

**DEPARTMENTAL DISTANCING: HOW MARYLAND'S  
EMERGENCY RESPONSE DURING THE COVID-19 PANDEMIC  
JEOPARDIZED THE SEPARATION OF POWERS**

***MURPHY V. LIBERTY MUTUAL INSURANCE COMPANY,*  
274 A.3D 412 (MD. 2022).**

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## I. INTRODUCTION

In *Murphy v. Liberty Mutual Insurance Company*,<sup>1</sup> the United States District Court for the District of Maryland posed a question to Maryland's highest state court.<sup>2</sup> The question concerned the constitutional validity of an administrative order (the "Tolling Order" or "Order")—issued by the Chief Judge of the Court of Appeals—tolling all statutes of limitations, without an individual showing of need, for the duration of court closures during the COVID-19 pandemic.<sup>3</sup> Specifically, the court was asked to address whether the Tolling Order violated Maryland's constitutional provision on the separation of powers or its prohibition on the suspension of laws.<sup>4</sup> The court answered that the Tolling Order, in the context of the statewide health emergency, did not violate either provision of the Maryland Constitution.<sup>5</sup>

This Comment provides a comprehensive overview of the underlying case, the Tolling Order, and the judicially enacted Emergency Rules that enabled it. It will then delve into the legal and factual background surrounding the court's rulemaking authority; its historical interpretation of separation of powers principles and the prohibition on the suspension of laws; its authority in the realm of statutes of limitations; and Maryland's overall response to the COVID-19 public health emergency. This Comment will then provide an overview of the court's analysis before asking whether the court appropriately considered the underlying concerns when addressing the questions before it.

This Comment will demonstrate that, while the court answered the question, it did not adequately address several serious underlying

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1. 274 A.3d 412 (Md. 2022).

2. On December 14, 2022, Maryland's highest court, previously the Court of Appeals, was renamed the Supreme Court of Maryland by constitutional amendment. MD. CONST. art. IV, § 1. This Comment retains the pre-amendment designation to be consistent with the cases, court rules, and statutes that still referred to Maryland's highest court as the "Court of Appeals" at the time of writing.

3. Amended Administrative Order Clarifying the Emergency Tolling or Suspension of Statutes of Limitations and Statutory and Rules Deadlines, at 2 (Apr. 24, 2020), <https://perma.cc/GC97-6R5Q> [hereinafter Tolling Order].

4. *Murphy*, 274 A.3d at 416.

5. *Id.*

separation of powers concerns: whether the broad tolling of statutes of limitations without regard to individual showing of needs is properly within the court's rulemaking authority; whether the circumstances of a situation may alter what is considered properly within the court's authority; and whether the broadening of the court's power from individual equitable determinations to broad prospective application was appropriate.

## II. STATEMENT OF THE CASE

This certified question arose from a dispute between Liberty Mutual Insurance Company ("Liberty Mutual") and Jesse J. Murphy and J.M. Murphy Enterprises, Inc. (collectively, "Murphy"), a concrete subcontractor.<sup>6</sup> Murphy was contracted to furnish and install concrete for a construction project.<sup>7</sup> A third-party bond company issued a payment and performance bond for the project, naming Murphy as the principal.<sup>8</sup> As principal of the bond, Murphy guaranteed the installation of the concrete, including payment for all labor and supplies.<sup>9</sup> Liberty Mutual, who insured the bond company, alleged that Murphy defaulted on their obligations in the project, causing the bond company to incur indemnified losses on certain claims between February 2017 and February 2018.<sup>10</sup>

Liberty Mutual, headquartered in Massachusetts, sued Murphy, a Maryland company, for indemnification of the payment of these claims in the United States District Court for the District of Maryland in July 2020.<sup>11</sup> In its complaint, Liberty Mutual alleged that the total amount of the claims exceeded the \$75,000 requirement for diversity jurisdiction.<sup>12</sup> Murphy moved for dismissal<sup>13</sup> on the grounds that the claims prior to July 2017 fell outside the three-year statute of limitations under Maryland law.<sup>14</sup> Since those claims could not be considered in the

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6. *Liberty Mut. Ins. Co. v. Murphy*, No. 20-cv-01961, 2022 WL 2105922, at \*1 (D. Md. June 10, 2022).

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. Complaint at 1–9, *Liberty Mut. Ins. Co. v. Murphy*, No. 20-cv-01961 (D. Md. July 2, 2020), 2021 WL 8893601 [hereinafter *Murphy Complaint*].

12. *Id.* at 2.

13. Defendant's Renewed Motion to Dismiss Amended Complaint and Memorandum of Points and Authorities in Support Thereof, *Liberty Mut. Ins. Co. v. Murphy*, No. 20-cv-01961 (D. Md. Jan. 24, 2021), 2021 WL 8893601 [hereinafter Defendant's Renewed Motion to Dismiss].

14. *Id.*; see MD. CODE ANN., CTS. & JUD. PROC. § 5-101 (West 2014).

calculation for damages, Murphy asserted that Liberty Mutual could not meet the amount in controversy requirement.<sup>15</sup>

However, on April 24, 2020, the Chief Judge of the Maryland Court of Appeals had issued the Tolling Order, tolling all statutes of limitations for the state in response to the public health emergency caused by the COVID-19 pandemic.<sup>16</sup> The Order states that:

[A]ll statutory and rules deadlines related to the initiation of matters required to be filed in a Maryland state trial or appellate court, including statutes of limitations, shall be tolled or suspended, as applicable, effective March 16, 2020, by the number of days that the courts are closed to the public due to the COVID-19 emergency by order of the Chief Judge of the Court of Appeals[.]<sup>17</sup>

On June 3, 2020, the Maryland Court of Appeals announced that the tolling period under this order would be from March 16, 2020 through July 20, 2020.<sup>18</sup> Liberty Mutual filed their suit on July 2, 2020, and asserted that their claims for February through July of 2017 fell within the tolling period announced by the Order and should not be excluded from the calculation of the amount in controversy.<sup>19</sup> Murphy, however, argued that the Maryland Court of Appeals' Tolling Order did not apply to the federal diversity case.<sup>20</sup>

The district court determined that the tolling of a statute of limitations is a question of state substantive law according to the standards set forth in *Erie R. Co. v. Tompkins* and its progeny and, absent a separate federal cause of action over the contract claims, the Order would apply to the case in diversity.<sup>21</sup> However, the district court identified another barrier to the application of the Order: its validity under the Maryland State Constitution.<sup>22</sup>

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15. *Murphy*, 2022 WL 2105922, at \*2.

16. *Id.*

17. Tolling Order, *supra* note 3, at 2.

18. Second Revised Administrative Order on the Emergency Tolling or Suspension of Statutes, at 3 (June 3, 2020), <https://perma.cc/ML58-EEMC>.

19. *Liberty Mut. Ins. Co. v. Murphy*, No. 20-cv-01961, 2021 WL 2784264, at \*2 (D. Md. July 2, 2021).

20. *Id.* at \*3.

21. *Id.* at \*3–4.

22. *Id.* at \*4. Interestingly, Murphy never argued against the Order's validity. See Defendant's Renewed Motion to Dismiss, *supra* note 13, at 1; see also Reply to Plaintiff's Opposition to the Renewed Motion to Dismiss Amended Complaint, No. 20-cv-01961 (D. Md. Feb. 25, 2021), 2021 WL 8893602. The district court appears to have raised the question *sua sponte*.

In particular, the district court was concerned that although the Chief Judge of the Maryland Court of Appeals has the constitutional authority to make rules governing practice and procedure and administration of the courts,<sup>23</sup> the Order's broad tolling of a statute of limitations has "such a deeply substantive effect" that its constitutional validity was suspect.<sup>24</sup> The district court therefore found that the Order's validity needed to be examined before the outcome of Murphy's motion to dismiss could be determined, but it also recognized that "the question of the . . . Order's validity is uniquely ill-suited for resolution by a federal district court because it implicates far-reaching questions as to the functioning and authority of the Maryland state courts."<sup>25</sup>

For the foregoing reasons, the district court certified the question to be answered by the Maryland Court of Appeals.<sup>26</sup> The question, as reformulated by the Maryland court,<sup>27</sup> read: "Did the Chief Judge of the Court of Appeals of Maryland act within her authority under Maryland law when, in response to the COVID-19 pandemic, she issued Administrative Orders that tolled statutes of limitations related to civil cases?"<sup>28</sup>

The Maryland Court of Appeals answered that (1) the Chief Judge acted within her authority in issuing the Administrative Orders, (2) the Orders did not violate Maryland's constitutional grant of separation of powers, and (3) the Orders did not violate Maryland's constitutional prohibition on the suspension of laws.<sup>29</sup> The district court, having established jurisdiction, denied Murphy's motion to dismiss.<sup>30</sup> On May 10, 2023, the case was dismissed.<sup>31</sup>

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23. MD. CONST. art. IV, § 18.

24. *Murphy*, 2021 WL 2784264, at \*4.

25. *Id.* at \*5 (citing *Bourgeois v. Live Nation Ent., Inc.*, No. CIV.A. ELH-12-58, 2012 WL 2234363, at \*8 (D. Md. June 14, 2012)).

26. *Id.* Maryland law provides that the court of appeals may "answer a question of law certified to it by a court of the United States . . . if the answer may be determinative of an issue in pending litigation in the certifying court and there is no controlling appellate decision, constitutional provision, or statute of this State." MD. CODE ANN., CTS. & JUD. PROC. § 12-603 (West 2022).

27. The specific wording of certified questions is left to the discretion of the answering court after input from the parties. MD. CODE ANN., CTS. & JUD. PROC. § 12-604 (West 2022); see also *Murphy*, 2021 WL 2784264, at \*5.

28. *Murphy v. Liberty Mut. Ins. Co.*, 274 A.3d 412, 431 (Md. 2022).

29. *Id.* at 416.

30. *Liberty Mut. Ins. Co. v. Murphy*, No. 20-cv-01961, 2022 WL 2105922, at \*1 (D. Md. June 10, 2022).

31. Order Approving Stipulation of Dismissal, *Liberty Mut. Ins. Co. v. Murphy*, No. 20-cv-01961 (D. Md. May 10, 2023).

## III. BACKGROUND

A. *The Rulemaking Authority of the Maryland Court of Appeals*

Article IV of Maryland's State Constitution establishes the Judiciary Department of Maryland's government.<sup>32</sup> Section 18(a) of this article grants Maryland's highest appellate court the authority to "adopt rules and regulations concerning the practice and procedure in and the administration of . . . the other courts of the State," and establishes the Chief Judge of that court as "the administrative head of the Judicial system of the State."<sup>33</sup> Because Maryland's Constitution prohibits the judiciary from performing non-judicial functions, this is a limited grant of authority that specifically restricts the Chief Judge's rulemaking power to (1) the administration of the court system, and (2) rules of practice and procedure.<sup>34</sup>

Section 18(a) additionally provides that such rules and regulations "shall have the force of law until rescinded, changed or modified by the Maryland Court of Appeals or otherwise by law."<sup>35</sup> This effectively gives concurrent rulemaking authority to the General Assembly, Maryland's legislative body.<sup>36</sup> Where the judiciary and the legislature have enacted conflicting provisions, the last enacted prevails.<sup>37</sup> This can result, and has resulted, in protracted back-and-forth battles between the court and the General Assembly on the formulation of procedural rules.<sup>38</sup>

Maryland law provides that "[t]he power of the [court] to make rules and regulations to govern the practice and procedure and judicial administration [of the] court . . . shall be liberally construed."<sup>39</sup> Rules concerning the "administration" of the courts include the management of

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32. MD. CONST. art. IV, § 1.

33. MD. CONST. art. IV, § 18(a)–(b)(1).

34. *Id.*; Dept. of Nat. Res. v. Linchester Sand & Gravel Corp., 334 A.2d 514, 522 (Md. 1975) ("[A]ll judicial authority is only such as it is provided for by [a]rticle [IV] of the Maryland Constitution, and it has been decided that only judicial functions can be exercised which find their authority in that [a]rticle . . ." (quoting *Dal Maso v. County Commrs.*, 34 A.2d 464, 466 (Md. 1943))).

35. MD. CONST. art. IV, § 18(a).

36. DAN FRIEDMAN, *THE MARYLAND STATE CONSTITUTION: A REFERENCE GUIDE* 169 (2006).

37. STEPHEN H. SACHS, *Constitutional Law—Separation of Powers—Court Procedures and Administration—First Amendment—Freedom of Press—General Assembly May Enact Legislation Prohibiting Broadcast of Court Proceedings*, in 66 ANNUAL REPORT AND OFFICIAL OPINIONS OF THE ATTORNEY GENERAL OF MARYLAND 80, 84 (1981).

38. See, e.g., *Hensley v. Bethesda Sheet Metal Co.*, 188 A.2d 290, 291–92 (Md. 1963).

39. MD. CODE ANN., CTS. & JUD. PROC. § 1-201(a) (West 2022).

judicial appointments and employees.<sup>40</sup> Additionally, the court recognizes an incidental authority to manage the legal profession in Maryland<sup>41</sup> and the general internal operations and facilities of the court system.<sup>42</sup>

Rules concerning “practice and procedure” govern where and by what means a litigant may bring a cause of action or appeal to a Maryland court. However, a procedural rule can neither modify the substance of nor create a new cause of action.<sup>43</sup> Of course, the distinction between substantive and procedural rules is often unclear and, unless there is intervention from the General Assembly, it is up to the court to call balls and strikes on its own pitches when issuing a rule of procedure that may have substantive effects.<sup>44</sup> The court also promulgates its own rules regarding the promulgation of its rules,<sup>45</sup> and holds the power to appoint all of the members of its Standing Committee on Rules of Practice and Procedure.<sup>46</sup>

#### *B. Maryland’s Constitutional Prohibition on the Suspension of Laws*

Article IX of Maryland’s Declaration of Rights states that “no power of suspending Laws, or the execution of Laws, unless by, or derived from the Legislature, ought to be exercised, or allowed.”<sup>47</sup> Until *Murphy*, the

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40. See MD. CODE ANN., STATE PERS. & PENS. § 2-201 (West 1996); *Whitaker v. Prince George’s Cnty.*, 514 A.2d 4, 8 (Md. 1986).

41. *Att’y Gen. of Md. v. Waldron*, 426 A.2d 929, 934–35 (Md. 1981).

42. *Murphy v. Liberty Mut. Ins. Co.*, 274 A.3d 412, 440 (Md. 2022).

43. *Consol. Const. Servs., Inc. v. Simpson*, 813 A.2d 260, 269–70 (Md. 2002) (holding that a rule promulgated by the Chief Judge was an improper use of the court’s rule making power because it constituted a substantive change to a statutory cause of action).

44. MD. CODE ANN., CTS. & JUD. PROC. § 1-201(b) (West 2022). The Maryland legislature has little occasion to intervene as it has defined “practice and procedure” broadly in its Code on Courts and Judicial Proceedings. Section 1-201(a) of the Maryland Code on Courts and Judicial Proceedings reads:

Without intending to limit the comprehensive application of the term “practice and procedure,” the term includes the forms of process; writs; pleadings; motions; parties; depositions; discovery; trials; judgments; new trials; provisional and final remedies; appeals; unification of practice and procedure in actions at law and suits in equity, so as to secure one form of civil action and procedure for both; and regulation of the form and method of taking and the admissibility of evidence in all cases, including criminal cases.

*Id.* § 1-201(a).

45. MD. R. CT. ADMIN. 16-802.

46. *Id.* at 16-701(b) (“The Committee shall consist of one incumbent judge of the Court of Special Appeals, three incumbent circuit court judges, three incumbent judges of the District Court, one member of the State Senate, one member of the House of Delegates, one clerk of a circuit court, and such other individuals determined by the Court of Appeals. All members shall be appointed by the Court of Appeals.”).

47. MD. CONST. decl. of rts. art. IX.

higher courts of Maryland had no occasion to interpret the substance of this prohibition as it relates to the tolling of a statute of limitations. In fact, the courts have scarcely had occasion to examine article IX at all and, when asked, has found it inapplicable.<sup>48</sup>

*C. Separation of Powers Under the Maryland State Constitution*

Unlike the U.S. Constitution, where separation of powers is implied by its separate Articles, Maryland's Constitution contains an express textual provision for the separation of powers. Article VIII of Maryland's Declaration of Rights states 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."<sup>49</sup> However, much like the federal system, Maryland has had to grapple with the reality that some overlap of judicial, legislative, and executive powers is inevitable in any functioning government.<sup>50</sup>

Maryland courts have never taken a literal interpretation of article VIII. In 1829, the court of appeals recognized that the language of this separation of powers clause had been adopted in some form by all of the state constitutions formed around the time of the revolutionary war, but "in none of these constitutions are the several departments kept *wholly* separate and unmixed," and that the separation of powers doctrine should only be in force "as far as comport[s] with free government, and to prohibit the exercise by one department of the powers of another."<sup>51</sup> Thus, the courts of Maryland have long recognized that "[i]n response to the practical needs of government . . . the separation of powers concept may constitutionally encompass a sensible degree of elasticity."<sup>52</sup>

The question then remains: what degree of elasticity is sensible within Maryland's constitutional scheme? The highest court has long recognized that "[w]ithin the particular limits assigned to each [branch],

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48. See e.g., *Paula v. Mayor and City Council of Balt.*, 268 A.3d 972, 986 (Md. Ct. Spec. App. 2022) (finding that article IX of the declaration did not apply to the City's non-compliance with a law); *Dr.'s Hosp. of Prince George's Cnty. v. Md. Health Res. Plan. Comm'n*, 501 A.2d 1324, 1333–34 (Md. Ct. Spec. App. 1986) (finding that article IX of the declaration did not apply to the Commission's decision to delay the grant of an application while awaiting additional information).

49. MD. CONST. decl. of rts. art. VIII.

50. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.").

51. *Crane v. Meginnis*, 1 G. & J. 463, 476 (1829) (emphasis in original).

52. *Dept. of Nat. Res. v. Linchester Sand & Gravel Corp.*, 334 A.2d 514, 521 (Md. 1975).



they are supreme and uncontrollable.”<sup>53</sup> These “particular limits” are generally those expressly vested in the constitutional text that creates the branch, although there have been “inherent,” unenumerated powers described as an “essential” function that cannot be interfered with or encroached on by another branch.<sup>54</sup> Outside of these particular limits, the sharing and delegation of authority between the branches is generally permissible.<sup>55</sup>

The concurrent authority between the judiciary and the legislature to promulgate rules of practice and procedure is a longstanding example of this permissible sharing of power. This is supported not only by precedent and tradition in Maryland, but also by its constitutional text.<sup>56</sup> Maryland courts employ the familiar canon of constitutional construction that general provisions must yield to specific provisions, therefore the specific grant of concurrent power between the legislature and the judiciary in article IV, section 18 has priority over the general grant of separation of powers in article VIII of the declaration.<sup>57</sup> However, this concurrent authority is limited to rules of practice and procedure.<sup>58</sup> It is the exclusive and essential function of the legislature to enact statutes, including statutes of limitations.<sup>59</sup>

#### *D. Judicial Authority over Statutes of Limitations in Maryland*

Maryland courts acknowledge that statutes of limitations involve a policy judgment that is within the exclusive purview of the legislature.<sup>60</sup> The purpose of a statute of limitations is to balance three separate interests: (1) potential plaintiffs’ interest in having enough time to develop a viable case and file suit; (2) potential defendants’ interest in not being hauled into court for conduct long forgotten; and (3) the public’s interest in a fair and efficient judicial system.<sup>61</sup> Statutes of limitations, like other laws, have a binding effect on all of Maryland’s citizens throughout all time. Only the General Assembly is given the

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53. *Wright v. Wright’s Lessee*, 2 Md. 429, 452 (1852).

54. *Att’y Gen. of Md. v. Waldron*, 426 A.2d 929, 933–34, 937 (Md. 1981) (finding that the regulation of the practice of law is an essential function of the judiciary).

55. FRIEDMAN, *supra* note 36, at 169.

56. See *supra* notes 32–38 and accompanying text.

57. See *State v. Smith*, 505 A.2d 511, 522 (Md. 1986) (“It is a basic rule of construction that ordinarily the specific prevails over the general.”).

58. See *Dept. of Nat. Res. v. Linchester Sand & Gravel Corp.*, 334 A.2d 514, 522 (Md. 1975).

59. *Christ by Christ v. Md. Dept. of Nat. Res.*, 644 A.2d 34, 42 (Md. 1994).

60. See *Ceccone v. Carroll Home Servs., LLC*, 165 A.3d 475, 481 (Md. 2017) (“A statutory period of limitations represents a policy judgment by the Legislature . . .”).

61. *Pennwalt Corp. v. Nasios*, 550 A.2d 1155, 1158 (Md. 1988).

constitutional grant of power to enact such laws, with the rigorous decisional processes and political accountability that that power requires.<sup>62</sup>

However, there are functions of the judiciary that, at times, must come to bear on laws enacted by the General Assembly, including the interpretation of those laws pursuant to their application to individual cases and the development of rules and regulations pursuant to those laws where the legislature has properly delegated its authority to do so. Therefore, although the enactment of statutes of limitations is within the exclusive purview of the General Assembly, the courts of Maryland have had permissible influence over the implementation of those statutes.

Similar to the U.S. Supreme Court after *Marbury v. Madison*, Maryland recognizes that it “is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule.”<sup>63</sup> When it is required for Maryland courts to interpret statutes of limitations, they adopt strict constructions in light of the statute’s purpose, and “decline to apply strained construction that evades [their] effect,”<sup>64</sup> on the grounds that “[s]tatutes of limitations are remedial legislation and rest upon sound public policy.”<sup>65</sup> Therefore, Maryland courts have consistently found that they do not have the authority to create an equitable exception to a statute of limitations that is not expressly provided for in the statute, even when such an exception would conform with the statute’s purpose.<sup>66</sup>

However, statutes of limitations are not immutable and are susceptible to judicial exceptions in certain limited and well-defined circumstances. First, it is within the province of the court to determine when a cause of action “accrues,” i.e., when the clock begins to tick on a statute of limitations.<sup>67</sup> For example, Maryland courts have adopted a “discovery rule,” where the accrual of a cause of action begins not at the time of the defendant’s conduct but at the time the plaintiff is, or should reasonably be, aware of the wrongdoing.<sup>68</sup> Second, courts are permitted to toll, or suspend, a statute of limitations where strict adherence would produce an absurd result, contrary to the purpose underlying the

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62. See generally MD. CONST. art. III, § 56.

63. *Linchester*, 334 A.2d at 521 (quoting *Marbury v. Madison*, 5 U.S. 137, 177 (1803)).

64. *Sheng Bi v. Gibson*, 45 A.3d 305, 307 (Md. Ct. Spec. App. 2012) (citing *Decker v. Fink*, 422 A.2d 389 (Md. Ct. Spec. App. 1980)).

65. *McMahan v. Dorchester Fertilizer Co.*, 40 A.2d 313, 315 (Md. 1944).

66. *Id.* at 316; see also *Young v. Mayne Realty Co.*, 429 A.2d 296, 298 (Md. Ct. Spec. App. 1981).

67. *Hahn v. Claybrook*, 100 A. 83, 84–85 (Md. 1917).

68. See *id.* at 86.

statute.<sup>69</sup> Finally, a court may suspend a statute of limitations where there is mutual agreement or waiver of the parties.<sup>70</sup>

Importantly, these judicial exceptions are all case-by-case determinations that arise from the court's constitutional authority to adjudicate disputes between parties.<sup>71</sup> In each of these judicial exceptions, the parties must show that the statute of limitations does not apply to their particular case. To invoke the discovery rule, the plaintiff must show that they were not, or should not have been, aware of the wrongdoing until sometime after the wrongdoing occurred.<sup>72</sup> A party requesting judicial tolling must show that the application of the statute would contraindicate strong policy concerns.<sup>73</sup> Parties may, either through refusal to invoke a statute of limitations or by expressed agreement, influence *only* how the statute of limitations applies to the particular case or controversy they have brought before the court.<sup>74</sup>

Additionally, the court may promulgate rules and regulations regarding statutes of limitations pursuant to their constitutional grant of authority over rules of practice and procedure. The court has thus promulgated rules regarding the computation of time,<sup>75</sup> as well as rules regarding the determination of commencement of an action.<sup>76</sup> These rules may affect when an action can be brought to the court and whose actions

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69. Philip Morris USA, Inc. v. Christensen, 905 A.2d 340, 347 (Md. 2006) (citing Bertonazzi v. Hillman, 216 A.2d 723, 726 (Md. 1966)) (“[W]e will recognize a tolling exception to a statute of limitations if, and only if, the following two conditions are met: (1) there is persuasive authority or persuasive policy considerations supporting the recognition of the tolling exception, and (2) recognizing the tolling exception is consistent with the generally recognized purposes for the enactment of statutes of limitations.”).

70. Ceccone v. Carroll Home Servs., LLC, 165 A.3d 475, 481–82 (Md. 2017) (citing Kim v. Comptroller of Treasury, 714 A.2d 176 (Md. 1998)) (“Statutes of limitation are not ordinarily jurisdictional, and parties may essentially lengthen them by waiving limitations or by agreeing to toll the period of limitations for a particular claim that might otherwise become barred.”); *see also* Milton Co. v. Council of Unit Owners of Bentley Place Condo., 729 A.2d 981, 987 (Md. 1999).

71. *Hahn*, 100 A. at 84–86 (citing Green v. Johnson, 3 G. & J. 394 (Md. 1831)) (“Apart from the savings and disabilities expressed in the statute itself there must, in order to defeat its operation, be some insuperable barrier, or some certain and well-defined exception, *clearly established by judicial authority.*” (emphasis added)).

72. *Id.* at 86.

73. *Christensen*, 905 A.2d at 357–58.

74. *Ceccone*, 165 A.3d at 481–82.

75. MD. R. GEN. PROVS. 1-203(a)–(d).

76. MD. R. CIV. PRO., CIR. CT. 2-101(b) (“Except as otherwise provided by statute, if an action is filed in a United States District Court or a court of another state within the period of limitations prescribed by Maryland law and that court enters an order of dismissal . . . because the action is barred by the statute of limitations required to be applied by that court, an action filed in a circuit court within [thirty] days after the entry of the order of dismissal shall be treated as timely filed in this State.”).

may be time-barred, but their purpose is not to suspend statutes of limitations in particular classes of cases, and they do not alter the rights of the parties. Rather, they are strictly procedural rules necessary for the court to ensure consistent application across all cases.

*E. Delegation of Authority for Statewide Emergencies in Maryland*

No department is granted exclusive authority over the response to statewide emergencies. Rather, this is another area of governance where the Maryland Constitution appears to support the concurrent authority of multiple departments.<sup>77</sup> The General Assembly has delegated to the Governor, as the head of the executive branch, authority to declare a state of emergency,<sup>78</sup> take action to respond to the emergency,<sup>79</sup> and to suspend statutes and rules during the course of the emergency.<sup>80</sup> The General Assembly imposes procedural requirements for these executive emergency actions and retains the ability to terminate a state of emergency at any time.<sup>81</sup>

The General Assembly also created the Maryland Emergency Management Agency and granted it the power to coordinate activity amongst Maryland's various administrative agencies during statewide emergencies.<sup>82</sup> Similarly, it delegated particular emergency response duties to the Secretary of Health during specific "catastrophic health emergencies,"<sup>83</sup> like the COVID-19 pandemic.<sup>84</sup>

There is no constitutional or legislative delegation of emergency response authority to the judiciary. The judiciary, however, took it upon themselves to grant emergency powers to the Chief Judge in March of 2020.<sup>85</sup> Maryland Rule of Court Administration 16-1003 (the "Emergency Rule" or "Rule") grants the Chief Judge the authority to "suspend, toll, extend, or otherwise grant relief from time deadlines, requirements, or expirations otherwise imposed by applicable statutes . . . where there is no practical ability of a party subject to such deadline . . . to comply with

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77. See *supra* note 51 and accompanying text.

78. MD. CODE ANN. PUB. SAFETY § 14-303(a)(1).

79. *Id.* § 14-303(b).

80. *Id.* § 14-107(d)(1)(i). Because this emergency power to suspend statutes and rules is directly delegated to the executive by the legislature, it does not conflict with the constitutional prohibition on the suspension of laws found in article IX of the Maryland Declaration of Rights. See discussion *supra* Section III.B.

81. PUB. SAFETY § 14-107.

82. See *id.* § 14-107(c)(1).

83. *Id.* § 14-3A-01(b).

84. Declaration of State of Emergency and Existence of Catastrophic Health Emergency – COVID-19, at 2 (Mar. 5, 2020) [<https://perma.cc/M45P-7U2B>].

85. MD. R. CT. ADMIN. 16-1001(b).

the deadline . . . or seek other relief.”<sup>86</sup> The Rule itself does not acknowledge any explicit concurrent authority or oversight, but a note by the Rules Committee does acknowledge that “the authority granted under these Rules must be exercised in harmony with lawful directives of the Governor and other Executive Branch officials to the maximum extent practicable.”<sup>87</sup>

*F. The Government of Maryland’s Response to the COVID-19 Pandemic*

In the final weeks of 2019, the outbreak of a highly infectious disease in Wuhan, China caused by a novel coronavirus—more commonly known as “COVID-19”—became an issue of international concern. In February 2020, the then-Governor of Maryland, Larry Hogan, responded by directing state agencies to prepare for a possible outbreak within the state, and allocated funding for emergency preparedness.<sup>88</sup> On March 5, 2020, the first COVID-19 case was confirmed in the state of Maryland and the Governor declared a state of emergency.<sup>89</sup>

The Governor issued an order authorizing the “head of each unit of State or local government” to suspend legal or procedural deadlines described in any statute that it administered.<sup>90</sup> This, ostensibly, would apply to the Chief Judge as the administrative head of the judiciary. Soon after, for the first time since the Civil War, the General Assembly adjourned its session early.<sup>91</sup>

On March 12, 2020, the Chief Judge issued orders suspending jury trials and all non-essential activities.<sup>92</sup> One day later, courthouses were

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86. *Id.* at 16-1003(a)(7).

87. RULES COMM. REP. No. 204, at 7 (Md. 2020), <https://www.courts.state.md.us/sites/default/files/minutes-rules/minutes20200313.pdf> [<https://perma.cc/MD6K-TMQ5>].

88. Press Release, Larry Hogan, Governor Md., Governor Hogan Announces Additional Steps to Protect Marylanders from Coronavirus (Feb. 27, 2020) [<https://perma.cc/5SK3-843F>].

89. See Declaration of State of Emergency, *supra* note 84, at 1.

90. Order of the Governor Extending Certain Licenses, Permits, Registrations, and Other Governmental Authorizations, and Authorizing Suspension of Legal Time Requirements (Mar. 12, 2020) [<https://perma.cc/P9UB-2PC5>].

91. Luke Broadwater & Pamela Wood, *Maryland Lawmakers to End General Assembly Session Wednesday, With Coronavirus Looming*, BALTIMORE SUN, <https://www.baltimoresun.com/politics/bs-md-pol-ga-sunday-20200315-31radfqihrkxg47qj6gngxhke-story.html> (Mar. 15, 2020, 11:52 PM).

92. Administrative Order on the Statewide Suspension of Jury Trials (Mar. 12, 2020), <https://www.mdcourts.gov/sites/default/files/admin-orders-archive/archivedin2022/20200312suspensionofjurytrials.pdf> [<https://perma.cc/GC7U-QDBA>]; Administrative Order on the Statewide Suspension of Non-Essential Judicial Activities Due to Emergency (Mar. 12, 2020),

closed to the public indefinitely.<sup>93</sup> That same day, the Court of Appeals, acting under its constitutional rulemaking authority, proposed its Emergency Rules.<sup>94</sup> The Chair of the Rules Committee explained that “the Governor has very comprehensive authority under the statutes to deal with these emergencies,” but that the statutes “do not address how the Judiciary will operate.”<sup>95</sup> The Chair reasoned that the statute was silent on the Judiciary because “the responsibility to run the Judicial branch is vested by the Maryland Constitution . . . to be implemented primarily through the [c]ourt’s rulemaking authority.”<sup>96</sup> It drafted the Emergency Rules to be substantially analogous to and compatible with the Governor’s emergency orders.<sup>97</sup>

The first administrative tolling order was issued by the Chief Judge just three weeks later, on April 3, 2020.<sup>98</sup> The order extended filing and hearing dates by the number of days the court was closed.<sup>99</sup> On April 24, 2020, the Chief Judge subsequently issued the Order at issue in this case, specifying that the judiciary was tolling all statutes of limitations—regardless of whether parties were able to make a showing of hardship—for the duration of the court closures.<sup>100</sup> The Chief Judge subsequently held meetings to inform the House and Senate Judiciary Committees of

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<https://www.courts.state.md.us/sites/default/files/admin-orders-archive/20200312suspensionnonessential.pdf> [<https://perma.cc/QTF2-5LUJ>].

93. Administrative Order on the Statewide Closing of the Courts to the Public Due to the COVID-19 Emergency (Mar. 13, 2020), <https://rosenberg-assoc.com/wp-content/uploads/2020/03/2020-03-13-MD-Statewide-Closing-of-Courts.pdf>.

94. See *supra* notes 82–84 and accompanying text.

95. RULES COMM. REP. No. 204, at 12–13 (Md. 2020) [<https://perma.cc/2F8P-ZA9T>].

96. *Id.*

97. *Id.* at 13 (“The proposed Rules recognize that the actions of the Chief Judge must be in harmony with the Governor’s lawful directives.”).

98. Administrative Order on Emergency Tolling or Suspension of Statutes of Limitations and Statutory and Rules Deadlines Related to the Initiation of Matters and Certain Statutory and Rules Deadlines in Pending Matters (Apr. 3, 2020), [<https://perma.cc/N3QU-UBNT>].

99. *Id.* at 1–2 (“Pursuant to Maryland Rule [of Court Administration] 16-1003(a)(7), all statutory and rules deadlines related to the initiation of matters required to be filed in a Maryland state court, including statutes of limitations, shall be tolled or suspended, as applicable, effective March 16, 2020, by the number of days that the courts are closed to the public due to the COVID-19 emergency by order of the Chief Judge of the Court of Appeals[.]”).

100. Tolling Order, *supra* note 3, at 2. The order states:

Justice requires that the ordering of the suspension of such deadlines during an emergency as sweeping as a pandemic be applied consistently and equitably throughout Maryland, and no party or parties shall be compelled to prove his, her, its, or their practical inability to comply with such a deadline if it occurred during the COVID-19 emergency to obtain the relief that this Administrative Order provides[.]

*Id.*

the emergency rules and administrative orders on May 7th and 18th, 2020, and January 8, 2021.<sup>101</sup>

#### IV. THE COURT'S REASONING

The Maryland Court of Appeals answered the district court's question in the affirmative: under the circumstances brought on by the COVID-19 pandemic, "the Chief Judge . . . acted within her authority and consistently with the Maryland Constitution when she issued [the] administrative order temporarily tolling statutes of limitations under Maryland law with respect to civil actions . . ." <sup>102</sup> In addressing the question, the court considered (1) whether the Chief Judge had authority to issue the tolling order, (2) whether the Tolling Order violated separation of powers under the Maryland Constitution, and (3) whether the Tolling Order violated the Maryland Constitution's prohibition on the suspension of laws.

##### A. *Whether the Chief Judge had the Authority to Issue the Tolling Order*

The court found that there "was ample and explicit authority under [a]rticle IV of the State Constitution and the Maryland Rules for the Chief Judge to issue the administrative tolling order."<sup>103</sup> In its evaluation, the court focused on the Chief Judge's own statements of authority within the Tolling Order.<sup>104</sup> According to the Tolling Order, those sources of authority flow from the court's emergency authority conferred by the Emergency Rule, the Chief Judge's administrative power under article IV, section 18, and the general circumstances created within the Maryland judicial system by the COVID-19 pandemic.<sup>105</sup>

Since there was "no contention that the adoption of the Emergency Rules was procedurally deficient," the court simply restated the Chief Judge's authority provided by the Emergency Rule to "suspend, toll, extend, or otherwise grant relief from time deadlines . . . otherwise imposed by applicable statutes," noting that that authority had been

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101. MD. S. JUD. PROC. COMM., BRIEFING ON THE COURTS AND CRIMINAL JUSTICE SYSTEM DURING THE COVID-19 PANDEMIC (2021), [<https://perma.cc/DZP4-5X4H>].

102. *Murphy v. Liberty Mut. Ins. Co.*, 274 A.3d 412, 443 (Md. 2022).

103. *Id.* at 433.

104. *Id.* at 432–33.

105. Tolling Order, *supra* note 3, at 1.

appropriately triggered by the Governor's declaration of a state of emergency in March 2020.<sup>106</sup>

The court further emphasized that the Tolling Order was appropriately promulgated pursuant to the Chief Judge's authority in her role as the administrative head of the judiciary. She had "administrative responsibility to ensure that the courts were available to discharge their constitutional duty to adjudicate disputes," and the circumstances of the COVID-19 pandemic, as laid out in the Order, "had disrupted access to the courts and the ability of the State Judiciary to operate effectively."<sup>107</sup> The court reasoned that since the Tolling Order was explicitly tied to the period that the courts were ordered to be closed due to the pandemic, the Chief Judge could not be said to have acted outside of that power.<sup>108</sup>

*B. Whether the Tolling Order Violated Maryland's Constitutional Separation of Powers*

In considering whether the Tolling Order violated the constitutional provision for separation of powers in article VIII of the Maryland Declaration of Rights,<sup>109</sup> the court identified two separation of powers concerns for the judiciary implicated by the Chief Judge's issuance of administrative orders: (1) the concern that the adoption of a particular rule by the court exceeded its authority to adopt rules and regulations regarding "practice and procedure," and (2) the concern that the adoption of a particular rule by the court exceeded that same authority regarding "the administration of the courts."<sup>110</sup>

Regarding the boundaries of the court's authority to adopt rules of practice and procedure, the court found that the tolling of statutes of limitations "falls within the field of procedural matters in which the [c]ourt may play a role" because a statute of limitations "neither creates a right of action nor pertains to the merits of a cause of action."<sup>111</sup> The court expounded on this by providing examples where it had permissibly "played a role on the subject" of statutes of limitations, including the promulgation of rules for the tolling of statutes of limitations in specific

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106. *Murphy*, 274 A.3d at 432 (quoting MD. R. CT. ADMIN. 16-1003(a)(7)); see also discussion *supra* Section III.F.

107. *Murphy*, 478 A.3d at 432–33.

108. *Id.* at 443.

109. See discussion *supra* Section III.C.

110. *Murphy*, 274 A.3d at 436.

111. *Id.* at 437 (citing *Park Plus, Inc. v. Palisades of Towson, LLC*, 272 A.3d 309, 320 (Md. 2022)).



procedural circumstances,<sup>112</sup> as well as the well-established judge-made “discovery rule,” and judicial tolling exceptions.<sup>113</sup> The court emphasized that the judicial tolling rules are founded on “similar policy goals” as the legislature in issuing statutes of limitations and that the Tolling Order “served the statutory purposes of the statute of limitations by affording litigants adequate time in which to prepare and file their pleadings and by avoiding the filing of inadequately-investigated lawsuits in the courts.”<sup>114</sup>

Having thus established that the Chief Judge was acting within her authority to promulgate rules regarding practice and procedure, the court then considered whether the exercise of this authority interfered with the essential functions of the other branches. It found that the Tolling Order “did not usurp powers belonging solely to another branch.”<sup>115</sup> Regarding any interference with the Legislature’s concurrent authority to issue rules regarding the practice and procedure of courts, the court stated that “the General Assembly’s authority to enact legislation on the subject of tolling does not deprive the Judicial Branch of its constitutional authority.”<sup>116</sup> The court supported this conclusion by pointing to “the back-and-forth [of the concurrent rulemaking power] between the two branches that may occasionally and constitutionally occur.”<sup>117</sup>

The court also found that the issuance of the Tolling Order did not usurp any Executive Branch functions because, in the context of the COVID-19 emergency, it complimented the Governor’s emergency orders. The court noted that the Governor had already addressed “in substantially similar terms” the pandemic’s effect on the ability to comply with deadlines when it is administered by Executive Branch agencies.<sup>118</sup> In this way, the Tolling Order “comported with the Executive Branch policy of limiting interactions among the public.”<sup>119</sup>

Next, the court found that the Tolling Order and the Emergency Rules fell within its power over the administration of the courts. Highlighting the pandemic’s impact on the internal operations and

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112. MD. R. CIV. PRO., CIR. CT. 2-101(b) (tolling the statute of limitations where a suit is brought in Maryland after having been dismissed in another forum on jurisdictional or other specific procedural grounds).

113. See discussion *supra* Section III.D.

114. *Murphy*, 274 A.3d at 437, 439.

115. *Id.* at 439.

116. *Id.* at 438.

117. *Id.*; see *Hensley v. Bethesda Sheet Metal Co.*, 188 A.2d 290 (Md. 1963); see also discussion *supra* Section III.A.

118. *Murphy*, 274 A.3d at 439.

119. *Id.*

logistical matters concerning the operation of the courts of Maryland, the court reasoned that “while an order tolling a statute of limitations would not ordinarily be an administrative matter, in this instance there were good grounds for treating it as such.”<sup>120</sup> The court again evaluated whether the exercise of this power usurped the functions of any other branch, and again emphasized the concurrent power over court rules with the Legislature and the Tolling Order’s comportment with the Executive Branch orders regarding the various limitations and difficulties imposed on the operation of the Judiciary by the pandemic.<sup>121</sup>

*C. Whether the Tolling Order Violated Maryland’s Constitutional Prohibition on the Suspension of Laws*

Recognizing a dearth of case law concerning article IX of the Maryland Declaration of Rights’ prohibition on the suspension of laws,<sup>122</sup> the court relied on a 1915 treatise on the subject, which states that article IX is a “declaration[] of abstract principles whose sole practical effect is to declare from what standpoint the law shall be considered and in what spirit interpreted.”<sup>123</sup> The court, therefore, declined to take a literal interpretation of the provision.

However, the court reasoned that even if it were to be read literally, it is still a general provision and that a “basic rule of construction’ applicable to the principles stated in the Maryland Declaration of Rights is ‘that ordinarily the specific prevails over the general.’”<sup>124</sup> Having established that the Emergency Rules were properly promulgated and valid rules of practice and procedure, and that the Tolling Order was a proper application of those rules, the court thus concludes that the Chief Judge’s specific constitutional authority to issue the Tolling Order prevails over the more general provision of article IX.<sup>125</sup>

The court further reasons that even if this basic rule of construction does not control, the Tolling Order would still not violate article IX because the “adoption of a new rule,” and the issuance of a tolling order pursuant to that new rule, does not constitute a “suspension” of laws.<sup>126</sup> Additionally, the court notes that article IX provides an exception for the suspension of laws that are “by, or derived from the Legislature,” and

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120. *Id.* at 440–41.

121. *Id.*

122. See discussion *supra* Section III.B.

123. *Murphy*, 274 A.3d at 441 (quoting ALFRED S. NILES, MARYLAND CONSTITUTIONAL LAW 12–14 (Hepbron & Haydon 1915)).

124. *Id.* at 441–42 (quoting *State v. Smith*, 505 A.2d 511 (Md. 1986)).

125. *Id.* at 442.

126. *Id.*

since the Chief Judge's rulemaking powers were exercised "consistently with the statutorily-authorized actions taken by the Governor," the Tolling Order was "derived from the Legislature."<sup>127</sup>

## V. ANALYSIS AND IMPLICATIONS

The distribution and separation of powers between departments, or branches, of government is fundamental, not just to the structure of the federal government of the United States, but also to every state in the Union. The separation of powers is a state's primary structural tool for providing a system of government where no one branch can usurp complete power, thereby providing protection against tyranny.<sup>128</sup> These foundational concerns cannot be overcome by mere agreement between the branches to cooperate or coordinate their power. If that were so, collusion between the branches would pose a serious threat to the underlying structural protections of state governments.

However, the distinction between the functions of the branches of government is often unclear, and even the staunchest proponents of separation of powers principles recognize that some degree of overlap is inevitable in a functioning body of government.<sup>129</sup> Every government that adopts separation of powers principles has had to grapple with this problem.<sup>130</sup> Rather than attempt to make formalistic distinctions between the branches of government, the Maryland Court of Appeals has chosen to adopt a more functionalistic approach:

Generally, in determining where that point might lie, the [c]ourt has looked to whether the branch whose power was challenged was "usurping" a power of another branch. To the same effect, the [c]ourt has considered whether the performance of a function by one branch "encroach[ed]" on the other branch's powers, and

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127. *Id.* at 441–42.

128. "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." THE FEDERALIST NO. 47, at 245 (James Madison) (Ian Shapiro ed., 2009).

129. "Experience has instructed us that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces the legislative, executive and judiciary . . ." THE FEDERALIST NO. 37, at 182 (James Madison) (Ian Shapiro ed., 2009); *see also* Springer v. Philippine Islands, 277 U.S. 189, 211 (1928) (Holmes, J., dissenting) ("[W]e do not and cannot carry out the distinction between legislative and executive action with mathematical precision and divide the branches into watertight compartments . . .").

130. *See* Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1522–23 (1991) (reviewing various critical approaches to the issue).

whether the branch in question had “a significant role” in the subject of the action, or whether, by contrast, that subject lay “solely and exclusively within the purview of [a different] branch.”<sup>131</sup>

This functionalist view of the separation of powers doctrine considers “whether an action of one branch interferes with one of the core functions of another” and “stresses not the independence, but the interdependence of the branches.”<sup>132</sup> There has been support for a more formalistic approach in some states and on the federal level, but Maryland is free to select its own methods of construction.<sup>133</sup>

In its answer to the district court, the court stated:

the Chief Judge did not, under the circumstances that existed at the time, unduly take upon herself . . . core functions belonging to either the Executive or the Legislative branches of State government. Nor did the emergency rules on which the administrative tolling order was based usurp another branch’s core function.<sup>134</sup>

This conclusion necessarily depends on the blanket suspension of statutes of limitations not being a core function of the Legislature, and the Order having been properly issued according to the power conferred by the Emergency Rule unless, as the court’s holding suggests, the circumstances of the situation should somehow come to bear on the appropriate allocation of power within Maryland’s government.

The court’s finding that the Order did not usurp a core function of the Legislature rests on its conclusion that statutes of limitations are procedural, not substantive, and therefore may fall within the court’s rulemaking power over rules of practice and procedure.<sup>135</sup> However, the question of whether statutes of limitations are procedural or substantive

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131. *Murphy*, 274 A.3d at 435 (alterations in original) (internal citations omitted).

132. *Brown*, *supra* note 130, at 1527–28.

133. See Robert A. Schapiro, *Contingency and Universalism in State Separation of Powers Discourse*, 4 ROGER WILLIAMS U. L. REV. 79, 92 (1998) (“[U]nlike federal individual rights precedent, federal separation of powers doctrine does not apply directly to the states.”); see also *Marine Forests Soc’y v. Cal. Coastal Comm’n*, 113 P.3d 1062, 1085–86 (Cal. 2005) (noting that although it cited other state cases in a horizontal federalism analysis, the case turned “solely” on its own state constitution).

134. *Murphy*, 274 A.2d at 416.

135. *Id.* at 437 (“The tolling of the statute of limitations thus falls within the field of procedural matters in which the [c]ourt may play a role.”).

does not have as easy an answer as the court seems to indicate.<sup>136</sup> The federal district court, in accordance with longstanding precedent under the *Erie* doctrine, considers the matter a substantive one subject to the laws of the state court in a diversity action.<sup>137</sup> Indeed, that is how the question came before the court in the first place.<sup>138</sup>

However, the federal finding that statutes of limitations are substantive is primarily concerned with curtailing the practice of forum shopping, and it's not clear that they should be considered substantive in other contexts.<sup>139</sup> For example, in the context of choice-of-law issues, the traditional rule has long been that statutes of limitations are considered procedural on the grounds that they address only the remedy available to, and not the rights of, the parties.<sup>140</sup> Although many states have since found statutes of limitations substantive for this purpose,<sup>141</sup> a number of states, including Maryland, still follow the traditional approach.<sup>142</sup> This

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136. In fact, there are strong arguments to treat them as neither. *See Chase Sec. Corp. v. Donaldson*, 325 U.S. 304, 314 (1945) (“Statutes of limitation . . . are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the voidable and unavoidable delay. . . . [T]he history of pleas of limitation shows them to be good only by legislative grace. . . .”); *Lujan v. Regents of Univ. of Cal.*, 69 F.3d 1511, 1516 (10th Cir. 1995) (“Statute of limitations are neither substantive nor procedural per se but have ‘mixed substantive and procedural aspects.’”) (quoting *Sun Oil Co. v. Wortman*, 486 U.S. 171, 736 (1988) (Brennan, J., concurring)).

137. *See Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945) (finding statutes of limitations “outcome-determinative,” holding that state statutes of limitations must be applied in diversity actions); *Bonham v. Weinraub*, 413 F. App’x. 615, 616 (4th Cir. 2011) (holding that a state’s statute of limitations is “considered substantive law” for *Erie* purposes).

138. *Liberty Mut. Ins. Co. v. Murphy*, No. 20-cv-01961, 2021 WL 2784264, at \*4 (D. Md. July 2, 2021) (“The *Erie* doctrine requires the adoption of state substantive law in diversity cases, which the Fourth Circuit has determined includes state statutes of limitation and tolling provisions.”).

139. *See Sun Oil Co.*, 486 U.S. at 726–28 (rejecting the argument that because statutes of limitations are substantive for *Erie* purposes, they should be treated the same for choice-of-law purposes).

140. *Davis v. Mills*, 194 U.S. 451, 454 (1904) (“[T]he ordinary limitations of actions are treated as laws of procedure and belonging to the [law of the forum], as affecting the remedy only and not the right.”).

141. *See, e.g., Heavner v. Uniroyal, Inc.*, 305 A.2d 412, 415, 418 (N.J. 1973) (reexamining the traditional rule and finding that it had “been almost universally criticized by legal commentators,” and choosing to apply the statute of limitations of foreign forums so long as New Jersey did not have a “substantial interest” in the suit); *Bates v. Cook, Inc.*, 509 So. 2d 1113, 1114–15 (Fla. 1987) (“[J]ust as in the case of other issues of substantive law, the significant relationships test should be used to decide conflicts of law questions concerning the statute of limitations.”); *Myers v. Gov’t Emps. Ins. Co.*, 225 N.W.2d 238, 368–69 (Minn. 1974); *see also* RESTATEMENT (SECOND) OF CONFLICTS OF LS. § 142 cmt. e (AM. L. INST. 1988).

142. *Tanges v. Heidelberg N. Am., Inc.*, 710 N.E.2d 250, 253 (N.Y. 1999) (“In New York, Statutes of Limitation are generally considered procedural . . . .”); *Turner v. Yamaha Motor*

patchwork of interpretations may be rather jarring in appearance but, due to a general unwillingness to read constitutional restrictions onto choice-of-law issues, states “enjoy a wide latitude for deciding how to approach statutes of limitations in choice-of-law regimes.”<sup>143</sup> This also should hold true for interpretations of statutes of limitations for state constitutional law purposes, which likewise would not be subject to federal constitutional restrictions.

Maryland courts consistently view statutes of limitations as procedural in a wide variety of contexts, and one could reasonably expect the court to continue to hold to that interpretation in this case.<sup>144</sup> However, the court also implicitly acknowledges that not every aspect of a statute of limitations is purely procedural in nature,<sup>145</sup> and that they “represent ‘a policy judgment by the Legislature[.]’” that courts are bound to be faithful to.<sup>146</sup> The question then becomes not simply whether Maryland regards statutes of limitations as procedural, but whether their procedural or substantive aspects are implicated in the particular circumstance before the court.

The court’s analysis, however, does not directly address this question.<sup>147</sup> Its conclusion that the court “may play a role” in the administration of statutes of limitations is clearly supported, but its conclusion that the court may play *this particular role* with respect to statutes of limitations, i.e., a broad suspension of them for all prospective litigants without any individual showing of need, was absent. The court reasoned by analogy to judicial rules that applied only to the mechanical application of statutes of limitations, or to judicial tolling exceptions that have long been well-defined and limited to specific circumstances on a case-by-case basis.<sup>148</sup>

The court made no specific justification for the extension of these limited exceptions to the broad suspension included in the administrative

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Corp., 591 A.2d 886, 887 (Md. Ct. Sp. App. 1991) (“[G]enerally the question as to which period of limitations applies is a matter of procedural, not substantive, law.”).

143. Wm. Grayson Lambert, *Focusing on Fulfilling the Goals: Rethinking How Choice-of-Law Regimes Approach Statutes of Limitations*, 65 SYRACUSE L. REV. 491, 522 (2015).

144. See, e.g., *Parks Plus, Inc. v. Palisades of Towson, LLC*, 272 A.3d 309, 320 (Md. 2022) (discussing arbitration agreements); *Anderson v. U.S.*, 46 A.3d 426, 428 (Md. 2012) (differentiating statutes of limitations, which are procedural, from statutes of repose, which are substantive); *Foos v. Steinberg*, 230 A.2d 79, 80 (Md. 1967); *Turner*, 591 A.2d at 887–88 (discussing conflicts-of-laws); see also discussion *supra* Section III.D.

145. *Murphy*, 274 A.3d at 441 (discussing the court’s role regarding the “procedural aspects” of statutes of limitations).

146. *Id.* at 418 (quoting *Ceccone v. Carroll Home Servs., LLC*, 165 A.3d 475, 481 (Md. 2017)).

147. See discussion *supra* Section IV.B.

148. *Murphy*, 274 A.3d at 348–56.

Tolling Order apart from pointing to the circumstances of the COVID-19 pandemic, noting that the Order “served the statutory purposes” of the statute of limitations under the circumstances.<sup>149</sup> However, it is clearly established in Maryland law that the Judiciary does not have the power to impose judge-made exceptions onto a Legislature’s statute of limitations, regardless of whether it serves the legislative purpose.<sup>150</sup> If the court can make its own policy judgments to affect the broad suspension of a statute of limitations for all potential litigants, what substance of the statute is left for the Legislature?

The court pointed to the constitutionally endorsed shared rulemaking authority between the court and the General Assembly as evidence that bringing this power under the purview of the courts would not “usurp” the power of the Legislature.<sup>151</sup> This certainly rings true with regard to the aspects of statutes of limitations that are undisputedly procedural, such as mechanical determinations of time.<sup>152</sup> It is not clear, however, whether a statute of limitations can serve its purpose if its entire application is subject to the sort of back-and-forth battles that result from the concurrent decision-making authority between the branches, especially in a scheme where the last enacted provision prevails.<sup>153</sup>

Statutes of limitations are effective in communicating to potential litigants when they may bring claims or have claims brought against them, but only if such limitations are unwaveringly consistent. Imagine the difficulty imposed on all the potential plaintiffs who might rely on a broad judicial tolling order and wait to file their claims if, meanwhile, the General Assembly passes legislation overturning that order. That such situations may arise from the concurrent authority of the two branches in this case is a hint that such a tolling order goes to the *substance* of the statute of limitations, and not merely its “procedural aspects.”

Of course, the court has constitutional rulemaking power not only over rules of procedure but also over rules of administration of the courts. The court advances the argument that, “while an order tolling a statute of limitations would not ordinarily be an administrative matter, in this instance there were good grounds for treating it as such.”<sup>154</sup> The circumstances of “this instance,” being the indefinite restrictions placed

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149. *Id.* at 439.

150. *See* *Young v. Mayne Realty Co.*, 429 A.2d 296, 298 (Md. Ct. Spec. App. 1981); *McMahan v. Dorchester Fertilizer Co.*, 40 A.2d 313, 316 (Md. 1944).

151. *Murphy*, 279 A.3d at 438–39.

152. *See* MD. R. GEN. PROVS. 1-203.

153. *See, e.g.*, *Hensley v. Bethesda Sheet Metal Co.*, 188 A.2d 290, 290 (Md. 1963).

154. *Murphy*, 274 A.3d at 441.

on the functioning of the courts, which the court, in its administrative capacity, was under an obligation to respond to.<sup>155</sup>

The court, concerningly, placed no limits on what functions typically belonging to other branches might become an “administrative matter,” nor did it offer any guidance as to what level of disruption in the courts constitutes a sufficient justification for invoking the court’s administrative duties. Redistribution of governmental authority in emergencies is, in many instances, necessary to respond effectively, but it is equally necessary to proceed with a level of care commensurate to the constitutional implications such actions might have on the structure of Maryland’s government.

It is also unclear whether the Order was appropriately issued according to the Emergency Rules. The court declined to question whether the Rules or the Order were promulgated according to appropriate procedures because it was uncontested by the parties.<sup>156</sup> However, the court also declined to evaluate whether the administrative Tolling Order was properly issued within the scope of the authority granted to it by the Emergency Rules.

The Emergency Rules authorize the Chief Judge to “suspend, toll, extend, or otherwise grant relief from time deadlines, requirements, or expirations otherwise imposed by applicable statutes . . . where there is no practical ability *of a party* subject to such deadline, requirement, or expiration to comply with the deadline or requirement or seek other relief.”<sup>157</sup> During the meeting of the Rules Committee to promulgate this rule, Judges Price and Bryant provided assurances that the statutes would toll on an individual basis and would be “no different than equitable tolling.”<sup>158</sup>

By contrast, the Tolling Order states that “*no party or parties shall be compelled to prove . . . their practical inability to comply with such a deadline if it occurred during the COVID-19 emergency to obtain the relief that this Administrative Order provides.*”<sup>159</sup> Thus, the Order expands the scope of the authority over the suspension of statutes beyond what was contemplated by the Rules Committee.

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155. *Id.* at 440–41.

156. If Liberty Mutual had undertaken such a challenge, it would likely not have succeeded. While the Rules Committee did not submit the Emergency Rules for public comment, its actions would have been subject to a good cause exemption due to the surrounding public emergency. See MD. R. CT. ADMIN. 16-802.

157. MD. R. CT. ADMIN. 16-1003(a)(7) (emphasis added).

158. *Court of Appeals Standing Committee on Rules of Practice and Procedure*, 26 (Md. 2020) (meeting minutes from March 13, 2020) [<https://perma.cc/MD6K-TMQ5>].

159. Tolling Order, *supra* note 3, at 2.



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The administrative Tolling Order expands the power of the courts beyond the individual litigants in the cases before it, permitting the court to preemptively apply its Order to all prospective litigants. The court does not address whether this expansion of scope was permissible. This is troubling. Such a broad, prospective application of policy judgments is certainly a function generally regarded as belonging solely to the Legislature. Without evaluating this underlying concern, the court does not properly address the separation of powers question before it.

## VI. CONCLUSION

In *Murphy*, the Maryland Court of Appeals was tasked with the heavy burden of evaluating whether its own actions violated the state's constitutional provision for the separation of powers. Unfortunately, while the court proceeded to answer the question, it did not address many key underlying concerns. It turned a blind eye to the expansion of judicial power over statutes of limitations from isolated procedural concerns and individual equitable determinations to policy judgments with broad prospective force. And while the effect of the COVID-19 pandemic on the functioning of the judicial system is certainly compelling, the court does not provide sufficient safeguards or limitations, nor does find sufficient justification for its imposition on what is generally a core function of the legislature.

