There’s plenty for citizens to find fascinating within state Constitutions, say experts Mark Graber and Dan Friedman. In a wide-ranging discussion, they talk candidly about hot-button issues now under debate from Maryland to Montana.

CAREY LAW: Are there features of a state constitution, and in particular the Maryland State Constitution, that are particularly distinctive—and that citizens should care about?

FRIEDMAN: The state constitution is where you put compromises that you don’t want the legislature to look at in the future. So for example, the one that I deal with most frequently is slots. For 10 years, we’ve considered how to do slots in the State of Maryland: VLTs, video lottery terminals. We couldn’t figure out how to do it. By putting it in the State Constitution, we took the decision about whether to have slots out of the realm of the General Assembly.

GRABER: State constitutions, I think, have different kinds of provisions that citizens might care about and be interested in. There are provisions distinctive to the state constitution—indeed probably distinctive to each state. For example, New York’s Constitution has provisions about how wide the ski trails have to be and if you own a ski resort in New York, you really need to know about those provisions. If you live in Utah, who cares? And Maryland has a lot of those same, state-specific provisions, too.

Of course, we left all the details to be worked out by legislation, so we’re back every year, fighting over what the details are. But that’s an example.
It’s also important for people to understand that states can add to the Federal constitutional rights of citizens, as long as those amendments don’t diminish those rights. For example, the Maryland Equal Rights Amendment. There is federal law on the Equal Rights Amendment but Marylanders thought the Federal law insufficiently rights protective, so we have a state constitutional amendment that says we’re going to protect more rights than the Federal government. So in effect, they can say: In this state you have a right to same-sex marriage. In this state, women will be treated equally. In this state, property will not be condemned under these conditions.

Finally, there are provisions that are identical to the Federal Constitution, but that are still open for different interpretation by the states—again as long as they don’t violate Federal rights. So there’s a lot in state constitutions that ought to be of interest to citizens.

**FRIEDMAN:** That’s absolutely true.

**GRABER:** What are other hot state constitutional issues that readers ought to be really interested in? What about the right to bear arms in the Maryland Constitution?

**FRIEDMAN:** Good one. Where there was debate about whether the Federal Second Amendment protected the individual right to bear arms, or whether it was a communal militia-based right, the Maryland Constitution—which pre-dated the Second Amendment, of course—was only a militia-based right, so none of those individual right-to-carry issues are going to arise under the Maryland Constitution.

**GRABER:** What about the special session of the Maryland General Assembly in May … was there a constitutional issue involved with that?

**FRIEDMAN:** Absolutely. For the first 150 some-odd years of Maryland
In the early part of the 1900s, we adopted what we called the executive budget system… The driver’s seat is given to the Governor, among other powers given to the Governor of the State of Maryland—making him, I believe, the most powerful governor of any of the states.

The legislature’s only mandatory function during the legislative session every year is to receive the budget from the Governor, adjust it in only limited ways, and approve it. Once that is done, however, it’s done.

There are choices and contingencies in that budget that are made and now we are struggling with how you undo those if there is a special session—which can only be called under processes that are spelled out in the State Constitution. If you have a special session, any changes in that budget have to be made in a manner that is consistent with Article III, Section 52 of the State Constitution. If you have a special session, any changes in that budget have to be made in a manner that is consistent with Article III, Section 52 of the State Constitution.

The way the doomsday budget was designed, there were $500 million in cuts, but those cuts would go away if the budget reconciliation act and the revenue act passed. Then the cuts would be restored. But once the session ended and that doomsday budget was adopted, you can’t just undo it because that’s increasing the budget—which is not a function that the legislature is permitted to do. So we’re spending a lot of time figuring out exactly how we can go back and restore the budget that the General Assembly initially intended.

Let me talk about [an issue] that will be on people’s ballots this year. In this past legislative session, we found something that was wrong about the State Constitution. If a state or local elected official is convicted of a crime, they are automatically removed from office. The problem is, there’s a 1974 opinion of the Attorney General that says conviction for this provision of the State Constitution happens at sentencing. And so we had the unseemly situation where the then-sitting Mayor of Baltimore City had been found guilty by a jury but remained in office for two more months until the sentencing and interdiction became final.

A similar thing happened in Prince George’s County, where a county councilwoman pled guilty but wasn’t removed from office because her guilty plea hadn’t hardened into a final conviction—so that the provision of the State Constitution that causes her automatic removal from office took place this year.

Because those were so unseemly, the General Assembly has proposed a constitutional amendment that will be on folks’ ballots in November, to move that up so there isn’t that awkward time after a guilty plea—or after a finding of guilt but before sentencing—where that person is allowed to stay in office and operate the machinery of government. So that was something we’ve learned in experience was bad and we get to fix it.

Remember that Maryland’s Constitution was written in 1867, by a very conservative group that was trying to undo progress that had been made during the Civil War. That was its express purpose. In the 140-some-odd-years after that, we’ve taken out a lot of the most egregious provisions. We’ve smoothed over some, or by
judicial remedy, by judicial interpretation, taken the hard edges off of stuff. But the Maryland Constitution is incredibly hard to read. It’s self-contradictory. It’s not user-friendly in any way. And one of my aspirations is that at some point we would clean it up, whether we do that by a constitutional convention or, my favored way of doing it, similar to the way we do code revision. We take on a new article of the Constitution every two years. We work together to make non-substantive changes that will make it easier for citizens to understand their Constitution.

**GRABER:** Another potentially hot issue … the Montana Supreme Court, in a campaign finance case, said maybe there’s not evidence that corporations are affecting the national government, but here in Montana, they’re ruining politics, so Citizens United [the campaign finance case], doesn’t apply to us. Are there areas where you see the Court of Appeals trying to use the Maryland Constitution to resolve issues that they suspect the more conservative Supreme Court of the United States will not reach?

**FRIEDMAN:** I have seen almost none of that … of the Court of Appeals using Michigan vs. Long to insulate its decisions from the decisions of the more conservative U.S. Supreme Court.

**GRABER:** Yes, Michigan v. Long is a Supreme Court case that essentially says that if a state wishes to provide

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more protections than the Federal Constitution, it can do so but it must say explicitly that we are interpreting the State Constitution, not the Federal Constitution.

**FRIEDMAN:** Right. It’s a plain statement of the adequate and independent state constitutional ruling …. [on a semi-related subject] … I think that this has been a year in which the Court of Appeals has told the Maryland General Assembly, you’ve gone too far in a number of places.

Along these lines, I think the lead paint decision of Jackson v. Dackman is a very interesting case. Seventeen or 18 years ago, the General Assembly enacted a statutory scheme that attempted to balance the rights of children poisoned by lead paint to protect the housing stock and to improve the housing stock so that in the future more kids aren’t lead poisoned. What it says is, if you clean up the house and you keep it, and you improve the conditions, then the remedy for a child poisoned is capped and it’s capped at a low figure. The General Assembly made that decision and for 17 years that’s been the law of the land. Landlords haven’t been buying insurance because they understood that their liability was capped in these ways.

The incidence of lead paint poisoning has dropped precipitously and this has been in many respects a very successful program in terms of maintaining housing stock, cleaning up apartments, and reduction in lead paint poisoning. This year the Court of Appeals held, however, that the statutory scheme, which caps the liability for the amount of money that the plaintiff can recover at about $17,000, violated our constitutional right to a remedy. Unfortunately the decision is not clear about at what level that remedy would be preserved—and so my clients said well, okay, $17,000 is too little. Is $34,000 the right number? Is $170,000 the right level? And I can’t answer that question because the court gave us almost no direction. But that’s another
time when the Court of Appeals said no, Legislature, you’ve gone too far.

The ground rent case is another one. The ground rent case is one called Muskin v. State Department of Assessment and Taxation. The Baltimore Sun published a series of reports saying, essentially, that owners of ground rents were using the collection system to repossess homes. For $90 in failure of back ground rents, they were taking people’s homes. One of the things the General Assembly wanted to do was make sure everybody had notice of the ground rents on their homes; it created a registry system and owners were given three years to register their ground rents, but if they didn’t do it within three years, the ground rents would be terminated and would revert to the owner of the property. The U.S. Supreme Court, in a series of cases, mostly mineral extraction cases, said you can terminate somebody’s property rights without violating those property rights if you gave them a notice period for these registries. Our Court of Appeals decided that that was unconstitutional and so this session the General Assembly developed a different statutory remedy for failure to register those ground rents.

“I think of studying the Maryland Constitution as really requiring an archaeologist’s skill because you can find provisions that date to any of our four constitutions: 1776, 1851, 1864, 1867.”

—DAN FRIEDMAN

1867. But I think also really interesting is the role of our 1967 Constitutional Convention, where we thought about changing the Maryland Constitution. Though voters rejected that proposed constitution, by hook or by crook we’ve subsequently adopted most of the ideas that were proposed in 1967.

CAREY LAW: Can you say more about that?

GRABER: Mainly, one of the standard arguments for gay marriage goes like this: If we agree that it’s a violation of the 14th Amendment on race, that if I can marry a white woman then I can marry an African American woman, and if the standard of protection is the same for race and gender …then shouldn’t it be the case that the gender of my marriage partner ought not to matter, just as my race doesn’t? That is the argument. It would seem once you’ve had an ERA that argument followed.

But the Maryland Supreme Court disagreed with my airtight analysis.

CAREY LAW: Mark, what is one of the things about the Maryland Constitution that most intrigues you?

GRABER: Maryland turns out to be a pioneer in special laws in the 19th century. There are just fascinating cases about administrative discretion as special laws because, in fact, both states and the Federal Constitution had trouble with bureaucracy. Namely, rather than having Congress pass a law, or the state legislature pass a law that said a boiler could be no more than 200 degrees, and then all the inspector did is [evaluate whether is was] at 200 degrees or not, you increasingly got laws of the form that when the boiler has to be safe, the bureaucrat goes in and decides whether it’s safe or not. Maryland was troubled by that. [There was] too much executive discretion. So the way Maryland understood these special law provisions was copied throughout the United States.

Maryland is also very interesting in the way the Equal Rights Amendment did not affect gay marriage in Maryland. One would have thought it might have, and it didn’t.