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LIFE AFTER *BROWN*: THE FUTURE OF STATE CONSTITUTIONAL TORT ACTIONS IN NEW YORK

GAIL DONOGHUE* & JONATHAN I. EDELSTEIN**

INTRODUCTION

On November 19, 1996, the New York Court of Appeals opened the door to a potentially extensive area of civil rights litigation in New York State. With the court of appeals' decision in *Brown v. State of New York*,[1] New York became the twentieth state to recognize a direct cause of action for damages based on violation of its state constitution.[2] Over

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** J.D., Fordham University School of Law, 1997; B.A., John Jay College of the City University of New York, 1992. The thank-you list for this Article is as extensive as the Article itself. First, and above all else, I would like to thank my co-author, Gail Donoghue, without whom this Article would never have been begun and who has shown more faith in me than I ever have in myself. Second—and this is a very close second—I wish to express my appreciation to Ruby Bradley, Lyle Frank, Zena Johnson and Katherine Winningham of the New York City Law Department, who participated in the early discussions of *Brown* and provided valuable and inspiring insights. I also wish once again to thank Professor Abraham Abramovsky of Fordham University School of Law, who has, as always, provided invaluable assistance and moral support. In addition, I wish to acknowledge the assistance of Mr. F. Timothy McNamara, attorney for the plaintiffs in the landmark Connecticut case *Binette v. Sabo*, who is a true gentleman and scholar and a lover of the law in the best Cardozo tradition. Finally, my thanks go out to former Judge Richard D. Simons of the New York Court of Appeals, who shared valuable time with me in clarifying many aspects of his valedictory opinion, and to the judges and clerks of the Court of Claims—particularly the Hon. Donald G. Corbett, David Crosby, Michael Kirschen and David B. Klingaman—who assisted me in gaining a further understanding of the open issues surrounding New York state constitutional tort. The views expressed in this Article are those of the authors and do not represent the views or position of the New York City Law Department.

1. 89 N.Y.2d 172, 674 N.E.2d 1129 (1996). Parallel citations to New York official reporters have been inserted at the request of the authors, who intend this article to be a resource for New York practitioners and courts as well as legal scholars.

2. Prior to the New York Court of Appeals' decision in *Brown*, 19 states and Puerto Rico recognized an implied cause of action for state constitutional violations prior to the *Brown* decision. The states in which such a cause of action has been recognized by the

a forceful dissent by Judge Bellacosa, a six-judge majority of New York's highest court determined that the judicial system of New York State need not wait for the legislature to enact monetary remedies for violation of certain "self-executing" provisions of the New York State Constitution.[3]

Although the *Brown* court determined that a right of action was available under the New York constitution under certain circumstances, it raised a host of related issues.[4] The *Brown* decision provided a framework for determining whether a damage remedy for violation of the state constitution was appropriate, but explicitly recognized a cause of action only for the equal protection and search and seizure clauses of the New York bill of rights.[5] It was specifically left to future courts to decide which other rights, if any, would be enforceable by actions for monetary damages.[6]

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highest state court are California, Illinois, Louisiana, Maryland, Michigan, New Jersey, New Mexico, North Carolina, Pennsylvania, Utah, Vermont and West Virginia. Four additional states: Arkansas, Maine, Massachusetts, and Nebraska, have enacted statutes providing private causes of action for violation of state constitutional rights under certain circumstances. Direct causes of action based on the Florida and Wisconsin Constitutions have also been recognized by certain lower courts of those states, but not by either state's highest court. In addition, subsequent to the court of appeals' decision in *Brown*, the Connecticut Supreme Court recognized a private right of action for violations of certain Connecticut constitutional provisions, resolving an issue which had previously been in dispute among the lower courts in that state. *See* Binette v. Sabo, No. SC-15547, at 3 (Conn. Mar. 10, 1998).

Seven states: Colorado, Georgia, Hawaii, Oregon, Tennessee, Texas, and Washington, have specifically rejected state constitutional causes of action. In addition, although the Alaska, New Hampshire, and Ohio courts have never recognized a private state constitutional right of action, they have indicated that they would do so under certain narrow circumstances. Finally, a private right of action has been implied from the Rhode Island Constitution, but only by federal courts. It should be further noted that this list does not include states which have recognized rights of action based upon constitutional provisions requiring just compensation for takings of private property for public use. *See infra* note 284 and accompanying text (discussing the unique place of just compensation clauses in constitutional tort jurisprudence).

3. *See Brown*, 89 N.Y.2d at 186-88, 674 N.E.2d at 1137-39.

4. *See* Martin Schwartz, Remarks at the Symposium on Trends and Developments in New York State Constitutional Law, Touro Law Center (Nov. 21, 1997) (stating that "*Brown*, like *Bivens*, represents a starting point in the law").

5. *See Brown*, 89 N.Y.2d at 192, 674 N.E.2d at 1141 (recognizing "a narrow remedy for violations of sections 11 and 12 of article I of the State Constitution").

6. One unreported court of claims decision has concluded that the prohibition against cruel and unusual punishment in article I, section 5 of the New York Constitution satisfies the requirements of *Brown* and will support a private right of action. *See* De La Rosa v. State, 662 N.Y.S.2d 921 (Ct. Cl. 1997). As of this writing, no court has made an explicit finding as to any other provision of the New York Constitution, although one

The *Brown* decision was also equivocal as to the availability of certain defenses and immunities which have grown up under federal common law surrounding civil rights actions.[7] Left open, as well, was the question of whether liability under the state constitution could be extended to non-governmental entities, and whether a right of action would be available to plaintiffs who could avail themselves of more established civil rights or common law tort remedies.[8] As the Monroe County Court of Claims plaintively noted in attempting to construe *Brown*, "there is little or no judicial history to guide [future courts]" in evaluating claims—or even in deciding whether claims exist—predicated upon violation of rights guaranteed by the state constitution.[9]

With the current substantive body of law in New York on state constitutional tort[10] actions amounting to four reported cases,[11] there is

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court specifically declined to rule on the availability of a cause of action based on the New York due process clause. *See* Goddard v. State 662 N.Y.S.2d 179 (Ct. Cl. 1997); *see also infra* notes 243-373 and accompanying text (discussing the potential availability of a cause of action under *Brown* for specific New York constitutional rights).

7. The *Brown* court stated that, due to the language of the New York Court of Claims Act, the governmental immunity established by the Supreme Court in *Monell v. Department of Social Services*, 468 U.S. 658 (1978), is inapplicable to actions brought under the state constitution. *See infra* notes 108-10 (discussing the *Brown* court's comments on *Monell*). However, the court was silent as to the applicability of other federally-developed immunities. *See infra* notes 391-404 and accompanying text (discussing qualified immunity).

8. *See* Martin A. Schwartz, *Recognizing Damage Suits Under the New York Constitution*, N.Y.L.J., Feb. 18, 1997, at 3.

9. *See* Ilic v. State, Claim No. 84129, at 15 (N.Y. Ct. Cl. Apr. 28, 1997) (Corbett, J.). The *Ilic* court declined to allow the plaintiff to add a New York constitutional cause of action to his claim against the state because, inter alia, it was unclear whether the *Brown* decision applied retroactively. *See id.* at 16.

10. The term "constitutional tort" to describe a civil action for damages premised on the violation of a constitutional right was invented in 1965 by Professor Marshall S. Shapo in his article *Constitutional Tort:* Monroe v. Pape *and the Frontiers Beyond*, 60 NW. U. L. REV. 277 (1965). Since then, this term has gained wide currency both among academic commentators and the courts, especially since its adoption by the United States Supreme Court in *Monell v. Dept of Social Services*, 436 U.S. 658, 691 (1978). While undeniably convenient, the increasing use of the term "constitutional tort" has often masked the important differences between civil rights and common law tort litigation. *See* Sheldon H. Nahmod, *Section 1983 Discourse: The Move from Constitution to Tort*, 77 GEO. L.J. 1719, 1720-22 (1989). This Article will use the term "state constitutional tort" to mean any direct civil action for the violation of a state constitutional right, with the caveat that state civil rights litigation, like its federal counterpart, does not fit neatly into the area of tort law.

little guidance as to the scope and nature of this cause of action. Consequently, this Article will analyze the viability of claims, defenses and immunities likely to be raised in civil rights litigation in light of the reasoning of the *Brown* court, the experience of other states which have allowed similar rights of action, and the body of federal common law relating to civil rights lawsuits. As New York is the newest in the family of states to allow civil actions for violations of state constitutional rights, the experience of other jurisdictions will prove valuable in shedding light on the manner in which issues relating to separation of powers, defenses and immunities have been addressed and developed.

The majority of legal scholarship on the topic of state constitutional tort actions has favored an expansive right of action,[12] but there are many

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11. In August 1996, while *Brown* was pending before the court of appeals, the Court of Claims, New York County, independently determined that state constitutional tort actions should be available in New York, using reasoning remarkably similar to that used by the court of appeals in *Brown*. *See* Ferrer v. State, 655 N.Y.S.2d 900, 903-04 (Ct. Cl. 1996). Although the *Ferrer* court placed certain conditions on the availability of such a cause of action which were not stated as conditions in *Brown*, it was not overruled by the *Brown* decision and can be read in conjunction with it in evaluating the regime governing state constitutional tort actions in New York. *See infra* notes 217-24 and accompanying text (discussing the reasoning of the *Ferrer* court). Subsequent to *Brown*, two reported decisions have evaluated state constitutional claims based on the framework set forth by the court of appeals. *See* Goddard v. State, 662 N.Y.S.2d 179 (Ct. Cl. 1997); De La Rosa v. State, 662 N.Y.S.2d 921 (Ct. Cl. 1997). Six other unreported decisions, one at the appellate level, have attempted to clarify or expand upon certain aspects of the *Brown* decision. *See* Bin Wahad v. City of New York, No. 75 Civ. 6203 (S.D.N.Y. Mar. 1, 1998); Augat v. State, 1997 N.Y. App. Div. LEXIS 12007 (3d Dep't Nov. 26, 1997); Remley v. State, No. 96098, Mot. No. M-55475 (N.Y. Ct. Cl. July 30, 1997) ("Remley I"); Remley v. State, No. 96098, Mot. No. M-55592 (N.Y. Ct. Cl. Sept. 10, 1997) ("Remley II"); W.J.F. Realty Corp. v. Town of Southampton, N.Y.L.J., Nov. 25, 1997, at 25 (Sup. Ct. Suffolk Co. Nov. 23, 1997). In addition, three subsequent courts have noted the availability of state constitutional tort actions in New York but did not engage in any substantive analysis. *See Ilic*, Claim No. 84129 at 16-17; Pazamickas v. New York State Office of Mental Retardation and Developmental Disability, 963 F. Supp. 190, 197 (N.D.N.Y. 1997); McReynolds v. Giuliani, 656 N.Y.S.2d 871 (1st Dep't 1997).

12. *See, e.g.*, John M. Baker, *The Minnesota Constitution as a Sword: The Evolving Private Cause of Action*, 20 WM. MITCHELL L. REV. 313 (1994); Susan Bandes, *Reinventing* Bivens: *The Self-Executing Constitution*, 68 S. CAL. L. REV. 289 (1995); Jennifer Friesen, *Recovering Damages for State Bills of Rights Claims*, 63 TEX. L. REV. 1269 (1985); Matthew S. Freedus, *A Cause of Action for Damages Under the State Constitution*, 60 ALB. L. REV. 1915 (1997); David M. Gareau, *Opening the Courthouse Doors: Allowing a Cause of Action to Arise Directly from a Violation of the Ohio Constitution*, 43 CLEV. ST. L. REV. 459 (1995); T. Hunter Jefferson, *Constitutional Wrongs and Common Law Principles: The Case for Recognition of State Constitutional Tort Actions Against State Governments*, 50 VAND. L. REV. 1525 (1997); Mindy L.

issues relating to public policy and separation of powers which militate in favor of treading cautiously in creating an extensive new area of liability. The New York Constitution is a more expansive document than the United States Constitution, guaranteeing more substantive rights.[13] Thus, if future courts expand *Brown* to allow damages actions for this full array of rights, governments might be subject to financial liability which exceeds their current exposure under federal civil rights jurisprudence.[14] This situation

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McNew, Note, Moresi: *Protecting Individual Rights Through the Louisiana Constitution,* 53 LA. L. REV. 1641 (1993); Sheldon H. Nahmod, *State Constitutional Torts:* DeShaney, *Reverse-Federalism and Community*, 26 RUTGERS L.J. 949 (1995); Paul R. Owen, *Reticent Revolution: Prospects for Damage Suits Under the New Mexico Bill of Rights*, 25 N.M. L. REV. 173 (1995); *see also* Jennifer Friesen, *State Courts as Sources of Constitutional Law: How to Become Independently Wealthy*, 72 NOTRE DAME L. REV. 1065, 1067 n.4 (1997) ("It is true that much of the law review and press commentary on the rights secured by state constitutions has been merely to urge state judges to 'expand' state bills of rights, or to applaud them for doing so . . . ."); Robert M. Pitler, *Independent State Search and Seizure Constitutionalism: The New York State Court of Appeals' Quest for Principled Decisionmaking,* 62 BROOK. L. REV. 1, 9 n.10 (1996) (noting that much of the literature on state constitutionalism "offers more in terms of approval and encouragement than of analytical insight and innovation") (quoting Ronald K.L. Collins & David M. Skover, *The Future of Liberal Legal Scholarship*, 87 MICH. L. REV. 189, 217 (1988)).

13. *See, e.g.*, N.Y. CONST. art. I, § 5 (forbidding unreasonable detention of witnesses); § 6 (granting right to indictment by grand jury in felony cases); § 17 (granting right to collective bargaining and setting wage and hour limits for public workers). In addition, even the substantive rights in the New York Constitution which have equivalent provisions in the United States Constitution are often interpreted more expansively by the New York courts. *See* People v. Dunn, 77 N.Y.2d 19, 25-26, 564 N.E.2d 1054, 1058-59 (1990) (search and seizure); People v. Vilardi, 76 N.Y.2d 67, 76, 555 N.E.2d 915, 919-20 (1990) (due process); O'Neill v. Oakgrove Constr., Inc., 71 N.Y.2d 521, 528-29, 523 N.E.2d 277, 280-81 (1988) (freedom of speech); People v. Krom, 61 N.Y.2d 187, 197, 461 N.E.2d 276, 280 (1984) (right to counsel). These decisions are informed by the principle that, "[e]ven if parallel to a Federal constitutional provision, a State constitutional provision's presence in the document alone signifies its special meaning to the People of New York; thus, the failure to perform an independent analysis under the State Constitution would improperly relegate many of its provisions to redundancy." People v. Alvarez, 70 N.Y.2d 375, 379 n.1, 515 N.E.2d 898, 899 n.1 (1987).

14. *See* Courts Oulahan, *The Proposed New Columbia Constitution: Creating a "Manacled State"*, 32 AM. U. L. REV. 635 (1983). Mr. Oulahan, a delegate to the District of Columbia Statehood Constitutional Convention held in 1982, argues that the exceptionally broad bill of rights proposed for the State of New Columbia—which included, inter alia, rights to employment, welfare and freedom from "political surveillance" as well as exceptionally detailed privacy and anti-discrimination provisions—would "[present] a strong possibility for bankrupting the new state[]" when combined with complete abolition of sovereign immunity and a constitutionally established right to sue for any violation of constitutional rights. *Id.* at 707. The authors are

is magnified by the fact that, consistent with the court of appeals' characterization of a constitutional violation as a tort, liability under *Brown* is based on the principle of respondeat superior. This is in contrast with federal law which imposes much stricter standards for liability on the part of governmental or corporate entities.[15]

The principle of allowing damage remedies for state constitutional violations is a sound one; rights guaranteed by a state constitution are no less worthy of protection than those secured by the Constitution of the United States. However, the creation and scope of such a remedy is a political issue which falls within the traditional scope of legislative power. The potential scope of liability under the New York Constitution implicates a delicate balance of rights and interests, which has been the subject of considerable litigation and analysis in the jurisprudence of other states and the federal courts.[16] For instance, especially in small jurisdictions, the liability from a single lawsuit could have crippling effects on governmental ability to provide necessary services to its citizens, or even necessitate the sale of local assets in order to satisfy a judgment.[17] In New York, expansive liability could also increase the burden on state and municipal agencies from a number of sources, including inmate lawsuits.[18]

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indebted to Mr. Oulahan, without whom the proposed New Columbia Constitution, and its unique perspective on state constitutional torts, would have remained unknown to them.

15. *See infra* text accompanying note 494 (discussing *Monell v. Department of Social Services*, 436 U.S. 658 (1978), and its progeny).

16. An excellent discussion of the balance of rights at stake in determining the scope of governmental liability is provided by the Colorado Supreme Court. *See* Board of County Comm'rs v. Sundheim, 926 P.2d 545, 549-50 (Colo. 1996). *See infra* notes 458-65 and accompanying text (discussing the *Sundheim* decision).

17. In numerous cases, municipalities have been forced to issue bonds or sell municipal assets in order to satisfy judgments, and in some cases have even considered disincorporation. *See, e.g.*, Carl Horowitz, *Local Government: Liable to be Sued*, INV. BUS. DLY., Nov. 3, 1994, at A1; Andrew Blum, *Lawsuits Put Strain on City Budgets*, NAT'L L.J., May 16, 1988, at 1 (city of South Tucson, Ariz., forced to issue bonds and turn eight acres of vacant city land over to plaintiff); "Assets of City Frozen," U.P.I., Mar. 23, 1988 (assets of depressed city of East St. Louis, Ill., frozen after $4 million civil rights verdict); "Cities Struggling with Liability Risk," N.Y. TIMES, May 30, 1982, at 21 (civil rights award amounting to more than half of annual municipal budget led West Virginia town to consider disincorporation).

18. Inmate civil rights lawsuits account for 16% to 30% of civil lawsuits filed in federal courts. *See* George Raine, *Bill Targets Inmates Who File Frivolous Lawsuits*, COMM'L APPEAL (Memphis), Feb. 13, 1996, at 7A (Inmates accounted for 40,569 of 248,335 federal civil filings in 1995.); *Prisoners Suing at Alarming Rate: Lawsuits Cost Calif. More Than $25 Million in '95*, ASSOC. PRESS, Oct. 23, 1995. In New York, Attorney General Dennis Vacco has estimated that inmate lawsuits constitute one third of

Constitutional liability also has public costs which go beyond the financial. While civil liability is a valuable deterrent to unlawful government activities, it may also deter even legitimate exercise of discretion.[19] Extensive liability "may reduce political decision making regarding the allocation of funds for government services. It may also, to some extent, reduce citizen participation in the political process. Similarly, [constitutional tort liability] could unduly chill independent decision making at the state and local levels."[20]

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his office's caseload. *See* Robin Topping, *Crackdown on Inmate Lawsuits Creates a Flap*, NEWSDAY, Mar. 19, 1997, at A33. Although 99% of these lawsuits are unsuccessful, the cost to the state of defending them runs to the tens of millions of dollars annually. *Id.* The cost of litigation is also a countervailing factor to Professor Friesen's comment that governmental liability for state constitutional violations can only be considered onerous "if we prefer our governments to become accustomed to being lawless." Friesen, *Recovering Damages*, *supra* note 12, at 1313. Professor Friesen's argument ignores the fact that much of the cost to government resulting from civil rights liability stems not from misconduct but from the defense of meritless claims. *See* McNew, *supra* note 12, at 1657 (1993). Ms. McNew notes that "[t]he practical concerns of the dissenters in *Bivens*, that an 'avalanche of new federal cases' would result from the holding, has been largely proven true." *Id.* at 1658. Between 1971 and 1981, more than 12,000 federal *Bivens* claims were filed. *See id.* In 1986, one in every 300 federal officials was named as a defendant in a pending *Bivens* action, and more than 2600 such claims were filed in that year alone. *See id.* However, "of the 12,000 claims previously mentioned, only thirty resulted in judgments for the plaintiffs." *Id.* The public cost of defending the 11,970 meritless claims, both in direct litigation costs and time lost by defendants in attending to trial preparation rather than public duty, is enormous.

19. *See infra* notes 391-404 and accompanying text (discussing the rationale for qualified immunity). Some degree of official immunity is necessary in order to allow the legislative and executive branches of government to carry out their constitutional functions. Abolition of immunity will result in "a state that inherently would be weak and vulnerable to attack by individuals." Oulahan, *supra* note 14, at 640. This would occur through making all governmental decisions—even discretionary or inherently political ones—subject to suit, creating a chilling effect on the operation of government. *Id.* at 694. Another result would be the weakening of governmental ability to provide essential services. *See* Board of County Comm'rs v. Sundheim, 926 P.2d 545, 549-50 (Colo. 1996) (stating that it should be the policy of the courts as well as the legislature to balance the rights of taxpayers and civil rights plaintiffs). Finally, abolition of immunity would necessarily shift power from the executive and legislative branches to the largely unelected judiciary, and reduce public control over "[a]llocation of resources for social services[, which] is at the heart of *legislative* decisionmaking." Oulahan, *supra* note 14, at 696.

20. Nahmod, *supra* note 12, at 959; *see also* Oulahan, *supra* note 14, at 640 (Attempts "to protect citizens from all conceivable injuries at the hands of state government" would result in "the creation of a 'manacled state'—a state in which the capacity for self-government is extremely, if not fatally, impaired.").

A final, and even more important, reason for caution in expanding state constitutional tort liability is separation of powers. In several states, the courts have refused to imply a direct state constitutional cause of action, concluding that to do so would usurp the traditional power of the legislature to enact remedies and would infringe on the legislative power to define the boundaries of sovereign immunity.[21] Even courts which have not viewed separation of powers as an absolute bar to an implied state constitutional tort action have stressed the importance of deferring to legislative action, and even purposeful legislative inaction, in the creation of alternative remedies.[22]

Thus, this Article will recommend that the New York Legislature act to define the boundaries of state constitutional litigation. The creation of

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21. *See infra* notes 455-63 and accompanying text (discussing decisions in Colorado, Georgia, Hawaii, Oregon and Texas).

22. *See infra* notes 153-76 and accompanying text. A final measure of caution, for those who are unmoved by arguments grounded in separation of powers or governmental integrity, is that broad liability for state constitutional violations may prove to be a two-edged sword. The majority of those who have favored broad state constitutional tort liability appear to be of a liberal political persuasion, and the constitutional violations they cite in support of their arguments include victims of unlawful searches or unfair trials, inmates struggling for humane confinement conditions, and employees fired for expressing their views. *See, e.g.*, Friesen, *Recovering Damages*, *supra* note 12, at 1311. However, it is equally possible that state constitutional tort actions might be brought under constitutional provisions such as the recently enacted California constitutional provision which would ban all affirmative action. *See* CAL. CONST. art. I, § 31. This amendment specifically declares itself to be self-executing, which would make it a possible basis for suit in most states which recognize state constitutional tort causes of action. *See infra* Part II(A) (discussing self-execution). Even the more traditional Bill of Rights provisions are subject to interpretations that might not please the proponents of state constitutional tort litigation. For example, a federal district court in Kansas noted recently that, if employees were allowed to sue for discharge in violation of their free speech rights under the Kansas Constitution, "an employer would conceivably have a cause of action against an employee who quit because she found the employer's exercise of his or her right to freedom of speech repugnant." Boyer v. Board of County Comm'rs, 922 F. Supp. 476, 483 n.5 (D. Kan. 1996). Such a right of action would allow employers to sue, for instance, a minority employee who resigns due to racist statements made by the employer. It is even possible, without too much exercise of imagination, to envision a militia member in Tennessee suing after his arrest in a bomb plot for violation of his state constitutional right to attempt to overthrow the government—a right which has been explicitly recognized by the Supreme Court of Tennessee. Davis v. Davis, 842 S.W.2d 588, 599 (Tenn. 1992) (stating that "the notion of individual liberty is so deeply embedded in the Tennessee Constitution that it, alone among American constitutions, gives the people . . . the right to resist [governmental] oppression even to the extent of overthrowing the government").

remedies is within the traditional scope of the Legislature's power.[23] Additionally, the proper balance of interests between individual plaintiffs and government is best resolved by the people's elected representatives rather than by unelected judges. These considerations of separation of powers weigh strongly in favor of resolving the issues raised in *Brown* through legislative action as has been done in the United States and by several state jurisdictions.[24]

Accordingly, this Article will be structured in five parts. Part I will discuss the court of appeals' holding in *Brown*, Judge Bellacosa's dissent, and the response of the majority to the concerns raised by Judge Bellacosa. Part II will examine the framework set by *Brown* under which courts in New York will resolve future claims involving violations of the state constitution. Part III will analyze the New York Constitution, in light of *Brown*, to determine which rights therein are likely to support claims for damages. Part IV will examine the court of appeals' designation of constitutional violations as torts and assess its impact on claims, defenses and immunities. Finally, Part V will analyze the reasons why civil rights are better enforced by statute than by a judicially implied cause of action, and examine the civil rights statutes which have been adopted in other jurisdictions to serve as a guide not only for New York but also for the forty-four other states which have not yet adopted similar legislation.

I. THE *BROWN* DECISION

A. *The Facts of Brown*

The claims in *Brown* arose from the investigation of an incident in 1992 in which a seventy-seven year-old white woman was reportedly attacked at knife-point in a house located close to the state university campus near Oneonta, New York.[25] The woman described the attacker as a black male,[26] and the police determined that he may have cut his hand

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23. *See generally* Bennett L. Gershman, *Supervisory Power of the New York Courts*, 14 PACE L. REV. 41 (1994). *See also* McNew, *supra* note 12, at 1668 (discussing the advantages of a legislative remedy).

24. *See* 42 U.S.C. § 1983 (providing a right of action for violations of the United States Constitution); MASS. GEN. LAWS ch. 12, § 11I (1996) (providing a cause of action for violations of rights secured by the Constitution of Massachusetts).

25. *See* Brown v. State, 89 N.Y.2d 172, 177, 674 N.E.2d 1129, 1131-32. (1996). For additional discussion of the facts and procedural history of the *Brown* case, see Freedus, *supra* note 12, at 1921-23; Eric J. Stockel, Brown v. State of New York: *Judge Simons Says New York State Can Be Held Liable for Money Damages*, 13 TOURO L. REV. 653, 653-54 (1997).

26. *See Brown*, 89 N.Y.2d at 176-77, 674 N.E.2d at 1131-32.

during the attack.[27] When initial law enforcement activities failed to identify a suspect, the New York State Police and campus security personnel attempted to question every black male attending the state university.[28] African-American students were systematically "stopped," interrogated and examined for injuries to their hands and forearms.[29] These interrogations occurred in dormitories, on the state university campus and on the streets in and around the city of Oneonta.[30] When these efforts did not lead to an arrest, a "street sweep" was conducted in which every non-white male found in Oneonta and its environs was stopped and interrogated.[31]

The claimants initiated a class action seeking monetary damages against the New York State Police, the State University of New York College at Oneonta, the State of New York and various officers and employees of those entities.[32] They alleged that the conduct of the defendants was racially motivated and deprived claimants of rights guaranteed by the state and Federal Constitutions.[33] With respect to the state constitution, claimants alleged a violation of the equal protection clause in article I, section 11[34] and the prohibition against unreasonable

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27. *See id.*

28. At the request of the state police and campus security, the state university prepared a computer list of African-American males in attendance at the university. *See id.* at 177, 674 N.E.2d at 1131-32.

29. *See id.*

30. *See id.*

31. *See id.* at 177, 674 N.E.2d at 1132.

32. *See id.* Plaintiffs' claims against all defendants other than the state itself were dismissed by the court of claims. *See* Brown v. State, 221 A.D.2d 681, 681, 633 N.Y.S.2d 409, 409 (3d Dep't 1995). However, plaintiffs filed a separate 42 U.S.C. § 1983 action in federal court against various law enforcement personnel and officials of the State University of New York College at Oneonta. *See id.* at 681 n.1, 633 N.Y.S.2d 409, 410 n.1.

33. Plaintiffs alleged claims under 42 U.S.C. §§ 1981 and 1985, under article I, sections 11 and 12 of the New York State Constitution, under New York Civil Rights Laws section 40-c and for common law negligence with respect to the training and/or supervision of officers and investigators. *See Brown*, 89 N.Y.2d at 184 n.4, 674 N.E.2d 1136 n.4. Plaintiffs did not allege a cause of action under 42 U.S.C. § 1983 because the state is not a "person" within the meaning of the statute. *See id.* at 185, 674 N.E.2d at 1136.

34. *See* N.Y. CONST. art. I, § 11 ("No person shall be denied the equal protection of the laws of this state or any subdivision thereof."). This provision contains language parallel to the equal protection clause in the United States Constitution.

searches and seizures contained in article I, section 12.[35] The state moved to dismiss on the grounds that the New York Court of Claims lacked subject matter jurisdiction and that the plaintiffs had failed to state a cause of action.[36] The court of claims dismissed the action, holding, in relevant part, that constitutional torts are not actionable in the court of claims and that direct actions for violations of the Bill of Rights of the New York State Constitution are not cognizable claims in any court in the state absent some link to a common-law "traditional" tort.[37] The appellate division affirmed,[38] and appeal to the New York Court of Appeals followed.[39]

B. *Issues Before the Court of Appeals*

The primary questions before the court of appeals were whether, absent either a state statute expressly authorizing such claims, or a traditional common-law tort theory supporting money damages, the court of claims had subject matter jurisdiction of the claims against the state, and whether claimants stated a cause of action based upon rights secured to them by the state and Federal Constitutions and various state statues.[40]

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35. *See* N.Y. CONST. art. I, § 12. Article I, section 12 provides that "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." This clause is equivalent to, and expands upon, the Fourth Amendment to the United States Constitution. Article I, section 12 of the New York Constitution also contains similar language with respect to security against interception of telephone or telegraph communications and procedures for obtaining eavesdropping warrants.

36. *See Brown*, 89 N.Y.2d at 176, 674 N.E.2d at 1131.

37. *See id.* at 176, 674 N.E.2d at 1132. Two other issues were decided by the court of claims. First, a claim for negligent training and supervision is not cognizable in the court of claims where the underlying harm—in this case, a constitutional violation—is not within the court's jurisdiction and second, actions based on 42 U.S.C. § 1981 do not lie against the states. *See id.* at 176, 674 N.E.2d at 1131. In effect, the court of claims precluded any relief to claimants. Both these issues were addressed by the court of appeals. As to the first, it found that the negligence claim contingent on the constitutional tort alleged was cognizable. *See id.* at 194-95, 674 N.E.2d at 1142-43. The court agreed, however, that the claims pursuant to 42 U.S.C. § 1981 were properly dismissed. *See id.* at 186, 674 N.E.2d at 1137.

38. *See* Brown v. State, 221 A.D.2d 681, 682, 633 N.Y.S.2d 409, 410 (3d Dep't 1995).

39. Leave to appeal was granted by the court of appeals on February 20, 1996. Brown v. State, 87 N.Y.2d 209 (1996).

40. *See Brown*, 89 N.Y.2d at 176, 674 N.E.2d at 1131.

The court decided both of these questions in the affirmative, in a manner with implications far beyond the availability of actions against the state.[41]

C. *Decision of the Court*

The court of appeals, in an unprecedented decision, reversed the appellate division, holding that the jurisdiction of the court of claims to hear claims for the torts of the officers or employees of the state "is not limited to common-law tort[s] . . . and that damage claims against the State based upon violations of the state constitution come within [that court's] jurisdiction."[42] Since the state has waived sovereign immunity for claims within the jurisdiction of the of court of claims,[43] it may be amenable to suit for constitutional torts.[44] Notwithstanding the absence of any enabling statutes authorizing one, the court implied a direct cause of action for damages for violation of certain rights provided by article I, sections 11 and 12 of the New York State Constitution.[45]

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41. For example, both the majority and the dissent in *Brown* agreed that New York constitutional tort actions would also be available against cities and other local government entities based on the provisions of the Court of Claims Act. *See id.* at 192-93, 674 N.E.2d at 1141-42 (discussing application of the special duty rule to municipal liability under *Brown*); *see also id.* at 205-06, 674 N.E.2d at 1149-50 (Bellacosa, J., dissenting) (discussing conflicts between *Brown* and *Monell*).

42. *Id.* at 183, 674 N.E.2d at 1136. Subdivision 2 of section 9 of the present Court of Claims Act confers jurisdiction on the court "[t]o hear and determine a claim of any person, corporation or municipality against the state for the appropriation of any real or personal property or any interest therein, for the breach of contract, express or implied, or for the torts of its officers or employees while acting as such officers or employees." N.Y. CT. CL. ACT § 9(2).

43. Section 8 of the Court of Claims Act contains the following waiver of sovereign immunity with respect to all claims over which the court of claims has jurisdiction: "The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations." N.Y. CT. CL. ACT § 8.

44. *See Brown*, 89 N.Y.2d at 188, 674 N.E.2d at 1137. Whether it is amenable to suit will depend on whether the particular constitutional provision at issue is self-executing and whether other factors support the implication of a remedy. *See infra* Part II (discussing the constitutional tort framework set forth by *Brown*).

45. With respect to this aspect of the decision, the court noted the limits of the cause of action created: "By recognizing a narrow remedy for violations of sections 11 and 12 of article I of the State Constitution, we provide appropriate protection against official misconduct at the State level." *Brown*, 89 N.Y.2d at 192, 674 N.E.2d at 1141.

1. Jurisdictional Issues

Preliminary to its consideration of whether the court of claims had jurisdiction in this case, the court concluded that the conduct alleged sounded in "constitutional tort."[46] It defined a constitutional tort as "any action for damages for violation of a constitutional right against a government or individual defendants."[47] The concept of a constitutional tort developed after the Civil War when Congress authorized civil damage actions for violation of federal constitutional rights.[48] The "Ku Klux Klan Act," now codified as 42 U.S.C. § 1983, was intended to create a "species of tort liability" for constitutional deprivations.[49] The term "constitutional tort" was also used by the United States Supreme Court in implying a direct cause of action for damages based on duties defined in the Federal Constitution even though not expressly authorized by statute.[50]

The *Brown* court framed the issue in terms of whether a "constitutional tort" was actually a species of tort liability sufficient to fall within the jurisdiction of the court of claims.[51] The court noted that there are differences between constitutional tort and traditional tort liability in that "[c]ommon-law duties arise in virtually all relationships and protect against most risks of harm, [while] [c]onstitutional duties . . . address a limited number of concerns and a limited set of relationships."[52] The court, however, chose to adopt a broad definition of tort, stating that a tort

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46. "Analysis starts by defining what is meant by [constitutional tort]." *Id.* at 177, 674 N.E.2d at 1132. The court acknowledged that the term was coined 35 years ago in a law review article. *Id.* at 177 n.2, 674 N.E.2d at 1132 n.2. The term "constitutional tort," however, has gained wide currency, especially since its adoption by the Supreme Court in *Monell v. Department of Social Services*, 436 U.S. 658, 691 (1978). Ironically, however, the article cited by the *Brown* and *Monell* courts cautions that a constitutional tort "is not quite a private tort, yet contains tort elements; it is not 'constitutional law,' but employs a constitutional test." Shapo, *supra* note 10, at 324.

47. *Brown*, 89 N.Y.2d at 177, 674 N.E.2d at 1132.

48. *See id.* at 177-78, 674 N.E.2d at 1132; *see also* 42 U.S.C. § 1981.

49. Carey v. Piphus, 435 U.S. 247, 253 (1969).

50. *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971). In this decision the Supreme Court held that an individual government officer could be held liable in federal court for money damages for a Fourth Amendment violation. In the years since *Bivens* was decided, its holding has been extended to Fifth and Sixth Amendment violations but not to violations of other constitutional provisions or to an action against the United States or any of its agencies. In addition, *Bivens* liability has been restricted within the last 15 years by increasing deference to legislatively created alternative remedies. *See infra* notes 177-96 and accompanying text (discussing the *Bivens* liability scheme).

51. *See Brown*, 89 N.Y.2d at 177, 674 N.E.2d 1131-32.

52. *Id.* at 178, 674 N.E.2d at 1133.

was "a civil wrong other than a breach of contract"[53] and that "[t]ort law is best defined as a set of general principles which . . . occupies a 'large residuary field' of law remaining after other more clearly defined branches of the law are eliminated."[54] In other words, the court of appeals adopted a definition under which almost any civil wrong could be classified as a tort.[55]

Having determined that the claims were a species of tort, the *Brown* court then analyzed the question of jurisdiction in terms of statutory construction. The court's analysis centered on whether the term "tort" as used in describing the jurisdiction of the court of claims was meant to include constitutional torts. Beginning with the operative principle of statutory construction found in its own precedent, that jurisdiction is construed broadly and waiver of immunity narrowly,[56] the court found support for inclusion of constitutional torts within this definition from two sources. First, it inferred a legislative intent to include constitutional torts from the fact that, because no clear definition exists by which wrongs are classified as torts, the legislature could not have intended to limit

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53. *Id.* at 181, 674 N.E.2d at 1134-35.

54. *Id.* at 181-82, 674 N.E.2d at 1134-35 (citation omitted). Notably, even some of the proponents of the *Brown* decision characterize the majority's definition of tort law as "amorphous." Freedus, *supra* note 12, at 1924.

55. It could be argued that the court of appeals adopted this broad definition of tort specifically to bring constitutional violations within the sphere of tort law. In a testament to the mutability of the constitutional tort concept, one commentator has attempted to justify an implied cause of action under a different state liability scheme by arguing that constitutional violations are not torts. *See* Owen, *supra* note 12, at 176 (1995). Under the New Mexico Tort Claims Act, the Legislature of New Mexico reserved sovereign immunity for tort claims only. *Id.* Thus, "[b]ecause [a prior judicial decision] abolished sovereign immunity generally and the legislature reasserted it only for torts, it is arguable that there is no immunity for violations of state constitutional rights." *Id.* A plaintiff might base this argument on the proposition "that a constitutional right is not a tort; a right is created by the constitution and a corresponding duty not to infringe upon that right is imposed upon the government." *Id.* Thus, the flexible definition of "tort," as noted by the dissent, gives rise to analytical uncertainty under which a plaintiff might argue that a constitutional violation is or is not a tort in order to fit it within the liability scheme created by a particular state's waiver of sovereign immunity.

56. *See Brown*, 89 N.Y.2d at 180, 674 N.E.2d at 1133. The court cited to its decision in *Smith v. State of New York*, 227 N.Y. 405, 409-10, 125 N.E.2d 841, 842 (1920) in support of this rule. Interestingly, the dissent also cited to *Smith* for the proposition that "[s]tatutes in derogation of the sovereignty of a state must be *strictly construed* and a waiver of immunity from liability must be *clearly expressed.*" *Brown*, 89 N.Y.2d at 199, 674 N.E.2d at 1145 (Bellacosa, J., dissenting) (emphasis in original). The majority, however, chose to read *Smith* in light of "the public policy which seeks to reduce rather than increase the obstacles to recovery of damages." *Id.* at 180, 674 N.E.2d at 1134.

jurisdiction to only those torts recognized at the time the act was passed.[57] Second, intent of the legislature to include torts developed subsequent to the Court of Claims Act is evidenced by the fact that the court of claims has entertained actions for torts recognized after the Act was adopted,[58] and for constitutional torts.[59] Although the *Brown* court did acknowledge that common law torts and constitutional torts are not coextensive,[60] it nevertheless found no reason to distinguish between them for purposes of the jurisdiction of the court of claims.[61] This classification of

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57. *See Brown*, 89 N.Y.2d at 182, 674 N.E.2d at 1135.

58. *See id.* The court cites to *Doe v. State of New York*, 155 Misc. 2d 286, 588 N.Y.S.2d 698 (Ct. Cl. 1992), *modified by* 189 A.D.2d 199, 595 N.Y.S.2d 592 (4th Dep't 1993), in which the appellate division reversed the court of claims' denial of damages for lost future earnings, citing to *Bovsun v. Sanperi*, 61 N.Y.2d 219, 223, 461 N.E.2d 843, 844 (1984), wherein the court of appeals permitted recovery of damages for emotional distress.

59. *See Brown*, 89 N.Y.2d at 182, 674 N.E.2d at 1135. The court cites to a number of cases for this proposition. *See* Vaughan v. State, 272 N.Y. 102, 5 N.E.2d 53 (1936) (The court of appeals ruled that § 270-a of the Tax Law providing for stock transfer taxed to be based on number of shares was constitutional.); Brenon v. State, 31 A.D.2d 776, 297 N.Y.S.2d 88 (4th Dep't 1969) (trial court erred in giving *res judicata* effect to a determination of the criminal court the suppressing property; state sustained burden of showing there was consent for a search); Frady v. State, 19 A.D.2d 783, 242 N.Y.S.2d 95 (3d Dep't 1963) (damages awarded for assault and battery by state trooper after illegal entry); Periconi v. State, 91 Misc. 2d 823, 398 N.Y.S.2d 959 (Ct. Cl. 1977) (claim for unpaid salary as a result of termination of employment in which the key issue was the constitutionality of retroactively depriving claimant of his salary); Dean v. State, 111 Misc. 2d 97, 443 N.Y.S.2d 581 (Ct. Cl. 1981) (damages awarded for negligent procurement of a search warrant); Hook v. State, 15 Misc. 2d 672, 181 N.Y.S.2d 621 (Ct. Cl. 1958) (claim for damages arising from alleged unlawful search, but no damages awarded as court found consent to the search). In describing these cases, the *Brown* court noted that "some of the cited claims involved no common-law cause of action and others asserted separate causes of action involving only the violation of a constitutional duty." *Brown*, 89 N.Y.2d at 182, 674 N.E.2d 1135. It is unclear how the merits of these constitutional tort claims were decided by prior New York courts, in light of the fact that the court of claims prior to *Brown* routinely granted motions to dismiss on the grounds that it did not possess subject matter jurisdiction over state constitutional violations. David Crosby, law clerk to New York Court of Claims Judge Philip J. Patti, suggests that these courts might have reached the merits because the parties simply failed to contest the issue of jurisdiction over constitutional torts. *See* Telephone Interview with David Crosby (Sept. 30, 1997).

60. *See Brown*, 89 N.Y.2d at 180, 674 N.E.2d at 1133-34.

61. *See id.* at 182, 674 N.E.2d at 1135. While the court states that the common law of torts deals with the relation between individuals which imposes on one a legal obligation for the benefit of the other and assesses damages for harm occasioned by a failure to fulfill that obligation, the court did not address the fact that a right to recover

constitutional violations as torts recurred elsewhere in the court's analysis, in which numerous other aspects of tort law were applied to constitutional violations.[62]

2. Implication of a Cause of Action

With jurisdiction established, the *Brown* majority's analysis then turned to whether a cause of action could be implied for violation of the New York equal protection and search and seizure clauses.[63] The court expressly acknowledged that in the absence of an enabling statute, a court could only recognize a damages remedy if one can be implied directly

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damages is an essential characteristic of a tort. The development of a damages remedy for constitutional violations, and hence the development of the concept of a "constitutional tort," is rooted in the remedies provided by 42 U.S.C. § 1981. The court created a like remedy based on the notion of a constitutional tort in the absence of a statute analogous to § 1983. *See id.* The *Brown* court also addressed the state's contention that "the waiver [of sovereign immunity] contained in section 8 [of the Court of Claims Act] does not reach [the *Brown* plaintiffs'] claim because it is limited to liability actions similar to those which may be brought in supreme court against individuals and corporations [and] [i]ndividuals and corporations . . . cannot be sued for constitutional violations." *Id.* at 182, 674 N.E.2d at 1135. The *Brown* majority, however, held that constitutional torts were "sufficiently similar" to claims which may be asserted against individuals and corporations to be justiciable in the court of claims, in part because certain constitutional provisions governed the conduct of private parties. *Id.* at 183, 674 N.E.2d at 1136; *see also* Stockel, *supra* note 25, at 667-68. It is noteworthy, however, that the specific constitutional provision cited by the court of appeals for this proposition—the civil rights clause of New York Constitution, article I, section 11—is not self-executing and required implementing legislation in order to constitute the basis for a private cause of action. *See Brown*, 89 N.Y.2d at 183, 674 N.E.2d at 1135. The *Brown* majority did not cite any case in which a cause of action was implied directly from the New York Constitution against a private individual or corporation.

62. *See Brown*, 89 N.Y.2d at 187-89, 674 N.E.2d at 1138-39 (using section 874A of the Restatement of Torts (Second) in determining whether a damage remedy was appropriate for state constitutional violations); *Id.* at 193-94, 674 N.E.2d at 1141-42 (stating that respondeat superior liability followed from the status of constitutional violations as torts); *Id.* at 192-93, 674 N.E.2d at 1141-42 (discussing the applicability of certain tort defenses and immunities). It is noteworthy that, as the court of appeals implicitly acknowledged, its classification of constitutional violations as torts renders such lawsuits subject to the complete framework of New York tort law, including limitations. Thus, the current concern with "tort reform" and limitations on recovery might also place limits on civil rights actions which would not exist if such actions were maintained as a separate category of lawsuit.

63. *See Brown*, 89 N.Y.2d at 186-87, 674 N.E.2d at 1137-38. "The substantive right may be firmly established, as in the case of sections 11 and 12, but it remains to determine whether the remedy of damages for the invasion of those rights will be recognized." *Id.* at 187, 674 N.E.2d at 1138.

from the state constitution.[64] Because the creation of a damages remedy is essentially a legislative function, the judicial branch may imply one only when the provision at issue is "self-executing," that is, if "it takes effect immediately, without the necessity for supplementary or enabling legislation."[65] The mere fact that a provision is self-executing, however, does not automatically indicate that a damages remedy will be available for the violation of the rights provided therein.[66] Even where a provision is self-executing, other factors must be considered before a damages remedy may be recognized.[67]

Applying this threshold analysis, the *Brown* court found that article I, section 12 of the state constitution, and that part of section 11 relating to equal protection, are "manifestly" self-executing because they define judicially enforceable rights and provide a basis for judicial relief against the state for violations of those rights.[68] It then continued its analysis by looking to additional factors which had been considered by other state courts in determining whether a cause of action should be implied. The court considered three such factors: (1) whether an analogy could be drawn to section 874A of the Restatement (Second) of Torts which provides for the creation of a damages remedy if such a remedy would be appropriate to insure a right;[69] (2) whether the reasoning of the Supreme

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64. *See id.* at 186, 674 N.E.2d at 1137.

65. *Id.* To support this proposition the court cites Jennifer Friesen. *See* JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES, § 7.05[1], at 7-12 (1995) (quoting COOLEY, CONSTITUTIONAL LIMITATIONS (7th ed. 1903); 16 C.J.S., CONSTITUTIONAL LAW, § 46).

66. *See Brown*, 89 N.Y.2d at 186, 674 N.E.2d at 1138. "The violation of a self-executing provision in the Constitution will not always support a claim for damages." *Id.* at 186, 674 N.E.2d at 1138.

67. *See id.* at 187-88, 674 N.E.2d at 1138.

68. *See id.* at 186, 674 N.E.2d at 1137-38. The *Brown* court stated that the equal protection and search and seizure clauses "define judicially enforceable rights and provide citizens with a basis of judicial relief against the State if those rights are violated." *Id.* at 186, 674 N.E.2d at 1137. The court noted, however, that the civil rights clause of article I, section 11 "was not intended to create a duty without enabling legislation but only to state a general principle recognizing other provisions in the Constitution, the existing Civil Rights Law or statutes to be later enacted" and was therefore not self-executing. *Id.* at 190, 674 N.E.2d at 1140. Thus, it is highly probable that the court of appeals would not recognize a cause of action for damages based on violation of the civil rights clause.

69. *See id.* at 187, 674 N.E.2d at 1138.

Court in *Bivens* could be applied;[70] and (3) whether there are common law antecedents for a damages action.[71]

The court reasoned that these factors all supported the creation of a cause of action for violation of the New York equal protection and search and seizure clauses.[72] Relying on the Restatement and the reasoning of *Bivens*, it held that article I, sections 11 and 12 created duties on the part of government which were independent of any common-law or statutory rule.[73] With regard to the equal protection clause, the court noted that "[t]he section imposes a clear duty on the State and its subdivisions to ensure that all persons in the same circumstances receive the same treatment."[74] Section 12, as well, "imposes a duty regulating the conduct of police officials."[75] In light of the restrictions these provisions placed on governmental power, the *Brown* court went on to find that their purpose was to "prevent [law enforcement] abuses and protect those in claimants' position," which the court of appeals characterized as a matter of great public concern.[76] In light of the Restatement principle that a cause of action for damages could be implied if necessary to maintain the purpose of a statute, the court found that "[a] damage remedy in favor of those harmed by police abuses is appropriate and in furtherance of the purposes underlying the[se] sections."[77] Noting that the duties imposed on government by the state constitution "address something far more serious than the private wrongs regulated by the common law,"[78] the court found that "the remedies now recognized . . . all fall short" and that damages were thus "a necessary deterrent for such misconduct."[79] Thus, according

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70. *See id.* The court noted that some state courts have relied on the reasoning of *Bivens* for the proposition that constitutional guarantees are worthy of protection on their own terms without being linked to some common-law or statutory tort, and that the courts have an obligation to enforce these rights by ensuring there is an adequate remedy if they are violated. The court of appeals in *Brown* found the analysis in *Bivens* to be an example of the principles of section 874A of the Restatement (Second) of Torts.

71. *See id.*

72. *See id.* at 188-92, 674 N.E.2d at 1138-41.

73. *See id.* at 190-91, 674 N.E.2d at 1140-41.

74. *Id.* at 190, 674 N.E.2d at 1140.

75. *Id.* at 191, 674 N.E.2d at 1140.

76. *Id.*

77. *Id.*

78. *Id.* at 191, 674 N.E.2d at 1140-41. The court of appeals also noted, in evaluating the propriety of a damage remedy, that the "overriding concerns of adjusting losses and allocating risks" which inform the creation of tort remedies "have little relevance when constitutional rights are at stake." *Id.* at 191, 674 N.E.2d at 1140.

79. *Id.* at 192, 674 N.E.2d at 1141.

to the doctrine stated in *Bivens* and in the Restatement of Torts (Second) section 874A, a damage remedy could be implied.

The *Brown* court also found that the common law antecedents to the New York equal protection and search and seizure clauses supported a claim for damages. Although "the rights embodied in sections 11 and 12 were first constitutionalized . . . in 1938 . . . the principles expressed in those sections are hardly new."[80] The court noted that both clauses had antecedents which could be traced to colonial times, and—in the case of the protection against unlawful searches and seizures—to the Magna Carta.[81] Moreover, not only the rights themselves but the existence of a damage remedy for their violation had existed prior to the enactment of the New York State Constitution of 1938.[82] A civil cause of action for unlawful searches and seizures "was fully developed in England [prior to 1775] and provided a damage remedy for the victims of unlawful searches at common law."[83]

Moreover, the *Brown* court found that the records of the New York Constitutional Convention of 1938 indicated that the framers of article 12 contemplated a damage remedy for victims of unlawful searches.[84] The court derived this from the debates at the 1938 convention concerning the exclusion of evidence obtained from unlawful searches and seizures, noting that the framers contemplated civil actions for damages as a substitute for exclusion.[85] In fact, the delegates "did not consider whether [a civil cause of action] was desirable - they assumed a civil remedy already existed."[86]

The court also cited a decision by Judge Cardozo rendered shortly before the convention in which he had refused to exclude illegally obtained evidence from a criminal trial, holding instead that the defendant's remedy was a civil action for damages.[87] According to the *Brown* majority, the delegates to the convention knew of this decision and that "they used that argument to help persuade the Convention that exclusion was unnecessary

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80. *Id.* at 188, 674 N.E.2d at 1139.

81. *See id.* The *Brown* court traced the antecedents of the equal protection clause by noting that a right to be free from discrimination had been identified in the due process clauses of New York constitutions prior to 1938.

82. *See id.*

83. *Id.* New York State law includes the common law of England as it existed on April 19, 1775, except insofar as it is repugnant to the New York Constitution. *See* N.Y. CONST. art. I, § 14.

84. *See id.* at 189, 674 N.E.2d at 1140.

85. *See id.* at 189, 674 N.E.2d at 1139.

86. *Id.*

87. *See id.* (citing People v. Defore, 150 N.E. 585, 586-87 (1926)).

to deter official misconduct."[88] Thus, it followed that "the concept of damages for constitutional violations was neither foreign to the delegates nor rejected by them."[89]

The *Brown* court, however, made no reference to common law antecedents providing a damage remedy for the equal protection clause, thus conceding without expressly stating that there was no historical precedent for such a remedy. Rather, the court concluded that the fact "[t]hat the Convention adopted the equal protection provision without similarly discussing the damage remedy does not establish that the delegates disfavored it nor does it foreclose our consideration of that relief."[90] This holding places New York in a distinct minority among states which have considered the intent of the framers of constitutional provisions as a factor in determining whether such provisions may be enforced by private actions for damages.[91] This, however, did not preclude the court of appeals from finding that both precedent and policy argued in favor of implying a cause of action for damages for the violation of certain state constitutional rights. In summing up, the *Brown* court stated that "[b]y recognizing a narrow remedy for violations of sections 11 and 12 of article I of the State Constitution, we provide appropriate protection against official misconduct at the State level."[92]

D. *The Dissenting Opinion*

The sole dissenter to the *Brown* holding, Judge Bellacosa, filed a forceful opinion in which he argued against several of the majority's assumptions. At the heart of the dissent are two related notions: (1) that "constitutional tort" litigation should not be equated with traditional torts;[93] and (2) that the extension of jurisdiction of the court of claims and the creation of a damages remedy for constitutional violations are serious intrusions by the judiciary into the prerogative of the Legislature.[94] Citing

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88. *Id.*

89. *Id.*

90. *Id.*

91. *See infra* notes 174-76 and accompanying text.

92. *Brown*, 89 N.Y.2d at 192, 674 N.E.2d at 1141; *see also* Bin Wahad v. City of New York, No. 75 Civ. 6203 MJL, 1998 WL 99625, at *3 (S.D.N.Y. Mar. 1, 1998).

93. *See Brown*, 89 N.Y.2d at 204, 674 N.E.2d at 1148 (Bellacosa, J., dissenting).

94. *See id.* at 212, 674 N.E.2d at 1153 (Bellacosa, J., dissenting). In fact, one commentator has noted that "[t]he State Constitution itself . . . gives the Legislature the sole authority to determine the [types of] monetary claims that may be brought . . . against the State." Patrick J. Boyle, *Recent Developments in New York Law: Court of Appeals Recognizes Private Constitutional Tort Remedy Against the State*, 71 ST. JOHN'S L. REV. 871, 877 (1997). This contention is founded upon article IV, section 9 of the

the principle of statutory construction that statutes in derogation of sovereign immunity are strictly construed, and waivers of immunity must be clearly expressed,[95] Judge Bellacosa found no support anywhere for the extension of court of claims jurisdiction to constitutional torts.[96]

The dissent argued that section 9(2) of the Court of Claims Act "precisely lists the subject-matter jurisdiction [of the court of claims] in words and structure that indicate a careful consideration by the Legislature of the categories and circumscriptions of claims to which the State's waiver of immunity would also apply."[97] Thus, Judge Bellacosa argued that the use of the word "tort" in the description of court of claims' jurisdiction should not be interpreted to include anything more than those torts understood by the Legislature in 1939 to be within the traditional tort rubric.[98] Disagreeing with the majority's broad definition of the scope of tort law, the dissent contended that the term "constitutional tort" is merely nomenclature to describe the development of a federal statutory remedy and should not be permitted to cloud the substance and nature of a claim.[99] Judge Bellacosa argued further that the Legislature never contemplated the common-law word "tort" to include constitutional violations because such torts did not exist until recently, and if inclusion of such actions had been in the contemplation of the Legislature, it seems likely to have generated

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New York Constitution, which provides that the court of claims "shall have jurisdiction to hear and determine claims against the state . . . as the legislature may provide." *Id.* at 877 n.35. Thus, Professor Boyle argues that the *Brown* decision represents "new heights in judicial legislating" and that the court of appeals "fashion[ed] new rules of law in derogation of their own Constitution while attempting to create new means for its very enforcement." *Id.* at 880. In addition to the constitutional provision cited by Professor Boyle, it could also be argued that section 7 of article VII, which confers exclusive power over the expenditure of state funds to the Legislature, places the implication of a cause of action for money damages against the state beyond the power of the judiciary.

95. *See Brown*, 89 N.Y.2d at 199, 674 N.E.2d at 1145 (Bellecosa, J., dissenting).

96. *See id.* at 199, 674 N.E.2d at 1145.

97. *Id.* at 200, 674 N.E.2d at 1146. "It is the interplay and application of the various constitutional and legislative declarations, with their evident and express limitations, that ought to govern this controversy, not speculative attributions of implied and assumed legislative intent." *Id.* at 200-01, 647 N.E.2d at 1146.

98. *See id.* at 204, 674 N.E.2d at 1148. Judge Bellacosa agreed that new areas of tort law recognized after 1939 could fall within the jurisdiction of the court of claims, but only if they were "reasonably understood by the enactors, as part of the common-law tradition, developed within the tort root rubric and jurisprudence." *Id.* at 201, 647 N.E.2d at 1146.

99. *See id.* at 205, 647 N.E.2d at 1149.

lively debate.[100] This view is consistent with section 12 (1) of the Court of Claims Act which provides that "[i]n no case shall any liability be implied against the state."[101]

The dissent also reasoned that neither the decision of the Supreme Court in *Bivens* nor legislative debate by the delegates to the 1938 constitutional convention supports the creation of a damages remedy.[102] The dissent noted that in *Bivens*, the Supreme Court created a remedy against an individual government agent, and that the question of whether the government was liable under an implied right of action based on the violation of a constitutional right was not at issue.[103] When that issue was presented in *Federal Deposit Insurance Corp. v. Meyer*,[104] the Supreme Court declined to imply a remedy, noting that the remedy created in *Bivens* against an individual was established for the purpose of deterring the officers from engaging in unconstitutional conduct, a purpose not served by implying a cause of action against the government.[105] Similarly, the civil damages remedy theoretically posed by Judge Cardozo in *Defore* and cited by the majority as historical support for a damages remedy for

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100. *See id.* at 203, 647 N.E.2d at 1148. Judge Bellacosa argued against "[t]he plaintiff's predicate argument . . . that the Legislature, through its use of the word 'torts,' implied an all-encompassing corral of wrongs." *Id.* at 201, 647 N.E.2d at 1146. To the contrary:

> [T]raditional tort law is not an undefinable, limitless arena of wrongs. Rather, the word of art reflects "[t]he civil action for a tort . . . is commenced and maintained by the injured person, and its primary purpose is to compensate for the damage suffered, *at the expense of the wrongdoer.*" Professor Prosser also notes the realistic and sensible limitation that "[i]t does not lie within the power of any judicial system to remedy all human wrongs." Indeed, the word "tort," for subject matter jurisdictional purposes, should be viewed and determined discretely within that universe and context.

Id. at 201, 647 N.E.2d at 1146 (citations omitted) (emphasis in original).

101. *Id.* at 203, 647 N.E.2d at 1148.

102. *See id.* at 207-12, 674 N.E.2d at 1150-54.

103. *See id.* at 210, 674 N.E.2d at 1152.

104. 510 U.S. 471 (1994).

105. *See Brown*, 89 N.Y.2d at 210, 674 N.E.2d at 1152. The majority responds that contrary to the reasoning of *Federal Deposit Insurance Corp. v. Meyer*, 510 U.S. 471 (1994), there is merit to imposing liability on the state as the party who is ultimately responsible, and who the wrongdoer will often blame for ordering or directing the conduct complained of. *See Brown*, 89 N.Y.2d at 195, 674 N.E.2d at 1143. The majority further counters that because the holding of *Bivens* limiting a cause of action to one against the individual officer was driven by concerns of federalism, it has no applicability to the situation in which the state has waived immunity. *See id.* at 195, 674 N.E.2d at 1143.

constitutional violations, was available only against the offending officer.[106] Thus, Judge Bellacosa argued that there is no basis for the majority's speculation that either Judge Cardozo in the *Defore* opinion, or the constitutional delegates ever imagined a direct action against the state for money damages resulting solely from constitutional provisions deemed self-executing.[107]

The impact of the majority opinion, in the view of the dissent, is to make the state liable under the rule of *respondeat superior* for the negligent acts of its officers in the context of the police power, a result at odds with the express historical and precedential limitations on municipal liability expressed in *Monell*.[108] Thus, the state may well be deprived of the traditional defenses available in a federal case[109] as well as defenses to common law tort liability when the defendant is the government, such as the special duty rule.[110]

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106. *See Brown*, 89 N.Y.2d at 208, 674 N.E.2d at 1151 (citing to 1 REV. RECORD OF N.Y. CONSTITUTIONAL CONVENTION 416 (1938) (statement by Harold Riegelman)).

107. *See id.* In fact, Judge Bellacosa argued that the delegates to the 1938 convention explicitly acknowledged the possibility of a damage remedy for unlawful searches and seizures as an alternative to the exclusionary rule. Thus, he contended that the modern acceptance of the exclusionary rule vitiates the need for a civil deterrent. The availability of both remedies, according to the dissent, raises the specter of "all filings of motions to suppress being accompanied by notices of claim." *Id.*

108. *See id.* at 205, 674 N.E.2d at 1149. The majority answers this criticism by stating that section 9(2) of the Court of Claims Act imposes vicarious liability on the state and not the court. In addition, the majority states that there is no reason why the state should not be vicariously liable for the constitutional torts of its officers of employees acting in the course of their employment as they are for common law torts. *Id.* at 194, 674 N.E.2d at 1129. This proposition makes express what follows analytically from the court's characterization of constitutional violations as torts. Interestingly, this principle appears in the court's response to the dissent, and not as a direct holding, creating some question as to its precedential value. *See* Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1758 (1995) (defining dicta as "statements about the law that are not necessary to the decision"). Moreover, at least one commentator has argued that the terms of the Court of Claims Act do not necessarily impose vicarious liability on the state for constitutional violations, because the language of the Court of Claims Act is not materially different from that of the Federal Tort Claims Act, which has been held not to require vicarious liability against the federal government in *Bivens* claims. Boyle, *supra* note 94, at 878 n.40.

109. *See Brown*, 89 N.Y.2d at 205, 674 N.E.2d at 1149.

110. *See id.* at 206, 674 N.E.2d at 1150. The special duty rule provides that a municipality is not liable for failure to provide police protection to a particular individual absent proof of a "special relationship" between that person and the municipality. *See* Kirchner v. City of Jamestown, 74 N.Y.2d 251, 253, 543 N.E.2d 443, 444 (1989). The majority did not indicate whether the special duty rule would apply in constitutional tort cases.

Lying at the center of all the dissenting arguments, however, is the proposition that the courts should not intrude into an area "where . . . the Legislature has not expressed, implied or spoken with a clear voice."[111] Judge Bellacosa argued forcefully that the creation of an entirely new, and potentially vast, area of tort exposure "would surely and legitimately also raise questions of judicial impact and resources, weighed against the proportionate societal benefit to be obtained."[112] Thus, the dissent contended that the scope of a New York constitutional tort cause of action should be decided by the Legislature, where "the judicial impact and resources questions would engender not only serious, respectful debate, but also robust differences of views and particularized, qualified expressions of law, effected through the statutory enactment method, not the inferential adjudicative interpretive model."[113] In addition to these policy factors, the dissent also noted that the principle of separation of powers has created "the well-established discipline that subject-matter jurisdiction, ground-breaking new remedies and their policy and practical ramifications are matters appropriately within the legislative purview."[114]

Although Judge Bellacosa's objections were rejected by the majority in *Brown*, subsequent New York constitutional tort decisions have been responsive to some of his concerns.[115] Just as the concerns of the *Bivens* dissent have been addressed and adopted by subsequent courts' greater deference to legislatively created remedies,[116] it remains to be seen whether future courts in New York will decide state constitutional claims with a greater deference to the doctrine of separation of powers.

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111. *Brown*, 89 N.Y.2d at 209, 674 N.E.2d at 1152 (Bellacosa, J., dissenting).

112. *Id.* at 209, 674 N.E.2d at 1151.

113. *Id.* at 210, 674 N.E.2d at 1152.

114. *Id.* at 201, 674 N.E.2d at 1147. *See also* Boyle, *supra* note 94, at 879 (stating that the *Brown* majority "ignored the governing principle that significant new policy decisions should be left to the legislature"). The majority responded to Judge Bellacosa's policy objections by citing Justice Harlan's concurring opinion in *Bivens* to the effect that considerations of public or judicial resources should not stand in the way of doing justice. *See Brown*, 89 N.Y.2d at 196, 674 N.E.2d at 1143 (citing *Bivens*, 403 U.S. at 411 (Harlan, J., concurring)). However, the majority did not respond to the separation of powers questions raised by the dissent. Judge Bellacosa did not argue that a cause of action should not exist for state constitutional violations, but only that the establishment of such a remedy was the legislature's proper sphere. The majority did not answer this argument.

115. *See infra* notes 428-34 and accompanying text (discussing retroactivity); *see also infra* notes 207-42 and accompanying text (discussing the effect of the availability of alternative remedies).

116. *See* Nathan R. Horne, Bivens *Actions: Removing the "Special" from the "Special Factors" Analysis in* Bivens *Actions*, 28 CREIGHTON L. REV. 795, 814 (1994).

II. RESOLVING STATE CONSTITUTIONAL TORT CLAIMS UNDER THE *BROWN* TEST

Unless and until the Legislature acts to define the scope of state constitutional tort actions in New York, such claims will be analyzed according to the two-part test set forth by the *Brown* majority. This consists of a threshold determination of whether the right sought to be enforced is self-executing, followed by an analysis of whether a damage remedy is a necessary and appropriate means of enforcing the right.[117]

While the two-part test set forth in *Brown* is very easily stated, it is not so easily applied.[118] Both a determination of whether a constitutional provision is self-executing, and a finding as to whether a damage remedy is appropriate, necessarily involve thorough examination of the history, intent and application of the right at issue. Courts and litigants must conduct this analysis in accordance with prior interpretations of the doctrine of self-execution and each of the three factors considered by the *Brown* court in determining whether a damage remedy may appropriately be inferred.

A. *Self-Executing: The Threshold Analysis*

In order to determine whether a right of action is available for violation of a New York constitutional right, a court must first determine whether that right is self-executing; that is, whether it takes effect without the necessity of implementing or supplementary legislation.[119] This term, in essence, involves the fundamental question of "whether a clause is judicially enforceable at all,"[120] or, put another way, whether the court has the power to create a remedy where the legislature has not provided one.

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117. *See Brown*, 89 N.Y.2d at 186-87, 674 N.E.2d at 1137-38.

118. In evaluating the *Brown* decision, one must remember that it was made in the context of a motion to dismiss based on lack of subject matter jurisdiction. Many of the factors in the *Brown* test had not been briefed by the parties, and the court's consideration of those issues was thus provisional. *See* Telephone Interview with David B. Klingaman, Chief Clerk, New York Court of Claims (Oct. 1, 1997). Furthermore, Mr. Klingaman advised, based on his attendance at a conference addressed by a judge of the court of appeals, that the *Brown* majority wished to leave at least some latitude for legislative action. *See id.*

119. *See Brown*, 89 N.Y.2d at 186, 674 N.E.2d at 1137.

120. FRIESEN, *supra* note 65, § 7.05, at 7-12. Because the term "self-executing" is essentially another means of stating that a provision is enforceable, an exact definition of self-execution has proved elusive: "the 'tests' for self-executing provisions are frequently difficult to apply and are somewhat circular." Baker, *supra* note 12, at 322.

In making this analysis, a number of states have dispensed with examination of each separate constitutional right and simply held the entire state constitution or bill of rights to be self-executing.[121] New York, however, in company with the majority of states which have recognized a cause of action based on violation of state constitutional rights, analyzes each section of the state constitution—and even each clause within that section—to determine whether it may be enforced without legislative enactment.[122]

1. Definitions of Self-Executing

The term "self-executing," as applied to constitutional provisions, was first defined in the nineteenth century in Judge Thomas Cooley's landmark treatise on the Constitution.[123] Judge Cooley stated that:

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121. *See, e.g.*, Widgeon v. Eastern Shore Hosp. Ctr., 479 A.2d 921, 924 (Md. 1984) ("[W]here individual rights . . . were preserved by a fundamental document (e.g., the Magna Carta), a violation of those rights generally could be remedied by a traditional action for damages."); Moresi v. State, 567 So. 2d 1081 1092 (La. 1990); Phillips v. Youth Dev. Program, Inc., 459 N.E.2d 453, 457 n.4 (Mass. 1984) ("[T]here is no need for legislative implementation to afford an appropriate remedy to redress a violation of [explicit state constitutional] rights."); Cooper v. Nutley Sun Printing Co., 175 A.2d 639, 643 (N.J. 1961) (indicating that courts have inherent power to enforce the New Jersey Constitution even in the absence of enabling legislation); Robb v. Shockoe Slip Found., 324 S.E.2d 674 (Va. 1985) ("[C]onstitutional provisions in bills of rights and those merely declaratory of common law are usually considered self-executing.").

122. *See Brown*, 89 N.Y.2d at 186-87, 674 N.E.2d at 1137 (noting that the Civil Rights Clause of article I, section 11 of the New York State Constitution is not self-executing but that the Equal Protection Clause, which is contained in the same article and section, is self-executing). Among the states which conduct a similar right-by-right analysis are California, Florida, Illinois, North Carolina, Pennsylvania and Vermont. *See* Leger v. Stockton Unified School Dist., 249 Cal. Rptr. 688 (Cal. Ct. App. 1988) (constitutional right to safe schools is not self-executing and does not create a private cause of action); Schreiner v. McKenzie Tank Lines & Risk Mgmt. Servs., Inc., 408 So. 2d 711, 713 (Fla. 1982) (Florida constitutional provision prohibiting discrimination based on physical handicap analyzed and found self-executing); Walinski v. Morrison & Morrison, 277 N.E. 242, 244 (Ill. 1970) (Illinois anti-discrimination clause self-executing due to specific language to that effect in constitutional provision itself); Corum v. University of North Carolina, 413 S.E.2d 276, 289 (N.C. 1992); Agostine v. School Dist. of Philadelphia, 523 A.2d 193 (Pa. 1987) (constitutional mandate for "a thorough and efficient system of education" not self-executing); Shields v. Gerhart, 658 A.2d 924, 926 (Vt. 1995) (Vermont free speech clause is self-executing and enforceable, but natural-rights clause is not).

123. THOMAS COOLEY, CONSTITUTIONAL LIMITATIONS (5th ed. 1883).

> A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law.[124]

Judge Cooley elaborated further upon the factors to be considered in determining whether a constitutional provision was self-executing, indicating that a clause which "fails to indicate its range, and to provide proper machinery, it is not in this particular self-executing, and legislation is essential."[125] In sum, a constitutional provision "is self-executing only so far as it is capable of execution."[126]

This definition was adopted by the New York courts in *People ex rel. Sweeley v. Wilson*,[127] and has been restated consistently throughout the century.[128] The court of appeals has additionally noted that "[t]he fact that a right granted by a constitutional provision may be better or further protected by supplemental legislation does not of itself prevent the provision in question from being self-executing."[129] Thus, the need for supplemental, as opposed to enabling, legislation will not preclude a determination that a constitutional right is self-executing.

2. Distinctions Between Prohibitory and Self-Executing Provisions

The concept of self-execution is related, but not identical, to the concept of the constitution as a prohibition against governmental misconduct. Because a constitution is a restraint on government, all constitutional provisions are necessarily prohibitory since they limit certain government actions or enactment of certain laws. The distinction is important in that, while the language of self-execution has been used to

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124. *Id.* at 99; *see* 16 AM. JUR. 2D Constitutional Law § 143 (1979).

125. COOLEY, *supra* note 123, at 99. "Where [a constitutional provision] lays down certain general principles, as to enact laws upon a certain subject, or for the incorporation of cities of a certain population, or for uniform laws upon the subject of taxation, it may need more specific legislation to make it operative." *Id.*

126. *Id.*; *see also* Davis v. Burke, 179 U.S. 399, 403 (1900) (adopting Judge Cooley's definition).

127. 12 Misc. 174, 179 (3d Dep't 1895); *aff'd*, 146 N.Y. 401 (1895).

128. *See* Brown v. State, 89 N.Y.2d 172, 186, 674 N.E.2d 1129, 1137 (stating that a self-executing constitutional provision "takes effect immediately, without the necessity for supplementary or enabling legislation").

129. People v. Carroll, 3 N.Y.2d 686, 692, 148 N.E.2d 875, 879 (1958).

describe prohibitory constitutional provisions, such provisions, without more, will not support an action for damages.

It has long been held by the courts of many states, including New York, that "[a]ny constitutional provision is self-executing to this extent, that everything done in violation of it is void."[130] These holdings, however, have been made in the context of criminal actions, challenges to the rulings of administrative agencies, or challenges to the constitutionality of statutes rather than actions for civil damages. The Supreme Court of Texas in *City of Beaumont v. Bouillion*[131] likewise explained that this doctrine means only that unconstitutional laws are void and have no legal effect.[132]

The difference between prohibitory and self-executing constitutional provisions was elucidated by a California court in *Leger v. Stockton Unified School District*,[133] which considered a claim brought under a California constitutional provision providing for safe schools.[134] The *Leger* court noted the truism that all constitutional provisions are self-executing to the extent that acts in violation of them were void.[135] However, in the context of an action for civil damages, "[t]he question here is whether [the safe-schools clause] is 'self-executing' in a different sense."[136]

The *Leger* court went on to explain that "[a] provision may be mandatory without being self-executing."[137] In an action for civil damages, a constitutional right is self-executing only "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."[138] Based on this

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130. Chittenden v. Wurster, 152 N.Y. 345 (1897); *see also* Leger v. Stockton Unified Sch. Dist., 249 Cal. Rptr. 688, 690 (Cal. Ct. App. 1988); Oakland Paving Co. v. Hilton, 11 P. 3 (Cal. 1886); Hemphill v. Watson, 60 Tex. 679, 681 (1884) ("[A]ny provision of the Bill of Rights is self-executing to the extent that anything done in violation of it is void."); COOLEY, *supra* note 123, at 100.

131. 896 S.W.2d 143 (Tex. 1995).

132. *See id.* at 249; *see also* Wren v. Dixon, 161 P. 722, 729 (Nev. 1916) (stating that all constitutional provisions are self-executing to the extent that everything done in violation of them is void, but a truly self-executing provision must be complete in itself).

133. 249 Cal. Rptr. 688 (Cal. Ct. App. 1988).

134. *See id.* at 690.

135. *See id.* (citations omitted).

136. *Id.*

137. *Id.* at 691.

138. *Id.*

principle, the court found that section 28(c) of the California Constitution, which created a right to safe schools, was not self-executing because, as with Professor Cooley's definition, it imposed no express duty on any person or agency, contained no procedures or mechanisms from which a damage remedy could be inferred, and was merely a statement of general principles.[139] Thus, in order to be self-executing in the sense of allowing a civil action for damages, a constitutional provision must, in itself or in connection with its legislative history,[140] provide sufficient operational details to establish the clear parameters of the right conferred and indicate clearly that the right was meant to be privately enforceable.[141]

3. The *Shields* Test for Self-Execution

Because the prohibitory nature of a constitutional provision is not sufficient by itself to determine that the provision is self-executing, a more detailed analysis of the nature of the right is necessary. The *Brown* court relied, to a considerable extent, on a four-part test developed by the Supreme Court of Vermont in *Shields v. Gerhart*[142] for evaluating whether a constitutional provision is self-executing.[143] This test, which is designed

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139. *See id.* (citations omitted); *see also* Gray v. Bryant, 125 So. 2d 846, 851 (Fla. 1960) (stating that constitutional provision is self-executing when it sufficiently delineates "a rule by means of which the right or purpose which it gives or is intended to accomplish may be determined, enjoyed, or protected without the aid of legislative enactment."); Russell v. Bliss., 101 N.E.2d 289, 291 (Ohio 1951); Jefferson, *supra* note 12, at 1539 (stating that a self-executing constitutional provision is one which "defines tangible rights personal to the plaintiff which may be enforced if transgressed").

140. *See Leger*, 249 Cal. Rptr. at 691-92 (noting that the California constitutional right to privacy was self-executing because its legislative history indicated that it was intended to create "an enforceable right of privacy for every Californian").

141. *See id.* at 691; *but see* Friesen, *supra* note 65, § 7.05, at 7-14 (arguing that state bills of rights should be considered self-executing because actions taken in violation of them are void).

142. 658 A.2d 924 (Vt. 1995).

143. The *Brown* court began its analysis by noting that the New York courts had established a presumption that provisions of the state constitution were self-executing. *Brown*, 89 N.Y.2d at 186, 674 N.E.2d at 1337. However, this "presumption" is unusual in that it does not apply to many, or even most, of the provisions of the New York Constitution, especially those most likely to be litigated in a civil rights claim. The key to understanding this presumption, created in *People v. Carroll*, 3 N.Y.2d 686, 148 N.E.2d 874 (1958), lies in the nature of the constitutional provision evaluated by the *Carroll* court and the changing role of state constitutions in the first half of the twentieth century. In *Carroll*, the court of appeals considered a constitutional provision, enacted for the first time in 1938, which set forth detailed and complete rules for the waiver of trial by jury in criminal cases. *Id.* at 688, 148 N.E.2d at 876 (citing N.Y. CONST. art.

to assist in applying Judge Cooley's definition of self-execution,[144] involves

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I, § 2). In conducting this analysis, the court drew a fundamental distinction between the manner in which state constitutions were viewed during the early years of American democracy and their function in the twentieth century. The court noted that:

> Originally, when the Federal Constitution and the first State Constitutions were written, their clear purpose was to establish a broad framework of basic principles within which the Nation and States should function. Actual administration and implementation was, in large part, left to departments created by the Constitution and was not attempted in those instruments. Since then, *and particularly during the last 50 years*, the function of the various Constitutions has evolved into one more like that of a legislative body . . . . Whereas initially the presumption was that provisions in a Constitution were merely general directions and that legislation was necessary to effectuate them, it is now presumed that constitutional provisions are self-executing.

Id. at 690-91, 148 N.E.2d at 877; *see also* Randy J. Holland, *State Constitutions: Purpose and Function*, 69 TEMP. L. REV. 989, 1005 (1996) ("The continual process of state constitution-making has transformed the short, principle-oriented charters of the early republic into 'super-legislative' documents."); Winchester v. Howard, 69 P. 77, 79 (Cal. 1902) ("Latterly, [the role of state constitutions as general limitations on government] has been changed. Through distrust of the legislatures and their natural love for power, the people have inserted in their constitutions many provisions of a statutory character. These are in fact but laws . . . and they are to be construed and enforced, in all respects, as though they were statutes."). Thus, the inclusion of "operational details" in the provision at issue in *Carroll* rendered it a provision of statutory character and therefore self-executing. *Carroll*, 3 N.Y.2d at 691, 148 N.E.2d at 878. In addition, the *Carroll* court analyzed the debates of the 1938 constitutional convention which enacted the provision, and found that its framers intended it to be "complete as it stands." *Id.* at 691, 148 N.E.2d at 878 (citing 2 REV. RECORD OF THE NEW YORK CONSTITUTIONAL CONVENTION 1273-86 (1938)).

Thus, the reasoning of the *Carroll* court makes clear that the "presumption" created therein applies primarily to twentieth-century constitutional provisions of a statutory character. Due to the increasing function of state constitutions as legislation, it may be presumed that newly enacted provisions of the New York Constitution are self-executing. However, since many of the fundamental rights created by the New York Constitution have been carried over essentially unchanged from New York's first constitution in 1777, they properly belong to the period when state constitutions were viewed as general principles which set broad limits on government. Accordingly, despite the *Carroll* presumption, it remains that many, or even the majority, of the commonly invoked rights in the New York State Constitution are not self-executing. In fact, the court of appeals noted in 1981, almost a generation after *Carroll*, that "most constitutional rights are not self-executing." People v. Hodge, 53 N.Y.2d 313, 317, 423 N.E.2d 1060, 1062 (1983). Thus, the *Carroll* presumption is only a starting point in an analysis of a *Brown* claim, and does not materially reduce a plaintiff's burden of showing that the right at bar is self-executing. Accordingly, courts such as the Suffolk County Supreme Court in *Schwartz v. Gamba*, N.Y.L.J., Nov. 25, 1997, at 25 (Sup. Ct., Suffolk Co., Nov. 23, 1997), which apparently relied solely on the *Carroll* presumption in assuming that three provisions of the New York Bill of Rights could state a cause of action, are incorrect.

analysis of: (1) whether the provision expresses only general principles or "describe[s] the right in detail, including the means for its enjoyment and protection;" (2) whether it contains a directive to the legislature for further action; (3) whether the legislative history indicates that the provision was intended to be self-executing; and (4) an examination of the right "in the context of the constitution as a whole to gauge its intended effect."[145]

The *Shields* court's reasoning suggests that most provisions of a state bill of rights will meet the Vermont test for self-execution due to their intended effect in the context of the constitution as a whole.[146] The majority of provisions in state bills of rights, as in the Federal Bill of Rights, contain no mandate for legislative action and delineate rights which are not repeated elsewhere and are vital to the effectuation of other enumerated rights. If the New York courts continue to rely on the *Shields* test, then those portions of the New York Bill of Rights which define specific and substantive rights will likely be found self-executing.[147]

This analysis, however, is by no means conclusive as to the entire bill of rights, or even those provisions which do not contain directives to the

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144. *See supra* notes 119-48 and accompanying text (discussing definitions of self-execution).

145. Shields v. Gerhart, 658 A.2d 924, 929 (Vt. 1995). Based on this test, the *Shields* court held that the free speech clause of the Vermont Constitution was self-executing but that its opening "natural rights" clause was not. *Id.* at 928-30. The second prong of the *Shields* test, an examination of whether the constitutional provision contains a directive to the legislature for further action, has been cited on numerous occasions in New York as a particularly important factor in determining whether a constitutional provision is self-executing. In the *Carroll* decision, which also established the presumption that provisions of the New York Constitution are self-executing, the court of appeals found that the clause of article I, section 2 of the New York Constitution relating to waiver of jury trial in civil cases, unlike the clause which dealt with criminal juries, was not self-executing because it contained a specific directive to the legislature to pass implementing legislation. *Carroll*, 3 N.Y.2d at 690, 148 N.E.2d at 876-77; *see also* Cooper v. Drexel Chemical Co., 949 F. Supp. 1275, 1282 (N.D. Miss. 1996) ("By its very nature, [MISS. CONST. § 191] is merely a directive to the legislature to enact protective measures . . . . If § 191 were 'self-enacting,' the legislature would have no need to enact enforcement legislation as they are directed to do."). In fact, one lower court in New York has gone so far as to state that "only where the constitutional provision specifically refers to the need for implementing legislation is the court unable to rely directly on the constitution for its authority." Ghobashy v. Sabra, 127 Misc. 2d 915, 487 N.Y.S.2d 626, 627 (Schuyler Co. Ct. 1985) (citation omitted). This extraordinarily broad definition of self-execution, however, has not been adopted by any New York appellate court, nor does the appellate authority cited in *Ghobashy* support its conclusion.

146. *See Shields*, 658 A.2d at 929-30 (discussing the Vermont free speech clause).

147. *See infra* notes 258-351 and accompanying text (discussing the *Brown* analysis as applied to the New York Bill of Rights).

legislature for further action. Certain portions of the New York Bill of Rights, such as the due process clause, contain much more vaguely defined rights.[148] The New York courts' analysis of these rights under *Brown* will necessarily involve a more thorough examination of legislative history and of the parameters of each right as defined by previous judicial interpretation.

B. *Assessing the Propriety of an Action for Damages*

The mere fact that a constitutional provision is self-executing does not necessarily mean that a cause of action for damages will be available under that provision.[149] A determination that a constitutional provision is self-executing is only the first step in a two-part analysis of whether such a right of action exists. The second step involves a right-by-right

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148. *See infra* notes 321-42 and accompanying text.

149. *See* Brown v. State, 89 N.Y.2d 172, 186, 674 N.E.2d 1129, 1138 ("The violation of a self-executing provision in the Constitution will not always support a claim for damages . . . ."). One commentator has argued that a determination that a constitutional provision is self-executing, standing alone, is sufficient to provide an inalienable cause of action for damages. *See* Gareau, *supra* note 12, at 477 ("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."); *see also* Bott v. Deland, 922 P.2d 732, 739 (Utah 1996) (concluding that "self-executing constitutional provisions allow for awards of money damages"). However, as Professor Friesen has noted, the mere fact that a constitutional right is self-executing may indicate that a remedy should be available for violation of that right, but not that this remedy should take the form of money damages. *See* FRIESEN, *supra* note 65, § 7.05, at 7-14 ("It does not necessarily follow that the court must provide the specific remedy of damages, as opposed to injunctive or declaratory relief . . . ."); *see also* Bonner v. City of Santa Ana, 33 Cal. Rptr. 2d 233, 239 (Cal. Ct. App. 1994) ("Self-executing provisions of our state Constitution can and are given effect in many ways—usually by injunction—without creating a direct action for money damages."); Figueroa v. State, 604 P.2d 1198, 1206 (Haw. 1979) (citing article XVI, section 15 of the Hawaii Constitution, stating that all provisions of the Hawaii Constitution are "self-executing to the fullest extent that their respective natures permit," did not mandate a state constitutional cause of action because "[n]o case has construed the term 'self-executing' as allowing money damages for constitutional violations"). In fact, a court may refuse even to enforce a self-executing constitutional provision where its meaning is unclear. *See* Hall v. Cummings, 213 P. 328, 328-30 (Colo. 1923) (declining to enforce recall provision in Colorado Constitution due to doubt over meaning of term "officer of the state"). It thus follows that a legislature may restrict the remedies available for violation of a self-executing constitutional provision, as long as the legislature does not entirely foreclose the availability of some sort of relief.

determination of whether a cause of action for damages is necessary and appropriate to fulfill the purposes of the provision.[150]

The *Brown* court listed three primary factors which it found useful in determining whether a private cause of action would be appropriate. These are "(1) the reasoning contained in the Restatement (Second) of Torts § 874A, (2) analogy to a *Bivens* action, (3) common law antecedents of the constitutional provision at issue, or a combination of all three."[151] In the *Brown* decision itself, the court conducted its analysis of the New York equal protection and search and seizure clauses under all three factors, but did not assign any priority or weight to any one factor.[152] It is therefore likely that future New York courts will follow this precedent, assigning varying importance to each of the three factors in determining whether a given constitutional provision will support a cause of action for damages.

1. Restatement (Second) of Torts section 874A

Section 874A of the Restatement (Second) of Torts is an expression of "a body of precedent established by state courts, which supports judicial creation of a damage remedy for positive rights in the absence of legislative implementation."[153] In essence, section 874A states that:

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150. *See Brown*, 89 N.Y.2d at 187, 674 N.E.2d at 1138.

151. *Id.* (citations omitted); *see also* FRIESEN, *supra* note 65, § 7.05, at 7-14 to 7-20. The Connecticut Supreme Court has also suggested a test for determining whether a damage action is an appropriate remedy for a constitutional violation, including the nature of the constitutional provision, the nature of the purported unconstitutional conduct, the nature of the harm caused, separation of powers considerations, and "the concerns expressed in *Kelley Property Development, Inc.*" Binette v. Sabo, No. 15547, 1998 WL 122424, at *11 (Conn. Mar. 10, 1998). The concerns expressed in *Kelley* include the transformation of political disputes into torts and the burden of imposing constitutional liability on laypersons. *See* Kelley Property Dev., Inc. v. Town of Lebanon, 627 A.2d 909, 923-24 (Conn. 1993).

152. *See Brown*, 89 N.Y.2d at 187-90, 674 N.E.2d at 1138-39. One commentator has stated that the *Brown* court placed its "chief reliance . . . on the *Bivens* analysis, which . . . is consistent with the rules that govern the implication of private rights of action generally." Stockel, *supra* note 25, at 670. In fact, the *Bivens* court referred both to the necessity analysis reflected in section 874A and to the common law antecedents of constitutional tort actions. *See Bivens*, 403 U.S. at 389-92. Another court has noted that the *Brown* majority's chief reliance was on Justice Harlan's separate concurrence in *Bivens*. *See* Bin Wahad v. City of New York, No. 75 Civ. 6203 MJL, 1998 WL 99625, at *3 n.2 (S.D.N.Y. Mar. 1, 1998).

153. FRIESEN, *supra* note 65, § 7.05, at 7-16.

> 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 new cause of action analogous to an existing tort action.[154]

Although the Restatement provides that the courts may imply a remedy under section 874A for a "legislative provision," the accompanying comment notes that the term "legislative provision" also includes constitutional provisions.[155] A cause of action under section 874A is based on the statutory creation of a legal duty toward a specific class of people; violation of that duty "is actionable alone, not merely as the first step toward a finding of negligence."[156] This is essentially a per se standard of liability under which noncompliance with the statutory duty is actionable regardless of the defendant's state of mind "unless excused or prevented by good cause . . . ."[157]

Perhaps for this reason, courts have often been reluctant to imply a civil remedy under section 874A absent a finding that the legislature intended the statute to be enforceable by a private action for damages.[158] In some cases, even legislative inaction has been treated as intent to deny a private tort cause of action. At least one court, for instance, has concluded that "[w]hile this Court may determine that such a remedy is appropriate . . . [in view of] § 874A, it should be hesitant to do so when

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154. Restatement (Second) of Torts § 874A.

155. *See id.* at Comment A; *see also Binette*, 1998 WL 122424, at *4.

156. FRIESEN, *supra* note 65, § 7.05, at 7-19. Although any statute arguably creates a duty, a statute which creates a duty to the public at large rather than a specific class of person is not actionable under the Restatement doctrine.

157. *Id.*; *see also* Nearing v. Weaver, 670 P.2d 137, 141 (Or. 1983) (holding a police officer strictly liable for noncompliance with mandatory arrest statute); Pine Grove Poultry Farm, Inc. v. Newtown By-Products Mfg. Co., 248 N.Y. 293, 297 (1928) (In a private action for violation of food purity statute, "[n]o element of ordinary negligence is essential. Violation of the statute becomes actionable default."); Friesen, *supra* note 12, at 1283 ("Defenses to the [statutory tort] action should have the same source as the duty: the [statute] itself.").

158. *See, e.g.*, Shields v. Gerhart, 658 A.2d 924, 932 (Vt. 1995) (court must look for "legislative intent, implicit or explicit, to create a private tort remedy") (quoting Rowe v. Brown, 599 A.2d 333, 336 (1991)).

it is clear that the Legislature could have done so, knew it could do so, and did not do so."[159]

New York cases interpreting section 874A are rare. An analogous body of law exists in New York, however, which details the circumstances under which a private right of action will be implied for violation of a statute. The analysis outlined by the New York courts is similar to the *Shields* test for self-execution, involving an examination of the terms of the statute, legislative history, the underlying purpose of the statute, and the position of the statute within the general scheme of New York law.[160]

The parameters of statutory tort liability in New York were defined in *Burns v. Lindner*,[161] decided by the court of appeals in 1983. *Burns* involved a private claim for damages brought under the Taylor Law, which prohibited strikes by public employees.[162] In assessing whether the Taylor Law gave rise to a private cause of action, the court noted that the intent of the legislature was entitled to the greatest weight.[163] While "the far better course is for the Legislature to specify [a remedy] in the statute itself" the courts may determine "in light of those provisions . . . and their legislative history, and of existing common-law and statutory remedies, with which legislative familiarity is presumed, what the Legislature intended."[164]

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159. *Id.* at 933 (quoting O'Brien v. Island Corp., 596 A.2d 1295, 1298 n.3 (1991)). The specific inclusion of causes of action in article V, section 6 and article XIV, section 5 of the New York State Constitution—one of which was enacted at the 1938 Convention and the other of which came up for debate—may provide an indication that the delegates to the Convention knew they could provide for a civil cause of action with regard to the remainder of the constitution and did not do so. *See infra* notes 370-73 and accompanying text.

160. *See* Burns v. Lindner, 59 N.Y.2d 314, 325, 451 N.E.2d 459, 463 (1983) ("Important . . . are what indications there are in the statute or its legislative history of an intent to create (or conversely to deny) such a remedy and, most importantly, the consistency of doing so with the purposes underlying the legislative scheme . . . ."); *see also* Brian Hoxie's Painting Co., v. Cato-Meridian Cent. Sch. Dist., 76 N.Y.2d 207, 212, 556 N.E.2d 1087, 1089 (1990) (stating that "the most critical inquiry in determining whether or not to recognize a private cause of action where one is not expressly provided is whether such action would be consistent with the over-all legislative scheme").

161. 59 N.Y.2d 314, 451 N.E.2d 459 (1983).

162. *See id.* at 332, 451 N.E.2d at 461; *see also* N.Y. CIV. SERV. LAW art. 14 (McKinney 1967) (codifying the Taylor Law).

163. *See id.* at 324, 451 N.E.2d at 462.

164. *Id.* at 325, 451 N.E.2d at 463 (citations omitted). The court's discussion of existing common-law and statutory remedies is similar to the third factor outlined by the *Brown* court, which assesses the appropriateness of a civil damage remedy based on the existence of prior common law remedies for violation of a given constitutional right. *See Brown*, 89 N.Y.2d at 187, 674 N.E.2d at 1138. It thus appears that, to a great extent,

The first step in a New York court's analysis of whether to imply a cause of action for violation of a statute requires the court to determine whether the plaintiff falls into the particular class of persons intended to be protected by the statute.[165] Following that threshold determination, the court must examine the legislative history of the statute and its place within New York's statutory scheme. In *Burns*, the court found that a cause of action predicated on the Taylor Law was not warranted. Although "such an action would be a powerful deterrent to public employee strikes" and therefore would further one of the purposes of the statute, the court nevertheless noted that "it would also . . . impose a crushing burden on the unions and each of the employees participating in the strike, who could be held jointly and severally liable with the union for the damages resulting from the violation."[166] In addition, a private right of action would tend to defeat the purpose of the statute by "upset[ting] the delicate balance [in public labor relations] established after 20 years of legislative pondering."[167] Thus, the *Burns* court combined analysis of legislative intent with awareness of the balance of public interests at stake when a new civil remedy is created.

Other New York statutory tort decisions, both before and after *Burns*, have agreed that legislative intent is controlling in determining whether a right of action exists, and that the burden on potential defendants is an important factor in considering how such a right of action would comport with the statutory scheme. In *Drinkhouse v. Parka Corp.*,[168] for example, the court of appeals held that no private right of action existed under the Residential Rent Law for unlawful eviction of a statutory tenant, observing

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the section 874A, *Bivens* and common-law antecedent analyses suggested by *Brown* blend into each other.

165. *See Burns*, 59 N.Y.2d at 325, 451 N.E.2d at 463 ("Whether a private cause of action was intended will turn in the first instance on whether the plaintiff is 'one of the class for whose especial benefit the statute was enacted[.]'").

166. *Id.* at 329, 451 N.E.2d at 465. The *Burns* court also cited legislative history indicating that the Taylor Law was intended to be non-punitive and that enforcement measures had been specified in the statute. *See id.* at 330, 451 N.E.2d at 466.

167. *Id.* at 330, 451 N.E.2d at 466; *see also* Carpenter v. City of Plattsburgh, 105 A.D.2d 295, 298-99, 484 N.Y.S.2d 284 (3d Dep't 1985) (holding that no private right of action exists for violation of Civil Rights Law section 50-a, providing for the confidentiality of police personnel records, due to the limited purpose of the statute and the limitations on traditional tort actions for invasion of privacy in New York); Brian Hoxie's Painting Co., v. Cato-Meridian Cent. Sch. Dist., 76 N.Y.2d 207, 212-13, 556 N.E.2d 1087, 1089-90 (1990) (contractor not allowed to sue based on violation of law requiring school districts to advertise prevailing wage rates, because the purpose of that legislation was to set a known minimum wage and facilitate governmental record-keeping rather than to impose a duty).

168. 3 N.Y.2d 82, 143 N.E.2d 767 (1957).

that "[w]ithout a provision granting damage for the removal of a statutory tenant there is no remedy, and, where such a statute exists, the remedy can be only that which the statute prescribes."[169] Likewise, in *County of Broome v. State*,[170] in considering whether a private right of action existed for violation of a statute providing for the defense of Indian land claims at state expense, the court considered whether such a right of action would impose a crushing burden on the state.[171]

This line of cases suggests the analysis that New York courts might follow in evaluating whether a damage remedy is appropriate under section 874A for violation of a state constitutional right. In most cases involving claims under the New York Bill of Rights, the first step—determining whether the plaintiff is a member of the specific class of persons intended to be protected by the constitutional provision—can likely be dispensed with, since the bill of rights applies to all citizens of New York State. Once past that hurdle, the court will examine the terms of the constitutional provision itself and the available legislative history in an attempt to determine the intent of its framers.[172] This is likely to be sparse in connection with many of the rights enumerated in article I of the New York Constitution, as many of these rights have passed unchanged from

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169. *Id.* at 88, 143 N.E.2d at 769. The court reached this conclusion "in accordance with the familiar rule in the construction of statutes that where a new right is created, or a new duty imposed by statute, if a remedy be given by the same statue for its violation or non-performance, the remedy given is exclusive." *Id.* (citations omitted).

170. 129 Misc. 2d 914, 494 N.Y.S.2d 638 (N.Y. Ct. Cl. 1985).

171. *See id.* at 917, 494 N.Y.S.2d 640. The court found that such a burden would not be imposed, "since the Legislature contemplated that [Indian land claim actions] be defended at public expense in the first place." *Id.*

172. Professor Friesen argues that "the court normally need not grapple with the question of legislative intent with regard to affording a private right of action [when conducting an § 847A analysis of a constitutional provision], as they must when a statute is a source of the duty." Friesen, *supra* note 65, § 7.05, at 7-17. It is difficult to see, however, any way in which a court could escape at least some analysis of the intent of the framers of a constitutional provision—whether a constitutional convention, a legislature or the electorate—in order to determine whether they intended to create a privately enforceable duty in the first place. *See* Brown v. State, 89 N.Y.2d 172, 192, 674 N.E.2d 1129, 1141 (1996) (examining records of 1938 New York constitutional convention in order to determine the intent of delegates to create a right of action); Bonner v. City of Santa Ana, 53 Cal. Rptr. 2d 671, 675 (Cal. Ct. App. 1996) (controlling issue is "whether the voters who ratified the provision intended it to be . . . enforceable"); Walinski v. Morrison & Morrison, 377 N.E.2d 242, 243-44 (Ill. 1978) (examining debates of constitutional convention regarding anti-discrimination clause).

the first state constitution in 1777 or even from prior documents.[173] Thus, the court's analysis is likely to focus on whether a private action for money damages would comport with New York's constitutional scheme. In the case of a vaguely defined right, this analysis would include an evaluation of the burden placed on potential defendants by the constitutionalization of a wide range of public and private action.

In addition, the great majority of states conducting analyses of legislative intent have required some affirmative indication by the framers that a private right of action was intended, rather than the mere absence of intent to exclude such actions.[174] In fact, courts in at least two states have rejected state constitutional tort actions where there was no evidence that the framers of the provision at issue specifically intended to authorize such suits.[175] These courts have recognized that "[i]f the [framers] wanted

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173. A number of the rights enumerated in the New York Bill of Rights were contained in New York's Colonial Charter of Rights and Liberties, enacted in 1691. The *Brown* court observed that some of these rights, such as the protection against unlawful search and seizure, could be traced to the Magna Carta. *See Brown*, 89 N.Y.2d at 191, 674 N.E.2d at 1139.

174. *See* Bonner v. City of Santa Ana, 53 Cal. Rptr. 2d 671, 676 (Cal. Ct. App. 1996) (citing explanation of proposed due process clause in voter pamphlet as evidence that the California electorate intended to create a right equivalent to the Federal Due Process Clause, under which money damages can be recovered in certain circumstances); Walinski v. Morrison & Morrison, 377 N.E.2d 242, 244 (Ill. 1970) (citing debates of 1969-70 Illinois Constitutional Convention which indicated that delegates contemplated a damage remedy based on violation of newly enacted provision barring employment and housing discrimination); Widgeon v. Eastern Shore Hosp. Ctr., 479 A.2d 921, 926-27 (Md. 1984) (inferring legislative intent that the Maryland Due Process and Equal Protection Clauses be enforceable for damages from legislative establishment of a statute of limitations for actions based on violation of these clauses); Jones v. Rhode Island, 724 F. Supp. 25, 34-35 (D.R.I. 1989) (citing debates of 1986 Rhode Island Constitutional Convention indicating that newly enacted due process and equal protection clauses were intended to parallel Fourteenth Amendment rights—which are actionable under federal civil rights law—and provide an independent state foundation for these rights); *but see* Bott v. DeLand, 922 P.2d 732, 739 (Utah 1996) (concluding that "the framers of the Utah Constitution . . . most likely contemplated an award of money damages for violation of [state constitutional] rights" because the rights enumerated in the Utah Bill of Rights had equivalents in the Magna Carta).

175. *See* Gates v. Superior Court, 38 Cal. Rptr. 2d 489 (Cal. Ct. App. 1995) (rejecting suit for damages under California equal protection clause where there was no evidence that the voters who approved the provision intended to authorize such actions); Systems Amusement, Inc. v. State, 500 P.2d 1253, 1255 (Wash. 1972) (stating that without authority to the contrary, the Washington due process clause cannot "be relied upon, as an affirmative mandate to create new causes of action").

to fashion a constitutional provision . . . enforceable by way of an action for money damages, there is nothing to stop them."[176]

2. Analogy to *Bivens* Actions

The second factor cited by the *Brown* court in determining the appropriateness of a state constitutional tort action for money damages is an analogy to a Federal *Bivens* claim.[177] A *Bivens* claim takes its name from *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,[178] which created a private right of action for violations of Fourth Amendment rights by federal officials.[179] Subsequent cases have expanded the *Bivens* rationale to other substantive provisions of the Bill of Rights.[180] To a great extent, *Bivens* has been the guiding force for state court decisions concerning state constitutional actions, both for the courts

176. *Bonner*, 53 Cal. Rptr. 2d at 676; *see also* Boyle, *supra* note 94, at 875 ("[W]hether or not the Convention delegates favored a constitutional tort remedy or believed such a remedy existed at common law is immaterial, for it was precisely those delegates who failed to grant a private remedy in the Constitution and instead granted to the Legislature all subsequent authority to create claims against the state."). In light of this, it is curious that the *Brown* court failed to consider that one article of the 1938 New York Constitution, article XIV, expressly creates a civil cause of action for violation of the rights conferred therein. *See* N.Y. CONST. art. XIV, § 5 (establishing a mechanism by which private citizens could sue to enforce the conservation provisions of the New York Constitution). In addition, section 6 of article V of the New York Constitution, first enacted at the 1938 Convention, created a "contractual relationship" based on public retirement plans. It is apparent from this that the delegates to the 1938 convention were aware that they could expressly provide for a civil right of action for violation of constitutional rights, and in fact did so for selected provisions. The *Brown* court, however, did not consider the effect of the delegates' failure to provide expressly for such a cause of action in relation to the remainder of the constitution, as this issue was not briefed or argued by either party. *See* Telephone Interview with the Hon. Richard D. Simons, retired Judge of the New York Court of Appeals (Oct. 8, 1997).

177. *See Brown*, 89 N.Y.2d at 187, 674 N.E.2d at 1138.

178. 403 U.S. 388 (1971).

179. *See id.* at 389 (stating that the cause of action created was against individually named federal officials and not against the United States itself).

180. *See* Davis v. Passman, 442 U.S. 228 (1979) (Fifth Amendment); Carlson v. Green, 446 U.S. 14 (1980) (Eighth Amendment). Although the Supreme Court has recognized *Bivens* claims only for violations of the Fourth, Fifth, and Eighth Amendments, lower courts have "indicated a willingness to extend *Bivens* claims to First and Sixth Amendment cases." John E. Nordin, *The Constitutional Liability of Federal Employees:* Bivens *Claims*, 41 FED. BUS. NEWS & J. 342, 346 (1994).

which have accepted such actions and for those which have rejected them.[181]

In the view of the *Brown* court, the underlying rationale of the *Bivens* decision "in simplest terms, is that constitutional guarantees are worthy of protection on their own terms without being linked to some common law or statutory tort, and that the courts have the obligation to enforce these rights by ensuring that each individual receives an adequate remedy for violation of a constitutional duty."[182] In evaluating a claim based on an illegal search, the *Bivens* Court noted that the Fourth Amendment created a positive right rather than merely being a limitation on government;[183]

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181. Professor Friesen has commented on the disproportionate influence of federal civil rights law in state courts. FRIESEN, *supra* note 65, § 7.05, at 7-14 ("[M]any state law opinions continue to depend heavily on interpretation of federal civil rights clauses either as a point of departure or as a stopping point."). Courts which have relied on *Bivens* in creating state constitutional tort actions include state courts in California, Illinois, Maryland, Massachusetts, New York, Utah and a Rhode Island federal court. *See* Gay Law Students Ass'n. v. Pacific Tel. & Tel. Co., 595 P.2d 592, 597-600 (Cal. 1979) (allowing action for systematic discrimination against homosexuals); Newell v. City of Elgin, 340 N.E.2d 344, 723-25 (Ill. 1976) (allowing action under Illinois search and seizure clause); Widgeon v. Eastern Shore Hosp. Ctr., 479 A.2d 921, 924-26 (Md. 1984) (allowing action for detention without due process of law); Phillips v. Youth Dev. Program, 390 Mass. 652, 658 (Mass. 1984) (allowing action for violation of freedom of expression); *Brown*, 89 N.Y.2d at 187-88, 674 N.E.2d at 1138; Jones v. Rhode Island, 724 F. Supp. 25, 34-35 (D.R.I. 1989) (allowing action under Rhode Island due process clause); Bott v. DeLand, 922 P.2d 732, 738-39 (Utah 1996) (allowing action under Utah's cruel and unusual punishment clause). Courts in Alaska, Colorado, Hawaii, New Hampshire, Ohio and Rhode Island have relied upon *Bivens* and its progeny to deny or limit state constitutional tort actions. *See* King v. Alaska State Housing Auth., 633 P.2d 256, 259-61 (Alaska 1981) (state constitutional tort action denied because of "special factors counseling hesitation," following *Bivens*); Board of County Comm'rs of Douglas County v. Sundheim, 926 P.2d 545, 550-53 (Colo. 1996) (citing legislative policy statement and availability of alternative remedies as "special factors counseling hesitation"); Figueroa v. State, 604 P.2d 1198 (Haw. 1979) (following *Bivens*, refused to allow constitutional tort actions against sovereign); Marquay v. Eno, 662 A.2d 272, 281 (N.H. 1995) (following *Bush v. Lucas*, refused to allow state constitutional tort action where alternative remedies existed although reserving the right to allow such claims in the absence of alternative remedies); Provens v. Stark County Bd. of Mental Retardation and Dev. Disabilities, 594 N.E.2d 959, 962-66 (Ohio 1992); Taylor v. Rhode Island, 726 F. Supp. 895, 900-01 (D.R.I. 1989) (citing *Bivens*, refused to allow action for equal protection violation where alternative remedies existed).

182. *Brown*, 89 N.Y.2d at 187, 674 N.E.2d 1138.

183. *Bivens*, 403 U.S. at 392. The opposing view of the Constitution, which informed the opinion of the *Bivens* dissenters, is that it is "a charter of negative liberties"—that is, that "it tells the state to let people alone; it does not require the federal government or the state to provide services . . . ." Bowers v. DeVito, 686 F.2d 616 (7th Cir. 1982); *see also* Nahmod, *supra* note 12, at 951 n.16.

namely, that "[i]t guarantees to citizens of the United States the absolute right to be free from unreasonable searches and seizures carried out by virtue of federal authority."[184]

The Supreme Court has narrowed the sweep of the *Bivens* doctrine with a series of judicially created limitations and immunities. Two such limitations have been drawn from the language of the *Bivens* decision itself. The first allows courts to decline to recognize a cause of action if "special factors counseling hesitation" are present.[185] Such factors were rarely found in early *Bivens* cases,[186] but have been more commonly invoked in the past decade.[187] While the Supreme Court has generally found special factors "only . . . in cases where congressional action exists or congressional inaction is purposeful,"[188] lower courts have been increasingly willing to find "special factors counseling hesitation" where allowing a claim would not serve the interests of justice or would invade the province of the legislature.[189]

Remedies under *Bivens* may also be foreclosed where alternative remedies exist.[190] There has, however, been considerable disagreement among the federal courts as to the extent of relief an alternative remedy must provide in order to preclude a direct claim under *Bivens*. Early decisions held that an alternative remedy would only bar a *Bivens* action if it was "equally effective," that is, if it provided the same extent of relief

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184. *Bivens*, 403 U.S. at 392.

185. *See id.* at 396.

186. Horne, *supra* note 116, at 814 (1994) ("The initial cases . . . contained no special factors.").

187. *See id.*

188. *Id.* Areas where the Supreme Court has found such factors include fiscal policy and actions arising out of military service. *See id.*

189. *See, e.g.*, Vennes v. An Unknown Number of Unidentified Agents, 26 F.3d 1448, 1452 (8th Cir. 1994) (dismissing due process *Bivens* claim, based on entrapment theory, brought by plaintiff who had pled guilty to the offenses which he claimed he was entrapped into committing); Vakas v. Rodriquez, 728 F.2d 1293, 1296 (10th Cir. 1984) (noting that "[t]he concept of a private right of action [under *Bivens*] has been strictly limited by the Supreme Court" and that the Court "cautioned against judicial action in expanding available remedies without congressional mandate").

190. The Supreme Court in *Bivens* noted that a damage remedy was appropriate because "we have here no explicit congressional declaration that persons injured by a federal officer's violation of the Fourth Amendment may not recover money damages from the agents, but must instead be remitted to another remedy, equally effective in view of Congress." *Bivens*, 403 U.S. at 397. Subsequent decisions following *Bivens* have interpreted this language to mean that where such a remedy does exist, no *Bivens* action will be available. *See* Bush v. Lucas, 462 U.S. 367, 377-78 (1983).

as a *Bivens* claim.[191] More recent cases, however, have narrowed the scope of the *Bivens* doctrine by holding that *Bivens* actions are precluded where an alternative remedy designated by Congress exists, even one with significantly less to offer the plaintiff.[192]

The combination of these two factors makes "exclusive reliance on the *Bivens* line of cases . . . undesirable from a plaintiff's point of view."[193] Indeed, state courts have invoked the *Bivens* alternative remedy doctrine to preclude direct state constitutional actions under even wider circumstances than the federal courts. State courts, for example, have denied relief even where the alternative remedy was not specifically designated as such by the legislature or where it contained no right to monetary damages at all.[194]

In contrast, the New York Court of Appeals in *Brown* appears to emphasize the more expansive remedial and deterrent aspects of *Bivens*,[195] although it acknowledged that "'[*Bivens*]' use in the Federal courts has been narrowed somewhat."[196] However, the absence of alternative remedies for the *Brown* plaintiffs was an important factor in the court's reasoning,[197] and it remains to be seen how the court of appeals will balance the equities where the plaintiff in a state constitutional claim has access to other relief.

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191. *See* Carlson v. Green, 446 U.S. 14, 18-19 (1980) (even though relief under the Federal Tort Claims Act ("FTCA") was available to plaintiff, he could pursue a *Bivens* claim because punitive damages were not available under the FTCA).

192. *See Bush*, 462 U.S. at 388 (denying *Bivens* claim where plaintiff could apply for relief within federal civil service system); Schweiker v. Chilicky, 487 U.S. 412 (1988) (denying relief under *Bivens* where administrative remedies were available through the Social Security Administration); *Vennes*, 26 F.3d at 1453-54 (denying claim against IRS agents where Congress had provided administrative mechanism for recovering tax refunds and limited damages in the event of IRS misconduct).

193. FRIESEN, *supra* note 65, § 7.05, at 7-15; *see also* Shields v. Gerhart, 658 A.2d 924, 933 (Vt. 1995) ("The more recent [state constitutional tort] decisions, particularly those issued after *Bush* and *Chilicky*, tend to be more cautious about accepting *Bivens*, and adopt part or all of the reasoning of *Bush* and *Chilicky*.").

194. *See, e.g.*, Rockhouse Mtn. Property Owners Ass'n. v. Town of Conway, 503 A.2d 1385, 1389 (N.H. 1985) (denying relief under state constitution even though statutory remedy did not specifically provide relief for unconstitutional conduct and did not allow money damages).

195. *See* Brown v. State, 89 N.Y.2d 172, 187, 674 N.E.2d 1129, 1138 (1996) (citing cases which used *Bivens* to imply a broad right of action).

196. *Id.* at 187-88, 674 N.E.2d at 1138-39.

197. *Id.* at 191-92, 674 N.E.2d at 1140-41; *see also infra* notes 207-42 and accompanying text.

3. Common Law Antecedents

The final factor cited by the *Brown* majority involves the existence of "common-law antecedents of [a damages remedy in connection with] the constitutional provision at issue."[198] The court explained that "New York's first Constitution in 1777 recognized and adopted the existing common law of England and each succeeding Constitution has continued that practice. Thus, in some cases, there exist grounds for implying a damage remedy based upon preexisting common-law duties and rights."[199]

This factor comes into play most often where the right at issue has been recently constitutionalized, but "the principles . . . [are] hardly new."[200] Examination of common law antecedents is thus particularly useful in an action arising out of a criminal procedural violation. Many criminal procedural rights now embodied in constitutional law, such as the right to *Miranda* warnings and the right to pretrial disclosure of exculpatory evidence, have only recently been constitutionalized but were previously available as a matter of statutory or decisional law. Analysis of these statutes or decisions is thus useful not only to determine the history of the right but the remedies that have been traditionally recognized for its violation. In *Brown* itself, the court noted that the New York State Constitution's equal protection and search and seizure clauses had not been constitutionalized until 1938, but that previous statutes and case law had recognized these rights and enforced them with money damages.[201]

Thus, this factor complements a court's analysis under section 874A. An examination under section 874A entails inquiry into the intent of the framers at the time a constitutional provision was enacted, while an analysis of common law antecedents involves an examination of the period prior to the debate and enactment. A court conducting an analysis of common law antecedents must investigate whether an independent body of law concerning the right in question existed before it was constitutionalized. If such a body of law exists, it must then be examined to determine whether it created rights and duties which were enforceable

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198. *Brown*, 89 N.Y.2d at 187, 674 N.E.2d at 1138.

199. *Id.* at 188, 674 N.E.2d at 1138.

200. *Id.*

201. *See id.* at 188-89, 674 N.E.2d at 1138-39. "The prohibition against unlawful searches and seizures originated in the Magna Carta and has been a part of our statutory law since 1828. The civil cause of action was fully developed in England and provided a damage remedy for the victims of unlawful searches at common law." *Id.* at 188, 674 N.E.2d at 1139. However, the court's analysis of the equal protection clause was conclusory and concentrated on common law antecedents to the right at issue without regard to enforcement with monetary damages. *See supra* notes 90-91 and accompanying text.

by an action for damages. Only if both the existence of the right and the existence of a cause of action for damages are supported by the prior body of law will an analysis of common law antecedents weigh in favor of allowing a direct claim under the state constitution.[202]

C. *Other Factors Cited by the* Brown *Majority*

In addition to outlining a legal test, the *Brown* majority articulated two closely entwined policy reasons for allowing state constitutional rights to be vindicated by direct actions for damages. The first of these is the need to deter misconduct by government officials.[203] Without a damage remedy, "the integrity of the rules and their underlying public values are called into question" because "no government can sustain itself, much less flourish, unless it affirms and reinforces the fundamental values that define it by placing the moral and coercive powers of the State behind these values."[204]

The *Brown* court's argument that the rights conferred on individuals by the state constitution would be meaningless without a remedy was part of the underlying rationale of *Bivens*[205] and has been shared by numerous other state courts. The North Carolina Supreme Court, for example, has argued that, due to the danger of oppressive conduct by persons in authority, "[a] direct action against the State for its violations of free speech is essential to the preservation of free speech."[206]

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202. The court of appeals did not make an express statement as to whether this analysis involves a search for common law antecedents to support a damage remedy for violation of a right, or only for antecedents of the right itself. However, its analysis of the common law antecedents to the New York search and seizure clause indicate that it examined not only the history of the right but the history of the remedy for its violation. *See Brown*, 89 N.Y.2d at 188-89, 674 N.E.2d at 1138-39; *see also* Binette v. Sabo, No. 15547, 1998 WL 122424, at *4 (Conn. Mar. 10, 1998) (collecting cases decided prior to adoption of first Connecticut Constitution in 1818 which recognized damage remedies for illegal searches or arrests); Turner v. Doe, No. CV-96-557306S, at 9-13 (Conn. Super. Ct. Jan. 15, 1997) (determining that article I, section 10 of the Connecticut Constitution preserved pre-1818 causes of action, and collecting cases in which damages were granted for invasions of "liberty interests" similar to modern due process rights).

203. *Brown*, 89 N.Y.2d at 192, 674 N.E.2d at 1141.

204. *Id.* at 196, 674 N.E.2d at 1144.

205. Bivens v. Six Unknown Agents of Federal Bureau of Narcotics, 403 U.S. 389, 394 (1971).

206. Corum v. University of North Carolina, 413 S.E.2d 276, 289 (N.C. 1992).

This argument is closely tied in with the absence of alternative remedies for many state constitutional torts.[207] It is well-settled that a violation of a right conferred by state law or a state constitution will not support a claim under 42 U.S.C. § 1983.[208] Accordingly, many state constitutional rights which have no analogues in federal statutory or constitutional law fall outside the scope of the Federal Civil Rights Statute, and facts which establish violation of such rights may not support a civil rights claim under federal law.

Moreover, state governments are immune from suit under 42 U.S.C. § 1983 due to Eleventh Amendment considerations of federalism.[209] Thus, state governments, or their agents, cannot be held accountable for violation of the United States Constitution or federal law. In addition, although most states have consented to limited waiver of sovereign immunity for common law tort claims, some constitutional violations will not satisfy the elements of any traditional state law tort. Accordingly, a person whose federal constitutional rights are violated by state officials may be denied relief unless a direct cause of action is available to him under an equivalent state constitutional provision.

This liability gap was expressly noted by the *Brown* court.[210] The court stated that, in the absence of a cause of action under the New York Constitution, the plaintiffs would "go remediless" despite having sustained indignities of a constitutional dimension,[211] and that the provisions of the

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207. *See infra* notes 208-42 and accompanying text (discussing alternative remedies as a consideration in implying a constitutional cause of action).

208. *See* McNew, *supra* note 12, at 1649; Flynn v. Sandahl, 58 F.3d 283, 290 (7th Cir. 1995) (dismissing a § 1983 claim predicated upon article I, section 6 of the Illinois Constitution because § 1983 only reached conduct in violation of federal law).

209. *See* Monell v. Department of Soc. Servs., 436 U.S. 658, 676 (1978).

210. The *Brown* court stated that the plaintiffs would be without remedy if a cause of action were not implied from the New York Constitution, but did not conduct any analysis to determine whether the elements of a common law tort cause of action might be satisfied by the facts as alleged by the plaintiffs. *See* Brown v. State, 89 N.Y.2d 172, 190-92, 674 N.E.2d 1129, 1139-41. In addition, the *Brown* court reinstated the plaintiffs' negligent supervision cause of action; however, this arguably did not constitute an alternative remedy because it contained an additional element and could not be proven by the same facts. In addition, former Judge Richard D. Simons of the New York Court of Appeals, the author of the *Brown* majority opinion, notes that the plaintiffs in *Brown* were pursuing federal remedies against certain individual defendants. This was brought to the attention of the court by the defendants. However, the defense did not argue this as a preclusive factor to a remedy under the New York Constitution. Telephone interview with the Hon. Richard D. Simons (Oct. 8, 1997). Finally, as noted by the *Brown* court, plaintiffs had no other remedy against the state itself. *See Brown*, 89 N.Y.2d at 193, 674 N.E.2d at 1141.

211. *Brown*, 89 N.Y.2d at 191, 674 N.E.2d at 1141.

New York Constitution would be vitiated if victims of constitutional torts were left "without any realistic remedy."[212] The *Brown* court did not directly address whether a direct cause of action under the New York Constitution would be available to plaintiffs who did have access to alternative remedies, such as common law tort actions or claims under 42 U.S.C. § 1983. Clearly, however, it offended the court's sense of justice that the plaintiffs in *Brown* should be entirely excluded from the courts merely because they fell through the cracks of the established pattern of civil rights liability.[213]

At least one state court has stated, in the context of defining an implied state constitutional cause of action, that "the existence of other available remedies, or the lack thereof, is not a persuasive basis for resolution of the issue before us."[214] Other courts which have shared the *Brown* majority's concerns about deterrence of misconduct, however, have held that a direct state constitutional tort cause of action will only be implied if no other remedy is available.[215] In addition, state courts which

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212. *See id.* at 196, 674 N.E.2d at 1144.

213. *See id.*

214. Widgeon v. Eastern Shore Hosp. Ctr., 479 A.2d 921, 929 (Md. 1984); *see also* Binette v. Sabo, No. 15547, 1998 WL 122424, at *4 (Conn. Mar. 10, 1998) (holding that only alternative remedies created by the state legislature and designed to remedy a particular constitutional violation would preclude the recognition of a direct cause of action under the Connecticut Constitution).

215. *See* Corum v. University of North Carolina, 413 S.E.2d 276, 291-92 (N.C. 1992) (holding state constitutional tort action available only against the State of North Carolina itself rather than private persons, because common law tort remedies or § 1983 causes of action are available against other defendants); Shields v. Gerhart, 658 A.2d 924, 934-35. (Vt. 1995) (although a monetary remedy would be appropriate where no other remedy existed to vindicate constitutional rights, a private state constitutional tort action would not be recognized where other remedies existed); *see also* Dick Fischer Dev. No. 2, Inc. v. State, 838 P.2d 263, 267 (Alaska 1992) (no cause of action under Alaska due process clause where alternative remedies existed); Rockhouse Mtn. Property v. Town of Conway, 503 A.2d 1385, 1388-89 (N.H. 1986) (cause of action would not be inferred from constitution where administrative remedy existed); Provens v. Stark County, 594 N.E.2d 959, 963 (Ohio 1992). The North Carolina courts have gone so far as to foreclose causes of action based on any constitutional violation which may be analogized to a common law tort, regardless of whether a common law cause of action could actually be asserted by a given plaintiff. *See* Rousselo v. Starling, 1998 N.C. App. LEXIS 112, at *16-18 (N.C. Feb. 3, 1998) (holding that there is no direct cause of action under the North Carolina search and seizure clause because "the common law action for trespass to chattels provides a remedy for an unlawful search"); Davis v. Town of Southern Pines, 449 S.E.2d 240, 248 (N.C. 1994), *rev. denied,* 454 S.E.2d 648 (N.C. 1995) (stating that no cause of action is available for an unconstitutional detention because such an action could be analogized to a claim for false imprisonment). At least one North Carolina appellate court has stated that it is immaterial if the analogous common law cause of

have followed the Supreme Court's recent narrowing of the *Bivens* doctrine have consistently held that state constitutional tort actions are barred by the existence of alternative remedies.[216]

An additional reported New York decision addressing the issue of state constitutional torts has ruled consistently with the courts of Alaska, New Hampshire, North Carolina, and Ohio that no right of action exists under the state constitution if alternative remedies are available. In *Ferrer v. State*,[217] decided while *Brown* was pending in the court of appeals, [218] the New York Court of Claims considered due process and equal protection claims brought under the New York Constitution against a state agency.[219] Rather than follow the appellate division decision in *Brown*, which held that no state constitutional tort action existed in New York, the *Ferrer* court conducted an independent analysis.[220]

The *Ferrer* decision was a foreshadowing of *Brown*. Citing many of the same decisions on which the *Brown* court relied, the court of claims in *Ferrer* found that a direct cause of action existed under the New York Constitution and used the same two-step analysis set forth by the *Brown* court.[221] The *Ferrer* court, however, carried the *Brown* analysis one step further to consider whether a private right of action under the state constitution was available if the plaintiff had access to alternative

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action requires proof of additional elements, "declin[ing] to hold that . . . no adequate remedy [is available to the plaintiff] merely because the existing common law claim might require more of him." *Rousselo*, 1998 N.C. App. LEXIS at *18-19.

216. *See* Marquay v. Eno, 662 A.2d 272, 282-83 (N.H. 1995) ("While this court ultimately has the authority to fashion a common law remedy for the violation of a particular constitutional right, we will avoid such an extraordinary exercise where established remedies—be they statutory, common law, or administrative—are adequate."); Dick Fischer Dev. No. 2, Inc. v. Dept. of Admin., 838 P.2d 263, 268 (Alaska 1992) ("We are . . . hesitant to extend the *Bivens* decision, and will not allow a claim for damages except in cases of flagrant [Alaska] constitutional violations where little or no alternative remedies are available."); *see also infra* Part IV.D.

217. 655 N.Y.S.2d 900 (Ct. Cl. 1996).

218. *See id.* at 903 (discussing the court of claims and appellate division decisions in *Brown*, and noting that leave had been granted by the court of appeals).

219. *See id.* at 902-03. The complainant, Norman Ferrer, charged that the New York State Division of Human Rights had inexcusably delayed seven years in processing his complaint of employment discrimination, leading to the reversal of an award in his favor. *See id.*

220. *See id.* at 903.

221. *See id.* at 904. The *Brown* court did not mention the court of claims' decision in *Ferrer*. The most likely reason for this is that the *Ferrer* decision was not released for publication until after the court of appeals' decision in *Brown*.

remedies.[222] Citing the *Bivens* line of cases and similar state court decisions, the court of claims found that one was not.[223] The *Ferrer* court held that since the plaintiff was pursuing both § 1983 and common law tort remedies, he could not assert an implied state constitutional cause of action.[224]

Although *Ferrer* was decided prior to *Brown*, it was not overruled by the later decision. Nothing in the *Brown* decision is incompatible with the language of *Ferrer*, and the reasoning of the two courts contains remarkable parallels.[225] In addition, several unreported post-*Brown* decisions, one at the appellate level, have agreed with the *Ferrer* court that a state constitutional tort action should not be available if alternative remedies exist. In the first of two decisions in *Remley v. State of New*

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222. *See id.* at 903-04.

223. *See id.*

224. *See id.*

225. The *Ferrer* court's reasoning, especially with regard to the availability of § 1983 remedies as a bar to an implied state constitutional tort action, is also in line with the attitude of Judge Simons, the author of the *Brown* majority opinion, toward state constitutional interpretation. Judge Simons is an exponent of the "interstitial" theory of state constitutional interpretation, which "addresses the State Constitutional question only if the Federal Constitution does not answer it." Remarks of the Hon. Richard D. Simons, Symposium on Trends and Developments in New York State Constitutional Law, Touro Law Center, at 4-5 (Nov. 21, 1997) ("Simons Remarks") (on file with authors); *see also* Freedus, *supra* note 12, at 1941 (noting Judge Simons' preference for the interstitial theory). Using an interstitial theory of state constitutional tort actions, therefore, it is logical that a cause of action under the New York Constitution should not be implied if a Federal constitutional remedy is adequate to redress the plaintiff's injury. Under the "primacy" or "dual reliance" theories of state constitutional analysis, which involve resolution of state constitutional issues prior to or concurrently with their federal counterparts, it is more problematic to view the existence of a federal remedy—as opposed to a state common law remedy—as a bar to a state constitutional cause of action. *See* Stewart G. Pollock, *Adequate and Independent State Grounds as a Means of Balancing the Relationship Between State and Federal Courts*, 63 TEX. L. REV. 977, 983-86 (1985) (explaining the three methods of state constitutional analysis); *see also* Binette v. Sabo, No. 15547, 1998 WL 122424, at *4 n.18 (Conn. Mar. 10, 1998) (holding that federal remedies do not stand as a bar to the recognition of a direct state constitutional remedy because state courts are not required to defer to the public policy determinations of the federal legislature). The New York Court of Appeals has, at times, used elements of all three theories; however, it is the opinion of at least one former court of appeals judge that the modern trend in New York's highest court is to apply interstitial analysis. *See* Simons Remarks, *supra*, at 5 ("If there is any trend at the present time it would seem to be that the Court will not address the State issue if the Federal provision is dispositive.").

York,[226] Judge Thomas J. McNamara of the court of claims suggested that where alternative remedies existed for a constitutional violation, an implied damage remedy was not "necessary to ensure the effectiveness of the [constitutional] provision."[227]

In a second decision rendered in the *Remley* case,[228] Judge McNamara gave another "example of why [the alternative remedy] rule should prevail."[229] Noting that *Brown* "involved circumstances in which no traditional tort remedy was available to the Claimants,"[230] the *Remley* court stated that "no useful purpose would be served by implying a remedy under the constitution where the injuries alleged could be redressed by a common law cause of action."[231] In addition, the court noted that plaintiffs would otherwise be able to circumvent statutes of limitations on common law tort claims by transforming them into constitutional causes of action.[232]

In *Augat v. State of New York*,[233] a New York appellate court added its weight to the argument that the existence of alternative remedies is a bar to an implied constitutional cause of action, affirming the court of claims' dismissal of a state constitutional claim where other vehicles for relief existed.[234] Significantly, the *Augat* court based its decision on a finding that "each of the claimants' constitutional tort allegations may be analogized to an existing common-law tort for which there are adequate alternative remedies,"[235] thus suggesting that the available remedies need

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226. Claim No. 96098, Motion No. M-55475 (N.Y. Ct. Cl. July 30, 1997) ("Remley I").

227. *Id.* at 3 (citing Brown v. State, 89 N.Y.2d 172, 187 (1996)); *see also* Restatement of Torts (Second) § 874A. Like the *Ferrer* court, the court in *Remley I* cited several decisions from other states which have declined to imply damage remedies for state constitutional violations where alternative means of relief were available. *See Remley I*, at 3.

228. Remley v. New York, Claim No. 96098, Motion No. M-55592 (Ct. Cl. Sept. 30, 1997) ("Remley II").

229. *Id.* at 4.

230. *Id.*

231. *Id.* Specifically, the claimant in *Remley* had stated causes of action for malicious prosecution and negligent supervision. *Id.*

232. *See id.*

233. 1997 N.Y. App. Div. LEXIS 12007 (3d Dep't Nov. 26, 1997).

234. *See id.* at *7-8. The original claim in *Augat*, alleging violations of the New York due process and freedom of association clauses, was filed and dismissed prior to the court of appeals' decision in *Brown*. *Id.* at *1-2, *7. The *Brown* decision intervened while the appeal to the third department was pending, forcing a reconsideration of these claims.

235. *Id.* at *7.

not actually be asserted in order to preclude an implied constitutional claim.

Most recently, in *Bin Wahad v. City of New York*,[236] a federal district court denied the plaintiff's motion to add a pendent *Brown* claim to an ongoing federal civil rights suit under 42 U.S.C. § 1983.[237] Citing *Remley*, the district court stated that "the existence of alternative damage remedies under Section 1983 obviates the need to imply a private right of action under the [New York] Due Process Clause."[238] Moreover, the court ruled that a § 1983 claim was an adequate alternative remedy despite the fact that additional elements of proof are required to establish a § 1983 cause of action against a municipality.[239] Rather, the *Bin Wahad* court stated that "the *Brown* court interpreted the *Bivens* doctrine as requiring an 'adequate' remedy for the constitutional violation, not a direct substitute for the claim."[240] Thus, "Section 1983 need not provide the exact same standard of relief in order to provide an adequate remedy that would vindicate [p]laintiff's due process claims."[241]

It remains to be seen whether the New York Court of Appeals will adopt the reasoning and holding of these decisions and decline to permit an implied state constitutional cause of action where alternative remedies are available.[242] The compatibility of the *Brown* decision and the

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236. 1998 WL 996225 (S.D.N.Y. Mar. 1, 1998).

237. *See id.* at * 1.

238. *Id.* at *3. The *Bin Wahad* court did not rule upon whether a cause of action could be maintained under the New York due process clause in the absence of alternative remedies, although it stated that it "agree[d]" with the defendant's contention "that the New York courts would decline to imply a cause of action for the [due process] provision of the New York Constitution under the *Brown* analysis." *Id.* at *3.

239. *See id.* at *3 n.4. Specifically, § 1983 does not provide for *respondeat superior* liability against municipalities as would a claim based directly on the New York Constitution under *Brown*. *See id.*

240. *Id.*

241. *Id.*

242. Another court of claims decision departed from the reasoning of *Bin Wahad*, *Ferrer* and *Remley*, holding that the existence of alternative remedies was not an absolute bar to a direct constitutional cause of action but rather one of a number of "benchmarks" which may be used to determine whether such a right of action is appropriate. *See* De La Rosa v. State, 622 N.Y.S.2d 921 (Ct. Cl. Jul. 14, 1997). In addition, the court in *Schwartz v. Gamba*, N.Y.L.J., Nov. 25, 1997, at 25 (Sup. Ct. Suffolk Co. Nov. 23, 1997) allowed the plaintiffs to add a cause of action under 42 U.S.C. § 1983 in addition to their claims under the New York Constitution, although it noted that the doctrine of double recovery would bar the plaintiffs from obtaining an award under both § 1983 and the state constitution if the two claims were based upon the same facts. The trial court in *W.J.F. Realty Corp. v. Town of Southampton*, N.Y.L.J., Dec. 16, 1997, at 29 (Sup. Ct. Suffolk Co. Dec. 15, 1997) also allowed the plaintiffs to assert causes of action both

limitations imposed in *Bin Wahad*, *Ferrer* and *Remley* would create a cause of action to vindicate a broad array of rights—but only when needed.

III. THE *BROWN* ANALYSIS APPLIED TO SPECIFIC CONSTITUTIONAL PROVISIONS

Although the *Brown* court articulated a general standard for determining whether a cause of action for damages could be implied from any right conferred by the New York Constitution, it made specific findings as to only three of these.[243] The viability of a cause of action based on other New York constitutional rights was left for future courts to develop.[244]

Any analysis of the application of *Brown* to other New York constitutional rights must begin by identifying the rights which are most likely to be litigated. Certain rights in the state constitution, even those

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under 42 U.S.C. § 1983 and the New York Constitution, although it awarded damages only under § 1983. Neither of the Suffolk County Supreme Court decisions showed any awareness of the court of claims and third department precedent barring recovery under the New York Constitution where alternative remedies exist.

243. The *Brown* court, in addition to finding that the equal protection and search and seizure clauses of the New York Constitution were actionable, made the additional finding that the civil rights clause of article I, section 11 was not self-executing. Brown v. State, 89 N.Y.2d 172, 190, 674 N.E.2d 1129, 1140. Therefore, the *Brown* court indirectly held that the New York civil rights clause is not actionable for damages.

244. *See* Augat v. State, 1997 N.Y. App. Div. LEXIS 12007, at *7 (3d Dep't Nov. 29, 1997) (stating that the availability of damages under the New York due process and freedom of association protections was "not specifically resolved in *Brown*"). At least one commentator has offered the opinion that there is "no meaningful way to distinguish the equal protection and search and seizure clauses from other provisions of the New York Constitution which provide positive rights and have equivalents in the Federal constitution" for purposes of determining whether they are actionable under *Brown*. Schwartz Remarks, *supra* note 4. This, however, ignores the fact that numerous provisions of the New York Bill of Rights are textually distinct from their federal counterparts and thus subject to differing interpretation. *See* Simons Remarks, *supra* note 225, at 1 (if equivalent federal and state constitutional provisions are textually dissimilar, they may be analyzed differently); People v. P.J. Video, Inc., 68 N.Y.2d 296, 301, 501 N.E.2d 556, 559 (1986), *cert. denied*, 479 U.S. 1091 (1987). In addition, even provisions which are identical in language to their federal counterparts are subject to differential interpretation based on their history in New York courts. *See id.* Finally, the test set forth by the *Brown* majority for determining whether a constitutional provision is actionable is different from, and stricter than, that set out in *Bivens*, which makes no reference to self-execution. Thus, any determination as to whether a New York constitutional provision is actionable under *Brown* must be made in light of two centuries of independent interpretation by New York courts, and cannot be resolved by simple reference to federal equivalents.

which are self-executing, simply regulate the mechanics of state government and do not confer any enforceable right on individuals.[245] It would be highly unlikely for any plaintiff to seek a damage remedy under these provisions.[246]

Some indication of the rights which are most likely to be sued under can be drawn from federal civil rights law, both under *Bivens* and under 42 U.S.C. § 1983. In the area of *Bivens* litigation, the "heartland" of cases has involved the Fourth, Fifth and Eighth Amendments—that is, rights generally implicated in the context of criminal procedure or discrimination—although some lower courts have been allowed First or Sixth Amendment *Bivens* claims.[247] In general, § 1983 litigation, has also involved these five provisions of the Bill of Rights, although the wider reach of § 1983 permits actions based on other substantive constitutional rights, federal statutes, and even treaties.[248]

A canvass of state constitutional tort decisions thus far reveals that the majority of such litigation follows this pattern.[249] However, important differences also exist between constitutional tort litigation at the state and

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245. *See, e.g.*, Ghobashy v. Sabra, 127 Misc. 2d 915, 916, 487 N.Y.S.2d 626, 627 (Westchester Co. Ct. 1985) (holding that N.Y. CONST. art. VI, § 19(b), allowing transfers of actions between certain courts, is self-executing).

246. Even if an individual did attempt to sue under one of these provisions, it is almost certain that he would not be able to obtain a damage remedy under *Brown*. Although many of these provisions are self-executing and contain detailed operational instructions, it is not likely that either *Bivens* jurisprudence nor common-law antecedents would support a damage remedy. Further, section 874A or New York's related "statutory tort" doctrine would not support a damage remedy, as these constitutional provisions are intended and designed to insure the smooth operation of government rather than providing rights to individuals. *See* Brian Hoxie's Painting Co., Inc. v. Cato-Meridian Cent. Sch. Dist., 76 N.Y.2d 207, 212-13, 556 N.E.2d 1087, 1089-90 (1990).

247. Nordin, *supra* note 180, at 346.

248. *See* Carlos Manuel Vasquez, *Treaty-Based Rights of Individuals*, 92 COLUM. L. REV. 1082, 1146-47, n.273 (1992); Maine v. Thiboutot, 448 U.S. 1, 4-8 (1980).

249. For instance, the six cases which have considered New York constitutional claims since *Brown* have been confined to five provisions of the state constitution: the equal protection, due process, search and seizure, freedom of association, and cruel and unusual punishment clauses. These rights, with the exception of freedom of association, are equivalent to those conferred in the Fourth, Fifth, and Eighth Amendments to the United States Constitution, which are well within the heartland of both *Bivens* and § 1983 litigation. An informal survey of reported decisions in other state jurisdictions reveals that these are among the most commonly litigated rights outside New York as well, along with freedom of speech, freedom of religion, and the right to vote. *See generally* Part IV infra. All of these except the right of suffrage have been entertained as § 1983 or *Bivens* claims, and deprivation of the right to vote is independently actionable at common law. *See infra* notes 288-99 and accompanying text.

federal levels. For instance, the due process clause is likely to take a less prominent place in state than federal civil rights litigation, as the Fourteenth Amendment due process clause is the conduit by which many of the substantive rights contained in the United States Constitution are applied to the states.[250] If a state constitutional right, rather than a federal one, is being litigated, there is no need to use the due process nexus in order to bring the actions of a state official within the scope of the substantive provision.[251]

In addition, state constitutions tend to be more detailed documents than the Constitution of the United States,[252] and typically contain many more provisions for the operation of government which confer rights on the public at large or on specific classes of people.[253] In the area of state constitutional tort litigation, plaintiffs have attempted to enforce certain of these rights via suits for damages.[254] In addition, state constitutions also may contain provisions governing the formation and rights of corporations[255] and local government,[256] which arguably confer substantive and enforceable rights upon their intended beneficiaries. Finally, state bills of rights often contain rights which have no equivalent in the Federal Bill of Rights, and which have on occasion been enforced successfully in state constitutional tort litigation.[257]

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250. *See* Barry Latzer, *Toward the Decentralization of Criminal Procedure: State Constitutional Law and Selective Disincorporation*, 87 J. CRIM. L. & CRIMINOLOGY 63, 70 (1996).

251. The due process clause may nevertheless be applicable, however, as a general guarantee of fairness in criminal proceedings separate from the specific rights enumerated elsewhere in the constitution. *See* Taylor v. Kentucky, 436 U.S. 478, 490 (1978).

252. John Devlin, *Developments in the Law, 1986-1987: A Faculty Symposium: Louisiana Constitutional Law*, 48 LA. L. REV. 335, 349-50 (1987).

253. In the New York Constitution, these include the provisions governing suffrage (Article II), merit appointment of civil servants (Article V, § 6), education (Article XI), conservation (Article XIV), taxation (Article XVI) and social welfare (Article XVII).

254. *See* Leger v. Stockton Unified Sch. Dist., 202 Cal. App. 3d 1448, 1454 (Cal. 1988) (safe-schools clause); Agostine v. Sch. Dist. of Philadelphia, 523 A.2d 193 (Pa. 1987) (constitutional mandate of "a thorough and efficient system of education").

255. *See, e.g.*, N.Y. CONST. art. X.

256. *See, e.g.*, N.Y. CONST. art. IX. Section 1 of article IX is titled the "Local Government Bill of Rights" and was arguably intended as a declaration of rights parallel to those conferred on individuals in article I of the New York Constitution. *See* N.Y. CONST. art. IX, § 1.

257. *See, e.g.*, Cooper v. Nutley Sun Printing Co., 175 A.2d 639, 643 (N.J. 1961) (allowing private enforcement of New Jersey constitutional right to collective bargaining); Melvin v. Reid, 297 P. 91 (Cal. 1931) (allowing suit for damages based on the right to privacy under the California Constitution).

A. *The New York Bill of Rights*

Even recognizing the possibility of suits based on provisions outside article I of the New York Constitution, however, it remains likely that the majority of *Brown* litigation will focus on the rights guaranteed in the New York Bill of Rights. Thus far, only four of these provisions have been analyzed by New York courts considering the viability of a cause of action for damages.[258] The New York Bill of Rights contains 15 sections, many of which confer more than one substantive right;[259] however, several provisions of the bill of rights do not grant any rights to individuals.[260] Unlike many state constitutions, the New York Constitution does not contain a "natural rights" clause entitling New York citizens to life, liberty and the pursuit of happiness. The New York Bill of Rights does include provisions equivalent to the First,[261] Fourth,[262] Fifth,[263] Sixth[264] and Eighth[265] Amendments to the United States Constitution, although these may be interpreted differently from their federal counterparts.[266] The New

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258. *See* Brown v. State, 89 N.Y.2d 172, 186-92, 674 N.E.2d 1129, 1137-41 (search and seizure, equal protection, civil rights); De La Rosa v. State, 622 N.Y.S.2d 924 (Ct. Cl. July 14, 1997) (cruel and unusual punishment).

259. *See* N.Y. CONST. art. I. Article I originally contained 18 sections; however, sections 10, 13, and 15 have been repealed.

260. *See id.* § 6 (governing waiver of immunity by public officers and granting power to grand juries to investigate official misconduct); *Id.* § 9 (restricting the power of the legislature to grant divorces and regulating gambling); *Id.* § 14 (providing that New York law shall include English common law prior to 1775 and certain acts of the colonial legislature); *Id.* § 16 (providing that the cause of action for wrongful death shall not be abrogated); *Id.* § 18 (granting the legislature the power to enact workers' compensation laws).

261. *See id.* § 3 (freedom of religion); *Id.* § 8 (freedom of speech and press); *Id.* § 9 (freedom of assembly).

262. *See id.* § 12 (protection from unreasonable search and seizure).

263. *See id.* § 6 (self-incrimination and due process).

264. *See id.* (right to counsel and confrontation).

265. *See id.* § 5 (prohibiting cruel and unusual punishment and excessive bail).

266. *See, e.g.*, People v. Vilardi, 76 N.Y.2d 67, 75-77, 555 N.E.2d 915, 918-20 (1990) (holding that the New York due process clause provides broader protection than its federal counterpart for purposes of required disclosure of exculpatory evidence). Under one proposed test, a New York constitutional provision may be interpreted differently from an equivalent federal provision if it is textually different from the United States Constitution, or if there is "any preexisting State statutory or common law defining the scope of the individual right in question; the history and traditions of the State in its protection of the individual right; any identification of the right in the State Constitution as being one of peculiar State or local concern; and any distinctive attitudes of the State citizenry toward the definition, scope or protection of the individual right." People v.

York Bill of Rights does not contain any counterparts to the Second, Third or Seventh Amendments,[267] but does include additional rights which have no equivalent in federal constitutional law.[268]

The *Brown* decision itself found that the search and seizure and equal protection clauses of the New York Constitution supported a cause of action for damages.[269] In addition, the *Brown* court split the atom of article I, section 11 of the New York Constitution, holding that the equal protection clause was self-executing and actionable while the civil rights clause was not.[270] Since the *Brown* decision, only one New York court has made any finding as to the availability of a cause of action based on another provision of the state constitution. In *De La Rosa v. State*,[271] the court of claims determined that a cause of action would be available for violation of the cruel and unusual punishment clause of article I, section

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P.J. Video, Inc., 68 N.Y.2d 296, 303, 501 N.E.2d 556, 560 (1986), *cert. denied*, 479 U.S. 1091 (1987). Although the court of appeals has since retreated from the *P.J. Video* test, (see People v. Scott, 79 N.Y.2d 474, 502, 593 N.E.2d 1328, 1345 (1992)), it continues to use the *P.J. Video* standards as persuasive factors in determining when a New York constitutional right should be interpreted differently from its federal counterpart. *See Scott*, 79 N.Y.2d at 502, 593 N.E.2d at 1345.

267. Given the breadth of the rights provided in New York constitutional law and the historical willingness of the New York courts to protect the rights of criminal defendants, the New York Constitution also contains certain startling omissions in the area of criminal procedural rights. For example, New York is one of only four states not to include a constitutional provision forbidding the passage of ex post facto laws. *See* Abraham Abramovsky, *Megan's Law: Is It Constitutional, and Is It Moral?*, N.Y.L.J., July 11, 1995, at 3.

268. *See* N.Y. CONST. art. I, § 2 (defining rules for waiver of trial by jury); *Id.* § 12 (providing protection against interception of telephone and telegraph communications); *Id.* § 17 (governing wages and hours in public work and providing a right to collective bargaining).

269. *See supra* notes 68-92 and accompanying text. The *Brown* court, strictly speaking, reached a conclusion only as to the existence of a cause of action based on the search and seizure clause of article I, section 12 of the New York Constitution and not as to the wiretap clause. However, the court of appeals would be almost certain to imply a cause of action from the wiretap clause if a lawsuit stemming from that provision were brought. The wiretap clause of article I, section 12 has been held self-executing, see *In re Intercepting Telephone Communications*, 55 Misc.2d 163, 165-66 (Supreme Ct. Queens Co. 1967), and the reasoning of the *Brown* majority regarding the necessity of a damage remedy to the enforcement of the search and seizure clause is equally valid as to the wiretap clause. *See* Brown v. State, 89 N.Y.2d 172, 190-92, 674 N.E.2d 1129, 1139-41. Moreover, antecedents for such a cause of action may be said to exist, inasmuch as federal statute law provides a civil cause of action for damages for the victim of an unlawful wiretap. *See* 18 U.S.C. § 2520.

270. *See Brown*, 89 N.Y.2d at 186-92, 674 N.E.2d at 1137-41.

271. 622 N.Y.S.2d 921 (Ct. Cl. July 14, 1997).

5 of the New York Constitution.[272] Applying the *Brown* analysis, the court held that "[t]he provision is self executing and imposes a clearly defined duty upon State officers and employees" and that injunctive or declaratory relief would often be inadequate in cases where harm had already been caused by state officials' unconstitutional conduct.[273] The court stated further that "one could reasonably conclude that . . . a monetary recovery for a violation of [article I, section 5] would further its purposes and assure its effectiveness by acting as a deterrent to governmental misconduct."[274]

Although the *De La Rosa* decision emanated from a lower court and thus has limited authority, it is in line with *Bivens* jurisprudence and with decisions from other states which have been faced with claims for damages predicated on equivalent rights. In *Carlton v. Department of Corrections*,[275] a Michigan court determined that a violation of the Michigan cruel and unusual punishment clause was an "appropriate case" in which a damage remedy could properly be implied directly from the state constitution.[276] Similarly, in *Bott v. DeLand*,[277] the Supreme Court of Utah held that an equivalent clause in the Utah Constitution was self-

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272. *Id.* at 924. The *De La Rosa* court made no findings as to the availability of a cause of action based on the other provisions of article I, section 5, which prohibit excessive bail and unreasonable detention of witnesses. It is unlikely that these clauses are self-executing, as the intent of their framers as expressed at the 1846 Constitutional Convention was "to assert a liberal principle" rather than to provide specifically defined rights. *See* REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF NEW YORK 1062 (1846). The delegates to the 1846 Convention recognized that both the excessive bail and unreasonable detention clauses were vague in the rights they conferred. *See id.* Moreover, these clauses were enacted in conjunction with other provisions setting out more specific prohibitions on the detention of witnesses, which have since been removed from the New York Constitution. *See id.* at 1061-62 (adopting article I, section 12, setting forth procedures for temporary detention and examination of witnesses in criminal cases). Thus, it would appear that the clauses now included in article I, section 5 represent only a statement of principle and not a grant of specific and self-executing rights. Further, even if these clauses were held to be self-executing, a money damage remedy would not be necessary as the rights therein could be vindicated by a reduction of bail or a release from temporary detention.

273. *De La Rosa*, 622 N.Y.S.2d at 924. The court noted that "it [was] damages or nothing" for the plaintiff because he had already contracted tuberculosis while incarcerated and therefore could not be made whole via equitable relief. *Id.* (quoting *Brown*, 89 N.Y.2d at 192, 674 N.E.2d at 1141.

274. *Id.*

275. 546 N.W.2d 671 (Mich. 1996).

276. *Id.* at 678.

277. 922 P.2d 732 (Utah 1996).

executing and actionable because it "arose from the English Bill of Rights of 1689, which actively and immediately proscribed tortures and other barbaric practices and was enforced without further definition by parliament."[278]

The remainder of the provisions of the New York Bill of Rights have not yet undergone any definitive analysis under *Brown*. However, previous courts have made findings as to whether two of these rights were self-executing. In *Trippe v. Port of New York Authority*,[279] the court of appeals ruled that the plaintiffs, who complained of reduction in property values caused by the operation of Kennedy Airport, could not base their lawsuit directly on article I, section 7 of the New York Constitution.[280] While acknowledging that this clause is "a mandate for payment,"[281] the *Trippe* court held that it was not "a self-executing, complete and absolute guarantee of compensation."[282] Rather, the language of the just compensation clause "is on its face no more than a listing of the tribunals or agencies by which compensation is to be fixed, [and] [c]onsent to suit is not included and must be looked for elsewhere."[283] In short, this section "states a liability but has nothing to do with enforcement of the claim," and a cause of action only existed in combination with a statute providing consent to sue.[284]

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278. *Id.* at 737-38. The *Bott* court also held that the Utah cruel and unusual punishment clause "prohibits specific evils that may be defined and remedied without implementing legislation." *Id.* at 737.

279. 14 N.Y.2d 119, 198 N.E.2d 585 (1964).

280. *Id.* at 125, 198 N.E.2d at 587. Article I, section 7(a) of the New York Constitution provides that "[p]rivate property shall not be taken for public use without just compensation." Section 7(b) further provides that the amount of compensation to be paid when private property is taken for public use shall be adjudicated "as shall be prescribed by law."

281. *Trippe*, 14 N.Y.2d at 123-24, 198 N.E.d at 586-87.

282. *Id.* at 125, 198 N.E.2d at 587.

283. *Id.* The *Trippe* court also cited the early case of *People ex rel. Dubois v. Supervisors of Ulster County*, 3 Barb. 334 (1847), noting that "[t]he Dubois case says that Article I (§ 7, subd. [b]) prescribes only the mode for fixing the compensation, that it contemplated legislation as to authorizing suits, etc., and that without such legislation no suit for damages would lie." *Trippe*, 14 N.Y.2d at 125-26, 198 N.E.2d at 587.

284. *Trippe*, 14 N.Y.2d at 125, 198 N.E.2d at 587. A statute did exist providing a cause of action against the Port Authority for inverse condemnation, but was not available to the plaintiffs in *Trippe* due to its one-year statute of limitations. *Id.* at 122, 198 N.E.2d at 586. The *Trippe* decision represents a narrow view of self-execution which places New York in a considerably more conservative position than most other states with regard to enforcement of the just compensation clause. Professor Friesen has noted that, in contrast to most provisions of state bills of rights, "one particular form of government deprivation is normally constitutionally *required* to be compensated: the

The only other provision of the bill of rights which a finding as to self-execution has been made is article I, section 2, which establishes procedures for waiving the right to trial by jury.[285] The court of appeals arrived at a mixed holding with regard to this section in 1958, holding that the provision dealing with criminal cases was self-executing but that the provision concerning civil cases was not because it specifically mandated further legislative action.[286] Even though the provision concerning criminal cases is self-executing, however, it seems unlikely that a damage remedy would be inferred for its violation. The right at issue in section 2 is technical in nature, and the proceedings of the 1938 constitutional convention at which the provision was enacted demonstrate that its purpose was not to deter government misconduct but to protect criminal defendants against their own improvidence.[287] As such, it creates no duties enforceable by a suit for damages. Moreover, a damage remedy is not necessary to achieve its goals, because any violation could be remedied by granting a jury trial.

No findings as to self-execution, or the availability of an action for damages, have been made concerning the remainder of the New York Bill of Rights. Analysis of these provisions begins with article I, section 1 of the New York Constitution, which provides that no "member of this state" may be "disenfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers."[288] This section, which derives from "the famous

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taking or damaging of private property for public use." FRIESEN, *supra* note 65, § 7.07, at 7-38.3. Thus, even many states which do not otherwise allow state constitutional tort actions have allowed an independent right of action for enforcement of the right to just compensation. *See, e.g.*, Steele v. City of Houston, 603 S.W.2d 786, 793 (Tex. 1980) (owners of home destroyed by police in order to flush out escaped prisoners were entitled to just compensation); Wegner v. Milwaukee Mut. Ins. Co., 479 N.W.2d 38, 42 (Minn. 1991) ("innocent third party" entitled to compensation for damage done to his property during the application of a fleeing felon). New York's reluctance to do so may lie in the New York Constitution's specific statement that the manner of compensation "shall be prescribed by law," a factor which weighed heavily in the reasoning of the *Trippe* court. *Trippe*, 14 N.Y.2d at 125, 198 N.E.2d at 587.

285. *See* N.Y. CONST. art. I, § 2.

286. *See* People v. Carroll, 3 N.Y. 686, 689-91, 148 N.E.2d 875, 877-88 (1958).

287. *See* 2 REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK, 1273-75 (vol. II 1938). "The proposal . . . is intended to protect the rights of the defendant, to assure him by the necessity for an approval by the judge of full opportunity to understand what he is doing. That is all that there is in this proposal." *Id.* at 1274.

288. N.Y. CONST. art. I, § 1. This section also contains a provision, enacted in 1959, allowing the cancellation of primary elections in cases where there is no contest, which would otherwise work a deprivation of the franchise. *Id.*

39th Article of Magna Charta,"[289] combines the language of the civil rights and due process clauses of the New York Constitution.[290]

The language of article I, section 1 which provides that no citizen may be deprived of "rights and privileges" except by law, is most likely not self-executing. As with the civil rights clause itself, article I, section 1 is not in itself the source of any rights, but only protects rights guaranteed elsewhere.[291] Thus, as with the civil rights clause, this section would not be amenable to an action for damages.

The provision of article I, section 1 prohibiting disenfranchisement, however, warrants closer examination. As with the language concerning rights and privileges, this does not confer any rights by itself; however, a specific right to vote is conferred in article II, section 1 of the New York Constitution, and New York courts have held that article I, section 1 must be read together with this section.[292] This provision confers a universal right of suffrage upon all New York citizens who are 18 years of age and meet specific residency requirements.[293] Other than several very narrow and specific categories of person excluded from suffrage by the New York Constitution itself,[294] this right is inalienable and inviolable. Moreover, the New York courts have specifically stated that "the right to vote is not dependent on legislative action"[295] and that "[n]o action by or failure to act

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289. 1 C.Z. Lincoln, THE CONSTITUTIONAL HISTORY OF NEW YORK FROM THE BEGINNING OF THE COLONIAL PERIOD TO THE YEAR 1905, SHOWING THE ORIGIN, DEVELOPMENT AND JUDICIAL CONSTRUCTION OF THE CONSTITUTION 522 (1906); *see also* People v. Priest, 206 N.Y. 274, 289, 99 N.E. 547, 552 (1912).

290. *See* N.Y. CONST. art. I, § 6 (due process); § 11 (civil rights). The New York courts have noted that "[t]he phrase 'law of the land' . . . is equivalent to the phrase 'due process of law.'" People v. Priest, 206 N.Y. 274, 289, 99 N.E. 547, 552 (1912) (citations omitted).

291. People *ex rel.* Gow v. Bingham, 57 Misc. 66, 69, 107 N.Y.S. 1011, 1014 (Sup. Ct., Kings Co. 1907). Referring to article I, section 1 and the due process clause of article I, section 6, the *Gow* court stated that "[t]hese constitutional provisions are not the sources of any right; they are in the nature of a shield against any unwarrantable interference with such rights by any department of the government, executive, legislative or judicial." *Id.* at 69, 107 N.Y.S. at 1014.

292. *See* Cohen v. State, 52 Misc. 2d 324, 326, 275 N.Y.S.2d 719, 721 (Sup. Ct., Bronx Co. 1966).

293. *See* N.Y. CONST. art. II, § 1.

294. Article II, section 3 provides that any person giving or receiving consideration for a vote at any election, or any person interested in a wager on the result of an election, shall not be eligible to vote at that election, and gives procedures for challenging the vote of such person. The legislature is also directed to withhold suffrage from "all persons convicted of bribery or of any infamous crime."

295. *In re* Zierbel, 102 Misc. 626, 628, 169 N.Y.S. 270, 272 (Sup. Ct. Erie Co. 1918).

on the part of the legislature" may impair the right of suffrage.[296] In other words, the constitutional right to vote in New York is self-executing.

There is considerable authority, as well, to support a damage action for deprivation of the right to vote. A disenfranchised plaintiff could not be made whole through prospective relief, as he has already suffered the loss of his vote.[297] In California, the only state to consider a state constitutional tort action based on deprivation of franchise, the court found that the right to vote was self-executing and enforceable by an action for damages, especially in light of the *"special dignity"* accorded to the franchise in American democracy.[298] Moreover, civil actions for deprivation of the right to vote have been allowed at common law since 1703.[299] Accordingly, the disenfranchisement clause of article I, section

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296. *Id.* at 628, 169 N.Y.S. at 272.

297. If sufficient numbers of voters are disenfranchised as to potentially change the result of an election, the election may be nullified. *See id.* However, the burden of proof is on the plaintiff to show that the election would actually have been decided differently if every qualified elector had been allowed to cast his vote. *See id.* Thus, disenfranchisement of a single voter will almost certainly not result in such equitable relief, leaving money damages as the only remedy for the loss of civil rights.

298. Fenton v. Groveland Community Servs. Dist., 185 Cal. Rptr. 758, 763 (Ct. App. 1982) (comparing the franchise to free speech and press) (citations omitted).

299. The classic case of *Ashby v. White*, 92 Eng. Rep. 126 (K.B. 1702), was brought by a freeholder who was deprived of his right to vote for a representative in Parliament. Chief Justice John Holt expressed the opinion that the jury verdict in favor of the plaintiff should be upheld, as "[t]his right of voting is a right in the plaintiff by the common law, and consequently he shall maintain an action for the obstruction of it" and because allowing such an action "will make publick officers more careful to observe the constitution of cities and boroughs, and not be so partial as they commonly are in all elections, which is indeed a great and growing mischief, and tends to the prejudice of the peace of the nation." *Id.* at 136-37 (Holt, C.J., dissenting). Although a majority of the King's Bench disagreed with Chief Justice Holt and reversed the jury verdict, it was reinstated the following year on appeal to the House of Lords. *See* Ashby v. White, 1 Eng. Rep. 417, 418 (H.L. 1703). Since the decision of the House of Lords, an action for deprivation of suffrage has been available at common law in England. In addition, such claims have been recognized at common law in the United States. *See* Nixon v. Herndon, 273 U.S. 536, 540 (1927) ("That private damage may be caused by [deprivation of franchise] and may be recovered for in a suit at law hardly has been doubted for over two hundred years . . . ."). This cause of action has been recognized even in certain states which have not allowed claims for violation of other constitutional rights. *See* Jeffries v. Ankeny, 11 Ohio 372, 373-75 (1842) (upholding damage award to plaintiff wrongfully deprived of franchise in violation of the Ohio Constitution, article 4, section 1). In New York, support for a damage remedy for deprivation of the right to vote can be derived both from the constitutional entitlement to pre-1775 English common law, and independent New York decisional law. *See* Goetcheus v. Madison, 61 N.Y. 420, 426, 429 (1875).

1, in combination with the right to vote provided in article II, would likely support an action for damages under *Brown*.

The New York Constitution also includes the First Amendment trilogy of freedom of speech,[300] religion[301] and assembly.[302] These provisions protect rights which are traditionally considered together in American jurisprudence, and set forth these rights in similar terms. Thus, these rights may be examined together under the standards articulated in *Brown*. Each of these three sections confers specific and positive rights, which do not require enabling legislation to become effective. In Vermont, a state with a constitutional liability scheme similar to New York,[303] the right of free speech was held self-executing and actionable.[304] In arriving at this conclusion, the court noted that "it would make little sense to have the right to speak out on government matters depend on legislative enactment, considering the fundamental nature of citizen input in our republican form of government."[305] Similarly, the courts of North Carolina have held that the free speech clause of the North Carolina Constitution, which guarantees that freedom of speech and the press "shall never be restrained,"[306] provides "a direct personal guarantee of each citizen's right of freedom of speech" and therefore can be the basis of a cause of action for damages.[307] Since similar language is contained in New York's free speech and freedom of religion clauses,[308] it is entirely possible that the court of appeals will agree with the North Carolina Supreme Court that "[a] direct action against the State for its violations of free speech is essential to the preservation of free speech."[309]

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300. *See* N.Y. CONST. art. I, § 8.

301. *See id.* § 3.

302. *See id.* § 9.

303. *See infra* notes 445-50 and accompanying text.

304. *See* Shields v. Gerhart, 658 A.2d 924, 930 (Vt. 1995).

305. *Id.* at 930. The court also found that recognition of free speech as a self-executing right "comports with the general constitutional scheme" as it is a specific right "that is crucial to the operation of government and vital to the effectuation of other enumerated rights." *Id.*

306. N.C. CONST. art. I, § 14.

307. Corum v. University of North Carolina, 413 S.E.2d 276, 289 (N.C. 1992).

308. Article I, section 3 provides that freedom of worship "shall forever be allowed in this state to all mankind." Article I, section 8 states that no law shall be passed "to restrain or abridge the liberty of speech or the press."

309. *Corum*, 413 S.E.2d at 289. An appellate court in California, as well, has allowed a civil damages action for violation of freedom of the press under the California Constitution. *See* Laguna Publ'g Co. v. Golden Rain Found., 182 Cal. Rptr. 813, 832-35 (Ct. App. 1982). A later federal decision in California, however, has used a narrower

The rights of criminal defendants under the New York Constitution, combining the protections found in the Fifth and Sixth Amendments to the United States Constitution, are found in article I, section 6. Interspersed with provisions governing the powers of grand juries and waiver of immunity by public officials[310] in this section are the right to indictment by grand jury for felony offenses, the right to counsel, the right to confront witnesses and be informed of the nature of criminal charges, and protections against self-incrimination and double jeopardy.[311] In addition, this section provides, in language similar to that of the Fifth Amendment, that no person shall be deprived of life, liberty or property without due process of law.[312]

The criminal procedural rights enumerated in article I, section 6 are different in character from the due process clause. Each of the procedural rights guaranteed by section 6 is more than a statement of general principles; each such provision "supplies a sufficient rule by means of which the right given may be enjoyed and protected,"[313] and requires no legislative action to take effect. The protections against self-incrimination and double jeopardy, as well as the rights to indictment, counsel and confrontation, do not depend upon implementing legislation, and were enforced well before their codification in the current New York Penal Law.[314] Thus, all these rights are self-executing.[315]

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definition of self-execution to exclude an action for violation of free speech, holding that the California free speech clause did not provide "'rules by means of which' the principles at issue could be given force of law" and was "devoid of 'guidelines, mechanisms or procedures from which a damages remedy could be inferred.'" Coming Up, Inc. v. City and County of San Francisco, 857 F. Supp. 711, 719 (N.D. Cal. 1994) (quoting Leger v. Stockton Unified Sch. Dist., 249 Cal. Rptr. 688, 691 (Ct. App. 1988). The New York Court of Appeals, however, has allowed actions based on the New York equal protection and search and seizure clauses, which are similarly devoid of mechanisms for recognizing a damage remedy. Thus, it is unlikely that the rationale of the *Coming Up, Inc.* court will prevent the New York courts from recognizing a cause of action for violation of freedom of speech, religion or assembly.

310. *See* N.Y. CONST. art. I, § 6. This section specifically provides that grand juries shall have the power to inquire into the misconduct of public officials, and that any public officer who refuses to testify or waive immunity when called before a grand jury shall forfeit his office. *See id.*

311. *See id.*

312. *See id.*

313. *Leger*, 249 Cal. Rptr. at 691 (quoting Older v. Superior Court, 109 P.478 (1910) (quoting THOMAS COOLEY, CONSTITUTIONAL LIMITATIONS (7th ed. 1903)).

314. *See, e.g.*, People v. Hartnett, 124 Misc. 418, 208 N.Y.S. 246, 250 (Erie County Ct. 1925) (involving the right to confrontation).

The availability of a cause of action for damages for violation of these rights is less certain. The provision of article I, section 6 dealing with waiver of grand jury indictment, for instance, is similar to the procedures for waiver of jury trial set forth in article I, section 2; that is, it requires no implementing legislation and contains considerable operational detail.[316] However, this clause is also like article I, section 2 in that it is technical in nature and violations can be remedied by dismissal of the unlawful indictment with leave to re-present.[317] Thus, money damages would not be necessary to further the purpose of this constitutional provision.

Prospective relief may be less effective, however, in vindicating the other rights guaranteed by article I, section 6. As these clauses protect fundamental rights of a criminal defendant at trial, violation may lead to long-term loss of liberty and great financial hardship. These rights may be enforced through reversal of criminal convictions,[318] but such a remedy is neither an adequate deterrent to prosecutorial misconduct nor adequate compensation for the time which has been lost forever to the plaintiff.[319] If the court of appeals adopts the *Ferrer* court's doctrine that a *Brown*

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315. The court of appeals, in *People v. Garofolo*, 46 N.Y.2d 592, 389 N.E.2d 123 (1979), stated that the constitutional guarantee against self-incrimination is "far from self-executing." *Id.* at 599, 389 N.E.2d at 126. However, this statement was made in the context of a discussion of the right to counsel. This context indicates that the court of appeals meant that criminal defendants required the assistance of counsel to effectively invoke the protection against self-incrimination, not that it required legislative action to take effect. *See id.* at 599, 389 N.E.2d at 126.

316. *See supra* notes 285-86 and accompanying text (discussing the self-executing nature of article I, section 2 of the New York Constitution).

317. *See supra* note 287 and accompanying text (discussing the availability of a cause of action under *Brown* for violation of article I, section 2). In addition, the right to indictment by grand jury is one of the few provisions of the Federal Bill of Rights which have not been incorporated against the states through the due process clause of the Fourteenth Amendment. *See* Hurtado v. California, 110 U.S. 516, 521 (1884). Although this is federal rather than New York precedent, it may provide evidence that the right to indictment by grand jury is not as significant as other criminal procedural protections and is therefore less appropriate as a basis for an action for damages. *See* Thomas B. McAffee & Michael J. Quinlan, *Bringing Forward the Right to Bear Arms: Do Text, History or Precedent Stand in the Way?*, 75 N.C. L. REV. 781, 784-85 n.7 (1997) (stating that the non-incorporation of the grand jury clause "suggest[s] that it was not viewed as fundamental to the same extent as other procedural guarantees").

318. *See, e.g.*, People v. Schaeffer, 56 N.Y.2d 448, 454, 438 N.E.2d 94, 98 (1982) (discussing the right to counsel).

319. The availability of such a cause of action would, of course, be dependent on the existence of causation; that is, proof that the plaintiff's injury was caused by the violation of his constitutional rights.

cause of action is unavailable where alternative remedies exist,[320] it will face the difficult decision of determining whether the reversal of a criminal conviction can be considered an adequate alternative remedy.

The final provision of article I, section 6 is a due process clause identical in language to the Fifth Amendment of the United States Constitution. In many ways, this right is the key protection available to criminal defendants, providing a general protection against an unfair trial even if it results from factors other than the rights specifically enumerated elsewhere in the constitution.[321] However, the very broadness which makes the due process clause such a powerful protector of the rights of the accused also renders it one of the closest calls in an analysis under *Brown*.[322]

Because the due process clause is a protection against fundamental prosecutorial misconduct, the court of appeals would likely allow an action for money damages under this provision if it were found to be self-executing.[323] The key issue, therefore, is whether the due process clause requires implementing legislation to take effect. The court of appeals has twice held that the due process clause is not self-executing,[324] even going so far as to say that the provision is "far from self-executing."[325] Conversely, one court of claims decision has stated in dicta that the due process clause is probably self-executing,[326] but this decision was not

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320. *See supra* notes 217-24 and accompanying text (discussing the *Ferrer* decision).

321. *See* Taylor v. Kentucky, 436 U.S. 478, 490 (1978). The New York due process clause, for example, has been interpreted to provide a right to disclosure of exculpatory evidence, which is not mandated elsewhere in the constitution. *See* People v. Vilardi, 76 N.Y.2d 67, 77, 555 N.E.2d 915, 919 (1990).

322. Among the reasons why the court of appeals expressly limited its holding in *Brown* to the equal protection and search and seizure clauses was its awareness of recent federal courts' concern that application of *Bivens* to a wide array of constitutional rights, especially rights as open-ended as due process, might create too broad a base of liability. Thus, the court of appeals reserved decision on the remainder of the New York Constitution until such time as the applicability of *Brown* to these rights could be fully briefed and argued. *See* Telephone interview with the Hon. Richard D. Simons, former Associate Judge, New York Court of Appeals (Oct. 8, 1997).

323. *See supra* note 92 and accompanying text (discussing the *Brown* court's reasoning regarding the necessity of damages as a deterrent to official misconduct).

324. *See* People v. White, 56 N.Y.2d 110, 115, 436 N.E.2d 507, 510 (1982); People v. Garofolo, 46 N.Y.2d 592, 599, 389 N.E.2d 123, 126 (1979).

325. *Garofolo*, 46 N.Y.2d at 599, 389 N.E.2d at 126. This statement, however, as well as the similar pronouncement in *White*, was not necessary to the court of appeals' decision, and the court did not explain its reasoning in making this conclusion.

326. *See* Goddard v. State, 662 N.Y.S.2d 179, 181 (Ct. Cl. June 20, 1997); Remley v. State, Claim No. 96095, Motion No. M-55475, at 3 (Ct. Cl. July 30, 1997).

briefed by the parties and was considered only in passing by the court.[327] Thus, a more thorough examination is necessary to determine the position of the due process clause in New York law.

Some guidance as to this comes from the decision of *People ex rel. Gow v. Bingham*,[328] which stated that the guarantee of due process is not the source of any right, but only a protection against interference with rights declared elsewhere.[329] The language in the *Gow* decision closely tracks the language which has been used by the court of appeals in determining that the civil rights clause of article I, section 11 is not self executing.[330] Similarly, the early decision in *Squares v. Campbell*[331] specified that "the manner in which the parties shall be [accorded due process of law through judicial proceeding] are within the province and constitutional power of the legislature."[332] Thus, it appears that the New York courts have viewed the due process clause similarly to the civil rights clause, as requiring implementing legislation to take effect. In addition, although there is no explicit statement of legislative intent concerning the

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327. *See* Telephone interview with David Crosby, Law Clerk to Judge Philip J. Patti, New York Court of Claims (Sept. 30, 1997). In addition, the *Remley* court's reliance on *Rivers v. Katz*, 67 N.Y.2d 485, 495 N.E.2d 337 (1986) for the proposition that the due process clause is self-executing rests on flawed reasoning. In *Rivers*, the court of appeals specifically noted that the liberty interest at issue—the right to refuse medication—was "a firmly established principle of the common law of New York" and was also recognized by statute. *See id.* at 492-93. The court, in fact, held further that "[t]his fundamental common law right is coextensive with the patient's liberty interest protected by the due process clause of our state constitution." *Id.* at 493. Thus, the *Rivers* court did not hold that the due process clause creates any rights in itself but only that it protected against arbitrary government interference with rights already defined elsewhere. This strongly implies that the due process clause is *not* self-executing. *See* Dorsey v. Stuyvesant Town Corp., 299 N.Y. 512, 531, 87 N.E.2d 541, 548 (1949) (civil rights clause in article I, section 11 of the New York Constitution, which protects "rights . . . elsewhere declared," is not self-executing); *see also* Brown v. State, 89 N.Y.2d 172, 190, 674 N.E.2d 1129, 1140 (1996); People v. Kern, 75 N.Y.2d 638, 651, 554 N.E.2d 1235, 1241 (1990) ("The Civil Rights Clause is not self-executing . . . and prohibits discrimination only as to civil rights which are 'elsewhere declared' by Constitution, statute or common law.").

328. 57 Misc. 66, 107 N.Y.S. 1011 (Sup. Ct., Kings Co. 1907).

329. *See id.* at 69, 107 N.Y.S. at 1014; *see also* Fidler v. Murphy, 203 Misc. 51, 53 (Sup. Ct., Onondaga Co. 1952); Van Allen v. McCleary, 27 Misc.2d 81, 83-84 (Sup. Ct., Nassau Co. 1961).

330. *See Kern*, 75 N.Y.2d at 651 (The civil rights clause protects "only . . . civil rights which are 'elsewhere declared' by Constitution, statute, or common law.").

331. 60 Barb. 391 (N.Y. App. Div. 1871).

332. *Id.* at 398.

New York due process clause,[333] other sources indicate that the Legislature has viewed implementation of the right to due process as a legislative function.[334] Moreover, the vagueness and sweeping language of this provision indicate that it was meant as a statement of general principle and not as a specific right enforceable on its own.[335]

Unlike most other constitutional provisions which have a federal equivalent, state courts have not reached a consensus on the availability of a state constitutional due process action. A California court found that "the Lockean trilogy [of] *life*, *liberty* and *property* in the due process clause of our state [c]onstitution" provided a sufficient guideline for enforcement of the due process right and afforded an adequate measure of damages for losses due to violation thereof.[336] Causes of action have also

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333. ROBERT ALLAN CARTER, THE NEW YORK STATE CONSTITUTION: SOURCES OF LEGISLATIVE INTENT 6 n.15 (1988).

334. For instance, the New York Family Court Act has been characterized as "a systematic effort to provide a due process of law." Governor's Memorandum on Chapters 684-705 of the Laws of 1962, McKinney's 1962 Session Laws of New York 3649, 3652; see also N.Y. FAM. CT. ACT § 711 (McKinney 1983) ("The purpose of this article is to provide a due process of law . . . ."); N.Y. FAM. CT. ACT § 1011 (McKinney 1983) ("[This article] is designed to provide a due process of law . . . .")

335. No court has yet addressed whether the reasoning of decisions such as *Gow* and *Squares* is affected by modern concepts of "substantive due process." The holdings of both federal and New York courts which have considered the nature of substantive due process protection, however, indicate that this reasoning is still valid and that due process only protects rights which have been defined elsewhere. *See* Francis S. Chlapowski, *The Constitutional Protection of Informal Privacy*, 71 B.U. L. REV. 133, 143 (1991) (stating that the historical tradition theory of substantive due process, which is currently accepted by the Supreme Court, "posits that any extratextual constitutional right must be one that traditionally has been protected"); Moore v. East Cleveland, 431 U.S. 494, 503 (1977) (citing prior Supreme Court decisions recognizing right to integrity of family life as grounds for affording substantive due process protection to family relationships); Hewitt v. Helms, 459 U.S. 460, 467-72 (1983) (states may create liberty interests protected by the Due Process Clause through the enactment of statutes, rules or regulations); Bowers v. Hardwick, 478 U.S. 186, 192-94 (1985) (due process clause protects liberties which can objectively be shown to be "deeply rooted in this Nation's history and tradition"); Rivers v. Katz, 67 N.Y.2d 485, 493, 495 N.E.2d 337, 341 (1986) (substantive due process protection of right to refuse medical treatment "coextensive" with common-law right). These decisions, combined with the court of appeals' two recent declarations that the New York due process clause is not self-executing, see *infra* notes 336-37 and accompanying text, indicates that the due process clause is still viewed as similar to the non-self-executing civil rights provision of article I, section 11.

336. Bonner v. City of Santa Ana, 33 Cal. Rptr. 2d 233, 240 (Ct. App. 1994), *vacated on other grounds*, 884 P.2d 987 (Cal. 1995). On remand, the appellate court found that a money damage remedy was unavailable for violation of the California due process clause for reasons unrelated to whether it was self-executing. The second *Bonner*

been allowed, albeit by federal courts, based on the Illinois and Rhode Island due process clauses.[337]

Another federal court in Utah, however, has stated flatly that the due process clause of the Utah Constitution "[is] not self-executing and contain[s] no provision or mechanism for court action or remedy."[338] Similarly, a court in Washington State has ruled that "[a]cts violative of the [due process] clause may be declared void by the courts, but the clause does not, of itself, provide the remedy of reparation."[339] In addition, a Michigan court has held that "the lack of 'clarity of the constitutional protection and violation'" in the Michigan due process clause "would militate against a judicially inferred damage remedy."[340]

Moreover, while due process *Bivens* actions have been allowed,[341] *Bivens* analysis only comes into play under *Brown* once the constitutional right in question has previously been determined to be self-executing.[342] Thus, it is difficult to predict the response of the court of appeals to a future state due process suit, although the clear stance of prior New York decisions indicates that the high court would more likely than not refuse such an action.

Section 17 of article I, the final section of the New York Bill of Rights which contains substantive individual rights, confers rights which are not equivalent to any stated in the United States Constitution. Created

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decision turned on legislative intent, which is inapplicable to the New York due process clause as no explicit statement of legislative intent exists. *See* Bonner v. City of Santa Ana, 53 Cal. Rptr. 2d 671, 675 (Ct. App. 1996).

337. *See* Jones v. Rhode Island, 725 F. Supp. 25, 34-36 (D.R.I. 1989); Clark v. City of Chicago, 595 F. Supp. 482, 486 (N.D. Ill. 1984). A lower court in Wisconsin has also allowed a state constitutional tort cause of action based on due process, based on the allowance of such actions under *Bivens*. *See* Old Tuckaway Assocs. v. City of Greenfield, 509 N.W.2d 323, 328 n.4 (Wis. 1993).

338. Snyder v. Murray City Corp., 902 F. Supp. 1444, 1453 (D. Utah 1995).

339. Systems Amusement, Inc. v. State, 500 P.2d 1253, 1255 (Wash. 1972) ("The due process clause is not even a positive mandate to preserve existing causes of action. Much less can it be relied upon, as an affirmative mandate to create new causes of action."). *Id.* (citations omitted).

340. Marlin v. City of Detroit, 517 N.W.2d 305, 308 (Mich. 1994) (citing Smith v. Department of Health, 410 N.W.2d 749 (Mich. 1987)).

341. *See, e.g.*, FDIC v. Meyer, 510 U.S. 471 (1993). The *Meyer* court, however, cautioned that due process *Bivens* claims are "appropriate in some contexts but not in others." *Id.* at 484 n.9.

342. Brown v. State, 89 N.Y.2d 172, 186-87, 673 N.E.2d 1129, 1137-38 (N.Y. 1996).

to protect labor, this section includes a right to collective bargaining[343] and restrictions upon the wages and hours of public employees,[344] as well as providing that human labor is not a commodity.[345]

Two of these provisions may provide rights which are actionable under *Brown*. The clause of section 17 stating that labor is not a commodity does not constitute a prohibition against slavery or against the purchase and sale of human labor. Rather, it was intended to protect labor unions against antitrust litigation premised on the claim that they monopolized the labor market.[346] Thus, this clause confers no rights upon individual workers and could not form the basis of a constitutional tort action.

The remaining provisions of section 17 provide clear protection to individual employees. The wage and hour clause, for instance, provides specific limitations on the employment of laborers in public works, and might thus on its face be self-executing according to the *Carroll* principle.[347] In addition, the record of the 1938 Constitutional Convention indicates that the drafters of this clause intended it as a "fixed principle . . . which should be embodied in our organic law."[348] Similarly, the debates concerning the collective bargaining clause suggest that it was intended to confer specific rights on individual workers.[349]

As neither of these provisions has an equivalent in the United States Constitution, *Bivens* jurisprudence would be of no use in the second prong of the *Brown* analysis; that is, determining whether a damage remedy is appropriate. However, an analysis under section 874A would

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343. *See* N.Y. CONST. art. I, § 17. "Employees shall have the right to organize and to bargain collectively through representatives of their own choosing." *Id.*

344. *Id.* The New York Constitution provides that no employee of a contractor or subcontractor engaged in public work shall be permitted to work more than eight hours per day and five days per week "except in cases of extraordinary emergency;" and that no such employee shall be paid less than the prevailing wage for the locality where the public work is undertaken. *Id.*

345. *Id.*

346. *See* REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK 2204 (vol. III 1938) [hereinafter REVISED RECORD].

347. *See* People v. Carroll, 3 N.Y.2d 686, 691, 148 N.E.2d 875, 877 (1958). The presence of operational details in a constitutional provision weighs heavily in favor of it being self-executing. *See id.* at 691, 148 N.E.2d at 877.

348. REVISED RECORD, *supra* note 346, at 2204.

349. *See id.* at 2243-45. The collective bargaining clause originally proposed by the convention provided that "labor" shall have the right to bargain collectively. The word "employees" was substituted due to concerns that the word "labor" might not provide sufficiently clear indication that the right was to be enjoyed by each employee. *Id.* at 2244-45. In addition, the collective bargaining clause was intended to constitutionalize a right previously included in self-executing legislation. *Id.* at 2243-44.

tend to favor a cause of action for damages. The wage and hour and collective bargaining clauses were drafted to benefit a class of people, and prospective relief will often be inadequate because it would fail to compensate potential plaintiffs for the costs of union organizing in a hostile environment or for prior labor at less than the prevailing wage. The one state to consider the availability of an action for violation of a labor-rights clause, New Jersey, has concluded that "[t]he right to organize and bargain collectively . . . included in the Rights and Privileges Article of our Constitution . . . should be accorded the same stature as other fundamental rights."[350] It seems likely that the court of appeals would reach a similar conclusion.[351]

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350. Cooper v. Nutley Sun Printing Co., 175 A.2d 639, 643 (N.J. 1961).

351. In addition to the individual bill of rights contained in article I, the New York Constitution also contains a "Bill of Rights for local governments." N.Y. CONST. art. IX, § 1. In addition, the New York Constitution includes a home rule clause granting certain legislative and administrative powers to local governments which cannot be taken away by the legislature. N.Y. CONST. art. IX, § 2(c). Although the Legislature retains certain supervisory powers over local government, the New York Constitution provides that the state may not infringe on the power of local government to take specified actions which "relate to the property, affairs or government of such local government." *Id.* The areas in which local governments may pass laws free of legislative restriction include the makeup of local government and civil service, transaction of local government business, acquisition of property and transit facilities, regulation of contractors, and "[t]he government, protection, order, conduct, safety, health and well-being of persons or property therein." N.Y. CONST. art. IX, § 2(c)(1)-(7), (10). This serves a "two-fold design to extend the field in which a city might legislate and to exclude the legislature from that field." Weber v. City of New York, 18 Misc. 2d 543, 545, 195 N.Y.S.2d 269, 271 (Sup. Ct., N.Y. Co. 1959) (citing New Rochelle Trust Co. v. White, 283 N.Y. 223, 230, 28 N.E.2d 387, 389 (N.Y. 1940)). Presumably, if the Legislature is excluded from acting in a certain field, state administrative agencies acting according to powers delegated by the Legislature are also excluded from so acting.

The most likely vehicle for municipal civil rights suits under *Brown* would be section 2 of article IX, which grants inalienable home rule powers. The "Bill of Rights for local governments" itself, in section 1 of article IX, is manifestly not self-executing as each of its provisions specifically calls for implementing legislation. The home rule provision of the New York Constitution, however, has been held to confer direct rights upon local governments. *See* City of Albany v. Newhof, 230 A.D. 687, 688, 246 N.Y.S. 100, 101-02 (3d Dep't 1930). Significantly, the court arrived at this holding despite a dissenting argument that the home rule clause was not self-executing. *Id.* at 690, 246 N.Y.S. at 107 (Davis, J., dissenting). While legislative immunity would appear to limit municipalities to suits for equitable relief when challenging actions of the Legislature, no such limits exist with regard to suits against state agencies or administrators in their individual capacities. In these cases, an action for damages might well serve as a necessary deterrent against infringement on local powers, allow cities and towns to recoup some of the costs of challenging unconstitutional legislation, and provide another weapon to local government in preserving its rights against state encroachment.

B. *Other New York Constitutional Provisions*

The New York Constitution includes provisions in other articles, as well, which future plaintiffs might claim confer individual rights and provide a private cause of action. Most of these, upon closer examination, would likely fail to pass muster under *Brown*, but there are several for which a damage remedy may exist.

The viability of a cause of action for violation of the right to vote contained in article II, section 1 of the New York Constitution has been discussed above.[352] Another provision which may provide a right of action under *Brown* is section 6 of article V, which mandates merit selection of civil service employees.[353] This section has been found self-executing by the court of appeals, thus satisfying the threshold standard of *Brown*.[354]

The key issue in any municipal civil rights action, other than whether the constitutional provision at bar is self-executing, will be whether a public corporation or municipality has standing to sue at all. Few if any cases exist in which governmental entities have sued as plaintiffs in civil rights actions. In one decision under the Massachusetts civil rights statute, a public corporation was denied standing to sue for violation of the Massachusetts due process clause. *See* Spence v. Boston Edison Co., 459 N.E.2d 80, 83 (Mass. 1983). This decision, however, was predicated upon the doctrine that the right of due process was guaranteed to individuals only. *See id.* In the case of a right guaranteed specifically to governments—such as the rights enumerated in article IX of the New York Constitution—a court might easily reach a different conclusion. Moreover, New York courts have consistently allowed municipalities to challenge the constitutionality of state actions which violate their right to home rule, despite the general rule that municipalities have no capacity to challenge state legislation. *See* Town of Black Brook v. State, 41 N.Y.2d 486, 487, 362 N.E.2d 579, 580 (1977). If a local government is found to have standing, it must also face the additional hurdle of showing that a money damage remedy is necessary to enforce the home rule provision at issue. In most cases, prospective relief will probably be held adequate, but there may be circumstances—such as where a municipality has suffered financial loss as a result of violation of home rule—where it will be "damages or nothing" for the local government.

352. *See supra* notes 288-99 and accompanying text.

353. "Appointments and promotions in the civil service of the state and all the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, as far as practicable, by examination which, as far as practicable, shall be competitive . . . ." N.Y. CONST. art. V, § 6. This section also provides for a five-point veterans' preference on civil service examinations. *See id.*

354. *See* Montero v. Lum, 68 N.Y.2d 253, 258, 501 N.E.2d 5, 8 (1986); *see also* People *ex rel.* McClelland v. Roberts, 148 N.Y. 360, 366, 42 N.E. 1082, 1084 (1896). The *McClelland* court, which was the first to construe the civil service clause of the New York Constitution, stated that:

> The principle that all appointments in the civil service must be made according to merit and fitness, to be ascertained by competitive examinations, is expressed in such broad and imperative language that in some respects it must

Thus, it only remains to be determined whether a damage remedy is appropriate for violation of the rights granted therein.

One key to this determination lies in the expressed purpose of the provision; that is, "to replace the spoils system with a system of merit selection."[355] The court of appeals has held that the intent of this clause was not only to protect the public from the misgovernment which results from political appointments, but to protect the rights of "all employees in the civil service as well as security for the individual employee."[356] In other words, the civil service clause—like the search and seizure clause—was designed both to prevent misconduct by those in power and to secure the rights of a specific class of individual. Moreover, civil rights actions under 42 U.S.C. § 1983 have been allowed for plaintiffs who were denied civil service positions for political reasons or required to make political contributions in order to obtain public employment.[357] Thus, it seems probable that an individual who is the victim of such misconduct will have a cause of action under the New York Constitution.

Section 24 of article III, which prohibits the contracting out of prison labor, may also provide a cause of action under *Brown*.[358] This section imposes a clear and definable duty upon prison administrators not to contract with any outside business for the use of prison labor, and thus is most likely self-executing. *Bivens* jurisprudence is of no assistance in evaluating the appropriateness of a damage remedy, as no analogous right exists in the United States Constitution; however, an analysis under section

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> be regarded as beyond the control of the legislature, and secure from any mere statutory changes. If the legislature should repeal all the statutes and regulations on the subject of appointments in the civil service the mandate of the Constitution would still remain, and would so far execute itself as to require the courts, in a proper case, to pronounce appointments made without compliance with its requirements illegal.

Id. at 366, 42 N.E. at 1084. In other words, even though the civil service clause does not prescribe the exact methods by which competitive examinations are to be held, it is still self-executing to the extent that it prohibits appointments made without such examinations.

355. *Montero*, 68 N.Y.2d at 258, 501 N.E.2d at 8; *see also* Social Investigator Eligibles Ass'n v. Taylor, 268 N.Y. 155, 161, 197 N.E. 262, 264 (1935) (stating that the aim of the civil service clause "was to supplant by a merit system a spoils system of office holding").

356. Wood v. City of New York, 274 N.Y. 155, 161, 8 N.E.2d 316, 318 (1937).

357. *See* Cullen v. Margiotta, 618 F.2d 226, 227 (2d Cir. 1980).

358. *See* N.Y. CONST. art. III, § 24 (No prisoner shall be allowed to work "at any trade, industry or occupation, wherein or whereby his work, or the product or profit of his work, shall be farmed out, contracted, given or sold to any person, firm, association or corporation."). However, the legislature may provide that convicts may work in prison for the benefit of the State itself or any political subdivision thereof. *See id.*

874A provides guidance as to the parameters of a cause of action under this provision. As the records of the 1894 Constitutional Convention make clear, this clause was not designed to protect the prisoners themselves but to protect outside merchants from competition with prison labor.[359] Thus, a prisoner whose labor is contracted out or whose prison-made products are sold would not have a right of action,[360] but a merchant who suffered losses as a result of competition from prison labor would likely have a cause of action to the extent of his lost business.[361]

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359. *See* REVISED RECORD, *supra* note 346, at 164. The delegate who introduced this provision into the Convention remarked that:

> The evil complained of by many people, by manufacturers, by storekeepers, by tradesmen and by workingmen, is that this competition of prison labor is most injurious to them. The State of New York has gone into the business of manufacturing . . . in competition with its own citizens and not without great injury to those citizens.

Id. The language in this section allowing prisoners to work "for the benefit of the State" was explained as "they may do any kind of work that is necessary for the State or for any of the institutions in the State that are owned and controlled by the State, or any public division of the State." *Id.* Thus, this provision of the New York Constitution would seem to allow prisoners to work at internal prison tasks or to produce materials needed in governmental operation but not to produce goods for sale. *See* 1 Op. Att'y Gen. 177, 178 (1916) (sale of prison-generated electricity to residents of village for personal use would be unconstitutional, although electricity can legally be furnished to the village itself); 10 Op. Att'y Gen 367, 368 (1934) (state may not sell prison-made products to public contractor); 78 Op. Att'y Gen 363, 364 (1942) (sale of prison-made products to federal government may be unconstitutional because federal government is not a subdivision of the state).

360. *See supra* note 165 and accompanying text (Section 874A and New York statutory tort law require that potential plaintiff be a member of the class intended to be protected by statute).

361. It is conceivable that plaintiffs might also attempt to sue directly under article VIII, sections 2 and 4 and related provisions, which set limits on local debt. These articles are self-executing in that they provide specific limits on indebtedness and provide operating instructions for the issuing of new debt by local subdivisions. Violations of these subdivisions may also cause injury to taxpayers in these subdivisions in the form of higher interest rates and increased local taxes necessary to discharge the unconstitutional debt. It is unlikely, however, that a direct cause of action for money damages would be allowable under article VIII, as no substantive rights are conferred on individuals and the dictates of the article could be enforced by an action for an injunction prohibiting the issuance of new debt. In addition, a *Brown* action based on article VIII or article VII (governing state debt and payment of state funds) would be unnecessary because New York law already allows civil actions to enjoin unconstitutional spending or to recover illegally spent funds for redeposit in the public treasury. *See* N.Y. STATE FIN. LAW art. 7-A, § 123-b (authorizing any taxpayer to challenge the "wrongful expenditure, misappropriation, misapplication, or any other illegal or unconstitutional disbursement of state funds or state property"). The only requirement to gain standing in such an action

Advocates for the poor may also contend that sections 1 and 3 of article XVII of the New York Constitution, directing the Legislature to take measures to provide for care of the needy[362] and public health,[363] might provide a basis for a *Brown* claim. This, however, is highly unlikely. The plain language of these sections—both of which are worded nearly identically—declares that care of the needy and public health are "public concern[s]" rather than positive rights, and that this care shall be accomplished "in such manner and by such means, as the Legislature may from time to time determine."[364] This explicit requirement of implementing legislation precludes any determination that this provision is self-executing.[365]

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is that the plaintiff be a voter in the political unit in which the illegal debt was contracted or payment was made. *See* Schulz v. State, 81 N.Y.2d 336, 344-46, 615 N.E.2d 953, 954-55 (1993). In light of the more appropriate remedies provided by law, an implied action for private damages under these provisions of the New York Constitution would be highly unlikely.

362. *See* N.Y. CONST. art. XVII, § 1.

363. *See id.* § 3.

364. *Id.* §§ 1, 3.

365. People v. Carroll, 3 N.Y.2d 686, 690, 148 N.E.2d 875, 878 (1958); *see also* Crawford v. Perales, 205 A.D.2d 307, 612 N.Y.S.2d 573, 575 (1st Dep't 1994), *lv. denied*, 84 N.Y.2d 987, 647 N.E.2d 111 (1985) (Article XVII does not mandate any particular type or level of care.); Ram v. Blum, 103 Misc. 2d 237, 425 N.Y.S.2d 735, 737 (Sup. Ct., N.Y. Co. 1980), *aff'd*, 77 A.D.2d 278, 432 N.Y.S.2d 892 (App. Div. 1980) (manner and means of providing for needy "lie within broadest legislative discretion"). On the other hand, section 1 of article XVII, although not section 3, has also been interpreted as imposing an affirmative duty upon the state, rather than leaving provision for the needy to legislative grace. *See* Tucker v. Toia, 43 N.Y.2d 1, 371 N.E.2d 449, 452-53 (1977). Thus, legislative inaction under certain circumstances has been held in violation of this article. *See* Ingram v. Fahey, 78 Misc. 2d 958, 358 N.Y.S.2d 604, 607 (Sup. Ct., Albany Co. 1974) (state and county required to meet emergency needs of disabled). Moreover, determinations as to eligibility for welfare payments made according to factors other than need were struck down as unconstitutional. *See* Aumick v. Bane, 161 Misc. 2d 271, 612 N.Y.S.2d 766, 773 (Sup. Ct., Monroe Co. 1994). Thus, despite the directive for legislative action contained in article XVII, section 1, the possibility remains open that it might be held self-executing to the limited extent of preventing total legislative inaction and prohibiting benefit determinations made according to factors other than need. *See* Sarah Ramsey & Daan Braveman, *Government's Obligation to Children in Poverty*, 68 TEMPLE L. REV. 1607, 1625 (1995) (Article XVII "precludes a complete denial of benefits to the poor but gives the legislature and agency discretion to determine the amount of aid, the definition of need, and the means for providing any aid."). A damage claim for legislative inaction would be unlikely, as legislative immunity would preclude liability; in addition, the courts are required to accept any legislative finding that a certain class of citizens is not needy. *See* Hope v. Perales, 83 N.Y.2d 563, 634 N.E.2d 183, 188 (1994). A claim arising from

Similarly, implementation of section 1 of article XVIII, providing that the Legislature may take measures to provide for low-income housing, is entrusted to the Legislature, foreclosing a cause of action for damages under *Brown*.[366] Article XI, as well, although it arguably contains a mandate that all children be educated,[367] directs the maintenance and support of public schools to the Legislature.[368] Courts in California and Pennsylvania have refused to imply a private right of action from similar state constitutional provisions, holding that they impose no express duties and create no specific rights which can be enforced by the courts.[369]

Two final provisions of the New York Constitution are noteworthy in that they expressly provide for a cause of action to enforce their provisions. Section 5 of article XIV specifically states that violation of any of the provisions of article XIV, which governs conservation of natural resources, shall be enforceable "at the suit of any citizen."[370] Further, section 7 of article V provides that any retirement plan for public employees shall create a "contractual relationship" between the employee

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a non-need-based denial or termination of benefits, however, might be asserted against a state or local agency as well as the legislature, and could provide an alternative to mandamus relief in the unlikely event that this section were held partially self-executing.

366. *See* N.Y. CONST. art. XVIII, § 1 (providing that the Legislature may provide for low-income housing "in such manner, by such means and upon such terms and conditions as it may prescribe").

367. *See In re* Wagner, 86 Misc. 2d 1025, 338 N.Y.S.2d 849, 850 (Fam. Ct., Monroe Co. 1976) (Article XI, section 1 entitles all children in New York to free public education.). In addition, the record of the 1894 Constitutional Convention, which enacted the common schools section, indicates that its purpose was to express "the principle of universal education" and "to enact an organic law, directing the Legislature to provide for the maintenance of a system of schools wherein all the children of the State may be educated." REVISED RECORD, *supra* note 346, at 164.

368. *See* N.Y. CONST. art. XI, § 1; *see also* Board of Educ. v. Nyquist, 57 N.Y.2d 27, 439 N.E.2d 359, 369 (1982) (manner in which public education is provided, and level of funding with which it is supported, are matters of legislative discretion); Bennett v. City Sch. Dist., 114 A.D.2d 58, 497 N.Y.S.2d 72, 79 (1st Dep't 1985) (common schools clause was never intended to impose a duty to provide a minimum level of education to individual pupils).

369. *See* Leger v. Stockton Unified Sch. Dist., 249 Cal. Rptr. 688, 690-91 (Ct. App. 1988); Agostine v. School Dist., 523 A.2d 193, 195 (Pa. Commw. Ct. 1987) (stating that the constitutional mandate that the Pennsylvania Legislature provide for "a thorough and efficient system [of education]" does not confer any individual rights upon students to a particular level or quality of education).

370. N.Y. CONST. art. XIV, § 5. Private actions to enforce article XIV must be undertaken with the prior consent of the appellate division and notice given to the Attorney General. *Id.*

and the government.[371] Since the state's waiver of sovereign immunity extends to breach of contract,[372] this section thus provides a constitutionally created cause of action for public employees whose expected pension benefits are reduced.[373] Needless to say, these causes of action need no judicial implication and were in existence prior to the *Brown* decision. However, the court of appeals apparently did not consider that the establishment of direct causes of action in two clauses of the New York Constitution might indicate that the lack of similar language in other sections of the constitution was purposeful.

IV. CONSTITUTIONAL VIOLATIONS AS TORTS: THE IMPACT OF *BROWN* ON FUTURE CLAIMS, DEFENSES AND IMMUNITIES

The *Brown* decision established a general framework for adjudicating state constitutional tort actions in New York. However, the *Brown* decision left numerous questions remaining about a number of crucial ancillary matters.[374] These omissions include issues of standing, immunity and procedure, as well as the range of potential defendants.

Forecasts as to the eventual resolution of these issues must be made in light of the jurisdictional constraints which affected the court of appeals' decision in *Brown*. Although other states have applied principles of tort law to civil rights litigations when useful,[375] New York is the only state

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371. *See* N.Y. CONST. art. V, § 7.

372. Section 8 of the Court of Claims Act provides that the State is liable to suit on the same terms as any private individual or corporation. Moreover, the New York Court of Appeals has explicitly recognized that the state is liable to suit for breach of contract. *See* Brown v. State, 89 N.Y.2d 172, 180, 674 N.E.2d at 1129, 1149 (1996).

373. At least one plaintiff has attempted to characterize an entire state constitution as a contract between a state government and its citizens. In *Rubio v. Carlsbad Mun. Sch. Dist.*, 744 P.2d 919, 922 (N.M. Ct. App. 1987), the plaintiffs argued that "sections of the New Mexico Constitution . . . that establish a uniform system of free public schools, require compulsory attendance and provide funding give rise to a contractual relationship for which parents and students may seek relief in the event of a breach." *Id.* The court, however, rejected this claim, noting that plaintiffs "[cited] no authority to support their claim other than references to the writings of John Locke and Thomas Hobbes . . . . We do not view the 'social contract' expounded by these early thinkers to translate into a legally-enforceable contract between a government and its citizens." *Id.* *But see* Jefferson, *supra* note 12, at 1555 (arguing that a constitution is a social contract which should be enforceable against governmental entities).

374. *See* Telephone interview with David B. Klingaman, Chief Clerk, New York Court of Claims (Oct. 1, 1997).

375. *See* Newell v. City of Elgin, 340 N.E.2d 344, 347-48 (Ill. App. Ct. 1976) (applying provisions of tort claims act to decide issues of governmental liability in state civil rights suit); Thomas v. City of Annapolis, 688 A.2d 448, 456-58 (Md. Ct. Spec.

where jurisdictional considerations constrained the court to classify constitutional violations as torts, making applicable all the strictures and limitations of traditional tort law. Unlike other states, the New York sovereign immunity scheme placed the court of appeals in a position where it was required to explicitly classify civil rights actions as torts in order to permit a cause of action at all.[376] It may thus be that the jurisdictional issue addressed by the court of appeals in *Brown* is in fact the most significant of its determinations as far as defining the range of applicable defenses and immunities.

Thus, precedent from other states has limited applicability to civil rights litigation in New York, both because it is not binding on New York courts and because other states retain more flexibility than New York in creating defenses and immunities or restricting the cause of action to specific plaintiffs or defendants.[377] Still, where a decision from another jurisdiction reaches a result which is not precluded by the *Brown* scheme of liability, it will likely be persuasive in resolving the remaining issues in New York civil rights law.

A. *Defenses and Immunities in New York Civil Rights Actions*

The court of appeals' explicit classification of constitutional violations as torts is likely to have the greatest impact in the area of defenses and immunities. In federal civil rights jurisprudence, and in many states, a unique set of defenses and immunities has been created which is specifically designed to balance the rights of citizens with the need to protect governmental decision-making.[378] In contrast, these considerations have played a much less prominent part in the development of the law of torts, which exists primarily to protect private persons from breaches of

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App. 1997); Lloyd v. Borough of Stone Harbor, 432 A.2d 572, 580 (N.J. Super. Ct. Ch. Div. 1981) (applying notice provision of state tort claims act to constitutional violations); Old Tuckaway Assocs. v. City of Greenfield, 509 N.W.2d 323, 329 (Wis. Ct. App. 1993) (classifying due process violation as "an intentional tort" for purposes of determining standard of care).

376. *See supra* notes 46-62 and accompanying text.

377. For instance, New York courts cannot now avail themselves of the option exercised by Michigan, to evaluate state constitutional tort claims in exactly the same manner as federal civil rights claims. *See* Coon v. Heron, No. 95-CV-71989-DT, 1997 U.S. Dist. LEXIS 7121, at *9 (E.D. Mich. Mar. 27, 1997) ("Michigan courts review Michigan constitutional violations under the same analysis applied under the U.S. Constitution.") (citations omitted).

378. *See infra* notes 458-65 (discussing Board of County Comm'rs v. Sundheim, 926 P.2d 545 (Colo. 1996)).

duties by other private persons.[379] Thus, the status of the civil rights immunities and defenses which have grown up in federal law and the law of other states is doubtful in New York, except insofar as those immunities may have roots or counterparts in traditional New York tort law.

In keeping with this, at least one of the defenses available under federal constitutional tort law was specifically discounted by the court of appeals. Both the majority and the dissent in *Brown* agreed that the express provisions of the Court of Claims Act mandated that governments were liable for their employees' violations of the New York Constitution under a doctrine of *respondeat superior*.[380] Thus, governmental entities sued under *Brown* would not be able to avail themselves of the defense set forth in *Monell v. Department of Social Services*,[381] which held that governments could only be liable for constitutional violations undertaken pursuant to an official policy, practice or custom.[382] In this, the New York courts have created a broader remedy than that available in nearly any other jurisdiction. Of the other states which have considered the application of respondeat superior liability to state constitutional violations, nearly all have rejected such vicarious liability in favor of a standard similar to *Monell*.[383] Only Illinois has specifically adopted vicarious liability—but the Illinois court's holding was based on its analysis of a state tort claims act similar to the New York Court of Claims Act.[384] It thus appears that the New York Court of Appeals' decision to classify state

379. *See* Brown v. State, 89 N.Y.2d 172, 191, 674 N.E.2d 1129, 1144 (1996).

380. *See id.* at 189, 674 N.E.2d at 1142, 1146 (Bellacosa, J., dissenting); *but see* Boyle, *supra* note 94, at 878 n.40 (arguing that the Court of Claims Act does not compel respondeat superior liability for constitutional torts).

381. 436 U.S. 658 (1978).

382. *See id.* at 690.

383. *See* Lyons v. National Car Rental Sys., Inc., 30 F.3d 240, 245-47 (1st. Cir. 1994) (interpreting Massachusetts Civil Rights Act); Bonner v. City of Santa Ana, 33 Cal. Rptr. 2d 233, 241 (Ct. App. 1994), *vacated on other grounds*, 884 P.2d 987 (Cal. 1995); Smith v. Department of Pub. Health, 410 N.W.2d 749, 794 (Mich. 1987) (Boyle, J., concurring); Stamps v. City of Taylor, 554 N.W.2d 603, 607 (Mich. Ct. App. 1996) (following the Boyle opinion in *Smith*); *see also* Ashton v. Brown, 660 A.2d 447, 465 (Md. 1995) (allowing suit against city which enacted unconstitutional law and enforced it "[as] a matter of municipal policy," and separating municipal from individual liability). Notably, both California and Michigan adopted this standard on independent state grounds rather than simply relying on federal civil rights precedent. *See Bonner*, 33 Cal. Rptr. 2d at 241 n.14; *Smith*, 410 N.W.2d at 794.

384. *See* Newell v. City of Elgin, 340 N.E.2d 344, 347-48 (Ill. App. Ct. 1976) (interpreting the Illinois Local Governmental and Governmental Employees Tort Immunity Act).

constitutional violations as torts has had a significant impact on at least this one area.[385]

The *Brown* court did, however, acknowledge that certain defenses peculiar to government had been developed in tort law "based on the special status of the defendant as a governmental entity . . . as a matter of policy."[386] Thus, the immunities which attach to judicial, legislative and prosecutorial functions—which exist in tort law as well as civil rights jurisprudence—are likely to remain applicable to constitutional litigation in New York. A related immunity under New York law may also come into play in future state constitutional tort cases. In *Arteaga v. State*,[387] the court of appeals created an absolute immunity for certain governmental acts requiring the exercise of discretion.[388] Although *Arteaga* immunity has thus far been applied primarily to "quasi-judicial" acts such as administrative hearings,[389] the broad language of the decision leaves

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385. Some commentators, including Justice Breyer of the United States Supreme Court, have argued that the *Monell* doctrine has become irrelevant because many governments now indemnify employees found liable under § 1983 for actions within the scope of their employment. *See* Board of County Comm'rs v. Brown, 117 S. Ct. 1382, 1404 (1997) (Breyer, J., dissenting). This, however, ignores the fact that certain immunities—such as qualified immunity—are available to individual defendants in civil rights cases but not to governments. Thus, if respondeat superior liability were imposed on governments in constitutional tort actions, governmental units might be held liable in many instances where their employees were immune. *See* George A. Bermann, *Integrating Governmental and Officer Tort Liability*, 77 COLUM. L. REV. 1175, 1186-87 (1977) ("[S]ituations frequently arise in which it is appropriate to require the government to compensate for harm done by a public official, even though it is inappropriate to hold the official personally liable."). Furthermore, vicarious liability would render governments liable for the actions of any government employee involved in the subject matter of the lawsuit, individually or collectively. Thus, in complex civil rights cases, political units may be placed in the untenable position of having to defend the actions of an entire department or even the entire government—a situation which would greatly enhance the scope of discovery, the length of pretrial delay, and the burden on both plaintiffs' and defendants' attorneys. In contrast, the *Monell* doctrine renders constitutional tort actions "'more manageable: causation is more easily proven and the locus of liability is more easily ascertained.'" *Smith*, 410 N.W.2d at 794 (citations omitted).

386. Brown v. State, 89 N.Y.2d 172, 192, 674 N.E.2d 1129, 1141 (1996).

387. 72 N.Y.2d 212, 527 N.E.2d 1194 (1988).

388. *See id.* at 215, 527 N.E.2d at 1195. *Arteaga* immunity applies to "governmental actions requiring expert judgment or the exercise of discretion." *Id.* at 216, 527 N.E.2d at 1196.

389. *See* Rodriguez v. City of New York, 189 A.D.2d 166, 173, 595 N.Y.S.2d 421, 425 (1st Dep't 1993). The term "quasi-judicial," however, has been applied to a wide range of acts requiring discretion. *See* Urquhart v. City of Ogdensburg, 91 N.Y. 67, 71 (1883) (maintenance of streets and sewers is quasi-judicial); Weiss v. Fote, 7

considerable room for expansion of immunity into other discretionary acts. At least one noted authority on constitutional law has argued that the court of appeals might apply an expansive interpretation of *Arteaga* which would "substantially erode the *Brown* remedy."[390]

The availability of the federally created civil rights defense of qualified immunity, however, is doubtful under the framework set forth in *Brown*. Qualified immunity, which arose from a nineteenth-century legal tradition granting limited immunity to government officials sued in tort,[391] provides that an executive official is immune from constitutional tort liability unless he violates "clearly established . . . constitutional rights of which a reasonable person would have known."[392] The rationale for this doctrine "lay in the realm of public policy,"[393] resting on the belief that failure to provide immunity would "dampen the ardor of all but the most resolute, or the most irresponsible [government officials], in the unflinching discharge of their duties."[394]

Nearly all the state jurisdictions to consider the issue of qualified immunity in constitutional tort cases have adopted the doctrine either explicitly or implicitly.[395] The only state to reject qualified immunity was Maryland, which ruled in *Clea v. City of Baltimore*[396] that qualified immunity was inconsistent with the purpose of the Maryland

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N.Y.2d 579, 582, 167 N.E.2d 63, 64 (1960) (maintenance of traffic light); Brenner v. County of Rockland, 67 A.D.2d 901, 401 N.Y.S.2d 434, 437 (2d Dep't 1979) (decision by prosecutor to disclose or withhold evidence from defendant); Harrington v. Norco Fruit Distribs., Inc., 70 Misc. 2d 471, 473-74, 333 N.Y.S.2d 794, 796 (Sup. Ct. N.Y. Co. 1972) (issuance of inspection certificate).

390. Schwartz, *supra* note 8, at 9.

391. Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1749 (1991).

392. Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

393. Fallon & Meltzer, *supra* note 391, at 1749.

394. *Harlow*, 457 U.S. at 814 (quoting Gregoire v. Biddle, 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied*, 339 U.S. 949 (1950)).

395. *See infra* notes 495-527 and accompanying text (discussing Massachusetts and Maine civil rights statutes); *see also* Binette v. Sabo, No. SC-15547, at 25 n.23 (Conn. Mar. 10, 1998) (stating that concerns of dissenting Justice about expansive police liability are unfounded because "official actions undertaken reasonably and in good faith" are shielded from liability under state as well as federal law); Moresi v. State, 567 So.2d 1081, 1094 (La. 1990) (adopting qualified immunity); Stamps v. City of Taylor, 554 N.W.2d 603, 607 (Mich. 1996) (implicitly adopting qualified immunity by stating that claims under the Michigan Constitution would be judged under the same standards as claims under 42 U.S.C. § 1983).

396. 541 A.2d 1303 (Md. 1988).

Constitution.[397] On the other hand, Louisiana has expressly accepted the doctrine of qualified immunity based on "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority."[398]

The roots of qualified immunity in the nineteenth-century common law of torts[399] allow the New York courts to accept the doctrine for purposes of state civil rights litigation. However, common law qualified immunity is different from that which has been developed by federal courts construing civil rights claims. At common law, qualified immunity was essentially a defense rather than an immunity, relying on the subjective good faith of the defendant which was a matter for proof at trial.[400] In contrast, constitutional qualified immunity as defined by the Supreme Court "differs from the common law immunity in one important respect: the bad or good faith of the officials is irrelevant to the inquiry."[401] The more recent objective inquiry established in *Harlow v. Fitzgerald*[402] is purely a creature of civil rights law. Thus, a question exists not only as to whether the court of appeals will adopt a form of discretionary immunity[403] but as to whether it will accept the objective standard developed by the federal courts in the last two decades.[404]

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397. *See id.* at 1314.

398. *Moresi*, 567 So. 2d at 1094. "The same factors that compelled the United States Supreme Court to recognize a qualified good faith immunity for state officers under § 1983 require us to recognize a similar immunity for them under any action arising from the state constitution." *Id.* at 1093.

399. *See* Fallon & Meltzer, *supra* note 391, at 1749.

400. *See* John P. O'Connor, *His Honor, the Employer: No Longer Absolutely Immune for Hiring Decisions*, 57 U. CIN. L. REV. 1141, 1160 n.125 (1989) ("[Q]ualified immunity has . . . an origin in a good faith probable cause law enforcement defense.").

401. Linda Ross Meyer, *When Reasonable Minds Differ*, 71 N.Y.U. L. REV. 1467, 1501 (1996); *but see* Sheldon Nahmod, *Constitutional Damages and Corrective Justice: A Different View*, 76 VA. L. REV. 997, 1005 n.50 (1990) ("[I]t was always clear that the qualified immunity test had an objective component and was therefore never purely subjective in nature" and that "the use of the term 'good faith' is misleading.").

402. 457 U.S. 800 (1982).

403. *See infra* notes 387-90 and accompanying text (discussing *Arteaga* immunity).

404. The court of claims has stated that, in addition to the absolute immunity pertaining to quasi-judicial acts in New York, "a qualified immunity shielding the government from liability except 'when there is bad faith or the action taken is without a reasonable basis'" exists for discretionary acts. Huzar v. State, 156 Misc. 2d 370, 373, 590 N.Y.S.2d 1000, 1002 (Ct. Cl. 1992) (citing Arteaga v. State, 72 N.Y.2d 212, 216, 527 N.E.2d 1194, 1196 (1988)). It thus appears that New York may recognize a test under which the defendant must show both objective unreasonableness and lack of subjective bad faith.

The Louisiana example may be instructive in predicting the future posture of the New York Court of Appeals. Although Louisiana does not adhere to a strict tort analysis, the state constitutional tort liability scheme created by Louisiana is, if anything, broader than that created by *Brown*.[405] However, the Louisiana courts have balanced the need to deter official misconduct with the concern that the exercise of authority in the public interest not be chilled.[406] The existence of, and need for, such policy-based defenses has been specifically recognized by the *Brown* court.[407] Thus, given the broad protections provided by the New York Constitution, it is possible that the court of appeals will apply at least some form of the qualified immunity doctrine to state constitutional tort cases. However, the *Brown* court's emphasis on deterrence of official misconduct may lead the New York courts to follow an approach like that of Maryland, which based its rejection of qualified immunity on similar policy grounds.[408]

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405. *See* Moresi v. Louisiana, 567 So. 2d 1081, 1091-94 (La. 1990). The *Moresi* court stated that rights protected by a "fundamental document" were traditionally remediable by an action for damages, thus sidestepping the first step of the *Brown* analysis by implying that the entire Louisiana Bill of Rights is self-executing. *Id.* at 1092.

406. *See id.* at 1094. It could additionally be argued that qualified immunity does not reduce the deterrent effect of a state constitutional tort cause of action, because if an official has acted in the objectively reasonable belief that he is not violating a person's constitutional rights, this is not the sort of misconduct that such a cause of action is intended to deter.

407. *See* Brown v. State, 89 N.Y.2d 172, 192-93, 674 N.E.2d 1129, 1141 (1996).

> The defenses the dissent refers to are based on the special status of the defendant as a governmental entity. The State is amenable to suit but may nevertheless assert these grounds to avoid paying damages for some tortious conduct because, as a matter of policy, the courts have foreclosed liability.

Id.

408. *See* Clea v. City of Baltimore, 541 A.2d 1303, 1314 (Md. 1988). If the New York courts allow qualified immunity for state constitutional violations and do not require state action as an element of such lawsuits, the issue will also arise as to whether qualified immunity applies to private as well as official constitutional tortfeasors. No court has yet decided whether a private person may avail himself of qualified immunity for constitutional violations. However, it could be argued that public officials—who are bound by oath to uphold the state constitution—possess greater understanding of the constitutional framework than private individuals, and that private persons are thus more likely to violate the constitutional rights of others inadvertently. Thus, it may well be that private persons should be protected by a form of qualified immunity in order to further prevent the constitutionalizing of routine private civil disputes. An objective test, however, would likely be inappropriate for the application of this immunity, as a private person cannot be expected to possess an understanding of clearly established constitutional rights. Possibly the older good-faith formula would be better suited to an immunity granted to private individuals.

B. *Potential Defendants in* Brown *Claims*

The *Brown* decision itself created a cause of action only against the State of New York.[409] The availability of such a cause of action against other defendants must be resolved by future courts, although the court of appeals' classification of constitutional violations as a form of tort established a framework within which these issues will be resolved.

Although the *Brown* decision did not specifically state that local governments in New York could be held liable for state constitutional torts, dicta in both the majority and dissenting opinions suggest that such lawsuits may be maintained.[410] From this, it seems likely that the scope of the *Brown* decision will be expanded to include New York's political subdivisions.[411]

The *Brown* decision also did not specifically state whether suits could be maintained against government officials in their individual capacities.[412] Although one commentator has stated that "logic might call for recognition

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409. *See Brown*, 89 N.Y.2d at 192, 674 N.E.2d at 1141. "By recognizing a narrow remedy for violations of sections 11 and 12 of article I of the State Constitution, we provide appropriate protection against official misconduct at the State level." *Id.*; *see also* Schwartz Remarks, *supra* note 4 (stating that the *Brown* decision "started in the exact opposite way as *Bivens*" by creating a cause of action against the government first).

410. *See Brown*, 89 N.Y.2d at 191, 674 N.E.2d at 1140; and 89 N.Y.2d at 204, 674 N.E.2d at 1149 (Bellacosa, J., dissenting). The applicability of *Brown* to municipalities can be inferred from the fact that municipal liability in New York is derivative of the state's sovereign immunity. *See* Bernardine v. City of New York, 294 N.Y. 361, 364, 62 N.E.2d 604, 605 (1945) (state's waiver of sovereign immunity operated as waiver of local government immunity); *see also* Schwartz Remarks, *supra* note 4 (stating that the New York Court of Claims Act "is a waiver of sovereign immunity not only as to the state but as to municipalities").

411. *See* Schwartz, *supra* note 8, at 9; *see also* Schwartz v. Gamba, N.Y.L.J., Nov. 25, 1997, at 25 (Sup. Ct., Suffolk Co. Nov. 23, 1997) (allowing state constitutional claims against the Town of East Hampton); W.J.F. Realty Corp. v. Town of Southhampton, N.Y.L.J., Dec. 16, 1997, at 29 (Sup. Ct., Suffolk Co. Dec. 15, 1997) (allowing suit against Town of Southampton for violation of New York equal protection clause). One key difference between suits against New York State and suits against cities under *Brown* is that claims against the state are tried in the court of claims, where there is no right to trial by jury, while claims against municipalities are tried in the supreme court, where the plaintiff may demand a jury trial. *See* Schwartz Remarks, *supra* note 4. Professor Schwartz believes that the impact of jury trials on damage awards in *Brown* actions against municipalities "could be significant." *See id.*

412. *See* Schwartz, *supra* note 8, at 9.

of a *Brown* right of action against the individual employee,"[413] the availability of actions under 42 U.S.C. § 1983 against state officials in their individual capacities, combined with the *Brown* court's reliance on *Bivens* and its alternative remedy doctrine, may lead to a different conclusion. In *Corum v. University of North Carolina*,[414] the North Carolina Supreme Court noted that, since § 1983 damage remedies were available against state officials in their individual capacities, there was no need to imply a constitutional cause of action against individual state officials.[415] Similarly, the New York Court of Appeals might hold "that the remedy against the State is sufficient to vindicate state constitutional rights and that any additional remedies must be authorized by the State legislature."[416]

The final category of potential defendants consists of private corporations or persons. The viability of suits against non-governmental defendants hinges on the issue of whether a *Brown* claim requires an element of state action or action under color of law. The question of whether acts by private persons may assume constitutional dimension was not at issue in *Brown*, as the acts complained of were committed by public officers. At least one New York court, however, has been of the opinion that the bill of rights governs "the rights of citizens with respect to their government and not the rights of private individuals against private

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413. *Id; see also* Bott v. DeLand, 922 P.2d 732, 739 (Utah 1996) (allowing state constitutional tort liability against individual officials because "state employees cannot be characterized as purely private individuals because they have a unique capacity to [cause constitutional] harm which private individuals do not have").

414. 413 S.E.2d 276 (N.C. 1992).

415. *See id.* at 293-94; *see also* Hawkins v. North Carolina, 453 S.E.2d 233, 242 (N.C. 1995); Jones v. Powell, 1998 Mich. App. LEXIS 25 (Mich. Feb. 3, 1998) (criticizing prior appellate decisions allowing constitutional causes of action against parties other than the state on the grounds that alternate remedies were available in such cases).

416. Schwartz, *supra* note 8, at 9. The *Augat*, *Ferrer*, and *Remley* courts' insistence on a lack of alternative remedies, if adopted by the court of appeals, might also effectively limit *Brown* actions to claims against the state, because federal civil rights remedies are normally available against local governments or individual state officials. *See supra* notes 217-42 and accompanying text (discussing the *Augat*, *Ferrer*, and *Remley* decisions). *But see* Marlin v. City of Detroit, 441 N.W.2d 45 (Mich. Ct. App. 1989) (allowing Michigan constitutional cause of action against municipality although such actions had previously been recognized only against the state); Johnson v. Wayne County, 540 N.W.2d 66 (1995) (extending Michigan constitutional tort liability to individual correction officers); Schwartz v. Gamba, N.Y.L.J., Nov. 25, 1997, at 25 (Sup. Ct., Suffolk Co., Nov. 23, 1997) (allowing state constitutional tort suits against individual town police officers and members of the town board).

individuals."[417] This view is supported by the position of the delegates to the Constitutional Convention of 1821, who introduced New York's first bill of rights,[418] and is also consistent with prior holdings that certain provisions of the New York Bill of Rights have been found to contain an inherent element of state action; that is, that they "protect the individual against action by governmental authorities, not by private persons."[419] However, the debates surrounding the enactment of certain provisions of the New York Constitution—including the equal protection clause and the right to collective bargaining—indicate that these rights were intended to reach private as well as governmental conduct.[420] In addition, courts in four states have allowed suits against non-governmental defendants for violation of state constitutional provisions where there had previously been determinations that private conduct could violate these provisions.[421] It is

417. Shad Alliance v. Smith Haven Mall, 66 N.Y.2d 496, 503, 488 N.E.2d 1211, 1215 (1985).

418. *See* REPORTS OF THE PROCEEDINGS AND DEBATES OF THE CONVENTION OF 1821 ASSEMBLED FOR THE PURPOSE OF AMENDING THE CONSTITUTION OF THE STATE OF NEW YORK 163. Mr. Sharpe, the sponsor of the bill, characterized it as a protection against "useless and improvident legislation." *Id.* at 163. Chief Justice Spencer, speaking immediately after Mr. Sharpe, was of the opinion that "where rights are so well understood as in this country, it is useless to have any bill setting them forth—yet upon the whole it was deemed proper to keep before the eyes of the legislature a brief and paramount declaration of rights beyond which they cannot go." *Id.*

419. *Shad Alliance*, 66 N.Y.2d at 502, 488 N.E.2d at 1212 (free speech); *see also* Blye v. Globe-Wernicke Realty Co., 33 N.Y.2d 15, 19, 300 N.E.2d 710, 713 (1973) (due process).

420. *See* REVISED RECORD, *supra* note 346, at 1139-49. The court of appeals has restricted application of the New York equal protection clause to cases where "state action" can be shown. *See* Under 21, Catholic Home Bureau for Dependent Children v. City of New York, 65 N.Y.2d 344, 360, 482 N.E.2d 1, 7-8 (1985). The debates recorded at the 1938 convention however indicate a consensus among the delegates that the equal protection clause would apply to private employment discrimination. *See* REVISED RECORD, *supra* note 346, at 1139-49. The debates concerning the collective bargaining clause also indicate that it was intended to constitutionalize prior labor legislation which applied to private as well as public employers. *See id.* at 2243-54.

421. *See* Melvin v. Reid, 297 P. 91, 93 (Cal. Ct. App. 1931) (allowing right of action against film-maker for invasion of constitutional right to privacy); Gay Law Students Ass'n v. Pacific Tel. & Tel. Co., 595 P.2d 592, 597-600 (Cal. 1979) (holding that California equal protection clause applied to private actors and was enforceable through private right of action); Laguna Publ'g. Co. v. Golden Rain Found., 182 Cal. Rptr. 813, 832-35 (Cal. Ct. App. 1982) (allowing action against condominium manager for violation of California free press clause); Walinski v. Morrison & Morrison, 377 N.E.2d 242, 243-45 (Ill. App. Ct. 1970) (allowing action against private employer for violation of Illinois constitutional provision which prohibited discrimination by "any employer"); Ritzheimer v. Insurance Counselors, Inc., 527 N.E.2d 1281, 1284-88 (Ill.

thus not impossible that the court of appeals will reach the same conclusion with respect to those New York constitutional rights which have been held applicable to private conduct.[422]

App. Ct. 1988); Cooper v. Nutley Sun Printing Co., 175 A.2d 639, 643 (N.J. 1962) (allowing private enforcement of New Jersey constitutional right to collective bargaining); Peper v. Princeton Univ. Bd. of Trustees, 389 A.2d 465, 476-78 (N.J. 1978) (allowing action against private employer for violation of equal protection right inferred from New Jersey "natural rights" clause); Erdman v. Mitchell, 56 A. 327, 331 (Pa. 1903) (permitting suit against labor union for violation of "natural rights" clause). *But see* Santiago v. Canon U.S.A., Inc., 1998 U.S. App. LEXIS 2951, *5, *10 n.6 (1st Cir. Feb. 20, 1998) (stating that no Puerto Rican court has recognized a cause of action against a private corporation for gender discrimination under article II, section 1 of the Puerto Rican Constitution, although the Puerto Rican Supreme Court has recognized that the Puerto Rican Constitution provides a direct right of action); Kelley Property Dev. Inc., v. Town of Lebanon, 627 A.2d 909, 923-24 (Conn. 1993) (declining to imply a cause of action under Connecticut due process clause against zoning board members who were laypersons who "might not be able to predict accurately what conduct would be found to violate the state constitution.").

422. The range of potential plaintiffs in *Brown* actions is also dictated by the designation of state constitutional violations as torts and the provisions of the New York Constitution itself. The *Brown* decision established the right of individuals to sue for deprivation of state constitutional rights. From this, it logically follows that the constitutional right of corporations "to sue and . . . be sued in all courts in like cases as natural persons," N.Y. CONST. art. X, § 4, confers upon corporations the right to sue for violation of the rights to which they are entitled under the New York Constitution. Corporations, however, do not have the same range of constitutional rights as do natural persons; rather, the application of constitutional rights to corporations "depends on the nature, history and purpose" of the right at issue. *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 779 n.14 (1978). Thus, corporations have no right to vote; do not enjoy a right to privacy, *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); and do not enjoy protection from unreasonable searches and seizures or from self-incrimination, *Wilson v. United States*, 221 U.S. 361, 374-76 (1911). Moreover, some of the rights conferred in article I of the New York Constitution—such as freedom of worship—are inapplicable to corporate entities. However, corporations are entitled to limited freedom of speech, *First Nat'l Bank*, 435 U.S. at 776-79; due process of law, *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408 (1989); protection from excessive fines, *Browning-Ferris Indus. of Vt. v. Kelco Disposal, Inc.*, 492 U.S. 257, 295 (1989); and equal protection, *People v. Perretta*, 253 N.Y. 365, 368, 171 N.E. 72, 73 (1930). This latter right under the New York Constitution serves to protect out-of-state corporations from discriminatory treatment as compared with New York corporations, and may thus form the basis of a *Brown* claim by a foreign company. *See id.* at 368, 171 N.E. at 73. In addition to private corporations, the possibility exists that public corporations and local governments might also be entitled to sue under *Brown* in limited circumstances. *See supra* note 351 and accompanying text (discussing article IX as the basis for a *Brown* claim).

D. *Standard of Care*

Another issue left undecided in *Brown* is the standard of care owed to New York citizens by government officials in protecting their constitutional rights. In traditional tort law, causes of action are divided into those which require intent and those which may be established by mere negligence. In civil rights jurisprudence, however, mere negligence is not sufficient, although a number of intermediate standards such as deliberate indifference, reckless disregard and unnecessary and wanton conduct will support liability under 42 U.S.C. § 1983 in certain circumstances.[423]

At least one state jurisdiction has classified constitutional violations as "intentional torts."[424] The *Brown* majority, however, did not address whether a constitutional tort remedy might be available even for negligent acts which cause harm of constitutional dimension.[425] This raises the possibility of large-scale constitutionalization of everyday tort actions, which the United States Supreme Court has warned would trivialize constitutional law.[426] In one decision subsequent to *Brown,* however, the court of claims has applied a higher standard, holding that damages should

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423. *See* Randy J. Amster, *Defining a Uniform Culpability Standard in Section 1983*, 56 BROOK. L. REV. 183 (1990); *see also* Bott v. DeLand, 922 P.2d 732, 738 (Utah 1996) ("The only common feature of all [state constitutional tort] cases is that they hold that simple negligence is not sufficient justification for a damage claim.").

424. Old Tuckaway Assocs. Ltd. v. City of Greenfield, 509 N.W.2d 323, 329 (Wis. Ct. App. 1993).

425. *See* Brown v. State, 89 N.Y.2d 172, 194, 674 N.E.2d 1129, 1143 (1996) (explaining that the state could avoid liability in the court of claims by disciplining or dismissing "incompetent or negligent" employees). The court of appeals, however, may have been referring to the general scope of state liability in the court of claims rather than to constitutional torts in particular.

426. *See* Daniels v. Williams, 474 U.S. 327, 330-32 (1986) (rejecting negligence standard for § 1983 actions because such a standard would trivialize the constitution and substitute constitutional law for tort law in a wide array of cases). "The need to distinguish between constitutional and common-law torts has become more important in recent years as the Court has embarked on a campaign to ensure that common-law torts do not 'sneak' into federal court disguised as constitutional claims." William Burnham, *Separating Constitutional and Common-Law Torts: A Critique and a Proposed Constitutional Theory of Duty*, 73 MINN. L. REV. 515, 516 (1989). While state courts may not be as concerned as federal courts with screening out tort actions, the concern with trivializing the constitution is shared equally by state and federal jurisdictions.

only be available for violations which occurred through the "deliberate indifference" of the defendants.[427]

E. *Retroactivity and Procedural Issues*

As one court has noted, the court of appeals also did not decide whether the *Brown* decision had retroactive effect.[428] Although changes in decisional law normally apply to all claims not fully decided at the time of the decision,[429] courts have been willing on certain occasions to make exceptions, especially when a change in the law radically undermines a principle upon which litigants had relied.[430] One commentator has additionally argued that retroactive liability for changes in constitutional law should be evaluated "in the interests of justice" rather than applied automatically.[431]

One New York court, although not explicitly ruling on the retroactive application of *Brown*, has used another vehicle to decline to give retroactive effect to the decision. In *Goddard v. State*,[432] relying on the finding in the *Brown* decision that the court of claims had entertained jurisdiction over state constitutional tort cases in the past,[433] the court held that a claim under *Brown* based upon past unconstitutional conduct accrued, not on the date of the *Brown* decision, but at the time "when the

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427. De La Rosa v. State, 662 N.Y.S.2d 921, 924 (Ct. Cl. 1997); *Bott*, 922 P.2d at 740 (adopting deliberate indifference standard in actions under Utah's cruel and unusual punishment clause to ensure that "human frailties of forgetfulness, distractability or misjudgment" do not lead to constitutional liability). The term "deliberate indifference," however, "is confusing and has a number of possible meanings." Russell W. Gray, Wilson v. Seiter: *Defining the Components Of and Proposing a Direction For Eighth Amendment Prison Condition Law*, 41 AM. U. L. REV. 1339, 1367 (1992).

428. *See* Ilic v. New York, Claim No. 84129, at 17 (Ct. Cl. Apr. 28, 1997) (Corbett, J.).

429. *See* Gager v. White, 53 N.Y.2d 475, 483, 425 N.E.2d 851, 853 (1981).

430. *See* Tucker v. Badoian, 384 N.E.2d 1195, 1202 (Mass. 1978) (Kaplan, J., concurring) ("In the present situation . . . we propose to alter a rule of long standing on which parties may have relied. Accordingly we think the new standard should be reserved for prospective application, that is, for conduct occurring hereafter, excepting future conduct so related in a continuum with past conduct that it would be unjust to apply the new standard to it."). Although a concurring opinion, this statement is authoritative as six of the seven justices of the Massachusetts Supreme Court joined in its holding. *See id.* at 1201.

431. *See generally* Fallon & Meltzer, *supra* note 391.

432. 662 N.Y.S.2d 179 (Ct. Cl. 1997).

433. *Id.* at 180 (citing *Brown*, 89 N.Y.2d at 182, 674 N.E.2d at 1135).

act complained of or injury [occurred]."[434] To hold otherwise, the court determined, would allow "not only this claimant, but potentially thousands of other aggrieved claimants . . . to initiate potentially stale claims from years past."[435] This holding, if adopted by the court of appeals, would effectively foreclose much of the retroactive applicability of *Brown*.

The *Goddard* court also held that the notice requirement and statute of limitations provided in the Court of Claims Act[436] applied to constitutional tort cases under *Brown*.[437] Although the notice requirement of the Court of Claims Act, and the similar requirement contained in the General Municipal Law, had not previously been applied to claims for violation of constitutional rights,[438] the *Goddard* court's holding was logical in view of the court of appeals' characterization of constitutional violations as torts under New York law.[439] It is thus likely that the court of appeals will require both the notice and limitation provisions as to the state itself and as to suits against municipalities.[440] The one other state to consider the application of notice-of-claim statutes to constitutional violations, New Jersey, has arrived at the same conclusion, holding that the notice requirement of the New Jersey Tort Claims Act "is not unreasonable" in that "[i]t provides municipalities with an opportunity for the prompt investigation and settlement of claims."[441]

Finally, the *Brown* court did not address whether punitive damages are available in cases where state constitutional rights are maliciously violated.

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434. *Goddard*, 662 N.Y.S.2d at 181.

435. *Id.* at 180.

436. N.Y. Court of Claims Act section 10 provides that no action in tort may be maintained against the state unless a notice of claim is filed within 90 days of the accrual of the claim; *see also* N.Y. GEN. MUN. LAW §§ 50-e, 50-i (McKinney 1985) (providing similar provisions with regard to municipalities).

437. *See Goddard*, 662 N.Y.S.2d at 182.

438. *See* Felder v. Casey, 487 U.S. 131, 152-53 (1988) (state notice-of-claim requirements cannot bar actions under 42 U.S.C. § 1983).

439. *See* Brown v. State, 89 N.Y.2d 172, 183, 674 N.E.2d 1129, 1135 (1996).

440. In *Schwartz v. Gamba*, N.Y.L.J., Nov. 25, 1997, at 25 (Sup. Ct., Suffolk Co., Nov. 23, 1997), however, the Suffolk County Supreme Court stated that New York constitutional torts have a six-year statute of limitations by operation of law under CPLR section 213(1) because there was no statutorily prescribed statute of limitations. The *Gamba* court apparently ignored the special statute of limitations prescribed for actions against municipalities or their agents by sections 50-e and 50-i of the General Municipal Law.

441. Lloyd v. Borough of Stone Harbor, 432 A.2d 572, 580 (N.J. Super. Ct. Ch. Div. 1981). The *Lloyd* decision is particularly applicable to New York because New Jersey, like New York, interprets state constitutional liability in terms of a state tort claims act.

Since the *Brown* decision involved a suit under the Court of Claims Act, which does not contemplate punitive damages,[442] this issue was never before the court. Thus, it remains to be seen whether the court of appeals, if it allows state constitutional claims against private individuals at all,[443] will allow punitive damages against such defendants.[444]

F. *The Future of Judicially Implied State Constitutional Tort in New York*

With the *Brown* decision, the court of appeals subjected New York civil rights law to the full spectrum of tort law, including its strictures and limitations. Within that framework, however, possibly the most likely models for New York state constitutional tort law are Vermont and California. The two-step test adopted by the court of appeals in *Brown* indicates reasoning very similar to the Vermont Supreme Court in *Shields* and the California courts in *Leger*.[445] The California and Vermont courts share the *Brown* majority's view of the state constitution as a source of positive rights, and share the court of appeals' concerns about providing meaningful remedies to protect state constitutional rights.[446]

Both the California and Vermont lines of state constitutional tort cases are philosophically compatible with the court of appeals' reasoning in *Brown*. The key difference between the Vermont and California lines of cases, however, is their attitude toward separation of powers. The Vermont courts, in deference to the role of the legislature, have created a narrow right which is only enforceable in the absence of alternative

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442. Punitive damages may not be recovered against the state itself or against any of its political subdivisions. *See* Sharapata v. Town of Islip, 56 N.Y.2d 332, 336-39, 437 N.E.2d 1104, 1106-08 (1982) (discussing reasons why punitive damages are not available against governmental units).

443. *See supra* notes 422-31 and accompanying text (discussing availability of *Brown* claims against individual defendants).

444. *See* Schwartz Remarks, *supra* note 4 (describing availability of punitive damages as an "open issue"). If the availability of punitive damages in *Brown* claims is decided as a matter of New York tort law, such damages will be available only for "outrageous or oppressive intentional misconduct" or "reckless or wanton disregard of safety or rights." *Sharapata*, 56 N.Y.2d at 335, 437 N.E.2d at 1106 (citing Clarence Morris, *Punitive Damages in Personal Injury Cases*, 21 OHIO ST. L.J. 216, 221 (1960)).

445. *See Brown*, 89 N.Y.2d at 186-87, 674 N.E.2d at 1138; Shields v. Gerhart, 658 A.2d 924, 927-30 (Vt. 1995); Leger v. Stockton Unified Sch. Dist., 249 Cal. Rptr. 688, 690-93 (Cal. Ct. App. 1988).

446. *See Shields*, 658 A.2d at 927; Fenton v. Groveland Community Servs. Dist., 185 Cal. Rptr. 758, 763 (Cal. Ct. App. 1982).

remedies.[447] The California courts, on the other hand, have taken for granted their authority to create remedies, and do not usually require the absence of alternative remedies.[448] The court of appeals has thus far not definitively indicated whether absence of alternative remedies is a prerequisite to maintaining a constitutional tort action.[449] Thus, if the Legislature does not enact a civil rights statute,[450] the court of appeals' attitude toward this factor may determine whether the emerging New York state constitutional tort cause of action is broad or narrow.

V. TOWARD A NEW YORK CIVIL RIGHTS ACT

A. *Reasons for a Civil Rights Statute*

"'[A] legislative solution is preferable to judicial action in [state civil rights law] for at least four obvious reasons.'"[451] These are "reducing the costs of trial and error; providing guidance for affected parties; promoting greater participation by the affected parties and others, resulting in more sensible and workable rules; and educating the public and others through the open legislative process."[452] Another commentator has argued that, by defining the right of action more clearly, a statute would reduce the number of frivolous or meritless claims.[453]

To this may be added two further reasons. The first of these is the elimination of the confusing and circular requirement that a constitutional provision must be self-executing in order to support a right of action. Since a civil rights statute would provide the necessary enabling legislation to establish a damage remedy, there would be no need to determine whether each individual constitutional right could support such a remedy on its own. A second, and more important, consideration is the doctrine of separation of powers. A statute, as opposed to a judicially created right of action, would be the result of a democratic consensus rather than judicial activism. In other words, "[t]he legislature is the more appropriate body to create such a cause of action because it can define its

447. *See Shields*, 658 A.2d at 933.

448. *See Fenton*, 185 Cal. Rptr at 761-66 (cause of action allowed under 42 U.S.C. § 1981 and California Constitution). *But see* Bonner v. City of Santa Ana, 33 Cal. Rptr.2d 366 (Cal. Ct. App. 1996) (claim not allowed under California due process clause in absence of alternative remedies due to legislative intent).

449. *See supra* notes 207-42 and accompanying text.

450. *See infra* notes 477-567 and accompanying text.

451. Nahmod, *supra* note 12, at 955 n.28 (quoting Friesen, *supra* note 12, at 1284).

452. *Id.* (citing Friesen, *supra* note 12, at 1284).

453. *See* McNew, *supra* note 12, at 1658.

limits through public debate, and those limits will exist prior to the conduct that could possibly bring about an action."[454]

Separation of powers has been cited as a key factor by those jurisdictions which have rejected a direct state constitutional tort cause of action. While not without sympathy for the plight of individuals whose civil rights have been violated, these courts have recognized the importance of deferring to the legislature's judgment in balancing the interests, rights and policies at stake in creating a damage remedy for state constitutional violations.[455] The Supreme Court of Oregon, for example, refused to allow a direct cause of action against a municipality for an alleged violation of the Oregon free speech clause, stating that "[i]f an implied private right of action for damages for governmental violations of article I, section 8, and other non-self-executing state constitutional provisions is to exist, it is appropriate that it come from the legislature, not by action of this court."[456] Similarly, the Georgia Supreme Court concluded that "[n]either the trial court nor this court is free to fashion a *Bivens* remedy under state law" in the absence of express authority conferring such a right.[457]

The concept of separation of powers as a bar to judicial implication of a constitutional right of action was set forth most thoughtfully in *Board of County Commissioners v. Sundheim,*[458] decided by the Colorado Supreme Court in 1996. The *Sundheim* court began its analysis by noting that while the Colorado Governmental Immunity Act (CGIA) waived Colorado's sovereign immunity in certain situations, "this waiver does not specifically include the violation of a citizen's state constitutional rights."[459] Having established that specific statutory authority for state constitutional tort actions was lacking, the court then moved on to its primary thesis—that "the [Colorado] General Assembly has carefully

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454. *Id.* at 1668; *see also* Freedus, *supra* note 12, at 1940.

455. *See infra* notes 458-65 and accompanying text.

456. Hunter v. City of Eugene, 787 P.2d 881, 884 (Or. 1990). "Of course, the judiciary has no authority without legislation to put a person in jail for violating a constitutional right. By like token, we are very reluctant to impose any civil responsibility in the form of damages for violation of such a right, absent specific legislation or clear legislative intent." *Id.* at 883.

457. State Bd. of Educ. v. Drury, 437 S.E.2d 290, 294 (Ga. 1993); *see also* Figueroa v. Hawaii, 604 P.2d 1198, 1205 (Haw. 1979) (court could not extend Hawaii's waiver of sovereign immunity without legislative authority); Bagg v. University of Texas, 726 S.W.2d 582, 584 n.1 (Tex. App. 1987) (holding that "[t]here is no state 'constitutional tort'" in Texas in the absence of statutory or established common law authority).

458. 926 P.2d 545 (Colo. 1996).

459. *Id.* at 549 n.8.

defined the limits of a private citizen's right to redress for the actions of government entities and officials."[460]

In support of this holding, the *Sundheim* court cited the legislative policy statement which accompanied the CGIA.[461] This statement, which details the balance of rights at stake in determining the extent of public liability, stated that although sovereign immunity could in some instances be "inequitable," unlimited liability could "disrupt or make prohibitively expensive" the delivery of essential government services and that "the taxpayers would ultimately bear the fiscal burdens" of such liability.[462] From this, the Colorado Supreme Court reasoned that "[t]he CGIA clearly sought to balance the interests of citizens seeking relief from governmental abuses of power against the public interest of maintaining an efficient and fiscally responsible government."[463] The court was unwilling to create "a new constitutional cause of action [which] could seriously alter the delicate balance between these competing policies."[464] Such changes, according to the *Sundheim* court, should best be made by the legislature.[465]

While the New York courts have declined to hold that separation of powers bars them from creating an implied right of action under the New York Constitution, it remains that the creation of remedies is traditionally the province of the legislature.[466] Ratification or modification of the *Brown* decision by legislative action—a possibility specifically left open by

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460. *Id.* at 549.

461. *Id.* (citing COLO. REV. STAT. § 24-10-102 (1997)).

462. COLO. REV. STAT. § 24-10-102 (1997).

463. *Sundheim*, 926 P.2d at 550. "The CGIA and [the Colorado Rules of Civil Procedure] clearly support an intent on behalf of the general assembly and this court to balance the rights of aggrieved citizens against legitimate government concerns." *Id.*

464. *Id.*

465. *See id.* The courts in two additional states, Washington and Tennessee, have also rejected causes of action based on their respective state constitutions, albeit in a peremptory manner and without reference to legislative authority. *See* Systems Amusement, Inc. v. Washington, 500 P.2d 1253, 1254-55 (Wash. Ct. App. 1972); Lee v. Ladd, 834 S.W.2d 323, 324-25 (Tenn. Ct. App. 1992); Bennett v. Horne, No. 89-31-II 1989 Tenn. App. LEXIS 530, at *4 (Aug. 2, 1989); *see also* Cline v. Rogers, 87 F.3d 176, 179 (6th Cir. 1996) ("Tennessee does not recognize a private cause of action for violations of the Tennessee Constitution.").

466. *See generally* Gershman, *supra* note 23; *see also* Smith v. Department of Pub. Health, 410 N.W.2d 749, 790 (Mich. 1987) (Brickley, J., concurring in part and dissenting in part); Sharapata v. Town of Islip, 56 N.Y.2d 332, 336-39, 437 N.E.2d 1104, 1106-08 (1982) (holding that courts could not assess punitive damages against governmental units absent authorization by the legislature). Notably, the *Sharapata* court stated that the New York Constitution itself "cautions against unwarranted invasion of the public purse." *Id.* at 338 (citing N.Y. CONST. art. VII, § 8; art. VIII, § 9).

the majority[467]—would address the concerns of the court of appeals and provide the additional advantages of a legislative remedy. Certainly, there is precedent for a legislatively created constitutional tort right of action superseding a judicial one; the comprehensive Massachusetts civil rights statute was enacted after a state constitutional tort cause of action had already been recognized by the Massachusetts courts.[468] Moreover, the current debate with respect to tort reform[469] renders a civil rights statute consistent with the present political climate[470] as well as the well-established legal principle that every wrong should have an appropriate remedy.[471]

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467. Brown v. State, 89 N.Y.2d 172, 192, 674 N.E.2d 1129, 1141-42. The *Brown* court noted that the New York Legislature could redefine the jurisdiction of the court of claims if it were dissatisfied with the court of appeals' conclusion. *See id.* at 192, 674 N.E.2d at 1142.

468. FRIESEN, *supra* note 65, § 7.07, at 7-28; *see also* McNew, *supra* note 12, at 1668-69 (suggesting a legislative enactment to supersede and clarify the judicially created Louisiana state constitutional tort cause of action); Schwartz Remarks, *supra* note 4 (stating that federal *Bivens* claims "were originally implied as part of the Constitution" but that "courts will still defer to legislatively created remedies"). Since the enactment of the Massachusetts Civil Rights Act, Massachusetts courts have discussed the possibility of inferring a direct cause of action in cases which fall outside the scope of the Act, but none has actually done so. *See* Martino v. Hogan, 643 N.E.2d 53, 59-60 (Mass. 1994). At least one Massachusetts court has offered the opinion that such an action is most likely precluded because the Act "may be thought, as it were, to occupy the field." *Id.* at 60.

469. *See supra* note 62 and accompanying text.

470. *See* Holland, *supra* note 143, at 1000-01, 1005 (stating that state constitutional reform often follows prevailing political and social climate).

471. This principle is enshrined in the constitutions of more than 30 states, although not in New York. A typical provision of this sort, contained in the Ohio Bill of Rights, provides 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 denial or delay." OHIO CONST. art. I, § 16. These provisions have their source in article 40 of the Magna Carta and Blackstone's famous maxim that "wherever the common law gives a right or prohibits an injury, it also gives a remedy by action; and, therefore, wherever a new injury is done, a new method of remedy must be pursued." 3 WILLIAM BLACKSTONE, COMMENTARIES *123. This principle has been embraced even by states such as New York which have not adopted it as a matter of constitutional law. Certain commentators, and two courts, have cited this doctrine to support the creation of a state constitutional tort cause of action. *See* Gareau, *supra* note 11, at 462, 472-76 (arguing that article I, section 16 of the Ohio Constitution mandates a damage remedy for violations of state constitutional rights); Jefferson, *supra* note 12, at 1574 (arguing that state constitutional remedy clauses "dictate recognition of Constitutional claims for damages"); Corum v. University of N.C., 413 S.E.2d 276, 289 (N.C. 1992) ("the common law, which provides a remedy for every wrong, will furnish the appropriate action for the adequate redress of a violation of [the

B. *Legislative Alternatives*

More than one alternative is available to the New York Legislature in addressing the issues raised by *Brown*. The court of appeals in *Brown* specifically suggested one such alternative, when it noted that "it is within the power of the Legislature to redefine the jurisdiction of the Court of Claims if it sees fit to do so."[472] In other words, the Legislature could immunize the state from constitutional tort litigation by amending the Court of Claims Act to provide that state constitutional violations are not within its jurisdiction.[473]

This would, however, be no more than a partial solution. The *Brown* decision arrived at two separate findings: that a violation of the New York Constitution was a tort cognizable under the Court of Claims Act, and that the equal protection and search and seizure clauses were enforceable by an action for damages.[474] Even if the Court of Claims Act is amended to exclude constitutional violations from the court of claims' jurisdiction, this will not disturb the *Brown* court's separate holding that a cause of action exists for violation of the equal protection and search and seizure clauses. Thus, an act which redefines the jurisdiction of the court of claims would immunize the state from constitutional tort suits, but would not eliminate

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North Carolina free speech clause]"); Shields v. Gerhart, 658 A.2d 924, 928 (Vt. 1995) (stating, based on chapter 1, article 4 of the Vermont Constitution, that "[t]he common law, which provides a remedy for every wrong, provides a remedy for violation of a constitutional right"). However, this doctrine has its limits. In *Tobin v. Grossman*, 24 N.Y.2d 609, 619, 249 N.E.2d 419, 424 (1969), Judge Breitel of the New York Court of Appeals noted that, "[w]hile it may seem that there should be a remedy for every wrong, this is an ideal limited perforce by the realities of the world." Other courts have interpreted remedy clauses to mean that the constitution "does not guarantee redress for every wrong, but instead enjoins the legislature from eliminating those remedies that have *vested at common law* without a legitimate legislative purpose." Olson v. Ford Motor Co., 558 N.W.2d 491, 497 (Minn. 1997). Finally, at least one court has noted that, even where the constitution guarantees a remedy, "the method by which such a remedy should be granted is not indicated." Doe v. Montessori Sch. of Lake Forest, 678 N.E.2d 1082, 1090 (Ill. App. Ct. 1997); *but see* Gaines v. Preterm-Cleveland, Inc., 514 N.E.2d 709, 716 (Ohio 1987) (a remedy must be "meaningful" in order to satisfy the requirements of the constitution). Thus, the remedy doctrine alone is not sufficient grounds to imply a damages action directly from a state constitution. However, it provides a sound traditional basis for legislation guaranteeing such a remedy.

472. *Brown*, 89 N.Y.2d at 196, 674 N.E.2d at 1144.

473. *See* Charles M. Yablon, *Court of Appeals in 96-97: Busy in Civil Procedure*, N.Y.L.J., Nov. 14, 1997, at 1, 4 ("[T]he Court's expansive reading of Court of Claims jurisdiction ultimately rests on statutory grounds and is therefore subject to legislative modification or reversal.").

474. *See Brown*, 89 N.Y.2d at 179-92, 674 N.E.2d at 1133-41.

such actions against private persons, against public officials in their individual capacities, or against political subdivisions of the state. The state constitutional cause of action itself would continue to exist against individuals and municipalities—and would be defined by the courts, not by the legislature.

Therefore, the only means of immunizing state officials in their individual capacities—and thus removing the risk of loss to the state treasury through indemnity—would be the enactment of legislation eliminating state constitutional tort actions entirely. While this is an option for the legislature,[475] it may not be a desirable one, as there is no logical reason to conclude that state constitutional rights are any less worthy of protection than their federal counterparts. Instead, the New York Legislature can protect state constitutional rights while defining the scope of liability by enacting a civil rights statute similar to those already enacted in several jurisdictions within the United States, which clearly sets forth the rights subject to suit and the available defenses and immunities.[476]

C. *An Overview of American Civil Rights Statutes*

The idea of a civil rights statute at the state level is a relatively new one in American law. Prior to 1977, only federal law provided a statutory cause of action for damages for violation of constitutional rights. In the

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475. Some may suggest that, once a court has implied a damage remedy for a self-executing constitutional provision, the legislature may not abridge that remedy. However, the majority of cases indicate that a legislature may control or restrict the remedies for self-executing constitutional provisions as long as it does not completely foreclose some form of relief. *See supra* note 149 and accompanying text. In addition, at least one court has implicitly held that a state legislature may prohibit the creation of constitutional torts. *See* Binette v. Sabo, No. 15547, 1998 WL 122424, at *9-11 (Conn. Mar. 10, 1998) (holding that the court has the authority to create a state constitutional tort cause of action where the legislature has not prohibited such a right of action or created other remedies).

476. At least one commentator has also suggested that a cause of action might be defined within the state constitution itself. *See* Owen, *supra* note 12, at 191 (suggesting that the New Mexico Constitutional Revision Commission recommend an amendment to the New Mexico Legislature authorizing a state constitutional tort cause of action). In addition, the District of Columbia Statehood Constitutional Convention included a provision in the draft New Columbia Constitution which was intended to provide a right to sue for violations of the Bill of Rights. *See* Oulahan, *supra* note 14, at 706 n.400 (citing committee report stating that "[t]he committee intends that the people shall retain a private right of action to enforce every section in this Article on Rights"); *id.* at 706 (noting that article I, section 24 of the New Columbia Constitution "provides a *Bivens*-like remedy for each section of Article I"). In New York, a constitutional amendment delineating the limits of a state constitutional tort cause of action could be enacted by legislative amendment process as defined in article XIX, section 1 or by convention as provided by article XIX, section 2.

past two decades, however, six states have enacted statutes providing in varying degrees for the private enforcement of state constitutional rights. As with the judicially created causes of action, the state civil rights statutes represent a variety of approaches to the problem of individual constitutional enforcement.

1. The Federal Statute: 42 U.S.C. §§ 1981-88

In addition to being the oldest civil rights statute by more than a century,[477] the Federal Civil Rights Act, as judicially construed, provides the most comprehensive scheme for redress of constitutional violations. An exhaustive analysis of federal civil rights law is far beyond the scope of this article.[478] Instead, this article will touch upon several basic aspects of the federal statutory scheme which may provide guidance to state legislatures developing their own civil rights laws.

The heart of the Federal Civil Rights Statute consists of 42 U.S.C. § 1983, which "provides a remedy for any person deprived of a federal right under color of state law."[479] Under § 1983, an action will lie against any "person" who, acting under color of state law,[480] deprives the plaintiff of a right "secured by the Constitution and laws" of the United States.[481] A plaintiff in a § 1983 action may recover compensatory and punitive damages as well as injunctive or declaratory relief.[482] In addition, a prevailing party in a federal civil rights action may recover reasonable legal fees.[483]

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477. The Federal Civil Rights Statute has its roots in the "Ku Klux Klan Acts" of 1871. For a detailed discussion of the history of the Ku Klux Klan Acts, see *Monroe v. Pape*, 365 U.S. 167, 172-79 (1961).

478. For instance, more than 1000 law review articles, a significant number of books, and countless federal and state court decisions have been written which touch upon aspects of federal civil rights litigation under 42 U.S.C. § 1981-88. For a historical discussion of the use of § 1983 as a vehicle for recovery of damages, see Stockel, *supra* note 25, at 655-59.

479. FRIESEN, *supra* note 65, § 7.03(2), at 7-8.

480. "State law" includes the law of any territory or the District of Columbia. 42 U.S.C. § 1983.

481. *Id.*

482. *See id.*

483. *See* 42 U.S.C. § 1988(b). Recovery of attorney's fees is at the discretion of the court, and may include expert fees. *See id.* § 1988(b), (c). Prevailing defendants, as well as plaintiffs, may recover attorney's fees, but may generally do so only if the plaintiff's underlying claim is frivolous or was brought in bad faith. *See* Rounseville v. Zahl, 13 F.3d 625 (2d Cir. 1994); United States v. Mississippi, 921 F.2d 604 (5th Cir. 1991); Bittner v. Sadoff & Rudoy Indus., 728 F.2d 820 (7th Cir. 1984).

Two companion statutes to § 1983 address conspiracies to violate civil rights. 42 U.S.C. § 1985(3) provides that an action will lie against two or more persons who conspire to violate certain constitutional rights possessed by any person or class of person.[484] Unlike the sweeping language of § 1983, this section only provides a cause of action for violation of the equal protection or privileges and immunities clause of the Constitution, or for certain types of political violence. Thus, the right of action under this somewhat ambiguous statute has been held to apply only to conspiracies motivated by a race or class-based animus.[485] Furthermore, the class of individuals targeted by the conspiracy must have been among the classes Congress intended to protect at the time the original federal Civil Rights Statute was enacted in 1871.[486]

The final statute in the federal civil rights trilogy, 42 U.S.C. § 1986, provides a cause of action against any person who has prior knowledge of a conspiracy in violation of § 1985 and fails to prevent it despite having the power to do so.[487] In a logical extension of the plain language of this statute, a claim under § 1986 can only be asserted by a plaintiff who has stated a valid cause of action under § 1985.[488] In addition, unlike §§ 1983 and 1985, this statute provides for a one-year period of limitation.[489]

Although no defenses or immunities are included in the language of these statutes, a number of judicially created immunities have developed during the century of the Federal Civil Rights Act's existence.[490] Actions against state governments, or against state officials in their official capacities, have been barred due to considerations of the Eleventh Amendment.[491] Judges, prosecutors and legislators acting in their official capacity "generally have absolute immunity from damages for acts within the scope of their proper function."[492] Ordinary executive officials,

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484. *See* 42 U.S.C. § 1985(3) (1979).

485. *See* Maida v. Andros, 710 F. Supp. 524 (D.N.J. 1988).

486. *See* Kimble v. D.J. McDuffy, Inc., 648 F.2d 340 (5th Cir. 1981), *cert. denied*, 454 U.S. 1110 (1981).

487. *See* 42 U.S.C. § 1986 (1979).

488. *See* McCalden v. California Library Ass'n, 955 F.2d 1214, 1223 (9th Cir. 1990), *cert. denied*, 112 S. Ct. 2306 (1990).

489. *See* 42 U.S.C. § 1986.

490. *See* FRIESEN, *supra* note 65, § 7.03(2), at 7-8.

491. *See* Will v. Michigan Dep't of State Police, 491 U.S. 58, 63-64 (1989).

492. FRIESEN, *supra* note 65, § 7.03(2), at 7-8 to 7-8.1. It should be noted that some courts have narrowed the scope of this immunity for prosecutors. *See id.* at 492-93. *See* Walker v. City of New York, 974 F.2d 293, 301 (2d Cir. 1992) (holding that absolute prosecutorial immunity applies only to decisions concerning whether to prosecute).

although not entitled to absolute immunity, retain "qualified immunity" for acts which do not violate a clearly established constitutional right.[493] In addition, local governments can be held liable only for their own unconstitutional policies or acts, but not those of their employees.[494] Each of these immunities is firmly established as a basic principle; however, as they are judicially created rather than inherent in the statute, their boundaries and contours are subject to constant flux.

The provisions of the Federal Civil Rights Statute dealing with conspiracies, which were designed to prevent very specific types of civil rights violation, have no parallel in any state civil rights statute. However, § 1983 has been enormously influential not only on the drafting but also on the judicial interpretation of its state counterparts. Thus, the framers of any state civil rights statute must consider § 1983 jurisprudence in evaluating the manner in which the courts will likely interpret the legislation they create.

2. "Little 1983:" The Massachusetts Civil Rights Act

The first, and most fully developed, state civil rights statute was enacted in 1979 by the state of Massachusetts. The Massachusetts Civil Rights Act, also known as "little 1983"[495] or the "baby civil rights bill,"[496] authorizes a private right of action for violation of civil rights.[497] The

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493. *See supra* notes 391-404 and accompanying text (discussing qualified immunity).

494. *See* Monell v. New York City Dep't of Soc. Servs., 436 U.S. 658, 691 (1978).

495. McNew, *supra* note 12, at 1668.

496. *See* Letter from Carol Brill, Executive Director, The Massachusetts Chapter of the National Association of Social Workers, to Gov. Edward J. King, in support of the Massachusetts Civil Rights Act (Nov. 13, 1979) (on file with *Governor's Legislative File for Chapter 801 of the Laws of 1979.*)

497. *See* MASS. GEN. LAWS ANN. ch. 12, §§ 11H, 11*I* (1996). Section 11H, which describes the conduct which will give rise to a cause of action by the Attorney General, reads:

> Whenever any person or persons, whether or not acting under color of law, interferes by threats, intimidation or coercion, . . . with the exercise or enjoyment by any other person or persons of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, the attorney general may bring a civil action for injunctive or other appropriate equitable relief in order to protect the peaceable exercise or enjoyment of the right or rights secured.

Id. Section 11*I* provides a private right of action to an individual for the conduct described in section 11H:

> Any person whose exercise or enjoyment of rights secured by the constitution or laws of the United States, or of rights secured by the constitution or laws of

statute provides for a cause of action for violation of both the Federal Constitution and laws, and the constitution and laws of Massachusetts. Injunctive relief, "other appropriate equitable relief," and compensatory money damages are specifically enumerated as available remedies.[498] In addition, the prevailing party is entitled to costs and reasonable legal fees.[499]

While the Massachusetts statute has been found to be essentially coextensive with 42 U.S.C. § 1983,[500] it exceeds its federal counterpart inasmuch as it provides for a private action.[501] Under section 11*I*, a plaintiff need not establish that the violation of his constitutional rights, whether guaranteed under the Federal or Massachusetts Constitution, was the result of state action. To the extent that a plaintiff who sues under section 11*I* is thus relieved of the need to establish state action to vindicate his federal rights, the statute provides a significantly broader avenue for redress than § 1983.

A second difference between the Massachusetts statute and 42 U.S.C. § 1983 is the requirement found in section 11H that a plaintiff show that

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> the commonwealth, has been interfered with, or attempted to be interfered with, as described in section 11H, may institute and prosecute in his own name and on his own behalf a civil action for injunctive and other appropriate equitable relief as provided for in said section, including the award of compensatory money damages.

Id.

498. *Id.*

499. *See id.* § 11*I* (The Massachusetts statute provides that "[a]ny aggrieved person or persons who prevail in an action authorized by this section shall be entitled to an award of the costs of the litigation and reasonable attorneys' fees in an amount to be fixed by the court.").

500. *See* Batchelder v. Allied Stores Corp., 473 N.E.2d 1128, 1131 (Mass. 1985).

501. *See id.* The court does not specify the basis for this conclusion, although it states that its holding is drawn from the legislative history of the statute. *Id.* However, the legislative history of the Massachusetts Civil Rights Act is sparse and capable of supporting conflicting determinations as to the intent of the legislature. In addition to letters and resolutions supporting and opposing the legislation, the Governor's Legislative File for Chapter 801 of the Laws of 1979 contains a textbook excerpt in which attention has been drawn to a discussion of the "state action" doctrine as it applies to the Federal Civil Rights Acts of 1875 and 1975 and to the discussion of state and private action. *See* Brill, *supra* note 496. The file also contains the decision of the United States Supreme Court in one of the famous civil rights cases, *Robinson v. Memphis & Charleston R.R. Co.*, 109 U.S. 3 (1883), in which the portions stating that the Fourteenth Amendment prohibits state action but does not address the individual invasion of individual rights, and secures individual rights by way of prohibition against state laws and proceedings affecting those rights, have been bracketed. *Id.* Finally, there appears a copy of William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

his rights were violated by threats, intimidation or coercion.[502] At least one Massachusetts court has found that a requirement of intent is implicit in such conduct and that the requirements of the statute are not generally met by conduct which is merely negligent.[503] The intent required, as under 42 U.S.C. § 1983,[504] is not a specific intent to deprive a person of his or her constitutional rights, but rather follows from the premise that a person intends the consequences of his acts.[505] However, because intentional conduct may exist in the absence of threats, intimidation or coercion, there can be instances where a constitutional violation which would be actionable under § 1983 would not result in a recovery under the Massachusetts statute.[506] For example, the failure of a city to train its employees in their constitutional obligations—which is actionable under § 1983 in certain circumstances[507]—may not form the basis of a suit under the Massachusetts Civil Rights Act because it does not involve threats, intimidation or coercion.[508]

Since the Massachusetts courts have found that the legislature modeled the Massachusetts Civil Rights Act on 42 U.S.C. § 1983,[509] they have relied heavily on federal precedent in determining related issues such as defenses and immunities. Although the Massachusetts statute, like 42 U.S.C. § 1983, does not provide for immunities, the doctrine of qualified immunity for discretionary functions has been applied to violations of the

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502. This requirement is based on the express language of section 11H. In *Appleton v. Town of Hudson*, 494 N.E.2d 10 (Mass. 1986), the court ruled that the presence of threats, intimidation, or coercion is an element of the claim. *See id.* at 13; *see also* Planned Parenthood v. Blake, 631 N.E.2d 985, 989 (Mass. 1994). A "threat" under the Massachusetts Civil Rights Act must involve the threatened deprivation of constitutional rights by unlawful means; a "threat" to use lawful means, in and of itself, is not actionable. *See* Sena v. Commonwealth, 629 N.E.2d 986, 994 (Mass. 1994).

503. *See* Deas v. Dempsey, 530 N.E.2d 1239, 1241 (Mass. 1988). The *Deas* court, however, left open the possibility that a degree of culpability short of intent might satisfy the requirements of the statute under certain circumstances. *See id.*

504. *See* Robins v. Meecham, 60 F.3d 1436, 1439-40 (9th Cir. 1995).

505. *See* Redgrave v. Boston Symphony Orchestra, Inc., 502 N.E.2d 1375, 1378-79 (Mass. 1987).

506. *See* Pheasant Ridge Assoc. v. Burlington, 506 N.E.2d 1152 (Mass. 1987) (holding that although an invalid taking of property by the town interfered with an owner's rights, it did not entitle plaintiff to a recovery because the element of threats, intimidation, or coercion was not satisfied). *See id.*

507. *See* City of Canton v. Harris, 489 U.S. 378, 379 (1989).

508. *See* Andujar v. City of Boston, 760 F. Supp. 238, 243 (D. Mass. 1991); Hathaway v. Stone, 687 F. Supp. 708, 711 (D. Mass. 1988).

509. *See* Batchelder v. Allied Stores Corp., 473 N.E.2d 1128 (Mass. 1985).

Massachusetts Civil Rights Act.[510] In further reliance on federal precedent,[511] the Massachusetts court has held that an employer is not liable for the acts of employees on the basis of respondeat superior.[512] Notably, the Massachusetts courts have applied the *Monell* doctrine even to private corporations—an issue never faced by the federal courts due to the requirement of state action inherent in § 1983 liability.[513] In addition, the Massachusetts courts have deferred to the State Legislature in holding that the Legislature may enact remedies for particular civil rights violations which preclude suit under the Massachusetts Civil Rights Act.[514]

In sum, the statutory remedy created by the Massachusetts legislature for violation of civil rights, as interpreted by the courts in accordance with federal precedent under 42 U.S.C. § 1983, has struck a balance between the protection of rights afforded by the Massachusetts State Constitution and limitations on governmental liability. In relying on established federal precedent in applying the statute, the Massachusetts courts have also provided litigants with a developed body of rules on which to assess their claims and defenses.

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510. *See* Duarte v. Healy, 537 N.E.2d 1230 (Mass. 1989). In an earlier decision, *Breault v. Chairman of the Board of Fire Commissioners*, 513 N.E.2d 1277, 1282-83 (Mass. 1987), the court ruled that the legislature had not intended to immunize nonjudicial officers from suit for all ministerial acts performed by them. The court supported this conclusion by relying on the fact that when the legislature enacted the Tort Claims Act one year prior to the Civil Rights Act, it withheld immunity from public employees where the acts complained of were intentional as opposed to negligent, and authorized public employers to indemnify public employees for violation of the Civil Rights Act. Prosecutorial immunity has also been held to apply. *See* Chicopee Lions Club v. District Attorney for Hampden District, 485 N.E.2d 673 (Mass. 1985).

511. *See* Monell v. New York City Dep't of Soc. Servs., 436 U.S. 658, 676 (1978).

512. *See* Lyons v. National Car Rental Sys., Inc., 30 F.3d 240, 246 (1st Cir. 1994). In arriving at this holding, the court relied on the finding of the Massachusetts Supreme Judicial Court in *Batchelder v. Allied Stores Corp.*, 473 N.E.2d 1128 (Mass. 1985) that rulings in § 1983 cases predating the Massachusetts Civil Rights Act may be used to determine whether doctrines applicable under § 1983 apply to it.

513. *See Lyons*, 30 F.3d at 246.

514. *See* Guzman v. Lowinger, 664 N.E.2d 820, 822 (Mass. 1996) (holding that the Civil Rights Act was not available as a remedy for sexual harassment claims since the legislature had provided a comprehensive scheme for adjudicating such claims).

3. Maine, Arkansas and California

Three other states, Maine,[515] Arkansas,[516] and California,[517] have enacted civil rights statutes similar in scope to 42 U.S.C. § 1983. All of these are more recently enacted than the Massachusetts Civil Rights Act, and the legislative and judicial history of all is sparse.[518] However, each represents a separate, and more restrictive, approach to constitutional tort actions than that taken by Massachusetts and federal law.

The original version of the Maine Civil Rights Act, enacted in 1989,[519] was similar in language to the Massachusetts statute, allowing a cause of action for violations of the Maine Constitution or laws regardless of state action.[520] The Maine statute included the Massachusetts requirement that the violation take place by means of "threats, intimidation or coercion," but added the additional requirement that the interference be intentional.[521]

The Maine courts, and federal courts in Maine, have utilized both federal and Massachusetts precedent in construing the Maine Civil Rights Act. The first decision to construe the Act, *Grenier v. Kennebec County*,[522] concluded that "the Maine Civil Rights Act was patterned after 42 U.S.C. § 1983"[523] and that the State of Maine was therefore not a "person" subject to suit under the statute.[524] In a subsequent decision, the Supreme Judicial Court of Maine also commented that the Maine statute "closely parallels the Massachusetts Civil Rights Act . . . ."[525] Additionally, the legislative history of the Maine statute indicates that it was adopted for a reason similar to that which led to the enactment of the

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515. *See* ME. REV. STAT. ANN. tit. 5, § 4682 (West 1996).

516. *See* ARK. CODE ANN. §§ 16-123-101 to 108 (Michie Supp. 1995).

517. *See* CAL. CIV. CODE § 52.1(b) (West 1997).

518. *See infra* notes 519-53 and accompanying text.

519. *See* Phelps v. President & Trustees of Colby College, 595 A.2d 403, 404-05 (Me. 1991).

520. *See* ME. REV. STAT. ANN. tit. 5, §§ 4681-82 (West 1996).

521. *See id.*

522. 733 F. Supp. 455 (D. Me. 1990).

523. *Id.* at 458 n.6.

524. *Id.*; *see also* Jenness v. Nickerson, 637 A.2d 1152, 1158 (Me. 1994); Durepo v. Town of Limestone, Civ. No. 95-254-13, 1996 U.S. Dist. LEXIS 11198, at *13 (D. Me. July 25, 1996) ("The Maine Civil Rights Act was patterned after § 1983, and, therefore, the § 1983 analysis applies to Plaintiff's § 4682 claim.").

525. Phelps v. President & Trustees of Colby College, 595 A.2d at 403, 405 (Me. 1991).

Massachusetts civil rights law; that is, to combat a perceived danger of private racial, ethnic and religious discrimination.[526]

The Maine courts, however, have declined to adopt some of the more expansive interpretations of the Massachusetts statute. Thus, Maine's highest court declined to adopt the "Massachusetts gloss" on the state action requirement and allow suits against private persons for rights which are "traditionally protected only against governmental action."[527] Rather, the court found nothing in the legislative history of the Maine statute that indicated that the Maine Legislature intended to adopt Massachusetts case law[528] or to create constitutional rights which did not previously exist.[529] Thus, the Maine court, unlike the courts of Massachusetts, declined to allow a right of action for alleged violations of freedom of speech by private persons, because the right of free speech "traditionally has content only in relation to state action."[530]

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526. *See id.* at 406 (basing this conclusion on "[t]he only recorded legislative debate" concerning the civil rights act, which consisted of a prepared statement by a Maine state senator in support of the bill).

527. *Id.* at 405.

528. *See id.* at 405-06.

> Plaintiffs argue that the Act was patterned on the Massachusetts Act, and that we should assume that the Maine Legislature was familiar with the interpretive rulings of the Massachusetts courts and presume that the Legislature intended to adopt those rulings. In our view, the legislative history provides no basis for indulging in such a presumption . . . . There is nothing in the legislative history that suggests that the Legislature was ever apprised of the fact that the Act was modeled on a similar law in Massachusetts, and there is even less reason to assume that the Legislature was made aware of the interpretive rulings of the Massachusetts Supreme Judicial Court.

Id.

529. *See id.* at 406.

> When the bill was heard before the Committee on the Judiciary, the National Lawyers Guild presented a written statement outlining the purpose of the bill. That statement emphasizes that the bill does not create new rights, but rather provides a means of protecting rights that already exist, rights that have been established by the Legislature, Congress or the Constitution.

Id. The court additionally noted that this interpretation of the Maine Civil Rights Act "does not render the entire act duplicative and meaningless," because certain rights in the Maine Constitution—including freedom to travel, freedom from racial discrimination and freedom of religion—which "secure rights against private parties or, at least, do not specifically limit themselves to government infringement." *Id.* at 407.

530. *Id.* at 406. The court noted that allowing causes of action against private persons for freedom-of-speech violations would require "Maine courts to mediate disputes between private parties exercising their respective rights of free expression and association . . . [w]e would ultimately be forced to mediate between two groups of peaceful demonstrators, both exercising their first amendment rights, if either intended to interfere

Most recently, the Maine Legislature has taken further measures to restrict the scope of state constitutional tort actions in Maine. In a 1996 amendment to the Maine Civil Rights Act, the Legislature enacted the additional requirement that interference with civil rights must be accomplished by physical force or violence, damage or destruction of property, trespass on private property or by the threat of any such act.[531] There has, as yet, been no judicial interpretation of the boundaries of this requirement, but it indicates a legislative intention to confine the scope of the statute to the more egregious civil rights violations and to avoid constitutionalizing routine disputes.

The Arkansas Civil Rights Act of 1993[532] takes a different approach to restricting the scope of state constitutional tort actions. The statute specifically provides that Arkansas courts may look to federal decisions prior to January 1, 1993 which construe 42 U.S.C. § 1983, but states that such precedent "shall have persuasive authority only."[533] Unlike the Maine and Massachusetts statutes, the Arkansas act contains no requirement that actionable interference be intentional or that it include threats, intimidation or coercion.[534] However, the Arkansas statute includes a state action requirement and specifically limits its scope to rights contained in the Arkansas Constitution rather than Arkansas statutes or the Constitution of the United States.[535]

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with the other." *Id.* at 407-08; *Cf.* Redgrave v. Boston Symphony Orchestra, Inc., 502 N.E.2d 1375, 1379 (Mass. 1987) (allowing action against private actor for interference with freedom of speech).

531. *See* ME. REV. STAT. ANN. tit. 5, § 4682 (1996).

532. *See* ARK. CODE ANN. §§ 16-123-101 to 109 (Michie Supp. 1997).

533. *Id.* at § 16-123-105(c). One commentator has noted that the reference to § 1983 "suggests a broad array of applications for the state act." Theresa M. Beiner, *An Overview of the Arkansas Civil Rights Act of 1993*, 50 ARK. L. REV. 165, 199 (1997). In keeping with this, the Supreme Court of Arkansas has allowed jurisdiction over a suit for injunctive relief for failure to comply with a constitutional provision requiring the publication of proposed constitutional amendments. *See* McCuen v. Harris, 902 S.W.2d 793, 795-98 (Ark. 1995) (upholding preliminary injunction prohibiting the Arkansas Secretary of State from placing a proposed constitutional amendment on the ballot because its provisions had not been published in accordance with article 19, section 22 of the Arkansas Constitution). This holding was reached despite a vigorous dissenting argument that the civil rights statute was intended to be more limited in scope. *See id.* at 800-01 (Glaze, J., dissenting).

534. *See* ARK. CODE ANN. § 16-123-105(a) (Michie Supp. 1997).

535. *See id.* This limitation was underscored in *Morrow v. City of Jacksonville*, 941 F. Supp. 816 (E.D. Ark. 1996), in which the court held that no remedy was available under the Arkansas act for employment discrimination because such discrimination was only prohibited by statute in Arkansas rather than by the state constitution. *See id.* at 820 n.2.

The Arkansas Civil Rights Act does contain a separate provision, which allows causes of action for discrimination in employment, credit, property transactions and public accommodations and for deprivation of the right to vote.[536] This section does not include a state action requirement, thus allowing a more liberal cause of action for violations of certain rights which the Legislature deemed fundamental.[537]

The extent of governmental liability allowed under the act is also uncertain. The statute expressly states that it does not constitute a waiver of the sovereign immunity of the State of Arkansas.[538] As Arkansas is one of the few states which have retained complete sovereign immunity,[539] this would appear to foreclose civil rights actions against the state itself.[540] However, Arkansas courts have held that an action against the state for injunctive relief does not implicate sovereign immunity,[541] and have also embraced the "legal fiction" that state officials performing unconstitutional acts are not acting in their official capacities and may be sued.[542]

Local governments also occupy an undefined position in the Arkansas statute. The original 1993 legislation specifically provided that governmental entities were liable for civil rights violations.[543] A 1995 amendment, however, removed the reference to governments and limited the right of action to suits against "persons."[544] It remains to be seen whether the Arkansas courts will construe this amendment as a legislative intent to grant immunity to local governments, or whether they will adopt the federal precedent holding that local governments are "persons" under certain circumstances for purposes of civil rights liability.[545]

California has also enacted a civil rights statute, the Bane Act, which allows individuals to sue for damages but incorporates the Massachusetts

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536. *See* ARK. CODE ANN. § 16-123-107(a), (b) (Michie Supp. 1997).

537. *See id.* However, damages for employment discrimination are capped by statute to protect small business. *See* ARK. CODE ANN. § 16-123-107(c)(2)(A) (Michie Supp. 1997).

538. *See* ARK. CODE ANN. § 16-123-104 (Michie Supp. 1997).

539. *See* ARK. CONST. art. V, § 20 (Michie Supp. 1997).

540. *See* Beiner, *supra* note 533, at 200.

541. *See id.*

542. *See id.*

543. S. Glen Hooks, *Survey of Legislation: Civil Liberties*, 18 U. ARK. LITTLE ROCK L.J. 291, 297 (1996).

544. *See id.*

545. *See supra* note 494 (discussing the *Monell* doctrine).

requirement of threats, intimidation or coercion.[546] Under this section, persons deprived of rights under the California Constitution, whether or not under color of law, may sue for three times their "actual damages" plus reasonable attorney's fees.[547] The Bane Act, however, has not often been litigated. This is likely because California courts have recognized a cause of action for state constitutional violations independent of the statute.[548] A suit under the Bane Act, rather than directly under the California Constitution, requires proof of the additional element of threats, intimidation or coercion, and thus is more difficult to establish.

In addition, the California courts have construed the Bane Act narrowly. Despite the fact that the Bane Act is not confined to violations committed under color of law, the California judiciary, like that of Maine, has ruled that certain constitutional provisions contain an inherent state action element.[549] Furthermore, the courts have adopted a narrow view of the California legislature's intent.[550] Noting that "[t]he Bane Act . . . [is] California's response to [the] alarming increase in hate crimes,"[551] the courts have held that the damages provision must be read in conjunction with section 51.7 of the California Civil Code, which provides a right "to be free from any violence, or intimidation by threat of violence... because of their race, color, religion, ancestry, national origin, political affiliation,

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546. *See* CAL. CIV. CODE § 52.1(a), (b) (West Compact ed. 1997). The California statute originally allowed injunctive relief only, but was amended in 1990 to allow damages in suits brought by individuals. Further technical amendments governing the availability of damages were enacted in 1991. *See* Stats. 1990, c.392 § 1 (Cal. 1990); Stats. 1991 c.607 § 3 (Cal. 1991).

547. CAL. CIV. CODE §§ 52(a); 52.1(b); 52.1(h) (West Compact ed. 1997).

548. *See supra* notes 445-50 and accompanying text.

549. *See* Jones v. Kmart Corp., 58 Cal. Rptr. 2d 576 (Cal. App. 1 Dist. 1996). The *Jones* court dismissed a complaint alleging an unlawful search and seizure by a private actor, holding that:

> [S]ection 52.1 provides a remedy for violation of constitutional rights without regard to whether the defendant acted under color of law. But this does not mean the state action requirement has been written out of federal and state constitutional law when the plaintiff sues a private party under section 52.1 for violation of a right requiring state action.

Id. at 581-82. The court specifically rejected the Massachusetts precedent eliminating the state action requirement for recovery of civil rights damages. *See id.* at 582.

550. *See* Boccato v. City of Hermosa Beach, 35 Cal. Rptr. 2d 282 (Cal. App. 2 Dist. 1994); Bay Area Rapid Transit v. Superior Court, 44 Cal. Rptr. 2d 887 (Cal. App. 1 Dist. 1995).

551. *Boccato*, 35 Cal. Rptr. 2d at 290; *see also In re* Joshua H., 17 Cal. Rptr. 2d 291, 300 n.9 (Cal. App. 6 Dist. 1993).

sex, sexual orientation, age, disability or position in a labor dispute . . . ."[552] Accordingly, a claim under the Bane Act must allege violence or threats based upon the plaintiff's membership in one of the classes listed in section 51.7.[553]

Thus, due to its specialized purpose, the Bane Act is of considerably less use to a constitutional tort plaintiff in California than the direct right of action recognized by the California courts. However, it appears that the California courts have interpreted the Bane Act as an additional source of remedies for victims of hate crimes rather than as a substitute for the judicially created cause of action. Because the California Legislature did not declare the Bane Act an exclusive remedy for state constitutional violations, the judicially implied right of action has continued to exist and the enactment of a statutory remedy has brought neither limitation nor clarity. It is apparent from the California experience that a legislative remedy must contain specific language restraining, as well as defining, a civil rights cause of action.

4. Limited Civil Rights Acts: Nebraska and Utah

Two other states have enacted statutes creating a limited right of action for violations of state constitutional rights. The Nebraska civil rights statute, enacted in 1977, provides a cause of action against private persons only, specifically excluding "political subdivisions."[554] The Nebraska courts have narrowed the application of the statute still further, limiting it to "private acts of discrimination, presumably of constitutional dimension, by private employers."[555] Thus, an allegation that an employer retaliated against an employee for the exercise of his freedom of association did not state a cognizable cause of action under the Nebraska law.[556] Similarly, a federal court refused to consider a state constitutional challenge to an employer drug testing program because the legislative history of the statute indicated that it was intended merely "to allow people who have

552. CAL. CIV. CODE § 51.7(a) (1996); *see also Boccato*, 35 Cal. Rptr. 2d at 290; *Bay Area Rapid Transit*, 44 Cal. Rptr. 2d at 889 ("Civil Code section 52.1 must be read in conjunction with section 51.7.").

553. *See Boccato*, 35 Cal. Rptr. 2d at 290; *see also Bay Area Rapid Transit*, 44 Cal. Rptr. 2d at 889 (the Bane Act "is limited to plaintiffs who themselves have been the subject of violence or threats").

554. NEB. REV. STAT. § 20-148(a) (1996).

555. Sinn v. City of Seward, 523 N.W.2d 39 (Neb. App. 1994); *see also* Wiseman v. Keller, 358 N.W.2d 768, 771 (Neb. 1984) (discussing the legislative history of the Nebraska civil rights act and indicating that it was limited to private employment discrimination cases).

556. *See Sinn*, 523 N.W.2d at 49-50.

complaints of discrimination to go into court rather than being compelled to go only through the Equal [Employment] Opportunity Commission."[557] In addition, in a significant departure from the more comprehensive statutes enacted by Arkansas, California, Maine, and Massachusetts, the Nebraska statute does not provide for an award of legal fees.[558]

The other limited state civil rights act is Utah's now-defunct Fourth Amendment Enforcement Act.[559] This act was designed to provide an alternative to the exclusionary rule mandated by the Supreme Court in *Mapp v. Ohio*[560] by providing a civil damage remedy for illegal searches rather than exclusion of evidence.[561] Damages were available under the statute for "unreasonable searches and seizures of objects and evidence" under the constitutions of the United States and Utah, but not for seizure of persons.[562] The statute included a waiver of sovereign immunity for the law enforcement agency employing the defendant officer and provided for punitive damages and legal fees.[563] However, damages were only available if unlawfully seized evidence was actually admitted in a criminal trial.[564] In addition, the statute did not allow for damages resulting from a criminal conviction, including loss of liberty, and provided that the victims of the offense were entitled to a lien on any award obtained by the plaintiff.[565]

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557. Ritchie v. Walker Mfg. Co., 963 F.2d 1119, 1122 (8th Cir. 1992); *see also* Goolsby v. Anderson, 549 N.W.2d 153, 156-57 (Neb. 1996) (discussing committee testimony and floor debates which indicate that the purpose of the Nebraska civil rights statute was to prevent delays in employment discrimination cases caused by the requirement that administrative remedies be exhausted before filing suit).

558. *See* NEB. REV. STAT. § 20-148 (1996).

559. *See* UTAH CODE ANN. § 78-16-1 to 78-16-11 (repealed Apr. 23, 1990).

560. 367 U.S. 643 (1961).

561. *See* UTAH CODE ANN. § 78-16-1 (repealed Apr. 23, 1990); *see also* FRIESEN, *supra* note 65, § 7.08, at 7-41 (noting that the Utah remedy "shall stand in lieu of the exclusion of evidence in criminal cases" except in cases of substantial bad-faith violation); Latzer, *supra* note 250, at 117 (noting that the Utah exclusionary rule was "narrower than that currently required by federal law" because it provided an unlimited good faith exception).

562. *See* FRIESEN, *supra* note 65, § 7.08, at 7-41.

563. *See* UTAH CODE ANN. §§ 78-16-3, 78-16-6, 78-16-7 (repealed Apr. 23, 1990).

564. *See* UTAH CODE ANN. § 78-16-1 (repealed Apr. 23, 1990) (provided that damage claims were not available if a suppression motion was granted by the court or if the prosecutor declined to prosecute based on a Fourth Amendment violation); *see also* FRIESEN, *supra* note 65, § 7.08, at 7-41.

565. *See* FRIESEN, *supra* note 65, § 7.08, at 7-42.

This limited remedy was repealed in 1990,[566] after a ruling by the Utah Supreme Court that the statute was unconstitutional because it provided too narrow an exclusionary rule.[567]

VI. CONCLUSION

With the *Brown* decision, the New York Court of Appeals brought New York into the family of states which allow causes of action for damages for violations of state constitutional rights, but raised many related questions. These issues will be resolved in one of two manners: future development by the courts, or legislative action. While the principle of allowing damages for state constitutional violations is not an unsound one, the nature of the interests which must be balanced when allowing such remedies renders this a political question best resolved by statute. Unless and until such legislation is enacted, the New York courts should thus be cautious about opening a "font of tort law"[568] which would further encroach on the province of the legislature.

The legislatures of New York and other states, in considering a proposed civil rights statute, have the widely differing examples of federal law and six state jurisdictions to guide them in tailoring the statute to fit the purpose of the state constitution and the general scheme of state law. In addition, state legislatures may draw on several generations of common law wisdom which have played a considerable part in fleshing out the contours of the causes of action provided by these statutes.

The exact scope of a civil rights statute must ultimately depend upon the legislature's judgment as to the role and importance of the state constitution and the balance between governmental authority and accountability. Whatever approach is taken by the legislature, however, the most important consideration when drafting a statute is clarity. In creating a statute, as previously discussed, a state legislature will be faced with a multitude of competing interests and public policies which must be balanced. Whatever choices the legislature makes when balancing these rights, however, it must create a statute which is a clear expression of

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566. *See* L. 1990, c. 15, § 4. Utah now recognizes a judicially implied state constitutional tort cause of action. *See* Bott v. DeLand, 922 P.2d 732, 737-39 (Utah 1996).

567. *See* State v. Mendoza, 748 P.2d 181 (Utah 1987).

568. Parratt v. Taylor, 451 U.S. 527, 544 (1981); Paul v. Davis, 424 U.S. 693, 701 (1976).

legislative intent. In short, a state civil rights statute should say what it means.[569]

Defenses and immunities should also be expressed in the statute itself rather than being left to development by the courts. Granting or withholding immunity from specific categories of defendants, and the degree of immunity to grant to each such category, are important aspects of the balance of rights which must be achieved in crafting a civil rights remedy. Since this balance affects the operation of government and the degree of governmental obligations to citizens,[570] it should be decided through public debate rather than judicial expediency.

569. One commentator has noted that "legislators must provide express limits or guidelines in the text of [a state civil rights] statute, or the statute will face the same problems that arise from a judicially-created cause of action." McNew, *supra* note 12, at 1669.

570. *See supra* notes 378-407 and accompanying text (discussing legislative, judicial, prosecutorial, and qualified immunity).