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The Special Laws Prohibition, Maryland's Charter Counties, and the "Avoidance of Unthinkable Outcomes"

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**THE SPECIAL LAWS PROHIBITION, MARYLAND’S CHARTER
COUNTIES, AND THE “AVOIDANCE OF UNTHINKABLE
OUTCOMES”**

DAN FRIEDMAN*

*Recently, Maryland appellate courts have suggested that county councils in Maryland’s charter home rule counties are prohibited from adopting laws that violate the State constitutional prohibition on special laws. Although none of the traditional techniques of constitutional interpretation require that this should be the case, this article suggests that courts can and should reach this result through a doctrine that I will call the “avoidance of unthinkable outcomes,” an interpretive technique derived from the United States Supreme Court’s decision in *Bolling v. Sharpe* and the Supreme Court of Maryland’s decision in *Attorney General v. Waldron*. The article concludes with my view that constitutional interpretation requires an interpreter to use all available interpretive techniques, constrained by professional norms, to come to the best possible constitutional interpretation.*

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* Judge, Appellate Court of Maryland. 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). I do not believe that the discussion here (or in a similar article)—focused exclusively on improving public understanding of a constitutional provision and not taking sides in that discussion—could “affect the outcome” or “impair the fairness” of any proceeding, but rather I think that such projects only serve to “promote[] public confidence in the independence, integrity, and impartiality of the judiciary.” *Id.*; MD. R. 18-101.2(a). To the best of my knowledge, however, there are no current cases pending or impending in my Court or any other court concerning these issues, rendering Rule 18-102.10(a) inapplicable.

Thanks to my teaching partner, co-author, and friend, Richard Boldt. You have made all of these ideas better and I don’t thank you enough.

Finally, in a small effort to promote academic fairness and equity, I 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).

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INTRODUCTION

In 2012, I wrote an analysis of the special laws prohibition¹ found in Article III, Section 33 of the Maryland Constitution.² I wrote everything that I could think of to say about the special laws prohibition: I discussed the cases

1. Although there is more to it, the heart of Article III, Section 33 provides, “[a]nd the General Assembly shall pass no special Law, for any case, for which provision has been made, by an existing General Law,” which is generally understood to prohibit the General Assembly from legislating to give favorable treatment to the privileged few. MD. CONST. art. III, § 33; *see* *Cities Serv. Co. v. Governor*, 290 Md. 553, 568–69, 431 A.2d 663, 672 (1981). For the full text of Article III, § 33, *see infra* note 37.

2. Dan Friedman, *Applying Federal Constitutional Theory to the Interpretation of State Constitutions: The Ban on Special Laws in Maryland*, 71 MD. L. REV. 411 (2012) [hereinafter Friedman, *Special Laws*]. That article takes several interpretive techniques developed and most often discussed in connection with the interpretation of the federal constitution—textualism, originalism, structuralism, moral interpretation theory, comparative constitutional law, and common law constitutional theory—and applies them to the interpretation of the special laws prohibition of the Maryland Constitution. I think that using these and other interpretive techniques together gives me a better perspective to determine the best possible interpretation of a constitutional provision. *See infra* notes 130–137 and accompanying text. I have used this method several times since then to develop the best possible interpretation of other provisions of the Maryland Declaration of Rights and Constitution. *See* 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 (2022) [hereinafter Friedman, *Ex Post Facto*]; 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*].

that interpret it;³ I analyzed every word of its text;⁴ I examined its history;⁵ I explored the theories of equality that it might imply;⁶ I considered its implications for the separation of powers;⁷ I compared our special laws prohibition to that of Indiana (from whom we borrowed a portion of it)⁸ and of Pennsylvania (from whom, despite geographic and temporal proximity, we probably didn't);⁹ I critiqued the existing judicial test derived from the 1977 case of *Cities Service Co. v. Governor*,¹⁰ and I proposed a new test.¹¹

But with all of that, I didn't write much about to which legislative bodies the special laws prohibition applies.¹² I took for granted that it applied only to the Maryland General Assembly.¹³ In the ten years since I wrote that article, however, Maryland appellate courts¹⁴ have begun a new application of the special laws prohibition by treating it as if it applies to charter counties:

3. Friedman, *Special Laws*, *supra* note 2, at 420–24, 464–65 (discussing principally, *Cities Service Co. v. Governor* and whether the case followed or revised prior special laws prohibition decisions).

4. *Id.* at 427–33 (discussing meaning of terms, “special law,” “local law,” and “general law”).

5. *Id.* at 436–42 (discussing the adoption of Article III, § 33 at the 1864 Maryland Constitutional Convention).

6. *Id.* at 444–48 (discussing the right to be treated as well as others and the right not to have others treated better).

7. *Id.* at 443–44, 459–61 (discussing special laws prohibition as preventing the legislative branch from undertaking tasks that are now more clearly associated with the judicial branch).

8. *Id.* at 439, 451–53 (describing, among others, Delegate Stockbridge's reviewing of exemplary special laws provisions from other states in *The American's Guide* and selecting Indiana's as a model for Maryland's).

9. *Id.* at 455–57.

10. *Id.* at 424–27 (describing test from *Cities Service*); *see* *Cities Serv. Co. v. Governor*, 290 Md. 553, 568–69, 431 A.2d 663, 672 (1981).

11. Friedman, *Special Laws*, *supra* note 2, at 466–70 (proposing new test). Since 2012, there has also been an explosion of excellent scholarship on state constitutional special laws prohibitions. *See, e.g.*, Chloe Slusher, Note, *Unconstitutional State Special Laws: Is Rational Basis Review the Rational Solution?* 87 MO. L. REV. 689 (2022); Constance Van Kley, Comment, *Article V, Section 12 of the Montana Constitution: Restoring Meaning to a Forgotten Provision*, 79 MONT. L. REV. 115 (2018); Evan C. Zoldan, *Legislative Design and the Controllable Costs of Special Legislation*, 78 MD. L. REV. 415 (2019); Anthony Schutz, *State Constitutional Restrictions on Special Legislation as Structural Restraints*, 40 J. LEGIS. 39 (2014); Justin R. Long, *State Constitutional Prohibitions on Special Laws*, 60 CLEV. ST. L. REV. 719 (2012).

12. I also didn't consider whether the special laws prohibition applied to the executive branch of local governments. That topic is discussed *infra* note 98.

13. Friedman, *Special Laws*, *supra* note 2, at 427 n.82 (identifying Maryland General Assembly as “the only body subject to the [special laws] prohibition”); *id.* at 465–66 (arguing that it would not upset reliance interest to overrule the decision in *Cities Service*, because only one party is subject to the provision's regulation: the Maryland General Assembly).

14. On December 14, 2022, a constitutional amendment changing the names of Maryland's appellate courts became effective. In this article, I will refer to the courts (and their personnel) by their new names, even when it looks a little ridiculous. *See, e.g., infra* note 43 (discussing Robert C. Murphy, who, as a result, is addressed by a title he never held and as leading a court whose name did not exist in his lifetime).

- *First*, in 2012, in *Jones v. Anne Arundel County*,¹⁵ in considering whether an incarcerated county councilmember continued to “reside” in the district that he represented, Justice Lynne A. Battaglia wrote for the Supreme Court of Maryland that: “If the General Assembly cannot enact a special law when a general law applies, then under the Express Powers Act, Anne Arundel County cannot be empowered to enact a special law where an applicable local law exists.”¹⁶ The Court cited no authority for this proposition, as it was, at the time, a completely novel interpretation of the special laws prohibition. No party to the litigation had argued this theory. It was not mentioned in the parties’ briefs at all. It was also likely *obiter dicta* as the Court proceeded to consider and rule on other grounds to invalidate the statute.¹⁷
- *Second*, in 2016, the Supreme Court of Maryland, in *Kenwood Gardens Condominium v. Whalen Properties*¹⁸ rejected a claim that a resolution adopted by the Baltimore County Council, by which it approved a developer’s planned unit development, was an unconstitutional special law.¹⁹ In describing the Kenwood Garden plaintiff’s claim, Justice Clayton Greene, Jr. explained the plaintiff’s theory that the special laws prohibition “flows through” to county governments “via the Express Powers Act.”²⁰ In explaining the plaintiff’s theory, Justice Greene cited only the special laws prohibition²¹ and the Express Powers Act.²² The Court never got further in explaining this new theory of how the special laws prohibition applies to local governments. Although Justice Greene began his analysis by observing that the intermediate appellate court’s unreported opinion found the bill did not violate the special laws prohibition, he then held only that “there is nothing unlawful or improper” about the bill, thus apparently assuming without

15. 432 Md. 386, 69 A.3d 426 (2013).

16. *Id.* at 403, 69 A.3d at 436.

17. *Id.* at 412–13, 69 A.2d at 442 (holding that ordinance violated Section 202(c) the Anne Arundel County Charter); see also Dan Friedman, *Jones Decision Creates Mischief for Charter Counties*, DAILY RECORD, Aug. 5, 2013, at 15A (describing this aspect of the Court’s opinion as *obiter dicta*).

18. 449 Md. 313, 144 A.3d 647 (2016).

19. *Id.* at 321 n.4, 343–44, 144 A.3d at 652 n.4, 666.

20. *Id.* at 321 n.4, 144 A.3d at 652 n.4 (describing the special laws prohibition as flowing through to the local government through the Express Powers Act).

21. *Id.* (citing MD. CONST. art. III, § 33).

22. *Id.* (citing MD. CODE ANN., LOC. GOV’T § 10-202 (1974, 2013 Repl. Vol.)).

deciding that the special laws prohibition in fact applies to charter counties.²³

- *Third*, in *Howard County v. McClain*,²⁴ the Appellate Court of Maryland invalidated a zoning law adopted by the Howard County Council to permit Glenelg Country School to build a childcare facility on the very edge of its property on the grounds that it was an unconstitutional special law.²⁵ The Appellate Court of Maryland, in an opinion by retired Supreme Court Justice Sally D. Adkins sitting by designation, did not even address the question of whether the special laws prohibition applies to local government because Howard County, relying on *Kenwood Gardens*, affirmatively conceded that it did.²⁶
- Finally, *fourth*, just this year, the Supreme Court of Maryland in *Prince George's County Council v. Concerned Citizens of Prince George's County*,²⁷ permitted changes to the Prince George's County zoning code permitting high-density redevelopment that applied only to the Freeway Airport property despite a uniformity challenge. Because of the resolution of the uniformity challenge, neither the Appellate Court of Maryland's unreported opinion, nor Justice Steven B. Gould's majority opinion for the Supreme Court of Maryland, reached the question of whether the enactment by Prince George's County violated the special laws prohibition.²⁸ Justice Brynja M. Booth's dissent disagreed with the majority on both the uniformity analysis and the necessity for a remand, arguing that the case should have been remanded for consideration of, among other things, whether the proposed zoning change violated the special laws prohibition.²⁹

23. *Id.* at 343–44, 144 A.3d at 666 (holding that the bill was not an unconstitutional special law because it “was intended to provide alternative compatibility requirements for a specified class of future [planned unit developments] and does not apply solely to the Whalen Properties [planned unit development] application”).

24. 254 Md. App. 190, 270 A.3d 1062 (2022).

25. *Id.* at 204, 270 A.3d at 1070.

26. As an active member of the Appellate Court of Maryland, I voted to report Justice Adkins's opinion in *McClain* (which I understand to mean that I agree that it is correctly decided and that reporting the opinion is of “substantial interest as [a] precedent[.],” MD. R. 8-605.1(a)), but only because the appellant, Howard County, expressly waived the issue.

27. 485 Md. 150, 300 A.3d 857 (2023).

28. *Id.* at 174 n.13, 300 A.3d at 871 n.13.

29. *Id.* at 262, 300 A.3d at 924 (Booth, J., dissenting).

Thus, although no appellate decision has clearly held that the special laws prohibition applies to charter counties³⁰ or articulated a clear interpretive theory or mechanism by which it would apply,³¹ it seems clear that the appellate courts of Maryland now believe that it does.³²

30. In these four cases, the appellate courts have applied (or at least considered applying) the special laws prohibition to Anne Arundel, Baltimore, Howard and Prince George's Counties, each of which has adopted the charter form of government pursuant to Article XI-A of the Maryland Constitution. MD. CONST. art. XI-A. I assume, therefore, that the courts believe that the special laws prohibition applies to each county that has adopted the charter form of county government: Anne Arundel, Baltimore County, Cecil, Dorchester, Frederick, Harford, Howard, Montgomery, Prince George's, Talbot, and Wicomico. It is less clear whether this theory also requires that the special laws prohibition apply to other forms of local government. Baltimore City, because it obtained local home rule before the adoption of Article XI-A in 1915, has local legislative powers granted by the General Assembly but that are not codified in the Express Powers Act. Baltimore City's express powers are codified instead in Article 4, Section 6 of the Public Local Laws of Maryland, and ultimately, in Article II of the Baltimore City Charter. *See* MD. CONST. art. XI-A, § 2; BALT. CITY CHARTER art. II; *see also* DAN FRIEDMAN, THE MARYLAND CONSTITUTION: A REFERENCE GUIDE 220 (Praeger ed., 2006) [hereinafter FRIEDMAN, THE MARYLAND CONSTITUTION] (“[T]he City’s enumerated powers may be found at Article II of the Baltimore City Charter.”); *Montgomery Citizens League v. Greenhalgh*, 253 Md. 151, 163–65, 252 A.2d 242, 248–49 (1969) (determining that, despite their different and separate source and text, the express powers of the charter counties and Baltimore City are equally broad). I feel confident that Baltimore City’s legislative power will, under a parity of reasoning with the analysis regarding the other charter counties, also be subject to the special laws prohibition. Six of Maryland’s counties—Allegany, Caroline, Charles, Kent, Queen Anne’s, and Worcester—have adopted code home rule pursuant to Article XI-F of the Maryland Constitution. Those counties, like the charter home rule counties, also have an express powers act that sets forth their legislative powers. MD. ANN. CODE, LOCAL GOV’T § 10-301 *et seq.* Thus, I imagine that these counties may also be subject to the special laws prohibition under the same theory. The remaining six Maryland counties—Calvert, Carroll, Garrett, St. Mary’s, Somerset, and Washington—are governed by the commissioner form of county government and have no home rule legislative power. As a result, I think, the special laws prohibition cannot apply to those counties. Finally, Maryland municipalities have a limited form of municipal home rule pursuant to Article XI-E of the Maryland Constitution and their respective municipal charters. It is not at all plain yet—at least to me—whether and to what extent the special laws prohibition might also be extended to apply to municipalities.

31. I think that failure to identify the mechanism by which the special laws prohibition is made applicable to the charter counties is a serious deficiency. After all, even with a clear textual basis in the Fourteenth Amendment, the precise scope and mechanism of the incorporation of the Bill of Rights against the states was among the most important American constitutional questions of the second half of the twentieth century. *See, e.g.,* Richard Boldt & Dan Friedman, *Constitutional Incorporation: A Consideration of the Judicial Function in State and Federal Constitutional Interpretation*, 76 MD. L. REV. 309, 316–25 (2017) (describing theories of incorporation of federal Bill of Rights protections against the states and listing further sources).

32. In each of these four cases (and likely in many future cases in which it will be asserted that the special laws prohibition applies to charter counties), there were sub-constitutional theories that could have resolved, or indeed did resolve, the legal issue. In *Jones*, the case was resolved on the sub-constitutional grounds of the interpretation of the Anne Arundel County Charter. *Jones v. Anne Arundel County*, 432 Md. 386, 411, 69 A.3d 426, 441 (2013) (interpreting the term “residence” as it appears in Section 202(c) of the Anne Arundel County Charter). In *Kenwood Gardens, McClain*, and *Concerned Citizens*, I think the plaintiffs’ allegations were really that the respective county councils engaged in the prohibited practice of “spot zoning,” that is, that they placed a small area in a different zoning classification than the surrounding properties. *See* Mayor & City Council of

My initial reaction to this new application was not favorable. I wrote an article in *The Daily Record* arguing that the special laws prohibition does not apply to charter counties and urging the charter counties to seek reconsideration of that aspect of the *Jones* decision.³³ I have since changed my mind. Although I still think that none of the traditional theories of constitutional interpretation support the application of the special laws prohibition to charter counties, I think that the Supreme Court of Maryland can and should apply it under an interpretive theory that I will call “avoidance of unthinkable outcomes,” an interpretive technique used by the U.S. Supreme Court in *Bolling v. Sharpe*³⁴ and by the Supreme Court of Maryland in *Attorney General v. Waldron*.³⁵ To get to that conclusion I will, in Section I, explain why none of the traditional interpretive techniques satisfactorily explain how or why the special laws prohibition applies to charter counties; in Section II, I’ll explain how the respective courts decided *Bolling* and *Waldron* and why the same technique might work here; and in Section III, I’ll explain how this fits into my overall view of how judges should interpret constitutions.

I. NONE OF THE TRADITIONAL TECHNIQUES FOR INTERPRETING
CONSTITUTIONS SATISFACTORILY EXPLAINS WHY THE SPECIAL LAWS
PROHIBITION APPLIES TO CHARTER COUNTIES

The special laws prohibition provides that “the General Assembly shall pass no special Law, for any case, for which provision has been made, by an existing General Law.”³⁶ It is situated as the second of three sentences in Article III, Section 33, each of which deals with an aspect of the problem of special laws.³⁷ Moreover, Article III, Section 33 resides within Article III,

Rockville v. Rylyns Enters., Inc., 372 Md. 514, 545–47, 814 A.2d 469, 487–488 (2002) (discussing common law prohibition on “spot zoning”). Under traditional modes of analysis, these cases should have been resolved by those sub-constitutional theories—not the constitutional special laws prohibition—pursuant to the doctrine of constitutional avoidance. *See, e.g.*, *VNA Hospice of Md. v. Dep’t of Health & Mental Hygiene*, 406 Md. 584, 606–09, 961 A.2d 557, 570–72 (2008) (“[T]his Court has regularly adhered to the principle that we will not reach a constitutional issue when a case can properly be disposed of on a non-constitutional ground.” (quoting *State v. Lancaster*, 332 Md. 385, 404 n.13, 631 A.2d 453, 463 n.13 (1993))).

33. Dan Friedman, *Jones Decision Creates Mischief for Charter Counties*, DAILY RECORD, Aug. 5, 2013, at 15A.They didn’t.

34. 347 U.S. 497 (1954).

35. 289 Md. 683, 426 A.2d 929 (1981).

36. MD. CONST. art. III, § 33.

37. The whole of Article III, Section 33 provides that:

The General Assembly shall not pass local, or special Laws, in any of the following enumerated cases, viz.: For extending the time for the collection of taxes; granting divorces; changing the name of any person; providing for the sale of real estate, belonging to minors, or other persons laboring under legal disabilities, by executors, administrators, guardians or trustees; giving effect

which consists of fifty-nine sections³⁸ that all concern the operation of the “Legislative Department” of Maryland government, that is, the Maryland General Assembly. The special laws prohibition was added to the Maryland Constitution in 1864.³⁹ Critically, it was adopted before the advent of local home rule for any local government in Maryland.⁴⁰ At that time, the Maryland General Assembly was the sole legislative body in the State, and it passed laws applicable statewide and for local jurisdictions. Thus, the text and original meaning of the special laws prohibition were focused exclusively on the *state* legislature: the Maryland General Assembly.

In 1914, the Maryland General Assembly proposed, and in 1915, the People of Maryland ratified, the “Home Rule Amendment” to the Maryland Constitution, which was codified as Article XI-A.⁴¹ The idea, championed by the Progressive movement, was to free the General Assembly from the responsibility to pass local legislation and to move the legislative function closer to the people.⁴² A tour of Article XI-A helps explain its function.⁴³

to informal, or invalid deeds or wills; refunding money paid into the State Treasury, or releasing persons from their debts, or obligations to the State, unless recommended by the Governor, or officers of the Treasury Department. *And the General Assembly shall pass no special Law, for any case, for which provision has been made, by an existing General Law.* The General Assembly, at its first Session after the adoption of this Constitution, shall pass General Laws, providing for the cases enumerated in this section, which are not already adequately provided for, and for all other cases, where a General Law can be made applicable.

Id. (emphasis added). Most analyses treat the second sentence independently and do not consider it in relationship to the other sentences that surround it. Friedman, *Special Laws*, *supra* note 2, at 433, 438–40; FRIEDMAN, *THE MARYLAND CONSTITUTION*, *supra* note 30, at 114–15.

38. The Sections of Article III are numbered §§ 1–61, but then subtract six for section numbers that are currently vacant (the contents of these sections having been repealed or transferred) and add four for the additional sections shoehorned in: §§ 35A, 40A, 40B, and 40C.

39. Friedman, *Special Laws*, *supra* note 2, at 436–42.

40. A measure of local home rule, that is, the power to legislate, was first granted to Baltimore City by the Maryland General Assembly in the City’s 1796 charter. Acts of 1796, ch. 68, § IX, 1796 Md. Laws 260 (“And be it enacted, That the [the Mayor and City Council of Baltimore] shall have full power and authority to enact and pass all laws and ordinances necessary to [the following list of topics.]”).

41. Acts of 1914, ch. 416, 1914 Md. Laws 657 (ratified 1915); FRIEDMAN, *THE MARYLAND CONSTITUTION*, *supra* note 30, at 217, 350 n.1 (discussing Progressive-era roots of Home Rule Amendment). Article XI-A was codified to follow the existing Article XI, I suppose, so that those articles concerning local government would be together. Of course, better still would have been to delete Article XI when Article XI-A was adopted, but regrettably, that wasn’t done. FRIEDMAN, *THE MARYLAND CONSTITUTION*, *supra* note 30, at 209, 211 (discussing limited continuing significance of Article XI).

42. FRIEDMAN, *THE MARYLAND CONSTITUTION*, *supra* note 30, at 217, 350 n.1 (first citing G. ALAN TARR, *UNDERSTANDING STATE CONSTITUTIONS* 150–53 (1998); then citing BENJAMIN PARKE DEWITT, *THE PROGRESSIVE MOVEMENT* 277–298 (1915)).

43. Chief Justice Robert C. Murphy of the Supreme Court of Maryland provided a similar tour of Article XI-A in *Maryland State Admin. Bd. of Elec. Laws v. Talbot County*, 316 Md. 332, 344–45, 558 A.2d 724, 730 (1988).

First, Article XI-A, Section 1 (and the subsequently-adopted Article XI-A, Section 1A) concern the method by which counties may obtain charter home rule. Article XI-A, Section 2 commands the General Assembly to provide a grant of express powers to the charter counties, that is, to identify the topics on which the charter counties may legislate.⁴⁴ That is accomplished, of course, in the Express Powers Act, which is currently codified at LG § 10-301 *et seq.*⁴⁵ Article XI-A, Section 3 creates the local legislative bodies (that is, county councils in charter counties and the Baltimore City Council in Baltimore City) and provides some procedural rules for those local legislative bodies. Specifically, Article XI-A, Section 3 provides rules governing the length of the local legislative session;⁴⁶ requirements for publication of laws before adoption; and provides interpretive rules for local ordinances. Article XI-A, Section 4 prohibits the General Assembly from legislating on the topics that it has identified (in the Express Powers Act enacted pursuant to Article XI-A, Section 2) as topics for legislation by the county councils in charter counties (and by the Baltimore City Council). Article XI-A, Section

44. Most of those express powers are codified, for the charter counties in §§ 10-301 to 10-330 of the Local Government Article of the Maryland Code and for Baltimore City in Article II of the Baltimore City Charter. *Piscatelli v. Bd. of Liquor License Comm'rs*, 378 Md. 623, 634, 837 A.2d 931, 937–38 (2003). Other express powers are set forth elsewhere in the Code, including in the Land Use Article. *Id.* All charter counties (that is, except Baltimore City) receive the same express powers through the Express Powers Act. FRIEDMAN, *THE MARYLAND CONSTITUTION*, *supra* note 30, at 219–20.

Recent opinions of the Supreme Court of Maryland have emphasized that the grant of express powers is to the local *legislative* body. *See, e.g.*, *K. Hovnanian Homes of Maryland, LLC v. Mayor of Havre de Grace*, 472 Md. 267, 290, 244 A.3d 1174, 1187 (2021); *River Walk Apartments, LLC v. Twigg*, 396 Md. 527, 545, 914 A.2d 770, 776 (2007); *J.P. Delphey Ltd. P'ship v. Mayor of Frederick*, 396 Md. 180, 193, 913 A.2d 28, 35 (2006). It is not clear (at least to me) whether this relatively recent line of cases, which seem to emphasize the separation of powers in local government, is compatible with older cases holding that there is no separation of powers principle in local government. *See, e.g.*, *Sugarloaf Citizens Ass'n v. Gudis*, 319 Md. 558, 572, 573 A.2d 1325, 1332–33 (1990); *Barranca v. Prince George's County*, 264 Md. 562, 571, 287 A.2d 286, 291 (1972); *Pressman v. D'Alesandro*, 193 Md. 672, 679, 69 A.2d 453, 454 (1949); *see also infra* note 97 (discussing separation of powers in local government).

45. When one reads Article XI-A, Section 2, it is worth noting that some of the unfortunate textual complexity exists because the constitutional text had to accommodate both the pre-existing home rule in Baltimore City, *see supra* note 40, and the possibility of future charter home rule in other counties. In this article, to avoid the same problem, I will refer to the charter county councils but intend it to mean, also, the Baltimore City Council.

46. Originally, the charter county councils were only permitted to legislate during one month of the year and violation of that limitation could result in a court's invalidating the legislation. *See, e.g.*, *Schneider v. Lansdale*, 191 Md. 317, 328, 61 A.2d 671, 676 (1948) (holding that budget function is not "legislation" and, therefore, not subject to limitation on legislative meetings); *Scully v. Montgomery Citizens League*, 249 Md. 271, 284, 239 A.2d 92, 99 (1968) (holding that the County Council could not evade the limitation on meetings by styling its meetings as executive, rather than as legislative). A constitutional amendment relaxed these timing requirements, Act of 1955, ch. 557 (ratified 1956), and they are now apparently easier to administer and do not result in much litigation any longer. *Montgomery Citizens League v. Greenhalgh*, 253 Md. 151, 157, 252 A.2d 242, 245 (1969) (rejecting a challenge based on alleged noncompliance with legislative days requirement).

5 describes the method of amending charters. Article XI-A, Section 6 transfers the power for establishing the form of county government (i.e., the number, compensation, powers, and duties of county officials) to the voters of the counties and for those forms of government to be placed in the counties' respective charters. And Article XI-A, Section 7 contains the technical rules regarding petitioning to create and modify county charters. Thus, each charter county can, through its charter, adopt its own form and structure of government, and can only legislate on the topics that the General Assembly assigns (which, not incidentally, the General Assembly also promises not to legislate about).

The question then, is whether some aspect of the home rule amendment caused the incorporation of the special laws prohibition against the county councils in the charter counties. In my prior writing, I have used theories of interpretation originally conceived for interpreting the federal constitution, including textualism, originalism, structuralism, and common law interpretation, to interpret provisions of the state constitution.⁴⁷ Here, however, as I will show, none of the applicable theories of interpretation satisfactorily explains the proposed interpretation.⁴⁸

47. See generally Friedman, *Ex Post Facto*, *supra* note 2; Friedman, *Special Laws*, *supra* note 2; Friedman, *Article 19*, *supra* note 2.

48. In past articles, I have also considered moral reasoning interpretive theory, comparative constitutional interpretive theory, and most recently, critical race theory. Moreover, I have argued that using all available interpretive techniques is important as each may provide a new perspective and because it is important for interpreters to avoid cherry-picking an interpretive technique that gives a preferred outcome. Despite this, however, I am not going to rehearse each of these other interpretive techniques here. Suffice it to say, I have tried and found each of them unhelpful in resolving the question of whether and by what mechanism the special laws prohibition is applied against the charter counties.

One more word about critical race theory is appropriate here. Critical race theory is an important and vital interpretive technique. It compels us to recognize that accommodating slavery, promoting racism, and maintaining white supremacy are important and central features of our federal constitutional design and, I posit, an even more important feature of the Maryland constitutional design. Friedman, *Ex Post Facto*, *supra* note 2, at 80–82. I can imagine a history regarding the special laws prohibition that would reflect this. In Maryland, our charter counties contain our largest concentrations of African-American citizens. Baltimore City and Prince George's County are majority African-American jurisdictions. Montgomery, Baltimore, and Anne Arundel counties each contain substantial African-American populations. Thus, if those charter counties sought to pass anti-discrimination legislation and were thwarted by the application (or non-application) of the special laws prohibition (which concerns a limited aspect of equality, specifically, prohibiting favorable treatment to the privileged few, *see supra* note 1), I could see how critical race theory could offer insight. And surely, there is often a question as to whether anti-discrimination legislation should be adopted statewide or in a pilot jurisdiction. See, e.g., J. Anthony Lukas, *Anti-Racial Ban Bill Is Delayed: City Supporters to Await State-Wide Action*, *BALT. SUN*, Oct. 30, 1961, at 23 (discussing decision to defer public accommodations law in Baltimore City in favor of statewide law); Joseph R. L. Sterne, *Racial Bars by Hotels Hit as 'Stupidity': Negro Council Member Sees 'Sentiment' Favoring Integration*, *BALT. SUN*, Feb. 5, 1957, at 34. But in reality, I don't think that anybody has ever considered the applicability of the special laws prohibition to the

A. Textualism

Textualism requires careful attention to the text, grammar, and even punctuation of the constitution.⁴⁹ A textualist would find scant support for the idea that the adoption of Article XI-A and the creation of charter home rule counties caused the special laws prohibition to be incorporated against those counties. There is certainly no text that performs the incorporation. Moreover, a textualist would find it to be important evidence against incorporation that Article III, Section 33 mentions—*three times!*—that it is directed to the “General Assembly” and not any other legislative body.⁵⁰

charter counties as a reason to adopt or not adopt either discriminatory or remedial legislation. It just isn't how it happened. Of course, that doesn't preclude the possibility that it will in the future.

49. See, e.g., Friedman, *Special Laws*, *supra* note 2, at 427–28 (discussing textualism and associated scholarship, including MICHAEL J. GERHARDT, STEPHEN M. GRIFFIN & THOMAS D. ROWE, JR., *CONSTITUTIONAL THEORY: ARGUMENTS AND PERSPECTIVES* 175–93 (3d ed. 2007); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 12–13 (1980); and Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999).

50. See Friedman, *Special Laws*, *supra* note 2, at 433. In my view, the provision's repeated use of the term “General Assembly” is important evidence, but not necessarily dispositive of the interpretive question. I'll use a federal constitutional example to explain why not. The First Amendment to the United States Constitution begins with the phrase, “Congress shall make no law . . .” U.S. CONST. amend I (emphasis added). Neither the word, “Congress,” nor the phrase, “make no law” (which describes an action that only Congress can take) are read literally by mainstream interpreters. Rather, we have always understood that the First Amendment applies *horizontally* to the executive and judicial branches of the federal government as well as to the legislative branch. See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 326 (2010) (“Courts, too, are bound by the First Amendment.”); *N.Y. Times Co. v. United States*, 403 U.S. 713, 726–27 (1971) (Brennan, J., concurring) (holding that the First Amendment prohibits president from exercising executive power to block publication of the “Pentagon Papers”). Moreover, since the adoption of the Fourteenth Amendment, the protections of the First Amendment have been incorporated *vertically* as well, against all three branches of state and local governments. See *generally* *Gitlow v. New York*, 268 U.S. 652 (1925) (announcing incorporation of the First Amendment through the Fourteenth Amendment).

There are a few academics that argue that this mainstream interpretation violates textualist interpretive theory. See, e.g., Sonja R. West, *Suing the President for First Amendment Violations*, 71 OKLA. L. REV. 321 (2018) (reviewing literature); Daniel J. Hemel, *Executive Action and the First Amendment's First Word*, 40 PEPP. L. REV. 601 (2013); GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION & AMERICAN LEGAL HISTORY* 43 (2004); Mark P. Denbeaux, *The First Word of the First Amendment*, 80 NW. U. L. REV. 1156 (1986). I think that this textualist objection is wrong and is overcome in two distinct ways. First, as to the vertical incorporation against all three branches of state and local governments, the adoption of the Fourteenth Amendment fundamentally changed—and was intended to change—the nature of the relationship between the People, the states, and the federal government. And, under even the most restrictive reading of the Fourteenth Amendment, the five basic freedoms of religion, freedom of speech, freedom of the press, freedom to assemble, and freedom to petition the government, are protected from state encroachment. Boldt & Friedman, *supra* note 31, at 316–25 (describing theories of incorporation of bill of rights protections against the states). Second, as to the horizontal incorporation to the other branches of the federal government, there is a plausible textual pathway in the Ninth Amendment. PHILIP BOBBITT, *CONSTITUTIONAL FATE* 101 (1982) (identifying the Ninth Amendment as a potential textual basis for expanding the First Amendment protection to

A textualist would also note that Article III, Section 33 is particularly problematic to incorporate against the charter counties. That's because the text of the first sentence of Article III, Section 33 pairs special laws with a prohibition on the General Assembly passing local laws in certain situations.⁵¹ But charter counties may pass "local laws." In fact, that's the only kind of laws that they can pass.⁵² It doesn't make linguistic sense to read Article III, Section 33 so that one half of the sentence can be applied to charter counties, but the other half can't. Logically, it seems to me, it is all or neither—and it can't be all.⁵³

B. Originalism

Originalism requires modern interpreters to ascertain and apply the original intended meaning of the framers or ratifiers or the original public meaning of a constitutional provision.⁵⁴ An originalist interpreter would find

other branches of federal government); *see also* Lochlan F. Shelfer, *How the Constitution Shall Not Be Construed*, 2017 BYU L. REV. 331, 378 (2017).

In my view, however, that textual account is unnecessary to defend the horizontal application of the First Amendment to the other branches of government. Instead, I think that reading the First Amendment as applying to the entire federal government is an eminently sensible, pragmatic interpretation supported by the doctrine of "avoidance of unthinkable outcomes." *See infra* Section II. The protections of the First Amendment wouldn't mean anything if they could so easily be evaded by just moving the state action to another branch of the federal government. It wouldn't make sense. My point here is that despite the clear textual direction that the First Amendment is directed only to "Congress," that direction is overcome by subsequent adoption of modifying language (here, the Fourteenth Amendment) or a sensible interpretive gloss (here, the further expansion to other branches of the federal government). All of this is to say that even though Article III, Section 33 says that it applies to the "General Assembly," that doesn't absolutely foreclose the possibility that it could also be applied to county councils in charter counties (and maybe other local legislatures, *see supra* note 30) either by subsequent constitutional amendment (namely the adoption of Article XI-A, *see supra* notes 41–46 and accompanying text) or even by an interpretive judicial gloss. Moreover, it is possible that the special laws prohibition also applies to the executive branch of local governments. *See infra* note 98.

51. *See supra* note 37. Originally, the prohibition on enacting local laws only applied in the limited situations named in Article III, Section 33. Later, the General Assembly was prohibited from passing local laws affecting charter counties in topics covered by the Express Powers Act. MD. CONST. art. XI-A, § 4. Later still, it was prohibited from passing local laws affecting code counties regarding topics covered by their express powers. MD. CONST. art. XI-F, § 4.

52. If a charter county passes a law that is, in effect, a public general law, it is invalid. *See, e.g., McCrory Corp. v. Fowler*, 319 Md. 12, 24, 570 A.2d 834, 840 (1990) (invalidating local law that purported to create a judicial cause of action); *Birge v. Town of Easton*, 274 Md. 635, 644, 337 A.2d 435, 440 (1975).

53. It might also be a problem for a textualist that at least one of the listed prohibitions in the first sentence of Article III, Section 33—the prohibition on "refunding money paid into the State Treasury, or releasing persons from their debts, or obligations to the State, unless recommended by the Governor, or officers of the Treasury Department"—can only apply (at least as written) to the State. It would be nonsensical for the county council of a charter county to try to refund State money or to release people from debts or obligations to the State.

54. Friedman, *Special Laws*, *supra* note 2, at 433–36 (discussing originalism and associated scholarship, including ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION*

no historical support for either (1) that the original public meaning of the special laws prohibition, despite that it said General Assembly, meant any legislative body, including any future home rule charter county council; or (2) that the Progressive-era framers of the Home Rule Amendment intended to incorporate (or that their words would have the public meaning of incorporating) the special laws prohibition against the charter counties.

First, the special laws prohibition was first adopted at Maryland's 1864 Constitutional Convention. This Constitutional Convention was held in the middle of the Civil War—in fact, convention proceedings were suspended for three weeks to allow delegates to return home to defend their homes and farms from a Confederate invasion⁵⁵—and public commentary focused on major constitutional innovations, not relatively minor provisions.⁵⁶ I found no evidence of public discussion of the special laws prohibition.⁵⁷ The constitutional convention records reveal just a few scraps relevant to the intent of the drafters of the special laws prohibition. Delegate Ezekiel Forman Chambers, a Democrat from the Eastern Shore, and Delegate Henry Stockbridge, a Republican from Baltimore City, introduced two separate provisions, which were then combined into a single, two-part provision.⁵⁸ Although the convention delegates didn't discuss Delegate Chambers' part of the proposal at all, they did discuss Delegate Stockbridge's part, which was identified as originating in the Indiana Constitution⁵⁹ and focused on protecting the separation of powers by keeping the General Assembly from performing tasks that we now clearly associate with the judicial function, like granting divorces, reforming deeds, and protecting people with legal disabilities in transactions.⁶⁰ There is, however, absolutely nothing in the convention records to suggest that the delegates considered applying the special laws prohibition to any legislative body other than the Maryland General Assembly.⁶¹ Of course, they would have considered this to be a weird

OF THE LAW (1990)); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); Edwin Meese, III, *Toward a Jurisprudence of Original Intent*, 11 HARV. J.L. & PUB. POL'Y 5 (1988); Edwin Meese, III, *The Supreme Court of The United States: Bulwark of a Limited Constitution*, 27 S. TEX. L.J. 455 (1986); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989)).

55. Richard R. Duncan, *Maryland's Reaction to Early's Raid in 1864: A Summer of Bitterness*, 64 MD. HIST. MAG. 248 (1969); WILLIAM STARR MYERS, *THE MARYLAND CONSTITUTION OF 1864* 44–46 (1901). See generally CONST. CONVENTION COMM'N, REPORT OF THE CONSTITUTIONAL CONVENTION COMMISSION 52–53 (1967).

56. Friedman, *Special Laws*, *supra* note 2, at 436–37 (discussing major issues of the 1864 Constitutional Convention including abolition of slavery, allegiance to the Union, and loyalty oaths as a condition of political participation).

57. *Id.* at 436–38.

58. *Id.* at 438–40.

59. *Id.* at 439–40.

60. *Id.* at 440.

61. *Id.* at 438–42.

suggestion as there were no other bodies exercising legislative powers in 1864.⁶²

Second, I reviewed dozens of newspaper accounts regarding the adoption of the Home Rule Amendment, which was codified and remains today as Article XI-A of the Maryland Constitution. The *Baltimore Sun* reported actively on the Home Rule Amendment, tracking its failures in prior legislative sessions; introduction, amendment, and passage during the 1914 legislative session; approval by the voters in the election of 1915; and the consideration of the Express Powers Act to effectuate the Home Rule Amendment in 1916 and beyond.⁶³ Other newspapers throughout the State

62. There was also no discussion of the special laws prohibition at the Maryland Constitutional Convention of 1867, when the provision was simply readopted. *Id.* at 437 n.143, 441–42. Originalism—at least state constitutional originalism—must develop a model for how to consider these subsequent readoptions of constitutional provisions. See Friedman, *Article 19*, *supra* note 2, at 966 n.92; Friedman, *Ex Post Facto*, *supra* note 2, at 80 n.106. I am encouraged by a recent article—and a forthcoming book—that tries to fit these subsequent enactments into a theoretical framework. Jason Mazzone & Cem Tecimer, *Interconstitutionalism*, 132 *YALE L.J.* 326, 354–378 (2022) (developing theoretical model to discuss similarities and changes between subsequent constitutions).

63. In this footnote, and the one that follows, I attempt to model how lawyers and judges should conduct historical research. In my view, it is insufficient, and indeed irresponsible, to simply select evidence that supports one’s positions. Rather, historical analysis must lay out all the evidence available to provide a candid and complete evaluation of the issue. Thus, for a complete catalog of contemporaneous articles in the *Baltimore Sun* concerning the Home Rule Amendment, see *Home Rule Tied Up*, *BALT. SUN*, Mar. 21, 1918, at 3 (discussing difficulties in passing Express Powers Act); *Home Rule for Counties*, *BALT. SUN*, Mar. 7, 1916, at 3 (describing Express Powers Act); *Amendments Explained*, *BALT. SUN*, Oct. 27, 1915, at 12 (explaining proposed Home Rule Amendment); *Don’t Forget the Home Rule Amendment!*, *BALT. SUN*, Oct. 24, 1915, at 8 (same); *Home Rule Big Benefit*, *BALT. SUN*, Oct. 23, 1915, at 16 (same); *Proposed Amendments to the Constitution of Maryland*, *BALT. SUN*, Sept. 19, 1915, at 8 (same); *Four Amendments Up*, *BALT. SUN*, Aug. 13, 1915, at 4 (same); *Blair Lee Launches His City Campaign*, *BALT. SUN*, June 16, 1915, at 14 (gubernatorial candidate announcing support for Home Rule Amendment); *Home Rule Progresses*, *BALT. SUN*, Nov. 22, 1914, at 7 (comparing proposed Maryland home rule to other home rule provisions); *Municipal League is Strong for Home Rule*, *BALT. SUN*, Nov. 21, 1914, at 6 (same); *Gets Praise and Blame*, *BALT. SUN*, Apr. 21, 1914, at 5 (describing Home Rule Amendment as positive development of legislative session); *The Home Rule Amendment*, *BALT. SUN*, Apr. 6, 1914, at 6; *Father of Real Home Rule in Maryland*, *BALT. SUN*, Apr. 6, 1914, at 5 (identifying William H. Maltbie as the “Father Of Real Home Rule” because he introduced a constitutional amendment during the 1912 legislative session); *Real Home Rule is in Sight At Last*, *BALT. SUN*, Apr. 5, 1914, at 1 (listing major provisions of Home Rule Amendment); *Full Text of Measure Providing for Home Rule*, *BALT. SUN*, Apr. 5, 1914, at 3; *Delay for Home Rule*, *BALT. SUN*, Apr. 3, 1914, at 3; *Home Rule is Now Within Maryland’s Grasp*, *BALT. SUN*, Apr. 5, 1914, at 3; *Home Rule Bill May Pass Today*, *BALT. SUN*, Apr. 2, 1914, at 1; *Vaudeville in the House*, *BALT. SUN*, Mar. 30, 1914, at 3 (describing Home Rule Amendment as “one of the most far-reaching and needed reforms” but still awaiting Senate approval); *The Home Rule Amendment*, *BALT. SUN*, Mar. 30, 1914, at 6; *1,776 Bills Presented*, *BALT. SUN*, Mar. 29, 1914, at 3 (describing the number of bills as “an almost unanswerable argument” in favor of the Home Rule Amendment); *Proves the Need of Home Rule*, *BALT. SUN*, Mar. 25, 1914, at 3 (same); *Home Rule Scores*, *BALT. SUN*, Mar. 19, 1914, at 2; *State’s Time Wasted: Why Adoption of Home Rule Plan is Absolutely Needed*, *BALT. SUN*, Mar. 13, 1914, at 2; *Home Rule Amendment Proposed by Speaker Trippe*, *BALT. SUN*, Mar. 10, 1914, at 7; *Trippe Home Rule Bill Meets Approval*, *BALT. SUN*, Mar. 9, 1914, at 14 (noting that

reported on the Home Rule Amendment as well (if not as in-depth).⁶⁴ The newspaper coverage described how a county would be authorized by its citizens to adopt a home rule charter and be allowed to legislate on topics permitted to it by the state legislature. Some articles described the benefits that home rule was hoped to achieve. Some articles explained that the General Assembly would no longer be allowed to legislate on those topics and described the benefit to the General Assembly to be derived from this reduction in local bills to consider. But not a single article discussed any of

proposed constitutional amendment is consistent with campaign promises); *Speaker Trippe's Home Rule Amendment*, BALT. SUN, Mar. 9, 1914, at 6; *Genuine Home Rule Proposed by Trippe*, BALT. SUN, Mar. 8, 1914, at 12; *Home Rule Bill Is In*, BALT. SUN, Feb. 7, 1914, at 3; *Two Kinds of Home Rule*, BALT. SUN, Jan. 11, 1914, at 5 (discussing prospects for Home Rule Amendment in 1914 legislative session).

64. As described above, *supra* note 63, in my view, a full historical analysis requires a complete review of all available evidence. Thus, for all available newspaper accounts regarding the Home Rule Amendment (in newspapers other than the *Baltimore Sun*), see *Legislature of 1916 Passes into History*, DAILY NEWS (Frederick, Md.), Apr. 4, 1916, at 5 (reporting defeat of proposed Express Powers Act); *The Amendments to Be Acted On*, DENTON JOURNAL, Jan. 22, 1916, at 5 (describing Express Powers Act); *The Home Rule Amendment*, CECIL WHIG, Nov. 20, 1915, at 4 (describing provisions of proposed Home Rule Amendment); *Republicans See Big Victory in State and County Today*, MORNING HERALD (Hagerstown, Md.), Nov. 2, 1915, at 1; *Voters to Pass on Four Amendments*, DAILY NEWS (Frederick, Md.), Nov. 1, 1915, at 2; *Eight States Vote Tuesday*, FREDERICK POST, Nov. 1, 1915, at 1; *Others Must Pass Upon Four New Amendments*, EVENING CAP. & MD. GAZETTE, Oct. 30, 1915; Jackson H. Ralston, Letter to the Editor, MARYLAND INDEPENDENT (Port Tobacco, Md.), Oct. 29, 1915 (describing proposed Home Rule Amendment); Jackson H. Ralston, Letter to the Editor, MIDLAND JOURNAL (Rising Sun, Md.), Oct. 29, 1915 (same); *Comment Relating to the Proposed Amendments*, CATOCTIN CLARION (Thurmont, Md.), Oct. 28, 1915; *The Constitutional Amendments*, EVENING TIMES (Cumberland, Md.), Oct. 26, 1915, at 4; *Elections to Be Held in Eight States November 2*, MORNING HERALD (Hagerstown, Md.), Oct. 25, 1915, at 3; *Editorials: Four Constitutional Amendments*, DEMOCRATIC ADVOCATE (Westminster, Md.), Oct. 22, 1915, at 10; *Maryland Democratic Platform of 1915*, MONTGOMERY CNTY. SENTINEL, Oct. 1, 1915 (identifying support of Home Rule Amendment); *Four Amendments Up*, CITIZEN (Frederick, Md.), Aug. 20, 1915; "Lest We Forget," CECIL WHIG (Elkton, Md.), July 31, 1915 (discussing proposed Home Rule Amendment); *For Your Consideration*, REPUBLICAN (Oakland, Md.), July 29, 1915 (same); *For Your Consideration*, CECIL WHIG, July 24, 1915 (same); *Untitled News Shorts*, REPUBLICAN (Oakland, Md.), July 22, 1915; *For Amendments*, EVENING CAP. & MD. GAZETTE, July 19, 1915, at 1; *Will Vote on Four Amendments*, CITIZEN (Frederick, Md.), July 16, 1915, at 5; *Maryland Voters to Pass On Amendments*, MORNING HERALD (Hagerstown, Md.), July 14, 1915, at 3; *Maryland Voters to Pass On Amendments*, DAILY NEWS (Frederick, Md.), July 12, 1915, at 2; "Lest We Forget," PRINCE GEORGE'S ENQUIRER, July 9, 1915 (same); *Voters Will Pass On "Home Rule" Measure*, MORNING HERALD (Hagerstown, Md.), Nov. 30, 1914, at 3; *Voters to Pass on "Home Rule" Bill*, DAILY NEWS (Frederick, Md.), Nov. 28, 1914, at 6; *Editorial Notes: The Constitutional Amendments*, DENTON J., Apr. 18, 1914, at 2; *Home Rule*, PRINCE GEORGE'S ENQUIRER, Apr. 10, 1914; *Home Rule Bill Is Finally Made Law*, MORNING HERALD (Hagerstown, Md.), Apr. 6, 1914, at 1; *Home Rule Bill*, EVENING TIMES (Cumberland, Md.), Apr. 6, 1914, at 9; *Legislators' Work Will End Tonight*, DAILY NEWS (Frederick, Md.), Apr. 6, 1914, at 2; *Home Rule Is Nearly Assured*, FREDERICK POST, Apr. 6, 1914, at 5; *Trippe Home Rule Bill Advanced*, FREDERICK POST, Apr. 2, 1914, at 1; *Home Rule Bill Will Likely Pass the State Legislature*, CUMBERLAND PRESS, Apr. 2, 1914, at 2; *Home Rule Amendment Proposed*, CECIL WHIG, Mar. 21, 1914, at 2, 6; *Much Legislation to Be Acted Upon*, MORNING HERALD (Hagerstown, Md.), Mar. 17, 1914, at 1.

the limitations on county councils found in Article XI-A, Section 3 and not a single article even hinted that the limitations found in Article III of the Constitution or that the special laws prohibition would apply against the newly established county councils. There was no such suggestion. This isn't a situation in which I suspect that the historical record is incomplete⁶⁵—that is, people were thinking and talking about the special laws prohibition being incorporated against county councils but didn't write it down or those writings haven't survived—but rather I suspect that the historical record actually proves the negative, that is, that people were not thinking, talking, or writing about this possibility.⁶⁶

Quite simply, an originalist reading does not support the application of the special laws prohibition against charter counties. Moreover, although I treat originalism as just one of many interpretive techniques (and I think it is best to use multiple interpretive techniques),⁶⁷ 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.⁶⁸ Thus, if we take the Supreme Court of Maryland at its word,

65. For a discussion of the problems that gaps in the historical record present to the originalist interpreter, see generally André LeDuc, *The Ontological Foundations of the Debate over Originalism*, 7 WASH. U. JURIS. REV. 263, 303 (2015) (discussing gap-filling); Martin H. Redish & Matthew B. Arnould, *Judicial Review, Constitutional Interpretation, and the Democratic Dilemma: Proposing a "Controlled Activism Alternative,"* 64 FLA. L. REV. 1485, 1502 (2012); Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95 (2010). As noted above, however, I don't think this is a problem of a "gap" in the historical record.

66. Finally, one other piece of historical evidence might bear on the question. The same session of the Maryland General Assembly that proposed the Home Rule Amendment also proposed a constitutional amendment to modify the uniform property tax rules of Article 15 of the Maryland Declaration of Rights. Acts of 1914, ch. 390, 1914 Md. Laws 633 (proposing amendments to Article 15); Acts of 1914, ch. 416, 1914 Md. Laws 657 (proposing Article XI-A, the Home Rule Amendment). While the amendments to Article 15 and their causes are complicated, it is worth noting that the constitutional framers thought that it was necessary to make the uniformity requirement specifically applicable to the counties and Baltimore City. See H.H. Walker Lewis, *The Tax Articles of the Maryland Declaration of Rights*, 13 MD. L. REV. 83, 100–03 (1953); FRIEDMAN, *THE MARYLAND CONSTITUTION*, *supra* note 30 at 22–25 (discussing Article 15 of the Declaration of Rights). Thus, at least implicitly, those framers did not assume that the limitations on the General Assembly imposed by the Maryland Declaration of Rights automatically transferred to the charter counties. I don't want to make too big a deal of this evidence regarding Article 15. At the time that the constitutional framers were proposing amendments to Article 15, they certainly didn't know for sure that the Home Rule Amendment would be adopted by the voters. Moreover, it is not clear whether the constitutional framers thought that mentioning the counties and Baltimore City in Article 15 was necessary to accomplish the purpose or chose to add them to the text of the proposed provision only as extra insurance.

67. See *infra* note 132.

68. *State Bd. of Elections v. Snyder*, 435 Md. 30, 53, 76 A.3d 1110, 1123 (2013) (“Our task in matters requiring constitutional interpretation is to discern and then give effect to the intent of the instrument’s drafters and the public that adopted it.”) (citing *Fish Mkt. Nominee Corp. v. G.A.A., Inc.*, 337 Md. 1, 8–9, 650 A.2d 705, 708 (1994)); see also *Bernstein v. State*, 422 Md. 36, 46–63, 29 A.3d 267, 273–83 (2011) (describing state constitutional interpretation as process of determining

then this originalist-style interpretation alone ought to be a sufficient basis to reject the idea that the special laws prohibition ought to be applied to charter county councils.

C. Structuralism

Structuralism suggests that, in addition to studying the text of a constitutional provision, a constitutional interpreter should also reason from the structure and relationships created by the text.⁶⁹ Thus, for example, although the concepts of “federalism,” “separation of powers,” and “majoritarianism” do not appear in the text of the federal constitution, these underlying structural concepts should inform our understanding of the text and should be relied upon to inform our understanding of the meaning.⁷⁰ Applying structuralist theory to the interpretation of state constitutions has, in my experience, proven challenging.⁷¹

1. Structuralism and the Separation of Powers

One of the key structures of the federal government, not mentioned in the federal constitutional text, but which gives rise to structuralist insight is the separation of powers.⁷² As a result, I have treated the state separation of powers as a structuralist notion, despite the crucial difference that in the

and effectuating framers’ and ratifiers’ intent); *Abrams v. Lamone*, 398 Md. 146, 173, 919 A.2d 1223, 1239 (2007) (same); *Lamone v. Capozzi*, 396 Md. 53, 71–72, 912 A.2d 674, 684–85 (2006) (same); *Fish Mkt. Nominee Corp. v. G.A.A., Inc.*, 337 Md. 1, 8, 650 A.2d 705, 708 (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).

69. CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 22 (1969); see also Friedman, *Special Laws*, *supra* note 2 at 458–59 (applying structuralism to state constitutional interpretation).

70. GERHARDT et al., *supra* note 49, at 321 (explaining structuralism).

71. Friedman, *Special Laws*, *supra* note 2, at 458–59 (describing that applying structuralism in state constitutional interpretation is “quite frankly, a far trickier exercise”); Friedman, *Ex Post Facto*, *supra* note 2, at 94 n.163 (confessing that I was pushing Professor Black’s desire for interpretations that “make sense” beyond Black’s conception); Friedman, *Article 19*, *supra* note 2, at 962 n.70 (locating placement-type arguments at the “intersection” of intratextualism and structuralism). But see Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 868 (2021) (quoting BLACK, *supra* note 69, at 31) (arguing that “plentiful text [of state constitutions] facilitates the ‘close and perpetual interworking between the textual and the relational and structural modes of reasoning’ that Charles Black advocated but that is often difficult for the federal document”).

72. GERHARDT et al., *supra* note 49, at 321 (explaining structuralism).

Maryland Declaration of Rights, the separation of powers is protected by an express textual provision.⁷³

Perhaps the most important new insight I gained in my previous look at the special laws prohibition was its importance to the separation of powers.⁷⁴ Both originalist interpretation⁷⁵ and structuralist interpretation⁷⁶ counseled that the special laws prohibition was intended to reinforce and protect the separation of powers by preventing the legislative branch from resolving issues that are more properly assigned to the judicial branch.

Although I understand how the special laws prohibition as applied to the General Assembly protects the separation of powers and keeps the General Assembly from invading the province of the judiciary, I'm not sure that applying the special laws prohibition to the charter counties does anything to protect the separation of powers. We no longer have local courts (or courts that are part of local government). The General Assembly has never given the charter counties powers through the Express Powers Act that impose on those of the judiciary. Moreover, the judiciary has refused to interpret the grant of express powers to include the power to create judicial causes of action.⁷⁷ Thus, I don't think that whether or not the special laws prohibition is held to apply against charter counties has any effect on the separation of powers, and incorporating the special laws prohibition won't advance the goal—previously derived from structuralist interpretation—of reinforcing the separation of powers.

2. *Structuralism and Placement within the Constitution*

In past articles, I have included arguments based on the placement of a provision within the state constitution as a subspecies of structuralist

73. MD. CONST. Decl. of Rts., art. 8 (“That the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other.”); *see also* FRIEDMAN, THE MARYLAND CONSTITUTION, *supra* note 30 at 19–20 (discussing Article 8 of the Declaration of Rights); Dan Friedman, *The History, Development, and Interpretation of the Maryland Declaration of Rights*, 71 TEMP. L. REV. 637, 653 (1998) [hereinafter Friedman, *Maryland Declaration of Rights*] (same); 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, 988–90 (2002) (same) [hereinafter Friedman, *Tracing the Lineage*]; *infra* note 91 (discussing separation of powers).

74. Friedman, *Special Laws*, *supra* note 2.

75. *Id.* at 440–42, 444, 466 (discussing that provisions’ framers were focused on which cases should be resolved in judicial branch not legislative branch).

76. *Id.* at 460–62, 466 (discussing that proper implementation of the special laws prohibition will foster respect for coordinate branches).

77. In *McCrory Corp. v. Fowler*, the Montgomery County Council purported to give claimants the right to bring a civil action for employment discrimination. 319 Md. 12, 15, 570 A.2d 834, 835 (1990). The Supreme Court of Maryland found the law to exceed the power of the county council. *Id.* at 24, 570 A.2d at 840.

interpretation.⁷⁸ Consideration of placement within the constitution suggests several arguments against the idea that the special laws prohibition in Article III, Section 33 was meant to restrict county councils in charter counties. First, Article III, Section 33 appears right in the middle of Article III, which from beginning to end, concerns only the General Assembly.⁷⁹ I would expect our structuralist interpreter focused on the placement of provisions within the Constitution to note that there is no obvious reason to incorporate the special laws prohibition against the charter counties but not incorporate other prohibitions and limitations found in Article III against the charter counties.

Second, I think our structuralist interpreter would compare the procedural rules applicable to the General Assembly that are collected in Article III⁸⁰ to the procedural rules that apply to charter county councils in Article XI-A, Section 3 described above. And, having made that comparison, I think that our structuralist interpreter might well believe that the Constitution places significant limits on the General Assembly because it is the only document that can, while it places far fewer and less onerous limitations on charter county government so that each charter county could, in its individual charter, adopt the types of legislative restrictions best adapted to its needs.⁸¹ If the framers of Article XI-A wanted a special laws prohibition to apply to the charter county councils, the natural place to put it would have been in Article XI-A, Section 3 alongside the other procedural rules for charter county council legislation. There it would have fit nicely next to the rules, described above, governing legislative days and the pre-adoption publication of ordinances. The second-best place to have put it would have

78. Friedman, *Ex Post Facto*, *supra* note 2 at 93–94; Friedman, *Special Laws*, *supra* note 2, at 458–60. I acknowledge that this is not an ideal placement as structuralism considers the structure and relationship of actors and institutions in the government created by the text, not the text itself. See Friedman, *Article 19*, *supra* note 2, at 962 n.70 (locating placement-type arguments at the “intersection” of structuralism and intratextualism). I’m not sure that the taxonomy matters so much as that we use these interpretive tools appropriately and judiciously. See Friedman, *Ex Post Facto*, *supra* note 2, at 81 n.108 (discussing difficulties of taxonomy of interpretive methods).

79. See M. Albert Figinski, *Maryland’s Constitutional One-Subject Rule: Neither a Dead Letter Nor an Undue Restriction*, 27 U. BALT. L. REV. 363, 363 n.1 (1998) (identifying sections of Article III of the Maryland Constitution that “contain limits on legislation or legislative activities”).

80. I am principally thinking of Article III, Section 27 (requiring three readings for bill passage); Article III, Section 28 (requiring recorded majority vote for bill passage); and Article III, Section 29 (providing one subject rules, descriptive title rule, and other procedural requirements for bill drafting).

81. And, in fact, while all twelve charter counties have adopted some procedural limitations, they have each taken slightly different approaches. See *infra* note 97. Although an historical survey of the various charter county charters is beyond my scope here, it is interesting to note that Baltimore City has experimented with a bicameral city council and has repeatedly modified the membership of its current, unicameral city council. See, e.g., BALT. CITY CHARTER, art. III, § 1(a), § 2(b) (2022) (providing unicameral city council of fourteen members); BALT. CITY CHARTER, art. III (1976) (providing for unicameral city charter of eighteen members from six councilmanic districts); BALT. CITY CHARTER, art. III (1897) (providing bicameral city council).

been in Article III, Section 33 itself, perhaps by deleting “General Assembly” and inserting “State or local legislative body,” thus making its application clear. That the framers of Article XI-A choose not to take either of these far easier paths makes me think that they didn’t mean to do it by implication.⁸²

3. *Structuralism and the Anti-Delegation Principle*⁸³

As discussed above, the Supreme Court of Maryland has not said much to explain why it thinks that the special laws prohibition applies to charter governments.⁸⁴ The most that it has said is that: “If the General Assembly cannot enact a special law when a general law applies, then under the Express Powers Act, Anne Arundel County cannot be empowered to enact a special law where an applicable local law exists.”⁸⁵ I read that to mean that the General Assembly can’t transfer a power that it doesn’t have. This makes logical sense. A body should not be able to delegate a power that it lacks.

There is, however, surprisingly little caselaw that supports this proposition. In *Sugarloaf Citizens Association’ v. Gudis*,⁸⁶ the Supreme Court of Maryland wrote: “[P]owers the General Assembly does not itself

82. Another piece of evidence on which a structuralist interpreter interested in placement-type arguments might rely is an analogy to the condemnation provisions. Just a few sections after the special laws prohibition in Article III, Section 33 are the limits on condemnation found in Article III, Section 40. This provision, which has been part of the Maryland Constitution since 1851, is framed in much the same way as the special laws prohibition. Article III, Section 40 instructs that when the General Assembly adopts legislation authorizing condemnation, it must require the condemning authority to pay just compensation as determined by a jury. MD. CONST. art. III, § 40 (“The General Assembly shall enact no Law authorizing private property, to be taken for public use, without just compensation, as agreed upon between the parties, or awarded by a Jury, being first paid or tendered to the party entitled to such compensation.”). Relevant here, when local home rule began, nobody assumed that Article III, Section 40 would be incorporated against home rule jurisdictions. Rather, every time it was considered desirable to expand condemnatory authority to a new local jurisdiction, the Constitution was amended to make sure that the limits on condemnation would also apply to the home rule jurisdiction. Look at the various different condemnation provisions of Article III, Section 40A (quick-take condemnation in Baltimore City, and Baltimore, Cecil, and Montgomery Counties), Section 40B (quick-take condemnation by the State Highway Administration), Section 40C (quick-take condemnation by Washington Suburban Sanitary Commission), Section 61 (urban renewal condemnation everywhere except Baltimore City), Article XI-B (urban renewal condemnation in Baltimore City), Article XI-C (off-street parking condemnation in Baltimore City), and Article XI-D (port development condemnation in Baltimore City). Each provision contains identical language requiring just compensation as determined by a jury. FRIEDMAN, *THE MARYLAND CONSTITUTION*, *supra* note 30, at 122–23, 123–26, 146–48, 225–32. It seems to me that this suggests that the limitations on the General Assembly weren’t believed to apply against local governments by implication but required separate enactment. If true for condemnation, it might also be true for the special laws prohibition. *See infra* note 96 (regarding condemnation provisions).

83. Although the taxonomy is difficult (and subject to debate), I think that this anti-delegation principle is best understood as being in the nature of a structuralist interpretation.

84. *See supra* notes 15–26.

85. *Jones v. Anne Arundel County*, 432 Md. 386, 403, 69 A.3d 426, 436 (2013).

86. 319 Md. 558, 573 A.2d 1325 (1990).

possess cannot be transferred to or shared with counties.”⁸⁷ It echoed this point again recently in *Dzurec v. Board of County Commissioners*.⁸⁸ I am not sure, however, that *Sugarloaf* helps much here. First, *Sugarloaf* doesn’t offer any citation for this proposition making it hard for us to test the pedigree of the legal proposition. And *Dzurec* only cites *Sugarloaf* for this proposition.⁸⁹ More importantly, *Sugarloaf* concerned a different species of proposed delegation.⁹⁰ That is, in *Sugarloaf*, the Supreme Court of Maryland held that, because the General Assembly could not delegate a nonjudicial power to a court, a charter county could therefore not delegate a nonjudicial power to a court. Thus, I think that the anti-delegation principle espoused by *Sugarloaf*, at bottom, turned on the view—absolutely correct—that a delegation of a nonjudicial power to a court violated the separation of powers.⁹¹ I am not sure that *Sugarloaf*’s analysis is relevant or applicable to our consideration of the General Assembly’s ability to delegate a *legislative* power to a charter county council.

But if *Sugarloaf* and *Dzurec* aren’t applicable, I haven’t been able to find any cases that stand for this anti-delegation proposition. Maybe then this anti-delegation principle provides a structuralist basis for interpreting the special laws prohibition as applying to charter counties but so far, no Maryland appellate court has said so.⁹²

87. *Id.* at 573, 573 A.2d at 1333.

88. 482 Md. 544, 568 n.15, 288 A.3d 1236, 1250 n.15 (2023).

89. *Id.* at 568 n.15, 288 A.3d at 1250–51.

90. In this context, the case of *Bottone v. Town of Westport*, 553 A.2d 576 (Conn. 1989) is instructive. In *Bottone*, the Supreme Court of Connecticut held that the Connecticut General Assembly’s delegation to a town is subject to different limitations and therefore a different standard of review than a delegation to a coordinate branch of state government. *Id.* at 580.

91. Maryland’s separation of powers is explicitly set forth in Article 8 of the Maryland Declaration of Rights. MD. CONST. Decl. of Rts., art. 8 (“That the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other.”). The separation of powers is a well-understood, if not rigidly defined, limitation on each branch’s power to exercise the powers of the other branches of state government. *See, e.g.*, *State v. Falcon*, 451 Md. 138, 160–61, 152 A.3d 687, 700 (2017) (describing Maryland’s separation of powers jurisprudence); *Merchant v. State*, 448 Md. 75, 96–97, 136 A.3d 843, 856–57 (2016) (same); *Schisler v. State*, 394 Md. 519, 907 A.2d 175 (2006) (plurality opinion) (same); *Dep’t. of Nat. Res. v. Linchester*, 274 Md. 211, 220, 334 A.2d 514, (1975) (same). For more on the separation of powers, see FRIEDMAN, THE MARYLAND CONSTITUTION, *supra* note 30, at 19–20.

92. I am also a little uncomfortable that this anti-delegation analysis is a good fit for the special laws prohibition. While it makes intuitive sense that the General Assembly can’t delegate a power that it doesn’t have, it isn’t clear to me that the special laws prohibition is really the kind of power that the General Assembly lacks. Under the special laws prohibition, the General Assembly can legislate on the topic, it just must do so in a way that effects the whole class rather than a favored few.

D. Common Law Interpretation

The common law method of constitutional interpretation relies on the use of precedent rather than authoritative texts to determine constitutional meaning.⁹³ I will apply two techniques associated with the common law method of constitutional interpretation to attempt to understand the mechanism by which the special laws prohibition becomes applicable to charter counties: (1) the case method; and (2) reasoning by analogy.

1. Common Law Interpretation and the Case Method

The most important tool of common law constitutional interpretation is the use of case precedents. Sometimes, there is a single, seminal precedent that drives the constitutional analysis.⁹⁴ Sometimes, there is a dispute about whether one line of cases or another should control.⁹⁵ Sometimes, as here, the job is more complicated, and requires an interpreter to attempt to synthesize a rule from fragments in a disparate group of cases.

I have looked at every case in which the Supreme Court of Maryland has discussed the application of a provision of the state constitution against charter counties. To be fair, most of these discussions are quick and conclusory. And I have been forced in many instances to predict what the Court will do because there has never been a litigated case. But I think that one way to explain this caselaw is to say that *substantive* rights that limit the General Assembly are also automatically imposed on local governments,⁹⁶

93. DAVID A. STRAUSS, *THE LIVING CONSTITUTION* 36 (2010) (noting that “the common law approach provides a far better understanding of what our constitutional law actually is”); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 879 (1996); see Friedman, *Ex Post Facto*, *supra* note 2, at 60, 68 (relying on Strauss’s work); Friedman, *Special Laws*, *supra* note 2, at 462–63 (same).

94. See, e.g., Friedman, *Special Laws*, *supra* note 2, at 420–27 (discussing canonical special laws case of *Cities Service Co. v. Governor*, 290 Md. 553, 431 A.2d 663 (1981)).

95. See, e.g. Friedman, *Ex Post Facto*, *supra* note 2, at 61 n.22 (quoting *Doe v. Dep’t of Pub. Safety & Corr. Servs.* 430 Md. 535, 557, 62 A.3d 123, 136 (2013) (plurality opinion) (discussing choice between following one of two lines of cases: “We can follow *stare decisis* . . . Or th[e] Court can . . . instead follow the [U.S.] Supreme Court’s analysis of the parallel federal protection . . .”).

96. I include within the category of **substantive** limitation taxes, *ex post facto* laws, due process, sex discrimination, free exercise, free exercise of religion, condemnation/ eminent domain, sanguinary laws, and suspension of habeas corpus. First, regarding taxes, the Maryland state constitution imposes limitations on the types of taxes that the General Assembly may impose. MD. CONST. Decl. of Rts., art. 15. One of these limitations, is that taxes must be uniform. There is no doubt about the mechanism by which the uniformity principle of Article 15 is made applicable to charter counties; the specific text says it is also applicable to “the Counties and the City of Baltimore.” *Id.*; *Snowden v. Anne Arundel County*, 295 Md. 429, 456 A.2d 380 (1983). Second, as for *ex post facto* laws, the state constitution prevents the General Assembly from enacting retroactive criminal legislation. MD. CONST. Decl. of Rts., art. 17; *Doe v. Dep’t of Pub. Safety & Corr. Servs.*, 430 Md. 535, 62 A.3d 123 (2013). But see Friedman, *Ex Post Facto*, *supra* note 2 (arguing for a broader scope of Article 17 that also includes a prohibition on retroactive civil

legislation). If someday it is determined that I'm right and that Article 17 applies to civil legislation, not just criminal, it ought to apply to the charter counties. Third, Article 24, the state's due process-style guarantee of life, liberty, and property applies as a limitation on legislation adopted by the General Assembly. MD. CONST. Decl. of Rts., art. 24; *see, e.g.*, *Dua v. Comcast Cable of Maryland, Inc.*, 370 Md. 604, 630, 805 A.2d 1061, 1076 (2002) (holding that state statute retroactively depriving citizen of a vested right violates Article 24 of the Declaration of Rights); *see also infra* note 104. Without much discussion, the Supreme Court of Maryland seems to have assumed that this guarantee also applies to charter counties. *Serio v. Baltimore County*, 384 Md. 373, 863 A.2d 952 (2004); *Prince George's County v. Goodsell*, 284 Md. 279, 292–93 & n.7, 396 A.2d 1033, 1040 (1979); *Pitsenberger v. Pitsenberger*, 287 Md. 20, 27–34, 410 A.2d 1052, 1056–60 (1980). Fourth, the state constitution prohibits discrimination on the basis of sex. MD. CONST. Decl. of Rts., art. 46. As a result, the General Assembly may not pass legislation that discriminates on the basis of sex. And, although I am not sure of the mechanism by which this occurs, I am confident that this limitation also applies to charter county councils. Fifth, the state constitution likewise protects the free exercise of religion. MD. CONST. Decl. of Rts., art. 36. The General Assembly may not pass laws that violate this requirement. Moreover, there is no doubt that Article 36 is applied against charter counties, *see, e.g.*, *Montrose Christian School v. Walsh*, 363 Md. 565, 770 A.2d 111 (2001), but the Court has not yet explained the mechanism by which this occurs. Sixth, the state constitution contains a free speech and free press guarantee, which among other things, prevents the General Assembly from passing laws that restrict speech and the press. MD. CONST. Decl. of Rts., art. 40. The Supreme Court of Maryland has assumed that Article 40 applies to limit charter counties as well as the General Assembly, although it has not explained the mechanism by which this is accomplished. *See, e.g.*, *Clear Channel Outdoor Inc. v. Dept. of Fin.*, 472 Md. 444, 247 A.3d 740 (2021). Seventh, the state constitution limits the ways in which the General Assembly may exercise its condemnation authority. MD. CONST. art. III, § 40. That is, the General Assembly may not take private property for public use unless just compensation is paid. The People of Maryland amended the state constitution repeatedly to make the just compensation rules applicable to the charter counties. *See supra* note 82 (discussing condemnation provisions). Eighth, the General Assembly is prohibited from adopting sanguinary laws, MD. CONST. Decl. of Rts., art. 16, which are usually understood to mean excessively punitive laws. *See generally Miles v. State*, 435 Md. 540, 80 A.3d 242 (2013). It is clear that charter counties can't legislate harsh punishments either. I believe there are three reasons for that: (1) it would constitute "state action" and thus violate the Fourteenth Amendment's incorporation of the Eighth Amendment; (2) it would exceed the Express Powers Act; and (3) such a law would be preempted. Whether it would also (4) be an improper delegation by the General Assembly of a power that it doesn't have, we will never know. Finally, the state constitution prohibits the General Assembly from suspending the writ of *habeas corpus*. MD. CONST. art. III, § 55. The U.S. Constitution also prohibits the U.S. Congress from suspending the writ of *habeas corpus*, U.S. CONST. art. I, § 9, cl. 2. I don't think that charter counties can suspend the writ either, although, once again, I can't identify the mechanism by which this is accomplished.

That I can't identify the theoretical mechanism by which some of these rights apply to charter counties, *see supra* note 29, doesn't undermine the conclusion that the Supreme Court of Maryland has held (or, I believe, will hold) these substantive rights to be applicable against charter county councils. As long as the interpretation of these substantive rights under the state constitution is construed in exactly the same way that the analogous provision of the federal constitution is construed, the precise nature of the mechanism by which it is transferred to charter county government is unimportant because it is a redundant check. Only with respect to state constitutional rights lacking a federal analog (right to a remedy and special laws prohibition) or when the Court is willing to give divergent interpretations does it have practical significance. For a discussion of the Supreme Court of Maryland's *in pari materia* doctrine, *see Friedman, Ex Post Facto, supra* note 2, at 65–68; for a discussion of the alternatives to Maryland's *in pari materia* doctrine, *see Boldt & Friedman, supra* note 31, at 334–44. *See also Friedman, Maryland Declaration of Rights, supra* note 73, at 645–46 (discussing how to present an argument based on the Maryland Declaration of Rights); *Friedman, Ex Post Facto, supra* note 2, at 61 n.25 (same, but adding an additional ground to depart from federal caselaw).

but that *procedural* limitations on the General Assembly are not also imposed on local governments.⁹⁷ Unfortunately, this doesn't solve the problem

97. I include within the category of **procedural** limitations on the General Assembly separation of powers, legislative sessions, bill requirements, debt limits, budget and appropriation, and local laws. First, the state constitution imposes a separation of powers. MD. CONST. Decl. of Rts., art. 8. Among the ways the separation of powers operates is to prevent the General Assembly from legislating in a way that violates or causes another branch to violate the separation of powers. *See, e.g.,* Schisler v. State, 394 Md. 519, 907 A.2d 175 (2006). The separation of powers, however, does not apply to local government. *See, e.g.,* Sugarloaf Citizens Ass'n v. Gudis, 319 Md. 558, 572, 573 A.2d 1325, 1332–33 (1990). A charter may create its own separation of powers, Montgomery County v. Anchor Inn Seafood Rest., 374 Md. 327, 822 A.2d 429 (2003), but that is not a limitation the state constitution imposes on local governments. *See supra* note 44 (discussing separation of powers in local government). Second, as for legislative sessions, the state constitution imposes restrictions on when the Maryland General Assembly may meet to legislate. *See* MD. CONST. art. III, § 14 (stating that regular session must convene on second Wednesday in January and describing method of convening extraordinary session); MD. CONST. art. III, § 15(1) (determining that Maryland General Assembly session is 90 days long and determining the methods by which it may be extended). These limitations do not apply to local governments. Rather, for charter counties, the analogous limitations are set forth in Article XI-A, Section 3 of the Maryland Constitution, and in their respective charters. ANNE ARUNDEL CNTY. CHARTER, § 208; BALT. CITY CHARTER, art. III, § 8; BALT. CNTY. CHARTER, § 208; CECIL CNTY. CHARTER, § 302; DORCHESTER CNTY. CHARTER, § 302; FREDERICK CNTY. CHARTER, § 302; HARFORD CNTY. CHARTER, § 217; HOWARD CNTY. CHARTER, § 208; MONT. CNTY. CHARTER, § 109; PRINCE GEORGE'S CNTY. CHARTER, § 316; TALBOT CNTY. CHARTER, art. II, § 212; WICOMICO CNTY. CHARTER, art. III, § 310. Third, the state constitution contains procedural requirements for the passage of bills. These include requirements for the style of bills, titles, subjects, number of readings, and votes for passage. MD. CONST. art. III, §§ 27, 28, 29, 30. These requirements do not apply to charter counties and most of the charter counties have their own (although, to be fair, many are similar to those imposed on the General Assembly by the state constitution). ANNE ARUNDEL CNTY. CHARTER, § 307; BALT. CITY CHARTER, art. III, §§ 12–14; BALT. CNTY. CHARTER, § 308; CECIL CNTY. CHARTER, § 304; DORCHESTER CNTY. CHARTER, § 304; FREDERICK CNTY. CHARTER, §§ 304–05; HARFORD CNTY. CHARTER, § 218; HOWARD CNTY. CHARTER, § 209; MONT. CNTY. CHARTER, § 111; PRINCE GEORGE'S CNTY. CHARTER, § 317; TALBOT CNTY. CHARTER, art. II, § 213; WICOMICO CNTY. CHARTER, art. III, § 311. Fourth, as for debt limits, the state constitution imposes significant constraints on the General Assembly's ability to incur state debt. MD. CONST. art. III, § 34. these limitations do not apply to local governments because (1) the text doesn't support such a reading, (2) the longstanding practice doesn't support such a reading, but mostly because (3) the constitution itself imposes other restriction on the manner in which local governments may incur debt. MD. CONST. art. XI, § 7 (debt limits on Baltimore City); MD. CONST. art. III, § 54 (debt limits on counties). Fifth, regarding budget and appropriation, the General Assembly originally controlled the state budget process. MD. CONST. art. III, § 32. In 1916, however, the People approved the "executive budget amendment" to the state constitution, which had the effect of significantly curtailing the General Assembly's power over the budget and transferring much of that power to the Governor. MD. CONST. art. III, § 52; *see also* FRIEDMAN, THE MARYLAND CONSTITUTION, *supra* note 30, at 133–42. Those limitations on the General Assembly's former legislative power are not transferred to the charter counties. Rather, each of the charter counties, by charter, has its own budget and appropriation process. ANNE ARUNDEL CNTY. CHARTER, art. VII; BALT. CITY CHARTER, art. VI, §§ 5–9; BALT. CNTY. CHARTER, art. VII, §§ 701 *et seq.*; CECIL CNTY. CHARTER, art. 5; DORCHESTER CNTY. CHARTER, art. 5; FREDERICK CNTY. CHARTER, art. 5; HARFORD CNTY. CHARTER, art. V; HOWARD CNTY. CHARTER, art. VI; MONT. CNTY. CHARTER, art. 3; PRINCE GEORGE'S CNTY. CHARTER, art. VIII; TALBOT CNTY. CHARTER, art. VI; WICOMICO CNTY. CHARTER, art. VII. Finally, the Maryland General Assembly is prohibited from passing local laws on several topics and with respect to certain counties. *See supra* note 51 (discussing prohibitions on

because it is unclear, to me at least, whether the special laws prohibition is a procedural or substantive right. As I wrote in my prior article on the special laws prohibition, although it may originally have been a procedural limit, the Supreme Court of Maryland seemingly has transformed it so that it now has aspects of both a substantive and procedural right.⁹⁸ That leaves me on the fence: Is it a procedural limit on the types of legislation that the General Assembly may pass, in which case it should not be applied to the charter counties or is it a substantive limit, protecting a right not to be treated differently, in which case it should also be applied to legislation adopted by charter counties (despite, perhaps that we don't yet understand the mechanism by which that is achieved)?⁹⁹

General Assembly adopting local laws). But charter counties are not prohibited from passing local laws. In fact, it is the only type of legislation that a charter county can pass. *Edwards Sys. v. Corbin*, 379 Md. 278, 296–97, 841 A.2d 845, 856–57 (2004).

98. Friedman, *Special Laws*, *supra* note 2, at 426 (“It is my view that [Justice] Eldridge’s opinion in *Cities Service* . . . improperly transformed what was a *procedural* legislative rule into what appears to be a *substantive* equality guaranty.”) (emphasis added). The procedural/substantive division may also have implications for whether a limitation applies only to the legislative branch of charter government or to the executive branch as well. It seems to me likely that substantive limitations apply to both the legislative and executive branches, but that procedural limitations might apply only to the legislative branch. That the special laws prohibition may have substantive and procedural aspects obviously complicates the analysis. On the one hand, it might be the case that the prohibition only applies to restrict the manner in which legislation is adopted. On the other, if it is a substantive guarantee, the special laws prohibition might also apply to the executive branch of a charter county. One can imagine the executive of a charter county adopting an administrative regulation that treats some people better than others. Such a regulation might now violate the special laws prohibition. One can also imagine the possibility that someone complains that the executive branch of a charter county is treating someone else better in an informal action or decision. Perhaps that too would now violate the special laws prohibition.

99. There is one additional constitutional limitation on the General Assembly that doesn’t fit my substantive/procedural paradigm, perhaps because I have been unwilling to ascribe to it definitively either a procedural or substantive cast: the right to a remedy. MD. CONST. Decl. of Rts., art. 19; Friedman, *Article 19*, *supra* note 2, at 426 (discussing substantive and procedural aspects of the right). In the modern era, Article 19 has been applied in three distinct contexts:

Guaranteeing “a right to a remedy both in circumstances in which the legislature has failed to provide such a remedy and in circumstances in which the legislature unreasonably seeks to limit an existing remedy.” These claims arise in a variety of situations, including new or expanded immunities, damage caps, statutes of limitation and repose, and alternative compensation systems; (2) [e]nsuring “that rights belonging to Marylanders are ‘not illegally or arbitrarily denied by the government;’” and (3) [m]ore literally, to ensure that courtrooms are open to litigants and the public.

Id. at 951 (internal citations omitted); *see also* FRIEDMAN, THE MARYLAND CONSTITUTION, *supra* note 30, at 26–27. It is not clear to me whether or which of these aspects is substantive or procedural (after all, for example, statutes of limitation are generally considered procedural while statutes of repose are generally considered substantive) and, therefore, under this rubric, to be applied against charter county governments (and if so, against just the council, or both the council and the executive).

Unfortunately, I am not sure if the distinction that I am drawing is correct and, if it is, on which side of the line the special laws prohibition falls.¹⁰⁰

2. *Common Law Interpretation and Reasoning by Analogy*

A second important method of constitutional interpretation, which is steeped in the common law tradition, is the method of reasoning by analogy. It is worth considering whether we ought to interpret the special laws prohibition as applying to charter counties because federal and state equal protection, which are in many respects analogous to the special laws prohibition, are applied to counties.

Federal equal protection comes from the Fourteenth Amendment¹⁰¹ and is generally the idea that government shouldn't separate a group out for worse treatment than everybody else absent a constitutionally sufficient reason. Courts apply different levels of scrutiny based on the characteristics by which the group is separated (strict scrutiny for race, intermediate scrutiny for gender and alienage, rational basis for economic classifications). It applies to all branches of government (executive, legislative, and judicial), all levels of government (state, county, and municipal) and sometimes to private action (if the state is sufficiently involved).

State equal protection is implied from Article 24 of the Maryland Declaration of Rights.¹⁰² State equal protection, like federal equal protection, generally prevents the State from separating out a group for worse treatment than everybody else. The Supreme Court of Maryland has described the protections of state equal protection and federal equal protection as "so intertwined that they, in essence, form a double helix, each complementing

100. Another potential way of dividing up the list is based on placement within the Constitution. That is, rights listed in the Declaration of Rights could apply to all levels of government, while those listed in Article III could apply only against state government and specifically only against the Maryland General Assembly. If we use that division, it doesn't change things much from the substantive/procedural paradigm. Limitations on condemnation and the protection against suspension of *habeas corpus* along with the special laws prohibition are located in Article III and therefore, under this theory, apply only against the Maryland General Assembly. The right to a remedy, Article 19, by contrast is located in the Declaration of Rights and so, under this theory, would apply against charter counties.

101. I am leaving aside, for the moment, that there is an equal protection component to the Fifth Amendment, which applies against the federal government. That aspect is discussed below, in Section II, in connection with the discussion of *Bolling v. Sharpe*.

102. Article 24 provides:

That no [person] ought to be taken or imprisoned or disseized of [their] freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of [their] life, liberty or property, but by the judgment of [their] peers, or by the Law of the land.

MD. CONST. Decl. of Rts., art. 24.

the other.”¹⁰³ State equal protection uses the same levels of scrutiny as federal equal protection, but there are Maryland precedents that apply a less deferential form of rational basis review.¹⁰⁴ State equal protection applies—without much analysis—to all levels of government (state, county, and municipal).¹⁰⁵ State equal protection also seems to have a state action requirement (although this hasn’t come up much, and the textual basis for a state action doctrine is less obvious under Article 24 than under federal equal protection).

The state special laws prohibition arises from Article III, Section 33 of the State Constitution and prevents the government from separating out a group for more favorable treatment than everyone else. Here it doesn’t matter why the group is selected for more favorable treatment, just that it is. Moreover, at least in Maryland, the legislature is given very little deference in special laws cases.¹⁰⁶ Historically, the special laws prohibition applies only

103. *Attorney General v. Waldron*, 289 Md. 683, 705, 426 A.2d 929, 941 (1981). One area in which state equal protection applies, but federal equal protection does not, is where one jurisdiction discriminates against residents of another jurisdiction. *Verzi v. Baltimore County*, 333 Md. 411, 635 A.2d 967 (1994) (rejecting Baltimore County legislation that discriminated against Harford County towing companies). In the federal system, instances of one state discriminating against inhabitants of another state are prohibited by the privileges and immunities clause or the so-called dormant commerce clause. *See, e.g., Hicklin v. Orbeck*, 437 U.S. 518, 531 (1978) (describing “mutually reinforcing relationship” between the privileges and immunities clause and the dormant commerce clause to prohibit discrimination against out-of-staters).

104. *Pizza di Joey v. Mayor of Baltimore*, 470 Md. 308, 235 A.3d 873 (2020); *Frankel v. Bd. of Regents of the Univ. of Md. Sys.*, 361 Md. 298, 761 A.2d 324 (2000); *Waldron*, 289 Md. at 722, A.2d at 950; *see also Dismas N. Locaria, Frankel v. Board of Regents of the University of Maryland System—In the Name of Equality: The Proper Expansion of Maryland’s Heightened Rational Basis Standard*, 61 MD. L. REV. 847 (2002).

105. *See, e.g., Tyler v. City of Coll. Park*, 415 Md. 475, 3 A.3d 421 (2010) (affirming rent control ordinance); *Kirsch v. Prince George’s County*, 331 Md. 89, 626 A.2d 372 (1993); *Ashton v. Brown*, 339 Md. 70, 660 A.2d 447 (1995) (invalidating City of Frederick’s municipal juvenile curfew ordinance); *Dubois v. City of Coll. Park*, 286 Md. 677, 410 A.2d 577 (1980) (overturning City of College Park’s city council redistricting on the basis of equal protection guarantees of Fourteenth Amendment and Article 24 of the Maryland Declaration of Rights).

106. Friedman, *Special Laws*, *supra* note 2, at 424 (discussing *Cities Services* test); *id.* at 454 (describing unanimity of sister state courts adoption of deferential, rational basis-style review of special laws); *id.* at 461 (describing lack of deference to the legislature as a structuralist criticism of special laws test). I also described the difference between the different levels of deference given to the “democratically elected legislature’s democratically selected policy choices” if challenged under equal protection as opposed to under special laws as a doctrinal incoherence that doesn’t make sense. *Id.* at 461–62. Richard Boldt suggests that this is not necessarily an example of doctrinal incoherence, but may reflect a theoretical preference for equality-based restrictions on legislation as opposed to due process-based restrictions. Justice Robert H. Jackson explained such a preference in his *Railway Express* concurrence:

The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply

to the legislative branch of government (and thus can't be violated by the executive or judicial branch or by private actors).¹⁰⁷ And the question I am asking here is whether it should apply to lower levels of government—county and municipal.

By the text of the Fourteenth Amendment, the federal equal protection clause applies to the “State[s].”¹⁰⁸ Courts have had no difficulty in determining that this includes that portion of state power exercised by local governments. But I am not certain how or why state equal protection applies to local governments. There is nothing obvious about the text of Article 24 that suggests that result. The best I can come up with is that it is inferred by analogy. I'm not saying that's wrong, just not obvious.

Moreover, I am not sure if that analogy should extend to the special laws prohibition. There is no doubt that the special laws prohibition is a form of equality protection similar to, but the obverse of, equal protection.¹⁰⁹ There is also no doubt that all of our sister states import equal protection analysis into the interpretation of their special laws prohibitions. I think that reasoning by this analogy provides a thin but not impossible basis for applying the special laws prohibition to local governments.

II. *BOLLING V. SHARPE, ATTORNEY GENERAL V. WALDRON*, AND THE “AVOIDANCE OF UNTHINKABLE OUTCOMES”

It seems to me that there remains one, rarely used and frequently derided, tool of constitutional interpretation that will accommodate the facts of this case: the “avoidance of unthinkable outcomes.” I derive the existence

legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.

Ry. Express Agency, Inc. v. New York, 336 U.S. 106, 112–13 (1949) (Jackson, J., concurring); see also *Lawrence v. Texas*, 539 U.S. 558, 585 (2003) (O'Connor, J., concurring).

107. See *supra* note 98 (discussing application of special laws prohibition to local executive branch actions).

108. U.S. CONST. amend. XIV, § 1.

109. By this, I mean that special laws prohibitions stop legislatures from giving benefits to a favored few, while equal protection is general understood to prevent legislatures from harming a disfavored minority. See, e.g., Jeffrey M. Shaman, *The Evolution of Equality in State Constitutional Law*, 34 RUTGERS L.J. 1013, 1049 (2003) (describing how state courts view rational basis as the appropriate standard of review for special laws prohibitions in state constitutions); Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195, 1210, 1222 (1985) (“[M]any state courts interpret special laws provisions by applying federal equal protection analysis.”); Friedman, *Special Laws*, *supra* note 2, at 454 n.223; Donald Marritz, *Making Equality Matter (Again): The Prohibition Against Special Laws in the Pennsylvania Constitution*, 3 WIDENER J. PUB. L. 161, 194–96 (1993) (distinguishing between the Equal Protection Clause of the Fourteenth Amendment's protections against classifications that burden and state special law provisions' protections against classifications that benefit).

of this interpretive theory from *Bolling v. Sharpe*,¹¹⁰ a case in which the U.S. Supreme Court held that racially segregated public schools in the District of Columbia violated the Fifth Amendment's due process requirement. *Bolling* was decided on the same day as *Brown v. Board of Education*,¹¹¹ in which the Court found racially segregated schools in several states violated the Fourteenth Amendment's guarantee of equal protection of the laws. The problem in *Bolling*, however, was that the Fourteenth Amendment, by its text and history applies only to the states, and the Fifth Amendment, which applies to the federal government (and the District of Columbia) does not by its text or history contain an equal protection component. The U.S. Supreme Court was undeterred, holding that "the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive" and that "discrimination may be so unjustifiable as to be violative of due process."¹¹² In the end, however, the Court's rationale rested on its view that "it would be *unthinkable* that the same Constitution would impose a lesser duty on the Federal Government [than on the States.]"¹¹³

110. 347 U.S. 497 (1954).

111. 347 U.S. 483 (1954).

112. *Id.* at 499. Although this idea was not much developed in *Bolling*, the U.S. Supreme Court had already taken tentative steps to recognizing an equal treatment component of the Fifth Amendment. *See* *Detroit Bank v. United States*, 317 U.S. 329, 338 (1943) (saying that the Fifth Amendment provides no guarantee against discriminatory legislation by Congress, but that such legislation "may be so arbitrary . . . as to violate due process"). Since *Bolling*, the U.S. Supreme Court has done nothing to cast doubt on the vitality of this component of the clause. *See infra*, note 119.

113. *Bolling*, 347 U.S. at 500 (emphasis added). There is a serious argument that the *Bolling* Court was, in fact, applying a structuralist analysis. That is, in effect, that the federal constitutional structure requires that subnational governments pass only laws that apply equally and don't discriminate. Moreover, such an interpretation, in Professor Black's phrase, might "make sense." BLACK, *supra* note 69, at 22 (discussing preference for interpretations that make sense). Although, as I have said elsewhere, *see supra* notes 78, 83, the taxonomy of interpretive techniques is difficult, I think that the *Bolling* analysis (and the Supreme Court of Maryland's *Waldron* analysis) fit more within the "avoidance of unthinkable outcomes," because they reflect a greater degree of judicial volition and less constraint.

There is no shortage of criticism of the Supreme Court's reasoning in *Bolling*.¹¹⁴ But there are few who criticize the result.¹¹⁵ In my view, what

114. See, e.g., MICHAEL STOKES PAULSEN, STEVEN G. CALABRESI, MICHAEL W. MCCONNELL, & SAMUEL L. BRAY, *THE CONSTITUTION OF THE UNITED STATES* 1369 (2d ed. 2013) (referring snarkily to *Bolling*'s interpretive theory as "double-reverse-ricochet-incorporation"); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 33 (1980) ("I would have strained sorely to side with . . . Chief Justice [Warren] had the language of the Fifth Amendment been able to bear his construction. It's hard to see how it can . . ."); *id.* at 32 (calling the Court's interpretation of the Fifth Amendment "gibberish both syntactically and historically"); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 *STAN. L. REV.* 395, 409 (1995) (describing the "embarrassing textual gap" in *Bolling*'s reasoning); LUCAS A. POWE, JR., *THE WARREN COURT AND AMERICAN POLITICS* 32 (2000) ("Equating the Due Process Clause and the Equal Protection Clause . . . was nothing short of stunning."); Richard A. Primus, *Bolling Alone*, 104 *COLUM. L. REV.* 975, 976–77 (2004) ("*Bolling* and reverse incorporation have generally been regarded as hard or even impossible to justify in terms of the text or the history of the Fourteenth Amendment."); CASS R. SUNSTEIN, *HOW TO INTERPRET THE CONSTITUTION* 112–13 (2023) (describing *Bolling* as difficult to defend as a matter of textualism and originalism); Gregory Dolin, *Resolving the Original Sin of Bolling v. Sharpe*, 44 *SETON HALL L. REV.* 749, 750–51 (2014) ("[A]bsent serious judicial and legal gymnastics, the clause simply did not provide such constraints on the federal government."); ROBERT BORK, *THE TEMPTING OF AMERICA* 83–84 (1990) (calling the reasoning in *Bolling* "social engineering from the bench"); Kermit Roosevelt, III, *Forget the Fundamentals: Fixing Substantive Due Process*, 8 *U. PA. J. CONST. L.* 983, 997 (2006) (observing that "[t]he argumentation in *Bolling* . . . is somewhat less than satisfactory" and that "[this] fact has been widely noted"); Raoul Berger, *Insulation of Judicial Usurpation: A Comment on Lawrence Sager's "Court-Stripping" Polemic*, 44 *OHIO ST. L.J.* 611, 629 n.173 (1983) (maligning *Bolling*); Raoul Berger, *Activist Censures of Robert Bork*, 85 *NW. U. L. REV.* 993, 1015 (1991) ("First, the conception of due process constitutionalized in 1789 could not contain an as yet unknown [equal protection] component. Second, the framers of the [F]ourteenth [A]mendment added to due process an equal protection clause, a considered judgment that the due process clause had no element of equal protection."); Sanford Levinson, *Constitutional Rhetoric and the Ninth Amendment*, 64 *CHI.-KENT L. REV.* 131, 147 (1988) ("There is no satisfactory theory . . . that explains the imposition on the federal government . . . of the equal protection norms . . ."). *But see* Peter J. Rubin, *Taking its Proper Place in the Constitutional Canon: Bolling v. Sharpe, Korematsu, and the Equal Protection Component of Fifth Amendment Due Process*, 92 *VA. L. REV.* 1879, 1880–81 (2006) (arguing that *Bolling* can be justified on history).

There is also a whole genre of law review articles proposing alternative theories by which the Supreme Court *could have* generated the outcome in *Bolling*. See, e.g., Akhil Reed Amar, *Intratextualism*, 112 *HARV. L. REV.* 747, 766–71 (1999) (defending *Bolling* as correctly decided under the Citizenship Clause, the Bill of Attainder Clause, or the Titles of Nobility Clause); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 *STAN. L. REV.* 395, 408–10 (1995) (defending *Bolling* based on changed meaning of "due process" in the Fifth Amendment); Dolin, *supra*, at 776–86 (arguing that *Bolling* is justifiable based on the Citizenship Clause); David E. Bernstein, *Bolling, Equal Protection, Due Process, and Lochnerphobia*, 93 *GEO. L.J.* 1253, 1254 (2005) (defending *Bolling* on a substantive due process justification); Ryan C. Williams, *Originalism and the Other Desegregation Decision*, 99 *VA. L. REV.* 493 (2013) (offering the Citizenship Clause as an originalist rationale for the outcome in *Bolling*); Michael J. Perry, Brown, *Bolling*, & *Originalism: Why Ackerman and Posner (Among Others) Are Wrong*, 20 *S. ILL. U. L.J.* 53, 69–72 (1995) (suggesting the Ninth Amendment as "a much more plausible basis" for *Bolling*); Gary Lawson, Guy I. Seidman, & Robert G. Natelson, *The Fiduciary Foundations of Federal Equal Protection*, 94 *B.U. L. REV.* 415, 415 (2014) (arguing that the decision in *Bolling* can be justified by an originalist using a fiduciary theory of interpretation); SUNSTEIN, *supra*, at 113 n.31. Because I do not view fidelity to a single interpretive technique to be an important or

drives its critics crazy is the *Bolling* opinion's refusal to reach what it terms an "unthinkable" result.

My point, however, is not to criticize the Court's reasoning in *Bolling*, but to praise it. It reflects, in my view, how judges really judge and how judges should judge. Judges don't let documents—even constitutions—force them into doing something "unthinkable." In this regard, I understand the term "unthinkable" to mean in a way that is completely incompatible with sensible government.¹¹⁶

The context in which *Bolling* arose is important. The Supreme Court had already decided how it would decide *Brown*. That is, the Court knew that it would overrule *Plessy* and its "separate but equal" analysis. The Court knew that it would hold that racially segregated public schools in the States violated the Fourteenth Amendment. The Court also knew that most Americans, including most educated Americans, neither knew nor cared that Washington, D.C. is not a State and, therefore, is not covered by the Fourteenth Amendment. The Court decided that the alternative result—allowing Washington, D.C. to retain segregated public schools, while simultaneously forcing the fifty states to desegregate—was "unthinkable" and did what common law judges have always done: avoided an unthinkable result and fixed the defective document.

In doing so, the Supreme Court treated the U.S. Constitution like a legal document, not like a holy relic. It refused to allow an interpretive theory to force it to a silly, absurd, or dangerous outcome. In the context of the revolution of *Brown*, *Bolling* is correctly viewed as a minor, incremental change.¹¹⁷ It is worth noting that only the government's ox was gored by this ruling. It resulted in an increase in equality, making our Union more

worthwhile interpretive value, and because I view the doctrine of "avoidance of unthinkable outcomes" as an acceptable and sufficient basis for decision, I am unpersuaded by the whole genre.

115. See, e.g., Primus, *supra* note 114, at 977 (2004) ("[T]he dominant approach has been to regard *Bolling* and reverse incorporation as justified by the force of sheer normative necessity."); William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2365 (2002) (describing *Bolling* as "universally accepted"); Michael W. McConnell, *The Fourteenth Amendment: A Second American Revolution or the Logical Culmination of the Tradition?*, 25 LOY. L.A. L. REV. 1159, 1162 n.14 (1992) ("As a matter of judicial statecraft, the imperative in *Bolling* was clear . . ."); Dolin, *supra* note 114, at 751 ("The *Bolling* decision is now universally recognized as . . . an unquestionably correct result as a policy and moral matter."); BORK, *supra* note 114, at 83 (stating that a different result in *Bolling* "would be *unthinkable*, as a matter of morality and of politics") (emphasis added); SUNSTEIN, *supra* note 114, at 114 (discussing *Bolling* as a "fixed point" of constitutional interpretation).

116. This is consistent with Justice Robert Jackson's famous statement in his *Terminiello v. Chicago* dissent: "There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact." 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

117. For *Brown* as constituting a revolution in constitutional theory, see Friedman, *Special Laws*, *supra* note 2, at 414.

perfect.¹¹⁸ I am also impressed by the fact that the U.S. Supreme Court was transparent about what it was doing. Moreover, the decision in *Bolling* has caused no harm, continues to be applied,¹¹⁹ and no one is seriously (and no one serious is) calling for it to be overturned.

The Supreme Court of Maryland was no less plain spoken in engrafting a notion of equal protection into its “Law of the Land” provision, Article 24 of the Maryland Declaration of Rights.¹²⁰ In *Attorney General v. Waldron*,¹²¹ Judge Waldron challenged the constitutionality of a statute that prohibited retired judges from practicing law while still collecting their judicial pensions. The Supreme Court of Maryland found that the prohibition violated the separation of powers and also the equal protection guarantees of the Fourteenth Amendment and Article 24 of the Maryland Declaration of Rights, which is usually understood to be our State’s due process analog.¹²² For current purposes, the key passage held: “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.”¹²³ The court explained, “[t]his result is similar to that reached by the United States Supreme Court in *Bolling v. Sharpe*, . . . where it held that the due process

118. My commitment to textual analysis requires that I also give consideration to the preamble to the U.S. Constitution. Friedman, *Ex Post Facto*, *supra* note 2, at 75 n.81 (discussing interpretive significance of constitutional preambles). As a result, it is significant to me that an interpretation can claim to make our Union “more perfect.” U.S. CONST. pmb. (stating that goal of U.S. Constitution is to “form a more perfect Union”).

119. *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 225–27 (1995) (relying on *Bolling* and applying strict scrutiny standard to racial classifications under the Fifth Amendment); *United States v. Paradise*, 480 U.S. 149, 166 n.16 (1987) (plurality opinion) (“[T]he reach of the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth . . .”); *Vance v. Bradley*, 440 U.S. 93, 94–95 n.1 (1979) (referring to the equal protection component of the Due Process Clause and explaining that “concern with assuring equal protection was part of the fabric of our Constitution even before the Fourteenth Amendment”); *Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (“Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.”); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975) (“[The Supreme] Court’s approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment.”).

120. *See supra* note 102.

121. 289 Md. 683, 426 A.2d 929 (1981).

122. *Id.* at 728–29, 426 A.2d at 946. A.E. DICK HOWARD, *THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA* 299 (1968) (“What the Great Charter [i.e., *Magna Carta*] called ‘law of the [L]and’ we would call ‘due process of law’—with excellent historical sanction . . .”). Recent scholarship argues that despite this long-standing interpretation, we have been wrong in equating “law of the Land”-style provisions with “due process of law”-type provisions. Max Crema & Lawrence B. Solum, *The Original Meaning of “Due Process of Law” in the Fifth Amendment*, 108 VA. L. REV. 447, 463–64 (2022).

124. *Id.* at 704–05, 426 A.2d at 929.

clause of the [F]ifth [A]mendment of the U.S. Constitution implicitly includes an equal protection element applicable to the U.S. government.”¹²⁴

Thus, the Supreme Court of Maryland held that Maryland’s due process-like provision, Article 24, contains an equal protection guarantee because it would have been *unthinkable* for it not to contain one. That outcome seems perfectly reasonable to me. And in the intervening years, this innovation has caused no problems. It has been wholly unobjectionable.¹²⁵

All of that is to say that, in my view, despite that none of the traditional interpretive theories support incorporating a special laws prohibition against charter counties, it would not bother me at all if the Supreme Court of Maryland decides to apply the special laws prohibition against the charter counties.¹²⁶ It could hold that it would be *unthinkable* to allow charter counties to legislate in a way that, without a pretty good reason, benefited only a special few rather than legislated for the benefit of all. If the Court applied the special laws prohibition to counties, it would be a small and incremental change.¹²⁷ Only special interests are affected and only in that

124. *Waldron*, 289 Md. at 704 n.8, 426 A.2d at 940 n.8.

125. Maryland courts apply equal protection analysis in Article 24 with no problem. *See, e.g.*, *Pizza di Joey v. Mayor of Balt.*, 470 Md. 308, 346–52, 235 A.3d 873, 894–95 (2020); *Conaway v. Deane*, 401 Md. 219, 244, 932 A.2d 571, 606 (2007) (holding that sexual orientation is not a suspect classification, therefore, regulation of same sex marriage subject to rational basis review), *abrogated by* Acts of 2012, ch. 2, 2012 Md. Laws 10 (deleting statutory prohibition on same-sex marriage), *and overruled by* *Obergefell v. Hodges*, 576 U.S. 644 (2015); *Ehrlich v. Perez*, 394 Md. 691, 730–31, 908 A.2d 1220, 1243 (2006); *Frankel v. Bd. Regents of the Univ. Md. Sys.*, 361 Md. 298, 318, 761 A.2d 324, 334 (2000); *Renko v. McLean*, 346 Md. 464, 482, 697 A.2d 468, 477 (1997) (stating that Article 24 supports the concept of equal protection even though it does not expressly state it); *Verzi v. Baltimore County*, 333 Md. 411, 417, 635 A.2d 967, 970 (1994) (stating that the Supreme Court of Maryland has “consistently recognized that the federal Equal Protection Clause and the Article 24 guarantee of equal protection of the laws are complementary but independent”); *Kirsch v. Prince George’s County*, 331 Md. 89, 97, 626 A.2d 372, 376 (1993) (stating that “the two provisions [the Fourteenth Amendment’s Equal Protection Clause and Article 24] are independent of one another, and a violation of one is not necessarily a violation of the other”); *Murphy v. Edmonds*, 325 Md. 342, 353–54, 601 A.2d 102, 107 (1992) (describing how Article 24, although independent from the federal Equal Protection Clause, has consistently been applied in the same way as the federal Equal Protection Clause); *Hornbeck v. Somerset County Bd. of Educ.*, 295 Md. 597, 640, 458 A.2d 758, 781 (1983) (same); *Governor v. Exxon Corp.*, 279 Md. 410, 438 n.8, 370 A.2d 1102, 1118 n.8 (1977) (same); *see also* Karen Syma Czapanskiy, *Why Does it Matter Where I Live? Welfare Reform, Equal Protection, and the Maryland Constitution*, 63 MD. L. REV. 655, 697–701 (2004) (discussing “rational basis with bite” review under Article 24); Locaria, *supra* note 104; MICHAEL CARLTON TOLLEY, STATE CONSTITUTIONALISM IN MARYLAND 75–77 (1992). *But see* *Bridges v. State*, 116 Md. App. 113, 120, 625 A.2d 609, 612 (1997) (“Commendably, the appellant has not urged upon us some illusory Maryland analogue to the Equal Protection Clause of the Fourteenth Amendment, such a constitutional provision never having been formally adopted in this State, or some Maryland equivalent of the academically indefensible *ipse dixit* of *Bolling v. Sharpe* . . .”).

126. And, for that matter, other local governments. *See supra* note 30.

127. There is a serious question about how big of a change that would be, that is, precisely what sorts of legislation will be prohibited that are not currently prohibited. *See supra* note 32.

they would be prevented from getting special treatment from the county councils of charter counties. It would operate only to make charter county government more equal and more fair. I only hope that if and when the Supreme Court of Maryland decides to incorporate the special laws prohibition against charter counties it doesn't do it in the quiet, *sub rosa* way that it has started on this venture,¹²⁸ but does it full-throated, in as clear and transparent manner as it did when it adopted state equal protection in *Waldron*.¹²⁹

III. MY THEORY OF CONSTITUTIONAL INTERPRETATION

In a landmark article, *An Originalism for Nonoriginalists*,¹³⁰ Professor Randy E. Barnett wrote that “[i]t takes a theory to beat a theory and, after a decade of trying, the opponents of originalism have never congealed around an appealing and practical alternative.”¹³¹ To me this statement is nonsensical. Imagine a carpenter saying, “it takes a tool to beat a tool and, after a decade of trying, the opponents of hammers have never found a better alternative,” and thereby concluding that the hammer wins and the screwdriver, hacksaw, and pliers are, therefore, not tools worthy of use. In my view, interpretive theories are not in competition with one another. They are not to be used to the exclusion of the other theories. Rather, they are tools,

128. See *supra* notes 15–26 and accompanying text (discussing *Jones, Kenwood Gardens, McClain*, and *Concerned Citizens*).

129. And as long as it is doing so, I would hope that the Court would consider improving the test that it employs to consider laws urged to violate the special laws prohibition. In my prior article on the special laws prohibition, I criticized the current test on both procedural and substantive grounds. Friedman, *Special Laws*, *supra* note 2, at 424–26. I proposed a new, four-part test that I argued was “faithful to the text of the Maryland Constitution, as well as to its history, structure, and values[;] . . . consistent with and commended by the jurisprudence of our sister jurisdictions[; a]nd [that] . . . will not destabilize existing expectations.” *Id.* at 469. My proposed test requires a court to ask:

1. Is there an existing general law on this topic to which the law that we are considering provides an exception? If “yes,” continue. If “no,” the law is constitutional.
2. Is the classification drawn by the law unnatural, unreasonable, or illogical? Is the class created by the statute closed? If “yes” to either question, continue. If “no,” the law is constitutional.
3. Does the statute provide an unfair benefit, demonstrate favoritism, or undermine the separation of powers? If “yes,” continue. If “no,” the law is constitutional.
4. Given the presumption of constitutionality that attaches to the acts of the legislature, was the decision to grant this benefit to the class unreasonable? If “yes,” the law is unconstitutional. If “no,” the law is constitutional.

Id. at 467–68. As long as we are making our special laws prohibition jurisprudence better, we really ought to make it better.

130. 45 LOY. L. REV. 611 (1999).

131. *Id.* at 617. Parenthetically, Professor Barnett’s choice of the verb, “congealed” gives away the game. Nothing palatable ever comes from a process of congealing. Yuck.

each with a different function, that are to be used together. Each has a valuable function. Each can improve our understanding. Thus,

[Judges] must use [their] 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 state as well as American traditions.¹³²

Put simply, judges should use all interpretive tools that are available and then use their reasoned judgment¹³³ to select the best possible interpretation.¹³⁴

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. To be clear, my goal is not to reduce or eliminate judicial discretion.¹³⁵ I am not afraid of the so-called “counter-

132. Friedman, *Special Laws*, *supra* note 2, at 467; *see* Friedman *Ex Post Facto*, *supra* note 2, at 59 (quoting that passage); Friedman, *Article 19*, *supra* note 2, at 950 (same); *see also* Richard C. Boldt, *Constitutional Structure, Institutional Relationships and Text: Revisiting Charles Black’s White Lectures*, 54 LOY. L.A. L. REV. 675, 693 (2021) (discussing how structuralism as a supplement to textualism “has the potential to broaden the information that litigants are likely to bring to the adjudicative process and to broaden the perspective of the judges charged with evaluating the resulting claims”); DANIEL A. FARBER & SUZANNA SHERRY, *DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS* 5 (2002) (“[N]o single grand theory can successfully guide judges or provide determinate—or even sensible—answers to all constitutional questions. Only an amalgam of theories will do.”). Other commentators have described this as a “pluralistic” method of constitutional interpretation. *See, e.g.*, PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* 3–4 (1982); Stephen M. Griffin, *Pluralism in Constitutional Interpretation*, 72 TEX. L. REV. 1753, 1757–60 (1994); Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1193 (1987) (describing the pluralist interpretive technique but employing terminology of “constructivist coherence”); RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* 19 (2001); Michael L. Smith, *Idaho’s Law of Constitutional Interpretation: Lessons from Planned Parenthood Great Northwest v. State*, 59 IDAHO L. REV. (forthcoming 2024) (discussing the above scholarship). Of course, it isn’t crucial that an interpreter uses only the interpretive techniques I have discussed or calls the techniques by the names I have called them. Rather, what matters is that the interpreter uses all of the available tools to come to the best possible interpretation. And, it is the role of the judge, exercising judgment, to determine the proper interpretation.

133. *See generally* Richard C. Boldt, *Reasoned Judgment*, 82 MD. L. REV. 104 (2023).

134. Of course, in my professional role, I adhere to the interpretive tools approved for my use by the Supreme Court of Maryland. *See supra* note 67.

135. From its inception, judicial constraint was offered as an important benefit of originalism. *See, e.g.*, Jeremy K. Kessler & David E. Pozen, *Working Themselves Impure: A Life-Cycle Theory of Legal Theories*, 83 U. CHI. L. REV. 1819, 1845 (2016) (“Constraining judges through text and history was held out to be [originalism’s] central virtue and objective.”); Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 3–4 (2018) (“Originalists hold that: (1) the meaning of a provision of the Constitution was fixed at the time it was enacted (the ‘Fixation Thesis’); and (2) that fixed meaning ought to constrain constitutional

majoritarian difficulty.”¹³⁶ Rather, I think that fully informed judges, knowing the full range of possible interpretations, are sufficiently constrained by our professional norms.¹³⁷

CONCLUSION

Here, I have walked through all of the available constitutional interpretive techniques. I don’t think either textualism or originalism provide any support to the idea that the special laws prohibition applies to charter counties.¹³⁸ Likewise, structuralism counsels against applying the special laws prohibition to charter counties.¹³⁹ I think common law constitutional interpretation might provide some limited support but it is a thin reed, indeed.¹⁴⁰ I think moral theory, critical race theory, and comparative constitutional law, are silent in helping us understand whether the special laws prohibition should be applied to the charter counties.¹⁴¹ Nevertheless, I don’t privilege the use of one theory over another. And, I don’t count them up and see how many theories point in each direction. Rather, constrained by the norms of my profession—the profession of judging—I use all of the interpretive techniques to come to the best possible interpretation. Here, I have determined that the “avoidance of unthinkable outcomes,” if applied judiciously and incrementally, supports applying the special laws prohibition against the charter counties (and potentially other local governments).¹⁴²

decisionmakers today (the ‘Constraint Principle’.)” (emphases omitted); Jack M. Balkin, “*Wrong the day It Was Decided*”: *Lochner and Constitutional Historicism*, 85 B.U. L. REV. 677, 690 (2005) (explaining that originalism was initially designed to “promote judicial restraint”); Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 602 (2004) (“By rooting judges in the firm ground of text, history, well-accepted historical traditions, and the like, originalists hoped to discipline them.”). Adherents of originalism, now that they are in ascendancy, are no longer so committed to the idea of judicial constraint as they originally were. *See, e.g.*, William Baude, *Originalism as a Constraint on Judges*, 84 U. CHI. L. REV. 2213, 2215–17 (2017) (admitting that judicial constraint is no longer an important value of originalism).

136. The idea of the “counter-majoritarian difficulty” arises from the allegedly undemocratic nature of unelected judges overruling democratically enacted statutes on the basis of their view of the meaning of the Constitution. *See generally* ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* (1962). Elsewhere, I have written that the counter-majoritarian difficulty, which so vexes some about the federal system, is not a problem in state systems, in which judges are often democratically elected and the constitutions are easier to amend. Friedman, *Special Laws*, *supra* note 2, at 435. Moreover, even in the federal system I find the obsession with the counter-majoritarian difficulty nearly unintelligible. FARBER & SHERRY, *supra* note 132, at 147–51 (discussing fallacies underlying concerns about the “counter-majoritarian difficulty”).

137. That is not to say that judges don’t make mistakes or that, faced with the full range of interpretive choices, don’t sometimes pick wrong. We do.

138. *See supra* Section I.A–B.

139. *See supra* Section I.C.

140. *See supra* Section I.D.

141. *See supra* Section I.E.

142. *See supra* note 30.

Allowing judges the latitude to come to correct decisions, even when not supported by the traditional interpretive techniques, is consistent with the appropriate judicial role and function.