The Minnesota Constitution as a Sword: The Evolving Private Cause of Action

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ARTICLES

THE MINNESOTA CONSTITUTION AS A SWORD: THE EVOLVING PRIVATE CAUSE OF ACTION

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I. INTRODUCTION

When is a civil remedy available to a person injured through a violation of the Minnesota Constitution? The answer must be found in a small and often contradictory body of Minnesota case law. To date, the great majority of cases that have involved the Minnesota Constitution arose when litigants raised the Minnesota Constitution as a “shield”—that is, as a device to thwart the

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enforcement of a state or local statute, ordinance, or regulation.\textsuperscript{1} For this reason, the Minnesota Supreme Court and Minnesota Court of Appeals have rarely addressed the circumstances in which private plaintiffs can use their rights granted under the Minnesota Constitution "as a sword"—that is, as an independent basis for seeking compensation, an injunction, or other relief.

While Minnesota appellate courts have taken for granted the availability of a private right of action to enforce the Minnesota Constitution, those courts have never articulated why such a cause of action is available. Without the foundation of a clear underlying philosophy, the logical limits of such a cause of action must remain uncertain. And until those limits are better defined, the availability of a private right of action to assert every state constitutional right remains in doubt.\textsuperscript{2}

Even where a cause of action exists, immunities or defenses can preclude or limit the availability of relief. Minnesota courts have compounded the predicament of the "sword-wielder" by failing to adopt a consistent approach to the definition of the immunities available to governmental entities and their officials for liability arising from violations of the Minnesota Constitution. Instead, every time the Minnesota Supreme Court has faced the question, it has resolved it as if faced with a question of first impression, and in each case has adopted a different approach.\textsuperscript{3}

When the Minnesota Supreme Court most recently approached the issue, the result accorded little or no weight to the value of protecting governments from liability in cases involving the exercise of discretion or novel constitutional theories.\textsuperscript{4} Meanwhile, the Minnesota Court of Appeals staked out a position near the other extreme and resurrected the doctrine of sovereign immunity to protect the State of Minnesota from liability

\textsuperscript{1} See State v. French, 460 N.W.2d 2, 11 (Minn. 1990) (applying the freedom of conscience clause invoked by respondent in administrative proceeding under Minnesota Human Rights Act); State v. Hamm, 423 N.W.2d 379, 386 (Minn. 1988) (finding a right to 12-person jury in misdemeanor cases in criminal proceeding); see also Kleeman v. Cadwell, 414 N.W.2d 433, 437 (Minn. Ct. App. 1987) (challenging enforcement of Tort Reform Act provision by invoking Due Process Clause of art. I, § 7).

\textsuperscript{2} See infra part II.

\textsuperscript{3} See infra part III.

\textsuperscript{4} Wegner v. Milwaukee Mut. Ins. Co., 479 N.W.2d 38, 42 (Minn. 1991) (reversing the court of appeals holding that the "taking" of private property was noncompensable under the doctrine of public necessity).
PRIVATE CAUSES OF ACTION

for damages due to state constitutional violations.\(^5\) Nevertheless, despite the absence of either definition or direction, the use of the Minnesota Constitution to assert a private cause of action remains a viable, workable option.

II. Is a Private Cause of Action Available to Enforce a Minnesota Constitutional Right?

The opening step in any serious evaluation of remedies for violations of the United States Constitution must begin with the United States Supreme Court's rediscovery of 42 U.S.C. § 1983\(^6\) in *Monroe v. Pape*.\(^7\) Section 1983 provides a statutory private cause of action that allows a plaintiff to seek damages and other relief for violations of the United States Constitution and certain federal statutory rights.\(^8\) Minnesota, however, has never adopted its own equivalent of § 1983 to remedy violations of its own constitution. Unless § 1983 was unnecessary for the assertion of a private cause of action under the U.S. Constitution in the first place, one might wonder whether the Minnesota Legislature's failure to act leaves victims of state constitutional violations without a civil remedy. Without addressing either the necessity, if any, of a state legislative equivalent or the doctrinal foundation,


\(^6\) 42 U.S.C. § 1983 (1993) (providing that a party who deprives another of rights or privileges secured by the Constitution and other laws shall be liable to the injured party in law and in equity).

\(^7\) 365 U.S. 167, 171 (1961). Section 1983 is the revised version of § 1 of the Ku Klux Act of 1871, which itself was derived in part from language in § 2 of the Civil Rights Act of 1866. It provides in relevant 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 thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable in an action at law, suit in equity, or other proper proceeding for redress.


\(^8\) In the words of the United States Supreme Court, "Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation . . . ." *Mitchum v. Foster*, 407 U.S. 225, 239 (1972).

if any, for recognizing a private right of action, the Minnesota Supreme Court and Minnesota Court of Appeals have assumed that plaintiffs may bring a private action to enforce the Minnesota Constitution.

Should the Minnesota courts ever feel compelled to seek out a rationale for recognizing a private cause of action by judicial fiat, decisions of other states readily provide them with various rationales. In other states, appellate courts considering the issue have generally recognized a private cause of action to enforce state constitutional rights. However, the rationales given for the recognition of a private right of action in this context suggest that not every state constitutional provision will be enforced in this manner.

A. Minnesota Law: The Unexplained Presumption that Civil Remedies Must Exist

1. A Foregone Conclusion

One of the first efforts to use the Minnesota Constitution as a sword involved a case that, in the Minnesota Supreme Court’s words, “reads like a sequel to Steinbeck’s The Grapes of Wrath.” Those facts alone may explain why the supreme court did not


11. Thiede, 217 Minn. at 219, 14 N.W.2d at 402 (referring to JOHN STEINBECK, THE GRAPES OF WRATH, (1939)).
engage in an extended analysis of whether the Minnesota Constitution could be enforced in a civil action. The plaintiffs in *Thiede v. Town of Scandia Valley*\(^{12}\) were forcibly removed from their home in sub-zero weather by town officials who sought to relieve the town's burden of supporting the family.\(^{13}\) Although the removal was authorized by state law, the Minnesota Supreme Court held that the eviction violated the plaintiffs' right under the Minnesota Constitution not to be forcibly removed while occupying their own freehold.\(^{14}\) The court then held the individual officials personally liable.\(^{15}\)

The *Thiede* decision did not usher in a new era in state constitutional litigation in Minnesota. Indeed, in later decisions the Minnesota Supreme Court has cited only to its interpretation of the Constitution and paid no attention to the analysis of the civil remedies available for state constitutional violations.\(^{16}\) The decision's ignominy may be due to the uncertain basis for its holding. Because the *Thiede* plaintiffs were victims of both a constitutional violation and the intentional torts of trespass and assault, for which a civil remedy was available as a matter of common law,\(^{17}\) the case did not squarely present the question of whether damages are available *solely* for state constitutional violations. The decision does not make clear whether damages would have been available in the absence of any tort.

Nearly one half-century later, the Minnesota Supreme Court again upheld an award for a violation of the Minnesota Constitution. In *Wegner v. Milwaukee Mutual Insurance Co.*,\(^{18}\) the Minnesota Supreme Court permitted the owner of a home damaged in a police raid to obtain compensation for a taking of property without just compensation.\(^{19}\) The property owner did not rely

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12. 217 Minn. 218, 14 N.W.2d 400 (1944).
13.  Id. at 220-24, 14 N.W.2d at 403-05.
14.  Id. at 224-26, 14 N.W.2d at 405-06.
15.  Id. at 230-34, 14 N.W.2d at 407-09.
17.  *Thiede v. Town of Scandia Valley*, 217 Minn. 218, 231, 14 N.W.2d 400, 408 (1944) ("The alleged misconduct of the individual defendants in the instant case constituted a trespass upon plaintiff's property and an assault upon her person, for both of which the law furnishes a remedy.").
18.  479 N.W.2d 38 (Minn. 1991).
19.  *Id.* at 41.
upon the federal takings clause or Minnesota's inverse condemnation statute, but instead based his claim solely upon what the Minnesota Supreme Court characterized as the plain meaning of the language of Article I, Section 13 of the Minnesota Constitution, which requires compensation when property is damaged for a public use. Without pausing to explain the basis for a private cause of action to enforce this right, the supreme court simply held that "[o]nce a 'taking' is found, compensation is required by operation of law." The court chose not to apply the tort defense of public necessity based upon "basic notions of fairness and justice . . . [that make it unfair] to allocate the entire risk of loss to an innocent homeowner for the good of the public."

Five weeks after the *Wegner* decision, in *McGovern v. City of Minneapolis*, the Minnesota Court of Appeals affirmed the denial of summary judgment in favor of the City of Minneapolis on a very similar case that involved damage inflicted during a crack-cocaine house raid. The court of appeals, however, seized upon the supreme court's use of the term "innocent" in a characterization of the plaintiffs in *Wegner* and remanded the case for a determination of whether the plaintiffs were involved in criminal activity.

Significant for these purposes, the Minnesota Supreme Court and Court of Appeals treated the availability of a private cause of

22. *Id.* at 42.
23. *Id.*
25. *Id.* at 127.
26. *Id.* This apparent recognition of a "guilty plaintiff" defense has no parallel in federal constitutional analysis. Justice Frankfurter once noted that "[i]t is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people." United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting).

When asked to recognize a "contributory fault" defense to § 1983 liability, the Eighth Circuit declined. *Wycoff v. Brewer*, 572 F.2d 1260, 1267 (8th Cir. 1978). In *Wycoff*, the court stated:

*It must be realized, however, that prison administrators are required to deal in a constitutional manner with convicts who are violent and unruly as well as with those whose conduct is exemplary or at least peaceful. And while prison officials must have some latitude in imposing conditions reasonably necessary to control a prisoner's behavior, the contributory fault of an inmate does not necessarily deprive him of his right to relief from deprivations of constitutional dimension.*

*Id.*
action in *Wegner* and *McGovern* as a foregone conclusion. Arguable, that approach may relate only to the particular constitutional rights invoked by the plaintiffs in those cases. After all, what court could find a taking without just compensation while holding that additional legislation is necessary to permit the plaintiff to actually receive compensation once a taking has occurred? However, while the *Wegner* and *McGovern* decisions do not necessarily support the existence of a private cause of action to enforce each "right" in the Minnesota Bill of Rights, let alone to enforce the provisions of all remaining articles, they do offer support to the proposition that some private cause of action must exist under the Minnesota Constitution.

2. Re-visiting the Issue

The Minnesota Court of Appeals recently re-visited the issue in an action challenging the constitutionality of an added restriction on the availability of welfare benefits to new Minnesotans. Like the defendants in the *Thiede* case decades before, the Commissioner of the Department of Human Services was charged with carrying out an effort to reduce the financial burden of welfare assistance, this time by limiting the benefits available to new Minnesotans without minor children to a fraction of the benefits available to those who have resided in Minnesota more than six months. In *Mitchell v. Steffen*, a class of new Minnesotans successfully attacked the relevant statute at the district court level, persuading the court that it violated the Equal Protection Clause of the United States Constitution. On appeal, the plaintiffs sought to protect their victory from potential scrutiny by the United States Supreme Court, and for that re-

27. A right to some kind of compensation is implicit in the takings clause itself, which cannot be said for other constitutional rights. For example, the right to free expression in the Minnesota Constitution does not necessarily imply that damages should be available to those whose right to free expression has been infringed.


32. *Id.* at 902-04.
son requested the Minnesota Court of Appeals to invalidate the statute under both the Federal and Minnesota Constitutions.\textsuperscript{33}

Relying upon a cryptic sentence in a 1985 decision,\textsuperscript{34} the Commissioner contended that no cause of action for damages was available for violations of the Minnesota Constitution. Once again, the court seemed to assume that the availability of a private cause of action to enforce the Minnesota Constitution was unquestioned (while limiting the availability of damages).\textsuperscript{35} On review, the Minnesota Supreme Court, affirming the lower courts, held that the statute violated the Equal Protection Clause of the United States Constitution.\textsuperscript{36} Unlike the court of appeals, however, the supreme court expressly chose not to consider the state constitutional question.\textsuperscript{37}

A recent Minnesota Supreme Court decision involving the use of the Minnesota Constitution as a sword, \textit{Skeen v. State}, is also the most famous.\textsuperscript{38} In 1988, fifty-two school districts and ten parents sued the State of Minnesota, one of its agencies and commissioners, alleging that the school financing system violated the Education Clause and the Equal Protection guarantees of the Minnesota Constitution.\textsuperscript{39} Following a seventy-six day bench trial, Wright County District Judge Gary Meyer declared that three components of the education finance system violated the Education Clause and the Equal Protection guarantees.\textsuperscript{40} The

\begin{itemize}
  \item \textsuperscript{33} \textit{Id.} at 904.
  \item The Commissioner in \textit{Mitchell} challenged the availability of a private cause of action under the Minnesota Constitution in reliance on the Minnesota Court of Appeals' statement in \textit{Bird v. State}, 375 N.W.2d 36, 40 (Minn. Ct. App. 1985) that the Minnesota Supreme Court "has not as yet recognized" a tort for deprivation of due process. \textit{Mitchell}, 487 N.W.2d at 905. This language, however, appeared in \textit{Bird} as part of the court of appeals' analysis of whether a plaintiff could seek damages because a state department had failed to comply with statutory provisions imposing a duty to provide the plaintiffs with notice and a hearing prior to canceling their automobile dealer's license. \textit{Bird}, 375 N.W.2d at 40 (relying on MINN. STAT. § 168.27, subd. 13 (1984)). The court was merely considering whether the statute, by itself, created "a cause of action in tort," and does not appear to have addressed a separate question of whether the same conduct was actionable as a violation of the Minnesota Constitution. \textit{Id.}
  \item \textsuperscript{35} \textit{Mitchell}, 487 N.W.2d at 900; see also infra notes 69-138 and accompanying text.
  \item Mitchell, 504 N.W.2d at 203.
  \item Id. In her dissent, Justice Tomljanovich reached the state constitutional question, and concluded that the statute did not violate the equal protection guarantee of either the state or the Federal Constitution. Nonetheless, she too, appears to have assumed the availability of private cause of action to raise that issue. \textit{Id.} at 210-11 (Tomljanovich, J., dissenting).
  \item \textsuperscript{38} \textit{Skeen v. State}, 505 N.W.2d 299 (Minn. 1993).
  \item \textsuperscript{39} \textit{Id.} at 301.
  \item \textsuperscript{40} \textit{Id.} at 301-02.
\end{itemize}
State, along with several intervenors, appealed separately to the court of appeals. The court of appeals consolidated the appeal and certified the matter to the Minnesota Supreme Court.

The availability of a private cause of action to invoke the Minnesota Constitution was only one of several troubling procedural issues raised by the Skeen lawsuit. Despite the obvious occasion for resolution of the private cause of action issue, the supreme court went directly to the merits of the claims and reversed each portion of the district court's holding. Once again, an opportunity to articulate the theoretical basis for private enforcement of the Minnesota Constitution passed without comment.

B. Alternative Rationales from Other States

While other state courts have concluded that a private cause of action is available to enforce their states' constitutions, their bases are diverse. Should the Minnesota Supreme Court ever elect to articulate a rationale for such a cause of action, they will likely borrow from one or more of these approaches. However, there are inherent limitations in each of these approaches that affect the full scope of the private cause of action. By examining those approaches, one can speculate about the limits the supreme court might place on the use of the Minnesota Constitution as a sword.

41. By this point in the litigation, the State had been joined by a substantial number of school districts that had intervened to protect a system that favored them. Id. at 302.
42. Id. at 302.
43. Skeen, 505 N.W.2d at 302.
44. Id. at 306. In their Complaint, the plaintiffs did not ask the court for relief that would directly remedy any injury. Id. at 299-300. Instead, through an injunction against the revenue-raising devices that wealthier school districts used to exacerbate the disparities and an injunction to compel the Commissioner to recommend new legislation that would close the gaps, they sought to create an equality of misery. Id. at 306. If the district court or Minnesota Supreme Court had applied the same doctrines of justiciability and redress applicable to civil actions in federal courts, the case likely would have been dismissed. See, e.g., Simon v. Eastern Ky. Welfare Rights Org., 426 U.S. 26, 38-40 (1976) (holding that plaintiffs lacked standing to bring suit based on their special interest in the health problems of the poor); NAACP v. Harris, 607 F.2d 514, 520 (1st Cir. 1979) (holding that plaintiffs lacked standing to contest alleged inequalities in public financing where success would merely achieve "the equality of equal misery").
45. Skeen, 505 N.W.2d at 319-20.
1. The "Self-Executing" Rights Doctrine

Courts in some states have held that most, but not necessarily all, state constitutional rights are "self-executing" and, for that reason, those rights can be enforced in a private action in the absence of a legislated remedial scheme. The presumption of a self-executing constitutional provision can be overcome only if a contrary intent is shown. Despite this presumption, the "tests" for self-executing provisions are frequently difficult to apply and are somewhat circular.

A more meaningful test is whether the provision "merely indicates principles, without laying down rules by means of which those principles may be given the force of law." For example, a section of the "Victim's Bill of Rights" in the California Constitution entitled the "right to safe schools" was not a self-executing provision because "[i]t imposes no express duty on anyone to make schools safe [and is] wholly devoid of guidelines, mechanisms, or procedures from which a damages remedy could be inferred.

2. English Common Law

Other states have grounded the right to sue for constitutional violations in the common law of England. For example, the Court of Appeals of Maryland has recognized such a cause of action because "[u]nder the common law of England, where individual rights, such as those now protected by Article 26 [of the Maryland Declaration of Rights] were preserved by a fundamental document (e.g., the Magna Carta), a violation of those rights

46. See, e.g., White v. Davis, 533 P.2d 222, 234 (Cal. 1975) (indicating that the California constitutional right to privacy is self-executing and supports a cause of action for an injunction); Schreiner v. McKenzie Tank Lines & Risk Mgmt. Serv., Inc., 408 So. 2d 711, 714 (Fla. Dist. Ct. App. 1982), aff'd, 432 So. 2d 567, 568 (Fla. 1983) (ruling that the ban on discrimination "because of race, religion or physical handicap" in the Florida Constitution is self-executing).


48. See, e.g., Leger 249 Cal. Rptr. at 691 (holding that a provision "is self-executing if no legislation is necessary to give effect to it, and if there is nothing to be done by the Legislature to put it into operation").

49. Id. (quoting Older v. Superior Court, 109 P. 478, 482 (Cal. 1910)).

50. Id. at 691.
generally could be remedied by a traditional action for damages." 51

Grounding the remedy in the common law implies that the legislature might provide a "reasonable substitute" for the remedy through legislation, as it has been permitted to do for other areas of the common law, without violating Article I, Section 8 of the Minnesota Constitution. 52 In addition, a common law rationale for the cause of action may require the courts to recognize common-law defenses—such as official and sovereign immunity.

3. Restatement (Second) of Torts § 874A

Professor Jennifer Friesen and at least one court have relied upon Section 874A of the Restatement (Second) of Torts as a source of definition for a private cause of action in constitutional violations. 53 That section provides that:

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. 54

A new cause of action would not be available under Section 874A to enforce a constitutional provision that does not protect an identifiable class of persons, or does not proscribe or require certain conduct, or if the court does not conclude that the private right of action is appropriate and "needed to assure the effectiveness of the provision." 55 However, plaintiffs may be relegated to a suitable existing tort action that may be subject to

52. See Hickman v. Group Health Plan, Inc., 396 N.W.2d 10, 14 (Minn. 1986).
55. Id.
defenses such as comparative fault, consent, privilege, or other tort law constraints.56

4. An Analogy to Bivens

In *Bivens v. Six Unknown Named Agents of the Fed. Bureau of Narcotics*,57 the United States Supreme Court implied a cause of action to seek damages for Fourth Amendment violations by federal agents from the United States Constitution and the statutory jurisdiction of the federal courts.58 This cause of action, known as a "Bivens claim,"59 has been expanded beyond the Fourth Amendment to other constitutional rights.60 However, the Supreme Court has recognized exceptions where there are "special factors counseling hesitation" or where Congress has created an alternative remedial scheme available to the plaintiff.61

State courts are using the Bivens holding and its exceptions to define and shape private causes of action under their state constitutions. For example, courts in New Jersey62 and Massachusetts63 have relied on Bivens to explain their recognition of an implied cause of action for state constitutional violations. Similarly, courts in Alaska64 and Hawaii65 have invoked the exceptions of the Bivens doctrine to deny relief. As with the remedy in Bivens, the claim may be subject to challenge based upon a potentially open-ended set of "special factors counseling hesitation" and is susceptible to state legislation restricting the amount and opportunity for relief.66

56. *Friesen*, *supra* note 54, at ¶ 7.05[3].
57. 403 U.S. 388 (1971).
58. *Id.* at 395-96.
59. *Friesen*, *supra* note 54, at ¶ 7.05[2].
60. *Id.* at ¶ 7.03[3].
65. *See* Figueroa v. State, 604 P.2d 1198, 1205-06 (Haw. 1979) (arguing by analogy to Bivens and permitting relief against individual officers, but not the sovereign entity).
III. IMMUNITIES TO STATE CONSTITUTIONAL CLAIMS

The primary battleground in federal constitutional litigation is not the availability of a remedy, but the scope and nature of defenses available to defendants sued under *Bivens* or § 1983.67 Indeed, many plaintiffs assert state constitutional claims in order to circumvent defenses otherwise available to the defendants under § 1983 or state tort law.68 Similarly, litigation concerning state tort remedies against governments and their officials commonly turns on the scope of immunities, privileges, and other defenses designed to restrict or bar relief in certain cases.69 There is every reason to believe that immunities will play an equally important role in state constitutional litigation in Minnesota.

The Minnesota Supreme Court has addressed the immunities available to defendants sued in state constitutional lawsuits on three occasions: in 1944 through the *Thiede* case;70 in 1988 through the landmark decision in *Jarvis v. Levine,*71 and most recently in 1991 through the *Wegner* case.72 The following year, the Minnesota Court of Appeals addressed the State's immunity in *Mitchell v. Steffen.*73 In the course of its three decisions, the Minnesota Supreme Court performed a 180-degree turn, shifting from absolute individual liability and governmental immunity,74 to a form of qualified individual immunity,75 to absolute

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68. *See, e.g.*, McGovern v. City of Minneapolis, 480 N.W.2d 121, 126-27 (Minn. Ct. App. 1992), *review denied* (Minn. Feb. 27, 1992) (ordering summary judgment against § 1983 claim on qualified immunity grounds, summary judgment against tort claims on official immunity and discretionary function immunity grounds, but denying summary judgment against state-constitution takings claim); *see also* Peper v. Princeton Univ. Bd. of Trustees, 77 N.J. 55, 389 A.2d 465 (1978) (invoking state constitutional recognition of right to acquire property as a vehicle to challenge sex discrimination in promotions where plaintiff's sex discrimination claim against private university under Title VII was barred by administrative filing requirement, and state statutory discrimination claim was barred by statutory exception for private universities).

69. *See Minn. Stat. § 466.03 (1992); see also* Pletan v. Gaines, 494 N.W.2d 38 (Minn. 1992) (adopting derivative official immunity doctrine protecting municipal entity); Elwood v. Rice County, 423 N.W.2d 671 (Minn. 1988) (recognizing official immunity).

70. Thiede v. Town of Scandia Valley, 217 Minn. 218, 14 N.W.2d 400 (1944).

71. 418 N.W.2d 139 (Minn. 1988) (recognizing state constitutional limitations on involuntary psychotropic treatment at state hospitals).


73. 487 N.W.2d 896 (Minn. Ct. App. 1992), *aff'd on other grounds*, 504 N.W.2d 198 (Minn. 1993).

74. *Thiede*, 217 Minn. at 231-32, 14 N.W.2d at 407-08.

75. *Jarvis*, 418 N.W.2d at 149-50.
individual immunity and strict governmental liability.\textsuperscript{76} The Minnesota Court of Appeals then completed the circle by announcing the State's "unquestionable" sovereign immunity to damages liability for a state constitutional violation.\textsuperscript{77} These variations reflect the diversity of approaches other states have applied to questions of governmental and official immunity in state constitutional litigation.

A. Minnesota's 180-Degree Turn.

The \textit{Thiede} decision\textsuperscript{78} in 1944 is the high water mark for personal liability for constitutional violations in Minnesota. Perhaps responding to the outrageous circumstances of the Thiede family's eviction and banishment,\textsuperscript{79} the Minnesota Supreme Court held that the officials involved should be fully liable for the resulting damages.\textsuperscript{80} The court explained its decision by emphasizing the constitutional nature of the rights involved:

The officer's protection given to him by the law is a shield to protect him against honest mistakes in judgment; it is not a sword with which to strike down constitutional rights of citizens. As in the case of illegal arrests, the officer is bound to know these fundamental rights and privileges, and must keep within the law at his peril. Our Constitution furnishes a guaranty against any encroachment by public officers or others upon the basic rights which belong to every citizen as a member of society... The complaint must be held to state a cause of action against the supervisors of the defendant town, irrespective of any allegations of wilfulness, wantonness, or malice. Such allegations are important only in determining their liability for exemplary as opposed to compensatory damages.\textsuperscript{81}

\textsuperscript{76} \textit{Wegner}, 479 N.W.2d at 42.
\textsuperscript{77} \textit{Mitchell}, 487 N.W.2d at 905.
\textsuperscript{78} \textit{Thiede}, 217 Minn. 218, 14 N.W.2d 400.
\textsuperscript{79} The Thiedes were forced from their own home and banished from their own community for the sake of easing a city's welfare burden. 217 Minn. at 219-25, 14 N.W.2d at 402-05. On February 27, 1943, "with force and violence against the will and over the objections" of the Thiedes, the entire family was evicted from their homestead in Scandia Valley by the Morrison county sheriff. \textit{Id.} at 223-24, 14 N.W.2d at 404-05. The family and all of their personal property were removed to Fawn Lake Township in Todd County, where they had lived before relocating to Scandia Valley. \textit{Id.} at 220-24, 14 N.W.2d at 403-05.
\textsuperscript{80} \textit{Id.} at 230, 14 N.W.2d at 407-08.
\textsuperscript{81} \textit{Id.} 231, 14 N.W.2d at 408 (citations omitted).
By contrast, the Minnesota Supreme Court resolved the "more perplexing question" of municipal liability for the officer's acts by concluding that the city was immune. The town of Scandia Valley appears to have escaped liability on two grounds. First, the court held that "in administering the poor laws, [city officials] act, not as agents of the town, but as officers of the state." The plaintiffs may simply have sued the wrong principal. More important, however, the court also embraced the legal fiction, then prevalent, that held public officials performing governmental tasks are "agents or servants of the public at large, and the [municipal] corporation is not responsible for their acts or omissions nor for the acts or omissions of the subordinates appointed by them."

The Minnesota Supreme Court's decision in *Jarvis v. Levine* is best known for the controversial procedural and substantive restrictions the court placed on the involuntary administration of certain medications and other intrusive treatment at state mental hospitals. Few may remember that the Supreme Court also addressed, in passing, whether the defendants involved should be held liable for violations of the state constitutional right to privacy upon which the decision was founded. Writing for the court, Justice Yetka stated:

"Insofar as the suit for damages in this case is concerned, we agree with the decision of the trial court that there is no cause of action. The parties involved followed the established procedures outlined by the state in the handling of mental institutions and are thus immune from liability. . . . [A]s to the failure of respondents to obtain judicial review in the past, prior to treating Jarvis, respondents are not liable for damages because they followed the statutory procedures which were presumptively constitutional until today."
In *Jarvis*, the supreme court left unanswered whether the plaintiffs would have encountered the same kind of *Harlow*-style qualified immunity on a claim directly against the State of Minnesota itself for a violation of state constitutional rights. If the court was serious about its analogy to *Harlow*, then this good-faith immunity would not necessarily have protected a governmental body from liability for damages, even in a test case. However, the Minnesota Supreme Court recently held in *Pletan v. Gaines* that a city is immune from tort liability if its agent is immune. The same logic should apply with equal force to state constitutional claims.

In *Wegner*, the property damage that resulted from the efforts of Minneapolis police officers to arrest a barricaded fugitive in the plaintiff’s home led to strict municipal liability. No consideration of traditional state tort law defenses, such as the immunity enforced in *Thiede*, was apparent in the decision. At the same time, however, the court concluded its analysis with the following: “As a final note, we hold that the individual police officers, who were acting in the public interest, cannot be held personally liable. Instead, the citizens of the City should all bear the cost of the benefit conferred.”

Perhaps the most troubling and controversial aspect of the Minnesota Supreme Court’s decision in *Wegner* is the speed with which it rejected the notion of a “public necessity” defense to liability under Article I, Section 13. The court rejected the city’s assertion of a public necessity defense, not because it found the damage inflicted by the officers to be unnecessary but because the court deemed that “an individual in Wegner’s position should not be forced to bear the entire cost of a benefit conferred on the community as a whole” by the apprehension of a dangerous felon.

88. See supra note 68 and accompanying text.
91. *Id.* at 43.
93. *Thiede v. Town of Scandia Valley*, 217 Minn. 218, 14 N.W.2d 400 (1944).
94. *Wegner*, 479 N.W.2d at 42.
95. *Id.* at 40-42.
96. The Constitutional provision states: “Private property shall not be taken, destroyed or damaged for public use, without just compensation therefor, first paid or secured.” *Minn. Const.* art. 1, § 13.
97. *Wegner*, 479 N.W.2d at 42.
Once a "taking" is found, compensation is required by operation of law. . . . At its most basic level, the issue is whether it is fair to allocate the entire risk of loss to an innocent homeowner for the good of the public. We do not believe the imposition of such burden on the innocent citizens of this state would square with the underlying principles of our system of justice. Therefore, the City must reimburse Wegner for the losses sustained.\(^98\)

The logic of Wegner—if generalized to all possible defenses in all state constitutional litigation in Minnesota—would essentially deprive all governmental entities of any defense otherwise available in state tort litigation or in federal constitutional litigation. If the question is really whether it is better for the public as a whole or the individual plaintiff to bear the burden incurred, the public entity will nearly always lose. Governments will nearly always be in a better position than individual citizens to bear the burden of injurious actions, even if such cost-shifting itself causes governments to react by reducing their involvement in activities of great public benefit.

The contrast between the logic applied in Wegner\(^99\) and the Minnesota Supreme Court’s more recent reasoning in Pletan\(^100\) could not be more striking. Acknowledging the doctrine of derivative official immunity as a bar to municipal tort liability for the parents of a child killed in a police chase, the court conceded at the outset the need to "shield an officer’s exercise of independent judgment from civil adjudication."\(^101\) The court was satisfied that the goals of compensation and deterrence were adequately served by the "ordinary" availability of auto insurance coverage and the deterrence resulting from internal peer review and public scrutiny.\(^102\) The combined effect of the Wegner\(^103\) and Pletan\(^104\) decisions creates a truly bizarre result: parents of a child killed in the chase are left without a remedy,\(^105\) but the owner of a sign damaged at the conclusion of the same chase

\(^98\) Id.
\(^99\) Id.
\(^100\) Pletan v. Gaines, 494 N.W.2d 38 (Minn. 1992).
\(^101\) Id. at 42.
\(^102\) Id. at 42-43.
\(^104\) 494 N.W.2d 38 (Minn. 1992).
\(^105\) Id. at 44.
may have an absolute constitutional right under Wegner to recover the value of that property. 106

By resting the cost-shifting logic of the Wegner decision upon "basic notions of fairness and justice," 107 the Minnesota Supreme Court may have left itself an out when confronted with future cases in which the composition of the court is more sympathetic to the governmental interests at stake. Indeed, by apparently restricting the scope of either the constitutional right or the implied remedy to instances in which the owner of the damaged property was "innocent," 108 the Supreme Court may have signaled an interest in considering and creating new defenses to state constitutional liability if the court's own sense of "fairness and justice" begins to tip against the plaintiff.

Only a few months after Wegner, the Minnesota Court of Appeals flashed a ray of hope for governmental entities that construed Wegner as the creation of absolute governmental liability for constitutional violations. In Mitchell v. Steffen, 109 the district court refused to award plaintiffs retroactive public assistance benefits after a constitutional violation was found. 110 The trial court believed that the Commissioner "was immune from money damages under the doctrine of sovereign immunity." 111 Although the Court of Appeals disagreed with the characterization of retroactive benefits as "money damages," it accepted the district court's premise that sovereign immunity would preclude plaintiffs who had prevailed under the United States and Minnesota Constitutions from recovering money damages. 112 Indeed, the appellate court held that money damages "would unquestionably be barred by the doctrine of sovereign immunity." 113 As to this issue, neither side asked the Minnesota Supreme Court to review the Court of Appeals' decision. 114

At first glance, an assertion of absolute immunity from liability for damages from state constitutional violations by cities and the

106. Wegner, 479 N.W.2d at 42.
107. Id.
108. Id.
109. 487 N.W.2d 896 (Minn. Ct. App. 1992), aff'd on other grounds, 504 N.W.2d 198 (Minn. 1993).
110. Id. at 904-05.
111. Id. at 905.
112. Id. at 905-06.
113. Id. at 905.
state is difficult to square with the result in Wegner. The answer may lie in the Mitchell appellate court's narrow conception of money damages that a sovereign cannot be compelled to pay. Arguably, this characterization does not include compensation for takings.

In deciding Mitchell, the court of appeals refused to borrow the seemingly analogous test used by federal courts to decide whether an award of retroactive welfare benefits constituted money damages or equitable relief. Instead, the court asked whether the action sought to enforce a mandate "which happens to be one for the payment of money." Because a takings clause is properly viewed as a mandate to pay compensation, the Wegner case may never have raised the question whether sovereign immunity would bar a claim for money damages under the Minnesota Constitution.

The Court of Appeals' reliance upon sovereign immunity in Mitchell flies in the face of the conventional wisdom that indicates the Supreme Court abolished sovereign immunity of public entities long ago. However, this seems to reflect a flaw in the reasoning behind the conventional wisdom rather than a flaw in the Mitchell decision. The Minnesota Supreme Court has abolished sovereign immunity to tort claims but has not purported to abolish its applicability to other types of claims. For

115. Wegner v. Milwaukee Mut. Ins. Co., 479 N.W.2d 38, 42 (Minn. 1991) (stating that once a "taking" is found, compensation is required by law).

116. Mitchell v. Steffen, 487 N.W.2d 896, 905-06 (Minn. Ct. App. 1992). Distinguishing between money damages and money claimed through specific relief, the court stated: "Damages are given to the plaintiff to substitute for a suffered loss, whereas specific remedies 'are not substitute remedies at all, but attempt to give the plaintiff the very thing to which he was entitled.' Thus, while in many instances an award of money is an award of damages, '[o]ccasionally a money award is also a specie remedy.'" Id. at 906 (quoting Bowen v. Massachusetts, 487 U.S. 879, 895 (1988)) (citation omitted).

117. Mitchell, 487 N.W.2d at 906 n.3. Indeed, the court of appeals' rejection of the Eleventh Amendment analogy is essential to the result because retroactive welfare benefits have long been considered a form of retrospective relief unavailable in federal courts against a state under that Amendment. See Edelman v. Jordan, 415 U.S. 651 (1974); Richter v. Bowen, 669 F. Supp. 275 (N.D. Iowa 1987) (holding that states are protected under the Eleventh Amendment from suits in federal court for retrospective relief such as awards for wrongfully withheld AFDC benefits). The Minnesota Court of Appeals instead looked to the Federal Administrative Procedure Act. Mitchell, 487 N.W.2d at 906 (citing 5 U.S.C. § 702 (1988)).

118. Mitchell, 487 N.W.2d at 906 (quoting Bowen v. Massachusetts, 487 U.S. 879, 900 (1988)).

119. See Nieting v. Blondell, 235 N.W.2d 597, 603 (Minn. 1975); Spanel v. Mounds View Sch. Dist. No. 621, 118 N.W.2d 795, 803 (Minn. 1962) (prospectively abolishing sovereign immunity to tort liability).
example, in *Spanel v. Mounds View School District No. 621*, the court held that “the defense of sovereign immunity will no longer be available to school districts, municipal corporations, and other subdivisions of government on whom immunity has been conferred by judicial decision *with respect to torts* which are committed after the adjournment of the next regular session of the Minnesota Legislature.” While considering the sovereign immunity of the State in 1975, the court merely held that “we therefore abolish *the tort immunity* of the State of Minnesota with respect to *tort claims* arising on or after August 1, 1976, subject to any appropriate action taken by the legislature.” Because the supreme court has never abolished sovereign immunity for other kinds of claims, and has not purported to do so in *Wegner* or any other decision, the state and its municipalities and school districts should remain totally immune from liability for money damages sought under nontort, noncontract theories. If this reasoning is sound, the critical question in future cases will be the parameters of the court of appeals’ narrow definition of “money damages” when applied in new contexts.

**B. “Enclaves of Immunity” to State Constitutional Liability in Other States**

The cost-shifting rationale announced with little explanation in the *Wegner* decision is virtually the same rule recommended by Yale Law Professor Peter H. Schuck for all government liability litigation. Yet even Professor Schuck acknowledges the need to create “enclaves of immunity” in order to encourage vigorous decision making. Similarly, U.S. District Court Judge Harry MacLaughlin has recognized the need to create exceptions to the usual rule of municipal or county liability under 42 U.S.C. § 1983 for final policymakers’ decisions where the conduct in question would otherwise be subject to judicial or quasi-judicial immunity in an action against an individual defendant.

120. 118 N.W.2d 795, 796 (Minn. 1962).
121. *Id.* (emphasis added).
122. *Nieting*, 235 N.W.2d at 603 (emphasis added).
123. PETER SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS, 111-12 (1983) (“When the collectivity seeks to fulfill benign aspirations but errs and injures, as it often will, it must—like anyone else—repair its damage and compensate its victims.”)
124. *Id.* at 149.
125. *In re* Scott County Master Docket, 672 F. Supp. 1152, 1187 (D. Minn. 1987).
if the Mitchell court’s resurrection of sovereign immunity is short-lived, and municipal liability for state constitutional violations becomes the prevailing rule, the experiences of other states suggest that Minnesota will recognize certain “enclaves of immunity” that parallel highly valued immunities to liability under state tort law and § 1983 liability.

Courts in other states have shown reluctance toward extending the scope of discretionary function immunity provisions in state tort claims legislation to bar state constitutional liability. Nevertheless, courts have shown a willingness to protect discretionary functions from state constitutional liability for policy reasons. For example, in Rockhouse Mountain Property Owners Association v. Town of Conway, the plaintiff contended that the municipal defendant’s refusal to lay out a road to serve the plaintiff’s land violated New Hampshire’s equal protection and due process clauses. Characterizing the decision of how and where to lay out a road as a decision requiring the exercise of a high degree of discretion, the New Hampshire Supreme Court held that such decisions must be immune from constitutionally based suits to the same extent as they would be immune from a tort suit.

The Michigan Court of Appeals has recognized a form of legislative immunity that precludes recovery of damages against the State of Michigan by a plaintiff who contended—successfully—that the state’s judicial compensation statute violated the equal protection clause of the Michigan Constitution. The Michigan Court of Appeals found that an award of damages in that setting was “objectionable on the basis of the most basic notions of common-law legislative immunity.”

Courts have also recognized the need to protect municipalities from liability in state constitutional lawsuits arising from judicial or quasi-judicial decisions. For example, in Davis v. Everett, the Alabama Supreme Court held that the city’s denial of a liquor

126. See, e.g., Melbourne Corp. v. City of Chicago, 394 N.E.2d 1291 (Ill. App. Ct. 1979) (asserting that a constitutional tort is not subject to restrictions in Illinois Tort Claims Act).
128. Id. at 1389.
129. Id.
131. Id. at 340.
license to an establishment less than 600 feet from a church violated the Alabama Constitution's equal protection guarantee, but denied plaintiff's request for attorney's fees. Using Alabama common law as a defense to liability in a state constitutional claim, the trial court held that "neither a municipality, its mayor, nor the members of the board of commissioners are liable in damages on account of the exercise of their quasi-judicial powers regarding approval or disapproval of an application for a retail liquor license . . . absent fraudulent, malicious, or corrupt intent."

IV. RECOVERY OF ATTORNEY FEES: THE MISSING CATALYST IN STATE CONSTITUTIONAL LITIGATION

One might wonder why the Minnesota Constitution is so rarely used as an offensive weapon. In many situations, it is the perfect end-run of the increasing conservatism of federal constitutional jurisprudence, a federal bench dominated by conservative appointees, and the various immunities and defenses to liability available under § 1983. The answer may lie in the absence of an express right to recover attorneys fees in a successful suit under the Minnesota Constitution.

Many scholars have associated the explosion in § 1983 litigation since the mid-1970s with the enactment in 1976 of the Civil Right Attorney's Fees Award Act, codified at 42 U.S.C. § 1988. Minnesota, like most other states, has not yet enacted a statutory counterpart to § 1988 that expressly entitles plaintiffs

133. Id. at 1236.
134. Id. at 1238.
135. Id. at 1235.
136. During § 1983's first 69 years of existence (1871-1939), only 19 cases were reported. Elena M. Alabamonte & Peter B. Wheeler, Comment, The Supreme Court Corrals a Runaway Section 1983, 94 MERCER L. REV. 1079, 1075 n.24 (1983). In 1960, only 280 cases were filed. Id. By 1971, however, the number of cases filed annually had risen to 4609. Id. (citation omitted). A 1980 government report further estimated that nearly 13,000 filings occurred annually in 1980. Id. (citing ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1980 ANNUAL REPORT OF THE DIRECTOR). See also Matthew V. Hess, Good Cop-Bad Cop: Reassessing the Legal Remedies for Police Misconduct, 1993 UTAH L. REV. 149, 153 n.28.
137. The dramatic increase in civil rights litigation over the past 15 years suggests to at least one commentator that § 1988(b) is fulfilling its purpose. Hess, supra note 136 at 173 n.163. But cf., Stewart J. Schwab & Theodore Eisenberg, Explaining Constitutional Tort Litigation: The Influence of Attorney Fees Statute and the Government as Defendant, 73 CORNELL L. REV. 719, 755-59 (1988) (suggesting attorney fees statutes may have less of an impact on filing rates than is commonly believed). Hess, supra note 136 at 173 n.163.
in state constitutional litigation to recover their attorney fees if successful. Thus, in the absence of a Minnesota equivalent to § 1988, plaintiffs seeking to enforce rights under the Minnesota Constitution must face a tradeoff. While the Minnesota Constitution may offer plaintiffs an interpretation of certain rights that is more expansive than is currently available under the United States Constitution, they must do so on their own “dime.”

In her 1992 treatise on constitutional law, Professor Friesen suggests a strategy, accepted by some courts, for getting the best of both worlds—the expansive interpretation of rights available under a state constitution and the attorney fees available under § 1988. Under her strategy, plaintiffs should simultaneously seek relief for federal constitutional violations under § 1983 and state constitutional violations in state court or as a pendent claim in federal court. The plaintiff should then encourage the court to follow “pre-existing state court precedent” so as to decide the merits of the state constitutional question before addressing the merits of the federal constitutional claim. Assuming the plaintiff successfully persuades the court that his or her state constitutional rights were violated, Professor Friesen contends that the plaintiff should be treated as a “prevailing party” under § 1988 and therefore collect his or her attorney fees, just as if the plaintiff had prevailed under § 1983.

Professor Friesen’s strategy is creative and potentially successful, but is difficult to square with the express terms of § 1988. Section 1988 contains an exhaustive list of rights for which recovery of attorney fees may be available, with no mention of state constitutional claims. Moreover, the clear focus of § 1988 is on federal (rather than state) rights. In addition, the Minnesota Supreme Court’s approach to Mitchell last year demonstrated that the “longstanding rules of judicial restraint” that en-

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139. Friesen, supra note 53, at ¶ 10.04.

140. Id. See also Carreras v. City of Anaheim, 768 F.2d 1039 (9th Cir. 1985) (awarding § 1988 fees when plaintiffs prevailed on state constitutional grounds in a combined federal and state constitutional lawsuit).

couraged courts to decide state-law questions before reaching federal constitutional questions are frequently disregarded by judges hesitant to resolve cutting-edge issues of state constitutional law.142 A plaintiff with a strong state constitutional claim who hopes to collect attorney's fees by tacking on a federal claim is more likely to be taken through removal before a federal court. Obviously, the federal court may have less interest in expanding state constitutional rights than a state court. In such cases the inclusion of the federal claim becomes a tactical blunder that, at a minimum, may result in delay due to a dismissal without prejudice of the state claims for lack of supplemental jurisdiction, and at worst may substantially increase the likelihood of a defeat on the merits.

V. Conclusion

This article might well have been titled, "Who Needs Section 1983 Anyway?" Thus far, Minnesota courts have demonstrated that the legislature's failure to enact any remedial scheme for state constitutional litigation does nothing to limit or foreclose the use of the Minnesota Constitution as a sword. Moreover, the armor of qualified immunities that surround cities and their officials and protect them from other kinds of lawsuits suggests that a claim under the Minnesota Constitution may be the preferred vehicle under which to seek relief. Thus far, the Minnesota Supreme Court has been able to address the remedial issues involved in state constitutional litigation without either articulating an underlying theory or rationale of any weight or attempting to reconcile the various approaches the court has taken in the past to such questions. The court can continue on this path for only so long before the resulting doctrinal disarray makes a harmonizing decision inevitable.