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Jackson v. Dackman Co.: The Legislative Modification of Common Law Tort Remedies Under Article 19 of the Maryland Declaration of Rights

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JACKSON v. DACKMAN CO.: THE LEGISLATIVE MODIFICATION OF COMMON LAW TORT REMEDIES UNDER ARTICLE 19 OF THE MARYLAND DECLARATION OF RIGHTS

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In *Jackson v. Dackman Co.*,[1] the Maryland Court of Appeals created a new test for evaluating the constitutionality of legislative modifications of common law tort remedies: to satisfy Article 19 of the Maryland Declaration of Rights, any substitute remedy must be "reasonable" to a majority of the Court.[2] While perhaps an admirably candid statement of what courts really do in these cases, as stated, the Court of Appeals' test provides no guidance for future cases testing the constitutionality of statutory modifications of common law tort remedies.[3]

In a recent article in the *Maryland Law Review*, I proposed a new methodology for the interpretation of provisions of state constitutions.[4] This new

* Judge, Maryland Court of Special Appeals. Many thanks to my teaching partner, Professor Richard C. Boldt of the University of Maryland School of Law, and our former students, Mollie Rosenzweig and Anwar Graves, who helped me work out some of the ideas presented here. Thanks also to Alison Best, Matthew Bradford, Jennifer Carson, David Maher, Julianne Montes de Oca, and Aryeh Rabinowitz, my law clerks, and to Megan Gallo, who each provided excellent research assistance. Of course, the discussion contained in this Article is not binding on me or my court, nor is it a "public comment that relates to a proceeding pending or impending in any court and that might reasonably be expected to affect the outcome or impair the fairness of that proceeding." Md. Rule 18-102.10.

1. 422 Md. 357, 30 A.3d 854 (2011).

2. *Id.* at 380, 30 A.3d at 867 ("The issue, under our Article 19 jurisprudence, generally is whether the abolition of the common law remedy and substitution of a statutory remedy was *reasonable*." (emphasis added)); *see also id.* at 381, 30 A.3d at 868 ("[T]he substituted remedy . . . is totally inadequate and unreasonable.").

3. Discussing the analogous provision of the Oregon Constitution, then-Professor (and later Judge) David Schuman observed:

> [C]onstitutional interpretation . . . must be sensible, clear, precise, and consistent—and more: it must also demonstrate fidelity to the constitution itself. . . . [A] court's explanation of the meaning of a given constitutional provision should demonstrate some logical connection to the words it purports to interpret, including their source, history, and position in the overall document. Further, "fidelity" requires that the court be sensitive to the political culture of the constitutionally-defined community and reflect the community's most deeply held constitutive traditions. Finally, . . . constitutional interpretation should be logical enough to avoid producing absurd outcomes, clear enough to guide ordinary citizens, and precise enough to have some meaning beyond unfocused exhortation[s].

David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197, 1219–20 (1992) (footnote omitted).

4. Dan Friedman, *Applying Federal Constitutional Theory to the Interpretation of State Constitutions: The Ban on Special Laws in Maryland*, 71 MD. L. REV. 411 (2012) [hereinafter Friedman, *Applying Federal Constitutional Theory*].

methodology was based on two premises. *First*, I argued that familiar theories used to interpret the federal constitution—textualism, originalism, structuralism, and the like—could be repurposed for the interpretation of state constitutions.[5] *Second*, I argued that none of these theories alone was sufficient to provide a one-size-fits-all, comprehensive interpretive tool.[6] Rather, it is my view that all of these tools, used together, can provide a careful judge with the material to determine the best possible interpretation of a constitutional provision, by which I mean:

> 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, subsequent judicial and scholarly interpretation in this and comparable jurisdictions, core moral values, political philosophy, and state as well as American traditions. A judge ought to make use of all possible tools to come to a proper interpretation.[7]

In that initial article, I used this methodology to enrich understanding of the prohibition against special laws found in Article III, section 33 of the Maryland Constitution.

Here, I use the same technique to inform my understanding of Article 19 of the Maryland Declaration of Rights[8] and to propose a better test than the one adopted by the Maryland Court of Appeals in 2011 in *Jackson v. Dackman Co*. That provision, descended from the Magna Carta, has been part of the Maryland Declaration of Rights continuously since 1776,[9] but has never received careful analysis from courts or commentators. Rather, the

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5. I will not repeat the discussion of the development and methods of interpretive theory. The interested reader should refer to my prior article and the work cited therein. Friedman, *Applying Federal Constitutional Theory, supra* note 4, at 412–17, 427–66. Or, as the insufferable Gilderoy Lockhart would say, "for full details, see my published works."

6. Nor will I repeat my criticism of foundationalism, by which adherents of a particular theory of interpretation, most often textualism or originalism, claim that these theories can provide answers to every interpretive question arising under a constitution, thereby reducing the need for judicial judgment. Friedman, *Applying Federal Constitutional Theory*, *supra* note 4, at 412–17, 444.

7. *Id.* at 467 (footnotes omitted); *see also supra* note 3.

8. Article 19 provides:

> That every man, for any injury done to him in his person or property, ought to have remedy by the course of the Law of the Land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the Law of the Land.

MD. CONST. DECL. OF RTS. art. 19.

9. MD. CONST. DECL. OF RIGHTS art. 17 (1976); Dan Friedman, *The History, Development, and Interpretation of the Maryland Declaration of Rights*, 71 TEMP. L. REV. 637, 658, 694 nn.304–13 (1998) [hereinafter Friedman, *Maryland Declaration of Rights*]; Dan Friedman, *Tracing the Lineage: Textual and Conceptual Similarities in the Revolutionary-Era State Declarations of Rights of Virginia, Maryland, and Delaware*, 33 RUTGERS L.J. 929 (2002) [hereinafter Friedman, *Tracing the Lineage*].

Court of Appeals historically treated Article 19 as if it was redundant to Article 24 of the Declaration of Rights, and treated both as if they were synonymous with the Due Process Clause of the Fourteenth Amendment to the United States Constitution.[10] Since 1985, however, the Court of Appeals has applied Article 19 in three contexts: (1) Guaranteeing "a right to a remedy both in circumstances in which the legislature has failed to provide such a remedy and in circumstances in which the legislature unreasonably seeks to limit an existing remedy."[11] These claims arise in a variety of situations, including new or expanded immunities, damage caps, statutes of limitation and repose, and alternative compensation systems; (2) Ensuring "that rights belonging to Marylanders are 'not illegally or arbitrarily denied by the government'";[12] and (3) More literally, to ensure that courtrooms are open to litigants and the public.[13]

Jackson v. Dackman Co. concerned the first context: whether the legislature's modification of the remedy for the victims of lead paint poisoning had the effect of denying victims a remedy.[14]

I. JACKSON V. DACKMAN CO.

A. The Court's Opinion

In 2002, Zi'Tashia Jackson and her mother, Tameka, sued the Dackman Company in the Circuit Court for Baltimore City, alleging that Zi'Tashia had suffered severe and permanent brain damage from ingesting lead paint at two properties owned by the defendant.[15] Among other arguments, the plaintiffs alleged that the Reduction of Lead Risk in Housing Act of 1994,[16] which created an alternative compensation system for victims of lead paint poisoning, was unconstitutional under Article 19 of the Maryland Declaration of Rights.[17] The trial court found the law constitutional and granted summary

10. *See infra* note 52.

11. DAN FRIEDMAN, THE MARYLAND STATE CONSTITUTION 46 (Oxford University Press ed. 2011) (2006) [hereinafter FRIEDMAN, THE MD. STATE CONSTITUTION] (Piselli v. 75th St. Med., 371 Md. 188, 205, 808 A.2d 508, 518 (2002); Ashton v. Brown, 339 Md. 70, 105, 660 A.2d 447, 464 (1992)).

12. *Id.* at 46–47 (citing Murphy v. Edmonds, 325 Md. 342, 366, 601 A.2d 102, 113 (1992)).

13. *Id.* at 47–48 (citing Green v. N. Arundel Hosp. Ass'n, 366 Md. 597, 626–27, 785 A.2d 361, 378 (2001)).

14. In this Article, I characterize the Reduction of Lead Risk in Housing Act of 1994 (at issue in *Jackson*) as an alternative compensation system, providing an immunity from suit in exchange for a reduced but certain no-fault award like, for example, the workers' compensation system. My characterization is in contrast to the Court of Appeals in *Jackson,* which made the rhetorical but not completely accurate choice to describe the Act as only providing immunity. *See infra* notes 23, 32.

15. Jackson v. Dackman Co., 422 Md. 357, 370, 30 A.3d 54, 861–62 (2011).

16. MD. CODE ANN., ENVIR. §§ 6-835–6-836 (LexisNexis 2013).

17. *Jackson*, 422 Md. at 375, 30 A.3d at 863.

judgment for the defendant.[18] On appeal, the Court of Special Appeals agreed as to the constitutionality of the Act but reversed on other grounds.[19]

The Court of Appeals granted certiorari to consider the constitutionality of the Act.[20] The Court reviewed the terms of the Act, which by its analysis offered the owner of an affected property immunity from personal injury lawsuits after making a qualified offer to a person at risk.[21] This immunity remained, notwithstanding acceptance or rejection of the qualified offer.[22] Moreover, the owners were immune from lawsuits brought on behalf of persons at risk, regardless of whether such a qualified offer was made. Essentially, the persons at risk had no cause of action in the event that no qualified offer was made.[23] In this case, the defendants made no qualified offer to the plaintiffs, thereby leaving the plaintiffs with no cause of action to recover for damages.[24]

Notwithstanding the owner's immunity, the statute placed a cap on the amount of the qualified offer.[25] The maximum amount payable is $17,000.[26] This amount consists of $7500 for medical treatment and $9500 for relocation benefits, including relocation expenses, a rent subsidy, and incidental expenses.[27] The Court of Appeals noted that "most of this [sum] is payable to the provider of medical or other services and not to the person at risk."[28] Critically, the Court held:

> For a child who is found to be permanently brain damaged from ingesting lead paint, proximately caused by the landlord's negligence, the maximum amount of compensation under a qualified offer is minuscule. It is almost no compensation. Thus, the remedy which the Act substitutes for a traditional personal injury action results in either no compensation (where no qualified offer is made or where a qualified offer is rejected) or drastically inadequate compensation (where such qualified offer is made and accepted).[29]

18. *Id.* at 374, 30 A.3d at 864.

19. *Id.* at 374–75, 30 A.3d at 864. The intermediate appellate court held that the landlord had failed to comply with registration requirements. *Id.*

20. *Id.* at 375, 30 A.3d at 865.

21. ENVIR. §§ 6-835 and 6-836.

22. *Id.* This reflects some confusion about the Act. In practice, a claimant's acceptance of a qualified offer reduced the landlord's liability to the amount of the qualified offer, as the Court seems to acknowledge in footnote 8. *Jackson*, 422 Md. at 369 n.8, 30 A.3d at 861 n.8.

23. *Jackson*, 422 Md. at 381, 30 A.3d at 868.

24. *Id.*

25. *Id.*

26. *Id.* (describing ENVIR. § 6-840).

27. *Id.* (describing ENVIR. § 6-840(a)(1)–(2)).

28. *Id.* at 366, 30 A.3d at 859 (referencing ENVIR. § 6-840(b), which requires all payments to be paid to service providers, excluding incidental expenses as required by Section 6-840(a)(2)(iii)).

29. *Id.* at 382, 30 A.3d at 868.

The Court determined that a qualified offer, which is the sole statutory remedy "for a permanently brain damaged child[,] is totally inadequate and unreasonable."[30] As a result, the Court declared the immunity provisions of the Act invalid under Article 19 of the Maryland Declaration of Rights.[31]

B. Criticism of the Opinion in Jackson v. Dackman Co.

The unanimous opinion for the Court of Appeals is not up to the Court's usual standards of depth, analysis, and reasoning. For example, there was very little discussion of the constitutional provision on which it relies—Article 19 of the Maryland Declaration of Rights. There was no textual analysis of Article 19. There was no historical analysis that would explain the history of Article 19 and how it came to be a part of Maryland's constitutional pantheon. There was no acknowledgement of the sensitive separation of powers issues that arise when the judiciary considers the constitutionality of legislation to modify a common law remedy. There was no consideration of sister state remedy clause jurisprudence. More concretely, there was also no consideration of why the legislature adopted the Reduction of Lead Risk in Housing Act of 1994.[32] There was no acknowledgement that the statute had been

30. *Id.* at 381, 30 A.3d at 868.

31. The Court held the immunity provisions (ENVIR. §§ 6-828, 6-835, 6-836, 6-836.1) unconstitutional, but severable, from the remainder of the Act. *Jackson*, 422 Md. at 383, 30 A.3d at 869. The Office of the Attorney General issued an opinion on December 4, 2017, regarding the *Jackson v. Dackman Co.* decision. MD. OFFICE OF THE ATTORNEY GEN., 102 OP ATT'Y GEN. 16, SEVERABILITY–LEAD POISONING PREVENTION–"QUALIFIED OFFER" PROVISIONS OF REDUCTION OF LEAD RISK IN HOUSING ACT ARE NOT SEVERABLE FROM THE IMMUNITY PROVISIONS INVALIDATED IN *JACKSON V. DACKMAN* (2017). Contrary to the Court's holding in *Jackson*, the Attorney General concluded that "the qualified offer provisions are so intertwined with the immunity provisions that the General Assembly *would not have intended them to operate apart from one another*." *Id.* at 17 (emphasis added). Thus, according to the Attorney General, "the qualified offer provisions did not survive the decision in *Dackman*." *Id.*

32. In this regard, it is noteworthy that the views of the Attorney General (who might have provided useful context) were not sought in *Jackson*. This is a recurrent problem that should be avoidable by reference to two strands of law, which together make it mandatory to seek the views of the Attorney General when an appellate court is considering the constitutionality of a state law. *First*, the Maryland Constitution requires the clerks of the appellate courts to notify the Attorney General of any case brought "in which the State . . . has [an] interest." MD. CONST. art. V, § 6; *see also* MD. CODE ANN., CTS. & JUD. PROC. § 3-405(c) (LexisNexis 2013) (requiring notice to the Attorney General of any declaratory judgment action seeking to declare a statute unconstitutional). *Second*, the Court of Appeals in *State v. Burning Tree Club* made plain that it is the duty of the Attorney General to defend the constitutionality of statutes: "A statute, with its presumption of constitutionality, has [the] right to an advocate of its validity." 301 Md. 9, 36–37, 481 A.2d 785, 799 (1984) (holding "the Attorney General ordinarily has the duty of appearing in the courts as the defender of the validity of enactments of the General Assembly"). With no advocate of its own in *Jackson*, it was easier for the Court to find the Reduction of Lead Risk in Housing Act of 1994 unconstitutional.

in place for seventeen years and that people had made economic decisions based on the Act's existence.[33]

The only analysis in which the Court engaged was a review of its prior precedents under Article 19—and not a very convincing review at that. The Court cited distinguishable cases,[34] and more importantly, without acknowledging that it was doing so, changed its test for evaluating Article 19 challenges from one that gave a great deal of deference to the legislature to one that gives no deference at all.[35] The *Jackson* Court held that "[t]he issue, under our Article 19 jurisprudence, generally is whether the abolition of the common law remedy and substitution of a statutory remedy was reasonable."[36] Concluding that it believed the provisions of the Act giving tort immunity to landlords in exchange for minimal compensation to victims were unreasonable, the Court invalidated the statute.[37]

The explanation of the *Jackson* Court's transformation of the standard for reviewing challenges brought under Article 19 requires a little history.

33. While the statute was in place, landlords who had made the necessary repairs purchased homeowners' insurance policies with lead paint exclusions designed to match the maximum exposure of a qualified offer. MD. CODE. ANN., INS. § 19-704(d) (LexisNexis 2017); *see also* MD. INS. ADMIN., REPORT OF THE WORKGROUP ON LEAD LIABILITY PROTECTION FOR OWNERS OF PRE-1978 RENTAL PROPERTY MSAR NO. 9267, at 5–6 (2012).

34. In summing up its review of its Article 19 precedents, the Court quoted *Robinson v. Bunch*, stating, "The Legislature may ordinarily substitute a statutory remedy . . . for a common law remedy without violating Article 19 of the Declaration of Rights." *Jackson,* 422 Md. at 381, 30 A.3d at 868 (quoting Robinson v. Bunch, 367 Md. 432, 446–47, 788 A.2d 636, 645 (2002)). From there, the Court concluded that challenges under Article 19 are to be analyzed under a reasonableness standard. *Id.* at 380, 30 A.3d at 867. The jump by the *Jackson* Court from *Robinson* to the announcement of this standard, however, was not adequately supported. In *Robinson*, the only support offered by the Court for its proposition was a string citation of cases—most of which addressed unrelated issues. For instance, the Court cited to Ashton v. Brown, 339 Md. 70, 104–08, 660 A.2d 447, 464–66 (1995); Ritchie v. Donnelly, 324 Md. 344, 374 n.14, 597 A.2d 432, 446 n.14 (1991); and Johnson v. Maryland St. Police, 331 Md. 285, 297 n.8, 628 A.2d 162, 168 n.8 (1993) all of which primarily addressed the permissible scope of state governmental immunity for violations of constitutional rights. Md. Aggregates Ass'n v. State, 337 Md. 658, 675–82, 655 A.2d 886, 895–98 (1995), concerned whether administrative agencies can perform judicial functions without violating the separation of powers under Article 8. Finally, Branch v. Indemnity Ins. Co., 156 Md. 482, 144 A. 696, 697 (1929), and Solvuca v. Ryan & Reilly Co., 131 Md. 265, 101 A. 710, 715 (1917), did not deal with the availability of a tort remedy under Article 19, but rather whether the Workers' Compensation Act must provide a right to a jury under Article 5 of the Maryland Declaration of Rights. Although each case discussed Article 19—at least cursorily—at some point, altogether, the cases offered little support for the Court's assertion in *Robinson.* Notably, the only support offered by the *Jackson* Court in its summary of Article 19 precedent is the identical string citation to that used in *Robinson*, which is equally unavailing here. Rather than adopting the same string citation from *Robinson*, I believe the Court could have better supported its conclusion that challenges under Article 19 are analyzed using a reasonableness standard by citing directly to the several Maryland cases that speak to that point. *See, e.g.*, Murphy v. Edmonds, 325 Md. 342, 365, 601 A.2d 102, 113 (1992); Dua v. Comcast Cable of Md., 370 Md. 604, 644, 805 A.2d 1061, 1084–85 (2002); Rios v. Montgomery Cnty., 386 Md. 104, 137, 872 A.2d 1, 20 (2005).

35. *See infra* notes 44–47.

36. *Jackson*, 422 Md. at 380, 30 A.3d at 867.

37. *Id.*

Early cases, if they dealt with Article 19 at all, ignored its focus on remedies and treated Article 19 as if it was simply redundant with Article 24 and with the Fourteenth Amendment's guarantee of procedural due process.[38] As a result, during this period, if the courts evaluated legislation under Article 19 at all, they imported the deferential rational basis review that applies in due process cases.[39] Things changed in a series of cases decided beginning in 1985.[40] In these cases, the Court of Appeals took a closer look at Article 19, stopped treating it as a due process provision, and began to treat it as an independent remedy provision.[41] Nevertheless, the Court decided to continue to apply a rational basis review or, as it sometimes characterized it, a test of

38. *See, e.g.*, *In re* Easton, 214 Md. 176, 187, 133 A.2d 441, 447 (1957) (reaffirming that "the phrase 'the Law of the Land' in Article [24] of the Declaration of Rights mean[s] the same as 'due process of law' in the Federal Constitution" and holding that "the words 'the Law of the Land' in Article 19 have a like meaning."); *see also* A. E. DICK HOWARD, THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA 299 (1968) ("What the Great Charter [i.e., Magna Carta] called 'law of the land' we would call 'due process of law'—with excellent historical sanction."). I also count *Attorney General v. Johnson*, a 1978 case upholding the constitutionality of a statutory scheme requiring medical malpractice claims to be arbitrated prior to suit, in this group of cases that treat Articles 19 and 24 interchangeably. 282 Md. 274, 298, 385 A.2d 57, 71 (1978), *rev'd on other grounds*, Newell v. Richards, 323 Md. 717, 594 A.2d, 1152 (1991). In *Johnson*, the Court held that "we simply cannot conclude that the additional expense and delay mandated by this malpractice claims statute is so unreasonable in relation to its legitimate goal that it contravenes *due process*." *Id*. at 299, 385 A.2d at 71 (emphasis added). Elsewhere, I have written about the historical relationship between Articles 19 and 24 of the Declaration of Rights, both of which were clearly derived from the same source: the Magna Carta of 1225. Though Maryland lawyers and judges have generally treated the two provisions as identical—both to each other, and to the Fourteenth Amendment to the U.S. Constitution's guarantee of due process—to read these "two provisions as redundant . . . violates the canon of constitutional interpretation that requires that each word of a constitution be given meaning." Friedman, *Tracing the Lineage*, *supra* note 9, at 1001 n.330. Today, however, it is clear that the courts use these two provisions for different purposes. *Compare* FRIEDMAN, THE MD. STATE CONSTITUTION, *supra* note 11, at 45–48, *with id.* at 56–61. *See also* JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES 6-5 (4th ed. 2006 & Supp. 2015) (stating "[a]lthough due course and due process clauses are often misread as equivalents . . . they are not the same").

39. Under Fourteenth Amendment due process jurisprudence, "rational basis" review, with considerable deference to the judgment of the legislature, is required when a statute does not affect a suspect class and does not interfere with the exercise of a fundamental right. City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) ("Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions . . . our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest.").

40. Murphy v. Edmonds, 325 Md. 342, 601 A.2d 102 (1992); Hill v. Fitzgerald, 304 Md. 689, 501 A.2d 27 (1985); Whiting-Turner Contracting Co. v. Coupard, 304 Md. 340, 499 A.2d 178 (1985).

41. *Hill*, 304 Md. at 703–04, 501 A.2d at 34–35 (discussing Article 19 as a constitutional provision protecting the right of access to the courts under which a tort claim can be brought); *Coupard*, 304 Md. at 360, 499 A.2d at 189 (recognizing that a litigant can assert a claim for relief under Article 19 if the right of access to the courts has been denied); *Murphy*, 325 Md. at 365, 601 A.2d at 113 (noting that tort plaintiffs can bring claims under Article 19 specifically and that if a restriction implicates Article 19, it might be "subject to heightened scrutiny for purposes of equal protection analysis under Article 24."); *see also* FRIEDMAN, THE MD. STATE CONSTITUTION, *supra* note 12, at 45–48.

"reasonableness."[42] In 1992, for example, the Court of Appeals decided *Murphy v. Edmonds*, in which it adopted the classic formulation of the test that it would apply in Article 19 cases: "Article 19 does guarantee access to the courts, but that access is subject to reasonable regulation. A statutory restriction upon access to the courts violates Article 19 *only* if the restriction is unreasonable."[43] The obvious hallmark of this *Murphy* formulation is its deference to the legislature and, in practice, during this period the Court did not invalidate a legislative enactment using Article 19.

Ten years later, however, the Court of Appeals began to modify the *Murphy* formulation by replacing the word "only" with an ellipsis.[44] In retrospect, the change—and its potential effect on the standard for reviewing

42. For example, in *Murphy*, the Court of Appeals upheld the constitutionality of the statutory cap on noneconomic tort damages as a reasonable restriction under Article 19 after applying a "rational basis" test. 325 Md. at 367 n.9, 601 A.2d at 114 n.9 (citing Franklin v. Mazda Motor Corp., 704 F. Supp. 1325, 1338 (D. Md. 1989) (holding that the statutory cap on noneconomic damages is constitutional and survived "rational basis" review under Article 19). In *Hill*, the Court used "rational basis" scrutiny under Article 19 to uphold a statute of limitations on medical malpractice claims, stating that "[l]aws [that] do not make distinctions based on suspect classifications or significantly interfere with a fundamental right are presumed constitutional and they will only be struck down if the party challenging them proves they have no rational basis." 304 Md. at 703, 501 A.2d at 34. Finally, in *Coupard*, the Court applied "rational basis" scrutiny under Article 19 to a statute of repose for claims for defects in improvements to land by examining "the reasonableness of the purpose of the statute and the reasonableness of the relationship of the restriction to that purpose." 304 Md. at 360, 499 A.2d at 189. Sometimes, the Court of Appeals described the same test as a "reasonableness" standard and asked whether the legislative modification was reasonable in relation to the goals of the legislature. Whether the Court called it "rational basis" review or simply a "reasonableness" test, the result was a standard that gave great deference to the judgment of the General Assembly.

43. 325 Md. at 365, 601 A.2d at 113 (emphasis added).

44. Dua v. Comcast Cable of Md., Inc., 370 Md. 604, 644, 805 A.2d 1061, 1084–85 (2002) ("A statutory restriction upon access to the courts [in such cases] violates Article 19 . . . if the restriction is unreasonable" (quoting *Murphy*, 325 Md. at 365, 601 A.2d at 113)). Written, notably, by the same author as *Dua* and *Jackson*, *Piselli v. 75th Street Medical*, 371 Md. 188, 215, 808 A.2d 508, 523–24 (2002), and *Lee v. Cline*, 384 Md. 245, 264, 863 A.2d 297, 309–10 (2004), followed *Dua*, and while purporting to follow the old rational basis test, modified the *Murphy* quote in the same way *Dua* had. *Rios v. Montgomery Cty.*, 386 Md. 104, 137, 872 A.2d 1, 20 (2005), was the counter-beat; it is the *only* Article 19 case during this period written by another author, and it skipped the modified quote from *Dua*, *Piselli*, and *Lee* and used the original formulation from *Murphy*. Of course, an alteration of a quotation, using ellipses and brackets, is not supposed to change the meaning of the quoted phrase, let alone modify a constitutional standard. *See* Larsen E. Whipsnade & J. Cheever Loophole, *Responsible Advocacy and Responsible Opinions at the Federal Circuit*, 35 IDEA 331, 333 (1995) (discussing "quote cropping"); Rachel Clark Hughey, *Effective Appellate Advocacy Before the Federal Circuit: A Former Law Clerk's Perspective*, 11 J. APP. PRAC. & PROCESS 401, 422–23 (2010) (discussing "cropping" quotes or misleading uses of ellipses as intellectually dishonest and as potentially endangering the credibility of the author); Daniel M. Friedman, J., U.S. Ct. of App. for the Fed. Cir., *Remarks, Ninth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit*, 140 F.R.D. 57, 87–88 (1991) (noting when quotes are cropped,"[t]hat's the worst thing, leaving out a few words that change the sense of it"); David Henige, *Mis/Adventures in Mis/Quoting*, 32 J. SCHOLARLY PUBLISHING 123, 125 (2001) (discussing that omitting key language from a quotation by ellipses can distort the meaning of the original quotation and that ellipses "should be high decibel alarms" to a reader given that they "immediately tell a reader that someone tailored a quote to fit his or her needs.").

challenges brought under Article 19—should have been obvious, but none of the cases adopting this modified language specifically concerned what degree of deference to apply to the legislature when analyzing Article 19 challenges.[45] *Jackson*, however, did turn on the appropriate degree of deference to the legislature, and yet the Court failed to announce—or even acknowledge—its transformation of the standard from the very deferential test created under *Murphy* to a standard that gives no deference to the legislature, whatsoever.[46] The result is that the *Jackson* decision adopts (or at least for the first time applies) a new standard for evaluating legislative modifications of common law tort remedies. Thus, rather than examining the reasonableness of the General Assembly's purpose in enacting the Reduction of Lead in Housing Act of 1994, and the reasonableness of the relationship between the alternative compensation system proposed by the Act and the purpose of the Act, the Court instead engaged in its own independent determination of whether a majority of its members thought the Act was "reasonable."[47] My objections are both procedural (the Court changed the test without announcement or acknowledgement) and substantive (the new test cannot predict future outcomes). We can do better.

II. THEORIES OF CONSTITUTIONAL INTERPRETATION

In the following pages, I will apply theories of textualism, originalism, structuralism, moral reasoning, comparative constitutionalism, and common law constitutional interpretation to Article 19 of the Maryland Declaration of Rights. These theories help to develop a better understanding of the provision and to develop a better test for courts to apply to determine the constitutionality of legislative modifications of common law tort remedies.

45. *Dua* addressed whether the retrospective application of a statute that impairs a vested right violates Article 19. 370 Md. at 644–45, 805 A.2d at 1084–85. *Piselli* concerned whether a statute of repose for medical malpractice actions, as applied to an injured minor's claim, constituted an unreasonable restriction upon the minor's access to the courts in violation of Article 19. 371 Md. at 207–08, 808 A.2d at 519–20. *Lee* analyzed whether immunity under the Maryland Tort Claims Act encompassed both constitutional and intentional torts. 384 Md. at 266, 863 A.2d at 309–10. None of these issues required the Court of Appeals to consider the degree of deference owed to the legislature.

46. *Jackson*, 422 Md. at 381–83, 30 A.3d at 868–69 (engaging in a purely judicial, and non-deferential, determination of whether the Court of Appeals thought that the General Assembly's alternative compensation system for lead paint claimants was reasonable and concluding that "the substituted remedy under the Reduction of Lead Risk in Housing Act for a permanently brain damaged child is totally inadequate and unreasonable"). As stated above, nothing in the text of the *Jackson* opinion explicitly proclaims the withdrawal of deference to the legislature, the abandonment of the "rational basis" standard, or the adoption of a new standard. But neither did the Court describe, evaluate, or even mention the legislature's purpose in adopting the Act—the exact thing to which deference would ordinarily be given and to which the relationship between it and the specific provisions of the Act would be reviewed under the "rational basis" standard.

47. *Jackson*, 422 Md. at 381–83, 30 A.3d at 868–89.

A. Textualism

Textualism requires the constitutional interpreter to look carefully at the precise words that make up the text.[48] Article 19 of the Maryland Declaration of Rights, while facially a forthright statement, is enigmatic in the details:

> That every man, for any injury done to him in his person or property, ought to have remedy by the course of the Law of the Land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the Law of the Land.[49]

Article 19 can be seen as comprised of two rights, so that every injured person ("That every man, for any injury done to him in his person or property") has a right to: (1) a remedy ("ought to have remedy by the course of the Law of the Land"); and (2) open courts ("ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the Law of the Land."). With that in mind, however, we proceed to breaking down the provision to its fundamental blocks.

1. "That every man . . ."

Article 19 begins by defining to whom the right belongs, namely to "every man." In the Magna Carta and in the Maryland Declaration of Rights as adopted in 1776 and 1851, the right was limited to every "freeman" or "free man."[50] In 1864, as befitted a constitutional convention convened for the principle purpose of abolishing slavery,[51] the right was extended to "every man." Today, I am confident that, in light of the adoption of Article 46 of the Maryland Declaration of Rights, this phrase is interpreted as if it read "every person."[52] No case has yet analyzed whether nonhuman entities, including corporations, have rights protected by Article 19, but given the text, I doubt it.[53]

2. "for any injury done to him in his person or property . . ."

The Maryland provision seems to apply only to tangible, physical injuries to person and property. Some sister states with similar, but not identical, provisions also protect intangible injuries. For example, the text of Article I,

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48. Friedman, *Applying Federal Constitutional Theory*, *supra* note 4, at 427–28 & nn.83–87.

49. MD. CONST. DECL. OF RTS. art. 19.

50. Friedman, *Maryland Declaration of Rights*, *supra* note 9, at 658.

51. FRIEDMAN, THE MD. STATE CONSTITUTION, *supra* note 11, at 11–13; Friedman, *Maryland Declaration of Rights*, *supra* note 9, at 641–42.

52. MD. CONST. DECL. OF RTS. art. 46 (ratified Nov. 7, 1972).

53. *See* Jonathan A. Marcantel, *The Corporation as a "Real" Constitutional Person*, 11 U.C. DAVIS BUS. L.J. 211, 240–41, 241 n.115 (2011). *But see* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 319 (2010) (holding that nonprofit corporations have free speech rights).

section 10 of the Oregon Constitution makes clear that a protected injury, in addition to an injury to person and property, also includes an injury to reputation.[54]

Originally, the Maryland provision read "for *every* injury," but that was changed in 1864 to "for *any* injury." The change was proposed by the Constitutional Convention's Committee on the Declaration of Rights (whose proceedings were not recorded), adopted without comment by the convention body, and the revised constitution was adopted by the people without public comment as to the intended meaning of this change.[55] Of course, neither phraseology can be literally correct as some injuries are so trivial as not to merit remedies. After all, as they say in Latin, *de minimis non curat lex* (the law doesn't bother with trifles).

As will be discussed below, in some states with analogous remedy provisions, court decisions have said that the legislature may define what constitutes an injury. In the states that use it, this construction causes the constitutional guarantee to disappear into itself: by changing what constitutes an injury, the legislature can eliminate the necessity for the judiciary to provide a remedy.[56]

For me, the word "injury" provides an important reminder of our interpretive obligation. As will be clear below, I think that an analysis based on the separation of powers is very helpful in understanding these provisions.[57] But, we shouldn't overstate the competition between the legislature and the judiciary and forget that this provision is principally about tort victims, people who are harmed, sometimes grievously, in their lives, their bodies, their property, or by the acts of others. And they are people to whom we have a constitutional obligation to ensure that they be permitted a recovery for those injuries.

3. "ought . . ."

The Court of Appeals has recently instructed:

> The word 'ought' appears in twenty-eight of the forty-seven articles of the current M[aryland] D[eclaration of] R[ights], almost all of which originated in the 1776 M[aryland] D[eclaration of] R[ights]. Examination of those provisions reveals a full spectrum

54. OR. CONST. art. I, § 10; *see also* Horton v. Or. Health & Sci. Univ., 376 P.3d 998, 1005, 1028 (Or. 2016).

55. Friedman, *Maryland Declaration of Rights*, *supra* note 9, at 694 n.310.

56. FRIESEN, *supra* note 38, at 6–7.

57. *See infra* notes 100–110 and accompanying text.

> of meanings depending on context, ranging in character from a mere statement of policy to an imperative command.[58]

Although the Court evaluated the use of "ought" in many contexts, it did not comment on its use in Article 19. I suspect that a court would interpret "ought" in both places that it appears in Article 19 to be nearly mandatory, while allowing flexibility for *de minimis* injury, incomplete remedies, and the like.

4. "to have remedy . . . "

For our purposes, the key question is what is meant by the word "remedy," and to what extent that meaning is fixed or may change over time. Nothing in the word itself gives us a hint.

5. "to have justice and right, freely without sale, fully without any denial, and speedily without delay . . ."

The language of Article 19 that promises "justice and right, freely without sale, fully without any denial, and speedily without delay" is derived directly from Coke's Institutes.[59] Although there is nothing in the text that compels the result, courts uniformly interpret this to be a procedural guarantee without independent content.[60] Moreover, this language is usually read as if Coke's high-flying rhetoric is not there, but as a rather concrete guarantee that courts will be open.[61]

6. "by the course of the Law of the Land" or " according to the Law of the Land"

It is standard for Maryland courts to note that the phrase "Law of the Land," as used both here and in Article 24, means "due process of law."[62] While this definition is occasionally helpful,[63] here it obscures, as the critical question isn't what it is, but who says what it is. If the meaning of the phrase "Law of the Land" is restricted to judge-made common law, then Article 19 might mean that an injured person is entitled to a common law tort remedy

58. Miles v. State, 435 Md. 540, 555, 80 A.3d 242, 251 (2013). For a pre-*Miles* interpretation of the use of the word "ought" in the Maryland Declaration of Rights, see Friedman, *Tracing the Lineage*, *supra* note 9, at 967 n.162.

59. EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 55–56 (4th ed. 1671).

60. Pinnick v. Cleary, 271 N.E.2d 592, 600 (Mass. 1971); FRIESEN, *supra* note 38, at 6.

61. David Schuman, *Oregon's Remedy Guarantee: Article I, Section 10 of the Oregon Constitution*, 65 OR. L. REV. 35, 38 (1986) (suggesting that this is a statement of abstract principle—courts should be "non-secret" and "accessible to scrutiny").

62. *See, e.g.*, *In re Easton*, 214 Md. 176, 187, 133 A.2d 441, 447 (1957).

63. *But see* FRIESEN, *supra* note 38, at 6-5 (stating that "[a]lthough due course and due process clauses are often misread as equivalents . . . they are not the same").

and the legislature is not allowed to modify that remedy. Alternatively, if the phrase "Law of the Land" includes both judge-made common law and legislative enactments, then at least the text would admit the possibility that the legislature could freely substitute a new remedy for the traditional common law remedy. Similarly, in the second clause—the open courts clause—"Law of the Land" could mean that courts may be closed only as permitted by the common law or also as modified by the legislature.

Finally, while it is conceptually possible, I cannot imagine a hairsbreadth of difference between "by the course of" and "according to."

7. Placing Emphasis

Two commentators have emphasized different parts of the analogous provision in the Oregon Constitution to come to two diametrically opposed, text-based interpretations.[64] David Schuman focuses his analysis on the language that guarantees a "remedy" for every "injury."[65] As a result, Schuman calls the Oregon provision a "remedy guarantee" and proposes an interpretation that would allow the legislature to determine what constitutes an injury, but once the legislature determines what constitutes an injury, the provision guarantees that a remedy will be provided.[66] By contrast, Jonathan M. Hoffman calls these "open courts" provisions, and focuses his analysis on the next phrase "by due course of [l]aw" (as it appears in Oregon's version) or, by analogy, "by the course of the Law of the Land" (as it appears in Maryland's Article 19).[67] By shifting the focus from one piece of text to another, Hoffman argues for a totally different interpretation—one that rejects any limits on statutory replacement of common law remedies, so long as there is a procedurally regular process.[68] Thus, two commentators reading the same text come to opposite conclusions: Schuman reads the text to cut the legislature out of the process and give the judiciary nearly complete control over remedies; Hoffman reads the same text to give the legislature nearly complete control, with the judiciary only capable of intervening in a wildly extreme situation in which plaintiffs are deprived of procedural regularity.

64. The Oregon provision is a direct lineal descendent of Maryland's provision. Friedman, *Tracing the Lineage*, *supra* note 9, at 1002–03 n.338.

65. Schuman, *supra* note 61, at 42–43, 67–69; Schuman, *The Right to a Remedy*, *supra* note 3, at 1220, 1223–25; *see also* Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125, 135–36 (1970).

66. Schuman, *The Right to a Remedy*, *supra* note 3, at 1220.

67. Jonathan M. Hoffman, *By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions*, 74 OR. L. REV. 1279, 1296, 1314 (1995) [hereinafter Hoffman, *By the Course of the Law*]; *see also* Jonathan M. Hoffman, *Questions Before Answers: The Ongoing Search to Understand the Origins of the Open Courts Clause*, 32 RUTGERS L.J. 1005 (2001) [hereinafter, Hoffman, *Questions Before Answers*].

68. Hoffman, *By the Course of the Law*, *supra* note 67, at 1318.

Although a Maryland court could decide to follow Schuman's pro-judicial position or Hoffman's pro-legislative interpretation, there is nothing in the text to point to one over the other. [69]

8. Intratextualism

Intratextualism is a form of textualism, added to the constitutional interpreter's bag of tricks by Akhil Reed Amar of Yale Law School.[70] Professor Amar suggests using recurrences of language within a constitution to inform meaning.[71] Unfortunately, however, there is nothing in the other two uses of the phrase "Law of the Land" in the Maryland Declaration of Rights—once again in Article 19 and again in Article 24—to improve our understanding.[72]

More promising is a look at Article 3 of the Maryland Declaration of Rights of 1776 (currently codified at Article 5). That provision explicitly guarantees Marylanders' rights to English law:

> That the inhabitants of Maryland are entitled to the common law of England . . . according to the course of that law, and to the benefit of such of the English statutes, as existed at the time of their first emigration, and which, by experience, have been found applicable to their local and other circumstances, and of such others as have been since made in England or Great Britain, and have been introduced, used, and practi[c]ed by the courts of law, or equity; and also to all acts of assembly in force on the first of June seventeen hundred and seventy-four, except such as may have since expired, or have been, or may be altered by acts of convention, or this

69. Interestingly, the *Jackson* opinion quotes *Piselli* (authored by the same judge), which, in turn, cites to both Schuman and Hoffman but does not acknowledge or resolve the two authors' antithetical interpretation of the text. *See* Jackson v. Dackman Co., 422 Md. 357, 376–77, 30 A.3d 854, 865 (2011).

70. Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999). Another aspect of intratextualism, perhaps at its intersection with structuralism, counsels the interpreter to read provisions holistically rather than the atomistic manner in which we generally treat constitutional provisions. *See generally* BURT NEUBORNE, MADISON'S MUSIC: ON READING THE FIRST AMENDMENT (2015). If there is a way to read a deeper meaning into Article 19 or the Maryland Declaration of Rights as a whole rather than in its constituent parts, I haven't found it.

71. Amar, *Intratextualism*, *supra* note 70, at 748 (explaining that intratextualism "gives interpreters yet another set of clues as they search for constitutional meaning and gives rise to yet another rich technique of constitutional interpretation").

72. With respect to the use of the phrase "Law of the Land" as it appears in Article 24, the Court of Appeals has said that it means "due process of law, according to the course and usage of the common law." Wright v. Wright's Lessee, 2 Md. 429, 452 (1852); *see also* Grove v. Todd, 41 Md. 633 (1875); Regents of the Univ. of Md. v. Williams, 9 G. & J. 365 (1838). For a discussion of the relationship between and possible redundancy amongst Articles 19 and 24, see Friedman, *Tracing the Lineage*, *supra* note 9, at 1001 n.330. *See also supra* note 52.

> Declaration of Rights— subject nevertheless to the revision of, and amendment or repeal by, the Legislature of this State.[73]

Thus, Maryland's constitutional framers explicitly declared the existence of a right to retain both English common law and both English and Maryland statutory law. Of course, this does not answer the question entirely either. On the one hand, Article 3 demonstrates that the constitutional drafters knew the difference between common law and statutory law and knew how to describe that difference in the text of the constitution. On the other hand, just because the framers knew how to split out the common law from the statutory law in Article 3 does not imply that they felt the need to do so in Article 19 when describing the "Law of the Land." Moreover, they might simply have preferred to retain the ancient phraseology.

At the end of the day, while textualism may give us insight into the meaning of the provision, it does not give us a definitive interpretation of the term "Law of the Land" or resolve to what extent the legislature may modify common law remedies.

B. Originalism

Originalism is concerned with the original public meaning of the words of the provision at the time that they were adopted.[74] Here, the challenges facing a state constitutional interpreter are significantly more complex than those facing an interpreter of the federal Constitution. An interpreter of the federal Constitution generally has to master the historical record surrounding the adoption of the Constitution in 1789 and the adoption of the Fourteenth Amendment in 1867 (and, to a lesser extent, the historical record surrounding the adoption of other amendments that may be relevant to a contested case). Looking at Article 19 of the Maryland Declaration of Rights requires one to try to understand the original public meaning at many historical moments, including (1) the original adoption of the Magna Carta by King John in 1215; (2) the reaffirmation of the Magna Carta by King Henry III in 1225; (3) the interpretation of the provision by Sir Edward Coke in his Second Institute; (4) the adoption of the provision in the Maryland Constitution of 1776; and

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73. MD. CONST. DECL. OF RTS. art. 3 (1776) (reprinted in Friedman, *Maryland Declaration of Rights*, *supra* note 9, at 650). The successor to this provision may be found at Article 5 of the current Maryland Declaration of Rights. For a general discussion of the long struggle by Maryland colonists to import English statutes, see HOWARD, *supra* note 38, at 53–65.

74. Friedman, *Applying Federal Constitutional Theory*, *supra* note 4, at 433 n.122 (describing originalism); *see also*, Jeremy M. Christiansen, *Originalism: The Primary Canon of State Constitutional Interpretation*, 15 GEO. J.L. & PUB. POL'Y 341 (2017). Mr. Christiansen has done exemplary work in uncovering the extent to which originalism is the principle interpretive tool in state constitutional law. I don't think his research goes so far, however, as to suggest that it is the only legitimate method. *See* Friedman, *Applying Federal Constitutional Theory*, *supra* note 4, at 415–16, 433–36 (discussing foundationalist and nonfoundationalist strands in originalist interpretation).

potentially, (5) its re-adoption in the Maryland constitutions of 1851, 1864, and 1867.

Originalism purports to confine its adherents to the original public meaning associated with a constitutional provision.[75] In other writings, I have championed the critical importance of historical research to the modern interpretation of state constitutions but have rejected the foundationalist aspects of originalism, by which the original popular understanding of a constitutional provision is supposed to determine conclusively the outcome of a current controversy.[76] Here, modern interpreters come to diametrically opposed views of the meaning of Article 19 because of their different understandings of a seemingly unknowable aspect of the provision's history.[77]

The history of Article 19 begins in feudal England. King John's court system was corrupt and administered justice for a fee. Those seeking justice in the courts had to purchase writs; the more you paid for your writ, the faster and more successful your case would be.[78] This and other grievances led a group of barons to rebel and, ultimately, forced King John to accept the Magna Carta, a series of limitations on his monarchal powers. Amongst these was a prohibition, subsequently numbered as Chapter 40, prohibiting the selling of writs: "To no one will we sell, to no one will we refuse or delay, right or justice."[79] Another related provision, subsequently numbered as Chapter 39, guaranteed the due process of laws: "No freemen shall be taken or . . . imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or . . . by the law of the land."[80]

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75. Friedman, *Applying Federal Constitutional Theory*, *supra* note 4, at 433–36.

76. *Id.* at 415–16, 433–36.

77. Jonathan Hoffman and Judge William C. Koch, Jr. provide contrasting viewpoints. Hoffman reads the history and concludes that these "open courts" provisions were intended to prevent executive interference, not to prevent the legislature from modifying or abolishing common law tort remedies. Hoffman, *By the Course of the Law*, *supra* note 67, at 1316. Judge Koch reads the same history and concludes that these "open courts" provisions were intended to prevent executive *and* legislative interference with common law tort remedies. William C. Koch, Jr., *Reopening Tennessee's Open Courts Clause: A Historical Reconsideration of Article I, Section 17 of the Tennessee Constitution*, 27 U. MEM. L. REV. 333, 408–10, 449–51 (1997).

78. WILLIAM SHARP MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 395–98 (2d ed. 1914); A.E. DICK HOWARD, MAGNA CARTA: TEXT AND COMMENTARY 15–16 (1964); H. D. Hazeltine, *The Influence of Magna Carta on American Constitutional Development*, 17 COLUM. L. REV. 1 (1917). The extensive history of the influence of the Magna Carta and Sir Edward Coke's Second Institute on state constitutional provisions such as Article 19 has also been recounted more recently. Koch, *supra* note 77, at 348–68.

79. The original text was in Latin; this is a standard English translation. MCKECHNIE, *supra* note 78, at 395 (Chapter 40 of the Magna Carta of 1215); HOWARD, *supra* note 78, at 15; Koch, *supra* note 77, at 350 n.96.

80. Again, the original text was in Latin; this is a standard English translation. MCKECHNIE, *supra* note 78, at 375 (Chapter 39 of the Magna Carta of 1215); HOWARD, *supra* note 78, at 14; Koch, *supra* note 77, at 350 n.95.

In 1225, King Henry III reorganized and reaffirmed the Magna Carta. In so doing, the former Chapters 39 and 40 were combined in a new Chapter 25:

> No freeman shall be taken or imprisoned, or be disseised of any freehold, or liberties, or free customs, or be outlawed or banished, or any other way destroyed, nor will we go upon him, nor send upon him, except by the legal judgment of his peers, or by the law of the land. To no one will we sell, to no one will we deny, or delay right or justice.[81]

Three hundred and fifty years later, Sir Edward Coke translated and republished this provision of the Magna Carta in his Institutes, a four-volume commentary on the laws of England. Coke's translation is suspect—it has been criticized as "more enthusiastic than accurate"—and was certainly intended to be used in his campaign for judicial independence and for the primacy of the common law.[82] As Coke had it:

> [E]very subject of this Realm, for injury done to him . . . may take his remedy by the course of the Law, and have justice, and right for the injury done him, freely without sale, fully without any denial, and speedily without delay.[83]

According to one commentator, the language of the provision "articulate[s] the very abuses against which Coke railed: the sale of common-law justice through corruption and the denial and delay of justice through external interference with the courts by the King and his ministers."[84] To translate into our modern terms—terms that describe concepts that did not even exist for many years—Coke was concerned about the separation of powers between the executive and judicial branches of government.[85] Critically, Coke was not expressing concern about the separation of powers between legislative and judicial powers, as that was not the controversy with which he was preoccupied. It is also worth noting that Coke did not explain the nature of the right to a remedy that the Magna Carta was supposed to protect.

Coke's Institutes were very popular with American colonists.[86] It was natural that when the colonists sought to draft their own constitutions, declarations, and bills of rights they would turn to Coke's Institutes for inspiration

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81. MAGNA CARTA, ch. XXIX (1225).

82. Hoffman, *By the Course of the Law*, *supra* note 67, at 1286, 1291–93.

83. COKE, *supra* note 59, at 55–56; FAITH THOMPSON, MAGNA CARTA: ITS ROLE IN THE MAKING OF THE ENGLISH CONSTITUTION, 1300–1629, at 365 (1948).

84. Hoffman, *By the Course of the Law*, *supra* note 67, at 1294.

85. *Id.* at 1288.

86. Schuman, *supra* note 61, at 39 (regarding Coke's Institutes' influence); *see* Daniel J. Hulsebosch, *The Ancient Constitution and the Expanding Empire: Sir Edward Coke's British Jurisprudence*, 21 LAW & HIST. REV. 439, 480 nn.194–98 & accompanying text (2003) (regarding Coke's influence on America); Charles F. Mullett, *Coke and the American Revolution*, 12 ECONOMICA 457 (1932) (same); *see also* BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE

and guidance. The Maryland constitutional framers, drafting our Declaration of Rights in 1776, copied Coke's translation of the Magna Carta nearly word for word:

> That every freeman, for every injury done to him in his goods, lands, or person, ought to have remedy by the course of the Law of the Land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the Law of the Land.[87]

This was the first adaptation of this provision into a state constitution,[88] but variations on it were subsequently adopted in many of the other states.[89] The Maryland provision has seen a few textual adjustments over the last 240 years since American Independence, but in general, the provision remains remarkably similar to Coke's.[90]

At some point, however, the understanding of the provision—and provisions like it in other states—subtly changed. These provisions are no longer used to protect judicial independence from executive overreach. The problem that this provision was originally intended to correct—the King's selling of judicial writs—has (over the last 800 years) ceased to be a problem. Rather, these provisions are now understood in some degree to protect the common law from statutory changes.[91] The difficult question for the originalist is when did this transformation occur? Did it occur before or after Maryland included this provision in its Declaration of Rights of 1776? Did it occur before any of the subsequent re-adoptions of the provision in the Maryland Declaration of Rights in 1850, 1864, or 1867?[92] Unfortunately for the originalist, we do not know.

AMERICAN REVOLUTION 31 (1967); MCKECHNIE, *supra* note 78, at 120–21; JAMES R. STONER, JR., COMMON LAW AND LIBERAL THEORY: COKE, HOBBES, AND THE ORIGINS OF AMERICAN CONSTITUTIONALISM 21 (1992);

87. MD. CONST. DECL. OF RTS. art. 19 (1776) (reprinted in Friedman, *Maryland Declaration of Rights*, *supra* note 9, at 658); *see also* Friedman, *Tracing the Lineage*, *supra* note 9, at 1002 n.336.

88. Friedman, *Tracing the Lineage*, *supra* note 9, at 1002–03 & n.338; *see also* Friedman, *Maryland Declaration of Rights*, *supra* note 9, at 681 n.99.

89. *See* FRIESEN, *supra* note 38, at 6-3–6-4 nn.10–11 (reporting that thirty-seven of fifty state constitutions contain an analogous provision); Schuman, *The Right to a Remedy*, *supra* note 3, at 1201 n.25 (reporting that thirty-nine of fifty state constitutions contain an analogous provision). Judge Koch says that the right number is thirty-eight, and the variation in the estimates is caused by the way in which commentators count New Mexico. Koch, *supra* note 77, at 341 n.27 and accompanying text.

90. Subsequent changes in the text of the provision are reprinted in Friedman, *Maryland Declaration of Rights*, *supra* note 9, at 658.

91. It is also not plain whether there is any "public meaning," original or otherwise, regarding this provision.

92. It is important to understand that after each of Maryland's constitutional conventions, the old document was completely repealed and a whole new document was adopted, even if specific provisions were exactly the same. It is not plain what value an originalist would place on the subsequent re-adoptions of this constitutional provision. Imagine, for example, that we knew that at

It is important to rehearse—if briefly—the underlying originalist theory. According to the originalists, judicial review, the process by which unelected judges can reject the product of democratically-elected legislatures, is aberrational in our system, and can only be justified when judges limit their use of judicial review to those situations in which the legislation violates the original public understanding of the constitutional provision because, in effect, the adoption of the constitutional provision was the superior democratic moment.[93]

The difficulty is in ascertaining what the relevant people knew, and when. In 1215, when King John accepted the Magna Carta, the King and the barons readily understood Article 40. It meant that King John would not sell writs anymore. The provision did not have a broader meaning. Moreover, in that agrarian, often illiterate, feudal society it is not clear what the "original public meaning" of the Magna Carta was, or why, as a theoretical matter, it should matter. Even acceptance of the Magna Carta—the first great limitation on a King's powers—can't be described as a "superior democratic moment."

In describing the Magna Carta in his Institutes, Coke seemingly broadened the application of the provision from its narrowest reading—no selling of writs—to a broader reading—no royal interference with courts. What we cannot know is at what level of generality Coke understood this move, at what level of generality the public understood it, and at what level of generality the Maryland framers, working 125 years later, understood it. Was Coke's move only viewed as a broadening of the notion of judicial independence from executive interference, or could it have been viewed as a more generalized notion of judicial independence from interference by any other branch of government? This seemingly minor point—unknowable across the intervening centuries—is the entire game for the originalist. If Coke, his

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the time of the adoption of the precursor to Article 19 in 1776, the public meaning associated with the provision was that it intended only to prohibit the King from selling writs or otherwise interfering with judicial independence. Imagine further, however, that by 1850 (or 1864 or 1867), the public meaning had clearly shifted to encompass protection for common law from legislative encroachment. Would the simple re-adoption of the same language without discussion of the new meaning be sufficient to allow an originalist to adopt the new meaning? What quantum of textual change or discussion of new meaning would be sufficient? Further, should "Maryland judges . . . contemplate the consequences of originalist doctrines when the document they are interpreting was drafted by 118 white men who all belonged to a single political party; when the original text of the document included painfully racist provisions and . . . when a substantial percentage of the framers were ardently racist by today's standards and somewhat racist by the standards of their own time"? JOHN J. CONNOLLY, REPUBLICAN PRESS AT A DEMOCRATIC CONVENTION: REPORTS OF THE 1867 MARYLAND CONSTITUTIONAL CONVENTION BY THE BALTIMORE AMERICAN AND COMMERCIAL ADVERTISER xxiv (2018) (ebook). An analogous issue arises when a state adopts a remedy provision from another state's constitution without significant discussion or debate. Schuman, *The Right to a Remedy*, *supra* note 3, at 1201 (discussing Oregon's adoption of remedy provision from Indiana's constitution).

93. Friedman, *Applying Federal Constitutional Theory*, *supra* note 4, at 434.

contemporaries, and the Maryland framers saw his restatement of the Magna Carta as a move for judicial independence from executive control, then today, for the originalist, the provision's reach must also be limited.[94] If, on the other hand, Coke, his contemporaries, and the Maryland framers saw in his restatement of the Magna Carta a more generalized statement of judicial independence and common law supremacy, then a modern interpretation would have to include a notion of the protection of judicial independence from legislative control as well.[95] The problem is originalism's unrealistic expectation that a modern researcher will find sufficiently definitive evidence to be dispositive of modern cases.[96]

C. Structural Reasoning

Structuralism suggests that, in addition to the text of a constitutional provision, we should also reason from the structure and relation created by the text.[97] Thus, although the terms federalism, majoritarianism, and separation of powers 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.[98] The application of the structuralist methodology to state constitutions is often difficult[99] but will provide a useful lens here.

94. *See, e.g.*, Meech v. Hillhaven West, Inc., 776 P.2d 488 (Mont. 1989); Schuman, *The Right to a Remedy*, *supra* note 3, at 1200 ("Looking to the history of the remedy guarantee to determine what 'evils' it was intended to 'cure' thus leads to diametrically opposite interpretations, depending on which 'history' is relevant.").

95. The contemporaneous evidence is scant. There are no known records from the deliberative process of the Maryland Constitutional Convention of 1776. Friedman, *Maryland Declaration of Rights*, *supra* note 9, at 640, 679 n.40. The Maryland Constitution and Declaration of Rights of 1776 did contain two other provisions declaring judicial independence. MD. CONST. DECL. OF RTS. art. 30 (1776); MD. CONST. art. 40 (1776).

96. For example, the differing reports on the constitutional convention of 1867 by different sides of the partisan press frustrate this goal. *See* CONNOLLY, *supra* note 92, at xxiv ("[R]eports of Convention debates may reveal . . . intent, but like many issues of statutory interpretation a Maryland case can be found to support competing viewpoints."). Jonathan M. Hoffman is more optimistic, arguing that with more historical research we might come to a definitive understanding of these types of provisions. Hoffman, *Questions Before Answers*, *supra* note 67, at 1043. I am less confident.

97. CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 22 (1969); *see also* Friedman, *Applying Federal Constitutional Theory*, *supra* note 4, at 458–59 (applying structuralism to state constitutional interpretation).

98. MICHAEL J. GERHARDT ET AL., CONSTITUTIONAL THEORY: ARGUMENTS AND PERSPECTIVES 321 (3d ed. 2007).

99. Friedman, *Applying Federal Constitutional Theory*, *supra* note 4, at 458–59 (first citing G. Alan Tarr, *Understanding State Constitutions*, 65 TEMP. L. REV. 1169, 1194 (1992); and then citing G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 191–94 (1998)).

1. Separation of Powers[100]

Questions about legislative modification of common law tort remedies arise precisely at the intersection between judicial and legislative authority.[101] The basic structure is in three steps: (1) over time the judiciary develops a common law tort remedy rule; (2) the legislature passes a law modifying that rule; (3) the judiciary evaluates the constitutionality of the modification. That arrangement doesn't offend anyone's notion of the separation of powers despite that there are two branches determining the substantive content of Maryland tort law.[102]

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100. Another form of structuralist analysis might attempt to discern something from the changes in the respective powers of the branches of government in relation to each other. Regretfully, however, I don't think this form of analysis helps us understand Article 19 any better. The Maryland Constitution and Declaration of Rights of 1776—like many other constitutions of the period—favored the legislative branch over the executive. FRIEDMAN, THE MD. STATE CONSTITUTION, *supra* note 11, at 6 (describing the Maryland Constitution); Robert F. Williams, *The State Constitutions of the Founding Decade: Pennsylvania's Radical 1776 Constitution and Its Influences on American Constitutionalism*, 62 TEMP. L. REV. 541, 546–47 (1989) (describing allocation of powers in "first wave" state constitutions). Over time, that relationship has flipped, and Maryland's Governor today is one of the most powerful state executives in the country. FRIEDMAN, THE MD. STATE CONSTITUTION, *supra* note 11, at 95. I have not detected a similar shift in the relationship between the judiciary and the other branches of government; rather, the Maryland Constitution and Declaration of Rights since the beginning and continuing today have continuously stressed the importance of a strong and independent judiciary. FRIEDMAN, THE MD. STATE CONSTITUTION, *supra* note 11, at 67–68; Friedman, *Tracing the Lineage*, *supra* note 9, at 984–86. Thus, I don't think we can make an argument that Article 19 reflects a trend in the relative power of the judiciary *vis-à-vis* other branches of government. *But see* Ned Miltenberg, *The Revolutionary 'Right to a Remedy'*, TRIAL, March 1998. Interestingly, Miltenberg's time sequence, which describes legislative supremacy in Revolutionary-era constitutions as having been curtailed by remedy provisions in later state constitutions, beginning with Massachusetts' 1780 constitution, doesn't have explanatory power in Maryland, where the remedy provision was included in our Revolutionary-era Declaration of Rights.

101. *See generally* Coleman v. Soccer Ass'n of Columbia, 432 Md. 679, 69 A.3d 1149 (2013) (discussing the power of courts and legislature respectively to replace contributory negligence with comparative negligence). Ironically, however, *Coleman* (written by the same author as *Jackson*), pushes the development of tort law away from the judiciary and toward the legislature—precisely the opposite direction as *Jackson*. Donald G. Gifford, *The Death of the Common Law: Judicial Abdication and Contributory Negligence in Maryland*, 73 MD. L. REV. ENDNOTES 1, 19 (2013) (stating that *Coleman* signals a "radical redefinition constraining the lawful authority of Maryland's highest common law court"); *see also* Donald G. Gifford & Christopher J. Robinette, *Apportioning Liability in Maryland Tort Cases: Time to End Contributory Negligence and Joint and Several Liability*, 73 MD. L. REV. 701 (2014).

102. My understanding of the separation of powers described here is functionalist, not formalist. *See, e.g.*, Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1522–30 (1991) (describing formalism and functionalism in federal separation of powers analysis and proposing a new analytic method based on maximizing ordered liberty). Although the existence of a textual separation of powers provision, MD. CONST. DECL. OF RTS. art. 8, might have led to formalist interpretations, the Maryland Court of Appeals' separation of powers decisions have, in my view, demonstrated a functionalist bent. FRIEDMAN, THE MD. STATE CONSTITUTION, *supra* note 11, at 34–36 ("Despite the seemingly absolute separation of powers, Maryland courts have never interpreted Article 8 in an unqualified fashion, always preferring a more flexible interpretation. As the Court of Appeals of Maryland has said, 'the separation of powers concept may consti-

Structuralism counsels us to favor an interpretation that comports with the separation of powers.[103] For me, this means to prefer an interpretation that is respectful of both branches, does not allow one branch to overwhelm the other, and assigns to each branch duties that comport with its competence.[104]

I would, therefore, be skeptical of a standard of review that required the courts to automatically uncritically accept any tort remedy that the legislature decided to substitute for a common law remedy. By the same token, I am skeptical of the standard of review adopted by the Court of Appeals in *Jackson*, which allows the Court's subjective view that a substitute tort remedy is "unreasonable" to overrule the judgment of the legislative branch.

A brief review of the Reduction of Lead Risk in Housing Act of 1994, which the Court of Appeals declared unconstitutional in *Jackson v. Dackman Co.*, demonstrates the importance of a court investigating the legislative history to determine the reasonableness of a legislative modification of a common law tort remedy. The bill file reveals that the Act was a compromise between competing concerns, including on one side, concerns about the care and compensation of the individual victims of lead poisoning and prevention of future incidences of lead poisoning and, on the other side, concerns about high jury verdicts leading, in turn, to higher insurance premiums or an unavailability of insurance altogether. The legislature took seriously the landlord's claim that without significant relief, they would simply walk away

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tutionally encompass a sensible degree of elasticity.'" (quoting Department of Nat. Res. v. Linchester Sand & Gravel Corp., 274 Md. 211, 220, 334 A.2d 514, 521 (1975))); *see also* Schisler v. State, 394 Md. 519, 558, 907 A.2d 175, 197 (2006) (quoting FRIEDMAN, THE MD. STATE CONSTITUTION, *supra* note 11, at 34–35)).

103. For an analysis of remedy provisions in exclusively separation of powers terms, see Matthew W. Light, Note, *Who's the Boss?: Statutory Damage Caps, Courts, and State Constitutional Law*, 58 WASH. & LEE L. REV. 315 (2001). *See also* FRIESEN, *supra* note 38, at 6-9–6-11 (describing theoretical positions, gleaned from the various "tests" announced for examining state constitutional right to remedy provisions, in separation of powers terms).

104. For example, the general paradigm of disputes resolved in the judiciary are bilateral disputes, with testimony from fact witnesses and experts hired by parties, at the conclusion of which one party is declared the winner. The paradigm of legislative dispute-resolution is very different, frequently involving compromise solutions for multi-sided disputes. I think that sometimes the judiciary fails to appreciate the important differences between the ways it obtains information and the methods that the legislative branch employs. This helps explain the judiciary's denigrating the evidence on which the legislature relies as merely "anecdotal." *See, e.g.*, Muskin v. State Dep't of Assessments & Taxation, 422 Md. 544, 550, 551 & n.1, 559, 564, 30 A.3d 962, 965 & n.1, 970–71, 973 (2011); *see also* State v. Goldberg, 437 Md. 191, 197, 85 A.3d 231, 234–35 (2014). *But see* Jackson v. Dackman Co., 181 Md. App. 546, 574–75, 956 A.2d 861, 878 (2008) (citing Heller v. Doe, 509 U.S. 312, 320–21 (1993)) (recognizing legislative branch obtains information differently and frequently anecdotally). *See also* Donald G. Gifford, *The Death of Causation: Mass Products Torts' Incomplete Incorporation of Social Welfare Principles*, 41 WAKE FOREST L. REV. 943, 1001–02 (2006) (discussing legislative and judicial competencies to respond to mass products torts). For a remarkable example of inter-branch conflict regarding the allocation of responsibility for determining tort remedies, see *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062 (Ohio 1999).

from large segments of the rental market, especially rental stock available to low income residents, thus blighting urban parts of the State and increasing homelessness.[105]

The legislation adopted offered landlords a choice: clean up the lead paint in your rental units and, in exchange, your liability will be capped at $17,000; fail to make the rental units safer, and continue to risk costly verdicts in the tort system. In effect, the Maryland General Assembly, faced with limited resources in a failing system, allocated a relatively small amount to individual victims and relatively more to improving the rental housing stock to avoid future injuries. Like many compromises, nobody was exactly happy with the outcome.[106] Then-Dean Donald Gifford of the University of Maryland School of Law, who had chaired an eighteen-month study commissioned by the legislature, expressed his "strong personal opposition" to the bill that became the Act.[107] Dean Gifford identified two defects in the bill: first, that it did not require periodic re-inspections of the rental properties and, second, a timing concern that the immunity attaches before clean up, not vice versa.[108] Dean Gifford's strong critique, however, did not criticize the $17,000 cap as being insufficient,[109] from which I draw the implication that he felt the cap amount was either sufficient or the best that could be achieved under the circumstances. Moreover, it is hard to argue with the success of the Act on its own terms. Housing stock has improved, and the incidences and severity of childhood lead paint poisoning have been greatly reduced.[110]

105. LEAD PAINT POISONING COMM'N, REPORT OF THE LEAD PAINT POISONING COMMISSION (1994).

106. "The Act is unique in that its passage was supported by child advocates, government officials[,] and landlords. Government officials and child advocates would have preferred tougher standards and broader benefits. Landlords lobbied hard for greater tort immunity and lesser risk prevention measures in their properties." D. Robert Enten, *Lead Paint Law Will Dramatically Change Rental Property Business*, DAILY RECORD (Baltimore), June 8, 1994.

107. Letter from Donald G. Gifford, Chair, Lead Paint Poisoning Comm'n, to the Honorable Ronald A. Guns, Chair, House Comm. on Envtl. Matters (Mar. 14, 1994) (on file with author).

108. *Id.*

109. *Id.*

110. Maryland's Department of the Environment (MDE) has noted "a significant drop in both the extent and severity of lead exposure" in Maryland and attributes "[m]uch of the decline . . . to the implementation of [the Act]." MD. DEP'T OF THE ENV'T, LEAD POISONING PREVENTION PROGRAM, CHILDHOOD BLOOD LEAD SURVEILLANCE IN MARYLAND, ANNUAL REPORT 2015, at 8 (2015) ("The overall Statewide activities to reduce (eliminate) childhood lead poisoning resulted in a significant drop in both the extent and severity of lead exposure among children over the years. . . . Much of the decline can be attributed to the implementation of [the Act] and the increased emphasis on the testing of children living in identified "At Risk" areas in Maryland."); *see also* DONALD G. GIFFORD, SUING THE TOBACCO AND LEAD PIGMENT INDUSTRIES 115, n.61 (2010) ("the … Maryland statute appear[s] to have had a significant effect in reducing the incidence of children with E[levated] B[loos] L[evels]") (citing MDE 2004 Annual Report). MDE does not provide data to support this conclusion and I think that there are three important caveats. *First*, it is impossible to compare Maryland's reduction to that of other states. Maryland's "significant" reduction came in the context of a nationwide reduction, but because of limitations in the data, it is impossible to compare Maryland's rate of reduction with that of the country as a whole and between Maryland

My point is not to endorse the compromise that the legislature made in 1994. In hindsight, it might have been more skeptical of landlord threats to walk away from their source of income.[111] It might have been more generous with benefits to claimants. My point rather, is that the legislature is the branch of our government best equipped to study a problem from multiple perspectives (current claimants, future claimants, other tenants, landlords, insurance companies, etc.) and to broker a compromise amongst them.[112] (There are, of course, limits to the appropriate deference to the legislative branch).

As described above, the Court of Appeals' opinion in *Jackson v. Dackman Co*. declined to explore the legislative history of the Act it was declaring unconstitutional. It evaluated the merits of a compromise after looking only at what the claimants gave up without considering what the other parties contributed.[113]

2. Making Sense, Part 1

An additional tenet of structuralism is to find constitutional interpretations that make "sense."[114] An interpretation that recreates the worst errors of the past fails this test. Allowing judges to use Article 19 to substitute their judgment for the judgment of the democratically-elected branches of government repeats the error of the *Lochner*-era, in which the United States Supreme

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and other states. *See* CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. TOTALS BLOOD LEAD SURVEILLANCE, 1997–2015, https://www.cdc.gov/nceh/lead/data/Chart_Website_StateConfirmedByYear_1997_2015.pdf (last visited Apr. 30, 2018); CTRS. FOR DISEASE CONTROL & PREVENTION, LEARN MORE ABOUT CDC'S CHILDHOOD LEAD POISONING DATA, https://www.cdc.gov/nceh/lead/data/learnmore.htm (last visited Apr. 30, 2018). Thus, we cannot say definitively that Maryland had a sharper decrease than other states, which makes it impossible to compare Maryland to states with and without legislation similar to the Act. *Second*, even if we could establish that Maryland had a sharper rate of reduction than other states, it is not clear from the data to what factor that reduction should be attributed. It might be attributable to discrepancies in testing regimes, more effective advocacy groups, the Act, or other reasons. And, *third*, it is not necessarily clear what aspect of the Act led to the reduction or whether a different legislative compromise might have had a similar, or even better, result. With those caveats in mind, however, we have to take MDE—the agency assigned to lead poisoning surveillance in Maryland—at its word that at least part of the reduction in extent and severity of lead poisoning in the State of Maryland is attributable to the Act.

111. David J. Nye & Donald G. Gifford, *The Myth of the Liability Insurance Claims Explosion: An Empirical Rebuttal*, 41 VAND. L. REV. 909 (1988) (refuting claims of a tort claims explosion, including for lead paint exposure, in a slightly earlier time period).

112. *See* John Fabian Witt, *The Long History of State Constitutions and American Tort Law*, 36 RUTGERS L.J. 1159, 1162–63 (2005) (advising caution in the use of state constitutional litigation to counter legislative reforms and noting that "[u]nder the guise of judicial review, state courts have all too often used state constitutional provisions to interfere with experiments in public policy that over time have come to be widely respected").

113. *See supra* note 14 (noting that the Court looked only at the "immunity" provisions (what claimants gave up) rather than at the compensation (what claimants received in return)).

114. BLACK, *supra* note 97, at 22.

Court used the Justices' peculiar notions of substantive due process to substitute its economic theories for those adopted by state legislatures.[115] Today, *Lochner* is nearly universally condemned as a "wrong turn" in American constitutional law.[116] For most, the error of the *Lochner*-era was the Court's aggressive judicial activism,[117] and the lesson learned from that era was one of judicial restraint and deference to the decisions of democratically elected legislatures.[118] The U.S. Supreme Court abandoned the *Lochner* doctrine in 1937 and adopted a deferential, rational basis test.[119]

The Court of Appeals of Maryland (along with many sister state supreme courts) continued to apply a less deferential "real and substantial relation" standard to evaluate legislative enactments regulating economic activity for forty more years after *Lochner* was dead.[120] Only in 1977 did the Maryland Court of Appeals follow the United States Supreme Court back to a more deferential standard of review of economic legislation:

> We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws. . . . 'We are not concerned . . . with the wisdom, need, or appropriateness of the legislation.' Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to

115. *See* Friedman, *Applying Federal Constitutional Theory*, *supra* note 4, at 413–14 (discussing Lochner).

116. 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.

117. *See* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of* Lochner, 76 N.Y.U. L. REV. 1383, 1385 (2001) (noting that "scholars [have] painted *Lochner* as the primary example of judicial activism").

118. *See id.*

119. W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 397–98 (1937).

120. *See, e.g.*, Md. St. Bd. of Barber Exam'rs v. Kuhn, 270 Md. 496, 511, 312 A.2d 216, 225 (1973); Md. Bd. of Pharmacy v. Sav-a-Lot, Inc., 270 Md. 103, 120, 311 A.2d 242, 252 (1973); *see also* FRIEDMAN, THE MD. STATE CONSTITUTION, *supra* note 11, at 58 (discussing the "real and substantial relationship" test); MICHAEL CARLTON TOLLEY, STATE CONSTITUTIONALISM IN MARYLAND 121 (1992) (same); Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 389–90 (1980) (same).

> 'subject the State to an intolerable supervision hostile to the basic principles of our Government . . . .'[121]

The Court's opinion in 1977, rejecting the "real and substantial relation" test under Article 24, reflects the same separation of powers concerns that I also apply to Article 19. It would be odd indeed for the Maryland Court of Appeals now to adopt a standard of review under Article 19 that returns to the erroneous path of "intolerable supervision" that the federal courts abandoned in 1937 and the Maryland courts rejected in 1977.

Of course, this analysis may also be wrong. It may be that, because of the dictates of Article 19, a court's review of substitute tort remedies *ought* to be more searching and less deferential than its review of economic legislation. If so, that review still ought to be accomplished, it seems to me, in a way that is more respectful to the legislative judgment than was done in *Jackson*.

3. Making Sense, Part 2

Finally, I think structuralism's search for sensible interpretations compels skepticism about interpretations that suggest that the outcome might depend on which plaintiff arrives at the court first. Substituted tort remedies always involve winners and losers between plaintiffs and defendants, and also within the class of plaintiffs and within the class of defendants.

Let's take workers' compensation as an example. At the dawn of industrialization, tort law overwhelmingly favored employers. Injured workers would almost invariably see their claims against their employers defeated by common law tort rules including the fellow-servant rule, contributory negligence, and assumption of the risk. Workers' compensation systems were a legislative compromise that took these workplace injuries outside of the tort system and created a no-fault system. For most injured workers, the result of the workers' compensation compromise was that they could recover in circumstances that would have barred recovery at common law. For a small number of injured workers, however, those whose claims could have survived in the common law system, their recoveries were likely diminished because their damages were to be computed by the workers' compensation schedules rather than by a jury award.[122]

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121. Governor of Md. v. Exxon Corp., 279 Md. 410, 425, 370 A.2d 1102, 1111 (1977) (quoting Ferguson v. Skrupa, 372 U.S. 726, 730–32 (1963)); *see also* FRIEDMAN, THE MD. STATE CONSTITUTION, *supra* note 11, at 58–59; TOLLEY, *supra* note 120, at 117–23.

122. The history of the "grand bargain" of workers' compensation has been frequently told. *See, e.g.*, Daniel T. Doherty, Jr., *Historical Development of Work[ers'] Compensation*, *in* C. ARTHUR WILLIAMS, JR., & PETER S. BARTH, COMPENDIUM ON WORK[ERS'] COMPENSATION 11 (Marcus Rosenblum ed., 1973); PRICE V. FISHBACK & SHAWN EVERETT KANTOR, A PRELUDE TO THE WELFARE STATE: THE ORIGINS OF WORKERS' COMPENSATION (2000); Price V. Fishback & Shawn Everett Kantor, *The Adoption of Workers' Compensation in the United States, 1900–1930*, 41 J.L. & ECON. 305 (1998). For an historical description of Maryland's version of this "grand bargain,"

Courts traditionally evaluate only the parties before them. That traditional paradigm, however, does not make as much sense when evaluating an alternative compensation system. Imagine the injured workers we saw above. For the vast majority of potential plaintiffs, the new workers' compensation system was an improvement; they received a small but sure remedy. For a small minority of plaintiffs, however, the workers' compensation system caused a diminished recovery. These are the plaintiffs whose claims could survive the gauntlet of the old tort law defenses and whose severe injuries might have resulted in compensatory and punitive damages far in excess of those allowed under the workers' compensation schedules. For them, of course, that new alternative compensation system doesn't look so great.[123]

My point here is that if a court evaluates the constitutionality of an alternative compensation system by its fairness or reasonability to the parties before it, too much depends on the character of those parties. And, in turn, too much turns on which sort of plaintiffs get their cases to the appellate courts first. I think structural reasoning compels us to be skeptical of a test that puts too much emphasis on the characteristics of the individual parties. Thus, when evaluating proposed standards of review under Article 19, I favor those that include an evaluation of the reasonability or fairness of an alternative compensation system as a whole, not just for the individual parties in a pending case.[124] Zi'Tashia Jackson was an attractive plaintiff for the Court of Appeals to consider, given her grievous injuries and comparatively minor recovery. Had another less-attractive, less-injured plaintiff arrived at the Court first, however, the Court might have calculated differently.

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see RICHARD P. GILBERT ET AL., MARYLAND WORKERS' COMPENSATION HANDBOOK 1-1–1-14 (4th ed. 2013) (1988) (describing employer/employee relationship under the common law); THEODORE B. CORNBLATT, ET AL., WORKERS COMPENSATION MANUAL 1 (14th ed.); MAURICE J. PRESSMAN, WORK[ERS'] COMPENSATION IN MARYLAND 1 (2d ed. 1977); George E. Barnett, *The End of the Maryland Work[ers'] Compensation Act*, 19 Q.J. ECON. 320 (1905); George E. Barnett, *Maryland Work[ers'] Compensation Act*, 16 Q.J. ECON. 591 (1902); Russell B. James, *Constitutionality of Compulsory Work[ers'] Compensation Statut*es, 13 MICH. L. REV. 683 (1915).

123. And, in today's environment, the deal looks even more lopsided as tort recoveries frequently far exceed workers' compensation schedules, which don't keep up with inflation.

124. *Solvuca v. Ryan & Reilly Co.* provides a paradigm. 131 Md. 265, 101 A. 710 (1917). While the case surely arose in the context of Mr. Solvuca's workplace injury, the Court of Appeals did not evaluate the fairness of the worker's compensation scheme by reference just to his injury. Instead, the Court evaluated the fairness of the alternative compensation to the whole class of injured workers. *Id.* at 273–76, 101 A. at 713–14. That same year, the United States Supreme Court addressed a federal constitutional challenge to New York's workers' compensation statute. N.Y. Cent. R.R. Co. v. White, 243 U.S. 188, 192 (1917). In framing its analysis, the Court noted that "[t]he statute under consideration sets aside one body of rules only to establish another system in its place. . . . The act evidently is intended as a just settlement of a difficult problem . . . and it is to be judged in its entirety." *Id.* at 201–02.

D. Moral Reasoning

Professor Ronald Dworkin advocates the explicit use of moral philosophy to interpret constitutional provisions.[125] He advocates using a three-step process:

1. The interpreter must decide whether the provision either (1) states an abstract moral principle[126] or (2) is more specific and does not involve a moral principle.[127] If the provision is specific (Dworkin uses the example of Article II's requirement that the President be at least thirty-five years old), it is interpreted according to its terms. On the other hand, if the provision states an abstract moral principle, the interpreter then moves to step 2.
2. The interpreter must determine what moral principle the framers intended to enact by adopting the provision. Dworkin conducts this inquiry "by constructing different elaborations of the [abstract phrases the framers used], each of which we can recognize as a principle of political morality that might have won their respect, and then by asking which of these it makes most sense to attribute to them, given everything else we know."[128]
3. "The moral reading [then] asks [constitutional interpreters] to find the best conception of constitutional moral principles . . . that fits the broad story of America's historical record."[129]

Dworkin insists that this is not an open-ended invitation for judges to read their policy preferences into the Constitution but is constrained 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."[130]

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125. RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 2 (1996); *see also* Friedman, *Applying Federal Constitutional Theory*, *supra* note 4, at 444–48 (discussing moral reasoning).

126. DWORKIN, *supra* note 125, at 7 (referring to the examples of "free speech," "due process," and "equal protection" as abstract moral language subject to the moral reading).

127. *Id.* at 8. Dworkin cites Article II's requirement that the President be at least thirty-five years old and the Third Amendment's prohibition on quartering soldiers in citizens' homes in peacetime as examples of specific provisions that do not encompass moral principles. *Id.*

128. *Id.* at 9. For an example of this process of "elaboration," see RONALD DWORKIN, LAW'S EMPIRE 381–87 (1986).

129. DWORKIN, *supra* note 125, at 11.

130. *Id.* at 10.

With Dworkin's three-step interpretive theory in mind, our task is next to see if it can help us better understand Article 19. At the first step, there can be little doubt that Article 19 belongs in the category of those provisions that state an abstract moral principle. Read it again:

> That every man, for any injury done to him in his person or property, ought to have remedy by the course of the Law of the Land, and ought to have justice and right, freely without sale, fully without any denial, and speedily without delay, according to the Law of the Land.[131]

Dworkin identifies "due process of law" as it appears in the federal constitution as a statement of an abstract moral principle; in fact, it is one of the Constitution's phrases to which Dworkin seeks to use moral reasoning to give content.[132] It seems obvious that if, as the Court of Appeals has said, the phrase "Law of the Land" as it appears in Article 19 means "due process of law,"[133] then both phrases state abstract moral principles. Moreover, while I was willing to disregard the second half of Article 19 in the textualist analysis above, here it draws our attention. It is hard to imagine a more perfect example of a phrase stating an abstract moral principle than "justice and right." This allows us to move to Dworkin's step two.

At step two, we are to engage in a process that Dworkin calls elaboration, in which we are to trying to identify statements of moral principles that the framers might have been seeking in drafting Article 19. I have identified two candidates:

1. That government should protect the rights of the aggrieved, the weak, and the injured; or
2. That government should provide prompt, neutral, regular, non-violent dispute resolution.

Both formulations of the abstract moral principle animating Article 19 seem plausible.[134] We move next to Dworkin's step three, in which he applies the moral principle to the current controversy.

Neither of my formulations of the abstract moral principle help resolve the primary question of under what circumstances the legislature may modify existing common law tort remedies. Nonetheless, they do provide insight.

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131. MD. CONST. DECL. OF RTS. art. 19.

132. DWORKIN, *supra* note 125.

133. *See supra* note 52.

134. The careful reader will note that I have cheated in Dworkin's step two by skipping the too complicated question of the identity of the framers of Article 19 and trying to guess which abstract moral principle each was trying to vindicate. Do we include King John and his feudal barons at Runnymeade? King Henry III? Lord Coke? The members of the Maryland Constitutional Convention of 1776? 1851? 1864? 1867? In the end, I skip this step because I simply don't have any additional information to inform my guess about which formulation of the abstract moral principle *any* of the possible framers of Article 19 were trying to vindicate.

My first formulation is plaintiff-centered: under this formulation, the government's job is to protect victims. Thus, if the first formulation is the abstract moral principle the framers intended, any legislative substitution must provide a sufficient, if not an equal, remedy to the remedy that existed at common law. On the other hand, my second formulation is process-centered: the government's job is to provide a fair, neutral process for dispute resolution. If the second formulation is the abstract moral principle the framers intended, that has important implications too. Under such a regime, the appropriate question isn't whether the plaintiff wins, but rather, whether the plaintiff has a fair opportunity to present the case to a neutral decisionmaker.

While this might not always be the case, here the process of "elaboration" at Dworkin's second step seems like it would be outcome-determinative, but ultimately is unknowable. The best we can say is that both of these abstract moral principles should be kept in mind when deciding Article 19 cases.

E. Comparative Constitutional Law

While comparative constitutional law is an unfamiliar and controversial technique for interpreting the federal Constitution,[135] it is a well-established and important method of interpreting state constitutions.[136] The Maryland Court of Appeals, however, has rarely looked beyond its own precedents in interpreting Article 19 and did not do so in *Jackson*. This was a mistake. Many other states have done far more extensive work in interpreting their remedy provisions.

With thirty-nine state constitutions containing remedy clauses,[137] a great variety of judicial tests have developed by which courts evaluate legislative modifications of common law tort remedies. Many commentators have created elaborate taxonomies by which to explain the range of judicial choices.[138] I won't repeat their work here. It is sufficient for my purposes to note that the continuum of possibilities includes:

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

136. ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS 15–16 (2009); *see also* Friedman, *Applying Federal Constitutional Analysis*, *supra* note 4, at 449–50 (applying comparative constitutional interpretation to state constitutional law).

137. *See supra* note 89.

138. FRIESEN, *supra* note 38, at 6-6–6-11; Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. REV. 1309 (2003); Shannon M. Roesler, Comment, *The Kansas Remedy by Due Course of Law Provision: Defining a Right to a Remedy*, 47 U. KAN. L. REV. 655 (1999); Schuman, *The Right to a Remedy*, *supra* note 3; Janice Sue Wang, *State Constitutional Remedy Provisions and Article I, Section 10 of the Washington State Constitution: The Possibility of Greater Judicial Protection of Established Tort Causes of Action and Remedies*, 64 WASH. L. REV. 203 (1989).

- The Montana Supreme Court, for example, reads Montana's remedy provision as directed to the judiciary, not the legislature, and as a result, the Court defers completely to its legislature. The Court will not invalidate a legislative modification of a common law tort remedy.[139]
- Many states, like Maryland before *Jackson*, employed a rational basis test to evaluate remedy clause challenges. Thus, for example, the West Virginia Supreme Court will uphold a law whose purpose is "to eliminate or curtail a clear social or economic problem, and the alteration or repeal of the existing cause of action or remedy is a reasonable method of achieving such purpose."[140]
- At the time that the Maryland Court of Appeals was deciding *Jackson*, the Oregon Supreme Court was employing a "time capsule" analysis to decide challenges to legislative modifications of tort remedies. Under this test, the Oregon Supreme Court read Oregon's remedy provision to preserve all common law remedies as they existed at the time its constitution was adopted but to allow legislative modification of common law remedies that were enacted after the adoption of the constitution.[141]
- In 2016, the Oregon Supreme Court overruled its prior precedent (described above) and adopted a new rule that permits a substitution of tort remedies so long as the new remedy isn't "paltry":

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139. Meech v. Hillhaven West, Inc., 776 P.2d 488, 491–93 (Mont. 1989). Other states employ the same deferential standard. *See, e.g.*, Harrison v. Schrader, 569 S.W.2d 822, 827 (Tenn. 1978) (stating that the remedy provision is "a mandate to the judiciary and not . . . a limitation upon the legislature"). *But see* Koch, *supra* note 77, at 448–451 (criticizing the approach of the Supreme Court of Tennessee); Pinnick v. Cleary, 271 N.E.2d 592, 600 (Mass. 1971) (stating that the remedy provision is "clearly directed toward the preservation of procedural rights and has been so construed"); O'Quinn v. Walt Disney Prods., Inc., 493 P.2d 344, 346 (Colo. 1972) (stating that the remedy provision does not prohibit legislature from changing a law that previously created a right, "[r]ather, this section simply provides that if a right does accrue under the law, the courts will be available to effectuate such right").

140. Lewis v. Canaan Valley Resorts, Inc., 408 S.E.2d 634, 645 (W. Va. 1991); *see also* Haney v. Int'l Harvester Co., 201 N.W.2d 140, 146 (Minn. 1972); Green v. Siegel, Barnett & Schutz, 557 N.W.2d 396, 404–05 (S.D. 1996); Tomczak v. Bailey, 578 N.W.2d 166, 174 (Wis. 1998).

141. Smothers v. Gresham Transfer, Inc., 23 P.3d 333, 353 (Or. 2001), *overruled by* Horton v. Or. Health & Sci. Univ., 376 P.3d 998 (Or. 2016). For a critique of *Smothers*, *see* Hoffman, *Questions Before Answers*, *supra* note 67. Other decisions applying this "time capsule" approach include Leiker v. Gafford, 778 P.2d 823, 848 (Kan. 1989); Williams v. Wilson, 972 S.W.2d 260, 264–65 (Ky. 1998). *See also* Roesler, *supra* note 138, at 661; Schuman, *The Right to a Remedy*, *supra* note 3, at 1208–09. Interestingly, at the time it decided *Jackson*, the Maryland Court of Appeals was already, theoretically, familiar with Oregon's *Smothers* decision, having cited it with approval in *Dua*. Dua v. Comcast Cable of Md., Inc., 370 Md. 604, 645 n.14, 805 A.2d 1061, 1085 n.14 (2002).

> [I]n deciding whether the legislature's actions impair a person's right to a remedy . . . we must consider the extent to which the legislature has departed from the common-law model measured against its reasons for doing so. . . . [T]he substantiality of the legislative remedy can matter in determining whether the remedy is consistent with the remedy clause. When the legislature does not limit the duty that a defendant owes a plaintiff but does limit the size or nature of the remedy, the legislative remedy need not restore all the damages that the plaintiff sustained to pass constitutional muster, but a remedy that is only a paltry fraction of the damages that the plaintiff sustained will unlikely be sufficient.[142]

- The Texas Supreme Court uses a balancing test. It holds:

  > [T]he right to bring a well-established common law cause of action cannot be effectively abrogated by the legislature absent a showing that the legislative basis for the statute outweighs the denial of the constitutionally-guaranteed right of redress. In applying this test, we consider both the general purpose of the statute and the extent to which the litigant's right to redress is affected. . . . [We] note that the litigant has two criteria to satisfy. First, it must be shown that the litigant has a cognizable common law cause of action that is being restricted. Second, the litigant must show that the restriction is unreasonable or arbitrary when balanced against the purpose and basis of the statute.[143]

- The Kansas Supreme Court uses a "quid-pro-quo" test, by which the legislature may only eliminate or restrict a cause of action if it supplies an adequate substitute remedy: "The legislature can modify the common law so long as it provides an adequate substitute remedy for the right infringed or abolished."[144]

142. *Horton*, 376 P.3d at 1028 (citing Howell v. Boyle, 353 Or. 359, 376 (2013)).

143. Sax v. Votteler, 648 S.W.2d 661, 665–66 (Tex. 1983).

144. Kan. Malpractice Victims Coal. v. Bell, 757 P.2d 251, 263 (Kan. 1988); *see also* Bonin v. Vannaman, 929 P.2d 754, 769 (Kan. 1996); Bair v. Peck, 811 P.2d 1176, 1188 (Kan. 1991); Samsel v. Wheeler Transp. Servs., Inc., 789 P.2d 541 (Kan. 1990). *But see* Roesler, *supra* note 138 at 662, 669 (arguing that Kansas' quid-pro-quo approach has essentially been reduced to a rational basis review). New Hampshire has also used the quid-pro-quo approach. Estabrook v. Am. Hoist &

- The Utah Supreme Court uses a two-part test, which includes both a "quid-pro-quo component" and an explicit balancing test:

> First, [the remedy clause] is satisfied if the law provides an injured person an effective and reasonable alternative remedy "by due course of law" for vindication of his constitutional interest. The benefit provided by the substitute must be substantially equal in value or other benefit to the remedy abrogated in providing essentially comparable substantive protection to one's person, property, or reputation, although the form of the substitute remedy may be different. . . . Second, if there is no substitute or alternative remedy provided, abrogation of the remedy or cause of action may be justified only if there is a clear social or economic evil to be eliminated and the elimination of an existing legal remedy is not an arbitrary or unreasonable means for achieving the objective.[145]

- The Florida Supreme Court has adopted a three-stage rule, incorporating a "time capsule," a "quid-pro-quo," and a balancing component:

> [1] where a right of access to the courts for redress for a particular injury has been provided [a] by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or [b] where such right has become a part of the common law of the State . . . [2] the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, [3] unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.[146]

Particularly in states where "tort reform" is frequently on the legislative agenda, courts have sharpened their analyses over the years to develop rules

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Derrick, Inc., 498 A.2d 741, 748 (N.H. 1985), *overruled by* Young v. Prevue Prods., Inc., 534 A.2d 714 (N.H. 1987); *see also* Light, *supra* note 103, at 358; Schuman, *The Right to a Remedy*, *supra* note 3, at 1211–12.

145. Berry v. Beech Aircraft Corp., 717 P.2d 670, 680 (Utah 1985).

146. Kluger v. White, 281 So. 2d 1, 4 (Fla. 1973).

for increasingly complex situations.[147] For present purposes, my point is not to endorse any one of these tests (although I will later), but to point out that a wide variety of excellent, battle-tested methods of analysis existed for the Court of Appeals to have considered in *Jackson*, but the Court never looked outside of Maryland's borders. It is also worth noting in this context that had the *Jackson* Court looked at our sister states, it would have seen a diversity of levels of deference to the legislative choices, but it would have found *no* examples of a court declining to give any deference at all. To repeat, the least deferential example that existed would likely have been that of Florida, the courts of which demand that legislative substitution of common law tort remedies satisfy strict scrutiny. Even Florida, however, is more deferential than the test that the *Jackson* Court selected, which proceeds without reference to the legislature whatsoever.[148]

F. Common Law Reasoning

Professor David Strauss of the University of Chicago Law School has argued that the best method of explaining our system of constitutional interpretation is by analogy to the development of the common law.[149] This theory counsels an interpreter against novel theories of constitutional interpretation but to accept "traditional" and "conventional" formulations that have been "accepted over time" and were developed by "people who were acting reflectively and in good faith."[150] I have argued that the analysis that Professor Strauss observes in constitutional interpretation is similar to the analysis that courts use in deciding whether to follow their prior precedents because of *stare decisis*.[151]

As described above, *Jackson* marked a sea change in the Court of Appeals' Article 19 jurisprudence.[152] Before *Jackson*, the Court evaluated legislative modifications to common law tort remedies with great deference, applying only rational basis review and never, in fact, rejecting such a legislative modification.[153] *Jackson* reversed the presumption, holding that

147. *See* FRIESEN, *supra* note 38, at 6-11–6-58.

148. *See supra* notes 57–59 and accompanying text.

149. 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) [hereinafter Strauss, *Constitutional Interpretation*] (arguing that the common law approach is most effective at restraining judges); *see also* Friedman, *Applying Federal Constitutional Theory*, *supra* note 4, at 462–66 (applying common law constitutional interpretation to state constitutional law).

150. Strauss, *Constitutional Interpretation*, *supra* note 149, at 890–91.

151. Friedman, *Applying Federal Constitutional Theory*, *supra* note 4, at 463–64 (comparing common law constitutional interpretation to *stare decisis*).

152. *See supra* notes 57–59 and accompanying text.

153. *See supra* note 53 and accompanying text.

the Court would review a legislative modification of a tort remedy and determine itself whether the modification was "reasonable." Under the test formulated by *Jackson*, only if the Court is satisfied will a legislative modification be affirmed.

It can be no surprise that I don't think much fidelity is owed to the decision in *Jackson*. The test stated there is neither traditional nor conventional. It is aberrant. And that aberration can and should be corrected.

III. A NEW TEST

To summarize, textualism cannot conclusively determine the meaning of Article 19. It does remind us, however, to focus on tort victims. While some believe that it is possible that better, more focused historical research may yield a definitive originalist interpretation, I do not share that optimism.[154] I don't think we will ever determine the precise meaning of our remedy provision through historical research. By contrast, I think structuralism provides important insights about the proper interpretation of Article 19. Specifically, structuralism directs our attention to the separation of powers and counsels us to adopt a standard that is respectful of both the legislative and judicial branches of government, allows them to function within their core competencies, and doesn't assign either a superior position. Structuralism also reminds us not to repeat the errors of the past. Moral reasoning can focus the interpreter on the abstract moral principle the constitutional Framers wanted to protect, but it doesn't make a definitive selection of interpretation. Comparative constitutional law provides us with dozens of models from which we can pick. Common law constitutional interpretation, if nothing else, releases us from the *stare decisis* effect of the *Jackson* decision.

As a result of the lessons learned from the various methods of constitutional interpretation, I reject the positions that our sister states have taken that are too deferential to the legislative branch (like Montana, West Virginia, and Maryland before *Jackson*) or not sufficiently deferential (like Florida). I don't think that the "time capsule" approach that assigns a preferred position to common law remedies that pre-date the adoption of the Constitution, offers much to commend it (other than the alleged simplicity of its application). In fact, the leading proponent of this approach, Oregon, has now abandoned it. Having surveyed the alternatives and found, like Goldilocks, that one test is too strict and one test is too deferential, I think the test that's just right is that:

> A legislative modification (or elimination) of a common law remedy (including immunities, damage caps, statutes of limitations and repose, and alternative compensation systems) is constitutional *unless* (1) it fails to provide an alternative remedy that is reasonable to the class to which the victim belongs (including all persons

154. *See supra* note 96.

> harmed or who will be harmed by the defendant's conduct (including the defendant(s) and other parties contributing to similar harm); or (2) it is not reasonably related to an important state objective.[155]

This test, if not specifically mandated by the text and history of Article 19, is certainly not prohibited by them. It considers both the injured individual and the class of those harmed.[156] This proposed test is respectful of both the judiciary and the legislature, it doesn't force either branch to defer completely to the other, and it assigns to each functions that are within their core competencies. It will allow the legislature to predict what it must do to comply with its constitutional responsibilities.

IV. CONCLUSION

The Court of Appeals' opinion in *Jackson v. Dackman Co.* established a test for analysis of legislative modification of common law tort remedies under Article 19 of the Maryland Declaration of Rights that makes the test solely whether the legislation is reasonable in the minds of a majority of the Court of Appeals' judges. A more careful look at Article 19 using the technique identified in my earlier work provides a better test that is more consistent with the text and history of the provision, comports with the separation of powers, and is informed by the useful experimentation conducted by our sister states.

155. I am not claiming that my proposal is particularly original. My proposal is substantively similar to the test suggested by Judge Koch and contains elements of the Oregon and Utah approaches cited above. *See* Koch, *supra* note 77, at 450; *supra* notes 142 and 145 and accompanying text.

156. In thinking about this test, I am in substantial debt to Donald G. Gifford, William L. Reynolds & Andrew M. Murad, *A Case Study in the Superiority of the Purposive Approach to Statutory Interpretation:* Bruesewitz v. Wyeth, 64 S.C. L. REV. 221 (2012). While I love the whole article, the section on the importance of enforcing the boundaries of a no-fault system was particularly helpful here. *Id.* at 255–57.