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Constitutional Wrongs and Common Law Principles: The Case for the Recognition of State Constitutional Tort Actions against State Governments

T. Hunter Jefferson

NOTES

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If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal.[1]

1. *Ashby v. White*, 92 Eng. Rep. 126, 136 (1703) (Holt, C.J., dissenting).

I. INTRODUCTION

Imagine an individual whose friend has allowed him to stay in a bedroom of his trailer home. This individual brings his most treasured and personal possessions along with him. Two police officers, after receiving information of potential criminal activity from an informant, enter the trailer without a warrant. Instead of obtaining a warrant, the officers solicit the consent of a third party and ransack the bedroom—leaving it in complete disarray. They find no evidence of the alleged criminal wrongdoing and seize no property. Although the police do not arrest the individual, they have humiliated him and have invaded his privacy. These state agents acted without a warrant, without the individual's consent, and in the absence of recognized exigent circumstances.

The United States Supreme Court has held that this particular type of police conduct does not violate the Fourth Amendment of the U.S. Constitution;[2] thus, no Section 1983 claim may be brought against these state officers.[3] Certain state supreme courts, however, have reached a different conclusion, finding similar conduct to violate comparable provisions of their respective state constitutions.[4] These

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2. See *Illinois v. Rodriguez*, 497 U.S. 177, 188 (1990) (holding that a warrantless search conducted pursuant to the consent of a third party does not violate the Fourth Amendment so long as the officer reasonably believed that the third party had authority to grant consent to a search of the premises). See also U.S. Const., Amend. IV (protecting against unlawful searches and seizures).

3. Section 1983 allows for damage suits against a "person" acting under the color of state law for a violation of the plaintiff's civil rights conferred under federal law or the U.S. Constitution. It provides:

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

Civil Rights Act, 42 U.S.C. § 1983 (1997). Thus, when no violation of federal law has occurred, no cause of action exists. This Note will not address the effectiveness of § 1983 as a remedy because it does not apply to state constitutions. For a discussion of the statute, see Erwin Chemerinsky, *Federal Jurisdiction* § 8 at 421-523 (Little, Brewn, 2d. ed. 1994).

4. On facts very similar to the ones in this example, except that the police found contraband, the New Mexico Court of Appeals, rejecting the U.S. Supreme Court's decision in *Illinois v. Rodriguez*, held that the consent of the third party was invalid and that the search violated Article II, § 10 of the New Mexico Constitution. *State v. Wright*, 119 N.M. 559, 893 P.2d 455, 461 (N.M. Ct. App. 1995). See also *State v. Lopez*, 78 Hawaii 433, 896 P.2d 889, 901 (Hawaii 1995) (rejecting *Rodriguez* as a violation of Article I, § 7 of the Hawaii Constitution); *State v. Will*, 131 Or. App. 498, 885 P.2d 715, 719 (1994) (rejecting *Rodriguez* under the Oregon Constitution). But see *State v. McCaughey*, 127 Idaho 669, 904 P.2d 939, 944 (1995) (holding

decisions notwithstanding, Section 1983 remains unavailable because, as a federal remedy, it does not extend to violations of state law.[5] Thus, without a direct claim under the state constitution for damages or a state provision comparable to Section 1983,[6] the plaintiff will go uncompensated for his loss, and he will not have his rights vindicated. Furthermore, the government will go unpunished for egregious acts that were in direct violation of the state constitution. As a result, the government will be undeterred from future unconstitutional conduct.

A direct cause of action for a constitutional violation will remedy the gap in an individual's ability to seek redress for breaches of constitutional provisions. The concept of a "constitutional tort"[7] first entered the American legal landscape in *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics* in 1971.[8] Although common law actions for trespass had long existed for illegal or unconstitutional searches and seizures, *Bivens* was the first decision to allow a direct

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that the "principles of *Rodriguez* apply equally to art. 1, § 17 of the Idaho Constitution"). See generally Richard J. Cromer, *Emerging Issues in State Constitutional Law: Search and Seizure Decisions*, 23 Search & Seizure L. Rep. 57, 59-60 (1996) (discussing *Rodriguez* and stato decisions rejecting its rationale on state constitutional grounds).

5. *Phillips v. Youth Development Program, Inc.*, 390 Mass. 652, 459 N.E.2d 453, 457 n.4 (1983).

6. This Note will not examine the current status of state civil rights laws or other provisions providing for damage suits based on the violation of a right secured by a state constitution. It is worth noting, however, that some states have enacted legislation similar to § 1983. See, for example, Ark. Stat. Ann. § 16-123-105 (1996); Cal. Civ. Code § 56.1 (West 1987); Mass. Gen. Laws. Ann. ch 12, §§ 11-H te 11-I (West 1996); 5 Me. Rev. Stat. Ann. § 4681 (1989); Neb. Rev. Stat. § 20-148 (1987); S.C. Code Ann. § 16-5-60 (Law. Co-op. 1995). In light of these and other remedies, though, some courts have refused to recognize direct constitutional damage claims or have placed additional limitations upon them. See Part II.B.4.

Further, this Note will not address the exclusionary rule. Although it is a remedy, it attaches only if the government wishes to use unconstitutionally obtained evidence in a criminal trial. Constitutional tort actions, though, seek to provide a remedy for any person who suffers harm from an unconstitutional act at the hands of the stato, not just for criminal defendants. For a discussion of the exclusionary rule as a remedy for a constitutional violation, see generally William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 Va. L. Rev. 881 (1991); Donald V. MacDougall, *The Exclusionary Rule and Its Alternatives—Remedies for Constitutional Violations in Canada and the United States*, 76 J. Crim. L. & Criminol. 608 (1985). See also *State v. Bolt*, 142 Ariz. 260, 689 P.2d 519, 527 (Ariz. 1984) (en banc) (discussing the appropriateness of the replacement of the exclusionary rule with a *Bivens*-type action for a violation of the Arizona Constitution); John C. Jeffries, Jr., *Damages for Constitutional Violations: The Relation of Risk to Injury in Constitutional Torts*, 75 Va. L. Rev. 1461, 1476-77 (1989) (discussing the use of constitutional torts in conjunction with the exclusionary rule effectively to compensate and deter constitutional violations).

7. "A constitutional tort is any action for damages for [a] violation of a constitutional right against a government or individual defendants." *Brown v. State*, 89 N.Y.2d 172, 674 N.E.2d 1129, 1132 (N.Y. 1986). The term first appeared in the title of an article discussing the Supreme Court's decision in *Monroe v. Pape*, 365 U.S. 167 (1961). See Marshall S. Shapo, *Constitutional Tort:* Monroe v. Pape, *and the Frontiers Beyond*, 60 Nw. U. L. Rev. 277 (1965).

8. 403 U.S. 388 (1971) (recognizing a cause of action for damages against federal agents for conducting a search in violation of the Fourth Amendment).

claim under the Fourth Amendment of the U.S. Constitution.[9] Since the Court's decision in *Bivens*, many state courts have addressed the issue of constitutional tort claims for violations of state constitutional provisions.[10] In 1996 alone, three states, Colorado,[11] New York,[12] and Utah,[13] joined the ranks of the many others that have confronted the issue. However, in most of these decisions, as in *Bivens*, the courts have failed to fully explore the extent of and need for government liability.[14]

The development of constitutional torts recognizes that constitutional rights and liberties are specific limitations and restrictions on governments and must be enforceable.[15] Courts must allow damage suits, the traditional common law remedy,[16] not because many of the rights parallel the interests protected by common law tort actions, but because constitutions are enforceable in their own right.[17] Thus, damage actions should not require implementing legislation because constitutions are specifically designed to place limitations on the political branches.[18] Although a balance must exist between vindication of constitutional rights and effective, efficient government,[19] the

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9. See Part II.A.

10. See Part II.B.

11. *Board of County Comm'rs of Douglas County v. Sundheim*, 926 P.2d 545, 549-53 (Colo. 1996) (en banc) (holding that an implied constitutional cause of action does not exist where alternative remedies, such as § 1983 and common law torts, are available to remedy a denial of a special land use permit).

12. *Brown*, 674 N.E.2d at 1138-39 (recognizing a constitutional cause of action for violations of §§ 11 and 12 of the New York Constitution when black males had been systematically stopped, detained, and interrogated without probable cause or reasonable suspicion).

13. *Bott v. Deland*, 922 P.2d 732, 739 (Utah 1996) (concluding that Article I, § 9 of the Utah Constitution allows for a damage claim by a prison inmate for failure to diagnose or provide adequate medical care after repeated complaints and the filing of grievances concerning blurred vision, severe headaches, nausea, dizziness, and body aches).

14. See Part III.A.

15. See Susan Bandes, *Reinventing* Bivens: *The Self-Executing Constitution*, 68 S. Cal. L. Rev. 289, 292 (1995).

16. *Bivens*, 403 U.S. at 395-96 (discussing damages as the traditional common law remedy and listing cases); *Brown*, 674 N.E.2d at 1141 (same); *Kelley Property Dev., Inc. v. Town of Lebanon*, 226 Conn. 314, 627 A.2d 909, 929 (1993) (Berdon, J., concurring in part and dissenting in part) (same); *Moresi v. State*, 567 So. 2d 1081, 1093 (La. 1990) (same); Christina B. Whitman, *Constitutional Torts*, 79 Mich. L. Rev. 5, 41 (1980) (same).

17. Bandes, 68 S. Cal. L. Rev. at 291 (cited in note 15).

18. See notes 46, 212, 260 and accompanying text.

19. Perry M. Resen, *The* Bivens *Constitutional Tort: An Unfulfilled Promise*, 67 N.C. L. Rev. 337, 338 (1989); *Sundheim*, 926 P.2d at 550 (refusing to recognize an action for damages under the Colorado Constitution because "[c]reating a new constitutional canse of action could seriously alter the delicate balance between" the rights of aggrieved citizens and legitimate government concerns).

application of common law tort doctrines to constitutional law can ensure adequate compensation for wronged plaintiffs while ensuring that governments are not mired down in baseless suits.[20] Moreover, damage awards are the only true remedy for the private citizen that can ensure that government officials respect constitutional protections.

This Note examines the current state of direct causes of action for damages under state constitutions and proposes that state courts recognize constitutional tort actions under their respective state constitutions. The Note explains that liability should be placed on the government because government liability will ensure that the goals of constitutional torts are adequately met.[21] It further seeks to explain the reasoning and rationale behind such causes of action.[22] Finally, the Note espouses several different theories upon which to base constitutional torts.[23]

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20. See *Kelley Property*, 627 A.2d at 924 n.31 (noting that a common law culpability requirement such as bad faith, malice, or improper motive will aid in limiting constitutional tort liability for constitutional violations because "laypersons can conform their conduct without knowing the contours of constitutional due process protections"). See Enid Campbell, *Liability to Compensate for Denial of a Right to a Fair Hearing*, 15 Monash U. L. Rev. 383, 391 (1989) (noting the use of fault or culpability to limit the liability of and burden on public utilities).

In addition to tort law, certain rules of civil procedure will also, if properly followed and enforced by courts, help to keep the disruptive effect of litigation at a tolerable level for governments. See, for example, F.R.C.P. 11 (providing for "appropriate sanction[s] upon the attorneys, law firms, or parties" who have filed frivolous or improper law suits); F.R.C.P. 56 (authorizing summary judgment whenever issues of material facts are not controverted). See also *Butz v. Economou*, 438 U.S. 478, 507-08 (1978) (relying on strict enforcement of summary judgment to ensure that government agents are not harassed by frivolous constitutional tort claims).

Any fears that officials will be exposed to an enormous amount of personal liability under *Bivens* have proven to be unwarranted. Perry M. Rosen notes that in the 10 years following the *Bivens* decision, over 12,000 constitutional tort suits were filed. However, the plaintiffs were only victorious in 30 of those suits. Rosen, 67 N.C. L. Rev. at 343 nn.40-42 (cited in note 19). See also Peter H. Schuck, *Suing Government: Citizen Remedies for Official Wrongs* 202 (Yale U., 1983) (compiling statistics concerning *Bivens* suits based on estimates prepared by the Department of Justice). Even though this fear has proven to be unfounded, the use of institutional liability instead of personal liability should remove any additional concern that government officials will not effectively and efficiently perform their jobs.

21. See Part III.

22. See Part IV.

23. See Part V.

II. THE DEVELOPMENT OF ACTIONS FOR DAMAGES FOR VIOLATIONS OF CONSTITUTIONAL RIGHTS

A. The Foundation

Fundamental rights have long been enforced through damage remedies.[24] In common law England, any violation of the constitution, including the Magna Carta,[25] by a government official was a trespass and was actionable in a case for damages, even without enabling legislation from Parliament.[26] These common law antecedents have been influential as state courts have created direct causes of action under state constitutions.[27] Even the Supreme Court has relied upon them.[28]

In *Bivens*, the Supreme Court recognized, for the first time, a claim arising directly under the U.S. Constitution against federal agents in their individual capacities for the violation of an individual's

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24. See, for example, *Kelley Property*, 627 A.2d at 929 (Berdon, J., concurring in part and dissenting in part) (discussing the history of damage claims for violations of rights at common law prior to the enactment of the Connecticut Constitution).

25. Damage suits were available for searches and seizures in violation of the Magna Carta. *Wilkes v. Wood*, 98 Eng. Rep. 489 (1763); *Huckle v. Money*, 95 Eng. Rep. 768 (1763); *Entick v. Carrington and Three Other Messengers*, 19 How. St. Tr. 1029 (1765). Further, any claim by government officials that they were acting pursuant to legal authority, such as a facially valid search warrant, was not a defense to liability: Such a claim could only be considered by the jury on the issue of mitigation of damages. *Wilkes*, 98 Eng. Rep. at 499.

26. *Ashby*, 92 Eng. Rep. at 136 (Holt, C.J., dissenting). See *Brown*, 674 N.E.2d at 1139; *Moresi*, 567 So. 2d at 1091 ("Under the common law of England, where individual rights, such as those protocted by Article 1, § 5 of the 1974 Louisiana Constitution, were preserved by a fundamental docament (e.g., tbe Magna Carta), a violation of those rights generally could be remedied by a traditional action for damages."); *Widgeon v. Eastern Shore Hosp. Center*, 300 Md. 520, 479 A.2d 921, 924 (1984) ("Under the common law of England, where individual rights, such as those protected by Article 26, where preserved by a fundamental document (e.g., the Magna Carta), a violation of those rights generally conld be remedied by a traditional action for damages.") (listing cases).

Ashby is the quintessential constitutional tort case. It concerned the proper remedy for a violation of the constitutional right to vote. The defendant had denied the plaintiff his right to vote for a representative to the House of Commons because the defendant rejected the plaintiff's status as a qualified elector. *Ashby*, 92 Eng. Rep. at 127. The plaintiff brought an action sounding in trespass on the case. Although the verdict for the plaintiff was overturned by the appellate court over the dissent of Lord Holt, it was reinstated by the House of Lords, presumably appreving of the arguments asserted by Lord Holt in his dissent. Campbell, 15 Monash U. L. Rev. at 389 (cited in note 20).

27. See note 26. See also *State v. Tonn*, 195 Iowa 94, 191 N.W. 530, 535 (1923) (recognizing a claim for damages arising from an illegal search and seizure); *Krehbiel v. Henkle*, 152 Iowa 604, 129 N.W. 945 (1911) (same); *Grumon v. Raymond*, 1 Conn. 39, 47 (1814) (same).

28. *Bivens*, 403 U.S. at 395-96. See also *Widgeon*, 479 A.2d at 925 (discussing and listing Supreme Court decisions embracing damage awards for violations of the Fourth Amendment).

constitutional rights.[29] Although *Bivens* concerned a claim arising under the Fourth Amendment,[30] the Supreme Court has applied the doctrine to violations of the Due Process Clause of the Fifth Amendment[31] and the Cruel and Unusual Punishment Clause of the Eighth Amendment.[32] The Court, however, has often withheld liability because of the availability of an equally effective alternative remedy,[33] because of "special factors counseling hesitation,"[34] or because of qualified immunity.[35]

In *Bivens*, the government performed a search and seizure which violated the Fourth Amendment.[36] The Supreme Court held that the plaintiff could bring suit against the officers for violating his Fourth Amendment rights.[37] The Court rejected the notion that state tort law should be relied upon to remedy unreasonable searches and

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29. *Bivens*, 403 U.S. at 388. For a more complete overview of *Bivens* and its progeny, see Chemerinsky, *Federal Jurisdiction* § 9.1 at 523-44 (cited in note 3).

30. *Bivens*, 403 U.S. at 397.

31. *Davis v. Passman*, 442 U.S. 228, 248-49 (1979).

32. *Carlson v. Green*, 446 U.S. 14, 24 (1980).

33. *Bush v. Lucas*, 462 U.S. 367, 368 (1983). The Court has held that exhaustion of administrative remedies is not a requirement of a *Bivens* cause of action when Congress has not addressed the issue. *McCarthy v. Madigan*, 503 U.S. 140, 149 (1992).

34. *Bush*, 462 U.S. at 380. See also *Chappell v. Wallace*, 462 U.S. 296, 304 (1983) (discussing the concept of "special factors counseling hesitation"); *United States v. Stanley*, 483 U.S. 669, 681-82 (1987) (same); *Schweiker v. Chilicky*, 487 U.S. 412, 423 (1988) (same); *FDIC v. Meyer*, 510 U.S. 471, 484-85 (1994) (same).

35. In *Butz v. Economou*, the Court concluded that the qualified immunity available in a § 1983 action should also be available to defendants in a *Bivens* suit. *Butz*, 438 U.S. at 497-98. Under the standard announced by the Court, qualified immunity would attach whenever the defendant could assert "reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief." Id. In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the Court refined the standard such that defendants would enjoy qualified immunity "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Id. at 818. For a further discussion of qualified immunity, see note 248.

36. The plaintiff alleged that agents of the Federal Bureau of Narcotics illegally entered his home and arrested him on drug charges in the presence of his family. *Bivens*, 403 U.S. at 389. They searched the apartment "from stom to stern." Id. The plaintiff was eventually taken to a federal courthouse, interrogated, booked, and subjected te a visible strip search. Id.

37. Id. at 397. In *FDIC v. Meyer*, the Court addressed the issue of government liability and held that an administrative agency could not be held liable for damages for violations of the U.S. Constitution. *Meyer*, 510 U.S. at 479. A unanimous Court, per Justice Thomas, concluded that government liability was inconsistent with the logic behind *Bivens*. Id. The Court determined that because "the purpose of *Bivens* is to deter the officer," a claim against the government would lose "the deterrent effects of the *Bivens* remedy." Id. Finally, the Court found a special factor counseling hesitation: "a potentially enormous financial burden for the Federal Government." Id. at 480. The Court disregarded any argument that the federal government was already spending large sums of money to indemnify federal officials found liable for damages under *Bivens*. Id. The Court declared that the issue of government liability was one of federal fiscal policy to be determined by the political branches. Id.

seizures[38] and based its holding on three observations: (1) the Court's consistent rejection of the notion that the Fourth Amendment proscribes only conduct that state law would condemn if engaged in by private persons;[39] (2) the recognition that the interests protected by tresspass law and invasion of privacy may be inconsistent with or even hostile to the interests protected by the Fourth Amendment's guarantee against unreasonable searches and seizures;[40] and (3) the recognition of damages as the ordinary remedy for an invasion of personal liberty.[41] Finally, the Court held that no "special factors counseling hesitation" were present to defeat liability[42] and that neither an equally effective legislative remedy nor any congressional bar to liability existed.[43]

In his concurrence, Justice Harlan explained the propriety of a damages award for the violation of a constitutionally protected interest. First, he noted that the Court had often implied causes of action for violations of federal statutes.[44] Second, he addressed the issue of judicial competence and concluded that the Court, if competent to select remedies to implement statutory and common law policies, is also competent to create remedies for violations of the Constitution.[45] Third, Justice Harlan outlined the inherent problems of requiring that the majority enact enabling legislation: The Bill of Rights was specifically designed to limit that majority.[46] Finally,

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38. *Bivens*, 403 U.S. at 389-92. The majority also concluded that "[a]n agent acting—albeit unconstitutionally—in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own." Id. at 392.

39. Id. at 392.

40. Id. at 394. The Court noted that although an individual may have other remedies, such as police protection, against a trespass committed by a private party, any attempt to stop a federal official may amount to criminal conduct and have punitive consequences. Id. at 394-95.

41. Id. at 395 (listing cases and authorities). The Court also emphasized that damage awards have often been implied for violations of federal statutes. Id. at 396.

42. Id. at 396.

43. Id. at 397.

44. Id. at 402 (Harlan, J., concurring). Justice Harlan also wrote that if enabling legislation is necessary for a damage award, it must also necessarily be required for equitable relief. Id. at 405 (Harlan, J., concurring).

45. Id. at 403-04 (Harlan, J., concurring). Justice Harlan opined that "courts of law are capable of making the types of judgment concerning causation and magnitude of injury necessary to accord meaningful compensation for invasion of Fourth Amendment rights." Id. at 409 (Harlan, J., concurring). Because injunctious have long been used to remedy constitutional violations without any enabling legislation, it stands to reason that damage awards are also appropriate without such endorsement from Congress.

46. Justice Harlan explained:

> But it must also be recognized that the Bill of Rights is particularly intonded to vindicato the interests of the individual in the face of the popular will as expressed in legislative majorities; at the very least, it strikes me as no more appropriate to await express con-

Justice Harlan underscored the value of deterrence when he asserted that relief should not be denied simply because there can be no showing that the remedy will not deter future lawlessness.[47] Justice Harlan concluded his concurrence with his oft-quoted statement: "For people in Bivens' shoes, it is damages or nothing."[48]

B. The Status of State Constitutional Torts

Although many state courts have hesitated to create or imply constitutional torts,[49] some have embraced the idea. Currently, seven states have recognized some form of action under their state constitution,[50] and another three have embraced the idea when certain conditions are met.[51] Some nine state courts, although not finding a constitutional tort appropriate in the case before them, have hinted that a constitutional cause of action may be appropriate in certain circumstances.[52] In contrast, only seven states have flatly rejected such a

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gressional authorization of traditional judicial relief with regard to these legal interests than with respect to interests protected by federal statutes.

Id. at 407 (Harlan, J., concurring).

47. Id. at 408 (Harlan, J., concurring).

48. Id. at 410 (Harlan, J., concurring). The dissents of Chief Justice Burger and Justices Blackmun and Black focused primarily upon the judicial impropriety of creating a damage claim. See, for example, id. at 411-12 (Burger, C.J., dissenting). Justices Black and Blackmun also feared a major influx of cases in the federal courts. Id. at 428 (Black, J., dissenting); id. at 430 (Blackmun, J., dissenting).

49. *Sundheim*, 926 P.2d at 552 (noting other ceurts' skepticism in cases involving licensing and zoning determinatious). The Supreme Court has also refused to hold the federal government liable for the constitutional torts of federal officers. See note 37.

50. These states include: California, *Fenton v. Groveland Community Serv. Dist.*, 185 Cal. Rptr. 758, 763 (Cal. Ct. App. 1982); Illinois, *Walinski v. Morrison & Morrison*, 60 Ill. App. 3d 616, 377 N.E.2d 242, 245 (1978); Maryland, *Widgeon*, 479 A.2d at 930; New Jersey, *Peper v. Princeton Univ. Bd. of Trustees*, 77 N.J. 55, 389 A.2d 465, 477-78 (1978); New York, *Brown*, 674 N.E.2d at 1138-39; Utah, *Bott*, 922 P.2d at 739; and Wisconsin, *Old Truckway Associates v. City of Greenfield*, 80 Wis. 2d 254, 509 N.W.2d 323, 328 n.4 (Wis. 1993). See also *Durant v. Michigan*, 1997 WL 430992, 10-11 (Mich.). For a more complete listing of cases, see notes 55-62.

51. These states include: California, *Gay Law Students Assoc. v. Pacific Telephone and Telegraph Co.*, 24 Cal. 3d 458, 595 P.2d 592, 597-98 (1979); Louisiana, *Moresi*, 567 So. 2d at 1091-92; North Carolina, *Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276, 289-93 (1992).

52. These states include: Alaska, *Thoma v. Hickel*, 1997 WL 468070, 8, 9 n.5 (Alaska); Arizona, *Knutson v. County of Maricopa*, 175 Ariz. 445, 857 P.2d 1299, 1301 (Ariz. Ct. App. 1993); Connecticut, *Kelley Property*, 627 A.2d at 923; Florida, *Schreiner v. McKenzie Tank Lines & Risk Management, Inc.*, 408 So. 2d 711, 713 (Fla. Ct. App. 1982); Massachusetts, *Phillips*, 459 N.E.2d at 457; Michigan, *Smith v. Department of Public Health*, 428 Mich. 540, 410 N.W.2d 749, 750 (1987); New Hampshire, *Rockhouse Mountain Prop. Owners Assoc. v. Town of Conway*, 127 N.H. 593, 503 A.2d 1385, 1388-89 (1986); North Dakota, *Livingood v. Meece*, 477 N.W.2d 183, 195 (N.D. 1991); Vermont, *Shields v. Gerhart*, 163 Vt. 219, 658 A.2d 924, 934 (1995).

cause of action.[53] Some federal courts have even been asked to address the issue and attempt to predict or interpret state law in cases involving supplemental state constitutional tort claims.[54]

The cases addressing the issue of state constitutional torts, based on their rationale and the constitutional provision involved, fall into one of five categories: (1) courts openly embracing constitutional damage suits; (2) courts refusing to recognize a cause of action because of "special factors counseling hesitation;" (3) courts evading the issue because of sovereign immunity; (4) courts depending upon the absence of alternative remedies; and (5) courts refusing to recognize constitutional torts and requiring implementing legislation.

1. Independent Causes of Action for Damages Arising Directly under State Constitutions

Some plaintiffs have convinced state courts to recognize direct claims for damages for violations of several constitutional provisions

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53. These states includes: Colorado, *Sundheim*, 926 P.2d at 548; Hawaii, *Figueroa v. State*, 61 Haw. 369, 604 P.2d 1198, 1206-07 (Hawaii 1980); Ohio, *Provens v. Stark County Bd. of Mental Retardation & Dev. Disabilities*, 64 Ohio St. 3d 252, 594 N.E.2d 959, 965 (1992); Oregon, *Hunter v. City of Eugene*, 309 Or. 298, 787 P.2d 881, 884 (1990); Tennessee, *Lee v. Ladd*, 834 S.W.2d 323, 325 (Tenn. Ct. App. 1992); Texas, *City of Beaumont v. Bouillion*, 38 Tex. Sup. J. 282, 896 S.W.2d 143, 148 (Tex. 1995); Wyoming, *Cooney v. Park County*, 792 P.2d 1287, 1298 (Wyo. 1990). See also *Bontwell v. Department of Corrections*, 226 Ga. App. 524, 486 S.E.2d 917, 921-22 (1997) (refusing to address the issue of constitutional tort actions under the Georgia Constitution because of the immunity which the Georgia Constitution creates for government officials engaged in official conduct).

In addition, some states need not address the issue and have not because of civil rights laws and implementing legislation for statutory claims for violations of stato constitutional rights and provisions. See, for example, Ark. Stat. Ann. § 16-123-105; 5 Me. Rev. Stat. Ann. § 4681; Neb. Rev. Stat. § 20-148; S.C. Code Ann. § 16-5-60. However, some state courts in states with such legislation have still addressed the issue of direct causes of action. See, for example, *Fenton*, 185 Cal. Rptr. at 788 (addressing the issue of state constitutional torts in spite of Cal. Civ. Code § 56.1 (West 1987)); *Phillips*, 459 N.W.2d at 453 (addressing the issue of state constitutional torts in spite of Mass. Gen. Laws ch. 12, §§ 11-H to 11-I).

54. *Taylor v. Rhode Island*, 726 F. Supp. 895, 900 (D.R.I. 1989) ("Although this issue remains undecided by any Rhode Island state court, it appears to this writer that the new 'due process' and 'equal protection' provisions in Article I, Section 2 [of the Rhode Island Constitution] create constitutional causes of action against state actors in certain circumstances."); *Jones v. Rhode Island*, 724 F. Supp. 25, 35 (D.R.I. 1989) (concluding that it must have been the intent of the drafters to create "an implicit right to sue state actors for damages" for violations of Article I, Section 2 of the Rhode Island Constitution); *Barlow v. Avco Corp.*, 527 F. Supp. 269, 273 (E.D. Va. 1981) (holding that "there is a private cause of action under [Article 1, Section 11] of the Virginia Constitution"). But see *Harbin v. City of Alexandria*, 712 F. Supp. 67, 73-74 n.7 (E.D. Va. 1989) (refusing to address the issue of a *Bivens*-type claim under the Virginia Constitution because it "may well raise novel state issues moro appropriately resolved in state courts").

including equal protection,[55] the right to be free from discrimination in employment,[56] due process,[57] search and seizure,[58] cruel and unusual punishment,[59] the right to vote,[60] the rights of free speech and free press,[61] and constitutional duties to fund certain activities.[62]

Recent decisions of the Supreme Court of Utah and the New York Court of Appeals delineate the legal concepts behind direct causes of action. In *Bott v. Deland*,[63] the Utah Supreme Court, in a unanimous opinion, held that a direct cause of action could be brought for violations of the state constitution's prohibition against cruel and unusual punishment.[64] The court used a two-part analysis to determine if an action for damages should lie. First, the court addressed the self-executing nature of the right.[65] Second, the court examined the adequacy of an award of damages as a remedy for constitutional violations.[66] The court quickly concluded that the provision was self-executing.[67] With respect to the appropriate remedy, the court examined the alternative, injunctive relief, and held that such an award could not remedy the harm Bott had suffered.[68] The court recognized that even if the constitutional right violated was not clearly

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55. *Brown*, 674 N.E.2d at 1139; *Ashton v. Brown*, 339 Md. 70, 660 A.2d 447, 462 (1995).

56. *Lloyd v. Borough of Stone Harbor*, 179 N.J. Super. 496, 432 A.2d 572, 577-80 (N.J. Super Ct. Ch. Div. 1981). Note that at least two cases involved the liability of private employers because the non-discrimination clauses in the state constitutions reached all employers, not just state actors. *Peper*, 389 A.2d at 477-78; *Walinski*, 377 N.E.2d at 245. Thus, constitutional rights which contain no state action requirement may give rise to civil liability between two entirely private parties in some states.

57. *Ashton*, 660 A.2d at 462; *State v. Meade*, 101 Md. App. 512, 647 A.2d 830, 838 (1994); *Old Truckway*, 509 N.W.2d at 328 n.4; *Clea v. Mayor and City Council of Baltimore*, 312 Md. 662, 541 A.2d 1303, 1311-14 (1988); *Widgeon*, 479 A.2d at 930.

58. *Brown*, 674 N.E.2d at 1139; *Meade*, 647 A.2d at 838; *Clea*, 541 A.2d at 1311-14; *Widgeon*, 479 A.2d at 930; *Terranova v. State*, 445 N.Y.S.2d 965, 969-70 (N.Y. Ct. Cl. 1982); *Mayes v. Till*, 266 So. 2d 578, 580 (Miss. 1972).

59. *Bott*, 922 P.2d at 739.

60. *Fenton*, 185 Cal. Rptr. at 763.

61. *Laguna Publishing Co. v. Golden Rain Foundation of Laguna*, 182 Cal. Rptr. 813, 835 (Cal. Ct. App. 1982).

62. *Durant*, 1997 WL 430992 at 9-10.

63. 922 P.2d 732 (Utah 1996). The plaintiff was a prisoner who was refused medical treatment for an eye ailment after repeated complaints about his vision as well as severe headaches, nausea, dizziness, and body aches. He filed two grievances over a three-week period before he received any medical attention. By the time he was treated, he had developed malignant hypertension and severe renal failure and had suffered a major reduction of his life expectancy. Id. at 735-36.

64. Id. at 737.

65. Id. at 739.

66. Id.

67. The court noted that English and American courts have often enforced the prohibition against cruel and unusual punishment without implementing legislation. Id. at 738. For a discussion of self-execution, see note 84.

68. *Bott*, 922 P.2d at 739.

established,[69] the plaintiff deserved damages because the constitutional provision at issue was self-executing.[70] Finally, the court held that no immunity or other limitation upon liability should attach because "[t]he actions of officials are apparently authorized by the law, and an 'agent acting . . . in the name of the state possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own.' "[71]

In *Brown v. State*,[72] the New York Court of Appeals addressed the viability of a class action suit against the state[73] brought on behalf of African-American males whom police officers had stopped, interrogated, and examined, presumably without probable cause or reasonable suspicion.[74] The court began by examining the self-executing nature of Section 11[75] and Section 12[76] of the New York Constitution and concluded that the Sections created judicially enforceable rights and "a basis for judicial relief against the State if those rights are violated."[77] The court then turned to the propriety of allowing an award of damages and concluded that it was the intent of the drafters

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69. For a discussion of the clearly established right requirement, see note 248.

70. *Bott*, 922 P.2d at 739.

71. Id. (quoting *Moresi*, 657 So. 2d at 1093).

72. 89 N.Y.2d 172, 674 N.E.2d 1129 (1996).

73. In this case, the court did not hold that respondeat superior liability should apply to the state because of any common law or constitutional doctrine. Rather, the court concluded that vicarious liability must apply because of the New York Court of Claims Act. Id. at 1142. Thus, the Court of Appeals, in at least a limited respect, allowed the legislature to define this particular facet of the tort.

74. Id. at 1131. The court noted that "[t]he interrogations were systematic, consisting of a 'stop' followed by questions regarding potential involvement in the [assault of an elderly white woman], requests for alibis, and an inspection of the students' hands and forearms." Id.

75. Section 11 provides:

> No person shall be denied the equal protection of the laws of this state or any subdivision thereof. No person shall, because of race, color, creed or religion, be subjected to any discrimination in his civil rights by any other person or by any firm, corporation, or institution, or by the state or any agency or subdivision of the state.

N.Y. Coust., § 11. The first sentence follows the Equal Protection Clause of the Fourteenth Amendment almost verbatim. See U.S. Const., Amend. XIV.

76. Section 12 reads in relevant part:

> The 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 prebable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized . . . .

N.Y. Const., § 12. This provision of the New York Constitution is almost identical to the Fourth Amendment. See U.S. Const., Amend. IV.

77. *Brown*, 674 N.E.2d at 1137.

of the New York Constitution to allow for such a remedy.[78] Finally, the court rejected any argument that the plaintiffs should be limited to common law torts because this limitation would allow for the vindication of common law rights but not constitutional guarantees.[79] Despite the claims of the dissent,[80] the court declared that damages are necessary to deter the government's misconduct[81] because they

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78. Id. at 1139. In addition to relying on New York's own constitutional history, the court reviewed the Supreme Court's decision in *Bivens*, § 874A of the Restatement (Second) of Torts, and the English common law of "constitutional torts." Id. at 1138.

79. Id. at 1140-41. The court went on to noto:

> Common law tort rules are heavily influenced by overriding concerns of adjusting losses and allocating risks, matters that have little relevance when constitutional rights are at stake. Moreover, the duties imposed upon government officers by these provisions address something far more serious than the private wrongs regulated by the common law. To confine claimants to tort causes of action would produce the paradox that individuals, guilty or innocent, wrongly arrested or detained may seek a monetary recovery because the complaint fits within the framework of a common law tort, whereas these claimants, who suffered similar indignities, must go remediless because the duty violated was spelled out in the State Constitution.

Id. at 1141.

In addition, the court noted that common law causes of action serve to protect plaintiffs against trespasses by private individuals, whereas constitutional provisions are specifically designed to limit government and its agents, those who have far greater potential to harm others. See id.

80. The dissent claimed, among other things, that damage awards for constitutional violations would open the flood gates to suits against the state. Id. at 1152 (Bellacosa, J., dissenting). The majority rejected this assertion, reasoning that concerns about the number of cases cannot outweigh the effect of the government's immoral conduct. Id. at 1143. Justice Bronnan addressed this sentiment in his seminal piece on state constitutional rights:

> It is true, of course, that there has been an increasing amount of litigation of all types filling the calendars of virtually every state and federal court. But a solution that shuts the courthouse door in the face of the litigant with a legitimate claim for relief, particularly a claim of deprivation of a constitutional right, seems to be not only the wrong tool but also a dangerous tool for solving the problem. The victims of the use of that tool are most often the litigants most in need of judicial protection of their rights—the poor, the underprivileged, the deprived minorities. The very lifeblood of courts is popular confidence that they mete out evenhanded justice and any discrimination that denies these groups access to the courts for resolution of their meritorious claims unnecessarily risks loss of that confidence.

William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 498 (1977). This is a more logical conclusion, as it is improper or at least illogical to sacrifice constitutional claims for the sake of conserving judicial resources especially since it is constitutions that create courts and vest judicial power in them.

81. *Brown*, 674 N.E.2d at 1141. The court further rejected any claim that other remedies should be pursued, and it noted the detorrent value of damages:

> The remedies now recognized, injunctive or declaratory relief, all fall short. Claimants are not charged with any crime as a result of their detention and thus exclusion has no deterrent value. Claimants had no opportunity to obtain injunctive relief before the incidents described and no ground to support an order enjoining future wrongs. For those in the claimants' position "it is damages or nothing."

Id. (quoting *Bivens*, 403 U.S. at 409 (Harlan, J., concurring)).

advance the underlying purposes of the constitutional provisions at issue.[82]

Bott and *Brown* indicate that so long as there has been a violation of a constitutional provision, a cause of action can proceed.[83] Before a constitutional provision can be violated, though, it must be self-executing such that the provision defines tangible rights personal to the plaintiff which may be enforced if transgressed.[84] However, the courts that have recognized independent causes of action have reached three far more important conclusions in the course of their deliberations: (1) violations of constitutional rights and guarantees

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82. Id. at 1139-40.

83. See also *Widgeon*, 479 A.2d at 929 ("Thus, the existence of other available remedies, or a lack thereof, is not a persuasive basis for resolution of the issue before us.").

84. The Supreme Court of Utah recently described the cencept of self-executing previsions:

> A constitutional provision is self-executing if it articulates a rule sufficient to give effect to the underlying rights and duties intsnded by the framers.... In other words, courts may give effect to a provision without implementing legislation if the framers intended the provision to have immediate effect and if "no ancillary legislation is necessary to the enjoyment of a right given, or the enforcement of a duty imposed." ... Conversely, constitutional provisions are not self-executing if they merely indicate a general principle or line of policy without supplying the means for putting them into effect.

Bott, 922 P.2d at 737 (citations omitted).

In determining when a provision is self-executing, state courts often look at the text of the provision, its legislative histery, the relationship between the provision and other clauses of the constitution, and the intent of the framers or voters approving the provision. *Shields*, 658 A.2d at 928-29 (relying on the toxt); *Durant*, 1997 WL 430992 at 11 (relying on voter intent); *Bonner v. City of Santa Ana*, 53 Cal. Rptr. 2d 671, 675 (Cal. Ct. App. 1996) (relying on votor intent); *Bott*, 922 P.2d at 737 (relying on the intent of the framers of the Utah Constitution); *Schreiner*, 408 So. 2d at 714 (relying on votsr intent). Often, however, courts simply presume provisions of a censtitution are self-executing. *Fenton*, 185 Cal. Rptr. at 762; *Laguna Publishing Co.*, 182 Cal. Rptr. at 834 (Cal. Ct. App. 1982). Some state constitutions dictate such an interpretation. *Figueroa*, 604 P.2d at 1205; *Walinski*, 377 N.E.2d at 245.

Determining that a provision is self-executing is generally not a per se guarantee that a claim for damages will attach for its violation. *Brown*, 674 N.E.2d at 1138 ("The violation of a self-executing provision in the Constitution will not always support a claim for damages, however."); *Shields*, 658 A.2d at 930; *Figueroa*, 604 P.2d at 1206 ("No case has construed the term 'self-executing' as allowing money damages for constitutional violations."). In 1996, however, the Supreme Court of Utah became the first court to declare that the violation of a self-executing provision automatically gives rise to a claim for damages. *Bott*, 922 P.2d at 739.

Some courts have declared the existence of constitutional tort actions only to find the theory inapplicable to the case at bar because the constitution was not violated, *Carlton v. Department of Corrections*, 215 Mich. App. 490, 546 N.W.2d 671, 680-81 (1996); *Johnson v. Wayne County*, 213 Mich. App. 143, 540 N.W.2d 66, 69-71 (1995); *Phillips*, 459 N.E.2d at 660; *Schreiner*, 408 So. 2d at 714; or the right violatsd was not clearly established, *Melbourne Corp. v. City of Chicago*, 76 Ill. App. 3d 595, 394 N.E.2d 1291, 1297 (1979). Other courts have avoided the recognition of the cause of action because either no constitutional right was transgressed, *Maricopa*, 857 P.2d at 1301; *Ohio Casualty Ins. Co. v. Todd*, 813 P.2d 508, 510 n.1 (Okla. 1991); or because the provision of the constitution at issue was not self-executing, *Sabia v. State*, 164 Vt. 293, 669 A.2d 1187, 1199 (1995).

may be vindicated through an action for damages;[85] (2) courts have not only the power but also the duty to create such causes of action;[86] and (3) fears of overburdening the courts' limited resources should not bar recovery.[87]

2. "Special Factors Counseling Hesitation:" The Refusal to Create Liability

Some courts have refused to find liability based on the amorphous concept of "special factors counseling hesitation."[88] These special factors usually center around public policy concerns involving unconstitutional legislation,[89] fears of potentially unending liability,[90] or constitutional provisions no longer in existence.[91] The doctrine, though, has been the focal point of criticism.[92] Although the concerns of the courts often have some merit, the "special factors" doctrine creates a far too tempting excuse to leave a plaintiff without a remedy. Instead, courts should focus on the constitutional right in question and should permit a cause of action to go forward whenever a right personal to the plaintiff has been violated. For instance, in the area of unconstitutional legislation, a plaintiff might only recover if he can prove that his specific rights were violated, not through some custom or policy, but by actual government conduct with respect to him or a

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85. This conclusion is often based upon traditional tort law principles and the English custom of providing money damages for violations of individual rights. *Bott*, 922 P.2d at 739; *Widgeon*, 479 A.2d at 924 (citing *Entick v. Carrington*, 19 How. St. Tr. 1029 (1765); *Wilkes*, 98 Eng. Rep. at 489; *Huckle*, 95 Eng. Rep. at 768).

86. For example, the New Jersey Supreme Court concluded that it has the power to enforce constitutional rights even in the absence of implementing legislation. *Peper*, 389 A.2d at 476. The court noted that "[j]ust as the Legislature cannot abridge constitutional rights by its enactments, it cannot curtail them through its silence, and the judicial obligation to protect the fundamental rights of individuals is as old as this country." Id. (citing *King v. South Jersey Natl. Bank*, 66 N.J. 161, 330 A.2d 1, 10 (1974)). See also *Widgeon*, 479 A.2d at 929 ("Thus, the existence of other available remedies, or a lack thereof, is not a persuasive basis for resolution of the issue [of constitutional tort claims].").

87. See note 80 and accompanying text.

88. This concept was first noted in *Bivens* and has since been used by many courts, especially in the federal arena to deny liability. See note 34 and accompanying text; Chemerinsky, *Federal Jurisdiction* § 9.1.3 at 531-34 (cited in note 3).

89. *Vest v. Schafer*, 757 P.2d 588, 598 (Alaska 1988); *77th Dist. Judge v. State*, 175 Mich. App. 681, 438 N.W.2d 333, 340 (1987); *Alaska Pacific Assurance Co. v. Brown*, 687 P.2d 264, 276 (Alaska 1984). But see *Ashton*, 660 A.2d at 461-62 (holding that in a constitutional tort claim based on an arrest made pursuant to an unconstitutional ordinance, the fact that the arrest was made pursuant to a law was not a defense to liability).

90. *Kelley Property*, 627 A.2d at 923-24; *King v. Alaska State Housing Authority*, 633 P.2d 256, 260-61 (Alaska 1981).

91. *Smith*, 410 N.W.2d at 789.

92. Gene R. Nichol, Bivens, Chilicky, *and Constitutional Damages Claims*, 75 Va. L. Rev. 1117, 1124 (1989) (describing the doctrine as "curious").

cognizable group of which he is a member. The legislative enactment alone cannot sustain liability, but its implementation and effect on specific individuals can. The law must not be unconstitutional simply because it violates some structural limitation of the government or its legislative powers, such as a federal staute which is void because it violates the Tenth Amendment or is not a valid exercise of the commerce power. Rather, the law must actually result in the violation of a constitutional right personal to the plaintiff which occurs when the unconstitutional statute is applied to the plaintiff.[93]

3. Sovereign Immunity as a Bar to Recovery

One of the most ominous obstacles facing plaintiffs in constitutional tort litigation is sovereign immunity. Courts have invoked this doctrine not only to bar recovery against the government[94] but also as an excuse not to recognize direct causes of action at all.[95] The concept

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93. See Sheldon Nahmod, *Constitutional Damages and Corrective Justice: A Different View*, 76 Va. L. Rev. 997, 1011-12 (1990) (arguing that liability should attach for both "systemic rights" and "personal rights"). It is absurd that a plaintiff will remain uncompensated when, for example, police officers violate his rights while acting pursuant to a law, whereas when an agent following a general government policy that happens to be unconstitutional violates a plaintiff's rights, that plaintiff will be able to recover. Atrocities that the executive branch commits but the legislature endorses should not go without a remedy.

Further, constitutional issues largely concern the due process and equal protection requirements in state constitutions. In the equal protection arena, the state of mind requirement for a violation will often curb liability. For due process, it may be appropriate for the courts to take a duty approach. However, courts should not simply dismiss constitutional tort claims in these areas because they pose difficult questions. Courts should abandon the special factor analysis and delineate clear standards in order to determine when these clauses are violated and when liability attaches. Nevertheless, the scope of liability for specific provisions of state constitutions is beyond the scope of this Note.

94. *Bontwell*, 486 S.E.2d at 921-22; *Garcia v. Reyes*, 697 So. 2d 549, 551 (Fla. Dist. Ct. App. 1997); *Murphy v. State*, 248 Mont. 82, 809 P.2d 16, 19 (1991); *Ritchie v. Donnelly*, 324 Md. 344, 597 A.2d 432, 444 (1991); *Meade*, 647 A.2d at 835; *Marshall v. Ilczuk*, 1993 WL 642946, 5 (D. Md. 1994); *Vest*, 757 P.2d at 598 n.40.

95. *Sundheim*, 926 P.2d at 549; *Anderson v. Department of Revenue*, 313 Or. 1, 828 P.2d 1001, 1005 (1992); *Livingood*, 477 N.W.2d at 189-90; *Hunter*, 787 P.2d at 883; *Rockhouse Mountain Prop. Owners*, 503 A.2d at 1389; *Figueroa*, 604 P.2d at 1205. In some of these cases, it is unclear whether constitutional tort claims would exist against officials sued in their individual capacity. See *Livingood*, 477 N.W.2d at 195 (failing to address constitutional tort claims against an official in his individual capacity because it was not properly preserved for appeal); *Figueroa*, 604 P.2d at 120 (addressing only the liability of the state). But see *Hunter*, 787 P.2d at 884 (holding that "persons whose rights under Article I, section 8, of the Oregon Constitution are violated by a municipality or its employees may not bring an action for damages against the municipality or its employees directly under the constitution, but will be limited to existing common-law, equitable, and statutory remedies").

of sovereign immunity stems from statutes and constitutions,[96] as well as from the common law.[97] The result, however, is often the same: The aggrieved plaintiff cannot recover from the state for the unconstitutional conduct of the state's employees.[98]

Many courts, however, have held that sovereign immunity does not apply to constitutional torts. In these cases, courts generally hold that the state's immunity statute either specifically exempts constitutional torts[99] or, conversely, that the statute does not grant immunity to cases involving constitutional deprivations.[100] Some courts, however, have specifically abrogated sovereign immunity for constitutional torts because of its inherent incompatibility with constitutional violations.[101]

The most notable of these cases is the recent decision of the North Carolina Supreme Court in *Corum v. University of North Carolina*.[102] In that case, the court held that the judicially created doctrine of sovereign immunity could not exist in the face of alleged violations of the North Carolina Constitution.[103] The court noted that

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96. See, for example, *Sundheim*, 926 P.2d at 549 (relying on the immunity contained in the Colorado Governmental Immunity Act); *Anderson*, 828 P.2d at 1005 (relying on the immunity contained in the Oregon Tort Claims Act); *Bontwell*, 486 S.E.2d at 921-22 (relying on the immunity contained in the Georgia Constitution).

97. See, for example, *Livingood*, 477 N.W.2d at 189-90 (refusing to abrogate judicially created immunity); *Rockhouse Mountain Prop. Owners*, 503 A.2d at 1389 (same); *77th Dist. Judge*, 438 N.W.2d at 340 (applying common law legislative immunity to bar a constitutional tort suit). The Maryland Court of Appeals more fully explained the concept of common law immunity:

> The "State" spoken of in this rule [of sovereign immunity] "itself is an ideal person, intangible, invisible, immutable," which can "act only by law, [and] whatever it does say and do must be lawful." When the State's agents act wrongly, their acts are ultra vires, and it is "the mere wrong and trespass of those individual persons. . . ."

Ritchie, 597 A.2d at 444. This concept, however, runs contrary to the law of agency and the law of corporations. See Catharine Pierce Wells, *Corrective Justice and Corporate Tort Liability*, 69 S. Cal. L. Rev. 1769, 1774 (1996) (noting that corporations law and respondeat superior both hold the greater or parent entity liable for the actions of the lesser).

98. But see *Meade*, 647 A.2d at 834 (discussing indemnity funds with which the government would indemnify police officers in civil suits); *Brown*, 674 N.E.2d at 1142 ("[I]n many cases the State will be secondarily liable for the employees' acts because it has assumed the obligation to defend and indemnify them.").

99. See *Brown*, 674 N.E.2d at 1142; *Strauss v. State*, 131 N.J. Super. 571, 330 A.2d 646, 649 (N.J. Super. Ct. Law Div. 1974).

100. See *Smith*, 410 N.W.2d at 793 (Boyle, J., concurring in part and dissenting in part); *Clark v. City of Chicago*, 595 F. Supp. 482, 486 & n.6 (N.D. Ill. 1984).

101. See *Bott*, 922 P.2d at 736; *Corum*, 413 S.E.2d at 291; *Smith*, 410 N.W.2d at 793 (Boyle, J., concurring in part and dissenting in part); *Fenton*, 185 Cal. Rptr. at 763 (concluding that the state immunity statute did not apply because "[t]he state constitutional right to vote is contained in a self-executing provision, which a governmental entity may not violate without standing accountable for any provable damages").

102. 330 N.C. 761, 413 S.E.2d 276 (1992).

103. Id. at 291.

although the legislature traditionally determines when the sovereign is liable, the judiciary's responsibility to protect and enforce the state's Declaration of Rights was paramount.[104] The court concluded that sovereign immunity could not trump constitutional tort claims because sovereign immunity is not a constitutional right of the state but merely a common law doctrine subject to the constraints of the constitution.[105] Thus, the court resolved the paradox between constitutional torts and sovereign immunity in favor of constitutional accountability: The rights are designed to limit and restrict the reach of government; thus sovereign immunity effectively bars the vindication of those rights when the government transgresses them.[106] Sovereign immunity must give way in the face of a constitutional tort claim.

4. Limiting the Constitution through the Legislature: The Existence of an Alternative Remedy

Several courts have refused to create a direct cause of action for damage awards under a state constitution because of the availability of alternative remedies.[107] These cases have involved employment disputes and discrimination,[108] contract bidding,[109] licensing and zoning determinations,[110] and dissemination of private information.[111] They have denied direct relief under the state constitution because

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104. Id.

105. Id. at 291-92. The court went on to state that "[t]hus, when there is a clash between these constitutional rights and sovereign immunity, the constitutional rights must prevail." Id. at 292.

106. Id. at 291-92. The court concluded:

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

Id. at 291.

107. Although not creating a cause of action in the case before them, some courts have indicated that a constitutional tort may very well be appropriate in the absence of an alternative remedy. See, for example, *Shields*, 658 A.2d at 934.

108. *Provens*, 594 N.E.2d at 961; *Irving v. School District No. 1-1A*, 248 Mont. 460, 813 P.2d 417, 420 (1991); *Walt v. State*, 751 P.2d 1345, 1353 (Alaska 1988); *State v. Haley*, 687 P.2d 305, 318 (Alaska 1984).

109. *Dick Fischer Develop. No. 2, Inc. v. Department of Administration*, 838 P.2d 263, 268 (Alaska 1992).

110. *Sundheim*, 926 P.2d at 553; *Shields*, 658 A.2d at 934; *Kelley Property*, 627 A.2d at 922; *Rockhouse Mountain Prop. Owners*, 503 A.2d at 1388.

111. *Thoma*, 1997 WL 468070 at 8, 9 n.5.

other remedies existed: administrative remedies,[112] statutory causes of action,[113] common law torts,[114] criminal prosecutions,[115] injunctive relief,[116] and even Section 1983 claims.[117] Often, however, alternative remedies provide only equitable relief, not actual relief for a deprivation of constitutional rights.

Shields v. Gerhart[118] demonstrates the rationales most commonly advanced to deny direct constitutional relief. After determining that certain provisions of the Vermont Constitution were self-executing,[119] the Supreme Court of Vermont turned to the propriety of a claim for damages. The court reviewed the *Bivens* line of cases and determined that where "other remedies exist as part of a statutory scheme fashioned by the legislature, the decisions show reluctance to add a damages remedy."[120] The court held that because the plaintiff had administrative remedies available to her, a damage suit would not lie for the alleged unconstitutional denial of her operating license.[121] Further, the plaintiff did not convince the court

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112. *Shields*, 658 A.2d at 935-36; *Kelley Property*, 627 A.2d at 923; *Dick Fischer*, 838 P.2d at 268; *Provens*, 594 N.E.2d at 965-66; *Walt*, 751 P.2d at 1353.

113. *Provens*, 594 N.E.2d at 965-66; *Ohio Casualty Ins. Co.*, 813 P.2d at 520 (Opala, C.J., concurring); *Rockhouse Mountain Prop. Owners*, 503 A.2d at 1388; *Thoma*, 1997 WL 468070 at 8.

114. *Sundheim*, 926 P.2d at 553 n.13 (relying on the existence of claims for intentional interference with contractual relations or intentional interference with a prospective business advantage to deny liability under the Colorado Constitution).

115. *Cooney*, 792 P.2d at 1298 n.7.

116. *Herrick's Aero-Auto-Aqua Repair Service v. State*, 754 P.2d 1111, 1116 (Alaska 1988).

117. *Sundheim*, 926 P.2d at 553 n.13; *Irving*, 813 P.2d at 419. These courts, however, fail to understand the most fundamental purpose behind state constitutional torts: vindication of state constitutional rights. As § 1983 does not permit recovery for state rights, it is ultimately irrelevant that the actions of the defendant may also violate the U.S. Constitution and give rise to liability under the statute. Fear of double recovery is also misplaced because of the common law rule prohibiting such recovery. Compare *Sundheim*, 926 P.2d at 553 n.13 ("In particular, [these damages] are recoverable under the plaintiff's § 1983 claims and therefore all damages sought here are merely duplicative.") with *Widgeon*, 479 A.2d at 928 (concluding that the availability of a § 1983 or other common law cause of action was irrelevant to the determination of whether a state constitutional tort action should lie).

118. 163 Vt. 219, 658 A.2d 924 (1995). The plaintiff claimed that she had been denied her property interest in her day care center in violation of the Vermont Constitution. She alleged that the defendants had revoked her license because of her support for corporal punishment. Further, she claimed that the defendants defrauded her into forgoing her appeal rights and applying for a license as a registered facility for which they allegedly knew she would not qualify. Id. at 926.

119. Id. at 930.

120. Id. at 933. The court also reviewed its own application of § 874A of the Restatement (Second) of Torts and concluded that damage awards for violations of a statute are not usually available under Vermont law when another remedy exists. Id. at 932-33. For a discussion of § 874A, see Part V.C.

121. *Shields*, 658 A.2d at 936. The court stressed that a damage suit and the potential of liability for government officials may have a "chilling effect" on those officials who are employed to oversee day care facilities and to protect the health and safety of children. Id.

that the statutory remedies were inadequate because the plaintiff was tricked into forgoing them.[122] Thus, the plaintiff was not afforded compensation for the loss of her property rights, even if they were intentionally or maliciously denied, because there was an administrative remedy in place allowing for the review and appeal of the initial denial of the license.[123]

In contrast to *Shields*, two courts have upheld constitutional torts but have permitted liability only in the absence of legislative or administrative remedies. In *Gay Law Students Association v. Pacific Telephone and Telegraph Co.*,[124] the Supreme Court of California concluded that a claim of employment discrimination in violation of the California Constitution could proceed because no statutory remedy existed for such unconstitutional behavior.[125] The court specifically limited its holding to those cases in which no other remedies were available.[126]

The Supreme Court of North Carolina reached a similar conclusion in *Corum*.[127] In that decision, the court concluded that a violation of the right to free speech in the North Carolina Constitution could support a common law action for damages provided that no other remedy existed.[128] The court noted that although it had the inherent power to create remedies for constitutional violations, it should defer to the decision of the legislature and should "minimize the encroachment upon other branches of government—in appearance and in fact—by seeking the least intrusive remedy available and necessary to right the wrong."[129] Because the legislature had not yet spoken on the issue and because damages were the least intrusive

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122. Id. at 935.

123. The court noted that any initial denial of due process could be rectified at a later date by filing an appeal in court. Id. at 936. This remedy, however, fails to compensate the plaintiff for any loss she may have suffered from the time due process was first denied to the time the decision could have been overturned and corrected by a court of law. In addition, the remedy afforded in *Shields* and other cases in no way addresses the need for deterrence. Presumably, an unconstitutional decision denying a license will be overturned on appeal, but neither the government nor the responsible government officials will be held accountable for their violations of the state constitution. This result seems highly incompatible with the purpose behind a guarantee of constitutional rights and government responsibility to the citizen. Further, it permits the legislature te define the scope of constitutional law, a function traditionally reserved for the apolitical judiciary.

124. 24 Cal. 3d 458, 595 P.2d 592 (1979).

125. Id. at 602.

126. Id. at 602 n.10.

127. 413 S.E.2d at 276.

128. Id. at 290-92.

129. Id. at 291.

remedy for the constitutional violation, the court recognized a constitutional tort action.[130]

These cases leave two issues unresolved: (1) whether the legislature has the power to interpret the scope of constitutional rights and constitutional remedies; and (2) whether the courts should defer to those interpretations. Because courts have the common law power to create remedies and the duty to enforce constitutional protections,[131] the availability or absence of legislative remedies should be irrelevant, especially since the legislature has no power to abrogate truly constitutional remedies.[132] Often, statutes and common law torts do not recognize or preserve the important constitutional interests at stake.[133] The availability of other remedies does not resolve the issue of direct causes of action under state constitutions.[134] A constitutional cause of action must exist to enforce constitutional provisions and to correct constitutional wrongs regardless of any legislative remedy.[135] It is one

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130. Id.

131 See Part V.A.

132. See Rosen, 67 N.C. L. Rov. at 358 (cited in note 19) (noting, with respect to *Bivens* suits, that "the Supreme Court has failed to explain adequately how a right derived directly from the Constitution can be abrogated by an act of Congress"). In the federal arena, the absence of a clear statement of the legal basis for constitutional tort claims has engendered much confusion. See George D. Brown, *Letting Statutory Tails Wag Constitutional Dogs—Have the* Bivens *Dissenters Prevailed?*, 64 Ind. L. J. 263, 269-74 (1989) (discussing the confusion over the basis for *Bivens* suits). This confusion, however, can and should be avoided in state courts. They should firmly state that damages are a remedy for constitutional violations as a matter of constitutional law. This is not to argue that legislatures may not impose additional liability for violations of constitutional rights. These statutory enactments, however, should not supplant constitutional remedies.

133. *Widgeon*, 479 A.2d at 928-29. See also Joan Steinman, *Backing Off* Bivens *and the Ramifications of this Retreat for the Vindication of First Amendment Rights*, 83 Mich. L. Rev. 269, 282-85 (1984) (discnssing the inadequacies of alternative remedies); Christina B. Whitman, *Emphasizing the Constitutional in Constitutional Torts*, 72 Chi. Kent L. Rev. 661, 686 (1997) ("It is dangerous to define constitutional claims as a narrow subset of tort law because tort law has been particularly ineffective in dealing with precisely the sorts of interests and injuries that are at the centor of constitutional law.").

134. *Widgeon*, 479 A.2d at 929. See also Bandes, 68 S. Cal. L. Rev at 361 n.225 (cited in noto 15) (noting that courts make the ultimate detormination about the effectiveness of legislative remedies and have often exercised their power to supplement ineffective legislation in the constitutional arena).

135. But see *Kelley Property*, 627 A.2d at 927 (Borden, J., concurring in part and dissenting in part) (noting that judicially created remedies for constitutional violations may be supplanted by legislative enactments); Mindy L. McNew, Note, Moresi: *Protecting Individual Rights Through the Louisiana Constitution*, 53 La. L. Rev. 1641, 1660 (1993) (arguing that statutes granting fair and actual relief should suffice).

Alexander Hamilton recognized the necessity of remedies for constitutional violations. In The Federalist No. 80 he wrote:

> [T]here ought always to be a constitutional method of giving efficacy to constitutional provisions. What, for instance, would avail restrictions on the authority of the Stato legislatures, without some constitutional mode of enforcing the observance of them?... No

thing for a legislative remedy to exist, and another for that remedy to meet constitutional minimums to ensure recovery.

5. Passing the Buck: The Requirement of Implementing Legislation and the Refusal to Vindicate Constitutional Rights

Several courts have refused to recognize direct causes of action for damages under state constitutions. They have based their decisions on judicial incompetence or impropriety,[136] a lack of historical or common law foundation for these actions,[137] a conclusion that implementing legislation is the only way to effectuate constitutional rights in certain situations,[138] or on no expressed basis at all.[139] These decisions, however, cannot be reconciled with the traditional powers, functions, and purposes of common law courts.[140]

The Oregon Supreme Court addressed the concept of judicial incompetence in *Hunter v. City of Eugene*.[141] The court was asked to create a direct cause of action for violations of the rights to free speech, liberty, and movement contained in the Oregon Constitution.[142] The court concluded that because there was no evidence of intent to create a direct cause of action for damages, a consti-

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man of sense will believe that such prohibitions would be scrupulously regarded without some effectual power in the government to restrain or correct the infractions of them.

Federalist No. 80 (Hamilton), in Clinton Rossiter, ed., *The Federalist Papers* 475, 475-76 (Mentor, 1961).

136. *Barcik v. Kubiaczyk*, 321 Or. 174, 895 P.2d 765, 775 (1994) (en banc); *Provens*, 594 N.E.2d at 965; *Hunter*, 787 P.2d at 884; *Vest*, 757 P.2d at 598; *77th Dist. Judge*, 438 N.W.2d at 339; *Smith*, 410 N.W.2d at 790 (Brickley, J., concurring).

137. *Bouillion*, 896 S.W.2d at 148; *Cline v. Rogers*, 87 F.3d 176, 179-80 (6th Cir. 1996); *Barcik*, 895 P.2d at 775; *Lee*, 834 S.W.2d at 322; *Hunter*, 787 P.2d at 883; *Bennett v. Horne*, 1989 WL 86555, 2 (Tenn. Ct. App.).

138. *Barcik*, 895 P.2d at 775; *Hunter*, 787 P.2d at 883; *Tremblay v. Webster*, 1996 WL 176381, 2 (Conn. Super. Ct.). But see *Laguna Publishing Co.*, 182 Cal. Rptr. at 835; *Fenton*, 185 Cal. Rptr. at 762; *Lloyd*, 432 A.2d at 578.

139. *Bagg v. University of Texas Medical Branch at Galveston*, 726 S.W.2d 582, 584 n.1 (Tex. Ct. App. 1987). See also *Czap v. Town of Newtown*, 1996 WL 737486 (Conn. Super. Ct.) (concluding that the Connecticut Supreme Court's decision in *Kelley Property* prohibits a constitutional cause of action even in the absence of an alternative remedy).

140. See Part V.A.

141. 309 Or. 298, 787 P.2d 881 (1990).

142. Id. at 882. The plaintiffs were a group of school teachers, accompanied by a news reporter, who were conducting a picket line at a high school. They alleged that they were attacked by club-wielding police officers acting pursuant to directions from their supervisors. Further, they alleged that any force inflicted was substantially above that necessary to accomplish any legitimate law enforcement objective. Id.

tutional tort claim could not succeed.[143] The court, however, further claimed that it was not competent to make the necessary decisions involving the creation of a new cause of action without legislative guidance.[144] The legislature would have to determine if any liability existed.

Judicially created constitutional torts have also been rejected because of an alleged lack of historical foundation. In *City of Beaumont v. Bouillion*,[145] the Supreme Court of Texas addressed the issue of whether an action for damages would lie for a violation of the rights of free speech and assembly contained in the Texas Constitution.[146] The court concluded that no implied cause of action existed under the constitution[147] and that the rights contained in the constitution did not give rise to an actionable common law duty.[148] The court refused to create a new cause of action for such behavior.[149]

The decisions of these courts are difficult to reconcile with a common law court's inherent authority to create new causes of action and remedies for wrongs.[150] Further, any assertion that courts are not competent to balance the concerns over constitutional liability is completely inconsistent with the day-to-day decisions of common law courts. Duty, proximate cause, and reasonable foreseeability, for instance, are all concepts that these courts created to balance the need for compensation with never-ending liability.[151] To assert that courts

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143. Id. The court found no evidence of either "legislative intent" or of textual and historical support for such liability. Id.

144. Id. at 884. The court relied extensively on legislative intent because that is a necessary element in implied causes of action for statutory violations. *Nearing v. Weaver*, 295 Or. 702, 670 P.2d 137, 143 (1983). This complete reliance on intent, however, is misplaced. See note 260. For a further discussion of the competence of the judiciary in *Bivens* suits, see Brown, 64 Ind. L. J. at 278-85 (cited in note 132).

145. 896 S.W.2d 143 (Tex. 1995).

146. Id. at 144. The plaintiffs in *Bouillion* claimed constructive discharge from their positions at the Beaumont Police Department. Id. They alleged that they were removed for exercising their rights to free speech and free assembly in reporting official misconduct. Id.

147. Id. at 147.

148. Id. at 150. The court also reviewed common law causes of action for the violation of constitutional rights. The court implicitly held that even though such actions existed at common law, plaintiffs are bound by the traditional private law causes of action defined not by reference te the values contained in the Texas Constitution but by other societal considerations. See id.

149. Id. This decision is strange when compared to *Duty v. General Fin. Co.*, 154 Tex. 16, 273 S.W.2d 64 (1954) (recognizing the tert of intentional infliction of emotional distress). In *Duty*, the court asserted its common law power to create remedies for wrongs involving one's common law right to be free from emotional distress but refused to assert this power when the interest violated is a constitutional guarantee. Id. at 64-66.

150. See Part V.A.

151. Bandes, 68 S. Cal. L. Rev. at 348 (cited in note 15) (noting that if courts are competent to fashion such rules as causation then they are also competent te create constitutional torts); *Bivens*, 403 U.S. at 403-04 (Harlan, J., concurring) (same).

are incompetent to perform this function in the area of constitutional rights is beyond understanding.[152] Asserting the court's incompetence denies the strong remedial tradition in American tort law,[153] refuses to vindicate a right, and promotes a wrong of the highest magnitude.[154]

III. THE LIABILITY OF STATE GOVERNMENTS FOR THE VIOLATION OF STATE CONSTITUTIONS

Direct causes of action for violations of state constitutions create a remedy of which many plaintiffs are deserving. Once constitutional torts are recognized, though, courts must first determine who should be liable and then construct a sound doctrinal and theoretical foundation for that liability. This Part explores why constitutional torts under state constitutions are necessary and why the state should bare the brunt of that liability.

A. The Need for Government Liability

Traditional tort law recognizes damages as a remedy for the violation of personal interests in order to affirm rights, provide compensation, promote deterrence, vindicate rights, and provide corrective justice.[155] Government liability for constitutional tort violations advances these goals. It forces the state to accept responsibility for individuals the government places in positions of authority. Liability deters future constitutional violations and also assuages the traditional fears of overdeterrence from personal liability. It places the burden of providing compensation on the party that can best provide compensation and the party that can spread the costs throughout the community: the government. Liability reinforces the

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152. Compare *Hunter*, 787 P.2d at 884 (concluding that the Supreme Court of Oregon was not competent to create a new cause of action involving constitutional violations) with *Truman v. Central Billing Bureau, Inc.*, 279 Or. 443, 568 P.2d 1382 (1977) (recognizing the tort of intentional infliction of emotional distress). See also Nichol, 75 Va. L. Rev at 1132 (cited in note 92) ("Statements about lack of competence and 'legislative domain' are less powerful when used to describe the traditional talent of courts to design remedies.").

153. David F. Partlett, *Tort Liability and the American Way: Reflections on Liability for Emotional Distress*, 45 Am. J. Comp. L. 171, 184-87 (1997).

154. See *Huckle*, 95 Eng. Rep. at 769 ("[T]hey saw a magistrato over all the King's subjects, exercising arbitrary power, violating Magna Charta, and attempting to destroy the liberty of the kingdom. . . ."); *Wilkes*, 98 Eng. Rep. at 490 ("That the constitution of our country had been so fatally wounded, that it called aloud for the redress of a jury of Englishmen.").

155. W. Page Keeton, et al., *Prosser and Keeton on Torts* § 4 at 20-26 (West, 5th ed. 1984).

moral accountability of the state and vindicates the reliance interest of the people. Finally, government liability holds the government responsible as an agent of the people.

1. The Affirmation of the Plaintiff's Rights: A Remedy for Every Wrong

A right without a remedy is not a right.[156] The most basic and logical rationale for the need of a remedy is the affirmation of the plaintiff's rights. The plaintiff has suffered a legal wrong and needs legal recognition of that wrong for no other reason than for society and the wrongdoer to acknowledge the violation of law.

However, the affirmation of the plaintiff's rights does not require a damage award per se. Other remedies, such as injunctions, criminal prosecution, professional and administrative discipline, and civil penalties serve to affirm the existence of a right.[157] Of these alternatives, though, only injunctions may serve to affirm the plaintiff's protected interest. In the case of a criminal prosecution and civil penalties, it is actually the state that has been wronged. The state seeks to have its interest in adherence to the penal code vindicated, not the rights of the victim. Further, the prosecution of these claims is completely within the state's discretion.[158]

Although an injunction is a remedy that an aggrieved party may request directly from a court, it often will not completely affirm his rights.[159] An injunction requires that the plaintiff prove the significant possibility of future harm.[160] This burden is quite difficult for the plaintiff to meet with regard to personal rights and liberties such as future intentional infliction of emotional distress. Many constitutional violations occur because of the government's negligence. How could a court enjoin future negligent acts? The plaintiff will also fail to satisfy the burden in regard to random unconstitutional acts. The remedy does not affirm the plaintiff's rights that have been transgressed in the past but only serves to limit or restrict future constitutional harm. In this respect, an injunction does not affirm the rights of the victim.

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156. See note 1.

157. John C. Jeffries, Jr., *Compensation for Constitutional Torts: Reflections on the Significance of Fault*, 88 Mich. L. Rev. 82, 90 (1989).

158. *Cooney*, 792 P.2d at 1309 (Urbigkit, J., dissenting).

159. See note 81; *Bott*, 922 P.2d at 739.

160. Don B. Dobbs, *Law of Remedies* § 2.9(2) at 165-68 (West, 2d ed. 1993).

Constitutional torts are the only conventional remedy in the court's repertoire which can affirm the rights of the plaintiff. In an action for damages, a court will have to address the alleged unconstitutional behavior of the government and specifically affirm that right with an award of damages. Indeed, the law of torts has long recognized and endorsed this use of damages.[161] Without a monetary award, the violation of constitutional rights will remain effectively ignored by the courts.

2. Assuring Effective and Actual Compensation

Compensation should make the plaintiff whole.[162] When an individual's constitutional rights are violated, he is deserving of compensatory damages for the loss he has suffered; otherwise, his constitutional rights are meaningless.[163] Because a government official has a much greater capacity to inflict harm than a private individual, compensatory damages are even more appropriate for constitutional torts.[164] Although the loss of one's right or of one's constitutionally protected dignity is sometimes the only loss suffered by an individual,[165] a compensatory scheme will ensure that that constitutional loss will not go without relief.

Once it is determined, though, that compensation is needed, the courts must decide who should bear the financial burden of providing compensation. Government liability is the natural choice because it ensures effective compensation for the wronged plaintiff.[166] Often, judges and juries will be hesitant to hold a government agent personally liable for an act taken in the scope of his employment which is discovered later to have been unconstitutional.[167] Even if

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161. See Part II.A.

162. Jean C. Love, *Presumed General Compensatory Damages in Constitutional Tort Litigation: A Corrective Justice Perspective*, 49 Wash. & Lee L. Rev. 67, 68 n.4 (1992).

163. *Kelley Property*, 627 A.2d at 929 (Borden, J., concurring in part and dissenting in part).

164. *Brown*, 674 N.E.2d at 1140. See Whitman, 72 Chi. Kent L. Rev. at 669 (cited in note 133) (noting that constitutional torts stress "the special power of the government te do harm").

165. See Whitman, 72 Chi. Kent L. Rev. at 669 (cited in note 133) (noting that constitutional torts seek to protect the dignity interests of individuals).

166. Michael Wells, *The Past and the Future of Constitutional Torts: From Statutory Interpretation to Common Law Rules*, 19 Conn. L. Rev. 53, 77 (1986); William P. Kratzke, *Some Rccommendations Concerning Tort Liability of Government and Its Employees for Torts and Constitutional Torts*, 9 Admin. L. J. Am. U. 1105, 1163 (1996).

167. Resen, 67 N.C. L. Rev. at 346-47 (cited in note 19) (discussing the problems judges and juries have with individual liability); Whitman, 79 Mich. L. Rev. at 56, 58 (cited in note 16) ("It is easier, when the defendant is an institution rather than an individual, for court, parties, and

liability is established, the amount of damages may well be insufficient to compensate for the actual loss suffered.[168]

If, however, the government is the real party in interest, the balance tips in favor of the plaintiff and the vindication of constitutional rights. Judges and juries would be much more likely to hold the government liable and to issue an award reflective of the actual wrong.[169] Further, the government is in a much better position to ensure actual recovery because it is a "deep pocket" with the funds and incentive to purchase insurance.[170]

It has often been argued that sovereign immunity must exist because compensatory damages awarded against the government will deplete public resources.[171] Nevertheless, many governments already indemnify their employees for any civil liability they incur in their employment.[172] Second, the government is in the best position to spread the costs of constitutional violations throughout the community.[173] This cost spreading may provide further deterrence. Because the public determines what assets are available, the public may demand the replacement of government officials who squander funds to pay constitutional tort awards. Thus, not only is the goal of compensation better served through government liability, the goal of deterrence is significantly advanced as well.

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public to view the conflict as intergovernmental, and, where that is appropriate, to stress the systemic origins of unconstitutional conduct.").

168. See Whitman, 72 Chi.-Kent L. Rev. at 669 (cited in note 133).

169. See Rosen, 67 N.C. L. Rev. at 346-47 (citod in note 19).

170. See Wells, 19 Conn. L. Rev. at 77 (cited in note 166).

171. See, for example, *Montana v. Gilham*, 932 F. Supp. 1215, 1219 (D. Mont. 1996); *Payne v. County of Jackson*, 484 S.W.2d 483, 485-86 (Mo. 1972); *Berek v. Metropolitan Dade County*, 396 So. 2d 756, 758 (Fla. Dist. Ct. App. 1981); Restatement (Second) of Torts § 895B (1979).

172. *Brown*, 674 N.E.2d at 1142 (discussing New York's indemnification statute); *Meade*, 647 A.2d at 834 (discussing the indemnification program in Baltimore). See, for example, Alaska Stat. § 14.12.115 (1996); Conn. Gen. Stat. § 1-125 (West 1996); Kan. Stat. Ann. § 75-6116 (1995); S.D. Cod. Laws Ann. § 3-22-1 (1996). See also John D. Kirby, Note, *Qualified Immunity for Civil Rights Violations: Refining the Standard*, 75 Cornell L. Rev. 462, 485-88 (1990) (discussing government indemnification programs and insurance); Neal Miller, *Less-Than-Lethal Force Weaponry: Law Enforcement and Correctional Agency Civil Law Liability for the Use of Excessive Force*, 28 Creighton L. Rev. 733, 749-50 (1995) (same); Peggy Ward Corn, Comment, Anderson v. Creighton *and Qualified Immunity*, 50 Ohio St. L. J. 447, 463-68 (1989) (discussing the advantages of a system of indemnification).

173. Wells, 19 Conn. L. Rev. at 76-77 (cited in note 166) (arguing that the government is in the best position to spread costs); Kratzke, 9 Admin. L. J. Am. U. at 1165 (cited in note 166) (same). Professor Whitman has also claimed that "[a] damage judgment against an entity supportsd by public taxes leads to spreading, rather than mere shifting, of the costs of injuries." Whitman, 79 Mich. L. Rev. at 67 (cited in note 16) (citation omitted). See also Kirby, 75 Cornell L. Rev. at 490-91 (cited in note 172) (concluding that indemnification through insurance of government agents allows for loss spreading).

The threat of a financial burden should not discourage the recognition of constitutional torts. Fear of depleting public assets should not excuse the government's violation of the very document that created it and defined its parameters.[174] This rationale only furthers the undesired behavior.[175] The enforcement of the government's moral foundation and position in society, the need for effective government, and the shifting of loss away from the victim of unconstitutional acts strongly support the conclusion that the government should bear the burden of the unconstitutional conduct of its agents even though this may tax the state's financial resources. It is this economic pressure which creates the deterrent necessary to reduce constitutional violations.

3. Deterrence of Constitutional Violations and the Avoidance of Overdeterrence

Deterrence is a far more important objective with regard to constitutional torts than with regard to traditional tort law[176] because the conduct is the very conduct that the founders sought to avoid.[177] Deterrence can be accomplished by liability and thereby induce constitutionally appropriate behavior.[178] The damage award punishes the government through a transfer of funds and creates an incentive to

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174. Professor Whitman argues, however, that the limited amount of public funds should be used "to improve the conditions that caused the problems" instead of compensating plaintiffs for past constitutional wrongs. Whitman, 79 Mich. L. Rev. at 50 (cited in note 16). This argument fails to account for the actual unlimited funds that government possesses through its power to tax and how voter backlash over incroased taxation may be an effective deterrent in itself.

175. Justice Brandeis wrote about and explored the effects of government behavior:

> Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be [imperiled] if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.

Olmstead v. United States, 277 U.S. 438, 485 (1927) (Brandeis, J., dissenting).

176. See Whitman, 79 Mich. L. Rev. at 55 (cited in note 16) ("We are more committed in constitutional litigation than in a common-law tort litigation to the deterrence of certain conduct and to using the skills of courts to articulate society's values.").

177. See *Durant*, 1997 WL 430992 at 11 ("Any other remedy . . . would authorize the state to violate constitutional mandates with little or no consequenco."); *Corum*, 413 S.E.2d at 292 (noting that constitutional torts are necessary to detor violations of the North Carolina Constitution because "that is the very harm that the people sought to thwart by adopting the Declaration of Rights").

178. Wells, 19 Conn. L. Rev. at 71 (cited in noto 166).

prevent future violations. Unlike an injunction or other remedy, damages are a tangible result which forces the government to transfer funds from the public treasury to the private citizen, which in turn requires either higher taxes or government cost-cutting. In the process, the government, if held accountable through institutional liability, would then take the necessary steps to reduce its liability by selecting more competent employees, by providing them with better and more continuous training, by ensuring more supervision of its employees, and by creating internal disciplinary rules for violators of the state constitution.[179] Constitutional torts are the best means of deterring future unconstitutional acts.[180]

Government liability also avoids the problems associated with overdeterring the conduct of government agents: As personal liability is removed, agents will not be timid in performing their duties.[181] Government agents can perform their governmental duties knowing that any constitutional infraction will be covered by their employer

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179. See Part III.A.6.

180. *Brown*, 674 N.E.2d at 1144 ("A damage remedy for constitutional torts depriving individuals of their liberty interests is the most effective means of deterring police misconduct, it is appropriate to the wrong and it is consistent with the measure by which personal injuries have historically been regulated."). See also *Corum*, 413 S.E.2d at 289 ("A direct cause of action against the State for its violations of free speech is essential to the preservation of free speech."). It has been claimed that damage awards are "time-consuming, wasteful, and painful for both parties and the courts." Whitman, 79 Mich. L. Rev. at 50 (cited in note 16). Damage awards, however, are designed to be painful for the parties, and they are certainly less painful for the courts given the judicial oversight that injuctions require.

Professor Whitman has argued, however, that injunctions are the preferable remedy because limited public funds should be used to correct the "systemic" problems which lead to unconstitutional conduct of state agents. Id. Such an argument, however, fails to conform with human norms. Until the government suffers an actual loss, it, like private citizens, will not take the steps necessary to stop such losses in the future. Although, theoretically, it may be more efficient to use injunctions and to apply government funds to better training and higher wages, the likelihood that an effective program will be developed in such a situation is minimal. Indeed, this runs contrary to the very notions developed over hundreds of years in tort law. Time has proven that the most effective remedy, in the long run, is an award of damages. Further, any use of pure equitable remedies may even create an incentive for protracted litigation and further harm to the individual through burdensome litigation expeuses. See *Durant*, 1997 WL 430992 at 13.

181. Wells, 19 Conn. L. Rev. at 80 (cited in note 166). It has been argued that damage awards will "overdeter" and lead to the loss of effective, decisive, and beneficial government conduct. Whitman, 79 Mich L. Rev. at 51 (cited in note 16); Wells, 19 Conn. L. Rev. at 72 (cited in note 166). However, this argument is usually advanced in § 1983 cases where the officer is held personally accountable, not the government. It loses much of its merit in a system of government liability for individnal actors who mistakenly or negligently violate a constitution and will most likely only receive a light reprimand and further training. Thus, such an officer, although hopefully more cegnizant of the constitutional standards for his conduct, will not behave in an overcautious way for he has little to lose.

and not by their paycheck.[182] Although there is a general societal interest to have effective and zealous government agents, innocent plaintiffs should not have to absorb the costs of agents' lawlessness.[183]

4. Vindicating the Reliance Interest of the Citizenry and the Rights of the People

A constitution is a social contract through which individuals give up certain liberties.[184] In exchange, the government agrees to provide services for the community such as the enforcement of social norms through the criminal law, the necessary infrastructure for the economy, and a general system of social stability.[185] However, the government also agrees to certain limitations on its authority in the form of constitutional rights.[186] The citizenry relies on the promise that the government will respect certain areas when it grants authority to the government.[187]

Whenever the government breaches this contract, the government has violated the community's reasonable reliance. The people have relied to their detriment and deserve compensation.[188] Without

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182. See *Kelley Property*, 627 A.2d at 923-24 (discussing the "chilling effect" of personal liability); Whitman, 79 Mich. L. Rev. at 50 (cited in note 16) (concluding that personal liability will deter conscientious persons from assuming public office); Wells, 19 Conn. L. Rev. at 80 (cited in note 166) (concluding that "[g]overnment can mitigate or entirely eliminate the effect of overdeterrence by indemnifying officers when they are held liable"); Kratzke, 9 Admin. L. J. Am. U. at 1163 (cited in note 166) (concluding that personal "liability will also overdeter other government employees").

183. Wells, 19 Conn. L. Rev. at 81 (cited in note 166) (noting that often the plaintiff is left without any recovery for constitutional violations in order not to deter effective government and concluding that the cost of such violations is more appropriately borne by the government).

184. *Christensen v. State*, 266 Ga. 474, 468 S.E.2d 188, 198 (1996) (Sears, J., dissenting); *United States v. Barona*, 56 F.3d 1087, 1093 (9th Cir. 1995); *United States v. Verdugo-Urquidez*, 856 F.2d 1214, 1231 (9th Cir. 1988) (Wallace, J., dissenting); *Cope v. Childers*, 197 Okla. 176, 170 P.2d 210, 217 (1946) (Riley, J., dissenting). But see *State v. Webb*, 238 Conn. 389, 680 A.2d 147, 163 (1996).

185. See *Moore v. Ganim*, 233 Conn. 557, 660 A.2d 742, 762-63 (1995); *Verdugo-Urquidez*, 856 F.2d at 1232 (Wallaco, J., dissenting); *Reedy v. Mullins*, 456 F. Supp. 955, 957 (W.D. Va. 1978).

186. See *Moore*, 660 A.2d at 762-63; *Verdugo-Urquidez*, 856 F.2d at 1232 (Wallace, J., dissenting).

187. See *Moore*, 660 A.2d at 762-63; *Verdugo-Urquidez*, 856 F.2d at 1232 (Wallace, J., dissenting); *State v. Newton*, 291 Or. 788, 636 P.2d 393, 405 (1981).

188. The Restatement (Second) of Contracts § 90 (1981) demonstrates the pervasivenesss of this concept in American law:

> A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

relief, the foundation upon which the government is built falls into question.

When a government violates a constitution, there is detrimental reliance—reliance by the people that the government will obey the constitution and that the government will appropriately use the power the people granted it. As a result, an injured citizen is uncertain what to expect.[189] A plaintiff is entitled not only to expect that the government will live up to its own agreement but also that courts will enforce the agreement and right the wrong.[190] Even though the government is often placed in a superior position with respect to the private citizen in other contexts,[191] this status cannot stand in the way of vindicating a violation of the constitution. Courts must recognize the need to hold the government accountable in the face of the community's reliance on its agreement with the government.[192] Without such recognition, no true limitations on government exist.

5. Corrective Justice

Corrective justice is a concept born in the mind of Aristotle.[193] Aristotle viewed the relationship between wrongdoer and victim as one which, at its most basic level, demanded damages in order to correct the balance.[194] The theory developed by the Greek philosopher

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Although this provision arguably only advocates the limited damages usually awarded in contract claims, it is still a useful example of the importance of reliance and the need to compensate for it.

189. Paul Finn and Kathryn J. Smith, *The Citizen, the Government, and "Reasonable Expectations,"* 66 Austl. L. J. 139, 140 (1992); *Kelley Property*, 627 A.2d at 928 (Berdon, J., concurring in part and dissenting in part) ("We do have the right, however, to expect that [public officials] will not use their positions of authority—even if unpaid and difficult, as are the positions of the defendants in this case—to work against us for malicious motives.").

190. Finn and Smith, 66 Austl. L. J. at 140 (cited in note 189).

191. Professors Finn and Smith recently noted this comparison of equities:

> [T]he expectation the individual citizen can have of fair treatment at the hands of government or, for that matter of public authorities, is still significantly circumscribed by the advantageous position in which both government and public authorities are often placed through doctrines, reserved to them alone, which allow individual interest to be sacrificed to consideration of public welfare.

Id. at 144.

192. See *Corum*, 413 S.E.2d at 292 ("Indeed, that is the very harm that the people sought to thwart by adopting the Declaration of Rights. In a democratic society legal doctrine should be designed so as to accentuate, not diminish, public accountability of government for its actions.").

193. Jeffries, 88 Mich. L. Rev. at 93 (cited in note 157) (citing Aristetle, *Nicomachean Ethics* §§ 1130a-32b); Kathryn R. Heidt, *Corrective Justice from Aristotle to Second Order Liability: Who Should Pay When the Culpable Cannot?*, 47 Wash. & Lee L. Rev. 347, 349 (1990).

194. Jeffries, 88 Mich. L. Rev. at 93 (citsd in note 157); Heidt, 47 Wash. & Lee L. Rev. at 354-55 (cited in note 193) (noting that corrective justice "rester[es] the parties to the position the parties occupied prior to the transaction"); Kent Reach, *The Limits of Corrective Justice and the*

requires the award of monetary compensation whenever one party ignores the limitations placed upon its behavior with respect to another party.[195]

When the government engages in unconstitutional acts, it is overstepping its limitations. The plaintiff suffers a loss while the state may realize gains through more efficient implementation of a government policy or program.[196] The transfer of funds from the wrongdoer to the victim rectifies the loss and returns the ill-gotten gains, restoring the balance between the parties. Because of the nature of the concept, immunity cannot stand in the way of correcting a wrong. Thus, when immunity and corrective justice conflict, it is the need to correct the prior unconstitutional act which must prevail.[197] Unlike traditional tort law, the constitutional tort doctrine does not reduce constitutional violations to an economic status so that the state government may achieve some optimal number of constitutional breaches.[198] Rather, the doctrine employs traditional notions of corrective justice.[199] Thus, "[i]f a plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it . . . ."[200] To this end, it is irrelevant whether the harm suffered can be expressed in economic terms, for it is not the harm for which the plaintiff is compensated, but the breach itself.[201] Although other remedies may also vindicate constitutional rights,[202] damages promise to be the most effective.[203]

Potential of Equity in Constitutional Remedies, 33 Ariz. L. Rev. 859, 867 (1991) (discussing Aristotle's view of corrective justice).

195. "[T]he principle of corrective justice requires that the responsible party pay damages in order to vindicate those righte." Wells, 19 Conn. L. Rev. at 80 (cited in note 166).

196. Jeffries, 88 Mich. L. Rev. at 94 (cited in note 157).

197. Wells, 19 Conn. L. Rev. at 80 (cited in note 166).

198. Id. at 72.

199. Id. at 72-73.

200. *Ashby*, 92 Eng. Rep. at 136 (Holt, C.J., dissenting).

201. See Whitman, 72 Chi.-Kent L. Rev. at 669 (cited in note 133) (noting that constitutional torts seek to "protect the *dignity* interest of the person of the plaintiff by specifying limits on the defendant's potentially intrusive conduct") (emphasis added).

202. Professor Whitman has written:

> [A] damage award is not needed to emphasize the existence or importance of the plaintiff's right. Damages serve only as a formal token of the legal conclusion of the court. Equity can do the job just as well, for a declaration is all that is necessary. . . .

Whitman, 79 Mich. L. Rev. at 53 (cited in note 16). Such a conclusion, however, fails to take into account the actual and symbolic importance of money in contemporary American society. If equity were truly a sufficient remedy in the eyes of plaintiffs, they would request an equitable remedy from the court. In private torts, plaintiffs often bring actions against others requesting a minuscule amount of compensatory damages or simply nominal damages. They do not seek an

6. The Responsibility of the Government as Principal and Employer

Because governments choose their agents and place them where the agents can commit constitutional infractions, the government should be held financially responsible.[204] Since the government selects its own agents, trains them, and oversees their employment, the government is in the best position to institute the programs necessary to eradicate constitutional violations.[205] Because most constitutional violations are attributable to systemic flaws in state government, the state should face liability in order to facilitate correction of those flaws.[206] By selecting the best employees, by providing them with adequate and continued training, and by disciplining them for their unconstitutional behavior, the government can substantially reduce the number of constitutional torts.[207]

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injunction because it does not carry the symbolic message of a damage award and the forced transfer of property.

203. The award of damages is "necessary and appropriate to ensure the full realization of the rights" contained in stato constitutions. *Brown*, 674 N.E.2d at 1139. Constitutional torts provide the means to assert those rights against the intrusions of the government.

204. Whitman, 79 Mich. L. Rev. at 56 (cited in note 16) ("[S]uch [damage] awards imply a culpability that is not appropriately placed upon an individual defendant who in effect serves only as a stand-in for a state or local government."); Christina B. Whitman, *Government Responsibility for Constitutional Torts*, 85 Mich. L. Rev. 225, 227-30 (1986) (discussing the role responsibility plays in assigning liability).

205. Wells, 19 Conn. L. Rev. at 77 (cited in note 166). Professor Whitman has also written that "[m]any of [a government agent's mistakes] may be caused by forces for which he cannot be held personally accountable—lack of education, training, personnel and equipment; and absence of public support." Whitman, 79 Mich. L. Rev. at 60 (cited in noto 16). See also Kratzke, 9 Admin. L. J. Am. U. at 1162 n.354 (cited in note 166). Thus, government liability is far more appropriate. But see *Smith*, 410 N.W.2d at 789 (stating that "making governmental bodies, as opposed to individual officials, liable for damages for constitutional violations lessens the deterrent effect of a *Bivens*-style remedy").

206. Whitman, 79 Mich. L. Rev. at 57 (cited in note 16). See also Laura Oren, *Immunity and Accountability in Civil Rights Litigation: Who Should Pay?*, 50 U. Pitt. L. Rev. 935, 1003 (1989) (concluding that "[i]t is the government, and not the individual employee, which has the ability to change policy, discipline misconduct, and require a different kind of training"); Jeremy Travis, Note, *Rethinking Sovereign Immunity After* Bivens, 57 N.Y.U. L. Rev. 597, 636-37 (1982) ("By holding governments liable for the effects of policies they promulgate, courts focus attention on purposeful activity [which] is precisely the type of decisionmaking process in which contemplation of potential damage liability is most likely te tip the balance in favor of observance of constitutional values.").

207. Professor Schuck discussed this rationale and provided an effective illustration.

> Consider a damage judgment against a city resulting from an illegal arrest by a police officer. The police department can respond by ordering additional training, new arrest guidelines, more and closer supervision, different recruitment and promotion policies, internal discipline, and the like. It may conclude instead that the benefits of illegal arrests outweigh the costs of anticipated adverse judgments or that, in any event, it can protect its budget from being taxed with those costs. In either case, the police department might decide to seek changes in the law or confine such arrests to situations in which com-

Further, it is inconsistent that the government may be liable for the common law torts of its employees but not their constitutional misconduct.[208] Finally, if individual agents remain personally liable for their unconstitutional behavior and governments for theirs, it will become difficult to determine which party is the appropriate defendant in any given suit.[209]

B. The Rejection of Sovereign Immunity

In the realm of constitutional torts, the doctrine of sovereign immunity cannot be permitted to protect the government.[210] The doctrine is incompatible with the concept of constitutional rights,[211] for constitutional rights are specifically designed to limit the actions of the government and its agents.[212] When state actors go beyond the constitutionally permissible scope of their authority, the state must be held accountable.[213]

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plaints by suspects are least likely. Alternatively, it might issue a warning to officers but take no steps to enforce it.

Schuck, *Suing Government* at 18 (cited in note 20). It is important to recognize that even though the government may be liable, it may simply pay any necessary damage awards and continue to behave uncenstitutionally. This potential, however, should not be used to defeat government liability, for this potential inheres in the basic concepts behind tort liability. Tortfeasors who are willing to pay may commit torts. Further, though, this outcome fails to take into consideration the deterrent effect such awards may have over time. See Part III.A.3.

208. *Brown*, 674 N.E.2d at 1142.

209. Whitman, 85 Mich. L. at 248-60, 276 (cited in note 204) (discussing the means courts nse and the difficulty in determining whether the government or the individual should be liable for a constitutional tort and advancing "[a] shift in focus beyond questions of individual wrongdoing").

210. Bandes, 68 S. Cal. L. Rev. at 343 (cited in note 15) ("Sovereign immunity need not, and should not, pose an obstacle to governmental accountability.").

211. See Travis, 57 N.Y.U. L. Rev. at 602-04 (cited in note 206) (discussing the inconsistencies of sovereign immunity and constitutional rights including the ability to enjoin prospective violatious but not to recover compensation for past injuries). The Utah Supreme Court has recently held that "[c]oustitutional rights serve to restrict governmental conduct. These rights would never serve this purpose if the state could use governmental immunity to avoid constitutional liability." *Bott*, 922 P.2d at 736-37. Thus, constitutional rights can only be truly advanced and enforced if sovereign immunity is removed as an obstacle. See also *Cooney*, 792 P.2d at 1318 (Urbigkit, J., dissenting) ("Governmental immunity or public officer privilege rests on a faulty and fallacious conceptual justification as only recently growing like thistles on the American governmental and judicial landscape.").

212. *Brown*, 674 N.E.2d at 1140; *Corum*, 413 S.E.2d at 292; Michael Wells, *Constitutional Torts, Common Law Torts, and Due Process of Law*, 72 Chi. Kent L. Rev. 617, 636 (1997).

213. See *Strauss*, 330 A.2d at 650 (holding the state liable because the state "through its agents and employees" violated the rights of the plaintiff). But see *Rockhouse Mountain Prop. Owners*, 503 A.2d at 1390 (refusing te determine "whether a municipality should be bound under respendeat superior, or whether something more should he required before the municipality would also be liable in damages").

Courts should recognize the threat of sovereign immunity and declare the doctrine inapplicable to constitutional tort actions.[214] This abrogation should extend not only to common law sovereign immunity but also to statutory immunity. Legislatures should not define the scope of recovery or liability for constitutional matters.[215] Removing this burden on plaintiffs is clearly within the power of the courts[216] and arguably is a dictate of state constitutions.[217]

Sovereign immunity is misplaced in American jurisprudence[218] in which no one, not even the government, should be above the law.[219]

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214. See *Cooney*, 792 P.2d at 1318-21 (Urbigkit, J., dissenting) (listing cases and authorities criticizing the doctrine of sovereign immunity).

215. See notes 132-35 and accompanying text. But see Jennifer Friesen, *Recovering Damages for State Bills of Rights Claims*, 63 Tex. L. Rev. 1269, 1298 (1985) (advocating that legislatures have the power to creato sovereign immunity for constitutional tort claims but that legislatures should specifically abrogate and abolish the immunity).

The doctrine of sovereign immunity did not enter the English common law until 1788. *Corum*, 413 S.E.2d at 291. Thus, the doctrine did not come into existence in England until after the American Revolution. As such, it is not a command of the original common law of the colonies. In fact, it did not take root in the United States until the late 19th century. See id. (discussing the history of sovereign immunity in North Carolina). Because it is not a concept that existed when most state constitutions were first promulgated, state courts should have no problem reaching the conclusion that the doctrine is not part of the constitutional common law but a concept that developed many years later.

216. Bandes, 68 S. Cal. L. Rev. at 343, 346 (cited in note 15). See also Friesen, 63 Tex. L. Rev. at 1296 (cited in note 215). But see *Vest*, 757 P.2d at 598 n.40 (concluding that the constitutional command that the legislature determine when the state is amenable to suit might prohibit the recognition of constitutional torts against the state).

The "remedies" clauses of state constitutions may also grant the courts authority to abrogate sovereign immunity. See Friesen, 63 Tex. L. Rev. at 1296-99 (cited in note 215). See also *Bott*, 922 P.2d at 736-37 (concluding that the Unnecessary Rigor Clause of the Utah Constitution prohibits any form of sovereign immunity in constitutional tort claims). However, if the immunity is actually a commandment of the constitutional text, ceurts may not be able to hold the stato liable. See *Bontwell*, 486 S.E.2d at 921-22 (discussing the sovereign immunity created by the Georgia Constitution).

217. The Utah Supreme Court has recently concluded that statutorily inposed immunity violates the state constitution. *Bott*, 922 P.2d at 736-37. The court held that any statute which takes away or inpairs a constitutional right is beyond the province of the legislature. Id. (citing Thomas M. Cooley, 2 *Constitutional Limitations* 756 (Little, Brown, 1927)). Because the immunity impaired recovery which would otherwise have been allowed, the immunity was repugnant to the Utah Constitution and could not stand as a barrier to the constitutional tort claim. Id. See also Kenneth Davis, 5 *Administrative Law Treatise* 55 (Little, Brown, 2d ed. 1984); Chemerinsky, *Federal Jurisdiction* § 9.1.4 at 539-40 (cited in note 3). But see *Bontwell*, 486 S.E.2d at 921-22 (discussing the sovereign immunity contained in the Georgia Constitution).

218. Professor Borchard concluded that the development of sovereign immunity in the United States cannot be sufficiently explained:

> Nothing seems more clear than that this immunity of the King from the jurisdiction of the King's court was purely personal. How it came to be applied in the United States of America, where the prerogative is unknown, is one of the mysteries of legal evolution.

Edwin M. Borchard, *Government Liability in Tort*, 34 Yale L. J. 1, 4 (1924). But see Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 Vand. L. Rev. 1529, 1530-32 (1992) (arguing that sovereign immunity "comports with our constitutional fabric" creating "structural protection for democratic rule").

The doctrine is premised on the belief that the king can do no wrong. However, the king commits many wrongs.[220] The doctrine of sovereign immunity was rejected by many early state courts[221] and should continue to be rejected by modern state courts.[222] Sovereignty originates with the people, and the government must be held accountable to them.[223] As President Abraham Lincoln noted, "[i]t is . . . as much the duty of Government to render prompt justice against itself in favor of citizens as it is to administer the same between private individuals."[224]

C. The Basis for State Liability

Beyond the issue of sovereign immunity, courts must develop a construct to determine when the government is to be liable. Two options have emerged in the case law: liability based upon actions taken pursuant to a custom or policy of the government[225] and liability determined by the law of agency and respondeat superior.[226] Although the requirement of a custom or policy will ensure the vindication of constitutional rights violated in accordance therewith, it leaves many plaintiffs with remedies only against governmental officers in their individual capacity. This requirement does not hold the government accountable for other unconstitutional acts for which it is often just as

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219. Chemerinsky, *Federal Jurisdiction* § 9.2.1 at 547 (cited in note 3).

220. See Bandes, 68 S. Cal. L. Rev. at 344 (cited in note 15) ("The principle that the King was capable of doing wrong and should be held accountable for it was the premise of the Magna Carta.").

221. See *Corum*, 413 S.E.2d at 291 (discussing four North Carolina decisions rejecting the doctrine). See also Travis, 57 N.Y.U. L. Rev. at 604-17 (cited in note 206) (discussing the roots of sovereign immunity in common law England, its early rejection in the United States, and the eventual development of the doctrine in America).

222. Sovereign immunity has " 'no foundation in public justice or convenience,' and any person should be entitled to make 'any just claim or demand against the Government' " stemming from constitutional violations. Finn and Smith, 66 Austl. L. J. at 139 (cited in note 189) (citation omitted).

223. See Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 Yale L. J. 1, 80 (1988) ("[T]he common law doctrine was founded on a notion that sovereignty resides in the person of the monarch, whereas the premise of the Constitution was that sovereignty derived from the people and the government created under the Constitution was subject to that written law."). Indeed, the notion that the state government is accountable to the people is contained in many state constitutions.

224. Chemerinsky, *Federal Jurisdiction* § 9.2.1 at 546 (cited in note 3).

225. See *Owen v. City of Independence*, 445 U.S. 622, 633 (1980); *Monell v. Department of Social Serv.*, 436 U.S. 658, 690 (1987); *Smith*, 410 N.W.2d at 794.

226. *Brown*, 674 N.E.2d at 1142 (imposing vicarious liability on the state of New York); *Vernado v. Department of Employment and Training*, 1996 WL 773181, 5 (La. Ct. App.) (stating that vicarious liability should be used to determine the liability of the government).

morally responsible as if the acts had been taken pursuant to a custom or policy.[227]

Complete reliance on respondeat superior also creates some problems as many state actors, especially those elected to their positions, often do not meet the requirements of a servant necessary for vicarious liability to attach.[228] Thus, a plaintiff may be able to recover from the government for the acts of its employees but not for the misdeeds of an elected official.[229] Because both doctrines leave the government free from liability in various situations, courts must create a new doctrine to ensure full compensation and vindication, as well as to ensure governmental accountability for government actors.

Government officials, as individual actors, cannot truly commit a constitutional tort because only state actors can violate constitutional provisions.[230] It is a fallacy to hold government officials individually liable for constitutional torts since they could not have

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227. See *Brown*, 674 N.E.2d at 1142 (rejecting the Supreme Court's limitations of government liability because "the State is appropriately held answerable"); Whitman, 79 Mich. L. Rev. at 58 n.258 (cited in note 16) (noting that the use of the custom or policy model will be unlikely to encompass all systemic flaws giving rise to constitutional violations).

228. See, for example, *Moy v. County of Cook*, 159 Ill. 2d 519, 640 N.E.2d 926, 928 (1994) (concluding that respondeat superior could not be used to impose liability on a county for the negligent acts of the county sheriff, because, among other reasons, he was an elected official).

229. Respondeat superior in its traditional form actually is not the best solution because it requires control or the right of control over the employee. See, for example, *Kidder v. Miller Davis Co.*, 1997 WL 374043 (Mich.) (noting the use of the control test te impose respondeat superior liability); *Hooper v. Browner*, 148 Md. 417, 129 A. 672, 676 (1925) (concluding that respondeat superior rests on the power of control of superior over the subordinate); Harold G. Reuschlein and William A. Gregory, *The Law of Agency and Partnership* § 52 at 104 (West, 2d ed. 1990) (noting that respondeat superior liability derives from a master's right of control over his servants). Consequently, many government officials may not be found to be servants for the purpose of the master and servant relationship. Thus, although an elected, independent county sheriff may not meet the requirements of respondeat superior, he is still in the position to violate the state constitution.

In order to ensure compensation in this situation, liability should be imputed to the government regardless of whether or not the relationship meets the formal requirements of respondeat superior. Although it can be argued that in such a case there is no deterrent effect because the elected official is not truly subject to the control of the sovereign, he is, however, subject to the will of the voters. The deterrent lies in his desire to be reelected and continue his employment. Thus, he has an automatic incentive, outside the realm of personal liability, te keep his constitutional infractions to a minimum. See also *Cashen v. Spann*, 125 N.J. Super. 386, 311 A.2d 192, 202 (N.J. Super Ct. App. Div. 1973) (holding that a county was not vicariously liable for the action of a prosecutor because he was an agent of the state, but passing on whether the county could ever be liable for the actions of the defendants).

230. *Corum*, 413 S.E.2d at 292-93. However, in *Melbourne Corp.*, 394 N.E.2d at 1291, the court stated:

> The City is a municipal corporation that can function ouly through the actions of its agents and officials. Melbourne may not evade the effects of the [Illinois Tort Claims] Act by suing the City itself, but not the Board officials whose actions or omissions constituted the alleged cause of action. The City may properly invoke the Board's immunity.

Id. at 1298.

committed the constitutional violation but for their status as state actors.[231] Thus, the actual violation of the constitution has been perpetrated not by the individual agent but by the government acting through the agent. This relationship is a form of inherent agency power that imputes liability to the government.[232] Just as an agent who has the inherent power to make true statements also has the inherent power to make misrepresentations,[233] a government official who is bound by the constitution also has the power to violate the constitution. Since this power inheres in the agency relationship, the principal should be held liable, even if the agent acts contrary to the principal's express instructions.[234] Thus, the government should be held accountable for damages arising from the unconstitutional acts of any member of the government, whether the actual tortfeasor is a legislator, an elected member of the executive, or any other government official or agent.

IV. THE IMPLICATIONS OF STATE CONSTITUTIONAL TORTS

Once constitutional torts for violations of state constitutions are recognized, there are many implications beyond the affirmation of the plaintiff's rights and the subsequent compensation for the violation of those rights. These torts provide many unique benefits for

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231. *Brown*, 674 N.E.2d at 1142-43.

232. The Restatement (Second) of Agency defines inherent agency powers as "a term used . . . to indicate the power of an agent which is derived not from authority, apparent authority or esteppel, but solely from the agency relationship and exists for the protection of persons harmed by or dealing with a servant or other agent." Restatement (Second) of Agency § 8A (1958).

233. See, for example, *Outlaw v. McMichael*, 397 So. 2d 1009, 1010 (Fla. App. 1981).

234. Of course, for the government to be liable for acts committed outside the scope of the agent's authority, the plaintiff must have reasonably relied on the status of the agent. See *Bernstein v. Centaur Ins. Co.*, 644 F. Supp. 1361, 1369 (S.D.N.Y. 1986). The concept of reasonableness, though, should go to the issue of authority, not to the conduct itself. Thus, if an agent asserts that he works for the government or is acting pursuant to government authority, this should satisfy the requirement. It should be immaterial if the action taken by the agent, such as a blatant use of unnecessary and unreasonable force, is itself unreasonable. The reliance stems from the manifestations of the agent based upon the authority that the principal has vested in him. See *William R. Turner Co. v. WIOO, Inc.*, 528 F.2d 262, 268 (3rd Cir. 1975). Further, private citizens should not be expected to question or second guess the commands of government officials. This can often lead to criminal liability. For instance, a citizen may not resist arrest even if the individual believes the arrest to be in violation of the state constitution. See, for example, *State v. Valentine*, 132 Wash. 2d 1, 935 P.2d 1294, 1303 (1997) (holding that an individual may not use force to resist an illegal arrest); *State v. Laughlin*, 933 P.2d 813, 815 (Mont. 1997) (same). Thus, it should be deemed reasonable for a private citizen to succumb to the dictates of a government official.

citizens and even for state governments ranging from greater structural protections to the opportunity to develop constitutional law.

A. Unprotected Rights: The Rejection of the U.S. Supreme Court's Interpretation of the Bill of Rights

State constitutions guaranteed individual rights prior to the enactment of the federal Bill of Rights.[235] As a result, the federal version was premised on the rights contained in the state constitutions of the day.[236] Further exemplifying the importance of state bills of rights, some states modeled their constitutional guarantees primarily on previous state constitutions, not on the rights expressed in the federal Constitution.[237]

Although states had long been the protectors of individual liberties,[238] they lost this role during the the Warren Court era.[239] In the last two decades, however, state courts have seen a dramatic shift in the United States Supreme Court's interpretation of the Bill of Rights such that its protections are constantly being reduced.[240] Consequently, states are turning to their own constitutions to protect their citizenry.[241] This use of state constitutions is unquestionably

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235. Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. Balt. L. Rev. 379, 380-81 (1980).

236. "Prior to the adoption of the federal Constitution, each of the rights eventually recognized in the federal Bill of Rights had previously been protected in one or more state constitutions." Brennan, 90 Harv. L. Rev. at 501 (cited in note 80) (footnote omitted). See also Judith S. Kaye, *Forward: The Common Law and State Constitutional Law as Full Partners in the Protection of Individual Rights*, 23 Rutgers L. J. 727, 732 (1992).

237. See, for example, Linde, 9 U. Balt. L. Rev. at 381 (cited in note 235) ("For example, Oregon's constitution adopted Indiana's copy of Ohio's version of sources found in Delaware and elsewhere.").

238. Brennan, 90 Harv. L. Rev. at 502 (cited in note 80).

239. *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 Harv. L. Rev. 1367, 1368 (1982) ("Throughout the Warren Court years, the availability of independent state constitutional interpretation was of little importance.").

240. Brennan, 90 Harv. L. Rev. at 495-98 (cited in note 80) (discussing Supreme Court decisions finding no constitutional violations); William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. Rev. 535, 547-48 (1986) (same); Donald E. Wilkes, Jr., *More on the New Federalism in Criminal Procedure*, 63 Ky. L. J. 873, 873-75 (1975) (same).

241. Paul S. Hudnut, *State Constitutions and Individual Rights: The Case for Judicial Restraint*, 63 Denver U. L. Rev. 85, 87 (1985). See generally, Wayne R. LaFave and Jerold H. Israel, *Criminal Procedure* § 2.10 at 93-95 (West, 2nd ed. 1992). Justice Brennan has noted this phenomenon and has enthusiastically endorsed it:

> State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.

permissible as states may grant greater protections than the federal constitution,[242] and states should embrace this use as the federal government continues to shift the responsibility for government to them.[243]

Refusing to apply the Supreme Court's interpretation of a constitutional right to the state constitution often leaves an individual without a mechanism to enforce that right. Federal rights are enforced via 42 U.S.C. § 1983.[244] This statute, however, only reaches federal constitutional and statutory rights.[245] This limitation creates no problem regarding those provisions of state constitutions which state courts interpret identically to the provisions' federal counterparts. But when state courts choose to grant greater protections, a state law action for damages must be found in order to compensate for any violation and to vindicate the state right.[246] Thus, an ever increasing need exists for the recognition of direct causes of action under state constitutions.[247]

Brennan, 90 Harv. L. Rev. at 491 (cited in note 80).

Justice Brennan noted that between 1970 and 1984, state courts had concluded in over 250 published opinions that the respective state constitution contained more stringent constraints on the government than the federal counterpart as interpreted by the Supreme Court. Brennan, 61 N.Y.U. L. Rev. at 548 (cited in note 240). In a recent survey, Professor Latzer found that during the period from the late 1960s through 1989, one state decision in three rejected the interpretations of the United States Supreme Court on state constitutional law grounds. Barry Latzer, *The Hidden Conservatism of the State Court "Revolution"*, 74 Judicature 190, 190 (1991).

242. Brennan, 61 N.Y.U. L. Rev. at 548 (cited in note 240) ("As is well known, federal preservation of civil liberties is a minimum, which the states may surpass so long as there is no clash with federal law."); Linde, 9 U. Balt. L. Rev. at 383 (cited in note 235); *Cooney*, 792 P.2d at 1325 (Urbigkit, J., dissenting) ("It is neither novel nor new in this era for recognition to be afforded that state courts provide greater protection for constitutional rights of citizens than can he expected or is provided by the federal authority.").

243. See *Saldana v. State*, 846 P.2d 604, 646 (Wyo. 1993) (Urbigkit, J., dissenting) (quoting Timothy Stallcup, Comment, *The Arizona Constitutional "Right to Privacy" and the Invasion of Privacy Tort*, 24 Ariz. St. L. J. 687, 693-95 (1992)).

244. See note 3.

245. See note 5 and accompanying text.

246. See *Brown*, 674 N.E.2d at 1141 ("By recognizing a narrow remedy for violations of Sections 11 and 12 of the State Constitution, we provide appropriate protection against official misconduct at the State level.").

247. In addition to the greater protections often afforded under state constitutions, many contain rights and provisions which have no counterpart in the Federal Constitution. See, for example, Alaska Const., Art. 1, § 24 (providing for victims' rights); Ariz. Const., Art. 2, § 2.1 (declaring a "Victims' Bill of Rights"); Del. Const., Art. 1, § 14 ("No commission of oyer and terminer, or jail delivery, shall be issued."); Ga. Const., Art. 1, § 1, Par. XXI ("Neither banishment beyond the limits of the state nor whipping shall be allowed as a punishment for crime."); Ga. Const., Art. 1, § 1, Par. XXV ("The social status of a citizen shall never be the subject of legislation."); Ga. Const., Art. I, § 22 (enumerating the rights of crime victims); Md. Const., Decl. of Rights, Art. 19 ("That every man, for any injury done to him in his person or property, ought to have remedy by the course of the Law of the land. . . ."); Mich. Const., Art. 1, § 17 ("The right of

B. *The Development of Constitutional Protections in Non-Criminal Cases*

State courts should reject any requirement that a right be clearly established before civil liability attaches for its violation.[248] State courts will then have a greater opportunity to develop their own

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all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed."); Mo. Const., Art. 1, § 29 ("[E]mployees shall have the right to organize and to bargain collectively through representatives of their own choosing."); Mont. Const., Art II, § 4 ("Neither the state nor any person, firm, corporation, or institution shall discriminate against any person in the exercise of his civil or political rights on account of race, color, sex, culture, social origin or condition, or political or religious ideas."); N.H. Const., Pt. 1, Art. 21 (right to compensation for jurors).

248. Only one state supreme court has specifically addressed qualified immunity as a means to defeat personal liability. In *Moresi v. State*, the Supreme Court of Louisiana found this defense appropriate. *Moresi*, 567 So. 2d at 1081. Following federal precedent, the court held that "[i]f the defendant shows that the state constitutional right alleged to have been violated was not clearly established, the defendant is entitled to qualified immunity." Id. at 1094. The court then addressed the difficulty associated with determining when a right is clearly established. Id. After reviewing its precedents with respect to the constitutional provision at issue, the court held that the officers would have had no reasonable basis to believe that their conduct would violate the Louisiana Constitution. Id.

For qualified immunity to attach, a government official must show that the alleged right violated was not clearly established. But as personal liability is replaced with sovereign liability, the doctrine of qualified immunity becomes inapplicable. Thus, any requirement that a right be clearly established should also be discarded for several reasons.

First the determination of when a right is clearly established is quite difficult. Kathryn R. Urbonya, *Problematic Standards of Reasonableness: Qualified Immunity in Section 1983 Actions for a Police Officer's Use of Excessive Force*, 62 Temp. L. Rev. 61, 79-81 & nn.134-37 (1989) (discussing the difficulties in detsrmining when a right is clearly established); Chemerinsky, *Fedsral Jurisdiction* § 8.6 at 479-80 (cited in note 3) (discussing the unsettled nature of what constitutes a clearly established right). See also A. Allise Burris, Note, *Qualifying Immunity in Section 1983 &* Bivens *Actions*, 71 Tex. L. Rev. 123, 163-65 (1992) (arguing that qualified immunity "approximates absolute immunity" because of the difficulty of overcoming the clearly established right requirements). Must there be a direct case on point from the court of last resort in jurisdiction? Do only a few courts of appeals in the state need to recognize the right?

Second, it is inherently improper to deny a plaintiff compensation simply because not enough courts have addressed the existence of the right which the plaintiff alleges to have been violated. *Bott*, 922 P.2d at 737; *Kewin v. Board of Educ.*, 65 Mich. App. 472, 237 N.W.2d 514, 520 (1975) ("Even though the constitutional claim may be one of first impression, courts should award compensation where there is an infringement of personal interests in liberty."); *Cooney*, 792 P.2d at 1332 (Urbigkit, J., dissenting) (same). But see *Marlin v. City of Detroit*, 205 Mich. App. 335, 517 N.W.2d 305, 308 (1994) ("[W]e conclude that the lack of 'clarity of the constitutional protection violated' in this case would militate against a judicially inferred damage remedy.") (citing *Smith*, 410 N.W.2d at 749); *Melbourne Corp.*, 394 N.E.2d at 225 ("That Melbourne's constitutional rights were being violated was not 'clearly' established until the decision of our Supreme Court and then only by a four to three margin . . . .").

Plaintiffs often care most about vindicating those rights which have yet to be acknowledged by the courts. Whitman, 79 Mich. L. Rev. at 52 (cited in note 16). Thus, the rejection of the clearly established right requirement will remove some of the difficulty from constitutional tort cases; it will allow for aggrieved plaintiffs to recover fully; and it will permit courts to vindicate rights the courts have yet to articulate clearly, which, in turn, will further the development of constitutional law.

system of constitutional law.[249] The greatest benefit will come with respect to those rights designed to protect individuals from certain government conduct in the investigation of crimes and in the enforcement of the criminal law.

Without the recognition of state constitutional torts, state criminal constitutional law will only develop in criminal cases. In such situations, courts may be unwilling to extend the reach of the state constitution because the immediate effect will often be the exclusion of evidence and the loss of a conviction. In addition, because the law is being developed in a criminal case, police and prosecutors have no advance warning that their conduct will offend the constitutional rights of the accused and thus cannot conform their conduct. It is quite understandable, albeit not necessarily morally defensible, that a court might refuse to extend the reach of a constitution in such cases.

When a civil action is brought by a plaintiff who is not facing any criminal charges, however, the balance shifts in favor of extension. Judges have no fear that a criminal will go unpunished and be released back into society.[250] They need not worry that the police did not and could not expect that their conduct would violate a constitution. Instead, a plaintiff free of any criminal wrongdoing will be seeking recovery for the offensive behavior of the government against which a constitution is specifically designed to protect. Thus, the recognition of constitutional tort actions will create a new and more effective avenue for the development of criminal constitutional law.[251] As it is often the goal of a plaintiff to convince a court to recognize a right for the first time,[252] the courts are able to develop constitutional law and satisfy the plaintiff simultaneously.

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249. See Whitman, 72 Chi. Kent L. Rev. at 676-77 (cited in note 133) (noting that constitutional torts allow for the development of constitutional law because they are "a mechanism for setting minimum standards for official behavior when democratic and administrative safeguards fail").

250. This is not to say, however, that future similar conduct of the police in criminal cases should be accepted. Obviously if it offends the constitution in a civil case, it offends the constitution in a criminal case. Government officials, though, will have fair warning that these actions are unconstitutional and that they must conform their actions to these constitutional standards. Nor does it follow from this argument that courts should not interpret the constitution anew in criminal cases. However, this argument recognizes as a practical matter that judges are less likely to read the constitutional protections broadly in criminal cases of first impression.

251. See also Wells, 72 Chi. Kent. L. Rev. at 636 (cited in note 212) (recognizing that the use of constitutional torts gives rise "to a new conception of rights"); Whitman, 72 Chi. Kent L. Rev. at 669 (cited in note 133) (arguing that constitutional torts have "expanded the reach" of constitutional law "by making it easier to argue that constitutional rights have been violated").

252. Whitman, 79 Mich. L. Rev. at 52 (cited in note 16).

C. Helping Fulfill the Promise of Checks and Balances

The doctrine of checks and balances is designed to limit the amount of power amassed by any one branch of a government.[253] To this end, it is the role of the judiciary, through judicial review, to "check" the actions of the political branches to ensure that they conform with a state's constitution.[254] Thus, under the American constitutional scheme, the courts cannot condone any attempt by the political branches to remove liability by either creating immunity or failing to enact a statutory cause of action condoned by the courts. A passive judiciary under such circumstances would permit exactly what the framers feared: a concentration of power which would destroy individual rights.[255] Although the broader doctrine of separation of powers is often invoked by state courts rejecting a direct cause of action under state constitutions,[256] the doctrine of checks and balances provides a powerful argument for the adoption of such a claim because constitutional torts guarantee a check on the unconstitutional acts of the political branches.

D. Enforcing the Intent of the Framers

Some scholars argue that the framers of the U.S. Constitution intended damages to be the remedy for a violation of the Constitution. This argument stems from the notion that the founding fathers were aware of the common law remedies, and they fully expected that they would be applied to enforce the Bill of Rights and thus included no remedial provision.[257] Further, it is unlikely that they intended the political branches to pass implementing legislation because the founders enacted the Bill of Rights specifically to limit those same branches.[258] This concept is just as pertinent, if not more, to state constitutional torts because states are the depositories of the common

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253. Bandes, 68 S. Cal. L. Rev. at 317 (cited in note 15).

254. Id.

255. Id. at 319.

256. See Part II.B.5 (discussing how courts refuse to recognize these actions because of judicial incompetence or impropriety).

257. Richard H. Fallon, Jr., and Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv. L. Rev. 1731, 1779 (1991); Nichol, 75 Va. L. Rev. at 1136 (cited in note 92) ("[T]he framers must have intended to vindicate constitutional rights through the institutions of the common law; . . . . what other choice did they have?").

258. Bandes, 68 S. Cal. L. Rev. at 313 (cited in note 15); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L. J. 1193, 1202 (1992).

law.[259] Thus, constitutional torts are necessary to effectuate the framers' intent with respect to legal remedies.[260]

E. A State Remedy for a State Wrong: The Ability to Adjudicate Claims in State Court

The recognition of constitutional torts for violations of state constitutions will not only compensate individuals for the loss of their rights and vindicate those rights through the law, but will also allow state courts to have complete jurisdiction and control over these claims. Just as the federal courts are often thought of as the appropriate place to adjudicate violations of federal rights,[261] state courts should adjudicate claims arising under state constitutions and against state actors.

A separate remedy in state court is essential to state sovereignty.[262] First, judges will be able to promote the policies of their state. Further, plaintiffs may stand a better chance of recovery

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259. See, for example, *State v. McCoy*, 94 Idaho 236, 486 P.2d 247, 249 (Idaho 1971) (discussing the common law powers of Idaho courts and the adoption of English common law in Idaho); *Meech v. Hillhaven West, Inc.*, 238 Mont. 21, 776 P.2d 488, 494 (1989) (discussing the role of the common law in Montana state courts).

260. Many courts have already relied on the intent of the framers to infer liability for a constitutional provision. *Jones*, 724 F. Supp. at 35; *Walinski*, 377 N.E.2d at 242. Other courts have relied on the voters approving amendments, *Durant*, 1997 WL 430992 at 11 ("The intent of the people in enacting art. 9, § 32 of the Michigan Constitution was not to enact a constitutional provision that could not be effectively enforced."); *Bonner*, 53 Cal. Rptr. 2d at 675 (relying on voter intent to determine that a constitutional provision is self-executing and thus supporting a cause of action for damages); *Schreiner*, 408 So.2d at 714 (same).

Relying on intent does not come without problems, however. First, discovering the appropriate legislative history may be quite difficult if not completely impossible with regard to some state constitutions. Even if the legislative history can be found, it is very likely that the framers did not even address remedies for constitutional wrongs in their debates or committee hearings.

Second, attempting to base the cause of action on the intent of voters is intrinsically misplaced. Jane S. Schacter, *The Pursuit of 'Popular Intent': Interpretive Dilemmas in Direct Democracy*, 105 Yale L. J. 107 (1995). Legislative intent is usually found in the records of legislative proceedings, including debates and committee reports. The public at large does not engage in any of the formalized fact-finding, discussions, or report writing that a legislative body is prone to do. Thus, there is no true "legislative history" with respect to voter approved constitutions and constitutional amendments.

Third, even though it may have been the intent that damage awards remedy constitutional violations, the actual text of the document does not usually expound upon this. Thus, courts must still rely on some other document or other source of law to craft the appropriate remedy.

261. Whitman, 79 Mich. L. Rev. at 23 (cited in note 16).

262. In addition, many violations of state constitutions often implicate parallel provisions of the federal constitution. Plaintiffs may now have a choice of forums. By relying solely on the state constitution, plaintiffs may avoid federal court and the limitations, such as qualified immunity and personal liability, of § 1983.

in state courts as state judges and juries may be more condemning of state agents who violate state constitutional law.[263] The interests that plaintiffs assert call for a separate and fully protective state remedy in state court.[264]

V. THE POWER TO IMPLY OR CREATE DAMAGE ACTIONS: THE COMMON LAW AND STATE COMMON LAW COURTS

As Alexander Hamilton wrote, "there ought always to be a constitutional method of giving efficacy to constitutional provisions."[265] In meeting this goal, state courts have several theories upon which they can justify the creation of constitutional torts. These include (1) the common law powers of common law courts, (2) the doctrine of implied causes of action as it existed at common law, (3) the Restatement (Second) of Torts § 874A, and (4) the remedy clauses of state constitutions. Regardless of the rationale selected, state courts must recognize that the state constitution demands the remedy.

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263. Although it has often been argued that the federal bench is of a higher quality, Burt Neuborne, *The Myth of Parity*, 90 Harv. L. Rev. 1105, 1106-15 (1977), and that state judges may be more sympathetic to defendants where federal civil rights claims are filed, Whitman, 79 Mich. L. Rev. at 23 (cited in note 16) (citing Paul Chevigny, *Section 1983 Jurisdiction: A Reply*, 83 Harv. L. Rev. 1352, 1358 (1970)), it stands to reason that where state law is implicated these factors cease to be relevant. It is in the state judge's interest to develop state law and to hold the state government responsible for its violations in order to create a true identity for the state. As state law develops and the state is held accountable for its actions, the state courts and the states themselves may gain greater influence in the union and may be more trusted by the community.

264. Justice Urbigkit of the Wyoming Supreme Court recognized the importance of state remedies:

> The thesis presented that citizen's rights within the state constitution are not without substance, even if not enforced by federal legislation, has realistic precedent by previous use of the *Bivens* remedy for the state court to enforce the rights independent of the federal civil rights action and proceeding. These concepts, although not yet to have predominated because of the preferential posture of past federal remedies, can now be cultivated to further the well-being of our citizens in a realistic recognition of the state's function in the federal system for the mutual protection of the state's constitutional guarantees.

Cooney, 792 P.2d at 1321 (Urbigkit, J., dissenting). See also Whitman, 79 Mich. L. Rev. at 22 (cited in note 16) ("[T]he distinctively federal nature of the interest asserted by the plaintiff calls for a separate, and fully, protective, federal remedy.") (footnote omitted).

265. *The Federalist No. 80 (Hamilton)* in Rossiter, ed., *The Federalist Papers* at 475 (cited in note 135).

A. The Traditional Role of the Courts in Protecting Individual Liberties and Rights at Common Law

State courts are the depositories of the common law. As common law courts, they can fashion remedies to vindicate personal rights.[266] State constitutional guarantees are the product of the common law and reflect those rights and interests created through judicial development.[267] In fact, most constitutional guarantees have common law antecedents,[268] violations of which could be remedied through common law actions for damages.[269] Thus, state common law courts are no more overstepping their duties and powers when they remedy a constitutional violation with damages,[270] than they are when they recognize any other tort for the first time.[271] Indeed, state constitutions are the product of the common law process[272] and should be subject to the remedies available at common law.[273] Just as the common law guarantees a remedy for every wrong,[274] so must state constitutions.

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266. *Sundheim*, 926 P.2d at 549.

267. Nichol, 75 Va. L. Rev. at 1136 (cited in note 92). See also Wells, 72 Chi. Kent. L. Rev. at 618 (cited in note 212) (noting that constitutional torts should protect "all the interests protected hy the common law").

268. Kaye, 23 Rutgers L. J. at 729-38 (cited in note 236). This is evident in the history of the United States Bill of Rights, as Professor Leonard Levy has duly noted: "In the national Bill of Rights, for example, the guarantees of the right against self-incrimination, indictment by grand jury, and trial by jury in civil and criminal cases simply declared the common law, as indeed was the case concerning numerous provisions of the Bill of Rights." Id. at 732 (citing Leonard W. Levy, *Emergence of a Free Press* 324-25 (Oxford U., 1985)).

269. See notes 24-28 and accompanying toxt.

270. This concept is as old as the Magna Carta. See id. But see Wells, 72 Chi. Kent L. Rev. at 619 (cited in note 212) (noting the ambivalenco unelected judges feel in creating constitutional torts).

271. See Keeten, et al., *Prosser and Keeton on Torts* § 1 at 3-4 (cited in note 155) ("New and nameless torts are being recognized constantly, and the progress of the common law is marked by many cases of first impression, in which the ceurt has struck out boldly to create a new cause of action, where none had been recognized before."); Kaye, 23 Rutgers L. J. at 743-44 (cited in note 236) (discussing the rise of the right to privacy and torts to protect that right).

272. See Nichol, 75 Va. L. Rev. at 1136 (cited in note 92); Al Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in* Bell v. Hood, 117 U. Pa. L. Rev. 1, 9-11 (1968).

273. The New York Court of Appeals has observed:

> [C]ourts have looked to the common law antecedents of the constitutional provision te discover whether a damage remedy may be implied. New York's first Constitution in 1777 recegnized 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 pre-existing common law duties and rights.

Brown, 674 N.E.2d at 1138.

274. *Shields*, 658 A.2d at 928 ("The common law, which provides a remedy for every wrong, provides a remedy for violation of a constitutional right."); *Corum*, 413 S.E.2d at 290.

If constitutional guarantees of individual rights are to have any meaning, courts must provide a remedy. Courts in common law England often allowed for the recovery of damage awards for violations of the English Constitution.[275] State courts have followed this tradition and have used their common law authority to imply causes of action for statutory violations[276] and to recognize the common law doctrine of sovereign immunity.[277] If a statutory right or interest is deserving of protection, certainly constitutional provisions, as the collective limitation on government issued by the people, are deserving of damage remedies.[278] American common law courts should be no less hesitant to follow their common law roots with respect to constitutional provisions.[279]

B. The Common Law and Implied Causes of Action

The common law grants courts the power to imply a cause of action for damages for a violation of a legislative provision.[280] This doctrine is a viable theory upon which state courts may base liability for constitutional violations. Presumably, the drafters of state constitutions were aware of this doctrine.[281] In addition, many state consti-

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275. See notes 24-26 and accompanying text.

276. See Part II.B.1.

277. See *Corum*, 413 S.E.2d at 291-92 (discussing the judicially created common law doctrine of sovereign immunity in North Carolina).

278. The Supreme Court of Connecticut, however, has recently held that although it is proper to create damage awards for the violation of a statute, it is improper to compensate for violations of the state constitution in the same respect:

> [W]e decline to read these cases as establishing a common law precedent for the existence of a constitutional claim for damages for any and all alleged misconduct by state or local governmental officers. It is more plausible to understand these cases as precursors of the modern principle that violation of statutory rights may allow an injured person to assert a private cause of action or a traditional tert action for damages.

Kelley Property, 627 A.2d at 919.

279. Walter E. Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 Harv. L. Rev. 1532, 1542 (1972) ("Given a common law background in which courts created damage remedies as a matter of course, it is not unreasonable to presume . . . judicial power to create a damage remedy."); Love, 49 Wash. & Loe L. Rev. at 80-81 (cited in note 162) (discussing the Supreme Court's reliance on the decision in *Ashby v. White* in recognizing a political right and the use of damages to rectify violations of those rights). See *Kelley Property*, 627 A.2d at 929 (Borden, J., concurring in part and dissenting in part) (relying on common law causes of action for violations of constitutional rights to infer a cause of action under the Connecticut Constitution).

280. See K.M. Stanton, *Breach of Statutory Duty in Tort* 2 (Sweet & Maxwell, 1986); Campbell, 15 Monash L. Rev. at 390 (cited in note 20); *Ashby*, 92 Eng. Rep. at 136 (Holt, C.J., dissenting). This authority has existed since the passage of the Statute of Westminster II in 1295. Stanton, *Breach of Statutory Duty in Tort* 2 (cited in note 280).

281. See *Bott*, 922 P.2d at 739 (concluding that the framers of the Utah Constitution were most likely aware of the English common law decisions granting damage awards for violations of

tutions[282] and statutory codes[283] contain provisions by which the common law of England is specifically adopted as state law. As courts already apply this theory to cases of breach of state statutory duties,[284] they can easily apply it to breaches of state constitutional provisions.

C. The Restatement (Second) of Torts § 874A

Those state courts which desire another justification for the award of damages for a violation of a constitutional right may choose to follow Section 874A of the Restatement (Second) of Torts.[285] The provision argues for the judicial creation of a cause of action for a violation of a "legislative provision" even when the legislature has not addressed civil liability.[286] Comment (a) specifically contemplates the application of the section to constitutional provisions.[287]

The Restatement requires that the remedy be "in furtherance of the legislation," necessary "to assure the effectiveness of the provision," and designed to protect the plaintiff.[288] Constitutional provisions can easily satisfy these three requirements. First, as the common law cases demonstrate, courts have traditionally construed torts as furthering constitutional rights.[289] Second, the remedy is necessary to vindicate the right because without the remedy, the

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English constitutional rights and most likely contemplated such a remedy for the Utah Constitution).

282. See, for example, Md. Const., Decl. of Rights, Art. 5.

283. See, for example, Ala. Code § 1-3-1 (1987); Ark. Stat. Ann. § 1-2-119; Cal. Civil Code § 22.2.

284. *Nearing*, 670 P.2d at 141. See *Kelley Property*, 627 A.2d at 919 (discussing implied causes of action).

285. The provision provides:

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

Restatement (Second) of Torts § 874A (1979).

286. Id.

287. Id. § 874A, cmt. a.

288. Id. § 874A. In the realm of statutes, the intent of the legislature is often a determining factor. *Shields*, 658 A.2d at 933. However, the requirement is immaterial for coustitutional provisions. Because constitutions are enacted by all of the community, "the court normally need not grapple with difficult questions of legislative intent in regard te such a remedy." Friesen, 63 Tex. L. Rev. at 1283 (cited in note 215).

289. See Part II.A.

constitutional provision would amount to no more than a guideline.[290] Finally, constitutional provisions are created to limit the government for the benefit of the entire community. Accordingly, if the plaintiff has a right under a constitution, he is a member of the class it was designed to protect. Section 874A provides a viable alternative for state courts that may be unwilling to rely completely on English common law precedents.[291]

D. Remedy Clauses and Common Law Causes of Action

Many state constitutions contain "open court" or remedy clauses.[292] Although courts have routinely interpreted these clauses as creating no new remedies, these clauses do guarantee a remedy for every wrong involving an interest or right that some other source of law protects.[293] Thus, applying the clause in conjunction with the common law recognition of constitutional torts creates a strong argument that state constitutions dictate recoguition of constitutional claims for damages.

Although the Supreme Court of Colorado has rejected the concept that its remedy clause requires the recognition of constitutional torts,[294] the court did not address the argument that a remedy existed at common law for such violations and is thus required under the state constitution. The Vermont Supreme Court, however, has implicitly accepted this argument.[295] Basing the claim upon the

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290. Nichol, 75 Va. L. Rev. at 1137 (cited in note 92) ("If limitations on government power are to be made meaningful, some evolving remedial process is essential.").

291. The provision has been cited by many courts addressing the issue of constitutional torts. See, for example, *Brown*, 674 N.E.2d at 1138; *Shields*, 658 A.2d at 932; *Kelley Property*, 627 A.2d at 920 n.26.

292. The remedy clause of the Colorado Constitution, which is similar to most state constitutions, provides: "Courts of jnstice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character; and right and justice should be administered without sale, denial or delay." Colo. Const, Art. II, § 6. Such clauses originated in chapter 40 of the Magna Carta: "To no one will we sell, to no one will we deny, or delay, right or justice." Magna Carta ch. 40 (1215).

293. *Shields*, 658 A.2d at 928 ("Though [the remedy clause] does not create substantive rights, it does ensure access to the judicial process."); Friesen, 63 Tex. L. Rev. at 1297 (cited in note 215); Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 Or. L. Rev. 125, 136-38 (1970).

294. *Sundheim*, 926 P.2d at 439 (concluding that the remedy clause of the state constitution in conjunction with the state due process clause did not require the recognition of a state constitutional tort claim).

295. In *Shields v. Gerhart*, the Supreme Court of Vermont wrote:

> The Vermont Constitution mandates that "[e]very person within this state ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. . . ." Vt. Const., ch. I, art. 4. Though Article 4 does not create substantive rights, it does ensure access to the judicial process. . . . The

remedy clause implicitly recognizes that the cause of action is one of constitutional dimensions.

VI. CONCLUSION: THE SELF-DEFEATING CAUSE OF ACTION

State constitutional torts have received little if any attention from courts or scholars in the American legal community. In the last few years, however, aggrieved citizens have discovered this cause of action as a means to vindicate their state constitutional rights. In turn, state courts have been forced to address the propriety of constitutional torts and the extent of government liability.

Constitutional torts serve important functions. They affirm an aggrieved citizen's rights, compensate the citizen for the violation of his rights, deter future violations, vindicate rights enumerated in constitutions, and provide a means of corrective justice. Recognizing constitutional torts also promotes goals unique to constitutional violations and the position of the government in society. Direct causes of action protect state constitutional rights and allow for the development of criminal constitutional law in non-criminal cases. They promote moral behavior by the government as well as by private citizens. The causes of action protect the reasonable reliance of the citizenry, fulfill the promise of checks and balances, and help realize the intent of the framers. Institutional liability of the government is necessary to achieve these goals, for it is the government which places individuals in the position to violate the constitution.

The necessity of constitutional torts is apparent, and the refusal to recognize them is inexcusable. The actions are a means to an end, a means which will be unnecessary once the end is accomplished. The legal system must ensure that state governments do not violate their respective constitutions and that plaintiffs are properly compensated for the violation of rights that are so important that the people chose to enumerate them in a constitution. So long as the government violates the dictates of the people expressed in state constitutions, constitutional torts must exist and must be enthusias-

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> common law, which provides a remedy for every wrong, provides a remedy for violation of a constitutional right.... To deprive individuals of a means by which to vindicate their constitutional rights would negate the will of the people in ratifying the constitution, and neither this Court nor the Legislature has the power to do so.

Shields, 658 A.2d at 928 (citations omitted). The court, however, did not allow a cause of action for damages because another romedy was available. Id. at 934.

tically prosecuted. Direct causes of action should not need to exist; unfortunately, they must. With the adoption and effective prosecution of direct causes of action, though, perhaps they will become relics of an unfamiliar time when constitutional violations were rampant.

T. Hunter Jefferson[*]

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