The Conscious Uncoupling
of the Maryland and Federal Constitutions
by John J. Connolly

A few years ago Judge Jeffrey Sutton came to Baltimore to discuss his influential book, *51 Imperfect Solutions*. The book explains how state constitutions have advanced individual rights when the federal constitution has lagged behind, and it urges lawyers to craft separate arguments for state and federal versions of constitutional rights. In the Q&A session, I asked what could a poor Maryland lawyer do, when his state's highest court had held over and over that comparable provisions of the two constitutions were to be interpreted *in pari materia*. I implied, probably erroneously, that *in pari materia* meant identically.[1]

Judge Sutton's initial response was mild bemusement at the Latinization of a term he calls "lockstepping." As to substance, his answer was, if I recall correctly: keep trying, because state high courts can change their minds. Great book, I thought, but you don't know Maryland.

I would like to apologize for my silent criticism because if I read the Maryland Supreme Court's majority opinion in *Clark* v. *State* correctly, Judge Sutton knows Maryland better than me.[2] In *Clark*, a trial court ordered a criminal defendant not to speak to his lawyer during an overnight recess straddling the defendant's testimony. The lawyer did not object. After his conviction was affirmed on direct review, Mr. Clark filed a petition for post-conviction relief on the grounds that the trial court erred and the lawyer's failure to object constituted ineffective assistance under the Sixth Amendment. Mr. Clark, failing to heed Judge Sutton's advice, did not ask for relief under the state constitution.

Nevertheless, in a 4-3 decision, the Maryland Supreme Court held that Clark was entitled to a new trial under both the federal and state constitutions. The key question was not

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[1] For a detailed assessment of what in pari materia means to various Maryland appellate judges, see Dan Friedman, Does Article 17 of the Maryland Declaration of Rights Prevent the Maryland General Assembly from Enacting Retroactive Civil Laws?, 82 Md. L. Rev. 55, 65-68 (2022) (discussed infra).

[2] As do others. Over 20 years earlier Judge Dan Friedman, now of the Appellate Court of Maryland, explained in a law review article how practitioners could create independent arguments under the Maryland Declaration of Rights. See Dan Friedman, The History, Development, and Interpretation of the Maryland Declaration of Rights, 71 Temple L. Rev. 637, 645-46 (1998).

whether the no-communication order was erroneous (it was), but whether Mr. Clark needed to show prejudice from his inability to speak with his lawyer. The Court held that under the Sixth Amendment, as well as Articles 21 (right to counsel) and 24 (due process) of the Maryland Constitution, proof of prejudice was not required. The three dissenting justices argued that the failure to object to the erroneous instruction moved the case from a direct deprivation of access to counsel by the court, which would be presumptively prejudicial, to ineffective assistance of counsel, which would require proof of prejudice.

This debate on the merits is interesting but perhaps less meaningful for Maryland law than a side-issue considering whether the state constitution warranted post-conviction relief independently from the Sixth Amendment. The majority stated that the Maryland precedent *already* established that "Article 21 provides protections to a criminal defendant's right to counsel above and beyond that determined by the Supreme Court as to the Sixth Amendment."[3] Three dissenting justices specifically disagreed with that proposition.[4]

If the majority is correct in its reading of Maryland precedent, or if its opinion establishes a new precedent on this point, then perhaps Maryland has abandoned its longtime reliance on *in pari materia* interpretation of the state and federal constitutions—whatever that term has come to mean. Before examining that question, however, it is useful to explain just how entrenched the *in pari materia* principle had become.

The concept of *in pari materia* made appearances in the Maryland Reports as early as 1790.[5] At the time it meant (and still means today) that all statutes on the same subject matter must be construed together.[6] It is essentially a rule of statutory

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[3] Clark v. State, No. 25, Sep. Term 2022, Slip Op. at 44.

[4] Clark v. State, No. 25, Sep. Term 2022, Slip Op. at 17 (Gould, J., dissenting).

[5] See Dulany v. Wells, 3 H & McH. 20, 37 (1790). In Dulany, a 1780 Maryland law permitted Maryland residents to pay debts owed to British subjects by tendering continental paper money to the state treasury. When the war ended, the treaty of peace provided that creditors on either side shall meet with no lawful impediment to the recovery of the full value in sterling money of all *bona fide* debts heretofore contracted." A Maryland law made the treaty of peace "the supreme law within this state." See 1787 Md. Laws ch. 25. Counsel for the British creditors argued that these three laws were "made *pari materia* and from thence form a conclusion of clear construction that the *British* creditors are entitled to recover of the original debtors the amount of their respective claims." Id. at 37.

[6] See Chesapeake & Ohio Canal Co. v. Baltimore & Ohio R.R. Co., 4 Gill & J. 1, 128 (1832).

construction; its original rationale, largely forgotten today, was that a legislature is deemed to contemplate its existing statutes when enacting a new law.[7] For that reason, "[s]tatutes of different states relating to the same subject are not considered to be in pari materia, because it cannot be presumed that the Legislature had them in mind in enacting a statute under consideration."[8]

In Maryland, however, the rule jumped from statutes of the same legislature to constitutional provisions of different sovereigns. As Dan Friedman and others have noted, the source of this species-crossing appears to be the 1902 decision in *Blum* v. *State*, where the Court observed that "the fourth and fifth amendments to the constitution of the United States … are in pari materia with articles 26 and 22 of our declaration of rights."[9] The issue arose in the context of a conviction of business owners whose corporate records had been acquired by court-ordered receivership, and some of those records were introduced against the defendants at trial. The Court of Appeals held the admission of the records to be a violation of the Declaration of Rights and, apparently, the Fourth and Fifth amendments, even though the case was decided well before incorporation of those amendments. Although the opinion as a whole is consistent with the *in pari materia* doctrine, it provides no analysis or rationale for applying it to interpretation of state constitutional rights.

Most subsequent Maryland cases that applied the doctrine have also declined to explain its rationale. An exception is a 1986 decision issued shortly after Maryland courts began questioning the scope of *in pari materia*. In that case, the Maryland Supreme Court seemed to tack back toward use of the doctrine:

> Here the relevant comparable provisions of the State and Federal Constitutions were adopted in times not far removed from each other. The first ten amendments to the Constitution of the United States, commonly known as the Bill of Rights, were all proposed by Congress on 25 September 1789, and declared ratified on 15 December 1791. Provisions comparable to the Fifth Amendment clauses concerning self-incrimination and due process of law and the Sixth Amendment clause concerning assistance of counsel appeared in the

[7] Francis J. McCaffrey, The Rule In Pari Materia As an Aid to Statutory Construction, 3 Lawyer & L. Notes 11, 11 (1949).

[8] Id. at 13.

[9] 94 Md. 375 (1902).

> Declaration of Rights, Constitution of Maryland (1776) and in each Constitution thereafter. Thus, the concern with self-incrimination, assistance of counsel and due process of law was shared by those who framed the Federal Constitution and those who framed the Maryland Constitution. This concern on the part of the drafters of each constitution was implanted in the same climate and nurtured by the same hopes and fears. The provisions, so alike in aim and content, were proposed and accepted by those anxious to preserve the freedom and rights they had so arduously won.[10]

This rationale, however terse, has some logical appeal. In the Founding Era, the drafters of the state and federal constitutions likely had similar interests in promoting individual rights, drawn from their recent experience with British rule. It's not obvious that the Maryland Constitution should be synchronized to federal interpretations of comparable provisions, given that the Maryland Constitution came first. On the other hand, Maryland ratified three constitutions after 1791, and each of those constitutions incorporated many key provisions from its 1776 Declaration of Rights. But the rationale for synchronization is much weaker if the test is the intent of the drafters and ratifiers of the 1867 Maryland Constitution, which is the version that applies today. It is quite a stretch to assume that Maryland's constitutional right of equal protection should be synchronized to federal interpretations of the Fourteenth Amendment's equal protection clause, when the Maryland Constitution has no express equal protection clause; the 1867 delegates that drafted the Maryland Constitution were far more concerned with thwarting federal powers than endorsing them; and by 1867 the Maryland General Assembly had already declined to ratify the Fourteenth Amendment and would not do so for another 90 years.[11]

Nevertheless, after *Blum*, Maryland's appellate courts have applied (or at least recited) the *in pari materia* principle scores of times in constitutional cases, occasionally treating it as a general proposition that applies to all common provisions in the two constitutions,[12] but more frequently citing specific

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[10] Lodowski v. State, 307 Md. 233, 245-46 (1986).

[11] See generally John J. Connolly, Republican Press at a Democratic Convention (2018).

[12] Ogrinz v. James, 309 Md. 381, 394 n.3 (1987) ("We have consistently considered guarantees in the Declaration of Rights to be *in pari materia* with similar provisions of the federal constitution. Thus, we apply the same standards whether the claim alleges violation of a state or federal

provisions from the Maryland Declaration of Rights and their analogs in the federal Bill of Rights. Thus, Maryland courts have invoked the *in pari materia* principle to interpret the right against unreasonable searches and seizures (Articles 21 or 26 of the Maryland Constitution and the Fourth Amendment);[13] the privilege against self-incrimination (Article 22 and the Fifth Amendment);[14] freedom of speech and the press (Article 40

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constitutional right."); see Widgeon v. Eastern Shore Hosp. Ctr., 300 Md. 520, 532 (1983) (discussing various provisions); Bridges v. State, 116 Md. App. 113, 126 (1997).

[13] Meisenger v. State, 155 Md. 195 (1928) (Parke, J., dissenting); Bass v. State, 182 Md. 496, 500 (1943); Johnson v. State, 193 Md. 136, 144-45 (1949); Givner v. State, 210 Md. 484, 492 (1956); Hughes v. State, 14 Md. App. 497, 510 n.10 (1972); Freedman v. State, 233 Md. 498, 505 (1964); Baker v. State, 39 Md. App. 133, 135 (1978); Merrick v. State, 283 Md. 1, 4 n.2 (1978); Liichow v. State, 288 Md. 502, 509 n.1 (1980); Gahan v. State, 290 Md. 310, 319, 322 (1981) (same, although adopting caution from Waldron that provisions remain independent); Brown v. State, 57 Md. App. 186, 188 (1984); Howell v. State, 60 Md. App. 463, 467 (1984); Webster v. State, 299 Md. 581, 592 n.3 (1984); Garrison v. State, 303 Md. 385, 391 (1984); Potts v. State, 300 Md. 567, 576 (1984); McMillian v. State, 65 Md. App. 21, 30 n.2 (1985); State v. Smith, 305 Md. 489, 513 n.9 (1985); Trusty v. State, 308 Md. 658, 660 n.1 (1986); Malcolm v. State, 314 Md. 221, 227 n.8 (1987); Snow v. State, 84 Md. App. 243, 245 n.1 (1990); City of Annapolis v. United Food and Commercial Workers, 317 Md. 544, 566 n.4 (1989); Birchead v. State, 317 Md. 691, 700 (1989); Gamble v. State, 318 Md. 120, 123 n.2 (1989); Benbow v. State, 322 Md. 394, 396 n.2 (1991); Henderson v. State, 89 Md. App. 19, 23-24 (1992); State v. Bell, 334 Md. 178, 180 n.2 (1994); Gadson v. State, 314 Md. 1, 8 n.3 (1995); Williams v. Prince George's Cty., 112 Md. App. 526, 547 (1996); Braxton v. State, 123 Md. App. 599, 620 (1998); Richardson v. McGriff, 361 Md. 437, 452-53 (2000); Scott v. State, 366 Md. 121, 140 (2001); Carter v. State, 367 Md. 447, 459 (2002); Muse v. State, 146 Md. App. 395, 401 n.7 (2002) ("Constructions of the federal amendment by the United States Supreme Court are controlling authority."); Behrel v. State, 151 Md. App. 64, 85 (2003); Fitzgerald v. State, 153 Md. App. 601, 681-82 (2003), aff'd, 384 Md. 484 (2004); Holland v. State, 154 Md. App. 351, 385 (2003); Berry v. State, 155 Md. App. 144, 176-77 (2004); Davis v. State, 383 Md. 394, 408 (2004); Fitzgerald v. State, 384 Md. 484 (2004) (declining to decide whether Maryland Constitution recognizes exclusionary rule for search and seizure violations); Blasi v. State, 167 Md. App. 483, 511 n.12 (2006); Byndloss v. State, 391 Md. 462, 465 n.1 (Md. 2006); Gorman v. State, 168 Md. App. 412, 422 n.3 (2006); In re Calvin S., 175 Md. App. 516, 527 n.3 (2007); Walls v. State, 179 Md. App. 234, 246 n.2 (2008); Jones v. State, 407 Md. 33, 46 n.2 (2008); Ford v. State, 184 Md. App. 535, 570 (2009); Fields v. State, 203 Md. App. 132, 142 n.1 (2012); Upshur v. State, 208 Md. App. 383, 397 (2012); Scott v. State, 247 Md. App. 114, 152-53 (2020); Washington v. State, 482 Md. 395, 408 (2022).

[14] Allen v. State, 183 Md. 603, 605 (1944); Brown v. State, 233 Md. 288 (1964); State v. Panagoulis, 3 Md. App. 330 (1968), aff'd, 253 Md. 699, 707 n.3 (1969); Andresen v. Bar Ass'n of Montgomery Cty., 269 Md. 313, 322 (1973); Richardson v. State, 285 Md. 261, 265 (1979); Leatherwood v. State,

and the First Amendment);[15] the Speech and Debate Clause (Article III, § 18 of the state constitution and Article I, § 6 of the

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49 Md. App. 683, 689 n.4 (1981); Andrews v. State 291 Md. 622, 626-27 (1981) (same, with Waldron caution); Attorney Grievance Comm'n v. Unnamed Attorney, 298 Md. 36, 43 n.1 (1983); In re Special Investigation No. 281, 299 Md. 181, 194 n.1 (1984); Webster v. State, 299 Md. 581, 591 n.2 (1984); In re Criminal Investigation No. 1-162, 307 Md. 674, 683 n.3 (1986); Lodowski v. State, 307 Md. 233, 245-47 (1986) (appearing to limit Waldron and return to a tighter link between the state and federal constitutions); Ellison v. State, 310 Md. 244, 259 n.4 (1986); Adkins v. State, 316 Md. 1, 6 n.4 (1987); Choi v. State, 316 Md. 529, 535 n.3 (1987) (noting two exceptions where Article 22 was broader than the Fifth Amendment); Hoey v. State, 311 Md. 473, 480 n.2 (1988) ("Article 22 is deemed to be in pari materia with the Fifth Amendment …. Thus, we will not discuss Article 22 independently."); Ross v. State, 78 Md. App. 275, 279 (1988); Morgan v. State, 79 Md. App. 699, 707 (1988); Kramer v. Levitt, 79 Md. App. 575, 579 n.4 (1988); In re Maurice M., 314 Md. 391, 393 n.1 (1988), rev'd, Baltimore City Dep't of Social Services v. Bouknight, 493 U.S. 549 (1990); Robinson v. Robinson, 328 Md. 507, 514 (1992); Evans v. State, 333 Md. 660, 682 n.6 (1994); Hof v. State, 337 Md. 581, 586 n.3 (1995); Bhagwat v. State, 338 Md. 263, 270-71 n.9 (1995); Pappaconstantinou v. State, 118 Md. App. 668, 676 n.2 (1998) ("since the Maryland constitutional provisions have been interpreted in pari materia with their federal counterparts, challenges based on the Maryland provisions would succeed or fail precisely as they would under the federal provisions"); Unnamed Attorney v. Attorney Grievance Comm'n, 349 Md. 391, 395 n.4 (1998); Faith v. Keefer, 127 Md. App. 706, 723 n.5 (1999); Crosby v. State, 366 Md. 518, 527 n.8 (2001) (noting that right to remain silent under state common law is broader than right under federal constitution); Gray v. State, 368 Md. 529, 559 (2002); Ashford v. State, 147 Md. App. 1, 50 (2002); Wyatt v. State, 149 Md. App. 554, 571 (2003); Harper v. State, 162 Md. App. 55, 72 (2005); Brown v. State, 171 Md. App. 489, 525 n.10 (2006); Buck v. State, 181 Md. App. 585, 632 (2008); Lee v. State, 418 Md. 136, 158-59 (2011) ("We have held the due process protections inherent in Article 22 are construed *in pari materia* with those afforded by the Fourteenth Amendment … so what we say about the latter controls, for both the federal and state constitutional arguments Petitioner makes."); State v. Rice, 447 Md. 594, 644-45 (2016) (acknowledging some broader protections under state constitution but "[w]ith respect to when a witness is entitled to invoke the privilege in lieu of speaking … we have held uniformly that Article 22 and the Fifth Amendment are *in pari materia*"); Moser v. Heffington, 465 Md. 381, 397 n.2 (2019); Madrid v. State, 474 Md. 273, 320, 330 (2021).

[15] Lightman v. State, 15 Md. App. 713, 727 (1972); WBAL-TV Div. v. State, 300 Md. 233, 243 n.4 (1984); Keene Corp. v. Abate, 92 Md. App. 362, 368-69 (1992); Pendergast v. State, 99 Md. App. 141, 148 (1994); Group W Tel., Inc. v. State, 96 Md. App. 712, 715 n.4 (1993); Jakanna Woodworks, Inc. v. Montgomery Cty., 344 Md. 584, 595 (1997); Peroutka v. Streng, 116 Md. App. 301, 308 (1997); The Pack Shack, Inc. v. Howard Cty., 377 Md. 55, 64 n.3 (2003) (noting flexibility but applying in pari materia); Lubin v. Agora, Inc., 389 Md. 1, 16 n.8 (2005); 104 W. Washington St. II Corp. v. Hagerstown, 173 Md. App. 553, 567 (2007); Newell v. Runnels, 407 Md. 578, 602 n.11 (2009); Abbott v. State, 190 Md. App. 595, 618 n.9 (2010); Nefedro v. Montgomery Cty., 414 Md. 585, 593 n.5 (2010); Piscatelli v.

federal);[16] the right to an impartial jury (Articles 21 and 24 and the Sixth and Fourteenth Amendments);[17] the right to counsel or effective assistance of counsel (Article 21 and 24 and the Sixth Amendment);[18] the Confrontation Clause (Article 21 and the Sixth Amendment);[19] the right to a speedy trial (Article 21 and the Sixth Amendment);[20] the protection from cruel and unusual punishment (Articles 16 and 25 and the Eighth Amendment);[21] the takings clauses (Article 23 of the Declaration of Rights and Article III, § 40 of the state constitution, and the Takings Clause of the Fifth Amendment as incorporated by the Fourteenth);[22] equal protection (Article 24 and the Fourteenth Amendment);[23] procedural and

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Smith, 197 Md. App. 23, 36 (2011); see also Supermarkets Gen. Corp. v. State, 286 Md. 611, 625 (1979) (declining to decide whether Article 36 and First Amendment Establishment clause are in pari materia).

[16] Montgomery Cty. v. Schooley, 97 Md. App. 107, 114 (1993); State v. Holton, 193 Md. App. 322 (2010), aff'd, 420 Md. 530 (2011).

[17] Lawrence v. State, 295 Md. 557, 561 (1983).

[18] State v. Tichnell, 306 Md. 428, 440 (1986) ("There is no distinction between the right to counsel guaranteed by the Sixth Amendment and Art. 21 of the Maryland Declaration of Rights"); Clark v. State, 306 Md. 483, 487 (1986); Lodowski v. State, 307 Md. 233, 247 (1983); Sites v. State, 300 Md. 702, 712 n.3 (1983); Leonard v. State, 302 Md. 111, 119 n.1 (1983); Parren v. State, 309 Md. 260, 262 n.1 (1987); Johnson v. State, 355 Md. 420, 442 (1999); State v. Campbell, 385 Md. 616, 626 n.3 (2005); Blake v. State, 395 Md. 213, 235 (2006); Jones v. State, 175 Md. App. 58, 74 n.1 (2007), aff'd, 403 Md. 267 (2008); Muhammad v. State, 177 Md. App. 188, 236-37 (2007); State v. Walker, 417 Md. 589, 604 n.8 (2011); Grandison v. State, 425 Md. 34, 56 (2012); Miller v. State, 435 Md. 174, 197-98 (2013) (plurality); Guardado v. State, 218 Md. App. 640, 653 (2014).

[19] Craig v. State, 322 Md. 418, 430 (1991); Simmons v. State, 333 Md. 547, 555 n.1 (1994); State v. Snowden, 385 Md. 64, 74 n.9 (2005); Collins v. State, 164 Md. App. 582, 591 n.7 (2005); Lawson v. State, 389 Md. 570, 586 n.7 (2005); Griner v. State, 168 Md. App. 714, 740 n.9 (2006); Washington v. State, 191 Md. App. 48, 94 n.14 (2010); Derr v. State, 434 Md. 88, 103 (2013); Cooper v. State, 434 Md. 209, 232-33 (2013); Norton v. State, 217 Md. App. 388, 397 (2014); Malaska v. State, 216 Md. App. 492, 505 (2014); Peterson v. State, 444 Md. 105, 122 n.4 (2015); but see Leidig v. State, 475 Md. 181 (2021) (discussed infra).

[20] Smith v. State, 276 Md. 521, 527 (1976).

[21] Walker v. State, 53 Md. App. 171, 183 (1982); Harris v. State, 312 Md. 225, 237 n.5 (1987) ("since the eighth amendment is in pari material with Article 25, we need not engage in separate discussions of these provisions"); Thomas v. State, 333 Md. 84, 99 n.4 (1994) (Chasanow, J., dissenting); Thompson v. Grindle, 113 Md. App. 477, 485 n.5 (1997); Harris v. State, 479 Md. 84, 121 (2022); Jedlicka v. State, 481 Md. 178, 201 (2022).

[22] Bureau of Mines v. George's Creek Coal & Land Co., 272 Md. 143, 156 (1974).

[23] The Maryland Constitution has no Equal Protection clause, but Maryland courts have interpreted the due process rights in Article 24 to embody equal protection. Conaway v. Deane, 401 Md. 219, 272 n.33 (2007),

substantive due process (Article 24 and the Fourteenth Amendment);[24] the Ex Post Facto clause (Article 17 and U.S. Const. art. I, sec. 10);[25] and a right of privacy.[26]

Beginning with the 1981 decision in *Attorney General* v. *Waldron*, the appellate courts often expressed caution about the extent of the *in pari materia* principle.[27] The common

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abrogated, 576 U.S. 644 (2015); For cases interpreting the Maryland "clause" in pari materia with the federal, see Bureau of Mines v. George's Creek Coal & Land Co., 272 Md. 143, 156 (1974); Attorney General v. Waldron, 289 Md. 683, 704-05 (1981); Hornbeck v. Somerset Cty. Bd. of Educ., 295 Md. 597, 640 (1983); Murphy v. Edmonds, 325 Md. 342, 353 (1992) (collecting cases).

[24] Pitsenberger v. Pitsenberger, 287 Md. 20, 27 (1980); Department of Human Resources v. Bo Peep Day Nursery, 317 Md. 573, 602 n.7 (1989); Renko v. McLean, 346 Md. 464, 482 (1997); Miller v. Bosley, 113 Md. App. 381, 389 n.7 (1997); City of Annapolis v. Rowe, 123 Md. App. 267, 270 (1998); Lone v. Montgomery Cty., 85 Md. App. 477, 493 (1991) (noting exceptions to in pari materia principle); Patterson v. State, 356 Md. 677, 694 (1999); Samuels v. Tschechtelin, 135 Md. App. 483, 523 (2000); Pickett v. Sears, 365 Md. 67, 77 (2001); Superior Court v. Ricketts, 153 Md. App. 281, 336 n.14 (2003); State v. Weisbrod, 159 Md. App. 488, 506 (2004); Canaj v. Baker, 391 Md. 374 (2006); Reese v. Department of Health, 177 Md. App. 102, 149 n.23 (2007); John Doe v. Dep't of Public Safety, 185 Md. App. 625, 636 (2009); Grymes v. State, 202 Md. App. 70, 108 (2011); In re Ryan W., 434 Md. 577, 608-09 (2013); Allmond v. Dep't of Health and Mental Hygiene, 448 Md. 592, 609 (2016); Ellis v. McKenzie, 457 Md. 323, 340-41 (2018).

[25] Khalifa v. State, 382 Md. 400, 425 (2004); Bereska v. State, 194 Md. App. 664, 669 n.3 (2010); Thompson v. State, 229 Md. App. 385, 401 (2016); but see Doe v. Dep't of Public Safety, 430 Md. 535 (2013) (discussed infra).

[26] Doe v. Dep't of Public Safety, 185 Md. App. 625, 643 (2009).

[27] Attorney General v. Waldron, 289 Md. 683, 714 (1981) (Article 24 and Fourteenth Amendment Equal Protection clause, but cautioning that in pari materia did not mean identical); Quailes v. State, 53 Md. App. 35, 37 (1982) (acknowledging Waldron caution but adding that Fourteenth Amendment cases are "practically direct authority" for resolution of Article 24); Hornbeck v. Somerset Cty. Bd. of Educ., 295 Md. 597, 640 (1983); Murphy v. Edmonds, 325 Md. 342, 382-83 (1992) (Chasanow, J., dissenting); Maryland Aggregates v. State, 337 Md. 658, 671-72 n.8 (1995); DePino v. Davis, 354 Md. 18, (1999) (noting some differences between state and federal constitutional provisions); Manikhi v. Mass Transit Admin., 360 Md. 333, 362 (2000); Frankel v. Board of Regents, 361 Md. 298, 313 (2000); Borchardt v. State, 367 Md. 91, 175 (2001) (Raker, J., dissenting) ("we have interpreted [Article 24] more broadly [than federal due process] in instances where fundamental fairness demanded that we do so"); Dua v. Comcast Cable, Inc., 370 Md. 604, 623 (2002) ("in applying Article 24 of the Maryland Declaration of Rights and Article III, § 40, of the Maryland Constitution, decisions applying federal constitutional provisions are no more than persuasive authorities"); Green Party v. Board of Elections, 377 Md. 127, 157-58 (2003); Pack Shack, Inc. v. Howard County, 377 Md. 55, 64 n.3 (2003); State v. Suddith, 379 Md. 425, 450 n.11 (2004) (Eldridge, J.,

caveat was that *in pari materia* did not prevent Maryland courts from interpreting the state constitution to provide greater rights than the comparable federal provision. Even after *Waldron*, however, many decisions applied the principle mechanically and treated federal authority as controlling.[28] Other decisions declared that they rested only on the state constitution, even if they cited or relied on federal authorities[29]—perhaps a means of insulating the decision from Supreme Court review.

What Maryland courts have very seldom done is explicitly hold that the state constitution grants rights greater than the federal counterpart. In *Doe* v. *Department of Public Safety*, decided in 2013, a plurality of the Maryland Supreme Court held that requiring certain sex offenders to register with a supervising authority violated the state's *ex post facto* doctrine, even though the United States Supreme Court had reached a contrary conclusion under the Fifth Amendment.[30] But the Court was evenly split on that issue: three judges wrote separately to explain that they saw no "principled reason for differentiating [the state] prohibition against *ex post facto* laws

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dissenting); State v. Brookins, 380 Md. 345, 350 n.2 (2004); Purnell v. State, 171 Md. App. 582, 603-07 (2006) (rejecting argument to construe Article 26 separately from Fourth Amendment); Haas v. Lockheed Martin, 396 Md. 469, 482 n.10 (2007) ("Maryland appellate courts have interpreted state statutes, rules, and constitutional provisions differently than analogous federal provisions on numerous occasions, even where the state provision is modeled after its federal counterpart."); Koshko v. Haining, 398 Md. 404, 444 n.22 (2007); Parker v. State, 402 Md. 372, 401-02 (2007); Griffin v. Bierman, 403 Md. 186, 209 (2008); Padilla v. State, 180 Md. App. 210, 227 (2008) ("despite the caveat of independence, the Court of Appeals has never held that Article 26 provides greater protection from State interference than its federal counterpart"); Frey v. Comptroller, 422 Md. 111, 176-77 (2011) (analyzing special nonresident tax under state equal protection law but ultimately reaching same outcome as federal decisions); Lupfer v. State, 420 Md. 111, 129-30 (2011); Muskin v. State Dep't of Assessments & Taxation, 422 Md. 544, 556 (2011) (taking of property question decided under Maryland constitutional precedent); Doe v. Department of Public Safety, 430 Md. 535, 548-49 (2013).

[28] E.g., Williams v. Prince George's Cty., 112 Md. App. 526, 547 (1996); Muse v. State, 146 Md. App. 395, 401 n.7 (2002); Gorman v. State, 168 Md. App. 412, 421 n.3 (2006); In re Calvin S., 175 Md. App. 516, 527 n.3 (2007); Fields v. State, 203 Md. App. 132, 142 n.1 (2012).

[29] Marshall v. State, 415 Md. 248, 260 (2010); see also Parker v. State, 402 Md. 372, 399 (2007) (exclusionary rule would apply under state constitution even if it did not under federal); Hardaway v. State, 317 Md. 160, 163 (1989); DeWolfe v. Richmond, 434 Md. 444, 457 n.9 (2013).

[30] 430 Md. 535 (2013).

from the parallel prohibition in the federal Constitution."[31] And the Appellate Court of Maryland has read the opinions in *Doe* to stand for the proposition that the state and federal *ex post facto* provisions are to be read *in pari materia*.[32]

Eight years later, a six-justice majority in *Leidig* v. *State*[33] held that the right of confrontation in Article 21 gave criminal defendants somewhat broader ability to exclude scientific reports as "testimonial" than a presumed (but not clearly decided) interpretation of the Sixth Amendment Confrontation Clause. After expressing frustration with the U.S. Supreme Court's decisions in this area, particularly the "fractured decision" in *Williams* v. *Illinois*, the Court titled one section of its opinion "We Take Our Own Path Under Article 21"—probably the clearest announcement of uncoupling the Court had ever given. In support of taking its own path, the Court relied on Judge Eldridge's dissenting opinion in *Derr II*, a case decided in 2013,[34] as well as more recent expressions in majority decisions that the *in pari materia* principle did not handcuff state interpretations of state constitutional rights. Justice Watts, in a separate concurring opinion, disagreed with the uncoupling point on the ground that *Derr II* had been decided only eight years earlier and the majority had offered no persuasive reason to depart from *stare decisis*, which would counsel adhering to the principle of *in pari materia* interpretation in this case.

That brings us back to *Clark*, where a sharply divided Court issued four different opinions—two each by the same 4-3 split[35]—that touch upon the *in pari materia* doctrine. Justice Watts wrote the lead opinion for herself and three concurring justices. That opinion held that counsel's failure to object to a no-communication order violated the right to counsel in both the federal and state constitutions regardless whether the defendant could show prejudice from the order. The Court was aware that the U.S. Supreme Court had not yet decided the

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[31] 430 Md. at 577-78 (McDonald, J., concurring); id. at 579-80 (Barbera, J., dissenting).

[32] Long v. State Dep't of Pub. Safety, 230 Md. App. 1, 18 (2016); In re Nick H., 224 Md. App. 668, 685 (2015); Grandison v. State, 234 Md. App. 564, 587-88 (2017).

[33] 475 Md. 181 (2021).

[34] Derr v. State, 434 Md. 88 (2013).

[35] That alone may be unique in the annals of Maryland law. A footnote on the title page of the opinion states that "[t]wo opinions received the votes of the same four Justices in this case" and "Justice Watts's opinion has been designated the Majority Opinion" while the other opinion "has been designated the Concurring Opinion of Justice Biran, which Justice Watts, Justice Hotten, and Justice Eaves join."

issue under the Sixth Amendment, so a Maryland Supreme Court decision under the Sixth Amendment might be overturned. Perhaps for that reason Justice Watts also decided the issue under the state constitution, even though that question had not been raised or briefed—an unusual departure from normal protocols of appellate procedure.

Justice Watts concluded that the better authority under the Sixth Amendment supported a presumption of prejudice to the defendant in these circumstances.[36] She also concluded that Maryland precedent already established that the right to counsel expressed in both Article 21 and Article 24 of the Maryland Constitution is broader than the right to counsel under the Sixth Amendment, and she expressly held that the Maryland Constitution would presume prejudice to the defendant irrespective of the final resolution under the Sixth Amendment.[37] Her discussion of *in pari materia* was relegated to two footnotes, one citing *Leidig*, and the other acknowledging that the principle had been applied in Maryland cases but treating it as nonconfining to interpretations of the state constitutional right to counsel.[38]

Justice Biran wrote a concurring opinion, joined by the same three justices, that also predicted the U.S. Supreme Court would rule for the defendant under the Sixth Amendment but, if he was wrong, "then I will be proud that Maryland provides a more robust right to counsel in this context under Article 21 and Article 24." Justice Biran said the case resembled *Leidig* in the sense that the U.S Supreme Court had failed to provide a conclusive answer to a pressing problem, implying but not holding that an important consideration in abandoning *in pari materia* was uncertainty in federal constitutional law.

Chief Justice Fader, joined by two other justices, made clear that "[a]s a general matter," he "welcome[d] the opportunity to explore claims properly brought, or at a minimum properly briefed and argued, by litigants under the Maryland Constitution."[39] He pointed to *Leidig* as an example. But he was "not aware of a circumstance in which we have decided to do so without the benefit of *any* argument and analysis by the parties, much less the thorough briefing and argument we ordinarily treat as a prerequisite to addressing unpreserved issues of any variety."[40]

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[36] See Clark v. State., Slip Op. at 68-69.
[37] See id. Slip Op. at 47-48.
[38] See id. Slip Op. at 46-47 nn. 16-17.
[39] See Clark v. State., Slip Op. at 87 (Fader, J. dissenting).
[40] Id.

The same three justices, in a dissent written by Justice Gould, argued that the majority had misinterpreted several precedents that supposedly uncoupled the state and federal constitutional rights to counsel.[41] In Judge Gould's view, the chief cases cited by the majority supported discretionary application of the *in pari materia* doctrine, but they did not compel a separate analysis and it would be imprudent to undertake one when the issue had not even been raised.[42] He concluded:

> In sum, the Majority resolves this case on alternative grounds not raised by the parties and overturns our recent pronouncement that ineffective-assistance-of-counsel claims under Article 21 and the Sixth Amendment are governed by the same *Strickland* standard. And the Majority does this without requesting input from the parties. To say that I disagree with this approach would be an understatement.

After *Leidig* and *Clark*, the door seems open to arguments that the state constitution provides greater rights than the federal.[43] To be fair, justices of the Maryland Supreme Court had stated many times in various ways that the door was open,[44] but given both appellate courts' long-term reliance on federal precedent to interpret state constitutional rights, lawyers can be forgiven for treating the door as shut.

The recent decisions could bring a flood of arguments for new, state-based constitutional rights. (The cases collected in this article hint at the size of the potential flood.) Although *Leidig* did not clearly articulate a limiting principle, the Court observed that if the Sixth Amendment issue had been clearly resolved by the U.S. Supreme Court, "we perhaps would be more reluctant to take a different approach under Article 21." The Appellate Court credited that observation when it seemed inclined to apply *in pari materia* to a different Confrontation Clause challenge where federal authority was clearer.[45] The

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[41] See id., Slip Op. at 16-19 (Gould, J. dissenting).

[42] See id., Slip Op. at 19 (Gould, J. dissenting).

[43] Of course, a state constitutional provision cannot restrict rights that are created by the U.S. Constitution. See Perry v. State, 357 Md. 37, 86 n.11 (1999); Smith v. Bortner, 193 Md. App. 534, 553 (2010).

[44] Trying to make sense of the cases in 2022, Judge Friedman observed that the meaning of *in pari materia* seemed to vary along a spectrum among judges on Maryland's high court. On one end, federal interpretations may be seen as a "starting place" for Maryland provisions, but not one that is presumptively correct or controlling. See Friedman, supra n.1, 82 Md. L. Rev. at 66 & n.2. At the other end, federal interpretations may be taken as correct unless there is a "principled reason to depart." See id.

[45] Smith v. State, ____ Md. App. ____, Slip Op. at 25 n.12 (July 26, 2023).

Appellate Court read *Leidig* as departing from federal precedent "due to the difficulties of applying the decision in *Williams v. Illinois*." In *Clark*, by contrast, the majority opinion explained that the outcome would be the same under the Sixth Amendment or the Maryland Constitution, but nevertheless uncoupled the two provisions and seemed to treat *in pari materia* as a nonissue for Sixth Amendment cases.

Post-*Leidig* cases under the Eighth Amendment have taken a different path. In 2022, after *Leidig* and before *Clark*, the Maryland Supreme Court twice declined to uncouple Article 25 from the Eighth Amendment's cruel and unusual punishment clause, finding that, unlike in *Leidig*, no "compelling reason" existed to depart from U.S. Supreme Court authority.[46] So perhaps *Leidig* and *Clark* are not a revolution at all, but just another step in the long evolution of *in pari materia* as a rule of constitutional interpretation.

When Maryland's *in pari materia* cases are arranged chronologically and by constitutional right, as they are in the footnotes to this article, a couple of trends emerge. First, the rigidity of the doctrine generally waxes from *Blum* in 1902 to *Waldron* in 1981, and thereafter wanes in Maryland Supreme Court decisions but not as much in Appellate Court decisions. Second, the *in pari materia* doctrine is applied more mechanically for some constitutional rights (like unreasonable searches[47]) than others (like the right to counsel in criminal cases).

A reasonable extrapolation from these trends might suggest that recognition of a new state constitutional right that exceeds the comparable federal right will be the sole province of the Maryland Supreme Court, while the Appellate Court will hew more closely to the traditional application of *in pari materia* at least until the Maryland Supreme Court holds that the two provisions are to be interpreted differently. Alternatively, both appellate courts might conclude that the force of the *in pari materia* doctrine varies with the particular constitutional right at issue.

This latter postulate has some merit based on the text, history, and structure of the Maryland Constitution when

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[46] Jedlicka v. State, 481 Md. 178, 201 (2022); see also Harris v. State, 479 Md. 84, 121 (2022) (declining to "stray from our longstanding precedent of interpreting Article 25 *in pari materia* with the Eighth Amendment").

[47] See, e.g., King v. State, 434 Md. 472, 483 (2013) ("Although we have asserted that Article 26 may have a meaning independent of the Fourth Amendment, we have not held, to date, that it provides greater protection against state searches than its federal kin.").

compared to the federal. Because the original Maryland Constitution of 1776 is older than the federal constitution, a true originalist might argue that it makes little sense to use federal authority to interpret state constitutional provisions. That is particularly true when the text of the state provision has little resemblance to the comparable federal provision. To take one example, the chief Maryland provision protecting the right to speech provides "that every citizen of the State ought to be allowed to speak, write and publish his sentiments on all subjects, being responsible for the abuse of that privilege."[48] Although that clause did not appear in the Maryland Constitution until 1864,[49] a straightforward reading of its text suggests that it enacts the narrow British understanding of the right of free speech—a prohibition on "previous restraints" on speech, but not on punishment of damaging speech after publication. Federal courts generally applied that understanding of freedom of speech until the early 20th Century,[50] when the more expansive modern view began to emerge. The text of the First Amendment is broad enough to encompass the expansive view, whereas Article 40 seemingly is not. So a rigid application of *in pari materia* may be sensible for the state right of free speech. That would leave the state constitutional right of free speech mostly superfluous, unless the Supreme Court significantly retrenches on the expansive view of free speech that has prevailed for more than a century.

On the other hand, as the *Leidig* Court observed, the right to confrontation in Article 21 of the Maryland Constitution is both older and broader than the corresponding right in the Sixth Amendment.[51] Those features played some role in the Court's decision to chart its own path, although perhaps the greater motivation was a general frustration with the U.S. Supreme Court's confusing jurisprudence under the Confrontation Clause. By contrast, in *Clark* the Court did not ground the expanded state right in differences in the text and history of the state and federal constitutions, but instead provided a thorough review of state and federal precedent and the policy reasons for adopting a rule potentially more protective of criminal defendants. Either approach is defensible, but the different approaches in *Leidig* and *Clark* make it difficult to predict what state constitutional rights will be uncoupled from the federal constitution in decisions to come.

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[48] Md. Const., Decl. Rts. art. 40.

[49] See Dan Friedman, The Maryland State Constitution 45 (2006).

[50] E.g., Patterson v. Colorado, 205 U.S. 454, 462 (1907).

[51] Leidig v. State, 475 Md. 181, 197-98 (2021).

Not everyone would agree that a depleted *in pari materia* doctrine is desirable. The downside of "51 Imperfect Solutions" is right there in the title. Not only are the solutions imperfect, there are 51 of them. The law in this country is already astoundingly complex. Perhaps a superior model of compensation in tort law will emerge through multi-state experimentation with systems of comparative fault, but one wonders if the same principle should apply to fundamental individual rights against governmental oppression. A three-hour train ride from New York to Washington, D.C. takes you through six legal regimes (counting D.C.). If your bag is searched during the trip, should your *constitutional* rights turn on where the train was at the time? Maybe one imperfect solution is better than 51.

That's probably not what most legal commentators think, at least in the current era where state prerogatives seem to be waxing. In prior eras, state prerogatives contributed to the Civil War, followed by the Reconstruction amendments, and ultimately incorporation of most of the Bill of Rights against the states. Now the federal constitution provides a bar against governmental oppression of the individual that state constitutions can raise but not lower. That seems prudent and costless until a raised bar in one state feels like oppression to the residents of another. Maryland residents, frustrated with urban violence, may not appreciate Virginia's protection of personal firearms that often find their way to Maryland. Virginia residents, frustrated by liberal access to abortion, may not appreciate that Maryland is a short drive away for most Virginians. The decentralization of constitutional rights is not an objective good. It is a policy.

The rule of *in pari materia* interpretation of state and federal constitutions, although doctrinally unsound, is also defensible as a policy. It tends to synchronize the floor on individual rights, but it allows augmentation of those rights by state *legislatures*. It is not clear why 51 high courts should remove that decision-making authority from the state's policymakers, absent some grounding in the text, history, or structure of the state constitution that would support greater rights than those granted by the federal constitutional counterpart.

The recent cluster of Maryland cases on *in pari materia* feel irreconcilable both with each other and with a long line Maryland precedent, but that too may be a conscious decision by our high court. The cases seem to leave the rule in place as a default policy, while allowing ample room for departure when circumstances warrant. Although commentators want to

reconcile the cases and articulate a rule of general application, that's not what the Court is telling us with respect to its *in pari materia* jurisprudence. An imperfect solution is the whole point.