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**CLAIMS FOR DAMAGES FOR VIOLATIONS OF
STATE CONSTITUTIONAL RIGHTS – ANALYSIS
OF THE RECENT COURT OF APPEALS
DECISION IN *BROWN V. NEW YORK*; THE
RESOLVED AND UNRESOLVED ISSUES**

Martin A. Schwartz

Professor Barry Latzer:

Our next presentation raises what I believe is called a federal level *Bivens* action issue; that is, can one sue, civilly of course, for damages based on violations of the state constitution? We know that this can be done at the Federal Constitutional level. To what extent can this be done at the state constitutional level?

Our presenter is Professor Martin A. Schwartz, who is a professor here at Touro Law Center. Professor Schwartz is a City College graduate. He received his law degree Magna Cum Laude from Brooklyn Law School and an LL.M. from New York University. He has had an active federal practice, including the honor of arguing three cases before the United States Supreme Court.

He is the author of a semi-monthly column in the New York Law Journal entitled “Public Interest Law” and he has lectured for the Practising Law Institute. He was a member of the New York State Bar Association Committee on State Constitutional Law and he is co-author of a multi-volume treatise on Section 1983 civil rights litigation entitled “Section 1983 Litigation: Claims and Defenses.” Having completed a single-volume treatise, I can well appreciate the monumental effort that goes into multi-volumes. This is the five-volume one, and growing I am sure. Obviously Professor Schwartz has great expertise in civil lawsuits at the federal level. We hope to encourage him to turn even more toward the same type of suits at the state court level. Ladies and gentlemen, please welcome Professor Martin A. Schwartz.

Professor Martin A. Schwartz:

Thank you, Barry. You may not know this, but we are here for an anniversary. It was one year ago almost to the day, November 19, 1996, that the New York State Court of Appeals decided a case of major importance, *Brown v. State of New York*.¹ In *Brown*, the New York Court of Appeals held that individuals may assert claims for compensatory damages for violations of their rights protected by the equal protection² and search and seizure³ guarantees of the New York State Constitution.⁴ The court held that these claims could be asserted against the State of New York in the Court of Claims⁵ and that they invoke *respondeat superior* liability.⁶ Judge Simons wrote the opinion for the court.⁷

The Bill of Rights of the New York State Constitution goes back to 1821.⁸ However, the equal protection and search and seizure clauses did not find their way into the constitution until 1938.⁹ There is another anniversary that we could be celebrating, which is the 150th Anniversary of the New York State Court of

¹ 89 N.Y.2d 172, 674 N.E.2d 1129, 52 N.Y.S.2d 223 (1996).

² N.Y. CONST. art. I, § 11. This section provides in pertinent part: "No person shall be denied the equal protection of the laws of this state or any subdivision thereof." *Id.*

³ N.Y. CONST. art. I, § 12. This section provides in pertinent part: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause" *Id.*

⁴ *Brown*, 89 N.Y.2d at 176, 674 N.E.2d at 1131, 52 N.Y.S.2d at 225.

⁵ *Id.* at 197, 674 N.E.2d at 1144, 52 N.Y.S.2d at 238.

⁶ *Id.* at 195-6, 674 N.E.2d at 1143-44, 52 N.Y.S.2d at 237-38

⁷ On the eve of his retirement, Judge Richard D. Simons wrote the majority opinion. *Id.* at 175, 674 N.E.2d at 1131, 52 N.Y.S.2d at 225. Chief Judge Judith Kaye and Judges Titone, Smith, and Ciparick concurred with Judge Simons. *Id.* at 213, 674 N.E.2d at 1154, 52 N.Y.S.2d at 248. Judge Bellacosa was the lone dissenter. *Id.* at 196, 674 N.E.2d at 1144, 52 N.Y.S.2d at 238. Judge Levine took no part in this decision. *Id.* at 213, 674 N.E.2d at 1154, 52 N.Y.S. 2d at 248.

⁸ PETER J. GALIE, THE NEW YORK STATE CONSTITUTION 34 (1997).

⁹ *Id.* at 56.

Appeals.¹⁰ Yet it was not until last year's decision in the *Brown* case that the New York Court of Appeals had ever dealt with this issue.¹¹ So I think that the *Brown* decision is truly a landmark decision - an opinion of first impression.¹² This is the first time that the Court of Appeals has recognized claims for damages for rights guaranteed by the New York State Constitution.¹³

I think that the issue of remedies for constitutional violations involves a very basic separation of powers question. Is this question of remedies principally a question for a legislative body, or is it principally a question for the judiciary? State courts around the country have differed with respect to this issue.¹⁴

I think that in order to understand the significance of the decision in *Brown* and future issues facing the New York Court of Appeals, it is instructive to go back and look to see how the question of remedies for federal constitutional violations has developed in this country. When individuals claim that their federal constitutional rights have been violated by state or local officials, 42 U.S.C. § 1983 provides the statutory authorization for the claim of relief.¹⁵ This Congressional authorization dates

¹⁰ Evan A. Davis, *New York Court of Appeals Roundup, the 150th Anniversary*, N.Y. L.J., Oct. 9, 1997, at 3. The New York Court of Appeals was established by article XXIV of the New York State Constitution of 1846. See FRANCIS BERGAN, *THE HISTORY OF THE NEW YORK COURT OF APPEALS 1847-1932* (1985). The court consisted of eight Justices, four of whom were elected statewide and four of whom were appointed from the state supreme court. *Id.* at 18-26. The Judiciary Amendment of 1869 reformed the court and in 1870, a new court of seven elected judges began hearing cases. *Id.*

¹¹ *Brown*, 89 N.Y.2d at 196, 674 N.E.2d at 1144, 652 N.Y.S.2d at 238.

¹² *Id.*

¹³ *Id.*

¹⁴ See generally J. FRIESEN, *STATE CONSTITUTIONAL LAW*, § 7-7(a) - 7-7(a)(15) (1996) (discussing decisions from several states that support a private cause of action for violations of state constitutional rights).

¹⁵ See 42 U.S.C. § 1983. Section 1983 provides in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction on thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party

back to 1871, when the original version of Section 1983 was adopted.¹⁶

How about violations of federal constitutional rights by federal officials? When an individual seeks to sue a federal official for a violation of federal constitutional rights, Section 1983 is not available.¹⁷ Section 1983 only covers actions under color of *state* law; of course, federal officials act under color of federal law.¹⁸

Maybe this is just one of those curiosities in the history of American law, but the Congress has never enacted a counterpart statute to Section 1983 that authorizes claims for damages for federal constitutional violations against federal officials.¹⁹ However, in 1971 the United States Supreme Court took the issue into its own hands in its landmark decision in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*.²⁰

injured in an action at law, suit in equity, or other proper proceeding for redress.

Id. See, e.g., *Monroe v. Pape*, 365 U.S. 167 (1961) (holding that officials acting in abuse of their authority who deprive an individual of a constitutional right may be liable under § 1983); *Monell v. New York City Dep't of Social Services*, 436 U.S. 658 (1978) (concluding that local government could be held responsible under § 1983 where its "official policy is responsible for a deprivation of right protected by the constitution"); *Maine v. Thiboutot*, 448 U.S. 1 (1980) (holding that §1983 may be used to vindicate a violation of a federal statutory right).

¹⁶ For a historical background of this statute, see generally M. SCHWARTZ & J. KIRKLIN, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES, §1.3 (3d ed. 1997). 42 U.S.C. § 1983 has its origins in § 1 the Civil Rights Act of 1871, a congressional response to the failure of the states to prevent widespread violence committed by the Klu Klux Klan. *Id.* at § 9. The Act was enacted "for the purpose of enforcing the provisions of the Fourteenth Amendment." *Id.* (quoting *Quern v. Jordan*, 440 U.S. 332, 354 (1979)). See also Marshall S. Shapo, *Constitutional Tort: Monroe v. Pape, and the Frontiers Beyond*, 60 NORTHWEST U. L. REV. 277 (1965).

¹⁷ See Schwartz, *supra* note 16, at § 5.7.

¹⁸ See, e.g., *Wheeldin v. Wheeler*, 373 U.S. 647 (1963).

¹⁹ See Martin A. Schwartz, *Recognizing Damage Suits Under New York Constitution*, N.Y. L.J., Feb. 18, 1997, at 3 (stating that "there is no counterpart to § 1983 that authorizes the assertion of claimed violations of federally protected rights against federal officials and agencies.").

²⁰ 403 U.S. 388 (1971). In *Bivens*, six federal narcotics agents entered into Bivens' apartment without an arrest warrant and arrested him on drug charges

Justice Brennan, writing for the majority, held that individuals have the right to assert claims for damages for violations of their Fourth Amendment²¹ rights against federal officials, who, in this case, were federal law-enforcement officials.²² The *Bivens* claim was implied from the Constitution itself, the Fourth Amendment. In reaching his conclusion, Justice Brennan said “[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty.”²³

Justice Harlan wrote a very influential concurring opinion.²⁴ He stressed the point that people like *Bivens*, who claim that federal law-enforcement agents engaged in conduct that violated their Fourth Amendment protections, do not have a remedy against the federal government because the federal government is protected by sovereign immunity.²⁵ Typically, they can not seek prospective relief; they do not have standing to get an injunction because these are typically “one-shot” wrongs and they are unable to show sufficient probability of its happening again.²⁶ So, Justice Harlan said, “for people in *Bivens*’ shoes, it is damages or nothing.”²⁷ It is either this monetary remedy or we have to say “too bad - the law simply does not give you a remedy.”

without probable cause. *Id.* at 389. After handcuffing him in front of his wife and children and threatening to arrest his entire family, the federal agents searched his entire apartment. *Id.* Thereafter, *Bivens* was booked, interrogated and subjected to a strip search. *Id.* Eventually, all charges against him were dropped and he sued the federal agents in federal district court seeking damages for violations of his constitutional rights, claiming that he suffered “great humiliation, embarrassment, and mental suffering as a result of the agents’ unlawful conduct.” *Id.* at 389-90.

²¹ U.S. CONST. amend. IV. The Fourth Amendment provides in pertinent part: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. .

. . .” *Id.*

²² *Bivens*, 403 U.S. at 397.

²³ *Id.* at 395.

²⁴ *Id.* at 398 (Harlan, J., concurring).

²⁵ *Id.* at 410 (Harlan, J., concurring).

²⁶ *Id.*

²⁷ *Id.*

How has the *Bivens* doctrine developed?²⁸ In *Davis v. Passman*,²⁹ the Court extended the *Bivens* doctrine to a gender discrimination claim under the Due Process Clause of the Fifth Amendment.³⁰ The plaintiff in the case was a woman named Shirley Davis who worked as a legislative assistant to Congressman Otto E. Passman.³¹ Congressman Passman said something that I am sure he has regretted ever since. He said something like "this is a job for a man."³² The next sentence was probably "you are fired." I am not sure that this actually happened, but maybe her reply was "see you in court." The United States Supreme Court held that she had the right to assert her claim for damages.³³ This is under the Due Process Clause of the Fifth Amendment.

The next year, in a case called *Carlson v. Green*,³⁴ the Court held that a prisoner had the right to assert a claim for damages for an alleged violation of the Cruel and Unusual Punishment Clause of the Eighth Amendment.³⁵ When this decision came

²⁸ See Schwartz, *supra* note 16, at §1.4 (providing a discussion of the *Bivens* doctrine).

²⁹ 442 U.S. 228 (1979).

³⁰ *Id.* at 248.

³¹ *Id.* at 230. Shirley Davis instituted a lawsuit against her employer, United States Congressman Otto E. Passman, for damages on the basis of gender discrimination in violation of the Fifth Amendment. *Id.*

³² *Id.* at 230 n. 3. In a letter that Congressman Passman sent to Shirley Davis he stated "You are able, energetic and a very hard worker. . . . [h]owever, on account of the unusually heavy work load in my Washington Office, and the diversity of the job, I concluded that it was essential that the understudy to my Administrative Assistant be a man." *Id.*

³³ *Id.* at 242 (reasoning that victims of constitutional violations such as plaintiff "have no effective means other than the judiciary to enforce these rights, [and] must be able to invoke the existing jurisdiction of the courts.").

³⁴ 446 U.S. 14 (1980). In *Carlson*, a prisoner's mother brought suit on behalf of her son's estate, alleging that federal prison officials were responsible for the death of her son because they violated their constitutional duty to provide him with proper medical care after he suffered an asthma attack. *Id.* at 16.

³⁵ *Id.* at 18-19 (approving a *Bivens* remedy against federal prison official charged with due process and eighth amendment violations). See U.S. CONST. amend. VIII. The Eighth Amendment provides: "Excessive bail shall not be

down, it was seen as especially important because, unlike *Bivens* and *Davis* where the plaintiff had no other remedy, in this case the United States Supreme Court recognized the claim for damages even though the prisoner had an alternative remedy, namely a remedy under the federal Tort Claims Act.³⁶ A closely divided Supreme Court said that the availability of this alternative federal statutory remedy did not negate the federal constitutional remedy.³⁷

However, after recognizing *Bivens* claims in these first three cases, *Bivens*, *Davis* and *Carlson*, the Supreme Court dramatically changed course and rejected the *Bivens* claim in the last five cases that raised the issue.³⁸ In some of these cases, the claim for damages under the Federal Constitution was rejected because Congress had enacted some alternative federal statutory remedy.³⁹ In other cases the *Bivens* remedy was rejected even when there was no alternative remedy, because the Supreme Court found "special circumstances" justifying denial of the remedy.⁴⁰ Two of the cases that used this doctrine were cases in

required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." *Id.*

³⁶ 28 U.S.C. § 2671 *et seq.* (1994).

³⁷ *Carlson*, 446 U.S. at 19-20. In *Carlson*, the Court recognized the *Bivens* claim despite the available remedy of the Federal Torts Claim Act. *Id.* The Court rejected the assertion that the Federal Torts Claim Act preempted an implied damages remedy, reasoning that legislation may defeat a *Bivens* claim only if Congress provided "an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective." *Id.*

³⁸ *FDIC v. Meyer*, 510 U.S. 471 (1994); *Schweiker v. Chilicky*, 487 U.S. 412 (1988); *United States v. Stanley*, 483 U.S. 669 (1987); *Bush v. Lucas*, 462 U.S. 296 (1983); *Chappell v. Wallace*, 462 U.S. 296 (1983).

³⁹ See *Schweiker*, 487 U.S. at 420 (refusing to permit an action for damages under the Due Process Clause related to improper denial of entitlement to Social Security disability benefits, in light of comprehensive administrative scheme established by Congress for correction of errors in Social Security Administration); *Bush*, 462 U.S. at 390 (finding that Congress' provision of an alternative remedy may expressly or implicitly foreclose the courts' exercise of power).

⁴⁰ See *Stanley*, 483 U.S. at 683-4 (holding that a *Bivens* remedy was not available, even against civilian government personnel, when the alleged

which the claim for damages grew out of military operations.⁴¹ In *FDIC v. Meyer*,⁴² the Court held that the *Bivens* damage remedy may be asserted only against a federal official in the official's personal capacity.⁴³ It is not a claim, the Court held, that may be asserted against the federal government or a federal agency.⁴⁴ This is so even where, as in a case like *FDIC v. Meyer*, Congress has waived the sovereign immunity of the particular federal agency.⁴⁵

If one stops for a moment and looks at this whole picture of how the *Bivens* doctrine started and where it is today, I think that it would not be unreasonable to suggest that the United States Supreme Court has shifted its philosophy. It originally took the position that the *Bivens* doctrine is a presumptively available remedy. However, today the Supreme Court seems to take the position that the *Bivens* remedy is a presumptively unavailable remedy.⁴⁶ I think this is very significant in terms of how the United States Supreme Court looks at this issue. I think it shifted from viewing the issue of remedies for constitutional violations from an issue of primary concern of the federal judiciary, to its present position, which seems to view it as principally a question of legislative policy and of legislative judgment for the Congress.⁴⁷

It is against this background of Section 1983 and the start and cutbacks of the *Bivens* remedy that the New York Court of Appeals decided *Brown v. State of New York*.⁴⁸ As previously stated, the court held that the plaintiffs did have the right to seek

injuries were incident to military service); *Chappell*, 462 U.S. at 305 (holding that in discrimination suits, the unique disciplinary structure of the military and Congress' activity in that field constitute special factors that prevent enlisted personnel from seeking damages against superior officers for constitutional violations).

⁴¹ See *supra* note 40

⁴² 510 U.S. 471 (1994).

⁴³ *Id.* at 486.

⁴⁴ *Id.*

⁴⁵ *Id.* at 483.

⁴⁶ *Id.* at 485.

⁴⁷ *Id.* at 486.

⁴⁸ 89 N.Y.2d 172, 674 N.E.2d 1129, 652 N.Y.S.2d 223 (1996).

damages in the Court of Claims for violations of their equal protection and search and seizure rights under the New York State Constitution.⁴⁹

The facts underlying the case were fairly well publicized. The case grew out of an investigation of an attack on an elderly woman in upstate New York - Oneonta, New York.⁵⁰ The complaint alleged that the police stopped and interrogated "nonwhite" males who were found in the City of Oneonta.⁵¹ The investigated residents brought the case as a class action in the New York Court of Claims.⁵² In holding that the plaintiffs had the right to seek damages for the alleged state constitutional violations, the New York Court of Appeals relied very heavily upon the *Bivens* decision, as well as upon those state court decisions that have recognized claims for damages under various Bill of Rights provisions of their state constitutions.⁵³

Again, this is an issue on which there has been sharp disagreement among the state courts around the country. I think that the basic theme of the New York Court of Appeals decision in *Brown* is that State constitutional rights that can be violated by state officials without remedial consequences are not meaningful rights. And looking at it from the opposite perspective, I think the court is saying that, by contrast, when the government recognizes a claim for damages for violations of a constitutionally protected right, the government puts its coercive power behind that right. And the government, through the New York Court of

⁴⁹ *Id.* at 188, 674 N.E.2d at 1138-39, 652 N.Y.S.2d at 232-33. N.Y. CONST. art I, § 11 (stating in pertinent part that "No person shall be denied the equal protection of the laws of this state or any subdivision thereof."); N.Y. CONST. art. I, § 12 (stating in pertinent part that "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause. . . .").

⁵⁰ *Brown*, 89 N.Y.2d at 176, 674 N.E.2d at 1131, 652 N.Y.S.2d at 225.

⁵¹ *Id.* at 174-75, 674 N.E.2d at 1131, 652 N.Y.S.2d at 225.

⁵² *Id.*

⁵³ *Id.* at 195, 674 N.E.2d at 1143, 652 N.Y.S.2d at 237 (stating that in *Brown*, as distinguished from *Bivens*, the state waived its immunity for the actions of the state's officers and employees).

Appeals, is announcing to the public that compliance regarding these constitutional rights is expected.

In addition, the court found that the damages remedy for violations of equal protection and search and seizure rights was the most effective way to deter police misconduct.⁵⁴ I read that to mean that now that the New York Court of Appeals has recognized claims for damages for violations of search and seizure and equal protection rights, a message is sent to law enforcement officers in the State of New York. "You are expected to comply with the equal protection and search and seizure guarantees of the New York State Constitution."

Using the analogy to the *Bivens* case, the Court of Appeals picked up on the point that, for individuals like Mr. Bivens and the plaintiffs in *Brown*, who do not have an available remedy for prospective relief, it is damages or nothing.⁵⁵ In concluding that the plaintiffs could seek damages in the Court of Claims, the New York Court of Appeals found that the New York Court of Claims Act⁵⁶, which contains a waiver of New York State's sovereign immunity, should be interpreted to waive the state's sovereign immunity for state constitutional violations.⁵⁷ The courts found no way to meaningfully distinguish state constitutional torts from common law torts in interpreting this sovereign immunity waiver.

What is the breadth of this waiver of sovereign immunity? What is the extent of it? The waiver of sovereign immunity is not only a waiver with respect to state government. It is also a waiver of sovereign immunity with respect to municipal government, so that municipalities are now subject to the *Brown*

⁵⁴ *Id.* at 194-95, 674 N.E.2d at 1142-43, 652 N.Y.S.2d 236-37.

⁵⁵ *Id.* at 192, 674 N.E.2d 1141, 652 N.Y.S.2d at 235.

⁵⁶ Court Claims Act § (9)(2). This section of the Court of Claims Act gives the Court of Claims jurisdiction:

[t]o hear and determine any claim of any person, corporation or municipality against the state for the appropriation of any real or personal property or any interest therein, for the breach of contract, express or implied, for the torts of its officers or employees while acting as such officers or employees

Id.

⁵⁷ *Brown*, 89 N.Y.2d at 194, 674 N.E.2d at 1142, 652 N.Y.S.2d at 237.

remedy.⁵⁸ Let me point out that there is a big difference in New York between suing the State of New York and suing a municipality. A suit against the State of New York must be brought in the New York Court of Claims, where there is no right to trial by jury. On the other hand, a suit against a municipality must be brought in the New York Supreme Court where there is a right to trial by jury.

This waiver of sovereign immunity is a waiver of immunity for compensatory damages.⁵⁹ It does not waive the state or municipal government's sovereign immunity for punitive damages. On the other hand, the waiver of sovereign immunity contemplates *respondeat superior* liability.⁶⁰ What we are talking about is liability imposed against the state, or liability imposed against municipal government, based upon acts of state and local employees that violate either the equal protection or search and seizure provisions of the New York State Constitution.⁶¹

The New York Court of Appeals in *Brown* believed that this was sound policy.⁶² For one thing, imposition of liability upon state or local government on the basis of *respondeat superior* will, one would hope, lead to better trained and better supervised law enforcement officers.⁶³ The New York Court of Appeals rejected the rationale of the United States Supreme Court in *FDIC v. Meyer*, which said that the *Bivens* claim could not be brought against the government itself.⁶⁴ In *Meyer* it was the federal government. The *Brown* Court held that the state constitutional claims do lie against the state and local government.⁶⁵

The decision in *Brown* is analogous to *Bivens* in the sense that each case represents a starting point in the development of the law. In some ways that is very exciting. Of course, starting

⁵⁸ *Id.* at 195, 674 N.E.2d at 1143, 652 N.Y.S.2d at 237.

⁵⁹ *Id.* at 194, 674 N.E.2d at 1142, 652 N.Y.S.2d at 236.

⁶⁰ *Id.* at 193, 674 N.E.2d at 1142, 652 N.Y.S.2d at 236.

⁶¹ *Id.* at 194, 674 N.E.2d at 1142-43, 652 N.Y.S.2d at 236-37.

⁶² *Id.*

⁶³ *Id.* at 194-95, 674 N.E.2d at 1142-43, 652 N.Y.S.2d at 236-37.

⁶⁴ *FDIC v. Meyer*, 510 U.S. 471, 485 (1994).

⁶⁵ *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 392 (1971).

points often raise troubling and unresolved questions. Think back to the *Bivens* case. In *Bivens*, the United States Supreme Court established the basic right of an individual to sue a federal law enforcement officer for monetary damages for violations of Fourth Amendment rights,⁶⁶ but it generated a host of unresolved questions.

Let me just mention some of them. *Bivens* was a violation of Fourth Amendment rights. How about other constitutionally protected rights? How about free speech,⁶⁷ freedom of religion,⁶⁸ due process,⁶⁹ equal protection⁷⁰ and so forth. Secondly, should the *Bivens* claim for damages be recognized even though Congress has perhaps created some type of alternative remedy that gives the plaintiff an avenue of relief? What about *respondeat superior*? We recognize the *Bivens* claim for relief, but should the government be liable for the constitutional wrongs of its employees? How about the statute of limitations? All the procedural details have to be filled in. One could go on down the line.⁷¹ What type of pleading requirements exist under *Bivens*?

⁶⁶ *Id.* at 394-95.

⁶⁷ U.S. CONST. amend. I. The Free Speech Clause states in pertinent part: "Congress shall make no law . . . abridging the freedom of speech" *Id.*

⁶⁸ U.S. CONST. amend. I. The Free Exercise Clause states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" *Id.*

⁶⁹ U.S. CONST. amend. XIV. The Due Process Clause of the Fourteenth Amendment provides in pertinent part: "No state shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States." *Id.*

⁷⁰ U.S. CONST. amend. XIV. The Equal Protection Clause of the Fourteenth Amendment provides in pertinent part: "nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any persons within its jurisdiction of equal protection of the law." *Id.*

⁷¹ See Martin A. Schwartz, *Recognizing Damage Suits Under New York Constitution*, N.Y. L.J., Feb. 18, 1997, at 3. This article discusses significant new issues, such as whether claims for relief would be recognized under other federal constitutional provisions; whether *Bivens* claims could be asserted even though alternative avenues of relief were available; whether *Bivens* liability could be based on respondent superior; what is the governing limitations period;

Very significantly, how about the immunities of the officials who are sued for *Bivens* violations?⁷²

Like *Bivens*, *Brown* is a starting point. It is a starting point, but it raises a host of unsettled questions. In *Brown*, we have the New York Court of Appeals recognizing a claim for damages for search and seizure and equal protection violations of the State Constitution. But how about the other rights in the New York State Constitution? The New York Court of Appeals in *Brown* very carefully limited its decision to the particular rights that were before the court.⁷³ The Court of Appeals did say that it would only allow a claim for damages for violations of rights protected by the State Constitution where the state constitutional provision at issue is “self-executing.”⁷⁴ What does that mean? What do we mean by “self-executing?” Well, from the research that I did, I think it means a provision of the Federal Constitution that does not require any implementing legislation by the New York State Legislature. But, at the same time, the Court of Appeals in *Brown* said that New York State constitutional rights are presumed to be “self-executing.”⁷⁵ I think that there is going to be a lot of litigation down the road regarding provisions of the New York State Constitution - which are “self-executing” and which are not?

I do not think that there is going to be a meaningful way to distinguish the equal protection and search and seizure provisions that were at issue in *Brown*⁷⁶ from other types of positive New York State constitutional rights that have counterparts in the Federal Constitution. For example, take the free speech⁷⁷ or

whether *Bivens* claims could be asserted against federal agencies;
what immunities may be asserted by *Bivens* defendants?

Id.

⁷² *Id.*

⁷³ *Brown*, 89 N.Y.2d at 196, 674 N.E.2d at 1144, 652 N.Y.S.2d at 238.

⁷⁴ *Brown*, 89 N.Y.2d at 186, 674 N.E.2d at 1137, 652 N.Y.S.2d at 231.

⁷⁵ *Id.* (stating that “[i]n New York, constitutional provisions are presumptively self-executing.”).

⁷⁶ See *supra* note 49 and accompanying text.

⁷⁷ N.Y. CONST. art. I, § 8. This section provides in pertinent part: “Every citizen may freely speak, write, and publish his sentiments on all subjects . . .

freedom of religion⁷⁸ provisions of the New York State Constitution. It seems to me that these claims would be very strong candidates for the *Brown* damages remedy. We should, by analogy, look to how the *Bivens* doctrine developed. Remember, the United States Supreme Court in *Bivens* did not focus on the nature of the particular federal constitutional provision that was at issue. It did not say that this case was different because it raised, for example, a Due Process issue, as opposed to a Fourth Amendment or an Eighth Amendment issue.

I think that the critical factor for the United States Supreme Court in the *Bivens* line of cases has been what the Congress has done. What has the legislative body done? Would the Supreme Court's recognition of a new *Bivens* claim for damages somehow interfere with, or interrelate with, the Congressional remedy?

There are other provisions of the New York State Constitution that do not have counterparts in the Federal Constitution. In state constitutional jargon, we call these provisions "unique provisions."

For example, New York is one of the relatively few states that has a provision in the state constitution placing a mandatory obligation upon the state to provide assistance to the needy.⁷⁹ In New York, that provision is Article XVII of the New York Constitution,⁸⁰ which has been the subject of many decisions of the New York Court of Appeals attempting to define the extent of this obligation.⁸¹ For present purposes, the important question is

and no law shall be passed to restrain or abridge the liberty of speech or of the press." *Id.*

⁷⁸ N.Y. CONST. art. I. § 3. This section provides in pertinent part: "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind . . ." *Id.*

⁷⁹ See ROBERT. F. WILLIAMS, STATE CONSTITUTIONAL LAW, CASES AND MATERIALS 470 (2d ed. 1993).

⁸⁰ N.Y. CONST. art. XVII, § 1. This section provides in pertinent part: "The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine." *Id.*

⁸¹ See, e.g., *Tucker v. Toia*, 43 N.Y.2d 1, 371 N.E.2d 449, 400 N.Y.S.2d 728 (1977). See also *Bernstein v. Toia*, 43 N.Y.2d 437, 373 N.E.2d 238, 402

whether this part of the New York State Constitution is one of those “self-executing” provisions? Only if it is “self-executing,” will an individual be able to go into a New York State court and say “You violated my Article XVII right to protect me as a needy person, to give me assistance as a needy person, and now I am seeking money damages.”

This is an arguable point because the language in Article XVII, on the one hand, provides that aid to the needy “shall be provided by the state, and its subdivisions.” But then there is a proviso which says “in such manner and by such means as the legislature may from time to time determine.” I think that because of this proviso there is at least an arguable point that this is not a “self-executing” provision; I don’t think it is clear cut either way. Despite the proviso, maybe the basic right to assistance under Article XVII is self-executing. We are going to have to see about that. So that is one of the open issues.

Another very important issue is whether there are any immunities that the state or municipality might be able to claim. This is a tricky issue because the Court of Appeals in *Brown* said that the Court of Claims waived the state’s sovereign immunity.⁸² But at the same time both the majority⁸³ and the dissenting opinion in *Brown*⁸⁴ acknowledged that the New York Court of Appeals decisional law provides an immunity for quasi-judicial and discretionary action by state and municipal officials in the State of New York.⁸⁵ I think one of the open questions is - how does this immunity apply to claims for damages under the *Brown* decision? It seems to me that if you read this immunity in an expansive way, it has the real potential for eviscerating a good part of the *Brown* remedy.

Another major issue left open pertains to damages under *Brown* against the state or municipal official in the official's personal

N.Y.S.2d 342 (1977); *Wilkie v. O'Connor*, 261 A.D.2d 373, 25 N.Y.S.2d 617 (4th Dep’t 1941).

⁸² *Brown*, 89 N.Y.2d at 172, 674 N.E.2d at 1129, 652 N.Y.S.2d at 233.

⁸³ *Id.*

⁸⁴ *Id.* at 197, 674 N.E.2d at 1144, 652 N.Y.S.2d at 238 (Bellacosa. J., dissenting).

⁸⁵ *Id.*

capacity. Remember that *Brown* recognized the claim against state and local government.⁸⁶ But again, how about the personal capacity claim? I think that this could be a very big issue when you consider that punitive damages are not within the Court of Claims' waiver of sovereign immunity. So the plaintiff who is seeking money damages might say "I can't get punitive damages against the state or local government because that is not encompassed within the waiver of sovereign immunity; maybe I can get punitive damages in a suit against the official who engaged in the particular wrongdoing in that official's personal capacity."

I think that it is very interesting that the law in the State of New York starts in the exact opposite way that the *Bivens* doctrine started in the United States Supreme Court. What do I mean by that? In *Bivens*, the Court recognized the claim for damages against the federal official in the official's personal capacity.⁸⁷ But there was a big issue that was left open. How about the claim for damages against the federal agency that employed that official?⁸⁸ Remember, that remedy was ultimately denied in *FDIC v. Meyer*. The *Brown* decision starts from the completely opposite starting point.⁸⁹ The *Brown* decision recognizes the claim for damages against the State of New York,⁹⁰ but leaves open the claim for damages against the particular official.⁹¹

I think that there is going to be exciting litigation over the next ten or twenty years. It is going to be fascinating to watch how the *Brown* doctrine develops. If we take lessons from *Bivens* decisional law, it may be critical for whoever sits on the New York Court of Appeals over the next ten or twenty years, whether the damage remedy for state constitutional violations is regarded, as Justice Brennan did in *Bivens*, as an ordinary remedy that is principally the function of the judiciary to administer. Or will the

⁸⁶ *Brown*, 89 N.Y.2d at 172, 674 N.E.2d at 1129, 652 N.Y.S.2d at 233.

⁸⁷ *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 392 (1971).

⁸⁸ *Id.*

⁸⁹ *Brown*, 89 N.Y.2d at 172, 674 N.E.2d at 1129, 652 N.Y.S.2d at 233.

⁹⁰ *Id.*

⁹¹ *Id.*

remedy be viewed as primarily a question for the legislature to resolve as a matter of policy? When you put the issue that way, it might not only be a question of judicial philosophy with respect to remedies for constitutional violations. It might also be a question of how the New York State Legislature reacts to the decision in *Brown*, if it reacts at all.

Despite the numerous unresolved issues, *Brown* is a vital precedent. It is New York's counterpart to Section 1983 and *Bivens*, filling a very significant remedial vacuum. It "adds teeth" to state constitutional violations and, in so doing, it furthers the rule of law and thus makes the law meaningful. Thank you very much.

Professor Latzer:

Thank you, Professor Schwartz. I want to thank all of our speakers for their thought-provoking presentations.

