University of Baltimore Law Review

Volume 18
Issue 1 *Fall 1988*

Article 9

1988

Casenotes: Statutes — Referendum — Appropriation — Stadium Enactments Not Subject to Referendum Because They Fall within Appropriation Exception to Referendum Amendment. Kelly v. Marylanders for Sports Sanity, Inc., 310 Md. 437, 530 A.2d 245 (1987)

Denise Ramsburg Stanley
University of Baltimore School of Law

STATUTES—REFERENDUM—APPROPRIATION—STADIUM ENACTMENTS NOT SUBJECT TO REFERENDUM BECAUSE THEY FALL WITHIN APPROPRIATION EXCEPTION TO REFERENDUM AMENDMENT. *Kelly v. Marylanders for Sports Sanity, Inc.*, 310 Md. 437, 530 A.2d 245 (1987).

For more than seventy years, Marylanders have possessed the power to place an enactment of the General Assembly on the ballot for referendum.[1] This power, however, is subject to several restrictions. In particular, the Maryland Constitution exempts from referendum any "appropriation for maintaining the state government."[2] In *Kelly v. Marylanders for Sports Sanity, Inc.*,[3] the Court of Appeals of Maryland held that the Stadium Enactments, which enabled the construction of professional sports facilities in Maryland, were not referable because they constituted an appropriation for maintaining the state government.[4] By construing the appropriations exception to the power of referendum broadly, the *Kelly* decision has not denied the people's right to referendum; instead, it has preserved the integrity of our representative system of self-government.

Article XVI of the Maryland Constitution provides:

> The people reserve to themselves power known as The Referendum, by petition to have submitted to the registered voters of the State, to approve or reject at the polls, any Act, or part of any Act of the General Assembly, if approved by the Governor, or, if passed by the General Assembly over the veto of the Governor.[5]

The Referendum Amendment was designed to deter corruption and abuses which had crept into legislation and public administration by reserving to the people of the State the right to approve or reject any law passed by the legislature.[6] Article XVI was intended to preserve Mary-

---

1. MD. CONST. art. XVI, § 1.
2. *Id.* § 2.
3. 310 Md. 437, 530 A.2d 245 (1987).
4. *Id.* at 463-68, 530 A.2d at 258-60.
5. MD. CONST. art. XVI, § 1(a).
6. In Beall v. State *ex rel.* Jenkins, 131 Md. 669, 103 A. 99 (1917), the court analyzed the legislative history of the Referendum Amendment in considering whether article III, section 31 of the Maryland Constitution was subject to the provisions of article XVI. In its discussion, the court recognized that Marylanders have lived under a form of representative self-government since the establishment of Maryland's first constitution. *Id.* at 677, 103 A. at 102. Founded on the early legal institutions of England, this form of government was brought to America by the colonists who incorporated it into their governmental systems and ultimately into the constitutions of the respective states and the United States Constitution. For many years, this representative system was considered one of the great principles of popular government. *Id.* After the Civil War, abuses crept into legislation and into the administration of the government, especially between the years 1880 and 1900. It was charged that government had been "prostituted to corrupt and selfish purposes" by powerful corporations and individuals who had gained control of the machinery of the political parties. *Id.*

land's form of representative self-government by thwarting the perversion of the political system for the benefit of private interests contrary to the will of the majority.[7]

The power to petition acts by referendum, however, is subject to certain exceptions. One such exception is that an act which contains an appropriation for maintaining the state government is not referable.[8] For an act to fall within this exception, two requirements must be satisfied. First, it must be established that the act authorizes an appropriation of public funds. Second, the appropriation must be used for the maintenance of the state government.[9]

There are two conflicting definitions of appropriation extant in Maryland. The first definition is found in section 32 of article III of the Maryland Constitution. This section provides that money may be drawn from the treasury only upon appropriation which specifies the amount appropriated and the object to which it shall be applied.[10] The second definition of appropriation appears in the Budget Amendment which was enacted subsequent to the passage of the Referendum Amendment. The Budget Amendment requires that all appropriations be made specifically in the form of either a budget bill or a supplementary appropriation bill.[11] Because the definition of appropriation under the Budget Amendment requires a withdrawal of funds to be made in a specific procedural form, it is a more restrictive definition than that contained in section 32 of article III of the Maryland Constitution.

The Court of Appeals of Maryland first examined the disparity in the definitions of appropriation in *Dorsey v. Petrott.*[12] *Dorsey* involved an act which replaced the State Conservation Commission with two commissions, one for tidewater fisheries and the other for game and inland fisheries.[13] After analyzing the evolution of the budget process in Maryland, the court found that the determinative characteristics of an appropriation at the time the Referendum Amendment was adopted were not fundamentally affected by the Budget Amendment.[14] The court applied a broader definition of appropriation similar to that contained in section 32 of article III of the Maryland Constitution but found that, even under the less stringent standard, the act sought to be referred was not an

7. *Id.*
8. MD. CONST. art. XVI, § 2. Section 2 also excludes from referendum any law "for maintaining or aiding any public institution, not exceeding the next previous appropriation for the same purpose. . . ." *Id.* The only other exception is contained in section 6 of article XVI and applies to the manufacture and sale of liquor. *Id.* § 6.
9. *See* Bayne v. Secretary of State, 283 Md. 560, 570, 392 A.2d 67, 72 (1978).
10. MD. CONST. art. III, § 32.
11. *Id.* § 52. The purpose of that amendment was to require the executive to submit a complete and unified plan of proposed expenditures and estimated revenues for each fiscal year, thereby facilitating the management of the budget. *See* Dorsey v. Petrott, 178 Md. 230, 241-43, 13 A.2d 630, 636-37 (1940).
12. 178 Md. 230, 13 A.2d 630 (1940).
13. *Id.* at 245-46, 13 A.2d at 638.
14. *Id.* at 241, 13 A.2d at 636.

appropriation.[15]

Defining appropriation as "a lawful legislative act whose primary object is to authorize the *withdrawal* from the state treasury of a certain sum of money for a specified public object or purpose,"[16] the *Dorsey* court noted that the only items in the act approaching appropriations were a cap set on salaries for the new commissioners and a provision for the collection of inspection fees and fines.[17] The act, however, did not regulate the manner in which public funds were to be supplied annually for the conservation of tidewater fisheries.[18] The court reasoned that an act which related primarily and specifically to general legislation could not be converted into an appropriation bill merely because there was an *incidental* provision for an appropriation of public funds.[19] Accordingly, the court concluded that the act did not make an appropriation and, therefore, was subject to referendum under section 1 of article XVI.

Once it has been established that an act authorizes an appropriation of public funds, the next inquiry is whether the appropriation is for maintaining the state government. The Court of Appeals of Maryland first addressed this issue in *Winebrenner v. Salmon*.[20] In *Winebrenner*, the plaintiffs petitioned for the referendum of an act which increased a fuel tax to provide for the construction of lateral roads within the State.[21] The court held that the fuel tax was being utilized for maintaining the state government and, therefore, the act was exempt from referendum under section 2 of article XVI of the Maryland Constitution.[22]

In reaching this holding, the *Winebrenner* court construed the "maintaining the state government" exception broadly. The court reasoned that the purpose of the exception "was to provide against the possibility of the government being embarrassed in the performance of its various functions," presumably by depriving a government of funds necessary to meet its obligations.[23] The court found that "maintaining the state government means providing money to enable it to perform the duties which it is required by law to perform."[24] The *Winebrenner* court then addressed whether the construction of state roads was a duty which the government was required to perform. Finding that the construction of state roads constituted just such a duty of government, the court characterized this duty as an "important" and "primary function" of govern-

15. *Id.* at 245-52, 13 A.2d at 637-41.
16. *Id.* at 245, 13 A.2d at 637-38 (emphasis added).
17. *Id.* at 246, 250, 13 A.2d at 638, 640.
18. *Id.* at 250, 13 A.2d at 640. The act remitted to the budget bill the designation and allowance of salaries, subject only to the cap contained in the act. The inspection fees and fines were to be paid directly to the Comptroller of the Treasury with no specific provision for their disbursement. *Id.*
19. *Id.* at 251, 13 A.2d at 640.
20. 155 Md. 563, 142 A. 723 (1928).
21. *Id.* at 565-66, 142 A. at 724.
22. *See id.* at 567-68, 142 A. at 725.
23. *Id.* at 568, 142 A. at 725.
24. *Id.*

ment.[25] The court, however, noted that an appropriation would not fall within the appropriations exception if it "*created* an entirely new function not theretofore recognized as coming within the sphere of governmental activity."[26] Thus, *Winebrenner* defined "maintaining the state government" as providing money to perform a primary function of government which is not newly created.

The next case to interpret the "appropriation for maintaining the state government" exception was *Bickel v. Nice*.[27] The petitioners in *Bickel* sought the referendum of an act that authorized the issuance of bonds to finance the construction and furnishing of a new state office building.[28] Adopting the reasoning in *Winebrenner* which equated primary function with maintaining the state government, the *Bickel* court found that housing state officers and employees was a "primary function of government."[29] The court recognized that the judicial branch cannot pass upon the need for, or wisdom of, a particular appropriation because such determinations are reserved to the legislature.[30] Accordingly, the court found that its inquiry ended with the determination of whether the appropriation was designed to maintain the state government.[31]

Bayne v. Secretary of State[32] is the most recent case prior to *Kelly v. Marylanders for Sports Sanity, Inc.*[33] to address the issue of whether an appropriation was for maintaining the state government. In *Bayne*, the petitioners sought to refer a portion of the 1979 Budget Bill authorizing Medicaid payments for abortions for indigent persons.[34] The court accepted the *Winebrenner/Bickel* formulation that performing a primary function of government equals maintaining the state government.[35] The court traced the history of numerous state laws providing medical services for indigent persons, demonstrating that Medicaid payments were not a "new" function of government.[36] Further, the court noted that the Department of Health & Mental Hygiene is one of the most "important" agencies of the state and that providing medical services to indigent persons was a primary function of government.[37] Having found that the provision of medical services for indigent persons was a long-standing,

25. *Id.*; *see also* Bonsal v. Yellot, 100 Md. 481, 60 A. 593 (1905).
26. *Winebrenner*, 155 Md. at 568, 142 A. at 725.
27. 173 Md. 1, 192 A. 777 (1937).
28. *Id.* at 3-4, 192 A. at 778-79.
29. *Id.* at 10, 192 A. at 781.
30. *Id.* at 11, 192 A. at 782.
31. *Id.* at 10, 192 A. at 781.
32. 283 Md. 560, 392 A.2d 67 (1978).
33. 310 Md. 437, 530 A.2d 245 (1987).
34. *Bayne*, 283 Md. at 563, 392 A.2d at 68-69.
35. *Id.* at 575, 392 A.2d at 75. Indeed, the *per curiam* opinion in *Bayne* left no room for doubt. The court stated: "No law making any appropriation for maintaining the State Government may be subject to The Referendum. If an appropriation is for a primary function of the State, it is for maintaining the State Government." *Id.*
36. *Id.* at 570-71, 392 A.2d at 72-73; *see also supra* text accompanying note 26.
37. *Bayne*, 283 Md. at 570-71, 392 A.2d at 72-73.

primary function of government, the court held that the appropriation was for maintaining the state government and, therefore, was not subject to referendum.[38]

A final consideration in determining whether an act may be referred is whether that portion of the act which constitutes an appropriation for maintaining the state government may be severed from the remainder of the act. The Referendum Amendment in the Maryland Constitution reserves the power to refer any act or "part of any act" to the voters of the State.[39] *Dicta* in the *Winebrenner* case supports the conclusion that parts of an act may be subject to referendum even though the act contains an appropriation which is not subject to referendum.[40] In *Mayor of Berlin v. Shockley*,[41] however, the court of appeals refused to follow the *dicta* enunciated in *Winebrenner*.[42] Instead, the court held that if a single enactment incorporates both a referable law and "one of the kinds excepted from the referendum," that law cannot be referred.[43]

Whether one act embodied in a single legislative scheme may be referred, however, was left open by the court of appeals decision in *Shockley*.[44] Under Maryland law, the General Assembly may embody a single legislative scheme in associated bills or acts,[45] and the principles of sever-

38. *Id.* at 572-73, 392 A.2d at 73-74.
39. MD. CONST. art. XVI, § 1(a).
40. Winebrenner v. Salmon, 155 Md. 563, 571, 142 A. 723, 726 (1928).
41. 174 Md. 442, 199 A. 500 (1938). *Shockley* addressed the referendum of an act involving distribution of profits from a county dispensary's sale of alcoholic beverages. Although this case did not involve the question of referendum of an act appropriating funds for maintaining the state government, it did involve the sale of alcoholic beverages, which is similarly excepted from referendum under section 6 of article XVI of the Maryland Constitution. *Id.* at 444, 199 A. at 500.
42. *Id.* at 44-46, 199 A. at 501. The *Shockley* court cited the statement in *Winebrenner* that the Referendum Amendment expressly provides for submission of "part of any act" and that part of an excepted law might be referred. The court, however, held that "the constitutional provision does not permit it." The court stated that:
> An association in a single enactment of a referable law and one of the kinds excepted from the referendum . . . might, perhaps, be found to leave part of an enactment referable, but not part of the excepted law. That law, with its incidents, still could not be referred.

Id. at 446, 199 A. at 501; *see also* Bayne v. Secretary of State, 283 Md. 560, 575, 392 A.2d 67, 75.
43. *Shockley*, 174 Md. at 445-46, 199 A. at 501.
44. *See id.* at 446, 199 A. at 501; *see also* Brief for Appellant Secretary of State at 48, Kelly v. Marylanders for Sports Sanity, Inc., 310 Md. 437, 530 A.2d 245 (1987) (No. 75). Other states, however, have applied the principles of severability of parts of a unified scheme in the context of referendum, holding that the exception of one act excepts all associated acts in the scheme. *See, e.g.*, County Rd. Ass'n v. Board of State Canvassers, 407 Mich. 101, 118-121, 282 N.W.2d 774, 780-81 (1979); Board of County Rd. Comm'rs v. Riley, 391 Mich. 666, 673-74, 218 N.W.2d 144, 147 (1974) (holding that all associated acts were exempt from referendum); State *ex rel.* Barrett v. Dallmeyer, 245 S.W. 1066, 1068 (Mo. 1922) (holding that referendum of one act which was *in pari materia* with another necessarily suspended the second act—the act in question did not fall within the exception from referendum).
45. *See* Ocean City Taxpayers for Equal Rights, Inc. v. Mayor of Ocean City, 280 Md. 585, 597, 375 A.2d 541, 548 (1977).

ability are applicable to a unified legislative scheme.[46] In *Ocean City Taxpayers for Equal Rights, Inc. v. Mayor of Ocean City*,[47] the Maryland Court of Appeals considered three factors in determining whether acts should be construed together as a unified legislative scheme.[48] The first factor is whether each enactment in the scheme makes reference to any other enactment in the title or body.[49] The second factor is whether the individual enactments cover the same subject matter.[50] The final factor focuses on whether the legislature intended the individual enactments to constitute a unified legislative scheme.[51]

In *Kelly v. Marylanders for Sports Sanity, Inc.*,[52] the Court of Appeals of Maryland examined whether the legislation known as the "Stadium Enactments" was subject to referendum under article XVI of the Maryland Constitution.[53] Chapter 122 of the Stadium Enactments authorizes the Maryland Stadium Authority (the "Authority")[54] to construct a stadium facility at Camden Yards in Baltimore, Maryland (the "Site").[55] Chapter 123 designates the Authority as an independent unit of the executive branch of state government, directs deposit of receipts into the Authority's financing fund and authorizes the Authority to acquire the Site by condemnation.[56] Finally, chapter 124 of the Stadium Enactments outlines the Authority's power to issue bonds for site acquisition and construction of the facility, provides for lease payments to the Authority appropriated by the legislature, creates a special, non-lapsing fund for receipts and disbursements designated for the facility, provides for a dedicated purpose account in the state reserve fund to cover debt service on the Authority's bonds and authorizes the State lottery agency to conduct sports lotteries annually for the benefit of the stadium facilities fund.[57]

Opponents of the Stadium Enactments, acting through Marylanders

---

46. *See id.* at 599, 375 A.2d at 549.
47. 280 Md. 585, 375 A.2d 541 (1977).
48. *Id.* at 596-601, 375 A.2d at 548-50.
49. *Id.* at 597-98, 375 A.2d at 548-49. This factor focuses on the form of acts within the statutory scheme.
50. *Id.* at 598, 375 A.2d at 549. This factor examines the acts to determine whether they are connected in substance.
51. *Id.* at 598-99, 375 A.2d at 549. The legislative history of the resolutions is examined under this factor.
52. 310 Md. 437, 530 A.2d 245 (1987).
53. *Id.* at 473, 530 A.2d at 262-63.
54. At the time, the Maryland Stadium Authority was an instrumentality of the State and a unit of the Department of Economic and Community Development. MD. FIN. INST. CODE ANN. § 13-702 (1986 & Supp. 1988).
55. Act of April 29, 1987, ch. 122, 1987 Md. Laws 802 (codified at MD. FIN. INST. CODE ANN. § 13-709 (Supp. 1988)).
56. Act of April 29, 1987, ch. 123, 1987 Md. Laws 805 (codified in scattered sections of MD. FIN. INST. CODE ANN. and MD. STATE FIN. & PROC. CODE ANN.).
57. Act of April 29, 1987, ch. 124, 1987 Md. Laws 815 (codified in scattered sections of MD. FIN. INST. CODE ANN., MD. STATE FIN. & PROC. CODE ANN. and MD. STATE GOV'T CODE ANN.).

for Sports Sanity ("MASS"), presented referendum petitions for chapters 122 and 124 to the Secretary of State.[58] The Secretary refused to accept the petitions, relying on an Attorney General opinion which found that neither law was referable.[59] The Circuit Court for Anne Arundel County granted MASS's request for a writ of mandamus compelling the Secretary to accept the petitions. The Secretary appealed to the court of special appeals.[60] While the appeal was pending in the court of special appeals, the court of appeals granted *certiorari* to expedite "the significant issue of public importance involved in [*Kelly*]."[61]

The petitioners in *Kelly* presented three issues for resolution by the court of appeals. The first issue required the court to focus on whether chapter 124 of the Stadium Enactments, which authorized the financing for the acquisition and construction of the stadium, constituted an appropriation within the meaning of the Referendum Amendment.[62] In determining that chapter 124 was a law making an appropriation, the *Kelly* court followed the *Dorsey* ruling that the Budget Amendment did not affect the definition of appropriation for purposes of referendum.[63] Although recognizing that chapter 124 did not meet the Budget Amendment's stringent definition of "appropriation,"[64] the court found that chapter 124 was an appropriation as contemplated in the Referendum Amendment because it set aside money for a particular purpose to the exclusion of all other purposes.[65]

Having established that chapter 124 authorized an appropriation of public funds, the *Kelly* court next considered whether the appropriation was for the purpose of maintaining the state government and, therefore, exempt from referendum under article XVI of the Maryland Constitution.[66] The court found that because chapter 124 was an appropriation for a long-standing governmental function, it constituted an appropriation for maintaining the state government.[67] The court reasoned that

58. *Kelly*, 310 Md. at 446-47, 530 A.2d at 249. Enactment of chapter 123 was made contingent on the enactment of chapter 122. *Id.* at 442, 530 A.2d at 247. Therefore, the referendum of chapter 122 would suspend the operation of chapter 123 until after the election.

59. *Id.* at 447, 530 A.2d at 249. The Attorney General concluded that chapter 124 was an appropriation, that the appropriation made in chapter 124 was for maintaining the state government and that because of their interrelationship, neither chapter 122 nor chapter 124 could be referred. 72 Op. Att'y Gen. 117, 129, 135, 139 (1987).

60. *Kelly*, 310 Md. at 449-50, 530 A.2d at 251.

61. *Id.* at 450 n.5, 530 A.2d at 251 n.5.

62. *Id.* at 450, 530 A.2d at 251. Chapter 124 authorizes the Authority to deposit monies derived from the various revenue mechanisms contained in the act to a financing fund from which it may expend those dedicated funds for site acquisition and stadium construction. *Id.* at 459-60, 530 A.2d at 256.

63. *Id.* at 459, 530 A.2d at 256; *see also supra* notes 10-19 and accompanying text.

64. *Kelly*, 310 Md. at 456, 530 A.2d at 254; *see also supra* note 11 and accompanying text.

65. *Kelly*, 310 Md. at 456, 530 A.2d at 254.

66. *Id.* at 461-68, 530 A.2d at 257-60.

67. *Id.* at 467, 530 A.2d at 259-60.

providing sports facilities for public recreation was a valid public purpose that was not a new function of Maryland's government.[68]

In arriving at this conclusion, the court rejected the "primary," "imperative" and "important" characterizations made in the previous cases,[69] stating that it never intended these characterizations to be used as the test for determining whether an appropriation was for maintaining the state government.[70] The court refused to "second guess" the legislature's determination that the appropriation was for maintaining the state government.[71] Accordingly, the court adopted the *Bickel* reasoning that if the legislation was designed for a public purpose, it was for maintaining the state government, regardless of its character or wisdom.[72]

Finally, the court addressed whether chapter 122 of the Stadium Enactments, which designated the site for stadium construction but contained no appropriation language, was nevertheless exempt from referendum because it could not be severed from the appropriations contained in chapter 124.[73] Finding that chapters 122 and 124 were not severable, the court concluded that chapter 122 was not subject to referendum. The court enunciated three premises for reaching this conclusion. First, the court noted that the legislative history of the Stadium Enactments indicated that the enactments were introduced and considered by the legislature as a single package.[74] This common origin of the Stadium Enactments signified that the General Assembly intended the acts to be construed as a unified statutory scheme.[75] Second, the court found that the goal of the exceptions to the Referendum Amendment was to protect the "purpose or object of the legislative appropriation."[76] Accordingly, the court reasoned that if any of the bills were referred, all of them would be suspended because of their interdependence, thereby jeopardizing the

68. *Id.* The *Kelly* court cited several cases for the proposition that encouraging professional sports was a governmental function, including Reyes v. Prince Georges County, 281 Md. 279, 381 A.2d 12 (1977) (sports arena); Pressman v. D'Alesandro, 193 Md. 672, 69 A.2d 453 (1949) (Baltimore stadium); Green v. Garrett, 192 Md. 52, 63 A.2d 326 (1949) (a valid public purpose exists in permitting use of Baltimore stadium for professional baseball). *Kelly*, 310 Md. at 461-62, 530 A.2d at 257. The court also noted many other jurisdictions where sports stadiums are publicly owned, such as Three Rivers Stadium owned by the Pittsburgh Stadium Authority and the Tampa Stadium owned by the Tampa Sports Authority. *Id.* at 462-63, 530 A.2d at 257-58. In addition, the court noted that Maryland had authorized the expenditure of over forty million dollars for construction of the original Baltimore stadium. *Id.* at 462 n.15, 530 A.2d at 257 n.15.

69. *See supra* text accompanying notes 25, 29, 37-38.

70. *Kelly*, 310 Md. at 466, 530 A.2d at 259.

71. *Id.* at 467-68, 530 A.2d at 260.

72. *Id.* at 466, 530 A.2d at 259.

73. *Id.* at 468-74, 530 A.2d at 260-63.

74. *Id.* at 469, 530 A.2d at 261.

75. *Id.* at 473, 530 A.2d at 262-63.

76. *Id.* at 472, 530 A.2d at 262. One of the chief aims of the appropriation in chapter 124 was to give the State the best possible chance to regain a professional football team upon expansion of the National Football League and to retain the Baltimore Orioles baseball franchise within the State. *Id.* at 471, 530 A.2d at 262.

goals of the appropriation.[77] Third, the court found that chapter 122 was the "building block" on which the Stadium Enactments rested.[78] Separately, the bills could not have achieved their objective, and to refer chapter 122 would have effectively scuttled the entire project.[79] Because chapter 124 was not subject to referendum and was dependent upon chapter 122, the court held that chapter 122 was not referable.[80] To allow the referendum of chapter 122 would defeat the intent of the appropriation exception to referendum by constructively suspending the effect of chapter 124 until the referendum of chapter 122 was resolved at the polls.[81]

The *Kelly* court's conclusion that chapter 124 makes an appropriation is consistent with previous decisions. Under the *Dorsey* decision, an appropriation need only meet the requirements similar to article III, section 32 for the referendum exception to apply.[82] Because the primary purpose of chapter 124 is to set aside certain money for the construction of a sports facility to the exclusion of all other purposes, it appears to comport with this definition of an appropriation.[83]

In determining whether an appropriation was for maintaining the state government, Maryland courts traditionally have applied a subjective "primary function" analysis. For example, in *Winebrenner*, the court of appeals labeled the establishment of roads as an "important" and "primary function" of government.[84] The *Bickel* court engaged in a comparison approach in which it found that housing for state employees is as much a primary function of government as constructing roads.[85] Similarly, the *Bayne* decision recognized the "important" and "primary" function of providing for the health, safety, and welfare of indigent persons.[86] This line of analysis permitted the court to judge arbitrarily whether a particular legislative enactment was important enough to be excepted from referendum.[87] The *Kelly* court, however, correctly re-

77. *Id.* at 474, 530 A.2d at 263.
78. *Id.* at 473, 530 A.2d at 263.
79. *Id.* at 474, 530 A.2d at 263.
80. *Id.* at 473-74, 530 A.2d at 262-63. The financing arrangements contained in chapter 124 were predicated upon timely approval of the Camden Yards site. Brief for Appellant Greater Baltimore Committee at 40, Kelly v. Marylanders for Sports Sanity, Inc., 310 Md. 437, 530 A.2d 245 (1987) (No. 75).
81. *Kelly*, 310 Md. at 474, 530 A.2d at 263.
82. *See supra* notes 10-19 and accompanying text.
83. *See supra* notes 57, 62-65 and accompanying text.
84. Winebrenner v. Salmon, 155 Md. 563, 568, 142 A. 723, 725 (1928); *see also supra* notes 20-26 and accompanying text.
85. Bickel v. Nice, 193 Md. 1, 10, 192 A. 777, 781 (1937); *see also supra* notes 27-31 and accompanying text.
86. Bayne v. Secretary of State, 283 Md. 560, 570, 392 A.2d 67, 72 (1978); *see also supra* notes 32-38 and accompanying text.
87. In dissent, Judge Adkins argued that the "primary" and "important" qualifications to the appropriations exception were not arbitrary; rather, these qualifications were consistent with the fundamental purpose of the appropriations exception. *See Kelly*, 310 Md. at 479-85, 530 A.2d at 266-69 (Adkins, J., dissenting). Noting that the

jected this subjective test, stating that it would not "second guess" the legislature.[88] Thus, by removing the subjective characterizations adopted since *Winebrenner*, the court has properly removed itself from the legislative arena. Under this reasoning, if the legislature directs the performance of an activity which is a proper function of government, an appropriation designed to achieve this end is an appropriation for maintaining the state government and is not referable.

The *Kelly* decision correctly recognizes that Maryland has a representative system of government with built-in checks and balances. The Referendum Amendment was adopted to remedy excesses, not to curb the representative process.[89] The Camden Yards site was selected only after public input and careful consideration by Maryland's political representatives.[90] Solid economic benefits were anticipated as a result of the Stadium Enactments.[91] A stadium would provide not only a source of public recreation, but would also create new businesses, jobs, tourism and national recognition, all of which accompany hosting professional baseball and football teams. Baltimore had already lost its professional football team, and the city needed a new stadium to be considered for an NFL expansion team.[92] The Baltimore Orioles had also expressed dissatisfaction with the current stadium and refused to sign a long-term lease on the property.[93] Furthermore, construction of a sports complex is consistent with Maryland's long established policy of supporting professional sports within the State.[94] Accordingly, the General Assembly's decision to construct a new stadium facility was reasonable in light of these economic and policy considerations. The *Kelly* court's decision

---

appropriation exception was included in the Referendum Amendment to avoid the possibility of the government being embarrassed in the performance of its duties, Judge Adkins reasoned that such a situation would occur only when the appropriation was for maintaining a primary or essential function of government. *Id.* at 483, 530 A.2d at 267-68. But where the function of government was merely legally permissible rather than essential, Judge Adkins believed that "the people's right to decide policy issues for themselves (the core purpose of the referendum) should prevail." *Id.* at 483, 530 A.2d at 268 (footnote omitted). Judge Adkins concluded that the construction of a sports stadium was not an essential function of government and, therefore, that chapter 124 of the Stadium Enactments did not fall within the appropriations exception to the Referendum Amendment.

88. *Id.* at 466-68, 530 A.2d at 259-60.

89. *Id.* at 450-51, 530 A.2d at 251-52 (citing Beall v. State, 131 Md. 669, 676-78, 103 A. 99, 102 (1917)). Indeed, in adopting the Referendum Amendment, proposals to abolish the representative system were rejected. *See id.*

90. *Id.* at 440, 530 A.2d at 246; *see also* 72 Op. Att'y Gen. 117, 119 (1987); MD. FIN. INST. CODE ANN. § 13-710 (Supp. 1988).

91. Expected economic benefits to the state were estimated at $132 million per year for the new baseball stadium and at $59.8 million if a football franchise was obtained. Benefits to the City of Baltimore were estimated at $9.6 million during construction and $1.6 million annually. *Kelly*, 310 Md. at 445-46, 530 A.2d at 249.

92. *Id.* at 471, 530 A.2d at 262.

93. *Id.* Subsequent to *Kelly*, the Orioles' owner did sign a long-term lease, thereby assuring that the baseball team would remain in Baltimore for another fifteen years.

94. *Id.* at 462, 530 A.2d at 257.

that chapters 122 and 124 were not severable is also consistent with the spirit of Maryland's previous decisions regarding the Referendum. Prior to *Kelly*, the court of appeals had determined that when a single act contained both referable and non-referable parts, the act could not be referred.[95] The rationale behind this conclusion was that a related or dependent portion of a non-referable act should not have to be stalled until the referable portion of the act was voted on at the polls, possibly years later.[96] This same logic is readily transferrable to the unified legislative scheme embodied in the Stadium Enactments. The referable chapter in the Stadium Enactments, chapter 122, designates the site for stadium construction.[97] Chapter 124, the non-referable part of the act, authorizes financing for the acquisition and construction of the stadium at the site.[98] If chapter 122 were severed from the remaining acts in the legislative scheme, the financing provisions contained in chapter 124 would be suspended until the outcome of the referendum. This result would effectively undermine the purpose of the Stadium Enactments — the acquisition and construction of a sports stadium at Camden Yards. Accordingly, the *Kelly* court correctly applied the same analysis to determine the severability of the unified legislative scheme embodied in the Stadium Enactments as it had previously applied to determine the severability of portions of a single act.

The *Kelly* court's construction of "appropriation" and "maintaining state government" makes it difficult to imagine any legislative measure which sets aside monies for a specific purpose as referable.[99] The power of referendum, however, is not defeated by this construction. Many legislative acts, including policy measures, do not make appropriations and thus continue to be subject to referendum.[100] Moreover, Maryland

95. *See* Mayor of Berlin v. Shockley, 174 Md. 442, 199 A. 500 (1938); *see also supra* notes 39-43 and accompanying text.
96. *Shockley*, 174 Md. at 446, 199 A. at 501.
97. *See supra* note 55 and accompanying text.
98. *See supra* notes 57, 62-65 and accompanying text.
99. In the *Winebrenner* decision, the court hinted that this exception would not apply where the appropriation was for a "new" function of government. Winebrenner v. Salmon, 155 Md. 563, 142 A. 723 (1928). The closest the court of appeals has come to reviewing a "new" function was the funding of abortions to indigent persons. *See* Bayne v. Secretary of State, 283 Md. 560, 392 A.2d 67 (1978). There, the court looked to Maryland's history of providing health care to the indigent. *See id.* at 570-71, 392 A.2d at 72-73. *Kelly* seems more similar to *Bickel*, where the State sought to build a new office building. *See* Bickel v. Nice, 173 Md. 1, 192 A. 777 (1937). In *Kelly*, the State was merely seeking to build a new professional sports facility, a function which it had undertaken in the past. *See supra* note 68.
100. For example, a measure abolishing the death penalty would not be excluded from referendum, nor would a measure making abortions illegal or a measure reassigning the power of appointment of school board officials. These policy issues would be referable so that each individual would have an opportunity to contribute to the decision.

Referendum of the revamped Maryland handgun legislation in the fall of 1988 illustrates the referendum's power and utility. Heated debate and copious advertising, especially by the National Rifle Association, gave the appearance that the bill

courts have refused to find that all appropriations are exempt from referendum.[101] In addition, the appropriations exception does not apply if the appropriation "*created* an entirely new function not theretofore recognized as coming within the sphere of governmental activity."[102] This limitation provides a vehicle for future courts to narrow the breadth of the appropriations exception.[103]

The *Kelly* court's conclusion that the Stadium Enactments were not severable implicitly recognizes that the exception from referendum of appropriations for maintaining state government facilitates the legislature in its dealings for the benefit of its citizens. Maryland must have credibility in its dealings in order to obtain favorable financing arrangements and to conduct business with other states and private industry. Permitting an appropriation measure contained in a unified legislative scheme to be stalled on referendum simply because the object of the appropriation was contained in a separate act would unduly impair the economic viability of the State.[104] To pervert the Referendum as a tool for stalling legislative acts which the representatives of the citizens of Maryland have in

---

could not pass. Yet the voters made it clear at the polls that they supported legislative regulation of handguns in Maryland by soundly endorsing passage of the act. The powerful, vocal minority was defeated, and the will of the majority was accomplished.

Although the legislature could tack an appropriation onto an otherwise referable act thereby removing it from referendum, it can be argued that the act still does not amount to an appropriation. For example, in the *Dorsey* case, the court stated that an act of general legislation "is not converted into an appropriation bill simply because it has engrafted upon it a section making an appropriation." Dorsey v. Petrott, 178 Md. 230, 251, 13 A.2d 630, 640-41 (1940) (quoting Bengzon v. Secretary of Justice and Insular Auditor, 299 U.S. 410, 413 (1937)). Similarly, in *Bengzon*, the Supreme Court held that the act was a general law and that it could not be converted into an appropriation merely because there is an incidental provision for appropriation of public funds. *Bengzon*, 299 U.S. at 413-15. Indeed, Judge Adkins' dissent in the *Kelly* decision relies on this statement in arguing that the stadium enactments are a general law and the appropriation in chapter 124 only incidental. *Kelly*, 310 Md. at 485-87, 530 A.2d at 269 (Adkins, J., dissenting). However, *Dorsey* also states that an appropriation bill has as its primary and specific aim the making of an appropriation of money. *Dorsey*, 178 Md. at 251, 13 A.2d at 641. The appropriations in *Dorsey* were meager at best. *See supra* notes 16-18 and accompanying text. Conversely, chapter 124 is very specifically designed to generate revenue and appropriate it to a specific purpose. *See supra* text accompanying notes 57, 62-65.

101. In *Bayne*, the court stated that not even a budget bill was *per se* excluded from referendum. *Bayne*, 283 Md. at 569, 392 A.2d at 72.

102. *Winebrenner*, 15 Md. at 568, 142 A. at 725.

103. Examples might include state funding of political campaigns or a state social security system. State funding of abortions in the *Bayne* case was certainly open to interpretation as "new" by adopting a narrow definition of health maintenance, and future courts are free to narrow the interpretation of an "existing" function of government.

104. The state has a legitimate interest in attracting industry, with its trappings of jobs and economic benefits, as well as a need to issue bonds to finance public projects. If the legislature's enactments appropriating funds were subject to referendum, businesses and investors would be less willing to deal with Maryland for fear that, at the whim of its citizenry, it could not live up to its obligations.

good faith enacted would allow a minority of citizens to defeat the efforts of the representatives of the majority.[105] Preservation of the democratic system of majority rule, however, is precisely the reason why the Referendum was originally enacted.[106]

In *Kelly*, the Court of Appeals of Maryland has rendered an enlightened interpretation of the Referendum which is consistent with Maryland precedent. By construing the exception for appropriations for maintaining state government broadly, the court has reaffirmed that the principal system of government in Maryland is a representative system of self-government. However, there is sufficient latitude in the reasoning of the *Kelly* decision to protect the intent of the Referendum as a safeguard against legislative abuses which place the will of a minority above that of the majority.

Denise Ramsburg Stanley

105. The court of appeals has characterized the Referendum Amendment as a "concession to an organized minority and a limitation upon the rights of the people." 72 Op. Att'y Gen. 117, 122 (1987) (quoting Tyler v. Secretary of State, 229 Md. 397, 402 (1962)).

106. *See supra* notes 5-7 and accompanying text; *see also* Beall v. State *ex rel.* Jenkins, 131 Md. 669, 677-78, 103 A. 99, 102 (1917).