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Comments: Opening the Door to Single Government: The 2002 Maryland Redistricting Decision Gives the Courts Too Much Power in an Historically Political Arena

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OPENING THE DOOR TO SINGLE GOVERNMENT: THE 2002 MARYLAND REDISTRICTING DECISION GIVES THE COURTS TOO MUCH POWER IN AN HISTORICALLY POLITICAL ARENA

I. INTRODUCTION

> *I speak tonight for the dignity of man and the destiny of democracy . . . . But even if we pass this bill, the battle will not be over. What happened in Selma is part of a far larger movement which reaches into every section and State of America. It is the effort of American Negroes to secure for themselves the full blessings of American life. Their cause must be our cause too, because it is not just Negroes but really it is all of us, who must overcome the crippling legacy of bigotry and injustice. And we shall overcome.*[1]
>
> —Lyndon B. Johnson

Since President Lyndon B. Johnson introduced the original Voting Rights Act ("VRA") to protect minority voting rights in 1965,[2] the requirements of the VRA have continuously conflicted with the requirements set forth in the Equal Protection Clause of the United States Constitution and other state constitutional requirements for redistricting.[3] For example, the VRA is often incompatible with the Maryland constitutional redistricting requirements of compactness, contiguity, and due regard for natural boundaries.[4]

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1. President Lyndon B. Johnson, Voting Rights Address to Congress (Mar. 15, 1965). *See also* GREAT ISSUES IN AMERICAN HISTORY: FROM RECONSTRUCTION TO THE PRESENT DAY, 1864-1981, 459-61 (Richard Hofstadter & Beatrice Hofstadter eds., 1982). President Johnson refers to "Bloody Sunday" in Selma, Alabama. *We Shall Overcome: Historic Places of the Civil Rights Movement. Selma to Montgomery March, available at* http://www.cr.nps.gov/NR/travel.civilrights/a14.htm (last visited Sept. 29, 2003). On Sunday, March 7, 1965, six hundred civil rights marchers set out to Montgomery for the Selma-to-Montgomery march for voting rights. *Id.* They had traveled only six blocks to a local bridge, however, when state and local lawmen attacked them with billy-clubs and tear gas. *Id.* Two days later Dr. Martin Luther King, Jr. led a symbolic march to the Selma local bridge. *Id.*
2. Richard Briffault, *The Contested Right to Vote*, 100 MICH. L. REV. 1506, 1520 (2002).
3. David Guinn et al., *Redistricting in 2001 and Beyond: Navigating the Narrow Channel Between the Equal Protection Clause and the Voting Rights Act*, 51 BAYLOR L. REV. 225, 266-67 (1999); *see also* U.S. CONST. amend. XIV, § 1. For a discussion of the VRA, see *infra* Part II.B.
4. Guinn, *supra* note 3, at 266-67; MD. CONST. art. III, § 4 (2002) ("[e]ach legislative district shall consist of adjoining territory, be compact in form, and of substantially equal population . . . regard shall be given to natural boundaries and the boundaries of political subdivision").

Because of these competing requirements, redistricting often involves the drawing of a redistricting map with plans for ensuing litigation, resulting in the map being struck down and returned to the legislature for re-drafting.[5] Present day redistricting problems are typically resolved through litigation, rather than through legislation.[6] Judge Raker's dissent in the 2002 Court of Appeals of Maryland case, *In re Legislative Districting of the State*, reminds courts that the process of redistricting remains an "inherently political and legislative—not judicial—task."[7]

The 2002 Maryland redistricting plan, proposed by former Governor Glendening and the Maryland General Assembly, should not have been rejected by the Court of Appeals of Maryland. The court failed to consider the VRA and treated county line cross-overs in the Glendening plan as *per se* violations of the Maryland Constitution.[8] Instead of balancing the requirements of the Maryland Constitution against those mandated by federal law, such as the VRA and the Equal Protection Clause, the Court of Appeals of Maryland statically applied Maryland constitutional law, leaving no room for the federal requirements.[9] Furthermore, the court erred in its remedy when it drew its own redistricting plan without allowing the Governor and General Assembly to redesign the plan themselves.[10] In doing this, the court of appeals delved into a typically political arena traditionally intended for the legislature.[11]

Part II of this comment will address the competing federal requirements of the Equal Protection Clause of the United States Constitution and the Voting Rights Act of 1965. It also looks to how other states have recently interpreted these federal mandates in their districting schemes. Part III outlines the Maryland constitutional requirements, focusing on compactness, contiguity, and due regard for natural boundaries. Part IV provides an in-depth analysis of the proposed 2002 Maryland districting plan, and proposes that the plan should have been upheld by the Court of Appeals of Maryland.

II. THE CONFLICTING FEDERAL REQUIREMENTS

A. *The Equal Protection Clause of the Fourteenth Amendment*

The Equal Protection Clause of the Fourteenth Amendment of the Constitution provides that "[n]o state shall . . . deny to any person

5. Guinn, *supra* note 3, at 227.
6. *In re* Legislative Dist. of State, 370 Md. 312, 376, 805 A.2d 292, 329-30 (2002) (Raker, J., dissenting).
7. *Id.* (quoting Jensen v. Wisc. Elections Bd., 639 N.W.2d 537, 540 (2002)).
8. *See generally id.*
9. *See id.* at 380-81, 805 A.2d at 332. See *infra* Part III for a discussion of the Maryland constitutional requirements.
10. *See In re* Legislative Dist. of State, 370 Md. at 374-75, 805 A.2d at 328-29.
11. *See supra* note 7 and accompanying text.

within its jurisdiction the equal protection of the laws."[12] The central mandate of the clause "is [to maintain] racial neutrality in governmental decisionmaking."[13]

The United States recognized its first racial gerrymander[14] claim in *Shaw v. Reno* ("*Shaw* I").[15] In *Shaw* I, the Supreme Court held that the appellants had stated a racial gerrymander claim sufficient to defeat a motion to dismiss.[16] The Court, however, was careful to point out that not all race-conscious redistricting was unconstitutional.[17]

In *Shaw* I, the bizarre shapes of two North Carolina voting districts were a decisive factor in determining that appellants had stated a cause of action under the Equal Protection Clause alleging an unconstitutional gerrymander.[18] The Court stated that the racial gerrymander claim was "analytically distinct" from a voter dilution claim.[19] The Court remanded the case to the district court to determine whether the North Carolina plan constituted an unconstitutional racial gerry-

12. U.S. CONST. amend. XIV, § 1.
13. Miller v. Johnson, 515 U.S. 900, 904 (1995).
14. The term "gerrymander" refers to the practice of drawing legislative districts to protect incumbents and possibly harm the prospects of other potential candidates. Legislative Redistricting Cases, 331 Md. 574, 609, 629 A.2d 646, 664 (1993). The Supreme Court has held that "avoiding contests between incumbents is a permissible reason for states to deviate from creating districts with perfectly equal populations." *Id.* at 610, 629 A.2d at 664 (citing Karcher v. Daggett, 462 U.S. 725, 740 (1983)). The Court of Appeals of Maryland has construed this to mean that "it is . . . permissible for states to consider incumbents in crafting districts in the first place" and "incumbent residency is a factor which may legitimately be considered in redistricting negotiations and plans." *Id.* (internal quotation marks omitted). The term "racial gerrymander" derives its roots from the history of gerrymandering decisions. It is distinct, however, because instead of trying to protect incumbents, districts are drawn to purposefully divide minority populations, preventing them from obtaining majority voting strength in all possible districts. *See Shaw v. Reno*, 509 U.S. 630, 640 (1993) [hereinafter *Shaw* I].
15. 509 U.S. 630. In *Shaw* I, a group of North Carolina voters challenged two districts claiming that their irregular shapes constituted an unconstitutional gerrymander in violation of the Equal Protection Clause. *Id.* at 633-34.
16. *Id.* at 642, 649.
17. *Id.* at 642; *see also* Guinn, *supra* note 3, at 228. The Court stated that "appellants appear to concede that race-conscious redistricting is not always unconstitutional. That concession is wise: "This Court has never held that race-conscious state decisionmaking is impermissible in *all* circumstances." *Shaw* I, 509 U.S. at 642.
18. *Shaw* I, 509 U.S. at 647-49, 658.
19. *Id.* at 652; *see also* Guinn, *supra* note 3, at 232.

mander.[20] It instructed the district court to make its determination applying a strict scrutiny review.[21]

Two years later, the same Court decided *Miller v. Johnson*,[22] holding that a bizarre shape of a district is only "circumstantial evidence"[23] of a racial gerrymander, and that "a plaintiff must demonstrate that a district's shape is so bizarre that it is unexplainable other than on the basis of race . . . ."[24] The Court emphasized that a plaintiff, in addition to introducing evidence of a district's shape and demographics, must also demonstrate that the legislature's purpose or motivation was race based.[25] The Court announced that strict scrutiny is to be used where race is the "predominant factor" motivating the construction of district boundary lines.[26] It held that the plaintiff, in a racial gerry-

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20. *Shaw* I, 509 U.S. at 658.

> [W]e hold only that appellants have stated a claim under the Equal Protection Clause by alleging that the North Carolina General Assembly adopted a reapportionment scheme so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race, and that the separation lacks sufficient justification.

Id.

21. *Id.* The case eventually made it back to the Supreme Court, where they found the redistricting plan unconstitutional. *Shaw* I, 509 U.S. 630, *remanded sub nom.* Shaw v. Hunt, 861 F. Supp. 408 (E.D.N.C. 1994), *rev'd*, 517 U.S. 899, 901-02 (1996).
22. 515 U.S. 900 (1995).
23. *Id.* at 912-13. The Court stated that circumstantial evidence is "persuasive," and that circumstantial evidence of a district's bizarre shape, together with demographics, *may* be enough to meet the plaintiff's burden in proving race was a predominant factor motivating the legislature's decision to draw district lines as it did. *Id.* at 916.
24. *Id.* at 910.
25. *Id.* at 915-16.
26. *Id.* at 915-20. In a concurring opinion, Justice O'Connor defends the use of strict scrutiny, stating:

> I understand the threshold standard the Court adopts—that "the legislature subordinated traditional race-neutral districting principles . . . to racial considerations,"—to be a demanding one. To invoke strict scrutiny, a plaintiff must show that the State has relied on race in a substantial disregard of customary and traditional districting practices. Those practices provide a crucial frame of reference and therefore constitute a significant governing principle in cases of this kind. The standard would be no different if a legislature had drawn the boundaries to favor some other ethnic group; certainly the standard does not treat efforts to create majority-minority districts *less* favorably than similar efforts on behalf of other groups. Indeed, the driving force behind the adoption of the Fourteenth Amendment was the desire to end legal discrimination against blacks.
>
> Application of the Court's standard does not throw into doubt the vast majority of the Nation's 435 congressional districts, where presumably the States have drawn the boundaries in accordance with their customary districting principles. That is so even though race may well have been considered in the redistricting process. But

mander case, has the burden of proving that "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."[27]

The Court did not answer the question of what compelling governmental interests can overcome strict scrutiny, namely, whether compliance with § 2 or § 5 of the VRA is a compelling interest.[28] The Court avoided this question again in *Shaw v. Hunt* ("*Shaw* II"),[29] the result of the remanded *Shaw* I.[30] In *Shaw* II, North Carolina created two specific districts to comply with § 2 and § 5 of the VRA.[31] North Carolina asserted that the creation of district 12 was done in order to comply with § 5 of the VRA, yet the Supreme Court held that creation of such a district was not a remedy demanded by § 5.[32] The Court affirmed

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application of the Court's standard helps achieve *Shaw's* basic objective of making extreme instances of gerrymandering subject to meaningful judicial review.

Id. at 928-29 (O'Connor, J., concurring) (quoting the majority).

27. *Id.* at 916.

28. *Id.* at 921. Section 2 of the VRA provides:

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . .
>
> A violation of subsection (a) of this section is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section 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. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973(a) - (b) (2000).

Section 5 of the VRA provides, in part, that the court or Attorney General must approve a change that would affect voting rights:

> Whenever a State or political subdivision . . . shall enact to or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect" to ensure that "the qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.

42 U.S.C. § 1973c. *See also infra* Part II.B (discussing the VRA).

29. 517 U.S. 899, 911 (1996) [hereinafter *Shaw* II].

30. 509 U.S. 630 (1993).

31. *Shaw* II, 517 U.S. at 908-14.

32. *Id.* at 911-13.

the district court's holding that circumstantial evidence (the districts' shapes) and direct evidence (the legislative intent) presented at trial supported the conclusion that race was the predominant factor in creating the districts.[33] While the Supreme Court in *Shaw* II ultimately found that the majority-minority districts were unnecessarily created,[34] the Court again announced that it would not address whether compliance with the VRA is considered to be a compelling governmental interest when developing a redistricting or reapportionment plan.[35]

The aforementioned cases, among others, demonstrate the uncertainty that surrounds the redistricting process when considering the relationship between the Equal Protection Clause and the VRA.[36] The Supreme Court leaves open many questions making it difficult for lower courts to render decisions. As a result, redistricting has become an area of law that demands more consistency in its application from both the lower courts and the United States Supreme Court.

B. The Voting Rights Act of 1965

The VRA of 1965[37] helps to ensure the Fifteenth Amendment's guarantee that the "rights of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."[38] Yet, as previously discussed, the well-intentioned VRA has nonetheless clashed with the Equal Protection Clause of the Fourteenth Amendment.[39] Sections 2 and 5 of the VRA often conflict with the Equal Protection Clause.[40] Section 2 provides that states and their subdivisions may not enforce any practice that undermines minority voting strength.[41] Section 5 provides that covered jurisdictions must first have any changes in voting practices approved by either the Attorney General or the United States District Court for the District of Columbia.[42] In effect, § 5 established a regulatory scheme prohibiting certain districts from changing their voting practices.

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33. *Id.* at 905-06.
34. *Id.* at 916-17.
35. *Id.* at 911. The Court stated: "In *Miller*, we expressly left open the question whether under the proper circumstances compliance with the [VRA], on its own, could be a compelling interest. Here once again we do not reach that question . . . ." *Id.* (internal citations omitted).
36. *See* Reno v. Bossier Parish Sch. Bd., 520 U.S. 471 (1997); Bush v. Vera, 517 U.S. 952 (1996); *Shaw* II, 517 U.S. 899; Miller v. Johnson, 515 U.S. 900 (1995); *Shaw* I, 509 U.S. 630 (1993).
37. 42 U.S.C. §§ 1973-1973bb-1 (2000).
38. U.S. CONST. amend. XV § 1; *see* Legislative Redistricting Cases, 331 Md. 574, 603, 629 A.2d 646, 660 (1993).
39. *See supra* note 3 and accompanying text; *supra* Part II.A.
40. *See* Guinn, *supra* note 3, at 226 n.2; *see also supra* note 28.
41. *See supra* note 28.
42. *Id.*

The Supreme Court interpreted minority voting strength requirements in *White v. Regester*.[43] The Court held that practices that negatively affect minority voting strength, when examined under the totality of the circumstances, will not survive challenges under the Equal Protection Clause of the Constitution.[44] In order to establish a violation of § 2 of the VRA, lower federal courts interpreted *White* to mean that a minority group only needed to show that the challenged voting practice had a discriminatory effect on its political participation.[45] In 1980, however, the Supreme Court stated in *Mobile v. Bolden* that *White* also required a showing of discriminatory intent in order to prevail on a claim under § 2 of the VRA.[46]

As a result of the *Mobile* decision, Congress rewrote § 2 of the VRA to reflect the pre-*Mobile* standard of only requiring minorities to prove discriminatory effect, thereby eliminating the intent requirement.[47] In 1986, the Supreme Court responded to this change in *Thornburg v. Gingles*.[48] The Court stated that the important question in a VRA action is "whether 'as a result of the challenged practice or structure,

43. 412 U.S. 755 (1973), *vacated by* 422 U.S. 935 (1975).

44. *See id.* at 769-70; Legislative Redistricting Cases, 331 Md. 574, 603, 629 A.2d 646, 660 (1993).

45. Legislative Redistricting Cases, 331 Md. at 603, 629 A.2d at 660-61; *see, e.g.*, Zimmer v. McKeithen, 485 F.2d 1297, 1304-06 (5th Cir. 1973) (en banc), *aff'd sub nom.* East Carroll Parish Sch. Bd. v. Marshall, 424 U.S. 636 (1976) (per curiam).

46. *See* Mobile v. Bolden, 446 U.S. 55, 66 (1980).

47. *See* Legislative Redistricting Cases, 331 Md. at 604, 629 A.2d at 661; Voting Rights Act Amendments of 1982, Pub. L. No. 97-205 (codified as amended at 42 U.S.C. § 1973 (2000)).

48. 478 U.S. 30, 34 (1986). The *Gingles* factors to identify a § 2 violation are:

> 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 36-37.

plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice.'"[49]

In *Reno v. Bossier Parish School Board*,[50] the Supreme Court faced the question of what, if any, relationship exists between § 2 and § 5 of the VRA.[51] In the initial Bossier Parrish redistricting plan, there were no majority-minority districts.[52] As such, the NAACP subsequently proposed a plan that contained two majority-minority districts, thereby revealing that the minority group in Bossier Parrish was sufficiently large and geographically compact to form these districts.[53] Upon receipt of this information, the Attorney General found a § 2 violation of the VRA and subsequently denied § 5 preclearance.[54]

The Supreme Court noted that "recognizing § 2 violations as a basis for denying § 5 preclearance would inevitably make compliance with § 5 contingent on compliance with § 2."[55] The Court rejected this approach, stating that § 2 and § 5 were intended to combat two, very different evils.[56] The Court stated that § 2 applies to all states and was intended to prohibit dilution of minority voting strength.[57] Section 5, on the other hand, only applies to certain states and was intended to prevent retrogressive changes to their existing voting procedures.[58]

The Supreme Court also stated that the burden of proof differs between § 2 and § 5 claims.[59] With a § 2 claim, the burden of proving vote dilution initially lies with the plaintiff.[60] With a § 5 claim, the state or political subdivision has the burden of proving the absence of discrimination.[61] Therefore, even if liability under § 2 exists, preclearance under § 5 should still be granted if no regression exists.[62]

C. Recent Treatment of Redistricting By Other States

1. Texas

One of the most important redistricting cases to reach the Supreme Court was the Texas case *Bush v. Vera*.[63] The United States District

49. *Id.* at 44 (quoting S. REP. NO. 97-417, at 28 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206).
50. 520 U.S. 471 (1997).
51. *Id.* at 474.
52. *Id.* at 474-75.
53. *See id.* at 475.
54. *See id.* at 475-76. *See supra* note 28 for the text of § 5 of the VRA.
55. *Bossier Parrish Sch. Bd.*, 520 U.S. at 477.
56. *See id.* at 476-77.
57. *Id.* at 479.
58. *See id.* at 477-78.
59. *See id.* at 478-80.
60. *See id.* at 479-80.
61. *See id.* at 477-78.
62. *See id.* at 486-88.
63. 517 U.S. 952 (1996).

Court for the Southern District of Texas found that three districts were unconstitutional gerrymanders.[64] The district court found that the three districts "were all designed with highly irregular boundaries that take no heed of traditional districting criteria,"[65] and that the districts "were not narrowly tailored to fulfill the State's compelling interest in avoiding liability under § 2 . . . of the federal [VRA]."[66]

The Supreme Court affirmed the district court's finding of unconstitutionality in this "mixed motive"[67] case.[68] Upon a finding that the districts were created predominately because of race, the Court applied strict scrutiny, stating that compliance with § 2 of the VRA is a compelling governmental interest.[69] The Court held that because the districts were not at all compact and each had highly irregular borders, they were not narrowly tailored to serve the State's interest in avoiding VRA liability.[70]

Professor Guinn explained that Justice O'Connor provides "the best guidance for states and lower courts in navigating the narrow channels and shoals of [§ 2 of the VRA]."[71] Justice O'Connor uses the following five factors in her analysis: (1) states may intentionally create majority-minority districts and take race into consideration, as long as they do not subordinate traditional redistricting criteria to the use of race for its own sake or as a proxy;[72] (2) where there is racial polarization of voting, the VRA prohibits states from adopting districting plans that have the effect of allowing minority voters "less opportunity than other members of the electorate to . . . elect representatives of their choice";[73] (3) the state has a compelling interest in avoiding liability under the VRA;[74] (4) if a state pursues that compelling interest by creating a district that substantially addresses the liability it faces, and the district does not deviate substantially from traditional districting

64. Vera v. Richards, 861 F. Supp. 1304, 1345 (S.D. Tex. 1994), *aff'd sub nom.* Bush v. Vera, 517 U.S. 952 (1996).

65. *Id.* at 1345. The Texas Constitution required the legislature to use natural geographic boundaries, contiguity, compactness, and conformity to political subdivisions. *Id.* at 1333.

66. *Id.* at 1345.

67. The Supreme Court found that while the three districts were created to comply with § 2 of the VRA, there was also extensive evidence that the legislature was concerned with ensuring the reelection of incumbent congressmen. *Bush*, 517 U.S. at 959.

68. *Id.* at 986.

69. *See id.* at 977.

70. *Id.* at 979.

71. *See* Guinn, *supra* note 3, at 241 (quoting The Honorable Deval Patrick, former Assistant Attorney Gen., Civil Rights Div., U.S. Dept. of Justice, Address at the Nat. Conference of State Legislatures (July 29, 1996), *available at* http:www.ncsl.org/statevote98/dojhtm.htm.

72. *Bush*, 517 U.S. at 993 (O'Connor, J., concurring).

73. *Id.*

74. *Id.* at 994.

principles, the plan will be deemed to be narrowly tailored;[75] and (5) districts that are "bizarrely shaped and non-compact" because of predominately racial reasons are unconstitutional.[76]

2. Colorado

In the case of *In re Reapportionment of the Colorado General Assembly*,[77] the Supreme Court of Colorado declared the decennial redistricting plan unconstitutional.[78] The court found that the 2002 plan did not comply with the criteria of article V, sections 46 and 47 of the Colorado Constitution[79] because (1) it was "not sufficiently attentive to county boundaries" and (2) it was "not accompanied by an adequate factual showing that less drastic alternatives could not have satisfied the equal population requirement."[80] Because there were no federal violations present, the reapportionment plan proposed by the Commission was struck down.[81]

In its decision, the Supreme Court of Colorado provided an important analysis of the standard of review that a court must use when reviewing such a decision. The court stated that its role "is a narrow one: to measure the present reapportionment plan against constitutional standards. The choice among alternative plans, each consistent with constitutional requirements, is for the Commission and not the

75. *Id.*
76. *Id.*
77. 45 P.3d 1237 (Colo. 2002).
78. *Id.* at 1241. Traditionally, reapportionment has been a matter of concern for citizens of Colorado. *See id.* at 1242-43. Colorado has a long history of citizen initiated statutes that have shaped the law in this area. *Id.* In 1966, one of the most noteworthy citizen initiated amendments to the constitution was passed, which (1) imposed a requirement of single-member districts and (2) "allowed the General Assembly to add part of one county to all or part of another county in the formation of senate and house districts, if necessary to meet equal population requirements." *Id.* at 1243. In 1974, voters approved a citizen-initiated constitutional amendment that created the Reapportionment Commission to do the work of the General Assembly. *Id.* at 1244. The purpose of this initiative was to create an independent body to accomplish reapportionment. *Id.* Furthermore, Colorado is one of the few states in which a majority-minority district was ordered by the United States Court of Appeals for the Tenth Circuit in order to comply with federal requirements. *See id.* at 1242-43. *See also* Sanchez v. Colorado, 97 F.3d 1303, 1329 (10th Cir. 1996) (requiring the redrawing of a house district in order to provide the substantial Hispanic population a fair opportunity to elect a representative of its own choosing).
79. Section 46 requires that the state be divided into as many districts as there are members of the senate and house. COLO. CONST. art. V, § 46. Section 47 requires that when a senatorial or representative district shall be composed of more than one county, they shall be as contiguous and compact as possible. COLO. CONST. art. V, § 47.
80. *In re* Reapportionment of Colo. Gen. Assembly, 45 P.3d at 1246.
81. *Id.*

Court."[82] It is the court's job to determine whether the Commission followed the correct procedures and applied the federal and Colorado law in their redistricting plan.[83] The Supreme Court of Colorado further stated: "We do not redraw the reapportionment map for the Commission."[84]

The court recognized that federal law superimposes requirements on the Colorado constitutional criteria.[85] In order of priority, the court placed the Equal Protection Clause of the Fourteenth Amendment and the Fifteenth Amendment first, § 2 of the VRA second, and the Colorado constitutional requirements last.[86] In analyzing such plans, the Supreme Court of Colorado first looked to see if there were any federal law violations.[87] If there are any actual or probable federal law violations, the court begins its analysis with that law.[88] If there are no federal law issues, the court can then proceed to Colorado constitutional criteria.[89]

While neither *Bush* nor *In re Reapportionment of Colorado General Assembly* directly addressed all of the issues found in the 2002 Maryland redistricting plan, each offers valuable insight on how to analyze the special problems created by modern redistricting practices. One of the most important aspects of both decisions is the emphasis placed on compliance with federal requirements, specifically the Equal Protection Clause of the Fourteenth Amendment and the VRA.[90] While state constitutional requirements do play an important role in determining the validity of reapportionment plans, state requirements are often superseded by federal law.[91]

III. MARYLAND'S CONSTITUTIONAL REQUIREMENTS

The Maryland Constitution requires that all legislative districts "shall consist of adjoining territory, be compact in form, and of substantially equal population," and that "[d]ue regard shall be given to natural boundaries and the boundaries of political subdivisions."[92] The three main requirements stemming from this part of the Maryland Constitution are compactness, contiguity, and the due regard

82. *Id.* at 1247 (quoting *In re* Reapportionment of Colo. Gen. Assembly, 647 P.2d 191, 194 (Colo. 1982)).
83. *Id.*
84. *Id.* at 1247.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.* (citing *In re* Reapportionment of Colo. Gen. Assembly, 828 P.2d 185, 193 (Colo. 1992)).
89. *Id.*
90. *See supra* notes 66-76, 86-89 and accompanying text.
91. *See supra* notes 66-76, 86-89 and accompanying text.
92. MD. CONST. art. III, § 4.

principle.[93] Courts in states with similar constitutional provisions have held that these requirements were created, and intended, to prevent political gerrymandering.[94]

A. *The Compactness Requirement*

Geometrically, compactness is "a circle with the perimeter of a district equidistant from its center."[95] Maryland, like the majority of states,[96] has not defined compactness in simple geometric terms.[97] Because there is no single measure of compactness, in the context of legislative redistricting, it is usually viewed as a relative standard.[98]

The compactness requirement is generally recognized as subservient to the dominant federal Constitutional requirement of the Equal Protection Clause.[99] Some courts have held that "compliance with the state constitutional compactness requirement is mandatory."[100] Uniquely shaped districts, however, usually do not constitute evidence of gerrymandering.[101] Oddly shaped districts, therefore, do not provide definitive evidence of failure by the General Assembly to comply with the compactness requirement.[102] Instead, a court must also look to other legitimate constraints that affect redistricting, such as the VRA and the Equal Protection Clause of the Fourteenth Amendment, and from there determine exclusively whether the compactness requirement was fully taken into account.[103] Thus, the compactness requirement is considered by the Court of Appeals of Maryland to be a "functional" requirement.[104]

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93. *In re* Legislative Dist. of State, 299 Md. 658, 674, 475 A.2d 428, 436 (1984).
94. *Id.* at 675, 475 A.2d at 436.
95. *Id.* at 676, 475 A.2d at 437.
96. The possible exception is Colorado. *Id. See* Acker v. Love, 496 P.2d 75, 76 (Colo. 1972) (en banc).
97. *In re* Legislative Dist. of State, 299 Md. at 676, 475 A.2d at 437.
98. *In re* Legislative Dist. of State, 370 Md. 312, 381, 805 A.2d 292, 333 (2002) (Raker, J., dissenting).
99. *See In re* Legislative Dist. of State (1984), 299 Md. at 680, 475 A.2d at 439. *See also In re* Interrogatories by Gen. Assembly, 497 P.2d 1024, 1025 (Colo. 1972); Preisler v. Kirkpatrick, 528 S.W.2d 422, 425 (Mo. 1975); Davenport v. Apportionment Comm'n, 319 A.2d 718, 722 (N.J. 1974); Schneider v. Rockefeller, 293 N.E.2d 67, 70 (N.Y. 1972); Commonwealth *ex rel.* Specter v. Levin, 293 A.2d 15, 18 (Pa. 1972).
100. *In re* Legislative Dist. of State (1984), 299 Md. at 680, 475 A.2d at 439 (discussing *In re* Legislative Dist. of Gen. Assembly, 193 N.W.2d 784 (Iowa 1972); *Acker*, 496 P.2d 75; *Preisler*, 528 S.W.2d 422).
101. *Id.* at 687, 475 A.2d at 443.
102. *Id.*
103. *See id.* at 679, 687, 475 A.2d at 439, 443.
104. *In re* Legislative Dist. of State, 370 Md. 312, 383, 805 A.2d 292, 334 (2002) (Raker, J., dissenting).

B. The Contiguity Requirement

The contiguity requirement is also a functional consideration.[105] It requires "that there be no division between one part of a district's territory and the rest of the district."[106] The contiguity requirement is often "affected and influenced by the population equality requirement."[107]

C. The Requirement of Due Regard for Natural Boundaries

A redistricting plan shows due regard for boundaries when it keeps cities, counties, and towns intact wherever possible in light of other political redistricting considerations.[108] The primary purpose of this principle is to maintain districts that enable voters to preserve an "orientation" to their district.[109] The due regard principle appears to be the most fluid of the three requirements in Article 4 of the Maryland Constitution.[110]

In her dissent in the 2002 legislative districting decision, Judge Raker looks to the interpretation of similar language in the due regard principle of the Massachusetts Constitution by the Supreme Court of Massachusetts.[111] The Massachusetts court held that the due regard principle requires districts to be formed "as nearly as may be" without uniting two counties, towns, or cities.[112] The court stated that as long as the legislature took reasonable efforts to conform to the requirements of the Constitution it would uphold the legislature's redistricting plan.[113]

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105. *Id.*

106. *In re* Legislative Dist. of State (1984), 299 Md. at 675-76, 475 A.2d at 437. Contiguous territory is further described as "territory touching, adjoining and connected, as distinguished from territory separated by other territory." *Id.* at 676, 475 A.2d at 437.

107. *In re* Legislative Dist. of State (2002), 370 Md. at 383, 805 A.2d at 334 (Raker, J., dissenting).

108. *Id.* at 384, 805 A.2d at 335 (Raker, J., dissenting).

109. *In re* Legislative Dist. of State (1984), 299 Md. at 681, 475 A.2d at 439.

110. *Id.*

111. *In re* Legislative Dist. of State (2002), 370 Md. at 385, 805 A.2d at 335 (Raker, J., dissenting).

112. *Id.* (citing Mayor of Cambridge v. Sec'y of the Commonwealth, 765 N.E.2d 749 (Mass. 2002)).

113. *Mayor of Cambridge*, 765 N.E.2d at 755. The Supreme Judicial Court of Massachusetts also stated:

> Because the redistricting process involves the consideration of these competing factors, the clause requiring the Legislature to avoid the division of cities, towns, and counties "as nearly as may be" cannot be interpreted to require that the Legislature adopt the plan with the absolute minimum number of districts that cross county, town, or city lines.

Id.

D. The Three Requirements Considered Together

The three requirements from section 4 of the Maryland Constitution were intended to work together to ensure legislative districts were organized as to provide fair representation.[114] Even with this common goal, however, the three requirements often come into conflict with one another.[115] The Court of Appeals of Maryland explained this in its 1984 redistricting decision, stating that a "population could be apportioned with mathematical exactness if not for the territorial requirements, and compactness could be achieved more easily if substantially equal population apportionment and due regard for boundaries were not required."[116]

In the 2002 court of appeals districting decision, the majority asserts that these three requirements serve as "legitimate reasons for states to deviate from creating districts with perfectly equal populations."[117] The majority points out that the Supreme Court has held that there are certain times when deviations from the equal population principle are constitutionally permissible.[118] This is a narrow exception, however, that does little to advance the majority's idea that when state and federal requirements conflict, the state requirements will prevail.[119]

IV. THE PROPOSED MARYLAND 2002 PLAN BY GOVERNOR GLENDENING AND THE GENERAL ASSEMBLY

Maryland has only twenty-four political subdivisions—twenty-three counties and Baltimore City.[120] In 1992, Maryland had eighteen shared senatorial districts.[121] Baltimore County's boundary with Baltimore City was crossed five times, while the boundary with other counties was crossed twice.[122] Four districts consisted of more than two counties.[123] One district in the 1992 plan consisted of more than four counties.[124] The redistricting plan of 1992 was an exception to the usual Maryland redistricting plans, which considered Baltimore City

114. *In re* Legislative Dist. of State (2002), 370 Md. at 360-61, 805 A.2d at 320-21 (quoting *In re* Legislative Dist. of State (1984), 299 Md. at 681, 475 A.2d at 440).
115. *Id.* at 361, 805 A.2d at 321 (quoting *In re* Legislative Dist. of State (1984), 299 Md. at 681, 475 A.2d at 440).
116. *In re* Legislative Dist. of State (1984), 299 Md. at 681, 475 A.2d at 440.
117. *In re* Legislative Dist. of State (2002), 370 Md. at 356, 805 A.2d at 318 (citing Reynolds v. Simms, 377 U.S 533, 577 (1964)).
118. *Id.* The *Reynolds* Court explained that "[a] State may legitimately desire to maintain the integrity of various political subdivisions, insofar as possible, and provide for compact districts of contiguous territory in designing a legislative apportionment scheme." *Reynolds*, 337 U.S. at 578.
119. *See infra* notes 137-140 and accompanying text.
120. Legislative Redistricting Cases, 331 Md. 574, 620, 629 A.2d 646, 669 (1993).
121. *In re* Legislative Dist. of State (2002), 370 Md. at 364, 805 A.2d at 322.
122. *See id.*
123. *See id.* at 364, 805 A.2d at 323.
124. *See id.*

and the counties as the primary elements in apportionment, and only crossed over subdivision lines to reach the goal of population equality.[125] Despite these frequent crossovers, the legislative plan was upheld as constitutional and was thus implemented.[126]

The proposed 2002 plan had twenty-two shared senatorial districts, only four more than the 1992 plan.[127] In the 2002 plan, "[t]he number of districts shared by Baltimore City and County remained static, at five."[128] The Baltimore County line was crossed nine times, as opposed to seven in the 1992 plan.[129] In the State's 2002 plan there were five districts that consisted of more than one county, an increase of only one since the 1992 plan.[130] Also, in the 2002 plan there were two districts that consisted of more than four counties, which again increased by one.[131]

A. The 2002 Plan Should Have Been Upheld

In the 2002 redistricting decision, the court of appeals majority places a significant amount of emphasis on these aforementioned differences,[132] but the emphasis should not be placed on the number of times the lines are crossed. Instead, the emphasis should be on why the court found that the 2002, and not the 1992 plan, violated the Maryland Constitution because they are seemingly very similar. The court addressed their similarity by pointing out that in the constitutionally upheld 1992 plan, the Baltimore City/Baltimore County region came close to violating the due regard provision, whereas the 2002 plan was held unconstitutional because there were two more cross-overs in the Baltimore City/Baltimore County region.[133]

The 1992 court explains that there is a great danger in splitting districts because when there are county-line cross-overs the representatives will have divided loyalty.[134] The 1992 court uses District 42, which splits up the "tightly knit Jewish population of Pikesville" into three districts, as an example.[135] But the court holds that this, in itself, does not make the plan unconstitutional, stating that "while the fact that district 42 splits the Jewish community may be regrettable, regard for that 'community of interest' cannot overcome other consti-

125. *Id.* at 368, 805 A.2d at 325.
126. Legislative Redistricting Cases, 331 Md. 574, 611, 615-16, 621 A.2d 646, 665, 667 (1993).
127. *In re* Legislative Dist. of State (2002), 370 Md. at 364, 805 A.2d at 322-23.
128. *Id.* at 364, 805 A.2d at 323.
129. *Id.*
130. *Id.* at 365, 805 A.2d at 323.
131. *Id.*
132. *See In re* Legislative Dist. of State (2002), 370 Md. at 364-65, 805 A.2d at 322-23.
133. *See id.* at 363-64, 805 A.2d at 322-23 (quoting Legislative Redistricting Cases, 331 Md. at 614, 629 A.2d at 666).
134. Legislative Redistricting Cases, 331 Md. at 615, 629 A.2d at 666.
135. *Id.* at 615, 629 A.2d at 667.

tutional considerations."[136] One of the constitutional considerations noted by the court was that District 10 is a "minority district whose creation was mandated by the Voting Rights Act."[137] The important reasoning behind this is the recognition of the fluidity of the due regard principle and the fact that it must sometimes give way to federal requirements.[138] When challenged with other considerations, the due regard principle will often yield to those requirements.[139] The mere fact that the numbers are slightly higher in other areas of the latter plan does not unquestionably prove unconstitutionality.

In the 2002 decision, the State asserted this same argument, describing the Article III requirements, including the due regard principle, as "secondary" and stated that these requirements must yield to other mandates, such as the VRA.[140] The majority of the 2002 court flatly rejects this argument.[141] According to Article II of the Maryland Declaration of Rights, state constitutional requirements yield to federal requirements.[142] In previous Maryland redistricting decisions this has been interpreted to mean that, while consideration of the Article III requirements is mandatory, the federal requirements trump state law.[143] Nevertheless, the 2002 majority states that the Maryland Constitutional requirements are not secondary considerations.[144] This is the first example of the court's unexplained departure from past practice.

The majority stated that there was an excessive number of political crossings in the proposed 2002 plan.[145] The court relied on other jurisdictions to support the proposition that this rendered the plan

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136. *Id.*

137. *Id.* at 615, 629 A.2d at 666-67.

138. *See id.* at 615, 629 A.2d at 667.

139. *Id.* at 615, 629 A.2d at 667.

140. *In re* Legislative Dist. of State, 370 Md. 312, 366, 805 A.2d 292, 324 (2002).

141. *Id.* at 370, 805 A.2d at 326.

142. MD. CONST. art. II. Article II states:

> The Constitution of the United States, and the Laws made, or which shall be made, in pursuance thereof, and all Treaties made, or which shall be made, under the authority of the United States, are, and shall be the Supreme Law of the State; and the Judges of this State, and all the People of this State, are, and shall be bound thereby; anything in the Constitution or Law of this State to the contrary notwithstanding.

Id.

143. *See* Legislative Redistricting Cases (1993), 331 Md. at 615, 629 A.2d at 667 (stating that when requirements conflict with each other the due regard principle "will often be the first to yield"); *In re* Legislative Dist. of State, 299 Md. 658, 680, 475 A.2d 428, 439 (1984) (stating that "the compactness requirement is subservient, in application, to the dominant federal constitutional requirement of substantial equality of population among districts").

144. *In re* Legislative Dist. of State (2002), 370 Md. at 370, 805 A.2d at 326.

145. *Id.* at 368, 805 A.2d at 325.

unconstitutional.[146] In previous Maryland reapportionment cases, however, the court has consistently recognized that the number of crossings of political divisions, alone, is not evidence of unconstitutionality.[147] This is a second example of the court's departure from past Maryland redistricting procedure.

The 2002 Glendening plan was approved and filed by the Maryland General Assembly.[148] A plan approved in this manner carries with it a presumption of validity.[149] The majority allocated the burden of proof to the state and held that the State failed to carry it.[150] As Judge Raker points out in her dissent, however, it does not make sense to place the burden on the State; it should have been placed on the petitioners alleging unconstitutionality.[151] She correctly identifies the majority's argument as a nonsequitur, stating that "[b]y definition, a *presumption* of validity requires that the burden of proof is upon the party attempting to overcome the presumption. The plaintiffs challenging the plan bear the burden of establishing that the adopted plan is unconstitutional."[152] This is the third example of the court's departure from traditional practices.

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146. *Id.* *See In re* Reapportionment of the Colo. Gen. Assembly, 45 P.3d 1237, 1248 (Colo. 2002) (stating that "[a] direct line of accountability between citizens [and their elected officials] is at the heart of responsive government in Colorado and is built into the county-oriented design of the Constitution's reapportionment provisions"); Carstens v. Lamm, 543 F. Supp. 68, 88 (D. Colo. 1982) (finding that "[t]hese political subdivisions (counties and municipalities) should remain undivided whenever possible because the sense of community derived from established governmental units tends to foster effective representation"); Davenport v. Apportionment Comm'n, 304 A.2d 736, 745 (N.J. Super. Ct. App. Div. 1973) (stating that "[t]he citizens of each county have a community of interest by virtue of their common responsibility to provide for public needs and their investment in the plants and facilities established to that end") (quoting Jackman v. Bodine, 205 A.2d 713, 718 (1964)); *In re* Reapportionment of Hartland, 624 A.2d 323, 330 (Vt. 1993) (observing that "unnecessary fragmentation of these [political subdivisions] limits the ability of local constituencies to organize effectively and increases voter confusion and isolation").

147. *See* Legislative Redistricting Cases (1993), 331 Md. at 615-16, 629 A.2d at 667 (holding that the fluid due regard principle allows for reasonable county line cross-overs); *In re* Legislative Dist. of State, 299 Md. 658, 680, 475 A.2d 428, 439 (1984) (stating that "it cannot ordinarily be determined by a mere visual examination of an electoral map whether the compactness requirement has been violated").

148. *See In re* Legislative Dist. of State (2002), 370 Md. at 328, 805 A.2d at 301.

149. Legislative Redistricting Cases (1993), 331 Md. at 614, 629 A.2d at 666. *See* Erfer v. Commonwealth, 794 A.2d 325, 331 (Pa. 2002) (stating that "[a]s with any legislative enactment, [a redistricting plan] enjoys a presumption of constitutionality" and that such a plan will be declared unconstitutional only if it is "clearly, palpably and plainly unconstitutional").

150. *In re* Legislative Dist. of State (2002), 370 Md. at 368, 805 A.2d at 325.

151. *Id.* at 387, 805 A.2d at 337 (Raker, J., dissenting).

152. *Id.* at 387-88, 805 A.2d at 337 (Raker, J., dissenting).

B. *The Court of Appeals of Maryland Should Have Allowed the Governor and General Assembly to Redraw the Map*

The majority of the 2002 court makes clear from the outset that it "do[es] not tread unreservedly into this 'political thicket'; rather, [it proceeds] in the knowledge that judicial intervention . . . is wholly unavoidable."[153] But when the court declared the Glendening plan unconstitutional and drafted its own plan, the court delved wholeheartedly and unjustifiably into the political arena.

The Maryland Constitution grants the Court of Appeals of Maryland the power to review the constitutionality of a redistricting plan when it is challenged by citizens of the state.[154] The court, in accordance with federal and state requirements, has the duty to decide if the plan is constitutional.[155] The Maryland Constitution also forbids the branches of government from usurping power from any other branch.[156] The duty to redistrict is an executive and legislative function, vested in the Governor and the General Assembly.[157] *Nowhere* in the constitution is this power expressly given to the judiciary.[158]

The Court of Appeals of Maryland does have the power to review whether lower courts have applied the constitutional requirements.[159] The court, however, does not have the power to decide whether the legislature could have drawn a more constitutional plan.[160] In *Beaubien v. Ryan*, the Supreme Court of Illinois answered the question of who should assess what trade-offs must be made in the redistricting process:

> Who, then, must finally determine whether or not a district is as compact as it could or should have been made? Surely not the courts, for this would take from the legislature all discretion in the matter and vest it in the courts, where it does not belong . . . . There is a vast difference between determining whether the principle of compactness of territory has been applied at all or not, and whether or not the nearest practical application to perfect compactness has been attained.

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153. *In re* Legislative Dist. of State (2002), 370 Md. at 353, 805 A.2d at 316 (quoting Burton v. Sheheen, 793 F. Supp. 1329, 1337 (D.S.C. 1992), *vacated sub nom.* Statewide Reapportionment Advisory Comm., 508 U.S. 968 (1993)).

154. MD. CONST. art. III, § 5.

155. *In re* Legislative Dist. of State (2002), 370 Md. at 353, 805 A.2d at 316.

156. MD. CONST. art. VIII.

157. MD. CONST. art. III, § 5.

158. *Id.*

159. *In re* Legislative Dist. of State, 299 Md. 658, 668, 475 A.2d 428, 433 (1984).

160. *See In re* Legislative Dist. of State (1984), 299 Md. at 688, 475 A.2d at 443; *see also* Acker v. Love, 496 P.2d 75, 76 (Colo. 1972) (en banc); People v. Thompson, 40 N.E. 307, 309-310 (Ill. 1895); *In re* Legislative Redistricting of the Gen. Assembly, 193 N.W.2d 784, 790 (Iowa 1972); Preisler v. Doherty, 284 S.W.2d 427 (Mo. 1955) (en banc).

> The first is a question which the courts may finally determine; the latter is [not].[161]

The majority of the 2002 court decided that its redistricting plan was more constitutional and adhered more closely to Maryland's constitutional requirements than the plan proposed by Glendening and the General Assembly.[162] Furthermore, the court did not give the Governor and General Assembly a chance to redraw the districts that it found unconstitutional.[163] Instead, the court developed and instated its own plan, stating that there was not enough time for the Governor to redesign the districts.[164] But the Governor and General Assembly were never given the opportunity to try to redesign the "unconstitutional" districts in the limited time period; the Court of Appeals of Maryland had already done it for them.[165] This departure from past practice is not only noteworthy, it shows that the judiciary usurped power in what was meant to be, and usually is, an "inherently political"[166] arena.

The court-proposed plan contains fewer political division crossovers than the Glendening plan.[167] While the Maryland constitutional requirements of compactness, contiguity, and due regard for boundaries are adhered to very closely in the court-proposed plan, the adherence comes at the expense of rights granted by federal requirements. The major concern with the court-proposed plan is that it violates the VRA and takes away minority voting power that is protected under the Act.[168]

Section 2 of the VRA is very important in the context of redistricting; it ensures that minority voters have an opportunity to elect candidates of their own choosing.[169] Studies have shown that there is a general cohesiveness of black voting behavior and preferences and that these preferences differ from those of white voters.[170] It is necessary to take into consideration minority populations in any redistricting plan to protect minority preferences in voting choices. The court-proposed plan does not consider this to the extent that it is required.

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161. Beaubien v. Ryan, 762 N.E.2d 501, 507 (Ill. 2001).
162. *See In re* Legislative Dist. of State, 370 Md. 312, 318-19, 805 A.2d 292, 295-96 (2002).
163. *See id.* at 323, 805 A.2d at 298.
164. *Id.*
165. *Id.* at 398-99, 805 A.2d at 343 (Raker, J., dissenting).
166. *Id.* at 376, 805 A.2d at 330 (Raker, J., dissenting).
167. *In re* Legislative Dist. of State (2002), 370 Md. at 374, 805 A.2d at 329.
168. *Id.* at 389-90, 804 A.2d at 338 (Raker, J., dissenting).
169. *See id.*
170. *Id.* at 391 n.15, 804 A.2d at 339 n.15 (Raker, J., dissenting). *See generally* DAVID A. BOSITIS, JOINT CENTER FOR POLITICAL AND ECONOMIC STUDIES, 1999 NATIONAL OPINION POLL (1999); Keith Reeves, *The Consequences of Cueing Subtle Appeals to Race, in* VOTING HOPES OR FEARS?: WHITE VOTERS, BLACK CANDIDATES & RACIAL POLITICS IN AMERICA 9, 76-90 (1997).

The VRA requires legislatures to create districts that contain a large concentration of minority voters.[171] This requirement is the only way to ensure that minority voting strength is not diluted.[172] The VRA prohibits the practice of "packing," which involves dilution of minority strength by placing a large number of minority voters in one district as to exclude a minority majority in other districts.[173] The practice of "packing" poses a great threat to minority voting power and has been characterized as "perhaps the greatest potential for minimizing and diluting the voting strength of racial and ethnic minority voters."[174]

Along with "packing" comes the problem of "bleaching," which occurs when minority voting strength is weakened in districts that adjoin the "packed" district.[175] The "packed" district takes all the minority voters out of other districts and contains a substantially larger number of minority voters than necessary for a minority supported candidate to prevail.[176] Thus, the adjoining districts have significantly less minority voting power than they would have if the "packing" had not occurred.[177] The districts that have lost the minority strength are then referred to as "bleached" districts.[178]

The Supreme Court, referencing legislative history in *Thornburg v. Gingles*, outlined factors that might be probative of a violation of § 2 of the VRA.[179] In *Growe v. Emison*,[180] the Court narrowed the *Gingles* factors down to three. The first factor is that the minority group must be large enough and geographically compact enough to create a majority in a district.[181] The second is that the minority group must be politically cohesive.[182] The third factor, which must also be met, is that the white majority in the district votes sufficiently as a group to defeat the minority preferred candidate.[183]

The court-proposed Maryland plan violates the VRA by "packing" districts. Districts 40, 41, 44, and 45 in the court-proposed plan contain significantly higher minority populations than those which are

171. 42 U.S.C. § 1973 (2000).
172. *See In re* Legislative Dist. of State (2002), 370 Md. at 392-93, 805 A.2d at 340 (Raker, J., dissenting).
173. *Id.* at 394, 805 A.2d at 341.
174. J. Gerald Hebert, *Redistricting in the Post-2000 Era*, 8 GEO. MASON L. REV. 431, 439 (2000).
175. *In re* Legislative Dist. of State (2002), 370 Md. at 394, 805 A.2d at 341 (Raker, J., dissenting).
176. *See id.* at 394-95, 805 A.2d at 341.
177. *See id.*
178. *See id.* at 394, 805 A.2d at 341.
179. Thornburg v. Gingles, 478 U.S. 30, 36-37 (1986). *See supra* note 48 (discussing the *Gingles* factors).
180. 507 U.S. 25, 39-40 (1993).
181. *Id.* at 40.
182. *Id.*
183. *Id.*

necessary to create a majority-minority district.[184] As a result, under the court-proposed plan, black voters might constitute a voting majority in fewer districts than they should according to the statewide minority population and the VRA.[185]

The majority in the 2002 decision plainly states that when the judiciary undertakes to develop a redistricting plan, "politics or political considerations have no role to play."[186] Yet, as the majority acknowledges, politics and political considerations are inseparable from [legislative] redistricting and apportionment"[187] and "districting inevitably has and is intended to have substantial political consequences."[188] By ignoring politics entirely, it is easier to create contiguous, compact districts.

V. CONCLUSION

The Court of Appeals of Maryland should not have rejected the plan proposed by Governor Glendening and the General Assembly, as unconstitutional. The plan created districts pursuant to the VRA and other federally mandated requirements.[189] Although the districts were not as compact as the districts in the court-proposed plan,[190] they were designed in a way to consider the Maryland constitutional requirements and adhere to them as closely as possible.

Redistricting is a confusing, political area in which the courts provide conflicting law. The Court of Appeals of Maryland made the process more confusing when it redrew the district map itself. Besides ignoring the separation of powers principle and usurping legislative power, the court of appeals did not give the legislature any guidance for designing future redistricting plans.[191] Instead, the court provided its own ideal, non-politically considerate plan.[192] *In re Legislative Districting of the State* (2002) simply declares the plan unconstitutional in favor of what, in the majority view, is a more constitutional plan without giving the next designer of a redistricting plan in Maryland any guidance as to what the court expects or how to ensure that the minority vote in Maryland is protected, as required by the VRA. In short, the court imposed Maryland redistricting plan opened the door

184. *In re* Legislative Dist. of State (2002), 370 Md. at 394, 805 A.2d at 341.
185. *Id.* at 395, 805 A.2d at 341.
186. *Id.* at 354, 805 A.2d at 317.
187. *Id.* at 354, 805 A.2d at 316-17 (quoting Gaffney v. Cummings, 412 U.S. 735, 753 (1973)).
188. *Id.* at 354, 805 A.2d at 317 (quoting *Gaffney*, 412 U.S. at 753).
189. *See In re* Legislative Dist. of State (2002), 370 Md. at 327-28, 805 A.2d at 301.
190. *See id.* at 388-89, 805 A.2d at 337-38 (Raker, J., dissenting) ("It is not for the judiciary to determine whether a *more* compact district could have been drawn . . . .").
191. *In re* Legislative Dist. of State (2002), 370 Md. at 399, 805 A.2d at 344 (Raker, J., dissenting).
192. *See id.* at 354, 805 A.2d at 317.

to single government by allocating too much power to the courts and forgetting about the legislature and its vital role in designing district maps, a role the legislature is fully competent to handle itself.

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