not harm the rights of minority voters.<sup>15</sup> That change may significantly alter how race is considered in redistricting. Whatever entity redraws the Commonwealth's electoral districts in 2021 will need to comply with fewer rules than the General Assembly did a decade ago, but that may not make redistricting easier.

The General Assembly was aware of the complexity surrounding 2021 redistricting and used its 2020 session to prepare. It passed legislation directing how electoral districts are to be redrawn and approved and sent the aforementioned constitutional amendment to voters for approval. The new legislation is sensible and addresses some issues of partisanship and race in redistricting but does not fully address the changes in the law of redistricting over the last decade that might affect the substance of the upcoming redistricting. The General Assembly may use its 2021 session to address lingering issues. However, it should have considered and resolved those issues in 2020. Addressing lingering issues in the 2021 session, as the redistricting process begins, may be deemed contrary to an attempt to eliminate politics from the redistricting process.

This Essay considers the changes in redistricting law that have occurred since Virginia redrew its electoral districts after the 2010 census, what those changes might mean for Virginia's redistricting in 2021, and how the General Assembly did and did not address those changes in its 2020 session. Part I discusses the legal regime in place for redistricting after the 2010 census. Part II notes how the General Assembly redistricted after the 2010 census. Part III explains how the law of redistricting has changed since Virginia last redistricted. Part IV analyzes how the General Assembly used

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14. See *Shelby County v. Holder*, 570 U.S. 529, 557 (2013).

15. 52 U.S.C. § 10304 (section 5 of the Voting Rights Act).

its 2020 session to prepare for redistricting in 2021, noting the issues it addressed and those it did not address.

## I. LEGAL REGIME FOR REDISTRICTING POST-2010 CENSUS

In Virginia, districting—the process of dividing a jurisdiction into geographical areas to provide those areas common representation<sup>16</sup>—was both simple and complex in 2011.<sup>17</sup> The process encompasses three separate tasks—redistricting the House of Delegates, the state Senate, and Virginia’s congressional delegation—with each task raising slightly different issues.<sup>18</sup> The state and federal requirements the General Assembly was required to navigate when redistricting in 2011 are overlapping and interconnected. The Virginia Constitution requires electoral districts be contiguous, compact, and of roughly equal population.<sup>19</sup> The U.S. Constitution and federal law similarly require electoral districts be of roughly equal population.<sup>20</sup> They also restrict the use of race when redistricting, but implicitly require consciousness of race so that minority-race voters can elect their representatives of choice to the same extent other voters can.<sup>21</sup> These components created a complex web of rules for mapmakers to navigate in 2011. Drawing districts with roughly equal population is simple; drawing coherent, equipopulous districts that adhere to the additional legal requirements for districting is complex.<sup>22</sup>

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16. Henry L. Chambers, Jr., *Enclave Districting*, 8 WM. & MARY BILL RTS. J. 135, 137 (1999) (“Districting is the process of grouping things—be they pieces of land or collections of people—in order to provide the group with common representation.”).

17. Though a legislature can be elected at-large and districts need not be geography-based, the Virginia Constitution requires the General Assembly and Virginia’s congressional representation be apportioned in geography-based electoral districts. VA. CONST. art. II, § 6 (“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.”).

18. Federal statutory law, not the U.S. Constitution, requires congressional districting. See 2 U.S.C. § 2c (requiring the creation of congressional districts).

19. VA. CONST. art. II, § 6.

20. See discussion *infra* sections I.B, III.B (describing requirements of the One Person-One Vote doctrine).

21. See 52 U.S.C. § 10301.

22. Drawing districts that match the purposes of districting can be even more difficult. For a discussion of justifications for districting, see generally Chambers, *supra* note 16.

### A. *Contiguity and Compactness*

The Virginia Constitution requires electoral districts be contiguous and compact.<sup>23</sup> Contiguity and compactness are related but serve somewhat different purposes.<sup>24</sup> Contiguity requires all parts of a district be physically connected.<sup>25</sup> Compactness requires a district not be spread too far apart.<sup>26</sup> The requirements may appear to constrain mapmakers significantly, but they do not.

The requirements suggest districts should be of standard shape, as square or circular as practicable, rather than like jigsaw puzzle pieces. However, Virginia law did not in 2011, and does not today, require standard-looking districts. It required districts that were contiguous by land or water and that met a minimal subjective standard of compactness. Mapmakers were not significantly constrained by the contiguity and compactness requirements in 2011.

The lack of constraint on mapmakers stemmed from both how Virginia law assesses the constitutionality of statutes and the law's substantive standards for contiguity and compactness. Post-2010 census redistricting produced standard legislation that defined election districts.<sup>27</sup> Virginia law presumes statutes are constitutional,<sup>28</sup> with statutes deemed constitutional unless they are clearly repugnant to the Virginia Constitution.<sup>29</sup> If the General Assembly believed it drew compact and contiguous electoral districts, the districts were to be deemed constitutional unless the General

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23. VA. CONST. art. II, § 6 (“Every electoral district shall be composed of contiguous and compact territory . . .”).

24. Chambers, *supra* note 16, at 159 (“[C]ompactness and contiguity are related, but are not the same. Nonetheless, contiguity and compactness are rarely analyzed separately, and compactness tends to subsume contiguity.”).

25. *See Wilkins v. West*, 264 Va. 447, 463–64, 571 S.E.2d 100, 109–10 (2002) (discussing the standard for contiguity).

26. Chambers, *supra* note 16, at 158 (“Compactness is a relative concept that focuses on the shape of a district and considers whether districting lines could be made more uniform or whether a district could be of a more regular shape.”).

27. *See, e.g.*, VA. CODE ANN. § 24.2-302.2 (Repl. Vol. 2016) (providing for the creation of Virginia's congressional districts).

28. *See, e.g.*, *Jamerson v. Womack*, 244 Va. 506, 509–10, 423 S.E.2d 180, 182 (1992) (“[W]e also note the ‘strong presumption of validity’ attached to every statute and the requirement that it ‘clearly’ violate some constitutional provision before courts will invalidate it.” (quoting *Caldwell v. Seaboard Sys. R.R.*, 238 Va. 148, 152, 380 S.E.2d 910, 912 (1989))).

29. *E.g.*, *Wilkins*, 264 Va. at 462, 571 S.E.2d at 108; *Jamerson*, 244 Va. at 509, 423 S.E.2d at 182 (“Legislative determinations of fact upon which the constitutionality of a statute may depend bind the courts unless clearly erroneous, arbitrary, or wholly unwarranted.”).

Assembly's position was not "fairly debatable."<sup>30</sup> A mapmaker must merely make an effort to comply with the legal standard for contiguousness and compactness for its districts to be deemed constitutionally acceptable.

In addition, the legal standards for contiguousness and compactness are low. Contiguousness requires each part of a district be accessible to all other parts of a district and is met when a person can reach every point in a district without crossing into another district.<sup>31</sup> A district will be deemed per se noncontiguous only when two parts of the district are completely separated by land.<sup>32</sup> When parts of a district are separated by water, the district may be contiguous even if the most practical way to get from one part of the district to another requires using a bridge that traverses a different district.<sup>33</sup> Under those circumstances, a court may find a district is contiguous if the use of other traditional redistricting factors—for example, preserving existing districts or communities of interest—justifies the district's shape.<sup>34</sup>

The compactness standard is easier to meet than is apparent because a district need not be as compact as possible to be deemed "compact."<sup>35</sup> Virginia's unique geography—including its eastern shore and its oddly shaped subdivisions (such as Henrico County)—guarantees that drawing maximally compact districts will conflict with other districting criteria, such as the desire to keep political subdivisions intact.<sup>36</sup> Nonetheless, even when a mapmaker is not constrained by such factors, the mapmaker need not attempt to draw highly compact districts. A minimal standard of

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30. See *Wilkins*, 264 Va. at 462, 571 S.E.2d at 108; *Jamerson*, 244 Va. at 509–10, 423 S.E.2d at 182.

31. For a general discussion of the contiguity requirement, see *Wilkins*, 264 Va. at 463–64, 571 S.E.2d at 109.

32. *Id.* at 464, 571 S.E.2d at 109 ("Short of an intervening land mass totally severing two sections of an electoral district, there is no per se test for the constitutional requirement of contiguity.").

33. See, e.g., *id.* at 465–66, 571 S.E.2d at 110 (discussing a district parts of which were separated by water with the only driving access between them being over a bridge that connected one part of the district with a different district).

34. See *id.* at 464, 571 S.E.2d at 109 (including "preservation of existing districts, incumbency, voting behavior, and communities of interest" as considerations that may have affected how a district was drawn and can affect whether the district will be deemed contiguous).

35. See *Jamerson*, 244 Va. at 517, 423 S.E.2d at 186 (noting certain Virginia state Senate districts were not as compact as they could be but were still constitutionally compact).

36. See *id.* at 512, 423 S.E.2d at 183 (noting Virginia redistricting policy considerations, including a desire to avoid splitting jurisdictions when districting).

compactness appears met if the mapmaker has good reasons for drawing the districts based on a combination of legitimate districting criteria.<sup>37</sup> For example, the southside Virginia state Senate districts deemed compact in *Jamerson v. Womack*<sup>38</sup> were 145 and 165 miles long, were relatively narrow, and ran parallel to one another.<sup>39</sup> The population in the two districts could have been divided into two very different and more geographically compact districts. Nonetheless, the districts were deemed compact.<sup>40</sup>

A compact district's relative compactness can matter. Compactness is a traditional districting principle.<sup>41</sup> The less compact a district is, the more likely a court may find an unacceptable, nontraditional districting principle has helped create the district. If a nontraditional districting principle predominates over traditional districting principles, the district may be deemed unlawful in some circumstances.<sup>42</sup>

In Virginia in 2011, compactness was a spatial and geographical requirement untethered to whether the population inside a district comprised a "community of interest."<sup>43</sup> Though one could argue contiguousness and compactness are required because they help ensure a district is internally cohesive, districts need not be internally cohesive to be deemed contiguous and compact.<sup>44</sup> If a district

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37. See *Wilkins*, 264 Va. at 463, 571 S.E.2d at 108 ("[I]f 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 [sic] requirements of Article II, § 6."); *Jamerson*, 244 Va. at 517, 423 S.E.2d at 186 ("The territories of Districts 15 and 18 are not ideal in terms of compactness. Nevertheless, we must give proper deference to the wide discretion accorded the General Assembly in its value judgment of the relative degree of compactness required when reconciling the multiple concerns of apportionment.").

38. 244 Va. at 517, 423 S.E.2d at 186.

39. *Id.* at 509, 423 S.E.2d at 181.

40. *Id.* at 517, 423 S.E.2d at 186.

41. See Chambers, *supra* note 16, at 158.

42. See, e.g., *Shaw v. Reno*, 509 U.S. 630, 642 (1993).

43. *Jamerson*, 224 Va. at 514, 23 S.E.2d at 184 (deeming the contiguity and compactness inquiries to revolve solely around spatial considerations). For a discussion of how Virginia's criteria for redistricting in 2021 define and consider "communities of interest," see *infra* section IV.A.5.

44. Compactness should be related to communities of interest and the idea that the population of a district has similar concerns. If a district's population does not comprise a community of interest, it is not clear why it should have shared representation. The assumption is that the closer a district's residents live to one another, the more likely they share a community of interest. See Chambers, *supra* note 16, at 163 ("The most important feature of compact districting is that it validates the notion that those who live close to each other should have common representation.").

was visually compact in 2011, whether it encompassed a community of interest did not appear to matter. However, if a district appeared noncompact, a mapmaker's attempt to create a community of interest in the district using other traditional districting criteria could help convince a court the district was compact.

### B. *One Person-One Vote and Equipopulous Districts*

The U.S. and Virginia Constitutions require electoral districts contain roughly equal populations. The Virginia Constitution's explicit requirement of equal representation for equal populations leads directly to the requirement of equipopulous districts.<sup>45</sup> The U.S. Constitution indirectly requires nearly equipopulous districts through its One Person-One Vote ("OPOV") jurisprudence. The OPOV doctrine stems from the Fourteenth Amendment's Equal Protection Clause. The assertion of a right to an equally weighted vote was initially deemed by the Supreme Court to involve a non-justiciable political question.<sup>46</sup> Litigants persisted, arguing Voter A and Voter B are treated unequally if Voter A's vote has more power to elect a representative than does Voter B's.<sup>47</sup> Eventually, the Court ruled the claim to an equally weighted vote is an Equal Protection issue that involves political rights rather than a political question, and ruled the matter justiciable.<sup>48</sup> The Court then ruled the Equal Protection Clause guarantees a right to an equally weighted vote.<sup>49</sup> The requirement of an equally weighted vote is operationalized by requiring districts of relatively equal population.<sup>50</sup> Though districts with the same population can have different numbers of voters, arguably triggering an OPOV violation, the Court has ruled OPOV is fairly realized through equipopulous districts rather than districts with equal numbers of voters.<sup>51</sup>

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45. VA. CONST. art. II., § 6 ("Every electoral district . . . shall be so constituted as to give, as nearly as is practicable, representation in proportion to the population of the district.").

46. *Colegrove v. Green*, 328 U.S. 549, 558 (1946).

47. *See Chambers*, *supra* note 16, at 138 ("At its core, the one-person, one-vote doctrine established that all citizens have an equal right to choose their political representatives, advance their political interests, and influence government.").

48. *Baker v. Carr*, 369 U.S. 186, 237 (1962).

49. *See Reynolds v. Sims*, 377 U.S. 533, 565–66 (1964).

50. *Id.* at 579.

51. *See Evenwel v. Abbott*, 136 S. Ct. 1120, 1132 (2016) (rejecting the argument that districts must contain equal numbers of voters rather than equal population).

States have argued that one of their state legislative houses should not be required to have equipopulous districts, just as the U.S. Senate is not subject to the OPOV doctrine.<sup>52</sup> Those arguments have been rejected.<sup>53</sup> Constitutional text explicitly structures the U.S. Senate, exempting it from the OPOV doctrine.<sup>54</sup> Unevenly apportioned districts in a state legislative body violate the Equal Protection Clause and are unconstitutional.

Electoral districts need only be roughly equipopulous. They must contain populations that are as close to equal as practicable.<sup>55</sup> For congressional districts, only slight deviations from equality are allowed.<sup>56</sup> Much larger deviations are allowed for state legislative districts.<sup>57</sup> The nature of state legislatures and legislative business suggests that allowing state legislative districts to follow political subdivisions and other redistricting criteria—even when that leads to nonequipopulous districts—is more important in that context than in the congressional context. State legislative districting plans that have a maximum overall deviation of greater than ten percent from perfect equality have been deemed constitutional.<sup>58</sup> State legislative districting plans cannot contain a maximum deviation of ten percent by right, but ten percent is a standard. When the maximum deviation is below ten percent, constitutionality can be presumed, with the plaintiff required to prove the deviation is unnecessary or motivated by an improper purpose.<sup>59</sup>

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52. See, e.g., *Reynolds*, 377 U.S. at 571–74 (discussing the analogy between Alabama Senate structure and U.S. Senate structure set out in an Alabama redistricting plan).

53. *Id.* at 568 (holding that, when apportioned, all state legislative bodies must be apportioned into districts with roughly equal populations).

54. U.S. CONST. art. I, § 3, cl. 1 (providing equal representation by state rather than by population).

55. See *Gaffney v. Cummings*, 412 U.S. 735, 743–45 (1973) (noting absolutely equal population is not required).

56. See *Abrams v. Johnson*, 521 U.S. 74, 98 (1997); *Karcher v. Daggett*, 462 U.S. 725, 730 (1983) (holding population deviations in congressional districts must not be able to be eliminated by a good-faith effort to draw districts of equal population and must be necessary to achieve legitimate state objectives).

57. See *Mahan v. Howell*, 410 U.S. 315, 318–19, 321 (1973) (noting that, for practical reasons, more flexibility in satisfying the equal apportionment requirement is appropriate for state legislative districts than for congressional districts, and upholding a Virginia redistricting plan including a maximum population variation of 16.4%).

58. See, e.g., *id.* Maximum deviation is calculated by adding the maximum percentage underpopulation to the maximum percentage overpopulation. See *Evenwel v. Abbott*, 136 S. Ct. 1120, 1124 (2016).

59. See *Cox v. Larios*, 542 U.S. 947, 947, 949–50 (2004) (Stevens, J., concurring) (summary affirmation of a finding of unconstitutionality for a redistricting plan with a maximum deviation under ten percent when the deviation was caused by improper political reasons).

### C. *Partisan Gerrymandering*

In 2011, the Supreme Court had not resolved whether redistricting for naked partisan advantage was unconstitutional, though it had been considering the issue for twenty-five years. In *Davis v. Bandemer*, the Court determined partisan gerrymandering is justiciable.<sup>60</sup> However, the Justices could not agree about the precise contours of the claim, and no relief was provided.<sup>61</sup> That approach continued in *Vieth v. Jubelirer*,<sup>62</sup> where five members of the Court deemed partisan gerrymandering cognizable, but no relief was provided.<sup>63</sup> Justice Kennedy—one of the group of five Justices who deemed partisan gerrymandering cognizable<sup>64</sup>—concurred in the decision of the four-Justice plurality that deemed gerrymandering a political question because he could not identify judicially discernible and manageable standards that would allow the claims to be adjudicated.<sup>65</sup> *Vieth's* multiple fractured opinions suggested the right to be free of partisan gerrymandering was a right without a remedy.

By 2011, three ideas had emerged. First, partisan gerrymandering was inconsistent with constitutional ideals.<sup>66</sup> Second, no agreement existed on the standards to use to determine when unconstitutional partisan gerrymandering had occurred.<sup>67</sup> Third, a right to be free of partisan gerrymandering did not subsume a right to proportional representation.<sup>68</sup> What remained unclear was whether a districting plan infected with partisan gerrymandering would ever be invalidated on that ground.

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60. 478 U.S. 109, 119 (1986).

61. *See id.* at 126–27, 142–43 (plurality opinion), 144 (O'Connor, J., concurring), 161–62 (Powell, J., dissenting) (setting out competing views of the appropriate standards to use in resolving political gerrymandering claims).

62. 541 U.S. 267 (2004).

63. *See id.* at 311 (Kennedy, J., concurring), 326–27 (Stevens, J., dissenting), 346 (Souter, J., joined by Ginsburg, J., dissenting), 368 (Breyer, J., dissenting) (variously asserting partisan gerrymandering claims may be justiciable under the Court's decision in *Bandemer*).

64. *Id.* at 317 (Stevens, J., dissenting) (noting five Justices took exception to the plurality's position that political gerrymandering claims are nonjusticiable).

65. *Id.* at 306–08 (Kennedy, J., concurring).

66. *See id.* at 316–17.

67. The Court never found a political gerrymander it thought it could remedy. *See, e.g.,* League of United Latin Am. Citizens v. Perry (*LULAC*), 548 U.S. 399, 414, 423 (2006).

68. *See* *Davis v. Bandemer*, 478 U.S. 109, 131–32 (1986).

### D. *Race and Redistricting*

Race is the most difficult issue a mapmaker must manage when redistricting. Redistricting must comply with the Fourteenth and Fifteenth Amendments and the Voting Rights Act (“VRA”). The Amendments and the VRA can take different paths toward ensuring racial equality in voting. The Fourteenth Amendment’s Equal Protection Clause requires all races be treated equally with respect to rights, including voting rights, and suggests considerations of race should not play a role in public policy decision-making, including redistricting.<sup>69</sup> The Fifteenth Amendment bars the denial or abridgment of the right to vote because of race.<sup>70</sup> However, the history of American voting rights suggests that protecting the voting rights of minority voters may require awareness of and the explicit consideration of race, including when redistricting. The VRA enforces the Fifteenth Amendment and encourages equality by demanding an equal opportunity for minority voters to exercise their voting power and to elect their representatives of choice when appropriate.<sup>71</sup> The Fourteenth Amendment on one hand and the Fifteenth Amendment and VRA on the other combine to demand mapmakers consider race as little as possible while considering race as much as necessary to guarantee minority voters are able to exercise their right to vote fully.<sup>72</sup>

#### 1. Fourteenth Amendment

The Fourteenth Amendment bars states from intentionally using race to make decisions except under limited circumstances. The use of race tends to be subject to strict scrutiny whether race is used affirmatively to help voters or negatively to harm them.<sup>73</sup>

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69. See Henry L. Chambers, Jr., *Colorblindness, Race Neutrality, and Voting Rights*, 51 EMORY L.J. 1397, 1410–14, 1424 (2002) (discussing the development of colorblindness doctrine under the Fourteenth Amendment).

70. U.S. CONST. amend. XV, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”).

71. See Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437 (codified as amended at 52 U.S.C. § 10301(a)) (announcing the Act’s purpose as enforcing the Fifteenth Amendment and prohibiting voting practices that discriminate on the basis of race).

72. See *Jamerson v. Womack*, 244 Va. 506, 511, 423 S.E.2d 180, 182–83 (1992) (noting redistricting must comply with the U.S. Constitution and sections 2 and 5 of the Voting Rights Act).

73. See *Shaw v. Reno*, 509 U.S. 630, 653 (1993) (discussing the imposition of strict scrutiny for malign and benign racial classifications); *Miller v. Johnson*, 515 U.S. 900, 904

However, in the redistricting context, the restriction on the use of race is somewhat relaxed.<sup>74</sup> Rather than bar all uses of race in redistricting, the Supreme Court deems the Equal Protection Clause implicated when race is used as a predominant factor in redistricting.<sup>75</sup>

In *Shaw v. Reno*,<sup>76</sup> a case involving white voters challenging their placement in a majority-minority district, the Court ruled assigning voters to districts based on race—even when attempting to provide minority-race voters fair access to political power—may violate the Fourteenth Amendment.<sup>77</sup> The plaintiffs were required to prove the redistricting, and their assignment into the district, could not be explained on any grounds other than race.<sup>78</sup> They did so, according to the Court, by showing the district's irregular shape suggested traditional districting principles, such as compactness and the preference to keep political subdivisions whole, had been abandoned.<sup>79</sup> The subversion of those principles supported the claim that the districting was unexplainable on any grounds other than race.<sup>80</sup> *Shaw* triggered confusion because some believed the Court's decision held the strange shape of the district alone proved the Fourteenth Amendment violation.<sup>81</sup> The Court clarified the doctrine in *Miller v. Johnson*.<sup>82</sup>

In *Miller*, the Court ruled the Fourteenth Amendment is implicated when mapmakers use race as a predominant factor in redistricting.<sup>83</sup> Plaintiffs challenging the redistricting were required to prove the use of race subordinated the use of “traditional race-neutral districting principles,” such as compactness, contiguousness,

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(1995).

74. See Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Race and Representation Revisited: The New Racial Gerrymandering Cases and Section 2 of the VRA*, 59 WM. & MARY L. REV. 1559, 1560–67 (2018) (discussing the genesis of the Supreme Court's analysis of race in redistricting).

75. See *Easley v. Cromartie*, 532 U.S. 234, 241–42 (2001) (citing *Hunt v. Cromartie*, 526 U.S. 541, 546–47 (1999)).

76. 509 U.S. 630.

77. *Id.* at 658.

78. *Id.* at 642.

79. *Id.* at 646–47, 649.

80. *Id.* (noting the use of traditional districting criteria can defeat a claim that a district was drawn for racial reasons).

81. See *Miller v. Johnson*, 515 U.S. 900, 912–13 (1995). This confusion may be explained by the *Shaw* Court's assertion that “reapportionment is one area in which [a district's] appearances do matter.” *Shaw*, 509 U.S. at 647.

82. 515 U.S. at 911–15.

83. *Id.* at 916.

respect for political subdivisions, and communities of interest.<sup>84</sup> The shape of the districts was relevant to proving the subordination of other districting principles, but did not alone prove the predominant use of race.<sup>85</sup>

When race is a predominant factor in districting, its use must survive strict scrutiny.<sup>86</sup> The use of race must serve a compelling state interest and be narrowly tailored to serve that interest.<sup>87</sup> Compliance with the Voting Rights Act has been treated as a compelling state interest with the “narrow tailoring” requirement being met by the need to use race to comply with the VRA.<sup>88</sup> That requires knowing exactly what the VRA requires, even as the VRA’s meaning changes over time.

## 2. Fifteenth Amendment

The Fifteenth Amendment bars voting restrictions based on race, color, or previous condition of servitude.<sup>89</sup> Laws that deny the right to cast a ballot based on race or that limit the effectiveness of a voter’s ballot based on race violate the Fifteenth Amendment.<sup>90</sup> The Amendment requires intentional discrimination by the state.<sup>91</sup> However, intent may be proven when facially race-neutral action hides intentional discrimination. For example, the grandfather clause—a clause basing one’s eligibility to vote on one’s grandfa-

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84. *Id.* (“[A] plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations.”).

85. *Id.* at 912–13. For discussion of race predominance, see Chambers, *supra* note 69, at 1454–57.

86. *See* Abrams v. Johnson, 521 U.S. 74, 91 (1997) (“If race is the predominant motive in creating districts, strict scrutiny applies . . .” (citing Bush v. Vera, 517 U.S. 952, 959 (1996))).

87. *Id.* at 91.

88. *See* Bush, 517 U.S. at 976–77 (discussing the “narrow tailoring” requirement in the redistricting context). Race need not be used as narrowly as possible in drawing districts to meet the narrow tailoring prong. *Id.* at 977.

89. *See* U.S. CONST. amend. XV, § 1 (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.”).

90. *See* Chambers, *supra* note 69, at 1419–33.

91. *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 223 (2009) (noting the Fifteenth Amendment is limited to covering intentional discrimination); *Mobile v. Bolden*, 446 U.S. 55, 65 (1980) (plurality opinion) (same).

ther's ability to vote on a date before former slaves had been allowed to vote—was used to limit the African American vote and was eventually deemed unconstitutional.<sup>92</sup>

The Fifteenth Amendment has also been used to stop electoral line drawing used to abridge minority voting rights. In *Gomillion v. Lightfoot*, the Supreme Court reviewed a law that redrew the city limits of Tuskegee, Alabama to exclude nearly all Black residents from the city.<sup>93</sup> Though the legislation was facially race neutral—it merely defined the city's boundaries—the Court found that if discriminatory intent supported the law, it was unconstitutional.<sup>94</sup> Attempts to limit the voting rights of African Americans, evidenced by cases like *Gomillion*, led to the passage of the Voting Rights Act, which may require the explicit consideration of race to guarantee the rights of minority-race voters are protected.

### 3. The Voting Rights Act

Passed in 1965 in the wake of the Civil Rights Act of 1964's tepid protection of voting rights, the Voting Rights Act enforces the Fifteenth Amendment.<sup>95</sup> Reauthorized in 1970, 1975, 1982, and 2006,<sup>96</sup> the VRA bars the denial or abridgment of the right to vote on account of race or color.<sup>97</sup> The VRA explicitly requires minority voters be given the ability to elect representatives of their choice consistent with democratic principles.<sup>98</sup> Compliance with that command may require race be considered or used in redistricting.

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92. See *Lane v. Wilson*, 307 U.S. 268, 276–77 (1939); *Guinn v. United States*, 238 U.S. 347, 367 (1915).

93. 364 U.S. 339, 340–41 (1960).

94. *Id.* at 347–48.

95. Pub. L. No. 89-110, 79 Stat. 437 (1965); see *Voinovich v. Quilter*, 507 U.S. 146, 152 (1993) (“Congress enacted § 2 of the Voting Rights Act of 1965 to help effectuate the Fifteenth Amendment’s guarantee that no citizen’s right to vote shall ‘be denied or abridged . . . on account of race, color, or previous condition of servitude’” (citation omitted)).

96. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314; Act of Aug. 6, 1975, Pub. L. No. 94-73, 89 Stat. 400; Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131; Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577.

97. See 52 U.S.C. § 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 . . .”).

98. See *id.* § 10301(b) (“A violation of subsection (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

Sections 2 and 5 were the key provisions of the VRA with which mapmakers needed to comply in 2011. The sections overlap but used different standards and had different purposes. Section 2 applied—and still applies—to all jurisdictions.<sup>99</sup> Until 2013, section 5 applied to a limited number of covered jurisdictions, including Virginia, and required those jurisdictions to have any new voting laws precleared or approved by the federal government before they could be used.<sup>100</sup> The preclearance provision was meant to guarantee the identified jurisdictions continued to move toward providing equal voting rights to their minority voters.

a. Section 2

Section 2 of the VRA bars laws and procedures that discriminate with respect to the right to vote on the basis of race. A law may violate section 2 if it either intentionally abridges or denies or otherwise has the effect of abridging or denying the right to vote based on a voter's race.<sup>101</sup> When minority voters cannot elect their representatives of choice to the same extent nonminority voters can elect their representatives of choice section 2 may be violated.<sup>102</sup> In the context of redistricting, section 2 provides minority-race voters no more and no less than other voters can gain through their exercise of the right to vote in an electoral system. Some object, arguing racial discrimination cannot exist and the VRA cannot be violated if mapmakers draw fair districts without explicitly considering race. However, if drawing fair districts or no districts at all—at-large voting—has the effect of harming the ability of minority voters to elect their candidates of choice, the VRA may be violated.

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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.”).

99. See *Georgia v. Ashcroft*, 539 U.S. 461, 478 (2003) (“For example, while § 5 is limited to particular covered jurisdictions, § 2 applies to all States.”).

100. Jurisdictions were covered based on the formula in section 4 of the VRA. See 52 U.S.C. § 10303(b) (2012).

101. The 1982 amendments to the Voting Rights Act broadened section 2's scope to include a quasi-effects test in the wake of *City of Mobile v. Bolden*, 446 U.S. 55 (1980). Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, sec. 3, § 2, 96 Stat. 131, 134 (codified as amended at 52 U.S.C. § 10301(a)); see *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986) (noting the 1982 amendments were made largely in response to the *Bolden* decision).

102. Some Justices do not believe section 2 should apply to redistricting. See, e.g., *Holder v. Hall*, 512 U.S. 874, 922–23 (1994) (Thomas, J., concurring).

The Supreme Court addressed issues related to the fairness of voting systems in *Thornburg v. Gingles*.<sup>103</sup> *Gingles* involved, in part, minority-race plaintiffs challenging several multimember districts and claiming their continued use effectively lessened their opportunity to elect representatives of their choice.<sup>104</sup> Evaluating the claim required the Court compare the representation minority voters received under the multimember system to the representation they would fairly receive under a single-member district system. The comparison was tricky, as the Court needed to distinguish between the amount of representation minority voters failed to gain because they were a *numerical* minority and the amount of representation they failed to gain because they were a *racial* minority.

The Court created three *Gingles* preconditions to illuminate that distinction. The three *Gingles* preconditions are: (1) the minority voters must be sufficiently numerous to constitute a majority in a regularly drawn single-member district, (2) the minority voters must be politically cohesive, and (3) bloc voting must exist such that nonminority voters can generally stop the minority voters from electing their candidate of choice.<sup>105</sup> If the minority voters do not constitute a majority in a compact single-member district, they lose because they are too geographically dispersed and not because they are racial minorities. If the minority voters are not cohesive, they lose because they lack the numbers to split the district's vote and still elect their candidate of choice and not because they are a racial minority. If racial bloc voting does not exist or does not stop the minority voters from electing their candidate of choice, the minority voters fail to elect their candidate of choice because they do not build coalitions and not because they *cannot* build coalitions. The *Gingles* preconditions have been criticized as too narrow, and they may be.<sup>106</sup> Nonetheless, the Supreme Court treated them as the minimum basis for a section 2 claim.<sup>107</sup> If the *Gingles* preconditions are met, the minority voters must then prove—based on a totality of the circumstances—they have less of an opportunity to

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103. 478 U.S. 30 (1986).

104. *Id.* at 35.

105. *Id.* at 50–51.

106. See, e.g., Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 199–204 (1989).

107. See, e.g., *Grove v. Emison*, 507 U.S. 25, 40 (1993) (discussing the *Gingles* factors as threshold factors for a section 2 vote-dilution challenge).

elect their representatives of choice than other groups.<sup>108</sup> If the *Gingles* preconditions are not met—assuming no other intentional discrimination has been proven—there is no section 2 violation in the context of redistricting.

The Court also applies the *Gingles* preconditions in cases when districts already exist.<sup>109</sup> When redistricting is at issue, the question is whether minority voters would have a better and fairer opportunity to elect their representatives of choice if the districts were drawn differently. One remedy for a section 2 violation would be to draw the majority-minority district that the *Gingles* preconditions prove can be drawn.

Depending on the population density and dispersion of minority voters, mapmakers may be able to draw more majority-minority districts than would provide proportional representation for minority voters. Mapmakers are not required to do so.<sup>110</sup> Section 2 focuses on making sure minority voters have as much power as they should—not necessarily more relative power than other voters. If more majority-minority districts than are necessary to reach proportional representation arose organically, section 2 would not bar them.<sup>111</sup> Such districts would simply exist; they would not be a remedy for a section 2 violation.

When redistricting, mapmakers must focus carefully on matching the potential remedy to the potential violation to avoid liability. A legislature cannot remedy a section 2 violation in one part of a state with a majority-minority district in a different part of the state.<sup>112</sup> If section 2 violations exist in both parts of the state, the legislature may draw one majority-minority district if drawing two

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108. See *LULAC*, 548 U.S. 399, 425–26 (2006) (“If all three *Gingles* requirements are established, the statutory text directs us to consider the ‘totality of circumstances’ to determine whether members of a racial group have less opportunity than do other members of the electorate.” (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1011–12 (1994))).

109. See *Grove*, 507 U.S. at 40 (deciding *Gingles* should apply to single-member districts).

110. See *Johnson*, 512 U.S. at 1016 (noting mapmakers may not be required to draw the maximum number of majority-minority districts that can be drawn when minority voters have proportional representation with fewer than the maximum majority-minority districts).

111. See *Voinovich v. Quilter*, 507 U.S. 146, 155–56 (1993) (suggesting states are not prohibited from drawing majority-minority districts in the absence of a section 2 violation).

112. *LULAC*, 548 U.S. at 430–31.

might “overrepresent” the minority group or if drawing two districts is not possible for other reasons.<sup>113</sup>

When remedying a section 2 violation, a mapmaker can choose to draw a majority-minority district or a crossover district in which a plurality of minority voters can join with a group of nonminority voters to reliably elect the representative the minority voters prefer.<sup>114</sup> Leaving the choice to the jurisdiction may seem odd. However, a crossover district allows minority voters to elect their representative of choice and may leave the minority voters who would have helped make a majority-minority district free to influence a different district or become a part of another crossover district. That is a choice the jurisdiction should be allowed to make.

#### b. Section 5

Until 2013, section 5 of the VRA required specific jurisdictions, including Virginia, to have their voting changes precleared by the DOJ or a three-judge panel of the United States District Court for the District of Columbia (“DDC”) before those changes became effective. Section 5 ensures equality by requiring a covered jurisdiction’s voting changes be precleared by the DDC only when the voting change at issue “neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color . . . .”<sup>115</sup> The DOJ administratively preclears the voting change when it believes the law meets the standard the DDC is required to apply.<sup>116</sup> Jurisdictions covered by section 5 included those defined by the coverage formula in section 4 of the VRA and those covered by section 3 of the VRA due to their record of voting rights violations.<sup>117</sup> The preclearance process functionally required covered jurisdictions to ask permission before applying changes to their voting and election laws.

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113. *Id.* at 429.

114. *See* *Bartlett v. Strickland*, 556 U.S. 1, 13 (2009).

115. 52 U.S.C. § 10304(a).

116. *See* Daniel P. Tokaji, *If It’s Broke, Fix It: Improving Voting Rights Act Preclearance*, 49 *HOW. L.J.* 785, 797 (2006) (discussing the standard for administrative preclearance).

117. *See* 52 U.S.C. § 10304(a) (section 5, providing jurisdictions subject to preclearance requirements); *id.* § 10302(c) (section 3, permitting federal courts to subject jurisdictions beyond those covered by section 4 to section 5 preclearance based on patterns of voting rights violations).

Preclearance was necessary because historical deficiencies in the covered jurisdictions' voting enforcement or voter registration suggested racial minorities had not been able to exercise their right to vote as fully as others in the covered jurisdictions.<sup>118</sup> Practically, preclearance forced jurisdictions to consider how their voting changes would be viewed by the DOJ or the DDC. That alone may have had a moderating effect on the legislation from those jurisdictions. The preclearance process ensured new laws could not lead to the retrogression of the position of minority voters' ability to exercise their right to vote.<sup>119</sup> Section 5 prohibited the covered jurisdictions from backsliding on any progress they had made toward providing equal voting rights.<sup>120</sup>

A redistricting plan cannot have “the purpose of or . . . have the effect of diminishing the ability of any citizens of the United States on account of race or color . . . to elect their preferred candidates of choice . . . .”<sup>121</sup> In the redistricting context, the preclearance inquiry requires the comparison of the power of minority voters to elect their preferred representatives of choice *before* the redistricting plan was passed to their power to elect their representatives of choice *after* the redistricting plan was passed.<sup>122</sup> That is tricky because districting is a dynamic process, particularly when comparing new districts to old districts drawn ten years prior. Population shifts over a decade ensure that new districts will not perfectly match old districts geographically. Though section 5 may appear to invite and may have led to district-versus-district retrogression comparisons, courts often compared an entire old redistricting map to the redistricting map that replaced it when considering retrogression.<sup>123</sup>

Population shifts could make a retrogression analysis difficult even when comparing an entire map to another entire map. Inward migration and outmigration can change a state's demographics. If a state's percentage of minority population changes, the amount of

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118. For a discussion of the original purpose and conception of preclearance, see *South Carolina v. Katzenbach*, 383 U.S. 301, 315–23 (1966).

119. *City of Lockhart v. United States*, 460 U.S. 125, 134–35 (1983) (describing section 5's purpose as prohibiting changes to voting procedures that lead to retrogressions in the ability of minority-race voters to exercise the right to vote); *Beer v. United States*, 425 U.S. 130, 141 (1976) (same).

120. See *Beer*, 425 U.S. at 140–41.

121. 52 U.S.C. § 10304(b).

122. See, e.g., *Georgia v. Ashcroft*, 539 U.S. 461, 465–66, 469 (2003).

123. *Id.* at 478.

power minority voters should wield might change. If intrastate population migration alters where minority groups live, comparisons can be difficult. In some circumstances, whether *Gingles* preconditions can be met in a specific part of the state can change based on population migration. Minority voters may become too dispersed to fit into a single-member district, or they may become less cohesive, or bloc voting may lessen. Nonetheless, the comparison between maps separated by a decade needed to be made for retrogression purposes.

In 2011, the Supreme Court's approach to retrogression in the redistricting context was unclear. In 2003, the Court decided *Georgia v. Ashcroft*.<sup>124</sup> In *Ashcroft*, the Court decided states could meet their section 5 non-retrogression redistricting obligations in part by creating "influence districts."<sup>125</sup> In contrast to crossover and majority-minority districts, influence districts allow minority voters to have influence over who is elected to represent a district but do not provide a sufficiently robust minority plurality for minority voters to elect their representatives of choice.<sup>126</sup> Georgia argued the set of influence districts, crossover districts, and majority-minority districts it created under its new districting plan provided just as much electoral power in the state legislature for minority voters as they had under the prior map, meaning no retrogression had occurred.<sup>127</sup> The *Ashcroft* Court determined section 5 required no retrogression with respect to the overall power of minority voters to influence the political system and allowed the trial court to consider the effect of influence districts in deciding the retrogression issue.<sup>128</sup> Congress disagreed.

The Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006 amended and reauthorized the Voting Rights Act.<sup>129</sup> It explicitly repudiated the *Ashcroft* Court's opinion. The 2006 amendments make clear that any voting rule (including a redistricting plan)

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124. 539 U.S. 461 (2003).

125. *Id.* at 482.

126. *Bartlett v. Strickland*, 556 U.S. 1, 13 (2009) ("At the other end of the spectrum are influence districts, in which a minority group can influence the outcome of an election even if its preferred candidate cannot be elected.")

127. *See Ashcroft*, 539 U.S. at 467–72 (discussing Georgia's redistricting and the motivation supporting it).

128. *Id.* at 490–91.

129. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577.

that diminishes minority voters' ability "to elect their preferred candidates of choice denies or abridges the right to vote . . . ."<sup>130</sup> Influence districts do not allow minority voters to elect their representatives of choice, so they cannot help a jurisdiction meet its section 5 obligation. The amendments did not indicate how crossover districts should factor into the retrogression analysis. Crossover districts do lead to the election of the minority voters' candidates of choice, but with help from others. A court might be allowed to compare crossover and majority-minority districts in a new plan to the crossover and majority-minority districts in the plan that was replaced. Conversely, a court could be limited to comparing majority-minority districts in a new plan to the majority-minority districts in a superseded plan to determine if a state had met its non-retrogression obligation.

### E. Summary

Mapmakers in 2011 had a difficult task. Their job was to create compact, contiguous districts of equal population which considered race enough to avoid violations of sections 2 or 5 of the VRA, but considered race *just* enough either to avoid a finding that race predominated in drawing districts or to garner a finding that the use of race was sufficiently narrowly tailored to meet a compelling state interest.<sup>131</sup> The use of race to comply with the VRA could be a compelling state interest, but the use of race had to be narrowly tailored to meet the scope of the compelling state interest; that is, good reasons must have existed to believe race needed to be used to comply with the VRA.<sup>132</sup> In drawing districts, the mapmakers should not have engaged in partisan gerrymandering, but might not have violated the U.S. Constitution if they did.<sup>133</sup> In addition

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130. *Id.* sec. 5, § 5(b), 120 Stat. at 580–81.

131. Section 5 violations are distinct from section 2 violations. A redistricting plan that is precleared may still violate section 2. *See Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 474, 476–77 (1997) (holding a jurisdiction's violation of section 2 does not automatically lead to a violation of section 5).

132. *See Shaw v. Hunt*, 517 U.S. 899, 915–16 (1996) ("Where, as here, we assume avoidance of § 2 liability to be a compelling state interest, we think that the racial classification would have to realize that goal; the legislative action must, at a minimum, remedy the anticipated violation or achieve compliance to be narrowly tailored.").

133. A confounding issue with racial and partisan gerrymandering existed in 2011. Being an African American voter can correlate with being a strong Democrat. Consequently, intentionally moving African Americans who happen to be strong Democrats into or out of districts could be framed as partisan gerrymandering rather than racial gerrymandering. Pulling those issues apart is very difficult but very important if partisan gerrymandering

to the legal rules mapmakers needed to follow, mapmakers tend to use additional traditional districting criteria when districting. Those criteria may include respect for existing districts, preservation of political subdivisions, incumbency protection, and the creation of communities of interest.<sup>134</sup> The General Assembly stepped into that complex maze in 2011.

## II. POST-2010 CENSUS REDISTRICTING

In 2011, the General Assembly was required to redistrict the House of Delegates, the state Senate, and Virginia's congressional delegation while complying with a complex structure of state and federal constitutional and statutory constraints. The General Assembly's tasks were clear—create 100 House of Delegates districts of roughly 80,010 people, forty Senate districts of roughly 200,026 people, and eleven congressional districts of roughly 727,366 people.<sup>135</sup> Virginia's population growth and shifts between 2000 and 2010 made the General Assembly's job challenging. The most overpopulated House of Delegates district (the thirteenth) had 110,610 more people than its target population of 80,010; the most underpopulated (the third) had 13,798 fewer people than its target population.<sup>136</sup> The most overpopulated Senate district (the thirty-third) had 116,410 more people than its target population of 200,026; the most underpopulated (the first) had 29,751 fewer people than its target population.<sup>137</sup> The most overpopulated congressional district (the tenth) had 142,071 more people than its target population of 727,366; the most underpopulated (the second) had 81,182 fewer people than its target population.<sup>138</sup> Population growth and loss created the need to move many people into and out of districts, leading to big shifts in some districts.

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yields no remedy while racial gerrymandering does. *See Easley v. Cromartie*, 532 U.S. 234, 241–42, 257–58 (2001).

134. Those criteria may differ depending on the jurisdiction. Indeed, traditional districting criteria used in some jurisdictions may be banned in others. Virginia, for instance, has shifted from embracing incumbency in redistricting to eschewing it. *See infra* section IV.C.

135. VA. DIV. OF LEGISLATIVE SERVS., DRAWING THE LINE 2011: REDISTRICTING IN VIRGINIA NO. 2, at 1 (2011) [hereinafter DRAWING THE LINE 2011], <http://redistricting.dls.virginia.gov/2010/data/publications/2011Draw2.pdf> [<https://perma.cc/6KN8-S8UG>].

136. *Id.* at 4–5.

137. *Id.* at 2–3.

138. *Id.* at 2.

Each General Assembly chamber was largely responsible for redistricting itself.<sup>139</sup> Delegate Steven Christopher Jones, a Republican, led the redistricting of the Republican-controlled House of Delegates.<sup>140</sup> Senator Janet Howell, a Democrat, chaired the Senate Privileges and Elections Committee and led the redistricting of the Democrat-controlled Senate.<sup>141</sup> Delegate William Janis, a Republican, led the congressional redistricting effort.<sup>142</sup>

The 2011 redistricting process began in earnest with the passage of resolutions providing redistricting criteria from the House and Senate Committees on Privileges and Elections. The redistricting criteria for the House of Delegates, the state Senate, and congressional districts were identical except for suggested maximum deviations from population equality.<sup>143</sup> Senate districts were allowed a maximum deviation from equality of plus or minus two percent.<sup>144</sup> House districts were allowed a maximum deviation from equality of plus or minus one percent.<sup>145</sup> Congressional districts were provided no deviation at all,<sup>146</sup> with the Senate resolution stating: “The population of each [congressional] district shall be as nearly equal to the population of every other district as practicable.”<sup>147</sup>

The resolutions provided a few requirements and a few guidelines but afforded mapmakers latitude in how those guidelines were met. Districts would be single-member districts that complied with state constitutional provisions, federal constitutional provisions, and the Voting Rights Act.<sup>148</sup> Compliance with the VRA required avoiding “unwarranted retrogression or dilution of racial or

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139. The House Committee on Privileges and Elections issued its House of Delegates District Criteria. *See* H. Comm. on Privileges & Elections Res. 1, Va. Gen. Assembly (Reg. Sess. 2011). The Senate Committee on Privileges and Elections likewise issued its Senate District Criteria. *See* S. Comm. on Privileges & Elections Res. 1, Va. Gen. Assembly (Reg. Sess. 2011).

140. *See* *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 796 (2017) (noting Delegate Jones’s role in House of Delegates redistricting).

141. *See* Christopher R. Nolen & Jeff Palmore, *Annual Survey of Virginia Law: Election Law and Government Ethics*, 46 U. RICH. L. REV. 119, 139–41 (2011) (discussing the 2011 redistricting process).

142. *See* *Page v. Va. State Bd. of Elections*, No. 3:13cv678, 2015 U.S. Dist. LEXIS 73514, at \*2–4 (E.D. Va. June 5, 2015) (noting Delegate Janis’s role in congressional redistricting).

143. For a discussion of the value of having different districting principles for districting different legislatures, see Chambers, *supra* note 16, at 163–64.

144. S. Comm. on Privileges & Elections Res. 1, *supra* note 139.

145. H. Comm. on Privileges & Elections Res. 1, *supra* note 139.

146. DRAWING THE LINE 2011, *supra* note 135, at 1–2.

147. S. Comm. on Privileges & Elections Res. 2, Va. Gen. Assembly (Reg. Sess. 2011).

148. S. Comm. on Privileges & Elections Res. 1, *supra* note 139; H. Comm. on Privileges

ethnic minority voting strength.”<sup>149</sup> Districts needed to be based on communities of interest; the factors that could help create a community of interest included “economic factors, social factors, cultural factors, geographic features, governmental jurisdictions and service delivery areas, political beliefs, voting trends, and incumbency considerations.”<sup>150</sup> Those factors provided mapmakers bounded discretion to craft the districts as they thought best, subject to the previously mentioned legal requirements.

Race was the most complicated and confounding factor in redistricting and its aftermath. The racial issues were difficult in part because most of Virginia’s majority-minority districts had become underpopulated in the prior decade. Of the twelve majority African American state House districts, ten were underpopulated by between three thousand to twelve thousand people, with the other two within one thousand people of the target population of 80,010.<sup>151</sup> Of the five majority African American state Senate districts, four were underpopulated by between about sixteen thousand to twenty-five thousand people, with the remaining district overpopulated by about two thousand people more than the target population of 200,026.<sup>152</sup> The single majority African American congressional district (the third) was underpopulated by almost sixty-four thousand people versus the target population of 727,366.<sup>153</sup> Creating equipopulous districts required moving significant numbers of people into these districts. Mapmakers had to consider how to do so consistent with the VRA and other requirements. Keeping those districts majority African American might mean moving people into and out of those districts with consciousness of, or because of, their race. That was a dangerous game.

The mapmakers maintained all majority-minority districts that had existed in the 2001 plans, keeping the Black Voting Age Population (“BVAP”) above 50% in those districts.<sup>154</sup> The BVAP does

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& Elections Res. 1, *supra* note 139.

149. See S. Comm. on Privileges & Elections Res. 1, *supra* note 139; H. Comm. on Privileges & Elections Res. 1, *supra* note 139.

150. See H. Comm. on Privileges & Elections Res. 1, *supra* note 139. For discussion of communities of interest, see Chambers, *supra* note 16, at 179–80.

151. DRAWING THE LINE 2011, *supra* note 135, at 4–5, 9–10.

152. *Id.* at 2–3, 6–7.

153. *Id.* at 2, 6.

154. See Complaint for Declaratory Judgment at 8–10, *Virginia v. Holder*, No. 1:11-cv-00885, 2011 WL 9203778 (D.D.C. filed May 9, 2011) (noting BVAP percentage for House of Delegates and Senate districts from 2001 districts and 2011 districts); *Personhuballah v. Alcorn*, 155 F. Supp. 3d 552, 562 (E.D. Va. 2016) (discussing the state’s decision to keep

not necessarily track the percentage of Black registered voters in a district. If Black voters are registered at a lower rate than non-Blacks, the BVAP may overstate the voting power of Blacks in the district. A district with a 51% BVAP may not functionally be a majority-minority district in which Blacks can elect their representative of choice. Conversely, in some situations, a district with a BVAP under 50% may effectively be a majority-minority district.<sup>155</sup> The BVAP in the five majority-minority Senate districts the mapmakers drew in 2011 fell to a range of 50.8%–53.6% from a range of 55.0%–58.5% in the 2001 districts.<sup>156</sup>

The mapmakers for the House districts used a 55% minimum BVAP when redistricting majority-minority districts.<sup>157</sup> They argued in subsequent litigation they believed the 55% minimum was appropriate to gain preclearance and ensure no retrogression regarding the ability of Black voters to elect representatives of their choice would occur.<sup>158</sup> In the twelve majority-minority districts the mapmakers drew, the BVAP range rose from 53.4%–59.7% in the 2001 districts to 55.3%–60.7% in the 2011 districts.<sup>159</sup> The House redistricting was adopted and precleared in 2011.<sup>160</sup>

The House and the Senate combined their redistricting plans into one package and sent it to Governor McDonnell, who vetoed the package, citing concerns with the Senate redistricting.<sup>161</sup> Two weeks later, Governor McDonnell approved new House and Senate redistricting plans.<sup>162</sup> The legislation was precleared by the DOJ with the new districts being used in the 2011 state legislative elections.<sup>163</sup>

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BVAP percentage in Virginia's only majority-minority congressional district above 50%).

155. For a discussion regarding the relationship between voting age population, citizenship voting age population, and voters, see *LULAC*, 548 U.S. 399, 423–25 (2006).

156. See Complaint for Declaratory Judgment, *supra* note 154, at 9.

157. See *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 794 (2017) (noting use of 55% BVAP minimum).

158. *Id.* at 795–96.

159. See Complaint for Declaratory Judgment, *supra* note 154, at 10.

160. *Bethune-Hill*, 137 S. Ct. at 796 (“In June 2011, the U.S. Department of Justice precleared the plan.”).

161. Governor's Veto Message, H.B. 5001, Va. Gen. Assembly (Spec. Sess. 2011).

162. See *Bethune-Hill v. Va. State Bd. of Elections*, 141 F. Supp. 3d 505, 522 (E.D. Va. 2015).

163. *Bethune-Hill*, 137 S. Ct. at 796.

The mapmakers for the congressional districts also used a 55% minimum BVAP, ostensibly for the same reason—non-retrogression—the House mapmakers did.<sup>164</sup> The congressional redistricting map was the most contentious, with the House of Delegates and the Senate producing their own maps. The House map appeared to be a revision of the 2001 congressional districts, with a focus on incumbency protection. Delegate Janis, who led the congressional redistricting effort, spoke to each incumbent congressional representative to get their assent to the districting plan.<sup>165</sup> The new map sought to retain the single majority-minority congressional district (the third) and increase its BVAP from 53.1% to 56.3%.<sup>166</sup> The congressional district with the next highest BVAP (the fourth) was adjacent to the third and would have a BVAP of 31.3%.<sup>167</sup> The Senate map, offered by Senator Mamie Locke, sought to create one majority-minority district with a 51% BVAP and a possible crossover district with a 42% BVAP.<sup>168</sup> The House of Delegates and the Senate could not agree on a map in 2011 to send Governor McDonnell and moved congressional redistricting to 2012.<sup>169</sup> Eventually, the House's congressional redistricting plan was adopted and precleared in 2012.<sup>170</sup>

The post-2010 census redistricting arguably followed the legal doctrine then in place. The mapmakers addressed population equality, race, and partisan advantage. The districts were well within the population deviation allowances: every Senate district was within two percent of population equality,<sup>171</sup> every House district was within one percent of population equality,<sup>172</sup> and every

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164. Page v. Va. State Bd. of Elections, No. 3:13cv678, 2015 U.S. Dist. LEXIS 73514, at \*2–4, \*27–28 (E.D. Va. June 5, 2015).

165. *Id.* at \*72–73 (Payne, J., dissenting).

166. *See id.* at \*11–12 (majority opinion).

167. *See Personhuballah v. Alcorn*, 155 F. Supp. 3d 552, 565 (E.D. Va. 2016).

168. *See Voting Age Population, SB 5004 Congressional Districts; Changes in Boundaries*, VA.'S LEGIS. INFO. SYS., [http://redistricting.dls.virginia.gov/2010/Data/congressional%20plans/SB5004\\_Locke/SB5004\\_Locke.pdf](http://redistricting.dls.virginia.gov/2010/Data/congressional%20plans/SB5004_Locke/SB5004_Locke.pdf) [<https://perma.cc/5GE8-9GPS>].

169. *Page*, 2015 U.S. Dist. LEXIS 73514, at \*11.

170. *Id.*

171. *See Senate Plan Population Totals, HB 5005 House of Delegates and Senate Districts; Changes in Boundaries*, VA.'S LEGIS. INFO. SYS., [http://redistricting.dls.virginia.gov/2010/Data/senate%20plans/HB5005\\_passed\\_042811\\_senateplan/HB5005\\_passed\\_042811\\_senateplan.pdf](http://redistricting.dls.virginia.gov/2010/Data/senate%20plans/HB5005_passed_042811_senateplan/HB5005_passed_042811_senateplan.pdf) [<https://perma.cc/ZJP7-W6U9>].

172. *See House Plan Population Totals, HB 5005 House of Delegates and Senate Districts; Changes in Boundaries*, VA.'S LEGIS. INFO. SYS., [http://redistricting.dls.virginia.gov/2010/Data/house%20plans/hb5005\\_passed\\_042811\\_houseplan/hb5005\\_passed\\_042811\\_houseplan.pdf](http://redistricting.dls.virginia.gov/2010/Data/house%20plans/hb5005_passed_042811_houseplan/hb5005_passed_042811_houseplan.pdf) [<https://perma.cc/CAT5-UPVS>].

congressional district was within just one person of population equality.<sup>173</sup>

The mapmakers argued they considered race only as much as necessary to maintain majority-minority districts and to guarantee no retrogression with respect to minority voters' ability to elect the representatives of their choice.<sup>174</sup> The Senate redistricting plan reflected the Senate's belief it could create majority-minority districts with BVAPs between 50% and 55%.<sup>175</sup> Those who led the redistricting of the House and the congressional seats argued the 55% minimum BVAP was necessary.<sup>176</sup> The minimum may have been an incorrect response to a reasonable interpretation of the 2006 amendments to the VRA. The amendments deemed retrogression to bar backsliding regarding minority voters' ability to elect their representatives of choice.<sup>177</sup> That suggests a majority-minority district may need to remain a majority-minority district in which minority voters are able to elect their representative of choice with no help. If a typical majority-minority district requires at least a 50% BVAP, a 55% BVAP would appear to provide a cushion to guarantee the minority voters in the district will elect their representative of choice. If the cushion is reasonable, a 55% BVAP is sensible. If the cushion is not necessary, putting more Black voters than necessary in a district looks like packing. Given the majority African American House districts and congressional district were underpopulated, repopulating them and raising their BVAP percentage involved intentionally moving minority voters into districts. That might have been acceptable had the House and congressional mapmakers shown a 55% minimum BVAP was necessary to keep the districts effectively majority minority. They failed to do the analysis for all but one district.<sup>178</sup>

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173. See *Population Totals, HB 251 Congressional Districts; Changes in Boundaries*, VA.'S LEGIS. INFO. SYS., [http://redistricting.dls.virginia.gov/2010/data/congressional%20plans/2012%20HB251\\_Bell/HB251\\_Bell.pdf](http://redistricting.dls.virginia.gov/2010/data/congressional%20plans/2012%20HB251_Bell/HB251_Bell.pdf) [<https://perma.cc/R2GC-5UN3>].

174. See *Page*, 2015 U.S. Dist. LEXIS 73514, at \*3–4.

175. See *Complaint for Declaratory Judgment*, *supra* note 154, at 9 (noting BVAP percentage for 2011 Senate districts between 50% and 55%).

176. See *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 795–96 (2017) (discussing the genesis of the 55% BVAP minimum).

177. Fannie Lou Hamer, Rosa Parks, and Coretta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, sec. 5, § 5(d), 120 Stat. 577, 580–81 (codified as amended at 52 U.S.C. § 10304(d)) (“The purpose of subsection (b) of this section is to protect the ability of such citizens to elect their preferred candidates of choice.”).

178. See *Bethune-Hill*, 137 S. Ct. at 794–95, 802.

Gerrymandering was another lurking concern. The Governor claimed in his veto message the redistricting plan for the Senate was insufficiently bipartisan and involved noncompact districts.<sup>179</sup> He signed a resubmitted Senate map two weeks later.<sup>180</sup> Whether the redistricting reflected partisan advantage is difficult to judge.<sup>181</sup> Eventually, all maps were approved and precleared, with the Senate map being the least litigated over the ensuing decade. The redistricting process was difficult; the litigation over the ensuing decade was brutal.

### III. THE CHANGED LEGAL LANDSCAPE FOR REDISTRICTING SINCE 2011

The legal landscape regarding redistricting has changed since 2011. The law has changed little in some areas, such as compactness, contiguousness, and the OPOV doctrine. The law has changed significantly in other areas, such as preclearance. Taken together, the doctrinal changes regarding districting have significantly altered the structure a mapmaker must comply with when redistricting in 2021.

#### A. *Contiguity and Compactness*

The law regarding contiguousness and compactness in Virginia was clarified but not significantly altered in the past decade. In *Vesilind v. Virginia State Board of Elections*,<sup>182</sup> plaintiffs challenged numerous state House and Senate districts from the 2011 redistricting, arguing they were not compact.<sup>183</sup> The Supreme Court of Virginia reaffirmed that districts are constitutional if their compactness is “fairly debatable.”<sup>184</sup> That continues to provide mapmakers with significant discretion.

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179. Governor’s Veto Message, *supra* note 161.

180. 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](https://richmond.com/news/mcdonnell-signs-redistricting-bill/article_32689192-4ee1-525e-9f5d-6d7517a7c968.html) [<https://perma.cc/5MH9-P2RP>] (noting Governor McDonnell signed the resubmitted redistricting bill, with the legislation moving DOJ for preclearance under section 5 of the VRA).

181. The Supreme Court could not determine what standard to use to judge partisan gerrymandering before deeming it a political question. *See* discussion *supra* section I.C; *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

182. 295 Va. 427, 813 S.E.2d 739 (2018).

183. *Id.* at 432–33, 813 S.E.2d at 741–42.

184. *Id.* at 444–45, 452, 813 S.E.2d at 748, 753 (“Thus, there is evidence to support the

Compactness can be measured objectively but is not under Virginia law. Numerous objective measures of compactness exist, but none are considered the best.<sup>185</sup> Even if there were a best measure, it might not matter because Virginia districts need not be as compact as possible.<sup>186</sup> A minimum standard of compactness may be impossible to find. The functional minimum compactness standard may consist of comparing today's districts with yesteryear's least compact districts.<sup>187</sup> Compactness is a subjective inquiry under Virginia law,<sup>188</sup> which is unsurprising given the *Vesilind* court's acknowledgment that compactness is an "abstract concept."<sup>189</sup>

Electoral districts must be compact, but compactness is only one of several appropriate redistricting principles that can be used together to create an acceptable district.<sup>190</sup> The compactness standard's lack of clarity makes complying with Virginia's contiguousness and compactness requirements easy.<sup>191</sup> Indeed, the *Vesilind* court deemed a House district that wrapped around another district like a horseshoe to be compact.<sup>192</sup> Consequently, Virginia's bar for contiguousness and compactness is so low that it functionally may be no bar at all.

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ruling that the determination of the General Assembly regarding compactness of the Challenged Districts is fairly debatable, and not clearly erroneous, arbitrary, or wholly unwarranted, and we must uphold the legislature's decision to draw the Challenged Districts as it did.").

185. *Id.* at 437, 813 S.E.2d at 744. Indeed, in support of its claim all 2011 state legislative districts were compact, the Virginia Attorney General's Office submitted the results of three different numerical measures of compactness in its preclearance submission to DOJ required under section 5 of the VRA. *Id.* at 435, 438, 813 S.E.2d at 743, 745.

186. *Id.* at 448, 813 S.E.2d at 750.

187. The *Vesilind* court compared the districts it was analyzing to those deemed compact in prior litigation. *Id.* at 450, 813 S.E.2d at 752.

188. *Id.* at 448, 813 S.E.2d at 751 (noting the compactness inquiry is not objective like the equal population standard).

189. *Id.* at 444, 813 S.E.2d at 748.

190. *Id.* at 452, 813 S.E.2d at 753 ("Our Constitution speaks to the result of the redistricting process, and mandates that districts be compact in the end. It does not attempt to curtail the legislative process that creates the end result. Nor does it require that compactness be given priority over other considerations, much less establish a standard to determine whether the legislature gave proper priority to compactness.").

191. *See id.* at 444, 813 S.E.2d at 743 ("The party challenging an enactment has the burden of proving that the statute is unconstitutional, and every reasonable doubt regarding the constitutionality of a legislative enactment must be resolved in favor of its validity.").

192. *Id.* at 449, 813 S.E.2d at 751; *see House of Delegates District 72*, VA. PUB. ACCESS PROJECT, <https://www.vpap.org/offices/house-of-delegates-72/redistricting/> [https://perma.cc/BC2Z-GE2C]

### B. *One Person-One Vote*

The One Person-One Vote doctrine has not changed significantly in the past decade. In *Harris v. Arizona Independent Redistricting Commission*,<sup>193</sup> the Supreme Court reiterated its rules on OPOV. The Equal Protection Clause requires districts be populated as close to equality as practicable, with justifiable deviations allowed.<sup>194</sup> Total deviations of less than ten percent for state legislative districts are presumed acceptable.<sup>195</sup> Though there is no safe harbor for a maximum total deviation under ten percent, a plaintiff's claim that a deviation under ten percent should not be allowed for a state legislative districting plan will rarely be successful.<sup>196</sup> The law has not changed with respect to population deviations regarding congressional districts. As the Court noted in *Tennant v. Jefferson County Commission*,<sup>197</sup> deviations from perfect equality are allowed, but they need to be justified and are smaller than deviations allowed for state legislative districts.<sup>198</sup>

### C. *Partisan Gerrymandering*

In *Rucho v. Common Cause*, the Supreme Court ruled partisan gerrymandering triggers a political question that the federal courts have no jurisdiction to resolve.<sup>199</sup> The Justices maintained extreme partisan gerrymandering is problematic and inconsistent with democratic principles, but noted insufficient legal standards for judging whether partisan gerrymandering claims exist.<sup>200</sup> The

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193. 136 S. Ct. 1301 (2016).

194. *Id.* at 1306.

195. *Id.* at 1305 (“Because the maximum population deviation between the largest and the smallest district is less than 10%, the appellants cannot simply rely upon the numbers to show that the plan violates the Constitution.”).

196. *Id.* at 1307.

197. 567 U.S. 758 (2012).

198. *See id.* at 759 (noting deviations are allowed even in congressional districting if the mapmaker has engaged in “a good-faith effort to achieve absolute equality” (quoting *Karcher v. Daggett*, 462 U.S. 725, 730 (1983))).

199. 139 S. Ct. 2484, 2506–07 (2019) (“We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts.”).

200. *See id.* at 2506 (“Excessive partisanship in districting leads to results that reasonably seem unjust.”); *id.* at 2509 (Kagan, J., dissenting) (“The partisan gerrymanders in these cases deprived citizens of the most fundamental of their constitutional rights: the rights to participate equally in the political process, to join with others to advance political beliefs, and to choose their political representatives. In so doing, the partisan gerrymanders here debased and dishonored our democracy, turning upside-down the core American idea that all governmental power derives from the people.”).

*Rucho* Court suggested states could alleviate partisan gerrymandering through state law or redistricting commissions.<sup>201</sup> As noted and discussed *infra*, the General Assembly passed legislation in 2020 essentially barring partisan gerrymandering<sup>202</sup> and Virginians created the Virginia Redistricting Commission with the passage of Constitutional Amendment 1 in November 2020.<sup>203</sup>

#### D. *Race and Redistricting*

Race remains the thorniest issue in redistricting. Over the last decade, the legal doctrine on race and redistricting has been clarified in some areas and significantly altered in other areas. The issues related to race and redistricting are interrelated. The Fourteenth Amendment's race predominance test limits the use of race without strong justification. The Voting Rights Act is often used as the justification for the use of race. Doctrinal changes—even small changes—in race predominance or VRA doctrine may have an outsized effect on a mapmaker's ability to redistrict using race to provide equal voting rights to minority voters. Mapmakers must use race to ensure equal voting rights but must not use race so much that the use violates equal protection.

##### 1. Race Predominance and the Fourteenth Amendment

Mapmakers may use race in redistricting when race is not a predominant factor that subverts traditional districting principles.<sup>204</sup> Race predominance doctrine has not changed much in the last decade, but the context in which race predominance tends to arise has changed. Prior to 2011, the race predominance test was used primarily by nonminority voters ostensibly to protect their voting

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201. *Id.* at 2507 (majority opinion).

202. *See* discussion *infra* section IV.A.3.

203. *See* discussion *infra* section IV.B.

204. *See* *Cooper v. Harris*, 137 S. Ct. 1455, 1463–64 (2017) (noting the need for factors such as “compactness, respect for political subdivisions, [and] partisan advantage” to be subordinated to race for race to become the predominant factor). However, this rule might change. *See* *Ala. Legislative Black Caucus v. Alabama (ALBC)*, 575 U.S. 254, 275 (2015) (“Finally, we note that our discussion in this section is limited to correcting the District Court’s misapplication of the ‘predominance’ test for strict scrutiny discussed in *Miller*. It does not express a view on the question [of] whether the intentional use of race in redistricting, even in the absence of proof that traditional districting principles were subordinated to race, triggers strict scrutiny.” (citation omitted)).

rights.<sup>205</sup> In the last decade, race predominance has become an argument minority-race voters use to argue legislatures are improperly using race to redistrict.<sup>206</sup> In these cases, the Supreme Court has reemphasized that race predominance is case and context specific, with actions that might seem to clearly trigger race predominance possibly not doing so. *Alabama Legislative Black Caucus v. Alabama (ALBC)*,<sup>207</sup> *Bethune-Hill v. Virginia State Board of Elections*,<sup>208</sup> and *Cooper v. Harris*<sup>209</sup> involve legislatures moving significant numbers of voters into and out of districts based on race. Those actions might seem to clearly trigger race predominance, but they may not. The Court suggests that any use of race, even the explicit use of race, might not trigger race predominance unless its use subverts traditional districting principles.<sup>210</sup>

The Court in *ALBC* reviewed Alabama's redistricting of its state legislative districts in the wake of the 2010 census.<sup>211</sup> Alabama's majority-minority districts had become underpopulated since the state redistricted after the 2000 census, so the state was required to move voters into those districts to comply with the Constitution's OPOV standard.<sup>212</sup> The overwhelming majority of voters Alabama moved into the majority-minority districts in the course of redistricting were minority-race voters, even though those districts would have remained majority-minority districts had a more racially diverse set of voters been placed in the districts.<sup>213</sup> Plaintiffs argued the redistricting was a racial gerrymander involving race predominance because the voters who were moved into the majority-minority districts were moved because of their race.<sup>214</sup> Arguing the VRA required it to pack so many African American voters into majority-minority districts so that redistricting would not lessen the opportunity for minority voters to elect their representatives of

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205. See, e.g., *Shaw v. Reno*, 509 U.S. 630, 636–37 (1993).

206. See, e.g., *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 794 (2017); *ALBC*, 575 U.S. at 258.

207. 575 U.S. 254.

208. 137 S. Ct. 788.

209. 137 S. Ct. 1455.

210. See, e.g., *ALBC*, 575 U.S. at 272 (discussing the use of race and the racial predominance test).

211. See *id.* at 258.

212. See *id.* at 259–60.

213. *Id.* at 277–78 (noting the BVAP percentage could fall a fair amount and still yield the election of the candidate preferred by the minority voters in the district).

214. *Id.* at 260.

choice,<sup>215</sup> Alabama claimed it needed to maintain the same BVAP percentage in each majority-minority district after redistricting as the districts had before redistricting.<sup>216</sup>

Given the underpopulation and the high BVAP percentage of some of the districts, the legislature needed to put an almost exclusively African American group of voters into some of the districts. In one district with a 72% BVAP, only thirty-six of nearly sixteen thousand people moved into the district were white.<sup>217</sup> Rather than deem the movement of people because of their race to be clear race predominance, the Supreme Court reversed and remanded the case for the plaintiffs to present their racial gerrymandering claims again, suggesting the case likely involved race predominance, but might not.<sup>218</sup> That was a bit surprising given the opinion noted a race-predominance racial gerrymander claim is premised on the harm a voter suffers from being racially classified and moved around because of race, not from the harm to the voter's voting power.<sup>219</sup>

In *Bethune-Hill v. Virginia State Board of Elections*, plaintiffs challenged Virginia's 2011 state legislative redistricting, claiming race was used as a predominant factor in redistricting multiple House of Delegates districts.<sup>220</sup> As in *ALBC*, the combination of underpopulated districts and the desire to keep BVAP percentages above a minimum figure guaranteed many people would be moved into, and possibly out of, districts based on their race.<sup>221</sup> The map-makers used a 55% minimum BVAP when creating majority-minority districts ostensibly to ensure African American voters in the districts could elect their candidates of choice.<sup>222</sup> The trial court decided the BVAP minimum and the movement of voters did not constitute race predominance in eleven of twelve districts at issue, in

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215. *Id.* at 259.

216. *Id.* at 259–60.

217. *Id.* at 260 (“[P]rior to redistricting, 72.75% of District 26’s population was black. Accordingly, Alabama’s plan added 15,785 new individuals, and only 36 of those newly added individuals were white.”).

218. *Id.* at 279.

219. *Id.* at 263.

220. 137 S. Ct. 788, 794–95 (2017).

221. *Id.* at 795.

222. *Id.* at 794–95; see *Personhuballah v. Alcorn*, 155 F. Supp. 3d 552, 556–67 (E.D. Va. 2016) (noting the same rule was used for Virginia’s congressional redistricting).

part because the districts were consistent with districts drawn using traditional districting principles.<sup>223</sup> The Supreme Court disagreed, noting race can be a predominant factor even if traditional districting factors are used.<sup>224</sup> The key to the Equal Protection violation is not whether the redistricting created districts inconsistent with traditional districting criteria, but whether the racial classification predominated.<sup>225</sup> The Court ruled the 55% minimum BVAP might not prove racial predominance though race was explicitly used in redistricting. Rather than deem the use of the minimum BVAP race predominance per se, the Court remanded the case and allowed the trial court to decide the issue with respect to eleven of the twelve districts at issue.<sup>226</sup> The Court agreed, however, with the trial court's original ruling that race was a predominant factor in redistricting with respect to the remaining district and that the state's use of race survived strict scrutiny.<sup>227</sup> The *Bethune-Hill* decision was just as surprising as the result in *ALBC* because the *Bethune-Hill* Court emphasized the *ALBC* Court's argument that the Equal Protection concern is the moving of people based on race, not the effect the movement has on voting rights.<sup>228</sup>

In *Cooper v. Harris*, the Court reviewed North Carolina's redistricting of two congressional districts which turned the crossover districts into majority-minority districts.<sup>229</sup> One district was underpopulated by about one hundred thousand people, and became a majority-minority district by the movement of a significant number of minority voters into the district.<sup>230</sup> The mapmakers intentionally increased the BVAP to over 50%—from 48.6% to 52.7%—in part by specifically reaching out to heavily African American areas to attach them to the district.<sup>231</sup> The Court agreed with the trial court's decision that race predominance had been proven regarding

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223. *Bethune-Hill*, 137 S. Ct. at 794 (noting the trial court held that for race to predominate in redistricting, an actual conflict between the use of race and traditional districting criteria must exist).

224. *Id.* at 797–98. Though the Court also noted it had never found race predominance when a district conformed to traditional districting principles. *Id.* at 799.

225. *Id.* at 798.

226. *Id.* at 800–02.

227. *Id.* at 801. The Court noted that it assumed without deciding that compliance with section 5 remained a compelling state interest. *Id.*

228. *See id.* at 797.

229. 37 S. Ct. 1455, 1465–66 (2017) (describing the electoral success of candidates favored by minority voters in districts that had BVAPs under 50%).

230. *Id.* at 1466.

231. *See id.* (noting that bringing areas into the district required “a finger-like extension of the district’s western line”).

that district.<sup>232</sup> The second district became a majority-minority district by exchanging a significant number of white voters for minority voters, increasing the BVAP from 43.8% to 50.7%.<sup>233</sup> The trial court determined race predominated, though the defendants argued the increased BVAP percentage was based on partisan gerrymandering rather than racial gerrymandering.<sup>234</sup> The Court allowed that ruling to stand, noting the rigorous and involved inquiry a court must, and the district court did, engage in to decide the issue.<sup>235</sup> The decisions the Court made in *Cooper* are consistent with a case- and context-specific analysis of race predominance.

Race predominance remains a doctrine in tension. It stems from the Fourteenth Amendment bar on racial classifications but allows the use of (not merely the consciousness of) race in redistricting. Functionally, race becomes a districting principle that may not significantly overshadow other districting principles.<sup>236</sup> Determining when race overpowers the other traditional redistricting principles is difficult. First, traditional districting principles tend to be pliable even when compliance with them is mandatory, as Virginia's loose requirements regarding contiguousness and compactness suggest. Second, the Court's assertion that a district can appear to have been redistricted using traditional criteria but that race may still be found to be a predominant factor is difficult to square.<sup>237</sup> The two pieces of the doctrine—barring the classification of people based on race and allowing the use of race if it does not subordinate other districting criteria—are almost impossible to reconcile. A court may choose which piece of the doctrine to use when analyzing a case. The Supreme Court's tendency to focus on the subordination piece today does not guarantee it will do so tomorrow given it continues to remind observers the core of race predominance is the bar on racial classification, rather than its effect on voting rights.<sup>238</sup>

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232. *Id.* at 1469.

233. *Id.* at 1466 (“[T]he district gained some 35,000 African-Americans of voting age and lost some 50,000 whites of that age . . .”).

234. *Id.* at 1473.

235. *Id.* at 1473–74.

236. *ALBC*, 575 U.S. 254, 272–73 (2015).

237. *See Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 797–98 (2017).

238. *See ALBC*, 575 U.S. at 272.

## 2. Voting Rights Act Section 2

Section 2's doctrine has not changed in the last decade, but it has been reinforced. *Thornburg v. Gingles* provides the operative law for section 2 redistricting claims.<sup>239</sup> The three *Gingles* preconditions—minority voters must be capable of being a majority in a compact, single-member district; minority voters must be cohesive; and racial bloc voting must keep the minority voters from electing their candidates of choice—must be satisfied before a section 2 claim is viable.<sup>240</sup> The Supreme Court has continued to focus heavily on the preconditions and on ensuring section 2 remedies squarely address section 2 violations.

In *Cooper v. Harris*, North Carolina turned a crossover district into a majority-minority district and the trial court found race predominated in the redistricting.<sup>241</sup> North Carolina claimed its fear of a section 2 violation justified its actions.<sup>242</sup> The Supreme Court rejected the state's defense, noting that a crossover district that consistently elects the representative of the minority voters' choice suggests the third *Gingles* precondition—bloc voting—cannot be proven.<sup>243</sup> In this circumstance, North Carolina's use of race as a predominant factor in redistricting was not acceptable because the state had no reason to believe it was required to use race to comply with the VRA's section 2 requirements.<sup>244</sup>

In *Abbott v. Perez*, the Court reviewed claims that part of Texas's redistricting of congressional and state legislative districts violated section 2.<sup>245</sup> The Court focused on the *Gingles* preconditions.<sup>246</sup> It closely considered the trial court's decision finding no

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239. See 478 U.S. 30 (1986).

240. For an in-depth discussion of the *Gingles* preconditions, see Justin Levitt, *Democracy on the High Wire: Citizen Commission Implementation of the Voting Rights Act*, 46 U.C. DAVIS L. REV. 1041, 1049–55 (2013).

241. 137 S. Ct. 1455, 1463 (2017).

242. *Id.* at 1469.

243. *Id.* at 1470.

244. *Id.* at 1472.

245. 138 S. Ct. 2305, 2313–14, 2330 (2018).

246. *Id.* at 2330–31 (“To make out a §2 ‘effects’ claim, a plaintiff must establish the three so-called ‘*Gingles* factors.’ These are (1) a geographically compact minority population sufficient to constitute a majority in a single-member district, (2) political cohesion among the members of the minority group, and (3) bloc voting by the majority to defeat the minority’s preferred candidate.”).

bloc voting to determine if Texas had an obligation to create a Latino opportunity district in a specific part of the state.<sup>247</sup> If bloc voting existed, the district had been drawn in the correct location; if bloc voting did not exist, no section 2 violation existed and the district had been drawn to remedy a nonexistent section 2 violation.<sup>248</sup> The need to match the section 2 violation to the section 2 remedy harkened to the Court's focus on violations and remedies in *League of United Latin American Citizens v. Perry*.<sup>249</sup> Ultimately, the *Abbott* Court found bloc voting existed and that the remedy matched the violation.<sup>250</sup>

### 3. Voting Rights Act Section 5

In *Shelby County v. Holder*, the Supreme Court gutted section 5 of the VRA by invalidating section 4.<sup>251</sup> Section 4 defined nearly all jurisdictions that were subject to preclearance under section 5.<sup>252</sup> The Court left section 5 intact but rendered it effectively worthless for now.<sup>253</sup> The Court argued section 4's formula was based on decades-old data and unfairly treated some states differently than others.<sup>254</sup> After deeming section 4 unconstitutional as currently structured, the Court suggested Congress could create a new constitutionally acceptable section 4 formula based on more recent data.<sup>255</sup> Congress has not yet done so.

Eliminating the preclearance standard for previously covered jurisdictions, like Virginia, is important. For the first time in decades, Virginia redistricting will not be subject to section 5 preclearance in 2021.<sup>256</sup> Mapmakers need not worry about retrogression or backsliding with respect to the ability of minority voters to elect

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247. *Id.* at 2331–32.

248. *See id.*

249. *See supra* notes 112–14 and accompanying text; *LULAC*, 548 U.S. 399 (2006).

250. *Abbott*, 138 S. Ct. at 2331–32.

251. 570 U.S. 529, 557 (2013) (“[Congress’s] failure to act leaves us today with no choice but to declare § 4(b) unconstitutional.”).

252. *Id.* at 537–38 (discussing section 4’s history).

253. *See id.* at 557 (“We issue no holding on § 5 itself, only on the coverage formula.”).

254. *Id.* at 551 (arguing no disparity exists between states covered under section 4 and those not covered under section 4).

255. *Id.* at 557.

256. Virginia has been a covered jurisdiction for preclearance purposes since 1965. *See Jurisdictions Previously Covered by Section 5*, U.S. DEP’T JUST., <https://www.justice.gov/crt/jurisdictions-previously-covered-section-5> [<https://perma.cc/3PQ9-WR4S>] (last updated Sept. 11, 2020).

their candidates of choice. The elimination of preclearance also removes section 5 compliance as a compelling state interest for using race as a predominant factor in redistricting. Cases in which states sought to justify the movement of many voters based on their race by reference to preclearance requirements—such as *ALBC* and *Bethune-Hill*—would need to be litigated solely on whether race predominance existed, because states would have virtually no chance to successfully argue their redistricting decisions could survive strict scrutiny.

### E. *Summary*

The mapmaker's obligations before the General Assembly met in 2020 were clear in some respects, and unclear in others. Districts must be roughly equipopulous and must be drawn consistent with the state's required districting criteria. The Constitution may discourage partisan gerrymandering but does not prohibit it. The state has a continuing obligation to protect equal minority voting rights and may need to use race to meet that obligation.

Mapmakers may use race when redistricting, but cannot use it as a predominant factor in a way that subverts other redistricting principles unless its use can survive strict scrutiny.<sup>257</sup> Whether race has subverted other principles can be unclear.<sup>258</sup> Racial gerrymandering and partisan gerrymandering can be intertwined and may be confused for each other if mapmakers move large chunks of voters who are of the same race and share a party affiliation.<sup>259</sup> Even when the use of race is clear, how much race has been used or can be used may be unclear.

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257. *Cooper v. Harris*, 137 S. Ct. 1455, 1463–64 (2017) (“[I]f racial considerations predominated over others, the design of the district must withstand strict scrutiny.”).

258. 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, 1838–43 (2018) (discussing the lack of clarity).

259. *Cooper*, 137 S. Ct. at 1473 (noting the difficulty in recognizing and distinguishing race and political gerrymandering); *Abbott v. Perez*, 138 S. Ct. 2305, 2314 (2018) (“While the Equal Protection Clause imposes these important restrictions, its application in the field of districting is complicated. For one thing, because a voter’s race sometimes correlates closely with political party preference, it may be very difficult for a court to determine whether a districting decision was based on race or party preference.” (citations omitted)); *Easley v. Cromartie*, 532 U.S. 234, 241–45 (2001).

When the use of race is a predominant factor in redistricting, its use must serve a compelling state interest and be narrowly tailored to serve that interest. Compliance with section 2 of the VRA appears to be the only compelling state interest for the predominant use of race in redistricting in Virginia. A strong basis to believe the use of race is necessary to comply with section 2 meets the narrow tailoring prong.<sup>260</sup> A state is required to use race as much as necessary, even if race is a predominant factor in redistricting, to comply with section 2 of the VRA. In addition, a state may use race as a non-predominant factor to protect voting rights as it sees fit. In its 2020 session, the General Assembly addressed some of these issues and elided others.

#### IV. GENERAL ASSEMBLY 2020 AND REDISTRICTING

The General Assembly faced a new and simpler legal regime regarding redistricting when its 2020 session opened than when its 2010 session opened. Any possible constitutional limit on partisan gerrymandering was gone and section 5's preclearance requirement has been gone for more than half a decade. The General Assembly likely realized mapmakers are free of some legal requirements in place a decade ago and that it could shape redistricting according to some of its preferences.

The General Assembly made two big moves in its 2020 session in anticipation of 2021 redistricting. First, it passed legislation that includes additional redistricting criteria. Whatever entity redistricts—the Virginia Redistricting Commission (“VRC”), or the Supreme Court of Virginia—presumably will use the criteria. Second, the General Assembly pushed forward the constitutional amendment that establishes the VRC, diminishes the General Assembly's role in redistricting and ends the Governor's role in redistricting. In its 2020 session, the General Assembly started the process of remaking redistricting in Virginia, but it left a few important issues unresolved.

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260. *Cooper*, 137 S. Ct. at 1464 (“When a State invokes the VRA to justify race-based districting, it must show (to meet the ‘narrow tailoring’ requirement) that it had ‘a strong basis in evidence’ for concluding that the statute required its action.” (quoting *ALBC*, 575 U.S. 254, 278 (2015))).

### A. *Criteria for 2021 Redistricting*

The mapmaker's task remains the same as in years past. Based on census data, the mapmakers will need to move people around to create districts within acceptable population deviations. The newly legislated redistricting criteria give mapmakers guidance regarding redistricting, but do not tell them exactly what to do or how to do it.<sup>261</sup> The 2020 legislation's redistricting criteria differ from the redistricting criteria the Privileges and Elections Committees have used in redistricting in the past.<sup>262</sup> The legislation notes districting must comply with state and federal constitutional requirements, the Voting Rights Act, and "relevant judicial decisions relating to racial and ethnic fairness."<sup>263</sup> It also specifies additional criteria that appear to move beyond constitutional and statutory enactments, and further defines "community of interest" in a new way.<sup>264</sup> Unless more criteria or explanations of the criteria are forthcoming, the mapmaker will need to make choices about significant policy issues that are not resolved by the criteria. The different entities that might be responsible for redistricting may have different views about how to resolve those issues.

#### 1. Equipopulous Districts

The legislation requires roughly equipopulous districts.<sup>265</sup> It permits population deviations in state legislative districts up to five percent,<sup>266</sup> which would allow a ten percent total maximum deviation consistent with federal law.<sup>267</sup> It provides no population deviations respecting congressional districts. Current OPOV doctrine

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261. See Acts of Apr. 22, 2020, chs. 1229 & 1265, 2020 Va. Acts \_\_, \_\_ & \_\_, \_\_ (codified at VA. CODE ANN. § 24.2-304.04 (Cum. Supp. 2020)).

262. See, e.g., H. Comm. on Privileges & Elections Res. 2, Va. Gen. Assembly (Spec. Sess. 2001) (the House's adopted 2001 criteria for congressional districts); S. Comm. on Privileges & Elections Res. 2, *supra* note 147 (the Senate's adopted 2011 criteria for congressional districts).

263. Chs. 1229 & 1265, 2020 Va. Acts at \_\_, \_\_ (codified at VA. CODE ANN. § 24.2-304.04(2) (Cum. Supp. 2020)).

264. *Id.* at \_\_, \_\_ (codified at VA. CODE ANN. § 24.2-304.04(5) (Cum. Supp. 2020)).

265. *Id.* at \_\_, \_\_ (codified at VA. CODE ANN. § 24.2-304.04(1) (Cum. Supp. 2020)).

266. *Id.* at \_\_, \_\_.

267. See *Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1305 (2016).

allows deviations in congressional district populations if the deviations are justified.<sup>268</sup> Consequently, the legislation is consistent with, but narrower than, the Supreme Court’s OPOV doctrine.

## 2. Contiguity and Compactness

The General Assembly modified and refined how contiguity and compactness are defined and assessed. The law narrows the mapmaker’s latitude but may not have much effect on redistricting. A district may not be contiguous solely “by connections by water running downstream or upriver . . . .”<sup>269</sup> That might mean one part of a district must be directly across the water from another part of the same district if the district is bisected by water. Conversely, it could mean two parts of a district that are separated by water must be directly connected by a bridge. If the latter, the legislation provides a new restriction.<sup>270</sup>

The law requires mapmakers consider compactness more objectively when drawing districts. Mapmakers must use numerical measures to draw districts, but the legislation does not require a district meet a minimum level of compactness to be deemed “compact.”<sup>271</sup> This approach differs from the Supreme Court of Virginia’s approach to compactness in *Vesilind v. Virginia State Board of Elections*.<sup>272</sup> The *Vesilind* test is indeterminate with no standard.<sup>273</sup> The new law provides a structure for considering compactness when redistricting, but does not appear to provide a clear basis for a court to determine when a district is not compact.

## 3. Partisan Gerrymandering

The districting criteria ban partisan gerrymandering, noting a statewide map may not “unduly favor or disfavor any political party.”<sup>274</sup> That is a clear statement against partisan gerrymander-

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

269. Chs. 1229 & 1265, 2020 Va. Acts at \_\_, \_\_ (codified at VA. CODE ANN. § 24.2-304.04(6) (Cum. Supp. 2020)).

270. See *supra* section I.A.

271. Chs. 1229 & 1265, 2020 Va. Acts at \_\_, \_\_ (codified at VA. CODE ANN. § 24.2-304.04(7) (Cum. Supp. 2020)).

272. 295 Va. 427, 813 S.E.2d 739 (2018).

273. *Id.* at 444–45, 813 S.E.2d at 7480–49.

274. Chs. 1229 & 1265, 2020 Va. Acts at \_\_, \_\_ (codified at VA. CODE ANN. § 24.2-

ing, but how the ban would be enforced is not clear. The law appears to recognize districting may favor one political party but allows favor only to a small extent. Only undue favor is banned. How a mapmaker or court should judge undue favor is not clear. Statistics coupled with behavior during the redistricting process may demonstrate clear partisan gerrymandering. However, a fair amount of partisan advantage might exist before statistics appear to show clear undue favor.<sup>275</sup>

The language in the legislation suggests what mapmakers *should* do. It does not indicate what they must do or explicitly limit what they can do. The law leaves open whether a mapmaker should assume the law intends a requirement of rough proportional representation. The legislation explicitly disclaims a right to proportional representation in its clause regarding minority voting rights.<sup>276</sup> The lack of a disclaimer in this section of the law might be argued to create such a right, though how the contours of a right could be divined and how such a right could be proven is unclear.

This provision's effect is uncertain because it could be interpreted quite differently depending on what entity interprets it—the VRC, or the Supreme Court of Virginia. The makeup and voting rules of the commission might guarantee that redrawn districts that systematically favor one party over another will not be passed out of the commission. However, this says nothing about how the Supreme Court of Virginia will or should view partisanship if the court is responsible for drawing the lines. Certainly, the court would draw districts consistent with its interpretation of the law, but how it would interpret the law for purposes of drawing maps is not clear.

#### 4. Race and Redistricting

The legislation notes districting must comport with the Voting Rights Act and incorporates additional language that largely

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304.04(8) (Cum. Supp. 2020)).

275. For a discussion of statistics and political partisanship, see *Gill v. Whitford*, 138 S. Ct. 1916, 1924 (2018); Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831 (2015).

276. Chs. 1229 & 1265, 2020 Va. Acts at \_\_, \_\_ (codified at VA. CODE ANN. § 24.2-304.04(3) (Cum. Supp. 2020)).

tracks the language and the doctrine of section 2 of the VRA.<sup>277</sup> For example, the legislation states the following:

A violation of this subdivision is established if, on the basis of the totality of the circumstances, it is shown that districts were drawn in such a way that members of a racial or language minority group are dispersed into districts in which they constitute an ineffective minority of voters or are concentrated into districts where they constitute an excessive majority.<sup>278</sup>

The only difference between the VRA and the Virginia legislation is the Virginia legislation's explicit reference to a bar on "cracking" minority voters into multiple districts and "packing" minority voters into fewer districts.<sup>279</sup> Cracking and packing ensures those voters have less of an opportunity to elect their representatives in similar number to their share of the population.<sup>280</sup> The limitation on cracking and packing has been a part of section 2 doctrine for years.<sup>281</sup>

The legislation appears to suggest mapmakers are obligated to consider drawing crossover districts where sensible rather than merely as a remedy for a section 2 violation. The legislation notes:

Districts shall be drawn to give racial and language minorities an equal opportunity to participate in the political process and shall not dilute or diminish their ability to elect candidates of choice either alone or in coalition with others.<sup>282</sup>

However, whether the legislation forces mapmakers to draw crossover districts whenever the mapmaker can, short of race predominance, is unclear. If a mapmaker aggressively draws crossover districts, the mapmaker may run afoul of the Fourteenth Amendment doctrine on racial predominance.<sup>283</sup> The desire to comply with an aggressive reading of a state statute may not qualify as a compelling state interest in the absence of a section 2 violation.

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277. *Id.* at \_\_, \_\_.

278. *Id.* at \_\_, \_\_.

279. *See id.* at \_\_, \_\_.

280. *See Vieth v. Jubelirer*, 541 U.S. 267, 286 n.7 (2004) (explaining the practices of cracking and packing).

281. *See Shaw v. Reno*, 509 U.S. 630, 670 (1993) (White, J., dissenting) (discussing racial gerrymanders and cracking and packing); *Voinovich v. Quilter*, 507 U.S. 146, 153–54 (1993).

282. Chs. 1229 & 1265, 2020 Va. Acts at \_\_, \_\_ (codified at VA. CODE ANN. § 24.2-304.04(4) (Cum. Supp. 2020)).

283. *See supra* section III.D.1.

The functional question is whether these sections of the statute are meant to encourage mapmakers to maximize the strength of minority voters consistent with the Constitution and VRA, or merely as a reminder that crossover districts—not just majority-minority districts—can help discharge the state’s VRA obligations and the desire to protect minority voters’ rights.<sup>284</sup> The reminder might be needed, because the post-2010 census redistricting focused on retaining majority-minority districts until the *Personhuballah v. Alcorn* litigation created two crossover congressional districts.<sup>285</sup> The issue is particularly tricky given that the legislation notes that it provides no right to proportional representation for minority voters.<sup>286</sup> These provisions are arguably at cross purposes and could lead different mapmakers to interpret the sections differently.

For example, the criteria provide little if any guidance on how a mapmaker should approach Virginia’s Third and Fourth Congressional Districts. Both are crossover districts represented by African American congressmen.<sup>287</sup> It is possible that no section 2 claim exists that would require both districts to be kept. If so, keeping the districts would depend on the mapmaker’s interpretation of the criteria. Whether the criteria should be read to explicitly encourage a mapmaker to try hard to keep the two crossover districts, to consider drawing a majority-minority district while leaving the other district as an influence district at best, or merely to be open to keeping the districts as crossover districts if they arise organically based on the 2020 census figures is not clear.

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284. The same issue arises with a provision in the proposed constitutional amendment, which requires: “Districts shall provide, where practicable, opportunities for racial and ethnic communities to elect candidates of their choice.” S.J. Res. 18, Va. Gen. Assembly (Reg. Sess. 2020) (proposed amendment to VA. CONST. art. II, § 6-A).

285. 155 F. Supp. 3d 552, 565 (E.D. Va. 2016); *see supra* Part II.

286. Chs. 1229 & 1265, 2020 Va. Acts at \_\_, \_\_ (codified at VA. CODE ANN. § 24.2-304.04(3) (Cum. Supp. 2020)).

287. Congressman Robert Scott represents the Third Congressional District and has been in Congress since 1993; Congressman A. Donald McEachin represents the Fourth Congressional District and has been in Congress since 2017. *See Membership*, CONG. BLACK CAUCUS, <https://cbc.house.gov/membership> [<https://perma.cc/83JR-RLNW>]. When the Districts were drawn, the Third had a 45.3% BVAP, and the Fourth had a 40.9% BVAP. *See Personhuballah*, 155 F. Supp. 3d at 565.

## 5. Communities of Interest

The new criteria require mapmakers to preserve “communities of interest,” defining a community of interest as “a neighborhood or any geographically defined group of people living in an area who share similar social, cultural, and economic interests.”<sup>288</sup> The definition explains why a group of people might be given common representation. If people live in the same neighborhood, they may care about similar issues even if they disagree about how to resolve those issues. However, the law does not *require* a district to comprise a single community of interest. Rather, it suggests a community of interest should not be divided into different districts. Multiple communities of interest may be joined in a single district without violating the letter or spirit of the law.

The law also defines what a community of interest is not. A community of interest is not “a community based upon political affiliation or relationship with a political party, elected official, or candidate for office.”<sup>289</sup> That description is a bit odd given that a community of interest is defined as a group having similar “social, cultural and economic interests.”<sup>290</sup> Those interests do not always track political affiliation, but they could. The General Assembly may not wish for a community of interest to be based on political affiliation and may deem political cohesion to be an unworthy basis on which to draw a district. However, if a geographically defined group of people overwhelmingly share the same political views, deeming that grouping not to be a community of interest is odd, and maybe telling. Considerations related to politics and incumbency were a part of the 2011 redistricting criteria.<sup>291</sup> It is possible the 2020 General Assembly wanted to remove politics and incumbency as a consideration in redistricting and thought redefining “communities of interest” was the best way to accomplish the task.

Unfortunately, defining communities of interest as nonpolitical can be at cross purposes with protecting minority voters’ rights. The section 2 *Gingles* preconditions require a geographically compact, politically cohesive group of minority voters be generally unable to elect their candidates of choice because of racial bloc voting.

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288. Chs. 1229 & 1265, 2020 Va. Acts at \_\_, \_\_ (codified at VA. CODE ANN. § 24.2-304.04(5) (Cum. Supp. 2020)).

289. *Id.* at \_\_, \_\_.

290. *Id.* at \_\_, \_\_.

291. S. Comm. on Privileges & Elections Res. 1, *supra* note 139.

Those preconditions appear to assume politically based communities of interest. If section 2 has been (or may be) violated if a specific district is not drawn, the legislation's definition of community of interest does not matter. However, assume that section 2 has not and will not be violated by a refusal to draw a crossover district, but the state wants to draw a crossover district. The legislation's definition of community of interest suggests that the political cohesiveness of the group of minority voters should not be considered in redistricting, though their race might be considered in redistricting.

## 6. A Lingering Issue

The redistricting criteria are standard and reasonable, but they might apply differently depending on what set of districts is being constructed. For example, a community of interest analysis looks different depending on whether one is thinking about House of Delegates districts of eighty thousand people, Senate districts of two hundred thousand people, or congressional districts of seven hundred twenty-seven thousand people. In addition, constructing a community of interest around the issues Congress addresses may be different than constructing a community of interest around the issues the General Assembly addresses. That might sound strange, but the difference is recognized in the OPOV doctrine. Deviations with respect to state legislative districts can be larger than those for congressional districts.<sup>292</sup> This is so in part because some districting criteria track communities of interest and should be adhered to when redistricting state legislative districts, but need not be adhered to when redistricting congressional districts because they do not track communities of interest with respect to Congress. For example, keeping jurisdictions whole and providing them with common representation may be important for state legislative districts given the issues state legislatures decide, but may not be important when considering the issues Congress decides. The redistricting criteria do not address this issue.

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292. Compare *Harris v. Ariz. Indep. Redistricting Comm'n*, 36 S. Ct. 1301, 1305–06 (2016) (discussing deviations in state legislative districts), with *Tennant v. Jefferson Cty. Comm'n*, 567 U.S. 758, 759 (2012) (discussing deviations in congressional districts).

### B. *The Virginia Redistricting Commission*

The General Assembly moved forward on the constitutional amendment that gave the responsibility to redistrict to the Virginia Redistricting Commission. The VRC is an attempt to address partisan gerrymandering and is consistent with the Supreme Court's invitation for states to do so in *Rucho v. Common Cause*.<sup>293</sup> Many states have attempted to lessen the effect of politics in redistricting by establishing independent or semi-independent redistricting commissions.<sup>294</sup> States may use independent redistricting commissions to apportion state legislative districts. In *Arizona State Legislature v. Arizona Independent Redistricting Commission*, the Supreme Court ruled states may also redistrict their congressional districts through a purely independent redistricting commission.<sup>295</sup> Under the *Arizona State Legislature* doctrine, the VRC would be allowed to redistrict congressional districts.<sup>296</sup> The VRC does not independently redistrict electoral districts; it drafts a redistricting plan the General Assembly must accept or reject without changes.<sup>297</sup>

The VRC will have sixteen members—eight legislators and eight citizens.<sup>298</sup> The eight legislators include four members of the House of Delegates and four members of the state Senate.<sup>299</sup> The legislators from the House consist of two members from each of the two parties with the most members in the House.<sup>300</sup> The legislators from the Senate consist of two members from each of the two parties with the most members in the Senate.<sup>301</sup> The citizen members are chosen by a panel of retired Virginia state circuit court judges

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293. 139 S. Ct. 2484, 2507 (2019).

294. See, e.g., Justin Levitt, *Democracy on the High Wire: Citizen Commission Implementation of the Voting Rights Act*, 46 U.C. DAVIS L. REV. 1041, 1043–47 (2013) (discussing California's Citizens Redistricting Commission). For a listing of states with independent and advisory citizen districting commissions, see *Independent and Advisory Citizen Redistricting Commissions*, COMMON CAUSE, <https://www.commoncause.org/independent-redistricting-commissions/> [<https://perma.cc/36GA-BCG7>].

295. 576 U.S. 787, 793 (2015).

296. See Franita Tolson, *Election Law "Federalism" and the Limits of the Antidiscrimination Framework*, 59 WM. & MARY L. REV. 2211, 2241–42 (2018) (discussing the latitude given to states to reapportion their congressional districts).

297. S.J. Res. 18, Va. Gen. Assembly (Reg. Sess. 2020) (proposed amendment to VA. CONST. art. II, § 6-A(e)).

298. *Id.* (proposed amendment to VA. CONST. art. II, § 6-A(b)).

299. *Id.* (proposed amendment to VA. CONST. art. II, § 6-A(b)(1)).

300. *Id.* (proposed amendment to VA. CONST. art. II, § 6-A(b)(1)(C)–(D)).

301. *Id.* (proposed amendment to VA. CONST. art. II, § 6-A(b)(1)(A)–(B)).

from lists provided by the Speaker of the House of Delegates, the leader of the party with the second-most members in the House of Delegates, the President pro tempore of the Senate, and the leader of the party with the second-most members in the state Senate.<sup>302</sup> The VRC creates a proposed set of maps. At least six of the legislators and six of the citizen members must agree to a redistricting plan before the plan is sent to the General Assembly for an up-or-down vote with no changes.<sup>303</sup> If the VRC and General Assembly do not pass maps in the allotted time, the Supreme Court of Virginia will draw the maps.<sup>304</sup>

The VRC is an attempt to remove partisan politics from the redistricting process by removing the power to redistrict from the General Assembly. Though the General Assembly appears ready to relinquish the power to draw the lines, it did not relinquish the power to tell the VRC how to draw the lines. That is the effect of the General Assembly's codification of the redistricting criteria. The criteria provide the VRC guidelines for redistricting, but also provide latitude for the VRC to redistrict in ways the General Assembly might not expect.

Presumably, any map the VRC presents to the General Assembly will not be partisan because it will have garnered approval from at least three-quarters of the VRC's legislative members and citizen members. What will happen if the Commission does not agree on a map, for partisan or nonpartisan reasons, is not clear. Without an agreement, the Supreme Court of Virginia redistricts. The court does not have a supermajority requirement like the VRC. Its redistricting is limited by the redistricting criteria, but its interpretation of the criteria will be its own. That process could create a set of maps with which virtually no one is happy.

### C. *Open Issues*

The General Assembly left a few large issues open in 2020. First, the General Assembly did not address whether mapmakers should start redistricting from scratch or keep current districts as the baseline. The criteria the General Assembly passed attempt to remove politics and incumbency from the redistricting process as

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302. *Id.* (proposed amendment to VA. CONST. art. II, § 6-A(b)(2)(A)–(B)).

303. *Id.* (proposed amendment to VA. CONST. art. II, § 6-A(d)–(e)).

304. *Id.* (proposed amendment to VA. CONST. art. II, § 6-A(f)–(g)).

much as possible.<sup>305</sup> The General Assembly also added a more robust form of compactness. If incumbency was a driving factor behind gerrymandered districts, and if compactness is a real districting value, whatever entity redistricts in 2021 arguably should start from scratch. Conversely, the General Assembly may merely want the current districts to be more compact. Starting from scratch may lead to serious dislocation and might eliminate crossover or majority-minority districts unless those districts would occur organically based on geography and population. Whatever is desired, the mapmaker will make the decision. The VRC and the Supreme Court of Virginia could reach very different conclusions regarding how to start the redistricting process, and for sensible reasons. For example, a preference for starting anew could be tempered with a recognition of the importance of seniority in the U.S House of Representatives. If power comes from seniority and having long-serving congressmen is important to Virginia, deciding to use the current districts as a baseline—which might be less likely to radically change a district—might be a reasonable or preferred way to start the process. That might resonate differently with different mapmakers.

Second, the General Assembly has not indicated what kind of districts the Commonwealth should prefer. A set of safe and stable districts might produce different policy outcomes, for good or for ill, than would a set of competitive districts. The General Assembly may have thought this question one they should not or could not answer, but they should answer it. The question affects politics, but it is not a partisan question. The General Assembly has already embedded some of its preferences in the legislation; it arguably should provide some guidance here as well. This is an important policy question that likely *will* be answered by the next mapmaker, but arguably should *not* be answered by VRC or the Supreme Court of Virginia.

Third, the General Assembly has not explained why it should no longer be primarily responsible for redistricting. No explanation is necessary for why it should not redistrict in 2021 the way it redistricted in 2011 and 2012. However, if the General Assembly believes it performed its job poorly in 2011 and 2012, it should fix the

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305. Acts of Apr. 22, 2020, chs. 1229 & 1265, 2020 Va. Acts at \_\_, \_\_ & \_\_, \_\_ (codified at VA. CODE ANN. § 24.2-304.04(5) (Cum. Supp. 2020)).

problems and do a better job in 2021. Ironically, the new redistricting criteria may be a step in the right direction. If the new redistricting principles are the right redistricting principles, the General Assembly should apply them and redistrict. If the criteria are not the right ones or are not complete, how the VRC or the Supreme Court of Virginia will fix them while applying them is not clear.

### CONCLUSION

In its 2020 session, the General Assembly considered how redistricting in 2021 should proceed in a legal landscape much different from the one that existed in 2011. The General Assembly enacted new districting criteria and pushed forward a constitutional amendment creating the Virginia Redistricting Commission. The General Assembly's 2020 approach to 2021 redistricting was remarkable. It enshrined its policy preferences in Virginia law with the newly enacted redistricting criteria but encouraged those policy preferences be enforced, and other policy choices be made, by other entities—the VRC and possibly the Supreme Court of Virginia—through the constitutional amendment. The amendment's passage has fundamentally altered the redistricting process. The General Assembly will not draw district lines, though it may still be deemed responsible for districts that are created. If all goes well, the VRC will draw maps that reflect the General Assembly's policy choices underlying the newly enacted redistricting criteria, and the General Assembly will approve them. If all does not go well, the Supreme Court of Virginia will make policy choices reflected in its redistricting maps and the General Assembly will have nothing to say about it. Allowing the court to use new redistricting criteria to draw electoral districts for the legislature—and likely make big electoral policy choices in the process if only by default—seems odd because it is odd.

The post-2020 census redistricting process will be different than the post-2010 census redistricting process, and that might be a good thing. The results may not differ much from a standard redistricting process, in which case the General Assembly's actions in its 2020 session may have been so much sound and fury. Conversely, the results may be significantly different, in which case we should fasten our seatbelts for a wild ride.