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Recognizing a Damage Remedy to Enforce Indiana's Bill of Rights

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Articles

RECOGNIZING A DAMAGE REMEDY TO ENFORCE INDIANA'S BILL OF RIGHTS

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"A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees."[1]

Assume you represent a public defender from a local city court who claims he was terminated because he supported the judge's political opponent and spoke out regarding alleged incompetency by the sitting judge. Your client seeks compensatory damages in the form of back wages and emotional distress as well as an injunction for reinstatement. You intend to pursue a First Amendment claim based on the alleged violation of the constitutional rights of free speech and association, but, because Supreme Court decisions have considerably restricted public employees' federal right to speak freely and to whistle-blow,[2] you wish

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1 Owen v. City of Independence, 445 U.S. 622, 651 (1980). The Supreme Court held that the need to provide damages for constitutional wrongdoing required that government entities be held accountable even where government officials acted in good faith and thus are insulated, in their individual capacity, from liability.

2 *See, e.g.*, Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1, 25–51 (1990) (arguing that the Court's jurisprudence is too restrictive on public employees' freedom of speech and limits their right to whistle-blow because it provides judges with too much discretion as to what types of speech are a matter of public concern); Michael L. Wells, *Section 1983, the First Amendment, and Public Employee Speech: Shaping the Right To Fit the Remedy (and Vice Versa)*, 35 GA. L. REV. 939, 986–1005 (2001) (arguing that public employees who wish to whistle-blow are hindered by the Court's vague, inconsistent First Amendment jurisprudence). I have previously argued that the Court has provided insufficient protection for employee speech, particularly with regard to whistle-blowing. Rosalie Berger Levinson, *Silencing Government Employee Whistleblowers in the Name of "Efficiency"*, 23 OHIO N.U. L. REV. 17, 18–20 (1996).

In addition to substantive limitations on asserting claims under the First Amendment, there are also serious procedural obstacles. Section 1983 is the core vehicle for bringing suits against persons who, acting under color of state law, deprive individuals of their federal constitutional or statutory rights. However, neither a state nor an agency of the state may be sued under 42 U.S.C. § 1983 (2000) for federal constitutional violations. Also, local government entities can only be held liable for their unconstitutional policies or customs, not on a theory of *respondeat superior*. Finally, individual defendants can assert immunity, either absolute or qualified, from liability for damages. *See* IVAN BODENSTEINER & ROSALIE BERGER LEVINSON, STATE AND LOCAL GOVERNMENT: CIVIL RIGHTS LIABILITY §§ 1:6–1:8, 1A:1–1A:6 (2005).

to add a claim under the Indiana Constitution. Article I, section 9 of Indiana's Bill of Rights prohibits any law "restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever." The Indiana Supreme Court has interpreted section 9 to provide greater protection than the Federal Constitution and has allowed it to be invoked as a defense to a criminal charge of disorderly conduct.[3] However, the court has never decided whether a private cause of action for damages may be brought under this provision. Indeed, the Indiana Supreme Court has never determined whether a private cause of action may be brought under any of the provisions in the Indiana Bill of Rights.[4] An appellate court, in *Orr v. Sonnenburg*,[5] held that mental institution patients who performed manual labor for the institution were entitled to just compensation under Article I, section 21, which mandates that "particular services" be remunerated. However, the Indiana Supreme Court vacated the holding, concluding that such labor did not constitute "particular services" under section 21, and thus the issue of damages was avoided.[6]

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[3] Price v. State, 622 N.E.2d 954 (Ind. 1993). The court held that if a defendant's speech giving rise to a disorderly conduct conviction is political, the State must demonstrate that it has not materially burdened the claimant's opportunity to engage in political expression, which requires the State to produce evidence that the speech inflicted particularized harm analogous to tortious injury on readily identifiable private interests. The court reasoned that evidence of mere annoyance or inconvenience is insufficient. In *Whittington v. State*, 669 N.E.2d 1363 (Ind. 1996), the court further explicated its understanding of section 9, emphasizing that this protection is restricted to political speech, whereas the constitutionality of a disorderly conduct conviction for nonpolitical speech is subjected only to a rationality standard of review. The significance of the *Price* decision in the development of Indiana constitutional law is discussed in Patrick Baude, *Has Indiana Constitution Found Its Epic?*, 69 IND. L.J. 849 (1994) and Daniel Conkle, *Indiana Supreme Court's Emerging Free Speech Doctrine*, 69 IND. L.J. 857 (1994).

[4] In 1993 the Indiana Supreme Court declined the invitation to determine this question. Lach v. Lake County, 621 N.E.2d 357 (Ind. Ct. App. 1993), *trans. denied* Dec. 29, 1993. In *Turner v. Sheriff of Marion County*, 94 F. Supp. 2d 966 (S.D. Ind. 2000), the federal court, pursuant to Rule 15(O) of the Indiana Rules of Appellate Procedure, asked the Indiana Supreme Court to determine whether an action could be brought under Article I, section 11, of the state constitution, but the case settled and the issue was never reached. *See also* Young v. Ind. Dep't of Natural Resources, 789 N.E.2d 550, 559 n.5 (Ind. Ct. App. 2003), *trans. denied*, 804 N.E.2d 754 (Ind. Oct. 22, 2003) (expressly declining to decide whether a private cause of action for damages exists under the Indiana Constitution); Hilburt v. Town of Markleville, 649 N.E.2d 1036, 1041 (Ind. Ct. App. 1995) ("Even assuming, but expressly not deciding, that an action for damages . . . may be brought under Section 12, [the plaintiff's] constitutional arguments fail on the merits.").

[5] 542 N.E.2d 201, 205 (Ind. Ct. App. 1989).

[6] Bayh v. Sonnenburg, 573 N.E.2d 398, 421 (Ind. 1991) (stating that "we do not reach the subsidiary [issue of] . . . the distinction between an award of damages and back wages").

Although this would appear to be a very basic, elementary question, the development of state constitutional law in Indiana, as elsewhere, is a fairly recent phenomenon. Because of the broad expansion of federal constitutional liberties under the Warren Court, the Indiana Supreme Court has had little opportunity to interpret Indiana's Bill of Rights generally, much less the specific question of whether a private cause of action for damages should be recognized. Most civil rights claims have been brought in federal court under federal law, perhaps with a state constitutional claim tacked on under the supplemental jurisdiction provision, leaving this issue to be decided by federal courts with little guidance from the state judiciary. Indeed, the Southern and Northern Districts of Indiana have split on the question of a cause of action for damages under the state constitution. The Northern District has recognized a cause of action for damages,[7] whereas courts from the Southern District of Indiana have found no basis for implying a private cause of action.[8] The Indiana Supreme Court is now poised to consider this critical question, having accepted certification from a federal district

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[7] *See* Discovery House, Inc. v. Consolidated City of Indianapolis, 43 F. Supp. 2d 997, 1004 (N.D. Ind. 1999). The court relied on the implicit acceptance of this principle by the Indiana Supreme Court in *Bayh v. Sonnenburg*. However, as noted *supra* note 6, the Indiana Supreme Court specifically refused to reach this issue, deciding instead on the merits. Nonetheless, the court of appeals in *Bayh* did assume the existence of a private cause of action for damages under Indiana's just compensation provision. It should be noted that some state courts that recognize damage liability for constitutional violations have relied on the fact that compensation is permitted under the state "takings" clauses. These courts have reasoned that if damages are available for deprivations of the right to hold property, they should be equally available for deprivations of other fundamental constitutional rights. *See, e.g.*, Fenton v. Groveland Cmty. Serv. Dist., 135 Cal. App. 797, 806, 185 Cal. Rptr. 758, 763 (1982) (holding that damages should be available for deprivation of the fundamental right to vote because such are available for takings claims); *accord* Corum v. Univ. of N.C., 413 S.E.2d 276, 291 (N.C. 1992); *see also* Klunk v. County of St. Joseph, 170 F.3d 772, 777–78 (7th Cir. 1999) (assuming summarily that Indiana recognizes a private right of action for damages under Article I, section 9 because an Indiana appellate court had addressed the merits of such a claim).

[8] *See, e.g.*, Raines v. Strittmatter, No. 1:03-CV-10289-JDTTAB, 2004 WL 2137634 (S.D. Ind. June 29, 2004). In *Boczar v. Kingen*, No. IP99-0141-C-T/G, 2000 WL 1137713 (S.D. Ind. 2000), the court, after noting that the Debates of 1850 provide little help, relied on the Indiana Supreme Court's reluctance to find an implied cause of action under statutory provisions as well as the common law understanding of sovereign immunity, which guided the framers of the state constitution. These arguments are addressed *infra* Part III. Other Indiana federal courts have reasoned that this issue should properly be decided by the state supreme court and not federal district courts. *See* Estate of O'Bryan v. Town of Sellersburg, No. 3:02CV00238-DFH-WGH, 2004 WL 1234215 (S.D. Ind. 2004).

court case, which raises the question in the context of a damage action brought under Article I, section 9.[9]

I. INTRODUCTION

As the Burger and Rehnquist Courts began to restrict the interpretation of federal rights, former Justice Brennan, among others, urged attorneys to reexamine their state constitutions as an important supplemental source for the protection of individual rights.[10] In 1989, Chief Justice Randall T. Shepard penned an article inviting Indiana practitioners to more closely examine Indiana's Constitution.[11] A survey of Indiana cases demonstrates that attorneys in Indiana have accepted Justice Shepard's invitation and, indeed, have successfully litigated claims brought under the state constitution. By and large, however, constitutional claims have been raised by defendants who assert violation of the state constitution's criminal procedural guarantees[12] or defenses based on civil liberties.[13]

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[9] The Indiana Supreme Court has accepted certification from a federal district court in the Northern District of Indiana. Cantrell v. Morris, Cause No. 94S-0505-CQ-00243. The specific question directed to the Indiana Supreme Court is: "Does a private right of action for damages exist under Article I, Section 9 of the Indiana Constitution, and, if so, what are the elements of the action the plaintiff must prove?"

[10] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); *see also* Kathleen C. Herasimchuk, *The New Federalism: Judicial Legislation by the Texas Court of Criminal Appeals?*, 68 TEX. L. REV. 1481, 1492 (1990) (referring to Justice Brennan's article as "a clarion call to state judges to wield their own bill of rights").

[11] Randall T. Shepard, *Second Wind for the Indiana Bill of Rights*, 22 IND. L. REV. 575 (1989); *see also* Randall T. Shepard, *The Maturing Nature of State Constitution Jurisprudence*, 30 VAL. U. L. REV. 421, 456 (1996) ("[W]hat respectable alternative is there to independent state constitutional jurisprudence? . . . Is it a country where state courts hearing ninety percent of the litigation resolve the most important cases without regard to their own history or precedent? Surely not.").

[12] *See, e.g.*, Malinski v. State, 794 N.E.2d 1071 (Ind. 2003) (deciding that Article I, section 13 mandates that law enforcement officials inform a custodial suspect immediately when an attorney hired by the suspect's family to represent him is present at the station); Bush v. State, 775 N.E.2d 309 (Ind. 2002) (holding that Article I, section 14's guarantee of the right against self-incrimination includes the right not to have the prosecutor comment on a defendant's failure to take the stand and testify and prohibits jury instructions that call attention to the fact that defendant could have testified if he chose to do so); State v. Gerschoffer, 763 N.E.2d 960 (Ind. 2002) (holding that evidence obtained from a roadblock did not satisfy the requirements of Article I, section 11 and thus such evidence must be suppressed); Richardson v. State, 717 N.E.2d 32 (Ind. 1999) (holding that Indiana's double jeopardy clause is broader and more protective than that of the Federal Constitution); Brown v. State, 653 N.E.2d 77 (Ind. 1995) (holding that a warrantless search of defendant's car violated the right to be secure against unreasonable searches and seizures (Article I, section 11 of the Indiana Constitution) and thus the conviction must be reversed);

The question of whether a private cause of action for damages may be implied under Indiana's Bill of Rights is critical to the development of the state constitution. To the extent the Indiana Supreme Court interprets Indiana's Bill of Rights as guaranteeing forms of liberty that go beyond the Federal Constitution, to restrict such protection to criminal or civil defendants will serve as a strong disincentive to attorneys who wish to heed Justice Shepard's invitation. More significantly, without a damage remedy, constitutional wrongdoing will go unredressed and government officials will have little incentive to observe Indiana's fundamental law. Part II of this Article examines this question using the now well-accepted methodology for constitutional interpretation adopted by the Indiana Supreme Court, namely, that constitutional interpretation "is controlled by the text itself, illuminated by history and by the purpose and structure of our constitution and the case law surrounding it."[14] Part II shows that this inquiry strongly supports recognition of a damage action to vindicate the violation of state constitutional rights. In addition to this historical analysis, the Indiana Supreme Court has also closely examined how sister states have dealt with the same constitutional issue.[15] The state courts are divided on the question of whether a private cause of action for damages can be implied under their constitutions. Part III addresses the competing arguments that have been made by these courts and explains why those states that have recognized this significant enforcement mechanism should provide the model for Indiana.

II. TEXT, HISTORY, PURPOSE, AND CASE PRECEDENT SUPPORT RECOGNITION OF A DAMAGE REMEDY

The Indiana Supreme Court has explained that it will take an historical/originalist approach in interpreting the state constitution:

Campbell v. State, 622 N.E.2d 495 (Ind. 1993) (deciding that, because Article I, section 13 places a unique value on the defendant's right to speak out personally in the courtroom, Indiana's alibi statute, which mandated that notice be given to the state of an alibi within twenty days prior to the omnibus date, was unconstitutional and thus defendant's conviction must be reversed); Brady v. State, 575 N.E.2d 981 (Ind. 1991) (holding that Article I, section 13 contains a unique face-to-face element requiring that the witness and the accused be able to see and recognize each other); Clark v. State, 561 N.E.2d 759 (Ind. 1990) (reversing defendant's sentence as "disproportionate" and thus in violation of Article I, section 16, where enhancement under the state's Habitual Offender Law was based on a conviction for conduct that the legislature had classified as a misdemeanor).

13 *See, e.g.*, Price v. State, 622 N.E.2d 954 (Ind. 1993) (holding that the defendant's conviction for disorderly conduct, based in part on her protest to the police officers' conduct, violated Article I, section 9).

14 *Id*. at 957 (citing State Election Bd. v. Bayh, 521 N.E.2d 1313 (1988)).

15 *See infra* note 81 and acompanying text.

"Questions arising under the Indiana Constitution are to be resolved by 'examining the language of the text in the context of the history surrounding its drafting and ratification, the purpose and structure of our Constitution, and case law interpreting the specific provisions.'"[16] This inquiry requires an exploration of the state constitutional guarantee of a remedy "by due course of law," the principle extant when the constitution was drafted that courts have inherent authority to award damages to vindicate constitutional rights, as well as the 1850 Debates surrounding the adoption of the constitution.

Although there is nothing specific in the text of the Indiana Constitution regarding remedies for constitutional wrongdoing, some support for recognition of an implied damage action may be found in Article I, section 12, which guarantees that a remedy "by due course of law" is available to anyone "for injury done to him in his person, property, or reputation" and that "[j]ustice shall be administered . . . completely and without denial."[17] Concededly, despite section 12's guarantee, a long line of cases recognizes the legislature's power to modify or abrogate common law rights.[18] However, constitutional rights are not mere common law rights, and, in any event, the Indiana General Assembly has not legislated a private cause of action for constitutional wrongdoing. Although this issue was not specifically addressed when the constitution was enacted, the framers did express their understanding that the General Assembly would provide a mechanism for holding the state accountable for its wrongdoing.[19] In this context, it was acknowledged that "if the Legislature neglects to carry out the

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16 Ratliff v. Cohen, 693 N.E.2d 530, 534 (Ind. 1998) (quoting Boehm v. Town of St. John, 675 N.E.2d 218, 321 (Ind. 1996)).

17 IND. CONST. art. I, § 12.

18 Martin v. Richey, 711 N.E.2d 1273, 1283 (Ind. 1999). The Indiana Supreme Court has also rejected the view that the Open Courts Clause is a "kind of jurisdiction-concurring mechanism for statutory rights." Blanck v. Ind. Dep't of Corr., 829 N.E.2d 505, 511 (Ind. 2005). In determining whether a private cause of action can be implied under a statute, the court explained that legislative intent is the core inquiry. *Id*. However, unlike statutory rights where deference to legislative intent should be paramount, constitutional rights stand on their own because the framers intended for the Indiana Bill of Rights to be the fundamental law of the state.

19 Article I, section 12 was proposed, read three times, and passed without discussion. *See* JOURNAL OF THE CONVENTION OF THE PEOPLE OF THE STATE OF INDIANA TO AMEND THE CONSTITUTION 187, 188, 571, 579 (1851). On the other hand, there was significant debate regarding Article IV, section 24, which addressed the problem of "special laws" that were used to hold the state accountable for its wrongdoing. *See* discussion *infra* Part III.C.

details, the *Constitution will itself afford the remedy*."[20] The idea that the constitution itself gives courts authority to redress government wrongdoing is most clearly articulated in section 12.

The Indiana Supreme Court has ruled that, consistent with due process, some remedy must be provided where vested rights are at stake. In a 1910 decision, the court held that when dealing with vested rights, the legislature cannot take away a remedy without providing some other means of enforcement because total withdrawal of a remedy would constitute subversion of the right itself.[21] This principle was reaffirmed in a 1978 Indiana Court of Appeals decision noting that "due process forbids the immediate withdrawal of all legal means of enforcing a right, since that would amount to withdrawal of the right itself."[22] Unlike common law rights, constitutional rights cannot be altered or withdrawn by legislative enactment. They are vested rights that must be protected from government encroachment.

This due process concern is reflected in a 1937 decision invalidating a state law that purportedly prohibited Indiana courts from testing the constitutionality of an act of the General Assembly.[23] The Indiana Supreme Court held that this law violated Article I, section 12 because an individual cannot be denied the right to challenge the constitutionality of a legislative enactment. In support of its holding, the court cited the case of *Consolidated Gas Co. v. Mayer*[24]:

> Every individual who feels himself aggrieved either by the action of some other individual or of the state or the nation is secured the right to bring his grievance before some court . . . somewhere or other there is provided for him a forum to which he can present his case . . . [t]hat is "due process of law," a heritage from long centuries of struggle, which this nation and its constituent states

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[20] REPORT OF THE DEBATES AND PROCEEDINGS OF THE CONVENTION FOR THE REVISION OF THE CONSTITUTION OF THE STATE OF INDIANA 1850 Vol. 2, at 1279 (2 vols. 1850) [hereinafter DEBATES] (emphasis added); *see also infra* Part III.C (discussing the Debates of 1850).

[21] Sansberry v. Hughes, 174 Ind. 638, 640, 92 N.E. 783, 784 (1910).

[22] DeHart v. Anderson, 178 Ind. App. 581, 585–86, 383 N.E.2d 431, 435 (1978).

[23] Pennington v. Stewart, 212 Ind. 553, 558–59, 10 N.E.2d 619, 622 (1937) (holding that despite the general validity of the statutory elimination of the cause of action for alienation of affection, the General Assembly could not prohibit and criminalize the filing of "any pleading or paper setting forth or seeking to recover upon any cause of action abolished or barred" by the statute).

[24] 146 F. 150 (C.C.N.Y. 1906), *cited in Pennington*, 10 N.E.2d at 622.

> have deposited in the cornerstones of their written Constitutions.[25]

More recently, in *Martin v. Richey*,[26] the Indiana Supreme Court relied in part on Article I, section 12 to hold that its two-year medical malpractice statute of limitations was unconstitutional as applied to a plaintiff who could not with due diligence discover that medical malpractice had occurred. The court reasoned that the Indiana Constitution guarantees that injured citizens have the right to a remedy and that those responsible should be held accountable for injuries suffered.[27] Indiana's due course of law provision is the "cornerstone" of its constitution because, without a judicial remedy, all the core values reflected in the Indiana Bill of Rights become subject to the whim of the executive and legislative branches of government.

In addition to its specific guarantee of a remedy "by due course of law," the purpose and structure of the Indiana Constitution support recognition of an implied cause of action to address constitutional wrongdoing. First, it is clear that the framers were concerned that individual liberty be protected, as reflected in their lengthy enumeration of rights in Article I, which sets forth thirty-four detailed provisions, as compared to the truncated Federal Bill of Rights, which appeared only as ten amendments to the original Constitution.[28] Second, it is clear that they envisioned a special role for the judiciary to play in protecting those rights. The Indiana Supreme Court has noted that the drafters of the Indiana Constitution were staunch believers in Jacksonian democracy,

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25 *Id*. at 152.

26 711 N.E.2d 1273 (Ind. 1999).

27 *Id*. at 1283; *see also* City of Fort Wayne v. Cameron, 267 Ind. 329, 370 N.E.2d 338 (1977) (holding that to require strict adherence to a sixty-day notice rule where the plaintiff was mentally and physically disabled during the notice period would violate Article I, section 12); State *ex rel*. Hurd v. Davis, 226 Ind. 526, 533, 82 N.E.2d 82, 85 (1948) (holding that Article I, section 12 guarantees "parties to the action and their attorneys free access to the papers in any case"); Square D. Co. v. O'Neal, 225 Ind. 49, 56, 72 N.E.2d 654, 657 (1947) (holding that any "regulation which would virtually deny our citizens the right to resort to this court would necessarily be unreasonable" and would violate Article I, section 12).

28 The North Carolina Supreme Court relied on this argument to recognize a damage claim for violation of the free speech rights of its public employees. *See* Corum v. Univ. of N.C., 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992) ("Our Constitution is more detailed and specific than the federal Constitution in the protection of rights of its citizens . . . . We give our Constitution a liberal interpretation in favor of its citizens with respect to those provisions which were designed to safeguard the liberty and security of the citizens in regard to person and property."). It further reasoned that "[i]t is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens; this obligation to protect the fundamental rights of individuals is as old as the state." *Id*. at 783, 413 S.E.2d at 290.

i.e., limited government and the protection of inalienable rights.[29] When the issue of state sovereign immunity came up during the Debates on the 1851 Constitution, several of the drafters spoke against this "antiquated" doctrine and instead recognized "the necessity of providing for awarding complete justice to individuals . . . for of what use or benefit is government, unless it is to carry out to the highest practical point of development, the fundamental principles of protection to life, liberty and property?"[30]

Early Indiana court decisions handed down at the time of the adoption of the constitution reflect this philosophy.[31] Just four years after the 1851 enactment of the constitution, the Indiana Supreme Court was asked to determine the constitutionality of the Liquor Act of 1855. In *Herman v. State*,[32] the court celebrated the significance of the state's written constitution and emphasized the important duty of the judiciary to enforce constitutional guarantees: "[A]long with our written constitution we have a judiciary whose duty it is, as the only means of securing to the people safety from legislative aggression, to annul all legislative action without the pale of those instruments."[33] In deciding that the Liquor Act interfered with rights guaranteed under Article I, section 1,[34] the court explained that "the enjoyment of these [natural]

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[29] Price v. State, 622 N.E.2d 954, 962 (Ind. 1993) (recognizing that anti-government Jacksonian Democrats launched the constitutional revision from which our current document emerged); *see also* Michael DeBoer, *Equality as a Fundamental Value in the Indiana Constitution*, 38 VAL. U. L. REV. 489, 513–19 (2004) (describing the Jacksonian movement and its dominance in the General Assembly that adopted the 1851 Constitution).

[30] Comment of Mr. Howe, DEBATES, *supra* note 20, at 1279–80. See further discussion *infra* Part III.C.

[31] *See* Town of St. John v. State Bd. of Tax Comm'rs, 665 N.E.2d 965, 968–74 (Ind. T.C.), *rev'd on other grounds*, 675 N.E.2d 318 (Ind. 1996) (referencing the importance of examining judicial decisions contemporaneous with adoption of the constitution).

[32] 8 Ind. 545 (1855).

[33] *Id*. at 551–52 (citing *Marbury* as establishing the duty of the judicial department to say what the law is). Similarly, in *Madison & Indianapolis R.R. v. Whiteneck*, 8 Ind. 217, 227–29 (1856), Justice Perkins explains that the whole purpose of the written constitution was to safeguard natural rights: "We come to the conclusion, then, that the courts should declare void a law in violation of this fundamental principle of the constitution—a law in violation of the natural rights of man." *See also* Finney v. Johnson, 179 N.E.2d 718, 721 (Ind. 1962) (recognizing that "the Constitution is a fundamental instrument, not to be stretched and strained to meet the exigencies and necessities of the moment," and that it "was framed to be strictly observed by all public officials and particularly the courts as guardians of the citizens' rights stated therein").

[34] The Indiana Constitution provides:

> WE DECLARE, That all people are created equal, that they are endowed by their CREATOR with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; that all power is inherent in the People; and that all free governments are, and

rights is the great end and aim of the constitution itself" and that Indiana's system of government was "designed to allow to each individual the largest liberty consistent with the welfare of the whole, and to subject the private affairs of the citizen to the least possible governmental interference."[35]

The importance that Indiana courts have placed on ensuring enforcement of its constitution is also reflected in the broad public standing doctrine that was recently reinvigorated by the court. In *Embry v. O'Bannon*,[36] the Indiana Supreme Court permitted a taxpayers' lawsuit challenging the state's provision of funds to pay teachers who instruct in parochial schools allegedly in violation of Article I, section 6. In finding that the taxpayers had standing to bring this action, the court acknowledged that, in contrast to federal law, Indiana's broad public standing doctrine, dating back more than 150 years, eliminates the need for a plaintiff to demonstrate a specific interest in the outcome of litigation different from that shared by the general public.[37] The doctrine was developed to enable citizens and taxpayers to enforce a public duty without having to show individualized harm. Further, the Indiana Supreme Court has specifically noted that, since the nineteenth century, the public standing doctrine has permitted claims challenging unconstitutional government action.[38] Concededly, the public standing doctrine does not directly speak to whether the framers would recognize a private damage action because its focus is on the need to vindicate public as opposed to private rights and because the private cause of action was provided in these cases by the writ of mandamus. Nonetheless, the public standing doctrine expresses an early voiced concern that constitutional violations not go unredressed, even if normal standing jurisprudence precludes access to the courts.

> of right ought to be, founded on their authority, and instituted for their peace, safety, and well-being.

IND. CONST. art. I, § 1.

35 *Herman*, 8 Ind. at 557, 563–64; *see also* State *ex rel*. Holt v. Denny, 118 Ind. 449, 21 N.E. 274 (1888) (holding that residency and political limitations for fire and police commissioners violated Article I, section 23); Graffty v. City of Rushville, 107 Ind. 502, 8 N.E. 609 (1886) (invalidating a fee for the sale of goods not manufactured or grown in a local county as violating Article I, section 23 due to the imposition of a special burden).

36 798 N.E.2d 157 (Ind. 2003).

37 *Id*. at 159–60.

38 Cittadine v. Ind. Dep't of Transp., 790 N.E.2d 978, 979–80, 983 (Ind. 2003) (noting that "the principles embodied in the public standing doctrine have also frequently been applied in cases challenging the constitutionality of government action, statutes, or ordinances"). The court in *Cittadine* cites to several cases from the nineteenth century allowing constitutional challenges to be brought based on this doctrine.

In addition to the framers' understanding that the government would be held accountable for its wrongdoing and the early Indiana decisions emphasizing the judiciary's responsibility to enforce constitutional guarantees, an examination of the common law extant in the 1850s reveals a general understanding that damages were a recognized remedy for invasions of liberty. Several state courts that have recognized a private cause of action for damages under their constitutions have relied upon the United States Supreme Court's decision in *Bivens v. Six Named Agents of the Federal Bureau of Narcotics*,[39] where the Court held that an implied cause of action for damages may be brought directly under the Fourth Amendment.[40] In reaching its conclusion, the Supreme Court cited early decisions in which damages were awarded in voting rights and eminent domain cases.[41] After exploring several of these cases, the Court concluded that "[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty."[42] The Court also cited *Marbury v. Madison*:[43] "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."[44] Further, in a concurring opinion, Justice Harlan asserted that even if the legislative record was silent as to the intent of the framers, the "contemporary modes of jurisprudential thought . . . appeared to link 'rights' and 'remedies' in a 1:1 correlation," and that this supports the notion that the right to sue for damages stems from the Federal Constitution itself.[45] He reasoned that it was the judiciary's role "to vindicate social policies which, by virtue of their inclusion in the Constitution, are aimed predominately at restraining the Government as an instrument of the popular will."[46] The *Bivens* analysis was subsequently extended to permit money damages for violations of the

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39 403 U.S. 388 (1977).

40 *See* JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES 7-12-13, –23 (3d ed. 2000).

41 *Bivens*, 403 U.S. at 395–96. The historical pedigree is reflected in the decisions the Supreme Court relied upon in *Bivens*. For example, in *Nixon v. Herndon*, 273 U.S. 536 (1927), the Court upheld an award of $5,000 in damages on behalf of an African-American citizen who was denied the right to vote pursuant to an unconstitutional Texas law. The Court noted "[t]hat private damage may be caused by such political action and may be recovered for in suit at law hardly has been doubted for over two hundred years." *Id*. at 540.

42 *Bivens*, 403 U.S. at 395.

43 5 U.S. (1 Cranch) 137 (1803).

44 *Id*. at 163.

45 *Bivens*, 403 U.S. at 402 n.3 (Harlan, J., concurring). Note how this parallels Mr. Howe's comment during the Debates of 1850 that the Indiana Constitution itself provides the remedy for government wrongdoing. *See* DEBATES, *supra* note 20.

46 *Bivens*, 403 U.S. at 404.

Fifth Amendment's Due Process Clause[47] and the Eight Amendment's Cruel and Unusual Punishment Clause.[48]

Although Indiana courts should not rely on *Bivens* nor be bound by its limitations,[49] the notions that invasions of personal interests demand judicial recognition of a damages remedy and that damages have been a traditional common law remedy were familiar to those who drafted and ratified the Indiana Constitution. This is reflected in the Indiana Supreme Court's own citation to *Marbury* in *Herman v. State*[50] and in the framers' expression of disdain for a sovereign immunity defense to damage liability during the Debates of 1850.[51]

Other state courts have found support for an implied damage remedy in the common-law doctrine of implied remedies that is expressed in section 874A of the *Restatement (Second) of Torts*, which states:

> 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.[52]

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47 Davis v. Passman, 442 U.S. 228 (1979).

48 Carlson v. Green, 446 U.S. 14 (1980).

49 Unlike federal judges, state judges are not constrained by policies of federalism, which assert that federal courts should not constitutionalize state torts. Because federal courts make laws that bind all states and state officials, their decisions raise unique concerns. *See* Binette v. Sabo, 710 A.2d 688, 697 (Conn. 1998) ("*Bivens* and its progeny serve only as a guide. Because we are considering a claim under our state constitution, those federal court cases, based on the Federal Constitution, are not determinative.").

Bivens was subsequently narrowed by the Supreme Court's ruling in *F.D.I.C. v. Meyer*, holding that an administrative agency could not be held liable for damages for violations of the U.S. Constitution. 510 U.S. 471 (1994). The Court reasoned that "the purpose of *Bivens* is to deter the *officer*," and thus a claim against the government itself was unwarranted. *Id*. at 485 (emphasis added). It also reasoned that the "potentially enormous financial burden for the Federal Government" was a special factor counseling hesitation. *Id*. at 486. This Article contends that entities should be held liable for state constitutional wrongdoing and that sovereign immunity is not a bar. *See infra* Part III.C.

50 *See supra* notes 32–35 and accompanying text.

51 *See* discussion *infra* Part III.C.

52 RESTATEMENT (SECOND) OF TORTS § 874A (1979).

A comment by the reporter for the *Restatement (Second) of Torts* explains that the term "legislative provision" also includes constitutional provisions as well as statutes, ordinances, and administrative regulations.[53] Further, the comment indicates that "[t]he primary test for determining whether the court should provide a tort remedy for violation of the legislative provisions is whether this is consistent with the legislative provision, appropriate for promoting its policy, and needed to assure its effectiveness."[54] When state constitutional rights are at issue, these three criteria clearly support recognition of a "new cause of action."

As chronicled by Jennifer Friesen in her treatise on state constitutional law, "[m]ost of the state courts ruling on this question have endorsed the theory expressed in section 874A when granting a right to sue for damages for deprivation of state constitutional rights."[55] She notes that courts in several states have cited this provision, often together with *Bivens*, to support recognition of a cause of action even in the absence of implementing legislation.[56] The principle that the violation of rights secured by fundamental charters and constitutions is actionable for damages was also a long-standing tradition of English common law, which several states have noted.[57] Because section 874A has its roots in state common law, it provides additional support for recognizing a type of "constitutional tort" damage action.[58]

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53 *Id.* at cmt. (a).

54 *Id.* at cmt. (h).

55 FRIESEN, *supra* note 40, at 7–15. Specific decisions citing section 874A include *Binette v. Sabo*, 244 Conn. 3, 32–35, 710 A.2d 688, 693–94 (1998); *Dorwart v. Caraway*, 312 Mont. 1, 14, 58 P.3d 128, 136 (2002); *Brown v. State*, 89 N.Y.2d 172, 186–87, 674 N.E.2d 1129, 1138 (1996); and *Shields v. Gerhart*, 163 Vt. 219, 230–31, 658 A.2d 924, 932 (1995).

56 FRIESEN, *supra* note 40, at 7–15. Friesen presents a state-by-state listing in section 7-7.

57 *See* Widgeon v. E. Shore Hosp. Ctr., 479 A.2d 921, 924 (Md. 1984) (noting that English common law allowed punitive and compensatory damages for unlawful searches by the king's messengers); Dorwart v. Caraway, 312 Mont. 1, 10–13, 58 P.3d 128, 133–36 (2002) (citing the strong trend among the states to recognize an action based on sources as old as English common law, the court concludes that state constitutional rights to privacy, due process, and freedom from unreasonable searches and seizures mandate recognition of a judicial remedy); Brown v. State, 89 N.Y.2d 172, 188–89, 674 N.E.2d 1129, 1139 (1996) (noting that in England, violations of the Magna Carta by government officials were actionable in a case for damages, even without enabling legislation from Parliament). Further, the Supreme Court in *Boyd v. United States*, 116 U.S. 616, 630 (1886) cited with approval an early English case that had upheld damages for an unlawful search and seizure. Entick v. Carrington, 19 How. St. Tr. 1029 (1765).

58 See Jennifer Friesen, *Recovering Damages for State Bills of Rights Claims*, 63 TEX. L. REV. 1269, 1281 (1984–1985), wherein the author contends that, rather than relying upon *Bivens*, state courts have discovered this "much older body of law generated by state courts which

For example, New York's high court invoked section 874A to support its ruling that the violation of rights secured by the New York Constitution gives rise to a direct claim for damages on behalf of a class of non-white males who alleged that they were subjected to illegal and discriminatory police investigations.[59] The court reasoned that section 874A authorizes the judiciary to imply a civil damage remedy for violations of constitutional duties whenever such would further the purpose of the provision and ensure its effectiveness.[60] In addition, the court cited the *Bivens* holding that constitutional guarantees should be protected even absent legislative enactments.[61] Similarly, the Supreme Court of North Carolina held that a faculty member allegedly discharged for opposing his superiors on a matter of school policy had a direct cause of action against the state for violation of his free speech rights under the state constitution.[62] The court relied upon the common-law mandate that state constitutional rights be enforceable because a remedy should be available for every wrong.[63] Further, the Connecticut Supreme Court has relied on the arguments set forth in *Bivens* as well as the authority found in section 874A to support its holding that the judiciary has inherent authority to recognize a damage claim for state constitutional violations.[64]

The fact that Indiana courts have long entertained suits for declaratory or injunctive relief for constitutional wrongdoing should lead to a finding that an implied cause of action for damages is also appropriate. By statute, Indiana's Declaratory Judgment provision authorizes courts to award "further relief."[65] Further, without statutory

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more directly supports judicial creation of a damage remedy for state constitutional deprivations . . . ." *See also* T. Hunter Jefferson, *Constitutional Wrongs and Common Law Principles: The Case for the Recognition of State Constitutional Tort Actions Against State Governments*, 50 VAND. L. REV. 1525, 1574 (1997) (reasoning that "[s]ection 874A provides a viable alternative for state courts that may be unwilling to rely completely on English common law precedents").

59 Brown v. State, 89 N.Y.2d 172, 674 N.E.2d 1129, 652 N.Y.S.2d 223 (1996).

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

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

62 Corum v. Univ. of N.C., 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992).

63 *Id*. at 782, 413 S.E.2d at 289.

64 Binette v. Sabo, 244 Conn. 23, 32–35, 710 A.2d 688, 693 (1998); *see also* Phillips v. Youth Dev. Program, Inc., 390 Mass. 652, 657, 459 N.E.2d 453, 457 (1993) (relying in part on *Bivens* to support a cause of action for alleged dismissal from employment without due process).

65 Indiana's declaratory judgment provision specifies that:

> Further relief based on declaratory judgment or decree may be granted whenever necessary or proper. The application for further relief must be by petition to a court having jurisdiction to grant the relief. If the application is deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the

authorization, in *Bell v. Hood*,[66] the United States Supreme Court recognized that "where federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief."[67] Although *Bell* arose in the context of enforcing federal statutory rights, Justice Harlan, in his concurring opinion in *Bivens*, relied on *Bell* to buttress the claim that courts have the inherent power to grant damages even in the absence of explicit congressional authorization of a remedy: "The presumed availability of federal equitable relief against threatened invasions of constitutional interests appears entirely to negate the contention that the status of an interest as constitutionally protected divests federal courts of the power to grant damages absent express congressional authorization."[68] In *Bivens*, the Supreme Court recognized that imposing a more stringent test where constitutional, as opposed to statutory claims, are at issue is clearly wrong because "the judiciary has a particular responsibility to assure the vindication of constitutional interests . . . . [A] court of law vested with jurisdiction over the subject matter of a suit has the power—and therefore the duty—to make principled choices among traditional judicial remedies."[69]

Indiana courts have long recognized that constitutional rights may be enforced through suits seeking declaratory and injunctive relief.[70]

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declaratory judgment or decree to show cause why further relief should not be immediately granted.

IND.CODE § 34-14-1-8 (2004).

66 327 U.S. 678 (1946).

67 *Id*. at 684.

68 Bivens v. Six Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 403 (1977) (Harlan, J., concurring). *Bell* is also relied upon in the majority opinion. *Id*. at 392.

69 *Id*. at 407–08 n.8.

70 *See, e.g.*, Humphries v. Clinic for Women, 796 N.E.2d 247, 249 (Ind. 2003) (holding that plaintiffs were entitled to a declaratory judgment that Indiana's Medicaid Program, which pays for abortion only if necessary to preserve a woman's life or in cases of rape or incest, violates Indiana's Privileges and Immunities Clause to the extent it denied payment for pregnancies that create "a serious risk of substantial irreversible impairment of a major bodily function"); Doe v. O'Connor, 790 N.E.2d 985 (Ind. 2003) (rejecting plaintiff's suit for a declaratory judgment that Indiana's Sex and Violent Offender Registry violated his rights under the state constitution); Clem v. Christole, 582 N.E.2d 780 (Ind. 1991) (upholding plaintiffs' right to injunctive relief against enforcement of a state law that contravened an existing restrictive covenant, contrary to Article I, section 24 of the state constitution, which prohibits laws impairing obligation of contracts); State v. Nixon, 270 Ind. 192, 384 N.E.2d 152 (1979) (upholding action by plaintiffs seeking declaratory and injunctive relief regarding state law that permitted pari-mutuel wagering upon horse races and harness races, and finding that Article XV, section 1 of the state constitution was intended to prohibit all mischief occasioned by lotteries and that this would include pari-mutuel gambling); Jacob Weinberg News Agency, Inc. v. Marion, 163 Ind. App. 181, 322 N.E.2d 730

Further, Indiana courts have observed the well-established doctrine that "a right that is protectable in a court of equity against threatened invasion is certainly broad enough to warrant an action at law for injuries resulting from a consummated violation thereof."[71] Finally, the requirement in Article I, section 12 that "[j]ustice be administered . . . completely, and without denial" lends further support to the notion that the framers envisioned judicial authority to award damages to fully vindicate violations of the fundamental law.

Finally, policy arguments should be discussed, although generally these play a lesser role in constitutional adjudication because of the countervailing principle that policy decisions are best left to the legislative branch. Nonetheless, the Indiana Supreme Court has not ignored the policy implications of their constitutional decisions,[72] and here policy arguments favor recognition of a private cause of action for damages. The compelling policy arguments for government accountability were expressed by the Supreme Court in *Owen v. City of Independence*.[73] In this case, the private cause of action was provided by 42 U.S.C. § 1983, but the Court had to determine whether municipal entities should be subject to a damage remedy for violation of federal constitutional rights even where officials acted in good faith. The Court

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(1975) (allowing the plaintiff to contest the constitutionality of a law allegedly infringing on section 9 free speech rights under the Declaratory Judgment Act); Finney v. Johnson, 242 Ind. 465, 179 N.E.2d 718 (1962) (holding that plaintiffs were entitled to an injunction against the enforcement of a tax provision, which violated Article X, section 1's requirement of "a uniform and equal rate of assessment and taxation"); Dep't of Ins. v. Schoonover, 225 Ind. 187, 72 N.E.2d 747 (1947) (permitting plaintiffs to sue for declaratory and injunctive relief that a provision in Indiana's insurance law was unconstitutional because it violated section 1 and section 23 of Article I of the state constitution); State *ex rel.* Johnson v. Boyd, 217 Ind. 348, 28 N.E.2d 256 (1940) (allowing taxpayers to challenge the use of taxes to benefit parochial schools, allegedly contrary to Article I, sections 4 and 6).

71 Patton v. Jacobs, 118 Ind. App. 358, 362, 78 N.E.2d 789, 790 (1948).

72 *See, e.g.*, Martin v. Richey, 711 N.E.2d 1273, 1279 (Ind. 1999) (recognizing the public policy implications of a statute of limitations period, as applied to the plaintiff, that "imposes an impossible condition on her access to the courts" because her cancer had a long latency period); Bals v. Verduzco, 600 N.E.2d 1353, 1355 (Ind. 1992) (noting the important public policy of not requiring an employee to "relinquish the value of a good reputation" upon entering the workplace in holding that an intra-corporate communication to be a publication under defamation law); Finney v. Johnson, 242 Ind. 465, 469, 179 N.E.2d 718, 720 (1962) (holding that under Article X, section 1, requiring uniform taxation, the "inequities are too great" to allow a formula based on real property values to estimate the taxable value of household goods); Pennington v. Stewart, 212 Ind. 553, 556, 10 N.E.2d 619, 621 (1937) (noting the policy considerations, particularly gender equality, relating to the question of the constitutionality of the General Assembly's elimination of the tort of alienation of affection).

73 445 U.S. 622 (1980).

reasoned that the denial of a damage remedy would have "the deleterious effect of freezing constitutional law in its current state of development, for without a meaningful remedy aggrieved individuals will have little incentive to seek vindication" of constitutional deprivations.[74] In addition, the Court explained that liability would encourage government officials, both executive and legislative, to err on the side of protecting constitutional rights and that well-established notions of fairness as well as the doctrine of equitable loss-spreading justified imposing costs on taxpayers for the official misconduct of government.[75] In many situations, there is a real threat that without a damage remedy some victims will have no remedy because injunctive relief is inappropriate or moot.[76] Moreover, without the fear of damages, government officials may not be deterred from ignoring constitutional rights.[77]

Although normally policy arguments are best addressed to the legislative branch of government, because the Indiana General Assembly has not spoken on the issue, the state judiciary should step in to fill this critical void. The fact that civil suits for damages have not been filed under the state constitution, or are merely appended to federal claims with little discussion, reflects the reality that few private attorneys in Indiana are willing to incur the costs of vindicating state constitutional deprivations. Certainly, there are competing concerns that government not be burdened by frivolous actions, but the rules of procedure, which permit sanctions for attorneys who file frivolous or improper lawsuits and which authorize summary judgment, significantly reduce the risk that Indiana courts will be burdened with such litigation.[78] In addition, it should be emphasized that recognition of a damage remedy does not mean that a plaintiff will succeed on the merits. For example, the Indiana Supreme Court may decide that Article I, section 9 does not

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74 *Id*. at 651 n.33.

75 *Id*. at 652; *see also* Jefferson, *supra* note 58, at 1549 (reasoning that imposing government liability for state constitutional tort violations forces the state to accept responsibility for those it places in positions of authority, deters future constitutional violations, places the burden of providing compensation on the party that can afford to do so, namely the government, and reinforces the moral accountability of the state).

76 *See* Bivens v. Six Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 410 (1977) ("For people in Bivens' shoes, it is damages or nothing.").

77 *See* Brown v. State, 89 N.Y.2d 172, 192, 674 N.E.2d 1129, 1141, 652 N.Y.S.2d 223, 235 (1996) (arguing that damages are necessary to deter government misconduct and that injunctive or declaratory relief is insufficient where claimants did not have the opportunity to obtain injunctive relief before the constitutional wrongdoing and they have no basis to support an award enjoining future wrongs).

78 IND. R. TRIAL PROC. 11; IND. R. TRIAL PROC. 56.

protect Indiana employees from patronage dismissals.[79] The key argument here is that if the court finds a violation of section 9, it should have inherent power to remedy that wrongdoing by awarding, where appropriate, damages. Further, although a ruling permitting a damage action for constitutional wrongdoing may lead to the filing of more suits in the state courts, the recognition of a damage remedy to enforce Indiana's fundamental law should be viewed as a positive development.[80]

III. ARGUMENTS FROM SISTER STATES

In addition to examining text, history, and Indiana case precedent, in recent years the Indiana Supreme Court has devoted significant attention to decisions from sister states interpreting their own constitutions.[81] Although the state courts remain deeply divided on the question of whether a private cause of action for damages may be brought under their respective state constitutions, [82] a recent Montana Supreme Court

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[79] This is one of the issues raised currently in the case that is before the Indiana Supreme Court. *See supra* note 9.

[80] See Brennan, *supra* note 10, at 498, rejecting the "flood of litigation" rationale as a basis for denying a remedy for constitutional wrongdoing:

> 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.

Id.

[81] *See, e.g*., Fowler v. State, 829 N.E.2d 459 (Ind. 2005) (referring to the conclusion of several other states concerning the applicability of forfeiture to a defendant's right to confront witnesses under the federal and state constitutions); Doe v. O'Connor, 790 N.E.2d 985 (Ind. 2003) (looking to interpretations of inalienable rights clauses of Alabama, Alaska, Idaho, and Nevada when considering Article I, section 1 of the Indiana Constitution); Martin v. Richey, 711 N.E.2d 1263 (Ind. 1999) (concluding that the court's holding that a two-year statute of limitations violated Article I, section 12 as applied to the plaintiff, who could not have discovered her injury within the limitations period, was consistent with the analogous analysis of Kentucky, Ohio, and Texas); *In re* Zumbrun, 626 N.E.2d 452, 455 n.10 (Ind. 1993) (looking to the Minnesota Constitution in determining that a state bankruptcy law that exempted an unlimited amount of intangible assets violates Article I, section 22, which demands that the exemption be "reasonable"); State v. Nixon, 270 Ind. 192, 384 N.E.2d 152 (1979) (looking to the decisions of Colorado, Illinois, Utah, Kentucky, and Nebraska to help define the bounds of prohibited lotteries with respect to a statute authorizing pari-mutuel horse wagering).

[82] *See* FRIESEN, *supra* note 40, § 7-7(a), at 7-19-20. Professor Friesen provides a state-by-state review of this issue in section 7-7. The issue is complicated because not only do courts oftentimes limit their holdings to claims arising out of a particular constitutional clause, but they may also approve suit only against a particular category of defendants. As to Indiana, Professor Friesen notes that the question "appears to be an open one." She discusses

decision asserts that the strong trend among the states is to recognize a right to sue for money damages for alleged violations of state constitutional rights. In *Dorwart v. Caraway*,[83] the court surveyed recent decisions and cited data indicating that by 1998, some twenty-one states had recognized an implied cause of action for state constitutional violations and that three additional states suggested they might do so under some circumstances. Further, at least four states had enacted statutes that authorize causes of action for violation of state constitutional rights.[84] The court joined this trend and recognized the right to sue for damages for violation of state constitutional rights to privacy, to be free of unreasonable searches and seizures, and to the fair process of law.[85]

On the other hand, decisions from two state supreme courts since 1998 suggest some movement in the opposite direction. Although the Utah Supreme Court initially ruled that all violations of individual rights secured by self-executing constitutional provisions could be vindicated by money damages, it has subsequently reined in that principle by requiring that a plaintiff show "flagrant" violation of constitutional rights as well as the unavailability of existing remedies to redress injury, including an explanation as to why equitable relief is inadequate.[86] In

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Matovina v. Hult, 125 Ind. App. 236, 123 N.E.2d 893 (1955), in which the court appeared to allow a prisoner to bring a tort claim for false imprisonment based on his constitutional claim that he was treated with "unnecessary rigor" contrary to Article I, section 16. Second, she cites *Bayh v. Sonnenburg*, 573 N.E.2d 398 (Ind. 1991). Neither case directly speaks to the question of a private cause of action for damages. The first discusses the availability of a tort action for constitutional wrongdoing, while, as previously discussed, the Indiana Supreme Court in *Sonnenburg* specifically refused to address the question of a private action for damages, instead denying the plaintiffs relief on the merits. *See supra* note 6 and accompanying text.

83 312 Mont. 1, 58 P.3d 128 (2002).

84 *Id*. at 10, 58 P.3d at 133. Gail Donoghue and Jonathan Edelstein report:

> By 1998, twenty-one states had recognized an implied cause of action for state constitutional violations. Three additional states had indicated that they would do so under certain narrow circumstances. A private cause of action has been recognized in a twenty-fifth state by federal courts and four states have enacted statutes that authorize causes of action for violation of state constitutional rights. Seven states have specifically rejected state constitutional causes of action.

Gail Donoghue & Jonathan I. Edelstein, *Life After* Brown*: The Future of State Constitutional Tort Actions in New York*, 42 N.Y. L. SCH. L. REV. 447, 447 n.2 (1998).

85 312 Mont. at 14, 58 P.3d at 136. Note that the court rejected a qualified immunity defense, refusing defendants' argument that the court adopt § 1983's immunity defenses. *Id*. at 20, 21, 58 P.3d at 140.

86 Spackman v. Bd. of Educ., 16 P.3d 533, 538 (Utah 2000) (holding that "a self-executing constitutional provision does not necessarily give rise to a damages suit"). The Utah Supreme Court had earlier ruled that a prison inmate could pursue a damage claim under

two recent decisions, the California Supreme Court has similarly adopted a more restrictive methodology for evaluating claims that makes it much more difficult to assert a private cause of action to enforce a constitutional tort.[87] Its new multi-factor test looks first to evidence of an "affirmative intent" in the constitution itself or accompanying material to authorize or withhold money damages as a remedy. Finding no such intent, it then examines several factors, such as the availability of other remedies, the extent to which the provision is self-executing (a judicially manageable tort), and the importance of the constitutional right.[88] The court found no action for damages for violation of either the due process or free speech clauses of its constitution, reasoning that there was no common law history from which it could infer an intent to provide an action for damages and thus such was not available.[89]

It is noteworthy that neither California nor Utah has ruled out the general principle that a private cause of action for damages may be implied for some constitutional wrongdoing.[90] It appears that only nine states have flatly rejected such a cause of action.[91] Nonetheless, the restrictions that California and Utah have imposed will clearly discourage injured plaintiffs from pursuing claims. There is no reason to limit relief, as Utah does, to "flagrant violations" of the state constitution. The egregiousness of the wrongdoing should affect the amount, not the

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the state constitution for failure to diagnose or provide adequate medical care. Bott v. Deland, 922 P.2d 732, 739 (Utah 1996).

87 Degrassi v. Cook, 29 Cal. 4th 333, 58 P.3d 360 (2002); Katzberg v. Regents of Univ. of Cal., 29 Cal. 4th 300, 58 P.3d 339 (2002).

88 *Katzberg*, 29 Cal. 4th at 323, 58 P.3d at 354.

89 *Id.*; *see also* Deirdre McInerney, *Due Process – Money Damages Are Not Available As a Means To Remedy a Violation of the Due Process Clause of the California Constitution*, 35 RUTGERS L.J. 1443, 1459 (2004) (noting that the *Katzberg* decision indicates "a general reluctance and apprehension" to recognize a monetary remedy that "may retard the development and litigation of state civil rights").

90 *Degrassi*, 29 Cal. 4th at 344, 58 P.3d at 367 ("This does not mean that the free speech clause, in general, never will support an action for money damages."). In *Spackman*, the Utah Supreme Court did not overrule its holding in *Bott*. It simply held that not all self-executing rights give rise to a damage action. *See supra* note 86.

91 These states include Colorado, *Bd. of County Comm'rs of Douglas County v. Sundheim*, 926 P.2d 545, 548 (Colo. 1996); Hawaii, *Figueroa v. State*, 61 Haw. 369, 382–84, 604 P.2d 1198, 1206–07 (1980); Mississippi, *City of Jackson v. Sutton*, 797 So. 2d 977, 979 (Miss. 2001); Ohio, *Provens v. Stark County Bd. of Mental Retardation & Dev. Disabilities*, 64 Ohio St. 3d 252, 260, 594 N.E.2d 959, 965 (1992); Oregon, *Hunter v. City of Eugene*, 309 Or. 298, 304, 787 P.2d 881, 884 (1990); North Dakota, *Kouba v. State*, 687 N.W.2d 466, 471–72 (N.D. 2004); Tennessee, *Lee v. Ladd*, 834 S.W.2d 323, 325 (Tenn. Ct. App. 1992); Texas, *City of Beaumont v. Bouillion*, 38 Tex. Sup. Ct. J. 282, 896 S.W.2d 143, 148 (1995); and Wyoming, *Cooney v. Park County*, 792 P.2d 1287, 1298 (Wyo. 1990).

availability, of damages.[92] Further, the California Supreme Court's recent mandate that the plaintiff demonstrate "affirmative intent" or else be subject to a multi-factor test is based, in part, on a faulty reading of *Bivens*.[93] Finally, California has implemented specific civil rights legislation, which permits a statutory claim for vindicating rights violations, thus justifying a more wary approach when an "implied" remedy is sought.[94] It is true that other states have refused to adopt a broad rule that all provisions of their state constitution necessarily give rise to a damage action.[95] Because Indiana has not yet recognized that courts have the power to award damages to vindicate constitutional wrongdoing, this Article addresses this threshold question as well as the concerns that have led other states to deny a damage action.

In general, those states that have refused to recognize a damage remedy under their constitutions have cited three primary concerns: (1) separation of powers, (2) the inappropriateness of implying a private cause of action when alternate remedies are available, and (3) sovereign immunity. Each of these arguments will be addressed in the sections that follow.

A. Separation of Powers

A core argument against recognizing a private cause of action for damages is that this violates separation of powers and interferes with the

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92 The Utah court cited to the affirmative defense of qualified immunity that is available to government officials sued in their individual capacity under 42 U.S.C. § 1983. However, to the extent plaintiffs seek to hold government entities, as opposed to individuals, liable for their wrongdoing, the Supreme Court has specifically rejected any good faith defense. *See supra* note 1.

93 The California Supreme Court purportedly relied on *Bivens* to ask whether other factors indicated that it should *create* a monetary remedy. *Katzberg*, 29 Cal. 4th at 323–24, 58 P.3d at 354–55. In reality, the Court in *Bivens* asked whether there are factors that would *deny* recognition of a monetary award. This author contends that the presumption should be in favor of recognizing a monetary award, absent strong countervailing arguments. Because state courts have inherent power to award damages for constitutional wrongdoing, the burden should be on the government to dissuade the court from exercising this power.

94 CAL. CIV. CODE § 56.1 (West 1987).

95 In addition to Utah and California, the Connecticut Supreme Court has stated that it will not necessarily imply a constitutional cause of action for every type of violation, but rather it explained that claims will be evaluated on a case-by-case basis, looking to the nature of the constitutional provision at issue, the unconstitutional conduct, and the nature of the harm, as well as separation of powers considerations and other factors articulated in *Bivens* and its progeny. Binette v. Sabo, 244 Conn. 23, 47–48, 710 A.2d 688, 700 (1998).

legislature's prerogative to resolve difficult questions of public policy.[96] Some state courts have expressed the separation of powers concern as raising the question of whether constitutional rights are "self-executing."[97] The term "self-executing" is not helpful because it only means that the constitutional provision is sufficiently clear in setting down principles so as to be judicially enforceable.[98] Even if a constitutional guarantee is clear, this does not necessarily trigger an "implied" cause of action for damages. Nonetheless, it is helpful to examine this question as a starting point for analysis.

Most provisions in Indiana's Bill of Rights should be presumed to be self-executing, in the sense that they are not merely horatory but rather they impose duties and create rights. The Indiana Supreme Court has

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[96] *See, e.g.*, Kelley Property Dev., Inc. v. Lebanon, 226 Conn. 314, 331–32, 627 A.2d 909, 918–19 (1993) (prohibiting suit by landowners challenging a zoning commission because such would involve policy choices best left to those who exercise discretionary power); Moody v. Hicks, 956 S.W.2d 398, 402 (Mo. Ct. App. 1997) ("Whether such a cause of action should be permitted is best left to the discretion of the General Assembly."); Provens v. Stark County Bd. of Mental Retardation & Dev. Disabilities, 64 Ohio St. 3d 252, 254–55, 594 N.E.2d 959, 961–62 (1992) (holding that the legislature was the more appropriate body to create remedies for constitutional violations, especially where other statutory or administrative procedures provided meaningful remedies); City of Beaumont v. Bouillion, 38 Tex. Sup. Ct. J. 282, 896 S.W.2d 143, 149 (1995) (holding that absent express authority from the legislature, it would not recognized an implied private cause of action for damages under the free speech and free assembly protections of the Texas Constitution).

[97] *See* Walinski v. Morrisson & Morrisson, 60 Ill. App. 3d 616, 619, 377 N.E.2d 242, 244 (1978) ("Since the right is explicitly made 'enforceable without action by the General Assembly,' an aggrieved person should have recourse to existing judicial or legislative remedies for a violation of a right."); Brown v. State, 89 N.Y.2d 172, 185–86, 674 N.E.2d 1129, 1137–38 (1996) (holding that a civil damage remedy can be implied under the state constitution when the provision is self-executing); Corum v. Univ. of N.C., 330 N.C. 761, 781, 413 S.E.2d 276, 289 (1992) (holding that because freedom of speech is self-executing, a cause of action for damages lies); Shields v. Gerhart, 163 Vt. 219, 225–27, 658 A.2d 924, 929–30 (1995) (holding that an implied cause of action is available with regard to constitutional rights, such as freedom of speech, that are concrete and defined); *cf.* Bandoni v. State, 715 A.2d 580, 587 (R.I. 1998) (holding that the state's recently enacted victims' rights amendment was not self-executing and thus did not give rise to a cause of action for a constitutional tort).

[98] *See, e.g.*, *Shields*, 163 Vt. at 224, 658 A.2d at 928 ("A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, . . . and it is not self-executing when it merely indicates principles."); *see also* THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 167–68 (8th ed. 1927) ("A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which these principles may be given the force of law.").

not ruled that any provision in the Indiana Bill of Rights is not self-executing in this sense, although in *Doe v. O'Connor*,[99] the court suggested in dicta that Article I, section 1, which broadly guarantees natural rights, may not be self-executing, or at least that other states have reached this conclusion regarding their similarly worded, open-ended provisions that protect all "inalienable rights."[100] The Indiana Supreme Court has, for a different reason, recognized one constitutional guarantee that cannot be independently enforced by the judiciary. In *In re Zumbrun*,[101] the court reasoned that Article I, section 22 was not "self-executing" because the provision states that "the privilege of the debtor to enjoy the necessary comforts of life shall be recognized *by wholesome laws*, exempting a reasonable amount of property from seizure or sale for the payment of any debt or liability . . . ."[102] Because the text as well as the legislative history specify the need for lawmaking power "to give it active vitality," the court's conclusion is justified.[103]

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99 Doe v. O'Connor, 790 N.E.2d 985 (Ind. 2003).

100 *Id*. at 991; *see also* Morrison v. Sadler, 821 N.E.2d 15, 31 (Ind. Ct. App. 2005) (reasoning that Article I, section 1 was really only a generalized policy statement by the framers of the Indiana Constitution as to important principles that should guide governance of the state, but that it lacked guidelines for uniform enforcement and thus should not be viewed as a concrete right). This interpretation of Article I, section 1 seems contrary to early Indiana Supreme Court decisions that invoked this provision to invalidate legislative enactments. *See supra* notes 32–33 and accompanying text. In *Clinic for Women, Inc. v. Brizzi*, 814 N.E.2d 1042, 1047 (Ind. Ct. App. 2004), *trans. granted*, 831 N.E.2d 735 (Jan. 27, 2005), the appellate court ruled, contrary to *Morrisson*, that Article I, section 1 encompasses a core value right to privacy, which includes the decision of whether to terminate a pregnancy. Other states are divided on this question. In addition to the cases cited in *Doe*, see *State v. Williams*, 88 Ohio St. 3d 513, 523, 728 N.E.2d 342, 354 (2000) (holding that Ohio's similar "fundamental rights" provision was not a self-executing provision, but rather required enacting provisions to indicate how these rights are subject to judicial enforcement); and *Shields*, 163 Vt. At 224–25, 658 A.2d at 928–29 (1995) (holding that its Article I, which declares the existence of "natural, inherent, and unalienable rights," is not self-executing and "does not provide rights to individuals that may be vindicated in a judicial action"). *Cf.* Peper v. Princeton Univ. Bd. of Trs., 77 N.J. 55, 77–81, 389 A.2d 465, 476–78 (1978) (recognizing a direct cause of action under the state's natural rights guarantee on behalf of a female employee suing a private university for sex discrimination); Hunter v. Port Auth. of Allegheny County, 277 Pa. Super. 4, 8–9, 419 A.2d 631, 633 (1980) (holding that an individual denied employment because of a fourteen-year-old assault conviction, for which he received unconditional pardon, could bring a cause of action directly under Pennsylvania's natural rights provision, citing earlier state law indicating that the clause needs no affirmative legislation, civil or criminal, for its enforcement in the civil courts).

101 626 N.E.2d 452 (Ind. 1993).

102 IND. CONST., art. I, § 22 (emphasis added).

103 Warren v. Ind. Telephone Co., 626 N.E.2d at 55; *see also* Leger v. Stockton Unified Sch. Dist., 202 Cal. App. 3d 1448, 1456, 249 Cal. Rptr. 688, 691–92 (1988) (holding that its constitutional amendment declaring an inalienable right to attend safe schools was not self-executing "in the sense of supplying a right to sue for damages," but was meant to serve

Aside from these cases, separation of powers should not keep Indiana courts from exercising their inherent power to enforce the state constitution. During the Debates of 1850, a deep concern was expressed regarding the General Assembly's practice of usurping the role of the judiciary by actually adjudicating claims against the state. Mr. Kelso stated: "I maintain that everything of a judicial character should be kept from the Legislature—our courts of justice being a separate and distinct part of the government."[104] Mr. Reed similarly asserted that "the determination of legal rights appropriately belongs to the courts and not to the Legislature"; the legislature "is the wrong department of government for determining questions of right."[105] Mr. Clark added: "It appears to me that a court of justice is a much more suitable tribunal to investigate claims against the State, than the Legislature."[106] These comments acknowledge that the framers intended for the protection of rights to be a judicial task, and they deeply resented the legislature's usurpation of this power. In light of the history surrounding Article IV, sections 22, 23, and 24, which targeted the General Assembly's unscrupulous practice of enacting special laws, it is highly unlikely that the framers would have entrusted the preservation of rights exclusively to the General Assembly.[107]

Early case precedent reflects this same understanding of separation of powers. In 1897, the Indiana Supreme Court reasoned that: "The great weight of authority is to the effect that a constitutional provision like the one here in question is self-executing, and needs no legislative enactment to carry it into effect and operation."[108] Similarly, the Indiana Supreme Court, in *Warren v. Indiana Telephone Co.*,[109] ruled that "[w]here a self-executing constitutional right is violated, no statutory remedy is necessary for its protection."[110] The court explained that the open court's

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only as a directive to the legislature to pass other measures); Lucas v. McAfee, 217 Ind. 534, 29 N.E.2d 588 (Ind. 1940) (holding that Article 2, section 8, which provides that "the General Assembly shall have power to deprive of the right of suffrage, and to render ineligible, any person convicted of an infamous crime," is not self-executing but rather authorizes the legislature to enact laws regarding the franchise).

104 DEBATES, *supra* note 20, at 1275.

105 *Id*. at 1283.

106 *Id*.

107 *See* further discussion *infra* Part III.C.

108 Carroll v. Green, 148 Ind. 362, 364, 47 N.E. 223, 224 (1897) (holding that Article II, section 6, which prohibits an individual who has offered or accepted a bribe from holding office, is self-executing and therefore did not require legislative definition to enforce in an election contest).

109 217 Ind. 93, 26 N.E.2d 399 (1940).

110 *Id*. at 114, 26 N.E.2d at 407; *see also* Harris v. Town of Ogden Dunes, 551 N.E. 2d 1147, 1149 (Ind. Ct. App. 1990) (citing to *Warren*).

provision of Article I, section 12 and the right of trial by jury guaranteed by section 20 reflect the "fundamental law of the state, declared by the people themselves acting in their sovereign capacity," and thus such rights must be strictly protected. More specifically, the court held that the right to a jury trial "is self-executing and will be enforced independent of statutory enactment."[111] These cases suggest that as long as a state constitutional right is sufficiently clear and defined and does not expressly mandate legislative action, it should be considered self-executing and enforceable by the judiciary.[112]

In *Bivens*, the United States Supreme Court squarely rejected the separation of powers argument as a limitation on judicial power to enforce federal constitutional rights. Justice Black contended, in a dissenting opinion, that fashioning a cause of action for damages was a usurpation of legislative power that is both unwarranted and unwise: "The task of evaluating the pros and cons of creating judicial remedies for particular wrongs is a matter for Congress and the legislatures of the states."[113] The majority disagreed. Justice Harlan framed the core question as whether the power to authorize damages for the vindication of a constitutional right was placed by the Constitution exclusively in Congress' hands.[114] He explained that, although nothing in the text or the debates directly answered this question, the understanding of the time, which linked rights to remedies, revealed that the right to pursue damages stemmed from the Constitution itself and was inherent in judicial power.[115] Further, he noted that the assessment of damages cannot be inherently legislative because courts have awarded damages

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111 *Warren*, 217 Ind. at 102, 26 N.E.2d at 403; *see also* Knight & Jillson Co. v. Miller, 172 Ind. 27, 36, 87 N.E. 823, 827 (1909) (noting that "[w]hen a constitutional provision or a statute is declarative of the common law, it is self-active").

112 Several state courts have ruled that the judiciary has the power to enforce constitutional rights even in the absence of implementing legislation. *See, e.g.*, Peper v. Princeton Univ. Bd. of Trs., 77 N.J. 55, 77, 389 A.2d 465, 476 (1978) ("[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."); Corum v. Univ. of N.C., 330 N.C. 761, 781–82, 413 S.E.2d 276, 289–90 (1992) (determining that the right of free speech in its constitution is "self-executing" and, because the common law provides a remedy for every wrong, it permits a damage action to adequately redress violation of that right).

113 Bivens v. Six Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 429 (1977) (Black, J., dissenting).

114 *Id*. at 401 (Harlan, J., concurring).

115 *Id*. at 402. He realized the problem of giving the Legislature this authority in light of the judiciary's role "to vindicate social policies which, by virtue of their inclusion in the Constitution, are aimed predominantly at restraining the Government as an instrument of the popular will." *Id*. at 404.

to effectuate congressional policy where statutory rights are involved and because a court's inherent equitable powers were broad enough to include the right to award damages where necessary.[116] Finally, he asserted 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."[117] Similarly, Indiana courts have the inherent power, duty, and capability to make principled choices among traditional judicial remedies, including damages.[118]

The United States Supreme Court has not only rejected separation of powers as an obstacle to a judicial remedy for constitutional wrong-doing, but has also expressed grave concern for legislative action that interferes with the judiciary's inherent power to adjudicate constitutional claims. In *Smith v. Robinson*,[119] it explained that "[e]ven if Congress repealed all statutory remedies for constitutional violations, the power of federal courts to grant the relief necessary to protect against constitutional deprivations or to remedy the wrong done is presumed to be available in cases within their jurisdiction."[120] Further, in *Legal Services Corp. v. Velazquez*,[121] it invalidated a restriction prohibiting legal services attorneys from receiving federal funds if their representation involved an effort to amend or otherwise challenge existing welfare laws. In finding this proscription unconstitutional, Justice Kennedy opined that this restriction on attorney representation impermissibly intruded into the "primary mission of the judiciary," which is to interpret the law and the Constitution.[122] He argued that the restriction "threatens severe impairment of the judicial function because it insulates laws presenting constitutional challenges from judicial inquiry."[123] Justice Kennedy warned that "we must be vigilant when Congress imposes rules and conditions which in effect insulate its own laws from legitimate judicial challenge."[124] The refusal of state courts to hear state

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116 *Id.*

117 *Id.*

118 As noted, Indiana courts have long used injunctions to remedy constitutional violations without enabling legislation, and the issuance of an injunction involves the same sensitive balance of interests as would be required in making a damage award. *See supra* notes 66–70 and accompanying text.

119 468 U.S. 992 (1993).

120 *Id.* at 1012 n.15.

121 531 U.S. 533 (2001).

122 *Id.* at 545.

123 *Id.* at 546.

124 *Id.* at 548.

constitutional claims should similarly be viewed as an abdication of judicial responsibility, not a violation of separation of powers.

A few states have enacted specific remedies for the violation of state constitutional rights,[125] but until the Indiana General Assembly sees fit to do so, the Indiana Supreme Court should exercise its inherent power to ensure that Indiana citizens have a full and complete remedy for constitutional wrongdoing, as guaranteed by Article I, section 12. The majority in *Bivens* flatly rejected the notion that the framers of the Federal Constitution intended to confer power to authorize damages for vindication of constitutional rights exclusively in Congress' hands.[126] To depend on the majority to enact enabling legislation, when the Bill of Rights was specifically designed to limit majority rule, is counter-intuitive.[127] Similarly, the framers of the Indiana Constitution sought a limited government and the protection of core constitutional values.[128] They could not have believed that the redressibility for violation of core values should depend exclusively on the willingness of the General Assembly to adopt a specific cause of action for damages. Indeed, statements made during the Debates of 1850 acknowledged that the Indiana Constitution itself provided the source for judicial authority to act if the General Assembly failed to pass laws allowing suit against the state.[129] Much of the discussion in 1850 focused on holding the state responsible for its contractual obligations.[130] However, if the framers were this concerned about the state's duty to honor its contracts, it is implausible to believe that they would have allowed the state to escape monetary liability for breaches of Indiana's Bill of Rights, the state's fundamental law, simply because the General Assembly had not acted.

B. The Existence of Alternate Remedies

Several state courts have dismissed constitutional damage claims where the plaintiffs already had access to a state contract claim, an

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125 As of 1998, four states had done so: Arkansas, Maine, Nebraska, and South Carolina. *See* Donoghue & Edelstein, *supra* note 84.

126 Bivens v. Six Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 397 (1977) (reasoning that absent an "explicit congressional declaration" that injured persons may not recover damages but must utilize a different "equally effective" congressional remedy, courts may award damages).

127 *Id.* at 407 (Harlan, J., concurring) ("[A]t the very least, it strikes me as no more appropriate to await express congressional authorization of traditional judicial relief with regard to these legal interest than with respect to interests protected by federal statutes.").

128 *See* discussion *supra* Part II.

129 *See* DEBATES, *supra* note 20 and accompanying text.

130 *See infra* Part III.C.

administrative remedial scheme, or a tort action.[131] At least one state court has even ruled that the existence of prospective equitable relief defeats the right to a damage remedy.[132] Some of these courts have relied upon the statements in *Bivens* that a private cause of action may be unavailable where Congress has provided its own "equally effective" remedy.[133] Others have cited to the *Restatement (Second) of Torts, § 874A*, and its commentary, which make the availability of existing remedies an

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[131] *See, e.g.*, Thomas v. Hickel, 947 P.2d 816, 824 (Alaska 1997) (holding that because a private tort action could be maintained for some of the conduct abridging plaintiff's speech, "a direct constitutional remedy would be superfluous"); State v. Haley, 687 P.2d 305, 317–18 (Alaska 1984) (holding that the existence of a contract remedy defeats the claim); Bd. of County Comm'rs of Douglas County v. Sundheim, 926 P.2d 545, 553 (Colo. 1996) (en banc) ("While it may be appropriate to recognize an implied state constitutional cause of action when there is no other adequate remedy, we agree with the approach taken by [Connecticut] that where other adequate remedies exist, no implied remedy is necessary."); Kelley Property Dev., Inc. v. Town of Lebanon, 226 Conn. 314, 338–39, 627 A.2d 909, 922 (1993) (holding that judicial deference to legislative resolution of public policy mandates that courts not imply damage actions when the legislature has provided a reasonably adequate statutory remedy); Jones v. Powell, 462 Mich. 329, 612 N.W.2d 423 (2000) (holding that, because plaintiff could sue for false arrest and imprisonment, assault and battery, intentional infliction of emotional distress, as well as for the deprivation of federal civil rights under § 1983, it would not infer a damage remedy for state constitutional rights); Robertson v. City of High Point, 129 N.C. App. 88, 92, 497 S.E.2d 300, 303 (1998) (holding that, although North Carolina generally recognizes a right of action to sue under its constitution, a takings claim was not actionable because state law provided an adequate remedy by affording compensation for a total or partial taking of real property interests); Shields v. Gerhart, 163 Vt. 219, 237, 658 A.2d 924, 936 (1995) (holding that the existence of an alternative, adequate remedy for invasion of plaintiff's interests under an existing administrative scheme defeats a private action for damages for denial of her operating license); *see also* Jefferson, *supra* note 58, at 1543 (listing cases involving employment disputes and discrimination, contract bidding, licensing and zoning determinations, and dissemination of private information, wherein state courts have refused to recognize a direct cause of action under the state constitution because of the availability of alternative remedies).

[132] *See* 77th Dist. Judge v. Michigan, 175 Mich. App. 681, 438 N.W.2d 333 (1989); *cf.* Moresy v. State *ex rel* Dep't of Wildlife and Fisheries, 567 So. 2d 1081, 1091–93 (La. 1990) ("Recovery of damages is the only realistic remedy for a person deprived of his right to be free from unreasonable searches or seizures. Rarely will he be able to obviate the harm by securing injunctive relief from any court."); Brown v. State, 89 N.Y.2d 172, 192, 674 N.E.2d 1129, 1141 (1996) (arguing that injunctive and declaratory relief are insufficient and that damages may be necessary to deter government misconduct).

[133] Bivens v. Six Named Agents of the Fed. Bureau of Narcotics, 403 U.S. 388, 396 (1977); *see also* Brown v. Ely, 14 P.3d 257, 261 (Alaska 2000) (declining to recognize a private cause of action to vindicate state constitutional rights where the litigant has another remedy, noting that "federal courts have not permitted the *Bivens* remedy where alternative remedies are available").

important factor in deciding whether to recognize an implied damage remedy.[134]

The existence of a tort remedy is most often cited as the basis for denying an implied damage remedy under the state constitution. In *Bivens*, the Supreme Court provided sound reasons for rejecting the notion that a cause of action for vindicating constitutional claims should be refused simply because a tort action may be available. The Court explained that a constitutional tort is different in kind and much more dangerous than a negligence tort: "An 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."[135] Further, the Court reasoned that the protection of constitutional rights should not be tied to the "niceties of local trespass laws."[136]

Many state courts have similarly reasoned that the availability of tort remedies should not, without more, defeat a constitutional claim. The Connecticut Supreme Court, for example, has explained that restricting plaintiffs to common-law remedies would require the court "to ignore the important distinction between the tortious misconduct of one private citizen toward another, on the one hand, and the violation of a citizen's constitutional rights by a police officer, on the other."[137] Courts in New York and Maryland have reached this same conclusion.[138]

Based on this analysis, it should be irrelevant whether a nonconstitutional tort remedy is available under the Indiana Tort Claims Act. First, it is clear that not all constitutional wrongdoing can be

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134 Comments to the Restatement list the following factors to be considered: (1) the adequacy of existing remedies; (2) the degree to which establishing a constitutional tort would alter current tort law; and (3) the nature and purpose of the provision. RESTATEMENT (SECOND) OF TORTS § 874A, cmt. H (1979).

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

136 *Id.* at 394; *see also* Carlson v. Green, 446 U.S. 12, 23 (1980) (holding that plaintiff could sue directly under the Eighth Amendment despite the fact that he had other remedies, including actions under the Federal Tort Claims Act).

137 Binette v. Sabo, 710 A.2d 688, 699 (Conn. 1998).

138 *See* Widgeon v. E. Shore Hosp. Ctr., 300 Md. 520, 533, 479 A.2d 921, 928 (1984) (holding that alternative remedies under the Federal Constitution and Maryland's non-constitutional tort law do not render a constitutional damage claim inappropriate); *Brown*, 89 N.Y.2d at 192–93, 674 N.E.2d at 1140–41 (rejecting the argument that plaintiffs should be limited to common law torts because the duties imposed upon government by the state constitution are far more serious than the private wrongs regulated by the common law and because the existence of a remedy should not depend upon whether the "complaint fits within the framework of a common law tort").

characterized as a tort. Claims that the state is not paying for certain medically necessary abortions[139] or that a township has forced the homeless into religious mission shelters that required them to attend religious services[140] or that local government has refused to pay appointed counsel for services rendered[141] cannot be pigeon-holed into any existing tort, but they nonetheless deserve a remedy. Second, even if some constitutional violations can be crafted as traditionally recognized torts, Indiana's Act provides inadequate protection. It generally does not allow claims against law enforcement officers, who comprise one of the largest groups of defendants charged with constitutional wrongdoing, and it is filled with exceptions, such as broad immunity for the performance of a discretionary function.[142] The Act also includes stringent notice requirements as well as damage caps.[143] The experience in other states is that when constitutional wrongdoing is enforceable only under, or is subject to, the state's tort law, the plaintiff often loses.[144]

Although the Indiana Civil Rights Act provides an avenue for relief in certain cases, it too should not be viewed as a preclusive alternative. The Act allows the Civil Rights Commission to enforce only violations of statutory rights set forth in that Act, not constitutional rights.[145] Finally,

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139 Humphries v. Clinic for Women, 796 N.E.2d 247 (Ind. 2003). See *supra* note 70 for a discussion of this case.

140 Ctr. Twp. Tr. v. Coe, 572 N.E.2d 1350 (Ind. Ct. App. 1991).

141 Sholes v. Sholes, 760 N.E.2d 156 (Ind. 2001).

142 IND. CODE § 34-13-3-3 (2004).

143 IND. CODE §§ 34-13-3-4, 34-13-3-6 (2004). Some states that have recognized state claims have required that constitutional claimants comply with such "notice of claim" requirements in the states' tort claims acts. *See, e.g.*, Lloyd v. Borough of Stone Harbor, 179 N.J. Super. 496, 511, 432 A.2d 572, 580 (1981).

144 *See, e.g.*, Norton v. Hall, 834 A.2d 928, 931 (Me. 2003) (holding that state constitutional claims were barred by the discretionary function immunity provisions of the Maine Tort Claims Act); Lee v. Cline, 384 Md. 245, 266–68, 863 A.2d 297, 311–12 (2004) (holding that state police officers classified as state personnel enjoyed qualified immunity under the tort claims law and thus liability could not be imposed absent proof of malice); Mack v. City of Detroit, 467 Mich. 186, 189, 649 N.W. 2d 47, 49–50 (2002) (holding that even if plaintiff had a constitutional claim against the city for sexual orientation discrimination, because "such a cause of action would contravene the governmental tort liability act," it declined to recognize the cause of action); City of Jackson v. Sutton, 797 So. 2d 977, 980 (Miss. 2001) (holding that the Mississippi Tort Claims Act was the exclusive remedy for filing suit against a government entity for monetary relief and that the Act immunized both defendants from liability, and explaining further that claims outside the Tort Claims Act were limited to declaratory actions and not claims involving money damages); *see also* 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 center of constitutional law.").

145 Indiana Civil Rights Act, IND. CODE § 22-9-1-1 (2004).

the availability of relief under § 1983 for federal constitutional wrongdoing should not defeat the independent significance of state constitutional rights and the need to vindicate deprivation of such rights. Certainly the framers of the Indiana Constitution intended the carefully crafted bill of rights to be supplemental to any rights available and enforceable under the Federal Constitution. Even those courts that have relied on the existence of alternative state remedies to defeat constitutional claims have accepted this notion.[146] More broadly, because state courts have inherent power to create remedies as well as the duty to enforce constitutional protections, they should not abdicate this power simply because the legislature has enacted remedial laws for other types of wrongdoing.[147]

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[146] *See, e.g.*, Katzberg v. Regents of the Univ. of Cal., 105 Cal. Rptr. 2d 586, 594 (Ct. App. 2001) ("We do not understand how a federal remedy serves to vindicate a state constitutional violation.").

[147] Although the existence of alternative remedies should not be viewed as foreclosing recognition of a judicial cause of action, there may be special instances where exhaustion of an administrative remedy may be required. For example, in *Young v. Indiana Department of Natural Resources*, 789 N.E.2d 550 (Ind. Ct. App. 2003), a former employee sued the state Department of Natural Resources ("DNR") alleging that he was terminated in retaliation for exercising his constitutional right to free speech. The court reasoned that the employee's failure to exhaust administrative proceedings specifically created for DNR employees divested the trial court of subject matter jurisdiction over his state constitutional law claims. The court cited to an earlier Indiana Supreme Court decision, *Turner v. City of Evansville*, 740 N.E.2d 860 (Ind. 2001), where the Indiana Supreme Court held that even if a complaint challenged the constitutionality of a statute that might be beyond the agency's power to resolve, "exhaustion may still be required because administrative action may resolve the case on other grounds without confronting broader legal issues." *Id*. at 862 (citations omitted); *see also* Abner v. Dep't of Health of Ind., 777 N.E.2d 778, 785 (Ind. Ct. App. 2002) (holding that judicial review of a complaint against the state seeking to recover unpaid overtime compensation is available only "after exhausting all administrative remedies available within the agency whose action is being challenged and within any other agency authorized to exercise administrative review"), *trans. denied,* 792 N.E.2d 38 (Ind. Feb. 20, 2003).

On the other hand, in *Turner*, the Indiana Supreme Court noted that exhaustion would not be required "where pursuit of administrative remedies would be futile, or where strict compliance would cause irreparable harm, or where the applicable statute is alleged to be void on its face." *Turner*, 740 N.E.2d at 862 n.1. Further, the court earlier ruled that exhaustion of administrative remedies would not be required where the litigant challenges the constitutionality of procedures rather than the denial of an individual claim for benefits. Wilson v. Bd. of Ind. Employment Sec. Div., 270 Ind. 302, 385 N.E.2d 438 (1979), *cert. denied*, 444 U.S. 874 (1979). The court reasoned that the rule requiring exhaustion of administrative remedies "should not be applied mechanistically . . . . In the present case the question presented is of constitutional character. With all due respect, we think that the resolution of such a purely legal issue is beyond the expertise of the Division's administrative channels and is thus a subject more appropriate for judicial consideration." *Id*. at 305, 385 N.E.2d at 441.

C. Sovereign Immunity

Sovereign immunity imposes one of the most difficult obstacles to recognizing a private cause of action against the state. State courts are deeply divided as to whether, and the extent to which, sovereign immunity prohibits damage claims for constitutional wrongdoing. Some states have viewed sovereign immunity as an absolute bar to damage claims,[148] whereas others have ruled that it does not affect constitutional claims.[149] A few state courts have held that plaintiffs cannot avail themselves of the waiver of sovereign immunity in their state tort statutes,[150] whereas others have relied on statutory waiver to impose *respondeat superior* liability for constitutional wrongdoing.[151] Professor

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[148] *See* State Bd. of Educ. v. Drury, 263 Ga. 429, 433–35, 437 S.E.2d 290, 294–95 (1993) ("[U]nless and until there is a waiver of the doctrine of sovereign immunity . . . the judiciary is compelled to hold that the victims of such state rules and regulations have no viable state claim for damages and that they must be relegated to the express remedies which do exist, such as initiation of a declaratory judgment action."); Prager v. State Dep't of Revenue, 271 Kan. 1, 20 P.3d 39 (2001) (holding that sovereign immunity would bar any claim against the State and the Kansas Tort Claims Act did not eliminate immunity for constitutional torts); Ritchie v. Donnelly, 324 Md. 344, 369, 597 A.2d 432, 444 (1991) (holding that, although state officers who violate rights may be sued for damages, the State itself enjoys sovereign immunity); Murphy v. State, 248 Mont. 82, 86, 809 P.2d 16, 19 (1991) (holding that the State did not waive sovereign immunity through the purchase of an insurance policy and thus that no action could exist); Kouba v. State, 687 N.W.2d 466, 471 (N.D. 2004) (holding that no private action exists under the state constitution for asserting this claim against the State); Livengood v. Meece, 477 N.W.2d 183, 190 (N.D. 1991) (holding that sovereign immunity bars state constitutional claims).

[149] *See, e.g.*, Moresi v. State, 567 So. 2d 1081, 1093 (La. 1990) (holding that "damages may be obtained by an individual for injuries or loss caused by a violation" of the state constitution, although affording officers qualified immunity); Smith v. Dep't of Pub. Health, 428 Mich. 540, 639–40, 410 N.W.2d 749, 793–94 (1987) (holding that sovereign immunity "loses its vitality when faced with unconstitutional acts of the state"); Brown v. State, 89 N.Y.2d 172, 195, 674 N.E.2d 1129, 1143 (1996) (concluding that the State had waived its sovereign immunity from all types of tort actions); Corum v. Univ. of N.C., 330 N.C. 761, 785, 413 S.E.2d 276, 291 (1992) (holding that common law sovereign immunity does not bar suit against the state for constitutional wrongdoing).

[150] Garcia v. Reyes, 697 So. 2d 549, 551 (Fla. Ct. App. 1997) (ruling that, although the state has waived its immunity from ordinary torts, it has never waived immunity with regard to constitutional torts); Figueroa v. State, 61 Haw. 369, 380–82, 604 P.2d 1198, 1205–06 (1970) (holding that although the Hawaii State Tort Liability Act waived immunity of the State for the torts of its employees, this included only waiver regarding traditionally recognized common law torts and not "novel liabilities," such as state constitutional violations); *cf.* Bott v. Deland, 922 P.2d 732, 736 (Utah 1996) (holding that statutory immunity does not insulate constitutionally-based damages, nor can an award be subject to the Utah Governmental Immunity Act section imposing caps for personal injury damages against state officials; the court reasoned that it would violate plaintiff's constitutional right to be free of "unnecessary rigor" to reduce the damage award).

[151] *See* DiPino v. Davis, 354 Md. 18, 46–48, 729 A.2d 354, 369–70 (1999) (holding that local government entities have *respondeat superior* liability for civil damages resulting from state

Friesen asserts that state sovereignty has come under heavy attack in state courts and that most states have abolished or severely limited this doctrine.[152] Indeed, she cites the report of the National Association of Attorneys General, asserting that thirty-four states have enacted legislation consenting to "more than minimal" state liability.[153]

Before addressing this question in light of Indiana's history, it should be noted that sovereign immunity, as understood under the common law, restricts only damage actions brought against the state itself. It does not restrict claims brought against cities or counties. The United States Supreme Court has explained that immunity for municipalities has no roots in the English law and, in fact, was specifically rejected by English courts.[154] Political subdivisions were regularly sued for damages in federal and state courts without objection at the time the Indiana Constitution was adopted.[155] Further, in the 1890 decision of *Lincoln County v. Luning*,[156] the Supreme Court announced that the record was "full of suits" against counties without any mention of any type of immunity.[157] Second, sovereign immunity does not foreclose suit against individual state officials. It was this distinction that allowed the Supreme Court in *Bivens* to recognize an implied damage action against

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constitutional violations committed by their agents and employees within the scope of the employment); Lloyd v. Borough of Stone Harbor, 179 N.J. Super. 496, 511, 432 A.2d 572, 580 (Ch. Div. 1981) (holding that state constitutional torts should be brought under and are governed by the New Jersey Tort Claims Act); Smialek v. Begay, 104 N.M. 375, 721 P.2d 1306 (1986) (holding that state constitutional claims are torts subject to the liabilities and immunities set out in the state tort claims act); Begay v. State, 104 N.M. 483, 488, 723 P.2d 252, 257 (Ct. App. 1985), *rev'd on other grounds sub nom.*, Smialek v. Begay, 104 N.M. 375, 721 P.2d 1306 (1986); *Brown*, 89 N.Y.2d at 180, 674 N.E.2d at 1134 (holding that the waiver in state law for claims of breach of contract and torts also permits application of the rule of *respondeat superior* to constitutional wrongdoing).

152 FRIESEN, *supra* note 40, § 8-3(b), at 8–12.

153 *Id.* (citing NAT'L ASS'N OF ATT'YS GEN., SOVEREIGN IMMUNITY: THE TORT LIABILITY OF GOVERNMENT AND ITS OFFICIALS 17 (1979)).

154 Owen v. City of Independence, 445 U.S. 622, 639 (1980).

155 *Id.* at 640 n.19 (listing several early decisions in which damages were imposed against municipalities for federal statutory and constitutional violations as well as for breach of contract); *see also* Rosalie B. Levinson, *Suing Political Subdivisions in Federal Court: From* Edelman *to* Owen, 11 TOL. L. REV. 829, 851 n.126 (1980) (citing additional cases). *But see* Jones v. Powell, 462 Mich. 329, 337, 612 N.W.2d 423, 427 (2000) (ruling that damage claims may not be brought against municipalities or individual government employees because cities may be sued under § 1983 to redress a violation of a federal constitutional right, and suits may be brought against individual defendants both under § 1983 and common-law tort theories, thus eliminating the need for such a remedy).

156 133 U.S. 529 (1890).

157 Although by the late nineteenth century some states began to confer sovereign immunity upon municipalities, this applied only to tortious conduct but not constitutional violations. *See* Levinson, *supra* note 155, at 852–53.

federal officials who violate the Constitution without discussing the doctrine.[158] Further, during the 1850 Debates on the Indiana Constitution, even those who favored greater protection for the state itself recognized that the doctrine did not insulate individual government officials.[159] Third, sovereign immunity has never posed an absolute bar to suing the state in Indiana. As discussed in Part II, courts of equity have long entertained suits seeking to enjoin unconstitutional action.[160]

As to the question of sovereign immunity from damages for the state itself, in *State v. Rendleman*,[161] the Indiana Supreme Court noted that "[s]overeign immunity has long been recognized in Indiana,"[162] but this statement of Indiana's history is woefully incomplete and misleading. The court correctly explained that, prior to the adoption of the 1851 Constitution, it was well recognized that a claim could be brought against the state only if the legislature authorized a particular individual to bring suit.[163] The prevailing practice at the time compelled litigants who had contracted with the state to bring their case before the General Assembly for purposes of securing a statutory enactment allowing suit against the state. The Debates of 1850 reflect two serious concerns with this practice. First, it meant that favoritism was extended to those individuals who had the power or skill to effectively lobby the General Assembly.[164] Second, a core concern was that the General Assembly was

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158 See discussion of *F.D.I.C. v. Meyer*, *supra* note 49.

159 Mr. Rariden urged that liability should be imposed on individuals and not the sovereign: "It is its spokesman and actors [who do wrong]; and it is they that are and ought to be responsible for wrongs inflicted, or rights withheld in its name . . . ." DEBATES, *supra* note 20, at 1282.

160 *See supra* notes 66–70 and accompanying text.

161 603 N.E.2d 1333 (Ind. 1992).

162 *Id*. at 1335; *see also* Boczar v. Kingen, No. IP99-0141-C-T/G, 2000 WL 1137713 (S.D. Ind. 2000) (reasoning that because the framers of the state constitution understood common law sovereign immunity as precluding damage actions, they would not have intended to allow an implied private cause of action against the state); Perkins v. State, 252 Ind. 549, 552, 251 N.E.2d 30, 32 (1969) (asserting that the drafters of the 1851 Constitution implicitly recognized sovereign immunity). Further, the Indiana Supreme Court has specifically rejected the notion that Article I, section 12, which guarantees a remedy by due course of law for injury to persons or property, should be read as an implicit abrogation of sovereign immunity. Dep't of Conservation v. Pulaski Cir. Ct., 231 Ind. 245, 250, 108 N.E.2d 185, 187 (1952); City of Indianapolis v. Indianapolis Water Co., 185 Ind. 277, 290–91, 113 N.E. 369, 373 (1916); State v. Mutual Life Ins. Co., 175 Ind. 59, 71, 93 N.E. 213, 218 (1910).

163 *Rendleman*, 603 N.E.2d at 1335.

164 Mr. Howe proclaimed that "all disputed claims against the State had been subjected to the mercy of the General Assembly . . . ." DEBATES, *supra* note 20, at 1279. He asserted that "[u]nless we adopt a provision of this sort [allowing for suit against the state], we strike at the very root of the right of the citizen to be protected in his property." *Id*. at 1274. Mr.

usurping the judicial role by actually determining the merits of a case because it was acknowledged that whenever such a law was passed, the state was held liable.[165] Mr. Kelso complained that the General Assembly was acting as a "judicial tribunal for the determination of claims against the state"[166] and that "[t]he Legislature in regard to those claims acts in a judicial capacity, although they are not authorized so to act."[167]

The debate culminated in the adoption of Article IV, section 24: "Provision may be made, by general law, for bringing suit against the state; but no special law authorizing such suit to be brought, or making compensation to any person claiming damages against the state, shall ever be passed." The context in which this provision was adopted reveals that the goal was to stop the General Assembly from passing laws on behalf of particular claimants, not to preserve sovereign immunity. To the contrary, the drafters of the constitution referred to sovereign immunity as an "antiquated," "absurd" doctrine that should not survive adoption of the state constitution.[168] The prevailing view was that the sovereign should be accountable for wrongdoing just like anyone else.[169] Mr. Howe asserted:

Kelso explained that the purpose of Article IV, section 24 was to ensure that all individuals who consider themselves aggrieved by the action of the state may have a hearing in a court of justice. *Id*. at 1281.

165 Mr. Holman remarked that there had been "no instance in which a special act of the Legislature has been passed granting to an individual the right to sue the State, in which such individual has not recovered." *Id*. at 1285. Further, he opined that the amount of the judgment against the state was often "much beyond the justice of the claim." *Id*.

166 *Id*. at 1274.

167 *Id*. at 1281.

168 Mr. Howe referred to sovereign immunity as the "antiquated objection" that allowing suit would be "derogatory to the dignity of the state." *Id*. at 1279. He subsequently alluded "to the absurd doctrine that it is derogatory to the dignity of the sovereign to be sued." He stated that in this country "the only sovereign is the people." *Id*. at 1280. Mr. Reed noted that the doctrine was advocated "before the sovereign people themselves" who determined that liability should be the rule. He explained: "The true and safe principle is, that the State should be entitled to the same legal rights, and held to the same mode of determining its legal obligations as individuals." *Id*. at 1283; *see also* Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 YALE L.J. 1, 80 (1998) ("[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.").

169 Mr. Howe argued there was "no just distinction between the sovereign and the subject in respect to the obligation to do justice." DEBATES, *supra* note 20, at 1279. Mr. Kelso explained that the doctrine of sovereignty "furnishes no good nor even plausible reason why the State should not be held in a strict accountability for her contracts and

> [I]f public sentiment has progressed at all since the adoption of our present constitution, it must certainly have progressed so far as to see the necessity of providing for awarding complete justice to individuals in all cases of this kind, without fraud or delay—for of what use or benefit is government, unless it is to carry out to the highest practical point of development, the fundamental principles of protection to life, liberty, and property?[170]

The question was not whether the sovereign should be liable, but rather the best way to address claims brought against the state. Amendments were proposed that would have allowed a board to initially determine such claims with an appeal to the Supreme Court, but, when the framers could not agree on a procedure, they decided to leave it to the General Assembly to work out the details.[171] Although one of the drafters feared the financial consequences of allowing suit against the state for breach of contract, his concern was assuaged by the assurance that the state would be liable only for breaches of future contracts.[172]

In light of this history, it is wrong to imply that the framers intended to disallow suit against the state absent legislative action. This is a particularly fallacious interpretation in light of the clearly voiced concern that liability questions needed to be returned to the courts and taken away from the General Assembly.[173] A recurring theme throughout the debates was the importance of having the judiciary determine legal

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undertakings . . . she may be sued and forced to fulfill such contracts as individuals are compelled to do." *Id*. at 1282.

170 *Id*. at 1279–80.

171 Mr. Howe proposed the creation of a Board of Claims that would adjudicate complaints against the state, followed by an appeal to the Indiana Supreme Court. *Id*. at 1274. When this suggestion was rejected, he conceded: "I am prepared to sanction the principle that the State is sueable [sic] in every Circuit Court in the State, leaving the details as to the bringing and conducting of those suits, to the Legislature. Where the sovereignty commits an injury upon the subject let it be liable for that injury." *Id*. at 1280. Mr. Reed also explained that this section simply directed the General Assembly to decide "in what manner, and in what courts, suits may be brought against the State." *Id.* at 1283.

172 Mr. Borden was concerned that claims by current bondholders would bankrupt the state, but Mr. Graham reassured him that the provision would operate prospectively only. Further, Mr. Howe noted that because jurors understand that their taxes will pay for any judgment, there is less concern that extravagant awards will be assessed against the state. *Id*. at 1281.

173 *Id*. at 1275. Mr. Graham noted that the "object was to place the matter beyond the power of the Legislature, at the same time to give it to the courts of justice . . . . [S]uch matters should be decided by a court, and not by the Legislature."

rights, not only with regard to contract claims but for "all claims," including "outrages" upon the rights of individuals.[174] There was never any notion that the General Assembly would have exclusive power on this subject. Indeed, Mr. Howe, who proposed this provision, clearly stated that "if the Legislature neglects to carry out the details, the Constitution will itself afford the remedy."[175] In explaining the general purposes of the provision, Mr. Holman specifically noted that one was "the recognition of the general principle by which a sovereign State in her sovereign capacity shall become subject to the just claims of the citizens."[176] Thus, rather than codifying a rule of sovereignty, the very purpose of Article IV, section 24 was to bury the ancient doctrine and to ensure that courts, and not the General Assembly, would be adjudicating claims of rights.[177]

The principle that sovereign immunity could be waived by the courts without legislative intervention is reflected in the state's actual history. By the mid-nineteenth century, the judiciary, without any legislative action, had significantly eroded sovereign immunity both with regard to tort actions as well as contract claims.[178] Despite this development, in *Rendleman*, the court held that the right to sue the state for tortious conduct ultimately rests in the General Assembly and that its legislation supersedes any judicial development of the common law.[179] However, in reaching this conclusion, the court explained that "in tort cases, the source of authority or lack thereof to sue the state originally arose from rights at common law, not from rights contained in the constitution."[180] Professor Friesen emphasizes this important distinction in her treatise. Citing to Justice Holmes, she explains that the justification for sovereign immunity is that legal rights depend on the authority that makes the law, but this rationale does not apply to

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174 Mr. Rariden, who was opposed to the provision, opined that "it confers a right of action against the state for all claims." Further, when asked by Mr. Rariden if this would allow the state to be sued for outrages upon the rights of individuals, Mr. Howe responded "Certainly." *Id*. at 1282.

175 *Id*. at 1279.

176 *Id*. at 1285.

177 "This will remove to courts of justice, where they properly belong, numerous claims which cannot be urged through a legislative body without temptation to demoralizing influences." *Id*. at 2043.

178 State v. Rendleman, 603 N.E.2d 1333, 1336 (Ind. 1992). However, note that although the common law permitted suit where a government entity breached a private duty owed to an individual, governmental entities were still immune from claims resulting from a breach of its public duties owed to all. *Id*.

179 *Id*. at 1337. The court relied on this principle to uphold the legislative authority to broaden the scope of sovereign immunity through its Tort Claims Act. *Id*.

180 *Id*.

violations of a constitution because constitutional rights are not created by the government in this same way.[181] The Indiana Constitution has its source in the people, not the General Assembly.[182]

Several state courts have acknowledged that common law sovereign immunity was never intended to encompass constitutional wrongdoing. For example, the Supreme Court of North Carolina has reasoned that "it would . . . be a fanciful gesture to say . . . that citizens have constitutional individual rights that are protected from encroachment actions by the State, while . . . saying that individuals whose constitutional rights have been violated by the State cannot sue because of the doctrine of sovereign immunity."[183] The court determined that although the legislature traditionally decides when the sovereign is liable, the judiciary's responsibility to protect and enforce a state's fundamental law was paramount: "[W]hen there is a clash between these constitutional rights and sovereign immunity, the constitutional rights must prevail."[184] Similarly, the Michigan Supreme Court has ruled that any governmental immunity should not foreclose suits for constitutional wrongdoing because common law sovereign immunity "should, as a matter of public policy, lose its vitality when faced with unconstitutional acts of the state."[185]

Professor Friesen persuasively argues that the "creation of each state's Bill of Rights, of its own force, impliedly waived governmental immunity for injuries to those rights."[186] She explains that "the state's

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[181] FRIESEN, *supra* note 40, § 8-8(a) at 8–49; *see also* Susan Bandes, *Reinventing* Bivens: *The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 343 (1995) (arguing in the context of the Federal Constitution, that "[s]overeign immunity need not, and should not, pose an obstacle to governmental accountability"); Jefferson, *supra* note 58, at 1543 (arguing that "[s]overeign immunity must give way in the face of a constitutional tort claim").

[182] *See supra* note 168.

[183] Corum v. Univ. of N.C., 330 N.C. 761, 786, 413 S.E.2d 276, 291 (1992) (holding that the common law doctrine of sovereign immunity would not bar suit against the state for an unconstitutional discharge in violation of the state free speech provision). Note that although the court did not rule out damages, it remanded for a determination of appropriate remedies, suggesting that monetary damages beyond back pay might intrude on the prerogatives of the other branches of government. *Id*. at 788–89, 413 S.E.2d at 293–94.

[184] *Id.* at 786, 413 S.E.2d at 292.

[185] Smith v. Dep't of Pub. Health, 410 N.W.2d 749, 794 (Mich. 1987) (Boyle, J., concurring in part and dissenting in part); *see also* Ashton v. Brown, 339 Md. 70, 100, 660 A.2d 447, 462 (1995) (reasoning that when government officials violate the state constitution, there must be a remedy to restrain their actions within constitutional bounds).

[186] Specialized immunity for certain legislative, judicial, or prosecutorial functions is beyond the scope of this Article. See, however, FRIESEN, *supra* note 40, at 8–27, discussing these doctrines.

basic charter, which exists to dictate certain boundaries to the government, would be undermined . . . if government officials were permitted to violate constitutional rights without financial consequence."[187] She concedes that this argument is more difficult to make when the state constitution expressly includes sovereign immunity,[188] but, as discussed, this is not the case in Indiana. To the contrary, the framers of the Indiana Constitution viewed sovereign immunity as an "archaic" doctrine that should be jettisoned.[189]

Moreover, even if a few of the framers viewed sovereign immunity as part of the common law that withstood enactment of the Indiana Bill of Rights, they also understood that sovereign immunity was an evolving doctrine subject to change, both through judicial development of the common law and through legislative action. As noted, long before adoption of the Indiana Tort Claims Act, Indiana courts had abolished sovereign immunity with regard to both tort and contract actions.[190] Surely the framers would not have believed that sovereign immunity would continue to bar claims against the state for constitutional wrongdoing while states could be readily sued for mere tortious injury or breaches of contract.[191] Further, it has been clear since at least 1972 that governmental entities and actors in Indiana are not shielded by common law sovereign immunity. In *Campbell v. State*,[192] the court reasoned that there were only three narrow occasions where common law sovereign immunity prevented suits: (1) where a city or state fails to provide adequate police protection to prevent crime; (2) where a state official makes an appointment of an individual whose incompetent performance gives rise to a suit alleging negligence in the making of the appointment; and (3) where judicial decision-making is challenged.[193]

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187 *Id.* at 8–49.

188 *Id.* at 8–25.

189 *See* discussion *supra* notes 168–70 and accompanying text.

190 State v. Rendleman, 603 N.E.2d 1333, 1335 (Ind. 1992).

191 The only clear statement on sovereign immunity that emerges from Indiana law is that punitive damages against the state are impermissible. The Indiana Supreme Court, in *State v. Denny*, 273 Ind. 556, 557, 406 N.E.2d 240, 241–42 (1980), states that "the concept of the State not having a state of mind or not being deterred by punitive damages should be the basis for the prohibition of such punitive damages in *all* cases applicable to the State." *Id.* (emphasis added). The court explained that the provision in the Indiana Tort Claims Act precluding punitive damages "should be considered as a statement of public policy by the legislature that the State is not to be considered as being liable for punitive damages . . . ." *Id.*; *see also* Dep't of Natural Resources v. Evans, 493 N.E.2d 1295, 1303 (Ind. Ct. App. 1986) (holding that punitive damages awarded in a breach of contract action must be reversed).

192 Campbell v. State, 259 Ind. 55, 284 N.E.2d 733 (1972).

193 *Id.* at 62–63, 284 N.E.2d at 737.

The Indiana Supreme Court reaffirmed the *Campbell* principles in the case of *Benton v. Oakland City*.[194] It noted that sovereign immunity will normally not apply and that exceptions to the presumption of liability will be "rare."[195] The Bill of Rights was viewed as the fundamental law of the state—preclusion of damage actions for constitutional wrongdoing appears antithetical to this basic understanding.[196] In short, the doctrine of sovereign immunity should not serve as a bar to bringing state constitutional law claims. The framers of the Indiana Constitution recognized it as an antiquated, absurd doctrine in 1851, and Indiana courts have largely ignored it. The Indiana Supreme Court today should give it no more credence.

IV. CONCLUSION

The Indiana Supreme Court should recognize that claims for damages may be brought for constitutional wrongdoing. The debates, the text of the constitution, and early case precedent all support this conclusion. Indiana should join its sister states who have acknowledged the importance of holding government fully accountable for the deprivation of cherished constitutional guarantees.

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194 Benton v. Oakland City, 721 N.E.2d 224 (Ind. 1999).

195 *Id.* at 230.

196 Note, in the alternative, that even if some legislative action is required to waive sovereign immunity, the Indiana Tort Claims Act ("ITCA") states that it applies to a "claim or suit in tort" without making any distinction as to the types of torts that are acceptable. The ITCA states that it cannot be construed to waive the Eleventh Amendment or any suit in federal court or any suit in a state court beyond the boundaries of Indiana. It does not exempt constitutional actions that sound in tort. IND. CODE § 34-13-3-1 (2004).