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Opening the Courthouse Doors: Allowing a Cause of Action to Arise Directly from a Violation of the Ohio Constitution

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I. INTRODUCTION

When discussing "constitutional rights" there is a tendency to think only of the first eight amendments to the United States Constitution. Many believe that those provisions alone are sufficient to secure and protect the freedoms of speech, religion, and the press. A second important source of protection exists that is often overlooked—the Ohio Constitution.

What happens when the rights and protections contained in the Ohio Constitution are violated? Is there, for example, any remedy under the Ohio Constitution for an Ohio citizen unlawfully seized? Are there any constitutional remedies for the police officer or college professor demoted in

rank or status simply because she publicly disagreed with the point of view expressed by her superiors? Can a citizen, alleging violations of the Ohio Constitution, bring an action for damages based solely upon the violation of a right guaranteed under the Ohio Constitution?

Consider the case of Parker Jeffries,[1] decided by the Supreme Court of Ohio in its December 1842 term. Mr. Jeffries had a father of European descent and a mother of both Indian and African descent.[2] Some time before the initiation of the suit, Mr. Jeffries attempted to cast his ballot in an election, but those stationed at the polling place did not allow him to vote because they believed that he was a "person of color."[3] In an effort to prove that he was eligible to vote, Mr. Jeffries produced his credentials.[4] His attempt at persuasion failed and Jeffries walked away from the poll.[5] Having had his constitutionally guaranteed right to vote denied him and having seen his opportunity to exercise his right pass with the closing of polls on election day, Jeffries was faced with a decision: do nothing and wait for the next election where the above scenario would perhaps again play itself out or, in the alternative, seek redress from those who had wrongfully denied him the exercise of his constitutionally protected right. Jeffries opted to turn to the courts for protection, filing an action for damages against those who had denied him the right to vote.[6]

The trial court found that Jeffries had been wrongfully denied the exercise of his right to vote and awarded him damages of six cents.[7] On appeal before the supreme court, Chief Justice Lane proclaimed that this "damages" remedy should be permitted.[8] Admitting that "no suit [generally] lies against an officer, for a mistake in the exercise of his judicial discretion[,]"[9] the court looked beyond this general rule and concluded that "when we reflect upon how highly the privilege of voting is generally valued, and that the legislature has provided, and the forms of law admit no other remedy than this action, we

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[1]Jeffries v. Ankeny, 11 Ohio 372 (1842). For a case similar in nature and reaching the same conclusion, see Anderson v. Millikin, 9 Ohio St. 568 (1859).

[2]*Jeffries*, 11 Ohio at 372.

[3]*Id.* at 374.

[4]*Id.*

[5]*Id.*

[6]11 Ohio at 374. The right to the franchise was guaranteed to Mr. Jeffries under OHIO CONST. art. 4, § 1. His complaint against the defendants was grounded solely upon a violation of the rights guaranteed him therein. *Id.*

[7]*Id.* at 373.

[8]*Id.* at 374.

[9]*Id.*

unite in the opinion, that a necessity exists for entertaining this remedy."[10] Judgment was entered for Jeffries.[11]

The *Jeffries* decision is significant in determining whether a cause of action can be maintained against those who violate rights contained in the Ohio Constitution. While few would argue that the *Jeffries* decision lacks logical grounding or that awarding damages was somehow unjust or unfounded, the principle for which the *Jeffries* decision stands, i.e. that violations of the Ohio Constitution warrant a recovery of damages, has been ignored. Given the number of other "highly valued" rights[12] contained in Ohio's Constitution, one could reasonably conclude that the courts, especially in the absence of legislative action, would have invoked their remedy powers to allow a cause of action for violations of those rights as well. Ohio's courts, however, have thus far failed to do so.

The reasons for the courts' failure to allow the cause of action are not easily found. Some would argue the "ever-expanding" role of the United States Constitution as protector of individual rights, when combined with the Civil Rights Act,[13] has permitted litigators to focus almost exclusively upon the protections afforded under federal law, to the detriment of the protections afforded under state law.[14] However, while a Section 1983 action provides a powerful tool in helping to prevent violations of constitutional rights, and Section 1983 actions do provide the aggrieved with a vehicle for the collection of damages as a result of those constitutional violations, one must always be cognizant of the fact that 42 U.S.C. § 1983 is a federal law meant to protect and compensate for violations of the United States Constitution.[15] Its applicability to violations of the Ohio Constitution is nonexistent.

The emergence of the Section 1983 action over the past thirty years cannot explain why the "damages" rationale in *Jeffries* has not been applied to the Ohio Constitution's numerous other protections[16]—nearly one-hundred and fifty years have passed since *Jeffries* and the Ohio Supreme Court has yet to declare that there can be a damage award for violations of any other provisions of the Ohio Constitution.

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[10] *Jeffries*, 11 Ohio at 374.

[11] *Id.*

[12] For example, the freedoms of speech and press contained in OHIO CONST. art. I, § 11; the freedom of religion contained in OHIO CONST. art. I, § 7; and the freedom from unreasonable search and seizure contained in OHIO CONST. art. I, §14.

[13] 42 U.S.C. § 1983 (1982).

[14] *See* Jennifer Friesen, *Recovering Damages for State Bill of Rights Claims*, 63 TEX. L. REV. 1269, 1273 (1985) (acknowledging that where "federal substantive law is as protective as the state law, state claims will be disfavored if the federal remedy offers a 'better' defendant, higher damages, enhanced access to attorney's fees, or some other advantage unrelated to the merits of the claim.").

[15] *Id.* at 1270 n.3.

[16] *See supra* note 12.

The time has come to revisit the *Jeffries* rationale and declare that Ohio's constitutional protections require enforcement, that those who suffer from violations of the Ohio Constitution have a vehicle to remedy the wrong, and that a cause of action arising directly from the constitutional violation will not only enforce and give meaning to the protections in the Ohio Bill of Rights, but will provide the remedy required to make whole the aggrieved party.

Several Ohio decisions over the past years provide hope for a resurrection of the ideal proclaimed in *Jeffries*.[17] The purpose of this note is to show that those decisions, together with Ohio's longstanding "right-to-a-remedy" doctrine,[18] have moved Ohio close to proclaiming that violations of the Ohio Constitution give rise to a cause of action against the violator.

This note will explain why Ohio's Constitution should be looked to as the source of meaningful[19] remedy when its provisions are violated. I will demonstrate that a cause of action grounded upon a violation of the Ohio Constitution is not only meaningful, but necessary to the notion of constitutional rights. Section two will briefly discuss the necessity of allowing a cause of action to arise from a violation of the Ohio Constitution. In particular, I will discuss the independence of the Ohio Constitution; the federal courts' increasing hostility toward the vindication of federal constitutional rights; and the benefit of allowing the aggrieved a choice, with respect to the vindication of his constitutional rights, between remedies offered under federal law and those afforded under Ohio law.

Section three will look at the example provided in both North Carolina and Maryland. Of note, this section will reflect the rationale provided by those states that have recognized a cause of action for damages arising directly from violations of their respective state constitutions.

Section four will discuss the means by which Ohio's courts could permit the constitutional cause of action. This analysis will involve a discussion of the nature of constitutional rights, the courts' remedy-crafting power articulated

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[17]Painter v. Graley, 639 N.E.2d 51 (Ohio 1994); Provens v. Stark County Bd. of Mental Retardation and Developmental Disabilities, 594 N.E.2d 959 (Ohio 1992); and Brennamen v. R.M.I. Company; Bechtel Group, Inc., 639 N.E.2d 425 (Ohio 1994) (expressly overruling Sedar v. Knowlton Constr. Co., 551 N.E.2d 938 (Ohio 1990)).

[18]*See* OHIO CONST. art. I, §16 proclaiming that "[a]ll courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without delay." *See also* Hardy v. VerMeulen, 512 N.E.2d 626, 628 (Ohio 1987)("the language in the Constitution is clear and leaves little room for maneuvering. Our courts are open to those seeking remedy for injury to person, property, or reputation); Finley v. Kline, 557 N.E.2d 853, 855 (Ohio C.P. 1988)("in administering justice, courts should render decisions which recognize and protect each litigant's rights, thus assuring each litigant access to the justice system and allowing each his day in court.").

[19]An existence of a remedy does not, *ipso facto*, end the analysis. The remedy must be meaningful. *See* Gaines v. Preterm Cleveland, Inc., 514 N.E.2d 709 (Ohio 1988)(finding that the denial of a remedy and the denial of a meaningful remedy lead to the same result, an injured party without a legal remedy).

in article one, section sixteen of the Ohio Constitution, the doctrine of self-execution, and a discussion of recent Ohio Supreme Court decisions dealing with the "right-to-a-remedy" doctrine.

Section five will discuss the Ohio Supreme Court's one modern encounter with the concept of allowing a cause of action to arise directly from a violation of the Ohio Constitution—*Provens v. Stark County Bd. of Mental Retardation and Developmental Disabilities*.[20] This section will discuss the logic and reasoning used by the Court and will examine the impact the decision will have on allowing a cause of action to exist for constitutional violations.

Lastly, section six will address potential impediments, both constitutional and statutory, to permitting a cause of action to arise directly from a violation of the Ohio Constitution.[21]

II. WHY REVISIT THE *Jeffries* RATIONALE?

Since the *Jeffries* decision, Ohio's courts have not held that a cause of action should lie against those who violate citizens' constitutional rights. The issue of awarding damages for violations of state constitutional rights has never been squarely addressed in modern Ohio courts. Developments in federal constitutional law as well as the fundamental principles of sovereignty, suggest that the time has come to reexamine the idea that damages should follow from a violation of one's state constitutional rights in Ohio.

In our modern federal system, where heavy emphasis is placed more on the actions of the federal government, one must still remember that Ohio is a sovereign state and the Ohio Constitution is a document of "independent force,"[22] apart from the United States Constitution. The two separate documents, co-existing in the federal relationship, often protect the same liberties and rights.[23] The degree of protection afforded under each, however, may differ.

In those situations where the federal constitution applies to the actions of the state of Ohio, and the Ohio Constitution protects the same rights as the federal constitution, Ohio courts, when interpreting the Ohio Constitution, must provide at least as much protection as the United States Supreme Court has provided when interpreting United States Constitution provisions similar or identical to those contained in the Ohio Constitution.[24] Ohio is unrestrained, however, in according "greater civil liberties and protections to individuals and

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[20] 594 N.E.2d 959.

[21] OHIO REV. CODE ANN. § 2745 (Baldwin 1989).

[22] Arnold v. City of Cleveland, 616 N.E.2d 163, syllabus ¶ 1 (Ohio 1993).

[23] *Compare, e.g.*, OHIO CONST. art. 1, § 11 (free speech and freedom of press) *with* U.S. CONST. amend. I; *compare* OHIO CONST. art. 1, §14 (prohibiting unreasonable searches and seizures and requiring probable cause to issue arrest warrant) *with* U.S. CONST. amend. IV.

[24] 616 N.E.2d 163, syllabus.

groups"[25] under Ohio's Bill of Rights than would ordinarily be provided for under the federal Bill of Rights. In other words, the federal Bill of Rights furnishes a floor below which Ohio cannot fall when providing protection of civil liberties.[26] Ohio is free, however, to provide any degree of protection so long as it does not submerge below that floor.

The Supreme Court of Ohio has acknowledged that the Ohio Bill of Rights has "undiminished vitality."[27] In recognizing the "undiminished vitality" concept, the various state courts in general, and the Ohio courts in particular, have a duty "to independently interpret and apply"[28] their own state constitutions. By turning to the protections afforded under the Ohio Constitution and enforcing those protections, Ohio will grant the proper respect due to its own legal foundations, fulfill its sovereign duties, and develop a body of independent jurisprudence in determining how and when the Ohio Constitution will be applied.[29]

Equally as important, recognizing a cause of action arising from a violation of the Ohio Constitution will refocus attention on Ohio's own independent constitution. No longer will the litigator look solely to 42 U.S.C. § 1983 when faced with a violation of a constitutionally protected right.[30] She will also look to a body of law developed in Ohio's courts.

This prediction seems likely to come true given the United States Supreme Court's increasingly hostile attitude toward the vindication of federal constitutional rights.[31] This hostility can be seen through the Court's limitations on the avenues of redress available to those whose federal constitutional rights have been infringed.[32] As evidence to support this claim, some point to the fragmented, contentious, impermanent and methodologically simplistic opinions[33] issued by the Court since 1977. More-

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[25] *Id. See also* State ex rel. The Repository v. Unger, 504 N.E.2d 37, 41 (Ohio 1986)(Celebrezze, C.J., concurring).

[26] *See, e.g.*, Direct Plumbing Supply Co. v. City of Dayton, 38 N.E.2d 70, 73 (Ohio 1941).

[27] *Id.* at 73.

[28] State v. Coe, 679 P.2d 353, 359 (Wash. 1984).

[29] *Id.*

[30] This scenario applies only in those situations where a right is protected under both the state and federal constitutions. *See supra* note 23.

[31] *See* Friesen, *supra* note 14, at 1271. *See also* Mindy L. McNew, *Moresi: Protecting Individual Rights Through the Louisiana Constitution*, 53 LA. L. REV. 1641, 1641 (1993).

[32] McNew, *supra* note 31, at 1641.

[33] David Schuman, *The Right to a Remedy*, 65 TEMP. L. REV. 1197, 1197 n.1 (1992).

over, lower federal courts are increasingly likely to defer or deny federal claims in favor of state remedies for the interest invaded.[34]

Revisiting and reinterpreting the *Jeffries* rationale in order to provide a state remedy for violations of the Ohio Constitution would counteract the U.S. Supreme Court's modern stance toward the vindication of constitutional violations and, inevitably, the decision would provide an alternative to those whose rights have been violated.[35] Ohio would reassert and reaffirm its status as a sovereign state, acknowledge its constitutional duty to protect the rights of its citizens, and, in the absence of other remedies, provide a remedy for those who have been wronged. In light of these benefits, the idea in *Jeffries* should be resurrected and applied to our modern Ohio Constitution.

III. THE CAUSE OF ACTION UNDER THE STATE CONSTITUTION—OTHER STATE'S METHODS

Since a cause of action arising directly from the U.S. Constitution was first recognized by the United States Supreme Court in *Bivens v. Six Unknown Named Agents Of The Federal Bureau Of Narcotics*,[36] numerous state courts have borrowed the Supreme Court's reasoning and declared that violations of their respective state constitutional guarantees can, without legislative authorization, give rise to a cause of action against those who were involved in the infringement.[37] In order to better understand the nature of the

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[34]Friesen, *supra* note 14, at 1271. *See, e.g.*, Hudson v. Palmer, 468 U.S. 517 (1984)(denying Plaintiff's federal claim under 42 U.S.C. § 1983 in favor of state remedies).

[35]To assert otherwise would lead to the illogical proposition that litigants will continue to file in an increasingly hostile federal forum instead of moving to the alternative, perhaps friendlier, state forum.

[36]403 U.S. 388 (1971). The Court, per Justice Brennan, stated that a violation of the Fourth Amendment itself gives rise to a cause of action even without congressional authorization for the action. *Id.* at 397-98. The Court reasoned 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." *Id.* at 392 (quoting Bell v. Hood, 327 U.S. 684 (1946)). While the decision held great promise for the vindication of those whose constitutional rights were violated, the Bivens' rationale has been largely avoided by the Court. For an analysis of the Court's subsequent treatment of the Bivens' principle, see Perry M. Rosen, *The Bivens Constitutional Tort: An Unfulfilled Promise*, 67 N.C. L. REV. 337 (1989).

[37]*See, e.g.* City of Beaumont v. Bouillion, 873 S.W.2d 425 (Tex. Ct. App. 1993) *rev'd*, 896 S.W.2d 143 (Tex. 1995); Corum v. University of North Carolina, 413 S.E.2d 276 (N.C. 1992), *cert. denied*, 506 U.S. 985 (1992); Moresi v. Department of Wildlife and Fisheries, 567 So. 2d 1081 (La. 1990); Smith v. Department of Pub. Health, 410 N.W.2d 749 (Mich. 1987); Nelson v. Lane County, 720 P.2d 1291 (Or. 1986)(allowed common law claim directly under the state's constitution, but held claim was foreclosed by state's immunity statute); Rockhouse Mountain Property Owner's Ass'n, Inc. v. Town of Conway, 503 A.2d 1385 (N.H. 1986); Widgeon v. Eastern Shore Hosp. Ctr., 479 A.2d 921 (Md. 1984); Phillips v. Youth Dev. Program, Inc., 459 N.E.2d 453 (Mass. 1983); Hunter v. Port Auth. of Allegheny County, 419 A.2d 631 (Pa. 1980); Gay Law Students Ass'n et al. v. Pacific Tel. & Tel. Co., 595 P.2d 592 (Cal. 1979); Peper v. Princeton Univ. Bd. of Trustees, 389

"constitutional cause of action" and determine how it could arise and be applied in Ohio, a brief review of those states' decisions is warranted.

In 1992, the North Carolina Supreme Court recognized for the first time that a cause of action existed for violations of rights protected by the North Carolina Constitution.[38] In *Corum v. University of North Carolina*, the plaintiff, a tenured college professor,[39] was demoted from his position as Dean of Learning Resources at Appalachian State University.[40] Plaintiff Corum had publicly, although peacefully, disagreed with his superior.[41] Two days later and without warning, Corum's superior removed him from his deanship.[42] Dr. Corum suspected that his dismissal from the deanship was based solely upon his having publicly disagreed with his superior so, after having exhausted the administrative remedies available to him,[43] Corum brought suit against several named defendants, including his superior at the university, alleging violations of 42 U.S.C. § 1983 and the right to free speech guaranteed him under the North Carolina Constitution.[44]

The North Carolina Supreme Court, faced with the issue of whether Dr. Corum could file suit claiming a violation of the free speech guarantee of the North Carolina Constitution and, faced with the fact that no statute provided for such a cause of action, had to determine if the claim for damages arising from the constitutional violation could be advanced.[45] At the onset of its analysis, the court found that article one, section fourteen of the North Carolina Constitution, North Carolina's freedom of speech guarantee, is a direct personal guarantee of each citizen's right to freedom of speech[46] and, further, that no legislation is required to make it effective.[47] The court then invoked its common-law "remedy-crafting" power by declaring that "the common law,

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A.2d 465, 476 (N.J. 1978)(holding that state Supreme Court has the power to enforce rights recognized by New Jersey Constitution even in the absence of implementing legislation). For a more exhaustive list of states that have recognized a cause of action in their state constitutions, see McNew, *supra* note 31, at 1655 n.12.

[38] 413 S.E.2d 276 (N.C. 1992), *cert. denied*, 506 U.S. 985 (1992).

[39] *Id.* at 280.

[40] *Id.* at 280-81.

[41] *Id.*

[42] *Corum*, 413 S.E.2d. at 282.

[43] *Id.*

[44] *Id.* N.C. CONST. art. I, § 14 reads as follows: "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."

[45] *See* John D. Boutwell, Note, *The Cause of Action for Damages Under North Carolina's Constitution: Corum v. University of North Carolina*, 70 N.C. L. REV. 1899, 1903 (1992).

[46] *Corum*, 413 S.E.2d at 289.

[47] *Id.*

which provides a remedy for every wrong, will furnish the appropriate action for the adequate redress of a violation"[48] of the right to free speech. Finding freedom of speech to be "one of the fundamental cornerstones of individual liberty and one of the great ordinances of our Constitution,"[49] the court held that "[a] direct action against the state for its violations of free speech is essential to the preservation of free speech."[50]

Turning to the issue of whether the state actors involved could be liable for damages as a result of the constitutional violations, the court answered in the affirmative.[51] The court first found that the Declaration of Rights in the North Carolina Constitution was adopted for the fundamental purpose of protecting the rights articulated therein from encroachment by the state.[52] This encroachment, the court found, is accomplished "by the acts of individuals who are clothed with the authority of the State"[53] and the "very purpose of the Declaration of Rights is to ensure that the violation of these rights is never permitted by anyone who might be invested under the Constitution with the powers of the State."[54] A state actor violating rights protected under the Declaration of Rights, thereby contradicting the very purpose of those provisions in the state constitution, would be liable in his official capacity for damages resulting from those violations.[55] Upholding this principle, the court concluded that Dr. Corum could maintain an action for damages against his superior, in his official capacity as an administrator at Allegheny State University, for violations of Dr. Corum's constitutional right to free speech.[56]

The Maryland Court of Appeal's decision in *Widgeon v. Eastern Shore Hospital*[57] provides another example of the cause of action arising from a violation of a state constitution. The plaintiff, John Widgeon, was involuntarily admitted to Eastern Shore Hospital Center pursuant to a Petition for Emergency Admission filed by Widgeon's wife.[58] Upon arrival at the hospital, two doctors examined Widgeon and did not find any outward signs of mental disorder, as had been alleged by his wife.[59] Nonetheless, the doctors ordered

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[48] *Id.*

[49] *Id.*

[50] *Corum*, 413 S.E.2d at 290.

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Corum*, 413 S.E.2d at 290 (citing State v. Manuel, 20 N.C. 144 (1838)).

[55] *Id.*

[56] *Corum*, 413 S.E.2d at 290.

[57] 479 A.2d 921 (Md. 1984).

[58] *Id.* at 922.

[59] *Id.* at 922-23.

him confined to the hospital.[60] Widgeon, suspicious that his confinement was nothing more than a scheme contrived by his wife, brought suit against the hospital and other defendants alleging, *inter alia*, that his rights under the Maryland Constitution[61] had been violated and for that he was entitled to compensatory and/or punitive damages.[62]

In response to a certified question to the Court of Appeals of Maryland, the state's high court declared that Maryland recognizes a common law action for damages for violations of state constitutional rights.[63] As a basis for its decision, the court pointed to the existence of common law injunctive remedies for unlawful searches and seizures[64] as well as damage remedies for unlawful takings.[65] Using these two examples, the court argued that it need not imply or create a new cause of action for constitutional violations, since the common law recognized such claims.[66] The court reinforced its argument by pointing to its ability to create remedies where none have been provided: "[i]t has long been held that where a statute establishes an individual right, imposes a corresponding duty on the government, and fails to provide an express statutory remedy, a traditional common law action will ordinarily lie."[67] Therefore, a cause of action could be maintained based solely upon a violation of a provision of the Maryland constitution.

These two decisions briefly described above, together with the *Jeffries* decision described at the onset, serve to demonstrate that courts are empowered to grant relief for those whose constitutional rights have been violated, even in the absence of express statutory or constitutional provisions providing that relief.[68] While it is obvious from *Jeffries* that the Ohio Supreme

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[60] *Id.* at 923.

[61] The provisions of the Maryland Constitution which were allegedly violated are as follows: "That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty, or property, but by the judgment of his peers, or by the Law of the land." MARYLAND CONST. art. 24, and "That all warrants, without oath or affirmation, to search suspected places, or to seize any person or property, are grievous and oppressive; and all general warrants to search suspected places or to apprehend suspected persons, without naming or describing the place, or the person in special, are illegal, and ought not to be granted." MARYLAND CONST. art. 26.

[62] *Widgeon*, 479 A.2d at 923.

[63] *Id.* at 922.

[64] *Id.* at 925.

[65] *Widgeon*, 479 A.2d at 929.

[66] *Id.*

[67] *Id.*

[68] Other states have recognized that there can be relief even in the absence of statutory or constitutional language explicitly providing such relief. *Gay Law Students Ass'n*, 595 P.2d at 602 n.10 ("the absence of . . . an administrative remedy, however, provides no justification for the judiciary to fail to enforce individual rights under the state

Court has invoked this judicial power in the past, it is the supreme court's failure to invoke the doctrine for other constitutional violations that remains an enigma. The ability to do so, however, remains as strong today as it was one-hundred and fifty years ago.

IV. THE OHIO COURTS' ABILITY TO CREATE REMEDIES FOR VIOLATIONS OF CONSTITUTIONAL RIGHTS

A. The Nature of Rights as a Source of the Remedy-Crafting Power of the Courts

The ability of a court to create a remedy where none has been provided is not a new concept.[69] The Restatement of Torts (Second) describes this common law doctrine as follows:

> When a legislative provision protects a class of persons by proscribing or requiring certain conduct but does not provide a civil remedy for the violation, the court may, if it determines that the remedy is appropriate in furtherance of the purpose of the legislation and needed to assure the effectiveness of the provision, accord to an injured member of the class a right of action, using a suitable existing tort action or a new cause of action analogous to an existing tort action.[70]

While on its face Section 874(A) appears to apply only to acts of the legislature, comment "a" to this section explicitly includes "constitutional provisions" within the definition of "legislative provision."[71]

The inclusion of constitutional provisions within the "remedy-crafting" doctrine might at first seem a bold declaration. Constitutions are not acts of the legislature, but rather are established by the people.[72] An analysis of the nature of "rights" demonstrates why Ohio's courts should allow a cause of action for violations of constitutional rights, even when no remedies have been provided by the legislature.

A legal right can be defined as "one that imposes a correlative duty on another to act or refrain from acting for the benefit of the person holding that

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Constitution"); Cooper v. Nutley Sun Printing Co., 175 A.2d 639 (N.J. 1961)(there is no need to have legislative implementation to afford an appropriate remedy to redress a violation of rights); Phillips v. Youth Dev. Program, Inc., 459 N.E.2d 453, 457 (Mass. 1983)("[w]e would grant, however, that a person whose constitutional rights have been interfered with may be entitled to judicial relief even in the absence of a statute providing a procedural vehicle for obtaining relief.").

[69]Friesen, *supra* note 14, at 1281.

[70]RESTATEMENT (SECOND) OF TORTS § 874(A) (1979).

[71]*Id.* at cmt. a.

[72]The preamble to the Ohio Constitution reads as follows: "We, the people of the State of Ohio, grateful to Almighty God for our freedom, to secure its blessings and promote our common welfare, do establish this Constitution." OHIO CONST. pmbl.

right."[73] A Bill of Rights is "that portion of [the] Constitution guaranteeing rights and privileges to the individual."[74] Taken together, Ohio's Bill of Rights can be defined as a guarantee to the individual, from the state, to act for the benefit of the individual, with a correlative duty resting upon the state to refrain from acting in ways injurious to the individual. In accord with this definition, the Constitution proclaims that the government is instituted for the equal protection and benefit of the people.[75] How is the government to know where it can and where it cannot act so as to avoid breaching its duty to act only in non- injurious and beneficial ways? The specific enumerations in the Bill of Rights of the Ohio Constitution[76] provide the answer—describing in detail those rights which are to be inherent in the people and upon which the state may not trample.

Why should Ohio courts provide remedies for violations of the Ohio Constitution? First, a "right without a remedy is not a legal right; it is merely a hope or a wish"[77] or, as the Ohio Supreme Court has acknowledged, a "command without a sanction."[78] Starting with the premise that, as stated above, a right requires a correlative duty to act for the benefit of another or to refrain from acting in a manner harmful to others, then unless that duty can be enforced, it is not really a duty.[79] Applied to constitutional rights, the "duty" is merely a voluntary obligation that a government can fulfill or not, at its whim.[80]

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[73] Donald H. Zeigler, *Rights Require Remedies: A New Approach to the Enforcement of Rights In Federal Courts*, 38 HASTINGS L. J. 665, 665 n.1 (1987)(citing W. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS 35-38 (W. Cook ed., 1919)).

[74] BLACK'S LAW DICTIONARY 164 (6th ed. 1990).

[75] OHIO CONST. art. I, § 2.

[76] "These protections [the Bill of Rights] are imperative to the existence and continuance of our democratic society." Arnold v. City of Cleveland, 616 N.E.2d 163, 171 (Ohio 1993). The people retain the right to amend the constitution and can do so in the event the government acts in an injurious manner and/or fails to uphold its "duty" under the constitution. *See* OHIO CONST. art. XVI, §§ 1-3. It is recognized that all the guarantees of the Bill of Rights "are subject to a reasonable, nonarbitrary exercise of the 'police power' of the state or municipality when such power is exercised in the interest of public health, safety, morals, or welfare." Direct Plumbing Supply Co. v. City of Dayton, 38 N.E.2d 70, 73 (Ohio 1941). Considering this to be the case, a reasonable and non-arbitrary defense would exist for those against whom an action would be filed claiming a violation of the claimant's constitutionally protected rights. The trier of fact would be left to determine if the government's actions were indeed reasonable and non-arbitrary.

[77] *See* Ziegler, *supra* note 73, at 678.

[78] Gregory v. Flowers, 290 N.E.2d 181, 186 (Ohio 1972). The Court further stated that "a right without a remedy is a *brutem fulem*, i.e., no law at all." *Id.*

[79] *See* Ziegler, *supra* note 73, at 678.

[80] *Id.*

A holder of a "correlative right can only hope that the act or forbearance will occur"[81] if he has no ability to enforce the duty or forbearance due him. Of what significance, therefore, is a right which cannot be enforced? Absent the ability to enforce, there is no legal right.[82] Allowing a cause of action for violations of the rights contained within the Ohio Constitution would provide the mechanism to enforce the "duty relationship" that exists between the government and its citizens.

Some might point to the existence of injunctive or declaratory relief as a remedy by which the constitutional rights of Ohio's citizens can be enforced. Indeed, the courts have the ability to grant injunctions or provide declaratory relief to prevent the enforcement of statutes or conduct that is violative of the Ohio Constitution.[83] Of particular note in such actions, however, is the fact that the conduct allegedly abhorrent to the Ohio Constitution has yet to occur or can still be undone.[84] The role of declaratory and injunctive relief is substantially different when the unconstitutional act takes only one minute, one day, or one weekend. Constitutional violations have no set time within which to occur: an illegal search of a home can be perfected in two hours; an unconstitutional seizure can last only a weekend; and the opportunity to vote comes but every election. An after-the-fact decree from the local court will do little to compensate those citizens whose rights were violated. Injunctive relief or declaratory relief, while effective to ward off future violations, does nothing to rectify past unconstitutional acts.

Without some method of compensating the victim and forcing the violator to suffer some loss for his or her transgression of the Constitution, the government's duty to forbear action that is injurious to the people is nothing more than a hope or a wish. The Ohio Bill of Rights means little if the only remedy available to those whose rights are violated is a warning by the court not to do it again.

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[81] *Id.*

[82] *Id.*

[83] *See e.g.* Rickard v. Ohio Dep't of Liquor Control, 504 N.E.2d 724, 728 (Ohio Ct. App. 1986)(Court of Common Pleas has jurisdiction over declaratory judgment seeking to determine the constitutionality of a statute).

[84] Injunction is defined as "[a] prohibitive equitable remedy issued . . . by a court at the suit of a party complainant, directed to the party defendant in the action, or a party made a defendant for that purpose, forbidding the latter from doing some act which he is threatening or attempting to commit, or restraining him in the continuance thereof. . . ." BLACK'S LAW DICTIONARY 784 (6th ed. 1990). Declaratory Judgment can be defined as "a binding adjudication of the rights and status of litigants even though no consequential relief is awarded." Brimmer v. Thomson, 521 P.2d 574, 579 (Wyo. 1974).

B. The Ohio Constitution as a Source of the Remedy-Crafting Power

Ohio's courts should allow remedies for violations of constitutional rights because of the "right-to-a-remedy" provision in the Ohio Constitution.[85] Its placement in the Bill of Rights suggests that it was the goal of the framers of Ohio's Constitution to protect the people and their freedoms. Moreover, the provision recognizes "that societal norms require that injured parties have the means by which to vindicate their rights."[86]

Article one, section sixteen of the Ohio Constitution states that "all courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay."[87] A logical interpretation of the clause would suggest that it prohibits all impediments to fair judicial process—both legislative and judicial.[88] Before reaching that conclusion, however, a brief discussion of the clause and its history is necessary.

The "remedy" provision of the Ohio Constitution has been included since Ohio drafted its first constitution in 1802.[89] Its language, in particular the use of the affirmative command "shall," demonstrates that the provision is a command requiring courts to provide remedy by due course of law through the state's legal apparatus for all who have been injured in land, goods, person, or reputation.[90] The text of the provision is devoid of any limitations placed upon the command.[91]

The notion that rights should have remedies has a long tradition in both the British and American legal systems.[92] Its most famous use in the American system is in Chief Justice John Marshall's oft-quoted opinion in *Marbury v. Madison*.[93] While no such provision appears in the United States Constitution,

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[85] *See supra* note 18. Ohio is one of thirty-five states whose constitutions contain "right to remedy" provisions. Caroline Forell, *The Statutory Duty Action in Tort: A Statutory/Common Law Hybrid*, 23 IND. L. REV. 781, 790 (1990).

[86] Donna B. Haas Powers, Note, *State Constitutions' Remedy Guarantee Provisions Provide More Than Mere 'Lip Service' to Rendering Justice*, 16 U. TOL. L. REV. 585, 590 (1985).

[87] OHIO CONST. art. I, sec. 16.

[88] *See* Schuman, *supra* note 33, at 1197.

[89] *See* OHIO CONST. of 1802, art. VIII, § 7.

[90] *See* Schuman, *supra* note 33, at 1200.

[91] *See* OHIO CONST. art. I, § 16.

[92] Most scholars attribute the concept to the Magna Charta, penned in 1212. *See* Powers, *supra* note 86, at 585. The Magna Charta proclaimed "[w]e will sell to no man, we will not deny or defer to any man justice or right." *Magna Charta*, 9 Hen. 3, c.29 (1225). Lord Coke later interpreted this provision as requiring that a remedy succeed an injury. *See* 2 E. COKE, INSTITUTES OF THE LAWS OF ENGLAND 41-55 (5th ed. 1797).

[93] 5 U.S. (1 Cranch) 137, 163 (1803)("[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.").

the "right-to-a-remedy" guarantee appears in thirty-nine[94] state constitutions. Often incorporated into the state constitutions with little or no discussion,[95] the provisions "arose from the basic desire for maximum personal freedom and represented both a warning to those in power not to violate the personal interests of the people, as well as the political philosophy of the revolution, for unrestricted liberty."[96]

There are numerous theories of what the "right-to-a-remedy" provision actually means and how it should be interpreted.[97] Attempting to apply any one definition or interpretation to all thirty-nine state remedy provisions, however, does an injustice to the individualistic nature and historical background of each state.[98] The appropriate question is not "what does the remedy provision mean," but rather "what does the remedy provision mean in state X?"[99] In order to determine whether the remedy provision in Ohio's Constitution can be used as a vehicle for permitting a cause of action for damages based upon a violation of the Ohio Constitution, one must answer "what does the remedy provision mean in Ohio?"

Ohio courts have had numerous occasions to examine the Constitution's "right-to-remedy" clause and have given its mandate a broad interpretation. A review of these decisions reveals that the "right-to-a-remedy" clause would not just encourage, but require recognition of a cause of action for damages resulting from a constitutional violation. A few examples serve to illustrate this proposition.

The Ohio Supreme Court, in *Kintz v. Harringer*,[100] abolished the common-law immunity for statements made before a grand jury. In so doing the court proclaimed that it is the "primary duty of courts to sustain the

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[94] *See* Schuman, *supra* note 33, at 1200.

[95] *See* Powers, *supra* note 86, at 586.

[96] *Id.* (citing Comment, *Article I, Section 19 of the Maine Constitution: The Forgotten Mandate*, 21 ME. L. REV. 83, 84 (1969)).

[97] *See* Schuman, *supra* note 33, at 1203-04. Schuman places the interpretations into three categories: 1) "no restriction" interpretations which hold that the remedy provisions apply only to judicial procedures as opposed to substantive legislation; 2) "due process" interpretations which hold that only fundamental remedies are immune from "legislative extinction"; and 3) "constitutional incorporation" interpretations which hold that the provision bars elimination of remedies that were established and in existence at the time the provision was placed into the constitution. *Id.*

[98] *Id.* at 1220. Schuman notes that a remedy guarantee means one thing if placed in the constitution of a people particularly distrustful of their legislature and it means quite another thing if placed in the constitution by a community with an "anti-judicial bias." *Id.*

[99] *See* Schuman, supra note 33, at 1203.

[100] 124 N.E. 168 (Ohio 1919). The holding of the case was overruled in *Taplin-Ric-Clerkin Co. v. Hower*, 177 N.E. 203 (Ohio 1931). The Court's use and interpretation of the Ohio Constitution's remedy provision, however, is still quoted. *See infra* note 110 and accompanying text.

declaration of right and remedy [as contained in the Ohio Constitution], whenever the same has been wrongfully invaded."[101] The court noted that one of the most sacred rights is the right to a good name and reputation, and that citizens ought to be protected in the "enjoyment of that good name and reputation."[102] Of particular interest is the candor with which the court deals with the precedent barring causes of action based upon similar claims. In upholding the right to a remedy, overturning the common-law immunity and all the precedents upholding it, the court noted that "precedents are valuable for information, admonition, and as milestones in the nation's progress. But they do not necessarily imply the last word of wisdom. They are not always to be adopted. They are frequently to be avoided."[103] The court thus used the "right to a remedy" to allow a cause of action, thereby overturning years of case law to the contrary.

Nearly thirty years later, the court of appeals in *Armstrong v. Duffy*,[104] held that a union's by-laws, in the absence of self- binding limitations by contract, could not prevent the union's members from resorting to the courts for remedy.[105] In so holding, the court reasoned that "it is the right of every citizen of this state to seek remedy by court action for any injuries done to him in his person or property"[106] and he is entitled "to have justice administered according to law, without denial or delay, and any person who attempts to interfere unlawfully with this right is guilty of a violation of the fundamental principles guaranteed by constitutional and statutory principles."[107] The "fundamental principle" guaranteed by the Constitution was the remedy clause of article one, section sixteen of Ohio's Constitution.[108]

In more recent times the courts have stated that courts have a duty to protect the rights of parties involved in litigation, thus guaranteeing access to the judicial system.[109] The notion that the Ohio Constitution provides some guarantee of access to the courts was articulated by the supreme court in *Hardy v. VerMeulen*.[110] At issue was a statute barring medical malpractice claims brought more than four years after the act or omission constituting the alleged

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[101] *Id.*

[102] *Id.* at 169.

[103] *Id.*

[104] 103 N.E.2d 760 (Ohio Ct. App. 1951).

[105] *Id.* at 769.

[106] *Id.*

[107] *Id.*

[108] *Armstrong*, 103 N.E.2d at 768.

[109] Finley v. Kline, 557 N.E.2d 853, 854 (Ohio P. Ct. 1988), *aff'd*, CA-923, unreported (January 26, 1990).

[110] 512 N.E.2d 626 (Ohio 1987). This decision cites and relies upon the *Kintz* Court's analysis of the remedy provision. *See supra* note 100 and accompanying text.

malpractice occurred, and whether the statute could be applied to people who either did not know or could not reasonably have known of their injuries within the proscribed four year period.[111] The court found the measure, as applied, unconstitutional as violative of the remedy provision of article one, section sixteen of the Ohio Constitution.[112] The decision finds its logical basis in the denial of a remedy, i.e. that a person who discovers she is the victim of medical malpractice is locked out of the courtroom because she failed to discover [perhaps could not discover] the injury within a proscribed period of time.[113] To this proposition the court interpreted the remedy provision of the Constitution with a broad brush, proclaiming "the language in the Constitution is clear and leaves little room for maneuvering. Our courts are open to those seeking remedy for injury to person, property or reputation."[114]

Lastly, the Ohio Supreme Court provided its most recent interpretation of the remedy provision in *Brennamen v. R.M.I. Company; Bechtel Group, Inc.*,[115] thereby demonstrating a commitment to allowing access to the courts for those who have been wronged. At the center of the controversy in *Brennamen* was Ohio's statute of repose.[116] The statute of repose "barred tort actions against designers and engineers of improvements to real property which are brought more than ten years after completion of the construction services."[117] The effect of the statute was to deprive claimants of a "right to sue" before they either knew or could have known of their decedents' injuries.[118] In *Brennamen*, this meant that the families of two men killed in an industrial accident caused by a defectively manufactured and installed valve/piping system could not maintain a cause of action[119] against those who had designed and installed the piping system because the work done at the property was done more than ten years before the accident.[120]

111*Hardy*, 512 N.E.2d at 627.

112*Id.* at 628.

113*Id.* at 630.

114*Id.* at 628.

115639 N.E.2d 425 (Ohio 1994).

116OHIO REV. CODE ANN. § 2305.131(1971)

117*Brennamen*, 639 N.E.2d at 428.

118*Id.* at 430.

119*Id.* at 427. A cause of action had been filed against the defendant Bechtel Group, Inc., alleging negligence, breach of warranty, and products liability in the design and construction of the handling system that eventually failed. *Id.* The trial court granted summary judgment in Bechtel's favor and the court of appeals affirmed, finding that the statute of repose barred any action against Bechtel as a matter of law. *Id.*

120*Brennamen*, 639 N.E.2d at 427. Bechtel had performed the work in 1958. *Id.*

The Ohio Supreme Court struck down the statute of repose as a violation of the remedy provision.[121] Noting that article one, section sixteen "protects the right to seek redress in Ohio's courts when one is injured by another,"[122] and that "at a minimum, article one, section sixteen requires that the plaintiffs have a reasonable time to enter the courthouse to seek compensation after the accident,"[123] the Court overturned a four-year-old decision[124] upholding the constitutionality of the statute and, in doing so, "reopen[ed] the courthouse doors."[125]

The preceding analysis reveals two principles of Ohio law. First, Ohio's Bill of Rights represents an attempt by its framers to protect the people of Ohio and their freedoms.[126] It imposes upon the state certain obligations or duties to act for the benefit of, or to refrain from acting in a way that injures, the people.[127] Second, Ohio has a long-embraced notion that its courts should be open to those in need of redress[128] and those injured by others should have remedy for their injuries.[129] In the words of Justice Pfeifer in *Brennamen*, the "courthouse doors shall be open."[130]

In light of the protective nature of the Bill of Rights and the strong emphasis placed upon access to the courts, Ohio's courts have the ability and the authority to permit a cause of action to arise directly from a violation of a provision of the Ohio Constitution. The protections of the Bill of Rights demand enforcement and the Constitution demands remedy for injury. Combined, the two principles require that the courts be open to a claim for damages arising directly from the violation of a constitutionally protected right.

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[121] *Id.* at 430.

[122] *Id.* at 427.

[123] *Id.*

[124] Sedar v. Knowlton Construction Co., 551 N.E.2d 938 (Ohio 1990). The decision analyzed the "right-to-a-remedy" provision in the Ohio Constitution and had sought to construe it in a constrained manner. Specifically, the Court argued that "the right-to-a-remedy provision of article I, section 16 applies only to existing vested rights, and it is state law which determines what injuries are recognized and what remedies are available." *Id.* at 947. *Brennamen* unequivocally rejected this holding; *Sedar* was overturned.

[125] *Brennamen*, 639 N.E.2d at 430.

[126] Powers, *supra* note 86, at 589. *See also* OHIO CONST. art. I, § 2.

[127] Ziegler, *supra* note 73.

[128] *See Jeffries*, 11 Ohio at 372.

[129] *See* Hardy v. VerMeulen, 512 N.E.2d 626 (1987), *cert. denied*, 848 U.S. 1066 (1988).

[130] 639 N.E.2d 425, 430, *amended*, 643 N.E.2d 138 (1994).

C. The Doctrine of Self-execution as a Remedy-Crafting Vehicle

A commonly advanced argument against judicial recognition of a cause of action based solely upon a constitutional violation is that the creation of remedies belongs with the state legislature. Those supporting this argument would point to the existence of a statutory remedy (regardless of its adequacy) and declare that "the legislature has spoken." For the courts to provide a second, more adequately tailored remedy to co-exist with any provided by statute would impermissibly interfere with the legislative process.[131] Likewise, where no remedy has been provided by the legislature, as is the case in Ohio, the legislative inaction is accorded the same authority as legislative action.[132] Under this method of analysis, when the legislature acts, its action is supreme; when the legislature does not act, its inaction is supreme. Under either scenario, the judiciary is effectively removed from the process.

Some have argued the converse—that the legislature should be (or always was) removed from the process of affording remedies for constitutional violations. One commentator has noted, "the Constitution should be enforceable on its own terms, not because of its congruence with state law. . . ."[133] Supporters of this theory argue that instead of relying on statutes to interpret or give effect to constitutional provisions, the provisions should be recognized as "self-executing;" both binding upon government actors and with violations automatically capable of remedy through the courts.[134] This approach embraces the longstanding principle that "where a constitution asserts a certain right, or lays down a certain principle of law or procedure, it speaks for the entire people . . ., and is full authority for all that is done in pursuance of its provisions."[135] To assert otherwise is to concede that rights "lie dormant"[136] within constitutions, waiting for legislation to awaken them. For those who would relegate to the legislature the task of remedying constitutional violations, the self-executing nature of constitutional rights may prove difficult to overcome.

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[131] *See e.g.*, Kelly Property Development, Inc. v. Lebanon, 627 A.2d 909, 924 (Conn. 1993)(refusing to recognize a "Bivens-type" cause of action in Connecticut where existing statutory remedies are present); *Provens*, 594 N.E.2d 959 (deferring to remedies created by state legislature, despite the fact that such remedies may be inadequate).

[132] The argument is commonly made that had the legislature wanted a remedy, it would have created one; since the legislature has not acted, it does not want a remedy.

[133] Susan Bandes, *Reinventing Bivens: The Self-executing Constitution*, 68 S. CA. L. REV. 289, 291 (1995).

[134] The judiciary is charged with interpreting the Constitution and protecting it from encroachment by the other branches.

[135] Davis v. Burke, 179 U.S. 399, 403-04 (1900).

[136] Tammy Wyatt-Shaw, *The Doctrine of Self-execution and the Environmental Provisions of the Montana State Constitution: "They Mean Something"*, 15 PUB. LAND L. REV. 219, 221 (1994)(citing THOMAS J. COOLEY, 1 COOLEY'S CONSTITUTIONAL LIMITATIONS 165, 169 (Walter Carrington ed., 8th ed. 1927)).

1. Self-Executing Defined

A constitutional provision is "self-executing" if "the judiciary can enforce the provision without the aid of a legislative enactment."[137] Succinctly stated, a constitutional right exists regardless of whether the legislature chooses to recognize it. By removing legislative action as a pre-requisite to enforcement of constitutional provisions, the doctrine of self-execution recognizes that the Constitution is supreme, the judicial branch is charged with upholding the Constitution, and that enforcing constitutional provisions "is not dependent on the assent of the political branches"[138] but that, to the contrary, the Constitution "is meant to circumscribe the power of government where it threatens to encroach on individuals."[139] Consistent with the separation of the branches of government, Constitutional protections "must be enforceable by individuals even when the political branches do not choose it to be."[140]

2. Other States' Approaches

Several courts have shown a willingness to use self-executing state constitutional provisions as vehicles for the recognition of a cause of action arising directly from a violation of their respective state constitutions, regardless of legislative authorization or input. California, in particular, has used the self-execution doctrine as the basis for a "constitutional cause of action."

The premise that self-executing provisions in the California Constitution could give rise to a cause of action has been discussed in numerous California state court opinions.[141] In *Porten v. University of San Francisco*,[142] the California Court of Appeals held the plaintiff had stated a cause of action for damages arising out of the defendant's violation of plaintiff's constitutionally protected right to privacy.[143] After holding that the constitutional right to privacy

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[137]Wyatt-Shaw, *supra* note 136, at 2. *See also* BLACK'S LAW DICTIONARY 1360 (6th ed. 1990)(defining "self-executing constitutional provisions" as "provisions which are immediately effective without the aid of ancillary legislation").

[138]*Id.* at 292. Although Bandes' discussion concerns itself with the United States Constitution, the premise of her argument is equally applicable to the Ohio Constitution.

[139]*Id.*

[140]*Id.*

[141]*See* Fenton v. Groveland Community Services Dist., 185 Cal. Rptr. 758 (Cal. App. 1982); Laguna Publishing Co. v. Golden Rain Foundation of Laguna Hills, 182 Cal. Rptr. 813 (Cal. App. 1982); Porten v. University of San Francisco, 134 Cal. Rptr. 839 (Cal. App. 1976); White v. Davis, 533 P.2d 222 (Cal. 1975). *Cf.* Bonner v. City of Santa Ana, 33 Cal. Rptr.2d 233 (Cal. App. 1994).

[142]*Porten*, 134 Cal. Rptr. at 840.

[143]Porten alleged that the university had improperly released confidential information concerning his grades and premised his cause of action upon a claimed violation of California's constitutionally protected "right to privacy." *Id.*

protected the unauthorized release of confidential student information,[144] the court held that Porten could collect damages based upon the defendant's violation of that right.[145] Apparently addressing the absence of legislative authorization of any such claim, the court explained that "the constitutional provision is self- executing; hence, it confers a judicial right of action on all Californians."[146]

Several years later the use of self-execution as a vehicle for a constitutional cause of action resurfaced. In *Laguna Publishing Co. v. Golden Rain Foundation*,[147] the plaintiffs alleged violations of their state constitutional rights to free speech and free press and sought damages on the basis of the "self-executing modality" of article 1, section 2 of the California Constitution.[148] After holding that no cause of action existed under 42 U.S.C. § 1983,[149] the *Laguna* court permitted plaintiff's cause of action, noting "it is too plain for argument that our state constitution has been interpreted to support an action for damages for a violation of rights arising under old section 1, article I,[150] and that such reliance was possible without the need for enabling legislation."[151] The violation of plaintiffs' rights to free speech and press alone provided a "direct right to sue for damages."[152] The case was remanded for trial.

Self-execution was also addressed in *Fenton v. Groveland Community Services District*[153]—*a* modern-day case similar to Ohio's *Jeffries*[154] decision. Faced with whether to allow a cause of action premised solely upon the plaintiffs' having

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144*Id.* Article I, § 1 of the California Constitution reads: "[A]ll people are by nature free and independent, and have certain inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."

145*Porten*, 134 Cal. Rptr. at 843.

146*Id.* at 842 (citation omitted).

147182 Cal. Rptr. 813 (Cal. App. 1982).

148*Id.* at 815. Article 1 § 2(a) of the California Constitution states as follows: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."

149*Id.* at 832. The court upheld the trial court's determination that there was insufficient state action necessary to invoke federal constitutional provisions and, therefore, 42 U.S.C. § 1983. *Id. See supra* notes 13-15 and accompanying text.

150Article I, section 1 of the California Constitution was at issue in *Porten*. *See supra* notes 143-44 and accompanying text.

151*Laguna Publising Co.*, 182 Cal. Rptr. at 835.

152*Id.* The court specifically stated that plaintiffs' ability to sue for damages "accrued under Article I, Section 2" of the California Constitution—the rights to free speech and free press. *Id.*

153185 Cal. Rptr. 758 (Cal. App. 1982).

154*See supra* note 1 and accompanying text.

been denied their constitutionally protected right to vote, the *Fenton* court noted that "the state constitution may provide a cause of action independent from any statute providing for liability."[155] Addressing self-execution as a method of providing for such causes of action, the court opined that "[t]he right to vote would appear to be contained in a self-executing provision of the Constitution as is [sic] the right to free speech and free press."[156] Indicating that California constitutional provisions are presumed to be self-executing,[157] the court declared that "this presumption will be given effect unless it appears that legislation is required to implement the right granted."[158] Because those rights are contained in self-executing provisions, a "governmental entity may not violate [them] without standing accountable for any provable damages."[159] Accordingly, the trial court's dismissal for failure to state a claim was reversed.

As in California, other courts[160] have acknowledged that violations of self-executing constitutional provisions can give rise to a claim for damages absent legislative authorization. Vermont addressed the issue in *Shields v. Gerhart*.[161] Carol Shields filed suit against the director of the Vermont Division of Licensing and Registrations for Social and Rehabilitation Services and three department employees alleging that her license to operate a day-care center had been revoked in retaliation for her public opposition to the Department's policy against the use of corporal punishment.[162] Her complaint alleged violations of 42 U.S.C. § 1983 as well as violations of the Vermont Constitution.[163]

Addressing whether money damages were available to a citizen whose constitutional rights had been violated, the Vermont Supreme Court acknowledged a two-step inquiry: (1) "we must first determine whether the constitutional provisions involved are self-executing, that is, whether they support an action against the state or its agents without implementing

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[155] *Fenton*, 185 Cal. Rptr. at 762 (citing legislative recognition of this fact).

[156] *Id.*

[157] *Id.*

[158] *Id.* at 763.

[159] *Fenton*, 185 Cal. Rptr. at 763.

[160] *See, e.g.*, Schreiner v. McKenzie Tank Lines, 408 So.2d 711 (Fla. App. Ct. 1982), *aff'd*, 432 So.2d 567 (Fla. 1983).

[161] 658 A.2d 924 (Vt. 1995).

[162] *Id.* at 926.

[163] *Id.* Shields had argued that Chapter 1, Articles 1 and 13 of the Vermont Constitution provided her a private cause of action against those who violated her constitutional rights. *Id.* at 926. The trial court rebuffed the claim on three grounds: (1) there is no private right of action for money damages for violation of the Vermont Constitution; (2) even if there were such a claim available in appropriate cases, there were alternative avenues available that should have been pursued; and (3) sovereign immunity barred the claims. *Id.* at 927.

legislation;" and (2) "if we find a provision is self-executing, we must determine whether monetary damages are available as a remedy for a violation."[164]

Conducting the analysis, the court, citing *Davis v. Burke*,[165] noticed that "[w]here a constitution asserts a certain right, or lays down a certain principle of law or procedure, it speaks for the entire people as their supreme law, and is full authority for all that is done in pursuance of its provisions."[166] In deference to this principle, "the absence of enabling statutes cannot be construed to nullify rights provided by the constitution if those rights are sufficiently specified."[167] After stating the common law principle that there shall be remedy for every wrong,[168] the court concluded by iterating that "[t]o deprive individuals of a means by which to vindicate their constitutional rights would negate the will of the people in ratifying the constitution, and neither this Court nor the Legislature has the power to do so."[169]

Having declared that violations of self-executing constitutional provisions would support an action against those who perpetrated the violation,[170] the court next conducted an analysis of self-execution. Specifically, the court sought to establish tests for determining when and under what circumstances a constitutional provision will be self-executing. Accordingly, "a self-executing provision should do more than express only general principles; it may describe the right in detail, including the means for its enjoyment and protection."[171] In addition, "a self-executing provision does not contain a directive to the legislature for further action," although "the legislative history may be particularly informative as to the provision's intended operation."[172] Lastly, "a decision for or against self-execution must harmonize with the scheme of rights established in the constitution as a whole."[173]

Examining Vermont's right to free speech[174] under its articulated test, the court concluded that the provision was indeed self-executing.[175] First, taking

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[164] *Shields*, 658 A.2d at 927 (citations omitted).

[165] 179 U.S. 399 (1900).

[166] *Shields*, 658 A.2d at 927 (citing *Davis*, 179 U.S. at 399).

[167] *Id.* (citations omitted).

[168] *See supra* note 92 and accompanying text.

[169] *Shields*, 658 A.2d at 928.

[170] *Id.* at 930.

[171] *Id.* at 928 (citing Convention Center Referendum Comm. v. Board of Elections and Ethics, 399 A.2d 550, 552 (D.C. Ct. App. 1979)).

[172] *Id.*

[173] Shields, 658 A.2d at 928.

[174] VT. CONST. ch. I, art. 13. The provision reads: "[T]hat the people have a right to freedom of speech, and of writing and publishing their sentiments, concerning the transactions of government, and therefore the freedom of the press ought not be restrained." *Id.*

cognizance of the provision's language, the court found its commands to be more than "general principles alone;" noting that it contains a single, specific right of the people to make themselves heard—a "fundamental characteristic of democratic government."[176] In addition, the free speech provision did not contain a legislative directive.[177] Applying the third criterion necessary to establish self-execution, the court found that self-execution of free speech rights would comport with the general constitutional scheme because free speech is "crucial to the operation of government and vital to the effectuation of other enumerated rights."[178] Allowing an individual the opportunity to seek redress when his right to free speech does not do violence to the overall constitutional scheme.

In spite of the emphasis the court placed on both the self-executing nature of Vermont's right to free speech as well as its significance in the constitutional scheme, the *Shields* court was unwilling to hold that its violation could always give rise to a cause of action for monetary damages. Deferring to legislative action, the court instead held that a monetary remedy for violations of self-executing constitutional provisions was not appropriate when other, legislatively crafted remedies existed.[179] The "remedy" available to Shields consisted primarily of an administrative appeal of her licensure revocation and denial.[180] Because Shields failed to pursue this remedy, her claim for monetary damages was barred.[181]

3. Self-execution in Ohio.

The doctrine of self-execution can and should be used by Ohio's courts in order to recognize a cause of action arising directly from a violation of Ohio's constitutional mandates. As acknowledged in *Shields*[182] and *Davis*,[183] the protections afforded under a state or federal constitution are vital to a democratic society. To deny an injured party the means of seeking a full and adequate redress for constitutional transgressions—based upon the claim that the legislature has not "permitted" a means of vindication—ignores the essence of rights as things to be enforced and concedes that rights are, in fact, dormant

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[175] *Shields*, 658 A.2d at 930.

[176] *Id.*

[177] *Id.*

[178] *Id.*

[179] Shields, 658 A.2d at 934. "Where the legislature has provided a remedy, although it may not be as effective for the plaintiff as money damages, we will ordinarily defer to the statutory remedy and refuse to supplement it."

[180] *Id.* at 936.

[181] *Id.*

[182] *See supra* note 135 and accompanying text.

[183] *See supra* note 166 and accompanying text.

until recognized by the legislature. Recognizing Ohio's constitutional protections as self-executing would neutralize the "legislation authorization" argument, recognize that constitutional rights are not "dormant," and enable courts to provide effective and adequate relief where state actors run afoul of the Constitution's provisions.

In Ohio, all constitutional provisions are presumed to be self-executing.[184] This presumption is stimulated by the knowledge that, "if not treated as self-executing, the legislature would have the power to ignore and practically nullify the directions of fundamental law."[185] It follows, therefore, that anything done in violation of a self-executing provision is void.[186]

Nevertheless, where the presumption is challenged, a self- execution test has been developed. Specifically, the Supreme Court of Ohio has stated:

> One of the recognized rules is that a constitutional provision is not self-executing when it merely lays down general principles, but that it is self-executing if it supplies a sufficient rule by means of which the right which it grants may be enjoyed and protected, or the duty which it imposes may be enforced, without the aid of legislative enactment. Therefore, if a constitutional provision either directly or by implication imposes a duty upon an officer, no legislation is necessary to require the performance of such duty. Another way of stating this general, governing principle is that a constitutional provision is self-executing if there is nothing to be done by the legislature to put it in operation. . . . [I]t must be regarded as self-executing if the nature and extent of the right conferred and the liability imposed are fixed by the constitution itself, so that they can be determined by an examination and construction of its terms, and there is no language indicating that the subject is referred to the legislature for action.[187]

In addition, courts are to consider the language of the provision, the objects to be accomplished, and the surrounding circumstances.[188]

To apply tests of self-execution to fundamental protections in Ohio's Constitution, only to conclude that such provisions are self-executing, would

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[184]State ex rel. Russell v. Bliss, 101 N.E.2d 289 (Ohio 1951)(addressing constitutional provisions mandating the rotation of candidates' names on a ballot).

[185]*Id.* at 291.

[186]Kraus v. City of Cleveland, 96 N.E.2d 314, 317 (Ohio Ct. App. 1951); Link v. Public Util. Comm'n of Ohio, 131 N.E. 796, 797 (Ohio 1921)("No legislative act can in any way modify or redistrict the power conferred by constitutional provision, and therefore any provision of the statute inconsistent with the constitutional provision conferring such power must fall.").

[187]*Russell*, 101 N.E.2d at 291 (citing 11 AM. JUR. § 74 (1938)). *See also* 16 AM. JUR. 2D *Constitutional Law* § 143 (1979).

[188]State v. Stouffer, 276 N.E.2d 651, 653 (Ohio Ct. App. 1971) ("In determining whether a constitutional amendment is self-executing, the general rule is that courts will consider the language used, the objects to be accomplished and the surrounding circumstances.").

seem an exercise in the obvious. Indeed, the authorities cited above all concluded that their respective state constitution's protections of fundamental rights were self- executing. Few would argue that a different result should be reached in Ohio. For example, Ohio's free speech and press provision specifically declares that "[e]very citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press."[189] Not only can one find a clear duty to refrain from abridging, but the provision's language unequivocally excludes the legislature from restraining or abridging free speech and press. Ohio's other constitutional protections are equally as clear.[190]

The more difficult question, as was the case in the above authorities, is whether Ohio's courts should *use* self-execution as a vehicle for awarding damages. No Ohio court has ever addressed the issue directly; *Jeffries*[191] came the closest—acknowledging the principle[192] but never explaining the rationale.

The absence of specific Ohio authority should not, of course, serve to dissuade courts from using the self-execution doctrine. As a method of removing the legislature from effectively deciding which constitutional rights are enforceable and what remedies are available for the injured, the doctrine serves only to reinforce the principles that constitutional rights are unassailable[193] and automatically subject to enforcement.[194] Further, as a method of justifying an award of damages, the self-execution doctrine enhances and reinforces the separation of powers—declaring that enforcement of constitutional rights belongs with the judicial branch and, when rights are violated, the judicial branch is within its jurisdiction to craft remedies to redress the wrongs.

The Ohio Constitution is enforceable not because the Ohio legislature authorizes enforceability, but because its provisions contain rights and rights, by definition,[195] are enforceable.

189OHIO CONST. art. I, § 11.

190*See supra* note 12.

191*See supra* notes 1 - 10 and accompanying text.

192The *Jeffries* Court ignored legislative inaction and crafted its own remedy. *See supra* note 10 and accompanying text.

193*See supra* notes 73-76 and accompanying text discussing the definition of a "right."

194*See supra* notes 77-81 and accompanying text discussing the necessity of providing remedies when rights are violated.

195*See supra* note 73 and accompanying text.

D. The Role of Public Policy

The Constitution of the State of Ohio provides for a system of courts to administer justice.[196] Implicit in the duties charged to the courts is the duty to preserve the existence of the rights and protections afforded by the Ohio Constitution. To execute those duties, it is necessary that the "constitution be supported in its full vigor."[197] How does the court preserve the existence of rights and "support the Constitution in its full vigor" when it is faced with an issue on which the legislature has not spoken? One way to do so is to render decisions which further the policies articulated within the Constitution and a powerful way of doing so is by reference to public policy.

The Constitution of the State of Ohio contains within its pages the public policy of those who live under its rule.[198] As such, these "public policies must be paramount, though a score of statutes conflict and multitude of judicial

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196 *See* OHIO CONST. art. IV, §§ 2-4. Of the three levels of courts expressly established by the Ohio Constitution, common pleas courts are, by far, provided with the most wide-ranging grant of original jurisdiction; the Constitution states that "the courts of common pleas and divisions thereof shall have original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and agencies as may be provided by law." OHIO CONST. art. IV, § 4(B). As a court of "general jurisdiction," therefore, the common pleas court possesses the authority to determine its own jurisdiction over the subject matter in any action pending before it, with such determination subject to review by the court of appeals. State ex rel. Heimann v. George, 344 N.E.2d 125 (Ohio 1976). Absent a statute, common-law decision, or constitutional provision declaring the courts' inability to hear a matter, a common pleas court can hear any claim involving a "justiciable matter."

That matters involving the violation of constitutional rights are justiciable can hardly be doubted. Acts of the legislature are routinely scrutinized by the courts, searching to determine if any of the rights contained within the Constitution have been violated. *See supra* note 115 and accompanying text. The far more difficult situation arises however, where constitutionality is questioned and there has been no legislative action.

The jurisdictional nature of the common pleas courts is to be contrasted with their counterpart district courts in the federal system. The federal district courts do not have general jurisdiction, but rather are given specific requirements that must be met in order for a claim to be heard. *See* 28 U.S.C. § 1331. The significance of this difference manifests itself when overemphasis is placed on *Bivens* and its progeny. While the U.S. Supreme Court's recognition of the "no right without a remedy" principle lends credibility to the concept, the nature of the statutorily imposed subject matter jurisdiction requirements makes tenuous the meaning of the principle. Remedies in the federal courts only exist if a statute grants jurisdiction to hear the claim. If jurisdiction is revoked or expressly denied, there will be no remedy—regardless of the right held.

197 1 WILLIAM BLACKSTONE, COMMENTARIES, *Of the Absolute Right of Individuals* *144.

198 *Kintz*, 124 N.E.2d at 170. *See also* Mills-Jennigs of Ohio, Inc. v. Department of Liquor, 435 N.E.2d 407, 410 (Ohio 1982)(noticing that Constitution evidences a strong public policy against gambling); Zepp v. City of Columbus, 12 N.E.2d 46, 49 (Ohio 1951)(Constitution of Ohio contains public policy with respect to lotteries); Inglis v. Pontius, 131 N.E.2d 509, 512 (Ohio 1921)(upheld state statute and declared that, as a basis for doing so, "the Constitution of Ohio has made declarations as to the policy of the people on this subject").

decisions be to the contrary."[199] When combined with the notions that the state has a duty to operate according to the requirements of the Bill of Rights and that the judiciary has a duty to "support the Constitution to its full vigor,"[200] it follows that the courts should render decisions which hold the "policies" of the Constitution superior to all acts, including the acts of a government which is duty-bound to function within the confines of the Constitution. The court recently had the opportunity to render a decision which upheld and reinforced the "policies" of the Constitution.

In *Painter v. Graley*,[201] the plaintiff, a chief deputy clerk in the Cleveland Municipal Court, asked for time off in order to run for Cleveland City Council.[202] Shortly thereafter, and in response to her request, she was discharged from her position.[203] The Deputy Clerk responded by filing suit, claiming that the sole reason she had been discharged from her position was her decision to become a candidate for Cleveland City Council[204] and that a discharge premised upon such reasoning violated article one, sections two and eleven of the Ohio Constitution.[205] Accordingly, she argued that a public employer could not, based upon the rights guaranteed under the Ohio Constitution, dismiss a public employee because the employee became a candidate for public office.[206]

The court, per Justice Sweeney, agreed that an at-will employee may state a cause of action for wrongful discharge where she is discharged in contravention of clear public policy statements[207] contained in the Ohio

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[199]Ziegler, *supra* note 73 and accompanying text.

[200]BLACKSTONE, *supra* note 197.

[201]639 N.E.2d 51 (Ohio 1994).

[202]*Id.* at 51.

[203]*Id.*

[204]*Id.* at 53. The Defendant never gave any other reason for the termination and never disputed the assertion that the decision to run for public office was the sole reason for plaintiff's termination. *Id.* at 53, n.3.

[205]Article I, section 2 of the Ohio Constitution states that "[a]ll political power is inherent in the people. Government is instituted for their equal protection and benefit, and they have the right to alter, reform, or abolish the same, whenever they deem it necessary; and no special privileges or immunities shall ever be granted, that may not be altered, revoked, or repealed by the general assembly." Article I, section 11 of the Ohio Constitution, the "free speech" provision, states, in pertinent part, "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press."

[206]*Painter*, 639 N.E.2d at 53.

[207]The Court disagreed with Ms. Painter's assertion that the Ohio Constitution, through article 1, sections 2 and 11, guaranteed her a right to run for office or prevented her public employer from prohibiting her from running for office. *Id.* at 53. No such right is contained in the Constitution. *Id.*

Constitution.[208] In so deciding, the court noted that "provisions found in the Ohio Constitution are necessarily statements of Ohio public policy, if not the most definitive statements of Ohio public policy."[209] While the court found that no provision of the Ohio Constitution guaranteed or assured the right to run for public office, the court remained silent as to what other policies contained in the Constitution might, if violated, give rise to a cause of action for wrongful discharge, noting only that the newly articulated exception to the at-will doctrine would apply only in situations where the violation of the public policy is "of equally serious import as the violation of a statute."[210]

The *Painter* decision is significant in two respects. First, the court, by declaring that the Ohio Constitution is the embodiment of public policy, is reaffirming the notion that the Constitution contains those ideas which we, as a society, believe are important.[211] If the concepts behind the "freedoms" contained in the Bill of Rights are significant enough to merit placement in the Constitution so as to avoid infringement by the government,[212] should not society recognize the significance of these freedoms beyond the interaction with government? Indeed, *Painter* stands for just that proposition. If a public employer discharges an at-will employee for doing something which the Constitution protects and deems fundamentally important, that employee has been wronged and, as *Painter* articulated, he should be entitled to maintain a cause of action against the employer.[213]

The *Painter* decision also recognized that employees can file suit against employers who discharge them in contravention of the public policies articulated in Ohio's Constitution.[214] The *Painter* court was willing to recognize that employers who discharge employees in an attempt to prevent the employees from exercising rights contained within the Ohio Constitution may be held liable for damages.[215] The use of such broad language in support of the Constitution bedevils the logic behind denying a cause of action against a

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[208] *Painter*, 639 N.E.2d at 56. The Court also held that such public policy statements can be contained in administrative rules and regulations as well as the common law. *Id.*

[209] *Id.*

[210] *Id.*

[211] Public policy is "community common sense and common conscience, extended and applied throughout the state to matters of public morals, safety, welfare, and the like; it is that general and well settled public opinion relating to man's plain, palpable duty to his fellow men, having due regard to all circumstances of each particular relation and situation." Hammonds v. Aetna Cas. and Sur. Co., 243 F. Supp. 793, 796 (N.D. Ohio 1965).

[212] *See supra* notes 72-76 and accompanying text.

[213] *Painter*, 639 N.E.2d at 56.

[214] The cause of action for a wrongful employee discharge in violation of public policy, like the cause of action being proposed herein, is of judicial origin. *See* Greeley v. Miami Valley Maintenance Contractors, Inc., 551 N.E.2d 981 (Ohio 1989).

[215] *Painter*, 639 N.E.2d at 56.

government actor when his actions violate not just the policy underlying the Constitution, but the provisions of the document itself?

V. THE SUPREME COURT'S FAILURE TO ALLOW A CAUSE OF ACTION ARISING DIRECTLY FROM A VIOLATION OF THE OHIO CONSTITUTION

Only once has the Ohio Supreme Court directly addressed the possibility of sustaining a cause of action for constitutional violations, arising not from any legislative enactment, but directly from the Constitution.[216] The decision, while denying the cause of action on the facts involved, demonstrates a willingness to recognize a cause of action arising directly from constitutional violations.[217]

In 1992 the Supreme Court decided *Provens v. Stark County Bd. of Mental Retardation and Developmental Disabilities*.[218] The plaintiff, Patricia Provens, was a teacher employed in the Defendant's school facility.[219] The crux of Ms. Provens complaint was that she was "harassed, discriminated against, and disciplined"[220] as a result of her having "criticized the operation and practices of the board [the defendant], and having filed discrimination charges against the board with both the Ohio Civil Rights Commission and the Equal Opportunity Commission."[221] Ms. Provens further alleged that, in violation of her "constitutional rights," her employer unlawfully searched her desk and singled her out for discriminatory treatment.[222] Moreover, Ms. Provens alleged that the Board retaliated against her because she "had initiated an assault and battery lawsuit against administrative employees of the board."[223]

216Provens v. Stark County Bd. of Mental Retardation and Developmental Disabilities, 594 N.E.2d 959 (Ohio 1992).

217When reading the analysis that follows, it is necessary to remember that Painter v. Graley was decided two years *after Provens*. Many of the statements made in *Provens* were modified or repudiated in *Painter*, although Painter did not overturn *Provens*. The two cases should be read together.

218594 N.E.2d 959.

219*Id.* at 959.

220*Id.* at 960.

221*Id.* Among the incidents of "harassment" alleged by Ms. Provens are: "1. She has been accused by her supervisors of not performing her job. 2. She was watched by her supervisors, and was told by supervisors that they were watching her and would 'get' her if she was out of her classroom. 3. She was spoken to by her supervisors about being absent from her assigned classroom, was asked 'why were you out, what were you doing?' and was advised, 'you shouldn't be out of your classroom.'" *Id.* For a list of the other fourteen alleged incidents of harassment, see *id.* n.2.

222*Id.* at 960.

223*Id.*

While Ms. Provens' complaint did not specifically set forth the constitutional provisions which were alleged to have been violated, the appellate briefs relied primarily upon a violation of Ohio's right to free speech.[224] The complaint sought injunctive relief[225] as well as compensatory and punitive damages.[226]

The trial court granted the Board's summary judgment motion, stating that "'a private cause of action under the Ohio Constitution does not exist', and held that it would be inappropriate for the court to create a new judicial remedy."[227] The court of appeals agreed and upheld summary judgment for the same reason.[228]

On a motion to certify the record,[229] the Supreme Court, per Justice Holmes, upheld the award of summary judgment granted in favor of the Board.[230] In doing so the court found that the "right to free speech" provision of article one, section eleven of the Ohio Constitution does not "provide an individual cause of action for an alleged violation of such constitutional right."[231] Adhering to the court's common-law ability to create a remedy when a right has been invaded or violated,[232] the Court noted that "this Court is empowered to grant relief not expressly provided by the legislature, and may grant relief by creating a new remedy."[233] However, the court held that it would "refrain from doing so where other statutory provisions and administrative procedures provide meaningful remedies."[234]

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[224]OHIO CONST. art. I, §11. Ms. Provens' appellate brief also relied upon OHIO CONST. art. I, §§ 1, 2, 3, 14, and 16. *Id.* at 960, n.1. These sections of the Bill of Rights are, respectively, the rights to freedom, life, liberty, happiness and safety, and the protection of property; the equal protection and benefit clause; the freedom of assembly and grievance clause; the search and seizure clause; and the due process and open courts clause (right-to-a-remedy provision). *Id.*

[225]*See supra* note 84 and accompanying text.

[226]*Provens*, 594 N.E.2d at 960.

[227]*Id.* at 961.

[228]*Id.* The court of appeals relied upon Bush v. Lucas, 462 U.S. 367 (1983). Such reliance must be scrutinized given the jurisdictional differences between the federal and state courts. *See supra* note 196.

[229]*Id.* at 959.

[230]Provens, 594 N.E.2d at 966.

[231]*Id.* at 961. The Court also noted that "this court has never pronounced it be the common law of this state that a public employee has a private cause of action against her employer to redress alleged violations by her employer of policies embodied in Ohio's Constitution." Id. Two years later, in Pain*ter*, the Court would so hold. *See supra* notes 207-10 and accompanying text.

[232]*See supra* notes 77-82 and accompanying text. *See also* RESTATEMENT(SECOND) OF TORTS § 874(A)(1979); Friesen, *supra* note 14, at 1281.

[233]*Provens*, 594 N.E.2d at 961-62.

[234]*Id.* at 962. While Ms. Provens argued that the remedy she sought would be in addition to any administrative remedies available to her, the Court simply looked to the

In reaching this conclusion the Court relied on the United States Supreme Court's decision in *Bush v. Lucas*[235] for the proposition that, in choosing whether to create a new remedy, the courts should pay heed to "any special factors counseling hesitation."[236] Specifically, the court cited *Bush* for the proposition that courts should not create new remedies for actions alleging violations of constitutional rights when the claim arises from an employment relationship "governed by comprehensive procedural and substantive provisions giving meaningful remedies . . . ."[237] In *Bush* this meant that the Court would not create a new remedy for his alleged free speech violations because the plaintiff had available "numerous procedural provisions,"[238] all of which govern the federal employment relationship.

Relying upon the *Bush* rationale, the *Provens* court denied Ms. Provens' claim and refused to allow a remedy based upon a constitutional violation. In particular, the Court noted that Ms. Provens had remedies available to her through the Ohio Civil Rights Commission, the State Employment Relations Board, and the State Personnel Board of Review.[239] Accordingly, the Court held that "public employees do not have a private cause of action against their employer to redress alleged violations by their employer of policies embodied in the Ohio Constitution when it is determined that there are other satisfactory remedies provided by statutory enactment and administrative process."[240]

While seemingly dealing a blow to the notion that a citizen should be permitted to maintain a cause of action against a government actor when the government actor violates that citizen's constitutional rights, the *Provens* decision is just is important for what it does not say. For example, two years later in *Painter*, the Court recognized that "*Provens* did not determine whether a private, common-law cause of action might be available to unclassified public employees or others asserting violations of constitutional rights for which

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existence of possible remedies through administrative channels, in and of themselves, as adequate to provide Ms. Provens with an opportunity to seek redress. *Id.* at 963. Whether or not Ms. Provens advanced a meritorious claim was not addressed.

235*Bush*, 462 U.S. at 367. The plaintiff, a federal aerospace engineer, filed a complaint against his employer, the George C. Marshall Space Flight Center, to recover damages for an alleged defamation and a retaliatory demotion. *Id.* at 367. The demotion was allegedly made following plaintiff's highly critical comments to news media concerning his employer. *Id.* The plaintiff grounded his complaint upon a claim that his right to free speech under the United States Constitution had been violated. *Id.*

236*Provens*, 594 N.E.2d at 962.

237*Id.* (quoting *Bush*, 462 U.S. at 368).

238*Bush*, 462 U.S. at 368.

239*Provens*, 594 N.E.2d at 963.

240*Id.* at 965-66.

statutory or administrative remedies do not exist."[241] *Painter* determined that such a cause of action did exist.[242]

Moreover, *Provens* acknowledged and reaffirmed the ability of the courts to create remedies where no remedies have been provided. Notably, however, the decision did not interpret the Ohio Constitution as a document of independent force,[243] standing alone and apart from other acts of the government.[244] In interpreting the provisions of the Ohio Constitution, the Court looked to a federal decision involving the U.S. Constitution.[245] As noted above, the federal system's jurisdiction is controlled by statute, making judicial deference to legislatively crafted remedies more attractive than in Ohio, where the general jurisdiction of the courts is not dependent upon the legislature.[246] The decision also fails to acknowledge that it is the court system that is charged with "preserving the existence"[247] of the rights contained in the constitution. Under *Provens*, other governmental bodies are left to decide the fate of citizens claiming violations of their constitutional rights.

Finally, while not specifically argued, the decision fails to acknowledge the principle that there shall by a remedy for every wrong.[248] Instead of reaffirming the principle that "[o]ur courts are open to those who seek remedy for injury to person, property, or reputation,"[249] the court says, in essence, take your claims of constitutional violations elsewhere.

The Supreme Court's sole modern encounter with the concept of allowing a remedy for violations of Ohio Constitutional rights does appear to support the proposition that the courts should use their remedy-crafting power to allow a cause of action for violations of the Ohio Constitution. While the outcome on the merits failed to support the idea, the principle behind the holding provides hope for the cause. In particular, the court acknowledged that it would refrain from creating new remedies when "other statutory provisions and administra-

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241 *Painter*, 639 N.E.2d at 54.

242 *Id.*

243 *Arnold*, 616 N.E.2d 163 at syllabus.

244 *See Kintz*, 124 N.E. at 170. "No General Assembly is above the plain provisions of the Constitution, and no court, however sacred or powerful, has the right to declare any public policy that clearly contravenes or nullifies the rights declared in the Constitution." *Id.*

245 *Bush*, 462 U.S. at 367.

246 *See supra* note 196.

247 *Arnold*, 616 N.E.2d at 170. The wrongful dismissal of a public employee is a matter to be decided by administrative agencies such as the State Employment Relations Board. The preservation of the rights guaranteed to the citizens is a task resting with the judiciary.

248 *See supra* notes 85-130 and accompanying text.

249 *Hardy*, 512 N.E.2d at 628.

tive procedures provide meaningful remedies."[250] The average citizen who is wrongfully seized and detained has no administrative remedies available to him, nor does a defendant in a criminal trial where evidence was wrongfully, illegally, and unconstitutionally obtained. Under the *Provens* rationale, in the absence of other remedies, the court would be "entitled" to invoke its remedy-crafting power to allow a cause of action for violations of those Ohio Constitutional rights. Taken beyond the context of the *Provens* lawsuit, any violation of a right, where there is no corresponding remedy, provides the opportunity for the courts to create a remedy. When coupled with the nature of rights[251] and the "right-to-a-remedy" provision in the Ohio Constitution,[252] the courts would seem not only "entitled" to permit the remedy, but would be bound to do so. Indeed, without any such remedy, any right contained in the Ohio Constitution would seem nothing more than a wish.[253]

VI. OVERCOMING THE DEFENSES TO GOVERNMENTAL INTRUSIONS UPON CONSTITUTIONALLY PROTECTED RIGHTS.

There are a number of potential defenses which, if applied and upheld to situations involving violations of constitutional rights, would prevent the courts from recognizing a cause of action arising directly from a violation of the Ohio Constitution. Each must be addressed individually in order to determine its validity.

A. Governmental Immunity under The Political Subdivision Tort Liability Act

Few would deny that there is something inherently suspicious about a government which purports to exist within the confines of a constitution and yet would make itself immune from liability when its conduct strays beyond those constitutional confines. Any court faced with a claim that it should permit a cause of action for constitutional violations, absent the legislature's consent, would no doubt be confronted with the defense of governmental immunity.[254]

In Ohio, the defense of governmental immunity is established under The Political Subdivision Tort Liability Act[255] (hereinafter "the Act"). The Act declares that political subdivisions are not liable for any acts other than those articulated[256] and establishes numerous defenses to claims brought against a

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[250] *Provens*, 594 N.E.2d at 962.

[251] *See supra* notes 73-82 and accompanying text.

[252] *See supra* notes 85-101 and accompanying text.

[253] *See* Ziegler, *supra* note 73, at 678.

[254] *See* Friesen, *supra* note 14, at 1289.

[255] OHIO REV. CODE ANN. § 2744.02 (Anderson 1989).

[256] The Act states, in pertinent part, the following:
(A)(1) For the purposes of this Chapter, the functions of political subdivisions are hereby classified as governmental functions and proprietary functions. *Except as provided in division (B) of this section,*

political subdivision.[257] There are several reasons, however, why the Act should not be used to prevent the courts from recognizing a cause of action arising from a violation of the Ohio Constitution.

First, as is evidenced by its title, the Act is designed to provide immunity for tort actions. Through its language, the Act provides immunity for "injury, death, or loss to persons or property."[258] In order to apply to claims for constitutional violations, the Act would have to be statutorily constructed to include constitutional violations within the meaning of either the words "loss to persons" or the word "injury."[259] The result of doing so would be to permit the government to violate, at will, any or all of the provisions in the Bill of Rights, knowing that its constitutionally abhorrent actions could go unchecked in the courts. A claim of sovereign immunity for violations of the Constitution would thus render the Bill of Rights "empty and meaningless"[260] given that the Bill of Rights is designed to "protect individual persons from impermissible infringements and oppressive violations by government action."[261] Also, such a reading seems implausible given the Ohio Supreme Court's recent strong defense of the public policies underlying the Bill of Rights.[262]

Invoking the Political Subdivision Tort Liability Act to invalidate a claim for damages resulting from a constitutional violation also violates the reasoning behind the "right-to-a- remedy" clause of article one, section sixteen.[263] If the "right- to-a-remedy" clause means that "our courts are open to those seeking remedy for injury to person, property, or reputation,"[264] then it would seem that the Act, as invoked to deny a claim for damages arising from a violation of the constitution, is in direct contradiction with Ohio's right to a remedy

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> a political subdivision is not liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function.

(*emphasis added*) R.C. § 2744.02(A)(1)(B) of the act then lists several instances in which the political subdivision or its employee would be liable for loss or injury. Damage arising from constitutional violations is not listed. *See* R.C. § 2744.03(B).

257*See* OHIO REV. CODE ANN. § 2744.03 (Anderson 1989). For a well articulated explanation of the Act, see Mackulin v. Lakewood Bd. of Educ., No. 61808, 1993 WL 69555 (Ohio Ct. App. March 11, 1993).

258R.C. § 2744.03(A)

259*See* Friesen, *supra* note 14, at 1294.

260City of Beaumont v. Bouillion, 873 S.W.2d 425, 442 (Ct. App. Tex. 1993), *rev'd*, 896 S.W.2d 143 (Tex. 1995).

261*Id.*

262*Painter*, 639 N.E.2d 51. *See also supra* notes 201-15 and accompanying text.

263*See supra* notes 85-99 and accompanying text.

264*Hardy*, 512 N.E.2d at 628.

provision.[265] Mindful of the fact that the "right-to-a-remedy" clause guarantees "the right of every citizen . . . to seek remedy by court action for any injuries done to him . . .",[266] the use of the Political Subdivision Liability Act to close the courthouse doors to those seeking redress for constitutional violations ignores the nature and existence of a right—a thing to be enforced.[267]

Lastly, given the courts' view of the nature of rights and governmental intrusions upon those rights, it would be illogical to use the tort liability Act to prevent the recovery of damages for constitutional violations. In an attempt to protect and further the rights guaranteed in the Ohio Constitution, the Ohio Supreme Court has held that "governmental action which limits the exercise of fundamental constitutional rights is subject to highest level of judicial scrutiny. . . ."[268] While this scrutiny is usually reserved for legislative acts which infringe upon the citizen's constitutional rights,[269] it is clear that its purpose is to protect constitutional rights from intrusion by the government.[270]

Considering the nature of this heightened judicial scrutiny for legislative acts and the purpose supporting it, it would be logically inconsistent to forbid a cause of action based upon a violation of a constitutional right simply because the legislature has cloaked the government with immunity. On the one hand the court would hold that any act of the legislature which infringes upon a fundamental right will be closely scrutinized, while on the other hand the court would hold that any physical act which infringes upon a right guaranteed under the Ohio Constitution is free from scrutiny because immunity has been invoked. If the role of the courts is to protect and enforce the rights guaranteed in the Ohio Constitution, then the Political Subdivision Tort Liability Act, as used to bar suits brought for damages as a result of violations of those same rights, should be held inapplicable. To hold otherwise would be wholly inconsistent with the nature of Ohio's courts.

B. Actions Brought Against the State Under the Court of Claims Act

The Ohio Revised Code addresses the civil liability of state officers and employees. It states, in pertinent part:

> no officer or employee of the state shall be liable in any civil action that arises under the law of this state for damage or injury caused in the performance of his duties, unless the officer's or employee's actions

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265 *Powers, supra* note 86, at 613.

266 *Armstrong*, 103 N.E.2d at 769.

267 *Ziegler, supra* note 73, at 678.

268 *See* Sorrell v. Thevenir, 633 N.E.2d 504, 511 (Ohio 1994).

269 *Id.* at 507.

270 Primes v. Tyler, 331 N.E.2d 723, 726 (Ohio 1975)(holding that a statute will be considered unconstitutional unless it is shown to be necessary to promote a compelling governmental interest).

> were manifestly outside the scope of his employment or official responsibilities. . . .[271]

This section is to be read along with the Court of Claims Act (hereinafter "Claims Act").[272] The Claims Act proclaims that the state[273] "hereby waives its immunity from liability and consents to be sued, and have its liability determined, in the court of claims created in this chapter."[274] The Claims Act also provides that the waiver "shall be void if the court [the Court of Claims] determines that the act or omission was manifestly outside the scope of the officer's or employee's office or employment. . . ."[275] Lastly, the Court of Claims has exclusive jurisdiction over matters brought against the state.[276] The Claims Act, therefore, requires that any actions brought against a state employee must be brought through the Court of Claims.

Notably officers and employees of the state are not given immunity for actions which are manifestly outside the scope of their employment or official responsibility.[277] This waiver is significant in one primary respect: actions of an unconstitutional nature cannot be said to be within a state actor's scope of employment or official responsibility because all officers of the state must take an oath to support the Ohio Constitution.[278] One cannot, at the same time, support and violate the provisions of the Ohio Constitution.

If the state officer was acting under an unconstitutional mandate from his department or office, then perhaps it could be argued that the officer was acting within the scope of employment so as to make the state liable under the Claims Act, even though the actions taken by the officer were ultimately unconstitutional.

While the Court of Claims Act would require that actions against the State of Ohio or its officers be brought in the Court of Claims, officers acting in an unconstitutional manner would no longer be protected by the state's immunity provisions. A claim for damages against such officers, arising from a violation of constitutional provisions, would not be barred by the Court of Claims Act.

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271 OHIO REV. CODE ANN. § 9.86 (Anderson 1980).

272 OHIO REV. CODE ANN. § 2743.02 (Anderson 1989).

273 The Ohio Revised Code defines "state" as the "State of Ohio" and excludes political subdivisions from definition. R.C. § 2743.01(A).

274 R.C. § 2743.02(A)(1).

275 *Id.*

276 OHIO REV. CODE ANN. § 2743.03(A)(1). *See* Cooperman v. University Surgical Ass., Inc., 513 N.E.2d 288 (Ohio 1987).

277 *See supra* note 212 and accompanying text.

278 OHIO CONST. art. XV, § 7.

VI. CONCLUSION

The time has come for the Ohio Supreme Court to declare that a cause of action exists against those governmental actors who violate the rights afforded Ohio's citizens under the Ohio Constitution. The principle that damages should be awarded citizens whose constitutional rights are violated should be reaffirmed in the context of modern Ohio.

The Ohio Constitution is a document independent of the United States Constitution. The protections provided therein ensure that the citizens of Ohio will be free from tyranny not from the federal government, but from the state government. To that end, Ohio constitutional provisions and the policies underlying them should be upheld and reinforced. Holding accountable those who violate the Constitution will ensure that the Constitution's provisions are adhered to and re-establish that document as the principle protector of our rights as Ohio citizens.

The nature of rights demands that remedies exist for their violations. Of what significance is a right for which there is no remedy? A government whose employees purport to govern and rule by certain standards articulated within the Constitution should be made to compensate those who are aggrieved when it strays from its constitutional confines. If not, what incentive exists to do so?

In addition, the doctrine of self-execution supports judicial creation of remedies: fundamental constitutional rights are not dependent upon legislative action for enforcement.

The Ohio Constitution demands that Ohio's citizens have access to the courts and that there be a "right-to-a-remedy" when one is injured in person, reputation or property. Allowing a cause of action to arise directly from a violation of the Ohio Constitution would further both the "right-to-a-remedy" provision as well as fundamental concepts and policies underlying those rights contained in Ohio's Bill of Rights. Given the fundamental nature of the rights protected by the Ohio Constitution, a constitutional violation requires a remedy as much, if not more, than a damage to reputation or property.

The *Painter* and *Provens* decisions show a willingness on the part of the Ohio Supreme Court to interpret the Ohio Constitution in an ever-expanding way, providing remedies when the fundamental concepts and rights contained within its pages are violated. As a document of the people, the Constitution should afford the people a certain level of protection. Allowing a damage remedy for constitutional violations would fulfill this principle.

Lastly, the government should not be able to envelop its employees in the cloak of sovereign immunity to prevent payment of damages when the employees act in contravention of the mandates of the Ohio Constitution. The words in the Bill of Rights become hollow without a way to enforce them. A damages remedy for constitutional violations would reinforce the protections of the Bill of Rights and when coupled with the inability to invoke sovereign

immunity, would ensure that the Bill of Rights' protections would be upheld by those to whom we hand the reigns of government. If the idea worked one-hundred and fifty years ago in the *Jeffries* decision, it certainly would work today.

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