

## Is Federal Congressional Redistricting in Maryland Governed by Article III, Section 4 of the State Constitution? An Analysis of the Trial Court Decision in *Szeliga v. Lamone*

Dan Friedman

Barnett Harris

Follow this and additional works at: <https://digitalcommons.law.umaryland.edu/mlr>

---

### Recommended Citation

Dan Friedman, & Barnett Harris, *Is Federal Congressional Redistricting in Maryland Governed by Article III, Section 4 of the State Constitution? An Analysis of the Trial Court Decision in Szeliga v. Lamone*, 83 Md. L. Rev. ()

Available at: <https://digitalcommons.law.umaryland.edu/mlr/vol83/iss4/5>

This Article is brought to you for free and open access by the Academic Journals at DigitalCommons@UM Carey Law. It has been accepted for inclusion in Maryland Law Review by an authorized editor of DigitalCommons@UM Carey Law. For more information, please contact [smccarty@law.umaryland.edu](mailto:smccarty@law.umaryland.edu).

---

---

**IS FEDERAL CONGRESSIONAL REDISTRICTING IN  
MARYLAND GOVERNED BY ARTICLE III, SECTION 4 OF THE  
STATE CONSTITUTION? AN ANALYSIS OF THE TRIAL COURT  
DECISION IN *SZELIGA V. LAMONE***

DAN FRIEDMAN\* & BARNETT HARRIS\*\*

*In Szeliga v. Lamone, a state trial court determined for the first time that Article III, Section 4 of the Maryland Constitution applies to restrict the Maryland General Assembly’s power to adopt a plan of congressional redistricting. Using theories of constitutional interpretation including textualism, originalism, comparative constitutional law, and common law*

---

© 2024 Dan Friedman & Barnett Harris.

\* Judge, Appellate Court of Maryland.

Before his appointment to the court, Judge Friedman was an Assistant Attorney General for the State of Maryland and, in that capacity, after the 2010 census, advised both the Governor’s Redistricting Advisory Committee and the Maryland General Assembly on redistricting issues, and was part of the team of lawyers that defended both the enacted plan of state legislative redistricting, *In re* 2012 Legis. Districting, 436 Md. 121, 80 A.3d 1073 (2013), and the enacted plan of federal congressional redistricting, *Fletcher v. Lamone*, 831 F. Supp. 2d 887 (D. Md. 2011) (three-judge panel), *aff’d*, 567 U.S. 930 (2012); *Benisek v. Mack*, 11 F. Supp. 3d 516 (D. Md. 2014) (but Judge Friedman was appointed to the bench before *Benisek* was repleaded, renamed, appealed twice to the U.S. Supreme Court, and consolidated with *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), discussed *infra* at note 158 and accompanying text); *Gorrell v. O’Malley*, No. WDQ-11-2975, 2012 WL 226919 (D. Md. Jan. 19, 2012); *Olson v. O’Malley*, No. WDQ-12-0240, 2012 WL 764421 (D. Md. Mar. 6, 2012) (discussed *infra* Part III.D.1).

The Maryland Code of Judicial Conduct requires “[a] judge [to] abstain from public comment that relates to a proceeding pending or impending in any court *and* that might reasonably be expected to affect the outcome or impair the fairness of that proceeding.” Md. R. 18-102.10(a) (emphasis added). There are no cases pending in any court concerning these issues and it is hard to call potential cases that might be filed after the results of the 2030 census, an “impending matter.” MD. R. 18-100.3 (e) (defining “impending matter” as “a matter that is imminent or expected to occur in the near future”). Moreover, Judge Friedman does not see how the discussion here (or in a similar article)—focused on improving our understanding of a constitutional provision—could “affect the outcome” or “impair the fairness” of any proceeding, MD. R. 18-102.10(a), but rather believes that such projects serve only to “promote[] public confidence in the independence, integrity, and impartiality of the judiciary.” MD. R. 18-101.2(a).

Judge Friedman would like to thank Nikisha Sisodiya of the University of Maryland School of Law for outstanding research assistance with this project during the summer of 2022. Judge Friedman also thanks his current law clerks: Jeneen Burrell, Joslyn Joy, and Jennifer Carson.

\*\* Law Clerk to the Hon. John F. Kness, Judge, United States District Court for the Northern District of Illinois (2023–2024 term); Law Clerk to the Hon. Patrick E. Higginbotham, Judge, United States Court of Appeals for the Fifth Circuit (2022–2023 term); J.D., 2021, Georgetown University Law Center; A.B., 2017, University of Delaware.

Both authors would like to acknowledge and thank The Appellate Project ([www.theappellateproject.org](http://www.theappellateproject.org)), a nonprofit organization committed to increasing diversity in the practice of appellate law. We met as a result of a fortuitous pairing in its mentorship program.

*constitutional interpretation, we reject the trial court’s interpretation. Instead, we suggest better techniques for interpreting the state constitution and perhaps for combating excessive partisan gerrymandering.*

I. INTRODUCTION.....	1263
A. Background .....	1263
B. The Trial Court’s Opinion in <i>Szeliga v. Lamone</i> .....	1269
II. USING INTERPRETIVE TECHNIQUES TO GENERATE BETTER UNDERSTANDING OF THE MEANING OF ARTICLE III, SECTION 4.	1270
A. Textualism .....	1273
B. Originalism .....	1276
1. A Long History of State Legislative Malapportionment ..	1278
2. One-Person, One-Vote Litigation in Maryland.....	1282
3. The Maryland Constitutional Convention of 1967–1968 .	1284
4. The Framers’ Intent and the Original Public Meaning of “Legislative District” .....	1288
i. The Original Meaning of the Phrase “Legislative Districts” .....	1288
ii. The Original Meaning of the Framers and Ratifiers of the ‘70 and ‘72 Amendments.....	1290
5. Conclusion .....	1294
C. Comparative Constitutional Law .....	1295
1. Federal Experience with Partisan Gerrymandering .....	1296
2. Other State Experience with Political Gerrymandering Claims Under State Constitutions .....	1299
D. Common Law Constitutional Interpretation.....	1305
1. Precedents Not Followed, Part 1: <i>Olson v. O’Malley</i> .....	1306
2. Precedents Not Followed, Part 2: Prior (and Subsequent) Article III, Section 4 Cases .....	1307

In a small effort to promote academic fairness and equity, the authors have adopted the “fair citation rule,” which allows the listing of the names of all authors of a published work in contravention of Bluebook Rule 15.1, which requires “et al.” to replace the names of three or more authors. See Jennifer Elisa Chapman, *Citation Ethics: Towards an Ethical Framework of Legal Citation*, in *THE ROLE OF CITATION IN THE LAW* 377, 391–92 (Michael Chiorazzi ed., 2022). The application of this “fair citation rule” is most apparent in footnote 176 of this article in which we report on interdisciplinary scholarship that proposes possible new tests for partisan gerrymandering. The fact that multi-author scholarship occurs so much more frequently in other disciplines than it does in legal scholarship makes us wonder whether Bluebook Rule 15.1 creates or merely reinforces norms against multi-author scholarship in the legal field. In any event, we decline to participate in a practice that devalues collaboration and that denigrates the participation of junior scholars, particularly women and people of color.

i. *Szeliga* Improperly Applied the Then-Existing  
Precedents on Partisan Gerrymandering..... 1307

ii. The *Szeliga* Opinion Is Inconsistent with the Subsequent  
Decision in *2022 Legislative Districting* ..... 1310

3. Precedential Value of *Szeliga v. Lamone* for Future  
Redistricting ..... 1312

CONCLUSION ..... 1312

## I. INTRODUCTION

In 2021, a state trial court invalidated Maryland’s enacted plan of federal congressional redistricting, finding that it was an “extreme partisan gerrymander[.]”<sup>1</sup> The state legislature adopted a replacement plan and the original case settled without appellate review. In this Article, we critique the trial court’s interpretation of the relevant provisions of the Maryland state constitution—primarily Article III, Section 4, which requires “legislative district[s]” to be “compact in form” with “[d]ue regard” for “natural boundaries and the boundaries of political subdivisions”—and suggest using a variety of interpretive techniques to develop a better constitutional interpretation.<sup>2</sup>

### A. Background

After receiving the results of the 2020 census, Republican Governor Larry Hogan convened the Maryland Citizens Redistricting Commission<sup>3</sup> to

---

1. *Szeliga v. Lamone*, No. C-02-CV-21-001816, at \*93 (Md. Cir. Ct. Anne Arundel Cnty. Mar. 25, 2022).

2. Because we criticize the trial court’s opinion invalidating the enacted plan of congressional redistricting, some will read this article as a defense of what the trial court condemned: extreme partisan gerrymandering. That would be an error. Neither of us supports or defends extreme partisan gerrymandering. In fact, Mr. Harris has written, elsewhere, about how Section 2 of the Fourteenth Amendment to the U.S. Constitution can be used to combat this scourge on our democracy. Barnett Harris, *Is Partisan Gerrymandering Unconstitutional? Rethinking Rucho v. Common Cause*, 56 U.S.F. L. REV. 35 (2021). We both recognize, however, that it is difficult to develop “judicially discoverable and manageable standards” to distinguish between the permissible influence of politics by the political branches in congressional redistricting on the one hand, and an unconstitutional partisan gerrymander on the other. *See infra* note 159 (describing the origins, development, and application to redistricting of this standard). And we both recognize that this difficult line-drawing is not aided by erroneous interpretations of the governing constitutional provisions.

3. Governor Hogan created the Maryland Citizen Redistricting Commission by executive order dated January 12, 2021. Md. Exec. Order No. 01.01.2021.02, Maryland Citizen Redistricting Commission (Jan. 12, 2021), <https://redistricting.lls.edu/wp-content/uploads/20210112-MY-gov-executive-order.pdf> [<https://perma.cc/AYN7-2GB5>]; *see* Allison Mollenkamp, *Maryland*

hold public hearings and propose a plan for redistricting Maryland's congressional delegation.<sup>4</sup> Democratic legislative leaders, including Senate President Bill Ferguson and House Speaker Adrienne Jones, created their own legislative redistricting advisory committee, chaired by the former executive director of the State's nonpartisan Department of Legislative Services, Karl S. Aro.<sup>5</sup> Both groups produced redistricting plans,<sup>6</sup> which were introduced at a Special Session of the General Assembly that convened December 6–9, 2021.<sup>7</sup> As expected, however, the General Assembly ignored

---

*Redistricting Groups Drawing New Congressional Maps*, CAP. NEWS SERV. (Sept. 17, 2021), <https://cnsmaryland.org/2021/09/17/maryland-redistricting-groups-drawing-new-congressional-maps/> [<https://perma.cc/DL2B-F9V3>]; Pamela Wood, *Commission Appointed by Maryland Gov. Hogan Proposes New Political District Maps*, BALT. SUN, Oct. 19, 2021, at A3. That Commission issued a report in 2022. FINAL REPORT OF THE MARYLAND CITIZENS' REDISTRICTING COMMISSION (2022), <https://redistricting.maryland.gov/Documents/Redistricting-Commission-After-Action-Report.pdf> [<https://perma.cc/2D8B-63VJ>].

4. Simultaneously, a similar but not identical process was taking place to redistrict the state legislative districts. Unlike federal congressional redistricting, the process for state legislative redistricting took place pursuant to Article III, Section 5 of the Maryland Constitution. MD. CONST. art. III, § 5; *see infra* note 37 (providing full text of Article III, Section 5). That is, the Maryland Citizens Redistricting Commission held public hearings and prepared a plan of state legislative redistricting. The Governor's plan was introduced by the legislative presiding officers as a joint resolution. The Governor's plan was amended by the General Assembly and the amended plan was adopted. The State's legislative plan became effective without the Governor's approval and was not subject to his veto. Challenges against the plan were filed in the Court of Appeals of Maryland, acting in the exercise of its original jurisdiction, referred to a special master for hearing, and decided by the Court. *In re 2022 Legis. Districting of the State*, 481 Md. 507, 282 A.3d 147 (2022); *see supra* note 201 and accompanying text. *See generally* Robert A. Zarnoch, *Surviving the Political Thicket: The Maryland Redistricting Experience*, 33 MD. BAR J. 16 (2000) (describing state legislative and federal congressional redistricting as separate processes).

5. Mollenkamp, *supra* note 3; Ovetta Wiggins, *Legislators Begin Redistricting Effort*, WASH. POST, July 9, 2021, at B2; Ovetta Wiggins, *Maryland Legislators Begin Redistricting Effort for 'Gerrymandered' State*, WASH. POST (July 8, 2021), [https://www.washingtonpost.com/local/md-politics/maryland-redistricting-general-assembly-panel/2021/07/08/231bca76-e01c-11eb-ae31-6b7c5c34f0d6\\_story.html](https://www.washingtonpost.com/local/md-politics/maryland-redistricting-general-assembly-panel/2021/07/08/231bca76-e01c-11eb-ae31-6b7c5c34f0d6_story.html) [<https://perma.cc/6W2R-LVDZ>]; Bryn Stole, *Top Maryland Democrats Launch Redistricting Commission Ahead of New Election Maps*, BALT. SUN (July 8, 2021), <https://www.baltimoresun.com/2021/07/08/top-maryland-democrats-launch-redistricting-commission-ahead-of-new-election-maps/> [<https://perma.cc/7HH5-8CKD>]; *In re 2022 Legis. Districting*, 481 Md. at 545–46, 282 A.3d at 170 (describing Legislative Redistricting Advisory Commission).

6. Ovetta Wiggins & Erin Cox, *Redistricting Group's Map May Oust State's Lone Republican in Congress*, WASH. POST, Nov. 11, 2021, at B8; Ovetta Wiggins, Meagan Flynn & Harry Stevens, *Md. GOP Plans Plan for State Redraw*, WASH. POST, Dec. 5, 2021, at C1.

7. The legislative plan was filed as House Bill 1. The Governor's plan was introduced as House Bill 2. *See* H.B. 1, 2021 Leg., 2021 First Spec. Sess. (Md. 2021); H.B. 2, 2021 Leg., 2021 First Spec. Sess. (Md. 2021).

the Governor's plan and adopted its own. The Governor vetoed the legislature's plan,<sup>8</sup> and the General Assembly overrode the Governor's veto.<sup>9</sup>

Legal challenges were filed in the Circuit Court for Anne Arundel County,<sup>10</sup> where they were assigned to Senior Judge Lynne A. Battaglia and consolidated.<sup>11</sup> In one of the challenges, Kathryn Szeliga, a Republican Delegate from Baltimore County, served as lead plaintiff.<sup>12</sup> In the other, Neil C. Parrott, a Republican Delegate from Frederick County, served as the lead plaintiff.<sup>13</sup> The defendants were Linda Lamone, the State Administrator of Elections as well as the Chair of the State Board of Elections and the State Board itself. Both complaints alleged exclusively state constitutional claims

---

8. Letter from Lawrence J. Hogan, Jr., Governor, to Adrienne A. Jones, Speaker of the Maryland House of Delegates, & Bill Ferguson, President of the Maryland Senate (Dec. 9, 2021), <https://htv-prod-media.s3.amazonaws.com/files/congressional-districting-hb1-veto-letter-special-session-2021-1639083030.pdf> [<https://perma.cc/6WEU-C4UF>].

9. H.B. 1, 2021 Leg., 2021 First Spec. Sess. (Md. 2021), <https://mgaleg.maryland.gov/2021S1/bills/hb/hb0001T.pdf> [<https://perma.cc/LWA9-LZTW>]; Meagan Flynn & Ovetta Wiggins, *Maryland General Assembly Overrides Hogan's Veto of New Congressional Map*, WASH. POST (Dec. 9, 2021), <https://www.washingtonpost.com/dc-md-va/2021/12/09/hogan-contests-redistricting-maryland/> [<https://perma.cc/MPW2-6REY>].

10. *Szeliga v. Lamone*, No. C-02-CV-21-001816 (Md. Cir. Ct. Anne Arundel Cnty. Mar. 25, 2022); *Parrott v. Lamone*, No. C-02-CV-21-001773 (Md. Cir. Ct. Anne Arundel Cnty. Mar. 25, 2022). The U.S. Supreme Court had recently decided *Rucho v. Common Cause*, in which the Court held that while partisan gerrymandering may be "incompatible with democratic principles," such claims are not justiciable in the federal courts. 139 S. Ct. 2484, 2502, 2506 (2019); *see infra* note 158 and accompanying text. As a result, state courts were the only remaining forum in which to present these types of claims.

11. Judge Battaglia had previously served as chief of staff to U.S. Senator Barbara A. Mikulski. She was then appointed by President Bill Clinton as U.S. Attorney for the District of Maryland. In 2001, Governor Parris N. Glendening appointed her to serve on the Maryland Court of Appeals representing the third appellate circuit (Western Maryland). She served on that Court until mandatory retirement in 2016 at age seventy. *See* MD. CONST. art. IV, § 5A (f) (requiring appellate judges to retire at seventy years old). Since then, Judge Battaglia has served by designation as a senior judge in various state courts. *See* MD. CONST., art. IV, § 3A (permitting senior judges to sit by designation of the Supreme Court of Maryland). In that capacity, she was specially assigned by the Administrative Judge of the Circuit Court for Anne Arundel County, Judge Glenn L. Klavins, to preside over the *Szeliga* and *Parrott* cases.

12. Szeliga's suit was funded and organized by Fair Maps Maryland, Inc., an entity that organizes for redistricting reform and that is closely associated with Governor Hogan and his former communications director, Doug Mayer. Pamela Wood, *2nd Legal Challenge Filed Against Maryland Congressional Map*, BALT. SUN, Dec. 24, 2021, at C3 (describing Fair Maps Maryland, as "aligned with Gov[ernor] Larry Hogan").

13. Parrott's challenge was orchestrated in coordination with Judicial Watch, a national conservative activist group. Pamela Wood, *Maryland's New Congressional Map Draws First Legal Challenge*, BALT. SUN (Dec. 22, 2021), <https://www.baltimoresun.com/2021/12/22/marylands-new-congressional-map-draws-first-legal-challenge/> [<https://perma.cc/DTH5-2YVK>]; Bennett Leckrone, *Parrott and Conservative Group Judicial Watch File Lawsuit Over Maryland Congressional Redistricting*, MD. MATTERS (Dec. 22, 2021), <https://www.marylandmatters.org/2021/12/22/parrott-and-conservative-group-judicial-watch-file-lawsuit-over-maryland-congressional-redistricting/> [<https://perma.cc/FL3M-JFHW>] (noting lawsuit's focus on Article III, Section 4 of the Maryland Constitution).

against the federal congressional redistricting plan. The *Parrott* complaint claimed violations of Article 7 of the Maryland Declaration of Rights (the “free and frequent” elections provision)<sup>14</sup> and Article III, Section 4 of the Maryland Constitution (the “legislative districts” provision).<sup>15</sup> The *Szeliga* Complaint omitted the Article III, Section 4 claim, but also added claims based on the equal protection component of Article 24 (the “Law of the [L]and” provision)<sup>16</sup> and on Article 40 of the Maryland Declaration of Rights

---

14. Article 7 of the Maryland Declaration of Rights provides:

That the right of the People to participate in the Legislature is the best security of liberty and the foundation of all free Government; for this purpose, elections ought to be free and frequent; and every citizen having the qualifications prescribed by the Constitution, ought to have the right of suffrage.

MD. CONST. Decl. of Rts., art. 7; *see also* Stephen M. Shapiro, *Szeliga v. Lamone: An End to Gerrymandering in Maryland—Or Perhaps Just a Pause*, 82 MD. L. REV. ONLINE 33, 47–48 (2022) (discussing parties’ respective arguments under Article 7 of the Maryland Declaration of Rights); DAN FRIEDMAN, *THE MARYLAND CONSTITUTION: A REFERENCE GUIDE* 33–34 (G. Alan Tarr ed., 2011) [hereinafter FRIEDMAN, *THE MARYLAND CONSTITUTION*]; Dan Friedman, *The History, Development, and Interpretation of the Maryland Declaration of Rights*, 71 TEMP. L. REV. 637, 653, 688 nn.185–93 (1998) [hereinafter Friedman, *Maryland Declaration of Rights*]; Dan Friedman, *Tracing the Lineage: Textual and Conceptual Similarities in the Revolutionary-Era State Declarations of Rights of Virginia, Maryland, and Delaware*, 33 RUTGERS L.J. 929, 955–56 (2002) [hereinafter Friedman, *Tracing the Lineage*]. This “free and frequent elections” provision is also discussed in greater detail in Section III.C.2 of this article.

15. Article III, Section 4 provides: “Each legislative district shall consist of adjoining territory, be compact in form, and of substantially equal population. Due regard shall be given to natural boundaries and the boundaries of political subdivisions.” MD. CONST. art. III, § 4; *see also* Shapiro, *supra* note 14, at 41–46 (discussing parties’ arguments under Article III, Section 4 of the Maryland Constitution).

16. Article 24 of the Maryland Declaration of Rights provides: “That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land.” MD. CONST. Decl. of Rts., art. 24; *see also* Shapiro, *supra* note 14, at 48–51 (discussing parties’ arguments under Article 24 of the Maryland Declaration of Rights); FRIEDMAN, *THE MARYLAND CONSTITUTION*, *supra* note 14, at 56–61; Friedman, *Maryland Declaration of Rights*, *supra* note 14, at 660, 697–98 nn.357–370; Friedman, *Tracing the Lineage*, *supra* note 14, at 966–67. This provision has been judicially determined to contain an equal protection component. *Att’y Gen. v. Waldron*, 289 Md. 683, 704; 426 A.2d 929, 940–41 (1981) (“Although the Maryland Constitution contains no express equal protection clause, we deem it settled that this concept of equal treatment is embodied in the due process requirement of Article 24 of the Declaration of Rights.”). For a discussion of the *Szeliga* court’s resolution of the plaintiffs’ equal protection claims, and our analysis, *see infra* note 24. For Judge Friedman’s thoughts on the *Waldron* opinion and its adoption of an equal protection component to Article 24, *see* Dan Friedman, *The Special Laws Prohibition, Maryland’s Charter Counties, and the “Avoidance of Unthinkable Outcomes”*, 83 MD. L. REV. ONLINE 28, 60–61 (2023) [hereinafter Friedman, *Avoidance of Unthinkable Outcomes*].

(the “liberty of the press” provision)<sup>17</sup> and Article I, Section 7 of Maryland’s Constitution (the “purity of elections” provision).<sup>18</sup>

The trial court entered an abbreviated briefing schedule, held a quick hearing,<sup>19</sup> and in short order, wrote a blistering ninety-four-page opinion declaring the enacted plan of federal congressional redistricting unconstitutional under Article III, Section 4 of the Maryland Constitution. As part of the trial court’s opinion, the court ordered the General Assembly to produce and approve a new map in five days.<sup>20</sup> The General Assembly complied and produced a new congressional redistricting plan that arguably complied with the standards propounded by the trial court.<sup>21</sup> Meanwhile, the

---

17. Article 40 of the Maryland Declaration of Rights provides: “That the liberty of the press ought to be inviolably preserved; that every citizen of the State ought to be allowed to speak, write[,] and publish [their] sentiments on all subjects, being responsible for the abuse of that privilege.” MD. CONST. Decl. of Rts., art. 40; *see also* Shapiro, *supra* note 14, at 51–53 (discussing parties’ arguments under Article 40 of the Maryland Declaration of Rights); FRIEDMAN, THE MARYLAND CONSTITUTION, *supra* note 14, at 73–75; Friedman, *Maryland Declaration of Rights*, *supra* note 14, at 672, 706 nn.527–537; Friedman, *Tracing the Lineage*, *supra* note 14, at 970–71. For a discussion of the *Szeliga*’s court’s resolution of the Article 40 claims, and our analysis of that resolution, see *infra* note 24.

18. Article I, Section 7 of the Maryland Constitution provides that “[t]he General Assembly shall pass Laws necessary for the preservation of the purity of Elections.” MD. CONST. art. I, section 7; *see also* Shapiro, *supra* note 14, at 36–41 (discussing parties’ arguments under Article I, Section 7 of the Maryland Constitution and an unpleaded claim under the closely-related provision, Article III, Section 49); FRIEDMAN, THE MARYLAND CONSTITUTION, *supra* note 14, at 89–90. Ultimately, the trial court dismissed the *Szeliga* plaintiffs’ Article I, Section 7 claim. *Szeliga v. Lamone*, No. C-02-CV-21-001816, at \*11 n.13. (Md. Cir. Ct. Anne Arundel Cnty. Mar. 25, 2022).

19. Meagan Flynn, *Trial Over Gerrymandering of Congressional Map Kicks Off*, WASH. POST, Mar. 16, 2022, at B5.

20. The trial court’s order was issued on March 25 and required the General Assembly to adopt a new plan by March 30. *Szeliga*, No. C-02-CV-21-001816, at \*94; *see* Meagan Flynn, *Racing Clock, Democrats Pass New Congressional Map*, WASH. POST, Mar. 31, 2022, at B6. The General Assembly complied, but the trial court took no action on the revised plan because, it said, the new plan hadn’t been approved by the Governor. *See, e.g.*, Meagan Flynn, *Maryland Judge Says She Cannot Approve Congressional Map Unsigned by Hogan*, WASH. POST (Apr. 1, 2022), <https://www.washingtonpost.com/dc-md-va/2022/04/01/maryland-hogan-congressional-map-gerrymandering/> [<https://perma.cc/JSR8-9KJA>]. The Governor then signed the revised plan in exchange for the Office of the Attorney General agreeing to dismiss its appeal from the *Szeliga* decision.

21. S.B. 1012, 2022 Leg., 444th Sess. (Md. 2022). It is not at all clear how much of a difference the amended congressional plan made. Shapiro argues that the amended plan was “far more rational from a geographic perspective” but that the “partisan make-up of the districts did not change significantly.” Shapiro, *supra* note 14, at 54 n.129. We understand Mr. Shapiro to mean that the changes made by the legislature were aesthetic but not substantive. That observation was borne out in the next congressional election, in which Maryland continued to send a 7-1 delegation to the U.S. House of Representatives. *See, e.g.*, Meagan Flynn, *Trone Declared Md. 6th Winner*, WASH. POST, Nov. 12, 2022, at B1; Jeff Barker, *GOP’s Surge Failed to Be – In Post-Hogan State Election, ‘Two Marylands’ Grow Further Apart*, BALT. SUN Nov. 13, 2022, at 1; Sam Wang, *Did Republicans Gerrymander Their Way to Victory?*, ATLANTIC (Nov. 17,



Attorney General's Office noted an appeal of the trial judge's decision to the Court of Special Appeals.<sup>22</sup> Shortly thereafter, however, the parties settled, with the Governor signing the revised plan into law and the Attorney General dismissing the appeal from the trial court's opinion.<sup>23</sup> As a result, the appellate courts did not have the opportunity to review the trial court's *Szeliga* opinion.

In this Article, we explain why the trial court's *Szeliga* opinion was wrong in its interpretation of Article III, Section 4 of the Maryland Constitution and should have no effect—certainly no binding precedential value, but also no persuasive precedential value—in future federal congressional redistricting in Maryland.

---

2022), <https://www.theatlantic.com/ideas/archive/2022/11/midterm-house-elections-2022-gerrymandering-new-york/672145/> [https://perma.cc/6Z9L-44HQ].

“Pretty” or “aesthetically pleasing” districts are not necessarily less partisan districts and “ugly,” “irregular,” or “funny-looking” districts are not necessarily the result of excessive partisanship. See, e.g., Bruce E. Cain, *Assessing the Partisan Effects of Redistricting*, 79 AM. POL. SCI. REV. 320, 321–22 (1985) (comparing partisan and bipartisan gerrymandering). For example, critics of the 2012 Maryland congressional redistricting invariably pointed to the irregular shapes of the second, third, and seventh congressional districts (in and around Baltimore) as “proof” of partisan gerrymandering. In Judge Friedman’s view, however, those irregular district shapes were not the result of extreme partisan gerrymandering (evidenced by the fact that they continued to perform, as always, as safe democratic districts). If anything, those irregular shapes reflected the personal preferences of incumbent members of Congress. And, if there was a partisan gerrymandering aspect in the 2012 redistricting (and we’re not saying there was), it was in the sixth district (western Maryland) in which the congressional district took a turn south rather than its historic turn east to Frederick and Carroll counties. All of which is to say that the part of the map that looked gerrymandered wasn’t, and the part that didn’t look gerrymandered may have been. The so-called interocular test (“it looks gerrymandered!”) is not an effective test.

22. By constitutional amendment that became effective on December 14, 2022, the name of the Court of Special Appeals was changed to the Appellate Court of Maryland. By the same amendment the name of the Court of Appeals of Maryland was changed to the Supreme Court of Maryland and the title of those who serve on the Supreme Court of Maryland was changed from “judges” to “justices.” See MD. CONST. art. IV, § 14. In this article, we use the names and titles that applied at the time of the events described.

23. Jeff Barker, *What’s Going on with Maryland’s Congressional District Lines? Hint: There’s a New Map in Town. Here’s Where We Are Now*, BALT. SUN (Apr. 4, 2022), <https://www.baltimoresun.com/2022/04/04/whats-going-on-with-marylands-congressional-district-lines-hint-theres-a-new-map-in-town-heres-where-we-are-now/> [https://perma.cc/3SPS-BY76]; Meagan Flynn & Ovetta Wiggins, *Hogan Signs New Md. Congressional Map Into Law, Ending Legal Battles*, WASH. POST (Apr. 4, 2022), <https://www.washingtonpost.com/dc-md-va/2022/04/04/maryland-new-congressional-map/> [https://perma.cc/9N94-]; Jeff Barker, *Maryland Gov. Hogan Signs Redrawn Congressional District Map, Ending Monthslong Legal and Legislative Battle*, BALT. SUN (Apr. 4, 2022), <https://www.baltimoresun.com/2022/04/04/maryland-gov-hogan-signs-redrawn-congressional-district-map-ending-monthslong-legal-and-legislative-battle/> [https://perma.cc/D57G-69TB].

*B. The Trial Court's Opinion in Szeliga v. Lamone*

The trial court's opinion consists of two main steps.<sup>24</sup> *First*, the trial court found that Article III, Section 4 of the Maryland Constitution applies to federal congressional redistricting and provides standards for determining the constitutionality of federal congressional districts.<sup>25</sup> And, *second*, the trial court found that the enacted plan violated those constitutional standards and was, therefore, an “extreme partisan gerrymander[.]”<sup>26</sup> As Part II will explain, the trial court was wrong at both steps.

---

24. The *Szeliga* court also found that the enacted congressional plan violated other provisions of the Maryland Constitution, including Articles 7, 24, and 40 of the Maryland Declaration of Rights. *Szeliga*, No. C-02-CV-21-001816, at \*93–94. Here, the trial court's *Szeliga* opinion spends extended effort building what it refers to as “a nexus between a ‘standards’ clause and its facilitating constitutional provision.” *Id.* at 21 (citing *Md. Green Party v. Md. Bd. of Elections*, 377 Md. 127, 150, 832 A. 2d 214, 243–46 (2003)). The trial court found these nexuses between Article III, Section 4 on the one hand, and the “free and frequent elections” provision of Article 7 of the Declaration of Rights, *id.* at 24–28; the equal protection component of Article 24 of the Declaration of Rights, *id.* at 29–35; and the free speech component of Article 40 of the Declaration of Rights, *id.* at 36–38, on the other hand. We read this as a structuralist interpretive analysis in which the *Szeliga* court found a background democracy principle to be a “[f]undamental [p]rinciple[ ] [u]nderlying the Maryland Constitution and Declaration of Rights,” *id.* at 39–43, and that those certain concrete provisions reveal, but do not limit, the underlying principle. In a way, the *Szeliga* court's opinion also echoes recent scholarship by Professors Jessica Bulman-Puzen of Columbia Law School and Miriam Seifter of Wisconsin Law School. Jessica Bulman-Puzen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859 (2021) (relying on combination of various provisions of state constitutions, including those calling for “free and equal elections,” those guaranteeing the right to vote, and those establishing direct democracy through referendum, initiative, and recall, to argue that there is a structuralist “democracy principle” underlying state constitutions); see also Dan Friedman, *Does Article 17 of the Maryland Declaration of Rights Prevent the Maryland General Assembly from Enacting Retroactive Civil Laws?*, 82 MD. L. REV. 55, 88–93 (2022) [hereinafter Friedman, *Ex Post Facto*] (discussing structuralism); see also Dan Friedman, *Applying Federal Constitutional Theory to the Interpretation of State Constitutions: The Ban on Special Laws in Maryland*, 71 MD. L. REV. 411, 458–59 (2012) [hereinafter Friedman, *Special Laws*] (same). We aren't sure we agree that there is a democracy principle underlying the Maryland Constitution, see, e.g., JOHN J. CONNOLLY, REPUBLICAN PRESS AT A DEMOCRATIC CONVENTION: REPORTS OF THE 1867 MARYLAND CONSTITUTIONAL CONVENTION BY THE BALTIMORE AMERICAN AND COMMERCIAL ADVERTISER, at xxi–xxiv, 1 n.64 (2018) (describing protection of white supremacy as a “fundamental principle” of Maryland's 1867 Constitution); Dan Friedman, *Miles to Go: A Response to Dr. Nicholas Cole's Speech at the Third Annual Robert F. Williams Lecture on State Constitutional Law*, RUTGERS U. L. REV. (forthcoming 2024) (manuscript at 14 n.64) [hereinafter Friedman, *Miles to Go*] (same), but for us the *Szeliga* court's structuralist, “nexus” analysis never gets off the ground because, for the reasons discussed in this article, we do not think Article III, Section 4 applies or can apply to federal congressional redistricting. Our intuition here was bolstered in the subsequent state legislative redistricting litigation when the petitioners, including Delegate Szeliga herself, voluntarily abandoned the exact same claims despite that those claims had prevailed in the *Szeliga* case. *In re 2022 Legis. Districting of the State*, 481 Md. 507, 558 n.32, 282 A.3d 177 n.32 (2022) (reporting abandonment of claims). We discuss later the possibility that the “free and frequent elections” provision of Article 7 of the Maryland Declaration of Rights has independent significance. See *infra* Section II.C.2.

25. *Szeliga*, No. C-02-CV-21-001816, at \*20.

26. *Id.* at 93.

## II. USING INTERPRETIVE TECHNIQUES TO GENERATE BETTER UNDERSTANDING OF THE MEANING OF ARTICLE III, SECTION 4

Using several interpretive techniques can help generate a full menu of possible interpretations of a constitutional provision from which a judge must select the best possible interpretation.<sup>27</sup> In this Article, we will use the techniques of textualism, originalism, comparative constitutional law, and common law constitutional interpretation to generate a better and more complete interpretation of Article III, Section 4 than the trial court did in *Szeliga*.<sup>28</sup>

---

27. Judge Friedman has often employed this technique of using several interpretive methods originally developed for interpretation of the federal constitution to interpret state constitutional provisions. Friedman, *Ex Post Facto*, *supra* note 24; Dan Friedman, *Jackson v. Dackman Co.: The Legislative Modification of Common Law Tort Remedies Under Article 19 of the Maryland Declaration of Rights*, 77 MD. L. REV. 949 (2018) [hereinafter Friedman, *Article 19*]; Friedman, *Special Laws*, *supra* note 24; Friedman, *Avoidance of Unthinkable Outcomes*, *supra* note 15. As he has explained it:

In my view, [judges] must use [their individual] judgment to develop the best possible interpretation of a constitutional provision that is constrained by a reasonable reading of the constitutional text and informed by the history of that provision's adoption, subsequent judicial and scholarly interpretation in this and comparable jurisdictions, core moral values, political philosophy, and [S]tate as well as American traditions. [Judges] ought to make use of all possible tools to come to [the best possible] interpretation.

Friedman, *Ex Post Facto*, *supra* note 24, at 59. Other commentators have described this same approach as a “pluralistic” method of constitutional interpretation. *See, e.g.*, Michael L. Smith, *Idaho's Law of Constitutional Interpretation: Lessons from Planned Parenthood Great Northwest v. State*, 59 IDAHO L. REV. 411, 419–20 (2023) (discussing Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1193 (1987); RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 19 (2001); PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 3–4 (1982); and Stephen M. Griffin, *Pluralism in Constitutional Interpretation*, 72 TEX. L. REV. 1753, 1757–60 (1994)); Robert Post *Theories of Constitutional Interpretation*, 30 REPRESENTATIONS 13 (1990); *see also* Chad M. Oldfather, *Methodological Pluralism and Constitutional Interpretation*, 80 BROOK. L. REV. 1 (2014) (discussing methodological pluralism within courts not by individual interpreters). Implicit in Judge Friedman's view is his belief that no single interpretive tool is capable of generating correct answers to all constitutional questions but by using many interpretive tools, judges can improve their interpretive choices. Friedman, *Avoidance of Unthinkable Outcomes*, *supra* note 15, at 63. Moreover, Judge Friedman believes that the quest to eliminate (or even substantially reduce) judicial discretion by binding judges to a single interpretive theory is foolish, futile, and ultimately, self-defeating.

Mr. Harris is not ready to commit himself to an interpretive technique. *See* Harris, *supra* note 2 (suggesting that the text of the Fourteenth Amendment already binds judges, under any interpretive theory they decide to use).

28. We are omitting from this Article a few of the interpretive techniques that Judge Friedman has employed in the past because they have not helped us achieve a “best possible interpretation” of Article III, Section 4 of the Maryland Constitution. *See supra* note 27 (discussing best possible constitutional interpretations); *see also* Friedman, *Ex Post Facto*, *supra* note 24, at 59 n.13 (explaining why interpreters should employ all available interpretive techniques, even if they don't generate useful interpretive results). We discuss those techniques briefly here to explain their exclusion:

- **Structuralism** suggests that, in addition to studying the text of a constitutional provision, interpreters should also reason from the structure and relation created by the text. CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 22 (1969); *see also* Friedman, *Ex Post Facto*, *supra* note 24, at 87 (applying structuralism to state constitutional interpretation); Friedman, *Article 19*, *supra* note 27, at 972–75; Friedman, *Special Laws*, *supra* note 24, at 458–59 (same). Interpretations based on the separation of powers are classic structuralism. Friedman, *Article 19*, *supra* note 27, at 969–72 (treating separation of powers arguments within the structuralist rubric); Friedman, *Special Laws*, *supra* note 24, at 460–62 (same). As is discussed *supra* note 24, the *Szeliga* court attempted a constitutional interpretation that we classify as a structuralist interpretation, but that we reject because it is predicated on the untenable premise that Article III, Section 4 applies to federal congressional redistricting. We make three additional points here regarding structuralist interpretation and the separation of powers. *First*, redistricting is an inherently political process. It should be carried out within the political branches—the executive and legislative—to the extent possible and the judiciary’s role should be as limited as possible to enforce the Constitution and laws of the United States and of Maryland. *See, e.g., In re 2022 Legis. Districting of the State*, 481 Md. at 554–55, 282 A.3d at 175. This is an important point, and its importance is not diminished by the difficulty in ascertaining in particular instances the proper level of judicial intervention. There are always those who argue that the courts intervene too much or too little. *See, e.g., Brooke Erin Moore, Opening the Door to Single Government: The 2002 Maryland Redistricting Decision Gives the Courts Too Much Power in an Historically Political Arena*, 33 U. BALT. L. REV. 123 (2003). We are not sure, however, that this observation gets us anywhere in evaluating the *Szeliga* opinion: if the enacted plan was unconstitutional, the court’s intervention was not too much; but, if the enacted plan was constitutional, it was. *Second*, however difficult it is for judges and courts to develop “judicially discoverable and manageable standards” it is even more difficult for legislatures and legislators to develop plans to satisfy those standards. *See infra* note 159 (discussing evolution of this standard). Right now, legislatures are allowed to consider politics in redistricting, just not to consider politics “too much.” *See infra* Section II.D.2.i (discussing subordination standard). That is a difficult standard to achieve. And *third*, our focus on courts as the sole interpreters of the various constitutions and laws has the effect of stifling constitutional innovation. That is, when the Maryland General Assembly relies too much on (1) the Supreme Court of Maryland’s prior interpretation; or (2) the Attorney General’s prediction of what that Court will find to be constitutional, rather than on conducting its own independent constitutional appraisal, there will be less innovation and boundary-testing. And, of course, that problem is made much worse if, in the future, the General Assembly cabins its view of its own powers to conduct congressional redistricting within the confines set out by a single trial judge in a *nisi prius* opinion, as *Szeliga* is. The precedential weight of the *Szeliga* opinion is discussed, below, under the rubric of common law constitutional interpretation, *see infra* Section II.D.2.iii. Nevertheless, we acknowledge that the precedential weight afforded to the *Szeliga* opinion could also affect the separation of powers (which we think of as a structuralist issue).
- **Moral reasoning theory** can often help a careful interpreter understand a constitutional provision. RONALD DWORKIN, FREEDOM’S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION (1996); *see also* Friedman, *Special Laws*, *supra* note 24, at 444 (discussing application of moral reasoning theory to state constitutions); Friedman, *Ex Post Facto*, *supra* note 24, at 85–87 (same); Friedman, *Article 19*, *supra* note 27, at 976 (same). The first step of moral reasoning

theory, however, requires a determination of whether a constitutional provision either (1) states an abstract moral principle or (2) is more specific and does not involve a moral principle. Friedman, *Special Laws*, *supra* note 24, at 444. If, as we feel is the case with Article III, Section 4, the provision is specific, it must be interpreted according to its terms, without regard to moral reasoning. We think this provides an important insight into the self-imposed constraints on moral reasoning theory—it is not nearly so freewheeling as its critics complain. Compare DWORKIN, *supra*, at 8, with, e.g., Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 *FORDHAM L. REV.* 1269 (1997) (critiquing Dworkin). Only broad constitutional statements of abstract moral principles are subject to moral reasoning analysis. As a result, however, moral reasoning won't help us to understand Article III, Section 4.

- **Critical race theory** proceeds from the observation that accommodating slavery, promoting racism, and maintaining white supremacy were important and intentional features of the U.S. Constitution. Friedman, *Ex Post Facto*, *supra* note 24, at 80–85 (first citing Dorothy E. Roberts, Foreword, *Abolition Constitutionalism*, 133 *HARV. L. REV.* 1 (2019); then citing T. Alexander Aleinikoff, *The Constitution in Context: The Continuing Significance of Racism*, 63 *U. COLO. L. REV.* 325 (1992); then citing Derrick Bell, *Racial Realism*, 24 *CONN. L. REV.* 363 (1992); then citing Derrick Bell, *Reconstruction's Racial Realities*, 23 *RUTGERS L.J.* 261 (1992); then citing Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind"*, 44 *STAN. L. REV.* 1 (1991); and then citing Jerome McCristal Culp, Jr., *Toward A Black Legal Scholarship: Race and Original Understandings*, 1991 *DUKE L.J.* 39, 67–97 (1991)). This observation applies with even greater force to the Maryland Constitution of 1867, which was written in the aftermath of the Civil War and explicitly sought to reestablish racial hierarchies after the abolition of slavery. Friedman, *Ex Post Facto*, *supra* note 24, at 80–85; CONNOLLY, *supra* note 24, at v, xxi-xxiv, 1 n.64 (2018) (describing rampant, unrepentant racism of 1867 Maryland constitutional convention delegates); Friedman, *Miles to Go*, *supra* note 24 (same). Critical race theory has exposed the ways in which both state legislative and federal congressional redistricting have been and continue to be used as tools of racial oppression. See, e.g., Janai Nelson, *Parsing Partisanship and Punishment: An Approach to Partisan Gerrymandering and Race*, 96 *N.Y.U. L. REV.* 1088 (2021); Patricia Okonta, *Race-Based Political Exclusion and Social Subjugation: Racial Gerrymandering as a Badge of Slavery*, 49 *COLUM. HUM. RTS. L. REV.* 254 (2018); A. Leon Higginbotham, Jr., Gregory A. Clarick & Marcella David, *Shaw v. Reno: A Mirage of Good Intentions with Devastating Racial Consequences*, 62 *FORDHAM L. REV.* 1593 (1994). Nevertheless, the interpretive choice of whether the 1972 constitutional amendments adding the term “legislative districts” included or excluded federal congressional districts and thus whether the constitutional standards of Article III, Section 4 of the Maryland Constitution apply to federal congressional districts does not implicate these concerns. This is especially true where, as in *Szeliga*, there were no allegations of racial bias in the congressional redistricting process or resulting plans, the congressional districts were found to comply with the Voting Rights Act, and it would have made for a “fusion of unexpected bedfellows,” for the *Szeliga* plaintiffs to have advanced such racial claims. See *Fletcher v. Lamone*, 831 F. Supp. 2d 887, 909 (D. Md. 2011) (Williams, J., concurring) (describing misalignment of plaintiffs and goals in *Fletcher* case), *aff'd*, 567 U.S. 930 (2012). Therefore, we do not think employing the techniques of critical race theory will help us understand and interpret Article III, Section 4.
- The “**Avoidance of ‘Unthinkable’ Outcomes**” is Judge Friedman’s hypothesis that sometimes judges can and must interpret constitutions in ways that are

### A. Textualism

Textualism requires a constitutional interpreter to focus on the specific language of a constitutional provision.<sup>29</sup> After all, as the Maryland cases emphasize, the language that the framers used is often the best evidence of their intent.<sup>30</sup>

The centerpiece of the trial court’s *Szeliga* opinion is the determination that the constitutional standards set forth in Article III, Section 4 of the Maryland Constitution apply to congressional redistricting. And if we were to look at the provision in complete isolation it might seem possible: “Each legislative district shall consist of adjoining territory, be compact in form, and of substantially equal population. Due regard shall be given to natural boundaries and the boundaries of political subdivisions.”<sup>31</sup> The trial court’s opinion observes that there is no definition in this section of a “legislative district” and therefore the standard could apply to both state legislative and

---

unsupported by text or history in order to avoid an otherwise “unthinkable” result. Judge Friedman has identified the U.S. Supreme Court’s decision in *Bolling v. Sharpe*, 347 U.S. 497 (1954) and the Maryland Court of Appeals’ decision in *Attorney General v. Waldron*, 289 Md. 683 (1981), as examples of the application of this doctrine. Friedman, *Avoidance of Unthinkable Outcomes*, *supra* note 16, at 61–62 (suggesting that Maryland courts could avoid an unthinkable outcome by extending constitutional special laws prohibition to Maryland’s charter counties). We suspect that avoiding what it perceived as an “unthinkable” outcome—especially after the U.S. Supreme Court abdicated the field in *Rucho*—is what actually animated the *Szeliga* court. *See supra* notes 157–158. If avoiding “unthinkable” outcomes is what was happening, however, the trial court should have been transparent about what it was doing, *see* Friedman, *Avoiding Unthinkable Outcomes*, at 59, 61 (discussing transparency as critical aspect of doctrine of avoiding unthinkable outcomes), rather than relying on its erroneous interpretation of Article III, Section 4 of the Maryland Constitution to achieve the result. And, although Judge Friedman didn’t explicitly articulate it in his previous work on the topic, we think that the determination of what constitutes an “unthinkable” outcome ought to be the prerogative of the jurisdiction’s supreme court as it was in *Bolling* and as it was in *Waldron*.

As a result, we will forgo further reliance on these interpretive techniques here.

29. Friedman, *Special Laws*, *supra* note 24, at 427–28; Friedman, *Article 19*, *supra* note 27, at 958.

30. *See, e.g.*, *Bernstein v. State*, 422 Md. 36, 43–44, 29 A.3d 267, 271 (2011) (“[C]ourts should be careful not to depart from the plain language of the [Maryland Constitution].”); *Abrams v. Lamone*, 398 Md. 146, 174, 919 A.2d 1223, 1240 (2007) (Bell, C.J., plurality opinion); *Davis v. Slater*, 383 Md. 599, 604–05, 861 A.2d 78, 81 (2004) (“If [the constitutional provision’s] language is clear and unambiguous, we need not look beyond the provision’s terms to inform our analysis . . . .”); *cf. Prince George’s County v. Thurston*, 479 Md. 575, 586, 278 A.3d 1251, 1258 (2022) (“Because we assume that the framers express their intent in the text of the charter, we principally focus on the plain language of the challenged provision as the ‘primary source of legislative intent.’” (quoting *O’Connor v. Baltimore County*, 382 Md. 102, 113, 854 A.2d 1191, 1198 (2004))).

31. MD. CONST. art. III, § 4 (emphasis added).

federal congressional districts.<sup>32</sup> Here's what the trial court's opinion said: "The Legislature, keenly aware of its ability to restrict or expand the application of Article III, Section 4, chose not to explicitly exclude Congressional districts from the purview of Article III, Section 4, nor just reference State legislative districts. As a result," the trial court wrote, "'legislative districts' includes congressional districts."<sup>33</sup>

The answer, however, is that the constitutional framers *did* provide a definition of the term "legislative district." That definition is provided in the immediately preceding provision, Article III, Section 3: "The State shall be divided by law into *legislative districts* for the election of members of the Senate and the House of Delegates. Each legislative district shall contain one (1) Senator and three (3) Delegates."<sup>34</sup>

Article III, Section 3 is crystal clear: the term "legislative districts" means State legislative districts, not federal congressional districts. The trial court's *Szeliga* opinion, by refusing to consider Article III, Section 4 in the context of its immediate neighbors, Article III, Section 3 and Article III, Section 5, is operating in a way that could be described as "clause bound."<sup>35</sup> That is, it looked at the clause entirely in isolation. The Court of Appeals of

---

32. *Szeliga v. Lamone*, No. C-02-CV-21-001816, at \*16 (Md. Cir. Ct. Anne Arundel Cnty. Mar. 25, 2022).

33. *Id.* at \*20. We also observe that the *Szeliga* Court's interpretation of the term "legislative districts" does not address whether, in addition to state legislative districts and federal congressional districts, any other kinds of "legislative districts" are also included within its new definition. For example, county councils in charter counties are "elective legislative bodies" pursuant to Article XI-A, Section 3, but the districts from which council members can be, but are not required to be elected, are called "councilmanic districts" pursuant to Article XI-A, Section 3A. Are those "councilmanic districts" within the *Szeliga* court's definition of "legislative districts"? Must the design of those districts now satisfy the requirements of Article III, Section 4? The councilmanic districts in Baltimore City certainly might fit that new definition of "legislative districts." How about districts for the election of county council members in counties that have adopted code home rule pursuant to Article XI-F? We don't know if any of them have commissioner districts. But if they do, we don't know whether they are within the *Szeliga* court's definition. This new definition of "legislative districts" probably does not apply to districts in commissioner counties, which are recognized by Article VII, Section 1, because the distinguishing characteristic of commissioner counties is their lack of home rule, by which is meant legislative capacity. Thus, we cannot see them as "legislative districts." How about in municipalities that elect town council members by districts? These municipalities have local legislative power. MD. CONST. art. XI-E. Are those town council districts now "legislative districts" under the *Szeliga* definition? If they are not, why not? And, if they are, how has nobody ever noticed it before? *See, e.g.*, *Dubois v. City of College Park*, 286 Md. 677, 447 A.2d 838 (1980) (overturning City of College Park City Council redistricting on the basis of equal protection guarantees of Fourteenth Amendment and Article 24 of the Maryland Declaration of Rights, not equal population guarantee of Article III, Section 4). Of course, the obvious response is that the *Szeliga* court wasn't asked if Article III, Section 4 applies to local governments and had it attempted such an answer, that would have been *obiter dicta*. Nonetheless, an answer to this question would have addressed an obvious weakness in the trial court's analysis.

34. MD. CONST. art. III, § 3 (emphasis added).

35. *See* JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 12–13 (1980) (critiquing "clause-bound" constitutional interpretation).

Maryland has been clear that constitutional interpretation should not look at provisions in isolation but should instead look to the context in which they appear to inform the determination of meaning.<sup>36</sup> Here, the trial court’s clause bound interpretation is particularly concerning, because it is predicated entirely on the existence of a division between Article III, Section 3 and Section 4. Had the constitutional framers simply chosen to put them in the same section, the *Szeliga* court’s entire theory would have collapsed. Moreover, Article III, Section 5 repeats that definition twice—“legislative districts for [electing of the / the election of] members of the Senate and the House of Delegates”—as it provides the procedure for drawing, introducing, adopting, and challenging the State legislative districts.<sup>37</sup> In fact, the Maryland Constitution uses the term “legislative” consistently throughout to refer to the Maryland General Assembly and it uses the term “congress” (or a variation of that word, such as “congressional”) exclusively to mean the

---

36. See, e.g., *Davis v. Slater*, 383 Md. 599, 604–05, 861 A.2d 78, 81 (2004) (“[T]he goal of our examination is always to discern the . . . purpose, the ends to be accomplished, or the evils to be remedied by a particular [constitutional] provision. . . . To that end, we must consider the context in which the constitutional provision . . . appears, including related [provisions], and relevant legislative history.” (emphasis added)).

37. The full text of Article III, Section 5, as of the *Szeliga* litigation, was as follows:

Following each decennial census of the United States and after public hearings, the Governor shall prepare a plan setting forth the boundaries of the *legislative districts* for electing of the members of the Senate and the House of Delegates.

The Governor shall present the plan to the President of the Senate and Speaker of the House of Delegates who shall introduce the Governor’s plan as a joint resolution to the General Assembly, not later than the first day of its regular session in the second year following every census, and the Governor may call a special session for the presentation of his plan prior to the regular session. The plan shall conform to Sections 2, 3 and 4 of this Article. Following each decennial census the General Assembly may by joint resolution adopt a plan setting forth the boundaries of the *legislative districts* for the election of members of the Senate and the House of Delegates, which plan shall conform to Sections 2, 3 and 4 of this Article. If a plan has been adopted by the General Assembly by the 45th day after the opening of the regular session of the General Assembly in the second year following every census, the plan adopted by the General Assembly shall become law. If no plan has been adopted by the General Assembly for these purposes by the 45th day after the opening of the regular session of the General Assembly in the second year following every census, the Governor’s plan presented to the General Assembly shall become law.

Upon petition of any registered voter, the Court of Appeals shall have original jurisdiction to review the legislative districting of the State and may grant appropriate relief, if it finds that the districting of the State is not consistent with requirements of either the Constitution of the United States of America, or the Constitution of Maryland.

MD. CONST. art. III, § 5 (emphasis added). The current version of this provision is unchanged except to update the name of the court to “the Supreme Court of Maryland.” We suppose that a motivated textualist might argue that the phrase “legislative district” appears alone in Article III, Section 4, but appears with some variation of the phrase “for electing state legislators” in Article III, Sections 3 and 5. If one treats the phrase “for electing state legislators” as a modifier, rather than as a definition, we suppose someone could argue that without the modifier the term might also include other kinds of legislative districts. We aren’t persuaded.



federal Congress.<sup>38</sup> A reasonable textualist interpretation would have no difficulty in determining that the trial court's *Szeliga* decision, as a matter of textualist interpretation, is wrong.<sup>39</sup>

### B. Originalism

Originalism seeks to determine and apply the original intent or the original public meaning of a constitutional provision.<sup>40</sup>

---

38. See, e.g., MD. CONST. art. I, § 6 (“If any person shall give, or offer to give, directly or indirectly, any bribe . . . to induce any voter to refrain from casting his vote, or to prevent him in any way from voting, or to procure a vote for any candidate or person proposed, or voted for as the elector of President, and Vice President of the United States, or Representative in *Congress* . . . the person giving, or offering to give and the person receiving the same . . . at any election to be hereafter held in this State, shall, on conviction . . . be forever disqualified to hold any office of profit or trust, or to vote at any election thereafter.” (emphasis added)); MD. CONST. art. III, § 10 (“No member of *Congress*, or person holding any civil, or military office under the United States, shall be eligible as a Senator, or Delegate . . .” (emphasis added)); MD. CONST. art. XVII, § 1 (“The purpose of this Article is to reduce the number of elections by providing that all State and county elections shall be held only in every fourth year, and at the time provided by law for holding *congressional* elections, and to bring the terms of appointive officers into harmony with the changes effected in the time of the beginning of the terms of elective officers.” (emphasis added)).

39. If the trial court's *Szeliga* opinion is right and “legislative district” as it appears in the Maryland Constitution means both State legislative and federal congressional districts, then it stands to reason that it carries that meaning not just in Article III, Section 4 but also in Article III, Section 5. If that is true, the result would be that, contrary to uniform practice since 1970, a plan of federal congressional redistricting is supposed to be introduced in the General Assembly as a joint resolution (not a bill as has always been done); is supposed to be approved by the General Assembly by the forty-fifth day of session pursuant to this special procedure by which it is automatically adopted if not amended (not as ordinary legislation pursuant to Article III, Section 28); is not subject to gubernatorial veto and legislative override pursuant to Article II, Section 17 (not as happened here, where the congressional plan was, in fact, vetoed and the veto overridden, *see supra* notes 8–9); and challenges to it are subject to the original jurisdiction of the Court of Appeals (not as happened here, lawsuits in the circuit courts). Federal congressional redistricting wasn't treated like state legislative redistricting this year or in any previous year for a simple reason: nobody has ever—ever!—read these provisions to apply to federal congressional redistricting. Although we find this evidence persuasive, we note that many originalists are skeptical of the interpretive value of post-enactment history. See generally, e.g., Spencer G. Livingstone, *The Use and Limits of Longstanding Practice in Constitutional Law*, 83 MD. L. REV. 10 (2023); Will Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019); Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255 (2017); Michael McConnell, *Time, Institutions, and Interpretation*, 95 B.U. L. REV. 1745 (2015); Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519 (2003); Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1 (1998) (describing interpretive value of post-enactment constitutional history). See also *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2162–63 (2022) (Barrett, J., concurring) (describing “the manner and circumstances in which post[-]ratification practice may bear on the original meaning of the Constitution” as “unsettled”).

40. Friedman, *Ex Post Facto*, *supra* note 24, at 69; Friedman, *Special Laws*, *supra* note 24, at 415–16, 433–36; Friedman, *Article 19*, *supra* note 27, at 963 n.74. This is, of course, a gross oversimplification. See, e.g., Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1 (2009) (describing varieties of originalism); Eric Berger, *Originalism's Pretenses*, 16 U. PA. J. CONST. L.

The trial court's *Szeliga* opinion attempts an originalist interpretation. In that section of the opinion, the trial court notes that Article III, Section 4 of the Maryland Constitution was drafted in 1970 and 1972.<sup>41</sup> The opinion then recounts four of the major “one person, one vote”<sup>42</sup> decisions of the U.S. Supreme Court during the 1960s and 1970s: *Baker v. Carr*; *Wesberry v. Sanders*; *Reynolds v. Sims*; and *Kirkpatrick v. Preisler*.<sup>43</sup> The trial court observes that some of these decisions concern state legislative districting (*Baker* and *Reynolds*), while others concern federal congressional districting (*Wesberry* and *Kirkpatrick*). The trial court also observes that the Maryland General Assembly is charged with knowing what is happening in the U.S. Supreme Court.<sup>44</sup> As a result, the trial court concludes that “[t]he context, therefore, of the 1967 through 1972 amending process . . . was the Supreme Court cases in which state legislative districts, but also Congressional districts were decided.”<sup>45</sup> It is unclear why these four Supreme Court cases

---

329 (2013) (same). See generally ERIC J. SEGALL, ORIGINALISM AS FAITH (2018); Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453 (2013); Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375 (2013); Steven G. Calabresi, *A Critical Introduction to the Originalism Debate*, 31 HARV. J.L. & PUB. POL'Y 875 (2008); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL'Y 599 (2004). Moreover, many originalists believe that to be an originalist requires the interpreter to commit, in advance, to using only originalism as an interpretive technique. See, e.g., Randy E. Barnett, *Scalia's Infidelity: A Critique of "Faint-Hearted" Originalism*, 75 U. CIN. L. REV. 7 (2006) (requiring originalist interpretation of all constitutional interpretations); DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS 10–28 (2002) (describing foundationalist aspect of originalism); Donald G. Gifford, Richard C. Boldt & Christopher J. Robinette, *When Originalism Failed: Lessons from Tort Law*, 51 FLA. ST. U. L. REV. (forthcoming 2024), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4648631](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4648631) [<https://perma.cc/W5CX-H7ZA>] (describing “thick originalism”). Although we discuss and rely on a version of originalism, we obviously do not subscribe to the foundationalist view. Finally, the importation of originalist interpretive theory to state constitutions is beset by both theoretical and practical problems. See Friedman, *Special Laws*, *supra* note 24, at 433–36 (discussing elected judges, ease of state constitutional amendment, and lack of information about intent as confounding application of originalism to state constitutional interpretation). Friedman, *Miles to Go*, *supra* note 24 (manuscript at 13) (same). Nevertheless, originalist technique and historical research can provide important information to a careful interpreter of state constitutions. See BOBBITT, *supra* note 27, at 9–24.

41. *Szeliga v. Lamone*, No. C-02-CV-21-001816, at \*16–17 (Md. Cir. Ct. Anne Arundel Cnty. Mar. 25, 2022).

42. At the time, these decisions were described as following a “one man, one vote” principle. Even then, that term should have been an anachronism. We have corrected to the appropriate modern usage throughout.

43. *Szeliga*, No. C-02-CV-21-001816, at \*16–19 (discussing *Baker v. Carr*, 369 U.S. 186 (1962); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964); and *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969)). This is obviously an incomplete list of Supreme Court cases on the topic.

44. *Id.* at \*17.

45. *Id.* at \*19.

provide “the” context,<sup>46</sup> but even if they do, it fails to explain why the drafters of Article III, Section 4 needed to address the whole context in this one constitutional provision. This is simply not a convincing originalist analysis.

We think that a more convincing and ultimately more accurate originalist interpretation would consider four topics: (1) the historic malapportionment of the Maryland General Assembly as opposed to Maryland’s federal congressional districts; (2) the one-person, one-vote litigation in Maryland; (3) the history of the Maryland constitutional convention of 1967–1968; and (4) the original intention of the framers and the original public meaning of the phrase “legislative district” as it appears in Article III, Section 4. We turn next to those four topics.

### *1. A Long History of State Legislative Malapportionment*

State legislative apportionment has been a difficult constitutional issue for Maryland since its founding.<sup>47</sup> During the colonial period, Maryland transitioned from direct participation of all freemen in the legislature to a system of representative democracy based on county without regard for population.<sup>48</sup> Maryland’s 1776 Constitution created an indirect method for the election of state senators (of whom nine had to be from the western shore and six from the eastern shore)<sup>49</sup> and a direct election of four delegates per

---

46. A fair recitation of the U.S. Supreme Court cases that affected Maryland redistricting in the 1960s would necessarily have to include *Maryland Committee for Fair Representation v. Tawes*, 377 U.S. 656 (1964). That case, which specifically concerned Maryland state legislative redistricting, is discussed in detail below. *See infra* Section II.B.2. It is inconceivable that this case would be left off of any list of the important U.S. Supreme Court cases affecting Maryland legislative districts. But more importantly, it is difficult to understand the idea that any list of four cases could provide the necessary context to understand redistricting issues during this period of American history. Unlike the context of the adoption of other provisions of the Maryland Constitution (about which the historical record is often lost or fragmentary), the historical record regarding the reapportionment of the Maryland General Assembly, and particularly the period that led up to the adoption of the ‘70 and ‘72 amendments, is substantial. *See infra* Section II.B.

47. *See, e.g.*, John H. Michener, *The History of Legislative Apportionment in Maryland*, in CONSTITUTIONAL CONVENTION COMMISSION OF MARYLAND, CONSTITUTIONAL REVISION STUDY DOCUMENTS 131, 131–50 (1968); MICHAEL CARLTON TOLLEY, STATE CONSTITUTIONALISM IN MARYLAND 49–50 (1992); GEORGE A. BELL & JEAN E. SPENCER, THE LEGISLATIVE PROCESS IN MARYLAND 11–28 (2d ed. 1963); *see also* Dan Friedman, *Magnificent Failure Revisited: Modern Maryland Constitutional Law from 1967 to 1998*, 58 MD. L. REV. 528, 553 n.128 (1999) [hereinafter Friedman, *Magnificent Failure Revisited*] (describing history of legislative apportionment in Maryland).

48. Michener, *supra* note 47, at 136; Douglas V. Rigler, *Senate Reapportionment—The Maryland Experience*, 31 GEO. WASH. L. REV. 812, 814–15 (1963).

49. MD. CONST. §§ 14–18 (1776); BELL & SPENCER, *supra* note 47, at 11; 1 CARL N. EVERSTINE, THE GENERAL ASSEMBLY OF MARYLAND: 1634–1776, at 567 (1980) [hereinafter, EVERSTINE, GENERAL ASSEMBLY: 1634–1776]; H.H. WALKER LEWIS, THE MARYLAND CONSTITUTION – 1776 (1976), *as reprinted in Writing It All Down: The Art of Constitution-Making for the State and the Nation, 1776-1833*, MD. STATE ARCHIVES,

county (regardless of population) with minor adjustments for Annapolis and Baltimore.<sup>50</sup>

Differential population growth rates made this system inequitable from the start.<sup>51</sup> The General Assembly, however, repeatedly refused to reapportion itself.<sup>52</sup> In 1837, a constitutional amendment provided for the direct election of one state senator per county (and for Baltimore City) and created a formula for the apportionment of delegate districts based, in part, on population.<sup>53</sup> By 1850, differential population growth had already made the 1837 formula unfair, and the malapportionment of the state legislature was a primary cause of the call for a new constitution.<sup>54</sup> The resulting 1850–1851 Constitution created both an interim and permanent basis for

---

<https://msa.maryland.gov/megafile/msa/speccol/sc2200/sc2221/000004/000000/html/00000005.html> [https://perma.cc/L7LV-T8NH] (last visited Apr. 17, 2024) (section titled “The Form of Government”); ELIHU S. RILEY, *A HISTORY OF THE GENERAL ASSEMBLY OF MARYLAND* 305 (1905). This method of indirect election of state senators apparently became the model for the federal electoral college. *See* THE FEDERALIST NO. 68 (Alexander Hamilton); Rigler, *supra* note 48, at 824.

50. MD. CONST. § 2 (1776) (generally); *id.* § 4 (city of Annapolis); *id.* § 5 (Baltimore Town); Michener, *supra* note 47, at 137; *see also* HERBERT C. SMITH & JOHN T. WILLIS, *MARYLAND POLITICS AND GOVERNANCE: DEMOCRATIC DOMINANCE 137–38* (2012); BELL & SPENCER, *supra* note 47, at 11; LEWIS, *supra* note 49; RILEY, *supra* note 49, at 305; Rigler, *supra* note 48, at 815.

51. CONSTITUTIONAL CONVENTION COMM’N, REPORT OF THE CONSTITUTIONAL CONVENTION COMM’N 28 (1967) (“The scheme of apportioning the members of the House of Delegates [in the 1776 Constitution] gave the small counties legislative power out of all proportion to their population and it resulted in government by the minority.”); Michener, *supra* note 47, at 138; 2 CARL N. EVERSTINE, *THE GENERAL ASSEMBLY OF MARYLAND: 1776–1850*, at 441–48 (1982) [hereinafter EVERSTINE, *GENERAL ASSEMBLY: 1776–1850*]; Rigler, *supra* note 48, at 815–16. Constitutional Amendments in 1802 and 1810 limited and then eliminated property qualification to vote. Acts of 1801, ch. 90, 1801 Md. Laws 88 (ratified 1802); Acts of 1809, ch. 83, 1809 Md. Laws 46 (ratified 1810). While these changes made the electorate more representative, *see e.g.*, Thornton Anderson, *Maryland’s Property Qualifications for Office: A Reinterpretation of the Constitutional Convention of 1776*, 73 MD. HIST. MAG. 327 (1978) [hereinafter Anderson, *Maryland’s Property Qualifications*], and although its effects were not evenly distributed by county, *see generally* Thornton Anderson, *Eighteenth-Century Suffrage: The Case of Maryland*, 76 MD. HIST. MAG. 141, 154 (1981) [hereinafter Anderson, *Eighteenth-Century Suffrage*] (discussing differences by county in suffrage under the Maryland Constitution of 1776), the effects on the apportionment of the General Assembly were indirect and likely negligible.

52. Michener, *supra* note 47, at 138–39.

53. 1836 Md. Laws, ch. 197 § 3 (ratified 1837); CONSTITUTIONAL CONVENTION COMM’N, *supra* note 51, at 40–41; Michener, *supra* note 47, at 138–39; SMITH & WILLIS, *supra* note 50, at 139, 155; BELL & SPENCER, *supra* note 47, at 12; FRIEDMAN, *THE MARYLAND CONSTITUTION*, *supra* note 14, 6–7; ROBERT J. BRUGGER, *MARYLAND: A MIDDLE TEMPERAMENT 1634–1980*, at 228–29 (1988); James Warner Harry, *The Maryland Constitution of 1851*, 20 JOHNS HOPKINS U. STUD. IN HIST. & POL. SCI., Nos. 7–8, at 15 (1902); EVERSTINE, *GENERAL ASSEMBLY: 1776–1850*, *supra* note 51, at 491; RILEY, *supra* note 49, at 347.

54. Michener, *supra* note 47, at 140–41; SMITH & WILLIS, *supra* note 50, at 139, 155; BELL & SPENCER, *supra* note 47, at 12; FRIEDMAN, *THE MARYLAND CONSTITUTION*, *supra* note 14, at 7; BRUGGER, *supra* note 53, at 258; EVERSTINE, *GENERAL ASSEMBLY: 1776–1850*, *supra* note 51, at 491–92; Harry, *supra* note 53, at 16–18, 34–35.

apportionment based on population,<sup>55</sup> but by limiting the number of delegates to eighty, requiring at least two delegates per county, and capping Baltimore City's delegates, the permanent apportionment "had an extremely serious weakness" that "made inevitable serious distortion[s]."<sup>56</sup> The 1864 Constitution again provided an interim and a permanent method of legislative apportionment.<sup>57</sup> Had it been implemented, the permanent apportionment under the 1864 Constitution would have been a significant improvement because Baltimore City was divided into three legislative districts, and there was no cap on the representation that it could receive.<sup>58</sup> But that permanent apportionment was never implemented.<sup>59</sup> Finally, the 1867 Constitution reestablished much of the inequitable maldistribution of the General Assembly.<sup>60</sup> Under that Constitution, the Senate was made up of one senator per county, except Baltimore City, which received three.<sup>61</sup> For the House of Delegates, a formula was established determining the number of delegates per county but which also required at least two delegates for the least populous counties and capped each of three districts in Baltimore City at six delegates.<sup>62</sup> The result was inequitable malapportionment of the General Assembly, which constitutional amendments in 1901 and 1922 improved but

---

55. MD. CONST. art. III, § 2 (1851) (providing election of state senators); *id.* § 3 (providing interim apportionment of House of Delegates); *id.* § 4 (providing permanent apportionment of House of Delegates after 1860 census); *see also* Michener, *supra* note 47, at 140–41; BELL & SPENCER, *supra* note 47, at 13–14; FRIEDMAN, THE MARYLAND CONSTITUTION, *supra* note 14, at 9; 3 CARL N. EVERSTINE, THE GENERAL ASSEMBLY OF MARYLAND: 1850–1920, at 14–15 (1984) [hereinafter EVERSTINE, GENERAL ASSEMBLY: 1850–1920]; RILEY, *supra* note 49, at 357; Harry, *supra* note 54, at 75.

56. Michener, *supra* note 47, at 141; CONSTITUTIONAL CONVENTION COMM'N, *supra* note 51, at 44 ("[T]he legislature, although reapportioned [under the 1851 Constitution], remained under the control of a conservative minority."); BRUGGER, *supra* note 53, at 258; EVERSTINE, GENERAL ASSEMBLY: 1776–1850, *supra* note 51, at 590.

57. MD. CONST. art. III, § 3 (senate) (1864); *id.* § 4 (interim and permanent apportionment of House of Delegates); EVERSTINE, GENERAL ASSEMBLY: 1850–1920, *supra* note 55, at 255; BELL & SPENCER, *supra* note 47, at 14–15; RILEY, *supra* note 49, at 377.

58. Michener, *supra* note 7, at 141–43; CONSTITUTIONAL CONVENTION COMM'N, *supra* note 51, at 56–57; BELL & SPENCER, *supra* note 47, at 15; William Starr Myers, *The Maryland Constitution of 1864*, 19 JOHNS HOPKINS U. STUD. HIST. & POL. SCI., nos. 8–9, at 8 (1901); RILEY, *supra* note 49, at 377.

59. The reasons why the 1864 Maryland Constitution was so short-lived are detailed in Myers, *supra* note 8. *See also* FRIEDMAN, THE MARYLAND CONSTITUTION, *supra* note 14, at 13.

60. Michener, *supra* note 47, at 143–44; SMITH & WILLIS, *supra* note 50, at 155; BELL & SPENCER, *supra* note 47, at 15; FRIEDMAN, THE MARYLAND CONSTITUTION, *supra* note 14, at 15; EVERSTINE, GENERAL ASSEMBLY: 1850–1920, *supra* note 55, at 270–71; William Starr Myers, *The Self-Reconstruction of Maryland, 1864-1867*, 27 JOHNS HOPKINS U. STUD. HIST. & POL. SCI., nos. 1–2, at 121 (1909); Rigler, *supra* note 48, at 816.

61. MD. CONST. art. III, § 2 (1867); RILEY, *supra* note 49, at 384.

62. MD. CONST. art. III, §§ 3–4 (1867); CONSTITUTIONAL CONVENTION COMM'N, *supra* note 51, at 62; BELL & SPENCER, *supra* note 47, at 15–17; RILEY, *supra* note 49, at 384.

did not alleviate.<sup>63</sup> And although the inequitable malapportionment of the state legislature continued to be a problem, the General Assembly was unwilling to fix it.<sup>64</sup>

In conclusion, for over two hundred years, the apportionment of the Maryland General Assembly had been a problem that pitted smaller, rural, more politically conservative counties that wanted to maintain their advantage in the General Assembly over larger, more progressive, suburban and urban jurisdictions.<sup>65</sup> And it was a problem that the General Assembly was unwilling (or unable) to fix.<sup>66</sup> Thus, by the time the *Szeliga* court's history begins in the 1960s,<sup>67</sup> there had already been a long history of discontent with the malapportionment of the Maryland General Assembly.

None of this history of state legislative malapportionment is intended to suggest that there was not also a history of malapportionment of Maryland's congressional districts. There was.<sup>68</sup> Our point is rather that these were different problems, arising at different times, and likely requiring different solutions, thereby making it less likely that the trial court's *Szeliga* opinion is correct that Article III, Section 4 was intended to resolve both problems simultaneously.

---

63. Michener, *supra* note 47, at 144–45; BELL & SPENCER, *supra* note 47, at 15–16; TOLLEY, *supra* note 47, at 49–50 (addressing legislative malapportionment from 1950s).

64. Michener, *supra* note 47, at 145; TOLLEY, *supra* note 47, at 50; BELL & SPENCER, *supra* note 47, at 26–27; Edward C. Mester, *The Constitutional Position of the Legislature of Maryland 110–12* (1949) (M.A. thesis, University of Maryland) (on file with authors).

65. Rigler, *supra* note 48, at 815–16, 818.

66. In addition to the materials cited in this section, the reader may also consult the following sources, each of which describes the long history of malapportionment of the Maryland General Assembly. *See* BRUGGER, *supra* note 53, at 420. *See generally* George K. Horvath, *The Anatomy of Maryland State Legislative Apportionment* (1969) (M.A. thesis, Seton Hall University) (on file with author); Samuel B. Hopkins, *The Apportionment of the Maryland House of Delegates: An Historical View* (1965) (student paper, Harvard Law School) (on file with author); ROYCE HANSON, EAGLETON INST., *FAIR REPRESENTATION COMES TO MARYLAND* (1964) (discussing efforts to reapportion Maryland General Assembly 1960–1964); COMM'N TO STUDY REAPPORTIONMENT OF THE GENERAL ASSEMBLY, *REPORT TO THE GOVERNOR OF MARYLAND* (Jan. 31, 1964) [hereinafter BURDETTE COMMISSION] (proposing constitutional amendment to reapportion Maryland General Assembly); COMM'N ON THE MORE EQUITABLE REPRESENTATION IN THE GEN. ASSEMBLY OF MD., *FINAL REPORT* (1960) [hereinafter WALSH COMMISSION] (recognizing inequalities and proposing reapportionment of the Maryland General Assembly). Not incidentally, none of these reports identify malapportionment of Maryland's federal congressional districts as a problem, and we have discovered no other reports that do.

67. *Szeliga v. Lamone*, No. C-02-CV-21-001816, at \*16–19 (Md. Cir. Ct. Anne Arundel Cnty. Mar. 25, 2022).

68. *Md. Citizens Comm. for Fair Cong. Redistricting, Inc. v. Tawes*, 253 F. Supp. 731, 733–34 (D. Md. 1966) (three-judge panel) (redistricting Maryland's congressional districts to comply with one-person, one-vote mandate); *Md. Citizens Comm. for Fair Cong. Redistricting, Inc. v. Tawes*, 228 F. Supp. 956, 957–58 (D. Md. 1964) (three-judge panel) (*per curiam*) (permitting 1964 congressional elections to be run under malapportioned districting plan); *see also* Rigler, *supra* note 48, at 821 (describing federal congressional malapportionment in Maryland and attributing its source to state legislative malapportionment).

## 2. *One-Person, One-Vote Litigation in Maryland*

In 1960, the Maryland Committee for Fair Representation<sup>69</sup> and several of its members brought suit asserting that the state legislative apportionment provisions (Article III, Sections 2 and 5) of the then-existing Maryland state constitution violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.<sup>70</sup> Critically, for our purposes, none of the allegations in the lawsuit concerned federal congressional districts, but instead focused exclusively on the malapportionment of the Maryland General Assembly.<sup>71</sup> The state trial court dismissed the complaint as non-justiciable.<sup>72</sup> The Maryland Court of Appeals, largely on the strength of the U.S. Supreme Court's intervening decision in *Baker v. Carr*, reversed and remanded the matter for a trial on the merits.<sup>73</sup> On remand, the trial court found that the apportionment of the State Senate was constitutional and dismissed that claim, but found that the apportionment of the House of Delegates was unconstitutional.<sup>74</sup> The next week, the General Assembly met in special session and adopted "stop-gap" legislation to temporarily reapportion the House of Delegates.<sup>75</sup> Meanwhile, the Maryland Committee for Fair Representation appealed from the trial court's dismissal of its challenge to the apportionment of the State Senate.<sup>76</sup> The Maryland Court of Appeals affirmed, because, in its view, it was constitutional to have the State Senate apportioned by county rather than by population.<sup>77</sup>

---

69. For a history of the Maryland Committee for Fair Representation, see HANSON, *supra* note 66, at 2–6.

70. Md. Comm. for Fair Representation v. Tawes, 228 Md. 412, 423, 180 A.2d 656, 661 (1962); Hanson, *supra* note 66, at 6; Michener, *supra* note 47, at 146; TOLLEY, *supra* note 47, at 50.

71. Md. Comm., 228 Md. at 421–22, 180 A.2d at 660–61.

72. Rigler, *supra* note 48, at 813.

73. Md. Comm., 228 Md. at 441, 180 A.2d 671; Hanson, *supra* note 66, at 20; Michener, *supra* note 47, at 146; TOLLEY, *supra* note 47 at 50; Rigler, *supra* note 48, at 813.

74. Md. Comm., for Fair Representation v. Tawes, 229 Md. 406, 409, 184 A.2d 715, 716 (1962), *rev'd*, 377 U.S. 656 (1964); see Michener, *supra* note 47, at 146; TOLLEY, *supra* note 47, at 50; Rigler, *supra* note 48, at 813.

75. HANSON, *supra* note 66, at 20–30 (describing call for and conduct of special session and resulting "stop-gap" legislation); Michener, *supra* note 47, at 146; TOLLEY, *supra* note 47, at 50–51; Rigler, *supra* note 48, at 813.

76. Md. Comm., 229 Md. at 409, 184 A.2d at 716; see Michener, *supra* note 47, at 146–47; TOLLEY, *supra* note 47, at 50–51; Rigler, *supra* note 48, at 813–14.

77. Md. Comm., 229 Md. at 416, 184 A.2d at 720–21; see Rigler, *supra* note 48, at 813–14. Scholars have described the Court of Appeals' reasoning as based upon the "federal analogy" because, the argument went, counties formed the basis of representation in the Maryland State Senate in the same way that states formed the basis of representation in the United States Senate. DANIEL HAYS LOWENSTEIN, RICHARD L. HASEN, DANIEL P. TOKAJI & NICHOLAS O. STEPHANOPOULOS, ELECTION LAW: CASES AND MATERIALS 99 (6th ed. 2017) (discussing the "federal analogy"); Michener, *supra* note 47, at 147; Rigler, *supra* note 48 at 822–23. Ultimately, that federal analogy was rejected. Reynolds v. Sims, 377 U.S. 533, 562 (1964). In 2012, one of the

The U.S. Supreme Court reversed, holding that the apportionment of both the Maryland State Senate and the Maryland House of Delegates violated the Equal Protection Clause of the Federal Constitution.<sup>78</sup> The U.S. Supreme Court's mandate is instructive:

[Because] primary responsibility for legislative apportionment rests with the legislature itself and [because] adequate time exists in which the Maryland General Assembly can act, the Maryland courts need feel obliged to take further affirmative action only if the legislature fails to enact a constitutionally valid *state legislative apportionment scheme* in a timely fashion after being afforded a further opportunity by the courts to do so. However, under no circumstances should the 1966 *election of members of the Maryland Legislature* be permitted to be conducted pursuant to the existing or any other unconstitutional plan. We therefore reverse the judgment of the Maryland Court of Appeals, and remand the case to that Court for further proceedings not inconsistent with the views stated here and in our opinion in *Reynolds v. Sims*. It is so ordered.<sup>79</sup>

The U.S. Supreme Court's order thus found the apportionment of both chambers unconstitutional and remanded the matter so that the state legislature could adopt a constitutional plan of state legislative apportionment. And, of course, the Supreme Court's order had nothing to do with the manner of drawing federal congressional districts. Action then shifted back to the General Assembly, which at a 1966 Special Session adopted another state legislative apportionment scheme.<sup>80</sup> That scheme was approved by the Maryland Court of Appeals<sup>81</sup> and review was denied by the U.S. Supreme Court.<sup>82</sup> Although the 1966 elections for the Maryland General Assembly were allowed to take place under that apportionment scheme, it was obvious that it could not last long, as that scheme permitted (in fact, required) population inequalities of a scale that the Supreme Court would

---

challenges to the enacted plan of state legislative redistricting was based on this same "federal analogy." The Maryland Court of Appeals rejected the theory again. *In re 2012 Legis. Districting*, 436 Md. 121, 138–44, 80 A.3d 1073, 1082–86 (2013) (discussing petition of Christopher E. Bouchat).

78. Md. Comm. for Fair Representation v. Tawes, 377 U.S. 656 (1964); see Michener, *supra* note 47, at 147–48; TOLLEY, *supra* note 47, at 51.

79. *Tawes*, 377 U.S. at 676 (emphasis added); see Michener, *supra* note 47, at 147–48; TOLLEY, *supra* note 47, at 51.

80. Michener, *supra* note 47, at 148–49. In fact, the General Assembly adopted, and the Governor signed, two redistricting plans: Senate Bill 5 and Senate Bill 8 of the Special Session 1966. *Id.* at 148–49. The circuit court found Senate Bill 8 unconstitutional, but found the back-up plan, Senate Bill 5, constitutional. *Id.* at 148–49; Hughes v. Md. Comm. for Fair Representation, 241 Md. 471, 217 A.2d 273 (1966).

81. *Hughes*, 241 Md. at 487, 217 A.2d at 282.

82. *Hughes v. Md. Comm.*, 384 U.S. 950, 950 (1966).



invalidate during its next term.<sup>83</sup> Worse still, because of differential growth rates, the malapportionment would only increase.

### 3. *The Maryland Constitutional Convention of 1967–1968*

After the U.S. Supreme Court's 1964 decision in *Maryland Committee*, Maryland still had to redistrict the state legislature in a way that would comport with the federal constitution. Given the legislature's long history of refusing to amend the constitution to accomplish redistricting, Governor J. Millard Tawes proposed to call a constitutional convention.<sup>84</sup> The legislature demurred.<sup>85</sup> To build support for a convention, Tawes next empaneled a constitutional convention study commission, chaired by H. Vernon Eney and known as the "Eney Commission."<sup>86</sup> The Eney Commission determined that a new constitution was necessary and prepared a draft constitution for consideration by a convention.<sup>87</sup> Relevant to our purposes, the Eney Commission proposed that the General Assembly would be responsible for enacting "plans of congressional districting *and* legislative districting and apportionment."<sup>88</sup> The Eney Commission draft, however, only provided standards that would be applicable to state redistricting;<sup>89</sup> federal congressional redistricting would be subject only to federal standards.<sup>90</sup>

---

83. Michener, *supra* note 47, at 149–50 (discussing *Kilgarlin v. Hill*, 386 U.S. 120 (1967)).

84. See CONST. CONVENTION COMM'N, *supra* note 51, at vii; see also JOHN P. WHEELER, JR. & MELISSA KINSEY, *MAGNIFICENT FAILURE: THE MARYLAND CONSTITUTIONAL CONVENTION OF 1967-1968*, at 16 (1970) (discussing causes of call for constitutional convention); Friedman, *Magnificent Failure Revisited*, *supra* note 48, at 530 (same).

85. CONST. CONVENTION COMM'N, *supra* note 84, at 1; Friedman, *Magnificent Failure Revisited*, *supra* note 48, at 531.

86. WHEELER & KINSEY, *supra* note 84, at 16, 39; Friedman, *Magnificent Failure Revisited*, *supra* note 48, at 531. Eney was subsequently elected to serve as a delegate to the constitutional convention and elected by the delegates to serve as the president of the convention. CONST. CONVENTION COMM'N, *JOURNAL OF THE CONSTITUTIONAL CONVENTION COMM'N* 17 (1968).

87. CONST. CONVENTION COMM'N, *supra* note 51, at 3 (reporting that the Eney Commission "adopted a resolution declaring that the present Constitution was in urgent need of complete revision"); *id.* at 4, 6–12 (1968) (discussing the Eney Commission's decision to prepare a draft constitution and the subsequent preparation process); see also WHEELER & KINSEY, *supra* note 84, at 20–23; Friedman, *Magnificent Failure Revisited*, *supra* note 48, at 531–32.

88. CONST. CONVENTION COMM'N, *supra* note 51, at 74, 128 (1968) (proposed Section 3.03) (emphasis added).

89. Pursuant to Section 3.02 of the Eney Commission's draft constitution, the standards for state legislative redistricting would require the districts to "consist of compact and adjoining territory, and the . . . population of such districts shall be as nearly equal as practicable." *Id.* at 74, 127.

90. CONST. CONVENTION COMM'N, *supra* note 51, at 74. In explaining the decision not to require federal congressional districts to satisfy the state constitutional standards, Delegate Francis X. Gallagher, chair of the legislative branch committee of the constitutional convention, explained that "Congress has from time to time decided for itself what the test will be for proper congressional redistricting" and the study commission "felt under all the circumstances that it was best not to get

When the constitutional convention finally convened,<sup>91</sup> it rejected the Eney Commission recommendations regarding both the mechanisms and the standards for redistricting. The constitutional convention instead proposed creation of an independent, nonpartisan redistricting commission to propose redistricting plans but retained final decision-making authority in the Maryland General Assembly.<sup>92</sup> Critically, for our purposes, the convention's draft constitution proposed that the same redistricting standards—population equality, “adjoining territory,” “compact in form” and with “[d]ue regard . . . to natural boundaries and the boundaries of political subdivisions”—would apply to both federal congressional *and* state legislative redistricting.<sup>93</sup> When the draft constitution was proposed to the voters,

---

into” the issue in the draft constitution. 12 CONSTITUTIONAL CONVENTION OF 1967: OFFICIAL TRANSCRIPT OF PROCEEDINGS 6279–80.

91. The story of convening the constitutional convention is interesting and complicated but beyond our scope. For further reading on the topic, see WHEELER & KINSEY, *supra* note 84 at 25–33; Friedman, *Magnificent Failure Revisited*, *supra* note 48, at 531–33.

92. The draft constitution also contained two important restrictions on state legislative redistricting: (1) that the membership in the House of Delegates not exceed 120 members and the Senate not exceed forty members; and (2) that each delegate represent a single district. WHEELER & KINSEY, *supra* note 84, at 71–73, 76–81; Friedman, *Magnificent Failure Revisited*, *supra* note 48, at 554–55; Marianne Ellis Alexander, *The Issues and Politics of the Maryland Constitutional Convention, 1967-1968*, at 66–68 (1972) (Ph.D. dissertation, Univ. of Maryland) (on file with author).

93. MD. CONST. § 3.07 (unratified draft 1967); *see also* WHEELER & KINSEY, *supra* note 84, at 143–49; George S. Wills, II, *The Reorganization of the Maryland General Assembly, 1966-1968: A Study of the Politics of Reform* 230 (1972) (Ph.D. dissertation, Johns Hopkins Univ.) (on file with author). Three additional points are of interest. First, though both provisions required a degree of population equality, the state legislative districts were required to be “substantially equal,” MD. CONST. § 3.04 (unratified draft 1967), while the federal congressional districts were prohibited from “exceed[ing] ten per cent of the mean population of all congressional districts.” MD. CONST. § 3.07 (unratified draft 1967). This is in direct contrast to current law, which requires a greater degree of precision in determining population equality for congressional districts than for state legislative districts. *See infra* note 101. Second, it is amusing to note that the title of Section 3.04 as drafted by the constitutional convention was “legislative districts,” while the title of Section 3.07 was “congressional districts.” Third, while the original public meaning of the 1967 constitution is of no real value to an originalist because the constitution was defeated and never went into effect, we have determined that the voters received three types of information about the redistricting provisions of the proposed constitution in contemporaneous press accounts. Some newspaper accounts accurately described the proposed constitution as containing two separate provisions, one dealing with state legislative redistricting and the other dealing with federal congressional redistricting. *See, e.g., Proposed Constitution for Maryland Is Summarized*, WASH. POST, Jan. 10, 1968, at B1 (separately describing state legislative and congressional redistricting proposals under proposed Constitution); *Article-by-Article Summary of Proposed Md. Constitution*, WASH. POST, May 9, 1968, at H1 (same); Max Johnson, *New Constitution Raises Questions*, BALT. AFRO-AMERICAN, May 30, 1968, at 4 (describing “two provisions” that cause concern—impliedly, describing those creating processes for state legislative and federal congressional redistricting); Richard Homan, *Method to Redistrict Maryland Approved on Convention Floor*, WASH. POST, Dec. 21, 1967, at B1 (describing both state legislative and federal congressional redistricting provisions in detail). Some of the contemporaneous press accounts discussed only the state legislative redistricting proposals, perhaps

however, it was overwhelmingly rejected and never went into effect.<sup>94</sup> The critical point here is that the arrangement that the *Szeliga* court found was in the Maryland Constitution was actually proposed by the 1967 constitutional convention and rejected by the voters.

In the wake of the defeat of the proposed constitution, however, Maryland still needed to reapportion the Maryland General Assembly to comply with federal constitutional mandates.<sup>95</sup> A 1970 constitutional amendment (“the ‘70 amendments”) enshrined the one-person one-vote concept in the state constitution<sup>96</sup> and in 1972, a more substantial constitutional amendment created the current system (“the ‘72 amendments”).<sup>97</sup> In the next section, we discuss these two sets of constitutional amendments.<sup>98</sup>

As we understand this history, it reveals that during the relevant period, say from 1964 to 1972, the top priority of political leadership had to be devising a plan of state legislative redistricting that would satisfy federal court scrutiny with regard to population equality. As Governor Tawes said in calling a special legislative session in 1965 to consider state legislative redistricting: “Better that we act, [because] it would be ‘far more distasteful’

---

in the belief that those were the more interesting proposals. *See, e.g.*, Denis O’Brien, *Frederick Lions Hear Talk Favoring Proposed New Maryland Constitution*, NEWS (Frederick, Md.), May 13, 1968, at A11 (listing advantages of proposed new constitution, including proposals regarding state legislative redistricting but not congressional redistricting); *Questions and Answers on New Constitution*, SALISBURY DAILY TIMES, May 12, 1968, at A5 (same); C. William Gilchrist, *The New Constitution: The Legislative Article of the Proposed Constitution*, NEWS (Frederick, Md.), May 6, 1968 (describing legislative article of proposed constitution and listing state legislative redistricting but not congressional redistricting); C.I. Winslow, *The New Constitution: More Questions and Answers*, BALT. SUN, Apr. 22, 1968, at A14; E. Dale Adkins, Jr., *The New Constitution: Decision-Making in the Assembly*, BALT. SUN, Apr. 2, 1968, at A10; Gene P. Ward, *Concon Delegates Approve New Charter; Sweeping Changes Due*, BALT. AFRO-AMERICAN, Jan. 9, 1968, at 24, 5 (describing proposed state legislative reapportionment but not congressional); Edward G. Pickett, *Wide Change Is Foreseen: Constitution Affects Courts, Legislature, Executive*, BALT. SUN, Jan. 7, 1968, at 1, 6. A few press accounts were unclear about whether they were describing just one or both proposed new redistricting provisions. *See, e.g.*, Francis X. Gallagher, *Proposed Constitution Defended: ‘It Is Infinitely Superior’ to the Present Charter*, BALT. SUN, May 12, 1968, at PE1 (describing proposed reapportionment provisions as “last chance for cooperative federalism”); *New Charter Would Call for Fewer Legislators*, SALISBURY DAILY TIMES, May 6, 1968, at 12 (headline describes state legislature, text describes apportionment of “legislative districts”).

94. WHEELER & KINSEY, *supra* note 84, at 2–7, 191–212 (discussing causes of failure of vote on proposed constitution); Friedman, *Magnificent Failure Revisited*, *supra* note 48, at 534–40 (same); SMITH & WILLIS, *supra* note 50, at 150 (same).

95. Friedman, *Magnificent Failure Revisited*, *supra* note 48, at 555.

96. Acts of 1969, ch. 785, 1969 Laws Md. 1684 (ratified 1970). The trial court’s *Szeliga* opinion refers to these as the ‘70 amendments.

97. Acts of 1972 ch. 363, 1972 Laws Md. 1213 (ratified 1972). The trial court’s *Szeliga* opinion refers to these as the ‘72 amendments.

98. *See infra* Section II.B.4.

to have the federal courts act for us.”<sup>99</sup> The second priority was establishing a system for state legislative redistricting for the future. The entire history of this issue made clear that the General Assembly was incapable of reapportioning itself, so there needed to be a new process for state redistricting going forward. Thus, the ‘72 amendments gave the Governor the power to institute the redistricting process and required the General Assembly to take an affirmative act to avoid the Governor’s plan.<sup>100</sup> If federal congressional redistricting was on the minds of the political leadership, it was—at best—a distant third priority. And even if federal congressional redistricting was on the minds of the political leadership, we think it was in a limited way because the federal constitution and federal courts were already taking care of fixing problems of population inequality.<sup>101</sup> Thus, on the historical evidence that we have reviewed here, we think that it was much more likely that the drafters of the ‘70, and especially the ‘72, amendments included only what was necessary (creating a constitutional framework for state legislative redistricting) and did not also do something unnecessary (creating a framework for federal congressional redistricting).

99. BRUGGER, *supra* note 53, at 608.

100. We think it is instructive that the framers of the ‘72 amendments did not recommend the creation of a nonpartisan redistricting commission as the 1967–1968 constitutional convention had proposed, but preferred the simpler system enacted for state legislative redistricting, with the Governor proposing a plan which becomes effective unless amended. We think this choice is consistent with the stated philosophies of both Governor Spiro Agnew and then Governor Marvin Mandel, in the wake of the defeat of the proposed 1967 Constitution, to adopt simple constitutional reforms in a piecemeal fashion. *See, e.g.*, Richard Homan, *Maryland Leaders Take Steps Toward Government Shifts*, WASH. POST, Jul. 11, 1968, at B1 (describing Agnew’s efforts as “clear attempts to salvage some of the less controversial reforms proposed by the Constitutional [C]onvention”); Charles Whiteford, *Mandel Aims to Improve Constitution*, BALT. SUN, Jan. 19, 1969, at 26 (describing process for selecting “some of the reforms . . . so they may be resubmitted as individual amendments”). *See generally* Friedman, *Magnificent Failure Revisited*, *supra* note 48, at 541–42 (discussing decisions to adopt in a piecemeal fashion many of the proposals of the 1967–1968 constitutional convention and discussing the relative complexity of getting “structural” as opposed to “balance of power” changes adopted).

101. Contrary to the *Szeliga* opinion’s mixing of the federal cases, *Szeliga v. Lamone*, No. C-02-CV-21-001816, at \*18–19 (Md. Cir. Ct. Anne Arundel Cnty. Mar. 25, 2022), the U.S. Supreme Court has always kept its state and federal redistricting jurisprudence rigorously separate. *See* Ashira Pelman Ostrow, *The Next Reapportionment Revolution*, 93 IND. L.J. 1033, 1042–43 (2018); LOWENSTEIN ET AL., *supra* note 77, at 102–03. Federal congressional redistricting is governed by Article I, Section 2 of the U.S. Constitution, and requires absolute population equality. *See, e.g.*, *Karcher v. Daggett*, 462 U.S. 725 (1983) (rejecting New Jersey congressional districts with less than one percent population deviation); *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969); *Wesberry v. Sanders*, 376 U.S. 1 (1964). By contrast, state legislative redistricting is governed by the Equal Protection Clause of the Fourteenth Amendment, and the U.S. Supreme Court generally permits up to ten percent population variation. *See, e.g.*, *Mahan v. Howell*, 410 U.S. 315, 319, 332–33 (1973); *White v. Regester*, 412 U.S. 755, 763–64 (1973); *Connor v. Finch*, 431 U.S. 407, 417–18 (1977); *see also* *Marylanders for Fair Representation, Inc. v. Schaefer*, 849 F. Supp. 1022, 1030–37 (D. Md. 1994) (three-judge panel) (discussing ten percent threshold in context of Maryland’s 1992 congressional redistricting plan).

4. *The Framers' Intent and the Original Public Meaning of "Legislative District"*

As noted above, originalism generally focuses either on the original intent of the constitutional framers or on the original public meaning of the provision. Here we have significant evidence as to each. All of the evidence that we have points to the same conclusion: that the term "legislative districts" in Article III, Section 4 refers to state legislative districts only, not federal congressional districts.<sup>102</sup>

i. *The Original Meaning of the Phrase "Legislative Districts"*

A careful constitutional interpreter might look to the history of a term or phrase used in the Constitution to learn about its meaning.<sup>103</sup> Here, the term "legislative district" has had a very specific meaning in the Maryland Constitution since 1867.<sup>104</sup> In the 1867 Constitution, senators and delegates were mostly elected by county.<sup>105</sup> To address continuing population disparities among counties (and, as a result, the malapportionment of the Maryland General Assembly), Baltimore City was divided into three "Legislative Districts" each electing its own senator and delegates.<sup>106</sup> Thus, from 1867 to 1970, the term "legislative district" had a specific meaning in the Maryland Constitution. That is, the term "legislative district" meant a

---

102. The originalist interpreter isn't always so fortunate to have so much available evidence. *See* Friedman, *Ex Post Facto*, *supra* note 24, at 74 n.80 (discussing evidentiary difficulties in ascertaining framer's intent and original public meaning of Article 17 of the Maryland Declaration of Rights); Friedman, *Article 19*, *supra* note 27, at 963–68 (discussing difficulties in ascertaining original public meaning of Article 19 of the Maryland Declaration of Rights); Friedman, *Special Laws*, *supra* note 24, at 436–439, 42 (noting lack of evidence of ratifiers' intent of MD. CONST. art. III, § 33 and limitations on evidence of drafters' intent with respect to MD. CONST. art. III, § 33). *But see* Friedman, *Avoiding Unthinkable Outcomes*, *supra* note 28, at 43 n.65 (discussing the problem of gaps in the historical record but concluding that absence of historical information regarding incorporation of special laws prohibition in the Home Rule Amendment was not a gap but evidence that no such incorporation was intended or occurred).

103. This point doesn't fit comfortably in either the textualist rubric or the originalist rubric but lies somewhere right between them. Irrespective of the label, however, we think that this is important information for a constitutional interpreter. That, in turn, suggests to us that purity of interpretive tools shouldn't be the consideration, rather usefulness of the tools. *See supra* note 27. *But see, e.g.*, Katie R. Eyer, *Disentangling Textualism and Originalism*, 13 CONLAWNOW 115 (2022) (suggesting more rigorous separation of textualism and originalism).

104. In fact, the proposed system of legislative districts had its genesis in the never-implemented permanent system of apportionment under the Maryland Constitution of 1864. MD. CONST. art. III, § 3 (1864) (senate); *id.* § 4 (interim and permanent apportionment of House of Delegates); *see supra* notes 57–58 and accompanying text. Because this provision of the 1864 Constitution was never implemented, we think it is better to start the clock at 1867.

105. MD. CONST. art. III, §§ 2–4, 6 (1867).

106. *Id.* The number of legislative districts was subsequently increased, *see* Acts of 1900, ch. 469, 1900 Laws Md. 750 (increasing number of legislative districts), but the meaning of the term did not change. *See In re* 2022 Legis. Districting of the State, 481 Md. 507, 520 n.1, 282 A.3d 147, 154 n.1 (2022).

sub-jurisdictional district for electing members of the state legislature. And, not to belabor the point, but the term “legislative districts” at least from 1867 to 1970 did not mean, could not have meant, and was never interpreted to include within it, federal congressional districts.

In 1970, the General Assembly proposed, and the voters adopted a constitutional amendment reapportioning the General Assembly. The ‘70 amendments created different districts for the Senate and the House of Delegates and described them both as “legislative districts”:

The State shall be divided by law into districts for the election of members of the Senate and into districts for the election of the members of the House of Delegates. The number of Senators and Delegates to be elected from each of the legislative districts shall be prescribed by law, but not more than two Senators shall be elected from any senatorial district.

Each legislative district shall consist of adjoining territory and shall be compact in form. The ratio of the number of Senators shall be substantially the same in each legislative district; the ratio of the number of Delegates to population shall be substantially the same in each legislative district. Nothing herein shall be construed to require the election of only one Delegate from each legislative district.<sup>107</sup>

This system, which lasted for only two years, was described as “chaotic” because the delegate districts and senate districts did not necessarily overlap.<sup>108</sup> More importantly for our present purposes, it was clear that the term “legislative district” meant only state legislative districts, both for electing senators and delegates. The ‘72 amendments cured the overlapping districts problem by making it so that each legislative district contains one senate district and three delegate districts (which could be elected at large or from subdistricts).<sup>109</sup> Sensibly, the ‘72 amendments called these districts, from which both senators and delegates are elected, “legislative districts.”<sup>110</sup> Regrettably however, in light of *Szeliga*, the definition of “legislative district” was placed in Article III, Section 3, while the standards for drawing those

---

107. Acts of 1969, ch. 785, 1969 Laws Md. 1684, 1685 (ratified 1970) (codified as MD. CONST. art. III, §§ 3, 4 (1970)).

108. Douglas Watson, *Maryland Voters to Decide on Constitutional Changes*, WASH. POST, Oct. 23, 1972, at B1 (“Supporters [of the ‘72 amendments] describe Maryland’s present legislative districts as ‘chaotic,’ with senators and delegates often chosen from separate, overlapping districts and voters frequently confused about who represents them.”); see also *Reapportionment Problems in Annapolis*, BALT. SUN, Feb. 29, 1972, at A10 (“Senate and Delegate district boundaries do not coincide in many political subdivisions. An East Baltimorean who votes in Delegate district 1A could also cast a ballot in Senate district 2B.”); *Second Try*, BALT. SUN, Feb. 13, 1971, at A12 (describing ratio between Senate and House of Delegate districts under ‘70 amendments).

109. Acts of 1972, ch. 363, 1972 Laws Md. 1213, 1214–15 (codified as MD. CONST. art. III, §§ 3–4).

110. *Id.*

legislative districts were placed in Article III, Section 4. As noted above,<sup>111</sup> we don't find this separate placement to be particularly meaningful, especially in light of the historic meaning of the term.

*ii. The Original Meaning of the Framers and Ratifiers of the '70 and '72 Amendments*

In Maryland, constitutional amendments are introduced in the General Assembly by bill<sup>112</sup> and must be approved by a vote of three-fifths of the members elected in each chamber of the legislature.<sup>113</sup> The Governor does not approve or veto constitutional amendments.<sup>114</sup> Instead, the Governor's role is only to ensure the proposed constitutional amendments to be published in the newspapers in the weeks before the general election.<sup>115</sup> The Secretary of State drafts ballot language that will appear on the voter's ballots

---

111. *See supra* note 33.

112. The Maryland General Assembly keeps a bill file that contains the documents that make up the legislative history to see what the legislature discussed, considered, and intended in drafting a bill or constitutional amendment. *See generally* Jack Schwartz & Amanda Stakem Conn, *The Court of Appeals at the Cocktail Party: The Use and Misuse of Legislative History*, 54 MD. L. REV. 432 (1995) (discussing documents found in legislative bill files in Maryland). Unfortunately, however, the General Assembly only began keeping these sorts of records in the late 1970s and the constitutional amendments that we are interested in predate that innovation. Conversation with Annette K. Haldeman, Library Director, Libr. and Info. Servs., Off. of Pol'y Analysis, Maryland Dep't of Legis. Servs. (May 28, 2023).

113. MD. CONST. art. XIV, § 1; FRIEDMAN, THE MARYLAND CONSTITUTION, *supra* note 14, at 365–68.

114. *Warfield v. Vandiver*, 101 Md. 78, 60 A. 538 (1905); FRIEDMAN, THE MARYLAND CONSTITUTION, *supra* note 14, at 368.

115. MD. CONST. art. XIV, § 1; FRIEDMAN, THE MARYLAND CONSTITUTION, *supra* note 14, at 368.

explaining the voter's choices.<sup>116</sup> And if the voters approve the amendment, it becomes part of the Constitution.<sup>117</sup>

The '70 amendments were about creating a method of apportioning the General Assembly in a way that would withstand federal constitutional scrutiny. Thus, the bill's title during the 1969 legislative session stated that it was:

An act to propose amendments to Article III of the Constitution of Maryland, title "Legislative Department" . . . establishing the membership of the General Assembly; providing for the creation of legislative districts; providing for the election of members to the General Assembly, and relating generally to the General Assembly of Maryland; and providing for the submission of this amendment to the qualified voters of the State of Maryland for their adoption or rejection.<sup>118</sup>

Even in the absence of a bill file, we think that the bill's title is very clear about the General Assembly's intent in framing the '70 amendments.<sup>119</sup> In context, we do not think it is even plausible that any constitutional framer

---

116. This process is currently codified at Title 7 of the Election Law article of the Maryland Code. *See* MD. CODE, ELEC. LAW § 7-101(1)(ii) (applicable to constitutional amendments); *id.* § 7-102(a)(3) (constitutional amendment qualifies for the ballot upon passage by the General Assembly); *id.* § 7-103(c)(1) (Secretary of State prepares ballot language); *id.* § 7-103(b) (ballot language must include: (1) a question number; (2) designation of the source, i.e. that it is a constitutional amendment; (3) a brief descriptive title; (4) a condensed statement of purpose; and (5) the voting choices); *id.* § 7-105 (requiring pre-election publication of constitutional amendments and other questions, including a non-technical summary, "prepared in clear and concise language, devoid of technical and legal terms to the extent possible" by the Department of Legislative Services and approved by the Attorney General, summarizing the proposed constitutional amendment). The whole process is subject to judicial review pursuant to Title 12, subtitle 2 of the Election Law article. *Id.* § 12-201 *et seq.*; *Stop Slots MD 2008 v. State Bd. of Elections*, 424 Md. 163, 189–212, 34 A.3d 1164, 1179–1187 (2012). Although not identically phrased or organized, the process and obligations were similar in the early 1970s. MD. CODE, art. 33, §§ 16-6, 23-1, 23-2, 23-6, 23-9, 23-10 (1972); *see also* *Morris v. Governor*, 263 Md. 20, 24–27, 281 A.2d 216, 218–19 (1971) (discussing MD. CODE, art. 33, § 16-6).

117. MD. CONST. art. XIV, § 1; FRIEDMAN, *THE MARYLAND CONSTITUTION*, *supra* note 14, at 365–68.

118. Acts of 1969, ch. 785, 1969 Laws Md. 1684.

119. The Maryland Court of Appeals has held that the titles of bills proposing constitutional amendments need not comply with the constitutional rules regarding titles for ordinary legislation. *Hillman v. Stockett*, 183 Md. 641, 647, 39 A.2d 803, 805–06 (1944) (distinguishing titles of constitutional amendments under MD. CONST. art. XIV, § 1 from titles of ordinary legislation under MD. CONST. art. III, § 29). Nevertheless, reviewing courts must still ensure that the summary description, *see supra* note 116, "accurately and in a non-misleading manner, apprises the voters of the nature of the legislation upon which they are voting." *Stop Slots MD 2008*, 424 Md. at 191 n.16, 34 A.3d at 1180 n.16 (quoting *Anne Arundel County v. McDonough*, 277 Md. 271, 296, 354 A.2d 788, 802–03 (1976)).



could have interpreted the clause, “providing for the creation of legislative districts” to include federal congressional districts.<sup>120</sup>

And, although we can’t know what every voter thought they were voting for, we can say that everything they were told was consistent: The ‘70 amendments were about changing the apportionment of the Maryland General Assembly. Thus, for example, on November 1, 1970, the *Washington Post* ran an article about the upcoming statewide vote on constitutional amendments, entitled *11 Statewide Referendum Items Listed on Maryland Ballots*.<sup>121</sup> The *Post* then reported “the questions exactly as they appear [on the ballot], with a brief explanation of what a vote ‘for’ or ‘against’ means.”<sup>122</sup> As to this question (#5), the *Post* reported as follows:

*An act to propose amendments to Article III of the Constitution of Maryland, title “Legislative Department” establishing the membership of the General Assembly; providing for the creation of legislative districts; providing for the election of members to the General Assembly, and establishing procedures for reapportion[ing] of the General Assembly following each decennial census.*

A VOTE “FOR” freezes the size of the House of Delegates at 142 members and the Senate at 42 members and sets up a procedure for reapportionment of the legislature, on a one-man one-vote basis after each 10-year census.

A VOTE “AGAINST” means that the state constitution will continue to contain no valid provision for apportionment.<sup>123</sup>

The ballot language,<sup>124</sup> and the *Washington Post*’s description of the ballot language, was entirely about state legislative districts, and there was no mention, at all, of federal congressional districts. Every other newspaper article that we found from around the State of Maryland was the same—the ‘70 amendments concerned the Maryland General Assembly, not the U.S.

---

120. In fact, if the clause had been intended to include congressional districts, we think it would have violated the obligation that titles of constitutional amendments not be misleading. *See supra* note 119.

121. *11 Statewide Referendum Items Listed on Maryland Ballots*, WASH. POST, Nov. 1, 1970, at E6. The *Washington Post*’s headline was technically inaccurate: Constitutional amendments and referenda are distinct items under the Maryland Constitution and proposed constitutional amendments aren’t referenda. *Compare* MD. CONST. art. XIV, § 1 (constitutional amendments), with MD. CONST. art. XVI (referendum), and MD. CONST. art. XIV, § 2 (requiring the General Assembly to determine every twenty years the “sense of the People” on whether to hold a state constitutional convention). Here, the *Washington Post* was really describing nine constitutional amendments, one “sense of the People,” and only one referendum. Oh well.

122. *11 Statewide Referendum Items Listed on Maryland Ballots*, *supra* note 121.

123. *Id.*

124. We also reviewed the actual ballot language, obtained from the Maryland State Archives, to confirm that it was identical. Question No. 5, Gen. Election Specimen Ballot (Nov. 3, 1970) (on file with authors). It was.

Congress.<sup>125</sup> Thus, both the ratifiers' intent and the original public meaning of the '70 amendments were both consistent and only included changes to the apportionment of the Maryland General Assembly.

Even if there was any doubt about the '70 amendments, the '72 amendments cleared it up. The framers' intent in the '72 amendments was clearly reflected in the bill's title, which provided that it was:

AN ACT to withdraw and repeal Chapter 356 of the Acts of the General Assembly of 1971 and to propose amendments to certain sections of the Constitution of Maryland by repealing and re-enacting, with amendments, Sections 2, 3, 4 and 5 of Article III, title "Legislative Department," establishing the membership and the districts for the election of members of the General Assembly and generally relating thereto, to provide for the manner of implementation of this plan and making general provisions therefor, and providing for the submission of this amendment to the qualified voters of the State for their adoption or rejection.<sup>126</sup>

Critically, the title is clear that the only legislative districts affected by the proposed amendment are those that concern the "membership and the districts for the election of members of the [Maryland] General Assembly" not the U.S. Congress.<sup>127</sup>

---

125. See, e.g., *The Questions*, FREDERICK POST, Nov. 2, 1970, at A4; *Housing Authority Is Among 11 State Questions*, BALT. SUN, Nov. 1, 1970, at PER2; Albert D. Darby, *General Assembly Size Would Stay Unchanged*, CUMBERLAND TIMES, Oct. 30, 1970, at 26; *Few Voters Bother to Look at Amendments on Ballots*, CUMBERLAND EVENING TIMES, Oct. 30, 1970, at 10; Stephen J. Lynton, *Apathy Is Widespread on 11 Ballot Issues*, BALT. SUN, Oct. 25, 1970, at 18, 20; Val Hymes, *Eleven Crucial Questions II*, NEWS (Frederick, Md.), Oct. 16, 1970, at A4; Val Hymes, *Election Ballot on Nov. 3 Will Present Challenge*, HAGERSTOWN DAILY MAIL, Oct. 15, 1970, at 6. The immediate post-election coverage was the same. See, e.g., *Constitution Changes Okayed*, BALT. SUN, Nov. 8, 1970, at S17; *State Questions*, BALT. SUN, Nov. 6, 1970, at A12; *Md. Referendum Results*, WASH. POST, Nov. 4, 1970, at A13; Stephen J. Lynton, *2 State Questions Are in Doubt: Voters Appear to Spurn Judges' Appointment, Housing Bids*, BALT. SUN, Nov. 4, 1970, at CA9; Stephen J. Lynton, *State Questions' Fate in Doubt: Scanty Initial Returns in Rural Areas Give Clouded Picture*, BALT. SUN, Nov. 4, 1970, at BA9; Dick Shafer, *Lt.-Gov. Among 9 Proposals Passed*, CUMBERLAND EVENING TIMES, Nov. 4, 1970, at 7; Dick Shafer, *All Questions on Ballot Approved Except Housing and Convention*, DAILY MAIL (Hagerstown, Md.), Nov. 4, 1970, at 40; *Voters Free Bench from Polls: Another State Question, Housing Authority Rejected*, BALT. SUN, Nov. 4, 1970, at A9.

126. Acts of 1972, ch. 363, 1972 Laws Md. 1213, 1213–14. The plan had been for the 1971 constitutional amendment to be voted on at a special election called for that purpose. When the Maryland Court of Appeals held that holding a special election to consider constitutional amendments violated the Maryland Constitution, *Cohen v. Governor*, 255 Md. 5, 7 255 A.2d 320, 321 (1969) (interpreting MD. CONST. art. XIV, § 1), the General Assembly then withdrew the 1971 proposed amendments and substituted the 1972 proposed amendment. *Bourbon v. Governor*, 258 Md. 252, 257–58, 265 A.2d 477, 480–81 (1970) (holding that Maryland Constitution permits withdrawal and substitution of proposed constitutional amendments); see also C. Mason White, *Court Finds in Favor of Legislators*, BALT. SUN, Mar. 21, 1970, at B18 (describing *Bourbon* litigation).

127. 1972 Laws Md. at 1213–14.

Similarly, the *Washington Post* described the proposed constitutional amendment in an article, *18 Questions Are Put to Maryland Voters*.<sup>128</sup> That article described question #1:

GENERAL ASSEMBLY. The amendment would increase the membership of the state Senate from 43 to 47 and decrease the House of Delegates from 142 members to 141. The state then would be reapportioned for the 1974 Election into 47 legislative Districts, each electing one senator and three delegates. The state now has one set of districts for election of senators and another set for delegates.<sup>129</sup>

Thus, in the *Washington Post*'s description of the '72 amendment, it is perfectly clear that it relates exclusively to state legislative districts and does not apply to federal congressional districts. We have surveyed other contemporaneous press accounts from around the State explaining the proposed constitutional amendment and all describe the amendment as applying to the Maryland General Assembly (and not a single one even hints that it might apply to the U.S. Congress).<sup>130</sup> It is hard to imagine a more clear expression of the ratifiers' intent or the original public meaning. For an originalist, this evidence would be incontrovertible.

### 5. Conclusion

Altogether, we think that a correct originalist interpretation of Article III, Section 4 would note: (1) that malapportionment of the Maryland General Assembly has been a constant and recurrent constitutional problem since its founding; (2) the *Maryland Committee v. Tawes* litigation, which drove the need for constitutional amendment, concerned state legislative redistricting, exclusively, not federal congressional redistricting; and (3) that after the

---

128. *18 Questions Are Put to Maryland Voters*, WASH. POST, Nov. 5, 1972, at N7.

129. *Id.* The *Washington Post*'s description did not exactly match word-for-word the ballot language, but was, in substance, identical. See Question No. 1, Gen. Election Specimen Ballot (Nov. 7, 1972) (on file with the authors).

130. See, e.g., *18 State Constitution Changes on the Ballot*, EVENING CAP. (Annapolis, Md.), Nov. 3, 1972, at 3; *Not Much Interest in Many Ballot Issues*, DAILY TIMES (Salisbury, Md.), Nov. 2, 1972, at 22; Barry Rascovar, *5 Ballot Questions Draw Legislature's Attention*, BALT. SUN, Oct. 30, 1972, at C20; *1972 Voters Guide: Issues and Candidates*, SUNDAY TIMES (Salisbury, Md.), Oct. 29, 1972, at B-12; Albert D. Darby, *18 Questions Face Voters Next Month*, CUMBERLAND NEWS, Oct. 26, 1972, at 44; Watson, *supra* note 108, at B1 ("Question one would provide that the state be divided into legislative districts, each of which would be represented by one state senator and three delegates."); *Mandel Redistrict Plan Takes Effect*, FREDERICK POST, Feb. 26, 1972, at 1; *Amendment Only Hope, Solons Say*, FREDERICK POST, Feb. 26, 1972, at 1; *Delegates Okay Own Redistrict Plan, Without Senate Changes*, FREDERICK POST, Feb. 19, 1972, at 1; *Women's Club Hears Talk on Nov. Ballot Questions*, MORNING HERALD (Hagerstown, Md.), Sep. 26, 1972, at 8; *Second Try*, BALT. SUN, Feb. 13, 1971, at A12; *Committee Okays Reapportion Bill*, CUMBERLAND EVENING TIMES, Feb. 9, 1972, at 40; *The Governor Gets Off*, SUNDAY TIMES (Salisbury, Md.), Jan. 2, 1972, at A4.

defeat of the proposed Maryland Constitution of 1967–1968, the constitutional framers likely made only the change necessary to bring the State into compliance with existing federal constitutional standards, that is to apply only to state legislative redistricting and not federal congressional redistricting. Most importantly, (4) we have actual evidence of what the provision meant as expressed by the General Assembly that proposed the ‘70 and ‘72 amendments; the Secretary of State who wrote the ballot language; and the newspapers that reported to the voters what the constitutional amendments would accomplish. Given all this, we think it is beyond cavil that the original intent and the original public meaning of Article III, Section 4 was that “legislative district” meant only State legislative district not federal congressional district. Given this mountain of evidence, an originalist interpretation could hardly conclude to the contrary. Moreover, the Maryland caselaw is clear that determining and implementing the intentions of the drafters and ratifiers of constitutional provisions is the primary goal of constitutional interpretation.<sup>131</sup> As a result, our interpretation might well stop here.

### C. Comparative Constitutional Law

Comparative constitutional law can be an important tool in constitutional interpretation.<sup>132</sup> The trial court’s *Szeliga* opinion does not use

131. *State Bd. Of Elections v. Snyder*, 435 Md. 30, 53, 76 A.3d 1110, 1123 (2013); *see also* *Bernstein v. State*, 422 Md. 36, 43–44, 29 A.3d 267, 271 (2011) (describing test); *Abrams v. Lamone*, 398 Md. 146, 172–74, 919 A.2d 1223, 1239 (2007) (same); *Lamone v. Capozzi*, 396 Md. 53, 72–73, 912 A.2d 674, 685–86 (2006) (same); *Fish Mkt. Nominee Corp. v. G.A.A., Inc.*, 337 Md. 1, 8–11, 650 A.2d 705, 708–10 (1994) (same); *Hornbeck v. Somerset Cnty. Bd. of Educ.*, 295 Md. 597, 619–20, 458 A.2d 758, 770 (1983) (same); *Brown v. Brown*, 287 Md. 273, 277–78, 412 A.2d 396, 398–99 (1980) (same); *Cnty. Council v. Supervisor of Assessments*, 274 Md. 116, 120, 332 A.2d 897, 899 (1975) (same); *Howard v. Skinner*, 87 Md. 556, 559, 40 A. 379, 380 (1898) (same); *Silver v. Magruder*, 32 Md. 387, 397 (1870) (same); *Smith v. Thursby*, 28 Md. 244, 259–60 (1868) (same); *Thomas v. Owens*, 4 Md. 189, 225 (1853) (same); Jeremy M. Christiansen, *Originalism: The Primary Canon of State Constitutional Interpretation*, 15 GEO. J.L. & PUB. POL’Y. 341, 381 (2017) (compiling cases). It is worth noting that the Supreme Court of Maryland’s definition quoted above—like Mr. Christiansen’s definition, *supra* at 344 (“originalism is broadly defined here as including both original-intent originalism, and original-public-meaning originalism”)—elides the theoretical difference between original intent and original public meaning originalism and the implications of those differences. *See* *Smith*, *supra* note 27 (critiquing Christiansen’s categorization of cases as reflecting originalism); *see also* *Whittington*, *supra* note 40 (discussing differences between original intent and original public meaning originalism); Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085 (1989).

132. *Friedman, Ex Post Facto*, *supra* note 24, at 97–105; *Friedman, Special Laws*, *supra* note 24, at 417, 448–50 (comparing how controversial comparative analysis has been in interpreting the federal constitution and how uncontroversial and routine it is in state constitutional interpretation); *Friedman, Article 19*, *supra* note 27, at 978 (same); *see also* Jason Mazzone & Cem Tecimer, *Interconstitutionalism*, 132 YALE L.J. 326, 378–92 (2022) (discussing interpretive rules for comparative constitutionalism); Bruce D. Black & Kara L. Kapp, *State Constitutional Law as a*

the technique of comparative constitutional interpretation, but we suggest that it might well have informed the analysis. Although the U.S. Supreme Court has, as we shall explain, recently abandoned the field of partisan gerrymandering, the federal experience can provide useful analytical tools, both to explain why the *Szeliga* court's opinion was wrong and to suggest paths forward.<sup>133</sup> Similarly, comparative analysis of sister state decisions based on their state constitutions—principally Pennsylvania and North Carolina—can help point the way forward.

### *1. Federal Experience with Partisan Gerrymandering*

While the U.S. Supreme Court first stated that map-drawing for political gains may raise serious Fourteenth Amendment concerns in *Fortson v. Dorsey*,<sup>134</sup> the Court has considered whether partisan gerrymandering violates the federal constitution in five important cases: *Gaffney v. Cummings*,<sup>135</sup> *Davis v. Bandemer*,<sup>136</sup> *Vieth v. Jubelirer*,<sup>137</sup> *League of United Latin American Citizens v. Perry*,<sup>138</sup> and most recently in *Rucho v. Common Cause*.<sup>139</sup> These cases reflect the Supreme Court—or perhaps only Justice Kennedy's—hunt to determine an appropriate standard for determining partisan gerrymandering. We review them quickly.

- In *Gaffney*, the plaintiffs alleged that a Connecticut redistricting plan was an unconstitutional partisan gerrymander where the Connecticut Apportionment Board created a redistricting plan designed to yield Republican and Democratic seats in proportion to the statewide vote, which the Board viewed as “political fairness.”<sup>140</sup> The Court concluded that this manipulation was fine, reasoning that map-drawing “inevitably has and is intended to have substantial political consequences.”<sup>141</sup>

---

*Basis for Federal Constitutional Interpretation: The Lessons of the Second Amendment*, 46 N.M. L. REV. 240 (2016) (advocating use of comparative constitutional law to inform interpretation of federal constitutional provision); Joseph Blocher, *Reverse Incorporation of State Constitutional Law*, 84 S. CAL. L. REV. 323, 349–52 (2011) (discussing comparative constitutionalism).

133. It may seem odd or unfamiliar to consider the federal courts' analysis as “comparative constitutional law.” Friedman, *Ex Post Facto*, *supra* note 24, at 97–98. In situations where the state constitution provides an independent and adequate grounds of decision, however, federal court precedents are no more than persuasive authority.

134. 379 U.S. 433 (1965).

135. 412 U.S. 735 (1973).

136. 478 U.S. 109 (1986).

137. 541 U.S. 267 (2004).

138. 548 U.S. 399 (2006).

139. 139 S. Ct. 2484 (2019).

140. *Gaffney*, 412 U.S. at 738.

141. *Id.* at 753.

- In *Bandemer*, the plaintiffs alleged that the redistricting of the Indiana state legislature had been an unconstitutional partisan gerrymander.<sup>142</sup> The Court split into three camps: a four-Justice plurality would have found the plaintiffs' claims justiciable, but found that they had failed to prove the necessary standard—intentional and actual discrimination against an identifiable group;<sup>143</sup> a second group of three Justices would have found the claims nonjusticiable;<sup>144</sup> and a third group of two Justices would have found both that the claims were justiciable and that the plaintiffs had satisfied the necessary standard.<sup>145</sup> All told, seven Justices thought the Indiana plan was constitutional, but six thought partisan gerrymandering claims were justiciable, though if there was a constitutionally required standard, it was so high that no plaintiff could successfully prove a claim.<sup>146</sup>
- In *Veith*, the U.S. Supreme Court again considered a claim of partisan gerrymandering, this time regarding the Pennsylvania state legislature.<sup>147</sup> Again, the Court fractured. The first group, a plurality of four Justices, would have held that the claims were nonjusticiable.<sup>148</sup> Four other Justices would have held that partisan gerrymandering claims were justiciable, but none could agree on a standard.<sup>149</sup> Finally, Justice Kennedy, in a “remarkably confusing opinion,”<sup>150</sup> argued that partisan gerrymandering claims were not automatically nonjusticiable, but that no plaintiff had yet identified judicially manageable standards.<sup>151</sup> Under the Court's so-called *Marks* rule,<sup>152</sup> Justice Kennedy's opinion was understood to be the narrowest ground for decision and was thought to control.
- In *Perry*, the Supreme Court broke into a four-Justice conservative bloc, which would have found the claims

---

142. *Davis v. Bandemer*, 478 U.S. 109, 113 (1986).

143. *Id.* at 113, 127.

144. *Id.* at 144 (O'Connor, J., concurring).

145. *Id.* at 161–62 (Powell, J., concurring in part and dissenting in part).

146. Harris, *supra* note 2, at 40.

147. *Veith v. Jubelirer*, 541 U.S. 267, 272 (2004).

148. *Id.* at 281, 305–06.

149. *Id.* at 317 (Stevens, J., dissenting); *id.* at 344 (Souter, J., dissenting); *id.* at 355–56 (Breyer, J., dissenting).

150. Harris, *supra* note 2, at 41; see also Taylor Larson & Joshua Duden, *Breaking the Ballot Box: A Pathway to Greater Success in Addressing Political Gerrymandering Through State Courts*, 22 CUNY L. REV. 104, 109 (2019) (referring to Justice Kennedy's “cryptic concurrence” in *Veith*).

151. *Veith*, 541 U.S. at 306, 317 (Kennedy, J., concurring).

152. *Marks v. United States*, 430 U.S. 188, 193 (1977). For more on the *Marks* rule, see, for example, Maxwell Stearns, *Modeling Narrowest Grounds*, 89 GEO. WASH. L. REV. 461 (2021); Richard M. Re, *Beyond the Marks Rule*, 132 HARV. L. REV. 1943 (2019).

nonjusticiable;<sup>153</sup> a four-Justice liberal bloc, which would have found the claims justiciable and identified a standard;<sup>154</sup> and Justice Kennedy, who alone thought that the claim might be justiciable, but again would have held that the plaintiff failed to articulate a judicially discoverable and manageable standard.<sup>155</sup> Again, applying the *Marks* rule, Justice Kennedy's opinion was thought to control.<sup>156</sup>

- Finally, in *Rucho*, for the first time, a majority of the Supreme Court found the issue of partisan gerrymandering nonjusticiable.<sup>157</sup> In a pair of cases from redistricting in North Carolina and Maryland, Chief Justice Roberts's majority opinion closed federal courts to partisan gerrymandering claims and suggested that the only means of remedying those constitutional violations were state courts and state legislators.<sup>158</sup>

One critical lesson from the federal experience from *Veith* to *Rucho* was the difficulty of finding “judicially discoverable and manageable” standards for determining what constitutes unconstitutional partisan gerrymandering.<sup>159</sup> For that fifteen-year period (2004 to 2019), when the key question was what sort of evidence would satisfy Justice Kennedy, the one-Justice bloc that would decide cases,<sup>160</sup> federal district courts had attempted to evaluate claims

---

153. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 511 (2006) (Scalia, J. concurring in part and dissenting in part).

154. *Id.* at 447, 475–77 (Stevens, J. concurring in part and dissenting in part).

155. *See, e.g., id.* at 414, 420 (plurality opinion) (using slightly different formulation of test).

156. *See id.* at 413–14, 418 (2006).

157. *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506 (2019).

158. *Id.* at 2507. It is beyond the scope of this article to offer a critique of the U.S. Supreme Court's decision in *Rucho*. For a point-by-point demolition of the majority opinion, see Kyle H. Keraga, *Answering the Political Question: Demonstrating an Intent-Based Framework for Partisan Gerrymandering*, 31 WM. & MARY BILL RTS. J. 885 (2023); Harris, *supra* note 2.

159. The “judicially discoverable and manageable” standard comes from *Baker v. Carr*, 369 U.S. 186, 217 (1962), and the political question doctrine. *See, e.g., Keraga, supra* note 158, at 894–95 (discussing origins and application of political question doctrine); Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1275 (2006) (discussing the nature of judicial manageability). Maryland courts have adopted the same standards for determining whether a case presents a nonjusticiable political question, including the requirement of a “judicially discoverable and manageable standard for resol[ution].” *See, e.g., Smigiel v. Franchot*, 410 Md. 302, 325, 978 A.2d 687, 701 (2009); *Lamb v. Hammond*, 308 Md. 286, 293, 518 A.2d 1057, 1060 (1987). During the period from *Gaffney* to *Rucho*, it has also been the standard for determining whether a particular test could be applied to partisan redistricting claims in federal court.

160. *See, e.g.,* Ethan Weiss, Comment, *Partisan Gerrymandering and the Elusive Standard*, 53 SANTA CLARA L. REV. 693, 712–14 (2013) (discussing search for “judicially discoverable and manageable standard[s]” to satisfy, particularly, Justice Kennedy); Samuel S.H. Wang, Brian A. Remlinger & Ben Williams, *An Antidote for Gobbledygook: Organizing the Judge's Partisan Gerrymandering Toolkit into Tests of Opportunity and Outcome*, 17 ELECTION L.J. 302, 303 (2018)

by using partisan symmetry in combination with actual election results, analyses of simulated maps, and whether the map is a historical outlier.<sup>161</sup> Yet each of these methodologies was rejected as failing to allow judges to distinguish between ordinary and acceptable political considerations and unconstitutional partisan gerrymandering. Nonetheless, the federal experience suggests that any test of partisan gerrymandering must present a “judicially discoverable and manageable standard” for distinguishing between ordinary constitutional redistricting and unconstitutional partisan gerrymandering.

## 2. *Other State Experience with Political Gerrymandering Claims Under State Constitutions*

After the U.S. Supreme Court abandoned the field in *Rucho*, attention turned to state courts and state constitutions. We make a few preliminary observations about that new phase of partisan gerrymandering litigation. It is critical to understand that there is a wide variety among state constitutions, generally, and also among provisions relevant to partisan gerrymandering. Some state constitutions take the redistricting function away from the political branches and assign that task to independent commissions, with the aim that these independent commissions would draw less partisan maps.<sup>162</sup> Other state constitutions, while leaving the redistricting power in the legislative and the executive branches, contain explicit, judicially-

---

[hereinafter Wang et al., *An Antidote for Gobbledygook*] (discussing effect of Justice Kennedy’s retirement on efforts to control partisan redistricting); Samuel S.H. Wang, Richard F. Ober Jr. & Ben Williams, *Laboratories of Democracy Reform: State Constitutions and Partisan Gerrymandering*, 22 J. CONST. L. 203, 209 (2019) [hereinafter Wang et al., *Laboratories*] (same). Or maybe that was never the right question at all. Maybe Justice Kennedy was holding out hope but knew all along that there was no test that could satisfy. Certainly, the big difference between the pre-*Rucho* era and the post-*Rucho* era was Justice Kennedy’s retirement. Larson & Duden, *supra* note 150, at 110 (noting, in a pre-*Rucho* article, that Justice Kennedy’s retirement “diminishes the prospect” for addressing partisan redistricting in the federal courts).

161. See generally League of Women Voters of Mich. v. Benson, 373 F. Supp. 3d 867 (E.D. Mich. 2019); Common Cause v. Rucho, 318 F. Supp. 3d 777 (M.D.N.C. 2018), *vacated*, 139 S. Ct. 2484 (2019); Whitford v. Gill, 218 F. Supp. 3d 837 (W.D. Wis. 2016).

162. See, e.g., N.J. CONST. art. II, § 2 (creating independent redistricting commission); IDAHO CONST. art. III, § 2; ME. CONST. art. IV, pt. 3, § 1-A; MICH. CONST. art. 4, § 6; MONT. CONST. art. V, § 14; VA. CONST. art. II, § 6-A; WASH. CONST. art. II, § 43. As discussed above, the Maryland Constitution of 1967–1968 proposed a redistricting process for both state legislative and federal congressional maps that employed an independent commission. See *supra* Section II.B.3. That proposed Constitution was defeated by the voters. See *supra* Section II.B.3. Nevertheless, the Maryland General Assembly is free to propose a constitutional amendment to assign the responsibility for proposing or enacting the state legislative or federal congressional maps or both to an independent redistricting commission if it so desires. It has not done so.



enforceable prohibitions on partisan gerrymandering.<sup>163</sup> Still other states since *Rucho* have relied on preexisting state constitutional equal protection guarantees to prohibit partisan gerrymandering.<sup>164</sup> Most promising, thirty-two state constitutions, including Maryland's, contain some variation of a provision that requires "free," "free and frequent," "free and equal," or "free and open" elections.<sup>165</sup> Courts in both Pennsylvania and North Carolina have relied on these types of provisions in the post-*Rucho* era to invalidate partisan gerrymanders.<sup>166</sup> In a pair of well-reasoned student notes, Aroosa Khokher and Megan Wilson separately argue that these "free and equal elections"-type provisions may provide an independent state constitutional ground for invalidating partisan gerrymandering now that the U.S. Supreme Court has abandoned the field.<sup>167</sup>

---

163. FLA. CONST. art. III, § 20(a) (prohibiting partisan considerations in federal congressional redistricting); *id.* § 21(a) (prohibiting partisan considerations in state legislative redistricting); *see also* League of Women Voters of Fla. v. Detzner, 172 So. 3d 363 (Fla. 2015); Harkenrider v. Hochul, 197 N.E.3d 437, 521 (N.Y. 2022); Aroosa Khokher, Note, *Free and Equal Elections: A New State Constitutionalism for Partisan Gerrymandering*, 52 COLUM. HUM. RTS. L. REV. 1, 21–23 (2020) (discussing *Detzner*). It is not clear to us to what extent these anti-gerrymandering provisions have been successful in our sister states. If, however, the Maryland General Assembly wishes to, it could certainly propose constitutional amendments to tighten Article III, Section 4 standards with respect to state legislative redistricting or make those standards apply to federal congressional redistricting; add anti-gerrymandering provisions; or myriad other solutions.

164. *See, e.g., In re. 2021 Redistricting Cases*, 528 P.3d 40 (Alaska 2023); *Grisham v. Van Soelen*, 539 P.3d 272 (N.M. 2023). Following these sister states' lead remains conceptually available to Maryland courts.

165. *Free and Equal Elections Clauses in State Constitutions*, NAT'L CONF. OF STATE LEGISLATURES (Nov. 4, 2019), <https://www.ncsl.org/redistricting-and-census/free-and-equal-election-clauses-in-state-constitutions> [<https://perma.cc/Z5YE-D4JA>]; Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 103 & n.86, 144–49 (2014) (identifying twenty-six state provisions); *see also infra* note 173 (discussing derivation of Virginia and Maryland versions of these types of provision). *See generally* Bertrall L. Ross, II, *Challenging the Crown*, 73 ALA. L. REV. 221, 289 n.475 (2021) (describing how the provision of the English Bill of Rights (1689) requiring that "[a]ll elections ought to be free" led to similar provisions in state bills and declarations of rights, including Maryland's).

166. *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737 (Pa. 2018); *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 N.C. Super. LEXIS 56 (N.C. Super. Ct. Sept. 3, 2019); Khokher, *supra* note 163, at 25–30 (describing *League of Women Voters of Pa.* and *Lewis*); Wang et al., *Laboratories*, *supra* note 160 at 211–13, 232–36 (same).

After the partisan composition of the North Carolina Supreme Court changed in the 2022 elections—and long after the deadline for a motion for reconsideration could normally be granted—the North Carolina Supreme Court reconsidered the decision in *Common Cause* and held that state constitutional claims of partisan gerrymandering of federal congressional districts predicated on the "free and equal elections" provision of the North Carolina Constitution were not justiciable. *Harper v. Hall (Harper III)*, 886 S.E.2d 393 (N.C. 2023); *see also* Brandon J. Johnson, *Harper v. Hall; and State Courts as Politically Accountable Actors*, 13 WAKE FOREST L. REV. ONLINE 42, 45 (2023) (discussing *Harper III*).

167. Khokher, *supra* note 163, at 33–34; Megan Wilson, Note, *Rethinking How Voters Challenge Gerrymandering: Congress, Courts, and State Constitutions*, 52 LOY. L.A. L. REV. 63 (2018); *see also* Brett Graham, "Free and Equal": James Wilson's Elections Clause and Its Implications for Fighting Partisan Gerrymandering in State Courts, 85 ALB. L. REV. 799 (2022).

First, we do not read the trial court’s *Szeliga* opinion as holding that Article 7 of the Maryland Declaration of Rights—Maryland’s “free and frequent” elections provision—is an independent prohibition on partisan gerrymandering. Rather, as discussed above,<sup>168</sup> the trial court in *Szeliga* tied its interpretation of Article 7 exclusively to its interpretation of Article III, Section 4. Without the one, it seems to us, the other necessarily fails.<sup>169</sup> To be explicit, therefore, *Szeliga* is not a persuasive precedent—one way or the other—for an independent interpretation of Maryland’s “free and frequent” elections provision.<sup>170</sup>

168. See *supra* note 24.

169. See *supra* notes 24, 28.

170. The State argued in *Szeliga* that, as a textual matter, the “free and frequent” elections provision of Article 7 applies only to the “Legislature” (with a capital “L”), by which the State argued, the provision’s framers meant only the Maryland General Assembly. *Szeliga v. Lamone*, No. C-02-CV-21-001816, at \*25 (Md. Cir. Ct. Anne Arundel Cnty. Mar. 25, 2022) (describing the State’s brief). The trial court was unpersuaded by that argument, writing:

[T]he State’s contention is belied by [Article 7’s] own language. Article 7, as it was originally adopted in 1776, was meant to secure a right of participation. . . . The language of Article 7 enunciated a foundational right to vote for the only entity for which the citizens of Maryland in 1776 had a participatory ability to elect through voting, the Legislature.

*Id.* This analysis is certainly wrong. The trial court’s opinion quotes today’s version of Article 7 and claims that it was the language of 1776. It wasn’t. Here’s how it read in 1776:

That the right in the people to participate in the legislature is the best security of liberty, and the foundation of all free government; for this purpose elections ought to be free and frequent, and every man having property in, a common interest with, and an attachment to the community, ought to have a right of suffrage.

MD. CONST. DECL. OF RTS. art. 7 (1776); see Friedman, *Maryland Declaration of Rights*, *supra* note 14, at 653; Friedman, *Tracing the Lineage*, *supra* note 14, at 955. We know, for example, that contrary to the trial court’s analysis, the word “legislature” in the 1776 version of the Maryland Declaration of Rights began with a lowercase “l” and was only changed to a capital “L” in the 1851 version and thereafter. Friedman, *Maryland Declaration of Rights*, *supra* note 14, at 653; Friedman, *Tracing the Lineage*, *supra* note 14, at 955. Regrettably, however, the records of the 1851 Constitutional Convention do not reveal the reason for this change. See 1 DEBATES AND PROCEEDINGS OF THE MARYLAND REFORM CONVENTION TO REVISE THE STATE CONSTITUTION 141, 186–87 (1851) (discussing other changes to Article 7); see also Friedman, *Miles to Go*, *supra* note 24 (manuscript at 2–6) (discussing deficits of records of Maryland constitutional conventions). A correct understanding of the development of the text of Article 7 might have strengthened the trial court’s view here.

The quoted language from the *Szeliga* opinion—“the citizens of Maryland in 1776 had a participatory ability to elect . . . the Legislature”—is also over- and under-inclusive about who could vote and what they could vote for. The answer is that essentially only property-owning white men could vote. Not most African-Americans, Native Americans, women, or the poor. Anderson, *Eighteenth-Century Suffrage*, *supra* note 51, at 144–45 (discussing voting by African-Americans); Anderson, *Maryland’s Property Qualifications*, *supra* note 51 (discussing property qualifications to vote); John C. Rainbolt, *A Note on the Maryland Declaration of Rights and Constitution of 1776*, 66 MD. HIST. MAG. 420 (1971) (same). And those who could vote could only vote directly for members of the House of Delegates; they could also vote for senatorial electors who would, in turn, elect State Senators (thus the voters could vote only indirectly for State Senators), see *supra* note

*Second*, although the trial court's *Szeliga* opinion did not rely independently on Maryland's "free and frequent" elections provision, there is no reason that a better interpretation could not rely independently on this provision. In that case, our sister state court interpretations can and should be useful models for how Maryland should interpret our analogous provision.<sup>171</sup> In previous writing, Judge Friedman has proposed a three-part test to determine how to use sister state opinions to interpret the Maryland Constitution. Specifically, Judge Friedman suggests that an interpreter should consider three steps:

- (1) the extent to which the issue presented in [the sister state court's] case parallels the question [being considered in Maryland];
- (2) the similarities and differences between the relevant provisions of the two constitutions and the systems that they create; and (3) the persuasiveness of the arguments made by the [sister state] court.<sup>172</sup>

Applying this test, we have some concerns about Maryland courts following cases like *League of Women Voters of Pennsylvania* and *Lewis*. Our concerns are at steps two and three of this analysis. At step two, regarding the similarities and differences with the allegedly comparable state provisions, Maryland's "free and frequent" elections provision has significant differences from these other states' "free and equal elections"

---

49 (discussing indirect election of state senators); and could vote only indirectly for delegates to the Continental (and then Confederation) Congress (who were selected by the state legislature).

Our point here is that the *Szeliga* court's interpretation of Maryland's "free and frequent elections" provision was certainly wrong but not binding on future courts. Below, we discuss some of the issues that should be considered in future interpretation of the provision. *See infra* note 173.

171. Of course, we would not just evaluate those state opinions vindicating claims based on the respective state constitutions, but also those rejecting those claims. *See e.g.*, *Brown v. Sec'y of State*, No. 2022-0629, 2023 WL 8245078, at \*16 (N.H. Nov. 29, 2023) (holding that claims under state "free and equal elections" provision are non-justiciable); *Harper III*, 886 S.E.2d 393 (same).

172. Friedman, *Ex Post Facto*, *supra* note 24, at 97 (citing Daniel A. Farber, *The Supreme Court, the Law of Nations, and Citations of Foreign Law: The Lessons of History*, 95 CALIF. L. REV. 1335, 1360-62 (2007)).

provisions.<sup>173</sup> An interpreter will have to account for these differences.<sup>174</sup> Also at step two, we note that our sister state court decisions rely on

---

173. If we are to develop an independent jurisprudence under Article 7 of the Maryland Declaration of Rights, we must engage all of our interpretive tools to determine the best possible meaning of the provision (in the same way that we have engaged all of our interpretive tools to determine the best possible meaning of Article III, Section 4) and to determine whether prevention of partisan gerrymandering is within that best possible meaning. As part of that determination, as is discussed above, it is unclear whether the use of the word “legislature” in 1776 or the change to the word “Legislature” in the 1851 and subsequent Maryland Constitutions limit the application to just the General Assembly. *See supra* note 170. A textualist interpretation would also have to consider whether the unique first clause of Article 7 is a preamble, and if it is, whether that preamble limits the operative clauses that follow it, including the “free and frequent elections” language. *See* Saul Cornell, *Originalism on Trial: The Use and Abuse of History in* District of Columbia v. Heller, 69 OHIO ST. L.J. 625 (2008) (discussing interpretation of constitutional preambles); Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 814–21 (1998) (same); Friedman, *Ex Post Facto*, *supra* note 24, at 75 n.81 (same).

An originalist interpretation would also analyze the history and interstate borrowing of the language of Article 7. *See generally* Ross, *supra* note 165 (tracing language from English declaration of rights (1689) to various State constitutions). For example, is it meaningful that Maryland’s Article 7 was adapted from the May 27, 1776, draft of the Virginia Declaration of Rights, and which was, in turn, adapted from the English Declaration of Rights of 1689? Friedman, *Tracing the Lineage*, *supra* note 14, at 955–56. Clearly, the English Declaration of Rights was talking about elections to a *national* legislature, the English Parliament. Just as clearly, by June 12, 1776, at least, the Virginia Declaration of Rights was referring only to their *state’s* legislature. *See id.* at 956 n.105. *But see also id.* at 936 n.24 (noting that Maryland constitutional framers relied on the May 27, 1776, and not the June 12, 1776, draft of the Virginia Declaration of Rights). Is it meaningful, when deciding how much weight to give a Pennsylvania court’s interpretation of the Pennsylvania “free and equal elections” provision, to consider that the Maryland framers intentionally declined to use Pennsylvania’s document as a model for drafting the Maryland Declaration of Rights? Friedman, *Tracing the Lineage*, *supra* note 14, at 942–43 (“Although the Pennsylvania Declaration of Rights [of 1776] was available to . . . the Maryland . . . constitutional convention [ of 1776, it] largely ignored the Pennsylvania draft.”); *see also* Dan Friedman, *Who Was First?: The Revolutionary-Era State Declarations of Rights of Virginia, Pennsylvania, Maryland, and Delaware*, 97 MD. HIST. MAG. 476, 482 (2002) (same). Or conversely, the extent to which North Carolina’s constitutional framers did copy Maryland’s? *See* Friedman, *Ex Post Facto*, *supra* note 24, at 72 n.69 (discussing North Carolina’s copying of Maryland’s *ex post facto* provision). Is it relevant to the consideration of the interstate borrowing of the language of Article 7 that Judge Niles, in his treatise, categorized Article 7 as being in his “Class D,” meaning that he thought that Article 7 was both “peculiar to Maryland” and of “substantially equal force and equal practical value with any other part of the Maryland Constitution”? ALFRED S. NILES, MARYLAND CONSTITUTIONAL LAW 14, 18–19 (1915). A proponent might also suggest that interpreting Article 7 in a manner that restricts partisan gerrymandering is consistent with a “democracy principle” that, some argue, underlies many state constitutional provisions. Bulman-Pozen & Seifter, *supra* note 24; *see also supra* notes 24, 28 (discussing structuralist interpretations of this democracy principle). All of these issues and more will have to be considered if a Maryland court will use our sister state decisions to inform a new interpretation of Maryland’s “free and frequent elections” provision, Article 7 of the Maryland Declaration of Rights.

174. For example, the Pennsylvania Supreme Court placed great emphasis on the “equal” part of its “free and equal elections” provision. *See* League of Women Voters of Pa. v. Commonwealth, 178 A.3d 737 (Pa. 2018); Brett Graham, “Free and Equal”: James Wilson’s Elections Clause and Its Implications for Fighting Partisan Gerrymandering in State Courts, 85 ALB. L. REV. 799 (2022). Such an analysis cannot be easily or directly imported to apply to Maryland’s “free and frequent elections” provision.

mathematical techniques explicitly rejected by the Maryland Court of Appeals.<sup>175</sup> Finally, at step three, regarding the persuasiveness of the allegedly comparable state's opinion, we find from our review of *League of Women Voters of Pennsylvania* and *Lewis* that the jury is still out on whether those sister state courts have answered Justice Kennedy's challenge that they develop "judicially discoverable and manageable" standards for determining what constitutes an unconstitutionally partisan gerrymander.<sup>176</sup>

---

175. Compare *League of Women Voters of Pa.*, 178 A.3d 737 (relying on mathematical computations of district compactness), with *In re 2022 Legis. Districting of the State*, 481 Md. 507, 282 A.3d 147 (2022) (refusing to adopt mathematical tests for district compactness). See also Larson & Duden, *supra* note 150, at 114–19 (describing expert witnesses relied upon by the petitioners in *League of Women Voters of Pennsylvania*); Bernard Grofman & Jonathan R. Cervas, *Can State Courts Cure Partisan Gerrymandering: Lessons from League of Women Voters v. Commonwealth of Pennsylvania* (2018), 17 ELECTION L.J. 264, 270 (2018) (same). Of course, it is at least conceptually possible (if unlikely) that the Maryland Court of Appeals would adopt the use of these mathematical tests in a "free and frequent elections" challenge, despite having rejected the use of those tests in an Article III, Section 4 challenge.

176. That is not to say that acceptable standards cannot be discovered. One of the unfortunate results of the U.S. Supreme Court's *Rucho* decision is that it will result in a substantial diminution of the promising efforts to devise and refine methods of distinguishing legitimate redistricting from partisan gerrymandering. Yet many of these plausible alternatives remain available for a state court to consider. See, e.g., Keraga, *supra* note 158 (proposing four-prong framework grounded in predominant legislative intent, rather than political impact); Jon X. Eguia, *A Measure of Partisan Advantage in Redistricting*, 21 ELECTION L.J. 84 (2022) (proposing "Jurisdictional Partisan Advantage" as benchmark for measuring partisan gerrymandering effects); Daryl R. DeFord, Nicholas Eubank & Jonathan Rodden, *Partisan Dislocation: A Precinct-Level Measure of Representation and Gerrymandering*, 30 POL. ANALYSIS 405 (2021) (describing method of measuring "partisan dislocation"); Benjamin Plener Cover & David Niven, *Geographic Gerrymandering*, 16 HARV. L. & POL'Y REV. 159 (2021) (proposing "geographic gerrymandering" as method to measure partisan gerrymandering); John A. Curiel & Tyler Steelman, *A Response to "Tests for Unconstitutional Partisan Gerrymandering in a Post-Gill World" in a Post-Rucho World*, 19 ELECTION L.J. 101 (2020) (defending zip code splits as a method of assessing partisan gerrymandering); Grofman & Cervas, *supra* note 175; Bernard Grofman, *Tests for Unconstitutional Partisan Gerrymandering in a Post-Gill World*, 18 ELECTION L.J. 93 (2019) (critiquing various methods of calculating partisanship); Nicholas O. Stephanopoulos & Eric M. McGhee, *The Measure of a Metric: The Debate over Quantifying Partisan Gerrymandering*, 70 STAN. L. REV. 1503 (2018) (defending efficiency gap as a method for determining partisan gerrymandering); Robin E. Best, Shawn J. Donahue, Jonathan Krasno, Daniel B. Magleby & Michael D. McDonald, *Considering the Prospects for Establishing a Packing Gerrymandering Standard*, 17 ELECTION L.J. 1 (2018) (proposing mean-median difference as a measure of partisan gerrymandering); Jonathan Krasno, Daniel B. Magleby, Michael D. McDonald, Shawn Donahue & Robin E. Best, *Can Gerrymanders be Detected? An Examination of Wisconsin's State Assembly*, 47 AM. POL. RSCH. 1162 (2018) (applying efficiency gap, partisan symmetry, and mean-median comparison methods to analyze partisan gerrymandering); Bernard Grofman, *Crafting a Judicially Manageable Standard for Partisan Gerrymandering: Five Necessary Elements*, 17 ELECTION L.J. 117, 126 (2018) (suggesting that existence of multiple competing metrics for determining partisan gerrymandering is a "feature, not a flaw"); Wang, *An Antidote for Gobbledygook*, *supra* note 160 (arguing that state-specific tests for partisan gerrymandering may work better than a single, nationwide standard); John A. Curiel & Tyler S. Steelman, *Redistricting Out Representation: Democratic Harms in Splitting Zip Codes*, 17 ELECTION L.J. 328 (2018) (proposing calculating zip code splits as a way of measuring partisan

#### D. Common Law Constitutional Interpretation

Common law constitutional interpretation proceeds from the observation that courts frequently decide constitutional cases based on courts' prior resolutions of similar cases—that is, based on precedent—rather than authoritative texts or history.<sup>177</sup> In evaluating the *Szeliga* court's use of precedent, it is important to understand both the precedents on which it relied and those which it ignored. Moreover, we must also consider the precedential weight that the *Szeliga* opinion itself should have in future congressional redistricting cases.<sup>178</sup>

---

gerrymandering); Benjamin Plener Cover, *Quantifying Partisan Gerrymandering: An Evaluation of the Efficiency Gap Proposal*, 70 STAN. L. REV. 1131 (2018) (critiquing efficiency gap as a measure of partisan gerrymandering); Christopher P. Chambers, Alan D. Miller & Joel Sobel, *Flaws in the Efficiency Gap*, 33 J.L. & POL. 1 (2017) (critiquing efficiency gap as a measure of partisan gerrymandering); Samuel S.H. Wang, *Three Practical Tests for Gerrymandering: Application to Maryland and Wisconsin*, 15 ELECTION L.J. 367 (2016) (proposing methods for assessing partisan asymmetry as a method for determining unconstitutional partisan gerrymandering); Samuel S.H. Wang, *Three Tests for Practical Evaluation of Partisan Gerrymandering*, 68 STAN. L. REV. 1263 (2016); Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831 (2015) (proposing efficiency gap as a measure of partisan gerrymandering); Michael D. McDonald & Robin E. Best, *Unfair Partisan Gerrymanders in Politics and Law: A Diagnostic Applied to Six Cases*, 14 ELECTION L.J. 312 (2015) (proposing mean-median difference as a measure of partisan gerrymandering); John F. Nagle, *Measures of Partisan Bias for Legislating Fair Elections*, 14 ELECTION L.J. 346, 351–52 (2015) (proposing a modified partisan bias test as a method for determining partisan gerrymandering); Theodore S. Arrington, *A Practical Procedure for Detecting a Partisan Gerrymander*, 15 ELECTION L.J. 385, 389–90 (2016) (proposing partisan bias test as a measure for determining partisan gerrymandering); Anthony J. McGann, Charles Anthony Smith, Michael Latner & J. Alex Keena, *A Discernable and Manageable Standard for Partisan Gerrymandering*, 14 ELECTION L.J. 295, 307–09 (2015) (proposing partisan bias test as a measure for determining partisan gerrymandering). In our view, a successful challenge to an allegedly partisan drawing of federal congressional districts would have to be based on the “Free and Frequent Elections” article and proven using one or more of these methods of determining excessive partisan gerrymandering (or another test to be developed in the future).

177. Friedman, *Ex Post Facto*, *supra* note 24, at 68 & nn.50–51 (discussing DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 36 (2010); and David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 879 (1996)); Friedman, *Special Laws*, *supra* note 24, at 462–63 (same); Friedman, *Article 19*, *supra* note 27, at 982 (same).

178. We read with particular concern an article in which members of the Maryland General Assembly were asked their opinion on the importance of the *Szeliga* opinion in future congressional redistricting cycles. Bennett Leckrone, *What's in Store for Future Congressional Redistricting Cycles in Maryland?*, MD. MATTERS (Apr. 21, 2022), [www.marylandmatters.org/2022/04/21/whats-in-store-for-future-congressional-redistricting-cycles-in-maryland/](http://www.marylandmatters.org/2022/04/21/whats-in-store-for-future-congressional-redistricting-cycles-in-maryland/) [https://perma.cc/R94C-SDNU]. Not surprisingly, these proponents and opponents took very different views:

Del. Anne Healey (D-Prince George's), chair of the House Rules and Executive Nominations Committee that approved Maryland's redistricting plans, questioned whether this unconventional round of mapmaking will set a precedent in Maryland.

“It doesn't set a precedent at all,” Healey said. “It's just one judge's opinion.”

1. *Precedents Not Followed, Part 1: Olson v. O'Malley*

The most relevant precedent that the trial court could have chosen to follow was federal district court Judge William D. Quarles, Jr.'s decision in *Olson v. O'Malley*.<sup>179</sup> Instead, the *Szeliga* court opinion did not even address *Olson*.

In *Olson*, the plaintiffs raised precisely the same issue as the *Szeliga* plaintiffs: that the enacted plan of federal congressional redistricting “violates Article III, [Section] 4 of the Maryland Constitution.”<sup>180</sup> Judge Quarles’s logic in rejecting this claim, though brief, seems unimpeachable. *First*, he notes that Article III of the Maryland Constitution “governs the Legislative Department of Maryland” and “references the federal government only once.”<sup>181</sup> *Second*, Judge Quarles observes the context in which Article III, Section 4 appears and that is “most often read together with

---

Because the case was settled and never went to the [state supreme court], how [the *Szeliga* court’s] ruling would’ve played out before the high court remains unknown, Healey said.

“Apparently, she came up with something that had never been considered before,” Healey added. “So we don’t know whether her interpretation would’ve been ratified by the Court of Appeals.”

Del. Neil C. Parrott (R-Washington), one of the plaintiffs in the case, said [that the *Szeliga* court’s] ruling should be heeded in future redistricting cycles.

“This judge, I think, simply acknowledged what’s already law,” Parrott, a 6th Congressional District candidate vying to unseat incumbent U.S. Rep. David Trone (D), said.

Parrott and other Republicans still aren’t satisfied with the redrawn map. . . . But Parrott said the map is “much better” than the previous proposal.

“I really hope that this is not just this year,” Parrott said. “I hope and I expect that in 10 years, 20 years, this would be a precedent now moving forward.”

*Id.* For the reasons described in this article, we agree with Delegate Healey, that the trial court’s opinion in *Szeliga v. Lamone* is not a precedent for future congressional redistricting efforts.

179. *Olson v. O'Malley*, No. WDQ-12-0240, 2012 WL 764421 (D. Md. Mar. 6, 2012). We focus on *Olson* because it provides the most explicit and extensive discussion of the applicability of Article III, Section 4 to federal congressional redistricting, but it is not the only case rejecting this theory by a federal district court in Maryland. *See Gorrell v. O'Malley*, No. WDQ-11-2975, 2012 WL 226919, at \*5 (D. Md. Jan. 19, 2012) (“[Gorrell] has cited—and the Court has found—no authority for applying [MD. CONST. art. III, § 5] to congressional redistricting.”); *Duckworth v. State Bd. Elections*, 213 F. Supp. 2d 543, 552 n.1 (D. Md. 2002) (“[W]hile [the] requirements [of Article III, Section 4 of the Maryland Constitution] apply to reapportionment of districts for the Maryland General Assembly, Maryland law does not require that those criteria be used in Congressional redistricting.”).

180. *Olson*, 2012 WL 764421, at \*2.

181. *Id.* (discussing Art. III, § 10). This is not a terribly strong point. There is no reason to believe that the framers of the Maryland Constitution could not have chosen to put a provision about congressional redistricting in Article III, especially if it was a provision about how the General Assembly was supposed to conduct congressional redistricting. In fact, as noted above, elsewhere, the 1967 constitutional convention proposed just such a provision in the legislative article. *See supra* note 86. Moreover, it is easy to make too much of where provisions are placed in a state constitution. Friedman, *Ex Post Facto*, *supra* note 24, at 93 n.160.

[Sections] 2, 3, and 5 of Article III.”<sup>182</sup> *Third*, Judge Quarles observes that “[t]he Court of Appeals of Maryland uses the term ‘legislative district’ to refer to state legislative districts and not congressional districts.”<sup>183</sup> *Fourth*, Judge Quarles rejects the plaintiffs’ argument that it would somehow be “fair[]” to apply the Article III, Section 4 standards to federal congressional redistricting.<sup>184</sup> And *finally*, Judge Quarles considers and rejects the idea that there is any precedent for applying the standards of Article III, Section 4 to congressional redistricting.<sup>185</sup> In all, the *Olson* opinion thoroughly repudiates the exact same claims vindicated in *Szeliga*.

Our point is not that the *Szeliga* court was bound by *Olson* as a mandatory precedent. It was not. *Olson* is simply a *nisi prius* trial court opinion (as we will argue, momentarily, that *Szeliga* is too). Rather, our point is that the *Szeliga* court should have considered *and at least explained* why it came to a different result than Judge Quarles had in *Olson*.

## 2. *Precedents Not Followed, Part 2: Prior (and Subsequent) Article III, Section 4 Cases*

Even if the trial court was right that the state constitutional standards in Article III, Section 4 apply to federal congressional redistricting, it misapplied those state standards to find that the enacted federal congressional plan constituted an unconstitutionally partisan gerrymander.

### i. *Szeliga Improperly Applied the Then-Existing Precedents on Partisan Gerrymandering*

The Maryland Court of Appeals has repeatedly explained the governing state constitutional standards regarding partisan gerrymandering. We have synthesized the court’s statements—as they appear in the pre-*Szeliga* opinions—into the following four redistricting principles:

- All four traditional constitutional standards (compactness, contiguity, equal population, and due regard for natural and

182. *Olson*, 2012 WL 764421, at \*2–3 (first citing *In re Legis. Districting of the State*, 370 Md. 312, 324–25, 805 A.2d 292, 299 (2002); and then citing *In re Legis. Districting of the State*, 299 Md. 658, 675 n.7, 475 A.2d 428, 436 n.7 (1984)).

183. *Id.* at \*3 (first citing *In re Legis. Districting of the State*, 370 Md. at 325, 805 A.2d 300; and then citing *In re Legis. Districting of the State*, 299 Md. at 673–74, 475 A.2d at 436).

184. *Id.* at \*3.

185. *Id.* at \*3 (rejecting plaintiffs’ argument that Judge Roger Titus’s concurrence in *Fletcher v. Lamone*, 831 F. Supp. 2d 887, 904, 907 (D. Md. 2011) (Titus, J., concurring), provides a precedent supporting application of MD. CONST. art. III, § 4 to federal congressional redistricting).



political boundaries<sup>186</sup>) are mandatory<sup>187</sup> and are intended to work together to prevent partisan gerrymandering.<sup>188</sup>

- In practice, the four traditional constitutional standards also operate in tension with one another. The result is that a plan might be made more compact, but that might come at the expense of some degree of, for example, equality of population.<sup>189</sup>
- The political branches may also consider other factors including political (political balance, incumbents' residences, etc.) and nonpolitical (communities of interest, landmarks, etc.) factors.<sup>190</sup>
- These other factors—political and non-political—may be considered but the constitutional factors cannot be subordinated to these other factors.<sup>191</sup>

The *Szeliga* opinion dutifully restates these principles. The problem, however, is with its application of those principles, particularly the court's

---

186. The Court of Appeals' "due regard" jurisprudence is hard for lawyers and judges to follow but worse still for legislators. In 1992, the court looked at the total number of political boundary crossings in the enacted plan statewide and warned that eighteen border crossings was "perilously close" to a constitutional violation. *Legis. Redistricting Cases*, 331 Md. 574, 613–14, 629 A.2d 646, 665–66 (1993). In 2002, the court rejected an enacted plan because it held that the twenty-two political border crossings contained in that plan statewide were "simply an excessive number of political subdivision crossings." *In re Legis. Districting of the State*, 370 Md. at 368, 805 A.2d at 325. In response, the court drew its own redistricting plan, which the court touted as requiring only fourteen political border crossings statewide. *Id.* at 375, 805 A.2d at 329; Brooke Erin Moore, Comment, *Opening the Door to Single Government: The 2002 Maryland Redistricting Decision Gives the Courts Too Much Power in an Historically Political Arena*, 33 U. BALT. L. REV. 123 (2003). In the 2012 redistricting, the State's enacted plan included only thirteen border crossings throughout the State, which the State argued, on the test established by the prior cases, was conclusive evidence that it had given "due regard" to the political boundaries. *In re 2012 Legis. Districting of the State*, 436 Md. 121, 137 n.15, 145, 80 A.3d 1073, 1082 n.15, 1086 (2013). The Court of Appeals emphatically rejected the State's interpretation and held that even a single unjustified political border crossing could represent a constitutional violation. *Id.* at 155, 80 A.3d at 1092. The court held, however, that the 2012 petitioners had failed to provide sufficient evidence of any improper border crossings. In 2022, by contrast, the Court of Appeals rejected the petitioners' "due regard" challenges because "the adopted plan had the same [total] number of districts with county crossings as their preferred plan." *In re 2022 Legis. Districting of the State*, 481 Md. 507, 564 n.39, 576–78, 282 A.3d 147, 180 n.39, 188–89 (2022). Thus, the court apparently discarded its former "even a single unjustified border crossing" jurisprudence and returned to an analysis based on the total number of statewide border crossings.

187. *In re Legis. Districting of the State*, 370 Md. at 321, 805 A.2d at 297.

188. *See, e.g., id.* at 360, 805 A.2d at 320; *In re Legis. Districting of the State*, 299 Md. at 675, 475 A.2d at 436.

189. *See, e.g., In re 2012 Legis. Districting of the State*, 436 Md. at 133–34, 80 A.3d at 1079–80; *In re Legis. Districting of the State*, 299 Md. at 681, 475 A.2d at 440.

190. *See, e.g., In re 2012 Legis. Districting of the State*, 436 Md. at 134, 80 A.3d at 1080; *In re Legis. Districting of the State*, 370 Md. at 321–22, 805 A.2d at 297; *Legislative Redistricting Cases*, 331 Md. at 610, 629 A.2d at 664; *In re Legis. Districting of the State*, 299 Md. at 673–74, 475 A.2d at 436 (1984).

191. *See, e.g., In re Legis. Districting of the State*, 299 Md. at 688, 475 A.2d at 443.

use and application of the word, “subordinated.” Let’s look at the way the plaintiffs’ expert, Sean Trende, used the word “subordinated” as reported in the trial court’s *Szeliga* opinion. First, he was asked to “opine as to whether traditional redistricting criteria [were] [subordinated] for partisan considerations.”<sup>192</sup> That seems to be a proper restatement of the traditional test. But from there, Mr. Trende goes off the rails, and he drags the trial court off with him. He testifies that the enacted congressional plan was “an extremely improbable outcome if you really were drawing — just caring about traditional redistricting criteria and weren’t subordinating those considerations for partisanship.”<sup>193</sup> That, it seems to us, is an incorrect statement of the standard. The political branches—the Governor and the Maryland General Assembly—are allowed to consider, that is “car[e] about,”<sup>194</sup> partisanship; they just aren’t allowed to put their partisanship desires in a class above the constitutional (or as Mr. Trende calls them, traditional) factors.<sup>195</sup> And, caring about politics is not necessarily, as Mr. Trende seems to say, subordinating the traditional factors to politics. The trial court’s opinion repeats this misunderstanding when it quotes Mr. Trende’s definition of an “outlier” as “a map that would have a less than five percent chance . . . of being drawn *without respect to politics*.”<sup>196</sup> This is a critical misstatement of the test as the Court of Appeals has always applied it, as there is no requirement that the political branches draw the map “without respect to politics.” And the trial court misstates the test again, but differently, just a few lines later, quoting Mr. Trende as requiring that “if traditional redistricting criteria predominated, [the map] would be extraordinarily unlikely to be drawn.”<sup>197</sup> The Court of Appeals cases are clear, however, that the constitutional factors don’t have to predominate, they just cannot be subordinate.

---

192. *Szeliga v. Lamone*, No. C-02-CV-21-001816, at \*59 ¶ 69 (Md. Cir. Ct. Anne Arundel Cnty. Mar. 25, 2022) (second alteration in original). The first bracket, added by the authors, corrects a grammatical error. The second bracket, added by the trial court, corrects a transcription error.

193. *Id.* at \*64 ¶ 108.

194. *Id.*

195. *Id.*

196. *Id.* at \*92 (emphasis added). Dr. Allan Lichtman, the State’s expert, tried to explain Mr. Trende’s misapplication of the standard, and was pilloried for it. *Id.* at \*86–87. In the *Szeliga* opinion, the trial court makes repeated reference to Dr. Lichtman’s response to Mr. Trende’s testimony about “zero politics.” *Id.* at \*78. Although the trial court seemed not to understand this testimony, we think it is obvious that Dr. Lichtman was criticizing Mr. Trende for misapplication of the governing legal standard and comparing the enacted plan to one in which there was “zero politics.” In fact, the trial court’s overall treatment of Dr. Lichtman, a noted national and international expert, was dismissive and frankly, mean-spirited. *See, e.g., id.* at \*86–87 (dismissing Dr. Lichtman as an “apologist” for the work of politicians).

197. *Id.* at \*92.

Mr. Trende and the *Szeliga* court repeatedly misstate and misapply the Court of Appeals' jurisprudence on partisan gerrymandering. These aren't word games. This is the crux of the constitutional problem. A plan isn't unconstitutional if it considers politics (as Mr. Trende testified); and a plan isn't unconstitutional if it considers political factors at the same level that it considers the constitutional factors (as Mr. Trende also seemed to testify); and—perhaps more controversially, but still supported by the Court of Appeals' statement of the test—a plan isn't unconstitutional if the constitutional factors operate in tension with one another and with the political factors. If that happens, the constitutional factors are not, it seems to us, subordinated to the political.<sup>198</sup> Thus, we think that even granting that the constitutional factors apply to federal congressional redistricting, the *Szeliga* opinion incorrectly applied the then-existing precedents regarding partisan gerrymandering.<sup>199</sup>

ii. *The Szeliga Opinion Is Inconsistent with the Subsequent Decision in 2022 Legislative Districting*

After the trial court issued its opinion in *Szeliga*, the Court of Appeals issued its opinion in *2022 Legislative Districting*.<sup>200</sup> Because of the timing, it would be unfair to criticize the *Szeliga* court for not accurately predicting what the Court of Appeals would say. Nevertheless, it is hard, in reading the opinions, to avoid the impression that the Court of Appeals was implicitly rejecting the decision in *Szeliga*.<sup>201</sup> The Court of Appeals clearly rejected the

---

198. Although the U.S. Supreme Court uses different terminology, this is the same point that was made in *Veith*: The “central problem” is not determining whether a jurisdiction has engaged in partisan gerrymandering. It is “determining when political gerrymandering has gone too far.” *Vieth v. Jubelirer*, 541 U.S. 267, 296 (2004) (plurality opinion).

199. To be clear, we have not attempted to reevaluate the data presented to the *Szeliga* court under the proper legal standards.

200. 481 Md. 507, 282 A.3d 147 (2022).

201. It is also possible to read the majority opinion in *2022 Legislative Districting* as completely foreclosing the argument made by the trial court in *Szeliga* that Article III, Section 4 applies to congressional redistricting. Although the Maryland Court of Appeals was careful to note that it was not considering the question of congressional redistricting, *id.* at 521 n.2, 282 A.3d at 155 n.2 (“Our discussion of ‘legislative redistricting’ in this case pertains only to the districting of the General Assembly under Article III. This case does not involve the separate process of drawing districts for seats in the United States Congress.”), each of the court’s other descriptions suggest that it rejected the trial court’s *Szeliga* analysis. *Id.* at 520 n.1, 282 A.3d at 154 n.1 (describing history of the term “legislative districts” in Maryland Constitution); *id.* at 521, 282 A.3d at 154 (describing the ‘70 and ‘72 amendments as “specific to State legislative redistricting”); *id.* at 526–27, 282 A.3d at 158 (“Article III, [Section] 4 of the State Constitution specifies the criteria to be considered for State legislative districts . . .”); *id.* at 521, 282 A.3d at 155 (“Article III of the Maryland Constitution pertains to the Legislative Branch – or, as the article is entitled, the ‘Legislative Department’ – of State government.” (emphasis added)); *id.* (“The first seven sections of . . . Article [III] concern the make-up of the General Assembly.”); *id.* at 522, 282 A.3d at 155 (Article III, Section 4 “sets forth

evidence that persuaded the *Szeliga* trial court. For example, the *Szeliga* trial court endorsed and relied on mathematical tests used to calculate the compactness of a district.<sup>202</sup> The Court of Appeals specifically rejected those same mathematical tests, finding them both inappropriate for Maryland’s geography<sup>203</sup> and not a part of the constitutional standard for compactness.<sup>204</sup> If the People of Maryland wanted these mathematical tests employed in determining compactness, the Court of Appeals’ majority wrote, they could have amended the Constitution to include them.<sup>205</sup> Likewise, the trial court’s *Szeliga* opinion was impressed by and substantially relied upon evidence introduced by Mr. Trende.<sup>206</sup> The Court of Appeals majority, by marked contrast, was not impressed at all by Mr. Trende’s analysis and testimony in the state legislative case.<sup>207</sup> It is hard to imagine that any of the factual underpinnings of the trial court’s partisan gerrymandering analysis in *Szeliga* survived the Court of Appeals’ subsequent decision in the state legislative districting case. Thus, although the Court of Appeals disclaimed that it was considering anything other than state legislative redistricting,<sup>208</sup> it effectively cut the legs out from the trial court’s analysis in *Szeliga*.

---

the criteria for determining the districts that the State senators and delegates represent . . .”). Although these descriptions are not part of the holding of *2022 Legislative Districting*, neither are they a “‘casual or hurried word[,]’ or a ‘by the way’ statement” that would allow them to be ignored as mere *obiter dicta*. *Wallace & Gale Asbestos Settlement Tr. v. Carter*, 211 Md. App. 488, 527, 65 A.3d 749, 772 (2013) (alteration in original) (citation omitted) (discussing *obiter dicta*), *rev’d on other grounds*, 439 Md. 333, 96 A.3d 147 (2014). Thus, we think it is possible, maybe even likely, that a future court will find that the central holding of *Szeliga*—that Article III, Section 4 applies to congressional districts—is foreclosed by the Court of Appeals’ considered dicta in *2022 Legislative Districting*.

202. *Szeliga*, No. C-02-CV-21-001816, at \*89 (“[B]y application of each of the four ‘most common compactness metrics,’ *i.e.*, the Reock score; the Polsby-Popper score; the Inverse Schwartzberg score; and the Convex Hull score, the districts included in the 2021 [Congressional] Plan are ‘quite non-compact’ compared to prior Maryland Congressional maps and to other Congressional maps . . . . It is notable that the 2021 Plan reflects compact[ness] scores that range from a ‘limited’ number of state maps worse than Maryland, to only six other maps with worse scores, to the worst Inverse Schwartzberg score in the last fifty years in the United States, to ‘very poorly relative to anything drawn in the last fifty years in the United States.’”).

203. *In re 2022 Legis. Districting of the State*, 481 Md. at 574–75, 282 A.3d at 187–88.

204. *Id.* at 574, 282 A.3d at 187.

205. *Id.* (noting that other state constitutions, including Missouri Constitution, require use of mathematical tests for compactness).

206. *Szeliga*, No. C-02-CV-21-001816, at \*59–68, \*82–83 (“[T]he trial judge gave great weight to the testimony and evidence presented by Sean Trende.”); *id.* at 84 (“Mr. Trende’s presentation was an example of a deliberate, multifaceted, and reliable presentation that this fact finder found and determined to be very powerful.”).

207. *In re 2022 Legis. Districting of the State*, 481 Md. at 570–78, 282 A.3d at 184–89.

208. *Id.* at 521 n.2, 282 A.3d at 155 n.2.

### 3. *Precedential Value of Szeliga v. Lamone for Future Redistricting*

The trial court's *Szeliga* opinion is a *nisi prius* opinion by a single judge in the Circuit Court for Anne Arundel County. As a matter of law, it is not a mandatory precedent that any court is obligated to follow.<sup>209</sup> Nor should it have significant persuasive value in any judicial proceeding as it is based on an erroneous interpretation of Article III, Section 4 of the Maryland Constitution. Moreover, for the same reasons, it should not even be a persuasive authority in the future consideration of congressional redistricting by the Maryland General Assembly as that body exercises its constitutional function to formulate a plan of congressional redistricting, or by the Governor of Maryland as the Governor exercises the constitutional function of that office to decide whether to approve or to veto that plan.

#### CONCLUSION

We think that it is clear that the *Szeliga* court was wrong in finding that the constitutional standards set forth in Article III, Section 4 of the Maryland Constitution—requiring “[d]ue regard” for “natural boundaries and the boundaries of political subdivisions”—apply to federal congressional redistricting. There is no evidence that points in that direction. All of the evidence, in fact, points in the opposite direction. In particular, both a textualist and an originalist interpretation clearly indicate that Article III, Section 4 applies only to state legislative redistricting, not to federal congressional redistricting. As a result, we conclude that Article III, Section 4 ought to be interpreted to apply exclusively to state legislative districts. Moreover, there is little support for the *Szeliga* court's conclusion that if those constitutional standards apply, the enacted plan violated those standards as they had been applied at the time of the *Szeliga* opinion. This is even more true now, after the Court of Appeals' most recent decision interpreting those standards.<sup>210</sup> As a result, it is our view that while the *Szeliga* opinion's view of Article III, Section 4 has no mandatory precedential value, it should also have no persuasive effect on future federal congressional redistricting in Maryland.

---

209. *Powell v. Md. Dep't of Health*, 455 Md. 520, 561, 168 A.3d 857, 881 (2017) (Getty, J., dissenting) (“And, while a Maryland appellate court's resolution of a legal claim has binding precedential weight, a Maryland trial court's holding does not.”); *Dep't of Health & Mental Hygiene v. Dillman*, 116 Md. App. 27, 41–42, 695 A.2d 211, (1997) (“Opinions of the lower courts are not binding on the Court of Appeals or [the] Court [of Special Appeals] . . . .”); *see also* MD. R. 1-104(a) (stating that only *reported* appellate court opinions may be cited as “precedent within the rule of stare decisis [or] persuasive authority”).

210. *In re 2022 Legis. Districting of the State*, 481 Md. 507, 282 A.3d 147.