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Brown v. State of New York: Judge Simons Says New York State Can Be Held Liable for Money Damages

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BROWN V. STATE OF NEW YORK: JUDGE SIMONS SAYS NEW YORK STATE CAN BE HELD LIABLE FOR MONEY DAMAGES

INTRODUCTION

On the eve of his retirement, Judge Richard Simons, writing for a 5-1 majority of the New York State Court of Appeals, announced a landmark opinion[1] which held that the State of New York can be liable in money damages for violations of the Equal Protection and Search and Seizure Clauses of the New York State Constitution.[2]

In 1992, Ricky Brown was a student at the State University of New York, College at Oneonta [hereinafter "SUNY-O"] when three police officers stopped him and two friends on Main Street in the upstate college town after a woman who had been assaulted near the campus a few days earlier told police that her attacker was a black man.[3] Within a few days of the attack, the police began rounding up almost every African-American in Oneonta, demanding to know where they had been and whether they had suspicious cuts on their arms.[4] More than four years later, the New York State Court of Appeals has held that Brown, and approximately 300 other African-Americans who were stopped by police during the days of roundups, have a valid cause of action against the State for violating their state constitutional rights.

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1. *See* Brown v. State of New York, 89 N.Y.2d 172, 674 N.E.2d 1129, 652 N.Y.S.2d 223 (1996).

2. N.Y. CONST. art I, § 11 (stating in pertinent part that "No person shall be denied the equal protection of the laws of this state or any subdivision thereof."); N.Y. CONST. art I, § 12 (stating in pertinent part that "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . . but upon probable cause. . . .").

3. *Brown*, 89 N.Y.2d at 176, 674 N.E.2d at 1131, 652 N.Y.S.2d at 225.

4. *Id.*

The lawsuit stems from a September 4, 1992, incident in which a seventy-seven year-old woman suffered superficial knife wounds while reportedly struggling with a purported burglar in her home located approximately five minutes from the Oneonta campus.[5] When the woman said she could only describe her assailant as a college-aged black man, state and county police obtained a list of every black man attending the University.[6] Using the list, which was provided by the University's acting president, police tracked down each of the men, demanding alibis and insisting on checking their arms for signs of a struggle.[7] When the list produced no suspects, police began stopping black men randomly in the streets, eventually questioning almost 300 people.[8]

A class action was brought on behalf of all of the questioned residents.[9] Before submitting their answer, the State moved to dismiss on the grounds that the plaintiff's had failed to state a cause of action and that the court lacked subject matter jurisdiction.[10] The Court of Claims dismissed the suit, claiming that the State's waiver of sovereign immunity applies only to traditional common law torts and, therefore, the court lacked jurisdiction.[11] The court also held that direct actions for state constitutional violations are not cognizable in any court unless

5. *Id.*

6. *Id* at 177, 674 N.E.2d at 1131-32, 652 N.Y.S.2d at 225-26.

7. *Id.*

8. *Id* at 176, 674 N.E.2d at 1131, 652 N.Y.S.2d at 225. In the years since the search first began, no person has been arrested for the attack. *Id.*

9. The claim was brought as a class action on behalf of two separate classes: the first class was comprised of those persons whose names were on the computer list generated by SUNY-O officials and the second class consisted of those persons who were stopped and questioned by police officers without reasonable suspicion. *Id.* at 177 n.1, 674 N.E.2d at 1132 n.1, 652 N.Y.S.2d at 226 n.1. Only claims involving the second class were being appealed. *Id.*

10. *Id.* at 176, 674 N.E.2d at 1131, 652 N.Y.S.2d at 225.

11. *Id.*

they are linked to a traditional tort. The Appellate Division, Third Department, affirmed.[12]

On review, the New York State Court of Appeals held that a cause of action seeking money damages may be brought against New York State for violations of Equal Protection and Search and Seizure Clauses of the New York State Constitution and that the jurisdiction of the Court of Claims is not limited to causes of action for traditional common law torts.[13] This note will first examine the history behind the "constitutional tort"[14] cause of action.[15] It will then analyze the Court of Appeals' decision in *Brown*[16] and discuss the implications of such a decision.

I. A "CONSTITUTIONAL TORT" CAUSE OF ACTION

In 1961, the United States Supreme Court ruled that the Civil Rights Statutes,[17] specifically 42 U.S.C. § 1983,[18] could be used by an individual to recover damages from a state official for

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12. *Id. See* Brown v. State of New York, 221 A.D.2d 681, 633 N.Y.S.2d 409 (3d Dep't 1995).

13. *Brown*, 89 N.Y.2d at 197, 674 N.E.2d at 1144, 652 N.Y.S.2d at 238.

14. A constitutional tort is "any action for damages for violation of a constitutional right against a government or individual defendants." *Id.* at 177, 674 N.E.2d at 1132, 652 N.Y.S.2d at 226. According to the *Brown* court "[t]he term 'constitutional tort' has been attributed to Professor Marshall Shapo who used it in an article on the subject in the Northwestern University Law Review 35 years ago. It is now used generally by courts and commentators." *Id.* at 177 n.2, 674 N.E.2d at 1132 n.2, 652 N.Y.S.2d at 226 n.2. (citations omitted). *See* William Burnham, *Separating Constitutional and Common Law Torts: A Critique and a Proposed Constitutional Theory of Duty*, 73 MINN. L. REV. 515, 515 n. 2 (1989).

15. *See infra* notes 17 - 62 and accompanying text.

16. *See infra* notes 63 - 122 and accompanying text.

17. 42 U.S.C. §§ 1981-1988 (1982).

18. Congress originally enacted 42 U.S.C. § 1983 as part of the Civil Rights Act of 1871, also known as the Ku Klux Klan Act. *See* Harry Blackmun, *Section 1983 and Federal Protection of Individual Rights-- Will the Statute Remain Alive or Fade Away?*, 60 N.Y.U. L. REV 1, 29 (1985).

deprivation of one's constitutional rights.[19] The Court found a monetary damages remedy appropriate since section 1983 was enacted "to aid in the preservation of human liberty and human rights."[20] With its decision in *Monroe v. Pape*,[21] the Supreme Court ushered in the era of the 'constitutional tort,' and with it, the right to obtain monetary relief for the violation of one's constitutional rights by a state official. However, where one's constitutional rights were violated by an FBI or INS agent, no similar cause of action was available since the Civil Rights Statutes did not apply to the actions of a federal official.[22]

It was not until the 1970's that the Supreme Court created a corollary cause of action for individuals whose constitutional rights are infringed by an employee of the federal government. In *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*,[23] the Supreme Court ruled that a federal official could be held personally liable for damages resulting from violations of a plaintiff's Fourth Amendment rights. The Court found that, in the absence of any statutory provision providing for such right, such as section 1983, an aggrieved party could bring suit directly under the Federal Constitution.[24]

The Supreme Court, in *Bivens*, felt compelled to fill a void left by Congress in the Civil Rights Statutes. The Court found it inherently unfair that an individual whose constitutional rights were violated could be deprived of redress simply by virtue of the fact that the wrongdoer was a federal rather than state official. Accordingly, the Court determined that the only way to

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19. *See* Monroe v. Pape, 365 U.S. 167, 171-87 (1961).

20. *See* Gomez v. Toledo, 446 U.S. 635, 638-39 (1980) (quoting Owen v. City of Independence, 445 U.S. 622, 636 (1980)).

21. 365 U.S. 167 (1961).

22. *See, e.g.,* Martinez v. Winner, 771 F.2d 424, 441 (10th Cir. 1985) (stating that federal officials are ordinarily not subject to suit under § 1983); Fullman v. Graddick, 739 F.2d 553, 560 (11th Cir. 1984) (stating that § 1983 actions do not lie against federal law enforcement officials). A federal official can be sued under 42 U.S.C. § 1985(3) if he conspires with a state official to violate the equal protection rights of a citizen. *See* United Bhd. of Carpenters v. Scott, 463 U.S. 825, 830 (1983).

23. 403 U.S. 388 (1971).

24. *Id.* at 397.

remedy this inequity was to create a damages cause of action based upon the United States Constitution itself. In creating such a remedy, the Court put teeth into the Constitution by ruling that a violation of one's constitutional rights could produce the same result as a violation of a common law right, *i.e.*, damages.

A. The History of a "Constitutional Tort"

For nearly a hundred years, the general view was that the Civil Rights Statutes, in particular 42 U.S.C. § 1983,[25] were limited to the redress of an unconstitutional action specifically authorized by a state.[26] Constitutional deprivations caused by a local police officer who conducted an illegal search or the sheriff who wrongfully placed a person in custody were considered beyond their official authority and therefore not actionable. The courts reasoned that, because conduct that went beyond an official's authority is not "state action," such conduct was not redressable under section 1983. Therefore, a remedy, if any existed, was to be found under some common law tort.[27]

In the 1940's, the Supreme Court began to alter its view of 'state action.' In two cases in particular,[28] the Court broadened the scope of 'state action' to include any "misuse of power, possessed by virtue of state law and made possible only because

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25. 42 U.S.C. § 1983 reads:
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 on 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. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.
Id.

26. *See* Monroe v. Pape, 365 U.S. 167, 195, 208-09 (1961) (Frankfurter, J., dissenting).

27. *Id. See Developments in the Law--Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1170-75 (1977).

28. *See* Screws v. United States, 325 U.S. 91 (1945); United States v. Classic, 313 U.S. 299 (1941).

the wrongdoer is clothed with the authority of state law."[29] As Justice Blackmun noted, these cases "signaled a general relaxation of the strict 'state action' requirement that had shackled the Fourteenth Amendment and its enforcing Civil Rights Acts since Reconstruction."[30] Although the notion of 'state action' was expanded by these decisions, damage recovery, in general, was still limited to actions based on the enforcement of official state policy.[31]

It was not until 1961 that the Supreme Court applied its broader 'state action' definition to a suit for damages under section 1983. In *Monroe v. Pape*,[32] the Court found that the victim of an illegal search and detainment could obtain damages from the arresting officers for their violation of the plaintiff's Fourth Amendment rights.[33] In applying a definition of 'state action' which included the routine acts of government, the Court, by permitting a meaningful affirmative remedy for most deprivations of one's constitutional rights caused by a state official, released the handcuffs which had remained on the Civil Rights Statutes since their inception.

While victims of a state official's act could now rely upon 42 U.S.C. § 1983 for damages, victims of virtually identical acts committed by federal officials had no similar statutory right to an action for damages. Section 1983, by its express wording, could only be applied to actions of persons acting "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia."[34] There was simply no law that authorized redress for a constitutional deprivation by a federal official.

In an effort to remedy this inequitable situation, the Supreme Court decided *Bivens v. Six Unknown Named Agents of the*

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29. *Screws*, 325 U.S. at 109.

30. *See* Blackmun, *supra* note 18, at 17.

31. *See, e.g.*, Lane v. Wilson, 307 U.S. 268, 275-77 (1939); Nixon v. Condon, 286 U.S. 73, 85-87 (1932).

32. 365 U.S. 167 (1961).

33. *Id.* at 187.

34. 42 U.S.C. § 1983; *see supra* note 25.

Federal Bureau of Narcotics.[35] The Court stated that it is "well settled that where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done."[36]

B. The Bivens Cause of Action

In *Bivens*, the Court recognized a cause of action directly under the Federal Constitution against federal officers acting in their individual capacity for violations of constitutionally protected rights.[37] Six federal narcotics agents entered into Webster Bivens' apartment without a warrant or probable cause.[38] They arrested Bivens, handcuffed him in front of his wife and children and searched the entire apartment.[39] Bivens was then booked, interrogated and strip-searched.[40] Eventually, all charges against him were dropped.

Since all charges were dropped, the usual remedy of excluding evidence seized in violation of the constitutional right against unreasonable searches and seizures was unavailable. Bivens sued the agents in federal district court, seeking damages to compensate for the humiliation, embarrassment and mental suffering he experienced due to the agents' unlawful conduct.[41] The government argued that Bivens had no cause of action for damages based solely on the United States Constitution, and since Congress had not established a federal cause of action for damages arising from an unreasonable search or seizure, Bivens' only remedies would be as provided in state tort law.[42] The

35. 403 U.S. 388, 396 (1971)
36. *Id.* at 396 (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)).
37. *Id.* at 394-95.
38. *Id.* at 389.
39. *Id.*
40. *Id.*
41. *Id.* at 389-90.
42. *Id.* at 390-91. In his complaint, Bivens claimed that he suffered "great humiliation, embarrassment, and mental suffering as a result of the agents' unlawful conduct, and sought $15,000 damages from each of them." *Id.*

Supreme Court disagreed and held that Bivens was entitled to sue for damages.[43]

Bivens sued directly under the United States Constitution for money damages arising from the illegal search and seizure by federal narcotics officers. Lacking any statutory basis for such an award, the Court inferred, from the text of the Federal Constitution, a right to obtain relief for the deprivation of one's Fourth Amendment rights by a federal official. The Court noted that "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."[44]

The Court recognized that the constitutional right to be free from unreasonable searches and seizures was enforceable by the judiciary without Congressional action such as an enabling statute.[45] The Court reasoned that the Fourth Amendment of the United States Constitution provides an example where the constitutional provision establishes the right, obligation, or principle without legislative action.[46] Justice Brennan, writing for the Court, found that "[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty."[47]

In his concurring opinion, Justice Harlan stressed that, because Bivens could not obtain prospective relief and because sovereign immunity precluded relief against the federal government, "[f]or people in Bivens' shoes," it is a damage claim against the individual officers "or nothing."[48]

While the *Bivens* decision has been described by numerous critics as a prime example of judicial activism and overreaching, a *Bivens* cause of action continues to exist in the absence of any statute authorizing it.[49] Subsequently, courts have extended the

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43. *Id.* at 397.

44. *Id.* at 392 (quoting Bell v. Hood, 327 U.S. 678, 684 (1946)).

45. *Id.* at 394-95.

46. *Id.*

47. *Id.* at 395.

48. *Id.* at 410 (Harlan, J., concurring).

49. The criticism started with the dissenting opinions in the *Bivens* decision. The dissenting Justices argued that the majority's holding infringed

right to obtain damages from a federal official for a constitutional violation from the Fourth Amendment violation present in *Bivens* to the right to seek damages for violation of the First,[50] Fifth,[51] Sixth[52] and Eighth[53] Amendments. Indeed, courts have generally viewed *Bivens* actions as applying to the full panoply of rights contained in the Federal Constitution.[54]

Seemingly, the *Bivens* decision put constitutional violations by a federal official on par with those committed by state officials by creating a right for an individual like Webster Bivens to obtain meaningful redress for the deprivation of his constitutional rights through a suit for damages.[55]

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upon the legislative function of Congress. *Id.* at 421-22 (Burger, J., dissenting); *Id.* at 427-30 (Black, J., dissenting). *Compare* Thomas S. Schrock & Robert C. Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117, 1135-38 (1978) (stating that *Bivens* is a constitutional decision because it prevents the Fourth Amendment from being rendered a "mere form of words") *with* Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 23-24 (1975) (stating that *Bivens* is a common-law decision in keeping with "the long federal common law practice of articulating the remedial implications of federal statutory rights").

50. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) (holding that government officials may be liable for damages when performance of discretionary duties clearly violate known statutory or constitutional rights).

51. *See* Davis v. Passman, 442 U.S. 228, 249 (1979).

52. *See* Wounded Knee Legal Defense/Offense Comm. v. FBI, 507 F.2d 1281, 1284 (8th Cir. 1974).

53. *See* Carlson v. Green, 446 U.S. 14, 17-18 (1980).

54. *See* Bennett v. Campbell, 564 F.2d 329, 331-32 (9th Cir. 1977). Causes of actions based upon *Bivens* have been brought against federal officials for a myriad of allegedly illegal activities, including wiretapping of other federal employees. *See* Halperin v. Kissinger, 807 F.2d 180, 182 (D.C. Cir. 1986). *Bivens* actions have also been brought for other violations. *See, e.g.*, Smith v. Nixon, 807 F.2d 197, 199 (D.C. Cir. 1986) (members of the press); Bryan v. Jones, 530 F.2d 1210, 1212 (5th Cir.), *cert. denied*, 429 U.S. 865 (1976) (improper incarceration); *Harlow*, 457 U.S. at 802 (personnel actions taken in response to the exercise of first amendment rights) and *Carlson*, 446 U.S. at 16 (inadequate medical care rising to the level of cruel and unusual punishment).

55. On remand from the Supreme Court, the Court of Appeals for the Second Circuit ruled that there was no immunity for the individual federal officials. *See* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 456 F.2d 1339, 1347 (2d Cir. 1972). The case was later settled,

C. State Liability for Constitutional Tort Claims

In general, a "constitutional tort" plaintiff bringing a Section 1983 action for a constitutional violation committed by a state employee may not recover damages from the state itself. The Supreme Court has held that, absent a waiver, each of the fifty state governments has sovereign immunity from constitutional torts.[56] Unlike the immunity which has been applied to the federal government, immunity for state governments is derived directly from the United States Constitution under the Eleventh Amendment.[57]

The Supreme Court had determined that, because the Civil Rights Statutes provided for damages against 'persons,' Congress did not intend to waive sovereign immunity for constitutional torts committed by states.[58] Therefore, state governments were not subject to suits for damages for constitutional torts committed by state employees. However, the sovereign immunity accorded states under the Eleventh Amendment is not impenetrable and it

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with each defendant paying Mr. Bivens $100. *See* Hernandez v. Lattimore, 454 F. Supp. 763, 767 n.2 (S.D.N.Y. 1978).

56. *See* Quern v. Jordan, 440 U.S. 332 (1979); Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 690 n.54 (1978); Edelman v. Jordan, 415 U.S. 651 (1974).

57. The Eleventh Amendment provides that "The Judicial power of The United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

58. *See* Quern v. Jordan, 440 U.S. 332 (1979). The Court in Quern stated:

> [Section] 1983 does not explicitly and by clear language indicate on its face an intent to sweep away the immunity of the States; nor does it have a history which focuses directly on the question of state liability and which shows that Congress considered and firmly decided to abrogate the Eleventh Amendment immunity of the States.

Id. at 345.

may be waived by the states or by an act of Congress, at least with regard to matters of federal concern.[59]

With the advent of the modern era of the constitutional tort, municipalities were initially granted the same sovereign immunity afforded to states. In *Monroe v. Pape*, the Supreme Court held that municipalities, like states, were not "persons" as that term is used under 42 U.S.C. §§ 1981 - 1988 and were therefore protected from suit.[60] However, in 1978, the Court reexamined the legislative history of the Civil Rights Act and found that Congress had, in fact, intended the Act to apply to local governments.[61] Since city and local governments are "persons" under this new interpretation of 42 U.S.C § 1983, they became subject to money judgments for violating the constitutional rights of individuals.[62] It is under this framework that the New York State Court of Appeals reviewed the claims of Ricky Brown and the other members of the class.

II. THE BROWN V. STATE OF NEW YORK DECISION

In *Brown*, the New York State Court of Appeals was presented with two primary issues: (1) whether the Court of Claims had subject matter jurisdiction over a constitutional tort claim against the State without either a statute expressly authorizing this type of claim or a traditional common law tort theory which supported money damages; and (2) whether the plaintiff's causes of action

59. *See* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

60. 365 U.S. 167, 191-92 (1961).

61. *See* Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 690 (1978). The determination of whether a local government or municipality has sovereign immunity from a constitutional tort is separate from the question of whether such entity may assert a defense of qualified immunity from such a claim. In Owen v. City of Independence, the Supreme Court, addressing this latter question, ruled that there was no basis for according qualified immunity to a municipality. 445 U.S. 622, 650 (1980).

62. *Monell*, 436 U.S. at 690.

against the State were based upon rights secured to them by the State Constitution and other State statutes.[63]

Noting the United States Supreme Court held, in *Monroe*, that a plaintiff can bring suit under section 1983 where his or her constitutional rights have been violated by a person acting under color of State law, even where an adequate common law remedy has been provided by the State, the court of appeals pointed out that "[t]he statute was intended to create 'a species of tort liability' in favor of persons deprived of their constitutional rights."[64] For support, the court looked to a number of other states which, under state or local laws, have recognized similar causes of action for constitutional violations.[65] The court also explained that, even though the Supreme Court has relied upon common law when determining the scope of liability in cases involving a *Bivens* claim, constitutional and common law tort causes of action are not "coextensive."[66] According to the court:

> The common law of tort deals with the relation between individuals by imposing on one a legal obligation for the benefit of the other and assessing damages for harm occasioned by a failure to fulfill that obligation. . . . Constitutional duties, by contrast, address a limited number of concerns and a limited set of relationships. Constitutions assign rights to individuals and impose duties on the government to regulate the government's actions to protect them. It is the failure to fulfill a stated constitutional duty which may support a claim for damages in a constitutional tort action.[67]

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63. Brown v. State of New York, 89 N.Y.2d 172, 176, 674 N.E.2d 1129, 1131, 652 N.Y.S.2d 223, 225 (1996).

64. *Id.* at 178, 674 N.E.2d at 1132, 652 N.Y.S.2d at 226. *See* Carey v. Piphus, 435 U.S. 247, 253 (1978) (quoting Imbler v. Pachtman, 424 U.S. 409, 417 (1976)).

65. *Id. See, e.g.*, Widgeon v. Eastern Shore Hosp. Ctr., 479 A.2d 921 (Md. 1984); Gay Law Students Assn. v. Pacific Tel. & Tel. Co., 595 P.2d 592 (Cal. 1979); Phillips v. Youth Dev. Program, 459 N.E.2d 453 (Mass. 1983); Newell v. City of Elgin, 340 N.E.2d 344 (Ill. 1976).

66. *Brown*, 89 N.Y.2d at 178, 674 N.E.2d at 1132-33, 652 N.Y.S.2d at 226-27.

67. *Id.* at 178-79, 674 N.E.2d at 1133, 652 N.Y.S.2d at 227 (citations omitted).

Brown was brought as a class action asserting claims under both the New York State Constitution and 42 U.S.C. § 1981, a federal civil rights statute.[68] The first issue the court had to address was whether the Court of claims had jurisdiction to hear a constitutional tort claim. The court began by recognizing that, under common law, a State is generally immune from suit unless it waives its sovereign immunity.[69] Noting that, in the initial action, the Court of Claims determined that it did not have jurisdiction to hear the case, the court of appeals carefully analyzed the history of sovereign immunity in New York State.[70]

After stating that sovereign immunity is an "'outmoded' holdover of the notion that the King can do no wrong," the court noted that, under common law, immunity offers a State complete protection from certain claims unless it has consented to such a suit.[71] Historically, New York State had "waived immunity and compensated aggrieved parties for very few claims."[72] Due to the increasing injustice and inefficiency stemming from this immunity, the legislature was forced to adjust its procedure for hearing claims brought against the State. As a result, the court of claims was given jurisdiction to hear these suits.[73]

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68. *Id.* at 176, 674 N.E.2d at 1131, 652 N.Y.S.2d at 225. However, on appeal, plaintiff's did not state causes of action under section 1981. *Id.*

69. The court noted that the applicable Constitutional provisions being questioned in *Brown* are "contained in article VI, § 9 of the State Constitution, which continues the Court of Claims and authorizes the Legislature to determine its jurisdiction, and the Court of Claims Act, which contains the waiver of immunity and the jurisdictional and procedural provisions necessary to implement the constitutional section." *Id.* at 179, 674 N.E.2d at 1133, 652 N.Y.S.2d at 227.

70. The Court of Claims rejected the jurisdictional argument on the grounds that the applicable statutes were not expansive enough to imply a waiver of the State's immunity from constitutional tort claims. *Id.*

71. *Id.*

72. *Id.*

73. *Id. See* CT. CL. ACT § (9)(2) (stating, in pertinent part, that the court has jurisdiction "[t]o hear and determine a claim of any person, corporation or municipality against the state for the appropriation of any real or personal property or any interest therein, for the breach of contract, express or implied, or for the torts of its officers or employees while acting as such officers or employees. . . .").

Furthermore, in *Smith v. State of New York*,[74] the New York State Court of Appeals stated that "the jurisdiction of the Court of claims is to be construed broadly and waiver of immunity narrowly."[75] The *Smith* court, in granting jurisdiction, stated that the court of claims' jurisdiction was of the "broadest character."[76] However, it agreed with the lower court holding and concluded that, although the State had waived its immunity from suit, it had not waived its immunity from liability and, therefore, dismissed the suit.[77] Finding that the *Smith* ruling went against public policy,[78] the State legislature amended the Court of Claims Act in an effort to "extend[], supplement[] and enlarge[] the waiver to remove the defense of sovereign immunity for tort actions."[79]

In *Brown*, the State argued that the Court of Claims lacked jurisdiction to hear either claim because the State's waiver of sovereign immunity was limited to traditional common law torts.[80] The court of appeals disagreed and held that the Court of Claims' statutory jurisdiction to hear claims against the State "for

74. 227 N.Y. 405, 125 N.E. 841, 841, *reh'g denied*, 229 N.Y. 571, 129 N.E. 918 (1920).

75. *Id.* at 409-10, 125 N.E. at 841. In *Smith*, the plaintiff was seeking damages from the State for injuries suffered due to the State's negligence. *Id.* at 407-08, 125 N.E. at 841.

76. *Id.* at 409, 125 N.E. at 842.

77. *Id.* at 410, 125 N.E. at 842 ("The immunity of the state from liability for . . . [torts] is not waived by a statute conferring jurisdiction only.").

78. The *Brown* court characterized this policy as "reduc[ing] rather than increase[ing] the obstacles to recovery of damages, whether defendant is a private person or a public body." Brown v. State of New York, 89 N.Y.2d 172, 180, 674 N.E.2d 1129, 1134, 652 N.Y.S.2d 223, 228 (1996).

79. *Id. See* Jackson v. State of New York, 261 N.Y. 134, 138, 184 N.E. 735, 736, *reh'g denied*, 261 N.Y. 637, 185 N.E. 771 (1933). Section eight of the current Court of Claims Act provides "[t]he state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations . . . . " CT. CL. ACT § (8).

80. *Brown*, 89 N.Y.2d at 181, 674 N.E.2d at 1134, 652 N.Y.S.2d at 228.

the torts of its officers and employees" covered the claims asserted here.[81]

In light of the lack of an established definition of the word "tort," the court felt that it was more probable that the legislature used the word generally to indicate a branch of law that would be "subject to expansion as new wrongs supporting liability were recognized."[82] Furthermore, the court found evidence that this interpretation of the court of claims' jurisdiction has been recognized in the past.[83]

The State also argued that, under the Court of Claims Act, the State's consent to be sued was "limited to liability actions similar to those which may be brought in the Supreme Court against individuals and corporations."[84] The court was of the view, however, that the constitutional tort claims asserted here were sufficiently similar to claims that could be asserted against individuals and corporations in state supreme court.[85] The court explained that there are sections of the constitution which are applicable to the actions of private parties and cited the Article I, § 11 prohibition against discrimination as an example.[86] Thus, where a constitutional provision is applicable to a private party, it could be enforced in state supreme court to recover damages.[87]

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81. *Id.* at 182, 674 N.E.2d at 1135, 652 N.Y.S.2d at 229.

82. *Id.* The *Brown* court noted that "the word tort has no established meaning in the law. Broadly speaking, a tort is a civil wrong other than a breach of contract. There are no fixed categories of torts, however, and no restrictive definitions of the term." *Id.* at 181, 674 N.E.2d at 1134, 652 N.Y.S.2d at 228.

83. *Id. See* Vaughan v. State of New York, 272 N.Y. 102, 5 N.E.2d 53 (1936), *appeal dismissed*, 300 U.S. 638 (1937); Brenon v. State of New York, 31 A.D.2d 776, 297 N.Y.S.2d 88 (4th Dep't 1969).

84. *Brown*, 89 N.Y.2d at 182, 674 N.E.2d at 1135, 652 N.Y.S.2d at 229. According to the court, the State claimed that individuals and corporations could not be sued for violations of the State Constitution. *Id.*

85. *Id.* at 183, 674 N.E.2d at 1135, 652 N.Y.S.2d at 229.

86. *Id.* Article I, § 11 prohibits discrimination by any "person or by any firm, corporation, or institution, or by the state." N.Y. CONST. art I, § 11.

87. *Brown*, 89 N.Y.2d at 183, 674 N.E.2d at 1135, 652 N.Y.S.2d at 229. However, the court noted that an action based on Article I, § 11 required enabling legislation "before the action could be maintained because the

The court concluded that:

> since the causes of action asserted by claimants are sufficiently similar to claims which may be asserted by individuals and corporations in Supreme Court to satisfy the statutory requirement. . . . the Court's jurisdiction is not limited to common-law tort causes of action and that damage claims against the State based upon violations of the State Constitution come within the jurisdiction of the Court of Claims.[88]

Having established jurisdiction, the court turned to the legal sufficiency of the causes of action. The court concluded that the plaintiff's first five causes of action,[89] which were based on violations of 42 U.S.C. § 1981,[90] should be dismissed for failure to state causes of action.[91]

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provision was not self-executing." *Id. See* N.Y. EXEC. LAW § 297(9) (McKinney 1986); N.Y. CIV. RIGHTS LAW § 40-d (McKinney 1986).

88. *Brown,* 89 N.Y.2d at 183, 674 N.E.2d at 1136, 652 N.Y.S.2d at 230.

89. Plaintiff's first five causes of action were as follows:

> Claim 1--Racially motivated violation of Fourth Amendment of United States Constitution, thereby violating 42 U.S.C. § 1981; Claim 2--Racially motivated violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution based on Fourth Amendment violations, thereby violating 42 U.S.C. § 1981; Claim 3--Racially motivated violation of the New York State Constitution, article I, § 12 and New York Civil Rights Law § 8, thereby violating 42 U.S.C. § 1981; Claim 4--Racially motivated violation of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution based upon violations of article 1, § 12 of the New York State Constitution, thereby violating 42 U.S.C. § 1981; Claim 5--Racially motivated violation of article I, § 11 of the New York Constitution and New York Civil Rights Law § 40-c, thereby violating 42 U.S.C. § 1981.

Id. at 184 n.4, 674 N.E.2d at 1136 n.4, 652 N.Y.S.2d at 230 n.4.

90. Section 1981 provides, in pertinent part:

> (a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other. . . . (c) The rights protected by this section are protected against

The court further concluded that the federal statutory claim was insufficient because, according to the United States Supreme Court decision in *Jett v. Dallas Independent School District*,[92] a § 1981 claim must be brought under 42 U.S.C. § 1983.[93] In *Jett*, the Supreme Court concluded that § 1983 may not be used against a state because a state is not a person for purposes of that statute.[94]

In *Brown*, plaintiff's had argued that the Civil Rights Act of 1991 was intended to overturn the *Jett* decision and permit a claim against the State directly under § 1981.[95] The New York Court of Appeals disagreed and concluded that the there is no direct evidence indicating that Congress intended the Civil Rights Act of 1991 to overturn *Jett*.[96] In fact, the court felt that the Act was intended to codify the Supreme Court's ruling in *Runyon v. McCrary*,[97] where the Court held that private parties could be found liable under § 1981.

The court of appeals then turned to the central substantive question of whether a private damage action exists under the New York State Constitution for harm caused by a violation of its Equal Protection and Search and Seizure clauses. For a civil damage remedy to be implied, the constitutional provisions in question must be self-executing[98] and the substantive right must

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impairment by nongovernmental discrimination and impairment under color of State law.

42 U.S.C. § 1981 (1988).

91. *Brown*, 89 N.Y.2d at 184, 674 N.E.2d at 1136, 652 N.Y.S.2d at 230.

92. 491 U.S. 701 (1989).

93. *Brown*, 89 N.Y.2d at 185, 674 N.E.2d at 1137, 652 N.Y.S.2d at 231.

94. *Jett*, 491 U.S. at 731.

95. *Brown*, 89 N.Y.2d at 185, 674 N.E.2d at 1137, 652 N.Y.S.2d at 231.

96. *Id.*

97. 427 U.S. 160 (1976).

98. *Brown*, 89 N.Y.2d at 186, 674 N.E.2d at 1137, 652 N.Y.S.2d at 231 ("A civil damage remedy cannot be implied for a violation of the State constitutional provision unless the provision is self-executing, that is, it takes effect immediately, without the necessity for supplementary or enabling legislation.").

be firmly established.[99] The court concluded that these conditions were met in *Brown*.

The court noted that there are four possible ways to imply a cause of action for damages: "(1) the reasoning contained in the Restatement [Second] of Torts § 874A, (2) analogy to a *Bivens* action, (3) common-law antecedents of the constitutional provision at issue, or [(4)] a combination of all three."[100]

In *Brown*, the New York State Court of Appeals' chief reliance falls on the *Bivens* analysis, which, the court observes, is consistent with rules that govern the implication of private rights of action generally.[101] The court found that certain provisions of the New York State Constitution are "preemptively self-executing" because the "Constitution is a source of positive law, not merely a set of limitations on government."[102] According to the court of appeals, constitutional guarantees are "worthy of protection on their own terms without being linked to some common law or statutory tort" and "the courts have an obligation to enforce these rights by ensuring that each individual receives an adequate remedy for violation of a constitutional duty."[103]

The court stated that legal protection against discrimination and unreasonable searches and seizures is historically well rooted in common law antecedents.[104] In support of the plaintiff's claims, the court observed that Equal Protection Clause of the Fourteenth Amendment, before being adopted by Congress, was heavily

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99. *Id.* at 186-87, 674 N.E.2d at 1138, 652 N.Y.S.2d at 232 ("The violation of a self-executing provision in the Constitution will not always support a claim for damages, however. . . . [t]he substantive right may be firmly established . . . ") (citations omitted).

100. *Id.* at 187, 674 N.E.2d at 1138, 652 N.Y.S.2d at 232. *See* RESTATEMENT (SECOND) OF TORTS § 847A (1977).

101. *Brown,* 89 N.Y.2d at 187, 674 N.E.2d at 1138, 652 N.Y.S.2d at 232.

102. *Id.* at 187, 674 N.E.2d at 1137, 652 N.Y.S.2d at 231. More specifically, the court noted that Article I, § 12 and the Equal Protection portion of § 11 are self-executing because "[t]hey define judicially enforceable rights and provide citizens with a basis for judicial relief against the State if those rights are violated. Actions of State or local officials which violate these constitutional guarantees are void." *Id.*

103. *Id.* at 187, 674 N.E.2d at 1138, 652 N.Y.S.2d at 232.

104. *Id.* at 188, 674 N.E.2d at 1139, 652 N.Y.S.2d at 233.

debated and "the prohibition against unlawful searches and seizures originated in the Magna Carta and has been a part of our statutory law since 1828."[105] In addition, the court pointed to evidence that the New York State Constitutional Convention of 1938 debate on the exclusionary rule assumed the existence of a damage action for search and seizure violations.[106]

The court determined that the existing remedies for police abuse, namely injunctive and declaratory relief, fall short and that damages are a necessary deterrent.[107] In *Brown*, the claimants had no opportunity to obtain an injunction and no ground to enjoin future violations. For these claimants, according to the court, "it is damages or nothing."[108] Moreover, the *Brown* court viewed this remedy as being in accordance with public policy.[109] The court stated that a claimant's right to recover damages should not be limited to those available under common-law tort claims and stated that:

> [t]o confine claimants to tort causes of action would produce the paradox that individuals, guilty or innocent, wrongly arrested or detained may seek a monetary recovery because the complaint fits within the framework of a common-law tort, whereas these claimants, who suffered similar indignities, must go remediless because the duty violated was spelled out in the State Constitution.[110]

Judge Joseph W. Bellacosa dissented. While noting that he respected "the cogency and reasonableness that is reflected in the decision [the majority] reach[ed] in this complicated case,"[111] he argued that it is up to the legislature to decide whether a cause of

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105. *Id.*

106. *Id.* at 189, 674 N.E.2d at 1139, 652 N.Y.S.2d at 233.

107. *Id.* at 192, 674 N.E.2d at 1141, 652 N.Y.S.2d at 235.

108. *Id.*

109. *Id.* at 191, 674 N.E.2d at 1140, 652 N.Y.S.2d at 234 ("A damage remedy in favor of those harmed by police abuses is appropriate and in furtherance of the purpose underlying the sections.").

110. *Id.* at 191, 674 N.E.2d at 1141, 652 N.Y.S.2d at 235.

111. *Id.* at 199, 674 N.E.2d at 1146, 652 N.Y.S.2d at 236 (Bellacosa, J., dissenting).

action implied from the state constitution may be asserted against the State.[112]

Judge Bellacosa agreed with the State's position that the word "tort" in the Court of Claims Act is confined to claims that the enactors of the statute would have understood "as part of the common-law tradition"[113] and concludes that the "[l]egislature has never contemplated that the common law word 'tort' to include the kind of extensive constitutional domain advanced here."[114] However, given his view of the proper meaning of the word 'tort,' Judge Bellacosa would allow 'constitutional tort'-type claims when they share a "recognized common law lineage" with tort claims such as assault, false arrest and trespass.[115]

Judge Simons' opinion for the court of appeals responds to a number of these concerns, including Judge Bellacosa's argument that there is no deterrence of wrongdoing by imposing liability on the state since the state officials who committed the violations retain their individual liability.[116] In response, Judge Simons, on behalf of the majority, argued that, as a result of being held liable in damages, the state will be encouraged to "avoid such misconduct by adequate training and supervision and avoid its repetition by discharging or disciplining negligent or incompetent employees."[117]

In addition, Judge Bellacosa argued that the creation of a civil remedy intrudes on the powers of the legislature and exposes the state to tremendous liability.[118] Judge Bellacosa was concerned that "[t]he exposure includes the stigma of societal fault and the payment of unknown sums of public funds, not only for this case

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112. *Id.* (Bellacosa, J., dissenting).

113. *Id.* at 201, 674 N.E.2d at 1146, 652 N.Y.S.2d at 240 (Bellacosa, J., dissenting).

114. *Id.* at 203, 674 N.E.2d at 1148, 652 N.Y.S.2d at 242 (Bellacosa, J., dissenting).

115. *Id.* at 207, 674 N.E.2d at 1150, 652 N.Y.S.2d at 244 (Bellacosa, J., dissenting).

116. *Id.* at 194, 674 N.E.2d at 1142, 652 N.Y.S.2d at 236.

117. *Id.* at 194, 674 N.E.2d at 1142-43, 652 N.Y.S.2d at 236-37.

118. *Id.* at 198, 674 N.E.2d at 1145, 652 N.Y.S.2d at 239 (Bellacosa, J., dissenting).

but also for innumerable others certain to be improvised within its precedential repertoire."[119]

In response, Judge Simons stated that the legislature could overturn the decision by redefining the Court of Claims' jurisdiction "if it sees fit to do so," but he suggested that would undermine the constitution itself.[120] Judge Simons summarized his position by stating:

> [t]he point is that no government can sustain itself, much less flourish, unless it affirms and reinforces the fundamental values that define it by placing the moral and coercive powers of the state behind those values. When the law immunizes official violations of substantive rules because the cost or bother of doing otherwise is too great, thereby leaving the victims without any realistic remedy, the integrity of the rules and their underlying public values are called into serious question.[121]

CONCLUSION

Although the effects of *Brown* are yet to be realized, the New York State Court of Appeals' decision could have tremendous implications in the future. Aside from over-turning decades of lower court rulings, this decision appears to have paved the way for redress for those citizens whose constitutional rights have been violated by New York State officials by expanding the protections of the state constitution. Furthermore, because the New York State Court of Appeals is one of the most influential state courts in the nation, this case will, most likely, have a domino effect that spreads into other jurisdictions.

On one hand, the *Brown* decision stands for the proposition that if the state's constitutional protections are to have any meaning, those whose rights have been violated must have some form of actions against the state. On the other hand, the decision has the potential of opening the floodgates to litigation on numerous

119. *Id.*
120. *Id.* at 196, 674 N.E.2d at 1144, 652 N.Y.S.2d at 238.
121. *Id.*

claims against the state and, in the event of a damages award for the plaintiff, the possibility of draining the state treasury.

Although the actual impact of the *Brown* decisions remains to be seen, one widely recognized authority on constitutional law observed, "[d]espite the numerous issues that will have to be resolved, *Brown* is a vital precedent. It is the state constitutional counterpart to § 1983 and *Bivens*, filling a substantial remedial vacuum. *Brown* adds teeth to state constitutional rights and, in doing so, furthers the rule of law."[122] Regardless of whether *Brown* has given "teeth" to state constitutional rights, it is clear that the New York State Court of Appeals has cleared the way for a new era by holding the state government and its agencies liable for violations of state constitutional rights.

Eric J. Stockel

122. Martin A. Schwartz, *Recognizing Damage Suits Under New York Constitution*, N.Y. L.J., Feb. 18, 1997, at 9.