LEGISLATIVE DESK REFERENCE MANUAL

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Foreword

The *Legislative Desk Reference* is published by the Office of Policy Analysis of the Department of Legislative Services. It is intended primarily to provide a quick source of information on the general state of the law in areas commonly encountered by legislative analysts in drafting legislation and providing other services to the Maryland General Assembly. Nonetheless, it is hoped that the *Legislative Desk Reference* also will be of use to others who may have a more casual interest in Maryland law and legislation. Readers of the *Legislative Desk Reference* may also be interested in the *Legislative Drafting Manual* and the *Maryland Style Manual for Statutory Law,* both of which are published by the Department of Legislative Services.

This 2023 edition of the *Legislative Desk Reference* revises and updates the 2018 edition. This edition was written and edited by Phillip Anthony, Jeremy Baker, Kiran Baran, Duane Bond, Shane Breighner, Tiffany Brooks, Matthew Buzard, Matthew Carpenter, Georgeanne A. Carter, Elisabeth Chaney, John Edwards, Dominic Gilani, Joseph Gutberlet, Harry Hall, Tatiana Hill, Ryan Hollen, Kelvin Lucas, Nathan McCurdy, David Morgan, Darragh Moriarty, Ryane Necessary, Joshua Prada, Lindsay Rowe, Charity Scott, Holly Vandegrift, Benjamin Voight, and Jennifer Young under the supervision of Jodie L. Chilson. The *Reference* was prepared for publication by Michelle Purcell.

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Rule

In construing a statute, Maryland courts seek to determine legislative intent. To determine legislative intent, courts will first look to the plain meaning of the statutory language. However, even where the language of the statute appears clear and unambiguous, statutes will be read in light of the surrounding context and other evidence of legislative intent gleaned from the enactment itself, legislative statements and reports, and other relevant legislative history.

Discussion

The Supreme Court of Maryland has often stated that the cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature and that the primary indicator of the legislature's intent is the language of the statute itself. See, *e.g., Gardner v. State,* 420 Md. 1 (2011); *Chesapeake Charter, Inc. v. Anne Arundel Bd. of Educ.*, 358 Md. 129 (2000); *Catonsville Nursing Home, Inc. v. Loveman*, 349 Md. 560 (1998); *Coburn v. Coburn*, 342 Md. 244 (1996). In reading the language of the statute, the courts apply "common sense to avoid illogical or unreasonable constructions." *Armstead v. State*, 342 Md. 38, 56 (1996). See also *Comptroller v. Fairchild Indus.,* 303 Md. 280, 285-286 (1985) (the words "and" and "or" can be used interchangeably when "necessary to effectuate the obvious intention of the legislature"). Statutes are interpreted so as "to give every word effect, avoiding constructions that render any portion of the language superfluous or redundant." *Blondell v. Baltimore Police*, 341 Md. 680, 691 (1996). See also *Bank of Amer. v. Stine,* 379 Md. 76, 85-86 (2003) (statutes to be construed so that no part is meaningless); *Brd. of Physician Quality Assur. v. Mullan,* 381 Md. 157, 168 (2003) (statutes are to be interpreted as a whole, giving meaning to all parts so that no part of the law is "surplusage or contradictory"). The words of the statute are given their natural, ordinary, and generally understood meanings. *Whack v. State*, 338 Md. 665, 672 (1995). That which necessarily is implied in a statute is as much a part of it as that which is expressed. *Stanford v. Md. Police Training*, 346 Md. 374, 379 (1997).

In construing a statute, the Maryland courts have consistently relied on the so-called "plain meaning" rule which holds that "[i]f the words of the statute, construed according to their common and everyday meaning, are clear and unambiguous and express a plain meaning, [the courts] will give effect to the statute as it is written." *Oaks v. Connors*, 339 Md. 24, 35 (1995) (quoting *Jones v. State*, 336 Md. 255, 261 (1994)). Indeed, a statute that clearly expresses the intent of the legislature must be construed to give effect to that intention regardless of the consequences, even though such effect may cause a hardship. *Edwards v. First Nat'l Bank*, 122 Md. App. 96, 107 (1998). If the meaning of the language is unclear or ambiguous, however, the court will "consider 'not only the literal or usual meaning of the words, but their meaning and effect in light of the setting, the objectives and purpose of the enactment,' in [the] attempt to discern the construction that will best further the legislative objectives or goals." *Whack,* 338 Md. at 672

(quoting *Gargliano v. State*, 334 Md. 428, 436 (1994)). Such an interpretation must be reasonable and consonant with logic and common sense. *Lewis v. State*, 348 Md. 648, 654 (1998). A court will seek to avoid construing a statute in a manner that leads to an illogical or untenable outcome. *Id.* See also *Blandon v. State,* 304 Md. 316, 319, 498 A.2d 1195, 1196 (1985) ("[R]ules of statutory construction require us to avoid construing a statute in a way which would lead to absurd results."); and *Erwin and Shafer, Inc. v. Pabst Brewing Co.,* 304 Md. 302, 311, 498 A.2d 1188, 1192 (1985) ("A court must shun a construction of a statute which will lead to absurd consequences.").

Prior to *Kaczorowski v. City of Baltimore*, 309 Md. 505 (1987), the courts favored relatively strict adherence to the plain meaning rule. A line of earlier cases stated that where statutory language is unambiguous, "there is no need to look elsewhere" to determine legislative intent. See, *e.g., Mauzy v. Hornbeck*, 285 Md. 84, 92-95 (1979) (interpretation of what the legislature meant by "professional employee"). See also *Koyce v. State of Md. Central Collection Unit*, 289 Md. 134 (1980) (whether the legislature intended that persons committed to a mental hospital should be required to pay for treatment); *County Council for Montgomery Cnty. v. Supervisor of Assessments of Montgomery Cnty.*, 274 Md. 116 (1975) (whether term "county council" is synonymous with term "county commissioners"); and *Young v. Young*, 61 Md. App. 103 (1984) (whether new alimony statute applied to instant case).

However, while the Supreme Court of Maryland continues to apply the plain meaning rule, the court in *Kaczorowski* signaled a change to a less rigid approach to the search for legislative intent:

> However fictional the notion of institutional intent may sometimes be, it is fair to say that legislation usually has some objective, goal, or purpose. It seeks to remedy some evil, to advance some interest, to attain some end .... Of course, in our efforts to discover purpose, aim, or policy we look at the words of the statute. That is the thrust of the plain-meaning rule.... But the plain-meaning rule is not rigid .... Moreover ... the plain-meaning rule does not force us to read legislative provisions in rote fashion and in isolation.

309 Md. at 513-14.

The court noted that "[t]he 'meaning of the plainest language' is controlled by the context in which it appears." *Id*. at 514 (quoting *Guardian Life Ins. Co. of Amer. v. Ins. Comm'r*, 293 Md. 629, 642 (1982)). In its pursuit of "the context of statutory language, [the court is] not limited to the words of the statute as they are printed in the Annotated Code." *Id.* at 514-15.

In *Kaczorowski*, the court also expressed a willingness to "consider other 'external manifestations' or 'persuasive evidence,' including a bill's title and function paragraphs, amendments that occurred as it passed through the legislature, its relationship to earlier and subsequent legislation, and other material that fairly bears on the fundamental issue of legislative purpose or goal." *Id.* at 515. (quotations in original). See also *Morris v. Prince George's Cnty.*, 319 Md. 597, 604 n.3 (1990) ("rigid approach" not proper when applying plain meaning rule); *Blaine v. Blaine,* 336 Md. 49, 64 (1994) (the plain meaning rule is not rigid).

Maryland courts will look to various sources of legislative history when interpreting statutes. In *Gardner,* the Supreme Court of Maryland stated "[w]here the words of a statute are ambiguous and subject to more than one reasonable interpretation, or where the words are clear and unambiguous when viewed in isolation, but become ambiguous when read as part of a larger statutory scheme, a court must resolve the ambiguity by searching for legislative intent in other indicia, including the history of the legislation or other relevant sources intrinsic and extrinsic to the legislative process." 420 Md. at 8-9 (citations omitted). See also *Armstead v. State,* 342 Md. 38, 57 (1996) (Senate Judicial Proceedings Committee Report); *Morris*, 319 Md. at 607-15 (1990) (interim committee reports, fiscal notes, and committee bill summaries); *McAlear v. McAlear*, 298 Md. 320 (1984) (Governor's Commission report); *Blumenthal v. Clerk of Circuit Ct.*, 278 Md. 398, 403-04 (1976) (Joint Legislative-Executive report); *Fairchild v. Maritime Air Service*, 274 Md. 181, 186 (1975) (Official Comments to Maryland Code section); *Allers v. Tittsworth*, 269 Md. 677, 681-83 (1973) (Review and Revision Commission report); *Ghajari v. State*, 108 Md. App. 586, 594 (1996) (quoting memoranda to sponsor of bill contained in bill file, the bill request form, and "committee note" in bill file).

Code Revision

Rule

Generally, in construing recodified statutory provisions, the courts presume that no substantive change is intended to be made to the law by a general recodification. To determine legislative intent, the courts may rely on standard uncodified language in a code revision bill and revisor's notes to the recodified provisions.

Discussion

Recodification

The Supreme Court of Maryland "consistently has presumed that general recodifications of statutes…are for the purpose of clarity only and not substantive change, unless the language of the recodified statute unmistakably indicates the intention of the Legislature to modify the law." *DeBusk v. Johns Hopkins Hosp.*, 342 Md. 432, 444 (1996) (citations omitted). In *DeBusk*, the petitioner argued that when the Legislature recodified the workmen's compensation statute, by changing the phrase "from the date of the accident" to "after the date of the accidental personal injury" it meant to change how the statute of limitations was to be calculated. *Id.* at 442-43. The court found that "[n]either the history of this particular recodification nor the language of the statute of limitations itself 'unmistakably'" indicated that such a change had been intended. *Id.* at 444. See also *Office & Prof'l Emps. Int'l v. Mass Transit Admin.*, 295 Md. 88 (1982) (change of phraseology in recodification no indication of legislative intent to expand collective bargaining authority of the Mass Transit Administration); *Tipton v. Partner's Mgmt. Co.,* 364 Md. 419 (2001) (without evidence of intent to make a substantive change, the statute of limitations for filing rent arrearages was not changed during a recodification).

Similarly, in *Welch v. Humphrey*, 200 Md. 410 (1952), the Supreme Court of Maryland discussed the elimination of the words "of the same" and "and" in a recodification of previously enacted legislation. The court ruled that this change in phraseology did not reflect an intention to make a drastic change in the Mechanics' Lien Law. The court noted that:

> It is true that a codification of previously enacted legislation, eliminating repealed laws and systematically arranging the laws by subject matter, becomes an official Code when adopted by the Legislature, and, since it constitutes the latest expression of the legislative will, it controls over all previous expressions on the subject, if the [l]egislature so provides. However, the principal function of a Code is to reorganize the statutes and state them in simpler form. Consequently any changes made in

them by a Code are presumed to be for the purpose of clarity rather than change of meaning.

Id. at 417.

Bureau of Mines v. George's Creek, 272 Md. 143 (1974), involved the interpretation of a language change made in the recodification of the natural resources law. The court concluded that the legislature intended no substantive change when it adopted the recodification of the strip mining provision at issue. *Id.* at 155. In *Nationstar Mortgage, LLC v. Kemp,* 476 Md. 149, 154 (2020), the court found that the addition of a definition of 'lender' to the Commercial Law Article in 1975 during code revision did not constitute a substantive change in law applicable to the understanding of assignees of mortgage loans.

In addition to case law, Maryland courts are increasingly relying on standard uncodified language contained in each code revision bill that states that, except as otherwise noted, the bill does not make substantive changes in the law. For example, in *Allen v. State,* 402 Md. 59, 73-74 (2007), the Supreme Court of Maryland found that the substantive meaning of § 7-203 of the Criminal Law Article did not change as a result of the enactment of the Criminal Law Article code revision bill (Chapter 26 of the Acts of 2002). The court relied heavily on the language of Section 13 of the bill: "AND BE IT FURTHER ENACTED, That it is the intention of the General Assembly that, except as expressly provided in this Act, this Act shall be construed as a nonsubstantive revision, and may not otherwise be construed to render any substantive change in the criminal law of the State."

Revisor's Notes

The Supreme Court of Maryland stated in *Dean v. Pinder*, 312 Md. 154, 163 (1988), that it is the "well-settled practice of this Court to refer to the Revisor's Notes when searching for legislative intent of an enactment." In construing a revised statute that deleted the word "actual" from the law, the court in *Dean* looked to the revisor's note, which stated that the new language was derived without substantive change from the former provision, in concluding that the meaning of the statute had not changed. *Id.*

In *Office & Professional Employees Int'l.,* the court opined that the "notes or reports of a revisor or revision commission are entitled to considerable weight in ascertaining legislative intent." 295 Md. at 101. Additionally, the court considered revisor's notes to indicate legislative intent in *Briggs v. State*, 289 Md. 23, 30-31 (1980), and *Bureau of Mines,* 272 Md. at 155. In *Allers v. Tittsworth*, 269 Md. 677, 683 (1973), the court declared that the "practice of considering revision commission reports in searching for legislative intent is too well established to be open to question."

In another case, the Supreme Court of Maryland relied heavily on the revisor's notes in holding that a substantive change had not occurred during the recodification. *Blevins v. Baltimore Cnty.,* 352 Md. 620 (1999). When Article 101, § 33(d) was recodified in § 9-610(a) of the Labor and Employment Article, the General Assembly deleted the former reference to "similar" benefits. *Id.* at 635. Baltimore County argued that since the word "similar" was deleted, the

General Assembly had made a substantive change to the law that eliminated the distinction between similar and nonsimilar benefits. *Id.* at 630. If the law had changed and the distinction between benefits had been eliminated, a decrease in benefits for local government employees would have resulted. The court looked to the revisor's note and held that no substantive change had occurred because it did not mention the deletion of the word "similar," but clearly stated that no substantive change was intended. *Id.* at 643.

In *Comptroller of Treasury v. Blanton*, 390 Md. 528, 543 (2006), the Supreme Court of Maryland again looked to the revisor's notes as well as a Department of Legislative Reference Report (Report on Senate Bill 1, Tax – General Article (January 14, 1988)) in concluding that changes made during the recodification of portions of Article 81 in §10-703(a) of the Tax – General Article were nonsubstantive "housekeeping" measures.

As discussed above, in *Allen ,* the Supreme Court of Maryland ruled that the substantive meaning of § 7-203 of the Criminal Law Article did not change as a result of the enactment of the Criminal Law Article code revision bill. 402 Md. at 73, 74. In addition to pointing to Section 13 of the code revision bill, the court also relied on the General Revisor's Note to the new Criminal Law Article and the first paragraph of the Revisor's Note to the section of law at issue in the case: "This section is new language derived without substantive change from former Art. 27, § 349."

State Budget

Rule

The "budget amendment" of the Maryland Constitution limits the General Assembly's authority over the State budget and prescribes how appropriations are to be made. The General Assembly may increase, decrease, or add appropriations to the Budget Bill, subject to certain limitations. The General Assembly may also condition or limit the use of an appropriation, but it may not legislate in the Budget Bill.

Discussion

Article III, § 52 of the Maryland Constitution provides that appropriations may be made only through the "Budget Bill" or a "Supplementary Appropriation Bill." Historically, the Maryland Constitution provided for strong executive control over the State budget, with express limitations on the budgetary authority of the General Assembly. However, a constitutional amendment ratified by the voters at the November 2020 general election modified the State budget process by allowing the General Assembly, beginning with the fiscal 2024 budget, to increase or decrease appropriations made by the Governor for the Executive Branch and add or create new appropriations for any branch of State government.

Budget Bill

The Budget Bill, unlike other bills, originates with the Governor. The General Assembly may amend the Budget Bill by increasing, decreasing, or adding items relating to the General Assembly, the judiciary, or the Executive Department provided that the total appropriation for the Executive Department approved by the General Assembly does not exceed the total proposed appropriation for the Executive Department submitted by the Governor. In addition, the salary or compensation of any public officer may not be decreased during the public officer's term of office. MD. CONST. art. III § 52(6b).

Once the Budget Bill is passed by the General Assembly, it becomes law without further action by the Governor. MD. CONST. art. III § 52(6b). However, at the same time, Article III, § 52(6a) of the Maryland Constitution requires the Budget Bill to be presented to the Governor for approval or disapproval and Article II § 17(f) authorizes the Governor to veto line items relating to the Executive Branch that have been increased or added by the General Assembly. If the Governor vetoes a line item, the General Assembly has 30 days to convene a special session to consider overriding the Governor's veto. If the vetoed item was increased by the General Assembly and the General Assembly does not override the veto, the additional funding for the item is removed from the budget. If the vetoed item was added by the General Assembly and the General Assembly does not override the veto, the item is removed from the bill.

Article III, § 52(5) of the Maryland Constitution authorizes the Governor to amend or supplement the Budget Bill, with the consent of the General Assembly, before final action on the Budget Bill. Thus, the Governor may include an appropriation in a "Supplemental Budget" to implement pending legislation during the upcoming fiscal year. In addition, the statutory budget amendment procedure provides a mechanism by which an appropriation may be amended by the Governor during the fiscal year to allow an expenditure of funds to implement newly enacted legislation. MD. CODE ANN., STATE FIN. & PROC. § 7-209.

Conditions on Appropriations/Legislating in the Budget

The General Assembly's authority to modify items of appropriation includes the authority to condition or limit the use of an appropriation. *Bayne v. Sec'y of State*, 283 Md. 560, 574 (1978). The General Assembly, however, may not legislate generally through the Budget Bill because the Budget Bill becomes law as soon as it is passed by both houses of the General Assembly and is generally not subject to the Governor's veto. See generally *Haub v. Montgomery Cnty.,* 353 Md. 448 (1999). To avoid violating the proscription against "legislating in the budget," any condition or limitation on the use of moneys appropriated, which is placed in the Budget Bill by the General Assembly, must:

- be directly related to the expenditure of the sum appropriated;
- not amend substantive legislation or administrative rules; and
- be effective only during the fiscal year for which the appropriation is made.

See 63 Op. Att'y Gen. 60, 73 (1978). See also 73 Op. Att'y Gen. 43, 46-48 (1988) (history of prohibition against "legislating in the budget"). Compliance with the relational requirement (that it be directly related to the expenditure of the sum appropriated) further requires that the condition or limitation be drafted in such a way that it is directly tied to the item or items of appropriation that are to be restricted. See generally *Kopp v. Schrader*, 456 Md. 524 (2017).

Mandated Appropriations

In addition to the General Assembly's ability to initiate an appropriation for the upcoming fiscal year in the Budget Bill, the General Assembly may, by legislation, require the Governor to include funding for a particular program in future budgets. See MD. CONST. art. III, § 52(11) and (12). The Attorney General has interpreted this provision to require that a mandatory funding statute provide a "clearly prescribe[d] … dollar amount or an objective basis from which a level of funding can easily be computed." 65 Op. Att'y Gen. 108, 110 (1980).

In general, while the Governor must include appropriations in the proposed budget as required by a mandated funding statute, the General Assembly's authority to strike or reduce appropriations is not similarly restricted. See 65 Op. Att'y Gen. 45, 50 (1980) (fact that General Assembly mandates minimum level of funding for particular programs does not infringe its own power to strike or reduce items in annual Budget Bill). Article III, § 52(6) of the Maryland

Constitution, however, prohibits the General Assembly from amending the Budget Bill so as to affect payment of the State's debt obligations or "the provisions made by the laws of the State for the establishment and maintenance of a system of public schools or the payment of any salaries required to be paid by the State of Maryland by the Constitution."

Special Funds

Another way that the General Assembly can exercise control over the State budget is by the use of special funds. Special funds are revenues that by law are dedicated to a particular purpose and may not be used for other purposes. See 89 Op. Attorney Gen. 172, 178 (2004) (Budget Bill cannot expand purposes for which Special Administrative Expense Funds may be used; however, the General Assembly may expand purposes in separate legislation). Although the Governor is not required to appropriate these funds for the dedicated purpose (unless the law also mandates a minimum funding level), the revenues may not be included in the budget for a different purpose unless the statute dedicating the revenues is amended. During periods of budget crisis, various "Budget Reconciliation and Financing Acts" have been enacted which, among other things, authorized the transfer of various monies in special funds to the General Fund to allow their use for other purposes.

Supplementary Appropriation Bills

In addition to appropriations in the Budget Bill, Article III, § 52(8) of the Maryland Constitution authorizes appropriations to be made through Supplementary Appropriation Bills, which originate from the General Assembly in the same manner as ordinary bills. To be valid, a Supplementary Appropriation Bill must be limited to "some single work, object or purpose therein stated" and must "provide the revenue necessary to pay the appropriation thereby made by a tax, direct or indirect, to be levied and collected as shall be directed in said bill." MD. CONST. art. III, § 52(8). These bills, like ordinary bills, are subject to the Governor's veto power. Unlike ordinary bills, Supplementary Appropriation Bills are also subject to the Governor's line-item veto power. The General Assembly may not finally act on a Supplementary Appropriation Bill until both houses have finally acted on the Budget Bill.

The Capital Budget Bill is one type of Supplementary Appropriation Bill. Supplementary Appropriation Bills that add or increase appropriations for the operating budget are relatively rare. For an example of this type of Supplementary Appropriation Bill, see Chapter 356, § 6 of the Acts of 2021.

Capital Budget Bill

The Capital Budget Bill authorizes the sale of State general obligation bonds, the proceeds of which are appropriated for enumerated capital projects. As with other Supplementary Appropriation Bills, the legislature may amend the Capital Budget Bill to add and delete appropriations; increase and decrease appropriations; and add contingent, conditional, and restrictive language regarding how appropriations may be applied. The Capital Budget Bill, unlike the operating Budget Bill, also must have an effective date, which is usually June 1.

State general obligation bonds are backed by the full faith and credit of the State. Article III, § 34 of the Maryland Constitution provides that the payment of the principal and interest on any debt incurred by the State must be secured by a tax, the debt must be discharged within 15 years, and the tax may not be repealed until the debt is discharged. (The tax does not, however, need to be collected in any year in which there are sufficient State funds to make the required payments.) Accordingly, a portion of the property tax is set aside to cover the payment of principal and interest on general obligation bonds.

LEGISLATIVE PROCEDURE ISSUES

Open Meetings Law

Rule

Except under specified circumstances, a public body must meet in open session and give notice of the open session when it convenes a quorum for the consideration or transaction of public business and carries out an advisory, legislative, or quasi-legislative function.

Each advisory board appointed by the Governor or the chief executive officer of a political subdivision of the State that includes in its membership at least two individuals not employed by the State or a political subdivision must meet in open session.

Discussion

For several decades, Maryland has had statutory provisions to ensure the public's ability to obtain prompt, complete, and accurate information regarding official actions. It is essential to democracy that, except in special and appropriate circumstances when meetings of public bodies may be closed, public business be conducted openly and publicly and that the public be allowed to not only observe the performance of public officials, but also the deliberations and decisions involved in the making of public policy. MD. CODE ANN., GEN. PROV., § 3-102(a). Additionally, it is the policy of the State that the public be provided with adequate notice of the time and location of meetings of public bodies and that the meetings be held in places reasonably accessible to individuals who would like to attend these meetings. GEN. PROV., § 3-102(c).

Scope of the Open Meetings Act

An evaluation of the application of the Open Meetings Act (Act) to a particular meeting requires a three-tier analysis:

(1) Is the entity a "public body" as defined under the law?

(2) Is the public body holding a "meeting" as defined under the law?

(3) Is the public body performing a "function" that is subject to the law?

Such evaluations are often made by the State Open Meetings Compliance Board (OMCB), established under § 3-201 of the General Provisions Article, to receive, review, and comment on complaints from persons alleging violations of the Act by public bodies. Opinions of the board, which are referenced in this section, are advisory only and are not binding on the public body or courts. See *Andy's Ice Cream v. Salisbury*, 125 Md. App. 125, 149 (1999), *cert. denied*, 353 Md. 473 (1999).

Definition of Public Body

The Act defines a "public body" as an entity that consists of at least two individuals and is created by the Maryland Constitution, a State statute, a county charter, a memorandum of understanding or a master agreement to which a majority of the county boards of education and the State Department of Education are signatories, an ordinance, a rule, resolution, or bylaw, an executive order of the Governor, or an executive order of the chief executive authority of a political subdivision of the State. GEN. PROV., § 3-101(h)(1). A public body also includes any multimember board, commission, or committee appointed by the Governor or the chief executive authority of a political subdivision of the State, or appointed by an official who is subject to the policy direction of the Governor or chief executive authority of the political subdivision, if the entity includes in its membership at least two individuals not employed by the State or the political subdivision. GEN. PROV., § 3-101(h)(2).

However, certain entities that might or otherwise would meet the definition of "public body" are specifically excluded. For example, subcommittees of a public body are expressly exempted from the Act unless the subcommittee is created by the Maryland Constitution, a State statute, a county charter, an ordinance, a rule, resolution, or bylaw, or an executive order of the Governor or the chief executive authority of a political subdivision of the State. GEN. PROV., § 3-101(h)(3). A subcommittee meeting, however, will be deemed to be a meeting of the parent public body if a quorum of the members of the parent body attends.

The issue of what constitutes a "public body" for purposes of the Act has been the subject of litigation. In 2006, the Supreme Court of Maryland applied the requirements of the Act to a quasi-public agency in the case of *Baltimore Development Corp. v. Carmel Realty Associates*, 395 Md. 299 (2006). During the decision-making process on a development project by the Baltimore Development Corporation (BDC), the plaintiffs attempted to attend various BDC meetings in accordance with the Act. *Id.* at 313. The BDC, however, denied access to the meetings, arguing that as a private, nonprofit corporation, the BDC was not obligated to permit public access to its meetings. *Id.* Additionally, since the BDC was created by a contract with the City of Baltimore, rather than by law, the BDC argued that the Act should not be applied to it. *Id.* at 322.

Conceding the technical point that the BDC was not an entity created by law as defined in § 3-101(h)(1) of the General Provisions Article, the Supreme Court of Maryland concluded, however, that under § 3-101(h)(2) of the General Provisions Article, the BDC did qualify as a public body because its members were appointed by the mayor. The court reasoned that an entity that possesses "as many public traits as does the BDC is a public body for the purposes of the Open Meetings Act." *Id.* at 329. The court concluded with a warning that it would continue to construe the Act "so as to frustrate all evasive devices relating to any public matter upon which foreseeable public action will be taken." *Id.* at 331. See also *Andy's Ice Cream*, 125 Md. App. at 157-58 (zoo commission public body for purposes of Open Meetings Act despite corporate form and function); See also Op. Atty. Gen.96-011 (February 29, 1996, unpublished) (Maryland School for the Blind not a "public body" due to historical circumstances of statutory charter, absence of government involvement in management, and official recognition of its private character); 4 OMCB Opinions 84 (2004) (Environmental Assessment Committee of the Baltimore County Public Schools not "public body" because County Council merely urged the creation of the

committee; however, would have been "public body" if County Council had the authority to, and established, committee by resolution); 14 OMCB Opinions 1 (2020) (determining that a "public body" was not created through the attendance of county employees at community meetings hosted by their departments).

Definition of Meeting

The Act applies to a meeting of a public body. Under the law, to "meet" means to convene a quorum of a public body for the consideration or transaction of public business. GEN. PROV., § 3-101(g).

In a statement of legislative policy, the Act emphasizes the importance of allowing citizens to observe "the performance of public officials…and…the deliberations and decisions that the making of public policy involves." GEN. PROV., § 3-102(a)(2). Accordingly, the Appellate Court of Maryland has stated "... it is clear that the Act applies, not only to final decisions made by the public body exercising legislative functions at a public meeting, but as well to all deliberations which precede the actual legislative act or decision, unless authorized by [the Act] to be closed to the public." *City of New Carrollton v. Rogers*, 287 Md. 56, 72 (1980). The rationale of the court also applies to briefings and other opportunities for public bodies to receive information. The receipt of information constitutes an important part of the decision-making process that the public must be allowed to observe. 1 OMCB Opinions 206 (1997). In addition, a public body may not escape the requirements of the law by describing a meeting as a "work session," "pre-meeting," or "retreat." In *New Carrollton*, the court stated "... the Act makes no distinction between formal and informal meetings of the public body; it simply covers all meetings at which a quorum of the constituent membership of the public body is convened 'for the purpose of considering or transacting public business'." 287 Md. at 72. This includes discussions conducted by teleconference or videoconference when a quorum is on the call or in the virtual meeting. See 14 OMCB Opinions 72, 73 (2020).

The Act also does not recognize the concept of a partially open meeting. "When the Act requires a meeting to be open, it must be open to all. The Act does not contain an intermediate category of partially open meetings, to which some members of the public are admitted and others excluded." *Bowie v. Bd. of Cnty. Comm'rs of Charles Cnty.*, 203 Md.App. 153, 170 (2012) (internal quotations and citations omitted by Appellate Court of Maryland in its opinion) (violation of the Act occurred when the board conducted a meeting closed to some members of the public at which merits of the case were discussed). Nor does the fact that a meeting occurs on private property exempt a public body that is meeting to conduct public business from the Act's requirements. *Id.*

The Act, however, does not apply to "a chance encounter, social gathering, or other occasion that is not intended to circumvent [the] subtitle." GEN. PROV., § 3-103(a)(2). Accordingly, a quorum of a public body may informally chat before or after a meeting or during a break, if the members discuss matters that are not a part of the decision-making process of the public body. 1 OMCB Opinions 157 (1996). But see 4 OMCB Opinions 63 (2004) (discussion among quorum of members regarding amendment to zoning ordinance that occurred during a recess was a meeting and violated the Act). If a retreat is not used as a guise to evade the law and formal public business

is not conducted, the retreat may be closed. See Md. Att'y Gen., Letter to Frank Gillio (March 26, 1985) and Md. Att'y Gen., Letter to Delegate Dana Lee Dembrow (January 5, 1990). Nor would the Act apply to a "sequential exchange" of email among members of a public body. Like an exchange of regular mail, such correspondence would not invoke the Act since no meeting was technically "convened." A simultaneous email exchange in "real time," however, may very well be found violative of the Act. 81 Op. Atty. Gen. 140 (1996). See also 13 OMCB Opinions 39, 45 (2019) (concluding that a county council's exchanges of emails and texts over a discrete period of time rose to the level of a meeting); 14 OMCB Opinions 33, 37 (2020) (concluding that a series of emails on one topic exchanged over fourteen hours amounted to a meeting of a quorum).

A meeting that begins as a chance encounter exempt from the Act's requirements may transform into a meeting subject to the Act if the nature of discussions changes. "[T]he Act applies, when an event that begins as a chance encounter or social gathering is then used to convey information that constitutes public business within the Act." 7 OMCB Opinions 269, 270 (2011). See also, e.g. 3 OMCB Opinions 30, 34 (2001) (finding that the Act applied when public business within the Act was conducted by an "accidental quorum" created by a member's unexpected appearance); 3 OMCB Opinions 78, 83 (2001) (finding that the Act applied to a social gathering where a nonvoting member told the members how he would present an agenda item at the board's meeting later that evening); 2 OMCB Opinions 74, 76 (1999) (cautioning that a public body meeting socially "must refrain from conducting public business during that time").

Open meeting requirements also apply to private discussions that happen during the course of an open meeting if the criteria for a "meeting" are met. OMCB determined that a public body violated the Act when two members of the public body, during a public meeting of a quorum of at least four members, exchanged text messages about an item of business that the quorum was then discussing. 14 OMCB Opinions 29, 31 (2020).

In the same opinion, OMCB addressed electronic communications that a member had received from a member of the public during the meeting. *Id*. at 31. OMCB noted that '"observing' a meeting could be construed to mean that the public is entitled to know when a nonmember is lobbying a member of the public body to vote a certain way on an item at the very moment when the public body is considering the item." However, the OMCB stated, "the Act only regulates public bodies, and so the unilateral conduct of a lobbyist (or, as here, any other member of the public) is not attributable to the public body unless a quorum of its members somehow participates in it." *Id*. Noting that the facts did not show that the nonmember's communications had influenced the member, OMCB cautioned that "if the facts about another public body were to show such influence, or that a quorum of the members of a public body had been contacted during the meeting about the matter they were considering, we would be concerned that the public had been deprived of the opportunity to observe that, in effect, private access had been permitted during a meeting and out of the public eye." *Id*. OMCB encouraged public bodies to address the practice through meeting rules and advisories to the public. See also 14 OMCB Opinions 83, 84 (2020) ("A public body . . . does not violate the Act by failing to provide members of the public with the ability to offer oral comments during a meeting.").

Function of the Public Body

The Act applies when a public body is carrying out an "advisory function," a "legislative function", or a "quasi-legislative function". The Act defines an "advisory function" as the study of a matter of public concern or the making of recommendations on the matter, under a delegation of responsibility by:

- law;
- the Governor;
- the chief executive officer of a political subdivision of the State; or
- formal action by or for a public body that exercises an executive, judicial, legislative, quasi-judicial, or quasi-legislative function.

GEN. PROV., § 3-101(c).

A "legislative function" means the process or act of:

- approving, disapproving, enacting, amending, or repealing a law or other measure to set public policy;
- approving or disapproving an appointment;
- proposing or ratifying a constitution or constitutional amendment; or
- proposing or ratifying a charter or charter amendment.

GEN. PROV., § 3-101(f).

A "quasi-legislative function" includes rulemaking; approving, disapproving, or amending a budget; and approving, disapproving, or amending a contract. GEN. PROV., § 3-101(j). In some circumstances, a quasi-legislative function may extend to a public body's performance evaluation of an employee whose contract is up for renewal or amendment. See 13 OMCB Opinions 71, 72 (2019) (addressing discussions about school superintendent's performance and contract terms).

The Act does not apply to a public body when it is carrying out an administrative function, a judicial function, or a quasi-judicial function. GEN. PROV., § 3-103(a)(1). An "administrative function" is defined as the administration of:

- a law of the State;
- a law of a political subdivision of the State; or
- a rule, regulation, or bylaw of a public body.

GEN. PROV., § 3-101(b)(1). The Appellate Court of Maryland has followed a two-step test to determine whether a public body has engaged in an administrative function:

> The first step is to evaluate whether the meeting falls within any other function defined in the statute. If it does, the analysis ends because, by definition, the meeting does not involve an administrative function. If the session does not involve one of the other defined functions, the second step is to evaluate whether the public body is involved in the administration of an existing law, rule, or regulation (as opposed to the development of new policy). If it is, the meeting likely involves an administrative function and the [Act] does not apply; if not, the discussion is not an administrative function and the [Act] does apply.

Dyer v. Bd. of Educ. of Howard Cnty., 216 Md.App. 530, 537 (2014) (emphasis and statutory citations removed) (citing 95 Md. Op. Att'y Gen. 152, 155–56 (2010)) (hearing by the Howard County Board of Education's Ethics Panel constituted an administrative function not subject to the Act). See also 90 Op. Att'y Gen. 17 (2005) (advising that hearing held by county board of education involving adverse personnel action by the Superintendent of Schools against an employee is a quasi-judicial function to which Act does not apply); 78 Op. Att'y Gen. 275 (1993) (guidance as to which activities encompassed by term "executive").

However, the Act does apply to a public body when it is meeting to consider granting a license to permit or a special exception, variance, conditional use, zoning classification, the enforcement of any zoning law or regulation, or any other zoning matter. GEN. PROV., § 3-103(b). See also *Wesley Chapel Bluemont Ass'n v. Baltimore Cnty.*, 347 Md. 125 (1997) (county board of appeals required to conduct deliberations on development plan in open session since closely tied to zoning matters).

Application of Rule to the General Assembly

In general, the Act applies whenever a Joint Session of the House of Delegates and Senate, the House of Delegates, the Senate, or a joint, standing, statutory, or conference committee convenes a quorum to approve or disapprove a law or to study or make recommendations on a matter of public concern. See Letter to Delegate Dembrow, *supra*. See also Md. Att'y Gen., Letter to Sheila E. Hixson (February 12, 2001).

There are certain circumstances when the Act does not apply to meetings of members of the General Assembly. The law does not apply when the General Assembly acts as a "judge," for example, in impeachment or election proceedings. *Id.* Furthermore, meetings of an investigating committee of the General Assembly may be closed pursuant to statutory authority. MD. CODE ANN., STATE GOV'T., § 2-1609(c). An "investigating committee" means any standing or joint committee or subcommittee of the General Assembly or a committee or subcommittee of the Legislative Policy Committee that has the power to compel "the attendance and testimony of witnesses or the production of … records." STATE GOV'T., § 2-1601(c). For example, the Joint Committee on the Management of Public Funds has such authority. See STATE GOV'T., § 2-807.

In addition, certain gatherings of legislators and staff do not fulfill the law's definition of "public body" or "meeting" and, therefore, are not subject to the Act. Informal bodies such as the Democratic Caucus, the House and Senate Leadership, and subcommittees of a standing committee are not created by statute, resolution, or rule and, accordingly, are not subject to the Act. See Md. Att'y Gen., Letter of Advice to the Hon. Benjamin L. Cardin (December 10, 1982); Md. Att'y Gen., Letter of Advice to Janet Davidson (December 18, 1986); Letter to Delegate Dembrow, *supra*. If less than a quorum of a committee is present, the law does not apply to a meeting of the committee chairman with other members of the committee or any other subcommittee or group of committee members. GEN. PROV., § 3-101(g). In addition, a gathering of legislators convened by an executive branch officer may be closed. Letter to Delegate Dembrow, *supra*.

Authority to Close a Meeting

A public body may close a meeting if the subject to be discussed relates to one of the specific exceptions in § 3-305(b) of the General Provisions Article, including discussing personnel matters, conducting collective bargaining negotiations or considering matters that relate to the negotiations, considering the investment of public funds or marketing of public securities, considering the acquisition of real property for a public purpose, or consulting with counsel to obtain legal advice. But see 1 OMCB Opinions 1, 5 (1992) (explaining that § 3-305(b)(7) is to be "narrowly construed to cover only the interchange between the client public body and its lawyer in which the client seeks advice and the lawyer provides it"). See also 12 OMCB Opinions 69, 73 (2018) (determining that a town council asking counsel to review the charter did not fall under § 3-305(b)(7)); 13 OMCB Opinions 27, 30-31 (2019) (determining that a town council's receipt of advice on actions the council could take regarding the town's police department employees fell within the exception but that its decision to ask counsel and law enforcement personnel to review the department's policies did not).

Section 3-305(b)(13) of the General Provisions Article may also justify a meeting in closed session; however, the scope of this exception is unclear. This provision authorizes a public body to meet in executive session to "comply with a specific constitutional...requirement that prevents public disclosure about a particular proceeding or matter." "Arguably, the speech and debate privilege of the Maryland Constitution or the 'secrecy' protection of Article III, § 19 ... might justify resort to this exemption, although those constitutional provisions are not normally thought of as 'requirements' with which the legislature or its committees must 'comply.' The Attorney General's Office has never advised a legislative committee to close a proceeding on the basis of this exemption and we understand that it has never been invoked by a committee." See Letter to Delegate Dembrow, *supra*.

Procedural Requirements

Training

Each public body must designate at least one of its employees, officers, or members to receive training on the requirements of the open meetings law. GEN. PROV., § 3-213(b). Within 90 days after being designated as the individual to receive training, the individual is required to complete a class on the requirements of the law that is offered online. GEN. PROV., § 3-213(c).

A public body that meets in closed session on or after October 1, 2017, is prohibited from meeting in closed session unless the public body has designated at least one of its members to receive Open Meetings Act training. GEN. PROV., § 3-213(d)(2). At least one individual designated to receive the training is required to be present at each open meeting of the public body. GEN. PROV., § 3-213(d)(3)(i). If the designated member cannot be present at an open meeting of the public body, the body must complete a specified compliance checklist developed by the Office of the Attorney General and include the checklist in meeting minutes. GEN. PROV., § 3-213(d)(3)(ii).

Notice of an Open or Closed Session

A public body must give reasonable advance notice of an open or closed session. GEN. PROV., § 3-302. Whenever reasonable, the notice must be in writing and include the date, time, and place of the session. GEN. PROV., § 3-302(b). The notice must also include, if appropriate, a statement that a part or all of a meeting may be conducted in closed session. *Id.* In *City of New Carrollton*, 287 Md. at 68-69, the Supreme Court of Maryland ruled that advance written notice of a meeting was adequate even though the notice did not state that the meeting was open to the public.

A public body must make available to the public prior to meeting in an open session an agenda that contains known items of business or topics to be discussed at the portion of the meeting that is open and that indicates whether the public body expects to close any portion of the meeting. GEN. PROV., § 3-302.1(a)(1). If the agenda has been determined at the time the public body gives notice of the meeting, the agenda must be made available at the same time as the notice. GEN. PROV., § 3-302.1(a)(2). Otherwise, most public bodies must make the agenda available as soon as practicable, but no later than 24 hours before the meeting. GEN. PROV., § 3-302.1(a)(3). See also 15 OMCB Opinions 1 (2021) (noting that, in accordance with § 1-302(c), the 24-hour period is to be calculated without regard to Sundays and legal holidays). If a public body is unable to comply with those deadlines because the meeting is scheduled in response to an emergency or any other unanticipated situation, the public body must make available, on request, an agenda within a reasonable time after the meeting occurs. GEN. PROV., § 3-302.1(b). A public body may still alter an agenda after it has been made available to the public. GEN. PROV., § 3-302.1(e).

In 2021, OCMB elaborated on what constitutes an "item of business". The board concluded that the question of whether to adopt a bill on an "emergency basis," such that the bill would become effective on its first reading, was a separate item from the item that the agenda had

described as the first reading of the bill. 15 OMCB Opinions 1, 3-4 (2021). The public body, therefore, had violated § 3-302.1 by failing to include an additional item on the agenda. *Id*.

Decorum

Whenever a public body meets in open session, the general public is entitled to attend. GEN. PROV., § 3-303(a). If the presiding officer determines that the behavior of an individual is disrupting the session, the public body may have the individual removed. GEN. PROV., § 3-303(c). A public body must adopt and enforce reasonable rules regarding the conduct of persons attending its meetings and the videotaping, televising, photographing, broadcasting, or recording of its meetings. GEN. PROV., § 3-303(b). See 5 OMCB Opinions 22, 24 (2006) (standing committee of House of Delegates may not prohibit videotaping at an open meeting, because prohibition is not "reasonable rule" and may not have rule permitting television news to videotape while prohibiting members of public from doing so).

Procedures for Meeting in Closed Session

A public body must follow certain procedures before meeting in closed session. Unless a majority of the members of a public body present and voting vote in favor of closing the session, the public body is prohibited from meeting in closed session. GEN. PROV., § 3-305(d)(1). Accordingly, before the closed meeting occurs, the presiding officer must conduct a recorded vote on the closing of the session and make a written statement of the reason for closing the meeting, including a citation of the statutory authority to do so and a listing of the topics to be discussed. GEN. PROV., § 3-305(d)(2). See 5 OMCB Opinions 14, 18-19 (2006) (presiding officer of closed meeting must complete written statement of reason for closing meeting, including citation of authority and a listing of topics to be discussed; mere repeating of language of applicable statutory justification inadequate). If a person objects to the closing of a session, the public body must send a copy of the written statement to OMCB. GEN. PROV., § 3-305(d)(3).

Records of a Meeting

Generally, as soon as practicable after a public body meets, it must have minutes of its session prepared. GEN. PROV., § 3-306(b)(1). See 5 OMCB Opinions 14, 17 (2006) (public body may not rely on limited staff time or competing priorities to excuse itself from compliance with Act); 4 OMCB Opinions 24, 26 (2004) (two month interval between meeting and disclosure of minutes to the public was "not unreasonable"; however, more than one year interval was "patently unacceptable"). The minutes must reflect each item that the public body considered, the action taken on each item, and each recorded vote. GEN. PROV., § 3-306(c)(1).

If a public body meets in closed session, the minutes for its next open session must include:

- a statement of the time, place, and purpose of the closed session;
- a record of the vote of each member on closing the session;
- a citation of the authority for closing the session; and

- a listing of the topics of discussion, persons present, and each action taken during the session.

GEN. PROV., § 3-306(c)(2).

A public body may record a session. GEN. PROV., § 3-306(c)(3)(i). For most public bodies, minutes are not required if live and archived video or audio streaming of the open session is available or if individual public votes on legislation taken by members of the public body are posted promptly on the Internet. GEN. PROV., § 3-306(b)(2). However, video or audio streaming should be designed in such a way as to capture the identities of speakers and of those voting. See 14 OMCB Opinions 111, 112 (2020) (citing measures that the presiding officer took to ensure that observers of a virtual meeting could identify the speakers). And, in case of a technical difficulty, the public body will need to prepare written minutes in order to comply with § 3-306. See 9 OMCB Opinions 256 (2015).

Except under certain circumstances, the minutes of a public body and any recording of a session must be unsealed and open to public inspection during normal business hours. GEN. PROV., § 3-306(d). A public body may not require a member of the public to submit a written request in order to review publicly-available minutes. 5 OMCB Opinions 14, 16 (2006). A public body must preserve the minutes and any recording of a closed or open session for at least five years after the date of the session. GEN. PROV., § 3-306(e)(1). To the extent practicable, a public body is required to post online the minutes or recordings of an open session. GEN. PROV., § 3-306(e)(2).

Enhanced Open Meeting Requirements

Certain economic development organizations and other specified public bodies such as the Maryland Stadium Authority, Maryland Transportation Authority, Public Service Commission, State Board of Elections, and State Ethics Commission are subject to enhanced requirements under the Act. GEN. PROV., § 3-307. These requirements include (1) making available on the public body's website each open meeting agenda and other specified documents at least 48 hours in advance of a meeting (rather than 24 hours in advance) unless the meeting is being held due to an emergency, natural disaster, or other unanticipated situation; (2) offering live video streaming of each portion of a meeting held in open session (subject to limited exceptions for the Maryland Stadium Authority and the Maryland Transportation Authority); and (3) subject to certain exceptions, preparing both written meeting minutes and making recordings of open meetings available. GEN. PROV., § 3-307(b).

Open Meetings Act Manual

The Office of the Attorney General has prepared an *Open Meetings Act Manual* (11th Edition, October 2022). As explained in the preface to the *Manual*, although "not a substitute for advice from a public body's own counsel" its purpose is to give "public bodies some practical guidance on how to comply with the Act" and provide "members of the media and the public with information on what they may expect." The *Manual* contains information relating to policy and interpretive principles, including applicability of the Act, notice and agendas, open meeting

requirements, permissibility of closed sessions, conditions for closing a meeting, meeting documents, and guidance, enforcement, and training. The Attorney General's website also includes answers to frequently asked questions, a compliance checklist, various other forms, instructions for the training requirement, a link to the online course discussed above under "Training," and an index of the opinions of OMCB.

Enforcement

Open Meetings Law Compliance Board

As noted above, the Act provides for a State Open Meetings Law Compliance Board (OMCB) consisting of three members appointed by the Governor with the advice and consent of the Senate. GEN. PROV., § 3-202. The purpose of OMCB is to review and resolve complaints from any person alleging a violation of the Open Meetings Act. GEN. PROV., § 3-204(a). In addition, OMCB will review allegations of a prospective violation of the law by a public body and advise the body on how it may comply with the law. GEN. PROV., § 3-204(b).

Any person may file a complaint with OMCB seeking a written opinion on the application of the Act to the action of a public body. GEN. PROV., § 3-205. On receipt of the complaint, OMCB must send the complaint to the public body and request that a response be sent to OMCB. GEN. PROV., § 3-206(a). The public body must file a written response to the complaint within 30 days after receipt and, on request of OMCB, must include the following with its written response: a copy of the written notice of the meeting; a written statement describing the reason for closing the meeting, if any; and the minutes and any recording of the meeting. GEN. PROV., § 3-206(b). If the public body has not filed a written response within 45 days, OMCB must decide the case on the facts before it. GEN. PROV., § 3-206(d). As noted above, the opinions of OMCB are advisory only. GEN. PROV., § 3-209. Accordingly, OMCB may not require or compel any specific actions by a public body. GEN. PROV., § 3-210. Furthermore, an opinion of OMCB may not be introduced as evidence in a court proceeding. But see *Andy's Ice Cream,* 125 Md. at 149 (although not precedent or in any way binding, court may review an opinion of OMCB for "limited purpose of its legislative analysis"). Nevertheless, public bodies and officials may seek and follow the recommendations of OMCB, and OMCB can provide quick and inexpensive resolutions to questions concerning the application of the Act to specific situations.

Litigation

If a public body fails to comply with the Act, any person may file in circuit court a petition requesting a court to:

- determine the applicability of the law;
- require the public body to comply with the law; or
- void the actions of the public body.

GEN. PROV., § 3-401(b)(1).

In order to void an action taken by a public body, the court is required to make a finding that the body willfully failed to comply with the Act and that no other remedy is adequate. GEN. PROV., § 3–401(d)(4); *Wesley Chapel Bluemont Ass'n*, 347 Md. at 149. See also *Cmty. & Labor United for Baltimore Charter Comm. v. Balt. City Bd. of Elections,* 377 Md. 183, 196-197 (2003) (Baltimore City Council willfully failed to comply with the Act and the appropriate remedy was to declare the action of the Council void). For a violation to be "willful," the violation must be knowing and intentional. See *Frazier v. McCarron*, 466 Md. 436, 453 (2019). In *Frazier*, the Supreme Court of Maryland elaborated:

> By "intentional," we mean deliberate – other than inadvertent – and by "knowing" we mean knowledge that the act or omission violates a mandatory provision of [the Open Meetings Act]. That is consistent with the statutory language applicable to civil penalties and not inconsistent with a reasonable contextual meaning of "willful" in § 3-401(d)(4) applicable to the voiding of public body actions. This standard does not require that the violation be for any nefarious or corrupt purpose.

Id. Moreover, the court noted that violations of the Act are neither "technical" in nature, nor are they ever "harmless." *Id*. at 449. However, "[t]hat does not mean that an axe must fall upon every, or any particular, violation. The Maryland Legislature wisely provided a range of remedial and punitive options … and, subject to those conditions, left the choice largely to the discretion of the court." *Id*.

A court may assess against any party reasonable counsel fees and other litigation expenses incurred by the prevailing party. GEN. PROV., § 3-401(d)(5)(i). But see *Baltimore Cnty. v. Wesley Chapel Bluemount Ass'n,* 128 Md. App. 180, 186-191 (1999) (since not mandatory, no presumption of attorney fee award to prevailing party). A person may file a petition in circuit court without seeking an opinion from OMCB. GEN. PROV., § 3-401(e)(1). The failure of a person to file a complaint with OMCB is not a ground for the court to either stay or dismiss a petition. GEN. PROV., § 3-401(e)(2). Under § 3-401(a)(2) of the General Provisions Article, a court may not void an action of one public body because of a violation of the Act by another public body. The Office of the Attorney General has interpreted this provision to mean that legislation enacted by the General Assembly may not be voided because one of the General Assembly's committees failed to comply with the Act. Letter to Delegate Dembrow, *supra*.

The provisions for enforcement of the law do not apply to an action that:

- appropriates public funds;
- levies a tax; or
- provides for the issuance of bonds, notes, or other evidences of public obligation.

See *Bd. of Cnty. Comm'rs v. Landmark Cmty. Newspapers of Md., Inc.*, 293 Md. 595, 599 (1982) (board of county commissioners' budget work session within appropriations exception); *Avara v.*

Baltimore News Am., 292 Md. 543, 552-54 (1982) (Budget Conference Committee budget bill deliberations excepted from the Act); and Letter to Delegate Dembrow, *supra*.

Although the Supreme Court of Maryland has addressed the application of the Act to certain proceedings of the General Assembly, questions concerning the immunity from suit of legislators and the discretion of legislators to close meetings remain unanswered by the court.

In *Avara,* the Baltimore News American brought suit against Delegate R. Charles Avara and other members of the House-Senate Budget Conference Committee seeking a declaratory judgment that meetings of all conference committees were required to be open under the Act. The Supreme Court of Maryland held that a conference committee is a public body that is subject to the Act. 292 Md. at 550-51. The court also concluded, however, that the deliberations of the Budget Conference Committee were essential to the process of enacting the Budget Bill and, therefore, constituted "an action appropriating public funds" within the meaning of § 10-510(a)(1)(i) of the State Government Article (now § 3-401(a)(1)(i) of the General Provisions Article). *Id.* at 552. Accordingly, the court held that the lower court lacked jurisdiction to declare the closed session illegal because the statute expressly precluded civil enforcement of the law against an action appropriating public funds. *Id.*

In *Avara*, the Attorney General raised questions as to whether the Speech and Debate Clauses of the Maryland Constitution and Declaration of Rights render the provisions of the Act inapplicable to members of the General Assembly and vest unreviewable discretion in its members to close committee meetings. *Id.* at 554, n. 7. Since the Supreme Court of Maryland was able to decide the case on other grounds, however, it was able to adhere to its "policy of not deciding constitutional issues unnecessarily." *Id.* There has been no further test, to date, of the applicability of the Act to the General Assembly.

Although the extent of civil enforcement of the Act against the General Assembly and its members remains unclear and the Maryland Constitution arguably grants discretion to the members of the General Assembly to conduct proceedings in private, both the leadership of the General Assembly and the Office of the Attorney General have consistently advised the members of the General Assembly to seek compliance with the Act.

Civil Penalties

A member of a public body who willfully participates in a meeting of the body with knowledge that the meeting is being held in violation of the provisions of the Act is subject to a civil penalty not to exceed $250 for a first violation and $1,000 for each subsequent violation occurring within three years of the first violation. GEN. PROV., § 3-402(a).

Public Information Act

Rule

With certain exceptions, custodians of public records must allow persons and governmental entities to inspect the records at any reasonable time. Official custodians must designate types of records that are to be made available immediately on request and maintain a list of those records.

Discussion

Since 1970, the Public Information Act has provided that "[a]ll persons are entitled to have access to information about the affairs of government and the official acts of public officials and employees." MD. CODE ANN., GEN. PROV., § 4-103(a). However, the Act does limit the right to access records by exempting specified public records and specific information from disclosure, while also allowing disclosure of certain information to be denied if inspection would be contrary to the public interest. The Act also provides for various enforcement mechanisms.

Scope of the Public Information Act

The Public Information Act covers virtually all public agencies and officials in the State in all branches of State government. It also covers political subdivisions (*i.e.* counties, municipal corporations, school districts, special districts, and unincorporated towns), as well as units and instrumentalities of the State or a political subdivision. GEN. PROV., § 4-101. See, *e.g. Moberly v. Herboldsheimer*, 276 Md. 211, 225 (1975) (Memorial Hospital of Cumberland is subject to the PIA as an instrumentality of the City of Cumberland).

All public records are covered by the Act. The scope of what comprises public records is broad. It includes any record made by a unit or an instrumentality of the State or of a political subdivision or received by the unit or instrumentality in connection with the transaction of public business and is in any form, including a computerized record, correspondence, a map, and a recording. GEN. PROV., § 4-101(k)(1). See *Lamson v. Montgomery County*, 460 Md. 349, 362 (2018) ("Because the [PIA] is designed to grant access to documents regarding the affairs of government and the official acts of public officials, it follows that the definition of a public record should be broad enough to cover a wide range of document types."). See also *e.g.* 92 Op. Atty. Gen. 26, 29 (2007) ("public record" includes police mug shots); 81 Op. Atty. Gen. 140, 144 (1996) ("public record" includes e-mail messages retained in the computer's storage); 71 Op. Atty. Gen. 288, 290, 296 (1986) (recordings of calls to 911 Emergency Telephone System centers are public records, but portions of the recordings may be withheld under certain exceptions to disclosure); 73 Op. Atty. Gen. 12, 24-25 (1988) ("public record" includes letters received by the Department of Agriculture regarding the gypsy moth program, but the deletion of certain information might be required). However, digital photographic images or signatures of individuals or actual stored data of the image or signature recorded by the Motor Vehicle Administration and records or any

information submitted to the Public Access Ombudsman or the State Public Information Act Board are specifically excluded from being a public record under the Act. GEN. PROV., § 4-101(k)(3).

Custodians and Rights of Access

A custodian of a public record can either be the official custodian (*i.e.* the officer or employee who is responsible for keeping a public record, whether or not the officer or employee has physical custody and control of a public record) or another authorized individual who has physical custody and control of a public record. GEN. PROV., § 4-101. See also 65 Op. Atty. Gen. 365, 366, 369 (1980) (An agency official or employee who is not entitled by law to possess agency records may still become a "de facto" custodian and, therefore, become "authorized" when he or she in fact has assumed custody of public records.) A custodian is required to allow a person or governmental unit to inspect any public record at any reasonable time, except as otherwise provided by law. Additionally, official custodians are required to (1) adopt reasonable rules and regulations that govern timely production and inspection of public records; (2) designate types of public records of the governmental unit that are to be made available to any applicant immediately on request; and (3) maintain a current list of the types of public records that have been designated as available to any applicant immediately on request. GEN. PROV., § 4-201.

A person seeking to inspect a public record must submit a written application to the custodian unless the record is designated as the type to be available immediately on request or the custodian waives the requirement. If the individual to whom the application is submitted is not the custodian of the public record, the individual must give the applicant notice of that fact within 10 working days after receiving the application along with the name of the custodian and the location or possible location of the public record, if known. When an applicant requests to inspect a public record and a custodian determines that the record does not exist, the custodian is required to notify the applicant of this determination immediately, in the case where the custodian has reached this determination on initial review of the application, or if a search for potentially responsive public records has been conducted, promptly after the search is completed but not more than 30 days after receiving the application. GEN. PROV., § 4-202.

Often, a person in interest is given greater right of access to certain records or information. A person in interest is a person or governmental unit that is the subject of a public record or a designee of the person or governmental unit; the parent or legal representative of the person if the person has a legal disability; or, as to requests for correction of certificates of death the spouse, the adult child, parent, adult sibling, grandparent, or guardian of the person of the deceased at the time of the deceased's death. GEN. PROV., § 4-101(g). Examples of records with respect to which a person in interest is given a greater right of access include personnel records (GEN. PROV., § 4- 311(b)), retirement records (GEN. PROV., § 4-312(b)), student records (GEN. PROV., § 4-313(b)), medical or psychological information (GEN. PROV., § 3-229(c)), licensing information (GEN. PROV., §§ 4-333(d) and 4-334(b)), financial information, (GEN. PROV., § 4-336(c)), examination information (GEN. PROV., § 4-345(b)), and records pertaining to investigations (GEN. PROV., § 4-351(b)).

With the exception of determining the status of an applicant as a person in interest or as otherwise required by law, a custodian is prohibited from conditioning the grant of an application

on the identity of the applicant, any organizational or other affiliation of the applicant, or a disclosure by the applicant of the purpose for an application. GEN. PROV., § 4-204(a). Generally the purpose for a request is not relevant. See *Moberly v. Herboldsheimer*, 276 Md. 211, 227-28 (1975) (upholding the circuit court's finding that it is not necessary to decide motives); 61 Op. of the Atty. Gen. 702, 709 (1976) ("…there is nothing in the statue indicating a legislative intent that the purpose of the inspection has any bearing on the right of the person to inspect where the right exists"). However, in 2021, the Act was amended to allow custodians to file complaints with the State Public Information Act Compliance Board alleging that an applicant's requests or patterns of requests are frivolous, vexatious, or in bad faith. GEN. PROV., § 4-1A-04(b).

Exceptions to Disclosure

The general right of access granted by the Act has a number of limits and exceptions. Generally, the Act must be construed in favor of allowing inspection of a public record unless an unwarranted invasion of the privacy of a person in interest would result. GEN. PROV., § 4-103(b). See also *Glenn v. Maryland Dep't of Health & Mental Hygiene*, 446 Md. 378, 385 (2016)("The ability to rebut the [disclosure] presumption is not to be construed liberally…."); and *Police Patrol Sec. Sys., Inc. v. Prince George's County*, 378 Md. 702, 717 (2003) (the statutory language regarding the construction of the Act "directs that the Act be construed more narrowly, and its exemptions more broadly, when privacy issues are at stake"). More than one exception may apply to a public record, and the exceptions are not mutually exclusive.

Generally, a custodian is required to deny inspection of a public record or any part of a public record if the public record is privileged or confidential by law or inspection would be contrary to State statute, federal statute or regulation, a rule adopted by the Appellate Court, or an order of a court of record. GEN. PROV., § 4-301(a). For members of the General Assembly and legislative staff, legislative privilege may apply to certain records and, therefore, shield them from disclosure.

Required Denials of Specific Records

Custodians are required to deny inspections of specific public records unless allowing inspection is otherwise required by law. The specific records to which the denial requirement applies include welfare records, personnel records, retirement records, student records, school safety plans, policies, and guidelines, and firearm and handgun records. GEN. PROV., Title 4, Subtitle 3, Part II.

Required Denials of Specific Information

In addition to denying inspection of certain public records in full, the Act also requires the denial of the inspection of the part of a public record that contains certain information, while allowing the inspection of the rest of the public record. Examples of information that must be redacted from a public record include certain medical or psychological information, social security numbers, information relating to an individual's finances (not including the salary of a public employee), and certain distribution lists used by governmental entities or elected officials. GEN. PROV., Title 4, Subtitle 3, Part III.

Discretionary Denials

If a custodian believes that inspection of a part of a public record would be contrary to the public interest, the custodian *may* deny inspection by the applicant of that part of the record as allowed under the Act. These records include (1) testing records for academic, employment, or licensing examinations; (2) records of investigation, intelligence information, security procedures, or investigatory files; (3) records of a public institution of higher education that contain personal information about a student, former student, or an applicant; and (4) records of 911 communications that depict a victim of domestic violence, sexual abuse, or child abuse. GEN. PROV., Title 4, Subtitle 3, Part IV.

Temporary Denials

In cases where public inspection is authorized by law but the custodian believes that inspection would cause substantial injury to the public interest, the official custodian has a "last resort" whereby the custodian may deny inspection temporarily and petition a court to approve continued withholding of the record. GEN. PROV., § 4-358.

Copies

If an applicant who is authorized to inspect a public record requests a copy, printout, or photograph of the public record, the custodian is required to provide one, or allow the applicant access to the public record to make the requested copy, printout, or photograph, if the custodian does not have the necessary facilities to reproduce the public record. Additionally, a custodian is required to provide a copy of the public record in a searchable and analyzable electronic format if (1) the public record is in a searchable and analyzable electronic format; (2) the applicant requests a copy of the public record in a searchable and analyzable electronic format; and (3) the custodian is able to provide a copy of the public record, in whole or in part, in a searchable and analyzable electronic format that does not disclose information for which the custodian is required to deny inspection, or for which the custodian has chosen to deny inspection under the applicable provisions of the Act. If the custodian is providing the public record in a searchable and analyzable electronic format, the custodian may remove metadata before the record is provided. GEN. PROV., § 4-205.

Fees

An official custodian may charge an applicant a reasonable fee for (1) the search for, preparation of, and reproduction of a public record prepared, on request of the applicant, in a customized format; and (2) the actual costs of the search for, preparation of, and reproduction of a public record in standard format, including media and mechanical processing costs. GEN. PROV., § 4-206(b)(1). See 71 Op. Atty. Gen. 318, 329 (1986) ("We think that the most appropriate method for arriving at the "reasonable charge" is to charge the actual costs incurred by the Division. The goal in this regard should be for the State neither to make a profit nor to bear a loss on the cost of providing information to the public.") However, an official custodian may not charge a fee for the first two hours that are needed to search for a public record and prepare it for inspection. GEN. PROV., § 4-206(c).

An applicant may request a waiver of fees. An official custodian may waive any fee if the applicant requests and either the applicant is indigent and files an affidavit of indigency or, after consideration of the ability of the applicant to pay the fee and other relevant factors, the official custodian determines that the waiver would be in the public interest. Determining public interest includes determining whether there is a public purpose for the information request. While the decision to grant or deny a fee waiver is discretionary, it may not be made arbitrarily or capriciously. GEN. PROV., § 4-206(e). See *Action Comm. for Transit, Inc. v. Town of Chevy Chase,* 229 Md. App. 540, 561-64 (2016).

Enforcement

State Public Information Act Compliance Board

The Act provides for the State Public Information Act Compliance Board, which is composed of five members who either have certain experience related to the Act or are private citizens. GEN. PROV., § 4-1A-02. The board is tasked with receiving, reviewing, and resolving complaints filed from applicants alleging a custodian denied inspection of a public record in violation of the Act, charged an unreasonable fee of more than $350, or failed to respond to a request for a public record within the time limits established by the Act. The board also receives, reviews, and resolves complaints filed by a custodian alleging that an applicant's request or pattern of requests is frivolous, vexatious, or in bad faith. After considering a complaint, the board is required to issue a written decision as to whether a violation occurred and, depending on the violation, order the custodian to take action to resolve the complaint (such as producing the public record for inspection or reducing the fee to an amount determined by the board to be reasonable and refunding the difference) or authorize the custodian to ignore the request that is the subject of the custodian's complaint or respond to a less burdensome version of the request within a reasonable time frame, as determined by the board. GEN. PROV., § 4-1A-04.

However, before filing a complaint with the board, the applicant or custodian must attempt to resolve the dispute through the Office of the Public Access Ombudsman and the Public Access Ombudsman must have issued a final determination stating that the dispute was not resolved. GEN. PROV., § 4-1A-05(a). On receipt of a complaint, the board is required to promptly send the complaint to the applicant or custodian identified in the complaint and request that a response be sent to the board within 30 calendar days after receipt of the complaint from the board. A custodian identified in a complaint, on request of the board, is required to provide certain information in the request depending on what violation is being alleged. GEN. PROV., § 4-1A-06(a) and (b)(1).

If the complaint alleges that the custodian denied inspection of a public record under a federal statute or regulation, the custodian is prohibited from being required to produce the public record for board review. However, the board may request information about the public record from the custodian or require a custodian or an applicant to provide an affidavit or a statement containing the facts that are at issue in the complaint. The board is also required to maintain the confidentiality of any record or information submitted by a custodian or an applicant. GEN. PROV., § 4-1A-06(b)(3), (4), and (5).

A custodian may not be civilly or criminally liable for providing or describing a public record to the board. Additionally, the provision of a record or a description of a record to the board may not be construed as a waiver of any applicable privilege. GEN. PROV., § 4-1A-06(b)(6) and (7).

On receipt of any written response and all information requested from an applicant or custodian identified in a complaint, the board must issue a written decision within 30 calendar days. The board may hold an informal conference to hear from the parties if needed. In cases where the board elects to hold an informal conference, the board is required to issue a written decision within 30 calendar days after the conference. However, where the board is unable to issue a decision within these 30 day windows, the board is required to state in writing the reason for its inability, and to issue a decision as soon as possible but not later than 120 days after the filing of the complaint. Note that a decision of the board may state that the board is unable to resolve the complaint. GEN. PROV., § 4-1A-07.

Compliance by a custodian with an order of the board is not an admission to a violation of the Act by the custodian and may not be used as evidence in a proceeding conducted during judicial review. GEN. PROV., § 4-1A-09. Additionally, a complainant or custodian may appeal a decision issued by the board to the circuit court. This will automatically stay the decision pending the circuit court's decision. GEN. PROV., § 4-1A-10. However, in cases where the board issues a decision stating that the complaint may not be resolved, the board's decision cannot be appealed. GEN. PROV., § 4-1A-09(c)(2)(ii).

Public Access Ombudsman

The Act also provides for the Public Access Ombudsman who is appointed by the Attorney General and serves a four-year term. GEN. PROV., § 4-1B-03. The Ombudsman is required to hear and make reasonable attempts to resolve disputes between applicants and custodians relating to request for public records, including disputes over the application of an exemption, redactions, overly broad requests, and requests for or denials of a fee waiver. GEN. PROV., § 4-1B-04(a).

Within 90 calendar days after receiving a request for dispute resolution and unless the parties mutually agree to extend the deadline, the Ombudsman is required to issue a final determination stating whether the dispute has been resolved. If the Ombudsman issues a final determination stating that the dispute has not been resolved, the Ombudsman must inform the applicant and the custodian of the availability of review. The Ombudsman is prohibited from compelling a custodian to disclose public records or redacted information in the custodian's physical custody to the Ombudsman or an applicant or disclosing information received from an applicant or custodian without written consent from the applicant or custodian. However, despite general confidentiality requirements, the Ombudsman is authorized to disclose information to the assistant Attorney General assigned to the Office of the Ombudsman or to any other person working under the direction of the Ombudsman and transfer basic information about a dispute, including the identity of the applicant and custodian and the nature of the dispute, to the board if appropriate steps have been taken to protect the confidentiality of communications made or received in the course of attempting to resolve the dispute. GEN. PROV., § 4-1B-04(b), (c), and (d).

Judicial Review

A person or governmental unit who is denied inspection of a public record or is not provided with a copy, printout or photograph of a public record as requested may file a complaint with the circuit court. Additionally, as noted above, a complainant or custodian may appeal a decision of the board. An applicant or custodian is not required to bring a dispute to the Ombudsman or the board before seeking judicial review. GEN. PROV., § 4-362.

Liability and Penalties

A person, including an officer or employee of a governmental unit, is liable to an individual for actual damages that the court considers appropriate if the court finds by clear and convincing evidence that the person willfully and knowingly allowed inspection or use of a public record in violation of the Act and the public record names or, with reasonable certainty, otherwise identifies the individual by an identifying factor, including an address, a fingerprint or voice print, or a picture. Another ground for liability is where a person willfully and knowingly obtains, discloses, or uses personal information in violation of § 4-320 of the General Provisions Article. GEN. PROV., § 4-401(2). The Act also establishes criminal penalties for violations. A person who willfully or knowingly violates any provision of the Act, fails to petition a court after temporarily denying inspection of a public record, or by false pretenses, bribery, or theft, gains access to or obtain a copy of a personal record if disclosure of the personal record to the person is prohibited by the Act is guilty of a misdemeanor and on conviction is subject to a fine not exceeding $1,000. GEN. PROV., § 4-402.

Right to Correction of Public Records

A person in interest may request that a unit of the State correct inaccurate or incomplete information in a public record that the unit keeps and the person in interest is authorized to inspect. Within 30 days after receiving a written request for correction or amendment, the agency must inform the requester that the requested change has been made or give written notice of the agency's refusal and the reason for it. If a request is refused, the person may file with the unit a statement of the reasons for the requested change and for the disagreement with the unit's decision. The unit must then include this statement in any disclosure of the public records to a third party. If the unit is subject to the contested case procedures of the Administrative Procedure Act, the person may seek administrative and judicial review of the agency's decision to deny the requested change or the right to submit a statement of disagreement or of any failure by the unit to provide the statement to a third party. GEN. PROV., § 4-502.

Public Information Act Representatives and Public Information Act Manual

Each governmental unit that maintains public records is required to identify a representative who a member of the public should contact to request a public record from the governmental unit and maintain contact information for that representative on the unit's website, or in a place easily accessible by the public if the unit does not have a website. GEN. PROV., § 4-503. Additionally, the Office of the Attorney General publishes a *Public Information Act*

Manual, which is available on the Office's website. The *Manual* contains information relating to the various elements of the Act, along with sample request, 10-Day, or denial letters, model regulations, a suggested process for responding to requests under the Act, and information on Public Information Act representatives.

Legislative Immunity

I. Legislators and Staff

Rule

Legislative immunity, established by common law and embodied in the Maryland Constitution, shields State and local legislators, staff, and certain others in the legislative process from civil suits resulting from acts taken or statements made during the legislative process, or within the legitimate sphere of legislative activity. The immunity extends to words spoken or votes taken in committee hearings and proceedings, and to the contents of committee reports.

Legislative immunity does not, however, extend to acts that are not an integral part of the legislative process, even if taken as part of the legislator's duties. Such unprivileged acts include the republication of otherwise privileged speech in a news release or constituent newsletter, and communication between a legislator and a member of the executive branch.

Discussion

The purpose of legislative immunity is to:

> … insure that the legislative function may be performed independently without fear of outside interference …. To preserve legislative independence, we have concluded that "legislators engaged 'in the sphere of legitimate legislative activity' … should be protected not only from the consequences of litigation's results but also from the burden of defending themselves."

Montgomery Cnty. v. Schooley, 97 Md. App. 107, 116 (1993) (quoting *Supreme Court of Va. v. Consumers Union*, 446 U.S. 719, 731-32 (1980)).

In *United States v. Mandel*, 415 F. Supp. 1025 (D. Md. 1976), the Federal District Court for Maryland stated that "[o]nly if a legislator is shielded from civil proceedings which disrupt and question his performance of legislative duties can he fully apply his best efforts and attention to the legislative matters with which he is entrusted." *Id*. at 1027–1028.

Legislative immunity dates back to at least 1688 and the English Bill of Rights. In 1766, legislative immunity was incorporated in Article 10 of the Maryland Declaration of Rights, which provides "[t]hat freedom of speech and debate, or proceedings in the legislature, ought not to be impeached in any Court of Judicature." The Speech and Debate Clause of the U. S. Constitution, Article 1, Section 6, contains similar language, providing that "... any speech or debate in either House, ... shall not be questioned in any other place." Because of the common derivation and

purpose of the State and federal speech and debate clauses, the legislative privilege embodied in the two clauses should be read in *pari materia*. *Blondes v. State*, 16 Md. App. 165, 175 (1972). In fact, the common law privilege underlying the federal speech and debate clause shields state legislators in the performance of their legislative duties. See, *e.g.*, *Tenney v. Brandhove*, 341 U.S. 367 (1951).

In light of the absolute legislative privilege, the Attorney General's office has advised the General Assembly that no records should be publicly disclosed to the extent that records relate to legislative activities. A legislator may waive privilege by introduction of a bill or amendment in public session. Only that particular record, however, not any other records of communication (drafts, notes, emails, etc.) by the legislator or staff is waived unless explicitly done so by the legislator.

Maryland courts have, in turn, recognized that the protections of this principle extend to local officials serving in a legislative capacity. See *Manders v. Brown*, 101 Md. App. 191, 205 (1994) (distinguishing conduct by city officials alleged to be outside legislative process); *Schooley,* 97 Md. App. at 115 ("beyond dispute" that municipal legislators enjoy protection of immunity when acting in sphere of legitimate legislative activity).

As to the scope of the privilege, the "legislative acts" to which it applies are not all-encompassing. The speech and debate clause clearly protects statements made on the floor of either House. However:

> [i]nsofar as the Clause is construed to reach other matters, *they must be an integral part of the deliberative and communicative processes* by which Members participate *in committee and House proceedings* with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House.

Hutchinson v. Proxmire, 443 U.S. 111, 126 (1979) (emphasis added by *Hutchinson* Court) (quoting *Gravel v. United States*, 408 U.S. 606, 625 (1972)).

Thus, the following activities have been held to be protected:

- exercising veto power, *Mandel v. O'Hara*, 320 Md. 103, 134 (1990) (exercise of veto power by Governor is legislative act entitling the Governor to absolute immunity);

- participating in committee proceedings, investigations, and reports, see *Tenney,* 341 U.S. at 377-78;

- issuing subpoenas pursuant to committee investigations, *Eastland v. U. S. Serviceman's Fund*, 421 U.S. 491, 504 (1975);

- distributing reports to members for legislative purposes, *Doe v. McMillan*, 412 U.S. 306, 312 (1973); and

- writing and delivering speeches, *United States v. Johnson*, 383 U.S. 169, 180 (1966).

It should be noted that the privilege is strictly construed, and that efforts by legislators to inform or communicate with either their constituents or members of the executive branch may not be protected. Only those acts that are integrally related to the legislative process, such as participating directly in house or committee proceedings, will be protected. Indeed, not only must the act occur as part of the legislative process, it must be in relation to the business before the body. See *Kilbourn v. Thompson*, 103 U.S. 168 (1881).

Thus, activities that have been held not to be protected include:

- writing a letter on Congressional stationery to the Attorney General claiming that a legal aid attorney was obstructing child support enforcement laws, *Chastain v. Sundquist*, 833 F.2d 311, 314 (D.C. Cir. 1987);

- issuing a press release and telephoning members of the executive branch to complain of alleged wasteful spending by the executive, *Hutchinson*, 443 U.S. at 131;

- conducting a personal investigation, unrelated to congressional business, of a company, *Steiger v. Superior Court for Maricopa Cnty.*, 536 P.2d 689, 692 (1975); and

- republishing otherwise protected speech, outside of the house floor, see *Hutchinson*, 443 U.S. at 127 and *Chastain*, 833 F.2d at 314.

While legislative immunity does not bar a state or federal prosecution, the immunity does bar the introduction of evidence of legislative acts, such as how a legislator voted, as part of the prima facie case of illegal conduct. *Blondes*, 16 Md. App. 165. There have, however, been challenges to this immunity.

In *Floyd v. Baltimore City Council*, 241 Md. App. 199, 213 (2019), the doctrine was challenged as being in conflict with the Open Meetings Act, due to the "application of legislative privilege … [stripping] the Act of all force and purpose." *Id* at 213. While the Appellate Court of Maryland acknowledged the potential perception of tension between the Act and the doctrine, it refused to adjudicate the conflict, seeing it as a political question, stating that "even if we perceived a tension between the doctrine of legislative privilege and the requirements of the Act, a judicial carve-out of an exception to the application of that doctrine in such cases would be inappropriate. That, in our view, would be a policy issue to be addressed by the General Assembly and not by the courts." *Id.* at 214.

The doctrine of legislative immunity also applies to legislative staff members, officers, or other employees of a legislative body. In *Marylanders For Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292 (D.Md. 1992), the Federal District Court for Maryland stated that "[the] immunity enjoyed by legislative staff derives from the individual legislators themselves: to the extent a legislator is immunized, his staffers are likewise 'cloaked.'" *Id*. at 298 *(*citing *Gravel v. United States*, 408 U.S. 606, 618 (1972) (since day-to-day work of personal staff is so critical to

legislator's performance, they must be considered lawmaker's "alter-ego" for purposes of immunity)). See also *Eastland*, 421 U.S. at 508 (chief counsel of Senate subcommittee who issued subpoena as part of congressional investigation immune because issuance of subpoena is "essential to legislating"); *In re 2022 Legislative Districting of the State, 481 Md. 507, 518* (Department of Legislative Services' drafting process is protected by legislative immunity due to the Department being an agency of the General Assembly and the drafting of legislation being legislative conduct protected by the *Speech and Debate Clause*).

The privilege may also protect public officials and State personnel engaged in "legislative acts." See*, e.g.*, *O'Hara*, 230 Md. 103; *Consumers Union*, 446 U.S. 719 (Supreme Court of Virginia entitled to legislative immunity when exercising state's legislative power of regulating Virginia bar); *Hernandez v. City of Lafayette*, 643 F.2d 1188(1981) (mayor of municipality entitled to legislative immunity when vetoing local legislation); *Bd. of Trs. v. Fineran*, 75 Md.App. 289 (1988) (no liability for individual board of trustee members of State colleges and universities who acted in good faith on letter of resignation).

The Supreme Court of Maryland has held that because the issuance of regulations is a quasi-legislative function, agencies engaged in such an act are entitled to absolute immunity. See *Md. Bd. v. Armacost*, 286 Md. 353, 355-356 (1979). See also *Jayvee Brand Inc. v. United States*, 721 F.2d 385 (D.C. Cir. 1983) (Consumer Product Safety Commission enjoys absolute immunity in exercising quasi-legislative regulatory authority); 81 Op. Att'y Gen., 240, 249 (June 24, 1996). Therefore, it is not necessary that "all legislative power be delegated as a condition precedent to the [delegate's] enjoying legislative immunity." *O'Hara*, 320 Md. at 131.

II. Legislative Witnesses

Rule

There is a qualified privilege for a statement made by a witness appearing before a legislative body, provided the statement is in the course of the witness petitioning for a redress of grievances before the body, and is relevant to and part of that petition. In general, this qualified privilege protects all statements except knowing or reckless false statements.

Discussion

Until 1985, statements made by a witness testifying before a legislative body were absolutely privileged. See, *e.g., Sherrard v. Hull*, 53 Md. App. 553 (1983). The source of the privilege was not the legislative or official immunity enjoyed by legislators but rather the Petition Clause contained in the First Amendment to the U.S. Constitution. The Petition Clause provides that "Congress shall make no law...abridging...the right of the people...to petition the Government for a redress of grievances." U.S. CONST. amend. I. In *Sherrard*, the defendant appeared before the Cecil County Board of County Commissioners to complain of an earlier action of the board in which the plaintiff's rezoning application was approved. During her appearance the defendant

stated, in reference to the vote by one of the commissioners in favor of the application, "I would like to know how much money it cost [the plaintiff]." In affirming a judgment for the defendant in the plaintiff's defamation action, the Appellate Court of Maryland held:

> [R]emarks made by an individual in the course of petitioning for a redress of grievances before a legislative body are absolutely privileged under the First Amendment to the United States Constitution. So long as the individual's comments are not part of a sham and are relevant to his petition and thus are uttered as a part of or in conjunction with it, he may not be held liable in damages for defamation.

53 Md. App. at 555.

While many other courts recognize this immunity, not all have done so under the First Amendment. See, *e.g., City of Long Beach v. Bozek*, 31 Cal.3d 527, 83 Cal.Rptr. 86, 645 P.2d 127 (1982); *In Re IBP Confidential Bus. Documents Litig.*, 755 F.2d 1300 (8th Cir. 1985); *Bio/Basics Int. Corp. v. Ortho Pharm. Corp.,* 545 F. Supp. 1106 (S.D.N.Y. 1982) (applying common law of New York).

The holding of *Sherrard* was limited in 1985, when the U.S. Supreme Court in a North Carolina case rejected a claim that the Petition Clause provided an absolute immunity to individuals seeking a redress of grievances. *McDonald v. Smith*, 472 U.S. 479, 484 (1985). The court found that the rights afforded by the Petition Clause were "cut from the same cloth" as the other First Amendment rights, such as the freedom to speak, publish, and assemble. *Id*. at 482. Since those rights have been found not to be absolute, the right to petition under the Petition Clause also provides only qualified immunity. *Id*. at 485. Statements made while seeking a redress of grievances, therefore, are not privileged if they constitute knowing or reckless falsehoods. *Id*. The Supreme Court of Maryland has specifically recognized the limitation the U.S. Supreme Court holding in *McDonald* places on *Sherrard*. See *Miner v. Novotny*, 304 Md. 164, 170 (1985).

The immunity of a witness is also qualified with regard to testimony given at an administrative proceeding. Whether it applies depends upon two factors "(1) the nature of the public function of the proceeding and (2) the adequacy of procedural safeguards ...". *Id*. at 172 (quoting *Gersh v. Ambrose*, 291 Md. 188, 197 (1981)). In *Reichardt v. Flynn*, 374 Md. 361 (2003), the Supreme Court of Maryland upheld a circuit court's ruling that a statement made during a complaint to public school authorities about the perceived conduct of a public school coach was protected by an absolute privilege in a defamation action.

CONSTITUTIONAL ISSUES

One Subject Rule/Body – Title Conflicts

Rule

The Maryland Constitution requires that "every Law enacted by the General Assembly shall embrace but one subject, and that shall be described in its title." This requirement, known as the "one subject rule," is satisfied if an act does not contain foreign or "nongermane" matter and if the title of the act fairly advises the General Assembly and the public of the real nature and subject of the legislation. While the title need not be an abstract of the contents of the body of the act, it must not be misleading.

In addition, the Maryland Constitution requires that the title of an act must be sufficiently clear and comprehensive to reasonably cover the contents of the act.

Discussion

Constitutional Requirements

Article III, § 29 of the Maryland Constitution requires, in part, that "every Law enacted by the General Assembly shall embrace but one subject, and that shall be described in its title." These two separate requirements first appeared in the Constitution of 1851 and, as described by the Supreme Court of Maryland in 1854, were intended to remedy the practice of:

> engrafting, upon subjects of great public benefit and importance, for local or selfish purposes, foreign and often pernicious matters … which if they were offered as independent subjects, would never have received...support.... [F]oreign matter has often been stealthily incorporated into a law…during the haste and confusion always incident upon the close of the sessions of all legislative bodies [resulting in] enactments…that few of the members of the legislature knew anything of….

Davis v. State, 7 Md. 151, 160 (1854). See generally Everstine, *Titles of Legislative Acts*, 9 Md. L. Rev. 197 (1948) (authoritative discussion of title requirements in Maryland legislation); M. Albert Figinski, *Maryland's Constitutional One-Subject Rule: Neither A Dead Letter Nor An Undue Restriction*, 27 U. Balt.L.Rev. 363 (1998) (review and analysis of case law addressing one subject rule).

One Subject Rule

The purpose of the first component of Article III, § 29, which confines legislative enactments to one subject, is to prevent the combination in one act of totally unrelated matters that might not receive support if offered independently. *Equitable Life Assurance Soc'y v. State*

Comm'n on Human Relations, 290 Md. 333, 339 (1981). The one subject rule helps to "avoid the necessity for a legislator to acquiesce in a bill he or she opposes in order to secure useful and necessary legislation." *State v. Prince Georgians For Glendening*, 329 Md. 68, 73 (1993) (quoting *Porten Sullivan Corp. v. State*, 318 Md. 387, 408 (1990)). Likewise, the rule protects gubernatorial veto power. *Id*. That is, by prohibiting the "joining [of] a number of different subjects in one bill the governor [is not] put under compulsion to accept some enactments that he could not approve, or to defeat the whole, including others that he thought desirable or even necessary." *Porten Sullivan,* 318 Md. at 400 (quoting *Commonwealth v. Barnett*, 199 Pa. 161, 171-172, 48 A. 976, 977 (1901)).

Statutes Upheld – One Subject

The Supreme Court of Maryland traditionally has allowed the legislature significant leeway in finding evidence of congruity or germaneness between matters within the same legislation that are challenged as unrelated. The court has held that Article III, § 29 should be liberally construed "so as not to interfere with or impede legislative action." *Whiting-Turner Contracting Co. v. Coupard*, 304 Md. 340, 361 (1985) (quoting *Painter v. Mattfeldt*, 119 Md. 466, 473 (1913)).

In *Maryland Classified Employees Ass'n v. State*, 346 Md. 1 (1997), a pilot program for privatizing certain child support enforcement services was appended to a welfare reform measure, after a similar provision was defeated in the State Senate. The added provisions were challenged on the basis of the one subject rule. Finding a "nexus" between child support enforcement and "weaning people off of" welfare, the Supreme Court of Maryland upheld the legislation. See *id.* at 17-21. In reaching its decision, the court explained that proper application of the one subject rule requires consideration of how closely connected and interdependent the several matters contained within an act may be. *Id.* at 14. Two matters can be regarded as a single subject, for purposes of the one subject rule, either because of a direct connection between them, horizontally, or because vertically they each have a direct connection to a broader common subject to which the Act relates. *Id.* at 15-16.

The basic test for determining whether a law embraces more than one subject is whether all portions of the statute are "germane" or whether they are foreign to one another. *Neuenschwander v. WSSC*, 187 Md. 67, 77 (1946). "The notion of germaneness is like those of connection and interdependence, for germane means '[i]n close relationship, appropriate, relative, pertinent'." *Porten Sullivan*, 318 Md. at 407 (quoting *Black's Law Dictionary* 618, (5th ed. 1979)).

More recently, in *Myong Nam Kim v. Board of Liquor License Commissoners for Baltimore City,* 255 Md. App. 35 (2022), the Appellate Court of Maryland found that despite appellants challenging Chapter 389 of 2020 on the basis of violation of the one subject rule, the Act broadly applied to the regulation of alcohol in Baltimore's 45th legislative district and the separate provisions challenged were germane to the same subject matter.

Statutes Invalidated – Unrelated Subjects

While the Supreme Court of Maryland historically construed the one subject rule liberally in order to give effect to legislation, more recently the court has become stricter in its interpretation

and has warned that there are limits to its willingness to find "horizontal" or "vertical" connections between "completely separate and unrelated" provisions in legislation. Additionally, the court is prepared to examine the circumstances surrounding the passage of the challenged legislation. For example, in *Migdal v. State*, 358 Md. 308 (2000), the court rejected the "eleventh-hour" engraftment of a bill concerning directors of investment companies that was previously defeated in committee onto a different "unrelated" bill concerning resident agents for corporations. *Id.* at 310-314. "This is precisely the type of legislative action Article III, Section 29 was designed to prevent," the court stated. *Id.* at 322.

The *Migdal* decision has caused the Attorney General's office to warn that:

> Now, it would seem that a narrow bill and a substantial amendment with the only connection being that they relate to a broad subject ... could be found constitutionally suspect. Clearly, *Migdal* will necessarily result in legislators, staff and the Attorney General's Office taking an excessively cautious approach to substantial amendments, particularly those reflecting the substance of a measure defeated or tied up in committee.

Letter from Asst. Attorney General Zarnoch to Senate President Miller, March 15, 2000.

The "cautious approach" recommended by the Attorney General's office was apparently not followed in *Delmarva Power & Light Co. v. Public Service Commission*, 371 Md. 356, (2002) ("*Delmarva II*"). In that case, the Supreme Court of Maryland struck down the General Assembly's attempt on the last day of the 2002 session to overturn a court decision that forced the Public Service Commission to comply with procedures for adoption of regulations specified in the Administrative Procedures Act. A House and Senate Conference Committee was in the process of resolving differences between two versions of a bill designed primarily to "special fund" the commission when the court handed down the decision voiding an order of the commission, on the grounds that the order constituted a "regulation," which could not be effective unless the procedures for adoption of regulations were followed. *Delmarva Power & Light Co. v. Public Service Commission*, 370 Md. 1 (2002) (*"Delmarva I"*) [slip op. at 3]. The conference committee responded to *Delmarva I* by adding two new sections to the special fund bill that amounted to "…an admitted effort to [retroactively] render... [*Delmarva I*]…nugatory… [and]…had nothing whatsoever to do with the Fund." *Delmarva II*, 371 Md. at 363.

The *Delmarva II* court, quoting *verbatim* transcripts of floor proceedings in the Senate and House of Delegates, observed that when the revised bill was reported out of committee and passed later the same day, "in neither House were the members informed about the two new sections…." *Id*. at 365. "At no point during the legislative process were there any committee hearings or other opportunities for public input on the additions to the bill; nor was the Attorney General's Office consulted," noted the court. *Id*. at 366. The court described the legislative action in this case as a "virtual repeat" of three recent cases in which it had disallowed attempts to attach provisions that were not "germane" to legislation immediately prior to final passage. *Id. at* 375 (citing *Porten Sullivan Corp.* 318 Md. 387; *Prince Georgians*, 329 Md. 68; *Migdal* 358 Md. 308).

Severability or Nonseverability

If a court does find that an act violates the one subject rule, it is then faced with the question of whether the act is void completely or whether portions of the act can stand. Section 1-210 of the General Provisions Article (formerly Article 1, § 23) of the Annotated Code of Maryland establishes a presumption that provisions of all statutes enacted after July 1, 1973 are severable, and states that a "finding by a court that part of a statute is unconstitutional or void does not affect the validity of the remaining portions of the statute…." Even prior to the enactment of Article 1, § 23, this principle was used by courts to look to the statute and its legislative history to determine which portions were constitutional and to separate out the "discordant and dissimilar subjects." See, *e.g., Davis*, 7 Md. at 161. See also *Migdal,* 358 Md. at 323-324 (severing unconstitutional investment company provision while allowing resident agent portion of statute to stand).

Where severance of provisions is not possible because "no one [subject] could be clearly recognized as the controlling or principal one," the entire statute will be void. *Davis,* 7 Md. at 161. Likewise, the entire act would be invalidated if the "provisions [of the act] … are so connected together in subject-matter, meaning or purpose, that it cannot be presumed the legislature would have passed the one without the other." *Curtis v. Mactier*, 115 Md. 386, 398 (1911).

Body – Title Conflicts

The second component of Article III, § 29, requiring that the subject of an act be described in its title, is intended to ensure that the General Assembly and the public are put on notice regarding the proposed legislation. *Ogrinz v. James*, 309 Md. 381, 398 (1987). The requirement is satisfied if the title fairly advises the General Assembly and the public of the real nature and subject of the proposed legislation. *Balt. Transit Co. v. Metro. Transit Auth.*, 232 Md. 509, 521 (1963). See also *Eubanks v. First Mt. Vernon Loan*, 125 Md. App. 642, (1999) (statute governing "hold over" procedures did not have unconstitutionally defective title since, when originally passed, it adequately apprised the legislature and public of nature and impact of legislation).

The title must be sufficiently clear and comprehensive to reasonably cover the provisions of the bill. *Barrett v. Clark*, 189 Md. 116, 127 (1947). In addition, the title may not be misleading. *Allied Amer. Mutual Fire Ins. v. Comm'r of Motor Vehicles*, 219 Md. 607, 614 (1959). In *Delmarva II*, the Supreme Court of Maryland struck down an enacted bill, titled "Public Utility Regulation Fund," because in part, a provision added by the Conference Committee altering the application of the Administrative Procedures Act on the Public Service Commission was not adequately described by the title. See *Delmarva II*, 371 Md. at 363-364. In response to the argument that the challenged additional provisions were, in fact, germane and related to the original bill's purpose of "efficient operation" or "effective funding" of the commission, the court noted that no such purpose was reflected in the title of the Act and, thus, the legislation failed to satisfy the constitutional requirement that the subject of an act be accurately described in its title. *Id*. at 376. The court explained that, "there is nothing … to suggest that the legislature viewed those provisions as having that connection, and even more important, nowhere is that broader subject reflected in the title to the Act." *Id*.

Conversely, the title need not be an index to all the bill contains and need not set forth all of its conditions and exclusions. *Eutaw Enters. v. Balt City*, 241 Md. 686, 699 (1966). Additionally,

a title that contains provisions not found in the body of a bill does not necessarily render the bill unconstitutional since such provisions may be treated by the courts as harmless surplusage. *Neuenschwander*, 187 Md. at 80 (upholding statute's title which referred to "counties and municipalities of Maryland" while body of act applied only to Caroline, Montgomery, and Prince George's counties); see also *Pressman v. State Tax Comm'n*, 204 Md. 78 (1954); 58 Op. Att'y Gen. 75 (1973) (title broader than body not necessarily misleading and violative of Article III, § 29).

In Maryland, deficient titles may be remedied through legislation known as the Annual Curative Bill. See, *e.g.*, Ch. 50, Acts of 2023; Ch 134, Acts of 2022; Ch.11, Acts of 2018; Ch. 61, Acts of 2017. For example, in approving for constitutionality and legal sufficiency Chapter 108 of the Laws of 2018 (St. Mary's County – Metropolitan Commission), the Attorney General noted in footnote two of Form Letter 04 09 2018(2) that there was a slight difference between the body of the bill and the title, as the deletion in the body of the phrase "discharge at pleasure" regarding a number of specified and other Commission personnel is not mentioned in the title. The Attorney General stated that until the matter is addressed in a future curative bill, the Commission may discharge at pleasure personnel not having contracts.

Current Approach to Article III, § 29

Although the Supreme Court of Maryland traditionally has been reluctant to invalidate legislative enactments on the basis of Article III, § 29, in recent years the court has indicated a willingness to consider several factors in deciding whether to uphold legislation, such as whether the alleged second subject was added by an amendment, whether the title reflects the added provisions, the point in the legislative process at which the provisions were added (such as during a conference committee late in the session), and what the members of the two houses were told. See, *e.g.,* Att'y Gen. Bill Review letter regarding House Bill 1215 of 2006 (citing *Delmarva II, 371 Md. at* 376-377).

In advising the Governor on whether or not to sign bills passed by the General Assembly, the Attorney General's Office has cited one subject and body-title problems as grounds for giving a bill only partial effect, to justify a veto, to recommend that a questionable title be cured in the annual curative bill, or, in light of the *Migdal* decision, to re-adopt arguably nongermane amendments as independent legislation in the following year's session. (See, *e.g.*, Att'y Gen. Bill Review letters regarding SB 187 of 2018; HB152 of 2017; SB 752 and HB 352 of 2007; SB 544/HB 638 and HB 1450 of 2006; HB 507 and SB 837 of 2004; HB 135 and HB 230 of 2002; SB 202, SB 209, SB 211, SB 381, SB 904 of 2000; HB 1148 of 2000; HB 1563 of 1994; SB 451 of 1992; SB 581 of 1989; SB 419 of 1989; and SB 839 of 1987).

Additionally, when concerns are raised about legislation violating the one subject requirement, the Attorney General's Office advises that any unconstitutional provision would be severable from the remainder of the bill and the remainder of the bill would be given full force and effect of the law. Despite Supreme Court of Maryland's generally liberal interpretation of what constitutes germane subject matter, the Attorney General has warned that even this treatment of Article III, § 29 has limits. (See, *e.g.*, Att'y Gen. Bill Review letters regarding HB202 of 2023; and HB441, HB785, and SB586 of 2022)

Referendum and Other Direct Participation of Voters in Lawmaking

Rule

The Maryland Constitution and related statutes establish procedures by which the voters of the State directly participate in lawmaking under some circumstances.

Except as provided in Article XIX of the Maryland Constitution for commercial gaming, the General Assembly may not enact a public general law that provides that it is contingent on approval by the voters in a referendum; however, it may condition the enactment of a public local law on the approval of the voters in a referendum in one or more jurisdictions of the State.

With specific exceptions, an enactment of the General Assembly may be challenged by petitioning it to a referendum of the voters of the State for their approval or rejection.

Any constitutional amendment proposed by the General Assembly must be submitted to the voters for their approval or rejection.

Discussion

Referendum Provision in Legislation

The General Assembly is prohibited from enacting a public general law that provides that it is contingent on a referendum of voters either statewide, or in one county. See *Bd. of Pub. Works v. Balt. Cnty.*, 288 Md. 678, 681 (1980). This constitutional prohibition was established by the Supreme Court of Maryland in *Brawner v. Supervisors*, 141 Md. 586, 595 (1922), where the court stated:

> [W]e rest our conclusion upon two grounds, one, that the people of Maryland, having delegated to the Legislature of Maryland the power of making its laws, that body could not legally or validly redelegate the power and the authority thus conferred upon it to the people themselves; and two, that people of the State, from whom the Legislature itself derives its powers, having prescribed in the Constitution of the State the manner in which its laws shall be enacted, it is not competent for the Legislature to prescribe any other or different way in which its laws may be enacted.

The one exception to the general prohibition is for a law authorizing additional forms or the expansion of commercial gaming. Under Article XIX, § 1(e) of the Maryland Constitution, the

General Assembly from is prohibited from authorizing additional forms or the expansion of commercial gaming unless "approval is granted through a referendum, authorized by an act of the General Assembly, in a general election by a majority of the qualified voters in the State."

As part of its inherent law-making powers under Article III of the Maryland Constitution, the General Assembly may condition the enactment of a public local law on the approval of the voters in one or more jurisdictions of the State. See *Bd. of Pub. Works*, 288 Md. 678.

The Attorney General, however, has opined that it is "[a] somewhat closer question… whether...a public general law might...contain a 'local option' mechanism – that is, a requirement for [enactment of a local ordinance subject to an option by the locality for a local vote approving the proposal] within the particular locality before the law could take effect there." 80 Op. Att'y Gen. 151, 155 (1995), and cases cited therein. In such circumstances, the Attorney General observed, the Supreme Court of Maryland has tended to treat the "local option" feature of the legislation as a public local law. The Attorney General further noted that it is probable that a "local option" ordinance may be petitioned to referendum without offending the Maryland Constitution and that the General Assembly may facilitate such a voluntary referendum in its enactment of legislation. *Id.* at 158.

Referendum Petition to Challenge Act

Generally

Article XVI, § 1 of the Maryland Constitution provides that "[t]he people reserve to themselves power known as The Referendum, by petition to have submitted to the registered voters of the State, to approve or reject at the polls, any Act, or part of any Act of the General Assembly, if approved by the Governor, or, if passed by the General Assembly over the veto of the Governor." Specific exceptions to the right to petition legislation to a referendum are discussed below.

The Maryland Constitution and provisions of the Election Law Article of the Annotated Code of Maryland contain precise requirements for bringing an act or part of an act to statewide referendum through a petition. Specifically, these provisions require that:

- a petition to refer an enactment of the General Assembly must be filed with the Secretary of State by June 1 of the same year in which the legislature passed the bill, with a separate petition submitted for each enactment. MD. CONST. art. XVI, § 2;

- the referendum petition must include the signatures of three percent of the qualified voters of the State, calculated on the basis of the number of votes cast for Governor at the last preceding gubernatorial election. One-third of those signatures must be filed with the Secretary of State by June 1, with the remaining two-thirds of the signatures filed by June 30, with no more than one-half of the signatures from residents of any single county or Baltimore City. MD. CONST. art. XVI, § 3;

- the petition must contain the full text of the referendum or a summary approved by the Attorney General. MD. CONST. art. XVI, § 4;

- the individuals who gather the petition signatures must submit affidavits stating that the signatures are "genuine and bona fide" and that the signers are registered voters at the addresses set opposite or below the signers' respective names. *Id*.;

- the State Board of Elections must verify the signatures. MD. CODE. ANN., ELEC. LAW, § 6- 207;

- the Governor must publish the text of the law in various newspapers to inform voters about the measure to be voted on. MD. CONST. art. XVI, § 5; and

- the Secretary of State must prepare and submit the form of the referendum question to the local boards of election supervisors. MD. CODE ANN., ELEC. LAW, § 7-103(c).

Assuming that an enactment is referable (discussed below), the Maryland Constitution mandates that once the required signatures are collected and filed with the Secretary of State, the implementation of the enactment is halted pending the outcome of the referendum vote at the next statewide general election. MD. CONST. art. XVI, § 2. If, however, the enactment has an emergency effective date, the implementation of the act is not halted pending the outcome of the referendum vote and the provisions will go into effect, pending a possible rejection by the voters. *Id.* (See discussion under "Emergency Legislation" below.)

Since the referendum petition provision was added to the Maryland Constitution in 1915, voters have used it sparingly. In 1974, an effort to petition an enactment to referendum succeeded. In 1992, the voters of the State decisively upheld an abortion rights measure enacted by the General Assembly that had been petitioned to referendum. In 2012, three laws passed by the General Assembly were successfully petitioned to referendum, all of which were approved by the voters:

- the Maryland Dream Act, a guarantee of in-state tuition to illegal immigrants who met specified requirements;

- the Maryland Congressional redistricting plan passed in October 2011; and

- the enactment of same-sex marriage.

Appropriation for Maintaining State Government Exception

Article XVI, § 2 of the Maryland Constitution specifically excludes from the referendum petition process any law "making any appropriation for maintaining the State Government, or for maintaining or aiding any public institution, not exceeding the next previous appropriation for the same purpose."

In *Dorsey v. Petrott*, 178 Md. 230 (1940), the Supreme Court of Maryland defined an "appropriation" under Article XVI as follows:

> [A]n appropriation of public funds is made by a constitutional mandate or a lawful legislative act whose primary object is to authorize the withdrawal from the state treasury of a certain sum of money for a specified public object or purpose to which such a sum is to be applied.

Id. at 245.

In 1978, the Supreme Court of Maryland addressed the "appropriations" issue in *Bayne v. Secretary of State*, 283 Md. 560 (1978). *Bayne* involved a petition drive by a citizens committee to put to referendum a portion of a General Assembly appropriation for funding Medicaid abortions. The Secretary of State refused to accept the petition, contending that the legislation was a non-referable appropriation. While conceding that the challenged budget bill was an "appropriation," the citizens who sought the referendum argued that it did not meet the exception's requirement that it also be "for maintaining the State Government." *Id.* at 570. The *Bayne* court concluded, however, that providing medical care to indigent persons was a "primary function of government" and thus "maintain[ed] the State Government" within the meaning of Article XVI. *Id.* at 571, 573. Therefore, the court held, the abortion funding provision was excepted from the provisions of Article XVI and could not be petitioned to a referendum. *Id.*

The *Bayne* decision relied heavily on two earlier cases to reach its decision: *Winebrenner v. Salmon*, 155 Md. 563 (1928) and *Bickel v. Nice*, 173 Md. 1 (1937). In *Winebrenner* the Supreme Court of Maryland first enunciated the "primary function of government" test in interpreting the "maintaining the State Government" provision under Article XVI. *Winebrenner* involved a referendum petition on a law that provided for an additional tax on motor vehicle fuel, with the proceeds to be used for road construction. The court held that the enactment was non-referable and stated that:

> Surely..."appropriations for maintaining the government" include more than merely those which provide for overhead expenses, such as salaries and expenses incident to keeping the government afloat as a going concern. "The government" includes all its agencies...[and] maintaining the government means providing money to enable it [the State Roads Commission] to perform the duties which it is required by law to perform.

155 Md. at 568.

The court elaborated, however:

> Certainly an act would not be within the exception merely because it carried an appropriation to an agency of government, if it *created* an entirely new function not theretofore recognized as coming within the sphere of governmental activity. But "the establishment, construction and maintenance of public roads is a primary function of government."

Id. (quoting *Bonsal v. Yellott*, 100 Md. 481 (1905)).

Similarly, 9 years later in *Bickel,* the court decided that legislation establishing housing for State officers and employees was non-referable under Article XVI, stating:

> It is undoubtedly true that the actuating purpose of the excepting clause was to prevent interruptions of government. But the court is of opinion that the test intended by the excepting clause is not the need of the appropriation or the project to carry out that purpose, but the design. If the particular appropriation is one designed for maintaining the government and the project stated is of a kind that may be within that classification of maintaining the government, it is excepted.

173 Md. at 10.

In 1987, voters attempted to petition to referendum a package of three acts by the General Assembly that authorized and funded construction of a professional sports complex in the Camden Yards area of Baltimore City. The petition effort was thwarted, however, when the Supreme Court of Maryland held that the acts were an "appropriations" package and not subject to referendum. Specifically, the court found that even though no funds were appropriated to the stadium authority, by giving it the power to borrow funds through the issuance of bonds, the statute was an "appropriation" made for "maintaining the State Government" and thus exempt from referendum. *Kelly v. Marylanders for Sports Sanity*, 310 Md. 437, 461 (1987).

In 2012, the Supreme Court of Maryland further clarified what type of legislation falls within the appropriations exception. In *Doe v. Maryland State Board of Elections*, 428 Md. 596, 610 (2012), plaintiffs argued that the Maryland Dream Act was not referable to referendum because it is an appropriation for maintaining State Government. The court rejected this argument determining that for an enactment to be a spending measure appropriation, the statute's "primary purpose must be to assign the monies for a specified purpose." *Id* at 611. It further stated that general legislation "cannot be converted into an appropriation bill merely because there may be an incidental provision for an appropriation of public funds." *Id.*

Liquor Law Exception

Article XVI, § 6 of the Maryland Constitution excludes liquor laws from the referendum petition process.

Emergency Legislation

Under the Maryland Constitution, legislation generally cannot take effect before the next June 1 after the session at which the legislation was passed. Article XVI, § 2. If, however, the legislation contains a section declaring that it is an "emergency law and necessary for the immediate preservation of the public health or safety," and is passed by three-fifths of both houses of the General Assembly, it takes effect from the time of its enactment. Although such laws can still be referred by petition, they remain in effect unless subsequently rejected by the voters in such a referendum or, of course, later repealed by the General Assembly.

Repealing, Amending, or Removing Referred Legislation

Although no Maryland case has specifically involved the repeal of referred legislation, the Maryland Attorney General has opined that the General Assembly can validly repeal a referred statute, and that, in such a case, the measure should then be removed from the ballot. 62 Op Att'y Gen. 405, 408 (1977). Additionally, assuming the legislature is acting "in true good faith to accomplish proper and appropriate governmental ends," and not "with the intention of frustrating the referendum process," it has been suggested that a referred measure could be amended or repealed and reenacted as a new measure. *Id.* at 408, 410 (citing *Wicomico County v. Todd*, 256 Md. 459, 467 (1970)).

Ratification of Proposed Constitutional Amendments by Voters

Article XIV of the Maryland Constitution provides that the General Assembly may propose constitutional amendments. Specifically, this provision requires that:

- each amendment be embraced in a separate bill, embrace a single subject, and embody only the article(s) or section(s) to be amended;

- each amendment be acted on separately and passed by three-fifths of all of the members elected to the Senate of Maryland and the House of Delegates;

- prior to the general election, the bills proposing the amendments be widely publicized in newspapers throughout the State and as otherwise ordered by the Governor; and

- each amendment be submitted to the qualified voters of the State for adoption or rejection at the next statewide general election following the passage of the proposed amendment by the General Assembly.

If a proposed constitutional amendment affects multiple jurisdictions in the State, it becomes effective if it receives a majority of the votes cast at the general election. If the General Assembly determines, however, that a proposed constitutional amendment affects only one county or the City of Baltimore, the proposed amendment becomes effective only if it receives a majority of the votes cast in the State and in the affected county or City of Baltimore, as the case may be. MD. CONST. art. XIV, § 1.

Procedural Due Process

Rule

A statute may be held unconstitutional if it results in a deprivation of a constitutionally protected liberty or property interest without providing an affected person an opportunity to be heard at a meaningful time and in a meaningful manner.

Discussion

The Fourteenth Amendment to the U.S. Constitution and Article 24 of the Maryland Declaration of Rights establish procedural due process guarantees that prohibit the State from enforcing a statute that deprives a person of certain protected liberty or property interests without due process of law. Generally, the government must provide notice and some form of hearing before a person may be deprived of life, liberty, or property. The due process guarantees embodied in Article 24 are *in pari materia* with or "equated" with the guarantees embodied in the Fourteenth Amendment. *Golden Sands Club v. Waller*, 313 Md. 484, 486 n.1 (1988); *Beeman v. Dep't of Health,* 107 Md. App. 122, 141 (1995); *Vavasori v. Comm'n on Human Relations*, 65 Md. App. 237, 243 (1985). Accordingly, U.S. Supreme Court interpretations of the federal due process clause are authority for the interpretation of Article 24. *Pitsenberger v. Pitsenberger*, 287 Md. 20, 27 (1980); but see *Dua v. Comcast Cable of Md., Inc.*, 370 Md. 604, 621 (2002) ("[S]imply because a Maryland constitutional provision is *in pari materia* with a federal one . . . . does *not* mean that the provision will *always* be interpreted or applied in the same manner as its federal counterpart." (emphasis in original)).

Legislative acts are presumed to be constitutional and a person challenging a statute has the burden of affirmatively establishing its invalidity. *Beeman,* 107 Md. App. at 141. Furthermore, a Maryland court will, whenever possible, construe and apply a statute to avoid casting serious doubt on its constitutionality. *Becker v. State*, 363 Md. 77, 92 (2001).

The basic function of procedural due process is to afford an opportunity to be heard "at a meaningful time and in a meaningful manner," thereby promoting accuracy in the resolution of disputes. *Pitsenberger*, 287 Md. at 30. To invoke the protections of procedural due process, the person asserting unconstitutionality must show that "State action" has been employed to deprive that person of liberty or property. *Roberts v. Total Health Care, Inc.*, 109 Md. App. 635 (1996). The enforcement of a statute that deprives a person of a protected property or liberty interest without appropriate procedural safeguards constitutes "State action" under a due process analysis. *Vavasori*, 65 Md. App. at 243.

Liberty interests that courts have recognized include those related to injury to reputation and those that related to physical restraint.

In *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), the U.S. Supreme Court struck down a statute that authorized municipal officials to forbid the dispensation of intoxicating liquor to certain "excessive drinkers" by posting notices in retail outlets. The court held that such posting may act as a stigma or badge of disgrace, and that procedural due process requires notice and an opportunity to be heard. In *Parham v. J.R.*, 442 U.S. 584 (1979), the court held that a parental decision to have a child institutionalized for mental illness triggers due process protections, such as a hearing to determine if the decision is warranted. See also *Vitek v. Jones*, 445 U.S. 480 (1979) (transfer of prisoners to mental hospital constitutes deprivation of liberty requiring procedural safeguards); *Samuels v. Tschechtelin*, 135 Md. App. 483, 530 (2000) (dismissal based on illegal discrimination or in retribution for exercise of First Amendment rights may violate liberty interests); *Beeman,* 107 Md. App. at 142 (being free from arbitrary and capricious administration of anti-psychotic drugs is significant constitutional liberty interest).

A property interest will trigger the protections of due process if it is a "legitimate claim of entitlement" to a benefit, as opposed to an abstract need or unilateral expectation of a benefit. *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972). Examples of such interests include: admission to a State residential facility for an intellectually disabled individual, *Reese v. Dep't of Health and Mental Hygiene*, 177 Md. App. 102 (2007); a claim of employment discrimination, *Samuels*, 135 Md. App. at 527; a horse trainer's license, *Barry v. Barchi*, 443 U.S. 55 (1979); disability benefits, *Mathews v. Eldridge*, 424 U.S. 319 (1976); public education, *Goss v. Lopez*, 419 U.S. 565 (1975); welfare benefits, *Goldberg v. Kelly*, 397 U.S. 254 (1970); and the right to practice medicine, *Aitchison v. State*, 204 Md. 538 (1954). See also *Evans v. Burruss*, 401 Md. 586 (2007) (property owner has no property right in regard to issuance of building permit for construction of amateur radio towers on adjacent property); *Higginbotham v. Pub. Serv. Comm'n*, 171 Md. App. 254 (2006) (no property right in continued public employment for nontenured State or local government employee who serves at will).

If a statute will result in a deprivation of a constitutionally protected liberty or property interest, the statute must include appropriate procedural safeguards. The deprivation of property by adjudication requires at a minimum that a party receive notice and reasonable opportunity to be heard consistent with the circumstances of the taking. *Sapero v. Mayor of Baltimore*, 398 Md. 317 (2007) (Baltimore City's quick-take condemnation violated landowner's procedural due process rights). Due process is a "flexible concept" that calls for such procedural protection as a particular situation may demand; it does not require procedures so comprehensive as to preclude any possibility of error. *Wagner v. Wagner*, 109 Md. App. 1 (1997). See also *Golden Sands Club*, 313 Md. 484 (in realm of creditors' remedies, procedural protection adequate if it represents fair accommodation of respective interests of creditor and debtor). Likewise, it is well established that due process does not require adherence to any particular procedure. *Vavasori*, 65 Md. App. at 248-49. In *Griffin v. Bierman,* 403 Md. 186 (2008), when deciding that sending notice of foreclosure action and sale by certified and first-class mail complied with procedural due process, the Supreme Court of Maryland stated the concept this way:

> There is no cookie cutter paradigm for determining the constitutionality of a particular procedure designed to convey notice. "[D]ue process is flexible and calls only for such procedural protections as the particular situation demands. Procedures adequate under one set of facts may not be sufficient in a different situation."

Griffin, 403 Md. at 197 (quoting *Dep't of Transp. v. Armacost*, 299 Md. 392, 416 (1984)).

In *Mathews v. Eldridge*, the U.S. Supreme Court designed a balancing test that Maryland courts have used in weighing due process issues.

> [O]ur prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 334-35. See, *e.g.*, *Rhoads v. Sommer,* 401 Md. 131 (2007), (applying Mathews balancing test, the Supreme Court of Maryland held that a statute creating attorney's lien did not violate client's procedural due process rights) and *Beeman*, 107 Md.App. 122 (also applying the *Mathews* test, the Appellate Court of Maryland concluded that sufficient safeguards exist in a challenged section of Health – General Article of Annotated Code of Maryland to prevent erroneous deprivation of liberty interests). In a final proceeding, due process requires notice reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections. *Golden Sands Club*, 313 Md. at 495 (notice provision of Maryland Contract Lien Act, which allows notice by certified or registered mail return receipt requested at unit owner's last known address, does not violate procedural due process); and *Barry Properties v. Fick Bros.*, 277 Md. 15, 24 (1976) (former mechanics' lien law unconstitutional, in part, because it permitted owner to be deprived of significant property interest without notice).

Equal Protection

Rule

Generally, states must guarantee the same rights, privileges, and protections to all citizens. A statute that draws distinctions between different classes of people, however, will be upheld under an equal protection analysis if the statute is rationally related to a legitimate governmental purpose. A statute that classifies people along "suspect" lines or infringes on a "fundamental interest" will be upheld under an equal protection analysis only if the statute is necessary to an overriding statutory purpose or a compelling state interest.

In addition, the Maryland Equal Rights Amendment includes a specific guarantee of equal protection that prohibits legislation that draws lines between men and women in allocating benefits, burdens, rights, and responsibilities.

Discussion

The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution provides in part "No State shall … deny to any person within its jurisdiction the equal protection of the laws." This clause imposes restrictions on the extent to which the State may treat different classes of people in different ways. Although there is no express equal protection language in any provision of the Maryland Declaration of Rights or the Maryland Constitution, the Supreme Court of Maryland has long held that equal protection is implicitly guaranteed by the due process provision in Article 24 of the Maryland Declaration of Rights. *Frankel v. Bd. of Regents,* 361 Md. 298, 312-313 (2000); *Kirsch v. Prince George's Cnty.*, 331 Md. 89, 96 (1993); *Murphy v. Edmonds*, 325 Md. 342, 353 (1992); *Hornbeck v. Somerset Cnty. Bd. of Educ.*, 295 Md. 597, 616 n. 4. (1983).

Maryland courts have generally relied on opinions of the U.S. Supreme Court for interpretation of:

> [t]hose portions of the Maryland Constitution and Declaration of Rights [which] afford protection to its citizens against unreasonable or arbitrary discrimination in like manner and to the same extent as the Fourteenth Amendment of the Federal Constitution.

Kirsch, 331 Md. at 97 (citing *U.S. Mortgage v. Matthews*, 167 Md. 383, 395), *rev'd on other grounds*, 293 U.S. 232 (1934). Despite adopting this precedent, the Supreme Court of Maryland has also "recognized that the two provisions are independent of one another, and a violation of one is not necessarily a violation of the other." *Id.* at 97.

Rational Basis Test

Traditionally, federal courts have interpreted the Equal Protection Clause to require only that a classification be "rationally related to a legitimate governmental purpose." *U.S. Dep't. of Agric. v. Moreno*, 413 U.S. 528, 533 (1973). This rational basis test applies when the one alleging a violation of equal protection laws is "not a member of any suspect class and alleges no burden of any fundamental right." In such a case, the complainant must prove that he or she has "been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in the treatment." *In re Premier Automotive, Inc.,* 492 F.3d 274, 283 (2007) (quoting *Village of Willowbrook v. Olech,* 528 U.S. 562, 564 (2000)). See, *e.g., Clear Channel Outdoor, Inc. v. Dir., Dep't of Fin.*, 472 Md. 444, 457 (2021) (citing *Regan v. Taxation with Representation*, 461 U.S. 540, 546–51).

Maryland courts use a similar analysis. In *Murphy v. Edmonds*, the Supreme Court of Maryland stated:

> "a court 'will not overturn' the classification 'unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [the court] can only conclude that the [governmental] actions were irrational.' A statutory classification reviewed under the rational basis standard enjoys a strong presumption of constitutionality and will be invalidated only if the classification is clearly arbitrary."

Murphy, 325 Md. at 355 (quoting *Gregory v. Ashcroft,* 501 U.S. 452, 472 (1991)). See, *e.g., Frankel*, 361 Md. at 318 (university policy denying in-state tuition status to student based on financial dependence on out-of-state sources was arbitrary and irrational classification which violated equal protection); *Kirsch,* 331 Md. at 98 (county zoning ordinance which differentiated tenant classes based on tenant's occupation violated equal protection under rational basis test); *Hornbeck,* 295 Md. at 656 (under rational basis test, statutes that govern system of financing public elementary and secondary schools do not violate federal Equal Protection Clause). To conduct this inquiry, the court will ask "(1) whether the stated objectives are legitimate governmental ends, and (2) whether the means chosen … bear a rational relationship to achievement of those ends." *Tyler v. City of College Park*, 415 Md. 475, 502 (2010).

The rational basis inquiry is extremely limited and deferential to the governmental action at issue. See *Doe v. Settle*, 24 F.4th 932, 943 (2022) (quoting *Heller v. Doe*, 509 U.S. 312, 320 (1993)) (the challenging party must overcome the "steep" burden of proving that there is "no rational relationship between the disparity of treatment and some legitimate governmental purpose"). The Supreme Court of Maryland has described rational basis review as "'the paradigm of judicial restraint,'" and stated that "'[t]he Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process [and] that . . . judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.'" *Tyler, 415 Md. at 502.* (citations omitted).

Strict Scrutiny Test

Where, however, a statutory classification burdens a "suspect class" or impinges on a "fundamental right," the classification is subject to a higher standard of strict scrutiny and will be upheld under the equal protection guarantees only if it is shown to be "suitably tailored to serve a compelling state interest." *Murphy*, 325 Md. at 356 (quoting *Broadwater v. State*, 306 Md. 597, 603 (1986)). In 2007, the Supreme Court of Maryland added, "a statute may be validated only if it is deemed to be suitably, or *narrowly*, tailored to further a compelling state interest." *Koshko v. Haining*, 398 Md. 404, 438 (2007). See *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College, 600 U.S. __ , 15; Alive Church of the Nazarene, Inc. v. Prince William Cnty.*, 59 F.4th 92, 112 (2023) (the strict scrutiny test presumes a law is unconstitutional unless the government overcomes the burden of proving that the law is narrowly tailored to achieve a compelling government interest).

A "suspect class" is a category of people who have experienced a history of purposeful unequal treatment or have been subjected to "unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." *Hornbeck,* 295 Md. at 641. Suspect classifications include those that are drawn upon racial lines, and in some cases, those that are drawn on the basis of nationality or alienage. *Graham v. Richardson*, 403 U.S. 365 (1971). As stated by the Supreme Court of Maryland in *Ehrlich v. Perez,* 394 Md. 691, 718 (2006), "classifications based on alienage…are inherently suspect and subject to strict scrutiny whether or not a fundamental right is impaired." Additionally, "statutory discrimination within a larger class of legal resident aliens, providing benefits to some aliens, but not to others, is nonetheless a classification based on alienage." *Id.* at 719. Classifications that draw lines on the basis of wealth or indigence (see, *e.g., James v. Valtierra*, 402 U.S. 137 (1971)), or on the basis of age (see, *e.g., Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976)), are generally not considered suspect classifications that trigger strict scrutiny.

When a classification is challenged as violating the Maryland Constitution or Declaration of Rights, the factors used to determine whether a classification warrants strict scrutiny (or intermediate scrutiny as discussed below), include (1) whether the group of people disadvantaged by a statute display a readily recognizable, obvious, immutable, or distinguishing characteristics that define the group as a discrete and insular minority; (2) whether the impacted group is saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process; and (3) whether the class of people singled out is subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities to contribute meaningfully to society. *Conaway v. Deane*, 401 Md. 219, 272-273 (2007) (abrogated by *Obergefell v. Hodges*, 576 U.S. 644 (2015) which held that, under both the Due Process and Equal Protection Clauses of the Fourteenth Amendment, same-sex couples may not be deprived of the right to marry).

Statutes impinging on fundamental rights, such as the right to travel from state to state or the right to vote, also trigger the strict scrutiny test. See, *e.g.*, *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (overruled on other grounds by *Edelman v. Jordan*, 415 U.S. 651 (1974)); *O.C. Taxpayers for Equal Rights, Inc. v. Ocean City*, 280 Md. 585, 594 (1977). Compare

Hornbeck, 295 Md. at 652-53 (right to education not fundamental right under Maryland Constitution or Maryland Declaration of Rights and, therefore, does not trigger strict scrutiny under equal protection analysis based on due process requirement of Article 24). No violation of federal or State constitutional equal protection rights has been found where State election laws permit exclusion of unaffiliated registered voters by political parties in primary elections because there is no "fundamental right to vote in the nominating primary of a party to which one does not belong." *Suessmann v. Lamone,* 383 Md. 697, 731 (2004).

Intermediate Scrutiny Test

There are classifications that are subject to a higher degree of scrutiny than the rational basis test, but which do not involve suspect classes or fundamental rights and thus are not subject to the strict scrutiny test. *Murphy*, 325 Md. at 357 (citing cases using "intermediate" test, for challenged classification based on gender, legitimacy of children, alienage, and professional compensation). The U.S. Supreme Court has stated that, in order for a legislative classification reviewed under "heightened scrutiny" or "intermediate scrutiny" to be sustained, the classification "must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig v. Boren*, 429 U.S. 190, 197 (1976). See *Pizza Di Joey, LLC v. Mayor*, 470 Md. 308, 347–48 (2020).

Gender Discrimination

As to gender discrimination, the Supreme Court of Maryland has noted that, since adoption of the Equal Rights Amendment (Article 46 of the Maryland Declaration of Rights) in 1972, a higher standard of scrutiny is required than that provided by U.S. Supreme Court precedent. In Maryland, "classifications based on gender are suspect and subject to strict scrutiny." *Murphy*, 325 Md. at 357 n. 7.

Federal Preemption of State Law

Rule

A state (or local) law that is preempted by federal legislation is unconstitutional under the Supremacy Clause of the U.S. Constitution. Federal preemption may occur in any of three ways:

1. **Congress may expressly preempt state law by the terms of a federal statute;**

2. **State law may be preempted to the extent it actually conflicts with federal law; or**

3. **Congress may impliedly preempt state law by occupation of an entire field of regulation, so that no room is left for supplementary state regulation.**

In addition, state law burdening interstate commerce is preempted generally by the terms of the U.S. Constitution. However, some state law that affects interstate commerce is allowed.

Discussion

The doctrine of federal preemption of state (or local) law arises under the Supremacy Clause of the U.S. Constitution, Article VI, cl. 2, which provides that the "Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land." The Maryland Declaration of Rights, Article 2 also states that, "the Constitution of the United States, and the laws made, or which shall be made, in pursuance thereof,...are, and shall be the Supreme Law of the State...."

Federal preemption can be placed into three basic categories: (1) when Congress places specific language in a statute announcing its intention to preempt state law, *i.e.*, express preemption; (2) when state law conflicts with federal law, *i.e.*, conflict preemption; and (3) when Congressional legislation is so comprehensive that it occupies an entire field of regulation, *i.e.*, field preemption. *Gaskins v. Marshall Craft*, 110 Md. App. 705, 710 (1996) (citing *California v. ARC Am. Corp*., 490 U.S. 93, 100-101 (1989)).

In addition, the Commerce Clause of the U.S. Constitution, Article I, § 8, cl. 3, generally prohibits state law burdening interstate commerce. In decisions by the U.S. Supreme Court interpreting the Commerce Clause, however, the trend has been to cut back federal power over the states, particularly in areas of traditional state powers.

Express Preemption

An example of express preemption is found in the Federal Employment Retirement Income Security Act of 1974 (ERISA). ERISA preempts "any and all state laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). For example, in *Pratt v. Delta Airlines Inc.,* 675 F. Supp. 991, 998 (D. Md. 1987), a claim of abusive discharge under state law based on an allegation that the discharge was intended to prevent the vesting of retirement benefits was held to be preempted by ERISA because the claim "related" to an employee benefit plan. *But* see *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355 (2002) (although "related to" employee benefit plan, act authorizing patients to appeal coverage denials to independent review boards is not preempted because it also "regulates insurance" under ERISA's savings clause).

Another example of an express preemption provision is in the federal Copyright Act, which provides that "all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by [the Act] … are governed exclusively by [the Act] … [and] no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State." 17 U.S.C. § 301. Accordingly, a Maryland law requiring publishers to offer to license electronic literary products was invalidated by the Federal District Court for Maryland, as the law "would impose on copyright holders, contrary to their exclusive rights under § 106, an obligation to distribute and make available other copies of the work following their initial decision to publish and distribute copies of the copyrighted item." *Ass'n of Am. Publrs., Inc. v. Frosh*, 586 F. Supp. 3d 379, 390 (D. Md. 2022) (citing *Orson, Inc. v. Miramax Film Corp.*, 189 F.3d 377, 386 (3d Cir. 1999)).

Conflict Preemption

State law is preempted if the state law "actually conflicts with federal law… or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). See also *Abbot by Abbot v. Am. Cyanamid Co.*, 844 F.2d 1108 (4th Cir. 1988). In *Jones v. Rath Packing Co.*,430 U.S. 519 (1977), a state law imposing labeling standards on flour was preempted by a federal law on the same subject because the federal law was intended to provide uniformity in labeling in order to facilitate comparisons of flour and compliance with the state law prevented comparisons.

On the other hand, in a case where state law enhances the policy underlying federal legislation and does not conflict with it, the state law generally will be upheld. In *Florida Lime & Avocado Growers Inc. v. Paul,* 373 U.S. 132 (1963), a state imposed standards for importing avocados that were stricter than standards approved by the federal Secretary of Agriculture. The issue was whether a state may reject goods that a federal authority had certified to be marketable. The U.S. Supreme Court found that there was no "inevitable collision" between the two standards, and that it was possible to comply with both the state law and the federal law by satisfying the stricter state standard. *Id*. at 143. In addition, the court recognized the strong and traditional state interest in the regulation of consumer protection, particularly in the area of food products. *Id.*

Field Preemption

Where the scheme of federal regulation is sufficiently comprehensive to make a reasonable inference that Congress "left no room" for supplemental state regulation or where the federal interest in the field is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject, a court will find field preemption. *Gaskins,* 110 Md. App. at 710-11 (citing *Hillsborough Cnty. v. Automated Med. Labs, Inc.*, 471 U.S. 707, 713 (1985)). See also *California v. ARC Am. Corp*., 490 U.S. 93, 100-101 (1989); *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190 (1983); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947).

The Supreme Court of Maryland also highlighted the following method by which field preemption may be found:

> [A]bsent express preemption or a direct conflict between the Federal and State law, an implied preemption may be found: if the scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," if the Federal law "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," if the "object sought to be obtained by the federal law and the character of obligations imposed by it ... reveal the same purpose," or if "the state policy may produce a result inconsistent with the objective of the federal statute.

Montgomery Cnty. v. Glenmont Hills Assocs. Privacy World at Glenmont Metro Ctr., 402 Md. 250, 267-268 (2007) (citing *Maryland v. Louisiana*, 451 U.S. 725, 746-747 (1981)).

Congressional Intent

Divining congressional intent is, in fact, a necessary task for a court in determining a preemption issue, particularly in a field preemption case. Intent to preempt can be determined by the degree of federal regulation, type of federal interest promoted, and wording of the act itself, including its expressly stated policy objectives. *Gaskins,* 110 Md. App. at 711.

However, the "starting point" for consideration of a preemption question is a presumption that Congress does not intend to displace state law, unless it expressly states otherwise. *Id*. "The purpose of Congress is the ultimate touchstone in every pre-emption case." *Pinney v. Nokia,* 402 F.3d 430, 453 (4th Cir. 2005) (quoting *Medtronic, Inc. v. Lohr,* 518 U.S. 470 (1996)). See *Chicago & N.W. Tr. Co. v. Kalo Brick & Tile Co*., 450 U.S. 311, 317 (1981) (preemption not favored "in the absence of persuasive reasons – either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained"). In *Board of Trustees v. City of Baltimore*, 317 Md. 72 (1989), the Supreme Court of Maryland upheld Baltimore City's ordinance requiring divestiture of the city's employees' pension funds over the challenge that the federal Anti-Apartheid Act preempted state and local laws on the subject of divestiture. In upholding the ordinance, the court recognized that the regulation of city employee pension fund investments is "clearly a matter of traditional local regulation," and it was "hardly clear that the Senate intended to preempt state or local divestment legislation." *Id.* at 116 and 118-19.

Interstate Commerce Clause

The issue of implied preemption often surfaces in the context of the Commerce Clause of the U.S. Constitution, which gives Congress the power to regulate interstate commerce. The Commerce Clause provides that "Congress shall have power … to regulate commerce … among the several states." U. S. CONST. art. I, § 8, cl. 3. Under the Commerce Clause, state law has traditionally been preempted even in areas where Congress has not chosen to regulate.

States may enact legislation that incidentally impacts interstate commerce provided the legislation is an evenhanded effort to effectuate a legitimate state interest. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); *Balt. Gas & Elect. v. Heintz*, 760 F.2d 1408, 1422 (4th Cir. 1985). Legislation that purposely favors local consumers or businesses over their out-of-state counterparts and has the effect of burdening interstate commerce, however, will fail under the Commerce Clause. See*, e.g., Lewis v. BT Inv. Managers Inc.*, 447 U.S. 27 (1980) (state law intended to discriminate against out-of-state investment advisers in favor of in-state companies is unconstitutional).

For further discussion, see chapter on "Commerce Clause" in this *Legislative Desk Reference*.

Tenth Amendment – States' Powers

Historically, courts refused to hold that the Tenth Amendment to the U.S. Constitution, which reserves to the states powers not delegated to the United States, is an obstacle to the federal government's authority to act under the Commerce Clause. See, *e.g., Shafer v. U.S.*, 229 F.2d 124 (4th Cir. 1956) (Tenth Amendment did not prevent Congress from passing legislation that included regulation of agricultural production intended wholly for consumption on farm). The U.S. Supreme Court, however, using a Tenth Amendment analysis, has begun in recent decades to restrict the scope of the Commerce Clause in relation to the power of state governments, resulting in the invalidation of provisions of various federal enactments. See, *e.g., Murphy v. Nat'l Collegiate Athletic Ass'n*, 584 U.S. ___ (2018) (provisions of the Professional and Amateur Sports Protection Act that prohibit state authorization and licensing of sports gambling schemes violate the Constitution's anticommandeering rule); *Bd. of Trustees v. Garrett*, 531 U.S. 356 (2001) (provision in federal Americans with Disabilities Act authorizing private party law suits against states for violation of statute insufficiently justified to warrant federal response and therefore invalid); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (federal age discrimination statute unconstitutional because it implicitly abrogated state immunity); *United States v. Morrison*, 529 U.S. 598 (2000) (suppression of violent crime truly local police power); *Printz v. United States*, 521 U.S. 898 (1997) (federal law forcing state and local law enforcement officers to perform background checks on prospective handgun owners unconstitutional); *United States v. Lopez*, 514 U.S. 549 (1995) (federal prohibition of possession of guns near schools unconstitutional attempt to convert commerce power into general police power retained by states).

State Preemption of Local Law

Rule

A local law that is preempted by State law is unconstitutional. State preemption of local law may occur in any of three ways:

1. **the General Assembly may expressly preempt local law by the terms of a State statute;**

2. **local law may be preempted to the extent it directly conflicts with State law; or**

3. **the General Assembly may impliedly preempt local law by occupation of an entire field of regulation so that no room is left for supplementary local regulation.**

Discussion

An issue of State preemption generally surfaces when a home rule county or municipal corporation regulates some activity that is also regulated by the State. Local law is subordinate to conflicting laws passed by the General Assembly. See MD. CONST. art. XI-A, § 3 (concerning charter counties and Baltimore City); MD. CONST. art. XI-E, § 6 (concerning municipal corporations); and MD. CONST. art. XI-F, § 10 (concerning code counties). Similarly, statutory law declares that a charter county may exercise the powers provided under the Express Powers Act "only to the extent that the powers are not preempted by or in conflict with public general law." MD. CODE ANN., LOCAL GOV'T, § 10-206(b).

Express Preemption

The General Assembly has the right to reserve to itself exclusive authority over an area of legislative concern. For example, in *Montgomery Cnty. v. Atlantic Guns*, 302 Md. 540 (1985), the Supreme Court of Maryland invalidated a local ordinance regulating the sale of ammunition because the State had expressly preempted this area. The court found the express preemption in Chapter 13, § 6 of the Acts of 1972, which provided that:

> [A]ll restrictions imposed by the law, ordinances, or regulations of the political subdivisions on the wearing, carrying, or transporting of handguns are superseded by this Act, and the State of Maryland hereby preempts the right of the political subdivisions to regulate said matters.

Id. at 543.

There are several other instances of express preemption of local law in State statutes. Although not exhaustive, examples of express preemption are listed in **Appendix 1**.

Preemption by Conflict

"A local ordinance is [preempted] by conflict when it prohibits an activity which is intended to be permitted by state law, or permits an activity intended to be prohibited by state law." *Holiday v. Anne Arundel Cnty.,* 349 Md. 190, 210 (1998). For example, in *Coalition for Open Doors v. Annapolis Lodge,* 333 Md. 359 (1994), the court held a local ordinance prohibiting private clubs from discriminating in membership policies was not preempted by conflict by State law because private clubs were outside the scope and "simply exclude[d]" under the State public accommodations law. *Id.* at 383.

In *Mayor of Baltimore v. Hart,* 395 Md. 394 (2006), the Supreme Court of Maryland stated "that a political subdivision may not prohibit what the State by general public law has permitted, but it may prohibit what the State has not expressly permitted." *Id.* at 407. The court continued, "unless a general public law contains an express denial of the right to act by local authority, the State's prohibition of certain activity in a field does not impliedly guarantee that all other activity shall be free from local regulation and in such a situation the same field may thus be opened to supplemental local regulation." *Id.* at 408.

Unless a conflict results, local government generally may supplement State regulation. A conflict does not result merely because an ordinance expands beyond the provisions of a statute by requiring more than the statute requires. A conflict results, however, if the effects of a local ordinance are so oppressive or burdensome that it is tantamount to a prohibition. See, *e.g., Montgomery Cnty. Bd. of Realtors v. Montgomery Cnty.*, 287 Md. 101 (1980) (Montgomery County real property tax ordinance held in conflict with State law); *County Council v. Investors Funding*, 270 Md. 403 (1973) (portion of Montgomery County retaliatory evictions ordinance conflicted with State summary eviction statute). See also 81 Md. Op. Att'y Gen. 42 (1996) (asserting that State law preempts Baltimore City ordinance requiring licensing of operators of construction equipment).

Implied Preemption

State law impliedly preempts local law where the local law deals with an area in which the General Assembly has acted with such force that an intent by the State to occupy the entire field must be inferred. *Holiday*, 349 Md. at 212 (citing *Talbot Cnty. v. Skipper*, 329 Md. 481, 488-489 (1993)). See *Bd. of Cty. Comm'rs v. Perennial Solar, LLC*, 464 Md. 610, 631 (2019) (statute impliedly preempts local law when it "manifests the general legislative purpose to create an all-compassing statutory scheme" that is "extensive and embraces[s] virtually the entire area involved.") For example, in *Allied Vending v. Bowie,* 332 Md. 279 (1993), the Supreme Court of Maryland invalidated ordinances enacted by the cities of Bowie and Takoma Park regulating the placement of cigarette vending machines, finding that the ordinances were preempted by State law. The court stated that "[t]he primary indicia of a legislative purpose to pre-empt an entire field of law is the comprehensiveness with which the General Assembly has legislated [in] the field." *Id.* at 299.

Although there is "no particular formula" for determining whether the General Assembly intended to preempt an entire area, *Howard Cnty., v. Potomac Electric Power Co.*, 319 Md. 511, 523 (1990), several factors have been considered by the courts. These include:

- ***Whether the local laws existed prior to the enactment of the State laws governing the same subject matter.*** The General Assembly is presumed to be aware of existing local law in the field. Where it has failed to address this local law, the courts presume that no preemption was intended. *Howard Cnty.*, 319 Md. at 523; *Nat'l Asphalt v. Prince George's Cnty.*, 292 Md. 75, 79 (1981).

- ***Whether the State laws provide for pervasive administrative regulation.*** Pervasive administrative control and regulation is considered "a compelling indication that the General Assembly did not intend that local governments should enact" their own laws, but that the matter under consideration "be strictly a state function." *Skipper,* 329 Md. at 489; *County Council v. Montgomery Ass'n.*, 274 Md. 52, 62 (1975).

- ***Whether the local law regulates an area in which some local control has traditionally been allowed.*** Where there is a tradition of local control, the courts will require further evidence of an express intent to preempt. See *Bd. of Child Care v. Harker*, 316 Md. 683, 698 (1989). Where there is no tradition of local control, the courts will see it as evidence of implied preemption. *Montgomery Ass'n.*, 274 Md. at 62.

- ***Whether the State law expressly provides concurrent legislative authority to local jurisdictions or requires compliance with local law.*** The courts have also deferred to agency regulations requiring compliance with local law when the regulations are "consistent with the letter and spirit of the statute under which the agency acts." *Harker*, 316 Md. at 698. State law that allows local governing bodies to "be significant participants" in the regulatory process, but still provides that the agency is "the ultimate decision-maker" is not evidence of concurrent legislative authority. *Perennial Solar*, 464 Md. at 643.

- ***Whether a State agency responsible for administering and enforcing the State law has recognized local authority to act in the field.*** In keeping with the general principle that "[t]he consistent construction by the agency responsible for administering a statute is entitled to considerable weight," the courts have presumed that preemption was not implied by the General Assembly when the relevant State agency recognizes and acts as if the local authorities may also act in the field. *Nat'l Asphalt,* 292 Md. at 80.

- ***Whether the particular aspect of the field sought to be regulated by the local government has been addressed by the State legislation.*** Where the General Assembly has chosen not to regulate a certain aspect of the field, preemption of that aspect is not presumed. *Ad + Soil, Inc. v. Cnty. Comm'rs*, 307 Md. 307, 328 (1986).

- ***Whether, if local laws were not preempted, the existence of a two-tiered regulatory process would engender chaos and confusion.*** A court may find implied preemption when two tiers "would inevitably lead to utter confusion." *Montgomery Ass'n.*, 274 Md. at 64.

Other areas where the Supreme Court of Maryland has found implied preemption include campaign finance regulation (*Montgomery Ass'n.*, 274 Md. 52) and education (*McCarthy v. Bd. of Educ.*, 280 Md. 634 (1977)).

Separation of Powers

Rule

Under the Separation of Powers provision in Article 8 of the Maryland Declaration of Rights, the "Legislative, Executive, and Judicial powers of Government ought to be forever separate and distinct from each other" and no person exercising the functions of one of the departments may assume or discharge the duties of another.

Discussion

The purpose of the Separation of Powers provision in the Maryland Declaration of Rights is to "parcel out and separate the powers of government, and to confide particular classes of them to particular branches of the supreme authority." *Wright v. Wright's Lessee*, 2 Md. 429, 452 (1852). The separation of powers doctrine is an "explicit Maryland Constitutional command." *Schisler et al. v. State*, 394 Md. 519, 567 (2006). This doctrine, however, does not require absolute separation between the branches of government. *McCulloch v. Glendening*, 347 Md. 272, 284 (1997). The Supreme Court of Maryland has interpreted the constitutional provision to mean that "one branch may not *usurp* the *essential* functions and powers of another branch (see *Shell Oil Co. v. Supervisor of Assessments*, 276 Md. 36, 46-47 (1975)), may not act to *destroy* the *essential* functions and powers of another branch (see *Criminal Injuries Compensation Brd. v. Gould*, 273 Md. 486, 500-501 (1975)), and may not *delegate* its *essential* functions and powers to another branch" (see *Ahlgren v. Cromwell*, 179 Md. 243, 246-247 (1941))". 63 Op. Att'y Gen. 305, 310 (1978) (emphasis in original).

Relation to Judicial Powers and Functions

Under Article IV, § 18(a) of the Maryland Constitution, the authority to make judicial rules is allocated between the Supreme Court of Maryland and the General Assembly. Traditionally, the judiciary has regulated certain areas of court administration and procedure. "[T]he regulation of the practice of law, the admittance of new members to the bar, and the discipline of attorneys who fail to conform to the established standards governing their professional conduct are essentially judicial in nature and, accordingly, are encompassed in the constitutional grant of judicial authority to the courts of this State." *Attorney General v. Waldron*, 289 Md. 683, 692 (1981). The General Assembly may regulate in these areas as long as it does not place restrictions that are "so onerous or burdensome that they impinge on the ability of the judicial branch to carry out its duties." *Id.* at 700. In *Waldron,* the Supreme Court of Maryland struck down a statute that limited the rights of retired judges to practice law, saying the statute went beyond the province of the legislature to regulate in this area.

The doctrine of separation of powers prohibits the courts from performing nonjudicial functions and prohibits administrative agencies from performing judicial functions. *Consol.*

Constr. v. Simpson, 372 Md. 434, 449 (2002). The General Assembly does not violate the doctrine when it delegates to administrative agencies "quasi-judicial" functions, *e.g.*, the power to hold administrative hearings. The delegation of a purely judicial function or power to an administrative agency, however, would violate the constitution. See *Shell Oil Co.,* 276 Md. at 47 (attempt by General Assembly to impose judicial functions on Maryland Tax Court unconstitutional); *Sugarloaf v. Dep't of Env't*, 344 Md. 271, 289-290 (1996) (not a proper function of administrative official to decide whether litigant has standing to maintain action in court). An agency of the executive branch may perform adjudicatory functions without violating the principle of separation of powers provided that there is an opportunity for judicial review of the agency's final determination. See *Md. Aggregates v. State*, 337 Md. 658, 678 (1995); *Merchant v. State,* 448 Md. 75, 103 (2016). Similarly, a statute that delegates administrative or executive functions to the courts is unconstitutional. See *Dep't. of Natural Res. v. Linchester Sand & Gravel Corp.*, 274 Md. 211, 217 (1975).

As a general rule, the General Assembly violates the separation of powers doctrine when it attempts to perform judicial functions. See*, e.g.*, *Mayor of Balt. v. Horn*, 26 Md. 194 (1867) (legislature may not direct parties to pay assessments which Supreme Court of Maryland decided they did not owe); *Wright v. Wright's Lessee*, 2 Md. 429 (1852) (General Assembly may not pass acts granting divorce); *Prout v. Berry*, 2 Gill 147 (1844) (General Assembly may not determine rights of parties in any given determination of the Supreme Court of Maryland); *Whittington v. Polk*, 1 H. & J. 236 (1802) (General Assembly may not make final determination of validity of its own acts). A statute will not be struck down, however, merely because it relates to a judicial function. See, *e.g.*, *Franklin v. Mazda Motor Corp.*, 704 F. Supp. 1325 (D. Md. 1989) (General Assembly may limit noneconomic damages in personal injury suits); *Comm'n. on Med. Discipline v. Stillman*, 291 Md. 390 (1981) (General Assembly may prohibit judicial stays of administrative orders revoking medical licenses); *Att'y Gen. v. Johnson*, 282 Md. 274 (1978), *appeal dismissed*, 439 U.S. 805 (1978) (General Assembly may require submission of medical malpractice suits to nonbinding arbitration as condition precedent to filing court action).

In addition, courts may not be vested with nonjudicial functions. In *Sugarloaf Citizens Ass'n v. Gudis*, 319 Md. 558, 568–569 (1990), the Supreme Court of Maryland struck down a provision in a county code that authorized courts to void legislation or other local government action if the court determined voiding the action "to be in the best interest of the public." Such "unguided discretion" involved questions of "policy and expediency" and was, therefore, "legislative, not judicial." *Id.* at 572. The Supreme Court of Maryland stated in *Coleman v. Soccer Ass'n of Columbia*, 432 Md. 679, 689-690 (2013), that "declaration of the public policy of Maryland is normally the function of the General Assembly". (citing *Harrison v. Montgomery Cnty. Bd. of Educ.,* 295 Md. 442, 460 (1983)). *But* see *Murphy v. Liberty Mut. Ins. Co.*, 478 Md. 333, 385 (2022 (holding that the court did not usurp core functions belonging to the other branches of the government when tolling statutes of limitations with respect to civil actions during the COVID-19 pandemic).

Relation to Executive Powers and Functions

The Supreme Court of Maryland has recognized the fundamental principle that, except when authorized by the Maryland Constitution, the General Assembly may not delegate its

lawmaking authority to the executive branch. *Pressman v. Barnes*, 209 Md. 544 (1956). See *also Christ v. Md. Dep't of Natural Res.*, 335 Md. 427, 444-445 (1994) (General Assembly "could not delegate to an administrative agency its power to impeach, to propose constitutional amendments, or to enact statutes"). "This principle is not violated, however, where a municipal corporation is vested with powers of legislation as to matters of local concern." *Pressman*, 209 Md. at 552.

The court in *Pressman* also held that the doctrine is not violated where a statute or ordinance gives discretion to administrative officials as long as the discretion is limited by standards sufficient to protect citizens against arbitrary and unreasonable exercise of that discretion. Moreover, "where the discretion to be exercised relates to police regulations for the protection of public morals, health, safety, or general welfare, and it is impracticable to fix standards without destroying the flexibility necessary to enable the administrative officials to carry out the legislative will, legislation delegating such discretion without such restrictions may be valid." *Id.* at 555 (upholding ordinance that gave Baltimore City Director of Traffic authority to adopt rules regulating traffic even though ordinance did not set standards to be followed). See *also Maryland State Police v. Warwick,* 330 Md. 474 (1993) (delegations of legislative power to administrative officials is proper where sufficient safeguards are legislatively provided); *Dep't. of Transp. v. Armacost*, 311 Md. 64 (1987) (vehicle emissions inspection program did not unconstitutionally delegate legislative power to administrative agency).

The doctrine also prohibits the General Assembly from usurping the powers of the executive branch. In *Schisler*, the Supreme Court of Maryland held that statutory provisions that terminate, *i.e.*, "remove," incumbent members of an executive commission were an "unconstitutional usurpation" by the General Assembly of the executive power of removal found in Article II, § 15 of the Maryland Constitution and violated Maryland's separation of powers doctrine. *Schisler*, 394 Md. at 566. However, in *State v. Falcon,* 451 Md. 138, 172-173 (2017), the Supreme Court of Maryland held that the General Assembly is authorized to abolish or reconstitute a statutory board or commission, even if it impacts the terms of incumbent members. The court found that the "termination of the Appointees' terms was incidental to the General Assembly's restructuring and reconstituting of the Nominating Commission." *Id*. at 172-173.

The General Assembly also may not diminish or abolish a constitutionally established office in the Executive Branch. In *Murphy v. Yates*, 276 Md. 475 (1975), the Supreme Court of Maryland struck down an act because it empowered the State Prosecutor to prosecute crimes to the exclusion of the State's Attorney. The court held:

> If an office is created by the Constitution … although additional powers may be granted by statute, the position can neither be abolished by statute nor reduced to impotence by the transfer of duties characteristic of the office to another office created by the legislature.

Id. at 492 (citations omitted).

Legislative Veto

Rule

Legislative oversight of executive action outside the passage of legislation is constitutionally questionable. To determine whether a legislative action undertaken by less than the full General Assembly constitutes an unconstitutional veto over an executive action, a court will weigh the scope and duration of interference with core executive functions caused by the legislative action.

Discussion

"Legislative veto" denotes a legislative action that serves to countermand an action of the Executive Branch without first passing a bill by both legislative chambers and presenting it to the Governor. The relevant State constitutional provisions are Articles 8 and 9 of the Maryland Declaration of Rights ("Separation of Powers" and "Power of Suspension," respectively), and Article II, § 17 and Article III, § 30 of the Maryland Constitution ("Approval" and "Presentment" requirements, respectively).

On the federal level, the U.S. Supreme Court found such a legislative veto to be unconstitutional in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983). In *Chadha*, the court reviewed the framers' intent in establishing the "single, finely wrought and exhaustively considered, procedure" of requiring valid legislative action to flow through both houses of Congress and be presented to the Executive. *Id.* at 945-952. *Chadha* held that the section of the Immigration and Nationality Act that authorized one house of Congress to invalidate a deportation decision made by the executive branch by resolution was unconstitutional since it failed to require action by both houses and presentment to the President. *Id.* at 960.

A Maryland court has yet to determine whether this type of legislative action is permissible under the Maryland Constitution. Pre-*Chadha*, the Maryland Attorney General had concluded that a statute reserving to a legislative committee a veto over proposed regulations was not clearly unconstitutional. 63 Op. Att'y Gen. 125, 127-28 and 150-51 (1978). Since *Chadha,* and after a series of court opinions from other states holding that legislative veto provisions violate the separation of powers provisions of their respective state constitutions (see cases collected in Rossi, *Institutional Design and the Lingering Legacy of Anti-Federalist Separation of Powers Ideals in the States*, 52 Vand.L.Rev. 1167, 1201-15 & nn. 186-90 (1999)), the Attorney General has repeatedly and consistently noted the questionable constitutionality of legislative veto provisions in light of the overwhelming weight of authority in other jurisdictions. See, *e.g.*, Advice Letter of Attorney General on House Bill 1443 of 2017 (March 17, 2017); Bill Review Letter of Attorney General on Senate Bill 856 of 2002 (May 3, 2002); 85 Op. Att'y Gen. 190 (2000); 75 Op. Att'y Gen. 431, 437 n.6 (1990); Bill Review Letter of Attorney General on Senate Bill 302 of 1998 (April 24, 1998) (citing prior letters and relevant case law).

According to the Attorney General, a "critical distinction" exists between statutes that give legislative bodies the power to approve or disapprove an action by an administrative body and those that merely give such bodies the authority to review and comment on such actions. 85 Op. Att'y Gen. 190 (2000). For example, in an opinion offered to the State Comptroller on a provision of the 1998 capital budget bill that authorized the Maryland Stadium Authority to perform construction and related work for State agencies and local governments, the Attorney General saw no constitutional problem with a requirement that the Stadium Authority notify the budget committees of the General Assembly of any agreement between the authority and another agency, before beginning any work, so as to allow the committees 30 days to review and comment on the agreement. *Id.*

In contrast, the Attorney General warned that a Senate bill that included a provision requiring approval by the Legislative Policy Committee before the Department of Juvenile Services provided a grant to public entities for the purpose of improving public recreational facilities experiencing violence and crime "amount[ed] to a legislative veto." Bill Review Letter of Attorney General on Senate Bill 370 of 2006 (April 5, 2006). See also Bill Review Letter of Attorney General on Senate Bill 302 of 1998 (April 24, 1998) (bill mandating that salaries of Baltimore City employees be determined with advice and consent of the Senators from Baltimore City is a "legislative veto provision of doubtful validity"). However, where the Legislative Policy Committee is to "review and approve" a plan proposed by an executive branch agency, but the Governor and Attorney General still have an opportunity to approve the plan if the Legislative Policy Committee does not approve, the Attorney General has opined that there is no unconstitutional legislative veto as the legislative body "does not have the ultimate authority to veto the plan." Bill Review Letter of Attorney General on Senate Bill 202 of 2023 n.1 (April 10, 2023).

In formulating and supporting this view of the legislative veto, the Attorney General has relied on a series of cases from other jurisdictions. See e.g., *Alaska Airlines v. Brock*, 480 U.S. 678**,** 683 (1987), *quoted in* Bill Review Letter of Attorney General on House Bill 376 of 1990 (May 24, 1990). Beyond the federal cases, the majority of out-of-state courts that have considered a legislative veto after *Chadha*, particularly concerning opposition to regulations, have struck down the practice as a violation of separation of powers or of the presentment requirement. See, *e.g.*, *Chaffin v. Ark. Game & Fish Comm'n*, 757 S.W.2d 950 (Ark. 1988) (required "advice" of legislative council in spending certain contract appropriations violates separation of powers); *Opinion of the Justices to the Senate*, 493 N.E.2d 859 (Mass. 1985) (simple resolution to block nuclear plant violates separation of powers); *Commonwealth v. Jubilerer*, 567 A.2d 741 (Pa. Commw. 1989) (regulation disapproval by legislative committee violates separation of powers, bicameral passage, and presentment requirements); but see *Mead v. Arnell*, 791 P.2d 410, 418-420 (Idaho 1990) (regulations are not statutes; legislative rejection of regulations by concurrent resolution violates neither separation of powers nor presentment requirement).

To the extent possible, in reviewing bills with a legislative impact on executive functions, the Attorney General examines the impact to determine whether it is an outright veto, whether it creates an undue delay in implementation of an executive action, and whether it impedes "core executive functions." Bill Review Letter of Attorney General on Senate Bill 273 of 1990 (May 23, 1990).

The Attorney General will construe a provision of questionable validity in a manner that avoids the constitutional issue, if possible. Chapter 500 (S.B. 694) of 1995 allowed the Secretary of the Department of Health and Mental Hygiene to propose a plan to enroll all Medicaid recipients in managed care plans. The bill prohibited the Secretary's plan from taking effect "until the General Assembly gives [its] legislative approval." Although the bill required the Secretary to present the plan only to the Senate Finance Committee and the House Environmental Matters Committee for review, the Attorney General opined that if the reference to "legislative approval" in the bill was construed to mean approval through passage of a bill presented to the Governor, the constitutional issue of legislative veto could be avoided. Bill Review Letter of Attorney General on Senate Bill 694 of 1995 (May 22, 1995).

Legislative veto was a dominant issue during the 2004 session as the General Assembly considered future funding of the Bridge to Excellence in Public Schools Act (Ch. 288 (S.B. 856) of 2002), popularly known as the "Thornton Bill." That legislation contained a provision that made greatly enhanced funding for public schools subject to passage of a joint resolution by the General Assembly at the 2004 session, affirming that the additional aid was within the State's fiscal resources. If the General Assembly failed to enact the joint resolution, the funding amounts would automatically be reduced for fiscal 2005 and subsequent fiscal years. Prior to the 2004 session, in a letter to the President of the Senate and the Speaker of the House of Delegates, the Attorney General reiterated an earlier conclusion (see Bill Review Letter of Attorney General on Senate Bill 856 of 2002 (May 3, 2003)) that the linking of the funding to passage of a joint resolution, the so-called "Thornton trigger" provision, "may well be regarded as an unconstitutional legislative veto." The letter included a memorandum of law concluding that "use of this mechanism in the Thornton Bill would allow the General Assembly to determine a change in State policy by a joint resolution that is not subject to a gubernatorial veto – as opposed to enacting a law that would be subject to a gubernatorial veto." This is precisely why the Attorney General has consistently found such mechanisms to be of doubtful constitutionality. The Attorney General further advised that the trigger mechanism would place the State at risk of a lawsuit challenging the provision's constitutionality and threatening the goals of the Thornton Bill. In response to these concerns, the General Assembly passed emergency legislation (Ch. 6 (H.B. 345) of 2004) repealing the constitutionally suspect trigger mechanism and maintaining full funding of the Bridge to Excellence in Public Schools Act.

Legislation that includes a legislative veto may still be valid in part, so long as the substantive and veto portions of the legislation are severable. The Attorney General has consistently supported the constitutionality of severable bills, particularly in the context of the budget. See, *e.g.*, Bill Review Letter of Attorney General on Senate Bill 302 (April 24, 1998), *supra*, (Senate delegation approval of Board salary adjustments); Bill Review Letter of Attorney General on House Bill 376 of 1990 (May 24, 1990) (1990 capital budget).

Invalid portions of appropriations bills are automatically severed under Article III, § 52 of the Maryland Constitution. The Attorney General has declined to predict the constitutional fate of appropriations provisions that cannot clearly be severed, such as prior budget committee approval for specific projects funded through legislatively created special funds. Bill Review Letter of Attorney General on House Bill 376 of 1990 (May 24, 1990); Bill Review Letter of Attorney General on Senate Bill 460 and House Bill 795 of 1996 (May 6, 1996) (questionable

status of “Sunny Day” fund transfers; performance guidelines approved by Legislative Policy Committee).

Impairment of Contracts

Rule

The Contract Clause of the U.S. Constitution prohibits a state from passing any law impairing the obligation of contracts.

Discussion

Courts have invalidated state legislative action for unjustifiably impairing contracts in a substantial way in violation of the Contract Clause of the U.S. Constitution, Art. I, § 10, cl.1. See *U.S. Trust Co. v. New Jersey*, 431 U.S. 1 (1977), and *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978). Although the language of the Contract Clause is facially absolute, all impairments by a state of its own apparent contractual obligations or contracts between private parties are not prohibited. The inherent police power of the state "to safeguard the vital interests of its people" imposes limitations on the operation of the Contract Clause. *Energy Reserves Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 410 (1983). This occurs in two ways:

1. In the case of a contract to which a state is a party, the contract is void where the state has attempted "to enter into binding contracts not to exercise its police power in the future." *U.S. Trust Co.,* 431 U.S. at 23, n.20. This is so because "the legislature cannot bargain away the police power of a State." *Id.* at 23 (quoting *Stone v. Mississippi*, 101 U.S. 814, 817 (1880)).

2. In the case where no such surrender of state sovereignty is involved (as well as in cases of contracts between private parties), a state may, in the exercise of its police power, constitutionally impair contractual obligations if the legislation is reasonable and necessary to serve a legitimate or important public purpose. *Allied Structural Steel*, 438 U.S. at 244; *Balt. Teachers Union v. Mayor of Baltimore*, 6 F.3d. 1012, 1018 (4th Cir. 1993).

Where a state's own contract is involved, "*complete* deference [by a reviewing court] to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake." *Md. State Teachers Ass'n v. Hughes*, 594 F. Supp. 1353, 1360 (D. Md. 1984), *aff'd* No. 84-2213 (4th Cir. 1985), *cert. denied,* 475 U.S. 1140 (1986) (emphasis in original). Where the impairment is to private contracts, courts will defer to the legislative judgment as to the necessity and reasonableness of a particular measure. *Id.*

The inquiry into the state law has three components: (1) whether there has been impairment of a contract; (2) whether the law is a "*substantial* impairment of a contractual relationship"; and (3) if there is substantial impairment of contract, "whether that impairment is nonetheless permissible as a legitimate exercise of the state's sovereign powers." *Balt. Teachers Union,* 6 F.3d. at 1015 (emphasis in original) (citations omitted). To analyze whether a law substantially impairs a contractual relationship, courts must consider "the extent to which the law undermines the

contractual bargain, interferes with a party's reasonable expectations, and prevents the party from safeguarding or reinstating [their] rights." *Sveen v. Melin*, 138 S. Ct. 1815, 1822 (2018) (citations omitted).

The severity of the impairment increases the level of scrutiny the legislation will receive. In determining the extent of the impairment, an important factor to consider is whether the affected industry has been regulated in the past. *Energy Reserves Grp.*, 459 U.S. at 410; *Allied Structural Steel Co.*, 438 U.S. at 250. To make a successful Contract Clause challenge, the state legislation must be shown to cause a retroactive, not prospective, impairment of contractual rights. *Md. State Teachers Ass'n,* 594 F. Supp. at 1360. To justify state regulation that constitutes a substantial contractual impairment, the State must have a significant and legitimate public purpose behind the regulation, such as remedying a broad and general social or economic problem. *Allied Structural Steel Co.*, 438 U.S. at 250. Moreover, the State's public purpose must be advanced in an appropriate and reasonable way. *Sveen*, 138 S. Ct. at 1822 (citing *Energy Reserves Grp.*, 459 U.S. at 411–12).

Once a legitimate public purpose has been identified, the next inquiry is whether the adjustment of "the rights and responsibilities of contracting parties [is based] upon reasonable conditions and [is] of a character appropriate to the public purpose justifying [the legislation's] adoption." *United States Trust Co.*, 431 U.S. at 22. Unless the state itself is a contracting party, "[a]s is customary in reviewing economic and social regulation ... courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." *Id.* at 22-23.

The U.S. Supreme Court has found that "a substantial impairment is unreasonable when 'an evident and more moderate course would serve [the state's] purposes equally well'". *Sveen*, 138 S. Ct. at 1829 (quoting *U.S. Trust Co.,* 431 U.S. at 31). Additionally, the Supreme Court of Maryland has ruled that "while all constitutional impairments of contracts are breaches of contract under Maryland law, not all breaches of contract rise to the level of an unconstitutional impairment." *Cherry v. Mayor of Balt.*, 475 Md. 565, 617 (2021).

In the related issue of impairment of property rights, the Supreme Court of Maryland has held that, as a matter of Maryland constitutional law, legislation that retroactively impairs vested property rights will be declared void. See *Dua v. Comcast Cable of Md., Inc.*, 370 Md. 604 (2002). For further discussion, see chapter on "Retroactive Legislation" in this *Legislative Desk Reference.*

Commerce Clause

Rule

A state statute that regulates even-handedly and has only indirect effects on interstate commerce is likely to be upheld if the statute is rationally related to a legitimate state purpose; however, if the statute directly regulates or discriminates against interstate commerce, the statute may be unconstitutional under the Commerce Clause of the U.S. Constitution.

Discussion

Federal Power to Regulate Interstate Commerce

The U.S. Constitution, Article I, § 8, cl. 3, delegates to Congress the power to "regulate Commerce...among the several States." U.S. CONST. art. I, § 8 cl.13. The U.S. Supreme Court has traditionally been extremely permissive in upholding federal regulation based on the Commerce Clause. For example, the court has stated that it "need not determine whether respondents' activities…substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding." *Gonzales v. Raich*, 545 U.S. 1, 22 (2005) (citing *United States. v. Lopez*, 514 U.S. 549, 557 (1995)). After such a finding, the only question left is whether the means chosen by Congress are reasonably related to the permitted end. *Hodel v. Va. Surface Mining and Reclamation Ass'n*, 452 U.S. 264, 276 (1981).

The U.S. Supreme Court, however, has begun to interpret more narrowly the grant of authority under the Commerce Clause by invalidating provisions of various federal enactments based on the Tenth Amendment to the U.S. Constitution which reserves to the states powers not delegated to the United States. See*, e.g.*, *Bd. of Trs. v. Garrett*, 531 U.S. 356 (2001) (provision in federal Americans with Disabilities Act authorizing private party lawsuits against states for violation of statute insufficiently justified to warrant federal response and therefore invalid); *United States. v. Morrison*, 529 U.S. 598 (2000) (suppression of violent crime truly local police power); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (federal age discrimination statute unconstitutional because it implicitly abrogated state immunity); *Printz v. United States*, 521 U.S. 898 (1997) (federal law forcing state and local law enforcement officers to perform background checks on prospective handgun owners unconstitutional); *Lopez*, 514 U.S. 549 (federal prohibition of possession of guns near schools unconstitutional attempt to convert commerce power into general police power retained by states).

State Regulation Affecting Interstate Commerce

In addition to being a grant of authority to Congress, the Commerce Clause has been interpreted as a limitation on state regulation of commerce, thereby prohibiting economic protectionism by the states. *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996). This is referred to as

the "dormant" Commerce Clause. The U.S. Supreme Court has stated that "[a]lthough the Commerce Clause is written as an affirmative grant of authority to Congress, this Court has long held that in some instances it imposes limitations on the States absent congressional action." *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2089 (2018).

A state tax, for instance, is evaluated under a four-part test that asks "whether a 'tax is applied to an activity with a substantial nexus with the taxing State; is fairly apportioned; does not discriminate against interstate commerce; and is fairly related to the services provided by the State.'" *Comptroller v. Wynne,* 575 U.S. 542, 547 (2015) (quoting *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977)). See also *Wayfair*, 138 S. Ct. at 2099 (physical presence not necessary to establish nexus with the state that established the regulation).

Even if a tax is facially discriminatory, the tax may still be upheld as constitutional if it is a "compensatory tax" that merely aims to ensure that interstate commerce bears a burden that intrastate commerce already bears. The U.S. Supreme Court has stated:

> [Case law has] distilled three conditions necessary for a valid compensatory tax. First, "a State must, as a threshold matter, 'identif[y] ... the [intrastate tax] burden for which the State is attempting to compensate'."… Second, "the tax on interstate commerce must be shown roughly to approximate – but not exceed – the amount of the tax on intrastate commerce." … "Finally, the events on which the interstate and intrastate taxes are imposed must be 'substantially equivalent'; that is, they must be sufficiently similar in substance to serve as mutually exclusive 'prox[ies]' for each other."

Fulton Corp., 516 U.S. at 332-333 (internal citations omitted). General revenue taxes already imposed on in-state corporations are unlikely to be a sufficient justification for the imposition of a "compensatory" tax on out-of-state corporations. *Id.* at 337 (tax on corporate stock that is proportional to portion of corporation's income subject to North Carolina income tax held unconstitutional). In practice, a facially discriminatory "compensatory tax" is likely to be upheld only if it is a "use" tax, equivalent to the state sales tax. Maryland currently has a use tax. *See* MD. CODE ANN., TAX – GEN. § 11-101, *et seq*.

In evaluating the impact on interstate commerce in regards to a tax, the U.S. Supreme Court uses the "internal consistency" test, which assumes that every state has the same tax in place to hypothetically determine whether identical application of the tax scheme would place interstate commerce at a disadvantage compared to other states. *Wynne*, 575 U.S. at 562 (internal citations omitted). Taxes that fail the test "inherently discriminate against interstate commerce without regard to the tax policies of other states" and will typically be found to be unconstitutional, whereas taxes that "create disparate incentives to engage in interstate commerce…only as a result of the interaction of two different but nondiscriminatory and internally consistent schemes" will typically be held constitutional. *Id.*

The U.S. Supreme Court has also developed a two-tiered approach for the analysis of state and local economic regulation under the Commerce Clause. *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986). *Brown* provided:

> When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry. When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.

Id. (internal citations omitted). The court added, "the critical consideration is the overall effect of the statute on both local and interstate activity." *Id.* The court subsequently clarified that this consideration of the overall effect of the statute is intended to determine whether a facially nondiscriminatory measure is, at its root, discriminatory. *Nat'l Pork Producers Council v. Ross*, 143 S. Ct. 1142, 1157 (2023) (stating that there is no clear separation between cases involving facially discriminatory statutes and those where discrimination is implicit). Explaining further, the court said, "if some of our cases focus on whether a state law discriminates on its face, [*Brown* and other cases] serve as an important reminder that a law's practical effects may also disclose the presence of discriminatory purpose." *Id.*

As a general principle, where a state directly regulates or discriminates against interstate commerce, or the effect of the regulation is to favor in-state economic interests, the court will apply a strict scrutiny test. Under strict scrutiny, the regulation will be justified if there is a legitimate state purpose that could not be served as well by nondiscriminatory means. *Hughes v. Oklahoma*, 441 U.S. 322 (1979). If a restriction on commerce is discriminatory, it is virtually *per se* invalid. *Or. Waste Sys. V. Dep't of Env't*, 511 U.S. 93 (1994). Once a law has been found to be discriminatory, it will be held invalid unless its proponents "can 'sho[w] that it advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.'" *Id.* at 100-101.

Relatedly, in the context of regulating alcoholic beverages in Maryland, the Attorney General has long advised that limiting alcoholic beverage licenses and permits to include only alcoholic beverages produced in Maryland violates the Commerce Clause. Bill Review Letter for Senate Bill 325 of 2019 (May 8, 2019) (advising that a new type of permit that was limited to alcoholic beverages "produced in Maryland" was unconstitutional for being facially discriminatory against alcoholic beverages in other states and failing to advance a legitimate local purpose that cannot be adequately served by other reasonable nondiscriminatory alternatives). Merely providing a competitive advantage to businesses in the State does not satisfy its burden for validating such a law. *Id.*

In contrast, facially discriminatory state or local laws may survive a challenge under the Commerce Clause if the governmental unit is acting as a market participant, rather than as a market regulator. *White v. Mass. Council of Constr. Emps.*, 460 U.S. 204 (1983). In *White*, the U.S. Supreme Court upheld a Boston mayor's executive order requiring that all construction projects funded in whole or in part with city funds, or funds that the city had the authority to administer, be performed by a work force at least 50 percent of whom were Boston residents. The court held that a state or local government is not subject to the limitations of the Commerce Clause when acting as a market participant. *See also Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794

(1976) (Maryland law favoring in-state scrap processors upheld because, in part, Maryland sought to enter the scrap market itself by incentivizing doing business with the state).

Double Jeopardy

Rule

The Fifth Amendment to the U.S. Constitution, made applicable to the states through the Fourteenth Amendment, provides, in part, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb." Although the Maryland Constitution does not contain a double jeopardy provision, Maryland does recognize a common law prohibition against double jeopardy. The double jeopardy rule "protects against three distinct abuses:

1. a second prosecution for the same offense after acquittal;

2. a second prosecution for the same offense after conviction; and

3. multiple punishments for the same offense."

***United States v. Halper*, 490 U.S. 435, 440 (1989).**

Discussion

Determining whether the double jeopardy protection applies in a given situation depends on whether jeopardy has "attached." Generally, jeopardy does not attach until conviction or acquittal. *Smith v. State*, 299 Md. 158, 179 (1984). For instance, once the trier of fact in a criminal case, whether it be the jury or the judge, intentionally renders a verdict of "not guilty," the verdict is final and the defendant cannot later be retried on or found guilty of the same charge. *Farrell v. State*, 364 Md. 499, 506-507 (2001) (double jeopardy still applies even where trial court acquitted defendant in error). An acquittal occurs when the fact finder resolves in the defendant's favor, correctly or incorrectly, some or all of the factual elements of the offense charged. *United States v. Martin Linen Supply,* 430 U.S. 564, 571 (1977).

Jeopardy may attach in certain proceedings, however, even though the proceeding has not been carried through to a conclusion. For example, jeopardy attaches in a jury trial when the jury is selected and sworn. *Crist v. Bretz*, 437 U.S. 28, 38 (1978). Jeopardy attaches in a nonjury situation when the accused is brought to trial and the court begins to hear the evidence. *State v. Despertt,* 73 Md. App. 620, 623-624 (1988). Subject to certain exceptions discussed below under "Resentencing," in the case of a defendant who pleads guilty, jeopardy attaches when the court accepts the plea, unless judicial acceptance of the plea was based on the defendant's fraudulent representations to the court. *Banks v. State*, 56 Md. App. 38, 47 (1983).

The defendant is not placed in jeopardy upon indictment, or when there is a hearing on the merits of pretrial motions. *Serfass v. United States*, 420 U.S. 377, 391 (1975). See also *Odem v. State,* 175 Md. App. 684, 700 (2007) (determination of preliminary matter that does not premise

its dismissal on grounds that defendant is not guilty of charge does not provide for attachment of jeopardy).

If a trial ends in a mistrial, a second trial is not normally barred when the defendant sought or consented to the mistrial, or if the declaration of a mistrial was a "manifest necessity" to prevent injustice to either party. *Giddins v. State,* 393 Md. 1, 14 (2006); *Booth v. State*, 301 Md. 1, 4 (1984). However, double jeopardy may bar a second trial if judicial or prosecutorial overreaching or bad faith caused the mistrial. *Hubbard v. State*, 395 Md. 73, 96 (2006) (double jeopardy attaches when declaration of mistrial is not manifestly necessary); *Giddins*, 393 Md. at 4-5. Similarly, a second trial is not barred where a defendant successfully seeks dismissal of a charge for a reason "unrelated to factual guilt or innocence." *United States v. Scott*, 437 U.S. 82, 99 (1978). When a conviction is overturned on appeal, "the general rule is that the Double Jeopardy Clause does not bar reprosecution." *Justices of the Boston Mun. Ct. v. Lydon*, 466 U.S. 294, 308 (1984).

Required Evidence Test

An acquittal also prevents subsequent prosecution for lesser included offenses or greater offenses that require proof of elements and facts of the former charge for which the defendant was acquitted. *Blockberger v. United States*, 284 U.S. 299 (1932). In *Blockberger*, the U.S. Supreme Court held that two offenses are considered the same offense for double jeopardy purposes unless each offense requires proof of a fact that the other does not. *Id.* at 304. In Maryland, the required evidence test for "merger" of offenses test has been stated as follows:

> If each offense requires proof of a fact which the other does not, the offenses are not the same and do not merge. However, if only one offense requires proof of a fact which the other does not, the offenses are deemed the same, and separate sentences for each offense are prohibited.

Dixon v. State, 364 Md. 209, 237 (2001) (quoting *Nightingale v. State*, 312 Md. 699 (1988)); see*, e.g., Utter v. State*, 139 Md. App. 43 (2001) (sentences for first degree burglary merged into sentence for first degree attempted rape).

This "required evidence test" may also be applied after a conviction to determine whether a subsequent prosecution is for the same offense for double jeopardy purposes. For example, if the defendant is charged with murder but convicted of manslaughter, the conviction for the lesser-included offense (of manslaughter) is an implied acquittal of murder, and the defendant cannot thereafter be retried for murder. *Green v. United States*, 355 U.S. 184, 190 (1957). Unlike an acquittal, however, a conviction is not an absolute bar to a subsequent prosecution for the same offense. For instance, a subsequent prosecution for a greater offense arising out of the same act or transaction that led to the prosecution of a lesser offense may be permitted if there are new facts that were not known at the time of the prosecution of the lesser offense. *Warne v. State,* 166 Md. App. 135, 139 (2005) (prohibition against double jeopardy did not bar prosecution for manslaughter by vehicle or vessel and related offenses when victim died after defendant paid fine for negligent driving citation).

If a defendant appeals a conviction on the basis of an error made at trial, the defendant has waived the right to claim double jeopardy. The exception to this rule occurs when the appeal is based on insufficiency of evidence. *Burks v. United States*, 437 U.S. 1, 17 (1978). This exception, however, does not apply when the reversal of the conviction is based on the weight of the evidence rather than its sufficiency. *Tibbs v. Florida*, 457 U.S. 31, 42 (1982).

The *Blockberger* test is also used where a single criminal act or transaction constitutes two separate crimes, resulting in the possibility of multiple punishments for the same offense. The classic example is the defendant who is arrested for purse snatching and is charged with both robbery and theft. Under common law, both crimes require proof of the taking and carrying away of the personal property of another with the intent to permanently deprive the person of possession of the property. The robbery charge, however, requires proof of an additional element − the use of force or the threat of force (assault) to facilitate the taking. This additional element makes robbery the "greater offense" and theft the "lesser included offense". See*, e.g., Newton v. State*, 280 Md. 260 (1977) (additional element makes felony murder greater offense and attempted robbery lesser included offense). Since these crimes constitute the same offense under *Blockberger*, the defendant may not be sentenced for both crimes. When these crimes are at issue at the same trial, the lesser-included offense merges into the greater offense for sentencing purposes. *Simms v. State*, 288 Md. 712, 718 (1980). Cf.*, Manokey v. Waters,* No. 03-6932 (4th Cir. Dec. 2, 2004) (upholding Supreme Court of Maryland's rejection of the claim that offenses of first degree assault and reckless endangerment merge); *Holbrook v. State*, 364 Md. 354, 371 (2001) (crimes of arson and reckless endangerment do not merge under required evidence test because each offense has element not present in other).

Exceptions

There are a few exceptions to the bar against multiple punishments for the same offense. If the defendant requested severance of the charges or the trial court for the first offense did not have jurisdiction to hear the second offense, multiple punishments may be sought. *Jeffers v. United States*, 432 U.S. 137, 151 (1977).

The bar is also inapplicable if the second prosecution is brought in a separate jurisdiction from the first prosecution. This is known as the "dual sovereign" rule. *Heath v. Alabama*, 474 U.S. 82, 88 (1985); *Bartkus v. Illinois*, 359 U.S. 121, 131-133 (1959); *Abbate v. United States*, 359 U.S. 187, 194 (1959). The basis for this rule is that the separate sovereigns have the right to enforce their own laws, and every citizen owes a dual allegiance, one to the state and one to the federal government. Accordingly, this exception applies when the prosecutions are brought in separate states or when one prosecution is brought in a state court and the other is brought in federal court. *Heath*, 474 U.S. at 88. The exception also applies when one prosecution is brought in a tribal court and the other is brought in a federal court. *United States v. Wheeler*, 435 U.S. 313, 329-330 (1978); see also *Denezpi v. United States*, 142 S. Ct. 1838, 1845-1846 (2022) (holding that the same logic applies where the first prosecution is brought to enforce tribal law in a Code of Federal Regulations court established by the federal Bureau of Indian Affairs).

Finally, multiple punishments are permitted if the legislature specifically provided for them through clear legislative intent. *Missouri v. Hunter*, 459 U.S. 359, 368 (1983). If the offenses are

statutory offenses and the legislative intent is not clear, the "rule of lenity" applies and the statute is interpreted in the defendant's favor. *Handy v. State*, 175 Md. App. 538, 588 (2007); *Snowden v. State*, 321 Md. 612, 619 (1991); *Bell v. United States*, 349 U.S. 81, 84 (1955).

Civil Actions

Generally, double jeopardy protections do not apply in civil cases and do not prohibit the imposition of civil punishments. *Hudson v. United States*, 522 U.S. 93, 99 (1997). In certain instances, however, a civil sanction may constitute punishment for the purposes of double jeopardy analysis. The U.S. Supreme Court has listed factors to evaluate whether a penalty intended as a civil remedy could be considered a criminal penalty, including:

> "(1) '[w]hether the sanction involves an affirmative disability or restraint'; (2) 'whether it has historically been regarded as a punishment'; (3) 'whether it comes into play only on a finding of scienter'; (4) 'whether its operation will promote the traditional aims of punishment–retribution and deterrence'; (5) 'whether the behavior to which it applies is already a crime'; (6) 'whether an alternative purpose to which it may rationally be connected is assignable for it'; and (7) 'whether it appears excessive in relation to the alternative purpose assigned.'"

Id. at 99-100 (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963)).

In Maryland, the issue of whether a civil action is punitive has been argued in the context of administrative suspension of a driver's license. See *State v. Jones*, 340 Md. 235, 266 (1995) (subsequent imposition of criminal penalties not barred by double jeopardy).

The protections of the Double Jeopardy Clause do not extend to litigation between private parties and do not preclude a private party from filing a civil suit seeking damages for conduct that was the subject of a criminal prosecution and punishment. *Halper,* 490 U.S. at 451.

Collateral Estoppel

The U.S. Supreme Court has held that the doctrine of collateral estoppel, which bars repeat litigation between the same parties of factual issues actually determined at a previous trial, is embodied in the Double Jeopardy Clause. *Ashe v. Swenson*, 397 U.S. 436, 445 (1970). In *Ashe*, the defendant was accused of robbing six persons at the same time. The jury acquitted the defendant as to one of the victims, and the state thereafter sought to prosecute him for the same crime as to another of the six victims. The court held that the second prosecution was barred, because the identity of the robber was the common issue in both trials and the acquittal precluded the State from trying to convince a second jury of the very same fact. *Id.* at 447.

For collateral estoppel to apply in a subsequent criminal proceeding:

- the earlier proceeding must have ended with a final judgment or final determination of the issue;

- the defendant must have been a party to both proceedings; and

- the resolution of the issue in the earlier proceeding must have been an ingredient or a basis of the decision, not unnecessary or mere dicta.

Bowling v. State, 298 Md. 396, 402 (1984). The burden is on the defendant to demonstrate that the issue that would be relitigated was actually decided by the prior jury's acquittal. *Schiro v. Farley*, 510 U.S. 222, 233 (1994).

The doctrine of collateral estoppel does not necessarily preclude the rendering of inconsistent verdicts. In *United States v. Powell*, 469 U.S. 57, 65 (1984), the U.S. Supreme Court found that:

> "inconsistent verdicts – even verdicts that acquit on a predicate offense while convicting on the compound offense – should not necessarily be interpreted as a windfall to the Government at the defendant's expense. It is equally possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense."

Any court review as to "the reason for the inconsistency would be based either on pure speculation, or would require inquiries into the jury's deliberations that courts generally will not undertake." *Id.* at 66.

The U.S. Supreme Court has also held that issue preclusion does not extend to a hung jury because "the fact that a jury hangs is evidence of nothing – other than, of course, that it has failed to decide anything." *Yeager v. United States*, 557 U.S. 110, 125 (2009). Only "a jury's decisions, not its failure to decide," identify "what a jury necessarily determined at trial" and therefore hung counts "ha[ve] no place in the issue preclusion analysis." *Id*. at 122.

Resentencing

The Double Jeopardy Clause does not bar resentencing generally. Under *North Carolina v. Pearce*, 395 U.S. 711, 725 (1969), the U.S. Supreme Court found that "[D]ue process of law … requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." Under *Pearce,* there is a presumption of vindictiveness when a judge imposes a more severe sentence on a defendant following retrial. However, the court may overcome this presumption if it meets specified requirements related to information contained in the record and the basis for the court's decision. *Id.* at 725. The Maryland General Assembly codified the doctrine of *Pearce*, including specific language from that holding, as § 12-702(b) of the Courts Article.

The U.S. Supreme Court has since limited the application and scope of *Pearce*. In *Alabama v. Smith*, 490 U.S. 794 (1989), the court held that the *Pearce* presumption does not apply when a sentence imposed after trial is greater than the sentence imposed after a prior guilty plea. The court found that the presumption applies when the increased sentence is the result of actual

vindictiveness by the sentencing authority. Absent that, the defendant has the burden to prove actual vindictiveness. *Id.* at 798-800.

In *Texas v. McCullough*, 475 U.S. 134 (1986), the U.S. Supreme Court held that the *Pearce* presumption did not apply when the trial judge granted the defendant's motion for a new trial and the defendant's sentences were imposed by two different sentencers. The court also determined that even if the presumption applied, it would have been rebutted by the trial court's findings and the basis for them. *Id.* at 138-141.

An increase is also not permitted if it can be shown that the court used the resentencing to chill the defendant's right to appeal. *Colten v. Kentucky*, 407 U.S. 104, 117-118 (1972).

Freedom of Religion

Rule

No law may be passed respecting an establishment of religion or prohibiting the free exercise of religion.

Discussion

The First Amendment to the U.S. Constitution forbids Congress from making any law respecting the establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment to the U.S. Constitution makes the First Amendment, including the Establishment Clause and the Free Exercise Clause, binding on the states. See, *e.g., Employment Div., Ore. Dept. of Human Res. v. Smith*, 494 U.S. 872 (1990); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Levitsky v. Levitsky*, 231 Md. 388 (1963).

Article 36 of the Maryland Declaration of Rights contains a free exercise guarantee, which states that "all persons are equally entitled to protection in their religious liberty."

However, Article 36 does not contain a proscription against governmental "establishment" of religion. *Barghout v. Mayor*, 325 Md. 311, 327 (1992). Recognizing that the Establishment Clause is applicable to the states, the Supreme Court of Maryland nevertheless has held that the ultimate determination of whether a state or local ordinance in Maryland violates the Establishment Clause of the U.S. Constitution "is for the federal courts." *Id.* at 328.

Article 37 of the Maryland Declaration of Rights prohibits a religious test from being required as a qualification for any office of profit or trust in the State. While Article 36 contains an exception to the religious test standard of Article 37 by conditioning competency as a witness or juror on belief in the existence of God, this exception was found unconstitutional. *Torcaso v. Watkins*, 367 U.S. 488 (1961).

Establishment of Religion

The Establishment Clause prohibits laws that have the "purpose" or "effect" of advancing or inhibiting religion. *Zelman v. Simmons-Harris*, 536 U.S. 639, 648-649 (2002). The prohibition against establishment of religion was intended to ensure the separation of church and state and to ensure that legislative powers of government could reach actions only and not opinions. *Reynolds v. United States*, 98 U.S. 145 (1878). The Establishment Clause has been held to prohibit governments from conducting such activities as setting up a church; passing laws to aid one religion over others; forcing or influencing a person to go to or remain away from church or to profess a belief or disbelief in any religion; punishing a person for entertaining or professing religious beliefs or disbeliefs or for church attendance or nonattendance; levying a tax to support

any religious activities or institutions; or participating in the affairs of any religious group or organization. *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948).

Governments must be careful to refrain from giving the appearance of endorsing a particular religion to the exclusion of others. See *Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989) (city crèche display unconstitutional). The U.S. Supreme Court, however, has indicated a willingness to allow governmental acts that include religious symbols if contained in an otherwise neutral setting like a seasonal holiday display. See *id.* (winter-holiday season display constitutional despite inclusion of menorah); *Lynch v. Donnelly*, 465 U.S. 668 (1984) (permitting nativity scene as part of Christmas holiday display). The court has also said that an inference of governmental endorsement of religion would have to be a reasonable one to raise constitutional issues. See *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995) (Ku Klux Klan display of cross on public property could not reasonably be considered governmental endorsement).

While the U.S. Supreme Court has disallowed government programs that provide aid directly to religious schools under *Mitchell v. Helms*, 530 U.S. 793 (2000), *Agostini v. Felton*, 521 U.S. 203 (1997), and *Rosenberger v. Rector and Visitors of University of Virginia.*, 515 U.S. 819 (1995), it has similarly struck down instances in which a state prevented the use of otherwise generally available public benefits based on religious exercise. *Espinoza v. Montana Department of Revenue*, 140 S. Ct. 2246 (2020). In *Espinoza*, otherwise eligible recipients were disqualified from receiving a public benefit through a Montana scholarship program based on their religious status. *Id.* at 2260. The court held that "[a] State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious. *Id*. In *Carson v. Makin*, 142 S. Ct. 1987, (2022), the U.S. Supreme Court found that "Maine's 'nonsectarian' requirement for its otherwise generally available tuition assistance payments violates the Free Exercise Clause of the First Amendment [because] the program operates to identify and exclude otherwise eligible schools on the basis of their religious exercise." *Id.* at 2022. Similarly, in *Trinity Lutheran Church of Columbia, Inc. v. Comer,* 582 U.S. 449 (2017), the matter at issue was Missouri's policy of denying grants to Trinity Lutheran Church to purchase rubber playground surfaces made from recycled tires. The court held that the exclusion of churches from an otherwise neutral and secular aid program violated the First Amendment's guarantee of free exercise of religion.

The U.S. Supreme Court has shown a willingness to uphold "neutral government programs that provide aid directly to a broad class of individuals, who, in turn, direct the aid to religious schools or institutions of their own choosing." *Zelman*, 536 U.S. at 649. In *Zelman*, the court upheld a program providing tuition aid for certain students in a Cleveland school district to attend public or private schools of their parents' choosing and tutorial aid for students who chose to remain enrolled in public school. After noting that the program "was enacted for the valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system," the court stated that the issue was whether it had the "forbidden 'effect' of advancing or inhibiting religion." *Id.* Relying on *Mueller v. Allen*, 463 U.S. 388 (1983), *Witters v. Wash. Dep't of Servs. for the Blind*, 474 U.S. 481 (1986), and *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993), the court stated:

> [W]here a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.

Zelman, 563 U.S. at 652.

The U.S. Supreme Court has been willing to uphold the validity of laws protecting valid secular interests even though there may be an "incidental benefit" to one or more religions. See, *e.g., Meek v. Pittenger*, 421 U.S. 349 (1975) (permitting Pennsylvania to purchase textbooks for non-public school students). The Federal District Court for Maryland, citing Baltimore City's secular interest in promoting tourism, travel, and economic development, upheld the use of an incentive package provided to a particular religious organization in exchange for its holding a convention in the city. *Person v. Mayor of Baltimore*, 437 F. Supp.2d 476 (D. Md. 2006).

The U.S. Supreme Court has acknowledged that a complete separation between church and state is impossible, and that some relationship between the institutions is inevitable. *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971). The court previously relied on *Lemon* to examine whether a law complies with the Establishment Clause if it (1) has a secular legislative purpose; (2) does not primarily advance or inhibit religion; and (3) does not foster excessive entanglement by the government with religion. *Id.* at 612-613. To determine whether a government entanglement with religion is excessive, a court was required to examine the character and purposes of the institutions that are benefited; the nature of the aid that the government provides; and the resulting relationship between the government and the religious authority. *Id.* at 615. However, the court has most recently instructed that *Lemon* and the related endorsement test are to be replaced and that the Establishment Clause must now be interpreted by "reference to historical practices and understandings." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2427–2428 (2022); See also *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067 (2019).

Free Exercise

The Free Exercise Clause provides that the government may not enact laws that suppress religious belief or practice. *McDaniel v. Paty*, 435 U.S. 618 (1978). The U.S. Supreme Court has stated that:

> [t]he First Amendment obviously excludes all "governmental regulation of religious beliefs as such." The government may not compel affirmation of religious belief, … punish the expression of religious doctrines it believes to be false, … impose special disabilities on the basis of religious views or religious status, … or lend its power to one or the other side in controversies over religious authority or dogma ….

Smith, 494 U.S. at 877 (citations omitted).The court has crafted the "ministerial exception" to ensure the First Amendment's protection of religious entities' right "to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."

Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2055 (2020) (quoting *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. America*, 344 U.S. 94, 116, (1952)) (internal quotation marks omitted). The court described the ministerial exception as a rule to ensure that courts "stay out of employment disputes involving those holding certain important positions with churches and other religious institutions." Id. at 2060. Additionally, the Appellate Court of Maryland refused to "interfere" in an employment dispute between a pastor and a church's regional supervisory body and others, stating that, under the Free Exercise Clause, religious organizations must be allowed to make their own decisions regarding appointment and employment. *Bourne v. Ctr. on Children,* 154 Md. App. 42, 53 (2003).

The U.S. Supreme Court has used the Establishment Clause to strike down statutes mandating any type of religious expression in public schools, including "moments of silence," expressly intended for student prayer and school-sponsored nonsectarian prayers at public school graduation ceremonies. See *Lee v. Weisman*, 505 U.S. 577 (1992); *Wallace v. Jaffree*, 472 U.S. 38 (1985). In *Kennedy*, the court found that the dismissal of a high school football coach for engaging in post-game prayer violated his rights under the Free Exercise Clause. The court distinguished the matter from cases finding prayer in public schools to be problematically coercive on the grounds that there was no compulsion to participate in the post-game prayer activities. *Id.* at 2431-2432.

The practice of religion, however, not only involves belief – it also often involves the performance of or abstention from physical acts. The Free Exercise Clause does not render the government incapable of using its inherent police power to regulate activities in a reasonable and nondiscriminatory manner to protect the safety, peace, good order, and comfort of all members of society. Possessing religious convictions that contradict such regulations does not relieve a citizen of the obligation to comply with them. See *Smith*, 494 U.S. at 878-879 (upholding Oregon law outlawing peyote use); *Reynolds v. United States*, 98 U.S. 145 (1879) (upholding criminal laws against polygamy). See also *Archdiocese of Wash. v. Moersen*, 399 Md. 637 (2007) (Free Exercise Clause and Article 36 of Maryland Declaration of Rights ordinarily do not grant to individual or religious organization constitutional right to ignore neutral law of general applicability even when such law has incident effect of burdening particular religious activity).

In upholding the peyote statute in *Smith,* the U.S. Supreme Court refused to require governments to defend facially neutral, across-the-board criminal prohibitions under the same strict scrutiny test it had earlier applied to governmental regulations that infringed upon free exercise rights. See, *e.g., Sherbert v. Verner*, 374 U.S. 398 (1963) (state had no compelling interest to deny Seventh-day Adventist unemployment benefits for refusing to work on Saturdays); *Keeler v. Mayor of Cumberland*, 940 F. Supp. 879, 886 (D. Md. 1996) (no compelling government interest in allowing historic preservation ordinance to interfere with church's religious mission).

On the other hand, a law that specifically "targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation" must "undergo the most rigorous of scrutiny" and will survive "only in rare cases." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (ordinances restricting practice of Santeria religion unconstitutional). The U.S. Supreme Court reemphasized this in *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018), where

a baker declined to bake a wedding cake for a same-sex couple on the basis of his religious beliefs. The court held that laws or regulations that are based on hostility to a religion or religious viewpoint violate the U.S. Constitution's guarantee of free exercise. *Id*. It stated that the Free Exercise clause bars even "subtle departures from neutrality on matters of religion." *Id*. at 1731 (quoting *Church of Lukumi*, 508 U.S. at 534).

Freedom of Speech and Press

Rule

Generally, the First Amendment to the U.S. Constitution and the Maryland Declaration of Rights guarantee the rights of freedom of speech and freedom of the press. These rights, however, are not absolute at all times and under all circumstances.

Discussion

The First Amendment to the U.S. Constitution and Article 40 of the Maryland Declaration of Rights establish the rights of freedom of speech and press. The guarantees of freedom of speech and press expressed in Article 40 are substantially similar and must be read *in pari materia* with the First Amendment. *Nefedro v. Montgomery Cnty.,* 414 Md. 585, 593 n.5 (2010); *Zanganeh v. Hymes*, 844 F. Supp. 1087, 1090 & n.3 (D. Md. 1994); *Pack Shack, Inc. v. Howard Cnty.*, 377 Md. 55, 64 n.3 (2003); *Pendergast v. State*, 99 Md. App. 141, 148 (1994); *Landover Books, Inc. v. Prince George's Cnty.*, 81 Md. App. 54, 76 (1989). These freedoms are among the fundamental rights and liberties protected by the Fourteenth Amendment from curtailment by the states. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). These rights are not absolute, however, and they may be subject to regulation.

Restrictions on freedom of speech and freedom of the press that are content-based are subject to "most exacting scrutiny" by the courts. See, *e.g., Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.,* 502 U.S. 105, 116 (1991) (content discrimination "raises the specter" that government may effectively drive certain ideas or viewpoints from marketplace). Such content-based restrictions are presumed to be impermissible and will be upheld only if there is a compelling reason for their enactment. *United States v. Playboy Entm't Grp. Inc.,* 529 U.S. 803, 813 (2000). See also, *Nefredo,* 414 Md. at 605–607 (ordinance prohibiting fortune telling for remuneration not narrowly tailored to provide speech-neutral fraud protection); *Ams. For Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2389 (2021) (California requirement to disclose donors to nonprofit organizations not sufficiently narrowly tailored due to chilling effect on First Amendment rights). Similarly, compelling individuals to engage in speech is impermissible. *Janus v. AFSCME, Council 31,* 138 S. Ct. 2448, 2463–2464 (2018) (compelling individuals to provide financial support for speech "…raises [serious] First Amendment concerns."); *303 Creative v. Elenis*, 143 S. Ct. 2298, 2315 (2023) (Colorado public accommodations law may not be applied to compel a website designer to produce webpages that included content that contradicted her religious convictions).

In contrast, content-neutral regulations, including those that restrict the time, place, and manner of expression, are subject to an intermediate level of scrutiny by the courts because such regulations pose a less serious risk of expurgating certain ideas or opinions from the public dialogue. *Broad. Sys., Inc. v. Fed. Commc'ns Comm'n*, 512 U.S. 622, 642 (1994).

Time, Place, and Manner Doctrine

The U.S. Supreme Court has held that freedom of speech and freedom of the press do not give people license to express their views whenever, however, and wherever they please, *Adderley v. Florida*, 385 U.S. 39, 48 (1966), and that the "time, place, and manner" of public expression may be constitutionally restricted. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). See, *Barr v. Am. Ass'n of Political* Consultants, 140 S. Ct. 2335, 2346 (2020) (allowing the use of robocalls in order to collect government debt was a content-based distinction, and thus disallowed); *City of Austin v. Reagan Nat'l Adver. of Austin, LLC*, 142 S. Ct. 1464, 1471 (2022) (regulating off-premises signs differently from on-premises signs was not content based and thus allowable). The court has stated that such restrictions are "valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant government interest, and that they leave open ample alternative channels for communication of the information." *Clark*, 468 U.S. at 293. For example, in *Pack Shack*, the Supreme Court of Maryland struck down a county ordinance that placed restrictions on the operation of adult businesses on the grounds that it imposed excessive burdens for obtaining a license and did not leave open an adequate alternative avenue to operate such a business. *377 Md.* at 71. See also, *Steiner v. Cnty. Comm'rs of Caroline Cnty.*, 490 F. Supp.2d 617, 626 (D. Md. 2007) (evidence that alternative land for operating an adult business is "economically undesirable" is not enough; a petitioner must show that alternative land is actually unavailable).

Other matters, such as those involving traffic and safety concerns, have also been upheld as valid state interests. See, *e.g., Warren v. Fairfax Cnty.*, 196 F.3d 186, 198 (4th Cir. 1999) (bans of certain speech in areas in close proximity to streets with moving traffic, including median strips, are reasonable time, place, or manner restrictions). See also *Polk v. State,* 378 Md. 1 (2003) (police officer's order to defendant to keep mouth shut after defendant repeatedly used loud profanity in addressing officer and subsequent arrest of defendant for disorderly conduct did not violate First Amendment since protecting citizens from unwelcome disturbances at a hospital is compelling government interest).

Prior Restraints

Statutes, ordinances, or regulations that place a prior restraint on freedom of expression are heavily presumed to be constitutionally impermissible. A prior restraint on freedom of expression is a "statute, ordinance, or regulation that prevents expression unless and until a license or permit is obtained from a government official or group." *Jakanna v. Montgomery Cnty.*, 344 Md. 584, 599 (1997). See also, *Nefredo,* 414 Md. at 599 ("a restriction on remuneration for protected speech is a restriction on the…freedom of speech"). A prior restraint on speech may be valid, however, if "adequate procedural safeguards exist to protect against unduly suppressing protected speech." *Id*. (citing *Freedman v. Maryland*, 380 U.S. 51, 58-60 (1965)). In *Freedman,* the U.S. Supreme Court outlined three procedural safeguards that are necessary for a prior restraint to survive a challenge:

- any restraint prior to judicial review may be imposed only for a specified brief period during which the *status quo* must be maintained;

- expeditious judicial review of that decision must be available; and

- the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court.

Freedman, 380 U.S. at 58-60. See also *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 321 (2002).

Since the *Freedman* decision, the U.S. Supreme Court has focused on two types of impermissible schemes in addressing prior restraints:

- schemes that give government officials or groups unfettered discretion in granting or denying licenses or permits; and

- schemes that do not specify time limits within which the government official or group must render a decision to grant or deny such licenses or permits.

Jakanna, 344 Md. at 600. See, *e.g., City of Littleton, Colo. v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004) (although First Amendment does not require special judicial review rules for "adult business," ability to obtain prompt judicial decision must be evaluated).

Clear and Present Danger

The U.S. Supreme Court has also determined that the government may prohibit or punish certain expression that causes violence or a breach of the peace. The court has articulated the "clear and present danger" test which guards against prior restraint or subsequent punishment of speech in the absence of a "clear and present danger" that the speech (written or spoken) will bring about "a substantial evil which the government has the power to prohibit." *Associated Press v. United States,* 326 U.S. 1, 7 (1945) (citation omitted).

The point at which expression creates such a clear and present danger, however, is difficult to define. Likewise, determining the constitutionality of a statute or other state action that seeks to restrain such expression can be difficult. The issue in every case is whether the words are of such a nature and are used in such circumstances as to create a "clear and present danger" of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949); *Davis v. DiPino*, 121 Md. App. 28, 64 (1998), *aff'd in relevant part*, 354 Md. 18 (1999). The U.S. Supreme Court has recognized that whether an utterance is likely to bring about a danger of substantive evils sufficient to justify infringement of the constitutional right of freedom of speech and press is a "question of proximity and degree." *Bridges v. California*, 314 U.S. 252, 261 (1941) (citation omitted). When confronted by a statute or other state action that seeks to limit speech or freedom of press, the U.S. Supreme Court has stated that the "clear and present danger" test "requires a court to make its own inquiry into the imminence and magnitude of the danger … and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression." *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 843 (1978). A court should also weigh the possibility that other less restrictive measures will serve the state's interest. *Id*.

Incitement of Imminent Illegal Acts

While the general consideration of "clear and present danger" may be difficult to define, the U.S. Supreme Court has also determined that the government may prohibit or punish advocacy of illegal acts under certain conditions. The court has articulated the "Brandenburg Test," which requires that the expression be both "directed to inciting or producing imminent lawless action and … likely to incite or produce such action." *Brandenburg v. Ohio,* 395 U.S. 444, 447 (1969).

The Brandenburg Test requires that the illegal action proposed by the expression be "imminent." Statements that advocate unlawful, even violent, behavior in the indeterminate future, are thus still subject to the First Amendment's protections. *Hess v. Indiana*, 414 U.S. 105, 109 (1973) (speech that was not likely to produce imminent disorder could not be punished because they "had a tendency to lead to violence" at some point in the future); *NAACP c. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982) (threats to break the necks of people who violated a boycott were not followed immediately by violence, and so were protected). The Brandenburg Test is viewed as a refinement of, and supplanting, the "clear and present danger" test.

True Threats

The court has also articulated that the First Amendment permits individuals to be punished for making "true threats." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 388 (1992) ("Threats of violence are outside the First Amendment"). However, only certain kinds of threats fall outside the protection of the First Amendment. *Virginia v. Black*, 538 U.S. 343, 359–360 (2003) (a true threat occurs "where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals."). Crucially, a true threat need not be carried out; the protection that a prohibition on true threats provides is in the prevention of the fear that the threat causes. *Id* at 360. In order for the person who makes the threat to be liable for the damage caused by the threat, it must be proved that the person "consciously disregarded a substantial risk that [the] communication would be viewed as threatening violence." *Counterman v. Colorado*, 143 S. Ct. 2106, 2111–2112 (2023).

Political Speech

One of the most important forms of protected speech is "political speech," particularly speech uttered during a campaign for political office. *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 222-223 (1989); see also Op. Att'y Gen. No. 98-003 (Jan. 27, 1998) (unpublished) ("Speech concerning public affairs is more than self-expression; it is the essence of self-government."). Regulations that burden core political speech are subject to exacting scrutiny and are upheld only if "narrowly tailored to serve an overriding state interest." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995). See also, *Citizens United v. Fed. Election Comm'n,* 558 U.S. 310, 340 (2010) ("[P]olitical speech must prevail against laws that would suppress it, whether by design or inadvertence"). In *Buckley v. Valeo*, 424 U.S. 1 (1976), the U.S. Supreme Court acknowledged the important function that limits on direct contributions to candidates can have in preventing corruption. *Id*. at 25.

Freedom of speech protects written, as well as oral expression, and encompasses the distribution and the publication of written material. In *State v. Brookins,* 380 Md. 345 (2004), for example, a statute that prohibited a candidate or a candidate's campaign from paying for "walk around services" or any other services as a poll worker or distributor of sample ballots, performed on the day of election, and prohibited any person from receiving payment for such services, was held to unconstitutionally violate freedom of speech. The ability to spend money to convey a candidate's political message, the Supreme Court of Maryland reasoned, is inextricably linked to the quantity, and even the quality, of that candidate's political speech. *Id.*at 364. See also, *Citizens United,* 558 U.S. at 350 ("The rule that political speech cannot be limited based on a speaker's wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker's identity."); *FEC v. Ted Cruz for Senate*, 142 S. Ct. 1638, 1656 (2022) (Section 304 of the federal Bipartisan Campaign Reform Act, limiting the extent to which candidates may be reimbursed for funds loaned to their own campaigns, burdened "core political speech without justification.").

Freedom of speech protections have also been held to apply to entities other than individuals. The U.S. Supreme Court held in *Citizens United* that a prohibition on independent expenditures by corporations for political purposes was an unconstitutional restriction on corporate political speech. *Id.* at 365 ("No sufficient government interest justifies limits on the political speech of nonprofit or for-profit corporations.").

Commercial Speech

While the U.S. Supreme Court has held that commercial speech is, indeed, a form of "speech," it is not afforded the same protections as other forms of expression under the First Amendment. Courts generally engage in an intermediate level of scrutiny when considering restrictions on commercial speech. The constitutionality of a statute or other state action that seeks to regulate commercial speech depends on the nature of both the expression and also the governmental interests served by the regulation. Thus, although the government may freely regulate commercial speech that concerns unlawful activity or is misleading, commercial speech that falls outside of these categories properly may be regulated where (1) the government asserts a substantial interest in support of the regulation; (2) the government demonstrates that the restriction on commercial speech directly and materially advances that interest; and (3) the regulation is narrowly drawn. *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 623-624 (1995) (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 564-565 (1980)).

In determining whether commercial speech has been unlawfully restrained by a governmental restriction in violation of the First Amendment, the U.S. Supreme Court applies the "reasonable-fit" test. *Fla. Bar*, 515 U.S. at 632. Under the "reasonable-fit" test, the validity of a government regulation that affects commercial speech is determined by examining the relationship between the legislature's goals and the means chosen to accomplish those goals. The regulation is likely to be upheld if (1) it is reasonable; (2) its scope is in proportion to the interest served even though it may not necessarily represent the single best option; and (3) it employs a means narrowly tailored to achieve the desired objective although not necessarily the least restrictive means.

Lorrillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001); *Bd. of Trs. of State Univ. of New York v. Fox*, 492 U.S. 469 (1989).

In *National Institute of Family and Life Advocates v. Becerra,* 138 S. Ct. 2361 (2018), the U.S. Supreme Court held that professional speech is not a unique category of speech and content-based regulation of professional speech is subject to strict scrutiny. *Id*. at 2371-2372. The court noted that there are two circumstances where a more deferential review to laws regulating professional speech: (1) "laws that require professionals to disclose factual, noncontroversial information in their 'commercial speech'" (citing *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio,* 471 U.S. 626, 651 (1985)); and (2) "states may regulate professional conduct, even though that conduct incidentally involves speech" (citations omitted). 138 S. Ct. at 2372-237.

Right to Peaceably Assemble and Right to Petition the Government

Rule

Under the First Amendment to the U.S. Constitution, the right to peaceably assemble and the right to petition the government is guaranteed. The Maryland Declaration of Rights and decisions of the Supreme Court of Maryland also protect these rights.

Discussion

The First Amendment to the U.S. Constitution establishes the right to peaceably assemble and the right to petition the government for a redress of grievances. The Supreme Court of Maryland has acknowledged that the rights to peaceably assemble and petition extend to the states and prevent the denial of these rights by a state. *Richards Furniture Corp. v. Bd. of Cnty. Comm'rs of Anne Arundel Cnty.*, 233 Md. 249, 260 (1964) (citations omitted).

Article 13 of the Maryland Declaration of Rights does not restate the rights, but it provides "[t]hat every man hath a right to petition the Legislature for the redress of grievances in a peaceable and orderly manner."

Limitations and Regulations

In General

The right to assemble and the right to petition the government are not absolute rights and are subject to limitations and reasonable regulations.

In order for the State to abridge the right to assemble or the right to petition, it must find:

- a justification in a reasonable apprehension of danger to organized government; and
- that the limitation on individual liberty is in appropriate relation to the safety of the State.

Herndon v. Lowry, 301 U.S. 242, 258 (1937). The right to assemble may be restricted only in order to prevent grave and immediate danger to those interests which a state may protect under the law, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 639 (1943), or if there is a "clear and present danger" of a substantial evil that the state may lawfully prevent. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

Based on this standard, violent assemblies and demonstrations are not protected and may be banned. A municipal ordinance forbidding anyone from being a part of a noisy or disorderly assembly that annoys the inhabitants of the city has been held, however, to constitute an unreasonable infringement on the right of free assembly. *Cleveland v. Anderson*, 234 N.E.2d 304, 307 (Ohio Ct. App. 1968).

In addition, the U.S. Supreme Court has held that the Petition Clause does not provide absolute immunity to defendants charged with expressing libelous and damaging falsehoods in petitions to government officials. *McDonald v. Smith,* 472 U.S. 479 (1985).

Licenses or Permits

A regulation requiring a permit or license to conduct an assembly does not violate the right of free assembly where it is determined to be a reasonable regulation for legitimate public safety and protection. Accordingly, requiring a permit for a parade is not unreasonable where it is determined that the permit is necessary for legitimate traffic considerations. *District of Columbia v. Edgcomb*, 305 A.2d 506, 511 (D.C. 1973). The courts will strike down regulations requiring permits, however, when the regulations constitute an arbitrary and unreasonable prior restraint of the right of free assembly. *Collin v. Chicago Park Dist.*, 460 F.2d 746, 755 (7th Cir. 1972).

The Maryland Department of General Services requires that a permit be obtained prior to holding a rally or demonstration on State property. The permits are free and issued on a first-come, first-served basis. A permit may only be denied because of scheduling, security, safety, or traffic-related concerns. See MD. CODE REGS 04.05.01.08 and 04.05.02.02 (2023).

Restrictions

The government may constitutionally limit the right to assemble on certain public properties. In fact, just because property is publicly owned does not mean that members of the public have a right to assemble there. *Knight v. Anderson*, 480 F.2d 8, 10 (9th Cir. 1973). For example, the right to assemble has been denied to protestors who have sought access to a gated and locked military base, *id*., and to protestors who have sought access to a prison or jail. *Adderley v. Florida*, 385 U.S. 39, 47 (1966).

While access to military bases and jails, which are considered "nonpublic forums," receives the least constitutional protection with respect to First Amendment expression, "public forums," such as streets, sidewalks, parks, and other similar public places receive the highest level of protection. *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972). Limitations on the right to assemble in public forums must be content-neutral, narrowly drawn to serve a significant government interest, and leave open adequate alternative channels for communication. *Frisby v. Schultz*, 487 U.S. 474, 481-482 (1988). (For further discussion, see "Time, Place, and Manner Doctrine" in the chapter on "Freedom of Speech and Press" in this *Legislative Desk Reference*.)

Significant government interests include:

- the need to control crowds to prevent physical danger;

- protection of unwilling listeners; and

- the need to keep streets free for ordinary traffic. (Note that mere convenience to the government will not suffice).

Grayned, 408 U.S. at 115-116.

Interstate Compacts

Rule

Under the Compact Clause of the U.S. Constitution, congressional approval is required for any interstate agreement or compact directed to the formation of any combination tending to increase political power in the states by encroaching on or interfering with the supremacy of the United States.

Discussion

The requirement that states submit interstate compacts to Congress for approval derives from the Compact Clause of the U.S. Constitution which provides that "[n]o [s]tate shall, without the Consent of Congress … enter into any Agreement or Compact with another State." U.S. CONST. art. I, § 10, cl. 3.

Scope of "Agreement" and "Compact"

In *Virginia v. Tennessee*, 148 U.S. 503 (1893), the U.S. Supreme Court stated that the "terms 'agreement' or 'compact' taken by themselves are sufficiently comprehensive to embrace all forms of stipulation, written or verbal, and relating to all kinds of subjects; to those to which the United States can have no possible objection or have any interest in interfering with, as well as to those which may tend to increase and build up the political influence of the contracting [s]tates, so as to encroach upon or impair the supremacy of the United States or interfere with their rightful management of particular subjects placed under their entire control." *Id*. at 517-518. Reciprocal legislation can also be a compact. *U. S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 470 (1978).

Whether Congressional Approval Required

An interstate compact must be approved by Congress if it "tend[s] to the increase of political power" of the party states, which may encroach upon or interfere with the just supremacy of the United States." *Virginia*, 148 U.S. at 519.

However, congressional approval is not required as follows:

- A compromise agreement among states does not necessarily elevate the agreement to the status of an interstate agreement requiring the approval of Congress. *New York v. United States*, 505 U.S. 144, 183 (1992).

- The historical practice of submitting most multilateral compacts for congressional approval does not mean that all multilateral compacts must receive the approval of Congress.

This practice may "simply reflect considerations of caution and convenience on the part of the submitting States." *U. S. Steel Corp.,* 434 U.S. at 471.

- Even if a compact might incrementally increase the bargaining power of member states under certain circumstances (*e.g.*, with respect to private corporations), failure to receive congressional approval does not invalidate the compact because the standard of measure is the agreement's tendency to enhance state power with respect to the national government. A compact that does not give a state any more power than it would have had in the absence of the compact does not unduly enhance state political power. *Id.* at 472-473.

Methods of Congressional Approval

Congress may indicate its approval as follows:

- Congress may expressly approve a compact that has been submitted for its consent. *Virginia*, 148 U.S. at 521.

- Congress may give prior approval by authorizing the states to pass certain laws creating certain compacts. *Cuyler v. Adams*, 449 U.S. 433, 440 (1981).

- Congress may consent to an interstate compact tacitly when it "adopts [a] particular act by sanctioning its objects and aiding in enforcing them." *Virginia*, 148 U.S. at 521.

Congressional Approval Not Received

In *United States Steel Corp*., the parties sought congressional approval of a compact even though congressional approval did not appear to be a requirement of the compact itself. 434 U.S. at 471-472. Although approval had been sought but was never received, the Multistate Tax Commission carried out its tasks under the compact. The U.S. Supreme Court held that the Compact Clause did not require congressional approval of the compact. *Id*. The court, however, did not address the issue of whether as a matter of state law, a state court can block implementation of a compact in the absence of congressional approval if congressional approval is required by the compact itself.

Compacts as Federal Law

The U.S. Supreme Court has stated that a congressionally approved interstate compact will be interpreted as if the court "were addressing a federal statute." *Virginia v. Maryland,* 540 U.S. 56, 66 (2003) (citing *New Jersey v. New York*, 523 U.S. 767, 811 (1998)). In *WMATA v. One Parcel of Land in Montgomery County, Md.*, 706 F.2d 1312 (4th Cir. 1983), the U.S. Court of Appeals for the Fourth Circuit stated that "where Congress has authorized the [s]tates to enter into a cooperative agreement, and where the subject matter of that agreement is an appropriate subject for congressional legislation, the consent of Congress transforms the [s]tates' agreement into federal law under the Compact Clause." *Id*. at 1317 (quoting *Cuyler*, 449 U.S. at 440). If, however, the "subject matter is appropriate for federal legislation" but the agreement does "not threaten to

increase the political power of the states at the expense of the federal government," the agreement is not invalidated for lack of congressional consent. *Id*. at 1317 n. 9.

Once an interstate compact becomes federal law, "its provisions, interpreted as federal law, must prevail over any existing or subsequently created provisions of state law in direct conflict." *Bush v. Muncy*, 659 F.2d 402, 410 (4th Cir. 1981). Further, no party state has the power, either in conjunction with or independently of its entry into a compact, to alter in any substantial manner any of the compact's provisions governing its intended operation between the states. Whether a particular enactment altering the compact has such a prohibited effect is a federal question "on which the federal courts have the final word without regard to any prior decisions by courts of the party state purporting to interpret or apply the provision in question." *Id*. at 411. The decision does not suggest how a substantive change must be made to the law, but apparently such a change would require further consent of Congress.

Different Versions of Same Compact

Each of the several states that are parties to an interstate compact normally signal their assent by enacting legislation that incorporates the compact into statutory law. If, however, the statutory language of one state varies from the statutory language of another state, an issue arises as to which, if any, provisions of the compact are effective.

Maryland courts have not ruled directly on this issue. The Supreme Court of Maryland has stated, however, that "[a] compact arises when two or more states enact *essentially identical* statutes which govern an area of mutual state concern and define the compact, its purposes, and policies." *In re Adoption No. 10087,* 324 Md. 394, 403 (1991) (emphasis added). It is likely that Maryland courts would agree with other jurisdictions that have held that varying language will be tolerated if it does not materially affect the other signatory states to the compact. See *In re Opinion of the Justices*, 184 N.E. 2d 353, 357-358 (Mass. 1962).

A potential problem related to varying language was raised in two enactments of the 1996 session. The first enactment was an amended version of the Woodrow Wilson Bridge and Tunnel Compact (SB 742/Ch. 599). Maryland and Virginia were considering similar legislation that differed in one respect – Virginia included in its legislation a reference to the Virginia Right to Work Law. At the time, Maryland did not have such a law so the Maryland legislation did not contain a similar reference. Counsel to the Maryland Department of Transportation concluded that the two versions of the compact were "substantially similar" and that the inclusion of the Virginia Right to Work Law did not affect the interests of Maryland or of people working in Maryland.

Another 1996 enactment (HB 711/Ch. 686) concerned the Washington Metropolitan Area Transit Authority, which had been established through a compact among Maryland, Virginia, and the District of Columbia. The act contained two Maryland-only provisions regarding actions of the authority that were not subject to the concurrence of the other parties or the United States. In the bill review letter regarding the constitutionality and legal sufficiency of the legislation, the Attorney General concluded that the Governor could sign the legislation into law, but that the issue of whether these two unilateral provisions are binding on the authority remained "unresolved." Bill Review Letter of Attorney General on House Bill 711 (May 17, 1996).

Indicia of a Nonbinding Compact

To be a binding compact, an agreement must meet what the courts have determined to be the necessary elements of a binding compact.

The Supreme Court of California in *Gillette v. Franchise Tax Board,* 62 Cal.4th 468 (2015) (S. Ct. *cert. denied*) determined that the Multistate Tax Compact did "not satisfy any of the indicia of binding interstate compacts noted in *Northeast Bancorp*" and thus was not binding on the member state of California. The Multistate Tax Compact was established in 1967 in response to Congressional intervention in state tax matters with the enactment of the federal Interstate Income Act of 1959 (limiting a state's ability to impose a corporate income tax on interstate commerce) following the rapid growth of multistate corporations and little uniformity among state tax systems.

The U.S. Court of Appeals for the Ninth Circuit summarized the primary indicia of a binding compact: "[t]hese are establishment of a joint organization for regulatory purposes; conditional consent by member states in which each state is not free to modify or repeal its participation unilaterally; and state enactments which require reciprocal action for their effectiveness." *Seattle Master Builders v. Pac. N.W. Elec. Power*, 786 F.2d 1359, 1363 (9th Cir. 1986) (referencing *Northeast Bancorp v. Bd. of Governors*, 472 U.S. 159, 175 (1985)).

The California Supreme Court found that the Multistate Tax Compact:

- was state law but did not have the force of federal law having never been ratified by Congress under the Compact Clause of the U.S. Constitution;
- created no reciprocal obligations among the member states and that the effectiveness of the Compact effectiveness was not dependent on the member states;
- did not include provisions prohibiting unilateral member action;
- did not delegate any sovereign or regulatory power to the administrative commission, whose powers remain advisory and informational only; and
- allowed each member state to withdraw at any time.

Ex Post Facto Laws

Rule

A criminal or penal law that operates both retrospectively and to the disadvantage of the offender is an unconstitutional ex post facto law under the U.S. Constitution and the Maryland Declaration of Rights.

Discussion

Both the U.S. Constitution, Art. I, § 10, cl. 1 and the Maryland Declaration of Rights, Art. 17, prohibit the State from enacting a law in the criminal or penal law area that retrospectively changes the legal consequences of actions that were committed before the enactment of the law. These types of laws are known as ex post facto laws. The ex post facto provisions of the U.S. Constitution and the Maryland Declaration of Rights have been interpreted by Maryland courts as having the same meaning. *Booth v. State*, 327 Md. 142, 170-76 (1992); *Anderson v. Dep't of Health and Mental Hygiene*, 310 Md. 217, 223 (1987).

A law's consequence must be punitive in order for the protections of the ex post facto clause to apply. A legislative restriction, on the other hand, that is an incident of a state's power to protect public health and safety generally will not be considered an ex post facto law. *Smith v. Doe*, 538 U.S. 84, 95-96 (2003) (Alaska's sex offender registration law constitutes nonpunitive regulatory measure). (For a discussion of retrospective legislation in the civil law area, see chapters on "Retroactive Laws" and "Impairment of Contracts" in this *Legislative Desk Reference*.)

Maryland courts have recognized four categories of ex post facto laws originally laid out by the U.S. Supreme Court in 1798. *Doe v. Dep't of Pub. Safety and Corr. Servs.*, 430 Md. 535, 555 (2013) (citing *Calder v. Bull*, 3 U.S. 386 (1798)). The four categories are:

1. "every law that makes an action, done before the passing of the law, and which was innocent when done, criminal and punishes such action";

2. "every law that aggravates a crime, or makes it greater than it was, when committed";

3. "every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime, when committed"; and

4. "every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense in order to convict the offender."

Calder, 3 U.S. at 390.

In *Wyatt v. State*, 149 Md. App. 554 (2003), the issue was whether a retroactive statutory amendment making the refusal to submit to a breathalyzer test admissible in driving under the influence of alcohol cases violated ex post facto prohibitions. The Appellate Court of Maryland discussed the four categories cited in *Calder* and, under the fourth category, held that the amendment did not "change the quantum of evidence necessary to sustain a conviction," but merely permitted the jury to consider additional evidence without making the additional evidence a conclusive element of guilt. *Id.* at 569.

The purpose of the prohibition of ex post facto laws is twofold:

1. to give fair warning as to the effect of legislation to allow reliance on the law until it is changed; and

2. to restrain the enactment of arbitrary or vindictive legislation.

Weaver v. Graham, 450 U.S. 24, 28-29 (1981).

Applicable Tests

In *Gluckstern v. Sutton*, 319 Md. 634 (1990), the Supreme Court of Maryland held that a statute, as applied in the case, violated the ex post facto clause. Sutton, a convicted murderer, had been sentenced to serve a life sentence in the Patuxent Institution. At the time of his referral to Patuxent in 1975, the Patuxent Board of Review had total authority as to whether an inmate should be paroled. In 1982, however, the law was changed to require gubernatorial approval of paroles of inmates serving life sentences. In 1984, the Board of Review recommended that Sutton be paroled, but the Governor denied the parole.

The Supreme Court of Maryland upheld the decision of the trial court in granting the writ allowing the Patuxent Board of Review complete discretion as to whether to parole Sutton. The court quoted the U.S. Supreme Court, stating "any law which was passed after the commission of the offence … is an ex post facto law, when it inflicts a greater punishment than the law annexed to the crime at the time it was committed … *or which alters the situation of the accused to his disadvantage*." *Id.* at 665 (quoting *In re Medley*, 134 U.S. 160, 171 (1890)) (emphasis added by *Gluckstern* court). The Supreme Court of Maryland also cited *Weaver*, 450 U.S. 24, in which the U.S. Supreme Court held that the ex post facto clause applied to a statute altering the availability of "gain time" credits to a prisoner, including those prisoners whose incarceration predated the statute. "[E]ven if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the [Ex Post Facto] clause if it is both retrospective and more onerous than the law in effect on the date of the offense." 319 Md. at 665-66 (citing 450 U.S. at 30-31). This includes both laws dealing with diminution credits and those dealing with parole.

The Supreme Court of Maryland in *Gluckstern* recognized that procedural changes were not subject to ex post facto limitations, which apply only to matters of substance. In *Gluckstern*, however, the requirement that the Governor approve a parole was an additional step that clearly operated to the offender's detriment. This was a substantive change that violated the constitutional prohibition against ex post facto laws. 319 Md. at 669.

A plurality of the court employed the "disadvantage test" again in *Doe* to find that requiring a sex offender who was convicted prior to the enactment of the registration law violated the State's prohibition against ex post facto laws. 430 Md. 535. A concurring minority in *Doe* found a violation of the ex post facto clause using the "intent-effects test." *Id.*

Because there was no majority opinion in *Doe*, application of the disadvantage test has come under scrutiny. The Appellate Court of Maryland has instead employed the intent-effects test to find that retroactive application of the registration law does not violate the prohibition against ex post facto laws. See *In re Nick H.*, 224 Md. App. 668, 705–706 (2015); see also *Long v. Md. State Dep't of Pub. Safety and Correc. Servs.*, 230 Md. App. 1 (2016).

The intents-effects test is a two-part inquiry. First, the court will ask "whether the legislature meant the statute to establish civil proceedings. If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive, [the court] must further examine whether the statutory scheme is so punitive either in purpose or effect as to negate [the State's] intention to deem it civil." *In re Nick H.*, 224 Md. App. at 683–684 (quoting *Smith,* 538 U.S. at 92).

While the first prong of the intent-effects test is usually a more straightforward inquiry into legislative intent, to determine whether there is clear proof that a statute is sufficiently punitive under the second prong of the test, the Supreme Court of Maryland has utilized seven factors first established by the U.S. Supreme Court. *Rogers v. State*, 468 Md. 1 (2020) (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-169 (1963)). In *Rogers*, court examined:

1. whether the sanction involves an affirmative disability or restraint;

2. whether it has historically been regarded as a punishment;

3. whether it comes into play only on a finding of *scienter*;

4. whether its operation will promote the traditional aims of punishment – retribution and deterrence;

5. whether the behavior to which it applies is already a crime;

6. whether it lacks an alternative purpose to which it rationally may be connected; and

7. if such alternative does exist, whether the statute appears excessive in relation to it.

Id. at 31-32 (citation omitted).

Not Applicable to Procedural Changes and Guidance

In three cases that dealt with inmates, Maryland courts have refused to expand the scope of what violates the ex post facto prohibition. In *Lomax v. Warden*, 356 Md. 569 (1999), the Supreme Court of Maryland dealt with changes in guidelines by the Governor's office to the Parole

Commission as to what class of inmates should be recommended for parole. The Governor had announced that he would approve paroles for inmates serving life sentences only if the inmates were very old or terminally ill and that he had directed the Parole Commission in the future to no longer recommend requests for murderers and rapists. *Id.* at 577. Distinguishing this guideline from a statute, such as the statute in *Gluckstern*, the court held that the guideline did not constitute a "law" within the meaning of the ex post facto prohibition. *Id.* The court took pains to note, however, that the concept of a "law" for purposes of the prohibition "is broader than a statute enacted by a legislative body, and may include some administrative regulations." *Id.* at 576. (citations omitted).

In *Campbell v. Cushwa*, 133 Md. App. 519 (2000), a State prisoner complained that by wrongfully refusing to decrease his security status, prison officials had illegally increased the punishment for his crimes, resulting in an ex post facto violation. The ultimate issue in the case was whether the challenged action produced a "sufficient risk of increasing the measure of punishment attached to the covered crimes to warrant invalidation." *Id.* at 541 (citations omitted). The prison security classification at issue in this case, however, did not constitute ex post facto punishment, the Appellate Court of Maryland reasoned, because the classifications did not alter, increase, or enhance the prisoner's sentence and constituted a matter of internal prison administration. *Id.*

In *Watkins v. Dep't of Safety*, 377 Md. 34, 47 (2003), several inmates complained that Division of Correction Directives' (DCD's) establishment of new security classifications and limited work release and family leave amounted to ex post facto laws because they increased the punishment for the inmates' crimes by altering parole eligibility rules. The Supreme Court of Maryland held that the DCD's were merely discretionary guidelines for the Commissioner of Correction; therefore, they were not laws and did not fall under ex post facto prohibitions. *Id.* at 51. The court explained that "whether an administrative provision qualifies as a 'law' for ex post facto purposes depends in large part on the manner and extent that it limits an agency's discretion. If the provision 'do[es] not have the force and effect of law' but simply announces how an agency is likely to exercise its discretion, the ex post facto clause does not apply." *Id.* at 49 (quoting *Gluckstern*, 319 Md. at 672) (citations omitted).

In *Dep't of Pub. Safety and Corr. Servs. v. Demby*, 390 Md. 580 (2006), however, the Supreme Court of Maryland reasserted the scope of the ex post facto clause when it considered the constitutionality of amendments to Division of Correction regulations as they applied to inmates who had committed their crimes prior to the issuance of the amendments. The amendments to the regulations denied the further award of diminution of confinement credits for double-celling to inmates who had committed certain disqualifying offenses. *Id.* at 588. In distinguishing the case from *Watkins*, the court found that the amendments represented a delegation of legislative authority and therefore were laws within the meaning of the ex post facto clause. *Id.* at 608. Because the prison terms of the inmates were increased by the amendments, the court concluded that the amendments violated the ex post facto clause. *Id.* at 618.

Changes in trial procedures that operate to the disadvantage of a defendant are usually seen as procedural and, therefore, not violative of the ex post facto law prohibition. In *Booth*, the Supreme Court of Maryland held that a change in the State's death penalty law that removed

intoxication as a specific mitigating factor, but still allowed it to be considered under the catch-all mitigating provision, was merely a procedural change. 327 Md. at 176. The fact that the defendant would have the added burden of proving that intoxication should be considered as mitigation did not affect the defendant's substantive rights. The court held that the two purposes of the ex post facto clause (*i.e.*, fair warning and protection from vindictive legislative acts) would not be furthered by applying the ex post facto clause. *Id.*

Similarly, in an unreported opinion, the Appellate Court of Maryland employed the intent-effects test to hold that the retroactive application of a statute reducing the number of post-conviction petitions from two to one did not increase punishment because post-conviction proceedings are not part of a criminal proceeding; rather, they are civil in nature. *Burke v. State*, No. 2388, 2016 Md. App. LEXIS 888 (Md. Ct. Spec. App. Sept. 30, 2016).

Special Laws

Rule

Article III, § 33 of the Maryland Constitution provides that "the General Assembly shall pass no special Law, for any case, for which provision has been made, by an existing General Law."

Discussion

The prohibition against special laws in Article III, § 33 of the Maryland Constitution is designed to prevent legislation providing for the relief of a particular person identified by name or in any equivalent manner. *Cities Serv. Co. v. Governor of Md.*, 290 Md. 553 (1981) (exemption from service station divestiture law limited to single mass merchandiser held to be unconstitutional special law). The Supreme Court of Maryland has defined a constitutionally prohibited "special law" as a law for a special case that relates to particular persons or things of a class, as distinguished from a general law that applies to all persons or things of a class. *State ex rel. Cnty. Comm'rs of Prince George's Cnty. v. Balt. & Ohio R. R.*, 113 Md. 179 (1910) (act directing specific railroad company to erect and maintain safety gates in particular county under daily penalty constituted unconstitutional special law). See also *Beauchamp v. Somerset Cnty. San. Comm'n*, 256 Md. 541 (1970) (statute providing for exemption in Somerset County of American Legion Post property from assessments by Somerset County Sanitary District is unconstitutional special law). The rule against enacting special laws also extends to the legislative bodies of municipal corporations to which the General Assembly has delegated power. See*, e.g.*, *Mears v. Town of Oxford*, 52 Md. App. 407 (1982).

One of the most important reasons for the constitutional prohibition against special legislation, as explained by the Supreme Court of Maryland, "is to prevent one who has sufficient influence to secure legislation from getting an undue advantage over others...." *Mayor of Balt. v. United Ry's & Elec. Co. of Balt.*, 126 Md. 39, 52 (1915).

The prohibition against special laws, however, does not render legislation invalid simply because the General Assembly was concerned with a specific entity when enacting the law. For example, in *Jones v. House of Reformation*, 176 Md. 43 (1939), the Supreme Court of Maryland upheld Chapter 70 of the Acts of 1937, which authorized an entity known as the "House of Reformation" to transfer its property to the State subject to certain conditions. The court stated:

> while the constitutional provision was wisely designed to prevent the dispensation or grant of special privileges to special interests, through the instrumentality of special legislation, in conflict with previously enacted general legislation covering the same subject matter, it was never intended, nor has this court ever held, that the framers of the Constitution intended to foreclose to the sovereign the right to pass special legislation "to serve a

> particular need, to meet some special evil, or to promote some public interest, for which the general law is inadequate.

Id. at 56 (quoting *Norris v. Baltimore*, 172 Md. 667, 683 (1937)).

There is no "mechanical rule" for deciding whether legislation constitutes a special law. The issue frequently turns on whether the law relates to a "class" (as opposed to particular persons or things) and, if so, what constitutes the "class." *Cities Serv. Co.*, 290 Md. at 567. A law may still be "general," even though it applies to a single entity at the time of enactment, as long as additional persons could be eligible for the benefit of the law in the future. *Reyes v. Prince George's Cnty.*, 281 Md. 279, 306 (1977) (act authorizing county government to sell bonds in order to acquire sports stadium or sports arena in Prince George's County is not special law although only one arena existed in Prince George's County at time); *Md. Dep't of the Env't v. Days Cove Reclamation Co., Inc.,* 200 Md. App. 256, 276 (2011) (law that immediately affected one entity applied generally to prohibit issuance of a permit to any party); *CCI Entm't v. State,* 215 Md. App. 359, (2013) (prohibition on certain gaming machines held consistent with general legislative intent to curb expansion of commercial gaming).

The Supreme Court of Maryland addressed the significance of a law passed in the absence of an applicable general law in *Police Pension Cases*, 131 Md. 315 (1917), where it upheld as constitutional several acts by the General Assembly that required payment by the Board of Police Commissioners of Baltimore City to specific named individuals. The court found that legislation passed to authorize benefits to specific individuals, when there was no applicable general law, "would seem peculiarly meritorious and just." *Id*. at 329. Relating to pension cases specifically, the Attorney General has noted that the courts have made a distinction between "a special act and an act for special purposes." Bill Review Letter of Attorney General on Senate Bill 397 of 2004 (May 12, 2004) (citing *United Railways*, 126 Md. at 54). Further, the Attorney General has noted that "[a]s long as the [Supreme Court of Maryland] continues to recognize exemptions from special law prohibitions for 'worthy' pension cases," similar pension bills will not be invalidated. *Id.* (quoting *Police Pension Cases*, 131 Md. at 326).

The Supreme Court of Maryland has enumerated a fairly comprehensive list of factors to be considered in deciding whether a statute is a "special law." These factors, excluding the pension exception noted above, include:

- whether the underlying purpose of the legislation is to benefit or burden a particular class member or members, instead of an entire class;

- whether particular individuals or entities are identified in the statute, either explicitly or by clear implication;

- what the substance and practical effect of a statute is and not simply its form;

- whether particular entities or individuals sought and obtained special advantages under the legislation or if other similar entities or individuals were discriminated against by the legislation;

- the public need and public interest underlying the enactment, and the inadequacy of the general law to serve the public need or public interest;

- whether the statute's distinctions are arbitrary or unreasonable, or whether unique circumstances render the entity a class unto itself; and

- whether the enactment, although it affects only one entity currently, would apply to other similar entities in the future.

Cities Serv. Co., 290 Md. at 569-70; *State v. Good Samaritan Hosp., Inc.*, 299 Md. 310, 330 (1984); *State v. Burning Tree Club, Inc.*, 315 Md. 254, 273-74 (1989).

Retroactive Laws

Rule

Although there is no specific constitutional prohibition against retroactive civil laws, a law that retroactively impairs "vested rights" will be held to violate the Maryland Constitution. Statutes affecting substantive rights, therefore, are generally presumed to operate prospectively only.

Discussion

Constitutional Basis

"A retroactive statute is one which purports to determine the legal significance of acts or events that have occurred prior to the statute's effective date." *Comm'n on Human Relations v. Amecom Div.*, 278 Md. 120, 123 (1976). The constitutional prohibitions against ex post facto laws (U.S. CONST. art. I, § 10; MD. DECL. OF RIGHTS, art. 17) apply only to criminal laws. (See chapter on "Ex Post Facto Laws" in this *Legislative Desk Reference*.) Although there is no explicit constitutional prohibition against retroactive civil laws, a retroactive law that impairs vested rights will likely be found unconstitutional under the implicit language of Articles 19 and 24 of the Declaration of Rights and Article III, § 40 of the Maryland Constitution, and their federal counterparts, the Due Process clause of the Fourteenth Amendment and the Takings Clause of the Fifth Amendment. See generally, *Dua v. Comcast Cable of Md., Inc.*, 370 Md. 604 (2002) (for further discussion, see chapter on "Impairment of Contracts" in this *Legislative Desk Reference* for further discussion).

As explained by the U.S. Supreme Court, "[r]etroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions." *Gen. Motors Corp. v. Romein*, 505 U.S. 181, 191 (1992). Under the federal constitutional requirements, the standard generally applied in examining retroactive statutes is whether the legislative act was arbitrary or irrational. *Allstate v. Kim*, 376 Md. 276, 293 (2003). However, in the consolidated opinion for *Dua v. Comcast Cable of Maryland, Inc.*, and *Harvey v. Kaiser Foundation Health Plan of the Mid-Atlantic States* ("*Dua*"), 370 Md. 604 (2002), the Supreme Court of Maryland found that, although there is no specific prohibition in the Maryland Constitution against retroactive civil laws, "retroactive legislation, depriving persons or private entities of vested rights, violates the Maryland Constitution, regardless of the reasonableness or 'rational basis' underlying the legislation." *Id*. at 625. As a result, the court struck down retroactive provisions of two separate acts of the General Assembly implicated in each case.

In the *Dua* case, the court considered a challenge to the retroactive application of Chapter 59 of the Acts of 2000, which was enacted in response to the court's earlier holding in *United Cable v. Burch*, 354 Md. 658 (1999). In the *Burch* case, the court had upheld a consumer

challenge to the amount charged for late fees by a cable television provider. The court declared that "as no statute provided to the contrary," the cable provider was limited to charging late fees at the legal rate of interest [6%] established in Article III, § 57 of the Maryland Constitution. *Dua*, 370 at 681. In response to this holding, the General Assembly subsequently passed Chapter 59, enacting statutory provisions that regulated late fees and, in effect, permitted higher late fees in contracts like those involved in *Burch*. In *Dua,* the court was asked to strike down the provision of Chapter 59 that applied the Act retroactively "to all late fees provided for in contracts entered into, or in effect, on or after November 5, 1995" – four and a half years prior to the effective date of the Act. *Dua*, 370 Md. at 610-611.

The second challenged statute, which was the subject of the *Harvey* case, resulted from an earlier court decision disallowing a right of subrogation claimed by a health maintenance organization (HMO) that would have allowed it to seek reimbursement for health services provided to an injured customer who subsequently received a monetary award in a lawsuit against the party causing the injury. *Riemer v. Columbia Med. Plan*, 358 Md. 222 (2000). In *Reimer*, the Supreme Court of Maryland had ruled that such subrogation provisions were "contrary to the express wording" of Title 19, Subtitle 7 of the Health - General Article. *Id*. at 233. In response, the General Assembly enacted Chapter 569 of the Acts of 2000, which provided a statutory basis for claims by HMOs for reimbursement out of their members' tort recoveries. In *Harvey*, the Supreme Court of Maryland was asked to invalidate the provision of Chapter 569 that applied the Act retroactively "to all subrogation recoveries by health maintenance organizations recovered on or after January 1, 1976" – almost 25 years prior to the effective date of the Act. *Dua*, 370 Md. at 611.

Vested Rights

As noted above, a statute may only operate retroactively under the Maryland Constitution if it does not impair a vested right.[1] *Dua*, 370 Md. at 629. Relying on principles derived from Article 24 of the Declaration of Rights (prohibiting the taking of life, liberty, or property without due process), and Article III, § 40 of the Maryland Constitution (prohibiting the taking of private property "without just compensation"), the *Dua* court held that the retroactive application of the two challenged statutes was unconstitutional because:

> [w]hether Chs. 59 and 569 of the Acts of 2000 are viewed as statutes abrogating petitioners' rights to particular sums of money, or as statutes abrogating causes of action in pending cases, or as both (which is probably the most accurate description), the retrospective portions of both statutes clearly deprived petitioners of vested rights.

Dua, 370 Md. at 642. Because these rights were vested, the court explained, they are considered property and thus are entitled to the same protections afforded other property under Maryland law.

[1]This may be a more stringent standard than the federal standard applied to assess retroactive legislation under the due process clause of the U.S. Constitution. 88 Op. of the Att'y Gen. 11, 20 n.9 (2003); *see,e.g., Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976).

In addition to violating Article 24 of the Declaration of Rights and Article III, § 40 of the Maryland Constitution, the court held that the two challenged statutes also violated Article 19 of the Maryland Declaration of Rights, which prohibits unreasonable statutory restrictions on access to the courts. *Id.* at 644-45 (holding that Article 19 precludes retrospective legislation from abrogating accrued causes of action).

Whether the right to receive ground rent is a vested right and thus may not be impaired by the retrospective operation of a statute was the question posed in *Muskin v. State Department of Assessments and Taxation,* 422 Md. 544 (2011). In *Muskin,* the Supreme Court of Maryland stated that "[t]here can be no reasonable doubt that the reversionary interest to real property and the contractual right to receive ground rent are vested rights under Maryland law." *Id*. at 560. Thus, the court held that a statute that extinguishes and transfers to a leasehold tenant a ground rent lease holder's fee simple interest in property for a failure to register ground rents by a certain date is retrospective in nature and unconstitutionally abrogates vested rights and takes property without just compensation under the Maryland Declaration of Rights and the Maryland Constitution.

The question of determining whether a "good cause" provision in a statute is to be applied retrospectively or prospectively to a renewable agreement arose in *John Deere Construction and Forestry Company v. Reliable Tractor Inc.,* 406 Md. 139 (2008). In that case, the Supreme Court of Maryland adopted the U.S. Supreme Court's factor analysis in *Landgraft v. USI Film Products*, 511 U.S. 244, 270 (1994) for retrospectivity that evaluates fair notice, reasonable reliance, and settled expectations to determine the nature and extent of the change in law and the degree of connection between the operation of the new rule and a relevant past event.

In 1984, John Deere*,* an equipment supplier, entered into agreements with Reliable Tractor, an equipment dealer. The agreements were to be automatically renewed unless they were terminated by either party by giving 120 days' notice. In 1998, a statute was enacted that prohibited an equipment supplier from terminating a dealer agreement without good cause. In 2007, John Deere gave 120 days' notice and terminated the agreements without cause. Reliable Tractor filed suit, arguing that John Deere's termination without good cause is prohibited under Maryland law. John Deere argued that since the statute went into effect after the agreements were executed, application of the good cause statute would constitute a prohibited retroactive application of the statute.

The court determined that the agreements created a series of 120-day contracts and did not create vested rights beyond that time period. Thus, the court held that because the contracts were allowed to renew after enactment of the good cause provision took effect, the good cause provision prospectively applied to the agreement in effect at the time of the attempted termination without cause.

Addressing the issue presented in a 2004 whistleblower bill (HB 1044) of making employers subject to suits for past acts that were not actionable at the time that they occurred, the Attorney General opined that application of a retroactive clause in such a statute, which created a new cause of action, was unconstitutional. See Bill Review Letter of Attorney General on House Bill 1044 (April 23, 2004).

Limitations

The Supreme Court of Maryland has recognized that there may be limitations to the principle that the Maryland Constitution precludes the General Assembly from retroactively impairing an accrued cause of action. In *Dua*, the court stated that it would permit retroactive abrogation of remedies for the enforcement of property rights "when an alternative remedy is open to the plaintiff." *Dua*, 370 Md. at 638 (citing *Wilson v. Smith*, 91 Md. 1, 5-7 (1900)). In addition, the *Dua* court cited *Baugher v. Nelson*, 9 Gill 299, 305-306 (1850), in which the court held that a law which repealed a prior statute relieving debtors of any obligation to pay the principle or interest on instruments that charged excessive interest was not objectionable, even though it applied retroactively. The *Baugher* court held that "a retrospective 'act which divests a [vested] right through the instrumentality of the remedy … is as objectionable as if the' vested right itself was abolished." *Dua*, 370 Md. at 639-640 (quoting *Baugher*, 9 Gill at 309) (alteration in original). According to the *Baugher* court, however, there was no vested right in forfeiting a debt already owed to a lender. *Dua*, 370 Md. at 640. Acknowledging the *Baugher* holding that there was no vested right to insist on the forfeiture of an entire debt, the *Dua* court noted that subsequent cases have recognized the principle that, with respect to vested property rights, the General Assembly is constitutionally precluded from retroactive impairment. *Dua*, 370 Md. 642; see, *e.g., Murphy v. Wheatly*, 100 Md. 358, 366 (1905); *Garrison v. Hill*, 81 Md. 551, 556 (1895).

It has been held that "remedial," "curative," or "ratifying" statutes, and laws affecting only procedure, as opposed to substantive rights, may be given retroactive effect. As the Supreme Court of Maryland has noted, however, these categories "tend to overlap in many instances and are not always easy to accurately recognize or to delineate or define in a given instance." *Janda v. Gen. Motors Corp.*, 237 Md. 161, 170 (1964); *cf.*, *Dua*, 370 Md. at 643 (challenged acts not "curative" but represented major changes of legislative policy.)

In *State v. Smith*, 443 Md. 572 (2015), the Supreme Court of Maryland considered the nature of a writ of error *coram nobis*. The writ allows a court to review and correct its original judgment based on fundamental errors. Ms. Smith sought *coram nobis* relief to have her 2003 conspiracy to distribute marijuana conviction vacated on the ground that her guilty plea was not knowing and voluntary. She rested that contention, in part, on the assertion that she had not been informed at the time of the plea of the elements or essential nature of the crime of conspiracy. While Smith's petition for writ of error *coram nobis* was pending, § 8-401 of the Criminal Procedure Article, which specifies that "failure to seek an appeal in a criminal case may not be construed as a waiver of the right to file a petition for writ of error coram nobis," was enacted. The court held that because § 8-401 is procedural and remedial in nature and does not impair the State's vested right in the finality of a conviction, the statute applied retrospectively to Smith's case and other applicable cases pending at the time the statute went into effect. Consequently, Smith's failure to apply for leave to appeal from her 2003 conviction, to move to withdraw her guilty plea, or to file a petition for post-conviction relief did not constitute a waiver of her right to pursue *coram nobis* relief.

Prospective Presumption

Although generally there is no absolute prohibition against retroactive civil laws, in the absence of clear legislative intent that a statute is to be applied retroactively, statutes are generally presumed to operate prospectively only. See *Langston v. Riffe*, 359 Md. 396, 406 (2000); *Informed Physician Services v. Blue Cross*, 350 Md. 308, 327 (1998); *Cnty. Council of Prince George's Cnty. v. Curtis Regency*, 121 Md. App. 123, 138 (1998); see, *e.g., Miles Labs. v. Doe*, 315 Md. 704, 712 (1989) (act expanding scope of exemption from strict liability for blood suppliers applied prospectively only).

In many cases, however, the classification of a statute as "retroactive" or "prospective" for purposes of applying the presumption of prospectivity can be difficult, especially when "legal consequences flow indefinitely into the future because of certain pre-enactment facts." 80 Op. Att'y Gen. 278, 280 (1995). "This rule of construction is particularly applicable where the statute adversely affects substantive rights, rather than only altering procedural machinery." *WSSC v. Riverdale Heights Fire Co.*, 308 Md. 556, 561-62 (1987) (citations omitted). The presumption is not applicable to a change affecting procedure or remedy, and such a change generally becomes effective, "whether accrued, pending, or future." *Id.* at 571, n.2. According to the court in *Allstate*, "a statute will be found to operate retroactively only when the Legislature 'clearly expresses an intent that the statute apply retroactively.'" *Allstate*, 376 Md. at 289 (quoting *Waters v. Montgomery Cnty.*, 337 Md. 15, 28 (1994)). The *Allstate* court explained that although legislative intent must be express, "there is no mandated form for its articulation," and thus, "expression may be found by necessary implication." *Allstate*, 376 Md. at 291.

The difficulty of applying these conclusory rules in a particular case is illustrated by the *Amecom* decision. 278 Md. at 123. In that case, a statute creating an interlocutory right to an injunction to preserve the status quo during pendency of a discrimination claim was held not to be merely remedial or procedural in nature, and was, therefore, construed to operate prospectively only; *i.e.*, it was not applicable to cases arising out of alleged acts of discrimination occurring prior to its effective date. *Id.* at 123.

Cases involving statute of limitations changes also present special problems in making the procedural versus substantive distinction for purposes of determining whether a statute should be construed to operate prospectively only. See, *e.g., Balt. Cnty. v. Churchill, Ltd.*, 271 Md. 1, 11 (1974) (quoting *Allen v. Dovell*, 193 Md. 359, 363-64 (1949) ("[A] statute of limitations, which does not destroy a substantial right, but simply affects remedy, does not destroy or impair vested rights.... [T]he legislature cannot cut off all remedy and deprive a party of his right of action by enacting a statute of limitations applicable to an existing cause of action in such a way as to preclude any opportunity to bring suit."). As the Appellate Court of Maryland has stated:

> Much of this, of course, is semantics. All of the discussion about retroactivity, of form or procedure versus substance, ultimately comes down to two things: (1) *did the body that enacted the new law* (whether legislative, executive/administrative, or judicial) *give any clear indication as to whether or how it should be applied to pending matters,* and (2) *would it be basically unfair to so apply it?*

T&R Joint Venture v. Office, Planning and Zoning, 47 Md. App. 395, 407 (1980) (emphasis added).

In *Allstate,* the Supreme Court of Maryland held that a retroactive application of a statute that abrogated parent-child immunity with respect to tort claims arising from motor vehicle accidents did not impair the motor vehicle insurer's contract with the insured. The court explained that:

> the Maryland Constitution ordinarily precludes the Legislature (1) from retroactively abolishing an accrued cause of action, thereby depriving the plaintiff of a vested right, and (2) from retroactively creating a cause of action, or reviving a barred cause of action, thereby violating the vested right of the defendant.

Allstate, 376 Md. at 296 (quoting *Dua*, 370 Md. at 633). Thus, the Court found no violation of any vested right enjoyed by the insurer, Allstate. *Id*. at 298.

Retroactive Authorization of Imposed Taxes

Another matter in which retroactivity of statutes has presented special problems is the area of taxes. See, *e.g., Comptroller v. Glenn L. Martin Co.*, 216 Md. 235 (1958) (act making retroactive changes to definitions under sales and use tax held violative of due process clause). *Cf., Diamond Match Co. v. State Tax Comm'n*, 175 Md. 234 (1938) (retroactive franchise tax found valid as it did not interfere with vested rights or impair contractual relations). Numerous cases challenging legislation purporting to retroactively authorize previously imposed taxes, authority for which had been found to be lacking, illustrate the difficulty of applying the exception for "curative" or "ratifying" legislation. See, *e.g., Vytar Associates v. City of Annapolis*, 301 Md. 558 (1984) (legislation purporting to retroactively authorize prior imposition of rental dwelling license fee held invalid impairment of property rights); *Wash. Nat'l Arena v. Prince George's Cnty.*, 287 Md. 38 (1980) (legislative attempt to retroactively authorize increase in county transfer tax held to violate due process clause since not designed to cure "technical" or "procedural" defects in collection of tax); *Katzenberg v. Comptroller*, 263 Md. 189 (1971) (capital gains tax with retroactive effect upheld); *Nat'l Can Corp. v. State Tax Comm'n*, 220 Md. 418 (1959), *appeal dismissed* 361 U.S. 534 (1959) (statute "ratifying" different assessment practices for real and personal property upheld against due process challenge).

Eminent Domain and Takings Clause

Rule

Eminent domain is the right of the sovereign state, or of those to whom the power has been lawfully delegated, to condemn private property for public use, and to appropriate the ownership and possession of the property for the use after paying the owner due compensation to be ascertained according to the law.

The Fifth Amendment of the U.S. Constitution and Article III, § 40 of the Maryland Constitution prohibit the taking of private property for public use without the payment of just compensation to the property owner.

"Quick take" powers may be exercised only by those entities identified in the Maryland Constitution; the General Assembly may not simply delegate "quick take" powers in the absence of specific constitutional authority.

Discussion

Eminent domain is the "inherent power of a governmental entity to take privately owned property… and convert it to public use ...." *Balt. Dev. Corp. v. Carmel Realty Assoc.*, 395 Md. 299, 315 (2006) (citing *Matthews v. Md.-Nat'l Cap. Park & Planning Comm'n*, 368 Md. 71, 87 (2002). The "mode and manner of the exercise of the power of eminent domain, however, …is not without its limitations." *Matthews*, 368 Md. at 87. The Fifth Amendment of the U.S. Constitution and Article III, § 40 of the Maryland Constitution "prohibit the taking of private property for public use without the payment of just compensation to the property owner." *King v. State Roads Comm'n*, 298 Md. 80, 84 (1983). Specifically, Article III, § 40 of the Maryland Constitution provides that "[t]he General Assembly shall enact no Law authorizing private property, to be taken for public use, without just compensation, as agreed upon between the parties, or awarded by a Jury, being first paid or tendered to the party entitled to such compensation."

In order to qualify for a compensation award under the eminent domain provision of the Maryland Constitution, the governmental action must (1) constitute a taking and (2) be for a public use. *Serio v. Balt. Cnty.*, 384 Md. 373 (2004).

Taking

A governmental entity may accomplish a taking either by taking physical possession of the property or, without a physical taking, by depriving the property owner of all reasonable use of the property through regulation or otherwise. *Arnold v. Prince George's Cnty.*, 270 Md. 285, 294 (1973); *Erb v. Md. Dep't of the Env't*, 110 Md. App. 246 (1996). Maryland courts have recognized two types of non-possessory takings: regulatory takings and inverse condemnations.

The government may accomplish a regulatory taking by passing a statute or regulation that limits the use of property or retroactively abrogates a vested right, depriving the property owner of the utility or value of the property. Regulatory takings require an analysis of the "fine line" between acceptable governmental regulation by zoning or other regulation and confiscation. *Howard Cnty. v. JJM, Inc*., 301 Md. 256, 281 (1984). Among the factors a court must consider in resolving a takings claim are: (1) "the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations" and (2) "the character of the governmental action [, namely,] whether it amounts to a physical invasion or instead merely affects property interests through 'some public program adjusting the benefits and burdens of economic life to promote the common good.' *Lingle v. Chevron, U.S.A., Inc.,* 544 U.S. 528, 539 (2005) (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978)); see also *Chevy Chase Sav. & Loan v. State*, 306 Md. 384, 411 (1986). "Regulations generally constitute a 'taking' only if the owner affirmatively demonstrates that the restrictions imposed deprive him of essentially all beneficial use of the property." *Cider Barrel Mobile Home Court v. Eader*, 287 Md. 571, 580 (1980) (restrictions on mobile home park owner's use of property not constitutional taking).

A statute that has the effect of retroactively abrogating a vested property right and that does not provide for compensation authorizes the taking of private property without just compensation and results in a person being deprived of private property contrary to the law of the land and is thus in violation of the State due process clause. MD. CONST., DECL. OF RIGHTS, art. 24; *Dua v. Comcast Cable of Md., Inc.*, 370 Md. 604 (2002). "Retrospective statutes are those 'acts which operate on transactions which have occurred or rights and obligations which existed before the passage of the act.'" *Muskin v. State Dep't of Assessments & Taxation*, 422 Md. 544, 557 (2011) (quoting *Langston v. Riffe*, 359 Md. 396, 406 (2000)). To determine whether a right is vested, a court will analyze the nature of the right implicated by the statute to determine if the right is an inextricable part of the bundle of vested rights. *State v. Goldberg*, 437 Md. 191, 207 (2014) (holding that a ground leaseholder's right of reentry is a unique remedy that may not be retroactively abolished and replaced with the remedy of foreclosure-and-lien by the General Assembly).

A zoning regulation may also amount to a taking of private property. In these cases, a court will examine whether the zoning regulation "deprive[s] the owner of 'all beneficial use of the property.'" *HNS Dev., LLC v. People's Counsel for Balt. Cnty.*, 200 Md. App. 1, 44 (2011) (quoting *Md.–Nat'l Cap. Park & Planning Comm'n v. Chadwick*, 286 Md. 1, 10 (1979)) (holding that the fact that the developer had improved and sold a portion of the property meant that it had not been denied all reasonable or beneficial use of the property).

The second non-possessory form of taking is inverse condemnation where the government's use of its property causes a substantial interference to an adjoining landowner's use of its property. *Md. Port Admin. v. QC Corp.*, 310 Md. 379 (1987). "The modern, prevailing view is that any substantial interference with private property which destroys or lessens its value (or by which the owner's right to its use or enjoyment is in any substantial degree abridged or destroyed) is, in fact and in law, a "taking" in the constitutional sense, to the extent of the damages suffered, even though the title and possession of the owner remain undisturbed." *Litz v. Md. Dep't of the Env't*, 434 Md. 623, 653 (2013) (discussing whether pollution of a campground lake by the town,

requiring the campground to be shut down, constitutes an inverse taking; quoting *Md. Port Admin. v. QC Corp.*, 310 Md. 379, 387 (1987)). An inverse condemnation may also be a partial taking, in which an intrusion is "so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it." *Id.* at 654 (quoting *United States v. Causby*, 328 U.S. 256, 265 (1946)).

Public Use

Although the law seems clear that private property may not be taken for private, rather than public use, *Riden v. Phila., B. & W. R.R. Co*., 182 Md. 336 (1943), the Supreme Court of Maryland has stated that the broader and more natural interpretation of what is constitutionally required for "public use" is a public purpose. *Mayor of Baltimore City v. Valsamaki*, 397 Md. 222 (2007). See*, e.g.*, *S. Easton Neighborhood Ass'n v. Town of Easton, Md.*, 387 Md. 468 (2005) (necessity of expanded emergency room was a "public purpose" that promoted public welfare).

In *Kelo v. City of New London*, 545 U.S. 469 (2005), the U.S. Supreme Court upheld a city plan to condemn homes in a residential neighborhood in order to give the land to a developer to build a waterfront hotel, office space, and higher-end housing. The court found this donation of property to a developer to be a "public use" and said that precedents gave the government "broad latitude" to determine what uses might be "public." See also *Prince George's Cnty. v. Collington Crossroads*, 275 Md. 171, 189-90 (1975) (does not matter that property will be owned by private entity after condemnation, so long as the project is for public benefit).

The Supreme Court of Maryland has directed that the decisions of the U.S. Supreme Court interpreting the "takings clause" of the U.S. Constitution are authoritative in interpreting the State's comparable takings provision. See *Erb*, 110 Md. App. at 262 n.2; *Bureau of Mines v. George's Creek Coal & Land Co.*, 272 Md. 143, 156 (1974).

Just Compensation

Appropriate compensation for a taking is a question of fact to be determined by a jury. *Matthews*, 368 Md. at 88. The Supreme Court of Maryland, however, has noted that this right is not absolute, but that the Maryland Constitution provides the opportunity to have a jury award just compensation for taken land only if the condemnee disputes the compensation offered by the condemnor by providing some evidence of a value greater than that offered. *Montgomery Cnty. v. Soleimanzadeh*, 436 Md. 377, 393 (2013). The measure of just compensation is defined as the "fair market value of the land at the time of the taking" or "the full and perfect equivalent in money of the property taken." *Dodson v. Anne Arundel Cnty.*, 294 Md. 490, 494 (1982) (quoting *State Roads Comm. v. Warriner*, 211 Md. 480 (1957) and *United States v. Miller*, 317 U.S. 369 (1943), respectively); see also MD. CODE ANN., REAL PROP., § 12-105(b) (explanation of the fair market value of property in a condemnation proceeding).

"Quick Take" Authority

The Maryland Constitution also includes provisions, known as "quick take" authority, that allow the State and designated local governments to take private property for certain purposes

before paying just compensation. In these provisions, the governing body is authorized to gain immediate possession of the property while paying the fair market value of the property into the court, pending a final determination of the just compensation issue. This method is typically available for projects that are best accomplished systematically rather than piecemeal, such as highway construction. (See MD. CONST., art. III, § 40A as to the authority of the State and Baltimore City for land located in Baltimore City and the authority of Baltimore County, Montgomery County, and municipal corporations in Cecil County; § 40B as to the authority of the State Highway Administration (formerly the State Roads Commission); and § 40C as to the authority of the Washington Suburban Sanitary Commission for land located in Prince George's County.)

It is important to note that "quick take" powers may be exercised only by those entities identified in the Maryland Constitution. The General Assembly may not simply delegate "quick take" powers in the absence of specific constitutional authority. Furthermore, over the last few decades, voters have consistently rejected every proposed constitutional amendment that sought to enable more jurisdictions to exercise "quick take" powers. The most recent acts that were not ratified at referendum were measures that would have authorized "quick take" to be exercised in Anne Arundel County (Chapter 674, Acts of 1988), Harford County (Chapter 83, Acts of 1996), and certain areas in Prince George's County (Chapter 205, Acts of 2000).

LOCAL GOVERNMENT ISSUES

Charter Counties

Rule

The Maryland Constitution allows a county to be designated as a charter home rule county. The General Assembly is prohibited by the Maryland Constitution from enacting a public local law for a single charter county if the enactment is within the scope of the Express Powers Act.

Discussion

In General

Article XI-A of the Maryland Constitution provides a charter home rule option for county government. Article XI-A, § 2 of the Maryland Constitution requires that the General Assembly provide a grant of express powers to counties that adopt charter home rule. The constitutional requirement is implemented by the list of express powers contained in the Express Powers Act. (MD. ANN. CODE., LOCAL GOV'T Title 10). The list of express powers is quite extensive and includes a grant of general police powers. (LOCAL GOV'T § 10-206(a)). The general welfare clause provides charter counties with authority to enact local ordinances for the public good as long as such ordinances are not inconsistent with other State law. *Holiday Universal Club v. Montgomery Cnty.*, 67 Md. App. 568 (1986), appeal dismissed, 479 U.S. 1049 (1987). The Supreme Court of Maryland has stated that "[g]ratification would not be afforded the purposes of home rule or the reasons [that] prompted it if the language of [§ 10-206(a) of the Local Government Article] were not to be construed as a broad grant of power to legislate on matters not specifically enumerated in [Title 10 of the Local Government Article] ...." *Montgomery Citizens League v. Greenhalgh*, 253 Md. 151, 160–161 (1969).

State Preemption

There are several areas of law that are outside a charter county's jurisdiction to enact because of State preemption. Among these are:

- Alcoholic Beverages;
- Courts;
- Criminal Law (including gambling);
- Education;
- Elections (at least as it relates to campaign finance regulation); and

- Taxation (The Express Powers Act grants authority to impose a property tax (LOCAL GOV'T, § 10-313), but does not grant general taxing authority. *E. Diversified Props., Inc. v. Montgomery Cnty.*, 319 Md. 45 (1990)).

Nor may a charter county legislate in an area that would not be considered "local law". *McCrory Corp. v. Fowler*, 319 Md. 12 (1990) (providing that a charter county may not establish a new private cause of action). See "State Preemption" in this *Legislative Desk Reference* for further discussion.

Legislation Affecting Two or More Counties

Under Art. XI-A, § 4 of the Maryland Constitution, the General Assembly is prohibited from enacting a public local law for a single charter county on any subject covered by the Express Powers Act. However, any enactment affecting at least two counties or a county and Baltimore City is a public general law and not subject to the limitation on the General Assembly's power under Article XI-A to enact local provisions. This principal is very broadly construed in the case of the bi-county agencies that operate in Montgomery and Prince George's Counties (see, *e.g.,* LOCAL GOV'T Division II (Maryland-National Capital Park and Planning Commission) and PUB. UTIL., Division II (Washington Suburban Sanitary Commission)). Since the laws governing these agencies are public general laws, bills that amend these provisions likewise are deemed public general laws even if they affect only one county. *Prince George's Cnty. v. Md.-Nat'l Capital Park & Planning Comm'n*, 269 Md. 202 (1973).

The eleven charter counties and the years that the counties adopted charter home rule are as follows: Anne Arundel (1964), Baltimore (1956), Cecil (2012), Dorchester (2002), Frederick (2014), Harford (1972), Howard (1968), Montgomery (1948), Prince George's (1970), Talbot (1973), and Wicomico (1964). Note that Baltimore City also operates as a charter county. For further discussion, see chapter on "Baltimore City" in this *Legislative Desk Reference.* The structure of each county government is set out in **Appendix 2**.

Code Home Rule Counties

Rule

The Maryland Constitution allows a county to be designated as a code home rule county. The General Assembly may legislate for all code home rule counties in a defined class in a uniform manner, but it generally may not enact a public local law for a single code home rule county. This limitation does not apply to areas of State preemption or to areas of law that are outside of a code county's legislative power.

Discussion

Although the exact scope of a code home rule county's authority has been subject to some debate, a county that adopts code home rule does enjoy significant autonomy in its ability to address local matters. See MD. CONST. art. XI-F, § 3; MD. CODE ANN., LOCAL GOV'T, Title 9, Subtitle 3 and Title 10.

Under Art. XI-F, § 4 of the Maryland Constitution, the General Assembly is generally forbidden from enacting, amending, or repealing a public local law that is special or local in substance for a single code home rule county. However, the General Assembly may enact a law on a matter of local concern applicable to all counties in one or more "classes" of code countries, regardless of the number of counties within a given class.

The Maryland Constitution authorizes the General Assembly to establish a maximum of four classes of code home rule counties. *Id.* § 5. In 1997, the General Assembly divided the State into four regions for the purpose of code home rule. LOCAL GOV'T, § 9-302. The regions are:

- Eastern Shore (Caroline, Kent, Queen Anne's, Worcester);
- Central Maryland (None);
- Western Maryland (Allegany); and
- Southern Maryland (Charles).

Areas of State preemption are not subject to the restriction placed on the General Assembly's power to legislate for a single code home rule county under Art. XI-F, § 4 of the Maryland Constitution. (For further discussion, see chapter on "State Preemption" in this *Legislative Desk Reference*.)

A code home rule county is not authorized to levy any type of tax or fee that has not been authorized by the General Assembly, either prior to adoption of home rule or for all code home rule counties within a given class once home rule has been adopted. MD. CONST. art. XI-F, § 9.

The Maryland Constitution reserves to the General Assembly the right to cap the maximum property tax rate that a code home rule county may impose and the maximum debt that a code county may incur. *Id.* § 8. Although the General Assembly is permitted to legislate for individual code home rule counties in these two areas, the General Assembly has not enacted such limitations.

The six code home rule counties and the years that the counties adopted code home rule are as follows: Allegany (1974), Caroline (1984), Charles (2003), Kent (1970), Queen Anne's (1990), and Worcester (1976). The structure of each county government is set out in **Appendix 2**.

Commission Counties

Rule

The General Assembly may legislate on any matter for a single county, or group of counties that does not have home rule powers (*i.e.,* "commission counties"). The powers of these commission counties are limited, and any delegation of power to a commission county by the General Assembly is strictly construed.

The General Assembly has delegated certain limited authority to commission counties that is generally known as "statutory home rule". This authority may be altered as to one county or group of counties at any time by the General Assembly.

Discussion

Until the mid-20th century, every county in Maryland operated under a commission form of government as provided under Article VII of the Maryland Constitution. Currently, only the six counties that have not adopted home rule retain the commission form of government. Commission counties are governed by public local laws enacted by the General Assembly. These laws often delegate authority to the board of county commissioners of the county, but the delegation is limited and strictly construed. *Barnett v. Bd. of Cnty. Comm'rs*, 206 Md. 478 (1955).

Commission counties enjoy statutory home rule, which is a statutory delegation of certain limited subjects from the General Assembly to the counties under the Local Government Article. These powers are generally not as broad as the authority granted to the charter and code home rule counties, and the General Assembly may alter the authority of any individual commission county or group of commission counties at any time.

A public local law may be codified in the county's Code of Public Local Laws or in the Annotated Code (usually the Local Government Article). Codification has no bearing on the legal effect of the law.

Counties that have a commission form of government must receive authority from the General Assembly to issue bonds for general obligation debt to fund county facilities. MD. CONST. art. III, § 54. Bills authorizing an individual commission county to issue debt in a specified amount are submitted to the General Assembly and are heard by the House of Delegates local delegations and the Senate select committees for the respective counties. The General Assembly, with rare exception, approves this enabling legislation.

The six commission counties are: Calvert, Carroll, Garrett, St. Mary's, Somerset, and Washington. The structure of each county government is set out in **Appendix 2**.

Baltimore City

Rule

Baltimore City is considered to be a county (not a municipal corporation) and operates under the same constitutional authority as charter home rule counties.

The express powers of Baltimore City are contained in Article II of the Charter of Baltimore City. Article II may be amended by the General Assembly, but may not be altered by Baltimore City.

Discussion

Baltimore City is considered to be one of the 24 primary political subdivisions of the State, along with 23 counties. Baltimore City has adopted home rule powers and operates under Article XI-A of the Maryland Constitution, the same constitutional provisions governing charter county home rule, as opposed to Article XI-E of the Constitution relating to municipal corporations. Generally, unless Baltimore City is expressly or impliedly excluded from a statutory reference to "counties", it is regarded as a county because the Rules of Interpretation of the Annotated Code of Maryland provide that, unless otherwise provided in the code, the word "county" means "a county of the State or Baltimore City". MD. ANN. CODE., GEN PROV. § 1-107.

Unlike charter home rule counties that are granted express powers under Title 10 of the Local Government Article, the Charter of Baltimore City contains the express powers for Baltimore City. See Article II, Charter of Baltimore City. Although the General Assembly lacks the authority to modify the express powers of any single charter county, it may amend the express powers of Baltimore City. Article XI-A, § 2 of the Maryland Constitution provides that the "express powers granted to the Counties and the powers heretofore granted to the City of Baltimore ... shall not be enlarged or extended by any charter formed under the provisions of this Article, but such powers may be extended, modified, amended or repealed by the General Assembly". Just as charter home rule counties are not able to amend their statutory express powers, Baltimore City is unable to modify the express powers contained in its charter.

Local laws enacted by the General Assembly that apply solely to Baltimore City are contained in the Public Local Laws of Baltimore City.

Municipal Corporations

Rule

The Maryland Constitution provides for the establishment of municipal corporations with home rule powers. Any law relating to the incorporation, organization, government, or affairs of municipal corporations must apply uniformly to all municipal corporations. Except under limited circumstances, the General Assembly may not enact legislation for individual municipal corporations.

Discussion

In General

There are 156 municipal corporations with home rule powers established in accordance with Article XI-E (Municipal Home Rule Amendment) of the Maryland Constitution. (Baltimore City has home rule powers under Article XI-A of the Maryland Constitution and is usually grouped for legislative purposes with the charter home rule counties rather than with the municipal corporations. See chapter "Baltimore City" in this *Legislative Desk Reference* for further discussion).

Division II of the Local Government Article is the primary source of authority regarding municipal corporations, although several provisions concerning municipal corporations can be found throughout the Code. See, *e.g.,* Division II of the Land Use Article – Maryland-National Capital Park and Planning Commission; the Health – General Article; and the Tax – Property Article. Section 4-103 of the Local Government Article grants the governing body of a municipal corporation the power to pass and adopt ordinances, resolutions, and bylaws necessary to exercise the powers granted to the municipal corporation. Title 5, Subtitle 2 implements Article XI-E by a grant of express powers.

Only five municipal corporations have been created since the 1954 passage and ratification of the Municipal Home Rule Amendment which granted home rule status to the municipal corporations. All other municipal corporations were created before 1954 by enactments of the General Assembly.

The general purpose of the Municipal Home Rule Amendment is to permit the municipal corporations to govern themselves in local matters. *Birge v. Town of Easton*, 274 Md. 635 (1975). This amendment manifests an explicit intention that the General Assembly deal with the charters of the municipal corporations on a general basis and not enact local legislation to amend the charters of individual municipal corporations. *Hitchins v. Mayor of Cumberland*, 208 Md. 134 (1955).

Under Article XI-E, §1 of the Maryland Constitution, the General Assembly may legislate on matters relating to the incorporation, organization, government, or affairs of municipal corporations only by general laws which apply "alike to all municipal corporations in one or more of the classes provided for in Section 2 of this Article." Under Article XI-E, § 2 of the Maryland Constitution, the General Assembly has the authority to divide the municipal corporations into as many as four classes, based on population. However, § 4-102 of the Local Government Article provides that there is only one class which contains all municipal corporations. Accordingly, until the General Assembly pursues classifying the municipal corporations by population, any law relating to the incorporation, organization, government, or affairs of the municipal corporations generally must apply uniformly to all municipal corporations.

Exceptions

Despite the general rule prohibiting the General Assembly from adopting legislation for less than all the municipal corporations, there are a few limited areas in which the General Assembly may adopt a law for an individual municipal corporation:

- modifying the maximum tax rate of a municipal corporation (MD. CONST. art. XI-E, § 5);
- regulating the amount of bonded indebtedness of a municipal corporation (MD CONST. art. XI-E, § 5); and
- granting or modifying urban renewal powers for slum clearance for a municipal corporation (MD. CONST. art. III, § 61).

The General Assembly shares concurrent jurisdiction with the municipal corporations concerning the first two powers; that is, both the General Assembly and a municipal corporation may adopt legislation concerning the maximum tax rate or bonded indebtedness of the municipal corporation. *Woelfel v. Mayor of Annapolis*, 209 Md. 314 (1956). As to the third power, a municipal corporation must receive express authority from the General Assembly in order to exercise urban renewal powers for slum clearance. However, a municipal corporation has authority under §§ 5-204(c) and 5-215 of the Local Government Article to exercise eminent domain powers for individual blighted properties, provided the municipal corporation has received the slum clearance power granted by the General Assembly under Article III, § 61 of the Maryland Constitution. 80 Op. Att'y Gen. 232 (1995).

State Preemption

Some fields have been preempted by the State, either by express preemption or implied preemption, so that only the General Assembly may legislate on these matters on behalf of the municipal corporations. Some of these areas include:

- alcoholic beverages (MD. CONST. art. XI-E, § 6);
- "blue laws" or Sunday commercial activity laws (MD. CONST. art. XI-E, § 6); and

- cigarette vending machines *(Allied Vending, Inc. v. City of Bowie*, 332 Md. 279 (1993)).

(For further discussion, see chapters on "Federal Preemption" and "State Preemption" in this *Legislative Desk Reference* for further discussion.).

Other Local Governmental Entities

Rule

The General Assembly may legislate only for those special taxing districts created by the General Assembly.

Only the General Assembly may alter the governing laws of multicounty agencies.

Discussion

Special Taxing Districts

The category of local government referred to as "special taxing districts" is extremely broad. Special taxing districts include entities that resemble municipal corporations, as well as entities that exist for a limited purpose such as the financing of public watershed associations for the drainage of the agricultural land of a few landowners or the creation and maintenance of street lighting in a particular neighborhood. While some of these districts were created by the General Assembly, others were created at the local level. However, all share some type of tax-setting or fee-charging authority.

Many of the quasi-municipal special taxing districts were created under charters enacted by the General Assembly. Unlike municipal corporations, these special taxing districts lack home rule powers and only the General Assembly may change their charters. In the last 30 years, several of these special taxing districts have opted to become municipal corporations with home rule powers under Article XI-E of the Maryland Constitution.

The code home rule counties and charter home rule counties are authorized under § 10-314 of the Local Government Article to create limited purpose special taxing districts to carry out most municipal services. Special taxing districts created by the counties are outside the General Assembly's legislative authority. The General Assembly has given16 counties broad authority to create special taxing districts and to impose special and *ad valorem* taxes for designated infrastructure improvements under Title 21, Subtitle 5 of the Local Government Article. Similar authority to create special taxing districts has been granted to Baltimore City in Article II, § 62A of the Baltimore City Charter. Additionally, under the provisions of Title 21, Subtitle 4 of the Local Government Article, municipal corporations are authorized to create special taxing districts within their borders for purposes of storm drainage, public parking facilities, pedestrian malls, area and street lighting, bus systems, and other infrastructure improvements. As with special taxing districts created by counties, these charters are beyond the specific legislative authority of the General Assembly.

To date, there are 11 special taxing districts still in existence that were created by the General Assembly. Three of these special taxing districts are located in Montgomery County and the other eight are located in Allegany County. Most of these special taxing districts resemble municipal corporations, and all were created before the two counties obtained home rule status. As to locally created special taxing districts, Anne Arundel County presently has more than 50 special taxing districts while other home rule counties have created few, if any, special taxing districts.

Multicounty Agencies

The General Assembly has created 12 multicounty agencies to address issues that cross county boundaries or deal with regional concerns. While the General Assembly has given each agency broad powers, only the General Assembly may alter the laws under which the agencies operate. The multi-county agencies are:

- the Baltimore Metropolitan Council, which was chartered in 1992 as a regional planning agency to replace the Baltimore Regional Council of Governments and promotes cooperation among local governments in the Baltimore area (Title 13, Subtitle 3 of the Economic Development Article);

- the Maryland Lower Eastern Shore Tourism Center Advisory Committee, which advises the Department of Commerce on the development and operations of the Maryland Lower Eastern Shore Tourism Center and consists of nine members, three each appointed by the Somerset County and Worcester County Boards of County Commissioners and the Wicomico County Council (Title 13, Subtitle 11 of the Economic Development Article);

- the Maryland-National Capital Park and Planning Commission, which performs the land use planning function and operates park facilities in Montgomery and Prince George's counties and performs the recreation function in Prince George's County (Division II of the Land Use Article);

- the Mid-Shore Regional Council, which operates as a regional planning and development agency for Caroline, Dorchester, and Talbot counties (Title 13, Subtitle 9 of the Economic Development Article);

- the Northeast Maryland Waste Disposal Authority, which assists participating local governments in Maryland (including Anne Arundel, Baltimore, Carroll, Frederick, Howard, Montgomery and Prince George's counties, and Baltimore City), other public entities, and the private sector in providing adequate waste disposal facilities (Title 3, Subtitle 9 of the Natural Resources Article);

- the Tri-County Council for the Lower Eastern Shore of Maryland, which operates as a regional planning and development agency for Somerset, Wicomico, and Worcester counties (Title 13, Subtitle 8 of the Economic Development Article);

- the Tri-County Council for Southern Maryland, which operates as a regional planning and development agency for Calvert, Charles, and St. Mary's counties (Title 13, Subtitle 6 of the Economic Development Article);

- the Tri-County Council for Western Maryland, which operates as a regional planning and development agency for Allegany, Garrett, and Washington counties (Title 13, Subtitle 7 of the Economic Development Article);

- the Upper Potomac River Commission, which operates a dam, a trunk sewer, and a sewage treatment facility in Allegany and Frederick counties (Chapter 409, Acts of 1935);

- the Upper Shore Regional Council, which operates as a regional planning and development agency for Cecil, Kent, and Queen Anne's counties (Title 13, Subtitle 10 of the Economic Development Article);

- the Washington Suburban Sanitary Commission, which provides water and sewer service in Montgomery and Prince George's counties (Division II of the Public Utilities Article); and

- the Washington Suburban Transit Commission, which is responsible for administering the Washington Suburban Transit District, is authorized to develop a transportation system, including mass transit facilities, for Montgomery and Prince George's counties and coordinates mass transit programs with the two county governments, the Washington Metropolitan Transit Authority, and the Maryland Department of Transportation. (Chapter 870, Acts of 1965).

ADMINISTRATIVE ISSUES

Executive Orders

Rule

The Governor has certain general and specific statutory authority to issue executive orders that do not alter or contravene existing statutory provisions.

However, under Article II, § 24 of the Maryland Constitution, the Governor may issue an executive order that supersedes a statute if:

1. **the order reorganizes the Executive Branch of State government;**

2. **the order is submitted in statutory form to the General Assembly within the first 10 days of a regular legislative session; and**

3. **neither house of the General Assembly, by a majority vote of all of the members of that house, adopts a resolution of disapproval of the order within 50 days after its submission.**

Discussion

By statute, the Governor has been granted the authority to issue executive orders. The Governor "is the head of the Executive Branch of the State government and, except as otherwise provided by law, shall supervise and direct the officers and units in that Branch." MD. CODE ANN., STATE GOV'T § 3-302. Under § 3-401 of the State Government Article, the Governor may issue an executive order that:

(1) proclaims or ends a state of emergency or exercises the authority of the Governor during an emergency, under Title 14, Subtitle 3 of the Public Safety Article or any other provision of law;

(2) adopts guidelines, rules of conduct, or rules of procedure for:

  (i) State employees;

  (ii) units of the State government; or

  (iii) persons who are under the jurisdiction of those employees or units or who deal with them;

(3) establishes a unit, including an advisory unit, study unit, or task force; or

(4) changes the organization of the Executive Branch of the State government.

The Governor must deliver each executive order to the Secretary of State on issuance of the order. STATE GOV'T § 3-404.

Article II, § 24 of the Maryland Constitution, approved by the voters in 1970, provides the only authority for the Governor to issue executive orders that are contrary to existing statutory provisions. Article II, § 24 authorizes the Governor to reorganize the Executive Branch of State government. If the proposed changes are inconsistent with existing law or create new government programs, the changes must be set forth in an executive order that is be prepared in statutory form and submitted to the General Assembly within the first 10 days of a regular legislative session. Unless the executive order is specifically disapproved by a resolution approved by a majority vote of all members of the Senate and the House of Delegates within 50 days after submission, the executive order is effective, has the force of law, and supersedes inconsistent statutes on the date designated in the executive order. The Governor may not issue any executive order that abolishes an office established by the Maryland Constitution or modifies the powers and duties delegated to particular officers or departments by the Maryland Constitution. MD. CONST. art. II, § 24.

The publisher of the Code of Public General Laws must "codify each executive order that is issued in statutory form under Article II, § 24 of the Maryland Constitution" and the Executive Director of the Department of Legislative Services must publish all other executive orders. STATE GOV'T § 3-406(a) and (b).

In addition to the authority of the Governor to issue executive orders granted by the Maryland Constitution, § 8-301(b) of the State Government Article provides that "the Governor may order any other reorganization of the Executive Branch that is considered by the Governor to be necessary and desirable and that is not inconsistent with law". STATE GOV'T § 8-301(b)(1). Such a reorganization may be effected by an executive order or by approval of a principal department secretary's recommendation. Approval by a principal department secretary's recommendation is treated as an executive order. STATE GOV'T § 8-301(b)(3).

The issue of the nature and effect of an executive order was first directly addressed by a Maryland court in *Lomax v. Warden*, 120 Md. App. 314 (1998) *aff'd* 356 Md. 569 (1999). In that case the Appellate Court of Maryland held that the Governor's pronouncement at a press conference that he had directed the Parole Board to refrain from sending him parole recommendations for inmates serving life sentences did not qualify as an executive order. *Id*. at 332. Although the court noted, "[b]oth the Maryland Constitution and statutory law authorize the Governor to issue executive orders," it found that the Governor's pronouncement met neither the constitutional nor the statutory requirements for an executive order. *Id*. at 331-332. The court made clear its opinion on the nature of executive orders, stating:

> We note parenthetically that executive orders promulgated pursuant to Article II, Section 24 of the Maryland Constitution have the "*force of law*." … In addition, we note that statutorily authorized executive orders, "as long as they are not inconsistent with existing statutes and are within the scope contemplated by the specific enabling legislation, are the *equivalent of statutes, and have the force of law*."

Id. at 333 n.8 (quoting 64 Op. Att'y Gen. 180 (1979)) (emphasis added). Thus, the court clearly articulated its position that constitutionally and statutorily authorized executive orders have the force of law and are the equivalent of statutes.

In *McCulloch v. Glendening*, 347 Md. 272 (1997), the Supreme Court of Maryland upheld an executive order that granted unionization and collective bargaining rights to employees of the Executive Branch. While the court did not explicitly address the nature and effect of executive orders (as the Appellate Court of Maryland did in *Lomax* several months later), the court did rely on the broad power of the Governor provided for in Article II, §§ 1 and 9 of the Maryland Constitution and the authority granted by §§ 3-302 and 3-401 of the State Government Article in concluding that "when the statutory and constitutional provisions are considered together, it becomes crystalline that the Governor has broad power and authority over Executive Branch employees and their working conditions." *Id*. at 285-286.

Similarly, in *Maryland Classified Employees Ass'n, Inc. v. Schaeffer*, 325 Md. 19 (1991), while the Supreme Court of Maryland did not address the nature and effect of executive orders directly, it upheld the validity of an executive order that increased the work week of most State employees from 35.5 hours to 40 hours. The court adopted the reasoning of the trial court, stating that "the definition of an executive order in § 3-401 of the State Government Article was sufficiently broad 'to allow the Governor to control and direct the officers over whom he is statutorily given control … [including] the essential aspects of state employment such as hours in a work week.'" *Id*. at 29 (citation omitted). The court reiterated the broad authority of the Governor as head of the Executive Branch, stating that the Governor "has broad powers with respect to Executive Branch State employees and over the Secretary of Personnel." *Id*. at 34.

In *State v. Maryland State Family Child Care Ass'n,* 184 Md. App. 424 (2009), the Appellate Court of Maryland upheld an executive order requiring the State to recognize a bargaining representative for private family child care providers who participated in the State's Purchase of Care Program. Under the program, the State reimbursed private child care providers – at a rate determined by the Maryland State Department of Education (MSDE) – for a portion of the cost of providing child care services to families of limited economic means. *Id.* at 426-27. The executive order directed MSDE to recognize an organization designated by participating child care providers as their exclusive bargaining representative and to collectively bargain the reimbursement rate with that representative. *Id.* at 428-29. Significantly, the court upheld the executive order despite the fact that the order affected private actors, namely, the child care providers who participated in the program, because they were "paid" and "regulated" by the State, and thus "deal with" the State for purposes of § 3-401 of the State Government Article.

In addition to the general statutorily authorized power of the Governor to issue executive orders, a number of statutes expressly authorize or require the exercise of gubernatorial powers by way of executive order. See, *e.g.*, MD. CODE ANN., PUB. SAFETY §§ 14-107 and 14–301, *et seq*. and 14-3A-01, *et seq*. (recognizing the Governor's emergency powers to issue executive orders during periods of public crisis, disaster, and health emergency); ENVIR. § 2-105 (allowing the Governor to proclaim air pollution emergency by executive order); and STATE GOV'T § 10-133 (requiring the Governor to issue a certain executive order to provide for review and evaluation of State agency regulations).

In 2016, Governor Hogan issued an executive order requiring that the public school year begin after Labor Day. In a Letter of Advice dated September 16, 2016, Adam Snyder, Chief Counsel, Opinions & Advice, said that the issue whether the executive order exceeded the Governor's authority was a close one. He observed that:

> the Governor has broad constitutional and statutory authority to direct the actions of the Executive Branch of State government through the issuance of executive orders, but that the executive order purports to direct the State and local boards of education, which are independent bodies that are not directly answerable to the Governor, and it directs them on a topic, the school calendar, that likely falls with the State Board's visitatorial power over educational policy and public school administration... In the absence of controlling judicial precedent discussing the interplay between the Governor's executive order authority and the State Board's visitatorial powers, I cannot say unequivocally that the Labor Day executive order exceeds the Governor's authority, but I believe it likely that a reviewing court, if presented with the issue, would conclude that it does....

In response to the spread of the COVID-19 pandemic, Governor Hogan declared a state of emergency on March 5, 2020. He issued multiple executive orders that restricted gatherings, closed businesses, and ordered people to stay at home with limited exceptions. The orders were challenged in the Federal District Court for Maryland by religious leaders, legislators, and other individuals who argued that the orders infringed on their federal and State constitutional rights to freedom of assembly, speech, and religion. In addition, business owners argued that the orders violated the commerce clause. On May 20, 2020, the court ruled that the orders were lawful and valid since Governor Hogan "exercise[ed] the powers given to him by the legislature in the face of the COVID-19 crisis [and] made reasonable choices informed, if not dictated by, [] data, science, and advice." *Antietam Battlefield KOA v. Hogan*, 461 F. Supp. 3d 214, 242 (D. Md. 2020).

Administrative Law – Review of Agency Regulations

Rule

All administrative regulations proposed for adoption by a unit of the Executive Branch of the State government must be submitted to the Joint Committee on Administrative, Executive, and Legislative Review (AELR Committee) of the General Assembly for review. Regulations intended to have emergency effect must have the approval of the AELR Committee. Although nonemergency regulations may become effective without AELR Committee approval, the AELR Committee has legal authority to delay the adoption of the regulation, hold a public hearing concerning the regulation, and, subject to the overriding power of the Governor to adopt the regulation, vote to oppose adoption of the regulation.

Discussion

AELR Committee

The AELR Committee is a statutory committee charged with legislative oversight of the State's regulatory process. The AELR Committee consists of 10 senators and 10 delegates appointed by the President of the Senate and the Speaker of the House, respectively, at the beginning of each regular session of the General Assembly. A Senate chair and a House chair, appointed by the President of the Senate and the Speaker of the House, respectively, alternate annually as the presiding chair. The Department of Legislative Services (DLS) provides staff assistance to the AELR Committee. See MD. CODE ANN., STATE GOV'T Title 2, Subtitle 5.

Nature of Regulation

Under the part of Maryland's Administrative Procedure Act governing regulations (Title 10, Subtitle 1 of the State Government Article), the term "regulation" is defined as "a statement or an amendment or repeal of a statement that:

(i) has general application;

(ii) has future effect;

(iii) is adopted by a unit to:

1. detail or carry out a law that the unit administers;

2. govern organization of the unit;

3. govern the procedure of the unit; or

4. govern practice before the unit; and

(iv) is in any form, including:

1. a guideline;

2. a rule;

3. a standard;

4. a statement of interpretation; or

5. a statement of policy."

STATE GOV'T § 10-101(g)(1). However, a regulation does not include "a statement that…concerns only internal management of the unit and…does not affect directly the rights of the public or the procedures available to the public." STATE GOV'T § 10-101(g)(2)(i). Responses to certain petitions for adoption of a regulation and certain declaratory rulings are also expressly excluded from the definition. STATE GOV'T § 10-101(g)(2)(ii) and (iii).

Maryland courts have determined that certain agency actions constitute regulations subject to the review of the AELR Committee. In *Massey v. Secretary, Department of Public Safety and Correctional Services*, 389 Md. 496 (2005), the Supreme Court of Maryland determined that certain directives of the Department of Public Safety and Correctional Services relating to inmate discipline and the procedures for charging offenses constituted "regulations" that were not legally effective because they had not been adopted in conformance with the required review procedures. According to the court, the directives did not merely pertain to routine internal management of correctional facilities but rather to fundamental rights of inmates. *Id.* at 516. The following year, the Supreme Court of Maryland held that protocols for administration of lethal injection, as set forth in directives of the Division of Correction (DOC), similarly constituted "regulations" and should have been subject to publication and legislative notice requirements. *Evans v. State*, 396 Md. 256 (2006). The court reasoned that the protocols had a general application and future effect, were adopted to detail or carry out law administered by DOC, and did not fall within the exemption for regulations pertaining solely to internal management of a unit. *Id.* at 349-350.

In contrast, the Supreme Court of Maryland has determined that an agency action is not a regulation that must be adopted in accordance with the review requirements under the Administrative Procedure Act if the action does "not formulate new rules of widespread application, change existing law, or apply new standards retroactively to the detriment of an entity that had relied upon the agency's past pronouncements." *Dep't of Health & Mental Hygiene* v. *Chimes*, *Inc*., 343 Md. 336, 346 (1996) (cited in *Md. Ass'n of Health Maint. Orgs.* v. *Health Servs. Cost Review Comm'n*, 356 Md. 581, 601 (1999)). Maryland courts also have held that an executive order issued under the Governor's constitutional and statutory authority is not a

regulation subject to review by the AELR Committee. (See, e.g. *State* v. *Md. State Family Child Care Ass'n*, 184 Md. App. 424, 450 (2009)).

Nonemergency Regulations

Preliminary Review by AELR Committee

Each regulation that a unit proposes to adopt on a nonemergency basis must be submitted for preliminary review to the AELR Committee, DLS, and the Administrator of State Documents at least 15 days before the date the unit submits the regulation to the *Maryland Register* for publication. STATE GOV'T § 10-110(c)(1)(i). During its 15-day period of preliminary review, the AELR Committee is not required to take any action concerning the regulation nor may inaction by the AELR Committee be construed as approval or disapproval of the regulation. STATE GOV'T § 10-110(d)(1) and (2). A unit that substantively alters a proposed regulation after submitting it to the AELR Committee for review but before it is published in the *Maryland Register* must resubmit the proposed regulation with the altered text to the AELR Committee, DLS, and the Administrator for an additional 15 day review period. STATE GOV'T § 10-110(c)(1)(ii).

To assist the AELR Committee in its oversight responsibility, DLS provides an analysis of each regulation after submission and prior to publication in the *Maryland Register*. Legislative staff of DLS assesses whether the regulation conforms to the statutory authority of the unit and the legislative intent of the statute under which the regulation is proposed. Fiscal analysts evaluate the unit's assessment of the economic impact of the regulation, as it pertains to the fiscal impact on State and local agencies, the State budget, and small businesses in the State. Since 2014, each proposed regulation and accompanying DLS analysis has been posted on the General Assembly's website.

Authority of AELR Committee to Delay Adoption

A unit may not finally adopt a regulation unless the unit submits the measure to the AELR Committee for preliminary review and waits at least 45 days after the regulation is initially published in the *Maryland Register*. STATE GOV'T § 10-111(a)(1). For at least 30 of the 45 days after publication, the unit must allow public comment concerning the regulation. STATE GOV'T § 10-111(a)(3). If the AELR Committee determines that it cannot conduct an appropriate review of the regulation within the 45-day period after publication, the committee may delay the adoption of the regulation by providing written notice to the adopting unit and the Division of State Documents before the expiration of the 45-day period. STATE GOV'T § 10-111(a)(2)(i). If such notice is provided by the AELR Committee, the unit may not adopt the regulation until it notifies the AELR Committee, in writing, of its intent to adopt the regulation and provides a further period of review that terminates on the later of the 60th day after the unit's notice is provided or the 105th day after the initial publication of the regulation in the *Maryland Register*. STATE GOV'T § 10-111(a)(2)(ii). If the adopting unit does not respond in opposition to the AELR Committee's request for a delay, the duration of the delay may be indefinite up to a year. A regulation that has not been finally adopted within one year after its last publication in the *Maryland Register* is deemed withdrawn as a matter of law. STATE GOV'T § 10-116(b)(1).

Committee Hearings

At the discretion of the presiding chair, the AELR Committee may hold a hearing on any nonemergency regulation. A request for a hearing may come from any member of the AELR Committee or from any member of the General Assembly either directly to the presiding chair or indirectly through another member of the AELR Committee.

Committee Opposition to a Regulation

Prior to the expiration of any period of review granted to or reserved by the AELR Committee, it may oppose the adoption of any nonemergency regulation by a majority vote. STATE GOV'T § 10-111.1(a)(1)). Within five working days after an opposition vote, the AELR Committee must provide written notice to the Governor and the promulgating unit of its action. STATE GOV'T § 10-111.1(c)(1). The unit may withdraw the regulation, propose a modified regulation, or submit the regulation to the Governor with a justification for the unit's refusal to withdraw or modify it. STATE GOV'T § 10-111.1(c)(2). The Governor may then instruct the unit to withdraw or modify the regulation, or may approve the adoption of the regulation. STATE GOV'T § 10-111.1(c)(3). As a result, if the AELR Committee votes to oppose a regulation, it may not be adopted unless approved by the Governor. STATE GOV'T § 10-111.1(d).

Although the AELR Committee has legal authority to vote to oppose a nonemergency regulation, this authority is not exercised often. In practice, units usually accommodate the recommendations of the AELR Committee for changes in or clarifications to regulations and the need for a formal vote in opposition to a regulation is unnecessary. Substantive changes to a nonemergency regulation that has been previously published in the *Maryland Register* require resubmission of the regulation to the AELR Committee. STATE GOV'T § 10-113(b).

Emergency Regulations

Necessity of Committee Approval

The approval of the AELR Committee is required for the emergency adoption of a regulation, which bypasses the normal public notice and comment period, to take effect. STATE GOV'T § 10-111(b)(1)(iii). Although an emergency regulation is not published in the *Maryland Register* before adoption, notice of the AELR Committee's receipt of the regulation is posted on the General Assembly's website and the adopting unit must post the text of the regulation on the unit's website within three business days after submission to the AELR Committee. STATE GOV'T §§ 10-111.2(a) and 10-112.1(b).

Unless the Governor declares that immediate adoption is necessary to protect the public health or safety, the AELR Committee may not approve the adoption of an emergency regulation earlier than 10 business days after receipt of the regulation by the AELR Committee and DLS. STATE GOV'T § 10-111(b)(2)(iv). In the absence of a request for a public hearing, staff may poll the members of the AELR Committee in person, by phone, or in writing. STATE GOV'T § 10-111(b)(3). In exigent circumstances, approval may be given by the presiding chair, or the cochair if the presiding chair is unavailable. STATE GOV'T § 10-111(b)(2)(i)2 and (3)(ii). As part

of its approval of an emergency regulation, the AELR Committee may impose any condition and is required to impose a time limit, not to exceed 180 days, during which the regulation may be in effect. STATE GOV'T § 10-111(b)(4)(i) and (ii). The AELR Committee may rescind its approval of an emergency regulation by majority vote at a public meeting. STATE GOV'T § 10-111(b)(5). If the AELR Committee fails to approve the emergency adoption of a regulation, the unit may proceed to adopt the regulation on a nonemergency basis within normal time periods and subject to the requirement relating to public comment.

Committee Hearings

Although the presiding chair has discretion regarding whether to hold a public hearing on a nonemergency regulation, the AELR Committee must hold a public hearing whenever a member of the committee requests a hearing concerning an emergency regulation. STATE GOV'T § 10-111(b)(2)(ii). If a public hearing is held, the AELR Committee may approve the emergency regulation only by a majority vote of the members present and voting at the hearing or at a subsequent meeting. STATE GOV'T § 10-111(b)(2)(iii)1.

APPENDICES

Appendix 1.

State Statutory Provisions Preempting Local Government Authority: Selective References*

Subject Area	Citation
Automated purchasing machines	Business Regulation Article, § 20-102
Automatic teller machines	Financial Institutions Article, § 1-406
Child care centers	Education Article, § 9.5-420
Condominium regimes	Real Property Article, § 11-122
Family and Medical Leave Insurance Program	Labor and Employment, § 8.3-102(b)
Hazardous waste facility siting	Environment Article, § 7-405(e)
Horse racing – regulation; fees; taxes	Business Regulation Article, § 11-102
Insurance businesses – regulation; fees; taxes	Insurance Article, §§ 1-205, 6-112
Junk dealers and scrap metal processors – required records	Business Regulation Article, § 17-1009
Law Enforcement Officers' Bill of Rights	Public Safety Article, § 3-102(a) and (b)
Maryland Cooperative Housing Corporation Act	Corporations and Associations Article, § 5-6B-32
Maryland Home Improvement Law	Business Regulation Article, § 8-102(b)
Maryland Homeowners Association Act	Real Property Article, § 11B-104(b)
Maryland Personal Information Protection Act	Commercial Law Article, § 14-3505
Maryland Vehicle Law	Transportation Article, § 25-101.1
Milk products – regulation	Health - General Article, § 21-404(a)
Pier construction within Chesapeake Bay Critical Area	Natural Resources Article, § 8-1808.4(c)
Protection of information by government agencies	State Government Article, § 10-1306
Procurement contracts for goods and services with person Engaged in investment activities in Iran (subject to abrogation)	State Finance and Procurement Article, § 17-707
Secondhand precious metal dealers – regulation	Business Regulation Article, § 12-102(d)
Sick and safe leave	Labor and Employment, § 3-1302
State-licensed ambulance	Education Article, § 13-515(k)

Tenant lead-paint rent escrow	Real Property Article, § 8-211.1(e)
Unmanned aircraft systems	Economic Development, § 14-301(c)
Weapons regulation	Criminal Law Article, § 4-209 Public Safety Article, §§ 5-104, 5-133(a), 5-134(a), and 5-207(a)
Well construction	Environment Article, § 9-1304

*This list includes selected statutory preemption provisions in the Code limiting the authority of local government. This list does not reflect statutory provisions that simply prohibit conflicting or nonconforming local regulations (see, *e.g.*, Environment Article, § 8-107 (Radiation)).

Appendix 2.

Baltimore City and County Governments – Form and Structure

County	Government Form	Elected Executive	Legislative Structure
Allegany	Code Home Rule	No	Board of Commissioners
Anne Arundel	Charter Home Rule	Yes	County Council
Baltimore City	Charter Home Rule	Yes	City Council
Baltimore	Charter Home Rule	Yes	County Council
Calvert	Commission	No	Board of Commissioners
Caroline	Code Home Rule	No	Board of Commissioners
Carroll	Commission	No	Board of Commissioners
Cecil	Charter Home Rule	Yes	County Council
Charles	Code Home Rule	No	Board of Commissioners
Dorchester	Charter Home Rule	No	County Council
Frederick	Charter Home Rule	Yes	County Council
Garrett	Commission	No	Board of Commissioners
Harford	Charter Home Rule	Yes	County Council
Howard	Charter Home Rule	Yes	County Council
Kent	Code Home Rule	No	Board of Commissioners
Montgomery	Charter Home Rule	Yes	County Council
Prince George's	Charter Home Rule	Yes	County Council
Queen Anne's	Code Home Rule	No	Board of Commissioners
St. Mary's	Commission	No	Board of Commissioners
Somerset	Commission	No	Board of Commissioners
Talbot	Charter Home Rule	No	County Council
Washington	Commission	No	Board of Commissioners
Wicomico	Charter Home Rule	Yes	County Council
Worcester	Code Home Rule	No	Board of Commissioners