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# Notes: Lussier v. Maryland Racing Commission: Maryland's Court of Appeals Upholds a Fine Imposed by an Administrative Agency despite a Lack of Specific Authorization to Fine from the General Assembly

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*LUSSIER v. MARYLAND RACING COMMISSION: MARYLAND'S COURT OF APPEALS UPHOLDS A FINE IMPOSED BY AN ADMINISTRATIVE AGENCY DESPITE A LACK OF SPECIFIC AUTHORIZATION TO FINE FROM THE GENERAL ASSEMBLY*

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## I. INTRODUCTION

Maryland citizens are far more likely to come into contact with administrative agencies during the course of their lives than any other branch<sup>1</sup> of government.<sup>2</sup> A citizen's contact with administrative agencies varies markedly and can range from applying for a motor vehicle license<sup>3</sup> to being fined for failing to comply with an agency's regulation.<sup>4</sup> As a creature of statute, however, an adminis-

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1. While not technically considered one of the traditional branches of government, many commentators liken administrative agencies to a branch of government co-equal to the executive, legislative, and judicial branches. See Frederick R. Anderson, *Revisiting the Constitutional Status of the Administrative Agencies*, 36 AM. U. L. REV. 277, 278 (1987) ("Delegation is the broad channel through which increasing power has flowed to what many feel is a *de facto* fourth branch."); Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 CORNELL L. REV. 1, 1 (1994) ("[Justice Robert Jackson] coined the term 'fourth branch' to describe administrative agencies and contended that this fourth branch 'has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking.'" (quoting *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting))); Richard Posner, *The Constitution as an Economic Document*, 56 GEO. WASH. L. REV. 4, 29 (1987) ("[J]udicial interpretations have, by authorizing a 'Fourth Branch' of administrative agencies by expansively construing congressional power over interstate and foreign commerce and congressional power to enact statutes that purportedly promote the general welfare, greatly strengthened the power of the federal government to regulate markets.").
  2. See Thomas O. Sargentich, *Teaching Administrative Law in the Twenty-First Century*, 1 WIDNER J. PUB. L. 147, 148 (1992) (noting that "[d]ay-to-day encounters between the government and the public most commonly involve agencies as opposed to courts or legislatures").
  3. See MD. CODE ANN., TRANSP. II § 16-606 (1998).
  4. See, e.g., COMAR 08.07.01.17 (requiring a dog to be on a leash in state parks and requiring pets to be "kept under reasonable control"). For example, Maryland dog owners who fail to leash their dogs in local parks are first issued

trative agency's regulatory authority does not reach beyond those powers conveyed to it by its organic legislation—the agency's enabling statute.<sup>5</sup>

A recurring issue in administrative law is the extent to which an agency may lawfully exercise power when its enabling statute contains a broad delegation of power.<sup>6</sup> In *Lussier v. Maryland Racing Commission*,<sup>7</sup> the Court of Appeals of Maryland considered whether an administrative agency may impose a fine absent explicit authority to do so in its enabling statute.<sup>8</sup> In resolving this issue in the agency's favor, the court of appeals expanded the power agencies may imply from broad enabling statutes.<sup>9</sup>

Specifically, the *Lussier* court addressed a regulation promulgated by the Maryland Racing Commission (MRC).<sup>10</sup> The regulation permitted the MRC to issue fines for violations of various MRC regulations.<sup>11</sup> However, the broad enabling statute that empowered the MRC to promulgate its regulation did not explicitly authorize the MRC to create a regulation permitting fines.<sup>12</sup> Nevertheless, the MRC imposed a \$5000 fine on Frank P. Lussier after it determined

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warnings by park rangers, but "a second scolding will most likely mean a ticket, and repeat offenses could lead to a \$5,000 fine." Candus Thomson, *Urban Angst Intrudes on Outdoor Trails; Recreation Etiquette Encouraged by Police*, THE SUN (BALT.), June 8, 1998, at B1.

5. See *Holy Cross Hosp. v. Health Servs. Cost Review Comm'n*, 283 Md. 677, 683, 393 A.2d 181, 184 (1978). An enabling statute is "any statute enabling persons or corporations, or administrative agencies to do what before they could not do. It is applied to statutes which confer new powers." BLACK'S LAW DICTIONARY 364 (6th ed. 1990). A legislature "creates an agency by enacting a statute (usually called an 'enabling act' or an 'organic statute' interchangeably), which provides rules that control and limit the agency's exercise of its authority." Keith Werhan, *The Neoclassical Revival in Administrative Law*, 44 ADMIN. L. REV. 567, 569 (1992). While the terms "organic statute" and "enabling statute" are synonymous, this Note refers to these statutes as enabling statutes for the purpose of consistency and because of the term's superior descriptive qualities—these statutes *enable* the agency to carry out the very purpose of its existence.
6. See *infra* notes 49-146, 168-79, 183-264 and accompanying text.
7. 343 Md. 681, 684 A.2d 804 (1996).
8. See *id.* at 684-85, 684 A.2d at 805.
9. For a discussion of how *Lussier* broadened Maryland law, see *infra* notes 482-508 and accompanying text.
10. See *Lussier*, 343 Md. at 684-85, 684 A.2d at 805.
11. See *id.* at 684, 684 A.2d at 805.
12. See *id.* at 687, 684 A.2d at 807 (construing MD. CODE ANN., BUS. REG. § 11-210 (1992)); *id.* at 710, 684 A.2d at 818 (Bell, J., dissenting) (construing MD. CODE ANN., BUS. REG. § 11-210 (1992)).

that he had engaged in conduct that violated several of the MRC's administrative regulations.<sup>13</sup> Lussier sought judicial review of the MRC's decision, challenging both the constitutionality of the delegation of power<sup>14</sup> and the MRC's construction of its enabling statute.<sup>15</sup>

The Court of Appeals of Maryland upheld the validity of the administrative regulation promulgated by the MRC that authorized the fine.<sup>16</sup> Specifically, the *Lussier* court held that the MRC's self-created power to fine was valid without explicit authority in its enabling statute.<sup>17</sup> The MRC's regulation was upheld because it was promulgated pursuant to a broad statutory delegation of authority and was consistent with the legislative history and prior applications of the statute.<sup>18</sup> Following *Lussier*, Maryland courts enjoy greater discretion in determining the validity of an agency's power to fine under broad statutory grants.<sup>19</sup>

This Note attempts to synthesize the pertinent areas of administrative law that underlie the court of appeals's decision in *Lussier*.<sup>20</sup> Part II briefly develops the relevant areas of federal administrative law from which many states have developed their administrative law jurisprudence.<sup>21</sup> Part III addresses state administrative law by exploring Maryland's constitutional framework for decisionmaking.<sup>22</sup> Part IV focuses on Maryland's common-law rules of statutory construction.<sup>23</sup> The statutory construction analysis focuses on canons unique

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13. See *id.* at 684, 684 A.2d at 805. For a further discussion of the regulations Lussier violated, see *infra* notes 439-41.

14. In Lussier's brief submitted to the court of appeals, he challenged the constitutionality of the MRC's acts and the legislature's standard-less delegation of power by relying on three seminal nondelegation doctrine cases of the court of appeals. See Brief for Petitioner at 10-19, *Lussier v. Maryland Racing Comm'n*, 343 Md. 681, 684 A.2d 804 (1996) (No. 94-96). For a discussion of the three opinions relied on by Lussier and distinguished by the court of appeals, see *infra* notes 454-64 and accompanying text. However, in its majority opinion, the Court of Appeals of Maryland eschewed the constitutional issues raised. See *Lussier*, 343 Md. at 682-700, 684 A.2d at 804-13.

15. See *Lussier v. Maryland Racing Comm'n*, 100 Md. App. 190, 202, 640 A.2d 259, 265 (1994), *aff'd*, 343 Md. 681, 684 A.2d 804 (1996). For a discussion of the procedural history of the case, see *infra* notes 442-52 and accompanying text.

16. See *Lussier*, 343 Md. at 700, 684 A.2d at 813.

17. See *id.*

18. See *id.* at 687-700, 684 A.2d at 807-13.

19. See *infra* notes 482-508 and accompanying text.

20. See *infra* notes 468-508 and accompanying text.

21. See *infra* notes 28-161 and accompanying text.

22. See *infra* notes 162-266 and accompanying text.

23. See *infra* notes 267-395 and accompanying text.

to administrative law and incorporates illustrative examples of Maryland cases.<sup>24</sup> Part V explains the background of *Lussier*, as well as the court's holding and rationale.<sup>25</sup> Finally, Part VI analyzes troubling aspects of the court's reasoning and discusses *Lussier's* potential impact on Maryland administrative law.<sup>26</sup> The analysis explores how other states have dealt with analogous issues and concludes with recommendations to practitioners.<sup>27</sup>

## II. FEDERAL ADMINISTRATIVE LAW

### A. *Separation of Powers*

The first three Articles of the United States Constitution established the legislative,<sup>28</sup> executive,<sup>29</sup> and judicial<sup>30</sup> branches of America's government. However, the text of the Constitution does not contain an explicit provision for the separation of powers among the three branches.<sup>31</sup> Rather, courts have found the requirement of separation of powers implicit in the language used by the Framers.<sup>32</sup>

While the Framers generally agreed that some method of dividing power in the government they were creating was necessary, several different views of what separation of powers meant surfaced during the Constitutional Convention.<sup>33</sup> Indeed, one scholar asserted that the only thing the Framers agreed on was Madison's view in Federalist 47, in which Madison explained that separation of powers "can amount to no more than this, that where the *whole* power of one department of the government is exercised by the

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24. See *infra* notes 267-395 and accompanying text.

25. See *infra* notes 396-467 and accompanying text.

26. See *infra* notes 468-508 and accompanying text.

27. See *infra* notes 509-53 and accompanying text.

28. See U.S. CONST. art. I, § 1.

29. See U.S. CONST. art. II, § 1.

30. See U.S. CONST. art. III, § 1.

31. See 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 2.1, at 34 (3d ed. 1994) ("If the Framers decided to incorporate a free-standing separation of powers requirement in the Constitution, that decision was implicit rather than explicit.").

32. See *id.*; see also James T. Blanch, Note, *The Constitutionality of the False Claims Act's Qui Tam Provision*, 16 HARV. J.L. & PUB. POL'Y 701, 748 (1993) ("[T]he principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the documents that they drafted in Philadelphia in the summer of 1787." (quoting *Buckley v. Valeo*, 424 U.S. 1, 124 (1976) (alteration in original))).

33. See 1 DAVIS & PIERCE, *supra* note 31, § 2.1, at 34-35.

same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted."<sup>34</sup> Madison emphasized that the principal reason for having a separation of powers provision was to prevent tyranny.<sup>35</sup> Thus, the Founding Fathers were aware that separating the government's power was necessary to preserve a democracy.<sup>36</sup>

The method the Framers chose to separate governmental power is evident from the language employed in the first three Articles. Article I of the Constitution established the legislative branch of the federal government.<sup>37</sup> Article I, section 1 states that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States."<sup>38</sup> This provision specifically vests the federal government's legislative power in Congress.<sup>39</sup> A principle function of Article I was to ensure that the public's interest would be protected through a process of deliberation and debate.<sup>40</sup>

In Article II, section 1, the Constitution declares that "[t]he executive Power shall be vested in a President of the United States of America."<sup>41</sup> Finally, Article III provides that the "judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."<sup>42</sup> Read together, the provisions in these three Articles have been construed to form the separation of powers doctrine.<sup>43</sup>

While the Constitution clearly did not provide for a fourth co-equal branch of government, courts recognized early on that administrative agencies were permissible and necessary.<sup>44</sup> The Neces-

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34. *Id.* § 2.1, at 34 (internal quotation marks omitted).

35. Madison noted: "The accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny." THE FEDERALIST NO. 47, at 301 (James Madison) (Garry Wills ed., 1982).

36. See THE FEDERALIST NOS. 47, 51, at 321 (James Madison), No. 78, at 466 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

37. See U.S. CONST. art. I, § 1.

38. *Id.*

39. See 1 DAVIS & PIERCE, *supra* note 31, § 2.6, at 66.

40. See ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW 14 (1993).

41. U.S. CONST. art. II, § 1.

42. U.S. CONST. art. III, § 1.

43. See *Morrison v. Olson*, 487 U.S. 654, 697-98 (1988).

44. See *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 142 (1940) (noting that administrative agencies have the power to initiate inquiry and control investigations in

sary and Proper Clause permits Congress to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."<sup>45</sup> This Clause provides the principal constitutional basis for allowing Congress to create and empower administrative agencies.<sup>46</sup> Thus, the early struggle was not about whether an administrative agency could exist; instead, courts wrestled with the extent to which Congress could delegate powers to these agencies.<sup>47</sup> The nondelegation doctrine came into existence as a result of this struggle.<sup>48</sup>

### B. Separation of Powers and the Nondelegation Doctrine

Conceptually, the separation of powers doctrine prevents one branch of government from exercising the constitutionally ordained

the arenas of transportation, communication, and other essential public services); *Brown v. Warner Holding Co.*, 50 F. Supp. 593, 597 (D. Minn. 1943) (explaining that constitutional requirements are met when Congress sets forth a policy along with standards for its application and then delegates the details essential to carry out the legislative policy to an administrative agency); *Henderson v. Kimmel*, 47 F. Supp. 635, 642 & n.10 (D. Kan. 1942) (noting that Congress may delegate to an administrative agency the power to determine the details necessary to carry out the legislative purpose).

45. U.S. CONST. art. I, § 8, cl. 18.

46. See *AMAN & MAYTON*, *supra* note 40, at 11 (explaining that under the Necessary and Proper Clause, Congress has the authority to create administrative agencies for legislative responsibilities); Deborah Maranville, *Nonacquiescence: Outlaw Agencies, Imperial Courts, and the Perils of Pluralism*, 39 VAND. L. REV. 471, 523-24 (1986) (explaining that under the Necessary and Proper Clause, Congress has the authority to create administrative agencies for judicial responsibilities).

47. See *United States v. Rock Royal Co-op., Inc.*, 307 U.S. 533, 574 (1939). The Supreme Court summarized the long-standing recognition of the legitimacy of administrative agencies as follows:

From the earliest days the Congress has been compelled to leave to the administrative officers of the Government authority to determine facts which were to put legislation into effect and the details of regulations which would implement the more general enactments. It is well settled, therefore, that it is no argument against the constitutionality of an act to say that it delegates broad powers to executives to determine the details of any legislative scheme. This necessary authority has never been denied.

*Id.* (footnote omitted).

48. See *infra* notes 49-58 and accompanying text.

power of a coordinate branch.<sup>49</sup> Technically, administrative agencies fall within the executive branch of the federal government.<sup>50</sup> From a purist's perspective, administrative agencies are confined to exercising executive powers.<sup>51</sup> Courts have recognized, however, that "a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively."<sup>52</sup>

Separation of powers challenges can arise with respect to each branch of government and do not require a delegation of power to occur.<sup>53</sup> However, when Congress delegates power to an administrative agency that arguably confers excessive legislative power, a separation of powers issue arises under what courts and commentators have dubbed the nondelegation doctrine.<sup>54</sup> Collectively, commenta-

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49. See *Mistretta v. United States*, 488 U.S. 361, 371-72 (1989) (holding that the delegation to the United States Sentencing Commission to promulgate sentencing guidelines did not amount to an excessive delegation of legislative power); see also *Field v. Clark*, 143 U.S. 649, 692 (1892) (holding that "the integrity and maintenance of the system of government ordained by the [C]onstitution" prevents Congress from delegating its legislative power to another branch).
50. See 2 CHARLES H. KOCH, JR., *ADMINISTRATIVE LAW AND PRACTICE*, § 7.11, at 366 (2d ed. 1997) ("Most agencies are 'executive' agencies, those housed in the executive branch. There are two types of executive agencies: agencies in one of the cabinet departments and 'independent' executive agencies."); see also *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (involving an antitrust suit by trucking company against a competitor). The Court stated that "administrative agencies . . . are both creatures of the legislature, and arms of the executive [branch]." *Id.*
51. Cf. Bernard Schwartz, *Administrative Law Cases During 1985*, 38 ADMIN. L. REV. 293, 293 (1986) (noting Attorney General Meese's view that "'quasi-legislative' or 'quasi-judicial' functions [can never] be properly delegated to independent agencies"). But see 2 KOCH, *supra* note 50, § 7.10, at 366 ("Administrative law enthusiasts reject a wooden commitment to separation of powers as they analyze the bureaucracy's place among the 'constitutional' branches.").
52. *Buckley v. Valeo*, 424 U.S. 1, 121 (1976) (explaining that although separation of powers is an essential check against tyranny, the Framers also recognized that completely separate branches of government would hinder the Nation as a whole from governing effectively).
53. See generally *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting) (" 'In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be the government of laws and not of men.' " (quoting MASS. CONST. art. XXX)).
54. See *United States v. Shreveport Grain & Elevator Co.*, 287 U.S. 77, 85 (1932)

tors use the terms "delegation doctrine" and "nondelegation doctrine" interchangeably<sup>55</sup> to refer to the judicially-created doctrine that seeks to prevent Congress from divesting itself of its legislative power.<sup>56</sup> The nondelegation doctrine is merely one method of challenging the government's behavior under the separation of powers doctrine.<sup>57</sup> However, the nondelegation doctrine broadly encompasses any improper delegation of power among the several branches of the federal government and their institutions.<sup>58</sup> This

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("That the legislative power of Congress cannot be delegated is, of course, clear."); see also Donald A. Dripps, *Delegation and Due Process*, 1988 DUKE L.J. 657, 657 (1988) ("Delegation becomes excessive when Congress transfers legislative powers without providing adequate guidance about how those powers are to be exercised."). Additionally, a separation of powers issue can arise when an administrative agency is delegated an excessive amount of judicial or executive power. See *Morrison*, 487 U.S. at 693 (holding that the independent counsel provisions of the Ethics in Government Act did not impermissibly interfere with the President's executive powers); *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 87 (1982) (holding Congress's delegation of adjudicatory powers to non-Article III bankruptcy judges unconstitutional).

55. For example, one commentator noted that Justice Scalia, in commenting on the *Benzene* case, said that the " 'delegation doctrine is worth hewing from the ice.' " David Schoenbrod, *Separation of Powers and the Powers That Be: The Constitutional Purposes of the Delegation Doctrine*, 36 AM. U. L. REV. 355, 355 (1987) (quoting Antonin Scalia, *A Note on the Benzene Case*, 4 REG. 25, 28 (1980)). Justice Rehnquist, in his dispositive concurring opinion in the *Benzene* case to which Justice Scalia was referring in his Comments, used the term "nondelegation doctrine" to refer to his opposition to the practice of "Congress[']s . . . delegat[ion of] important choices of social policy to politically unresponsive administrators." *Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 686-87 (1980) (*The Benzene Case*). The above-cited sources illustrate the use of technically different terms in referring to the same issue in the same context and serve as evidence that they mean the same thing. This Note will deal with the narrow issue of Congressional delegation of legislative power and will consistently use the term "nondelegation doctrine" to refer to the recurring question of the proper extent and degree to which Congress may delegate its power.
56. See 1 DAVIS & PIERCE, *supra* note 31, § 2.6, at 66.
57. See Schoenbrod, *supra* note 55, at 387 (characterizing the delegation doctrine as a separation of powers sub-issue in which "two branches consent not to be separated").
58. See 3 KOCH, *supra* note 50, § 12.13, at 174-75; Misty Ventura, Comment, *The Legislative Veto: A Move Away From Separation of Powers or a Tool to Ensure Nondelegation?*, 49 SMU L. REV. 401, 401 (1996) ("The separation of powers doctrine prevents the accumulation of excessive power in one branch; the nondelegation doctrine prevents one branch from abdicating its authority to another.").

Note focuses on the narrow category of the nondelegation doctrine issues that arise when Congress delegates legislative power to an administrative agency. Generally, an analysis of this type of nondelegation doctrine issue by a court begins with the statute that grants the administrative agency its power to regulate—the enabling statute.<sup>59</sup>

When Congress passes enabling legislation, it creates the agency and delineates its regulatory power.<sup>60</sup> The power Congress confers upon the agency generally includes a grant allowing the agency to promulgate regulations to carry out certain policy objectives.<sup>61</sup> The power to promulgate regulations—rulemaking—is often barely distinguishable from Congress's power to make laws.<sup>62</sup> This has led courts and commentators to characterize this administrative rulemaking power as *quasi-legislative* power.<sup>63</sup> Thus, it would appear as though a separation of powers issue under the nondelegation doctrine hides within any exercise of quasi-legislative power by an agency.

A major principle set forth in early Supreme Court opinions was that “[s]o long as Congress ‘shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.’ ”<sup>64</sup>

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59. See, e.g., *infra* notes 77-82 and accompanying text. For an explanation of what an enabling statute is, see *supra* note 5.

60. See Werhan, *supra* note 5, at 569.

61. See *Dixon v. United States*, 381 U.S. 68, 74 (1965); *Manhattan Gen. Equip. Co. v. Commissioner*, 297 U.S. 129, 134 (1936).

62. See Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 123 (1994) (“We accept, perhaps uneasily, the delegation of substantial lawmaking power to the President, who executes the laws he makes. Of course we don’t call the President’s power ‘lawmaking.’ We have euphemisms—we call this power ‘regulatory,’ or ‘interpretive,’ or ‘gap-filling.’ ”).

63. See, e.g., *INS v. Chadha*, 462 U.S. 919, 989 (1983) (explaining that the Supreme Court considers rulemaking by administrative agencies to be quasi-legislative in nature); Judith K. Meierhenry, *The Due Process Right to an Unbiased Adjudicator in Administrative Proceedings*, 36 SAN DIEGO L. REV. 551, 556 (1991).

64. *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (quoting *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)); see also *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 848-49 (1986) (holding that a proper delegation of adjudicatory functions must be assessed by reference to the underlying purpose of the requirements of Article III); *Chadha*, 462 U.S. at 954 (holding that although Congress can delegate portions of its powers, it cannot control administration of its power through a retained veto); *Industrial Union Dep’t v. American Petroleum Inst.*, 448 U.S. 607, 675 (1980) (Rehn-

This intelligible principle test is one of several jurisprudential attempts to explain the fundamental concept that congressional delegations must contain legislative standards.<sup>65</sup> In modern times, the substance of these judicially created legislative standards tests has imposed a nugatory hurdle in the path of the federal administrative regime.<sup>66</sup> Administrative agencies churn out regulations with increasing frequency,<sup>67</sup> and the federal judiciary has demonstrated a heightened sense of reluctance to disturb these acts.<sup>68</sup> Before the federal government reached the administrative state of its present existence, important precedent developed that continues to influence judicial decisionmaking.<sup>69</sup>

### C. *The Nondelegation Doctrine in Its Formative Years*

In order to survive constitutional scrutiny, early Supreme Court cases required all delegations of legislative authority to contain standards that guided the agency's exercise of rulemaking powers.<sup>70</sup> In *J. W. Hampton, Jr., & Co. v. United States*,<sup>71</sup> the Supreme Court first enunciated the "intelligible principle" test.<sup>72</sup> The Court stated, "[i]f Congress shall lay down by legislative act an intelligible principle to which [an agency] is directed to conform, such legislative action is not a forbidden delegation of legislative power."<sup>73</sup> Relying on the rationale of the *J. W. Hampton* Court, two subsequent Court decisions

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quist, J., concurring) (discussing proper delegations of power, but finding that a delegation to OSHA of power to adopt appropriate standards of occupational exposure of benzene "would violate the doctrine against uncanalized delegations").

65. See David Schoenbrod, *The Delegation Doctrine: Could the Court Give it Substance?*, 83 MICH. L. REV. 1223, 1225 (1985) ("Although the Court never disavowed its 1935 decisions and continued to articulate essentially the same delegation test, it has never again held a statute unconstitutional on the basis of the delegation doctrine.").

66. See *id.* at 1231.

67. See, e.g., *United States v. Wooten*, 343 F.2d 214, 217 (5th Cir. 1965) (observing that there are a "mounting number of matters entrusted to the jurisdiction of . . . agencies").

68. See R. George Wright, *The Fourteen Faces of Narrowness: How Courts Legitimize What They Do*, 31 LOY. L.A. L. REV. 167, 206-07 (1997) ("In the modern regulatory state, broad delegation of authority strikes most federal judges as desirable if not necessary.").

69. See *infra* notes 119-37, 498 and accompanying text.

70. See *infra* notes 71-99 and accompanying text.

71. 276 U.S. 394 (1928).

72. See *id.* at 409.

73. *Id.*

struck down provisions of the National Industrial Recovery Act (NIRA).<sup>74</sup> Both cases dealt with delegations of legislative power by Congress to the President.<sup>75</sup> However, the standards espoused in these cases have also been applied to delegations of power by Congress to administrative agencies.<sup>76</sup>

In *Panama Refining Co. v. Ryan*,<sup>77</sup> the Supreme Court addressed section 9(c) of the NIRA.<sup>78</sup> Section 9(c) authorized the President to prohibit the transportation, in interstate and foreign commerce, of petroleum products produced by any state in excess of certain specified limits.<sup>79</sup> The NIRA authorized the President to issue executive orders to carry out these duties.<sup>80</sup> Any violation of an executive order under the provision was punishable by a fine or imprisonment.<sup>81</sup> However, section 9(c) did not set forth any standard to guide the President in exercising his authority.<sup>82</sup>

Recognizing that there had been a purported delegation of legislative power to the President,<sup>83</sup> the Court inquired whether "Congress ha[d] declared a policy with respect to that subject; whether the Congress ha[d] set up a standard for the President's action; whether the Congress ha[d] required any finding by the President in the exercise of the authority to enact the prohibition."<sup>84</sup> The Court noted that "Congress ha[d] declared no policy, ha[d] established no standard, [and] ha[d] laid down no rule" to guide the

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74. See *infra* notes 77-99 and accompanying text.

75. See *infra* notes 77-99 and accompanying text.

76. See *infra* note 136 and accompanying text.

77. 293 U.S. 388 (1935).

78. See *id.* at 406. In subsection c, the statute provided:

The President is authorized to prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any State law or valid regulation or order prescribed thereunder, by any board, commission, officer, or other duly authorized agency of a State.

Any violation of any order of the President issued under the provisions of this subsection shall be punishable by fine of not to exceed \$1,000, or imprisonment for not to exceed six months, or both.

*Id.* (quoting 15 U.S.C. § 709(c) (1933)).

79. See *id.*

80. See *id.* at 406-07.

81. See *id.*

82. See *id.* at 415.

83. See *id.* at 414.

84. *Id.* at 415.

President's discretion.<sup>85</sup> The Court concluded that section 9(c) was an unconstitutional delegation of legislative powers.<sup>86</sup> The *Panama Refining* Court reasoned that although there was a "declaration of policy,"<sup>87</sup> there were neither guiding policies nor standards to prevent arbitrary enforcement.<sup>88</sup>

Similarly, in *Schechter Poultry Corp. v. United States*,<sup>89</sup> the Supreme Court voided another section of the NIRA as violative of the nondelegation doctrine.<sup>90</sup> In *Schechter*, the petitioners were convicted of eighteen counts of violating the Live Poultry Code,<sup>91</sup> which was

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85. *Id.* at 430.

86. *See id.* at 433.

87. *Id.* at 416 (internal quotation marks omitted).

88. *See id.* at 415-33. Justice Cardozo, in his dissent, conceded the importance of a standard to guide discretion in enforcing the terms of the Act. *See id.* at 434 (Cardozo, J., dissenting). However, Justice Cardozo disagreed with the majority's opinion that inadequate standards existed. *See id.* (Cardozo, J., dissenting). Justice Cardozo contended that the President's discretion was curtailed by the structure of the Act and that it would be reasonable to import standards from other statutes. *See id.*

89. 295 U.S. 495 (1935).

90. *See id.* at 550-51.

91. *See id.* at 519. Section 3(a) provided:

"Upon the application to the President by one or more trade or industrial associations or groups, the President may approve a code or codes of fair competition for the trade or industry or subdivision thereof, represented by the applicant or applicants, if the President finds (1) that such associations or groups impose no inequitable restrictions on admission to membership therein and are truly representative of such trades or industries or subdivisions thereof, and (2) that such code or codes are not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them, and will tend to effectuate the policy of this title: Provided, That such code or codes shall not permit monopolies or monopolistic practices: Provided further, That where such code or codes affect the services and welfare of persons engaged in other steps of the economic process, nothing in this section shall deprive such persons of the right to be heard prior to approval by the President of such code or codes. The President may, as a condition of his approval of any such code, impose such conditions (including requirements for the making of reports and the keeping of accounts) for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest, and may provide such exceptions to and exemptions from the provisions of such code, as the President in his discretion deems necessary to effectuate the policy herein declared."

*Id.* (quoting 15 U.S.C. § 703 (1933)).

promulgated pursuant to section 3 of the NIRA.<sup>92</sup> Section 3 allowed the President to promulgate "codes of fair competition" and take any other measures to effectuate the broad goals set forth in section 1 of the NIRA.<sup>93</sup> The petitioners argued that it was unconstitutional because the President was bound by no standards in exercising this power.<sup>94</sup>

The Court relied on *Panama Refining* to determine the validity of the legislative delegation.<sup>95</sup> The Court explained that a legislative delegation must operate "within prescribed limits."<sup>96</sup> The *Schechter* Court emphasized that the statute which delegated power to the President failed to describe its subject,<sup>97</sup> beyond insuring fair competition.<sup>98</sup> The *Schechter* Court held that the delegation was unconstitutional because it failed to set standards to guide the President in creating the codes of fair competition.<sup>99</sup>

Although *Panama Refining* and *Schechter* have not been overruled, some commentators categorize these cases as "doubtful precedents."<sup>100</sup> Since these cases, Supreme Court decisions have invariably permitted even the broadest delegations of power.<sup>101</sup> Moreover; the Supreme Court has consistently upheld delegations, even when power was conferred with minimal or no standards whatsoever.<sup>102</sup>

Nothing spurred the growth of the administrative state more than President Franklin Roosevelt's New Deal.<sup>103</sup> Today, it is a well-

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92. *See id.*

93. *Id.* at 521 n.4.

94. *See id.* at 538-39.

95. *See id.* at 529-30.

96. *Id.* at 530.

97. *See id.* at 530-31. In *Panama Refining*, the subject described in the Act was the prevention of the transportation of "hot oil" in interstate commerce. *See Panama Ref. Co. v. Ryan*, 293 U.S. 388, 430 (1935).

98. *See Schechter*, 295 U.S. at 530.

99. *See id.* at 541-42.

100. 1 JACOB A. STEIN ET AL., ADMINISTRATIVE LAW § 3.03[1], at 3-70 (Matthew Bender ed., 1998).

101. *See id.* at 3-77.

102. *See Uwe Kischel, Delegation of Legislative Power to Agencies: A Comparative Analysis of United States and German Law*, 46 ADMIN. L. REV. 213, 220 (1994) (noting that after *Schechter* and *Panama Refining*, the Supreme Court has not "use[d] the delegation doctrine to strike down any statutes enacted by Congress"); *see also*, e.g., *Yakus v. United States*, 321 U.S. 414, 426 (1944) (upholding the validity of the Emergency Price Control Act of 1942 that contained minimal safeguards).

103. *See Michael J. Klarman, Antifidelity*, 70 S. CAL. L. REV. 381, 412-13 ("The Constitution's tripartite division of powers . . . has been largely eviscerated in the

recognized reality that the legislative and judicial branches are ill-suited to perform many of the day-to-day functions required of the government.<sup>104</sup> From the New Deal Era to present day, the administrative bureaucracy in the federal government has grown exponentially, taking on a life of its own.<sup>105</sup> Indeed, one scholar noted that, “[t]he size and scope of federal administrative activity has increased during every period in the nation’s history.”<sup>106</sup>

The Supreme Court has facilitated the growth of federal agency power by practically eliminating the requirement of meaningful standards to curtail an agency’s rulemaking authority.<sup>107</sup> After *Schechter* and *Panama Refining*, the Supreme Court has not struck down a delegation of power by Congress to the executive branch on constitutional grounds.<sup>108</sup> As federal law developed, the Supreme Court has upheld increasingly broad delegations of legislative power to administrative agencies.<sup>109</sup>

Courts and scholars have identified several reasons that justified and arguably necessitated the need for relaxing the nondelegation doctrine.<sup>110</sup> Administrative agency decisionmaking is often more cost effective.<sup>111</sup> Additionally, many governmental policy decisions involve intricate issues that are more aptly dealt with by expert administrative agencies.<sup>112</sup> This expertise is particularly necessary in areas that

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twentieth century in order to accommodate the exponential growth of the modern administrative state.”); Ventura, *supra* note 58, at 402 n.8 (“This regulatory authority [granted to administrative agencies] has grown exponentially since World War II . . .”).

104. See Peter Marra, *Have Administrative Agencies Abandoned Reasonability?*, 6 SETON HALL CONST. L.J. 763, 772, 777 (1996).

105. See Henry G. Manne, *The Judiciary and Free Markets*, 21 HARV. J.L. & PUB. POL’Y 11, 23 (1997) (“The most powerful source of the dilution of the older structure in American law was the growth, particularly during and after the ‘New Deal’ in the 1930’s, of vast amounts of regulatory legislation and the enormous growth of administrative law . . .”); Werhan, *supra* note 5, at 574-75.

106. 1 DAVIS & PIERCE, *supra* note 31, § 1.3, at 6.

107. See, e.g., *American Textile Mfrs. v. Donovan*, 452 U.S. 490 (1981) (allowing OSHA to promulgate regulations regarding toxic materials or harmful physical agents under a mere “feasibility standard”).

108. See 1 DAVIS & PIERCE, *supra* note 31, § 2.6, at 73 (“The Court has not held a delegation unconstitutional since 1935.”).

109. See, e.g., *Donovan*, 452 U.S. at 490.

110. See *infra* notes 111-13, 139-41 and accompanying text.

111. See AMAN & MAYTON, *supra* note 40, at 10.

112. See Charles H. Koch, Jr., *An Issue-Driven Strategy for Review of Agency Decisions*, 43 ADMIN. L. REV. 511, 516 (1991) (noting that “agencies embody special expertise” such as “superior capacity for compiling the information” and

evolve rapidly and require flexibility.<sup>113</sup>

While it became widely accepted that Congress could delegate portions of its lawmaking power, the constitutional principle behind the separation of powers and nondelegation doctrines remained a constant.<sup>114</sup> Even though the nondelegation doctrine may have experienced a liberalization, it still forbids complete divestment of lawmaking power to an unrestrained agency.<sup>115</sup> Standards used to curtail excessive delegations of power, such as the intelligible principle test, exist primarily because administrative agencies, unlike Congress, lack a fundamental constitutional protective device—political accountability.<sup>116</sup> While the intelligible principle test was one of the more prevalent standards the Supreme Court used to decide whether an unconstitutional delegation of power occurred<sup>117</sup> after

“synthesiz[ing] the information”); Marra, *supra* note 104, at 767 (“The justifications for the delegation of congressional power to administrative agencies include Congress’s inability to handle technical issues and act efficiently and effectively.”).

113. See *Mistretta v. United States*, 488 U.S. 361, 372 (1989). In *Mistretta*, the Supreme Court explained the necessity of the nondelegation doctrine as follows: “Our jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.” *Id.*; see also AMAN & MAYTON, *supra* note 40, at 11.
114. See I DAVIS & PIERCE, *supra* note 31, § 2.6, at 69-70 (“For two centuries, the Supreme Court has struggled to reconcile this routine congressional practice with the Court’s oft-stated belief that Article I prohibits Congress from delegating legislative power.”).
115. See *National Cable Television Assoc. v. United States*, 415 U.S. 336, 342 (1974) (citing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935)).
116. See AMAN & MAYTON, *supra* note 40, at 14 (noting that basic choices cannot be passed to agencies because agencies are not “politically responsible officials”); Christopher T. Handman, Note, *The Doctrine of Political Accountability and Supreme Court Jurisdiction: Applying a New External Constraint to Congress’s Exceptions Clause Power*, 106 YALE L.J. 197, 200 (1996) (noting that Congress’s diminished accountability to the electorate by delegating powers to administrative agencies has led many courts and commentators to conclude that unaccountable legislation is unconstitutional legislation); David A. Herrman, Comment, *To Delegate or Not to Delegate—That Is the Preemption: The Lack of Political Accountability in Administrative Preemption Defies Federalism Constraints on Government Power*, 28 PAC. L.J. 1157, 1170 (1997) (explaining that administrative agencies cannot have unrestrained power to formulate laws because they are unelected and are not politically accountable).
117. See *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) (holding that the delegation of legislative power to an administrative agency will be

1936 the Court seemed to abandon it in large part.<sup>118</sup>

In the early 1980's, it appeared as though a trend toward the re-establishment of the legislative standards requirement began to develop in Supreme Court jurisprudence.<sup>119</sup> Notably, Justice Rehnquist called for a return to more stringent nondelegation principles such as those first espoused by Chief Justice Taft in *J. W. Hampton*.<sup>120</sup> Justice Rehnquist's philosophical approach to the nondelegation doctrine was first articulated in his concurring opinion in *Industrial Union Department v. American Petroleum Institute*,<sup>121</sup> and later in his dissenting opinion in *American Textile Manufacturers Institute, Inc. v. Donovan*.<sup>122</sup>

In *American Petroleum*, Justice Rehnquist recognized that "[t]he rule against delegation of legislative power is not . . . so cardinal [a] principle as to allow for no exception."<sup>123</sup> Justice Rehnquist explained that Congress may "lay down the general policy and standards that animate the law," while permitting an executive agency to "refine those standards, fill in the blanks, or apply the standards to particular cases."<sup>124</sup> However, Justice Rehnquist emphasized that the constitutionality of a delegation of legislative power "must be judged according to common sense and the inherent necessities of governmental coordination."<sup>125</sup> According to Justice Rehnquist, the delegation in *American Petroleum* was unconstitutional because Congress did not set forth any ascertainable standard to guide the Secretary of Labor in promulgating a benzene exposure limit under OSHA.<sup>126</sup> *American Petroleum* illustrates what one scholar described to

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upheld if Congress established an intelligible principle to direct the agency).

118. See Schoenbrod, *supra* note 65, at 1231 (noting that the intelligible principle test became "so ephemeral and elastic as to lose its meaning").

119. See *infra* notes 123-27 and accompanying text.

120. For a discussion of the intelligible principle test as enumerated by the *J. W. Hampton* Court, see *supra* notes 71-73 and accompanying text.

121. 448 U.S. 607, 675-76 (1980) (Rehnquist, J., concurring) (noting that a standard-less delegation to the Secretary of Labor to establish certain OSHA requirements "would violate the doctrine against uncanalized delegations of legislative power").

122. 452 U.S. 490, 545, 548 (1981) (Rehnquist, J., dissenting) (arguing that a "feasibility standard" is no standard at all; therefore, a Congressional act delegating to the Secretary of Labor the power to promulgate an OSHA cotton dust regulation was an unconstitutional delegation of legislative authority).

123. *American Petroleum*, 448 U.S. at 673.

124. *Id.* at 675 (internal quotation marks omitted).

125. *Id.* (internal quotation marks omitted).

126. See *id.* at 675-77.

be Justice Rehnquist's "distaste for open-ended delegations" of legislative authority.<sup>127</sup>

Additionally, a recent majority opinion by the Supreme Court seemed to indicate an overall resurgence in the nondelegation doctrine's legislative standards requirement. *Touby v. United States*<sup>128</sup> appears to depart from post-1936 delegation doctrine precedent and return to the intelligible principle test espoused in *J. W. Hampton*.<sup>129</sup> In *Touby*, the Supreme Court considered whether a provision of the Controlled Substances Act "unconstitutionally delegate[d] legislative power to the Attorney General."<sup>130</sup> The purpose of the Act was to establish "an expedited procedure by which the Attorney General [could] schedule a substance on a temporary basis when doing so [was] necessary to avoid an imminent hazard to the public safety."<sup>131</sup>

In its rationale, the Supreme Court stated "that the nondelegation doctrine does not prevent Congress from seeking assistance, within proper limits, from its coordinate Branches."<sup>132</sup> Congress can "legislate[] in broad terms" provided the legislation contains " 'intelligible principle[s] ' " that serve as guideposts for those individuals or bodies entrusted to carry out the legislative directive.<sup>133</sup> The Court found, however, that "one [could not] plausibly argue that § 201(h)'s 'imminent hazard to the public safety' standard [was] not an intelligible principle."<sup>134</sup>

The *Touby* Court declined to hold that "something more than an 'intelligible principle' is required when Congress authorizes another branch of government to promulgate regulations that contemplate criminal sanctions."<sup>135</sup> Moreover, the Supreme Court observed that the delegation was constitutional because it meaningfully constrained the Attorney General by placing specific restrictions on his discretion to define criminal conduct.<sup>136</sup> Although the Supreme

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127. Schoenbrod, *supra* note 65, at 1231 n.39.

128. 500 U.S. 160 (1991).

129. *See id.* at 165; *see also supra* notes 71-73 and accompanying text.

130. *Touby*, 500 U.S. at 162.

131. *Id.* at 163 (internal quotation marks omitted).

132. *Id.* at 165 (citing *Mistretta v. United States*, 488 U.S. 361, 372 (1989)).

133. *Id.*

134. *Id.*

135. *Id.* at 166-67.

136. *See id.* at 167-69. In *Touby*, the Supreme Court rejected three challenges to the constitutionality of the Controlled Substances Act. *See id.* at 165-69. First, petitioners argued that the statute violated separation of powers by granting the Attorney General too much power. *See id.* at 167. Petitioners claimed that while Congress could delegate the power to schedule drugs to the Executive

Court favorably quoted the “intelligible principle” test, the Court did not strictly apply it in *Touby* as it had in *Schechter* and *Panama Refining*.<sup>137</sup>

Indeed, *Touby*, rather than marking the resurgence of the nondelegation doctrine, looks to have marked its demise.<sup>138</sup> The Court appears to have retreated from strictly applying the nondelegation doctrine for three reasons:

First, they seem to have recognized the extreme difficulty of creating a justiciable standard that would allow judges to distinguish between constitutional and unconstitutional delegations. Second, they seem to have adopted a more realistic perspective on the legislative process. Third, the Justices are less concerned about broad delegations to agencies because they now recognize that agencies *are* politically accountable institutions of government.<sup>139</sup>

Acknowledging this last reason, a unanimous Court observed in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,<sup>140</sup> that “[w]hile agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political

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Branch, the Attorney General could not be the recipient of that power since the Attorney General also has the power to prosecute drug offenses. *See id.* In response, the Supreme Court held that the petitioners’ argument did not implicate the separation of powers doctrine because the doctrine does not concern itself with the distribution of power within a single branch. *See id.* at 167-68.

Second, the Court rejected the argument that the statute was unconstitutional because it barred judicial review, noting that in a separate section, the Act specifically permitted judicial review. *See id.* Finally, the Court disposed of petitioners’ third challenge and held that the Attorney General’s delegation of his temporary scheduling power to the DEA was constitutional because Congress did not limit the Attorney General’s delegation authority in the Act. *See id.* at 169.

137. Compare *id.* at 165 (finding that “imminent hazard to the public safety” was an “intelligible principle”), with *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 550 (1935) (noting that codes of fair competition failed to provide guidance to the President), and *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 407 (1935) (concluding that the statute authorizing the President “to prescribe such rules and regulations as may be necessary to carry out the purposes of Title I of the [NIRA]” lacked sufficient guidance).

138. See 1 DAVIS & PIERCE, *supra* note 31, § 2.6, at 76.

139. *Id.*

140. 467 U.S. 837 (1984).

branch of the Government to make such policy choices.”<sup>141</sup> While the nondelegation doctrine may ring hollow, the Court has not abandoned its scrutiny of administrative agencies.

In fact, the void created by the impotence of the nondelegation doctrine has been filled by the development of other protective mechanisms.<sup>142</sup> First, courts now strive to place substantive limitations on over-broad, vague, or standard-less laws.<sup>143</sup> Second, courts require “reasoned consistency” in agency decisionmaking.<sup>144</sup> The final mechanism imposed by federal courts is the use of procedural safeguards to protect against abuses of discretion.<sup>145</sup> Nevertheless, no matter how many procedures an agency employs during its rulemaking process, if the power is conveyed in an unconditional delegation of Congress’s lawmaking function, the statute cannot be cured.<sup>146</sup>

#### D. *Nondelegation Analysis Through Statutory Construction*

Another prevalent method courts employ to avoid invalidating a statute on nondelegation grounds is the canon of judicial restraint.<sup>147</sup> This canon requires a court to abstain from basing its ruling on constitutional grounds if another non-constitutional basis for the decision exists.<sup>148</sup> By invoking the canon of judicial restraint, a

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141. *Id.* at 865.

142. *See* STEIN ET AL., *supra* note 100, § 3.03[1], at 3-97 to 3-99.

143. *See, e.g.*, *Kent v. Dulles*, 357 U.S. 116, 130 (1958) (holding that absent explicit authority to deny passports to citizens based on “their beliefs or associations,” the Secretary of State could “not employ that standard to restrict the citizens’ right of free movement”).

144. Richard B. Stewart, *The Reformation of Administrative Law*, 88 HARV. L. REV. 1669, 1679 (1975).

145. *See id.* at 1679.

146. *See* AMAN & MAYTON, *supra* note 40, § 1.4, at 37.

147. *See* *Three Affiliated Tribes v. Wold Eng’g, P.C.*, 467 U.S. 138, 157-58 (1984); *see also* *Rust v. Sullivan*, 500 U.S. 173, 191 (1991) (“This canon is followed out of respect for Congress, which we assume legislates in the light of constitutional limitations.”); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (“[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”); *Industrial Union Dep’t v. American Petroleum Inst.*, 448 U.S. 607, 646 (1980) (reasoning that it is more favorable to construe a statute to avoid finding a “sweeping delegation of legislative power”); 3 KOCH, *supra* note 50, § 12.11[3], at 162-63.

148. *See* *Three Affiliated Tribes*, 467 U.S. at 157-58; *see also* *American Petroleum*, 448 U.S. at 646; 3 KOCH, *supra* note 50, § 12.11[3], at 162-63.

court can resolve a challenge asserted under the nondelegation doctrine by applying a narrow construction to the enabling statute to void the specific regulation promulgated by the agency.<sup>149</sup> The court avoids the constitutional issue by holding that the regulation promulgated by the agency exceeded the power conferred to it by the enabling statute.<sup>150</sup> Instead of rendering the entire enabling statute unconstitutional, the court strikes only the particular agency power asserted.<sup>151</sup> This method of analysis enables a court to curtail excessive agency power, but on statutory construction grounds.<sup>152</sup>

Often the enabling statute at issue is broad and the agency could reasonably interpret it to permit the regulation adopted.<sup>153</sup> The claimant challenging the delegation will assert that the power conveyed was overly broad and violative of the nondelegation doctrine.<sup>154</sup> A reviewing court will then proceed through traditional canons of statutory construction.<sup>155</sup> Assuming Congress intended that the agency could promulgate the regulation at issue, the court will decide whether allowing this construction would violate the nondelegation doctrine.<sup>156</sup> If upholding the regulation would violate the nondelegation doctrine, the court will infer that Congress would not have intended to delegate the particular power involved.<sup>157</sup> Accordingly, the court will conclude that the agency went beyond the scope of its enabling act.<sup>158</sup>

It would behoove a litigant to juxtapose any nondelegation doctrine challenge with the canon of judicial restraint. By itself, the nondelegation doctrine will rarely provide a basis for a court to pre-

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149. See *American Petroleum*, 448 U.S. at 646; see also 3 KOCH, *supra* note 50, § 12.11[3], at 162-63.

150. See *American Petroleum*, 448 U.S. at 646; see also 3 KOCH, *supra* note 50, § 12.11[3], at 162-63.

151. See *American Petroleum*, 448 U.S. at 646 (narrowing the statutory language so as to avoid violating the nondelegation doctrine); see also 3 KOCH, *supra* note 50, § 12.13[5], at 179-80.

152. See *American Petroleum*, 448 U.S. at 646; see also 3 KOCH, *supra* note 50, § 12.13[5], at 180.

153. See *Rust v. Sullivan*, 500 U.S. 173, 184-91 (1991); *American Petroleum*, 448 U.S. at 640-41.

154. See *AMAN & MAYTON*, *supra* note 40, at 20 (citing *NBC v. United States*, 319 U.S. 190, 211-12 (1943)).

155. See *id.* at 15 (citing *American Petroleum*, 448 U.S. at 607).

156. See *American Petroleum*, 448 U.S. at 639-40; *National Cable Television Assoc. v. United States*, 415 U.S. 336, 342-44 (1974).

157. See *American Petroleum*, 448 U.S. at 645; *National Cable Television*, 415 U.S. at 343-44.

158. See *American Petroleum*, 448 U.S. at 663-64.

vent an agency from exercising broad rulemaking power.<sup>159</sup> When combined with a statutory construction analysis premised upon the canon of judicial restraint, however, the nondelegation doctrine remains a viable method of curtailing broad delegations of power to agencies.<sup>160</sup> In essence, the principles behind the nondelegation doctrine are now employed to infer congressional intent.<sup>161</sup>

### III. STATE ADMINISTRATIVE LAW

State constitutions contain three types of separation of powers provisions.<sup>162</sup> Twenty-seven state constitutions, including Maryland's,<sup>163</sup> contain the most restrictive type of separation of powers clause.<sup>164</sup> These restrictive separation of power clauses include an express separation of powers provision coupled with an additional clause that explicitly prohibits "any person belonging to or exercising power under any branch from . . . exercising any power or function belonging to another."<sup>165</sup> Twelve state constitutions contain separation of powers provisions expressly stating that the governmental powers shall be separate.<sup>166</sup> Ten state constitutions resemble the provisions in the United States Constitution and implicitly incorporate the separation of powers provision by establishing three branches of government and according each branch specific powers.<sup>167</sup>

The various separation of powers provisions have led to differing approaches to nondelegation issues by state courts. One com-

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159. See *supra* note 108 and accompanying text.

160. See *supra* notes 147-58 and accompanying text.

161. See *supra* note 157 and accompanying text.

162. See John Devlin, *Toward a State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions*, 66 TEMP. L. REV. 1205, 1236-37 (1993).

163. Maryland's separation of powers provision provides: "That the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other." MD. CODE ANN., CONST., DECLARATION OF RIGHTS art. 8 (1998).

164. See Devlin, *supra* note 162, at 1237.

165. *Id.* (internal quotation marks omitted). Louisiana's state constitution is similar to these twenty-seven states in that it contains an express separation of powers provision and an additional limiting clause. See *id.* at 1237 & n.112. Louisiana's limiting clause provides that "no one of these branches, nor any person holding office in one of them, shall exercise power belonging to either of the others." *Id.* at n.112.

166. See *id.* at 1236.

167. See *id.*

mentator has identified three categories of nondelegation doctrine approaches.<sup>168</sup> The first category consists of states with the strictest nondelegation doctrine jurisprudence—delegations of legislative power must be accompanied by “strict” standards and safeguards.<sup>169</sup> This rule requires that statutes contain definite and clear standards to control the agency’s decisionmaking process.<sup>170</sup> There are eighteen states that subscribe to this view.<sup>171</sup>

States in the second category—the “loose” standard and safeguard category—require their legislatures to set forth general rules in their enabling statutes in order to curtail agency discretion.<sup>172</sup> These jurisdictions require guiding principles to take the form of either general legislative standards or procedural safeguards, or a combination of both.<sup>173</sup> Twenty-four states apply these general requirements.<sup>174</sup>

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168. See Gary J. Greco, Survey, *Standards or Safeguards: A Survey of the Delegation Doctrine in the States*, 8 ADMIN. L.J. AM. U. 567, 579-80 (1994). The author cataloged not only the standards that each state applies, but the cases adopting the standards requirement. See *id.*

169. See *id.* at 580. The author notes that the requirement of standards and safeguards is based on a policy that the legislature should not avoid its political responsibility by delegating its lawmaking authority. See *id.*

170. See *id.*

171. See *id.* at 581-84 (citing *Askew v. Cross Key Waterways*, 372 So. 2d 913, 918-19 (Fla. 1978) (requiring a statute to provide strict standards); *Guillou v. Division of Motor Vehicles*, 503 A.2d 838, 840-42 (N.H. 1986) (requiring a statute to provide a general policy and prescribe specific standards); *Boreali v. Axelrod*, 517 N.E.2d 1350, 1354 (N.Y. 1987) (requiring a statute to provide reasonable safeguards and standards); *Blue Cross of Northeast Ohio v. Ratchford*, 416 N.E.2d 614, 618 (Ohio 1980) (requiring a statute to provide practical standards or an “intelligible principle”); *Commonwealth v. Sessoms*, 532 A.2d 775, 784 (Pa. 1987) (Papadikos, J., concurring) (requiring a statute to provide limits on an agency’s powers and establish procedures to govern their decisionmaking); *Chapel v. Commonwealth*, 89 S.E.2d 337, 342 (Va. 1955) (requiring that a statute fix a standard to guide the agency in rulemaking); *State ex rel. Barker v. Manchin*, 279 S.E.2d 622, 631 (W. Va. 1981) (requiring that a statute must provide sufficient standards for guidance)).

172. See *id.* at 588.

173. See *id.*

174. See *id.* at 588-92 (citing *Connecticut v. Campbell*, 617 A.2d 889, 895 (Conn. 1992) (requiring that standards be as definite as is reasonably practical under the circumstances); *Atlantis I Condominium Ass’n v. Bryson*, 403 A.2d 711, 713 (Del. 1979) (noting that a court will focus on totality of protections against arbitrariness including both standards and safeguards); *Department of Transp. v. City of Atlanta*, 398 S.E.2d 567, 571-72 (Ga. 1990) (noting that legislature must provide sufficient guidelines); *People v. Turmon*, 340 N.W.2d 620, 623 (Mich. 1983) (requiring that statutes provide standards that are as reasonably precise

The final category is the procedural safeguard category.<sup>175</sup> Under the procedural safeguards test, courts focus on whether the legislature has created procedural safeguards in determining whether the enabling statute was an unconstitutional delegation of power.<sup>176</sup> States in this category grant their administrative agencies wide discretion in determining policy and writing regulations.<sup>177</sup> There are six states that subscribe to the procedural safeguards requirement.<sup>178</sup> The commentator that set forth these categories identified Maryland as falling within this procedural safeguards category.<sup>179</sup> The following analysis illustrates the present state of the nondelegation doctrine in Maryland.

#### A. *Maryland Administrative Law*

Until *Lussier*, the Court of Appeals of Maryland had addressed essentially two primary issues in cases concerning the extent of power the Maryland General Assembly bestowed on administrative agencies under broad statutory grants of authority.<sup>180</sup> The first issue was whether the Maryland General Assembly could constitutionally delegate its power.<sup>181</sup> The second issue involved a statutory construction analysis that was aimed at determining the extent of power the General Assembly actually intended to convey to the agency.<sup>182</sup> Both

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as the subject matter permits); *Township of Mount Laurel v. Department of Pub. Advocate*, 416 A.2d 886, 891 (N.J. 1980) (requiring that statutes contain sufficient standards); *Adams v. North Carolina Dep't of Natural Resources*, 249 S.E.2d 402, 410-11 (N.C. 1978) (noting that if the legislature provides general policies or guidelines, detailed standards are not necessary)).

175. *See id.* at 598.

176. *See id.*

177. *See id.*

178. *See id.* at 598-99 (citing *People v. Wright*, 639 P.2d 267, 271 (Cal. 1982) (noting that reasonable grants of powers to agencies are permissible so long as suitable safeguards are established); *Meyer v. Lord*, 586 P.2d 367, 371 (Or. Ct. App. 1978) (noting that the determining factor for ruling on the constitutionality of a delegation is whether adequate administrative safeguards exist); *Barry & Barry, Inc. v. State*, 500 P.2d 540, 542-43 (Wash. 1972) (noting that the statute should contain a general standard advising the agency of what to do and must provide adequate procedural safeguards)).

179. *See id.* at 598-99 (citing *Department of Transp. v. Armacost*, 311 Md. 64, 532 A.2d 1056 (1987)).

180. *See infra* notes 192-395 and accompanying text.

181. For a discussion of Maryland cases addressing constitutional issues, see *infra* notes 192-262 and accompanying text.

182. For a discussion of Maryland cases addressing statutory construction issues, see *infra* notes 276-395 and accompanying text.

categories of issues are explored in the following subsections.

### 1. Separation of Powers and the Nondelegation Doctrine in Maryland

While Maryland is not bound by the doctrine of separation of powers that has developed under the federal Constitution,<sup>183</sup> Maryland courts have articulated analogous principles. Article 8 of the Maryland Declaration of Rights provides that "the Legislative, Executive and Judicial powers of Government ought to be forever separate."<sup>184</sup> Thus, unlike the federal Constitution, Maryland's Constitution contains an explicit reference to the separation of powers.<sup>185</sup> Any delegation of legislative or judicial power to an administrative agency appears to contradict Article 8 because, in theory, administrative agencies fall under the executive branch.<sup>186</sup> Nonetheless, the Court of Appeals of Maryland has recognized the right of the General Assembly to delegate legislative powers to administrative agencies for over 125 years.<sup>187</sup> As the court of appeals has construed Article 8, the separation of powers doctrine does not act as a complete bar to the transfer of power among the three branches of government.<sup>188</sup>

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183. See Richard A. Schapiro, *Contingency and Universalism in the State Separation of Powers Discourse*, 4 ROGER WILLIAMS U. L. REV. 79 (1998) ("State courts clearly have the power to diverge from federal doctrine in construing their states' constitutions . . .").

184. MD. CODE ANN., CONST., DECLARATION OF RIGHTS art. 8 (1998).

185. See *Maryland State Police v. Warwick Supply & Equip. Co.*, 330 Md. 474, 480, 624 A.2d 1238, 1241 (1993) (distinguishing the explicit reference to the separation of powers doctrine in Maryland's Constitution from the implicitly recognized doctrine in the federal Constitution).

186. See *Lussier v. Maryland Racing Comm'n*, 343 Md. 681, 702-03, 648 A.2d 804, 814 (1996) (Bell, J., dissenting). In his dissent, Judge Bell noted that the ability to promulgate a regulation imposing a fine is a legislative function. See *id.* at 702, 648 A.2d at 814 (Bell, J., dissenting). The ability to impose the fine is a judicial function. See *id.* (Bell, J., dissenting). However, the delegation was not unconstitutional as violative of the separation of powers bar between the executive and the judiciary because the enabling statute provided for judicial review of the punishment. See *id.* at 707, 684 A.2d at 817 (Bell, J., dissenting).

187. See *id.* at 706, 684 A.2d at 816 (Bell, J., dissenting); see also *Harrison v. Mayor of Baltimore*, 1 Gill 264, 276-77 (1843) (noting that, by incorporating the Mayor and City Council of Baltimore, "the corporate authorities were clothed with all the legislative powers which the General Assembly could have exerted").

188. See *Lussier*, 343 Md. at 706, 684 A.2d at 816 (Bell, J., dissenting) (citing *Department of Natural Resources v. Linchester Sand & Gravel Corp.*, 274 Md. 211, 220, 334 A.2d 514, 521 (1975)).

As with the federal courts, Maryland courts have adopted and developed their own nondelegation doctrine jurisprudence that regulates the transfer of power from the General Assembly to administrative agencies.<sup>189</sup> The Court of Appeals of Maryland has aptly recognized that “[t]he delegation doctrine . . . is a corollary of the separation of powers doctrine.”<sup>190</sup> Thus, Maryland’s nondelegation doctrine curtails violations of Maryland’s constitutional separation of powers doctrine.<sup>191</sup>

*a. The Adequate Legislative Standards Requirement*

Originally, Maryland courts required the General Assembly to provide adequate legislative standards in all enabling statutes in order to prevent arbitrary enforcement by administrative agencies.<sup>192</sup> Early courts recognized that legislative standards were necessary “because the omission to prescribe reasonably definite standards for the exercise of such an authority might result in arbitrary discriminations.”<sup>193</sup> Therefore, analogous to the federal precedent discussed in Section II, the initial inquiry in a nondelegation doctrine challenge in Maryland focuses on the legislative standards supplied by the General Assembly in the particular enabling statute at issue.<sup>194</sup> However, early Maryland case law began to erode this strict standards requirement.

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189. *See Warwick*, 330 Md. at 480, 624 A.2d at 1241 (explaining that “[t]he delegation doctrine prohibits a legislative body from delegating its law-making function to any other branch of government or entity and is a corollary of the separation of powers doctrine implicit in the United States Constitution and expressly provided in the Maryland Constitution”).

190. *Department of Transp. v. Armacost*, 311 Md. 64, 77, 532 A.2d 1056, 1062 (1987).

191. In Maryland, the separation of powers provision requires that legislative and executive authority must be separate. *See MD. CODE ANN., CONST., DECLARATION OF RIGHTS* art. 8 (1998). This provision acts as a bar to the sharing of power between branches, unless the judiciary creates an exception.

192. *See, e.g., Schneider v. Pullen*, 198 Md. 64, 69-70, 81 A.2d 226, 229 (1951) (addressing the sufficiency of legislative standards to survive constitutional scrutiny); *Baltimore v. Bloecher & Schaff, Inc.*, 149 Md. 648, 656, 132 A. 160, 164-65 (1926) (considering whether “unfit for human food” was an adequate standard).

193. *County Comm’rs of Prince George’s County v. Northwest Cemetery Co.*, 160 Md. 653, 656, 154 A. 452, 453 (1931) (invalidating a statute conferring unbridled discretion upon county commissioners to permit or proscribe the establishment of a cemetery).

194. *See supra* notes 64-69 and accompanying text.

b. *Areas in Which the Legislative Standards Requirement Has Eroded*

In *Givner v. Commissioner of Health*,<sup>195</sup> the court of appeals relaxed the requirement for a legislative standard when a statute conferred powers relating to areas of public health.<sup>196</sup> In *Givner*, a landlord brought suit against the Commissioner of Health of Baltimore City seeking a decree declaring unconstitutional a regulation concerning bathing facilities in dwelling units.<sup>197</sup>

The issue was whether the enabling legislation was sufficiently definite as “to guide the [agency] in ascertaining the basic facts upon which [its] regulations were predicated.”<sup>198</sup> The *Givner* court began its analysis by documenting areas of administrative law where the nondelegation doctrine had been relaxed such as zoning, redevelopment, and public health cases.<sup>199</sup> As with these areas, the court of appeals concluded that a statute enabling an agency to regulate the area of “public health” should be treated more liberally by courts engaging in a constitutional nondelegation doctrine analysis.<sup>200</sup> The court explained that agencies regulating the area of public health should be accorded broader quasi-legislative discretion because “there is a practical necessity for expert interpretation in its application to concrete situations.”<sup>201</sup> The court, however, did not provide a specific test for determining if a particular legislative standard provided enough guidance to survive a nondelegation doctrine challenge.

c. *The Safeguards Component*

Early Maryland precedent emphasized the legislative standards requirement—powers delegated to an administrative agency must

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195. 207 Md. 184, 113 A.2d 899 (1955).

196. *See id.* at 184, 113 A.2d at 899.

197. *See id.* at 187-90, 113 A.2d at 900-01.

198. *Id.* at 191, 113 A.2d at 902.

199. *See id.* The court noted that the trend of administrative law cases allowing relaxed standards started with zoning cases. *See id.* The court pointed to *Heath v. Mayor of Baltimore*, 187 Md. 296, 303, 49 A.2d 799, 803 (1946), and *Montgomery County v. Merlands Club*, 202 Md. 279, 287, 96 A.2d 261, 264 (1953), to support this proposition. The court also noted a trend to loosen the standards requirement in both redevelopment cases and public health cases. *See Givner*, 207 Md. at 191-92, 113 A.2d at 902-03.

200. *See Givner*, 207 Md. at 192, 113 A.2d at 902. The statute at issue directed the Commissioner of Health to “cause all ordinances for the preservation of the health of the inhabitants of Baltimore City to be faithfully executed and strictly observed.” *Id.* at 189, 113 A.2d at 901.

201. *Id.* at 191, 113 A.2d at 902.

contain adequate legislative standards to prevent an abuse of discretion.<sup>202</sup> As case law developed, however, so did the court's inquiry. Specifically, courts added an alternative "safeguard" component to the legislative standards test.<sup>203</sup> This legislative safeguards component was similar to the standards test in that it required the legislature to provide safeguards to prevent arbitrary enforcement by administrative agencies.<sup>204</sup> Later, Maryland courts apparently merged the legislative safeguards test with the legislative standards test.<sup>205</sup> Thus, the inquiry evolved from determining whether the legislative standards exist, to determining whether legislative safeguards or standards exist.<sup>206</sup> Under the legislative safeguards or standards test, if the enabling legislation creates either sufficient standards or sufficient safeguards, it will be upheld.<sup>207</sup> The following two cases demonstrate how the Court of Appeals of Maryland has applied the legislative standards or safeguards test.

In *County Council for Montgomery County v. Investors Funding Corp.*,<sup>208</sup> the court of appeals articulated the legislative standards or safeguards test and struck down as unconstitutional a portion of a statute authorizing a county commissioner to issue fines up to \$1000.<sup>209</sup> A group of landlords sought to invalidate an administrative

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202. See *supra* notes 192-93 and accompanying text.

203. See *Maryland Theatrical Corp. v. Brennan*, 180 Md. 377, 383, 24 A.2d 911, 915 (1942) ("The usual rule with respect to delegations of . . . power to administrative [agencies is that they] must be surrounded with such safeguards that the [agency] cannot [act] arbitrarily."). While the safeguards component began to surface in early cases, it was not until *County Council for Montgomery County v. Investors Funding Corp.*, 270 Md. 403, 312 A.2d 255 (1973), that the court of appeals articulated the safeguards component as a distinct alternative to the standards component. See *infra* note 206.

204. This test is not to be confused with the procedural safeguards that an agency may choose to implement on its own initiative. For a discussion of those self-imposed procedural safeguards, see *infra* notes 356-59 and accompanying text.

205. See *infra* notes 208-38 and accompanying text.

206. Compare *Givner*, 207 Md. at 191, 113 A.2d at 902 ("The fact that the promulgation of regulations involves the exercise of discretion and deliberation of a type that might be described as legislative in character, is not necessarily fatal, provided there are adequate standards set up . . . ."), with *Investors Funding*, 270 Md. at 442, 312 A.2d at 246 ("We hold here that because of the complete lack of any safeguards or standards, the grant of unlimited discretion . . . is illegal.").

207. See *infra* notes 208-38 and accompanying text.

208. 270 Md. 403, 312 A.2d 225 (1973).

209. See *id.* at 441-42, 312 A.2d at 246. The statute stated, in pertinent part, that among the powers conveyed was the power to enforce the provisions of the

regulation, alleging that the enabling legislation that was enacted by the Montgomery County Council violated the state and federal constitutions.<sup>210</sup> The landlords asserted, *inter alia*, that the power to fine which the County Council granted to the Commission on Landlord-Tenant Affairs was an improper delegation of the power.<sup>211</sup>

The court of appeals inquired whether the Council's delegation of the power to fine was constitutional.<sup>212</sup> The court's analysis in *Investor's Funding* turned on whether adequate legislative safeguards or standards existed.<sup>213</sup> The court first noted that the legislature had specifically granted the administrative agency the authority to impose fines up to \$1000 for a violation of any provision of the statute.<sup>214</sup> The court recognized the general liberality in the trend of cases that has permitted broad grants of discretion to administrative officials justified by the need "to facilitate the administration of the laws as the complexity of the governmental and economic conditions increase[d]."<sup>215</sup>

The court explained that a valid delegation of legislative authority to an administrative agency must be accompanied by sufficient legislative safeguards or standards to prevent a violation of both the separation of powers provision and due process.<sup>216</sup> The court noted that "[n]o meaningful judicial review of the Commission's assessment of such penalties would appear possible in light of the unrestricted nature of the discretion sought to be vested in the

Act:

through any appropriate means; including but not limited to . . . (ii) the imposition of a civil penalty, not in excess of \$1,000, for the violation of any provision of this Chapter, (iii) the imposition of an award of money damages against a landlord or tenant for the benefit of either as may be provided for in this Chapter.

*Id.* at 408, 312 A.2d at 228.

210. *See id.* at 406, 312 A.2d at 227-33.

211. *See id.* at 441, 312 A.2d at 246.

212. *See id.* at 440-41, 312 A.2d at 245-46. There was no need for the court to inquire whether the power was actually delegated because the legislature specifically delegated the power to fine. *See id.* The court further indicated that the power to fine may be constitutionally delegated by the legislature. *See id.* at 441, 312 A.2d at 246. Therefore, the administrative agency was not legislating, *per se*, when it imposed a fine because the legislature had specifically delegated the authority.

213. *See id.* at 441-42, 312 A.2d at 246.

214. *See id.* at 441, 312 A.2d at 246.

215. *Id.* at 442, 312 A.2d at 246.

216. *See id.*

Commission."<sup>217</sup> The *Investor's Funding* court concluded that the unlimited discretion to impose a fine "up to \$1000 without regard to the nature or gravity of the violation . . . constitute[d] an invalid delegation of legislative powers and otherwise violate[d] due process of law requirements."<sup>218</sup>

Recently, in *Christ v. Maryland Department of Natural Resources*,<sup>219</sup> the court of appeals addressed a broad grant of power by the General Assembly to the Department of Natural Resources.<sup>220</sup> The enabling statute at issue granted the Department the power to "adopt regulations governing the 'operations of any vessels' which are subject to the Act."<sup>221</sup> Pursuant to this grant of power, the Department issued a regulation<sup>222</sup> that prohibited persons under the age of fourteen from operating personal watercraft on Maryland waterways.<sup>223</sup> Charles R. Christ sought declaratory relief on behalf of his minor son, challenging the Department's regulation.<sup>224</sup> Christ challenged the constitutionality of the power asserted under the delegation doctrine<sup>225</sup> and whether the Department properly executed its powers as they were conferred by the enabling legislation.<sup>226</sup>

The court of appeals rejected Christ's argument that the enabling legislation violated the separation of powers principle.<sup>227</sup> The court explained that the separation of powers principle does not act

217. *Id.*

218. *Id.* at 441, 312 A.2d at 246. The court concluded that the agency's power to fine had a "total absence of any legislative safeguards." *Id.* However, the concurring opinion aptly recognized that the delegated power at issue was judicial in nature, rather than legislative. *See id.* at 459-60, 312 A.2d at 255 (Barnes, J., concurring in part and dissenting in part).

219. 335 Md. 427, 644 A.2d 34 (1994).

220. *See id.* at 431-32, 644 A.2d at 35-36.

221. *Id.* at 437, 644 A.2d at 39.

222. The regulation at issue in *Christ* was COMAR 08.18.02.05A. *See id.* at 431 n.1, 644 A.2d at 35 n.1. This regulation provided that "[a] person may not lease, hire, rent, operate, or give permission to operate a personal watercraft unless the operator is 14 years old or older." *Id.* at 433, 644 A.2d at 36.

223. The statutory grant relied on by the Department of Natural Resources to adopt the regulation at issue was section 8-704 of the Natural Resources Article which provided that "[t]he Department may adopt regulations necessary to carry out the provisions of the subtitle." *Id.* at 432 n.2, 644 A.2d at 36 n.2.

224. *See id.* at 433, 644 A.2d at 36.

225. *See id.* at 441-45, 644 A.2d at 40-42.

226. *See id.* at 437-40, 644 A.2d at 38-39. For a discussion of the statutory construction analysis employed by the *Christ* court, see *infra* notes 276-97 and accompanying text.

227. *See Christ*, 335 Md. at 445, 644 A.2d at 42.

as a complete bar between the branches of government.<sup>228</sup> Specifically, the court noted that the delegation of legislative power to an executive agency will not violate the separation of power principle when the regulation is accompanied by “guidelines or safeguards, sufficient under the circumstances, [and] contained in the pertinent statute or statutes.”<sup>229</sup>

The court concluded, in this instance, that the enabling legislation did not create a constitutional violation of the separation of powers principle because adequate legislative safeguards were present.<sup>230</sup> For example, the department could not present any proposed legislation “without first soliciting the advice and opinions of public officials and representatives of specified types of organizations.”<sup>231</sup> Further safeguards included the requirements of “notice, public comments and public hearings.”<sup>232</sup>

Additionally, Christ maintained that, “a fundamental policy making decision,” may not be constitutionally delegated by the leg-

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228. *See id.* at 441, 644 A.2d at 40.

229. *Id.*; *see also* *Judy v. Schaefer*, 331 Md. 239, 263, 627 A.2d 1039, 1051 (1993) (determining that the governor’s statutory authority to reduce budget appropriations by up to twenty-five percent did not violate separation of powers because the limitations on the governor’s exercise of authority provided sufficient safeguards); *Maryland State Police v. Warwick Supply & Equip. Co.*, 330 Md. 474, 480-81, 624 A.2d 1238, 1241 (1993) (determining that a Board of Public Works’s regulation was consistent with its enabling statute and did not violate the separation of powers bar); *Department of Transp. v. Armacost*, 311 Md. 64, 72, 532 A.2d 1056, 1060 (1987) (importing standards from a federal program to validate a state program). The *Christ* court noted that the requirement of legislative safeguards had been relaxed in prior decisions. *See Christ*, 335 Md. at 441, 644 A.2d at 40 (citing *Pressman v. Barnes*, 209 Md. 544, 555, 121 A.2d 816, 822 (1956)).

230. *See Christ*, 335 Md. at 445, 644 A.2d at 42. Quoting *Pressman*, which acts as an exception to the standards or safeguards requirement, the court stated the requirement for guidelines is not absolute “where the discretion to be exercised relates to . . . 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.” *Id.* at 441-42, 644 A.2d at 40-41; *see also Judy*, 331 Md. at 263-64, 627 A.2d at 1051-52. The court, however, did not reach the *Pressman* analysis noted above because there were adequate legislative safeguards within the enabling legislation. *See Christ*, 335 Md. at 443-44, 644 A.2d at 42. For a discussion of the exception to the legislative standards or safeguards requirement developed in *Pressman*, *see infra* notes 239-62 and accompanying text.

231. *Christ*, 335 Md. at 443, 644 A.2d at 41.

232. *Id.* at 444, 644 A.2d at 42.

islature to the executive branch.<sup>233</sup> This type of fundamental policymaking argument has proven convincing to one Supreme Court Justice<sup>234</sup> and the court of appeals agreed that "the General Assembly cannot constitutionally delegate to another body its 'fundamental decisionmaking authority' in the sense that it cannot delegate a function which the Constitution expressly and unqualifiedly vests in the General Assembly itself."<sup>235</sup> The court intimated, however, that fundamental decisionmaking authority is a narrowly limited concept that includes such acts as the power to impeach, propose constitutional amendments, or to enact statutes.<sup>236</sup> The *Christ* court opined that prior decisions of the court of appeals have "repeatedly upheld the constitutionality of administrative regulations reflecting policy determinations which have been just as 'fundamental' as the age restriction" set forth in the regulation at issue.<sup>237</sup> Thus, the court held the legislature may authorize administrative agencies with a broad grant of power to promulgate legislative-type rules such as those at issue.<sup>238</sup> *Christ* does not represent the high-water mark for the court of appeals's liberalization of the nondelegation doctrine. Several decades before *Christ*, the court of appeals began to carve out an exception to the legislative standards requirement.

*d. The Impracticability Exception to the Legislative Standards or Safeguard Requirement*

In *Pressman v. Barnes*,<sup>239</sup> the court of appeals created the first true exception to the legislative standards requirement for areas involving police regulations of public safety.<sup>240</sup> In *Pressman*, taxpayers brought suit against the Director of Traffic, the Mayor, and the City Council of Baltimore<sup>241</sup> alleging that the municipal corporation im-

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233. *Id.* *Christ* relied on opinions of the Supreme Court of California. *See id.* (citing *People v. Wright*, 639 P.2d 267 (Cal. 1982); *Krugler v. Yocum*, 445 P.2d 303, 306 (Cal. 1968)).

234. *See Industrial Union Dep't v. American Petroleum Inst.*, 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring) ("When fundamental policy decisions underlying important legislation about to be enacted are to be made, the buck stops with Congress and the President insofar as he exercises his constitutional role in the legislative process.").

235. *Christ*, 335 Md. at 444, 644 A.2d at 42.

236. *See id.* at 444-45, 644 A.2d at 42.

237. *Id.* at 445, 644 A.2d at 42.

238. *See id.*

239. 209 Md. 544, 121 A.2d 816 (1956).

240. *See id.* at 555, 121 A.2d at 822.

241. The ordinance at issue gave the Mayor of Baltimore the power to appoint the

properly delegated the power to regulate the speed limits on certain streets in Baltimore City to the Director.<sup>242</sup> Plaintiffs argued, *inter alia*, that this delegation of power violated the separation of powers provision of the Maryland Declaration of Rights.<sup>243</sup>

The *Pressman* court first noted that “[i]t is a fundamental principle that, except when authorized by the Constitution, the Legislature cannot delegate the power to make laws to any other authority.”<sup>244</sup> Citing the separation of powers provision, the court explained that generally, any attempt to abdicate legislative authority is unconstitutional.<sup>245</sup> However, the court went on to note that the separation of powers provision is not violated when a municipal corporation is vested with legislative powers as to local concerns if the legislature provided standards for restraint and guidance.<sup>246</sup> Thus, the *Pressman* court acknowledged that the delegation of

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Director of Traffic. *See id.* at 549, 121 A.2d at 819. The case repeatedly refers to this delegation of power as a delegation to the Mayor and the City Council. This Note refers to the two parties collectively as the “municipal corporation.”

242. *See id.* at 549-50, 121 A.2d at 819.

243. *See id.* at 552, 121 A.2d at 820. The municipal corporation delegated the power to set speed limits to the Director. *See id.* at 549-52, 121 A.2d at 819-20. The taxpayers argued, *inter alia*, that the legislative function of setting speed limits could not lawfully be delegated by the municipal corporation to the Director. *See id.* at 549, 121 A.2d at 819-20. The issue turned on whether executive officers, the municipal corporation, could sub-delegate their legislative authority to a lower level executive, the Director. *See id.* at 552-54, 121 A.2d at 820-21. However, the standards established in *Pressman* have been applied to determine the validity of delegations of power by the legislative branch to administrative agencies as well. *See, e.g.,* County Council for Montgomery County v. Investor's Funding Corp., 270 Md. 403, 441, 312 A.2d 225, 246 (1973) (rendering a delegation by the legislature to an agency invalid because it lacked legislative safeguards or standards).

244. *Pressman*, 209 Md. at 552, 121 A.2d at 820.

245. *See id.*

246. *See id.* The court stated that the same constitutional restrictions bind a municipal corporation and the legislature. *See id.* The court also noted that a municipal corporation may sub-delegate powers to subordinate officials in order to carry out ordinances. *See id.* Although this delegation requires the exercise of discretion by the subordinate officer, the court explained that this discretion can fairly be considered part of the police power of the executive branch. *See id.* The court cited *Tighe v. Osborne*, 150 Md. 452, 133 A. 465 (1926), in support of the proposition that this discretion is constitutional if accompanied by sufficient legislative safeguards to avoid arbitrary and unreasonable exercises of power. *See id.*; *see also* County Comm'rs of Prince George's County v. Northwest Cemetery Co., 160 Md. 653, 656, 154 A. 452, 453 (1931) (voiding a statute that provides county commissioners with unregulated discretion to allow or prevent the establishment or maintenance of cemeteries).

power to Baltimore City, a municipal corporation, to regulate local traffic was appropriate.<sup>247</sup>

The *Pressman* court then considered whether the power to regulate speed limits could be sub-delegated by the municipal corporation.<sup>248</sup> The court explained that the same type of legislative standards inquiry applies when a municipal corporation sub-delegates legislative powers to local administrative agencies.<sup>249</sup> The power delegated by the legislature that was sub-delegated by the municipal corporation related to a matter of public safety.<sup>250</sup> The *Pressman* court noted that prior decisions had lowered standards in delegation cases in areas such as zoning<sup>251</sup> and public health<sup>252</sup> and reasoned that delegations in the area of public safety should be at least as flexible as in the area of public health.<sup>253</sup>

After identifying the general trend towards liberally applying the nondelegation doctrine to areas of public health, safety, and welfare, the *Pressman* court analyzed whether the municipality's ordinance set forth adequate legislative standards to prevent arbitrary enforcement by the Director.<sup>254</sup> Normally, a delegation of power must contain standards to guide the exercise of power.<sup>255</sup> However, the ordinance that enabled the Director of Traffic to create speed limits contained no standards.<sup>256</sup> Thus, the *Pressman* court was forced to decide that the statute violated the nondelegation doctrine because it lacked adequate legislative standards or require an exception to the legislative standards requirement.

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247. See *Pressman*, 209 Md. at 554, 121 A.2d at 821.

248. See *id.* at 552-53, 121 A.2d at 820-21.

249. See *id.* at 552, 121 A.2d at 820.

250. See *id.* at 553, 121 A.2d at 821.

251. See *Tighe*, 150 Md. at 457-58, 133 A. at 467 (1926) (holding that the Mayor and City Council of Baltimore may delegate to the Zoning Commissioner the ability to determine whether the proposed use of buildings would interfere with public security, health, or morals).

252. See *Givner v. Commissioner of Health*, 207 Md. 184, 191, 113 A.2d 899, 902 (1955) (noting that more flexible standards are permitted in public health than in zoning).

253. See *Pressman*, 209 Md. at 553, 121 A.2d at 821.

254. See *id.* at 554-55, 121 A.2d at 821. Typically, these standards must be provided to prevent arbitrary or unreasonable exercise of power by the administrative agency beyond the proper scope of the police power. See *id.*

255. See *id.*

256. See *id.* at 550, 121 A.2d at 819 (citing section 2 of the ordinance that empowered the Director and listed such powers). Through its analysis, the *Pressman* court indicated that no standards were specifically listed in the ordinance. See *id.* at 555, 121 A.2d at 822.

The court held that when the discretion to be exercised relates "to police regulations for the protection of public morals, health, safety, or general welfare," the regulation could be valid absent any standards, but only if it was impracticable for the legislature to fix these standards without destroying the flexibility necessary to carry out the legislative intent.<sup>257</sup> Thus, in considering this issue, the *Pressman* court established an impracticability exception to the general rule that prevents delegations without standards or safeguards.<sup>258</sup>

The *Pressman* court concluded that the statute at issue did not contain restrictions to prevent abuse, but fell within the impracticability exception.<sup>259</sup> The court held that under a public safety rationale, the municipal corporation lawfully delegated the power to set speed limits on the streets of Baltimore to the Director without any legislative standards or safeguards.<sup>260</sup> The court reasoned that it was impossible for the legislature to prescribe restrictive guidelines for traffic regulation because traffic regulation was so complex.<sup>261</sup> Thus, under the limited exception established in *Pressman*, a standard-less delegation may be valid in situations in which it would be impracticable to set standards without destroying the flexibility necessary to enable administrative officials to carry out the legislature's intent.<sup>262</sup>

These cases illustrate two levels of inquiry that Maryland courts will engage in when determining a nondelegation issue. Under *Investor's Funding*, when a court determines the validity of a broad grant of power to an administrative agency, the court must consider whether there were adequate standards or safeguards provided by the legislature.<sup>263</sup> If there are no standards or safeguards for gui-

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257. *Id.* The court explained:

[g]enerally, a statute or ordinance vesting discretion in administrative officials without fixing any standards for their guidance is an unconstitutional delegation of legislative power. But we also hold, as a qualification of the general rule, that 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.* (citations omitted).

258. *See id.*

259. *See id.* at 554-55, 121 A.2d at 821-22.

260. *See id.* at 554, 121 A.2d at 821.

261. *See id.* at 553, 555, 121 A.2d at 821-22.

262. *See id.* at 555, 121 A.2d at 822.

263. *See supra* text accompanying note 213.

dance, a regulation must be held invalid unless it falls within the *Pressman* exception—when standards would be impracticable to set.<sup>264</sup> Under *Christ*, if either of these tests are met, the administrative agency may promulgate regulations that are consistent with the letter and spirit of the enabling statute.<sup>265</sup> Determining what is within the letter and spirit of an enabling statute requires a court to perform a statutory construction analysis.<sup>266</sup> Section IV of this Note highlights a few canons of statutory construction that courts often utilize in the administrative law context in deciphering the legislature's intent.

#### IV. MARYLAND'S RULES OF STATUTORY CONSTRUCTION IN ADMINISTRATIVE LAW

As noted, broad statutory delegations of administrative regulatory authority are often challenged on constitutional grounds.<sup>267</sup> Claimants often argue that the nondelegation doctrine is violated when a legislative body assigns its "lawmaking function" to an administrative agency.<sup>268</sup> However, broad delegations of power are rarely voided under the nondelegation doctrine.<sup>269</sup> Maryland courts have recognized that the legislature is often unable to anticipate every specific grant of power to promulgate each necessary regulation as "it is manifestly impracticable for the legislature to set specific guidelines to govern the day-to-day exercise of rulemaking power."<sup>270</sup>

More frequently, courts focus on whether the power exercised by the agency was impermissibly expanded beyond the intent of the legislature.<sup>271</sup> Therefore, a challenge to an agency's exercise of

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264. See *supra* note 257 and accompanying text.

265. See *infra* notes 284-97 and accompanying text.

266. See *infra* notes 276-97 and accompanying text.

267. See *Falik v. Prince George's Hosp. & Med. Ctr.*, 322 Md. 409, 415-18, 588 A.2d 324, 327-28 (1991) (challenging the Workmen's Compensation Commission's discretion to disapprove fees for medical services rendered in excess of Commission guidelines); *Governor of Maryland v. Exxon Corp.*, 279 Md. 410, 440-41, 370 A.2d 1102, 1119 (1979), *aff'd*, 437 U.S. 117 (1978) (challenging the constitutionality of a statute proscribing petroleum producers or refiners from selling petroleum products at retail outlets).

268. See, e.g., *Pressman v. Barnes*, 209 Md. 544, 121 A.2d 816 (1956).

269. For a discussion of the liberalization of the nondelegation doctrine by Maryland courts, see *supra* notes 195-262 and accompanying text.

270. *Sullivan v. Board of License Comm'rs*, 293 Md. 113, 123, 442 A.2d 558, 563 (1982).

271. See *Pressman*, 209 Md. at 557, 121 A.2d at 823; see also *Falik*, 322 Md. at 417, 588

power often requires the reviewing court to apply canons of statutory construction to the enabling legislation to determine whether the legislature has actually conveyed the specific power sought to be exercised by the agency.<sup>272</sup> The primary purpose of this statutory construction analysis is to carry out the legislature's intent.<sup>273</sup> If the legislature delegates enumerated powers to an agency, and the agency's action extends beyond the reach of the specifically delegated power, then that action may be invalidated by a court.<sup>274</sup> However, Maryland courts extend substantial deference to legislative decisions to delegate a broad grant of power to administrative agencies.<sup>275</sup>

*Christ v. Maryland Department of Natural Resources*<sup>276</sup> is illustrative of the general deference courts will accord an agency attempting to carry out the intent of the legislature.<sup>277</sup> In addition to the constitutional challenge previously discussed,<sup>278</sup> the court of appeals held that a broad grant of power under an enabling statute permitted the Department of Natural Resources to promulgate a regulation prohibiting children under the age of fourteen from operating personal watercraft.<sup>279</sup> Christ argued that the statute<sup>280</sup> did not provide the administrative agency with the power to promulgate a regulation<sup>281</sup> that would prevent persons under a certain age from operat-

A.2d at 328.

272. For a discussion of the application of a statutory construction analysis to determine what was included under a broad legislative grant of authority, see *infra* notes 336-55 and accompanying text.

273. See *Holy Cross Hosp. v. Health Servs. Cost Review Comm'n*, 283 Md. 677, 684, 393 A.2d 181, 184 (1978) (citing *Mazor v. State Dep't of Correction*, 279 Md. 355, 369 A.2d 82 (1977)).

274. See *Brzowski v. Maryland Home Improvement Comm'n*, 114 Md. App. 615, 626, 691 A.2d 699, 704 (1997).

275. See *Sullivan*, 293 Md. at 122, 442 A.2d at 563 (observing that the court of appeals has "upheld broad delegations of legislative power to administrative agencies" in a long line of cases).

276. 335 Md. 427, 644 A.2d 34 (1994).

277. See *id.* at 431, 644 A.2d at 35 (resolving a declaratory judgment action brought to challenge a Department of Natural Resources regulation prohibiting the operation of personal watercraft by a person under the age of 14).

278. For a discussion of the constitutional challenge considered in *Christ*, see *supra* notes 219-38 and accompanying text.

279. See *Christ*, 335 Md. at 443, 644 A.2d at 41.

280. See MD. CODE ANN., NAT. RES. I. § 8-704 (Supp. 1997). The statute notes that, "[t]he Department may adopt regulations necessary to carry out the provisions of this subtitle." *Id.*

281. The Department promulgated a regulation in the Code of Maryland Regula-

ing watercraft.<sup>282</sup> The court of appeals disagreed.<sup>283</sup>

The *Christ* court noted that its prior decisions generally upheld administrative agency rules or regulations "as long as they did not contradict the language or purpose of the statute."<sup>284</sup> *Christ* asserted that the Department contradicted the purpose of the enabling statute by "prohibit[ing] the use of vessels by an entire class of citizens of the State."<sup>285</sup> The court suggested that *Christ's* reading of the purpose of the statute was unduly narrow.<sup>286</sup> The court opined that the legislature's grant of power to the agency was purposefully broad.<sup>287</sup> The court concluded, "[i]n any particular area of legislative concern, whether there should be a broad general delegation of regulatory authority to administrators, or a more specific delegation, is a choice for the General Assembly."<sup>288</sup>

The thrust of the plaintiff's argument was that the Department's mission, as enunciated in the Department's enabling statute, was to promote boat safety and education.<sup>289</sup> As such, completely prohibiting youngsters from operating boats was inconsistent with this mission.<sup>290</sup> The plaintiff reasoned that this inconsistency existed because the State Boat Act evinced an "overall spirit" to educate young boaters as opposed to prohibit them from operating certain vessels.<sup>291</sup>

The court stated that the General Assembly need not specifically delegate the power to prevent a class of persons from operating watercraft.<sup>292</sup> The court noted that "[t]he broad authority to promulgate 'regulations governing the . . . operations of any vessels'

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tions, which provided: "A person may not lease, hire, rent, operate, or give permission to operate a personal watercraft unless: (1) the operator is 14 years old or older . . ." COMAR 08.18.02.05A.

282. See *Christ*, 335 Md. at 433-34, 644 A.2d at 36-37.

283. See *id.* at 437, 644 A.2d at 39.

284. *Id.* at 438, 644 A.2d at 39.

285. *Id.* at 439, 644 A.2d at 39.

286. See *id.*

287. See *id.*

288. *Id.*

289. See *id.* at 437, 644 A.2d at 38. The State Boat Act directs the Department to "[p]romote the safety of life and property through an educational program directed to boat owners, boat operators, and others concerning the inherent hazards of vessels." MD. CODE ANN., NAT. RES. I § 8-703(a)(2) (1990 & Supp. 1993).

290. See *Christ*, 335 Md. at 437, 644 A.2d at 38.

291. See *id.*

292. See *id.*

plainly encompasses a regulation prohibiting the operation of certain motor vessels by persons under 14.”<sup>293</sup> The court’s conclusion was supported by cases in which it previously held that it would be impracticable for the legislature to set specific guidelines to govern the day-to-day exercise of rulemaking power.<sup>294</sup>

The court agreed that the legislative intent behind the enabling statute was to promote boating safety.<sup>295</sup> However, the court held that the agency’s regulation restricting the age of boat operators was “a reasonable regulation to promote the statutory purpose of boating safety.”<sup>296</sup> Thus, the *Christ* court held that the regulation at issue was promulgated pursuant to a broad grant of power, and therefore could include age restrictions because it would be impracticable for the legislature to have to deal with the complex issues of boating safety.<sup>297</sup>

While *Christ* illustrates the deference accorded by the courts to administrative agencies, an agency’s power is not unlimited. For example, in *Pressman*, after resolving the constitutional issue,<sup>298</sup> the court conducted a thorough statutory construction analysis<sup>299</sup> of an enabling statute that conferred power to the City of Baltimore. The *Pressman* court examined whether an enabling statute passed by the

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293. *Id.*

294. *See id.*; *see also* Falik v. Prince George’s Hosp., 322 Md. 409, 417, 588 A.2d 324, 328 (1991); Sullivan v. Board of License Comm’rs, 293 Md. 113, 122-23, 442 A.2d 558, 563 (1982); Governor of Maryland v. Exxon Corp., 279 Md. 410, 441, 370 A.2d 1102, 1119 (1977), *aff’d*, 437 U.S. 117 (1978).

295. *See Christ*, 335 Md. at 443, 644 A.2d at 41.

296. *Id.*

297. *See id.* at 439-41, 644 A.2d 39-40.

298. For a discussion of the *Pressman* court’s constitutional inquiry, *see supra* text accompanying notes 239-62.

299. *See Pressman v. Barnes*, 209 Md. 544, 558-59, 121 A.2d 816, 823-24 (1956). The *Pressman* court noted that in determining the legislative intent of an enactment, a court should consider the language used by the legislature in its natural and ordinary sense. *See id.* at 558, 121 A.2d at 823. If no ambiguity exists, applying the canons of statutory construction is unnecessary. *See id.* If the words used are ambiguous on their face, their meanings may be expanded or contracted to harmonize the language of the statute with the legislature’s intent if that intent can be ascertained by the construction. *See id.* The meaning of the words depends on the history of the statute and its objectives. *See id.* at 558-59, 121 A.2d at 823; *see also* United States v. Hartwell, 73 U.S. (6 Wall.) 385, 395-96 (1867) (noting that penal statutes are to be construed strictly and intent is to be gathered from the words used in context); Norfolk & Portsmouth Traction Co. v. Ellington’s Admiral, 61 S.E. 779, 782 (Va. 1908) (relying on context and “remedy in view” in interpreting an ambiguous statute).

Maryland General Assembly that allowed the City of Baltimore to regulate any road within the city's limits, except for extensions of state roads, included the power to regulate roads within the city marked as state roads.<sup>300</sup> Baltimore's City Council delegated the power to the Director of Traffic.<sup>301</sup> In turn, the Director of Traffic posted speed limits on roads within the city's boundaries.<sup>302</sup> After the *Pressman* court determined that the delegation of power to the City Council did not violate the separation of powers doctrine,<sup>303</sup> it addressed whether the Director of Traffic's administrative regulation was within the domain of powers conferred by the General Assembly.<sup>304</sup>

The City argued that the ordinance passed by the Director did not affect any streets that were "designated or *maintained* as a part of the State or Federal highway system or an extension thereof."<sup>305</sup> The City reasoned that the ordinance was lawful because the City did not exceed the lawmaking power given to it by the General Assembly.<sup>306</sup> Although the taxpayers conceded that the state did not maintain the roads at issue, they argued that many of the city streets were "part of the State highway system or at least extensions of that system."<sup>307</sup> Therefore, the taxpayers asserted that the exercise of power by the city over these streets exceeded the power given to it by the state legislature.<sup>308</sup>

The court's interpretation of the statute necessarily focused on whether the streets at issue were considered "extensions" of state highways.<sup>309</sup> The court first noted that the cardinal rule of statutory

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300. *See Pressman*, 209 Md. at 557, 121 A.2d at 823. The statute stated in relevant part:

[n]otwithstanding any other provision of this Article, the appropriate authorities of any incorporated city . . . are authorized . . . to regulate the speed of vehicles on any road . . . which is within their respective corporate limits and which has not been designated or maintained as a part of the State or Federal highway system or an extension thereof.

*Id.*

301. *See id.* at 549, 121 A.2d at 819.

302. *See id.*

303. *See id.* at 554, 121 A.2d at 821.

304. *See id.* at 557-61, 121 A.2d at 823-24.

305. *Id.* at 557, 121 A.2d at 823.

306. *See id.*

307. *Id.* at 557-58, 121 A.2d at 823.

308. *See id.*

309. *See id.* at 559, 121 A.2d at 824.

construction is that statutes should always be construed to carry out the legislature's intent.<sup>310</sup> The court further stated that in cases of ambiguity, the proper course of construction is to adopt the meaning that best harmonizes with the context of the statute and promotes the policies and objectives of the legislature.<sup>311</sup>

The *Pressman* court considered the meaning of "extension" and noted that it is a flexible term that lends "itself to a variety of meanings."<sup>312</sup> The court reasoned that because the meaning of the word extension was flexible, it had to be ascertained within the context of the particular factual situation.<sup>313</sup> The *Pressman* court analyzed "extension" in the context of city streets that were continuations of the State highway system.<sup>314</sup> The court highlighted the fact that the streets at issue, despite being within city limits, were clearly marked with state road signs "erected by the State Roads Commission."<sup>315</sup> In light of the broad meaning of the word extension, in conjunction with the state road signs, the court held that the regulation of these roads by the state was beyond the power conferred to it by the statute.<sup>316</sup> Therefore, the Director of Traffic was enjoined from posting speed limits on these roads because the city never had the power to grant the Director the authority to do so.<sup>317</sup>

The *Pressman* court's analysis illustrates a commonly asserted alternative ground on which to challenge a delegation of power to an agency when a nondelegation doctrine argument fails.<sup>318</sup> While Maryland cases indicate that the courts are willing to accord substantial deference to agency rulemaking pursuant to broad statutory grants of power, it would be inaccurate to conclude that litigants challenging an agency's power are left without canons in their arsenal. Subsection A elaborates on the primary canons of construction that apply to the administrative law context.

#### A. *Three Primary Methods of Determining Legislative Intent*

Ordinarily, an administrative remedy must be invoked before

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310. *See id.* at 558, 121 A.2d at 823.

311. *See id.* at 558-59, 121 A.2d at 823.

312. *Id.* at 559, 121 A.2d at 824.

313. *See id.*

314. *See id.*

315. *Id.* at 559-60, 121 A.2d at 824.

316. *See id.* at 560, 121 A.2d at 824.

317. *See id.*

318. *See id.*

resorting to an independent judicial remedy.<sup>319</sup> After a party exhausts its administrative remedies, it may seek judicial relief on the grounds that the agency's construction of the enabling statute was erroneous. When construing a statute in the administrative law context, courts will apply the traditional canons of statutory construction.<sup>320</sup> In addition to traditional canons of statutory construction, there are several unique canons of construction that apply to administrative law decisions.<sup>321</sup>

Courts often examine three factors when trying to determine the legislature's intent with respect to determining the scope of power granted to an agency under an enabling act. The primary factor courts look to is the construction that the administrative agency placed on the statute shortly after it was passed.<sup>322</sup> This construction often has a "strong, persuasive influence" on a court's overall interpretation.<sup>323</sup> Additionally, courts will look to the nature of the process that led to the agency's interpretation. The second factor courts consider is the Attorney General's interpretation of the statute.<sup>324</sup> Courts will presume that the legislature is aware of an At-

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319. See *Maryland-Nat'l Capital Park & Planning Comm'n, v. Crawford*, 307 Md. 1, 25, 511 A.2d 1079, 1091 (1986) (noting that a plaintiff must invoke and exhaust his administrative remedies before maintaining an action in court).

320. See 3 NORMAN J. SINGER, *STATUTES AND STATUTORY CONSTRUCTION* § 65.02, at 312 (5th ed. 1992) ("The usual rules of statutory construction are controlling for the purpose of determining what administrative powers, rights, privileges and immunities are granted.").

321. See *Holy Cross Hosp. v. Health Servs. Cost Review Comm'n*, 283 Md. 677, 685-86, 393 A.2d 181, 185 (1978).

322. See *Demory Bros. v. Board of Pub. Works*, 20 Md. 467, 473, 316 A.2d 529, 532 (1974).

323. *Holy Cross*, 283 Md. at 685, 393 A.2d at 185; see also *Farber's, Inc., v. Comptroller of the Treasury*, 266 Md. 44, 50-51, 291 A.2d 658, 661-62 (1972) (explaining that an administrative construction of a statute applied shortly after the enactment of the statute should not be disregarded "except for the strongest and most cogent reasons," while rules and regulations adopted by administrative agencies must be reasonable and consistent with the letter and policy of the statute under which the agency acts); *F. & M. Schaefer Brewing Co. v. Comptroller of the Treasury*, 255 Md. 211, 218, 257 A.2d 416, 419 (1969) (illustrating an argument made by the Comptroller that his construction of the statute should be strongly persuasive and influential on the judicial construction of the statute). On the federal level, broad judicial deference is given to an agency's construction of a statute. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 851 (1984) (explaining that judicial deference must be accorded to an agency's construction of a statute).

324. See *Demory Bros.*, 20 Md. at 473, 316 A.2d at 532.

torney General's interpretation.<sup>325</sup> The final factor courts look to is the legislative history of the statute, particularly the presence or absence of legislative amendments which would support or exempt an agency's interpretation.<sup>326</sup>

### 1. The Agency's Construction of the Statute

Statutory construction is a judicial function.<sup>327</sup> However, courts will consider an agency's interpretation of an enabling statute when deciphering the legislature's intent.<sup>328</sup> If the statutory language in question is ambiguous, a long-standing administrative interpretation may be given weight.<sup>329</sup> Indeed, Maryland courts have gone so far as to hold that an agency's interpretation "should not be disregarded except for the strongest and most urgent reason."<sup>330</sup>

In particular, a long-standing administrative interpretation that was established immediately or shortly after the enabling act passed and that continued uniformly thereafter gives rise to a strong presumption that the interpretation is correct.<sup>331</sup> Courts will construe an absence of legislative amendments as indicative of a continuous

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325. *See id.*

326. *See id.*

327. *See Mitchell v. Register of Wills*, 227 Md. 305, 311, 176 A.2d 763, 766 (1962) (holding that the Maryland General Assembly acquiesced in an administrative agency's construction of a statute where the General Assembly had ample time to amend it and did nothing).

328. *See Commission on Human Relations v. Baltimore County*, 46 Md. App. 45, 58, 415 A.2d 856, 863 (1980).

329. *See Macke Co. v. State Dep't of Assessments & Taxation*, 264 Md. 121, 134, 285 A.2d 593, 599-600 (1972) (giving great weight to twenty-five year administrative interpretation of a statute); *Department of Motor Vehicles v. Greyhound Corp.*, 247 Md. 662, 669, 234 A.2d 255, 258 (1967) (noting that an administrative interpretation is accorded "great weight by the courts").

330. *Holy Cross Hosp. v. Health Servs. Cost Review Comm'n*, 283 Md. 677, 685, 393 A.2d 181, 185 (1978).

331. *See Baltimore Gas & Elec. Co. v. Public Serv. Comm'n*, 305 Md. 145, 161, 501 A.2d 1307, 1315 (1986) (noting that an agency charged with the administration of a statute is entitled to great deference in its interpretation, especially when the interpretation has been consistently applied for a long period of time); *National Asphalt Pavement Assoc. v. Prince George's County*, 292 Md. 75, 80, 437 A.2d 651, 653 (1981) (noting that a consistent construction of a statute by an administrative agency responsible for administering the statute is entitled to considerable weight); *Holy Cross*, 283 Md. at 685-86, 393 A.2d at 185; *see also Board of Educ. v. Lendo*, 295 Md. 55, 63, 453 A.2d 1185, 1189 (1982) (noting that an agency's interpretation of a statute more than a half of a century after its enactment is not long-standing).

acquiescence to the administrative construction.<sup>332</sup> Legislative acquiescence to the administrative construction of the statute will be deemed to have occurred when the legislature had "ample time to amend it," but remained silent.<sup>333</sup> Thus, Maryland courts, in effect, use the agency's construction to infer legislative intent.

When the statutory language is unambiguous, an administrative interpretation that directly conflicts with its plain meaning will not be given weight, even if the interpretation was long-standing.<sup>334</sup> Moreover, little or no weight will be given to an administrative interpretation of a statute if an agency has inconsistently interpreted the statute or has failed to enforce the statute in accordance with the agency's own interpretation.<sup>335</sup> An illustrative example of an agency's inconsistent interpretation of its enabling statute and its effect on a court's statutory construction analysis is *Holy Cross Hospital v. Health Services Cost Review Commission*.<sup>336</sup>

In *Holy Cross*, the court of appeals was called on to interpret a broad statutory grant of power by the Maryland General Assembly to the Maryland Health Services Cost Review Commission.<sup>337</sup> The broad enabling legislation granted the Commission the power to

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332. See *Holy Cross*, 283 Md. at 685, 393 A.2d at 181.

333. *Id.* When the administrative agency responsible for administering the statute has made its interpretation known to the legislature in agency reports, it is entitled to great weight. See *Falik v. Prince George's Hosp. & Med. Ctr.*, 322 Md. 409, 416, 588 A.2d 324, 327 (1991) (noting that considerable weight should be given to an administrative construction of a statute when the legislature was aware of the interpretation in the agency's reports).

334. See *Falik*, 322 Md. at 416, 588 A.2d at 327 ("[W]hen the statutory language is unambiguous, administrative constructions, no matter how well entrenched, are not given weight."); *Lendo*, 295 Md. at 63, 453 A.2d at 1189 (noting that "[n]o custom, however venerable, can nullify the plain meaning and purpose of a statute"); *Holy Cross*, 283 Md. at 685, 393 A.2d at 185; *City of Hagerstown v. Long Meadow Shopping Ctr.*, 264 Md. 481, 493, 287 A.2d 242, 248 (1972) (noting that adherence to the rule of deference to long-standing administrative interpretation is conditional upon the enabling statute being ambiguous); *Shapiro v. City of Baltimore*, 230 Md. 199, 216, 186 A.2d 605, 615 (1962) (noting that no custom, no matter how long it has been followed by administrative officials, can nullify the plain meaning and purpose of the statute).

335. See *Comptroller of the Treasury v. John C. Louis Co.*, 285 Md. 527, 545, 404 A.2d 1045, 1056 (1979); 2B SINGER, *supra* note 320, § 49.05, at 18 ("[W]eight given to an agency interpretation depends on many factors including . . . its consistency with earlier and later agency pronouncements.").

336. 283 Md. 677, 393 A.2d 181 (1978).

337. See *id.* at 679, 393 A.2d at 182.

regulate hospital charges.<sup>338</sup> The central issue was whether the Commission's act of setting physicians' fees went beyond the scope of power granted to the Commission by its enabling legislation.<sup>339</sup>

Under the enabling act, the Commission was granted quasi-legislative powers.<sup>340</sup> Specifically, the enabling act at issue granted the Commission the power to regulate the "total costs of the hospital" and to "review and approve the reasonableness of rates established or requested by any hospital."<sup>341</sup> The Commission established physicians' fees in the specialties of cardiology, pathology, and radiology.<sup>342</sup>

The Commission was of the opinion that this act fell within its authority to regulate the total costs of the hospital.<sup>343</sup> Holy Cross Hospital challenged the regulation, arguing that the contested physicians' fees were not part of the total costs of the hospital; therefore, the Commission exceeded its authority under the enabling act.<sup>344</sup> In an attempt to discern whether the total costs of the hospital included the contested physicians' fees<sup>345</sup> the *Holy Cross* court ap-

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338. *See id.* at 682-83, 393 A.2d at 184.

339. *See id.* at 679, 393 A.2d at 182. The statute in *Holy Cross* stated that the Commission had the power to "[e]xercise, subject to the limitations and restrictions herein imposed, all other powers which are reasonably necessary or essential to carry out the expressed objects and purposes of this subtitle." *Id.* at 680 n.1, 393 A.2d at 182 n.1 (citing MD. ANN. CODE art. 43, § 568M(3) (1971 & Supp. 1978)).

340. The Commission's powers were quasi-legislative in nature because the Commission could establish hospital rates in accordance with the enabling act. *See id.* at 682-83, 393 A.2d at 184. Under the enabling act, "the hospital's aggregate rates [had to be] reasonably related to the hospital's aggregate costs." *Id.* at 682, 393 A.2d at 184 (quoting MD. ANN. CODE art. 43, § 568U(a) (1971 & Supp. 1978)).

341. *Id.* at 682-83, 393 A.2d at 184.

342. *See id.* at 679, 393 A.2d at 182. The Commission believed that it had the authority to regulate the rates charged in cardiology, pathology, and radiology because those specialties involved services of the hospital and the Commission had the authority to concern itself with all costs associated with the services rendered to patients in the hospital. *See id.* at 680, 393 A.2d at 182-83.

343. *See id.*

344. *See id.* at 681, 393 A.2d at 183.

345. *See id.* at 684-89, 393 A.2d at 184-87. The statute specified:

[T]he Commission shall have the power to initiate such reviews or investigations as may be necessary to assure all purchasers of health care hospital services that the total costs of the hospital are reasonably related to the total services offered by the hospital, [and] that the hospital's aggregate rates are reasonably related to the hospital's aggregate costs . . . . In order to properly discharge these obligations,

plied several general principles of statutory construction.<sup>346</sup>

The Court determined that several possible meanings of the term existed.<sup>347</sup> As such, the statutory language was deemed ambiguous,<sup>348</sup> a finding which permitted the court to place weight on the agency's interpretation.<sup>349</sup> However, no long-standing administrative interpretation of the enabling act existed because the Commission had reversed its position on its authority to establish physicians' fees.<sup>350</sup>

When the enabling act was first passed, the Commission had interpreted the setting of physicians' fees to be outside its scope of

the Commission shall have full power to review and approve the reasonableness of rates established or requested by any hospital subject to the provisions of this subtitle.

*Id.* at 682-83, 393 A.2d at 184 (quoting MD. ANN. CODE art. 43, § 568U (1971 & Supp. 1978)).

346. The court stated a litany of traditional statutory construction principles:

As we have so often said, the cardinal rule of construction of a statute is to ascertain and carry out the real intention of the Legislature. The primary source from which we glean this intention is the language of the statute itself. And in construing a statute we accord the words their ordinary and natural signification. If reasonably possible, a statute is to be read so that no word, phrase, clause, or sentence is rendered surplusage or meaningless. Similarly, wherever possible an interpretation should be given to statutory language which will not lead to absurd consequences. Moreover, if the statute is part of the general statutory scheme or system, the sections must be read together to ascertain the true intention of the Legislature.

*Id.* at 684, 393 A.2d at 184-85 (citations omitted).

However, the court recognized that "construing a statute liberally and adding to it, by judicial fiat, a provision which the Legislature did not see fit to include are not one and the same thing." *Id.* at 685, 393 A.2d at 185 (quoting *Harden v. Maryland Transit Auth.*, 277 Md. 399, 406, 354 A.2d 817, 821 (1976)). The court stated that the legislature's intent was to provide for administrative review of hospital charges to insure that the total costs of the hospital were reasonably related to the total services offered by the hospital. *See id.* at 687, 393 A.2d at 186.

347. The court concluded that "total costs of the hospital means the Hospital's expenditures or outlays of money in connection with the operation of the Hospital." *Id.* at 689, 393 A.2d at 187 (internal quotation marks omitted). The court noted that when the statute was enacted, the term "total costs of the hospital" may have been considered a "term of art in the health care field having a well understood meaning different from its common signification which would include the fees of the physicians here." *Id.*

348. *See id.* at 687-89, 393 A.2d at 186-87.

349. *See id.* at 685, 393 A.2d at 185.

350. *See id.* at 685-86, 393 A.2d at 185.

authority under the act.<sup>351</sup> Several years later, the Commission changed its position and asserted that it had the authority to set physicians' fees.<sup>352</sup> Thus, the Commission's inconsistent interpretation was a factor the court considered in assessing what weight to give the Commission's interpretation.<sup>353</sup>

Applying this principle of statutory construction, the *Holy Cross* court intimated that the Commission's current interpretation of the enabling act would not have persuasive influence on the court's construction of the statute.<sup>354</sup> The *Holy Cross* court, however, was unable to determine whether the fees charged by the physicians were part of the total costs of the hospital due to lack of evidence in the trial court record and remanded the case.<sup>355</sup>

*a. The Procedures Employed by the Agency in Reaching Its Interpretation*

Although the procedures employed by an agency in arriving at its interpretation do not rise to the level of more traditional canons of statutory construction, they are relevant in assessing the weight accorded the agency's interpretation.<sup>356</sup> For example, when the agency's interpretation of a statute is the result of (1) the agency "focus[ing] its attention on the statutory provisions in question, (2) thoroughly address[ing] the relevant issues, and (3) reach[ing] its interpretation through a sound reasoning process," then that interpretation is given deference by the courts.<sup>357</sup> However, if the agency's interpretation does not arise out of contested adversarial proceedings or formal rule procedure, the court is not likely to find

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351. *See id.*

352. *See id.*

353. *See id.*

354. *See id.* The court explained:

[T]he view taken of a statute by administrative officials soon after its passage is strong, persuasive influence in determining the judicial construction and should not be disregarded except for the strongest and most urgent reasons. . . . Even if sufficient time had passed since enactment of the statute here under consideration for administrative interpretation of it to be regarded as long-standing, no such interpretation exists here because the Commission has reversed its position.

*Id.* (citations omitted).

355. *See id.* at 689-90, 393 A.2d at 187.

356. *See Baltimore Gas & Elec. Co. v. Public Serv. Comm'n*, 305 Md. 145, 162, 501 A.2d 1307, 1315 (1986) (holding that an administrative agency's interpretation of its enabling statute was to be given weight because it was the product of contested proceedings).

357. *Id.* at 161-62, 501 A.2d at 1315.

it persuasive.<sup>358</sup> Additionally, it can be asserted that if the legislature delegates excessive lawmaking powers, no amount of administrative procedure that an agency institutes will cure a nondelegation doctrine violation.<sup>359</sup>

## 2. Attorney General Opinions

As the state's chief counsel,<sup>360</sup> the Attorney General of Maryland has a tremendous impact on administrative law. It is the constitutional duty of the attorney general to represent the state when it is brought before an administrative agency<sup>361</sup> and to represent the state administrative agencies before the courts.<sup>362</sup> Another duty of the attorney general is to interpret the meaning of an administrative agency's enabling statute and reduce it to a written advisory opinion for all interested parties.<sup>363</sup> In turn, agencies often rely on these attorney general opinions in executing the power granted to them under the enabling statute.<sup>364</sup>

The attorney general advisory opinions are often relied on by courts when interpreting ambiguous language in an administrative agency's enabling statute.<sup>365</sup> As with other extraneous authority, courts will only look to attorney general advisory opinions when

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358. *See id.*; *Comptroller v. John C. Louis Co.*, 285 Md. 527, 544, 404 A.2d 1045, 1056 (1979).

359. *Cf. supra* note 146 and accompanying text.

360. *See* MD. CODE ANN., STATE GOV'T § 6-106(b) (1998); *State ex rel. Attorney Gen. v. Burning Tree Club, Inc.*, 301 Md. 9, 34, 481 A.2d 785, 797 (1984).

361. *See* MD. CODE ANN., CONST. art. 5, § 3(a)(1) (1981).

362. *See id.* § 3(a)(2).

363. Notably, this power is one for attorneys general, but not for the courts. *Compare* *Maryland-Nat'l Capital Park & Planning Comm'n v. Randall*, 209 Md. 18, 27, 120 A.2d 195, 199 (1956) (refusing to issue an advisory opinion "to the Legislature or anyone else"), *and* *Hatt v. Anderson*, 297 Md. 42, 46, 464 A.2d 1076, 1078 (1983), *with* MD. CODE ANN., CONST. art. 5, § 3(a)(4) (1981) (requiring the attorney general to "[g]ive his opinion in writing whenever required by the General Assembly or either branch thereof, the Governor, the Comptroller, the Treasury or any State's Attorney on any legal matter or subject").

364. *See* *Mitchell v. Register of Wills*, 227 Md. 305, 310, 176 A.2d 763, 766 (1962) (noting that attorney general opinions are "entitled to careful consideration and serve as important guides to those charged with the administration of the law"); *see also* MD. CODE ANN., STATE GOV'T § 10-107(b) (1995) ("Unless a proposed regulation is submitted to the Attorney General . . . for approval as to legality, the regulation: (1) may not be adopted under any statutory authority; and (2) if adopted, is not effective.").

365. *See* *Bouze v. Hutzler*, 180 Md. 682, 687, 26 A.2d 767, 769 (1942).

statutory language is ambiguous.<sup>366</sup> Even when the enabling statute is ambiguous, attorney general advisory opinions do not bind courts.<sup>367</sup> Courts that do rely on these advisory opinions do so under the rule of contemporaneous construction.<sup>368</sup>

The rule of contemporaneous construction is a rule of statutory construction that enables a court to draw inferences of legislative intent.<sup>369</sup> When an attorney general has issued an advisory opinion on a particular matter and the legislature has failed to react to this opinion through a legislative amendment, a court may consider this acquiescence to the opinion.<sup>370</sup> According to the court of appeals:

[W]hen the meaning of the legislative language is not entirely clear, such legal interpretation and administrative construction should be given great consideration in determining the legislative intent. The Legislature knew, or must be presumed to know, of this interpretation and administrative construction at the time of [a law's passage] and must be held to have employed the language it did with that interpretation in view.<sup>371</sup>

Even if legislative acquiescence can be inferred through the rule of contemporaneous construction, the courts are the final arbiter of the law and are always free to disagree with an attorney general's opinion.<sup>372</sup> This is particularly true when an attorney general issues inconsistent opinions on the same matter or when the court deems the interpretation incorrect.<sup>373</sup> Even when an attorney general opinion has been consistently applied and the legislature has

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366. See *Schmidt v. Beneficial Finance Co.*, 285 Md. 148, 158, 400 A.2d 1124, 1129 (1979); *Falcone v. Palmer Ford*, 242 Md. 487, 494, 219 A.2d 808, 810-11 (1966); *Bouze*, 180 Md. at 687, 26 A.2d at 769.

367. See *Schmidt*, 285 Md. at 158, 400 A.2d at 1129; *Falcone*, 242 Md. at 494, 219 A.2d at 810-11; *Bouze*, 180 Md. at 687, 26 A.2d at 769.

368. See *Bouze*, 180 Md. at 687, 26 A.2d at 769.

369. See *Read Drug & Chem. Co. v. Claypoole*, 165 Md. 250, 257, 166 A. 742, 745 (1933).

370. See *State v. Crescent Cities Jaycees Found., Inc.*, 330 Md. 460, 470, 624 A.2d 955, 960 (1993); *Crest Inv. Trust, Inc. v. Cohen*, 245 Md. 639, 647-48, 227 A.2d 8, 13 (1967).

371. *Read Drug & Chem. Co.*, 165 Md. at 161, 501 A. at 745.

372. See *Crescent Cities*, 330 Md. at 470, 624 A.2d at 960; *Schmidt*, 285 Md. at 158, 400 A.2d at 1129; *Falcone*, 242 Md. at 493-94, 219 A.2d at 810; *Read Drug & Chem. Co.*, 165 Md. at 257, 166 A. at 745.

373. See *Bouze*, 180 Md. at 687, 26 A.2d at 769 (noting inconsistent rulings between successive attorneys general in finding a lack of persuasiveness).

amended a statute, but failed to address the attorney general's opinion, the rule of contemporaneous construction can fail.<sup>374</sup>

For example, in response to the contention that the rule of contemporaneous construction "should not be disregarded except on the most imperative ground," the court of appeals once proclaimed: "The imperative ground here is that we do not agree with the conclusion reached by the Attorney General."<sup>375</sup> Thus, while attorney general advisory opinions have some significance in administrative law, courts are *always* free to disagree.

### 3. Legislative History of the Statute and the Agency

The legislative history of the statute, as well as the history of the agency itself, will be considered in deciphering legislative intent. *Gutwein v. Easton Publishing Co.*,<sup>376</sup> provides an illustrative example of how courts deal with legislative history in the administrative law context. In *Gutwein*, the court of appeals held that an administrative agency could not award compensatory damages without explicit authority in the agency's enabling statute.<sup>377</sup>

In *Gutwein*, Easton Publishing allegedly discharged Paul D. Gutwein in violation of an anti-discrimination law.<sup>378</sup> The legislature originally charged the Human Relations Commission with the duty to investigate any allegations of discrimination "and to take such affirmative action as will effectuate the purposes of the particular subtitle."<sup>379</sup> Upon investigating Gutwein's discharge, the Commission

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374. See, e.g., *Schmidt*, 285 Md. at 158, 400 A.2d at 1129.

375. *Id.*

376. 272 Md. 563, 325 A.2d 740 (1974).

377. See *id.* at 576-77, 325 A.2d at 747.

378. See *id.* at 565, 325 A.2d at 741. The statute violated by Easton provided:

It shall be an unlawful employment practice for an employer: (a) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, creed, sex, age or national origin.

*Id.* at 565-66, 325 A.2d at 741.

379. *Id.* at 565, 325 A.2d at 741. The statute provides in pertinent part:

[T]he Commission shall hold a public hearing . . . [and] "[i]f upon all the evidence, the Commission finds that the respondent has engaged in any discriminatory act within the scope of any of these subtitles, it shall so state its findings. The Commission thereupon shall issue and cause to be served upon the respondent an order requiring the respondent to cease and desist from the discriminatory acts and to take such affirmative action as will effectuate the purposes of the particular subtitle."

found that Easton Publishing discriminated against Gutwein, a white male, because his fiancée was black.<sup>380</sup> The Commission awarded Gutwein six weeks lost pay and moving expenses as compensatory damages.<sup>381</sup>

Following the award of compensatory damages to Gutwein, Easton Publishing appealed to the Circuit Court for Talbot County.<sup>382</sup> The circuit court reversed the Commission's award of compensatory damages after concluding that Gutwein failed to prove any redressable injury.<sup>383</sup> The Commission and Gutwein appealed the circuit court's decision.<sup>384</sup> The court of appeals determined that the Commission's finding that a redressable injury had occurred "should have been accepted by the circuit court."<sup>385</sup>

However, before allowing the Commission's award to stand, the court of appeals addressed whether the Commission even had the power to award compensatory damages.<sup>386</sup> The enabling statute did not explicitly authorize the Commission to award compensatory damages.<sup>387</sup> Gutwein and the Commission asserted that the agency's authority to order affirmative action was analogous to state and federal civil rights laws, which have been "interpreted 'expansively' to permit the payment of compensatory damages to victims of discrimination."<sup>388</sup> After examining the assertedly analogous federal and state civil rights cases, the court of appeals concluded that no court has construed the "bare words affirmative action as will effectuate the purposes of the statute, . . . to authorize a monetary award."<sup>389</sup>

In rendering its opinion, the court of appeals focused on the legislative background of the Commission to determine whether the Maryland General Assembly conferred the power to award compensatory damages.<sup>390</sup> The court found that although the Commission's powers have changed throughout time, for the first thirty-five years of its existence, the Commission possessed no enforcement powers

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*Id.* (citation omitted).

380. *See id.*

381. *See id.* at 566, 325 A.2d at 742.

382. *See id.*

383. *See id.*

384. *See id.*

385. *Id.* at 567, 325 A.2d at 742.

386. *See id.* at 568, 325 A.2d at 743.

387. *See id.* at 568-69, 325 A.2d at 743.

388. *Id.* at 568, 325 A.2d at 743.

389. *Id.* (internal quotation marks omitted).

390. *See id.* at 575-76, 325 A.2d at 746-47.

whatsoever.<sup>391</sup> The Commission was granted the power to seek court enforcement of its orders only after the state banned racial discrimination in 1963.<sup>392</sup> The court of appeals determined that since 1963, the Maryland General Assembly never specifically enlarged the Commission's enforcement powers; thus, the Commission had no authority to award compensatory or other damages.<sup>393</sup>

The *Gutwein* court concluded that because the legislature did not delegate the power to award damages to the Commission, and because it would be unlikely that the legislature would intend to confer the power to award compensatory damages without adequate guidelines or limitations, the agency was not entitled to make any monetary awards.<sup>394</sup> The court of appeals cautioned "that even when the legislature is fairly explicit about the meaning of 'affirmative action,' a monetary damage remedy is not to be lightly implied."<sup>395</sup> While the imposition of a monetary damage award appears to be quite analogous to an imposition of a fine, Section V of this Note demonstrates that they are apparently considered distinct by the court of appeals.

## V. *LUSSIER v. MARYLAND RACING COMMISSION*

### A. *History of the Maryland Racing Commission*

Originally, in Maryland, counties individually regulated horse racing.<sup>396</sup> Although some counties established commissions to regulate racing,<sup>397</sup> in most counties the judiciary regulated racing.<sup>398</sup> This scheme continued virtually unchanged until 1919, when, in *Close v. Southern Maryland Agriculture Ass'n*,<sup>399</sup> the court of appeals held that judicial regulation of horse racing violated the separation of powers

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391. *See id.* The Commission's authority was limited to the study and survey of inter-racial problems and relations. *See id.* at 576, 325 A.2d at 747.

392. *See id.*

393. *See id.*

394. *See id.* at 576-77, 325 A.2d at 747. The court noted that the statute did not speak in terms of remedying the effects of discrimination, but attempted to provide a means to halt discrimination. *See id.* at 568-69, 325 A.2d at 743. The court further contrasted this with Title VII claims in which there is a specific provision for awarding damages. *See id.* at 569-70, 325 A.2d at 743-44.

395. *Id.* at 574, 325 A.2d at 746.

396. *See Lussier v. Maryland Racing Comm'n*, 343 Md. 681, 691, 684 A.2d 804, 808 (1996).

397. *See id.*

398. *See id.*

399. 134 Md. 629, 108 A. 209 (1919).

principle.<sup>400</sup>

In *Close*, a statute enacted by the General Assembly granted county circuit courts the power to issue any person a license permitting betting, pool selling, and bookmaking, provided that an application was filed and notification given.<sup>401</sup> The *Close* court held that the statute violated the separation of powers provision of Maryland's Constitution because it conferred non-judicial duties on the judiciary.<sup>402</sup>

Following the decision in *Close*, the Maryland General Assembly enacted Chapter 273 of the Acts of 1920 that created the Maryland Racing Commission (MRC).<sup>403</sup> The 1920 statute conferred upon the MRC a broad delegation of power to regulate racing in general.<sup>404</sup>

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400. *See id.* at 644, 108 A. at 215 (holding that article 27, sections 217 to 221 of the *Annotated Code of Maryland* violated article 8 of Maryland's Declaration of Rights).

401. *See id.* at 630, 108 A. at 210.

402. *See id.* at 642, 108 A. at 214; *see also Lussier*, 343 Md. at 691, 684 A.2d at 809. The statute required an individual seeking a license to file an application with the circuit court that then gave public notice of the application. *See Close*, 134 Md. at 635, 108 A. at 212. The court of appeals explained the nature of the judicial duties after an application was filed as follows:

If the petitioner complies with all of the requirements of the statute, what is there for the court to try? If it is a valid statute, what sort of cause would be sufficient to justify the court in refusing a license? Surely the court, if acting judicially, cannot be governed by the individual views of the judges as to betting, or pool selling or bookmaking on horse races. There is nothing in the statute to be determined, excepting the name of the applicant, the name of the grounds, a definite description of the place where such grounds are located, whether the certificate is signed by at least 25 respectable qualified voters of the election district, and the number of days and months within which the license shall be operative, even if an order to show cause is intended to be passed. All those things can be done by the clerk of the court.

*Id.* at 642, 108 A. at 214-15.

403. *See Lussier*, 343 Md. at 691, 684 A.2d at 809. The statute contained detailed provisions relating to licensing and regulating persons conducting horse racing in Maryland. *See id.* However, the statute provided that the "Racing Commission shall have full power to prescribe rules, regulations and conditions under which all horse-races shall be conducted within the State of Maryland. Said Commission may make rules governing, restricting or regulating betting on such races." *Id.* at 692, 684 A.2d at 809 (citing Act of Mar. 31, 1920, ch. 273 § 1(11), 1920 MD. LAWS 479, 484-85).

404. The statute broadly stated that the MRC shall have full authority to prescribe rules under which all racing shall be conducted including the power to regulate any horse race meeting "for purse, stake or reward." *Id.*

Specifically, the 1920 statute granted the MRC explicit authority to regulate racetrack owners and operators.<sup>405</sup> However, the 1920 statute did not “expressly authorize the [MRC] to license and regulate racehorse owners, trainers [or] jockeys.”<sup>406</sup>

In 1921, the Attorney General was called upon by the MRC to clarify whether the MRC could require trainers and jockeys to be licensed.<sup>407</sup> The Attorney General concluded that the legislature intended for the licensure of trainers and jockeys to fall within the scope of authority granted to the MRC.<sup>408</sup>

Shortly thereafter,<sup>409</sup> the MRC adopted a regulation pertaining not only to licensure, but to the conduct of racehorse owners, trainers, and jockeys.<sup>410</sup> Since then, the MRC has adopted regulations governing racehorse owners, trainers, and jockeys, which, for all intents and purposes, have paralleled the statutory provisions<sup>411</sup> enacted by the General Assembly that expressly authorize the MRC to regulate racetrack owners and operators.<sup>412</sup> Among the regulations promulgated by the MRC was a provision that granted itself the power to suspend or revoke a license, as well as impose a fine on any person licensed by the MRC to participate in racing.<sup>413</sup> The MRC implied that it had the authority to adopt this regulation based on the broad power in its enabling legislation that granted it the power to promulgate reasonable rules necessary to regulate all matters pertaining to horse racing.<sup>414</sup> The regulation allows the

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405. *See id.* at 694, 684 A.2d at 810.

406. *See id.* at 692, 684 A.2d at 809.

407. *See id.*

408. *See id.* The Attorney General concluded that the General Assembly intended to grant “broad and sweeping powers of control and regulation of racing” in order to secure clean racing. *Id.* at 693, 684 A.2d at 810 (citing 6 Op. Att’y Gen. 480, 482 (1921)). The Attorney General’s conclusion was accepted by the court of appeals in *Mahoney v. Byers*, 187 Md. 81, 84-85, 48 A.2d 600, 602 (1946) (holding that the 1920 act creating the MRC includes the power and authority to promulgate reasonable rules to govern the racing of horses, including rules governing “the conduct of trainers, jockeys, [and] [horse]owners,” as well as to “generally regulate all matters pertaining to horse racing”).

409. *Lussier*, 343 Md. at 695, 684 A.2d at 811.

410. *See* COMAR 09.10.04.03D. These regulations, applicable to owners, jockeys and trainers, under COMAR 09.10.01.01A, provided the MRC with the power to issue fines not exceeding \$5000. *See id.* at 09.10.04.03D(2).

411. *See* MD. CODE ANN., BUS. REG. § 11-308 (1997).

412. *See Lussier*, 343 Md. at 695, 684 A.2d at 811.

413. *See* COMAR 09.10.04.03D.

414. *See* MD. CODE ANN., BUS. REG. § 11-210(a)(1) (1997).

MRC to punish racehorse owners, jockeys, and trainers engaged in specific types of misconduct in a manner parallel to the explicit statutory authority granted to the MRC to punish, suspend, or fine racetrack owners and operators.<sup>415</sup> Since 1921, the MRC has exercised this regulatory power.<sup>416</sup> It was not until *Lussier v. Maryland Racing Commission* that the court of appeals addressed whether this statutory grant included the power to fine racehorse owners,<sup>417</sup> and if so, whether such a grant was constitutional.<sup>418</sup>

### *B. Factual Background*

Frank P. Lussier, a Vermont resident, purchased three horses in the spring of 1991.<sup>419</sup> Lussier purchased the horses hoping to race them and “make some money.”<sup>420</sup> Later that year, the horses were shipped to Maryland and each horse was entered in a separate race at Laurel Race Course.<sup>421</sup>

Perfect Reign, the first of these horses to compete, had been sold to Woodard Tuttle six days prior to its race.<sup>422</sup> Tuttle purchased the horse for \$5000, despite being told that the horse “might last 20 starts [or] . . . a couple starts.”<sup>423</sup> The entry form listed Tuttle as the horse’s owner and trainer.<sup>424</sup> Although Lussier had sold the horse, he was present at Laurel Race Course and bet approximately \$5400 on Perfect Reign.<sup>425</sup> Perfect Reign won the race; Lussier collected \$15,000 and subsequently repurchased the horse from Tuttle for \$6000.<sup>426</sup>

Lussier then asked a relatively unknown trainer, Jody Marsh, to train his second horse, The Manager.<sup>427</sup> Marsh replaced Lussier’s well-known trainer Michael Downing, who according to Lussier, was going to be out of the country on The Manager’s race date.<sup>428</sup>

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415. See *Lussier*, 343 Md. at 696, 684 A.2d at 811.

416. See *id.* at 692-94, 684 A.2d at 809-10.

417. See *id.* at 695-97, 684 A.2d at 807-08.

418. See *id.* at 700, 684 A.2d at 813.

419. See *id.* at 683, 684 A.2d at 805.

420. *Lussier v. Maryland Racing Comm’n*, 100 Md. App. 190, 193, 640 A.2d 259, 261 (1994), *aff’d*, 343 Md. 681, 684 A.2d 804 (1996).

421. See *id.* at 194, 640 A.2d at 261.

422. See *id.*

423. *Id.* (alteration in original).

424. See *id.*

425. See *id.* at 195, 640 A.2d at 262.

426. See *id.* at 196, 640 A.2d at 262.

427. See *id.* at 197, 640 A.2d at 263.

428. See *id.*

Marsh agreed to train The Manager with no discussion as to salary or compensation.<sup>429</sup> Marsh was subsequently listed as the horse's trainer on the racing forms.<sup>430</sup> Lussier bet heavily on his horse, and The Manager won the race.<sup>431</sup>

Lussier's third horse, High Passer, raced at Laurel Race Course on December 31, 1991.<sup>432</sup> Lussier sold High Passer four or five days prior to the race.<sup>433</sup> Again, Lussier appeared at the racetrack and bet on the horse.<sup>434</sup> High Passer came in third at Laurel Race Course.<sup>435</sup> After the race, the buyer rescinded the sale because of an alleged injury High Passer suffered during the race.<sup>436</sup> None of the horses had ever raced before the events at Laurel Race Course; consequently, race times were not published before their races.<sup>437</sup> Instead of performance times from previous races, workout times were published.<sup>438</sup>

The MRC commenced an investigation into these suspect actions and concluded that Lussier participated in improper acts relating to racing in violation of COMAR 09.10.01.11A(14) and COMAR 09.10.01.25B(8).<sup>439</sup> In particular, the MRC found that in each race, the information pertaining to workout times and trainers for Lussier's horses was falsified or concealed.<sup>440</sup> Consequently, the MRC imposed a \$5000 fine pursuant to COMAR 09.10.04.03D.<sup>441</sup>

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429. *See id.*

430. *See id.* at 198, 640 A.2d at 263.

431. *See id.*

432. *See id.* at 199, 640 A.2d at 264.

433. *See id.* at 199-200, 640 A.2d at 264.

434. *See id.* at 200, 640 A.2d at 264.

435. *See id.*

436. *See id.*

437. *See id.* at 195, 198, 200, 640 A.2d at 262, 263, 264.

438. *See id.* Replacing prior race times with workout times was permitted by regulation. *See id.* at 195, 640 A.2d at 262.

439. *See Lussier v. Maryland Racing Comm'n*, 343 Md. 681, 684, 684 A.2d 804, 805 (1996). The MRC concluded that Lussier had violated COMAR 09.10.01.11A(14) by transferring "two of his horses from himself to the name of another person for a purpose other than the legitimate sale of the horses." *Id.* (internal quotation marks omitted). The MRC also contended that Lussier had conducted dishonest acts in connection with racetrack activities; therefore he was charged with violating COMAR 09.10.01.25B(8).

440. *See id.*

441. *See id.* at 684, 684 A.2d at 805. COMAR 09.10.04.03D provides:

D. Denials of Licenses and Sanctions. (1) The Commission may refuse to issue or renew a license, or may suspend or revoke a license issued by it, if it finds that the applicant or licensee: (a) Has engaged

Lussier filed an action in the Circuit Court for Baltimore County challenging the administrative decision on several grounds.<sup>442</sup> The circuit court affirmed the decision of the MRC.<sup>443</sup> Lussier appealed the trial court verdict to the Court of Special Appeals of Maryland, again raising several issues.<sup>444</sup> Specifically, Lussier challenged the fine imposed by the MRC for his alleged violation of MRC regulations.<sup>445</sup>

The court of special appeals began its analysis by rebuffing Lussier's contention that an administrative agency lacked power to fine, absent express statutory authority.<sup>446</sup> The court concluded that

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in unethical or criminal conduct; (b) Is associating or consorting with an individual who has been convicted of a crime in any jurisdiction; (c) Is consorting or associating with, or has consorted with, a bookmaker, tout, or individual of similar pursuits; (d) Is, or has been, operating as a bookmaker, tout, or a similar pursuit; (e) Is not financially responsible; (f) Has been engaged in, or attempted to engage in, any fraud or misrepresentation in connection with the racing or breeding of a horse; (g) Assaults, or threatens to do bodily injury to, a member of the Commission or any of its employees or representatives or a member or employee of an association; (h) Has engaged in conduct detrimental to racing; or (i) Has violated, or attempted to violate: (i) A law or regulation in any jurisdiction, including this State, or (ii) A condition imposed by the Commission. (2) *Instead of, or in addition to, suspending a license, the Commission may impose a fine not exceeding \$5,000.* (3) In determining the penalty to be imposed, the Commission shall consider the: (a) Seriousness of the violation; (b) Harm caused by the violation; (c) Good faith or lack of good faith of the licensee; and (d) Licensing history of the licensee.

*Id.* at n.1 (emphasis added).

442. *See id.* at 684, 684 A.2d at 805.

443. *See id.*

444. *See Lussier v. Maryland Racing Comm'n*, 100 Md. App. 190, 202, 640 A.2d 259, 265 (1994), *aff'd*, 343 Md. 681, 684 A.2d 804 (1996). Lussier raised five issues that were addressed by the court of special appeals: (1) that the MRC lacked the statutory authority to fine because the statute creating and empowering the MRC did not provide express authority to fine; (2) that the MRC disregarded its own standards when fining him; (3) that there was insufficient evidence to support the MRC's findings; (4) that the MRC regulation was unconstitutionally vague; and (5) that the MRC issued an improper subpoena which was illegally enforced. *See id.* The court rejected each of these arguments and affirmed. *See id.* at 202-21, 640 A.2d at 265-75.

445. *See id.* at 193, 640 A.2d at 261.

446. *See id.* at 203, 640 A.2d at 266. The court of special appeals stated that Lussier's reliance on cases requiring a constitutional inquiry was misplaced. *See id.* The court reasoned that courts applying a constitutional analysis have never considered whether an agency possessed the power to impose civil fines

the issue turned on whether the power to fine was consistent with the purpose of the statute.<sup>447</sup> The court reasoned that, in light of the legislative history and purpose of the statute, the power to fine was implicitly included in the MRC's broad enabling statute.<sup>448</sup> The court, therefore, rejected each of Lussier's contentions that the MRC had no authority to fine him.<sup>449</sup>

Lussier appealed this decision to the Court of Appeals of Maryland arguing, *inter alia*, that "[d]elegations of legislative power to administrative agencies are constitutional only when accompanied by [a] 'standard or rule by which that power should be exercised.'" <sup>450</sup> The court of appeals granted *certiorari* to consider whether the MRC could impose a fine under its broad empowering statute, absent express statutory authority.<sup>451</sup> The court held that the broad delegation of authority to the MRC included the power to establish a regulation that authorized it to issue fines.<sup>452</sup>

The *Lussier* court began its examination of the issue by refuting Lussier's argument that administrative agencies lack the authority to fix penalties absent specific statutory authorization from the legisla-

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and that the cases relied upon were therefore irrelevant. *See id.* Accordingly, the court did not make a constitutional inquiry. *See id.*

447. *See id.* at 204, 640 A.2d at 266. The court stated that "a court must examine the purpose of the statute creating the agency, its legislative history, and any relevant case law to determine whether the legislature intended that the agency have the challenged authority." *Id.* (citations omitted).

448. *See id.* at 212, 640 A.2d at 270.

449. *See id.*

450. Brief for Petitioner at 18, *Lussier v. Maryland Racing Comm'n*, 343 Md. 681, 684 A.2d 804 (1996) (No. 94-96) (citing *Electric Pub. Utils. Co. v. Public Serv. Comm'n*, 154 Md. 445, 453, 140 A.2d 840, 843 (1928); *Albert v. Public Serv. Comm.*, 209 Md. 27, 34, 120 A.2d 346, 349 (1956)).

451. *See Lussier*, 343 Md. at 684, 684 A.2d at 805. *Lussier* quoted section 11-210 of the Business Regulation Article of the *Annotated Code of Maryland*, which provides in relevant part:

(a) *In general*.—Except as provided in subsection (b) of this section, the Commission may: (1) adopt regulations and conditions to govern racing and betting on racing in the State . . . (b) *Prohibited regulations*.—The Commission may not adopt regulations that allow: (1) racing a breed of horse not now authorized by law; or (2) holding currently unauthorized: (i) intertrack betting; (ii) off-track betting; or (iii) telephone betting other than telephone account betting.

*Id.* at 687-88, 684 A.2d at 807. The court noted that the statute in question provided broad powers to the MRC to adopt regulations to govern racing in Maryland and then specifically restricted those powers. *See id.* at 687, 684 A.2d at 807.

452. *See id.* at 700, 684 A.2d at 813.

ture.<sup>453</sup> Lussier's misplaced reliance on *Holy Cross* in support of this proposition was highlighted by the court.<sup>454</sup> The court opined that *Holy Cross* addressed whether an administrative agency possessed the power to set fees under its broad statutory grant, not whether an administrative agency could impose penalties.<sup>455</sup> The court explained that the power to set fees was irrelevant to the argument that agencies require express authority to impose fines.<sup>456</sup> However, the court failed to draw a distinction between the power to set fees<sup>457</sup> and the power to fine.

Thereafter, the court examined Lussier's reliance on *Gutwein*.<sup>458</sup> Lussier argued that, under *Gutwein*, administrative agencies lack authority to fix penalties without a specific grant of power from the legislature.<sup>459</sup> The *Lussier* court distinguished *Gutwein* as pertaining to the power of an administrative agency, *in light of its history*, to make an award of compensatory damages to a victim of discrimination.<sup>460</sup> As *Gutwein* dealt with neither an agency adopted penalty nor a regulation, the court found Lussier's reliance was again misplaced.<sup>461</sup>

Similarly, the court observed that Lussier's reliance on *Investor's Funding* was misguided.<sup>462</sup> The court noted that in *Investor's Funding*, a statute had specifically authorized the agency to impose a fine.<sup>463</sup> According to the *Lussier* court, the issue in *Investor's Funding* was whether, and under what circumstances, the legislature could constitutionally delegate the authority to impose fines.<sup>464</sup>

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453. See *id.* at 685-87, 684 A.2d at 805-07.

454. See *id.* at 685-86, 684 A.2d at 806. Lussier relied on *Holy Cross* to support his argument that administrative agencies lack authority to fix penalties absent specific authority from the legislature. See *id.* at 685, 684 A.2d at 806.

455. See *id.* at 686, 684 A.2d at 806. For a discussion of *Holy Cross*, see *supra* notes 336-55 and accompanying text.

456. See *Lussier*, 343 Md. at 686, 684 A.2d at 806.

457. See *Holy Cross Hosp. v. Health Servs. Cost Review Comm'n*, 283 Md. 677, 687, 393 A.2d 184, 186 (1978) (holding that the agency did not inherently possess the power to set physicians' fees).

458. See *Lussier*, 343 Md. at 686, 684 A.2d at 806.

459. See *id.*

460. For a discussion of *Gutwein*, see *supra* notes 376-95 and accompanying text.

461. See *Lussier*, 343 Md. at 686, 684 A.2d at 806.

462. See *id.* Lussier relied on *Investor's Funding* to bolster his argument that an administrative agency lacks the power to fix penalties absent express statutory authority. See *id.*

463. For a discussion of the statute in *Investor's Funding*, see *supra* note 209.

464. See *Lussier*, 343 Md. at 686, 684 A.2d at 806.

The court concluded that when the General Assembly delegates broad authority to regulate, the regulations promulgated pursuant to the statute are valid if they are consistent with the language or purpose of the enabling statute.<sup>465</sup> The statute creating the MRC contained a broad grant of power from the legislature.<sup>466</sup> After considering the language, purpose, and history of the MRC, the court determined that the power to fine racehorse owners was consistent with the purpose of the enabling statute.<sup>467</sup>

## VI. ANALYSIS

### A. *Critique of the Court's Rationale*

The *Lussier* court devoted the bulk of its attention to an issue of statutory construction that was unremarkable. From the record, it was clear that the General Assembly intended to permit the MRC to impose fines on racehorse owners. The statutory language was ambiguous inasmuch as it spoke in broad, unspecified terms about the MRC's power to regulate racehorse owners.<sup>468</sup> Thus, presuming the constitutionality of the delegation of power, the court properly looked to the canons of statutory construction to determine legislative intent.<sup>469</sup> Looking to the three primary methods courts employ to determine legislative intent in the administrative law context,<sup>470</sup> *Lussier* provides a textbook example in which all three methods bolster the court's conclusion.

First, the *Lussier* court properly accorded deference to the MRC's construction of its enabling statute.<sup>471</sup> From its inception, the MRC continuously construed its enabling statute to grant it the power to regulate racehorse owners in parallel fashion to racetrack owners.<sup>472</sup> During the entire history of the MRC, it never wavered from the construction it initially placed on the enabling statute.<sup>473</sup> This evinces a long-standing agency construction of its enabling stat-

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465. *See id.* at 688, 684 A.2d at 807.

466. *See id.* at 687, 684 A.2d at 807.

467. *See id.* at 688-89, 684 A.2d at 808.

468. *See supra* notes 403-06 and accompanying text. *But see Lussier*, 343 Md. at 710, 684 A.2d at 818 (Bell, J., dissenting) (noting that when the legislature wants to grant an agency the power to fine, it knows how to do so explicitly).

469. *See supra* note 467 and accompanying text.

470. *See supra* notes 327-35 and accompanying text.

471. *See supra* notes 322-26 and accompanying text.

472. *See supra* notes 409-16 and accompanying text.

473. *See supra* notes 409-16 and accompanying text.

ute that a court may properly accord substantial weight.<sup>474</sup>

Second, the Attorney General's opinion provides additional support for the MRC's exercise of power over racehorse owners.<sup>475</sup> Through the doctrine of contemporaneous construction,<sup>476</sup> the court of appeals was well within its power to infer legislative acquiescence by way of the 1921 Attorney General's opinion that supported the manner by which the MRC regulated racehorse owners.<sup>477</sup> Indeed, the Attorney General's broad interpretation of the MRC's power had been accepted as controlling by the court of appeals in an earlier decision.<sup>478</sup>

Third, the legislative history of the statute and the agency provides convincing support for the court's conclusion.<sup>479</sup> The MRC exercised the power to fine racehorse owners for decades and the legislature made no attempt to curtail it through statutory amendments.<sup>480</sup> Indeed, the inference of legislative acquiescence was solidified as early as 1947, when the General Assembly made an explicit reference to this power in creating the Relief Fund of the MRC.<sup>481</sup>

It is rare to find a better example of a case in which all three of the primary methods of statutory construction point to the con-

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474. See *supra* notes 322-26 and accompanying text.

475. See *supra* notes 364-75 and accompanying text.

476. See *supra* notes 369-75 and accompanying text.

477. See *supra* notes 407-08 and accompanying text.

478. See *supra* note 408 and accompanying text.

479. See *supra* notes 326, 376-95 and accompanying text.

480. See *supra* notes 409-18 and accompanying text.

481. See *Lussier v. Maryland Racing Comm'n*, 343 Md. 681, 696 n.5, 684 A.2d 804, 811 n.5 (1996). As the *Lussier* court noted:

The General Assembly has clearly been aware of the Maryland Racing Commission's regulation authorizing the imposition of fines upon racehorse owners, jockeys, trainers, and others, and has legislated with respect to those fines. See, e.g., Ch 786 of the Acts of 1947, authorizing the Commission to establish 'the Relief Fund of the Maryland Racing Commission,' referring in both the title and the preamble to the 'fines and [monetary] penalties . . . collected from jockeys, trainers, owners and others,' and providing that such fines should continue to be paid into the Relief Fund.

See also the Department of Fiscal Service's Sunset Review of the Maryland Racing Commission for 1989, at 37-38, referring to the Commission's authority to impose fines upon "general" licensees such as racehorse owners, trainers and jockeys, and commending the effectiveness of these monetary penalties.

*Id.*

clusion that the court of appeals properly reached. In narrowly focusing its attention on the statutory construction analysis, however, the court of appeals may have inadvertently altered the way future lower courts view the nondelegation doctrine in Maryland administrative law.

In large part, the *Lussier* court ignored the constitutional issues raised on appeal and never conducted a nondelegation doctrine or separation of powers analysis.<sup>482</sup> Instead, the *Lussier* court focused the bulk of its attention on construing the enabling statute at issue. The *Lussier* court merely applied a test of "consistency"<sup>483</sup> to determine if the legislature had properly delegated the power to fine racehorse owners to the MRC. In reaching its verdict, the court seemed to ignore well-settled precedent.

The three primary cases relied on by *Lussier*, hastily distinguished by the court of appeals, each demonstrated the appropriate inquiry into the constitutionality of a delegation of legislative power to the executive branch.<sup>484</sup> This constitutional inquiry was necessarily antecedent to resolving any statutory construction issue.<sup>485</sup> The *Lussier* court merely "rubber-stamped" the MRC's authority to write a regulation absent specific legislative authority. An administrative agency's promulgation and enforcement of punitive regulations without specific statutory authority had, until *Lussier*, been unconstitutional.<sup>486</sup> Moreover, the court incorrectly rejected *Lussier's* reliance on three significant administrative law opinions: *Holy Cross*, *Gutwein*, and *Investor's Funding*.<sup>487</sup>

As to the constitutional argument raised by *Lussier*, the court began its analysis by stating that *Holy Cross* dealt with whether an administrative agency's authority extends to the regulation of fees

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482. For a discussion of the court of appeals's limited constitutional analysis, see *supra* notes 453-65 and accompanying text. For a discussion of the court of appeals's statutory construction analysis see *supra* notes 465-81 and accompanying text.

483. See *Lussier*, 343 Md. at 687, 684 A.2d at 806-07 ("[T]he governing standard is whether the regulation is " 'consistent with the letter and spirit of the law under which the agency acts' " (quoting *Christ v. Department of Natural Resources*, 335 Md. 427, 437, 644 A.2d 34, 38 (1994) (quoting *Department of Transp. v. Armacost*, 311 Md. 64, 74, 532 A.2d 1056, 1061 (1987))))).

484. For a discussion of the court's limited constitutional analysis, see *supra* notes 453-65 and accompanying text.

485. See *supra* notes 208-62 and accompanying text.

486. See *Lussier*, 343 Md. at 704, 684 A.2d at 815 (Bell, J. dissenting).

487. See *supra* notes 208-18, 336-55, 376-95 and accompanying text.

charged by physicians.<sup>488</sup> However, the *Holy Cross* court began its analysis with the premise that an administrative agency has no inherent powers and its powers do not reach beyond those provided by statute.<sup>489</sup> The *Holy Cross* court, however, did not actually reach its statutory construction analysis because there was no evidence that "total costs of the hospital" included "fees of the physicians."<sup>490</sup> Thus, because the fundamental premise of *Holy Cross* was that administrative agencies lack power absent that conferred by statute, the *Lussier* court incorrectly categorized *Holy Cross* as merely a statutory construction case.

The court committed a similar error in addressing Lussier's reliance on *Gutwein*. According to the court, *Gutwein* dealt with an agency's authority to make an award of compensatory damages.<sup>491</sup>

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488. See *Lussier*, 343 Md. at 685-86, 684 A.2d at 806. The court specifically stated that *Holy Cross* "was not concerned with the imposition of penalties; instead, the question in that case was whether, as a matter of statutory construction, an administrative agency's statutory authority to regulate hospital rates extended to fees charged by physicians to hospital patients." *Id.*

489. See *Holy Cross Hosp. v. Health Servs. Cost Review Comm'n*, 283 Md. 677, 683, 393 A.2d 181, 184 (1978). The *Holy Cross* court stated: "It is elementary that since an administrative agency, such as the Commission, is a creature of statute, it has no inherent powers and its authority thus does not reach beyond the warrant provided by statute." *Id.* (citing *Gutwein v. Easton Publ'g Co.*, 272 Md. 563, 575-77, 325 A.2d 740, 747 (1974)). After making this statement, the *Holy Cross* court proceeded to recite several canons of statutory construction. See *id.* at 684, 393 A.2d at 184-85. However, the court failed to reach the statutory construction issue because it was impossible to determine whether physicians' fees were included. See *id.* at 689, 393 A.2d at 187.

490. *Id.* The court remanded for further proceedings to afford the Commission the opportunity to introduce evidence that the "total costs of the hospital" was a term of art and therefore included physicians' fees. *Id.* at 690, 393 A.2d at 187. The court stated that if the Commission could not produce evidence that physicians' fees were included in "total costs," then the Commission "has exceeded the power vested in it by the General Assembly." *Id.* (emphasis added).

491. See *Lussier*, 343 Md. at 686, 684 A.2d at 806. The *Lussier* court stated that *Gutwein* concerned the following:

[W]hether, under the pertinent statutory provisions and "[i]n view of the [Human Relations] Commission's legislative background," the Human Relations Commission was authorized to make an award of compensatory damages to a victim of employment discrimination. Neither a penalty nor a regulation adopted by the agency was involved in the *Gutwein* case.

*Id.* However, the *Gutwein* court clearly stated that it had two reasons for denying the compensatory damages in addition to the legislative background that the *Lussier* court addressed. The *Gutwein* court also looked to the failure of the enabling statute to specifically authorize an award of compensatory dam-

However, the *Gutwein* court specifically stated that in cases allowing monetary damages, the legislature has only used language "plainly indicative of a legislative intent to authorize monetary awards."<sup>492</sup> Therefore, if the legislature had intended to confer the power to award fines, *Gutwein* appears to stand for the proposition that the legislature must use language "plainly indicative" of that intent.<sup>493</sup> Moreover, the *Gutwein* court specifically stated that a monetary damage remedy is "not to be lightly implied."<sup>494</sup>

Finally, the *Lussier* court's rejection of *Investor's Funding* was flawed. The court of appeals noted that *Lussier's* reliance on *Investor's Funding* was misplaced because *Investor's Funding* dealt with the validity of a regulation in light of constitutional delegation of powers and due process principles.<sup>495</sup> *Lussier's* basic contention was that the MRC lacked the authority to pass a regulation because the regulation would exceed the MRC's authority and would therefore be an unconstitutional delegation of power.<sup>496</sup> Thus, it would appear that *Lussier's* reliance on *Investor's Funding* was anything but misplaced.

In rejecting *Lussier's* reliance on these cases, the court implied that when there is a broad statute delegating legislative power, a reviewing court's only inquiry should be one of statutory construction. This inquiry appears to supplant the court of appeals's prior constitutional inquiry.

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ages, as well as the "unlikelihood of a legislative grant of unbridled power to an administrative agency to make monetary awards without guidelines or limitations." *Gutwein*, 272 Md. at 576-77, 325 A.2d at 747.

492. *Gutwein*, 272 Md. at 574, 325 A.2d at 746. However, the *Gutwein* court did note that no constitutional issue was raised, unlike *Investor's Funding*. See *id.* at 574 n.10, 325 A.2d at 746 n.10.

493. See *id.*

494. *Id.* at 574, 325 A.2d at 746.

495. See *Lussier*, 343 Md. at 686, 684 A.2d at 806. However, the court's statement is partially incorrect. In *Investor's Funding*, there was a statute specifically authorizing the fine, but the court stated that such a delegation without legislative safeguards was invalid. See *County Council v. Investor's Funding Corp.*, 270 Md. 403, 441, 312 A.2d 225, 246 (1973). In *Lussier*, there was no specific delegation of the power to fine, nor could there be any legislative standards or safeguards accompanying the implied power. Therefore, under *Investor's Funding* and *Pressman*, the statute could have been invalidated not only because there was no specific delegation, but also because, *a fortiori*, there were no standards or safeguards. For a discussion of *Investor's Funding*, see *supra* notes 208-18 and accompanying text. For a discussion of *Pressman*, see *supra* notes 239-62 and accompanying text.

496. See *supra* note 450 and accompanying text.

*B. Future Impact on Maryland Law*

*Lussier* may have altered the way Maryland's courts approach similar administrative law issues. *Lussier's* greatest impact is that it may have eliminated the requirement of legislative standards or safeguards in delegations of administrative authority. The *Lussier* court intimated that lower courts should focus merely upon whether the challenged statutory interpretation by the administrative agency is consistent with the purpose of the agency's enabling legislation.<sup>497</sup>

Judge Bell, however, noted that until *Lussier*, the delegation of legislative authority without legislative standards or safeguards has previously been held to be unconstitutional.<sup>498</sup> In fact, a reviewing court would first inquire whether the authority was constitutionally delegable.<sup>499</sup> To determine the constitutionality of the power delegated, the reviewing court must decide whether the statute was accompanied by adequate safeguards or standards or exempt from these requirements because it was impracticable for the legislature to fix standards or safeguards.<sup>500</sup> However, under *Lussier*, the consti-

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497. See *supra* note 465, 483 and accompanying text.

498. See *Lussier*, 343 Md. at 706-07, 684 A.2d at 816 (Bell, J., dissenting). Judge Bell limited his criticism to the lack of a constitutional inquiry. See *id.* at 707-08, 684 A.2d at 817 (Bell, J., dissenting). He noted that prior case law considered whether a power was delegable, and if so, whether the delegation was constitutional. See *id.* at 707, 684 A.2d at 816 (Bell, J., dissenting). If constitutional, the court would apply statutory construction in some cases. See *id.* at 717, 684 A.2d at 822 (Bell, J., dissenting). Judge Bell also noted that the issue was not whether the MRC could regulate licensure, but whether they could fine. See *id.* at 709-10, 684 A.2d at 818 (Bell, J., dissenting). Judge Bell stated that this issue is distinguishable from *Christ* in which the issue was analogous to licensure. See *id.* at 714-15, 684 A.2d at 820 (Bell, J., dissenting). Interestingly, Judge Bell quoted the intelligible principle test as enunciated by the Supreme Court in an early nondelegation doctrine case. See *id.* at 705-06, 684 A.2d at 816 (Bell, J., dissenting) (quoting *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)). For a discussion of *J. W. Hampton* and earlier Supreme Court nondelegation doctrine precedent, see *supra* notes 70-102 and accompanying text.

499. See *supra* text accompanying notes 263-66.

500. See *supra* text accompanying notes 263-66. Maryland has all but eliminated the standards requirement, which places them in the most liberal category of states in permitting broad delegations of power to agencies. It is interesting to note that Maryland is the only state in this category that has the most restrictive type of separation of powers provision. See *supra* notes 162-79 and accompanying text. But see *Department of Transp. v. Armacost*, 311 Md. 64, 82, 532 A.2d 1056, 1065 (1987) (noting that the requirement under Maryland's separa-

tutional line of inquiry is given considerably less attention, and potentially rendered impotent.

Judge Bell recognized that the court validated a statute without determining whether it was accompanied by adequate standards or safeguards.<sup>501</sup> The enabling statute was silent as to whether the MRC could create a regulation that would allow it to impose fines on racehorse owners.<sup>502</sup> One point that the *Lussier* court overlooked was that the enabling statute could not possibly contain legislative standards or safeguards on the exercise of this power because the grant of power was merely implicit. Under *Pressman*, the only way that an enabling statute that lacks standards or safeguards can survive constitutional scrutiny is if it falls within the impracticability exception.<sup>503</sup> However, the *Lussier* court never inquired whether the *Pressman* exception of impracticability was met. Therefore, *Lussier* could be read to implicitly overrule both the requirements of legislative standards or safeguards requirement as well as the alternative requirement of impracticability.<sup>504</sup>

Furthermore, the cases leading up to *Pressman*, as well as its progeny, established a limited category of exceptions to standardless delegations of legislative power to administrative agencies.<sup>505</sup> Formerly, the relaxed standards and safeguards requirements only applied to a limited category of agency acts that dealt with areas such as public health and safety.<sup>506</sup> By upholding the MRC's regulation without any constitutional inquiry, the *Lussier* court seemingly approved a regulation outside the traditional areas of administrative law that are accorded more liberal treatment. One logical conclusion lower courts might draw from the *Lussier* opinion is that the court of appeals has rejected the need for these special categories, opting instead to treat all delegations liberally.<sup>507</sup>

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tion of powers provision is no higher than the bar under the United States Constitution).

501. See *Lussier*, 343 Md. at 707-08, 684 A.2d at 817 (Bell, J., dissenting).

502. See *supra* note 406 and accompanying text.

503. See *supra* notes 239-62 and accompanying text.

504. The legislature, in fact, provided no safeguards whatsoever because the power to fine was not specifically included in the enabling statute.

505. See *supra* notes 192-238 and accompanying text.

506. See *supra* notes 192-262 and accompanying text.

507. At the very least, the *Lussier* court created a new administrative regime that meets the impracticability exception established by the *Pressman* court. For a discussion of *Pressman*, see *supra* notes 239-62 and accompanying text.

Further, the *Lussier* court declined to provide standards to help courts evaluate administrative regulations in the future. The court of appeals simply held that because the regulation at issue was consistent with the purpose of the statute, it was a valid exercise of power.<sup>508</sup> Thus, it appears as though an administrative agency's power under a broad enabling statute is limited only by what is *consistent* with the purpose of the statute.

Finally, administrative agencies now have significant powers to implement their remedies, notwithstanding the possible punitive nature of the sanctions. The inescapable conclusion is that administrative agencies may award compensatory damages, fine individuals, or impose other sanctions as long as the sanctions are consistent with the purpose of the agency's enabling statute.

### C. *Alternative Approaches to the Power to Fine*

The power to impose a fine occupies a unique place in administrative law.<sup>509</sup> Although the nondelegation doctrine acts to protect against delegations that could be abused by administrative agencies,<sup>510</sup> some courts impose stricter applications of the legislative standards requirement and more conservative approaches to their statutory construction analysis.<sup>511</sup> These judicial efforts are aimed at preventing abuses of power by administrative agencies.<sup>512</sup>

#### 1. Florida

In *Continental Construction Co. v. Board of Trustees of the Internal Improvement Trust Fund*,<sup>513</sup> Continental appealed a final order of the Board that assessed a fine due to Continental's unauthorized use of sovereign submerged lands.<sup>514</sup> Continental argued that the penalty imposed upon them violated Florida's Constitution.<sup>515</sup> The constitutional provision relied on by Continental provided: "No administra-

508. See *supra* notes 465, 483 and accompanying text.

509. Indeed, Judge Bell likened the power to fine to a criminal sanction. See *Lussier*, 343 Md. at 709 n.7, 684 A.2d at 817 n.7 (Bell, J., dissenting) ("When a fine or penalty is imposed . . . by any ordinance of any incorporated city or town in this State . . . such act shall be deemed to be a criminal offense unless the offense is defined as a municipal infraction." (quoting MD. ANN. CODE art. 38, § 1 (1982) (internal quotation marks omitted))).

510. See *supra* note 193 and accompanying text.

511. See *supra* notes 163-65 and accompanying text.

512. See *infra* notes 513-45 and accompanying text.

513. 464 So. 2d 204 (Fla. 1985).

514. See *id.* at 205.

515. See *id.*

tive agency shall impose a sentence of imprisonment, nor shall it impose any other penalty except as provided by law.”<sup>516</sup> The court agreed and explained that the legislative statute granting the Board broad authority to “police, protect, conserve, improve; . . . or take such other action or do such other things as necessary for the full protection and conservation of the said lands” did not contain express or specific language granting the Board the authority to impose a fine.<sup>517</sup> Therefore, the court held that the rule, promulgated by the Board to assess fines, violated Florida’s constitution and was invalid.<sup>518</sup>

## 2. California

In *People v. Harter Packing Co.*,<sup>519</sup> the Court of Appeals of California also addressed the issue of whether an administrative agency may promulgate rules to impose penalties.<sup>520</sup> The California legislature promulgated the Marketing Act of 1937 in an effort to promote the marketing of agriculture products.<sup>521</sup> The Act provided the Director of Agriculture with the express authority to issue marketing orders to regulate producer marketing, handling, processing and distribution of agriculture products pursuant to the Act.<sup>522</sup> The Act also granted the Director the authority to impose a penalty fine of up to \$500 for each violation of the Act.<sup>523</sup>

The Director issued a marketing order outlining specific guide-

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516. *Id.* at 206.

517. *Id.* at 207.

518. *See id.*; *see also* Department of Env'tl. Regulation v. Puckett Oil Co., 577 So. 2d 988, 993 (Fla. Dist. Ct. App. 1991) (holding that the “law is clear that an agency’s authority to impose sanctions must be expressly delegated to the agency”); Division of Admin. Hearings v. Department of Transp., 534 So. 2d 1219, 1220 (Fla. Dist. Ct. App. 1988) (holding that an agency did not have necessary legislative authority to adopt rule allowing hearing officer to impose sanction). *See generally* Dan R. Stengle & James Parker Rhea, *Putting the Genie Back in the Bottle: The Legislative Struggle to Contain Rulemaking by Executive Agencies*, 21 FLA. ST. U. L. REV. 415 (1993). The authors summarize Florida’s requirement that “[a]n enabling statute, however, may not provide unbridled authority to an administrative agency to decide what the law is. A statute providing such a legislative authorization must . . . declare the legislative policy or standard, and must operate to limit the delegated power.” *Id.* at 415-16. (footnote omitted).

519. 325 P.2d 519 (Cal. Dist. Ct. App. 1958).

520. *See id.* at 521.

521. *See id.* at 520.

522. *See id.* at 520-21.

523. *See id.*

lines for canning and freezing peaches.<sup>524</sup> In the order, the Director established that violations of the order would be determined based on the tonnage of non-conforming peaches.<sup>525</sup> Specifically, each five tons, or portion thereof, was considered a single violation of the order.<sup>526</sup> As a result of this order, Harter Packing Company was fined \$5093.<sup>527</sup>

Initially, the court explained that an administrative agency is a creature of statute that only possesses the powers specifically granted to it by the legislature.<sup>528</sup> The court found that the marketing order penalty provision, promulgated by the Director, was not authorized by the Act.<sup>529</sup> The court noted that “[i]f the act under which the administrative agency gets its powers provides no sanctions or penalties for failure to comply, the agency may not by rule promulgate them.”<sup>530</sup> From this logic, the court concluded that the Director could not enlarge a penalty provision in the Act to declare a different penalty.<sup>531</sup>

### 3. Rhode Island

The Supreme Court of Rhode Island addressed whether an administrative agency had the implied authority to impose civil fines against violators of its regulations in *F. Ronci Co. v. Narragansett Bay Water Quality Management District Commission*.<sup>532</sup> The Rhode Island General Assembly created the Water Quality Management Commission to combat water-quality problems arising from the discharge of pollutants into Narragansett Bay.<sup>533</sup> After Ronci, a manufacturer, continually failed to comply with the Commission’s discharge regulations, the Commission commenced enforcement proceedings.<sup>534</sup> The Commission ordered the manufacturer to comply within a given time period and to pay a civil penalty in the amount of \$219,950 for its violations.<sup>535</sup> The Commission claimed that it had the authority to issue the fine under its enabling statute that read:

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524. *See id.* at 519-20.

525. *See id.* at 520.

526. *See id.*

527. *See id.*

528. *See id.* at 521.

529. *See id.*

530. *Id.*

531. *See id.*

532. 561 A.2d 874 (R.I. 1989).

533. *See id.* at 875.

534. *See id.* at 876.

535. *See id.*

"[T]he executive director may institute such civil or criminal proceedings . . . for the violation of any provisions of [certain sections of the enabling statute] or of any permit, rule, regulation or order issued pursuant thereto."<sup>536</sup> The Commission argued that the cited language granted the agency the option to choose between an administrative or a judicial forum for the pursuit of remedies, and thus its levy of a civil fine through the administrative proceeding was permissible.<sup>537</sup>

The court rejected the Commission's position, holding that the plain language of the statute clearly established that after an exhaustion of administrative remedies, the executive director could then choose to institute proceedings for noncompliance in the Superior Court for the county.<sup>538</sup> The statute did not grant an independent choice to levy fines at the administrative level, and such a levy was an extension of the agency's power beyond the scope of the enabling legislation.<sup>539</sup> The court reasoned that while an administrative agency does have rather broad discretion to promulgate regulations based on an interpretation of the enabling legislation, it may not do so absent a specific or implied grant of authority.<sup>540</sup> The court found that the levying of civil fines was neither express nor implied in the statutory language and in fact was in "direct contradiction to the specific powers enumerated in their enabling legislation."<sup>541</sup>

The court bolstered its opinion by pointing to a recent amendment of the enabling legislation that allowed the Commission to impose administrative penalties in addition to those remedies promulgated in the original enactment.<sup>542</sup> The court contrasted the specific and express grant of authority in the amendment with the absence of any such language in the original statute.<sup>543</sup> Noting that the amending language represented "precisely the type of specific statutory grant that the commission needed before levying a civil fine against the plaintiff,"<sup>544</sup> the court held that at the time of the dispute, the Commission had no power to require the manufacturer to

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536. *Id.* at 880.

537. *See id.*

538. *See id.*

539. *See id.* at 881.

540. *See id.*

541. *Id.*

542. *See id.*

543. *See id.*

544. *Id.*

pay the levied fine.<sup>545</sup>

Each jurisdiction surveyed imposes restrictions on the power to fine when conferred to administrative agencies. These cases demonstrate the reluctance of courts to allow administrative agencies the unbridled power to promulgate punitive regulations, even pursuant to broad statutory grants, without legislative standards or procedural safeguards to prevent abuse by the administrative agency.<sup>546</sup>

*D. Recommendations to Practitioners*

Practitioners challenging the validity of administrative regulations should emphasize that a challenged power is inconsistent with the enabling statute's purpose. In light of *Lussier*, this appears to be the only certain method of demonstrating that a regulation is invalid. Conversely, administrative agencies may cite the broad power deemed valid in *Lussier* as support for a sweeping range of regulations. If the court of appeals continues to apply the *Lussier* framework to delegations of power by the General Assembly, administrative agencies will have broad powers under their enabling statutes that are limited, not by Maryland's separation of powers provision, but merely by future courts' interpretations of legislative intent.

As the inquiry presently exists, standards and safeguards are not necessarily required to accompany delegations.<sup>547</sup> Therefore, individuals subject to an agency's regulations are open to great risk from the arbitrary exercise of agency power. Moreover, individuals may now be subject to harsh penalties with little hope of recourse, either political or legal.<sup>548</sup> This is the broadest implication that the

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545. *See id.*

546. *See supra* notes 513-45 and accompanying text; *see also In re Fayetteville Hotel Assocs.*, 450 S.E.2d 568 (N.C. Ct. App. 1994) (holding that the power to impose sanctions requires specific legislative authority and without such authority, the power to impose sanctions "would exceed the Commission's general rulemaking authority"); *Columbus Wine Co. v. Sheffield*, 64 S.E.2d 356, 362 (Ga. Ct. App. 1951) (holding that an administrative agency could not, by regulation, make penal something not made penal under the law itself, but could only enforce its regulations by suspension or cancellation of licenses); *Groves v. Modified Retirement Plan*, 803 F.2d 109, 117 (3d Cir. 1986) (holding that although an administrative agency has broad discretion to implement remedial legislation, it may not penalize absent express authority from the legislature). Under *Pressman* and *Lussier*, however, the Court of Appeals of Maryland has expressed a more liberal approach to the implied powers of administrative agencies than jurisdictions surveyed.

547. *See supra* notes 497-507 and accompanying text.

548. Members of administrative agencies are not elected, so it is impossible to

*Lussier* opinion could have.

However, it is unlikely that the court of appeals would abandon the entire framework for deciding nondelegation doctrine cases. Instead, the *Lussier* opinion indicates the reluctance of the majority of the court of appeals to strike enabling legislation purely on nondelegation grounds. The majority's position will at least require a practitioner to creatively phrase future nondelegation doctrine challenges.

Thus, a nondelegation doctrine challenge should be presented by litigants in the alternative. First, the litigant must assert that the power exercised by the agency extended beyond the power the legislature may constitutionally delegate. As evidenced by *Lussier*, the court of appeals is extremely reluctant to acknowledge this pure nondelegation argument. A litigant can create an escape hatch for the court by positing a statutory construction argument through the canon of judicial restraint.<sup>549</sup>

To lead the court into invoking the canon of judicial restraint, a litigant should assert, in the alternative, that the power exercised by the agency went beyond that which was delegated by the legislature. This argument should employ the traditional canons of statutory construction.<sup>550</sup> Additionally, the litigant should remind the court of its duty to rule on non-constitutional grounds whenever feasible.<sup>551</sup> If the agency's act is indicative of standard-less power, a court could be persuaded to infer that legislature never would have intended to grant such power to the agency because it would violate the nondelegation doctrine.<sup>552</sup> By presenting these arguments in the

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"vote out" an administrator who engages in disfavorable conduct. 1 FRANK E. COOPER, *STATE ADMINISTRATIVE LAW* 37-39 (1965). One scholar has noted that as administrative power increases, the court's power decreases in several ways. *See id.* (noting seven distinct negative effects occurring as administrative independence develops). However, on the federal level, administrative agencies are presently being held vicariously liable through the President. *See supra* notes 139-41 and accompanying text.

549. *See supra* notes 147-59 and accompanying text.

550. *See supra* notes 147-59 and accompanying text.

551. *See supra* notes 147-59 and accompanying text. *Cf. Gutwein v. Easton Publ'g Co.*, 272 Md. 563, 576-77, 325 A.2d 740, 747 (1974).

552. *Cf. Gutwein*, at 576-77, 325 A.2d 747. The *Gutwein* court intimated that this type of argument may prove particularly persuasive when if concluded its opinion as follows:

In view of the Commission's legislative background, the failure of [its enabling statute] to specifically authorize an award of compensatory damages, *the unlikelihood of a legislative grant of unbridled power to an ad-*

alternative, and highlighting the permissible inference of legislative intent, a litigant is more likely to prevail than when the argument is based solely upon constitutional grounds.<sup>553</sup>

## VII. CONCLUSION

The *Lussier* court held that an administrative agency's authority to create a regulation that enabled the agency to impose a fine was valid under a broad statute granting the power to regulate horse racing.<sup>554</sup> The opinion stands for validating any broad delegations of authority, as long as the authority is consistent with the statutory purpose and does not contradict the language or purpose of the statute.<sup>555</sup>

There is no doubt that the General Assembly can enable an agency with the power to create regulations that authorize fines. Prior to *Lussier*, however, this type of delegation of power had to be accompanied by legislative standards or safeguards, unless the agency's jurisdiction fell within one of the carefully defined areas of regulatory authority and met the *Pressman* impracticability exception.<sup>556</sup> After *Lussier*, it appears as though a delegation of quasi-legislative power need not contain standards or safeguards, nor must it fall within a category of authority subject to the *Pressman* exception.

By not undertaking its customary constitutional analysis, the *Lussier* court may have compromised its previous requirement of legislative standards or safeguards accompanying delegations of authority. Furthermore, the *Lussier* holding broadened the powers agencies can now imply to include the power to fine. This holding contravenes prior case law and violates Maryland's separation of

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ministrative agency to make monetary awards *without guidelines or limitations*, and the cited cases, we conclude that the Commission's order granting Gutwein six weeks' loss of pay and moving expenses was *plainly beyond its power and jurisdiction*.

*Id.* (emphasis added). One reason why the court may not have embraced the canon of judicial restraint is because Gutwein did not challenge the constitutionality of the power delegated to the Commission. *See id.* at 576 n.10, 325 A.2d at 746 n.10.

553. *See supra* notes 147-59 and accompanying text.

554. For a discussion of the enabling statute in *Lussier*, see *supra* notes 403-06 and accompanying text.

555. *See Lussier v. Maryland Racing Comm'n*, 343 Md. 681, 688, 684 A.2d 804, 807 (1996).

556. *See supra* notes 239-62 and accompanying text.

powers principle.<sup>557</sup> To prevent the unintended erosion of the nondelegation doctrine in Maryland, it may be necessary for the court to reaffirm both its constitutional inquiry as a threshold issue to any statutory construction analysis, as well as its requirement of legislative standards to prevent abuse.

*Gregory C. Ward*

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557. For a discussion of the separation of powers principle, see *supra* notes 183-91 and accompanying text.