The Maryland Administrative Procedure Act: Forty Years Old in 1997

Edward A. Tomlinson

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THE MARYLAND ADMINISTRATIVE PROCEDURE ACT:  
FORTY YEARS OLD IN 1997

EDWARD A. TOMLINSON*

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INTRODUCTION

American government in the twentieth century has witnessed the arrival of the administrative state. Legislatures still make law by enacting statutes, and courts still apply law by deciding cases, but a vast array of administrative agencies now also exercise important lawmaking and adjudicatory functions.¹ As the Maryland Court of Appeals acknowledged nearly thirty years ago, agencies "have come to legislate more than legislatures and to adjudicate more than courts."² Agen-

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¹ The nondelegation doctrine, at least in theory, bars the legislature from delegating its lawmaking powers, but agency rulemaking is permissible if the statute authorizing agency action states an "intelligible principle"—that is, if the statute provides "sufficient legislative guidelines to limit adequately the exercise of discretion by administrative officials." Department of Transp. v. Armacost (Armacost II), 532 A.2d 1056, 1062 (Md. 1987). Given the lack of vigor characterizing the Court of Appeals's enforcement of these vague standards, it is disingenuous to deny that agencies exercise lawmaking powers, at least within whatever limits the legislature prescribes. See Falik v. Prince George's Hosp. & Med. Ctr., 588 A.2d 324, 328 (Md. 1991) (stating that "the modern tendency of the courts is toward greater liberality in permitting grants of discretion to administrative officials" (citing Sullivan v. Board of License Comm'rs, 442 A.2d 558, 563 (Md. 1982))).

² State Ins. Comm'r v. National Bureau of Cas. Underwriters, 236 A.2d 282, 286 (Md. 1967). Chief Judge Hammond's opinion for the court in National Bureau recognized the validity of lawmaking and adjudication by administrative agencies, effectively giving agencies the court's constitutional seal of approval. See Edward A. Tomlinson, Constitutional...
cies exercise those functions only within limits set by the legislature and the courts; thus, an agency can only make law if given statutory authority to do so, and most agency action is reviewable by the courts. Those salutary checks on agency action prevent agencies from abusing their powers.

Agency lawmaking and adjudication raise basic questions of legitimacy. As an arm of the executive branch, agency regulators lack the legitimacy that legislators acquire through popular election and that judges acquire through the independence and institutional traditions of the courts. This legitimacy deficit frustrates the ability of agencies to obtain popular acceptance as lawmakers and adjudicators, rather than as meddlesome bureaucrats. Popular acceptance is important because, in many areas affecting day-to-day life, the controlling law is likely to be an administrative regulation rather than a statute, and the application of that law to individuals is likely to occur before an administrative agency rather than a court.

Administrative Procedure Acts (APAs) help agencies overcome this legitimacy deficit. No doubt they often appear burdensome to agencies subject to their provisions, but in return for the burdens imposed, APAs reward agencies with increased legitimacy. APAs provide legitimacy in at least three ways: (1) they require transparency by affording public access to agency law and records; (2) they ensure procedural regularity when agencies make or apply law; and (3) they provide judicial review to persons adversely affected by agency action. By promoting the values of transparency, procedural regularity, and judicial review, APAs enhance the legitimacy of the administrative state and, one hopes, improve the quality of agency decisionmaking.

The federal and state APAs adopt a general or comprehensive approach to further these values; they cover all agencies in the jurisdiction except those specifically exempted by statute. As a result, a lack of fit may sometimes exist between APA requirements and the sensible administration of a particular agency program. Despite this concern, APAs normally mandate uniformity in procedural matters unless an agency makes a sufficiently strong case to the legislature for an explicit exemption. This approach reflects a judgment, supported by long experience, that without minimum procedural safeguards,


3. See infra notes 51, 99; see also infra text accompanying note 9.

agencies will give inadequate protection to private interests in the pursuit of efficient, effective, and economical government.5

Maryland enacted its Administrative Procedure Act in 1957.6 The original statute was a fairly barebones affair, but its thirteen brief articles established the basic framework that remains in place today.7 Through its definition of "agency," the 1957 Act applied to "any State board, commission, department or officer authorized by law to make rules or to adjudicate contested cases."8 Specifically exempted were agencies within the legislative or judicial branches and five named executive branch agencies: the Department of Parole and Probation, the State Industrial Accident Commission, the Public Service Commission, the Employment Security Board, and the State Tax Commission.9 For the remaining covered agencies, the Act prescribed procedures for two types of proceedings: rulemaking procedures for the adoption of rules10 and adjudicatory procedures for deciding contested cases.11 This basic dichotomy between rulemaking and adjudication followed the approach found in the Federal APA and anticipated that of the 1961 Model State APA.12

Maryland's 1957 APA, like its federal and state counterparts, embodied the values of transparency, procedural regularity, and judicial review. To ensure transparency, the Act required the Secretary of State to compile, index, and publish all agency rules then in effect

5. See id. at 303-08. Given their general character, APAs should only apply to those situations where the benefits of uniformity outweigh the need for diversity. See id. at 305.
10. Id. § 244(a).
11. Id.
12. See 1961 MSAPA, supra note 6; Bonfield, supra note 4, at 308-09 (discussing states' and model APAs' emulation of the Federal APA).
and to publish the text of all rules subsequently adopted. To ensure procedural regularity, the Act prescribed agency procedures for adopting rules and adjudicating contested cases. To ensure the availability of judicial review, the Act authorized two types of challenges to agency action. First, one could petition a circuit court for a declaratory judgment to determine the validity of a rule if it appeared "that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights or privileges of the petitioner." Second, a "party aggrieved" by a final decision in a contested case could petition the circuit court for review. These two provisions reflect the dichotomy in the Act between rulemaking and adjudication; the scope of review is quite different if the challenged agency action is a rule rather than a final decision in a contested case. Indeed, the court's function in determining the validity of a rule is so narrow that it may be inappropriate to describe it as "judicial review."

Subsequent amendments built on the 1957 Act's basic framework to advance the values of transparency, procedural regularity, and judicial review. The 1974 State Documents Law assured greater transparency and procedural regularity in rulemaking by creating the Maryland Register and the Code of Maryland Regulations (COMAR). By mandating a uniform format for reporting all agency rulemaking activity in two centralized publications, the Act provides the public with ready access to the text of proposed, adopted, and

14. Id. § 245 (rulemaking); §§ 251-254 (contested cases).
15. Id. § 249(a). Section 249 now appears at Md. Code Ann., State Gov't § 10-125. The only changes are stylistic.
17. See infra notes 79-84, 125-130 and accompanying text.
18. The statutory provision authorizing declaratory judgment actions to determine the validity of agency regulations, unlike the provision governing judicial review of decisions in contested cases, makes no mention of judicial review. Md. Code Ann., State Gov't § 10-125.
20. Id. The Maryland Public Information Act, enacted in 1970, also ensured greater transparency by providing all persons access to nonexempt agency records. Act of May 21, 1970, ch. 698, 1970 Md. Laws 1970 (codified at Md. Code Ann., State Gov't §§ 10-611 to -628). Public information provisions are part of the Federal APA and most state APAs, but the Maryland legislature has not formally incorporated the Public Information Act into the APA.
existing regulations. Like their federal counterparts, the Maryland Register publishes notices of proposed and adopted regulations, and COMAR publishes a compilation of all regulations currently in effect. In 1989 the legislature created the Office of Administrative Hearings (OAH) to enhance procedural regularity in adjudication. The OAH functions as a central administrative court for the adjudication of contested cases. Although the APA allows agency heads to retain final decisional authority and to conduct contested case hearings, agencies may no longer employ their own hearing examiners; instead, agencies must use administrative law judges (ALJs) employed by the OAH.

The introduction of a centralized hearing office required further refinement of the statutory provisions relating to contested cases; the legislature adopted the necessary changes in 1993 in response to the recommendations of the Governor's Commission to Revise the Administrative Procedure Act (the Tiburzi Commission).

As Maryland's APA reaches its fortieth anniversary, it has succeeded in legitimating agency lawmaking and adjudication. The Act functions reasonably well, and after the major revisions enacted in 1989 and 1993—the latter revisions in response to the recommendations of a prestigious gubernatorial commission—there is little likelihood that the legislature will tinker further with the Act's text. This Article, therefore, does not propose to analyze the Act's detailed provisions to determine if further amendments are desirable. Rather, it

24. Id. § 7-205.
26. See Md. Code Ann., State Gov't § 9-1601(b) (describing applicability of the OAH); § 10-206 (describing procedures and practice in contested cases).
27. Section 10-202(c) defines "agency head" to mean "an individual or group of individuals in whom the ultimate legal authority of an agency is vested by any provision of law." Id. § 10-202(c).
28. Id. § 10-205(b).
29. Id. § 10-205(a)(1).
30. Id. § 9-1601(b).
shall use Maryland's experience in implementing the Act to analyze how Maryland administrative law differs substantially from contemporary federal administrative law and from administrative law as envisioned by the drafters of the 1981 Model State APA. In addition, the Article shall address two basic questions to assess the soundness of the Act's basic framework.

The first question is the utility of the rulemaking-adjudication dichotomy, both generally and as implemented by Maryland's APA. The categorization of agency action into rulemaking or adjudication determines what procedures the agency must provide and the extent to which aggrieved persons may obtain judicial review. Should so much depend on a distinction that legislatures and courts find difficult to draw? The Article concludes that the Act's reliance on the distinction is reasonable and preferable to a unitary approach. It also concludes, however, that separation of powers principles do not preclude the legislature from requiring courts to review regulations under the standards that the APA applies to final decisions in contested cases; the Court of Appeals errs when it suggests or holds differently.

The second question is the wisdom of recognizing a single procedural model for rulemaking and a single model for adjudication. Applying the APA's rulemaking and contested case procedures is an all-or-nothing affair. When an agency adopts a regulation it must follow the rulemaking procedures, and when it adjudicates a contested case it must follow the contested case procedures. That approach works reasonably well for rulemaking, even though one might question the utility of rulemaking procedures for adopting regulations that do not have legal effect. Adjudication, however, is less clear-cut. The statutory definition of a contested case raises difficult interpretive questions and may cover proceedings for which some procedural adjustments are appropriate, such as initial licensings. In addition, there appear to be adjudications that are not contested cases. Although an adjudication found to be a contested case triggers the full panoply of procedural safeguards and judicial review under the APA, the situation is quite different for adjudications that are not con-

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94. See discussion infra Part I.C.
95. See discussion infra Parts III.A to III.C.
tested cases. The APA assures neither procedural regularity nor judicial review for these cases. Affected parties receive only those procedures the agency chooses to provide, and they may only access the courts, absent some other statutory right to review, through the courts’ inherent power to correct illegal, arbitrary, and capricious administrative acts.  

Relegating noncontested cases to the netherworld of non-APA adjudication deprives them of the APA’s legitimating function. Not all adjudications, however, involve sufficiently important interests to warrant contested case treatment. For example, when a state park ranger revokes a camping permit, the minimal private interest at stake surely does not warrant contested case treatment and the accompanying procedural safeguards. Properly interpreted, the APA does not require that result.

I. RULEMAKING VS. ADJUDICATION IN MARYLAND

Maryland’s APA provides two procedural models: one for adopting regulations and one for adjudicating contested cases. The models differ sharply in providing for public participation and review of agency action. Participation in rulemaking is open to everyone, but limited to the submission of written or oral comments; judicial review of regulations is also limited, but legislative oversight often provides a significant review mechanism. In contested cases, however, aggrieved persons may participate as parties in the equivalent of a civil bench trial before an ALJ. Although legislative review is unavailable, courts review final decisions in contested cases more intensely than they do regulations. Thus, designating a matter as a contested case rather than as rulemaking affords an indeterminate class of persons—those aggrieved by the agency’s decision—with increased opportunities to participate before the agency and to seek relief from the courts.

The Federal APA, by contrast, recognizes at least four procedural models: formal rulemaking, informal rulemaking, formal adjudications, and informal adjudications. Formal rulemaking is subject to both public participation and judicial review, while informal rulemaking is subject only to public participation. Formal adjudications are subject to both public participation and judicial review, while informal adjudications are subject only to public participation. The Federal APA provides a comprehensive framework for ensuring that agencies act in a transparent and accountable manner, and that the public has an opportunity to participate in the rulemaking process.

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37. See infra note 347 and accompanying text.
39. Id. §§ 10-201 to -227.
40. Id. § 10-112(a)(3)(ii).
41. See id. §§ 10-110 to -111.1 (describing legislative review); § 10-125 (limiting judicial review of regulations to declaratory judgment actions).
42. See id. §§ 10-207 to -219 (describing procedures for contested cases).
43. Compare id. § 10-125(d) (permitting a reviewing court to strike a regulation only if ultra vires, unconstitutional, or adopted in violation of procedural requirements for adoption), with id. § 10-222(h)(3) (permitting a court reviewing a decision in a contested case to reverse or modify for other errors of law, for lack of evidence, or because of the agency’s arbitrary or capricious action).
ation, and informal adjudication. Formal or trial-type proceedings are available only if some other statute requires the agency to make a rule or adjudicate a case "on the record after opportunity for an agency hearing." For those proceedings, the Federal APA, like its Maryland counterpart, affords parties the equivalent of a civil bench trial. If no statute external to the APA requires formal proceedings, the agency may proceed informally. For informal rulemaking, the Federal APA specifies the notice and comment procedures that the agency must follow. The Federal APA is largely silent on the procedures that the agency must follow in an informal adjudication, but the Act's unitary review provisions do subject the agency's decision or order to judicial review. Thus, when adjudicating informally, an agency may adopt whatever procedures it chooses, subject to any restrictions found in the United States Constitution or in the agency's enabling legislation. As a general matter, neither informal notice and comment procedures nor findings and conclusions are necessary. However, the availability of review distinguishes informal adjudication in the federal system from non-APA adjudication in Maryland. A federal court cannot perform its reviewing function unless it knows the reasons for the agency's action. Consequently, as the Supreme Court explained, the availability of judicial review "imposes a 'general' pro-

44. See 5 U.S.C. §§ 556-557 (1994) (formal rulemaking); § 553 (informal rulemaking); §§ 554, 556-557 (formal adjudication). For informal adjudication, the Act does not specify what procedures agencies must follow, but provides for judicial review. See 5 U.S.C. § 706.
45. 5 U.S.C. § 553(c) (rulemaking); § 554(a) (adjudication).
46. 5 U.S.C. §§ 556-557. Formal adjudication is also subject to section 554. In recent years, formal rulemaking under sections 556 and 557 has largely disappeared as a procedural model. Congress rarely requires agencies to make rules "on the record after opportunity for an agency hearing." See BERNARD SCHWARTZ, ADMINISTRATIVE LAW § 4.11, at 192 (3d ed. 1991). The Supreme Court is unwilling to construe other statutory language conferring hearing rights as sufficient to trigger formal proceedings. See, e.g., United States v. Florida E. Coast Ry., 410 U.S. 224, 234 (1973) (noting the Court's prior refusal to interpret the Interstate Commerce Act's mandate that the Interstate Commerce Commission act "after hearing" as triggering formal rulemaking procedures (citing United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742 (1972))).
47. 5 U.S.C. § 553. That section exempts certain rules from the requirements of informal rulemaking. For those rules, the applicable procedural model is that of "publication rulemaking." See infra text accompanying notes 239-242.
48. 5 U.S.C. § 702 ("agency action" reviewable); see also id. § 551(13) (defining "agency action" to include "order"); § 551(6) (defining "order" to mean the final disposition of an adjudication). The definitions in sections 551(6) and 551(13) are incorporated into the Act's judicial review chapter. 5 U.S.C. § 701(b)(2).
A. Rulemaking Procedures in Maryland

The rulemaking model requires agencies to follow a legislative-type notice and comment process whenever they adopt a regulation; this requirement broadly applies to most all agencies, including those specifically exempted from the original APA. Under this model, potentially interested persons receive notice of a proposed regulation through the Maryland Register and may submit written or oral comments to the agency; the comment period lasts at least thirty days, and an agency cannot adopt a nonemergency regulation for at least forty-five days after its initial publication in the Maryland Register. To receive oral comments, the agency may either schedule a public hearing or provide a telephone number that persons may call. Notice of an adopted regulation must also appear in the Maryland Register; that notice must identify any changes in the proposed regulation and must include, if changes occurred, a certification from the Attorney General that the text adopted does not differ "substantively" from the text proposed. Thus, if an agency wishes to adopt a regulation that differs "substantively" from the proposed regulation, it must first propose the regulation anew and afford a further opportunity for public comment. That approach differs sharply


51. The rulemaking procedures apply to every "unit" in "the Executive Branch of the State government." Md. Code Ann., State Gov't § 10-109 (1995). "Unit" is defined as an "officer or unit authorized by law to adopt regulations." Id. § 10-101(i). The only executive branch "units" exempted from the APA's rulemaking procedures are the Injured Workers' Insurance Fund, a board of license commissioners, and the Forvm for Rural Maryland. Id. § 10-102(b). Certain bicounty commissions, such as the Washington Suburban Sanitary Commission, also have a limited exemption. Id. § 10-105. Finally, there are a small number of enabling statutes that explicitly exempt agencies from both the rulemaking and contested case subtitles of the APA. See, e.g., Md. Code Ann., Educ. § 12-104(h)(2) (1995) (exempting the Board of Regents of the University of Maryland).


53. Id. § 10-112(a)(2)(ii).

54. Id. § 10-111(a)(3).

55. Id. § 10-111(a)(1)(ii).

56. Id. § 10-112(a)(3)(ii).

57. Id. § 10-114(b)(1).

58. Id. § 10-113(c).

59. Id. § 10-113(a). The Act defines "substantively" to mean "in a manner substantially affecting the rights, duties, or obligations of: (1) a member of a regulated group or profession; or (2) a member of the public." Id. § 10-101(h).
from federal law, which gives agencies greater flexibility to modify proposed rules in response to public comment. 60 Maryland law, however, unlike the Federal APA, does not require agencies to explain the basis and purpose of all adopted rules. 61

Although the opportunities for public participation in rulemaking are fairly limited, the oversight role of the Joint Committee on Administrative, Executive, and Legislative Review (the AELR Committee) is substantial. Statutorily established in 1974, 62 the Committee functions year-round to review proposed regulations for consistency with legislative intent. 63 The APA requires an agency to submit a proposed regulation to the Committee at least fifteen days before submitting it for publication in the Maryland Register; 64 the Committee then has the authority to delay 65 or formally to oppose a regulation's adop-

60. The Federal APA does not explicitly address the issue, but the courts have allowed federal rulemakers to avoid a second round of notice and comment procedures if the adopted rule is a logical outgrowth of the proposed rule. See Benjamin W. Mintz & Nancy G. Miller, Administrative Conference of the U.S., A Guide to Federal Agency Rulemaking 177-84 (2d ed. 1991) [hereinafter Federal Agency Rulemaking]; see also, e.g., American Med. Ass'n v. United States, 887 F.2d 760, 767 (7th Cir. 1989) ("[A] final rule is not invalid for lack of adequate notice if the rule finally adopted is 'a logical outgrowth' of the original proposal." (footnote omitted)). That approach allows agencies to avoid further delay if the notice of proposed rulemaking affords adequate notice for the rule ultimately adopted. See Federal Agency Rulemaking, supra, at 178; see also American Med. Ass'n, 887 F.2d at 768 ("The crucial issue ... is whether parties affected by a final rule were put on notice that 'their interests [were] "at stake".'" (citing Spartan Radiocasting Co. v. FCC, 619 F.2d 314, 321 (4th Cir. 1980) (quoting South Terminal Corp. v. EPA, 504 F.2d 646, 659 (1st Cir. 1974))). Although recognizing Maryland law to be more "stringent," the Attorney General believes that reproposal is not necessary if the changes do not significantly "disadvantage" groups affected by a regulation. 75 Md. Op. Att'y Gen. 90-003, 5, 14 (Jan. 22, 1990). To reduce delay, the Tiburzi Commission recommended amending the APA to create an expedited republication process for making substantive changes in proposed regulations. See Commission to Revise the Admin. Proc. Act, Supplemental Report on Subtitle 1 of the APA 11-12 (1992) [hereinafter Tiburzi Commission Supplemental Report]. The legislature did not act on that recommendation.


62. The AELR Committee was established as part of the State Documents Law of 1974. See supra note 19.


64. Id. § 10-110(b). The Committee may delay a regulation indefinitely unless the agency notifies the Committee of its intention to adopt the regulation and provides the Committee an additional period of time (either 30 days or until the seventy-fifth day following the publication of the proposed regulation, whichever is longer) to complete its review. Id. § 10-111(a)(2)(ii).

65. Id. § 10-111(a)(2).
If the Committee formally opposes a regulation, an agency may adopt it only with the Governor’s approval. Thus, the Committee does not have full veto power over executive branch rulemaking. Committee approval, however, is necessary if an agency wishes a proposed regulation to take effect upon publication under the “emergency adoptions” provision. An emergency regulation takes effect on the date specified by the Committee. If the Committee imposes a time limit on the emergency regulation, the agency must adopt it through normal rulemaking procedures if the regulation is to remain in effect.

The AELR Committee, assisted by the Department of Legislative Reference, reviews roughly five hundred regulations annually. While it does not appear that the Committee has ever formally opposed a regulation, agencies are responsive to the Committee’s views on law and policy. As explained in the Committee’s 1992 Annual Report: “It is an understatement to say that the Committee continues to

66. Id. § 10-111.1. The Committee’s authority to delay or oppose regulations derives from 1985 amendments to the APA. Act of May 28, 1985, ch. 783, 1985 Md. Laws 3664. The prior year, Governor Harry Hughes vetoed a bill authorizing the Committee to suspend a regulation until the following legislative session. See Veto Message of May 29, 1984, 1984 Md. Laws 4092. The Governor contended that the bill violated separation of powers by infringing on the executive branch and the judiciary. See id. The Committee’s lesser authority under the 1985 legislation is now generally accepted.

67. MD. CODE ANN., STATE GOV’T § 10-111.1(d).

68. Id. § 10-111(b). This authority dates from the 1974 State Documents Law. See supra note 19; see also MD. CODE ANN., STATE GOV’T § 10-110(a) (exempting emergency adoptions under section 10-111(h) from preliminary review).

69. MD. CODE ANN., STATE GOV’T § 10-117(b).

70. Id. § 10-111(b)(4)(i)-(ii).

71. Id. § 2-505(b).

72. In 1995, the Committee reviewed 87 regulations submitted for emergency adoption and 445 regulations proposed for adoption within normal time frames (532 total). The comparable figures for 1994 were 84 emergency and 541 proposed regulations (625 total); for 1993, there were 69 emergency and 356 proposed regulations (425 total). See ANNUAL REPORT OF THE JOINT COMM. ON ADMIN., EXECUTIVE, AND LEGIS. REVIEW 2 (1995) [hereinafter 1995 ANNUAL REPORT].

73. Telephone Interview with David M. Sale, Counsel, AELR Committee (Apr. 22, 1996). In late 1994, the Committee decided to oppose a regulation proposed by the Board of Physical Therapy Examiners in the Department of Health and Mental Hygiene. Letter from Paula C. Hollinger, Presiding Chairman of the AELR Committee, to Senator Clarence W. Blount and Delegate Ronald A. Guns (Dec. 2, 1994) (on file with author). However, the Department withdrew the regulation before the Committee formally voted to oppose it. Letter from Charles M. Dilla, Chairman, Board of Physical Therapy Examiners, Department of Health and Mental Hygiene, to Senator John Pica and Delegate John Arnick (Feb. 25, 1995) (on file with author). The regulation had evidently aroused the opposition of chiropractors, who believed it encroached on their territory. See id.
be an active partner in the regulatory process." No doubt the Committee is most active in the emergency adoptions process in which its approval is necessary; it has rejected emergency adoptions in some cases and held public hearings in others. It has also delayed a significant number of proposed regulations. The Committee's primary input, however, is more informal. As explained by the Committee in its 1993 Annual Report:

"Time after time, an agency's draft would be presented to us for review prior to publication and, after review for clarity and compliance with statutory authority, amendments would be necessary. Again, no hard numbers are available because of the informal nature of many of the contacts, but the Committee continues to have input on a substantial number of proposed regulations."

Given the Committee's authority to involve the Governor in agency rulemaking, it is not surprising that agencies usually, but not always, accept the Committee's recommended changes.

Court review of adopted regulations, by contrast, has been quite modest. The judicial review provisions of the APA do not apply to regulations, but only to final decisions in contested cases. The Act's declaratory judgment section authorizes review of a regulation before


its application to determine its validity if "the regulation or its threatened application interferes with or impairs or threatens to interfere with or impair a legal right or privilege" of the person seeking relief.\textsuperscript{80} That section has received little judicial application,\textsuperscript{81} perhaps because of the limited scope of the review provided. A court may declare a regulation invalid only if found to be unconstitutional, \textit{ultra vires}, or adopted in a procedurally irregular fashion.\textsuperscript{82} Thus, review is for legality but not for rationality; the court does not determine whether substantial evidence supports the regulation or whether the regulation is arbitrary or capricious.

Rulemaking procedures in Maryland are thus fairly efficient and not particularly exacting; agencies need not disclose for comment the factual basis for a proposed regulation, nor need they respond to any comments received. The courts' role is minimal, but there is considerable legislative oversight. The process closely resembles the original federal informal rulemaking process. Section 553 of the Federal APA also mandates a legislative-type notice and comment process for informal rulemaking; however, unlike the Maryland APA, it allows an agency to limit interested persons to written submissions.\textsuperscript{83} During the Federal APA's first few decades, opportunities for public participation in agency rulemaking were quite limited, but congressional review of regulations played a significant role in federal rulemaking until the Supreme Court invalidated the legislative veto in 1983.\textsuperscript{84}

\textsuperscript{80} Id. § 10-125(b).
\textsuperscript{81} The first reported decision applying it does not even cite it. See Christ v. Maryland Dep't of Natural Resources, 644 A.2d 54 (Md. 1994) (dismissing a declaratory judgment action challenging regulation setting a minimum age for power boat operators); see also State v. 91st St. Joint Venture, 625 A.2d 953, 958 (Md. 1993) (per curiam) (discussing the availability of judicial review of a regulation's validity in a judicial enforcement proceeding).
\textsuperscript{82} Section 10-125(d) of the State Government Article instructs the court to declare a provision of a regulation invalid:

\begin{enumerate}
\item the provision violates any provision of the United States or Maryland Constitution;
\item the provision exceeds the statutory authority of the unit; or
\item the unit failed to comply with statutory requirements for adoption of the provision.
\end{enumerate}

\textbf{MD. CODE ANN., STATE GOV'T § 10-125(d).}

\textsuperscript{83} 5 U.S.C. § 553(c) (1994). The agency has the discretion to permit oral presentations. Id.

\textsuperscript{84} See INS v. Chadha, 462 U.S. 919, 959 (1983). The Court found that the legislative veto provision in \textit{Chadha}, which permitted either house of Congress to overrule the Attorney General's suspension of an alien's deportation, violated the Constitution's requirements of presenting legislation to the President for approval, bicameral approval of legislation, and separation of executive and legislative powers. \textit{Id.} at 924-25, 952-58. In his
A major transformation in federal rulemaking commenced in the late 1960s. Informal notice and comment rulemaking, justly praised by Professor Kenneth Culp Davis as "one of the greatest inventions of modern government," became "ossified." A process designed to be fair, simple, and efficient became increasingly costly and time-consuming, as all three branches of government imposed additional procedural and substantive requirements on rulemaking agencies. Congress, for example, enacted enabling statutes requiring particular agencies to provide a heightened factual basis for their regulations or to afford the public additional opportunities to participate in the rulemaking process. The executive branch also contributed to the ossification process. Though not required to do so, many agencies developed "hybrid" procedures, affording greater opportunities for the adversarial testing of a proposed rule's factual basis than the purely paper process required by section 553 of the APA. More importantly, the President, acting through the Office of Management and Budget, assumed major oversight responsibilities for agency rulemaking. That oversight, mandated by executive order since the Nixon administration, forces agencies to evaluate the costs and benefits of major proposed rules and to consider less costly regulatory alternatives.

The judiciary has been the most significant contributor to the ossification of federal rulemaking. Starting in the late 1960s, courts, re-

dissent, Justice White asserted that Congress had included a legislative veto in nearly two hundred statutes enacted during the prior five decades. Id. at 968 (White, J., dissenting).


86. Thomas O. McGarity, Some Thoughts on "Deossifying" the Rulemaking Process, 41 DUKE L.J. 1385, 1385 (1992). Professor McGarity was the first to use the colorful phrase "ossify" to describe what had happened to federal rulemaking. See id. For an update on efforts to deossify federal rulemaking, see Richard J. Pierce, Jr., Seven Ways to Deossify Agency Rulemaking, 47 ADMIN. L. REV. 59 (1995).


88. The Administrative Conference of the United States encouraged this development. See ACUS Recommendation 72-5, 1 C.F.R. § 305.72-5 (1996). "Hybrid" procedures exceed the minimum section 553 paper process, but afford less than trial-type process.


viewing regulations under an arbitrary and capricious standard, required federal rulemakers to engage in what the judges called "reasoned analysis." 91 Previously, federal agencies could limit their notices in the Federal Register to a summary of the proposed or adopted rules' provisions. 92 Reasoned analysis, however, forced agencies to expose for adversarial comment the factual basis for a proposed rule and to respond to the relevant objections of interested persons. 93 If an agency failed to satisfy these new informational and explanatory demands, it ran a grave risk that a reviewing court would find the rule to be arbitrary and capricious and, therefore, invalid. 94 Thus, federal rulemakers must expend considerable time and effort in building a record if they expect to produce a rule that will survive judicial review.

The ossification of federal rulemaking reduces the procedural gap between rulemaking and adjudication. Procedures for the adoption of major rules have become so expensive and protracted that many agencies understandably strive to minimize their use and even to substitute adjudication in implementing their statutory mandate. 95 Significantly, Maryland has not experienced a similar development. Compared with the transformation of the federal rulemaking process, rulemaking in Maryland has changed little since the adoption of the State Documents Law 96 in 1974. Reviewing courts have not required reasoned decisionmaking, and the legislature has not imposed "hybrid" rulemaking procedures. In 1978, the legislature did require agencies to publish an economic impact statement with each notice of

91. See, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co., 463 U.S. 29, 57 (1983) (quoting that phrase from Judge Leventhal's well-known opinion in Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970)); United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 252-53 (2d Cir. 1977) (requiring FDA to explain further the basis for a regulation regarding fish processing); Rodway v. United States Dep't of Agric., 514 F.2d 809, 817 (D.C. Cir. 1975) (holding that basis and purpose statement under section 553 must respond "in a reasoned manner" to comments and must explain how the agency resolved significant problems raised by the comments); Automotive Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968) (requiring that basis and purpose statement permit a reviewing court to understand the major policy issues in an informal rulemaking and to see why an agency resolved those issues in a particular fashion).

92. See McGarity, supra note 86, at 1396-97.

93. See Nova Scotia Food Prods., 568 F.2d at 252-53 (finding that agency improperly failed to expose to adversarial comment the factual basis for its rule).

94. See, e.g., id. at 253.

95. Ossification of rulemaking has had that effect on the National Highway Traffic Safety Administration. See JERRY L. MASHAW & DAVID L. HARFST, THE STRUGGLE FOR AUTO SAFETY 95-103, 149-65 (1990); see also CARNEGIE COMMISSION, RISK AND THE ENVIRONMENT: IMPROVING REGULATORY DECISION MAKING 107 (1998) ("many agencies today tend to skirt the informal rulemaking process").

a proposed regulation, 97 but that provision has not imposed a major explanatory burden on agencies. 98 The contrast between the legislative model, applicable to rulemaking, and the trial model, applicable to contested cases, thus remains quite sharp in Maryland.

B. Contested Case Procedures in Maryland

The more demanding contested case model requires the agency 99 to provide a trial-type process with a reasoned decision based exclusively on the record. 100 The trial judge is normally an ALJ employed by the OAH. 101 The 1989 amendments to the APA eliminate the authority of most agencies to employ their own hearing examiners. 102 Agency heads may, if they choose, conduct a contested case hearing themselves, but only if the agency head 103 presides; otherwise,
the agency must delegate hearing authority to the OAH. The agency may delegate its hearing authority case by case or, as almost always occurs, generically for all cases decided under a grant of statutory authority. The agency’s delegation may also authorize the ALJ to issue either a proposed or final decision. If the agency delegates authority to issue a final decision, the ALJ’s decision is directly reviewable in the circuit court; proposed decisions, however, are subject to agency review. In either case, the APA requires the OAH to complete the procedure within ninety days of the hearing.

The trial-type process afforded the parties at a contested case hearing resembles a bench trial in a civil case. Subpoenas are available for the production, but not the discovery, of witnesses and documents, and witnesses testify under oath. A party may present oral and documentary evidence and cross-examine witnesses called by another party or the agency. Hearsay evidence is admissible, but rules of privilege apply, and evidence supporting a finding must be proba-

104. Id. § 10-205(a)(1)(ii). Alternatively, with the prior written approval of the Chief ALJ, the agency may delegate to a person not employed by the OAH the authority to conduct the contested case hearing. Id.
105. Id. § 10-205(a)(1)(ii)(1).
106. Id. § 10-205(b).
107. Among the more important categories of cases in which the OAH has been delegated final decisional authority are involuntary commitment and forced medication proceedings (Department of Health and Mental Hygiene) and drivers’ license suspensions and revocations (Department of Transportation). See Letter from Nelson J. Sabatini, Secretary, Maryland Department of Health and Mental Hygiene, to John W. Hardwicke, Chief Administrative Law Judge 2 (Feb. 23, 1994) (on file with author) (delegating authority for involuntary commitment and forced medication hearings); Letter from James Lighthizer, Secretary, Maryland Department of Transportation, to John W. Hardwicke, Chief Administrative Law Judge 4 (May 26, 1993) (delegating authority for drivers’ license suspension and revocation cases).
109. Id. § 10-220. In its delegation of authority, an agency may require the OAH to allow it to review, and even to modify, a proposed decision before it is distributed to the parties. Id. § 10-220(b)(2), (d)(4). The delegation letters on file at the OAH suggest that few agencies have availed themselves of this possibility.
110. Id. § 10-205(e)(1)(ii). The Chief ALJ may extend the time limit. Id. § 10-205(e)(2).
111. Id. § 9-1605(c). Although nonparty discovery is unavailable, the OAH’s Rules of Procedure require a party, upon request of another party, to provide discovery of documents and tangible things. Md. Regs. Code tit. 28, § 02.01.10A (1994). The unavailability of nonparty discovery does not violate due process. See Maryland Dep’t of Human Resources v. Bo Peep Day Nursery, 565 A.2d 1015, 1025-29 (Md. 1989) (holding no due process violation where hearing officer denied motion for a psychological interview of an abuse victim).
In addition, both proposed and final decisions must contain findings of fact and conclusions of law; the findings of fact must be based exclusively on evidence introduced into the record or officially noticed during the proceeding. To ensure a decision based on the record, ex parte communications between the parties and the presiding officer are prohibited. Finally, the OAH's procedural rules for contested cases apply, unless federal or state law requires that the delegating agency's regulations take precedence in the event of a conflict.

The two-tiered decisional process, commonly employed in contested cases, complicates the analogy to the judicial, or trial, model. Unless the agency delegates final decisional authority to the OAH, the agency head or her designee is responsible for the final agency decision. If the agency head makes the final decision, the parties have a right to file exceptions to the proposed decision and to "present argument" to the final decisionmaker. In reviewing a proposed decision, an agency head does not function like an appellate judge, but may freely substitute her findings of fact and conclusions of law for those of the ALJ, except where credibility is at issue. This arrangement allows agency heads, usually political appointees, to apply their expertise and policy judgments to a record compiled by an independent judge.

Agency heads, unlike ALJs, often exercise enforcement

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113. Id. § 10-213(c), (e). The presiding officer may admit, and give effect to, "probative evidence that reasonable and prudent individuals commonly accept in the conduct of their affairs." Id. § 10-213(b). Hearsay evidence, if sufficiently probative, may provide the substantial evidence needed to support a finding. See Motor Vehicle Admin. v. Karwacki, 666 A.2d 511, 518 (Md. 1995) (holding sworn police report sufficient to support ALJ's decision to suspend driver's license). The Karwacki court emphasized that the ALJ did not believe the motorist's contrary testimony and that the motorist could have subpoenaed the police officer. Id.


115. Id. § 10-214(a).

116. Id. § 10-219.

117. Id. § 10-206(a)(2).

118. Id. § 10-205(a).

119. Id. § 10-216(a). Agencies generally permit written exceptions and oral argument.

120. See Anderson v. Department of Pub. Safety & Correctional Servs., 623 A.2d 198, 209-13 (Md. 1993). The agency head must have "strong reasons" for rejecting an ALJ's credibility determination. Id. at 213 (following Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951)).

121. Federal law adopts a similar, uneasy compromise between the judicial model embodied in the ALJ and the policymaking role of "expert" agency heads. See 5 U.S.C. § 557(b) (1994) (providing that when considering an appeal from an ALJ decision the agency "has all the powers which it would have in making the initial decision").
and rulemaking, as well as adjudicatory responsibilities.\textsuperscript{122} Thus, the separation of functions does not apply to the final agency decision. Although ex parte communications are banned,\textsuperscript{123} an agency head, board, or commission may communicate with advisory staff and counsel who did not otherwise participate in the contested case.\textsuperscript{124}

Final decisions in contested cases are reviewable in the circuit courts.\textsuperscript{125} Only parties aggrieved by the final decision are entitled to judicial review.\textsuperscript{126} The APA's judicial review section specifies six grounds for relief: unconstitutionality, excess of statutory authority, unlawful procedure, other error of law, lack of substantial evidence, and arbitrariness or capriciousness.\textsuperscript{127} The scope of review for final decisions in contested cases is thus much broader than for preapplication review of regulations under the APA's declaratory judgment provision.\textsuperscript{128} Regulations are subject to review for legality but not rationality; the reviewing court does not determine whether substantial evidence supports the regulation or whether the regulation is arbitrary or capricious.\textsuperscript{129} The Federal APA and the 1981 Model State APA reject this dichotomy between review of regulations and adjudicatory decisions. Both provide a unitary system of review applicable to all final agency action; the scope of review depends on whether the issue before the court is one of fact, law, or discretion, and not on whether the agency resolves the issue in rulemaking or adjudication.\textsuperscript{130}

\textsuperscript{122} The Secretary of the Environment, for example, has statutory authority to adopt regulations and to enforce environmental statutes and regulations. Md. Code Ann., Envir. § 1-404(b), (i) (1996).

\textsuperscript{123} Md. Code Ann., State Gov't § 10-219(a)(1). An agency head is a "presiding officer" subject to the APA's restrictions on ex parte communications. Id. § 10-202(g) (when making the agency's final decision in a contested case).

\textsuperscript{124} Id. § 10-219(a)(2).

\textsuperscript{125} Id. § 10-222. That section authorizes the reviewing court to:
reverse or modify the decision if any substantial right of the petitioner may have been prejudiced because a finding, conclusion, or decision:
(i) is unconstitutional;
(ii) exceeds the statutory authority or jurisdiction of the final decision maker;
(iii) results from an unlawful procedure;
(iv) is affected by other error of law;
(v) is unsupported by competent, material, and substantial evidence in light of the entire record as submitted; or
(vi) is arbitrary or capricious.

Id. § 10-222(h)(3).

\textsuperscript{126} Id. § 10-222(a).

\textsuperscript{127} Id. § 10-222(h)(3); see infra note 131.

\textsuperscript{128} Md. Code Ann., State Gov't § 10-125.

\textsuperscript{129} Id. § 10-125(d).

For contested case proceedings, the reviewing court decides all questions of law and subjects all findings of fact to substantial evidence review. The approach by the Court of Appeals to substantial evidence review reflects Judge Hammond's classic formulation in *State Insurance Commissioner v. National Bureau of Casualty Underwriters:* whether "a reasoning mind reasonably could have reached the factual conclusion the agency reached." Thus, agency findings of fact, if supported by substantial evidence, bind the reviewing court, and the court cannot substitute its judgment for that of the agency. The situation is less clear with respect to mixed questions—the agency's application of the law to the facts—and to exercises of discretion. The APA's judicial review section is silent on what is a "finding, conclusion, or decision" subject to substantial evidence review. In reviewing

131. Questions of law encompass the first four grounds listed in the judicial review provision of the APA. See Md. Code Ann., State Gov't § 10-222(h)(3)(i)-(iv) (listing unconstitutionality, excess of statutory authority, unlawful procedure, and other error of law as grounds for reversal or modification). In reviewing issues of statutory authority, the Court of Appeals has not adopted the Supreme Court's *Chevron* doctrine, which requires a reviewing court to accept the agency's interpretation of an ambiguous statute if it is a reasonable one. See *Chevron U.S.A Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837, 843 (1984). The Court of Appeals insists that an agency interpretation is never "binding" on a court, although it may be entitled to deference if the agency has applied it consistently for a long period of time. See *Baltimore Gas & Elec. Co. v. Public Serv. Comm'n*, 501 A.2d 1307, 1315 (Md. 1986). Similarly, an agency interpretation of a regulation receives great deference, but does not bind the courts. See *Ideal Fed. Sav. Bank v. Murphy*, 665 A.2d 1272, 1279 (Md. 1995) ("[A]n agency's interpretation of an administrative regulation is of controlling weight unless it is plainly erroneous or inconsistent with the regulation.") (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).


133. 236 A.2d 282 (Md. 1967).

134. Id. at 292. Other frequently cited decisions describe substantial evidence review in similar terms. See, e.g., *Liberty Nursing Center*, 624 A.2d at 945-46 ("If reasoning minds could reasonably reach the conclusion reached by the agency from the facts in the record, then it is based upon substantial evidence."); *Caucus Distrbs., Inc. v. Maryland Sec. Comm'r*, 577 A.2d 783, 788 (Md. 1990) ("[S]ubstantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."); *Bulluck v. Pelham Woods Apts.*, 390 A.2d 1119, 1123-24 (Md. 1978) (determining '"whether a reasoning mind reasonably could have reached the factual conclusion the agency reached"' (quoting *Dickinson-Tidewater, Inc. v. Supervisor of Assessments*, 329 A.2d 18, 25 (Md. 1974))). Prior to 1978, the APA's judicial review section also required the reviewing court to determine if the agency's findings of fact were "against the weight of competent, material, and substantial evidence." Md. Ann. Code art. 41, § 255(g)(6) (1957), repealed by Act of May 29, 1978, ch. 884, 1978 Md. Laws 2586, 2594. Weight of the evidence review seems more intense than substantial evidence review, but the *National Bureau* court found them to be basically the same. *National Bureau*, 236 A.2d at 291-92 ("There are differences but they are slight and under any of the standards the judicial review should be limited to whether a reasoning mind reasonably could have reached the factual conclusion the agency reached.").

135. See *Liberty Nursing Ctr.*, 624 A.2d at 945.

Tax Court decisions, the Court of Appeals has treated mixed questions as it would findings of fact. Thus, deferential substantial evidence review applies to "findings of fact, drawing of inferences, and application of law to the facts." Applying that substantial evidence review to contested cases is consistent with the Court of Appeals's endorsement of rationality review, and the Court of Special Appeals has done so.

On the second issue, the APA's judicial review provision seemingly authorizes review of discretionary agency action, providing that the reviewing court may reverse an agency decision that is "arbitrary or capricious." The Court of Appeals, however, has given little attention to that provision. In the federal system, review of discretionary action under the arbitrary and capricious standard has often proved intense. Concern over the judicial role in reviewing such action prompted the drafters of the 1981 Model State APA to offer a unitary judicial review provision with two options. One option authorized review of agency action for unreasonableness, arbitrariness, or capriciousness; the second option eliminated such review. As stated by the drafters, the legislature might eliminate review for arbitrariness or capriciousness "to discourage reviewing courts from substituting their judgment for that of the agency as to the wisdom or desirability


138. *Friends Sch.*, 550 A.2d at 660 n.2 (whether superintendent's house on school grounds dedicated to "educational use"); *see also Ramsay, Scarlett & Co.*, 490 A.2d at 1301 (whether separate accounting was authorized under Md. Ann. Code art. 81, § 516(c) (1980)).


141. Perhaps the most well-known example is the Supreme Court's decision in *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Insurance Co.*, 463 U.S. 29 (1983). The case involved a challenge to the National Highway Traffic Safety Administration's rescission of a regulation requiring passive restraints on new motor vehicles. *Id.* at 34. There the Court held that:

> [A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *Id.* at 48.

142. *See 1981 MSAPA, supra note 38, § 5-116(c)(8)(iv). Although review under the arbitrary and capricious standard is optional, the Model Act authorizes substantial evidence review of all agency determinations of fact. *Id.* § 5-116(b)(7).
of the agency action under review."^{143} Although Maryland's APA affords that type of review for contested case decisions,^{144} it is not surprising, given the Court of Appeals's aversion to anything resembling judicial substitution of an agency's judgment, that it has remained a dead letter.

The Maryland APA gives the circuit courts jurisdiction to review final decisions in contested cases.^{145} The legislature cannot make agency action directly reviewable in the Court of Special Appeals or the Court of Appeals because the jurisdiction of those courts under Maryland's Constitution is exclusively appellate.^{146} Although judicial review of agency action is often referred to as an appeal, the Court of Appeals has held that "review of the decision of an administrative agency is an exercise of original jurisdiction and not of appellate jurisdiction."^{147} This restriction on the legislature is unfortunate. Judicial review under the APA is exclusively on the administrative record,^{148} and the legislature might well find it advisable, in certain categories of

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143. *Id.* § 5-116 cmt. Judge (now Justice) Breyer also noted the upside-down quality of federal courts intensively reviewing agency exercises of discretion while accepting, under the *Chevron* doctrine, agency interpretations of statutes, so long as the interpretation is reasonable. *See* Stephen J. Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 397-98 (1986). That dichotomy encourages courts to meddle in policy matters (the agency's business), while limiting their role in interpreting statutes (the court's business). *See id.*


145. *Id.* § 10-222(c). The petition for review must generally be filed within 30 days of the final decision. *Md. R.* 7-203(a) (1996).


148. The 1957 Maryland APA allowed the circuit court to take "de novo evidence." *Md. Ann. Code art.* 41, § 255(g)(6)-(7) (1957). In 1978, the legislature repealed these provisions and required review to be based on the administrative record unless some other statute provided for "de novo review." *Act of May 29, 1978, ch.* 884, 1978 Md. Laws 2594, 2594 (latter provision codified at *Md. Ann. Code art.* 41, § 252A (1982)). In 1993, the legislature, following a recommendation of the Tiburzi Commission, eliminated from the APA the reference to statutes requiring de novo review and adopted a rule of interpretation that "de novo" means "judicial review based upon an administrative record." *Md. Ann. Code art.* 1, § 32(a) (1995). This rule of interpretation is subject to several exceptions. *Id.* § 32(b). One of those exceptions appears in the APA itself, which allows the taking of new evidence by the circuit court under very limited circumstances. *Md. Code Ann.*, STATE GOV'T § 10-222(g)(2) (testimony on procedural irregularities). The reviewing court has broader authority to expand the record by ordering the agency to take additional evidence. *Id.* § 10-222(f) (newly discovered evidence).
contested cases, to allow direct review in the Court of Special Appeals. Such an approach might be appropriate if the cases involved were modest in number and likely to involve significant legal issues. For those cases, eliminating circuit court review might well produce efficiencies.

The courts' performance of their review function further demonstrates the tenuousness of the distinction between original and appellate jurisdiction. Under the APA, a party aggrieved by a final judgment of a circuit court may normally appeal to the Court of Special Appeals; certiorari is also available to the Court of Appeals. The appellate courts do not, as one might expect, review the circuit court's judgment; rather, they "essentially repeat the task of the circuit court." Thus, the appellate court determines whether the agency erred and not whether the lower court did so. As the Court of Appeals explained: "[A] reviewing court, be it a circuit court or an appellate court, shall apply the substantial evidence test to the final decisions of an administrative agency." It is, therefore, hard to understand why the Court of Appeals may review an administrative record for substantial evidence on appeal from a lower court, but not if a lower court has not intervened. In both cases the Court of Appeals reviews the agency's decision; but in neither case does the Court of Appeals revise or correct the judgment of a lower court in any meaningful sense.

149. Review of Tax Court decisions is an example. Under the statutes declared unconstitutional in Shell Oil, 343 A.2d at 528, the legislature had authorized direct review by the Court of Appeals or the Court of Special Appeals. Id. at 523. Tax Court decisions are now initially reviewable in the circuit court. Md. Code Ann., Tax-Gen. § 10-223 (1995).

150. Congress enjoys greater flexibility and may assign judicial review of agency action to either a trial or an appellate court. On the policy questions raised by this choice, see David P. Currie & Frank I. Goodman, Judicial Review of Federal Administrative Action: Quest for the Optimum Forum, 75 Colum. L. Rev. 1, 5-23 (1975).


154. See id.

155. Baltimore Lutheran High Sch. Ass'n, Inc. v. Employment Sec. Admin., 490 A.2d 701, 708 (Md. 1985). In Anderson v. Department of Public Safety & Correctional Services, 623 A.2d 198, 220 (Md. 1993), the Court of Appeals quoted that language to justify its determination that substantial evidence did not support the agency's findings. Id.

156. In Shell Oil, the Court of Appeals, quoting Joseph Story, Commentaries on the Constitution of the United States § 1755 (1833), treated the revising and corrective power as "the essential criterion of appellate jurisdiction." Shell Oil Co. v. Supervisor of Assessments, 343 A.2d 521, 525 (Md. 1975). Of course, under the present system, the Court of Special Appeals or Court of Appeals will affirm or reverse the circuit court's judg-
C. Application of Rulemaking vs. Adjudication Dichotomy

The procedural models applicable to rulemaking and adjudication under Maryland’s APA afford affected persons strikingly different opportunities to participate in agency decisionmaking and to obtain judicial review. Under the adjudicatory model, the parties have the right to a decision based on a record compiled through trial-type procedures before an independent judicial officer; courts may review that decision for both legality and rationality. Under the rulemaking model, any person may submit written or oral comments to inform or persuade the agency decisionmaker, but there is no opportunity to challenge effectively, before the agency or in court, the factual basis for the regulation. Rulemaking is thus a legislative-type process and adjudication a trial-type process. In the former, interested persons may present their views; in the latter, parties present proof subject to cross-examination.

This dichotomy between rulemaking and adjudicatory proceedings makes sense if it reflects a difference in the factual disputes the agency needs to resolve. Disputed facts, according to Professor Davis, are either adjudicative or legislative. Trial-type procedures are appropriate for determining adjudicative facts. Adjudicative facts “usually answer the questions of who did what, where, when, how, why, with what motive or intent; adjudicative facts are roughly the kind of facts that go to a jury in a jury case.” Adjudicative facts thus pertain to particular persons and their activities. For example, did a landowner dredge and fill wetlands without a permit, or did a licensee misappropriate her client’s funds? Ordinarily, those types of facts ought not to be determined without providing affected persons an opportunity to know and meet unfavorable evidence in a trial-type proceeding. On the other hand, notice and comment procedures are appropriate to ascertain legislative facts. Legislative facts do not

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158. Id. § 10-222.
159. See supra notes 51-58 and accompanying text.
160. See supra notes 79-130 and accompanying text.
162. See id.
163. See id.
concern particular persons, "but are the general facts which help the tribunal decide questions of law and policy and discretion." Examples of legislative facts include the health hazards posed by cigarette smoke in workplaces and the capacity of persons under fourteen years of age safely to operate power boats. Generally, trials are neither necessary nor appropriate when agencies determine disputed legislative facts.

Some of the more ardent proponents of the adjudicative-legislative fact distinction favor abandoning the rulemaking-adjudication dichotomy and substituting a unitary proceeding. Under this approach, an agency would structure the proceeding to accommodate the factual disputes to be resolved. The agency would use notice and comment procedures to determine legislative facts and trial-type procedures to determine adjudicative facts, regardless of whether the agency was rulemaking or adjudicating. The proponents appear to be mainly concerned about the wasteful use of trial-type process to determine legislative facts in adjudication. The proponents also recognize, however, that more than notice and comment procedures might sometimes be needed in rulemaking to resolve specific issues of material fact. Their goal is to achieve a closer fit between the facts in dispute and the procedures used to resolve those disputes. Agency fact-finding procedures should conform to the nature of the facts in dispute and not to the classification of the proceeding as rulemaking or adjudication.

This functional approach is appealing. Two leading zoning cases demonstrate the Court of Appeals's commitment to the unitary ap-

164. See id.
165. Maryland agencies recently determined these legislative facts in rulemaking proceedings. See Fogle v. H & G Restaurant, Inc., 654 A.2d 449 (Md. 1995) (reviewing a regulation banning smoking in most workplaces); Christ v. Maryland Dep't of Natural Resources, 644 A.2d 34 (Md. 1994) (upholding a regulation banning persons under 14 years of age from operating power boats).
168. See Robinson, supra note 167, at 537.
169. See 2 DAVIS, supra note 161, § 12:5, at 422.
172. See id.
proach if the APA does not apply. Both cases involved the same statutory provision giving interested persons a right to a "public hearing" in connection with an application to amend the Montgomery County zoning map.\textsuperscript{173} In \textit{Hysan v. Montgomery County Council},\textsuperscript{174} the court held that affected property owners had the right to cross-examine witnesses at a sectional map amendment hearing before the county council.\textsuperscript{175} Although the \textit{Hysan} court conceded that zoning reclassifications were "legislative or quasi-legislative,"\textsuperscript{176} it reasoned that the adjudicative facts in dispute determined "the type of public hearing which the Council was required to afford."\textsuperscript{177} Eleven years later, in \textit{Montgomery County v. Woodward & Lothrop, Inc.},\textsuperscript{178} the Court of Appeals distinguished \textit{Hysan} as involving piecemeal rezoning and held that property owners challenging a comprehensive rezoning did not have a right to a trial-type hearing.\textsuperscript{179} According to the \textit{Woodward & Lothrop} court, whether the comprehensive rezoning bore "the requisite relationship to the public health, safety and general welfare" was not an adjudicative determination "affecting one property owned by one person."\textsuperscript{180} Rather, the council's determinations were "classically legislative . . . designed to affect local and regional needs and all property owners within the planning area."\textsuperscript{181} The court found it irrelevant that downzoning the challengers' property from business to residential might affect protected property interests.\textsuperscript{182} What determined a party's right to an adjudicatory hearing was, according to the court, "the nature of the decision's fact-finding process, not the ultimate effect of the decision."\textsuperscript{183} Thus, the legislative-type hearing afforded the aggrieved property owners all the process they were due.\textsuperscript{184}

The Court of Appeals has adopted a different approach in distinguishing between rulemaking and adjudication under Maryland's APA. Rather than focusing on the nature of the facts in dispute, as it

\begin{itemize}
  \item \textsuperscript{173} \textit{Montgomery County, Md., Code} § 59-204 (Supp. II 1974).
  \item \textsuperscript{174} 217 A.2d 578 (Md. 1966).
  \item \textsuperscript{175} \textit{Id.} at 585-86.
  \item \textsuperscript{176} \textit{Id.} at 583.
  \item \textsuperscript{177} \textit{Id.} at 584.
  \item \textsuperscript{178} 376 A.2d 483 (Md. 1977). For a recent application of the \textit{Hysan} and \textit{Woodward & Lothrop} cases, see \textit{Woodmont Country Club v. Mayor of Rockville}, 670 A.2d 968, 986 (Md. Ct. Spec. App.), \textit{cert. granted}, 677 A.2d 583 (Md. 1996), holding that the city council's denial of the right to cross-examination at the special assessment hearing violated due process.
  \item \textsuperscript{179} \textit{Woodward & Lothrop}, 376 A.2d at 497.
  \item \textsuperscript{180} \textit{Id.} at 498.
  \item \textsuperscript{181} \textit{Id.}
  \item \textsuperscript{182} \textit{Id.} at 495.
  \item \textsuperscript{183} \textit{Id.} at 497.
  \item \textsuperscript{184} \textit{Id.} at 495.
\end{itemize}
did in the zoning cases, the court inquires whether the agency action is of "general" or "particular" applicability.\textsuperscript{185} Rulemaking generates "prescriptive statements" of general applicability and future effect,\textsuperscript{186} whereas adjudication applies the law to "a specific person or entity."\textsuperscript{187} Thus, the adoption of general standards is rulemaking, and the application of those standards to a particular person is adjudication. An agency adjudicates when it grants a license or approves a particular rate filing; the decision's policymaking component and prospective effect do not transform it into a rulemaking.\textsuperscript{188} All licensing and most ratemaking are thus adjudicatory under the Maryland APA. For example, the Health Services Cost Review Commission proceeds hospital by hospital in approving rates; those proceedings are, therefore, contested cases reviewable under the APA.\textsuperscript{189} Likewise, the Public Service Commission determines company by company what are just and reasonable rates;\textsuperscript{190} those proceedings are not subject to the APA because they are neither rulemaking (the rate order is of particular applicability) nor contested cases (the Commission is exempt from the contested case subtitle of the APA).\textsuperscript{191}

The Court of Appeals's distinction between matters of general and particular applicability is consistent with the Maryland APA. The Act defines "regulation" to include "a statement or amendment or repeal of a statement" that has "general application" and "future effect"

\textsuperscript{185} See, e.g., CBS, Inc. v. Comptroller of the Treasury, 575 A.2d 324, 328 (Md. 1990) (holding that an agency must utilize rulemaking to change an existing rule).

\textsuperscript{186} Id. at 326. Under the Federal APA, a rule may be either of general or particular applicability; the hallmark of a rule is its prospective effect. 5 U.S.C. § 551(4) (1994). Federal law treats a rule as general and not particular, even though only one person is subject to the rule, provided the rule does not name that specific person. See, e.g., Anaconda Co. v. Ruckelshaus, 482 F.2d 1301, 1304 (10th Cir. 1973) (holding that a challenge to a proposed EPA rule was not ripe because it had yet to be applied to any individual).

\textsuperscript{187} Medical Waste Assocs., Inc. v. Maryland Waste Coalition, Inc., 612 A.2d 241, 248 (Md. 1992). In Medical Waste Assocs., Judge Eldridge suggested that this definition of adjudication applies in non-APA cases as well. Id. That dictum reflects a change in the court's position. Cf. Chevy Chase Village v. Montgomery County Bd. of Appeals, 239 A.2d 740, 745 (Md. 1968) (grant of building permit is "quasi-legislative"); Woodward & Lothrop, 376 A.2d at 497 (grant of building permit in Chevy Chase is not "quasi-judicial").

\textsuperscript{188} The Federal APA defines adjudication to include licensing. 5 U.S.C. § 551(6)-(7). However, ratemaking of particular applicability—applicable to a named entity—is rulemaking. See supra note 186.

\textsuperscript{189} See Health Servs. Cost Review Comm'n v. Franklin Square Hosp., 372 A.2d 1051, 1055 (Md. 1977) (noting that agency determination of certain facts is reviewable under the APA).

\textsuperscript{190} See Building Owners & Managers Ass'n v. Public Serv. Comm'n, 614 A.2d 1006, 1012 (Md. Ct. Spec. App. 1992). Most ratemaking in Maryland appears to be of particular applicability. For an example of ratemaking of general applicability, see the regulation of the Maryland Port Authority, discussed infra note 247.

and is adopted by an agency to "detail or carry out" a law that the agency administers.\textsuperscript{192} In a contested case, on the other hand, the agency "determines" either a "right, duty, statutory entitlement, or privilege of a person" or "the grant, denial, renewal, revocation, suspension, or amendment of a license."\textsuperscript{193} Regulations, therefore, implement statutes generally; in doing so, they "detail" or "carry out" the law. Regulations do not, however, determine rights of specific persons; that determination occurs when the agency applies a regulation or statute to specific parties.\textsuperscript{194}

Despite the advantages of tailoring procedures to the nature of the facts in dispute, the federal and most state APAs have, like Maryland, maintained the traditional rulemaking-adjudication dichotomy.

\textsuperscript{192} Id. § 10-101(g). The definition reads in full:

\begin{itemize}
\item[(g) Regulation - (1)] "Regulation" means a statement or an amendment or repeal of a statement that:
\begin{itemize}
\item[(i)] has general application;
\item[(ii)] has future effect;
\item[(iii)] is adopted by a unit to:
\begin{itemize}
\item[1.] detail or carry out a law that the unit administers;
\item[2.] govern organization of the unit;
\item[3.] govern the procedure of the unit; or
\item[4.] govern practice before the unit; and
\end{itemize}
\item[(iv)] is in any form, including:
\begin{itemize}
\item[1.] a guideline;
\item[2.] a rule;
\item[3.] a standard;
\item[4.] a statement of interpretation; or
\item[5.] a statement of policy.
\end{itemize}
\end{itemize}
\begin{itemize}
\item[(2)] "Regulation" does not include:
\begin{itemize}
\item[(i)] a statement that:
\begin{itemize}
\item[1.] concerns only internal management of the unit; and
\item[2.] does not affect directly the rights of the public or the procedures available to the public;
\end{itemize}
\item[(ii)] a response of the unit to a petition for adoption of a regulation, under § 10-123 of this subtitle; or
\item[(iii)] a declaratory ruling of the unit as to a regulation, order, or statute, under Subtitle 3 of this title.
\end{itemize}
\begin{itemize}
\item[(3)] "Regulation," as used in §§ 10-110 and 10-111.1, means all or any portion of a regulation.
\end{itemize}
\end{itemize}

\textsuperscript{193} Id. § 10-202(d). For the complete text of the definition of contested case, see infra note 323.

\textsuperscript{194} The 1957 Maryland APA made this distinction clearer by defining a contested case to mean a proceeding for determining the rights of "specific parties." Md. Ann. Code art. 41, § 244(c) (1957). The term "person" was substituted for "specific parties" in this definition when the APA was incorporated into the State Government Article in 1984. Md. Code Ann., State Gov't § 10-201(c) (1984). The Revisor provided no explanation for this change.
Such an approach seems appropriate for three reasons. First, the distinction between legislative and adjudicative facts is often more difficult to draw than the distinction between rulemaking and adjudication. Second, it is possible to develop considerable procedural flexibility within the distinct categories of rulemaking and adjudication. Third, and most important, there is already a rough fit between adjudication and adjudicative facts and rulemaking and legislative facts.

This fit is particularly tight for general rulemaking proceedings and accusatory adjudicatory proceedings. An example of the former is the Division of Labor and Industry’s recent proceeding to promulgate a regulation prohibiting smoking in enclosed workplaces. The regulation, like a statute, was prospective in effect and applied generally, rather than to specifically named workplaces. The regulation’s opponents challenged the scientific evidence on which the Division relied to establish the health hazards of environmental tobacco smoke, but the court found that the Division’s notice and comment procedures were adequate to resolve the issues of disputed legislative fact. Examples of accusatory adjudicatory proceedings would include a disciplinary action against a state employee or a license revocation for violating a regulatory standard. In those cases the agency must determine what the employee or licensee did in order to apply the law to those facts. Once again, the fit is reasonably close between the facts likely to be in dispute and the APA’s procedures. The disputed facts will be adjudicative, and trial-type procedures will be suitable for resolving them. The same is likely to be so for cases involving the termination of welfare or other benefits.

Initial licensing and ratemaking cases are more problematic. Licensing is “a distinctive genre, partaking of the characteristics both of

195. The Florida APA, as amended in 1974, is the one significant exception. That Act abolishes the traditional distinction and substitutes in its place formal (trial-type) proceedings for resolving disputed issues of material fact and informal (notice and comment) proceedings for all other matters. Fla. Stat. Ann. § 120.57 (West 1996). As in the Court of Appeals’ zoning decisions, the nature of the facts in dispute determines the type of process required.

196. See Bonfield, supra note 4, at 308-16.


199. See H & G Restaurant, 654 A.2d at 458.

200. See, e.g., Maryland State Police v. Zeigler, 625 A.2d 914, 923-24 (Md. 1993) (holding that disciplinary action against employee is a contested case); Prince George’s County v. Blumberg, 418 A.2d 1155, 1167 (Md. 1980) (holding that license revocation or suspension is a contested case).

201. See, e.g., Murray v. State Dep’t of Soc. Servs., 272 A.2d 16, 17 (Md. 1971) (holding that termination of welfare benefits is a contested case).
rule making and of adjudication." When granting or denying a license, an agency determines the present right of a specific person, but it does not do so by applying a legal standard to past adjudicative facts. Rather, the agency must predict whether the future effect of granting the license is likely to be consistent with its statutory mandate—will the licensee behave properly, and what effect will the licensed activity have on other persons? Those predictive determinations are often formulated as issues of adjudicative fact (does this applicant satisfy all relevant criteria?), but the policymaking or legislative component of initial licensing often remains quite pronounced. The agency must make a judgment with respect to the future and not, as in license suspensions and revocations, resolve an accusation of past misconduct. In this context, the distinction between legislative and adjudicative facts becomes exceedingly difficult to apply.

Responding to this concern, the Federal APA exempts initial licensing from some of the trial-type procedures required for formal adjudication under sections 554, 556, and 557. The APA's drafters believed that initial licensing determinations were "much like rulemaking." Thus, in initial licensing, federal agencies have more flexibility than in other formal adjudications. Section 556(d) allows agencies to adopt procedures for the presentation of all or part of the evidence in written form; section 554(d) permits the use of staff experts, including those who have taken adversarial positions, to formulate the agency's decision; and section 557(b) authorizes an agency to eliminate an initial or recommended decision by the ALJ. These adjustments in the trial-type procedures for formal adjudication assist agencies in using their expertise to determine legislative facts and to

202. 2 Frank E. Cooper, State Administrative Law 483 (1965).
204. See id. at 50-53.
205. See supra note 200.
206. For example, a leading environmental permitting case treats as an adjudicative fact the predicted effect of thermal pollution—heated water discharged by a nuclear plant—on marine life. See Seacoast Anti-Pollution League v. Costle, 572 F.2d 872, 881-82 (1st Cir. 1978). For Professors Davis and Pierce, the fact is clearly legislative. See I Davis & Pierce, supra note 50, § 8.2, at 383.
209. 5 U.S.C. §§ 554(d), 556(d), 557(b). For a vigorous defense of these provisions, especially the elimination of separation of function constraints, see William E. Pedersen, Jr., The Decline of Separation of Functions in Regulatory Agencies, 64 Va. L. Rev. 991, 998-1001, 1034-35 (1978).
make policy in initial licensing proceedings. Maryland's APA does not contain any comparable provisions; not surprisingly, initial licensings have sometimes posed special problems when adjudicated as contested cases.

The Federal APA's treatment of ratemaking is a bit more complex. The Act defines rulemaking as the "approval or prescription" for the future "of rates" and other charges, regardless of whether the agency proceeds generally (approving rates for a whole industry) or particularly (approving rates for a named entity). The drafters evidently assumed that most agency ratemaking would occur through modified trial-type procedures. That assumption soon proved unworkable, at least for ratemaking of general applicability in which the agency makes "a basically legislative-type judgment, for prospective application only." Thus, in United States v. Florida East Coast Railway, the Court held that the Interstate Commerce Commission (ICC) provided the hearing required by the Interstate Commerce Act when the ICC utilized notice and comment procedures to determine generally what per diem charges provided railroads an incentive to return empty boxcars to their owners. In upholding the ICC's action, the Court carefully distinguished, as involving a "quasi-judicial" proceeding, an earlier case requiring the ICC to use a trial-type process in determining whether a particular railroad's rates were unreasona-

210. The EPA has invoked the partial exemption of initial licensing from the requirements of formal adjudication to craft relatively informal procedures for environmental permitting. See Natural Resources Defense Council, Inc. v. EPA, 859 F.2d 156, 191-95 (D.C. Cir. 1988) (per curiam) (upholding the EPA's nonadversarial panel procedures for the issuance of discharge permits).

211. See infra text accompanying notes 497-520.


213. See Attorney General's Manual, supra note 203, at 32-35. Ratemaking statutes generally required a hearing; it was, therefore, assumed that agencies would promulgate rates under the trial-type procedures found in APA sections 556 and 557 (including special provisions similar to those applicable to initial licensing), rather than under the notice and comment procedures found in section 555. Sections 556 and 557 apply when rules are "required by statute to be made on the record after opportunity for an agency hearing." 5 U.S.C. § 553(c).


217. Florida E. Coast Ry., 410 U.S. at 238-46. The Court also held that the hearing required by the Interstate Commerce Act did not trigger the applicability of sections 556 and 557 of the APA. Id. at 234-38.
The Court thus emphasized the fit between adjudicative facts and matters of particular applicability and between legislative facts and matters of general applicability. Maryland is, therefore, correct in treating only ratemaking of particular applicability as adjudicatory.

Initial licensing and general ratemaking thus raise concerns about using trial-type procedures to determine legislative facts. Another related concern is the use of formal, trial-type procedures where the private interests at stake are modest, even if the facts in dispute are likely to be adjudicative. Developing fair, informal procedures for such cases was considered—primarily in the mid- and late-1970s—an important challenge confronting administrative law. Scholars vigorously debated which procedural components for informal adjudication were essential, and a consensus developed that fairness required, at a minimum, notice to affected parties, an opportunity to make written or oral submissions, and a statement of reasons from an impartial decisionmaker. This informal adjudicatory process closely resembles informal notice and comment rulemaking; although there is an impartial decisionmaker (not required in rulemaking), there is no presentation of testimony subject to cross-examination to compile a formal trial record.

The 1981 Model State APA responds to this interest in informal procedures with two new adjudicatory models to supplement the con-
The conference hearing model provides a stripped-down version of a formal hearing: notice, an opportunity to testify and to submit written exhibits, an ALJ as the initial decisionmaker, limits on ex parte contacts, findings and reasons, and agency review. Other elements of a formal hearing are not present: prehearing conferences, subpoenas, discovery, cross-examination, and testimony by nonparties. In contrast, the summary adjudicative model affords a party the minimum process envisioned by the advocates of informal procedures: notice, an opportunity to state her position, a reasoned decision by a responsible agency official, and administrative review. The provisions of the 1981 Model State APA allow an agency to use these informal adjudicatory procedures, not only if there are no material facts in dispute or if the parties consent, but also if the interests involved are relatively minor.

Despite much scholarly praise, the informal adjudicatory models have generated little response from state legislatures. Of the three states that have adopted the 1981 Model State APA, only Washington has included the APA provisions on informal adjudication. In other states are either optional or

225. See 1981 MSAPA, supra note 33, §§ 4-401, 4-502.
226. See id. § 4-402.
227. See id.
228. See id. § 4-503; supra notes 222-223 and accompanying text.
229. For example, conference hearings are permissible if the monetary amount in dispute is not more than $1000 (or other amount designated by the legislature). See 1981 MSAPA, supra note 33, § 4-401(2). They are also permissible for disciplinary sanctions against prisoners and, if no more than a ten-day suspension is at stake, against students and public employees. See id. Summary adjudicative proceedings are permissible if the monetary amount in dispute is not more than $100. See id. § 4-502(3). They are also permissible for reprimands to public employees, denials of public employment, and rejections by public educational institutions. See id. The legislature may add other subject matter areas if it chooses.
231. WASH. REV. CODE ANN. § 34.05.482 (West 1996). That section allows an agency to conduct a brief adjudicative proceeding—similar to the 1981 Model State APA's summary adjudicative proceeding—if the agency determines by regulation that the issues and interests involved do not require more formal procedures. Id. § 34.05.482(d). The only agency that appears to have adopted such a regulation is the University of Washington. Wash. ADMIN. CODE § 365-210-070 (West 1996) (failure on examination); § 1321-130-030 (tuition and fee waivers).
applicable only if no adjudicative facts are in dispute. This preference for formal adjudication reflects a judgment that trial-type procedures are usually necessary to determine disputed adjudicative facts. It seems fairer, if informal procedures do not resolve a dispute, to give the affected party an opportunity to appear with witnesses before an impartial decisionmaker, rather than to devise procedures for depriving aggrieved parties of their proverbial day in court. At least most state legislatures appear to believe so.

II. RULEMAKING AND THE MARYLAND APA

Rulemaking proceedings, although limited to matters of general applicability, occupy a far larger terrain in Maryland than does informal rulemaking in the federal system. There are two explanations for this phenomenon. First, the Maryland APA does not replicate the numerous exemptions from notice and comment rulemaking found in section 553 of the Federal APA. The Act does contain an "internal management" exception, but the Attorney General has given that exception a narrow construction. Second, both the Attorney General and the Court of Appeals have sharply restricted the ability of agencies to make general policy through adjudication. As a result of these initiatives, agencies normally must use rulemaking procedures to make general policy.

The numerous rulemaking exemptions in the Federal APA have produced an additional, less formal model often called "publication
rulemaking." Under this model, the agency either publishes the adopted rule in the Federal Register—ultimately codifying it in the Code of Federal Regulations—or makes the adopted rule available for public inspection under the Freedom of Information Act. In neither case does the agency provide any opportunity for public participation prior to adopting the rule. This publication model is permissible for rules exempted from the notice and comment provisions in section 553 of the Federal APA. The exemptions fall into three categories: subject matter exemptions (rules relating to military or foreign affairs, public property, loans, grants, benefits, or contracts); exemptions for nonlegislative rules (interpretive rules, general statements of policy, and rules of agency organization, procedure, or practice); and a general good-cause exemption where notice and comment procedures are impracticable, unnecessary, or contrary to the public interest.

These exemptions have received their share of criticism, and the Administrative Conference has adopted a number of recommendations urging agencies not to invoke them. The publication model nevertheless seems appropriate, at least for exempt rules in the second and third categories. For those categories, the cost of public procedures—mainly extra effort and delay—may exceed the benefits. Nonlegislative rules—interpretive rules and policy statements—do not bind members of the public, but if published they do bind agency staff and provide public guidance as to how the agency is likely to act. Similarly, rules adopted under the good-cause exemption are usually either noncontroversial or responsive to situations requiring the agency promptly to provide public guidance. These exemptions thus encourage desirable rulemaking that might otherwise not occur.

240. See id. at 1470. For exempt rules of general applicability, the agency must use the Federal Register. 5 U.S.C. § 552(a)(1).
241. A legislative or substantive rule has the force and effect of law; it is thus binding both on the agency and on private parties. See Schwartz, supra note 46, § 4.8, at 180-81.
244. See Strauss, supra note 239, at 1468-69. Professor Strauss recognizes that higher level agency decisionmakers normally can depart from a nonlegislative rule if they provide an explanation. See id.
Maryland's APA, like its federal counterpart, defines "regulation" broadly to cover interpretive rules, policy statements, and rules governing practice and procedure. Unlike the Federal Act, however, the Maryland Act does not exempt nonlegislative regulations from public rulemaking proceedings. Thus, an agency must use notice and comment procedures to adopt interpretive regulations and policy statements. The only exception found in the Act is for matters of "internal management." According to the Attorney General, that exception applies to a staff directive or similar statement only if the internal guidance it provides to staff "does not significantly affect either the procedural steps that interested persons must take in their dealings with an agency or the allocation of substantive benefits or burdens." Although the Attorney General applied that test to find that the Governor's Policy on Smoking fell within the exception, it would seem that most interpretive rules would not be exempt because they do affect how agency staff treat members of the public.

Equating the procedures for promulgating binding and nonbinding regulations seems questionable. The Attorney General has recommended that the legislature consider amending the APA to exempt interpretive regulations from notice and comment procedures. According to the Attorney General, almost all of the states follow the Federal APA and the 1961 and 1981 Model State APAs in restricting public rulemaking procedures to statements of a "legislative nature." Maryland's overuse of rulemaking procedures prompted the Tiburzi Commission to recommend a comparable change. Rather

ing the six-month period studied by Professor Lavilla, over 30% of all final rules appearing in the Federal Register were adopted pursuant to this exemption. See id. at 339-40.

247. Id. It also does not exempt rulemaking relative to public property, loans, grants, benefits, or contracts. Id. The Attorney General nevertheless found implicit in the Act a narrow exemption for proprietary price-setting by the Maryland Port Authority. See 68 Md. Op. Att'y Gen. 9, 9 (1983). The price-setting was of general applicability; the Attorney General nevertheless found it was exempt, reasoning that it was unreasonable to require rulemaking procedures every time an agency changed the price of carrots and peas in the cafeteria line. See id. at 15.

250. 72 Md. Op. Att'y Gen., at 296 (stating that persons transacting public business "do not have a right to smoke while doing so").
251. See id. at 27.
252. Id.
than distinguishing between legislative and nonlegislative statements, the Commission sought to define a category of noncontroversial regulations—those unlikely to attract public comment—that agencies could adopt through short-track procedures. \(^{254}\) Those procedures would apply primarily to curative, corrective, or technical changes that conform regulations to superseding state and federal law. \(^{255}\) Both the Attorney General’s and the Commission’s proposals deserve serious consideration.

Maryland’s distinctive approach to required rulemaking provides the second explanation for rulemaking’s comparative importance. \(^{256}\) A hallmark of federal administrative law is the broad discretion of agencies to choose between rulemaking and adjudication when formulating general policy. \(^{257}\) Although the Supreme Court has suggested in dicta that an agency’s choice of adjudication might, in some circumstances, constitute an abuse of discretion, \(^{258}\) the federal courts have not required agencies to make general rules only through rulemaking procedures, thus eschewing what scholars call “required rulemaking.” \(^{259}\) As a result, some federal agencies—the National Labor Relations Board (NLRB), most notably—implement their statutory mandate primarily through adjudication. \(^{260}\) Those agencies conduct few rulemaking proceedings because they formulate general policy in adjudication. \(^{261}\)

The situation is quite different in Maryland. Although the Court of Appeals initially endorsed the federal approach, \(^{262}\) it ultimately

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254. See id.
255. See id. At the very least, that reform should encourage removing references to superseded statutes and regulations from COMAR.
256. See, e.g., CBS, Inc. v. Comptroller of the Treasury, 575 A.2d 324, 326-28 (Md. 1990) (departing from the federal standard granting agencies broad discretion to choose between rulemaking and adjudication).
258. See Bell Aerospace, 416 U.S. at 294. The Bell Aerospace Court did not specify what those circumstances might be. Id.
259. I DAVIS & PIERCE, supra note 50, at § 6.8, at 266-73.
261. See, e.g., id. at 274-76 (describing NLRB’s virtually exclusive use of adjudication to make policy).
262. See Baltimore Gas & Elec. Co. v. Public Serv. Comm’n, 501 A.2d 1307, 1319 (Md. 1986) ("'[T]he choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency.'" (quoting Chenery, 332 U.S. at 203)).
adopted a strikingly different methodology in *CBS, Inc. v. Comptroller of the Treasury.* In that case, the Comptroller, in auditing CBS's 1980 and 1981 tax returns, applied for the first time an audience-share method to determine the proportion of CBS's network advertising revenue that was taxable in Maryland. The Comptroller's "new policy" increased CBS's tax liability. The court found that application of the Comptroller's new policy was invalid because it "amounted to a change in a generally applicable rule" that "had to be promulgated pursuant to the rulemaking procedures of the APA."

The *CBS* decision broadly requires agencies to use rulemaking procedures to formulate general policy. Although the court emphasized that the Comptroller's new policy reflected a change, the court's reasoning applies with equal force to agency policies that are truly new. The court invoked the advantages of rulemaking—prospective effect and greater public participation—and favorably cited out-of-state precedent interpreting similar APA provisions to mandate rulemaking "when the agency action falls within the statutory definition of 'rule' or 'regulation.'" That a new policy represents a significant change does not appear to determine whether rulemaking is required. The Attorney General rightly framed the basic inquiry in a broader fashion: "Is the agency's action a prospective exercise in policymaking that will have a significant effect on a member of the public, including members of a regulated industry? If so, the APA's rulemaking requirement applies." Applying that test, the Attorney General advised the Racing Commission that authorizing Arabian racing at licensed tracks required a regulation. The Attorney General also recognized that identifying changes in policy is often a difficult task. For example, the Attorney General was unsure whether permitting Arabian racing constituted a change

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263. 575 A.2d 324 (Md. 1990).
264. Id. at 325.
265. Id. at 330.
266. Id.
267. Id. at 328 ("the change must be accompanied by rulemaking").
268. Id. at 328.
269. Id. at 327. The lead precedent, cited by the *CBS* court, is *Megdal v. Oregon State Board of Dental Examiners*, 605 P.2d 273, 287 (Or. 1980) (holding that revocation of dentist's license for making intentional misrepresentations was erroneous where agency had not adopted a rule proscribing this conduct).
271. Id. In an earlier opinion, the Attorney General had advised the Racing Commission that it could not award Sunday racing dates at Maryland tracks without first adopting a regulation allowing Sunday racing. See 65 Md. Op. Att'y Gen. 396 (1980) (cited favorably by the *CBS* court, 575 A.2d at 328).
in policy if there had been no "conscious policy" of the Commission prohibiting it.273 Likewise, the policy change identified by the CBS court was problematic at best. The Comptroller, in previous audits of the network's tax returns, had done nothing to attribute any of its advertising revenues to Maryland.274 That informal practice, not reflected in any regulation or adjudicatory decision, was, in the eyes of the court, the changed "policy."275 The presence of change, therefore, seems less important than the general applicability of the new policy in determining whether rulemaking is required. As the CBS court recognized, rulemaking is not necessary if the Comptroller adjusts his policy to the "peculiar or unusual circumstances that apply to a particular taxpayer."276

Maryland's required rulemaking doctrine has also had a profound effect on adjudication. In Maryland, policy issues do not arise in adjudication as often as in federal administrative law. Agency counsel, invoking a long line of Attorney General opinions,277 advise that issues of general policy must be resolved through rulemaking. As a result, the focus of adjudication changes; decisionmakers tend to interpret and apply Maryland regulations rather than determine what is sensible policy under the statute. Like all generalizations, this one is subject to exceptions. Agency regulations are often vague or do not address all relevant issues. Certainly, one cannot eliminate all policymaking from adjudication; but even in initial licensing, the most policy-oriented category of adjudication, decisionmakers in Maryland tend to focus on whether the applicant satisfies the applicable regulations. Thus, in reviewing applications for certificates of need, the Health Resources Planning Commission focuses on applying the State Health Plan.278 Similarly, in issuing air quality permits, the Depart-

273. See id. at 320.
274. CBS, 575 A.2d at 325, 328-29.
275. Id. at 329. The court also noted that there was "no showing that this policy was only applied to CBS." Id.
276. Id. at 330 n.5. The Court of Appeals recently held that rulemaking is not necessary if a new rule formulated by an agency lacks widespread application. See Department of Health & Mental Hygiene v. Chimes, Inc., 681 A.2d 484, 489 (Md. 1996).
ment of the Environment seeks to avoid open-ended issues not addressed by agency regulations.  

This shift from policymaking by adjudication to policymaking by rulemaking somewhat rationalizes the Maryland APA's bifurcated review provisions. Under those provisions, final decisions in contested cases are reviewable for both legality and rationality, but regulations are reviewable only for legality; the court does not determine whether substantial evidence supports the regulation or whether it is arbitrary or capricious. Proponents of a unitary system argue that the scope of review should not depend on the nature of the proceeding but on the nature of the issue—whether it is one of fact, law, application, or discretion. For example, an agency's imposition of a new requirement on a regulated trade or profession should not be subject to rationality review if accomplished through adjudication, but be subject only to review for legality if adopted by rulemaking. That argument, however, loses a good deal of its force if, as appears to be the case in Maryland, the required rulemaking doctrine causes agencies to resolve most policy issues through rulemaking. Because the agency must adopt new policy through regulations not subject to rationality review, the reviewability of an agency's policy determination does not depend on the agency's choice of rulemaking or adjudication. Maryland thus achieves uniformity by excluding the check of judicial review.

It is, nevertheless, a close question whether the factual and policy bases for regulations should be subject to rationality review in the courts. Proponents might argue that the availability of judicial review would improve the quality of agency decisionmaking. Before adopting a regulation, an agency should gather information, consider relevant factors, and articulate, at least for itself, the reasons for its action. Most agency rulemakers do that today, but persons ad-

280. See supra notes 79-82, 125-130 and accompanying text.
283. See supra notes 235-238, 262-276 and accompanying text.
versely affected by a regulation have no mechanism available for challenging an agency's refusal to engage in reasoned decisionmaking. Although the AELR Committee sometimes does intervene, that review process is political, and an aggrieved person has no right to force the Committee to act.\textsuperscript{285}

Rationality review of regulations appears workable even though the facts supporting the regulation will be legislative, rather than adjudicative. The agency should gather relevant facts in preparing its notice of proposed rulemaking and in conducting the public rulemaking proceeding. Thus, the agency should have a record to present to the reviewing court.\textsuperscript{286} Take, for example, the Department of Natural Resources regulation prohibiting the operation of personal watercraft in Maryland waters by any person who is less than fourteen years old.\textsuperscript{287} That regulation easily survived review for legality in the Court of Appeals;\textsuperscript{288} the court rejected challenges based on the nondelegation doctrine and lack of statutory authority.\textsuperscript{289} Although the court did not review the regulation for rationality, one would hope that the record before the agency\textsuperscript{290} amply demonstrated that there was substantial evidence to support the regulation—that a reasoning mind reasonably could have reached the same conclusion.\textsuperscript{291} Courts, of course, do not normally subject statutes to rationality review when determining their constitutionality; rather, the court presumes the existence of justifying facts and requires the challenger to establish that

\begin{footnotesize}
\begin{enumerate}
\item 285. See supra notes 62-78 and accompanying text.
\item 286. It is a close question whether the agency rulemaking record should be the exclusive record for judicial review. The Federal APA so provides in 5 U.S.C. § 706 (1994). See Nova Scotia Food Prods. Corp. v. United States, 568 F.2d 240, 249 (2d Cir. 1977) (stating that for informal rulemaking judicial review should focus on existing agency record). But see 1981 MSAPA, supra note 33, §§ 3-112(c), 5-114(a)(3) (allowing a reviewing court to hear new evidence).
\item 288. See Christ v. Maryland Dep't of Natural Resources, 644 A.2d 34, 42 (Md. 1994) ("[T]his Court has repeatedly upheld the constitutionality of administrative regulations reflecting policy determinations which have been just as 'fundamental' as the age restriction embodied in the [boating regulation].").
\item 289. See id. at 40.
\item 290. The Department had received numerous complaints, ran tests, and held public hearings. See id. at 36 n.4.
\item 291. Under the Federal APA, substantial evidence review only applies to formal, on-the-record proceedings. 5 U.S.C. § 706(2)(E). For informal proceedings (including most rulemaking), the standard of review is whether the agency action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Id. § 706(2)(A). When applied to questions of fact, that standard closely resembles substantial evidence review. See Association of Data Processing Serv. Orgs., Inc. v. Board of Governors, 745 F.2d 677, 683-84 (D.C. Cir. 1985) (stating that "there is no substantive difference").
\end{enumerate}
\end{footnotesize}
those facts do not exist.\textsuperscript{292} The courts’ refusal to review for rationality seems appropriate for statutes promulgated by a democratically elected legislature; it seems less so for regulations or other exercises of delegated authority.\textsuperscript{293}

In contrast, ossification of the federal rulemaking process demonstrates that rationality review of regulations has its costs.\textsuperscript{294} That unhappy experience makes it unlikely that the Maryland legislature will change the present system of bifurcated review. This is hardly an irrational choice.\textsuperscript{295} In non-APA cases, the Court of Appeals has similarly limited review of agency action that is legislative in nature.\textsuperscript{296} The judiciary’s role “is limited to assessing whether the agency was acting within its legal boundaries.”\textsuperscript{297} Under this “legal boundaries” review, the court decides all relevant questions of law, including the scope of the agency’s authority, but does not review the agency’s action to determine if “it is arbitrary or capricious or unsupported by substantial evidence.”\textsuperscript{298} Those grounds of review—which may be considered rationality review—apply only if the agency action is adjudicatory or quasi-judicial.\textsuperscript{299} Thus, in \textit{Fogle v. H & G Restaurant, Inc.},\textsuperscript{300} the court restricted its review of a Division of Labor and Industry regulation


\textsuperscript{293} The \textit{Christ} opinion may express some concern over rationality review when it reasons that “[S]ome age restriction . . . would seem to be absolutely necessary.” \textit{Christ}, 644 A.2d at 41-42 (emphasis added). The reference to “some” suggests the question—why age 14? Why not 15 or 13? Any line drawn has a certain arbitrary quality, but a line at any of those age limits would appear reasonable. Perhaps a court committed, or overcommitted, to review of arbitrariness or capriciousness might require the agency to demonstrate that it had considered alternative age limitations or even that the age limitation chosen was the best one. Such intensive review seems excessive. To prevent it, one might limit rationality review, as did the 1981 Model State APA in an optional provision, to substantial evidence review of factual determinations. See \textit{supra} text accompanying notes 142-144. That approach eliminates review for arbitrariness and capriciousness of agency exercises of discretion.

\textsuperscript{294} \textit{See supra} notes 86-95 and accompanying text.

\textsuperscript{295} A majority of the states do not afford rationality review of rules. \textit{See Funk}, \textit{supra} note 282, at 134-95 (identifying only 13 states that provide such review).

\textsuperscript{296} \textit{See Weiner v. Maryland Ins. Admin.}, 652 A.2d 125, 129 (Md. 1995) (quoting Department of Natural Resources v. Linchester Sand & Gravel Corp., 334 A.2d 514, 523 (Md. 1975) (limiting review of agency action that is legislative in nature)). \textit{Weiner} involved the approval of a rate filing. \textit{Id.} at 126-27.

\textsuperscript{297} \textit{Id.} at 129.

\textsuperscript{298} \textit{Judy v. Schaefer}, 627 A.2d 1039, 1053 (Md. 1993) (involving appropriations reduction by Governor).

\textsuperscript{299} \textit{See Weiner}, 652 A.2d at 129 (finding grounds apply when agency acting in quasi-judicial capacity (quoting \textit{Linchester}, 334 A.2d at 523)); \textit{Judy}, 627 A.2d at 1053 (finding grounds do not apply because action is not adjudicatory or quasi-judicial).

\textsuperscript{300} 654 A.2d 449, 456 (Md. 1995).
prohibiting smoking in workplaces to a determination of whether the agency stayed within "legal boundaries," notwithstanding the applicable statute's explicit mandate of substantial evidence review.301

The Court of Appeals's model for review of quasi-legislative agency action is consistent with the limited review of regulations available under the APA's declaratory judgment section. The court errs, however, when it suggests, as in H & G Restaurant, that the Separation of Powers provision in the Maryland Declaration of Rights302 bars the legislature from requiring stricter review of agency regulations.303 While the court is correct in asserting that the legislature may not confer upon courts the authority to substitute the court's judgment for the agency's legislative determination,304 rationality review, properly understood, does not permit the court to do so. In State Insurance Commissioner v. National Bureau of Casualty Underwriters,305 the court reviewed the legislative determinations of the Insurance Commissioner under a statutorily mandated preponderance of the evidence standard306 and correctly concluded that the legislature had not conferred upon the court "a too intense right of review."307 A court could perform its legislatively assigned task because preponderance of the evidence review, like substantial evidence review, did not allow substituted judgment.308 Rather, when reviewing under either a substantial evidence or a preponderance of the evidence standard, the court's role "should be limited to whether a reasoning mind reasonably could have reached the factual conclusion the agency reached. This need not and must not be either judicial fact-finding or a substitution of judicial judgment for agency judgment."309

The Court of Appeals thus erred in H & G Restaurant when it refused to subject the Division's regulation to substantial evidence review.310 The Division promulgated the regulation, which prohibited

301. Id. The statute was Md. Code Ann., Labor & Empl. § 5-215(c) (1991).
302. Article 8 of the Declaration of Rights reads:
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.
303. H & G Restaurant, 654 A.2d at 455.
304. Id. at 456; see Weiner, 652 A.2d at 229.
305. 236 A.2d 282 (Md. 1967).
306. Id. at 288.
307. Id. at 287.
308. Id.
309. Id. at 292.
310. H & G Restaurant, 654 A.2d at 455.
smoking in workplaces, under Maryland’s Occupational Safety and Health Act,\(^3\) and as the court recognized, that Act provided the “appropriate standards of review.”\(^4\) Those standards included substantial evidence review.\(^5\) Nevertheless, the court concluded:

The “substantial evidence” standard of judicial review, as set forth in § 5-215(c)(2), namely, whether a reasoning mind could have reached the factual conclusions the agency reached, is inapplicable as our prior cases indicate where the agency is acting in a quasi-legislative mode in considering and adopting regulations within the boundaries of its rule-making authority.\(^6\)

The *H & G Restaurant* court relied on earlier cases involving legislative determinations by zoning boards\(^7\) and, in one case, by the Baltimore Commissioner of Health.\(^8\) Those cases addressed the constitutional limits on the exercise of the police power and not the reviewability of agency action under the APA or other statute; thus, given the legislative nature of the agency action challenged, the Court of Appeals treated the agency’s action as presumptively correct.\(^9\)

That approach—requiring notice, hearing, and evidentiary support only for

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312. *H & G Restaurant*, 654 A.2d at 455 (citing Md. Code Ann., Lab. & Empl. § 5-215(c)).

313. Id.

314. Id. at 456 (emphasis added). By “inapplicable,” the court must have meant unconstitutional; there is no other possible basis for the court’s refusal to follow the legislature’s command.


316. See Givner v. Commissioner of Health, 113 A.2d 899 (Md. 1954). The *H & G Restaurant* court also relied on *Department of Natural Resources v. Linchester Sand & Gravel Corp.*, 334 A.2d 514 (Md. 1975). *H & G Restaurant*, 645 A.2d at 455. In that oft-cited case, the court struck down, on separation of powers grounds, a statute requiring independent judicial fact-finding—substitution of judgment—on the grant or denial of wetlands permits. *Linchester*, 334 A.2d at 521. The *Linchester* court did suggest that the scope of review of agency action legislative in nature was “limited to assessing whether the agency was acting within its legal boundaries (not an issue here).” Id. at 523. As the *Linchester* court explicitly noted, that statement was no more than dictum; in its support, the court cited the same line of cases invoked by the *H & G Restaurant* court. *Id.*

317. See Woodward & Lothrop, 376 A.2d at 495 (stating that legislative acts undergo narrow, arbitrary or ultra vires review and noting presumption of validity of zoning board’s actions); Storch, 298 A.2d at 14 (same); Crown Cent. Petroleum, 265 A.2d at 196-97 (concluding zoning board acting in legislative or quasi-legislative capacity will be upheld if a reasonable factual basis supports board’s action, even if the board acted with no evidence and noting heavy presumption of constitutionality); Givner, 113 A.2d at 903 (noting that review of health board’s action is only for arbitrary, illegal, or unreasonable acts).
adjudicatory action\textsuperscript{318}—is appropriate if the legislature has not spoken. But \textit{National Bureau} makes clear that the legislature can require courts to perform substantial evidence or similar rationality review of agency regulations.\textsuperscript{319} The legislature had so provided in the Maryland Occupational Safety and Health Act,\textsuperscript{320} and the \textit{H \& G Restaurant} court should have respected that choice.\textsuperscript{321}

III. ADJUDICATION AND \textbf{THE MARYLAND APA}

\textbf{A. \textit{Relationship Between Adjudication and Contested Case}}

The Maryland APA’s trial-type hearing procedures apply to all agencies that “adjudicate contested cases.”\textsuperscript{322} Although it follows that all contested cases are adjudications, it does not follow that all adjudications are contested cases. A proceeding must satisfy two requirements under the APA to qualify as a contested case.\textsuperscript{323} First, the

\textsuperscript{318} This approach appears most clearly in \textit{Mayor of Baltimore v. Biermann}, 50 A.2d 804 (Md. 1947). There, the court held that the legislative determinations of zoning authorities are presumptively correct, “even if the legislative body acted without evidence at all.” \textit{Id.} at 808. To obtain relief, aggrieved property owners had to show that the challenged action exceeded the police power or deprived them of property without due process. \textit{Id.}


\textsuperscript{320} \textbf{MD. CODE ANN., LAB. \& EML.} § 5-215(c)(2) (1991).

\textsuperscript{321} Despite its explicit refusal to apply the statute, the \textit{H \& G Restaurant} court did engage in considerable rationality review. For example, the court found “abundant scientific evidence in the record” to support the agency’s conclusions on the health hazards posed by environmental tobacco smoke. \textit{H \& G Restaurant}, 654 A.2d at 458.


\textsuperscript{323} \textit{Id.} § 10-202(d). That definition reads in full:

\begin{itemize}
  \item [(d)] \textit{Contested case}.—(1) “Contested case” means a proceeding before an agency to determine:
    \begin{itemize}
      \item [(i)] a right, duty, statutory entitlement, or privilege of a person that is required by statute or constitution to be determined only after an opportunity for an agency hearing; or
      \item [(ii)] the grant, denial, renewal, revocation, suspension, or amendment of a license that is required by statute or constitution to be determined only after an opportunity for an agency hearing.
    \end{itemize}
  
  (2) “Contested case” does not include a proceeding before an agency involving an agency hearing required only by regulation unless the regulation expressly, or by clear implication, requires the hearing to be held in accordance with this subtitle.
\end{itemize}
proceeding must be of particular applicability—the agency must "determine"\textsuperscript{324} (adjudicate) "a right, duty, statutory entitlement, or privilege of a person" or "the grant, denial, renewal, revocation, suspension, or amendment of a license."\textsuperscript{325} Second, a "statute or constitution"\textsuperscript{326} or a "regulation"\textsuperscript{327} must require the agency to make such a determination "only after an opportunity for an agency hearing."\textsuperscript{328} Thus, the statutory definition of a contested case does not itself grant a right to a contested case hearing; that right must come from an external source—either some other statutory provision,\textsuperscript{329} constitutional principles, or an agency regulation. In the case of hearings required by regulation, contested case procedures only apply when the regulation "expressly, or by clear implication,"\textsuperscript{330} requires the hearing to be held in accordance with the contested case subtitle.\textsuperscript{331}

Maryland's APA thus adopts an "intermediate" approach in determining the relationship between adjudication and the APA's hearing provisions.\textsuperscript{332} An adjudication is not a "contested case" unless a stat-

\begin{itemize}
\item \textsuperscript{324} Id.
\item \textsuperscript{325} Id. § 10-202(d)(1)(i)-(ii).
\item \textsuperscript{326} Id.
\item \textsuperscript{327} Id. § 10-202(d)(2).
\item \textsuperscript{328} Id. § 10-202(d)(1)(i)-(ii).
\item \textsuperscript{329} The statutory source is usually not part of the APA, but at least one section of the APA does appear to confer hearing rights. See id. § 10-226(c) (providing that an agency cannot suspend or revoke a license without first giving the licensee notice and an opportunity for a hearing); see also Maryland Racing Comm'n v. Castrenze, 643 A.2d 412, 418 (Md. 1994) (concluding that "the General Assembly intended that an administrative agency could not suspend a license without first giving the licensee ... an opportunity to be heard in the matter"). The Court of Appeals thus misspoke when it stated that "the APA itself does not grant a right to a hearing." Sugarloaf Citizens Ass'n v. Northeast Md. Waste Disposal Auth., 594 A.2d 1115, 1120 (Md. 1991). What the court meant to say was that the APA's definition of a "contested case" does not itself grant a right to a hearing.
\item \textsuperscript{330} MD. CODE ANN., STATE GOV'T § 10-202(d)(2).
\item \textsuperscript{331} The contested case provisions in the original Maryland APA applied to all hearings "required by law or constitutional right." MD. ANN. CODE art. 41, § 244(c) (1957). When the APA became part of the State Government Article, the Revisor substituted "required by law" for "required by law or constitutional right." MD. CODE ANN., STATE GOV'T § 10-201(c) (1984) (Revisor's Note). The Court of Appeals subsequently interpreted that language to cover hearings required by "a statute, a regulation, or due process principles." Sugarloaf Citizens Ass'n v. Northeast Md. Waste Disposal Auth., 594 A.2d 1115, 1120 (Md. 1991). The present definition of contested case derives from the recommendations of the Tiburzi Commission. See Tiburzi Commission Initial Report, supra note 32, at 25. The Commission found the term "law" to be ambiguous and substituted the phrase "statute or constitution." Id. The present definition also treats separately hearings required by regulation to allow agencies to grant parties a contested case hearing even though not required to do so by constitution or statute. See id.
\item \textsuperscript{332} Professor Asimow uses the terms "maximum," "intermediate," and "minimum" to describe the three principal alternatives from which legislatures must choose when decid-
ute, constitution, or agency regulation confers a right to a hearing and thus triggers contested case procedures.\(^3\)\(^3\) By contrast, the "maximum" approach, adopted by the 1981 Model State APA, ensures that all agency adjudication falls under the APA; an agency must conduct an "adjudicative proceeding" under the Act whenever it formulates an order of particular applicability that determines "the legal rights, duties, privileges, immunities, or other legal interests of one or more specific persons."\(^3\)\(^3\)\(^4\) The maximum approach thus requires an agency to follow APA procedures whenever it adjudicates, regardless of whether some other statute or due process principles require a hearing. The 1981 Model State APA recognizes, however, that in some adjudications the interests at stake may not be important enough to warrant formal procedures. It, therefore, creates four distinct procedural models: formal adjudicative hearings, conference adjudicative hearings, emergency adjudicative proceedings, and summary adjudicative proceedings.\(^3\)\(^3\)\(^5\) The formal adjudicative hearing resembles the contested case model; the other models allow agencies to adopt less formal procedures where a full, trial-type process is not appropriate.\(^3\)\(^3\)\(^6\)

The "minimum" approach, in contrast, limits contested case procedures to adjudications where a statute requires the opportunity for a hearing.\(^3\)\(^3\)\(^7\) A prime example is the Federal APA, which adopts the minimum approach to formal adjudication—the federal equivalent of a contested case. Sections 554, 556, and 557 of the Federal Act require trial-type procedures for formal adjudication,\(^3\)\(^3\)\(^8\) but those sections apply only to "adjudication required by statute to be determined on the record after opportunity for an agency hearing."\(^3\)\(^3\)\(^9\) That text makes no mention of hearings required by the Constitution and


\(^{334}\) 1981 MSAPA, supra note 33, § 1-102(5).

\(^{335}\) Id. §§ 4-202 to -221 (formal adjudicative hearings); § 4-402 (conference adjudicative hearings); § 4-501 (emergency adjudicative proceedings); § 4-503 (summary adjudicative proceedings).

\(^{336}\) See supra text accompanying notes 225-229.

\(^{337}\) Asimow, supra note 230, at 1082.


\(^{339}\) Id. § 554(a).

\(^{340}\) Shortly after the Act's enactment, the Supreme Court, in a deportation case, interpreted a hearing "required by statute" to include a hearing required by "more than statutory authority"—a hearing required by the Federal Constitution. Wong Yang Sung v. McGrath, 339 U.S. 33, 50, modified, 339 U.S. 908 (1950). That holding has "fallen into obscurity" following the "due process explosion" of the 1970s, which extended hearing rights to protect many less important interests. Peter L. Strauss et al., Gellhorn &
specifies that any hearing required by statute must be "on the record" to trigger formal adjudicatory procedures. As a result, there is now a large body of federal informal adjudication not governed by APA hearing provisions. The Federal APA does not specify the procedures that agencies must follow in these informal adjudications, but the Act's unitary judicial review provision applies to both formal and informal adjudication. Judicial review under the Federal APA is, therefore, available even though the agency does not conduct a hearing under the APA.

The situation in Maryland is quite different. Informal adjudication does not comprise a recognized category of proceedings. It does occur, but agencies have not developed informal hearing procedures for adjudications that are not contested cases. In addition, the APA's judicial review section applies only to final decisions in contested cases. There is, however, a good deal of agency adjudication (mostly formal) that is expressly exempted from the APA's contested case subtitle. Final decisions in informal adjudications, or in adjudications conducted by exempt agencies, are reviewable only under

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Byse's Administrative Law 375 (9th ed. 1995). While never overruled, Wong Yang Sung has had little impact on the scope of formal adjudication under the Federal APA. See, e.g., Clardy v. Levi, 545 F.2d 1241, 1244-46 (9th Cir. 1976) (holding that prison disciplinary proceedings are not formal adjudications even though the Constitution requires a hearing).

341. 5 U.S.C. § 554(a). The Supreme Court has never resolved what statutory hearing rights are sufficient to trigger formal adjudication. The Courts of Appeals are hopelessly divided. Compare Seacoast Anti-Pollution League v. Costle, 572 F.2d 872, 877 (1st Cir. 1978) (holding that a statutory right to a "public hearing" suffices), with Chemical Waste Mgmt., Inc. v. EPA, 873 F.2d 1477, 1481 (D.C. Cir. 1989) (upholding agency's interpretation that required "public hearing" did not trigger formal adjudication). Recent decisions appear to favor the approach of the Chemical Waste Mgmt. court. See I Davis & Pierce, supra note 50, § 8.2, at 386-89.

342. See Paul R. Verkuil et al., Administrative Conference of the U.S., Recommendations and Reports, The Federal Administrative Judiciary 859 (1992). According to this Administrative Conference Study, the corps of non-ALJ federal adjudicators (often called administrative judges or AJs) is almost twice the size of the ALJ corps. See id. at 789. AJs also decide more cases, but do so "with less prestige, compensation, and job security." Id. at 788. For an earlier description of informal adjudication by non-ALJs, see Verkuil, supra note 223, at 757-75.

343. 5 U.S.C. §§ 701-706. In informal adjudication, an agency must observe whatever procedures its enabling act requires, plus due process principles. Id. § 706. For the effect of judicial review on the procedures which an agency must follow, see supra text accompanying note 50.

344. 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action ... is entitled to judicial review thereof.").


346. For the list of exempt agencies, see supra note 99. The federal APA does not exempt named agencies. While section 554(a) of the federal APA does exempt certain functions, such as military and foreign affairs functions, from the requirements of formal
some other express statutory provision or under the courts' inherent power to "review and correct" agency action "which is arbitrary, illegal, capricious or unreasonable." 347

Whether or not an adjudication is a contested case thus affects the review available. Informal adjudication poses a particular problem because the legislature, having declined to provide hearing rights, is unlikely to authorize judicial review. Therefore, the only review available is under the courts' inherent power. The Court of Appeals has asserted that the scope of inherent power review is "essentially the same" as that available under the APA. 348 That dictum surely reflects a concern that the scope of review should not depend on whether an adjudication is a contested case; it also finds considerable support in the case law. In original actions for certiorari and mandamus, courts review agency action for both legality 349 and rationality, 350 that review most likely occurs on the administrative record, rather than on a court-compiled record. 351 Nevertheless, some features of inherent-power review differ significantly from judicial review under the APA. For example, governmental entities cannot invoke inherent-power re-

adjudication, those exemptions are less important than the rulemaking exemptions found in section 553.


349. See, e.g., Silverman v. Maryland Deposit Ins. Fund Corp., 563 A.2d 402, 411-12 (Md. 1989) (following Gould in action for mandamus); Gould, 331 A.2d at 76 (concluding case was application for certiorari and stating that misinterpretations of law not within agency's discretion and are illegal).

350. See Cicala v. Disability Review Bd., 418 A.2d 205 (Md. 1980) (action for mandamus). The Cicala court stated that "one of the ways in which an administrative agency acts arbitrarily is to reach a decision which is not based upon or supported by facts in the record." Id. at 209; see also Dickinson-Tidewater, Inc. v. Supervisor of Assessments, 329 A.2d 18, 25 (Md. 1974) (holding that the substantial evidence test applies to inherent power review).

351. See Cicala, 418 A.2d at 209. Prior to Cicala, circuit courts often heard evidence to determine if the agency acted arbitrarily. See, e.g., State Dep't of Health v. Walker, 209 A.2d 555, 561 (Md. 1965) (holding that evidence presented to circuit court established agency decision not supported by substantial evidence). Certiorari review is by definition on the record.
view. Further, it is unclear whether a private party seeking inherent-power review must invoke a personal or property right. In addition, a court rule requires a party to bring a review action under the APA or other statutory provision within thirty days of the agency's decision; as a result, agencies sometimes prefer to adjudicate through contested case procedures in order to foreclose court challenges brought after the thirty-day period.

B. Overview of Adjudication in Maryland

In Maryland, most agency adjudication falls into one of two categories. The first consists of contested cases subject to trial-type process and judicial review under the APA. In these proceedings, an ALJ normally conducts the hearing and renders either a final decision or a proposed decision for the agency to review. Most contested case hearings, therefore, occur at the OAH, but a limited number of agencies subject to the contested case subtitle may use their own hearing examiners. The second category includes adjudications involving agencies exempt from the APA's contested case subtitle. These proceedings are not contested cases, but private parties obtain equivalent

352. See Board of Educ. v. Secretary of Personnel, 562 A.2d 700, 706 (Md. 1989) (explaining that mandamus cases "all involve claims of personal rights or property rights of private individuals or entities" rather than government officials or agencies). Under the APA, however, local governmental units have the same rights as private persons. Md. Code Ann., State Gov't § 10-204 (1995).

353. See Gould, 221 A.2d at 68-71. The Gould court held that a claimant's satisfying the statutory qualifications for compensation constituted a "sufficient 'personal right.'" Id. at 71 (quoting Md. Ann. Code art. 26A, § 5 (1973)). APA review is available to an "aggrieved party." For a discussion of that standing requirement, see infra text accompanying notes 497-520.


355. See Maryland-Nat'l Capital Park & Planning Comm'n v. Friendship Heights, 468 A.2d 1353, 1357 (Md. Ct. Spec. App. 1984) (holding that a three-year period of limitations for mandamus action would compromise agency's approval of site plan). In addition, if review is available under the APA, an aggrieved party must exhaust that remedy. See Prince George's County v. Blumberg, 418 A.2d 1155, 1160 (Md. 1980).


357. The principal agencies in this category are the Comptroller of the Treasury (tax assessments and licensing), the Health Services Cost Review Commission (hospital ratemaking), and the Health Resource Planning Commission (issuance of certificates of need for health care facilities). See Md. Code Ann., State Gov't § 9-1601(a), discussed supra note 102. Section 9-1601(a) also allows hearing examiners in the Department of Labor, Licensing and Regulation to conduct contested case hearings on unemployment insurance claims. See id. These proceedings are subject to most, but not all, of the provisions in the contested case subtitle. See Md. Code Ann., Lab. & Empl. §§ 8-501 to -510 (1991 & Supp. 1996) (providing procedures for conduct of hearings before Board of Appeals of the Department of Economic and Employment Development).
trial-type process and judicial review, at least before the principal exempt agencies.\textsuperscript{358} The exemptions, therefore, do not significantly increase agency use of informal adjudicatory procedures.

In Maryland, there are few adjudicatory hearings that are less formal than the contested case model. Most informal hearings that do occur provide an administrative remedy that an aggrieved person must exhaust prior to obtaining a contested case or other formal hearing.\textsuperscript{359} Thus, although in theory the Maryland APA adopts the intermediate approach of providing a formal hearing only if a statute, regulation, or due process principles require such a hearing, in practice Maryland follows the maximum approach of treating almost all adjudicatory hearings conducted by nonexempt agencies as contested cases.

The OAH's present workload reflects that practice. The OAH conducts hearings for at least twenty different agencies administering more than two hundred separate programs.\textsuperscript{360} In 1995, the OAH received 43,442 cases and decided 29,170 by written decision.\textsuperscript{361} Those...
figures place Maryland "in the vanguard" of central panel states.\textsuperscript{362} Maryland's OAH apparently has the broadest jurisdiction and the largest caseload of any central panel agency state.\textsuperscript{363} Maryland's ALJs render decisions in such diverse areas as occupational licensing, benefits eligibility, civil rights, occupational safety and health, personnel, special education, mental health, and environmental permitting and enforcement.\textsuperscript{364} To handle that caseload, the OAH employs fifty-nine full-time ALJs, appointed by the chief ALJ and removable only for cause.\textsuperscript{365} Prior to the creation of the OAH, state agencies employed eighty-five full-time and five contractual hearing examiners to hear contested cases.\textsuperscript{366} Those statistics indicate that the OAH's creation has resulted in efficiencies. Its work has been justly praised.\textsuperscript{367}

A number of factors explain the dominance of the contested case model in Maryland. First, the legislature has been quite generous in conferring hearing rights, particularly in occupational licensing and government benefits cases. The legislature frequently specifies that the required hearing shall be conducted in accordance with the contested case subtitle of the APA.\textsuperscript{368} Only rarely does the legislature specify that a required "hearing" shall not be a contested case hearing.\textsuperscript{369} Apparently, the legislature believes that the contested case modest filing fees for most categories of cases (there was a particularly sharp drop in MVA post-conviction cases) and to agency efforts, encouraged by the OAH, to settle more cases before sending them to the OAH for a hearing. See id. 362. Allen Hoberg, Administrative Hearings: State Central Panels in the 1990's, 46 ADMIN. L. REV. 75, 84 (1994).

363. See id. at 88. Judge Hoberg defines a central panel system as "an independent administrative law judge (ALJ) corps in which a central office of administrative hearings employs a staff of ALJs and assigns them, upon request of administrative agencies, to preside over agency proceedings that are within the jurisdiction of the central office." Id. at 76. There are central panels in at least sixteen jurisdictions. See Hardwicke, supra note 31, at 90-91.

364. See 1995 OAH ANNUAL REPORT, supra note 356, at app. C.

365. See id. at 8.

366. See id.; see also Hoberg, supra note 362, at 81-82.

367. See Hoberg, supra note 362, at 84 (placing Maryland in the "vanguard" of states with centralized administrative offices).

368. A Westlaw search of the 1995 Code discloses at least seventy-one sections in which the legislature granted hearing rights and expressly required the agency to conduct the hearing in accordance with the contested case subtitle of the APA.

369. In addition to the statutes providing an "informal hearing" as a prelude to formal adjudication, see supra note 359, there are only eight such statutes. Three apply to the Secretary of Budget and Fiscal Planning's resolution of disputes between local agencies and the State over state retirement contributions. Md. Code Ann., Educ. §§ 5-202.1(c)(3), 16-403.1(c)(3), 25-403.1(c)(3) (1992). Three others have only limited application. Md. Code Ann., Envir. § 5-906(e) (1996) (applying to permits for certain regulated activities on nontidal wetlands); Md. Code Ann., Bus. Reg. § 1-407(b) (Supp. 1995) (applying to denials of trademark registrations by Secretary of State); Md. Code Ann., Fin. Inst. § 8-
model best assures procedural fairness and judicial review. Second, the Court of Appeals has been generous in interpreting statutes to require contested case hearings. Where the legislature merely requires a "hearing," but does not specify the type, the Court of Appeals inquires whether the proceeding is an adjudication—whether the agency is determining the rights, duties, statutory entitlements, or privileges of specific persons or parties. If so, a statutory hearing requirement triggers the contested case procedures, unless something in the statutory scheme negates a contested case hearing. Thus, if a proceeding is adjudicatory, a statutorily required hearing is presumptively a contested case hearing.

A final factor explaining the dominance of the contested case model is agencies' generosity in treating adjudicatory proceedings as contested cases. Statutes delegating adjudicatory authority are sometimes silent on hearing rights. In addition, rather than refer to the APA, statutes may ambiguously require a "public" hearing or helpfully provide that any hearing required shall be conducted in accordance with the APA. In these instances, agencies often grant a

402(c)(7) (1992) (applying to emergency orders by Division of Savings and Loan Associations). For the two remaining statutes, see infra notes 425 and 435.

370. See, e.g., C.S. v. Prince George's County Dep't of Soc. Servs., 680 A.2d 470, 479 (Md. 1996) (determining the "nature of the hearing").

371. See id.; see also Donocam Assocs. v. Washington Suburban Sanitary Comm'n, 489 A.2d 26, 31-32 (Md. 1985) (holding that "the particular nature of the hearing required... determines whether a matter is a contested case" (quoting Donocam Assocs. v. Washington Suburban Sanitary Comm'n, 471 A.2d 1097, 1100 (Md. Ct. Spec. App. 1984))).


373. This presumption readily explains the Department of Personnel's longstanding practice to grant contested case hearings to employees in disciplinary and grievance proceedings. MD. CODE ANN., STATE PERS. §§ 2-301 to -302 (1994) (providing an employee's right to a "hearing"). The State Personnel Management System Reform Act of 1996 now expressly requires the OAH to hear those cases in accordance with the contested case subtitle of the APA. State Personnel Management System Reform Act of 1996, ch. 347, § 11-110(C)(2), 1996 Md. Laws 2077, 2227.


375. The statute before the court in Sugarloaf, 594 A.2d at 1122, is one example. That statute required the Air Management Administration in the Department of the Environment to hold a "public hearing" before issuing a permit to construct certain pollution-causing sources. Id. The court interpreted the statute to require a contested case hearing at the construction permit stage. Id.

376. For example, the legislature has provided that the Board of Trustees of the State Retirement System may hold hearings as necessary to perform its duties "[i]n addition to any hearing that Title 10 of the State Government Act requires." MD. CODE ANN., STATE PERS. § 21-111(b). Of course, Title 10 of the State Government Article—the APA—does not require the Board to hold any hearings, although it does generally provide that "the
contested case hearing by regulation or informal practice. Sometimes an agency may grant contested case hearings in response to a concern that the affected party has a constitutional right to a hearing. This appears to have been the basis for regulations granting contested case hearings to aggrieved applicants for environmental permits. Perhaps the agency reasoned that the applicant had a liberty interest, protected by due process, in using her property as she saw fit. On other occasions, an agency may grant contested case hearings because agency counsel perceives advantages in doing so; contested case procedures provide a remedy that potential litigants need to exhaust and produce a record that the agency can furnish a reviewing court, thus avoiding a trial in the circuit court.

The use of regulations as a source for contested case hearings led the Tiburzi Commission to recommend that a regulation could not serve that function unless it required a contested case hearing "expressly, or by clear implication." The Commission believed that allowing agencies to negate the presumption that an adjudicatory hearing is a contested case hearing would "encourage agencies to consider granting some form of hearing rights in those situations in which full APA hearing procedures are not necessary or appropriate." Despite legislative enactment of that provision, no agency appears to have responded. In fact, the opposite trend continues. For example, the Board of Trustees of the State Retirement and Pension System recently adopted regulations codifying the agency's prior practice of treating disability and other retirement determinations as contested cases.

recipient of notice of an agency's action may have an opportunity to request a hearing." Md. Code Ann., State Gov't § 10-207(b)(4) (1995).

377. See Warwick Corp. v. Department of Transp., 486 A.2d 224, 228 (Md. Ct. Spec. App. 1985) (holding that a hearing required by agency regulation was a contested case). Logically, a private party is unlikely to challenge an informal agency practice of granting contested case hearings.


379. See, e.g., State Dep't of Health v. Walker, 209 A.2d 555, 558 (Md. 1965) (indicating that the circuit court had held a lengthy trial following the agency's denial of wetlands permits without a hearing).


381. See id.


The Court of Appeals recently accentuated this trend in favor of the contested case when it sharply limited the scope of the informal adjudicatory procedures fashioned by the legislature for determining the correctness of child abuse and neglect records.\textsuperscript{384} State law requires local social services departments to investigate all reports of child abuse or neglect.\textsuperscript{385} If the investigation does not rule out a finding of abuse or neglect (the abuse or neglect is either "indicated" or "unsubstantiated"), the local department must notify the alleged abuser of her right to request an administrative hearing before an ALJ.\textsuperscript{386} The hearing is not a trial-type one; rather, the alleged abuser receives notice of the local department's records (redacted to protect confidential sources and persons whose life or safety might be endangered by full disclosure), is permitted to make written submissions and argument, and is entitled to a reasoned decision from the ALJ.\textsuperscript{387} Quite plainly, the legislature did not intend these proceedings to be contested cases.\textsuperscript{388} Although the Court of Appeals did not disagree with that conclusion, it held that another statute\textsuperscript{389} required a contested case hearing before the Department of Human Resources or a local social services department could list an alleged abuser on a central registry.\textsuperscript{380} According to the court, informal procedures were permissible for challenges to a department's investigatory finding, but not if the party contested the entry of her name on a central registry.\textsuperscript{391}

\textsuperscript{384} See C.S. v. Prince George's County Dep't of Soc. Servs., 680 A.2d 470, 478 (Md. 1996).
\textsuperscript{386} Id. §§ 5-706.1, -706.2. "Unsubstantiated" covers an intermediate category of cases where there is insufficient evidence either to support a finding of "indicated" abuse or neglect, or to rule out such a finding. Md. Code Ann., Fam. Law § 5-701(v) (Supp. 1995).
\textsuperscript{387} Md. Code Ann., Fam. Law § 5-706.2(c)-(d).
\textsuperscript{388} The Attorney General has so concluded. See 78 Md. Op. Att'y Gen. 93-023, 137, 141 (June 26, 1993). The OAH conducted 878 of these non-APA hearings in 1994 and 856 in 1995. See Catherine M. Brennan, Abuse Suspects Win Day in Court, Daily Record (Baltimore), Aug. 1, 1996, at 10A. The ALJ renders the final agency decision.
\textsuperscript{389} Md. Code Ann., Fam. Law § 5-715.
\textsuperscript{391} See id. at 475, 480. The Court of Appeals did not decide whether the Department's computerized data base, which includes investigatory findings, itself constitutes a central registry. See id. at n.8. If it does, then the informal procedures developed by the legislature would have little or no applicability. Cf. Hodge v. Carroll County Dep't of Soc. Servs., 812 F. Supp. 593, 603 (D. Md. 1992) (holding that the computerized data base is a central registry), rev'd on other grounds sub nom. Hodge v. Jones, 91 F.3d 157 (4th Cir.), cert. denied, 115 S. Ct. 581 (1994).

Adjudicating disputes over the correctness of child abuse and neglect records poses a difficult challenge for the OAH, particularly if contested case procedures are necessary. The number of such cases is significant, and the validity of the accusations often depends
The contested case model has proved workable in Maryland, despite the breadth of adjudication covered. Its success is attributable to its flexibility and to the innovativeness of adjudicators. The OAH in particular has adopted “flexible due process” as its basic credo. By statute, nonattorney representation is permissible in a wide range of proceedings; in addition, ALJs must observe all procedures required by federal or state law or regulation. The latter provision allows (and, in actuality, requires) ALJs to apply the delegating agency’s procedural rules to supplement the OAH rules. For example, in motor vehicle cases, ALJs apply the Department of Transportation regulation requiring subpoena requests for police and other witnesses to contain a proffer of the witness’s expected testimony and its relevance to the proceeding. Likewise, in inmate grievance cases, ALJs apply Inmate Grievance Office regulations that limit the availability of witnesses and the scope of review of prison disciplinary determinations.

The OAH’s own rules of procedure also give ALJs considerable flexibility in procedural matters. The rules are largely permissive on such important subjects as the holding of prehearing conferences, the summary disposition of cases in which there are no material facts in dispute, the taking of official notice, and the mandatory submission of proof in written form. Not surprisingly, the conduct of contested cases, like the trial of civil cases, varies considerably from case to case. Some proceedings are naturally less formal than others. In addition, the OAH offers settlement conferences and mediation in certain areas in response to the inability of many parties on the credibility of the accusers, including the alleged child victims. On the other hand, the interests of the alleged abuser are considerable, and trial-type procedures may be necessary to resolve the adjudicative facts in dispute.

394. Id. § 9-1607.2(b).
395. See Md. Regs. Code tit. 28, § 02.01.01C (1994) (providing that OAH “regulations supplement the procedures required by law”).
396. Md. Regs. Code tit. 11, § 11.03.07A (1990). The Court of Appeals has found that regulation to be compatible with the APA. See Forman v. Motor Vehicle Admin., 630 A.2d 753, 765 (Md. 1993) (stating that evidence proffered at hearing “met both the statutory and regulatory standards”).
399. Id. § 02.01.13A.
400. Id. § 02.01.16C(2).
401. Id. § 02.01.18F.
402. Id. § 02.01.18E.
403. Motor vehicle cases, roughly half the OAH’s caseload, are among the less formal. There is no agency presenter of fact, the driver is often the only witness, and the ALJ
to take full advantage of formal procedures, thus allowing ALJs to resolve a significant number of disputes without a formal hearing. However, settlement conferences and mediation do not always succeed, and they are not available in all contested-case proceedings. As a result, ALJs sometimes conduct fairly protracted trial-type hearings in cases where the private interests at stake appear to be relatively minor.

The OAH's dominant role on the adjudicatory scene raises a further question with respect to reviewing courts giving deference to agency expertise. The 1957 Maryland APA authorized agencies to "utilize their experience, technical competence and specialized knowledge in the evaluation of the evidence presented to them." In the first case to reach the Court of Appeals under the APA, the court invoked that section to defer to the Real Estate Commission's findings on the bad faith of realtors whose licenses the Commission had suspended. According to the Court of Appeals, a reviewing court should not "substitute its judgment for the expertise of the administrative agency from which the appeal is taken." In at least some cases, agency expertise has been determinative in the reviewing court's upholding of agency findings of fact. When it last revisited the APA in 1993, the legislature evidently believed that reviewing courts should also consider OAH expertise. Thus, the General As-

normally renders a decision from the bench. See 1991 OAH ANNUAL REPORT, supra note 361, at 8.

404. See 1995 OAH ANNUAL REPORT, supra note 356, at 11.

405. Settlement conferences are held in most personnel cases, with considerable success; mediation is available in special education cases. See OFFICE OF ADMINISTRATIVE HEARINGS, 1994 ANNUAL REPORT 8-9; 1995 OAH ANNUAL REPORT, supra note 356, at 11. Both of these initiatives received legislative endorsement in the General Assembly's 1996 session. See Act of April 30, 1996, ch. 190, 1996 Md. Laws 1599, 1601 (amending MD. CODE ANN., EDUC. § 8-415(b) (allowing parents to seek mediation of special education disputes)); State Personnel Management System Reform Act of 1996, ch. 347, 1996 Md. Laws 2077, 2241 (adding MD. CODE ANN., STATE PERS. § 12-205(b)(2) (providing that the settlement of grievances is the first option which should be examined)). The latter bill also creates informal procedures as an alternative to contested case hearings in both disciplinary and grievance proceedings. Id. at 2110 (adding MD. CODE ANN., STATE PERS. § 4-106 (establishing peer review panels)).

406. MD. ANN. CODE art. 41, § 252(d) (1957).

407. See Bernstein v. Real Estate Comm'n, 156 A.2d 657, 662 (Md. 1959).

408. See id. That reference to agency expertise subsequently became part of the Court of Appeals's standard formulation of the substantial evidence test. See Bullock v. Pelham Wood Apts., 390 A.2d 1119, 1124 (Md. 1978) (citing Bernstein, 156 A.2d at 662).

409. See Howard County v. Davidsonville Area Civic & Potomac River Ass'n, 527 A.2d 772, 779 (Md. Ct. Spec. App. 1987) (holding that agency expertise justified agency finding that nitrogen removal from discharge was unnecessary).

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assembled the original APA language quoted above to allow not only agencies, but also the OAH, to use "experience, technical competence, and specialized knowledge" to evaluate evidence.\textsuperscript{411}

The substitution of generalist central office ALJs for specialist agency hearing examiners is nevertheless likely to reduce the role of expertise. Despite the OAH's efforts to cross-train ALJs for all subject matter areas in which they conduct hearings, ALJs are likely, in most cases, to have less experience, technical competence, and specialized knowledge than did the agency hearing examiners they replaced. The legislature, when it chose the central panel system, favored independence over expertise. However, this shift may have only a limited impact in cases where the agency retains final decisional authority. In those cases, it is the expert agency's findings that are subject to review; ALJ findings in a proposed decision do not bind the agency unless based on credibility evidence.\textsuperscript{412} In addition, agency staff, participating as witnesses or counsel, should be able to ensure that an adequate record is built for the agency's final decision.

The situation is less clear when the ALJ makes the final agency decision. Normally, it is the agency that chooses whether to delegate authority to make a proposed or a final decision, but the legislature recently gave the OAH final decisional authority in personnel\textsuperscript{413} and special education cases.\textsuperscript{414} In those cases, a reviewing court is unlikely to give an ALJ's findings the same deference as agency findings; it is also unlikely that a court will give the same deference to an ALJ's interpretation of an agency regulation that courts have given to agency interpretations.\textsuperscript{415} Similarly, although courts have recognized the ex-

\textsuperscript{411} Id.


\textsuperscript{415} The Court of Special Appeals, for example, has deferred to the expertise of the Nursing Home Appeals Board (NHAB) in interpreting the Board's complex reimbursement regulations. See Department of Health & Mental Hygiene v. Reeder's Mem'l Home, Inc., 586 A.2d 1295, 1299 (Md. Ct. Spec. App. 1991) (reversing circuit court and remanding with instructions to reinstate NHAB decision).
pertise of agency staff that testify as witnesses.\textsuperscript{416} The present trend favors using neutral, less adversarial experts.\textsuperscript{417} Perhaps the above developments are desirable, but one should realize that they favor independence as a decisional value and take significant steps toward eliminating the "agency" from agency adjudication. In many areas, the OAH is becoming an administrative (nonjudicial) court for resolving disputes between private parties and state agencies; the agency, rather than functioning as an adjudicator, participates as a party to defend its determination.\textsuperscript{418}

The evolving role of the OAH as an administrative court raises a final question: May the legislature assign the OAH the task of resolving disputes between private parties? The notion of a "contested" case—an aggrieved party " contesting" an agency "determination"—suggests a negative answer. In addition, a nonjudicial body's adjudication of tort, contract, or other private disputes most likely violates the Separation of Powers provision in Maryland's Constitution.\textsuperscript{419} However, the Court of Appeals has recognized that an agency may grant damages or other relief to private parties when that relief is "incidental, although reasonably necessary, to its regulatory powers."\textsuperscript{420} In such cases, the agency's determination to grant relief to one private party may be an appropriate basis for giving a contested case hearing to another private party aggrieved by that determination. The legislature recently so provided with respect to Department of Natural Resources determinations requiring surface mine owners to compensate adjoining land owners for damage caused by dewatering or sinkholes.\textsuperscript{421} According to the Court of Appeals, agency (and presumably OAH) adjudication of a mine owner's liability does not violate separa-

\textsuperscript{416} See, e.g., Hawkins v. Department of Pub. Safety & Correctional Servs., 602 A.2d 712, 714-15, 720 (Md. 1992) (upholding termination of prison guard based on security director's testimony that guard's racist remarks outside of work indicated that he could potentially spark a major prison disturbance).

\textsuperscript{417} The ALJ now has authority in special education cases to require an independent examination of the student by an impartial expert witness. Md. Code Ann., Educ. § 8-415(c)(iii) (Supp. 1995).

\textsuperscript{418} One check on this development is the APA provision that the OAH “is bound by any agency regulation, declaratory ruling, prior adjudication, or settled pre-existing policy to the same extent as the agency is or would have been if it were hearing the case.” Md. Code Ann., State Gov't § 10-214(b) (1995). This provision preserves the agencies' policymaking role.

\textsuperscript{419} See Tomlinson, supra note 2, at 453 (discussing County Council v. Investors Funding Corp., 312 A.2d 225 (Md. 1973)); see also supra note 302.

\textsuperscript{420} Investors Funding, 312 A.2d at 245-46.

tion of powers if judicial review is available to aggrieved parties. Likewise, it appears to be constitutional for the legislature to grant an insurance company a contested case hearing on the Maryland Insurance Administration's determination that the insurer improperly cancelled a policy holder. The Administration has delegated final decisional authority in those cases to the OAH. Because the Administration rarely participates as a party, the dispute is, as a practical matter, between the insured and her insurance company. Nonjudicial adjudication of what are in reality disputes between private parties nevertheless appears appropriate if the agency, or the OAH, can provide more timely and economical decisions than the courts.

C. What Is a Contested Case?

Describing the universe of contested cases in Maryland does not tell us what is a contested case. The APA's definition of contested case poses at least four distinct interpretive issues. First, what agency "determinations" does it cover? Is there a category of "other" agency action that does not constitute rulemaking, but also does not constitute adjudication (and, therefore, cannot be a contested case) because the agency is not determining anyone's "right, duty, statutory entitlement, or privilege"? Second, when does a constitution (state or federal) trigger contested case procedures? Must a constitution require a trial-type hearing, or is it sufficient, under the Supreme Court's variable due process approach, that a constitution require "some kind of hearing"? Third, when does a statute (state or federal) trigger contested case procedures? Do all statutory hearing rights qualify, or do some statutory schemes negate the availability of a contested case hearing? Fourth, who may invoke the APA's contested case proce-
dures? Must the party seeking a contested case hearing be the party
whose license is at stake or whose rights or privileges the agency is
adjudicating? The definition of contested case is silent on this issue,
and the APA's judicial review provision does no more than provide
that "a party who is aggrieved by the final decision in a contested case
is entitled to judicial review of the decision as provided in this
section." 428

Lurking behind all these questions is the hypothetical of the
camper aggrieved by the denial or revocation of a state camping per-
mit. What happened to the camper happens to countless persons
every day when park rangers or other state actors make decisions that
adversely affect private interests. Students receive low grades, or do
not make the football team; vehicles fail inspection; prisoners are
transferred to more secure facilities; job seekers are turned down; and
shopkeepers suffer business losses through road repairs, or the failure
to make them. Understandably, the aggrieved private party may wish
to contest the determination. In some of these situations, the legisla-
ture (by statute) or an agency (by regulation or informal practice)
may find it desirable to provide the aggrieved party a contested case
hearing to challenge the agency's determination. The legislature has
so provided with respect to most prisoner grievances. 429 However, if
the legislature has not spoken, the agency should be able to deter-
mine that a contested case hearing is not warranted, either because
the interests at stake are not important enough or because trial-type
process is not appropriate for resolving the dispute. 430 Treating all
these petty disputes as contested cases is impractical, if not absurd; it is
important that the APA give the courts sufficient flexibility to avoid
that result. Fortunately, as will be seen, that appears to be the case.

How to handle these disputes is a more difficult question, largely
beyond the scope of this Article. If the dispute is not a contested case,
the APA is inapplicable; the aggrieved party cannot invoke the Act's
provisions to contest the agency's determination. Of course, if some
fundamental right is at stake (if the camper claims that the park
ranger discriminated on the basis of race or other impermissible fac-
tor), the aggrieved party may bring a lawsuit in the courts. The lack of

430. Testing procedures are often more appropriate than trial-type process. See Md.
fail an emissions test).
an administrative remedy does not affect the judicial remedy.\textsuperscript{431} In addition, persons who believe they have been mistreated by insensitive or error-prone agency officials may seek, with the aid of the media, corrective action from higher officials at the agency, from elected officials, or from the courts.\textsuperscript{432} If the legislature finds those remedies to be insufficient, it could amend the APA, as have the legislatures in Washington and California, to provide more informal adjudicatory procedures to resolve these disputes.\textsuperscript{433} The case for doing so remains unproven.

Informal procedures are unlikely to satisfy the parties, or adequately to resolve the dispute, if adjudicative facts are hotly controverted. Informal notice and comment procedures may sometimes prove effective, but their implementation should be left to agency discretion. For example, absent some evidence of abuse, the Department of Natural Resources should be trusted to ensure that park rangers do not revoke camping permits without giving the camper a reason and an opportunity to respond. Affording informal process in these situations may be sound administration, but APAs can only do so much to ensure good government.

Turning to the first question raised by the definition of contested case, there appears to be a category of other agency action that is neither rulemaking nor adjudication. One example is an agency decision to initiate, or not initiate, an investigation, prosecution, or other proceeding. Thus, the Human Relations Commission does not "adjudicate the rights or property of specific parties" when it makes a no probable cause finding on a discrimination complaint.\textsuperscript{434} There is also a range of administrative decisions that do not require adjudicatory procedures even though they might be viewed as particular rather than general. These would include a decision to build or close a highway, to construct a state facility, or to relocate a university department.

\textsuperscript{431} See, e.g., Board of County Comm'rs v. Umbehr, 116 S. Ct. 2342, 2347 (1996) (holding "government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected ... freedom of speech' even if he has no entitlement to that benefit" (quoting Perry v. Sindermann, 408 U.S. 593, 596 (1972)) (alteration in original)).

\textsuperscript{432} See, e.g., Zion Evangelical Lutheran Church v. State Highway Admin., 350 A.2d 125, 128 (Md. 1976) (finding capricious blocking of access by closing beltway ramp reviewable under courts' inherent power).

\textsuperscript{433} See supra text accompanying notes 225-234.

\textsuperscript{434} Parlato v. State Comm'n on Human Relations, 548 A.2d 144, 147 (Md. Ct. Spec. App. 1988) (where no probable cause found, dispute was not a contested case); see also Eliason v. State Roads Comm'n, 189 A.2d 649, 651 (Md. 1963) (same). The 1981 Model State APA explicitly provides that an agency need not conduct an adjudicative proceeding when deciding whether to initiate or not to initiate an investigation, prosecution, or adjudicative proceeding. See 1981 MSAPA, supra note 33, § 4-101(a).
These actions do not determine the legal rights of specific persons. For example, when the State Board of Education reviews a local board's decision to close a school, it need not conduct a contested case proceeding. The same result is likely if the Department of Transportation closes a major bicycle route, even though a recently enacted statute prohibits the Department from doing so unless it provides a reasonable alternative route. Once again, the agency's action does not appear to determine the rights of specific parties.

For matters that are adjudicatory, questions two and three ask whether constitutional or statutory provisions conferring hearing rights are sufficient to trigger contested case procedures. Under the Maryland APA's intermediate approach, the source of the hearing right may be either constitutional or statutory. Equating constitutionally based hearing rights and statutory hearing rights, rather than limiting contested case procedures to adjudications where a statute requires a hearing, poses at least two serious problems. First, it is often extremely difficult to determine when the state or Federal Constitution requires a hearing. Under the Supreme Court's present approach, due process requires notice and a hearing before a state can deprive a person of a liberty or property interest; the Court of Appeals has given the same "meaning" to due process under the state constitution. Identifying liberty and property interests is not an

435. For a similar point, see Asimow, supra note 230, at 1090 n.73. Surprisingly, but perhaps out of an abundance of caution, the legislature has provided that the hearing required to be held on a change in use, purpose, or function of a state facility, or on the acquisition of property by the state, is not a contested case hearing. Md. Code Ann., State Gov't § 8-306 (1995).

436. See, e.g., Elprin v. Howard County Bd. of Educ., 470 A.2d 833, 836 (Md. Ct. Spec. App. 1994) (holding no right or privilege to attend a particular school). In a similar case, the Court of Appeals held that a county school board's redrawing of school districts was legislative rather than adjudicative because the Board did not reassign students based on "individual factors." Bernstein v. Board of Educ., 226 A.2d 243, 249 (Md. 1967).

437. Md. Code Ann., Transp. § 8-601.1 (Supp. 1995). Under federal law, all agency action is either rulemaking or adjudication; adjudication is the residual category. Thus, the Department's action would be adjudicatory and reviewable by persons with standing. See, e.g., Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971) (involving similar statute protecting parkland).

438. See Md. Code Ann., State Gov't § 10-202(d)(i)-(ii); see supra text accompanying notes 332-333.

439. See Board of Regents v. Roth, 408 U.S. 564, 569-70 n.7 (1972); Perry v. Sindermann, 408 U.S. 593, 603 (1972).

easy task in the context of the regulatory state. Agencies grant many permits and make many determinations that affect private interests. How does one determine when those actions deprive persons of protected interests in liberty or property? What appears to be controlling is the presence of standards that restrict an agency's discretion, thus giving rise to a legitimate claim of entitlement.  

The application of this vague test poses more difficulties than does its formulation. The problem is in part one of federalism. Take, for example, the landowner seeking to develop her property. Can the owner claim a property interest in the permission or license required for such development? The federal courts have held that any "significant discretion conferred upon the local agency defeats the claim of a property interest." That demanding test makes it difficult for the landowner to establish a property interest, which is exactly what the federal courts intend. As explained by the Fourth Circuit: "Resolving the routine land-use disputes that inevitably and constantly arise among developers, local residents, and municipal officials is simply not the business of the federal courts."  

Federal courts, therefore, define narrowly liberty and property to avoid unwarranted intervention in matters of state and local concern. State courts, however, face no such constraints, but also have no need to base their decisions explicitly on the Constitution. For example, the Court of Appeals has made quite clear that a landowner seeking a special use exemption has the right to a fair hearing before the local  

441. See Schwartz, supra note 46, § 5.18, at 264-66 (property interests). The Court recently abandoned this approach as a basis for defining the liberty interests of prisoners. It is no longer sufficient for the creation of an entitlement that statutes or prison regulations limit the discretion of prison officials. See Sandin v. Connor, 115 S. Ct. 2293, 2299-30 (1995) (stating that "atypical and significant hardship" is required for deprivation of prisoner's federal liberty interest).  

442. Gardner v. City of Baltimore, 969 F.2d 63, 68 (4th Cir. 1992) (citing Spence v. Zimmerman, 873 F.2d 256, 258 (11th Cir. 1989) (holding that owners of a partially finished house had no protected property interest in temporary certificate of occupancy because the city was given discretion in its issuance); RRI Realty Corp. v. Incorporated Village, 870 F.2d 911, 918 (2d Cir. 1989) (denying plaintiff's claim that the denial of a building permit violated substantive due process because the village authority had been granted wide discretion in approving building permits); Carolan v. City of Kansas City, 813 F.2d 178, 181 (8th Cir. 1987) (holding that appellants were not denied a protected property interest in a temporary occupancy certificate because they had not complied with proper procedural prerequisites); Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence, 927 F.2d 1111, 1116 (10th Cir. 1991) (holding that plaintiff did not possess a property interest in a public works agreement permitting development of proposed subdivision because state and municipal law accorded the city discretion to refuse to issue the agreement)).  

443. Id. at 67.
zoning authorities. Not surprisingly, the court speaks in common law terms rather than explicitly holding that the landowner has a constitutionally protected property interest in a special use exemption. As a result, there is a shortage of state case law on when the state or Federal Constitution requires a hearing. Federal case law is more abundant, but it is often inappropriate to treat it as controlling because federalism values encourage federal courts to define narrowly liberty and property. State courts should not hesitate to protect a broader range of interests under the state constitution; the Court of Appeals should, therefore, reconsider its acceptance of federal precedent defining liberty and property interests.

The second, and more serious, problem with the Constitution as a source of hearing rights derives from the Supreme Court's variable due process approach. Under that approach, the type of process due depends on a utilitarian balancing of the interests at stake. Hearings required by the Constitution, therefore, take many forms. If the private interest at stake is considerable, and the facts in dispute are adjudicative, due process may require trial-type process—the equivalent of contested case procedures. An example might be the removal of a civil servant for misconduct. If, however, the private interest at stake is less significant, and the governmental interest in a prompt decision is considerable, more informal procedures satisfy due process. The classic example is the "corridor hearing" that the principal or other school disciplinarian must afford before imposing a...
short suspension on a high school student for misconduct. The disciplinarian must provide the student with notice and an opportunity to explain, but may do so orally immediately after observing the alleged misconduct. The Constitution requires "some kind of hearing" before the school sends the student home, but does not require the full panoply of due process protections.

The Constitution, if treated as a source of hearing rights under the APA, may, therefore, require agencies to use contested case procedures whenever due process requires some kind of hearing. That result—requiring contested case hearings where less formal procedures are both appropriate and constitutional—may produce inefficiencies. Such a mismatch is avoidable in statutorily required hearings. If the legislature believes that trial-type procedures are appropriate, it should specify, as has the Maryland legislature on numerous occasions, that the agency afford notice and an opportunity for a hearing in accordance with the contested case subtitle of the APA. If, however, the legislature believes that some kind of less formal hearing is appropriate, it may statutorily require whatever hearing procedures it finds appropriate. If the legislature thus negates the availability of APA contested case procedures, the statute and agency regulations will provide the procedures that govern adjudications. The legislature can even provide that the OAH adjudicate these "noncontested" cases, as it did recently for proceedings to correct child abuse and neglect records.

Treating all cases in which the Constitution requires a hearing as contested cases thus generates both uncertainty as to coverage and an overuse of trial-type procedures. These problems are less serious if an agency must use contested case procedures only when the Constitution requires a trial-type or evidentiary hearing. The new California APA explicitly so provides. Under that Act, an agency must conduct a formal APA hearing if the state or Federal Constitution requires "an evidentiary hearing for determination of facts." If a less

449. See Goss v. Lopez, 419 U.S. 565, 581 (1975) (concluding need to ensure efficient operation of schools does not mean school administrators are totally free from notice and hearing requirements).

450. See id.


452. See supra note 368.


454. See CAL. GOV'T CODE § 11410.10 (West 1996).

455. Id.
formal hearing satisfies due process, the formal APA hearing procedures do not apply.\textsuperscript{456} The Court of Special Appeals interpreted the Maryland APA to reach the same result in \textit{Angell v. Henneberry}.\textsuperscript{457} The court held that a decision by the Patuxent Institution (a special treatment facility) to transfer an inmate to the Division of Correction was not a contested case, even though, under prevailing Supreme Court precedent, the inmate had a due process right to a hearing.\textsuperscript{458} According to the Court of Special Appeals, the constitutionally required hearing was less "formal" or "structured" than the adversarial, trial-type hearing that "generally characterizes a contested case."\textsuperscript{459} Under due process principles, the prisoner had only a limited right to call witnesses and no right to confront or cross-examine Patuxent's witnesses.\textsuperscript{460} These limitations were, in the \textit{Angell} court's opinion, "at odds" with the rights conferred on the parties in a contested case to call witnesses and to cross-examine opposing witnesses.\textsuperscript{461} The prisoner's due process right to an informal hearing was, therefore, insufficient to trigger more formal contested case procedures.\textsuperscript{462}

The \textit{Angell} court reaches a sensible result by recognizing that the informal nature of the constitutionally required process may negate contested case procedures.\textsuperscript{463} The decision, however, creates at least

\textsuperscript{456} See \textit{id.} § 11410.10 cmt. (citing examples of informal processes to which the APA does not apply).
\textsuperscript{458} \textit{Id.} at 600-02. The \textit{Angell} court found that the inmate had a liberty interest at stake because explicit statutory language restricted Patuxent's discretion to transfer to the Division of Correction prisoners previously found eligible to receive Patuxent's services. \textit{Id.} at 598. That holding most likely does not survive \textit{Sandin v. Connor}, 115 S. Ct. 2293 (1995). \textit{See supra} note 441.
\textsuperscript{459} \textit{Angell}, 607 A.2d at 602. The principal Supreme Court precedent relied on was \textit{Wolff v. McDonnell}, 418 U.S. 539 (1974), regarding prison disciplinary proceedings.
\textsuperscript{460} \textit{Angell}, 607 A.2d at 602.
\textsuperscript{461} \textit{Id.}
\textsuperscript{462} \textit{Id.}

\textsuperscript{463} \textit{Id.} The \textit{Angell} court's reasoning would ensure that campers evicted from state parks would not receive contested case hearings. Even if the Department of Natural Resources's regulations could be construed to create a liberty or property interest (an unlikely occurrence because a ranger may revoke a camping permit without giving a reason, \textit{Md. REGs. Code} tit. 8, § 07.06.08B (1995)), the camper, like the suspended student in \textit{Goss v. Lopez}, 419 U.S. 565 (1975), would be constitutionally entitled to no more than an informal "campsite" hearing.

However, statutory provisions governing inmate grievances give inmates with far less at stake than Angell the opportunity for a contested case hearing before the OAH. \textit{See Md. ANN. Code} art. 41, § 4-102.1 (e), (k) (1993). Special procedural regulations govern those hearings, \textit{see Md. REGs. Code} tit. 12, § 07.01 (Inmate Grievance Office), but inmates enjoy the right to retained counsel—the right which the Court of Special Appeals held that Patuxent could deny the inmate in \textit{Angell}. \textit{Angell}, 607 A.2d at 602.
one major problem. Excluding an adjudication from the APA's contested case subtitles also excludes the agency's final decision from the APA's judicial review provision. That result is unfortunate. The Federal APA, in contrast, subjects both formal and informal adjudication to judicial review. Legitimating agency action through the availability of APA review is particularly important when the agency conducts an informal adjudication by constitutional compulsion, rather than as an exercise of discretion. Perhaps the courts can ensure the necessary procedural regularity under inherent power review, but it would seem preferable for the legislature to make all constitutionally required adjudicatory hearings reviewable under the APA.

Similar questions arise in determining what statutory hearing rights trigger contested case procedures. Is it sufficient that a statute requires some kind of hearing, or must there be a close fit between the nature of the hearing required and the trial-type process afforded by the APA? On this issue, the Court of Appeals, in Sugarloaf Citizens Ass'n v. Northeast Maryland Waste Disposal Authority, did not require a particularly tight fit, holding that a statutory requirement of a "public hearing" suffices unless something in the statutory scheme "expressly or by implication negates a contested case hearing." The legislature promptly overturned that decision, amending the APA to provide that a requirement for a "public hearing" does not trigger contested case procedures unless the statute expressly so provides.

464. There is also a problem in determining whether the Constitution requires a trial-type or evidentiary hearing rather than some less formal hearing. An interesting example of this phenomenon is the adjudication of employee claims for accidental disability benefits. In 1980, the Attorney General, in a rare confession of impotence, concluded that he was unable to reach, on the information available to him, an "informed judgment" on whether the Federal Constitution gave an employee a right to a trial-type hearing in a dispute over pension benefits. See 65 Md. Op. Att'y Gen. 461, 466-70 (1980). Despite this uncertainty, the agency treats these proceedings as contested cases. See Courtney v. Board of Trustees, 402 A.2d 885, 886-87 (Md. 1979) (describing agency's procedures in that case). See supra note 383 for the present regulations.


467. Id. at 1127 (on denial of reconsideration).


(c) A public hearing required or provided for by statute or regulation before an agency takes a particular action is not an agency hearing under § 10-202(d) of this subtitle (defining a contested case) unless the statute or regulation:

1) expressly requires that the public hearing be held in accordance with this subtitle; or

2) expressly requires that any judicial review of the agency determination following the public hearing be conducted in accordance with this subtitle.

Id. § 10-203(c).
lature, however, limited the effect of this general provision when it amended the Environment Article to afford a contested case hearing on most, if not all, significant environmental permit determinations. The Sugarloaf saga is also worth recounting for its insights into who are the parties to a contested case hearing—the fourth question of interpretation raised by the definition of contested case—and the consequences of granting a contested case hearing to persons whose rights, or licenses, are not at stake.

In Sugarloaf, Montgomery County and the Northeast Maryland Waste Disposal Authority applied to the Maryland Department of the Environment (MDE) for a permit to locate a solid waste incinerator in a Prevention of Significant Deterioration (PSD) area. The PSD permit was the first of three required permits. No statute required the MDE to hold a hearing before granting or denying the permit application, but an MDE regulation did require the applicants to publish a newspaper advertisement informing the public of their right to request a "public hearing" on the application and to submit "written comments" to which the agency had an obligation to respond. However, a statute required the agency, before issuing the second required permit (the construction permit), to give public notice and to provide "an opportunity for a public hearing in the county in which the proposed source will be located." The agency regulation implementing that hearing right required public notice by newspaper advertisement, a "public hearing" on written request, and an agency response to all written comments.

The Sugarloaf Citizens Association, a nonprofit corporation representing the interests of area residents, and two individual landowners requested that the MDE hold a contested case hearing on the PSD permit. When the MDE denied that request, Sugarloaf and the landowners sought judicial relief. In the Court of Appeals, they lost the battle but won the war. The court held that the regulatory hear-

470. Sugarloaf, 594 A.2d at 1118.
471. Id.
472. Id. at 1121 n.9 (referring to Md. Regs. Code tit. 26, § 11.02.10C).
473. Id. at 1122 (referring to Md. Code Ann., Envir. § 2-404(b)).
475. Sugarloaf, 594 A.2d at 1118.
476. Id. at 1118-19.
ing on the PSD application was not a contested case hearing, but that the statutory hearing on the construction permit was such a hearing.477 According to the court: “Under the air quality permit scheme as a whole, the State has chosen the construction permit approval stage as the point at which a hearing is required by law, thus meeting the definition of a contested case.”478

Sugarloaf’s holding on the construction permit issue is unconvincing if one assumes, as did the court, that not all statutory hearing rights trigger contested case procedures. The statutory hearing appears to have been a legislative-type hearing, ensuring community residents input in the permit-issuing process. The procedures specified in the agency’s implementing regulations confirm this impression; parties to a contested case do not receive notice through newspaper advertisements, nor does the agency respond to all written comments received.479 Under prevailing federal law, the agency’s interpretation would probably control on the issue of what type of hearing its enabling statute required.480 In rejecting the agency’s interpretation, the Sugarloaf court reasoned, rather formalistically, that a “public hearing” was nevertheless a “hearing.”481 The court also insisted that the APA’s definition of a contested case was controlling; therefore, it did not matter whether the external statutory source “uses language indicating that the hearing is adjudicatory.”482 Under this approach, which emphasizes the generic nature of the word “hearing” found in the definition, any statutory hearing right would trigger the applicability of contested case procedures. However, the court then contradicted itself when it recognized that something in a statutory scheme might, expressly or impliedly, “negate” a contested case hearing.483

477. Id. at 1122-23.
478. Id. at 1122. In a lengthy opinion denying the State’s motion for reconsideration, Judge Eldridge, again speaking for the Sugarloaf court, rejected the State’s argument that the court’s addressing the construction permit issue was unnecessary for the disposition of the case. Id. at 1124-31.
479. In proposing the regulation, the agency (then the Department of Health and Mental Hygiene) identified the purpose of the regulation as providing “the public an opportunity to request a public hearing before the Department.” 13:18 Md. Reg. 2053, 2054 (1986) (emphasis added).
480. See Chemical Waste Mgmt., Inc. v. EPA, 873 F.2d 1477, 1482 (D.C. Cir. 1989) (adopting as reasonable the agency’s interpretation that a statutory hearing right did not require formal adjudication). The court applied the Supreme Court’s Chevron doctrine, Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. 467 U.S. 837 (1984), to hold that the agency’s position was based on a “permissible construction of the statute.” Chemical Waste Mgmt., 873 F.2d at 1480.
481. Sugarloaf, 594 A.2d at 1122 n.12.
482. Id. at 1126 (on denial of reconsideration).
483. Id. at 1121; see also id. at 1127 (on denial of reconsideration).
Despite the legislative history and the agency's implementing regulations, the court found nothing to "negate" contested case hearings on construction permit applications; it reacted quite differently to the agency regulation that required hearings on PSD permit applications. That regulation, according to the court, negated contested case status for the hearing because the regulation authorized the agency to substitute EPA informal hearing procedures for state hearing procedures.\footnote{484} The Sugarloaf opinion also leaves unexplained why the adjoining landowners may obtain a contested case hearing on the construction permit application. For a proceeding to be a contested case, an agency must determine either a "right, duty, statutory entitlement, or privilege of a person" or "the grant, denial, renewal, revocation, suspension, or amendment of a license."\footnote{485} It appears that the MDE was determining the "right" or "privilege" of the applicants to construct the facility, and it was most certainly determining whether to grant them a license. In fact, the agency's regulations allowed an applicant to request a contested case hearing if the permit was denied.\footnote{486} Ironically, the applicants whose rights, and certainly whose license, were at stake not only did not request, but actively resisted, a contested case hearing.\footnote{487} The landowners requesting the hearing were in a different situation. Although they alleged that the incinerator would diminish the value of their property and adversely affect their health, it does not appear that the MDE was determining their rights or denying them a license or other permission.\footnote{488} Their situation appears

\footnote{484} Id. at 1122-23.\footnote{485} Md. Code Ann., State Gov't § 10-202(d)(1)(i)-(ii) (1995).\footnote{486} Md. Regs. Code tit. 26, § 11.02.12 (repealed on May 8, 1995, 22:9 Md. Reg. 648 (1995)). That provision derived from Maryland's original air quality regulations. See Md. Regs. Code tit. 10, § 18.02.03, reprinted in 7:5 Md. Reg. 500, 511 (1980). The present regulations, Md. Regs. Code tit. 26, §§ 11.02.01 to -21 (1996), implement the new Public Participation subtitle of the Environment Article; see infra text accompanying notes 509-512.\footnote{487} Sugarloaf, 594 A.2d at 1119.\footnote{488} Under federal law, generalized health, safety, and environmental concerns do not constitute liberty or property interests. See City of W. Chicago v. United States Nuclear Regulatory Comm'n, 701 F.2d 632, 645 (7th Cir. 1983) (recognizing those interests not subject to due process protection). Similarly, a landowner does not have a property interest in another person's land use merely because that use may adversely affect the market value of the landowner's property. See Mehta v. Surles, 905 F.2d 595, 598-99 (2d Cir. 1990) (licensing of community residence for mentally retarded does not deprive neighbors of any constitutionally cognizable property interest); Woodward & Lothrop, Inc. v. Neall, 813 F. Supp. 1158, 1160 (D. Md. 1993) (adjacent property owner (a competitor) has no constitutionally protected property interest in preventing expansion of mall). Finally, the MDE's licensing of the incinerator does not affect any rights the landowners may have under the law of nuisance or inverse condemnation. See Washington Suburban Sanitary Comm'n v.
analogous to that of the pharmacists in the subsequent case of *Weiner v. Maryland Insurance Administration*. Although the Administration's approval of a Blue Cross/Blue Shield filing certainly aggrieved the pharmacists, the court held that they were not entitled to a contested case hearing because the agency had not determined their "rights." Persons in the landowners' position are familiar figures in federal administrative law, where they operate as "private Attorneys General." To qualify as a private Attorney General, one must establish some injury in fact, but the injury that establishes one's standing as an aggrieved person need not affect any right. Private Attorneys General, therefore, do not represent their own interests, but "have standing only as representatives of the public interest." Under the broad federal law of standing, private Attorneys General may obtain review of agency action and intervene in ongoing agency proceedings. More important, they may also force an agency to initiate an adjudicatory proceeding. For example, in the seminal case of *Office of Communications of the United Church of Christ v. FCC*, aggrieved listeners convinced the court to order a formal Federal Communications Commission (FCC) adjudicatory hearing on a broadcast license renewal after the agency had granted the application without a hearing.

Maryland's APA recognizes the standing of "a party who is aggrieved by a final decision in a contested case" to obtain judicial review of that decision, but is silent on standing to intervene or to initiate a contested case hearing. The Court of Appeals, addressing standing, has interpreted the APA to require that a party establish "a

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CAE-Link Corp., 622 A.2d 745, 752-53 (Md. 1993) (concluding state's grant of permission was not a defense for nuisance action). Given this case law, it is hard to identify any rights of the landowners adjudicated by the agency.

489. 652 A.2d 125 (Md. 1995).

490. *Id.* at 130.


492. *FCC v. Sanders Bros.*, 309 U.S. 470, 476 (1940) (holding that existing licensee may challenge licensing of competitor even though no right to be free from competition).


494. Federal courts tend to equate standing to obtain judicial review and standing to intervene. See Schwartz, supra note 46, § 6.1, at 294.

495. 359 F.2d 994 (D.C. Cir. 1966).

496. *Id.* at 1009. The agency had granted a probationary renewal, *id.* at 999, which the applicant had accepted.

specific interest or property right... personally and specifically affected in a way different from that suffered by the public generally." This test for defining "aggrieved" is more demanding than federal standing doctrine, but does not appear to require the deprivation of a right; a showing of special damage should suffice. The test for standing to intervene in an ongoing contested case should be no more restrictive because, under the Maryland APA, only an aggrieved person who is also party to a contested case may obtain judicial review of the final decision. However, standing to initiate a contested case proceeding raises additional concerns because of the extra burden it imposes on the agency and the other parties. Forcing an agency to conduct an unwanted hearing is surely more burdensome than requiring that a new party be accommodated in an ongoing proceeding. For this reason, the 1981 Model State APA does not require an agency to initiate an adjudicative proceeding at the request of a private Attorney General. To obtain an adjudicative proceeding, an applicant must establish that "the applicant's legal rights, duties, privileges, immunities, or other legal interests are to be determined by the requested order." Under that approach, the landowners in Sugarloaf most likely would not have obtained a contested case hearing.

The Sugarloaf court, although not deciding whether the landowners had standing, framed the issue in terms of their standing to obtain judicial review of the MDE permit. Evidently, the court did not per-


499. While federal law requires the party claiming standing to be among the persons injured by agency action, there is no requirement that the injury suffered be different than that suffered by others. See Sierra Club v. Morton, 405 U.S. 727, 734-41 (1972) (discussing requirements of standing). In addition, federal law allows organizations to represent the interests of their members, Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 342-43 (1977) (discussing prerequisites to "associational standing"), while Maryland law requires an organization to establish a "property interest of its own—separate and distinct from that of its members." Citizens Planning & Hous. Ass'n v. County Executive, 329 A.2d 681, 687 (Md. 1974).

500. See Bryniarski, 230 A.2d at 294 ("[H]e is personally and specially affected in a way different from that suffered by the public generally.").

501. MD. CODE ANN., STATE GOV'T § 10-222(a)(1).

502. See 1981 MSAPA, supra note 33, § 4-102(b)(4).

503. Id. § 4-102(b)(4) cmt. The Model Act has a separate provision on intervention as of right in an ongoing formal adjudication. See id. § 4-209(a).

504. Sugarloaf Citizens Ass'n v. Northeast Md. Waste Disposal Auth., 594 A.2d 1115, 1119 n.6 (Md. 1991). Peculiarly, the Court of Appeals reasoned that, in light of its decision that the proceeding was a contested case, it did not need to reach the issue of the landown-
ceive the issue to be one of standing to intervene. In a subsequent case involving a similar MDE decision, the Court of Appeals did decide the standing issue when it held that an association did not have standing to obtain judicial review of the agency’s decision to grant the permit. The court treated the proceeding as a contested case, but mentioned neither the agency’s failure to conduct a contested case hearing nor the association’s standing to compel the agency to do so. Both the APA and case law thus leave unaddressed who has standing to intervene. The Court of Appeals’s confusing analysis evidently led the Attorney General to conclude that “members of the public” opposing a landfill permit application were entitled to a contested case hearing, but that only persons “aggrieved” by the agency’s decision to grant the permit could obtain judicial review under the APA. That result is unfortunate; trial-type process to challenge agency action should not be available to all comers, but only to persons who would be injured in some fashion by the agency’s determination.

The legislature, with the aid of the Tiburzi Commission, provided a more appropriate response to Sugarloaf. The first part of that response defined “public hearing” to overturn Sugarloaf’s holding that a statutory right to a “public hearing” was a sufficient trigger. Second, and more important, the legislature added a new subtitle on Public Participation in the Permitting Process to the Environment Article. That process, which applies to most MDE permit determinations, includes informational meetings and public hearings on permit applications; it also grants a contested case hearing to persons’ standing to bring this action. Id. That reasoning is peculiar, not only because it suggests that it is appropriate to decide the merits before resolving the standing issue, but because it seems to assume that the only standing issue before the court was the standing of the landowners to obtain judicial review of the permit determination.

But see id. at 1124-25 (on denial of reconsideration) (stating the court was not deciding whether the landowners had standing to obtain a contested case hearing). The MDE subsequently granted the permit after a contested case hearing in which the landowners participated. Sugarloaf Citizens’ Ass’n v. Department of the Env’t, 653 A.2d 506, 508 (Md. Ct. Spec. App. 1994), cert. granted, 661 A.2d 733 (Md. 1995). Applying the Bryniarski test, the Court of Special Appeals held that the landowners did not have standing to obtain review of that decision under the Maryland APA. Id. at 511.

See Medical Waste Assoc., Inc. v. Maryland Waste Coalition, Inc., 612 A.2d 241, 249-50 (Md. 1992). While the Medical Waste Associates court held that the administrative proceeding under review was a contested case, id. at 246, the agency had not conducted a contested case hearing.


Md. Code Ann., State Gov’t § 10-203(c) (1995) (public hearings); see also supra note 468 (text of amendment).


See id. § 2-404 (air quality construction permits); § 9-209 (landfill permits); § 9-323 (discharge permits—water); §§ 9-234, -238 (sewage sludge permits); §§ 7-103, -232 (con-
"aggrieved" by the MDE's final determination. Thus, while over-turning the Sugarloaf court’s interpretation of “public hearing,” the legislature reached the same result; it classified adjudications granting or denying air quality and most other environmental permits as contested cases. This reflects a healthy trend whereby the legislature addresses explicitly, in delegating adjudicatory authority, whether the agency must afford an opportunity for a contested case hearing and to whom that opportunity must be afforded.

The new public participation subtitle of the Environment Article contains special provisions designed to make contested case procedures more manageable for environmental cases. Although not part of the APA, these provisions (at least in their intent) resemble the Federal APA's provisions allowing an agency to use less formal procedures for initial licensing and ratemaking. The concern is the same in both instances: the mismatch between trial-type procedures and initial licensing. Trial-type procedures may become unmanageable, given the predictive and policy component of much initial licensing and the efforts of adversely affected persons to prolong the proceeding. The resulting delay may be more harmful to the public inter-

511. Id. § 1-605.
512. In 1994 the legislature explicitly required contested case procedures for permitting proceedings transferred to the MDE from the Department of Natural Resources. Id. § 5-204(f) (applicable to water appropriation permits, nontidal wetlands permits, oil and gas permits, mining permits, and most private wetlands permits).
513. See id. § 1-605(a)-(e) (discussed infra text accompanying notes 516-518).
514. For a description of the federal provisions, see supra text accompanying notes 207-211.
515. That concern led the Attorney General to advise the Secretary of Health and Mental Hygiene to approve group home applications for the developmentally disabled without notice and hearing once the agency determined that the application was in compliance with regulatory guidelines. See 78 Md. Op. Att’y Gen. 99-080, 169, 169 (July 30, 1993). The Attorney General had previously advised the secretary that the hearing required by statute was legislative and that providing community residents an evidentiary hearing would have “discriminatory effects prohibited by federal law.” 75 Md. Op. Att’y Gen. 90-014, 101, 112 (Mar. 7, 1990). For the applicable federal law, see Potomac Group Home Corp. v. Montgomery County, 823 F. Supp. 1285, 1295-97, 1299 (D. Md. 1993) (invalidating county's licensing procedures for group homes).

nest than a more timely regulatory approval using less formal procedures.

To expedite the permitting process, the Environment Article’s public participation subtitle contains time limits for scheduling the required informational meetings and public hearings on permit applications.\textsuperscript{516} Upon the completion of that process, only aggrieved persons may obtain a contested case hearing on the MDE’s determination to grant or deny a permit, and they must allege with “sufficient particularity” both the basis for their aggrievement and the legal and factual bases for challenging the determination.\textsuperscript{517} If the allegations are insufficient, the MDE shall dismiss the request for a contested case hearing; if the MDE grants a contested case hearing, the ALJ has express authority to decide the case summarily if there is no genuine dispute as to the material facts.\textsuperscript{518} Although these provisions allow aggrieved persons to initiate contested case proceedings and leave the definition of “aggrieved” to the courts, they should allow the agency to obtain an early determination of the standing issue. In \textit{Sugarloaf}, the courts held that the granting of the construction permit was a contested case without addressing whether the landowners had standing.\textsuperscript{519} As a result, the OAH held fifteen days of hearings at the behest of a party subsequently found to lack standing.\textsuperscript{520} Surely, an agency should be able to avoid conducting a trial-type hearing if it believes, and is able to establish in court, that the only party seeking the hearing lacks standing.

\textbf{Conclusion}

The Maryland APA has well served its intended function of legitimating agency lawmaking and adjudication. During its forty-year life, the Act has furthered the values of transparency, procedural regularity, and judicial review. As a result, Marylanders have less to fear from the administrative state than they would without the APA.

Perhaps Maryland’s APA could do more to further these values if the legislature removed the Act’s principal limitations. The legislature could apply the APA to agencies now exempt from its provisions, subject regulations to rationality review, create procedures for informal adjudication, and make all adjudicatory actions reviewable under

\textsuperscript{516} Md. Code Ann., Envir. § 1-605(a).
\textsuperscript{517} Id.
\textsuperscript{518} Id.
\textsuperscript{519} See supra notes 504-505 and accompanying text.
Those changes would bring Maryland's APA in line with the Federal APA and the 1981 Model State APA. Although 1997 does not seem a propitious time for revision, such changes may occur in the future. However, there are strong arguments for retaining the APA's limitations. Exemptions for particular agencies permit a greater role for agency expertise in highly specialized areas; judicial review of regulations for rationality might further ossify the rulemaking process; informal procedures are not appropriate for resolving disputed issues of adjudicative fact; and the courts' inherent review power does serve as a check on most informal adjudication. The status quo on these matters is, therefore, acceptable, although legislators and scholars should revisit these issues in future years. However, the legislature should consider exempting nonlegislative regulations from rulemaking procedures and facilitating agency efforts to modify proposed regulations in light of public comment; both would lighten agencies' rulemaking burden. The modesty of these proposed reforms further demonstrates that Maryland's APA is working well.