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# COMMENT

## CHALLENGING THE CONSTITUTIONALITY OF MONTANA'S STATUTE LIMITING MEDICAL MALPRACTICE NON-ECONOMIC DAMAGES

Alexander Blewett IV\*

### I. INTRODUCTION

Since the 1970s, insurance companies and their allies have mobilized to limit the damages recoverable by victims of medical malpractice. These sustained lobbying efforts have prompted many states to enact legislation capping non-economic damages in medical malpractice tort cases.<sup>1</sup> In 1995, Montana enacted Montana Code Annotated § 25-9-411, which capped all non-economic damages caused by medical malpractice at \$250,000.<sup>2</sup> In recent years, however, the medical malpractice tort reform movement has been confronted with judicial resistance. Several state courts have invalidated damage caps on state constitutional grounds.<sup>3</sup> As more courts strike down medical malpractice damage caps, it

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1. Kevin J. Gfell, *The Constitutional and Economic Implications of a National Cap on Non-Economic Damages in Medical Malpractice Actions*, 37 Ind. L. Rev. 773, 782–83, 810–14 (2004).

2.

In a malpractice claim or claims against one or more health care providers based on a single incident of malpractice, an award for past and future damages for noneconomic loss may not exceed \$250,000. All claims for noneconomic loss deriving from injuries to a patient are subject to an award not to exceed \$250,000. Mont. Code Ann. § 25-9-411 (2005).

3. Gfell, *supra* n. 1, at 783 (“[T]hree [states] that now have caps once found previous versions unconstitutional.”).

has become increasingly difficult to predict how courts will rule on constitutional challenges to statutory damage caps. This is due, in part, to high courts of various states interpreting “almost identical constitutional provisions” in significantly different ways to either uphold or invalidate these damage caps.<sup>4</sup>

More than ten years after its enactment, the constitutionality of Montana Code Annotated § 25-9-411 has yet to be challenged before the Montana Supreme Court.<sup>5</sup> This Comment assesses the constitutionality of Montana’s legislative limitation on non-economic medical malpractice damages under the open courts provision of the Montana Constitution.<sup>6</sup> Fundamental to this question is whether Montana’s constitutional open courts provision grants mere procedural guarantees or whether it provides substantive rights that restrict the legislature from eliminating established causes of action and remedies.<sup>7</sup> This Comment argues that Montana’s constitutional open courts provision substantively restricts the legislature and should be invoked to invalidate Montana Code Annotated § 25-9-411.

Part II evaluates the language of several states’ constitutional open courts provisions and the various ways courts have interpreted these provisions. Part III assesses the language of Montana’s constitutional open courts provision, its historical context and precedent, and the Montana Supreme Court’s existing constitutional jurisprudence considering the provision and the Declaration of Rights. Part IV critiques the Montana Supreme Court’s interpretation of the open courts provision in *Meech v. Hillhaven West, Inc.*<sup>8</sup> Part V applies three levels of constitutional scrutiny to assess the constitutionality of Montana Code Annotated § 25-9-411.

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4. Carly N. Kelly & Michelle M. Mello, *Are Medical Malpractice Damage Caps Constitutional? An Overview of State Litigation*, 33 J.L., Med. & Ethics 515, 518 (2005).

5. *Id.* at 530.

6. This statutory damage cap (Mont. Code Ann. § 25-9-411) is vulnerable to constitutional challenges under alternative state constitutional provisions, including separation of powers, due process, right to a jury trial, and, perhaps strongest of all, equal protection. Mont. Const. art. III, § 1; *id.* at art. II, § 17; *id.* at art. II, § 26; *id.* at art. II, § 4.

7. Mont. Const. art. II, § 16 provides:

Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character. No person shall be deprived of this full 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. Right and justice shall be administered without sale, denial, or delay.

8. *Meech v. Hillhaven West, Inc.*, 776 P.2d 488 (Mont. 1989).

## II. COMPARATIVE ASSESSMENT OF OPEN COURTS PROVISIONS AND THE RIGHT TO FULL REDRESS

### A. Language of Various Open Courts Provisions

Open courts provisions have “a long and tangled history.”<sup>9</sup> Although the history is unclear, it tends to support the notion that the provisions were established to protect against legislative limitations of common law remedies.<sup>10</sup> Open courts provisions made their way into American legal jurisprudence after states began including the provisions into state constitutions. Thirty-nine state constitutions, including Montana’s, have adopted express guarantees of remedies for all tortious injuries to persons, property, and character.<sup>11</sup> Many of these open courts constitutional provisions are similarly worded in a manner that does not explicitly curb legislative authority. These provisions typically include language like that in the Missouri Constitution, which states, “the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay.”<sup>12</sup>

A few state constitutions contain explicit provisions that prevent their legislatures from limiting remedies. For instance, Wyoming’s Constitution states, “[n]o law shall be enacted limiting the amount of damages to be recovered for causing the injury or death of any person.”<sup>13</sup> Constitutional provisions such as Wyoming’s un-

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9. Suzanne L. Abram, *Problems of Contemporaneous Construction in State Constitutional Interpretation*, 38 *Brandeis L.J.* 613, 641 (2000).

10. Robert S. Peck & Ned Miltenberg, *Right to a Complete Remedy; Open Courts*, 3 *ATLA’s Litigating Tort Cases* § 29:15 (Roxanne Barton Colin & Gregory S. Cusimano, eds., ATLA 2006); *Marbury v. Madison*, 5 U.S. 137, 163 (1803). In *Marbury*, Chief Justice John Marshall emphasized the fundamental importance of the right to a remedy, stating, “The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.” *Id.* Oregon’s high court has discussed that government duty in terms of the history of open courts provisions:

Whenever the common law recognized a right or prohibited an injury, [Blackstone] wrote, it also gave a remedy by legal action initiated by filing the appropriate writ. Blackstone echoed Coke in stating that it would be “in vain” for the law to recognize rights, if it were not for the remedial part of the law that provides the methods for restoring those rights when they wrongfully are withheld or invaded. To Blackstone, the guarantee of legal remedy for injury “is what we mean properly, when we speak of the protection of the law.” Hence, the maxim of English law, *Ubi jus, ibi remedium*: “For every right, there must be a remedy.”

*Smothers v. Gresham Transfer, Inc.*, 23 P.3d 333, 343 (Or. 2001) (citations omitted).

11. Peck & Miltenberg, *supra* n. 10, at § 29:15.

12. Kelly & Mello, *supra* n. 4, at 518; Mo. Const. art. I, § 14.

13. Wyo. Const. art. X, § 4.

equivocally bar the legislature from curbing common law tort damages. In most open courts provisions, however, the language and scope is not as clearly delineated. This has prompted disparate state court interpretations of these provisions.<sup>14</sup>

### B. *Divergent Interpretations of Open Courts Provisions*

Two competing philosophies have emerged from state courts' interpretations of open courts provisions.<sup>15</sup> The first philosophy interprets the provisions to grant procedural guarantees of access to the judicial process. The second philosophy interprets the provisions as "substantive constraints on the legislature's discretion to restrict established causes of action and remedies."<sup>16</sup> Under the first interpretation, medical malpractice damage caps are usually upheld so long as the legislation does not bar litigants from access to the courtroom. Under the second interpretation, courts have struck down such legislation by using a balancing test that "requires courts to inquire into the public necessity for a statute that limits access to courts, or whether the statute provides plaintiffs with some replacement remedy or 'commensurate benefit,' or both."<sup>17</sup> Six states have upheld non-economic damage caps, while courts in South Dakota, Florida, and Texas have struck down such damage caps on similar challenges.<sup>18</sup>

A number of states have constitutions containing open courts provisions that lack language specifying the right to full legal redress.<sup>19</sup> Several of these states' courts have interpreted the open courts provisions to include a right to full remedy even without explicit language stating full legal redress. For instance, in *Lucas v. U.S.*, the Texas Supreme Court invoked the Texas Constitution's open courts provision to strike down a legislative cap on non-economic damages in medical malpractice cases.<sup>20</sup> The court interpreted the Texas Constitution, Article I, section 13, which provides that "[a]ll 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," not just to provide access to justice,

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14. Kelly & Mello, *supra* n. 4, at 518.

15. *Id.*

16. *Id.*

17. *Id.* at 518–19.

18. *Id.* at 519.

19. *E.g.* Tex. Const. art. I, § 13; *contra* Mont. Const. art. II, § 16.

20. *Lucas v. U.S.*, 757 S.W.2d 687, 687 (Tex. 1988).

but to “guarantee[ ] meaningful access to the courts.”<sup>21</sup> The court applied a two-prong test requiring litigants to demonstrate first “a cognizable common law cause of action that is being restricted,” and second “that the restriction is unreasonable or arbitrary when balanced against the purpose and basis of the statute.”<sup>22</sup> In determining the second prong, the court considered whether the “legislature has failed to provide Lucas any adequate substitute to obtain redress for his injuries.”<sup>23</sup> The court held that the medical malpractice damage cap violated both prongs.<sup>24</sup> The statute failed to provide a substitute remedy and for this reason was “unreasonable *and* arbitrary.”<sup>25</sup> The court also reasoned that it was “unreasonable *and* arbitrary to limit [non-economic] recovery in a speculative experiment to determine whether liability insurance rates will decrease.”<sup>26</sup>

The Supreme Court of Florida in *Smith v. Department of Insurance* interpreted the Florida Constitution’s open courts provision as restricting legislative power, and therefore invalidated a cap on non-economic damages recoverable in medical malpractice cases.<sup>27</sup> Florida’s open courts provision, which states, “[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay,”<sup>28</sup> is almost identical to the first and last sentences of Article II, section 16 of the Montana Constitution. Despite the absence of explicit constitutional language mandating full legal redress, the Florida Supreme Court recognized that “[a]ccess to courts is granted for the purpose of redressing injuries.”<sup>29</sup> Hence, when the legislature alters common law remedies, it must provide “an alternative remedy or commensurate benefit” that “will benefit the tort victim.”<sup>30</sup> The Florida Supreme Court has since maintained this substantive

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21. *Id.* at 691; Catherine M. Sharkey, *Unintended Consequences of Medical Malpractice Damages Caps*, 80 N.Y.U. L. Rev. 391, 413–14 (2005). In 2003, Texas passed Proposition 12 via public referendum. This created a constitutional amendment, Tex. Const. art. III, § 66, which essentially overruled *Lucas* by permitting the legislature to “determine the limit of liability for all damages and losses, however characterized, other than economic damages.” *Id.*

22. *Lucas*, 757 S.W.2d at 690.

23. *Id.*

24. *Id.*

25. *Id.* at 691.

26. *Id.*

27. *Smith v. Dept. of Ins.*, 507 So. 2d 1080, 1088–89 (Fla. 1987); Fla. Const. art. I, § 21.

28. Fla. Const. art. I, § 21.

29. *Smith*, 507 So. 2d at 1088.

30. *Id.* at 1089.

restriction on the legislature's ability to curb common law remedies under its open courts provision.<sup>31</sup>

The Utah Supreme Court has interpreted the Utah Constitution's open courts provision to provide substantive guarantees that prevent the legislature from eliminating common law remedies unless the legislation is shown to "provide a substitute remedy substantially equal to that abrogated" or eliminate "clear social or economic evil[ ]" in a reasonable or nonarbitrary way.<sup>32</sup> Although the Utah Supreme Court upheld the cap on non-economic damages in medical malpractice cases,<sup>33</sup> it concluded that "the cap on quality of life damages, which does nothing more than reduce [the plaintiff's] recovery, does not provide a substitute remedy substantially equal to that abrogated."<sup>34</sup>

In *Knowles v. U.S.*, the South Dakota Supreme Court imposed substantive restrictions on the legislature through South Dakota's open courts provision by invalidating a cap on medical malpractice damages.<sup>35</sup> The language of South Dakota's constitutional provision, which is similar to Montana's, states, "[a]ll courts shall be open, and every man for an injury done him in his property, person or reputation, shall have remedy by due course of law, and right and justice, administered without denial or delay."<sup>36</sup> The court inferred a right to full redress by emphasizing that "[i]t is not enough to say the legislature has the right to limit remedies; those restrictions must also be constitutional."<sup>37</sup>

The case law from Texas, Florida, Utah, and South Dakota demonstrates that state courts commonly interpret open courts provisions to affirmatively restrict legislative authority even when no explicit language grants a right to full redress. These courts

31. See *U. of Miami v. Echarte*, 618 So. 2d 189, 190, 193-94 (Fla. 1993). Despite upholding a subsequent statute that imposed mandatory arbitration for medical malpractice claims and capped non-economic damages, the Florida court determined that the statute was constitutional because the arbitration arrangement provided a "commensurate benefit" in the form of quicker, less expensive access to remedies along with relaxed evidentiary rules. *Id.* at 194.

32. *Judd v. Drezga*, 103 P.3d 135, 139 (Utah 2004); Utah Const. art. 1, § 11.

33. *Judd*, 103 P.3d at 141.

34. *Id.* at 139.

35. *Knowles v. U.S.*, 544 N.W.2d 183, 189 (S.D. 1996); S.D. Const. art. VI, § 20.

36. S.D. Const. art. VI, § 20.

37. *Knowles*, 544 N.W.2d at 189; Kelly & Mello, *supra* n. 4, at 517. The South Dakota legislature subsequently passed a similar legislative cap on non-economic damages in medical malpractice cases, but the statute has yet to be challenged on constitutional grounds. S.D. Codified Laws § 21-3-11 (2006).

interpreted their state constitutions as empowering the judiciary to check the legislature's power to abrogate common law remedies.

### III. MONTANA'S OPEN COURTS PROVISION

#### A. *Language of Montana's Open Courts Provision*

The language of the Montana Constitution's open courts provision in Article II, section 16 is not as explicit as the language of Wyoming's constitutional right to redress. However, compared to the constitutions of other states, which have affirmatively interpreted their open courts provisions to restrict the legislature, the Montana Constitution clearly protects the right of legal redress and prevents legislative interference. The provision states,

Courts of justice shall be open to every person, and speedy remedy afforded for every injury of person, property, or character. No person shall be deprived of this full 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. Right and justice shall be administered without sale, denial, or delay.<sup>38</sup>

#### B. *Montana's 1972 Constitutional Convention*

The history of Montana's constitutional open courts provision also supports the notion that it was intended to restrict the legislature. To understand the meaning of current Article II, section 16, it is necessary to examine its predecessor in Montana's 1889 Constitution, as well as the record from Montana's Constitutional Convention of 1972. Article III, section 6 of the 1889 Montana Constitution states, "[c]ourts of justice shall be open to every person, and a speedy remedy afforded for every injury of person, property, or character; and that right and justice shall be administered without sale, denial or delay."<sup>39</sup> This language is identical to the first and last sentences of Article II, section 16 of the current 1972 Montana Constitution. Hence, to decipher the meaning of Article II, section 16, it is necessary to examine how the delegates interpreted the prior constitutional provision and why they added the following language:

No person shall be deprived of this full legal redress for injury incurred in employment for which another person may be liable ex-

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38. Mont. Const. art. II, § 16.

39. Mont. Const. art. III, § 6 (1889) (repealed 1972).



cept 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.<sup>40</sup>

Referring to the additional language inserted in Article II, section 16, Delegate Marshall Murray stated,

The committee voted unanimously to retain this section with one important addition. The provision as it stands in the present Constitution guarantees justice and a speedy remedy for all without sale, denial or delay. The committee felt, in light of a recent interpretation of the Workmen's Compensation law, that this remedy needed to be explicitly guaranteed to persons who may be employed by one covered by Workmen's Compensation to work on the facilities of another. Under Montana law, as announced in the recent decision of *Ashcraft v. Montana Power Company*, the employee has no redress against third parties for injuries caused by them if his immediate employer is covered under the Workmen's Compensation law. The committee feels that this violates the spirit of the guarantee of a speedy remedy for all injuries of person, property or character.<sup>41</sup>

Delegate Wade Dahood also expressed his belief that the 1889 open courts provision constitutionally protected the right to full redress and additional language was required in order to restore this constitutional right to workers whose rights to full redress were deprived by *Ashcraft*. Delegate Dahood stated,

This section is doing nothing more, and the wording has been very precisely selected to make sure that it does nothing more, than place the injured working man back in the status that he enjoyed prior to 1971, a very basic constitutional right which he enjoyed for 80 years in the State of Montana . . . . Regardless of all this conflict, this technicality, having to use the word "Workmen's Compensation" in this particular section, which we didn't want to do, because the minute we did it we knew that somebody would jump up and say it's legislative, but if you're going to draft something with precision and you want to make sure that all that you're doing is returning the law to what it was prior to this decision a year ago, you are compelled, sometimes, in fashioning this precise language to use language that may be seized upon by someone else as legislative. It is not. It is giving back a basic constitutional right that the citizen of Montana had prior to that particular decision.<sup>42</sup>

These comments suggest that the delegates to the Constitutional Convention interpreted the open courts provision of the

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40. Mont. Const. art. II, § 16 (1972).

41. *Montana Constitutional Convention, 1471-1972* vol. 5, 1217, 1753-54 (Margaret S. Warden et al. eds., Mont. Legis. 1981) (citing *Ashcraft v. Mont. Power Co.*, 480 P.2d 812 (Mont. 1971)).

42. *Id.* at 1755-57.

1889 Constitution to protect workers' right to full redress when suing negligent third parties. If the delegates believed the 1889 Constitution protected workers' right to full redress, it follows they assumed this constitutional right to full redress extended beyond workers to all citizens of Montana. It is contrary to the spirit of the Constitution to provide a right to full legal redress, but limit it to one class of persons. Therefore, the language of Article III, section 6 of the 1889 Constitution was almost certainly not intended to provide an exclusive constitutional right to full redress to workers alone. In drafting Article II, section 16 of the 1972 Constitution, the delegates sought to preserve all citizens' constitutional right to full redress, which delegates believed was protected by Article III, section 6 of the 1889 Constitution, and to restore workers' long-held constitutional right to full redress.

### C. Case Law Interpreting Montana's Open Courts Provision

Montana Supreme Court decisions also interpret Article II, section 16 to provide a right to full redress. In *Corrigan v. Janney*, the court invalidated a legislative restriction on a tenant's right to bring a personal injury cause of action against a landlord on the grounds that the legislative restriction failed to provide "a substitute remedy" to the plaintiff.<sup>43</sup> Without specifically addressing the level of constitutional scrutiny to be applied, the court reasoned that Montana's open courts provision "requires that plaintiff have a form of redress for wrongful death and survival damages."<sup>44</sup>

In *White v. State*, the court expanded *Corrigan* by holding that Article II, section 16 provides a fundamental right to full redress that "guarantees that all persons have a speedy remedy for every injury."<sup>45</sup> The court defined "every injury" to encompass "all recognized compensable components of injury, including the right to be compensated for physical pain and mental anguish and the loss of enjoyment of living."<sup>46</sup> The court imposed strict scrutiny in all instances in which the legislature stripped a litigant of full legal redress.<sup>47</sup> In *Pfost v. State*, the court held that the open courts provision of the Montana Constitution provides a fundamental

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43. *Corrigan v. Janney*, 626 P.2d 838, 840 (Mont. 1981).

44. *Id.* at 841.

45. *White v. State*, 661 P.2d 1272, 1275 (Mont. 1983), *overruled*, *Meech v. Hillhaven W., Inc.*, 776 P.2d 488 (Mont. 1989).

46. *White*, 661 P.2d at 1275.

47. *Id.*

constitutional right to full legal redress that affirmatively restricts the legislature.<sup>48</sup> The court stated,

A state constitutional right to full legal redress was thereby created. Any state statute that restricts, limits, or modifies full legal redress for injury to person, property or character therefore affects a fundamental right and the state must show a compelling state interest if it is to sustain the constitutional validity of the statute.<sup>49</sup>

Admittedly, the court has inconsistently interpreted this constitutional provision. In *Meech v. Hillhaven West, Inc.*, the court overruled *White* and *Pfost* so far as those two cases held that the right to full legal redress is a fundamental constitutional right protected by Article II, section 16.<sup>50</sup> In *Meech*, the court assessed whether Montana's Wrongful Discharge from Employment Act (WDEA) violated the right to full redress. In enacting WDEA, the legislature created a statutory cause of action that preempted the common law tort of wrongful discharge and provided "the exclusive remedy and procedure for actions formerly governed to a great extent by common-law requirements."<sup>51</sup> The new statutory scheme redefined the elements required to prove wrongful discharge and restructured the type and amount of damages available to a successful plaintiff.<sup>52</sup>

In determining whether WDEA violated the constitutional right to full redress, the court held that it did not because WDEA "simply defines what constitutes the facts which must be established to obtain remedy and redress in the context of wrongful discharge."<sup>53</sup> The court also concluded that Article II, section 16 serves "as only a mandate to the courts."<sup>54</sup> After conducting a narrow historical analysis of the open courts provision, the court concluded "that framers of state constitutions inserted remedy clauses to insure equal administration of justice."<sup>55</sup>

Despite holding that the right to full redress is not a fundamental right and that Montana's open courts provision applies only to access to courts, the court conceded that the legislature's power to eliminate common law remedies is limited when common

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48. *Pfost v. State*, 713 P.2d 495, 503 (Mont. 1985), overruled, *Meech*, 776 P.2d at 491.

49. *Id.*

50. *Meech*, 776 P.2d at 491.

51. *Id.* at 490.

52. *Id.* at 490-91.

53. *Id.* at 498.

54. *Id.* at 501.

55. *Id.* at 493.

law remedies trigger constitutionally protected rights.<sup>56</sup> In analyzing the constitutionality of replacing the common law tort of wrongful discharge with WDEA, the court justified the Act's constitutionality on the grounds that it provided a "reasonably just substitute for the common-law causes it abrogates."<sup>57</sup> The court determined that the statute "may benefit employees by eliminating common-law defenses formerly available"<sup>58</sup> and by providing employees with greater certainty regarding their employment rights.<sup>59</sup> While overruling *Corrigan* so far as it determined that the right to full redress is a fundamental right,<sup>60</sup> the court preserved the substitute-remedy test used in *Corrigan* to assess the constitutionality of statutory replacements for common law tort remedies.<sup>61</sup> In fact, the *Meech* court added a reasonableness component to the *Corrigan* test when the court justified the substitute remedy provided by WDEA on the grounds that it was a "reasonably just substitute."<sup>62</sup> By retaining this aspect of *Corrigan*, the court implicitly acknowledged that common law remedies do in fact enjoy some level of constitutional protection under Montana's Constitution.

#### IV. RETHINKING *MEECH*

*Meech* should be overruled because the constitutional analysis in the case is clearly at odds with the court's current constitutional jurisprudence for determining fundamental rights. In order to constitute a fundamental right under Montana's Constitution, the specific right must be found within the Declaration of Rights located in Article II of the Montana Constitution, or it must be a right " 'without which other constitutionally guaranteed rights would have little meaning.' "<sup>63</sup> Justice Nelson, in his special concurrence in *Kloss v. Edward D. Jones & Co.*, stated that "the right of access to the courts" under Montana's open courts provision meets both of these requirements because it is found in the Declaration of Rights, and it establishes rights without which "other

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56. *Meech*, 776 P.2d at 494.

57. *Id.* at 506.

58. *Id.*

59. *Id.*

60. *Id.* at 491; *Corrigan v. Janney*, 626 P.2d 838, 840 (Mont. 1981), *overruled in part*, *Meech*, 776 P.2d, at 491.

61. *Corrigan*, 626 P.2d at 840.

62. *Meech*, 776 P.2d at 506.

63. *Butte Community Union v. Lewis*, 712 P.2d 1309, 1311 (Mont. 1986) (quoting *In re C.H.*, 683 P.2d 931, 940 (Mont. 1984)).

fundamental rights would have had no real existence.”<sup>64</sup> Although Justice Nelson did not explicitly address the right to full redress, his reasoning logically applies to the entire open courts provision, including the right to full redress, because the right to access the courts would be rendered meaningless if claimants could bring causes of action but were legislatively barred from collecting damages. The court in *Meech*, however, did not conduct this type of constitutional analysis. Instead, it narrowly interpreted the right to full redress without addressing the significance of Article II, section 16’s location within the Declaration of Rights, or how the right to full redress could potentially impact other fundamental rights.

The court in *Meech* failed to give any consideration to whether the enforcement of other fundamental constitutional rights, such as the right to due process<sup>65</sup> and the right to the administration of justice,<sup>66</sup> depend not just upon access to the courts but upon a constitutional right to full common law remedies or statutory equivalents. Justice Sheehy, dissenting in *Meech*, noted that the right to access the courts is devoid of meaning without the right to full redress:

The right of a citizen to claim justice from his state, is, we should agree, a fundamental right; else the right of petition for redress from grievances is meaningless . . . . The right of access to courts is only part of the fundamental right; the right to a full legal remedy completes the part to make a whole. The two, access to the courts and full redress, indivisibly make one fundamental right, and together they are the essence of justice. They must coexist to complete the fundamental right to justice.<sup>67</sup>

The interdependency of the right to access the courts and the right to full redress is further demonstrated by the detrimental impact that legislative damage caps have on access to the courts. Empirical research demonstrates that damage caps reduce the financial viability of medical malpractice suits.<sup>68</sup> This, in turn, deters plaintiffs’ attorneys from handling these cases on a contingency basis, and reduces the likelihood that injured persons will secure competent legal representation and access to the civil jus-

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64. *Kloss v. Edward D. Jones & Co.*, 54 P.3d 1, 13 (Mont. 2002) (Nelson, J., concurring).

65. Mont. Const. art. II, § 17.

66. *Id.* at § 16.

67. *Meech*, 776 P.2d at 514 (Sheehy, J., dissenting).

68. Stephen Daniels & Joanne Martin, *The Texas Two-Step: Evidence on the Link between Damage Caps and Access to the Civil Justice System*, 55 DePaul L. Rev. 635, 643–46 (2006).

tice system.<sup>69</sup> Hence, the right to full redress directly implicates the fundamental right to access the courts and, for this reason, should be treated as a fundamental right.

Instead of applying its standard constitutional analysis, the majority in *Meech* focused strictly on “the history of [the Montana Constitution’s] remedy guarantee, the rule that the legislature may alter the common law, and the wording of Article II, § 16,” to support its conclusion that “no fundamental right exists to the common-law claims.”<sup>70</sup> In interpreting Montana’s Constitution, the court primarily relied on a detailed historical, rather than constitutional, analysis, and doggedly maintained that open courts provisions apply only to judicial access.<sup>71</sup> Not only is the court’s history-based approach an unorthodox method of Montana constitutional interpretation, but the historical premise upon which the opinion relies is highly questionable. Many scholars, legal practitioners, and historians have criticized historical conclusions similar to those reached by the court in *Meech* as inconclusive.<sup>72</sup> Exposing the ambiguous history of the open courts provisions weakens the core historical premise upon which the court made its decision.

The court in *Meech* also erred in interpreting the plain language of Article II, section 16. In reaching its decision, the court “construe[d] the term ‘full legal redress’ in the second sentence of Art. II, Sec. 16 as applying only to injured workmen who have claims against third parties for their injuries,” but as having “no effect on the remainder of Art. II, Sec. 16.”<sup>73</sup> However, as Justice Sheehy pointed out, this construction defies well established grammatical rules of the English language.<sup>74</sup> The court in *Pfost* explained the most logical interpretation of this clause:

The use of the clause “this full legal redress” has major significance. It obviously and grammatically refers to the “speedy remedy afforded for every injury of person, property, or character.” The adjective “this” means the person, thing, or idea that is present or near in place, time, or thought or that has just been mentioned. *Webster’s New Collegiate Dictionary* (1981). The constitutional framers thus

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69. *Id.*

70. *Meech*, 776 P.2d at 500.

71. *Id.* at 491–93.

72. Jonathan M. Hoffman, *Questions before Answers: The Ongoing Search to Understand the Origins of the Open Courts Clause*, 32 Rutgers L.J. 1005, 1006 (2001).

73. *Meech*, 776 P.2d at 512 (Sheehy, J., dissenting).

74. *Id.*

construed a “speedy remedy” as comprehending “full legal redress.”<sup>75</sup>

Justice Sheehy’s dissent also maintained that the language of Article II, section 16 plainly states, “the right of ‘full legal redress’ is not given *only* to Workers’ Compensation claimants. Rather, the right of ‘full legal redress’ is emphatically granted to Workers’ Compensation claimants *too*.”<sup>76</sup> Montana’s open courts provision, unlike many states’ provisions, specifically refers to full legal redress. This explicit language serves as the basis for a fundamental right, ensuring access not only to the courts, but to full redress as well.

## V. APPLYING MONTANA’S CONSTITUTIONAL OPEN COURTS PROVISION TO MONTANA CODE ANNOTATED § 25-9-411

### A. *Strict Scrutiny*

Because *Meech* was decided incorrectly, and the right to full redress is, in fact, a fundamental right, any violation of this right would trigger the highest level of scrutiny.<sup>77</sup> This would require the government to “show a compelling state interest if it is to sustain the constitutional validity of [a] statute” which “restricts, limits or modifies full legal redress for injury to person, property or character.”<sup>78</sup> In *Pfost*, the court rejected the government’s argument that it had a compelling state interest to limit state tort liability because tort judgments against the state could potentially increase taxes.<sup>79</sup>

As with tort liability, the legislature, in enacting Montana Code Annotated § 25-9-411, lacked a compelling state interest because it relied upon the speculative conclusion that non-economic medical malpractice damages increased medical malpractice insurance premiums and caused a healthcare crisis.<sup>80</sup> The legislative history of § 25-9-411 fails to demonstrate any evidence of discussion of a compelling state interest. Instead, the record contains only promises by insurance industry lobbyists that a cap on non-economic damages would reduce malpractice insurance pre-

75. *Pfost v. State*, 713 P.2d 495, 503 (Mont. 1985), *overruled*, *Meech*, 776 P.2d at 491.

76. *Meech*, 776 P.2d at 512 (Sheehy, J., dissenting).

77. *Pfost*, 713 P.2d at 503; *White v. State*, 661 P.2d 1272, 1275 (Mont. 1983), *overruled*, *Meech*, 776 P.2d at 491.

78. *Pfost*, 713 P.2d at 503.

79. *Id.* at 504.

80. Mont. H. Jud. Comm., *Hearing on H. 309*, 54th Leg., Reg. Sess., 12 ex. 12 (Feb. 2, 1995).

miums.<sup>81</sup> The insurance lobbyists also admitted during their testimony that capping non-economic damages would not necessarily lower health care costs for patients.<sup>82</sup> Furthermore, a 1994 House Joint Interim Subcommittee on Insurance Issues found there was no “medical malpractice crisis in Montana” and that “[p]rofessional liability insurance for health care providers is available at competitive rates.”<sup>83</sup>

Even if a compelling state interest could be demonstrated, strict scrutiny would require the government to “show that the choice of legislative action is the least onerous path that can be taken to achieve the state objective.”<sup>84</sup> Montana Code Annotated § 25-9-411 is not narrowly tailored to effectuate a compelling state interest because it fails to address the multiple causes responsible for increasing medical malpractice insurance premiums. State Auditor Mark O’Keefe testified that increasing competition among insurers and regulating medical malpractice insurance premiums—especially since Montana’s medical malpractice insurance industry “has six times the profit of any other insurance industry in the state”<sup>85</sup>—would “greatly reduce rates.”<sup>86</sup> Montana Code Annotated § 25-9-411 not only fails to regulate insurance premiums or encourage competition, it also fails to regulate “problem physicians” who increase malpractice insurance premiums by committing a disproportionate amount of medical malpractice.<sup>87</sup> Instead, this legislation arbitrarily caps non-economic damages for a broad class of claimants when there is no definitive correlation between caps and lower medical malpractice premium rates.<sup>88</sup> Thus, the damage cap would fail a strict scrutiny analysis.

### B. Alternative Strict Scrutiny Analysis

The Montana Supreme Court could also recognize a fundamental right to full redress, but create a more dynamic standard of judicial review, which would enable the legislature to modify

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81. *Id.* at 9.

82. *Id.* at 14 ex. 14.

83. Ltr. from Mont. Tr. Law.’s Assoc., to Rep. Bob Clark, Chair, Mont. H. Jud. Comm., Re: *HB 309* (Feb. 2, 1995) (on file with *Montana Law Review*).

84. *Pfost*, 713 P.2d at 505.

85. Mont. H. Jud. Comm., *Hearing on H. 309*, at 12.

86. *Id.* at 8.

87. *Id.* at 5–6.

88. *Id.* at 12 ex. 12; U.S. Gen. Acctg. Off., *Medical Malpractice Insurance: Multiple Factors Have Contributed to Increased Premium Rates* 15, 42–43 (GAO-03-702 June 2003).



common law remedies. Under a traditional strict scrutiny analysis, the legislature would have to demonstrate a compelling state interest each time it modifies a common law remedy. In order to protect the fundamental right to full redress while at the same time granting the legislature flexibility to modify the common law, the court could devise a two-tiered approach, which would initially require the court to analyze, like the Utah Supreme Court did in *Judd v. Drezga*, whether the government provided “a substitute remedy substantially equal to that abrogated.”<sup>89</sup> If the legislative substitute was “substantially equal” to the abrogated common law remedy, the legislative substitute would not violate the fundamental right to full redress. Hence, the first tier would enable the legislature to modify the common law without demonstrating a compelling state interest as long as the substitute remedy is fair. After failing the first tier, legislative curtailing of remedies would implicate the constitutional right to full redress. Because the right to full redress is a fundamental right, it would trigger strict scrutiny to determine if the government had a compelling state interest to provide an inadequate remedy.

The Montana Supreme Court has never explicitly recognized this two-tiered approach; however, in *Corrigan*, the court employed a similarly structured test which accorded the right to full redress heightened constitutional protection while granting the legislature flexibility to alter common law remedies.<sup>90</sup> In determining whether a statutory restriction on a tenant’s right to bring a personal injury cause of action against a landlord was unconstitutional, the court invalidated the statute because it failed to provide an adequate substitute remedy.<sup>91</sup> Although *Corrigan* did not address whether the right to full redress was a fundamental right,<sup>92</sup> the court recognized the heightened constitutional status of the right to full redress and used Article II, section 16 as the constitutional grounds for invalidating the statute.<sup>93</sup> Had the legislature been able to demonstrate a compelling state interest for its failure to provide an adequate substitute remedy, the court

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89. *Judd v. Drezga*, 103 P.3d 135, 139 (Utah 2004).

90. *Corrigan v. Janney*, 626 P.2d 838, 840 (Mont. 1981), *overruled in part*, *Meech v. Hillhaven W., Inc.*, 776 P.2d 488 (Mont. 1989).

91. *Corrigan*, 626 P.2d at 840.

92. *Id.*; *Meech*, 776 P.2d at 491. By explicitly overruling *Corrigan* insofar as it held the right to full redress to be fundamental, *Meech* implicitly interpreted *Corrigan* to stand for the proposition that the right to full redress was a fundamental constitutional right. *Meech*, 776 P.2d at 491.

93. *Corrigan*, 626 P.2d at 840.

likely would have upheld the constitutionality of the statute. Hence, the substitute remedy test employed in *Corrigan*, like in *Judd*, permits the legislature to alter common law remedies so long as it provides a substantially equal substitute remedy. In the event the statute fails to provide a substantially equal substitute remedy, the legislature must demonstrate a compelling state interest for failing to do so. The test created by *Corrigan* enables the legislature to carry out its lawmaking duties while at the same time granting judicial oversight to protect the fundamental right to full redress.

Montana Code Annotated § 25-9-411 would clearly not pass muster under this two-tiered test. As determined by the Utah Supreme Court in *Judd*, however, a cap limiting non-economic damages in medical malpractice cases clearly fails the first tier of this test because it “does nothing more than reduce [the plaintiff’s] recovery.”<sup>94</sup> This reasoning is also consistent with *Corrigan* because, just as taking away a plaintiff’s ability to sue for wrongful death is an inadequate substitute, so too is curtailing a plaintiff’s ability to sue for non-economic damages. After failing the first tier, the legislature would then need to demonstrate a compelling state interest for providing the inadequate remedy. As explained above, § 25-9-411 would not survive strict scrutiny.

### C. Rational Basis Scrutiny

Finally, the court could follow *Meech* and refuse to recognize the right to full redress as a fundamental right. In keeping with its holding in *Meech* that the right to redress is not a fundamental right but does enjoy some constitutional protection, the court would apply a rational basis analysis to determine whether the alternative statutory remedy provides a “reasonably just substitute for the common-law causes [the legislature] abrogates.”<sup>95</sup> Even under this deferential standard, however, the non-economic damage cap would fail the “reasonably just substitute” test employed in *Meech* because Montana Code Annotated § 25-9-411 provides no alternative rights or benefits to the class of victims who suffer non-economic damages in medical malpractice cases. Unlike *Meech*, in which the court held that WDEA provided enhanced statutory benefits,<sup>96</sup> the legislature, in enacting § 25-9-411, failed

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94. *Judd*, 103 P.3d at 139.

95. *Meech*, 776 P.2d at 506.

96. *Id.* at 505.

to provide plaintiffs who suffer severe non-economic injuries any commensurate benefit. The legislation simply imposes a strict limitation on non-economic remedies, which strips the most severely injured plaintiffs of full compensation.

The legislation at issue in *Meech* was fundamentally different from Montana Code Annotated § 25-9-411. While the court in *Meech* simply analyzed how the legislature statutorily replaced the common law cause of action for wrongful discharge,<sup>97</sup> the legislative damage cap set forth in § 25-9-411 does not replace an entire common law cause of action. Instead, it preserves the cause of action but selectively limits the amount of damages available.<sup>98</sup> The selective deprivation of damages from an existing common law cause of action is an arbitrary legislative action that fails to comprehensively define or replace a common law cause of action. For this reason, § 25-9-411 is distinguishable from the legislation at issue in *Meech*, and would not survive rational basis scrutiny. All three constitutional analyses lead to the conclusion that § 25-9-411 unconstitutionally restricts the right to a remedy enumerated in Article II, section 16 of the Montana Constitution.

## VI. CONCLUSION

The manner in which various states have interpreted their respective open courts provisions demonstrates that open courts provisions, regardless of their language, have been construed as limiting legislatures. While the degree to which these provisions restrict the legislatures depends on the level of constitutional scrutiny applied, Montana's open courts provision warrants the highest level of scrutiny because it is a fundamental constitutional right. Not only does Montana's provision lie within Montana's Declaration of Rights, but the provision also contains unique language that distinguishes it from other states' provisions.

Judging from the comments of the delegates to the Constitutional Convention, the provision's right to full legal redress has long been a constitutional right enjoyed by all Montanans, enshrined in the 1972 Constitution. Until *Meech*, the Montana Supreme Court interpreted the open courts provision in a manner consistent with the intentions of the delegates. Even in the con-

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97. *Id.* at 498.

98. Mont. Code Ann. § 25-9-411(1)(a) (2005) ("In a malpractice claim or claims against one or more health care providers based on a single incident of malpractice, an award for past and future damages for noneconomic loss may not exceed \$250,000.").

flicted language of *Meech*, however, the court implicitly acknowledged that the open courts provision restricts the legislature. Nonetheless, the decision reached in *Meech* should be overruled because it cannot be reconciled with the Montana Supreme Court's current constitutional jurisprudence, which treats rights upon which other fundamental rights rely as fundamental constitutional rights.<sup>99</sup> Regardless of the level of scrutiny applied to Montana's constitutional open courts provision, it is clear that Montana Code Annotated § 25-9-411 is unconstitutional because it violates Montana's open courts provision.

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99. *Butte Community Union v. Lewis*, 712 P.2d 1309, 1311 (Mont. 1986) (quoting *In re C.H.*, 683 P.2d 931, 940 (Mont. 1984)).

