Washington Law Review

Volume 64
Number 1 *Dedication to Professor Charles E. Corker; Symposium on State Constitutional Law*

1-1-1989

State Constitutional Remedy Provisions and Article I, Section 10 of the Washington State Constitution: The Possibility of Greater Judicial Protection of Established Tort Causes of Action and Remedies

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STATE CONSTITUTIONAL REMEDY PROVISIONS AND ARTICLE I, SECTION 10 OF THE WASHINGTON STATE CONSTITUTION: THE POSSIBILITY OF GREATER JUDICIAL PROTECTION OF ESTABLISHED TORT CAUSES OF ACTION AND REMEDIES

Abstract: Several state courts interpret their states' constitutional remedy provisions as justifying heightened judicial scrutiny of legislative alterations in tort law. This confers greater protection of tort causes of action and remedies established at the time of the state constitution's adoption. This Comment considers whether article I, section 10 of the Washington constitution can support such an interpretation. Additionally, the author discusses the existing interpretations of other states' remedy provisions and suggests a heightened scrutiny model that best balances the interest in retaining already recognized tort remedies against the interest in fostering positive change.

The Washington Supreme Court declared more than half a century ago that the state constitution lacked a remedy provision.[1] One commentator, however, recently argued that article I, section 10, which provides that "[j]ustice in all cases shall be administered openly, and without unnecessary delay,"[2] could be construed as a remedy provision that allows heightened judicial scrutiny of tort legislation.[3] At

1. Shea v. Olson, 185 Wash. 143, 160–61, 53 P.2d 615, 622 (1936) ("[i]n this state, the constitution contains no such [remedy] provision, but only the general "due process" and "equal protection" clauses. There is, therefore, no express, positive mandate of the constitution which preserves such [tort] rights of action from abolition by the legislature").

Remedy provisions are often referred to as "open court" or "access to courts" provisions. *See* Wiggins, Harnitiaux & Whaley, *Washington's 1986 Tort Legislation and the State Constitution: Testing the Limits,* 22 GONZ. L. REV. 193, 201 nn.44–45 (1986/87) [hereinafter Wiggins]; *see also* Comment, *The Right of Access to Civil Courts Under State Constitutional Law: An Impediment to Modern Reforms, or a Receptacle of Important Substantive and Procedural Rights?,* 13 RUTGERS L.J. 399, 399 n.1 (1982).

On the utility of a state constitutional remedy provision, see *infra,* notes 20–41 and accompanying text.

2. WASH. CONST. art. I, § 10. Article I, section 10 is involved in other current topics that will not be discussed in this Comment. It has been the focus of litigation involving the exclusion of the public from criminal trials. *See* Cohen, *Cameras in the Courtroom and Due Process: A Proposal for a Qualitative Difference Test,* 57 WASH. L. REV. 277, 288 (1982). The provision also is the foundation to the right to a speedy trial. *See* State *ex rel.* James v. Superior Court, 32 Wash. 2d 451, 202 P.2d 250 (1949).

3. *See* Wiggins, *supra* note 1, at 200–01, 211–20, 230–31; *see also* Comment, *supra* note 1, at 399 n.1.

This Comment only addresses the application of remedy provisions to tort law. Whether remedy provisions affect changes to other areas of law, such as contract or property law, will not be answered in this analysis.

least thirty-five state constitutions include remedy provisions.[4] Several states interpret remedy provisions as allowing some level of heightened scrutiny of statutes which alter or eliminate a common law or statutory cause of action.[5] In light of the modern trend toward limiting

4. ALA. CONST. art. I, § 13; ARIZ. CONST. art. XVIII, § 6; CONN. CONST. art. I, § 10; DEL. CONST. art. I, § 9; FLA. CONST. art. I, § 21; IDAHO CONST. art. I, § 18; ILL. CONST. art. I, § 12; IND. CONST. art. I, § 12; KAN. CONST., Bill of Rights § 18; KY. CONST., Bill of Rights § 14; LA. CONST. art. I, § 22; ME. CONST. art. I, § 19; MASS. CONST. art. XI; MINN. CONST. art. I, § 8; MISS. CONST. art. III, § 24; MO. CONST. art. I, § 14; MONT. CONST. art. II, § 16; NEB. CONST. art. I, § 13; N.H. CONST. pt. I, art. 14; N.C. CONST. art. I, § 18; N.D. CONST. art. I, § 9; OHIO CONST. art. I, § 16; OKLA. CONST. art. II, § 6; OR. CONST. art. I, § 10; PA. CONST. art. I, § 11; R.I. CONST. art. I, § 5; S.C. CONST. art. I, § 9; S.D. CONST. art. VI, § 20; TENN. CONST. art. I, § 17; TEX. CONST. art. I, § 13; UTAH CONST. art. I, § 11; VT. CONST. ch. I, art. 4, ch. II, § 28; W. VA. CONST. art. III, § 17; WIS. CONST. art I, § 9; WYO. CONST. art. I, § 8.

There seem to be two major formats of remedy provisions. Comment, *supra* note 1, at 399 n.2. Connecticut Constitution, article I, section 10 is typical: "All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay." Other states with provisions patterned after this model, though with minor variations, include Alabama, Delaware, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Pennsylvania, Oregon, Ohio, North Carolina, North Dakota, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wyoming.

The second major variation typically reads like the Maine Constitution, article I, section 19: "Every person, for an injury done him in his person, reputation, property or immunities, shall have remedy by due course of law; and right and justice shall be administered freely and without sale, completely and without denial, promptly and without delay." Other states with similar formats in their remedy provisions, with some minor variations, include Arkansas, Illinois, Maryland, Massachusetts, Minnesota, New Hampshire, Rhode Island, Vermont, and Wisconsin.

Article II, section 11 of the Arizona Declaration of Rights is the only state constitutional provision identical to the Washington version, reading: "Justice in all cases shall be administered openly, and without unnecessary delay." However, the Arizona courts have not construed a remedy guarantee from this provision because article XVIII, section 6 clearly expresses the right to a remedy in modern language: "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."

The Montana Constitution also attempts to be unusually specific with its remedy provision. Article II, section 16(3) expressly allows for modification or abolishment of remedies by the legislature, "except that any express dollar limits on compensatory damages for actual economic loss for bodily injury must be approved by a 2/3 vote of each house of the legislature."

Florida's article I, section 21 is also drafted in more modern language: "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."

The format in which a remedy clause is drafted has little bearing upon the level of scrutiny attached to the clause by the state court. For example, while the Alabama courts construe their state's constitutional remedy provision as providing a means of strict judicial scrutiny of legislation, Tennessee attaches no such interpretation to its remedy provision. *Compare* Grantham v. Denke, 359 So. 2d 785 (Ala. 1978) (Alabama state constitutional remedy provision as source of heightened scrutiny) *with* Harrison v. Schrader, 569 S.W.2d 822 (Tenn. 1978) (Tennessee state constitutional remedy provision does not mandate judicial scrutiny of legislation).

5. For an overview of the different levels of judicial scrutiny associated with remedy provisions, see *infra* notes 20–41 and accompanying text.

tort recovery in response to the "insurance crisis,"[6] the time is ripe for reconsideration whether the abolition and modification of tort actions and remedies merit special judicial scrutiny.

This Comment will consider whether article I, section 10 of the Washington Constitution provides a right to a remedy for tort claims. In doing so, the common law origins of remedy clauses in the United States and their relationship with the drafting of Washington's article I, section 10 will be examined first. Second, although it is beyond the scope of this Comment to examine exhaustively the treatment of remedy provisions in all thirty-five jurisdictions, the three major judicial interpretations that contribute to the heritage of Washington's article I, section 10 will be reviewed. Finally, this Comment will consider the desirability of adopting judicial scrutiny of legislation dealing with remedies.

I. COMMON LAW ORIGINS

A. The Magna Carta

The impetus for remedy provisions can be traced to the thirteenth century abuses of King John of England. Access to the King's medieval courts meant paying for a writ, and an especially speedy and potent writ could be had for a fatter fee.[7] For this and other abuses, the barons forced King John to sign the Magna Carta in 1215.[8] Chapter 40 of the Magna Carta addressed the problem of overpriced writs, stating "[t]o no one will we sell, to no one will we refuse or delay, right or justice."[9]

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6. *See generally Symposium: Issues in Tort Reform,* 48 OHIO ST. L.J. 317 (1987) (articles evaluating federal and state developments in response to rising liability insurance rates).

For commentary on Washington State's 1986 Tort Reform Act, see Peck, *Constitutional Challenges to the Partial Rejection and Modification of the Common Law Rule of Joint and Several Liability Made by the 1986 Washington Tort Reform Act,* 62 WASH. L. REV. 681 (1987); Peck, *Washington's Partial Rejection and Modification of the Common Law Rule of Joint and Several Liability,* 62 WASH. L. REV. 233 (1987); Comment, *supra* note 1; Comment, *Constitutional Challenges to Washington's Limit on Noneconomic Damages in Cases of Personal Injury and Death,* 63 WASH. L. REV. 653 (1988).

7. W. MCKECHNIE, MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 395 (2d ed. 1914).

8. Id. at 395–96.

9. Id. at 395.

American state courts which interpret remedy provisions recognize the Magna Carta as the progenitor of such provisions. *E.g.,* Davidson v. Rogers, 281 Or. 219, 574 P.2d 624, 625 (1978) (Linde, J., concurring).

B. Sir Edward Coke and the American Revolution

It took four and a half centuries for Chapter 40 to give birth to the remedy guarantee. In his *Second Institute,* Sir Edward Coke interpreted the meaning of "justice" in Chapter 40 to encompass a remedy guarantee.[10] Coke's pronouncement of a remedy guarantee became highly influential despite its questionable accuracy.[11] His work clearly influenced American ideas of government and jurisprudence during the Revolutionary period.[12] Coke's idea of a remedy guarantee sur-

10. On Chapter 40, Coke wrote:

> And therefore every Subject of this Realm, for injury done to him in [goods, lands, or person] . . . may take his remedy by the course of the Law, and have justice and right for the injury done him, freely without sale, fully without any denial, and speedily without delay.
>
> Hereby it appeareth, that Justice must have three qualities, it must be [free, for nothing is more iniquitous than justice for sale; complete, for justice should not do things by halves; swift, for justice delayed is justice denied;] and then it is both Justice and Right.

Schuman, *Oregon's Remedy Guarantee: Article I, Section 10 of the Oregon Constitution,* 65 OR. L. REV. 35, 38 & n.19 (1986) (quoting E. COKE, SECOND INSTITUTE 55–56 (4th ed. 1671) and translating bracketed portions from Latin into English).

Chapter 40 was merged with Chapter 39 ("[n]o freeman shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land") into Chapter 29 of Henry III's version of the Magna Carta of 1225. A. HOWARD, THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA 284 (1968); W. MCKECHNIE, *supra* note 7, at 375. Chapter 29 of the Henry III reissue read:

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

W. SWINDLER, MAGNA CARTA: LEGEND AND LEGACY 316–17 (1965), *reprinted in* Comment, *supra* note 1, at 399–400. This merging of the two chapters of the Magna Carta apparently explains why "due process" language is sometimes associated with remedy provisions. *See, e.g.,* Harrington, *The Texas Bill of Rights and Civil Liberties,* 17 TEX. TECH L. REV. 1487, 1523–24 (1986) (characterizing Texas' remedy provision, article I, section 13, "[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," as a "due process" guarantee, "non-coterminous" with the other "due process" guarantee of article I, section 19).

11. On Coke's influence, Professor Max Radin commented:

> As a judge, he was a stout champion of the Common Law in its narrowest sense—a bitter opponent of the Prerogative Courts, including the Chancery, and a still more determined opponent of any attempt at a radical change in the Common Law. His general learning was wide and inaccurate. His legal learning was portentous but unscrupulously applied. He had no sense of historical criticism and no hesitation in distorting his data.

M. RADIN, HANDBOOK OF ANGLO-AMERICAN LEGAL HISTORY 285 (1936).

12. *See, e.g.,* B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 30–31 (1967).

William Penn's Frame of Government of Pennsylvania of 1682 relied heavily on Coke, and Article V incorporated the Magna Carta's Chapter 40, "[t]hat all courts shall be open, and justice shall neither be sold, denied nor delayed." SOURCES OF OUR LIBERTIES 217 (R. Perry & J. Cooper eds. 1978). James Otis' obsession with Coke's ideas helped drive Otis insane. *See, e.g.,* G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 9 (1969).

faced in five revolutionary declarations of rights.[13] When the final version of the federal Bill of Rights, which lacked any remedy language, was submitted for the states' approval, at least two states—North Carolina and Virginia—suggested adding remedy language to the Bill of Rights.[14]

C. *Blackstone's* Commentaries on the Laws of England

Blackstone's *Commentaries,* published between 1765 and 1769, was the most influential common law treatise in both England and America.[15] The *Commentaries* appealed to eighteenth-century Americans owing to Blackstone's alleged ability to extract general principles from the common law.[16] He deduced that the English common law protected three "principal" rights: "[T]he right of personal security,

13. For example, DEL. DECLARATION OF RIGHTS OF 1776, § 12 reads:

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

Reprinted in THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 277 (B. Schwartz ed. 1971) [hereinafter B. Schwartz]. *See also* MD. DECLARATION OF RIGHTS OF 1776, art. XVII, *reprinted in* B. Schwartz, *supra,* at 281; MASS. DECLARATION OF RIGHTS OF 1780, pt. I, art. XI, *reprinted in* B. Schwartz, *supra,* at 342; N.H. BILL OF RIGHTS OF 1783, art. XIV, *reprinted in* B. Schwartz, *supra,* at 377; N.C. DECLARATION OF RIGHTS OF 1776, art. XIII, *reprinted in* B. Schwartz, *supra,* at 287.

14. On June 27, 1788, the Virginia Ratifying Convention, in approving the Federal Constitution, made proposals for the then yet to be drafted Bill of Rights. Among its proposed amendments, the Virginia delegation included:

> 12th. That every freeman ought to find a certain remedy, by recourse to the laws, for all injuries and wrongs he may receive in his person, property, or character. He ought to obtain right and justice freely, without sale, completely and without denial, promptly and without delay, and that all establishments or regulations contravening these rights are oppressive and unjust.

Reprinted in B. Schwartz, *supra* note 13, at 841.

A little over a month later, the North Carolina Ratifying Convention resolved on August 1, 1788 that a declaration of rights should include:

> 12. That every freeman ought to find a certain remedy, by recourse to the laws, for all injuries and wrongs he may receive in his person, property, or character; he ought to obtain right and justice freely without sale, completely and without denial, promptly and without delay; and that all establishments or regulations contravening these rights are oppressive and unjust.

Reprinted in B. Schwartz, *supra* note 13, at 967–68.

Justice Linde of the Oregon Supreme Court suggests that a provision imposing an affirmative right to "remedy in due course of law" would have made little sense in a Bill of Rights that was meant to "limit" the federal government. Linde, *Without "Due Process": Unconstitutional Law in Oregon,* 49 OR. L. REV. 125, 138 n.38 (1970).

15. *E.g.,* Kennedy, *The Structure of Blackstone's Commentaries,* 28 BUFFALO L. REV. 209 (1979); SOURCES OF OUR LIBERTIES, *supra* note 12, at 334–35.

16. *E.g.,* G. WOOD, *supra* note 12, at 10 ("[t]he great appeal for Americans of Blackstone's *Commentaries* stemmed not so much from its particular exposition of English law . . . but from

the right of personal liberty, and the right of private property . . . ."[17] When the right of personal security is breached, by assault for example, the injured party is due "a pecuniary satisfaction in damages . . . ."[18] The fact that Blackstone saw fit to classify personal physical integrity as something that today would be called a fundamental right, evinces the deep, philosophical importance of tort compensation in the Anglo-American legal tradition.[19]

II. THREE MODELS OF INTERPRETING STATE CONSTITUTIONAL REMEDY PROVISIONS

The purpose of article I, section 10 remains unclear despite an examination of the Washington Constitutional Convention's existing papers. In choosing the best interpretation of this provision, it is illuminating to consider the three basic approaches of other state courts which already have interpreted their states' remedy provisions. By analyzing each approach—"strict scrutiny," "no restriction," and "intermediate scrutiny"—the conflict between the interest in reform and the interest in maintaining well-established doctrine will become apparent.

A. "Strict Scrutiny" Model

State courts which follow the "strict scrutiny" model interpret state constitutional remedy provisions as requiring heightened judicial scrutiny of legislation that would change or eliminate tort law recovery. In strict scrutiny states, the burden is upon the legislature to show either an overpowering public necessity for the change and that no less restrictive alternative was available, or show that the change supplies a reasonable alternative in place of the superseded tort remedy. It therefore becomes difficult for the legislature to make substantial changes in tort law without a detailed articulation of the need for change.

The Florida Supreme Court applies a strict scrutiny test to statutory changes affecting remedies.[20] In *Kluger v. White,*[21] Florida's no-fault

its great effort to extract general principles from the English common law and make of it, as James Iredall said, 'a science.' ").

17. 1 W. BLACKSTONE, COMMENTARIES *129.

18. 3 W. BLACKSTONE, COMMENTARIES *116.

19. On Blackstone's continuing influence in America, see Kennedy, *supra* note 15, at 210–11.

20. *E.g.,* Wiggins, *supra* note 1, at 215.

The Kentucky high court utilizes a variation on the strict scrutiny standard. In Saylor v. Hall, 497 S.W.2d 218 (Ky. 1973), *overruled on its facts,* Carney v. Moody, 646 S.W.2d 40 (Ky. 1982), the Kentucky Court of Appeals decided the state's constitutional remedy provision prevented the legislature from abolishing rights of action established prior to the adoption of the state constitution. "It was the manifest purpose of the framers of [the constitution] to preserve and

automobile statute[22] was challenged as unconstitutional under Florida's constitution, article I, section 21,[23] because it effectively denied recovery for property damage under $550.[24] The Florida Supreme Court held that the deprivation of a remedy in a property cause of action was unconstitutional in light of the state's constitutional remedy guarantee provision.[25]

The *Kluger* court reasoned that the Florida remedy provision encompassed all statutory and common law remedies recognized in Florida prior to the state constitution's adoption. However, the Florida Supreme Court went on to adopt a test that would allow the legislature to abolish a constitutionally-protected remedy under two circumstances. First, if the legislature supplied "a reasonable alternative" in place of the superseded cause of action, the old remedy was no longer protected since a new remedy was available.[26] Second, if the state legislature could "show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such

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perpetuate the common-law right of a citizen injured by the negligent act of another to sue to recover damages for his injury." *Id.* at 222–23 (quoting Ludwig v. Johnson, 243 Ky. 533, 49 S.W.2d 347 (1932)). Under this doctrine, since "[r]ecovery is not possible until a cause of action exists," a statute of repose so short as to prevent a cause of action against building contractors from ever arising violated the right to remedy. *Id.* at 224–25. The *Saylor* result itself was overruled on its facts in Carney v. Moody, 646 S.W.2d 40 (Ky. 1982) (*Saylor* decision incorrect because court failed to consider whether remedy against building contractor existed at time of constitution's adoption in 1891).

21. 281 So. 2d 1 (Fla. 1973).

22. The pertinent portion of FLA. STAT. ANN. § 627.732 (West 1971) provided, "an owner who has elected not to purchase insurance with respect to property damage to his motor vehicle may maintain an action of tort therefore against the owner, registrant, operator or occupant of a motor vehicle causing such damage if such damage exceeds five hundred and fifty dollars . . . ." *Kluger*, 281 So. 2d at 3.

23. "The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." FLA. CONST. art. I, § 21.

24. *Kluger*, 281 So. 2d at 2–3.

25. [W]here a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State . . . the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.

Id. at 4. Compare this language with the strict scrutiny language applied in due process and equal protection cases involving fundamental rights protected by the federal Constitution, *infra* notes 42–59 and accompanying text.

The "reasonable alternative" requirement is sometimes known as the "adequate remedy doctrine" or "quid pro quo." *E.g.*, Wiggins, *supra* note 1, at 200.

26. *Kluger*, 281 So. 2d at 4.

public necessity can be shown," the old remedy was permissibly abolished.[27]

An example of a "reasonable alternative" is the typical workmen's compensation scheme, abolishing the right to sue an employer for an employee's injury arising from the employment relationship in return for statutorily mandated compensation. The *Kluger* court noted that the compensation scheme provided "adequate, sufficient, and even preferable safeguards for an employee who is injured on the job . . . ."[28] An illustration of the "overwhelming public necessity" exception is the abolition of the right of action for alienation of affections.[29]

B. "No Restriction" Model

A second category of states interpret their remedy clause as not requiring any heightened judicial scrutiny of changes in substantive law. This "no restriction" model[30] takes three different forms.[31] First, some courts view their states' remedy provisions as directed only at the judiciary and not the legislature, leaving the legislature free to abolish any causes of action not yet vested.[32] A second approach holds that a remedy provision preserves only procedural rights and does not place limits upon the legislature's ability to change substantive rights.[33] Under the third line of thought, the courts recognize no state constitutional limitations upon the legislative power to alter or abolish common law causes of action or remedies.[34]

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27. *Id.*

28. *Id.*

29. *Id.* (construing Rotwein v. Gersten, 160 Fla. 736, 36 So. 2d 419 (1948)).

30. The phrase "no restriction theory" originated in Note, *Medical Malpractice Statute of Repose: An Unconstitutional Denial of Access to the Courts,* 63 NEB. L. REV. 150, 171–73 (1983). This phrase is used here to promote uniformity in the terminology used in discussing remedy provisions.

31. *See id.* at 171.

32. *E.g.,* Harrison v. Schrader, 569 S.W.2d 822, 827 (Tenn. 1978) (remedy provision, "all courts shall be open; and every man, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay," a "mandate to the judiciary and not . . . a limitation upon the legislature").

33. *See, e.g.,* Pinnick v. Cleary, 360 Mass. 1, 271 N.E.2d 592, 600 (1971) (plaintiff challenging no-fault automobile insurance scheme unable to recover under article 11 guarantee of "a certain remedy, by having recourse to the laws, for all injuries or wrongs" since article 11 is "clearly directed toward the preservation of procedural rights and has been so construed.").

34. *See, e.g.,* O'Quinn v. Walt Disney Prods., 177 Colo. 190, 493 P.2d 344, 346 (1972) (article II, section 6 of Colorado constitution, "[c]ourts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character," did not disallow the legislature from changing the law which previously created a right, "[r]ather, this section simply provides that if a right does accrue under the law, the courts will be available to effectuate such right").

C. *"Intermediate Scrutiny" Model*

The "intermediate scrutiny" model also interprets state constitutional remedy provisions as requiring heightened judicial scrutiny of changes in tort law. Unlike strict scrutiny, the intermediate scrutiny model assumes that the change is constitutional. The burden is upon the litigant to show that the change is "unreasonable or arbitrary" when compared with the purpose and basis of the new statute. For example, the Texas high court drew upon its state's constitutional remedy provision[35] to adopt a two-step balancing test that weighs the litigant's interest in a previously recognized cause of action against the purpose and basis of the statutory change.

The Texas Supreme Court formulated this balancing test in *Sax v. Votteler*.[36] *Sax* dealt with a medical malpractice statute of limitations that limited suits for children under six years of age to the later of two years following the breach or injury, or until they reached the age of eight.[37] Under the first step of the balancing test, the *Sax* court found that the right of a minor to sue for injuries due to another's negligence was long-recognized by the Texas courts.[38] Under the second step, the court found the purpose of the statute—controlling insurance rates—was legitimate. However, the court in *Sax* found the means were not reasonable because eliminating the ability to sue in such a manner was overly restrictive when weighed against a child's right to obtain redress.[39] The statute was therefore held to have violated the remedy guarantee.[40]

35. "All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." TEX. CONST. art. I, § 13.

Texas has interpreted the "due course of law" language as a due process guarantee, separate from the due process guarantee of article I, section 19, "[n]o citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land." This helps explain how due process language has become closely related to remedy provisions in Texas. *See* Harrington, *supra* note 10, at 1520–25.

36. 648 S.W.2d 661 (Tex. 1983).

37. *Id.* at 663.

38. *Id.* at 666.

39. *Id.* at 667.

40. *Id.* Other states which utilize a heightened scrutiny standard include Alabama. *See* Grantham v. Denke, 359 So. 2d 785 (Ala. 1978) (amendment to workmen's compensation act denying right of action against negligent co-employee by injured employee unconstitutional under right to remedy provision where amendment offers neither a substitute remedy nor a showing of social evil overcome by the legislative change).

III. TORT REMEDY PROTECTIONS UNDER THE FEDERAL CONSTITUTION

The United States Supreme Court generally has held that the federal due process and equal protection clauses do not protect against changes in tort law. Consequently, state constitutional remedy provisions have become an important way to fill the void in federal constitutional theory.

A. Due Process Clause Protections

Although the federal Bill of Rights lacks explicit right to remedy language,[41] some controversy exists over whether the due process clause of the fifth and fourteenth amendments guarantees a right to a remedy. The United States Supreme Court remains undecided whether due process requires a reasonable alternative to replace a diminished or eliminated cause of action.[42] In *Silver v. Silver,*[43] the Court emphasized that states are free to abolish or modify common law rights.[44]

While the Supreme Court has not yet recognized a right to a remedy in the compensatory sense, the Court has construed, somewhat ambivalently, a federal constitutional right to a remedy in the jurisdictional sense: access to courts in order to pursue a legal remedy.[45] In *Boddie v. Connecticut,*[46] the Supreme Court faced the problem of an indigent unable to pay the court filing fees and costs required to obtain a divorce.[47] The Court first noted that divorce involved "a fundamental human relationship," and thus merited substantive due process scrutiny.[48] The Court then reasoned that since the courts were the only means through which a divorce could be obtained, the due process

41. *See supra* note 14 and accompanying text.

42. Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59 (1978). In dealing with the Price-Anderson Act's $560 million limitation on liability for nuclear accidents, the Court said, "[i]nitially, it is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy." *Id.* at 88. However, the Court declined to decide that question, concluding that the Act's assurance of a fund from which compensation would be paid provided a reasonably just substitute for the common law or state law remedies it replaced. *Id.*

43. 280 U.S. 117 (1929).

44. *Id.* at 122.

45. Apparently the only state court that has considered whether there is a state constitutional right to a remedy in the jurisdictional sense is Washington. *See* Note, *Constitutional Law: Statutorily Required Mediation as a Precondition to Lawsuit Denies Access to the Courts,* 45 MO. L. REV. 316, 321 n.40 (1980); *see also infra* notes 85–89 and accompanying text.

46. 401 U.S. 371 (1971).

47. *Id.* at 371–72.

48. *Id.* at 383.

clause was violated when the state prevented adequate access to the courts in order to obtain a divorce.[49]

But two later decisions limit the right of access to cases involving fundamental rights. In *United States v. Kras,*[50] the Court refused to recognize a discharge in bankruptcy as a fundamental interest, distinguishing the divorce situation, because "the *Boddie* appellants' inability to dissolve their marriages seriously impaired their freedom to pursue other protected associational activities."[51] A few months later, the Court handed down *Ortwein v. Schwab,*[52] in which the Court decided that the right to welfare, where the recipient already had an evidentiary hearing, was not a fundamental right which required access to a court.[53]

It is apparent from *Boddie, Kras,* and *Ortwein* that the Supreme Court views the right of access as attaching only when the plaintiff shows both that a fundamental interest is involved, and that there are no other available means of obtaining a remedy for the right involved.[54] In the absence of these two criteria, legislation need only meet the lenient "rational relationship" level of scrutiny.[55] This means that elimination or modification of tort remedies need only have some rational relationship to a legitimate state end—a highly deferential judicial review of legislative decisions.

49. *Id.* at 382–83.

50. 409 U.S. 434 (1973).

51. *Id.* at 444–45.

52. 410 U.S. 656 (1973). The Oregon Supreme Court had held that the remedy provision of the Oregon constitution, article I, section 10, did not require judicial review of a state welfare division's order to reduce welfare payments. Ortwein v. Schwab, 262 Or. 375, 498 P.2d 757 (1972), *aff'd,* 410 U.S. 656 (1973).

53. *Ortwein,* 410 U.S. at 658–59.

54. *See* Comment, *Article I, Section 21: Access to Courts in Florida,* 5 FLA. ST. U.L. REV. 871, 904 (1977).

55. *See, e.g.,* Williamson v. Lee Optical, 348 U.S. 483 (1955).

B. Equal Protection Clause Protections

Several states adopt federal equal protection analysis[56] to justify an intermediate level of scrutiny. In *Carson v. Maurer,*[57] the New Hampshire Supreme Court held that the right to recover for personal injuries, though not a "fundamental right," involved "an important substantive right."[58] *Carson* involved a statutory $250,000 cap on noneconomic damages. The statute created two sets of classifications. The first classification divided tortfeasors into two groups: tortfeasors who were health care providers, and tortfeasors who were not health care providers. The second classification distinguished between victims: medical malpractice victims whose non-economic damages exceeded $250,000, and those who suffered monetarily lesser damages. The court decided that because an important right—the right to compensation for injuries—was involved, intermediate scrutiny under the equal protection clause was appropriate, and that the classifications were arbitrary and lacked "a fair and substantial relation to the object of the legislation."[59]

The problem with equal protection analysis, however, is how to define the classifications. Hypothetically, if all medical malpractice involving negligence was eliminated as a cause of action, it would pass muster under equal protection analysis because everyone suffering from negligent malpractice would be treated equally. It seems doubtful that this scenario, however improbable, would be seen as an unjustifiable classification between victims of medical negligence versus victims of non-medical negligence. On the other hand, remedy analysis, in states which recognize heightened judicial scrutiny, works as an affirmative mandate to provide a remedy.

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56. It is beyond the scope of this Comment to give more than the briefest outline of equal protection analysis. Equal protection "strict scrutiny" attaches when either a "suspect classification" or impairment of a "fundamental right" is the subject of a statute. *E.g.,* Loving v. Virginia, 388 U.S. 1 (1967) (racial classification in absence of legislative showing of necessity toward accomplishment of a permissible state objective was unconstitutional suspect classification). Equal protection "intermediate scrutiny" attaches when a "quasi-suspect" classification is involved. *E.g.,* Craig v. Boren, 429 U.S. 190, 197 (1976) ("classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives"). In all other cases, some form of "rational relationship," the lowest level of scrutiny, applies. *Compare* United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 177 (1980) (where legislation concerning economic and social benefits is involved, Congress need only avoid acting in "patently arbitrary or irrational way") *with* F.S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) ("classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation").

57. 120 N.H. 925, 424 A.2d 825 (1980).

58. *Carson.* 424 A.2d at 830.

59. *Id.*

The lack of clear federal remedy protection under either the due process or equal protection clauses means that any protection of remedies must be provided by state constitutions. Whether the State of Washington provides such additional protection of remedies, in article I, section 10 of the Washington Constitution, is discussed below.

IV. TORT REMEDY PROTECTIONS UNDER THE WASHINGTON STATE CONSTITUTION

A. Adoption of the Washington Constitution

When the Washington Bill of Rights made its debut at the Washington Constitutional Convention on July 11, 1889, article I, section 8 of the draft was drawn from, and virtually identical to, Oregon's article I, section 10.[60] The draft of the provision read: "[n]o court shall be secret but justice shall be administered openly and without purchase, completely and without delay, and every person shall have remedy by due course of law for injury done him in his person, property or reputation."[61] Two weeks later, however, the provision was adopted in its current form, "[j]ustice in all cases shall be administered openly, and without unnecessary delay."[62] The "due course of law" language apparently resurfaced as the "due process" language in article I, section 3.[63] The remedy language was dropped altogether.

B. Intent of the Framers of the Washington Constitution

Interpreting the Washington Constitution is difficult because the transcripts of the Washington Constitutional Convention have been lost.[64] The framers might have intended article I, section 10 to include a remedy guarantee by drafting it in language significantly closer to the original form of Magna Carta Chapter 40.[65] As Coke drew remedy principles from "justice" language, so perhaps the convention del-

60. "No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation." OR. CONST. art. I, § 10.

61. JOURNAL OF THE WASHINGTON STATE CONSTITUTION CONVENTION, 1889, at 51, 499 n.18 (B. Rosenow ed. 1962) [hereinafter JOURNAL]. *Compare with* OR. CONST. art. I, § 10, *supra* note 60 *and* WASH. CONST. art. I, § 10, *supra* note 2 and accompanying text.

62. WASH. CONST. art. I, § 10; *see also* JOURNAL, *supra* note 61, at 154, 499.

63. WASH. CONST. art. I, § 3; *see also* JOURNAL, *supra* note 61, at 496. Note that article I, section 3 is nearly identical to the due process clause of the federal fifth amendment, reading: "No person shall be deprived of life, liberty, or property, without due process of law."

64. *See* JOURNAL, *supra* note 61, at vii.

65. *Compare* WASH. CONST. art. I, § 10 ("[j]ustice in all cases shall be administered openly, and without unnecessary delay") *with* Magna Carta ch. 40 ("[t]o no one will we sell, to no one will we refuse or delay, right or justice").

egates felt that the remedy language already was rooted in the "justice . . . without delay" language.[66]

Because the remedy language was dropped, however, the simplest answer is that the framers did not intend to incorporate a remedy guarantee into the Washington Constitution. The Bill of Rights submitted by Allen Weir was drawn in large part from the Oregon Constitution.[67] Weir was heavily influenced by a suggested constitution printed in the Portland *Oregonian* by a prominent Oregon lawyer, W. Lair Hill.[68] It seems circumstantially likely that the drafters were aware of a decision handed down two years earlier interpreting the Oregon constitutional remedy clause as protecting common law causes of action against change by the legislature.

In *Eastman v. County of Clackamas,*[69] plaintiff brought suit against Clackamas County for injuries sustained from negligent maintenance of a wooden bridge on a county road.[70] After the complaint, the Oregon legislature amended the Code of Civil Procedure, allowing suits against public corporations and officers only in cases arising on contract, though the statute previously allowed suits for "injury to the rights of the plaintiff, arising from some act or omission . . . ."[71] In dicta, Judge Matthew Deady reasoned that the Oregon clause, "every man shall have remedy by due course of law for injury done him," incorporated into the constitution the remedies and causes of action recognized at the time of the constitution's adoption.[72] Thus, according to Deady, the remedy clause preserved the cause of action and its attendant remedy.[73]

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66. For the full text of article I, section 10 of the Washington Constitution, see *supra* text accompanying note 2.

67. JOURNAL, *supra* note 61, at 494–518 & nn.5–50.

68. *Id.* at v.

69. 32 F. 24 (D. Or. 1887).

70. *Id.* at 26–28.

71. *Id.* at 30–31.

72. To begin with, it may be admitted that the remedy guarantied [sic] by this provision is not intended for the redress of any novel, indefinite, or remote injury that was not then regarded as within the pale of legal redress. But whatever injury the law, as it then stood, took cognizance of and furnished a remedy for, every man shall continue to have a remedy for by due course of law. When this constitution was formed and adopted, it was and had been the law of the land, from comparatively an early day, that a person should have an action for damages against a county for an injury caused by its act or omission. If this then known and accustomed remedy can be taken away in the face of this constitutional provision, what other may not? Can the legislature, in some spasm of novel opinion, take away every man's remedy for slander, assault and battery, or the recovery of a debt? and, if it cannot do so in such cases, why can it in this?

Id. at 32.

73. *Id.*

It is interesting to speculate what impact, if any, Judge Deady's opinion had on the Washington convention. Of the seventy-five delegates to the convention, twenty-one were lawyers.[74] Three of the lawyers present practiced previously in Oregon.[75] It seems unlikely that the convention was not aware of *Eastman* and its interpretation of a remedy provision.

One characteristic of the convention was its concern over abuse of legislative power—the Washington Constitution in one sense is drafted as a limitation of legislation.[76] It would thus be out of the framers' character to omit another check upon the powers of the legislature. Yet, if the convention intended to retain Coke and Blackstone's idea of an affirmative duty to provide a remedy, the logical thing would have been to retain the Oregon constitutional language rather than to draft language that more closely resembles the Magna Carta.[77] One does not discard the "clarification" in favor of the rough draft. Since Coke's elaboration on Chapter 40 of the Magna Carta was the basis of the Oregon remedy provision, language resembling Coke's interpretation and not the Magna Carta would more persuasively evince an intent to retain the remedy doctrine.

The decision to deviate from the original remedy clause drawn from the Oregon version was perhaps influenced by post-Civil War constitutional construction and the sentiments of the Reconstruction era. The Oregon constitution was adopted in 1859, before the adoption of the Civil War amendments. In light of the new federal constitutional amendments, the Washington delegates in 1889 might have felt that incorporating the federal fifth amendment guarantee of due process[78] and a prohibition against special privileges and immunities[79] into the Washington constitution were sufficient safeguards against the abuse

74. *See* Kinnear, *Notes on the Constitutional Convention,* 4 WASH. HIST. Q. 276, 277 (1913); JOURNAL, *supra* note 61, at 465–90.

75. Washington Constitutional Convention delegates George Comegys, R.O. Dunbar, and Austin Mires apparently practiced law in Oregon before coming to Washington. *See* JOURNAL, *supra* note 61, at 469, 470, 480. Since they were fairly prominent in their day, they presumably kept abreast of legal events in Oregon.

76. *See* Knapp, *The Origin of the Constitution of the State of Washington,* 4 WASH. HIST. Q. 227, 228 (1913).

Examples that manifest a distrust of legislators include article II, section 19 ("[n]o bill shall embrace more than one subject, and that shall be expressed in the title") and article II, section 28, forbidding special legislation in specific areas.

77. For the full text of Magna Carta Chapter 40, see *supra* notes 9–10 and accompanying text.

78. WASH. CONST. art. I, § 3: "No person shall be deprived of life, liberty, or property, without due process of law."

79. WASH. CONST. art. I, § 12: "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations."

of legislative power.[80] This, to the framers, would make remedy language and its protections unnecessary and obsolete. Because the remedy language is absent from article I, section 10, as adopted by the Washington convention, it seems highly unlikely that it was meant to be retained. Current Washington law is consistent with this view.

C. Current Washington Law

More than fifty years ago, the Washington Supreme Court rejected the notion that the Washington constitution contained an affirmative guarantee of a remedy. In *Shea v. Olson,*[81] the Court refused to find in the Washington constitution any justification for scrutinizing changes in common law causes of action and remedies. In rejecting Oregon, Delaware, and Kentucky cases that struck down guest-passenger statutes, the Washington Supreme Court pointed out that each of those states had constitutional provisions that specifically contained remedy provisions, while Washington's did not.[82] "There is, therefore, no express, positive mandate of the constitution which preserves such rights of action from abolition by the legislature . . . ."[83] Instead, Washington follows the general rule that due process does not prevent changes in the common law; that "[t]here is neither a vested right in an existing law which precludes its amendment or repeal nor a vested right in the omission to legislate on a particular subject."[84]

On the matter of remedy in the jurisdictional sense, the Washington Supreme Court has been sure of the right of access, but unsure of its

80. Lebbeus J. Knapp, a delegate at the 1889 convention, wrote in 1913:

> In keeping with the growing distrust of the people in legislative bodies, the constitution of Washington . . . enters fully and explicitly into the field of legislative restriction . . . . Such is the power to grant any person or class of persons any exclusive political honors or privileges, and the power to abridge in any way the rights of life, liberty, and property.

Knapp, *supra* note 76, at 228.

81. 185 Wash. 143, 53 P.2d 615 (1936).

82. *Id.* at 159–60, 53 P.2d at 622; *see also* DEL. CONST. art. I, § 9; KY. CONST. §§ 14, 54, 241; OR. CONST. art. I, § 10.

83. 185 Wash. at 161, 53 P.2d at 622.

While the *Shea* decision did not involve Washington's article I, section 10, if the framers' intent was to preserve a right to a remedy, it is possible that the *Shea* court was aware of the convention's intent. If so, then the court's refusal to find a remedy provision in the Washington Constitution is correct in terms of framers' intent. Of the nine justices—William J. Millard, John R. Mitchell, Warren W. Tolman, William J. Steinert, James M. Geraghty, John F. Main, O.R. Holcomb, Walter B. Beals, and Bruce Blake—only Justice Mitchell was definitely present in Washington at the time of the constitutional convention. Whether Justice Mitchell had any "inside knowledge" from the conventioneers is at this point pure speculation. For brief biographies of the 1936 Washington Supreme Court justices, see A. ALLEN, WHO'S WHO IN WASHINGTON STATE (1929); G. BARTEAU, WHO'S WHO IN WASHINGTON STATE (1939).

84. Godfrey v. State, 84 Wash. 2d 959, 962–63, 530 P.2d 630, 632 (1975).

constitutional source. In *Carter v. University,*[85] the court decided that the right of access to courts was a fundamental one, because the right of access was a right "preservative of all rights."[86] The court later, however, overruled the portion of *Carter* that grounded the right of access upon the right to petition the government in *Housing Authority v. Saylors.*[87] The *Saylors* court held that though access to the courts could not be supported by the right of petition, "[a]ccess to the courts is amply and expressly protected by other provisions."[88] Unfortunately, the court failed to detail the provisions from which it drew its conclusions.[89]

D. The Possibility of Reform Under Article I, Section 10

Neither the *Shea* reasoning, nor the lack of any affirmative intent by the Constitutional Convention, prevents the supreme court from interpreting the constitution as including a remedy doctrine in light of the common law tradition behind article I, section 10.[90] The flexibility of having a state bill of rights lies in the state court's freedom to confer additional rights and safeguards not recognized in the federal Constitution by the United States Supreme Court.[91]

The shortcomings of the *Shea* approach were acknowledged by the Washington Supreme Court that same year in *Blanchard v. Golden Age Brewing Co.*[92] In striking down the operative portions of Washington's "Little Norris-LaGuardia Act,"[93] Justice Tolman's concurring opinion stated that some guarantee of a remedy was required:

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85. 85 Wash. 2d 391, 536 P.2d 618 (1975), *overruled in part,* Housing Auth. v. Saylors, 87 Wash. 2d 732, 557 P.2d 321 (1976).

86. 85 Wash. 2d at 398, 536 P.2d at 623.

87. 87 Wash. 2d 732, 557 P.2d 321 (1976).

88. *Id.* at 742, 557 P.2d at 327.

89. *See id.*

90. See *supra* Section I for a discussion of the common law tradition behind article I, section 10 of the Washington constitution.

91. *See generally* PruneYard Shopping Center v. Robins, 447 U.S. 74, 81 (1980); Brennan, *State Constitutions and the Protection of Individual Rights,* 90 HARV. L. REV. 489 (1977); Utter, *Freedom and Diversity in a Federal System: Perspectives on State Constitutions and the Washington Declaration of Rights,* 7 U. PUGET SOUND L. REV. 491 (1984).

92. 188 Wash. 396, 63 P.2d 397 (1936).

93. The Norris-LaGuardia Act of 1932, 47 Stat. 70 (1932) (current version at 29 U.S.C. §§ 101–115 (1982)), was the landmark labor act declaring the unenforceability of "yellow dog" contracts, and severely restricting the federal courts' power of injunction in labor disputes. State versions of the Norris-LaGuardia Act commonly are referred to as "Little Norris-LaGuardia Acts" or "Baby Norris-LaGuardia Acts." The Washington version was the "Labor Disputes Act," 1933 Wash. Laws Special Session 10, *cited in* Blanchard v. Golden Age Brewing Co., 188 Wash. 396, 409, 63 P.2d 397, 403 (1936).

> In my opinion, the legislature may take away from the courts, as now established, the power to protect certain rights and to exercise certain remedies, provided that it supplies a reasonably adequate remedy in the place of the one abolished, but by the same token the legislature may not abolish a common law right and its remedy without setting up some reasonable substitute.[94]

In his dissenting opinion in *Blanchard,* Justice Beals echoed Justice Tolman's concern. He pointed out that abolishing a cause of action has the same effect as denying the court jurisdiction over the case.[95] "Certainly, the complete taking of a right theretofore existing constitutes the exercise of a higher prerogative than the limiting of the relief to be granted in an action based upon alleged violation of a right which the legislature has still permitted to exist."[96]

By interpreting article I, section 10 as including a remedy guarantee, the Washington Supreme Court could protect potential claimants from deprivation of a remedy by a legislature motivated by political convenience. While the court should avoid becoming a "super-legislature," imposing its own judgment against the legislature's decision to alter or abolish a cause of action, requiring agreement between the legislature, executive, and judiciary, would further ensure that established common law principles are not tampered with lightly. Yet if Washington's article I, section 10 is a possible source of a remedy doctrine, the question remains as to the desired level of judicial scrutiny.

1. The "Strict Scrutiny" Model Unwisely Makes "Super Legislatures" of Courts

The strict scrutiny model is inadvisable because it allows a court to pass upon the reasonableness of any alternatives offered or the reasonableness of the legislature's showing of a compelling interest. The *Kluger v. White*[97] strict scrutiny model, followed by Florida, forbids incursions upon common law tort remedies unless either the statute provides a reasonable alternative in place of the previous remedy, or an "overpowering public necessity" exists to justify the incursion.[98] Yet the difficulty of applying the "reasonable alternative" exception of *Kluger* becomes clear in *Mahoney v. Sears, Roebuck & Co.*[99] In *Mahoney,* a plaintiff's workers' compensation award was held to have

94. 188 Wash. at 426–27, 63 P.2d at 410 (Tolman, J., concurring).
95. *Id.* at 443–44, 63 P.2d at 417 (Beals, J., dissenting).
96. *Id.* at 445, 63 P.2d at 417; *see also supra* notes 21–29 and accompanying text.
97. 281 So. 2d 1 (Fla. 1973).
98. *Id.* at 4.
99. 440 So. 2d 1285 (Fla. 1983).

fully paid his medical care and wage-loss benefits during his recovery. Though the $1200 award for the 80% loss of vision in one eye "may appear inadequate and unfair," it was not unconstitutional under the access to courts for redress of an injury provision.[100] Because "reasonableness" is as much a subjective question on the part of the judiciary as it is for the legislature, it becomes difficult to see whether a judicial assessment of "reasonable alternative" has any practical advantages.

A recent example of the potential for overly intrusive inquiries into legislative decisions is *Smith v. Department of Insurance*.[101] In *Smith*, the Florida Supreme Court struck down a $450,000 cap on noneconomic damages in tort suits. The court held that there was neither an alternative remedy nor commensurate benefit to plaintiffs in tort suits who otherwise would have recovered the full value of their noneconomic damages.[102] And though recovery was not totally abolished, the *Kluger* rule would not allow the cap without a rational alternative or overpowering necessity. Otherwise, "if the legislature may constitutionally cap recovery at $450,000, there is no discernible reason why it could not cap the recovery at some other figure, perhaps $50,000, or $1,000, or even $1."[103] The *Smith* court added that the importance of the access to courts for redress of injuries was to withstand attacks by "majoritarian whim" against traditional rights of action.[104]

But the Florida legislature had expressly found that the lack of liability insurance constituted an overpowering necessity for tort reform.[105] The Florida court ignored this legislative finding and substituted its own judgment.[106] Traditionally, it is objectionable for a court to substitute its own findings in economic and societal matters for those of the legislature.[107] Thus, *Smith* illustrates the difficulty of allowing a court too much discretion to override articulated legislative purposes.

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100. *Id.* at 1286.

101. 507 So. 2d 1080 (Fla. 1987).

102. *Id.* at 1088.

103. *Id.* at 1089.

104. *Id.*

105. *See* Note, *The Constitutionality of Florida's Cap On Noneconomic Damages in the Tort Reform and Insurance Act of 1986*, 39 U. FLA. L. REV. 157, 165 (1987).

106. Smith v. Department of Ins., 507 So. 2d 1080 (Fla. 1987).

107. *See, e.g.*, Nebbia v. New York, 291 U.S. 502, 537 (1934) (rejecting "lochnerizing" substantive due process by inquiring into wisdom of economic policy made by legislatures since "courts are both incompetent and unauthorized to deal [in economic matters]").

Another problem with the *Kluger* strict scrutiny approach is that causes of action created after the adoption of the constitution are treated with less respect. While causes of action and their attendant remedies predating the constitution are protected by Florida's remedy provision, causes of action arising after the constitution's adoption are not incorporated within the remedy provision.[108] It seems troubling to assume that legislation enacted before a particular date is worthy of more consideration than legislation passed afterwards.

2. *The "No Restriction" Model Fails to Provide an Important Check Upon Legislatures*

The "no restriction" model allows the legislature maximum control in changing or abolishing causes of action. It avoids the idea that remedy provisions are intended to freeze tort law as it existed at the adoption of the state's constitution. Instead, remedy provisions are interpreted as a procedural guarantee of a remedy under the substantive law, and the legislature's role is to formulate the substantive law without hindrance from the judiciary.[109]

While the courts are not free to pass upon the wisdom of a change in the common law, one commentator points out that courts would still retain a "prescriptive" use of the remedy provision.[110] In the "prescriptive" sense, a constitutional remedy provision requires that when a lawmaker creates or recognizes a legal injury in the substantive law,

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108. *See* McPhail v. Jenkins, 382 So. 2d 1329, 1330–31 (Fla. Dist. Ct. App. 1980) (*Kluger* analysis not applicable to statutory change in wrongful death statute, because no right of recovery for wrongful death at common law when Florida wrongful death statute passed in 1972; remedy guarantee protects only common law and statutory remedies acknowledged at time Florida constitution re-adopted in 1968).

It is worth pointing out that *Kluger* strict scrutiny does not, therefore, apply to additional torts recognized after the adoption of the Florida constitution. In comparison, scrutiny under the federal due process clause and equal protection clause applies to all legislation, whether the new statute changes a previously recognized tort or recognizes a new tort. This makes the strict scrutiny model under a remedy provision less broad in scope than strict scrutiny under either the due process clause or the equal protection clause.

109. At least two commentators have argued in favor of this approach over any judicial scrutiny-types of interpretation of remedy provisions. Linde, *supra* note 14, at 136–38; Schuman, *supra* note 10, at 69–71; *see also* Davidson v. Rogers, 281 Or. 219, 574 P.2d 624, 625–26 (1978) (Linde, J., concurring) (footnote omitted):

> The guarantee in article I, section 10, of a "remedy by due course of law for injury done [one] in his person, property, or reputation" is part of a section dealing with the administration of justice. It is a plaintiffs' clause, addressed to securing the right to set the machinery of the law in motion to recover for harm already done to one stated kinds [sic] of interest, a guarantee that dates by way of the original state constitutions of 1776 back to King John's promise in Magna Charta chapter 40 . . . . It is concerned with securing a remedy from those who administer the law, through courts or otherwise.

110. Schuman, *supra* note 10, at 67–71.

a legal remedy also comes into being.[111] If the legislation lacks provision for a remedy, the courts should be able to fashion a remedy to match the injury.[112] An illusory remedy does not pass muster under the prescriptive use theory. Though abolishing tort actions would survive constitutional attack based on the remedy provision, assuming the change survived federal due process and equal protection challenges, a statutory remedy provision of $1 for noneconomic tort damages would be considered arbitrary and would not survive.

While the prescriptive use theory of interpreting remedy guarantees is attractive for its clarity, the theory avoids the question whether judicial scrutiny is needed when changes to the common law arise. Bothersome in its interference with the legislative process, usage of remedy provisions to scrutinize legislation nonetheless has the benefit of protecting a possible victim's access to the proper judicial or quasi-judicial body for relief.[113]

3. *An Altered Version of the "Intermediate Scrutiny" Model Is Appropriate*

Compared with Florida's *Kluger* strict scrutiny analysis, Texas' *Sax*[114] intermediate scrutiny approach is more accomodating to the legislative role in defining causes of action and their attendant remedies. Whereas the *Kluger* approach holds changes to the common law immediately suspect, the *Sax* approach presumes constitutionality, placing the burden of showing unconstitutionality upon the plaintiff. The *Sax* approach also offers the litigant a chance to show that the legislation constitutes either an unreasonable or arbitrary burden in excess of the intended benefits of the statute. Thus, the intermediate

111. *Id.*

112. *Id.* at 69.

113. As written by Justice Sloan in his dissenting opinion in *Holden v. Pioneer Broadcasting Co.*:

> The deference we should pay to legislative action within the legislative function is not that which should be given to legislation when it limits or denies access to a court for the redress of wrong committed. All too often such attempted restrictions have been for the benefit of the few at the loss of the many . . . .
>
> . . . For it must be remembered that when the legislature abolishes a cause of action to benefit a favored few it must be taken to be because the courts have failed to protect the rights of the few. It is a recognition that the courts have allowed fraud or partiality to warp the course of justice. When the courts sustain the act it is a tacit acknowledgment not only of the failure to dispense justice but also an admission that the courts cannot remedy the wrong, if one exists.

228 Or. 405, 365 P.2d 845, 865 (1961) (Sloan, J., dissenting), *cert. denied,* 370 U.S. 157 (1962).

114. Sax v. Votteler, 648 S.W.2d 661 (Tex. 1983).

approach allows more flexibility to the legislature in instituting tort reform.

On the other hand, intermediate scrutiny puts the court in the position of balancing costs and benefits when the legislature has presumably already done so.[115] A single judge, or even a panel of judges, is unlikely to be more able to assess the costs and benefits of a change in legislation than a state legislature. Tort reform is almost always justified as an economic measure aimed at deflating the "insurance crisis," and when it comes to the economic arena, courts generally recognize that they are the inappropriate forum to assess legislative decisions.[116]

Yet the principles behind intermediate scrutiny offer the logical alternative model for Washington. While the intermediate model is not without flaws, it is more consistent with Washington law. In *Shea,* the Washington court ignored the argument for recognizing a fundamental right to freedom from bodily harm.[117] Yet there is some recent recognition of the right to compensation for personal injuries as being a substantial right. In *Hunter v. North Mason School District,*[118] the Washington Supreme Court held that "[t]he right to be indemnified for personal injuries is a substantial property right . . . ."[119] The court in *Hunter* then applied the equal protection intermediate scrutiny test.

To reconcile the *Hunter* result with *Shea,* it would be theoretically permissible to apply the intermediate remedy scrutiny in Washington. Despite the court's failure in *Shea* to examine the theory behind article I, section 10, the modern court has the option of incorporating Coke's interpretation of a remedy guarantee into article I, section 10.[120] Considering that the court in *Hunter* recognized that the right to compensation for injuries was a substantial right, thus meriting equal protection intermediate scrutiny, invoking intermediate scrutiny under

115. A recent example of the intrusive nature of the intermediate scrutiny balancing text is Lucas v. United States, No. C-6181, slip op. 1988 WL 45,162 (Tex. May 11, 1988) (WESTLAW, TX-CS database). In an opinion responding to a state law question certified to it by the Fifth Circuit, Lucas v. United States, 811 F.2d 270 (5th Cir. 1987), the Texas Supreme Court declared unconstitutional a $450,000 cap on noneconomic damages. The court found that based on one study, "there is no relationship between a damage cap and increases in insurance rates" and thus the restrictions imposed by the statutory cap were unreasonable and arbitrary under the *Sax* test.

116. *See, e.g.,* Williamson v. Lee Optical Co., 348 U.S. 483, 487 (1955).

117. Shea v. Olson, 185 Wash. 143, 53 P.2d 615 (1936). The argument urging that the right to life included freedom from bodily harm was made in Brief of Respondent at 48–49, Shea v. Olson, 185 Wash. 143, 53 P.2d 615 (1936) (No. 25,800). The *Shea* court also ignored the arguments that the right to recover for injuries was a property right. *Id.* at 49–52.

118. 85 Wash. 2d 810, 539 P.2d 845 (1975).

119. *Id.* at 814, 539 P.2d at 848.

120. See *supra* notes 7–19 and accompanying text for a discussion on the common law interpretation of remedy provisions.

a constitutional remedy guarantee as authority would least disrupt the current state of Washington law.

Any judicial scrutiny model for Washington should give great deference to actual legislative findings, and avoid the intrusions into legislative findings inherent in the strict scrutiny model.[121] Where actual legislative findings are clear and available, the court should accept those findings. The court should not speculate whether a change in tort law is "reasonable or arbitrary" when compared to the new statute's purpose and basis unless there are no legislative findings available.[122]

A final concern is the relationship of a remedy clause to the concept of court access. The first clause of article I, section 10 provides that "[j]ustice in all cases shall be administered . . . ." In a grammatical sense, the clause refers to the administration of justice, which includes access to a court. The historical roots of remedy provisions include a desire to make access to justice a right.[123] Therefore, the right of access to a court can logically be attributed to the administration of justice clause.

This does not mean, however, that claims must be submitted to a court. Even under the strict scrutiny model of *Kluger,* justice administered on an administrative level is permissible as a reasonable alternative to the common law court system.[124] According to Justice Linde of the Oregon Supreme Court, administration of justice is "a plaintiffs' clause, addressed to securing the right to set the machinery of the law in motion to recover for harm already done . . . It is concerned with securing a remedy from those who administer the law, through courts or otherwise."[125] Thus at the very least, the Washington Supreme Court can find the constitutional guarantee of access to courts rooted in article I, section 10, and that access means the ability to obtain whatever recovery the law allows.

V. CONCLUSION

Article I, section 10 has a pedigree rich in possibilities. Within this provision, the right of access to courts in Washington can at last find a constitutional grounding. The provision can also become a guarantee

121. See *supra* notes 97–108 and accompanying text for a critique of the strict scrutiny model.

122. For a discussion of the desirability of an actual purpose inquiry in the equal protection context, see Gunther, *In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1, 43–48 (1972).

123. *See supra* notes 7–9 and accompanying text.

124. *See supra* note 28 and accompanying text.

125. Davidson v. Rogers, 281 Or. 219, 574 P.2d 624, 625–26 (1978) (Linde, J., concurring).

of the right to a remedy, protecting tort victims from future inroads by the legislature into their right to recover. The Washington Constitutional Convention probably did not intend article I, section 10 to function as a remedy provision. Yet with even less material, and without the benefit of the experiences of other states, Sir Edward Coke was able to fashion a remedy guarantee from the Magna Carta. It may be desirable for the Washington Supreme Court to do the same.

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