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The Cause of Action for Damages under North Carolina's Constitution: Corum v. University of North Carolina

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NOTES

The Cause of Action for Damages Under North Carolina's Constitution: *Corum v. University of North Carolina*

The North Carolina Constitution's Declaration of Rights[1] offers individuals shelter from state encroachment on certain fundamental civil liberties. Although many may have ignored the protection the state constitution affords its citizens, the North Carolina Supreme Court's decision in *Corum v. University of North Carolina*[2] should usher in a resurgent attitude. *Corum* breathed new life into the Declaration of Rights by holding that an individual whose free speech rights a state official has violated may seek damages directly under the North Carolina Constitution[3] and by abolishing sovereign immunity as a potential bar to this constitutional cause of action.[4] The supreme court acted in response to an earlier challenge from Chief Justice Exum, who called on the state's lawyers to "dust off the old document" in state courts and use its protective provisions to preserve individual rights.[5] The court's decision in *Corum* represents a vigorous shake indeed, and when the dust settles, North Carolina may well emerge into a new era marked by the practical primacy of state constitutional jurisprudence.

This Note analyzes the *Corum* court's state constitutional holdings,[6] discusses the limited precedential support in North Carolina for the decision,[7] and examines the federal impetus for this cause of action.[8] The Note suggests that although *Corum* may be viewed in isolation and limited to its facts,[9] sufficient support exists for extending the *Corum* principle to other provisions in the Declaration of Rights.[10] The Note concludes that North Carolina attorneys should test the waters and force

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1. Article I of the state constitution, referred to as the Declaration of Rights, is comprised of many provisions that enumerate individual and collective rights of the people of North Carolina, some of which duplicate those in the federal Constitution. *See* N.C. CONST. art. I; for a comparison of the Declaration of Rights and the Federal Bill of Rights, see *infra* note 93 and accompanying text.

2. 330 N.C. 761, 413 S.E.2d 276 (1992).

3. *Id.* at 786, 413 S.E.2d at 292; *see* N.C. CONST. art. I, § 14 (freedom of speech).

4. *Corum*, 330 N.C. at 786, 413 S.E.2d at 291-92.

5. James G. Exum, Jr., *Dusting Off Our State Constitution*, N.C. ST. B.Q., Spring 1986, at 6, 8.

6. *See infra* notes 29-47 and accompanying text.

7. *See infra* notes 48-61 and accompanying text.

8. *See infra* notes 62-69 and accompanying text.

9. *See infra* notes 74-84 and accompanying text.

10. *See infra* notes 87-99 and accompanying text.

the courts to reexamine the fundamental importance of the state constitution in protecting individual rights.

Dr. Alvis Corum was a tenured faculty member and the Dean of Learning Resources at Appalachian State University.[11] Corum's duties included supervising the Appalachian Collection,[12] which was housed in the University's Daughtery Library.[13] In 1983, school administrators began to discuss the possibility of moving the collection to different facilities.[14] Dr. Harvey Durham, Vice Chancellor for Academic Affairs and Corum's immediate supervisor, informed Corum of his decision to move the collection[15] but failed to mention that the component parts would be placed in separate locations.[16]

At a subsequent meeting with various school administrators concerning the details of moving the collection, Corum learned that the collection indeed would be bifurcated.[17] The next day, Corum presented an alternative plan that would keep the collection intact.[18] The day after Corum's alternative proposal, Durham discharged Corum from his deanship.[19]

Corum, believing that Durham demoted him in retaliation for exercising his right to freedom of speech, filed a grievance proceeding with the University of North Carolina.[20] After a ruling in Durham's favor,

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11. *Corum*, 330 N.C. at 767, 413 S.E.2d at 280.

12. The Appalachian Collection consisted of a collection of books, research reports, music, and artifacts, all of which "represent[ed] the mountain culture of the Southern Appalachian Region." *Id.* at 767, 413 S.E.2d at 281.

13. *Id.* at 767, 413 S.E.2d at 280-81.

14. *Id.*

15. *Id.* at 768, 413 S.E.2d at 281. Corum accepted Durham's decision under the belief that the proposal "would at least maintain the physical integrity of the Collection." *Id.*

16. *Id.* Corum's primary concern throughout the discussion concerning moving the Collection was that it not be divided by location. *Id.*

17. *Id.* Although Durham was not present, Dr. Clinton Parker, the Associate Vice Chancellor of Academic Affairs, attended this meeting as Durham's representative. *Id.*

18. *Id.* at 769, 413 S.E.2d at 281. Parker, in Durham's absence, acknowledged that he lacked authority to change Durham's decision but volunteered to inform him of Corum's proposals. *Id.*

19. *Id.* at 769, 413 S.E.2d at 282. Durham believed that Corum's actions amounted to a refusal to implement the decision to move the Collection, while Corum maintained that he fully cooperated despite his expression of concerns with Durham's decision. *Id.* Dr. John Thomas, the Chancellor of Appalachian State University, affirmed the demotion of Dr. Corum, although neither Durham nor Thomas gave Corum an opportunity to explain his remarks. *Id.* Corum was allowed to remain a tenured faculty member. *Id.*

20. *Id.* Corum claimed Durham concealed the fact that the Collection would be divided until the "eleventh hour," Corum v. University of North Carolina, 97 N.C. App. 527, 536, 389 S.E.2d 596, 601 (1990), *aff'd in part and rev'd in part*, 330 N.C. 761, 413 S.E.2d 276 (1992), in order to make the moving of the Collection "administratively easier by preventing vocal opposition to the decision." *Corum*, 330 N.C. at 769-70, 413 S.E.2d at 282. When Corum exposed

Corum filed an action against the University of North Carolina and several university officials[21] seeking injunctive relief and damages pursuant to the federal civil rights statute[22] and the North Carolina Constitution.[23] Believing that the doctrines of sovereign and qualified immunity barred such actions,[24] the defendants moved for summary judgment, but the trial court denied their motions.[25]

After analyzing the federal civil rights claims,[26] the North Carolina

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this "ruse" by presenting his alternative proposal, Durham retaliated by demoting him. *Id.* at 770, 413 S.E.2d at 282. Durham defended his actions as a permissible response to insubordination. *Id.*

21. The named defendants were the University of North Carolina (UNC), of which Appalachian State University is a part, Appalachian State University (ASU), Mr. Spangler (President of UNC) in his official capacity, and Drs. Thomas and Durham in their official and individual capacities. *Corum*, 97 N.C. App. at 532, 389 S.E.2d at 599.

22. 42 U.S.C. § 1983 (1988). Section 1983 provides remedies to persons deprived of a federal right by a state official. These remedies include damages, injunctive relief, declaratory relief, and attorney fees. Jennifer Friesen, *Recovering Damages for State Bills of Rights Claims*, 63 TEX. L. REV. 1269, 1273-74 (1985). Obstacles of sovereign immunity and qualified immunity, however, often make these remedies difficult to achieve. *See id.* at 1274.

23. *Corum*, 330 N.C. at 766, 413 S.E.2d at 280.

24. *Id.* The doctrine of sovereign immunity apparently arose from the English concept that "the King can do no wrong." *Id.* at 785, 413 S.E.2d at 291. *See* Russell v. Men of Devon, 2 T.R. 667, 672-73, 100 Eng. Rep. 359, 362-63 (1788); WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 131, at 970 (4th ed. 1971); Louis E. Wolcher, *Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations*, 69 CAL. L. REV. 189, 196 n.24 (1981); *infra* note 55 and accompanying text. This doctrine bars relief "on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907) (Holmes, J.). Because sovereign immunity is a bar to jurisdiction itself, courts grant interlocutory appeal. ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 8.6.1, at 405-06 (1989); *cf. Corum*, 330 N.C. at 767, 413 S.E.2d at 280 (treating sovereign immunity as a defense instead of a bar to jurisdiction and still granting interlocutory appeal). As Professor Prosser explained, the immunity is based on the defendant's favored status, not the merits of the case. PROSSER, *supra*, § 131, at 970-71. The doctrine of qualified immunity similarly bars relief if the official acted in his capacity and in "good faith." Perry M. Rosen, *The Bivens Constitutional Tort: An Unfulfilled Promise*, 67 N.C. L. REV. 337, 348-49 (1989). Judge Learned Hand explained that it is "better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950).

25. *Corum*, 330 N.C. at 766, 413 S.E.2d at 280.

26. The court of appeals held that the trial court erred in denying defendants' motion for summary judgment on plaintiff's § 1983 claims as to UNC and ASU and the individual defendants acting in their official capacities, reasoning that the doctrine of sovereign immunity barred an action against them for damages under § 1983. Corum v. University of North Carolina, 97 N.C. App. 527, 533, 389 S.E.2d 596, 599 (1990), *aff'd in part and rev'd in part*, 330 N.C. 761, 413 S.E.2d 276 (1992). The court of appeals relied on an earlier decision which held that an action brought under § 1983 against UNC and Winston-Salem State University was barred because of the doctrine of sovereign immunity, *id.* at 532-33, 389 S.E.2d at 599 (citing Truesdale v. University of North Carolina, 91 N.C. App. 186, 371 S.E.2d 503 (1988), *disc. rev. denied*, 323 N.C. 706, 377 S.E.2d 229, *cert. denied*, 493 U.S. 808 (1989)), and reasoned that

Court of Appeals considered Corum's claims arising under the North Carolina Constitution. The court of appeals held that sovereign immunity barred any action under the state constitution against the state and against the individual defendants in their official capacities.[27] As to Drs. Thomas and Durham in their individual capacities, however, the court affirmed the trial court's denial of summary judgment, maintaining that a governmental employee may be held personally liable under the North Carolina Constitution only if he acts outside the scope of his duties.[28]

The North Carolina Supreme Court[29] granted discretionary review and affirmed in part and reversed in part the appellate court's decision.[30]

"an action against a State employee in his official capacity for monetary damages would actually be an award against the State since the award would be paid from the State treasury." *Id.* at 533, 389 S.E.2d at 599. The court did hold, however, that sovereign immunity does not bar a claim for prospective injunctive relief under § 1983 against defendants acting in their official capacities. *Id.* As to Thomas and Durham in their individual capacities, the court held that the trial court should have granted summary judgment under the doctrine of qualified immunity. *Id.* at 536, 389 S.E.2d at 601. The court noted that government officials sued in their individual capacities under § 1983 for damages may raise the defense of qualified immunity, which will shield them " 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " *Id.* at 534, 389 S.E.2d at 600 (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)). *Harlow* established this objective standard—whether a government official violates "clearly established statutory or constitutional rights of which a reasonable person would have known"—to determine when a defense of qualified immunity bars further litigation. *Harlow*, 457 U.S. at 818. The court then discussed the essential elements of a § 1983 action for a freedom of speech violation: whether the speech addresses a matter of public concern, and if so, whether the employee's interest in speaking out on the issue outweighs the government's interest in effectively and efficiently fulfilling its responsibilities to the public. *Corum*, 97 N.C. App. at 535, 389 S.E.2d at 600 (citing Connick v. Myers, 461 U.S. 138, 147, 150 (1983)). The court conceded that Corum's speech addressed a matter of public concern, *Corum*, 97 N.C. App. at 535, 389 S.E.2d at 600-01, but based on a balancing of the employee's and government's interests, concluded that "[i]t is apparent to us that when defendants acted they were not violating a 'clearly established' right of which a reasonable person would have known." *Id.* at 536, 389 S.E.2d at 601.

27. *Corum*, 97 N.C. App. at 537, 389 S.E.2d at 601. As a result, the court barred Dr. Corum from seeking relief for violations of the North Carolina Constitution against UNC and ASU, and against Spangler, Thomas, and Durham in their official capacities. *Id.*

28. *Id.* at 538, 389 S.E.2d at 602 ("In the instant case, plaintiff has alleged and come forward with some evidence that the two defendants acted in violation of law, and therefore outside the scope of their duties in discharging plaintiff.").

29. Justice Harry Martin's majority opinion in *Corum* was his valedictory before retiring. *Corum*, 330 N.C. at 766, 413 S.E.2d at 277, 280. Justice Webb was the lone dissenter. *Id.* at 790, 413 S.E.2d at 294 (Webb, J., dissenting). For Justice Martin's views on the role of the state constitution as a source of individual liberty, see Harry C. Martin, *The State as a "Font of Individual Liberties": North Carolina Accepts the Challenge*, 70 N.C. L. REV. 1749, 1752-56 (1992).

30. *Corum*, 330 N.C. at 766, 413 S.E.2d at 280. With regard to the federal civil rights claims under 42 U.S.C. § 1983, the supreme court held that a state and its employees who are acting in their official capacities are not considered "persons" for purposes of a monetary claim under § 1983, although they are considered "persons" when the remedy sought under § 1983

Because Corum claimed that Durham had violated his right to free speech under the North Carolina Constitution[31] by demoting him for his vocal opposition to moving the Appalachian Collection,[32] and because no North Carolina statute provides a cause of action for this constitutional violation, the supreme court had to decide if a cause of action exists under the state constitution.[33] The court held that Corum "does have a direct cause of action under the State Constitution for alleged violations of his freedom of speech rights."[34] First, the court explained that the free speech provision is self-executing; it is not dependent upon a legislative

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is injunctive relief. *Id.* at 771, 413 S.E.2d at 282-83. The court found that Corum had not presented sufficient evidence to withstand a motion for summary judgment as to ASU, UNC, Spangler, and Thomas for injunctive relief, *id.* at 781, 413 S.E.2d at 289, but had presented enough evidence to continue his claim for injunctive relief against Durham in his official capacity. *Id.* at 780-81, 413 S.E.2d at 288-89. The court held that neither sovereign nor qualified immunity is available as a defense when one is sued in one's official capacity under § 1983, *id.* at 771-72, 413 S.E.2d at 283, and overruled Truesdale v. University of North Carolina, 91 N.C. App. 186, 371 S.E.2d 503 (1988), *disc. rev. denied*, 323 N.C. 706, 377 S.E.2d 229 (1989), *cert. denied*, 493 U.S. 808 (1989), insofar as it stands for the proposition that sovereign immunity bars § 1983 actions against state institutions. *Corum*, 330 N.C. at 771 n.2, 413 S.E.2d at 283 n.2.

When a monetary claim is asserted against a state official in his *individual* capacity, however, the court held that he may be personally liable to the extent that the defense of qualified immunity does not lie. *Id.* at 772, 413 S.E.2d at 283-84. The supreme court reasoned that:

> unlike a suit against a state official in his official capacity, which is basically a suit against the official office and therefore against the State itself, a suit against an individual who happens to be a governmental official but is not acting in his official capacity is not imputed to the State. Presumably, they are personally liable for payment of any damages awarded.

Id. at 772, 413 S.E.2d at 283. The North Carolina Supreme Court altered the objective *Harlow* test, *see supra* note 26, maintaining that "where the existence of a constitutional violation depends on proof of motivation," a court must also inquire into the defendant's motive, his state of mind. *Corum*, 330 N.C. at 773, 413 S.E.2d at 284. Applying this subjective analysis, the court concluded that Corum had presented sufficient evidence of improper motive to withstand Durham's motion for summary judgment. *Id.* at 781, 413 S.E.2d at 289. The court held, however, that Thomas should prevail on his motion. *Id.*

31. N.C. CONST. art. I, § 14 ("Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained, but every person shall be held responsible for their abuse.").

32. *Corum*, 330 N.C. at 769, 413 S.E.2d at 282.

33. *Id.* at 781, 413 S.E.2d at 289.

34. *Id.* at 786, 413 S.E.2d at 292. The court chose to limit this holding to defendants who are state officials acting in their *official* capacities. *Id.* at 787-88, 413 S.E.2d at 292-93. Reasoning that the framers intended that the Declaration of Rights protect individuals against state action, the court stated:

> In 1776 when the people of North Carolina established the State of North Carolina, they clearly and affirmatively set forth certain fundamental human rights which their government was bound to respect. Through the Declaration of Rights, the people of North Carolina secured these rights against state officials and shifting political majorities. . . . The Declaration of Rights was intended to protect individual rights from

enactment for its enforcement or impairment.[35] The supreme court then proclaimed that "the common law, which provides a remedy for every wrong, will furnish the appropriate action for the adequate redress of a violation of that right."[36] As partial explanation and illustration of the type of action it was recognizing, the court referred to an earlier decision where, without a statutory provision, it ordered a similar remedy of compensation to an individual whose property had been taken by the State.[37] The court, describing free speech as "one of the fundamental cornerstones of individual liberty and one of the great ordinances of our Constitution," asserted that it was deserving of at least as much protection as the right to possess and use property.[38] The court, therefore, concluded that a direct action against the State under the state constitution is necessary to protect an individual's right to free speech, and that, in the absence of other remedies, the common law guarantees such an action.[39]

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infringement by the State. To that end, the Declaration of Rights expresses the rights it guarantees in clear and explicit language.

As a matter of fundamental jurisprudence the Constitution itself does not recognize or create rights which may be asserted against individuals.

Id. at 787, 413 S.E.2d at 292-93. As a result, Corum had no state constitutional claim against Durham or Thomas in their individual capacities. *Id.* at 789, 413 S.E.2d at 293. The court, moreover, allowed Corum's state constitutional claim to proceed only against Durham acting in his official capacity, maintaining that Corum failed to present sufficient evidence to withstand a motion for summary judgment from the other defendants. *Id.*

35. *Id.* at 782, 413 S.E.2d at 289.

36. *Id.* On the one hand, the court's statement implies that the cause of action represents a common-law response to the need for a remedy rather than a constitutional response. If the remedy is common-law only and not constitutionally compelled, the General Assembly can statutorily abridge or abolish the cause of action without replacing it. CHEMERINSKY, *supra* note 24, § 9.1.2, at 457-58. On the other hand, the court notes that the source of this cause of action comes from the judiciary's "inherent constitutional power." *Corum*, 330 N.C. at 784, 413 S.E.2d at 291.

37. *Corum*, 330 N.C. at 782-85, 413 S.E.2d at 289-90 (discussing Sale v. State Highway & Pub. Works Comm'n, 242 N.C. 612, 89 S.E.2d 290 (1955)). *Sale* involved a provision in the Declaration of Rights (N.C. CONST. art I, § 19 (formerly § 17)) which implicitly guarantees compensation for government takings of private property. *Sale*, 242 N.C. at 617, 89 S.E.2d at 295; *see infra* notes 48-54 and accompanying text. The court's comparison of the two cases in the context of a common-law remedy involving self-executing provisions is significantly similar to a natural law analysis. Also illustrative of the court's natural law approach is its statement that the judiciary's "obligation to protect the fundamental rights of individuals is as old as the State." *Corum*, 330 N.C. at 783, 413 S.E.2d at 290.

38. *Corum*, 330 N.C. at 782, 413 S.E.2d at 289; *cf.* Harry C. Martin, *Freedom of Speech in North Carolina Prior to* Gitlow v. New York, *With a Forward Glance Thereafter*, 4 CAMPBELL L. REV. 243, 248 (1982) ("Freedom of speech is a fundamental doctrine and is indispensable to the continued growth and well-being of our free society.").

39. *Corum*, 330 N.C. at 782-83, 413 S.E.2d at 289; *see also* Corum v. University of North Carolina, 97 N.C. App. 527, 540, 389 S.E.2d 596, 603 (1990) (Greene, J., concurring in part and dissenting in part) (maintaining that "[t]o deny such a claim would deny the plaintiff the 'very essence of civil liberty' which entitles 'every individual to claim the protection of the

Finding this cause of action under the constitution, the court turned to the issue of sovereign immunity as a bar to the action's success. Noting the long history of sovereign immunity,[40] the court conceded its validity as a show of respect for the legislature as a co-equal governmental branch.[41] The court, nonetheless, held that sovereign immunity will not bar an action against the State for a constitutional violation,[42] and declared that:

> It would indeed be a fanciful gesture to say on the one hand that citizens have constitutional individual civil rights that are protected from encroachment actions by the state, while on the other hand saying that individuals whose constitutional rights have been violated by the State cannot sue because of the doctrine of sovereign immunity.[43]

The court reasoned that whenever enforcement or protection of a constitutional right clashes with the judicially created doctrine of sovereign immunity, it is the common-law immunity that must succumb.[44]

The supreme court remanded the case to determine the necessary relief for the violation of Corum's free speech rights, subject to two limitations.[45] First, before a court can exercise its "inherent constitutional power" to create a common-law remedy for a violation of a constitutional right, it must submit to any existing alternative statutory or proce-

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laws, whenever he receives an injury' ") (quoting Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803)), *aff'd in part and rev'd in part*, 330 N.C. 761, 413 S.E.2d 276 (1992).

40. *Corum*, 330 N.C. at 785, 413 S.E.2d at 291; *see supra* note 24; *infra* notes 55-61 and accompanying text.

41. *Corum*, 330 N.C. at 786, 413 S.E.2d at 291. Thus, "courts have deferred to the legislature the determination of those instances in which the sovereign waives its traditional immunity." *Id.*

42. *Id.* at 785-86, 413 S.E.2d at 291. "The doctrine of sovereign immunity cannot stand as a barrier to North Carolina citizens who seek to remedy violations of their rights guaranteed by the Declaration of Rights." *Id.*

43. *Id.* at 786, 413 S.E.2d at 291.

44. *Id.* at 786, 413 S.E.2d at 292. Abolishing the doctrine of sovereign immunity as to constitutional claims against the State and state officials in their official capacities, the court found that Corum had presented sufficient evidence to withstand a motion for summary judgment by Durham. *Id.* at 789, 413 S.E.2d at 293. The court granted the motions for summary judgment, however, brought by UNC, ASU, Spangler, and Thomas. *Id.*

45. *Id.* at 784-85, 413 S.E.2d at 291. The court, without specifying the scope of relief available under Corum's state constitutional law claim, mentioned that relief could consist of reinstatement of Corum's deanship and lost wages. *Id.* at 784, 413 S.E.2d at 291. The court noted, however, that "[v]arious rights that are protected by our Declaration of Rights may require greater or lesser relief to rectify the violation of such rights, depending upon the right violated and the facts of the particular case." *Id.* In conclusion, the court suggested that the state constitutional claim completed Corum's relief options by providing recovery of monetary damages against Durham in his official capacity. *Id.* at 789, 413 S.E.2d at 294.

dural remedies.[46] Second, the court must respect the other branches of government and apply "the least intrusive remedy available and necessary to right the wrong."[47]

Sale v. State Highway & Public Works Commission[48] was the precursor to the *Corum* private cause of action under the state constitution. In *Sale*, the State Highway Commission acquired an easement over the plaintiff's property in return for compensation and the removal and reconstruction elsewhere of the buildings located on the easement.[49] During removal, the buildings were destroyed by fire, and the plaintiff brought an action to recover the compensation due him plus damages arising from the destruction.[50] The plaintiff argued that unless he was compensated, he would be deprived of his property in violation of article I, section 17[51] of the state constitution.[52] The North Carolina Supreme Court characterized this constitutional provision as self-executing[53] and declared:

> When Article I, Section 17, of the North Carolina Constitution provides that "no person [shall be] . . . in any manner deprived of his life, liberty or property, but by the law of the land," and when the fundamental law of this State, based on natural justice and equity, prohibits the taking or acquisition of private property for public use without the payment of just compensation, or its equivalent, and the North Carolina Constitution points out no remedy, and if no statute affords an adequate remedy . . . the common law which provides a remedy for every wrong will furnish the appropriate action for the adequate redress of such grievance.[54]

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46. *Id.* at 784, 413 S.E.2d at 291 (citing *In re* Alamance Cty. Ct. Facilities, 329 N.C. 84, 99-105, 405 S.E.2d 125, 132-35 (1991)).

47. *Id.* These limitations are similar to those specified in Bivens v. Six Unknown Named Agents, 403 U.S. 388, 396-97 (1971). *See infra* notes 67-68 and accompanying text.

48. 242 N.C. 613, 89 S.E.2d 290 (1955); *see also* Midgett v. North Carolina State Highway Comm'n, 260 N.C. 241, 250, 132 S.E.2d 599, 608 (1963) (applying *Sale*), *overruled in part by* Lea Co. v. North Carolina Bd. of Transp., 308 N.C. 603, 304 S.E.2d 164 (1983).

49. *Sale*, 242 N.C. at 616, 89 S.E.2d at 294.

50. *Id.* at 615, 89 S.E.2d at 294.

51. N.C. CONST. art. I, § 17. The current version of this provision is found in N.C. CONST. art. I, § 19.

52. *Sale*, 242 N.C. at 617, 89 S.E.2d at 295.

53. *Id.*

54. *Id.* at 618, 89 S.E.2d at 296. The court viewed this principle of compensation as "grounded in natural law." *Id.* at 617, 89 S.E.2d at 295. Similar cases regarding the taking of private property have provided remedies with a view toward natural justice. *See, e.g.*, Johnston v. Rankin, 70 N.C. 550, 555 (1874) (maintaining that even absent a constitutional provision of compensation for the taking of private property, compensating the individual "is so grounded in natural equity that it has never been denied to be a part of the law of North Carolina"); University of North Carolina v. Foy, 5 N.C. 58, 88 (1805) (allowing an injunction

By contrast, North Carolina has a long, albeit eroding, history of support for the doctrine of sovereign immunity. North Carolina apparently adopted the doctrine in 1889 in *Moffitt v. City of Asheville*.[55] Justice Avery, writing for the court, explained:

> [W]here a city or town in [sic] exercising the judicial, discretionary or legislative authority, conferred by its charter, or is discharging a duty, imposed solely for the benefit of the public, it incurs no liability for the negligence of its officers, though acting under color of office, unless some statute (expressly or by necessary implication) subjects the corporation to pecuniary responsibility for such negligence.[56]

Thereafter, North Carolina courts consistently applied the doctrine, and the General Assembly recognized it as the public policy of the state.[57] More recently, however, the supreme court has criticized the logic of sovereign immunity and called for the legislature to modify or repeal the doctrine.[58] The court pointed to the inconsistency between this country's traditional concepts of democratic government and of an individual's right to redress for injuries and the anachronistic notion that a state can escape liability solely because of its status.[59] Illustrative of the court's disenchantment with the doctrine was its creation in 1976 of an exception to sovereign immunity whenever the State enters into a contract.[60] The court reasoned that when the State assumes a contractual obligation, it "implicitly consents to be sued for damages on the contract in the event it breaches the contract," and that any other result would discredit

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against a legislative enactment that would have taken away property from the trustees of UNC).

55. 103 N.C. 237, 255, 9 S.E. 695, 697 (1889). North Carolina did not adopt the doctrine of sovereign immunity when it statutorily adopted the common law of England because the decision incorporating the doctrine into English common law postdated by thirteen years North Carolina's statutory adoption, but instead espoused it as a creature of the judiciary in respect for its co-equal branch, the General Assembly. Steelman v. City of New Bern, 279 N.C. 589, 592, 184 S.E.2d 239, 241 (1971); *Corum*, 330 N.C. at 785, 413 S.E.2d at 291.

56. *Moffitt*, 103 N.C. at 255, 9 S.E. at 697.

57. *Corum*, 330 N.C. at 785, 413 S.E.2d at 291. *See, e.g.*, N.C. GEN. STAT. § 160A-485 (1987) (waiver of immunity by municipality through purchase of insurance); *id.* § 153A-435 (1991) (same for counties); *id.* § 115D-24 (1990) (same for Boards of Trustees of state community colleges).

58. *Steelman*, 279 N.C. at 595, 184 S.E.2d at 243. Although judicially created, the General Assembly recognized sovereign immunity as part of the state's public policy; therefore, the court in *Steelman* maintained that any modification or repeal of the doctrine should come from the legislature. *Id.* at 594-95, 184 S.E.2d at 242-43.

59. *Id.* at 593-94, 184 S.E.2d at 242-43 (citing Hargrove v. Town of Cocoa Beach, 96 So. 2d 130, 132-33 (Fla. 1957)). The court noted that several other jurisdictions had modified or overruled the doctrine, particularly in the area of tort liability. *Id.*

60. Smith v. State, 289 N.C. 303, 320, 222 S.E.2d 412, 423-24 (1976).

the integrity and reputation of the State.[61]

The landmark decision from the United States Supreme Court which provides impetus and guidance to states willing to recognize a private constitutional cause of action[62] is *Bivens v. Six Unknown Named*

61. *Id.* The court drew a distinction between contract liability and tort liability, and noted that any repeal of the doctrine of sovereign immunity in tort actions should come from the General Assembly. *Id.* at 322, 222 S.E.2d at 424-25. The court's justification for the distinction between the causes of action is that the State can estimate its liability for breach of contract, but "the extent of tort liability for wrongful death and personal injuries is never predictable." *Id.* at 322, 222 S.E.2d at 425. Without liability limitations, moreover, jury verdicts could unduly strain the State's budget. *Id.*

In dissent, Justice Lake maintained that sovereign immunity is not judicially created but is an inherent attribute of sovereign rule, and thus the judiciary is not the proper branch of government to modify or repeal the doctrine. *Id.* at 341, 222 S.E.2d at 436-37 (Lake, J., dissenting). Justice Lake prophesied that "[t]he road to judicial dictatorship is also paved with good intentions." *Id.* at 338, 222 S.E.2d at 434 (Lake, J., dissenting).

62. Several states besides North Carolina have allowed a private cause of action under their state constitutions. *See, e.g.*, Fenton v. Groveland Community Servs. Dist., 135 Cal. App. 3d 797, 804-05, 185 Cal. Rptr. 758, 762-64 (1982) (allowing an action for damages under the California Constitution where there is a violation of one's right to work); Schreiner v. McKenzie Tank Lines, 408 So. 2d 711, 713-14 (Fla. Dist. Ct. App. 1982) (determining that the provision in the Florida Constitution which prohibits any deprivation of a right because of "race, religion or physical handicap" is self-executing), *approved*, 432 So. 2d 567 (Fla. 1983); Walinski v. Morrison & Morrison, 60 Ill. App. 3d 616, 620, 377 N.E.2d 242, 244-45 (1978) (acknowledging action for compensatory and punitive damages for sex discrimination under the Illinois Constitution); Widgeon v. Eastern Shore Hosp. Ctr., 300 Md. 520, 537-38, 479 A.2d 921, 930 (1984) (allowing a common-law action for damages under the Maryland Constitution where there has been deprivation of property or an illegal search or seizure); Phillips v. Youth Dev. Program, Inc., 390 Mass. 652, 658-60, 459 N.E.2d 453, 457-78 (1983) (demonstrating willingness to grant judicial remedy for a due process violation under the Massachusetts Constitution if state action is proven); Smith v. Department of Pub. Health, 428 Mich. 540, 541-42, 410 N.W.2d 749, 751 (1987) (stating willingness to consider claims for damages for certain violations of the Michigan Constitution, although declining to do so on the facts presented), *aff'd sub nom.* Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989); Peper v. Princeton Univ. Bd. of Trustees, 77 N.J. 55, 79-80, 389 A.2d 465, 476-78 (1978) (allowing a cause of action under the New Jersey Constitution for sex discrimination); Terranova v. New York, 111 Misc. 2d 1089, 1095-96, 445 N.Y.S.2d 965, 969-70 (N.Y. Ct. Cl. 1982) (finding an unreasonable search and seizure in violation of the New York Constitution and granting damages as a remedy); Hunter v. Port Auth., 277 Pa. Super. 4, 14, 419 A.2d 631, 636 (1980) (allowing a cause of action under the Pennsylvania Constitution when one's right to pursue employment is obstructed). Arguably, California is the leader in this rebirth of federalism. Friesen, *supra* note 22, at 1276. Justice Tobriner indeed held that there is no state action requirement in finding an unconstitutional discrimination in employment by a public utility. Gay Law Students Ass'n v. Pacific Tel. & Tel. Co., 24 Cal. 3d 458, 467-72, 595 P.2d 592, 597-600, 156 Cal. Rptr. 14, 19-22 (1979); *see* Friesen, *supra* note 22 at 1277 ("The possibility of imposing constitutional norms on private actors is potentially one of the most far-reaching changes in constitutional law to be worked by the state civil rights movement.").

Despite this ground swell, some states have refused to recognize a cause of action arising from their state constitutions. *See, e.g.*, King v. Alaska State Hous. Auth., 633 P.2d 256, 260 (Alaska 1980) (declining to recognize an action for damages under the Alaska Constitution because of the potential for "endless lawsuits"); Figueroa v. State, 61 Haw. 369, 381-82, 604 P.2d 1198, 1205 (1979) (maintaining that a claim for damages under the Hawaii Constitution

Agents.[63] Bivens sought damages under the Fourth Amendment,[64] claiming that federal officers conducted an unreasonable search and seizure.[65] In a trailblazing announcement, the Supreme Court inferred a cause of action for damages directly under the United States Constitution.[66] The Court did not find the right to a common-law cause of action under the Constitution unqualified; to the contrary, it identified two situations in which it would not infer a cause of action: when there are "special factors counselling hesitation in the absence of affirmative action by Congress,"[67] and when Congress has provided an equally effective remedy.[68] The Court, moreover, left a substantial obstacle to *Bivens*-type

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against the state is prevented by the doctrine of sovereign immunity); Hunter v. City of Eugene, 309 Or. 298, 304, 787 P.2d 881, 884 (1990) (leaving it to the legislature to imply a private cause of action for damages under the Oregon Constitution). The Alaska Supreme Court recently retreated somewhat from its holding in *King*, however, by announcing in Alaska Pacific Assurance Co. v. Brown, 687 P.2d 264 (Alaska 1984), its willingness to recognize an action for damages under the Alaska Constitution, although the court dismissed plaintiff's action because the defendant was not a state actor. *Id.* at 275-76. Rationales underlying the refusal to recognize a private cause of action include the belief that the legislature is the proper governmental branch to establish remedies and set limits on state liability, *Hunter*, 309 Or. at 303-04, 787 P.2d at 884, or the notion that sovereign immunity bars suit against the state. *Figueroa*, 61 Haw. at 381-82, 604 P.2d at 1205; *see* Friesen, *supra* note 22, at 1280.

63. 403 U.S. 388 (1971).

64. U.S. CONST. amend. IV (protecting against unreasonable searches and seizures and against the issuance of warrants upon less than probable cause).

65. *Bivens*, 403 U.S. at 389.

66. *Id.* at 397. Justice Brennan, writing for the majority, opined that persons injured should be able to seek relief notwithstanding the absence (§ 1983 only applies to state and local, not federal, officers) of a statutory remedy. *Id.* at 392. For a discussion of the role of state constitutions in creating private causes of action in the wake of the U.S. Supreme Court's later retreat from its holding in *Bivens*, see William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495-502 (1977); *see also* William J. Brennan, Jr., *Foreword to Symposium—"The Law of the Land": The North Carolina Constitution and State Constitutional Law*, 70 N.C. L. REV. 1701, 1701 (1992) [hereinafter Brennan, Symposium Preface].

In a concurrence to the *Bivens* majority, Justice Harlan noted that the Court is primarily responsible for enforcing the Bill of Rights, and thus legislative action is not necessary for the judiciary to craft the appropriate relief. *Bivens*, 403 U.S. at 407 (Harlan, J., concurring). *Compare id.* (Harlan, J., concurring) *with Corum*, 330 N.C. at 783, 413 S.E.2d at 290 ("It is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens . . . ."). Chief Justice Burger dissented, warning that creating a cause of action should be a congressional function. *Bivens*, 403 U.S. at 412 (Burger, C.J., dissenting); *see also id.* at 429 (Black, J., dissenting) (contending that if Congress wanted to create a remedy for constitutional violations by federal officers it would have extended § 1983 to federal actors); *id.* at 430 (Blackmun, J., dissenting) (arguing that the authority to create causes of action belongs to Congress, not the Court).

67. *Bivens*, 403 U.S. at 396.

68. *Id.* at 397. The Court more recently merged these two factors, viewing an alternative remedial scheme created by Congress as a factor which counsels hesitation. *See* Schweiker v. Chilicky, 487 U.S. 412, 423, 428-29 (1988).

The Court has extended the *Bivens* analysis to other provisions in the Bill of Rights. *E.g.*,

claims by not addressing whether sovereign immunity would act as a bar to actions against the state or government officials acting in their official capacities. The only mention of the doctrine appears in Justice Harlan's concurrence: "However desirable a direct remedy against the Government might be as a substitute for individual official liability, the sovereign still remains immune to suit."[69] Nevertheless, *Bivens* opened the doors of compensation to many persons whose constitutional rights federal officials violated.

Beginning in the 1980s, some ten years after its decision in *Bivens*, the Supreme Court began to retreat from enthusiastically proclaiming similar direct causes of action.[70] Against the backdrop of this federal

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Carlson v. Green, 446 U.S. 14, 20-23 (1980) (acknowledging a private cause of action for violations of the Eighth Amendment); Davis v. Passman, 442 U.S. 228, 248-49 (1979) (the same for violations of the Fifth Amendment). Lower federal courts further extended *Bivens* to violations of the Fourteenth Amendment. *See* Jones v. City of Memphis, 586 F.2d 622, 624 (1978), *cert. denied*, 440 U.S. 914 (1979).

69. *Bivens*, 403 U.S. at 410 (Harlan, J., concurring). For a criticism of this result, see Rosen, *supra* note 24, at 346-48.

70. In Bush v. Lucas, 462 U.S. 367 (1983), for example, the Court refused to permit a *Bivens* suit under the First Amendment when an employee was demoted because of his public statements, *id.* at 390, even though a damages remedy would be more effective than the existing statutory relief provided by the Civil Service Commission regulations, and even though Congress had not precluded the use of a *Bivens* suit, *id.* at 378, because alternative remedies existed under the Civil Service Commission regulations. *Id.* at 385-86. Similarly, in *Schweiker*, the majority did not allow a Social Security beneficiary to bring a *Bivens*-type action under the Due Process Clause because of the administrative and judicial procedures which Congress had established to correct improper denials of disability benefits. *Schweiker*, 487 U.S. at 429.

The Supreme Court's restrictive treatment of *Bivens* suits has prompted many state judges and legal commentators to advocate adjudicating constitutional claims under state constitutions rather than focusing primarily on the United States Constitution. *See, e.g.*, Shirley S. Abrahamson, *Reincarnation of State Courts*, 36 SW. L.J. 951, 959-72 (1982); Exum, *supra* note 5, at 8-9; Friesen, *supra* note 22, at 1271; Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 383 (1980); Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707, 717 (1983). *But see* Earl M. Maltz, *The Dark Side of State Court Activism*, 63 TEX. L. REV. 995, 1007 (1985) (pointing out potential problems with expanding state constitutional adjudication). For a comprehensive overview and analysis of the underlying theories governing this state activism, see *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1331-1493 (1982).

Justice Brennan, who in 1977 authored the seminal article calling for increased judicial activism under state constitutions, is primarily responsible for this revamping of federalism. Brennan, 90 HARV. L. REV., *supra* note 66, at 502 ("I suggest to the bar that, although in the past it might have been safe for counsel to raise only federal constitutional issues in state courts, plainly it would be most unwise these days not also to raise the state constitutional questions"); *see* Brennan, Symposium Preface, *supra* note 66, at 1701; William J. Brennan, Jr., *The Bill of Rights and the States: the Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 546-53 (1986). Brennan's plea for increased protection of individual rights under state constitutions resulted largely from the Supreme Court's general

constitutional ebb, the flow of *Corum* with respect to state constitutional causes of action is dramatic.[71] In *Corum*, North Carolina responded to the clarion call caused by the Supreme Court's change in position,[72] and provided a *Bivens*-type remedy under its state constitution.[73]

As with many constitutional decisions, *Corum* can be interpreted narrowly or broadly. On the one hand, the implied constitutional cause of action for damages may be confined to violations of free speech rights. Indeed, *Corum* phrased the issue as whether a cause of action exists under the constitution for violations of the free speech provision.[74] The court's formulation of the holding likewise is structured upon freedom of speech.[75]

Even if *Corum* is not limited strictly to freedom of speech cases, attorneys seeking to extend *Corum* may encounter obstacles as a result of ambiguities in the court's decision. By stating that free speech deserves at least as much protection as the right to own and use property,[76] *Corum* may be interpreted as having created a hierarchy of protection of those individual rights enumerated in the constitution.[77] Under this type of analysis, future courts could refuse to extend *Corum* to those provisions in the Declaration of Rights deemed less significant than free speech or property rights. The supreme court, moreover, may have limited *Corum*-type actions to intentional violations, or at least to state actors with a mens rea greater than negligence. Qualified immunity, still an available defense to a *Corum*-based cause of action,[78] rests on a defendant's good faith; a plaintiff's showing of bad faith would require evidence

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retreat from the types of protections afforded by *Bivens*-type actions. *See* Brennan, 90 HARV. L. REV., *supra* note 66, at 495.

71. *See* Louis D. Bilionis, *On the Significance of Constitutional Spirit*, 70 N.C. L. REV. 1803, 1814-15 (1992).

72. *See supra* note 70.

73. *See supra* notes 34-39, 45-47 and accompanying text.

74. *Corum*, 330 N.C. at 781, 413 S.E.2d at 289.

75. *Id.* at 786, 413 S.E.2d at 292.

76. *See supra* note 38 and accompanying text.

77. *See Corum*, 330 N.C. at 784, 413 S.E.2d at 291 ("Various rights that are protected by our Declaration of Rights may require greater or lesser relief to rectify the violation of such rights, *depending* upon the right violated and the facts of the particular case.") (emphasis added). It should be noted, however, that this statement appeared in the court's discussion of the nature of the remedy and not in the creation of the cause of action. *See id.* at 784, 413 S.E.2d at 290-91.

78. Although it abolished sovereign immunity, the court explained that defendants still are "entitled to all defenses that may arise upon the facts and law of the case." *Id.* at 786, 413 S.E.2d at 292. The applicable defense in *Corum* for defendant Durham is qualified immunity, which is based on the good faith of the defendant. *See supra* notes 24-26 and accompanying text.

of culpable behavior more egregious than simple negligence.[79]

The court's characterization of the free speech provision also suggests a narrow approach. First, the court described freedom of speech as "a direct personal guarantee," which suggests that only personal rights, as opposed to collective rights, should receive *Corum* protection.[80] Second, the court's emphasis on the self-executing nature of the free speech and property provisions[81] raises the question whether the supreme court will view all provisions in the Declaration of Rights as self-executing for purposes of granting *Corum* protection. Finally, the existence of sufficient[82] statutory remedies, as mentioned in both *Corum*[83] and *Bivens*,[84] may preclude an implied cause of action under some other constitutional provisions.[85] Any judicial intrusion upon the legislature would be especially acute in North Carolina, because the Declaration of Rights contains a provision guaranteeing the separation of powers.[86]

Several factors, on the other hand, suggest that *Corum* indeed may have broad implications for individuals seeking a private right of action for violations of their state constitutional rights. Perhaps most important, the *Corum* court stressed that "[t]he very purpose of the Declaration of Rights is to ensure that the violation of *these* rights is never permitted."[87] Similarly, the court proclaimed that everyone "whose state constitutional *rights* have been abridged" has a cause of action under the constitution.[88] Equally expansive is the supreme court's triumphant declaration that the common law will provide a remedy for "*every*

79. *See* Harlow v. Fitzgerald, 457 U.S. 800, 815 (1982).

80. *Corum*, 330 N.C. at 781, 413 S.E.2d at 289 ("The words 'shall never be restrained' are a direct personal guarantee . . . ." (quoting N.C. CONST. art. I, § 14)). As an example of this possible distinction, compare N.C. CONST. art. I, § 14 ("Freedom of speech and of the press . . . shall never be restrained . . . ."), a personal right, with N.C. CONST. art. I, § 12 ("The *people* have a right to assemble together . . . .") (emphasis added), which could be interpreted as a collective right.

81. *See supra* note 35 and accompanying text.

82. North Carolina provides an administrative cause of action for an employee who claims he had been discharged or demoted without just cause. N.C. GEN. STAT. § 126-35 (1991). The supreme court in *Corum* evidently believed that this remedy was not sufficient in redressing violations of Corum's free speech rights.

83. *See supra* note 46 and accompanying text.

84. *See supra* note 68 and accompanying text.

85. For example, North Carolina statutes allow a claim against a state agency for money due on a construction contract, N.C. GEN. STAT. § 143-135.3 (1991), and permit an individual to seek compensation for the taking of land against the Department of Transportation. *Id.* § 136-111. Moreover, an administrative cause of action is available for an employee who claims she was denied employment benefits in violation of her equal protection rights.

86. N.C. CONST. art. I, § 6.

87. *Corum*, 330 N.C. at 783, 413 S.E.2d at 290 (emphasis added).

88. *Id.* at 782, 413 S.E.2d at 289 (emphasis added).

wrong,"[89] and the court's "liberal interpretation" of those constitutional provisions which guarantee individual rights.[90] The court's language in defining the scope of the remedy—that "*[v]arious* rights that are protected by our Declaration of Rights may require greater or lesser relief to rectify the violation of such rights, *depending* upon the right violated,"[91]—likewise suggests that *Corum* will provide a font of protection generally to rights in the state constitution. Finally, the court permitted the implied cause of action to supplement some remedies already available to plaintiffs, rather than limiting it to situations in which no possible alternative remedy existed.[92]

If attorneys seize this broad interpretation and bring *Corum*-type actions in state courts, the decision's primary effect, because of the interplay between the state and federal constitutions, will expand the overall protection of individual liberties afforded citizens of North Carolina. North Carolina's Declaration of Rights includes many of the provisions which are found in the Federal Bill of Rights.[93] The North Carolina Supreme Court, however, is not bound by the United States Supreme Court's construction of an analogous federal provision when construing the state constitution: the federal Constitution provides a minimum level of protection to individuals, below which the states may not fall, but beyond which state constitutions are free to go.[94] For example, the state constitution's due process and equal protection provisions[95] could sweep

89. *Id.* (emphasis added).

90. *Id.* at 783, 413 S.E.2d at 290 (emphasis added).

91. *Id.* at 784, 413 S.E.2d at 291 (emphasis added).

92. Because Corum could not seek monetary damages against Durham in his official capacity under § 1983, he was limited to injunctive relief. *Id.* at 771, 413 S.E.2d 282-83; *accord* Will v. Michigan Dept. of State Police, 491 U.S. 58, 71 n.10 (1989). Corum may, however, seek monetary damages under § 1983 against Durham in his individual capacity. *Corum*, 330 N.C. at 798, 413 S.E.2d at 293-94. Thus, the supreme court created a constitutional cause of action as intersticial relief which is not necessarily precluded where there are alternative remedies. *Contra* Bush v. Lucas, 462 U.S. 367, 388-90 (1983) (denying a *Bivens*-type action because of a congressionally created alternative remedy); *see* discussion *supra* note 70.

93. *E.g.*, N.C. CONST. art. I, § 12 (right to assemble); *id.* § 13 (right to worship); *id.* § 14 (free speech and press); *id.* § 19 (equal protection provision and the law of the land provision, which is analogous to a due process provision,); *id.* § 20 (prohibition against general warrants, which is analogous to a prohibition of unreasonable search and seizures); *id.* § 23 (freedom from self-incrimination); *id.* § 24 (right to jury trial); *id.* § 27 (protection against cruel and unusual punishments); *id.* § 30 (right of militia to bear arms).

94. *Corum*, 330 N.C. at 783, 413 S.E.2d at 290; Exum, *supra* note 5, at 8.

95. N.C. CONST. art. I, § 19. Rather than "due process," the state constitution uses the term "law of the land." *Id.* The law of the land provision, nonetheless, is synonymous with the Fourteenth Amendment's due process provision. State v. Smith, 90 N.C. App. 161, 163, 368 S.E.2d 33, 35 (1988), *aff'd*, 323 N.C. 703, 374 S.E.2d 866, *cert. denied*, 490 U.S. 1100 (1989). Like its federal counterpart, it pertains to both procedural and substantive law. *In re* Moore, 289 N.C. 95, 97-98, 221 S.E.2d 307, 309 (1976). Any decision by the Supreme Court

into the Declaration of Rights an unlimited host of court-construed individual rights which may fall under *Corum*'s umbrella of protection.[96]

North Carolina's Declaration of Rights, moreover, enumerates rights not included in the Federal Bill of Rights.[97] Potentially, the most significant of these rights in terms of *Corum*'s impact is the right to education.[98] A plaintiff who could prove a denial of equal access, whether it be a classification based on race or on disparity in wealth,[99] *may* be lim-

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which construes the Fourteenth Amendment's due process clause is, however, not binding on the state supreme court's interpretation of the law of the land clause. Bulova Watch Co. v. Brand Distrib. of N. Wilkesboro, Inc., 285 N.C. 467, 474, 206 S.E.2d 141, 146 (1974).

The North Carolina Supreme Court also uses the federal analysis for equal protection purposes. When a legislative act infringes upon a fundamental right or distinguishes between people of a suspect class, the supreme court engages in strict scrutiny. Abbott v. Town of Highlands, 52 N.C. App. 69, 75, 277 S.E.2d 820, 824-25, *cert. denied*, 303 N.C. 710, 283 S.E.2d 136 (1981).

Both of these provisions enable the court to read rights into the state constitution, even in situations in which the Supreme Court has refused to recognize the same rights under the Federal Constitution. In Texas, for example, the court of appeals extended the right of privacy to homosexual conduct, notwithstanding the Supreme Court's refusal to do so under the federal Constitution in Bowers v. Hardwick, 478 U.S. 186 (1986). State v. Morales, No. 3-91-195-CV, 1992 WL 44590, at * 3-5 (Tx. Ct. App. Mar. 11, 1992).

96. These unenumerated rights include the right to pursue an occupation, Treants Enters., Inc. v. Onslow County, 83 N.C. App. 345, 354, 350 S.E.2d 365, 371 (1986) (labelling the right to earn a living as "fundamental" for purposes of constitional adjudication), *aff'd*, 320 N.C. 776, 360 S.E.2d 783 (1987); of equal access to participation in the public school system, Sneed v. Greensboro City Board of Educ., 299 N.C. 609, 618, 264 S.E.2d 106, 113 (1980) (declaring that equal access is a fundamental right protected by due process); of freedom of contract, Louchheim, Eng. & People, Inc. v. Carson, 35 N.C. App. 299, 306, 241 S.E.2d 401, 405 (1978) (explaining that freedom of contract is a liberty and a property right that can be restricted only by a valid exercise of police power); and freedom to travel. State v. Dobbins, 277 N.C. 484, 499, 178 S.E.2d 499, 457-58 (1971). Athough the supreme court could refuse to extend *Corum* beyond the express constitutional provisions to these unenumerated rights, any distinction would be tenuous since these rights are actually incorporated into the law of the land and equal protection provision, and because it only takes the court's articulation of a right to make it self-executing.

97. These rights, for example, include the protection of the habeas corpus privilege, N.C. CONST. art. I, § 21, guarantee of a jury trial in civil cases, N.C. CONST. art I, § 25, and freedom from discriminatory exclusion from jury service, N.C. CONST. art. I, § 26.

98. N.C. CONST. art. I, § 15 ("The people have a right to the privilege of education, and it is the duty of the State to guard and maintain that right."). The United States Court of Appeals for the Fourth Circuit has construed this provision to "embody [a] mandate[] for the establishment of free public schools in North Carolina, the untrammeled privilege of education for all students, and 'the duty of the State to maintain and guard that right,' while guaranteeing equal opportunities to all students." Webster v. Perry, 512 F.2d 612, 615 (4th Cir. 1975) (quoting N.C. CONST. art. I, § 15).

99. The United States Supreme Court has refused to bestow constitutional protection on education, because the Court does not view education as a fundamental right deserving of strict scrutiny. San Antonio Indep. Sch. Dist. v. Rodriquez, 411 U.S. 1, 25, 37 (1973). Furthermore, the Court will not subject any legislation which has a disparaging impact upon districts with a low tax base to strict scrutiny, because it does not believe that the impoverished are a suspect class. *Id.* The problem in North Carolina, however, is not in granting constitu-

ited no longer to injunctive relief if the court chooses to grant damages under a *Corum*-type action.

The state judiciary, when interpreting potential *Corum* claims, of course must heed *Corum*'s admonishment to defer to established remedies so as not to infringe upon the legislative branch.[100] Within the confines of these restraints, however, North Carolina courts still can use *Corum* effectively to fill the gaps in protection for individual rights. But a critical prerequisite to an extended and meaningful use of *Corum* is the initiation of *Corum*-type actions by state attorneys. *Corum* is but a call to arms; only when North Carolina's lawyers reacquaint themselves with the "old document"[101] will a new era of constitutional jurisprudence fully emerge.

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tional protection to education but determining what interferes with a person's equal access to education. The court of appeals, refusing to acknowledge a denial of equal access, recently dismissed a *Rodriquez*-type allegation that the system of financing public schools discriminated against those counties which had a low tax base from which to draw funds. Britt v. North Carolina State Bd. of Educ., 86 N.C. App. 282, 290, 357 S.E.2d 432, 436-37, *appeal dismissed and disc. rev. denied*, 320 N.C. 790, 361 S.E.2d 71 (1987).

100. *Corum*, 330 N.C. at 784, 413 S.E.2d at 291; *see supra* notes 45-47 and accompanying text.

101. *See* Exum, *supra* note 5 and accompanying text.