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## ESSAY

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### LEGISLATIVE CONTROL OVER REDISTRICTING AS CONFLICTS OF INTEREST: ADDRESSING THE PROBLEM OF PARTISAN GERRYMANDERING USING STATE CONFLICTS OF INTEREST LAW

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#### INTRODUCTION

Partisan gerrymandering decreases the electoral accountability and responsiveness of legislative bodies and contributes to the polarization of American politics. When drawing the lines of new electoral district maps, legislators from the majority party have a strong interest, both collectively and individually, in manipulating the location and composition of these districts so as to entrench and extend their control over legislative bodies. This is in conflict with the public's interest in electoral accountability and representative government. Moreover, allowing individual legislators to vote on matters that directly affect their own prospects for reelection—often determinatively—creates a clear conflict of interest with their legal and ethical responsibilities as public servants.

This Essay examines legislative control over redistricting through the lens of conflicts of interest law and suggests a novel legal framework for addressing partisan gerrymandering. Part I starts by giving a brief overview of the history and legal landscape surrounding partisan gerrymandering before moving on to a discussion of the problem of legislative control over redistricting. Part II assesses the applicability of state conflicts of interest laws and constitutional provisions to the practice of legislative control over redistricting. Finally, Part III takes a close look at the Virginia General Assembly Conflicts of Interest Act and analyzes what a legal challenge under this statute might entail, including an assessment of potential remedies.

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## I. THE LAW AND POLITICS OF REDISTRICTING

A. *History and Legal Landscape*

The process by which legislative districts are drawn has received increasing scrutiny in recent years,<sup>1</sup> but politicization of the redistricting process is as old as the Republic.<sup>2</sup> The term “gerrymander” refers to a redistricting plan designed to benefit individual legislators or a particular political party. The phrase was coined in 1812 to describe a district formed in Essex County, Massachusetts, by then-Governor Elbridge Gerry that was so unnatural it resembled the shape of a salamander.<sup>3</sup> Congress, recognizing potential for abuse, added to its sixth post-census Apportionment Act of 1842 the requirement that states be split into single-member districts according to their apportionment, and that representatives “be elected by districts composed of contiguous territory.”<sup>4</sup> This reform was followed in 1872 with the requirement that districts be, to the extent “practicable,” equal in population,<sup>5</sup> and in 1901 with the requirement that districts be “compact.”<sup>6</sup> Many states, including Virginia, have separately adopted the requirement that their state legislative districts be “contiguous and compact.”<sup>7</sup>

These qualities have never been strictly defined, however. In fact, the Supreme Court has held that politically motivated gerrymandering can be constitutional,<sup>8</sup> in part because the Court has been unable to develop a judicially manageable standard for determining what might constitute an unconstitutional political or partisan gerrymander.<sup>9</sup> As a result, litigation

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<sup>1</sup> See generally J. Gerald Hebert & Marina K. Jenkins, *The Need for State Redistricting Reform to Rein in Partisan Gerrymandering*, 29 YALE L. & POL’Y REV. 543 (2010).

<sup>2</sup> See Thomas Rogers Hunter, *The First Gerrymander?: Patrick Henry, James Madison, James Monroe, and Virginia’s 1788 Congressional Districting*, 9 EARLY AM. STUD. 781, 782 (2011) (identifying Patrick Henry in 1789 as the first American politician to utilize the tool of gerrymandering).

<sup>3</sup> Emily Barasch, *The Twisted History of Gerrymandering in American Politics*, ATLANTIC (Sept. 19, 2012), <http://www.theatlantic.com/politics/archive/2012/09/the-twisted-history-of-gerrymandering-in-american-politics/262369/#slide2> [<http://perma.cc/UZ5C-VKC7>].

<sup>4</sup> Ch. 47, § 2, 5 Stat. 491.

<sup>5</sup> An Act for the Apportionment of Representatives to Congress Among the Several States According to the Ninth Census, Ch. 11, § 2, 17 Stat. 28 (1872).

<sup>6</sup> An Act Making an Apportionment of Representatives in Congress Among the Several States Under the Twelfth Census, Ch. 93, § 3, 31 Stat. 733, 734 (1901).

<sup>7</sup> See, e.g., VA. CONST. art. II, § 6 (“Every electoral 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.”).

<sup>8</sup> See *Vieth v. Jubelirer*, 541 U.S. 267, 305 (2004) (plurality opinion) (“We conclude that neither Article I, § 2, nor the Equal Protection Clause, nor (what appellants only fleetingly invoke) Article I, § 4, provides a judicially enforceable limit on the political considerations that the States and Congress may take into account when districting.”).

<sup>9</sup> *Id.*; see also *id.* at 291 (“Fairness’ does not seem to us a judicially manageable standard. Fairness is compatible with noncontiguous districts, it is compatible with districts that straddle

involving redistricting has largely focused on the Equal Protection Clause of the Fourteenth Amendment and Section Two of the Voting Rights Act and has challenged the use of race in line-drawing and the discriminatory vote-dilution effects of specific redistricting measures.<sup>10</sup>

Even in the context of race-based gerrymandering, however, the legal tools are limited. While the use of race in redistricting is generally subject to strict scrutiny under the Equal Protection Clause,<sup>11</sup> so long as a legislature is at least plausibly motivated by the desire to segregate the electorate on partisan grounds rather than racial grounds, the Supreme Court has largely upheld the gerrymander.<sup>12</sup> This has been the result even where the line-drawers were aware of the high correlation between race and partisan preference, and indeed may have expressly used race as a proxy for partisan preference.<sup>13</sup>

Section Two of the Voting Rights Act prohibits redistricting and other voting-related measures that “result[] in a denial or abridgement of the right . . . to vote on account of race or color,” including measures that diminish the opportunity

political subdivisions, and it is compatible with a party’s not winning the number of seats that mirrors the proportion of its vote. Some criterion more solid and more demonstrably met than that seems to us necessary to enable the state legislatures to discern the limits of their districting discretion, to meaningfully constrain the discretion of the courts, and to win public acceptance for the courts’ intrusion into a process that is the very foundation of democratic decisionmaking.”). However, the “Efficiency Gap,” which measures the number of votes “wasted” by each side, could serve as a manageable standard. *See infra* note 17 and accompanying text (describing the holding of a recent district court case based on the Efficiency Gap).

<sup>10</sup> *See, e.g.*, *Miller v. Johnson*, 515 U.S. 900, 916-17 (1995) (invalidating a redistricting plan because “the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations”); *Shaw v. Reno*, 509 U.S. 630, 642, 650 (1993) (rejecting “redistricting legislation that is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification,” and recognizing that race-based gerrymandering “reinforces racial stereotypes and threatens to undermine our system of representative democracy by signaling to elected officials that they represent a particular racial group rather than their constituency as a whole”).

<sup>11</sup> The Equal Protection Clause “requires state legislation that expressly distinguishes among citizens because of their race to be narrowly tailored to further a compelling governmental interest.” *Shaw*, 509 U.S. at 643.

<sup>12</sup> *See, e.g.*, *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999) (“Our prior decisions have made clear that a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were *conscious* of that fact.”); *Bush v. Vera* 517 U.S. 952, 968 (1996) (plurality opinion) (“If district lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race, there is no racial classification to justify . . .”). The Supreme Court may reconsider this precedent in two cases presently before it, *Bethune-Hill v. Virginia State Board of Elections* and *McCrory v. Harris*, challenging Virginia’s state legislative districts and North Carolina’s congressional districts, respectively. *See generally* Amy Howe, *Argument Previews: Racial Gerrymandering Returns to the Court*, SCOTUSBLOG (Nov. 30, 2016), <http://www.scotusblog.com/2016/11/argument-previews-racial-gerrymandering-returns-to-the-court/> [<http://perma.cc/6V8L-RFUX>].

<sup>13</sup> *Hunt*, 526 U.S. at 551.

of minority groups to “elect representatives of their choice.”<sup>14</sup> In practice, this means that states are barred from diluting minority voting strength by drawing districts that either spread minority voters across multiple districts such that they do not constitute a majority in any district (known as “cracking”), or that concentrate the vast majority of minority voters into a few districts (“packing”).<sup>15</sup> As a result, in jurisdictions with significant, geographically concentrated minority populations and a history of racially polarized voting, the Voting Rights Act essentially requires legislators to take race into account when drawing district lines. At the same time, however, the Court has forbidden these legislators from making race the “predominant factor” in a redistricting plan under the Equal Protection Clause.<sup>16</sup> Legislators considering redistricting plans—and courts evaluating their constitutionality—may thus find it difficult to determine whether a particular plan’s use of race is permissible.

Without an established standard for adjudicating the constitutionality of a partisan gerrymander,<sup>17</sup> and with very narrow grounds upon which to challenge a partisan gerrymander achieved through the use of race in redistricting, the legal tools currently available for challenging partisan gerrymandering are limited. However, an examination of some of the problems caused by partisan gerrymandering points toward the applicability and potential efficacy of a novel legal framework rooted in government ethics law.

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<sup>14</sup> 52 U.S.C. § 10301(a)–(b) (2012).

<sup>15</sup> See *Thornburg v. Gingles*, 478 U.S. 30, 46 n.11 (1986) (“Dilution of racial minority group voting strength may be caused by the dispersal of blacks into districts in which they constitute an ineffective minority of voters or from the concentration of blacks into districts where they constitute an excessive majority.”); *id.* at 80 (“The District Court in this case carefully considered the totality of the circumstances and found that in each district racially polarized voting; the legacy of official discrimination in voting matters, education, housing, employment, and health services; and the persistence of campaign appeals to racial prejudice acted in concert with the multimember districting scheme to impair the ability of geographically insular and politically cohesive groups of black voters to participate equally in the political process and to elect candidates of their choice.”).

<sup>16</sup> *Miller*, 515 U.S. at 916–18.

<sup>17</sup> It should be noted here that a three-judge federal district court panel in Wisconsin recently relied in part on a standard, the “Efficiency Gap,” which compares the number of votes “wasted” by each political party under a particular district map, in striking down redistricting efforts in Wisconsin. *Whitford v. Gill*, No. 15-CV-421, 2016 WL 6837229, at \*9, \*53 (W.D. Wis. Nov. 21, 2016). An Efficiency Gap of zero indicates a districting plan that favors neither major party—the number of “wasted” votes are the same for each—and the higher the Efficiency Gap, the more a particular plan favors one party over the other, thereby “impeding their [voters’] ability to translate their votes into legislative seats.” *Id.* at \*56. Some experts believe the efficiency gap could serve as an objective standard by which the Supreme Court could measure political gerrymandering. Michael Wines, *Judges Find Wisconsin Redistricting Unfairly Favored Republicans*, N.Y. TIMES (Nov. 21, 2016), <https://www.nytimes.com/2016/11/21/us/wisconsin-redistricting-found-to-unfairly-favor-republicans.html> [<http://perma.cc/M2HR-ZHLK>].

### B. *The Problem of Partisan Gerrymandering*

In any single member, winner-take-all system of legislative apportionment, the political composition of each district is a central determining factor of the overall composition of the legislative body. By packing large numbers of minority party voters into a small number of districts while simultaneously spreading the remaining minority party voters across a large number of majority-party-leaning districts, the majority party can artificially increase the overall number of seats it controls. Legislators can also use gerrymandering to entrench individual incumbents, or even to draw particular opponents out of their own districts—that is, they can redraw the district lines in such a way as to make it impossible for political rivals to win reelection in their district, or eliminate their district altogether by combining parts of it with neighboring districts and thus forcing them to run against another incumbent.

Because the way in which districts are drawn has such a profound effect on the makeup of legislative bodies, and because redistricting generally occurs just once every ten years following the census, the political party in control of the state at that time has a huge incentive to redraw the districts in a way that will solidify and extend its control. In addition, as data and analysis on voting patterns and demographics become more sophisticated, the line-drawers' ability to maximize the electoral benefits of partisan gerrymandering continues to increase.<sup>18</sup> This has had a number of negative effects on national and state politics.

First, and perhaps most obvious, a politically gerrymandered legislative body is simply less representative of the political preferences of the overall population. Virginia presents a prime example. Contrary to its state constitutional requirement that districts be contiguous and compact, Virginia has, by some measures, the seventh-least compact districts in the nation.<sup>19</sup> This is a consequence of the extensive partisan gerrymandering that followed

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<sup>18</sup> See generally Micah Altman et al., *From Crayons to Computers: The Evolution of Computer Use in Redistricting*, 23 SOC. SCI. COMPUTER REV. 334 (2005) (describing the ease with which computers can accomplish the goals of partisan line-drawers).

<sup>19</sup> See AZAVEA, REDRAWING THE MAP ON REDISTRICTING (2012), [https://s3.amazonaws.com/s3.azavea.com/com.redistrictingthenation/pdfs/Redistricting\\_The\\_Nation\\_Addendum.pdf](https://s3.amazonaws.com/s3.azavea.com/com.redistrictingthenation/pdfs/Redistricting_The_Nation_Addendum.pdf) [http://perma.cc/HM6H-GPF8] (noting that, depending on the measure employed, Virginia has either the fourth-, seventh-, or thirteenth-least compact districts).

the 2010 census, as reflected in both statistical measures<sup>20</sup> and court documents filed by Republican state legislators.<sup>21</sup>

The results are striking: although Democrats garnered 45.5% of the vote across the forty-three contested House of Delegates races in 2013, Democratic candidates won only eight of those forty-three seats.<sup>22</sup> Similarly, despite Virginia's Democratic congressional candidates receiving more than forty-seven percent of the vote statewide in 2012, they won only three out of eleven districts.<sup>23</sup> This kind of result is, if not unconstitutional,<sup>24</sup> at least grossly unrepresentative, and yet it is now the norm in state legislatures across the country.<sup>25</sup> The antidemocratic effects of partisan gerrymandering are most conspicuously on display in the U.S. House of Representatives, where Republicans retained a sizeable 234–201 majority in 2012 despite Democratic congressional candidates receiving 1.4 million more votes.<sup>26</sup>

Another problem that could result from gerrymandering—both partisan and bipartisan<sup>27</sup>—is that the creation of less competitive districts makes it safer for

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<sup>20</sup> See Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831, 879 fig.7, 890 (2015) (finding that Virginia's congressional district map results in a gap of at least two seats between the expected and actual number of representatives elected by each party given the total number of votes cast for candidates from each party).

<sup>21</sup> See Brief of Intervenor-Defendants at 2, *Personhuballah v. Alcorn*, 155 F. Supp. 3d 552 (E.D. Va. 2016) (No. 3:13-CV-678) (responding to a challenge based on a racial gerrymandering claim by citing “the Legislature’s overarching priorities of incumbency protection and preservation of cores to maintain the 8–3 partisan division established in the 2010 election” as guiding the design of its congressional district map).

<sup>22</sup> Josh Israel, *How Gerrymandering Gave Virginia Republicans a House Supermajority*, THINKPROGRESS (Nov. 14, 2013), <http://thinkprogress.org/justice/2013/11/14/2941931/gerrymandering-virginia-republicans/> [<http://perma.cc/67G6-R5Q6>].

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

<sup>24</sup> *Cf.* *Bethune-Hill v. Va. State Bd. of Elections*, 141 F. Supp. 3d 505, 571 (E.D. Va. 2015) (holding that Virginia’s redistricting plan did not violate the Equal Protection Clause), *vacated on other grounds*, 137 S. Ct. 788 (2017).

<sup>25</sup> For instance, Democratic-controlled state legislatures in Illinois and Maryland enacted partisan gerrymanders which resulted in a twelve and twenty-six percentage point higher share of each state’s congressional delegation than their statewide share of the vote, respectively. Adam Serwer et al., *Now That’s What I Call Gerrymandering!*, MOTHER JONES (Nov. 14, 2012), <http://www.motherjones.com/politics/2012/11/republicans-gerrymandering-house-representatives-election-chart> [<http://perma.cc/8K6W-GRL6>].

<sup>26</sup> David Daley, *The House the GOP Built: How Republicans Used Soft Money, Big Data, and High-Tech Mapping to Take Control of Congress and Increase Partisanship*, N.Y. MAG. (Apr. 24, 2016), <http://nymag.com/daily/intelligencer/2016/04/gops-house-seats-are-safe-heres-why.html> [<http://perma.cc/AUR2-AXCY>].

<sup>27</sup> Bipartisan gerrymandering refers to collusion between legislators from opposing parties in drawing districts that, while not changing the overall partisan makeup of the legislative body, entrench individual incumbents in their existing districts. See JUSTIN BUCHLER, *HIRING AND FIRING PUBLIC OFFICIALS: RETHINKING THE PURPOSE OF ELECTIONS* 51–52 (2011) (“[T]he bipartisan gerrymander is the quintessential noncompetitive plan. Under a bipartisan gerrymander, voters from each party are packed into a set of safe districts. Thus there is one set of seats that the

legislators to adopt more extreme positions, resulting in gridlock and a lack of accountability on the part of the body as a whole.<sup>28</sup> According to this theory, the certainty of one party's control over a seat means the representative from that district can all but ignore minority party voters and representatives and move further towards one end of the political spectrum—and indeed often must do so or risk losing in the primary to a more ideologically extreme challenger.<sup>29</sup>

In addition to these systemic problems, there are also clearly identifiable individual victims of partisan gerrymandering. Majority party leadership often targets the home districts of minority party leadership for reapportionment or dissolution to remove troublesome opponents from the legislative body by making their reelection all but impossible. One salient example involves former Democratic member of the Virginia House of Delegates, Ward Armstrong. Armstrong served for ten terms, representing District Ten from

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Democrats are guaranteed to win and another set that the Republicans are guaranteed to win, but very few (if any) that can be contested.”).

<sup>28</sup> The degree to which gerrymandering contributes to polarization in legislatures is heavily disputed. *Compare* Brief for Amici Curiae Thomas Mann and Norman Ornstein in Support of Appellees at 16, *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015) (No. 13-1314) (“The result is that Representatives increasingly find themselves in the partisan equivalent of an echo chamber—districts drawn on party lines assure them of electoral success without the need for cross-party compromise, and the increasing zeal of their most active constituents—the only voters to whom they feel accountable—pushes them into a contest for partisan orthodoxy within their parties.”), *with* Harry Enten, *Why “Gerrymandering” Doesn’t Polarise Congress the Way We’re Told*, *GUARDIAN* (Jan. 3, 2013), <https://www.theguardian.com/commentisfree/2013/jan/03/gerrymandering-polarise-congress> [<http://perma.cc/6BFM-XRQU>] (noting that entire states are becoming polarized, leading to safer districts, and that “[g]errymandering probably doesn’t help, yet it’s not the major cause of the [political polarization]”).

<sup>29</sup> *See generally* Brief for Amici Curiae of Mann and Ornstein, *supra* note 28. Although ideological extremism is hard to quantify, and there are many contributing factors, it is hard to dismiss the increase in political polarization after aggressive Republican redistricting measures following the 2010 census dramatically increased the number of “safe” seats among both parties across the country. *See 2012 REDMAP Summary Report: How a Strategy of Targeting State Legislative Races in 2010 Led to a Republican U.S. House Majority in 2013*, *REPUBLICAN ST. LEADERSHIP COMM.* (Jan. 4, 2013), <http://www.redistrictingmajorityproject.com/?p=646> [<https://perma.cc/68U5-ACDB>] (describing the Republican redistricting strategy for state legislative races in 2010); *see also* Daley, *supra* note 26 (“You might even argue [the Republican gerrymander of 2011] worked *too well*, creating the solid conservative districts that gave rise to the renegade House Freedom Caucus, forced Speaker John Boehner out of office, and fomented the grass-roots anger that fueled Donald Trump’s ascent and punctured the GOP establishment.”); *The Rise of Safe Seats: The Relative Impact of Redistricting and “The Big Sort,”* *CTR. FOR VOTING & DEMOCRACY* (Nov. 2013), [https://d3n8a8pro7vvhmx.cloudfront.net/fairvote/pages/2412/attachments/original/1449515619/Redistricting\\_2014.pdf?1449515619](https://d3n8a8pro7vvhmx.cloudfront.net/fairvote/pages/2412/attachments/original/1449515619/Redistricting_2014.pdf?1449515619) [<https://perma.cc/P6RZ-S97L>] (finding the number of congressional districts with balanced partisanship “has declined by nearly a third since 2010”); *cf.* Jamie L. Carson et al., *Reevaluating the Effects of Redistricting on Electoral Competition, 1972–2012*, 14 *ST. POL. & POL’Y Q.* 165, 168 (2014) (finding that independent commission- and court-drawn legislative districts experience more competition than those drawn by legislatures).

1992 to 2012.<sup>30</sup> Serving as House minority leader beginning in 2007, Armstrong was brash, outspoken, and increasingly a thorn in the side of General Assembly Republicans.<sup>31</sup> During the redistricting process following the 2010 census, Republican House leadership decided to write him out of his own district by moving his Tenth District to Northern Virginia and thereby forcing him to run in the Sixth District against a strong Republican incumbent (and personal friend).<sup>32</sup> Instead, Armstrong moved six miles to the newly drawn Ninth District to run against another Republican incumbent, also a strong, entrenched candidate. That incumbent received extensive financial backing from state GOP leadership and ultimately defeated Armstrong, who has declined to run again.<sup>33</sup>

Individual targeting of this nature is rampant,<sup>34</sup> and it raises a number of ethical issues that lie outside of the normal conversation surrounding redistricting. Should elected officials be allowed to target one another using what is essentially a procedural mechanism, in retaliation for taking certain positions or in order to protect their own electoral interests? Notwithstanding the Supreme Court's reluctance to establish a standard for unconstitutional partisan gerrymandering, one can imagine that this is where a line could be drawn. Such practices smack of the kinds of unethical conduct routinely barred under government ethics law, such as legislators granting preferential treatment to a client or family member, or damaging a business rival.<sup>35</sup>

Moreover, legislators who control redistricting have clear personal, financial, and professional interests in drawing the district lines to increase their chances of reelection—or all but assure it. These personal interests create the kind of conflicts of interests that many states have sought to eliminate via legislation prohibiting legislators from voting on matters in which they have a personal stake.

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<sup>30</sup> Jim Nolan, *GOP Targets Democratic Veteran Armstrong*, RICHMOND TIMES-DISPATCH (Sept. 11, 2011), [http://www.richmond.com/news/article\\_73ebb4c5-10b6-52cf-8d20-766438335126.html](http://www.richmond.com/news/article_73ebb4c5-10b6-52cf-8d20-766438335126.html) [<https://perma.cc/674X-KMXXB>].

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

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

<sup>34</sup> Instances are too numerous to list, but in one example involving both inter- and intra-party favoritism by Illinois Democratic leadership, “[n]ot only did the Democrats who drew the lines pit more than two dozen Republican lawmakers against each other, they also carved out potential primary and general election challengers to the benefit of sitting Democrats.” Ray Long, *Democrats Protect Their Own in State Legislative Remap: Party Shields Incumbents from Potential Foes, Lumps Republicans Together*, CHI. TRIB. (Aug. 9, 2011), [http://articles.chicagotribune.com/2011-08-09/news/ct-met-legislative-remap-0809-20110809\\_1\\_democrats-collins-map](http://articles.chicagotribune.com/2011-08-09/news/ct-met-legislative-remap-0809-20110809_1_democrats-collins-map) [<https://perma.cc/65X4-GPLX>].

<sup>35</sup> See *Conflict of Interest Definitions*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/ethics/50-state-table-conflict-of-interest-definitions.aspx> [<https://perma.cc/Q6JV-KBC8>] (describing the conflict of interest laws of each state).

## II. LEGISLATIVE CONTROL OVER REDISTRICTING AS CONFLICTS OF INTEREST

The legal concept of a conflict of interest<sup>36</sup> with respect to public officials finds its origin in the Lockean ideal of government as a social contract, in which the public authorizes the government to act on its behalf and in its interest.<sup>37</sup> Conflict of interest laws seek to preserve the public trust in the integrity of government institutions by prohibiting public officials from participating in decisionmaking processes that implicate their own private interests.<sup>38</sup>

Although gerrymandering is, in many respects, a project of political parties, it is the legislators themselves that ultimately determine how the lines are drawn in the vast majority of states.<sup>39</sup> These sitting legislators understand that how they draw district lines affects not only the overall partisan composition of the legislative body, but also their own prospects for reelection. Because legislators receive a salary and other benefits for serving, they have a personal financial interest in drawing the lines to substantially

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<sup>36</sup> A conflict of interest is defined as a “situation in which a public official or fiduciary who, contrary to the obligation and absolute duty to act for the benefit of the public or a designated individual, exploits the relationship for personal benefit, typically pecuniary.” 3 WEST’S ENCYCLOPEDIA OF AMERICAN LAW 84 (2d ed. 2005).

<sup>37</sup> See JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION 74 (C.H. Wilson & R.B. McCallum eds., Basil Blackwell 1948) (1690) (“[T]he legislative being only a fiduciary power to act for certain ends, there remains still in the people a supreme power to remove or alter the legislative when they find the legislative act contrary to the trust reposed in them . . . .”); see also *id.* at 71 (“These laws also ought to be designed for no other end ultimately but the good of the people.”).

<sup>38</sup> See, e.g., VA. CODE ANN. § 30-100 (2014) (“The General Assembly, recognizing that our system of representative government is dependent in part upon (i) citizen legislative members representing fully the public in the legislative process and (ii) its citizens maintaining the highest trust in their public officers, finds and declares that the citizens are entitled to be assured that the judgment of the members of the General Assembly will not be compromised or affected by inappropriate conflicts.”).

<sup>39</sup> Thirty-seven states give state legislators direct control over redistricting, seven states have created political redistricting commissions comprised of a mix of legislators and appointees (typically appointed by the Governor and/or a court), and six states have adopted independent redistricting commissions, which do not include legislators or other elected officials. *State-by-State Redistricting Procedures*, BALLOTEDIA, [https://ballotpedia.org/State-by-state\\_redistricting\\_procedures](https://ballotpedia.org/State-by-state_redistricting_procedures) [<https://perma.cc/5DC3-MDWB>].

benefit their own reelection prospects.<sup>40</sup> This personal interest conflicts with their ethical, and in many cases legal, duty to serve the public interest.<sup>41</sup>

Most states have passed government ethics laws or other provisions prohibiting legislators from taking legislative actions concerning matters in which they have a personal interest, or at least requiring them to disclose that such an interest exists.<sup>42</sup> Some states define what might constitute a personal interest quite narrowly, limiting it to, for instance, a financial interest in a “contract, sale, purchase or service” involving the agency of which they are a part,<sup>43</sup> or an ownership stake in a firm that may be affected by a legislative act.<sup>44</sup> Other provisions prohibit only instances in which a legislator will derive a “direct”<sup>45</sup> or “immediate”<sup>46</sup> monetary benefit or loss as the result of a particular matter before the legislature. However, many states’ conflicts of interest laws and constitutional provisions contain much broader language.

New York’s Public Officers Law, for instance, declares that “[n]o . . . member of the legislature or legislative employee should have any interest, financial or otherwise, direct or indirect . . . which is in substantial conflict with the proper discharge of his duties in the public interest.”<sup>47</sup> Washington uses almost identical language to describe “[a]ctivities incompatible with public

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40 In fact, legislators can often draw district lines with such precision as to all but assure reelection. See, e.g., Hanh Quach & Dena Bunis, *All Bow to Redistrict Architect: Politics Secretive, Single-Minded Michael Berman Holds All the Crucial Cards*, ORANGE COUNTY REG. (Aug. 26, 2001) <http://archive.fairvote.org/redistricting/reports/remanual/canews4.htm#architect> [<https://perma.cc/NT55-MRL2>] (“[Michael Berman, a consultant hired by California Democratic state legislators to formulate a redistricting plan,] can move the boundaries and squeeze a sitting lawmaker out of his or her safely nested seat. Or he can create a district so loaded with Democratic voters that no Republican candidate has a chance. . . . ‘Twenty thousand is nothing to keep your seat,’ [Representative Loretta] Sanchez said. ‘I spend \$2 million (campaigning) every election. If my colleagues are smart, they’ll pay their \$20,000, and Michael [Berman] will draw the district they can win in. Those who have refused to pay? God help them.’”).

41 Although many legislative acts can be said to implicate such a conflict, actions directed toward *insulating* the legislator from electoral accountability, such as gerrymandering or voter suppression, are fundamentally different from actions directed toward *gaining the support* of the electorate, and far more suspect.

42 See *supra* note 39; see also *Voting Recusal Provisions*, NAT’L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/ethics/50-state-table-voting-recusal-provisions.aspx> [<https://perma.cc/62R7-HE7E>] (cataloguing regulations and procedures for handling conflicts of interest).

43 ARIZ. REV. STAT. ANN. § 38-503(A) (2016).

44 See N.J. STAT. ANN. § 52:13D-13(g) (West 2016) (“‘Interest’ means (1) the ownership or control of more than 10% of the profits or assets of a firm, association, or partnership, or more than 10% of the stock in a corporation for profit other than a professional service corporation . . . or (2) the ownership or control of more than 1% of the profits of a firm, association, or partnership, or more than 1% of the stock in any corporation, which is the holder of, or an applicant for, a casino license or in any holding or intermediary company with respect thereto . . .”).

45 CONN. GEN. STAT. ANN. § 1-85 (West 2016).

46 COLO. H. RULE. 21.

47 N.Y. PUB. OFF. LAW § 74(2) (McKinney 2008).

duties.”<sup>48</sup> Wisconsin’s conflict of interest prohibition states that “no state public official may . . . [u]se his or her office or position in a way that produces or assists in the production of a substantial benefit, direct or indirect, for the official,”<sup>49</sup> but notably exempts from the prohibition “any action concerning the lawful payment of salaries or employee benefits.”<sup>50</sup>

Louisiana law provides that “[i]f any elected official, in the discharge of a duty or responsibility of his office or position, would be required to vote on a matter which vote would be a violation of R.S. 42:1112,<sup>[51]</sup> he shall recuse himself from voting.”<sup>52</sup> The state constitutions of Alabama,<sup>53</sup> Colorado,<sup>54</sup> Kentucky,<sup>55</sup> Oklahoma,<sup>56</sup> Pennsylvania,<sup>57</sup> Texas,<sup>58</sup> and Washington<sup>59</sup> contain almost identical provisions requiring any member of the legislature who has a “personal or private interest” in a matter before the legislature to disclose that interest and recuse themselves from voting on the matter.

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48 See WASH. REV. CODE ANN. § 42.52.020 (West 2016) (“No state officer or state employee may have an interest, financial or otherwise, direct or indirect . . . that is in conflict with the proper discharge of the state officer’s or state employee’s official duties.”).

49 WIS. STAT. ANN. § 19.46(1)(b) (West 2016).

50 *Id.* § 19.46(3).

51 See LA. STAT. ANN. § 42:1112(a) (2016) (providing that “[n]o public servant . . . shall participate in a transaction in which he has a personal substantial economic interest of which he may be reasonably expected to know involving the governmental entity”).

52 *Id.* § 42:1120.

53 See ALA. CONST. art. IV, § 82 (“A member of the legislature who has a personal or private interest in any measure or bill proposed or pending before the legislature, shall disclose the fact to the house of which he is a member, and shall not vote thereon.”).

54 See COLO. CONST. art. V, § 43 (“A member who has a personal or private interest in any measure or bill proposed or pending before the general assembly, shall disclose the fact to the house of which he is a member, and shall not vote thereon.”); *see also* COLO. S. RULE 41(b)(1) (“Subject to article V, section 43, of the state constitution, a Senator has the right to vote upon all questions before the Senate and to participate in the business of the Senate and its committees, and, in so doing, is presumed to act in good faith and in the public interest. When a personal interest conflicts with the public interest and tends to affect the Senator’s independence of judgment, legislative activities are subject to limitations. Where any such conflict exists, it disqualifies the Senator from voting upon any question and from attempting to influence any legislation to which it relates.”).

55 See KY. CONST. § 57 (“A member who has a personal or private interest in any measure or bill proposed or pending before the General Assembly, shall disclose the fact to the House of which he is a member, and shall not vote thereon upon pain of expulsion.”).

56 See OKLA. CONST. art. V, § 24 (“A member of the Legislature, who has a personal or private interest in any measure or bill, proposed or pending before the Legislature, shall disclose the fact to the House of which he is a member, and shall not vote thereon.”).

57 See PA. CONST. art. III, § 13 (“A member who has a personal or private interest in any measure or bill proposed or pending before the General Assembly shall disclose the fact to the House of which he is a member, and shall not vote thereon.”).

58 See TEX. CONST. art. III, § 22 (“A member who has a personal or private interest in any measure or bill, proposed, or pending before the Legislature, shall disclose the fact to the House, of which he is a member, and shall not vote thereon.”).

59 See WASH. CONST. art. II, § 30 (“A member who has a private interest in any bill or measure proposed or pending before the legislature, shall disclose the fact to the house of which he is a member, and shall not vote thereon.”).

It is unlikely that the framers of these laws and provisions would have envisioned them being applied to conflicts of interest arising in the context of redistricting. However, legislators do in fact have substantial personal, financial, and professional interests in the outcomes of redistricting proposals—interests that may conflict with their ethical and legal obligation to act in good faith and consistent with the public interest.

### III. THE VIRGINIA GENERAL ASSEMBLY CONFLICTS OF INTEREST ACT

Virginia's conflicts of interest law may be particularly well suited to the redistricting context because it specifically defines personal interest to include salary and benefits paid by the legislature and lacks much of the limiting language often found in similar laws.

#### A. *Background and Relevant Provisions*

Enacted in 1970, the Rules and Conflicts of Interest Act was the first comprehensive statute in Virginia governing the conflicts of interest of government officials, replacing thirty-eight separate state laws.<sup>60</sup> The product of a major study undertaken by a governor-appointed commission, the Act's passage also coincided with the drafting of Virginia's 1971 Constitution, which granted the legislature explicit authority "to prevent conflicts of interest."<sup>61</sup>

The 1970 Act required government officials to "disqualify [themselves] from voting or participating in any official action in which [they] may have a material financial interest,"<sup>62</sup> but did not apply to General Assembly members until 1987 when separate acts were passed governing General Assembly members and state and local officials and employees.<sup>63</sup> The heart of the 1987 Virginia General Assembly Conflicts of Interest Act (hereinafter the Act) was its requirement that General Assembly members abstain from voting whenever the member "has a personal interest in a transaction."<sup>64</sup>

Following the public corruption investigation and charges against former Virginia Governor Bob McDonnell and his wife in 2014, the Virginia General Assembly altered how the Act deals with gifts, changed the composition of the Virginia Conflicts of Interest and Ethics Advisory Council, and updated

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<sup>60</sup> Mary R. Spain, *A Legislator's Guide to Conflicts of Interests and Rules of Conduct* 4, 12-13 (2009), <http://dls.virginia.gov/pubs/ConflictInterestGuide.pdf> [<https://perma.cc/J9UE-9Z6J>].

<sup>61</sup> *Id.* at 3.

<sup>62</sup> *Id.* at 4.

<sup>63</sup> *Id.* at 5.

<sup>64</sup> *Id.*

certain disclosure requirements.<sup>65</sup> The Council provides training and guidance to legislators, issues formal advisory opinions, assists with the filing of disclosure reports, and approves travel waivers, but lacks any investigative or adjudicative powers.<sup>66</sup>

The Act's central purpose is to increase public confidence in the legislature by preventing legislators—who serve part-time for a modest salary and who may have external personal financial interests that would be affected by matters under consideration by the General Assembly—from having their judgment influenced by “inappropriate conflicts.”<sup>67</sup> The Act's “Declaration of legislative policy; construction” reads,

The General Assembly, recognizing that our system of representative government is dependent in part upon (i) citizen legislative members representing fully the public in the legislative process and (ii) its citizens maintaining the highest trust in their public officers, finds and declares that the citizens are entitled to be assured that the judgment of the members of the General Assembly will not be compromised or affected by inappropriate conflicts. . . . *This chapter shall be liberally construed to accomplish its purpose.*<sup>68</sup>

Implicit here is a recognition that legislators cannot, in good faith, represent the public interest on matters in which they have a personal financial interest.

The rest of the Act codifies this purpose. Section 30-108 provides that “[a] legislator who has a personal interest in a transaction shall disqualify himself from participating in the transaction.”<sup>69</sup> This means that while a legislator may participate in discussions and debates, “he [may] not vote on the transaction in which he has a personal interest.”<sup>70</sup> In turn, section 30-101 defines a “personal interest” as,

a financial benefit or liability accruing to a legislator or to a member of his immediate family. Such interest shall exist by reason of . . . salary, other compensation, fringe benefits, or benefits from the use of property, or any combination thereof, paid or provided by a business or governmental agency that exceeds, or may reasonably be anticipated to exceed, \$5,000 annually . . . .<sup>71</sup>

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<sup>65</sup> *Ethics Reform Overhaul Passes*, VA. ASS'N COUNTIES (Mar. 5, 2015), <http://www.vaco.org/ethics-reform-overhaul-passes/> [<https://perma.cc/URT3-WANU>].

<sup>66</sup> *Id.*

<sup>67</sup> VA. CODE ANN. § 30-100 (West 2014).

<sup>68</sup> *Id.* (emphasis added).

<sup>69</sup> *Id.* § 30-108 (West 2014).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* § 30-101 (West 2014) (emphasis added).

Because a House Delegate's salary is \$17,640 per year and a Senator's salary is \$18,000,<sup>72</sup> and because these legislative bodies are governmental agencies,<sup>73</sup> the salaries for all Virginia state legislators qualify as a "personal interest" under the Act.

The Act then goes on to define, with greater specificity, "personal interest in a transaction" to mean "a personal interest of a legislator in any matter considered by the General Assembly."<sup>74</sup> It notes,

Such personal interest exists when an officer . . . has a personal interest in property or a business, or represents or provides services to any individual or business and such property, business or represented or served individual or business (i) is the subject of the transaction or (ii) may realize a reasonably foreseeable direct or indirect benefit or detriment as a result of the action of the agency considering the transaction. A "personal interest in a transaction" exists only if the legislator . . . is affected in a way that is substantially different from the general public or from . . . [a] class or group of which he or the individual or business he represents or serves is a member.<sup>75</sup>

Finally, it defines a "[t]ransaction" to mean "any matter considered by the General Assembly, whether in a committee, subcommittee, or other entity of the General Assembly or before the General Assembly itself, on which official action is taken or contemplated."<sup>76</sup>

A point of contention may arise concerning whether the above language narrows the definition of "personal interest" to encompass only "a personal interest in property or a business" affected by the transaction.<sup>77</sup> However, such an interpretation would render superfluous the preceding language encompassing salary and benefits among several other forms of nonproperty, nonbusiness-related interests.<sup>78</sup> In addition, the immediate juxtaposition of the inclusive phrase "such personal interest *exists when*" with the exclusive phrase "a personal interest in a transaction *exists only if*" indicates that the language referring to property and business interests here is more likely intended to define further the circumstances under which one particularly common type of personal financial interest creates a conflict, rather than as a

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<sup>72</sup> Dave Ress, *Part 1: A Part-Time Legislature With-Full Time Rewards*, DAILY PRESS (Nov. 18, 2014), <http://www.dailypress.com/news/politics/dp-nws-virginiaway-overview-20141116-story.html> [<https://perma.cc/45B7-7BFG>].

<sup>73</sup> See VA. CODE ANN. § 30-101 (defining "governmental agency" to include "each component part of the legislative . . . branches of state . . . government").

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

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> See *supra* text accompanying notes 71, 75.

<sup>78</sup> See *supra* text accompanying note 71.

limitation on the overall definition of what may constitute a “personal interest.”<sup>79</sup>

The real limiting factor here is the provision stating that a personal interest in a transaction exists only when a legislator may be affected by the outcome of a transaction in a way that is “substantially different from the general public or from persons comprising a profession . . . or other comparable and generally recognizable class or group of which he . . . is a member.”<sup>80</sup> This provision essentially creates an exception to the prohibition on legislators voting on matters in which they have a personal interest for situations in which the legislative outcome may affect that interest, but in a way that is not “substantially different” from any other similarly situated person and thus does not raise the kinds of concerns about legislative objectivity that the Act aims to address. Legislators running for reelection are members of a class that includes other legislative candidates or, more narrowly, candidates running for their individual seat. Because a sitting legislator-as-candidate may gain a significant electoral advantage over another member of this candidate class through the adoption of a given redistricting measure, this should qualify as “substantially different” for the purposes of the above provision.

Taken together, the provisions of the Act suggest that a legislator’s personal interest in retaining their own salary should preclude them from voting on matters that affect their own prospects for reelection and thus, at minimum, on any redistricting measure in which their district has been redrawn.

### B. *Legal Strategy*

Given the language<sup>81</sup> and purpose of the Act, it should be possible to allege that any member of the General Assembly who is running for reelection and who casts a vote on a redistricting proposal that alters his or her district has violated the Act. It may also be possible to allege a violation if it can be shown that a sitting member plans to run for election in the future, even absent plans to run in the next election, so long as the redistricting proposal would be in effect when he or she runs.

A more promising approach might be to argue that, because the vast majority of General Assembly members are barred from participating in

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<sup>79</sup> See *supra* text accompanying notes 74–75. Note that in Virginia, “little is available to determine legislative intent compared to other states or to the congressional level. There are no official transcripts of the House and Senate debates or the proceedings of the standing committees.” *Legislative History in Virginia*, LIBR. VA. [http://www.lva.virginia.gov/public/guides/leg\\_his.htm](http://www.lva.virginia.gov/public/guides/leg_his.htm) [<https://perma.cc/7Q28-K8PC>].

<sup>80</sup> VA. CODE ANN. § 30-101.

<sup>81</sup> “The language of the Act” is to be “liberally construed to accomplish its purpose.” *Id.* § 30-100.

redistricting matters under the Act due to their status as candidates running for public office, the General Assembly as a body is not well-situated to effectively control redistricting and thus must divest itself of the authority.

To establish standing, plaintiffs would likely need to be former legislators who were drawn out of their districts (such as Mr. Armstrong), or candidates, including incumbents, who can show that the districts in which they are running have been drawn in a way that gives their opponents an insurmountable advantage over them.<sup>82</sup> It may also be possible for voters within a gerrymandered district to establish standing on the theory that such partisan gerrymandering violates the compactness and contiguity requirements of the Constitution of Virginia<sup>83</sup> and causes them direct harm as a result.<sup>84</sup> These voters could then assert that the General Assembly's redistricting authority itself violates the Act's requirement that personally interested members abstain from voting on the composition of their own districts.

One potential obstacle that any legal challenge would need to address concerns the dual doctrines of legislative immunity and privilege. Under the Constitution of Virginia, members of the General Assembly are "privileged from arrest" during the legislative session or the fifteen days before and after the session, except in cases of "treason, felony, or breach of the peace"—legislative immunity.<sup>85</sup> In addition, "any speech or debate in either house shall not be questioned in any other place"—legislative privilege.<sup>86</sup>

However, the Constitution also states that "nothing in this Constitution shall limit the power of the General Assembly to prevent conflict of interests, dual officeholding, or other incompatible activities by elective or appointive officials of the Commonwealth or of any political subdivision."<sup>87</sup> This provision appears to circumvent an assertion that legislative immunity under the Virginia Constitution allows a legislator to avoid being bound by conflict of interest laws enacted by the General Assembly, even when such laws govern conduct, such as voting, otherwise covered by legislative immunity

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<sup>82</sup> See *Cupp v. Bd. of Supervisors*, 318 S.E.2d 407, 411 (Va. 1984) (holding that a litigant has standing if she has "a sufficient interest in the subject matter of the case so that the parties will be actual adversaries and the issues will be fully and faithfully developed").

<sup>83</sup> See VA. CONST. art. II, § 6 (setting out the compactness and contiguity requirements).

<sup>84</sup> See *Wilkins v. West*, 571 S.E.2d 100, 107 (Va. 2002) (holding that residents of unconstitutional districts have standing because they are affected in a way that gives rise to the "inference of particularized injury").

<sup>85</sup> VA. CONST. art. IV, § 9.

<sup>86</sup> *Id.* The Virginia Supreme Court recently interpreted the "speech or debate" clause to shield internal legislative research documents from a subpoena on the basis that they constituted "communication regarding a core legislative function." *Edwards v. Vesilind*, 790 S.E.2d 469, 480 (Va. 2016).

<sup>87</sup> VA. CONST. art. II, § 5(c).

where a conflict of interest is not implicated.<sup>88</sup> Thus, a legal challenge brought under the Act is unlikely to be vulnerable to an assertion of legislative immunity.

### C. Possible Remedies

Plaintiffs in an action challenging legislative redistricting under the Act could request a number of remedies, some more suitable than others. The Act itself provides for criminal and civil penalties including a finding of guilt of a Class 1 misdemeanor, forfeiture of money derived from a violation, and assessment of fines equal to the amount of money forfeited.<sup>89</sup> However, the more appropriate remedy would be some form of injunction preventing all or part of the legislature from voting on a pending redistricting measure, or ordering the General Assembly to adopt new redistricting procedures that comport with the Act's requirements.

On one end of the spectrum, plaintiffs could request an injunction barring any individual member of the Virginia legislature running for reelection from voting on redistricting measures that alter his or her district. As suggested above, however, relief of this form would leave few members available to vote, which itself seems to confer an unacceptable amount of power on the few members of the legislature not running for reelection. Such relief could also result in a perverse situation where each party designates certain members to not seek reelection after a census year just so those members would be eligible to vote on redistricting measures.

At the other end of the spectrum, plaintiffs could request an injunction ordering the General Assembly as a whole to remove itself from the redistricting process. Other states have achieved similar ends via statute, with Alaska, Arizona, California, Idaho, Montana, and Washington establishing independent commissions to draw the lines.<sup>90</sup> Regulations in these states limit or eliminate direct participation by elected officials in the redistricting process.<sup>91</sup> Other states have set up special redistricting commissions that include both legislators and non-legislators,<sup>92</sup> which would be an acceptable

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<sup>88</sup> There is no case law addressing the question of whether a legislature can collectively waive legislative immunity in certain contexts via constitutional provision. However, the language of Article II, Section 5(c)—“nothing in this Constitution shall limit the power of the General Assembly to prevent conflict of interests . . . by elective . . . officials of the Commonwealth”—seems sufficiently “explicit and unequivocal” so as to satisfy the Supreme Court’s lofty standard. *United States v. Helstoski*, 442 U.S. 477, 491 (1979).

<sup>89</sup> VA. CODE ANN. §§ 30-123, 30-126 (West 2014).

<sup>90</sup> *State-by-State Redistricting Procedures*, BALLOTPEDIA (Jan. 2017), [https://ballotpedia.org/State-by-state\\_redistricting\\_procedures](https://ballotpedia.org/State-by-state_redistricting_procedures) [<https://perma.cc/6V58-75QW>]. The Supreme Court has held that such independent redistricting commissions are constitutional. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2671 (2015).

<sup>91</sup> BALLOTPEDIA, *supra* note 90.

<sup>92</sup> *Id.*

remedy here if it could be shown that such a commission sufficiently insulates the individual legislators from the actual line-drawing responsibilities so as to mitigate their conflict of interest.

#### CONCLUSION

Legislative control over redistricting creates conflicts between the personal interests of sitting legislators and the public interest they are charged with serving. While the Supreme Court has held that it is constitutional for legislators to draw their own districts in ways that advance their personal interests, and has yet to adopt a standard for determining an unconstitutional partisan gerrymander, state conflicts of interest laws and constitutional provisions offer a new legal avenue through which to challenge this practice. Without any precedent dealing with conflicts of interest law in the context of redistricting, it is difficult to anticipate how a court would adjudicate such a claim. However, the language and purpose of these laws and provisions, as well as the inability of existing legal frameworks to adequately address the problem of partisan gerrymandering, suggest that such an approach is worth pursuing.

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