DECENNIAL REDISTRICTING IN VIRGINIA'S LOCALITIES

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INTRODUCTION

Decennial "redistricting"[1] will soon be here.[2] The process will involve careful consideration of the Commonwealth's congressional, state, and local election districts with potential changes to the same. Although much attention has recently been given to the redistricting of congressional and state legislative districts in the Commonwealth, that should not overshadow the importance of the forthcoming redistricting of local election districts. This presentation is meant to provide an overview of the redistricting process Virginia's localities must undergo, in view of applicable state and federal law.

We hope that this presentation is helpful. However, please bear in mind that it does not purport to cover all manner of redistricting concerns, in each of their potential applications, or all competing views regarding the same. Matters related to redistricting are complex and fact-specific. Stakeholders should consult their counsel regarding their specific situation.[3]

LOCAL REDISTRICTING UNDER VIRGINIA LAW

Virginia's localities are creations of the Commonwealth. Their structure and governance derive from the Virginia Constitution and the laws and charters enacted by the General Assembly, though federal law may preempt Virginia law in certain circumstances.

I. Relevant sources of Virginia law.

For Virginia's localities, the Virginia law of most concern in decennial redistricting is found in Article I, § 11 and Article VII, § 5 of the Virginia Constitution, and Title 24.2, Chapter 3 of the Code of Virginia. For those localities having charters or otherwise affected by special laws, their provisions may also be of importance.[4]

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[1] "The terms 'redistricting,' 'apportionment,' and 'reapportionment' frequently are used interchangeably. Technically, the words 'apportionment' and 'reapportionment' apply to the allocation of a finite number of representatives among a fixed number of pre-established areas, while 'districting' and 'redistricting' refer to the drawing of district lines." *Davis v. Bandemer*, 478 U.S. 109, 161 n.1 (1986) (Powell, J., concurring in part & dissenting in part).

[2] Concerns have been expressed that the novel coronavirus could delay the release of decennial census information, which could result in delays in redistricting. Obviously, this is a very important concern for redistricting localities, which are under constitutional and statutory deadlines.

[3] Stakeholders are also well-advised to monitor for guidance from the state government. In past years, the Division of Legislative Services has issued helpful guidance documents. Div. of Legis. Servs., *Redistricting Publications*, VIRGINIA.GOV, *available at* http://dls.virginia.gov/pubs_redistricting.html.

[4] Note that Va. Code § 24.2-311(E) provides that, "[i]n the event of a conflict between the provisions of a decennial redistricting measure and the provisions of the charter of any locality, the provisions of the redistricting measure shall be deemed to override the charter provisions to the extent required to give effect to the redistricting plan." That section of the Virginia Code is titled, "Effective date of decennial redistricting measures; elections following decennial redistricting."

In material part, Article I, § 11 of the Virginia Constitution provides "that the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged." On redistricting matters, our Supreme Court has stated that Article I, § 11's antidiscrimination clause is "congruent with" the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. *Wilkins v. West*, 264 Va. 447, 467, 571 S.E.2d 100, 111 (2002). Therefore, claims under Article I, § 11 are considered under the "standards and nomenclature" developed under the Equal Protection Clause. *Id.*

Article VII, § 5 of the Virginia Constitution is titled, "County, city, and town governing bodies." It reads as follows:

> The governing body of each county, city, or town shall be elected by the qualified voters of such county, city, or town in the manner provided by law.
>
> If the members are elected by district, the district shall be composed of contiguous and compact territory and shall be so constituted as to give, as nearly as is practicable, representation in proportion to the population of the district. When members are so elected by district, the governing body of any county, city, or town may, in a manner provided by law, increase or diminish the number, and change the boundaries, of districts, and shall in 1971 and every ten years thereafter, and also whenever the boundaries of such districts are changed,[5] reapportion the representation in the governing body among the districts in a manner provided by law. Whenever the governing body of any such unit shall fail to perform the duties so prescribed in the manner herein directed, a suit shall lie on behalf of any citizen thereof to compel performance by the governing body.
>
> Unless otherwise provided by law, the governing body of each city or town shall be elected on the second Tuesday in June and take office on the first day of the following September. Unless otherwise provided by law, the governing body of each county shall be elected on the Tuesday after the first Monday in November and take office on the first day of the following January.

There is similar language in Article II, § 6's provision regarding the decennial redistricting of Virginia's congressional and state legislative districts and its forerunners in prior constitutions.[6]

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[5] The focus of this presentation is decennial redistricting. Redistricting required by boundary changes is not discussed further herein.

[6] Addressing Virginia's congressional and state legislative districts, Article II, § 6 includes an identically-worded requirement that such districts "shall be composed of contiguous and compact territory and shall be so constituted as to give, as nearly as is practicable, representation in proportion to the population of the

Title 24.2, Chapter 3 of the Code of Virginia is titled, "Election districts, precincts, and polling places." In Chapter 3, the provisions of primary concern here are in Article 2.1, titled, "Reapportionment of Local Election Districts;" Article 3, titled, "Requirements for Election Districts, Precincts, and Polling Places;" and Article 4, titled, "Effective Dates of Redistricting Measures."

While local charters are not discussed in detail herein, any locality having a charter should consult its provisions insofar as they relate to election districts, redistricting, or both.

II. The requirement to redistrict.

As reflected in Article VII, § 5 of the Constitution of Virginia and Va. Code § 24.2-304.1(B), the redistricting of local election districts is the responsibility of the local governing body. That will remain the case, regardless of how Virginia voters act on the pending Virginia Redistricting Commission amendment. *See* 2020 Va. Acts, ch. 1196; 2019 Va. Acts, ch. 821.[7]

Article VII, § 5 requires that local governing bodies elected by district "shall in 1971 and every ten years thereafter . . . reapportion the representation in the governing body among the districts in a manner provided by law."

Va. Code § 24.2-304.1(B) similarly provides that, if the governing body's "members are elected from districts or wards and other than entirely at large from the locality," then, "[i]n 1971 and every 10 years thereafter, the governing body of each such locality shall reapportion the representation among the districts or wards, including, if the governing body deems it appropriate, increasing or diminishing the number of such districts or wards, in order to give, as nearly as is practicable, representation on the basis of population."

Together, Article VII, § 5 and Va. Code § 24.2-304.1(B) require that such a locality's governing body "must take an affirmative action to reapportion" the locality's election districts in the "tenth year since the last reapportionment." Va. Att'y Gen. Op. No. 11-075, 2011 Va. AG LEXIS 36, at *4 (June 22, 2011). The redistricting requirement applies "irrespective of whether the most recent decennial population figures for each of those districts would necessitate any boundary adjustments." *Id.*

district." This requirement is retained in the proposed amendment. 2020 Va. Acts, ch. 1196; 2019 Va. Acts, ch. 821.

[7] Earlier versions of House Joint Resolution 615 would have required each local governing body, elected from districts, to "establish in the year following the decennial census an independent redistricting commission for the purpose of proposing electoral districts for members of the governing body." H.J. Res. 615 (prefiled Jan. 1, 2019); H.J. Res. 615 (comm. sub. Feb. 1, 2019). Senate Joint Resolution 17, which actually passed the Senate and House of Delegates, if approved by voters, would establish a bipartisan redistricting commission to draw redistricting maps for Virginia Senate and House of Delegates districts, and congressional districts.

Where members of the locality's governing body are elected at large, however, redistricting is not required. The Attorney General has opined that, "[w]here a city has 'qualification districts' under its charter, the city is not required to reapportion such districts under Art. VII, § 5 of the Virginia Constitution, where the charter provides for all candidates to be elected at large." 1981-82 Va. Op. Att'y Gen. 90, 1981 Va. AG LEXIS 22, at *4 (Dec. 30, 1981) (addressing provisions of Poquoson's charter).[8]

III. The redistricting ordinance.

Redistricting is done by ordinance,[9] Va. Code § 24.2-304.3, and the ordinance takes effect immediately upon enactment, *id.* § 24.2-311(B). The ordinance must be enacted at least sixty days before the next general election, and notice shall be published prior to enactment in a newspaper having general circulation in the election district or precinct once a week for two successive weeks. *Id.* § 24.2-306(A).

IV. Redrawing the districts.

Article VII, § 5 and Va. Code § 24.2-304.1 includes provisions on the redrawing of districts in redistricting. Both require that the redrawn districts "of contiguous and compact territory" that are "so constituted as to give, as nearly as is practicable, representation in proportion to the population."

A. CONTIGUOUS AND COMPACT TERRITORY.

The contiguous-and-compact-territory requirement of Article VII, § 5 and Va. Code § 24.2-304.1(B) have been given relatively little authoritative discussion, but decisions under the similarly-worded requirement of Article II, § 6 (regarding Virginia's congressional and state legislative districts) may be persuasive and are referenced herein.

The contiguous and compact requirement concerns the district's "territory." It sets "spatial restrictions in the composition of electoral districts." *Jamerson v. Womack*, 244 Va. 506, 514, 423 S.E.2d 180, 184 (1992).

The contiguity requirement concerns whether the territory in the district is "touching or in close physical proximity." *See* 1984-1985 Op. Atty Gen. Va. 128, 1984 Va. AG LEXIS 61, at *2 (Oct. 4, 1984). Clearly, a district fails the contiguity requirement if

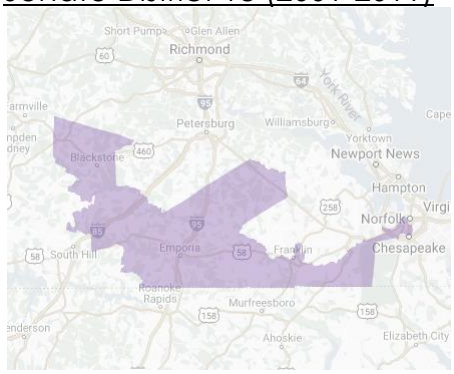
[8] The Attorney General acknowledged that, "[a]t some point in time, population imbalances between the districts could become so great that they would need to be adjusted under other provisions of State or federal law." 1981-82 Va. Op. Att'y Gen. 90, *supra*, at *4 n.4.

[9] The redistricting of local election districts is often referred to as the redistricting of "magisterial districts." *Cf.* Va. Code § 15.2-1211(A). Note that a county ordinance may provide that the "magisterial districts" of the county remain the same, but that the representation on the governing body shall be according to "election districts." *Id.* § 15.2-1211(C).

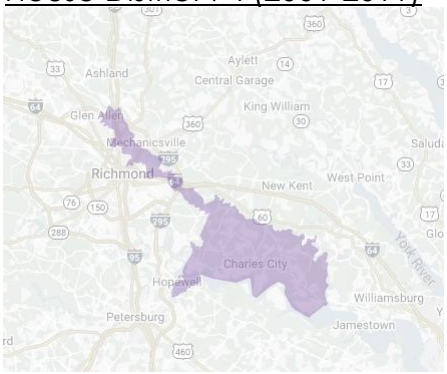
different sections of the district are "completely severed" by land outside of the district. *Wilkins*, 264 Va. at 463, 571 S.E.2d at 109. Short of that, "there is no per se test" for contiguity. *Id.* at 464, 571 S.E.2d at 109. The contiguity requirement may be satisfied where different sections of a district are separated by water. *Id.*

The compactness requirement is "somewhat abstract," and there is no "bright line" test for determining whether a district violates the compactness requirement. *Vesilind v. Va. State Bd. of Elections*, 295 Va. 427, 444-45, 813 S.E.2d 739, 748 (2018). Importantly, "the Constitution of Virginia does not require districts to be as compact as possible." *Id.* at 448, 813 S.E.2d at 750.

Senate District 18 (2001-2011)[10]



House District 74 (2001-2011)[11]



As illustrated by our Supreme Court's decision upholding the 2001 redistricting's Senate District 18 and House District 74 (shown above), an election district with a "bizarre shape" may even survive a compactness challenge. *See Wilkins*, 264 Va. at 481, 483, 571 S.E.2d at 119, 120 (Hassell, J., concurring).

A challenged district will be upheld if the contiguity and compactness of its territory is "fairly debatable." *Vesilind*, 295 Va. at 445, 813 S.E.2d at 749. In this analysis, courts also acknowledge legislative discretion in reconciling the contiguity and compactness requirement among the multiple other redistricting concerns. *See id.*; *Jamerson*, 244 Va. at 517, 423 S.E.2d at 186.

For an example of a contiguous-and-compact challenge to local election districts, see *Allen v. Greensville County Board of Supervisors*, 24 Va. Cir. 398 (Greensville Cnty. 1991). There, the circuit court upheld an election district in Greensville County. The court reviewed the district with "a presumption of correctness," requiring that the violation "be shown by clear and convincing evidence." *Id.* at 399. In upholding the district, the court observed that the word "contiguous" should be interpreted "to effectuate redistricting." *Id.* The court further elaborated that Article VII, § 5's framers must have intended that

[10] *State Senate District 18*, VPAP.ORG, *available at* https://www.vpap.org/offices/state-senate-18/redistricting/ (last accessed Apr. 29, 2020).

[11] *House of Delegates District 74*, VPAP.ORG, *available at* https://www.vpap.org/offices/house-of-delegates-74/redistricting/2001-house/ (last accessed Apr. 29, 2020).

"due deference" be given to redistricting given the geographic diversity of the Commonwealth. *Id.* "Recognizing its many eastern rivers, bays, and tributaries, valleys and hills of the piedmont, and the mountains of the west, such vast and different topography would make a strict or rigid construction of 'contiguous and compact' difficult or impractical as it applies to redistricting." *Id.*

B. CLEARLY DEFINED AND CLEARLY OBSERVABLE BOUNDARIES.

Va. Code § 24.2-305(A) repeats the contiguous-and-compact requirement and further requires that each election district "shall have clearly defined and clearly observable boundaries." Subsection (B) defines "clearly observable boundary." Such a boundary will include the following:

- any named road or street,;
- any road or highway that is a part of the federal, primary, or secondary state highway system;
- any river, stream, or drainage feature shown as a polygon boundary on the TIGER/line files of the U.S. Census Bureau; or
- any other natural, constructed, or erected permanent physical feature shown on an official map issued by the Virginia Department of Transportation, on a U.S. Geological Survey topographical map, or as a polygon boundary on the TIGER/line files of U.S. Census Bureau.

Subsection (B) further provides that a "property line or subdivision boundary" can only be deemed a "clearly observable boundary" if it is marked by a permanent physical feature shown on an official map issued by the Virginia Department of Transportation, on a U.S. Geological Survey topographical map, or as a polygon boundary on the TIGER/line files of the U.S. Census Bureau.

C. PROPORTIONATE REPRESENTATION.

As mentioned above, Article VII, § 5 requires that local election districts "shall be so constituted as to give, as nearly as is practicable, representation in proportion to the population of the district." Va. Code § 24.2-304.1(B) is to similar effect.

Notably, two decisions from our Supreme Court have applied the similarly-worded requirement of Article II, § 6's precursor in holding that certain congressional districts were invalid on the basis of disproportionate representation in the districts. *Wilkins*, 264 Va. 447, 571 S.E.2d 100; *Brown v. Saunders*, 159 Va. 28, 31, 166 S.E. 105, 105 (1932). In those cases, "the evidence showed significant and obvious disparities in the populations of the various congressional districts." *Jamerson*, 244 Va. at 516, 423 S.E.2d at 186 (describing *Wilkins* and *Brown*). "Although some effort was made to justify the disparities on the grounds of communities of interest," "the evidence failed to show that the General Assembly could not have adjusted the boundaries of those districts to achieve a more reasonable equality in population." *Id.* at 516-17, 423 S.E.2d at 186 (same).

Wilkins v. Davis (1965)		
District	Population	Percentage
First	422,624	10.69%
Second	494,292	12.50%
Third	418,081	10.57%
Fourth	352,157	8.91%
Fifth	325,989	8.24%
Sixth	378,864	9.58%
Seventh	312,890	7.91%
Eighth	357,461	9.04%
Ninth	364,973	9.23%
Tenth	527,098	13.33%

Brown v. Saunders (1932)		
District	Population	Percentage
First	239,835	9.90%
Second	302,715	12.50%
Third	288,939	11.93%
Fourth	212,952	8.79%
Fifth	251,090	10.37%
Sixth	280,708	11.59%
Seventh	336,654	13.90%
Eighth	183,934	7.59%
Ninth	325,024	13.42%

However, "[m]athematical exactness" in proportionate representation "cannot be attained" and "was not contemplated" in this constitutional provision. *Wilkins v. Davis*, 205 Va. 803, 806, 139 S.E.2d 849, 851 (1965) (quoting *Brown*, 159 Va. at 43-44, 166 S.E. at 110). Given the various considerations in redistricting, "[i]t is inevitable that there must be in the several districts some variation from the unit of representation found by dividing the total population of the State by the number of representatives apportioned to the State." *Id.* at 805, 139 S.E.2d at 850 (quoting *Brown*, 159 Va. at 37, 166 S.E. at 107). "No small or trivial deviation from equality of population would justify or warrant an application to a court for redress. It must be a grave, palpable and unreasonable deviation from the principles fixed by the Constitution. No exact dividing line can be drawn." *Id.* at 806, 139 S.E.2d at 851 (quoting *Brown*, 159 Va. at 44, 166 S.E. at 110).

For purposes of determining the "population," the governing body will use the locality's most recent decennial population figures from the U.S. Census Bureau.[12] Va. Code § 24.2-304.1(C). As discussed further below, an amendment from the 2020 legislative session will require that the census data used for redistricting be "adjusted by the Division of Legislative Services." 2020 Va. Acts, ch. 1265, § 1 (amending Va. Code § 24.2-304.1(C) and adding Va. Code § 23.2-314).

Over the last two decades, the General Assembly has been attentive to how local prison populations figure into the population count. *See* 2001 Va. Acts, ch. 6 (spec. sess. I); 2002 Va. Acts, ch. 127; 2012 Va. Acts, ch. 357; 2013 Va. Acts, ch. 483; 2020 Va. Acts,

[12] These "figures are identical to those from the actual enumeration conducted by the United States Bureau of the Census for the apportionment of representatives in the United States House of Representatives, except that the census data for these redistricting and apportionment purposes will not include any population figure that is not allocated to specific census blocks within the Commonwealth, even though that population may have been included in the apportionment population figures of the Commonwealth for the purpose of allocating United States House of Representatives seats among the states." Va. Code § 24.2-304.1(C).

ch. 1265. At present, the governing body "may elect to exclude the adult inmate population of any federal, state, or regional adult correctional facility located in the locality from the population figures used for the purposes of the decennial reapportionment and redistricting."[13] *Id.* By the time of the 2021 redistricting, that matter will be out of the governing body's hands. 2020 Va. Acts, ch. 1265, § 1 (amending Va. Code § 24.2-304.1(C) and adding Va. Code § 23.2-314).

As a result of 2020 Va. Acts, ch. 1265, the Division of Legislative Services will adjust the census data to account for prisoners in federal, state, or local correctional facilities. A prisoner who resided within the Commonwealth at the time of incarceration will be deemed to be a resident at that address. *Id.* (to be codified at Va. Code § 23.2-314(A)(1)). A prisoner who resided outside of the Commonwealth (or whose residence cannot be determined) as of the time of incarceration will be deemed to be a resident at the location of the correctional facility. *Id.* (to be codified at Va. Code § 23.2-314(A)(2)). "The adjusted population data shall be used for purposes of redistricting and reapportionment and shall be the basis for . . . local government election districts." *Id.* (to be codified at Va. Code § 23.2-314(D)). The Division of Legislative Services is to adjust the census data and make it available no later than thirty days after it receives the census data from the U.S. Census Bureau. *Id.* (to be codified at Va. Code § 23.2-314(E)).

D. TRADITIONAL REDISTRICTING ELEMENTS.

While redistricting involves balancing "a number of competing constitutional and statutory factors," it bears mention that there are "also legitimate legislative considerations" that have been acknowledged though they are not required by constitution or statute. *Wilkins*, 264 Va. at 463, 571 S.E.2d at 109. Among these "traditional redistricting elements" are "preservation of existing districts, incumbency, voting behavior, and communities of interest." *Id.*

V. Elections after redistricting.

Although the redistricting ordinance takes effect upon enactment, there is a delay before the next elections. *See* 1976-77 Va. Op. Att'y Gen. 70, 1976 Va. AG LEXIS 32, at *3 (Dec. 21, 1976) ("Neither the United States Constitution nor the Constitution of Virginia require that an immediate election be held following reapportionment.").

Article VII, § 5 of the Virginia Constitution provides a default schedule for elections of local governing bodies, unless otherwise provided by law. Under the constitutional default, governing bodies for cities and towns are "elected on the second Tuesday in June and take office on the first day of the following September," and governing bodies for counties are "elected on the Tuesday after the first Monday in November and take office on the first day of the following January." The General

[13] "The adult inmate population so excluded shall be based on information provided by the facility as to the adult inmate population at the facility on the date of the decennial census." Va. Code § 24.2-304.1(C).

Assembly has enacted several statutes regarding elections after the enactment of a redistricting ordinance.

Members of the local governing body in office on the redistricting ordinance's effective date will complete their terms. Va. Code § 24.2-311(B). The redistricting ordinance will be used in the next general election preceding the expiration of the incumbent's term. *Id.* § 24.2-311(B).

If a special election is required to fill a vacancy arising after redistricting ordinance's effective date, then the vacancy is filled from the district in the ordinance "which most closely approximates the district in which the vacancy occurred." *Id.* § 24.2-311(C).

Other rules come into play if the redistricting ordinance adds any number of districts and increases the membership of the governing body. In such cases, the election for the additional member(s), whether for the full or partial term provided by law, is held at the next November general election (if the locality regularly elects its governing body in November) or the next May general election occurring at least 120 days after the redistricting ordinance's effective date. *Id.* § 24.2-311(D).

For county boards of supervisors elected biennially for staggered four-year terms, if a redistricting ordinance results in an increase in the number of districts, then a two-year or four-year term will be assigned for each new district "so as to maintain as equal as practical the number of members to be elected at each biennial election." *Id.* § 24.2-219(C). Otherwise, such boards are elected "in each new district at the general election next preceding the expiration of the term of the office of the member of the board representing the predecessor district of each new district." *Id.*

Note that Va. Code § 24.2-313 addresses elections where the locality's redistricting plan "is not precleared by the Attorney General of the United States pursuant to § 5 of the federal Voting Rights Act at least thirty days prior to the general election" or "the Attorney General grants preclearance at least thirty days prior to the general election." As discussed further below, Virginia and its localities are not presently subject to the § 5 preclearance requirement. It is unlikely that will change in advance of the 2021 elections, and it is unlikely that Va. Code § 24.2-313 will play a part in this decennial redistricting.

VI. Enforcement.

Under Article VII, § 5, whenever the locality's governing body fails to perform the duties prescribed in that section in the manner therein directed, "a suit shall lie on behalf of any citizen thereof to compel performance by the governing body."

In a decision from Lancaster County, the circuit court held that a town and its mayor and council members, in their official capacity, could not bring suit under Article VII, § 5 because the town was not a "citizen," and no other law was cited that would give

it authority to challenge the County's redistricting ordinance. *Town of White Stone v. Lancaster Cnty.*, 97 Va. Cir. 309, 10-11 (Lancaster Cnty. 2002).

The Virginia Code also provides for two types of civil actions regarding redistricting. If the locality's governing body fails to redistrict as prescribed by law, "mandamus shall lie in favor of any citizen of such county, city, or town, to compel the performance of such duty." Va. Code § 24.2-304.4. Consistent with the law of mandamus more generally, this type of mandamus action reflects a recognition that "[r]edistricting is a ministerial act in several respects."[14] *Town of White Stone*, 97 Va. Cir. at 312. Another type of redistricting case may "go beyond the scope of a writ of mandamus." *Id.* If the locality's governing body does redistrict as prescribed by law, "the action shall not be subject to judicial review, unless it is alleged that the representation is not proportional to the population of the district." Va. Code § 24.2-304.4. In the language of mandamus, "[t]he location of district lines drawn during reapportionment is discretionary with the governing body." *Town of White Stone*, 97 Va. Cir. at 312 n.2.

While Va. Code § 24.2-304.4 does not address challenges under the contiguous-and-compact requirement, the circuit court in *Town of White Stone* held that § 24.2-304.4 does not specify "the only ground for initiating a lawsuit to challenging local redistricting." *Id.* at 313. Article VII, § 5 "states that 'a suit shall lie on behalf of any citizen [of the locality] to compel performance by the governing body.' It does not restrict what type of suit may be brought." *Id.*[15] Bear in mind that the court required the plaintiffs to satisfy pleading requirements for bringing such suits. *See, e.g.*, *Town of White Stone*, 97 Va. Cir. at 315 (requiring allegations of "'actual controversy' or 'antagonistic assertion and denial of right'" for declaratory-judgment action and "proof of lack of an adequate remedy at law, irreparable injury, and the posting of bond" for injunction).

If a locality is named as a defendant in any civil action challenging the legality of its electoral district boundaries, it shall immediately notify the Attorney General of the same. Va. Code § 24.2-304.5. The Attorney General will review the civil action and may

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[14] The court observed that the requirements to redistrict "are mandates to take action. They are not dependent upon some discretionary decision by the local body, but are ministerial acts required both by the Virginia Constitution and Virginia statute." *Town of White Stone*, 97 Va. Cir. at 312 (citations omitted).

[15] While not referenced in the *Town of White Stone* decision, observe that the Committee on Constitutional Revision expressly declined to use the word "mandamus" in Article VII, § 5: "The word 'suit' is used, rather than . . . 'mandamus,' because mandamus is an extraordinary writ. 'Suit' is more comprehensive." REPORT OF THE COMMISSION ON CONSTITUTIONAL REVISION 234 (Jan. 1, 1969). The executive director of that committee later commented that the right to sue under Article VII, § 5

> is not limited to instances in which the governing body fails to act at all; the right extends equally to instances where the governing body, although acting, fails to follow the standards laid down in this section. Thus, for example, suit would lie if an apportionment plan were not based as nearly as practicable on population, or if districts were not composed of contiguous and compact territory.

2 A.E. Dick Howard, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 840 (1974).

represent the interests of the Commonwealth in developing an appropriate remedy consistent with legal requirements. *Id.* § 2.2-508.

VII. Redistricting for school boards elected by district.

The decennial redistricting is significant to school boards serving localities in which the voters directly elect the school board by district. Va. Code § 22.1-57.3 addresses the matter in more detail, but the takeaway is that the redistricting of the governing body will generally also apply with respect to the school board.

Where both the school board and the governing body are elected by district, the school board's districts are "coterminous" with the governing body's. *Id.* § 22.1-57.3(B). For most localities, the elections will be held simultaneously. *See id.*[16] The school board and governing body members will also serve the same terms. *Id.*

VIII. Redistricting's effect on precincts.

While the primary focus of this presentation is redistricting, the decennial obligation to redistrict brings with it certain obligations regarding the boundaries of voting precincts. Each precinct in a city or county must be "wholly contained within any election district used for the election of one or more members of the governing body or school board for the county or city." *Id.* § 24.2-307. Similarly, each town precinct must be "wholly contained within any election district used for the election of one or more council or school board members." *Id.* § 24.2-308. Redistricting localities will have to heed these requirements, as well as the various others regarding precincts and polling places. *See generally id.* § 24.2-305, et seq.; 2020 Va. Acts, ch. 1268.

IX. Possible changes?

It bears mention that there appears to be some interest in the General Assembly in making rather significant changes to the local redistricting process. It is doubtful that any significant changes would be made before the 2021 redistricting; however, it is not impossible, and in any event such changes could be made in advance of the 2031 redistricting.

A. STATE PRECLEARANCE.

Delegate VanValkenburg (D-72d Dist.) was the chief patron of House Bill 761 ("HB761"), which would have added a Code section titled, "Preclearance of certain covered practices."

[16] Exceptions are allowed for certain localities. Va. Code § 22.1-57.3:1(A) (Loudoun, Pulaski, and Rockbridge Counties); *id.* § 22.1-57.3:1(B) (Bath County); *id.* § 22.1-57.3:1.1 (Loudoun County); *id.* § 22.1-57.3:1.2 (Pittsylvania County).

In its original form, HB761 would have required local governing bodies to preclear certain "covered practices" either through a declaratory-judgment action filed in the Court of Appeals or through the Attorney General. H.B. 761 (prefiled Jan. 7, 2020).[17] Among the "covered practices" were "[a]ny change to the boundaries of election districts or wards in a county or city[.]" Depending on the preclearance route chosen, the covered practice would not be effective until:

- the Court of Appeals entered a judgment to the effect that it "neither has the purpose nor will have the effect of denying or abridging the right to vote on account of race or color or membership in a language minority group;" or
- sixty days passed after submission to the Attorney General, without the Attorney General making an objection, or, if good cause justified expedited approval, the Attorney General affirmatively indicated no objection would be made.[18]

Preclearance by any of these methods would not "bar a subsequent action to enjoin enforcement of" the covered practice.

The House Committee on Privileges and Elections reported a substitute. H.B. 761 (comm. sub. Jan. 31, 2020).[19] Among other things, it defined "covered jurisdictions" also including towns, revised the "covered practices," added a "retrogression" element to preclearance, changed the jurisdiction for declaratory-judgment actions from the Court of Appeals to the "circuit court for the jurisdiction," and provided for litigation arising out of the Attorney General's preclearance decision and a covered jurisdiction's failure to initiate the preclearance process.[20] The revised "covered practices" still included "[a]ny change to the boundaries of election districts or wards in the covered jurisdiction or to the boundary lines of the covered jurisdiction[.]" A "covered jurisdiction" was defined as "any county, city, or town that is determined . . . to have a voting age population that contains two or more racial or ethnic groups, each constituting at least 20 percent of its voting age population." The Attorney General would determine such populations, in consultation with the State Board of Elections and other relevant agencies of the executive branch, and publish the same.

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[17] *Available at* https://lis.virginia.gov/cgi-bin/legp604.exe?201+ful+HB761.

[18] The Attorney General's expedited approval would not prejudice his right to reexamine the submission "if additional information that would otherwise require objection" came to his attention during the remainder of the sixty-day period. H.B. 761 (prefiled Jan. 7, 2020).

[19] *Available at* https://lis.virginia.gov/cgi-bin/legp604.exe?201+ful+HB761H1.

[20] In any action filed in the circuit court, it would enjoin the "enjoin the enactment or administration of the covered practice that is the subject of the action, unless it determines that the covered practice neither has the purpose or effect of denying or abridging the right to vote on account of race or color or membership in a language minority group nor will it result in the retrogression in the position of members of a racial or ethnic group with respect to their effective exercise of the electoral franchise." H.B. 761 (comm. sub. Jan. 31, 2020).

The House of Delegates passed the House Committee on Privileges and Elections substitute by a vote of 59-40.

HB761 was then referred to the Senate Committee on Privileges and Elections, which reported a substitute. H.B. 761 (comm. sub. Feb. 25, 2020).[21] Among the substantive changes were the removal of towns from the "covered jurisdictions" and the change in venue from the "circuit for the jurisdiction" to the Circuit Court for the City of Richmond. Significantly, the substitute also provided that HB761 would "become effective on January 1, 2020," and no covered jurisdictions would be required to preclear "for any change made to the boundaries of its election districts or wards until July 1, 2022."

This substitute then went to the Senate Committee on Finance and Appropriations, which amended HB761 so that it would "not become effective unless an appropriation effectuating the purposes of this act is included in a general appropriation act passed in 2020 by the General Assembly that becomes law." *Amendment(s) Proposed by the Senate – Finance & Appropriations*, H.B. 761 (Mar. 2, 2020).[22]

Thereafter, Senator Petersen (D-34th Dist.) proposed an amendment,[23] expressly excluding from the "covered jurisdiction" definition "any county or city that, on or after January 1, 2008," had been bailed out of the "the preclearance requirements of § 5 of the Voting Rights Act of 1965, as amended, pursuant to a declaratory judgment issued by the United States District Court for the District of Columbia under § 4 of that Act." *Amendment(s) Proposed by the Senate – Sen. Petersen*, H.B. 761 (Mar. 5, 2020).[24]

By a vote of 21-19, the Senate passed the Senate Committee on Privileges and Elections substitute with these two amendments.

The House agreed to the Senate Committee on Privileges and Elections substitute by a vote of 64-32 and Senator Petersen's amendment by a vote of 58-40. The House rejected the Senate Committee on Finance and Appropriations amendment by a vote of 0-99. The Senate insisted upon the amendment and requested a conference committee. Each house appointed conferees, but HB761 failed to pass before the session ended.

B. LOCAL REDISTRICTING COMMISSIONS.

There has been interest in local redistricting commissions, but they are not provided for in the pending constitutional amendment. *Compare* H.J. Res. 615 (prefiled Jan. 1, 2019), *and* H.J. Res. 615 (comm. sub. Feb. 1, 2019), *with* 2020 Va. Acts, ch. 1196,

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[21] *Available at* https://lis.virginia.gov/cgi-bin/legp604.exe?201+ful+HB761S1.

[22] *Available at* https://lis.virginia.gov/cgi-bin/legp604.exe?201+amd+HB761AS.

[23] *Available at* https://lis.virginia.gov/cgi-bin/legp604.exe?201+amd+HB761AS.

[24] *See infra* Local Redistricting Under Federal Law pt. II (discussing "bail out" of § 5 preclearance).

and 2019 Va. Acts, ch. 821. House Bill 381 ("HB381") would have required an alternative type of local redistricting commission. Delegate Cole (R-88th Dist.) was the chief patron of HB381.

Among other things, HB381 would have required local governing bodies elected by district to establish local redistricting commissions for purposes of decennial redistricting. H.B. 381 (prefiled Jan. 2, 2020).[25] The local redistricting commission would have four members and would propose two or more redistricting plans to the governing body. For a plan to be proposed, it would require at least three affirmative votes from the commissioners. The commission would designate one of the proposed plans as its preferred plan. The governing body would have to choose from among the proposed plans without making any changes to the proposed plans. If the governing body did not select a plan within thirty days of their being made available to the public, the commission's preferred plan would be deemed adopted and would go into effect immediately.

At the end of the 2020 session, HB381 remained in the House Privileges and Elections Committee.

LOCAL REDISTRICTING UNDER FEDERAL LAW

While Virginia law addresses many of the details regarding local redistricting, there are very important provisions of federal law bearing on the same. In many cases, federal law and Virginia law can stand together. *See* U.S. Const. amend. X. However, the U.S. Constitution, and the laws made pursuant to it, will preempt anything to the contrary in the constitution and laws of Virginia. *See id.* art. VI, cl. 2.

I. Relevant sources of federal law.

In the matter of local redistricting, the federal law of primary concern is found in the Fourteenth and Fifteenth Amendments to the U.S. Constitution and the Voting Rights Act of 1965, Pub. L. No. 89-110, §§ 2, 4, 5, 79 Stat. 437, 437-39 (codified as amended at 52 U.S.C. §§ 10301, 10303, and 10304) (the "VRA").

The Fourteenth Amendment includes the "Equal Protection Clause," which provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

In relevant part, the Fifteenth Amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged . . . by any state on account of race, color, or previous condition of servitude." *Id.* amend. XV, § 1. Congress is authorized to enforce this prohibition "by appropriate legislation." *Id.* amend. XV, § 2.[26]

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[25] *Available at* https://lis.virginia.gov/cgi-bin/legp604.exe?201+ful+HB381.

[26] While these constitutional limitations speak in terms of the "State," they extend to localities, which are creations of the State deriving their authority from the State. *See Avery v. Midland Cnty.*, 390 U.S. 474, 480 (1968); *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278, 290-91, 294 (1913).

The most important federal statutes bearing on redistricting trace their origin to the VRA, which was enacted pursuant to the Fifteenth Amendment. While there have been amendments since 1965,[27] the provisions are still referenced by their original designations in the VRA.

II. Preclearance under VRA §§ 4(b) and 5.

Together, VRA §§ 4(b) and 5 establish a "preclearance" procedure. Covered States and localities must preclear certain changes in their voting laws with the U.S. District Court for the District of Columbia or the U.S. Attorney General. In other words, VRA § 5 "suspends new voting regulations pending scrutiny by federal authorities." *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966). After the U.S. Supreme Court's decision in *Shelby County v. Holder*, 570 U.S. 529 (2013), VRA § 5 preclearance will not be a part of the redistricting process unless a particular jurisdiction is "bailed in" to coverage or Congress enacts a new coverage formula to replace VRA § 4(b)'s.

Under VRA § 5, a covered locality to preclear its enactment or administration of any "standard, practice, or procedure with respect to voting"[28] different from that in force or effect on November 1, 1964, 1968, or 1972. 52 U.S.C. § 10304(a). The reference year corresponds to the locality's coverage under the formula in VRA § 4(b), which is based on conditions in the locality in 1964, 1968, and 1972, respectively. *See id.* §§ 10303(b), 10304(a). There is also a procedure for a locality to "bail out" of coverage, *id.* § 10303(a), and one for a noncovered locality to be "bailed in," *id.* § 10302(c).[29]

Virginia and all of its localities were covered under the 1964 formula.[30] By the time the U.S. Supreme Court decided *Shelby County*, thirty-two Virginia localities had bailed out of coverage. *Section 4 of the Voting Rights Act*, JUSTICE.GOV (updated May 5, 2020).[31]

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[27] Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 315; Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400; Voting Rights Act Amendment of 1982, Pub. L. No. 97-205, 96 Stat. 134; Voting Rights Language Assistance Act of 1992, Pub. L. No. 102-344, 106 Stat. 921; Fannie Lou Hamer, Rosa Parks, & Coretta Scott King Voting Rights Act Reauthorization & Amendments Act of 2006, Pub. L. No. 102-246, 120 Stat. 577.

[28] A redistricting plan is a "standard, practice, or procedure with respect to voting." *McDaniel v. Sanchez*, 452 U.S. 130, 137 (1981); *Georgia v. United States*, 411 U.S. 526, 531-35 (1973).

[29] For additional discussion of the preclearance requirements, see generally Local Gov't Atty's of Va., HANDBOOK OF VIRGINIA LOCAL GOVERNMENT LAW 16-11 through 16-27 (2018).

[30] Determination of the Attorney General Pursuant to Section 4(b)(1) of the Voting Rights Act of 1965, 30 Fed. Reg. 9897 (Aug. 7, 1965); Determination of the Director of the Census Pursuant to Section 4(b)(2) of the Voting Rights Act of 1965, 30 Fed. Reg. 9897 (Aug. 7, 1965).

[31] *Available at* https://www.justice.gov/crt/section-4-voting-rights-act#bailout_list.

In *Shelby County*, the U.S. Supreme Court held that the VRA § 4(b) coverage formula was unconstitutional. 570 U.S. at 557. In 2006, Congress retained the existing VRA § 4(b) coverage formula, extended the VRA § 5 preclearance requirement twenty-five years, and made the preclearance standard more demanding. *Id.* at 539. Congress had not changed the coverage formula since 1975, and the changes since 1965 had only expanded upon the formula's preexisting coverage. *See id.* at 538. The Court concluded that it was inappropriate for Congress "to distinguish between States in such a fundamental way based on 40-year-old data, when today's statistics tell an entirely different story." *Id.* at 556.

The Court acknowledged that "Congress may draft another formula based on current conditions." *Id.* at 557. As of this date, Congress has not done so; however, there are several bills pending in Congress. Voting Rights Advancement Act of 2019, H.R. 4, 116th Cong.; Voting Rights Advancement Act of 2019, S. 561, 116th Cong.; Voting Rights Amendment Act of 2019, H.R. 1799, 116th Cong.

At this time, neither Virginia nor any of its localities are presently subject to VRA § 5's preclearance requirement.

III. Violations under VRA § 2.

Differing from VRA § 5, VRA § 2 imposes a prohibition of general applicability. It applies to "any State or political subdivision." 52 U.S.C. § 10301(a). There is no distinction in the coverage of States or localities.

As pertains here, VRA § 2(a) prohibits localities from imposing or applying any "standard, practice, or procedure . . . 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, or [membership in a language minority group], as provided in subsection (b)." *Id.*

Under VRA § 2(b), a violation is established where the "totality of circumstances" show that the political processes leading to the nomination or election of persons in the locality "are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* § 10301(b). VRA § 2 does not establish "a right to have members of a protected class elected in numbers equal to their proportion in the population;" however, the "extent to which members of a protected class have been elected to office . . . is one circumstance which may be considered." *Id.*

A. VOTE DILUTION AND ELECTION DISTRICTS.

VRA § 2 has been primarily used in "vote-dilution cases," such as those challenging election districts as diminishing the "voting strength" of protected classes. *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 239 (4th Cir. 2014).

Vote dilution can result from practices known as "cracking" or "packing." *Abbott v. Perez*, 138 S. Ct. 2305, 2338 n.2 (2018). "Cracking" spreads a protected class across many enough election districts so that it is an insufficient minority therein. *See id.*; *Hall v. Virginia*, 385 F.3d 421, 429 n.12 (4th Cir. 2004). "Packing" concentrates a protected class into few enough election districts so that it is an excessive majority therein. *See Abbott*, 138 S. Ct. at 2338 n.2; *Hall*, 385 F.3d at 429 n.12. Cracking and packing can result in a protected class's having "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b).

The U.S. Supreme Court views multimember and at-large election districts as generally more likely to result in dilution of a protected class's vote than single-member districts; however, the general standards for determining a VRA § 2 violation are the same. *See Growe v. Emison*, 507 U.S. 25, 39-41 (1993).

Note, however, that the size of the governing body alone is not subject to a VRA § 2 challenge. *Holder v. Hall*, 512 U.S. 874 (1994); *Hines v. Mayor & Town Council of Ahoskie*, 998 F.2d 1266, 1271 (4th Cir. 1993).

B. THE *GINGLES* PRECONDITIONS.

Where the drawing of election districts (whether multimember or single-member) is at issue, there are three necessary preconditions to establishing a VRA § 2 violation. These are known as "*Gingles* preconditions," having been identified by the U.S. Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). While *Gingles* addressed multimember districts, *id.*, the three preconditions also apply in cases involving single-member districts, *Growe*, 507 U.S. at 39-41.

Where the claim is that multimember districts dilute a protected class's votes in violation of VRA § 2, the plaintiff must be able to show that:

(1) the protected class "is sufficiently large and geographically compact to constitute a majority in a single-member district;"
(2) the protected class "is politically cohesive;" and
(3) the majority "votes sufficiently as a bloc to enable it – in the absence of special circumstances, such as [its preferred] candidate running unopposed – usually to defeat the [protected class's] preferred candidate."

Gingles, 478 U.S. at 50 (citations omitted). "When applied to a claim that single-member districts dilute minority votes, the first *Gingles* condition requires the possibility of creating more than the existing number of reasonably compact districts with a sufficiently [protected class] population to elect candidates of its choice." *Johnson v. De Grandy*, 512 U.S. 997, 1008 (1994).[32]

[32] For additional discussion of the *Gingles* preconditions, see generally Local Gov't Atty's of Va., HANDBOOK OF VIRGINIA LOCAL GOVERNMENT LAW, *supra*, at 16-30 through 16-40.

The U.S. Supreme Court "has made clear that unless *each* of the three *Gingles* prerequisites is established, 'there neither has been a wrong nor can be a remedy.'" *Cooper v. Harris*, 137 S. Ct. 1455, 1472 (2017) (quoting *Growe*, 507 U. S. at 41). "If all three *Gingles* requirements are established," the court considers the vote-dilution claim under the "totality of circumstances." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 425-26 (2006).

C. THE TOTALITY OF CIRCUMSTANCES.

A VRA § 2 violation depends upon the "totality of circumstances." 52 U.S.C. § 10301(b). These circumstances include, but are not limited to, factors listed in the Senate Judiciary Committee's Report (the "Senate Report") on the 1982 amendments to the VRA. *E.g.*, *League of United Latin Am. Citizens*, 548 U.S. at 26; *Gingles*, 478 U.S. at 36-37; *League of Women Voters of N.C.*, 769 F.3d at 240.

The Senate Report stated that these factors "will often be the most relevant ones," but "in some cases other factors will be indicative of the alleged dilution." S. Rep. No. 97-417, at 29 (1982), *available at* 1982 U.S.C.C.A.N. 177, 207. "[T]here is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." *Id.*

That Senate Report listed seven "typical factors":

1. The extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
2. The extent to which voting in the elections of the state or political subdivision is racially polarized;
3. The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
4. If there is a candidate slating process, whether the members of the minority group have been denied access to that process;
5. The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
6. Whether political campaigns have been characterized by overt or subtle racial appeals;
7. The extent to which members of the minority group have been elected to public office in the jurisdiction.

Id. at 28-29, *available at* 1982 U.S.C.C.A.N. 177, 206-07.

The Senate Report identified two "[a]dditional factors that in some cases have had probative value" establishing a violation: "[w]hether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group;" and "[w]hether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous." *Id.* at 29, *available at* 1982 U.S.C.C.A.N. at 207.

D. RESULTS, NOT NECESSARILY INTENT OR PURPOSE.

Under VRA § 2, the necessary focus is on the "results" of the challenged "standard, practice, or procedure." 52 U.S.C. § 10301(a). Intent or purpose may be among the circumstances considered, and it may be probative of a VRA § 2 violation; however, it is not necessary for a plaintiff to establish such an intent or purpose. *See Chisom v. Roemer*, 501 U.S. 380, 393-94 & nn.20-21 (1991); *League of Women Voters of N.C.*, 769 F.3d at 238.

E. MINORITY-MAJORITY, INFLUENCE, CROSSOVER, AND COALITION DISTRICTS.

Vote dilution claims can (one way or another) concern minority-majority election districts. A "minority-majority" district (or "majority-minority" district) is one in which "a minority group composes a numerical, working majority of the voting-age population." *Bartlett v. Strickland*, 556 U.S. 1, 13 (2009). "Under present doctrine, § 2 can require the creation of these districts," *id.*; however, minority-majority districts can also raise "packing" concerns. It will depend upon the results in the particular locality, as seen through the totality of the circumstances. As the U.S. Supreme Court has observed,

> [T]he creation of majority-minority districts . . . does not invariably minimize or maximize minority voting strength. Instead, it can have either effect or neither. On the one hand, creating [majority-minority] districts necessarily leaves fewer [minority] voters and therefore diminishes [minority]-voter influence in predominantly [majority] districts. On the other hand, the creation of [majority-minority] districts can enhance the influence of [minority] voters. Placing [minority] voters in a district in which they constitute a sizeable and therefore "safe" majority ensures that they are able to elect their candidate of choice. Which effect the practice has, if any at all, depends entirely on the facts and circumstances of each case.
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> . . . . Section 2 contains no *per se* prohibitions against particular types of districts: It says nothing about majority-minority districts . . . . Instead, § 2 focuses exclusively on the consequences of apportionment. Only if the apportionment scheme has the effect of denying a protected class the equal opportunity to elect its candidate of choice does it violate § 2; where such an effect has not been demonstrated, § 2 simply does not speak to the matter.

Voinovich v. Quilter, 507 U.S. 146, 154-55 (1993).

Some cases have addressed other types of districts: "influence districts," "crossover districts," and "coalition districts":

- an "influence district" is one "in which a minority group can influence the outcome of an election even if its preferred candidate cannot be elected;"
- "a crossover district is one in which minority voters make up less than a majority of the voting-age population," and "the minority population, at least potentially, is large enough to elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate;" and
- a "coalition district" is one "in which two minority groups form a coalition to elect the candidate of the coalition's choice."

Bartlett, 556 U.S. at 13. The U.S. Supreme Court has said that influence and crossover districts are allowed under VRA § 2 but cannot be required. *League of United Latin Am. Citizens*, 548 U.S. 399; *Bartlett*, 556 U.S. 1. There is a circuit split regarding coalition districts.[33]

IV. Constitutional limitations.

Judicial precedents from the federal courts have indicated that there are a number of ways the U.S. Constitution, particularly the Fourteenth and Fifteenth Amendments, may interact with a locality's redistricting ordinance. These include one-person/one-vote under the Fourteenth Amendment and vote-dilution and the Fourteenth Amendment's (and possibly the Fifteenth Amendment's) prohibition on racial gerrymandering.

A. ONE-PERSON/ONE-VOTE.

In *Avery v. Midland County*, the U.S. Supreme Court held that a local governing body selected from "single-member districts of substantially unequal population" violated the "one man, one vote principle" and, thus, the Equal Protection Clause of the Fourteenth Amendment. *See* 390 U.S. 474, 475-76 (1968). The Court stated "that the Constitution imposes one ground rule for the development of arrangements of local government: a requirement that units with general governmental powers over an entire geographic area not be apportioned among single-member districts of substantially unequal population." *Id.* at 485-86.

The Court's precedents establish that local election districts

[33] For cases indicating VRA § 2 can require coalition districts, see *Campos v. City of Baytown*, 840 F.2d 1240 (5th Cir. 1988); *Concerned Citizens of Hardee Cnty. v. Hardee Cnty. Sch. Bd.*, 906 F.2d 524 (11th Cir. 1990); *Badillo v. City of Stockton*, 956 F.2d 884 (9th Cir. 1992); *Bridgeport Coal. for Fair Representation v. City of Bridgeport*, 26 F.3d 280 (2d Cir. 1994). For a case to the contrary, see *Nixon v. Kent Cnty.*, 76 F.3d 1381 (6th Cir. 1996).

> are permitted to deviate somewhat from perfect population equality to accommodate traditional districting objectives, among them, preserving the integrity of political subdivisions, maintaining communities of interest, and creating geographic compactness. Where the maximum population deviation between the largest and smallest district is less than 10%, the Court has held, a . . . local legislative map presumptively complies with the one-person, one-vote rule. Maximum deviations above 10% are presumptively impermissible.

Evenwel v. Abbott, 136 S. Ct. 1120, 1124 (2016) (citation & footnote omitted).[34]

In connection with its "one-person/one-vote" jurisprudence, the U.S. Supreme Court has opined that the infrequency of redistricting implicated the Equal Protection Clause. In *Reynolds v. Sims*, the Court said that a State must have "a reasonably conceived plan for periodic readjustment of legislative representation." 377 U.S. 533, 583 (1964). The Court did not make decennial redistricting "a constitutional requisite;" however, decennial redistricting "would clearly meet the minimal requirements," and anything less frequent "would assuredly be constitutionally suspect." *Id.* at 583-84.[35] Several decisions have considered local redistricting under this branch of "one-person/one-vote" jurisprudence, finding in favor of the local government. *E.g.*, *Fairley v. Forrest Cnty.*, 814 F. Supp. 1327 (S.D. Miss. 1993); *French v. Boner*, 786 F. Supp. 1328 (M.D. Tenn. 1992), *aff'd*, 963 F.2d 890 (6th Cir. 1992); *Ramos v. Illinois*, 781 F. Supp. 1353 (N.D. Ill. 1991), *aff'd sub. nom Political Action Conf. of Ill. v. Daley*, 976 F.2d 335 (7th Cir. 1992).

B. UNCONSTITUTIONAL VOTE DILUTION.

"[P]rior to the amendment of the Voting Rights Act in 1982, dilution claims typically were brought under the Equal Protection Clause." *Holder v. Hall*, 512 U.S. 874, 893 n.1 (1994) (Thomas, J., concurring in the judgment) (collecting cases). The Equal Protection Clause "prohibits intentional 'vote dilution'—invidiously minimizing or canceling out the voting potential of racial or ethnic minorities." *Abbott v. Perez*, 138 S. Ct. 2305, 2314 (2018) (cleaned up).

There is a circuit split on the question whether vote dilution in redistricting violates the Fifth Amendment, *Backus v. South Carolina*, 857 F. Supp. 2d 553, 569 (D.S.C. 2012), but the U.S. Supreme Court has "never . . . held any legislative

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[34] For additional discussion of "one-person/one-vote" concerns under the Equal Protection Clause, see generally Local Gov't Atty's of Va., HANDBOOK OF VIRGINIA LOCAL GOVERNMENT LAW, *supra*, at 16-2 through 16-7.

[35] "In the wake of *Reynolds*, courts generally have accepted that some lag-time between the release of census data and the reapportionment of a state's legislative districts is both necessary and constitutionally acceptable, even when it results in elections based on malapportioned districts in the years that census data are released." *Miss. State Conf. of NAACP v. Barbour*, No. 3:11cv159, 2011 U.S. Dist. LEXIS 52822, at *23 (S.D. Miss. May 16, 2011) (collecting cases), *aff'd*, 133 S. Ct. 2389 (2013).

apportionment inconsistent with the Fifteenth Amendment," *Voinovich*, 507 U.S. at 159; *Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320, 334 n.3 (2000). In any event, the Fourth Circuit has treated vote-dilutions under the Fourteenth and Fifteenth Amendments as "essentially congruent." *Backus*, 857 F. Supp. 2d at 569; *Washington v. Finlay*, 664 F.2d 913, 919 (4th Cir. 1981).

While VRA § 2 vote-dilution claims may be established on "a showing of discriminatory effect," a claim of unconstitutional vote dilution requires more: "a plaintiff must prove discriminatory intent to succeed." *Irby v. Va. State Bd. of Elections*, 889 F.2d 1352, 1357 (4th Cir. 1989). "Proof by such means that a discriminatory effect (or disproportionate impact, or dilution of voting potential) exists does not end the inquiry; it is also necessary to establish that the disputed plan was conceived or operated as a purposeful device to further racial discrimination." *Washington*, 664 F.2d at 920 (cleaned up). Circumstances showing "disproportionate impact or effect" can be a "starting point" in proving unlawful intent "by inference;" however, it is not enough to establish unlawful intent when the challenged district "is readily explainable on grounds apart from race." *Id.*

C. RACIAL GERRYMANDERING.

The Equal Protection Clause also "forbids 'racial gerrymandering,' that is, intentionally assigning citizens to a district on the basis of race without sufficient justification." *Abbott*, 138 S. Ct. at 2314. The U.S. Supreme Court has indicated that there is some difference in "racial gerrymandering" and "vote dilution" cases in that "classifying citizens by race," alone, "threatens special harms that are not present in . . . vote-dilution cases." *Shaw v. Reno*, 509 U.S. 630, 649-50 (1993); *Miller v. Johnson*, 515 U.S. 900, 911 (1995). Such harms "include being personally subjected to a racial classification as well as being represented by a legislator who believes his primary obligation is to represent only the members of a particular racial group." *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 797 (2017) (quoting *Ala. Legislative Black Caucus v. Alabama*, 575 U.S. 254, 263 (2015)).

A racial-gerrymandering claim depends upon depends upon a showing that "race was the predominant factor" motivating the placement of "a significant number of voters within or without a particular district." *Ala. Legislative Black Caucus*, 575 U.S. at 272.[36] This can be shown by "direct evidence going to the legislative purpose" or "circumstantial evidence of a district's shape and demographics," as long as "traditional race-neutral districting principles" were subordinated to "racial considerations." *Bethune-Hill*, 137 S. Ct. at 797. Traditional race-neutral principles include "compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, incumbency protection, and political affiliation," *Ala. Legislative Black Caucus*, 575 U.S. at 272 (citations & internal quotation marks omitted). Traditional redistricting principles "are

[36] The focus of a racial-gerrymandering is on "the boundaries of individual districts," though evidence of a larger scope may be probative of "racial gerrymandering in a particular district," *Ala. Legislative Black Caucus*, 575 U.S. at 262-63.

numerous and malleable," and "if race for its own sake is the overriding reason for choosing one map over others, race still may predominate." *Bethune-Hill*, 137 S. Ct. at 799.

"[I]f racial considerations predominated over others, the design of the district must withstand strict scrutiny," and the burden shifts to the government "to prove that its race-based sorting of voters serves a 'compelling interest' and is 'narrowly tailored' to that end." *Cooper*, 137 S. Ct. at 1464 (citation omitted). Where VRA compliance is invoked as the "compelling interest," the government must show "narrow tailoring" based on either a "strong basis in evidence" for concluding that the VRA required the challenged district or "good reasons" to think it would have violated the VRA had it drawn the district differently. *Id.* (citations omitted).[37]

The U.S. Supreme Court has acknowledged that the Equal Protection Clause's "application in the field of districting is complicated." *Abbott*, 138 S. Ct. at 2314.[38] One's race can correlate with one's political party preference, which can make it "very difficult" for a court to determine whether a districting decision was based on impermissible racial considerations or permissible political considerations. *Id.* There is also tension between the requirements of the Equal Protection Clause and the VRA: "the Equal Protection Clause restricts consideration of race," but "the VRA demands consideration of race," leaving redistricting plans "vulnerable to 'competing hazards of liability.'" *Id.* at 2315 (quoting *Bush v. Vera*, 517 U.S. 952, 977 (1996) (plurality op.)). Thus, the Court has described redistricting as presenting somewhat of a "legal obstacle course." *Id.*

D. PARTISAN GERRYMANDERING.

In *Rucho v. Common Cause*, the U.S. Supreme Court held that claims alleging unconstitutional partisan gerrymandering raised political questions without discernable standards and were, therefore, nonjusticiable. 139 S. Ct. 2484 (2019).

The plaintiffs challenged congressional districts in North Carolina (drawn to favor Republicans) and Maryland (drawn to favor Democrats). *See id.* at 2491-93. The North Carolina plaintiffs asserted violations of constitutional violations under the Equal

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[37] For additional discussion of racial-gerrymandering concerns, see generally Local Gov't Atty's of Va., HANDBOOK OF VIRGINIA LOCAL GOVERNMENT LAW, *supra*, at 16-42 through 16-55.

[38] The course of a recent equal-protection challenge to twelve Virginia House of Delegates districts may illustrate the complexity. In a 2-1 decision, the three-judge U.S. district court upheld the twelve districts, *Bethune-Hill v. Virginia State Bd. of Elections*, 141 F. Supp. 3d 505 (E.D. Va. 2015), and the Supreme Court (with one Justice concurring in part and concurring in the judgment and another Justice concurring in the judgment in part and dissenting in part) affirmed as to one district and vacated and remanded as to the others, 137 S. Ct. 788 (2017). In a 2-1 decision on remand, the three-judge U.S. district court found the eleven districts unconstitutional, 326 F. Supp. 3d 128 (E.D. Va. 2018), and in another 2-1 decision adopted redistricting proposals from a special master, 368 F. Supp. 3d 872 (E.D. Va. 2019). The 2-1 decision holding the eleven districts unconstitutional was appealed, and a 5-4 majority of the U.S. Supreme Court dismissed the appeal for lack of standing. *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019).

Protection Clause, the First Amendment, Article I, § 2,[39] and the Elections Clause.[40] *Id.* at 2492. In that case, the three-judge U.S. district court found violations under each of the constitutional provisions invoked, though one of the judges dissented on several points including the First Amendment claim. *See id.* The Maryland plaintiffs asserted violations of the First Amendment, Article I, § 2, and the Elections Clause. *Id.* The three-judge U.S. district court in the Maryland case found a First Amendment violation. *Id.*

The U.S. Supreme Court vacated the judgments and "remanded with instructions to dismiss for lack of jurisdiction." *Id.* at 2508. The Court concluded "that partisan gerrymandering claims present political questions beyond the reach of the federal courts." *Id.* at 2506-07. Under the "political questions" doctrine, a claim is nonjusticiable if it "is entrusted to one of the political branches or involves no judicially enforceable rights." *See id.* at 2494 (quoting *Vieth v. Jubelier*, 541 U.S. 267, 277 (2004) (plurality op.)). On the question of partisan gerrymandering, the Court found that the Constitution provided "no plausible grant of authority" for federal courts to decide such cases and "no legal standards to limit and direct their decisions." *Id.* at 2507. Citing examples in historical enactments of Congress, *id.* at 2495, recent bills in Congress, *id.* at 2508, and other measures in the States, *id.* at 2507-08, the Court note that the avenues for reform remained open, *id.* at 2508. As for the Court itself, it had "no commission to allocate political power and influence in the absence of a constitutional directive or legal standards to guide [it] in the exercise of such authority." *Id.*

Often enough, the drawing of electoral districts informs politics and politics inform the drawing of electoral districts. "George Washington and his Federalist allies accused Patrick Henry of trying to gerrymander Virginia's districts against their candidates—in particular James Madison, who ultimately prevailed over fellow future President James Monroe." *Id.* at 2494; *Vieth*, 541 U.S. at 274 (plurality op.). In actuality, there may have been more partisanship behind the Federalists' accusations than the district lines. Thomas Rogers Hunter, *The First Gerrymander?*, 9 Early Am. Studies 781 (2011). When there are competing views on district lines and politics, as often there are, it can be difficult to resolve issues regarding partisan gerrymandering.

It will remain to be seen whether and how reforms, such as the proposed amendment to Article II, § 6 of the Virginia Constitution, address the subject of partisan gerrymandering.

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[39] Article I, § 2, clause 1 of the U.S. Constitution reads as follows: "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."

[40] The Elections Clause reads as follows: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but Congress may at any time make or alter such Regulations, except as to the Place of chusing Senators." U.S. Const. art. I, § 4, cl. 1.

CONCLUSION

"Redistricting is never easy;"[41] however, that only reinforces its importance among the various civic duties undertaken by our fellow citizens we elect to serve on the boards of supervisors and councils of the Commonwealth.

> The task of redistricting is one that carries great political and legal consequence. In a representative democracy, such legislation shapes more than the abstract boundaries of electoral districts; it shapes the character, conduct, and culture of the representatives themselves. On its face, the legislation recites a singularly tedious list of [districts]. But in application, few pieces of legislation have a more profound impact on the function of government and whether it acts as "the faithful echo of the voices of the people."[42]

[41] *Abbott*, 138 S. Ct. at 2314 (2018).

[42] *Bethune-Hill*, 141 F. Supp. 3d at 511 (quoting 1 THE WORKS OF THE HONOURABLE JAMES WILSON 433 (Bird Wilson, ed. 1804)).