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Constitutional Initiative 30: What Constitutional Rights Did Montanans Surrender in Hopes of Securing Liability Insurance?

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CONSTITUTIONAL INITIATIVE 30: WHAT CONSTITUTIONAL RIGHTS DID MONTANANS SURRENDER IN HOPES OF SECURING LIABILITY INSURANCE?

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I. INTRODUCTION

On November 4, 1986, Montanans voted to "stop paying the price of the lawsuit crisis,"[1] by adopting Constitutional Initiative 30.[2] Reports of abuses in the civil justice system, "unnecessary lawsuits, long delays, exorbitant awards, and unpredictable results," have been widely publicized.[3] The so-called lawsuit crisis is not limited to Montana. Neither is the intense debate over its causes and solutions. Nearly every state legislature that convened in 1986 considered bills to reform the tort system.[4] Approximately thirty states enacted statutory measures designed to contain jury awards (and otherwise limit amounts and types of recoverable damages) as well as restrict recognized theories of tort liability.[5]

The lawsuit crisis is the cause célèbre of the insurance industry and its clients. Needing to explain its inability to provide affordable liability insurance, the insurance industry spent six and one half million dollars during the first half of 1986 to promote the urgent need for tort reform.[6] Its advertisements warn that "[u]sing the civil justice system to right every imagined wrong is not only inefficient—it is expensive."[7] Economic harm is not the only menace; the psychological health of the community also suffers. "Lawsuits and threats of lawsuits have fostered an atmosphere of fear."[8]

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1. Insurance Information Institute, "The Lawsuit Crisis" (1986).
2. *See infra* note 12.
3. Insurance Information Institute, "The Lawsuit Crisis" (1986). *See also* "Sorry, America, Your Insurance Has Been Canceled," TIME, Mar. 24, 1986, at 16-26.
4. "Caps on Liability Spread," Great Falls Tribune, Mar. 31, 1986, at 1A.
5. "Insurers' Push to Limit Civil Damage Awards Begins to Slow Down," Wall St. J., Aug. 1, 1986, at 1.
6. *Id.*
7. Insurance Information Institute, "The Lawsuit Crisis" (1986).
8. *Id.*

Believing themselves unable to predict accurately the risk of lawsuits or the amount of potential judgments, governments, businesses, professionals, and individuals increasingly rely on available and affordable liability insurance. Insurers identify the actors in the tort system (avaricious and aggressive attorneys, inventive judges, and soft-hearted juries) as the culprits of the liability insurance "squeeze." Opposing groups, including trial attorneys, labor unions, and consumer organizations, spent vast sums to refute insurance industry claims, document "subjective rate-setting practices," and advocate state (and national) regulation of industry practices.[9]

At stake in the rush for tort reform is an injured person's right to bring an action for personal injuries, i.e., to have access to the courts and a remedy for injury. The promise of access to and redress through the courts has been included in the Montana Constitution since 1889. Article III, section 6, proclaimed, "Courts 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."[10] The framers of the 1972 Montana Constitution voted overwhelmingly to retain this "right to remedy" provision.[11]

Montana voters, however, surrendered a large measure of their constitutional protection on November 4, 1986. Constitutional Initiative 30[12] amended article II, section 16 by authorizing the legislature to modify or even abolish common law rights and remedies.

Montana voters chose to amend their Constitution, exposed only to the most obvious and unsophisticated presentation of the

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9. "Insurers' Push to Limit Civil Damage Awards Begins to Slow Down," Wall St. J., Aug. 1, 1986, at 1.

10. MONT. CONST. art. III, § 6 (1889).

11. Delegates at the 1971-72 Constitutional Convention voted 76-21 in favor of retaining the access and remedy provision. VII MONTANA CONSTITUTIONAL CONVENTION 1971-1972, 2643-44 (1979) [hereinafter MONT. CONST. CONV.].

12. Constitutional Initiative 30 provided:

> § 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 ⅔ vote of each house of the legislature.

issues. Missing from the debate was an analysis of the complex political and economic factors contributing to the lawsuit crisis. Also unacknowledged was the significance of the shift of responsibility for the ultimate development of tort law from the courts to the legislature. Most importantly hidden from the public's view was the delicate balance of constitutional principles at stake.

This article examines the constitutional foundations of Montana's tort system found in article III, section 6 of the 1889 Montana Constitution, and its successor, article II, section 16 of the 1972 Montana Constitution, and the interpretation afforded these provisions by the Montana Supreme Court. The nature of the constitutional interests involved were shaped by the interaction between the Montana Supreme Court and Legislature as they responded to one another's attempts to protect the interests of affected parties. A subsequent article will examine the issues that remain unsettled by the adoption of Constitutional Initiative 30. This second article will consider the political, economic, and constitutional factors still influencing the civil justice system.

II. History of Article III, Section 6: A Mandate Exclusive to the Courts—The Minimal Significance Interpretation

Article III, section 6, of the 1889 Montana Constitution, proclaimed, "Courts 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."[13] Montana's provision apparently derives from the Magna Charta,[14] the common source of similar constitutional provisions in other states.[15] This seemingly clear and power-

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13. Mont. Const. art. III, § 6 (1889).

14. The Montana Supreme Court has traced the language of this provision to the Magna Charta.

> Since the days of Magna Charta it has been the proud boast of the English people that their courts are open to everyone to afford a speedy remedy for every injury to person, property or character, and to administer right and justice without sale, denial or delay. That charter of liberty, deemed essential to the very existence of free government, was a part of the inheritance of the original American colonies, has been adopted in the later states, and finds expression in section 6, Article III of the Constitution of Montana.

Stephens v. Nacey, 47 Mont. 479, 482-83, 133 P. 361, 362 (1913). For a more comprehensive review of the connection between the "right to remedy" provisions in state constitutions and the Magna Charta, see Schuman, *Oregon's Remedy Guarantee: Article I, Section 10 of the Oregon Constitution*, 65 Or. L. Rev. 35, 37-41 (1986).

15. For a list of similar provisions in state constitutions, see Note, *Medical Malpractice Statute of Repose: An Unconstitutional Denial of Access to the Courts*, 63 Neb. L. Rev. 150, 170 n.86 (1983); Note, *Article I, Section 21: Access to Courts in Florida*, 5 Fla. St. U.L. Rev. 871, 876 (1977); Note, *Constitutional Guarantees of a Certain Remedy*, 49 Iowa L.

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ful guarantee has, nevertheless, been the subject of at least three standard but conflicting interpretations by the highest courts of the states:[16]

(1) At least one state has interpreted the provision to recognize a fundamental constitutional right to a remedy for all injuries.[17] It entitles a person to bring an action for any legally recognized injury, requiring the courts to provide a corresponding remedy. It also prohibits the legislature from abolishing remedies without demonstrating a compelling state interest. Indeed, that jurisdiction has declared, "It is the primary duty of the courts to safeguard the declaration of right and remedy guaranteed by the constitutional provision insuring a remedy for all injuries."[18]

(2) Several states have interpreted the provision to preserve common law rights and remedies existing at the time of the adoption of the state constitution. These states have insisted that if the legislature chooses to limit or abolish pre-existing rights or remedies, it must provide adequate or reasonable substitutes (judicial or administrative).[19] Thus the access and remedy provision effec-

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REV. 1202 n.1 (1964).

16. Several articles explore the access and remedy provisions in state constitutions and some offer alternative typologies of interpretations. *See, e.g.*, Schuman, *Oregon's Remedy Guarantee: Article I, Section 10 of the Oregon Constitution*, 65 OR. L. REV. 35 (1986); Jensen, *Legislative Larceny: The Legislature Acts Unconstitutionally When It Arbitrarily Abolishes or Limits Common Law Rights to Redress for Injury*, 31 S.D.L. REV. 82 (1985); Mickelsen, *The Use and Interpretation of Article I, Section Eight of the Minnesota Constitution 1861-1984*, 10 WM. MITCHELL L. REV. 667 (1984); Note, *Medical Malpractice Statute of Repose: An Unconstitutional Denial of Access to the Courts*, 63 NEB. L. REV. 150 (1983); Note, *Article I, Section 21: Access to Courts in Florida*, 5 FLA. ST. U.L. REV. 871 (1977); Note, *Constitutionally Incorporated Common Law-The Connecticut Remedy Clause Limits Legislative Abridgement of Plaintiffs' Rights: Gentile v. Altermatt, 169 Conn. 267 (1975), appeal dismissed, 423 U.S. 1041 (1976)*, 8 CONN. L. REV. 753 (1975-76); Note, *Constitutional Guarantees of a Certain Remedy*, 49 IOWA L. REV. 1202 (1964).

17. Ernest v. Faler, 237 Kan. 125, ____, 697 P.2d 870, 874-75 (1985). Rather than an "open court provision," Arizona has a more specific constitutional requirement. Article 18, § 6 provides, "The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation." In Kenyon v. Hammer, 142 Ariz. 69, 75, 688 P.2d 961, 965-67 (1984), the Supreme Court of Arizona held that art. 18, § 6 prohibited the legislature from successfully enacting a statute of repose that operated to bar "a cause of action before it could legitimately be brought."

18. *Ernest*, 237 Kan. at ____, 697 P.2d at 875 (citing Neely v. St. Francis Hosp. & School of Nursing, 192 Kan. 716, 722-23, 391 P.2d 155, 160 (1964)).

19. *See, e.g.*, Gentile v. Altermatt, 169 Conn. 267, 286, 363 A.2d 1, 12 (1976), in which the court stated:

> The adoption of article first, § 10 [Connecticut Constitution] recognized all existing rights and removed from the power of the legislature the authority to abolish those rights in their entirety. Rather, the legislature retained the power to provide reasonable alternatives to the enforcement of such rights. Where such reasonable alternatives are created, the legislature may then restrict or abolish the incorporated common-law or statutory rights.

tively incorporates pre-existing rights and remedies into the constitution.

(3) Finally, some states have accorded the provision a minimal significance. They interpreted the provision to apply to the judiciary only and to require the courts to administer justice conscientiously, guaranteeing that the courts shall be available at reasonable times and places to administer appropriate remedies.[20]

In three early cases, the Montana Supreme Court flatly rejected arguments that the Montana constitutional provision guaranteed injured persons access to and full redress through the courts. Instead, the court accorded the provision a minimal significance that merely directed courts to perform their judicial duties conscientiously and to safeguard the proper administration of justice.

The first substantive interpretation of article III, section 6 urged upon the court would have guaranteed persons *judicial* remedies for injuries,[21] a form of the first of the standard interpretations. This interpretation best served the interests of an injured worker who challenged the constitutionality of the Montana Workmen's Compensation Act,[22] the legislature's substitute for the traditional tort remedy. The plaintiff argued that by closing an injured worker's access to the courts, the act violated article III, section 6. "In other words, since the section declares in express terms that there shall be a judicial remedy for every wrong suffered by one person at the hands of another it is beyond the power of the Legislature to provide any other remedy . . . ."[23]

That interpretation would have altered the balance of power between the legislature and judiciary. Since 1895, Montana law has provided that, "In this state there is no common law in any case where the law is declared by statute."[24] The plaintiff was asking the court to hold that article III, section 6 drastically curtailed the lawmaking power of the legislature. Indeed, accepting the plaintiff's argument would have required the court to declare that this constitutional provision compelled the legislature to respect the ex-

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See also Lankford v. Sullivan, Long & Hagerty, 416 So. 2d 996 (Ala. 1982).

20. In Harrison v. Schrader, 569 S.W.2d 822, 827 (Tenn. 1978), the court stated that Tennessee Constitution art. I, § 17 speaks only "as a mandate to the judiciary and not as a limitation upon the legislature." *See also* Goldberg v. Musim, 162 Colo. 461, 467-72, 427 P.2d 698, 702-04 (1967).

21. Shea v. North-Butte Mining Co., 55 Mont. 522, 530, 179 P. 499, 501 (1919).

22. *Id.* at 528, 179 P. at 501.

23. *Id.* at 530, 179 P. at 501.

24. MONT. CIV. PROC. CODE § 3452 (1895), currently codified at MONT. CODE ANN. § 1-1-108 (1985).

isting common law and perhaps concede judicial supremacy to shape tort law.

The court recognized the full implications of the plaintiff's argument. "If the contention of counsel should be upheld, the consequence would be that the Legislature would be stripped of all power to alter or repeal any portion of the common law relating to accidental injuries or the death of one person by the negligence of another."[25]

Rejecting this heretical position, the court reminded the plaintiff of "the proposition, well established by the courts everywhere, that no one has a vested right in any rule of the common law."[26] From this, the court emphatically concluded:

> But at this late day it cannot be controverted that the remedies recognized by the common law in this class of cases, together with all rights of action to arise in [sic] future may be altered or abolished to the extent of destroying actions for injuries or death arising from negligent accident . . . .[27]

Ultimately, the court found the plaintiff's argument entirely misconceived because article III, section 6 was not intended to affect the legislature. "A reading of the section discloses that it is addressed exclusively to the courts. The courts are its sole subject matter . . . ."[28] The court construed the provision as saying, "*Courts* of justice, which shall be open to every person, shall *administer* a speedy remedy for every *legally cognizable* injury of person, property, or character." According to the court, the provision was silent as to the legislature.

The second substantive interpretation of article III, section 6 presented to the court was more moderate, but it too would have expanded the reach of the provision and thus eroded the authority of the legislature to limit the common law. The plaintiff asserted that the provisions of section 6 secured the constitutional right to some remedy—rather than a necessarily judicial remedy—for injury,[29] a classic statement of the second of the standard interpretations. The state legislature might alter (i.e., *substitute* a statutory remedy for a common law remedy), but was prohibited from abolishing or limiting, common law rights to redress for injury which were well defined and recognized when the Montana Constitution was adopted in 1889.

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25. *Shea*, 55 Mont. at 533, 179 P. at 503.
26. *Id.* at 534, 179 P. at 503.
27. *Id.* at 533-34, 179 P. at 503.
28. *Id.* at 533, 179 P. at 502.
29. Stewart v. Standard Pub. Co., 102 Mont. 43, 48-49, 55 P.2d 694, 695 (1936).

In *Stewart v. Standard Publishing Co.*, the plaintiff sustained personal injuries when she fell on an icy sidewalk. Defendant company, the owner of the abutting property, argued that the common law did not impose a duty on it to maintain sidewalks in a reasonably safe condition. Instead, the common law gave an injured person a cause of action against the city. Although a city could enact an ordinance which required the abutting property owner to keep the sidewalks in repair, the ordinance could not relieve the city of liability. The Montana legislature, by later enacting a statute that limited the existing common law, relieved cities of liability for injuries similar to the one suffered by plaintiff. Thus, if the abutting property owner owed no independent duty to "travelers," then the legislature had left her without a remedy when it immunized the city from liability. Because the common law provided a remedy for injury at the time of the adoption of the Constitution, such a "rule," effectively eliminating the only possible defendant, would violate article III, section 6.

Although the Montana Supreme Court admitted that other courts had interpreted similar constitutional provisions to require that the legislature provide reasonable substitutes when eliminating or limiting pre-existing common law rights,[30] the court believed that Montana had chosen a different interpretation.[31] The court offered no additional analysis; it merely quoted the *Shea* language,[32] concluding that "the legislature was free to alter or repeal any portion of the common law relating to accidental injuries or death." Thus, in *Stewart*, the court reaffirmed the minimal significance interpretation of this constitutional provision.

The final substantive interpretation presented to the court would have infused article III, section 6 with the strongest possible constitutional significance. The plaintiff argued that the express language of this provision imposed an affirmative and compulsory

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30. *See, e.g.*, Mattson v. Astoria, 39 Or. 577, 65 P. 1066 (1901). For a comprehensive analysis of the interpretation accorded South Dakota's similar constitutional provision, see Jensen, *Legislative Larceny: The Legislature Acts Unconstitutionally When It Arbitrarily Abolishes or Limits Common Law Rights to Redress for Injury*, 31 S.D.L. REV. 82 (1985) and the cases cited in note 18 *supra*.

31. *Stewart*, 102 Mont. at 49, 55 P.2d at 695.

32. *Id.* at 49, 55 P.2d at 695-96. The court quoted:

> Their contention is based upon a misconception of the scope of the guaranty therein contained. A reading of the section discloses that it is addressed exclusively to the courts. The courts are its sole subject matter, and it relates directly to the duties of the judicial department of the government. . . . Many of the state Constitutions contain similar provisions, and the courts, including our own, have held, either expressly or impliedly, that their meaning is that above stated. [Citing cases.] . . . .

obligation on the court to assure that persons had access to and redress through the courts for every injury.[33] This provision empowered, and in fact commanded, the courts to invalidate legislation and abolish common law rules that denied access to courts or failed to recognize injuries and create corresponding remedies.

The question of first impression before the court was whether one spouse could sue the other for a personal tort.[34] At common law, neither husband nor wife had a right of action for a personal tort committed by the other.[35] Reserving the constitutional argument as a last resort, the plaintiff first argued that two Montana statutes, contained in the Married Women's Act, abrogated this common law rule,[36] and granted her a cause of action against her husband for a personal tort. Although "there is no common law in any case where the law is declared by statute,"[37] these statutes did not speak explicitly to this question. The court therefore considered the legislative intent in enacting the Married Women's Act to determine whether the legislature intended to alter the common law. The court concluded that: "We cannot escape the conclusion that, in enacting the law respecting the rights, duties, and liabilities of married women, the Legislature did not intend to interfere with the centuries-old policy which prohibits the spouses from suing each other for a personal tort."[38]

Anticipating that the court would not find legislative intent to bestow upon women the substantive right to sue spouses for personal torts, the plaintiff apparently also argued that interpreting the statutes so as to leave her without a remedy violated article III, section 6. The court summarily dismissed her argument. "Nor can we see the applicability of this section to the question at bar. See Woltman v. Woltman, 153 Minn. 217, 189 N.W. 1022."[39]

The court added only:

> The Constitution was written and adopted in the light of conditions and well-known laws relating to domestic relations as they then existed in Montana, and must be construed accordingly. The salutary declarations of section 6 simply recognize fundamentals of government dear to the American heart; they assert nothing new in the way of constitutional declarations, and clearly were

33. Conley v. Conley, 92 Mont. 425, 439, 15 P.2d 922, 926 (1932).
34. *Id.* at 431, 15 P.2d at 923.
35. *Id.* at 436, 438, 15 P.2d at 925, 926.
36. The two Montana statutes cited by the plaintiff were REVISED CODES of 1921 ch. 6, § 5791 & 5809. *Id.* at 435, 15 P.2d at 924.
37. See note 24.
38. *Conley*, 92 Mont. at 439, 15 P.2d at 926.
39. *Id.* at 440, 15 P.2d at 926.

not intended to affect statutory laws then existing.[40]

Only if the plaintiff had argued that article III, section 6 should be interpreted as a constitutional mandate restricting legislative lawmaking power would the court's reasoning make sense. The court, however, interpreted this provision of the Constitution as an implicit acceptance of statutory and common law limitations on access and remedy existing at the time of its adoption.

The holdings in *Shea*, *Stewart*, and *Conley* drained article III, section 6 of its potential to inhibit legislative action and reduced it to a proclamation of judicial protocol. In *Shea*, the court explained the constitutional meaning of the administration of justice:

> [I]t relates directly to the duties of the judicial department of government. It means no more nor less than that, under the provisions of the Constitution and law constituting them, the courts must be accessible to all alike, without discrimination, at the time or times, and the place or places, appointed for their sitting, and afford a remedy for every wrong recognized by law as being remediable in a court. The term "injury" as therein used, means such an injury as the law recognizes or declares to be actionable.[41]

Under article III, section 6, duties of the "judicial department of government" have included: exercising equity jurisdiction to "insure appropriate, just, and adequate relief" where an established right existed and the sole challenge was on "purely artificial grounds;"[42] reviewing legislation which affected *judicial competency* to preside over cases;[43] remaining open to afford a remedy

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40. *Id.*

41. Shea v. North-Butte Mining Co., 55 Mont. at 533, 179 P. at 502.

42. Edgerton v. Edgerton, 12 Mont. 122, 145-46, 29 P. 966, 973 (1892). The court said:
> This latter provision [§ 6, art. III] was, we think, set before the courts, by the framers of the Constitution, as a tenet for consideration in a case like this, where clearly there is an established right existing, subject to judicial enforcement, and the question is raised on purely artificial grounds, as to whether such right shall be enforced in such an action and in such jurisdiction as by its practice and methods of procedure can insure an appropriate, just, and adequate relief, or whether there shall be a denial of such appropriate and adequate remedy as the courts can afford.

43. State *ex rel.* Anaconda Copper Mining Co. v. Clancy, 30 Mont. 529, 546, 77 P. 312, 318 (1904). The court said:
> By this we do not mean to say that there is no limit beyond which the legislature may not go. The Constitution has wisely provided that, "courts 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;" and whenever it affirmatively appears that any measure has transgressed this provision, it will be held inoperative. But it must be shown that the *necessary* consequence of the enforcement of the Act will be to deny to litigants a speedy trial before we can say that the legislature exceeded its powers.

where state agency rules would prevent a valid claim from receiving consideration;[44] and requiring city or county officials to pay for transcripts in criminal cases.[45]

III. THE 1972 CONSTITUTION: A CONCERN FOR EQUAL REDRESS

Forty years elapsed before the court heard another challenge to the constitutionality of a statute under article III, section 6 in a personal injury or wrongful death action. During this hiatus, the people of Montana adopted a new Constitution.[46] The members of the Bill of Rights Committee of the 1971-1972 Constitutional Convention voted unanimously to retain the "right to remedy" provision, recommending one addition to the convention delegates. Responding to an unpopular decision of the Montana Supreme Court,[47] depriving workers of redress against negligent third parties if their immediate employer was covered under the Workmen's Compensation Law, the Committee recommended an additional provision: "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 to his immediate employer who hired him if such immediate employer provides coverage under the Workmen's Compensation Law of this state."[48]

The Bill of Rights Committee articulated its rationale for the recommendation:

The provision as it stands in the present Constitution guarantees

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> Certainly, the extreme limits of legislative authority were reached in enacting this measure; but we cannot say that it appears conclusively that the operations of the law will result in a denial of justice.

(emphasis added).

44. Poore v. Kaufman, 44 Mont. 248, 119 P. 785 (1911).

45. State *ex rel.* Parmenter v. District Ct., 111 Mont. 453, 455, 110 P.2d 971, 971 (1941); Sullivan v. Board of County Comm'rs of Silver Bow County, 124 Mont. 364, 367, 224 P.2d 135, 136 (1950). In *Sullivan*, the court said:

> Every person convicted of crime in Montana has the constitutional right to appeal to this court under the provisions of law and the rules of this court. It would therefore be a violation of both *the spirit and letter of the provisions of section 6 of Article III* for a trial court in a proper case and upon a proper showing as here, to refuse to make such order for the required copies of the record to enable the convicted person to perfect his appeal. * * * (Court then quoted *Shea*)

(emphasis added).

46. On June 6, 1972, the people of Montana adopted a new Constitution. Governor Anderson proclaimed the Constitution officially adopted on June 20, 1972. For a brief, but informative, description of the movement for a new constitution, see B. Cockhill, Montana State Archivist, "The Movement for Statehood and Constitutional Revision in Montana, 1866-1972," I MONT. CONST. CONV., *supra* note 11, at v.

47. Ashcraft v. Montana Power Co., 156 Mont. 368, 480 P.2d 812 (1971).

48. II MONT. CONST. CONV., *supra* note 11, at 636-37.

> 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 Co.*, 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. It is this specific denial—and this one only—that the committee intends to alter with the following additional wording: [see proposed addition quoted above].[49]

Thus, according to the members of the Bill of Rights Committee and a majority of the convention delegates and Montana voters, fairness and justice required that workers receive the same opportunity for redress as everyone else.

The Bill of Rights Committee also voted unanimously to abolish the "archaic doctrine" of sovereign immunity. The 1889 Constitution had not referred to sovereign immunity. The legislature had established some statutory exceptions to absolute immunity which the court had upheld in cases prior to 1972.[50] Thus, at the time of the 1971-72 constitutional convention, the state enjoyed absolute immunity from tort liability unless it had purchased a policy of liability insurance which covered the activity giving rise to the tort. Even then, its liability was limited to the amount of insurance coverage.

The 1972 Constitution abolished governmental immunity. The Comments accompanying the recommendation of the Bill of Rights Committee explained:

> The committee voted unanimously to adopt this section abolishing the archaic doctrine of sovereign immunity. In doing so, the committee responds to the increasing citizen concern and the writing of legal scholars to the effect that the doctrine no longer has a rational justification in law. The committee notes that a clear trend has emerged nationwide to abolish the doctrine. The appellate courts of sixteen states have abolished the doctrine—a

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49. *Id.* at 636-37. The discussion of the addition to article II, section 16 with the full Constitutional Convention delegates can be found at V MONT. CONST. CONV., *supra* note 11, at 1755-58.

50. *See* Pfost v. State, ___ Mont. ___, ___, 713 P.2d 495, 497-99 (1985), for a review of the history of sovereign immunity in Montana. *See also* White v. State, ___ Mont. ___, ___, 661 P.2d 1272, 1280 (1983).

clear indication that they can no longer find a justification for its continued operation.

Briefly, the doctrine of sovereign immunity bars tort suits against the state for negligent acts by its officials and employees. The committee finds this reasoning repugnant to the fundamental premise of the American justice: all parties should receive fair and just redress whether the injuring party is a private citizen or a governmental agency. The committee believes that just as the government administers a system of justice between private parties it should administer the system when the government itself is alleged to have committed an injustice. The committee notes that private firms are liable for the negligence of their employees and points out this fact to indicate the inconsistency of the state's position in the system of tort law. It is the belief of the committee that this proposed provision rectifies this inconsistency.[51]

The version of article II, section 18 which appeared in the 1972 Constitution read: "The state, counties, cities, towns, and all other local governmental entities shall have no immunity from suit for injury to a person or property. This provision shall apply only to causes of action arising after July 1, 1973." Thus, the framers of the 1972 Montana Constitution expressed their commitment to insuring that victims of government tortfeasors receive the same opportunity for redress as everyone else and that government tortfeasors incurred the same liability as private tortfeasors.[52]

IV. Interpretations of Article II, Section 16

A. *Reaffirming the Minimal Significance Interpretation*

The Montana Supreme Court had consistently interpreted article III, section 6 as a mandate exclusive to the judiciary, and thus had refused to review the constitutionality of legislation under this provision. In its first opportunity to interpret article II, section 16 of the 1972 Montana Constitution (the successor to article III, section 6), the court reaffirmed the minimal significance interpretation. The result in *Reeves v. Ille Electric Co.*[53] was the same as in *Shea* and *Stewart*. In *Reeves*, plaintiff, administrator and father of decedent, brought an action for damages for the death of his son

51. *Id.* at 637-38.

52. In the 1974 general election, Montana voters approved a constitutional amendment that empowered the legislature to limit governmental immunity. Article II, § 18 now reads: "The state, counties, cities, towns, and all other local governmental entities shall have no immunity from suit for injury to a person or property, except as may be specifically provided by law by a ⅔ vote of each house of the legislature."

53. 170 Mont. 104, 551 P.2d 647 (1976).

who was electrocuted in a whirlpool bath in the fieldhouse at Montana State University. Defendant architect moved to dismiss the complaint on the ground that the architects' and builders' statute, section 93-2619 of the 1947 Revised Codes of Montana barred plaintiff's suit because more than ten years had elapsed since completion of the fieldhouse and installation of the whirlpool bath. Plaintiff attacked the constitutionality of section 93-2619, arguing that, inter alia, it denied him access to the courts and a speedy remedy for injuries and damages.[54] Specifically, plaintiff alleged section 93-2619 barred his action before it arose.[55]

The court framed the issue as it did in *Shea* and *Stewart*: Did article II, section 16 constitutionally guarantee existing common law claims and thereby prohibit the legislature from eliminating such common law rights? The court again said no.

> Assuming arguendo, that plaintiff would have a claim under common law, the legislature is not constitutionally prohibited from eliminating a common law right as it did in *Shea* and *Stewart*. In section 93-2619, the legislature did not interfere with any vested right of plaintiff, but simply cut off accrual of the right to sue after ten years. . . . In the instant case, plaintiff's alleged cause of action arose more than ten years after completion; hence the statute is a valid bar to his suit against defendants protected by it.[56]

The plaintiff also clothed this argument in due process terms: Section 93-2619 violated his due process by depriving him of a common law right without providing a reasonable substitute.[57] The plaintiff in *Stewart* had raised the identical argument, but had asserted that the antecedent of article II, section 16 itself required the reasonable substitute. Here, the court found the due process argument "without merit."[58]

> Section 93-2621, R.C.M. 1947, part of the same enactment as section 93-2619 (Ch. 60, Laws 1971), states:
>
> > The limitation prescribed by this act shall not affect the responsibility of any owner, tenant, or person in actual possession and control of the improvement at the time a right of action arises.
>
> The plain words of section 93-2621 refute the implication of plaintiff's argument that he is without a remedy. As indicated in *Shea* and *Stewart*, the legislature is not constitutionally prohib-

54. *Id.* at 108, 551 P.2d at 649.
55. *Id.* at 109, 551 P.2d at 650.
56. *Id.* at 110-11, 551 P.2d at 651.
57. *Id.* at 113, 551 P.2d at 652.
58. *Id.*

ited from eliminating common law rights which have not accrued or vested.[59]

Thus, the court rejected plaintiff's argument for two reasons: (1) the legislature had not left the plaintiff remediless, and (2) the legislature had the power to leave the plaintiff remediless. The court emphasized, "The Constitution does not freeze common law rights in perpetuity."[60]

B. *Requiring Substitute Remedies*

In what might be called precedential amnesia, the court abandoned its ninety-two year minimal significance interpretation of the provision and joined the courts that insist that similar constitutional provisions require adequate substitutes if pre-existing rights or remedies are abolished. Just five years after reaffirming that, "The Constitution does not freeze common law rights in perpetuity,"[61] the court boldly held, to the contrary, that article II, section 16 prohibited the denial of all causes of action for personal injuries or wrongful death without providing a substitute remedy.[62] In *Corrigan v. Janney*, plaintiff filed an action to recover damages for wrongful death and survival against a landlord. Plaintiff alleged that she and decedent, her husband, had received electric shocks from the beginning of their tenancy when they touched the plumbing. She further alleged that they had notified the landlords of the problem and requested that the landlords inspect and repair the electrical system, all without avail. While she and her husband were bathing, her husband touched the faucet and received a shock which later killed him.

Plaintiff's suit forced the court to reconsider its longstanding rule on the doctrine of deduct and repair and allow a personal injury action by a tenant against a landlord. The plaintiff and the court were faced with a 1917 Montana Supreme Court decision, holding the repair and deduct remedy the exclusive remedy: "[I]f the landlord fails to repair, after notice, the tenant may himself repair, within a certain limit, or move out; but he has *no redress* in damages for *injury to person* or property consequent upon the landlord's failure to repair . . . ."[63] In *Corrigan*, the court overruled "the holding as not being applicable to cases involving tenant

59. *Id.*
60. *Id.*
61. *Id.*
62. Corrigan v. Janney, ___ Mont. ___, ___, 626 P.2d 838, 840 (1981).
63. *Id.* at ___, 626 P.2d at 839-40 (quoting Dier v. Mueller, 53 Mont. 288, 291, 163 P. 466, 467 (1917)).

suits for personal injuries against a landlord."[64] The court believed that article II, section 16 compelled this result.

> It would be patently unconstitutional to deny a tenant all causes of action for personal injuries or wrongful death arising out of the alleged negligent management of rental premises by a landlord. If this action were to be taken away, a substitute remedy would have to be provided. Arguably, the repair and deduct statute provides an alternative remedy for damage to the leasehold interest. However, in no way can it be considered an alternative remedy for damages caused by personal injury or wrongful death.[65]

The court neglected to evaluate any prior precedent.[66] Without explicit acknowledgement, it adopted the interpretation it had expressly rejected in *Stewart* in 1936.

C. *No Longer a Mandate Exclusive to the Courts*

With the same lack of fanfare as had accompanied its break with tradition in *Corrigan*, the court not only quietly discarded its earlier interpretation that the provision was addressed exclusively to the courts, it also began reviewing legislation under article II, section 16 by applying traditional constitutional principles.[67] In

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64. *Id.* at ____, 626 P.2d at 840.

65. *Id.*

66. *See* Justice Weber's dissenting opinion in White v. State, ____ Mont. at ____, 661 P.2d at 1278-80.

67. In typical cases challenging legislation that allegedly closes access to, or eliminates remedies available from, the courts, the source of the cause of action at stake is statutory or common law. In a unique case, the challenged legislation allegedly burdened an explicitly recognized constitutional cause of action. The Montana Supreme Court was "handed for determination a classic confrontation between basic and treasured constitutional rights, the freedom of speech and press guaranteed under the First Amendment of the United States Constitution, on the one hand, and the rights of an individual to be secure from defamation on the other." Madison v. Yunker, ____ Mont. ____, ____, 589 P.2d 126, 128 (1978).

In *Madison*, the plaintiff argued that MONT. REV. CODES § 64-207.1 (1947), by requiring that a plaintiff demand a retraction as a prerequisite to filing a civil action for libel, and by allowing such a retraction to serve as a remedy in certain cases, impermissibly limited access to, and restricted the right to a remedy from, the courts. Unlike other access and remedy cases, in *Madison* the court determined that "suits for libel are recognized and preserved in the 1972 Montana Constitution." *Id.* at ____, 589 P.2d at 130. In article II, § 7, the Constitution provided "Every person shall be free to speak or publish whatever he will on any subject," but it also expressly held persons "responsible for all abuse of that liberty." Section 7 also explicitly preserved libel actions by stating, "in all suits and prosecutions for libel or slander." MONT. CONST. art. II, § 7 (1972).

The court found that the required notice for retraction limited access "in direct derogation of the clear and unambiguous language of Article II, Section 16, 1972 Montana Constitution, which mandates that the courts of this state are open to every person." *Id.* at ____, 589 P.2d at 131.

Although the Constitution did not define "abuse of that liberty," Montana statutory law defined libelous publications, MONT. REV. CODES § 64-203 (1947), at the time of the

Linder v. Smith,[68] the plaintiff challenged the constitutionality of the Montana Medical Malpractice Panel Act.[69] The act required potential plaintiffs whose claims fell within the statutory definition[70] to submit those claims to the panel prior to filing an action in court.[71] The decision of the panel neither bound the plaintiff,[72] nor was it even admissible in a subsequent judicial action.[73] Thus, the legislation did not limit or eliminate established judicial remedies or deprive plaintiff of full legal redress. Instead, argued the plaintiff, the delays and costs it occasioned essentially denied plaintiff his constitutionally guaranteed access to the courts.[74]

The Montana Supreme Court began its analysis of the plaintiff's challenge applying constitutional principles traditionally used to review legislation. It classified access as a dependent or derivative right; that is, the constitutionally protected right of access had no independent force. Instead, access derived its status from the status of the right at issue in any particular case. "[A]ccess is not an independent fundamental right; access is only given such a status when another fundamental right—such as the right to dissolve the marital relationship—is at issue, and no alternative forum ex-

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adoption of the 1972 Constitution. The legislature also determined who could be held liable for libel. MONT. REV. CODES § 64-201 *et. sec.* (1947). The court thus found that the legislature had implemented, and the constitution had preserved, the constitutional right to remedy for injury to character. Thus, the court held,

> We do not find that the "right" of a libeled individual to obtain a retraction under section 64-207.1 is itself a remedy. Remedies for "injury of . . . character" are found in "courts of justice" which "shall be open to every person". In all suits for libel, "the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the facts". Article II, sections 7 and 16, 1972 Montana Constitution. Thus, the state constitution fixes the right to a remedy and where it may be sought. The legislature is without power to provide otherwise.

Id. Thus, although the court directly reviewed the constitutionality of legislation under art. II, § 16, *prior to 1981*, it was protecting an explicitly authorized constitutional remedy when it did so.

68. ___ Mont. ___, 629 P.2d 1187 (1981).

69. MONT. CODE ANN. §§ 27-6-101 to -704 (1985). The current name of the Act is the Montana Medical Legal Panel Act.

70. MONT. CODE ANN. § 27-6-103(4) (1985).

71. MONT. CODE ANN. § 27-6-701 (1985).

72. MONT. CODE ANN. § 27-6-606 (1985).

73. MONT. CODE ANN. § 27-6-704(2) (1985).

74. The access provision assumedly protects every person's ability to pursue an available remedy, that is to proceed to and through litigation unhampered by insurmountable or unduly burdensome legislative obstacles. Although every legislative (and judicial) refusal to create a new claim for relief or decision to eliminate an existing claim (or refusal to establish a remedy for a recognized injury) necessarily closes access to the courts, analytically distinct access cases involve legislation allegedly constitutionally infirm because it delays, burdens, or impedes the process of obtaining an otherwise available remedy.

ists in which to enforce that right."[75]

The next logical step in the constitutional analysis would have been to classify the right plaintiff Linder was attempting to vindicate. Linder, in alleging that the defendant had committed medical malpractice, was attempting to bring "a civil action for personal injuries." Article II, section 16 guarantees a remedy for every [recognized] injury of person. Thus, the court could have found that Linder was attempting to vindicate a fundamental right. In that event, the court would have measured the constitutionality of the Panel Act by determining whether a compelling state interest justified infringing upon the right to bring an action for personal injuries. The court could still have refused to invalidate the Panel Act because Linder retained a judicial forum in which to vindicate that right; the Montana Medical Malpractice Panel Act did not foreclose Linder's ultimate right to bring an action in court.

The court, however, engaged in no such analysis, apparently assuming that the right to bring an action for personal injuries was not a fundamental right. The court determined that the legislature could hinder access in *Linder* if a rational basis existed for doing so. Across the nation, legislatures had been enacting panel acts to address the medical malpractice insurance crisis, "with this legislation intended to limit malpractice filings to those which are clearly meritorious."[76]

Using the rational relationship test to measure the "fit" between the purpose of the legislation, limiting malpractice filings to those that are meritorious, and the means chosen by the legislature to achieve that purpose, the Panel Act, the court needed only to determine whether the facts revealed a medical malpractice insurance crisis and whether the Panel Act was a reasonable means to address the crisis. The court, upon reviewing the facts as found by a "Master,"[77] and the evidence presented to the legislature,[78] con-

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75. Linder v. Smith, ___ Mont. at ___, 629 P.2d at 1190.

76. *Id.*

77. The court assumed original jurisdiction in this declaratory judgment action. The court said,

> Because of the complexity of this case, and in view of the fact that we accepted original jurisdiction, we appointed a Master to act as fact-finder for this Court. He heard testimony and accepted exhibits, and issued findings which were subsequently adopted by this Court. His report shows that a medical malpractice crisis exists in the State of Montana, noting that Montana's insurance rate is cited as 17th highest in the United States, and that there is an enormous increase in physicians carrying no insurance. He determined that the legislation was enacted in response to this crisis and to guarantee quality health care to Montanans.

Id.

78. The court also reviewed the report of the interim legislative committee charged

cluded that, "[T]he Panel Act is a reasonable response to the medical situation in Montana. Because the delays and expense are not unreasonable in light of the aims of the statute [sic] we find no impermissible burden on access."[79]

Although the court found that the Panel Act did not impermissibly burden the access right, *Linder* was the first time the court accepted a direct invitation to review the constitutionality of legislation under article II, section 16, using traditional constitutional principles. The court's interpretation was not one of the three standard interpretations of the provision; however, the direct review of the constitutionality of the legislation launched the court on a new course and infused the provision with a traditional constitutional significance.

The new interpretations of article II, section 16 in *Corrigan* and *Linder* created an inevitable tension between the Montana Legislature and Montana Supreme Court. Article II, section 16 was now a mandate to the legislature as well as the courts, and legislation which burdened or eliminated common law rights was now subject to judicial review. This facilitated the possibility of a conflict between the court and the legislature that was sparked by worsening economic conditions. In 1977, pursuant to article II, section 18, the legislature enacted numerous statutes establishing various forms of governmental immunity.[80] One of these very statutes, section 2-9-104 of the Montana Code Annotated, set the stage for the oncoming confrontation.

D. *Discovering Fundamental Rights*

In 1983 (a mere two years after rejecting the minimal significance interpretation and joining the substitute remedy jurisdictions), the Montana Supreme Court adopted the fundamental right interpretation of the provision, the first of the standard interpretations.[81] Karla White was attacked by an escapee from the

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with studying the medical situation in Montana. The court said,

> Additionally, we note that in 1976 the legislature authorized an interim legislative committee to report to the 1977 legislature on the medical situation in Montana. That committee compiled a report indicating that although the medical situation in Montana "appears to be less critical than in many other states," yet premium costs are ever increasing and the availability of coverage is of "pressing concern." The hearings of the 1977 legislature indicate that the panel act was enacted in response to this situation.

Id.

79. *Id.* at ____, 629 P.2d at 1190-91.

80. *See generally* MONT. CODE ANN. tit. 2, ch. 9 (1985).

81. White v. State, ____ Mont. ____, 661 P.2d 1272 (1983).

Warm Springs Mental Hospital. She alleged that the state had negligently allowed her attacker to escape and remain at large for five years without seriously attempting to locate and reincarcerate him. The attack caused her to suffer severe emotional injuries, preventing her from living a happy and fulfilling life.

Because White suffered only relatively insignificant economic injuries, the legislature's limitation on governmental liability in section 2-9-104 left her practically remediless. The Montana Legislature had "immunized" the state from liability for noneconomic damages.[82] White attacked section 2-9-104,[83] contending that its limitations on recovery against the state violated equal protection by establishing three discriminatory classifications:

> 1. It classifies victims of negligence who have sustained noneconomic damage by whether they have been injured by a nongovernment tort-feasor or a government tort-feasor. It totally denies any recovery to the latter class.
>
> 2. It classifies victims of government tort-feasors by whether they have suffered economic damages or noneconomic damages. It allows recovery to the former group up to $300,000 while it totally denies recovery to the latter group.
>
> 3. It classifies victims of government tort-feasors by the se-

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82. Section 2-9-104 provided:

(1) Neither the state, a county, municipality, taxing district, nor any other political subdivision of the state is liable in tort action for:

(a) noneconomic damages; or

(b) economic damages suffered as a result of an act or omission of an officer, agent, or employee of that entity in excess of $300,000 for each claimant and $1 million for each occurrence.

(2) The legislature or the governing body of a county, municipality, taxing district, or other political subdivision of the state may, in its sole discretion, authorize payments for noneconomic damages or economic damages in excess of the sum authorized in subsection (1)(b) of this section, or both, upon petition of plaintiff following a final judgment. No insurer is liable for such noneconomic damages or excess economic damages unless such insurer specifically agrees by written endorsement to provide coverage to the governmental agency involved in amounts in excess of the limitation stated in this section or specifically agrees to provide coverage for noneconomic damages, in which case the insurer may not claim the benefits of the limitation specifically waived.

83. Ms. White was not the first litigant to attack the constitutionality of MONT. CODE ANN. § 2-9-104 (1985). In Mackin v. State, ____ Mont. ____, 621 P.2d 477, 480 (1980), the plaintiff argued that § 2-9-104 violated art. II, § 18 of the 1972 Montana Constitution, as an invalid legislative attempt to reinstate governmental immunity. She did not, apparently, contend that the statute violated art. II, § 16. The court refused to reach the constitutional issues and instead held that the district court's entry of a partial summary judgment denying her claim for noneconomic damages was premature. The court construed the statute to require a judicial determination of the amount of noneconomic damages as a condition precedent to plaintiff petitioning the legislature for the payment of those damages.

> verity of the victims' injuries. It grants recovery to those victims who have not sustained significant injury by allowing them to recover up to $300,000 in economic damages. It discriminates against the seriously injured victims by denying recovery for any injuries over $300,000.[84]

Although both the federal and state Constitutions allow the legislature to classify persons, the constitutional guarantee of equal protection requires that legislation treats all persons alike in like circumstances. If a statute classifies persons in their exercise of a fundamental right, the state must demonstrate that the statutory classification is necessary to promote a compelling governmental interest. The state must also show that "the choice of legislative action is the least onerous path that can be taken to achieve the state objective."[85]

White apparently argued that section 2-9-104 affected a fundamental right—her right to bring an action for personal injuries, including all compensable components of injuries—requiring the court to evaluate the constitutionality of the statute by the strict scrutiny test. The state disagreed, asserting that the right to bring an action for personal injuries was not a fundamental right so that the court should measure section 2-9-104 by the rational basis test.

The parties' explicit disagreement over the proper characterization of the right to access and remedy sharply focused the court, causing it to address expressly the very issue it had neglected (or assumed) in *Linder*. The court first looked at the plain language of the constitutional provision. "Article II, section 16 of the Montana Constitution guarantees that all persons shall have a 'speedy remedy . . . for every injury of person, property, or character.' "[86] The court also reconceived its holding in *Corrigan* as founded in equal protection principles. "In *Corrigan v. Janney*, this Court held that it is 'patently unconstitutional' for the legislature to pass a statute which denies a certain class of Montana citizens their causes of action for personal injury and wrongful death."[87] Plaintiff asserted in *Corrigan* that the Constitution guaranteed her a remedy for personal injuries; White asserted that the Constitution guaranteed her a remedy for all legally cognizable injuries. The court agreed:

> We affirm and refine our holding in *Corrigan v. Janney*, supra; we

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84. White v. State, ___ Mont. at ___, 661 P.2d at 1274.

85. Pfost v. State, ___ Mont. ___, ___, 713 P.2d 495, 505 (1985) (citing Washakie County School District No. One v. Herschler, 606 P.2d 310 (Wyo.), *cert. denied*, 449 U.S. 824 (1980)).

86. *White*, ___ Mont. at ___, 661 P.2d at 1275.

87. *Id.*

> hold that the Montana Constitution guarantees that all persons have a speedy remedy for every injury. The language "every injury" embraces 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.[88]

The court concluded that the statutory classifications affected a fundamental right. Consequently it used the strict scrutiny test to examine the governmental interests allegedly promoted by section 2-9-104. The state asserted two interests:

> (1) a governmental interest in "insuring that sufficient public funds will be available to enable the State and local governments to provide these services which they believe benefit their citizens and which their citizens demand," and
>
> (2) a governmental "need to engage in a wide variety of activities, some of which are extremely dangerous and not confronted by private industry."[89]

These asserted state interests failed to impress the court. It characterized these interests as routine rather than compelling interests.

> The government has a valid interest in protecting its treasury. However, payment of tort judgments is simply a cost of doing business. There is no evidence in the record that the payment of such claims would impair the State's ability to function as a governmental entity or create a financial crisis. In fact, the State of Montana does have an interest in affording fair and reasonable compensation to citizens victimized by the negligence of the State.[90]

The state could muster no evidence to document these contentions. Of more constitutional significance, these two interests were not sufficient to constitute the extraordinary justifications required to deprive someone of any fundamental right, much less the right to damages for real, albeit noneconomic, injury.

The court acknowledged that certain conditions might justify legislatively created damage limitations. Statutory distinctions between economic and noneconomic harm, however, inevitably violate equal protection. "We recognize that some limit on the State's liability may comport with the constitutional guarantees of equal protection. However, such a limitation cannot discriminate between those who suffer pain and loss of life quality and those who

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88. *Id.*
89. *Id.*
90. *Id.*

primarily suffer economically."[91]

Invalidating the statutory "discrimination" between economic and noneconomic damages left the statute still constitutionally infirm. Recovery for noneconomic damages was unlimited, but the statute limited recovery for economic damages to three million dollars for each claimant and one million dollars for each occurrence. The court declared section 2-9-104 unconstitutional in its entirety. The state had not managed to convince the court that any compelling state interest existed to support any limitations.

Less visible was the court's holding that the constitutional right to redress for all injuries does not encompass a right to recover punitive damages. As a nonfundamental right, its infringement need only be measured by the rational relationship test. Punitive damages serve to punish tortfeasors and to deter future misconduct of the tortfeasor and others tempted to similarly misbehave. Any award of punitive damages assessed against the government is shouldered by innocent taxpayers who exercise no control over state agents. In this matter then, according to the court, governmental defendants are not similarly situated to nongovernmental tortfeasors. The court held, "[S]ection 2-9-104, MCA, constitutionally creates immunity from punitive damage assessments for governmental entities."[92]

Concurring in the majority's holding as to punitive damages, Justice Weber strongly dissented to the remainder of its opinion. He began his dissent by noting the historical inconsistency between the express language of article II, section 16 (and its antecedent) and the judicial interpretation of it: "The majority concludes that Article II, section 16 of the Montana Constitution guarantees that all persons have a speedy remedy for every injury. A review of the history of this constitutional provision, along with the interpretations of this Court, raises serious challenges to that conclusion."[93] Justice Weber objected to the court's radical shift in position. After a detailed review of the cases in which the court had interpreted article II, section 16, he found no authority supporting the court's conclusion.

The court, in *White*, declared section 2-9-104 unconstitutional on April 8, 1983. Just three weeks later, on April 29, 1983, the legislature imposed new limitations on governmental liability in tort.[94] Presumably responding to the court's cues in *White*, the

91. *Id.*
92. *Id.* at 1276.
93. *Id.* at 1277.
94. MONT. CODE ANN. § 2-9-107 (1983), Mont. Laws ch. 675 § 2.

new legislation differed from the former in two respects. First, the legislature codified its findings, detailing its rationale for limiting damages.[95] Second, the new legislation simply limited all damages, regardless of their nature, recoverable from governmental entities.[96]

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95. MONT. CODE ANN. § 2-9-106 (1983):

(1) The legislature recognizes and reaffirms the report of the subcommittee on judiciary, contained in the interim study on limitations on the waiver of sovereign immunity (December 1976), that unlimited liability of the state and local governments for civil damages makes it increasingly difficult if not impossible for governments to purchase adequate insurance coverage at reasonable costs.

(2) The legislature finds that the obligations imposed upon governmental entities must be performed, even though risks inherent in performing absolute obligations are great. The responsibility for confining, housing, and rehabilitation of persons convicted of criminal activity; the treatment and supervision of mental patients at government institutions or under government programs; the planning, construction, and maintenance of thousands of miles of highways; the operation of municipal transportation systems and airport terminals; and the operation and maintenance of schools, playgrounds, and athletic facilities are only a few of these obligations.

(3) The legislature finds that there are many functions and services both governmental and proprietary in nature traditionally offered by the state and other governmental entities which, because of the size of government operations and the inherent nature of certain functions and services, entail a potential for civil liability for tortious conduct far beyond the potential for liability of corporations and other persons in the private sector. Despite this potential for liability unparalleled in the private sector, the legislature finds that these functions of government are necessary components of modern life and that, despite limited resources and competition for those resources between necessary programs and entities, all functions and services both governmental and proprietary in nature are deserving of conscious and deliberate continuation or retirement by the people through their elected representatives. The legislature further finds that liability for damages resulting from tortious conduct by a government or its employees is more than a cost of doing business and has an effect upon government far beyond a simple reduction in governmental revenues. Unlimited liability would, because of the requirement for a balanced budget contained in Article VIII, section 9, of the Montana constitution and because bankruptcy is a remedy unavailable to the state and most other governmental entities, result initially in increased taxes to pay judgments for damages and would eventually have the effect of reallocating state resources to a degree which would result in involuntary choices between critical state and local programs. The legislature finds these potential results of unlimited liability for tort damages to be unacceptable and further finds that, given the realities of modern government and the litigiousness of our society, there is no practical way of completely preventing tortious injury by and tort damages against the state and other governmental entities. The legislature therefore expressly finds that forced reduction in critical governmental services that could result from unlimited liability of the state and other governmental entities for damages resulting from tortious conduct of those governments and their employees constitutes a compelling state interest requiring the application of the limitations on liability and damages provided in parts 1 through 3 of this chapter.

96. MONT. CODE ANN. § 2-9-107 (1983):

(1) Neither the state, a county, municipality, taxing district, nor any other political subdivision of the state is liable in tort action for damages suffered as a

When Richard Pfost, rendered a quadriplegic from a truck wreck on an icy bridge, filed an action seeking compensatory damages of six million dollars against the state, the Department of Highways, Montana Highway Patrol, and Missoula and Mineral Counties, the second conflict occurred. Pfost also filed a declaratory judgment action.[97] He contended that, "The effect of the statute in question is to deny a severely injured person, such as Richard Pfost, fair and reasonable compensation for severe injuries caused by government negligence."[98]

The court agreed that the statute discriminated.

> On its face, the statute is discriminatory. That point should be beyond argument. It discriminates in that any person who sustains damages of less than $300,000 in value will be fully redressed if the tortfeasor is the State, but any person with catastrophic damages in excess of $300,000 will not have full redress.[99]

Such discrimination between tort victims triggered an equal protection inquiry.

The equal protection inquiry began with all parties conceding that the right to *bring* an action for personal injuries was a fundamental right in Montana.[100] The defendants attempted to distinguish *Pfost* from *White* (the case in which the court held that article II, section 16 established that fundamental right):

> The pricking point . . . is that while the right to sue for personal injuries is a fundamental right, the right to recover damages is not; or as encapsulated by the State, the "lower court sustains the proposition that a monetary limitation as to amount of damage recovery is the denial of some fundamental right."[101]

The court looked once again to the express language (including the grammar) of the 1972 constitutional provision to inform its interpretation. In particular, the court considered the full legal redress language that the framers of the 1972 Constitution added to protect workers:[102]

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result of an act or omission of an officer, agent, or employee of that entity in excess of $300,000 for each claimant and $1 million for each occurrence.

(2) No insurer is liable for excess damages unless such insurer specifically agrees by written endorsement to provide coverage to the governmental agency involved in amounts in excess of a limitation stated in this section, in which case the insurer may not claim the benefits of the limitation specifically waived.

97. Pfost v. State, ___ Mont. ___, 713 P.2d 495 (1985).
98. Respondent's Brief on Appeal, Docket No. 85-007, March 28, 1985 at 5.
99. *Pfost*, ___ Mont. at ___, 713 P.2d at 500.
100. *Id.* at ___, 713 P.2d at 501.
101. *Id.* at ___, 713 P.2d at 502.
102. *See supra* notes 75-80 and accompanying text.

> However, Art. II, § 16 of the State Constitution gives a constitutional right of full legal redress for injury.
>
> 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 construed a "speedy remedy" as comprehending "full legal redress."[103]

The court concluded that the Montana Constitution created a fundamental right to full legal redress. It held, "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."[104]

The court's determination that the statute's classification infringed the fundamental right to full legal redress invoked the strict scrutiny test. The state thus shouldered the burden of demonstrating that its statutory classification was necessary to achieve a compelling state interest. Although lengthy, the "legislative findings" codified in section 2-9-106 failed to convince the court that immunizing the state from full liability in damages was necessary. In fact, the court viewed the contents of section 2-9-106 as little more than a "legislative plea not to require the legislature and other political entities to provide the funds necessary to pay the just obligations of those entities."[105]

The legislative findings conflicted with fairness and fact, according to the court. The legislature "speculated" that full payment of tort judgments would require it to raise taxes. The legislature's argument that immunizing the state was necessary to conserve and properly allocate state resources "would place the burden of catastrophic damages not on the State whose agent caused them but on the unfortunate person who received them."[106] The court looked to the intent of the framers of the 1972 Montana Constitution and found an unmistakeable concern with the importance of the individual. Thus, immunizing the state unjustly treated individuals. "The findings of the legislature denigrate the right of the individual to full legal redress in favor of not raising

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103. *Pfost*, ___ Mont. at ___, 713 P.2d at 502-03 (Quotation of provision omitted).
104. *Id.* at ___, 713 P.2d at 503.
105. *Id.* at ___, 713 P.2d at 504.
106. *Id.*

taxes. Such a concept does not constitute either an acceptable or a compelling state interest."[107]

Other legislative findings in section 2-9-106 merely lacked any "foundation in fact." The legislature contended that the state's potential for tort liability, arising from the functions and services performed by the state, far exceeded that of corporations and others in the private sector. The court rejected the notion. The federal government's functions and services, as well as some large private corporations', surpassed the state's in quantity and complexity. "It is a novel argument indeed for a party to complain that it is too big and complex, or its employees too poorly trained and unchecked, for the party to be able to respond in damages for its tortious acts."[108]

Thus, even combined, these legislative findings did not amount to a compelling interest, justifying the statutory classification discriminating between victims of government tortfeasors. The court declared section 2-9-107 unconstitutional.

Justice Morrison wrote a special concurring opinion[109] to respond directly to the dissents of Chief Justice Turnage[110] and Justice Weber. The Chief Justice comprehensively examined the history of the "full legal redress" clause of article II, section 16, revealing and emphasizing its purpose as presented to the delegates at the Constitutional Convention. He concluded that:

> The majority opinion cited *White* and Article II, Section 16, for the proposition that there is a fundamental right to full legal redress under the facts of this case.
>
> A grammatical reading of Article II, Section 16, does not support this interpretation.
>
> The clear intent of the 1972 delegates to the Constitutional Convention does not support this interpretation.[111]

Justice Morrison objected to the Chief Justice's characterization of the issue presented in the case and accused him of missing the constitutional mark by narrowing the object of analysis to article II, section 16.[112] Justice Morrison did not find the legislation to offend article II, section 16 directly. Only legislation that fully and absolutely immunized the state from tort liability, and thus closed the courthouse, might affront the constitutional guarantee to legal re-

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107. *Id.*
108. *Id.* at ____, 713 P.2d at 505.
109. *Id.* at ____, 713 P.2d at 506-08 (Morrison, J., concurring).
110. *Id.* at ____, 713 P.2d at 508-14 (Turnage, C.J., dissenting).
111. *Id.* at ____, 713 P.2d at 514 (Turnage, C.J., dissenting).
112. *Id.* at ____, 713 P.2d at 506 (Morrison, J., concurring).

dress. Instead, the statute treated victims of government negligence differently: It fully compensated some victims and only partially compensated others. After framing the constitutional issue presented by Pfost's case and the legislature's scheme for disparately compensating victims of government tortfeasors, Justice Morrison offered an equal protection analysis that supplemented the one presented in the majority opinion. He believed that the Chief Justice's analysis was inadequate. By "not addressing the equal protection issue, [he] leaves us in the dark about whether he would apply a rational basis test or a middle tier analysis. He does not say if the present statute would pass either test, and if so, why."[113]

Justice Morrison also answered Justice Weber's dissent.[114] Justice Morrison chided Justice Weber for failing to subject legislation enacted pursuant to one constitutional provision to the guarantees of others. Merely because the legislature exercised the power granted by article II, section 18 to adopt some form of governmental immunity, its work still had to satisfy all constitutional provisions. Only other constitutional provisions are sufficiently comparable to be balanced against, rather than judged by, one another.[115]

E. *Constitutional Initiative 30: A Return to the Minimal Significance Interpretation?*

As a result of the court's declaration that section 2-9-107 was unconstitutional, the state was exposed to unlimited liability for the second time in two years. This time, the executive rather than the legislative branch responded quickly to the court's declaration that statutory limitations on governmental liability were unconstitutional. On March 13, 1986, Governor Schwinden called the 49th Legislature into special session.[116] In his call, he directed the special session to consider action on, inter alia: "1. Bills to propose amendments to the Montana Constitution on governmental liability; 2. Bills to propose amendments to the Montana Constitution on private liability."[117] In his call, Governor Schwinden identified the following reasons for the special session:

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113. *Id.* at ____, 713 P.2d at 507 (Morrison, J., concurring).

114. Justice Weber analyzed the significance of sovereign immunity. *Id.* at ____, 713 P.2d at 514-17 (Weber, J., dissenting).

115. *Id.* at ____, 713 P.2d at 508 (Morrison, J., concurring).

116. State of Montana Proclamation, Call to the 49th Legislature for a Special Session, Mar. 13, 1986.

117. *Id.*

> [O]n December 31, 1985, the Supreme Court of the State of Montana held that the limits of liability set forth in section 2-9-107, MCA, constitute "an unconstitutional invasion by the legislature on a fundamental right granted under the state Constitution to sue governmental entities for full legal redress; and
>
> [G]overnmental entities have unlimited exposure as a result of that opinion; and
>
> [T]hat opinion has focused substantial attention and concern over both public and private liability and insurance-related issues; and
>
> [M]any cities and towns throughout the State of Montana are unable to purchase liability insurance . . . .[118]

The special session considered, debated, and ultimately defeated several bills to limit governmental liability and to address the tort and insurance crisis. The Montana Legislature did, however, pass Senate Joint Resolution No. 1 on the last day of the special session. In it, the Senate and the House of Representatives of Montana resolved that a special joint interim committee be assigned to study and to prepare legislation to address insurance problems, tort reform and constitutional amendments, and general questions involving public and private liability.[119]

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118. *Id.*

119. Senate Joint Resolution No. 1:

A JOINT RESOLUTION OF THE SENATE AND THE HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA REQUESTING AN INTERIM STUDY OF INSURANCE-RELATED PROBLEMS, INCLUDING THE HIGH COST AND UNAVAILABILITY OF LIABILITY INSURANCE, PROPOSALS FOR GENERAL TORT REFORM, AND GENERAL QUESTIONS INVOLVING PUBLIC AND PRIVATE LIABILITY ISSUES; REQUIRING A REPORT OF THE FINDINGS OF THE STUDY TO THE 50TH LEGISLATURE.

WHEREAS, on December 31, 1985, the Supreme Court of the state of Montana issued the *Pfost* decision, overturning our sovereign immunity protections and thereby exposing state governmental entities to unlimited civil liability; and

WHEREAS, current circumstances in the insurance industry have made insurance coverage and protection unavailable for many businesses and governmental entities; and

WHEREAS, considerable evidence establishes the difficulty of other businesses and governmental entities to obtain insurance coverage and protection at reasonable rates; and

WHEREAS, the high cost of insurance seriously threatens the provision of certain goods and services to the state's citizens; and

WHEREAS, proposed solutions to the complex problems of insurance coverage and protection and public and private tort liability are not easily identified, and adequate and effective solutions may not be obtainable within the pressures of a special or regular legislative session; and

WHEREAS, a thoughtful and reasoned study of the myriad aspects of insurance costs and availability, tort reform and constitutional amendment proposals, and public and private liability would aid in the solution of these complex issues.

NOW, THEREFORE, BE IT RESOLVED BY THE SENATE AND THE

Unable to wait for the legislature to complete its study and address both tort and insurance reform in the upcoming session, a group of citizens formed a group called the Montana Liability Coalition. The purpose of the Liability Coalition was to collect enough signatures on an initiative drive to amend the Constitution to allow the Legislature to overturn the Montana Supreme Court's recent fundamental rights interpretation of article II, section 16. Constitutional Initiative 30 resulted. On November 4, 1986, Montana voters approved Constitutional Initiative 30.

During the campaign to amend article II, section 16, another group of Montana citizens formed "Montanans for the Preservation of Citizens' Rights" for the purpose of opposing and defeating Constitutional Initiative 30. This group filed an original proceeding requesting the Montana Supreme Court to enjoin the Secretary of State from submitting Constitutional Initiative 30 to the voters in the general election on November 4, 1986.[120] A majority of the court, on October 7, 1986, ordered "that the Application for Writ of Injunction and Other Appropriate Relief is denied in its entirety, without prejudice to consideration of the issues in other

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HOUSE OF REPRESENTATIVES OF THE STATE OF MONTANA:

That a special joint interim committee, to which the full subpoena power of the Legislature and the Legislative Council is extended, be assigned to study and to prepare legislation to address:

(1) insurance problems, including how to make insurance coverage and protection available to Montana citizens at a reasonable cost;

(2) the effectiveness of various tort reform and constitutional amendment proposals; and

(3) general questions involving public and private liability, including but not limited to the issues of the collateral source rule, simultaneous pursuit of a bad faith claim with the underlying claim, structured settlements, statutes of limitations, joint and several liability, caps on damage awards, contingent fee arrangements, attorney fees for defense counsel, reinsurance, a state reinsurance fund, insurance marketing assistance, wrongful discharge, punitive damages, and sanctions for filing frivolous lawsuits.

BE IT FURTHER RESOLVED, that money be appropriated to fund the study, and that the committee prepare a report of study findings for the 50th Legislature.

120. State *ex rel.* Montana Citizens for the Preservation of Citizens' Rights v. Waltermire, ___ Mont. ___, ___ P.2d ___, 43 St. Rptr. 1869 (1986) (Sheehy, J., dissenting).

In this action, plaintiffs contended that Constitutional Initiative 30 was constitutionally infirm in several respects that rendered its submission to the voters impermissible.

Plaintiffs raised three issues for the court's consideration:

1. The statement of purpose of the Attorney General and the statements of implication contained in the Initiative are false and misleading.

2. The proposed Initiative invades the separation of powers doctrine by transferring judicial authority to the legislature.

3. The Initiative does not meet the constitutional requirement of presenting a single subject to the voters.

Id. at ___, ___ P.2d at ___, 43 St. Rptr. at 1871.

proceedings."[121]

On October 22, 1986, Justices Sheehy, Hunt, and Gary[122] issued their dissenting opinion. The dissenters disagreed primarily with the majority's refusal to decide the issues prior to the election.[123] In their dissenting opinion, however, the justices did discuss what they saw as the potential effects of the constitutional amendment:

> [T]he Initiative will take away every person's right to a speedy remedy for *every* injury of person, property, or character. The word "every" is deleted in the Initiative's § 16(1). The word "every" in that context has been a part of our State's Constitution since 1889. See Art. III, § 6, 1889 Montana Constitution.
>
> [The] right of redress for injury will no longer be a *full* right. The words "this full" describing legal redress were deleted in § 16(2) of the Initiative.
>
> Perhaps worst of all, . . . all judicial power to review and construe the validity of actions taken by the Legislature under the Initiative is taken away. The Legislature will become the sole judge of the legality of its actions under the Initiative. It should be clear that such a drastic transference of the judicial power from the courts to the Legislature . . . .
>
> Finally, . . . the authority given the Legislature if the Initiative passes is not merely limited to "tort reform." *Every* right to remedy, of *every* kind and nature, will be locked away from judicial review whenever the Legislature acts under the Initiative.[124]

The dissent appears to believe that Constitutional Initiative 30 heralds a return to the minimal significance interpretation of article II, section 16.

V. Conclusion

The precise significance of Constitutional Initiative 30 is yet to be determined. Unless it is successfully challenged, the new version of article II, section 16 may empower the legislature to address the so-called lawsuit crisis unfettered by the previous constitutional constraints. Justices Sheehy and Hunt and Judge Gary warn that, "In exchange for a short term liability insurance crisis, Initiative 30 will substitute a long-term submission to the unbridled will of

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121. The court issued its order on the same date as it heard oral argument because it believed an immediate response important. The court has not yet issued its written opinion.

122. Judge Gary sat in place of Justice Morrison.

123. The dissent addressed at length each issue raised by the plaintiffs. The issues raised by the parties and addressed by the dissenters were tangential to the major topic of this article—prior constitutional interpretation of art. II, § 16.

124. *Id.* at ____, ____ P.2d at ____, 43 St. Rptr. at 1879.

the Legislature. Any student of the long-time history of the Montana Legislature will recognize the folly of that direction."[125] Hopefully, the legislature will exercise caution in altering the tort system by carefully considering the full range of political and economic factors contributing to the insurance crisis as well as the report forthcoming from its special joint interim committee.

A subsequent article will examine the issues that remain unsettled by the adoption of Constitutional Initiative 30. These issues include: (1) The constitutional principles, especially of equal protection, which may yet limit the scope of the legislature's authority under the initiative. (2) The political and economic factors that the legislature must evaluate as it considers instituting tort and insurance reform. Together it is these issues, and the respective wisdom of the Supreme Court and the Legislature, that will shape the future of Montanans' rights to access, remedy, and redress.

125. *Id.* at ____, ____ P.2d at ____, 43 St. Rptr. at 1884.