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Court of Appeals Recognizes Private Constitutional Tort Remedy Against the State

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RECENT DEVELOPMENTS IN NEW YORK LAW

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In September 1992, a 77-year-old white woman was allegedly attacked at knifepoint in a house in Oneonta, near the State University campus.[1] Based upon the woman's description of the assailant as a black man who may have cut his hand during the attack, both New York State Police and University security officials began a five-day manhunt for the perpetrator.[2] They obtained a computer-generated list containing the names and addresses of every African-American male attending the University and sought to interrogate each of those students.[3] Additionally, both State and local law enforcement officials conducted a "street-sweep" in which all African-Americans in the vicinity of the City of Oneonta were stopped and similarly questioned.[4] These tactics did not lead to an arrest of a suspect.[5]

"Suspects" who were interrogated by the police or whose names were on the computer list, brought suit in both state and federal court and asserted that the conduct of the police was racially motivated and therefore deprived them of rights guaran-

[1] *See* Brown v. City of Oneonta, 911 F. Supp. 580, 583 (N.D.N.Y. 1996), *order rev'd in part*, 106 F.3d 1125, 1135 (2d Cir. 1997); Brown v. State, 89 N.Y.2d 172, 176, 674 N.E.2d 1129, 1131, 652 N.Y.S.2d 223, 225 (1996).

[2] *See Brown*, 89 N.Y.2d at 176-77, 674 N.E.2d at 1131-32, 652 N.Y.S.2d at 225-26.

[3] *See id.* at 177, 674 N.E.2d at 1131-32, 652 N.Y.S.2d at 225-26; *see also Brown*, 911 F. Supp. at 584.

[4] *See Brown*, 89 N.Y.2d at 177, 674 N.E.2d at 1132, 652 N.Y.S.2d at 226; *see also Brown*, 911 F. Supp. at 584.

[5] *See Brown*, 89 N.Y.2d at 177, 674 N.E.2d at 1132, 652 N.Y.S.2d at 226.

teed by both the New York and United States Constitutions.[6] In the federal suit, the plaintiffs named as defendants the individuals who acted under color of state law[7] and the municipality of Oneonta, alleging that the policies of the Oneonta Police Department led to the constitutional rights violations.[8] In the state action, plaintiffs sought damages from the State of New York, alleging illegal and unconstitutional acts by the State, the State Police, the State University of New York, and other individuals acting under color of state law.[9] However, an issue concerning the State's liability arose because federal law does not allow a state itself to be named as a defendant in such a lawsuit.[10]

In spite of this backdrop of state immunity from suits alleging constitutional torts—that is, actions for damages against the government or individual defendants for violations of a constitu-

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[6] *See Brown*, 911 F. Supp. at 584 (noting that claims alleged by plaintiffs included violations of Fourth and Fourteenth Amendments and were brought under 42 U.S.C. §§ 1981, 1983, 1985, 1986 and New York State law); *Brown*, 89 N.Y.2d at 176, 674 N.E.2d at 1131, 652 N.Y.S.2d at 225 (noting various state and federal constitutional and civil rights violations alleged by plaintiffs).

[7] *See Brown*, 911 F. Supp. at 586-87 (granting summary judgment motion in favor of State police officers as to 24 of 27 plaintiffs alleging 42 U.S.C. § 1983 violations); *see also* 42 U.S.C. § 1983 (1994). Section 1983 of Title 42 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction 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.

Id.

[8] *See Brown*, 911 F. Supp. at 591 (setting forth reasons for which plaintiffs felt City of Oneonta should be held liable for officers' conduct); *see also* Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 694-95 (1978) (distinguishing between liability of municipality solely on basis of actions of employee, but holding municipality liable under statute if policies or customs caused constitutional rights deprivation).

[9] *See Brown*, 89 N.Y.2d at 176, 674 N.E.2d at 1131, 652 N.Y.S.2d at 225.

[10] *See* U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."); *see also* Will v. Michigan Dep't of State Police, 491 U.S. 58, 63-65 (1989). In *Will*, the Supreme Court addressed the issue of whether a state is a person within the meaning of section 1983. *Id.* at 63. The issue was placed squarely before the Court because the section 1983 claim was proceeding in Michigan state court, where the Eleventh Amendment was not an obstacle to suing the state. *See id.* The Court concluded "that a state is not a person within the meaning of § 1983." *Id.* at 64.

tional right[11]—the New York Court of Appeals, in *Brown v. State of New York*,[12] reversed the Appellate Division and held that based on principles embodied in the State Constitution[13] and jurisdiction created by the Court of Claims Act,[14] the State could be held liable for damages if its employees violate a person's constitutional rights.[15]

Writing for the majority, Judge Simons acknowledged that unlike federal constitutional tort actions arising under 42 U.S.C. § 1983,[16] New York does not have a statute providing for a private right of action against the State or its employees for violations of the State Constitution.[17] Nevertheless, the majority employed the "analytical tools" of section 874A of the Restate-

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[11] *See Brown*, 89 N.Y.2d at 177-78, 674 N.E.2d at 1132, 652 N.Y.S.2d at 226 (discussing definition and origination of term "constitutional torts").

[12] *Id.* at 172, 674 N.E.2d at 1129, 652 N.Y.S.2d at 223.

[13] *Id.* at 186-92, 674 N.E.2d at 1137-41, 652 N.Y.S.2d at 231-35. "Manifestly, article I, § 12 of the State Constitution and that part of section 11 relating to equal protection are self-executing." *Id.* at 186, 674 N.E.2d at 1137, 652 N.Y.S.2d at 231. The provisions of the New York State Constitution that were held to be self-executing read as follows:

> 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. CONST. art. 1, § 11.

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

Id. § 12.

[14] *Brown*, 89 N.Y.2d at 179-83, 674 N.E.2d at 1133-36, 652 N.Y.S.2d at 227-30. The two relevant provisions—sections 8 and 9—of the Court of Claims Act, read in concert, waive the State's sovereign immunity and impose upon the State vicarious liability for the torts of its employees. Section 8 provides:

> The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations, provided the claimant complies with the limitations of this article.

N.Y. COURT OF CLAIMS ACT § 8 (McKinney 1989). Section 9 provides that "[t]he court shall have jurisdiction ... To hear and determine a claim of any person, corporation or municipality against the state ... for the torts of its officers or employees while acting as such officers or employees, providing the claimant complies with the limitations of this article." *Id.* § 9.

[15] *Brown*, 89 N.Y.2d at 191, 674 N.E.2d at 1140, 652 N.Y.S.2d at 234.

[16] *See supra* note 7 (quoting 42 U.S.C. § 1983).

[17] *See Brown*, 89 N.Y.2d at 186, 674 N.E.2d at 1137, 652 N.Y.S.2d at 231.

ment (Second) of Torts[18] and the United States Supreme Court decision in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,[19] which recognized a federal action against federal agents, in order to imply a remedy against the State for violations of the State Constitution.[20]

The court emphasized that while a damages remedy was not explicitly included in either the State Constitution or in subsequent enforcement legislation,[21] there was "historical support" for implying a tort remedy for violations of rights created by the State Constitution.[22] The court pointed out that the delegates

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[18] *See id.* at 186-90, 674 N.E.2d at 1138-40, 652 N.Y.S.2d at 232-34; *see also* RESTATEMENT (SECOND) OF TORTS § 874A (1979). Section 874A of the Restatement (Second) of Torts 874A states:

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

Id.

In *Brown*, the Court of Appeals began its analysis by noting that State courts have implied causes of action for damages through the Restatement (Second) of Torts § 874A. *Brown*, 89 N.Y.2d at 186, 674 N.E.2d at 1138, 652 N.Y.S.2d at 232.

[19] 403 U.S. 388 (1971). In *Bivens*, the Supreme Court recognized a private federal right of action for damages against federal agents who conducted an unreasonable search in violation of the Fourth Amendment. *Id.* at 388-98. Justice Harlan stated:

> The contention that the federal courts are powerless to accord a litigant damages for a claimed invasion of his federal constitutional rights until Congress explicitly authorizes the remedy cannot rest on the notion that the decision to grant compensatory relief involves a resolution of policy considerations not susceptible of judicial discernment.

Id. at 402 (Harlan, J., concurring).

[20] *See Brown*, 89 N.Y.2d at 187-90, 674 N.E.2d at 1138-40, 652 N.Y.S.2d at 232-34. From the *Bivens* decision, the New York Court of Appeals acknowledged the principles that "constitutional guarantees are worthy of protection on their own terms without being linked to some common-law or statutory tort, and that the courts have the obligation to enforce these rights by ensuring that each individual receives an adequate remedy for violation of a constitutional duty." *Id.* at 187, 674 N.E.2d at 1138, 652 N.Y.S.2d at 232.

[21] *See id.* at 186-87, 674 N.E.2d at 1137-38, 652 N.Y.S.2d at 231-32.

[22] *See id.* at 189, 674 N.E.2d at 1139, 652 N.Y.S.2d at 233 (citing People v. Defore, 242 N.Y. 13, 150 N.E. 585 (1926)). In *Defore*, Judge Cardozo wrote the opinion for the Court of Appeals, holding that evidence obtained in violation of the search and seizure clause of the Civil Rights Act could be used against the defendant in a criminal trial. *Defore*, 242 N.Y. at 21-22, 150 N.E. at 588-89. Judge Cardozo believed that the defendant's remedy for the wrong was a civil suit for damages. *See id.* at

from the State's 1938 Constitutional Convention did not reject or disfavor a damages remedy for violations of "constitutional torts."[23] Whether or not the Convention delegates favored a constitutional tort remedy or believed such a remedy to exist at common law is immaterial, for it was precisely those delegates who failed to grant a private remedy in the Constitution and instead granted to the legislature all subsequent authority to create claims against the State. In fact, the legislature has never enacted a statute that creates such a remedy.[24]

In essence, the court engendered the potential for liability of the State by recognizing that constitutional torts are included within the "torts" for which the Court of Claims Act imposes respondeat superior liability upon the State.[25] In so doing, the court disregarded its own prior ruling that State liability should not be imposed under the Court of Claims Act absent legislative language "clearly designed to have that effect."[26] Furthermore, the State's vicarious liability created by the court sharply contradicts federal law that precludes states and municipalities from being held liable for the constitutional torts of their employees.[27]

In a lengthy dissent, Judge Bellacosa presented a more persuasive analysis than was set forth by the majority.[28] He urged that the torts for which the State is vicariously liable should not

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19, 150 N.E. at 587. The majority in *Brown* concluded therefore, that the reason the New York Constitution did not contain a damage remedy was because the delegates to the Constitutional Convention assumed that such a remedy already existed. *Brown*, 89 N.Y.2d at 189, 674 N.E.2d at 1139, 652 N.Y.S.2d at 233 (citing 1 REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK 416, 425, 459 (1938)) [hereinafter REVISED RECORD].

[23] *Brown*, 89 N.Y.2d at 189, 674 N.E.2d at 1139, 652 N.Y.S.2d at 233 (stating that debates from 1938 State Constitutional Convention "reveal[ed] that the concept of damages for constitutional violations was neither foreign to the delegates nor rejected by them").

[24] *See id.* at 186, 674 N.E.2d at 1137, 652 N.Y.S.2d at 231; *see also supra* text accompanying note 17.

[25] *See id.* at 183, 674 N.E.2d at 1136, 652 N.Y.S.2d at 230.

[26] Steitz v. City of Beacon, 295 N.Y. 51, 55, 64 N.E.2d 704, 706 (1945) (Thacher, J.).

[27] *See* Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 694-95 (1978) (emphasizing that municipality must have caused deprivation of rights in order for it to incur liability). "[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.* at 694.

[28] *See Brown*, 89 N.Y.2d at 197-213, 674 N.E.2d at 1144-54, 652 N.Y.S.2d at 238-48.

include "constitutional torts."[29] Judge Bellacosa noted that while the term "constitutional torts" is "catchy nomenclature for law review titles,"[30] the nature of such torts is different from the common law torts referred to in the Court of Claims Act.[31] Moreover, not only can constitutional torts be distinguished analytically from common law torts,[32] but they also do not fall within the ambit of claims intended by the drafters of the Court of Claims Act when they surrendered sovereign immunity for "torts" in 1939.[33]

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[29] *Id.* at 197-213, 674 N.E.2d at 1144-54, 652 N.Y.S.2d at 238-48.

[30] *Id.* at 204, 674 N.E.2d at 1148, 652 N.Y.S.2d at 242.

[31] *See id.* at 197-210, 674 N.E.2d at 1144-53, 652 N.Y.S.2d at 238-47.

[32] Judge Bellacosa pointed out that the term "constitutional tort" was first coined in the title of a law review article that attempted to " 'analyze the jurisprudential development of a federal statutory remedy.' " *Id.* at 204, 674 N.E.2d at 1148, 652 N.Y.S.2d at 242 (emphasis omitted) (quoting Marshall S. Shapo, *Constitutional Tort:* Monroe v. Pape*, and the Frontiers Beyond*, 60 NW. U. L. REV. 277, 323-24 (1965)). Professor Shapo himself recognized the dilemma in describing a "constitutional tort" because of the inability to exclusively characterize a "constitutional tort" as a part of constitutional law or as an element of a private tort. *See* Shapo, *supra*, at 324. This stems from the fact that such torts are a combination of tort elements with a constitutionally-based test. *See id.* As a result, this confusing dichotomy makes it difficult to determine the situations in which the remedy would apply. *See id.*

The Supreme Court has distinguished common law torts from constitutional torts in an effort to prevent common law torts from "sneak[ing]" into federal court. William Burnham, *Separating Constitutional and Common-Law Torts: A Critique and a Proposed Constitutional Theory of Duty*, 73 MINN. L. REV. 515, 516 (1989) (presenting in-depth discussion of federal courts' attempts to distinguish between common law and constitutional torts). Ironically, *Brown* presented the reverse situation to the Court of Appeals, where a clear constitutional claim sought a home within the New York State common law tort regime for the purpose of fitting within the terms of the Court of Claims Act. Chief Judge Judith Kaye of the New York Court of Appeals has noted, however, that unlike federal courts, "state courts move seamlessly between the common law and state constitutional law, the shifting ground at times barely perceptible." Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 15 (1995).

Judge Bellacosa believed that the majority in *Brown* elevated "semantical shorthand" over the "substance and essence" of the claim. *Brown*, 89 N.Y.2d at 204, 674 N.E.2d at 1148, 652 N.Y.S.2d at 242 (Bellacosa, J., dissenting). This was contrary to a long-standing rule in New York that courts should look to the true nature of the action and not merely to its name. *See* Morrison v. National Broad. Co., 19 N.Y.2d 453, 459, 227 N.E.2d 572, 574, 280 N.Y.S.2d 641, 644 (1967) (citing Brick v. Cohn-Hall-Marx Co., 276 N.Y. 259, 264, 11 N.E.2d 902, 904 (1937)).

[33] The word "tort" in the Court of Claims Act, while not "frozen like a fossil in time" should be interpreted as it was understood by the enactors of the Act itself. *Brown*, 89 N.Y.2d at 201, 674 N.E.2d at 1146, 652 N.Y.S.2d at 240 (Bellacosa, J., dissenting). *See generally* Jill A. Abramow, Survey of New York Practice, 58 ST.

Judge Bellacosa also argued that the majority erred in implying a remedy against the State where none exists.[34] The State Constitution itself gives the State legislature the sole authority to determine the types of monetary claims that may be brought against the State.[35] Judge Bellacosa thereby urged that if any legislative history was at all relevant, the meaning of the term "torts" within the Court of Claims Act was most important.[36] The legislative history, the dissent noted, displayed "no intention, understanding or contemplation to sweep the State's assumption of liability into [the] uncharted and open waters" of constitutional torts.[37] Therefore, no room remained for the majority's implication of a remedy based on the Restatement, a Supreme Court opinion, and its interpretation of the Constitutional

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JOHN'S L. REV. 199, 200 & n.66 (1983) (describing evolution from old rule of sovereign's absolute immunity from tort liability to current legislative waiver of sovereign immunity).

[34] The dissent attacked the majority's assertion that the delegates to the Constitutional Convention, based on Judge Cardozo's opinion in *Defore*, believed there already existed a remedy against the State. *See Brown*, 89 N.Y.2d at 208-09, 674 N.E.2d at 1151-52, 652 N.Y.S.2d at 244-45 (Bellacosa, J., dissenting). On the contrary, Judge Cardozo's dictum about a private right of action was only concerned with a remedy against the offending officer, and not with a claim against the State. *See id.* at 208, 674 N.E.2d at 1151, 652 N.Y.S.2d at 244-45. Moreover, the delegates to the 1938 Constitutional Convention were acutely aware of this limitation. *See id.* at 208-09, 674 N.E.2d at 1151, 652 N.Y.S.2d at 245 (citing REVISED RECORD, *supra* note 22, at 416) ("The State forbids an unreasonable search. The State officer disobeys the injunction. He can and should be punished and made to answer in damages.") (Statement of Harold Riegelman).

> The same Constitutional Convention, relied upon now to infer a direct action damage remedy against the State, expressly rejected—after sharp and lively debate—not only an exclusionary remedy, but also a forfeiture of office remedy. These express rejections were not done because of the hypothetical dictum of Judge Cardozo concerning a personal civil action, but for fundamental, doctrinal and jurisprudential reasons that were fully debated.

Brown, 89 N.Y.2d at 208-09, 674 N.E.2d at 1151, 652 N.Y.S.2d at 245 (Bellacosa, J., dissenting) (citing REVISED RECORD, *supra* note 22, at 577-78). "The gap between express rejection of considered remedies and the discovery of this new additional one is not bridgeable by statutory construction." *Id.* at 209, 674 N.E.2d at 1151, 652 N.Y.S.2d at 245 (Bellacosa, J., dissenting).

[35] N.Y. CONST. art. VI, § 9. "The court [of claims] shall have jurisdiction to hear and determine claims against the state or by the state against the claimant or between conflicting claimants as the legislature may provide." *Id.*

[36] *See Brown*, 89 N.Y.2d at 200-03, 674 N.E.2d at 1146-48, 652 N.Y.S.2d at 240-42 (Bellacosa, J., dissenting).

[37] *See id.* at 200, 674 N.E.2d at 1146, 652 N.Y.S.2d at 240 (citing Bill Jacket, L. 1939, ch. 860, Mem. of James Barrett, Presiding Judge of the Ct. Cl., at 2; Mem. of Senator Feinberg, at 2-3).

Convention's legislative history.[38]

Questioning the majority on policy and analytical grounds as well, Judge Bellacosa aptly noted that even the Supreme Court, by stating that "[w]e leave it to Congress to weigh the implications of such a significant expansion of Government liability,"[39] has limited *Bivens* actions to suits against individuals and has refused to allow an action against the government itself.[40] Moreover, the Supreme Court deferred to Congress to provide the specific constitutional tort remedy against the government and did not look to the "tort" language of the Federal Tort Claims Act as supplying that remedy.[41]

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[38] *See id.* at 210-13, 674 N.E.2d at 1152-54, 652 N.Y.S.2d at 246-48. "The cause of action that the majority concedes it needs to 'imply' in order to give it life—because it surely is not legislatively expressed—should not prevail over an explicit constitutional imperative and specifically delegated authorization to the Legislature." *Id.* at 212-13, 674 N.E.2d at 1153, 652 N.Y.S.2d at 247.

[39] Federal Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 486 (1994).

[40] The majority in *Brown* addressed the fact that the Supreme Court in *Meyer* had limited *Bivens* to suits against individuals, and not the government itself. *Brown*, 89 N.Y.2d at 195, 674 N.E.2d at 1143, 652 N.Y.S.2d at 237. Judge Simons attempted to dismiss these limitations on the *Bivens* decision on two grounds. First, unlike federal law, the Court of Claims Act provides for State respondeat superior liability for the torts of its employees. Second, Supreme Court restraint in the area of constitutional torts is caused by concerns of federalism, a desire to not "unduly interfere with States' rights." *Id.* at 195, 674 N.E.2d at 1143, 652 N.Y.S.2d at 237. Neither of these points, however, proves particularly persuasive. First, the State's waiver of sovereign immunity under the Court of Claims Act is not greater than the federal government's own waiver under the Federal Tort Claims Act. *See infra* note 41 and accompanying text (comparing waiver language of both Federal Tort Claims Act and New York's Court of Claims Act and struggling to discern distinction). Second, concerns of federalism could not have played a part in *Meyer* because that case involved an extension of the federal cause of action recognized in *Bivens* to proceed against the federal government. The distinction between *Meyer* and *Brown* is essentially the philosophical differences between the New York Court of Appeals and the United States Supreme Court concerning the sanctity of sovereign immunity.

[41] *Compare* 28 U.S.C. § 2674 (1994) ("The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances ...."), *and* 28 U.S.C. § 2675 (1994) (describing prerequisites for suit against the government "for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of Government while acting within the scope of his office or employment ...."), *with* N.Y. COURT OF CLAIMS ACT § 8 (McKinney 1989) ("The State hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations ...."), *and* N.Y. COURT OF CLAIMS ACT § 9 (McKinney 1989) ("The court shall have jurisdiction ... 2. To hear and determine a claim of any person, corporation or municipality against the state ... for the torts of its officers or employees while acting as such officers or employees, providing the claimant complies with the

Even absent the State's constitutional prohibition against implying new remedies against the State, the majority ignored a governing principle that significant new policy decisions should be left to the legislature.[42] Departure from that canon was particularly ill-advised, Judge Bellacosa noted, given the long line of New York Court of Appeals decisions holding that the State's waiver of sovereign immunity should be narrowly construed.[43] Finally, the dissent noted that further proof that a private damages remedy was never intended to emanate from the New York State Constitution, which is enforceable through the Court of Claims Act, is that many State statutes, such as the Civil Rights Laws, are now rendered superfluous.[44]

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limitations of this article.").

[42] *See, e.g.*, Wieder v. Skala, 80 N.Y.2d 628, 633, 609 N.E.2d 105, 107, 593 N.Y.S.2d 752, 754 (1992) (refusing to recognize tort of wrongful discharge because " 'such a significant change in our law is best left to the Legislature' ") (quoting Murphy v. American Home Prods. Corp., 58 N.Y.2d 293, 301, 448 N.E.2d 86, 89, 461 N.Y.S.2d 232, 235 (1983)).

[43] *See Brown*, 89 N.Y.2d at 201-02, 674 N.E.2d at 1147, 652 N.Y.S.2d at 241 (Bellacosa, J. dissenting); *see also* Arteaga v. State, 72 N.Y.2d 212, 215-16, 527 N.E.2d 1194, 1195-96, 532 N.Y.S.2d 57, 58-59 (1988) (holding that under Court of Claims Act, State retains its immunity for exercise of discretionary functions); Tarter v. State, 68 N.Y.2d 511, 518-19, 503 N.E.2d 84, 87, 510 N.Y.S.2d 528, 531 (1986) (holding that parole board enjoys immunity because its decisions involve quasi-judicial expertise and judgment); Sharapata v. Town of Islip, 56 N.Y.2d 332, 336, 437 N.E.2d 1104, 1106, 452 N.Y.S.2d 347, 349 (1982) (citations omitted) ("[A] statute in derogation of the sovereignty of a State must be strictly construed, waiver of immunity by inference being disfavored ...."); Steitz v. City of Beacon, 295 N.Y. 51, 55-56, 64 N.E.2d 704, 706 (1945) (holding that liability under Court of Claims Act should not be imposed absent clear legislative direction); Goldstein v. State, 281 N.Y. 396, 405, 24 N.E.2d 97, 101 (1939) (reversing Court of Claims' decision limiting term "officers" in Court of Claims Act, and holding that Act "must be given a reasonable construction, consistent with our conception of governmental functions and public policy"); *see also* John J. McNamara, Jr., *The Court of Claims: Its Development and Present Role in the Unified Court System*, 40 ST. JOHN'S L. REV. 1, 23 (1965) ("[S]tatutes in derogation of the sovereignty of the state are strictly construed and do not divest the state of its rights or interests, save by specific provision or unmistakable legislative intent to that effect.").

[44] *See Brown*, 89 N.Y.2d at 211-12, 674 N.E.2d at 1153, 652 N.Y.S.2d at 247 (citing Civil Rights Law § 40-c and Executive Law § 290). Section 40-c of the Civil Rights Law prohibits civil rights discrimination and section 40-d provides both civil and criminal penalties for violations of those rights. N.Y. CIV. RIGHTS LAW §§ 40-c, 40-d (McKinney 1992). Section 290 of the Executive Law, known as the "Human Rights Law," *see* N.Y. EXEC. LAW § 290(1) (McKinney 1992), creates a division in the executive department to ensure equal opportunity and to "eliminate and prevent discrimination." N.Y. EXEC. LAW § 290(3) (McKinney 1992).

CONCLUSION

The Court of Appeals has cast away the State's sovereign immunity for the constitutional torts of its employees. By implying a private damages remedy against the State for violations of the Constitution by quilting together the word "torts" from the Court of Claims Act, the Restatement (Second) of Torts, Constitutional Convention history, and misapplied Supreme Court analysis, the Court of Appeals has reached new heights in judicial legislating. Critics often complain that courts usurp the legislative prerogative. Rarely do courts, however, fashion new rules of law in derogation of their own Constitution while attempting to create new remedies for its very enforcement. The Court of Appeals, however, has accomplished just that in its decision in *Brown v. State of New York*.

Patrick J. Boyle