

SPEECH

THE CONSTITUTIONAL RIGHT TO A REMEDY

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Of all the rights guaranteed by state constitutions but absent from the federal Bill of Rights, the right to a remedy through open access to the courts may be the most important. The remedy clause, which appears in the constitutions of forty states, usually takes one of two basic forms, but courts have interpreted and applied the clause in a variety of different and often contradictory ways. In this address, Chief Justice Phillips traces the development of the remedy guarantee from its inception in Magna Carta and explication by Coke and Blackstone. Many framers of the original state constitutions in colonial America adopted this guarantee as their own, recognizing it as a constraint on both judicial and legislative power. The Chief Justice examines subsequent judicial interpretations of the remedy clause as a potential check on legislative action limiting tort recoveries, particularly in the employment, construction, and medical malpractice contexts. Although he offers several reasons for caution against too robust a reading of the clause, the Chief Justice ultimately posits an approach that aims to protect absolute rights through equal access to justice, while urging state appellate courts to develop a coherent doctrine of remedies jurisprudence that reflects the continuing importance of the right to a remedy.

INTRODUCTION

The American Bill of Rights, to which United States Supreme Court Justice William J. Brennan was so devoted, is one of the supreme achievements of the human spirit. In ten concise paragraphs, it encapsulates most of the basic rights and freedoms that most of the world now regards as the basis of individual liberty and human dignity.¹ But Justice Brennan, for one, never forgot that every American had even more protection from government oppression. Ever mindful of his roots as a state judge (with stints on the New Jersey trial, appel-

* Chief Justice, Supreme Court of Texas. This speech was delivered on February 28, 2002 for the annual Justice William J. Brennan Lecture on State Courts and Social Justice at New York University School of Law. I want to acknowledge the contributions of my law clerks, Jennifer Smith (2001-02) and Brandy Matthews (2002-03), in preparing this address for delivery and subsequent publication. For all practical purposes, they are co-authors of this paper. I particularly appreciate Ms. Smith's research on Blackstone's contribution to the right to a remedy and her theories about Blackstone's continuing relevance in contemporary remedies jurisprudence, and Ms. Matthews's research on current applications of the remedy doctrine. All errors and omissions, of course, remain my own.

¹ U.S. Const. amends. I-X.

late, and supreme court benches), he urged the bench and bar to rely on state bills of rights as well as the federal one.² He recognized that

[s]tate constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law—for without it, the full realization of our liberties cannot be guaranteed.³

Most state bills of rights are longer than the first ten Amendments, containing rights and guarantees not found in the Federal Constitution. The most widespread and important of these unique state provisions is probably the guarantee of a right of access to the courts to obtain a remedy for injury. It is one of the oldest of Anglo-American rights, rooted in Magna Carta⁴ and nourished in the English struggle for individual liberty and conscience rights.⁵ Today, it expressly or implicitly appears in forty state constitutions.⁶

While there are thirty-two different versions⁷ among the forty

² William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 502 (1977).

³ Id. at 491.

⁴ Chapter 29 of the 1225 version of Magna Carta states:

N[o] freeman shall be taken or imprisoned or disseised *of any freehold, or liberties, or free customs*, or outlawed, or banished, or in any *other* way destroyed, nor will we go upon him, nor send upon him, except by the legal judgment of his peers or by the law of the land. To no one will we sell, to no one will we deny, or delay right or justice.

See William F. Swindler, *Magna Carta: Legend and Legacy* 316-17 (1965).

⁵ See, e.g., A.E. Dick Howard, *The Road From Runnymede: Magna Carta and Constitutionalism in America* 6-8 (1968).

⁶ Ala. Const. art. I, § 13; Ariz. Const. art. II, § 11; Ark. Const. art. II, § 13; Colo. Const. art. II, § 6; Conn. Const. art. I, § 10; Del. Const. art. I, § 9; Fla. Const. art. I, § 21; Ga. Const. art. I, § 1, para. 12; Idaho Const. art. I, § 18; Ill. Const. art. I, § 12; Ind. Const. art. I, § 12; Kan. Const. Bill of Rights, § 18; Ky. Const. § 14; La. Const. art. I, § 22; Me. Const. art. I, § 19; Md. Const. Decl. of Rights, art. 19; Mass. Const. pt. I, art. 11; Minn. Const. art. 1 § 8; Miss. Const. art. III, § 24; Mo. Const. art. I, § 14; Mont. Const. art. II, § 16; Neb. Const. art. I, § 13; N.H. Const. pt. I, art. 14; N.C. Const. art. I, § 18; N.D. Const. art. I, § 9; Ohio Const. art. I, § 16; Okla. Const. art. II, § 6; Or. Const. art. I, § 10; Pa. Const. art. I, § 11; R.I. Const. art. I, § 5; S.C. Const. art. I, § 9; S.D. Const. art. VI, § 20; Tenn. Const. art. I, § 17; Tex. Const. art. I, § 13; Utah Const. art. I, § 11; Vt. Const. ch. I, art. 4; Wash. Const. art. I, § 10; W. Va. Const. art. III, § 17; Wis. Const. art. I, § 9; Wyo. Const. art. I, § 8.

⁷ Professor Jennifer Friesen has counted 27 state constitutions that require courts to be open, 36 that require justice to be administered promptly, 27 that require justice to be administered without purchase or sale, 34 that require justice to be granted completely and/or without denial, and 11 that require justice to be delivered freely. Additionally, 35 states provide a right to a remedy, of which 21 require the remedy to be by due process or due course of law. 1 Jennifer Friesen, *State Constitutional Law: Litigating Individual Rights, Claims, and Defenses* app. 6 at 6-65 to 6-67 (3d ed. 2000), adapted from Ronald K.L. Collins, *Bills and Declarations of Rights Digest*, in *The American Bench: Judges of the Nation* 2511-13 (Sarah Livermore ed., 1985).

states, there are two major variants. Eleven states use language devised in the seventeenth century by Sir Edward Coke. Their constitutions provide something like this:

That every person for every injury done him in his goods, land or person, ought to have remedy by the course of the law of the land and ought to have justice and right for the injury done to him freely without sale, fully without any denial, and speedily without delay, according to the law of the land.⁸

Twenty-seven states use a more compact form, reading something like this:

That all courts shall be open, and every person, for an injury done him in his person, property or reputation, shall have remedy by the due course of the law.⁹

Today, these traditional words are invoked to challenge procedural impediments to judicial access or to block substantive modifications to established causes of action or remedies. In roughly the last quarter century alone, state supreme courts have relied on the right to a remedy to strike down laws that lack discovery rule exceptions to a time bar on bringing suit,¹⁰ allow limitations to run against minor plaintiffs,¹¹ or interpose terms of repose on claims against architects, builders, suppliers, and manufacturers.¹² Courts have struck down

⁸ This language is a composite of the clauses, cited *supra* note 6, from the following state constitutions: Arkansas, Illinois, Indiana, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, Rhode Island, Vermont, and Wisconsin.

⁹ This language is a composite of the clauses, cited *supra* note 6, from the following state constitutions: Alabama, Arizona, Colorado, Connecticut, Delaware, Florida, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, and Wyoming.

¹⁰ See, e.g., *Kenyon v. Hammer*, 688 P.2d 961, 979 (Ariz. 1984) (invalidating absolute limitations bar on medical malpractice claims three years from date of injury); *Heath v. Sears, Roebuck & Co.*, 464 A.2d 288, 295-96 (N.H. 1983) (invalidating twelve-year absolute statute of limitations for products-liability claims); *Reynolds v. Porter*, 760 P.2d 816, 825 (Okla. 1988) (invalidating three-year limitations provision without discovery rule in medical malpractice suits).

¹¹ See, e.g., *Strahler v. St. Luke's Hosp.*, 706 S.W.2d 7, 11-12 (Mo. 1986) (finding statute of limitations in medical malpractice case unconstitutional as applied to minors); *Mominee v. Scherbarth*, 503 N.E.2d 717, 722 (Ohio 1986) (same); *Sax v. Votteler*, 648 S.W.2d 661, 667 (Tex. 1983) (same).

¹² See, e.g., *Jackson v. Mannesmann Demag Corp.*, 435 So. 2d 725, 728-29 (Ala. 1983) (finding seven-year statute of repose for claims against architects, contractors, and builders unconstitutional); *Overland Constr. Co. v. Sirmons*, 369 So. 2d 572, 575 (Fla. 1979) (invalidating similar twelve-year statute of repose); *Perkins v. Northeastern Log Homes*, 808 S.W.2d 809, 817 (Ky. 1991) (invalidating similar five-year statute); *Hanson v. Williams County*, 389 N.W.2d 319, 328 (N.D. 1986) (invalidating ten-year date-of-use statute of repose for products-liability claims); *Daugaard v. Baltic Coop. Bldg. Supply Ass'n*, 349 N.W.2d 419, 427 (S.D. 1984) (finding similar six-year statute of repose for claims against architects, contractors, and builders violates open courts provision); *Berry v. Beech Air*

laws that grant sovereign immunity to municipalities for proprietary functions,¹³ permit defamers to retract and avoid liability,¹⁴ and prevent guests from suing automobile drivers for ordinary negligence.¹⁵ In the medical malpractice area, courts have struck down statutes capping noneconomic damages for medical malpractice victims¹⁶ and requiring medical malpractice claims to be screened by experts before filing.¹⁷ Finally, courts have used the provision to open judicial proceedings to the public,¹⁸ including juvenile hearings,¹⁹ to forbid using filing fees for general state revenue,²⁰ and to proscribe the payment of

craft Corp., 717 P.2d 670, 684-86 (Utah 1985) (invalidating ten-year date-of-use statute of repose for products-liability claims); *Phillips v. ABC Builders, Inc.*, 611 P.2d 821, 831 (Wyo. 1980) (voiding similar ten-year statute of repose for claims against architects, contractors, and builders).

¹³ See, e.g., *Oien v. City of Sioux Falls*, 393 N.W.2d 286, 290-91 (S.D. 1986) (finding unconstitutional statutes granting sovereign immunity for municipalities in their proprietary capacity of constructing, maintaining, and operating parks); *Laney v. Fairview City*, 57 P.3d 1007, 1027 (Utah 2002) (holding that discretionary function exception to municipalities' waiver of sovereign immunity violates state's open courts clause).

¹⁴ See, e.g., *Boswell v. Phoenix Newspapers, Inc.*, 730 P.2d 186, 196 (Ariz. 1986) (finding statute limiting defamation damages to special damages when defendant retracted comments unconstitutional as applied); *Madison v. Yunker*, 589 P.2d 126, 130-31 (Mont. 1978) (finding statute mitigating damages when defendant retracted comments unconstitutional as applied).

¹⁵ See, e.g., *Primes v. Tyler*, 331 N.E.2d 723, 729 (Ohio 1975).

¹⁶ See, e.g., *Lucas v. United States*, 757 S.W.2d 687, 688-89, 691 (Tex. 1988) (invalidating \$500,000 cap on paralyzed child's damages).

¹⁷ See, e.g., *State ex rel. Cardinal Glennon Mem'l Hosp. for Children v. Gaertner*, 583 S.W.2d 107, 110 (Mo. 1979) (striking down statute requiring claimants to submit to review board as precondition for filing in court); *Mattos v. Thompson*, 421 A.2d 190, 196 (Pa. 1980) (finding statute requiring arbitration in every case where health care providers are defendants violates open courts provision and right to jury trial by causing oppressive delay).

¹⁸ See, e.g., *In re Edens*, 226 S.E.2d 5, 9-10 (N.C. 1976) (censuring judge for improperly deciding criminal case through secret communications with defense counsel); *KFGO Radio, Inc. v. Rothe*, 298 N.W.2d 505, 511 (N.D. 1980) (requiring state to grant media access to criminal inquiry); *Oregonian Publ'g Co. v. O'Leary*, 736 P.2d 173, 178 (Or. 1987) (holding that reporter may not be statutorily barred from summary hearing in criminal trial); *Cohen v. Everett City Council*, 535 P.2d 801, 803 (Wash. 1975) (holding unconstitutional court order sealing records of city council license revocation action); *State ex rel. Herald Mail Co. v. Hamilton*, 267 S.E.2d 544, 552 (W. Va. 1980) (prohibiting enforcement of closure order in pretrial hearing); see also Jack B. Harrison, *How Open is Open? The Development of the Public Access Doctrine Under State Open Court Provisions*, 60 U. Cin. L. Rev. 1307, 1308 (1992) ("The idea of public access to judicial proceedings is rooted in the rich tradition of Anglo-American law."); cf. Louis F. Hubener, *Rights of Privacy in Open Courts—Do They Exist?*, 2 *Emerging Issues St. Const. L.* 189, 191-92 (1989) (arguing that open court provisions originated as guarantees of legal remedies, not as guarantees of public access to court proceedings).

¹⁹ See, e.g., *State ex rel. Oregonian Publ'g Co. v. Deiz*, 613 P.2d 23, 27 (Or. 1980) (invalidating judicial order closing juvenile proceedings).

²⁰ See, e.g., *Crocker v. Finley*, 459 N.E.2d 1346, 1351 (Ill. 1984) (holding that filing fees may be used only for court costs); *Safety Net for Abused Persons v. Segura*, 692 So. 2d 1038, 1042 (La. 1997) (same); *LeCroy v. Hanlon*, 713 S.W.2d 335, 342 (Tex. 1986) (same).

penalties or fines as a condition for challenging them in court.²¹

These holdings demonstrate the significance of the remedy guarantee, but they do not establish the parameters of its application. During the same quarter century, other courts in other jurisdictions (or sometimes even the same courts in the same jurisdiction) have upheld each of these types of laws against remedies challenges.²² As

²¹ See, e.g., *Cent. Appraisal Dist. v. Lall*, 924 S.W.2d 686, 692-93 (Tex. 1996) (ruling that only undisputed portion of tax bill may be required to be prepaid as condition for judicial review); *State v. Flag-Redfern Oil Co.*, 852 S.W.2d 480, 485 (Tex. 1993) (holding that requiring payment of disputed penalties as condition to judicial review was violation of open courts provision); *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 450 n.17 (Tex. 1993) (same); *Jensen v. State Tax Comm'n*, 835 P.2d 965, 969 (Utah 1992) (striking down statute requiring payment of delinquent taxes, interest, and penalties before seeking review of assessment in cases where taxpayer is unable to comply); see also *N. Port Bank v. State Dep't of Revenue*, 313 So. 2d 683, 687 (Fla. 1975) (reading statute liberally so as not to violate open courts provision by allowing taxpayer to post bond of lesser amount instead of requiring full payment of taxes into registry of court).

²² For cases upholding statutes of limitations without a discovery rule, see: *Owen v. Wilson*, 537 S.W.2d 543, 545-46 (Ark. 1976); *Crier v. Whitecloud*, 496 So. 2d 305, 310 (La. 1986); *Hill v. Fitzgerald*, 501 A.2d 27, 35 (Md. 1985); *Harrison v. Schraeder*, 569 S.W.2d 822, 827-28 (Tenn. 1978); *Diaz v. Westphal*, 941 S.W.2d 96, 100-01 (Tex. 1997); *Bala v. Maxwell*, 909 S.W.2d 889, 893 (Tex. 1995).

For cases upholding limitations running against minors, see: *Maine Med. Ctr. v. Cote*, 577 A.2d 1173, 1176-77 (Me. 1990); *Estate of McCarthy v. Montana Second Judicial Dist. Court*, 994 P.2d 1090, 1093-95 (Mont. 1999); *Dowd v. Rayner*, 655 A.2d 679, 683 (R.I. 1995).

For cases upholding statutes of repose for architects, builders, engineers, and/or manufacturers, see: *Zapata v. Burns*, 542 A.2d 700, 710-11 (Conn. 1988); *Daily v. New Britain Mach. Co.*, 512 A.2d 893, 904-06 (Conn. 1986); *Cheswold Volunteer Fire Co. v. Lambertson Constr. Co.*, 489 A.2d 413, 417-18 (Del. 1984); *Love v. Whirlpool Corp.*, 449 S.E.2d 602, 604 (Ga. 1994); *Nelms v. Georgian Manor Condo. Ass'n*, 321 S.E.2d 330, 333 (Ga. 1984); *Olson v. J.A. Freeman Co.*, 791 P.2d 1285, 1296-98 (Idaho 1990); *Twin Falls Clinic & Hosp. Bldg. Corp. v. Hamill*, 644 P.2d 341, 346 (Idaho 1982); *Dague v. Piper Aircraft Corp.*, 418 N.E.2d 207, 213 (Ind. 1981); *Beecher v. White*, 447 N.E.2d 622, 628 (Ind. Ct. App. 1983); *Burmaster v. Gravity Drainage Dist. No. 2*, 366 So. 2d 1381, 1387-88 (La. 1978); *Whiting-Turner Contracting Co. v. Coupard*, 499 A.2d 178, 189 (Md. 1985); *Klein v. Catalano*, 437 N.E.2d 514, 522 (Mass. 1982); *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 833 (Mo. 1991); *Reeves v. Ille Elec. Co.*, 551 P.2d 647, 651 (Mont. 1976); *Spilker v. City of Lincoln*, 469 N.W.2d 546, 549 (Neb. 1991); *Williams v. Kingery Constr. Co.*, 404 N.W.2d 32, 34 (Neb. 1987); *Tetterton v. Long Mfg. Co.*, 332 S.E.2d 67, 72-73 (N.C. 1985); *Lamb v. Wedgewood S. Corp.*, 302 S.E.2d 868, 882-83 (N.C. 1983); *St. Paul Fire & Marine Ins. Co. v. Getty Oil Co.*, 782 P.2d 915, 918-21 (Okla. 1989); *Sealey v. Hicks*, 788 P.2d 435, 439 (Or. 1990); *Freezer Storage, Inc. v. Armstrong Cork Co.*, 382 A.2d 715, 720-21 (Pa. 1978); *Walsh v. Gowing*, 494 A.2d 543, 547-48 (R.I. 1985); *Jones v. Five Star Eng'g, Inc.*, 717 S.W.2d 882, 883 (Tenn. 1986); *Harmon v. Angus R. Jessup Assocs.*, 619 S.W.2d 522, 524 (Tenn. 1981); *Trinity River Auth. v. URS Consultants, Inc.*, 889 S.W.2d 259, 261-63 (Tex. 1994); *Craftsman Builder's Supply, Inc. v. Butler Mfg. Co.*, 974 P.2d 1194, 1201 (Utah 1999); *1519-1525 Lakeview Boulevard Condo. Ass'n v. Apartment Sales Corp.*, 29 P.3d 1249, 1255 (Wash. 2001); *Worden v. Vill. Homes*, 821 P.2d 1291, 1293-95 (Wyo. 1991).

For cases upholding sovereign immunity for proprietary functions, see: *Hardin v. City of DeValls Bluff*, 508 S.W.2d 559, 562-63 (Ark. 1974); *Sadler v. New Castle County*, 565 A.2d 917, 923-24 (Del. 1989); *Carroll v. County of York*, 437 A.2d 394, 396 (Pa. 1981); *City*

one judge has aptly concluded, "In some states, [the right to a remedy] is second only to the due process clause in importance; while in other states, it is little more than an interesting historical relic."²³

These disparate results are essentially inexplicable. They cannot be harmonized by reliance on textual distinctions among the states. There is no correlation between the words of a particular guarantee and how expansively the courts of that state have applied it.²⁴ Nor can these different outcomes be explained by historical, social, political, or cultural variations among the states.²⁵ In each section of the country, whether the constitution is old or new, the judges elected or appointed, or the political culture traditional or progressive, some state courts defer unhesitatingly to legislative choices, while others

of *Tyler v. Likes*, 962 S.W.2d 489, 503 (Tex. 1997); *Randall v. Fairmont City Police Dep't*, 412 S.E.2d 737, 743-45 (W. Va. 1991).

For a case upholding a statute permitting defamers to retract to avoid liability, see: *Davidson v. Rogers*, 574 P.2d 624, 625 (Or. 1978).

For cases upholding statutes capping noneconomic damages for medical malpractice damages, see: *Univ. of Miami v. Echarte*, 618 So. 2d 189, 193-94, 198 (Fla. 1993); *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898, 905-06 (Mo. 1992).

For cases upholding required screening by experts before filing medical malpractice claims, see: *Johnson v. St. Vincent Hosp., Inc.*, 404 N.E.2d 585, 596 (Ind. 1980); *Everett v. Goldman*, 359 So. 2d 1256, 1268-69 (La. 1978); *Irish v. Gimbel*, 691 A.2d 664, 672-73 (Me. 1997); *Linder v. Smith*, 629 P.2d 1187, 1190-91 (Mont. 1981); *Prendergrast v. Nelson*, 256 N.W.2d 657, 663-65 (Neb. 1977).

For cases upholding automobile guest statutes, see: *Sidle v. Majors*, 341 N.E.2d 763, 774-75 (Ind. 1976); *Henry v. Bauder*, 518 P.2d 362, 364 (Kan. 1974); *Behrns v. Burke*, 229 N.W.2d 86, 88 (S.D. 1975).

For a case upholding the closure of judicial proceedings to the public, see: *Virmani v. Presbyterian Health Servs. Corp.*, 515 S.E.2d 675, 693-94 (N.C. 1999).

For cases upholding the closure of juvenile proceedings to the public, see: *In re T.R.*, 556 N.E.2d 439, 450-51, 455 (Ohio 1990); *State ex rel. Garden State Newspapers, Inc. v. Hoke*, 520 S.E.2d 186, 190-92, 196 (W. Va. 1999).

For a case upholding the use of filing fees to supplement state general revenue, see: *Fox v. Hunt*, 619 So. 2d 1364, 1367 (Ala. 1993).

For a case upholding the requirement that penalties be paid before being challenged in court, see: *Heikes v. Clay County*, 526 N.W.2d 253, 255 (S.D. 1995) (holding that state requirement that tax deficiencies be paid in order to recover property sold for unpaid taxes is not unconstitutional).

²³ William C. Koch, Jr., *Reopening Tennessee's Open Courts Clause: A Historical Reconsideration of Article I, Section 17 of the Tennessee Constitution*, 27 U. Mem. L. Rev. 333, 341 (1997).

²⁴ See John H. Bauman, *Remedies Provisions in State Constitutions and the Proper Role of the State Courts*, 26 Wake Forest L. Rev. 237, 244 (1991) ("[B]oth [of the major] variations have been expansively and narrowly interpreted.").

²⁵ Some commentators have proposed that the history or culture of a particular state can explain differences in interpretations of state constitutional clauses. See, e.g., David Schuman, *The Right to a Remedy*, 65 Temp. L. Rev. 1197, 1220 (1992). This is dubious as a general proposition (for a critique, see Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 Harv. L. Rev. 1147 (1993)), and seems particularly irrelevant in remedies jurisprudence.

routinely strike down any statutes that impede access to the courts or impair recovery under traditional theories.²⁶ Finally, these distinctions cannot be explained by divergent intentions among the particular framers and ratifiers of the individual state constitutions. In most states, there is almost no historical record to explain what the framers and ratifiers thought the provision would accomplish.²⁷ More often than not, such provisions were adopted without a word of debate or a dissenting vote,²⁸ while in many others there was but a cursory modification before approval.²⁹ The occasional nugget in the framers'

²⁶ See Koch, Jr., *supra* note 23, at 437-39 (describing varying state interpretations of remedy provision).

²⁷ Note, *Constitutional Guarantees of a Certain Remedy*, 49 Iowa L. Rev. 1202, 1203-04 (1964) ("[R]ecords of the constitutional conventions which adopted certain-remedy clauses are virtually devoid of any clues as to the intentions of the framers . . .").

²⁸ In many states, the right to a remedy is in the constitution, but there is no indication that it even was discussed by the framers during the full convention. See, e.g., 14 Collections of the Illinois State Historical Library 866-67 (Clarence W. Alvord ed., 1919); *Debates and Proceedings of the Convention Which Assembled at Little Rock, to Form a Constitution for the State of Arkansas* 355, 584, 656-57 (Little Rock, J.G. Price 1868), <http://www.hti.umich.edu/cgi/t/text/text-idx?c=moa;idno=AHM5156> (last visited Apr. 23, 2003); *Debates of the Maryland Constitutional Convention of 1867*, at 78, 141 (Philip B. Perlman ed., 1923); *The Debates, Resolutions, and Other Proceedings, of the Convention of Delegates, Assembled at Portland on the 11th, and Continued Until the 29th Day of October, 1819, for the Purpose of Forming a Constitution for the State of Maine* 1, 7-8, 69, 91 (Jeremiah Perley ed., Portland, A. Shirley 1820); *Journal of the Constitutional Convention of Connecticut* 169-70, 445 (1902); *Journal of the Convention for Framing a Constitution of Government for the State of Massachusetts* Bay 38, 225 (Boston, Dutton & Wentworth 1832); *Journal of the Convention of the People of the State of Indiana to Amend the Constitution* 186-88, 571, 579, 868, 872 (Indianapolis, Austin H. Brown 1851); *Journal of the Convention of the State of Tennessee* 184, 391-92 (Nashville, W. Hasell Hunt & Co. 1834); *Journal of the Public and Secret Proceedings of the Convention of the People of Georgia* 97, 195, 235, 286, 301 (Milledgeville, Ga., Boughton, Nisbet & Barnes 1861), <http://docsouth.unc.edu/georgia/georgia.html> (last visited May 28, 2003); *Official Proceedings of the Constitutional Convention of the State of Alabama*, May 21st, 1901, to September 3rd, 1901, at 351, 788, 1730 (1940), http://www.legislature.state.al.us/misc/history/constitutions/1901/proceedings/1901_proceedings_vol1/1901.html (last visited Apr. 23, 2003); *Official Report of the Proceedings and Debates of the First Constitutional Convention of North Dakota* 357-71, 531-37 (Bismarck, N.D., Tribune 1889); *The Oregon Constitution and Proceedings and Debates of the Constitutional Convention of 1857*, at 120, 310, 343, 468 (Charles Henry Carey ed., 1926); *Proceedings of the Constitutional Convention held in Denver, December 20, 1875 to Frame a Constitution for the State of Colorado* 89, 142, 376, 486, 523-24 (1907); *The Records of the Arizona Constitutional Convention of 1910*, at 660, 1238 (John S. Goff ed., n.d.); 2 *Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Indiana* 1368, 1389, 2067 (photo. reprint 1935) (Indianapolis, A.H. Brown 1850).

²⁹ See, e.g., *The Constitutional Convention, 27 August-21 September 1776*, in *Proceedings of the Assembly of the Lower Counties of Delaware 1770-1776, of the Constitutional Convention of 1776, and of the House of Assembly of the Delaware State 1776-1781*, at 202, 212-13 (Claudia L. Bushman et al. eds., 1986); 4 *Debates of the Convention to Amend the Constitution of Pennsylvania* 647, 755 (Harrisburg, Pa., Benjamin Singerly 1873) (striking from remedies clause provision "that no law shall limit the amount of damages recoverable, and where an injury caused by negligence or misconduct results in death the

debates³⁰ or in complementary constitutional provisions³¹ is definitely the exception, not the rule.

action shall survive" because already incorporated in constitutional restrictions on legislative branch); Proceedings and Debates of the Constitutional Convention of Idaho 372-73, 2051 (I. W. Hart ed., 1912) (adopting provision after delegates substituted "for" in place of "to").

³⁰ In Louisiana, the 1974 Constitutional Convention rejected this proposed addition to the state's existing remedies clause: "Neither the state, its political subdivisions, nor any private person shall be immune from suit and liability." From this, the Louisiana Supreme Court concluded that the framers "did not intend to limit the legislature's ability to restrict causes of action or to bar the legislature from creating various areas of statutory immunity from suit." *Crier v. Whitecloud*, 496 So. 2d 305, 309-10 (La. 1986).

In Ohio, the right to a remedy was included in the 1802 Constitution. Ohio Const. of 1802, art. VIII, § 7, reprinted in *The Constitution of 1802 and Acts, and Proposed Amendments, in The Constitutions of Ohio* 71, 91 (Isaac Franklin Patterson ed., 1912). When it was omitted from the Bill of Rights Committee's draft at the 1851 convention, delegate Ranney moved from the floor to restore it. This exchange then occurred:

MR. RANNEY said he perceived that the [Standing] Committee [on the Preamble and the Bill of Rights] had left out of this report a number of articles in the old bill of rights. He had copied one of them, and would move its adoption as an additional section

MR. HITCHCOCK of Geauga, had no objection, to the amendment, if it could be carried out. Justice should certainly be administered without denial or delay, but delay could not possibly be avoided in the Courts, unless they could have a gag-law there, as well as in this body. [A laugh.]

The section was agreed to.

2 Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of Ohio, 1850-51, at 337 (Columbus, S. Medary 1851), quoted in *In re T.R. v. Solove*, 556 N.E.2d 439, 447 n.7 (Ohio 1990). For a history of the remedies clause in the Ohio Constitution, see *E.W. Scripps Co. v. Fulton*, 125 N.E.2d 896, 905-07 (Ohio Ct. App. 1955) (Hurd, J., concurring) (concluding that open courts clause gives public right of access to courts).

The Committee on the Bill of Rights of the 1868 Mississippi Convention initially recommended this provision: "All persons for injuries suffered in person, reputation, or property, shall have their remedy by due course of law." *Journal of the Proceedings of the Constitutional Convention of the State of Mississippi* 84 (Jackson, Miss., E. Stafford 1871). The following week, the Committee recommended the following addition: "All courts shall be open, and every person, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and justice administered without denial or delay." *Id.* at 131. The next week, the Committee proposed another draft, omitting any type of remedies provision. *Id.* at 155-57. Nothing in the record indicates why any of these actions were taken. The final version of the 1868 Constitution contained no remedies clause, although it was present in the 1832 Constitution. *Id.* at 720-22; *Miss. Const. of 1832*, art. I, § 14, http://mshistory.k12.ms.us/features/feature6/1832_state_constitution.html (last visited May 28, 2003).

See also 2 *Debates of the Convention to Amend the Constitution of Pennsylvania*, *supra* note 29, at 734-44.

³¹ Kentucky's remedies clause was part of the Bill of Rights in its first constitution of 1792. Thomas P. Lewis, *Jural Rights Under Kentucky's Constitution: Realities Grounded in Myth*, 80 Ky. L.J. 953, 953-54 & n.1 (1992). New remedy-related provisions (Sections 54 and 241) were added during the Constitutional Convention of 1891. *Id.* at 953-54. The Kentucky Supreme Court has referred to the three sections collectively as the "open courts" provisions. *Id.* at 954.

An obvious explanation for such disparities is the absence of a corresponding guarantee in the United States Constitution. Not only do states lack the benefit of federal interpretation, but they also lack the intensive scholarship and focused public debate that has helped develop and refine our federal rights. To be sure, more treatises and law journals are addressing the right to a remedy than ever before. But like the dog's bark for Sherlock Holmes,³² the real significance is what is not there. There are no right-to-a-remedy chairs at any law school. No interest groups solicit funds to support a wider acceptance of their favored interpretation of the provision. I have never located a legal symposium devoted to the guarantee or even a journal article followed by replies or comments. I suspect that no one has ever been tenured at an accredited law school based on remedies research. The states cannot even agree on nomenclature: I have found eight different names for the guarantee in cases and convention debates.³³

³² See Arthur Conan Doyle, *The Adventure of Silver Blaze*, *The Strand Magazine*: An Illustrated Monthly, July-Dec. 1892, at 645, 659, <http://etext.lib.virginia.edu/etcbin/toccer-new2?id=DoyBlaz.sgm&images=images/modeng&data=texts/english/modeng/parsed&tag=public&part=1&division=div1all> (last visited Apr. 23, 2003).

³³ For cases that refer to "open court" or "open courts," see: *Clouse v. State*, 16 P.3d 757, 769 (Ariz. 2001); *Moses v. Diocese of Colo.*, 863 P.2d 310, 314 n.2 (Colo. 1993); *Helman v. State*, 784 A.2d 1058, 1070 (Del. 2001); *Kirkland v. Blaine County Med. Ctr.*, 4 P.3d 1115, 1119 (Idaho 2000); *Boggs v. Tri-State Radiology, Inc.*, 730 N.E.2d 692, 695 (Ind. 2000); *Boykins v. Hous. Auth. of Louisville*, 842 S.W.2d 527, 529 (Ky. 1992); *Crier v. Whitecloud*, 496 So. 2d 305, 309 (La. 1986); *Maine Med. Ctr. v. Cote*, 577 A.2d 1173, 1175 (Me. 1990); *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898, 905 (Mo. 1992); *MacPheat v. Schauf*, 41 P.3d 895, 898 (Mont. 2002); *Givens v. Anchor Packing, Inc.*, 466 N.W.2d 771, 778 (Neb. 1991); *Virmani v. Presbyterian Health Servs. Corp.*, 515 S.E.2d 675, 692 (N.C. 1999); *Fed. Land Bank of St. Paul v. Ziebarth*, 520 N.W.2d 51, 56 (N.D. 1994); *Morris v. Savoy*, 576 N.E.2d 765, 783 (Ohio 1991) (Sweeney, J., concurring and dissenting in part); *State ex rel. Sports Mgmt. News, Inc. v. Nachtigal*, 921 P.2d 1304, 1307 n.6 (Or. 1996); *Commonwealth v. Hayes*, 414 A.2d 318, 322 (Pa. 1980); *Green v. Siegel, Barnett & Schutz*, 557 N.W.2d 396, 399 (S.D. 1996); *Ferguson v. Ram Enters., Inc.*, 900 S.W.2d 19, 21 (Tenn. 1995); *Lucas v. United States*, 757 S.W.2d 687, 690 (Tex. 1988); *Cruz v. Wright*, 765 P.2d 869, 869 (Utah 1988).

For cases that refer to "access to [the] courts," see: *Sigman v. Seafood Ltd. P'ship I*, 817 P.2d 527, 533 (Colo. 1991); *Spencer v. Fla. Dep't of Corr.*, 823 So. 2d 752, 755 (Fla. 2002); *Fann v. McGuffy*, 534 S.W.2d 770, 776 (Ky. 1975); *Whitnell v. Silverman*, 686 So. 2d 23, 30-31 (La. 1996); *Murphy v. Edmonds*, 601 A.2d 102, 113 (Md. 1992); *Fisher v. State Highway Comm'n*, 948 S.W.2d 607, 611 (Mo. 1997); *Kloss v. Edward D. Jones & Co.*, 54 P.3d 1, 8 (Mont. 2002); *State ex rel. Tyler v. Douglass County Dist. Court*, 580 N.W.2d 95, 98 (Neb. 1998); *Town of Nottingham v. Newman*, 785 A.2d 891, 895 (N.H. 2001); *Mayer v. Bristow*, 740 N.E.2d 656, 664 (Ohio 2000); *Kennedy v. Cumberland Eng'g Co.*, 471 A.2d 195, 197 (R.I. 1984).

For cases that refer to "remed[y]" or "remedies," see: *Helman v. State*, 784 A.2d 1058, 1070 (Del. 2001); *McIntosh v. Melroe Co.*, 729 N.E.2d 972, 975 (Ind. 2000); *Mohundro v. Alcorn County*, 675 So. 2d 848, 851 (Miss. 1996); *Meech v. Hillhaven W., Inc.*, 776 P.2d 488, 497 (Mont. 1989); *Jensen v. Whitlow*, 51 P.3d 599, 601 (Or. 2002); *Kennedy v. Cumberland Eng'g Co.*, 471 A.2d 195, 202 (R.I. 1984) (Murray, J., dissenting).

The American legal community never would have ignored a federal constitutional right of even remotely comparable importance.

Because the United States Supreme Court is unlikely to recognize a remedy guarantee within federal due process,³⁴ it seems that

For a case that refers to the "right to the courts," see: *Huff v. State*, 549 S.E.2d 370, 372 (Ga. 2001).

For cases that refer to "certain remedy," see: *Best v. Taylor Mach. Works*, 689 N.E.2d 1057, 1111 (Ill. 1997) (Miller, J., concurring in part and dissenting in part); *Fischer v. State Highway Comm'n*, 948 S.W.2d 607, 611 (Mo. 1997).

For cases that refer to "guaranteed remedy," see: *In re Abbott*, 653 A.2d 1113, 1115 (N.H. 1995); *Pritchard v. City of Portland*, 796 P.2d 1184, 1187 (Or. 1990).

For cases that refer to "right to [a] remedy," see: *Baugh v. Beaver Constr. Co.*, 791 So. 2d 932, 934 (Ala. 2000); *McAlister v. Schick*, 588 N.E.2d 1151, 1157 (Ill. 1992); *Appeal of Wintle*, 781 A.2d 995, 997 (N.H. 2001); *Holeton v. Crouse Cartage Co.*, 748 N.E.2d 1111, 1132 (Ohio 2001) (Cook, J., dissenting).

For a case that refers to "remedy by due course of law," see: *McIntosh v. Melroe Co.*, 729 N.E.2d 972, 976 (Ind. 2000).

Some states refer to the right by a mix of these names. Compare *Moses v. Diocese of Colo.*, 863 P.2d 310, 314 (Colo. 1993) ("open courts"), with *Sigman v. Seafood Ltd. P'ship I*, 817 P.2d 527, 533 (Colo. 1991) ("access to the courts"); *McIntosh v. Melroe Co.*, 729 N.E.2d 972, 975-76 (Ind. 2000) ("open courts," "remedies," and "remedy by due course of law"), with *Boggs v. Tri-State Radiology, Inc.*, 730 N.E.2d 692, 695 (Ind. 2000) ("open courts"); *Boykins v. Hous. Auth. of Louisville*, 842 S.W.2d 527, 529 (Ky. 1992) ("open courts"), with *Fann v. McGuffy*, 534 S.W.2d 770, 776 (Ky. 1975) ("access to the courts"); *In re Asbestos Plaintiffs v. Borden, Inc.*, 630 So. 2d 1310, 1311 (La. 1994) ("open courts"), with *Whitnell v. Silverman*, 686 So. 2d 23, 30 (La. 1996) ("access to the courts"); *Fischer v. State Highway Comm'n*, 948 S.W.2d 607, 611 (Mo. 1997) ("access to the courts" and "certain remedy"), with *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898, 905 (Mo. 1992) ("open courts" and "certain remedy"); *MacPheat v. Schauf*, 41 P.3d 895, 898 (Mont. 2002) ("open courts"), with *Kloss v. Edward D. Jones & Co.*, 54 P.3d 1, 8 (Mont. 2002) ("access to the courts"), and *Meech v. Hillhaven W., Inc.*, 776 P.2d 488, 497 (Mont. 1989) ("remedy"); *Givens v. Anchor Packing, Inc.*, 466 N.W.2d 771, 778 (Neb. 1991) ("open courts"), with *State ex rel. Tyler v. Douglass County Dist. Ct.*, 580 N.W.2d 95, 98 (Neb. 1998) ("access to the courts"); *Town of Nottingham v. Newman*, 785 A.2d 891, 894 (N.H. 2001) ("access to the courts"), with *In re Abbott*, 653 A.2d 1113, 1115 (N.H. 1995) ("guaranteed remedy"), and *Appeal of Wintle*, 781 A.2d 995, 997 (N.H. 2001) ("right to remedy"); *Morris v. Savoy*, 576 N.E.2d 765, 783 (Ohio 1991) (Sweeney, J., concurring in part and dissenting in part) ("open courts"), with *Mayer v. Bristow*, 740 N.E.2d 656, 664 (Ohio 2000) ("access-to-courts"), and *Holeton v. Crouse Cartage Co.*, 748 N.E.2d 1111, 1132 (Ohio 2001) (Cook, J., dissenting) ("right to remedy"); *State ex rel. Sports Mgmt. News, Inc. v. Nachtigal*, 921 P.2d 1304, 1307 n.6 (Or. 1996) ("open courts"), with *Jensen v. Whitlow*, 51 P.3d 599, 601 (Or. 2002) ("remedy"), and *Pritchard v. City of Portland*, 796 P.2d 1184, 1187 (Or. 1990) ("guaranteed remedy"); *Kennedy v. Cumberland Eng'g Co.*, 471 A.2d 195, 197 (R.I. 1984) ("access to the courts"), with *id.* at 202 (Murray, J., dissenting) ("remedy").

³⁴ See *Silver v. Silver*, 280 U.S. 117, 122 (1929) ("[T]he Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object."); see also Friesen, *supra* note 7, § 6-1 n.1 ("[I]t is unclear, outside the criminal context, to what extent the Federal Constitution requires the states to assure meaningful access to courts to enforce ordinary civil claims.").

Since *Silver*, the Court has declined several opportunities to incorporate the right to a remedy into the Due Process Clause. For example, in *Duke Power Co. v. Carolina Environmental Group, Inc.*, 438 U.S. 59 (1978), the Court rejected a federal due process chal-

state litigants and state courts are on their own. In my view, state courts should welcome this opportunity. If we are truly worthy of Justice Brennan's confidence in state courts as equal partners in defining basic rights and responsibilities, then the bench and bar should be able to make the right to a remedy more than a wild card in the creative litigator's deck. If we cannot tell precisely why the framers in Texas included this clause while those in New York did not, we nevertheless can discover why English reformers created the guarantee, why American patriots preserved it, and how its purpose can be fulfilled today. Within each jurisdiction, the courts should articulate a sufficiently coherent doctrine to allow for the guarantee to be applied consistently and predictably. If two states develop divergent doctrines, each state's courts should be able to explain why: Either one state is right and the other wrong, or some legitimate distinction permits both states to be right.

If state courts can meet this task, then independent state constitutional jurisprudence may well be on solid ground. If, in interpreting other constitutional guarantees, such courts happen to differ with federal precedent about corresponding rights, such divergence is defensible and perhaps desirable. But if state courts cannot make any sense out of their most important unique guarantee, then maybe a "lock-step" approach is the most practical, if not the most principled, method of interpreting those rights found in both the United States Constitution and state constitutions.

I

ORIGINS OF THE RIGHT TO A REMEDY

To understand the right to a remedy, most states look first to the

lenge to the Price-Anderson Act, which sets a \$560 million cap on liability for private nuclear power plant accidents. *Id.* at 64-65. After holding that the provision was rationally related to a legitimate government purpose, *id.* at 84, the Court turned to the argument that the cap "fail[ed] to provide those injured by a nuclear accident with a satisfactory *quid pro quo* for the common-law rights of recovery which the Act abrogates," *id.* at 87-88. The Court noted that "it is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy." *Id.* at 88. Although the Court cited by footnote eight cases either directly rejecting or suggesting a rejection of a federal remedies challenge, it did "not resolve" the issue because it concluded that the Act "provide[d] a reasonably just substitute for the common-law or state tort law remedies it replace[d]." *Id.*

The Supreme Court passed up another opportunity in *Fein v. Permanente Medical Group*, 474 U.S. 892 (1985). In that case, the Supreme Court declined to review, for want of a substantial federal question, a state supreme court decision upholding noneconomic damage caps on medical malpractice awards. *Id.* at 892-93 (White, J., dissenting from denial of certiorari). Justice White dissented, arguing that he would have granted certiorari to consider whether federal due process requires a *quid pro quo* when a state replaces a common-law remedy with a compensation statute. *Id.* at 894-95.

guarantee's origin and development in England. Judges long have been impressed by its pedigree, dating from the Great Charter on the field at Runnymede in 1215 and confirmed as Chapter 29 of the "final version" of Magna Carta in 1225.³⁵ But the modern significance of the right to a remedy began in 1641, when Sir Edward Coke's *Second Part of the Institutes of the Laws of England* was published posthumously.³⁶ Coke described Chapter 29 of Magna Carta as a "roote" from which "many fruitfull branches of the law of England have sprung."³⁷ One such branch was the protection of individuals' rights from official acts of oppression, the precursor to modern due process.³⁸ Another was "the rights of subjects in their *private relations* with one another,"³⁹ where Coke gave this gloss on Magna Carta:

[E]very subject of this realm, for injury done to him in goods, lands, or person, by any other subject, be he ecclesiastical, or temporall, . . . or any other without exception, may take his remedy by the

³⁵ See, e.g., Koch, Jr., *supra* note 23, at 340 (selecting open courts clause for study because of its "rich historical background that can be traced back more than eight centuries"). Translated into modern English, Chapter 29 provides:

N[o] freeman shall be taken or imprisoned or disseised of *any freehold, or liberties, or free customs*, or outlawed, or banished, or in any *other* way destroyed, nor will we go upon him, nor send upon him, except by the legal judgment of his peers or by the law of the land. To no one will we sell, to no one will we deny, or delay right or justice.

See Swindler, *supra* note 4, at 316-17. The original Latin text can be found in Faith Thompson, *The First Century of Magna Carta: Why It Persisted as a Document* 111 (1925).

The motivations for the original guarantee are actually easier to discern than those of our own states' framers. The barons had little interest in abstract pronouncements of ideal governance; they were after specific language to compel particular action. See William Sharp McKechnie, *Magna Carta: A Commentary on the Great Charter of King John* 51-52, 120 (2d ed. 1914). The barons were displeased because the royal courts, which fast were displacing local feudal courts as the preferred forum for dispute resolution, operated on a fee scale, with different charges for particular writs. "The system invited abuse; more expensive writs worked faster than cheaper ones, were more potent, and could achieve access to a more favorable forum." David Schuman, *Oregon's Remedy Guarantee: Article I, Section 10 of the Oregon Constitution*, 65 Or. L. Rev. 35, 37 (1986). By eliminating these fees, the barons not only alleviated this disparity but also increased the chances that royal courts would recede in importance. If free royal justice were unprofitable, the barons might increase their "market share" and regain the power and prestige of operating successful local courts. See McKechnie, *supra*, at 80-81, 87-90 (chronicling writ system's role in "diverting the stream of litigation from the barons' courts to the [royal courts]" and recognizing Crown's plan to overthrow jurisdiction of baronial courts while also profiting from rigid writ system).

³⁶ See Hastings Lyon & Herman Block, *Edward Coke: Oracle of the Law* 348 (1929).

³⁷ Edward Coke, *The Second Part of the Institutes of the Laws of England* 45 (photo. reprint 1986) (London, W. Clarke & Sons 1817) (1641).

³⁸ *Id.* at 46.

³⁹ *Smothers v. Gresham Transfer, Inc.*, 23 P.3d 333, 341 (Or. 2001) (explaining Coke's view that second sentence of Magna Carta evolved into guarantee that afforded every subject legal remedy for injury caused by another to goods, land, or other property).

course of the law, and have justice, and right for the injury done to him, freely without sale, fully without any deniall, and speedily without delay.

. . .[J]ustice must have three qualities; it must be . . . free; for nothing is more odious than Justice let to sale; full, for justice ought not to limp, or be granted piece-meal; and speedily, for delay is a kind of denial; and then it is both justice and right.⁴⁰

Much of this language survives intact as the remedies guarantees of some state constitutions.⁴¹

During the next century, Sir William Blackstone described the right to a remedy as one of the critical means through which a civilized society served its principal aim—the preservation of an individual's absolute rights to life, liberty, and property.⁴² In his *Commentaries on the Laws of England*, first published in Oxford between 1765 and 1769, Blackstone divided the rights of persons into two categories.⁴³ The three absolute rights of personal security, personal liberty, and private property existed in a state of nature.⁴⁴ Other rights were merely relative, arising only because men live in society and have relationships with other people.⁴⁵ Absolute rights could not be protected simply by declaratory law; individuals required means of vindicating

⁴⁰ Coke, *supra* note 37, at 55 (portions of quotation translated from Latin by author).

⁴¹ See *supra* notes 7-9 and accompanying text.

⁴² According to Blackstone,

[T]he principal aim of society is to protect individuals in the enjoyment of those absolute rights, which are vested in them by the immutable laws of nature; but which could not be preserved in peace without that mutual assistance and intercourse, which is gained by the institution of friendly and social communities. Hence it follows, that the first and primary end of human laws is to maintain and regulate these *absolute* rights of individuals. Such rights as are social and *relative* result from, and are posterior to, the formation of states and societies: so that to maintain and regulate these, is clearly a subsequent consideration.

1 William Blackstone, *Commentaries* *124. For example, protection from homicide is an absolute right; an import duty on wool is a relative right. Man's laws either may permit or forbid relative rights without offending natural law. *Id.* at *42-43.

⁴³ *Id.* at *123. One good secondary treatise on Blackstone is Blackstone's *Commentaries on the Law*, From the Abridged Edition of Wm. Hardcastle Browne Including a Biographical Sketch, Modern American Notes, Common Law Maxims and a Glossary of Legal Terms (Bernard C. Gavit ed., 1941).

⁴⁴ 1 William Blackstone, *Commentaries* *125,*129. Personal security included the right to life and limb, and, less importantly, to body (freedom from assault), health, and reputation. Personal liberty encompassed freedom of movement and freedom from imprisonment without due course of law. Property rights include "the free use, enjoyment, and disposal of acquisitions, without interference or diminution" except by law. *Id.* at *130-39.

⁴⁵ *Id.* at *123. The four main categories of relative rights, which Blackstone called "rights and duties in private economical relations" and the "great relations in private life," are the relationships between master and servant, husband and wife, parent and child, and guardian and ward. *Id.* at *422.

them.

But in vain would these [absolute] rights be declared, ascertained, and protected by the dead letter of the laws, if the constitution had provided no other method to secure their actual enjoyment. It has therefore established certain other auxiliary subordinate rights of the subject, which serve principally as outworks or barriers to protect and maintain inviolate the three great and primary rights, of personal security, personal liberty, and private property.⁴⁶

The right to a remedy was one of the five subordinate rights through which people vindicated their absolute rights,⁴⁷ and it encompassed both the substance of the law and the procedures through which courts applied that law.⁴⁸ Once a person was injured, the right to an “adequate remedy” immediately attached, though judicial process might be necessary to ascertain the exact parameters of that right.⁴⁹ The right to a remedy dictated that common-law courts exercise general jurisdiction, being open for all cases involving injury to individual rights, “[f]or it is a settled and invariable principle in the laws of England, that every right when withheld must have a remedy, and every injury its proper redress.”⁵⁰ Thus when Blackstone quoted Coke’s dictum that justice be granted fully and without delay, he was concerned not merely with the physical availability of judicial process but with the substantive opportunity to assert claims to protect absolute rights.⁵¹

Neither Coke nor Blackstone would have empowered judicial officers to protect rights against government intrusion. At that time, no one accorded power to the courts to strike down legislative actions, *Bonham’s Case* (whatever it means) notwithstanding.⁵² As

⁴⁶ Id. at *140-41.

⁴⁷ The other four subordinate rights include the constitution, powers, and privileges of parliament; the limitations of the king’s prerogative; the right to petition the king or either house of parliament for redress of grievances; and the right to bear arms in self-defense. Id. at *141-44.

⁴⁸ Id. at *142 (“Not only the substantial part, or judicial decisions, of the law, but also the formal part, or method of proceeding, cannot be altered but by parliament; for, if once those outworks were demolished, there would be an inlet to all manner of innovation in the body of the law itself.”).

⁴⁹ 3 William Blackstone, Commentaries *116.

⁵⁰ Id. at *109.

⁵¹ 1 William Blackstone, Commentaries *141 (“Since the law is in England the supreme arbiter of every man’s life, liberty, and property, courts of justice must at all times be open to the subject, and the law be duly administered therein” to satisfy the subordinate right of “applying to the courts of justice for redress of injuries.”).

⁵² *Bonham’s Case*, 77 Eng. Rep. 646, 652 (K.B. 1610) (opinion of Coke, J.) (declaring in dicta “that in many cases, the common law will . . . controul [sic] Acts of Parliament, and sometimes adjudge them to be utterly void”). See Douglas W. Vick, *The Human Rights Act and the British Constitution*, 37 Tex. Int’l L.J. 329, 335 n.43 (2002) (dismissing influ-

Blackstone stated, “[Parliament] being the highest and greatest court, over which none other can have jurisdiction in the kingdom, if by any means a misgovernment should any way fall upon it the subjects of this kingdom are left without all manner of remedy.”⁵³ Blackstone clearly saw the remedies guarantee only as a check on royal and other “private” abuses of power, not parliamentary excess.

Unlike Coke and Blackstone, the rebellious American colonists saw both the Crown and Parliament as oppressors.⁵⁴ Parliamentary initiatives during the 1760s and 1770s convinced the colonists that the informal constitution securing English rights against royal infringement was inadequate to protect against all forms of government oppression. When independence was declared, some of the new American states began adopting formal written constitutions to structure their new governments and to help secure their most fundamental rights. As Gordon Wood notes, they recognized that laws protecting their basic freedoms must be of “a nature more sacred than those which established a turnpike road.”⁵⁵

By the end of 1776, two states—Delaware and Pennsylvania—had adopted constitutions guaranteeing the right to a remedy.⁵⁶ Four

ence of *Bonham*’s dicta on ability of courts to control acts of Parliament; noting that Coke’s view “never took hold” and that “Coke himself seem[ed] to repudiate it” in later writings).

⁵³ 1 William Blackstone, Commentaries *161 (recounting Sir Matthew Hale’s observation). Therefore, so long as the English Constitution lasted, the power of Parliament would be “absolute and without control.” *Id.* at *162.

⁵⁴ As one observer notes, “Lord Coke was a fervent advocate of parliamentary supremacy, whereas the colonists ended up resisting parliamentary as well as royal authority.” Jonathan M. Hoffman, *By the Course of the Law: The Origins of the Open Courts Clause of State Constitutions*, 74 *Or. L. Rev.* 1279, 1301 (1995) (discussing Britain’s perceived interference with American colonial courts prior to American Revolution, and comparing colonial grievances over royal abuses with conflict between Coke and Crown 150 years earlier).

⁵⁵ Gordon S. Wood, Foreword: State Constitution-Making in the American Revolution, 24 *Rutgers L.J.* 911, 920 (1993) (citing *The Crisis*, No. XI, 81-87 (New York 1775)). The initial American constitutional initiative was chaotic, not systematic. Some states kept their royal charters throughout the Revolution or beyond, *id.* at 913-14, while others were unsure about whether or to what extent their constitutions actually constrained legislative behavior, *id.* at 921-24. Some states tried to ensure the primacy of the new documents by declaring them fundamental (as in the case of Virginia) or partly unchangeable (Delaware), *id.* at 921, and/or by requiring extraordinary legislative majorities to change them (as with Delaware and Maryland), *id.* at 922. Vermont, unsure whether a constitutional convention was legal, went so far as to have its legislature reenact its constitution. *Id.*

⁵⁶ Section 12 of Delaware’s Declaration of Rights and Fundamental Rules, passed September 11, 1776, borrowed language from Lord Coke to provide

[t]hat every Freeman for every Injury done him in his Goods, Lands or Person, by any other Person, ought to have Remedy by the due Course of the Law of the Land, and ought to have Justice and Right for the Injury done to him freely without Sale, fully without any Denial, and speedily without Delay, according

more states adopted the right before the United States Constitution was ratified,⁵⁷ as did all three new states that joined the Union before 1800.⁵⁸

In the absence of any surviving debate or discussion from the adoption of these provisions, our best opportunity to discover how the early framers intended to adapt the wisdom of Coke and Blackstone to the American experience comes from early judicial interpretations of the right. If the framers really intended to place a constitutional shield around the common law, that notion should appear in opinions applying the guarantee.⁵⁹

to the Law of the Land.

A Declaration of Rights and Fundamental Rules of the Delaware State, in 2 Sources and Documents of United States Constitutions 197, 198 (William F. Swindler ed., 1973).

Section 26 of the Plan or Frame of Government for the Commonwealth or State of Pennsylvania provided that "[a]ll courts shall be open, and justice shall be impartially administered without corruption or unnecessary delay." Pa. Const. of 1776, Plan or Frame of Government for the Commonwealth or State of Pennsylvania § 26, <http://www.yale.edu/lawweb/avalon/states/pa08.htm> (last visited Apr. 20, 2003).

The distinctions between these two provisions form the basic division between remedies clauses today. See *supra* notes 8-9 and accompanying text.

⁵⁷ Maryland, Massachusetts, New Hampshire, and North Carolina all followed the Delaware model, although North Carolina's constitutional provision applied only to persons restrained of their liberty. Md. Const. of 1776, A Declaration of Rights, art. 17, <http://elsinore.cis.yale.edu/lawweb/avalon/states/ma02.htm> (last visited Apr. 20, 2003); Mass. Const. of 1780, Part 1: A Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts, art. 11, <http://www.nhinet.org/ccs/docs/ma-1780.htm> (last visited Apr. 20, 2003); N.H. Const. of 1784, Part 1: The Bill of Rights, art. 14, in 4 *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America 2455* (photo. reprint 1977) (Francis Newton Thorpe ed., 1909) [hereinafter *The Federal and State Constitutions*]; N.C. Const. of 1776, A Declaration of Rights, art. 13, <http://elsinore.cis.yale.edu/lawweb/avalon/states/nc07.htm> (last visited Apr. 20, 2003).

⁵⁸ These states are Kentucky, Tennessee, and Vermont, all of which followed the Pennsylvania model. Ky. Const. of 1792, art. XII, § 13, reprinted in 3 *The Federal and State Constitutions*, *supra* note 57, at 1264, 1275; Tenn. Const. of 1796, art. XI, § 17, http://www.michie.com/tennessee/lpext.dll/Infobase/4e6?f=templates&fn=document-frame.htm&2.0#JD_tncartxv (last visited May 13, 2003); Vt. Const. of 1777, ch. II, § 23, <http://elsinore.cis.yale.edu/lawweb/avalon/states/vt01.htm> (last visited Apr. 20, 2003).

Delaware itself switched to the Pennsylvania model in 1792, with Article I, Section 9 of its new constitution providing:

All courts shall be open; and every man, for an injury done him in his reputation, person, moveable or immoveable possessions, shall have remedy by the due course of law, and justice administered according to the very right of the cause and the law of the land, without sale, denial, or unreasonable delay or expense

Del. Const. of 1792, art. I, § 9, reprinted in 1 *The Federal and State Constitutions*, *supra* note 57, at 568, 569. Today, twenty-seven states use something resembling the original Pennsylvania formulation; only eleven states still adhere to Coke's language. See Bauman, *supra* note 24, at 284-88 (providing complete list of remedies provisions in state constitutions).

⁵⁹ Of the eight states that accompanied their ratification of the Federal Constitution

with suggestions for additional amendments, only three—Virginia, North Carolina, and Rhode Island—included a remedies provision. The Virginia Ratification Convention proposed

[t]hat every freeman ought to find a certain remedy by recourse to the laws for all injuries and wrongs he may receive in his person, property, or character. He ought to obtain right and justice freely without sale, completely and without denial, promptly and without delay, and that all establishments or regulations, contravening these rights, are oppressive and unjust.

10 The Documentary History of the Ratification of the Constitution: Ratification of the Constitution by the States: Virginia 1552 (John P. Kaminski & Gaspare J. Saladino eds., 1993) [hereinafter Documentary History]; 18 Documentary History, *supra*, at 202, 315.

North Carolina submitted proposed amendments identical to Virginia's. Compare Ratification of the Constitution by the State of North Carolina, November 21, 1789, <http://www.yale.edu/lawweb/avalon/const/ratnc.htm> (last visited Apr. 20, 2003), with Ratification of the Constitution by the State of Virginia, June 26, 1788, <http://www.yale.edu/lawweb/avalon/const/ratva.htm> (last visited Apr. 20, 2003).

Rhode Island's statement of ratification included this proposal: "That every freeman ought to obtain right and justice freely and without sale; completely, and without denial; promptly, and without delay; and that all establishments and regulations contravening these rights are oppressive and unjust." William R. Staples, *Rhode Island in the Continental Congress, with the Journal of the Convention that Adopted the Constitution, 1765-1790*, at 652, 676 (Reuben Aldridge Guild ed., Providence, R.I., Providence Press Co. 1870), <http://name.umd.umich.edu/AQJ4219> (last visited Apr. 20, 2003).

The Virginia proposals were submitted for ratification in New York, see Letter from George Mason to John Lamb (June 9, 1788), in 9 Documentary History, *supra*, at 818, but the New Yorkers did not include a remedies guarantee in their own proposals. Ratification of the Constitution by the State of New York, July 26, 1788, <http://www.yale.edu/lawweb/avalon/const/ratny.htm> (last visited Apr. 20, 2003). Of the six states with a remedies provision in their own constitution, only North Carolina recommended that the Federal Constitution follow suit. See Koch, Jr., *supra* note 23, at 372.

Despite the Virginia recommendation, James Madison, a Congressman from that state who drafted the Federal Bill of Rights, did not propose a remedies clause for it. Moreover, there is no record that any member of the House of Representatives urged its inclusion. But in the Senate, an amendment to guarantee a remedy for all injuries or wrongs was offered and rejected on September 8, 1789. Koch, Jr., *supra* note 23, at 374-75.

Because of the limited role of federal courts under the new government, the members of the First Congress were wise to exclude the right to a remedy from the new Constitution. See Hans A. Linde, Without "Due Process": Unconstitutional Law in Oregon, 49 Or. L. Rev. 125, 138 n.38 (1970) (arguing that limited role of federal government in matters of common law justified exclusion of right to remedy, but inclusion of federal due process clause in Bill of Rights "made sense" as way "to secure that the new government would exercise its untried powers over life, liberty, and property by due process of law"). After all, the Constitution requires only one federal court (the Supreme Court), with Congress empowered—but not required—to create inferior courts. And the Constitution did not intend for federal judges to take the lead in creating or modifying common-law causes of action. See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.").

For many years, it appeared that the Federal Constitution still might protect the right to a remedy under the due process clause. For a discussion of that development, see *supra* note 34.

II EARLY INTERPRETATIONS

The first case I have found that mentions the remedies guarantee of a state constitution was decided in 1814. Upholding a Massachusetts law that abolished the common-law right of land-owners to sue mill owners for flooding and substituted a payments schedule instead, the Supreme Judicial Court reasoned: "If it should be said, that the legislature itself has not the constitutional authority to deprive a citizen of a remedy for a wrong actually done to him: the answer is obvious, that they have a right to substitute one process for another"⁶⁰ Early nineteenth-century courts invariably recognized an adequate substitute as a defense to a remedies attack,⁶¹ even if the substituted remedy was "less convenient" or "more tardy and difficult."⁶²

An 1821 case offers the earliest example of an opinion that mentions the remedies guarantee while striking down a law. The Supreme Court of Errors and Appeals of Tennessee relied on several federal and state constitutional grounds to invalidate a statute providing a two-year moratorium on executing on a judgment for debt unless the creditor agreed to accept the notes of certain banks in satisfaction.⁶³ The court noted that "[i]n magna charta [the remedies] restriction is upon royal power; in our country it is upon legislative, and all other, power."⁶⁴ But based on Sullivan's commentaries on Coke, the court read the right to a remedy as protecting only "original and judicial process";⁶⁵ that is, "the mean, whereby we may attain the end," of justice, or law.⁶⁶ Thus, "where the law, operating upon the contract when first made, held out to the creditor the promise of immediate execution after judgment,"⁶⁷ the new statute, imposing a moratorium on collection, violated the right to a remedy.

In reviewing statutes, nineteenth-century courts often applied the remedies clause interchangeably with federal and state impairment of obligation of contracts clauses, federal and state due process or due

⁶⁰ *Stowell v. Flagg*, 11 Mass. (9 Tyng) 364, 365 (1814).

⁶¹ See, e.g., *Von Baumbach v. Bade*, 9 Wis. 559, 577-78 (1859) ("All the authorities agree that it is within the power of the legislature to repeal, amend, change, or modify the laws governing proceedings in courts . . . so that they leave the parties a substantial remedy").

⁶² *Bronson v. Kinzie*, 42 U.S. (1 How.) 311, 316 (1843) (observing that state may alter remedy so long as "the alteration does not impair the obligation of the contract").

⁶³ *Townsend v. Townsend*, 7 Tenn. (Peck) 1 (1821).

⁶⁴ *Id.* at 14.

⁶⁵ *Id.* at 15.

⁶⁶ *Id.*

⁶⁷ *Id.*

course guarantees, and federal and state prohibitions against ex post facto or retroactive laws.⁶⁸ Debtor protection laws were struck down in this scattershot manner on several occasions before the Civil War, with the opinions not articulating the extent to which the remedies clause contributed to the end results.⁶⁹

The first case to strike down a government action solely on the basis of the remedies clause again came from Tennessee, in 1835.⁷⁰ The action condemned was not a law, but a justice-of-the-peace court rule requiring all motions for new trial to be made on the first Saturday after trial. Because “[i]t is the business of the courts to be open, where right and justice shall be administered[,]” the rule had to yield to the constitution.⁷¹ Later, several state courts voided laws that taxed access to the courts in one way or another beyond what was needed to support the judicial machinery.⁷²

⁶⁸ See, e.g., *Riggs, Peabody & Co. v. Martin*, 5 Ark. 506, 508 (1844); *Commercial Bank of Natchez v. Chambers*, 16 Miss. (8 S. & M.) 9, 46-47 (1847); *Townsend*, 7 Tenn. (Peck) at 14-16; *Von Baumbach v. Bade*, 9 Wis. 559, 577 (1859).

⁶⁹ When reading early cases with a modern eye, it is often difficult to find the precise authority on which a court purports to act. Unlike today's courts, which generally resolve cases on a single ground and which dismiss as dicta any statement not directly necessary to that holding, courts in the 1800s routinely struck down laws on every applicable ground and without any indication that only one of the alternative holdings was law. See, e.g., *Davis v. Pierce*, 7 Minn. 13 (1862) (striking down stay law suspending judicial privileges of those aiding Confederacy during Civil War under five constitutional provisions, including remedies clause, contracts clause, prohibition on ex post facto laws, privileges and immunities clause and guarantee of grand jury in criminal matters); see also *Chambers*, 16 Miss. at 46-47.

In other cases of that period, the court would fail to identify any particular authority for a judicial outcome. As late as 1871, the chief justice of Wisconsin said in what may have been a remedies case:

I care very little whether it is placed on those fundamental principles of law and justice which, in our form of government it has been held no legislative body can override, even though not prohibited by the written constitution, or upon the provisions of the constitution itself, some of which clearly forbid the enactment of such laws.

Durkee v. City of Janesville, 28 Wis. 464, 467 (1871); see also Judith S. Kaye, Foreword: The Common Law and State Constitutional Law as Full Partners in the Protection of Individual Rights, 23 Rutgers L.J. 727, 730-32 (1992) (observing that common law and constitutional law often embody same principles, and commenting that “the mere fact that a common law right received constitutional recognition did not signify that it was thereby extinguished as a common law right”).

⁷⁰ *Pawley v. McGimpsey*, 15 Tenn. (7 Yer.) 502 (1835).

⁷¹ *Id.* at 504.

⁷² Thus, while early decisions upheld a five-dollar tax on losing litigants, *Harrison, Pepper & Co. v. Willis*, 54 Tenn. (7 Heisk.) 35, 45-47 (1871) (finding that tax does not violate “letter or spirit” of open courts clause), and a three-dollar fee to obtain a jury trial, *Adams v. Corrison*, 7 Minn. 456, 461 (1862) (“The constitution does not guarantee to the citizen the right to litigate without expense, but simply protects him from the imposition of such terms as unreasonably and injuriously interfere with his right to a remedy . . .”), other courts struck down statutes mandating “fees” that seemed intended to fund the gen-

The first case I have found that struck down a non-revenue statute primarily on the basis of the remedies clause did not come until 1862, when the Supreme Court of Minnesota struck down a law denying access to the courts of the state to anyone "aiding the Rebellion."⁷³ After expounding their support for the Union cause, the justices observed that "in the end all must regard as matter of pride and gratulation, that in this state no one, not even the worst of felons, can be denied the right to simple justice."⁷⁴

Yet even these modest holdings were not without controversy. When the Wisconsin Supreme Court in 1859, relying in part on the remedies clause, even considered striking down a law giving a mortgagor six months to answer a foreclosure complaint, one justice wrote a vigorous concurrence, characterizing as "extraordinary" the court's position that

the remedy is under the control of the state; and, so long as its legislation only alters or impairs it, to what the judiciary deems a reasonable extent, then it is not within the constitutional prohibition; but when it does so to an unreasonable extent, then it is. . . . [T]his is . . . but a judicial discretion to revise legislation; and in my judgment, there is no authority for it in the constitution.⁷⁵

And in 1861, the Kentucky Supreme Court concluded:

The terms and import of this provision show that it relates altogether to the judicial department . . . which is to administer justice "by due course of law," and not to the legislative department, by which such "due course" may be prescribed.

Any other construction would make it inconsistent with other clauses of the constitution, and, in fact, render it practically

eral treasury, see *Flood v. State ex rel. Homeland Co.*, 117 So. 385, 387 (Fla. 1928) (describing ten-dollar docket fee collected for public law library as tax, and thus "repugnant" to state's open court clause); *State ex rel. Davidson v. Gorman*, 41 N.W. 948, 949 (Minn. 1889) (finding statute that required payment based on value of decedent's estate before beginning probate proceedings more like taxation than fee and thus unconstitutional as "hav[ing] no proximate relation to the . . . expenses of the court, nor to the nature or extent of the services which may become necessary in the proceedings"). At least one court struck down a law requiring a tax or assessment to be paid before it could be challenged in court. *Weller v. City of St. Paul*, 5 Minn. 95, 101 (1860) (construing "unconscionable and unjust" tax payment requirement as potentially "amount[ing] to an entire denial of justice"); see also *Wilson v. McKenna*, 52 Ill. 43, 48-49 (1869) (striking down revenue law that required party to show he paid all taxes due on land before challenging tax title set up against him); *Bennet v. Davis*, 37 A. 864, 865 (Me. 1897) (striking down statute that required party to pay amount claimed against him, including costs and interest, before beginning his defense).

⁷³ *Davis v. Pierse*, 7 Minn. 13, 20 (1862) ("[T]he legislature cannot, directly or indirectly . . . deprive [a citizen] of his constitutional right to commence, maintain or defend any action or other judicial proceeding.").

⁷⁴ *Id.* at 23.

⁷⁵ *Von Baumbach v. Bade*, 9 Wis. 559, 589 (Paine, J., concurring).

absurd.⁷⁶

Not until after the Civil War was there any reported opinion dealing with a remedies clause challenge to a statute limiting a tort claim. In 1875, the Pennsylvania Supreme Court upheld a law providing those who worked on or near a railroad with the same limited right to sue the railroad as that enjoyed by the railroad's employees.⁷⁷ The court concluded that no fundamental right had been "cut off or struck down" because the doctrine of respondeat superior "is only an offspring of law."⁷⁸ Since the servant still could be sued for negligence, and the injured party still could recover from someone, the law was constitutional.⁷⁹ But the same year, the Pennsylvania Supreme Court affirmed a judgment striking down a statute that limited a railway's damages to \$3000 for personal injury.⁸⁰ While the court cited the Pennsylvania Constitution of 1874, it is not clear whether it relied solely on the remedies clause or a provision providing for no limitation of damages.⁸¹ Five years later the Supreme Court of Pennsylvania explained:

[W]e are not convinced that *Railroad v. Cook* should be overruled. Its authority is in conservation of the reserved right to every man, that for an injury done him in his person, he shall have a remedy by due course of law. The people have withheld power from the legislature and the courts to deprive them of that remedy, or to circumscribe it so that a jury can only give a pitiful fraction of the damage sustained. Nothing less than the full amount of pecuniary damage which a man suffers from an injury to him in his lands, goods or person, fills the measure secured to him in the Declaration of Rights.⁸²

Finally, in 1887, a federal district judge in Oregon alluded to the remedies clause as grounds for invalidating a tort statute.⁸³ The plaintiff sued a county for injuries sustained while crossing a defective bridge in a horse-drawn buggy.⁸⁴ While the case was pending, the Oregon Legislature passed a statute limiting suits against counties to contract actions and repealing authorization to sue "'for an injury . . . arising from some act or omission' of any county."⁸⁵ The court stated

⁷⁶ *Johnson v. Higgins*, 60 Ky. (3 Met.) 566, 570-71 (1862).

⁷⁷ *Kirby v. Pa. R.R. Co.*, 76 Pa. 506, 508 (1875).

⁷⁸ *Id.* at 509.

⁷⁹ *Id.*

⁸⁰ *Cent. Ry. of N.J. v. Cook*, 1 Weekly Notes of Cases 319 (Pa. 1875).

⁸¹ *Id.*

⁸² *Thirteenth & Fifteenth St. Passenger Ry. v. Boudrou*, 92 Pa. 475, 481-82 (1880).

⁸³ *Eastman v. County of Clackamas*, 32 F. 24 (D. Or. 1887).

⁸⁴ *Id.* at 25-26.

⁸⁵ *Id.* at 30-31.

that in its judgment, the statute was invalid because "the legislature cannot, in the face of [the remedies clause], deny to any one a remedy by due course of law for an injury arising from the wrongful act or omission of a county"⁸⁶ However, the court concluded it was "content to rest the decision of this case on the conclusion that the amendment . . . does not and was not intended to affect the plaintiff's right of action" because it was passed after the action commenced and, as a rule of construction, had to be interpreted as applying to future actions.⁸⁷

Not until 1901 did a court rely squarely on the right to a remedy to strike down a statute providing tort remedies. In *Mattson v. Astoria*,⁸⁸ a municipal ordinance completely eliminated all remedies for persons injured by a defective public street.⁸⁹ The Oregon Supreme Court held that

[t]he constitutional provision guarantying [sic] to every person a remedy by due course of law for injury done him in person or property . . . was intended to preserve the common-law right of action for injury to person or property, and while the legislature may change the remedy or form of procedure, attach conditions precedent to its exercise, and perhaps abolish old and substitute new remedies, it cannot deny a remedy entirely.⁹⁰

Thus, the full import of the remedies clause was not realized until the same decade when the United States Supreme Court used substantive due process to "enact Mr. Herbert Spencer's Social Statics" in *Lochner*.⁹¹ Yet state courts were unwilling to apply the remedies clause aggressively to strike down emerging workers' compensation systems. All states eventually adopted these plans, and they were generally upheld by the courts, although in some instances constitutional amendments were necessary to satisfy or overcome judicial objections.⁹²

⁸⁶ Id. at 32.

⁸⁷ Id. But see *Templeton v. Linn County*, 29 P. 795, 796 (Or. 1892) (refusing to strike down same statute based on remedies guarantee).

⁸⁸ 65 P. 1066 (Or. 1901).

⁸⁹ Id. at 1066-67.

⁹⁰ Id. at 1067 (citations omitted).

⁹¹ *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting); see Herbert Spencer, *The Man Versus the State* 27 (Liberty Classics 1981) (1884) (stating that man's liberty "is to be measured, not by the nature of the government machinery he lives under . . . but by the relative paucity of the restraints it imposes on him").

⁹² 99 C.J.S. *Workman's Compensation* §§ 36-40 (2000). Decisions to uphold the statutes frequently were based on the fact that the employee or employer, or both, had the ability to opt out of the scheme. See, e.g., *Shade v. Ash Grove Lime & Portland Cement Co.*, 144 P. 249, 250 (Kan. 1914) (holding that because compensation system rests on consent of employer and employee, all remedies under common and statutory law remain intact); *Matheson v. Minneapolis St. Ry. Co.*, 148 N.W. 71, 76 (Minn. 1914) (same); *Shea v.*

While inconsistent with some modern views of the right to a remedy, these early cases were surprisingly consistent with Blackstone's view. In most early American cases, the courts were willing to supply a remedy for every right, whether created by common law or statute. But they were not bound to preserve any particular remedy or procedure for vindicating the right. As long as the new law preserved the injured person's ability to vindicate his or her rights in court or provided an adequate substitute remedy, the right to a remedy was not violated. The courts also allowed legislatures to limit remedies derived from *relative* law, such as respondeat superior, in part because the injured person retained the right to obtain a judicial remedy against the individual who caused the injury, that is, the individual who violated the injured person's *absolute* right to personal security.

III MODERN INTERPRETATIONS

Most state courts also upheld legislative repeal of the so-called "heart-balm actions" in the mid-twentieth century, but their reasons for doing so added still new variations to the doctrine.⁹³ For example, in *Pennington v. Stewart*, the Indiana Supreme Court held that the affections of the plaintiff's wife were not property rights.⁹⁴ It further held that because marriage and divorce were controlled by the legislature, and a cause of action for alienation of affections was an incident of marriage, it was also within the purview of the legislature to alter or eliminate the cause of action.⁹⁵ Furthermore, in *Haskins v. Bias*, the Ohio Court of Appeals held that these causes of actions were no longer considered "properly recognizable at law" and had been severely criticized "because of their peculiar susceptibility to abuse and the changing attitude toward the status of women."⁹⁶ Thus, the remedies clause did not apply because it protected only "wrongs that are recognized by law."⁹⁷ One commentator, criticizing the heart-balm decisions, observed: "The fact that the legislature's decision was

North-Butte Mining Co., 179 P. 499, 503 (Mont. 1919) (same); *Evanhoff v. State Indus. Accident Comm'n*, 154 P. 106, 111 (Or. 1915) (same); *Scott v. Nashville Bridge Co.*, 223 S.W. 844, 852 (Tenn. 1920) (finding no deprivation because act is optional and not compulsory).

⁹³ See *Rotwein v. Gersten*, 36 So. 2d 419 (Fla. 1948) (upholding legislature's repeal of actions for alienation of affection). But see *Heck v. Schupp*, 68 N.E.2d 464 (Ill. 1946) (striking down repeal of alienation of affections remedy).

⁹⁴ 10 N.E.2d 619, 621 (Ind. 1937).

⁹⁵ *Id.*

⁹⁶ 441 N.E.2d 842, 844 (Ohio Ct. App. 1981).

⁹⁷ *Id.*

not controversial does not make it constitutional if it denies fundamental rights."⁹⁸

Widely divergent outcomes resulted from challenges to the various statutes of repose passed in the 1960s and 1970s to help architects, engineers, builders, and others in the construction field. Because these statutes cut off certain claims before they even arose, they were in tension with the established remedies doctrine in many states. Most of these statutes were upheld against remedies attacks,⁹⁹ though a significant minority were struck down.¹⁰⁰

Numerous remedies challenges were brought against laws passed in the 1970s and 1980s regulating medical malpractice suits. Again, while many of these laws were struck down in whole or in part on equal protection,¹⁰¹ jury trial,¹⁰² privileges and immunities,¹⁰³ due pro-

⁹⁸ Bauman, *supra* note 24, at 278.

⁹⁹ See, e.g., *Carter v. Hartenstein*, 455 S.W.2d 918, 921 (Ark. 1970); *Yarbrow v. Hilton Hotels Corp.*, 655 P.2d 822, 827 (Colo. 1982); *Zapata v. Burns*, 542 A.2d 700, 711 (Conn. 1988); *Cheswold Volunteer Fire Co. v. Lambertson Constr. Co.*, 489 A.2d 413, 417-18 (Del. 1984); *Twin Falls Clinic & Hosp. Bldg. Corp. v. Hamill*, 644 P.2d 341, 346 (Idaho 1982); *Beecher v. White*, 447 N.E.2d 622, 628 (Ind. Ct. App. 1983); *Burmaster v. Gravity Drainage Dist. No. 2*, 366 So. 2d 1381, 1387-88 (La. 1978); *Whiting-Turner Contracting Co. v. Coupard*, 499 A.2d 178, 188-89 (Md. 1985); *Klein v. Catalano*, 437 N.E.2d 514, 522 (Mass. 1982); *Anderson v. Fred Wagner & Roy Anderson, Jr., Inc.*, 402 So. 2d 320, 324 (Miss. 1981); *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 832-33 (Mo. 1991); *Reeves v. Ille Elec. Co.*, 551 P.2d 647, 650-52 (Mont. 1976); *Lamb v. Wedgewood S. Corp.*, 302 S.E.2d 868, 880-83 (N.C. 1983); *Loyal Order of Moose, Lodge 1785 v. Cavaness*, 563 P.2d 143, 146-48 (Okla. 1977) (rejecting right to remedy claim, but holding that statute is nevertheless unconstitutional violation of federal equal protection provision); *Josephs v. Burns*, 491 P.2d 203, 207 (Or. 1971), abrogated by *Smothers v. Gresham Transfer, Inc.*, 23 P.3d 333, 356 (Or. 2001); *Freezer Storage, Inc. v. Armstrong Cork Co.*, 382 A.2d 715, 720-21 (Pa. 1978); *Walsh v. Gowing*, 494 A.2d 543, 547-48 (R.I. 1985); *Harmon v. Angus R. Jessup Assocs., Inc.*, 619 S.W.2d 522, 524 (Tenn. 1981); *Trinity River Auth. v. URS Consultants, Inc.*, 889 S.W.2d 259, 261-63 (Tex. 1994).

¹⁰⁰ See, e.g., *Jackson v. Mannesmann Demag Corp.*, 435 So. 2d 725, 727-28 (Ala. 1983); *Overland Constr. Co. v. Sirmons*, 369 So. 2d 572, 575 (Fla. 1979); *Perkins v. N.E. Log Homes*, 808 S.W.2d 809, 817 (Ky. 1991); *Saylor v. Hall*, 497 S.W.2d 218, 225 (Ky. 1973); *Brenneman v. R.M.I. Co.*, 639 N.E.2d 425, 430 (Ohio 1994) (overruling *Sedar v. Knowlton Constr. Co.*, 551 N.E.2d 938, 947 (Ohio 1990)); *Daugaard v. Baltic Coop. Bldg. Supply Ass'n*, 349 N.W.2d 419, 424 (S.D. 1984); *Horton v. Goldminer's Daughter*, 785 P.2d 1087, 1096 (Utah 1989); *Kallas Millwork Corp. v. Square D Co.*, 225 N.W.2d 454, 460 (Wis. 1975); *Phillips v. ABC Builders, Inc.*, 611 P.2d 821, 831 (Wyo. 1980).

¹⁰¹ See, e.g., *Austin v. Litvak*, 682 P.2d 41 (Colo. 1984) (holding that three-year statute of repose for medical malpractice actions violates state equal protection guarantee as to one class of claims, but not as to others); *Shessel v. Stroup*, 316 S.E.2d 155 (Ga. 1984) (holding that medical malpractice statute of limitations of two years violates equal protection); *Farley v. Engelken*, 740 P.2d 1058 (Kan. 1987) (ruling that abrogation of collateral source rule violates state equal protection); *Wentling v. Med. Anesthesia Servs.*, 701 P.2d 939 (Kan. 1985) (ruling that abrogation of collateral source rule violates state and federal equal protection); *Coffey v. Bresnahan*, 506 A.2d 310 (N.H. 1986) (finding two-year statute of limitations for tort plaintiffs in survival actions violates equal protection when other tort plaintiffs could recover for six years); *Carson v. Maurer*, 424 A.2d 825 (N.H. 1980) (holding

cess,¹⁰⁴ and separation of powers grounds,¹⁰⁵ as well as on the right to a remedy,¹⁰⁶ state courts also have upheld a number of statutes against

virtually all features of malpractice act unconstitutional); *Arneson v. Olson*, 270 N.W.2d 125 (N.D. 1978) (finding that \$300,000 cap on damages violates state equal protection); *Schwan v. Riverside Methodist Hosp.*, 452 N.E.2d 1337 (Ohio 1983) (holding that one-year statute of limitations as applied to minors over ten years of age violates equal protection because it lacks rational basis); *Duren v. Suburban Cmty. Hosp.*, 482 N.E.2d 1358 (Ohio Ct. Com. Pl. 1985) (holding \$200,000 damage cap violates equal protection); *Graley v. Satayatham*, 343 N.E.2d 832 (Ohio Ct. Com. Pl. 1976) (finding that modification of collateral source rule violates equal protection); *Boucher v. Sayeed*, 459 A.2d 87 (R.I. 1983) (holding that pretrial screening panel violates equal protection); *Baptist Hosp. of S.E. Tex., Inc. v. Baber*, 672 S.W.2d 296 (Tex. App. 1984) (ruling that \$500,000 damage cap violates equal protection).

¹⁰² See, e.g., *Boyd v. Bulala*, 647 F. Supp. 781 (W.D. Va. 1986) (holding damage cap violates right to jury trial found in state constitution); *Simon v. St. Elizabeth Med. Ctr.*, 355 N.E.2d 903 (Ohio Ct. Com. Pl. 1976) (concluding that admission of review panel findings at trial violates right to jury trial and equal protection); *Heller v. Frankston*, 475 A.2d 1291 (Pa. 1984) (holding limitation on awards for attorneys' fees unconstitutional violation of right to jury trial); *Mattos v. Thompson*, 421 A.2d 190 (Pa. 1980) (ruling delay in pretrial arbitration requirement violates right to trial by jury).

¹⁰³ See, e.g., *Eastin v. Broomfield*, 570 P.2d 744 (Ariz. 1977) (finding requirement that party not prevailing before panel post \$2000 bond before proceeding to trial violated state privileges and immunities clause).

¹⁰⁴ See, e.g., *Aldana v. Holub*, 381 So. 2d 231 (Fla. 1980) (holding review panel process violates federal and state due process rights); *Flippin v. Jarrell*, 270 S.E.2d 482 (N.C. 1980) (finding statute of limitations in medical malpractice action violated mother's due process rights by providing unreasonable time to file claim after discovery of injury); *Arneson*, 270 N.W.2d 125 (invalidating cumulative effect of provisions in medical malpractice statute on substantive due process grounds); *Gaines v. Preterm-Cleveland, Inc.*, 514 N.E.2d 709 (Ohio 1987) (holding statute of repose unconstitutionally applied to medical malpractice victim who discovered injury during period of repose but had unreasonably short amount of time to file suit).

¹⁰⁵ See, e.g., *Bernier v. Burris*, 497 N.E.2d 763 (Ill. 1986) (ruling that pretrial screening panels made up of circuit judge, attorney, and health-care professional violate separation of powers under state constitution); *Wright v. Cent. Du Page Hosp. Ass'n*, 347 N.E.2d 736 (Ill. 1976) (same); *Arneson*, 270 N.W.2d at 131-32 (holding that legislative attempt to restrict joinder and doctrine of *res ipsa loquitur* in medical negligence cases violates exclusive authority of state supreme court to establish rules of procedure and evidence).

¹⁰⁶ See, e.g., *Smith v. Dep't. of Ins.*, 507 So. 2d 1080 (Fla. 1987) (finding \$450,000 damage cap violates right of access to courts); *Strahler v. St. Luke's Hosp.*, 706 S.W.2d 7 (Mo. 1986) (holding statute of limitations applicable to minors violates right of access to courts); *State ex rel. Cardinal Glennon Mem'l Hosp. for Children v. Gaertner*, 583 S.W.2d 107 (Mo. 1979) (ruling that statutorily required pretrial panel review violates right of access to courts by imposing delay before jurisdiction is obtained); *Jiron v. Mahlab*, 659 P.2d 311 (N.M. 1983) (finding review panel's undue delay as applied to plaintiffs violates their right of access to courts); *Hardy v. VerMeulen*, 512 N.E.2d 626 (Ohio 1987) (holding statute of limitations abolishing discovery rule violates constitutional provision granting right to remedy); *Neagle v. Nelson*, 685 S.W.2d 11 (Tex. 1985) (holding statute of limitations violates right of access to courts as applied to plaintiff who discovered negligence after period was up); *Nelson v. Krusen*, 678 S.W.2d 918 (Tex. 1984) (declaring that statute of limitations cutting off cause of action before discovery of injury is unconstitutional under open courts provision); *Sax v. Votteler*, 648 S.W.2d 661 (Tex. 1983) (concluding that two-year statute of limitations for minors over age six violates open courts provision).

all such attacks.¹⁰⁷

Now, remedies challenges are being leveled against recent "tort reform" laws. Taking advantage of new state constitutional law treatises, law review articles, and increased interstate dialogue between state appellate justices, contemporary remedies opinions are often longer and more thoughtful, but as yet they are no more consistent than before. Indeed, current variations among and even within states are truly confounding. Justice Hans Linde noted that his own Supreme Court of Oregon "has written many individually tenable but inconsistent opinions" about the remedies guarantee,¹⁰⁸ while former Justice Zimmerman of the Utah Supreme Court called upon the bench and bar to develop new approaches to find "understandable standards . . . that are practically capable of predictable application."¹⁰⁹

¹⁰⁷ See, e.g., *Fein v. Permanente Med. Group*, 695 P.2d 665 (Cal. 1985) (holding cap on noneconomic damages and modification of collateral source rule constitutional); *Lacy v. Green*, 428 A.2d 1171 (Del. Super. Ct. 1981) (finding statute providing for medical review board does not deny constitutional protections of right to trial by jury, equal protection, separation of powers, access to court, or due process); *Attorney Gen. v. Johnson*, 385 A.2d 57 (Md. 1978) (ruling that medical review panel requirement does not violate separation of powers, right to jury trial, or equal protection); *State ex rel. Strykowski v. Wilkie*, 261 N.W.2d 434 (Wis. 1978) (same); *Comiskey v. Arlen*, 390 N.Y.S.2d 122 (App. Div. 1976) (holding that statute allowing for admission of medical malpractice panel's recommendation at subsequent trial does not violate right to jury trial, due process, or equal protection), *aff'd*, 43 N.Y.2d 696 (1977); see also Richard C. Turkington, *Constitutional Limitations on Tort Reform: Have the State Courts Placed Insurmountable Obstacles in the Path of Legislative Responses to the Perceived Liability Insurance Crisis?*, 32 Vill. L. Rev. 1299, 1317-19 n.52 (1987) (listing states that have held medical malpractice acts unconstitutional and states that have ruled favorably on constitutionality of such acts).

¹⁰⁸ *Hale v. Port of Portland*, 783 P.2d 506, 518 (Or. 1989) (Linde, J., concurring); see also Martin B. Margulies, *Connecticut's Misunderstood Remedy Clause*, 14 Q.L.R. 217 (1994) (advocating for standard of review approach to remedy clause analysis); Lewis, *supra* note 31, at 955, 985 (concluding that Kentucky's jural rights doctrine is based on misconception of constitutional history and should be abandoned).

¹⁰⁹ *Lyon v. Burton*, 5 P.3d 616, 641 (Utah 2000) (Zimmerman, J., concurring). Justice Zimmerman criticized the seminal case of *Berry v. Beech Aircraft Corp.*, 717 P.2d 670 (Utah 1985), as "subject to manipulation," "lead[ing] to absurd results," and distorting the court's relationship with the Utah Legislature by "bestow[ing] upon [the Utah Supreme Court] the unfettered right to second-guess the legislature." *Craftsman Builder's Supply, Inc. v. Butler Mfg. Co.*, 974 P.2d 1194, 1224, 1228 (Utah 1999) (Zimmerman, J., concurring). Zimmerman advocates a procedural approach to interpreting the clause. *Id.* at 1238. He argues that

[b]ecause the open courts provision does not place substantive limitations on the legislature, the legislature may eliminate a cause of action, narrow the factual circumstances that will give rise to any particular cause of action, or limit the remedies available for a legal injury. Of course, the power of the legislature to make such changes in the law is limited by other constitutional provisions Furthermore, the legislature is also constrained in that it cannot make modifications affecting vested rights. That is, once the right to an action vests, the legislature is not free to thereafter eliminate the cause of action.

IV CATEGORIES OF RECENT DECISIONS

Some scholars, wading through this morass, have attempted to classify or systematize the various approaches.¹¹⁰ Many of their distinctions are instructive, though I do not find any compelling. At best, the disarray may be organized into certain rubrics that recur from state to state.

A. *Quid Pro Quo*

First, all states apparently recognize the doctrine of a substitute remedy, or quid pro quo, to justify legislative change. But some states hold that the substitute need only benefit society as a whole,¹¹¹ while others require that it benefit the individual plaintiff.¹¹² And when they require an individual benefit, courts differ on how closely the new remedy must replicate the one it replaced.¹¹³

Even more disparity occurs when the statute does not provide a quid pro quo. Some courts hold that such laws invariably must be struck down.¹¹⁴ Many take something of a “due process” approach—that is, the courts will uphold the legislative choice if it bears a rational

Id. He further states that “[t]he procedural protection afforded by article I, section 11 is not empty. I conclude that it prohibits both the courts and the legislature from closing the doors of the courts to any person who has a legal right to vindicate.” Id.

¹¹⁰ See, e.g., 1 Friesen, *supra* note 7, § 6-2(c); Francis E. McGovern, *The Variety, Policy and Constitutionality of Product Liability Statutes of Repose*, 30 Am. U. L. Rev. 579, 616 (1981); Schuman, *supra* note 25, at 1205-17; Patrick E. Sullivan, Note, *Medical Malpractice Statute of Repose: An Unconstitutional Denial of Access to the Courts*, 63 Neb. L. Rev. 150, 170-77 (1983); Janice Sue Wang, Note, *State Constitutional Remedy Provisions and Article 1, Section 10 of the Washington State Constitution: The Possibility of Greater Judicial Protection of Established Tort Causes of Action and Remedies*, 64 Wash. L. Rev. 203, 208-11 (1989).

¹¹¹ See *Lemuz v. Feiser*, 933 P.2d 134, 150 (Kan. 1997) (finding risk management and minimum insurance requirements that benefit public are adequate quid pro quo for abrogating cause of action against hospital for corporate negligence).

¹¹² See *Estabrook v. Am. Hoist & Derrick, Inc.*, 498 A.2d 741, 746-48 (N.H. 1985) (holding that amendment to workers’ compensation act giving immunity to negligent fellow employees is unconstitutional because it does not provide adequate quid pro quo), overruled by *Young v. Prevue Prods., Inc.*, 534 A.2d 714, 717 (N.H. 1987) (declining to apply narrow quid pro quo requirement used in *Estabrook*).

¹¹³ See Schuman, *supra* note 25, at 1210-12 (discussing *Estabrook*). Compare *Tex. Workers’ Comp. Comm’n v. Garcia*, 893 S.W.2d 504, 521 (Tex. 1995) (comparing amended statute to common-law remedy, and not previous statute, when considering open court challenge), with *Bair v. Peck*, 811 P.2d 1176, 1191 (Kan. 1991) (holding that if comprehensive remedial legislation that originally preserved common-law remedy is amended to abrogate that remedy, change is constitutional if “the substitute remedy would have been sufficient if the modification had been part of the original act”).

¹¹⁴ *Smothers v. Gresham Transfer, Inc.*, 23 P.3d 333, 356 (Or. 2001) (ruling that legislature must provide substitute remedial process when it abolishes any pre-1857 common-law right).

or perhaps a reasonable relationship to a legitimate or permissible legislative goal.¹¹⁵ But still other opinions, borrowing federal equal protection terminology, require something akin to strict scrutiny in deciding whether to permit the legislative restriction.¹¹⁶ A few decisions have required "an overpowering public necessity" to uphold a restriction without a substitute remedy.¹¹⁷ Finally, some opinions use different standards of scrutiny based on the nature of the right being infringed.¹¹⁸

In evaluating the restriction, some opinions look only at the legislative purpose in changing the law, while others "balance" the plaintiff's loss of a remedy against the general benefit to society.¹¹⁹ The standards articulated by courts for conducting this balance typically provide little guidance to constrain the judges' personal preferences.¹²⁰

¹¹⁵ Thus, West Virginia courts will uphold a law whose purpose is "to eliminate or curtail a clear social or economic problem, and the alteration or repeal of the existing cause of action or remedy is a reasonable method of achieving such purpose." *Lewis v. Canaan Valley Resorts, Inc.*, 408 S.E.2d 634, 645 (W. Va. 1991). See also *Haney v. Int'l Harvester Co.*, 201 N.W.2d 140, 146 (Minn. 1972) (stating that no substitute remedy is needed if abolition is in pursuit of "permissible legislative objective"); *Green v. Siegel, Barnett & Schutz*, 557 N.W.2d 396, 404-05 (S.D. 1996) (deferring to legislature's reasonable decision to run statute of limitations from date of breach of duty rather than date of discovery); *Berry v. Beech Aircraft Corp.*, 717 P.2d 670, 680 (Utah 1985) (requiring substantially equal alternative benefit unless "there is a clear social or economic evil to be eliminated and the elimination of an existing legal remedy is not an arbitrary or unreasonable means for achieving the objective").

¹¹⁶ See *Kenyon v. Hammer*, 688 P.2d 961, 975 (Ariz. 1984) (applying strict scrutiny equal protection analysis because state constitutional guarantee prohibiting abrogation of right to recover damages makes right to remedy fundamental); *White v. State*, 661 P.2d 1272, 1274-75 (Mont. 1983) (using similar analysis with respect to state's "speedy remedy" provision), overruled by *Meech v. Hillhaven W., Inc.*, 776 P.2d 488 (Mont. 1989) (holding that Montana constitution does not guarantee fundamental right to full redress).

¹¹⁷ See *Psychiatric Assocs. v. Siegel*, 610 So. 2d 419, 424 (Fla. 1992) (requiring finding of overpowering necessity and no alternative means to meet necessity to justify legislature's abrogation of court access). But see *Agency for Health Care Admin. v. Associated Indus. of Fla., Inc.*, 678 So. 2d 1239, 1253 (Fla. 1996) (clarifying that lesser standard applies when legislature abolishes affirmative defenses).

¹¹⁸ See *Murphy v. Edmonds*, 601 A.2d 102, 113-14 (Md. 1992) (requiring quid pro quo when statute abrogates recovery for violation of fundamental rights, but perhaps not when other common-law rights are abrogated).

¹¹⁹ See *Strahler v. St. Luke's Hosp.*, 706 S.W.2d 7, 11-12 (Mo. 1986) (striking down medical malpractice statute of repose because cost to injured minors outweighs societal good).

¹²⁰ As I said in my dissent in *Lucas v. United States*:

With all due respect, these approaches [in the court's other three opinions] all suffer from a common vice: [T]hey require this court to strike a delicate balance between important competing interests without any standards for evaluating the relative importance of those interests. This unfettered discretion leaves us with little other than our personal predilections on which to rely in reaching our decision. One justice therefore finds the cap to be "reasonable," the other justices condemn the caps as "unfair and unreasonable" or "unrea-

B. Application to Common Law Only

Second, regardless of the standard employed, most decisions hold that the remedies clause only impedes legislatures from altering or amending a common-law remedy, not a statutorily-created one.¹²¹ Some opinions hold that the common-law remedy must be “well-established.”¹²² That can mean merely that the remedy is older than the statute allegedly impairing it,¹²³ or that the remedy was settled when the constitution was adopted.¹²⁴ But all these distinctions assume that the bench and bar can tell whether today’s cause of action is the same as or different than one from a century or two ago, a task that sometimes confounds even legal historians.¹²⁵

Some authorities reject all these distinctions as artificial.¹²⁶ They see the guarantee as encompassing both statutory and common-law provisions, with importance rather than age or pedigree being the principal inquiry. For example, one justice would apply the remedies provision to protect a statute, a judicial holding, or even a custom that is “engrained into the fabric of the law [so] as to acquire fundamental and basic status.”¹²⁷

sonable and arbitrary.”

757 S.W.2d 687, 717 (Tex. 1988) (citations omitted).

¹²¹ See, e.g., *Olson v. Ford Motor Co.*, 558 N.W.2d 491, 497 (Minn. 1997) (explaining that “Remedies Clause does not guarantee redress for every wrong, but instead enjoins the legislature from eliminating those remedies that have *vested at common law* without a legitimate legislative purpose”) (emphasis in original); *Moreno v. Sterling Drug, Inc.*, 787 S.W.2d 348, 355 (Tex. 1990) (stating that litigant must show that “well-recognized common-law cause of action . . . is being restricted”). But see *Kluger v. White*, 281 So. 2d 1, 4 (Fla. 1973) (holding that remedy is protected if provided by statute passed prior to effective date of constitution or created by common law at any time).

¹²² See, e.g., *Trinity River Auth. v. URS Consultants, Inc.*, 889 S.W.2d 259, 261 (Tex. 1994).

¹²³ See, e.g., *Olson*, 558 N.W.2d at 497 (concluding seat belt gag rule not violation where it predates crashworthiness doctrine it supposedly impaired); *Trinity River Auth.*, 889 S.W.2d at 263 (finding statute of repose constitutional because common law had not recognized discovery rule at time statute was passed).

¹²⁴ *Stein v. Katz*, 567 A.2d 1183, 1186 (Conn. 1989) (denying attempt to strike down dental repose statute because plaintiff died before trial and negligence claims abated at death under common law when constitution was adopted in 1818).

¹²⁵ *Schuman*, supra note 25, at 1209-10 (comparing *Saylor v. Hall*, 497 S.W.2d 218 (Ky. 1973), which held that cause of action was protected as developed over time, with *Carney v. Moody*, 646 S.W.2d 40 (Ky. 1982), which held that cause of action was protected only if existing when Kentucky constitution was adopted).

¹²⁶ See *Neher v. Chartier*, 879 P.2d 156, 161 (Or. 1994) (recognizing abandonment of distinction between statutory and common-law claim); *Schuman*, supra note 25, at 1217 (“To distinguish between common-law and legislative causes of action is to elevate form over substance.”).

¹²⁷ *Lankford v. Sullivan, Long & Hagerty*, 416 So. 2d 996, 1007 (Ala. 1982) (Jones, J., concurring).

C. *Delay or Denial of Access*

Third, some opinions limit only statutes that delay or deny access to the courts, not those that deny or restrict substantive relief.¹²⁸ Thus, in medical malpractice cases, the Missouri Supreme Court has struck down pre-suit screening panels but upheld statutes limiting liability.¹²⁹ Others protect only against retroactive changes in the law. Thus, the legislature can change or abolish any cause of action, but the remedies clause protects the claims of those individuals whose causes of action had accrued at or before the time of the change.¹³⁰ And some decisions hold that the remedy clause is not violated by the complete abolition of a remedy if the legislature has left a plaintiff a similar remedy against other defendants.¹³¹

D. *No Restriction on Legislation*

Finally, a significant number of opinions hold that the remedies guarantee does not constrain any substantive legislation. For example, in North Carolina, "the remedy constitutionally guaranteed must be one that is legally cognizable. The legislature has the power to define the circumstances under which a remedy is legally cogni-

¹²⁸ See *Commonwealth v. Werner*, 280 S.W.2d 214 (Ky. 1955) (invalidating statute that deferred jury trials for two years in highway condemnation proceedings); *Johnson v. Higgins*, 60 Ky. (3 Met.) 566 (1861) (holding that remedies clause does not apply to courts' jurisdiction); *Pinnick v. Cleary*, 271 N.E.2d 592, 600 (Mass. 1971) (finding remedies clause preserves procedural but not substantive rights). Professor Schuman concludes that "history more logically supports a 'substantive/procedural' distinction than a 'legislative/judicial' one." Schuman, *supra* note 25, at 1203.

¹²⁹ *Adams v. Children's Mercy Hosp.*, 832 S.W.2d 898 (Mo. 1992) (finding statutory cap on damages constitutional); *Harrell v. Total Health Care, Inc.*, 781 S.W.2d 58 (Mo. 1989) (holding that immunity statute exempting health services corporations from certain liabilities is constitutional); *State ex rel. Cardinal Glennon Mem'l Hosp. for Children v. Gaertner*, 583 S.W.2d 107 (Mo. 1979) (invalidating as unconstitutional statute requiring person with malpractice claim to refer claim to Review Board before filing court action).

¹³⁰ See *Pickett v. Matthews*, 192 So. 261, 264 (Ala. 1939) ("Undoubtedly the right to the remedy must remain and cannot be curtailed after the injury has occurred and right of action vested, regardless of the source of the duty which was breached, provided it remained in existence when the breach occurred."); *Harrison v. Schrader*, 569 S.W.2d 822, 827 (Tenn. 1978) (noting that guarantee only applies to "such injuries as constitute violations of established law of which the courts can properly take cognizance") (citations omitted). Justice Shores criticizes this approach as providing no more protection than that already provided by the *ex post facto* prohibition. *Fireman's Fund Am. Ins. Co. v. Coleman*, 394 So. 2d 334, 351 (Ala. 1981) (Shores, J., concurring).

¹³¹ See *Sartori v. Harnischfeger Corp.*, 432 N.W.2d 448, 454 (Minn. 1988) (upholding statute of repose for manufacturers, designers, and contractors of improvement to real property because suit still available against landowner and worker's compensation benefits still available for injured employees); *Noonan v. City of Portland*, 88 P.2d 808, 821 (Or. 1938) (concluding that remedy clause not violated because, though city is immune, suit still available against negligent officials and abutting property owner), overruled by *Smother's v. Gresham Transfer, Inc.*, 23 P.3d 333, 353 (Or. 2001).

zable and those under which it is not.”¹³² Other courts have reached the same result by describing the guarantee as merely a general principle, not a constitutional standard.¹³³

V

SHOULD THE GUARANTEE BE NARROWLY CONSTRUED?

In surveying this morass, it is certainly tempting to give the remedies guarantee a narrow or constricted scope. Among the reasons that suggest caution to me are these:

First, the paucity of historical information may make us uncomfortable with our ability to interpret and develop the clause.¹³⁴ Some jurists and scholars have suggested that constitutional texts without an extensive historical record, because they have never engendered broad interest or public debate, do not deserve to be interpreted in the same fashion as the “great ordinances of the Constitution.”¹³⁵

¹³² *Lamb v. Wedgewood S. Corp.*, 302 S.E.2d 868, 882 (N.C. 1983); see also *Crier v. Whitecloud*, 496 So. 2d 305, 309-10 (La. 1986) (holding that state constitution does not limit legislature’s ability to restrict causes of action or to create areas of immunity from suit).

¹³³ In Idaho, the remedies clause “merely admonishes the Idaho courts to dispense justice and to secure citizens the rights and remedies afforded by the legislature or by the common law.” *Hawley v. Green*, 788 P.2d 1321, 1324 (Idaho 1990). See also *O’Quinn v. Walt Disney Prods., Inc.*, 493 P.2d 344, 346 (Colo. 1972) (explaining that remedies clause “simply provides that if a right does accrue under the law, the courts will be available to effectuate such right”); *Langevin v. City of Biddeford*, 481 A.2d 495, 497 n.2 (Me. 1984) (noting that remedies clause does not create fundamental right, but rather establishes general principle); *Black v. Solmitz*, 409 A.2d 634, 635 (Me. 1979) (describing remedies clause as general principle that every wrong requires remedy); Ruth A. Mickelsen, *The Use and Interpretation of Article I, Section Eight of the Minnesota Constitution 1861-1984*, 10 Wm. Mitchell L. Rev. 667, 675-80 (1984) (discussing nineteenth- and early-twentieth-century Minnesota cases). In *Garing v. Fraser*, 76 Me. 37, 41-42 (1884), the Court explained:

To be sure, it is a general rule of the common law and it has been substantially engrafted into . . . our constitution But the law has more than one idea. And this principle however sound must be understood with such qualifications and limitations as other principles of law equally sound and important impose upon it.

¹³⁴ See generally L. Harold Levinson, *Interpreting State Constitutions by Resort to the Record*, 6 Fla. St. U. L. Rev. 567 (1978) (suggesting that clear, well-assembled record is useful aid to establish “collective intent” in interpretation of constitutional provisions).

¹³⁵ *Springer v. Philippine Islands*, 277 U.S. 189, 209 (1928) (Holmes, J., dissenting); *Vreeland v. Byrne*, 370 A.2d 825, 831-32 (N.J. 1977); see also James Gray Pope, *An Approach to State Constitutional Interpretation*, 24 Rutgers L.J. 985, 986-87 (1993) (suggesting different interpretive treatment for “vital” constitutional provisions and minor ones).

However ancient its origin, the right to a remedy simply was not one of the core freedoms for which the revolution was waged. The eighteen volumes thus far published of the comprehensive *The Documentary History of the Ratification of the Constitution* include only two letters from one anonymous pamphleteer that discuss the guarantee at all. An Additional Number of Letters from the Federal Farmer to the Republican; Leading to a

Second, it is difficult to put parameters on the scope of judicial review in a remedies challenge. For example, if Congress is to make no law respecting the establishment of religion, then a court can test a law against a judicially-fashioned standard of what constitutes establishment. But the essence of lawmaking is the fixing of rights and responsibilities and the creation of remedies when they are breached. Logically, any change in any law that may be enforced through a civil action could violate the remedies guarantee. But no one contends that the law can or should be frozen or that only judges are legitimate agents of change. Thus, the remedies clause is clearly in tension with the separation of powers doctrine that is the genius of the American system. For example, forty-two states have constitutional or statutory reception clauses providing that the common law shall control unless and until changed by statutory law.¹³⁶ The remedies guarantee must be harmonized with the legislature's undoubted right to make broad policy.¹³⁷ As one justice has queried: "How do courts supply content

Fair Examination of the System of Government, Proposed by the Late Convention; and to Several Essential and Necessary Alterations in It; and Calculated to Illustrate and Support the Principles and Positions Laid Down in the Preceding Letters, 17 Documentary History, *supra* note 59, at 265, 347. The pamphlet appeared sometime before May 2, 1788, when its publication was announced in the *New York Journal* and *New York Packet*. *Id.*

One letter mentioned that "having free recourse to the laws" was a "natural and unalienable" right "of which even the people cannot deprive individuals." Letter VI (Dec. 25, 1787), in *id.* at 268, 273-74. A second letter argued for the explicit protection of the right to a remedy in the Federal Constitution. While "by long custom, by magna charta, bills of rights &c.," the people had become "entitled to obtain right and justice freely and without delay" in the state courts, the federal courts were new and had no such tradition. Letter XVI (Jan. 20, 1788), in *id.* at 342, 347-48.

¹³⁶ Victor E. Schwartz, Mark A. Behrens & Leah Lorber, Tort Reform Past, Present and Future: Solving Old Problems and Dealing with the "New Style" Litigation, 27 Wm. Mitchell L. Rev. 237, 252 & n.87 (2000).

¹³⁷ Note, *supra* note 27, at 1205 & n.18. See also *Lucas v. Bishop*, 273 S.W.2d 397, 399 (Ark. 1954) (holding that remedies clause does not allow court to transgress division of powers to create means of redress for injury); *Cason v. Baskin*, 20 So. 2d 243, 250 (Fla. 1944) (en banc) ("The words 'for any injury . . . [he] shall have remedy, by due course of law' do not mean that strictly legislative power is delegated to the courts."); *Simons v. Kidd*, 38 N.W.2d 883, 886 (S.D. 1949) (concluding that remedies clause does not allow judicial usurpation of legislative powers). In 1989, the Montana Supreme Court overruled three decisions less than ten years old to hold:

Montana's remedy clause seeks to guarantee equal access to courts to obtain remedies for injuries as provided by governing law. It does not, however, impart a definition of what the law considers a remedy or full legal redress. Nor does it empower this Court to exclude the legislature from defining what are legal injuries.

Meech v. Hillhaven W., Inc., 776 P.2d 488, 507 (Mont. 1989) (overruling *Pfost v. State*, 713 P.2d 495 (Mont. 1985); *White v. State*, 661 P.2d 1272 (Mont. 1983); and *Corrigan v. Janney*, 626 P.2d 838 (Mont. 1981), all of which had held that Montana Constitution guarantees all persons judicial remedy for every injury). But see *State ex rel. Watkins v. Fernandez*, 143 So. 638, 641 (Fla. 1932) ("In a changing world marked by the ebb and flow of social and

to the provision without overstepping their traditional role and legislating themselves?"¹³⁸

Third, our view of the common law is quite different from that of the founders two centuries ago. Their guides were Coke and Blackstone, for whom the common law was not simply the creation of human judges. Rather, it was a pre-existing body of truth, in part or in whole divinely inspired,¹³⁹ that was merely "discovered" by judges. Thus, "[c]ases were mere evidence of the law as opposed to comprising the law itself."¹⁴⁰ Today, we regard the common law as dynamic, not static. We see judicial opinions not as "mere evidence of the law's content,"¹⁴¹ but as the law itself. Is this mutable, temporary, and very obviously human law as worthy of constitutional protection as a "brooding omnipresence in the sky?"¹⁴²

Fourth, the scope and function of the common law have changed rather dramatically since most states adopted their remedies provisions. In 1776, and well into the nineteenth century, most law was judge-made, not statutory.¹⁴³ Christopher Columbus Langdell, after all, felt able to teach the "science" of law exclusively through the "case method."¹⁴⁴ But as codified law increased, more rights and remedies were created legislatively, not judicially.¹⁴⁵ From wrongful death acts, to private antitrust actions, to the Uniform Commercial Code, to consumer protection statutes, it is legislatures, not courts,

economic shifts, new conditions constantly arise which make it necessary, that no right be without a remedy, to extend the old and tried remedies. It is the function of *courts* to do this." (emphasis added)).

¹³⁸ *Fireman's Fund Am. Ins. Co. v. Coleman*, 394 So. 2d 334, 351 (Ala. 1981) (Shores, J., concurring).

¹³⁹ 1 William Blackstone, *Commentaries* *39-41.

¹⁴⁰ Christian F. Southwick, Note, Unprecedented: The Eighth Circuit Repaves *Antiquas Vias* with a New Constitutional Doctrine, 21 Rev. Litig. 191, 246 (2002). Blackstone wrote in reaction to legal changes wrought by the incipient Industrial Revolution. As Southwick concluded, "Blackstone saw the inadequacies of the common law as arising from alterations to its original form. For him, the study of history might make it possible to bring such deviations back into congruence with the common law's initial perfect state." *Id.* (citing Daniel J. Boorstin, *The Mysterious Science of Law* 27, 68 (1941)).

¹⁴¹ *Id.* at 253.

¹⁴² *S. Pac. Co. v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

¹⁴³ See Kaye, *supra* note 69, at 728, 730-32 (discussing state common-law and constitutional rights during colonial period); John M. Walker, Jr., *Judicial Tendencies in Statutory Construction: Differing Views on the Role of the Judge*, 58 Ann. Surv. Am. L. 203, 207-09 (2001).

¹⁴⁴ See, e.g., Arthur E. Sutherland, *The Law at Harvard 167-76* (1967) (relating history of Langdell's years as dean of Harvard Law School). Cf. Grant Gilmore, *The Ages of American Law* 42 (1977) ("Langdell seems to have been an essentially stupid man who, early in his life, hit on one great idea to which, thereafter, he clung with all the tenacity of genius.").

¹⁴⁵ See, e.g., Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. Rev. 1, 8-9 (1995).

who are now the prime creators of new rights and remedies. Can state courts in good conscience say to their legislatures, "Well, sure, you've created all these causes of action for all these wrongs, but you can't touch this right because some judge recognized it in England a few hundred years ago?" Isn't that ignoring the beam in the judicial eye while obsessing on the mote in the legislative one? Moreover, if early-nineteenth-century state courts did not accord constitutional protection to common-law remedies when they were much more pervasive than they are now, why should modern courts strain to protect such remedies?

Fifth, and finally, the aggressive use of the remedies guarantee creates the danger of a "see-saw" battle between judges and legislators.¹⁴⁶ Already, legislatures in at least two states have sent constitutional amendments to the voters to overrule remedy decisions by their state supreme court.¹⁴⁷ Moreover, the continued judicial rejection of popularly supported legislative changes risks "federalizing" more law, as proponents of reform will turn to Congress to provide national solutions to problems traditionally left to the states. One example is the ongoing attempt to federalize the law of products liability.¹⁴⁸ I do

¹⁴⁶ Schwartz et al., *supra* note 136, at 240.

¹⁴⁷ *Fireman's Fund Am. Ins. Co. v. Coleman*, 394 So. 2d 334, 352 (Ala. 1981) (Shores, J., concurring) (noting that legislature amended Article IV, Section 82 of Alabama Constitution to authorize adoption of arbitration statutes). Constitutional Initiative No. 30, approved by the electorate Nov. 4, 1986, would have amended the Montana Constitution Article II section 16 to read as follows:

(1) Courts of justice shall be open to every person, and speedy remedy afforded for injury of person, property, or character. Right and justice shall be administered without sale, denial, or delay.

(2) No person shall be deprived of legal redress for injury incurred in employment for which another person may be liable except as to fellow employees and his immediate employer who hired him if such immediate employer provides coverage under the Workmen's Compensation Laws of this state.

(3) This section shall not be construed as a limitation upon the authority of the legislature to enact statutes establishing, limiting, modifying, or abolishing remedies, claims for relief, damages, or allocations of responsibility for damages in any civil proceeding; except that any express dollar limits on compensatory damages for actual economic loss for bodily injury must be approved by a 2/3 vote of each house of the legislature.

State ex rel. Mont. Citizens for the Pres. of Citizens' Rights v. Waltermire, 738 P.2d 1255, 1257 (Mont. 1987). The amendment failed, however, because of defects in presentation to the electors. *Id.* at 1264.

¹⁴⁸ See, e.g., Health Act of 2003, S. 607, 108th Cong. § 8(c) (2003) (regulating claims against manufacturers of medical products); Personal Responsibility in Food Consumption Act, H.R. 339, 108th Cong. (2003) (precluding lawsuits against manufacturers, distributors, and sellers of food or nonalcoholic beverage products unless product is in violation of statutory or regulatory requirements); Asbestos Compensation Act of 2003, H.R. 1114, 108th Cong. (2003) (regulating claims arising out of asbestos-related injuries); Small Business Liability Reform Act of 2001, S. 865, 107th Cong. § 204 (2001) (limiting liability of product sellers); see also Marcia Coyle, In Washington, Old Fights Are New Again:

not say that courts should disregard the law for prudential concerns. But as a Texan, I do offer for guidance Congressman David Crockett's motto: "Be sure you are right, then go ahead."¹⁴⁹

VI

NEW APPROACHES TO INTERPRETING THE REMEDIES GUARANTEE

Mindful of such considerations, many scholars have devised new approaches to rein in the remedies clause. For instance, one professor would allow the legislature to abolish a cause of action entirely, because that is substantive, but not to place limitations or restrictions that could be deemed procedural on the same cause of action.¹⁵⁰ But that reasoning has the perverse effect of encouraging the legislature to make wholesale changes in common-law principles when a mere tweak could satisfy the perceived need for change. Another commentator suggests that "[a]n open courts clause analysis consistent with the origins of the provision should focus not on whether the legislature has abolished a 'remedy' but on whether the challenged action compromises the judiciary as an independent branch of government."¹⁵¹ This may be close to right, but it needs more explication to be useful. Some of my colleagues feel compromised whenever the legislature is sitting, while for others only a reduction in judicial pay would meet that standard! Finally, one scholar's proposal that a court may authorize a remedy only when the legislature has created a right without a remedy¹⁵² presumably would relegate the clause to the far backwater of useable law.

Given all these problems, is the remedies guarantee merely constitutional detritus, like a Rhode Islander's fundamental right to gather seaweed on the beach?¹⁵³ Not at all. Certainly, remedies jurisprudence has much to offer in enhancing access to justice. The best years of the clause may lie ahead. As one scholar has noted, "the

Onlookers Recall '90s Tort Reform Effort, *Nat'l L.J.*, Nov. 18, 2002, at A1 (describing political battles in Congress to limit personal injury and products-liability lawsuits).

¹⁴⁹ David Crockett, *A Narrative of the Life of David Crockett of the State of Tennessee* 13 n.1 (James A. Shackford & Stanley J. Folmsbee eds., The Univ. of Tenn. Press 1973) (1834).

¹⁵⁰ Bauman, *supra* note 24, at 240.

¹⁵¹ Hoffman, *supra* note 54, at 1316. Schuman agreed with this approach in his early work but rejected it later. Compare Schuman, *supra* note 35, at 67-68 (reading remedy guarantee as directed to those who apply law, not to those who make it), with Schuman, *supra* note 25, at 1222 (rejecting judicial/legislative function distinction in favor of procedural/substantive one).

¹⁵² John H. Bauman, Note, Implied Causes of Action in the State Courts, 30 *Stan. L. Rev.* 1243, 1254-56 (1978).

¹⁵³ See R.I. Const. art. I, § 17.

state declarations embody a much broader concept of access than does the [F]irst [A]mendment as interpreted by the Supreme Court.”¹⁵⁴ In an era when “there is far too much law for those who can afford it and far too little for those who cannot,” in Derek Bok’s felicitous phrase,¹⁵⁵ the remedies clause may impose some level of responsibility on courts to see that all citizens secure the promise of equal justice under the law.¹⁵⁶ When one sees legislatures willing to create new courts only if they will produce a positive revenue stream from fines and fees, the guarantee may help preserve an independent and coequal judiciary.¹⁵⁷ And when our nation’s highest court refuses to let cameras broadcast its proceedings and allows near-contemporaneous audio broadcasts only if the presidency is perceived to be at stake or affirmative action is at issue,¹⁵⁸ the open courts guarantee might be read to ensure meaningful public access to state court proceedings in an era of tiny courtrooms but global interconnectivity.

As to whether and to what extent the right to a remedy should preserve substantive rights from legislative encroachment, I must confess continued irresolution. But let me offer one hypothesis, or rather a provisional hypothetical, of how a close reading of history might support a definite, but limited, role for the guarantee in curbing legislative excess. Consider again Blackstone’s hierarchy of rights, which probably was familiar to the framers of our eighteenth- and nineteenth-century constitutions.¹⁵⁹ Blackstone considered the primary absolute rights—personal security, personal liberty, and property—to

¹⁵⁴ 1 Friesen, *supra* note 7, § 6-7(b); see also *Federated Publ’ns, Inc. v. Kurtz*, 615 P.2d 440, 445-47 (Wash. 1980) (applying open courts provision to pretrial proceedings by balancing public’s right to access and criminal defendant’s right to fair trial).

¹⁵⁵ Derek Bok, Report to the Board of Overseers (Apr. 21, 1983), in *Quotationary* 43 (Leonard Roy Frank ed., 1999).

¹⁵⁶ See 1 Friesen, *supra* note 7, § 6-7(a) (discussing state court decisions that struck down rules creating financial barriers to seeking remedies); see also *Griffin Indus., Inc. v. Thirteenth Ct. of App.*, 934 S.W.2d 349, 354 (Tex. 1996) (“If a lawyer is unable or unwilling to pay out-of-pocket costs, an indigent’s right to access to the courts would be at an end.”). But see *Doe v. State*, 579 A.2d 37, 46-47 (Conn. 1990) (holding that open courts provision does not require state to pay indigents’ attorney’s fees in civil cases); *Smith v. Dep’t of Health and Rehabilitative Servs.*, 573 So. 2d 320, 322-24 (Fla. 1991) (finding statutory, but not constitutional right to free transcripts for indigents). For an extreme view, see Judith Anne Bass, Note, Article I, Section 21: Access to Courts in Florida, 5 Fla. St. U. L. Rev. 871 (1977) (calling for changes to Florida’s open courts provision to provide constitutional right to access for indigents).

¹⁵⁷ Bauman, *supra* note 24, at 248-50.

¹⁵⁸ Anne Gearan, High Court OK’s Audio of Arguments, AP Online, Dec. 9, 2000, 2000 WL 30320503; Dahlia Lithwick, Frank Admissions: The Supreme Court Finally Talks Seriously About Race, *Slate Supreme Court Dispatches*, Apr. 1, 2003, at <http://slate.msn.com/id/2080999>.

¹⁵⁹ Suzanne L. Abram, Note, Problems of Contemporaneous Construction in State Constitutional Interpretation, 38 *Brandeis L.J.* 613, 613-14 (2000).

be protected by the subordinate absolute rights, such as the right to a remedy.¹⁶⁰ Many causes of action that legislatures typically have sought to restrict, including loss of consortium, alienation of affections, or respondeat superior, would to Blackstone surely be mere relative rights that could be altered or abolished.¹⁶¹ Moreover, even absolute rights could be protected through administrative schemes or alternate dispute resolution mechanisms, so long as these procedures adequately protected claimants' remedies. Furthermore, many elements of damages that have raised legislative skepticism, such as mental anguish or hedonic loss, would not be protected by Blackstone because freedom from psychological torment was not regarded as an absolute right. Punitive damages and other elements which do not redress an injury would also be outside the scope of the Blackstonian remedy.

But if a legislature, perhaps buckling to inordinate pressure from a well-organized and highly vocal special-interest group, sought to deny all recovery for a well-recognized action that did implicate absolute rights, the remedy guarantee would come into play. Under this approach, medical lobbyists would be checked if they convinced a state to abolish all medical malpractice claims, railroad interests could not succeed in eliminating all crossing claims, and retail groups could not end all slip-and-fall claims. As the Supreme Court of Maine has concluded, the remedies guarantee forbids legislative limitations "so unreasonable as to deny meaningful access to the judicial process."¹⁶² Thus, consistent with both the ancient notions of Blackstone and the modern realities of legislative and judicial roles, a right to a remedy along these lines could be a narrow but potent protection for basic rights.

CONCLUSION

Given the continuing importance of remedies law, I submit that state courts have an urgent responsibility to develop a coherent, reasonable doctrine for resolving these cases. Closer attention to the history and purpose of the clause may help state courts meet this challenge. While this address does not purport to provide final answers, it hopefully has provoked further productive thought.

¹⁶⁰ 1 William Blackstone, Commentaries *140-41.

¹⁶¹ Professor Friesen claims it is arguable that wrongful death and other such causes of action are not injury to "person, property, or reputation." 1 Friesen, *supra* note 7, § 6-2(c) n.30. In support, she cites *Kilminster v. Day Management Corp.*, 919 P.2d 474, 479 (Or. 1996) (holding that remedies clause is not violated, as claimants had no cause of action under statutory or common law).

¹⁶² *Me. Med. Ctr. v. Cote*, 577 A.2d 1173, 1176 (Me. 1990).