1980

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STATE CONSTITUTIONAL LAW FOR MARYLAND LAWYERS: JUDICIAL RELIEF FOR VIOLATIONS OF RIGHTS

Charles A. Rees†

This article examines and compares Maryland and federal constitutional law regarding access to judicial relief for violations of individual civil rights. The author collects the significant constitutional provisions, statutes, and cases and provides a framework for analyzing possible obstacles to judicial relief when constitutional issues are presented in state or federal court.

I. INTRODUCTION

An earlier article in this law review¹ compared provisions regarding individual rights of a civil nature in the Constitution of Maryland with related provisions in the Constitution of the United States. The present article is a comparative study of access to civil judicial relief² for violations of those individual rights and the limitations on that access under the state and federal constitutions, related statutes, rules, and common law.

Designed for use by lawyers and law students who are familiar with the principles of federal constitutional law, this guide begins by stating the justifications for studying the state constitution, particularly in respect to access to both state and federal courts. It then compares the bases of judicial review under the state and federal constitutions and explores the extent of judicial review under Maryland state constitutional law. This article also examines and compares the state and federal constitutional and policy limitations on judicial review, including subject matter jurisdictional requirements, the necessity of having a cause of action, and governmental and official immunities.

II. WHY STUDY THE STATE CONSTITUTION

As will be demonstrated, the Constitution of Maryland and the Constitution of the United States have been construed similarly with

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² The following matters are beyond the scope of this article: (a) access to relief through administrative agency proceedings, criminal prosecutions of violators of rights, and other means of relief such as publicity or self-help; and (b) timing limitations on access to judicial relief such as abatement, abstention, and exhaustion. The timing limitations of mootness and ripeness will, however, be discussed.
respect to many aspects of access to judicial relief and the limitations thereon for violations of individual rights. Nonetheless, to the extent that state law is different than federal law or may become different in the future by constitutional amendment, judicial interpretation, or statutory revision, the study of state constitutional law is of great utility for several reasons.

First, state law may govern cases adjudicating state constitutional rights in state courts. As was noted in the earlier article in this law review, the state constitution, rather than the federal, may provide the basis for claims involving violations of individual rights because, according to the theory of federalism, state law is the primary source of protection for individual rights. In addition, certain provisions of the Federal Bill of Rights have never been incorporated through the due process clause of the fourteenth amendment and therefore the state constitution affords the only protection against violation of these rights by state action. Moreover, the state constitution guarantees certain rights that are not contained in the Federal Constitution. Reliance on the state constitution may also be motivated by the fact that the Supreme Court has taken an increasingly conservative view of the nature and extent of the individual rights protected by the Federal Constitution.

When state rights are adjudicated in state courts, state law regarding access to judicial relief ordinarily applies. There are some situations, however, in which federal law may apply. For example, when the application of state law regarding access violates federal constitutional rights such as due process or equal protection, federal law governs access to judicial relief. Federal law also applies when the application of state law impinges on the immunity of the federal government or of federal officials and is, therefore, preempted by federal constitutional, statutory, or common law provision. In addition, when the Supreme Court reviews the federal questions involved in either of the two situations above, the federal law of access to judicial relief controls.

Second, state law regarding access to judicial relief may govern in cases in which federal constitutional rights are adjudicated in state courts. In most cases, state and federal courts have concurrent

3. Rees, supra note 1, at 299—300.
4. Id. at 300.
5. Id. at 301.
6. Id.
7. When a federal official is sued, the case may be removable to federal court under 28 U.S.C. § 1442 or § 1442a (1976).
9. See Ferri v. Ackerman, 444 U.S. 193, 202 (1979) (dictum) (federal official may be immune under federal law); notes 180, 197, 200 & 217 infra.
jurisdiction to hear federal claims. To the extent that federal courts are viewed as more hostile than state courts, either because of stricter limitations on access to judicial relief or because of unfavorable decisions on the merits, state courts may increasingly be used to litigate federal rights.

When federal rights are adjudicated in state courts, both state and federal law regarding access to judicial relief may apply. State law dealing with subject matter jurisdictional requirements ordinarily controls. By definition, whether a cause of action exists is de-

14. Of course, there may be other reasons, procedural or practical, for a litigant to select state courts. See C. WRIGHT, FEDERAL COURTS § 31 (3d ed. 1976); Shapiro, Federal Diversity Jurisdiction, 91 HARV. L. REV. 317, 327–30 (1977).
15. Many of these cases may be removed to federal court. See, e.g., 28 U.S.C. §§ 1441, 1442 (1976).
16. See Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 262 n.8 (1977) (dictum). See also 16 C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, FEDERAL PRACTICE AND PROCEDURE § 4024 (1977). When state procedures are more restrictive of federal substantive rights than are federal procedures, however, federal procedures may be required even in state court. See Dice v. Akron, Canton & Youngstown R.R., 342 U.S. 359 (1952) (jury trial right in Federal Employers Liability Act case in state court). When the case involves a federal claim, the federal constitutional power to control procedures in state courts has been questioned. See P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 571 (2d ed. 1973). It has been suggested that a determination of whether state or federal procedures are to apply depends upon a balancing of the state interest in the orderly, efficient, and consistent administration of justice with the federal interest in preventing destruction of federal rights in the name of local procedure. 16 C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, supra, at § 4021. Cf. Erie R.R. v. Tompkins, 304 U.S. 64 (1938) (balancing of state and federal interests in diversity cases in federal courts).

The language of Supreme Court precedents regarding whether state or federal limitations on access to judicial relief apply leaves a confused picture. 16 C. WRIGHT, A. MILLER, E. COOPER & E. GRESSMAN, supra, at § 4023. Moreover, those precedents were decided before Henry v. Mississippi, 379 U.S. 443 (1965), which held that, at least for purposes of Supreme Court review, state procedures restricting federal substantive rights were adequate only when those procedures clearly served legitimate state interests that could not be substantially served by other alternatives less restrictive of the federal rights. Of course, Henry may also be described as a way of balancing state and federal interests.

It is questionable whether state law, if more restrictive than federal law, might be considered as "adequate and independent grounds" barring Supreme Court review of the claim of federal right. See Herb v. Pitcairn, 324 U.S. 117 (1945) (describing the adequate and independent state ground doctrine). See also Henry v. Mississippi, 379 U.S. 443 (1965) (distinguishing between substantive and procedural state grounds). So far, the Supreme Court has not considered more restrictive state limitations as "adequate and independent grounds" for upholding a state court judgment in a case in which federal rights are
terminated under federal law. The immunity of the federal and state governments and of federal and state officials generally is governed by federal law. Federal subject matter jurisdictional requirements apply when Supreme Court review of a state court judgment is sought and granted.  

Third, state law regarding access may control in cases in which state constitutional rights are adjudicated in federal courts. These cases include diversity cases, federal question cases in which questions of state rights are raised as pendent or ancillary claims, cases removed from state to federal court, and cases in which the Supreme Court reviews state court judgments. When state rights are adjudicated in federal courts, the law regarding access to judicial relief is mixed. Federal law concerning subject matter jurisdiction and the immunities of the federal and state governments ordinarily applies. Whether a cause of action exists, by definition, is governed by state law. With respect to the immunities claimed. See Liner v. Jafco, Inc., 375 U.S. 301 (1964) (dismissed for mootness); Allied Stores, Inc. v. Bowers, 358 U.S. 522 (1959) (dismissed for lack of standing); Staub v. Baxley, 355 U.S. 313 (1958) (same); In re Summers, 325 U.S. 561 (1945) (dismissed for want of adverse parties); General Oil Co. v. Crain, 209 U.S. 211 (1908) (sovereign immunity).

As to the immunity of the federal government and federal officials, see notes 180, 197, 200 & 217 infra. As to the immunity of state governments, see General Oil Co. v. Crain, 209 U.S. 211 (1908), and state officials, see Martinez v. California, 444 U.S. 277, 284 (1980). State law regarding the immunities of the state government or of state governmental officials may be relevant when those immunities are less protective than federal immunities and when the federal immunities are not of constitutional stature. Cf. Illinois v. City of Milwaukee, 406 U.S. 91, 107—08 (1972) (dictum) (in a federal question case in federal court stricter state law may inform federal common law with respect to pollution of interstate waters).


See notes 7 & 15 supra.

See notes 10 & 18 and accompanying text supra.


Under the rule of Erie R.R. v. Tompkins, 304 U.S. 64 (1938), there may be a distinction between substantive and remedial aspects of the cause of action. Whether a state constitution confers a right would be a substantive matter, governed by state law; whether an equitable remedy exists for the violation of such a right would be a procedural matter, governed by federal law, even if the remedy was not available in state courts. Guaranty Trust Co. v. York, 326 U.S. 99, 105—07 (1945). Whether the availability of other, non-
ties of governmental officials, federal law applies as to federal officials, and state law applies as to state officials.

Fourth, although federal law regarding access to judicial relief ordinarily applies when federal rights are adjudicated in federal courts, state law may govern in cases removed from state to federal court, in cases in which the Supreme Court reviews state court judgments, and even in cases originally brought in federal court. For example, state law may apply when it is incorporated by federal law or when there is no relevant federal law. In addition, state law may control when the immunities of the state government or of state government officials under state law are less protective than those immunities under federal law, and when the federal immunities are not of constitutional stature.

Therefore, both federal and state constitutional law should be examined, not only as it relates to the substantive aspects of a case involving individual rights, but also as it relates to the law of access to judicial relief. A consideration of the rules of access in federal and state courts should aid the determination of whether a state or federal forum is to be used to litigate a particular constitutional claim. The rules relating to access will be considered below after examining the power of judicial review, its sources, and its various aspects.

III. JUDICIAL REVIEW OF ALLEGED VIOLATIONS OF CONSTITUTIONAL RIGHTS

The power of judicial review, that is, the power of courts to declare governmental acts unconstitutional, is well established in Maryland. The first statement of that power by the Court of Ap-
peals of Maryland in Whittington v. Polk\textsuperscript{32} preceded the Supreme Court's decision in Marbury v. Madison.\textsuperscript{33}

Despite its long-standing acceptance in Maryland, in other states, and in the federal system, the doctrine of judicial review is of continuing interest for a number of reasons. First, if judicial review is not constitutionally proper, it cannot be legitimized by the mere passage of time and should be either expressly adopted by constitutional amendment or overruled by the courts or by constitutional amendment.\textsuperscript{34} Second, to the extent that there is doubt about the legitimacy of judicial review, the courts may tend to limit the cases they will consider by their definitions of the case or controversy doctrine and by rules of judicial self-restraint.\textsuperscript{35} Third, to the extent that there is that doubt, the courts may exercise greater deference to the judgment of other branches of government — federal and state — such as by a presumption of constitutionality and by review against a rational basis standard rather than one of strict scrutiny.\textsuperscript{36} Fourth, so long as the power of the courts to review governmental acts, particularly those of the legislative branches, remains open to question, legislators may limit the statutory jurisdiction of the courts.\textsuperscript{37}

Although the theoretical bases for an implied power of judicial review in the constitutions of Maryland and the United States are similar in some respects, they differ in others. The similarities include the reliance in both Whittington and Marbury on the nature of a written constitution as paramount law, the nature and duty of the judiciary to say what the law is, and particular constitutional provisions as reflecting the intent of the framers to establish the power of judicial review.\textsuperscript{38} With respect to the differences between the constitutions of Maryland and the United States, some of the disparities suggest a firmer basis for judicial review in the state constitution and others suggest a firmer basis in the Federal Constitution.

\textsuperscript{32} 1 H. & J. 236 (Md. 1802) (dictum). The first holding was in State v. Dashiell, 6 H. & J. 268 (Md. 1824). Perkins v. Eakridge, 278 Md. 619, 366 A.2d 21 (1976), a recent restatement of the power of judicial review, considered the retroactivity of a determination of unconstitutionality.

\textsuperscript{33} 5 U.S. (1 Cranch) 137 (1803).

\textsuperscript{34} R. Berger, Congress v. The Supreme Court 208—9 (1969) [hereinafter cited as Berger].


\textsuperscript{36} G. Gunther, Cases and Materials on Constitutional Law 24 (9th ed. 1975).

\textsuperscript{37} L. Tribe, American Constitutional Law 33 (1978).

\textsuperscript{38} Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176—80 (1803); Whittington v. Polk, 1 H. & J. 236, 242—46 (Md. 1802). Note that both constitutions also establish an independent judiciary, arguably presupposing judicial review and minimizing retaliation thereto by the coordinate branches. U.S. Const. art. III, § 1 (term during good behavior and no diminution of salary); Md. Const. of 1776, art. XL and Md. Const. of 1776, Decl. of Rights art. XXX (term during good behavior and secure salaries). Cf. Md. Const. art. IV, §§ 3, 14, 24, 41H and Md. Const. Decl. of Rights art. 33 (15 year term unless discharge for inability and no diminution of salary). See generally Berger, supra note 34, at 117.
The Constitution of Maryland affords a sounder basis for judicial review than the Constitution of the United States in the following respects. First, the state constitution, unlike its federal counterpart, originally provided that the constitution could not be altered, changed, or abolished by the legislature except as specifically prescribed. Second, an express separation of powers provision is included in the state constitution, while that doctrine is only impliedly included in the Federal Constitution. Third, Maryland’s constitution makes state legislative and executive officials accountable for their conduct as trustees of the public. Fourth, judges in Maryland are required by the state constitution to have legal training, presumably making them better qualified than others to decide legal and constitutional questions. Fifth, the state constitution includes an express provision making the judgment of the highest court final and conclusive against the legislature and executive, while finality is only implied in the Federal Constitution. Sixth, the state constitution includes a receiving clause, which declares what existing law is to continue in force, directs the
judiciary as to what law to apply, and affirms the authority of the legislature to make future changes. 48

On the other hand, the Constitution of the United States in certain respects provides a more substantial basis for judicial review than the Constitution of Maryland. First, the Federal Constitution, unlike the state constitution, defines and limits the powers of the legislature. 49 Second, the Federal Constitution can be amended only by the people, 50 while the state constitution originally provided for amendment by the legislature only. 51 Third, unlike the original state constitution, the Federal Constitution conferred, in broad terms, "judicial power" on the courts. 52 Fourth, power to hear cases "arising under this Constitution" is expressly granted to the courts in the Federal Constitution. 53 Fifth, the Federal Constitution expressly makes effective not every law, but only laws made "in pursuance" of the Constitution. 54 Sixth, under the Federal Constitution, judges are required to take an oath to support the Constitution, which was not the case in the original state constitution. 55 Seventh, the Framers of the Federal Constitution in 1787, unlike the framers of the original state constitution in 1776, were influenced by post-revolutionary


49. U.S. Const. art. I, §§ 8, 9. Compare Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803) (powers of legislature are defined and limited) with Whittington v. Polk, 1 H. & J. 236, 246 (Md. 1802) (powers of legislature are not particularly or specifically defined, but conferred under a general grant). Of course, both constitutions contain express limitations on the power of the legislature, see, e.g., U.S. Const. art. I, § 9; Md. Const. art. III, §§ 36, 40, 55, recognize the constraints arising from our system of federalism, U.S. Const. amend. X; Md. Const., Decl. of Rights art. 2, and provide for rights of individuals against governmental actions, Rees, supra note 1, passim.

50. U.S. Const. art. V (proposed amendments ratified by the people through state legislatures or state conventions).


52. U.S. Const. art. III, § 1. Although the Constitution of Maryland of 1776 was silent as to judicial power, the current constitution vests it in the courts. Md. Const. art. IV, § 1. The judicial power contemplated was that exercised by the English courts at common law, including, by hypothesis, judicial review. E.g., Dr. Bonham's Case, 77 Eng. Rep. 646, 652 (1610). See generally Berger, supra note 34, at 209—12.

53. U.S. Const. art. III, § 2, cl. 1. Some commentators have viewed the grant as conferring the power of judicial review. E.g., Berger, supra note 34, at 198—222.


55. U.S. Const. art. VI, cl. 3. See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803). The original state constitution did not include a requirement that judges take an oath to support the constitution. Cf. Md. Const. of 1776, art. L (oath to appoint clerks impartially); Md. Const. of 1776, art. LII (oath not to profiteer); Md. Const. of 1776, Decl. of Rights art. XXV (oath of support and fidelity to the state and declaration of a belief in the Christian religion). See also Law of April 20, 1777, ch. 5, 1777 Md. Laws (oath to do equal right and justice according to law). The current state constitution includes a requirement that judges take an oath to support the Constitution of the United States and the constitution and laws of Maryland. Md. Const. art. 1, § 6.
abuses of state legislative power, by state courts exercising judicial review, and by legislative actions taken in retaliation to judicial review.56

Whatever the bases, state court judicial review under the constitutions of both Maryland and the United States has three different aspects. The first concerns the role of state courts as concurrent forums for the determination of federal constitutional questions. The Constitution of the United States authorizes state courts to pass on the validity of federal laws and treaties under the Federal Constitution.57

A second facet of judicial review in state courts relates to the concept of supremacy. The supremacy clauses of both the federal and state constitutions give state courts the authority to rule on the validity of state constitutions and laws under the Constitution of the United States. Of course, the supremacy clauses of both constitutions make supreme not only the Federal Constitution and Supreme Court interpretations of that Constitution, but also

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56. BERGER, supra note 34, at 34—46. As suggested in the text, the second, third, sixth, and seventh differences between the two constitutions no longer exist. The Constitution of Maryland now provides, respectively, that the constitution can be amended only by the people, art. XIV, that the "judicial power" is conferred in broad terms on the courts, art. IV, § 1, and that judges take an oath to support the constitution, art. I, § 9. Of course, the history of post-revolutionary judicial review and legislative retaliatory actions was available to the framers of the current state constitution.

57. Under the supremacy clause, U.S. CONST. art. VI, cl. 2, state judges are bound by the Federal Constitution, laws, and treaties. According to Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), the supremacy clause requires courts to give the Constitution primacy over other laws. See also BERGER, supra note 34, at 266—79. Berger concludes that the Framers of the Constitution intended state courts to have the power to review the constitutionality of acts of Congress and of treaties and that the first Congress assumed state courts had that power when it left the great bulk of federal question jurisdiction to state courts and provided for review of such cases (including judgments of state courts that a federal statute or treaty was invalid) by appeal to the Supreme Court.

Although the Supreme Court has affirmed state court determinations that federal laws were unconstitutional, see, e.g., Coyle v. Smith, 221 U.S. 559 (1911), a Supreme Court decision holding that state courts have the power to declare federal laws unconstitutional has not been found. No Court of Appeals of Maryland decision, holding that a federal law was unconstitutional, has been found. The court of appeals, however, after assuming it had the power to review the constitutionality of federal law, has upheld challenged federal law. See, e.g., State v. Siegel, 266 Md. 256, 292 A.2d 86 (1972).

58. U.S. CONST. art. VI, cl. 2.
59. MD. CONST., DECL. OF RIGHTS art. 2.
60. See Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) (supremacy over state statute); Davidson v. Miller, 276 Md. 54, 344 A.2d 422 (1975) (supremacy over state constitution).
federal statutes and treaties. Both constitutions require that state courts give federal law precedence when there is a conflict with state constitutions, laws, acts of the executive, or acts of county, municipal, and other local units of government under powers delegated by the state.

The final aspect of judicial review in state courts is the power of state courts to interpret the Constitution of Maryland. The state constitution authorizes the state judiciary to decide on the validity of state governmental acts in light of the mandates of the Constitution of Maryland. Governmental acts subject to review include acts of the legislature, acts of the executive, acts of the judiciary (common law) and acts of county, municipal, and other local units of government under powers delegated by the legislature.

In theory, the power of judicial review is broad. In practice, however, it is limited by a number of factors, including the requirements of subject matter jurisdiction and a cause of action and the existence of governmental and official immunities.

IV. CONSTITUTIONAL LIMITATIONS ON JUDICIAL REVIEW

A. Subject Matter Jurisdiction

The constitutional aspects of the subject matter jurisdiction of the federal courts and of Maryland state courts may be compared using four factors: (1) whether jurisdiction may be exercised only by courts named in the constitution; (2) whether the constitution specifies only certain categories of cases within the courts' jurisdic-

68. See note 32 and accompanying text supra.
69. See Bucholtz v. Hill, 178 Md. 250, 13 A.2d 348 (1940). See also Department of Natural Resources v. Linchester Sand & Gravel Corp., 274 Md. 211, 334 A.2d 514 (1975).
70. See Pope v. State, 384 Md. 309, 396 A.2d 1054 (1979) (common law crime of misprision of a felony abolished); MD. CONST., DECL. OF RIGHTS art. 5.
tion; (3) whether the jurisdiction of the courts must be expressly provided by statute; and (4) whether the jurisdiction of the courts is limited by justiciability doctrines.\textsuperscript{72}

1. \textit{Courts Named in the Constitution.} The federal judicial power, with one exception, need not be exercised by courts named in the Constitution of the United States.\textsuperscript{73} In contrast, the state judicial power, with one exception, may be exercised only by courts named in the Constitution of Maryland.\textsuperscript{74}

2. \textit{Constitutional Categories of Cases.} Federal courts are limited to hearing cases within categories described in the Constitution of the United States.\textsuperscript{75} On the other hand, the state courts’ jurisdiction is not limited by any reference to categories of cases described in the Constitution of Maryland.\textsuperscript{76}

3. \textit{Jurisdiction Expressly Provided by Statute.} Except for the original jurisdiction of the Supreme Court,\textsuperscript{77} the jurisdiction of the federal courts must be described by statute.\textsuperscript{78} The jurisdictions of

\textsuperscript{72} Other factors, such as original versus appellate jurisdiction and exclusive versus concurrent jurisdiction, are largely irrelevant to this study.

\textsuperscript{73} The federal judicial power is vested in “inferior courts” to be established by Congress and in “one supreme Court.” \textit{U.S. Const.} art. III, § 1, cl. 1. See also \textit{U.S. Const.} art. I, § 8, cl. 9. The principal inferior courts established by Congress are the courts of appeal, 28 U.S.C. §§ 41, 43 (1976 & Supp. III 1979), and the district courts, 28 U.S.C. §§ 81–132 (1976 & Supp. III 1979). Congress has created other inferior courts that exercise the federal judicial power under article III. See, e.g., 28 U.S.C. § 171 (1976) (Court of Claims); id. § 211 (Court of Customs and Patent Appeals); id. § 251 (Customs Court). Congress, acting under powers granted by other articles of the Constitution, has created other inferior courts. See, e.g., \textit{Palmore v. United States}, 411 U.S. 389 (1973) (local courts for the District of Columbia pursuant to art. I, § 8, cl. 17); Only the Supreme Court, courts of appeal, and district courts are considered in this study.

\textsuperscript{74} Shell Oil Co. v. Supervisor of Assessments, 276 Md. 36, 44, 343 A.2d 521, 526 (1975) (noting the contrast between federal and state requirements). The state judicial power is vested in courts specifically named in \textit{Md. Const.} art. IV, §§ 1, 27 — a court of appeals, circuit courts, orphans’ courts, courts for Baltimore City (the Supreme Bench, the Superior Court, the Court of Common Pleas, the Baltimore City Court, the Circuit Court, and the Criminal Court), and a district court — and in the intermediate courts of appeal, described in \textit{Md. Const.} art. IV, §§ 1, 14A, pursuant to which the Court of Special Appeals of Maryland was established by \textit{Md. Civ. & Jud. Proc. Code Ann.} § 1-401 (1980). All the state courts except for the orphans’ courts are considered in this study.

\textsuperscript{75} See \textit{Hodgson v. Bowerbank}, 9 U.S. (5 Cranch) 303 (1809). The most important categories described in the Constitution are cases arising under the Constitution, laws, or treaties of the United States, cases to which the United States is a party, and cases between citizens of different states. \textit{U.S. Const.} art. III, § 2, cl. 1.

\textsuperscript{76} See \textit{Md. Const.} art. IV, §§ 1, 14A, 27, 41A.


The requirement is of constitutional significance. Exercise by the federal courts of
the Court of Special Appeals of Maryland and the district court, unlike the jurisdictions of the state circuit courts and the courts for Baltimore City, must be described by statute. Whether the jurisdiction not described by statute would interfere with constitutional grants of power to Congress to establish inferior federal courts and to make exceptions to the appellate jurisdiction of the Supreme Court, see American Fire & Cas. Co. v. Finn, 341 U.S. 6, 17-18 (1951), and would possibly interfere with a constitutional reservation of power in the states and their courts, see Healy v. Ratta, 292 U.S. 263, 270 (1934).


81. Md. Const. art. IV, § 20 provides in part:

   A Court shall be held in each County of the State to be styled the Circuit Court for the County, in which it may be held. The said Circuit Courts shall have and exercise, in the respective counties, all the power, authority and jurisdiction, original and appellate, which the present Circuit Courts of this State now have and exercise, or which may hereafter be prescribed by law.

Historically, the jurisdiction of the circuit courts has been broad. Earlier constitutions incorporated the jurisdiction of the then-existing county courts. See Md. Const. of 1864, art. IV, § 25; Md. Const. of 1851, art. IV, § 8; Md. Const. of 1776, § 1 of 1805 amendment. That jurisdiction was initially described by indirection much the same as that of English common law courts. See Md. Const. of 1776, Decl. of Rights art. III (similar to the present Decl. of Rights art. 5). See also Kisner v. State, 209 Md. 524, 530, 122 A.2d 102, 105 (1956).

That the jurisdiction of the circuit courts is granted by Md. Const. art. IV, § 20 and need not be described by statute is suggested in Md. Cts. & Jud. Proc. Code Ann. § 1-501 (1980), which provides:

   The circuit courts are the highest common-law and equity courts of record exercising original jurisdiction within the State. Each has full common-law and equity powers and jurisdiction in all civil and criminal cases within its county, and all the additional powers and jurisdiction conferred by the Constitution and by law, except where by law jurisdiction has been limited or conferred exclusively upon another tribunal.

See also First Federated Commodity Trust Corp. v. Commissioner of Sec., 272 Md. 329, 335, 322 A.2d 539, 543 (1974); Moore v. Moore, 218 Md. 218, 220 n.1, 145 A.2d 764, 765 n.1 (1958); Adkins, Code Revision in Maryland, 34 Md. L. Rev. 7, 16 (1974) (provisions in the Maryland Code regarding organization of the circuit courts are informationally unnecessary because they are contained in the state constitution and were included in the code merely for symmetry). But cf. Ex parte McCardle, 74 U.S. (7 Wall) 506 (1868) (power of Congress to make exceptions to appellate jurisdiction of Supreme Court implies a requirement of affirmative statutory description of such jurisdiction).


82. Md. Const. art. IV, §§ 28–30 describe the jurisdictions of the courts for Baltimore City in terms of the jurisdictions exercised by the then-existing courts of Baltimore City. Earlier constitutions described the jurisdictions of those existing courts. See Md. Const. of 1864, art. IV, §§ 33–36; Md. Const. of 1851, art. IV, §§ 10, 11, 13. The legislature has recognized that the jurisdictions of the courts for Baltimore City are as broad as the jurisdiction-
tion of the Court of Appeals of Maryland must be described by statute is open to debate.\textsuperscript{83}

4. \textit{Justiciability Limitations}. Both federal and state courts are limited by doctrines of justiciability which are, at least arguably, of constitutional origin.\textsuperscript{84} Comprised of similar elements, both the federal and the state doctrines prohibit advisory opinions, moot cases, and political questions. In addition, both require adverse parties, parties with standing, and ripe issues.

(a) \textit{Sources}. Although the constitutional sources of the federal and state justiciability doctrines are similar, the extents to which the
doctrines are constitutionally-based, rather than policy-based, are different.

Regarding constitutional sources, the federal doctrine is based on the terms "cases" and "controversies" in Article III, Section 2, Clause 1 of the Constitution of the United States, which reflects both separation of powers and historical limitations on judicial power. The state doctrine is based on the separation of powers principle in Article 8 of the Declaration of Rights and the related idea of "judicial power" mentioned in Article IV, Section 1 of the Constitution of Maryland.

Regarding the extent to which the justiciability doctrines are based on the respective constitutions, rather than on policy, the federal doctrine is a blend of constitutional requirements and policy considerations which are ordinarily not easily distinguishable. In contrast, the state doctrine has elements clearly attributable either to the Constitution of Maryland or to policy. The limitations that are of constitutional origin are the prohibitions against advisory opinions regarding legal questions pending before coordinate branches of government and political questions. The policy constraints include bans against advisory opinions rendered in judicial pro-

85. Flast v. Cohen, 392 U.S. 83, 94-95 (1968). Apparently, the term "judicial power" in U.S. Const. art. III, §§ 1 & 2 has not been a source of the justiciability doctrine.

86. Reyes v. Prince George's County, 281 Md. 279, 295, 380 A.2d 12, 21 (1977). The Constitution of Maryland contains no express language limiting judicial power to "cases" or "controversies." Id. at 290, 380 A.2d at 18.

Although Reyes appeared to limit the discussion of the justiciability doctrine to suits for declaratory judgments, see id. at 287-89, 380 A.2d at 17-18, the doctrine seems to apply to other types of cases. Supreme Court cases, cited by the Court of Appeals of Maryland as persuasive authority, see id. at 283, 285, 286, 289, 380 A.2d at 14, 15-16, 18, have applied the justiciability doctrine to other kinds of cases. The court of appeals previously applied the doctrine in cases in which injunctive relief, as well as declaratory relief, was demanded. E.g., Hammond v. Lancaster, 194 Md. 462, 471-72, 71 A.2d 474, 477 (1950). In addition, the court has applied the doctrine in cases in which declaratory relief was not sought, e.g., Sansbury v. Director of Patuxent Inst., 237 Md. 545, 548, 206 A.2d 807, 808 (1965) (post-conviction relief), and has opined in dicta that the doctrine applies generally, e.g., Liberto v. State's Attorney, 223 Md. 356, 361, 164 A.2d 719, 722 (1960). Of course, Reyes may simply reflect the observation that suits for declaratory relief often raise the most doubts about justiciability, see Aetna Life Ins. Co. v. Haworth, 300 U.S. 227 (1937), and the fact that the Maryland Uniform Declaratory Judgment Act expressly requires satisfaction of certain elements of justiciability, Md. Cts. & Jud. Proc. Code Ann. § 3-409(a) (1980).


89. See id. at 295, 380 A.2d at 21 (separation of powers principle in Md. Const., Decl. of Rights art. 8 prohibits the courts from performing nonjudicial functions).
ceedings and moot questions, and requirements of adverse parties, standing, and ripeness.

Whether the federal and state justiciability doctrines are based on the respective constitutions, rather than on policy, has a number of procedural and substantive implications. Procedurally, when a party fails to satisfy the justiciability doctrines, dismissal of the case is mandatory if the doctrines are constitutionally-based and discretionary if policy-based. To the extent that constitutionally-based elements of justiciability touch on a court's subject matter jurisdiction, while policy-based elements do not, the distinction has significance for the rules regarding waiver of the preliminary defense of lack of subject matter jurisdiction, consideration of pendent and ancillary claims, appellate review of subject matter jurisdiction, although the issue was not raised at trial, and collateral attack because of a lack of subject matter jurisdiction. Substantively, whether the federal and state justiciability doctrines are based upon the respective constitutions, rather than on policy, determines whether the doctrines may be substantially modified only by amendment of the constitution or whether they may be modified by the courts or by the legislature.

91. Id. at 292, 293, 380 A.2d at 20 (dictum).
92. Id. at 298–99, 380 A.2d at 23.
93. See id. at 296 n.14, 380 A.2d at 22 n.14.
94. Id. at 292, 380 A.2d at 20 (dictum that the rule against decision of abstract issues is based on policy, not constitutional limitations).
96. This distinction is suggested by the cases, but the consequences have not been clearly articulated. Baker v. Carr, 369 U.S. 186, 198 (1962); see Reyes v. Prince George's County, 281 Md. 279, 292, 294–95, 380 A.2d 12, 19, 20 (1977).
97. FED. R. CIV. P. 12(g), (h); MD. R.P. 323(b).
103. Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979). But cf. Reyes v. Prince George's County, 281 Md. 279, 288 n.16, 380 A.2d 12, 23 n.16 (1977) (because of separation of powers doctrine, legislature may not require courts to decide moot or abstract questions). The Reyes limitation on legislative power may be criticized on two grounds. First, Reyes also held that a court's decision in regard to a moot or an abstract question would not raise a separation of powers problem and, therefore, was a matter of policy, not
(b) **Elements.** The federal and state justiciability doctrines contain similar elements with similar contents. The elements of both justiciability doctrines include advisory opinions, adverse parties, standing, mootness, ripeness, and political questions. Each will be discussed below with an emphasis upon the differences that exist between the state and federal doctrines.

(i) **Advisory Opinions.** Generally, advisory opinions are prohibited by both federal and state law. Although the Court of Appeals of Maryland has noted the similarity between federal and state law on the subject, the court has drawn a distinction between two types of advisory opinions. The first type embraces cases that involve legal questions pending before a coordinate branch. The second type relates to questions in judicial proceedings in which there is no actual controversy between the parties. According to the court of appeals, state courts may render advisory opinions in a narrow class of cases when compelling circumstances are present.

(ii) **Adverse Parties.** Both federal and state law generally require adverse parties, not feigned, fictitious, friendly, or collusive suits. Although the Court of Appeals of Maryland has noted the similarity between federal and state law on the subject, Maryland’s position appears less rigid in that state courts may adjudicate a suit, absent adverse parties, in a narrow class of cases characterized by certain compelling circumstances.

of constitutional significance. *Id.* at 292. The anticipated response to this first criticism, that the policy issue is one to be decided by the courts, not the legislature, leads to the second criticism. Md. Const. art. III, § 56, giving the legislature power to enact laws “necessary and proper” for carrying into execution the powers vested by the constitution in the courts (or other departments of government), appears to be one of the checks and balances that is an express exception to the separation of powers doctrine. The anticipated response to this second criticism is that the issue is so integral to judicial power that it could not be subject to legislative power, absent an express constitutional provision. Cf. National League of Cities v. Usery, 426 U.S. 833 (1976) (limitation of federalism on Congress’ power).

108. *Id.*
109. *Id.* at 299–300, 380 A.2d at 23. Cf. Secretary, Maryland Dep’t of Human Resources v. Wilson, 286 Md. 639, 647–48, 409 A.2d 713, 718–19 (1979) (under exceptional circumstances a court may, in dismissing an appeal, express as dicta its views on the merits).
112. The requirement is a narrow and technical one under both federal and state law. See *Reyes v. Prince George’s County*, 281 Md. 279, 288 n.4, 380 A.2d 12, 17 n.4 (1977), and sources cited therein.
113. See *id.* at 283, 285, 380 A.2d at 15, 16.
114. *Id.* at 299–300, 380 A.2d at 23–24.
(iii) **Standing.** “A personal stake in the outcome of the controversy” is required by both federal and state law. The Court of Appeals of Maryland has implicitly accepted Supreme Court opinions on the subject as persuasive authority.

The actual or threatened injury required as part of the “personal stake” includes a wide variety of interests, not just legal rights, under both federal and state law. However, the federal requirement of a nexus between the alleged injury and the challenged conduct or the judicial relief requested has not yet been considered under state law.

Both the Supreme Court and the Court of Appeals of Maryland have spoken as to the standing of a person in a particular role or status. Only federal law has the special two-part nexus requirement in federal taxpayer suits. Both federal and state law permit an action by a state or local taxpayer upon a showing of pocketbook injury. A suit by a person alleging injury only by reason of being a citizen is barred under federal and state law. Neither federal nor state law has definitively resolved the issue of whether a legislator has standing. Both federal and state law permit actions by an administrative official, charged with enforcing a possibly unconstitutional statute, who is faced with the dilemma of either losing the job (for not enforcing the statute) or violating the oath to uphold the constitution (by enforcing the statute). The ability of

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political units to sue higher political units on behalf of citizens is limited under federal and state law.

Both federal and state law generally prohibit a party from asserting the rights of a third person. There are exceptions. Federal law permits an injured party to assert the rights of certain third persons, as well as its own rights, in a variety of situations; state law in the area is undeveloped. Both federal and state law permit standing in free expression, vagueness, and overbreadth cases, where a person may challenge the validity of a statute on its face although it may be proper as applied to the challenger.

(iv) Mootness. Generally, mootness at any stage bars a case from being heard in either federal or state courts. The Court of Appeals of Maryland has indicated that federal and state law are similar in this respect. There are exceptions to the mootness bar. Both federal and state law permit an otherwise moot case to be heard if the issue is "capable of repetition, yet evading review." Federal law permits a case to be heard when mootness was caused by voluntary cessation of allegedly illegal conduct; state law on the subject is unclear. In addition, the court of appeals has held that state courts may adjudicate an otherwise moot controversy in certain cases of urgent and important public concern.

130. Massachusetts v. Mellon, 262 U.S. 447 (1923) (a state, as parens patriae, may not sue the United States).
131. Duvall v. Lacy, 195 Md. 138, 142—43, 73 A.2d 26, 27—28 (1950) (a municipality, as parens patriae, may not sue the state).
134. The situations include those in which there is a special relationship between the party and the third person. E.g., Griswold v. Connecticut, 381 U.S. 479 (1965) (physician and patient); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) (organization and members; Barrows v. Jackson, 346 U.S. 249 (1953) (seller and buyer of property).
143. See Attorney Gen. v. Anne Arundel County School Bus Contractors Ass'n, 286 Md. 324, 327—28, 407 A.2d 749, 751—52 (1979) (cessation of allegedly illegal conduct caused mootness when cessation was, presumably, involuntary during the term of an injunction and voluntary afterward).
144. Id. at 328, 407 A.2d at 752.
(v) Ripeness. Ripe or concrete cases, as opposed to those that are abstract or hypothetical, are generally required by both federal and state law. The Court of Appeals of Maryland has noted the similarity between federal and state law on the subject. The Supreme Court has equivocated between treating ripeness as a discretionary policy matter and treating it as a mandatory constitutional requirement. The court of appeals, treating the ripeness doctrine as a discretionary policy matter, has suggested that state courts may adjudicate a suit that is not ripe in a narrow class of cases in which certain compelling circumstances exist.

(vi) Political Questions. When a case presents issues more appropriately resolved by the coordinate legislative or executive branches or by the people, rather than by the judiciary, such issues are deemed political questions and will not be heard by either federal or state courts. The Court of Appeals of Maryland has recognized that the essential nature of the political question doctrine, the separation of powers, is the same under both federal and state law. Both federal and state courts have concluded that the determination of whether or not an issue is a political question is for the judiciary, as the ultimate interpreter of the constitution. Federal law includes elaborate formulations describing political questions; state law in the area is undeveloped.

B. Cause of Action

The extent to which federal law and Maryland state law permit a cause of action for alleged violation of constitutional rights may be compared using two factors: (1) whether a remedy is expressly provided by statute or is implied in the constitution; and (2) whether damages, as well as injunctive and declaratory relief, are available for violation of constitutional rights.

152. See id. at 426—28, 180 A.2d at 663—64.
1. Remedy Expressly Provided by Statute or Implied in Constitution. Remedies for violations of federal constitutional rights\(^{156}\) are either provided expressly by statute\(^{157}\) or implied in the Constitution of the United States.\(^{158}\) Remedies for violations of state constitutional rights are implied in the Constitution of Maryland.\(^{159}\)

2. Damages as well as Injunctive and Declaratory Relief. Both federal\(^{160}\) and state\(^{161}\) law provide injunctive and declaratory relief for violation of rights under the respective constitutions. Federal law provides damages for violation of certain constitutional rights.\(^{162}\)

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156. As to the elements of a cause of action for violation of federal constitutional rights, compare Gomez v. Toledo, 100 S. Ct. 1920 (1980) (by implication) (deprivation of a constitutional right and governmental action are elements; good faith and reasonable belief constitute an affirmative defense) with Washington v. Davis, 426 U.S. 229 (1976) (discriminatory purpose or intent is an element in certain equal protection cases).


"Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."


159. See Schneider v. Fullen, 156 Md. 64, 81 A.2d 226 (1951). See also, e.g., MD. COM. LAW CODE ANN. § 12-707 (Supp. 1977) (state remedial statutes based on the police power, rather than on the power to enforce constitutional rights) (non-discrimination in credit). Cf. e.g., MD. ANN. CODE art. 49B, §§ 1-28 (1979) (state remedial statutes, based on the police power, authorizing a public cause of action) (Human Relations Commission authorized to enforce non-discrimination in public accommodations, employment, and housing).

160. The Supreme Court has assumed that injunctive relief, see Frontiero v. Richardson, 411 U.S. 777 (1973); Mitchum v. Foster, 407 U.S. 225 (1972), and declaratory relief, see Steffel v. Thompson, 415 U.S. 452 (1974); Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978), are available for violation of rights under the Constitution of the United States. The relief in Mitchum and Steffel was provided by 42 U.S.C. § 1983, (Supp. III 1979), see note 157 supra. The relief in Frontiero and Duke Power was implicitly provided by the relevant constitutional provision.


Whether state law provides damages for violation of constitutional rights is unsettled.\textsuperscript{163}

\section*{C. Immunities}

Actions for judicial review of violation of constitutional rights are subject to various governmental and official immunities\textsuperscript{164} under both federal and Maryland law.\textsuperscript{165} The immunities provided by federal and state law may be compared by considering, generally, the sources of the immunities and their contents and, specifically, the Tahoe Regional Planning Agency, 440 U.S. 391, 398 (1979). \textit{But cf} Lynch v. Household Fin. Corp., 405 U.S. 538, 552 (1972) (distinction between personal and property rights rejected in the context of actions against state government officials).

As to the availability of punitive damages, see Carlson v. Green, 100 S. Ct. 1468, 1473—74 (1980).

\textsuperscript{163} The following considerations suggest a cause of action for damages for violation of state constitutional rights. First, \textit{MD. CONST.}, DECL. OF RIGHTS art. 19 suggests, albeit somewhat circularly, that there is a remedy for such injury. Article 19 provides in pertinent part: "That every man, for any injury done to him in his person or property, ought to have remedy by the course of the Law of the land . . . ." Second, two authorities have suggested that the due process provisions of the state constitution support a private cause of action for damages. See Davidson v. Koerber, 454 F. Supp. 1256 (D. Md. 1978) (cause of action under DECL. OF RIGHTS art. 23, now art. 24, is analogous to cause of action under 42 U.S.C. § 1983 (Supp. III 1979)); \textit{Niles}, supra note 39, at 192—93 (1915) (due process and separation of powers provisions of the constitution would have secured compensation in cases of eminent domain even before a just compensation provision was adopted). Third, other remedies for violation of constitutional rights have been implied. See Weyler v. Gibson, 110 Md. 636, 73 A. 261 (1909) (ejectment); notes 159 & 161 supra (injunctive and declaratory relief). Note that the existence of other remedies was one basis for the decision in Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), the first federal case to imply a cause of action for damages for violation of federal constitutional rights. Fourth, many of the rights in the Constitution of Maryland have been construed similarly to the rights in the Constitution of the United States. See generally Rees, supra note 1, at 326. Certain rights in the Federal Constitution support a private cause of action for damages. See note 162 supra. Cf. 42 U.S.C. § 1983 (Supp. III 1979). Fifth, to deny a cause of action for damages in state courts for violation of state constitutional rights would be anomalous in view of the availability of a cause of action for damages in state courts for violation of federal constitutional rights. See \textit{Testa} v. \textit{Katt}, 330 U.S. 386 (1947).

On the other hand, the following considerations suggest that no cause of action for damages for violation of state constitutional rights may be available. First, there exists no state statute analogous to 42 U.S.C. § 1983 (Supp. III 1979), even though the legislature has broad powers to execute duties imposed by the state constitution on the state government. See \textit{MD. CONST.} art. III, § 56. Presumably, those duties include protecting the rights granted to individuals in the constitution. Second, there exists no state tradition of implying in statutes causes of action for damages. See, e.g., Dillon v. Great Atl. & Pac. Tea Co., 43 Md. App. 161, 403 A.2d 406 (1979). \textit{But cf} Aravanis v. Eisenberg, 237 Md. 242, 206 A.2d 148 (1965) (the violation of a statute, which is a cause of injury, is evidence of negligence). \textit{See also} Pitman v. Washington Suburban Sanitary Comm'n, 279 Md. 313, 316—17, 368 A.2d 473,476 (1977). Note that the federal tradition of implying causes of action for damages in statutes was one of the bases for the decision in Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).

\textsuperscript{164} Regarding the immunities of foreign governments, see 28 U.S.C. §§ 1602—1607 (Supp. III 1979).

\textsuperscript{165} It is unclear whether the immunities are the same in cases alleging violation of constitutional rights as in cases alleging violation of other rights (statutory or common law). This distinction was noted, but decision on the issue was reserved, in Butz v. Economou, 438 U.S. 478, 489, 495 (1978) (executive immunity). \textit{See also} Pierson v. Ray, 386 U.S. 547, 555 (1967). The Court of Appeals of Maryland has been silent on the issue.

Whether immunities should be abolished both in cases alleging violation of constitu-
immunities afforded governmental entities and governmental officials.

1. General Considerations.

(a) Sources. Whether the federal and state immunity doctrines are based on the respective constitutions, rather than on common law, determines whether the doctrines may be substantially

tional rights and in other cases is beyond the scope of this article. Note, however, that, aside from the allocation of the burdens of pleading and proof, see Gomez v. Toledo, 100 S.Ct. 1920 (1980), the qualified immunity for executive officials under federal law, in effect, makes them liable for negligent or intentional violations of constitutional rights; that is, they are immunized only from strict liability.

There are good reasons to recognize the distinction by permitting a lesser immunity (or no immunity) in cases alleging violation of constitutional rights than in other cases. First, recognizing the distinction would reflect the essential role of judicial review in our system, particularly when no other judicial remedy for the constitutional wrong exists. See Bivens v. Six Unknown Named Agents, 403 U.S. 388, 409—10 (1971) (Harlan, J., concurring) (damages was the only possible remedy for illegal search and seizure).

Second, recognizing the distinction would reflect the difference between the lawmaking roles of Congress and the courts in constitutional matters and those lawmaking roles in matters not of constitutional magnitude. In constitutional matters, those roles are primarily to interpret the Constitution, not to make law. See Butz v. Economou, 438 U.S. 478, 491 n.15 (1978) (early doubt that Congress [a fortiori, the courts] could immunize federal officials from constitutional claims). But cf. id. at 500, 504 (suggestion that Congress may immunize federal officials from constitutional claims); id. at 501—02 (immunities of federal officials are largely of judicial creation). In other matters within their competences, Congress is free to make law and the courts are free to develop the common law. See generally McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

Third, recognition of the distinction would comport with holdings that at least one constitutional right, just compensation, constitutes a waiver of governmental immunity. See notes 184 & 185 infra; see also Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 704 (1949) (dictum) (judicial relief for violation of constitutional rights by governmental action).

Note that Md. Const., Decl. of Rights art. 5, which maintains in force the English common law as it existed on July 4, 1776, does not “constitutionalize” the common law, because that provision expressly authorizes the legislature to amend or repeal the common law and implicitly authorizes the courts to determine which parts of the common law are applicable in Maryland and are consistent with the constitution. State v. Buchanan, 5 H. & J. 317, 358—59 (Md. 1821).

There are good reasons, however, to believe that courts, both federal and state, will not distinguish between cases involving claims of violation of constitutional rights and other cases in deciding what immunities are to be permitted. First, many of the early, seminal immunity cases involved claims of rights not of a constitutional nature. E.g., Kilbourn v. Thompson, 103 U.S. 168, 170 (1881) (common law claim); Bradley v. Fisher, 80 U.S. (13 Wall.) 335, 337—39 (1872) (common law claim).

Second, in determining the nature of immunity in cases claiming violation of constitutional rights, the Supreme Court has looked to immunities existing at common law that were mostly developed in cases in which the claims of right were not of a constitutional nature. E.g., Pierson v. Ray, 386 U.S. 547, 555—57 (1967).

Third, under current federal law, the immunities of the federal government, state government, legislative officials, and judicial officials are identical, regardless of whether the claims are for violation of constitutional rights. Hutchinson v. Proxmire, 443 U.S. 11, 123 (1979) (dictum) (absolute immunity of legislative officials to common law claim); Stump v. Sparkman, 435 U.S. 349 (1978) (absolute judicial immunity to constitutional claim); Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1975) (absolute immunity of legislative officials to constitutional claim); Edelman v. Jordan, 415 U.S. 651 (1971) (absolute immunity of state government to constitutional claim); Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949) (absolute immunity of federal government
modified only by amendment of the constitutions or whether they may be modified by the courts or by the legislature.\textsuperscript{166}

to common law claim); Alzua v. Johnson, 231 U.S. 106 (1913) (absolute judicial immunity to common law claim); United States v. Lee, 106 U.S. 196, 204 (1883) (dictum) (absolute immunity of federal government to constitutional claim); O'Neill v. Pennsylvania, 459 F.2d 1 (3d Cir. 1972) (absolute immunity of state government to common law claim). Apparently, it is only in the immunities of executive officials that there may be a distinction. See Butz v. Economou, 438 U.S. 478, 489, 495 (1978).

Fourth, in many cases, claims of violation of constitutional rights are interwoven with other claims in one or more of several ways. For example, the facts may support claims of both constitutional and common law rights. \textit{E.g., id. at} 482–83 & n.5. In addition, most claims of violation of common law or statutory rights by the government can easily be cast in terms of claims of violation of constitutional rights, such as due process. \textit{Id. at} 522 (Rehnquist, J., concurring in part and dissenting in part). \textit{But cf.} Paul v. Davis, 424 U.S. 693 (1976) (Federal Constitution and civil rights statutes do not create a body of general federal tort law). Moreover, allowing an immunity in a case in which common law or statutory rights are involved may implicate constitutional rights of due process and equal protection, see Austin v. Mayor of Baltimore, 286 Md. 51, 66–67, 405 A.2d 265, 263 (1979) (common law negligence claim), or impairment of contracts, \textit{but cf.} Maryland Port Admin. v. I.T.O. Corp., 40 Md. App. 697, 711–12, 395 A.2d 145, 153 (1978) (no impairment in that courts were powerless to enforce a remedy because of governmental immunity). Similarly, a constitutional claim may be incorporated in a common law claim, \textit{cf.} Aravanis v. Eisenberg, 237 Md. 242, 206 A.2d 148 (1965) (violation of statute [or, by hypothesis, constitution] may be evidence of negligence), or in a statutory claim, see 28 U.S.C. \S\ 1346(b) (Supp. III 1979) (Federal Tort Claims Act makes United States liable if a private person would be liable in accordance with the law [by hypothesis, including the state constitution] of the place where the act occurred).

Fifth, in Butz v. Economou, 438 U.S. 478, 497 (1978), where the distinction was emphasized, the policy bases for executive immunity (injustice to executive exercising discretion in good faith and deterrence of decisive exercise of executive judgment) appear to apply equally to cases involving claims of violation of constitutional rights and to other claims. See \textit{id. at} 522–23, 526–28 (Rehnquist, J., concurring in part and dissenting in part).


Assuming that the courts do not distinguish between cases alleging violation of constitutional rights and other cases in deciding whatimmunities are to be permitted, the constitutional causes may be analogized to common law causes of action, such as tort or contract, to determine whether an immunity exists or to determine which statute may waive an immunity. \textit{Cf.} Williamson v. Columbia Gas & Elec. Corp., 110 F.2d 15 (3d Cir. 1939) (statutory cause of action analogized to common law form of action to determine what statutory period of limitations applied), \textit{cert denied}, 310 U.S. 639 (1940). Most of the rights protected by the Constitution appear to be tort-like rights, \textit{i.e.}, interests in liberty of person or in security of person and property, see W. Prosser, \textit{The Law of Torts} 6 (4th ed. 1971), except the right of just compensation, U.S. \textit{CONST. amend. V; MD. \textit{CONST. art. III, \S\S 40–40C, arts. XI-B to D}, which appears to be in the nature of a contract implied in law, see Jacobs v. United States, 290 U.S. 13 (1933). More broadly, however, all constitutional rights may be considered as arising from the "social compact," that is, contractual in nature. See J. Rousseau, \textit{Du Contrat Social} (Paris 1762). See \textit{generally} McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); U.S. \textit{CONST. preamble}.

(b) Nature. Federal and state immunities are either absolute or qualified. The nature of these immunities has a number of procedural implications. With respect to pleading, an absolute governmental immunity is jurisdictional\(^\text{167}\) and, therefore, may be raised preliminarily or at any other time by the parties or by the court.\(^\text{168}\) An absolute official immunity may be raised at an early stage,\(^\text{169}\) but is waived if not timely raised.\(^\text{170}\) A qualified official immunity is an affirmative defense\(^\text{171}\) and is waived if not timely raised.\(^\text{172}\) As to relief, an absolute immunity may bar an action for injunctive or declaratory relief as well as for damages.\(^\text{173}\) A qualified immunity is a defense to an action for damages, but not to an action for declaratory or injunctive relief.\(^\text{174}\) With regard to subsequent proceedings, the finding of an absolute immunity is determinative of the case,\(^\text{175}\) while the finding of a qualified immunity ordinarily requires a trial on the merits.\(^\text{176}\)

2. Specific Considerations.

(a) Governmental Immunities. The United States and its agencies\(^\text{177}\) and the Maryland state government and its agencies\(^\text{178}\) have

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172. See Fed. R. Civ. P. 8(c), 12(a)–(b); Md. R.P. 885, 1085.


177. Regarding which federal agencies are immune, see Keifer v. RFC, 306 U.S. 381 (1939), and NLRB v. Nash-Finch Co., 404 U.S. 138, 146 n.4 (1971).

178. Regarding which state agencies are immune, see Katz v. WSSC, 284 Md. 503, 397 A.2d 1027 (1979) (WSSC is a state agency, but its immunity has been waived by statute);
absolute immunity to suit, according to both federal\textsuperscript{179} and state\textsuperscript{180} law. Counties, municipalities, and other local governments ordinarily have no immunity under federal law.\textsuperscript{181} They are immune under state law to tort actions for their "governmental functions," but not to

\textsuperscript{179}O & B, Inc. v. Maryland-Nat'l Capital Park & Planning Comm'n, 279 Md. 459, 369 A.2d 553 (1977) (the Commission is a state agency and is immune); Board of Trustees v. John K. Ruff, Inc., 278 Md. 580, 366 A.2d 360 (1976) (state college is a state agency and is immune); Bolick v. Board of Educ., 256 Md. 180, 260 A.2d 31 (1969) (local public school boards are immune, not because they are state agencies, but because they have neither funds available to pay damages nor the power to raise such funds by taxation).


tort actions for their "proprietary functions"\(^{182}\) or to most contract actions.\(^{183}\)

Governmental immunity may be waived by federal\(^{184}\) or state\(^{185}\) constitutional provision or by federal\(^{186}\) or state\(^{187}\) statute. The

\(^{182}\) Austin v. Mayor of Baltimore, 286 Md. 51, 405 A.2d 255 (1979). See also Clarke, *Municipal Responsibility in Tort in Maryland*, 3 Md. L. Rev. 159 (1939). Local governments may be held liable under a respondent superior theory for "proprietary function" torts of their agents, if the agents are themselves liable. See Bradshaw v. Prince George's County, 284 Md. 294, 300, 396 A.2d 255, 262 (1979) (by implication). When local governments are to be sued, notice of the claim must be given within 180 days after the injury. Md. CTS. & JUD. PROC. CODE ANN. § 5-306 (1980).

\(^{183}\) Md. Ann. Code art. 23A, § 1A (Supp. 1979) (municipalities); id. at art. 25, § 1A (commissioners counties); id. at art. 25A, § 1A (chartered counties); id. at art. 25B, § 13A (code counties) (actions on written contracts). The extent of local governments' immunity to contract actions prior to the legislation cited above and, by hypothesis, the current rule as to immunity on contracts other than written ones is discussed in American Structures, Inc. v. Mayor of Baltimore, 278 Md. 356, 396 A.2d 751, 757 (1978).


\(^{187}\) State laws waiving the immunity of the state include Md. Ann. Code art. 41, § 10A (1978) (actions on written contract), and Md. Educ. Code Ann. §§ 4-105, 13-108, 14-109, 16-206 (1978) (actions on claims not in excess of insurance policy limits against local school boards, the University of Maryland, state universities and colleges, and community colleges, respectively). Note that only § 4-105 uses mandatory "shall" carry insurance language and expressly prohibits raising the immunity defense to claims of $100,000 or less. Revisor's Notes to the other sections cited above indicate that those provisions are dormant because insurance was not obtained. See Board of Trustees v. John K. Ruff, Inc., 278 Md. 500, 505, 366 A.2d 360, 363 (1977). Other statutes waiving the state's immunity include Md. Transp. Code Ann. § 7-702 (1977) (actions against the Mass Transit Administration for its contracts and torts and the torts of its officers, agents, and employees); Md. Transp. Code Ann. §§ 3-216(d), 6-204(b), 6-206(b) (1977) (actions arising out of Maryland Port Administration's ownership, control, or operation of docks and wharves, see Maryland Port Admin. v. SS American Legend, 455 F. Supp. 584 (D. Md. 1978).
waiver must be express or necessarily implied under both federal\textsuperscript{188} and state\textsuperscript{189} law. Waiver of governmental immunity under state law, unlike federal law, requires that the agency have funds available for the satisfaction of any judgment or have the authority to raise such funds by taxation.\textsuperscript{190} Both federal\textsuperscript{191} and state\textsuperscript{192} law permit govern-


\textsuperscript{189} Board of Educ. v. Alcryamat Corp., 258 Md. 508, 516, 266 A.2d 349, 353 (1970). The requirements of federal and state law are similar in this respect. \textit{Id.}

\textsuperscript{190} University of Maryland v. Maas, 173 Md. 554, 557–59, 197 A. 123, 125 (1938).

\textsuperscript{191} Federal law permits a federal official to be sued in federal court, Larson v. Domestc & Foreign Commerce Corp., 337 U.S. 682, 690—91, 702 (1949), subject to certain limitations, \textit{id.} at 691 n.11 (neither affirmative action by government nor disposition of unquestionably government property may be requested). Federal law also permits a state official to be sued in federal court. \textit{Ex parte} Young, 209 U.S. 123 (1908).

\textsuperscript{192} Regarding whether a federal official may be sued in state court, \textit{compare} Tarble’s Case, 80
mental immunity to be avoided by an action for prospective relief against an executive official who has acted unconstitutionally.

(b) **Official Immunities.** Both federal and state law provide immunity for legislative, executive, and judicial officials. Of course, those officials may be liable *personally* for actions not taken in an official capacity.\(^{193}\)

(i) **Legislative Immunities.** Legislators are absolutely immune to suit\(^{194}\) for their "legislative" acts\(^{195}\) under both federal\(^{196}\) and

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\(^{194}\) The immunity is to suit for declaratory or injunctive relief as well as for damages. Eastland v. United States Servicemen's Fund, 421 U.S. 491, 503 (1975). The immunity applies even in the presence of malice. Tenney v. Brandhove, 341 U.S. 367, 378 (1951). There are no state cases dealing with either of these points. *But see note 197 infra* (state law construed in pari materia with federal law).

\(^{195}\) The scope of "legislative" acts is considered in Hutchinson v. Proxmire, 443 U.S. 111 (1979), and Blondes v. State, 16 Md. App. 165, 294 A.2d 661 (1972). Whether legislators have a qualified immunity for acts that are not "legislative" is questionable. Davis v. Passman, 442 U.S. 228, 246 n.25 (1979).

With regard to who is immune, federal law protects legislative aides to the extent that their conduct would be protected if performed by a legislator. Gravel v. United States, 408 U.S. 606 (1972). *But cf.* Powell v. McCormack, 395 U.S. 486, 501—06 (1969) (legislative employees executing legislators' orders were not immune). State law in the area is undeveloped. *But see* note 197 infra (state law construed in pari materia with federal law).

\(^{196}\) Federal legislators are immune to suit in federal court under U.S. CONST. art. I, § 6, cl. 1, the speech and debate clause, and to suit in state court under that clause and under U.S. CONST. art. VI, cl. 2, the supremacy clause. *Cf.* Kilbourn v. Thompson, 103 U.S. 168 (1881) (federal legislators immune to common law action in the District of Columbia local courts); note 180 supra (federal governmental immunity under common law is entitled to supremacy in state courts).

As a matter of federal common law, state legislators are immune to suit based on federal claims in federal court. *See* Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 404 (1979). Whether local government legislators, as a matter of federal common law, are similarly immune is not settled. *Id.* at 404 n.26. By hypothesis, state and local legislators' immunity to suit based on state claims in federal court is a matter of state law.
state\textsuperscript{197} law. Whether legislative immunity may be waived, either by statute or by a legislator, is unsettled.\textsuperscript{198}

(ii) Executive Immunities. Both federal\textsuperscript{199} and state\textsuperscript{200} law provide a qualified immunity\textsuperscript{201} in suits for damages against executive

197. Federal legislators are immune to suit in state court under the Federal Constitution, see note 196 supra, which is also made supreme as a matter of state constitutional law. Md. Const. Decl. of Rights art. 2. Cf. 28 U.S.C. § 1442 (1976) (removal to federal courts of suits in state courts against federal officers); note 180 supra (immunity of federal government in state courts).

State and, by hypothesis, local legislators are immune to suit based on federal claims in state court as a matter of federal common law. Cf. Martinez v. California, 444 U.S. 277, 282 (1980) (claim against state executive official under general federal civil rights remedial statute, 42 U.S.C. § 1983 (Supp. III 1979)). State legislators are immune to suit based on state claims in state court under Md. Const., Decl. of Rights art. 10 and Md. Const. art. III, § 18, the speech and debate clauses. These clauses have been construed in pari materia with the federal speech and debate clause, U.S. Const. art. I, § 6, cl. 1. Blondes v. State, 16 Md. App. 165, 175, 294 A.2d 661, 667 (1972). See also Niles, supra note 39, at 13, 22, 143 (federal and state clauses are similar).

Local government legislators are immune to suit in state court by statute. Md. Crs. & JUD. PROC. CODE ANN. § 5-304 (1980).


State executive officials, as a matter of federal common law, are qualifiedly immune to suit based on federal claims in federal court. See Scheuer v. Rhodes, 416 U.S. 232, 241 (1974) (federal constitutional claims). By hypothesis, state and local executive officials' immunity to suit based on state claims in federal court is a matter of state law. Local government executive officials, as a matter of federal common law, are qualifiedly immune to suit based on federal claims in federal court. See Pierson v. Ray, 386 U.S. 547, 555—57 (1967) (federal constitutional claims).


judicial relief

officials for discretionary. Executive officials have no immunity, however, to suits for damages caused by their ministerial acts, according to both federal and state law. In addition, executive officials have no immunity to suits for injunctive or declaratory relief under either federal or state law.

The federal and state qualified immunities for executive officials differ in two respects. First, the federal immunity apparently covers all members of the executive branch who exercise discretionary executive functions. The state immunity covers only “public offi-


203. The immunity includes only acts within the scope of the official’s authority. See Butz v. Economou, 438 U.S. 478, 497 (1978); Bradshaw v. Prince George’s County, 284 Md. 294, 302–03, 396 A.2d 255, 260 (1979). In addition, the immunity, at least under federal law, includes only acts that are functionally “executive” in nature. Executive officials exercising judicial or prosecutorial functions are absolutely immune as judicial or quasi-judicial officials. Butz v. Economou, 438 U.S. at 512–13, 517 (federal agency officials exercising judicial or prosecutorial functions); Imbler v. Pachtman, 424 U.S. 409 (1976) (state prosecutor). Whether executive officials exercising legislative functions are absolutely immune as legislative officials is unresolved. See United States v. Mandel, 415 F. Supp. 1025 (D. Md. 1976) (no immunity in a criminal prosecution under the circumstances), aff’d by an equally divided court, 602 F.2d 653 (4th Cir. 1979) (in banc), cert. denied, 100 S. Ct. 1647 (1980).

204. Federal and state executive officials are subject to suit in federal court for damages caused by their malicious or negligent performance of ministerial acts, see Bates v. Clark, 95 U.S. 204 (1877) (dictum) (federal executive); Amy v. Barkholder, 78 U.S. (11 Wall.) 136 (1871) (state executive), or strictly for ministerial acts beyond their authority, Chaffin v. Taylor, 114 U.S. 309 (1885) (state executive); Bates v. Clark, 95 U.S. 204 (1877) (federal executive). But cf. 22 U.S.C. § 817(a) (1976) (Federal Tort Claims Act remedy against United States is exclusive); 28 U.S.C. § 2679(b) (Supp. III 1979) (Federal Tort Claims Act remedy against United States is exclusive in certain cases).

205. Federal executive officials are subject to suit in state court for damages caused by their malicious or negligent performance of ministerial acts, see Buck v. Colbath, 70 U.S. (3 Wall.) 334 (1866), or strictly for ministerial acts beyond their authority, Teal v. Felton, 53 U.S. (12 How.) 284 (1852), as a matter of federal law. But cf. notes 192 & 204 supra (division of opinion as to whether a federal official may be sued in state court and exclusive Federal Tort Claims Act remedy in certain cases). State law apparently permits such suits. See Johnson v. Maryland, 254 U.S. 51 (1920) (reversing state court judgment); McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) (same). State and local government executive officials are subject to suit in state court for damages caused by their malicious or negligent performance of ministerial acts. See James v. Prince George’s County, 288 Md. 315, 418 A.2d 1173 (1980).


207. See note 192 supra. See also Md. CTs. & JUD. PROC. CODE ANN. §§ 3-8A-01, 02 (1980); Md. R.P. BE40–46 (mandamus remedy).

sionals” (not other public officers, agents, and employees\textsuperscript{209}) who exercise discretionary executive functions.\textsuperscript{210} Second, the federal immunity requires the absence of both malice and negligence.\textsuperscript{211} The state immunity requires only the absence of malice, regardless of negligence.\textsuperscript{212}

(iii) Judicial Immunities. Judges\textsuperscript{213} are absolutely immune\textsuperscript{214} to suit for their “judicial” acts\textsuperscript{215} under both federal\textsuperscript{216} and state\textsuperscript{217} law.

\textsuperscript{209} Some of these other persons are granted a measure of immunity by statute. \textit{E.g.}, Md. Educ. Code Ann. § 6-109 (1978) (school employees who make certain reports or participate in certain proceedings); Md. Ann. Code art. 43, § 132B (1980) (medical personnel participating in immunization projects); \textit{id.} § 556A (1980) (medical personnel taking blood samples or making blood tests at direction of law enforcement officers).

\textsuperscript{210} James v. Prince George’s County, 288 Md. 315, 418 A.2d 1173 (1980).


\textsuperscript{213} According to federal law, judges of general or appellate jurisdiction are immune, unless they act in the clear absence of all jurisdiction. Stump v. Sparkman, 435 U.S. 349, 356 (1978). Judges of limited jurisdiction are immune only when acting within their jurisdiction. Randall v. Brigham, 74 U.S. (7 Wall.) 523, 535–36 (1869) (dictum). State law in this area is undeveloped.

Other participants in judicial proceedings, such as lawyers, parties, witnesses, jurors, and judicial employees, may have a quasi-judicial or derivative immunity for their words or acts. Butz v. Economou, 438 U.S. 478, 512 (1978); Imbler v. Pachtman, 424 U.S. 409, 423 & n.20 (1976). \textit{But cf.} Ferri v. Ackerman, 444 U.S. 193 (1979) (as a matter of federal law, court-appointed lawyer in federal criminal case has no immunity to state law claim for malpractice). With regard to state law, see Korb v. Kowalevich, 285 Md. 699, 402 A.2d 557 (1979); DiBlasio v. Kolodner, 233 Md. 512, 197 A.2d 245 (1964) (dictum).


\textsuperscript{215} The scope of “judicial” acts is considered in Stump v. Sparkman, 435 U.S. 349 (1978), and Roth v. Shupp, 94 Md. 55, 50 A. 430 (1901). Judges have no immunity for “ministerial” acts. \textit{See} Pierson v. Ray, 386 U.S. 547, 567 n.6 (1967) (Douglas, J., dissenting); \textit{Ex parte Virginia}, 100 U.S. 339, 348 (1880); State v. Carrick, 70 Md. 586, 17 A. 559 (1889). Regarding judges acting in other capacities, see Supreme Court v. Consumers Union, 100 S. Ct. 1967 (1980) (judges acting in a “legislative” capacity have an absolute legislative immunity) (judges acting in an administrative capacity have no immunity to prospective relief).

\textsuperscript{216} Federal judges are immune to suit in federal court as a matter of federal common law. \textit{See} Bradley v. Fisher, 78 U.S. (13 Wall.) 335 (1872).


\textsuperscript{217} By hypothesis, the immunity of federal judges, as a matter of federal common law, is entitled to supremacy in state courts under U.S. Const. art. VI, cl. 2 and Md. Const., Decl. of Rights art. 2. \textit{Cf.} 28 U.S.C. § 1442 (1976) (removal to federal courts of suits in state courts against federal officers); note 180 supra (immunity of federal government in state courts).
Whether judges are immune to suits for injunctive or declaratory relief is open to question.218

V. CONCLUSION

As demonstrated above, provisions in the Constitution of Maryland for access to judicial relief for violations of individual rights and for limitations on that access are largely similar to related provisions in the Constitution of the United States. In some respects, Maryland law is less protective of constitutional rights than is federal law. Maryland law provides less certain access to judicial relief for violations of those rights in that no state statute provides a general remedy for violation of constitutional rights, and a cause of action for damages for violation of state constitutional rights has not yet been implied. Maryland law also places greater limitations on access to judicial relief in that, generally, the judicial power must be exercised by courts named in the state constitution,219 less comprehensive waivers of the state's governmental immunity exist, waiver of state agency immunity requires availability of funds to satisfy a judgment or the authority to raise such funds by taxation, and state executive officials are liable only for acts of malice and not for negligence.

In other respects, Maryland law is more protective of constitutional rights than is federal law. Maryland has fewer limitations on access to judicial relief for violations of those rights in that state courts are not limited to categories of cases described in the constitution, state courts of general jurisdiction are not limited to a jurisdiction described by statute, certain aspects of the state justiciability doctrine are based on policy, not constitution, with the attendant procedural and substantive implications, and the state executive official immunity is limited to "public officials" and does not include public officers, agents, and employees generally.

A comparative study of constitutional law by Maryland governmental decision-makers—the legislature, the executive, the judiciary, and the people—will help the state fulfill its function in our federal system as one of "fifty little laboratories of democracy."220


219. Of course, courts created extra-constitutionally may be instruments of oppression rather than of promotion of constitutional rights. See G. Smith, A CONSTITUTIONAL AND LEGAL HISTORY OF ENGLAND 256–59 (1955) (Court of Star Chamber).