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Dan Friedman

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**APPLYING FEDERAL CONSTITUTIONAL THEORY
TO THE INTERPRETATION OF STATE CONSTITUTIONS:
THE BAN ON SPECIAL LAWS IN MARYLAND**

DAN FRIEDMAN*

INTRODUCTION

The last forty years have witnessed the creation and explosive evolution of theories of constitutional interpretation that purport to explain how federal constitutional courts should or must interpret constitutional texts. At almost precisely the same time, a much smaller movement has developed, calling for a renewed focus on state constitutions as an independent source of constitutional protections. Interestingly, however, academia has rarely attempted to apply these theories of constitutional interpretation to state constitutions. This Article fills that void and applies constitutional interpretation theory to a misunderstood provision of the Maryland Constitution concerning the prohibition on special laws—laws that relate to a particular person or class, as opposed to general laws, which apply to all. In so doing, this Article examines the usefulness of existing theories of constitutional interpretation, designed principally for interpreting the

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* Assistant Attorney General of Maryland and Counsel to the Maryland General Assembly. Neither my boss, the Honorable Douglas F. Gansler, Attorney General of Maryland, nor my colleagues, nor our clients, the senators and delegates of the Maryland General Assembly, are responsible for this work and, therefore, cannot be bound by the views expressed herein. Nonetheless, I hope it will make their important work easier and better. This Article arises at the intersection of (1) my representation of the State of Maryland at the trial court and on appeal in a case called *Days Cove Reclamation Co. v. Maryland Department of the Environment*, 200 Md. App. 256, 27 A.3d 565 (2011); (2) teaching a course in theories of constitutional interpretation during the fall of 2009 at the University of Maryland Francis King Carey School of Law with my friend Richard C. Boldt; (3) preparation of my remarks on the importance of empathy and human judgment in judging delivered at the investiture of the Honorable Sherrie R. Bailey as an Associate Judge of the Circuit Court for Baltimore County; and (4) my previous work on Maryland state constitutional law. Thanks are therefore due (1) to those who pushed hard to consider these issues in the *Days Cove* case: my co-counsel, Assistant Attorney General Kathryn M. Rowe; our opposing counsel, James J. Doyle, III, Esq.; and our trial judge, the Honorable Martin P. Welch, now the Chief Judge of the Circuit Court for Baltimore City; (2) to Richard and our students on whom I tried out the first of these ideas; and (3) to Judge Bailey for the honor of allowing me to speak on such a wonderful occasion. Thanks also for research assistance to Katie Kruger, Matthew MacKenzie, and Pierce Murphy, who didn't know what interning for me might include. And thanks to Jeff Rosenfeld, proofreader extraordinaire.

federal constitution, for the new purpose of interpreting state constitutions.

This Article examines six specific theories of constitutional interpretation: (1) textualism; (2) originalism; (3) moral reasoning; (4) structural reasoning; (5) comparative constitutional law; and (6) common law reasoning. This Article argues that no preordained system of interpretation can answer every possible constitutional question. Constitutional theory can inform, but never replace, human judgment. Rather, judges should make use of all possible tools of interpretation, including their own personal judgment constrained by a reasonable reading of the text as informed by the history of the provision's adoption, subsequent judicial and scholarly interpretations, core moral values, political philosophy, and state and national traditions, to find the best possible interpretation.

Part I of this Article examines the development and current field of constitutional interpretation theory. Part II sketches the evolution of "New Judicial Federalism" and the awakening to the importance of state constitutional law. Part III examines the leading case of *Cities Service Co. v. Governor*¹ and the current interpretation of the Maryland special laws provision. Part IV uses the prohibition on special laws in the Maryland Constitution to critique theories of federal interpretation as applied to state constitutions.² Part V demonstrates why the criticisms outlined in Part IV require judges to use all possible tools, including their own personal judgment, to properly interpret state constitutions, and concludes by summarizing a composite theory of state constitutional interpretation.

I. CONSTITUTIONAL INTERPRETATION THEORY

Historically, constitutional theory provided tools to assist in constitutional interpretation. Chief Justice John Marshall's opinion in *McCulloch v. Maryland*,³ for example, relied on a number of constitutional interpretative tools, including "history, text, usage, structure, congressional action and inaction, logic, common law reasoning, and practical considerations"⁴ to inform the Court's understanding of

1. 290 Md. 553, 431 A.2d 663 (1981).

2. MD. CONST. art. III, § 33.

3. 17 U.S. (4 Wheat.) 316 (1819).

4. DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS 162-63 (2002) [hereinafter FARBER & SHERRY, SEEKING CERTAINTY].

Congress's power to create a national bank.⁵ Over time, however, "foundationalist" theorists have attempted to turn some of these interpretive tools into exclusive theories of constitutional interpretation that provide the answer to every possible constitutional question.⁶ This Part briefly traces the three important marker posts in modern American federal constitutional theory and explains the limits of foundationalism.

A history of modern constitutional theory must start with *Lochner v. New York*.⁷ The 1905 decision overturned a democratically adopted state law protecting bakery workers based on the Court's strongly held belief in the existence of a right to contract implicit in the "liberty" provision in the Due Process Clause of the Fourteenth Amendment.⁸ Over the next thirty years, the Supreme Court struck down nearly 200 state laws based on this "liberty of contract" theory.⁹ By 1937, the Supreme Court reversed course and adopted a more deferential standard of review of social and economic legislation. Today, *Lochner* is nearly universally condemned as a "wrong turn" in American constitutional law.¹⁰ For most, the error of the *Lochner* era was the Court's aggressive judicial activism,¹¹ and the lesson learned from that era was

5. See *McCulloch*, 17 U.S. (4 Wheat.) at 408 (noting that a determination that forming a national bank is outside the scope of constitutional authority would "impute to the framers of that instrument, when granting [specific] powers [to the government] for the public good, the intention of impeding their exercise by withholding a choice of means[]").

6. See FARBER & SHERRY, SEEKING CERTAINTY, *supra* note 4, at 1 (noting that foundationalism "seeks to ground all of constitutional law on a single foundation").

7. 198 U.S. 45 (1905).

8. *Id.* at 57–58.

9. See THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION 1392–99, 1431–87 (Norman J. Small & Lester S. Jayson eds., 1964) (listing Supreme Court cases holding state laws unconstitutional on liberty of contract grounds).

10. I am not persuaded by modern attempts to resurrect the reputation of *Lochner*. See, e.g., RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 214 (2004); David E. Bernstein, *The Story of Lochner v. New York: Impediment to the Growth of the Regulatory State*, in CONSTITUTIONAL LAW STORIES 325, 326–27 (Michael C. Dorf ed., 2004); RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 128–29 (1985); David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 12–13 (2003); David E. Bernstein, *Lochner's Legacy's Legacy*, 82 TEX. L. REV. 1, 2 (2003). In the end, however, it doesn't much matter to me if "the *Lochner* error" was as grave as conventional wisdom suggests it was. For present purposes, it is sufficient for *Lochner* to stand as the convenient archetype of misguided judicial activism in support of the Court's idiosyncratic economic theories. See *infra* note 16.

11. See Barry Friedman, *The History of the Counter-majoritarian Difficulty, Part Three: The Lesson of Lochner*, 76 N.Y.U. L. REV. 1383, 1385 (2001) [hereinafter Friedman, *Counterma-*

one of judicial restraint and deference to the decisions of democratically elected legislatures.¹²

In *Brown v. Board of Education*,¹³ the second marker post in the development of constitutional theory, the Court overturned the established “separate but equal” doctrine of *Plessy v. Ferguson*,¹⁴ and found that racially segregated schools violated the Equal Protection Clause of the Fourteenth Amendment.¹⁵ At the time, Chief Justice Earl Warren’s *Brown* opinion was roundly condemned by southerners and segregationists, and the opinion was also controversial amongst its supporters. Prominently, Professor Herbert Wechsler criticized the *Brown* decision, even though he agreed with the outcome, because he found the decision unsupported by “neutral principles” of constitutional interpretation.¹⁶ It is commonplace to note that the *Brown* decision is inconsistent with the original understanding of the framers of the Fourteenth Amendment, who in the same legislative session approved segregated schools in the District of Columbia.¹⁷ Today, however, despite some minor continuing criticism of its theoretical reasoning, *Brown* has achieved wide acceptance in the legal community and American society.¹⁸

The third important marker post is the privacy decisions of *Griswold v. Connecticut*, which overturned a state law prohibiting contraceptive use by married couples,¹⁹ and *Roe v. Wade*, which invalidated most state prohibitions on abortion.²⁰ Opponents have attacked these

journalist Difficulty] (noting that “scholars [have] painted *Lochner* as the primary example of judicial activism”).

12. *Id.*

13. 347 U.S. 483 (1954).

14. 163 U.S. 537, 544 (1896).

15. *Brown*, 347 U.S. at 495.

16. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 31–34 (1959). There are also those who disagree with Wechsler’s assessment that Chief Justice Warren’s *Brown* opinion violated neutral principles of constitutional interpretation or that a rejection of neutral principles was necessary to the result. See RICHARD KLUGER, *SIMPLE JUSTICE* 711–13 (1975). My point isn’t to resolve that controversy but rather to identify the necessity of the possibility of transformative decisions, and suggest the conventional account of *Brown* as an archetype. See *supra* note 10.

17. See *infra* note 26.

18. See, e.g., Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947, 952 (1995) [hereinafter McConnell, *Desegregation Decisions*] (“[T]he moral authority of *Brown* [is now so strong] that if any particular theory does not produce the conclusion that *Brown* was correctly decided, the theory is seriously discredited.”). But see RAOUL BERGER, *GOVERNMENT BY THE JUDICIARY* 117–33 (1977) (criticizing *Brown* on historical grounds).

19. 381 U.S. 479, 485 (1965).

20. 410 U.S. 113, 164–65 (1973).

decisions relentlessly for allegedly writing the Court's personal political preferences into constitutional doctrine.²¹ As with *Brown*, many of those who support the outcomes question the legal reasoning and textual bases for the decisions.²²

In my view, any credible theory of constitutional interpretation must avoid the problem of *Lochner* while simultaneously allowing the possibility of *Brown*. An interpretive theory must sufficiently cabin judicial discretion to avoid allowing the personal preferences of the Justices to guide decision making, as was the case in *Lochner*, while allowing sufficient judicial discretion to permit the change of course that *Brown*'s rejection of *Plessy* symbolizes. It is my view that no preordained system of interpretation can steer a course that safely avoids the *Lochner* problem but also permits the result in *Brown*. That's the problem with foundationalism. To steer the proper course requires both the exercise of human judgment and the risk of human error. Our human system both created and corrected the *Lochner* error and reached the transformative decision in *Brown*.

Despite this, many have tried to create foundationalist interpretive systems. Justice Hugo Black, for instance, was a leading proponent of textualism and judicial restraint. Dating from his appointment to the Supreme Court in 1937 until his retirement in 1971, he argued in his judicial opinions that only these principles together could properly constrain the excess of the *Lochner* era. Despite the constraints imposed by his interpretive theory, Justice Black joined the unanimous Court in the *Brown* decision. He dissented in *Griswold*, however, and died before the decision in *Roe*.

Originalism, another influential theory of interpretation, began in the 1970s principally as a critique of the privacy decisions of *Griswold* and *Roe*. From those beginnings, originalism has grown to a complete foundationalist interpretive theory that purports to provide answers to all questions of constitutional interpretation.²³ Under ori-

21. See, e.g., Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 7–11 (1971) (criticizing *Griswold* as “fail[ing] every test of neutrality”).

22. See, e.g., ARCHIBALD COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 112–14 (1976) (arguing that while there is sufficient connection between the Due Process Clause and a woman's right to an abortion, the *Roe* Court failed to confront the issue on principled terms); DAVID STRAUSS, *THE LIVING CONSTITUTION* 92–95 (2010) (supporting *Roe* but opining that the question remains open as to whether the woman's right should have overridden the state's interest); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 703–05 (1975) (arguing that while it is appropriate for courts to protect values not enumerated in the Constitution, courts and commentators have not “clearly stated and articulately defended” this doctrine).

23. See FARBER & SHERRY, *SEEKING CERTAINTY*, *supra* note 4, at 1 (noting that foundationalism “seeks to ground all of constitutional law on a single foundation”).

ginalism, judicial review is an aberrational, antimajoritarian practice that can only be justified if based on the original public understanding of the meaning of a constitutional provision at the time of its adoption. Originalism's adherents take the position that it is the only legitimate means of judicial review. By attempting to eliminate judicial discretion (although whether its adherents are successful in this project is an open question), originalism attempts to avoid the *Lochner* problem.²⁴ Originalism has a much harder time allowing for the possibility of *Brown*,²⁵ particularly because the historical record simply does not support the conclusion that the framers or ratifiers of the Fourteenth Amendment intended school desegregation.²⁶ More generally, originalism is an inherently conservative interpretive theory and is unlikely to be capable of the flexibility *Brown* demands.

Most modern constitutional interpretive theory arises either in support of, or in opposition to, originalism. Moral reasoning, as advocated by Ronald Dworkin, for example, rejects the whole premise of originalism and instead urges judges engaging in constitutional interpretation to use moral philosophy explicitly.²⁷ While such a system would clearly allow judges the flexibility to adopt the *Brown* decision, it is unclear how moral philosophy would avoid, except in retrospect, the *Lochner* problem. Common law constitutional interpretation takes its cues from the traditional common law method and, relying on notions of traditionalism and conventionalism, attempts to construct a system capable of avoiding *Lochner* while permitting *Brown*. Whether it succeeds is an open question.

Other modern interpretative theories are not foundationalist because they do not purport to create a single one-size-fits-all method of

24. See 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").

25. See Michael W. McConnell, *The Originalist Case for Brown v. Board of Education*, 19 HARV. J.L. & PUB. POL'Y 457, 457 (1996) ("An impressive array of academic authorities . . . ha[ve] come to the conclusion that under the original understanding of the Fourteenth Amendment, racial segregation of public schools was constitutionally permissible."); McConnell, *Desegregation Decisions*, *supra* note 18, at 949–52 (explaining that the standard understanding of *Brown* is that it conflicts with the Constitution's original meaning); Michael W. McConnell, *The Originalist Justification for Brown: A Reply to Professor Klarman*, 81 VA. L. REV. 1937, 1937, 1944 (1995) (arguing that the Fourteenth Amendment was understood at the time to forbid school segregation but conceding that the historical record is somewhat unreliable).

26. See McConnell, *Desegregation Decisions*, *supra* note 18, at 952 ("In the fractured discipline of constitutional law, there is something very close to a consensus that *Brown* was inconsistent with the original understanding of the Fourteenth Amendment . . .").

27. RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 2 (1996) [hereinafter DWORKIN, *FREEDOM'S LAW*].

constitutional interpretation. Nevertheless, adherents of these theories believe they provide important information about interpreting constitutions. This category includes structural reasoning, which requires an interpreter to reason not only from the text of the Constitution but also from the “structure and relation” created by the text.²⁸ Similarly, comparative constitutional law suggests that a constitutional interpreter may be aided by the interpretations of similar constitutions.²⁹

II. NEW JUDICIAL FEDERALISM

Scholars suggest that a renewed interest in state constitutions began almost forty years ago with the California Supreme Court’s decision to invalidate the death penalty based exclusively on a provision in California’s bill of rights.³⁰ The idea spread with the publication of a 1977 law review article by Justice William J. Brennan, Jr., which noted that “[s]tate constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court’s interpretation of federal law.”³¹ In the years that followed, rivers of ink were spilled in judicial opinions and law review articles over the legitimacy of state courts interpreting state constitutional provisions differently than the U.S. Supreme Court interpreted similar, and even identical, provisions of the federal constitution. In answering these legitimacy concerns, Oregon Supreme Court Justice Hans A. Linde argued that state courts should apply a “first things first” approach, in which the state court always interprets its constitution first without regard to the federal interpretation.³² By contrast, Washington Supreme Court Justice Robert F. Utter advocated what he called a “dual sovereignty” model in which state and federal interpre-

28. See CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 7 (1969) (describing one theory of constitutional interpretation as a “method of inference from the structures and relationships created by the constitution in all its parts or in some principal part”).

29. See Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 *YALE L.J.* 1225, 1228 (1999) [hereinafter Tushnet, *Comparative Constitutional Law*] (describing comparative constitutional law as the possibility of learning from constitutional experience elsewhere).

30. ROBERT F. WILLIAMS, *THE LAW OF AMERICAN STATE CONSTITUTIONS* 119–20 (2009) [hereinafter WILLIAMS, *STATE CONSTITUTIONS*] (citing *People v. Anderson*, 493 P.2d 880 (Cal. 1972), *superseded by constitutional amendment*, CAL. CONST. art. I, § 27).

31. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 *HARV. L. REV.* 489, 491 (1977).

32. Hans A. Linde, *First Things First: Rediscovering the States’ Bills of Rights*, 9 *U. BALT. L. REV.* 379, 383 (1980).

tation would be conducted in every case.³³ Courts in New Jersey, Washington, and Pennsylvania, among others, have adopted at various times a “criteria approach” under which they identify a series of factors that will justify departure from established federal precedent.³⁴ Some courts, commentators, and even state constitutional provisions, reflecting these same legitimacy concerns, reject independent state analysis entirely and tie the analysis of a state’s provision directly to that of the federal analog.³⁵ These traditional forms of state constitutional analysis ask *when* it is legitimate for us to interpret a state’s constitution.

As Counsel to the Maryland General Assembly, I rarely face these legitimacy questions. More frequently, my time is spent interpreting those provisions of the Maryland Constitution where there is no Supreme Court interpretation of an analogous provision of the federal constitution to “cast a shadow”³⁶ over the analysis.³⁷ My colleagues

33. Robert F. Utter, *The Practice of Principled Decision-Making in State Constitutionalism: Washington’s Experience*, 65 TEMP. L. REV. 1153, 1160 (1992); Robert F. Utter, *Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues when Disposing of Cases on State Constitutional Grounds*, 63 TEX. L. REV. 1025, 1029–30 (1985).

34. WILLIAMS, STATE CONSTITUTIONS, *supra* note 30, at 146–57 (discussing Commonwealth v. Edmunds, 586 A.2d 887 (Pa. 1991); State v. Gunwall, 720 P.2d 808 (Wash. 1986); and State v. Hunt, 450 A.2d 952 (N.J. 1982)).

35. See, e.g., CAL. CONST. art. I, § 7; FLA. CONST. art. I, § 12; Eastwood Mall, Inc. v. Slanco, 626 N.E.2d 59, 61 (Ohio 1994) (tying interpretation of article I, section 11 of the Ohio Constitution to the Supreme Court’s interpretation of the First Amendment); James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L.J. 1003, 1058 (2003) (“[A] state constitution must generally be interpreted with one eye on the U.S. Constitution . . .”). But see Robert F. Williams, *A “Row of Shadows”: Pennsylvania’s Misguided Lockstep Approach to Its State Constitutional Equality Doctrine*, 3 WIDENER J. PUB. L. 343, 374–75 (1993) [hereinafter Williams, *Misguided*] (arguing that it is a mistake for courts to interpret their state constitutional provisions in “lockstep” with the federal constitution).

36. The metaphor of the Supreme Court casting a shadow over state court decision making is from a seminal article by Professor Robert F. Williams. Robert F. Williams, *In the Supreme Court’s Shadow: Legitimacy of State Rejection of Supreme Court Reasoning and Result*, 35 S.C. L. REV. 353, 356 (1984).

37. That is not to say that the Office of the Attorney General (and specifically the Office of Counsel to the General Assembly) does not attempt to predict those circumstances in which the Court of Appeals of Maryland might give a divergent interpretation to a Maryland Constitution provision from that given by the Supreme Court of an analogous federal provision. Marylanders are frequently reminded by their courts that such divergent interpretation is possible. See, e.g., Marshall v. State, 415 Md. 248, 259–60 n.4, 999 A.2d 1029, 1035 n.4 (2010) (stating that there is no need for a Maryland constitutional provision to always be interpreted or applied in the same manner as its federal counterpart); Pack Shack, Inc. v. Howard County, 377 Md. 55, 64–65 n.3, 832 A.2d 170, 176 n.3 (2003) (same); Attorney Gen. v. Waldron, 289 Md. 683, 705, 426 A.2d 929, 941 (1981) (describing the equal protection guaranties of the Fourteenth Amendment and of article 24 of the Maryland Declaration of Rights as “independent [and] capable of divergent effect” but also “so intertwined that they, in essence, form a double helix, each complementing the

and I are asked to determine if a bill will be upheld if challenged under the “descriptive title” rule.³⁸ We are asked if an amendment should be rebuffed because the resultant bill would violate the “one subject” rule.³⁹ We make sure the state budget is adopted in a manner that is consistent with the governing constitutional rules.⁴⁰ With these questions, there is no such legitimacy concern—we must independently interpret the state constitution. Instead of *when*, I am much more interested in the question of *how* we should interpret the state constitution. The literature here is much sparser. As Professor G. Alan Tarr stated, “Constitutional theorists have continued to announce theories of constitutional interpretation that are really only theories of how to interpret a single constitution . . . [while] state jurists and state constitutional scholars, with a few isolated exceptions, have ignored recent constitutional theory in interpreting state constitutions.”⁴¹ To begin to fill this apparent void, in this Article I use the techniques of constitutional interpretation created for the federal constitution to help give meaning to a state constitutional provision.⁴² I have selected Maryland’s prohibition on special laws, article III, section 33, precisely because there is no analogous federal provision. It thus avoids the question of what to do when a U.S. Supreme Court interpretation of an analogous provision casts a shadow over the state court’s interpretation of its own provision.⁴³ Instead, Maryland courts

other”). Unfortunately, however, Maryland courts have not given much guidance about when they will follow the federal interpretation and when they will diverge. See WILLIAMS, STATE CONSTITUTIONS, *supra* note 30, at 197 (describing the Maryland courts’ approach as a “mixed message”).

38. MD. CONST. art. III, § 29.

39. MD. CONST. art. III, § 29.

40. MD. CONST. art. III, § 52.

41. G. Alan Tarr, *Constitutional Theory and State Constitutional Interpretation*, 22 RUTGERS L.J. 841, 842–43 (1991) (footnote omitted).

42. In important respects, this Article is another attempt to fulfill the research agenda for state constitutional law set forth by my friend and mentor, Professor Robert F. Williams of the Rutgers School of Law-Camden. Robert F. Williams, *Foreword: Looking Back at the New Judicial Federalism’s First Generation*, 30 VAL. U. L. REV. xiii, x–xv (1996).

43. Interestingly, there is a U.S. Supreme Court decision, by Justice Benjamin Cardozo, interpreting Maryland’s special laws prohibition. *Williams v. Baltimore*, 289 U.S. 36 (1933). It is well-written and well-reasoned and clearly explains Maryland’s special laws jurisprudence—at least as it existed in 1933:

Time with its tides brings new conditions which must be cared for by new laws. Sometimes the new conditions affect the members of a class. If so, the correcting statute must apply to all alike. Sometimes the new conditions affect one only or a few. If so the correcting statute may be as narrow as the mischief. The [Maryland] Constitution does not prohibit special laws inflexibly and always. It permits them when there are special evils with which existing general laws are incompetent to cope. The special public purpose will then sustain the special

may independently ascertain the meaning of this provision without any question about the legitimacy of such an enterprise.

III. THE CURRENT INTERPRETATION OF ARTICLE III, SECTION 33—THE SPECIAL LAWS PROVISION

A. *Cities Service Co. v. Governor*

The current text of article III, section 33 of the Maryland Constitution provides in relevant part that “the General Assembly shall pass no special Law, for any case, for which provision has been made, by an existing General Law.”⁴⁴ Most generally, the prohibition bars laws that give special treatment to the privileged few. The leading case interpreting this provision is *Cities Service Co. v. Governor*, which concerned the laws governing the sale of gasoline.⁴⁵ Under Maryland’s “divestiture law,” producers or refiners of petroleum products are generally prohibited from operating retail gasoline service stations.⁴⁶

form. The problem in last analysis is one of legislative policy, with a wide margin of discretion conceded to the lawmakers. Only in cases of plain abuse will there be revision by the courts. If the evil to be corrected can be seen to be merely fanciful, the injustice or the wrong illusory, the courts may intervene and strike the special statute down. If special circumstances have developed, and circumstances of such a nature as to call for a new rule, the special act will stand.

Id. at 46 (citations omitted). Because the Supreme Court was interpreting a provision of the state’s constitution, however, the claim cannot be made that the Court of Appeals of Maryland ought to defer to the Supreme Court’s interpretation.

44. MD. CONST. art. III, § 33. The full text of section 33 reads as follows:

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 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.

45. 290 Md. 553, 555, 431 A.2d 663, 665 (1981).

46. *Id.* at 555–56, 431 A.2d at 665–66. Maryland’s “divestiture law” provided that: [A]fter July 1, 1974, no producer or refiner of petroleum products shall *open* a retail service station in Maryland and operate it with company personnel or a subsidiary company . . . [and] after July 1, 1975, no producer or refiner of petroleum products shall operate any retail service station in Maryland with company personnel or a subsidiary company, regardless of when the station may have

In 1979, the Maryland General Assembly adopted a “mass merchandiser exemption”⁴⁷ to the divestiture law.⁴⁸ The terms of the mass merchandiser exemption were drafted so that only one retailer, Montgomery Ward, would ever be able to own gasoline service stations.⁴⁹ Judge John C. Eldridge, writing for a unanimous Court of Appeals, undertook the first modern analysis of the special laws prohibition of article III, section 33 to determine the validity of this mass merchandiser exemption.⁵⁰

Judge Eldridge’s analysis began by noting that “a statute is not prohibited by the [special laws] restriction unless two conditions are met: (1) it must be a ‘special’ law; (2) there must be no provision for the matter in an existing general law.”⁵¹ He then described the difficulties in defining a “special” law. First, he derided as “often repeated . . . [but] not particularly helpful,” the nearly tautological definition found in many cases: A special law is “‘a law for a special case’ or for ‘a particular case’ or for ‘individual cases.’”⁵² The court found the following definition more instructive: “[a] special law is one that

been opened, and that all stations must be operated by retail service station dealers.

Id. (citing MD. CODE ANN., art. 56, § 157E(b), (c), (g), (h), and (i) (1957, 1979 Repl. Vol., 1980 Cum. Supp.)).

47. The mass merchandiser exception

exempted from the divestiture requirement a retail service station in operation on January 1, 1979, that was operated by a subsidiary of a petroleum producer or refiners of January 1, 1979, on a year to year basis as long as the subsidiary’s gross revenues from petroleum products sold in Maryland are less than two percent of the subsidiary’s gross revenues from all retail operation in Maryland.

Id. at 557–58, 431 A.2d at 666–67 (citing MD. CODE ANN., art. 56, § 157E(c)(2) (1957)).

48. *Id.* at 557, 431 A.2d at 666.

49. *Id.* at 570–71, 431 A.2d at 673.

50. *Id.* at 555, 431 A.2d at 665.

51. *Id.* at 567, 431 A.2d at 671. There are very few Maryland cases, none recent, addressing the requirement that there be no provision for the matter in general law. *See, e.g.*, *State v. Ambrose*, 191 Md. 353, 368, 62 A.2d 359, 365 (1948) (holding that a statute that permitted the Board of Public Works to abandon certain oyster condemnation proceedings did not violate article III, section 33 of the Maryland Constitution because there was no corresponding general law); *Gebhart v. Hill*, 189 Md. 135, 140–41, 54 A.2d 315, 318 (1947) (holding that a statute enabling World War II veterans under the age of twenty-one to participate in the advantages of the Servicemen’s Readjustment Act was not invalid under article III, section 33 of the Maryland Constitution because there was no corresponding existing general law).

52. *Cities Serv. Co.*, 290 Md. at 567, 431 A.2d at 671 (citing *Reyes v. Prince George’s County*, 281 Md. 279, 305, 380 A.2d 12, 26 (1977); *Potomac Sand & Gravel Co. v. Governor*, 266 Md. 358, 378, 293 A.2d 241, 521–52 (1972); *Jones v. House of Reformation*, 176 Md. 43, 55, 3 A.2d 728, 734 (1939); *Norris v. Baltimore*, 172 Md. 667, 682, 192 A. 531, 538 (1937); *Baltimore v. Starr Church*, 106 Md. 281, 289, 67 A. 261, 265 (1937); *McGrath v. State*, 46 Md. 631, 634 (1877)).

relates to particular persons or things of a class, as distinguished from a general law which applies to all persons or things of a class,”⁵³ but recognized that this definition, too, is difficult to apply as it depends entirely on the “determination of what constitutes [a] ‘class.’”⁵⁴ Importantly, Judge Eldridge recognized that prior cases had approved legislation affecting a single entity—a so-called “class of one”—where that entity “constituted a class of itself, and similar conditions did not exist with any other company,”⁵⁵ thus undermining the utility of a definition based on the concept of “class.”⁵⁶

In *Cities Service*, Judge Eldridge created a new, two-step test for determining if a law is a “special” law in violation of the constitutional prohibition. First, he said that a court should consider whether the legislation violates the historical purpose of the constitutional provision.⁵⁷ Through reference to a series of old cases,⁵⁸ Judge Eldridge apparently, although not explicitly, identified the historical purpose of the special laws prohibition as preventing the grant of special privileges to influential people.⁵⁹ Second, Judge Eldridge listed certain additional “considerations and factors” that courts have considered in assessing whether laws are special:⁶⁰ (1) whether the “underlying purpose” of the legislation is “actually intended” to “benefit or burden” a particular member or members of a class rather than the entire class;⁶¹ (2) whether particular people or entities are identified by the

53. *Id.* (quoting *Prince George’s County v. Balt. & Ohio R.R. Co.*, 113 Md. 179, 183, 77 A. 433, 434 (1910)).

54. *Id.* at 567, 431 A.2d at 672.

55. *Id.* at 567–68, 431 A.2d at 671–72 (quoting *Baltimore v. United Rys. & Elec. Co.*, 126 Md. 39, 48–49, 94 A. 378, 381 (1915)); *see also* *Jones v. House of Reformation*, 176 Md. 43, 55, 3 A.2d 728, 734 (1939) (approving legislation creating a “class of one”).

56. *See* *Cities Serv. Co.*, 290 Md. at 567, 431 A.2d at 672 (noting that this definition “provides no mechanical rule for deciding cases, as it depends upon a determination of what constitutes a ‘class’”).

57. *Id.* at 568, 431 A.2d at 672.

58. Judge Eldridge’s opinion did not explore the records of the constitutional conventions that adopted and readopted the provision.

59. *Cities Serv. Co.*, 290 Md. at 568–69, 431 A.2d at 672 (citing *Jones v. House of Reformation*, 176 Md. 43, 56, 3 A.2d 728, 734–35 (1939); *Norris v. Baltimore*, 172 Md. 667, 682–83, 192 A. 531 (1937); *Mayor & City Council of Baltimore v. United Rys. & Elec. Co.*, 126 Md. 39, 52, 94 A. 378, 382 (1915); *Baltimore v. United Rys. & Elec. Co.*, 126 Md. 39, 52 (1915); *Montague v. State*, 54 Md. 481, 490 (1880)). Importantly, many cases that follow *Cities Service Co.* skip this first step. *See, e.g.*, *State v. Burning Tree Club, Inc.*, 315 Md. 254, 272–76, 554 A.2d 366, 375–77 (1989).

60. *Cities Serv. Co.*, 290 Md. at 569–70, 431 A.2d at 672–73.

61. *Id.* at 569, 431 A.2d at 672 (citing *Beauchamp v. Somerset County Sanitary Comm’n*, 256 Md. 541, 549, 261 A.2d 461, 464–65 (1970) (striking down a statute that effectively “applie[d] to one taxpayer only and to the lands of that one taxpayer”); *Littleton v. City of Hagerstown*, 150 Md. 163, 176–77, 132 A. 773, 779 (1926) (holding that a statute

statute;⁶² (3) the substance and “practical effect” of a statute, not simply its form;⁶³ (4) whether particular entities or individuals sought and obtained special advantages or if other similar entities or individuals were discriminated against by the legislation;⁶⁴ (5) whether the general law, on its own, is adequate to serve the public need purportedly addressed by the special law;⁶⁵ (6) whether the statute’s distinc-

exempting the city of Hagerstown from the control of the Public Service Commission was an unconstitutional special law)).

62. *Cities Serv. Co.*, 290 Md. at 569, 431 A.2d at 672–73 (citing *Reyes v. Prince George’s County*, 281 Md. 279, 305–06, 380 A.2d 12, 26–27 (1977)). The *Cities Service* court was careful to note, however, that courts have upheld statutes in which specific entities were named, *Cities Serv. Co.*, 290 Md. at 569, 431 A.2d at 673 (citing *Baltimore v. United Rys. & Elec. Co.*, 126 Md. 39, 52–53, 94 A. 378, 382 (1915)), and have rejected statutes in which the specific entities were not named. *Id.* (citing *Beauchamp v. Somerset County Sanitary Comm’n*, 256 Md. 541, 549, 261 A.2d 461, 464–65 (1970); *Littleton v. City of Hagerstown*, 150 Md. 163, 176–77, 132 A. 773, 779 (1926)).

63. *Cities Serv. Co.*, 290 Md. at 569–70, 431 A.2d at 673 (citing *Beauchamp*, 256 Md. at 549, 261 A.2d at 464–65 (demonstrating that the practical effect of the law in question limited its effect to only one American Legion Post); *Littleton*, 150 Md. at 177, 132 A. at 779 (stating that “[i]t is the object to be accomplished and not the form of the act which determines the validity of a classification”); *United Rys. & Elec. Co.* 126 Md. at 52, 94 A. at 382 (noting that, when there is only one company to be impacted by a specific law, it has the same effect as if the company was specifically named in the statute)).

64. *Cities Serv. Co.*, 290 Md. at 570, 431 A.2d at 673 (citing *United Rys. & Elec. Co.*, 126 Md. at 51, 94 A. at 382 (considering whether either the subject of the law or the maker of the law received special advantages); *Littleton*, 150 Md. at 182, 132 A. at 781 (noting that “unreasonable discrimination” is sufficient to “invalidate [a] classification”)).

65. *Cities Serv. Co.*, 290 Md. at 570, 431 A.2d at 673 (citing *Jones v. House of Reformation*, 176 Md. 43, 58, 3 A.2d 728, 735 (1939) (noting that special laws are not prohibited “inflexibly and always,” but are permitted when there is a “special public purpose” that can “sustain the special form”)). Interestingly, while this factor was repeated by Chief Judge Robert C. Murphy in the special laws case following *Cities Service Company, State v. Good Samaritan Hospital of Maryland, Inc.*, 299 Md. 310, 330, 473 A.2d 892, 902 (1984), this factor disappeared from the list recited in Judge Eldridge’s next special laws opinion, *State v. Burning Tree Club, Inc.*, 315 Md. 254, 273–74, 554 A.2d 366, 376 (1989). Of course, I cannot know why Judge Eldridge omitted this factor from his *Burning Tree* opinion or if this factor remains part of the governing law. I can, however, note my view that the determination of the “adequacy” of a law is a particularly legislative function, poorly suited for judicial review. The *Days Cove* case presents a good example of this. Existing law provided a statewide application process for a rubble landfill permit. See *Days Cove Reclamation Co. v. Md. Dep’t of the Env’t*, No. 24-C-07-003455, mem. op. at 2 (Md. Cir. Ct. Balt. Aug. 25, 2008) (on file with author) (noting that Maryland Department of the Environment had a three-phase permit process for rubble landfill operation). The legislature adopted Chapter 161 in 2006, which reflected its determination that the existing permit process was not restrictive enough in two parts of the State: (1) within a four-mile radius around Unicorn Lake in Queen Anne’s County and a sliver of Kent County; and (2) within a one-mile radius of certain creeks and tributaries of the Potomac River in Prince George’s County. *Id.* at 3. The trial court in the *Days Cove* case, applying the *Cities Service* test, made a specific finding that the pre-existing “permit process is more than adequate to protect environmentally sensitive areas, such as Unicorn Lake. Consequently, [the trial] court finds that there are adequate provisions for the matter in existing general law.” *Id.* at 9. The Court

tions or classifications are arbitrary or unreasonable;⁶⁶ and (7) whether the enactment, although it affects only one entity currently, would apply to other similar entities in the future.⁶⁷

B. Criticism of Cities Service

There are many grounds on which to criticize the decision of the Court of Appeals in *Cities Service*. As a procedural matter, the court does not explain how the two steps are supposed to relate to one another, except that none of the additional “considerations and factors” are “conclusive in all cases.”⁶⁸ Moreover, the court did not state what standard will be applied if a law is found to be special.

There are also substantive concerns. First and foremost, Judge Eldridge’s formulation eliminates the “reasonableness” test that existed in some pre-*Cities Service* Maryland cases⁶⁹ and in the decisions of the courts in every other state in the Union.⁷⁰ Second, the *Cities Service* test fails to reflect—or even mention—the presumption of constitutionality that attaches to all bills passed by the legislature. This is a serious defect in the *Cities Service* test that reflects a complete break with prior cases.⁷¹

Third, one of the additional “considerations and factors” asks, in part, if the legislature “actually intended” to “benefit or burden” a

of Special Appeals reversed, 200 Md. App. 256, 259, 27 A.3d 565, 567 (2011). My point is not to quarrel with the trial court’s application of the standard but rather to suggest that the standard is completely inappropriate. It is the legislature’s duty—not the court’s—to decide which laws are “adequate.”

66. *Cities Serv. Co.*, 290 Md. at 570, 431 A.2d at 673 (citing *Littleton*, 150 Md. at 176, 132 A. at 778 (noting that the “basis of classification [must] bear[] a reasonable relation to the subject-matter of the act”)).

67. This last factor, while clearly discussed by the court in the *Cities Service* case, *Cities Service Co.*, 290 Md. at 571–72, 431 A.2d at 673–74, was not added to the list of “considerations” until *Burning Tree Club, Inc.*, 315 Md. at 274, 554 A.2d at 376. See, e.g., *Reyes*, 281 Md. at 305–06, 380 A.2d at 27 (determining that, despite the existence of only one entity impacted by a statute, it did not qualify as a special law because of the possibility of additional impacted entities in the future).

68. *Cities Serv. Co.*, 290 Md. at 569, 431 A.2d at 672. It is my understanding that this is fairly typical of Judge Eldridge’s opinions, in which he prefers open-ended “considerations” or “factors” to “elements” or “checklists.”

69. See, e.g., *Littleton*, 150 Md. at 183, 132 A. at 781.

70. For a discussion of the approach to special laws of other states, see *infra* text accompanying notes 218–224.

71. See, e.g., *Beauchamp v. Somerset County Sanitary Comm’n*, 256 Md. 546, 547, 261 A.2d 461, 463–64 (1970) (“[A] statute is presumptively constitutional and the courts are reluctant to declare a statute unconstitutional if, by any construction, it can be sustained.”) (citations omitted); see also *Univ. of Md. Med. Sys. Corp. v. Malory*, 143 Md. App. 327, 352–53, 795 A.2d 107, 122 (2001) (discussing presumption of constitutionality in post-*Cities Services* decisions) (citations omitted).

particular member or members of a class, rather than the entire class.⁷² I am not sure why the legislature's intent is particularly relevant: either the bill creates an improper subclass or it does not.

Fourth, I am skeptical of a court's ability to properly assess "legislative intent." It is my view that courts, often unfamiliar with the give and take of the legislative process, place much too great of an emphasis on the words spoken at legislative hearings and in floor debates, but pay insufficient attention to the underlying motivations of legislators.⁷³ Reliance on legislative intent creates a disincentive for legislators to be candid about their reasons for supporting a piece of legislation.⁷⁴ That possible lack of candor is detrimental to our democracy.

Fifth, while I agree that a law that *benefits* only some members of a class may be an unconstitutional special law, I do not agree with Judge Eldridge that a law that *burdens* only some members of the class will violate the constitutional prohibition.⁷⁵ Similarly, while I agree that "[i]f a particular individual or business sought and received *special advantages* from the Legislature . . . this would support a conclusion that the Act constitutes a prohibited special law,"⁷⁶ I disagree with the further statement that "if other similar individuals or businesses were *discriminated* against by the legislation, this would support a conclusion that the Act constitutes a prohibited special law."⁷⁷ The cases cited by Judge Eldridge do not support this notion. In fact, no reported Maryland appellate opinion has ever invalidated a statute under article III, section 33 because it *burdened*, as opposed to *benefitted*, specific individuals.⁷⁸ The history of the provision does not support this interpre-

72. *Cities Serv. Co.*, 290 Md. at 569, 431 A.2d at 672.

73. See generally Jack Schwartz & Amanda Stakem Conn, *The Court of Appeals at the Cocktail Party: The Use and Misuse of Legislative History*, 54 MD. L. REV. 432, 457–59 (1995) (discussing courts' difficulties in assessing legislative history). See also *Muskin v. State Dep't of Assessments and Taxation*, 422 Md. 544, 30 A.3d 962 (2011) (deriding the legislature's evidence of ground rent problems as "anecdotal"). In *Days Cove*, the Court of Special Appeals declined to assess the legislature's intent in adopting the prohibition on rubble landfills in certain parts of the state. 200 Md. App. 256, 270, 27 A.3d 565, 574 (2011) (citing *Workers' Comp. Comm'n v. Driver*, 336 Md. 105, 118, 647 A.2d 96, 103 (1994)).

74. Cf. Jacob E. Gersen & Eric A. Posner, *Soft Law: Lessons from Congressional Practice*, 61 STAN. L. REV. 573, 610 & n.157 (2008) ("Congress may not always have an incentive to express its views candidly . . .").

75. See *Cities Serv. Co.*, 290 Md. at 569, 431 A.2d at 672 (considering whether the purpose of the legislation was to either benefit or burden a particular member or subclass).

76. *Id.* at 570, 431 A.2d at 673 (emphasis added).

77. *Id.* (emphasis added).

78. Cf. *Beauchamp v. Somerset County Sanitary Comm'n*, 256 Md. 541, 549, 261 A.2d 461, 464 (1970) (striking down a statute that effectively benefitted only one taxpayer); *Littleton v. City of Hagerstown*, 150 Md. 163, 176–77, 132 A. 773, 779 (1926) (holding that a statute benefitting only one entity was an unconstitutional special law); *Mayor of Balt. v.*

tation. None of Maryland's sister states use their special laws prohibitions in this novel way. It is illogical to use Maryland's provision to prevent discrimination because the identical legislative conduct—impermissibly discriminatory classifications—will be subject to constitutional restrictions under both the special laws provision and the equal protection concept, and consequently, subject to two different standards.⁷⁹ Moreover, even the proponents of the most expansive interpretation of special laws provisions do not claim that they were drafted, or may be used, to prevent classifications that *burden* individuals or groups.⁸⁰ Quite simply, this mirror image rule, while rhetorically attractive, is not supportable. It is my view that Judge Eldridge's opinion in *Cities Service* created an improper standard that is difficult to apply and improperly transformed what was a procedural legislative rule into what appears to be a substantive equality guaranty.

Despite these failings, the test developed in *Cities Service* is the controlling legal standard in Maryland. It is this standard that will be used to test the effectiveness of the six previously identified theories of federal constitutional interpretation as applied to state constitutions. While the outcome of *Cities Service*—invalidating the mass merchandiser exemption that applied only to Montgomery Ward—is generally viewed as correct,⁸¹ the appropriate question is whether the opinion formulated a *useful* and a *correct* standard for predicting and

United Rys. & Elec. Co., 126 Md. 39, 52, 94 A. 378, 382 (1915) (emphasizing the importance of preventing a highly influential individual from “getting an undue advantage over others”).

79. Because impermissibly discriminatory classifications are subject to the equal protection notion implicit in the “laws of the land” provision of article 24, an attempt to use Maryland's special laws provision to prevent discrimination would be subject to both the *Cities Service* test for the special laws complaint, *see supra* text accompanying notes 57–67, and a deferential rational basis review for the equal protection claim. *See* *Murphy v. Edmonds*, 325 Md. 342, 355, 601 A.2d 102, 108 (1992) (noting that most provisions attacked on equal protection grounds are evaluated using a rational basis test).

80. *See* 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). *See also* *Tanner v. Or. Health Sci. Univ.*, 971 P.2d 435, 447–48 (Or. Ct. App. 1998) (using state equal privileges and immunities provision to remedy both favoritism and discrimination); Timothy W. Snider, *A Rational Basis Review Under Article I, Section 20 of the Oregon Constitution?*, 39 WILLAMETTE L. REV. 1215, 1223–25 (2003) (discussing how *Tanner* serves as an example in which “Oregon courts have interpreted the [state equal privileges and immunities clause] to forbid discrimination as well as favoritism”).

81. *See, e.g., Green v. N.B.S., Inc.*, 409 Md. 528, 544–46, 976 A.2d 279, 288–89 (2009) (tracing the *Cities Services* rationale through subsequent citing cases) (citations omitted).

determining if other laws will violate the prohibition.⁸² As the principles of constitutional interpretation will show, the court in *Cities Service* failed to do so.

IV. APPLYING PRINCIPLES OF FEDERAL CONSTITUTIONAL INTERPRETATION TO STATE CONSTITUTIONS

Six theories of constitutional interpretation have come to dominate the scholarly literature: (1) textualism, (2) originalism, (3) moral reasoning, (4) structural reasoning, (5) comparative constitutional law, and (6) common law reasoning. This Part applies each of these theories of constitutional interpretation to the special laws provision of the Maryland Constitution to test their effectiveness in interpreting state constitutional provisions. As you will see, in my view, none of these theories alone can properly provide interpretive solutions to all of the questions raised in interpreting the provision.

A. *Textualist Analysis*

Textualism requires that constitutional interpretation begin with the text of the constitution. There is no debate about this proposition. Rather, the debate arises in considering whether, and with what external materials, the words of the text may be supplemented to determine meaning.⁸³ Some textualists take the position that the written text is the only legitimate source for judicial action and that supplementation is inherently antidemocratic.⁸⁴ By contrast, other scholars argue that the judicial enterprise always involves interpretation.⁸⁵ Dean John Hart Ely added another dimension to this debate by distinguishing between certain “specific” provisions of a constitution, which are amenable to a strict textual approach, and the more “open-textured” provisions, the interpretation of which require more judgment and reliance on external sources.⁸⁶ Finally, Professor Ahkil

82. While courts must ultimately decide whether a law violates article III, section 33, my job is to predict and advise the Maryland General Assembly (the only body subject to the prohibition) on how to comply with the provision.

83. See, e.g., Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 1–2 (1984).

84. MICHAEL J. GERHARDT ET AL., CONSTITUTIONAL THEORY: ARGUMENTS AND PERSPECTIVES 175 (3d ed. 2007) [hereinafter GERHARDT, CONSTITUTIONAL THEORY].

85. See, e.g., Richard Posner, *What Am I? A Plotted Plant? The Case Against Strict Constructionism*, NEW REPUBLIC, Sept. 28, 1987, at 23–25, reprinted in GERHARDT, CONSTITUTIONAL THEORY 191–93 (arguing that, because the Constitution is written in general terms, any application of the Constitution by a judge must involve at least some interpretation).

86. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 12–13 (1980).

Reed Amar reminds us to pay attention to the use of similar words throughout the constitution to aid in our understanding of their respective meanings.⁸⁷

State constitutional interpretation frequently takes a decidedly textualist tone.⁸⁸ In cases in which there are analog provisions of the federal constitution, interpreters of state constitutions have frequently used even minor textual differences as a starting point for independent interpretation.⁸⁹ Even in cases in which there is not a cognate federal provision, state constitutional interpretation tends to focus on the constitutional text and, specifically, a single “clause-bound” piece of text.⁹⁰

Textualist analysis of the Maryland special laws provision begins, of course, with the text itself: “And the General Assembly shall pass no special Law, for any case, for which provision has been made, by an existing General Law.”⁹¹ The most important questions for a textualist analysis then, are what are “special laws” and what are “general laws.” Unfortunately, it is difficult to know the exact meaning of either term. When these types of provisions came to popularity in state constitutions beginning in about the 1850s, there was no body of law that defined what exactly constituted a special law and what constituted a general law.⁹² According to Professor Thomas F. Green, Jr., at the time of the adoption of these constitutional provisions, “the exis-

87. Ahkil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 748 (1999).

88. G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 194 (1998) [hereinafter TARR, UNDERSTANDING].

89. See, e.g., Hansen v. Owens, 619 P.2d 315, 316–17 (Utah 1980) (finding broader privilege in article I, section 12, of the Utah Constitution, which provides that “[t]he accused shall not be compelled to *give evidence* against himself,” than in the Fifth Amendment of the U.S. Constitution, which provides that no person can be compelled “*to be a witness* against himself”) (emphasis added), *overruled by* American Fork City v. Crosgrove, 701 P.2d 1069, 1075 (Utah 1985). See also People v. Bullock, 485 N.W.2d 866, 872 n.11 (Mich. 1992) (“[I]t seems self-evident that that any adjectival phrase in the form ‘A *or* B’ necessarily encompasses a broader sweep than a phrase in the form ‘A *and* B.’ The set of punishments which are *either* ‘cruel’ *or* ‘unusual’ would seem necessarily broader than the set of punishments which are *both* ‘cruel’ *and* ‘unusual.’”).

90. See TARR, UNDERSTANDING, *supra* note 88, at 194 (suggesting that because state constitutions have been frequently amended, constitutional theorists cannot often look to the whole document to “illuminate the meaning of its parts,” and that state constitutions require a “clause-bound” interpretation, which limits the analysis to a portion of the constitution); WILLIAMS, STATE CONSTITUTIONS, *supra* note 30, at 338–39 (discussing the evolution of state constitutional language over time).

91. MD. CONST. art. III, § 33.

92. Thomas F. Green, Jr., *A Malapropian Provision of State Constitutions*, 24 WASH. U. L.Q. 359, 368 n.39 (1939) (“Prior to the adoption of the constitutional provisions, the phrases ‘special act’ and ‘local act’ had no legal significance.”).

tence of the mischief was recognized, but the exact nature of the evil had not been defined.”⁹³

Maryland law suggests that, particularly in interpreting the constitution, which reflects the voice of the people, we should begin with the ordinary meaning that would be given to the words.⁹⁴ The problem is not that “special” and “general” are technical terms, but rather that they are exceedingly common words used in a technical sense. Therefore, neither the dictionary definitions of “special” and “general” from 1864,⁹⁵ nor from the modern era,⁹⁶ provide any useful guidance. Even if we are permitted to use *legal* dictionaries of the times,

93. *Id.* at 368.

94. Older Maryland cases took the position that interpreting the state constitution and ordinary statutes were different tasks. As the Court of Appeals said in *Picking v. State*:

[T]he rules for construing a statute are not the same as those by which the courts are bound when they come to interpret the meaning of a constitutional provision. The technical rules applicable to the former have no application to the latter. “The Constitution, unlike the Acts of our Legislature, owes its whole force and authority to its ratification by the people, and they judged of it by the meaning apparent upon its face, according to the general use of the words employed, where they do not appear to have been used in a legal or technical sense.[”]

26 Md. 499, 504–05 (1867) (quoting *Manly v. State*, 7 Md. 135, 147 (1854)). See WILLIAMS, STATE CONSTITUTIONS, *supra* note 30, at 315–16 (quoting *Vreeland v. Byrne*, 370 A.2d 825, 830 (N.J. 1977)) (describing state constitutional interpretive preference for ordinary or plain-meaning interpretations as consistent with the “voice of the people”). Modern Maryland cases uniformly reject the idea of a distinction between the techniques of interpretation of statutes and constitutions, *see, e.g.*, *Andrews v. Governor*, 294 Md. 285, 290, 449 A.2d 1144, 1147 (1982) (“In ascertaining the meaning of a constitutional provision, we are governed by the same rules of interpretation which prevail in relation to a statute.”) (citation omitted), but continue to hold that the words of the Maryland Constitution should be given the plain-meaning interpretation that the people would have understood when it was ratified. *See, e.g.*, *Abrams v. Lamone*, 398 Md. 146, 172, 919 A.2d 1223, 1239 (2007) (citations omitted) (applying the general Maryland rule that constitutional provisions should be interpreted by the plain meaning at the time they were adopted). While it is possible, maybe even likely, that this apparent inconsistency can be reconciled, Maryland’s cases have not yet done so.

95. The terms “special and general” were incorporated into the Maryland Constitution in 1864. *See Gans v. Carter*, 77 Md. 1, 8–9, 25 A. 663, 663–64 (1893) (discussing the adoption of article III, section 33 during the 1864 Maryland Constitutional Convention). Noah Webster’s 1859 dictionary, a popular dictionary in 1864, included this definition: “*Special statute* is a private act of the legislature such as respects a private person or individual.” NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 1060 (1859). Webster’s definition of “general” includes no reference to “general statutes.” *Id.* at 487.

96. *See, e.g.*, THE AMERICAN NEW HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1729 (3d ed. 1992) (defining “special” as “having a limited or specific function,” however, there is no definition of “special law”); *id.* at 755 (defining “general” as “concerned with, applicable to, or affecting the whole or every member of a class or category,” however, there is no definition of “general law”).

they provide little guidance.⁹⁷ It is only modern legal dictionaries, usually off-limits to textualists interpreting popularly adopted constitutions,⁹⁸ that provide useful definitions.⁹⁹

Part of the problem arises from the partial importation of English practice. From medieval times, in part because of the inability of the courts to provide appropriate redress, private bills made up a significant part of Parliament's legislative output.¹⁰⁰ These private bills granted favor, legal relief, and redress of private wrongs, often in circumstances in which relief was not available from the courts.¹⁰¹ Black-

97. John Bouvier's *Law Dictionary* in 1843 and 1864 did not have definitions of either general or special law. His 1885 edition, however, defines general law, and by reference to the definition of general law, special law is defined. Unfortunately, however, even if it could be made relevant, the definition provides little guidance for the modern interpreter:

GENERAL LAWS. The later constitutions of many of the states place restrictions upon the legislature to pass special laws in certain cases. In some states there is a provision that general laws only may be passed, in cases where such can be made applicable. Under these provisions the legislature has discretion to determine the cases in which a special law may be passed The wisdom of these constitutional provisions has been the subject of grave doubt.

1 JOHN BOUVIER, *LAW DICTIONARY* 707 (Philadelphia, J.B. Lippincott & Co. 1885) (citations omitted).

98. See Ellen P. Aprill, *The Law of the Word: Dictionary Shopping in the Supreme Court*, 30 ARIZ. ST. L.J. 275, 312 (1998) (suggesting that legal dictionaries, which draw their definitions from legal opinions, are particularly poor choices for textualist interpretations).

99. BLACK'S LAW DICTIONARY (6th ed. 1990):

General law. A law that affects the community at large. A general law as contradistinguished from one that is special or local, is a law that embraces a class of subjects or places, and does not omit any subject or place naturally belonging to such class. A law, framed in general terms, restricted to no locality, and operating equally upon all of a group of objects, which, having regard to the purposes of the legislation, are distinguished by characteristics sufficiently marked and important to make them a class by themselves, is not a special or local law, but a general law. A law that relates to a subject of a general nature, or that affects all people of state, or all of a particular class.

Id. at 684.

Special law. One relating to particular persons or things; one made for individual cases or for particular places or districts; one operating upon a selected class, rather than upon the public generally. A private law. A law is "special" when it is different from others of the same general kind or designed for a particular purpose, or limited in range or confined to a prescribed field of action or operation. A "special law" relates to either particular persons, places, or things or to persons, places, or things which, though not particularized, are separated by any method of selection from the whole class to which the law might, but not such legislation, be applied. A special law applies only to an individual or a number of individuals out of a single class similarly situated and affected, or to a special locality.

Id. at 1397-98 (citations omitted).

100. ROBERT LUCE, *LEGISLATIVE PROBLEMS* 536-37 (1935).

101. *Id.*

stone described a “general or public act” as “a universal rule that regards the whole country[.]” while “special or private acts are rather exceptions than rules, being those which only operate upon particular persons and private concerns.”¹⁰² English practice since Blackstone’s time, however, has used the term “public” rather than “general,” and “private” rather than “special.”¹⁰³ All English legislation requires the King’s consent, but his approval of public bills was given by the phrase “*Le roy le veut*,”¹⁰⁴ while for private bills, he replied, “*Soit fait comme il est désirè*.”¹⁰⁵ Public and private acts appeared in the statute books together until 1798, but since then only public acts are set out in full.¹⁰⁶ The distinction between public and private acts carries legal significance in the English system because the courts are required to take judicial cognizance of public acts but not of private acts, unless private acts are formally set forth in the pleadings.¹⁰⁷

In the American practice, however, there was no legal distinction between public and private bills, which were approved in the same manner and often, although not exclusively, codified together.¹⁰⁸ Moreover, because of the longstanding practice of enacting private laws in both England and the United States, it was widely assumed that private or special legislation was necessary to the operation of government.¹⁰⁹ Despite this belief, during the middle part of the nineteenth century the amount of special legislation adopted by state legislatures exploded and ultimately became a real impediment to the flow of legislative business.¹¹⁰ When state constitutional conventions

102. *Id.* at 532 (quoting 13 WILLIAM BLACKSTONE, COMMENTARIES *85–86).

103. *See* 13 WILLIAM BLACKSTONE, COMMENTARIES *85 (referring to two types of laws as “general or special, public or private”). The United States Congress has adopted the English terms; state constitutions usually use the terms special and general. LUCE, *supra* note 100, at 534–35. *But see* Lyman H. Cloe & Sumner Marcus, *Special and Local Legislation*, 24 KY. L.J. 351, 362 (1936) (describing variations and inconsistency in use of terms in state constitutions).

104. “*Le roy le veult*” means “The King wills it so to be.” BLACKSTONE, *supra* note 103, at *184.

105. “Be it as it is desired.” *Id.* *See also* LUCE, *supra* note 100, at 538.

106. LUCE, *supra* note 100, at 538.

107. *Id.*; *see* Cloe & Marcus, *supra* note 103, at 363 & n.51 (noting the use of “special” and “general” to distinguish those statutes which the English Courts would not recognize from those that did not require special pleadings).

108. *Cf.* LUCE, *supra* note 100, at 538–39 (“In the assemblies of colonial America no sharp line was drawn between public and private bills. They were printed indiscriminately in the statute book, and indeed it was not uncommon for part of a statute to be general and part special.”).

109. Green, *supra* note 92 at 368.

110. *See* LUCE, *supra* note 100, at 544–45 (describing the explosion of the introduction of private bills); Cloe & Marcus, *supra* note 103, at 355–56 (characterizing special laws as

began to propose prohibitions on special laws, there was a general understanding of the problem but no accepted definition of what constituted a special law.¹¹¹ Courts and commentators have struggled mightily to create appropriate definitions.¹¹² Professor Green forewent a definition and, much like Judge Eldridge in *Cities Service*, proposed a purely functional test, stating that a law is special “when its operation and effect are such as to contribute to the evils which the constitution seeks to remove.”¹¹³ On the other hand, a law is general in nature “when it does not exclude cases which are substantially similar to those included in its operation, when it makes no unjust distinctions and confers no special favors, and when able and honest men will recognize that the differentiation is justified and therefore time, attention, and money are not wasted.”¹¹⁴ Nevertheless, even applying Professor Green’s functional test, it may be true that the only real definition of a special law is one that “the court calls Special.”¹¹⁵

Thus, a textualist is likely to be frustrated in attempting to interpret Maryland’s special laws provision as the key terms were not defined at the time of adoption. Nor are the key terms clearly understood today. At the risk of adding more insult to textualist injury, it is necessary to point out that textualism also cannot answer any of the other questions about the special laws provision, including: is the provision *mandatory* (and enforceable by the courts) or is it *directory* (and subject to legislative discretion)?¹¹⁶ what is the meaning of the clause “for any case”?¹¹⁷ and, what are we supposed to do with the extra

an “almost universally obnoxious” form of legislation); Green, *supra* note 92, at 362–64, (criticizing special laws as “trivial matters” whose explosion increased political corruption and “undue enlargement” of statute books); Robert M. Ireland, *The Problem of Local, Private, and Special Legislation in the Nineteenth Century United States*, 46 AM. J. LEGAL HIST. 271, 275–77 (2004) (characterizing the process of special legislation as “basically undemocratic” and the recipient of too much legislative attention).

111. Green, *supra* note 92, at 362–64, 368.

112. For a confusing discussion of the confusion, see Cloe & Marcus, *supra* note 107, at 365 (“If ‘private’ constitutes a further subdivision it would seem that ‘local’ and ‘special’ would include only those laws where there was an unreasonable classification and not those in which there was no attempt to classify, the objects being specified by name, which would be ‘private.’”).

113. Green, *supra* note 92, at 366.

114. *Id.*

115. Frank E. Horack, *Special Legislation: Another Twilight Zone*, 12 IND. L.J. 109, 123 (1936).

116. See *infra* text accompanying note 217.

117. My theory is that this clause actually means to limit the applicability of the special laws prohibition to legislation that would affect actual pending litigation. See *infra* text accompanying notes 171–173.

commas:¹¹⁸ These shortcomings demonstrate that textualism alone cannot provide the meaning of the special laws prohibition. Moreover, they are illustrative of the problem of limiting interpretation to the words of the text.

Professor Amar's intertextualist method, in which an interpreter "tries to read a word or phrase that appears in the Constitution in light of another passage in the Constitution featuring the same (or a very similar) word or phrase,"¹¹⁹ also offers us little assistance in determining the meaning of the key phrases in the special laws prohibition, except to emphasize the close connections between the three sentences of article III, section 33.¹²⁰ The term "special Law" does not appear anywhere in the Maryland Constitution except in the first and second sentences of article III, section 33, and the term "General Law" appears only in the second and third sentences of the provision.¹²¹

B. *Originalist Analysis*

Originalism is an interpretive system that compels its adherents to apply the original public meaning of the provisions of the Constitution to even the most modern of constitutional questions.¹²² Original-

118. In a prior article, I noted that the drafters of the Maryland Declaration of Rights in 1776 were "overly fond of commas." 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, 950 (2002). Apparently, our constitutional framers had not outgrown that fondness by 1864. We could safely remove all three: "And the General Assembly shall pass no special Law, for any case, for which provision has been made, by an existing General Law." MD. CONST. art. III, § 33. A case could be made that "for any case" is an appositive phrase that can be set off by commas, but there is no possible grammatical justification for that last comma.

119. Amar, *supra* note 87, at 748. See also DANIEL A. FARBER & SUZANNA SHERRY, JUDGMENT CALLS 28 (2009) [hereinafter FARBER & SHERRY, JUDGMENT CALLS] (defining "intratextualism" as a "variant form of textualism" that calls for the interpreter "to compare different parts of the constitutional text in the search for meaning").

120. See MD. CONST. art. III, § 33.

121. *Id.* For the full text of section 33, see *supra* note 44.

122. See ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 143–45 (1990) (noting that in originalist theory, "[a]ll that counts is how the words used in the Constitution would have been understood at the time"). It is important to distinguish originalism from ordinary historical research. Constitutional interpretation has always been informed by historical research. Madison's notes of the debates of the federal Constitutional Convention of 1789, for example, frequently help us understand what was intended by a provision. Originalism, however, is different in that historical research ceases to be an interpreter's tool and becomes the sole, definitive source of answers in determining meaning. See generally *id.* at 218–19 (arguing that originalists seek the objective meaning of the language when it was adopted, and that a change in circumstances or situations "does not mean that we should conclude that those terms can be redefined to say absolutely anything we like").

ism arises from concerns over the so-called “countermajoritarian difficulty,” the seeming paradox that in a democratic society, unelected judges are permitted to overrule democratically adopted legislation based on what might be their idiosyncratic ideas of what the Constitution requires.¹²³ According to the originalists, judicial review can only be justified if judges are constrained to view the Constitution according to the common public understanding of a provision at the time of its adoption.¹²⁴ In many ways, originalism developed in reaction to what its founders and adherents—including Robert Bork, Edwin Meese, and Antonin Scalia¹²⁵—saw as unprincipled constitutional decisions like *Griswold v. Connecticut* and *Roe v. Wade*. Critics dispute every step of the originalist analysis, arguing that there is no countermajoritarian difficulty¹²⁶ or that it is significantly overstated;¹²⁷ that the range of potential interpretations is effectively constrained by other means;¹²⁸ that the constitutional Framers themselves did not intend

123. Friedman, *Countermajoritarian Difficulty*, *supra* note 11, at 1385.

124. See Edwin Meese, III, *Toward a Jurisprudence of Original Intent*, 11 HARV. J.L. & PUB. POL'Y 5, 10–11 (1988) [hereinafter Meese, *Toward a Jurisprudence*] (arguing that judicial action becomes problematic when the courts do not feel bound by the text or original meaning of the Constitution).

125. See, e.g., BORK, *supra* note 122, at 110–15 (criticizing the Court's reasoning in *Griswold v. Connecticut* and *Roe v. Wade* as a departure from constitutional text); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 8–9 (1971) (arguing that *Griswold v. Connecticut* “is an unprincipled decision” that “fails every test of neutrality”); Meese, *Toward a Jurisprudence*, *supra* note 124, at 10–11 (criticizing judges who are “tempted to add to or subtract from the written constitution” as contrary to the intentions of the Framers); Edwin Meese, III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. TEX. L.J. 455, 464–65 (1986) (arguing that a jurisprudence of original intention would prevent judicial decisions that are “mere policy choices instead of articulations of constitutional principle”); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 864 (1989) (arguing that originalism establishes a historical criterion that can tame the “inevitable tendency of judges to think that the law is what they would like it to be”).

126. See, e.g., Mark A. Graber, *The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary*, 7 STUD. AM. POL. DEV. 35, 36–37 (1993) (arguing because very few judicial decisions present instances of countermajoritarian difficulty it is not the appropriate lens through which to view the judiciary).

127. See, e.g., FARBER & SHERRY, JUDGMENT CALLS, *supra* note 119, at 23–26 (arguing that the three premises providing the foundation for the countermajoritarian dilemma are each “either false or greatly exaggerated”); FARBER & SHERRY, SEEKING CERTAINTY, *supra* note 4, at 145 (arguing that “[a]lthough the countermajoritarian difficulty has a core of truth, it has been blown out of proportion”).

128. See, e.g., FARBER & SHERRY, JUDGMENT CALLS, *supra* note 119, at 6 (arguing that judicial discretion is effectively restrained by adherence to precedent, process constraints, and internalized norms); FARBER & SHERRY, SEEKING CERTAINTY, *supra* note 4, at 13–14 (contending that the originalist view of the Constitution as “a simple recipe” with “clear directions” from history “fall[s] prey to the fallacy that there is no middle ground between blind adherence to originalism and purely political decisionmaking”).

for their views to control, but instead drafted the Constitution to allow development,¹²⁹ that it is impossible to determine with certainty (and at appropriate levels of generalization) the original public understanding,¹³⁰ or that it is even appropriate to allow the “dead hand” of our Revolutionary-Era forefathers to govern our current affairs.¹³¹ Finally, and most importantly, originalism’s critics charge that it is ironically ineffective in constraining judicial activism.¹³²

Many of the theoretical underpinnings that underlie originalism do not exist or exist only in modified form in state constitutions. For example, a major reason that originalists seek to constrain the interpretative range of federal judges is that they are not democratically elected; yet many state judges are.¹³³ Similarly, one important reason for originalists to constrain judges is the near impossibility of amending the federal constitution to correct interpretations offensive to a democratic majority.¹³⁴ It is not nearly so difficult to amend state constitutions, and they are frequently amended specifically to correct individual case interpretations.¹³⁵ Thus, it is not clear that originalism—

129. See Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENT. 77, 84–85 (1988) (arguing that although “[t]he framers assuredly gave [the Constitution] its words they did not determine the meaning of those words as understood by the ratifiers”); H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 887–88 (1985) (noting that the original “original intent” referred to the proceedings of state ratifying conventions rather than to the intent of the Framers).

130. See Daniel A. Farber, *The Originalism Debate: A Guide for the Perplexed*, 49 OHIO ST. L.J. 1085, 1095 (1989) (discussing the difficulties of determining the appropriate level of generality in interpreting constitutional principles).

131. See *id.* at 1095–97 (acknowledging that one of the most common arguments against originalism is that it is “too static”).

132. See FARBER & SHERRY, SEEKING CERTAINTY, *supra* note 4, at 155 (noting that even originalism is not “sufficiently determinate to stop willful judges from pursuing their own preferences”).

133. See Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, 757–58 (1995) (discussing the accountability problems that accompany an unelected judiciary). In Maryland, our appellate judges are subject to retention election every ten years. MD. CONST. art. IV, § 5A(c), (d).

134. See TARR, UNDERSTANDING, *supra* note 88, at 23–24 (noting that while the federal constitution has been amended less than once per decade, 5,900 amendments out of 9,500 proposed ones have been adopted by the states as of 1996).

135. See WILLIAMS, STATE CONSTITUTIONS, *supra* note 30, at 335 (noting that provisions can be included in state constitutions to effectively overrule a judicial interpretation). An example from Maryland is the 1978 constitutional amendment to art. III, § 52(11) and (12), Acts of 1978, ch. 971 (ratified Nov. 7, 1978), which was adopted to reverse the outcome of *Md. Action for Foster Children, Inc. v. State*, 279 Md. 133, 367 A.2d 491 (1977) and to restore the intended constitutional balance in budget-making between the legislative and executive departments. See Dan Friedman, *Magnificent Failure Revisited: Modern Maryland Constitutional Law from 1967 to 1998*, 58 MD. L. REV. 528, 557–58 (1999) (discussing the General Assembly’s response to the Court of Appeals’ decision in *Maryland Action for Foster Children*).

at least in its most distilled foundationalist form—can be imported into state constitutional interpretation.

1. Uncovering the Original Public Meaning of the Special Laws Provision

Despite these theoretical limitations, what can an originalist analysis add to the understanding of Maryland's prohibition on special laws? Originalist theorists tell us that the most important clue to the meaning of a constitutional provision is what the ratifiers (not the drafters) intended.¹³⁶ Unfortunately, however, we will never know what the citizens of Maryland thought of this provision during the ratification vote. Unlike the state conventions that ratified the federal constitution, whose debates were recorded and can provide clues about the ratifiers' intent, state constitutions—at least by the mid-nineteenth century—were ratified directly by the voters.¹³⁷ No speeches are made or recorded in the process of citizen voting. All that can be known directly is the final vote tally,¹³⁸ which tells nothing about the ratifiers' intent with respect to a single provision.¹³⁹ Sometimes there can be indirect evidence, such as newspaper articles, describing or even advocating for certain constitutional provisions. With respect to Maryland's special laws provision, however, there is no such indirect evidence. Despite extensive research, I can find no newspaper accounts or other indirect sources from the ratification campaign that discussed this provision.

The lack of secondary materials is not surprising. Political campaigns, including constitutional ratification campaigns, tend to focus on a few large issues and not the minutia for which we are searching. This was especially true in the ratification campaign for the Maryland Constitution of 1864, which was debated largely as a referendum on

136. See WILLIAMS, *STATE CONSTITUTIONS*, *supra* note 30, at 320–21 (discussing theories of “linkage” between intent of drafters and ratifiers of state constitutions).

137. *Id.* at 26.

138. This strikes me as an important defect in originalism as a theory. Originalist theorists have identified ratifiers' intent as the critical piece of evidence, but ratifiers' intent is evidence that can exist only in the unique historical circumstances of the ratification of the federal constitution by state ratifying conventions. If this is true, originalism, at least in its most distilled form, can have little appeal as a general theory outside of its application to the federal constitution.

139. The vote to adopt the Maryland Constitution of 1864 was very close—27,541 Maryland voters supported the constitution, and 29,536 opposed it. Only the absentee ballots cast by soldiers in the field saved the constitution. Not surprisingly, the Union soldiers voted overwhelmingly for the new constitution: 2,633 for and only 263 against, and thus provided the razor-thin margin of victory. JEAN H. BAKER, *THE POLITICS OF CONTINUITY: MARYLAND POLITICAL PARTIES FROM 1858 TO 1870*, at 109 n.120 (1973).

the ongoing Civil War.¹⁴⁰ Thus, important innovations in the 1864 Constitution were (1) a provision providing immediate emancipation of Maryland slaves;¹⁴¹ (2) a provision declaring that “paramount allegiance” is owed to the federal government and Constitution;¹⁴² and (3) a series of restrictive loyalty oaths designed to disenfranchise Confederate sympathizers and ensure the continued electoral success of the controlling Unionist party.¹⁴³ If there was a fourth topic that could have garnered public attention, it would have been the radical restructuring and centralization of the state public education system.¹⁴⁴ There is no recorded evidence that anybody outside of the

140. See BAKER, *supra* note 139, at 108–09 (“Inevitably the campaign for ratification of the Constitution merged with that to elect Lincoln and the Unionist candidate for governor, Thomas Swann. This campaign played on expressive symbols long familiar to Marylanders—the importance of Union, the necessity of allegiance to the United States, and the need for a new Constitution. . . . Support of Unionism and the Constitution assured progress Opposition to Unionism meant support for the slave oligarchy of the past—and the secessionists of the present.”).

141. MD. CONST. (1864), Decl. of Rts., art. 24 (“That hereafter, in this State, there shall be neither slavery nor involuntary servitude, except in punishment of crime, whereof the party shall have been duly convicted; and all persons held to service or labor as slaves are hereby declared free.”); see also WILLIAM STARR MYERS, *The Maryland Constitution of 1864*, JOHNS HOPKINS UNIV. STUDIES, Series XIX, Nos. 8–9, 52–59 (1901) (highlighting the debates and arguments that took place when the provision was adopted).

142. MD. CONST. (1864), Decl. of Rts., art. 5 (“The Constitution of the United States, and the laws made in pursuance thereof being the supreme law of the land, every citizen of this State owes paramount allegiance to the Constitution and Government of the United States, and is not bound by any law or ordinance of this State in contravention or subversion thereof.”). For a brief discussion of the importance of this “paramount allegiance” provision in 1864, see THOMAS SCHARF, *HISTORY OF MARYLAND FROM THE EARLIEST PERIOD TO THE PRESENT DAY* 582 (1967); Dan Friedman, *The History, Development, and Interpretation of the Maryland Declaration of Rights*, 71 TEMP. L. REV. 637, 687 n.173–74 (1998); MYERS, *supra* note 141, at 59–60.

143. MD. CONST. (1864), art. I, §§ 4, 7; art. III, § 47; DAN FRIEDMAN, *THE MARYLAND STATE CONSTITUTION: A REFERENCE GUIDE* 7 (2006) [hereinafter FRIEDMAN, *STATE CONSTITUTION*]. The Maryland Constitution of 1864 was short-lived. By 1867, Maryland had adopted a new constitution whose drafters were committed to eliminating the innovations made in the 1864 constitution. In fact, the 1867 Constitutional Convention seriously considered a proposal to use the 1851 Maryland Constitution as a guide for its deliberations, effectively ignoring the intervening 1864 Maryland Constitution. PHILIP B. PERLMAN, *DEBATES OF THE MARYLAND CONSTITUTIONAL CONVENTION OF 1867*, at 53–54, 57–58 (1923). Although this procedure was ultimately rejected, the delegates to the 1867 Constitutional Convention clearly understood that a large part of their task was to repeal portions of the 1864 Constitution. See Friedman, *supra* note 135, at 538 n.55 (noting that because the Maryland Constitution of 1864 “did not appropriately reflect the political views of the Maryland electorate, it was replaced at the earliest possible opportunity, 1867”). Despite their goal of restoring the pre-Civil War *status quo ante*, and despite their success in many instances doing so, the drafters of the 1867 Maryland Constitution did not remove what is now article III, section 33. See *infra* notes 255–262 and accompanying text.

144. See MD. CONST. (1864), art. VIII (governing the education system in Maryland, including but not limited to the creation of a centralized education system, its funding, and

constitutional convention considered or even cared about the special laws provision.

In lieu of evidence of the ratifiers' intent, an originalist interpreter of article III, section 33 is left only with the drafters' intent.¹⁴⁵ Fortunately, that record tells an interesting story. But, reading the debates of the constitutional convention of 1864 suggests that at least the first two sentences of article III, section 33 must be read together.¹⁴⁶ Otherwise, there is almost no history of the second sentence—the one about which we care—to review. Delegate Ezekiel Forman Chambers¹⁴⁷ introduced an amendment that added what is now

the powers and rights of the General Assembly with respect to education in Maryland); see also *Hornbeck v. Somerset County Bd. of Educ.*, 295 Md. 597, 622–23, 458 A.2d 758, 771 (1983) (detailing how article VIII of the Maryland Constitution of 1864 restructured the educational system); MYERS, *supra* note 141, at 85–86 (describing the importance and the working details of a new article governing the Maryland system of education); L.E. Blauch, *The First Uniform School System of Maryland, 1865–1868*, 26 MD. HIST. MAG. 205, 205 (1931) (noting that the 1864 Maryland Constitution “was the first legal enactment for a uniform system of public schools in Maryland”); Susan P. Leviton & Matthew H. Joseph, *An Adequate Education for All Maryland's Children: Morally Right, Economically Necessary, and Constitutionally Required*, 52 MD. L. REV. 1137, 1155 (1993) (noting the 1864 education clause called for a “uniform system of free public schools” and contained a specific requirement to hire a state superintendent of schools who would have been granted wide authority to improve the State's educational quality).

145. See WILLIAMS, *STATE CONSTITUTIONS*, *supra* note 135, at 320–21 (noting that because it is only with the consent of the drafters that constitutional provisions are submitted to the ratifiers, intent of the drafters may be relevant); Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 197 (1984) (“State constitutions . . . have drafters, yes, but no ‘Founders’ . . .”).

146. The first two sentences of article III, section 33 of the Maryland Constitution provide:

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 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.

MD. CONST. art. III, § 33; see Oscar Leser, *Report on the Evils of Special and Local Legislation*, in REPORT OF THE EIGHTH ANNUAL MEETING OF THE MARYLAND STATE BAR ASSOCIATION 160, 177–78 (1904) (noting that the second sentence extended the prohibition of the General Assembly to pass special laws to any cases, in addition to the ones enumerated in the first sentence, for which provisions had been made by an existing law).

147. Ezekiel Forman Chambers was at the twilight of an extraordinarily distinguished career when he was elected as a delegate from Kent County to the Constitutional Convention of 1864, having previously served as a Brigadier General in the War of 1812; a state senator (1822–1826); a United States senator (1826–1834); judge of the Court of Appeals of Maryland (1834–1851); and a delegate to the Maryland Constitutional Convention of 1851.

known as the second sentence of article III, section 33. The provision was adopted without debate or even a recorded vote.¹⁴⁸ That's it.

Widening the lens, however, and reading the history of the first two sentences of article III, section 33 together, much more information can be gathered. When the convention began to consider the proposed article III, on July 19, 1864, Delegate Henry Stockbridge of Baltimore City¹⁴⁹ introduced a new provision, explicitly modeled on a provision of the Indiana Constitution¹⁵⁰ that would prohibit "local or

Just three weeks after the new Constitution of 1864 was approved by the voters, Judge Chambers, the Democratic candidate, was defeated in his campaign for Governor of Maryland. BIOGRAPHICAL CYCLOPEDIA OF REPRESENTATIVE MEN OF MARYLAND AND DISTRICT OF COLUMBIA 97-98 (Baltimore 1879) [hereinafter BIOGRAPHICAL CYCLOPEDIA]; Biographical Directory of the United States Congress, <http://bioguide.congress.gov/scripts/biodydisplay.pl?index=C000282> (last visited Feb. 13, 2012).

148. Delegate Ezekiel Forman Chambers of Kent County proposed the language that became the second sentence of article III, section 33 three times at the Maryland Constitutional Convention of 1864. First, Delegate Chambers suggested a provision requesting that "[t]he legislature shall not pass any special law to make valid a defective deed, or afford other remedy in any case for which under existing laws provision has been made." 2 THE DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MARYLAND 882 (Annapolis, Richard P. Bayly 1864) [hereinafter 2 DEBATES]. The amendment was ruled out of order. *Id.* Chambers proposed it again and it was again ruled out of order. *Id.* at 885-86. In commenting on another proposal, Chambers remarked that: "If the proposition . . . should be rejected, then I would submit my proposition, which is simply, that there shall be no special legislation in any case in which the provisions of the general law enables the party to obtain redress." *Id.* at 887. And, a short while later, Delegate Chambers urged the body to vote against another proposition the convention was considering in favor of a now streamlined proposal that Chambers wished to offer: "The legislature shall pass no special law in any case in which under existing law provision is made." *Id.* None of his colleagues even responded. Finally, on Saturday, July 23, 1864, Delegate Chambers was allowed to offer his amendment and it was adopted without debate or a recorded vote. *Id.* at 896-97; *see also* PROCEEDINGS OF THE STATE CONVENTION OF MARYLAND TO FRAME A NEW CONSTITUTION 297 (Annapolis, Richard P. Bayly 1864) (describing Delegate Chambers' amendment).

149. Delegate Stockbridge was a lawyer and a member of the State Senate at the time of his election as a delegate to the Constitutional Convention of 1864. Delegate Stockbridge served as Chairman of the Judiciary Committee and was a leader of the Republican/Unionist Party at the convention. BIOGRAPHICAL CYCLOPEDIA, *supra* note 147, at 189-90; *see also* 2 MEN OF MARK IN MARYLAND 299 (1912) (biography of Judge Henry Stockbridge, Jr., son of Delegate Henry Stockbridge).

150. *See* 2 DEBATES, *supra* note 148, at 877 (statement of Delegate Stockbridge) (stating that there are similar provisions in other state constitutions and that, "[p]erhaps the most full and ample is that in the constitution of Indiana, on page 352 of the book of constitutions"). Delegate Stockbridge was describing a book purchased by the 1864 Constitutional Convention that was referred to as "American Constitutions" and published by "Lippincott in Philadelphia." 1 DEBATES OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF MARYLAND 36-37 (Annapolis, Richard P. Bayly 1864). The book is formally titled THE AMERICAN'S GUIDE: COMPRISING THE DECLARATION OF INDEPENDENCE; THE ARTICLES OF CONFEDERATION; THE CONSTITUTION OF THE UNITED STATES, AND THE CONSTITUTIONS OF THE SEVERAL STATES COMPOSING THE UNION (1864) [hereinafter THE AMERICAN'S GUIDE]. The Archives of Maryland has published online a copy of this volume "known to have been

special laws” in thirteen enumerated cases.¹⁵¹ Although he mashed them together considerably both in the written amendment and in his comments,¹⁵² he was clearly concerned with two separate problems: local bills, which he thought should be handled by local government; and special laws, which he thought were in the “nature and form of a litigated case” and should be adjudicated by courts and not the legislature.¹⁵³ Thus, Delegate Stockbridge—the proponent of the amendment—saw the principal purpose of the prohibition on special laws as reinforcing the separation of powers.¹⁵⁴ Delegate Stockbridge also saw his amendment primarily protecting the legislature from the demands of citizens, not as protecting citizens from the legislature.¹⁵⁵

The comments of Delegate Chambers make clear that he too viewed Delegate Stockbridge’s amendment as protecting the separation of powers. Delegate Chambers focused on whether the courts or the legislature is the proper venue for certain disputes to be resolved: “There is no mischief in this State greater than that which has been

used by W. R. Cole, Secretary, Constitutional Convention of 1864.” 420 ARCHIVES OF MARYLAND ONLINE (Sept. 27, 2009), available at <http://www.msa.md.gov/megafile/msa/speccol/sc2900/sc2908/000001/000420/html/index.html>. As Delegate Stockbridge promised, on page 352 is article IV, section 22 of the Indiana Constitution of 1851—one of that constitution’s three prohibitions on local and special laws. THE AMERICAN’S GUIDE, *supra*, at 352. However, Delegate Stockbridge did not seek to introduce a provision like article IV, section 23 of the Indiana Constitution of 1851, which stated that “[i]n all the cases enumerated in the preceding section, and in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the State.” *Id.* at 353. Moreover, no member proposed an equal privileges and immunities provision like article I, section 23 of the Indiana Constitution of 1851, which states, “The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens.” *Id.* at 350.

151. 2 DEBATES, *supra* note 148, at 801–02.

152. In debating a provision that was eventually rejected, which would have prevented local and special laws for the punishment of crimes and misdemeanors, regulating the practice of Courts of Justice, or authorizing or directing the trial of any case in any court, Delegate Stockbridge first argued that these types of court rules would be better resolved by local government. *Id.* at 884. In the next breath, however, Delegate Stockbridge seemingly changed his mind and argued statewide uniformity is the goal of this provision (which would not be aided by a patchwork of laws adopted by local government). This suggests his concern was not local laws, but special laws. *Id.* at 884, 891 (taking the position that fees and salaries should be uniform, but to the extent that they cannot, should be set locally). My point is not to criticize Delegate Stockbridge but to point out how difficult it was for the constitutional convention, particularly as it was operating before the advent of local home rule, to distinguish between the concepts of special and local laws.

153. *Id.* at 884, 891.

154. *See id.* at 883–84 (stating that the purpose of Delegate Stockbridge’s amendment was in concurrence with Delegate Edelen’s view that “[t]he process by which business is to be done in the courts is something which [should be left] to the courts themselves”).

155. *See id.* at 877 (noting that the legislature was frequently preoccupied by citizens’ demands, responding to which cost the State hundreds of dollars and hours of time).

complained of and which this section is designed to remedy; that is, the interference of the Legislature in cases where individual rights are concerned, and where parties have no opportunity of being properly represented and heard.”¹⁵⁶ Delegate Chambers continued, “Let the Legislature adopt the principle upon which the courts are to act, and let the courts carry out those principles, upon the establishment by proof of the particular cases provided for.”¹⁵⁷ Delegate Chambers described how “influential parties” had abused the legislative process by having the legislature, for example, revise a defective deed, rather than using the established judicial process.¹⁵⁸ Thus, the two principal participants in the debate, Republican Stockbridge and Democrat Chambers, each framed their description of the purpose of the amendment in terms of the separation of powers.¹⁵⁹

Delegate Chambers went on to announce that he would vote against Delegate Stockbridge’s amendment and offer instead his own amendment, which was a general prohibition against special laws.¹⁶⁰ Despite this, the convention body adopted Delegate Stockbridge’s enumerated special laws amendment, as amended, with no additional recorded discussion.¹⁶¹ The next morning, Delegate Chambers was finally permitted to offer his alternative, but instead of replacing Delegate Stockbridge’s amendment, Delegate Chamber’s amendment was transformed into the second sentence of article III, section 33 without any recorded discussion or debate.¹⁶² The Maryland Constitution was subsequently changed by the constitutional convention in 1867, which slightly revised the enumerated list in the first sentence of article III, section 33, but left the second sentence untouched.¹⁶³ The 1867 version of the special laws provision remains, to this day, the

156. *Id.* at 878.

157. *Id.*

158. *Id.* at 887.

159. Use of special laws provisions to police the separation of powers is not unique to Maryland. *See* Green, *supra* note 92, at 371–72 (describing separation of powers as an important basis for the prohibition of special laws). The Nebraska Supreme Court has expressed a related reason for its state constitutional ban on special laws: “It is because the legislative process lacks the safeguards of due process and the tradition of impartiality which restrain the courts from using their powers to dispense special favors that such constitutional prohibitions against special laws were enacted.” *Haman v. Marsh*, 467 N.W.2d 836, 845 (Neb. 1991).

160. 2 DEBATES, *supra* note 148, at 887.

161. *Id.* at 896.

162. *Id.* at 896–97; *see also* PROCEEDINGS, *supra* note 148, at 297 (indicating no discussion or debate between the amendment submission and the vote).

163. PHILIP B. PERLMAN, DEBATES OF THE MARYLAND CONSTITUTIONAL CONVENTION OF 1867, at 115 (1923); PROCEEDINGS OF THE STATE CONVENTION TO FRAME A NEW CONSTITUTION 108 (1867).

text of what is now article III, section 33 of the Maryland Constitution.¹⁶⁴

2. *Applying Originalist Theory to the History of Article III, Section 33*

After considering this history, I have several observations. First, it is overly optimistic to believe that the recorded comments of a dozen or so delegates can be used to determine what the constitutional convention as a whole intended.¹⁶⁵ There is no way of knowing whether Delegate Stockbridge's focus on protecting the legislature from inundation by special requests was real, or, given his audience, a smart rhetorical decision. There is no way of knowing whether Delegate Stockbridge spoke for the majority in describing the meaning of his amendment or merely verbally battered them into submission.¹⁶⁶ There is no way of knowing whether Delegate Chambers's somewhat cryptic description of his amendment reflected anybody else's view at all, because no one else discussed it on the record.¹⁶⁷ In short, the thought that these few pages of historical record can give the modern reader a roadmap for the modern interpretation of article III, section 33 is unlikely.

Nevertheless, it is fair to note what the drafters of this provision did *not* say. They did not say, as Judge Eldridge claimed in *Cities Service*, that “[o]ne of the most important reasons,” or even mention as one of the reasons, “for the provision in the Constitution against special legislation is to prevent one who has sufficient influence to secure

164. Commentators writing in the years after ratification of article III, section 33 viewed the enumerated list of special topics important but utterly failed to ascribe any importance whatsoever to the second sentence of the provision. MYERS, *supra* note 141, at 78; Harry J. Green, *A Study of the Legislature of the State of Maryland*, in JOHNS HOPKINS U. STUD. HIST. & POL. SCI., Ser. XLVIII 16 (1930). This suggests that nearly contemporaneous readers did not view the provision as particularly important.

165. See L. Harold Levinson, *Interpreting State Constitutions by Resort to the Record*, 6 FLA. ST. U. L. REV. 567, 570–71 (1978) (expressing skepticism and proposing restrictive rules for use of convention records in interpreting state constitutional provisions); see also Farber, *supra* note 130, at 1088–89 (questioning whether the documentary evidence of federal constitutional convention debates is reliable); James Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1, 1–2 (1986) (acknowledging that some of the principal documents regarding the Constitutional Convention may not be reliable).

166. Reviewing the convention debates, one is left with the clear impression that Delegate Stockbridge had little patience for the give and take of the constitutional convention. See, e.g., 2 DEBATES, *supra* note 148, at 884 (statement of Delegate Stockbridge) (responding to a fellow delegate about his amendment, “No, sir; I am tired of this catechi[z]ing and disputatious way of debating questions.”).

167. See generally *id.* at 876–96.

legislation from getting an undue advantage over others.”¹⁶⁸ *Not one single delegate expressed this view.*¹⁶⁹ Of course, it cannot be conclusively proved that the delegates were not thinking this. Maybe it was, in their minds, an important reason for adopting the provision. All the records can show is that if it was in their minds, they did not express it. This is a point of fundamental importance. The convention records simply do not support the *Cities Service* analysis.

Second, it is legitimate to take away from a review of these convention debates the clear sense that the delegates intended this provision as a support to the separation of powers. They wanted to ensure that categories of cases assigned to the judiciary could not instead be resolved by the legislature.¹⁷⁰ This suggests that the courts may be misreading the critical sentence: “And the General Assembly shall pass no special Law, *for any case*, for which provision has been made, by an existing General Law.”¹⁷¹ While courts have ignored the words “for any case” as if the phrase meant “in any instance” or “in every circumstance,” what if they really were intended to mean “for every legal controversy”? This reading would comport better with Delegate Chambers’s specific intent in introducing his amendment and generally with the debates at the 1864 Constitutional Convention, which in every circumstance centered on the problem of litigants having their legal disputes handled in the wrong branch of government.¹⁷² Such a

168. *Cities Serv. Co. v. Governor*, 290 Md. 553, 568–69, 431 A.2d 663, 672 (1981) (quoting *Baltimore v. United Rys. & Elec. Co.*, 126 Md. 39, 52, 94 A. 378, 382 (1915)).

169. See generally 2 DEBATES, *supra* note 148, at 876–96. I am making a distinction between Judge Eldridge’s statement about influential people and Delegate Chambers’s statement (quoted *supra* in the text accompanying note 158) because of Delegate Chambers’s specific focus on the separation of powers. See 2 DEBATES, *supra* note 148, at 887 (discussing power of “influential people” while addressing the need and importance of the separation of powers). Even if this is a distinction without a difference, only Delegate Chambers, a member of the minority party, made this argument.

170. See 2 DEBATES *supra* note 148, at 878 (statement of Delegate Chambers) (emphasizing the importance that courts analyze conformity of the facts with the law, rather than exercising their discretion regarding both facts and law, because the latter constitutes legislation—a “power . . . the court ought [not] to be requested, or obligated, or even permitted to exercise”).

171. MD. CONST. art. III, § 33 (emphasis added).

172. I also reviewed the debates regarding this provision to see how the delegates themselves used the word “case” or “cases” in the hope that it might give a clue about how they intended that the word be understood. On some occasions, convention delegates used the word generically to mean “instances.” See, e.g., 2 DEBATES, *supra* note 148, at 878 (“It would be very difficult to enumerate all the cases in which such a [name] change is necessary.”). At other times, the context makes plain that they were using the word in the more specific sense, to mean “lawsuit.” See, e.g., *id.* at 877 (“There are other things which if they do not affect the direct pecuniary interests of men, are at least in the nature and form of a litigated case . . .”). Thus, unfortunately, the evidence is inconclusive.

reading would also better comport with the interpretive dictum that requires us to give effect to every word of the Maryland constitution, because if “for any case” just means “always” it would be superfluous.¹⁷³

Thus, an originalist would reject the *Cities Service* test but would not be able to provide a complete and convincing alternative interpretation of Maryland’s special laws provision. An originalist interpretation is only able to provide a vague picture that the special laws provision reflected a general desire to maintain the separation of powers and prevent the legislature from resolving cases that should be litigated in court. Together, these two observations make an important point about originalism. Originalism has serious limitations as a foundationalist interpretive theory. In my mind, it cannot provide—in advance—the answers to every interpretive question. Nevertheless, a modern interpreter who ignores the historical record does so at significant peril.

C. Moral Reasoning

A completely different school of interpretive thought, led most famously by Professor Ronald Dworkin, advocates the explicit use of moral philosophy to discover the right answers to constitutional questions.¹⁷⁴ Professor Dworkin separates the federal constitution into two categories of provisions: those whose content states an abstract moral principle,¹⁷⁵ and those whose content is more specific and does not state a moral principle.¹⁷⁶ While the specific provisions are presumably interpreted according to their meaning, those stating a moral principle should be interpreted in accordance with what Professor Dworkin considers to be the underlying moral philosophy of the Constitution: that a government should treat everyone “as having equal moral and political status; it must attempt, in good faith, to treat them all with equal concern; and it must respect whatever individual free-

173. See *Kadan v. Bd. of Supervisors of Elections*, 273 Md. 406, 415–16, 329 A.2d 702, 707 (1974) (quoting *Johnson v. Duke*, 180 Md. 434, 440, 24 A.2d 304, 307 (1942) (“It is an elementary rule of interpretation that effect should be given, if possible, to every section and clause of a written Constitution . . .”)); see also *Pickett v. Prince George’s County*, 291 Md. 648, 661, 436 A.2d 449, 456 (1981) (stating interpretive preference against construction of constitutional provision that will render it nugatory).

174. DWORKIN, *FREEDOM’S LAW*, *supra* note 27, at 2.

175. *Id.* at 7 (referring to the examples of “free speech,” “due process,” and “equal protection” as abstract moral language subject to the moral reading).

176. *Id.* at 8. For example, the Third Amendment prohibits the government from quartering soldiers in citizens’ houses in peacetime, which does not encompass a moral principle. *Id.*

doms are indispensable to those ends, including but not limited to the freedoms more specifically designated in the document.”¹⁷⁷ Professor Dworkin argues that a judge following his system will be restrained not only by the text of the Constitution but also by the judge’s notion of integrity in interpreting the text—that judges must read the moral clauses of the Constitution in a manner that is consistent both with “the structural design of the Constitution as a whole” and also with “the dominant lines of past constitutional interpretation by other judges.”¹⁷⁸

What can a moral reasoning analysis add to the understanding of state constitutions generally and the special laws prohibition of the Maryland Constitution specifically? As an initial matter, it is sometimes hard with state constitutions to separate those provisions whose content contains statements of moral philosophy from those that do not. The tendency to mandate certain actions in language of a moral character while framing others in concrete terms that are not subject to a moral reading may just be a function of drafting style.¹⁷⁹ Sometimes even the most important “moral” provisions of a state constitution can be drafted in a prosaic style.¹⁸⁰ Here too, article III, section 33 provides a useful example. If there is a moral principle at stake here (and there are obviously those who argue that there is), it is hidden in a provision that reads like a legislative procedural rule. If article III, section 33 is a specific prohibition whose content does not state a moral principle, then Professor Dworkin would tell us to just

177. *Id.* at 7–8.

178. *Id.* at 10.

179. *Id.* at 7–8 (noting that some constitutional clauses are written to allow a moral interpretation, while others lack the abstract quality required to apply a moral reading).

180. Many accounts have criticized early state constitutions for employing the exhortatory “ought” rather than the mandatory “shall.” See LEONARD LEVY, *EMERGENCE OF A FREE PRESS* 184 (1985) (calling use of “ought” in early state constitutions “flabby” and “namby-pamby”); BERNARD SCHWARTZ, *THE GREAT RIGHTS OF MANKIND: A HISTORY OF THE AMERICAN BILL OF RIGHTS* 91 (1992) (recognizing that drafters used the term “ought not” when the term “shall not” would have been the proper guarantee with respect to protected rights); J. PAUL SELSAM, *THE PENNSYLVANIA CONSTITUTION OF 1776: A STUDY IN REVOLUTIONARY DEMOCRACY* 203–04 (1971) (noting that the words “ought to be” were used in place of the words “shall be” in several places throughout the Pennsylvania Constitution). *But see* TARR, *UNDERSTANDING*, *supra* note 88, at 77–79 (explaining that the use of terms like “ought not” was not a mistake, but rather by design according to the “republican political theory” of government); Jeremy Elkins, *Declarations of Rights*, 3 U. CHI. L. SCH. ROUNDTABLE 243, 306–07 (1996) (noting that in using the conditional language the legislatures still intended the provisions to be taken seriously).

apply the text and that his moral reading cannot offer us any more interpretive help.¹⁸¹

If, however, the prohibition on special laws does state an abstract moral principle, it should be interpreted in a way that is consistent with the constitution's underlying moral principles. If there is a way to discern the Maryland Constitution's underlying moral principles—through three major revisions and literally hundreds of amendments—it is not apparent.¹⁸² And the same is true for other state constitutions, as well. These documents are simply too long, too detailed, too internally conflicted, and too busy with the daily details of government to be susceptible to this type of analysis.¹⁸³ Again, this suggests a serious deficit in a theory of constitutional interpretation if it cannot be applied to constitutions other than the federal constitution.¹⁸⁴

Finally, if we suppose that Professor Dworkin's statement of the underlying constitutional principle of the U.S. Constitution is a universal American moral principle, we can try to apply it to Maryland's prohibition against special laws. Professor Dworkin's statement of moral principle is focused on equality of treatment: "government must treat all those subject to its dominion as having equal moral and political status; it must attempt, in good faith, to treat them all with equal concern; and it must respect whatever individual freedoms are indispensable to those ends."¹⁸⁵ Given Professor Dworkin's focus on equal treatment, perhaps that should push us toward the interpretation of the special laws prohibition that will best effectuate the moral philosophy of equality. Such a legal regime would look skeptically on any divergent treatment of people, especially if the basis for that classification is not a natural or obvious distinction. One can easily im-

181. DWORKIN, FREEDOM'S LAW, *supra* note 27, at 8 (recognizing that not all clauses in the Constitution are conducive to a moral reading and, as such, are given their plain text meaning).

182. It is possible to suggest that representative democracy is an underlying moral principle of the Maryland Constitution. As a moral principle, however, the principle of representative democracy is at such a high level of abstraction and, in the Maryland Constitution, the principle is so thoroughly qualified, that I am not confident it provides a basis for any constitutional interpretation.

183. See G. Alan Tarr, *Understanding State Constitutions*, 65 TEMP. L. REV. 1169, 1170–71, 1175–76 (1992) [hereinafter Tarr, *State Constitutions*] (noting that state constitutions are on average three times as long as the federal constitution and contain over a hundred amendments that serve to correct antiquated provisions and manage aspects of the government that might otherwise be left to legislative discretion).

184. See *supra* note 138 (discussing defect in originalism that it may be inapplicable to constitutions other than the U.S. Constitution).

185. DWORKIN, FREEDOM'S LAW, *supra* note 27, at 7–8.

agine a court that is trying to follow Dworkin's interpretive theory adopting a test like the "necessity test," endorsed by the Pennsylvania Supreme Court in *Appeal of Ayars*, which says that "classification . . . is essentially unconstitutional, unless a necessity therefore exists,—a necessity springing from manifest peculiarities, clearly distinguishing those of one class from each of the other classes, and imperatively demanding legislation for each class, separately, that would be useless and detrimental to the others."¹⁸⁶

This interpretation, however, misunderstands Professor Dworkin's conception of equality. Professor Dworkin links his views of equality to his idea of moral membership in a community.¹⁸⁷ He discusses German Jews under Hitler, Catholics in Northern Ireland, nationalists in the Caucasus, and separatists in Quebec as groups that are not—or in some cases claim not to be—afforded moral membership in the right political community.¹⁸⁸ Thus, Professor Dworkin is defining equality as the prohibition of discrimination, which is classically the subject of state and federal equal protection guarantees, specifically the types of classification against "discrete and insular minorities" that the Supreme Court subjects to strict scrutiny or at least to heightened scrutiny.¹⁸⁹ That is not to say that Professor Dworkin accepts the Supreme Court's classifications or the levels of review analysis, but it is fair to say that he is expressing similar equality concerns. But Dworkin's conception of equality—at least as the Constitution's central moral principle—does not appear to be describing equality as a right to be treated the same as others or a right to prevent others from getting more favorable treatment,¹⁹⁰ which is the topic of state constitutional special laws and equal privileges and immunities provisions.¹⁹¹ In this way, Professor Dworkin's analysis seems consistent

186. 16 A. 356, 363 (Pa. 1889). For a discussion of the "necessity test," see *infra* text accompanying notes 226–229.

187. DWORKIN, FREEDOM'S LAW, *supra* note 27, at 23.

188. *Id.*

189. The Maryland Constitution does not contain a clear textual equal protection guarantee. Instead, Maryland courts imply that guarantee from article 24 of the Maryland Declaration of Rights, which is considered to be our "due process" analog. See, e.g., *Attorney General v. Waldron*, 289 Md. 683, 426 A.2d 929 (1981); FRIEDMAN, STATE CONSTITUTION, *supra* note 143, at 35.

190. DWORKIN, FREEDOM'S LAW, *supra* note 27, at 9 (stating that although it was once debated that the Equal Protection Clause merely required that "legal benefits conferred on everyone . . . must not be denied . . . to anyone," history shows instead that the framers "did not mean to lay down so weak a principle as that one" as the outer limit of equality).

191. For a discussion of state constitutional equal privileges and immunities provisions, see David Schuman, *The Right to "Equal Privileges and Immunities": A State's Version of "Equal Protection,"* 13 VT. L. REV. 221 (1988). Of course, that is likely a fallacy created by my as-

with Supreme Court jurisprudence, which treats economic equality as a lesser value and accords it only rational basis review. Thus, at least as Professor Dworkin has stated the underlying moral principles on which American constitutions are based, his moral reading does not *compel* us toward any particular reading of article III, section 33.¹⁹²

D. Comparative Constitutional Law

In recent years, the use of comparative constitutional law as a tool of constitutional interpretation has become increasingly controversial.¹⁹³ The reliance on international sources—always the most controversial—by the liberal majorities in *Atkins v. Virginia*,¹⁹⁴ *Lawrence v. Texas*,¹⁹⁵ and *Roper v. Simmons*,¹⁹⁶ and the condemnation of that reliance by the conservative dissents¹⁹⁷ has served as a catalyst for the debate. Justice Stephen Breyer, a leading judicial proponent of reliance on international sources, has said that certain legal questions are common to all people, and that “[r]eaching out to . . . other nations, reading their decisions, seems useful, even though they cannot determine the outcome of a question that arises under the American Constitution.”¹⁹⁸ Of course, Justice Breyer does not view international precedents as binding or controlling, but merely as a potential source

sumption that Professor Dworkin was stating a universal American moral philosophy rather than the moral philosophy that he found underlying the U.S. Constitution.

192. To be sure, it is not comfortable to reject this conception of equality as a moral precept. Professor Dworkin’s notion of integrity, however, requires an interpreter to apply only those moral principles that are clearly compelled by the Constitution and the “dominant lines of past constitutional interpretation by other judges.” DWORKIN, FREEDOM’S LAW, *supra* note 27, at 10. In the obverse situation, I was responding—unknowingly—to Professor Dworkin’s conception of equality when I wrote that a failure to incorporate an equal protection guarantee into the Maryland Declaration of Rights through article 24 would have been “embarrassing.” FRIEDMAN, STATE CONSTITUTION, *supra* note 143, at 35. See *supra* note 189.

193. See, e.g., Daniel A. Farber, *The Supreme Court, The Law of Nations, and Citations of Foreign Law: The Lessons of History*, 95 CALIF. L. REV. 1335, 1340–44 (2007).

194. 536 U.S. 304, 316 n.21 (2002).

195. 539 U.S. 558, 572–73 (2003).

196. 543 U.S. 551, 575–77 (2005).

197. See, e.g., *Roper*, 543 U.S. at 604 (O’Connor, J., dissenting) (arguing that the lack of a national consensus regarding the juvenile death penalty prevents the international consensus from serving the confirmatory role the majority attributes to it); *Lawrence*, 539 U.S. at 598 (Scalia, J., dissenting) (rejecting the majority’s discussion of the “views of a ‘wider civilization’” as “meaningless dicta”); *Atkins*, 536 U.S. at 322 (Rehnquist, C.J., dissenting) (describing the majority’s reliance on foreign laws as a “defect” in the Court’s decision).

198. Justice Stephen Breyer, Discussion at the American University Washington College of Law (Jan. 13, 2005), in 3 INT’L J. CONST. L. 519, 528 (2005).

of inspiration and instruction.¹⁹⁹ Justice Antonin Scalia, a leading opponent, has argued, “We *don’t* have the same moral and legal framework as the rest of the world, and never have.”²⁰⁰ To Justice Scalia, focused as he is on the jurisprudence of American originalism, “obviously foreign law is irrelevant.”²⁰¹ Other judicial critics also note the inherent difficulties in understanding foreign precedents, “which necessarily arise from unfamiliar legal, political, and governmental terrains” and the likelihood of result-oriented reliance, in which judges selectively cite only that comparative law that supports their positions.²⁰² Academics have joined the debate on both sides.²⁰³

State constitutional law provides an opportunity to evaluate this debate. State constitutional interpreters are routinely confronted with the task of evaluating the precedential weight to be given to sister state decisions interpreting their state constitutions, especially when a provision in one state’s constitution was borrowed from the constitution of another state.²⁰⁴ This task is analogous to the Supreme Court’s use of international precedents. In both cases, the precedent that is being evaluated is merely persuasive.

Presented with a foreign court precedent, a court ought to evaluate (1) the extent to which the issue presented in that case parallels the question it is facing; (2) the similarities and differences between

199. *See id.* (“[W]ith all the uncertainties involved, I would rather have the judge read pertinent foreign cases while understanding that the foreign cases are not controlling. I would rather have the judge treat those cases cautiously, using them with care, than simply to ignore them. I would rather hope that judges will exercise proper control, taking the cases for what they are worth, than have an absolute rule that says judges may never look at foreign decisions.”).

200. Justice Antonin Scalia, Discussion at the American University Washington College of Law (Jan. 13, 2005), in 3 INT’L J. CONST. L. 519, 521 (2005).

201. *Id.* at 525.

202. Mark C. Rahdert, *Comparative Constitutional Advocacy*, 56 AM. U. L. REV. 553, 584 (2007).

203. *See* Farber, *supra* note 193, at 1340–44 (summarizing the scholarly debate over the use of foreign law in Supreme Court opinions); Rahdert, *supra* note 202, at 575–89; Tushnet, *Comparative Constitutional Law*, *supra* note 29, at 1228.

204. *See, e.g.*, TARR, UNDERSTANDING, *supra* note 88, at 205–08 (recognizing that states must decide whether the interpretation of the originating state will be endorsed). Treating state constitutional law as “comparative American constitutional law” is a rather new innovation, but it hardly seems controversial to me. *See* WILLIAMS, STATE CONSTITUTIONS, *supra* note 30, at 15–16 (noting that “comparative American constitutional law” is important and warrants the attention of interpreters). Although I have treated international comparative constitutional law in the context of the controversy over the U.S. Supreme Court’s citation to international precedents, there are also those who would create a foundationalist interpretive theory out of international comparative constitutional law. *Cf.* DAVID M. BEATTY, THE ULTIMATE RULE OF LAW 36–37 (2004) (suggesting that a comparative analysis of interpretations of liberty would provide a “satisfactory account” of the rights and freedoms able to be claimed by individuals).

the relevant provisions of the two constitutions and the systems that they create;²⁰⁵ and (3) the persuasiveness of the arguments made by the foreign court.²⁰⁶ While the second factor—similarity of constitutions and systems—may differ greatly if the foreign precedent is an international one, it still falls on the same continuum as if we were discussing sister state interpretation. Obviously, the Nebraska Constitution is much more similar to the Maryland Constitution than the Constitution of Norway is to the U.S. Constitution. That does not mean, however, that U.S. constitutional analysis cannot be informed by the constitutional judgments of a constitutional court in Norway. It just means that the analysis is less persuasive. In this way, state constitutional jurisprudence, which does this sort of work all of the time, can offer useful guidance to interpreters of the U.S. Constitution.

Maryland's prohibition against special laws provides an excellent lens through which to view this point. There is, however, one important difference between state and federal comparative practice.²⁰⁷ Comparative state constitutional analysis often begins with an examination of the state from which a particular provision has originated, but when that provision has already been authoritatively interpreted by the originating state, the borrowing state "is understood to have adopted the provision as interpreted, to have included within its constitution the authoritative interpretation of the meaning of the provision."²⁰⁸ Maryland has never had occasion to adopt this interpretive rule, but that is probably due to a lack of opportunity, rather than a disagreement with the rule.²⁰⁹ As one of the original thirteen colo-

205. See Farber, *supra* note 193, at 1361–62 ("Essentially, the closer a foreign jurisdiction is to the U.S. in terms of historical connections, constitutional provisions, and legal institutions, the more relevant that jurisdiction's decisions.").

206. *Id.* at 1362 ("Foreign law is also entitled to more weight when it is persuasively justified; and to less weight when it seems to reflect another country's peculiarities.").

207. This difference is, however, likely a practical rather than an analytical one. Had the United States borrowed a constitutional provision from another country or from one of the States with a definitive judicial interpretation already annexed at the time of its adoption, a court should have probably treated that judicial interpretation as a binding precedent at least until the U.S. Supreme Court decided to change it.

208. TARR, UNDERSTANDING, *supra* note 88, at 207; see also WILLIAMS, STATE CONSTITUTIONS, *supra* note 30, at 339–40 (describing this as a "very important approach" to interpretation of borrowed state constitutional provisions).

209. See *Hitchcock v. State*, 213 Md. 273, 284, 131 A.2d 714, 719 (1957) ("Where a constitutional provision has received a judicial construction and then is incorporated into a new or revised constitution, it will be presumed to have been re-adopted with the knowledge of the previous construction and to have been intended to have the meaning given it by that construction.").

nies, Maryland has had its provisions borrowed much more frequently than it has borrowed the provisions of other constitutions.²¹⁰

The application of the interpretive rule in this circumstance is not so simple. The history of the debates shows that Delegate Henry Stockbridge intended to use article IV, section 22 of the Indiana Constitution of 1851 as the model for his amendment,²¹¹ the list of enumerated topics about which the legislature is prohibited from passing special laws, which became the first sentence of Maryland's article III, section 33.²¹²

It is not clear, however, whether and to what extent Delegate Ezekiel Forman Chambers used the subsequent section of the Indiana Constitution—article IV, section 23—as a basis for *his* amendment, which became the second sentence of Maryland's article III, section 33.²¹³ Thus, while decisions of the Indiana Supreme Court between

210. 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 (2002) (describing interstate borrowing of state constitutional provisions during the Revolutionary-Era) [hereinafter Friedman, *Tracing the Lineage*]; cf. Neal Devins, *How State Supreme Courts Take Consequences into Account: Toward A State-Centered Understanding of State Constitutionalism*, 62 STAN. L. REV. 1629, 1639 (2010) (“[K]nowing that Congress would have to approve their constitutions, later-admitted states would borrow from earlier state constitutions and the Federal Constitution.”).

211. See *supra* note 150 and accompanying text.

212. This history also demonstrates the fictional nature of this interpretive rule. There is no evidence to suggest that Delegate Stockbridge knew about the Indiana Supreme Court's interpretation of the model provision. Stockbridge did not clearly disclose the model's Indiana roots, let alone its interpretive history, to the convention body. See generally 2 DEBATES, *supra* note 148, at 876–96 (recounting debates relating to Stockbridge's amendment). And nobody told the voters anything about it. See *supra* text accompanying notes 137–139 (discussing voters' understanding of the special laws provision). Thus, the idea that Maryland voters specifically chose to bind themselves to the Indiana decisions is pure fiction.

213. See *supra* text accompanying notes 148–156 (discussing the process by which Chambers's amendment was proposed and adopted); see also 2 DEBATES, *supra* note 148, at 882, 885, 896–97 (documenting proceedings related to Stockbridge's two failed attempts and final successful attempt to introduce his amendment); PROCEEDINGS OF THE STATE CONVENTION, *supra* note 148, at 297 (documenting Chambers's amendment and subsequent vote adopting that amendment). There is an important textual difference between IND. CONST. art. IV, § 23 and the second sentence of MD. CONST. art. III, § 33: Indiana's Constitution prohibits special laws in “all . . . cases where a general law *can* be made applicable,” IND. CONST. art. IV, § 23 (emphasis added), while Maryland's prohibits “special Law[s], for any case, for which provision *has been made*, by an existing General Law.” MD. CONST. art. III, § 33 (emphasis added). Thus, Indiana's provision asks for a judgment about what general laws could conceptually be drafted, while Maryland's provision asks only whether a general law already exists. See Green, *supra* note 92, at 369–370 (discussing approaches of various states, including Indiana and Maryland, to the issue of when courts may determine whether a general law can be made applicable). It seems to me, however, that the textual difference would have made a difference in the analysis—but not the outcome—of *Stocking v. State*, 7 Ind. 326 (1855), discussed *infra* at notes 215–216 and accom-

1851 and 1864 concerning its article IV, section 22 ought to be binding precedents in interpreting the first sentence of Maryland's article III, section 33,²¹⁴ it is unclear whether we should also treat as binding the decisions of the Indiana Supreme Court between 1851 and 1864 concerning its article IV, section 23, had there been any.

During the period between 1851 and 1864, the Indiana Supreme Court decided three special law cases.²¹⁵ These cases, while not entirely clear in defining special laws or even which constitutional provision was being interpreted, hold that determining whether a law is special is a judicial function.²¹⁶ Thus, by 1864 when Maryland borrowed Indiana's prohibition of special laws, Indiana law provided for rigorous judicial enforcement of both of its constitutional special laws provisions.²¹⁷ To the extent that those opinions were predicated on

panying text, in which there was no existing general law and the Indiana Supreme Court found that no general law could be adopted. 7 Ind. at 328. Professor Thomas F. Green, Jr. has derided as "folly" and "fallacy" those provisions, like Indiana's, that ask if "a general law can be made applicable," Green, *supra* note 92, at 367 (internal quotation marks omitted), because, in his view, a general law can *always* be drafted. *Id.* at 366-68. For a different view on this topic, see Oscar Leser, *Report on the Evils of Special and Local Legislation*, in NINTH ANNUAL MEETINGS OF THE MARYLAND STATE BAR ASSOCIATION 160, 178 (1903) (attributing underenforcement of article III, section 33 to the difference between whether a general law can be made applicable or whether a general law has been made applicable).

214. The conclusion that the old Indiana cases, discussed *infra* note 215 and accompanying text, were binding precedents at the time that Maryland adopted the provision has little continuing significance as the Maryland cases have ignored these Indiana precedents for more than sixty years. For example, see *supra* Part III.B, for a discussion of the Court of Appeals of Maryland's departure from precedent in *Cities Service Co. v. Governor*, 290 Md. 553, 431 A.2d 663 (1981).

215. Horack, *supra* note 115, at 111 n.7 & 8 (listing three cases: *Madison & Indianapolis R.R. Co. v. Whiteneck*, 8 Ind. 217 (1856); *Stocking v. State*, 7 Ind. 326 (1855); and *Thomas v. Bd. of Comm'rs*, 5 Ind. 4 (1854), *overruled in part by Gentile v. State*, 29 Ind. 409 (1868)).

216. See *Madison*, 8 Ind. at 219 ("[W]hen [special legislation] takes place it will be for the Court to judge, . . . under section 23, of article 4, of the constitution, whether more general legislation could reasonably have been made applicable; and, also, whether such special legislation conflicts with any other constitutional provision." (citation omitted)); *Stocking*, 7 Ind. at 328 (holding, without discussion of the court's power to consider the issue, that a statute creating a new judicial district was not a special law under the Indiana Constitution, article IV, section 23, because no general law could have been made applicable); *Thomas*, 5 Ind. at 7 ("Whether the legislature have, in the case at bar, acted within the scope of their authority, is, in our opinion, a proper subject of judicial inquiry.")).

217. Ironically, in 1868, the Indiana Supreme Court abruptly reversed course and, in *Gentile v. State*, 29 Ind. 409 (1868), held that the question of whether a law is "special" is for the legislature to decide and not subject to review by the courts. *Id.* at 413-15. See also Horack, *supra* note 115, at 112-13 (noting that the *Gentile* court determined that "judicial review of special legislation [was] unwise"); Jon Laramore, *The Demise of Special Laws? Dispelling Myths Generated by Kimsey*, 46 RES GESTAE, May 2003, at 35, 35 (discussing period during which the Indiana Supreme Court "declined to review laws under Article 4, sections 22 and 23"). That decision, however, was rendered after Maryland adopted its own prohibition on special laws and therefore, because "no state can know how another state

the provision that Delegate Stockbridge borrowed, or to the extent that Delegate Chambers was also borrowing from the Indiana Constitution, these precedents should be a part of Maryland constitutional law as well.

The next task of comparative state constitutional law requires us to evaluate how other states interpret their special laws prohibition and determine whether those interpretations are useful for interpreting Maryland's analogous provision. Forty-four of the fifty states have state constitutional prohibitions on special laws.²¹⁸ These prohibitions generally take one of three forms.²¹⁹ First, eleven states have a list of

will interpret a provision in the future, . . . the borrowing state is not bound by whatever changes in interpretation might occur subsequent to ratification.” TARR, UNDERSTANDING, *supra* note 88, at 207. Thus, *Gentile* is not a binding precedent in Maryland, although it might serve as persuasive authority. The claim that *Gentile* should be used as persuasive authority, however, is undermined by the fact that by 1930, the Indiana Supreme Court reversed field again and resumed its role determining whether laws passed by the Indiana state legislature were unconstitutionally special. *Heckler v. Conter*, 187 N.E. 878, 879 (Ind. 1933) (disapproving of the reasoning in *Gentile* as allowing the legislature to “arbitrarily decide that a general law cannot be made applicable” and have its decision be unreviewable); Laramore, *supra*, at 35 (noting the Indiana Supreme Court’s change of course); Horack, *supra* note 115, at 113–15 (discussing significance of *Heckler*). In other states, the state constitutional prohibition on special laws was subsequently amended to specify that the issue is justiciable in the courts. KAN. CONST. art. II, § 17 (amended 1905), *reprinted in* KANSAS CONSTITUTIONAL CONVENTION: A REPRINT OF THE PROCEEDINGS AND DEBATES OF THE CONVENTION WHICH FRAMED THE CONSTITUTION OF KANSAS AT WYANDOTTE IN JULY, 1859, at 579 (James L. King et al. eds., 1920); *see also* Anderson v. Bd. of Comm’rs, 95 P. 583, 586–87 (Kan. 1908) (discussing 1905 amendment to the Kansas Constitution, article II, section 17, which granted the courts power to determine the constitutionality of a special law). However, Kansas has since amended its constitution such that it no longer prohibits special laws. *See Ullrich v. Thomas County*, 676 P.2d 127, 131 (Kan. 1984) (acknowledging that although the Kansas constitution originally prohibited special laws, it has since been amended to eliminate that provision).

218. The six state constitutions generally understood to lack a true prohibition on special laws are Hawaii, Kansas, Mississippi, New Hampshire, Rhode Island, and Vermont. *But see* Cloe & Marcus, *supra* note 103, at 351 & n.1 (writing before Hawaii statehood, identifying only four states without special laws provisions: Connecticut, Massachusetts, New Hampshire, and Vermont). The case of Hawaii is arguable as several sections of that state’s constitution require all laws to be general laws. *See, e.g.*, HAW. CONST. art XI, § 5 (“The legislative power over the lands owned by or under the control of the State and its political subdivisions shall be exercised only by general laws, except in respect to transfers to or for the use of the State, or a political subdivision, or any department or agency thereof.”); *Sierra Club v. Dep’t of Transp.*, 202 P.3d 1226, 1245 (Haw. 2009) (discussing provisions of Hawaii’s Constitution that require general laws).

219. Authorities differ on how to categorize the various forms of prohibitions. Professor Robert F. Williams describes these prohibitions as “contain[ing] either general or detailed limitations on the objects of legislation.” Robert F. Williams, *Equality Guarantees in State Constitutional Law*, 63 TEX. L. REV. 1195, 1209 (1985) [hereinafter Williams, *Equality Guarantees*]. The most detailed taxonomy finds six or more variations on these themes. Cloe & Marcus, *supra* note 103, at 351–53.

specific instances in which special laws are prohibited.²²⁰ Second, thirteen states have a general prohibition of all special laws where a general law applies.²²¹ Third, twenty states, including Maryland, have both of these forms.²²² Courts in states other than Maryland have been nearly uniform in adopting a very deferential “rational” or “reasonable” basis-type test to evaluate special law claims under their respective state constitutions.²²³ This is not a circumstance in which there is a majority rule and a minority rule. All states except Maryland apply very deferential rational basis-type standards.²²⁴

Even if all states with special laws prohibitions have adopted deferential rational basis-type tests, as part of the comparative constitu-

220. ALA. CONST. art. IV, §§ 104, 105, 110; CONN. CONST. art. X, § 1; DEL. CONST. art. II, § 19; FLA. CONST. art. III, § 11; IDAHO CONST. art. III, § 19; IND. CONST. art. 4, § 22; LA. CONST. art. III, § 12; N.Y. CONST. art. III, § 17; N.C. CONST. art. II, § 24; WASH. CONST. art. II, § 28; WIS. CONST. art. IV, § 31.

221. ALASKA CONST. art. II, § 19; CAL. CONST. art. 4, § 16; GA. CONST. art. III, § VI; ILL. CONST. art. IV, § 13; ME. CONST. art. IV, pt. 3, § 13; MASS. CONST. pt. I, art. 10, pt. 2, cl. 1, art. 4; MICH. CONST. art. IV, § 29; MINN. CONST. art. XII, § 1; MONT. CONST. art. V, § 12; N.D. CONST. art. IV, § 13; OHIO CONST. art. II, § 26; TENN. CONST. art. XI, § 8; UTAH CONST. art. VI, § 26.

222. ARIZ. CONST. art. IV, pt. 2, § 19; ARK. CONST. art. 5, §§ 24–25; COLO. CONST. art. V, § 25; IOWA CONST. art. III, § 30; KY. CONST. § 59; MO. CONST. art. III, § 40; NEB. CONST. art. III, § 18; NEV. CONST. art. 4, §§ 20–21; N.J. CONST. art. IV, § 7, pt. 7–10; N.M. CONST. art. IV, § 24; OKLA. CONST. art. V, §§ 46, 59; OR. CONST. art. IV, §§ 23, 27; PA. CONST. art. III, § 32; S.C. CONST. art. III, § 34; S.D. CONST. art. III, § 23; TEX. CONST. art. 3, § 56; VA. CONST. art. IV, §§ 14–15; W. VA. CONST. art. VI, § 39; WYO. CONST. art. III, § 27.

223. *See, e.g.*, *Williams v. Blue Cross Blue Shield of N.C.*, 581 S.E.2d 415, 425 (N.C. 2003) (discussing a “reasonable classification” test); *Wings Field Preservation Assocs., L.P. v. Commonwealth*, 776 A.2d 311, 316 (Pa. Commw. Ct. 2001) (finding the Pennsylvania Constitution “allows a legislative classification that has some rational relationship to a proper state purpose”); *U.S. Fid. & Guar. Co. v. City of Columbia*, 165 S.E.2d 272, 274 (S.C. 1969) (noting that “[t]here must be some rational basis” for creating a legislative classification); *Laurels of Bon Air, LLC v. Med. Facilities of Am. LIV Ltd.*, 659 S.E.2d 561, 568 (Va. Ct. App. 2008) (noting that Virginia applies a rational basis test when determining the constitutionality of special legislation); *Atchinson v. Erwin*, 302 S.E.2d 78, 84 (W. Va. 1983) (stating that classifications must be rational to comply with constitutional requirements); *see also* 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 provisions in state constitutions); *Williams, Equality Guarantees, supra* note 219, at 1222 (“[M]any state courts interpret special laws provisions by applying federal equal protection analysis”). Implicit in the conclusion that other states with constitutional special laws prohibitions uniformly adopt something akin to a rational basis test is the view that state constitutional equal privileges and immunities provisions are different from special laws prohibitions. *Cf. Schuman, supra* note 191, at 223 & n.15 (noting that while some states have an “equal privileges and immunities” clause, others have “functionally comparable provisions prohibiting ‘special laws’”).

224. *Compare* *State v. Good Samaritan Hosp. of Md., Inc.*, 299 Md. 310, 330, 473 A.2d 892, 902 (1984) (presuming special laws provisions are unconstitutional and applying a multi-factor test to determine if a law meets the special law requirements), *with supra* note 223 (listing examples of the states using a rational basis test).

tional analysis, we should also determine if there is criticism of that deferential standard in the sister states. Donald Marritz argues that Pennsylvania has improperly abandoned its historical special laws jurisprudence in favor of the deferential federal equal protection standards.²²⁵ Marritz advocates a return to two much more restrictive tests that Pennsylvania courts had once used. For classifications that “implicate the most basic rights of Pennsylvania citizens, as set out in the Declaration of Rights,”²²⁶ he urges the re-adoption of the “necessity test.”²²⁷ As set forth in *Appeal of Ayars*,²²⁸ the necessity test holds a classification to be “essentially unconstitutional, unless a necessity therefor exists,—a necessity springing from manifest peculiarities, clearly distinguishing those of one class from each of the other classes, and imperatively demanding legislation for each class, separately, that would be useless and detrimental to the others.”²²⁹ For those cases that do not implicate fundamental rights, Marritz advocates what he calls the “enhanced version of the ‘fair and substantial’” relation test.²³⁰ Derived from *Kroger Co. v. O’Hara Township*,²³¹ this test requires a court to first “determin[e] whether the classification involved [is] fairly and substantially related to the purpose of the law,” and then “‘carefully review’ the statute in question to ensure that it ‘substantially further[s] the statutory objective.’”²³²

Marritz’s argument in support of Pennsylvania’s re-adoption of this pair of highly restrictive tests is based on the history of Pennsylvania’s adoption of its special laws provisions. Marritz (1) describes the widespread problem of legislative corruption and special treatment of

225. Marritz, *supra* note 80, at 172, 184; *see also* Williams, *Misguided*, *supra* note 35, at 347 (suggesting that Pennsylvania courts’ application of federal protection standards ignores constitutional texts, history, and lessons of federalism, and reduces the state constitutional protections to a “mere row of shadows”).

226. Marritz, *supra* note 80, at 213. *See also* Pa. Decl. of Rts. (itemizing twenty-eight basic rights guaranteed to all Pennsylvanians).

227. *See* Marritz, *supra* note 80, at 204 (stating that the necessity test not only “coincides with the history and purpose of the special laws prohibition,” but also “best implements the settled determined purpose on [the] part of the people to hold back from the legislature the power to enact local and special laws.”) (internal quotation marks omitted).

228. 16 A. 356 (Pa. 1889).

229. *Id.* at 363.

230. Marritz, *supra* note 80, at 213 (noting that this enhanced fair and substantial test offers a “reasonable alternative” to the necessity test by recognizing that “the right to be free from special laws is a constitutional right worthy of great protection”).

231. 392 A.2d 266 (Pa. 1978).

232. Marritz, *supra* note 80, at 213 (quoting *Kroger Co. v. O’Hara Twp.*, 392 A.2d 266, 276 (Pa. 1978)).

corporate interests in the Pennsylvania legislature;²³³ (2) links that problem to the call for the Pennsylvania constitutional convention of 1874;²³⁴ (3) identifies the special laws prohibition as a key reform in the constitution that was specifically designed to address the problems of corruption and unequal treatment;²³⁵ and (4) makes a “linkage” between the intent of the drafters and the ratifiers of the provision.²³⁶

Comparative constitutional law helps us answer whether and to what extent the Pennsylvania history that Marritz presents, and the conclusions that he suggests, should influence our understanding of the Maryland special laws provision. Earlier in this Article, I suggested a three-part framework for comparative constitutional law that can now be modified as follows: In deciding whether to adopt an out-of-state theory of interpretation, one must evaluate (1) the extent to which the issue presented parallels the question we are facing; (2) the similarities and differences between the relevant provisions of the two constitutions and the systems that they create; and (3) the persuasiveness of the interpretation.²³⁷

As to the first inquiry, Marritz and I are engaged in precisely the same enterprise, seeking the appropriate interpretation of our respective states’ special laws prohibition.

Jumping to the second inquiry, there are vast differences between the Pennsylvania history told by Marritz and the history of the Maryland special laws provision.²³⁸ Even allowing for the fact that Marritz has distilled the historical record for the purpose of making

233. *Id.* at 185–89 (describing the historical prevalence of special legislation and noting that special interests had “perverted the legislative process from its original purpose of serving the general welfare to that of serving private interests” (internal quotation marks omitted)).

234. *Id.* at 190–91 (noting that in response to the growing demand for reform, the legislature “enacted a statute calling for a convention to amend the constitution”).

235. *Id.* at 192–93 (“[T]he ‘most emphatic expression’ of the new limitations on the powers of the legislature concerned not procedure, but substance—the prohibition against special laws. This was ‘[t]he great change’ wrought by the new constitution and the ‘most important of all the amendments.’” (citation omitted)).

236. *Id.* at 194–95 (suggesting that the intent of the drafters was to create a restraint on private privilege); *see also* Perkins v. Philadelphia, 27 A. 356, 361 (Pa. 1893) (discussing the people’s intent in the constitution to ban local and special laws); *see generally* William A. Russ, Jr., *The Origin of the Ban on Special Legislation in the Constitution of 1873*, 11 PA. HIST. 260 (1944) (describing the roots of the ban on special legislation). For a discussion of theories of “linkage” between drafter and ratifier intent, *see* WILLIAMS, SEEKING CERTAINTY, *supra* note 30, at 320–21.

237. *See supra* text accompanying notes 205–206.

238. *Compare* Donald Marritz, *Making Equality Matter (Again): The Prohibition Against Special Laws in the Pennsylvania Constitution*, 3 WIDENER J. PUB. L. 161, 186–94 (1993) (discussing Pennsylvania’s motivation for special laws provision), *with supra* Part IV.B.1. (discussing the history of Maryland’s ban on special laws).

his case, the differences are great. In Pennsylvania, Marritz reports pervasive complaints about legislative corruption and favoritism toward corporate interests.²³⁹ In Maryland, I have discovered no evidence before or at the constitutional convention of any such complaints. In Pennsylvania, Marritz reports that solving the problems of legislative corruption and corporate favoritism was a leading reason for calling the constitutional convention. In Maryland, these reasons were never mentioned; instead, issues of the Civil War precipitated the call to convention.²⁴⁰ Most importantly, Marritz identifies Pennsylvania's special laws prohibition as the key method of combating legislative corruption and corporate favoritism.²⁴¹ By contrast, in Maryland, the discussion of the adoption of a special laws prohibition was absolutely devoid of any suggestion of legislative corruption or corporate favoritism. Instead, the Maryland framers voiced concerns about protecting legislators from the unreasonable demands of their constituents.²⁴² This compels the nearly inescapable conclusion that the two states adopted similar (although not identical) provisions as a cure for different problems. While it is reasonable that Pennsylvania's special laws provision should be interpreted in a manner that reflects the intent of its drafters and ratifiers (to prevent legislative corruption and corporate favoritism to protect equal treatment), it is also reasonable that Maryland's provision should be interpreted in a manner that reflects the intent of its drafters and ratifiers (to protect the legislature from unreasonable constituent requests and to reinforce the separation of powers).

As to the third inquiry, while Marritz's historical recitation and proposed interpretation is compelling, it has not been adopted in Pennsylvania or any other state. Instead, the tide seems very much to be flowing in the opposite direction, toward less restrictive interpretations of special laws provisions.²⁴³

Comparative constitutional law is—contrary to claims by some on the U.S. Supreme Court and their adherents—a helpful practice in understanding Maryland's special laws provision. A review of sister state constitutions and the analysis of those constitutions shows that Maryland's *Cities Service* test is outside the mainstream of more defe-

239. Marritz, *supra* note 80, at 193–94.

240. See *supra* text accompanying notes 140–144.

241. Marritz, *supra* note 80, at 186–91.

242. See 2 DEBATES, *supra* note 148, at 877 (citing the burden borne by the legislature in spending three quarters of its time addressing the “petty things” brought by constituents).

243. See *supra* note 223 (listing examples of states applying a more lenient, rational basis test in evaluating special laws).

rential tests applied by sister states.²⁴⁴ While this alone does not compel a change in Maryland's interpretation, it provides important persuasive authority supporting a change.²⁴⁵ Nevertheless, because comparative constitutional interpretation cannot provide a binding interpretation of Maryland's constitution, and because of the existence of unique provisions for which there are no comparisons, it cannot answer all questions of state constitutional interpretation.

E. Structural Reasoning Analysis

Structural reasoning, as a theory of constitutional interpretation, requires an interpreter to consider not just the text of the constitution, but to reason from the structure and relation created by the text.²⁴⁶ Thus, although the concepts of "federalism," "separation of powers," and "majoritarianism" do not appear in the text of the federal constitution, these underlying structural concepts inform our understanding of the document and those concepts should be relied upon to interpret the meaning.²⁴⁷ Although the structural reasoning method of interpretation reached its high point (or low point, depending on one's perspective) in Justice William O. Douglas's opinion in *Griswold v. Connecticut*,²⁴⁸ it is at least as old as Chief Justice John Marshall's opinion in *McCulloch v. Maryland*,²⁴⁹ and continues to be used by the Supreme Court today.²⁵⁰

Structural reasoning can also play an important part in state constitutional interpretation although it is, quite frankly, a far trickier ex-

244. See *supra* text accompanying notes 223–224.

245. See *supra* text accompanying notes 204–206.

246. See CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 22 (1969) (speaking of structural reasoning as different from simple text-explication, and instead a method of reasoning from structure and relation).

247. GERHARDT, CONSTITUTIONAL THEORY, *supra* note 84, at 321.

248. 381 U.S. 479, 484–85 (1965) (inferring from the various provisions of the Bill of Rights a common thread prohibiting government intrusion into individual privacy absent compelling circumstances).

249. 17 U.S. (4 Wheat.) 316, 426 (1819) (holding that despite the lack of an "express provision" prohibiting Maryland from taxing the Bank of the United States, it cannot do so because of a "principle which so entirely pervades the constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it, without rending it into shreds.").

250. See *Printz v. United States*, 521 U.S. 898, 921, 935 (1997) (relying on structural reasoning to hold that the Constitution prevents Congress from enlisting state law enforcement to conduct background checks on handgun purchasers); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 827 (1995) (relying on structural reasoning regarding to reject state imposition of congressional term limits); see also Brannon P. Denning & Glenn Harlan Reynolds, *Comfortably Penumbra*, 77 B.U. L. REV. 1089, 1098–1100 (1997) (describing the Supreme Court's use of structural or "penumbral" reasoning in various cases).

ercise. Professor G. Alan Tarr generally counsels against it: “State constitutional provisions should generally be understood as discrete units, because state constitutions typically lack a unifying theory or set of extraconstitutional assumptions.”²⁵¹ While Dr. Tarr’s assessment that repeated constitutional revision and amendment can make it difficult to extract general structural principles from state constitutions is correct, it may still be worth trying. Again, article III, section 33 provides an opportunity to do just that.

Maryland’s constitution, since its first drafting in 1776, has always been composed of two parts, a declaration of rights and a form of government.²⁵² The Declaration of Rights is intended to describe the fundamental rights of humankind.²⁵³ By contrast, the form of government provides the concrete rules for the operation of state government.²⁵⁴ Since 1851, the form of government has been divided by subject into a series of articles: article I, which concerns the Elective Franchise; article II, which concerns the Executive Department; article III, which provides the rules for operation of the Legislative Department; and so on. Even a cursory review of article III discloses that its sections consist of procedural rules, not substantive guaranties.²⁵⁵ Moreover, this basic arrangement has been maintained, despite the frequent revisions and amendments the Maryland Constitution has undergone.

The decision by the framers of the 1864 Maryland Constitution to place the prohibition against special laws in article III (and the de-

251. Tarr, *State Constitutions*, *supra* note 183, at 1194. For a more complete discussion about the lack of “constitutional coherence” in state constitutions, see TARR, UNDERSTANDING, *supra* note 88, at 191–94 (concluding that “an interpreter cannot always look to the [state constitutional] whole to illuminate the meaning of its various parts”). This is the same reason that Professor Amar’s intertextual interpretive theories are unlikely to be helpful in analyzing state constitutional provisions. See *supra* text accompanying notes 83–88.

252. FRIEDMAN, STATE CONSTITUTION, *supra* note 143, at 2–3.

253. *Id.* at 2.

254. See Friedman, *supra* note 142, at 677 n.3 (noting that the form of government is the only document to which the term “constitution” was applied).

255. The only arguably close call is article III, section 40 (and its related provisions, article III, sections 40A–C), the principal provision of which provides that “[t]he 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.” MD. CONST. art. III, § 40. The federal analog to this provision is found within the Bill of Rights. U.S. CONST. amend. V (“nor shall private property be taken for public use, without just compensation”). Without diminishing the importance of this provision or the property rights that it guarantees, it is my view that the State provision, especially with its principal focus on the actions of the General Assembly, can properly be regarded as a procedural rule.

cision by the 1867 framers to retain it in that location) should give rise to the implication, based on the “structure and relation” of the constitution, that this provision should be treated more like a procedural rule than a substantive right.²⁵⁶ Thus, structural reasoning suggests that a modern interpreter of article III, section 33 should favor an interpretation that treats the provision as a procedural rule, not a substantive equality guarantee.²⁵⁷

In this regard, the Maryland framers consciously chose to model this provision on article IV, section 22 of the Indiana Constitution of 1851, but apparently equally consciously chose not to borrow Indiana’s equal privileges and immunities provision.²⁵⁸ That provision, which remains a part of Indiana’s Declaration of Rights today, states that “[t]he General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens.”²⁵⁹ The Maryland drafters’ decision to omit that provision resonates in historical, comparative, *and* structural analyses and suggests that the Maryland drafters consciously and intentionally selected a procedural model to follow and placed it with other procedural rules. They chose not to borrow a substantive equality guarantee, and they were not confused about what they were doing.²⁶⁰ Their choices must have implications for our current interpretation.

Judicial respect for the constitutional decision of coordinate branches can appropriately be characterized as a structuralist notion, although there is in the Maryland Constitution—unlike the federal constitution—textualist support for this separation of powers as well.²⁶¹ By passing a law, the state legislature has—perhaps explicitly

256. See WILLIAMS, STATE CONSTITUTIONS, *supra* note 30, at 278 (“These [special law] provisions, although often interpreted and applied as *rights* provisions, are actually *limits* on the legislative branch”).

257. Courts can be more deferential to the legislature when it has arguably violated the procedural rules of article III than they are when the legislature has violated the substantive guaranties of the declaration of rights. See, e.g., *Smigiel v. Franchot*, 410 Md. 302, 324–26, 978 A.2d 687, 701 (2009) (finding that legislative adjournment rule, MD. CONST. art. III, § 25, is a nonjusticiable controversy, best resolved by the legislature).

258. IND. CONST. art. I, § 23. See 2 DEBATES, *supra* note 148, at 877 (“Perhaps the most full and ample [provision] is that in the constitution of Indiana . . .”).

259. IND. CONST. art. I, § 23.

260. Friedman, *Tracing the Lineage*, *supra* note 210, at 945–48 (describing intentionality in borrowing of state constitutional provisions).

261. 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.”)

but certainly implicitly—determined that it is constitutional.²⁶² Ordinarily, we would expect courts to defer to that decision by the legislature. If the prohibition against special laws exists, however, to prevent corrupt legislatures from adopting corrupt legislation, then it would be silly to leave its enforcement to the legislature. That’s the essential holding of the Indiana Supreme Court in *Thomas v. Board of Commissioners*.²⁶³ But if, as the history of the Maryland provision tends to suggest, the provision was not intended as a response to legislative corruption, why shouldn’t the legislature’s constitutional judgments about the acceptable forms of classification in legislation be entitled to some measure of deference?²⁶⁴ The lack of explicit deference to the legislature is an important structuralist criticism of the *Cities Service* test.²⁶⁵

Structural reasoning also urges interpretations that “make sense.”²⁶⁶ One aspect of this should be jurisprudential coherence, that similar provisions are given similar interpretations. The *Cities Service* test violates this interpretive canon. All laws classify people, if only by deciding to whom the law applies. Using the equal protection analysis, and assuming that the legislation does not discriminate on an impermissible basis (suspect classification or the exercise of a fundamental right), the court will defer to the legislature’s classification so long as there is a rational basis. Courts use this deferential standard to reflect respect for the democratically elected legislature’s democratically selected policy choices. Under the *Cities Service* test, however, the same classification is subjected to a much less deferential stan-

262. See MD. CONST. art. I, § 9 (explaining the constitutional oath of office requires legislators to execute their office “according to the Constitution and Laws of this State”); see also *Keyser v. Upshur*, 92 Md. 726, 728, 48 A. 399, 400 (1901) (holding that acting in accordance with constitutional oath becomes part of the duties of the office).

263. 5 Ind. 4 (1854).

264. The Office of the Attorney General, emphasizing a pre-*Cities Service* test, takes a more deferential position in its review of legislation by (1) recognizing that it is the “province of the General Assembly” to determine “whether public policy dictates the necessity [of a particular piece of legislation] ‘to meet some special evil, or [to] promote some public interest, for which the general law is inadequate,’” 66 OP. ATT’Y GEN. 207, 209 (1981) (quoting *Jones v. House of Reformation*, 176 Md. 43, 55–56, 3 A.2d 728, 734 (1939)), and (2) applying the presumption of constitutionality that attaches to all legislative enactments. *Id.* (citing *Salisbury Beauty Sch. v. State Bd. of Cosmetologists*, 268 Md. 32, 48, 300 A.2d 367, 378 (1973)); see also *Williams v. Mayor of Balt.*, 289 U.S. 36, 46 (1933) (emphasizing judicial deference to legislative determination of need for legislation in deciding special laws cases).

265. See *supra* Part II.B.

266. CHARLES L. BLACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 22 (1969).

dard.²⁶⁷ There is no good reason why less deference should be given to the democratically selected policy choices of the legislature here than in equal protection. The same legislative classifications are judged by two different standards, implying two different levels of deference to the democratic process. That does not “make sense.”²⁶⁸

Thus, structural reasoning provides some helpful guidance in interpreting the Maryland special laws provision. Structural reasoning counsels that the special laws provision should be seen as a procedural right that should be given deference by the judiciary.²⁶⁹ Applying the interpretative theory of structural reasoning to state constitutions, however, is a difficult and often uncertain task.²⁷⁰ Therefore, structural reasoning can be helpful, but generally cannot be used alone to answer all interpretive questions presented by a state constitutional provision.

F. “Common Law” Constitutional Interpretation

David Strauss has argued that the best explanation of the constitutional interpretive model that is actually practiced is common law decision making.²⁷¹ Like traditional common law systems, judges rely on precedent, rather than authoritative texts, to determine the Constitution’s meaning. Professor Strauss does not argue that common law constitutional interpretation is the best possible interpretive model. Rather, he says that it is “the best way to understand what we are doing; the best way to justify what we are doing; and the best guide to resolving issues that remain open.”²⁷²

Professor Strauss argues that there are two components of common law constitutional interpretation that, operating together, make

267. See *supra* notes 69–71 and accompanying text.

268. In *Days Cove*, the Court of Special Appeals began to explore the relationship between special laws and equal protection. See *Md. Dep’t of the Env’t v. Days Cove Reclamation Co.*, 200 Md. App. 256, 282–85, 27 A.3d 565, 581–82 (2011).

269. See *supra* text accompanying note 257.

270. See *supra* note 135 and accompanying text.

271. See 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) (arguing that the common law approach is most effective at restraining judges). See also FARBER & SHERRY, *SEEKING CERTAINTY*, *supra* note 4, at 152–56 (arguing that a common law approach to constitutional interpretation offers a consistent approach that also affords the chance to reevaluate the current state of the law).

272. Strauss, *supra* note 271, at 888. See also FARBER & SHERRY, *SEEKING CERTAINTY*, *supra* note 4, at 154 (“To paraphrase Churchill, common law reasoning may be the worst possible method of judicial decision, except for all the others.”).

this method work: *traditionalism* and *conventionalism*.²⁷³ Professor Strauss's concept of traditionalism may be generally characterized as a general opposition to change.²⁷⁴ Conventionalism, according to Professor Strauss, is "the notion that it is more important that some things be settled than that they be settled right."²⁷⁵ Professor Strauss argues that these two components explain why the text of the Constitution is sometimes critically important and why it is sometimes, for all intents and purposes, ignored, and why the intention of the Framers is sometimes very important and sometimes ignored.²⁷⁶

Although Professor Strauss is careful never to equate his common law method of interpretation with the notion of *stare decisis* in constitutional decisions, the similarities are such as to make the comparison unavoidable.²⁷⁷ In *Planned Parenthood v. Casey*, the U.S. Supreme Court described *stare decisis* as a rule or a policy, not an "inexorable command."²⁷⁸ The Court stated that it is "customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case."²⁷⁹ The similarities between the *Casey* Court's description of *stare decisis* and Professor Strauss's description of the twin components of common law constitutional interpretation—traditionalism and conventionalism—are obvious.

The difficult balance in deciding whether to affirm or overrule a constitutional precedent based on *stare decisis* (or Professor Strauss's traditionalism and conventionalism) must be recalibrated when applied to a state supreme court's interpretation of its state constitution. As U.S. Supreme Court Justice Louis Brandeis stated: "The policy of *stare decisis* may be more appropriately applied to constitutional questions arising under the fundamental laws of those States whose

273. Strauss, *supra* note 271, at 890–91.

274. *See id.* at 891–92 ("The central traditionalist idea is that one should be very careful about rejecting judgments made by people who were acting reflectively and in good faith, especially when those judgments have been reaffirmed or at least accepted over time."). However, Professor Strauss does argue that within the common law approach, "gradual innovation" and "[e]ven sudden changes are possible." *Id.* at 935.

275. *Id.* at 907. Conventionalism, although commonplace with respect to the common law, is far more controversial in constitutional interpretation.

276. *Id.* at 896–97 (arguing that traditionalist and conventionalist theories do not unequivocally support the text of the Constitution itself; they both must employ various methods of interpretation when the text does not provide a definite answer).

277. *See id.* at 913 (reiterating that common law interpretation is based on precedent).

278. 505 U.S. 833, 854 (1992).

279. *Id.*

constitution may be easily amended.”²⁸⁰ Subsequent commentators have noted that aside from the relative ease of amending state constitutions, noted by Justice Brandeis, there are other factors in state constitutional practice that may require a further recalibration of the *stare decisis* calculation.²⁸¹ Maryland cases have not explored these questions with much sophistication.²⁸²

How do Professor Strauss’s common law theory of constitutional interpretation and the policy of *stare decisis* help us understand the prohibition on special laws in the Maryland Constitution? It is not clear whether Judge Eldridge’s intention in *Cities Service* was to synthesize existing special laws tests or whether he was fashioning a new test. Of course, there is not a simple answer to this question. There were aspects of the *Cities Service* test that repeated pre-existing law. Some aspects of the *Cities Service* test that were wholly new, such as the “mirror image” suggestion that the provision bans laws that “burden” as well as “benefit” a subclass. And there were aspects of the pre-existing law that *Cities Service* failed to mention, such as the strong presumption of constitutionality of statutes²⁸³ or the use of a reasonable-

280. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 409 n.5 (1932) (Brandeis, J., dissenting).

281. See WILLIAMS, STATE CONSTITUTIONS, *supra* note 30, at 349–50 (noting that even Justice Brandeis acknowledged that state legislatures are not hesitant to correct state court opinions they deem wrong); James C. Rehnquist, *The Power That Shall Be Vested in a Precedent: Stare Decisis, the Constitution, and the Supreme Court*, 66 B.U. L. REV. 345, 352–53 (1986) (suggesting that state legislatures can respond to court decisions by creating statutory rights beyond those protected by a court); Mark Sabel, *The Role of Stare Decisis in Construing the Alabama Constitution of 1901*, 53 ALA. L. REV. 273, 287, 294 (2001) (arguing that *stare decisis* should play a more influential role in the interpretation of the Alabama Constitution); Thad B. Zmistowski, *City of Portland v. DePaolo: Defining the Role of Stare Decisis in State Constitutional Decisionmaking*, 41 ME. L. REV. 201, 221 (1989) (arguing that because the Maine Constitution is a common law document, *stare decisis* should play an integral role in its interpretation). There is an interesting twist here. Although Justice Brandeis correctly points out that constitutional amendment is easier in state constitutions, it strikes me as exceedingly unlikely that the state legislature would propose a constitutional amendment to overturn a decision which, in effect, expands the legislature’s power to legislate. Thus, a decision overturning the *Cities Service* precedent in favor of a more deferential standard seems unlikely to cause the legislature to propose a constitutional amendment.

282. See, e.g., *DRD Pool Serv., Inc. v. Freed*, 416 Md. 46, 68, 5 A.3d 45, 58 (2010) (noting that, in response to the “contention that constitutional precedents are less deserving of robust *stare decisis* protection than are other rulings,” such constitutional “rulings require as much deference as non-constitutional cases, and are not less protected by *stare decisis* based solely on their constitutional nature”).

283. See, e.g., *Beauchamp v. Somerset County Sanitary Comm’n*, 256 Md. 541, 547, 261 A.2d 461, 463–64 (1970) (holding that in Maryland, statutes are presumptively constitutional).

ness test to evaluate legislative classifications.²⁸⁴ Reasonable people can disagree about the extent to which Judge Eldridge's *Cities Service* opinion adhered to the "essential holdings" of earlier special laws cases and the extent to which, by adopting a new method of analysis, it preserved a mere façade.²⁸⁵ Similarly, if the test from *Cities Service* is now to be modified, it is not clear whether that modification ought to be characterized as a complete overruling of the prior precedent or merely a minor adjustment.

Even if the *Cities Service* test is improperly formulated, Professor Strauss's common law method counsels us not to reject it lightly.²⁸⁶ Doubtless, the test was formulated by "people who were acting reflectively and in good faith,"²⁸⁷ and that the test has been "accepted over time."²⁸⁸ Moreover, while the *Cities Service* test may not have been formulated perfectly, it may satisfy the test of conventionality: it may be good enough. Similarly, *stare decisis* counsels caution in overruling the *Cities Service* test. Using the *Casey* formulation, we must "test the consistency of overruling a prior decision with the ideal rule of law" and "gauge the respective costs of reaffirming and overruling a prior case."²⁸⁹

The *Cities Service* test, however, is a perfect candidate for revision under the *Casey* standard. The rule has proven unworkable because it has provided little helpful guidance for the legislature or for courts.²⁹⁰ It has a legion of defects that are cataloged in Part III.B of this Article. Fortunately, however, there has been no reliance—in fact there can

284. See, e.g., *Littleton v. Hagerstown*, 150 Md. 163, 183, 132 A. 773, 778–79 (1926) (holding that the basis for a classification must bear a reasonable relation to the goal of the legislation).

285. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 846 (1992) (O'Connor, J., plurality opinion) (reaffirming the "essential holding" of *Roe v. Wade*); *id.* at 954 (Scalia, J., dissenting).

286. See Strauss, *supra* note 271, at 888 (arguing that within the existing legal framework, the common law model is "the best way to understand what we are doing; the best way to justify what we are doing; and the best guide to resolving issues that remain open").

287. *Id.* at 891. Perhaps this is the appropriate time, while recognizing that those who decided *Cities Service* were "acting reflectively and in good faith," to emphasize the high esteem in which I hold Judge John C. Eldridge. A quiet, thoughtful, scholarly man, Judge Eldridge is and has long been an excellent appellate judge.

288. *Id.* It is worth noting that the *Cities Service* test is far older and has been relied upon more frequently by appellate courts than the ruling upholding the constitutionality of the cap on noneconomic damages, see *Murphy v. Edmonds*, 325 Md. 342, 601 A.2d 102 (1992), which the Court of Appeals recently declared to have "become embedded in the bedrock of Maryland law." *DRD Pool Serv., Inc. v. Freed*, 416 Md. 46, 68, 5 A.3d 45, 58 (2010).

289. *Casey*, 505 U.S. at 854.

290. See *Green v. N.B.S., Inc.*, 409 Md. 528, 545–46, 976 A.2d 279, 289 (2009) (noting that because the statute at issue in *Cities Service* was incredibly fact-specific, the case does not provide useful guidance).

be no real reliance—on the *Cities Service* rule. The only party whose conduct is regulated by the prohibition on special laws—the Maryland General Assembly—will thereafter attempt to conform its annual legislative conduct to whatever new standard the court adopts. Similarly, while Professor Strauss’s common law constitutional interpretation urges us not to overrule longstanding precedents lightly, it certainly does not prohibit judges from adopting “[g]radual innovation[s]” to improve a constitutional interpretation.²⁹¹

Thus, common law constitutional interpretation provides some helpful guidance interpreting the Maryland special laws provision. Common law constitutional interpretation counsels that the court’s opinion in *Cities Service* may be a suitable candidate for the court to revisit and overrule.

V. APPLYING A COMPOSITE THEORY OF INTERPRETATION TO THE SPECIAL LAWS PROVISION

After independently applying all six theories of constitutional interpretation to the Maryland special laws provision, it is clear that none of the six theories can by itself provide the correct interpretation of the provision. A textualist is likely to be frustrated because the key terms of the Maryland special laws provision were not clearly defined at the time the provision was adopted.²⁹² Originalist theory provides only the conclusion that the provision’s drafters thought of it as a procedural limitation to protect legislators and to protect the separation of powers.²⁹³ Moral reasoning theory is unlikely to help interpret the special laws provision.²⁹⁴ Structural reasoning suggests that it is more likely that the special laws provision should be interpreted as a legislative procedural provision, rather than as a substantive equality guaranty.²⁹⁵ Comparative constitutional law suggests that Maryland might want to follow the examples of its sister states and adopt a more deferential standard of review for laws that are alleged to be unconstitutionally special.²⁹⁶ Finally, the common law method of constitutional interpretation suggests that, although the doctrine of *stare decisis* commends retaining the *Cities Service* test for special laws, that claim is

291. See Strauss, *supra* note 271, at 935 (stating that the common law method does not “immunize” precedent from new challenges, but rather encourages the empirical testing and re-testing of established legal doctrines).

292. See *supra* Part IV.A.

293. See *supra* Part IV.B.

294. See *supra* Part IV.C.

295. See *supra* Part IV.E.

296. See *supra* Part IV.D.

particularly weak here.²⁹⁷ Individually, these theories each have substantial weakness; using all six together provides tools that a judge can use to successfully interpret the provision. This example, to me, counsels strongly against any foundationalist theory of interpretation, or foundationalism generally.

In my view, a judge must use his or her 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,²⁹⁸ subsequent judicial and scholarly interpretation in this and comparable jurisdictions, core moral values, political philosophy, and state as well as American traditions.²⁹⁹ A judge ought to make use of all possible tools to come to a proper interpretation.

Combining what we have learned from each of the interpretive techniques and responding to the other criticisms of *Cities Service*, I propose adoption of the following four-part test for evaluating laws that are alleged to be special:

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.

297. See *supra* Part IV.F.

298. Originalism, shorn of its foundationalist baggage, is just normal historical interpretation, which I view as a particularly valuable tool in constitutional interpretation.

299. I was prepared to call this theory a "pragmatic" theory of interpretation. See Farber, *supra* note 130, at 1104–06 (explaining that pragmatic constitutional interpretation accounts for history and the Framers' intent, but also considers the flaws in the Framers' thinking, such as adherence to slavery). On reflection, however, it seems to me that this label, while literally correct, may carry too much baggage. See, e.g., RICHARD A. POSNER, HOW JUDGES THINK 232–33 (2008) (describing "coevolution" of philosophical and legal pragmatism); Daniel A. Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1341–43 (1988) (describing the virtues of pragmatism, but acknowledging that it has been the subject of serious criticism); see also Steven D. Smith, *The Pursuit of Pragmatism*, 100 YALE L.J. 409, 412–14 (1990) (attempting to make non-pragmatic theorists appear pragmatic and pragmatists appear non-pragmatic, in pursuit of the author's largely anti-pragmatic agenda). Professors Farber and Sherry recently published their full scale theoretical model, which calls for a constitutional jurisprudence marked by "[r]espect [for] precedent, [the] exercise [of] good judgment, provid[ing] reasoned explanations, deliber[at]ions with [judicial] colleagues, and keep[ing] in mind . . . responses of critics." FARBER & SHERRY, JUDGMENT CALLS, *supra* note 119, at 167. According to Farber and Sherry, the "first virtue" of their proposed interpretive theory is "prudence." *Id.* Whether this is "pragmatic" interpretive theory, I can't say.

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.

So let’s take it out for a spin. First, let’s try this new four-part test on the mass merchandiser exception to the divestiture law that was challenged in *Cities Service*. On the first part, which is derived from the text of the constitutional provision, it is clear that the mass merchandiser exemption was an exception to a general law requiring gas station divestiture.³⁰⁰ On the second part, although it is not plain that the classification of mass merchandisers was unnatural, unreasonable, or illogical, the class was clearly closed and no future mass merchandiser could obtain the benefit.³⁰¹ Thus, we proceed to the third part of the test. Here, it was clear that the mass merchandiser exemption created an unfair benefit to Montgomery Ward that no other mass merchandiser could share.³⁰² We then proceed to the fourth part of the test. It strikes me that, even despite the presumption of constitutionality, the law was unreasonable and therefore unconstitutional.

Now let’s look at *Maryland Department of the Environment v. Days Cove Reclamation Co.*, a case dealing with the licensure of rubble landfills (and a case in which I represented the State of Maryland).³⁰³ The law challenged in this case provides an exception to the general law by providing that in certain parts of the state—namely near Unicorn Lake and near certain Potomac River tributaries—no licenses may be issued.³⁰⁴ So, because there is an existing general law, we proceed to the second part. The two parties strenuously debated whether the classification drawn by the statute is unnatural, unreasonable, or illogical.³⁰⁵ While I do not and cannot concede the point, let’s assume for now that the classification fails this part of the test. So we proceed to part three. The statute does not create an unfair benefit to anyone. It does not create favoritism. And there is no implication for the se-

300. *Cities Serv. Co. v. Governor*, 290 Md. 553, 577, 431 A.2d 663, 676–77 (1981).

301. *See id.* at 570–71, 431 A.2d at 673 (noting that the company in question was the only subsidiary of an oil producer or refiner that could qualify for the statutory exemption).

302. *See id.*

303. *Days Cove Reclamation Co. v. Md. Dep’t of Env’t*, No. 24-C-07-003455, slip op. at 2–4 (Md. Cir. Ct. Balt. Aug. 25, 2008), *rev’d*, 200 Md. App. 256, 27 A.3d 565 (2011).

304. *Id.* at 3–4.

305. *Id.* at 5 n.7.

paration of powers. Therefore, based on the third part of the test, the statute is constitutional.³⁰⁶ That's the same result that the Court of Special Appeals reached using the traditional *Cities Service* test.³⁰⁷

This proposed test is faithful to the text of the Maryland Constitution, as well as to its history, structure, and values. It is consistent with and commended by the jurisprudence of our sister jurisdictions. And while it would supplant the *Cities Service* test, given the limited reliance, it will not destabilize existing expectations. And, at least on these two examples, it comes to the right conclusion.

Despite this, some may view this new proposal as too deferential to the legislature. This criticism is misplaced. First, this is an area in which explicit deference to the legislative policy choices of a democratically-elected state legislature is appropriate. As the Court of Appeals said long ago, “[T]he constitutional provision was wisely designed to prevent the dispensation or grant of special privileges to special interests, . . . it was never intended . . . to foreclose the sovereign the right to pass special legislation to serve a particular need, to meet some special evil, or to promote some public interest, for which the general law is inadequate.”³⁰⁸

Second, despite the fact that the *Cities Service* test for special laws gives the appearance of liberality, it is not generally applied so loosely. In 150 years of special laws litigation, in fact, the Court of Appeals has invalidated laws as violating the prohibition only eight times.³⁰⁹ Thus, while the *Cities Service* test may appear liberal, that appearance may, in practice, be somewhat deceptive. If adopted, this proposed test will be easier for the legislature and courts to apply, but would be unlikely to change the outcomes in many cases.

Thus, a combined theory of constitutional interpretation is successful in interpreting the special laws provision of the Maryland Constitution. The test created by this method of interpretation follows the text, history, structure, and values of the Maryland Constitution.

306. *See* Md. Dep't of the Env't v. Days Cove Reclamation Co., 200 Md. App. 256, 27 A.3d 565 (2011).

307. *Id.*

308. *Jones v. House of Reformation*, 176 Md. 43, 56, 3 A.2d 728, 734 (1938) (internal quotation marks omitted).

309. *Cities Serv. Co. v. Governor*, 290 Md. 553, 570, 431 A.2d 663, 673 (1981); *Beauchamp v. Somerset County Sanitary Comm'n*, 256 Md. 541, 549, 261 A.2d 461, 464 (1970); *Littleton v. Hagerstown*, 150 Md. 163, 183, 132 A. 773, 781 (1926); *Westminster v. Consol. Pub. Utils. Co.*, 132 Md. 374, 379, 103 A. 1008, 1009 (1918); *Crisfield v. Chesapeake & Potomac Tel. Co.*, 131 Md. 444, 448, 102 A. 751, 752 (1918); *State v. Balt. & Ohio R.R. Co.*, 113 Md. 179, 187, 77 A. 433, 435 (1910); *Mayor of Balt. v. Starr Methodist Protestant Church*, 106 Md. 281, 289, 67 A. 261, 265 (1907); *Mayor of Balt. v. Allegany County*, 99 Md. 1, 12–13, 57 A. 632, 636 (1904).

The test is consistent with the jurisprudence of Maryland's sister states. The test is consistent with the doctrine of *stare decisis*. Allowing a judge to make use of all available resources, including all six methods of constitutional interpretation, rather than limiting to a single foundationalist method, successfully interprets a state constitutional provision.